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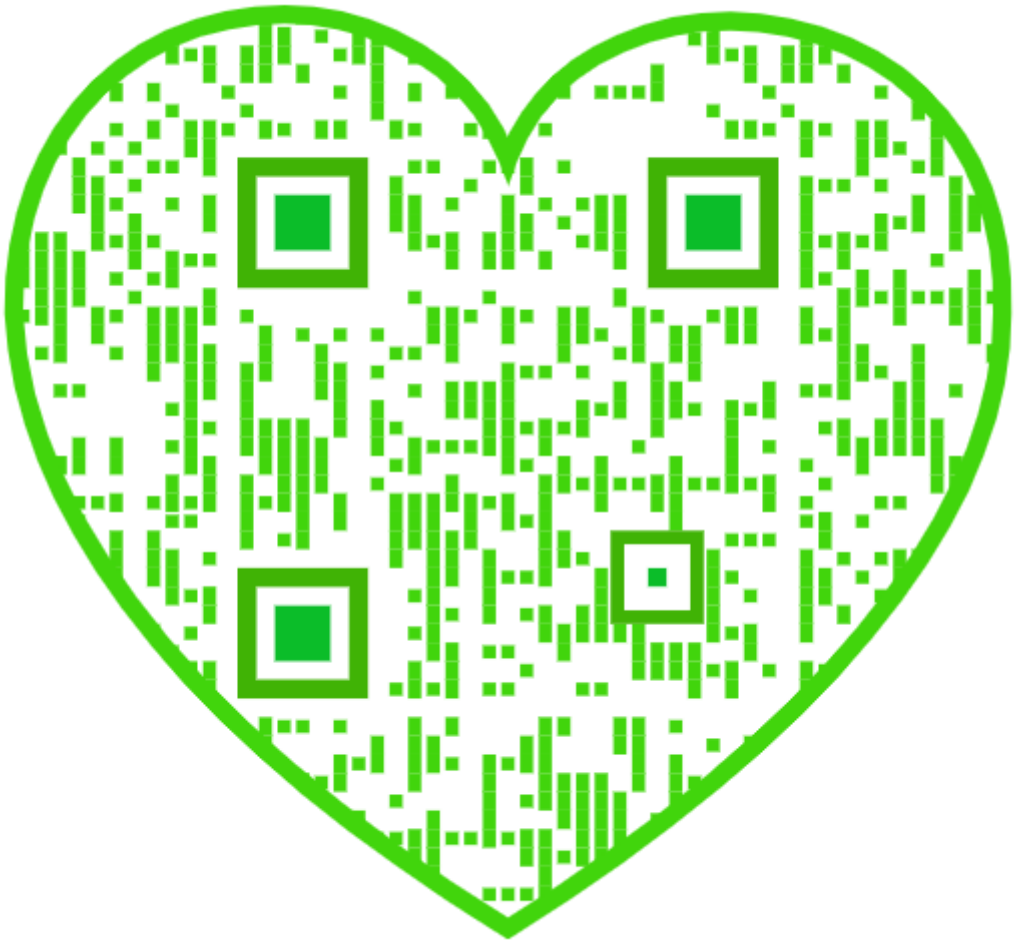

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CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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Insane Person, see INSANE PERSONS, 22 Cyc. 1194.
Joint Tenant, see JOINT TENANCY, 23 Cyc. 492.
Legatee, see WILLS.
Lessor, see LANDLORD AND TENANT, 24 Cyc. 928, 1248, 1279, 1319.
Lienor, see LIENS, 25 Cyc. 681, 683.
Life-Tenant, see ESTATES, 16 Cyc. 636.
Lunatic, see INSANE PERSONS, 22 Cyc. 1194.
Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1318.
Master, see SHIPPING.
Mortgagee, see CHATTEL MORTGAGES, 7 Cyc. 105; MORTGAGES, 27 Cyc. 1373, 1449; RAILROADS, 33 Cyc. 513, 584.
Mortgagor, see CHATTEL MORTGAGES, 7 Cyc. 47, 61.
Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 621, 652, 761, 866, 1244, 1596.
Parent or Child, see PARENT AND CHILD, 29 Cyc. 1657.
Partner, see PARTNERSHIP, 30 Cyc. 334.
Peddler, see HAWKERS AND PEDDLERS, 21 Cyc. 364.
Pledgee or Pledgor, see PLEDGES, 31 Cyc. 824, 848.
Receiver, see RECEIVERS, 34 Cyc. 309.
Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1160.
Remainder-Man, see ESTATES, 16 Cyc. 652.
School Authorities, see SCHOOLS AND SCHOOL-DISTRICTS, *post*.
State, see STATES.
Tenant in Common, see TENANCY IN COMMON.
Town, see TOWNS.
Trustee, see TRUSTS.
Warehouseman, see WAREHOUSEMEN.
Sale in Judicial or Other Proceeding:
Action:
By Creditor Against Principal and Surety, see PRINCIPAL AND SURETY, 32 Cyc. 142.
By or Against Partners, see PARTNERSHIP, 30 Cyc. 599, 744.
To Avoid Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 822.
Administration of:
Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 237.
Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 317, 674.
Insolvent Estate, see INSOLVENCY, 22 Cyc. 1302.
Minor's Estate, see GUARDIAN AND WARD, 21 Cyc. 119.
Attachment, see ATTACHMENT, 4 Cyc. 710, 825.
Bankruptcy, see BANKRUPTCY, 5 Cyc. 382.
Enforcement of Assessments and Special Taxes For:
Levee, see LEVEES, 25 Cyc. 204.
Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1244.
Enforcement or Foreclosure of:
Internal Revenue Tax, see INTERNAL REVENUE, 22 Cyc. 1669.
Lien in General, see LIENS, 25 Cyc. 681.
Maritime Lien, see ADMIRALTY, 1 Cyc. 894; COLLISION, 7 Cyc. 374; SALVAGE; SHIPPING; TOWAGE.
Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 443.
Mortgage Lien, see CHATTEL MORTGAGES, 7 Cyc. 105; MORTGAGES, 27 Cyc. 1449, 1680.

For Matters Relating to — (*continued*)
Sale in Judicial or Other Proceeding — (*continued*)
Enforcement or Foreclosure of — (*continued*)
Railroad Lien or Mortgage, see RAILROADS, 33 Cyc. 584.
Tax, see TAXATION.
Tax by Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1717.
Vendor's Lien, see VENDOR AND PURCHASER.
Execution:
In General, see EXECUTIONS, 17 Cyc. 1233.
Against Interests Under Contract of, see EXECUTIONS, 17 Cyc. 968.
From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 629.
In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1080.
Judicial Sale, see JUDICIAL SALES, 24 Cyc. 1.
Partition, see PARTITION, 30 Cyc. 145.
Receivership, see RECEIVERS, 34 Cyc. 309.
Sale of Particular Kinds of Property:
Adulterated Article, see ADULTERATION, 1 Cyc. 939.
Bond and Like Securities:
In General, see BONDS, 5 Cyc. 782.
Corporate, see CORPORATIONS, 10 Cyc. 1172.
County, see COUNTIES, 11 Cyc. 570.
Municipal, see MUNICIPAL CORPORATIONS, 28 Cyc. 1596.
Railroad, see RAILROADS, 33 Cyc. 447.
Cemetery Lot, see CEMETERIES, 6 Cyc. 707.
Common Lands, see COMMON LANDS, 8 Cyc. 354, 361.
Copyright, see COPYRIGHT, 9 Cyc. 934.
Counterfeit, see COUNTERFEITING, 11 Cyc. 310.
Crop, see CROPS, 12 Cyc. 977.
Distribution Share, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 603.
Dower Interest, see DOWER, 14 Cyc. 973.
Drugs, see DRUGGISTS, 14 Cyc. 1078.
Exempt Property, see EXEMPTIONS, 18 Cyc. 1446; HOMESTEADS, 21 Cyc. 527.
Explosive, see EXPLOSIVES, 19 Cyc. 1; MUNICIPAL CORPORATIONS, 28 Cyc. 713.
Ferry, see FERRIES, 19 Cyc. 504.
Fertilizer, see AGRICULTURE, 2 Cyc. 70.
Food, see FOOD, 19 Cyc. 1091.
Franchise, see FRANCHISES, 19 Cyc. 1459.
Good-Will, see GOOD-WILL, 20 Cyc. 1277.
Homestead, see HOMESTEADS, 22 Cyc. 527.
Impounded Animal, see ANIMALS, 2 Cyc. 449.
Indenture of Apprenticeship, see APPRENTICES, 3 Cyc. 555.
Indian Lands, see INDIANS, 22 Cyc. 135.
Intoxicating Liquor, see INTOXICATING LIQUORS, 23 Cyc. 43.
Judgment, see JUDGMENTS, 23 Cyc. 1413.
Legacy, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 603.
Life-Estate, see ESTATES, 16 Cyc. 636.
Literary Property, see LITERARY PROPERTY, 25 Cyc. 1498.
Lottery Ticket, see LOTTERIES, 25 Cyc. 1631.
Medicine, see DRUGGISTS, 14 Cyc. 1078.
Mercantile Information, see MERCANTILE AGENCIES, 27 Cyc. 473.
Mining Lease, see MINES AND MINERALS, 27 Cyc. 701.
Obscene Publication, see OBSCENITY, 29 Cyc. 1314.
Patent, Patent Right, or Patented Article, see PATENTS, 27 Cyc. 943.
Pew, see RELIGIOUS SOCIETIES, 34 Cyc. 1179.

For Matters Relating to — (*continued*)
Sale of Particular Kinds of Property — (*continued*)
Poison, see POISONS, 31 Cyc. 896.
Public Lands, see MINES AND MINERALS, 27 Cyc. 541; PUBLIC LANDS, 32 Cyc. 759.
Railroad:
In General, see RAILROADS, 33 Cyc. 382.
Bond, see RAILROADS, 33 Cyc. 447.
Right of Way, see RAILROADS, 33 Cyc. 219.
Securities Issued in Aid of, see RAILROADS, 33 Cyc. 84.
Stock to Competing Line, see RAILROADS, 33 Cyc. 385.
Real Estate, see VENDOR AND PURCHASER.
Reports of Judicial Decisions, see REPORTS, 34 Cyc. 1614.
Stamps, see POST-OFFICE, 31 Cyc. 986.
Standing Timber, see LOGGING, 25 Cyc. 1549.
Stock of:
Bank, see BANKS AND BANKING, 5 Cyc. 437.
Building and Loan Association, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 128.
Corporation Generally, see CORPORATIONS, 10 Cyc. 577.
Street Railroad, see STREET RAILROADS.
Telephone or Telegraph, see TELEPHONES AND TELEGRAPHS.
Ticket, see CARRIERS, 6 Cyc. 570; SHIPPING.
Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES.
Turnpike or Toll-Road, see TOLL-ROADS.
Water:
By Canal Company, see CANALS, 6 Cyc. 277.
Rights, see WATERS.
Weapon, see WEAPONS.
Wharf, see WHARVES.
Wrecked Vessel, see SHIPPING.
Transfer of Property as Consideration For Contract, see CONTRACTS, 9 Cyc. 313.

## I. DEFINITIONS AND NATURE.

**A. Sale.** A sale, in its broadest sense, may be defined as the transfer of the property in a thing for a price in money.[1] Usually the term "sale" is confined to

1. *Alabama.*—Foley *v.* Felrath, 98 Ala. 176, 180, 13 So. 485, 39 Am. St. Rep. 39; Allen *v.* Maury, 66 Ala. 10, 17.
*California.*— Civ. Code (1903), § 1721.
*Delaware.*— State *v.* Peo, 1 Pennew. 525, 527, 42 Atl. 622.
*Georgia.*— Cain *v.* Ligon, 71 Ga. 692, 694, 51 Am. Rep. 281. See also Howell *v.* State, 124 Ga. 698, 700, 52 S. E. 649.
*Illinois.*— People *v.* Law & Order Club, 203 Ill. 127, 132, 67 N. E. 855, 62 L. R. A. 884.
*Mississippi.*— State *v.* Austin, (1898) 23 So. 34.
*Missouri.*— State *v.* Wingfield, 115 Mo. 428, 436, 22 S. W. 363, 37 Am. St. Rep. 406; Barrie *v.* United R. Co., (App. 1909) 119 S. W. 1020, 1052; Peycke *v.* Aherns, 98 Mo. App. 456, 459, 72 S. W. 151.
*Nebraska.*—Mansinger *v.* Steiner-Medinger Co., 4 Nebr. (Unoff.) 392, 94 N. W. 633, 634.
*North Carolina.*—Albemarle Lumber Co. *v.* Wilcox, 105 N. C. 34, 38, 10 S. E. 871; Wittkowsky *v.* Wasson, 71 N. C. 451, 455.
*North Dakota.*— Rev. Code (1905), § 5394.
*Pennsylvania.*— Stephens *v.* Gifford, 137 Pa. St. 219, 227, 20 Atl. 542, 21 Am. St. Rep. 868; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.
*South Dakota.*— Rev. Code (1903), § 1299. See also Hall *v.* Feeney, (1908) 118 N. W. 1038, 1041; Brooke *v.* Eastman, 17 S. D. 339, 346, 96 N. W. 699, 701.
*Texas.*— Houston, etc., R. Co. *v.* Keller, 90 Tex. 214, 220, 37 S. W. 1062, 1063; Krnavek *v.* State, 38 Tex. Cr. 44, 46, 41 S. W. 612.
*Washington.*— Ross *v.* Portland Coffee, etc., Co., 30 Wash. 647, 654, 71 Pac. 184.
*Wyoming.*— Cone *v.* Ivinson, 4 Wyo. 203, 215, 33 Pac. 31, 35 Pac. 933.
*United States.*— Williamson *v.* Berry, 8 How. 495, 544, 12 L. ed 1170; De Bary *v.* Soner, 101 Fed. 425, 427, 41 C. C. A. 417.
**Other definitions** are: "A transmutation of property from one man to another, in consideration of some price." 2 Blackstone Comm. 446 [*quoted* in Cain *v.* Ligon, 71 Ga.

personal property, and, more narrowly still, to that species of personal property

692, 694, 51 Am. Rep. 281; People *v.* Law & Order Club, 203 Ill. 127, 132, 67 N. E. 855, 62 L. R. A. 884; Barrow *v.* Window, 71 Ill. 214, 217; Com. *v.* Williams, 6 Gray (Mass.) 1, 8; Barrie *v.* United R. Co., (Mo. App. 1909) 119 S. W. 1020, 1052; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131, 139; State *v.* Hopkins, 49 N. C. 305, 307; Ott *v.* Sweatman, 166 Pa. St. 217, 227, 31 Atl. 102; Spokane *v.* Baughman, (Wash. 1909) 103 Pac. 14, 16; Iowa *v.* McFarland, 110 U. S. 471, 478, 4 S. Ct. 210, 28 L. ed. 198; Butler *v.* Thompson, 92 U. S. 412, 414, 23 L. ed. 684; Buffum *v.* Merry, 4 Fed. Cas. No. 2,112].

"A transfer of the absolute or general property in a thing for a price in money." Benjamin Sales (6th Am. ed.), § 1 [*quoted* in Goodwin *v.* Kerr, 80 Mo. 276, 281; Coulter *v.* Portland Trust Co., 20 Oreg. 469, 481, 26 Pac. 565, 27 Pac. 266].

"A contract for the transfer of property from one person to another for a valuable consideration." Cent. Dict. [*quoted* in Barber Asphalt Paving Co. *v.* Standard Asphalt Co., 39 N. Y. App. Div. 617, 623, 58 N. Y. Suppl. 405]; Kent Comm. [*quoted* in Cain *v.* Ligon, 71 Ga. 692, 694, 51 Am. Rep. 281; Micks *v.* Stevenson, 22 Ind. App. 475, 51 N. E. 492, 493; Barrie *v.* United R. Co., (Mo. App. 1909) 119 S. W. 1020, 1052; Schermerhorn *v.* Talman, 14 N. Y. 93, 117; Ott *v.* Sweatman, 166 Pa. St. 217, 227, 31 Atl. 102, 15 Pa. Co. Ct. 97, 113; Butler *v.* Thompson, 92 U. S. 412, 414, 23 L. ed. 684]. See also Roberson *v.* State, 100 Ala. 37, 40, 14 So. 554; Vincent *v.* Walker, 93 Ala. 165, 169, 9 So. 382; Ward *v.* State, 45 Ark. 351, 353; State *v.* Peo, 1 Pennew. (Del.) 525, 527, 42 Atl. 622; Howell *v.* State, 124 Ga. 698, 700, 52 S. E. 649; Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279, 281; Edwards *v.* Farmers' F. Ins., etc., Co., 21 Wend. (N. Y.) 467, 493, 494; Bennett *v.* Sims, Rice (S. C.) 421, 423; Iowa *v.* McFarland, 110 U. S. 471, 478, 4 S. Ct. 210, 28 L. ed. 198.

"The transfer, in pursuance of a valid agreement, from one party, called the seller, to another, called the buyer, of the general or absolute title to a specific chattel, for a price, or a consideration estimated, in money." Mechem Sales, § 1.

"A transfer of property for money." Close *v.* Browne, 230 Ill. 228, 236, 82 N. E. 629, 13 L. R. A. N. S. 634. See also Mansfield *v.* District Agriculture Assoc. No. 6, 154 Cal. 145, 97 Pac. 150; Reed *v.* State, (Okla. Cr. App. 1909) 103 Pac. 1070.

A transfer of property "in exchange for money or security for money." Brown *v.* Fitz, 13 N. H. 283, 285.

"A transfer of property for a fixed price in money or its equivalent." Howell *v.* State, 124 Ga. 698, 699, 52 S. E. 649; Iowa *v.* McFarland, 110 U. S. 471, 478, 4 S. Ct. 210, 28 L. ed. 198; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604, 606.

"A transmutation of property from one man to another, in consideration of some price or recompense in value." Parker *v.* Donaldson, 2 Watts & S. (Pa.) 9, 19.

"A transfer of property from one to another in consideration of a price paid or agreed to be paid in current money." Labaree *v.* Klosterman, 33 Nebr. 150, 166, 49 N. W. 1102; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131, 139.

"The passing of the title and possession of any property for money which the buyer pays or promises to pay." People *v.* Law, etc., Club, 203 Ill. 127, 132, 67 N. E. 855, 62 L. R. A. 884 [*citing* Krnavek *v.* State, 38 Tex. Cr. 44, 41 S. W. 612].

"An exchange of goods or property for money paid or to be paid." Meyer *v.* Rousseau, 47 Ark. 460, 463, 2 S. W. 112; Cooper *v.* State, 37 Ark. 412, 418; Hatfield *v.* State, 9 Ind. App. 296, 36 N. E. 664.

"A transmutation of property or a right from one man to another in consideration of a sum of money, as opposed to barter, exchange, and gifts." Rapalje & L. L. Dict. [*quoted* in Howell *v.* State, 124 Ga. 698, 700, 52 S. E. 649].

"An agreement, a meeting of the minds of two or more persons, founded upon a money consideration, by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer." White *v.* Treat, 100 Fed. 290, 291.

"An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer, or purchaser, who, on his part, agrees to pay such price." Bouvier L. Dict. [*quoted* in Howell *v.* State, 124 Ga. 698, 699, 52 S. E. 649; Eldridge *v.* Kuehl, 27 Iowa 160, 173; Barrie *v.* United R. Co., (Mo. App. 1909) 119 S. W. 1020, 1052].

"A contract between parties to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold." Coombs *v.* Steere, 8 Ill. App. 147, 150; Mansinger *v.* Steiner-Medinger Co., 4 Nebr. (Unoff.) 392, 94 N. W. 633, 634; Huthmacher *v.* Harris, 38 Pa. St 491, 498. 80 Am. Dec. 502; Homan *v.* State, (Tex. Cr. App. 1899) 51 S. W. 237, 238; Williamson *v.* Berry, 8 How. (U. S.) 495, 544, 12 L. ed. 1170; Union Stockyards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 53, 7 C. C. A. 660.

**"The leading case, in Pennsylvania,** as to what constitutes a complete sale of a chattel, as between the parties, is Scott *v.* Wells, 6 Watts & S. (Pa.) 357, 40 Am. Dec. 579." Bigley *v.* Risher, 63 Pa. St. 152, 155.

**In an act prohibiting the "sale" of intoxicating liquors** the word "sale" is to be construed in its broad sense, and therefore includes what is commonly known as barter and exchange. Howell *v.* State, 124 Ga. 698, 52 S. E. 649; James *v.* State, 124 Ga. 72, 52 S. E. 295. "Barter" defined see 5 Cyc. 621. "Exchange" defined see 17 Cyc. 871.

known as "goods." [2] In the restricted sense in which it is here treated, a sale may be defined as an agreement whereby one party, called the seller, transfers to the other party, called the buyer, the property in goods for a money consideration called the price which the buyer pays or agrees to pay.[3] A sale of goods is also termed a "bargain and sale" [4] and an "executed contract of sale." [5]

**B. Contract to Sell.** A contract to sell goods may be defined as a contract whereby the seller agrees to transfer the property in goods to the buyer for a price which the buyer pays or agrees to pay.[6] A contract to sell is also termed an "executory contract of sale" and an "agreement to sell." [7]

**C. Sale on Condition.** A sale or a contract to sell may be on condition; as where something remains to be done by the vendor to put the goods into a deliverable state, or where the goods are to be selected, inspected, weighed, or measured to ascertain the quantity or quality for the purpose of determining the price.[8] Contracts of this kind stand, so far as their operation and effect are concerned, on practically the same bases as ordinary executory contracts,[9] and are so treated in this article.[10]

**D. Sale Distinguished From Other Transactions** [11] **— 1. In General.** The essence of a sale is the transfer of the property in the thing from buyer to seller for a price.[12] The elements which distinguish a sale from other transfers are:

**2. "Goods" defined** see 20 Cyc. 1268.

**3.** Ross *v.* Portland Coffee, etc., Co., 30 Wash. 647, 71 Pac. 184; Benjamin Sales, §§ 1, 3; Tiedeman Sales, § 1.

**4. "Bargain and sale" defined** see 5 Cyc. 616; State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406.

**5.** Barrie *v.* United R. Co., (Mo. App. 1909) 119 S. W. 1020; Brittin *v.* Freeman, 17 N. J. L. 191; Hargous *v.* Stone, 5 N. Y. 73; Cleu *v.* McPherson, 1 Bosw. (N. Y.) 480; Benjamin Sales, § 3; Chalmers Sale Goods 3.

**6.** English Sale Goods Act (1893), § 1.

**Memorandum of articles sold.**—After negotiations to induce plaintiff to buy a lot of jewelry, he agreed to buy a part of several kinds listed in the contract, and the other kinds were erased from the contract, as well as the request at the end of the contract: "Please ship assortment of goods in accordance"—the rest of the phrase, "with the above terms," being left in, so that the paper only contained a memorandum of the articles actually bought, the terms of the sale, and certain guaranties. It was held that the instrument did not become a contract of sale, but was only a memorandum of the articles sold. Price *v.* Rosenberg, 200 Mass. 36, 85 N. E. 887.

**"Sale" distinguished.**—Although the term "contract of sale" is commonly applied both to a sale and to a contract to sell (Chalmers Sale Goods 3), there is a marked distinction in their nature and the rights acquired thereunder. A contract to sell is a contract pure and simple, whereas a sale is in the nature of a conveyance. By a contract to sell a *jus in personam* is created; by a sale a *jus in rem* is transferred (Chalmers Sale Goods 3. See also Strong, etc., Co. *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919). The word "sale" imports an actual transfer of title, and although it may be used to signify a mere contract to sell, yet in strictness it denotes only an actual transmission of property. Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478. If a contract to sell be broken, the buyer has only a personal remedy against the seller. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also has the usual proprietary remedies against the goods themselves. See *infra*, IX, B, 1.

**7.** Benjamin Sales, § 308.

**8.** Benjamin Sales, § 364. See also *infra*, III, D; VI, A, 2, d.

**9.** Mechem Sales, § 7.

**10.** See *infra*, VI, A.

**Another class of contracts,** which do not pass title, notwithstanding the goods have been delivered, until the performance of some condition by the purchaser, generally payment of the price (Benjamin Sales, § 364) is for the purpose of this article distinguished from ordinary executory contracts and treated separately as "conditional sales." See *infra*, X.

**11. "Abandonment" distinguished** see ABANDONMENT, 1 Cyc. 4 note 1.

**Agency to buy or sell.**—As to distinction between the relation of principal and agent and that of buyer and seller see PRINCIPAL AND AGENT, 31 Cyc. 1198.

**12.** Chalmers Sale Goods 93. See also Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131.

**A "sale," in the legal import of the word,** implies a transferring of property from the seller to the buyer for a price, and includes, not only the idea of divesting the seller of title, but that of vesting it in the buyer. In this sense the sale can be only to the party who, on the sale and by reason of it, becomes the owner of the thing sold. State *v.* Wentworth, 35 N. H. 442, 443.

**A release of all one's right, title, and interest** in personal property for a sum agreed to be paid may be declared on as for a sale. Kerr *v.* Lucas, 1 Allen (Mass.) 279.

**Loan.**—The giving of a note bearing inter-

(1) That the transfer is of the property, that is, of the general or absolute property as distinguished from a special property;[13] and (2) that it is for a price.[14]

**2. Accord and Satisfaction.** A sale differs from an accord and satisfaction in that the thing given in accord and satisfaction is for the purpose of quieting a claim and not for a price.[15]

**3. Assignment For Benefit of Creditors.** A sale is to be distinguished from an assignment for the benefit of creditors. An assignment for the benefit of creditors contemplates a transfer of property to an assignee in trust to apply the same or the proceeds thereof to the payment of debts, the surplus, if any, to be returned to the debtor.[16] If, however, the transfer is absolute and not subject to a trust,[17] for a fixed price,[18] and for the absolute payment of the debt,[19] the transaction is a sale and not an assignment, although the surplus is to be returned to the debtor.

**4. Bailment — a. In General.** In a bailment, at most, only a special property passes to the bailee, who receives possession for a particular purpose, upon contract that after the purpose has been fulfilled it shall be redelivered to the bailor or otherwise dealt with according to his directions, while the general property remains in the bailor.[20] The common test of bailment or sale is whether it is the intention of the parties that the thing delivered shall be returned. The transaction is a

est for depreciated bank paper indicates that the transaction is a loan, not a sale. Breeding *v.* Thrielkeld, 6 J. J. Marsh. (Ky.) 378; Morris *v.* Caldwell, 3 J. J. Marsh. (Ky.) 693.

13. Mansfield *v.* Strauss, 68 N. Y. Suppl. 682; Still *v.* Cannon, 13 Okla. 491, 75 Pac. 284.

**As to the distinction between "the" property,** that is, the general property, and "a" property, that is, a special property, see Sewell *v.* Burdick, 10 App. Cas. 74, 93, 5 Aspin. 376, 54 L. J. Q. B. 126, 52 L. T. Rep. N. S. 445, 33 Wkly. Rep. 461 [*reversing* 13 Q. B. D. 159, 175, 53 L. J. Q. B. 399, 32 Wkly. Rep. 740]. And see Cobb *v.* Tufts, 2 Tex. App. Civ. Cas. § 152.

14. See *infra*, II, D.

15. Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831. See, generally, Accord and Satisfaction, 1 Cyc. 305.

16. See Assignments For Benefit of Creditors, 4 Cyc. 120, 129.

**Assignment distinguished.**—The distinctions between an assignment and a sale are too marked to be misunderstood. Sales are transfers in the ordinary course of business. Assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid or agreed to be paid and created or passing simultaneously. An assignment is in most cases for a consideration already executed, as for a precedent or subsisting debt. A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of the trustee. Stout *v.* Watson, 19 Oreg. 251, 24 Pac. 230. See also Smith-McCord Dry Goods Co. *v.* Carson, 59 Kan. 295, 52 Pac. 880; Knoxville Mantel, etc., Co. *v.* Coon, 61 Mo. App. 151; Tompkins *v.* Hunter, 149 N. Y. 117, 43 N. E. 532.

**Intention of parties.**— The important factor in determining whether the transaction is a sale or an assignment for the benefit of creditors is the intention of the parties. Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733 [*affirming* 46 Hun 196].

17. Kaufman *v.* Coburn, 30 Nebr. 672, 46 N. W. 1010; Vallance *v.* Miners' L. Ins., etc., Co., 42 Pa. St. 441; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Sandwich Mfg. Co. *v.* Max, 5 S. D. 125, 58 N. W. 14, 24 L. R. A. 524.

**A promise by a debtor to his creditors** that, if they will abstain from suing him, he will soon send a stock of goods to an auctioneer to be sold, and the proceeds applied to the payment of their claims, is no sale. Ochs *v.* Price, 6 Heisk. (Tenn.) 483.

18. Smith-McCord Dry Goods Co. *v.* Carson, 59 Kan. 295, 52 Pac. 880; Keiler *v.* Tutt, 31 Mo. 301.

19. *Alabama.*— Otis *v.* Maguire, 76 Ala. 295; Heyer *v.* Bromberg, 74 Ala. 524; Danner *v.* Brewer, 69 Ala. 191.

*Iowa.*— Cowles *v.* Ricketts, 1 Iowa 582.

*New Hampshire.*— Hosmer *v.* Farley, 67 N. H. 590, 27 Atl. 223; Kenefick *v.* Perry, 61 N. H. 362.

*New York.*— See Cook *v.* Bennett, 60 Hun 8, 14 N. Y. Suppl. 683.

*Pennsylvania.*— Lockhard *v.* Stevenson, 61 Pa. St. 64.

See 43 Cent. Dig. tit. "Sales," § 15; and Assignments For Benefit of Creditors, 4 Cyc. 113.

**Debt assumed by transferee.**— See Eskridge *v.* Abrahams, 61 Ala. 134; Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A 609; Powell *v.* Kelly, 82 Ga. 1, 9 S. E. 278, 3 L. R. A. 139; Watkins *v.* Pope, 38 Ga. 514; Kaufman *v.* Coburn, 30 Nebr. 672, 46 N. W. 1010.

**Application of surplus to other claims.**— The transaction is a sale, although the surplus, if any, is to be applied to the payment of other claims. Beeker *v.* Rardin, 107 Mo. 111, 17 S. W. 892; Keiler *v.* Tutt, 31 Mo. 301.

20. See Bailments, 5 Cyc. 161, 170.

bailment if the identical thing is to be returned,[21] although in altered form.[22] If the receiver is not bound to return the identical things but is at liberty to return something else, as a rule the property passes, and the transaction is in effect a sale [23] or an exchange.[24] But if the option to return other articles of the same kind applies only in case of a loss for which the bailee is liable the transaction is a bailment.[25] It depends upon the substance of the agreement, and not upon its form,

**Evidence.**— Disparity between the value of the property and the consideration does not tend to show the character of the transaction as a sale or a bailment. Tanner *v.* Parshall, 4 Abb. Dec. (N. Y.) 356, 3 Keyes 431, 2 Transcr App. 204, 5 Abb. Pr. N. S. 373, 35 How. Pr. 472. Neither is a delivery of cattle shown to be a sale by proof of the sale of the owner's farm. Rodgers *v.* Crook, 97 Ala. 722, 12 So. 108. And an invoice of goods delivered is not a bill of sale, nor is it evidence of a sale rather than a bailment. Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093 [*following* Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214].

**Determination.**— Whether the transaction is a sale or a bailment is to be determined from all the circumstances. Reherd *v.* Clem, 86 Va. 374, 10 S. E. 504; Dean *v.* Lammers, 63 Wis. 331, 23 N. W. 892. It is a question of fact for the jury. Reissner *v.* Oxley, 80 Ind. 580; Brown *v.* Gilliam, 53 Mo. App. 376; Crosby *v.* Delaware, etc., Canal Co., 119 N. Y. 334, 23 N. E. 736, 128 N. Y. 641, 28 N. E. 363 [*reversing* 13 N. Y. Suppl. 306], 141 N. Y. 589, 36 N. E. 332 [*affirming* 21 N. Y. Suppl. 83]; Caldwell *v.* Smith, 20 N. C. 193; James *v.* Plank, 48 Ohio St. 255, 26 N. E. 1107; Bretz *v.* Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

21. *Connecticut.*— Bulkley *v.* Andrews, 39 Conn. 70.

*District of Columbia.*— Moses *v.* Taylor, 6 Mackey 255.

*Illinois.*— Andrus *v.* Mann, 92 Ill. 40; Lonergan *v.* Stewart, 55 Ill. 44; Bauman Loan Co. *v.* Hatowsky, 107 Ill. App. 181.

*Indiana.*— Cruikshank *v.* Henry, 6 Blackf. 19.

*Iowa.*— Backus *v.* Lawbaugh, (1901) 86 N. W. 298.

*Maine.*— Moore *v.* Holland, 39 Me. 307.

*Maryland.*— B. F. Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

*Minnesota.*— Williams *v.* McGrade, 13 Minn. 174.

*Missouri.*— Coquard *v.* Wernse, 100 Mo. 137, 13 S. W. 341.

*New York.*— Westcott *v.* Thompson, 18 N. Y. 363; Wadsworth *v.* Allcott, 6 N. Y. 64; Marsh *v.* Titus, 6 Thomps. & C. 29; Westcott *v.* Tilton, 1 Duer 53.

*Ohio.*— See Clark *v.* Gault, 77 Ohio St. 497, 83 N. E. 900.

*Utah.*— Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848.

*United States.*— Sturm *v.* Boker, 151 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Laflin, etc., Powder Co. *v.* Burkhardt, 97 U. S. 110, 24 L. ed. 973; *In re* Galt, 120 Fed. 64, 56 C. C. A. 470; Austin *v.* Seligman, 18 Fed. 519, 21 Blatchf. 506.

*Canada.*— Isaac *v.* Andrews, 28 U. C. C. P. 40.

See 43 Cent. Dig. tit. "Sales," §§ 7, 8, 12.

**The sale of a mare with foal,** in consideration that the purchaser should raise the colt and return it to the seller, constitutes a bailment for hire, in referenee to the colt. Duffy *v.* Howard, 77 Ind. 182. And see Wolf *v.* Esteb, 7 Ind. 448.

22. Backus *v.* Lawbaugh, (Iowa 1901) 86 N. W. 298. See also *infra*, I, D, 4, b.

23. *Illinois.*— Singer Mfg. Co. *v.* Ellington, 103 Ill. App. 517. *Compare* Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192 [*reversing* 98 Ill. App. 564]; Bastress *v.* Chickering, 18 Ill. App. 198; Brinton *v.* Gerry, 7 Ill. App. 238.

*Kansas.*— Scott Min., etc., Co. *v.* Schultz, 67 Kan. 605, 73 Pac. 903.

*Maine.*— Frye *v.* Burdick, 67 Me. 408.

*New York.*— Marsh *v.* Titus, 3 Hun 550; Reed *v.* Abbey, 2 Thomps. & C. 380; Dykers *v.* Allen, 7 Hill 497, 42 Am. Dec. 87; Hurd *v.* West, 7 Cow. 752; Carpenter *v.* Griffin, 9 Paige 310.

*United States.*— Union Stock-Yards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 7 C. C. A. 660; Austin *v.* Seligman, 18 Fed. 519, 21 Blatchf. 506; Genobia Aragon de Jaramillo *v.* U. S., 37 Ct. Cl. 208. See also Coweta Fertilizer Co. *v.* Brown, 163 Fed. 162, 89 C. C. A. 612.

See 43 Cent. Dig. tit. "Sales," § 7 *et seq.*

**Goods on memorandum.**— Where goods are delivered on memorandum to be paid for when sold it is a sale not a bailment. McArthur *v.* Wilder, 3 Barb. (N. Y.) 66; Oelberman *v.* Jarman, 12 N. Y. Suppl. 383.

24. See *infra*, I, D, 7.

25. Downer *v.* Rowell, 22 Vt. 347 [*following* Smith *v.* Niles, 20 Vt. 315, 49 Am. Dec. 782]. See also Williams *v.* McGrade, 13 Minn. 174.

**A contract by which A leased sheep to B** for the term of two years, for which B agreed to pay a yearly rental, and providing that the lessee should "keep the old stock good," which expert testimony showed to mean that the same number, ages, and quality of sheep were to be returned, was one of lease and not of sale; the lessee being authorized to sell the old sheep and let younger ones take their place, but not the whole herd. Turnbow *v.* Beckstead, 25 Utah 468, 71 Pac. 1062.

**Contract of hire.**— Where defendant tried to hire a sleigh, and, plaintiff being reluctant to let it go, said that "if he broke it he would pay for it," and repeated that he would like to "hire" the sleigh, this did not establish a contract on defendant's part to purchase the sleigh in case of damage, but

or upon particular expressions used, whether a transaction is a bailment or a sale.[26]

**b. Contract For Manufacture or Performance of Labor.** Where articles are delivered by one person to another who is to perform labor upon them or manufacture them into other articles for the former, the transaction is a bailment notwithstanding the articles are to be returned in altered form.[27] But if the

merely to pay for the injuries. Brown *v.* Cuozzo, 89 N. Y. App. Div. 619, 85 N. Y. Suppl. 759.

**26.** *Illinois.*— Singer Mfg. Co. *v.* Ellington, 103 Ill. App. 517; North, etc., Rolling Stock Co. *v.* O'Hara, 73 Ill. App. 691; McCrory *v.* Hamilton, 39 Ill. App. 490; Barnes *v.* Morse, 38 Ill. App. 274.

*Indiana.*— Beist *v.* Sipe, 16 Ind. App. 4, 44 N. E. 762.

*Iowa.*— Irons *v.* Kentner, 51 Iowa 88, 50 N. W. 73, 33 Am. Rep. 119.

*Louisiana.*— Seelig *v.* Dumas, 48 La. Ann. 1494, 21 So. 91.

*Minnesota.*— National Car, etc., Builder *v.* Cyclone Steam Snow Plow Co., 49 Minn. 125, 51 N. W. 657.

*Pennsylvania.*— Summerson *v.* Hicks, 134 Pa. St. 566, 19 Atl. 808.

*United States.*— Union Stock-Yards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 7 C. C. A. 660.

See 43 Cent. Dig. tit. "Sales," § 7 *et seq.*

**Transfer of whole interest.**— Where the owner of a slave conveyed the house in which the slave lived to defendant, and gave him also his note for fifty dollars, in consideration that defendant would support the slave and her husband, both being old, for the rest of their lives, the transaction was a sale of the slave, since the whole interest in the slave was conveyed. State *v.* Duckworth, 60 N. C. 240. See also Trongott *v.* Byers, 5 Cow. (N. Y.) 480.

**Payment in instalments as work progresses.**— Where plaintiff contracted to furnish certain pumping machinery, to be installed in the hull of a dredge being constructed by defendant, the contract further providing that plaintiff should install the machinery at its own expense; that defendant should afford the facilities of its yards for such installation, and furnish men and material for that purpose at cost; that defendant should keep the machinery insured for the benefit of plaintiff; and that it should pay one third of the price when the machinery was delivered, one third when it was installed on board the dredge, and the balance on completion of the test by the party for whom the dredge was being constructed, on delivery of the machinery, and payment of the first instalment of the purchase-price, there was a completed sale, and not a mere bailment, of the machinery to defendant. William R. Trigg Co. *v.* Bucyrus Co., 104 Va. 79, 51 S. E. 174.

**27.** *Colorado.*— Patrick *v.* Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236.

*Illinois.*— McCrory *v.* Hamilton, 39 Ill. App. 490.

*Maine.*— Barker *v.* Roberts, 8 Me. 101. See also Moore *v.* Holland, 39 Me. 307.

*Massachusetts.*— Mansfield *v.* Converse, 8 Allen 182.

*New York.*— Mack *v.* Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534; Smith *v.* James, 7 Cow. 328. See also Sattler *v.* Hallock, 160 N. Y. 291, 54 N. E. 667, 73 Am. St. Rep. 680, 46 L. R. A. 679 [*affirming* 15 N. Y. App. Div. 500, 44 N. Y. Suppl. 543], holding that a bailment, and not a sale, is effected by a contract whereby farmers deliver farm produce to another to manufacture into pickles, receiving on delivery the market price therefor, and he sells it in their name, each party receiving a share of the net proceeds.

*Pennsylvania.*— Spanogle *v.* Doane, 15 Wkly. Notes Cas. 156 [*affirming* 13 Wkly. Notes Cas. 449].

*Vermont.*— Gleason *v.* Beers, 59 Vt. 581, 10 Atl. 86, 59 Am. St. Rep. 757; Brown *v.* Hitchcock, 28 Vt. 452.

*United States.*— Davis *v.* U. S., 27 Ct. Cl. 181.

*England.*— Collins *v.* Forbes, 3 T. R. 316, 1 Rev. Rep. 712, 100 Eng. Reprint 596.

See 43 Cent. Dig. tit. "Sales," § 9.

**Grain to be made into flour.**— When grain is delivered for which the depositor is to receive flour, it is a bailment if flour from the identical grain is to be returned. Ashby *v.* West, 3 Ind. 170; Foster *v.* Pettibone, 7 N. Y. 433, 57 Am. Dec. 530; Mallory *v.* Willis, 4 N. Y. 76; Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Johnson *v.* Miller, 16 Ohio 431; Slaughter *v.* Green, 1 Rand. (Va.) 3, 10 Am. Dec. 488; Stephenson *v.* Ranney, 2 U. C. C. P. 196.

**Compensation based on profits of sale.**— Where A delivered leather to B to be made into boots which B was to consign to A who was to sell them on a commission of five per cent, it was held to be a bailment. Schenck *v.* Saunders, 13 Gray (Mass.) 37. And see Hyde *v.* Cookson, 21 Barb. (N. Y.) 92. But in Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121, 28 Am. Dec. 691, a contract by a merchant to deliver hides to a tanner, to be charged at cost and five per cent commission, and interest after six months, and when tanned to be returned to the merchant to be sold by him, and out of the proceeds of sale the first cost and five per cent to be deducted, and the balance to be paid to the manufacturer, was held on grounds of public policy to be such a sale as would subject the hides to levy and sale as the property of the manufacturer. And see Butterfield *v.* Lathrop, 71 Pa. St. 225; Prichett *v.* Cook, 62 Pa. St. 193; Mitchell *v.* Com., 37 Pa. St. 187.

person by whom the articles are received may deliver in return articles which are not the product of those received the transaction is in effect a sale.[28]

**c. Deposit of Grain in Warehouse.** Where grain is deposited in an elevator or warehouse on an understanding express or implied that the warehouseman may mix it with other grain of like quality, and shall return to the depositor the amount of his deposit out of the mass, which is to be kept good to that extent, the various owners of the grain are tenants in common, and the transaction is a bailment.[29] If the warehouseman commingles his own grain, he becomes tenant

**Services and materials.**— Contract of sale distinguished from contract to furnish services and materials. Wyllie *v.* Palmer, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285.

**Share of product as compensation.**—Where materials are delivered to be manufactured, and the manufactured article is to be divided between the parties in certain proportions, the transaction is not a sale but a bailment. Gregory *v.* Stryker, 2 Den. (N. Y.) 628; Pierce *v.* Schenck, 3 Hill (N. Y.) 28.

28. *Indiana.*— Woodward *v.* Semans, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225; Ewing *v.* French, 1 Blackf. 353.

*Iowa.*— Wilson *v.* Cooper, 10 Iowa 565.

*Missouri.*— Potter *v.* Mt. Vernon Roller Mill Co., 101 Mo. App. 581, 73 S. W. 1005; O'Neal *v.* Stone, 79 Mo. App. 279; Martin *v.* Ashland Mill Co., 49 Mo. App. 23.

*New York.*— Norton *v.* Woodruff, 2 N. Y. 153 [*affirming* 2 Barb. 520]; Smith *v.* Clark, 21 Wend. 83, 34 Am. Dec. 213 [*overruling* Seymour *v.* Brown, 19 Johns. 44].

*United States.*— Laflin, etc., Powder Co. *v.* Burkhardt, 97 U. S. 110, 24 L. ed. 973; Buffum *v.* Merry, 4 Fed. Cas. No. 2,112, 3 Mason 478.

See 43 Cent. Dig. tit. "Sales," § 9.

**Material added by manufacturer.**— Where a railroad company delivered old rails to a rolling mill company, which added new iron as needed and remade them into new rails, the transaction was held a bailment, the material inquiry being which company furnished the principal portion of the material. Arnott *v.* Kansas Pac. R. Co., 19 Kan. 95.

**Where a chattel is in existence** at the time a contract for its transfer is made, and the vendor is to do work thereon to adapt it to a particular use for the vendee, the contract is a sale. Binder *v.* Robinson, 61 Misc. (N. Y.) 278, 113 N. Y. Suppl. 766.

29. *Illinois.*—Ardinger *v.* Wright, 38 Ill. App. 98; Pontiac Nat. Bank *v.* Langan, 28 Ill. App. 401.

*Indiana.*— Miller *v.* State, 144 Ind. 401, 43 N. E. 440; Schindler *v.* Westover, 99 Ind. 395; Bottenberg *v.* Nixon, 97 Ind. 106; Rice *v.* Nixon, 97 Ind. 97, 49 Am. Rep. 430; Barrows *v.* Wampler, 24 Ind. App. 472, 56 N. E. 935; Drudge *v.* Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. Rep. 359.

*Iowa.*— Irons *v.* Kentner, 51 Iowa 88, 50 N. W. 73, 33 Am. Rep. 119; Marks *v.* Cass County Mill, etc., Co., 43 Iowa 146. See also Sexton *v.* Graham, 53 Iowa 181, 4 N. W. 1090.

*Massachusetts.*—Cushing *v.* Breed, 14 Allen 376, 92 Am. Dec. 777.

*Michigan.*— Erwin *v.* Clark, 13 Mich. 10.

*Oregon.*— McBee *v.* Ceasar, 15 Oreg. 62, 13 Pac. 652.

*Pennsylvania.*— Bretz *v.* Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

*Texas.*— See Ravenna First State Bank *v.* Barnett, (Civ. App. 1907) 106 S. W. 182.

*Wisconsin.*— Young *v.* Miles, 20 Wis. 615, 23 Wis. 643.

*Compare* Lawlor *v.* Nicol, 12 Manitoba 224.

See 43 Cent. Dig. tit. "Sales," § 11.

**Cases sometimes cited** in support of the view that the transaction is a sale, because the identical grain is not to be returned, are usually distinguishable on the ground that the warehouseman had the right to sell and to pay in money or grain. See Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623 [*distinguished* in James *v.* Plank, 48 Ohio St. 255, 26 N. E. 1107]; Rahilly *v.* Wilson, 20 Fed. Cas. No. 11,532, 3 Dill. 420; South Australian Ins. Co. *v.* Randell, 1 L. R. 3 P. C. 101, 22 L. T. Rep. N. S. 843, 6 Moore P. C. N. S. 341, 16 Eng. Reprint 755, 6 Am. L. Rev. 450.

**In some states it is declared by statute** that the transaction is a bailment. In Hall *v.* Pillsbury, 43 Minn. 33, 35, 44 N. W. 673, 19 Am. St. Rep. 209, 7 L. R. A. 529, the court said: "The evils to be cured were those which were supposed to follow the prior rule of law — the rule of the common law. That rule was that where a deposit was made of grain or other like property, with the expectation that it would be commingled in a common mass of similar kind, deposited by different persons, so that its identity would necessarily be lost, and the undertaking of the depositee was not to redeliver the identical property deposited, but to deliver, in lieu thereof, an equal amount of the same kind of property, the title to the property deposited passed to the depositee. The deposit had the effect of a sale. The statute changes this rule, and provides (Gen. St. (1878) c. 124, § 13) that 'such delivery shall in all things be deemed and treated as a bailment, and not as a sale.' Of course, it cannot be understood from this that the depositor's title to the identical grain remains. The legislature must be taken to have had in view the way in which the business of such warehouses is, and of necessity must be, conducted. They are constantly receiving deposits of grain, and issuing receipts for it, and as constantly taking up outstanding receipts, and removing the amounts of grain called for by them, so that perhaps the same identical grain may

in common with the depositors and bailor as to them.[30] The transaction is a bailment notwithstanding the depositor retains the right to elect whether to demand a delivery of grain or money.[31] But the transaction is in effect a sale if the delivery is upon such terms that the warehouseman is not to return, but is to pay for, the grain,[32] or that he has from the beginning the right to use or sell the grain and

not remain in the warehouse a week, though the amount in store is not diminished. The declaration that the delivery shall be deemed and treated as a bailment must be taken as meaning that the depositor shall be deemed to be the owner of, and to have on bailment in the warehouse, the amount of grain that he deposits, although its identity may have been lost by commingling with other, the like kind of grain, and although not a kernel of the identical grain deposited still remains. As fast as grain is removed, and other grain is put into the common mass, the new grain takes the place of that originally deposited, and is appropriated to the contract of bailment, so as to become the property of the depositor." And see Jackson *v.* Sevatson, 79 Minn. 275, 82 N. W. 634; State *v.* Cowdery, 79 Minn. 94, 81 N. W. 750, 48 L. R. A. 92; State *v.* Barry, 77 Minn. 128, 79 N. W. 656; Weiland *v.* Sunwall, 63 Minn. 320, 65 N. W. 628; Weiland *v.* Krejnick, 63 Minn. 314, 65 N. W. 631; National Exch. Bank *v.* Wilder, 34 Minn. 149, 24 N. W. 699; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244. In Snydacker *v.* Blatchley, 177 Ill. 506, 512, 52 N. E. 742, the court said: "The general doctrine, frequently announced, that in order to constitute a bailment the obligation must be to restore the identical thing which was delivered, and that where the obligation of the receiver is to return another thing of equal value such receiver becomes a debtor to make such return and the transaction is a sale, has no application when the receiver comes into the possession in the capacity of a keeper of a public warehouse, within the purview of the constitution and statutes upon that subject. Article 13 of the constitution, entitled 'Warehouses,' and section 2 of the act of the General Assembly enacted to give effect to the constitutional requirement, in force July 1, 1871 (Hurd's Stat. (1897) par. 135, chap. 114), contemplated that grain deposited in public warehouses by different owners will not be kept separate and that the holders of receipts issued by the proprietors of such warehouses will not receive the same grain they put in storage, and secures to the owners of such receipts the title and right to a like quantity of other grain equal in value. The proprietors of such warehouses do not become debtors to make return of the identical grain deposited, and therefore debtors for the value of the grain, but custodians charged with the obligation to restore in quality and quantity."

**Oil in storage tank.**— Where oil was taken from plaintiff's tanks into defendant's pipe line under its contract to pipe the product of plaintiff's wells to defendant's storage tanks at certain rates, and receipts were issued to plaintiff for the oil, defendant afterward offering to deliver the oil to plaintiff, or to whomsoever it might sell it, defendant was not liable for the market price of the oil on the theory that it had contracted to buy the same. J. M. Guffey Petroleum Co. *v.* Glass Oil Co., 37 Tex. Civ. App. 413, 84 S. W. 281.

**Evidence.**— Where the one to whom plaintiff's wheat was delivered and who has a receipt therefor is a warehouseman, whose business it is to receive grain in store as well as to buy and sell, there is no presumption that the transaction is a sale. James *v.* Plank, 48 Ohio St. 255, 26 N. E. 1107. Parol evidence of the purpose for which the grain was received is admissible. McCabe *v.* McKinstry, 15 Fed. Cas. No. 8,667, 5 Dill. 509; Cargo *v.* Joyner, 4 Northwest Terr. 64.

**30.** *Indiana.*— Baker *v.* Born, 17 Ind. App. 422, 46 N. E. 930.

*Iowa.*— Nelson *v.* Brown, 53 Iowa 555, 5 N. W. 719; Sexton *v.* Graham, 53 Iowa 181, 4 N. W. 1090.

*Minnesota.*— Hall *v.* Pillsbury, 43 Minn. 33, 44 N. W. 673, 19 Am. St. Rep. 209, 7 L. R. A. 529.

*Ohio.*— O'Dell *v.* Leyda, 46 Ohio St. 244, 20 N. E. 472.

*Pennsylvania.*— Bretz *v.* Diehl, 117 Pa. St. 589, 11 Atl. 893, 2 Am. St. Rep. 706.

See 43 Cent. Dig. tit. "Sales," § 11.

**31.** Ledyard *v.* Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; James *v.* Plank, 48 Ohio St. 255, 26 N. E. 1107.

**32.** *Illinois.*— Richardson *v.* Olmstead, 74 Ill. 213; Lonergan *v.* Stewart, 55 Ill. 44; Ives *v.* Hartley, 51 Ill. 520; Grier *v.* Stout, 2 Ill. App. 602.

*Indiana.*— Woodward *v.* Boone, 126 Ind. 122, 25 N. E. 812; Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; Hagey *v.* Schroeder, 30 Ind. App. 151, 65 N. E. 598.

*Michigan.*— Jones *v.* Kemp, 49 Mich. 9, 12 N. W. 890.

*Minnesota.*— Weiland *v.* Sunwall, 63 Minn. 320, 65 N. W. 628.

*Pennsylvania.*— Light *v.* Heilman, 1 Pearson 537; Minnich *v.* Kafroth, 5 Lanc. L. Rev. 189.

*Virginia.*— Reherd *v.* Clem, 86 Va. 374, 10 S. E. 504.

See 43 Cent. Dig. tit. "Sales," § 11.

**Sale at market price.**— In Redfern *v.* Stacy, 12 Ohio Cir. Ct. 36, 5 Ohio Cir. Dec. 340, the court held that where plaintiff delivered wheat to defendants, receiving from defendants a grain check reciting that the wheat was received on storage, "to be sold not later than the middle of July," the transaction was a contract to sell, under which plaintiff had the option of demanding a sale up to the middle of July at the market price, and that on failure to exercise that option, it was a sale to defendants at the then market price.

to pay in grain or money.[33] If in lieu of grain the warehouseman is to deliver flour, which is to be made from grain in the common mass, the transaction is a bailment.[34]

**d. Bailment With Option to Buy.** A bailment with the right on the part of the bailee to buy is to be distinguished from a sale, the transaction not becoming a sale until the option is exercised.[35] Analogous to these transactions are sales "on trial" or "on approval." [36]

**e. Pledge.** A sale is to be distinguished from a pledge, which is a bailment to secure the payment of a debt or the performance of some other act,[37] the pledgee acquiring only a special property in the thing pledged.[38] When personal property

33. *Illinois.*— Cloke *v.* Shafroth, 137 Ill. 393, 27 N. E. 702, 31 Am. St. Rep. 375.

*Indiana.*— Carlisle *v.* Wallace, 12 Ind. 252, 74 Am. Dec. 207. See also Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311.

*Iowa.*— Barnes *v.* McCrea, 75 Iowa 267, 39 N. W. 392, 9 Am. St. Rep. 473; Johnston *v.* Browne, 37 Iowa 200.

*Missouri.*— O'Neal *v.* Stone, 79 Mo. App. 279.

*Ohio.*— Chase *v.* Washburn, 1 Ohio St. 244, 59 Am. Dec. 623; Gibb *v.* Townsend, 9 Ohio Cir. Ct. 409, 4 Ohio Cir. Dec. 96.

*Oregon.*— State *v.* Stockman, 30 Oreg. 36, 46 Pac. 851.

*United States.*— Rahilly *v.* Wilson, 20 Fed. Cas. No. 11,532, 3 Dill. 420.

See 43 Cent. Dig. tit. "Sales," § 11.

**Bailment with option to buy.**— In some cases a distinction has been made between a bailment with option to buy and a delivery with an immediate right to sell and to pay in grain or money. Nelson *v.* Brown, 44 Iowa 455; Ledyard *v.* Hibbard, 48 Mich. 42, 12 N. W. 637, 42 Am. Rep. 474. In State *v.* Rieger, 59 Minn. 151, 60 N. W. 1087, where defendant was convicted of a violation of a statute providing that no person holding grain in store should deliver it without authority of the owner and return of the receipt, and the receipt received an option either to deliver the grade of wheat called for by the ticket, or to pay the bearer the market price on surrender of the ticket, it was held that this did not render the transaction a sale, but merely gave the warehouseman an option to buy when the receipt was presented, which could only be exercised when it was presented and by payment. See also *infra*, I, D, 4, d.

34. Inglebright *v.* Hammon, 19 Ohio 337, 53 Am. Dec. 430; Slaughter *v.* Green, 1 Rand. (Va.) 3, 10 Am. Dec. 488. See also *supra*, note 27.

35. *Alabama.*— Wailes *v.* Howison, 93 Ala. 375, 9 So. 594.

*Connecticut.*— Hart *v.* Carpenter, 24 Conn. 427.

*Delaware.*— Standard Sewing-Mach. Co. *v.* Frame, 2 Pennew. 430, 48 Atl. 188.

*Georgia.*— Furst *v.* Commercial Bank, 117 Ga. 472, 43 S. E. 728; Wiggins *v.* Tumlin, 96 Ga. 753, 23 S. E. 75.

*Illinois.*— Colton *v.* Wise, 7 Ill. App. 395.

*Maine.*— Frye *v.* Burdick, 67 Me. 408.

*Massachusetts.*— See Hunt *v.* Wyman, 100 Mass. 198.

*Missouri.*— Mt. Leonard Milling Co. *v.* Liverpool, etc., Ins. Co., 25 Mo. App. 259. The fact that goods consigned to a person for examination and selection under an option to purchase are consigned at such person's risk is not conclusive that the transaction was a sale, and not a bailment. State *v.* Betz, 207 Mo. 589, 106 S. W. 64.

*New Hampshire.*— Sargent *v.* Gile, 8 N. H. 325.

*New York.*— Otis *v.* Wood, 3 Wend. 498.

*Pennsylvania.*— Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331; Middleton *v.* Stone, 111 Pa. St. 589, 4 Atl. 523; Enlow *v.* Klein, 79 Pa. St. 488; Crist *v.* Kleber, 79 Pa. St. 290; Becker *v.* Smith, 59 Pa. St. 469; Henry *v.* Patterson, 57 Pa. St. 346; Rowe *v.* Sharp, 51 Pa. St. 26; Chamberlain *v.* Smith, 44 Pa. St. 431; Potter *v.* Stetson, 11 Pa. Super. Ct. 627; Rieker *v.* Koechling, 4 Pa. Super. Ct. 286.

*Vermont.*— Deering *v.* Austin, 34 Vt. 330.

*Wisconsin.*— Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

See 43 Cent. Dig. tit. "Sales," §§ 10, 12.

**Effect of custom.**— Where goods are delivered on memorandum, it may be shown by proof of custom that such goods were at the transferee's use and that the transaction was therefore a sale. Oelbermann *v.* Jarman, 12 N. Y. Suppl. 383.

**An instrument in writing** by which the manufacturer of certain passenger railroad cars leased them to a railroad company which had ordered them, but was unable to pay cash for them as agreed, at a specified rental per month, with the privilege to the lessee to purchase the cars, constitutes a bailment, and not a sale. American Car, etc., Co. *v.* Altoona, etc., R. Co., 218 Pa. St. 519, 67 Atl. 838.

**Where one ascertains the price** of a horse and proposes that the owners shall let him take the horse and try it promising to return it in good condition if he does not like it, the transaction is a bailment and not a sale. Hunt *v.* Wyman, 100 Mass. 198.

**Where the one receiving the property** admits by writing executed at the time that title is in the one delivering the property and agrees that it shall so continue until the price is fully paid and agrees to use the property only in a particular way he is a mere bailee. Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

36. See *infra*, VI, A, 2, e.

37. Brewster *v.* Hartley, 37 Cal. 15, 99 Am. Dec. 237. See also PLEDGES, 31 Cyc. 789.

38. Hamilton *v.* Wagner, 2 A. K. Marsh.

is delivered as security the transaction is a pledge.[39] But if goods are delivered by a debtor to his creditor in payment of the debt, the transaction has the effect of a sale;[40] and the same is true if goods are delivered by the debtor to the creditor to be sold, and the proceeds applied on the debt with a return of the surplus.[41] A transaction on its face a sale will not be converted into a pledge by a mere agreement to resell.[42]

**5. Chattel Mortgage — a. In General.** A sale is to be distinguished from a chattel mortgage, which is the transfer of the title to personal property as security for the payment of money or the performance of some other act, subject to the condition that upon performance by the transferrer the title shall revest in him.[43] In some jurisdictions, however, it is held that the mortgage does not transfer the title, but gives only a lien.[44] In determining whether a transaction is a sale or a mortgage the court will take into consideration the intention of the parties in view of all the circumstances.[45] When on the face of the transaction it is doubt-

(Ky.) 331; Barnes *v.* Swift, 11 Ohio Dec. (Reprint) 321, 22 Cinc. L. Bul. 110; Smith *v.* Atkinson, 4 Heisk. (Tenn.) 625.

39. *California.*— Irwin *v.* McDowell, (1893) 34 Pac. 708; Rohrle *v.* Stidger, 50 Cal. 207.

*Illinois.*— Beidler *v.* Crane, (1889) 19 N. E. 714.

*Iowa.*— Sperry *v.* Clarke, 76 Iowa 503, 41 N. W. 203.

*Massachusetts.*— Kimball *v.* Hildreth, 8 Allen 167.

*Pennsylvania.*— Bissell *v.* Steel, 67 Pa. St. 443; Diller *v.* Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Houser *v.* Kemp, 3 Pa. St. 208.

*Wisconsin.*— Gardinier *v.* Kellogg, 14 Wis. 605.

See 43 Cent. Dig. tit. "Sales," § 14; and Pledges, 31 Cyc. 789.

**A bill of sale without delivery of possession** may be operative by way of security if so intended. Upham *v.* Richey, 163 Ill. 530, 45 N. E. 228 [*affirming* 61 Ill. App. 650].

**An absolute bill of sale, accompanied by delivery** of the goods, may be shown to be a pledge if such was the intention of the parties. May *v.* Eastin, 2 Port. (Ala.) 414; Morgan *v.* Dod, 3 Colo. 551; Newton *v.* Fay, 10 Allen (Mass.) 505; Walker *v.* Staples, 5 Allen (Mass.) 34; Campbell *v.* Parker, 9 Bosw. (N. Y.) 322. And see Henry *v.* Davis, 7 Johns. Ch. (N. Y.) 40 [*affirmed* in 2 Cow. 324]. See also Pledges, 31 Cyc. 792.

**Option to hold as buyer or as pledgee.**— Where W sold B twenty shares of stock for one thousand dollars, and agreed in writing to "purchase back said twenty shares of stock, if he so elects, in one year from this date, and upon the written request from said Boynton, and reassignment of said twenty shares" and to "pay said Boynton therefor the said sum of one thousand dollars, and interest . . . to be paid to said Boynton as aforesaid, provided he shall reassign said stock to me within one year as aforesaid, and not otherwise," it was held that B had an option to hold the shares as purchaser, or merely as collateral security for the loan of the one thousand dollars paid. Boynton *v.* Woodbury, 101 Mass. 346.

**Retention of possession.**—An absolute bill of sale of merchandise given as security, possession being retained by the debtor, is a pledge and not a sale. Upham *v.* Richey, 163 Ill. 530, 45 N. E. 228 [*affirming* 61 Ill. App. 650]. And see Pledges, 31 Cyc. 792.

40. Reeves *v.* Sebern, 16 Iowa 234, 85 Am. Dec. 513; Pomez *v.* Camors, 36 La. Ann. 464; Lauman's Appeal, 68 Pa. St. 88; Spering's Appeal, 60 Pa. St. 199.

**Sale conditional on payment of seller's note.**— Where plaintiff, at the time of execution of a note by her, indorsed by defendants, for the purpose of enabling her to pay an assessment on stock held by her, also executed an instrument under seal, containing an assignment of the stock to defendants, and, after a recital of the indorsement of the note and the purpose thereof, an agreement by plaintiff that, if she did not pay the note at maturity, and defendants did pay it, they should "absolutely own" the stock, it was held that the transaction amounted to a sale of the stock on condition, and not a pledge of it to indemnify defendants against their indorsement, and that, on failure of plaintiff to pay the note, and on payment thereof by defendants, the latter became absolute owners of the stock. Morgenstern *v.* Davis, 14 N. Y. Suppl. 31 [*affirmed* in 158 N. Y. 733, 53 N. E. 1128]. And see Ware *v.* Hooper, 98 Fed. 160.

**Surplus to third persons.**—An agreement, by which A transfers to B movable property on condition that B sell it, pay himself what A owes him, and distribute the residue to C and D, is not a sale, but rather a trust or bailment; and the property is liable to seizure on fieri facias by E, a judgment creditor of A. Bourg *v.* Lopez, 36 La. Ann. 439. And see Rollins *v.* Watson, 8 La. Ann. 435.

41. Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771; Harris *v.* Lombard, 60 Miss. 29; Jensen *v.* Bowles, 8 S. D. 570, 67 N. W. 627.

42. Com. *v.* Reading Sav. Bank, 137 Mass. 431; Woodworth *v.* Morris, 56 Barb. (N. Y.) 97.

43. See Chattel Mortgages, 6 Cyc. 985.

44. See Chattel Mortgages, 6 Cyc. 985.

45. *Alabama.*— May *v.* Eastin, 2 Port. 414.

*Arkansas.*— Scott *v.* Henry, 13 Ark. 112.

*Florida.*— Long *v.* State, 44 Fla. 134, 32 So. 870.

ful whether the parties intended a mortgage or a sale,[46] or there is great disparity between the value of the property and the price,[47] or fraud has intervened to make a transaction intended as a mortgage assume the form of an absolute sale,[48] equity will treat the transaction as for security only. But equity will not interfere to declare a contract which on its face is an absolute sale to be a mortgage when it appears that the transaction was intended to defraud the vendor's creditors.[49] A bill of sale absolute on its face may be shown by other writings and acts of the parties to have been intended as a mortgage.[50] In most jurisdictions it is the established rule that parol evidence is admissible to show that a bill of sale absolute

*Maine.*— Reed *v.* Jewett, 5 Me. 96; Bartels *v.* Harris, 4 Me. 146.

*Maryland.*— Seighman *v.* Marshall, 17 Md. 550.

*Michigan.*— Warner *v.* Beebe, 47 Mich. 435, 11 N. W. 258.

*Minnesota.*— Seymour *v.* Ryan, 94 Minn. 20, 101 N. W. 958.

*Mississippi.*— Weathersly *v.* Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Vasser *v.* Vasser, 23 Miss. 378.

*Montana.*— Schwab *v.* Owens, 10 Mont. 381, 25 Pac. 1049.

*New Jersey.*— Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

*New York.*— Ricketts *v.* Wilson, 6 N. Y. St. 508.

*Texas.*— Lessing *v.* Grimland, 74 Tex. 239, 11 S. W. 1095.

*Virginia.*— Bird *v.* Wilkinson, 4 Leigh 266; Chapman *v.* Turner, 1 Call 280, 1 Am. Dec. 514.

*West Virginia.*— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 996.

**Authority of agent.**— Where property was conveyed by an agent, who was only authorized to mortgage, with notice of which authority the vendee was held chargeable, the conveyance should be deemed a mortgage only. Coppage *v.* Barnett, 34 Miss. 621.

**46.** Parish *v.* Gates, 29 Ala. 254; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190; Secrest *v.* Turner, 2 J. J. Marsh. (Ky.) 471; Turner *v.* Brown, 82 Mo. App. 30; Gaither *v.* Teague, 29 N. C. 460; Poindexter *v.* McCannon, 16 N. C. 373, 18 Am. Dec. 591.

**47.** *Alabama.*— Rapier *v.* Gulf City Paper Co., 77 Ala. 126; Davis *v.* Hubbard, 38 Ala. 185; Williamson *v.* Culpepper, 16 Ala. 211, 50 Am. Dec. 175; Todd *v.* Hardie, 5 Ala. 698; English *v.* Lane, 1 Port. 328; Hudson *v.* Isbell, 5 Stew. & P. 67.

*Illinois.*— Danforth *v.* Cleary, 41 Ill. App. 655.

*Michigan.*— Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660; McKinney *v.* Miller, 19 Mich. 142.

*North Carolina.*— Wilson *v.* Weston, 57 N. C. 349.

*Tennessee.*— Wilson *v.* Carver, 4 Hayw. 90.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 996.

**48.** Smith *v.* Pearson, 24 Ala. 355; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Bright *v.* Wagle, 3 Dana (Ky.) 252; Farrell *v.* Bean, 10 Md. 217.

**Fraud in obtaining an absolute conveyance** of slaves to secure a loan of money may be inferred from facts and circumstances, from the character of the contract, or from the condition and circumstances of the parties. Watkins *v.* Stockett, 6 Harr. & J. (Md.) 435.

**49.** Brantley *v.* West, 27 Ala. 542; Wright *v.* Wright, 2 Litt. (Ky.) 8; Barr *v.* Chandler, 47 N. J. Eq. 532, 20 Atl. 733; Wheeler *v.* Eastwood, 88 Hun (N. Y.) 160, 34 N. Y. Suppl. 513.

**50.** *Maine.*— Reed *v.* Jewett, 5 Me. 96.

*Maryland.*— Brogden *v.* Walker, 2 Harr. & J. 285.

*Massachusetts.*— New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275.

*Oregon.*— Bartel *v.* Lope, 6 Oreg. 321.

*Virginia.*— Dabney *v.* Green, 4 Hen. & M. 101, 4 Am. Dec. 503; Chapman *v.* Turner, 1 Call 280, 1 Am. Dec. 514; Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422.

See 43 Cent. Dig. tit. "Sales," § 125; and CHATTEL MORTGAGES, 6 Cyc. 997.

**Acts of parties.**— Where plaintiff contends that he made an absolute sale of the property, and defendant claims that he accepted the bill of sale as a chattel mortgage, it is competent for plaintiff to show that defendant has sold the property, or a part thereof, as his own. Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471.

**Circumstances attending transaction.**— In a suit to have a bill of sale of plaintiff's interest in a firm to defendant declared security for the firm's indebtedness to defendant, evidence showing that the firm was solvent, having assets exceeding the liabilities, so that plaintiff had a substantial interest in the business, is admissible to corroborate plaintiff's statement that the bill of sale was merely intended to secure defendant on account of the firm's indebtedness to him. Donnelly *v.* McArdle, 86 N. Y. App. Div. 33, 83 N. Y. Suppl. 193. Where one claims goods as a buyer, a note given to him by the alleged seller, on the day of the sale, equal in amount to the sum then paid by him to the alleged seller, is admissible to show that the transaction was a loan, and not a sale. Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

**Question for jury.**— Whether a bill of sale is given as security and therefore a mortgage is ordinarily a question of intention, and one of fact for the jury. Cook *v.* Lion F. Ins. Co., 67 Cal. 368, 7 Pac. 784; King *v.* Greaves, 51 Mo. App. 534; Gaither *v.* Teagie, 29 N. C. 460; Horne *v.* Puckett, 22 Tex. 201.

in form is a mortgage.[51] In some jurisdictions, however, the rule obtains that in an action at law parol evidence is not admissible for that purpose.[52] Such evidence is, however, regarded as admissible in equity,[53] subject in some instances

51. *California.*— Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911.

*Illinois.*— National Ins. Co. *v.* Webster, 83 Ill. 470; Moore *v.* Foster, 97 Ill. App. 233.

*Indiana.*— Hayworth *v.* Worthington, 5 Blackf. 361, 35 Am. Dec. 126.

*Iowa.*—Merritt-Allen Co. *v.* Torrence, (1905) 102 N. W. 154; Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

*Kansas.*— Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247.

*Michigan.*— Wetmore *v.* Moloney, 127 Mich. 372, 86 N. W. 808; Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134; Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804; Fuller *v.* Parrish, 3 Mich. 211.

*Minnesota.*— Jones *v.* Rahilly, 16 Minn. 320.

*Missouri.*— King *v.* Greaves, 51 Mo. App. 534; Quick *v.* Turner, 26 Mo. App. 29; Newell *v.* Keeler, 13 Mo. App. 189. But see Montany *v.* Rock, 10 Mo. 506. See also Link *v.* Harrington, 41 Mo. App. 635 (holding that parol evidence is inadmissible except as between the parties); State *v.* Kock, 40 Mo. App. 635; Moore *v.* Keep, 5 Mo. App. 593.

*Nevada.*— Carlyon *v.* Lannan, 4 Nev. 156.

*New York.*— Coe *v.* Cassidy, 72 N. Y. 133 [*affirming* 6 Daly 242]; Despard *v.* Walbridge, 15 N. Y. 374; Tyler *v.* Strang, 21 Barb. 198. But see Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961 [*affirming* 52 Hun 343, 5 N. Y. Suppl. 365], holding that where a bill of sale is absolute in its terms of transfer, states the quantity and price of each class of property, and the total price, with a provision for the correction of mistakes as to quantity, and contains an agreement as to how the price is to be applied between the parties, and the vendee takes possession thereunder, parol evidence is not admissible to show that it was intended merely as a collateral security.

*Ohio.*— Mollenkopf *v.* Baumgardner, 21 Ohio Cir. Ct. 591, 11 Ohio Cir. Dec. 655.

*Oklahoma.*— Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

*Oregon.*— Bartel *v.* Lope, 6 Oreg. 321.

*Texas.*— Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407.

*Washington.*— Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

*Wisconsin.*— Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257; Manufacturers' Bank *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

See 43 Cent. Dig. tit. "Sales," § 125; and CHATTEL MORTGAGES, 6 Cyc. 997.

**Under statutes.**— In some jurisdictions the rule rests on provisions of the statute allowing equitable defenses to be set up in actions at law. Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100; Despard *v.* Wallbridge, 15 N. Y. 374. See also Rogers *v.* Nidiffer, 5 Indian Terr. 55, 82 S. W. 673. The rule in Arkansas was formerly the contrary. George *v.* Norris, 23 Ark. 121.

52. *Alabama.*— Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Hartshorn *v.* Williams, 31 Ala. 149; McKinstry *v.* Conly, 12 Ala. 678.

*Maine.*— Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

*Maryland.*— Bent *v.* Susquehanna Bridge, etc., Co., 6 Harr. & J. 128, 14 Am. Dec. 261.

*Massachusetts.*— Pennock *v.* McCormick, 120 Mass. 275; Harper *v.* Ross, 10 Allen 332. Otherwise as to a bill of parcels. Hildreth *v.* O'Brien, 10 Allen 104; Caswell *v.* Keith, 12 Gray 351; Hazard *v.* Loring, 10 Cush. 267; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74. The rule applies only to parties and their privies. Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802.

*Mississippi.*— Rev. Code (1892), § 4233, providing that deeds or other writings absolute on their face, where the maker parts with the possession of the property conveyed, shall not be shown by parol to be mortgages, unless in case of fraud in their procurement, applies only to tangible property, and does not embrace the transfer of life insurance policies during the life of the assured, which may be shown to be mere securities for debt. Armstrong *v.* Owens, 83 Miss. 10, 35 So. 320.

See 43 Cent. Dig. tit. "Sales," § 125; and CHATTEL MORTGAGES, 6 Cyc. 997.

**As to third persons.**—A party to a bill of sale cannot, in a controversy with a stranger, introduce parol evidence to show that it was intended as a mortgage. Henderson *v.* Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434; Rogers *v.* Severson, 2 Gill (Md.) 385. The general rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument is confined to the parties to the instrument, and does not prevent an assignee in insolvency from showing that an absolute bill of sale given by his assignor for an inadequate consideration was verbally agreed to be considered as a mortgage. Grove *v.* Rentch, 26 Md. 367.

53. *Alabama.*— Bishop *v.* Bishop, 13 Ala. 475; English *v.* Lane, 1 Port. 328.

*Indiana.*— Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

*Maryland.*— Booth *v.* Robinson, 55 Md. 419.

*Massachusetts.*— Newton *v.* Fay, 10 Allen 505.

*Mississippi.*— Carter *v.* Burris, 10 Sm. & M. 527.

*New York.*— Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307 [*affirming* 13 N. Y. Suppl. 4]; Anthony *v.* Atkinson, 2 Sweeny 228.

*Virginia.*— Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422.

*United States.*— Morgan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87.

See 43 Cent. Dig. tit. "Sales," § 125; and CHATTEL MORTGAGES, 6 Cyc. 997.

to the restriction that fraud or mistake must have been alleged.[54] A bill of sale will not be held to be a mortgage unless the proof is clear and convincing.[55]

**b. Transfer in Payment of Debt.** A transfer of title by a debtor to a creditor in payment is in effect a sale and not a mortgage.[56]

**c. Sale as Security.** When a bill of sale is executed as security, it is generally held to be a mere mortgage.[57] Thus in cases where there has been no change of

**54.** McKinstry *v.* Conly, 12 Ala. 678; Marshall *v.* Cox, 7 J. J. Marsh. (Ky.) 133; Thompson *v.* Patton, 5 Litt. (Ky.) 74, 15 Am. Dec. 44; Farrell *v.* Bean, 10 Md. 217; Whitfield *v.* Cates, 59 N. C. 136.

**55.** *Alabama.*— Harris *v.* Miller, 30 Ala. 221; Brantley *v.* West, 27 Ala. 542; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190; Chapman *v.* Hughes, 14 Ala. 218; Freeman *v.* Baldwin, 13 Ala. 246; Hatfield *v.* Montgomery, 2 Port. 58.

*Arkansas.*— Trieber *v.* Andrews, 31 Ark. 163; Williams *v.* Cheatham, 19 Ark. 278.

*Illinois.*— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636.

*Iowa.*— Powers *v.* Benson, 120 Iowa 428, 94 N. W. 929.

*Maryland.*— Watkins *v.* Stockett, 6 Harr. & J. 435.

*New Jersey.*— Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

*Wisconsin.*— Mackey *v.* Stafford, 43 Wis. 653.

But see Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

See 43 Cent. Dig. tit. "Sales," § 137; and CHATTEL MORTGAGES, 6 Cyc. 998.

**Illustrations.**— Proof that the vendee took from the vendor no note or other evidence of the debt, although a strong circumstance to show that a sale, and not a mortgage, was intended, is by no means conclusive. Robinson *v.* Farrelly, 16 Ala. 472. The surrender by a creditor of certain notes to a debtor, on the execution of a bill of sale by the latter to the former, is not conclusive that the transaction was a sale and not a mortgage. Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804. Where a bill of sale was executed in payment of a precedent debt, the use of the word "security" by the vendee upon the witness' stand in describing the transaction is not sufficient to fix the character of such instrument as a mortgage. Prentiss Tool, etc., Co. *v.* Schirmer, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737 [*affirming* 17 N. Y. Suppl. 662]. On an issue as to whether a transaction was a sale by plaintiff to defendant of notes and mortgages, as claimed by defendant, or was an assignment as collateral security, as it purported to be, and as was claimed by plaintiff, a statement in a letter from plaintiff to defendant's attorney that the transaction "was only an indirect way to purchase" the notes and mortgages is sufficient corroboration of defendant's testimony to sustain a finding in his favor. Standen *v.* Brown, 31 N. Y. Suppl. 535 [*affirmed* in 152 N. Y. 128, 46 N. E. 167]. There must be proof of facts and circumstances *dehors* the deed, and proof of the declaration of the parties alone will not be sufficient. Colvard *v.* Waugh, 56 N. C. 335. Where it is alleged that part of the paper on which an absolute bill of sale is written has been torn off, and that the detached part contained a stipulation allowing the vendor to redeem, proof that the paper is mutilated is not sufficient. The contents must be proved. Hall *v.* Forgueran, 2 Litt. (Ky.) 329.

**56.** *Alabama.*— McKinstry *v.* Conly, 12 Ala. 678.

*Colorado.*— Krippendorf-Dittman Co. *v.* Trenoweth, 16 Colo. App. 178, 64 Pac. 373.

*Michigan.*— Cunningham *v.* O'Connor, 136 Mich. 293, 99 N. W. 25.

*New York.*— Prentiss Tool, etc., Co. *v.* Schirmer, 17 N. Y. Suppl. 662 [*affirmed* in 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737].

*North Carolina.*— Cohen *v.* Stewart, 98 N. C. 97, 3 S. E. 716; Poindexter *v.* McCannon, 16 N. C. 373, 18 Am. Dec. 591.

*Pennsylvania.*— Lauman's Appeal, 68 Pa. St. 88.

*Washington.*— Hammer *v.* O'Laughlin, 8 Wash. 393, 36 Pac. 257.

See 43 Cent. Dig. tit. "Sales," § 13.

**It does not affect the application of the rule** that the instrument does not, in terms, declare the conveyance a satisfaction of the debt. Miller *v.* Baker, 20 Pick. (Mass.) 285. Nor that there is a collateral agreement to resell. Morris *v.* Angle, 42 Cal. 236; Mason *v.* Moody, 26 Miss. 184; Coe *v.* Cassidy, 6 Daly (N. Y.) 242 [*affirmed* in 72 N. Y. 133].

**Surplus to be returned.**—A bill of sale by a debtor to a creditor of property to be sold, and the surplus after payment of the debt to be returned to the debtor, is a sale, and not a mortgage. Camp *v.* Thompson, 25 Minn. 175.

**57.** *Alabama.*— Ross *v.* Ross, 21 Ala. 322.

*California.*—Perkins *v.* Eckert, 55 Cal. 400.

*Florida.*— Shad *v.* Livingston, 31 Fla. 89, 12 So. 646.

*Georgia.*— Denton *v.* Shields, 120 Ga. 1076, 48 S. E. 423; Ward *v.* Lord, 100 Ga. 407, 28 S. E. 446; Lee *v.* Clark, 60 Ga. 639.

*Illinois.*— Purington *v.* Akhurst, 74 Ill. 490.

*Iowa.*— Wilson *v.* Palo Alto County, 71 Iowa 351, 32 N. W. 377.

*Maine.*— Smith *v.* Tilton, 10 Me. 350.

*Massachusetts.*— Potter *v.* Boston Locomotive Works, 12 Gray 154.

*Michigan.*— Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Duffie *v.* Clark, 106 Mich. 262, 64 N. W. 57.

*Nebraska.*— Conway *v.* St. Joseph Iron Co., 33 Nebr. 454, 50 N. W. 326.

possession,[58] or the sale is accompanied by a defeasance,[59] or provides for

*New York.*— Susman *v.* Whyard, 149 N. Y. 127, 43 N. E. 413 [*reversing* 71 Hun 215, 25 N. Y. Suppl. 222]; Woodworth *v.* Hodgson, 56 Hun 236, 9 N. Y. Suppl. 750; Barry *v.* Coville, 53 Hun 620, 7 N. Y. Suppl. 36 [*affirmed* in 129 N. Y. 302, 29 N. E. 307]; Marsh *v.* Lawrence, 4 Cow. 461; Bissell *v.* Hopkins, 3 Cow. 166, 15 Am. Dec. 259; Clark *v.* Henry, 2 Cow. 324; Barrow *v.* Paxton, 5 Johns. 258, 4 Am. Dec. 354.

*South Carolina.*— Foster *v.* Calhoun, Dudley 75; Berry *v.* Glover, Harp. Eq. 153.

*Utah.*— Ewing *v.* Merkley, 3 Utah 406, 4 Pac. 244.

See 11 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 991 *et seq.*

**Executory contract of sale.**—An agreement providing that whereas the owners of a ship have sold to another one-third part thereof for one dollar, the condition of the agreement being that such other shall cause to be paid three thousand dollars when the ship shall have been launched clear of liens, is an executory contract providing for a future purchase, and not a mortgage. Metcalf *v.* Taylor, 36 Me. 28. And see Brewster *v.* Baker, 20 Barb. (N. Y.) 364 [*reversing* 16 Barb. 613].

**Modification by subsequent agreement.**—An absolute bill of sale may, by subsequent agreement, on sufficient consideration, be so modified as that the whole transaction shall constitute a mortgage. King *v.* Greaves, 51 Mo. App. 534. See also Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43; Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131.

**Notes for purchase-money.**—A note given in part payment of the price of chattels, providing that the title shall remain in the vendor until the note is paid, with the right on default to take possession of the property without refunding any money previously paid on account of said purchase, is a contract for an absolute sale and mortgage back to secure the agreed price. Baldwin *v.* Crow, 86 Ky. 679, 7 S. W. 146, 9 Ky. L. Rep. 836.

**Obscure instruments.**— On the question whether an obscurely worded instrument was an absolute bill of sale or a mortgage, if it conveyed title and was consummated by a delivery of the property, it should be deemed an absolute bill of sale. Gladden *v.* Dozier, 71 Ga. 380. Where A, an attorney, in consideration of services to be rendered, took from B an instrument: "Received of J. J. Findley and W. F. Findley twenty-five dollars in full payment for one black cow. . . . It is agreed by the purchasers . . . that said Hughes shall retain the property and use the same from this date to the first day of October next, at which time should the said Hughes pay to said Findleys twenty-five dollars, then the property is to remain the said Hughes', but if the money be not paid that day, the property to be delivered up to the said Findley," it was held that this was a mortgage. Findley *v.* Deal, 69 Ga. 359, 360.

**Oral mortgage.**— Where plaintiff bank agreed with a stock buyer who had no deposit with it, to pay checks issued by him in payment for a lot of hogs, and that he should ship the hogs to K, sell them, and there deposit the proceeds to plaintiff's credit in its corresponding bank, it was held not a sale but only a parol chattel mortgage. Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 58 Mo. App. 17.

**Retaining lien for purchase-price.**—An instrument by which one agrees to sell, and the other to purchase, certain personal property, and providing that the vendor shall have a lien upon the property till the purchase-price is paid, is in the nature of a chattel mortgage. Baldwin *v.* Owens, 51 S. W. 438, 21 Ky. L. Rep. 352; Read *v.* Horner, 90 Mich. 152, 51 N. W. 207; Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

58. *Connecticut.*—Williams *v.* Chadwick, 74 Conn. 252, 50 Atl. 720.

*Illinois.*— Upham *v.* Richey, 61 Ill. App. 650.

*Indian Territory.*— Rogers *v.* Nidiffer, 5 Indian Terr. 55, 82 S. W. 673.

*Missouri.*— Desloge *v.* Ranger, 7 Mo. 327; King *v.* Greaves, 51 Mo. App. 534.

*New York.*— Ford *v.* Ransom, 8 Abb. Pr. N. S. 416, 39 How. Pr. 429; Wellington *v.* Morey, 12 N. Y. Wkly. Dig. 476.

*Ohio.*— Tufts *v.* Haynie, 4 Ohio Cir. Ct. 494, 2 Ohio Cir. Dec. 668.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 992 *et seq.*

**When as security for a debt** P gave W a written agreement acknowledging that he had received from W a horse which he would return or pay the debt, the horse being at the time really P's property and never delivered to W, the transaction was neither a sale nor a mortgage. Crane *v.* Pearson, 49 Me. 97.

59. *Colorado.*— Horn *v.* Reitler, 12 Colo. 310, 21 Pac. 186.

*Kentucky.*— Lobban *v.* Garnett, 9 Dana 389; Townsend *v.* Frazee, 54 S. W. 722, 21 Ky. L. Rep. 1183.

*Massachusetts.*— The defeasance must be in writing. Pennock *v.* McCormick, 120 Mass. 275. And see Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83.

*Mississippi.*— Barnes *v.* Holcomb, 12 Sm. & M. 306.

*Nebraska.*— Omaha Book Co. *v.* Sutherland, 10 Nebr. 334, 6 N. W. 367.

*New York.*— Blake *v.* Corbett, 120 N. Y. 327, 24 N. E. 477; Hughes *v.* Harlam, 37 N. Y. App. Div. 528, 55 N. Y. Suppl. 1106 [*affirmed* in 166 N. Y. 427, 60 N. E. 22].

*North Carolina.*— McFadden *v.* Turner, 48 N. C. 481; Joyner *v.* Vincent, 20 N. C. 652.

*Texas.*— Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087; Stephens *v.* Sherrod, 6 Tex. 294, 55 Am. Dec. 776.

redemption,[60] or a reconveyance,[61] the transaction is ordinarily held to be merely a mortgage.[62]

**d. Sale With Right to Repurchase.** A sale reserving to the seller a right to repurchase is not a mortgage,[63] especially when there is no debt to be secured and no obligation to repay.[64] If, however, there is a right reserved by the

*Vermont.*— Gifford *v.* Ford, 5 Vt. 532.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 992 *et seq.*

**Conditional defeasance.**— Where A gave an absolute bill of sale of slaves to B, and B gave back a bond that he would cancel the bill of sale on A's furnishing him satisfactory evidence of the payment of a debt on which B was liable as surety, it was held that the transaction did not constitute a mortgage, but that the bond was a conditional defeasance. Forkner *v.* Stuart, 6 Gratt. (Va.) 197.

60. *Kentucky.*— Perkins *v.* Drye, 3 Dana 170.

*Massachusetts.*— Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802.

*Mississippi.*— Barnes *v.* Holcomb, 12 Sm. & M. 306; Kent *v.* Allbritain, 4 How. 317.

*New Jersey.*— Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518; Wilmerding *v.* Mitchell, 42 N. J. L. 476.

*North Carolina.*— Wilson *v.* Weston, 57 N. C. 349.

*Tennessee.*— Overton *v.* Bigelow, 3 Yerg. 513.

*Vermont.*— Blodgett *v.* Blodgett, 48 Vt. 32.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 992 *et seq.*

61. *Arkansas.*— Merrick *v.* Avery, 14 Ark. 370.

*Georgia.*— Frost *v.* Allen, 57 Ga. 326.

*Idaho.*— Pritchard *v.* Butler, 4 Ida. 578, 43 Pac. 73.

*Illinois.*— Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636.

*Kentucky.*— Bishop *v.* Rutledge, 7 J. J. Marsh. 217; Knox *v.* Black, 1 A. K. Marsh. 298; McGinnis *v.* Hart, 4 Bibb 327.

*Maine.*—Titcomb *v.* McAllister, 77 Me. 353; Winslow *v.* Tarbox, 18 Me. 132.

*Michigan.*— Buhl Iron Works *v.* Teuton, 67 Mich. 623, 35 N. W. 804.

*North Carolina.*—Anonymous, 3 N. C. 26.

*South Carolina.*— Mosely *v.* Crocket, 9 Rich. Eq. 339.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 992 *et seq.*

**62. Existence of debt.**— There must, however, be an actual debt secured. Atwood *v.* Impson, 20 N. J. Eq. 150; State *v.* Rice, 43 S. C. 200, 20 S. E. 986; Stelling *v.* G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81. And see *infra*, I, D, 5, d.

**Conveyance must be to creditor.**—An absolute sale to one as "trustee" for the creditor is not a mortgage. Munro *v.* Merchants' Bank, 11 Allen (Mass.) 216.

**Rights of third persons.**— It is only between the parties that an absolute bill of sale may be treated as a mortgage. This will not be done to the prejudice of third persons. State *v.* Bell, 2 Mo. App. 102; Gaither *v.* Mumford, 4 N. C. 600.

**Right to surplus.**—A bill of sale of goods to a creditor to secure his indebtedness with an agreement that the vendee shall pay the vendor or his creditors any surplus arising from the sale over and above the vendee's claim is a mortgage. Moore *v.* Foster, 97 Ill. App. 233; Haynes *v.* Hobbs, 136 Mich. 117, 98 N. W. 978; Canfield *v.* Gould, 115 Mich. 461, 73 N. W. 550; Sloan *v.* Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470; Nichols *v.* Lyon, 14 N. Y. St. 549. But see Camp *v.* Thompson, 25 Minn. 175, where it was held that an absolute bill of sale of lumber, with a collateral writing by which the vendees agreed to sell it and apply the proceeds first to the vendor's indebtedness, and pay the remainder of the proceeds over to him, did not constitute a mortgage.

63. *Alabama.*— Murphy *v.* Barefield, 27 Ala. 634; Sewall *v.* Henry, 9 Ala. 24; Eiland *v.* Radford, 7 Ala. 724, 42 Am. Dec. 610.

*Kentucky.*— Harrison *v.* Lee, 1 Litt. 190.

*Massachusetts.*—Lee *v.* Kilburn, 3 Gray 594.

*New York.*— Brennan *v.* Crouch, 125 N. Y. 763, 26 N. E. 620 [*affirming* 57 Hun 585, 10 N. Y. Suppl. 419]. But see Susman *v.* Whyard, 149 N. Y. 127, 43 N. E. 413 [*reversing* 71 Hun 215, 25 N. Y. Suppl. 222].

*Canada.*— Moore *v.* Sibbald, 29 U. C. Q. B. 487.

See 43 Cent. Dig. tit. "Sales," § 13; and CHATTEL MORTGAGES, 6 Cyc. 992 *et seq.*

**An agreement** between A and B, that, if B would advance money to redeem A's negroes from an encumbrance, "the said negroes should become the property of the said Daniel, subject to the right of the said Hugh D. to redeem them on the repayment to said Daniel of $1,600 with interest thereon, within a short space of time," is a mortgage, and not a sale with right to repurchase. Morrow *v.* Turney, 35 Ala. 131.

**An instrument, executed by the purchaser** at a time subsequent to that of the purchase, and not in pursuance of the contract of purchase, by which he offers the seller the right to repurchase at what he himself gave, with interest, does not make the original transaction a mortgage. Vasser *v.* Vasser, 23 Miss. 378.

**A bill of sale, with a lease** back, containing an agreement of the seller to buy back the property at a fixed price, will be construed as a mortgage. *In re* Gurney, 10 Fed. Cas. No. 5,873, 7 Biss. 414, 15 Nat. Bankr. Reg. 373. And see Dickinson *v.* Oliver, 96 N. Y. App. Div. 65, 89 N. Y. Suppl. 52 [*affirmed* in 127 N. Y. App. Div. 932, 111 N. Y. Suppl. 1116 (*affirmed* in 195 N. Y. 238, 88 N. E. 44)].

64. *Alabama.*— Swift *v.* Swift, 36 Ala. 147.

buyer to demand and enforce repayment the transaction is not a sale but in the nature of a mortgage.[65]

**6. Contract For Work, Labor, and Material.** Whether a contract is one for the sale of goods or is merely a contract for work, labor, and materials is chiefly important in determining whether the contract is one "for the sale of goods" within the statute of frauds, and for determining this question different rules prevail in different jurisdictions.[66] In cases in which the statute of frauds is not involved, the question whether a contract is for the sale of goods, or for work, labor, and materials must be determined in accordance with the rule prevailing in the jurisdiction in cases arising under the statute.[67]

**7. Exchange or Barter.** If the consideration for the transfer of the property is other goods, no price being fixed in money, the transaction is an exchange or barter.[68] The legal effect of a contract of exchange is, however, generally the same as that of a contract of sale.[69]

*Arkansas.*— Johnson *v.* Clark, 5 Ark. 321.
*Kentucky.*— Stone *v.* Willis, 4 B. Mon. 496.
*New York.*— Quirk *v.* Rodman, 5 Duer 285.
*North Carolina.*— Munnerlin *v.* Birmingham, 22 N. C. 358, 34 Am. Dec. 402; Chambers *v.* Hise, 22 N. C. 305; Critcher *v.* Walker, 5 N. C. 488, 4 Am. Dec. 576.
*Tennessee.*— Burts *v.* Evans, 1 Heisk. 420; Hickman *v.* Cantrell, 9 Yerg. 172, 30 Am. Dec. 396; Scott *v.* Britton, 2 Yerg. 215.
*Virginia.*— Strider *v.* Reid, 2 Gratt. 38; Moss *v.* Green, 10 Leigh 251, 34 Am. Dec. 731; Chapman *v.* Turner, 1 Call 280, 1 Am. Dec. 514.
See 43 Cent. Dig. tit. "Sales," § 13; and Chattel Mortgages, 6 Cyc. 992 *et seq.*

**Vente à réméré.**—A right to refund the price and take back the property necessarily supposes a stipulated price. Where there is no determinate price, the party is not divested of title, and there is no *vente à réméré.* Hutchings *v.* Field, 10 La. 237.

**65.** Where the vendee retains the right to demand repayment of the vendor notwithstanding the purchase, it is conclusive to show that the transaction was intended as a security, and not a sale. Robinson *v.* Farrelly, 16 Ala. 472.

**66.** See Frauds, Statute of, 20 Cyc. 240.

**67.** Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Wyllie *v.* Palmer, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; Garvin Mach. Co. *v.* Hutchinson, 1 N. Y. App. Div. 380, 37 N. Y. Suppl. 394; Central Lith., etc., Co. *v.* Moore, 75 Wis. 170, 43 N. W. 1124, 17 Am. St. Rep. 186, 6 L. R. A. 788; King *v.* Dupuis, 28 Can. Sup. Ct. 388; Ross *v.* Doyle, 4 Manitoba 434. See also Chandler *v.* De Graff, 22 Minn. 471.

**68.** *Alabama.*— Coker *v.* State, 91 Ala. 92, 8 So. 874; Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318.
*Arkansas.*— Gillan *v.* State, 47 Ark. 555, 2 S. W. 185; Cooper *v.* State, 37 Ark. 412.
*Indiana.*— Forkner *v.* State, 95 Ind. 406; Hatfield *v.* State, 9 Ind. App. 296, 36 N. E. 664.
*Kentucky.*— Com. *v.* Davis, 12 Bush 240.
*Missouri.*— Martin *v.* Ashland Mill Co., 49 Mo. App. 23.
*Nebraska.*— Labaree *v.* Klosterman, 33 Nebr. 150, 49 N. W. 1102.
*New Hampshire.*— Mitchell *v.* Gile, 12 N. H. 390.
*New York.*— Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131. But see Hudson Iron Co. *v.* Alger, 54 N. Y. 173.
*Ohio.*— Jenkins *v.* Mapes, 53 Obio St. 110, 41 N. E. 137.
*Vermont.*— Loomis *v.* Wainwright, 21 Vt. 520.
*United States.*— Speigle *v.* Meredith, 22 Fed. Cas. No. 13,227, 4 Biss. 120.
See 43 Cent. Dig. tit. "Sales," § 6; and Barter, 5 Cyc. 621; Exchange of Property, 17 Cyc. 829.

**Note in conditional payment.**— Where a note is given in conditional payment, the transaction is a sale. Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316.

**Question for jury.**—Whether a contract by which one party agreed to deliver to the other a definite number of hides, and to accept therefor the paper of a third party, constituted a sale of the hides or an exchange thereof for the paper, was a question for the jury. Deford *v.* Dryden, 46 Md. 248.

**69.** Howard *v.* Harris, 8 Allen (Mass.) 297; Com. *v.* Clark, 14 Gray (Mass.) 367; Crapo *v.* Seybold, 36 Mich. 444; Kennerly *v.* Somerville, 68 Mo. App. 222; La Neuville *v.* Nourse, 3 Campb. 351; Emanuel *v.* Dane, 3 Campb. 299. See also Berger *v.* U. S. Steel Corp., 63 N. J. Eq. 809, 53 Atl. 68.

**Pleading.**— In case of an exchange the declaration must be for damages for breach of a special agreement; but if the contract is for exchange of goods at a stipulated price, the declaration may be in assumpsit for goods sold. Picard *v.* McCormick, 11 Mich. 68; Herrick *v.* Carter, 56 Barb. (N. Y.) 41; Way *v.* Wakefield, 7 Vt. 223; Hands *v.* Burton, 9 East 349; Harrison *v.* Luke, 14 L. J. Exch. 248, 14 M. & W. 139; Forsyth *v.* Jervis, 1 Stark. 437, 18 Rev. Rep. 804, 2 E. C. L. 169. And an averment of a contract of sale is not supported by proof of an exchange, since the words "sale" and "exchange" express legally different transactions. Vail *v.* Strong, 10 Vt. 457.

**8. Gift.** If there be no valuable consideration for the transfer of the property, the transaction is a gift.[70]

## II. Requisites and Validity of Contract.

**A. In General.** To constitute a valid sale[71] there must be: (1) Parties competent to contract;[72] (2) a subject-matter or thing sold;[73] (3) a price or consideration;[74] and (4) mutual consent of the parties.[75]

**B. Parties — 1. In General.** Two parties, seller and buyer, competent to contract, are essential to every sale or contract to sell.[76]

**2. Capacity of Parties.** Capacity to buy or sell is coextensive with capacity to contract.[77]

**3. Parties By and Against Whom Contract May Be Enforced.** The obligations and duties arising out of a contract are due only to those with whom it is made; and therefore an action on the contract can as a rule be brought only by one who is a party to the contract,[78] and against one who is a party.[79]

**Exchange frequently denominated sale.**— Where goods are delivered upon such terms that the receiver is not bound to return the identical goods, but is at liberty to return something else, the property passes, and the courts frequently denominate the transaction a sale. Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093.

**70.** *Alabama.*— Kinnebrew *v.* Kinnebrew, 35 Ala. 628.

*California.*— Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

*Indiana.*— Smith *v.* Dorsey, 38 Ind. 451, 10 Am. Rep. 118.

*Louisiana.*— Haggerty *v.* Corri, 5 La. Ann. 433.

*New York.*— Van Deusen *v.* Rowley, 8 N. Y. 358; Seymour *v.* Seymour, 28 N. Y. App. Div. 495, 51 N. Y. Suppl. 130.

See, generally, Gifts, 20 Cyc. 1192.

**Insufficient consideration.**—A conveyed five slaves to his daughter B, upon the consideration of natural love and affection and of one hundred dollars. It was held that, as the consideration of one hundred dollars was insufficient to support a sale of the slaves, this was a gift, and not a sale. Pearl *v.* Hansborough, 9 Humphr. (Tenn.) 426. See also Gifts, 20 Cyc. 1215.

**Intention.**— Where the evidence shows that an act of sale was intended as a donation, and it is clothed with the formalities required by law for the validity of donations *inter vivos*, effect will be given to it as a donation. Harper *v.* Pierce, 15 La. Ann. 666.

**Sale not gift.**— Where one giving a calf to his minor stepson permits him to sell it, and afterward sells the stepson a horse, taking in payment the proceeds of the sale of the calf, the title to the horse passes by purchase and not by gift. Carpenter *v.* Davis, 71 Ill. 395.

**71.** *Alabama.*— Martin *v.* State, 59 Ala. 34.

*Arkansas.*— Matthews *v.* Freker, 68 Ark. 190, 57 S. W. 262.

*Massachusetts.*— Gardner *v.* Lane, 12 Allen 39.

*Missouri.*— Kelley *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Wheless *v.* Meyer, etc., Grocer Co., (App. 1909) 120 S. W. 708; Barrie *v.* United R. Co., (App. 1909) 119 S. W. 1020.

*Texas.*— Keaton *v.* State, (Cr. App. 1896) 36 S. W. 440.

*United States.*— Butler *v.* Thomson, 92 U. S. 412, 23 L. ed. 684. See also 2 Kent Comm. 468; Benjamin Sales, § 1.

**72.** See *infra*, II, B.

**73.** See *infra*, II, C.

**74.** See *infra*, II, D.

**75.** See *infra*, II, E.

**76.** Simpson Brick-Press Co. *v.* Wormley, 166 Ill. 383, 46 N. E. 976; Benjamin Sales, § 1. See, generally, Contracts, 9 Cyc. 371.

**Non-existing corporation.**— Where goods were bought in the name of a corporation which was never organized, by one who represented himself as manager of the alleged corporation, the seller was not divested of title. Wyckoff *v.* Vicary, 75 Hun (N. Y.) 409, 27 N. Y. Suppl. 103.

**77.** This question is treated under various titles. See Aliens, 2 Cyc. 88; Contracts, 9 Cyc. 372; Convicts, 9 Cyc. 874; Corporations, 10 Cyc. 1099; Counties, 11 Cyc. 467; Drunkards, 14 Cyc. 1099; Husband and Wife, 21 Cyc. 1310; Infants, 22 Cyc. 580; Insane Persons, 22 Cyc. 1194; Joint Stock Companies, 23 Cyc 470; Municipal Corporations, 28 Cyc. 633; Religious Societies, 34 Cyc. 1139; Spendthrifts; States; Towns; United States.

**A mind capable of making a contract of sale** is one that has sufficient intelligence to know what he is doing, and what property he is disposing of, and to whom he is transferring it. Whitaker *v.* Hamilton, 126 N. C. 465, 35 S. E. 815.

**Where necessaries** are delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent, he must pay a reasonable price therefor. See Drunkards, 14 Cyc. 1099; Infants, 22 Cyc. 590; Insane Persons, 22 Cyc. 1201.

**78.** Field *v.* Runk, 22 N. J. L. 525; Davenport *v.* Buckland, Lalor (N. Y.) 75. Contracts, 9 Cyc. 372.

**79.** National School Furnishing Co. *v.*

**4. Sale on Credit of Third Person.** Where goods are furnished by one person to another on the request and credit of a third person, he, and not the one who receives the goods, is liable as buyer to pay for the same.[80] But it is not enough to charge a third person with payment that he requested the seller to give credit to the person to whom the goods were furnished,[81] or that the seller looked to a third person for payment, in the absence of a promise, express or implied, on his part to pay for them.[82]

**5. Parties by Assignment.** As a rule rights arising out of the contract may be assigned.[83]

Cole, 30 Ill. App. 156; Clark *v.* Imlay, 12 N. J. L. 119; Kirchner *v.* Otto, 10 Misc. (N. Y.) 226, 30 N. Y. Suppl. 1065; Bush *v.* Folks, 19 N. Y. Suppl. 439. And see Contracts, 9 Cyc. 386.

**Order for delivery to third person.**— The acceptance of an order for the delivery of goods to a third person does not constitute a sale to such person. Burrall *v.* Jacot, 1 Barb. (N. Y.) 165.

**Real purchaser.**—A contract of sale will be binding on the real purchaser, although made by him in the name of another. O. M. Cockrum Co. *v.* Klein, 165 Ind. 627, 74 N. E. 529. The person paying the purchase-price is not necessarily the vendee. Davis *v.* Maltz, 57 Mich. 496, 24 N. W. 861; Balz *v.* Shaw, 13 Misc. (N. Y.) 181, 34 N. Y. Suppl. 5 [*affirming* 11 Misc. 643, 32 N. Y. Suppl. 791]. But the giving of a note for the purchase-price is *prima facie* evidence that the maker is the purchaser. Anderson *v.* Adams, 117 Ga. 919, 43 S. E. 982; Brady *v.* McKee, 30 Ga. 748.

**Where one contracts to pay for goods in the notes of a third person,** and, after delivery of part of the goods, refuses to deliver the notes, he becomes personally liable for the goods delivered. Partridge *v.* Gildermeister, 6 Bosw. (N. Y.) 57 [*affirmed* in 3 Abb. Dec. 461, 1 Keyes 93].

**80.** *Illinois.*— Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622 [*affirming* 45 Ill. App. 250]; Lawrence *v.* Cowles, 13 Ill. 577.

*Indiana.*— Chicago, etc., R. Co. *v.* West, 37 Ind. 211.

*Nebraska.*— Houghton *v.* Todd, 58 Nebr. 360, 78 N. W. 634.

*New Jersey.*— Holmesburg Granite Co. *v.* West, 65 N. J. L. 46, 46 Atl. 780.

*New York.*— Halsted *v.* Pelletreau, 101 N. Y. App. Div. 125, 91 N. Y. Suppl. 927; McCaffil *v.* Radcliff, 3 Rob. 445.

*Texas.*— Bailey *v.* Hicks, 16 Tex. 222; Williamson *v.* Smith, (Civ. App. 1904) 79 S. W. 51.

*Virginia.*— Lanier *v.* Harwell, 6 Munf. 79.

*Washington.*— Nelle *v.* Quade, 4 Wash. 334, 30 Pac. 141.

*Wisconsin.*— Thayer *v.* Gallup, 13 Wis. 539; Turton *v.* Burke, 4 Wis. 119.

*Canada.*— Stephenson *v.* Miller, 27 N. Brunsw. 42 [*affirmed* in 16 Can. Sup. Ct. 722]; Grasett *v.* Hutchinson, 10 U. C. C. P. 265.

See 43 Cent. Dig. tit. "Sales," § 27.

**Seller estopped.**— Where A agreed with B to take goods of him, to be manufactured for him by C, and C sent goods to A, who credited them to B, and afterward accounted for them in a settlement with B, and C, knowing that the goods were thus credited, did not give notice to A until after such settlement, that the goods had not been delivered on account of B, C cannot support an action for goods sold, etc., against A. Farwell *v.* Smith, 12 Pick. (Mass.) 83.

**Where goods were furnished to a livery** stable on the credit of the person carrying it on, and he afterward withdrew from the business, it was his duty to give actual notice of his withdrawal to relieve himself from liability for subsequent purchases. Shaunce *v.* McCrystal, 162 Pa. St. 457, 29 Atl. 866.

**81.** Bushnell *v.* Bishop Hill Colony, 28 Ill. 204; Lord *v.* Willard, 51 Me. 196, holding that where defendant wrote to plaintiff: "Let my brother, Erat Willard, have what corn and flour he may want, on commission, and I will be responsible for the amount sold by him, for you, on commission," assumpsit for goods sold and delivered to defendant did not lie.

**82.** *Alabama.*— Wood-Dryer Grocery Co. *v.* Alabama Nat. Bank, 119 Ala. 311, 20 So. 311.

*Indiana.*— Lance *v.* Pearce, 101 Ind. 595, 1 N. E. 184 (holding that a buyer cannot evade paying for goods sold to him solely upon the ground that they were at his request charged to another person); Norris *v.* Dodge, 23 Ind. 190.

*Michigan.*— Brossard *v.* Bateson, 48 Mich. 292, 12 N. W. 196.

*New York.*— Barber *v.* Lyon, 22 Barb. 622; Herring *v.* Marvin, 5 Johns. 393.

*Texas.*— Womack *v.* Acuff, (App. 1891) 16 S. W. 107.

*Canada.*— Hechler *v.* Forsyth, 22 Can. Sup. Ct. 489. See also Ogilvie *v.* McLeod, 11 U. C. C. P. 348.

See 43 Cent. Dig. tit. "Sales," § 27; and Principal and Agent, 31 Cyc. 1345.

**A third person may enter into a contract** making himself secondarily liable for the payment of the price. McKenzie *v.* McBean, 4 U. C. Q. B. O. S. 137. See Frauds, Statute of, 20 Cyc. 160; Guaranty, 20 Cyc. 1404; Principal and Surety, 32 Cyc. 22.

**83.** La Rue *v.* Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179, (1890) 24 Pac. 45; Tyler *v.* Barrows, 6 Rob. (N. Y.) 104. See Assignments, 4 Cyc. 20.

**The rule is otherwise** if the rights are coupled with liabilities or if the contract involves relations of personal confidence. Wheeler *v.* Walton, etc., Co., 64 Fed. 664.

6. DETERMINATION OF PARTIES — a. Evidence. Who is the real purchaser in the contract of sale may be shown by the entries on the books of the seller,[84] but such evidence is not conclusive,[85] even against the seller.[86] The person who is the purchaser may be determined by evidence showing who gave the order for the goods,[87] or to whom [88] and for whose benefit [89] the property was delivered. Evidence as to the credit of the alleged purchaser may be shown as tending to prove a sale to him rather than another person.[90]

See ASSIGNMENTS, 4 Cyc. 22. So where a vendee assigns the contract of sale, directing the vendor to deliver the goods to the assignee, he is not thereby released from liability for the price. Martin *v.* Orndorff, 22 Iowa 504.

**Failure of assignee to perform.**— Where a buyer assigns his interest in the contract to parties who agree to perform it on his part, and, on their failure to perform, himself fulfils and takes the property, he becomes a seller as toward such assignee. Dustan *v.* McAndrew, 44 N. Y. 72.

84. *California.*— Sanhorn *v.* Cunningham, (1893) 33 Pac. 894.

*Iowa.*— Hale *v.* Gibbs, 43 Iowa 380.

*Massachusetts.*— Langdon *v.* Hughes, 107 Mass. 272.

*Michigan.*— Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840.

*New York.*— Woodward *v.* Remmington, 81 Hun 160, 30 N. Y. Suppl. 743.

See 43 Cent. Dig. tit. "Sales," § 126.

**Bills rendered** by the seller to the person to whom the goods were delivered, and other incidents surrounding the transaction, are admissible, although the goods were charged to the person giving the order. Buckingham *v.* Murray, 7 Houst. (Del.) 176, 30 Atl. 779.

**In determining who was the seller** evidence as to the ownership of the property (Richmond *v.* Sundberg, 77 Iowa 255, 42 N. W. 184; McKenzie *v.* Vandecar, 105 Mich. 232, 62 N. W. 1031), or of the agency of the apparent vendor (Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936. See also Shaw *v.* Fleming, 143 Pa. St. 104, 22 Atl. 816), is admissible.

85. *Illinois.*— Baird *v.* Hooker, 8 Ill. App. 306.

*Kansas.*— Beebe *v.* Carter, 54 Kan. 261, 38 Pac. 278.

*Massachusetts.*—Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381.

*Michigan.*— Loranger *v.* Foley, 79 Mich. 244, 44 N. W. 781.

*Nebraska.*— Deranlieu *v.* Jandt, 37 Nebr. 532, 56 N. W. 299.

*New York.*— Quinby *v.* Carhart, 133 N. Y. 579, 30 N. E. 972 [*affirming* 58 N. Y. Super. Ct. 490, 12 N. Y. Suppl. 556]; Foster *v.* Persch, 68 N. Y. 400.

*Washington.*— Cosh-Murray Co. *v.* Adair, 9 Wash. 686, 38 Pac. 749.

*Wisconsin.*— Champion *v.* Doty, 31 Wis. 190.

See 43 Cent. Dig. tit. "Sales," § 126.

**The presumption raised by the entry** on the books may be rebutted. Walker *v.* Richards, 41 N. H. 388; Pecker *v.* Hoit, 15 N. H. 143; Champion *v.* Doty, 31 Wis. 190.

86. Lyon *v.* Chamberlain, 41 Mich. 119, 1 N. W. 983.

87. Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697; Bridgman *v.* Hallberg, 52 Minn. 376, 54 N. W. 752; Quinby *v.* Carhart, 133 N. Y. 579, 30 N. E. 972 [*affirming* 58 N. Y. Super. Ct. 490, 12 N. Y. Suppl. 556]; Richards *v.* Ross, 83 Hun (N. Y.) 390, 31 N. Y. Suppl. 905; Howe *v.* Morehouse, 5 Silv. Sup. (N. Y.) 272, 7 N. Y. Suppl. 938 [*affirmed* in 130 N. Y. 651, 29 N. E. 1033]; Benson *v.* Hart, 10 Wash. 301, 38 Pac. 1041.

**In an action against two persons,** the fact that one of them ordered goods does not justify a judgment in favor of the other when the evidence shows that the latter urged a hurried delivery of the goods, and also that he made the payment on which the delivery was conditioned. Crockett *v.* Roebuck, 77 Ga. 16.

88. Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622 [*affirming* 45 Ill. App. 250]; Milligan *v.* Butcher, 23 Nebr. 683, 37 N. W. 596; Maresi *v.* American Yacht Club, 10 Misc. (N. Y.) 220, 30 N. Y. Suppl. 1068; Pacific Cable Constr. Co. *v.* McNatt, 2 Wash. 216, 27 Pac. 869.

89. Tozier *v.* Crafts, 123 Mass. 480; Tidden *v.* Raab, 60 Hun (N. Y.) 579, 14 N Y. Suppl. 556.

**Where plaintiff claimed** that defendant and his son came to his place of business, that defendant said he intended to build some houses, and that whatever his son ordered might be charged to him but defendant denied the contract as claimed, and testified that he simply contracted for the material in one house, which he was building, it was error to exclude evidence for defendant that title to the lots other than the first was not in defendant, but in his sons. Miller *v.* Jurczyk, 109 Mich. 637, 67 N. W. 898. But where plaintiff claimed that he supplied a furnace to defendant at her request, but defendant claimed that the furnace was furnished to one T, who was under a written contract with her to build the house in which the furnace was placed, and defendant and T both testified that the furnace was furnished to the latter, the written contract with T was properly excluded. Meurer *v.* Von Kramer, 69 Hun (N. Y.) 125, 23 N. Y. Suppl. 371.

90. Alcock *v.* Hopkins, 6 Cush. (Mass.) 484; Bronner *v.* Frauenthal, 37 N. Y. 166 [*affirming* 9 Bosw. 350]; Moore *v.* Meacham, 10 N. Y. 207; Maher *v.* Willson, 3 N. Y. Suppl. 80 [*affirmed* in 123 N. Y. 655, 25 N. E. 954]. But see Norris *v.* Dodge, 23 Ind. 190, where it was held that in an action against a father for the price of goods

**b. Question For Jury.** The determination of the parties to the contract of sale is a question for the jury.[91]

**C. Subject-Matter of Sale — 1. In General.** Generally speaking every species of personal property may be the subject of sale;[92] but the agreement by which a chose in action is transferred is generally termed an assignment.[93] The subject-matter of a sale is commonly said to be "goods," which may be defined as including all chattels personal except choses in action and money.[94]

which he had ordered for a son who had come of age and had a family of his own, evidence of the insolvency of the son is immaterial.

91. *Connecticut.*— Spurr *v.* Coffing, 44 Conn. 147.

*Kansas.*— Burkhalter *v.* Farmer, 5 Kan. 477.

*Maryland.*— Green *v.* Ford, 35 Md. 82.

*Massachusetts.*— Emerson *v.* Patch, 123 Mass. 541.

*Michigan.*— Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697; Loranger *v.* Foley, 79 Mich. 244, 44 N. W. 781; Henry C. Hart Mfg. Co. *v.* Mann's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820; Callam *v.* Barnes, 44 Mich. 593, 7 N. W. 198; Ingersoll *v.* Baker, 41 Mich. 48, 1 N. W. 907.

*New York.*— Downs *v.* Jalowack, 66 Barb. 458.

*Washington.*— Comegys *v.* American Lumber Co., 8 Wash. 661, 36 Pac. 1087.

*Wisconsin.*— Oothaut *v.* Leahy, 23 Wis. 114.

*Canada.*— Severn *v.* Toronto St. R. Co., 23 U. C. Q. B. 489.

See 43 Cent. Dig. tit. "Sales," § 147.

Sale on credit of third person.— Whether the sale was made on the credit of a third person is for the jury. Jewell *v.* Posey, 119 Iowa 412, 93 N. W. 379.

92. Thus the following may be the subject of sale: An undivided interest in a partnership (Schurtz *v.* Romer, 82 Cal. 474, 23 Pac. 118; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415. See also Partnership, 30 Cyc. 444); the route of a newspaper carrier (Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739); the practice and good-will of a physician (Hoyt *v.* Holly, 39 Conn. 326. See also Good-Will, 20 Cyc. 1277); a seat or membership in stock exchange or board of trade (See Exchanges, 17 Cyc. 864); and the income to be derived from the gate receipts and the various privileges of future races and fairs to be held on grounds already prepared for such purposes (Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128).

93. See Assignments, 4 Cyc. 1. See also Commercial Paper, 7 Cyc. 495.

94. See Goods, 20 Cyc. 1262.

Statute of frauds.— Most of the decisions involving the meaning of "goods" have arisen under the seventeenth section of the English statute of frauds and the corresponding section of the statute as enacted in this country. The language used in the English statute, and in many of the American statutes, is "goods, wares and merchandise"; but in some statutes the terms include choses in action and some all personal property. See Frauds, Statute of, 20 Cyc. 238.

Choses in action.— In England choses in action, including bills and notes and shares of stock, have been held not to be within the statute. But in this country, even when the language conforms to the English statute, it is generally held that "goods, wares and merchandise" include choses in action and securities which are the subject of common sale and barter, and which have a visible and palpable form, such as shares of stock, negotiable instruments, and the like. See Frauds, Statute of, 20 Cyc. 238.

Things attached to land.— When a contract of sale is made, the subject of which is something attached to or forming part of the land, as crops, natural or industrial, growing trees, fixtures, and the like, the question frequently arises, whether it is a sale of goods, wares, and merchandise within the section of the statute applicable thereto, or a sale of an interest in land within the section of the statute relating to sales of that character; the answer to the question depends upon the particular subject-matter, and there is much conflict of authority upon the different questions thus presented. When the question is presented, whether a contract for the sale of crops, standing timber, and the like is a contract for the sale of goods, and governed by the law of sales, or is a contract for the sale of real property, the rules applicable in cases arising under the statute of frauds will generally be followed, and reference must be had thereto. See Frauds, Statute of, 20 Cyc. 238. And see Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918, 22 Ky. L. Rep. 1510; Glass *v.* Blazer, 91 Mo. App. 564.

Money.— Gold, when regarded, not as money, but as a commodity, is within the statute of frauds. Peabody *v.* Speyers, 56 N. Y. 230. A contract to deliver ten thousand dollars "current funds of the United States," at fifteen cents on the dollar in ten months from date, is in effect a contract to deliver ten thousand dollars legal tender notes for one thousand five hundred dollars in coin, and is valid. Cooke *v.* Davis, 53 N. Y. 318. Defendant, prior to the passage of the act of congress of Feb. 25, 1862, making treasury notes legal tender, loaned to plaintiff seven hundred dollars in American gold. Plaintiff executed a note therefor payable in "United States gold." It was held that the transaction was a loan and not a sale of gold recognized as valid by the act of March 3, 1863, sections 4 and 5. Warnihold *v.* Schlicting, 16 Iowa 243. Depreciated bank paper may be the subject of sale. Bos-

**2. Existence — a. In General.** The goods which form the subject-matter of a contract to sell may be existing goods or future goods, that is, goods thereafter to be manufactured or acquired by the seller;[95] but the goods which form the subject-matter of a sale must be in existence.[96] If there is a contract for the present sale of specific goods, and the goods, without the knowledge of the parties, have ceased to exist at the time of the contract, the contract is void.[97]

**b. Potential Existence.** According to the rule generally prevailing in this country, a sale of goods having a potential existence[98] operates to pass the property in the goods upon their coming into existence,[99] as a sale of crops grown on the seller's land,[1] the future offspring of his animals,[2] or cheese to be made from the

well *v.* Clarksons, 1 J. J. Marsh. (Ky.) 47. But the giving of a note, bearing interest, for depreciated bank paper, is a strong indication of a loan, and not a sale. Breeding *v.* Threlkeld, 6 J. J. Marsh. (Ky.) 378; Morris *v.* Caldwell, 3 J. J. Marsh. (Ky.) 693.

**95.** Ajello *v.* Worsley, [1898] 1 Ch. 274, 67 L. J. Ch. 172, 77 L. T. Rep. N. S. 783, 14 T. L. R. 168, 46 Wkly. Rep. 245. See also Central Oil Co. *v.* Southern Refining Co., 154 Cal. 165, 97 Pac. 177. See *infra*, II, C, 2, c.

**96.** *Alabama.*— Robinson *v.* Hirschfelder, 59 Ala. 503.

*Georgia.*— See Huntington *v.* Chisholm, 61 Ga. 270.

*New York.*—Andrew *v.* Newcomb, 32 N. Y. 417; Wolf *v.* Di Lorenzo, 22 Misc. 323, 49 N. Y. Suppl. 191.

*Pennsylvania.*— See Clemens *v.* Davis, 7 Pa. St. 263.

*Vermont.*— Smith *v.* Atkins, 18 Vt. 461.

*United States.*— Bertram *v.* Lyon, 3 Fed. Cas. No. 1,362, McAllister 53 [*affirmed* in 20 How. 149, 15 L. ed. 847]; Low *v.* Andrews, 15 Fed. Cas. No. 8,559, 1 Story 38.

See 43 Cent. Dig. tit. "Sales," § 21.

**On the theory that a promise to pay** has no existence until regularly issued and passed into other hands so as to require value, it was held in Schermerhorn *v.* Talman, 14 N. Y. 93, that one cannot sell his own promise to pay.

**97.** *Maryland.*— Franklin *v.* Long, 7 Gill & J. 407.

*Massachusetts.*— Rice *v.* Dwight Mfg. Co., 2 Cush. 80; Thompson *v.* Gould, 20 Pick. 134.

*Michigan.*— Hamilton *v.* Park, etc., Co., 125 Mich. 72, 83 N. W. 1018; Gibson *v.* Pelkie, 37 Mich. 380.

*Vermont.*— Varnum *v.* Hygate, 65 Vt. 416, 26 Atl. 628.

*United States.*— Allen *v.* Hammond, 11 Pet. 63, 9 L. ed. 633.

*England.*— Coutourier *v.* Hastie, 5 H. L. Cas. 673, 2 Jur. N. S. 1241, 25 L. J. Exch. 253, 10 Eng. Reprint 1065; Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115.

See 43 Cent. Dig. tit. "Sales," § 21; and Contracts, 9 Cyc. 399.

**Non-existence of specific consideration.**— Where plaintiff bought from G a mare, supposed by the parties to be with foal, agreeing to give for her the colt, which the mare was expected to have, when it should become four months old, but the mare was not with foal and had no colt, and plaintiff kept possession of the mare nearly three years, the fact that it was impossible for plaintiff to pay for her in the manner agreed upon did not render the sale void, but only rendered plaintiff liable to pay for the mare in another way. Reed *v.* Canady, 34 Vt. 198.

**98. Potential existence.**— Things which are the expected product or increase of something owned by the seller are said to have a potential existence. Grantham *v.* Hawley, Hob. 132, 80 Eng. Reprint 281; Robinson *v.* McDonald, 5 M. & S. 228. See also Wood *v.* Foster, 1 Leon. 42, 74 Eng. Reprint 39. The cases involving the doctrine of potential existence are generally cases of chattel mortgages. See Chattel Mortgages, 6 Cyc. 1045. And see Assignments, 4 Cyc. 12. In England the exception in favor of goods having a potential existence is doubted by Chalmers, J., who says there is no rational distinction between one class of future goods and another and that the supposed rule has never been acted on. Chalmers Sale Goods 8.

**99.** Robinson *v.* Hirschfelder, 59 Ala. 503; Noyes *v.* Jenkins, 55 Ga. 586; Andrew *v.* Newcomb, 32 N. Y. 417; Smith *v.* Atkins, 18 Vt. 461.

**An expectation of profits** may be the subject of the contract of sale. Slidell *v.* McCoy, 15 La. 340. See Assignments, 4 Cyc. 12.

**Bonds of unorganized corporation.**—A contract for the sale of bonds of a corporation not yet organized is void. House *v.* Faulkner, 61 Tex. 308.

**1.** Robinson *v.* Mauldin, 11 Ala. 977; Weatherly *v.* Higgins, 6 Ind. 73; Dickey *v.* Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449; Crapo *v.* Seybold, 36 Mich. 444; Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180. *Compare* Huntington *v.* Chisholm, 61 Ga. 270; Redd *v.* Burrus, 58 Ga. 574; Noyes *v.* Jenkins, 55 Ga. 586, which cases hold that until the seed is planted the crop has no existence, actual or potential.

**Where a creditor furnished his debtor wheat** to be sowed on the farm owned by the latter subject to the debt, under an agreement to pay the expenses in harvesting and marketing, and that the debtor should furnish his labor, and should turn over to the creditor so much of the proceeds of the wheat as was necessary to pay the indebtedness, the ownership of the wheat was not transferred to the creditor, who had at best a lien. Sedgwick City Bank *v.* Pollard, 8 Kan. App. 34, 54 Pac. 14.

**2.** Hull *v.* Hull, 48 Conn. 250, 40 Am.

milk of his cows.[3] The seller must, however, have a present interest in that of which the thing sold is the product or increase.[4]

c. Goods to Be Acquired — (I) *In General.* A contract for the sale of goods to be acquired by the seller can operate only as a contract to sell.[5] It was once held that a contract for the sale of goods to be delivered at a future day, when the seller had not the goods but intended to go into the market and buy them, was a mere wager on the market price and was invalid.[6] But this doctrine has been abandoned.[7]

(II) *Acquisition Dependent on Contingency.* There may be a contract to sell goods the acquisition of which by the seller depends upon a contingency which may or may not happen.[8]

Rep. 165; Fonville *v.* Casey, 5 N. C. 389, 4 Am. Dec. 559; McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262. *Contra*, Bates *v.* Smith, 83 Mich. 347, 47 N. W. 249.

3. Conderman *v.* Smith, 41 Barb. (N. Y.) 404; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9.

4. Dickey *v.* Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449; Smith *v.* Atkins, 18 Vt. 461.

**Expectant interest.**—A son cannot make a sale of his expectant interest in his father's estate. Wheeler *v.* Wheeler, 2 Metc. (Ky.) 474, 74 Am. Dec. 421; Read *v.* Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122.

**Fish to be caught.**—An attempted sale of "all the halibut that may be caught by the master and crew of the schooner Florence Reed, on the voyage upon which she is about to proceed," has no effect to pass the property in the fish when caught. Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357.

5. Whitehead *v.* Root, 2 Metc. (Ky.) 584; House *v.* Faulkner, 61 Tex. 308; Lunn *v.* Thornton, 1 C. B. 379, 9 Jur. 350, 14 L. J. C. P. 161, 50 E. C. L. 379. But *compare* Currie *v.* White, 45 N. Y. 822 [*reversing* 37 How. Pr. 330, 384].

**In such case,** although the contract be in the form of a present sale, the property in the goods does not pass until the seller, after acquiring the goods, does some act appropriating them to the contract. Langton *v.* Higgins, 4 H. & N. 402, 28 L. J. Exch. 252, 7 Wkly. Rep. 489. See *infra*, VI, A, 1, b.

6. Bryan *v.* Lewis, R. & M. 386, 21 E. C. L. 775. See also Branch *v.* Palmer, 65 Ga. 210.

7. *Delaware.*— Rogers *v.* Fenimore, (1898) 41 Atl. 886.

*Georgia.*— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485.

*Indiana.*— Shipp *v.* Bowen, 25 Ind. 44.

*Maryland.*— Appleman *v.* Fisher, 34 Md. 540.

*New York.*— Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383, 77 N. Y. Suppl. 719; Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612; Stanton *v.* Small, 3 Sandf. 230.

*United States.*— Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388; Clarke *v.* Foss, 5 Fed. Cas. No. 2,852, 7 Biss. 540.

*England.*— Mortimer *v.* McCalln, 4 Jur. 172, 9 L. J. Exch. 73, 6 M. & W. 58; Hibblewhite *v.* McMornie, 3 Jur. 509, 8 L. J. Exch. 271, 5 M. & W. 462.

See 43 Cent. Dig. tit. "Sales," § 24.

**In equity** a contract purporting to be for the transfer of the property in goods afterward to be acquired, if they are sufficiently described to be identified, is generally held as operating to transfer the equitable interest in the goods as soon as they are acquired. See CHATTEL MORTGAGES, 6 Cyc. 1052.

**Futures.**— When under the guise of a contract for the sale of goods for future delivery, the real intention is merely to speculate in the rise and fall of prices, the contract is a wager, and is void. Johnson *v.* Brown, 2 Cinc. Super. Ct. (Ohio) 83; Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388. See also GAMING, 20 Cyc. 926.

**Options.**— A writing, providing that "I hereby give you an option on my livery business and stable. . Price for all $5,500," is merely a revocable proposal to sell, and hence does not violate Ill. Cr. Code, § 130, prohibiting one from contracting to give himself an option to sell or buy at a future time. Seymour *v.* Howard, 51 Ill. App. 384. See also Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 [*reversing* 56 Ill. App. 248]; Consolidated Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565. See GAMING, 20 Cyc. 931.

8. Northington-Munger-Pratt Co. *v.* Farmers' Gin, etc., Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210 (contract to sell conditionally upon being able to secure title); Taft *v.* Church, 162 Mass. 527, 39 N. E. 283 (a pledgee, having authority to sell on breach of the conditions of the pledge, may before that event agree to sell the property to a third person upon the happening thereof); Wamsley *v.* Horton, 77 Hun (N. Y.) 317, 28 N. Y. Suppl. 423; Hale *v.* Rawson, 4 C. B. N. S. 85, 4 Jur. N. S. 363, 27 L. J. C. P. 189, 6 Wkly. Rep. 339, 93 E. C. L. 85 (goods to arrive by a certain ship).

**It is only in this sense that there can be the sale of a chance,** known to the civil law as *venditio spei*. Pothier Conte de Vente No. 61. See Hitchcock *v.* Giddings, Dan 1, 4 Price 135, Wils. Exch. 32, 18 Rev. Rep. 725; Hanks *v.* Palling, 6 E. & B. 659, 2 Jur. N. S. 688, 25 L. J. Q. B. 375, 4 Wkly. Rep. 607, 88 E. C. L. 659; Buddle *v.* Green, 27 L. J. Exch. 33. But in Louisiana under Civ. Code, arts. 2450, 2451, a hope of a future crop is made merchantable, so that the parties may make either the hope or the crop itself the subject of their contract. Losecco

**3. Ownership.** As a rule there can be no sale, that is, there can be no transfer of the property in goods, unless they are owned by the seller.[9] But a contract to sell goods belonging to a third person may be valid.[10]

**4. Possession.** Actual possession is not necessary to a transfer or sale of personal property.[11] A sale may be made by the owner, although the goods sold are at the time in the adverse possession of another.[12]

**D. The Price or Consideration[13] — 1. In General.** The consideration for a sale must be a price in money, paid or promised.[14] The discharge of an existing indebtedness of the seller to the buyer is sufficient,[15] or the payment of, or an

*v.* Gregory, 108 La. 648, 32 So. 985. And see Slidell *v.* McCoy, 15 La. 340.

9. *Colorado.*— Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

*Illinois.*— McCully *v.* Hardy, 13 Ill. App. 631. See also Taylor *v.* Welsh, 138 Ill. App. 190.

*Kansas.*— Hoy *v.* Griggs, 46 Kan. 58, 26 Pac. 467.

*Louisiana.*— Jochams *v.* Ong, 45 La. Ann. 1289, 14 So. 247.

*Maryland.*— Johnson *v.* Hines, 61 Md. 122.

*Vermont.*— Bruce *v.* Bishop, 43 Vt. 161.

See 43 Cent. Dig. tit. "Sales," § 23.

**Ordinarily power to sell implies the ownership of the goods** on the part of the person by whom they are sold or offered for sale. There are some exceptions, however, as in the case of a commission merchant, who is expressly authorized to sell personal property left with him or consigned to him for sale. White *v.* Com., 78 Va. 484.

**Sale to owner.**—A contract in terms a conditional sale to one who is shown to be the owner is inoperative as such. Mansinger *v.* Steiner-Medinger Co., 4 Nebr. (Unoff.) 392, 94 N. W. 633.

10. Stearns *v.* Foote, 20 Pick. (Mass.) 432.

11. Erwin *v.* Arthur, 61 Mo. 386; Tome *v.* Dubois, 6 Wall. (U. S.) 548, 18 L. ed. 943; The Sarah Ann, 21 Fed. Cas. No. 12,342, 2 Sumn. 206 [*affirmed* in 13 Pet. 387, 10 L. ed. 213]; U. S. *v.* Delaware Ins. Co., 25 Fed. Cas. No. 14,942, 4 Wash. 418.

**Necessity of delivery** see *infra*, VI, A, 4, a.

12. Meeker *v.* Vredenburg, 15 La. Ann. 438 (holding that, although the government does not recognize the validity of a transfer of goods deposited in one of its warehouses before payment of duties, the importer may sell in the meantime); Wilson *v.* Munday, 5 La. 483; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87; Cartland *v.* Morrison, 32 Me. 190; Klinck *v.* Kelly, 63 Barb. (N. Y.) 622; Kimbro *v.* Hamilton, 2 Swan (Tenn.) 190.

**Some cases hold that in such case the transaction is in effect the assignment of a chose in action and not a valid sale.** O'Keefe *v* Kellogg, 15 Ill. 347; Erickson *v.* Lyon, 26 Ill. App. 17; Young *v.* Ferguson, 1 Litt. (Ky.) 298; Stogdel *v.* Fugate, 2 A. K. Marsh. (Ky.) 136.

**Goods sold by buyer before acceptance of offer.**— Where the buyer of goods had sold a portion thereof, after the offer to sell and before his acceptance, it could not be objected that the subject-matter of the contract of sale had no actual or potential existence. Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

**No right to possession.**— One who has neither actual nor constructive possession of a vessel, nor the right of possession, cannot transfer a good title thereto. Burckle *v.* The Tapperheten, 4 Fed. Cas. No. 2,141.

13. **Consideration of contract** generally see Contracts, 9 Cyc. 308.

14. Murphy *v.* McGuire, (Md. 1890) 20 Atl. 726; Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131. See *supra*, I, A.

**It does not affect the validity of the sale** that the price fixed is to be paid in merchandise. Crapo *v.* Seybold, 36 Mich. 444; Picard *v.* McCormick, 11 Mich. 68; Herrick *v.* Carter, 56 Barb. (N. Y.) 41. So too it may be agreed that payment shall be made by note (Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316), by the capital stock of a corporation on the sale of property to the corporation (Gardiner *v.* Haines, 19 S. D. 514, 104 N. W. 244), or the transfer of a bond without recourse (Gwynn *v.* Hodge, 49 N. C. 168). And money's worth is a valuable consideration for a sale, as much as the money itself. Huff *v.* Hall, 56 Mich. 456, 23 N. W. 88.

15. *Colorado.*— Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. 164.

*Connecticut.*— St. John *v.* Camp, 17 Conn. 222.

*Georgia.*— Woodward *v.* Solomon, 7 Ga. 246.

*Illinois.*— Wells *v.* Miller, 37 Ill. 276.

*Louisiana.*— Levert *v.* Hebert, 51 La. Ann. 222, 25 So. 118; Morgan *v.* Richmond, 28 La. Ann. 838.

*Maryland.*— Mudd *v.* Turton, 4 Gill 233.

*Texas.*— Lewter *v.* Lindley, (Civ. App. 1904) 81 S. W. 776; Billings *v.* Warren, 21 Tex. Civ. App. 77, 50 S. W. 625.

*Vermont.*— Patton *v.* Cardiner, 72 Vt. 47, 47 Atl. 110.

*Canada.*— Ralph *v.* Link, 5 U. C. Q. B. 145.

See 43 Cent. Dig. tit. "Sales," § 31.

**Sale in trust for creditors.**— Where a creditor of B induced him to satisfy the indebtedness by a bill of sale of his stock, and other creditors immediately attached it, and to avoid litigation the purchasing creditor reconveyed to B, and, in consideration of a release from his creditors, he made a bill of sale to M, there was an absolute sale to M,

agreement to pay, a debt of the seller.[16] But there can be no sale if the parties have not agreed, expressly or by implication, upon the price or upon the manner in which it is to be determined.[17]

**2. Price to Be Fixed as Agreed.** The price may be left to be fixed in such manner as may be agreed upon in the contract of sale, as by the market price of the commodity at a certain time and place,[18] or by any other method by which it can be determined with reasonable certainty.[19] So the price may by

although he was trustee as to the creditors. Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892. See, generally, Assignments for Benefit of Creditors, 4 Cyc. 129.

16. Bell *v.* Greenwood, 21 Ark. 249; Meade *v.* Smith, 16 Conn. 346; Hackley *v.* Cooksey, 35 Mo. 398.

**Where one makes a proposition to** sell provided the other performs a certain act, the performance of that act in pursuance of such suggestion furnishes a sufficient consideration to compel the proposer to perform on his part. Ganss *v.* J. M. Guffey Petroleum Co., 125 N. Y. App. Div. 760, 110 N. Y. Suppl. 176.

17. *Alabama.*— Wilkinson *v.* Williamson, 76 Ala. 163.

*Arkansas.*— See Priest *v.* Hodges, (1909) 118 S. W. 253.

*California.*— Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

*Georgia.*— Deadwyler *v.* Karow, 131 Ga. 227, 62 S. E. 172, 19 L. R. A. N. S. 197; Lewis *v.* Lofley, 60 Ga. 559.

*Louisiana.*— Kleinpeter *v.* Harrigan, 21 La. Ann. 196; Gorham *v.* Hayden, 6 Rob. 450; D'Orgenoy *v.* Droz, 13 La. 382; Rhodes *v.* Rhodes, 10 La. 85; Holmes *v.* Patterson, 5 Mart. 693.

*Michigan.*— Whiteford *v.* Hitchcock, 74 Mich. 208, 41 N. W. 898; Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171.

*Missouri.*—Greer *v.* Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

*New York.*— Reynolds *v.* Miller, 79 Hun 113, 29 N. Y. Suppl. 405.

*North Carolina.*— Wittkowsky *v.* Wasson, 71 N. C. 451.

*Oklahoma.*— Still *v.* Cannon, 13 Okla. 491, 75 Pac. 284.

*Pennsylvania.*— Bigley *v.* Risher, 63 Pa. St. 152.

*United States.*— Harper *v.* Dougherty, 11 Fed. Cas. No. 6,087, 2 Cranch C. C. 284.

See 43 Cent. Dig. tit. "Sales," § 4.

**Evidence.**— Where plaintiff sues for the price which he alleges defendant agreed to pay for a cotton crop, defendant may show that the crop was not worth such price, as tending to show that he had not agreed to pay it. Sledge *v.* Rayborn, 3 Tex. App. Civ. Cas. § 303. But see Fabel *v.* Mayer, 14 Pa. Super. Ct. 139. If a merchant receives an invoice and retains it for a considerable time without any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. Kearney *v.* Letellier, 27 Can. Sup. Ct. 1.

**What is the agreed price is a question for** the jury. Llewellyn Steam Condenser Mfg. Co. *v.* Malter, 76 Cal. 242, 18 Pac. 271; Barwick *v.* Gast Lith., etc., Co., 11 N. Y. Suppl. 373.

18. Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734; McConnell *v.* Hughes, 29 Wis. 537; McBride *v.* Silverthrone, 11 U. C. Q. B. 545. See also Lewis *v.* Lofley, 60 Ga. 559.

19. *Illinois.*— Beardsley *v.* Smith, 61 Ill. App. 340, lowest jobbing price.

*Iowa.*— Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235 (holding that an agreement to keep a merchant supplied with a stock of goods, he to pay for them by weekly remittance of the proceeds of the sales after deducting expenses, is not void for uncertainty); Lund *v.* McCutchen, 83 Iowa 755, 49 N. W. 998.

*Kentucky.*— Hagins *v.* Combs, 102 Ky. 165, 43 S. W. 222, 19 Ky. L. Rep. 1165.

*Louisiana.*— Wise *v.* Guthrie, 11 La. Ann. 91; Walker *v.* Fort, 3 La. 535.

*Massachusetts.*— Holbrook *v.* Setchel, 114 Mass. 435.

*New York.*— De Groff *v.* American Linen Thread Co., 21 N. Y. 124.

*North Carolina.*— Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.

*United States.*— Ames *v.* Quimby, 96 U. S. 324, 24 L. ed. 635, price to be regulated by the price of gold.

*England.*— Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Valpy *v.* Gibson, 14 C. B. 837, 864, 11 Jur. 826, 16 L. J. C. P. 241, 56 E. C. L. 837.

*Canada.*— Hughes *v.* Moore, 11 Ont. App. 569.

See 43 Cent. Dig. tit. "Sales," § 4.

**Certainty.**— The agreement is void if it does not provide for determination of the price with reasonable certainty. Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Buekmaster *v.* Consumer's Ice Co., 5 Daly (N. Y.) 313.

**Price dependent on subsequent event.**— The amount of the price may be made to depend upon a future event. Newell *v.* Smith, 53 Conn. 72, 3 Atl. 674. And see Jewett *v.* Lincoln, 14 Me. 116, 31 Am. Dec. 36.

**Price to be agreed upon.**—Where the sale is for a reasonable price, to be afterward agreed upon, the title passes if such is the intention, although no price is afterward agreed upon. Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42. But the rule is otherwise, where the intention is to defer the passage of title until the price shall be agreed upon. Wittkowsky *v.* Wasson, 71 N. C. 451.

**Presumption.**— In the absence of fraud or collusion, the price agreed upon by the parties

agreement be left to be fixed in accordance with a valuation of the goods to be subsequently made by some third person.[20]

**3. Inadequate [21] or Excessive Price.** The fact that the price is inadequate or excessive is not ground for rescission of a contract of sale.[22]

**4. Presumption as to Price.** When the parties have agreed upon a sale, but the price is not fixed, or the manner of its determination expressly agreed upon, their assent to the payment of a reasonable price will be implied.[23]

to a contract will be presumed to be fair and reasonable. Fowle *v.* Raleigh, 75 N. C. 273.

20. Willingham *v.* Veal, 74 Ga. 755; New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432; Brown *v.* Bellows, 4 Pick. (Mass.) 179; Leonard *v.* Cox, 64 Mo. 32.

**If such third person** cannot or does not fix the price, the contract to sell is thereby avoided. Hutton *v.* Pearce, 26 Ark. 382; Elberton Hardware Co. *v.* Hawes, 122 Ga. 858, 50 S. E. 964; Preston *v.* Smith, 67 Ill. App. 613; Fort *v.* Union Bank, 11 La. Ann. 708; Tiernan *v.* Martin, 2 Rob. (La.) 523; Conway *v.* Bordier, 6 La. 346; Vickers *v.* Vickers, L. R. 4 Eq. 529, 36 L. J. Ch. 946; Thurnell *v.* Balbirnie, 1 Jur. 847, 6 L. J. Exch. 255, M. & H. 235, 2 M. & W. 786; Cooper *v.* Shuttleworth, 25 L. J. Exch. 114; Wilks *v.* Davis, 3 Meriv. 507, 36 Eng. Reprint 195; Milnes *v.* Gery, 14 Ves. Jr. 400, 33 Eng. Reprint 574.

**If the goods or any part of them** have already been delivered and appropriated by the buyer, he must pay a reasonable price for them. Kenniston *v.* Ham, 29 N. H. 501; Smyth *v.* Craig, 3 Watts & S. (Pa.) 14; Humaston *v.* American Tel. Co., 20 Wall (U. S.) 20, 22 L. ed. 279; Clarke *v.* Westrope, 18 C. B. 765, 25 L. J. C. P. 287, 86 E. C. L. 765.

**Arbitration contingent on disagreement.—** Where in March H sold goods to defendant, at an agreed price, and defendant took possession, and the following May it was agreed that H should sell and defendant buy the same goods, the price to be the fair value, to be settled, in case the parties differed by arbitration; and that defendant should pay to H such price within two months after it should have been fixed, and defendant continued possession, in an action by H's assignees, in bankruptcy, it was held that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shown that the event upon which the arbitration clause was to apply had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously agreed to. Cannan *v.* Fowler, 14 C. B. 181, 2 C. L. R. 43, 23 L. J. C. P. 48, 2 Wkly. Rep. 101, 78 E. C. L. 181.

21. Adequacy of consideration generally see Contracts, 9 Cyc. 365.

22. *Kentucky.*— Meriweather *v.* Herran, 8 B. Mon. 162; Waller *v.* Cralle, 8 B. Mon. 11.

*New Hampshire.*— Bedel *v.* Loomis, 11 N. H. 9.

*North Carolina.*—Gwynn *v.* Hodge, 49 N. C. 168.

*Pennsylvania.*— Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 664.

*Wisconsin.*—Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

*United States.*— Henckley *v.* Hendrickson, 11 Fed. Cas. No. 6,348, 5 McLean 170.

See 43 Cent. Dig. tit. "Sales," § 32.

**The price must be serious.**— One out of all proportion with the value of the thing invalidates the sale. D'Orgenoy *v.* Droz, 13 La. 382. And see Parker *v.* Talbot, 37 La. Ann. 22.

**In equity inadequacy of consideration** is often treated as corroborative evidence of fraud or undue influence which will enable a promisor to resist a suit for specific performance or to have his contract set aside; but mere inadequacy or excessiveness of price, unless it is so great as to shock the conscience and amount to evidence of fraud, is not of itself ground for relief in equity. Baldwin *v.* Dunton, 40 Ill. 188; Percival *v.* Harger, 40 Iowa 286; Wickliffe *v.* Clay, 1 Dana (Ky.) 585; Williams *v.* Utterback, 3 Bibb (Ky.) 437; Dakin *v.* Rumsey, 104 Mich. 636, 62 N. W. 990; Cummings' Appeal, 67 Pa. St. 404; Butler *v.* Haskell, 4 Desauss. Eq. (S. C.) 651; Gregor *v.* Duncan, 2 Desauss. Eq. (S. C.) 636; Haynes *v.* Swann, 6 Heisk. (Tenn.) 560; Hardeman *v.* Burge, 10 Yerg. (Tenn.) 202; Wright *v.* Wilson, 2 Yerg. (Tenn.) 294; Stubblefield *v.* Patterson, 3 Hayw. (Tenn.) 128; White *v.* Flora, 2 Overt. (Tenn.) 426; McKinney *v.* Pinckard, 2 Leigh (Va.) 149; Cooper *v.* Reilly, 90 Wis. 427, 63 N. W. 885; Simpson *v.* Wiggin, 22 Fed. Cas. No. 12,887, 3 Woodb. & M. 413.

See Contracts, 9 Cyc. 367; Specific Performance.

23. *Alabama.*— Shealy *v.* Edwards, 73 Ala. 175, 49 Am. Rep. 43.

*Illinois.*— McEwen *v.* Morey, 60 Ill. 32

*Indiana.*— Prenatt *v.* Runyon, 12 Ind. 174.

*Kentucky.*— Jenkins *v.* Richardson, 6 J. J. Marsh. 441, 22 Am. Dec. 82; Snodgrass *v.* Broadwell, 2 Litt. 353.

*Massachusetts.*— Taft *v.* Travis, 136 Mass. 95.

*Michigan.*— Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

*Nevada.*— Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290.

*New Jersey.*— Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206.

*New York.*— Lefurgy *v.* Stewart, 69 Hun 614, 23 N. Y. Suppl. 537 [*affirmed* in 140 N. Y. 661, 35 N. E. 893].

*England.*— Acebal *v.* Levy, 10 Bing. 376, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84.

*Canada.*— Christie *v.* Burnett, 10 Ont. 609.

See 43 Cent. Dig. tit. "Sales," § 4.

**E. Mutual Assent — 1. In General.** It is an elementary principle of law that it is essential to a contract for the sale of a chattel, like every other contract,[24] that there must be a meeting of the minds and an agreement by both of the parties to the sale and purchase; that is to say, upon the one part there must be an intention and offer to sell,[25] and on the other part an acceptance [26] of such offer and an intention to buy.[27]

**2. Offer.** There must be an offer as such. A proposal which amounts merely to an invitation to make an offer cannot be turned into a binding agreement by acceptance.[28] Advertisements, circulars, and price lists, announcing goods for sale at certain prices, are ordinarily to be construed merely as invitations for offers.[29] But the question is one of intention; and whether a proposal is to be construed as an invitation to deal or as an offer which can be turned into a binding agreement by acceptance depends upon the language used and the circumstances of the particular case.[30] An offer may be withdrawn at any time before it is

**The assent to the payment of a reasonable price** may be implied, although the contract is executory. Hoadly *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231; Valpy *v.* Gibson, 4 C. B. 837, 11 Jur. 826, 16 L. J. C. P. 241, 56 E. C. L. 837. But see James *v.* Muir, 33 Mich. 223.

**24.** See Contracts, 9 Cyc. 245.

**25.** See *infra*, II, E, 2.

**26.** See *infra*, II, E, 3.

**27.** *Alabama.*— Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626.

*Arkansas.*— Priest *v.* Hodges, 90 Ark. 131, 118 S. W. 253.

*California.*— Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32.

*Illinois.*— Bay State Milling Co. *v.* Barth, 135 Ill. App. 539.

*Indiana.*— Indiana Fuel Supply Co. *v.* Indianapolis Basket Co., 41 Ind. App. 658, 84 N. E. 776.

*Missouri.*— Barrie *v.* United R. Co., (App. 1909) 119 S. W. 1020.

*North Carolina.*— Wittkowsky *v.* Wasson, 71 N. C. 451.

*Rhode Island.*— Thornton *v.* Kelly, 11 R. I. 498.

*Texas.*— Jackson *v.* Butler, 21 Tex. Civ. App. 379, 51 S. W. 1095.

*Vermont.*— Equitable Mfg. Co. *v.* Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915.

*Washington.*—Spokane *v.* Baughman, (1909) 103 Pac. 14.

*West Virginia.*—Parks *v.* Morris, 63 W. Va. 51, 59 S. E. 753.

*United States.*— Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 473; Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54.

*Canada.*— Nelson *v.* Wigle, 8 Ont. 82; Best *v.* Boice, 22 U. C. Q. B. 439.

**Time of assent.**— It is not essential that the assent of the seller and buyer should be concurrent in point of time. Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Falls *v.* Gaither, 9 Port. (Ala.) 605.

**28.** *Colorado.*— See Schon-Klingstein Meat, etc., Co. *v.* Snow, 43 Colo. 538, 96 Pac. 182.

*Indiana.*— Moody *v.* Standard Wheel Co., 20 Ind. App. 422, 50 N. E. 890.

*Iowa.*— Patton *v.* Arney, 95 Iowa 664, 64 N. W. 635, holding that where plaintiff inquired the price of certain steers, and defendant wrote that he could "not give a close price on account of not seeing them for a while, that they ought to be worth $4.25" per hundredweight; "go see them," there was no offer for plaintiff to accept, so as to bind defendant.

*Maine.*— State *v.* Peters, 91 Me. 31, 39 Atl. 342.

*Maryland.*—Johnson *v.* Corbett, 95 Md. 746, 53 Atl. 570.

*Massachusetts.*— Ashcroft *v.* Butterworth, 136 Mass. 511.

*Michigan.*— Ahearn *v.* Ayers, 38 Mich. 692, holding that an inquiry by one party as to how much the other's firm was paying for a certain article, and an answer that they would take all he could make and deliver at a certain price, did not constitute a contract.

*Pennsylvania.*— Allen *v.* Kirwan, 159 Pa. St. 612, 28 Atl. 495; Slaymaker *v.* Irwin, 4 Whart. 369.

*Wisconsin.*— Moulton *v.* Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516.

*Canada.*— Baston *v.* Toronto Fruit Vinegar Co., 4 Ont. L. Rep. 20.

See 43 Cent. Dig. tit. "Sales," § 39; and Contracts, 9 Cyc. 278.

**Order through agent.**— Where an agent merely solicits orders for goods, and sends them to his principal to be filled, the taking of such an order by the agent does not constitute a sale, either absolute or conditional, of the goods ordered, but it is a mere proposal, to be accepted or not as the principal may see fit. McKindly *v.* Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740. See also Waco Mill, etc., Co. *v.* Allis-Chalmers Co., (Tex. Civ. App. 1908) 109 S. W. 224.

**29.** Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4. *Contra*, Hall *v.* Kimbark, 11 Fed. Cas. No. 5,938. See also Contracts, 9 Cyc. 278.

**30.** Robinson *v.* Leatherbee Tie, etc., Co., 120 Ga. 901, 48 S. E. 380; Fairmount Glass Works *v.* Crunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. L. Rep. 264, holding that where plaintiff wrote to defendant: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. . . State terms and cash discount," and defendant replied: "We quote you Mason fruit jars,

accepted,[31] even if the offerer has declared that he will not withdraw it,[32] or has by the terms of the offer allowed the offeree a certain time in which to accept it, as in the case of options and refusals,[33] unless the offer is under seal,[34] or the agreement to hold it open is supported by a consideration.[35] The revocation of an offer must ordinarily be communicated.[36] An offer comes to an end at the expiration of the time given for acceptance,[37] and if no time is fixed at the expiration of a

complete (stating prices) . . . for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days," there was a present offer by defendant, the immediate acceptance of which closed the contract.

**Catch order.**— Where in response to an inquiry from retail merchants a mill company wrote that it could sell bran for seven dollars per ton and expressed a hope to receive their order, and the merchants telegraphed to ship fifty tons at prices specified, and it was shown that the firm negotiated a sale of twenty tons, at a profit, to the proprietor of another mill, before their order was given, and there was no evidence of any collusion between such proprietor and his vendors in connection with their order, it was held that the evidence failed to show that the order was a "catch order," given to place the company in position to be mulcted in damages for breach of contract which would have made it void as to the company. College Mill Co. *v.* Fidler, (Tenn. Ch. App. 1899) 58 S. W. 382.

31. *Arkansas.*— Merchants' Exch. Co. *v.* Sanders, 74 Ark. 16, 84 S. W. 786.

*Colorado.*— Sherwin *v.* National Cash-Register Co., 5 Colo. App. 162, 28 Pac. 392.

*Iowa.*— Bradley *v.* Smith, (1898) 77 N. W. 506; Reis *v.* McConnel, 60 Iowa 463, 15 N. W. 278.

*Kentucky.*— Burton *v.* Shotwell, 13 Bush 271.

*Michigan.*— Brown *v.* Snider, 126 Mich. 198, 85 N. W. 570; Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328, 53 N. W. 555.

*Missouri.*— Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34.

*Nebraska.*— Northwestern Thresher Co. *v.* Kubicek, (1908) 118 N. W. 94.

*North Dakota.*— Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

*Pennsylvania.*— Ames *v.* Pierson, 4 Pa. Dist. 392.

*Texas.*— James *v.* King, 2 Tex. App. Civ. Cas. § 544.

*Canada.*— Underwood *v.* Maguire, 6 Quebec Q. B. 237.

See 43 Cent. Dig. tit. "Sales," § 40; and CONTRACTS, 9 Cyc. 284.

**Presumption as to time of revocation.**—A revocation of an order will be presumed, in the absence of contrary evidence, to have been before acceptance. Johnson *v.* Filkington, 39 Wis. 62.

**Order to agent.**—An order for goods given to an agent not having authority to accept it is revocable at any time before acceptance by the principal and communication thereof. Merchants' Exch. Co. *v.* Sanders, 74 Ark. 16, 84 S. W. 786; Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897; Martin *v.* Wilms, 61 Ill. App. 108; Durkee *v.* Schultz, 122 Iowa 410, 98 N. W. 149; J. Thompson, etc., Mfg. Co. *v.* Perkins, 97 Iowa 607, 66 N. W. 874; Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328, 53 N. W. 555; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962; L. J. Mueller Furnace Co. *v.* Meiklejohn, 121 Wis. 605, 99 N. W. 332.

**Contract by agent.**— If an agreement to sell is entered into by an agent of the seller, subject to the principal's approval, and is modified by the seller, and the goods are accepted by the buyer, the rights of the parties are governed by the agreement as modified. Atlantic Phosphate Co. *v.* Sullivan, 34 S. C. 301, 13 S. E. 539.

**A withdrawal of an offer** to contract must be a distinct, unequivocal, and unconditional statement of the party's withdrawal, such as to leave no doubt that further relations between the parties on the subject are at an end. Victor Safe, etc., Co. *v.* O'Neil, 48 Wash. 176, 93 Pac. 214.

32. Peck *v.* Freese, 101 Mich. 321, 59 N. W. 600; National Refining Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962. See also CONTRACTS, 9 Cyc. 285.

**Order not subject to countermand.**—An order for books, to be paid for in instalments, providing that "'I [the purchaser] understand this order is not subject to countermand or cancellation.' . . . You are at liberty to consult as to my reputation for keeping [business] promises" is revocable before acceptance, and the fact that the publisher incurs a liability to the book agent for his commission, for every order obtained, without regard to the outcome of the sale, does not render the maker of the order liable thereon before acceptance by the publisher, in the absence of any showing that he knew of that fact. Cary *v.* Appo, 84 N. Y. Suppl. 569. See also Hallwood Cash Register Co. *v.* Finnegan, 84 N. Y. Suppl. 154.

33. See *infra*, II, E, 5. See also CONTRACTS, 9 Cyc. 285.

34. See CONTRACTS, 9 Cyc. 287.

35. See *infra*, II, E, 5; and CONTRACTS, 9 Cyc. 286.

36. See CONTRACTS, 9 Cyc. 288.

**Where an offer of sale fixed a time and place** at which the buyer was to reject or accept, the offer was not withdrawn by the offerer failing to be present; and where the buyer attended at the time and place fixed, and tendered the price the next day, the contract was complete. Omer *v.* Farlow, 46 Ill. App. 122.

37. *Maryland.*— Bernard *v.* Torrance, 5 Gill & J. 383.

reasonable time.[38] The offer also comes to an end upon the death of either party before acceptance.[39]

**3. Acceptance — a. In General.** An offer to buy or sell becomes a binding agreement when the person to whom the offer is made accepts[40] it and communicates his acceptance,[41] or performs an act in compliance with the terms of

*Massachusetts.*— Park *v.* Whitney, 148 Mass. 278, 19 N. E. 161.

*New York.*— Page *v.* Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173 [*reversing* 52 N. Y. App. Div. 349, 65 N. Y. Suppl. 174].

*North Carolina.*— Union Nat. Bank *v.* Miller, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538.

*Pennsylvania.*— Boyd *v.* Merchants', etc., Peanut Co., 25 Pa. Super. Ct. 199.

See 43 Cent. Dig. tit. "Sales," § 43; and Contracts, 9 Cyc. 291.

38. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

*California.*— Roberts *v.* Evans, 43 Cal. 380.

*Illinois.*— Allen B. Wrisley Co. *v.* Mathieson Alkali Works, 107 Ill. App. 379.

*Iowa.*— Judd *v.* Day, 50 Iowa 247.

*Kansas.*— Trounstine *v.* Sellers, 35 Kan. 447, 11 Pac. 441.

*Louisiana.*— Boyd *v.* Cox, 15 La. Ann. 609.

*New Hampshire.*— Barker *v.* Barker, 16 N. H. 333.

*New York.*— Batterman *v.* Morford, 76 N. Y. 622. *Compare* Frith *v.* Lawrence, 6 Wend. 103, 21 Am. Dec. 262 [*reversing* 1 Paige 434].

*North Carolina.*— Mizell *v.* Burnett, 49 N. C. 249, 69 Am. Dec. 744.

*Pennsylvania.*— Carmichael *v.* Newell, 2 Phila. 289.

*Tennessee.*— Paragon Refining Co. *v.* Lee, 98 Tenn. 643, 41 S. W. 362.

*United States.*—Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. 560; Burmester *v.* Phillips, 25 Fed. 805.

See 43 Cent. Dig. tit. "Sales," § 43; and Contracts, 9 Cyc. 291.

39. Riner *v.* Husted, 13 Colo. App. 523, 58 Pac. 793. See also Contracts, 9 Cyc. 293.

**Where the party accepting an offer dies** before his letter reaches the other party, the bargain is nevertheless closed if the offer still remained open at the time of acceptance. Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262, 263 [*reversing* Frith *v.* Lawrence, 1 Paige 434].

40. *Georgia.*— Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; Oak City Cooperage Co. *v.* Kennedy Stave, etc., Co., 4 Ga. App. 344, 61 S. E. 499.

*Indiana.*— Rouse *v.* Rose, 41 Ind. App. 308, 83 N. E. 253.

*Kentucky.*— L. A. Becker Co. *v.* Alvey, 86 S. W. 974, 27 Ky. L. Rep. 832.

*Minnesota.*— Johnson *v.* Jacobs, 42 Minn. 168, 44 N. W. 6.

*Missouri.*— Barrie *v.* United R. Co., (App. 1909) 119 S. W. 1020.

*New York.*— Fitch *v.* Kennard, 2 Misc. 95, 20 N. Y. Suppl. 845 [*reversing* 19 N. Y. Suppl. 468].

*Pennsylvania.*— Hall *v.* Chambersburg Wooden Co., 187 Pa. St. 18, 40 Atl. 986, 67 Am. St. Rep. 563, 52 L. R. A. 689.

*Texas.*— Fred W. Wolf Co. *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648, holding that where an agent sold a machine on behalf of his principal with the understanding that the contract should be submitted to his principal before it should be binding, there was no contract until the approval of the principal.

*Vermont.*— Bruce *v.* Bishop, 43 Vt. 161.

*West Virginia.*— Parks *v.* Morris, 63 W. Va. 51, 59 S. E. 753.

*Wisconsin.*— Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160; Northwestern Wheel, etc., Co. *v.* Milwaukee Electric St. R. Co., 94 Wis. 603, 69 N. W. 371.

*United States.*— Ketchum *v.* Duncan, 96 U. S. 659, 24 L. ed. 868.

See 43 Cent. Dig. tit. "Sales," § 41; and Contracts, 9 Cyc. 254.

**An order for goods** is a mere offer and is not binding upon the offerer until accepted. McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525, 56 N. W. 682; Bronson *v.* Herhert, 95 Mich. 478, 55 N. W. 359; Goodspeed *v.* Wiard Plow Co., 45 Mich. 322, 7 N. W. 902; Reid *v.* Northwestern Implement, etc., Co., 79 Minn. 369, 82 N. W. 672; Bement *v.* Rockwell, 86 N. Y. Suppl. 876.

**Order for delivery to third person.**— The acceptance of an order for the delivery of goods to a third person does not amount to a sale to such person. Burrall *v.* Jacot, 1 Barh. (N. Y.) 165.

**Insufficient acceptance.**—A statement in an order for the purchase of books, "first payment may be made to the agent," does not show an acceptance by the publishers, where no such payment was made, and there was no showing who the agent was to whom payment might be made, and the fact that the agent who procured the order affixed his name thereon after the word "Salesman," and also wrote "10 per cent. off" upon the margin, does not show an acceptance of the order by the publisher, where there is no evidence of the salesman's authority to accept the order or reduce the price. Cary *v.* Appo, 84 N. Y. Suppl. 569.

41. *California.*— Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

*Georgia.*— Gartner *v.* Hand, 86 Ga. 558, 12 S. E. 878.

*Mississippi.*— Starling, etc., Co. *v.* Caldwell, (1895) 18 So. 376.

*Nebraska.*— Jones *v.* Wattles, 66 Nebr. 533, 92 N. W. 765.

*New Jersey.*— Bates *v.* Elmer Glass Mfg. Co., (Ch. 1888) 14 Atl. 273.

*New York.*— Currier *v.* Carnick, 36 Misc.

the offer from which his acceptance may be implied.[42] An offer, unless withdrawn, may be accepted within the time expressly or impliedly limited.[43] If the offer is rejected, either by an absolute refusal or by an acceptance not identical with the terms of the offer, or by a counter offer, it cannot be afterward accepted.[44] But if the offeree makes a conditional acceptance or a counter offer, and the offerer accepts the same, there is a binding agreement.[45] An acceptance may be revoked by a communication to that effect before the acceptance is communicated, but not after.[46] An acceptance, to be effective, must be identical with the offer and unconditional;[47] and must be definite and in such terms that it cannot be mis-

176, 73 N. Y. Suppl. 146; Fitch *v.* Kennard, 2 Misc. 95, 20 N. Y. Suppl. 845 [*reversing* 19 N. Y. Suppl. 468]; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.

*North Dakota.*— Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

*Pennsylvania.*— Eckert *v* Schoch, 155 Pa. St. 530, 26 Atl. 654.

*Texas.*— Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App 493, 33 S. W. 154.

*Vermont.*— Fenno *v.* Weston, 31 Vt. 345.

*Virginia.*— Insurance Co. of North America *v.* Gamble, 94 Va. 622. 27 S. E. 463.

*United States.*— Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. ed. 341; Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54.

See 43 Cent. Dig. tit. "Sales," § 41; and CONTRACTS, 9 Cyc. 270.

**A letter from a manufacturer to his agent,** acknowledging receipt of an order for goods, does not constitute an acceptance, where no notice thereof is given the maker of the order before he revokes it. Harvey *v.* Duffey, 99 Cal. 401, 33 Pac. 897.

**Manner of acceptance prescribed.**— If an offer provides that an acceptance should be in writing a verbal acceptance is insufficient. Bosshardt, etc., Co. *v.* Crescent Oil Co., 171 Pa. St. 109, 32 Atl. 1120. So too if the order provides that it shall not be binding unless accepted by the officers of the corporation, the signer is not bound until such acceptance. Robinson *v.* Ralph, 74 Nebr. 55, 103 N. W. 1044. See also CONTRACTS, 9 Cyc. 266.

**42.** See *infra*, II, E, 6, b. See also CONTRACTS, 9 Cyc. 257, 290.

**43.** Arnold *v.* Blabon, 147 Pa. St. 372, 23 Atl. 575; Boyd *v.* Merchants, etc., Peanut Co., 25 Pa. Super. Ct. 199. See also CONTRACTS, 9 Cyc. 286.

**Time of acceptance.**— What is a reasonable time for the acceptance of an offer to sell goods at a certain price is to be determined by the circumstances and the situation of both parties. Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. 560.

**44.** Rock Island Plow Co. *v.* Meredith, 107 Iowa 498, 78 N. W. 233; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Richardson *v.* Lenhard, 48 Kan. 629, 29 Pac. 1076; Rapp *v.* Livingston, 14 Daly (N. Y.) 402, 13 N. Y. St. 74; Howells *v.* Stroock, 30 Misc. (N. Y.) 569, 62 N. Y. Suppl. 870 [*affirmed* in 50 N. Y. App. Div. 344, 63 N. Y. Suppl. 1074]; Minneapolis, etc., R. Co. *v.* Columbus Rolling-Mill Co., 119 U. S. 149, 7 S. Ct. 168, 30 L. ed. 376. See also CONTRACTS, 9 Cyc. 290.

**45.** Kansas City, etc., R. Co. *v.* McGuire Mfg. Co., 108 Ill. App. 258; Baldwin *v.* Com., 11 Bush (Ky.) 417; Stock *v.* Towle, 97 Me. 408, 54 Atl. 918. See also CONTRACTS, 9 Cyc. 269.

**Acceptance of counter offer.**— See Howells *v.* Stroock, 50 N. Y. App. Div. 344, 63 N. Y. Suppl. 1074.

**46.** See CONTRACTS, 9 Cyc. 288. And see Parlin, etc., Co. *v.* Boatman, 84 Mo. App. 67.

**Acquiescing in revocation.**— If one accepts, and then notifies the other that he will await further information before confirming his acceptance, the other may disregard the acceptance. Cameron *v.* Wright, 163 N. Y. 586, 57 N. E. 1105 [*affirming* 21 N. Y. App. Div. 395, 47 N. Y. Suppl. 571].

**Where there was an established custom** in the trade for both buyer and seller to confirm in writing a sale made by a broker, an offer by a broker to sell accepted by the buyer "subject to confirmation" by the seller, did not create a contract, and the acceptance was subject to withdrawal at any time before such confirmation; and where before confirmation the seller became insolvent, a demand for security by the buyer was not a waiver of the requirement of confirmation. Johnston *v.* Fairmont Mills, 129 Fed. 74, 63 C. C. A. 516 [*affirming* 116 Fed. 537].

**47.** *Alabama.*— Falls *v.* Gaither, 9 Port. 605.

*California.*— Four Oil Co. *v.* United Oil Producers, 145 Cal. 623, 79 Pac. 366, 68 L. R. A. 226.

*Georgia.*— Phinizy *v.* Bush, 129 Ga. 479, 59 S. E. 259.

*Illinois.*— Rockford *v.* Mead, 207 Ill. 423, 69 N. E. 756; Cornwells *v.* Krengel, 41 Ill. 394; Chicago Curtain Stretcher Co. *v.* Paepcke-Leicht Lumber Co., 108 Ill. App. 249; Corbin *v.* Speeter, 92 Ill. App. 652.

*Indiana.*— Stagg *v.* Compton, 81 Ind. 171.

*Iowa.*— Rogers *v.* French, 122 Iowa 18, 96 N. W. 767 (holding that where an offer to sell ice does not specify the time of payment, it will be presumed that payment is to be in cash on delivery; so that an acceptance, "will take the ice; commence loading Monday; will weigh and settle promptly," is not an unconditional acceptance); Stennett *v.* Red Oak First Nat. Bank, 112 Iowa 273, 83 N. W. 1069.

*Kansas.*— Plant Seed Co. *v.* Hall, 14 Kan. 553; Seymour *v.* Armstrong, 10 Kan. App.

understood.[48] If an offer is accepted, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope or suggestion, or of the same idea in different language.[49] But if the acceptance differs from original offer to such an extent as to amount to a counter offer there is no contract.[50] If the offerer submits alternative propositions and the offeree accepts one of them, there is a binding agreement as to the proposition accepted.[51] When an offer is made by

10, 61 Pac. 675. See also Starks Co. *v.* Brewer, 77 Kan. 610, 95 Pac. 402.

*Kentucky.*—Hutcheson *v.* Blakeman, 3 Metc. 80.

*Louisiana.*—Barrow *v.* Ker, 10 La. Ann. 120.

*Maine.*—Jenness *v.* Mt. Hope Iron Co., 53 Me. 20.

*Maryland.*—Hardwick *v.* Kirwan, 91 Md. 285, 46 Atl. 987.

*Massachusetts.*—Gowing *v.* Knowles, 118 Mass. 232.

*Michigan.*—U. S. Heater Co. *v.* Applebaum, 126 Mich. 296, 85 N. W. 743; Wilkin Mfg. Co. *v.* H. M. Loud, etc., Lumber Co., 94 Mich. 158, 53 N. W. 1045; Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195; Johnson *v.* Stephenson, 26 Mich. 63.

*Minnesota.*—Kileen *v.* Kennedy, 90 Minn. 414, 97 N. W. 126.

*Missouri.*—Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34; Denton *v.* McInnis, 85 Mo. App. 542; Tufts *v.* Sams, 47 Mo. App. 487; Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297.

*Montana.*—Brophy *v.* Idaho Produce, etc., Co., 31 Mont. 279, 78 Pac. 493.

*New York.*—Howell *v.* Stroock, 50 N. Y. App. Div. 344, 63 N. Y. Suppl. 1074; Cameron *v.* Wright, 21 N. Y. App. Div. 395, 47 N. Y. Suppl. 571 [*affirmed* in 163 N. Y. 586, 57 N. E. 1105]; Myers *v.* Trescott, 59 Hun 395, 13 N. Y. Suppl. 54; Uhlman *v.* Day, 38 Hun 298; Kirwan *v.* Byrne, 9 Misc. 76, 29 N. Y. Suppl. 287; Marschall *v.* Eisen Vineyard Co., 7 Misc. 674, 28 N. Y. Suppl. 62.

*Ohio.*—Postal Tel. Cable Co. *v.* Akron Cereal Co., 23 Ohio Cir. Ct. 516; Warner El. Co. *v.* Guthrie, 12 Ohio Cir. Ct. 182, 5 Ohio Cir. Dec. 128; Pappenheimer Hardware Co. *v.* Harrison Wire Co., 8 Ohio Dec. (Reprint) 657, 9 Cinc. L. Bul. 131.

*Pennsylvania.*—Clements *v.* Bolster, 6 Pa. Super. Ct. 411.

*Texas.*—Summers *v.* Mills, 21 Tex. 77; Whitaker *v.* Zeihme, (Civ. App. 1901) 61 S. W. 499; Jackson *v.* Butler, 21 Tex. Civ. App. 379, 51 S. W. 1095.

*Washington.*—Bringham *v.* American Bridge Co., 39 Wash. 3, 80 Pac. 788.

*Wisconsin.*—Shores Lumber Co. *v.* Patterson, 98 Wis. 534, 74 N. W. 367.

*United States.*—Hite *v.* Savannah Electric Co., 164 Fed. 944, 90 C. C. A. 348; National Trading Co. *v.* Vulcanite Portland Cement Co., 159 Fed. 403, 86 C. C. A. 341; Kelley *v.* Sibley, 137 Fed. 586, 69 C. C. A. 674; Johnston *v.* Fairmont Mills, 129 Fed. 74, 63 C. C. A. 516 [*affirming* 116 Fed. 537]; China, etc., Trading Co. *v.* Davis, 119 Fed. 688, 56 C. C. A. 108; Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. 560; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

*Canada.*—Cole *v.* Sumner, 30 Can. Sup. Ct. 379 [*reversing* 33 Nova Scotia 179].

See 43 Cent. Dig. tit. "Sales," § 41; and CONTRACTS, 9 Cyc. 267.

**Immaterial variance between an offer** of sale of personal property and its acceptance will be disregarded. Kaw City Mill, etc., Co. *v.* Purcell Mill, etc., Co., 19 Okla. 357, 91 Pac. 1022.

**48.** Coad *v.* Rogers, 115 Iowa 478, 88 N. W. 947; Wheeling Steel, etc., Co. *v.* Evans, 97 Md. 305, 55 Atl. 373; Shady Hill Nursery Co. *v.* Waterer, 179 Mass. 318, 60 N. E. 789.

**49.** *Georgia.*—Cherokee Mills *v.* Gale City Cotton Mills, 122 Ga. 268, 50 S. E. 82.

*Illinois.*—Olcese *v.* Mobile Fruit, etc., Co., 211 Ill. 539, 71 N. E. 1084 [*affirming* 112 Ill. App. 281], holding that where a buyer wrote to a seller: "We intend doing a considerable business with you. . . . Keep us posted on prices. . . . You may ship us from your first steamer one car straights and also one car culls," etc., the seller replied: "We will fill your order for one car, each, straights and culls, and will wire you price before shipping," the second letter was an unconditional acceptance.

*Kentucky.*—Fairmount Glass Works *v.* Crunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. L. Rep. 264.

*Maine.*—Phillips *v.* Moor, 71 Me. 78.

*Michigan.*—Talcott *v.* Freedman, 140 Mich. 32, 103 N. W. 535. See also Bollenbacher *v.* Reid, 155 Mich. 277, 118 N. W. 933.

*Minnesota.*—King *v.* Dahl, 82 Minn. 240, 84 N. W. 737; Hayden *v.* Bryon, 78 Minn. 27, 80 N. W. 835.

*New York.*—Crossett *v.* Carleton, 23 N. Y. App. Div. 366, 48 N. Y. Suppl. 309; Brown *v.* Norton, 50 Hun 248, 2 N. Y. Suppl. 869; Clark *v.* Dales, 20 Barb. 42.

*Ohio.*—Livingston *v.* Klopper, 9 Ohio Dec. (Reprint) 185, 11 Cinc. L. Bul. 175.

*Pennsylvania.*—Ames *v.* Pierson, 174 Pa. St. 597, 34 Atl. 317.

*United States.*—Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 5 S. Ct. 1061, 29 L. ed. 341.

See 43 Cent. Dig. tit. "Sales," § 42; and CONTRACTS, 9 Cyc. 290.

**50.** Howells *v.* Stroock, 50 N. Y. App. Div. 344, 63 N. Y. Suppl. 1074 [*affirming* 30 Misc. 569, 62 N. Y. Suppl. 870]; Russell *v.* Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134; Carter *v.* Bingham, 32 U. C. Q. B. 615.

**51.** Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326; Woolbright *v.* Sneed, 5 Ga. 167 (holding that where defendant wrote to plaintiff offering to take a piano if plaintiff would

post or telegraph, it is generally held that the contract is complete as soon as an acceptance is despatched in the same manner.[52]

**b. Shipment or Delivery of Goods.** An order for goods to be shipped or delivered to the buyer becomes an agreement when the goods are shipped or delivered according to the terms of the order without communication of the acceptance.[53] But until the goods are shipped or delivered, there is no acceptance unless acceptance be communicated.[54]

**4. INCOMPLETE NEGOTIATIONS.** There can be no contract of sale until all the terms are fully agreed upon.[55]

take a third person's note for it, or to pay him three hundred dollars as soon as he could make it out of such third person, plaintiff had a right to elect which of the two propositions he would accept; and, on such election, the buyer would be bound thereby); Fairmount Glass Works *v.* Crunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. L. Rep. 264 (holding that where an offer was made to sell different sizes of jars at different prices, shipment not later than May 15, the buyer had the right by his acceptance to fix the quantity of each size and to fix different days for the delivery of the goods); Seley *v.* Williams, 20 Tex. Civ. App. 405, 50 S. W. 399.

52. *Georgia.*— Bryant *v.* Booze, 55 Ga. 438.
*Illinois.*— Haas *v.* Myers, 111 Ill. 421, 53 Am. Rep. 634; Bay State Milling Co. *v.* Barth, 135 Ill. App. 539.
*Kentucky.*— Mitchell *v.* Wallace, 87 S. W. 303, 27 Ky. L. Rep. 967.
*Nebraska.*— See Northwestern Thresher Co. *v.* Kubicek, (1908) 118 N. W. 94.
*New York.*— Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511 [*reversing* 41 Barb. 255]; Mactier *v.* Frith, 6 Wend. 103, 21 Am. Dec. 262.
*North Dakota.*— Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.
*Pennsylvania.*— Barney *v.* Clark, 5 Pittsb. Leg. J. N. S. 69.
*Texas.*— Short *v.* Threadgill, 3 Tex. App. Civ. Cas. § 267; James *v.* King, 2 Tex. App. Civ. Cas. § 544.
*Utah.*— Haarstick *v.* Fox, 9 Utah 110, 33 Pac. 251.
*United States.*— Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54; Andrews *v.* Schreiber, 93 Fed. 367; Brooks *v.* Coquard, 18 Fed. 316, 5 McCrary 588; Winterport Granite, etc., Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898, Holmes 99.
*Canada.*— Magann *v.* Auger, 31 Can. Sup. Ct. 186 [*overruling* Underwood *v.* Maguire, 6 Quebec Q. B. 237; Reeves *v.* McCullock, 4 Quebec Pr. 285].
See 43 Cent. Dig. tit. "Sales," § 39 *et seq.*; and CONTRACTS, 9 Cyc. 295.
**Acceptance by mail.**— Where a proposition of sale, made by mail, arrived in the town of the buyer's residence after business hours on Saturday and was received by the buyer Monday morning, an acceptance sent by telegram and by mail on Monday evening was made within a reasonable time, and created a binding contract. Mitchell *v.* Wallace, 87 S. W. 303, 27 Ky. L. Rep. 967. Whether acceptance by mail or telegram was within a reasonable time is for the jury. Robeson *v.* Pels, 202 Pa. St. 399, 51 Atl. 1028; Boyd v. Merchant, etc., Peanut Co., 25 Pa. Super. Ct. 199.

53. *Iowa.*—Aultman *v.* Nilson, 112 Iowa 634, 84 N. W. 692; Rock Island Plow Co. *v.* Meredith, 107 Iowa 498, 78 N. W. 233.
*Massachusetts.*—Mauger *v.* Crosby, 117 Mass. 330.
*Michigan.*— National Cash Register Co. *v.* Dehn, 139 Mich. 406, 102 N. W. 965.
*New York.*— Grant *v.* Griffith, 165 N. Y. 636, 59 N. E. 1123 [*affirming* 39 N. Y. App. Div. 107, 56 N. Y. Suppl. 791]; Briggs *v.* Sizer, 30 N. Y. 647.
*North Carolina.*— Ober *v.* Smith, 78 N. C. 313.
*South Carolina.*— Burwell *v.* Chapman, 59 S. C. 581, 38 S. E. 222.
*Washington.*— Whitman Agricultural Co. *v.* Strand, 8 Wash. 647, 36 Pac. 682.
*Wisconsin.*— Kingman *v.* Watson, 97 Wis. 596, 73 N. W. 438 (holding that a delivery by plaintiff of a threshing machine to defendant pursuant to his order bound the latter to perform the terms of the order as to payment, and the acceptance of the order by plaintiff bound it to comply with stipulations therein on its part); Hawkinson *v.* Harmon, 69 Wis. 551, 35 N. W. 28; Western Historical Co. *v.* Schmidt, 56 Wis. 681, 14 N. W. 822.
*England.*— Harvey *v.* Johnston, 6 C. B. 295, 6 D. & L. 120, 12 Jur. 981, 17 L. J. C. P. 298, 60 E. C. L. 295.
See 43 Cent. Dig. tit. "Sales," § 46.

54. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 56 N. Y. Suppl. 791. But see McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.
**A countermand of an order of goods** received before their shipment is effective, as no contract is made until after the offer of purchase is accepted by shipment. Main *v.* Tracey, 86 Ark. 27, 109 S. W. 1015.
**The order is not accepted,** if the goods shipped do not conform to the order in kind (Cooper *v.* Altimus, 62 Pa. St. 486), or in amount (Bruce *v.* Pearson, 3 Johns. (N. Y.) 534).

55. *Alabama.*— Rider *v.* Wood, 138 Ala. 235, 35 So. 46.
*Georgia.*— Decker *v.* Gwinn, 95 Ga. 518, 20 S. E. 240.
*Louisiana.*— Knox *v.* Thompson, 12 La. Ann. 114.
*Maryland.*— Joseph Joseph, etc., Co. *v.* Schonthal Iron, etc., Co., 99 Md. 382, 58 Atl. 205.

**5. Options.** An option is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time,[56] and unless the option is founded on a consideration or is under seal, it may be withdrawn at any time before acceptance.[57] Such an offer imposes no obligation upon the offerer unless within the time expressly or impliedly limited it is accepted.[58] If the goods are specific or definite in

*Michigan.*— Topliff *v.* McKendree, 88 Mich. 148, 50 N. W. 109; Whiteford *v.* Hitchcock, 74 Mich. 208, 41 N. W. 898; Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Gates *v.* Nelles, 62 Mich. 444, 29 N. W. 73.

*Minnesota.*— Ames, etc., Co. *v.* Smith, 65 Minn. 304, 67 N. W. 999.

*Missouri.*— Whedon *v.* Ames, 28 Mo. App. 243.

*New Hampshire.*— Crawford *v.* Forristall, 57 N. H. 102.

*New York.*— Sanders *v.* Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45, 4 N. E. 4; Richard *v.* Wellington, 66 N. Y. 308; Wood *v.* Ellsworth, 45 Misc. 584, 91 N. Y. Suppl. 24; Fiedler *v.* Tucker, 13 How. Pr. 9.

*Texas.*— San Antonio Gas, etc., Co. *v.* Marx, (Civ. App. 1905) 87 S. W. 1166.

*Vermont.*— Fenno *v.* Weston, 31 Vt. 345.

*Wisconsin.*— West Shore Lumber Co. *v.* Northrop, 94 Wis. 558, 69 N. W. 338.

*Wyoming.*— Sheridan First Nat. Bank *v.* C. D. Woodworth Co., 7 Wyo. 11, 49 Pac. 406.

*United States.*— Martin *v.* Northwestern Fuel Co., 22 Fed. 596.

*Canada.*— Oppenheimer *v.* Brackman, etc., Milling Co., 32 Can. Sup. Ct. 699; Cole *v.* Sumner, 30 Can. Sup. Ct. 379 [*reversing* 33 Nova Scotia 179].

See 43 Cent. Dig. tit. "Sales," § 39; and Contracts, 9 Cyc. 280.

**Terms substantially agreed on.**— Where an order for goods was given, and was accepted, which specified the amount and quality of goods, the price and terms of payment, with other details, the contract was not incomplete because the buyer was, in the future, to furnish details as to sizes and styles. John Single Paper Co. *v.* Hammermill Paper Co., 96 N. Y. App. Div. 535, 89 N. Y. Suppl. 116; George Delker Co. *v.* Hess Spring, etc., Co., 138 Fed. 647, 71 C. C. A. 97. And see also Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

**Variance between bought and sold notes.**— Where there is a material variance between bought and sold notes there is no contract of sale. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Peltier *v.* Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Grant *v.* Fletcher, 5 B. & C. 436, 8 D. & R. 59, 29 Rev. Rep. 286, 11 E. C. L. 530. Where the "bought" note given by the buyer to the seller's broker and the "sold" note delivered by the buyer to the broker varied in their express terms, but in view of the usages of the trade their meaning was substantially the same, the notes did not show that the minds of the parties had not met. Eau Claire Canning Co. *v.* Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. And see Howell *v.* Maas, 13 Daly (N. Y.) 221.

**Sale complete notwithstanding disagreement as to other provisions.**— Where a proposed contract of sale was executed by delivery of the goods and payment of the price, the sale was complete, although the parties were not agreed as to other provisions of the contract. Thompson *v.* Huhbard, 131 U. S. 123, 9 S. Ct. 710, 33 L. ed. 76.

**56.** *Arkansas.*— Bonanza Min., etc., Co. *v.* Wade, 78 Ark. 306, 95 S. W. 765.

*Georgia.*— Black *v.* Maddox, 104 Ga. 157, 30 S. E. 723.

*Minnesota.*— Womack *v.* Coleman, 92 Minn. 328, 100 N. W. 9.

*Montana.*— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 617.

*New York.*— Ganss *v.* J. M. Guffey Petroleum Co., 125 N. Y. App. Div. 760, 110 N. Y. Suppl. 176; McLaurin *v.* Cuba Co., 87 N. Y. App. Div. 558, 84 N. Y. Suppl. 526.

*United States.*— Milwaukee Mechanics' Ins. Co. *v.* Rhea, 123 Fed. 9, 60 C. C. A. 103.

See 43 Cent. Dig. tit. "Sales," § 49; and Contracts, 9 Cyc. 285.

**"There are two elements in an option contract.**— First, the offer to sell, which does not become a contract until accepted; second, the completed contract to leave the offer open for the specified time. These elements are wholly independent, and can not be treated together without great liability to confusion and error." Hanly *v.* Watterson, 39 W. Va. 214, 220, 19 S. E. 536.

**Time is of the essence** of such a contract, which, if not limited hy agreement, must be acted on within a reasonable time. Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536.

**57.** *Georgia.*— Simpson *v.* Sanders, 130 Ga. 265, 60 S. E. 541.

*Illinois.*— Allen B. Wrisley Co. *v.* Mathieson Alkali Works, 107 Ill. App. 379.

*Kentucky.*— L. A. Becker Co. *v.* Alvey, 86 S. W. 974, 27 Ky. L. Rep. 832.

*New York.*— Ganss *v.* J. M. Guffey Petroleum Co., 125 N. Y. App. Div. 760, 110 N. Y. Suppl. 176; Worthington *v.* Herrmann, 89 N. Y. App. Div. 627, 88 N. Y. Suppl. 76 [*affirmed* in 180 N. Y. 559, 73 N. E. 1134]; Klee *v.* Grant, 4 Misc. 88, 23 N. Y. Suppl. 855 [*reversing* 2 Misc. 412, 21 N. Y. Suppl. 1010].

*Pennsylvania.*— Corser *v.* Hale, 149 Pa. St. 274, 24 Atl. 285.

*Vermont.*— Faulkner *v.* Hebard, 26 Vt. 452.

See 43 Cent. Dig. tit. "Sales," §§ 50, 51; and Contracts, 9 Cyc. 285.

**58.** *California.*— Buttner *v.* Smith, (1894) 36 Pac. 652.

amount, acceptance of the offer completes a contract of sale.[59] The acceptance, however, must be one which imposes an obligation upon the accepter.[60] An offer or promise by one person to supply another with such goods as he may order or wish during a certain period may be accepted by giving an order for a definite amount of goods, since the accepter thereby becomes bound to take and pay for the goods ordered;[61] but a mere order does not bind the seller to supply goods for the remainder of the period.[62] Nor does such an offer become a binding agreement by a mere signification by the offeree of his acceptance, since such an acceptance does not bind him in any way.[63] On the other hand, an offer by one to supply another with such goods as he may need in his business during a certain period becomes a binding agreement when the offeree signifies his acceptance of the offer, for, although he may not need the goods, and hence is not absolutely bound to take and pay for any, yet if he does need the goods he is bound to order them from the offerer.[64] The same rule applies if the offer is for the purchase by one of all the goods of a certain kind that another may produce in a certain time.[65]

*Connecticut.*— Alderman *v.* New Departure Bell Co., 75 Conn. 519, 54 Atl. 198.

*Illinois.*— Allen B. Wrisley Co. *v.* Mathieson Alkali Works, 107 Ill. App. 379; American Refrigerator Transit Co. *v.* Chilton, 94 Ill. App. 6.

*Kansas.*— Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956.

*Michigan.*— Kibler *v.* Caplis, 140 Mich. 28, 103 N. W. 531, 112 Am. St. Rep. 388.

*United States.*— Pollock *v.* Riddick, 161 Fed. 280, 88 C. C. A. 326.

See 43 Cent. Dig. tit. "Sales," § 49; and CONTRACTS, 9 Cyc. 291.

**The burden of proof** to show the acceptance of an option to buy is on the buyer. Neill *v.* Hitchman, 201 Pa. St. 207, 50 Atl. 987.

**59.** Gartner *v.* Hand, 86 Ga. 558, 12 S. E. 878; Seymour *v.* Howard, 51 Ill. App. 384; O'Neill *v.* James, 43 N. Y. 84. See also Boynton *v.* Woodbury, 101 Mass. 346; Redfern *v.* Stacy, 12 Ohio Cir. Ct. 36, 5 Ohio Cir. Dec. 340.

**Option to renew contract.**— In an agreement signed by both parties, whereby one is to deliver to the other a quantity of warp per day, at a specified price, a provision that it is to be for one year, "with the privilege of renewing for three years," is a bilateral agreement, which gives either party a right to renew. Smitherman Cotton Mills *v.* Randleman Mfg. Co., 125 N. C. 329, 34 S. E. 446.

**60.** See CONTRACTS, 9 Cyc. 327.

**Seller's option to cancel contract.**— A contract by which plaintiff agrees to sell fertilizer, and defendants agree to buy, having no other consideration than their mutual promises and providing that plaintiff may cancel it at any time, is void for lack of mutuality of engagement, so that defendants may refuse to buy, although plaintiff manufactures and tenders fertilizer. American Agricultural Chemical Co. *v.* Kennedy, 103 Va. 171, 48 S. E. 868.

**Granting to a person the exclusive right to sell** goods within certain limitations is of itself sufficient as a consideration for a contract to buy such goods. Weiboldt *v.* Standard Fashion Co., 80 Ill. App. 67. And see Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117, 77 N. Y. Suppl. 457.

**61.** Keller *v.* Ybarru, 3 Cal. 147; Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664; Dambmann *v.* Lorentz, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364; Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384. And see CONTRACTS, 9 Cyc. 329.

**62.** Allen B. Wrisley Co. *v.* Mathieson Alkali Works, 107 Ill. App. 379; Michigan Bolt, etc., Works *v.* Steel, 111 Mich. 153, 69 N. W. 241. And see Reis *v.* McConnel, 60 Iowa 463, 15 N. W. 278.

**63.** Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664; Higbie *v.* Rust, 112 Ill. App. 218 [*affirmed* in 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204]. And see CONTRACTS, 9 Cyc. 327.

**Construction of contract.**— Plaintiff and defendant entered into an agreement providing that whenever purchases and sales were made between the parties for the next five years they should be upon certain terms, but nothing was said as to any particular quantities to be sold or purchased, the agreement implied no covenant by either party either to buy or sell. Ellis *v.* Miller, 22 N. Y. App. Div. 33, 47 N. Y. Suppl. 824.

**64.** McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664; Wells *v.* Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. And see CONTRACTS, 9 Cyc. 329.

**65.** Robert E. Lee Silver Min. Co. *v.* Omaha, etc., Smelting, etc., Co., 16 Colo. 118, 26 Pac. 326; Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367 (holding that where defendant sent his agent to plaintiff, and solicited the purchase of scrap iron, and a written agreement was made by which defendant agreed to pay twelve dollars per ton for all scrap iron plaintiff desired to sell, defendant agreeing to remove the iron after acceptance of the proposition, which was signed by defendant, and a written acceptance

**6. Implied Agreement — a. In General.** The assent of the parties to a contract to sell or to a sale may be implied as well as express; and it may be implied from their language,[66] or from their conduct;[67] but there can be no implied contract when there is an express contract between the parties in reference to the same subject-matter.[68]

indorsed thereon and signed by plaintiff, such writing constituted a contract, since plaintiff was obligated thereby to sell to defendant at twelve dollars per ton whatever iron then on the premises it afterward sold to any one); McCall Co. *v.* Icks, 107 Wis. 232, 83 N. W. 300; Ft. Scott *v.* W. G. Eads Brokerage Co., 117 Fed. 51, 54 C. C. A. 437.

66. Carney *v.* Cook, 80 Iowa 747, 45 N. W. 919; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84.

**Illustrations.**— Where an agent sold goods at a specified price, to be delivered on the buyer's request, conditioned on the principal having the goods in stock when the order reached him, and the principal, on receiving the order, wrote to the buyer acknowledging the receipt, and, without stating that the goods were not in stock, asked for references as to the buyer's financial standing, and thereafter allowed the buyer to believe that the reference furnished in reply to the letter was satisfactory, and that the order was accepted, it was held that on the principal's failure to deliver the goods the buyer could recover damages for breach of contract, although the goods were never in the seller's stock. Pitcher *v.* Lowe, 95 Ga. 423, 22 S. E. 678. And where plaintiff sent defendant separate orders for goods, specifying number, quality, price, and time of delivery and of payment, and defendant wrote, "we are in receipt of the following contracts, for which we thank you," describing the orders, it was held that the letter was an acceptance of the orders. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521. But where plaintiff sent an order to a merchant for goods and the latter acknowledged its receipt, and said it should have prompt attention, it was held not an acceptance. Manier *v.* Appling, 112 Ala. 663, 20 So. 978.

67. *California.*— Johnson-Locke Mercantile Co. *v.* Howard, (1901) 65 Pac. 953.

*Illinois.*— Smith *v.* Tobey Furniture Co., 57 Ill. App. 379.

*Iowa.*— Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507, holding that where a corporation, successor of an individual, on an order directed to its predecessors in the business, delivers the goods, which are accepted, a contract on the terms contained in the order will be implied.

*Kentucky.*— Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. 373, 23 Ky. L. Rep. 1834, holding that where the last of several letters between seller and buyer as to the sale of coal was from the buyer to the seller, containing a statement of the buyer's understanding of the seller's proposition as to quality and price, and an acceptance thereof, that letter, in the absence of any reply thereto, bound the seller, if it furnished the coal, to do so on the terms stated in the letter.

*Missouri.*— Bicking *v.* Stevens, 69 Mo. App. 168; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

*Nebraska.*— Curtiss *v.* McCune, 4 Nebr. (Unoff.) 483, 94 N. W. 984.

*New York.*— Norton *v.* Squier, 16 Johns. 225.

*United States.*— Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221.

*England.*— Nicol *v.* Hennessey, 44 Wkly. Rep. 584.

See 43 Cent. Dig. tit. "Sales," § 60.

**If a customer takes goods from a tradesman's counter** and carries them away, and nothing is said on either side, a sale for a reasonable price is implied. Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231.

**Course of dealing.**— Where an employee, during a period of four years, took goods from the stock for his own use, charging himself on his employers' books with the cost price, without objection on the part of his employers, an implied agreement, for such price, may be inferred. Stoudenmire *v.* Harper, 81 Ala. 242, 1 So. 857. A sale to decedent of pictures, put away in a drawer for him in claimant's store, is proved by testimony of B, their salesman, that decedent had for years been an extensive purchaser from them; that he had looked over every new invoice, and if he saw anything he liked he would say, "Put that away for me," or "I will take this"; and that B would then name a price, mark it on them, and put them away in a drawer separate from all other goods, to which he and decedent alone would have access, they being put aside, not for approval, but as actually sold, and decedent would take them, as he was ready to use them, they being charged at once to him, although bills were not rendered till they were taken away. *In re* Cope, 191 Pa. St. 589, 43 Atl. 473.

68. Jenks *v.* Mathews, 31 Me. 318; Jones *v.* Moore, 50 Vt. 53 (holding that where defendant arranged with contractors that they were to supply him with goods, and receive their pay in board furnished to their workmen, and under such arrangement defendant ordered goods from plaintiff, which were used in boarding the contractor's workmen, and plaintiff charged them to the contractors, defendant was not liable to plaintiff for the goods as on an implied promise); Thayer *v.* Street, 23 U. C. Q. B. 189. See also Contracts, 9 Cyc. 242.

**Mutual assent.**— There can be no implied agreement without mutual assent. Snow *v.* Mastick, (Cal. 1902) 71 Pac. 165; Barnes *v.*

**b. Dealing With Goods.** If one sends or delivers goods to another, under circumstances which indicate that a sale is intended, but no price is named, and the other uses or otherwise deals with them as his own, a sale for a reasonable price is implied.[69] If the person sending or delivering the goods names a price, and the other deals with the goods as his own, a sale for the price named is implied.[70] And if upon an order for goods the seller sends different goods,[71] or a less quantity, and the orderer deals with them as his own, a sale for a reasonable price is implied.[72] But no sale can be implied from acts of ownership against one who had no reason to believe that he was using goods belonging to the person who seeks to charge him as buyer.[73]

Shoemaker, 112 Ind. 512, 14 N. E. 367; Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104; Concord Coal Co. *v.* Ferrin, 71 N. H. 33, 51 Atl. 283, 93 Am. St. Rep. 496. To the same effect see Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

**69.** *Alabama.*— Kinney *v.* South Alabama, etc., R. Co., 82 Ala. 368, 3 So. 113.

*Delaware.*— Carman *v.* Scribner, 3 Houst. 554.

*Louisiana.*— Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714.

*New York.*— Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun 537, 33 N. Y. Suppl. 355.

*Pennsylvania.*— Indiana Mfg. Co. *v.* Hayes, 155 Pa. St. 160, 26 Atl. 6, holding that one who takes goods consigned to him out of the possession of the carrier, and has them hauled to his own place of business, and afterward sends his check to the consignor for other goods purchased by him, without reference to the goods so taken, is liable for their price, although he may not have ordered them.

*West Virginia.*— Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015 (holding that where one sends goods to another, as on a sale, and the latter disclaims to have purchased them, but permits a third person to take them, and convert them to his own use, he will be liable as purchaser); Bartholomae *v.* Paull, 18 W. Va. 771.

*Wisconsin.*— Wellauer *v.* Fellows, 48 Wis. 105, 4 N. W. 114.

See 43 Cent. Dig. tit. "Sales," § 41; and *supra*, II, D, 4.

**Promise to pay.**— If goods are delivered although without any order therefor having been given, and the receiver promises to pay therefor, he is liable. Reynolds *v.* Blake, 111 Ill. App. 53.

**The fact of consignment** of goods is not of itself notice to the consignee that he is held by the consignor as buyer. Peck *v.* Ritchey, 66 Mo. 114.

**Acts not of ownership.**— Where a buyer of goods referred to defendant as his financial reference, and at the buyer's request the goods were shipped to defendant, without instructions from the seller being sent to defendant, who directed the carrier to deliver them to the buyer, defendant was not liable for the goods. Farley *v.* Kline, 9 Pa. Super. Ct. 562.

**70.** Barnes *v.* Shoemaker, 112 Ind. 512, 14 N. E. 367; Neidig *v.* Cole, 13 Nebr. 39, 13 N. W. 18; Slater *v.* Church, 11 N. Y. App. Div. 307, 42 N. Y. Suppl. 389; Doerr *v.* Woolsey, 15 Daly (N. Y.) 284, 5 N. Y. Suppl. 447, 7 N. Y. Suppl. 662. And see Cunningham Mfg. Co. *v.* Rotograph Co., 30 App. Cas. (D. C.) 524, 15 L. R. A. N. S. 368; Yaeger Milling Co. *v.* Brown, 128 Mass. 171.

**Plaintiff gave defendant an option to buy** a certain judgment. Afterward defendant wrote plaintiff to execute an instrument that would allow defendant to enforce the claim in its name, stating that "of course, this will be on the understanding that, if we use the same, we shall pay you for the claim." Plaintiff sent the assignment, stating that it was to be held in trust until it decided whether it would buy according to previous correspondence. Defendant having used the claim in connection with another owned by it against the same debtor, and realized more than enough to pay the latter claim, must be held to have purchased the judgment. Clement *v.* Michigan Clothing Co., 110 Mich. 458, 68 N. W. 224.

**Where an offer to sell goods is sent by a writing** which owing to a mistake is ambiguous as to the price, and the receiver, assuming a construction favorable to himself, without inquiring orders the goods and uses them, he must pay for their value as if no offer had been made. Butler *v.* Moses, 43 Ohio St. 166, 1 N. E. 316.

**71.** Shields *v.* Pettie, 4 N. Y. 122; Bours *v.* Watson, 1 Mill (S. C.) 393.

**72.** Downs *v.* Marsh, 29 Conn. 409.

**73.** Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705 [*affirming* 32 Fed. 55], holding that where defendants' general agent, after being instructed not to add to defendants' stock, agreed with plaintiffs, who had knowledge of such instructions, to purchase goods from them for defendants, and surreptitiously put them among the stock and sell them, and procure payment from defendants, without their knowledge; and the goods were so furnished and sold, the proceeds going to defendants, plaintiffs could not sue for goods sold and delivered, as there was no sale. And see Grant *v.* Cole, 8 Ala. 519.

**Goods received as from another.**— Where shingles intended to be delivered to one were by accident delivered to another, in an action for their value, the party receiving them may show that he received them as from another with whom he had dealings and to whom he had paid their value. Deysher *v.* Triebel, 64 Pa. St. 383.

**7. Quasi-Contract.** Sometimes where there is no agreement, express or implied, the law imposes an obligation, often called quasi-contractual, to pay the value of goods appropriated by a person into whose hands they have come.[74]

**8. Validity of Assent — a. In General.** Apparent assent to a sale or contract to sell may be unreal or invalid, as in the case of contracts in general,[75] because of mistake,[76] misrepresentation,[77] fraud,[78] duress,[79] undue influence,[80] or because of mental incapacity.[81]

**b. Mistake** — (i) *In General.* From the principle that contracts can be effected only by mutual assent,[82] it follows that where through some mistake of fact each is assenting to a different contract, there is no real agreement, notwithstanding the apparent mutual assent.[83]

(ii) *Mistake as to Parties.* Where a person contracts with another believing him to be one with whom he intends to contract, while as a matter of fact it is another person, there is no agreement,[84] as where a buyer sends an order for goods to a person, and the order is filled by a different person, who has succeeded to the business of the former, and the buyer supposes his order to have been filled by the person to whom he sent the order,[85] or where a person obtains

**One person cannot, by sending goods to another,** gain thereby the right to treat him as a buyer because he fails to notify the sender that he will not buy, unless the relation between the parties or other circumstances impose a duty upon the receiver to speak. Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495. See also Contracts, 9 Cyc. 258. But some cases hold that one to whom goods have been sent without request is liable as a buyer unless within a reasonable time he returns the goods or notifies the sender that he will not accept them. Thompson *v.* Douglass, 35 W. Va. 337, 13 S. E. 1015; Bartholomae *v.* Paull, 18 W. Va. 771. See also Masterson *v.* Heitman, 38 Tex. Civ. App. 476, 87 S. W. 227; Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,822, 1 Wash. 454.

**Retention of goods.**— Where a merchant who received goods in excess of those ordered, on remitting the price of the latter, wrote: "Balance of goods shipped me were not ordered. You will please have patience until they are sold, or they are subject to your order, if you prefer it," his retention of them for several years, without proof that he sold them, did not constitute in law any promise to pay for them. Goodwin *v.* Wells, 49 Ala. 309.

**Question for jury.**— The question as to what is a reasonable time within which to return goods sent with the invoices to one who did not order them, or to notify the sender that he will not accept them, is one of fact for the jury. Bartholomae *v.* Paull, 18 W. Va. 771.

74. See Contracts, 9 Cyc. 243.

**Such an obligation may arise** when goods are delivered under a contract which is unenforceable (see Frauds, Statute of, 20 Cyc. 245), where by reason of mistake there is no mutual assent (Baldwin *v.* Mildeberger, 2 Hall (N. Y.) 196; West *v.* De Wezele, 4 F. & F. 596; Keating *v.* Graham, 26 Ont. 361), or where a person into whose possession goods have come converts them (Waterman *v.* Stimpson, 24 Vt. 508. See also Assumpsit, Action of, 4 Cyc. 332).

75. See Contracts, 9 Cyc. 388.

76. See *infra*, II, E, 8, b.

77. See *infra*, II, E, 8, c.

78. See *infra*, II, E, 8, d.

79. See Contracts, 9 Cyc. 443.

80. See *infra*, II, E, 8, e.

81. See Drunkards, 14 Cyc. 1103; Insane Persons, 22 Cyc. 1194.

82. See *supra*, II, E, 1.

83. Benjamin Sales, § 50. See, generally, Contracts, 9 Cyc. 388.

84. Newberry *v.* Norfolk, etc., R. Co., 133 N. C. 45, 45 S. E. 356; Wilson *v.* Windsor Foundry Co., 33 Nova Scotia 21 [*affirmed* in 31 Can. Sup. Ct. 381]. See also Contracts, 9 Cyc. 401.

**Where seller intends sale to predecessor.**— Where a firm with which plaintiff has dealt has dissolved and formed itself into a corporation, the only change in name being the omission of the character "&," and notice of dissolution was published, and plaintiff's salesman thereafter sold a bill of goods, at the store of the concern, to one of the old partners, and the goods were shipped in the partnership name, and received by the corporation, there has been no sale to the corporation. Roof *v.* Morrisson, 37 Ill. App. 37. And see Buffalo Consumers' Ice Co. *v.* Webster, 32 N. Y. App. Div. 592, 53 N. Y. Suppl. 56.

**Belief of seller as to identity.**—Where plaintiff sold goods to defendant's son who bore the same name and had purchased his business and conducted it under the former name, but plaintiff had not before dealt with defendant, and did not rely upon his reputed responsibility, no fraud being shown, defendant was not liable. Preston *v.* Foellinger, 24 Fed. 680. But where goods sold were used in repairing a machine belonging to a partnership consisting of defendants and K, and it appeared that plaintiff did not know of the partnership but had had dealings with defendants and had the right to suppose the goods were for defendants the latter were liable. Tanner *v.* Townsend, 4 Colo. App. 543, 36 Pac. 908.

85. Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101; Boston Ice Co. *v.* Potter, 123 Mass. 28,

goods by fraudulently impersonating a third person to whom the owner supposes he is selling,[86] or by pretending to be the agent of a third person to whom the owner supposes he is selling.[87]

(III) *MISTAKE AS TO THING SOLD* — (A) *Existence of Thing Sold.* Where the parties purport to sell specific goods, and the goods without the knowledge of the parties have ceased to exist at the time when the agreement is made, the agreement is void.[88]

(B) *Identity of Thing Sold.* Where the seller understands that he is selling one thing and the buyer understands that he is buying another thing, there is no contract of sale.[89]

(C) *Unknown Thing Contained in Thing Sold.* The sale of a thing which unknown to the seller contains another article concealed in it is not a sale of that article.[90]

(D) *Mistake as to Quantity.* Where there is a contract for the sale of specific goods, mistakenly estimated to comprise a certain quantity, and the actual quantity is materially more or less than the estimated quantity, there is no mutual assent.[91]

(E) *Mistake as to Nature and Qualities.* If the parties are agreed as to the

25 Am. Rep. 9; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93; Bushnell *v.* Chamberlain, 44 Nebr. 751, 62 N. W. 1114; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

**Notice to buyer before goods are appropriated.**— Where goods are ordered of one person and supplied by another, and notice is given to the buyer after delivery but before the goods are appropriated, he will be liable upon an implied agreement; and if it is so given by letter or on the invoice, he cannot escape liability on the ground that he did not see it through inattention. Barnes *v.* Shoemaker, 112 Ind. 512, 14 N. E. 367.

**86.** Loeffel *v.* Pohlman, 47 Mo. App. 574; Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406. See also Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283.

**87.** *Illinois.*— La Salle Pressed Brick Co. *v.* Coe, 65 Ill. App. 619.

*Indiana.*— Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

*Kentucky.*— Howe *v.* Combs, 38 S. W. 1052, 18 Ky. L. Rep. 1002.

*Massachusetts.*— Rodliff *v.* Dallinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394.

*New York.*— Hentz *v.* Miller, 94 N. Y. 64. See also Kinsey *v.* Leggett, 71 N. Y. 387.

*Ohio.*— Hamet *v.* Letcher, 37 Ohio St. 356, 41 Am. Rep. 519.

*Pennsylvania.*— Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

*Vermont.*— McCrillis *v.* Allen, 57 Vt. 505.

*England.*— Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239; Higgins *v.* Burton, 26 L. J. Exch. 342, 5 Wkly. Rep. 683.

See 43 Cent. Dig. tit. "Sales," § 63.

**88.** See *supra*, II, C, 2.

**Mutual mistake as to the existence of the goods** at a particular place, where the parties would not have entered into the agreement had the actual situation of the goods been known, will avoid the agreement. Ketchum *v.* Catlin, 21 Vt. 191.

**89.** Saltus *v.* Pruyn, 18 How. Pr. (N. Y.) 512. See also CONTRACTS, 9 Cyc. 398.

**Illustrations.**— Where two things have the same name and the buyer means one and the seller the other (Raffles *v.* Wichelhausand, 2 H. & C. 906, 33 L. J. Exch. 160), or the seller having goods of two sorts undertakes to sell goods of one sort which he mistakenly supposes are in a particular package and the parties agree upon a sale of the goods in that package (Harvey *v.* Harris, 112 Mass. 32; Sheldon *v.* Capron, 3 R. I. 171), or a mistake arises by fault of a broker who makes the sale and describes a different article to each party (Thornton *v.* Kempster, 1 Marsh. 355, 5 Taunt. 786, 15 Rev. Rep. 658, 1 E. C. L. 402), there is no contract of sale.

**If the description does not admit of two meanings,** the fact that one party thought it was something else does not affect the agreement. Brewington *v.* Mesker, 51 Mo. App. 348; Montgomery *v.* Ricker, 43 Vt. 165. See also CONTRACTS, 9 Cyc. 398.

**90.** *Arkansas.*— Ray *v.* Light, 34 Ark. 421.

*Indiana.*— Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172.

*Maine.*— Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

*Pennsylvania.*— Hutchmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

*Rhode Island.*— Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528.

*England.*— Merry *v.* Green, 10 L. J. M. C. 154, 7 M. & W. 323.

See 43 Cent. Dig. tit. "Sales," § 63.

**Delivery by mistake of other goods** than those agreed to be sold passes no title. Gardner *v.* Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779.

**91.** Scott *v.* Warner, 2 Lans. (N. Y.) 49; Wheadon *v.* Olds, 20 Wend. (N. Y.) 174; Watkins *v.* Elliott, 28 Gratt. (Va.) 374; Cox *v.* Prentice, 3 M. & S. 344, 16 Rev. Rep. 288. And see Sheffield *v.* Hamlin, 26 Hun (N. Y.) 237.

thing to be sold and the terms of the contract, the agreement is complete, notwithstanding they may be totally mistaken in the motive which induced the assent, as where the buyer mistakenly believes that the thing will answer a certain purpose.[92] The mere fact that the thing failed to possess the value, qualities, or collateral attributes which the parties believed it to possess does not render the agreement incomplete.[93]

(iv) *Mistake as to Price or Terms.* If the offer is stated in such terms that the offeree understands one price, while the offerer means another, the parties are never *ad idem*, and there is no agreement.[94] So if the misunderstanding arises in the same manner as to other terms of the agreement,[95] or if the offerer

**Partial rescission.**— Where defendant sold plaintiff trees standing on certain land, and there was a mutual mistake as to the boundaries, plaintiff was not entitled in equity to a rescission of the entire contract, but to an allowance *pro rata* for the trees on the land which proved not to be defendant's. Hamilton *v.* McAlister, 49 S. C. 230, 27 S. E. 63.

**The fact that the buyer ordered more goods** than he intended is immaterial (Shrimpton *v.* Brice, 102 Ala. 655, 15 So. 452; Coats *v.* Early, 46 S. C. 220, 24 S. E. 305; Coates *v.* Buck, 93 Wis. 128, 67 N. W. 23), unless the order was procured by fraud (Shrimpton *v.* Rosenbaum, 106 Mich. 68, 63 N. W. 1011).

92. Ollivant *v.* Bayley, 5 Q. B. 288, Dav. & M. 373, 7 Jur. 1130, 13 L. J. Q. B. 34, 48 E. C. L. 288; Prideaux *v.* Bunnett, 1 C. B. N. S. 613, 87 E. C. L. 613; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399.

93. *Maryland.*— Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28, mutual mistake as to condition of horse.

*Massachusetts.*— Hecht *v.* Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708, mutual mistake as to solvency of maker of note bought through broker.

*Michigan.*— Miller *v.* Brooks, 109 Mich. 174, 66 N. W. 1092. But see Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531, where the subject of sale was a blooded cow, believed by the parties to be barren, and hence worth only eighty dollars, which was the price. Before the time for delivering the seller discovered that the cow was with calf, and hence worth not less than seven hundred and fifty dollars. It was held that the seller could rescind on the ground that the mistake went to the substance of the agreement.

*Mississippi.*— Sample *v.* Bridgforth, 72 Miss. 293, 16 So. 876.

*New York.*— Taylor *v.* Fleet, 4 Barb. 95.

*Pennsylvania.*— Sankey *v.* Mifflinburg First Nat. Bank, 78 Pa. St. 48.

*Wisconsin.*— Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610, holding that where a woman sold a stone for one dollar to a jeweler, both being ignorant of its value, and it proved to be a valuable diamond, she could not rescind.

*England.*— Barr *v.* Gibson, 1 H. & N. 70, 7 L. J. Exch. 124, 3 M. & W. 390.

*Canada.*— Baker *v.* Lyman, 38 U. C. Q. B. 498.

See 43 Cent. Dig. tit. "Sales," § 63; and Contracts, 9 Cyc. 395, 397.

**If the buyer thinks he is being promised goods** possessing a certain quality or attribute which they do not in fact possess, and the seller knows that the buyer so thinks, there is no agreement. Smith *v.* Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. 221, 25 L. T. Rep. N. S. 329, 19 Wkly. Rep. 1059, holding that where the buyer had agreed to buy oats, thinking they were old oats, whereas they were new oats, the mere fact that the seller knew that the buyer so thought was not enough to avoid the sale. To have such effect the seller must have known that the buyer thought he was being promised old oats. And see Gill *v.* McDowell, [1903] 2 Ir. 463. See also Contracts, 9 Cyc. 396.

**Mistake in description.**— A mere mistake without bad faith in the description of the brand on flour barrels does not avoid the contract where the quality of the flour delivered was the same as that bearing the brand described. Bertram *v.* Lyon, 3 Fed. Cas. No. 1,362, McAllister 53 [*affirmed* in 61 U. S. 149, 15 L. ed. 847].

94. *California.*— Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 121 Cal. 641, 54 Pac. 101; Rovengo *v.* Defferari, 40 Cal. 459.

*Illinois.*— Rupley *v.* Daggett, 74 Ill. 351.

*Indiana.*— Mummenhoff *v.* Randall, 19 Ind. App. 44, 49 N. E. 40.

*Wisconsin.*— Harran *v.* Foley, 62 Wis. 584, 22 N. W. 837.

*United States.*— Greene *v.* Bateman, 10 Fed. Cas. No. 5,762, 2 Woodb. & M. 359.

*England.*— Phillips *v.* Bistolli, 2 B. & C. 511, 3 D. & R. 822, 2 L. J. K. B. O. S. 116, 26 Rev. Rep. 433, 9 E. C. L. 225.

See 43 Cent. Dig. tit. "Sales," § 63; and Contracts, 9 Cyc. 398.

**Immaterial mistake.**— Where an agreement is made by a debtor with several creditors, by which he is to be released from all their claims, and he is to convey his property to one of them, who is to pay the indebtedness to the others, the fact that the buyer's agreement with the other creditors is that he will pay their claims out of the proceeds of the property, while the seller understands that the buyer assumed the claims absolutely, is not a material mistake affecting the sale, as in either case the seller gets his release, and the buyer the goods. Lowenstein *v.* Goodbar, 69 Miss. 808, 13 So. 860.

95. Singer *v.* Grand Rapids Match Co., 117

makes a mistake in stating the price and the offeree is aware of it,[96] there is no contract. But if the mistake of the one is not known to the other, it can have no effect on the contract.[97] The misunderstanding of a term of trade by one of the parties cannot affect the rights of the other.[98]

(v) *Effect of Signing Contract Without Reading.* A person may not avoid a contract of sale which he has signed on the ground that he was ignorant of its terms if he signed without reading it,[99] or if, being unable to read, he signed it without having it read.[1] If, however, a trick is used to substitute another instrument for the one he intended to sign, his signature has no legal effect.[2] And, if he is induced to sign by the fraudulent misrepresentation of the other party, he may avoid the contract.[3]

**c. Misrepresentation.** As a rule an innocent misrepresentation of a fact has no effect upon a sale or a contract to sell,[4] unless the representation is a condition in the contract,[5] or amounts to a warranty.[6]

**d. Fraud** — (i) *In General* — (a) *What Constitutes Fraud.* Fraud is a false representation of a fact, made with knowledge of its falsity, or recklessly, without belief in its truth, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it to his injury.[7] Fraud renders a sale or a contract to sell voidable; [8] and the same state of facts which is ground

Ga. 86, 43 S. E. 755 (quantity ordered); Hogue *v.* Mackey, 44 Kan. 277, 24 Pac. 477 (time of payment); Pittsburg, etc., Coal Co., *v.* Slack, 42 La. Ann. 107, 7 So. 230 (time when sale is to take effect); Concord Coal Co. *v.* Ferrin, 71 N. H. 33, 51 Atl. 283, 93 Am. St. Rep. 496 (holding that where a debtor to defendant told him that he would cause plaintiff to furnish defendant a ton of coal for application on his indebtedness, and the debtor notified plaintiff that defendant wanted a ton of coal, without stating the arrangement, and the coal was delivered and charged by plaintiff to defendant, who used it and credited its value on the debtor's account, there was no contract, because of mutual mistake as to payment).

**96.** Cunningham Mfg. Co. *v.* Rotograph Co., 30 App. Cas. (D. C.) 524; Everson *v.* International Granite Co., 65 Vt. 658, 27 Atl. 320; Hume *v.* U. S., 132 U. S. 406, 10 S. Ct. 134, 33 L. ed. 393.

**Implied agreement.**— If the buyer, after being informed of the mistake, receives and disposes of the goods, he will be liable at the price intended to be quoted. Mummenhoff *v.* Randall, 19 Ind. App. 44, 49 N. E. 40.

**97.** Star Glass Co. *v.* Longley, 64 Ga. 576; Abey *v.* Bennett, 10 Ind. 478; Griffin *v.* O'Neil, 47 Kan. 116, 27 Pac. 826, 48 Kan. 117, 29 Pac. 143; Scott *v.* Hall, 60 N. J. Eq. 451, 46 Atl. 611 [*reversing* 58 N. J. Eq. 42, 43 Atl. 50].

**Mistake of telegraph company.**— Where the mistake is due to the error of a telegraph company in transmitting the offer, and the offeree accepts in ignorance of the mistake, the offerer is bound, he being responsible for the correct transmission of the message. Western Union Tel. Co. *v.* Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 26; Ayer *v.* Western Union Tel Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Postal Tel. Cable Co. *v.* Akron Cereal Co., 23 Ohio Cir. Ct. 516. The rule is otherwise in jurisdictions where the rule prevails that the sender is not responsible for the correct transmission of the telegram. Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344; Pegram *v.* Western Union Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557. See also Contracts, 9 Cyc. 295.

**98.** Soper *v.* Tyler, 77 Conn. 104, 58 Atl. 699.

**99.** Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715; History Co. *v.* Dougherty, 3 Ariz. 387, 29 Pac. 649; Gage *v.* Phillips, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494; Hallwood Cash Register Co. *v.* Greenberger, 90 N. Y. Suppl. 361. See also Contracts, 9 Cyc. 388.

**1.** See Contracts, 9 Cyc. 390.

**2.** See Contracts, 9 Cyc. 390.

**3.** See *infra*, II, E, 8, d, (I), (I).

**4.** See *infra*, II, E, 8, d, (I), (D); and Contracts, 9 Cyc. 408.

**An innocent misrepresentation of a material fact** may, however, be ground for relief in equity. Seeberger *v.* Hobert, 55 Iowa 756, 8 N. W. 482; Carter *v.* Cole, (Tex. Civ. App. 1897) 42 S. W. 369. See also Contracts, 9 Cyc. 408.

**5.** See Contracts, 9 Cyc. 408.

**6.** See Contracts, 9 Cyc. 408.

**7.** See Contracts, 9 Cyc. 411.

**8.** *Arkansas.*— Hamilton *v.* Ford, 46 Ark. 245.

*Colorado.*— Pike's Peak Paint Co. *v.* Masury, 19 Colo. App. 286, 74 Pac 796.

*Indiana.*— Bell *v.* Cafferty, 21 Ind. 411.

*Maine.*—Ayers *v.* Hewett, 19 Me. 281.

*Minnesota.*— Cochran *v.* Stewart, 21 Minn. 435.

*New Hampshire.*— Kingsbury *v.* Smith, 13 N. H. 109.

*New Jersey.*— Byard *v.* Holmes, 33 N. J. L. 119; Hicks *v.* Campbell, 19 N. J. Eq. 183.

for avoidance of the contract may also, although not necessarily, give rise to an action for deceit.[9]

(B) *Representation Must Be of Fact.* As a rule the representation must be of fact, as distinguished from opinion,[10] intention,[11] or matter of law.[12]

(C) *Failure to Disclose Facts.* As a rule the mere failure of a party to a contract to disclose facts does not constitute fraud, but the failure to disclose must be accompanied by an active attempt to deceive.[13]

(D) *Knowledge and Intent* — (1) KNOWLEDGE. A false representation made without knowledge of its falsity is not as a rule fraudulent,[14] but a misrepresentation is fraudulent if made recklessly without knowledge whether it be true or false.[15] And it is generally held that an unqualified statement of a material fact implies a representation of knowledge, and that if the representation be false it is fraudulent.[16]

*New York.*— Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. 493; Matteawan Co. *v.* Bentley, 13 Barb. 641.

*Rhode Island.*— Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520.

*England.*— Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26, 41 L. J. Exch. 17, 25 L. T. Rep. N. S. 708, 20 Wkly. Rep. 189.

See 43 Cent. Dig. tit. "Sales," §§ 85, 100; and CONTRACTS, 9 Cyc. 431.

9. See FRAUD, 20 Cyc. 10.

10. See *infra*, II, E, 8, d, (II), (B); and CONTRACTS, 9 Cyc. 416.

11. Ayres *v.* Blevins, 28 Ind. App. 101, 62 N. E. 305; Witt *v.* Cuenod, 9 N. M. 143, 50 Pac. 328. See also *infra*, II, E, 8, d, (III), (D); CONTRACTS, 9 Cyc. 418.

12. See CONTRACTS, 9 Cyc. 420.

13. See *infra*, II, E, 8, d, (II), (A); and CONTRACTS, 9 Cyc. 412.

14. *Alabama.*— Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

*Arkansas.*— Plant *v.* Condit, 22 Ark. 454.

*Illinois.*— Taylor *v.* Warren, 27 Ill. App. 655.

*Indiana.*— Humphreys *v.* Comline, 8 Blackf. 516.

*Kentucky.*— Stewart *v.* Dougherty, 3 Dana 479.

*Maine.*— Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

*Massachusetts.*— Morse *v.* Dearborn, 109 Mass. 593; King *v.* Eagle Mills, 10 Allen 548.

*Michigan.*— Horner *v.* Fellows, 1 Dougl. 51. But see Totten *v.* Burhans, 91 Mich. 495, 499, 51 N. W. 1119, where it is said: "The rule of law is well settled in this State . . . that it is immaterial whether a false representation is made innocently or fraudulently, if, by its means, the plaintiff is injured." See also Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46; Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Baughman *v.* Gould, 45 Mich. 481, 8 N. W. 73.

*Mississippi.*— Mizell *v.* Sims, 39 Miss. 331.

*Missouri.*— Peers *v.* Davis, 29 Mo. 184.

*New York.*— Jones *v.* Allan, 13 Misc. 442, 35 N. Y. Suppl. 527.

*North Carolina.*—Caudle *v.* Fallen, 98 N. C. 411, 4 S. E. 40.

*Pennsylvania.*—Kimmel *v.* Lichty, 3 Yeates 262; Hardy *v.* Anderson, 7 Kulp 396.

*Tennessee.*— Ruohs *v.* Chattanooga Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.

*United States.*— Thomson-Houston Electric Co. *v.* Brush-Swan Electric Light, etc., Co., 31 Fed. 535.

*England.*— Collins *v.* Evans, 5 Q. B. 820, 48 E. C. L. 820; Ormrod *v.* Huth, 14 L. J. Exch. 366, 14 M. & W. 651.

See 42 Cent. Dig. tit. "Sales," § 66; and CONTRACTS, 9 Cyc. 421.

*Compare* Terhune *v.* Dever, 36 Ga. 648, holding that, by statute, misrepresentation of a material fact, whether intentional or by mistake, if it actually deceives, is legal fraud, which will vitiate a sale.

15. *Alabama.*— Blackman *v.* Johnson, 35 Ala. 252; Atwood *v.* Wright, 29 Ala. 346; Burnett *v.* Stanton, 2 Ala. 181.

*Georgia.*— Smith *v.* Newton, 59 Ga. 113.

*Kentucky.*— Foard *v.* McComb, 12 Bush 723.

*Maine.*— Wheelden *v.* Lowell, 50 Me. 499.

*Massachusetts.*— Nettleton *v.* Beach, 107 Mass. 499.

*New Jersey.*— Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

*New York.*— Hammond *v.* Pennock, 61 N. Y. 145; Meyer *v.* Amidon, 45 N. Y. 169.

*Ohio.*— Parmlee *v.* Adolph, 28 Ohio St. 10.

*United States.*— Patent Title Co. *v.* Stratton, 95 Fed. 745.

*England.*— Reese River Silver Min. Co. *v.* Smith, L. R. 4 H. L. 64, 39 L. J. Ch. 849, 17 Wkly. Rep. 1024; Weir *v.* Bell, 3 Ex. D. 238, 242, 47 L. J. Exch. 704, 38 L. T. Rep. N. S. 929, 26 Wkly. Rep. 746.

See 43 Cent. Dig. tit. "Sales," § 66; and CONTRACTS, 9 Cyc. 422.

16. *Alabama.*— Perry *v.* Johnston, 59 Ala. 648; Sledge *v.* Scott, 56 Ala. 202.

*California.*— Spreckels *v.* Gorrill, 152 Cal. 383, 92 Pac. 1011.

*Georgia.*— Newman *v.* H. B. Claflin Co., 107 Ga. 89, 32 S. E. 943.

*Illinois.*— Borders *v.* Kattleman, 142 Ill. 96, 31 N. E. 19; Ruff *v.* Jarrett, 94 Ill. 475; Allen *v.* Hart, 72 Ill. 104; Ellefritz *v.* Taylor, 84 Ill. App. 396.

*Indiana.*— Matlock *v.* Todd, 19 Ind. 130; Timmis *v.* Wade, 5 Ind. App. 139, 31 N. E. 827.

(2) INTENT. To render a representation fraudulent it must have been made with the intention that it should be acted on by the injured party.[17] If the representation be made with knowledge of its falsity or recklessly without knowledge of its truth, it is immaterial whether the party making it intended to defraud or not.[18]

(E) *Communication of Representation.* A false representation made to a third person is not fraudulent unless it be made for the purpose of being communicated to the other party;[19] but if it be made with the intention of being communicated to the other party, and it is actually communicated, the effect is the same as if made to him directly.[20] A person may be bound by the representation of his agent,[21] or of one to whom he refers the other party for information.[22] Acquiescence in a misrepresentation made by another, the falsity of which is known to a party who acquiesces therein, is sufficient to constitute fraud.[23]

(F) *Materiality of Representation.* The representation must be material, that is, it must have been an inducement to the contract.[24] A representation is material

*Kentucky.*— Phelps *v.* Quinn, 1 Bush 375; Thomas *v.* McCann, 4 B. Mon. 601.

*Massachusetts.*— Litchfield *v.* Hutchinson, 117 Mass. 195; Hazard *v.* Irwin, 18 Pick. 95.

*Missouri.*— Dulaney *v.* Rogers, 64 Mo. 201.

*Nebraska.*— Olcott *v.* Bolton, 50 Nebr. 779, 70 N. W. 366; Foley *v.* Holtry, 43 Nebr. 133, 61 N. W. 120.

*New York.*— Marsh *v.* Falker, 40 N. Y. 562; Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351, 67 N. Y. Suppl. 284; Brown *v.* Tuttle, 66 Barb. 169; Elwell *v.* Chamberlain, 2 Bosw. 230.

*Ohio.*— King *v.* Hopkins, 13 Ohio Cir. Ct. 305, 7 Ohio Cir. Dec. 362.

*Tennessee.*— Young *v.* Forgey, 4 Hayw. 10.

*Texas.*— Ross-Armstrong Co. *v.* Shaw, (Civ. App. 1905) 113 S. W. 558; Jesse French Piano, etc., Co. *v.* Nolan, 38 Tex. Civ. App. 395, 85 S. W. 821; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

*Vermont.*— Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

*United States.*— Turner *v.* Ward, 154 U. S. 618, 14 S. Ct. 1179, 23 L. ed. 391.

See 43 Cent. Dig. tit. "Sales," § 66.

In some jurisdictions, however, it is held that a statement made in the honest belief that it is true is not fraudulent, notwithstanding the absence of reasonable grounds for believing it true. Standard Horseshoe Co. *v.* O'Brien, 91 Md. 751, 46 Atl. 346. See also CONTRACTS, 9 Cyc. 423.

17. *Maine.*— Cross *v.* Peters, 1 Me. 376, 10 Am. Dec. 78.

*Minnesota.*— Holt *v.* Sims, 94 Minn. 157, 102 N. W. 386.

*New York.*— Estey Mfg. Co. *v.* Waring, 7 N. Y. St. 775.

*Pennsylvania.*— Zineman *v.* Harris, 6 Pa. Super. Ct. 303.

*United States.*— Marshall *v.* Hubbard, 117 U. S. 415, 6 S. Ct. 806, 29 L. ed. 919.

See 43 Cent. Dig. tit. "Sales," § 66; and CONTRACTS, 9 Cyc. 424.

18. *Arkansas.*— Stephenson *v.* Weathersby, (1898) 45 S. W. 987.

*Illinois.*— Case *v.* Ayers, 65 Ill. 142; Reed *v.* Pinney, 35 Ill. App. 610.

*New Jersey.*— Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

*New York.*— Hammond *v.* Pennock, 61 N. Y. 145; Whitcomb *v.* Salsman, 16 How. Pr. 533.

*England.*— Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29; Polhill *v.* Walter, 3 B. & Ad. 114, 23 E. C. L. 59.

See 43 Cent. Dig. tit. "Sales," § 66; and CONTRACTS, 9 Cyc. 425.

19. Smith *v.* Newton, 59 Ga. 113. See also CONTRACTS, 9 Cyc. 424.

20. Walker *v.* Anglo-American Mortg., etc., Co., 72 Hun (N. Y.) 334, 25 N. Y. Suppl. 432.

21. Light *v.* Jacobs, 183 Mass. 206, 66 N. E. 799; Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754. See also PRINCIPAL AND AGENT, 31 Cyc. 1582.

**Seller's agent colluding with joint purchaser.**— A purchaser was induced by false representations of a joint purchaser to pay a greater sum for a third interest in patents assigned by defendants than they asked for the entire interest, such joint purchaser receiving a two-thirds interest without expense. Defendants' financial agent drew the assignments in accordance with the directions given by the joint purchaser, and in the presence of one of defendants delivered the assignments, receiving from the purchasers payment for their respective interest. Subsequently the joint purchaser received from such agent the amount which he had paid. The agent knew the consideration, and stated that he was surprised to receive the two-thirds payment from the joint purchaser, but kept quiet. It was held sufficient to show that defendants, through their agent, assisted in the perpetration of the fraud. Felt *v.* Bell, 205 Ill. 213, 68 N. E. 794 [*modifying* 102 Ill. App. 218].

**Representation made by unauthorized person.**— A false representation is not available to the vendee, if not made by the vendor or his authorized agent. Brounfield *v.* Denton, 72 N. J. L. 235, 61 Atl. 378; Morris *v.* Wells, 7 N. Y. Suppl. 61.

22. Linton *v.* Housh, 4 Kan. 535; Cahaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

23. Perry *v.* Johnston, 59 Ala. 648.

24. *Indiana.*— Jenkins *v.* Long, 19 Ind. 28,

if, had it been known to be false, the party would not have entered into the contract.[25] It is sufficient if the representation was a material element in inducing him to enter into the contract, although it was not the sole inducement.[26]

(G) *Reliance on Representation* — (1) IN GENERAL. The representation must be relied on, for otherwise it does not deceive, and hence does not constitute fraud.[27] If the other party does not believe the representation, he is not deceived.[28] But the mere fact that he obtained other information is immaterial, if it did not

81 Am. Dec. 374; Zehner *v.* Kepler, 16 Ind. 290.

*Michigan.*— Soule *v.* Harrington, 135 Mich. 155, 97 N. W. 357.

*Missouri.*— Voorhis *v.* Smith, etc., Mfg. Works, 11 Mo. App. 108.

*Nevada.*— Klopenstein *v.* Mulcahy, 4 Nev. 296.

*New Jersey.*— Garrison *v.* Technic Electrical Works, 63 N. J. Eq. 806, 52 Atl. 1131 [*affirming* 59 N. J. Eq. 440, 45 Atl. 612].

*New York.*— Bronson *v.* Wiman, 8 N. Y. 182.

*Oregon.*— Waymire *v.* Shipley, (1908) 97 Pac. 807.

*Pennsylvania.*— Griffith *v.* Herr, 17 Pa. Super. Ct. 601.

*Texas.*— Downes *v.* Self, 28 Tex. Civ. App. 356, 67 S. W. 897. See also Ross-Armstrong Co. *v.* Shaw, (Civ. App. 1905) 113 S. W. 558, holding that where the seller of a piano represented to the purchaser that the piano had a mandolin attachment, and the purchaser was thereby induced to make the purchase believing that he was purchasing a better piano than he did purchase, the representation was material.

*Vermont.*— Stone *v.* Robie, 66 Vt. 245, 29 Atl. 257.

*United States.*— Curtiss *v.* Hurd, 30 Fed. 729.

See 43 Cent. Dig. tit. "Sales," § 65; and CONTRACTS, 9 Cyc. 425.

25. *Arkansas.*— French, etc., Importing Co. *v.* Belleville Drug Co., 75 Ark. 95, 86 S. W. 836, holding that a representation that no similar goods had been sold to other dealers in the same town was material.

*Iowa.*— Highee *v.* Trumbauer, 112 Iowa 74, 83 N. W. 812, holding that a representation by the seller's agent that the buyer's brother had said it would be advisable to buy the goods was material.

*Mississippi.*— Hirschburg Optical Co. *v.* Jackson, 63 Miss. 21.

*New York.*— Bridger *v.* Goldsmith, 3 Misc. 535, 23 N. Y. Suppl. 9 [*affirmed* in 143 N. Y. 424, 38 N. E. 458], holding that the sale of a business is vitiated by suppression of the books of account, and denial of their existence.

*Texas.*— Ford *v.* Oliphant, (Civ. App. 1895) 32 S. W. 437; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358.

*Wisconsin.*— Pratt *v.* Darling, 125 Wis. 93, 103 N. W. 229, holding that a representation that similar goods had not been sold to any other dealer in the same town was material.

See 43 Cent. Dig. tit. "Sales," § 65; and CONTRACTS, 9 Cyc. 425.

**Party relying chargeable with knowledge of law.**— Where a merchant seeking to purchase goods presented a written guaranty, by a national bank, of payment for any goods he might purchase, it was held that even if it implied a representation that the bank was financially sound, it was immaterial, since the seller was chargeable with knowledge that in law such a guaranty by a national bank is *ultra vires* and void. Commercial Nat. Bank *v.* Pirie, 82 Fed. 799, 27 C. C. A. 171.

26. *Illinois.*— Ruff *v.* Jarrett, 94 Ill. 475.

*Maine.*— Greenleaf *v.* Gerald, 94 Me. 91, 46 Atl. 799, 50 L. R. A. 542.

*Maryland.*— McAleer *v.* Horsey, 35 Md. 439.

*Massachusetts.*— Safford *v.* Grout, 120 Mass. 20.

*Minnesota.*— Moline-Milburn Co. *v.* Franklin, 37 Minn. 137, 33 N. W. 323.

*Missouri.*— Burnham *v.* Ellmore, 66 Mo. App. 617; Kirkendall *v.* Hartsock, 58 Mo. App. 234.

*New York.*— Hahlo *v.* Grant, 10 N. Y. Suppl. 188 [*affirmed* in 132 N. Y. 593, 30 N. E. 1151]; Hill *v.* Carley, 8 Hun 636.

*Vermont.*— James *v.* Hodsden, 47 Vt. 127.

See 43 Cent. Dig. tit. "Sales," § 65; and CONTRACTS, 9 Cyc. 426.

27. *Alabama.*— Darby *v.* Kroell, 92 Ala. 607, 8 So. 384.

*Indiana.*— Gregory *v.* Schoenell, 55 Ind. 101.

*Kansas.*— W. W. Kimball Co. *v.* Raw, 7 Kan. App. 17, 51 Pac. 789.

*Montana.*— Ellison *v.* Barker, 14 Mont. 96, 35 Pac. 722.

*Nebraska.*— Korbel *v.* Skocpol, 70 Nebr. 45, 96 N. W. 1022.

*Oregon.*— Waymire *v.* Shipley, (1908) 97 Pac. 807.

*South Carolina.*— Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557.

*United States.*— Sullivan *v.* Pierce, 125 Fed. 104, 60 C. C. A. 148.

See 42 Cent. Dig. tit. "Sales," §§ 74, 90; and CONTRACTS, 9 Cyc. 426.

**The intent to defraud cannot be shown** by evidence of declarations, not relied upon as a part of the false pretenses by which the goods were obtained, but made, after the completion of the transaction, by a third person, to whom the seller was referred by the vendee for information. Easter *v.* Allen, 8 Allen (Mass.) 7.

28. *Alabama.*— Sledge *v.* Scott, 56 Ala. 202.

*Georgia.*— Smith *v.* Newton, 59 Ga. 113.

*Indiana.*— Gregory *v.* Schoenell, 55 Ind. 101; Connersville *v.* Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214.

disclose the falsity of the representation.[29] The fact that a considerable time had elapsed after the representation before he entered into the contract does not necessarily show that he was not entitled to and did not rely on it.[30]

(2) RIGHT TO RELY ON REPRESENTATION. The representation must be such that the buyer had a right to rely on it.[31]

(H) *Injury Must Result.* To give the complaining party the right to avoid the contract, he must have been injured by the other's fraud.[32]

(I) *Contract in Writing* — (1) IN GENERAL. The fact that the contract of sale is in writing does not preclude a party from avoiding it on the ground of fraud whereby he was induced to enter into the contract.[33]

(2) EXECUTION PROCURED BY FRAUD. Where one of the parties has been

*Iowa.*— Caldwell *v.* Bridal, 48 Iowa 15, holding that the fact that the seller kept the diseased portion of a flock of sheep separate from the remainder, and did not show them to the buyer, would not vitiate the sale of the flock if he obtained knowledge of the diseased condition before completing the purchase.

*Maine.*— McDonald *v.* Trafton, 15 Me. 225.

*Maryland.*— Gunby *v.* Sluter, 44 Md. 237.

*Massachusetts.*—Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821.

*Pennsylvania.*— Phelps *v.* Buckman, 30 Pa. St. 401.

*England.*— Horsefall *v.* Thomas, 1 H. & C. 90, 8 Jur. N. S. 721, 31 L. J. Exch. 322, 6 L. T. Rep. N. S. 462, 10 Wkly. Rep. 650.

See 43 Cent. Dig. tit. "Sales," § 74; and CONTRACTS, 9 Cyc. 427.

**29.** Light *v.* Jacobs, 183 Mass. 206, 66 N. E. 799; Olcott *v.* Bolton, 50 Nebr. 779, 70 N. W. 366; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

**30.** Seaver *v.* Dingley, 4 Me. 306; Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938; Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134, 74 N. Y. Suppl. 496.

**31.** See CONTRACTS, 9 Cyc. 428.

**This rule excludes** statements of opinion, dealer's talk, and the like. See *infra,* II, E, 8, d, (II), (B), (1), (2). Whether a party to a contract has a right to rely upon the representations of the other when the means of knowledge are at hand and equally available to both parties is a question on which the authorities are in conflict. See *infra,* II, E, 8, d, (II), (C). See also CONTRACTS, 9 Cyc. 428.

**A vendee of a doubtful title** to real estate gave in payment therefor, among other things, certain copper stock which afterward proved to be utterly worthless. It appeared that the vendee told the seller not to rely upon his estimation of the value of said stock given in payment, but to make inquiries. It was held that equity would not avoid the sale on the ground of fraud. Beeker *v.* Hastings, 15 Mich. 47.

**32.** Schubart *v.* Chicago Gaslight, etc., Co., 41 Ill. App. 181; Percival *v.* Harger, 40 Iowa 286; Stevens *v.* Huber, 3 Misc. (N. Y.) 599, 23 N. Y. Suppl. 343; Mason *v.* Wheeler, 2 Misc. (N. Y.) 523, 24 N. Y. Suppl. 879; Hopkins *v.* Woldert Grocery Co., (Tex. Civ. App. 1902) 66 S. W. 63. See also CONTRACTS, 9 Cyc. 431. But see Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101, where it was held that the fact that defendant was induced to enter into the contract of purchase by the seller's fraudulent misrepresentation that he was acting as agent of a third person is a good defense to an action for breach of such contract, although defendant can show no damage from the fraud.

**Illustrations.**— It has been held that the buyer cannot rescind for fraud where the goods were worth what he paid for them. Aron *v.* De Castro, 13 N. Y. Suppl. 372 [*affirmed* in 131 N. Y. 648, 30 N. E. 491]. And it has been held that where the seller falsely represented that there was no mortgage on the goods, but had the mortgage released as soon as his attention was called to it, the buyer could not rescind. Johnson *v.* Seymour, 79 Mich. 156, 44 N. W. 344. See also Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271. But see Merritt *v.* Robinson, 35 Ark. 483; Thomas *v.* Coultas, 76 Ill. 493.

**Canceling mortgage** after suit does not defeat the right to rescind. Stevenson *v.* Marble, 84 Fed. 23.

**33.** Dowagiac Mfg. Co. *v.* Gibson, 73 Iowa 525, 35 N. W. 603, 5 Am. St. Rep. 697; Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360; Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Pharo *v.* Beadleston, 17 N. Y. Suppl. 730; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; History Co. *v.* Durham, (Tex. Civ. App. 1893) 23 S. W. 327.

**Representations of a promissory character** become merged in the written contract. Wheeler *v.* Mowers, 16 Misc. (N. Y.) 143, 38 N. Y. Suppl. 950.

**Where writing excludes representations.**— Where in a sealed contract of sale of a business it was recited that no representations in regard thereto had been made, it was held that this did not preclude the party misled by fraudulent representations of the other from proving them. Bridger *v.* Goldsmith, 143 N. Y. 424, 38 N. E. 458. But where a contract of sale stipulated that the sale was made under the representations therein expressed, and no others, it was held not to be a defense to an action for the price that the purchaser entered into the agreement by reason of false representations by an agent of the seller, not contained in the contract, where he was not misled as to its contents. Equitable Mfg. Co. *v.* Biggers, 121 Ga. 381, 49 S. E. 271.

fraudulently induced to execute a contract upon misrepresentation of the other party as to its character or terms, many courts hold that he is not precluded by his negligence in failing to read it from asserting the invalidity of the contract as against the party who procured its execution by fraud.[34] But in view of the circumstances it has been held in other cases that the person neglecting to read the contract is precluded from asserting the fraud.[35]

(II) *Fraud of Seller* — (A) *Failure to Disclose Facts* — (1) In General. In contracts of sale disclosure is not ordinarily incumbent on the seller, the rule being *caveat emptor*, and the mere failure to disclose material facts does not constitute fraud.[36] As a rule, to charge the seller with fraud, there must be some active attempt to deceive, either by a statement which is false, or at least by a representation which, although true as far as it goes, is accompanied by such a suppression of the facts as to convey a false impression.[37] If the buyer wishes to protect himself further he must require of the seller a warranty of any matter

**34.** *Georgia.*— McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999; Wood *v.* Cincinnati Safe, etc., Co., 96 Ga. 120, 22 S. E. 909; Chapman *v.* Atlanta Guano Co., 91 Ga. 821, 18 S. E. 41.

*Illinois.*— Goetz *v.* Sona, 65 Ill. App. 78.

*Minnesota.*— Shrimpton *v.* Philbrick, 53 Minn. 366, 55 N. W. 551.

*Nebraska.*—Woodbridge *v.* Dewitt, 51 Nebr. 98, 70 N. W. 506; Ward *v.* Spelts, 39 Nebr. 809, 58 N. W. 426; Aultman *v.* Finck, 36 Nebr. 680, 54 N. W. 989; Cole *v.* Williams, 12 Nebr. 440, 11 N. W. 875.

*New Jersey.*—Alexander *v.* Brogley, 63 N. J. L. 307, 43 Atl. 888.

*Pennsylvania.*—American Harrow Co. *v.* Swoope, 16 Pa. Super. Ct. 451.

*Tennessee.*— Fine *v.* Stuart, (Ch. App. 1898) 48 S. W. 371.

*Wisconsin.*— Warden, etc., Co. *v.* Whitish, 77 Wis. 430, 46 N. W. 540.

*United States.*—American Fine Art Co. *v.* Reeves Pulley Co., 127 Fed. 808, 62 C. C. A. 488.

*Canada.*— Jones Stacker Co. *v.* Green, 14 Manitoba 61.

See 43 Cent. Dig. tit. "Sales," § 65; and Contracts, 9 Cyc. 390.

**Due care.**— Where plaintiff was unable to read without spectacles but had the contract read over to him by the seller's agent, who deceived him as to the terms of the contract, he was not guilty of negligence. Sawin *v.* Union Bldg., etc., Assoc., 95 Iowa 477, 64 N. W. 401.

**Inability to read.**— See Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846; Gross *v.* Drager, 66 Wis. 150, 28 N. W. 141, where the person imposed upon was unable to read English.

**35.** Williams *v.* Leisen, 72 N. J. L. 410, 60 Atl. 1096; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109, 84 N. W. 14.

**36.** *Alabama.*— Armstrong *v.* Bufford, 51 Ala. 410; Barnett *v.* Stanton, 2 Ala. 181.

*Georgia.*— Barnett *v.* Speir, 93 Ga. 762, 21 S. E. 168.

*Illinois.*— Cogel *v.* Kniseley, 89 Ill. 598; Mason *v.* Wait, 5 Ill. 127.

*Indiana.*— Boyer *v.* State, 169 Ind. 691, 83 N. E. 350, holding that it is the duty of one selling personal property to disclose fully and fairly all known defects or infirmities not within the reach of ordinary observation, and that a failure to do so is a fraudulent concealment of the facts.

*Maine.*— Milliken *v.* Chapman, 75 Me. 306, 46 Am. Rep. 486.

*Massachusetts.*—Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884.

*Mississippi.*— Joslin *v.* Caughlin, 26 Miss. 134; Otts *v.* Alderson, 10 Sm. & M. 476.

*Missouri.*— McCurdy *v.* McFarland, 10 Mo. 377.

*New York.*— People's Bank *v.* Bogart, 81 N. Y. 101, 37 Am. Rep. 481.

*North Carolina.*— Duckworth *v.* Walker, 46 N. C. 507.

*Ohio.*— Goodale *v.* Hunt, 5 Cinc. L. Bul. 172, 6 Ohio Dec. (Reprint) 897, 8 Am. L. Rec. 624.

*Pennsylvania.*— Kintzing *v.* McElrath, 5 Pa. St. 467; Pulhamus *v.* Pursel, 3 Pa. L. J. 399.

*Tennessee.*— Cowan *v.* Dodd, 3 Coldw. 278.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220.

*United States.*— Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. ed. 214.

*England.*— Horsfall *v.* Thomas, 1 H. & C. 90, 8 Jur. N. S. 721, 31 L. J. Exch. 322, 6 L. T. Rep. N. S. 462, 10 Wkly. Rep. 650.

See 43 Cent. Dig. tit. "Sales," §§ 69–72, 84.

**37.** *Alabama.*— Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725.

*Indiana.*— Hull *v.* Kirkpatrick, 4 Ind. 637.

*Mississippi.*— Patterson *v.* Kirkland, 34 Miss. 423.

*New York.*— Gough *v.* Dennis, Lalor 55.

*Ohio.*— Goodale *v.* Hunt, 5 Cinc. L. Bul. 172, 6 Ohio Dec. (Reprint) 897, 8 Am. L. Rec. 624.

*Tennessee.*— George *v.* Johnson, 6 Humphr. 36, 44 Am. Dec. 288.

*Vermont.*— Graham *v.* Stiles, 38 Vt. 578; Wheeler *v.* Wheelock, 34 Vt. 553.

*United States.*— Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

*England.*— Peek *v.* Gurney, L. R. 6 H. L. 377, 43 L. J. Ch. 19, 22 Wkly. Rep. 29.

See 43 Cent. Dig. tit. "Sales," § 69; and Contracts, 9 Cyc. 413.

the risk of which he is unwilling to assume.[38] Any device, however, used by the seller to conceal defects or to induce the buyer to omit inquiry or examination is as much a fraud as active concealment.[39]

(2) LATENT DEFECTS. Some cases carry the doctrine of *caveat emptor* so far as to hold that the seller is under no obligation to communicate the existence of defects in the thing sold not discoverable by examination, such as a hidden disease in an animal.[40] But it is generally held in this country that the intentional non-disclosure of a latent defect by the seller, when he knows that it is unknown to the buyer, is fraudulent.[41] If the defect be unknown to the seller, he cannot of

**38.** Veasey *v.* Doton, 3 Allen (Mass.) 380; Morrison *v.* Koch, 32 Wis. 254. See also *infra*, VII.

**39.** *California.*— Roseman *v.* Canovan, 43 Cal. 110.

*Georgia.*— Marietta Fertilizer Co. *v.* Beckwith, 4 Ga. App. 245, 61 S. E. 149.

*Indiana.*— McAvoy *v.* Wright, 25 Ind. 22; Firestone *v.* Werner, 1 Ind. App. 293, 27 N. E. 623.

*Iowa.*— Evans *v.* Palmer, 137 Iowa 425, 114 N. W. 912; Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678 (statements regarding the condition of the thing sold, made for the purpose of diverting the attention of the buyer); Raeside *v.* Hamm, 87 Iowa 720, 54 N. W. 1079.

*Massachusetts.*— Matthews *v.* Bliss, 22 Pick. 48.

*New York.*— Smith *v.* Countryman, 30 N. Y. 655; Howell *v.* Biddlecom, 62 Barb. 131; Johnson *v.* Luxton, 41 N. Y. Super. Ct. 481.

*North Carolina.*— Biggs *v.* Perkins, 75 N. C. 397.

*Pennsylvania.*— Croyle *v.* Moses, 90 Pa. St. 250, 35 Am. Rep. 654, where, upon the sale of a horse, the vendor knew him to be unsound in a certain respect, and by artifice concealed the defect, or, in answer to inquiries, gave evasive and artful replies.

*United States.*— Stewart *v.* Wyoming Ranche Co., 128 U. S. 383, 9 S. Ct. 101, 32 L. ed. 439.

*England.*—Udell *v.* Atherton, 7 H. & N. 172, 7 Jur. N. S. 777, 30 L. J. Exch. 337, 4 L. T. Rep. N. S. 797.

See 43 Cent. Dig. tit. "Sales," § 69; and CONTRACTS, 9 Cyc. 413.

**40.** Morris *v.* Thompson, 85 Ill. 16; Beninger *v.* Corwin, 24 N. J. L. 257; Paul *v.* Hadley, 23 Barb. (N. Y.) 521; Ward *v.* Hobbs, 3 Q. B. D. 150, 47 L. J. Q. B. 90, 37 L. T. Rep. N. S. 654, 26 Wkly. Rep. 151 [*affirmed* in 4 App. Cas. 13, 48 L. J. C. P. 281, 40 L. T. Rep. N. S. 73, 27 Wkly. Rep. 114].

**41.** *Alabama.*— Armstrong *v.* Huffstutler, 19 Ala. 51.

*Arkansas.*— Turner *v.* Huggins, 14 Ark. 21; Turner *v.* Huggins, 11 Ark. 337.

*Georgia.*— The duty to disclose is imposed by statute. Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151 (holding that on sale of a note failure to disclose insolvency of maker is fraudulent); Beasley *v.* Huyett, etc., Mfg. Co., 92 Ga. 273, 18 S. E. 420.

*Kentucky.*— Hughes *v.* Robertson, 1 T. B. Mon. 215, 15 Am. Dec. 104; Smith *v.* Rowzee, 3 A. K. Marsh. 527.

*Maine.*— Downing *v.* Dearborn, 77 Me. 457, 1 Atl. 407.

*Maryland.*— Duvall *v.* Medtart, 4 Harr. & J. 14.

*Massachusetts.*— French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440.

*Minnesota.*— Johnson *v.* Wallower, 18 Minn. 288; Marsh *v.* Webber, 13 Minn. 109.

*Mississippi.*— Patterson *v.* Kirkland, 34 Miss. 423.

*Missouri.*— Grigsby *v.* Stapleton, 94 Mo. 423, 7 S. W. 421 (animal infected with Texas fever); Cecil *v.* Spurgers, 32 Mo. 462; Barron *v.* Alexander, 27 Mo. 530; McAdams *v.* Cates, 24 Mo. 223; Joplin Water Co. *v.* Bathe, 41 Mo. App. 285.

*New Hampshire.*— Hanson *v.* Edgerly, 29 N. H. 343.

*New York.*— Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Jeffrey *v.* Bigelow, 13 Wend. 518, 28 Am. Dec. 476 (animal infected with contagious disease); Ketletas *v.* Fleet, 7 Johns. 324.

*Ohio.*— Hadley *v.* Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454, holding that whether failure to disclose a latent defect constitutes fraud is a question for the jury.

*Pennsylvania.*— McDowell *v.* Burd, 6 Binn. 198; Cassel *v.* Herron, 5 Pa. L. J. Rep. 250; Bellas *v.* Shurts, 5 Phila. 442.

*Tennessee.*— Cardwell *v.* McClelland, 3 Sneed 150; George *v.* Johnson, 6 Humphr. 36, 44 Am. Dec. 288; McGavock *v.* Ward, Cooke 403.

*Texas.*— Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

*Vermont.*— Maynard *v.* Maynard, 49 Vt. 297 (impotency of bull bought for breeding); Graham *v.* Stiles, 38 Vt. 578; Paddock *v.* Strobridge, 29 Vt. 470.

*Wisconsin.*— Dowling *v.* Lawrence, 58 Wis. 282, 16 N. W. 552, blindness of horse.

*United States.*— Pease *v.* McClelland, 19 Fed. Cas. No. 10,882, 2 Bond 42.

*England.*— Gill *v.* McDowell, [1903] 2 Ir. 463.

See 43 Cent. Dig. tit. "Sales," § 70.

**Sufficiency of disclosure.**— The seller need not disclose the fullest extent of the unsoundness of a horse by describing particularly the different stages and symptoms of the disease, and all the circumstances attending it. Armstrong *v.* Huffstutler, 19 Ala. 51.

**The seller is bound to no diligence in acquiring knowledge** of the value or quality of

course be liable for fraud in the absence of an express representation.[42] Refusal to give a warranty does not relieve the seller from disclosing such a known defect.[43] If the sale is expressly with all faults, the buyer cannot be heard to complain that he has been defrauded,[44] unless the seller uses active means to conceal the defects or to induce the buyer to omit examination.[45]

(B) *Matters of Fact or of Opinion* — (1) IN GENERAL. A mere statement of opinion, belief, or expectation, although unfounded or false, is not such a false representation as to constitute fraud.[46]

the subject of sale, in order to communicate it to the other party, but only to good faith, regarding the knowledge which he actually has. Burgess *v.* Chapin, 5 R. I. 225. But see Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151, holding that if the seller of a note is aware of facts which would lead him as a reasonable man to infer that the maker is insolvent, this is equivalent to knowledge.

**Under the Louisiana code,** if the seller knows of a defect which is unknown to the buyer, it is his duty to disclose it. Huntington *v.* Brown, 17 La. Ann. 48; Carreta *v.* Lopez, 15 La. Ann. 64; Richardson *v.* Bell, 12 La. Ann. 296; Robertson *v.* Wallis, 10 La. Ann. 214; Musson *v.* Clayton, 1 La. Ann. 122; Clarke *v.* Lockhart, 10 Rob. 5; Reynaud *v.* Guillotte, 1 Mart. N. S. 227; Rouzel *v.* McFarland, 8 Mart. 704. When the article is susceptible of convenient examination, the purchaser is bound to make that examination and abide by it. Bevans *v.* Farrell, 18 La. Ann. 232. A seller is not obliged to communicate to the buyer the existence of any vice which does not afford ground for redhibition, that is, a vice in the thing sold which renders it useless, or its use so inconvenient or imperfect that it must be supposed that the buyer would not have purchased it had he known the vice; and the concealment of such defect is no fraud. Gros *v.* Bienvenu, 3 Rob. 396; Xenes *v.* Taquino, 7 Mart. N. S. 678. By the code the vendor is bound to explain himself clearly respecting the extent of his obligations. Any obscure clause will be construed against him. Clarke *v.* Lockhart, *supra*; Erwin *v.* Greene, 5 Rob. 70; Phillipi *v.* Gove, 4 Rob. 315.

42. Brooks *v.* Cannon, 2 A. K. Marsh. (Ky.) 525; Lindsay *v.* Davis, 30 Mo. 406; Shenault *v.* Eaton, 4 Yerg. (Tenn.) 98; Simpson *v.* Wiggin, 22 Fed. Cas. No. 12,887, 3 Woodb. & M. 413.

43. Ogden *v.* Michel, 4 Rob. (La.) 155; Galpin *v.* Jessup, 3 Rob. (La.) 90; Turner *v.* Wheaton, 18 La. 37; Melancon *v.* Robichaux, 17 La. 97; Andry *v.* Foy, 6 Mart. (La.) 689; Macarty *v.* Bagnieres, 1 Mart. (La.) 149; Hough *v.* Evans, 4 McCord (S. C.) 169. But see Nelson *v.* Lillard, 16 La. 336, holding that an express exclusion of warranty as to one of several articles is a declaration of unsoundness.

44. West *v.* Anderson, 9 Conn. 107, 21 Am. Dec. 737; Bywater *v.* Richardson, 1 A. & E. 508, 3 L. J. K. B. 164, 3 N. & M. 748, 28 E. C. L. 246; Baglehole *v.* Walters, 3 Campb. 154, 13 Rev. Rep. 778; Pickering *v.* Dowson, 4 Taunt. 779.

45. West *v.* Anderson, 9 Conn. 107, 21 Am. Dec. 737; Whitney *v.* Boardman, 118 Mass. 242; Pearce *v.* Blackwell, 34 N. C. 49; Smith *v.* Andrews, 30 N. C. 3; Schneider *v.* Heath, 3 Campb. 506, 14 Rev. Rep. 506.

46. *Colorado.*— Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271.

*Georgia.*— Miller *v.* Ferguson, 37 Ga. 558.

*Illinois.*— Burwash *v.* Ballou, 230 Ill. 34, 82 N. E. 355, 15 L. R. A. N. S. 409 [*affirming* 132 Ill. App. 71]; O'Donnell, etc., Brewing Co. *v.* Farrar, 163 Ill. 471, 45 N. E. 283; Warren *v.* Doolittle, 61 Ill. 171; Miller *v.* Young, 33 Ill. 354; Barrie *v.* Jerome, 112 Ill. App. 329.

*Iowa.*— Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Dawson *v.* Graham, 48 Iowa 378; Rawson *v.* Harger, 48 Iowa 269.

*Kentucky.*— Head *v.* Dant, 21 S. W. 528, 14 Ky. L. Rep. 742.

*Maine.*— Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

*Maryland.*—Buschman *v.* Codd, 52 Md. 202.

*Massachusetts.*— Schramm *v.* Boston Sugar Refining Co., 146 Mass. 211, 15 N. E. 571; Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Homer *v.* Perkins, 124 Mass. 431, 26 Am. Rep. 677; Belcher *v.* Costello, 122 Mass. 189.

*Michigan.*— Johnson *v.* Seymour, 79 Mich. 156, 44 N. W. 344.

*Missouri.*— Brockhaus *v.* Schilling, 52 Mo. App. 73.

*New York.*—Arnold *v.* Norfolk, etc., Hosiery Co., 76 Hun 15, 28 N. Y. Suppl. 638 [*affirmed* in 148 N. Y. 392, 42 N. E. 980].

*North Carolina.*— Woodridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

*Ohio.*— Curran *v.* Hauser, 4 Ohio S. & C. Pl. Dec. 449 [*reversed* on other grounds in 8 Ohio S. & C. Pl. Dec. 495, 5 Ohio N. P. 224].

*Pennsylvania.*— Watts *v.* Cummins, 59 Pa. St. 84.

*Rhode Island.*— Lyons *v.* Briggs, 14 R. I. 222, 51 Am. Rep. 372.

*Washington.*— English *v.* Grinstead, 12 Wash. 670, 42 Pac. 121.

*Wisconsin.*— Vodrey Pottery Co. *v.* H. E. Horne Co., 117 Wis. 1, 93 N. W. 823.

*United States.*— Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. 832; Greene *v.* Societé Anonyme des Matieres Colorantes et Produits Chinniques de St. Denis, 81 Fed. 64.

See 43 Cent. Dig. tit. "Sales," § 67; and CONTRACTS, 9 Cyc. 416.

**On sales of patents** the following representations have been held statements of opinion: That a patent is valid and covers a certain method of manufacture (Huber *v.* Guggen-

(2) "DEALER'S TALK." [47] Commendatory expressions and extravagant statements, such as men commonly use to puff their wares and induce others to enter into bargains, are not deemed to be representations of fact.[48]

(3) REPRESENTATIONS AS TO VALUE. Statements in respect to the value of the thing sold are generally regarded as expressions of opinion and not as representations of fact,[49] and this applies to statements as to the market value.[50] But it is otherwise if the seller has special learning or means of knowledge not open to the buyer,[51] or if the relation between them is confidential.[52] Representations

heim, 89 Fed. 598); statements as to the supposed value of an invention, and what may be done with it (Patent Title Co. *v.* Stratton, 89 Fed. 174); and that a patent was a valuable and useful improvement (Bain *v.* Withey, 107 Ala. 223, 18 So. 217). The following representations have been held representations of fact on which the buyer could rely: A representation by the owner of a patent right on a churn to a purchaser of a right to vend the churn that the strainer of the churn would separate the butter from the milk without handling, and that it would allow the milk to flow out of the churn, and would retain the butter in the churn (Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421); misrepresentations as to the value of an invention, made by the inventor to a party intending to purchase the state right thereof (Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241 [*reversing* in part 15 Ill. App. 480]); and representations by the seller of a patent of the novelty and value of his process, he being an expert, when the buyer was entirely ignorant of the matter (Page *v.* Dickerson, 28 Wis. 694, 9 Am. Rep. 532).

47. "Dealer's talk" defined see 13 Cyc. 287. See also FRAUD, 20 Cyc. 53.

48. *Alabama.*— Sledge *v.* Scott, 56 Ala. 202.
*Arkansas.*— Righter *v.* Roller, 31 Ark. 170.
*Georgia.*— Terhune *v.* Coker, 107 Ga. 352, 33 S. E. 394.
*Illinois.*— Burwash *v.* Ballou, 230 Ill. 34, 82 N. E. 355, 15 L. R. A. N. S. 409 [*affirming* 132 Ill. App. 71]; Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Harris *v.* Brain, 33 Ill. App. 510.
*Iowa.*— Dawson *v.* Graham, 48 Iowa 378.
*Massachusetts.*— Deming *v.* Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Kimball *v.* Bangs, 144 Mass. 321, 11 N. E. 113; Teague *v.* Irwin, 127 Mass. 217; Morse *v.* Shaw, 124 Mass. 59.
*Michigan.*— Jackson *v.* Collins, 39 Mich. 557.
*Pennsylvania.*— Griffith *v.* Herr, 17 Pa. Super. Ct. 601; Macbeth *v.* Lee, 5 Pa. Co. Ct. 225.
*United States.*— Southern Dev. Co. *v.* Silva, 125 U. S. 247, 8 S. Ct. 881, 31 L. ed. 678; Reynolds *v.* Palmer, 21 Fed. 433.
See 43 Cent. Dig. tit. "Sales," § 67.

**Purchase by others.**— False statement as to purchases made by others of the same class of goods are statements of a material fact. Henkel *v.* Trubee, (Conn. 1887) 11 Atl. 722. See also Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360.

49. *District of Columbia.*— Patterson *v.* Barrie, 30 App. Cas. 531.
*Illinois.*— Schramm *v.* O'Connor, 98 Ill. 539.
*Indiana.*— McComas *v.* Haas, 93 Ind. 276; Kennedy *v.* Richardson, 70 Ind. 524.
*Iowa.*— Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 94.
*Massachusetts.*— Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Manning *v.* Albee, 11 Allen 520; Brown *v.* Castles, 11 Cush. 348.
*New Jersey.*— Ubler *v.* Semple, 20 N. J. Eq. 288.
*New York.*— Giles Lith., etc., Co. *v.* Racamier Mfg. Co., 12 N. Y. St. 169; Davis *v.* Meeker, 5 Johns. 354.
*Pennsylvania.*— Byrne *v.* Stewart, 124 Pa. St. 450, 17 Atl. 19.
*United States.*— Gordon *v.* Butler, 105 U. S. 553, 26 L. ed. 1166.
See 43 Cent. Dig. tit. "Sales," § 79; and CONTRACTS, 9 Cyc. 416

**False representations by the agent of a seller of books** to an intending purchaser that they are of the value of the price asked is an expression of opinion, which by itself is not sufficient to constitute such a fraud as will enable the purchaser to avoid the sale. Patterson *v.* Barrie, 30 App. Cas. (D. C.) 531.

50. *Indiana.*— Cronk *v.* Cole, 10 Ind. 485; Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.
*Iowa.*— Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142.
*Kansas.*— Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171.
*Maine.*— Richardson *v.* Noble, 77 Me. 390.
*Massachusetts.*—Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. N. S. 821; Manning *v.* Albee, 11 Allen 520.
See 43 Cent. Dig. tit. "Sales," § 79.

51. *Illinois.*— Murray *v.* Tolman, 162 Ill. 417, 44 N. E. 748; Hayes *v.* Houston, 86 Ill. 487.
*Indiana.*— Bish *v.* Beatty, 111 Ind. 403, 12 N. E. 523; Sieveking *v.* Litzler, 31 Ind. 13; Gatling *v.* Newell, 12 Ind. 118.
*Kansas.*— Crane *v.* Elder, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795.
*Michigan.*— Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.
*Missouri.*— Hirschberg Optical Co. *v.* Richards, 62 Mo. App. 408.
*Wisconsin.*— Paetz *v.* Stoppleman, 75 Wis. 510, 44 N. W. 834.
See 43 Cent. Dig. tit. "Sales," § 79; and CONTRACTS, 9 Cyc. 417.

52. Baum *v.* Holton, 4 Colo. App. 406, 36

of material facts affecting the value are not regarded as mere expressions of opinion,[53] as representations concerning the earnings, profits, indebtedness, and value of a business on a sale of the business or good-will,[54] or on a sale of stock in a corporation conducting the same.[55] Statements of what the seller was offered,[56] or of what he gave, are by some courts deemed to be mere expressions of opinion on which the buyer is not entitled to rely;[57] but by other courts they are deemed to be material statements of facts.[58] Statements that a third person gave so much for the same or for similar articles are generally regarded as material.[59]

Pac. 154; Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416.

**53.** *Alabama.*— Alexander *v.* Dennis, 9 Port. 174, 33 Am. Dec. 309.

*Kentucky.*— Coffey *v.* Hendrick, 65 S. W. 127, 23 Ky. L. Rep. 1128.

*Maine.*— Hoxie *v.* Small, 86 Me. 23, 29 Atl. 920; Coolidge *v.* Goddard, 77 Me. 578, 1 Atl. 831.

*Massachusetts.*—Andrews *v.* Jackson, 168 Mass. 266, 47 N. E. 412, 60 Am. St. Rep. 390, 37 L. R. A. 402; Hazard *v.* Irwin, 18 Pick. 95.

*Michigan.*— Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754; Collins *v.* Jackson, 54 Mich. 186, 19 N. W. 947; Jackson *v.* Collins, 39 Mich. 557.

*Minnesota.*— MacLaren *v.* Cochran, 44 Minn. 255, 46 N. W. 408.

*Missouri.*— Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

*New Jersey.*— Crosland *v.* Hall, 33 N. J. Eq. 111.

*New York.*— Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Chrysler *v.* Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Manning *v.* Maas, 2 Misc. 266, 21 N. Y. Suppl. 959; Pharo *v.* Beadleston, 17 N. Y. Suppl. 730.

*Pennsylvania.*— Byrne *v.* Stewart, 124 Pa. St. 450, 17 Atl. 19.

*United States.*— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

See 43 Cent. Dig. tit. "Sales," § 79; and CONTRACTS, 9 Cyc. 417.

**54.** *California.*— Cruess *v.* Fessler, 39 Cal. 336.

*Colorado.*— Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271.

*Illinois.*— O'Donnell, etc., Brewing Co. *v.* Farrar, 163 Ill. 471, 45 N. E. 283.

*Indiana.*— Hoffa *v.* Hoffman, 33 Ind. 172.

*Maryland.*— Findlay *v.* Baltimore Trust, etc., Co., 97 Md. 716, 55 Atl. 379.

*Massachusetts.*—Boles *v.* Merrill, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308.

*New York.*— Jackson *v.* Foley, 53 N. Y. App. Div. 97, 65 N. Y. Suppl. 920; Harding *v.* Taylor, 37 Misc. 684, 76 N. Y. Suppl. 365; Tilden *v.* Washburn, 6 N. Y. Suppl. 556.

See 43 Cent. Dig. tit. "Sales," § 80.

A contract for the purchase of a store, which was entered into under a mistake and misrepresentation as to the real condition of the concern, in consequence of which the substantial object of the contract was defeated, may be set aside in equity. Callender *v.* Colegrove, 17 Conn. 1.

**55.** *California.*— Gifford *v.* Carvill, 29 Cal. 589.

*Iowa.*— Averill *v.* Boyles, 52 Iowa 672, 3 N. W. 731.

*New York.*— Truman *v.* Lombard, 10 N. Y. App. Div. 430, 42 N. Y. Suppl. 262.

*Pennsylvania.*— McElwee *v.* Chandler, 198 Pa. St. 575, 48 Atl. 475.

*Rhode Island.*— Handy *v.* Waldron, 19 R. I. 618, 35 Atl. 884.

*Wisconsin.*— Beetle *v.* Anderson, 98 Wis. 5, 73 N. W. 560.

*United States.*— Boggs *v.* Wann, 58 Fed. 681.

See 43 Cent. Dig. tit. "Sales," § 81.

**56.** Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086; Dillman *v.* Nadlehoffer, 119 Ill. 567, 7 N. E. 88 [*affirming* 19 Ill. App. 375]; Boles *v.* Merrill, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308. *Contra*, Strickland *v.* Graybill, 97 Va. 602, 34 S. E. 475; Moline Plow Co. *v.* Carson, 72 Fed. 387, 18 C. C. A. 606.

**57.** *Georgia.*— Underwood *v.* Caldwell, 102 Ga. 16, 29 S. E. 164.

*Illinois.*— Hauk *v.* Brownell, 19 Ill. App. 189 [*affirmed* in 120 Ill. 161, 11 N. E. 416].

*Kentucky.*— Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

*Maine.*— Holbrook *v.* Connor, 60 Me. 578, 11 Am. Rep. 212.

*Massachusetts.*— Boles *v.* Merrill, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; Gassett *v.* Glazier, 165 Mass. 473, 43 N. E. 193; Way *v.* Ryther, 165 Mass. 226, 42 N. E. 1128; Hemmer *v.* Cooper, 8 Allen 334; Medbury *v.* Watson, 6 Metc. 246, 39 Am. Dec. 726.

*United States.*— Mackenzie *v.* Seeberger, 76 Fed. 108, 22 C. C. A. 83. And see Hazleton Tripod-Boiler Co. *v.* Citizens' St. R. Co., 72 Fed. 317.

See 43 Cent. Dig. tit. "Sales," § 82.

**58.** *Indiana.*— McFadden *v.* Robison, 35 Ind. 24; Miller *v.* Buchanan, 10 Ind. App. 474, 37 N. E. 187, 38 N. E. 56.

*Iowa.*— Welch *v.* Burdick, 101 Iowa 70, 70 N. W. 94.

*Kentucky.*— Blacks *v.* Catlett, 3 Litt. 139.

*New York.*— Fairchild *v.* McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701; Smith *v.* Countryman, 30 N. Y. 655; Harlow *v.* La Brum, 82 Hun 292, 31 N. Y. Suppl. 487; Van Epps *v.* Harrison, 5 Hill 63, 40 Am. Dec. 314; Sandford *v.* Handy, 23 Wend. 260.

*United States.*— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

See 43 Cent. Dig. tit. "Sales," § 82.

**59.** Caswell *v.* Hunton, 87 Me. 277, 32 Atl. 899; Coolidge *v.* Goddard, 77 Me. 578, 1 Atl.

(4) REPRESENTATIONS AS TO QUALITY. Fraudulent misrepresentations by the seller concerning the quality, character, or soundness of the goods are ground for avoiding the contract,[60] provided the circumstances are such that the buyer was entitled to rely on the representations.[61] If the buyer relies on an examination or test made by himself or another, he does not rely on the representation.[62]

(5) REPRESENTATIONS AS TO QUANTITY. A fraudulent misrepresentation by the seller concerning the quantity of the goods sold may be ground for avoiding the contract.[63]

(6) REPRESENTATIONS AS TO TITLE. Although by a contract of sale, the seller impliedly warrants his right to sell the goods,[64] if he fraudulently represents the goods to be his own when they are not, the buyer may avoid the contract upon that ground.[65] He may also do so if the seller makes a fraudulent representation

831; Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108; Belcher *v.* Costello, 122 Mass. 189; Barnsville First Nat. Bank *v.* Yocum, 11 Nebr. 328, 9 N. W. 84.

**60.** *Alabama.*— Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725.

*Colorado.*— Hennessy *v.* Damourette, 15 Colo. App. 354, 62 Pac. 229.

*Georgia.*— Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137.

*Illinois.*— Forbes *v.* Pausinsky, 14 Ill. App. 17.

*Iowa.*— Evans *v.* Palmer, 137 Iowa 425, 114 N. W. 912; McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913.

*Kentucky.*— Scott *v.* Perrin, 4 Bibb 360.

*Louisiana.*— Williams *v.* Miller, 9 La. 129.

*Maine.*— Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593.

*Massachusetts.*— Hazard *v.* Irwin, 18 Pick. 95.

*Michigan.*— Ripley *v.* Case, 78 Mich. 126, 43 N. W. 1097, 18 Am. St. Rep. 428.

*Mississippi.*— Hirschburg Optical Co. *v.* Jackson, 63 Miss. 21.

*New Hampshire.*— Spaulding *v.* Hanscom, 67 N. H. 401, 32 Atl. 154.

*New York.*— Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540; Brown *v.* Tuttle, 66 Barb. 169; Wolf *v.* Michael, 21 Misc. 86, 46 N. Y. Suppl. 991.

*Pennsylvania.*— Pyroleum Appliance Co. *v.* Williamsport Hardware, etc., Co., 169 Pa. St. 440, 32 Atl. 458; Nelson *v.* Martin, 105 Pa. St. 229.

*Tennessee.*— Donelson *v.* Young, Meigs 155.

*Texas.*— Blythe *v.* Speake, 23 Tex. 429. See also Ross-Armstrong Co. *v.* Shaw, (Civ. App. 1905) 113 S. W. 558.

*United States.*— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

*Canada.*— Haggert Mfg. Co. *v.* Pugsley, 26 N. Brunsw. 223.

See 43 Cent. Dig. tit. "Sales," § 79.

**61.** Bierman *v.* City Mills Co., 10 Misc. (N. Y.) 140, 30 N. Y. Suppl. 929 (holding that a manufacturer of garments, who buys cloth to be used in such manufacture, can have no cause of action for alleged misrepresentations as to the wearing quality of the goods, because he should know best what is suitable for his purpose); Bruner *v.* Strong, 61 Tex. 555 (holding that where the seller made representations which he refused to guarantee, the buyer was not justified in relying on them).

**Statement contrary to natural laws.**— Fraud cannot be predicated on a sale of eyeglasses on the representation that a chemical process imparted a quality to the glass that made it fit the eye indefinitely, so that the glasses, once fitted, would always adapt themselves to the eye. H. Hirschberg Optical Co. *v.* Michaelson, 1 Nebr. (Unoff.) 137, 95 N. W. 461.

**62.** *Alabama.*— Brewer *v.* Arantz, 124 Ala. 127, 26 So. 922.

*Indiana.*— Hagee *v.* Grossman, 31 Ind. 223.

*Missouri.*— Morse *v.* Rathburn, 49 Mo. 91.

*New Jersey.*— Norfolk, etc., Hosiery Co. *v.* Arnold, 49 N. J. Eq. 390, 23 Atl. 514, holding that one who, for more than four years, has had the exclusive use of a machine under a contract, and has, all that time, tested it by use, is not in a position where he can be deceived by false representations as to its capacity or efficiency.

*New York.*— Howell *v.* Biddlecom, 62 Barb. 131.

*Pennsylvania.*— Kreamer *v.* Smith, 187 Pa. St. 209, 41 Atl. 43.

*Texas.*— Haley *v.* Manning, 2 Tex. Civ. App. 17, 21 S. W. 711.

See 43 Cent. Dig. tit. "Sales," § 75.

**63.** Ruff *v.* Jarrett, 94 Ill. 475; Lewis *v.* Jewell, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454; Lewis *v.* Muse, 130 Mo. App. 194, 108 S. W. 1107; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379, holding that, although the seller refuses to warrant the number of cattle sold, he may be liable for fraudulent representations as to their number.

**Ordinarily, where the buyer has equal means of forming his own estimation,** representations of quantity are not such as the buyer is entitled to rely upon. Cole *v.* Smith, 26 Colo. 506, 58 Pac. 1086; Brockhaus *v.* Schilling, 52 Mo. App. 73. See also *infra*, II, E, 8, d, (II), (C).

**64.** See *infra*, VII, D, 6, b.

**65.** *Indiana.*—Bales *v.* Weddle, 14 Ind. 349, holding that a false representation by the vendor in an executed contract that he has the goods he professes to sell, whereby the purchaser is induced to make advances, avoids the contract.

*Iowa.*— Hale *v.* Philbrick, 42 Iowa 81.

*New York.*— Sweetman *v.* Prince, 62 Barb. 256 [*reversed* on other grounds in 26 N. Y.

as to the existence of liens or encumbrances on or claims by third persons to the thing sold.[66]

(c) *Representations Where Means of Knowledge Are at Hand.* Many cases lay down the rule broadly that if the means of knowledge are at hand and equally available to both parties, the buyer will not be heard to say that he has been deceived.[67] On the other hand there are cases which hold that a person cannot avoid the effect of his fraudulent misrepresentation on the ground of the credulity or negligence of the injured party, and that the buyer may rely upon a representation of fact, although the means of knowledge are at hand and open to him.[68] All courts agree that if the means of knowledge are not at hand or the buyer has not equal facilities for ascertaining the truth, he may rely on the seller's representations.[69]

224]; Case *v.* Hall, 24 Wend. 102, 35 Am. Rep. 605; Ketletas *v.* Fleet, 7 Johns. 324.

*West Virginia.*— Hyer *v.* Smith, 48 W. Va. 550, 37 S. E. 632.

*United States.*— Simpson *v.* Wiggin, 22 Fed. Cas. No. 12,887, 3 Woodb. & M. 413.

See 43 Cent. Dig. tit. "Sales," § 78.

**A failure to disclose want of title may constitute fraud.** Abbott *v.* Marshall, 48 Me. 44; Sweetman *v.* Prince, 62 Barb. (N. Y.) 256 [*reversed* on other grounds in 26 N. Y. 224].

**66.** Merritt *v.* Robinson, 35 Ark. 483; Halsell *v.* Musgraves, 5 Tex. Civ. App. 476, 24 S. W. 358 (holding that a false representation that a third person no longer claimed title was fraudulent); Stevenson *v.* Marble, 84 Fed. 23.

**67.** *Delaware.*— Journal Printing Co. *v.* Maxwell, 1 Pennew. 511, 43 Atl. 615.

*Indiana.*— Gatling *v.* Newell, 12 Ind. 118.

*Massachusetts.*— Poland *v.* Brownell, 131 Mass. 138, 41 Am. Rep. 215; Brown *v.* Leach, 107 Mass. 364.

*New York.*— Guilfoyle *v.* Pierce, 4 N. Y. App. Div. 612, 38 N. Y. Suppl. 697.

*North Carolina.*— Williamson *v.* Holt, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. N. S. 240.

*Oregon.*— Waymire *v.* Shipley, (1908) 97 Pac. 807.

*Washington.*— Griffith *v.* Strand, 19 Wash. 686, 54 Pac. 613.

*Wisconsin.*— Mamlock *v.* Fairbanks, 46 Wis. 415, 1 N. W. 167, 32 Am. Rep. 716, holding that where the purchaser of a mortgage might have ascertained the truth or falsity of the seller's representations as to the identity and residence of the parties by examination of the mortgage, and is not prevented by artifice, the rule *caveat emptor* will apply.

*United States.*— Slaughter *v.* Gerson, 13 Wall. 379, 20 L. ed. 627; Dalhoff Constr. Co. *v.* Black, 157 Fed. 227, 85 C. C. A. 25, 17 L. R. A. N. S. 419; Anschutz *v.* Miller, 20 Fed. 376.

See 43 Cent. Dig. tit. "Sales," § 75; and CONTRACTS, 9 Cyc. 428.

**Knowledge of buyer.**— Where a purchaser of logs had lived for a long time adjoining the land on which the logs were situated, had gone twice on the land to view them and had ample opportunity to make examination before buying, he could not rescind for false representations as to number and quality. Hulet *v.* Achey, 39 Wash. 91, 80 Pac. 1105.

**68.** *Alabama.*— Burroughs *v.* Pacific Guano Co., 81 Ala. 255, 1 So. 212.

*Iowa.*— Hale *v.* Philbrick, 42 Iowa 81.

*Kentucky.*— Gant *v.* Shelton, 3 B. Mon. 420; Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265.

*Michigan.*— Ripley *v.* Case, 78 Mich. 126, 43 N. W. 1097, 18 Am. St. Rep. 428; Jackson *v.* Collins, 39 Mich. 557.

*Missouri.*— Union Nat. Bank *v.* Hunt, 76 Mo. 439.

*New Hampshire.*— Stewart *v.* Stearns, 63 N. H. 99, 56 Am. Rep. 496.

*North Dakota.*— Fargo Gas, etc., Co. *v.* Fargo Gas, etc., Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593.

*Vermont.*— Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832; Kendall *v.* Wilson, 41 Vt. 567.

*United States.*— Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

*England.*— Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 113, 45 L. T. Rep. N. S. 485, 30 Wkly. Rep. 251.

See 43 Cent. Dig. tit. "Sales," § 75; and CONTRACTS, 9 Cyc. 429.

**A purchaser of a patent right may rely on** the representations of the seller as to what was covered by the patent, although by searching the record of the patent office the buyer might have discovered the fraud. Swinney *v.* Patterson, 25 Nev. 411, 62 Pac. 1.

**69.** *Arkansas.*— Gaty *v.* Holcomb, 44 Ark. 216.

*Illinois.*— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241 [*affirming* 15 Ill. App. 480]; Allen *v.* Hart, 72 Ill. 104; Mayberry *v.* Rogers, 81 Ill. App. 581.

*Indiana.*— Overbay *v.* Lighty, 27 Ind. 27.

*Iowa.*— McDowell *v.* Caldwell, 116 Iowa 475, 89 N. W. 1111; Beebe *v.* Funkhouser, 2 Iowa 314.

*Kentucky.*— Hanks *v.* McKee, 2 Litt. 227, 13 Am. Dec. 265.

*Missouri.*— Cahn *v.* Reid, 18 Mo. App. 115.

*New York.*— Holmes *v.* Bloomingdale, 72 N. Y. App. Div. 627, 76 N. Y. Suppl. 182; Yeomans *v.* Bell, 79 Hun 215, 29 N. Y. Suppl. 502.

(D) *Representations When Warranty Accompanies Contract.* The buyer may avoid the contract for the seller's fraudulent representation notwithstanding the seller warrants the truth of the fact represented,[70] unless the circumstances are such that the buyer must have relied solely upon the warranty for protection.[71]

(III) *FRAUD OF BUYER* [72] — (A) *Failure to Disclose Facts.* In contracts of sale disclosure is not ordinarily incumbent on the buyer, and the mere failure to disclose facts which would enhance the price or other material facts does not constitute fraud.[73] As a rule, to charge the buyer with fraud, there must be active misstatement or such partial statement that the withholding of what is not stated makes that which is stated absolutely false.[74]

(B) *Matter of Fact or of Opinion* — (1) IN GENERAL. A mere statement by

*Pennsylvania.*— Bigler *v.* Flickinger, 55 Pa. St. 279; Scully *v.* Miller, 29 Leg. Int. 230; Bower *v.* Fenn, 7 Wkly. Notes Cas. 431.

*Texas.*— Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

See 43 Cent. Dig. tit. "Sales," § 75; and CONTRACTS, 9 Cyc. 429.

**70.** *Iowa.*— McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913; Raeside *v.* Hamm, 87 Iowa 720, 54 N. W. 1079.

*Louisiana.*— Back *v.* Meeks, 1 La. 309.

*Maine.*— Prentiss *v.* Russ, 16 Me. 30.

*Pennsylvania.*— Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874. And see Maute *v.* Gross, 56 Pa. St. 250, 94 Am. Dec. 62.

*Texas.*— Hubby *v.* Stokes, 22 Tex. 217.

See 43 Cent. Dig. tit. "Sales," § 68.

**Warranty of other matters.**— Of course the buyer's right to avail himself of the seller's fraud is not affected by the fact that the contract is accompanied by warranty of other matters. Huckabee *v.* Albritton, 10 Ala. 657; Beasley *v.* Huzett, etc., Mfg. Co., 92 Ga. 273, 18 S. E. 420; Hanks *v.* McKee, 2 Litt. (Ky.) 227, 13 Am. Dec. 265.

**71.** Reeves *v.* Corning, 51 Fed. 774 (holding that the buyer of a patent right could not rescind the sale on the ground of false representations that the patent was valid and did not interfere with any prior patent, where the contract contained an express warranty to the same effect, and an engagement on the part of the grantor to defend at his own expense all suits for infringement. And see H. W. Williams Transp. Line *v.* Dariuss Cole Transp. Co., 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939.

**72. Criminal liability** for obtaining goods by means of false pretenses see FALSE PRETENSES, 19 Cyc. 384.

**73.** *Illinois.*— Hayner *v.* McIlwain, 53 Ill. App. 652.

*New York.*—Bench *v.* Sheldon, 14 Barb. 66; Farmer *v.* Shannon, 8 N. Y. St. 131.

*Pennsylvania.*— Butler's Appeal, 26 Pa. St. 63; Kintzing *v.* McElrath, 5 Pa. St. 467; Eichelberger *v.* Barnitz, 1 Yeates 307.

*United States.*—Laidlaw *v.* Organ, 2 Wheat. 178, 4 L. ed. 214; Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

*England.*— Fox *v.* Mackreth, 2 Bro. Ch. 400, 29 Eng. Reprint 224; Turner *v.* Harvey, Jac. 170, 4 Eng. Ch. 170, 37 Eng. Reprint 814.

*Compare* Frazer *v.* Gervais, Walk. (Miss.) 72.

See 43 Cent. Dig. tit. "Sales," §§ 86, 92.

**Failure to answer** a question concerning which the buyer has information is not fraud. Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178, 4 L. ed. 214; Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331. But if he answers, he must answer truthfully. Smith *v.* Countryman, 30 N. Y. 655.

**74.** Bench *v.* Sheldon, 14 Barb. (N. Y.) 66, holding that where a seller had lost a flock of sheep, and B heard of them, inquired of the owner if he had found them, and, on being answered that he had not, observed that he "supposed he never would find them," and offered A ten dollars for them, which A accepted, B's conduct was a fraud. See also CONTRACTS, 9 Cyc. 412.

**Innocent misrepresentation by agent.**— Where the purchaser, in New York, knew of an advance in the price of copper in Europe, but his broker, in Boston, was ignorant of the advance, and, on being asked by the seller just before the sale whether there was any advance, replied, "None that I know of," it was held that there was no such concealment as would invalidate the contract. Coddington *v.* Goddard, 16 Gray (Mass.) 436.

**Confidential relations.**— A duty to disclose arises where the buyer stands in a confidential relation to the seller. Smith *v.* Sweeney, 69 Ala. 524 (holding that the relation between the owner of a horse and one who undertakes to train it for pay is one of trust and confidence, and a purchase by the latter without a full disclosure of all facts known by him affecting the speed and value of the horse will authorize a rescission of the sale by the owner); Oliver *v.* Oliver, 118 Ga. 362, 45 S. E. 232; Bowman *v.* Patrick, 36 Fed. 138. But where respondent had been employed by A in care of certain oyster beds, and seven years after he had left the service A became broken in mind, and his wife, taking charge of the business, applied to respondent, telling him that he might have them if he would pay as much as any one else, and he offered two hundred dollars, although he knew that they would easily bring five hundred dollars and that she thought he would offer a fair price, and she at once accepted, it was held that there was not such a confidential relation as to make respondent's conduct fraudulent. Hemingway *v.* Coleman, 49 Conn. 390, 44 Am. Rep. 243. See also Fletcher *v.* Bartlett, 157 Mass. 113, 31 N. E. 760.

the buyer of opinion, belief, or expectation, although unfounded or false, is not as a rule such a false representation as to constitute fraud.[75]

(2) REPRESENTATIONS AS TO VALUE. Statements by the buyer of the value of the thing sold are generally regarded as expressions of opinion.[76] But it is otherwise if the buyer has means of knowledge not open to the seller.[77]

(c) *Representations as to Financial Condition* — (1) IN GENERAL. In a sale upon credit a representation by the buyer as to his solvency and financial condition is material, and if it is knowingly false and induces the sale, it constitutes fraud.[78] A representation of a material fact affecting his financial condition is

**75.** Fish *v.* Cleland, 33 Ill. 238 (chances of sale, or the probability of getting a better price); Downes *v.* Self, 28 Tex. Civ. App. 356, 67 S. W. 897. See also *supra*, II, E, 8, d, (I), (B).

**76.** Bird *v.* Forceman, 62 Ill. 212; Williams *v.* Thomas, 65 Iowa 183, 21 N. W. 509; Burns *v.* Hahannah, 39 Kan. 87, 17 Pac. 319; Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171; Barlow *v.* Wiley, 3 A. K. Marsh. (Ky.) 457. *Compare* Smith *v.* Countryman, 30 N. Y. 655.

**77.** Russell *v.* Peay, 2 Speers (S. C.) 217.

**Knowledge of seller.**— Fraud justifying rescission of a sale of stock on the ground of false representations by the purchaser is not shown where the seller's agent had better knowledge of the condition of the corporation than the buyer. Brinkerhoff *v.* Sartwell, 85 Hun (N. Y.) 557, 33 N. Y. Suppl. 162 [*affirmed* in 35 N. Y. Suppl. 1104].

**Representations of fact** affecting the value may be material. McCormick *v.* Malin, 5 Blackf. (Ind.) 509. *Contra,* Hills *v.* Jacobs, 7 Rob. (La.) 406. A statement of what the buyer has given for similar goods is material. Smith *v.* Countryman, 30 N. Y. 655. This is true of a statement that another is offering the same goods at a certain price. Smith, etc., Co. *v.* Smith, 166 Pa. St. 563, 31 Atl. 343. But a statement of the reason why the buyer wishes to purchase at a low rate is immaterial. Byrd *v.* Rautman, 85 Md. 414, 36 Atl. 1099.

**78.** *Alabama.*—McKenzie *v.* Weineman, 116 Ala. 194, 22 So. 508; McCormick *v.* Joseph, 77 Ala. 236.

*Arkansas.*— W. W. Johnson Co. *v.* Triplett, 66 Ark. 233, 50 S. W. 455; Bugg *v.* Wertheimer-Schwartz Shoe Co., 64 Ark. 12, 40 S. W. 134 [*distinguishing* Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283].

*Colorado.*— Bell *v.* Kaufman, 9 Colo. App. 259, 47 Pac. 1035.

*Connecticut.*— Judd *v.* Weber, 55 Conn. 267, 11 Atl. 40.

*Delaware.*— Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Illinois.*— Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Schweizer *v.* Tracy, 76 Ill. 345; Huthmacher *v.* Lowman, 66 Ill. App. 448; Hacker *v.* Munroe, 61 Ill. App. 420.

*Indiana.*— Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028.

*Iowa.*— Morris *v.* Posner, 111 Iowa 335, 82 N. W. 755; P. Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Reid *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359.

*Kentucky.*— Bradberry *v.* Keas, 5 J. J. Marsh. 446; Field Grocery Co. *v.* Conley, 104 S. W. 372, 31 Ky. L. Rep. 989.

*Michigan.*— Clark *v.* William Munroe Co., 127 Mich. 300, 86 N. W. 816; Arnstine *v.* Treat, 71 Mich. 561, 39 N. W. 749.

*Missouri.*— Beebe *v.* Hatfield, 67 Mo. App. 609; Burnham *v.* Jacobs, 66 Mo. App. 628.

*Nebraska.*— McKinney *v.* Chadron First Nat. Bank, 36 Nebr. 629, 54 N. W. 963; Work *v.* Jacobs, 35 Nebr. 772, 53 N. W. 993; Tootle *v.* Chadron First Nat. Bank, 34 Nebr. 863, 52 N. W. 396.

*New Jersey.*— Candy *v.* Globe Rubber Co., 37 N. J. Eq. 175.

*New York.*— Fitchard *v.* Doheny, 93 N. Y. App. Div. 9, 86 N. Y. Suppl. 964; Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266, 52 N. Y. Suppl. 925; Westcott *v.* Ainsworth, 9 Hun 53; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. 493; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323.

*Pennsylvania.*— Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Ensign *v.* Hoffield, 2 Pa. Cas. 504, 4 Atl. 189; Zeeman *v.* Saleburg, 25 Pa. Super. Ct. 423.

*Tennessee.*— Wertheimer-Swartz Shoe Co. *v.* Faris, (Ch. App. 1898) 46 S. W. 336.

*Texas.*— Hall, etc., Wood-Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715; Morrison *v.* Adoue, 76 Tex. 255, 13 S. W. 166; Avery *v.* Dickson, (Civ. App. 1899) 49 S. W. 662; Abilene Mill, etc., Co. *v.* Finley, (Civ. App. 1896) 34 S. W. 311.

*Vermont.*— Hodgeden *v.* Hubbard, 18 Vt. 504, 46 Am. Dec. 167.

*United States.*— Openhym *v.* Blake, 157 Fed. 536, 87 C. C. A. 122; *In re* Gany, 103 Fed. 930; Johnson *v.* Peck, 13 Fed. Cas. No. 7,404, 1 Woodb. & M. 334.

See 43 Cent. Dig. tit. "Sales," § 95.

**False representations not sufficient to sustain an indictment for false pretenses** may be sufficient to vitiate a contract of sale. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Eastern Lumber Co. *v.* Gill, 9 Pa. Co. Ct. 630.

**Goods shipped C. O. D.**—Where an express agent refused to deliver goods shipped C. O. D. until the price was paid, but on the buyer's representations that his check was as good as gold and that he could pay all his debts in an hour, the agent delivered the goods on receipt of a check payable in fifteen days, at which time the merchant stated funds would be in the bank to meet it, the buyer knowing

sufficient.[79] A representation of solvency is not fraudulent if the buyer had reasonable grounds for believing it true.[80] The representation must be one of fact and not of opinion,[81] and must not relate merely to something promised to be done.[82]

(2) Reliance on Representation. The representation must have been relied on.[83]

(3) Communication of Representation. A seller cannot avoid a contract of sale on the ground of a representation by the buyer as to his financial condition which was not made to the seller or to a third person for the purpose of being communicated to the seller.[84]

he was a bankrupt, it was held that no title to the goods passed, on account of the fraud. American Merchants' Union Express Co. *v.* Willsie, 79 Ill. 92.

**The sale must have been upon credit** in part at least. Wertheimer-Swarts Shoe Co. *v.* Springfield Exch. Bank, 56 Mo. App. 662.

**79.** Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Redpath *v.* Brown, 71 Mich. 258, 39 N. W. 51; Robinson *v.* Walsh, 54 Mich. 506, 20 N. W. 538; Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832.

**Immaterial representation.**— A false representation by a buyer not shown to have been insolvent at the time, although becoming bankrupt two months later, that he had purchased and could purchase goods of a certain firm on four months' credit, thereby obtaining one month's credit from the seller, did not give him the right to rescind. Patton *v.* Campbell, 70 Ill. 72.

**A partial statement,** if misleading, is fraudulent (Tennessee Coal, etc., Co. *v.* Sargent, 2 Ind. App. 458, 28 N. E. 215; Newell *v.* Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562; Collins *v.* Cooley, (N. J. Ch. 1888) 14 Atl. 574; Ensign *v.* Hoffield, 2 Pa. Cas. 504, 4 Atl. 189), but not if it simply omits immaterial details (Luthy *v.* Kline, 56 Ill. App. 314; Standard Horseshoe Co. *v.* O'Brien, 88 Md. 335, 41 Atl. 898; Tootle *v.* Petrie, 8 S. D. 19, 65 N. W. 43).

**80.** Swaim *v.* Humphreys, 15 Ill. App. 451; Wakefield Rattan Co. *v.* Tappan, 70 Hun (N. Y.) 405, 24 N. Y. Suppl. 430 [*affirmed* in 80 Hun 219, 30 N. Y. Suppl. 38]; Wessels *v.* Weiss, 156 Pa. St. 591, 27 Atl. 535. *Contra,* Turner *v.* Ward, 154 U. S. 618, 14 S. Ct. 1179, 23 L. ed. 391, holding that a sale to a firm induced by a false representation, although honestly made, that its assets exceeded three times its liabilities, may be rescinded.

**Amount of indebtedness.**— False representations by a purchaser as to the amount of his indebtedness entitled the seller to recover the goods, as the purchaser was bound to know the truth of such representations, and mere belief in their truth was no excuse. Gallipolis Furniture Co. *v.* Symmes, 19 Ohio Cir. Ct. 659, 10 Ohio Cir. Dec. 514.

**81.** *Iowa.*— Franklin Sugar Refining Co. *v.* Collier, 89 Iowa 69, 56 N. W. 279. See also Blaul *v.* Wandel, 137 Iowa 301, 114 N. W. 899.

*Kansas.*— William B. Grimes Dry Goods Co. *v.* Jordan, 7 Kan. App. 192, 53 Pac. 186.

*Louisiana.*— Yeager Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398.

*New Hampshire.*—Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637.

*Rhode Island.*— White *v.* Fitch, 19 R. I. 687, 36 Atl. 425.

*Wisconsin.*— Fromer *v.* Stanley, 95 Wis. 56, 69 N. W. 820.

See 43 Cent. Dig. tit. "Sales," § 95.

**82.** Tennessee Coal, etc., Co. *v.* Sargent, 2 Ind. App. 458, 28 N. E. 215; Cohn *v.* Broadhead, 51 Nebr. 834, 71 N. W. 747; Fromer *v.* Stanley, 95 Wis. 56, 69 N. W. 820.

**83.** Gregory *v.* Schoenell, 55 Ind. 101.

**If made after the sale** is consummated, it is immaterial. Robinson *v.* Levi, 81 Ala. 134, 1 So. 554; Coffin *v.* Hollister, 5 Silv. Sup. (N. Y.) 172, 7 N. Y. Suppl. 734 [*affirmed* in 124 N. Y. 644, 26 N. E. 812]. If made before the sale is consummated the seller may avoid the contract. Bliss *v.* Sickles, 21 N. Y. Suppl. 273 [*affirmed* in 142 N. Y. 647, 36 N. E. 1064].

**When the buyer makes a statement** which shows his inability to pay his debts in ordinary course, the seller cannot allege fraud. Grossman *v.* Wenham, 10 Ohio Cir. Ct. 348, 6 Ohio Cir. Dec. 563; Tootle *v.* Petrie, 8 S. D. 19, 65 N. W. 43.

**Whether a representation as to solvency** may be regarded as a representation of financial standing at a later date depends upon the circumstances of the particular case. Morris *v.* Talcott, 96 N. Y. 100; Levy *v.* Abramsohn, 39 Misc. (N. Y.) 781, 81 N. Y. Suppl. 344; Howell *v.* Berger, 19 Misc. (N. Y.) 315, 44 N. Y. Suppl. 259; Goldsmith *v.* Stern, 84 N. Y. Suppl. 869; Hotchkins *v.* Martin, 11 N. Y. Suppl. 806; Hotchkin *v.* Malone Third Nat. Bank, 11 N. Y. Suppl. 220; Taylor *v.* Grever, 6 Ohio Cir. Ct. 269, 3 Ohio Cir. Dec. 448.

**84.** Staver, etc., Mfg. Co. *v.* Coe, 49 Ill. App. 426; Van Kleek *v.* Leroy, 4 Abb. Dec. (N. Y.) 479, 4 Transcr. App. 295, 4 Abb. Pr. N. S. 431 [*affirming* 37 Barb. 544]; Bach *v.* Tuch, 10 N. Y. Suppl. 884 [*affirmed* in 126 N. Y. 53, 26 N. E. 1019]; Noyes *v.* Wilson, 7 N. Y. St. 439; Tootle *v.* Petrie, 8 S. D. 19, 65 N. W. 43.

**But if it be made to a third person for the** purpose of being and is communicated to the seller, the effect is the same as if made to him directly. McKenzie *v.* Weineman, 116 Ala. 194, 22 So. 508; Kline *v.* Baker, 106 Mass. 61; Hamilton Brown Shoe Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913; Bliss *v.*

(4) Statements to and Reports by Commercial Agencies — (a) In General. A statement made by the buyer concerning his financial condition to a commercial agency for the purpose of being communicated to its patrons and others applying to it for such information, if communicated to the seller, is a representation on which he may rely.[85] The buyer is not, however, responsible for representations made by the agency based on information not furnished by himself,[86] or for

Sickles, 21 N. Y. Suppl. 273 [*affirmed* in 142 N. Y. 647, 36 N. E. 1064]. So when the buyer obtains credit upon the recommendation of a third person, made at the buyer's request, he must be held responsible for the extent of the recommendation as if he had made it himself. Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46.

**An annual statement of a corporation,** showing its debts, was properly relied on by the seller, notwithstanding the source from which he received the statement. Hamilton Brown Shoe Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913.

**85.** *Connecticut.*— Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547, 48 Atl. 425.

*Georgia.*— Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

*Illinois.*— Moyer *v.* Lederer, 50 Ill. App. 94.

*Indiana.*— Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

*Kentucky.*— Tennent Shoe Co. *v.* Stovall, 78 S. W. 417, 25 Ky. L. Rep. 1615.

*Maryland.*— Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

*Michigan.*— Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790; Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206.

*Minnesota.*— Charles P. Kellogg Co. *v.* Holm, 82 Minn. 416, 85 N. W. 159; Stevens *v.* Ludlum, 46 Minn. 160, 48 N. W. 771, 24 Am. St. Rep. 210, 13 L. R. A. 270.

*Montana.*— John V. Farwell Co. *v.* Boyce, 17 Mont. 83, 42 Pac. 98.

*New York.*— Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822 [*affirming* 57 N. Y. App. Div. 450, 67 N. Y. Suppl. 1017]; Eaton, etc., Co. *v.* Avery, 83 N. Y. 31, 38 Am. Rep. 389; Pier *v.* Doheny, 93 N. Y. App. Div. 1, 86 N. Y. Suppl. 971; Arnold *v.* Richardson, 74 N. Y. App. Div. 581, 77 N. Y. Suppl. 763 (holding that where a positive statement made to an agency turns out to be untrue, in that certain bills payable and receivable were omitted, the honesty of the merchant when he omitted such items, in believing that they were not valid obligations, will not affect the right of one who sold him goods in reliance on such statement to rescind the sale); Converse *v.* Sickles, 17 Misc. 169, 40 N. Y. Suppl. 971. But see Vietor *v.* Henlein, 67 How. Pr. 486.

*Ohio.*— Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

*Pennsylvania.*— Ralph *v.* Fon Dersmith, 10 Pa. Super. Ct. 481, 3 Pa. Super. Ct. 618, 40 Wkly. Notes Cas. 116.

*Tennessee.*— Ernst *v.* Cohn, (Ch. App. 1900) 62 S. W. 186.

*Texas.*— Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; Aultman *v.* Carr, 16 Tex. Civ. App. 430, 42 S. W. 614; Lowdon *v.* Fisk, (Civ. App. 1894) 27 S. W. 180.

*United States.*— *In re* Epstein, 109 Fed. 874; Fechheimer *v.* Baum, 37 Fed. 167.

See 43 Cent. Dig. tit. "Sales," § 96.

**Knowledge and intent.**— A tradesman who knowingly makes false statements to a commercial agency to procure credit is liable to an action for rescission and for damages to one who extends credit on the faith of the statement given out by the commercial agency, and who suffers injury thereby, although the representations were not made to him personally, and although there was no specific intent on the tradesman's part to defraud his creditors by the statements made by him. Mills *v.* Brill, 105 N. Y. App. Div. 389, 94 N. Y. Suppl. 163.

**A statement made to an agency** by a partnership of its assets and liabilities, in which a space for "loans from friends or relatives or any other obligations" is left blank, when each of the partners had borrowed on his note from his wife money which had been put into the firm, is not sufficient evidence of fraud to authorize rescission. Vermont Marble Co. *v.* Smith, 13 Ind. App. 457, 41 N. E. 973.

**Statement not prejudicial.**— A false statement as to the amount of indebtedness is not prejudicial if before the seller received the report from the agency the indebtedness had been reduced below the amount stated. Hamburger *v.* Lusky, (Tenn. Ch. App. 1900) 56 S. W. 24.

**Where, in response to a request** that the buyer give a statement as to his responsibility, the seller was referred to the reports of a mercantile agency, wherein the buyer was greatly overrated, the purchase procured on the faith of said statement may be rescinded as fraudulent. Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707.

**86.** *Iowa.*— P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

*Mississippi.*— Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707.

*Nebraska.*— Cream City Hat Co. *v.* Tollinger, 62 Nebr. 98, 86 N. W. 921; Berkson *v.* Heldman, 58 Nebr. 595, 79 N. W. 162.

*New York.*— Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9.

*Tennessee.*— Dorman *v.* Weakley, (Ch. App. 1896) 39 S. W. 890.

*United States.*— *In re* Roalswick, 110 Fed. 639.

See 43 Cent. Dig. tit. "Sales," § 96.

statements made by the agency to the seller which are not in accordance with the statements made by the buyer.[87]

(b) Duty to Report Changes in Condition. It has been held that one who makes a statement to an agency is not bound to furnish it with a statement of changes in his condition, and that the mere fact that he fails to do so is not fraudulent.[88]

(c) Reliance on Representation. The seller must of course have relied on the agency's representation,[89] and have been justified in so doing,[90] and he is not justified in so doing if an unreasonable time has elapsed.[91]

(d) *Intention Not to Pay* — (1) In General. Although a representation of

**Report based on public statement.**—Fraudulent representations in the statement required by statute to be filed by a corporation to prevent personal liability to its officers for its debts, and which is made the basis of a report by a commercial agency as to the corporation's financial standing, on the faith of which report goods are sold the corporation on credit, entitles the seller to rescind. Silherman *v.* Munroe, 104 Mich. 352, 62 N. W. 555.

87. Wachsmuth *v.* Martini, 154 Ill. 515, 39 N. E. 129; Berkson *v.* Heldman, 58 Nebr. 595, 79 N. W. 162; Poska *v.* Stearns, 56 Nebr. 541, 76 N. W. 1078, 71 Am. St. Rep. 698, 42 L. R. A. 427; Bennett *v.* Apsley Rubber Co., 54 Nebr. 553, 74 N. W. 821; Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618.

88. Burchinell *v.* Hirsh, 5 Colo. App. 500, 39 Pac. 352; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330; Reid *v.* Kempe, 74 Minn. 474, 77 N. W. 413; Strickland *v.* Willis, (Tex. Civ. App. 1897) 43 S. W. 602.

**Insolvency.**— It is his duty to report if he has become insolvent or if his condition has become such that he will be obliged to suspend. Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425. And see Boaz *v.* Coulter Mfg. Co., (Tex. Civ. App. 1897) 40 S. W. 866.

**Failure to report the truth** when he knows that a false rating is being carried on the books of the agency is fraudulent. Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283; P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Lindauer *v.* Hay, 61 Iowa 662, 17 N. W. 98; Frisbee *v.* Chickering, 115 Mich. 185, 73 N. W. 112.

89. Robinson *v.* Levi, 81 Ala. 134, 1 So. 554; Cantor *v.* Claflin, 12 N. Y. Suppl. 759; Manhattan Brass Co. *v.* Reger, 168 Pa. St. 644, 32 Atl. 64; Ernst *v.* Cohn, (Tenn. Ch. App. 1900) 62 S. W. 186.

**Seller put upon inquiry.**— Where a merchant made false statements as to his indebtedness in reports sent to commercial agencies, but with a belief that he could pay for all goods purchased, and in reliance on such reports a wholesale house accepted orders for goods to be shipped on credit, and before all the goods had been shipped, the debtor became in default on payments, and the creditor sent its agent to insist on payment, and to arrange for prompt payment before further shipments were made, but the agent made no inquiry as to the debtor's financial condition, and the creditor refused the debtor's request for a reduction of his orders, and shipped the remainder of the goods on receiving further payments, it was held that it was chargeable with notice of the facts which could have been learned by its agent, and that on the subsequent bankruptcy of the debtor it could not rescind the sale and recover goods thereafter shipped, as having been obtained through fraud. *In re* Epstein, 109 Fed. 874.

**Presumption as to reliance.**— The fact that a seller, after receiving a report from a commercial agency concerning a buyer's financial responsibility, based on statements of the buyer to the agency, received other information affecting the standing of the buyer, raises no presnmption of law that, in afterward shipping the goods, the seller did not rely on the commercial agency's report. Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462, 56 Pac. 1079.

**Statements not made by buyer.**— A sale of goods made on the faith of the entire report of a commercial agency as to the financial standing of the proposed buyer, and not particularly in reliance of a statement made by him to the agency, cannot be rescinded because such statement was false and untrue. Berkson *v.* Heldman, 58 Nebr. 595, 79 N. W. 162.

90. Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330; Cohn *v.* Broadhead, 51 Nebr. 834, 71 N. W. 747.

**Whether such a time has elapsed after a statement** has been made to an agency that the seller is no longer entitled to rely on it depends upon the circumstances of each case. Nicholls *v.* McShane, 16 Colo. App. 165, 64 Pac. 375; Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830. The seller is entitled to rely on a statement for a reasonable time after it has been made. Humphrey *v.* Smith, 7 N. Y. App. Div. 442, 39 N. Y. Suppl. 1055 (four months); Claflin *v.* Flack, 13 N. Y. Suppl. 269 (several months); Schram *v.* Strouse, (Tex. Civ. App. 1894) 28 S. W. 262 (five months); Lowdon *v.* Fisk, (Tex. Civ. App. 1894) 27 S. W. 180 (six months).

**Continuing representation.**—A statement by a corporation to an agency regarding the manner of its organization is a continuing representation. Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238.

91. Sharpless *v.* Gummey, 166 Pa. St. 199, 30 Atl. 1127, two years.

intention ordinarily amounts to a mere promise, yet if a person represents that he has a certain intention when he has not, he makes a misrepresentation of fact.[92] Accordingly it is generally held that one who buys goods on credit impliedly represents that he intends to pay for them, and that if he intends not to pay for them he is guilty of fraud.[93] The intention not to pay must be a preëxisting intention, that is, it must exist at the time of the sale,[94] or contract to

92. See CONTRACTS, 9 Cyc. 418.

93. *Alabama.*— Pelham *v.* Chattahoochee Grocery Co., (1908) 47 So. 172; Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, 129 Ala. 292, 29 So. 781; Maxwell *v.* Brown Shoe Co., 114 Ala. 304, 21 So. 1009; Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Spira *v.* Hornthall, 77 Ala. 137.

*Arkansas.*— Bugg *v.* Wertheimer-Schwartz Shoe Co., 64 Ark. 12, 40 S. W. 134.

*California.*— Stewart *v.* Levy, 36 Cal. 159.

*Connecticut.*— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121; Ford *v.* Atwater, 1 Root 58.

*Delaware.*— Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Georgia.*— Seisel *v.* Wells, 99 Ga. 159, 25 S. E. 266; Johnson *v.* O'Donnell, 75 Ga. 453.

*Illinois.*— Farwell *v.* Hanchett, 120 Ill. 573, 11 N. E. 875, (1886) 9 N. E. 58; Allen *v.* Hartfield, 76 Ill. 358; Patton *v.* Campbell, 70 Ill. 72; Henshaw *v.* Bryant, 5 Ill. 97.

*Indiana.*— Curme *v.* Rank, 100 Ind. 247; Brower *v.* Goodyer, 88 Ind. 572; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383; Tennessee Coal, etc., Co. *v.* Sargent, 2 Ind. App. 458, 28 N. E. 215.

*Iowa.*— P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

*Kentucky.*— Lowry *v.* Hitch, 110 S. W. 833, 33 Ky. L. Rep. 573; Lane *v.* Robinson, 18 B. Mon. 623; Reager *v.* Kendall, 39 S. W. 257, 19 Ky. L. Rep. 27.

*Louisiana.*— Yeager Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398.

*Maine.*— Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

*Maryland.*— Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 180; Powell *v.* Bradlee, 9 Gill & J. 220.

*Massachusetts.*— Dow *v.* Sanborn, 3 Allen 181; Wiggin *v.* Day, 9 Gray 97.

*Michigan.*— Frisbee *v.* Chickering, 115 Mich. 185, 73 N. W. 112; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419, 47 N. W. 330; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60; Shipman *v.* Seymour, 40 Mich. 274.

*Minnesota.*— Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

*Missouri.*— Fox *v.* Webster, 46 Mo. 181; Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339; Wingate *v.* Buhler, 62 Mo. App. 418; Elsass *v.* Harrington, 28 Mo. App. 300.

*New Hampshire.*— Stewart *v.* Emerson, 52 N. H. 301.

*New York.*— Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Byrd *v.* Hall, 1 Abb. Dec. 285; Swarthout *v.* Merchant, 47 Hun 106; King *v.* Phillips, 8 Bosw. 603; Johnson *v.* Carley, 53 How. Pr. 326; Durell *v.* Haley, 1 Paige 492.

*North Carolina.*— Des Farges *v.* Pugh, 93 N. C. 31, 53 Am. Rep. 446.

*Ohio.*— Wilmot *v.* Lyon, 49 Ohio St. 296, 34 N. E. 720; Talcott *v.* Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Kraft *v.* Dulles, 2 Cinc. Super. Ct. 116.

*Pennsylvania.*—A mere intention not to pay, even accompanied by insolvency, is not enough. There must be some artifice, trick, or conduct which involves a false representation. Bughman *v.* Central Bank, 159 Pa. St. 94, 28 Atl. 209; Rodman *v.* Thalheimer, 75 Pa. St. 232; Harner *v.* Fisher, 58 Pa. St. 453; Backentoss *v.* Speicher, 31 Pa. St. 324; Smith *v.* Smith, 21 Pa. St. 367, 60 Am. Dec. 51; Pottinger *v.* Hecksher, 2 Grant 309; Reed *v.* Felmlee, 25 Pa. Super. Ct. 37; Diller *v.* Nelson, 10 Pa. Super. Ct. 449; Claster *v.* Katz, 6 Pa. Super. Ct. 487; Davis *v.* Cosel, 4 Pa. Super. Ct. 519; Paul *v.* Eurich, 3 Pa. Super. Ct. 299.

*Tennessee.*— Belding *v.* Frankland, 8 Lea 67, 4 Am. Rep. 630; Wertheimer-Swartz Shoe Co. *v.* Faris, (Ch. App. 1898) 46 S. W. 336.

*Texas.*—Avery *v.* Dickson, (Civ. App. 1899) 49 S. W. 662; Williams *v.* Kohn, (Civ. App. 1894) 28 S. W. 920; Blum *v.* Jones, (Civ. App. 1893) 23 S. W. 844.

*Washington.*— Goodyear Rubber Co. *v.* Schreiber, 29 Wash. 94, 69 Pac. 648.

*Wisconsin.*— Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

*United States.*— Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Fechheimer *v.* Baum, 37 Fed. 167; Jaffrey *v.* Brown, 29 Fed. 476; Carnahan *v.* Bailey, 28 Fed. 519; Parker *v.* Byrnes, 18 Fed. Cas. No. 10,728, 1 Lowell 539.

*England.*— *Ex p.* Whittaker, L. R. 10 Ch. 446, 44 L. J. Bankr. 91, 32 L. T. Rep. N. S. 443, 23 Wkly. Rep. 555; Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139; Load *v.* Green, 10 Jur. 163, 15 L. J. Exch. 113, 15 M. & W. 216. And see Bristol *v.* Wilsmore, 1 B. & C. 514, 2 D. & R. 755, 1 L. J. K. B. O. S. 178, 25 Rev. Rep. 488, 8 E. C. L. 218.

See 43 Cent. Dig. tit. "Sales," § 93.

**If the sale is made on condition as to payment,** the condition not being performed, the intent of the purchaser to pay or not is immaterial, where no fraud is imputed to him, and he testifies that he had no intention of taking the goods. Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449.

94. John V. Farwell Co. *v.* Linn, 59 Ill. App. 245; Hanchett *v.* Mansfield, 16 Ill. App. 407; Starr *v.* Stevenson, 91 Iowa 684, 60

sell,[95] and must be an intention, not merely not to pay when the price falls due, or according to agreement, but not to pay at all.[96]

(2) Concealment of Insolvency or Inability to Pay. According to the prevailing rule, the fact that the buyer knows that he is insolvent and fails to disclose his insolvency to the seller does not constitute fraud, if he does not buy intending not to pay.[97] Some cases even go so far as to hold that it is not enough

N. W. 217; American Exp. Co. *v.* Smith, 57 Iowa 242, 10 N. W. 655; Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637; Leedom *v.* Mayer, 114 Wis. 267, 90 N. W. 169. See also Ayers *v.* Farwell, 196 Mass. 349, 82 N. E. 35.

**Intent when contract becomes complete.**— Where goods are ordered, but the contract is not complete until delivery, an intention not to pay, formed when the goods are received, avoids the sale. Whitten *v.* Fitzwater, 129 N. Y. 626, 29 N. E. 298 [*reversing* 11 N. Y. Suppl. 297]. On an executory sale, void by the statute of frauds, the intervening insolvency of the purchaser, and the intent not to pay for the goods, such intent being formed at the time they are received and accepted by the purchaser, avoids the sale. Pike *v.* Wieting, 49 Barb. (N. Y.) 314.

**When the sale becomes complete** on shipment of the goods, an intention afterward formed is insufficient. Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; Brooks *v.* Geo. H. Friend Paper Co., 94 Tenn. 701, 31 S. W. 160.

**95.** Foerster *v.* Gallinger, 62 Hun (N. Y.) 439, 17 N. Y. Suppl. 144.

**96.** Armstrong *v.* Lewis, 38 Ill. App. 164; Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366; Bidault *v.* Wales. 20 Mo. 546, 64 Am. Dec. 205; Beebe *v.* Hatfield, 67 Mo. App. 609; Strickland *v.* Willis, (Tex. Civ. App. 1897) 43 S. W. 602.

**An intention not to pay** is enough. Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

**In Alabama** it seems that the intention must be accompanied by insolvency. Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Maxwell *v.* Brown Shoe Co., 114 Ala. 304, 21 So. 1009; Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693; Cohn *v.* Stringfellow, 100 Ala. 242, 14 So. 286; Johnson *v.* Bent, 93 Ala. 160, 9 So. 581; Darby *v.* Kroell, 92 Ala. 607, 8 So. 384; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Kyle *v.* Ward, 81 Ala. 120, 1 So. 468; Hornthall *v.* Schonfeld, 79 Ala. 107; McCormick *v.* Joseph, 77 Ala. 236; Spira *v.* Hornthall, 77 Ala. 137; Loeb *v.* Flash, 65 Ala. 526.

**97.** *Arkansas.*— Gavin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262.

*California.*— Bell *v.* Ellis, 33 Cal. 620. But see Seligman *v.* Kalkman, 8 Cal. 207.

*Delaware.*— Mears *v.* Waples, 3 Houst. 581.

*District of Columbia.*—Morrison *v.* Shuster, 1 Mackey 190.

*Georgia.*— Fulton *v.* Gibian, 98 Ga. 224, 25 S. E. 431.

*Illinois.*— Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024; Hacker *v.* Munroe, 56 Ill. App. 532; Morris *v.* Reticker, 27 Ill. App. 601. But see Henshaw *v.* Bryant, 5 Ill. 97.

*Indiana.*— Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506. But see Brower *v.* Goodyer, 88 Ind. 572; Levi *v.* Bray, 12 Ind. App. 9, 39 N. E. 754.

*Kansas.*— Kelsey *v.* Harrison, 29 Kan. 143.

*Maine.*— Cross *v.* Peters, 1 Me. 376, 10 Am. Dec. 78.

*Maryland.*— Edelhoff *v.* Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314.

*Michigan.*— Shipman *v.* Seymour, 40 Mich. 274.

*Minnesota.*— Sprague *v.* Kempe, 74 Minn. 465, 77 N. W. 412.

*Missouri.*— Stein *v.* Hill, 100 Mo. App. 38, 71 S. W. 1107.

*Nevada.*— Klopenstein *v.* Mulcahy, 4 Nev. 296.

*New York.*— Sinnott *v.* German-American Bank, 164 N. Y. 386, 58 N. E. 286 (holding that the fact that the buyer's entire capital had been secured by obtaining the discounting of forged notes was not inconsistent with an intention to pay for the goods); Hennequin *v.* Naylor, 24 N. Y. 139; Harrisburg Pipe-Bending Co. *v.* Welsh, 26 N. Y. App. Div. 515, 50 N. Y. Suppl. 299; Pinckney *v.* Darling, 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411; Fish *v.* Payne, 7 Hun 586; Buckley *v.* Artcher, 21 Barb. 585; Mitchell *v.* Worden, 20 Barb. 253; King *v.* Phillips, 8 Bosw. 603; Hall *v.* Naylor, 6 Duer 71 [*reversed* on other grounds in 18 N. Y. 588, 75 Am. Dec. 269]; Coffin *v.* Hollister, 7 N. Y. Suppl. 734. But see Johnson *v.* Monell, 2 Abb. Dec. 470, 2 Keyes 655.

*Ohio.*— Wachtel *v.* Reichel, 19 Ohio Cir. Ct. 626, 10 Ohio Cir. Dec. 531; Kaminer *v.* Wolf, 13 Ohio Cir. Ct. 612, 6 Ohio Cir. Dec. 295; Pike *v.* Equitable Nat. Bank, 2 Ohio S. & C. Pl. Dec. 283, 1 Ohio N. P. 323.

*Pennsylvania.*— Shirk *v.* Konigmacher, 3 Pa. Super. Ct. 45.

*Rhode Island.*—Dalton *v.* Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905.

*Tennessee.*— Rome Furniture, etc., Co. *v.* Walling, (Ch. App. 1900) 58 S. W. 1094.

*Texas.*— Strickland *v.* Willis, (Civ. App. 1897) 43 S. W. 602.

*Wisconsin.*— Consolidated Milling Co. *v.* Fogo, 104 Wis. 92, 80 N. W. 103; David Adler, etc., Clothing Co. *v.* Thorp, 102 Wis. 70, 78 N. W. 184.

*United States.*— Carnahan *v.* Bailey, 28 Fed. 519.

See 43 Cent. Dig. tit. "Sales," § 94; and Contracts, 9 Cyc. 413 note 75.

**Mistake as to solvency of buyer.**— A sale

to constitute fraud that the buyer has no reasonable expectation of being able to pay;[98] but in other cases it has been said that if he has no reasonable expectation of being able to pay, this is equivalent to an intention not to pay.[99]

(E) *Purchase With Intent to Set Off Debt.* On a sale upon credit the mere fact that the buyer intends to set off a debt against the price does not constitute fraud.[1]

(F) *Representation as to Securities Given in Payment.* Where by the terms of sale a note or other security is to be given in payment of the price, a representation by the buyer concerning the solvency of the maker made with knowledge of its falsity constitutes fraud.[2]

(G) *Representation as to Terms Agreed to by Agent.* Where the seller's salesman agrees to a cash sale, and the buyer obtains the goods by representing that the salesman agreed to a sale on credit, it has been held that the representation constitutes fraud entitling the seller to rescind.[3]

(H) *Delivery of Possession Induced by Fraud.* A sale is to be distinguished from a delivery of possession induced by fraud. Where the owner, not intending

cannot be set aside on the ground that the parties were under a mistake as to the ability of the buyer to pay, he being in fact insolvent. Lupin *v.* Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256.

**Mere insolvency** raises no presumption of fraud (Wabash, etc., R. Co. *v.* Shryock, 9 Ill. App. 323; Ross *v.* Miner, 101 Mich. 1, 59 N. W. 425; Stein *v.* Hill, 100 Mo. App. 38, 71 S. W. 1107; Pinckney *v.* Darling, 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411 [*affirmed* in 158 N. Y. 728, 53 N. E. 1130]; Talcott *v.* Salke, 9 Daly (N. Y.) 154) unless accompanied by artifice, trick, or false pretense (North American Smelting Co. *v.* Temple, 12 Pa. Super. Ct. 90; Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618, 40 Wkly. Notes Cas. 116).

98. *Colorado.*— Burchinell *v.* Hirsh, 5 Colo. App. 500, 39 Pac. 352.

*Missouri.*— Manheimer *v.* Harrington, 20 Mo. App. 297.

*New Hampshire.*— Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637.

*Tennessee.*— Dorman *v.* Weakley, (Ch. App. 1896) 39 S. W. 890.

*Vermont.*— Redington *v.* Roberts, 25 Vt. 686.

*United States.*— Biggs *v.* Barry, 3 Fed. Cas. No. 1,402, 2 Curt. 259.

See 43 Cent. Dig. tit. "Sales," § 94.

99. *Alabama.*— Pelham *v.* Chattahoochee Grocery Co., (1908) 47 So. 172; McKensie *v.* Rothschild, 119 Ala. 419, 24 So. 716; Maxwell *v.* Brown Shoe Co., 114 Ala. 304, 21 So. 1009.

*Maryland.*— Edelhoff *v.* Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314; Powell *v.* Bradlee, 9 Gill & J. 220.

*Minnesota.*— Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

*Missouri.*— Reid *v.* Lloyd, 52 Mo. App. 278; Elsass *v.* Harrington, 28 Mo. App. 300.

*New York.*— Whitten *v.* Fitzwater, 129 N. Y. 626, 29 N. E. 298; Schufeldt *v.* Schnitzler, 21 Hun 462; Bach *v.* Tuch, 10 N. Y. Suppl. 884 [*affirmed* in 126 N. Y. 53, 26 N. E. 1019]; Stallcup *v.* National Park Bank, 6 N. Y. St. 512.

*Ohio.*— Wilmot *v.* Lyon, 49 Ohio St. 296, 34 N. E. 720; Talcott *v.* Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394; Pike *v.* Equitable Nat. Bank, 2 Ohio S. & C. Pl. Dec. 283, 1 Ohio N. P. 323.

*Pennsylvania.*— Perlman *v.* Sartorius, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. Rep. 834, under law of Maryland.

*Rhode Island.*— Mulliken *v.* Millar, 12 R. I. 296.

*Texas.*— Boaz *v.* Coulter Mfg. Co., (Civ. App. 1897) 40 S. W. 866.

*United States.*— Jaffrey *v.* Brown, 29 Fed. 476; Davis *v.* Stewart, 8 Fed. 803, 3 McCrary 174.

See 43 Cent. Dig. tit. "Sales," § 94.

**Permitting false statements to remain** on the books of a commercial agency is evidence of an intent not to pay. Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283; Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98.

1. Royal Remedy, etc., Co. *v.* Gregory Grocer Co., 90 Mo. App. 53.

**But it is otherwise** if the buyer with such intent obtains possession of the goods by independent fraud. Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566; Harner *v.* Fisher, 58 Pa. St. 453.

2. Stanley *v.* Irwin, 34 Iowa 418; Moline-Milburn Co. *v.* Franklin, 37 Minn. 137, 33 N W. 323 (holding that it is no defense that there are solvent indorsers); Watson *v.* Picket, 2 Mill (S. C.) 222.

**Fraudulent concealment.**— Where the purchaser gave a note of an irresponsible person, knowing that the vendor supposed that it was signed by a wealthy individual of the same name, his silence was a fraud. Parrish *v.* Thurston, 87 Ind. 437.

**Payment by forged check** as a fraud on seller see Brice *v.* Boyd, (Ky. 1897) 39 S. W. 821.

**Fraud cannot be predicated** upon a mere expression of opinion as to the maker's solvency. Homer *v.* Perkins, 124 Mass. 431, 26 Am. Rep. 677.

3. Rauh *v.* Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42.

a sale, is induced by the false representations of another to deliver to him the possession of goods, there is no sale, because there is no agreement, and the owner may reclaim the goods.[4]

**e. Undue Influence.** Equity has jurisdiction to set aside a contract of sale where the assent of one of the parties thereto was procured by undue influence.[5]

**9. Evidence — a. In General.** Whether there has been a completed contract of sale may be shown by proof of charges on the books of the seller and delivery of the goods,[6] and by evidence of the circumstances surrounding the transaction and the acts of the parties in relation thereto.[7]

**b. Fraud of Seller.** The burden is on the party alleging fraud to show not only the fraud,[8] but the seller's knowledge of the falsity of the statements,[9] and that he relied on them.[10] The fraud may be shown by the circumstances attending

4. Butler *v.* Collins, 12 Cal. 457; Kinsey *v.* Leggett, 71 N. Y. 387.

**So where a person obtains goods by fraudulently impersonating a third person,** or by pretending to be the agent of a third person, to whom the owner supposes he is selling the goods, there is no mutual assent and no sale. See *supra*, II, E, 8, b, (II).

5. Rumph *v.* Abercrombie, 12 Ala. 64; Marmion *v.* McClellan, 11 App. Cas. (D. C.) 467; Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760; Parris *v.* Cobb, 5 Rich. Eq. (S. C.) 450. See also Contracts, 9 Cyc. 454.

6. Wight *v.* Stiles, 29 Me. 164; Stubbings *v.* Dockery, 80 Wis. 618, 50 N. W. 775; McCoul *v.* Lekamp, 2 Wheat. (U. S.) 111, 4 L. ed. 197. But see Ridgway *v.* Bell, 1 Phila. (Pa.) 117.

7. *Colorado.*— Bunte *v.* Wilson, 8 Colo. App. 136, 45 Pac. 232.

*Missouri.*— Oliver *v.* Love, 104 Mo. App. 73, 78 S. W. 335.

*North Carolina.*— Henry *v.* Patrick, 18 N. C. 358.

*North Dakota.*— Ulmer *v.* McDonnell, 11 N. D. 391, 92 N. W. 482.

*Wisconsin.*— Packard *v.* Backus, 78 Wis. 188, 47 N. W. 183.

See 43 Cent. Dig. tit. "Sales," § 124.

**Acts not connected with the transaction** cannot be shown to prove an alleged sale. Lyon *v.* Kidder, 48 Vt. 42.

**Attempt to resell.**— Evidence of an attempt to resell was not inconsistent with plaintiffs' claim of a sale to defendants. Gibbon *v.* Highes, 76 Wis. 409, 45 N. W. 538.

**Custom and usage.**— Testimony as to the custom of brokers when making a sale to deliver to each party a memorandum and that neither party receives any writing from the other is not admissible to prove the contract. Goddard *v.* Garner, 109 Ala. 98, 19 So. 513.

**The suitability of the goods** to the needs of the alleged purchaser is a fact to be considered in determining whether the parties came to an agreement. Shrimpton *v.* Brice, 102 Ala. 655, 15 So. 452; Upton *v.* Winchester, 106 Mass. 330.

**Where the point in issue** is whether the machine was sold or taken on trial, and the machine has been shown to be in defendant's possession, it is not error to admit testimony to the effect that plaintiff's agent had requested defendant, after he refused to keep the machine, to place it under cover on his place until the agent could see his principal. Lyon *v.* Hayden, 58 Vt. 662, 5 Atl. 892.

**The sufficiency of the evidence** was considered in Shrimpton *v.* Brice, 102 Ala. 655, 15 So. 452; Fremont Cultivator Co. *v.* McCamy, 80 Ga. 343, 4 S. E. 849; Lydig *v.* Braman, 117 Mass. 212, 58 N. E. 696; James Curran Mfg. Co. *v.* Aultman, etc., Mach. Co., 62 N. Y. App. Div. 201, 70 N. Y. Suppl. 1074 [*affirmed* in 172 N. Y. 623, 65 N. E. 1118]; Saunders *v.* Greever, 85 Va. 252, 7 S. E. 391.

8. Beninger *v.* Corwin, 24 N. J. L. 257; Hotchkin *v.* Martin, 11 N. Y. Suppl. 806; Hotchkin *v.* Malone Third Nat. Bank, 11 N. Y. Suppl. 220.

9. Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

**Knowledge of seller** may be shown by evidence as to statements made to him by a third person. Dowling *v.* Lawrence, 58 Wis. 282, 16 N. W. 552. Where defendant sold property with full warranty, which he had previously purchased without any warranty, the fact of the exclusion of warranty in the act of sale from his vendor was not *per se* evidence of knowledge of the existence of a defect, and of the fraudulent concealment of it, on his part, at the date of the sale to plaintiff. Belknap *v.* Kendig, 15 La. Ann. 203.

**Intent of seller.**— Where testimony is introduced by a defendant tending to prove false representations by the seller it is competent for him, to repel the presumption of fraud, to show that he informed the purchaser after the sale of an error in his representations, and offered to take back the property, which offer the purchaser rejected. Bush *v.* Bradford, 15 Ala. 317. Where the seller denied making the representations charged, the court properly refused to permit him to testify that he did not intend to deceive or defraud the purchaser since such statement could not strengthen his evidence. Baldwain *v.* Marsh, 6 Ind. App. 533, 33 N. E. 973.

10. Caruthers *v.* Cherry, (Tex. App. 1890) 16 S. W. 867. But see Fishback *v.* Miller, 15 Nev. 428, holding that where representations made by a seller are shown to be material and false, it is for him to show that

the sale.[11] To prove fraud as a defense generally the same facts must be shown as would be necessary in an action for deceit,[12] and the evidence must be strong and convincing.[13]

**c. Fraud of Buyer** — (i) *ADMISSIBILITY.* For the purpose of showing fraud on the part of the buyer evidence as to the circumstances attending the transaction,[14] his eagerness for credit, and that he was purchasing widely is admissible.[15] The fact that the buyer gave mortgages covering the goods and other property [16] and committed other acts of insolvency [17] may be shown as tending

the buyer did not rely on them, and that without them the purchase would have been made.

**Knowledge of buyer.**— The fact that the purchaser paid what would be an inadequate price if the animal purchased was sound is a circumstance to be considered in determining whether he was advised of the latent unsoundness of the animal, if there was any. Armstrong *v.* Huffstutler, 19 Ala. 51. The vendee of a slave, sold as a runaway and drunkard, cannot urge that the vendor, in prior conversations, informed him that the habit of running away was only a qualified one. Bayon *v.* Towles, 5 Mart. N. S. (La.) 1.

**11.** *Delaware.*—Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Kentucky.*— Pioneer Granite Co. *v.* Reidy, 83 S. W. 571, 26 Ky. L. Rep. 1196.

*Massachusetts.*— Way *v.* Ryther, 165 Mass. 226, 42 N. E. 1128.

*Nebraska.*— Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

*Pennsylvania.*— Rees *v.* Jackson, 64 Pa. St. 486, 3 Am. Rep. 608.

See 43 Cent. Dig. tit. "Sales," § 129.

**Price.**—As tending to show fraud in representations as to quality it may be shown that the price named in the order was above current prices. Hirschberg Optical Co. *v.* Dalton, Nye, etc., Co., 7 Utah 433, 27 Pac. 83.

**That the goods were unsuitable** for the vendee's purposes does not, in the absence of knowledge on the part of the vendor and representations to the contrary, show fraud. Beck, etc., Lith. Co. *v.* Houppert, 104 Ala. 503, 16 So. 522, 53 Am. St. Rep. 77.

**Time of making representations.**— Representations as to the quality of goods or chattels made a month before the contract of sale are too remote to be given in evidence. Bryant *v.* Crosby, 40 Me. 9. And as representations as to value refer to the time of the sale, evidence as to value long after the sale is inadmissible to show fraud. Gatling *v.* Newell, 12 Ind. 118; Irvine *v.* Grady, 85 Tex. 120, 19 S. W. 1028.

**12.** Wilder *v.* De Cou, 18 Minn. 470.

**13.** Walton *v.* Jordan, 23 Ga. 420; Greene *v.* Société Anonyme, etc., 81 Fed. 64.

**The evidence was considered insufficient** to show: Fraud as to the price in Fletcher *v.* Witlow, 72 Ark. 234, 79 S. W. 773. Knowledge of defects in Bunnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678. A conspiracy to defraud in Steinhauser *v.* Mason, 19 N. Y. Suppl. 228 [*affirmed* in 138 N. Y. 621, 33 N. E. 1083]. That the execution of the contract was procured by fraud in Oxford *v.* Nichols, etc., Co., 57 Minn. 206, 58 N. W. 865; Aultman *v.* Hacker, 14 N. Y. Suppl. 744; Deering *v.* Hoeft, 111 Wis. 339, 87 N. W. 298. Fraud generally in Schramm *v.* Boston Sugar Refining Co., 146 Mass. 211, 15 N. E. 571; Gans *v.* Wormser, 73 N. Y. App. Div. 623, 76 N. Y. Suppl. 874.

**The evidence was considered sufficient** to show fraud in Pioneer Granite Co. *v.* Reidy, 83 S. W. 571, 26 Ky. L. Rep. 1196; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810.

**14.** Skinner *v.* Flint, 105 Mass. 528; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60; Van Kleck *v.* Leroy, 4 Abb. Dec. (N. Y.) 479, 4 Transcr. App. 295, 4 Abb. Pr. N. S. 431; Leedom *v.* Earls Furniture, etc., Co., 12 Utah 172, 42 Pac. 208.

**Evidence that the goods were received a month before the buyer stopped business,** and were immediately shipped by him to the east, and that such goods could not, under such circumstances, be sold at a profit, is admissible to show fraudulent intent. Kline *v.* Baker, 106 Mass. 61.

**15.** Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421; Meyerhoff *v.* Daniels, 173 Pa. St. 555, 34 Atl. 298, 51 Am. St. Rep. 782.

**Evidence of the amount of stock carried by other merchants** in the same village is not admissible to prove that the debtor's stock was not unreasonably large. Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832. Testimony to the effect that the buyer was asked to purchase goods from other merchants after his purchase from plaintiffs is properly excluded as having no bearing on the intent with which he purchased plaintiff's goods. Hahlo *v.* Grant, 10 N. Y. Suppl. 188 [*affirmed* in 132 N. Y. 593, 30 N. E. 1151].

**16.** Brock *v.* Garson, 117 Mich. 550, 76 N. W. 111; Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

**17.** Deere *v.* Morgan, 114 Iowa 287, 86 N. W. 271; Cooper Mfg. Co. *v.* De Forest, 5 N. Y. App. Div. 43, 38 N. Y. Suppl. 1038; Hersey *v.* Benedict, 15 Hun (N. Y.) 282; Gobrecht *v.* McDonald, 8 Ohio S. & C. Pl. 526, 5 Ohio N. P. 427. But evidence to explain such acts is admissible. Stearn *v.* Clifford, 62 Vt. 92, 18 Atl. 1045. And see Hosmer *v.* Oddham, 122 Mass. 551; Haskins *v.* Warren, 115 Mass. 514, where it was held that it must appear that there was no change in the purchaser's financial condition between the sale and the insolvency proceedings.

to prove fraud.[18] The financial condition of the buyer at the time of the sale,[19] and his knowledge thereof,[20] may be shown. So too evidence of other contemporaneous acts of fraud is admissible as showing the intent of the buyer.[21]

(II) *SUFFICIENCY.* It is not necessary that the proof of fraud should resist any other conclusion, but it is sufficient if on the whole it agrees with and supports the hypothesis which it is adduced to prove.[22] Disposal of the goods within a

**18.** That a purchaser of goods on credit did not misapply the same or the avails but continued his business as usual is evidence that he did not purchase with intent to defraud the seller. Fenno *v.* Hannan, 2 N. Y. Suppl. 474.

**19.** *Maryland.*— Peters *v.* Hilles, 48 Md. 506.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514.

*Michigan.*— Arnstine *v.* Treat, 71 Mich. 561, 39 N. W. 749; Shipman *v.* Seymour, 40 Mich. 274.

*New Hampshire.*—Cole *v.* Putnam, 62 N. H. 616.

*New York.*— Schmidt *v.* Schanzlin, 53 N. Y. Super. Ct. 498; King *v.* Jacobson, 12 N. Y. Suppl. 584; Stallcup *v.* National Park Bank, 6 N. Y. St. 512.

*Pennsylvania.*— Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093.

*Vermont.*— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

See 43 Cent. Dig. tit. "Sales," § 134.

**Statements to commercial agencies.**—Where the purchaser denies that he made representations as to his solvency, as charged, it may be shown that at about the same time he made statements to commercial agencies as to his financial standing. Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. 867. Where it is contended that the credit was given on the faith of two commercial agency reports and a false statement by the buyer formed part of one of them, it is error to admit one and exclude the other, the omitted report being material in determining whether the false statement induced the credit. Cook *v.* Harrington, 31 Mo. App. 199. It was not error to admit in evidence old commercial reports for the purpose of showing that a large indebtedness of defendant had always been omitted in his statements, in connection with evidence that in the later reports he had stated that there was no change in the financial condition of his firm. John V. Farwell Co. *v.* Boyce, 17 Mont. 83, 42 Pac. 98. And see King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432, when the statements were made directly to the seller.

**20.** Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146, 59 N. W. 395.

**The purchaser may show that a large portion of his debts were held by personal friends,** that none of his creditors were pressing him, and that other friends had promised to loan him money, as facts tending to rebut the presumption of fraud. Schufeldt *v.* Schnitzler, 21 Hun (N. Y.) 462.

**21.** *Iowa.*— Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

*Maine.*— Hawes *v.* Dingley, 17 Me. 341.

*Massachusetts.*— Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

*Michigan.*— Ross *v.* Miner, 64 Mich. 204, 31 N. W. 185; Shipman *v.* Seymour, 40 Mich. 274.

*Missouri.*— Elsass *v.* Harrington, 28 Mo. App. 300; Manheimer *v.* Harrington, 20 Mo. App. 297.

*New Hampshire.*— Bradley *v.* Obear, 10 N. H. 477.

*New York.*— Bliss *v.* Sickles, 21 N. Y. Suppl. 273 [*affirmed* in 142 N. Y. 647, 36 N. E. 1064]; Hedges *v.* Payne, 17 N. Y. Suppl. 809. *Compare* Murfey *v.* Brice, 23 Barb. 561.

*Pennsylvania.*— Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69.

*Tennessee.*— Katzenberger *v.* Leedom, 103 Tenn. 144, 52 S. W. 35.

*Vermont.*— Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832.

See 43 Cent. Dig. tit. "Sales," § 132.

**Laying foundation.**— Evidence that the purchaser, about the time of the sale, made false representations as to its financial condition to a third person, is not admissible where no evidence of fraud in the sale has been offered. Wheeler, etc., Mfg. Co. *v.* Keeler, 65 Hun (N. Y.) 508, 20 N. Y. Suppl. 388. In an action against an alleged fraudulent subpurchaser from plaintiff's vendee, evidence that his vendee had purchased other goods on credit from another person about two weeks prior to the sale to the subpurchaser, without an offer to prove also that the vendee had not paid for such goods, is inadmissible. New York, etc., Cigar Co. *v.* Bernheim, 81 Ala. 138, 1 So. 470.

**22.** *California.*— Seligman *v.* Kalkman, 8 Cal. 207.

*Massachusetts.*— Light *v.* Jacobs, 183 Mass. 206, 66 N. E. 799.

*Michigan.*— Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146, 59 N. W. 395.

*New York.*— Fay *v.* Grant, 53 Hun 44, 5 N. Y. Suppl. 910 [*affirmed* in 126 N. Y. 624, 27 N. E. 410]; King *v.* Phillips, 8 Bosw. 603.

*Pennsylvania.*— Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33. And see Brown *v.* Mentzer, 209 Pa. St. 477, 58 Atl. 863, where the evidence was regarded as insufficient.

See 43 Cent. Dig. tit. "Sales," § 141.

**No stronger proof is necessary** to show fraud in a sale than in other cases. Kline *v.* Baker, 106 Mass. 61.

**Fraud is not established** where defendant stated that he had opened a store, and had as partner his cousin, that they had bought from the sheriff a place and wanted to start a business with the goods, although it appeared that defendant and his partner had

short time after the purchase at a price below cost,[23] or insolvency within a short time after the purchase, no change of circumstances intervening,[24] is sufficient; and insolvency is shown by proof of inability to pay, an overt act of insolvency not being requisite.[25]

**10. Questions For Jury — a. In General.** Whether there is, in view of all the circumstances, a completed sale is a question for the jury.[26]

**b. Fraud of Seller.** Whether the representations made were matters of opinion or of fact,[27] or whether they were made fraudulently,[28] or facts were fraudulently concealed,[29] is for the jury; but whether the false statement was material is a question of law for the court.[30]

**c. Fraud of Buyer.** Generally it is for the jury to determine whether from all the circumstances the transaction was fraudulent on the part of the purchaser.[31]

**F. Form of Contract — 1. In General.** Aside from the provisions of the

not actually purchased the store, but a cousin had bought it at sheriff's sale, and had informed defendant that he had bought it for him, and had actually installed him therein, and that before the letter was written one of plaintiffs informed defendant he could have all the goods he wanted. Sadallah *v.* Mandour, 94 N. Y. Suppl. 562.

**23.** Loeb *v.* Flash, 65 Ala. 526; Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437; King *v.* Jacobson, 17 N. Y. Suppl. 898 [*affirmed* in 138 N. Y. 629, 33 N. E. 1084].

**24** Reager *v.* Kendall, 59 S. W. 257, 19 Ky. L. Rep. 27; Droege *v.* Ahrens, etc., Mfg. Co., 163 N. Y. 466, 57 N. E. 747 [*reversing* 34 N. Y. App. Div. 631, 54 N. Y. Suppl. 1099]; Smith *v.* Frank, 2 Rob. (N. Y.) 626; Wilson *v.* White, 80 N. C. 280; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

**25.** Benedict *v.* Schaettle, 12 Ohio St. 515.

**Insolvency is not in itself sufficient** to show fraud when a reasonably long period has elapsed since the sale. Bentley *v.* Woolson Spice Co., (Nebr. 1901) 95 N. W. 803; Ward *v.* Woodburn, 27 Barb. (N. Y.) 346; Rice *v.* Heath, 5 N. Y. St. 244; Greene *v.* Fondersmith, 200 Pa. St. 625, 50 Atl. 209.

**A difference of sixty-nine per cent** between the value of the purchaser's assets as stated and as actually existing six months later and the giving of a chattel mortgage within two weeks after the purchase is sufficient to show fraud. Silberman *v.* Munroe, 104 Mich. 352, 62 N. W. 555.

**The evidence was considered sufficient to show insolvency** in P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Coffin *v.* Hollister, 5 Silv. Sup. (N. Y.) 172, 7 N. Y. Suppl. 734 [*affirmed* in 124 N. Y. 644, 26 N. E. 812]; Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287; Small *v.* Glasel, 28 Nova Scotia 245; and to show fraud in the purchaser's statements as to his financial condition in Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753; Greene *v.* Fondersmith, 200 Pa. St. 625, 50 Atl. 209.

**26.** *Alabama.*— Darden *v.* Lovelace, 52 Ala. 289.

*Iowa.*— McClung *v.* Kelley, 21 Iowa 508.

*Massachusetts.*— Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

*Michigan.*— Ginsburg *v.* Cutler, etc., Lumber Co., 85 Mich. 439, 48 N. W. 952.

*New Jersey.*— Smalley *v.* Hendrickson, 29 N. J. L. 371.

*New York.*— Douglas *v.* New York Cent., etc., R. Co., 105 N. Y. App. Div. 65, 93 N. Y. Suppl. 723; Delafield *v.* J. K. Armsby Co., 99 N. Y. App. Div. 622, 90 N. Y. Suppl. 998; Hand *v.* Gas Engine, etc., Co., 34 N. Y. App. Div. 354, 54 N. Y. Suppl. 250 [*reversed* on other grounds in 167 N. Y. 142, 60 N. E. 425]; Barwick *v.* Gast Lith., etc., Co., 11 N. Y. Suppl. 373; De Ridder *v.* McKnight, 13 Johns. 294.

*North Carolina.*— Naested *v.* Scott, 20 N. C. 524.

*Pennsylvania.*— Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638; Laurel Hill Slate Co. *v.* Snyder, 8 Pa. Cas. 563, 13 Atl. 194.

*South Dakota.*— Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29.

*Vermont.*— Bullard *v.* Billings, 2 Vt. 309.

See 43 Cent. Dig. tit. "Sales," § 145.

**27.** Brown *v.* Freeman, 79 Ala. 406; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237; Floyd *v.* Edley, 6 Ohio Dec. (Reprint) 1185, 12 Am. L. Rec. 231; Spearfish Bank *v.* Graham, 16 S. D. 49, 91 N. W. 340.

**28.** Bigler *v.* Flickinger, 55 Pa. St. 279.

**29.** Sides *v.* Hilleary, 6 Harr. & J. (Md.) 86.

**30.** Greenleaf *v.* Gerald, 94 Me. 91, 46 Atl. 799, 80 Am. St. Rep. 377, 50 L. R. A. 542.

**31.** *Indiana.*— Tennessee Coal, etc., Co. *v.* Sargent, 2 Ind. App. 458, 28 N. E. 215.

*Maryland.*— Standard Horseshoe Co. *v.* O'Brien, 88 Md. 335, 41 Atl. 898.

*Michigan.*— Pinkerton Bros. Co. *v.* Bromley, 119 Mich. 8, 77 N. W. 307; Redpath *v.* Brown, 71 Mich. 258, 39 N. W. 51; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60.

*New York.*— King *v.* Phillips, 8 Bosw. 603; Talcott *v.* Einstein, 10 Daly 210; Hedges *v.* Payne, 17 N. Y. Suppl. 809; Salomon *v.* Van Praag, 48 How. Pr. 338 [*affirmed* in

statute of frauds [32] and of any other statute in that behalf [33] a contract to sell or a sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth,[34] as where a written offer is accepted orally,[35] or may be implied from the conduct of the parties.[36]

**2. Contract in Writing.** The rules applicable to contracts in writing in general are applicable to written contracts of sale.[37] If it is the intention of the parties that the agreement shall not be binding until reduced to writing, there can be no binding agreement until that is done.[38] To make an enforceable contract, no particular form of words is essential, the intention only being looked to.[39]

**G. Illegality — 1. In General.** The rule that an agreement, the object of which is illegal, is invalid and will not be enforced [40] applies to contracts of sale.[41]

6 Hun 529]; Francheris *v.* Henriques, 24 How. Pr. 165; Ash *v.* Putnam, 1 Hill 302.

*Pennsylvania.*— Soperstein *v.* Salsberg, 17 Pa. Super. Ct. 288; Donnelly *v.* Hoffman, etc., Co., 3 Brewst. 32.

*Wisconsin.*— Singer *v.* Schilling, 74 Wis. 369, 43 N. W. 101.

See 43 Cent. Dig. tit. "Sales," § 151.

**Illustrations.**— The existence of an intent not to pay for the goods purchased (Gavin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347; Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Pequeno *v.* Taylor, 38 Barb. (N. Y.) 375; Buckley *v.* Artcher, 21 Barb. (N. Y.) 585); whether the buyer's representation was the expression of opinion or the representation of a material fact (Morse *v.* Shaw, 124 Mass. 59); and whether it was relied on by the seller (Kirkendall *v.* Hartsock, 58 Mo. App. 234; Boyd *v.* Shiffer, 156 Pa. St. 100, 27 Atl. 60; Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255) are questions for the jury.

32. See Frauds, Statute of, 20 Cyc. 238.

33. See *infra*, VI, A, 7; X, D.

34. Lockett *v.* Nicklin, 2 Exch. 93, 19 L. J. Exch. 403.

**Question for jury.**— Whether a contract of sale was entirely oral or was embodied in a writing is a question for the jury, on conflicting evidence. Chamberlin *v.* Van Campen, 120 N. Y. 637, 24 N. E. 279.

35. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157; Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579.

36. See *supra*, II, E, 6; Chalmers Sale Goods, § 4.

37. See Contracts, 9 Cyc. 298–308.

**Contract signed by one.**—A contract of sale is not wanting in mutuality because it is signed by only the seller, if it be accepted by the buyer. Ward *v.* Spelts, 39 Nebr. 809, 58 N. W. 426. And see Justice *v.* Lang, 42 N. Y. 493, 1 Am. Rep. 576 [*reversing* 2 Rob. 333, 30 How. Pr. 425]; Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19. See also Contracts, 9 Cyc. 300.

**Certainty.**— Where the parties made the following memorandum: "Bought 500,000 of good, merchantable brick from Messrs. Moulding and Harland, to be delivered on Wabash avenue, just south of Van Buren street, at the rate of $6.37 per thousand, to be delivered this fall. Moulding & Harland," and the other parties executed and signed the following: "Sold 50,000 good, merchantable brick to Prussing & Mueller, just south of Van Buren street, at $6.37½ per thousand. Said Prussing & Mueller agree that we shall commence to deliver on Wednesday next, or agreement is of no account. Prussing & Mueller," it was held that the memoranda, when separately considered, showed no sale, because, by the terms, each party contracted with themselves, and, taken together, were void for uncertainty and repugnance. Moulding *v.* Prussing, 70 Ill. 151. Where at the time second-hand rails were sold the rails had not been taken up, and the quantity of each grade was estimated, it being agreed that all the rails to be taken up by plaintiff in the reconstruction of the street railroad in a certain city were sold to defendant at certain prices per ton for each grade, the contract was not void for indefiniteness as to the thing sold. Nelson *v.* Hirsch, etc., R. Co., 102 Mo. App. 498, 77 S. W. 590.

38. McPherson *v.* Wiswell, 16 Nebr. 625, 21 N. W. 391. See Contracts, 9 Cyc. 280, 298.

**A contract signed in duplicate,** in which a buyer agrees to pay one hundred dollars cash and three hundred dollars on time, never becomes operative where the seller retains both copies, and the buyer does not pay the one hundred dollars. Owen *v.* Long, 97 Wis. 78, 72 N. W. 364.

**They may be bound by their preliminary agreement,** although it is to be reduced to writing, if they so intend. Cheney *v.* Eastern Transp. Line, 59 Md. 557; Woldert *v.* Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052. See also Contracts, 9 Cyc. 282.

39. Saladin *v.* Mitchell, 45 Ill. 79; Crawford *v.* Geiser Mfg. Co., 88 N. C. 554; Hodson *v.* Carter, 3 Chandl. (Wis.) 234; Butler *v.* Thomson, 92 U. S. 412, 23 L. ed. 684.

**Bought and sold notes.**—A contract of sale through a broker may be by bought and sold notes. Murray *v.* Doud, 63 Ill. App. 247 [*affirmed* in 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297]. See, generally, Factors and Brokers, 19 Cyc. 109.

40. **Illegality as affecting contracts** generally see Contracts, 9 Cyc. 465.

41. Benjamin Sales, § 786.

**Where an illegal sale is abandoned,** part of the goods not being delivered, a new sale of the undelivered portion for a legal pur-

Such a contract may be illegal because of its immoral purpose,[42] or because it violates some positive law.[43]

**2. Statutes Regulating Dealings in Articles of Commerce.** There are statutes enacted for the protection of the public in business dealings, which generally impose a penalty for non-compliance with their provisions,[44] and which are construed as prohibiting sales on the part of dealers who have failed to comply with them, and the effect of non-compliance with which on the part of the seller is to preclude him from recovering the price.[45] Such is the effect of violation of statutes requiring dealers to have their weights, measures, or scales approved or sealed;[46] requiring coal, lumber, or other articles to be officially weighed, measured, or surveyed;[47] requiring articles to conform to a certain weight or to certain

pose is valid. Grayson *v.* Latham, 84 Ala. 546, 4 So. 200, 866.

**The burden of proof** to show that a sale is illegal in an action for the price is on defendant. Devlin *v.* Crary, 60 N. Y. 635.

**42.** Adams *v.* Coulliard, 102 Mass. 167; Territt *v.* Bartlett, 21 Vt. 184. See also Reed *v.* Brewer, (Tex. Civ. App. 1896) 36 S. W. 99 (where furniture was sold for use in a house of prostitution); Rice *v.* Williams, 32 Fed. 437 (holding void a contract by an advertising solicitor to sell to a so-called specialist letters written by persons afflicted with diseases to another person who advertised to cure such diseases in order that such specialist might send his advertisements to them).

**43.** See Contracts, 9 Cyc. 466.

**Agreements to defraud the public.**—Agreements for the sale of grain for seed at a price far above its actual value, in which the seller agrees to sell the crop raised therefrom or a part of it for the buyer at an extravagant price, are void in that they cannot be performed without defrauding some one. Schmueckle *v.* Waters, 125 Ind. 265, 25 N. E. 281; Shipley *v.* Reasoner, 80 Iowa 548, 45 N. W. 1077; Merrill *v.* Packer, 80 Iowa 542, 45 N. W. 1076; Davis *v.* Seeley, 71 Mich. 209, 38 N. W. 901; McNamara *v.* Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; Carter *v.* Lillie, 3 Ohio Cir. Ct. 364, 2 Ohio Cir. Dec. 204; Shirey *v.* Ulsh, 2 Ohio Cir. Ct. 401, 1 Ohio Cir. Dec. 554. But see Matson *v.* Blossom, 2 N. Y. Suppl. 551.

**Agreements to waive fraud.**— A stipulation in a contract of sale waiving fraud on the part of the seller will not be enforced. Strand *v.* Griffith, 97 Fed. 854, 38 C. C. A. 444.

**It is no defense to an action for goods sold** and delivered that plaintiff is a member of an illegal trust or combination, the illegality of the combination being merely collateral to the contract of sale. Booth *v.* Seibold, 37 Misc. (N. Y.) 101, 74 N. Y. Suppl. 776; National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902. And see Dennehy *v.* McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609. So a sale of coal is not invalid because the offer was accompanied by an option prohibited by statute as to future sales. Corcoran *v.* Lehigh, etc., Coal Co., 138 Ill. 390, 28 N. E. 759 [*reversing* 37 Ill. App. 577]; Minnesota Lumber Co. *v.* Whitebreast Coal Co., 56 Ill. App. 248. See also Houck *v.* Wright, 77 Miss. 476, 27 So. 616; Minnesota Sandstone Co. *v.* Clark, 35 Wash. 466, 77 Pac. 803.

**44.** See Contracts, 9 Cyc. 475; Municipal Corporations, 28 Cyc. 720 *et seq.*

**45.** See Contracts, 9 Cyc. 479.

**Under Tenn. Acts (1897), c. 123, § 3,** prohibiting the sale of commercial fertilizers unless the analysis shows a given per cent of ammonia, etc., and section 10, declaring that persons making sales contrary to the act shall be fined, a sale of commercial fertilizer containing no ammonia is void and unenforceable. Harris *v.* Parker, 108 Tenn. 29, 64 S. W. 1087.

**46.** Finch *v.* Barclay, 87 Ga. 393, 13 S. E. 566; Prescott *v.* Battersby, 119 Mass. 285; Palmer *v.* Kelleher, 111 Mass. 320; Sawyer *v.* Smith, 109 Mass. 220; Smith *v.* Arnold, 106 Mass. 269; Miller *v.* Post, 1 Allen (Mass.) 434 (holding that no action lies to recover the price of milk sold by the can at wholesale in cans not sealed, as required, although the state sealer refused to seal for the statutory price); Bisbee *v.* McAllen, 39 Minn. 143, 39 N. W. 299. See Municipal Corporations, 28 Cyc. 724; Weights and Measures.

**The burden of proving** that the weights or measures were not sealed as required by statute is upon defendant, and proof that they were not duly sealed in the town of the sale, without also proving that plaintiff was an inhabitant of that town, will not defeat the action. Hewes *v.* Platts, 12 Gray (Mass.) 143.

**47.** Knight *v.* Burnham, 90 Me. 294, 38 Atl. 168; Richmond *v.* Foss, 77 Me. 590, 1 Atl. 830 [*criticizing* Rogers *v.* Humphrey, 39 Me. 382, where it was held that a sale of boards sufficient to make a certain number of sugar box shooks was valid without survey of the lumber]; Durgin *v.* Dyer, 68 Me. 143 (holding that one cannot recover the price of hoops sold in contravention of a statute imposing a penalty on any person selling hoops before they have been culled by the proper officer); Libby *v.* Downey, 5 Allen (Mass.) 299; Levy *v.* Gowdy, 2 Allen (Mass.) 320 (holding that a sale of coal without the required certificate of a weigher is not rendered valid in consequence of the neglect of the town to appoint a weigher); Pray *v.* Burbank, 10 N. H. 377; Little *v.* Poole, 9 B. & C. 192, 7 L. J. K. B. O. S. 158, 17 E. C. L. 93. See also Howe *v.* Norris, 12

dimensions;[48] to be sold by weight and not by measure or *vice versa*;[49] to be marked in a particular manner;[50] or to be inspected and labeled;[51] or prohibiting the sale of diseased animals[52] or adulterated food;[53] or requiring dealers to take out a license.[54]

**3. Knowledge and Intent of Seller.** Mere knowledge of the seller that the purchaser intended to make an illegal use of the property will not render the contract invalid if the seller had no intention of aiding or promoting the illegal purpose.[55] If, however, the seller does any act in furtherance of the illegal intent

Allen (Mass.) 82; Briggs *v.* Light Boat, 7 Allen (Mass.) 287. *Compare* McNeill *v.* Chadbourn, 79 N. C. 149, holding a sale of timber, although without a measurement, as required, to be binding on the vendor if he makes no objection thereto, where the act was for the vendor's benefit only.

See Municipal Corporations, 28 Cyc. 724; Weights and Measures.

**Offering for sale.**— Where the prohibition is against "offering for sale," a sale without offering is not invalid. Abbott *v.* Goodwin, 37 Me. 203; Bartlett *v.* Hoyt, 29 N. H. 317; Williams *v.* Tappan, 23 N. H. 385.

**Where all exceptions of the statute are not negatived,** the consideration of the promise will not be held illegal. Whitman *v.* Freese, 23 Me. 185.

**Burden of proof.**— In a suit for the price of coal sold to defendant, and for weighing coal for him at a fixed price per load, if the defense is that the coal was not weighed in either instance by a sworn weigher, as required by statute, the burden of proof is on defendant to show a violation of the statute. Goddard *v.* Rawson, 130 Mass. 97.

**48.** Wheeler *v.* Russell, 17 Mass. 258; Law *v.* Hodgson, 2 Campb. 147, 11 East 300, 10 Rev. Rep. 513. See also Coombs *v.* Emery, 14 Me. 404; Colton *v.* King, 2 Allen (Mass.) 317. See Weights and Measures.

**49.** Eaton *v.* Kegan, 114 Mass. 433; Johnson *v.* Kolb, 3 Wkly. Notes Cas. (Pa.) 273. See Weights and Measures.

**50.** Buxton *v.* Hamblen, 32 Me. 448; Forster *v.* Taylor, 5 B. & Ad. 887, 3 L. J. K. B. 137, 3 N. & M. 244, 27 E. C. L. 374.

**Sale not prohibited.**— The price may be recovered if a sale of unmarked goods is not expressly prohibited. Dennis *v.* Grove, 4 Pa. Super. Ct. 480.

**Where marking is permissive,** failure to mark does not prevent recovery. Clark *v.* Oliver, 3 Allen (Mass.) 336.

**51.** See Inspection, 22 Cyc. 1368.

**Fertilizers.**— There can be no recovery for the price of fertilizers which have not been inspected and labeled as required by statute. Merriman *v.* Knox, 99 Ala. 93, 11 So. 741; Hanover Nat. Bank *v.* Johnson, 90 Ala. 549, 8 So. 42; Campbell *v.* Segars, 81 Ala. 259, 1 So. 714; Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Pacific Guano Co. *v.* Dawkins, 57 Ala. 115; Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Allen *v.* Pearce, 84 Ga. 606, 10 S. E. 1015; Hammond *v.* Wilcher, 79 Ga. 421, 5 S. E. 113; Martin *v.* Upshur Guano Co., 77 Ga. 257; Conley *v.* Sims, 71 Ga. 161; Johnston *v.* McConnell, 65 Ga. 129; Kleckley *v.* Leyden, 63 Ga. 215; Vanmeter *v.* Spurrier, 94 Ky. 22, 21 S. W. 337, 14 Ky. L. Rep. 684; McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845. See also Agriculture, 2 Cyc. 71. *Contra*, Niemeyer *v.* Wright, 75 Va. 239, 40 Am. Rep. 720.

**Tags lost.**— The sale is invalid, although tags were properly attached, if they were lost before sale. Kirby *v.* Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 So. 38; Brown *v.* Adair, 104 Ala. 652, 16 So. 439; Clark's Cove Guano Co. *v.* Dowling, 85 Ala. 142, 4 So. 604; Steiner *v.* Ray, 84 Ala. 93, 4 So. 172, 5 Am. St. Rep. 332. See also Agriculture, 2 Cyc. 71.

**Substantial compliance.**—An immaterial variance between a guaranteed analysis of a fertilizer which has been sold in the state and the analysis made by the state chemist of samples of such fertilizer, forwarded him by the ordinary, under Ga. Pol. Code, § 1571, will not render the contract of sale illegal. Spinks *v.* Rome Guano Co., 108 Ga. 614, 33 S. E. 906. And see Baker *v.* Burton, 31 Fed. 401. Where the seller, at the request of the purchaser, fails to tag each package of fertilizer sold, but delivers tags for each package to the purchaser, who promises to attach them, the statute is substantially complied with. Steiner *v.* Ray, 84 Ala. 93, 4 So. 172, 5 Am. St. Rep. 332.

**Burden of proof.**— In an action for the price of fertilizers, the want of inspection, tagging, and branding is matter of defense, and the burden is on defendant to prove it. Avera *v.* Tool, 74 Ga. 398.

**52.** Caldwell *v.* Bridal, 48 Iowa 15; Johnson *v.* Chilson, 29 Nebr. 301, 45 N. W. 462. *Contra*, Vining *v.* Bricker, 14 Ohio St. 331, under statute making sale a misdemeanor, but providing that the act shall not change the rights of any one sustaining damage through the sale.

**53.** See Food, 19 Cyc. 1085; Municipal Corporations, 28 Cyc. 734.

**Sale of oleomargarine.**— It is no defense, in an action for the price of oleomargarine, merely that the article was designed to take the place of butter, since the unlawful act declared in N. Y. Laws (1885), c. 183, is for selling an article in imitation or semblance, as well as one designed to take the place. Waterbury *v.* Egan, 3 Misc. (N. Y.) 355, 23 N. Y. Suppl. 115.

**54.** See Contracts, 9 Cyc. 478; Licenses, 25 Cyc. 633; Municipal Corporations, 28 Cyc. 723, 733.

**55.** *Alabama.*— Thedford *v.* McClintock, 47 Ala. 647 [*overruled* in Milner *v.* Patton, 49 Ala. 423].

*Arkansas.*— Hollenberg Music Co. *v.* Berry,

of the purchaser, he is a participant therein, rendering the transaction wholly invalid.[56]

**4. Partial Illegality.** If the contract of sale is entire, as where the consideration is a gross sum,[57] the illegality of the contract as to part of the goods sold will vitiate the entire contract.[58] If, however, the contract is severable, as where the sale is not at a gross sum but at stipulated prices for each article, the entire sale will not be rendered invalid because the sale of some of the articles was illegal.[59]

**H. Estoppel or Waiver[60] as to Defects or Objections — 1. In General.** Generally if a party with knowledge of the fraud or other defect[61] fails to

85 Ark. 9, 106 S. W. 1172, 122 Am. St. Rep. 17.

*Colorado.*— Rose *v.* Mitchell, 6 Colo. 102, 45 Am. Rep. 520.

*Illinois.*— Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

*Indiana.*— Bickel *v.* Sheets, 24 Ind. 1.

*Kentucky.*— Hedges *v.* Wallace, 2 Bush 442, 92 Am. Dec. 497.

*Massachusetts.*— Dater *v.* Earl, 3 Gray 482. But see Ely *v.* Webster, 102 Mass. 304; Adams *v.* Coulliard, 102 Mass. 167.

*Minnesota.*— Anheuser-Busch Brewing Assoc. *v.* Mason, 44 Minn. 318, 46 N. W. 558, 20 Am. St. Rep. 580, 9 L. R. A. 506.

*Missouri.*— Kerwin *v.* Doran, 29 Mo. App. 397; Curran *v.* Downs, 3 Mo. App. 468.

*New Hampshire.*—Delavina *v.* Hill, 65 N. H. 94, 19 Atl. 1000; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617.

*New York.*— Tracy *v.* Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Ross-Lewin *v.* Johnson, 32 Hun 408; Kreiss *v.* Seligman, 8 Barb. 439, 5 How. Pr. 425.

*South Carolina.*— Wallace *v.* Lark, 12 S. C. 576, 32 Am. Rep. 516.

*Tennessee.*— Tedder *v.* Odom, 2 Heisk. 68, 5 Am. Rep. 25; Gillam *v.* Looney, 1 Heisk. 319.

*Texas.*— Kottwitz *v.* Alexander, 34 Tex. 689.

*Washington.*— Washington Liquor Co. *v.* Shaw, 38 Wash. 398, 80 Pac. 536.

*United States.*— Sortwell *v.* Hughes, 22 Fed. Cas. No. 13,177, 1 Curt. 244.

*England.*— Hodgson *v.* Temple, 1 Marsh. 5, 5 Taunt. 181, 14 Rev. Rep. 738, 1 E. C. L. 100. But see Langton *v.* Hughes, 1 M. & S. 593.

See 43 Cent. Dig. tit. "Sales," § 107; and Contracts, 9 Cyc. 571.

**The rules of the common law require at least knowledge on the part of the seller that the goods are purchased for an illegal purpose.** That he has reasonable cause to believe such to be the fact is not sufficient to show participation in the illegal purpose so as to invalidate the sale. Hotchkiss *v.* Finan, 105 Mass. 86.

**Vendor without knowledge of illegal purpose.**— Fee *v.* Gonegal, 19 La. Ann. 263; Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808, 812.

**56.** *Arkansas.*— Parsons Oil Co. *v.* Boyett, 44 Ark. 230; Tatum *v.* Kelley, 25 Ark. 209, 94 Am. Dec. 717.

*Maine.*— Banchor *v.* Mansel, 47 Me. 58.

*New York.*— Arnot *v.* Pittston, etc., Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

*Texas.*— Reed *v.* Brewer, 90 Tex. 144, 37 S. W. 418 [*affirming* (Civ. App. 1896) 36 S. W. 99].

*Vermont.*— Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

*Washington.*— Standard Furniture Co. *v.* Van Alstine, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960, 51 L. R. A. 889.

*United States.*— Green *v.* Collins, 10 Fed. Cas. No. 5,755, 3 Cliff. 494.

See 43 Cent. Dig. tit. "Sales," § 107; and Contracts, 9 Cyc. 575.

**57.** See *infra*, III, E, 3.

**58.** *Alabama.*— Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

*Georgia.*— Allen *v.* Pearce, 84 Ga. 606, 10 S. E. 1015.

*Indiana.*— See Hynds *v.* Hays, 25 Ind. 31; Pierce *v.* Pierce, 17 Ind. App. 107, 46 N. E. 480.

*Iowa.*— Gipps Brewing Co. *v.* De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; Braitch *v.* Guelick, 37 Iowa 212.

*Maine.*— Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17; Wirth *v.* Roche, 92 Me. 383, 42 Atl. 794; Ladd *v.* Dillingham, 34 Me. 316; Deering *v.* Chapman, 22 Me. 488, 39 Am. Dec. 592.

*Mississippi.*— Colten *v.* McKenzie, 57 Miss. 418.

*New Hampshire.*—Kidder *v.* Blake, 45 N. H. 530; Coburn *v.* Odell, 30 N. H. 540.

*Ohio.*— Widoe *v.* Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

*Rhode Island.*— See McGuinness *v.* Bligh, 11 R. I. 94.

*Vermont.*— See Shaw *v.* Carpenter, 54 Vt. 155, 41 Am. Rep. 837, where it was held that if the valne of the illegal articles was ascertainable the contract was divisible and could be enforced so far as it was valid.

See 43 Cent. Dig. tit. "Sales," § 108; and Contracts, 9 Cyc. 566.

**Question for jury.**— Whether the transaction is partially invalid because of the nature of the property sold is for the jury. Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17.

**59.** Boyd *v.* Eaton, 44 Me. 51, 69 Am. Dec. 83; Carleton *v.* Woods, 28 N. H. 290; Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605. See also Contracts, 9 Cyc. 566.

**60. Distinction between estoppel and waiver** see Estoppel, 16 Cyc. 805.

**61.** Grigsby *v.* Emerson, 5 Dana (Ky.) 251; King *v.* Phillips, 8 Bosw. (N. Y.) 603;

object,[62] offers to perform the contract,[63] or attempts to enforce it,[64] he will be estopped to set up the fraud or defect. So if the buyer with knowledge of the fraud voluntarily pays the purchase-price he cannot rely on the fraud as a ground to set aside the sale.[65]

**2. Acceptance and Retention of Goods.** A purchaser who has accepted and retains the goods waives defects in the contract.[66] If the purchaser desires to

Gallipolis Furniture Co. *v.* Symmes, 19 Ohio Cir. Ct. 659, 10 Ohio Cir. Dec. 514. See also Wendling Lumber Co. *v.* Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

**Duty to make inquiry.**— Where one has bought goods from a dealer, under an agreement by the latter to sell as low as he sold the same goods to other purchasers, the fact that such purchaser assented to pay the prices at which the goods were sold to him under such agreement, relying on the dealer's assurance that such prices were as low as he made to others, does not preclude him from resorting to the contract, upon discovering a breach thereof. Holtz *v.* Schmidt, 59 N. Y. 253. But in the absence of fraud it is no defense that the price of goods is above the market, when the goods were examined and selected by the purchaser's agents and were received by him and kept without objection. Miller *v.* Tiffany, 1 Wall. (U. S.) 298, 17 L. ed. 540. So one permitting himself to be defrauded by not having the contract which he signs read to him, if he is unable to read himself, debars himself from asking for relief. McKinney *v.* Herrick, 66 Iowa 414, 23 N. W. 767.

**Knowledge implied.**— Where the purchaser had the goods in his possession for a long time and ample opportunity to examine them and ascertain their quality, knowledge will be implied. Houser *v.* Lithgow Mfg. Co., 84 Ga. 333, 11 S. E. 309.

**Concealed defects.**— There is no estoppel where defects in the property were concealed by the artifice of the vendor, although the purchaser after examination expressed himself satisfied and retained the property. Ranger *v.* Hearne, 41 Tex. 258.

**One who with knowledge of the fact purchases property in litigation is estopped to set up the defect in title.** Helena First Nat. Bank *v.* How, 1 Mont. 604. And see Costar *v.* Brush, 25 Wend. (N. Y.) 628, where a doubtful right was purchased.

**Burden of proof.**— When plaintiff's knowledge of the fraud and his neglect promptly to rescind the contract are relied on to defeat an action to recover the price for stock alleged to have been fraudulently sold, the burden of proving the fact of such knowledge and the time when it was acquired rests upon defendant. Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420.

62. Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753; Shrimpton *v.* Eschwege, 10 N. Y. App. Div. 56, 41 N. Y. Suppl. 966 [*affirmed* in 158 N. Y. 731, 53 N. E. 1122].

**The failure of the purchaser to require a warranty** as to the quality of the goods does not estop him to set up fraud on the part of the seller. Bevans *v.* Farrell, 18 La. Ann. 232. But see Floyd *v.* Woods, 110 Ga. 850, 36 S. E. 225, where the purchaser undertook to buy the "property entirely upon his own judgment, waiving all defects, either patent or latent," as well as "the implied warranty upon the part of the seller" raised by law, "that he knows of no latent defects undisclosed," and it was held that the purchaser could not set up the seller's fraudulent representations.

**Undue influence.**— An action for damages for procuring a sale by undue influence will not lie where plaintiff made no offer to rescind, when freed from the undue influence, and knew at the time of the sale the facts constituting the undue influence. Bancroft *v.* Bancroft, 110 Cal. 374, 42 Pac. 896.

63. Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

**Non-existence of contract.**— Where persons agree that a proposed contract for the sale of brick shall be in writing, the fact that the vendor delivered part of the brick will not estop him from asserting that there was no contract, because it was not reduced to writing, and signed by both parties. Spinney *v.* Downing, 108 Cal. 666, 41 Pac. 797. And see Morrill *v.* Tehama Consol. Mill, etc., Co., 10 Nev. 125, where it was held that delivery of part of the goods was not a ratification of a contract incomplete because not assented to in writing according to agreement.

64. Caylus *v.* New York, etc., R. Co., 76 N. Y. 609; Dean *v.* Nelson, 10 Wall. (U. S.) 158, 19 L. ed. 926.

**Attempt to secure claim** without knowledge of the fraud does not estop the seller to assert it. Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902.

**Question for jury.**— Whether there has been an affirmance of the sale is for the jury. Heilbronn *v.* Herzog, 73 N. Y. App. Div. 188, 76 N. Y. Suppl. 738.

65. Graham *v.* Hull, 8 Pa. Co. Ct. 202; Gilbert *v.* Hunnewell, 12 Heisk. (Tenn.) 289. But see Huckabee *v.* Albritton, 10 Ala. 657, where it was held that a promise to pay after knowledge of the facts constituting the alleged fraud was merely evidence that there was no fraud.

**Recoupment of damages.**— But his knowledge does not estop him to set off damages for the seller's fraud. Mills *v.* Johnson, 3 Tex. Civ. App. 359, 22 S. W. 530; Birdsey *v.* Butterfield, 34 Wis. 52.

**Reservation of rights.**— The rule does not apply where there is a payment under protest or with a distinct reservation of rights. Dowagiac Mfg. Co. *v.* Gibson, 73 Iowa 525, 35 N. W. 603, 5 Am. St. Rep. 697; Campbell *v.* Thompson, 27 Hun (N. Y.) 541.

66. Davis *v.* Betz, 66 Ala. 206; Byrne *v.*

take advantage of the fraud of the seller he must act at once, and a retention of the property after discovery of the fraud waives the objection.[67]

**I. Ratification of Voidable Contract.** In the case of defects or fraud rendering the contract voidable merely and not void, it is within the power of the parties to ratify the contract and affirm the sale without a new consideration.[68] Ratification may be shown by acts and conduct from which an intent to affirm the sale may be implied,[69] such as refusing to take back the goods alleged to be obtained by fraud,[70] demanding payment of the price,[71] or security therefor,[72] and by bringing an action for the recovery of the price for which the goods were sold.[73]

Hibernia Nat. Bank, 31 La. Ann. 81; Wellauer *v.* Fellows, 48 Wis. 105, 4 N. W. 114; Miller *v.* Tiffany, 1 Wall. (U. S.) 298, 17 L. ed. 540. See, generally, ESTOPPEL, 16 Cyc. 787.

**Illustration.**— Where machinery is bought for a certain purpose, and it proves, on trial, not to be adapted to that purpose, but the purchaser retains it, an action for the price cannot be defeated unless the machinery was wholly valueless for any purpose. Hardee *v.* Carter, 94 Ga. 482, 19 S. E. 715.

67. *Georgia.*— Houser *v.* Lithgow Mfg. Co., 84 Ga. 333, 11 S. E. 309.

*Indiana.*— Regensburg *v.* Notestine, 2 Ind. App. 97, 27 N. E. 108.

*Maryland.*—Duvall *v.* Medtart, 4 Harr. & J. 14.

*New York.*— Baird *v.* New York, 96 N. Y. 567.

*Ohio.*— Males *v.* Lowenstein, 10 Ohio St. 512.

*Pennsylvania.*— Mingle *v.* Rossman, 161 Pa. St. 366, 29 Atl. 46.

*Tennessee.*—Gilbert *v.* Hunnewell, 12 Heisk. 289.

*Vermont.*— Cole *v.* Champlain Transp. Co., 26 Vt. 87.

See 43 Cent. Dig. tit. "Sales," § 110; and ESTOPPEL, 16 Cyc. 787.

**Tender refused.**— The retention and use of the property after the purchaser has discovered a fraud in the sale and after the vendor has refused to receive it back is no waiver of the fraud. McLaren *v.* Long, 25 Ga. 708.

**Failure to return is not excused** where the loss of the property preventing a return is the fault of the purchaser. Joslin *v.* Caughlin, 32 Miss. 104.

68. Bell *v.* Cafferty, 21 Ind. 411; Myton *v.* Thurlow, 23 Kan. 212; Galloway *v.* Holmes, 1 Doug. (Mich.) 330.

69. Tilden *v.* Washburn, 6 N. Y. Suppl. 556; Eldridge *v.* Young America, etc., Consol. Min. Co., 27 Wash. 297, 67 Pac. 703.

**Acts which are in effect merely attempts to avoid the loss** entailed by the fraud do not constitute a ratification. Russell *v.* Bryant, 181 Mass. 447, 63 N. E 927; Ketcham *v.* Troxell, 49 N. Y. 677.

**Recognition of contract.**— In an action on a written contract for the sale of machinery, specifying on or about September 1 as the date of delivery, where defendant alleges that the date agreed on was August 20, a letter from him to plaintiffs, dated August 23, saying, "If the goods are not here in a few days, . . . I cannot wait any longer," is not a recognition of the contract as signed. Chatham *v.* Jones, 69 Tex. 744, 7 S. W. 600.

70. *In re* Walrup, 1 Fed. 287, 1 McCrary 70.

71. Foreman *v.* Barrie, 24 Minn. 349.

**Making claim against assignee.**— Droege *v.* Ahrens, etc., Mfg. Co., 163 N. Y. 466, 57 N. E. 747 [*reversing* 34 N. Y. App. Div. 631, 54 N. Y. Suppl. 1099].

**Retention of price.**— Where a contract of sale does not specify the price to be paid by the purchaser, the seller's retention of money paid does not constitute a ratification of the contract at the price insisted on by the purchaser, if such retention is equally consistent with the version of the contract claimed by each party. Wilkinson *v.* Williamson, 76 Ala. 163.

72. Burnham *v.* Smith, 82 Mo. App. 35.

**Filing a mechanic's lien on property** in which the goods have been used does not constitute an election to affirm the sale, estopping a rescission thereof for fraud. Droege *v.* Ahrens, etc., Mfg. Co., 163 N. Y. 466, 57 N. E. 747 [*reversing* 34 N. Y. App. Div. 631, 54 N. Y. Suppl. 1099].

73. *Arkansas.*— Mansfield *v.* Wilson, (1890) 13 S. W. 598.

*Illinois.*— Gray *v.* St. John, 35 Ill. 222; Horner *v.* Boyden, 27 Ill. App. 573; Dobbins *v.* Hanchett, 20 Ill. App. 396.

*Indiana.*— O'Donald *v.* Constant, 82 Ind. 212.

*Kansas.*— Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701.

*Maryland.*— Dellone *v.* Hull, 47 Md. 112.

*New York.*— Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019 [*affirming* 57 Hun 588, 10 N. Y. Suppl. 884]; Heilbronn *v.* Herzog, 73 N. Y. App. Div. 188, 76 N. Y. Suppl. 738; Field *v.* Bland, 59 How. Pr. 85.

*United States.*— Adler *v.* Fenton, 24 How. 407, 16 L. ed. 696.

See 43 Cent. Dig. tit. "Sales," § 117.

**Mistaking remedy.**— The rule does not apply when the seller has mistaken his remedy. Flower *v.* Brumbach, 131 Ill. 646, 23 N. E. 335 [*affirming* 30 Ill. App. 294]; Bonaparte *v.* Clagett, 78 Md. 87, 27 Atl. 619; Johnson-Brinkman Commission Co. *v.* Kansas City Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

**Bringing suit before notice.**— Where one obtains good by fraudulent representations, the bringing of an attachment suit before notice of the fraud is not conclusive of an elec-

**J. Conflict of Laws — 1. In General.** In accordance with the general rule,[74] the validity of a sale is determined by the law of the place where the sale is made, and a sale which is valid where made will be upheld even in a state where it could not have been lawfully made;[75] while a sale which is invalid where made will not be sustained elsewhere.[76] Courts will not, however, usually enforce a rule resting for its exercise in comity to the detriment of the rights of citizens of the state under its own laws.[77]

**2. Legal Effect of Contract of Sale.** The legal effect of a sale and the obligations resulting therefrom are determined by the law of the place where the sale is made.[78] The validity of a transfer of chattels as against creditors and subse-

tion to affirm, where the rights of innocent third parties have not intervened. Goodger *v.* Finn, 10 Mo. App. 226.

**The bringing of an action to recover damages for fraud** in inducing the seller to sell goods proceeds on the theory that the seller has parted with his title, and is an affirmance of the sale. Dobbins *v.* Hanchett, 20 Ill. App. 396.

**74.** See Contracts, 9 Cyc. 672.

**75.** *Alabama.*—Weinstein *v.* Freyer, 93 Ala. 257, 9 So. 285, 12 L. R. A. 700; Boit *v.* Maybin, 52 Ala. 252.

*Arkansas.*— Parsons Oil Co. *v.* Boyett, 44 Ark. 230.

*Georgia.*— Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170.

*Illinois.*— Schlee *v.* Guckenheimer, 179 Ill. 593, 54 N. E. 302.

*Indiana.*— Keiwert *v.* Meyer, 62 Ind. 587, 30 Am. Rep. 206.

*Iowa.*— Tegler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118.

*Kansas.*— McCarty *v.* Gordon, 16 Kan. 35; Haug *v.* Gillett, 14 Kan. 140.

*Louisiana.*— Mure *v.* Donnell, 12 La. Ann. 369; Hall *v.* Mulhollan, 7 La. 383; Lynch *v.* Postlethwaite, 7 Mart. 69, 12 Am. Dec. 495.

*Maine.*— Torrey *v.* Corliss, 33 Me. 333.

*Maryland.*— Kerr *v.* Urie, 86 Md. 72, 37 Atl. 789, 63 Am. St. Rep. 493, 38 L. R. A. 119; Fouke *v.* Fleming, 13 Md. 392.

*Massachusetts.*— Frank *v.* Hoey, 128 Mass. 263; Suit *v.* Woodhall, 113 Mass. 391; Brockway *v.* Maloney, 102 Mass. 308; Kline *v.* Baker, 99 Mass. 253; Finch *v.* Mansfield, 97 Mass. 89; Hardy *v.* Potter, 10 Gray 89; Orcutt *v.* Nelson, 1 Gray 536; Greenwood *v.* Curtis, 6 Mass. 358, 4 Am. Dec. 145.

*Michigan.*— Webber *v.* Donnelly, 33 Mich. 469; Roethke *v.* Philip Best Brewing Co., 33 Mich. 340; Kling *v.* Fries, 33 Mich. 275.

*New Hampshire.*— Boothby *v.* Plaisted, 51 N. H. 436, 12 Am. Rep. 140; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205; Garland *v.* Lane, 46 N. H. 245; Smith *v.* Godfrey, 28 N. H. 379, 61 Am. Dec. 617; Smith *v.* Smith, 27 N. H. 244; Woolsey *v.* Bailey, 27 N. H. 217.

*New York.*— Wilson *v.* Lewiston Mill Co., 74 Hun 612, 26 N. Y. Suppl. 847 [*affirmed* in 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680]; Grant *v.* McLachlin, 4 Johns. 34.

*Tennessee.*— Allen *v.* Bain, 2 Head 100; Dougherty *v.* Curle, 2 Humphr. 453.

*West Virginia.*— Kurner *v.* O'Neil, 39 W. Va. 515, 20 S. E. 589.

*United States.*—Wickham *v.* Dillon, 29 Fed. Cas. No. 17,612.

See 43 Cent. Dig. tit. "Sales," § 2; and Contracts, 9 Cyc. 682.

**The validity of a contract to sell,** that is, of an executory contract of sale, is as a rule determined by the law of the place where the contract is made (Gipps Brewing Co. *v.* De France, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; Jones *v.* National Cotton Oil Co., 31 Tex. Civ. App. 420, 72 S. W. 248. See Frauds, Statute of, 20 Cyc. 279); but if it contemplates a sale which will be valid at the place where it is to be executed the contract will not be held invalid merely because the sale would have been invalid at the place where the contract was made (Bollinger *v.* Wilson, 76 Minn. 262, 79 N. W. 109, 77 Am. St. Rep. 646; Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769. See also Contracts, 9 Cyc. 672).

**76.** Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; Weil *v.* Golden, 141 Mass. 364, 6 N. E. 229; Tredway *v.* Riley, 32 Nebr. 495, 49 N. W. 268, 29 Am. St. Rep. 447.

**77.** Tatum *v.* Wright, 7 La. Ann. 358. See also Contracts, 9 Cyc. 675.

**78.** *Alabama.*— Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

*Illinois.*— Waters *v.* Cox, 2 Ill. App. 129, holding that a contract made in Michigan for the purchase of a piano, construed by the courts of that state to be a mere bailment, will be so construed by the courts of Illinois upon the buyer's removal to Illinois bringing the piano and mortgaging it without the seller's knowledge or consent.

*Louisiana.*— Claflin *v.* Mayer, 41 La. Ann. 1048, 7 So. 139.

*Massachusetts.*— Ames *v.* McCamber, 124 Mass. 85.

*New Hampshire.*— French *v.* Hall, 9 N. H. 137, 32 Am. Dec. 341.

*New Jersey.*— Marvin Safe Co. *v.* Norton, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566; Herrick *v.* King, 19 N. J. Eq. 80.

*New York.*— Townsend *v.* Allen, 13 N. Y. Suppl. 73 [*affirmed* in 126 N. Y. 646, 27 N. E. 853].

*North Carolina.*— Drewry *v.* Phillips, 44 N. C. 81; Morrow *v.* Alexander, 24 N. C. 388.

*Pennsylvania.*— Guttman *v.* Cole, 21 Wkly. Notes Cas. 96.

quent purchasers will be determined by the law of the state where the chattels are located.[79]

**3. Place of Sale.** A contract of sale is considered as made at the place where the transaction is finally consummated by delivery and acceptance.[80] A sale is deemed to be made at the place where it is executed by a transfer of the property in the goods from the seller to the buyer.[81] Accordingly, if an order is given for goods and is accepted by delivery of the goods to a carrier for shipment with

*United States.*— Treadwell *v.* Anglo-American Packing Co., 13 Fed. 22.

See 43 Cent. Dig. tit. "Sales," § 2.

**Thus in order that the seller shall have the vendor's privilege given by the law of Louisiana the contract of sale must be made in that state (De la Vergne Refrigerating Mach. Co. *v.* New Orleans, etc., R. Co., 51 La. Ann. 1733, 26 So. 455; Erman *v.* Lehman, 47 La. Ann. 1651, 18 So. 650; Brent *v.* Shouse, 16 La. Ann. 158, 79 Am. Dec. 573; Whiston *v.* Stodder, 8 Mart. (La.) 95, 13 Am. Dec. 281; G. A. Gray Co. *v.* Taylor Bros. Iron-Works Co., 66 Fed. 686, 14 C. C. A. 56) or be executed there (McLane *v.* Creditors, 47 La. Ann. 134, 16 So. 764; Newman *v.* Cannon, 43 La. Ann. 712, 9 So. 439; McIlvaine *v.* Legare, 36 La. Ann. 359; Overend *v.* Robinson, 10 La. Ann. 728). But a lien given by the law of another state under a contract made in that state will be enforced in Louisiana. Tyree *v.* Sands, 24 La. Ann. 363.**

**Payment of price by giving note.— The law of the place where the sale is made determines whether a note given in payment of the price is to be deemed *prima facie* absolute or conditional payment. Parbox *v.* Childs, 165 Mass. 408, 43 N. E. 124. See also Vancleef *v.* Therasson, 3 Pick. (Mass.) 12.**

**79.** Beirne *v.* Patton, 17 La. 589; Whitman *v.* Conner, 40 N. Y. Super. Ct. 339; *In re* Pease Car, etc., Works, 134 Fed. 919.

**The rights of a bona fide purchaser from one to whom the merchandise had been delivered under a contract of sale is not affected by a statutory provision of the state in which the original sale was made that such merchandise shall not be considered as the property of the buyer, or the ownership given up, until it shall be fully paid for, "although delivered into the possession of the buyer," although such statute entered into the terms of the contract of sale and became a part of it. Comer *v.* Cunningham, 77 N. Y. 391, 33 Am. Rep. 626.**

**80.** *Connecticut.*— See Moline Jewelry Co. *v.* Dinnan, 81 Conn. 111, 70 Atl. 634, 17 L. R. A. N. S. 1119; Johnson County Sav. Bank *v.* Walker, 80 Conn. 509, 69 Atl. 15, holding that where a manufacturing company in Iowa, soliciting in Connecticut through an agent, obtained an order for jewelry to be delivered free on board transportation companies in Iowa, the sale was made in Iowa.

*Louisiana.*— De la Vergne Refrigerating Mach. Co. *v.* New Orleans, etc., R. Co., 51 La. Ann. 1733, 26 So. 455; McLane *v.* Creditors, 47 La. Ann. 134, 16 So. 764; Newman *v.* Cannon, 43 La. Ann. 712, 9 So. 439; McIlvaine *v.* Legare, 36 La. Ann. 359.

*Massachusetts.*— Finch *v.* Mansfield, 97 Mass. 89.

*Michigan.*— Myers *v.* Carr, 12 Mich. 63.

*New York.*— Wilson *v.* Lewiston Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680 [*affirming* 74 Hun 612, 26 N. Y. Suppl. 847].

*United States.*— Ladd *v.* Dulany, 14 Fed. Cas. No. 7,971, 1 Cranch C. C. 583.

See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 682.

**Thus where an order is given for the purchase of goods to an agent who has not authority to sell, but which is forwarded to his principal for approval, the contract is deemed to be made at the place of approval. Engs *v.* Priest, 65 Iowa 232, 21 N. W. 580; Taylor *v.* Pickett, 52 Iowa 467, 3 N. W. 514; Tegler *v.* Shipman, 33 Iowa 194, 11 Am. Rep. 118; Kerwin *v.* Doran, 29 Mo. App. 397; Woolsey *v.* Bailey, 27 N. H. 217; Shuenfeldt *v.* Junkermann, 20 Fed. 357. See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 682.**

**In Louisiana where an agent for non-resident dealers had authority only to exhibit samples and receive orders for communication to his principals for acceptance or rejection, an order so transmitted becomes a contract when it was accepted and the goods were delivered to the carrier, and the contract was governed by the law of the place of shipment. Claflin *v.* Mayer, 41 La. Ann. 1048, 7 So. 139. But where an agent for non-resident sellers had authority to make sales, forwarding orders, not for acceptance or rejection, but for execution, and entered into a contract for the sale of goods, and instructed his principal to ship them to the buyer, which was done, it was held that the contract was made in Louisiana, and governed by its laws. Erman *v.* Lehman, 47 La. Ann. 1651, 18 So. 650. See also McLane *v.* Creditors, 47 La. Ann. 134, 16 So. 764.**

**81.** *Iowa.*— Fred Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959.

*Kansas.*— Gill *v.* Kaufman, 16 Kan. 571.

*Louisiana.*— McIlvaine *v.* Legare, 36 La. Ann. 359; Maillard *v.* Nihoul, 21 La. Ann. 412; Overend *v.* Robinson, 10 La. Ann. 728.

*Maine.*— State *v.* Peters, 91 Me. 31, 39 Atl. 342.

*Maryland.*— Owens *v.* Bowie, 2 Md. 457.

*Massachusetts.*— Weil *v.* Golden, 141 Mass. 364, 6 N. E. 229; Ames *v.* McCamber, 124 Mass. 85; Dolan *v.* Green, 110 Mass. 322; Abberger *v.* Marrin, 102 Mass. 70; McIntyre *v.* Parks, 3 Metc. 207.

*Michigan.*— Myers *v.* Carr, 12 Mich. 63.

*New Hampshire.*—Felton *v.* Fuller, 29 N. H. 121.

the intention of transferring the property therein to the buyer, the sale is governed by the law of the place of shipment; [82] but if it is the intention that the property shall not pass until delivery by the carrier to the buyer at the place of destination, the sale is governed by the law of that place.[83]

**4. Sale With Design of Selling in Another State in Violation of Law.** The comity that induces a state to enforce a foreign contract does not extend to a contract entered into with the design of evading the law.[84] Accordingly a sale executed with the mutual design of reselling in violation of the laws of another state will not be enforced in that state.[85]

## III. Construction of Contract.

**A. General Rules — 1. In General.**[86] In the construction of contracts of sale, as in the construction of contracts generally, the intent of the parties as expressed in the language used must govern,[87] and this intention must be gathered

*New Jersey.*— Marvin Safe Co. *v.* Norton, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566.

*Pennsylvania.*— Perlman *v.* Sartorius, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. Rep. 834; Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811; Whiting Mfg. Co. *v.* Fourth St. Nat. Bank, 15 Pa. Super. Ct. 419.

See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 682.

**When property passes** see *infra*, VI, A.

**82.** *Georgia.*— Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170.

*Illinois.*— Illinois Terra Cotta Lumber Co. *v.* Owen, 64 Ill. App. 632; Brinker *v.* Scheunemann, 43 Ill. App. 659.

*Iowa.*— Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219.

*Kansas.*— Williams *v.* Feiniman, 14 Kan. 288.

*Louisiana.*— Claflin *v.* Mayer, 41 La. Ann. 1048, 7 So. 139.

*Maine.*— Banchor *v.* Cilley, 38 Me. 553; Torrey *v.* Corliss, 33 Me. 333.

*Massachusetts.*— Betz *v.* McMorrow, 173 Mass. 8, 52 N. E. 1069; Orcutt *v.* Nelson, 1 Gray 536.

*Michigan.*— Sullivan *v.* Sullivan, 70 Mich. 583, 38 N. W. 472.

*Missouri.*— Kerwin *v.* Doran, 29 Mo. App. 397.

*Oklahoma.*— Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

*Pennsylvania.*— Lowrey *v.* Ulmer, 1 Pa. Super. Ct. 425.

*Vermont.*— Dame *v.* Flint, 64 Vt. 533, 24 Atl. 1051.

*Canada.*— Timossi *v.* Palangio, 6 Quebec Pr. 452; Gravel *v.* Gendreau, 5 Quebec Pr. 360.

See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 682.

**Acceptance after countermand.**— Where defendant gave an order in Illinois for intoxicating liquors to be shipped to him in Iowa, and afterward countermanded the order, but, upon the liquors being delivered to him in Iowa, accepted them, the acceptance of the liquors did not constitute a new contract, made in Iowa, but was a mere waiver of the countermand, and an affirmation of the original contract, made in Illinois. Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235.

**83.** *Kansas.*— Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956.

*Louisiana.*— Bancker *v.* Brady, 26 La. Ann. 749.

*Maine.*— Wasserboehr *v.* Boulier, 84 Me. 165, 24 Atl. 808, 30 Am. St. Rep. 344.

*Minnesota.*— Theo. Hamm Brewing Co. *v.* Young, 76 Minn. 246, 79 N. W. 111, 396.

*Tennessee.*— Rome Furniture, etc., Co. *v.* Walling, (Ch. App. 1900) 58 S. W. 1094.

*Canada.*— Walker *v.* Gervais, 5 Quebec Pr. 330.

See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 682.

**Question for jury.**— That the seller, residing in another state, took a bill of lading in the name of its local manager, who indorsed the same, and that it was forwarded with a draft showing that a delivery of the goods was not to be made to the buyer in the state until payment of the price, did not, as matter of law, show that the sale took place in the state, but the question was for the jury to determine upon all the facts. Hamilton *v.* Jos. Schlitz Brewing Co., 129 Iowa 172, 105 N. W. 438, 2 L. R. A. N. S. 1078.

**84.** See Contracts, 9 Cyc. 675.

**85.** *Iowa.*— Davis *v.* Bronson, 6 Iowa 410.

*Kansas.*— Feineman *v.* Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547.

*Maine.*— Banchor *v.* Mansel, 47 Me. 58.

*Massachusetts.*—Webster *v.* Munger, 8 Gray 584. See also Graves *v.* Johnson, 156 Mass. 211, 30 N. E. 818, 32 Am. St. Rep. 446, 15 L. R. A. 834.

*New Hampshire.*— Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927.

*Vermont.*— Aiken *v.* Blaisdell, 41 Vt. 655; Gaylord *v.* Soragen, 32 Vt. 110, 76 Am. Dec. 154.

*United States.*— Kohn *v.* Melcher, 43 Fed. 641, 10 L. R. A. 439.

*England.*— Waymell *v.* Reed, 5 T. R. 599, 2 Rev. Rep. 675, 101 Eng. Reprint 335.

See 43 Cent. Dig. tit. "Sales," §§ 2, 154; and Contracts, 9 Cyc. 675.

**86. Construction of contracts** generally see Contracts, 9 Cyc. 577.

**87.** Scott *v.* Baber, 13 Ala. 182; St. Louis

from the whole agreement,[88] and in case of doubt by reference to the subject-matter, situation of the parties, and the object which they had in view,[89] together with all the facts and circumstances surrounding the transaction.[90] When the contract is express no other conditions or terms than those contained therein will be implied,[91] and generally an express written contract of sale is, in the absence of fraud or mistake, conclusive on the parties;[92] but effect must be given to the real intention of the parties, although this requires a departure from the strict letter of the contract.[93] In arriving at the intent of the parties the words used are as a rule to be construed according to their ordinary settled meaning,[94] and as referring to the usual known and foreseen conditions attending commercial transactions.[95] If, however, the ordinary or literal meaning of particular words is inconsistent with the plain intent of the parties as shown by the whole contract, such meaning will be discarded,[96] especially when the words have acquired a special meaning by mercantile usage,[97] and generally mercantile usage and custom may be considered in arriving at the intent of the parties,[98] if it appears that the custom was known to both parties,[99] as it will be presumed that the parties contracted with reference to a usage peculiar to the particular transaction if there is nothing in the contract to exclude this inference,[1] although a usage or custom of trade cannot change the intrinsic character of the contract of the parties.[2] The same expressions used in different parts of the contract should usually be interpreted in the same sense,[3] and the punctuation should be considered in arriv-

Refrigerator Co. *v.* Vinton Washing-Mach. Co., 79 Iowa 239, 44 N. W. 370, 18 Am. St. Rep. 366; Kelley *v.* Upton, 5 Duer (N. Y.) 336; Gallup *v.* Sterling, 22 Misc. (N. Y.) 672, 49 N. Y. Suppl. 942; Wheeler *v.* Walton, etc., Co., 64 Fed. 664. See also, generally, CONTRACTS, 9 Cyc. 577.

**Effect of assignment.**— Even after an assignment of the contract the rights of the parties are to be determined from the language of the original contract. Dustan *v.* McAndrew, 44 N. Y. 72; Smith *v.* Foster, 36 Vt. 705.

**88.** Scott *v.* Baber, 13 Ala. 182; Kennedy *v.* Lee, 147 Cal. 596, 82 Pac. 257; Kelley *v.* Upton, 5 Duer (N. Y.) 336. See also, generally, CONTRACTS, 9 Cyc. 579.

**The ordinary rule of construction applies** that the contract must be construed with reference to all of its terms and so as if possible to give effect to all of them. Bass *v.* Veltum, 28 Minn. 512, 11 N. W. 65.

**89.** Rutledge *v.* McAfee, 72 Md. 28, 18 Atl. 1103; Fullam *v.* Wright, etc., Wire Cloth Co., 196 Mass. 474, 82 N. E. 711; Kennedy *v.* Schwartz, 13 Nev. 229; Parker *v.* Adams, 47 Vt. 139.

**90.** See *infra*, III, A, 3.

**91.** Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179, 82 S. W. 1128.

**92.** *Alabama.*— Morgan *v.* Smith, 29 Ala. 283.

*Kansas.*— Phelps-Bigelow Windmill Co. *v.* Piercy, 41 Kan. 763, 21 Pac. 793.

*Kentucky.*— O'Neal *v.* M. Rumley Co., 53 S. W. 521, 21 Ky. L. Rep. 936.

*Louisiana.*— Fortier *v.* Zimpel, 6 La. Ann. 53.

*Missouri.*— Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179, 82 S. W. 1128.

*Ohio.*— Schroeder *v.* Kisselbach, 5 Ohio Dec. (Reprint) 158, 3 Am. L. Rec. 295; Straus *v.* Payne, 1 Ohio Dec. (Reprint) 61.

See 43 Cent. Dig. tit. "Sales," § 161.

**93.** Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497.

**94.** Barrow *v.* Window, 71 Ill. 214; Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

**95.** Losecco *v.* Gregory, 108 La. 648, 32 So. 985.

**96.** Losecco *v.* Gregory, 108 La. 648, 32 So. 985; Kelley *v.* Upton, 5 Duer (N. Y.) 336.

**Changing words from context.**— If the contract demands that the word "and" shall be construed as "or" in order to give effect to the intention of the parties, this construction will be adopted. Gibbes Mach. Co. *v.* Johnson, 81 S. C. 10, 61 S. E. 1027.

**97.** Ashforth *v.* Redford, L. R. 9 C. P. 20, 43 L. J. C. P. 57; Hutchinson *v.* Bowker, 9 L. J. Exch. 24, 5 M. & W. 535. See also Everitt *v.* Indiana Paper Co., 25 Ind. App. 287, 57 N. E. 281.

**98.** *Iowa.*— Wood *v.* Allen, 111 Iowa 97, 82 N. W. 451.

*Kentucky.*— Fairmount Glass Works *v.* Grunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. L. Rep. 264.

*Louisiana.*— Landry *v.* Adeline Sugar-Factory Co., 52 La. Ann. 258, 26 So. 824.

*Missouri.*— Price *v.* Vanstone, 40 Mo. App. 207.

*Canada.*— Woolf *v.* Allen, 4 Northwest. Terr. 431.

See also, generally, CUSTOMS AND USAGES, 12 Cyc. 1075, 1084.

**99.** McKee *v.* Wild, 52 Nebr. 9, 71 N. W. 958; Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

**1.** Everitt *v.* Indiana Paper Co., 25 Ind. App. 287, 57 N. E. 281; Iasigi *v.* Rosenstein, 3 N. Y. App. Div. 500, 38 N. Y. Suppl. 354 [*affirmed* in 158 N. Y. 678, 52 N. E. 1124]. See also, generally, CUSTOMS AND USAGES, 12 Cyc. 1082.

**2.** Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

**3.** Woolf *v.* Allen, 4 Northwest. Terr. 431.

ing at the meaning of the contract.[4] The language of the contract will usually be construed most strongly against the party using it,[5] and if the contract is partly printed and partly written, the written portion will control the printed.[6] While the parties must be held to what they have in fact agreed upon, although the result may be inequitable,[7] if the contract is open to construction, that construction should be adopted which is equitable and will prevent fraud or injustice.[8]

**2. Contemporaneous Writings and Agreements.** In construing contracts of sale all contemporaneous instruments and agreements in regard to the transaction should be construed together,[9] and if possible so as to give effect to all of them.[10] If a new agreement is entered into for the avowed purpose of continuing in a modified form a former agreement, the latter may properly be looked at in construing the new contract;[11] but writings or printed documents merely attached to or accompanying the contract and not specifically referred to or incorporated therein will not be regarded as part thereof.[12] So too printed conditions on letter and bill heads or order blanks, not specifically referred to or incorporated in the contract, will not be regarded as a part thereof.[13]

**3. Circumstances Surrounding Transaction.** The circumstances attending the making of a contract are entitled to great weight in arriving at the intention of the parties,[14] and if the contract is ambiguous or uncertain may be resorted to in determining the proper construction;[15] and this rule refers not only to the

4. Van Eman *v.* Stanchfield, 8 Minn. 518.

5. Scott *v.* Baber, 13 Ala. 182; Jackson *v.* Builders' Woodworking Co., 91 Hun (N. Y.) 435, 26 N. Y. Suppl. 227; Moore *v.* U. S., 38 Ct. Cl. 590. See also, generally, Contracts, 9 Cyc. 590.

6. Russell *v.* Bondie, 51 Mich. 76, 16 N. W. 239.

7. Loughridge *v.* Allen, 38 S. W. 698, 18 Ky. L. Rep. 894. See also Tipton *v.* Feitner, 20 N. Y. 423.

8. St. Louis Refrigerator, etc., Co. *v.* Vinton Washing Mach. Co., 79 Iowa 239, 44 N. W. 370, 18 Am. St. Rep. 366; Van Eman *v.* Stanchfield, 8 Minn. 518; Tipton *v.* Feitner, 20 N. Y. 423. See also, generally, Contracts, 9 Cyc. 587.

9. *Alabama.*— Buist *v.* Eufaula Drug Co., 96 Ala. 292, 11 So. 301.

*Illinois.*—Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157 [*affirming* 57 Ill. App. 507].

*Indiana.*— Semon *v.* Coppes, 35 Ind. App. 351, 74 N. E. 41.

*Kentucky.*— Watts *v.* National Cash Register Co., 78 S. W. 118, 25 Ky. L. Rep. 1347.

*Louisiana.*—Ware *v.* Morris, 23 La. Ann. 665; Calderwood *v.* Calderwood, 23 La. Ann. 658.

*Massachusetts.*— Whittemore *v.* Fuller, 10 Allen 361.

*Missouri.*— Nelson *v.* Cal Hirsch Iron, etc., Co., (App. 1903) 77 S. W. 590.

*New Jersey.*— Dobbins *v.* Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

*Texas.*— Bender *v.* Freidrich, 39 Tex. 276; Brenck *v.* Eastern Mfg. Co., (Civ. App. 1901) 61 S. W. 329.

*United States.*— National Cordage Co. *v.* Pearson Cordage Co., 55 Fed. 812, 5 C. C. A. 276.

*England.*— Phippen *v.* Hyland, 19 U. C. C. P. 416.

See 43 Cent. Dig. tit. "Sales." § 159; and generally, Contracts, 9 Cyc. 580.

10. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157 [*affirming* 57 Ill. App. 507].

11. Woolf *v.* Allen, 4 Northwest. Terr. 431.

12. Columbus Constr. Co. *v.* Crane Co., 52 Fed. 635, 3 C. C. A. 216.

**Bought and sold notes.**— Where there is already a complete written contract negotiated through brokers, it will not be controlled by bought and sold notes subsequently exchanged between the brokers, containing terms not warranted by the authority granted to the buyer's broker. Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298.

13. Samuels *v.* Shipley, 112 Iowa 580, 84 N. W. 687; Patch *v.* Smith, 105 N. Y. App. Div. 208, 94 N. Y. Suppl. 692; Weeks *v.* Robert A. Johnston Co., (Wis. 1902) 92 N. W. 794. But see Anaconda Copper Min. Co. *v.* Houston, 107 Ill. App. 183.

14. Del Bondio *v.* Jacob Dold Packing Co., 79 Mo. App. 465.

15. *Colorado.*— Scott Supply, etc., Co. *v.* Roberts, 42 Colo. 280, 93 Pac. 1123.

*Illinois.*— Smith *v.* Gillett, 50 Ill. 290.

*Iowa.*— McCormick Harvesting Mach. Co. *v.* Williams, 99 Iowa 601, 68 N. W. 907.

*Missouri.*— Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Del Bondio *v.* Jacob Dold Packing Co., 79 Mo. App. 465.

*New York.*— Tallcott *v.* Arnold, 61 N. Y. 616; Bronson *v.* Gleason, 7 Barb. 472.

*Tennessee.*— Carnegie Steel Co. *v.* Chattanooga Const. Co., (Ch. App. 1896) 38 S. W. 102.

*Texas.*— Streeper *v.* Frieberg, 3 Tex. App. Civ. Cas. § 240.

*Vermont.*— McGowan *v.* Griffin, 69 Vt. 168, 37 Atl. 298.

*United States.*— Reynolds *v.* Palmer, 21 Fed. 433.

See also, generally, Contracts, 9 Cyc. 587.

**Evidence to aid construction** see *infra*, III, G.

general conditions under which the contract was made, but also to legal [16] and physical conditions.[17] So too when it is a question which of two agreements constituted the contract the consideration given and accepted may be regarded as controlling.[18]

**4. Construction by the Parties.** If the language of the contract is indefinite and ambiguous the construction put thereon by the parties themselves will ordinarily govern,[19] if the language used will reasonably permit of such construction,[20] and as tending to show a construction by the parties, their subsequent conduct and declarations may be considered.[21] If, however, the meaning of the contract is clear, its effect will not be controlled by any erroneous construction that the parties may have put upon it.[22]

**B. Subject-Matter — 1. In General.** While it is essential that the property sold can in some way be identified,[23] a general description is sufficient if the property intended by the parties can be identified,[24] even by the aid of parol evidence.[25] If the contract of sale specifically designates the subject-matter of the transaction, such designation must control and cannot be enlarged by construction,[26] and a specific designation of the subject-matter will control, although such designation is followed by more general words of description.[27] So, while it is not an objection that the contract does not specify the definite location of the property if it can be otherwise identified,[28] if the location of the property is definitely stated, the contract will cover only the goods that are within the location described[29] at

16. Jolsen's Taendstikfabrikker *v.* Thurber, 118 N. Y. 684, 23 N. E. 808.

17. Tallcot *v.* Arnold, 61 N. Y. 616.

18. Danolds *v.* U. S., 6 Ct. Cl. 71.

19. *Arkansas.*—Union Trust Co. *v.* Webber-Seely Hardware Co., 73 Ark. 584, 84 S. W. 784.

*California.*— Kennedy *v.* Lee, 147 Cal. 596, 82 Pac. 257; Baldwin *v.* Napa, etc., Wine Co., 1 Cal. App. 215, 81 Pac. 1037.

*Illinois.*— Harman *v.* Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017; W. H. Purcell Co. *v.* Sage, 200 Ill. 342, 65 N. E. 723 [*affirming* 90 Ill. App. 160].

*Indiana.*— Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Gardner *v.* Caylor, 24 Ind. App. 521, 56 N. E. 134.

*Kentucky.*— Totten *v.* Cooke, 2 Metc. 275.

*Louisiana.*— Perry *v.* Holloway, 6 La. Ann. 265.

*Ohio.*— Butler *v.* Moses, 43 Ohio St. 166, 1 N. E. 316.

*Wisconsin.*— Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459.

*United States.*— Davis *v.* Alpha Portland Cement Co., 142 Fed. 74, 73 C. C. A. 388 [*affirming* 134 Fed. 274].

*England.*— King *v.* Reedman, 49 L. T. Rep. N. S. 473.

**Sale or consignment.**— Where there is a question as to whether a transaction was a sale or a mere consignment, the fact that the parties by their correspondence after the shipment construed it as a consignment for sale is conclusive. B. F. Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

20. Kennedy *v.* Lee, 147 Cal. 596, 82 Pac. 257.

21. *California.*— Thresher *v.* Gregory, (1895) 42 Pac. 421.

*Illinois.*— Carpenter *v.* Joliet First Nat. Bank, 119 Ill. 352, 10 N. E. 18 [*affirming* 19 Ill. App. 549].

*Indiana.*— Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

*Missouri.*— Laclede Constr. Co. *v.* T. J. Moss Tie Co., 185 Mo. 25, 84 S. W. 76; Del Bondio *v.* Jacob Dodd Packing Co., 79 Mo. App. 465.

*South Carolina.*—Gibbes Mach. Co. *v.* Johnson, 81 S. C. 10, 61 S. E. 1027.

*England.*— Macdonald *v.* Longbottom, 1 E. & E. 987, 6 Jur. N. S. 724, 29 L. J. Q. B. 256, 2 L. T. Rep. N. S. 606, 8 Wkly. Rep. 614, 102 E. C. L. 987.

22. Gardner *v.* Caylor, 24 Ind. App. 521, 56 N. E. 134.

23. Cohen *v.* Stewart, 98 N. C. 97, 3 S. E. 716.

24. Coghill *v.* Boring, 15 Cal. 213; Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

**Description held sufficient** see Carpenter *v.* Featherston, 15 La. Ann. 235; Brown *v.* Mynard, 107 Mich. 401, 65 N. W. 293; Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81; Cohen *v.* Stewart, 98 N. C. 97, 3 S. E. 716; Barber *v.* Andrews, (R. I. 1908) 69 Atl. 1; Fraser *v.* Macpherson, 34 N. Brunsw. 417.

25. Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81.

**Evidence to aid construction** as to subject-matter of sale see *infra*, III, G, 3.

26. O'Reer *v.* Strong, 13 Ill. 688; Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

**"Stationery."**—A sale of a building "including the vault, safe, stationery, and all bank fixtures contained therein" does not include revenue stamps, as the word "stationery" does not include stamps of any kind. Gregory *v.* Keller, 137 Ill. App. 441.

27. Harrell *v.* Durrance, 9 Fla. 490.

28. Thomas *v.* Mathis, 92 Ind. 560.

29. Novelty Paper Box, etc., Co. *v.* Stone, 92 Wis. 523, 66 N. W. 600, holding that a sale of the stock of manufactured goods

the time when the contract is made.[30] If the language of the contract is ambiguous the intention of the parties as to the subject-matter may be ascertained by the ordinary rules of construction,[31] including the construction which the parties themselves have put upon it.[32]

**2. Property Included in Description.** In determining what property is included in the contract of sale the intent of the parties will of course govern,[33] and this must be gathered from the entire contract,[34] and when necessary, by reference to the facts and circumstances surrounding the transaction.[35] Words of description will generally be construed to include all goods or articles that may fairly and reasonably be regarded as falling within such description,[36] unless a

"now on hand in the factory of said company" does not include goods previously taken from the factory and at the time of the sale in a store or warehouse.

**Application of rule.**—A bill of sale conveying a stock of merchandise contained in a certain store in a particular building does not transfer goods of the seller contained in other parts of the building than the store (Brown *v.* Loos, 66 Mo. App. 211); and where A agreed to sell B "all the surplus shavings made" at his mill on a certain corner for one year and before the year was out A left the mill described and took another, the sale did not cover shavings made at the new mill (Des Rivieres *v.* Lumber Dist. Milling Co., 69 Ill. App. 31); but a bill of sale of "all my stock of goods" and all other personal property contained in a certain building or on the lot on which such building is located is sufficient to pass title to a portion of the stock which had been withdrawn temporarily from the building and stored in another building partly located on the same lot (Towslee *v.* Russell, 76 Iowa 525, 41 N. W. 208).

30. O'Reer *v.* Strong, 13 Ill. 688; Denver First Nat. Bank *v.* Scott, 36 Nebr. 607, 54 N. W. 987. But see Martin *v.* Cope, 28 N. Y. 180, 3 Abb. Dec. 182, where it was held that a sale of a "carding machine and fulling mill," and "all the fixtures belonging to the fulling mill and carding machine," should be construed as including machinery which had been detached and removed without supplying its place.

31. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Martin *v.* Cope, 28 N. Y. 180, 3 Abb. Dec. 182.

**Particular contracts construed.**— Where a bill of sale of logs contains the words, without punctuation, "I do hereby sell . . . all the logs belonging to and owned by me in the Mississippi River and along the shores thereof and also in booms above the Falls of St. Anthony," the words should be construed as limiting the sale to such logs only as were above the Falls of St. Anthony. Van Eman *v.* Stanchfield, 8 Minn. 518. A contract by which a piano company acknowledges the receipt of a certain piano from the other party to the contract, for which it agrees to allow a stated sum upon the purchase of a "new Pease" piano at regular retail price, requires the piano company to make such allowance only upon the purchase of a new piano of the "Pease" make, in the absence of any showing that there is any piano by the name of the "New Pease." Graham *v.* Pease Piano Co., 111 N. Y. Suppl. 60.

**Evidence to aid construction** as to subject-matter see *infra*, III, G, 3.

32. Houghton Co. *v.* Kennedy, 8 Cal. App. 777, 97 Pac. 905; Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

33. *Alabama.*— Rankin *v.* Vandiver, 78 Ala. 562.

*Kentucky.*— Mason *v.* Cowan, 1 B. Mon. 7.

*Missouri.*— Phillips *v.* Jones, 20 Mo. 67.

*New York.*— Towsand *v.* Ford, 72 N. Y. App. Div. 621, 76 N. Y. Suppl. 501.

*Tennessee.*— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

*Wisconsin.*— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 43 Cent. Dig. tit. "Sales," § 184.

**Mistake.**— In an action by the seller to recover goods, which the buyer claims were included in the sale, the latter may plead the equitable defense that the goods were by mistake omitted from the description. Steele *v.* Haddock, 3 C. L. R. 326, 10 Exch. 643, 24 L. J. Exch. 78, 3 Wkly. Rep. 172.

34. Phillips *v.* Jones, 20 Mo. 67; Dobbins *v.* Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

35. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Link *v.* Harrington, 47 Mo. App. 262; McGowan *v.* Griffin, 69 Vt. 168, 37 Atl. 298.

36. Keith *v.* Becker, (Ala. 1893) 13 So. 494; Rankin *v.* Vandiver, 78 Ala. 562; Houghton Co. *v.* Kennedy, 8 Cal. App. 777, 97 Pac. 905; Erickson *v.* Lyon, 26 Ill. App. 17; Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

**Illustrations.**—A sale of all property and rights of property will include property held by a third person to the use of the seller. Woodward *v.* Solomon, 7 Ga. 246. A sale of all the seller's stock in trade, accounts, and all contracts for the purchase and delivery of goods transfers to the buyer a contract for the purchase of goods, not specifically mentioned in the bill of sale. Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854. A bill of sale, purporting to convey "all my stock and farming implements" and "farming utensils, wagons," etc., will include blacksmith's tools used in operating the farm, and a hack and buggy used thereon. Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

**Hotel furniture** may include a piano for the use of guests. Crossman *v.* Baldwin, 49 Conn. 490.

contrary intention is shown by other provisions of the contract;[37] but if words of general description are used in connection with a specific enumeration of articles, the sale will ordinarily include only articles similar to those specifically mentioned.[38] While property clearly excluded by the language of the contract will not pass by the sale,[39] if any property falling within the description was not intended to be included, such intention must be clearly shown.[40] Where broad and general terms of description are used for the evident purpose of embracing all the property of the seller or all of a certain kind, they will pass property the existence of which was not known to the parties at the time of the sale;[41] but the sale of a specific chattel will not carry with it valuables secreted therein unknown to the parties,[42] and the purchaser of a safe acquires no title to its contents.[43]

**3. Attachments and Appurtenances.** The sale of a specific article will generally include all appurtenances and attachments necessarily accompanying it;[44] but separate and distinct articles not properly attachments or appurtenances of that which is specifically designated will not pass,[45] and if the contract expressly includes appurtenances only such articles will pass as are properly appurtenant to that which is expressly designated.[46]

**4. Sale of Going Concern.** The sale of a business will usually carry with it such articles, instruments, and privileges as are necessarily incident thereto,[47]

**Office furniture** will include a safe in use in the office. Skowhegan Bank *v.* Farrar, 46 Me. 293. And see Keller *v.* Rhodes, 64 Ill. App. 36. But in the absence of a representation that the article is complete the sale of a second-hand safe does not necessarily include a key to it. Davidge *v.* Crandall, 23 Ill. App. 360.

**"Effects."**—A ship at sea will pass by a sale of "goods, merchandise and effects." Welsh *v.* Parish, 1 Hill (S. C.) 155.

**Time check.**— The sale of a time check is a sale of the claim of the employee for wages. Citizens' State Bank *v.* Bonnes, 76 Minn. 45, 78 N. W. 875.

**Sale of goods to arrive.**—A sale of hides, "to arrive by vessel or vessels within 60 days from date," covers hides arriving by any vessels and not those arriving by the seller's vessels only. Fraser *v.* Harbeck, 4 Rob. (N. Y.) 179. A contract for the sale of iron "for shipment in March, 1880, from Great Britain to New York by sail or steam vessels, at seller's option" does not require that the iron should be shipped by the sellers, and they have the option to have it come by a steam or sailing vessel. Cunningham *v.* Judson, 100 N. Y. 179, 2 N. E. 915.

37. Phillips *v.* Jones, 20 Mo. 67.

38. Alt *v.* California Fig Syrup Co., 19 Nev. 118, 7 Pac. 174; Durant *v.* Allen, 65 N. Y. 562; Hickok *v.* Stevens, 18 Vt. 111. See also McAlpine *v.* Foley, 34 Minn. 251, 25 N. W. 452.

39. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Phillips *v.* Jones, 20 Mo. 67; Jacobson *v.* Tallard, 116 Wis. 662, 93 N. W. 841.

40. Newsome *v.* Brazell, 118 Ga. 547, 45 S. E. 397 (holding that a sale will include articles covered by the description, although the seller did not intend to include them if he fails to inform the purchaser); Rogers *v.* Newton, 91 Wis. 523, 65 N. W. 52 (holding that under a sale of logs to be paid for on the basis of the amount of merchantable lumber cut therefrom, the culls and unmerchantable lumber will pass as an integral part of the logs in the absence of any express reservation thereof).

41. Meriweather *v.* Herran, 8 B. Mon. (Ky.) 162; Cram *v.* Union Bank, 1 Abb. Dec. (N. Y.) 461, 4 Keyes 558 [*affirming* 42 Barb. 426].

42. Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

43. Ray *v.* Light, 34 Ark. 421; Kevill *v.* Soldani, 34 Mo. 149.

44. *Colorado.*— Scott Supply, etc., Co. *v.* Roberts, 42 Colo. 280, 93 Pac. 1123.

*Iowa.*— Pickerell *v.* Carson, 8 Iowa 544.

*Maryland.*— Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 29 Atl. 69.

*Massachusetts.*— Way *v.* Ryther, 165 Mass. 226, 42 N. E. 1128.

*Wisconsin.*— Weeks *v.* Robert A. Johnson Co., 116 Wis. 105, 92 N. W. 794; Radell *v.* Sharlan, 66 Wis. 138, 28 N. W. 136.

*United States.*— Wheeler, etc., Mfg. Co. *v.* Lyon, 71 Fed. 374.

See 43 Cent. Dig. tit. "Sales," § 184.

**Sacks containing grain.**— A sale of grain in sacks in the absence of evidence to the contrary includes also the sacks. Burr *v.* Williams, 23 Ark. 244; Texas Standard Cotton-Oil Co. *v.* National Cotton-Oil Co., (Tex. Civ. App. 1897) 40 S. W. 159.

45. Stephens *v.* Orman, 10 Fla. 9; O'Reer *v.* Strong, 13 Ill. 688; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

46. Gullman *v.* Sharp, 81 Hun (N. Y.) 462, 30 N. Y. Suppl. 1036; Rosenbaum *v.* Foss, 4 S. D. 184, 56 N. W. 114.

47. American Typefounders Co. *v.* Conner, 6 Misc. (N. Y.) 391, 26 N. Y. Suppl. 742; McFarland *v.* Stewart, 2 Watts (Pa.) 111, 26 Am. Rep. 109. See also Crawford *v.* Weston, 131 Mass. 283.

**A sale of a newspaper** carries with it the subscription list (McFarland *v.* Stewart, 2

such as the account-books,[48] correspondence,[49] and pending contracts.[50] Ordinarily the sale of a stock of goods will not carry with it money on deposit derived from a sale of part of such stock,[51] although the sale by a proper construction of its terms in connection with the circumstances surrounding the transaction may include such a fund,[52] even where its existence was not known to the parties at the time of the sale.[53]

**C. Price, Expenses, and Transportation — 1. Price — a. When Not Fixed by Contract.** In the case of a sale where the price is not fixed by contract, the buyer will be liable for the market value,[54] or as stated in some cases the reasonable value of the goods,[55] it being held in some cases that this is the market value,[56] and in others that while the reasonable value is ordinarily to be determined by the market value,[57] this is not necessarily or always the case,[58] particularly in the case of sales at retail or on credit.[59] The reasonable or market value should

Watts (Pa.) 111, 26 Am. Dec. 109); and the subscription accounts collected by the seller between the execution of the agreement and the delivery of possession (Claybaugh *v.* Goodchild, 135 Pa. St. 421, 19 Atl. 1015).

**Insurance policies.**—A sale of the furniture, rights, contracts, and effects owned by the sellers in connection with their hotel does not include policies of insurance on such property which are transferable only by indorsement and with the consent of the insurer, no such indorsement having been made or consent procured; nor where the contract is completely executed in so far as it manifests a purpose to vest any right of property in the purchaser is there any obligation on the part of the seller subsequently to procure such consent and transfer the policies. Jackson *v.* Millspaugh, 103 Ala. 175, 15 So. 576.

**48.** American Typefounders' Co. *v.* Conner, 6 Misc. (N. Y.) 391, 26 N. Y. Suppl. 742; Putnam *v.* Turney, etc., Co., 95 Fed. 56.

**49.** Beal *v.* Chase, 31 Mich. 490.

**50.** Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

**51.** Hayes *v.* Lewisburg Bank, (Tenn. Ch. App. 1897) 39 S. W. 753.

**52.** McGowan *v.* Griffin, 69 Vt. 168, 37 Atl. 298, holding that a contract of sale of all the "right, title and interest" of the seller in a grocery "business," and an assignment of "all accounts due," the purchaser agreeing to pay all debts and assume all obligations of the business, when construed in connection with the circumstances surrounding the particular transaction entitled the purchaser to money derived from the sale of goods then on hand or deposited in bank.

**53.** Cram *v.* Union Bank, 42 Barb. (N. Y.) 426 [*affirmed* in 1 Abb. Dec. 461, 4 Keyes 558], holding that a sale by a firm of a business, expressly including the goods "and all other property and valuable thing or things, belonging to said firm, of every name and kind," passes to the purchaser a sum of money deposited in a bank to the credit of such firm, although its existence was not known to the parties at the time of the sale.

**54.** *Arkansas.*— Burr *v.* Williams, 23 Ark. 244.

*Florida.*— Yulee *v.* Canova, 11 Fla. 9.

*Illinois.*— McEwen *v.* Morey, 60 Ill. 32; B. S. Green Co. *v.* Smith, 52 Ill. App. 158.

*Maine.*— South Gardner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

*New York.*— Konitzky *v.* Meyer, 49 N. Y. 571; Kittle *v.* Huntley, 67 Hun 617, 22 N. Y. Suppl. 519; Lent *v.* Hodgman, 15 Barb. 274.

*North Carolina.*— Dickson *v.* Jordan, 34 N. C. 79.

See 43 Cent. Dig. tit. "Sales," § 205.

**55.** *Alabama.*— Wilkinson *v.* Williamson, 76 Ala. 163.

*Illinois.*— Larson *v.* Johnson, 42 Ill. App. 198.

*Kentucky.*— Ross *v.* Adams, 5 Dana 509.

*Massachusetts.*— Taft *v.* Travis, 136 Mass. 95.

*Michigan.*— Comstock *v.* Sanger, 51 Mich. 497, 16 N. W. 872; James *v.* Muir, 33 Mich. 223.

*Mississippi.*— Paxton *v.* Meyer, 58 Miss. 445.

*Missouri.*— Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619; Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34; Bailey *v.* Beasley, 32 Mo. App. 406.

*New York.*— Regus *v.* Moran, 9 N. Y. Suppl. 927; Ballard *v.* Trow's Printing, etc., Co., 1 N. Y. City Ct. 188.

*North Carolina.*— Carter *v.* McNeeley, 23 N. C. 448.

*England.*— Hoadley *v.* McLaine, 10 Bing. 482, 3 L. J. C. P. 162, 4 Moore & S. 340, 25 E. C. L. 231.

See 43 Cent. Dig. tit. "Sales," § 206.

**An agreement to purchase "four notes,"** each given for a certain sum stated, will be construed as an undertaking to pay therefor the face value of such notes. Ubbinga *v.* Farmers' Sav. Bank, 108 Iowa 221, 78 N. W. 840.

**56.** Yulee *v.* Canova, 11 Fla. 9; Wagoner Undertaking Co. *v.* Jones, 134 Mo. App. 101, 114 S. W. 1049. See also Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34 (where the rule is stated as being the "reasonable market prices"); Regus *v.* Moran, 9 N. Y. Suppl. 927 (where the rule is stated as being the "reasonable or market price").

**57.** Paxton *v.* Meyer, 58 Miss. 445.

**58.** James *v.* Muier, 33 Mich. 223; Paxton *v.* Meyer, 58 Miss. 445.

**59.** Paxton *v.* Meyer, 58 Miss. 445.

ordinarily be determined as of the time and place of delivery,[60] if there is a market value at such time and place,[61] although accidental causes or manipulations of the market may prevent the market price at the particular date from being the proper standard.[62] The market price should also be determined by the general market price for which the goods would sell in the regular course of business,[63] under the usual and ordinary course of lawful trade and competition,[64] and not such price as the seller might demand or some particular buyer be willing to pay;[65] and it must also be the market price for similar transactions according to whether the sale in question is wholesale or retail,[66] or for cash or on credit.[67] If the goods shipped or delivered are accompanied by a bill or invoice stating a price, and are accepted by the buyer without objection, they will be held to have been accepted at the price stated,[68] and as between merchants an account rendered will, in the absence of fraud or mistake, be deemed to be conclusive as to the price unless objected to within a reasonable time.[69] So also if the goods are ordered from price lists furnished by the seller, the prices stated in such lists will be taken as the prices agreed on.[70]

**b. Under Provision of Contract.** Where the price of the goods sold is fixed by the contract of sale, such price will control,[71] regardless of the actual value of

**60.** *Arkansas.*— Burr *v.* Williams, 23 Ark. 244.

*Florida.*— Yulee *v.* Canova, 11 Fla. 9.

*Illinois.*— McEwen *v.* Morey, 60 Ill. 32.

*Maine.*— South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

*Mississippi.*— Paxton *v.* Meyer, 58 Miss. 445.

*New Jersey.*— Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206.

See 43 Cent. Dig. tit. "Sales," § 207.

Any subsequent rise or fall in the value of the property is to the advantage or loss of the buyer. Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206.

Seller in distant state.— Where a buyer in one state orders lumber from a wholesale dealer in another state to be shipped to the buyer, and the order is silent as to the price, the market value at the place of business of the seller, and not the market value at the place to which the lumber is shipped, governs the price. Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

**61.** South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110, holding that if there is no market price at the place of delivery, the value should be determined at the nearest place where the goods have a market price, by the addition or reduction of the difference in the cost of delivery, and that if there were no sales at the particular time reference should be had to sales nearest in time.

**62.** Paxton *v.* Meyer, 58 Miss. 445; Acebal *v.* Levy, 10 Bing. 376, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180.

**63.** Yulee *v.* Canova, 11 Fla. 9; Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; Paxton *v.* Meyer, 58 Miss. 445; Wagoner Undertaking Co. *v.* Jones, 134 Mo. App. 101, 114 S. W. 1049.

**64.** Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770, holding that a price fixed by a combination of manufacturers or dealers including the seller, formed for the express purpose of controlling the price of the goods, is not entitled to rank as the "market price," and this irrespective of the unlawful character of the combination.

**65.** Yulee *v.* Canova, 11 Fla. 9.

**66.** Paxton *v.* Meyer, 58 Miss. 445; Kittle *v.* Huntley, 67 Hun (N. Y.) 617, 22 N. Y. Suppl. 519, holding that where goods in question were sold by a retailer to a customer, the market price is the retail market price as fixed by the trade and regulated by the law of supply and demand, and that evidence as to the market price as between the manufacturer or wholesaler and the retailer is inadmissible.

**67.** Paxton *v.* Mayer, 58 Miss. 445.

**68.** Metropolitan Mfg. Co. *v.* Dunning, 2 N. Y. St. 711; Mitchell *v.* McBee, 1 McMull. (S. C.) 267, 36 Am. Dec. 264; Kearney *v.* Letellier, 27 Can. Sup. Ct. 1.

**69.** B. S. Green Co. *v.* Smith, 52 Ill. App. 158; Lefurgy *v.* Stewart, 23 N. Y. Suppl. 537.

**70.** Paine Lumber Co. *v.* Betcher, 34 Minn. 480, 26 N. W. 606. See also Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

**71.** *Georgia.*— Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261.

*Illinois.*— Illinois Linen Co. *v.* Hough, 91 Ill. 63; Minneapolis Threshing Mach. Co. *v.* Higgins, 71 Ill. App. 506.

*Maryland.*— Gibney *v.* Curtis, 61 Md. 192.

*Michigan.*— Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263, 39 N. W. 54.

*Missouri.*— Wheeler *v.* Mabrey, 65 Mo. 166.

*New Jersey.*— Camden Iron Works *v.* Camden, 60 N. J. Eq. 211, 47 Atl. 220.

*New York.*— Larrowe *v.* Lewis, 128 N. Y. 593, 27 N. E. 1075 [*affirming* 11 N. Y. Suppl. 342].

*Ohio.*— Courcier *v.* Graham, 1 Ohio 330.

*Wisconsin.*— Kvammen *v.* Meridean Mill Co., 58 Wis. 399, 17 N. W. 22.

See 43 Cent. Dig. tit. "Sales," § 204.

Although the evidence is conflicting as to the price agreed upon, if there was in fact an agreement as to price, the jury must

the goods,[72] or the cost to the seller of manufacturing them,[73] unless a different agreement as to price was subsequently entered into;[74] and in the absence of fraud neither party is entitled to show the actual value or contest the justice of the price agreed on.[75] Although the seller does not strictly comply with his part of the contract in regard to the character of the goods or time of delivery, the contract price will control if the buyer accepts the goods without objection under the contract.[76] On a sale of goods to be manufactured the question as to whether a change in the design will affect the contract price depends upon whether such change amounts to a new undertaking.[77] If the contract contains provisions as to the price but the terms of the contract are not clear, the price must be determined by the ordinary rules of construction;[78] but in such cases or where the evidence as to the price agreed on is conflicting, if the goods when shipped or delivered were accompanied by a bill or invoice, stating the price, and were received without objection, the price so stated will be held to be the price agreed on.[79] Where the contract does not expressly state the price but provides a method by which it shall be determined, this method must be followed,[80] unless the parties subsequently adopt a different method.[81] In such cases the intention of the parties as to the method to be employed must be determined by a construction of the terms of the agreement,[82] and the price as thus established will control and

find from the evidence what the agreed price was and not the actual or reasonable value of the goods. Illinois Linen Co. *v.* Hough, 91 Ill. 63. See also Kvammen *v.* Meridean Mill Co., 58 Wis. 399, 17 N. W. 22.

72. Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261; Illinois Linen Co. *v.* Hough, 91 Ill. 63; Courcier *v.* Graham, 1 Ohio 330.

73. Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263, 39 N. W. 54.

74. Wheeler *v.* Mabrey, 65 Mo. 166.

75. Courcier *v.* Graham, 1 Ohio 330.

76. Wheeler *v.* Mahrey, 65 Mo. 166. *Compare* Watkins *v.* Paine, 57 Ga. 50, holding that a receipt and retention of the goods by the buyer without objection renders him liable for their real value not exceeding the contract price.

77. Moran Bros. Co. *v.* Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759, holding that if the change in the design amounts to a new undertaking, the manufacturer may recover the reasonable value of his product, regardless of the contract price; but if the change does not amount to a new undertaking, he can only recover the contract price in so far as such price is applicable, with a *quantum meruit* for extra labor and materials necessitated by the change.

78. Deyo *v.* Hammond, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719; Burton, etc., Co. *v.* London St. R. Co., 7 Ont. L. R. 717.

**Alternative stipulations.**—An agreement to pay five hundred dollars for two horses, three hundred dollars down and the balance when the purchaser is satisfied that the horses are sound, should be construed as fixing two prices for the horses, one if sound and the other if unsound, and if it appears that one of the horses was unsound at the time of the sale, the purchaser is neither bound to pay the other two hundred dollars nor offer to return the horses. Thompson *v.* Russey, 50 Ala. 329. If the purchaser pays a certain amount and agrees that an additional sum shall be paid if the goods on being tested within a certain time show certain qualities, he cannot escape payment of the additional sum by neglecting or refusing to make the test, and if he does so it may be recovered by the seller upon proof by other evidence that the goods possessed the required qualities. Deyo *v.* Hammond, 102 Mich. 122, 60 N. W. 455, 25 L. R. A. 719.

79. Paddock-Hawley Iron Co. *v.* Pullis, 42 Mo. App. 206; Metropolitan Mfg. Co. *v.* Dunning, 2 N. Y. St. 711; Kearney *v.* Letellier, 27 Can. Sup. Ct. 1; Burton, etc., Co. *v.* London St. R. Co., 7 Ont. L. R. 717, holding that in such case a buyer will be estopped to deny that such bill or invoice properly represents the price agreed on.

**But if there is a definite agreement as to price** the fact that the goods are invoiced at a different price will not control or vary the price agreed on. Edwards, etc., Lumber Co. *v.* Baker, 2 N. D. 289, 50 N. W. 718.

80. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371; Lucas Coal Co. *v.* Delaware, etc., Canal Co., 148 Pa. St. 227, 23 Atl. 990; Duff *v.* Thrall, 35 Pa. Super. Ct. 136.

**If the parties have voluntarily adopted a method** by which the price is to be determined, which is not illegal, neither can afterward be heard to say that such method is not a fair and proper one. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371.

**Option as to methods.**— Where cattle running at large and estimated at a certain number are sold for a certain sum, the excess or deficiency to be at so much per head, and the contract provides that the buyer may take them without counting upon paying a certain additional sum, this is a mere privilege to be exercised or not at his option. Norris *v.* Harris, 15 Cal. 226.

81. Holbrook *v.* Setchel, 114 Mass. 435.

82. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371; Whiting *v.* Root, 52 Iowa 292, 3 N. W. 134; Kelly *v.* Berry, 39 Wis. 669.

be binding upon the parties,[83] provided the estimate according to the method agreed upon is a correct one.[84]

**c. Market Price.** Where the price under the terms of the contract is expressly based upon the market price, the effect of the contract if ambiguous as to its terms must be determined by the ordinary rules of construction.[85] What constitutes the market price will be governed by the general rules above stated,[86] unless the parties agree upon a particular method of determining the market price.[87] So the market price will be taken as the market price at the time and place of delivery,[88] provided there is a market price at such time and place,[89] unless the contract provides that it shall be determined as of some other time or place.[90] If the contract provides that one of the parties may select a date as of which the market price is to be determined, it will be construed as requiring the selection of a date subsequent to that upon which the selection is made,[91] and in the absence of any express limitation that the date shall be selected within a reasonable time.[92] If no selection is made within the time limited the market price at the time and place of delivery will control.[93]

**Particular provisions construed.**—When the price to be paid is a certain per cent lower than the lowest price made by a certain dealer, "payment to be made promptly on receipt" of the goods, the price of each shipment was to be determined by the prices of the designated dealer existing at the time of its receipt, and was not affected by a subsequent reduction during the season. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371. Where plaintiffs agreed to furnish defendants all the timber they required at their coal mines, they to pay at the rate of eighteen cents per ton for all the coal mined, and, should the tonnage during the year not amount to seventy-five thousand tons, defendants to pay the difference between the amount shipped and seventy-five thousand tons at the rate of eighteen cents per ton, the price agreed on under such contract for its fulfilment was eighteen cents per ton for seventy-five thousand tons. Wolf Creek Diamond Coal Co. *v.* Schultz, 71 Pa. St. 180. A contract to pay a certain price per cubic yard for building stone delivered fixes the price per cubic yard of stone as measured at the time of delivery, and not as a solid wall after the stone had been laid. Rogers *v.* Hayden, 91 Me. 24, 39 Atl. 283. In a contract for the sale of ore at prices regulated by the assay value per ton, ores delivered to be paid for monthly, the assays are to be averaged at the end of each month, and not taken in separate lots and quantities as delivered. Kennedy *v.* Schwartz, 13 Nev. 229. A contract which provides for the payment of a certain sum for an engine, to be furnished, and for the payment of a larger sum by way of reward if the engine exceeds a certain efficiency, and a lesser sum if it does not equal such efficiency, does not establish a fixed or certain contract price, but the contract price under such a contract is the amount actually paid for the engine when its efficiency has been determined. Chicago *v.* Hunt, 227 Ill. 130, 81 N. E. 243 [*affirming* 130 Ill. App. 462].

83. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371.

84. Phipps *v.* Hully, 18 Nev. 133, 1 Pac. 669, holding that where ore is sold to be paid for on the basis of the assay values of certain samples, such assay values must be correct or the estimate based thereon will not be binding upon the parties.

85. Mason *v.* Beard, 2 Ind. 505.

**Contract for highest market price.**— Under a contract to pay the "highest market price," it is the duty of the seller to inform himself as to what is the highest market price, and if without doing so he accepts what the buyer without fraud tenders, as the highest market price, there is no mutual mistake which will justify an impeachment of the account or recovery of the difference between the amount paid and the actual highest market price. Stern *v.* Ladew, 47 N. Y. App. Div. 331, 62 N. Y. Suppl. 267, 30 N. Y. Civ. Proc. 135.

**Market price of materials.**— Under a contract to make and deliver certain goods from materials of a certain "market value," the words "market value" mean the price in the market to an ordinary customer, irrespective of this particular contract. Orchard *v.* Simpson, 2 C. B. N. S. 299, 89 E. C. L. 299.

86. See *supra*, C, 1, a.

87. Gilbert *v.* Manning, 54 Hun (N. Y.) 99, 7 N. Y. Suppl. 220, holding that where the parties agree that the market price shall be determined by newspaper quotations, this method will control, and that the price may be shown by a paper of the day prior to the sale if the paper issued on the day of the sale contained no quotations.

88. South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110; Carter *v.* McNeeley, 23 N. C. 448.

89. South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

90. S. W. Bacon Fruit Co. *v.* Blessing, 122 Ga. 369, 50 S. E. 139; South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

91. McNeely *v.* Carter, 23 N. C. 141. See also Handwerk *v.* Oswood, 23 Ill. App. 282.

92. Handwerk *v.* Oswood, 23 Ill. App. 282.

93. Carter *v.* McNeely, 23 N. C. 448,

**d. Cost Price.** In the case of a sale of goods made at or based upon the cost price, the meaning of the term "cost price" depends upon the situation of the parties and the circumstances under which it is used,[94] but as applied to a retail stock of goods usually refers to the cost at wholesale.[95] The cost price means the amount actually paid for the goods,[96] but in determining the cost price, the cost of freight paid may be added to the original cost.[97] If the goods have not been paid for by the seller, the cost price is the amount which he would have to pay at the time of his sale to the second buyer.[98] Under an agreement to pay such price as the seller may have paid, the price is the amount actually paid,[99] and no deduction will be made for commissions received by the seller acting as a broker for the sale of the goods in question and other like goods.[1]

**e. Fluctuations of Market or Price.** A contract to furnish certain goods which merely recites what the present price for such goods shall be will not control in regard to orders made by the buyer after being notified by the seller of an advance in price;[2] but in contracts of sale the price to be paid by the buyer is frequently made expressly subject to variation according to fluctuations of the market or the cost of materials, or the price charged by the seller to other buyers,[3] and in such cases the price to be paid by the buyer depends upon the proper construction of the terms of the contract.[4] Variations according to the market

where, however, it is said that if the market price at the time and place of delivery were higher than the price upon any date which the seller might under the terms of the contract have selected, the amount recoverable should be limited accordingly.

**94.** Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782, holding that the term "cost price" is a relative term, differing according to whether it refers to the cost to the importer, jobber, retailer, or purchaser from the retailer.

**95.** Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782.

**Contract to deliver on demand.**— Under a contract to deliver to the buyer on demand goods to a certain amount from the stock of the seller "at wholesale price," the price is the wholesale price at the time of such demand. Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230.

**96.** Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782; McCoy *v.* Hastings, etc., Co., 92 Iowa 585, 61 N. W. 205.

**Price marked as cost price.**— If goods are sold at the cost price, such price is the actual cost and not that marked upon the goods as the cost price (Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782), unless the contract provides that the marked price shall be taken as the contract price, in which case the agreement will be binding in the absence of any fraud in marking the goods (Strubhar *v.* Misch, 68 Ill. App. 241).

**97.** Boaz *v.* Owens, 45 S. W. 876, 20 Ky. L. Rep. 257.

**98.** McCoy *v.* Hastings, etc., Co., 92 Iowa 585, 61 N. W. 205, holding that on a sale of goods for which the seller has not yet paid, where the price is fixed at a certain per cent of the cost price, the cost price is the price which the owner at the time of the sale would have to pay to the wholesaler, and if the time for obtaining a discount has passed the purchaser is not entitled to have such discount considered in computing the cost price.

**99.** Salm *v.* Israel, 74 Iowa 314, 37 N. W. 387, holding that where goods invoiced at a certain price were sold to the purchaser at less than the invoiced price, and he in turn contracted to sell them, agreeing that they should be invoiced to the second purchaser "at the invoiced price that first parties purchased same for," this agreement contemplated the actual cost to the first purchaser and not the price stated in the first invoice.

**1.** Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767.

**2.** Rice *v.* Western Fuse, etc., Co., 64 Ill. App. 603.

**3.** See cases cited *infra*, notes 4–13.

**4.** Rutledge *v.* McAfee, 72 Md. 28, 18 Atl. 1103 (provision for reduction in price according to subsequent prices of seller); Bass *v.* Veltum, 28 Minn. 512, 11 N. W. 65 (provision for variation according to fluctuations of market); Parker *v.* Adams, 47 Vt. 139 (provision for variation according to fluctuations of market).

**Particular provisions construed.**—Where the contract specifies a certain price to continue until there may be "a general advance in the market price," it will be construed as referring to a general advance above the price named and not an advance above what was the actual market price at the time of the contract. Spang *v.* Rainey, 79 Fed. 250, 24 C. C. A. 551. Where goods are sold to be delivered at a future date at a certain price, with a provision that the seller shall have the benefit of a rise in the market, with the privilege of closing the sale at the market price within a time limited, if he fails to exercise the option within the time specified it becomes *functus officio* and the price originally fixed applies. Bump *v.* Cooper, 19 Oreg. 81, 23 Pac. 806.

**Agreement to "protect and guarantee."**— An agreement by a manufacturer and seller of lead to "protect and guarantee" a cus-

price of the goods must be governed by what is properly the general market price or what customers are willing to pay in the regular course of business,[5] taking into consideration the different ways in which the commodity is being bought and sold in the market at the particular time; [6] and a buyer who is entitled to the benefit of a fall in the market price is not entitled to the lowest price which the seller may quote to some other particular buyer,[7] or the lowest price at which the buyer might procure the goods from some particular seller.[8] Where the price to the buyer of goods to be manufactured by the seller is to vary according to the market price of the materials, the variation is governed by the general market price of such materials and not their actual cost to the seller; [9] and it is not necessary for the seller to notify the buyer of any rise in the price of materials in order to hold him for the higher price of the goods manufactured.[10] Provisions for a variation of price according to the future prices of the seller also depend upon a construction of the contract; [11] but a contract giving a buyer the benefit of subsequent lower prices to other customers does not apply to deliveries made under contracts previously entered into at a fixed price,[12] nor can a buyer claim a reduction of price on his original purchase where he himself is the only subsequent buyer at a reduced price.[13]

2. EXPENSES.[14] In so far as provided for by the contract of sale the liability of the seller or buyer for expenses incident to the property sold and its transfer is governed by the terms and proper construction of the contract,[15] and in the

tomer on lead until the arrival of the seller's agent, with whom more definite agreements were to be made, means that the seller will supply the article to the customer as low as the most favorable market price at the time of delivery. Beymer-Bauman Lead Co. *v.* Haynes, 81 Me. 27, 16 Atl. 326.

5. Spang *v.* Rainey, 79 Fed. 250, 24 C. C. A. 551.

Market price defined see 26 Cyc. 819.

6. Spang *v.* Rainey, 79 Fed. 250, 24 C. C. A. 551.

7. Wing *v.* Wadhams Oil, etc., Co., 99 Wis. 248, 74 N. W. 819, holding that where the contract provides that if during the deliveries under it "the price" shall be below that named therein, the seller shall rebate the difference, on the deliveries so effected, the words "the price" relate to the market price and not the price at which the seller may sell to some other customer.

8. Thomson *v.* McCaldin, 5 Silv. Sup. (N. Y.) 57, 8 N. Y. Suppl. 71.

9. Vivian Mfg. Co. *v.* Robertson, 176 Mo. 219, 75 S. W. 644.

10. Vivian Mfg. Co. *v.* Robertson, 176 Mo. 219, 75 S. W. 644.

11. Rutledge *v.* McAfee, 72 Md. 28, 18 Atl. 1103, holding that in construing a provision giving the buyer the benefit of any lower price subsequently made by the seller, the situation of the parties, subject-matter of the contract, and purpose of the provision must be considered, and that where it appears that the object was to protect the purchaser against competition a subsequent sale to the same purchaser at a lower price will not affect the price of the original purchase.

Particular provisions construed.— Where a manufacturer agrees that if any reduction is made the next season in his price on a particular machine, the purchaser shall be credited with such amount on all machines carried over, if the manufacturer discontinues making the particular machine but makes another which is substantially the same, with only slight improvements and intended for the same trade, which is listed at a lower price, the dealer is entitled to the credit provided for in the contract. Champion Mach. Co. *v.* Gorder, 30 Nebr. 89, 46 N. W. 253. Where a purchaser of rubber goods agrees to take all the "seconds" manufactured by the seller in one year at twenty per cent less than the price of "firsts," the company agreeing to maintain the price of "firsts," the fact that it reduces the price will not justify a refusal of the buyer to take the "seconds," since he has the right to take them at twenty per cent less than the reduced price of "firsts" and in that way meet the cut in the price of the "firsts." Owen *v.* Matthews, 19 N. Y. Suppl. 813. Where goods are sold at a stated price with a stipulation for a reduction in the price to correspond with any lower price made to any other purchaser, the fact that another purchaser has the right of returning goods unsold at the end of the season is immaterial unless such privilege affects the market value of the goods sold with such privilege. Luthy *v.* Waterbury, 140 Ill. 664, 30 N. E. 351 [*affirming* 39 Ill. App. 317].

12. Plymouth Cordage Co. *v.* Pennsylvania Wood Co., 203 Pa. St. 206, 52 Atl. 245.

13. Rutledge *v.* McAfee, 72 Md. 28, 18 Atl. 1103.

14. Customs duties see *infra*, III, C, 4.
Freight charges see *infra*, III, C, 3.

15. Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367; Ducey Lumber Co. *v.* Lane, 58 Mich. 520, 25 N. W. 568; Grant *v.* Merchants', etc., Bank, 35 Mich. 515.

Goods to be taken "from the deck."— When a cargo of goods consigned to the

absence of express provision may be controlled by a usage or custom of the trade;[16] but in the absence of express provision or usage, such expenses incurred prior to the transfer of title are ordinarily to be paid by the seller,[17] and subsequent expenses by the buyer,[18] unless caused by the fault of the seller.[19] If, however, a buyer for his own protection takes out insurance on the goods between the time of sale and delivery, he cannot claim reimbursement therefor from the seller.[20] Where goods are to be shipped, a sale f. o. b. at a certain point contemplates that they shall be delivered by the seller on board the cars or vessel at such point without any expense to the buyer,[21] and that after such delivery subsequent expenses incident to the transportation and delivery shall be paid by the buyer,[22] unless caused by a failure of the seller to comply with his part of the contract;[23] but this rule may be modified by other provisions of the contract

seller was purchased before the ship came into harbor with a condition that the goods should be taken from the ship's deck by the buyer the contract "from the deck" meant that the seller should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck, and that harbor dues charged to be paid before goods could be removed were payable by the seller. Playford *v.* Mercer, 22 L. T. Rep. N. S. 41.

**A provision that the goods are to be delivered free at a certain depot** means that the buyer is not to be put to any expense for packing and hauling the same to such depot. Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

**Storage charges.**—Where the buyer of goods to be delivered on a certain date agrees that if the seller will defer delivery to a later date he, the buyer, will be responsible for any expense or damage caused by the delay, such agreement is valid and the seller may recover for storage charges incurred during the delay. Orguerre *v.* Luling, 1 Hilt. (N. Y.) 383.

**Expense of raising cargo.**—Where the buyer of granite which is to be shipped by the seller to the place where it is to be used agrees to "assume the risk of damage to cutting on said stone while being transported" to such place, and a cargo of the granite is sunk at sea, but the cutting is uninjured, the purchaser is not liable for any part of the expense incurred in raising the cargo. Tillson *v.* U. S., 129 U. S. 101, 9 S. Ct. 255, 32 L. ed. 636.

**Insurance.**— If the contract of sale states that the goods are fully insured by the seller, he and not the buyer is liable for any premiums paid between the time of sale and delivery. Kugelman *v.* Levy, 4 Misc. (N. Y.) 519, 24 N. Y. Suppl. 559. Where the purchaser of granite to be cut and shipped agrees to pay "the full cost" of "insurance on the same," he is not liable for insurance where none was ever taken out by the seller. Tillson *v.* U. S., 129 U. S. 101, 9 S. Ct. 255, 32 L. ed. 636. Where a contract for the sale of lumber provides that the seller and purchaser shall each pay a portion of the insurance thereon, which is to be procured by the seller while the lumber is in his yards, the contract price should be regarded as the value, for insurance purposes. Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625.

16. Clarke *v.* Hall, etc., Lumber Co., 41 Minn. 105, 42 N. W. 785. See also Kugelman *v.* Levy, 4 Misc. (N. Y.) 519, 24 N. Y. Suppl. 559.

17. Cole *v.* Kerr, 20 Vt. 21.

**Storage charges** between the time of sale and delivery by the seller must be paid by the seller in the absence of clear proof of a contrary usage. Kugelman *v.* Levy, 4 Misc. (N. Y.) 519, 24 N. Y. Suppl. 509.

**If the buyer cancels his order** and notifies the seller not to ship the goods, it is not necessary for the seller to ship them in order to recover, and if he does so he can recover only the contract price and not the cost of packing and shipping. Wallace *v.* Blake, 15 Daly (N. Y.) 158, 3 N. Y. Suppl. 934.

18. Grant *v.* Merchants', etc., Bank, 35 Mich. 515. See also Ducey Lumber Co. *v.* Lane, 58 Mich. 520, 25 N. W. 568.

19. Fogel *v.* Brubaker, 122 Pa. St. 7, 15 Atl. 692.

20. Orguerre *v.* Luling, 1 Hilt. (N. Y.) 383.

21. *Alabama.*— Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672. See also Capehart *v.* Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 14 Am. St. Rep. 60.

*California.*— J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 70 Pac. 669.

*Illinois.*— Knapp Electrical Works *v.* New York Insulated Wire Co., 157 Ill. 456, 42 N. E. 147 [*affirming* 57 Ill. App. 82].

*New York.*— Silberman *v.* Clark, 96 N. Y. 522, holding that under a contract of sale of rails "f. o. b. Continental port. Inspection at maker's works," the rails must be delivered free on board the vessel, and as the inspection is to be made before delivery the expense thereof must be borne by the seller.

*Rhode Island.*— Hobart *v.* Littlefield, 13 R. I. 341.

*United States.*— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527.

*Canada.*— Marshall *v.* Jamieson, 42 U. C. Q. B. 115; Clark *v.* Rose, 29 U. C. Q. B. 302; George *v.* Glass, 14 U. C. Q. B. 514.

22. Knapp Electric Works *v.* New York Insulated Wire Co., 157 Ill. 456, 42 N. E. 147 [*affirming* 57 Ill. App. 82].

23. Fogel *v.* Brubaker, 122 Pa. St. 7, 15 Atl. 692, where the goods were to be shipped f. o. b. at place of shipment, hut were re-

of sale whereby one of the parties agrees to assume certain expenses for which the other would ordinarily be liable.[24]

**3. Freight Charges.** In contracts of sale the effect of any provisions in regard to freight charges depends upon the proper construction of the contract.[25] In contracts for the sale of property to be shipped the term "f. o. b." means "free on board" at the place named in the contract,[26] and if the sale is f. o. b. at the place of shipment the purchaser must pay the freight,[27] provided the seller complies with his part of the contract;[28] but if f. o. b. at the place of destination the freight must be paid by the seller.[29] Where freight at a stipulated rate is made an element of the price, the purchaser to have the burden or benefit of any variation or difference, such provision applies to the freight rate strictly so called and not to the net cost of transportation,[30] and the purchaser is not liable for any increase in the cost of transportation due to demurrage,[31] or entitled to any deduction for despatch money earned under charter parties,[32] and other allowances earned by expediting the loading or unloading of the cargo.[33] If the contract provides for an increase in price in case of an increase in freight rates, the seller is entitled thereto if an increase occurs in the ordinary mode from causes not under his control;[34] but if the contract provides only for an increase of price upon an increase of rates, the purchaser is not entitled to a reduction in case the rates are decreased.[35] Where the written contract of a sale of goods to be shipped is silent as to which party shall pay the freight, it will be presumed that it is to be paid by the purchaser;[36] but this presumption may be rebutted by parol evi-

jected by the buyer because they did not comply as to quality with the requirements of the contract.

24. Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283, 62 N. E. 367, where the sale was of certain property "spot cash, f. o. b. Berlin," but by a subsequent clause in the contract the buyer agreed to "assume all costs of removing the same."

25. Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672; Lund *v.* McCutchen, 83 Iowa 755, 49 N. W. 998; Morris *v.* Edwards, 10 Mont. 298, 25 Pac. 1030.

Advances for freight.— Where it is stipulated that the vendee is "to advance the freight" and to deduct the amount thereof out of the price agreed on upon settlement, payment to be made on delivery, the vendee, if required, is bound to advance money to pay freight before the goods are shipped, and if he refuses so to do, the vendor may treat the contract as rescinded. Hartje *v.* Collins, 46 Pa. St. 268.

Delivery at more distant point.—A provision in a contract that the purchaser might elect to have the property delivered at a more distant place than that first specified in the contract, and that in such case the purchaser should pay "the additional cost of delivery" arising from the change, does not bind the purchaser to pay anything additional for risk or loss incurred through the change, but only for the additional cost. Wormer *v.* U. S., 1 Ct. Cl. 212.

26. Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672, holding that the court will take judicial notice of this fact.

27. Knapp Electrical Works *v.* New York Insulated Wire Co., 157 Ill. 456, 42 N. E. 147 [*affirming* 57 Ill. App. 82]. See also Rose *v.* Weinberger, 108 Ga. 533, 34 S. E. 28, 75 Am. St. Rep. 73; Burton, etc., Co. *v.* London St. R. Co., 7 Ont. L. Rep. 717.

28. Fogel *v.* Brubaker, 122 Pa. St. 7, 15 Atl. 692, holding that where goods are shipped f. o. b. at place of shipment and on arrival they are found not to be according to the contract, and are refused by the buyer, the seller is liable for the freight and other expenses incident to their shipment and return.

29. Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672.

30. Ascherson *v.* Bethlehem Iron Co., 161 Pa. St. 63, 28 Atl. 1011 [*affirming* 2 Pa. Dist. 597].

31. See Ascherson *v.* Bethlehem Iron Co., 161 Pa. St. 63, 28 Atl. 1011 [*affirming* 2 Pa. Dist. 597].

32. Ascherson *v.* Bethlehem Iron Co., 161 Pa. St. 63, 28 Atl. 1011 [*affirming* 2 Pa. Dist. 597]; Ennis *v.* Pennsylvania Steel Co., 154 Pa. St. 138, 26 Atl. 362; Pottsville Iron, etc., Co. *v.* Ascherson, 58 Fed. 319, 7 C. C. A. 246. But see Earnshaw *v.* McHose, 56 Fed. 606, 6 C. C. A. 51 [*affirming* 48 Fed. 589].

33. Ennis *v.* Pennsylvania Steel Co., 154 Pa. St. 138, 26 Atl. 362.

34. Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291.

35. Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672, holding that where the price is based upon a specified freight rate to be paid by the seller, with a provision that in case of an advance in rates the buyer is given the option of taking the goods at the advanced rate or canceling the contract, unless the seller shall elect to pay the same, the buyer is not entitled to a reduction in price because of a reduction in rates.

36. Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789.

dence of an agreement on the part of the seller to pay it.[37] Where the seller guarantees that the freight will not exceed a certain amount, the purchaser is not obliged to take the goods if the amount is larger than that stipulated,[38] and where the goods are not according to the contract and the purchaser refuses to receive them, he is entitled to reimbursement for any freight paid or advanced by him.[39] Where the place of delivery is changed at the instance of the buyer, he is liable for any additional freight charges due to such change.[40]

**4. Customs Duties.** Where goods are sold which are to be shipped and are subject to duty, the liability of the seller or purchaser therefor depends upon the terms of the contract,[41] or its proper construction if the provisions as to duties are not clear.[42] If the contract is silent upon this point it will be construed as having been made with reference to the prevailing custom of the trade,[43] but evidence of a custom as to such duties is not admissible to contradict or vary any express provisions of the contract.[44] If the goods are sold to be delivered free of charge, the seller and not the purchaser is liable for the duty,[45] and if paid by the buyer in order to obtain possession, he may deduct the amount so paid from the purchase-money due to the seller.[46] If the duty, although formally paid by the seller, is under the contract to be paid by the purchaser, the latter may recover back an amount advanced or paid to the seller in excess of that actually paid by the latter as duty.[47] Where the contract merely provides as to which party shall pay the duty, it will be construed as an agreement to pay whatever the duty may be at the time of delivery,[48] and a change in the rate of duty between the date of the contract and time of delivery will not affect the contract price,[49] unless it is otherwise provided by the contract,[50] or by statute.[51]

37. Robert Buist Co. *v.* Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789 (holding further that a payment by the purchaser of the freight on a portion of the goods when received does not estop him to deny any liability for the freight on the balance of the bill); Robert Buist Co. *v.* Lancaster Mercantile Co., 68 S. C. 523, 47 S. E. 978.

38. Fobes *v.* Branson, 81 N. C. 256, holding, however, that it is the duty of the purchaser to act promptly in notifying the seller of his refusal, and that if the seller offers to reduce the price in accordance with the increased rate the purchaser will be liable on the contract if he neither declines to take the goods nor to accept the proposed reduction.

39. Barnett *v.* Terry, 42 Ga. 283; Columbian Nat. Bank *v.* White, 65 Mo. App. 677, each holding that if the seller refuses to take back the goods and reimburse the buyer for freight paid, the latter may sell the goods and repay himself out of the proceeds.

40. Symmers *v.* Livingstone, 10 Ont. App. 355.

41. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159, (1903) 71 Pac. 697.

42. Solomon Tobacco Co. *v.* Cohen, 184 N. Y. 308, 77 N. E. 257 [*reversing* 95 N. Y. App. Div. 297, 88 N. Y. Suppl. 641]; Asher *v.* Abenheim, 83 Hun (N. Y.) 34, 31 N. Y. Suppl. 514; Wilson *v.* Mason, 38 U. C. Q. B. 14.

43. Brown *v.* Browne, 9 U. C. Q. B. 312.

44. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159, (1903) 71 Pac. 697.

45. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159; Fitch *v.* Archibald, 29 N. J. L. 160.

46. Fitch *v.* Archibald, 29 N. J. L. 160.

47. Solomon Tobacco Co. *v.* Cohen, 184 N. Y. 308, 77 N. E. 257 [*reversing* 95 N. Y. App. Div. 297, 88 N. Y. Suppl. 641] (where there was an error in the original appraisal which was subsequently corrected and the amount of the reduction refunded by the government to the seller); Asher *v.* Abenheim, 83 Hun (N. Y.) 34, 31 N. Y. Suppl. 514 (where the seller misrepresented the amount of the duty); Asher *v.* Abenheim, 19 Misc. (N. Y.) 282, 43 N. Y. Suppl. 69 [*affirmed* in 31 N. Y. App. Div. 623, 52 N. Y. Suppl. 270].

48. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159, 71 Pac. 697.

49. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159, 71 Pac. 697, holding that where the contract provided that the seller should pay the duty, the purchaser could not claim any reduction in the contract price by reason of a reduction in the amount of duty prior to a delivery of the goods.

50. Detrick *v.* Balfour, 8 Fed. 468, 7 Sawy. 348, holding, however, that where the contract provides that any change in duties shall be for or against the purchaser, the words "change in duties" refer only to those in the rate of duty by authority of congress and not to a difference in the amount of duty due to differences in the rate of exchange of foreign money.

51. Babbett *v.* Young, 51 N. Y. 238 [*affirming* 51 Barb. 466] (holding that under the act of congress of June 30, 1864, providing that any person who shall have made a contract prior to the passage of the act for the delivery of manufactured articles is authorized to add to the contract price any duty subsequently imposed, and sue for and recover the same, a person so contracting may

**D. Conditions and Covenants — 1. In General.** In determining whether particular provisions of a contract of sale are to be considered as conditions, the intention of the parties as gathered from the contract as a whole must govern,[52] and in construing such provisions the distinction must be observed between conditions of sale and mere matters of description,[53] or mere representations,[54] and also between conditions and covenants.[55] If the contract does contain a condition it must be so construed as to give effect to the intention of the parties.[56] If the language used is unambiguous it must be held to express such intention;[57] but if not the intention must be determined according to the ordinary rules of construction,[58] and while a condition will ordinarily be construed most strongly against the party who stipulates,[59] yet it will be given a reasonable construction [60] in view of the usages of the trade to which the contract is incident,[61] and will not be extended beyond the plain language of the contract.[62] Conditions may, however, be implied when the circumstances of the transaction seem to require it and the language of the contract will justify it.[63]

add an increase of duty to the contract price and sue for and recover the same without having himself first paid in); Anspach *v.* Heft, 57 Pa. St. 326 (holding that under the act of congress of June 30, 1864, the seller is authorized to add the increased duty to the contract price, although under the contract the goods should have been delivered prior to the passage of the act, if the purchaser accepted their delivery after the passage of the act in fulfilment of the contract).

**52.** Scott *v.* Baber, 13 Ala. 182; Officer *v.* Sims, 2 Heisk. (Tenn.) 501; Gattorno *v.* Adams, 12 C. B. N. S. 560, 104 E. C. L. 560. See also Bartlett *v.* Jewett, 98 Ind. 206.

**53.** Corrigan *v.* Coney Island Jockey Club, 61 N. Y. Super. Ct. 393, 20 N. Y. Suppl. 437 [*reversing* 15 N. Y. Suppl. 705]. See also Callender Insulating, etc., Co. *v.* Badger, 30 Ill. App. 314.

**54.** Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184.

**55.** Hale *v.* Finch, 104 U. S. 261, 26 L. ed. 732 [*affirming* 1 Wash. Terr. 566], holding that where a steamboat is sold and the contract provides that it "is upon this express condition" that it shall not be used upon a certain route of travel within a certain time, such provision is a condition and not a covenant.

**Covenants** generally see COVENANTS, 11 Cyc. 1035.

**56.** Osborn *v.* Jernegan, 126 Mass. 362; Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841.

**Construction as to nature of condition** see *infra*, III, D, 2.

**57.** Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841.

**58.** Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841.

**Particular provisions construed.**—Where defendant agreed to sell to plaintiff all of certain machines which it should manufacture, and sell to no other person, provided plaintiff should purchase all that it should make, and agreed to deliver at least two machines per month, and that, if it failed for three consecutive months to deliver this number, plaintiff might have such machines built by some other responsible concern, it was held that plaintiff could hold defendant to its agreement not to sell to any one else, and also upon failure of defendant to furnish the machines could procure them to be made elsewhere. Myers *v.* Steel Mach. Co., 67 N. J. Eq. 300, 57 Atl. 1080 [*affirmed* in 68 N. J. Eq. 795, 64 Atl. 746].

**59.** Scott *v.* Baber, 13 Ala. 182; Hale *v.* Rawson, 4 C. B. N. S. 85, 4 Jur. N. S. 363, 27 L. J. C. P. 189, 6 Wkly. Rep. 339, 93 E. C. L. 85.

**Strict construction.**—A sale of goods "to be delivered on safe arrival of" a certain vessel imposes on the seller an absolute obligation to deliver if the vessel arrives, although she does not bring the goods. Hale *v.* Rawson, 4 C. B. N. S. 85, 4 Jur. N. S. 363, 27 L. J. C. P. 189, 6 Wkly. Rep. 339, 93 E. C. L. 85. When a contract for the sale of a machine stipulated that it should "do good work and give satisfaction," these conditions were to be construed as independent of each other so that unless the machine gave satisfaction to the buyer as well as did good work the buyer was not liable for the price. Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841.

**60.** Davis *v.* Alpha Portland Cement Co., 134 Fed. 274 [*affirmed* in 142 Fed. 74, 73 C. C. A. 338]. See also Garvin *v.* Montenegro-Riehm Music Co., 104 S. W. 964, 31 Ky. L. Rep. 1182.

**61.** Iasigi *v.* Rosenstein, 3 N. Y. App. Div. 500, 38 N. Y. Suppl. 354 [*affirmed* in 158 N. Y. 678, 25 N. E. 1124].

**62.** Iasigi *v.* Rosenstein, 141 N. Y. 414, 36 N. E. 509 [*reversing* 65 Hun 591, 20 N. Y. Suppl. 491] (holding that a provision that goods shall be shipped from a certain place by a certain vessel does not require that they shall arrive at their destination by the same vessel, or prevent them from being transferred from such vessel to another at an intermediate point, in accordance with the custom prevailing in regard to shipments from the original point of shipment); Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879; Smyth *v.* Schilizzi, 4 Wkly. Rep. 460.

**63.** Durrive *v.* Frere, 11 La. 374 (holding that such conditions will be implied as neces-

**2. Nature of Condition — a. In General.** The nature of conditions in contracts of sale, whether conditions precedent, concurrent, dependent, or independent, depends upon the intention of the parties,[64] and in construing such provisions technical words should give way to such intention.[65] A stipulation may be a condition precedent in the sense that the contingency must happen prior to the existence of any contract,[66] or be performed before there is a complete contract of sale,[67] or transfer of title;[68] or it may be a condition subsequent, the nonperformance of which will defeat a title which is passed.[69] So also conditions of the contract may be concurrent,[70] or they may be either dependent or independent.[71] A condition may also be of a suspensory character as in the case of a sale of goods to be accepted and paid for if satisfactory,[72] or where the sale is made subject to a subsequent ascertainment of some fact not known to the parties at the time.[73]

**b. Conditions Precedent, Subsequent, or Concurrent.** Whether a condition is precedent or subsequent depends upon the intention of the parties as shown by the terms and proper construction of the contract.[74] The condition will be construed as a condition precedent if the act stipulated for must be performed before performance can be required from the other party,[75] or if the stipulations are mutual and go to the whole consideration of the contract,[76] or are of the very

sarily result from the facts stated, and that if in selling certain goods the seller states that he has previously given an agent in a different place authority to sell them, the sale is conditional upon the agent not having already sold the goods); Reitz's Appeal, 64 Pa. St. 162.

Implied conditions.— Where a written contract signed by both parties provides that the seller for and in consideration of "the following covenants" to be kept by the buyer agrees to sell and deliver to the buyer a certain amount of oil at specified prices, a covenant on the part of the buyer to purchase such oil will be implied. King-Keystone Oil Co. *v.* San Francisco Brick Co., 148 Cal. 87, 82 Pac. 849. A contract for the sale of a cargo to be shipped by a certain steamer at a certain time and place, and providing for its cancellation in case of prohibition of export, blockade, or hostilities preventing shipment, is subject to the implied condition that the steamer shall at the specified time be in existence as a cargo-carrying vessel. Nickoll *v.* Ashton, [1901] 2 K. B. 126, 9 Aspin. 209, 6 Com. Cas. 151, 84 L. T. Rep. N. S. 804, 70 L. J. K. B. 600, 17 T. L. R. 467, 49 Wkly. Rep. 513. Under a contract to sell hemp in stacks when it shall be suitable for stacking, the contract implies that the seller shall care for the hemp in the customary manner, and he is bound to shock, take care of, and stack it in a careful manner, although the contract does not expressly require it. Summers Fiber Co. *v.* Walker, 109 S. W. 883, 33 Ky. L. Rep. 153.

64. Officer *v.* Sims, 2 Heisk. (Tenn.) 501.

65. Officer *v.* Sims, 2 Heisk. (Tenn.) 501.

66. Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 121 Cal. 641, 54 Pac. 101; Machson *v.* Syrop, 91 N. Y. Suppl. 12.

67. Equitable Mfg. Co. *v.* Cooley, 69 S. C. 332, 48 S. E. 267; National Cordage Co. *v.* Pearson Cordage Co., 55 Fed. 812, 5 C. C. A. 276.

68. Selden *v.* Pringle, 17 Barb. (N. Y.) 458.

69. Lawrence *v.* Gifford, 17 Pick. (Mass.) 366; Gray *v.* Gardner, 17 Mass. 188; Burke *v.* Rollinson, 23 R. I. 177, 49 Atl. 694; State *v.* Milwaukee Chamber of Commerce, 121 Wis. 110, 98 N. W. 930.

70. See *infra*, III, D, 2, b.

71. See *infra*, III, D, 2, c.

72. Phelps *v.* Willard, 16 Pick. (Mass.) 29; Mulcahy *v.* Diendonne, 103 Minn. 352, 115 N. W. 636; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

73. Durrive *v.* Frere, 11 La. 374, sale subject to the condition that the seller's agent in another's place, who had been authorized to sell the goods in question, had not already done so.

74. Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218; Selden *v.* Pringle, 17 Barb. (N. Y.) 458.

There are no precise technical words necessary to make a condition precedent or subsequent. The same words may operate as the one or the other according to the nature of the transaction and the intention of the parties. Selden *v.* Pringle, 17 Barb. (N. Y.) 458.

75. *Alabama.*—Austill *v.* Hieronymus, 124 Ala. 376, 27 So. 255.

*California.*— Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159.

*Georgia.*— Equitable Mfg. Co. *v.* J. B. Davis Co., 130 Ga. 67, 60 S. E. 262.

*Indiana.*— Bressler *v.* Kelly, 34 Ind. App. 235, 72 N. E. 613.

*New York.*— Steinhardt *v.* Bingham, 182 N. Y. 326, 75 N. E. 403 [*affirming* 90 N. Y. App. Div. 149, 85 N. Y. Suppl. 1044]; Tipton *v.* Feitner, 20 N. Y. 423.

*South Carolina.*— Equitable Mfg. Co. *v.* Cooley, 69 S. C. 332, 48 S. E. 267.

*Vermont.*— Lawrence *v.* Davey, 28 Vt. 264.

*United States.*— Straus *v.* J. M. Russell Co., 85 Fed. 589.

76. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Springfield Seed Co. *v.*

essence of the contract;[77] but ordinarily a condition which does not go to or constitute the entire consideration will not be held to be a condition precedent.[78] Stipulations as to the time of shipment or delivery are ordinarily regarded as of the essence of the contract and therefore conditions precedent;[79] but this depends upon the intention of the parties,[80] and such a stipulation will not be construed as a condition precedent if it appears from a proper construction of the terms used that the parties did not intend it to be such.[81] The condition is a condition subsequent if it was the intention of the parties that upon the happening of such condition the contract should be extinguished,[82] or the property revest in the seller.[83] If the acts stipulated for are to be performed at the same time, the conditions are concurrent,[84] as where the contract stipulates for delivery and payment to be made on delivery.[85]

**c. Dependent or Independent Conditions.** Whether the conditions or covenants of a contract of sale are dependent or independent depends upon the intention of the parties,[86] and upon their nature and order of performance.[87] The question

Walt, 94 Mo. App. 76, 67 S. W. 938; Straus *v.* J. M. Russell Co., 85 Fed. 589; Kingdom *v.* Cox, 5 C. B. 522, 12 Jur. 336, 17 L. J. C. P. 155, 57 E. C. L. 522; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228.

**77.** Steinhardt *v.* Bingham, 182 N. Y. 326, 75 N. E. 403 [*affirming* 90 N. Y. App. Div. 149, 85 N. Y. Suppl. 1044]; Higgins *v.* Delaware, etc., R. Co., 60 N. Y. 553; Hubbard *v.* Chapman, 34 N. Y. App. Div. 252, 54 N. Y. Suppl. 527; Watson *v.* Walker, 67 Tex. 651, 4 S. W. 576; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228.

**Stipulations as to shipment.**— A provision for shipment of goods to be manufactured to some place to be designated is not a condition precedent to payment, when the contract provides that the goods become the buyer's property on completion. Buedingen Mfg. Co. *v.* Royal Trust Co., 90 N. Y. App. Div. 267, 85 N. Y. Suppl. 621 [*affirmed* in 181 N. Y. 563, 74 N. E. 1115]. Where, in a contract for the sale of an intended shipment of goods, it is stipulated that shipment is to be made "by sailer or sailers" between named dates, the stipulation as to "sailer or sailers," and also that as to the named dates, are conditions precedent of the contract. Ashmore *v.* Cox, [1899] 1 Q. B. 436, 4 Com. Cas. 48, 68 L. J. Q. B. 72, 15 T. L. R. 55. When the contract calls for the shipment of a large quantity of goods to be made "at the first open water, allowing a fair and reasonable time for the arrival out of the vessel" the furnishing of a single vessel is not a condition precedent but the buyer may send several vessels to receive the goods. Reade *v.* Meniaeff, 7 C. B. 152, 18 L. J. C. P. 145, 62 E. C. L. 152; Meniaeff *v.* Reade, 7 C. B. 139, 62 E. C. L. 139.

**Name of vessel.**— A stipulation that "as soon as the seller knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer" forms a condition precedent. Busk *v.* Spence, 4 Campb. 329; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228.

**78.** Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938.

**79.** Redlands Orange Growers' Assoc. *v.* Gorman, 76 Mo. App. 184; Bidwell *v.* Overton, 26 Abb. N. Cas. (N. Y.) 402, 13 N. Y. Suppl. 274; Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730; Ashmore *v.* Cox, [1899] 1 Q. B. 436, 4 Com. Cas. 48, 68 L. J. Q. B. 72, 15 T. L. R. 55.

**Goods to arrive.**— In an agreement for the delivery of goods on arrival, to be delivered "with all convenient speed, but not to exceed" a given day, the arrival in time for delivery on that day is a condition precedent. Alewyn *v.* Pryor, R. & M. 406, 27 Rev. Rep. 763, 21 E. C. L. 781.

**80.** Redlands Orange Growers' Assoc. *v.* Gorman, 76 Mo. App. 184; Hawes *v.* Lawrence, 3 Sandf. (N. Y.) 193 [*affirmed* in 4 N. Y. 345].

**81.** Hawes *v.* Lawrence, 3 Sandf. (N. Y.) 193 [*affirmed* in 4 N. Y. 345].

**82.** State *v.* Milwaukee Chamber of Commerce, 121 Wis. 110, 98 N. W. 930.

**83.** Lawrence *v.* Gifford, 17 Pick. (Mass.) 366.

**84.** Catlin *v.* Jones, 52 Oreg. 337, 97 Pac. 546; Harris' Appeal, 9 Pa. Cas. 233, 12 Atl. 743; Perry *v.* Wheeler, 24 Vt. 286; Livermore *v.* Brauer, 128 Fed. 265, 62 C. C. A. 647.

**85.** Stoolfire *v.* Royse, 71 Ill. 223; Lester *v.* Jewett, 11 N. Y. 453; Kelley *v.* Upton, 5 Duer 336; Keeler *v.* Schmertz, 46 Pa. St. 135; Levering *v.* Phillips, 7 Pa. St. 387; Jones *v.* Marsh, 22 Vt. 144.

**86.** *Maryland.*— Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218.

*Massachusetts.*— Knight *v.* New England Worsted Co., 2 Cush. 271.

*Missouri.*— Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938.

*New York.*— Pearsoll *v.* Frazer, 14 Barb. 564; Dox *v.* Dey, 3 Wend. 356.

*Tennessee.*— Officer *v.* Sims, 2 Heisk. 501.

*United States.*— Straus *v.* J. M. Russell Co., 85 Fed. 589.

**Conditions held dependent** see Straus *v.* J. M. Russell Co., 85 Fed. 589.

**Conditions held independent** see Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Pearsoll *v.* Frazer, 14 Barb. (N. Y.) 564; Evans *v.* Fegely, 67 Pa. St. 370.

**87.** Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271.

is frequently one of much difficulty to determine,[88] and while certain general rules of construction have been laid down as applicable to such cases,[89] it has been said that they are of little practical value and they should never be permitted to interfere with carrying into effect what appears to have been the real intention of the parties.[90] Such covenants or conditions are dependent if the obligation to perform the one is made to depend upon the performance of the other,[91] or where in the case of mutual covenants or conditions they go to the whole consideration on both sides;[92] but they are to be regarded as independent if they go only to a part of the consideration,[93] or if the time of performance of the one is to happen or may happen before the time of performance of the other,[94] or the conditions are in the nature of separate undertakings, one of which must be performed regardless of the performance of the other;[95] but a condition may, according to the intention of the parties, be a dependent condition, although it is to be performed in advance of a performance by the other party.[96] If the party to be benefited by a condition precedent accepts a substantial part of that which was to be performed in his favor the condition becomes an independent agreement, for the breach of which he has only a right to damages.[97]

**E. Entire and Divisible Contracts — 1. In General.** The question as to whether a contract of sale is entire or divisible has arisen in a variety of ways,[98] and it seems that the decisions of the courts as to how such contracts should be construed in particular cases have frequently been made to depend somewhat upon the purpose for which the question was invoked.[99] The well settled rule of construction, however, is that the intention of the parties must govern,[1] and

88. See Dox *v.* Dey, 3 Wend. (N. Y.) 356.

89. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938; Dox *v.* Dey, 3 Wend. (N. Y.) 356; Officer *v.* Sims, 2 Heisk. (Tenn.) 501.

90. Straus *v.* J. M. Russell Co., 85 Fed. 589.

91. Gates *v.* Ryan, 115 Mass. 596; Officer *v.* Sims, 2 Heisk. (Tenn.) 501.

92. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271.

93. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938; Bladsworth *v.* Rosenblatt, 20 Misc. (N. Y.) 357, 45 N. Y. Suppl. 931; Dox *v.* Dey, 3 Wend. (N. Y.) 356.

**Future sales.**— A stipulation in a contract of sale that the seller shall have all future orders for such goods as the buyer may need is an independent condition. Magnolia Compress Co. *v.* Smith. 75 Ark. 503, 88 S. W. 563; Eastern Counties R. Co. *v.* Philipson, 16 C. B. 2, 24 L. J. C. P. 140, 81 E. C. L. 2.

**Agreement for transportation.**— Where a contract to sell all logs cut and hauled to a certain stream also provides that the buyer is to pay the seller a specified amount for driving the logs to the point named, the agreement to drive is independent of the contract of sale, and therefore the seller may recover the value of the logs, although they are not driven to the point named. Haynes *v.* Hayward, 41 Me. 488.

**Stipulation for seller's benefit.**— In a contract to sell five hundred bales of cotton, to arrive in Liverpool, a stipulation, "The cotton to be taken from the quay," was an independent stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed. Neill *v.* Whitworth, L. R. 1 C. P. 684, Harr. & R. 832, 12 Jur. N. S. 761, 35 L. J. C. P. 304, 14 L. T. Rep. N. S. 670, 14 Wkly. Rep. 844.

94. Dox *v.* Dey, 3 Wend. (N. Y.) 356.

95. Brehen *v.* O'Donnell, 34 N. J. L. 408; Bladsworth *v.* Rosenblatt, 20 Misc. (N. Y.) 357, 45 N. Y. Suppl. 931.

96. Straus *v.* J. M. Russell Co., 85 Fed. 589.

97. Brown *v.* Ellis, 103 Ky. 303, 45 S. W. 94, 19 Ky. L. Rep. 2023; Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218; Young Bros. Mach. Co. *v.* Young, 111 Mich. 118, 69 N. W. 152; Lewis *v.* Weldon, 3 Rand. (Va.) 71.

98. Potsdamer *v.* Kruse, 57 Minn. 193, 58 N. W. 983.

99. Potsdamer *v.* Kruse, 57 Minn. 193, 58 N. W. 983.

1. *Georgia.*— Main *v.* Simmons, 2 Ga. App. 821, 59 S. E. 85.

*Illinois.*— Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

*Iowa.*— Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865.

*Maryland.*— Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218.

*Massachusetts.*— Barlow Mfg. Co. *v.* Stone, 200 Mass. 158, 86 N. E. 306.

*New Hampshire.*— Holmes *v.* Gregg, 66 N. H. 621, 28 Atl. 17.

*New Jersey.*— Thompson *v.* Conover, 30 N. J. L. 329.

*North Carolina.*— Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.

*Oregon.*— Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

this must be ascertained by the ordinary rules of construction,[2] considering not only the language of the contract,[3] but also, in cases of uncertainty, the subject-matter, situation of the parties, and circumstances surrounding the transaction.[4] The question does not depend solely or necessarily upon the nature of the subject-matter of the sale,[5] its divisibility,[6] or the multiplicity of the articles or items composing it.[7] In arriving at the intention of the parties the nature of the subject-matter is to be considered,[8] and also the nature of the consideration; [9] but the fact that the subject-matter is divisible does not render the contract divisible if it otherwise appears that the parties intended it to be entire.[10] The construction which the parties themselves have put upon the contract must also be considered,[11] and if by their conduct they have put a particular construction upon it as being entire or as being divisible, such construction will ordinarily be adopted and enforced.[12] The contract may be entire, although consisting of separate orders if they are all accepted together; [13] and conversely the contract, although consisting of a single writing, may be divisible as to the separate articles or items included therein.[14] A general agreement between a buyer and seller that all goods are to be paid for within a certain date after delivery does not constitute an entire contract so as to prevent each order separately negotiated between them from being an independent contract.[15]

**2. Nature of Subject-Matter — a. In General.** If the subject-matter of the sale is regarded by the parties as being in the nature of one entire thing,[16] or the sale is of a specified quantity or amount,[17] the contract is entire, although such goods consist of separate lots, parcels, or packages,[18] and are priced separately

*Pennsylvania.*— Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.

2. Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865; Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Tipton *v.* Feitner, 20 N. Y. 423; Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

**No precise rule** can be laid down by which the question whether the contract in any particular case is entire or divisible can be determined, as it depends upon the intention of the parties to be ascertained by the ordinary rules of construction. Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865.

3. Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865; Thompson *v.* Conover, 30 N. J. L. 329; Tipton *v.* Feitner, 20 N. Y. 423; Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

4. Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865; Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Tipton *v.* Feitner, 20 N. Y. 423; Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

**Sale of business.**— The delivery of a check by the purchaser of a business and the execution by the seller of an agreement not to again engage in that business for a specified time at the place of sale are parts of the same transaction, constituting a sale of such business, and must be so treated where both acts were done at the same time and place notwithstanding a few moments may have intervened between them. Skaggs *v.* Simpson, 110 S. W. 251, 33 Ky. L. Rep. 410.

5. Clark *v.* Baker, 5 Metc. (Mass.) 452; Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

6. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837; Mansfield *v.* Trigg, 113 Mass. 350; Kein *v.* Tupper, 42 How. Pr. (N. Y.) 437; Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.

7. Clark *v.* Baker, 5 Metc. (Mass.) 452; Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

8. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 827; Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.

**Nature of subject-matter** see *infra*, III, E, 2.

9. Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

**Nature of consideration** see *infra*, III, E, 3.

10. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837; Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.

11. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

12. Goodwin *v.* Merrill, 13 Wis. 658.

13. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

14. Tipton *v.* Feitner, 20 N. Y. 423; Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736; Loomis *v.* Eagle Bank, 10 Ohio St. 327.

15. R. C. Bowers Granite Co. *v.* Farrell, 66 Vt. 314, 29 Atl. 491.

16. Barrow *v.* Penick, 110 La. 572, 34 So. 691, sale of an entire crop of molasses at so much per gallon.

17. *Alabama.*— Batre *v.* Simpson, 4 Ala. 305, specified number of bales of cotton.

*Arkansas.*— Jackson *v.* Jones, 22 Ark. 158, specified number of bushels of corn.

*Massachusetts.*— Fullam *v.* Wright, etc., Wire Cloth Co., 196 Mass. 474, 82 N. E. 711, specified number of cords of wood.

*New York.*— Baker *v.* Higgins, 21 N. Y. 397, specified number of brick.

*Pennsylvania.*— Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560, specified number of tons of coal.

18. Converse *v.* Harzfeldt, 11 Ill. App. 173 [*affirmed* in 105 Ill. 534]; Mansfield *v.* Trigg,

or according to certain standards of weight or measurement,[19] and even the fact that different prices per pound are fixed by the contract will not necessarily render the contract divisible.[20]

**b. Distinct and Separate Articles.** If the articles constituting the subject-matter of the contract are entirely distinct and not in their nature connected with each other the contract is generally construed as divisible,[21] provided of course the consideration is divisible and can be apportioned,[22] the rule applied in such cases being that a contract of sale of different articles is not entire unless the taking of the whole is essential because of the character of the property, or is made so by agreement, or unless it is of such a nature that a failure to obtain the whole would materially affect the objects of the purchase.[23] In accordance with

113 Mass. 350; Morse *v.* Brackett, 98 Mass. 205; Gray *v.* Walton, 107 N. Y. 254, 14 N. E. 191; Pope *v.* Porter, 102 N. Y. 366, 7 N. E. 304; Nightingale *v.* Eiseman, 50 Hun (N. Y.) 189, 2 N. Y. Suppl. 779 [*affirmed* in 121 N. Y. 288, 24 N. E. 475]; Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227; Reimers *v.* Ridner, 2 Rob. (N. Y.) 11; Kein *v.* Tupper, 42 How. Pr. (N. Y.) 437; Tompkins *v.* Haas, 2 Pa. St. 74.

**Goods at different places.**— The fact that the various parcels are at different places does not render the contract divisible, if they are included in one agreement, and there is nothing to show an intent to regard the contract as divisible. Bigg *v.* Whisking, 14 C. B. 195, 2 C. L. R. 617, 78 E. C. L. 195.

19. *Arkansas.*— Jackson *v.* Jones, 22 Ark. 158.

*Illinois.*— Converse *v.* Harzfeldt, 11 Ill. App 173.

*Massachusetts.*— Mansfield *v.* Trigg, 113 Mass. 350; Morse *v.* Brackett, 98 Mass. 205; Clark *v.* Baker, 5 Metc. 452.

*New York.*— Mount *v.* Lyon, 49 N. Y. 552; Salomon *v.* Corbett, 38 N. Y. App. Div. 262, 57 N. Y. Suppl. 18; Reimers *v.* Pidner, 2 Rob. 11.

*Pennsylvania.*— Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560.

*England.*— Reuter *v.* Sala, 4 C. P. D. 239, 48 L. J. C. P. 492, 40 L. T. Rep. N. S. 476, 27 Wkly. Rep. 631.

**The entirety of the contract is not destroyed** by the fact that the subject of the sale is of such a character as to be divisible proportionally by weight or measure or is contained in packages of uniform quality and value. Mansfield *v.* Trigg, 113 Mass. 350.

**Number indefinite.**— If the number is indefinite and expressed in minimum and maximum limits, the contract is divisible above the minimum limit. Vaughan *v.* Howe, 20 Wis. 497.

20. Batre *v.* Simpson, 4 Ala. 305 (holding that a sale of a certain number of bales of cotton is entire, although the price per pound is to vary according to classification); Barker *v.* Reagan, 4 Heisk. (Tenn.) 590 (holding that a sale of two bales of cotton is an entire contract, although each bale is to be paid for at a different rate per pound and in a different currency).

21. *Alabama.*— Camp *v.* Dill, 27 Ala. 553.

*Arkansas.*— Duffie *v.* Pratt, 76 Ark. 74, 88 S. W. 842.

*California.*— Norris *v.* Harris, 15 Cal. 226.

*Illinois.*— Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837; Spring *v.* Slayden-Kirksey Woolen Mills, 106 Ill. App. 579.

*Louisiana.*— Montan *v.* Whitley, 12 La. Ann. 175; Andry *v.* Foy, 6 Mart. 689.

*Maryland.*— McCeney *v.* Duvall, 21 Md. 166.

*Massachusetts.*— A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91.

*Minnesota.*— McGrath *v.* Cannon, 55 Minn. 457, 57 N. W. 150.

*New York.*— Tipton *v.* Feitner, 20 N. Y. 423.

*Texas.*— Streeper *v.* Frieberg, 3 Tex. App. Civ. Cas. § 240.

*Utah.*— Tucker *v.* Billing, 3 Utah 82, 5 Pac. 554.

*Wisconsin.*— Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

*United States.*— Kelley *v.* Sibley, 137 Fed. 586, 69 C. C. A. 674; Saunders *v.* Short, 86 Fed. 225, 30 C. C. A. 462.

*England.*— James *v.* Shore, 1 Stark. 426, 18 Rev. Rep. 798.

See 43 Cent. Dig. tit. "Sales," § 173.

**Rule subject to intention of parties.**— In determining whether a contract of sale is entire or divisible the intention of the parties must control, regardless of the severable nature of the subject-matter, and while this is to be considered in determining the intention, it cannot make a contract divisible where it is otherwise shown that the parties intended it to be entire. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

**Separable order.**— Where a buyer orders certain specified goods and states in the order that "if you please you can send me at the same time" certain other specified goods, the seller might ship and recover for the goods first mentioned without shipping the others, but he cannot ship those last mentioned which were to be shipped "at the same time" without also shipping those first mentioned. Virtue *v.* Beacham, 17 N. Y. Suppl. 450 [*affirmed* in 18 N. Y. Suppl. 949].

22. Norris *v.* Harris, 15 Cal. 226; Symonds *v.* Carr, 1 Campb. 361. And see *infra*, III, E, 3.

23. Norris *v.* Harris, 15 Cal. 226; Slayden-Kirksey Woolen Mills *v.* Spring, 116 Ill. App. 27; Streeper *v.* Frieberg, 3 Tex. App. Civ. Cas. § 240. See also McGrath *v* Cannon, 55 Minn. 457, 57 N. W. 150.

this distinction it is generally held that, although the articles are distinct, the contract is entire if the proper use of one is dependent on the other,[24] as in the case of machines to be used together,[25] a set of books deliverable in separate parts or volumes,[26] or a suite of furniture.[27] On the other hand, although the articles are of the same general class, the contract may be regarded as divisible in so far as it covers articles of different kinds, styles, or qualities.[28] If, however, the inducement to the contract was the purchase of the entire lot, the contract is entire.[29]

**3. Nature of Consideration.** In some cases it has been held that the character of a contract of sale as entire or divisible should be determined chiefly by the character of the consideration,[30] and the rule has been adopted that where the sale is for a gross price, that is, where the consideration is entire, the contract is entire;[31] and conversely, that if the sale is not for a gross price, that is, if the consideration is divisible, the contract is divisible,[32] the rule being that the contract

**24.** Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Sun Pub. Co. *v.* Minnesota Type Foundry Co., 22 Oreg. 49, 29 Pac. 6.

**25.** *Georgia.*— Campbell *v.* Trunnell, 67 Ga. 518.

*Illinois.*— Kingman *v.* Meeks, 56 Ill. App. 272.

*Maryland.*— Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926.

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Courtright, 54 Nebr. 18, 74 N. W. 418.

*North Dakota.*— Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

*United States.*— Aultman *v.* McFallon, 11 Fed. 836.

See 43 Cent. Dig. tit. "Sales," § 173.

**Machines capable of independent use.**— If the machines are considered as forming an entire plant, the contract is entire, although some of the machines are also capable of independent use. Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

**Warranty divisible.**— Where a threshing outfit consisting of an engine, separator, weigher, etc., is bought as an establishment under a contract which contains specific warranties of each article, and provides that "the failure of any part of machine to fulfill its warranty shall not in any way affect the payment of the purchase price of any other part or parts of said establishment," the contract is divisible. Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865.

**26.** Barrie *v.* Jerome, 112 Ill. App. 329; Barrie *v.* Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126.

**27.** Tobey Furniture Co. *v.* Macmasters, 21 Quebec Super. Ct. 336.

**28.** Barlow Mfg. Co. *v.* Stone, 200 Mass. 158, 86 N. E. 306; Potsdamer *v.* Kruse, 57 Minn. 193, 58 N. W. 983; Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831 [*affirming* 42 Hun 571]. See also Cohen *v.* Pemberton, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101.

**29.** *Arkansas.*— Jackson *v.* Jones, 22 Ark. 158.

*California.*— Dabovich *v.* Emeric, 12 Cal. 171.

*Indiana.*— Smith *v.* Lewis, 40 Ind. 98.

*Missouri.*— Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384.

*New Jersey.*— Thompson *v.* Conover, 30 N. J. L. 329.

*South Carolina.*— Pratt *v.* Frasier, 72 S. C. 368, 51 S. E. 983.

**30.** Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320. See also cases cited *infra*, notes 31–36.

**31.** *California.*— Norris *v.* Harris, 15 Cal. 226.

*Colorado.*— Campbell Printing Press, etc., Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799.

*Georgia.*— Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100; Bass *v.* Freeman, 36 Ga. 435.

*Massachusetts.*— Clark *v.* Baker, 5 Metc. 452.

*North Dakota.*— Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

*Oregon.*— Sun Pub. Co. *v.* Minnesota Type Foundry Co., 22 Oreg. 49, 29 Pac. 6; Scheland *v.* Erpelding, 6 Oreg. 258; Banks *v.* Crow, 3 Oreg. 477.

*Pennsylvania.*— Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856.

*England.*— Symonds *v.* Carr, 1 Campb. 361.

See 43 Cent. Dig. tit. "Sales," § 175.

**Contra.**— Andry *v.* Foy, 6 Mart. 689, holding that a sale of several slaves for a gross price was not an entire contract as the slaves did not make up a concrete whole, and that in case some of them were defective the buyer was not entitled to rescind the contract as to all of them.

**The consideration is entire** if there is a sale of a whole quantity at an agreed price, although the price is to be paid in instalments. Fullam *v.* Wright, etc., Wire Cloth Co., 196 Mass. 474, 82 N. E. 711.

**32.** *California.*— Herzog *v.* Purdy, 119 Cal. 99, 51 Pac. 27; Norris *v.* Harris, 15 Cal. 226.

*Indiana.*— Weil *v.* Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243.

*Iowa.*— Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827.

*Massachusetts.*— A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91.

*Michigan.*— Howard *v.* Bellows, 49 Mich. 620, 14 N. W. 570.

*Minnesota.*— Potsdamer *v.* Kruse, 57 Minn. 193, 58 N. W. 983.

*Missouri.*— Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567.

*New York.*— Pierson *v.* Crooks, 42 Hun 571

is divisible if the consideration is apportioned among the different articles,[33] and although the consideration is stated at a gross sum, the contract will be construed as divisible if it appears that the consideration is but the aggregate of prices agreed upon for the different articles,[34] as for instance in a sale of a stock of goods where each article was separately valued and priced,[35] unless the different articles are of such character as to be necessary to each other, or it appears that according to the intention of the parties the taking of all or none was of the essence of the contract.[36]

**4. Delivery in Instalments.** The mere fact that the articles sold are to be delivered in instalments does not of itself render divisible a contract otherwise entire.[37] If, however, the goods are sold in different parcels to be delivered and paid for at different times the contract is divisible,[38] and it has ordinarily been held that even though the goods were sold as an entire quantity, the contract is divisible if they are to be delivered and paid for in separate instalments.[39] The mere fact that payment was not exacted on delivery of an instalment does not affect the rule.[40] If payment is not to be made until all instalments are delivered the contract is entire;[41] but if there is no express provision as to the

[*affirmed* in 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831].

*North Carolina.*— Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.

*Pennsylvania.*— Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

*Wisconsin.*— Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

**33.** Herzog *v.* Purdy, 119 Cal. 99, 51 Pac. 27; Barlow Mfg. Co. *v.* Stone, 200 Mass. 158, 86 N. E. 306; A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91. And see cases cited *supra*, note 32.

**Purpose of apportionment.**— The apportionment of the consideration which was in fact a gross sum merely for the purpose of determining the revenue stamp required for the contract does not affect its entirety. Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

**34.** Aultman, etc., Co. *v.* Lawson, 100 Iowa 569, 69 N. W. 865.

**35.** Carleton *v.* Woods, 28 N. H. 290.

**36.** See Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736; and, generally, *supra*, III, E, 2, b.

**37.** *Massachusetts.*—Fullam *v.* Wright, etc., Wire Cloth Co., 196 Mass. 474, 82 N. E. 711.

*Missouri.*— Morrison *v.* Leiser, 73 Mo. App. 95. But see Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567.

*New York.*— Pope *v.* Porter, 102 N. Y. 366, 7 N. E. 304; Schwartz *v.* Hirsch, 56 Misc. 618, 107 N. Y. Suppl. 796.

*Rhode Island.*—Providence Coal Co. *v.* Coxe, 19 R. I. 380, 35 Atl. 210.

*Tennessee.*— Ross-Meehan Foundry Co. *v.* Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829.

*United States.*— Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 109 Fed. 411, 48 C. C. A. 455; Clark *v.* Wheeling Steel Works, 53 Fed. 494, 3 C. C. A. 600.

See 43 Cent. Dig. tit. "Sales," § 174.

**38.** Pope *v.* Porter, 102 N. Y. 366, 7 N. E. 304; Swift *v.* Opdyke, 43 Barb. 274.

**39.** *Alabama.*— Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

*Colorado.*— Gomer *v.* McPhee, 2 Colo. App. 287, 31 Pac. 119.

*Illinois.*— Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

*Iowa.*— Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827; Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787; Hansen *v.* Consumers' Steam-Heating Co., 73 Iowa 77, 34 N. W. 495; Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692.

*Maryland.*— Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218.

*Michigan.*— Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352.

*New York.*— Swift *v.* Opdyke, 43 Barb. 274; Deming *v.* Kemp, 4 Sandf. 147; Seymour *v.* Davis, 2 Sandf. 239; Bernstein *v.* Hilpoltsteiner, 18 Misc. 376, 41 N. Y. Suppl. 659; Azema *v.* Lewis, 5 N. Y. Suppl. 418.

*North Carolina.*— Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., 134 N. C. 574, 47 S. E. 116.

*Ohio.*— Loomis *v.* Eagle Bank, 10 Ohio St. 327.

*Pennsylvania.*— McLaughlin *v.* Hess, 164 Pa. St. 570, 30 Atl. 491; Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320; Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753; Morgan *v.* McKee, 77 Pa. St. 228.

*Tennessee.*— Coleman *v.* Hudson, 2 Sneed 463. *Compare* Ross-Mcehan Foundry Co. *v.* Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829.

*Vermont.*— R. C. Bowers Granite Co. *v.* Farrell, 66 Vt. 314, 29 Atl. 491; Mixer *v.* Williams, 17 Vt. 457.

*Wisconsin.*—Racine Shoe Mfg. Co. *v.* Badger Mfg. Co., 123 Wis. 94, 100 N. W. 1044; Campbell, etc., Co. *v.* Weisse, 121 Wis. 491, 99 N. W. 340; Sawyer *v.* Chicago, etc., R. Co., 22 Wis. 403, 99 Am. Dec. 49; Goodwin *v.* Merrill, 13 Wis. 658.

See 43 Cent. Dig. tit. "Sales," § 174.

But see Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366.

**40.** Stifel *v.* Lynch, 7 Mo. App. 326.

**41.** Pope *v.* Porter, 102 N. Y. 366, 7 N. E.

time of payment it will be presumed, in the absence of anything to indicate a contrary intention, that the different instalments are to be paid for as delivered,[42] particularly where they are made up of articles of a different character.[43]

**5. Subsequent Circumstances, Agreement, or Conduct.** The character of the contract as entire or divisible may depend on a contingency,[44] or may be changed by the subsequent agreement of the parties as to the time of delivery,[45] or terms of payment,[46] or a severance of the subject-matter,[47] or by their subsequent conduct in regard to the performance of the contract.[48] Thus a contract otherwise entire may be rendered divisible by the delivery and acceptance of a part of the goods;[49] but the acceptance in such a case must be valid,[50] and unconditional.[51] Where goods have been bought at different times and on different terms of credit, the rendering of an account for the whole does not render the contract entire.[52] So too if the goods are to be delivered in instalments and paid for as delivered, the failure to exact payment on each delivery does not render the contract entire.[53]

**F. Duration and Termination — 1. Duration.** In some cases the duration of contracts of sale must be determined by the ordinary rules of construction.[54] A contract to furnish goods at a specified price which is not limited as to duration will not be construed as a perpetual contract,[55] but will be construed as terminable at the pleasure of either party,[56] upon notice to the other party,[57] or at least

304; Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560; Goodwin *v.* Merrill, 13 Wis. 658.

42. Tipton *v.* Feitner, 20 N. Y. 423.

43. Tipton *v.* Feitner, 20 N. Y. 423.

44. Reid *v.* Caldwell, 110 Ga. 481, 35 S. E. 684.

45. Winchester *v.* Newton, 2 Allen (Mass.) 492; Newton *v.* Winchester, 16 Gray (Mass.) 208; Ming *v.* Corbin, 68 Hun (N. Y.) 161, 22 N. Y. Suppl. 647 [*affirmed* in 142 N. Y. 334, 37 N. E. 105].

46. Loomis *v.* Eagle Bank, 10 Ohio St. 327.

47. Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636.

48. Richards *v.* Shaw, 67 Ill. 222; Roberts *v.* Beatty, 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 410; Saunders *v.* Short, 86 Fed. 225, 30 C. C. A. 462.

49. *Illinois.*— Richards *v.* Shaw, 67 Ill. 222.

*Massachusetts.*— Bowker *v.* Hoyt, 18 Pick. 555.

*New York.*— Talmage *v.* White, 35 N. Y. Super. Ct. 218.

*Pennsylvania.*— Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

*United States.*— Saunders *v.* Short, 86 Fed. 225, 30 C. C. A. 462.

*England.*—Champion *v.* Short, 1 Campb. 53, 10 Rev. Rep. 631.

See 43 Cent. Dig. tit. "Sales," § 176.

50. Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227.

51. Ming *v.* Corbin, 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 641, where the acceptance was coupled with a demand for the rest of the goods.

52. Zimmerman *v.* Erhard, 83 N. Y. 74, 38 Am. Rep. 396.

53. Stifel *v.* Lynch, 7 Mo. App. 326.

54. See McCormick Harvesting Mach. Co. *v.* Jensen, 29 Nebr. 102, 45 N. W. 160 (holding that a contract made by plaintiff to deliver to defendant a quantity of binder twine on or before June 10, 1888, plaintiff guaranteeing the prices named therein "during the season of 1888," is a continuing contract during the season of 1888, and plaintiff is liable for its breach by failure to deliver twine in July, the delivery having been postponed to that time at defendant's request); Armour *v.* Cayuga Lake Ice Line, 16 N. Y. Suppl. 26.

55. Echols *v.* New Orleans, etc., R. Co., 52 Miss. 610.

**Limitation on renewal.**— Where a contract for the sale of bananas provides that it is to remain in force for one year with the privilege of renewal for another year, provided the buyer does not "advance, loan, or aid any one" in the importation of bananas, the proviso is a limitation on the contract at the end of the renewal year and does not render it of unlimited duration so long as plaintiff complies with its provisions. Underhill *v.* Buckman Fruit Co., 97 Md. 229, 54 Atl. 873.

56. *Georgia.*— Savannah Electric R. Co. *v.* Tennessee Coal, etc., Co., 98 Ga. 189, 26 S. E. 741.

*Maine.*— Cumberland Bone Co. *v.* Atwood Lead Co., 63 Me. 167.

*Mississippi.*— Echols *v.* New Orleans, etc., R. Co., 52 Miss. 610.

*New York.*— Comora *v.* Mariano, 24 Misc. 755, 53 N. Y. Suppl. 856.

*Texas.*— Bradshaw *v.* Terrell Foundry, etc., Co., (Civ. App. 1907) 104 S. W. 509.

**Retraction of termination.**— Although one party has given notice of a termination of the contract, this does not prevent him from retracting such notice with the consent of the other party and ordering other goods to be delivered under the contract. Montgomery *v.* Thompson, 152 Cal. 319, 92 Pac. 866.

57. Savannah Electric R. Co. *v.* Tennessee Coal, etc., Co., 98 Ga. 189, 26 S. E. 741, holding that such a contract, although terminable at the will of either party, cannot be abandoned without notice, and that it remains in full force until such notice is given.

within a reasonable time.[58] In contracts of sale, time is usually a material and essential element of the contract,[59] and if a period is fixed during which the contract is to continue, the life of the contract will be strictly limited to the time fixed,[60] subject, however, to any right of renewal provided for in the contract.[61]

**2. TERMINATION.** As above stated some contracts of sale may be terminated at the option of one of the parties upon notice, and others by expiration of the time limit contained in the contract.[62] Such contracts may also be terminated by the happening of a contingency named in the contract,[63] or in the case of executory contracts by the death of one of the parties, where the contract is personal,[64] although the rule is otherwise if the contract is not personal.[65] A contract for the sale of goods which the seller is to manufacture but which does not bind him to manufacture them may be terminated by his ceasing to manufacture them,[66] or by the destruction of his mill or factory.[67] The termination of the contract

**58.** Echols *v.* New Orleans, etc., R. Co., 52 Miss. 610, holding further that what is a reasonable time is a question of law for the court, but that the court will consider the facts and circumstances of the particular case as a basis of its ruling.

**59.** Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

**60.** Haskell *v.* Ayres, 32 Mich. 93; Steagall *v.* McKellar, 20 Tex. 265; Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

**Effect of strike clause.**— Under a contract of sale for the delivery of a certain amount of goods in weekly instalments as manufactured, between certain specified dates, the contract containing a strike clause providing that in case of a strike deliveries might be "suspended," if deliveries are suspended by reason of a strike and in consequence the stipulated amount of goods is not delivered by the expiration of the time limited, the contract is not continued beyond this date, and the purchaser cannot require the deficiency to be made up thereafter (Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213); but under a contract of sale of goods to be manufactured and delivered on a certain date containing a clause "barring fires, strikes, and other unavoidable casualties," this clause does not affect the whole contract but merely the time of delivery, and if on account of a strike the goods cannot be delivered by the date specified, the seller must deliver them within a reasonable time thereafter (Fish *v.* Hamilton, 112 Fed. 742, 50 C. C. A. 509).

**61.** Smitherman Cotton Mills *v.* Randleman Mfg. Co., 125 N. C. 329, 34 S. E. 446, holding that a contract to deliver a certain quantity of goods per day for a period of one year "with the privilege of renewing for three years," must, in the absence of any express restriction of such right to one of the parties, be construed as giving either party a right to renew.

**62.** See *supra*, III, F, 1.

**63.** Consumers Ice Co. *v.* Trautman, 45 La. Ann. 775, 12 So. 930, where the seller agreed to furnish ice at certain prices until a pool was formed to advance prices.

**Forfeiture avoided.**— Where timber is sold, the buyer being allowed "as long as he wishes to cut the same, provided he pay the taxes on said land," a failure to pay the taxes will not operate as a forfeiture of the title to the timber still uncut immediately upon the taxes coming due, or even after they are delinquent, but in the absence of any demand payment after delinquency will avoid a forfeiture. Matthews *v.* Mulvey, 38 Minn. 342, 37 N. W. 794.

**64.** Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497 (death of seller where sale was of six successive crops of hemp of the seller's "own raising"); Dickinson *v.* Calahan, 19 Pa. St. 227 (death of seller where sale was of all the lumber to be sawed at the seller's mill during five years).

**The intention of the parties** must govern, and if they intended the contract to be personal it must be so considered and treated regardless of its subject-matter. Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497.

**65.** Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498; Kline *v.* Low, 11 Johns. (N. Y.) 74. See also, generally, CONTRACTS, 9 Cyc. 631.

**The death of an insolvent vendee** after goods are transmitted to him but before the receipt of them does not revest goods in the vendor unless he intercepts them before they come into the possession of the vendee's representative. Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

**66.** Jugla *v.* Trouttet, 120 N. Y. 21, 23 N. E. 1066, holding that a contract by a manufacturer to sell exclusively to a certain dealer the goods manufactured by him does not bind the manufacturer to continue the manufacture of such goods but that the contract is terminated by his ceasing to do so.

**67.** Blodgett *v.* Johnson, 72 N. H. 92, 54 Atl. 1021, holding that a contract whereby the lessee of a sawmill sells its output for one year, with a right in the purchaser to renew the contract for so long as the lessee retains the property, is terminated by a destruction of the mill by fire, although the lessee subsequently purchases the premises and builds thereon another mill.

by expiration of time does not affect the remedy for any breaches already existing.[68]

**G. Evidence to Aid Construction — 1. In General.** In construing contracts of sale the general rule applies that parol or extrinsic evidence is not admissible to contradict or vary the terms of a written contract,[69] and the rule applies to any writing which the parties adopt as the means of perpetuating the terms of their agreement;[70] but such evidence is admissible to supply terms omitted from the contract,[71] to show that the contract was altered after signing,[72] or to show that an instrument on its face a conditional sale was intended as a mortgage.[73] If the contract is uncertain or ambiguous, parol evidence is admissible to explain it so as to give effect to the intention of the parties,[74] and for such purpose parol evidence is admissible to explain the meaning of particular words or phrases,[75] and especially to show that such terms have acquired a special meaning in com-

68. Bushnell *v.* Chautauqua County Nat. Bank, 10 Hun (N. Y.) 378.

69. *Alabama.*— Morgan *v.* Smith, 29 Ala. 283.

*Illinois.*— Schneider *v.* Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164.

*Kansas.*— Phelps-Bigiow Windmill Co. *v.* Piercy, 41 Kan. 763, 21 Pac. 793.

*Kentucky.*—Licking Rolling Mill Co. *v.* Snyder, 89 S. W. 249, 28 Ky. L. Rep. 357.

*New York.*— Bonesteel *v.* Flack, 41 Barb. 435.

*Ohio.*— Schroeder *v.* Kisselbach, 5 Ohio Dec. (Reprint) 158, 3 Am. L. Rec. 295; Straus *v.* Payne, 1 Ohio Dec. (Reprint) 61, 1 West. L. J. 410.

*South Carolina.*— Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

*Texas.*— Coverdill *v.* Seymour, 94 Tex. 1, 57 S. W. 37 [*reversing* (Civ. App. 1900) 56 S. W. 221].

*Wisconsin.*— Wiener *v.* Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775.

*England.*— Trueman *v.* Loder, 11 A. & E. 589, 9 L. J. Q. B. 165, 3 P. & D. 567, 39 E. C. L. 319; Brady *v.* Oastler, 3 H. & C. 112, 11 Jur. N. S. 22, 33 L. J. Exch. 300, 11 L. T. Rep. N. S. 681; Ford *v.* Yates, 10 L. J. C. P. 117, 2 M. & G. 549, 2 Scott N. R. 645, 40 E. C. L. 738.

**For general rule** as to admissibility of parol or extrinsic evidence affecting writings see Evidence, 17 Cyc. 567.

**Application of rule to sales generally** see Evidence, 17 Cyc. 607.

**Sale by sample.**— It has been held that where the contract of sale is in writing, and there is nothing in the contract to indicate that a sample was used or referred to, parol evidence is not admissible to show a sale by sample. Harrison *v.* McCormick, 89 Cal. 237, 26 Pac. 830, 23 Am. St. Rep. 469; Wiener *v.* Whipple, 53 Wis. 278, 10 N. W. 433, 40 Am. St. Rep. 775. But see Pike *v.* Fay, 101 Mass. 134.

70. Newman *v.* Hunt, 1 Phila. (Pa.) 503.

**Bill of parcels.**— A mere bill of parcels is not a contract of sale and may therefore be varied by parol. Johnson *v.* Harris, 13 Fed. Cas. No. 7,388, 1 Cranch C. C. 257 [*affirmed* in 3 Cranch 311, 2 L. ed. 450].

**Inventory.**— Where various articles are sold at public auction, testimony offered by a purchaser to establish a claim to certain articles alleged by him to have formed a part of his purchase is properly excluded, where they were not embraced either in the printed advertisement or in the inventory read at the sale. Davidson *v.* De Lallande, 12 La. Ann. 826.

71. *California.*—Thresher *v.* Gregory, (1895) 42 Pac. 421.

*Kentucky.*— Warfield *v.* Curd, 5 Dana 318.

*Louisiana.*— Landry *v.* Adeline Sugar-Factory Co., 52 La. Ann. 258, 26 So. 824.

*New York.*— Hurd *v.* Bovee, 4 Silv. Sup. 186, 7 N. Y. Suppl. 241.

*England.*— Lockett *v.* Nicklin, 2 Exch. 93, 19 L. J. Exch. 403.

**General rule** as to admissibility of evidence where writing does not express entire contract see Evidence, 17 Cyc. 741 *et seq.*

**If the instrument is manifestly incomplete** and not intended to embody the entire agreement, the writing is conclusive so far as it goes, but parol evidence is admissible to establish such parts of the actual agreement as are not embraced within the writing. The Alida, 1 Fed. Cas. No. 200, 1 Abb. Adm. 173.

**Date.**— The date of a written contract of sale may be proved by evidence outside the contract. Corcoran *v.* Sheriff, 19 La. Ann. 139.

72. Cullen *v.* Detroit Tug, etc., Co., 99 Mich. 23, 57 N. W. 1043.

**General rule** as to admissibility of parol evidence in regard to alterations see Evidence, 17 Cyc. 640.

73. Hudson *v.* Wilkinson, 45 Tex. 444; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; McLellan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87. See also, generally, Evidence, 17 Cyc. 692.

74. Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693; Semon *v.* Coppes, etc., Co., 35 Ind. App. 351, 74 N. E. 41, 111 Am. St. Rep. 351; Riley-Wilson Grocery Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Spicer *v.* Cooper, 1 Q. B. 424, 1 G. & D. 52, 5 Jur. 1036, 10 L. J. Q. B. 241, 41 E. C. L. 608. See also, generally, Evidence, 17 Cyc. 662.

75. Newell *v.* Nicholson, 17 Mont. 389, 43 Pac. 180; Neff *v.* Klepfer, 16 Misc. (N. Y.) 49, 37 N. Y. Suppl. 654; Ottawa Bottle, etc., Co. *v.* Gunther, 31 Fed. 208; Woolf *v.* Allen, 4 Northwest. Terr. 431. See also, generally, Evidence, 17 Cyc. 682.

mercial usage;[78] but if the language used is not ambiguous evidence to explain the meaning thereof is not admissible.[77] So evidence as to a custom or usage applicable to the transaction in question is admissible to explain the contract if ambiguous,[78] but not to contradict or vary its terms where there is no ambiguity.[79] The rule as to the inadmissibility of parol evidence to contradict or vary a written contract does not apply to writings or memoranda relating to the transaction but which do not embody the agreement entered into by the parties,[80] and where the contract is oral and there is a disagreement and conflict of evidence as to what the agreement was, any evidence is admissible which tends to throw any light upon this question.[81]

**2. Prior Negotiations or Course of Dealing.** In order to explain ambiguities or supply omissions in a contract of sale, evidence of the prior negotiations between the parties out of which the contract grew is admissible,[82] and evidence as to the previous course of dealing between the parties is admissible for the purpose of showing their intention in regard to the particular contract;[83] but evidence is not admissible of previous dealings consisting of distinct transactions and not constituting a connected course of dealing between the parties,[84] or of previous dealings or the manner of doing business between one of the parties to

**76.** *Kentucky.*— Howes *v.* Union Mfg. Co., (1908) 113 S. W. 512; Fairmount Glass Works *v.* Crunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196, 21 Ky. L. Rep. 264.

*Missouri.*— Price *v.* Vanstone, 40 Mo. App. 207.

*Montana.*— Newell *v.* Nicholson, 17 Mont. 389, 43 Pac. 180.

*New York.*— Neff *v.* Klepfer, 16 Misc. 49, 37 N. Y. Suppl. 654.

*United States.*— Salmon Falls Mfg. Co. *v.* Goddard, 14 How. 446, 14 L. ed. 493; Ottawa Bottle, etc., Co. *v.* Gunther, 31 Fed. 208.

*England.*— Ashforth *v.* Redford, L. R. 9 C. P. 20, 43 L. J. C. P. 57; Powell *v.* Horton, 2 Bing. N. Cas. 668, 2 Hodges 12, 5 L. J. C. P. 204, 3 Scott 110, 29 E. C. L. 710; Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 27 L. J. C. P. 29, 3 Jur. N. S. 867, 5 Wkly. Rep. 709, 89 E. C. L. 681; Lucas *v.* Bristow, E. B. & E. 907, 5 Jur. N. S. 68, 27 L. J. Q. B. 364, 6 Wkly. Rep. 685, 96 E. C. L. 907; Bold *v.* Rayner, 5 L. J. Exch. 172, 1 M. & W. 343, Tyrw. & G. 820.

*Canada.*— Woolf *v.* Allen, 4 Northwest. Terr. 431.

See 43 Cent. Dig. tit. "Sales," § 241.

**77.** Lombardo *v.* Case, 45 Barb. (N. Y.) 95, 30 How. Pr. 117; Coates *v.* Early, 46 S. C. 220, 24 S. E. 305; Williams *v.* Stevens' Point Lumber Co., 72 Wis. 487, 40 N. W. 154; Sotilichos *v.* Kemp, 3 Exch. 105, 18 L. J. Exch. 36; Smith *v.* Jeffryes, 15 L. J. Exch. 325, 15 M. & W. 561; Yates *v.* Pym, 2 Marsh. 141, 6 Taunt. 446, 16 Rev. Rep. 653, 1 E. C. L. 697.

**78.** Gibney *v.* Curtis, 61 Md. 192; Williams *v.* Woods, 16 Md. 220.

General rule as to admissibility of evidence of usage and custom in construction of contract see Customs and Usages, 12 Cyc. 1081 *et seq.*, 1091 *et seq.*

**79.** Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672; Wilkinson *v.* Williamson, 76 Ala. 163; Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Gibney *v.* Curtis, 61 Md. 192; Silberman *v.* Clark, 96 N. Y. 522; Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

**80.** Ins. Co. of North America *v.* Gamble, 94 Va. 622, 27 S. E. 463 (holding that telegrams between a principal and his agent, authorizing and confirming a sale made by the agent to a third party, do not constitute a written contract of sale, and that evidence tending to vary or contradict the terms of such telegrams is not inadmissible as tending to vary or contradict a written contract); Rogers *v.* Hadley, 2 H. & C. 227, 9 Jur. N. S. 898, 32 L. J. Exch. 241, 9 L. T. Rep. N. S. 292, 11 Wkly. Rep. 1074.

**81.** Dimmack *v.* Wheeling Tract. Co., 58 W. Va. 226, 52 S. E. 101.

**82.** Thresher *v.* Gregory, (Cal. 1895) 42 Pac. 421 (contract for sale of fruit silent as to mode of measuring and grading); Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590 (contract not specifying time of delivery).

**83.** Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166 (previous course of dealing as to terms of credit); Gray *v.* Gannon, 6 Thomps. & C. (N. Y.) 245 (mode of delivery); The Alida, 1 Fed. Cas. No. 200, 1 Abb. Adm. 173 (time and mode of delivery and payment). See also Bronson *v.* Gleason, 7 Barb. (N. Y.) 472, place of delivery.

The reason for the rule is that where a particular course of dealing between the parties is shown to exist, it will be presumed to continue until some new arrangement is made or until one party or the other gives notice of an intention to change it. Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166.

**84.** Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904.

There is no presumption of law that parties will always make the same terms for their contracts and consequently each contract must stand by itself unless the different contracts are actually connected or referred to in the course of dealing. Hinman *v.* Eakins, 26 Mich. 80.

the contract and third parties;[85] nor, if the contract is clear and unambiguous as to its terms and conditions, is evidence admissible of a previous course of dealing upon different terms even between the same parties.[86]

**3. Subject-Matter.** In accordance with the general rules above stated,[87] if the terms of the contract are uncertain or ambiguous parol evidence is admissible to identify the subject-matter of the sale,[88] or to show its kind or quality,[89] or the amount or the number and identity of the different articles intended to be included;[90] but such evidence is not admissible where there is no ambiguity in the contract as to the description of the property,[91] or the articles included.[92] If the contract is oral and there is a controversy and conflict of evidence as to the property included, any evidence is admissible which tends to throw any light upon this question.[93]

**4. Price and Terms of Payment.** While the consideration stated in a bill of sale is open to explanation by parol evidence,[94] in ordinary contracts of sale if the price is expressly agreed upon and stated, that price must control regardless of the actual value of the property,[95] and in such cases evidence is not admissible to show the value of the property,[96] or its cost to the seller,[97] although where an aggregate sum is named as the consideration for the sale of several articles, the actual consideration of each may be shown by parol.[98] If, however, the contract is silent as to the price or, in the case of an oral contract, the evidence is conflicting as to the price agreed on, it is competent to show the value of the property,[99] since, in the absence of agreement, the value of the property will be taken as the price to be paid,[1] and in the case of a conflict of evidence it is a corroborative fact proper to be considered by the jury in determining what the price agreed on actually was.[2] In such cases any evidence otherwise competent is admissible if it tends to show the value of the property at the time of the sale,[3] and evidence

85. Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522.

86. Ford *v.* Yates, 10 L. J. C. P. 117, 2 M. & G. 549, 2 Scott N. R. 645, 40 E. C. L. 738.

87. See *supra*, III, G, 1.

88. Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683; Warfield *v.* Curd, 5 Dana (Ky.) 318, sale of a slave where the written contract did not contain the name and description necessary to identify the one intended.

89. Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693; Miller *v.* Tanners' Supply Co., 150 Mich. 292, 114 N. W. 61.

90. Martin *v.* Cope, 28 N. Y. 180, 3 Abb. Dec. 182; Kelly *v.* Fleming, 113 N. C. 133, 18 S. E. 81; Rugg *v.* Hale, 40 Vt. 138.

91. Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

92. O'Reer *v.* Strong, 13 Ill. 688.

93. Dimmack *v.* Wheeling Tract. Co., 58 W. Va. 226, 52 S. E. 101, holding that where a verbal contract of sale of personal property is made and a contest arises as to what property was embraced therein, it is competent to prove the price paid and the value of all the property claimed to have been purchased.

Subsequent correspondence in regard to a sale and purchase of logs is admissible, although it names a different mark from that on the logs actually received, if it is shown by other evidence that such correspondence related to the logs in question. Lee *v.* Campbell, 77 Wis. 340, 46 N. W. 497.

94. Eckles *v.* Carter, 26 Ala. 563; Clark *v.* Deshon, 12 Cush. (Mass.) 589. See also Howland *v.* Hammill, 5 Alb. L. J. (N. Y.) 334, holding that the statement of the consideration in a bill of sale is not conclusive and that the real value may be proved, but that evidence of a custom to overstate the value of a vessel in the bill of sale is inadmissible. And see, generally, Evidence, 17 Cyc. 656 text and note 1.

95. See *supra*, III, C, 1, b.

96. Campau *v.* Moran, 31 Mich. 280.

97. Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263, 39 N. W. 54; Campau *v.* Moran, 31 Mich. 280.

98. Field *v.* Austin, 131 Cal. 379, 63 Pac. 692; Mulcahy *v.* Diendonne, 103 Minn. 352, 115 N. W. 636.

99. *Alabama.*—Anniston Line, etc., Co. *v.* Lewis, 107 Ala. 535, 18 So. 326.

*Iowa.*— Johnson *v.* Harder, 45 Iowa 677.

*Michigan.*— Banghart *v.* Hyde, 94 Mich. 49, 53 N. W. 915; Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77; Campau *v.* Moran, 31 Mich. 280.

*Minnesota.*— Miller *v.* Lamb, 22 Minn. 43.

*Nebraska.*— Fry *v.* Tilton, 11 Nebr. 456, 9 N. W. 638.

*Wisconsin.*— Bell *v.* Radford, 72 Wis. 402, 39 N. W. 482.

See 43 Cent. Dig. tit. "Sales," § 244.

1. See *supra*, III, C, 1, a.

2. Banghart *v.* Hyde, 94 Mich. 49, 53 N. W. 915; Bell *v.* Radford, 72 Wis. 402, 39 N. W. 482.

3. Anniston Line, etc., Co. *v.* Lewis, 107 Ala. 535, 18 So. 326, holding that, in case of a sale of second-class stock of a certain commodity, it is competent for the seller to testify as to the price for which he was selling first-class stock at the time and the dif-

is admissible of circumstances existing at the time calculated to affect the market value.[4] Where the contract is silent as to price, a price list sent by the seller to the buyer prior to the sale is admissible as tending to show the terms of the contract.[5] If under the contract the price is to be fixed by third persons, an invoice prepared by such persons acting in accordance with the provisions of the agreement is admissible.[6] If the contract is clear and unambiguous as to the mode and terms of payment, no evidence of a custom or usage is admissible to vary it;[7] but where in the case of an oral contract the evidence is conflicting as to whether the sale was for cash or on credit, evidence as to the financial condition of the buyer at the time of the sale is admissible.[8]

**H. Province of Court and Jury.** The construction of a written contract of sale is ordinarily a question of law for the court,[9] it being a question for the court wherever the language of the contract is clear and unambiguous;[10] but if, although the contract is in writing, it is uncertain or ambiguous and its proper interpretation depends upon extrinsic facts, it should be submitted to the jury,[11] unless the evidence introduced to explain the ambiguity is clear and without conflict,[12] or the language of the contract is meaningless and unintelligible, presenting a case of incurable uncertainty.[13] So also in the case of oral contracts of sale, the determination as to the real intention of the parties is for the jury, if the evidence as to the terms of the contract is conflicting,[14] or the language used

ference in price between the first and second class stock.

**4.** Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765, holding that where a contract for the sale of lumber is silent as to the price, evidence as to whether lumber was scarce or plentiful at the time is admissible as tending to show its market value.

**5.** Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

**6.** Veal *v.* Willingham, 80 Ga. 243, 4 S. E. 554, holding that where the contract of sale provided that if the parties could not agree upon the wholesale market value of the goods they should choose third persons to assess the value of such goods, an invoice made by such persons is admissible, although the value is not stated as the wholesale market value, if it appears from the testimony in the case that it was the value of the goods at the time of the assessment at the wholesale price.

**7.** Gibney *v.* Curtis, 61 Md. 192.

**8.** Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912, holding that such evidence is admissible as tending to show the probability or improbability of credit having been given to the buyer.

**9.** *Connecticut.*— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

*Delaware.*— Johnson Forge Co. *v.* Leonard, 3 Pennew. 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225.

*Kentucky.*— Licking Rolling Mill Co. *v.* Snyder, 89 S. W. 249, 28 Ky. L. Rep. 357.

*Pennsylvania.*— Reaney *v.* Culbertson, 21 Pa. St. 507.

*Washington.*—Livesley *v.* O'Brien, 3 Wash. 546, 28 Pac. 920.

*United States.*— Lydia Cotton Mills *v.* Prairie Cotton Co., 156 Fed. 225, 84 C. C. A. 129; Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

**The construction of letters** passing between parties after they had entered into a contract for the sale and purchase of goods is a question of law for the court. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**10.** Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521; Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. 373, 23 Ky. L. Rep. 1834; Mee *v.* McNider, 109 N. Y. 500, 17 N. E. 424; Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730.

**11.** Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Barker *v.* Freeland, 91 Tenn. 112, 18 S. W. 60; Jung Brewing Co. *v.* Konrad, 137 Wis. 107, 118 N. W. 548; Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854; Ashforth *v.* Redford, L. R. 9 C. P. 20, 43 L. J. C. P. 57; Thornton *v.* Charles, 11 L. J. Exch. 302, 9 M. & W. 802.

**Mercantile usage.**— If the language of the contract when read according to the ordinary meaning of the words used is ambiguous, it is a question for the jury whether the language has not acquired a definite meaning by mercantile usage (Ashforth *v.* Redford, L. R. 9 C. P. 20, 43 L. J. C. P. 57); but if the jury has determined the meaning in commercial usage of a particular term used in the contract, it is then for the court to construe the contract (Hutchinson *v.* Bowker, 9 L. J. Exch. 924, 5 M. & W. 535).

**12.** Licking Rolling Mill Co. *v.* Snyder, 89 S. W. 249, 28 Ky. L. Rep. 357, holding that, although there is an ambiguity in the contract, if the evidence introduced to explain it is without conflict, its construction is for the court.

**13.** Cheney Bigelow Wire Works *v.* Sorrell, 142 Mass. 442, 8 N. E. 332.

**14.** Goslen *v.* Campbell, 88 Me. 450, 34 Atl. 265; McKeever *v.* Dady, 18 N. Y. Suppl. 439.

is uncertain and ambiguous,[15] or the contract is silent upon some point as to which the intention of the parties must be determined from extraneous circumstances to be proved.[16] So where the contract is ambiguous or the evidence as to its terms is conflicting, it is a question for the jury to determine the intention of the parties, as in regard to the subject-matter of the sale,[17] the quantity or standard of measurement,[18] price,[19] terms of payment and credit,[20] whether the sale was intended to be by sample or upon the buyer's own judgment,[21] when title was to pass,[22] the place of delivery,[23] the time when the property was to be called for by the purchaser,[24] or delivered by the seller,[25] and the condition in which it was to be delivered.[26]

## IV. MODIFICATION OR RESCISSION OF CONTRACT.

**A. Modification**[27] — **1. In General.** A contract of sale, like other contracts,[28] may be modified by agreement of the parties as to any of its terms or conditions,[29] such as the time,[30] mode,[31] or place of delivery,[32] the price[33] and terms of payment,[34] the subject-matter,[35] or the parties.[36]

**2. Consideration.** Generally a contract of sale that is wholly executory may be modified without a new consideration, the consideration of the original contract being deemed sufficient.[37] If, however, the contract is complete or executed by one party any modification thereof must be supported by a new consideration.[38]

15. McKeever *v.* Dady, 18 N. Y. Suppl. 439; Ayers *v.* Herring, (Tex. Civ. App. 1895) 32 S. W. 1060.

16. Bosworth *v.* Frankberger, 15 Ill. 508.

17. Knight *v.* Parker, 25 Ill. 593; Western Stage Co. *v.* Walker, 2 Iowa 504, 65 Am. Dec. 789; Pollen *v.* LeRoy, 30 N. Y. 549 [*affirming* 23 N. Y. Super. Ct. 38].

18. Cullum *v.* Wagstaff, 48 Pa. St. 300, whether a sale of a certain number of barrels of oil contemplated a standard barrel or the larger oil barrel in common use.

19. Willard *v.* Randall, 65 Me. 81 (whether a sale of property "at its cost" was at the cost price or actual cost); Holbrook *v.* Setchel, 114 Mass. 435; Edwards, etc., Lumber Co. *v.* Baker, 2 N. D. 289, 50 N. W. 718; Ruege *v.* Gates, 71 Wis. 634, 38 N. W. 181.

**The question as to which of two inspections** should govern the price of wheat sold by defendant to plaintiff is a question of fact for the jury, where it is not clear from the terms of the contract and the evidence is conflicting. Farmer *v.* Emminga, 53 Ill. App. 220.

**Language not ambiguous.**—Where there is no uncertainty in the language used to state the price the question whether the goods were billed at the prices fixed by the contract is for the court. Manda *v.* Etienne, 93 N. Y. App. Div. 609, 87 N. Y. Suppl. 588.

20. Zimmern *v.* Heinecke, 17 N. Y. Suppl. 728.

21. Jones *v.* Wasson, 3 Baxt. (Tenn.) 211.

22. Goslen *v.* Campbell, 88 Me. 450, 34 Atl. 265.

23. Bosworth *v.* Frankberger, 15 Ill. 508; McLaughlin *v.* Marston, 78 Wis. 670, 48 N. W. 1058.

24. Steagall *v.* McKellar, 20 Tex. 265.

25. Fitzgerald Cotton Oil Co. *v.* Farmers Supply Co., 3 Ga. App. 212, 59 S. E. 713; Bagby *v.* Walker, 78 Md. 239, 27 Atl. 1033; Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

**Reasonable time.**— Where under a contract of sale delivery is to be made "about June, 1906," it is proper for the court to instruct that the seller has the month of June and a reasonable time thereafter to make delivery, leaving to the jury the determination as to what under the circumstances is a reasonable time. Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358.

26. Wood Mowing, etc., Mach. Co. *v.* Gaertner, 63 Mich. 520, 30 N. W. 106, whether under a contract of sale of a piece of machinery, to be delivered on a certain date, it was to be delivered set up and in condition for use on that date.

27. **Of conditional sale** see *infra*, X, E.

28. See Contracts, 9 Cyc. 593.

29. *In re* Naylor Mfg. Co., 135 Fed. 206.

30. General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928 [*affirming* 83 N. Y. Suppl. 1106].

31. Whitlock *v.* Hay, 58 N. Y. 484.

32. Robinson *v.* Batchelder, 4 N. H. 40.

33. B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

34. Lilienthal *v.* Betz, 61 N. Y. App. Div. 601, 70 N. Y. Suppl. 920 [*affirmed* in 172 N. Y. 643, 65 N. E. 1118].

35. Boothe *v.* Squaw Springs Water Co., 142 Cal. 573, 76 Pac. 385.

36. Ellis *v.* U. S. Fertilizing, etc., Co., 64 Ga. 571; Smith *v.* Plummer, 5 Whart. (Pa.) 89, 34 Am. Dec. 530; Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221.

37. Peters, etc., Pottery Co. *v.* Folckemer, 131 Mo. App. 105, 110 S. W. 598; Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488.

38. *Colorado.*— Cofield *v.* Clark, 2 Colo. 101.

*Georgia.*— J. A. Fay, etc., Co. *v.* Dudley, 129 Ga. 314, 58 S. E. 826, after purchase by

A sufficient consideration may be found in a release or waiver of claims under the old contract,[39] or a disadvantage imposed on one of the parties,[40] or the mutual agreements of the parties.[41]

**3. Mutual Assent.** In order that a modification of the contract shall be operative it must be assented to by both parties,[42] and such assent is not shown by a mere failure to reject a proposed modification.[43] Assent may, however, be implied from the conduct of the parties.[44]

**4. Form of Agreement.** The contract of sale may be modified by parol,[45] even though the original contract provides that no modification thereof shall

defendant and delivery by plaintiff. See also Mills *v.* Mercer, Dudley 158.

*Iowa.*— See Carruthers *v.* McMurry, 75 Iowa 173, 39 N. W. 255.

*Michigan.*— Bell *v.* Utley, 17 Mich. 508.

*Mississippi.*— Hendricks *v.* Robinson, 56 Miss. 694, 31 Am. Rep. 382.

*Pennsylvania.*— Cannon *v.* Young, 5 Pa. Dist. 772, 19 Pa. Co. Ct. 239.

See 43 Cent. Dig. tit. "Sales," § 259.

**39.** Plano Mfg. Co. *v.* Kesler, 15 Ind. App. 110, 43 N. E. 925; Nelson *v.* Hagen, 72 Iowa 705, 31 N. W. 875.

**40.** Smith *v.* Plummer, 5 Whart. (Pa.) 89, 34 Am. Dec. 530, holding that where one sold goods to another, who bought them for a third party, the latter accepting a bill for the purchase-price drawn on him by the purchaser, and afterward agreeing with the seller to allow the bill to go to protest and be personally liable to the latter for the debt, the dishonor of the bill was a sufficient consideration for the release of the original purchaser.

**41.** B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139, holding that a modification as to price by allowance of credit because of the quality of the goods is supported by the agreement to pay the price as modified.

**42.** *Iowa.*— Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

*Kansas.*— Holton *v.* McPike, 27 Kan. 286.

*Kentucky.*— Kerr *v.* Smith, 5 B. Mon. 552.

*Maine.*— Woodward *v.* Libby, 58 Me. 42.

*Massachusetts.*— Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446.

*Michigan.*— Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

*Montana.*— John S. Brittain Dry Goods Co. *v.* Birkenfeld, 20 Mont. 347, 51 Pac. 263.

*United States.*— Utley *v.* Donaldson, 94 U. S. 29, 24 L. ed. 54 [*reversing* 28 Fed. Cas. No. 16,807]; Schuchardt *v.* Allens, 1 Wall. 359, 17 L. ed. 642.

**Question of law or fact.**— Ordinarily whether the alleged modification was assented to by the parties is for the jury. Manhattan Mills, etc., Mfg. Co. *v.* Edward P. Allis Mfg. Co., (Kan. 1898) 54 Pac. 689; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 [*affirmed* in 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811]. But where the alleged modification is evidenced by writings, as a letter by one of the parties proposing the change and a letter by the other party making a counter proposition, the construction of the writings is a question of law for the court. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**43.** J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 70 Pac. 669; C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604; Murphy *v.* Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113. But see Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811 [*affirming* 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251].

**For evidence held sufficient to show modification** see Birkett *v.* Nichols, 184 N. Y. 315, 77 N. E. 374 [*reversing* 98 N. Y. App. Div. 631, 90 N. Y. Suppl. 257].

**A counter proposition** made to a proposition to change the original agreement does not show a modification of the latter. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**One cannot rely on a proposed modification** to which he has not assented. Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057.

**Subsequent assent.**— Although a contract of sale is made without reference to a proposition of the seller for inspection by the buyer at a point intermediate that of shipment and delivery, a subsequent acceptance by the buyer of the proposition modifies the contract. Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204.

**Change in course of dealing.**— Where plaintiffs had pursued a certain course of dealing with defendant for many years, they could not arbitrarily change it without notice to him. Carter *v.* Lane, 5 Fed. Cas. No. 2,477, 1 Hayw. & H. 176.

**44.** Schweppe Grocer Co. *v.* Nolin, 83 Mo. App. 73.

**Change of parties.**— Where there has been a change of vendors the acceptance of the goods from the new vendor is an assent to the change. Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221. But acceptance of payment from a third person does not effect a change of parties. Barkley *v.* Rensselaer, etc., R. Co., 71 N. Y. 205. So an offer to ship the goods to one who has purchased the buyer's business is not an assent to a change of parties. Downs *v.* Marsh, 29 Conn. 409.

**45.** *District of Columbia.*— Cumberland Hydraulic Cement, etc., Co. *v.* Wheatley, 9 App. Cas. 334.

*Iowa.*— Aldrich *v.* Price, 57 Iowa 151, 9 N. W. 376, 10 N. W. 339.

*New Hampshire.*— Robinson *v.* Batchelder, 4 N. H. 40.

be binding unless in writing.[46] The new agreement must purport to modify the original contract or must be inconsistent therewith or there is no modification.[47]

**5. Operation and Effect.** If the new agreement covers substantially the entire subject-matter of the original contract, the original will be regarded as merged in the subsequent contract.[48] Similarly when there is a modification of particular terms the modified agreement takes the place of, and is as binding on the parties as, the original contract,[49] and neither party, as a rule, can rely on the original contract.[50] So where there has been an assent to a change of purchasers the original purchaser is released,[51] and the one substituted becomes liable as an original purchaser.[52] But a modification of the contract allowing delivery to be made at a different time or at a different place,[53] or limiting the time

*New York.*— Orguerre *v.* Luling, 1 Hilt. 383.

*Vermont.*— Hunt *v.* Thurman, 15 Vt. 336, 40 Am. Dec. 683.

*United States.*— *In re* Naylor Mfg. Co., 135 Fed. 206.

See Contracts, 9 Cyc. 597; Frauds, Statute of, 20 Cyc. 241.

**46.** General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928 [*affirming* 83 N. Y. Suppl. 1106]. But *compare* Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884.

**47.** Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

**Conditional acceptance.**— Where the seller, in delivering to the buyer tobacco which he has contracted to sell in a merchantable condition, is informed by the buyer that it is not in a merchantable condition, and will not be accepted unless put in such condition by the seller, or by the buyer at the seller's expense, and the seller leaves the tobacco with the buyer, this is not a modification of the contract but a conditional acceptance. Olson *v.* Mayer, 56 Wis. 551, 14 N. W. 640.

**Inspection of goods.**— A contract to sell and deliver ties, which made no provision for inspection, is not changed, as to the seller's duty to deliver them without a prior inspection, by the purchaser's compliance with the seller's request, made on account of the demand of the person from whom the seller was obtaining the ties, that an inspector be sent. Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64. So a contract for a car of fruit to be delivered at a specified place is not modified as to place of delivery by reason of the buyer's compliance with the seller's request to inspect the fruit at an intermediate point. Seefeld *v.* Thacker, 93 Wis. 518, 67 N. W. 1142.

**48.** *Georgia.*— Poland Paper Co. *v.* Foote, etc., Co., 118 Ga. 458, 45 S. E. 374; Byrd *v.* Campbell Printing Press, etc., Co., 90 Ga. 542, 16 S. E. 267.

*Maine.*— Patten *v.* Hood, 40 Me. 457.

*Michigan.*— Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65; Osborne *v.* Baker, 103 Mich. 247, 61 N. W. 509.

*Missouri.*— Peters, etc., Pottery Co. *v.* Folckemer, 131 Mo. App. 105, 110 S. W. 598.

*New York.*— Farrell *v.* Ryan, 107 N. Y. App. Div. 609, 94 N. Y. Suppl. 850; Shull *v.* Ostrander, 63 Barb. 130; Keeney *v.* Mason, 49 Barb. 254.

*Pennsylvania.*— Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774.

*Wisconsin.*— Vodrey Pottery Co. *v.* H. E. Horne Co., 117 Wis. 1, 93 N. W. 823.

See 43 Cent. Dig. tit. "Sales," § 260.

**Collateral agreements.**— When the new agreement is merely collateral the original contract is not merged therein. Carruthers *v.* McMurry, 75 Iowa 173, 39 N. W. 255; Sterling *v.* Rogers, 25 Wend. (N. Y.) 658. And see Mills *v.* Mercer, Dudley (Ga.) 158.

**Reinstatement of former contract.**— Where the parties to a running contract for the delivery of goods during its life made a new contract for the sale of the same goods, the buyer giving an order thereunder, stating that, if only a portion of the goods ordered were taken, the balance should not apply under the former contract, and the seller replied that the first contract had to be considered in force if the second were broken, and the buyer assented, the seller had a right to revive the first contract on breach of the second. Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356, 53 N. Y. Suppl. 950.

**49.** Brooke *v.* Waring, 7 Gill (Md.) 5.

**When the modification is invalid as to creditors** it affects the whole contract to the same extent as if it had been a part of the original contract. H. B. Claflin Co. *v.* Kern, 55 Fed. 578.

**50.** *California.*— Boothe *v.* Squaw Springs Water Co., 142 Cal. 573, 76 Pac. 385.

*Georgia.*— McGregor *v.* Bensinger Self-Adding Register Co., 86 Ga. 439, 12 S. E. 683; Wilson *v.* Paulsen, 57 Ga. 596.

*Iowa.*— Aldrich *v.* Price, 57 Iowa 151, 9 N. W. 376, 10 N. W. 339.

*New York.*— General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928 [*affirming* 83 N. Y. Suppl. 1106].

*Vermont.*— Drew *v.* Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122.

*United States.*— Roberts *v.* Benjamin, 124 U. S. 64, 8 S. Ct. 393, 31 L. ed. 334; Mason *v.* U. S., 6 Ct. Cl. 57 [*affirmed* in 17 Wall. 67, 21 L. ed. 564].

See 43 Cent. Dig. tit. "Sales," § 260.

**51.** Smith *v.* Plummer, 5 Whart. 89, 34 Am. Dec. 530.

**52.** Ellis *v.* U. S. Fertilizing, etc., Co., 64 Ga. 571; Sloan *v.* Van Wyck, 47 Barb. (N. Y.) 634 [*affirmed* in 4 Abb. Dec. 250, 5 Transcr. App. 98].

**53.** Cease *v.* Cockle, 76 Ill. 484; Bacon *v.*

of payment,[54] must be acted on to prevent the other party from relying on the original contract. And if the modification is conditional it cannot be taken advantage of unless the condition is complied with.[55] A modification of one of the terms or conditions of the contract will not of course affect the liability of the parties under other terms and conditions,[56] unless such conditions are directly related to the modified conditions.[57]

**B. Rescission**[58] **— 1. In General.** While the parties to a contract may rescind it by mutual consent,[59] or one party may rescind for fraud,[60] mistake,[61] or, in some cases, for breach of contract or condition[62] on the part of the other, neither of them can do so arbitrarily.[63]

**2. By Agreement of Parties — a. Option to Rescind — (I) *In General.*** The parties to a contract of sale may stipulate that one of them shall have the right to terminate the contract for certain specified reasons. The option thus given to rescind must be distinguished from the conditional contracts for sale or return,[64]

Cobb, 45 Ill. 47; Scully *v.* Detroit Iron Furnace Co., 132 Mich. 333, 93 N. W. 885; Stiff *v.* Stevens, (Tex. Civ. App. 1893) 21 S. W. 295; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291.

54. Weiss *v.* Marks, 23 Pa. Super. Ct. 602.

55. Van Camp Packing Co. *v.* Smith, 101 Md. 565, 61 Atl. 284; Heierman *v.* Robinson, 26 Tex. Civ. App. 491, 63 S. W. 657.

56. O'Ferrall *v.* Vancamp, 124 Ind. 336, 24 N. E. 134; Bryant *v.* Sears, 49 Iowa 373; Gammar *v.* Borgain, 27 Iowa 369; Youqua *v.* Nixon, 30 Fed. Cas. No. 18,189, Pet. C. C. 221.

57. T. Wilce Co. *v.* Kelley Shingle Co., 130 Mich. 319, 89 N. W. 957, holding that when the purchaser of lumber to be delivered by November 1, after being piled sixty days, asked for and was granted delay in the delivery, he could not repudiate the contract because the full amount of lumber had not been piled in the seller's yards by September 1.

**Where a second contract was not to be performed until the first was completed,** an extension of the time of performance of the first operated to extend that of the second and the seller was guilty of a breach of the second contract in refusing to deliver under it upon the completion of the first, although it was after the time named for the delivery. Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450.

58. **Other remedies of seller** see *infra*, VIII.

**Other remedies of buyer** see *infra*, IX.

59. See *infra*, IV, B, 2.

60. See *infra*, IV, B, 3, a.

61. See *infra*, IV, B, 3, b.

62. See *infra*, IV, B, 3, c.

63. *Illinois.*— Kendall *v.* Young, 27 Ill. App. 174 [*affirmed* in 141 Ill. 188, 30 N. E. 538].

*Missouri.*— Ludwig *v.* Knippinger, 13 Mo. App. 593.

*Nebraska.*— Backes *v.* Black, 5 Nebr. (Unoff.) 74, 97 N. W. 321.

*New York.*— Loader *v.* Brooklyn Chair Co., 75 N. Y. App. Div. 621, 78 N. Y. Suppl. 156. Where A contracted with B to furnish certain fixtures and merchandise for use in the latter's saloon and entered into a contract in his own name with a third party to furnish the same, B not being a party in any way to the latter contract, the failure of B to carry out his contract with A could not affect the latter's liability to the third party for the price which it had agreed to pay the third party for the goods. Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383, 77 N. Y. Suppl. 719.

*Pennsylvania.*— Roberts *v.* Andrews, 23 Pa. Co. Ct. 97.

*South Dakota.*— Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. 330.

64. See *infra*, VI, A, 2, f. And see the cases cited *infra*, this note.

**Illustrations of options.**— Where, in a bill of sale of stoves, the vendor promised that, if the stoves were not resold within one year, he would take back two of them, and pay the vendee fifty dollars and interest, it was in effect giving the vendee the right to rescind the sale at the end of the year as to two of the stoves. Sawyer *v.* McIntyre, 18 Vt. 27. A stipulation that, should the purchaser fail to make payments of the price as agreed, he should forfeit the goods which should revert to the seller, and all claims against the purchaser should thereupon cease, is not a penalty, but an option in the purchaser, to either pay the price and take the goods or refuse to pay and forfeit the goods, and a refusal to pay was not a breach. Gallup *v.* Sterling, 22 Misc. (N. Y.) 672, 49 N. Y. Suppl. 942. But a memorandum, "Guaranteed against our own decline," given by the seller at the time of making a sale, does not reserve to the purchaser the right to rescind the contract at will, but is a mere assurance that the seller would not decline to fill the order and imposed no other duty than was implied by law. Buist *v.* Eufaula Drug Co., 96 Ala. 292, 11 So. 301.

**Assignment of contract.**— Where a contract provided that, if the purchaser of property should become dissatisfied, she should be entitled to a return of the purchase-price on surrender of the property sold, the fact that pending the suit to enforce such agreement she assigned the contract was held immaterial, since the statute authorized the continuance of a suit in the name of the original party, or substitution of the transferee where

and sale on approval.[65] Such provisions, although not usual, are valid.[66] Under a reservation of the right to rescind the rights of the parties are mutual,[67] and the consent of the other party is not a condition precedent to the exercise of the right.[68]

(II) *EXERCISE OF OPTION.* The option can be exercised only for the reasons,[69] and in the manner specified in the contract.[70] On the exercise of the option by the buyer it is usually necessary that he should return the property,[71] or give the seller notice of his election.[72] As a general rule a mere offer to return the goods is insufficient under a provision requiring their return.[73] The tender of the goods in return must be unconditional,[74] and must be made at the place designated in the option.[75]

**b. Agreement to Rescind.** The power to rescind a sale by agreement is

plaintiff's claim was transferred *pendente lite.* O'Rourke *v.* Schultz, 23 Mont. 285, 58 Pac. 712.

**65.** See *infra*, VI, A, 2, e.

**66.** Smalley *v.* Hendrickson, 29 N. J. L. 371.

**67.** Kraft *v.* Sims, 1 Tex. App. Civ. Cas. § 404.

**68.** Coombs *v.* Glass, 5 B. Mon. (Ky.) 11; Patterson *v.* Bonner, 14 La. 214; Carter *v.* Walker, 2 Rich. (S. C.) 40; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L ed. 595. See also Young *v.* Paris, 69 Ill. App. 449, holding that the option cannot be revoked by the other party.

**69.** Semon *v.* Coppes, etc., Co., 35 Ind. App. 351, 74 N. E. 41, 111 Am. St. Rep. 171; Swann *v.* West, 41 Miss. 104.

**70.** McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; King *v.* Towsley, 64 Iowa 75, 19 N. W. 859; Avery Planter Co. *v.* Peck, 80 Minn. 519, 83 N. W. 455, 1083; Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634; Sandwich Mfg. Co. *v.* Feary, 34 Nebr. 411, 51 N. W. 1026; Edgerly *v.* Gardner, 9 Nebr. 130, 1 N. W. 1004.

**71.** King *v.* Towsley, 64 Iowa 75, 19 N. W. 859; Walls *v.* Gates, 6 Mo. App. 242; Smalley *v.* Hendrickson, 29 N. J. L. 371; Knoxville Traction Co. *v.* Manchester Mfg. Co., (Tenn. Ch. App. 1900) 59 S. W. 173.

**Partial rescission.**— Under a contract of sale giving the purchaser the right to return any part of the goods when found bad, he need rescind the contract only as to the portion found bad. P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246, 34 N. Y. Suppl. 741.

**Impossibility of return.**— Where a pony is sold, with option to the purchaser, if dissatisfied, to rescind the sale within a certain time, the purchaser, on the death of the pony within such time, may still rescind the sale. Lyons *v.* Stills, 97 Tenn. 514, 37 S. W. 280.

**Question for jury.**— Whether or not a party has so contracted as to relieve himself from the obligation of returning or tendering the property where he wishes to rescind a sale is a question for the jury, where the contract is an oral one. Smalley *v.* Hendrickson, 29 N. J. L. 371.

**72.** Smalley *v.* Hendrickson, 29 N. J. L. 371. And see Moral School Tp. *v.* Harrison, 74 Ind. 93; Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57.

**Waiver by seller.**— The seller may by stipulation relieve the buyer of the obligation to relieve the property or give notice. Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634; Smalley *v.* Hendrickson, 29 N. J. L. 371.

**73.** McCormick Harvesting Mach. Co. *v.* Allison, 116 Ga. 445, 42 S. E. 778; Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854; Hoover *v.* Doetsch, 54 Ill. App. 65; Clark *v.* Deering, 29 Nebr. 293, 45 N. W. 456; Edgerly *v.* Gardner, 9 Nebr. 130, 1 N. W. 1004. But see Champion Mach. Co. *v.* Mann, 42 Kan. 372, 22 Pac. 417 (holding that the purchaser was excused from making an actual return when on an offer to do so the seller declined to receive the property); McCormick Harvesting Mach. Co. *v.* Knoll, 57 Nebr. 790, 78 N. W. 394, holding that notice, given by the buyer to the seller's agent, of a rescission of an executory contract of sale, together with an offer to deliver the property to the agent, is a sufficient tender of the return of the property to work a rescission, although there was no direct refusal of the offer to return.

**Property held subject to seller's order.**— A mere notice by the purchaser, under a contract that if a machine sold shall not work it shall be returned after four months, that the machine is held subject to the seller's order is not a compliance with the contract. Dickey *v.* Winston Cigarette Mach. Co., 117 Ga. 131, 43 S. E. 493.

**Protection of buyer's interests.**—Where the purchaser of corporate stock, under an option to return it and have the money paid for it refunded, tenders the stock in rescission, and the seller refuses to accept it, the purchaser has the right to do any acts in regard to the stock reasonably necessary to protect his interests, and at the same time to maintain his claim to rescind. Jessop *v.* Ivory, 158 Pa. St. 71, 27 Atl. 840.

**74.** Pitt's Sons' Mfg. Co. *v.* Spitznogle, 54 Iowa 36, 6 N. W. 71; Walls *v.* Gates, 6 Mo. App. 242.

**75.** Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854, holding that a mere notice to the seller that the goods are held subject to his order is insufficient.

**Return to place of delivery.**— If the seller has no regular place of business a return of the goods to the place of delivery is sufficient if notice thereof is given, and, if the whereabouts of the agent who sold the goods is not known, notice may be given to the nearest agent. Paulson *v.* Osborne, 37 Minn. 19, 33 N. W. 2.

coextensive with the power to contract,[76] and the mutual release of the rights of the parties under the contract of sale is regarded as a sufficient consideration for the agreement.[77] There must be a mutual assent to the agreement,[78] and an unconditional acceptance of the proposal operates as a rescission.[79] If the contract of sale is fully executed redelivery of the goods is necessary to complete the agreement to rescind;[80] but this requirement is fulfilled by a constructive delivery as where the vendee holds the goods as bailee for the seller,[81] especially if the sale is not fully executed by payment of the price.[82] If, however, there is an actual delivery it must be unconditional.[83] The agreement to rescind may be by parol,[84] and it is not essential that a party in express terms consents to the

**Where no place for delivery on return is specified** the buyer, in order to rescind the contract, is not required to return the machine until he has been informed where he should leave it. Westinghouse Co. *v.* Gainor, 130 Mich. 393, 90 N. W. 52.

**76.** Smith *v.* Field, 5 T. R. 402, 2 Rev. Rep. 630, 101 Eng. Reprint 225. See also CONTRACTS, 9 Cyc. 593.

**The fact that advances had been made to the purchaser** to be paid out of the proceeds of goods to be consigned to the creditor did not give the creditor such a lien on the goods as would prevent the purchaser from entering into an agreement with the seller to rescind the sale. Clemson *v.* Davidson, 5 Binn. (Pa.) 392.

**Return of purchase-money notes.**— Where no part of the purchase-money has been paid, a sale may be rescinded by mutual consent, although the purchase-money notes have been transferred to a third person, provided the seller takes up the notes in consequence of the rescission, and either returns them to the maker, or holds them subject to his order. Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206.

**77.** Gant *v.* Shelton, 3 B. Mon. (Ky.) 420; Brooke *v.* Waring, 7 Gill (Md.) 5; Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967; Kelly *v.* Bliss, 54 Wis. 187, 11 N. W. 488.

**78.** Robinson *v.* Pogue, 86 Ala. 257, 5 So. 685; J. P. Gentry Co. *v.* Margolius, 110 Tenn. 669, 75 S. W. 959; Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981, cancellation of order.

**If such assent is induced by fraud or mistake** the agreement to rescind is of no effect. Byers *v.* Chapin, 28 Ohio St. 300. But see Flint *v.* Standard Rope, etc., Co., 52 N. Y. App. Div. 459, 65 N. Y. Suppl. 238, where on a rejection of the goods by the purchaser it was held to be the duty of the seller to investigate.

**79.** Flynn *v.* Ledger, 48 Hun (N. Y.) 465, 1 N. Y. Suppl. 235. See also Pictou Bank *v.* Harvey, 14 Can Sup. Ct. 617, 7 Can. L. T Occ. Notes 130.

**When a proposal to rescind is made** by one party, the other must accept the proposal within a reasonable time. McGregor Noe Hardware Co. *v.* Livesay, 85 Mo. App. 271.

**Conditional acceptance.**— If the agreement is conditioned on the performance of some act to be performed by the vendee, there must be performance on his part before the rescission can take effect. Lightfoot *v.* Strahan, 7 Ala. 444.

**A request to delay shipment** acceded to by the seller for a limited period does not constitute a rescission. National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100.

**Failure to reply to a proposal** to rescind does not constitute an acceptance thereof. Robinson *v.* Pogue, 86 Ala. 257, 5 So. 685; Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419.

**Question for jury.**— Whether there has been a rescission is a question for the jury. Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756; Dignan *v.* Spurr, 3 Wash. 309, 28 Pac. 529; James *v.* Adams, 16 W. Va. 245.

**Sufficiency of evidence** to show a rescission by agreement is considered in Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89; H. Hirschberg Optical Co. *v.* Michaelson, 1 Nebr. (Unoff.) 137, 95 N. W. 461; Sloan *v.* Van Wyck, 47 Barb. (N. Y.) 634 [*affirmed* in 4 Abb. Dec. 250, 5 Transcr. App. 98].

**80.** Quincy *v.* Tilton, 5 Me. 277; Klein *v.* Rector, 57 Miss. 538; Miller *v.* Smith, 17 Fed. Cas. No. 9,590, 1 Mason 437.

**Implied promise.**— A promise to return the goods is implied in a rescission by agreement. Talbot *v.* Dailey, 3 Bibb (Ky.) 443.

**Reasonable time.**— A delay of eight months in returning goods is not unreasonable when the purchase-price has not been returned and no loss actually sustained by the seller. Willard *v.* Tatum, (Cal. 1893) 31 Pac. 912.

**81.** Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206; Folsom *v.* Cornell, 150 Mass. 115, 22 N. E. 705.

**82.** Gant *v.* Shelton, 3 B. Mon. (Ky.) 420; Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967; Wolff *v.* Zeller, 31 Misc. (N. Y.) 255, 64 N. Y. Suppl. 129 [*reversing* 27 Misc. 646, 58 N. Y. Suppl. 608].

**83.** Willard *v.* Tatum, (Cal. App.) 31 Pac. 912.

**84.** Gant *v.* Shelton, 3 B. Mon. (Ky.) 420; Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 697; Dignan *v.* Spurr, 3 Wash. 309, 28 Pac. 529. But see Noble *v.* Ward, L. R. 1 Exch. 117, 4 H. & C. 149, 12 Jur. N. S. 167, 35 L. J. Exch. 81, 13 L. T. Rep. N. S. 639, 14 Wkly. Rep. 397 [*affirmed* in L. R. 2 Exch. 135, 36 L. J. Exch. 91, 15 L. T. Rep. N. S. 672, 15 Wkly. Rep. 520], holding that a contract within the statute of frauds cannot be rescinded by verbal agreement.

rescission, but such consent may be implied from his acts or conduct.[85] But a return of a portion of the goods operates as a rescission *pro tanto* only.[86]

**3. For Fraud, Mistake, or Default in Performance — a. Fraud.** The contract of sale may be rescinded for fraud [87] of either the buyer,[88] or the seller.[89]

85. Avery Planter Co. *v.* Peck, 80 Minn. 519, 83 N. W. 455, 1083; Hart *v.* Haight, 10 N. Y. Suppl. 798; Terry *v.* Wenderoth, 147 Pa. St. 519, 23 Atl. 763; Greder *v.* Stahl, (S. D. 1908) 115 N. W. 1129; West Coast Shingle Co. *v.* Markhams Shingle, 50 Wash. 681, 97 Pac. 801, holding that there was a mutual rescission of defendant's contract to sell plaintiff shingles, where defendant wrote, asking plaintiff not to depend upon it, since its kilns had burned, and plaintiff replied, expressing regret, and stating: "However, . . . if you can get your kilns rebuilt quickly, and take advantage of the good market, you can probably soon make up your loss. . . . As soon as you are in shape to again make shipments, trust you will let us hear from you."

**But receiving the goods merely for the purpose of preventing loss,** with notice to the purchaser that they are not accepted for the purpose of rescission, is not an assent. Bauer *v.* Stumph, Wils. (Ind.) 514. Otherwise if no such notice is given to the purchaser. Redmond *v.* Smock, 28 Ind. 365.

**Agreement to replace.**— If the seller takes back the goods on an agreement to replace them with others this is in effect a rescission of the original sale (Hardenburgh *v.* Schmidt, 5 N. Y. St. 844; Russell *v.* Wolff, 19 Misc. (N. Y.) 536, 43 N. Y. Suppl. 1077. *Contra*, see West *v.* Cutting, 19 Vt. 536), but not when it is expressly agreed that the transaction shall not have that effect (Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980).

86. Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389; Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615, 34 Pac. 161.

87. See *supra*, II, E, 8, d; and cases cited *infra*, this note.

**Actual fraud.**— The right to rescind for fraud has been held to exist only when actual fraud is shown, and a rescission cannot be had for constructive fraud. Barnett *v.* Speir, 93 Ga. 762, 21 S. E. 168.

**Trick or artifice.**— It is held sometimes that false representations are not ground of rescission unless accompanied by some trick or artifice. Labe *v.* Bremer, 167 Pa. St. 15, 31 Atl. 342; Diller *v.* Nelson, 10 Pa. Super. Ct. 449; Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618, 40 Wkly. Notes Cas. 116; Paul *v.* Eurich, 3 Pa. Super. Ct. 299.

88. *Alabama.*— Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, 129 Ala. 292, 29 So. 781; McKenzie *v.* Rothschild, 119 Ala. 419, 24 So. 716.

*Arkansas.*— Stephenson *v.* Weathersby, (1898) 45 S. W. 987.

*Connecticut.*— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

*Georgia.*— Newman *v.* H. B. Claflin Co., 107 Ga. 89, 32 S. E. 943.

*Illinois.*— Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12 [*affirming* 61 Ill. App. 420]; Bowen *v.* Schuler, 41 Ill. 192; Henshaw *v.* Bryant, 5 Ill. 97; Huthmacher *v.* Lowman, 66 Ill. App. 448.

*Indiana.*— Brower *v.* Goodyer, 88 Ind. 572.

*Iowa.*— Deere *v.* Morgan, 114 Iowa 287, 86 N. W. 271; Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

*Kentucky.*— Bradbury *v.* Keas, 5 J. J. Marsh. 446; Crawford *v.* Hurd, 106 S. W. 849, 32 Ky. L. Rep. 636.

*Louisiana.*— Hills *v.* Jacobs, 7 Rob. 406.

*Massachusetts.*— Steel *v.* Webster, 188 Mass. 478, 74 N. E. 686; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

*Missouri.*— Blackman *v.* McAdams, 131 Mo. App. 408, 111 S. W. 599; Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339; Moore *v.* Hinsdale, 77 Mo. App. 217; Swafford Bros. Dry-Goods Co. *v.* Jacobs, 66 Mo. App. 362.

*Montana.*— Richardson-Roberts-Byrne Dry-Goods Co. *v.* Goodkind, 22 Mont. 462, 56 Pac. 1079.

*Nebraska.*— Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 176.

*New Hampshire.*— Bradley *v.* Obear, 10 N. H. 477.

*New Jersey.*— Hicks *v.* Campbell, 19 N. J. Eq. 183.

*New York.*— Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759; Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266, 52 N. Y. Suppl. 925; Roth *v.* Palmer, 27 Barb. 652; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323.

*North Carolina.*— Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566.

*Oregon.*— Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858; Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421.

*Pennsylvania.*— Zeeman *v.* Saleburg, 25 Pa. Super. Ct. 423; Davis *v.* Cosel, 4 Pa. Super. Ct. 519; Harding *v.* Lloyd, 3 Pa. Super. Ct. 293, 40 Wkly. Notes Cas. 66.

*Tennessee.*— Wertheimer-Swartz Shoe Co. *v.* Faris, (Ch. App. 1898) 46 S. W. 336.

*Texas.*— Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

*Wisconsin.*— Hart *v.* Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881; Weed *v.* Page, 7 Wis. 503.

See 43 Cent. Dig. tit. "Sales," § 262.

89. *Alabama.*— Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197; Young *v.* Arntze, 86 Ala. 116, 5 So. 253.

*Arkansas.*— Righter *v.* Roller, 31 Ark. 170.

*Georgia.*— Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137.

*Illinois.*— Barker *v.* Keown, 67 Ill. App. 433.

*Indiana.*— Sieveking *v.* Litzler, 31 Ind. 13.

*Iowa.*— Eldorado Jewelry Co. *v.* Darnell, 135 Iowa 555, 113 N. W. 344, 124 Am. St. Rep. 309; Hall *v.* Orvis, 35 Iowa 366.

*Kentucky.*— H. T. Conde Implement Co. *v.* Griggsby, 82 S. W. 458, 26 Ky. L. Rep. 768.

**b. Mistake.** Although the parties may generally rescind on the ground of mistake,[90] it is not every mistake that will afford a ground for rescission.[91] Thus a mere mistake or misunderstanding as to the interpretation of the contract,[92] or a mistake by including in the goods delivered some that were not purchased,[93] will not justify rescission. And it may be said that generally the other party must not have acted on the agreement to such an extent that a rescission would be to his prejudice.[94]

**c. Breach of Contract or Condition** — (i) *BY THE BUYER* — (A) *In General.* The seller may rescind the contract of sale on the breach of the contract or a condition thereof by the buyer,[95] as by the refusal of the buyer to receive the goods,[96]

*Maine.*— Junkins *v.* Simpson, 14 Me. 364.
*Maryland.*— Findlay *v.* Baltimore Trust, etc., Co., 97 Md. 716, 55 Atl. 379.
*Massachusetts.*— Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Holbrook *v.* Burt, 22 Pick. 546; Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.
*Michigan.*— Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.
*Missouri.*— Spangler *v.* Kite, 47 Mo. App. 230.
*New Hampshire.*— Demorest *v.* Eastman, 59 N. H. 65.
*New York.*— Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. N. S. 600 [*affirming* 118 N. Y. App. Div. 208, 103 N. Y. Suppl. 156]; Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19; Keefuss *v.* Weilmunster, 89 N. Y. App. Div. 306, 85 N. Y. Suppl. 913; Harding *v.* Taylor, 37 Misc. 684, 76 N. Y. Suppl. 365.
*Pennsylvania.*— Thompson *v.* Chambers, 13 Pa. Super. Ct. 213.
*Texas.*— Jesse French Piano, etc., Co. *v.* Nolan, 38 Tex. Civ. App. 395, 85 S. W. 821; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

**Injury to buyer.**— Where a seller of stocks and bonds of a corporation falsely and fraudulently represents that the mortgage securing the bonds is a first mortgage, the fact that he pays off and procures a cancellation of prior encumbrances does not affect the buyer's right to rescind. Nor is that right affected by the fact that the contract bound the seller to pay off all liabilities of the corporation. Stevenson *v.* Marble, 84 Fed. 23.

**Value of property immaterial.**— Upon discovery of the fraud the purchaser may rescind regardless of the actual value of the property. Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197.

**Actual knowledge not necessary.**— One may rescind a contract for the sale of mortgages on the ground of false representations as to the character of the security, although he acts only on suspicion as to the falsity of the representations, provided he can subsequently prove that his suspicions were well founded. Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.

**False representations of agent prior to sale.**— Where a contract for the sale of an acetylene gas plant was made directly with the seller, and at that time no representations were made as to the relative cost of acetylene gas and electricity, and the contract was silent on the subject and there was no fraud or mistake in the contract, the contract could not be rescinded for a misrepresentation by an agent of the seller some time before as to the relative cost of gas and electricity. Daylight Acetylene Gas Co. *v.* Hardesty, (Ky. 1908) 112 S. W. 847.

90. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Goodrich *v.* Strawbridge, 5 Pa. Co. Ct. 427; Mitchell *v.* Lapage, Holt N. P. 253, 17 Rev. Rep. 633, 3 E. C. L. 107.

91. **Mistake as affecting the validity of assent** see *supra*, II, E, 8, b.

92. Montgomery *v.* Ricker, 43 Vt. 165.

93. De Graff *v.* Byles, 63 Mich. 25, 29 N. W. 487.

94. Scott *v.* Hall, 58 N. J. L. 42, 43 Atl. 50.

95. Jung Brewing Co. *v.* Konrad, (Iowa) 118 N. W. 548; Hayden *v.* Reynolds, 54 Iowa 157, 6 N. W. 180; Goodrich *v.* Lafflin, 1 Pick. (Mass.) 57; Winchester *v.* King, 46 Mich. 102, 8 N. W. 722; Olpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444.

**Ordering goods in breach of implied covenant.**— Where defendant contracted to supply plaintiffs with all new barrels needed during a certain year, at specified prices, such contract contained an implied covenant that plaintiffs were to order only such barrels as were necessary for their business, which was dependent on defendant's covenant to supply; and the breach of plaintiff's covenant, by ordering barrels with a view to stocking up for another year, and for sale to other parties, constituted a breach of their contract, which entitled defendant to refuse further delivery and rescind the contract. H. D. Williams Cooperage Co. *v.* Scofield, 115 Fed. 119, 53 C. C. A. 23.

**Performance rendered impossible by act of God.**—A sale of goods upon credit to a particular member of a firm for the partnership, but upon the express understanding that he shall personally attend to their sale, may be rescinded upon the death of such member, unless the contract has not been so far executed that the parties cannot be put *in statu quo*, which is not the case where the event above mentioned which rendered performance by the buyer impossible happened before the goods reached their destination or came to the buyer's possession. Fulton *v.* Thompson, 18 Tex. 278.

96. Wight *v.* Gardner, 66 Ill. 94; Middle

or by a breach of other conditions of the executory contract by a deliberate refusal to perform the stipulations upon which the obligation of the other party depends.[97] But the conduct of the purchaser must be such as to evince an intention not to perform the contract as agreed or to be bound by its terms,[98] or a deliberate demand insisting, as a condition precedent to performance, on new terms different from those contained in the original contract,[99] in which cases the contract may be rescinded.[1]

Division El. Co. *v.* Vandeventer, 80 Ill. App. 669; John A. Roebling's Sons Co. *v.* Lock Stitch Fence Co., 28 Ill. App. 184; McEachron *v.* Randles, 34 Barb. (N. Y.) 301; Hurlburt *v.* Simpson, 25 N. C. 233; Honck *v.* Muller, 7 Q. B. D. 92, 50 L. J. Q. B. 529, 45 L. T. Rep. N. S. 202, 29 Wkly. Rep. 830; Simpson *v.* Crippin, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. Rep. N. S. 546, 21 Wkly. Rep. 141.

**97.** Jung Brewing Co. *v.* Konrad, 137 Wis. 107, 118 N. W. 548 (failure of the buyer to order goods at periods stipulated in the contract); Alpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444 (failure of the buyer to order and give notices covering quantities of goods deliverable within certain periods, as provided by the contract).

Performance: Delivery in instalments see *infra*, V, B, 9, e. Option as to time of delivery see *infra*, V, B, 7, b, (v). Option as to quantities to be delivered see *infra*, V, B, 9, b, (v).

**98.** Hartnett *v.* Baker, 4 Pennew. (Del.) 431, 56 Atl. 672. But in St. Regis Paper Co. *v.* Santa Clara Lumber Co., 42 Misc. (N. Y.) 102, 85 N. Y. Suppl. 1034 [*affirmed* in 105 N. Y. App. Div. 341, 85 N. Y. Suppl. 1034, 93 N. Y. Suppl. 1146], a written contract provided for the sale and delivery at a place named, for ten years, during ten months of each year, of a certain quantity of pulp wood to a paper company, which company on request was to make advances to the vendor during the progress of the work, not exceeding the cost thereof, and it was held that the repeated failures or refusal of the paper company to make these advances, which were necessary to enable the vendor to carry on the work, entitled him to rescind the contract, so that the paper company would not be entitled to a specific performance thereof; that it was not necessary that the defaulting party actually abandon the contract, or show an intention so to do, in order to enable the other party to rescind since he might want to retain the contract and its benefits, but be unable to perform as agreed, or might wish to annoy or coerce, or deprive the other party of his contract rights; but that when he, knowing all the facts, deliberately and intentionally violated the contract upon his part in a material respect, an inquiry as to his intentions was not necessary in order to define the rights of the other party.

**99.** Hartnett *v.* Baker, 4 Pennew. (Del.) 431, 56 Atl. 672; Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225; West *v.* Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791.

1. See *supra*, notes 95–97; and cases cited *infra*, this note.

**Demand for allowance.**—A refusal by a purchaser of goods to accept any further amount unless an allowance shall be made to him for defects in those already received is such a refusal to carry out the contract as will entitle the vendor to rescind the contract, where the goods already delivered are in exact accordance with the terms of the contract. McCowan *v.* McKay, 13 Manitoba 590.

**Dispute as to character of goods.**—Where the purchaser refuses to receive the goods because he believes them to be different from those to which he was entitled, he cannot be regarded as having abandoned the contract. Treat *v.* Richardson, 47 Conn. 582.

**Dispute as to weight.**—The failure of the purchaser of tomatoes to allow true weight for the tomatoes already delivered was not a repudiation of the contract so as to entitle the seller to rescind. Hartnett *v.* Baker, 4 Pennew. (Del.) 431, 56 Atl. 672.

**Suspension of order.**—When goods are purchased to be shipped as ordered a suspension of orders for a short time is not such a repudiation of the contract as will entitle the seller to rescind when the period to be covered by the contract has not expired by several months. Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599.

**Failure to account.**—Where one having a half interest in an unpatented device conveyed the same to defendants on the agreement that they should manufacture and sell the device, accounting to him for half the profits, defendants' mere failure to account for the seller's half interest did not entitle him to a rescission. Hunt *v.* American Radiator Co., 2 N. Y. App. Div. 34, 37 N. Y. Suppl. 576.

**Wrongful act.**—A wrongful act amounting to a trespass by the buyer in connection with property other than that sold is not ground for rescission. Lewis *v.* Clifton, 14 C. B. 245, 2 C. L. R. 1350, 18 Jur. 291, 23 L. J. C. P. 68, 2 Wkly. Rep. 230, 78 E. C. L. 245.

**Custom of trade as to time of payment.**—Where a contract for the sale of fruit, containing no stipulation as to the dates of payment, was subject to a custom requiring payments to be made on the fifteenth and thirtieth of each month, unless those dates came on Saturday, in which case the payments were to be made the following Monday, a demand by the buyer that the amount due for fruit delivered should be deposited in a bank payable on completion of the contract,

(B) *Non-Payment of Price.* When payment of the price is to be made in advance of or concurrent with delivery it is of the essence of the contract, and a failure to pay is such a breach of the contract as will justify a rescission,[2] and this is true, although the amount withheld is small.[3] But the seller himself must not be in default.[4] Similarly where delivery is made in instalments a failure to pay for an instalment delivered within the time specified in the contract is ground for rescission.[5] But the conduct of the purchaser must in such case be

and that future deliveries would be paid for on delivery, entitled the seller to rescind the contract. Minaker *v.* California Canneries Co., 138 Cal. 239, 71 Pac. 110.

**Separate contracts.**— Insisting on different terms as a condition precedent to the performance of one contract is no ground for the rescission of another and different contract. Steinlein *v.* S. Blaisdell, Jr., Co., (Tex. Civ. App. 1898) 44 S. W. 200.

**Divisible and entire instalment contracts** see *supra*, III, E, 4.

**Payment for deliveries in instalments** see *infra*, V, D, 3, b.

**Subsidiary promises** generally see CONTRACTS, 9 Cyc. 650.

2. *California.*— Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266.

*Illinois.*— Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Cheatle *v.* MacVeagh, 83 Ill. App. 336; Harrison Mach. Works *v.* Miller, 36 Ill. App. 86.

*Maine.*— Dwinel *v.* Howard, 30 Me. 258.

*Maryland.*— McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415.

*Michigan.*— Jenness *v.* Shaw, 35 Mich. 20.

*New York.*— American Broom, etc., Co. *v.* Addickes, 19 Misc. 36, 42 N. Y. Suppl. 871; Stocksdale *v.* Schuyler, 8 N. Y. Suppl. 813 [*affirmed* in 130 N. Y. 674, 29 N. E. 1034].

*South Carolina.*— Neil *v.* Cheves, Bailey 537; Pickett *v.* Cloud, 1 Bailey 362.

*Virginia.*— Smyth *v.* Sutton, 24 Gratt. 191.

*England.*—Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370; Read *v.* Hutchinson, 3 Campb. 352.

*Canada.*— Clement *v.* Durocher, 16 Quebec Super. Ct. 479.

See 43 Cent. Dig. tit. "Sales," § 264.

**Failure to pay draft.**— If, upon a sale for cash, the purchaser gives a draft as a means of payment, and it is not paid, the vendor has the option to sue for a rescission of the contract or to sue upon the draft. Guilbeau *v.* Melancon, 28 La. Ann. 627.

**Unreasonable delay** in receiving or paying for goods is ground for rescission. Tabary *v.* Thieneman, 27 La. Ann. 720; Granberry *v.* Frierson, 2 Baxt. (Tenn.) 326.

**Failure to pay for previous purchases.**— The fact that the purchaser in a contract of sale had not paid the seller for goods previously purchased did not authorize the seller to rescind the contract. Southern Car Mfg., etc., Co. *v.* Scullin-Gallagher Iron, etc., Co., (Tex. Civ. App. 1905) 85 S. W. 845. *Compare* Steinlein *v.* S. Blaisdell, Jr., Co., (Tex. Civ. App. 1898) 44 S. W. 200.

**Worthless paper given in payment.**—Where goods were sold on promise to pay for them by a well indorsed note, and the purchaser delivers a note, both the drawer and indorser of which are insolvent, the sale will be annulled. Chastant *v.* Elliott, 27 La. Ann. 322.

**Sale on credit.**— Under a contract for sale on credit time is not the essence of the contract and the vendor cannot rescind the contract on non-payment at the day. Martindale *v.* Smith, 1 Q. B. 389, 1 G. & D. 1, 5 Jur. 932, 10 L. J. Q. B. 155, 41 E. C. L. 592.

3. Genesee Fruit Co. *v.* Barrett, 67 Ill. App. 673.

4. Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213; Hull *v.* Pitrat, 45 Fed. 94.

**Seller not in default.**— Where the purchaser was to notify the seller in writing when delivery was desired, mailing a notice erroneously addressed does not put the seller in default so as to preclude rescission for non-payment. Price *v.* New York, 104 N. Y. App. Div. 198, 93 N. Y. Suppl. 967.

5. *Florida.*— Stokes *v.* Baars, 18 Fla. 656, entire contract.

*Illinois.*— George H. Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557 [*affirming* 51 Ill. App. 146]; W. H. Purcell Co. *v.* Sage, 200 Ill. 342, 65 N. E. 723 [*affirming* 90 Ill. App. 160], refusal to pay until another instalment delivered.

*Michigan.*— Jenness *v.* Shaw, 35 Mich. 20.

*New York.*— Price *v.* New York, 104 N. Y. App. Div. 198, 93 N. Y. Suppl. 967; Bright *v.* Dean, 2 N. Y. City Ct. 433 [*affirmed* in 2 N. Y. Suppl. 658].

*Pennsylvania.*— Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320; Reybold *v.* Voorhees, 30 Pa. St. 116; Granite Mills *v.* Keystone Oil Cloth Co., 15 Montg. Co. Rep. 36.

*United States.*— Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

*England.*— Bloomer *v.* Bernstein, L. R. 9 C. P. 588, 43 L. J. C. P. 375, 31 L. T. Rep. N. S. 306, 23 Wkly. Rep. 238.

See 43 Cent. Dig. tit. "Sales," § 264.

**Non-payment in connection with other circumstances.**— If non-payment of one instalment of goods be accompanied by such circumstances as to give the seller reasonable grounds for thinking that the buyer will refuse or be unable to pay for the rest, he may take advantage of this one omission to repudiate the contract (Stephenson *v.* Cady, 117 Mass. 6; Bloomer *v.* Bernstein, L. R. 9 C. P. 588, 43 L. J. C. P. 375, 31 L. T. Rep. N. S. 306, 23 Wkly. Rep. 238. And see Eastern Forge Co. *v.* Corbin, 182 Mass. 590, 66 N. E. 419), as where the default is accompanied with a demand insisting upon new terms (Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am.

such as to show an intent to abandon the contract,[6] and especially is this true, when the contract of sale is entire.[7] According to some decisions if the contract is severable, a mere refusal to pay for one instalment will not justify a rescission of the entire contract.[8] It is obvious that if the sale is executed, the goods being delivered, a mere failure to pay the price is not ground for rescission.[9]

(c) *Insolvency of Buyer.* The insolvency of the buyer at the time of sale is ground for rescission if accompanied by a fraudulent intent not to pay,[10] or if the buyer had no reasonable expectation of being able to pay, although he may have intended to do so.[11] Mere insolvency is, however, insufficient to warrant a rescission,[12] especially in the absence of intent to defraud.[13] There must of

St. Rep. 86, 57 L. R. A. 225; King *v.* Faist, 161 Mass. 449, 37 N. E. 456).

6. Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 434, 53 L. J. Q. B. 497, 51 L. T. Rep. N. S. 637, 32 Wkly. Rep. 989; Freeth *v.* Burr, L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. Rep. N. S. 773, 22 Wkly. Rep. 370; Corcoran *v.* Proser, 22 Wkly. Rep. 222. And see Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225.

**Construction of contract.**— Where the refusal to pay is based on a construction of the contract as to time of payment and performance according to such construction is insisted on, there is no ground for rescission. West *v.* Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213.

7. Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225; Winchester *v.* Newton, 2 Allen (Mass.) 492; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523.

**Entire and severable contracts** see *supra*, III, E.

8. Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787; Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; Hansen *v.* Consumers' Steam-Heating Co., 73 Iowa 77, 34 N. W. 495; Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692; Winchester *v.* Newton, 2 Allen (Mass.) 492. But see Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

**Sale of separate articles.**— Where the contract was to deliver lumber and slabs a refusal to pay for the lumber did not justify a rescission as to the slabs. Tucker *v.* Billing, 3 Utah 82, 5 Pac. 554.

9. Kramer *v.* Messner, 101 Iowa 88, 69 N. W. 1142; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; Roberts *v.* Boulton, 56 Mo. App. 405. And see Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399, where it was held that the failure of the vendee to pay the consideration in the manner agreed did not permit the vendor to avoid the contract for fraud.

10. *Alabama.*— McKensie *v.* Rothschild, 119 Ala. 419, 24 So. 716.

*Delaware.*— Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Michigan.*— Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; Doyle *v.* Mizner, 40 Mich. 160.

*Pennsylvania.*— Bughman *v.* Central Bank, 159 Pa. St. 94, 28 Atl. 209; Johnson *v.* Groff, 22 Pa. Super. Ct. 85; Davis *v.* Cosel, 4 Pa. Super. Ct. 519.

*United States.*— *In re* Lewis, 125 Fed. 143.

See 43 Cent. Dig. tit. "Sales," § 265.

**Existence of intent.**— Where a sale of goods, after having been executed on the part of the seller, is canceled by the parties, and a new contract as to the payment is substituted, the seller cannot rescind the sale and claim the goods, by reason of a fraudulent intent on the part of the buyers not to pay therefor, existing only at the time of the original contract; and the mere failure to perform the new contract is not sufficient to show that the fraudulent intent continued in respect to the new contract. Sparks *v.* Leavy, 19 Abb. Pr. (N. Y.) 364.

**Negligence of seller.**—A sale of a piano will not be rescinded, because of the insolvency of the purchaser, where at the time of the purchase he tendered to the vendor certain warehouse acceptances as security, but the seller, from the manner and surroundings of the purchaser, was of the opinion that the purchaser was abundantly able to pay and did not take the security. Boone *v.* Collins, 43 Ga. 278.

**Joint purchasers.**—A sale to two persons jointly, who are not partners, cannot be rescinded by the seller upon the insolvency of one of the purchasers, but he must make an offer of performance if the other be solvent. Soloman *v.* Neidig, 1 Daly (N. Y.) 200.

**Goods in transit.**— The seller may rescind for the insolvency of the buyer, although the goods are already in transit. Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

11. McKensie *v.* Rothschild, 119 Ala. 419, 24 So. 716. And see Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, 129 Ala. 292, 29 So. 781.

12. Freeman *v.* Topkis, 1 Marv. (Del.) 174, 40 Atl. 948; Johnson *v.* Groff, 22 Pa. Super. Ct. 85. But see *Ex p.* Stapleton, 10 Ch. D. 586, 40 L. T. Rep. N. S. 14, 27 Wkly. Rep. 327; Morgan *v.* Bain, L. R. 10 C. P. 15, 44 L. J. C. P. 47, 13 L. T. Rep. N. S. 616, 23 Wkly. Rep. 239.

13. Jaffray *v.* Moss, 41 La. Ann. 548, 6 So. 520; Illinois Leather Co. *v.* Flynn, 108

course be actual insolvency.[14] If the contract of sale is executed the subsequent insolvency of the buyer is not ground for rescission.[15]

(II) *BY THE SELLER* — (A) *In General.* The buyer may rescind the contract of sale when there has been a breach of the contract or of a condition thereof by the seller,[16] provided the breach is in some substantial particular which goes to the essence of the contract and renders the defaulting party incapable of performance or makes it impossible for him to carry out the contract as intended.[17] Not every slight or partial dereliction of one party will entitle the other to rescind or abrogate a contract.[18] A mere mistake on the part of the seller in carrying out his part of the contract not prejudicial to the buyer,[19] as by delivery of the wrong article,[20] or a mistake as to the terms of payment,[21] does not justify a rescission. The conduct of the seller must be such as to show a disposition or intent to repudiate the obligation of the contract,[22] as where the seller disposes of the property to a third person,[23] delivers something entirely different from that agreed to be delivered,[24] or refuses to adhere to the original terms of payment.[25] But

Mich. 91, 65 N. W. 519; Hartwell *v.* Carlisle Mfg. Co., 17 Pa. Co. Ct. 565.

**14.** F. W. Kavanaugh Mfg. Co. *v.* Rosen, 132 Mich. 44, 92 N. W. 788, 102 Am. St. Rep. 378; Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; *In re* Phœnix Bessemer Steel Co., 4 Ch. D. 108, 46 L. J. Ch. 115, 35 L. T. Rep. N. S. 776, 25 Wkly. Rep. 187.

**15.** Holland *v.* Cincinnati Desiccating Co., 97 Ky. 454, 30 S. W. 972, 17 Ky. L. Rep. 316; Florence Min. Co. *v.* Brown, 124 U. S. 385, 8 S. Ct. 531, 31 L. ed. 424.

**16.** Howe Mach. Co. *v.* Rosine, 87 Ill. 105; Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710; Desson *v.* Antony, 13 N. Y. Suppl. 890; Phillips *v.* Bruce, Anth. N. P. (N. Y.) 123; Jackson *v.* Butler, 21 Tex. Civ. App. 379, 51 S. W. 1095.

**Agreement not to sell to other dealers.**— A breach by the seller of a provision of the contract, that he will not, for four months, sell similar goods to any person other than defendant, is a ground for the rescission of the contract by the buyer, although the stipulated time for the payment expired within the four months. Koerner *v.* Henn, 8 N. Y. App. Div. 602, 40 N. Y. Suppl. 1021. But see Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992, holding that a breach of an oral promise by plaintiff's agent not to sell his wares to merchants in the same town, other than defendant, will not justify defendant in rescinding a contract of purchase made through such agent.

**17.** Krebs Hop Co. *v.* Livesley, 51 Oreg. 527, 92 Pac. 1084.

**18.** Summers Fibre Co. *v.* Walker, 109 S. W. 883, 33 Ky. L. Rep. 153; Krebs Hop Co. *v.* Livesley, 51 Oreg. 527, 92 Pac. 1084.

**19.** Mattingly *v.* Stone, 12 S. W. 467, 12 Ky. L. Rep. 72.

**20.** Miller *v.* Benjamin, 142 N. Y. 613, 37 N. E. 631 [*affirming* 21 N. Y. Suppl. 1116]; Githens *v.* Zorn, 1 Wkly. Notes Cas. (Pa.) 118.

**21.** John Single Paper Co. *v.* Hammermill Paper Co., 96 N. Y. App. Div. 535, 89 N. Y. Suppl. 116; Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493, 33 S. W. 154.

**22.** Howe Mach. Co. *v.* Willie, 85 Ill. 333; Moore *v.* Curry, 112 Mass. 13; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61; McCowan *v.* McKay, 13 Manitoba 590.

**Intent to abandon.**— The intent to insist on an unauthorized condition or repudiate the contract must clearly appear. Wheeler *v.* New Brunswick, etc., R. Co., 115 U. S. 29, 5 S. Ct. 1061, 29 L. ed. 341.

**Conduct not constituting a breach.**—Where property is sold payable in instalments, a refusal by the vendor to give a receipt for a payment made will not justify a rescission by the vendee, even if a receipt is required by the contract. Weintz *v.* Hafner, 78 Ill. 27. A contract for the sale of a stock of goods, "to be invoiced at cost and as agreed upon," cannot be rescinded merely because the seller failed to produce the original bills of certain of the goods on demand. Kendall *v.* Young, 27 Ill. App. 174.

**Election to stand on contract.**— Where the vendee in a sale on credit becomes insolvent the seller may insist upon cash payment, and on the refusal of the vendee to accept and pay for the goods may resort to a resale to protect his interest. This action on the part of the seller does not give the vendee the right to rescind, as it is not a repudiation of the contract by the vendor but an election to stand on the contract. Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

**23.** Smiley *v.* Barker, 83 Fed. 684, 28 C. C. A. 9; Leahy *v.* Lobdell, 80 Fed. 665, 26 C. C. A. 75.

**Sale to other parties.**— Where the sale to other parties is made after the buyer has refused to perform it is not evidence of an intent on the part of the seller to abandon the contract. Page *v.* Eduljee, L. R. 1 P. C. 127, 12 Jur. N. S. 361, 14 L. T. Rep. N. S. 176; Pitt *v.* Cassanet, 6 Jur. 1125, 12 L. J. C. P. 70, 4 M. & G. 898, 5 Scott N. R. 902, 43 E. C. L. 463.

**24.** Howe Mach. Co. *v.* Willie, 85 Ill. 333; Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143, 60 N. E. 473.

**25.** Bumpass *v.* Harrolson, Minor (Ala.) 162.

even in such case if the contract is wholly executed the purchaser must stand on his rights under the contract.[26]

(B) *Failure to Deliver.* The buyer may rescind if the seller fails to make delivery of the goods in accordance with the terms of the contract.[27] If, however, the failure to deliver is due to no fault of the seller there can be no rescission.[28] Where delivery is to be made in instalments a failure to deliver an instalment will not ordinarily be ground for rescission,[29] although under particular circumstances it may furnish evidence of an intention not to be further bound by the agreed terms of the contract.[30] But if there is a failure of delivery as to the first instalment,[31] or the failure to deliver is a continuing one,[32] the buyer may rescind.

(C) *Failure of or Defect in Title.* The buyer may rescind because of a failure of or a defect in the title of the seller to the property sold,[33] as where the property

26. Babcock *v.* Purcupile, 36 Nebr. 417, 54 N. W. 675.

27. Russell *v.* Gregory, 62 Ala. 454; *Ex p.* Bottoms, 46 Ala. 312; Heidelbaugh *v.* Cranston, 4 Pennew. (Del.) 464, 56 Atl. 367; Browne *v.* Paterson, 36 N. Y. App. Div. 167, 55 N. Y. Suppl. 404 [*reversed* on other grounds in 165 N. Y. 460, 57 N. E. 296]; Lippman *v.* Hauben, 47 Misc. (N. Y.) 668, 94 N. Y. Suppl. 520; Kallis *v.* Lissberger, 39 Misc. (N. Y.) 773, 81 N. Y. Suppl. 332; White *v.* Wolf, 185 Pa. St. 369, 39 Atl. 1011; *In re* Heller, 6 Pa. Dist. 193, 19 Pa. Co. Ct. 301, 13 Montg. Co. Rep. 122; Camden Iron-Works *v.* Fox, 34 Fed. 200. And see Somers *v.* Sturre, 106 Minn. 221, 118 N. W. 682.

**Failure to deliver one of several articles** covered by a contract of sale will not entitle the buyer to rescind. Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. 832.

**Inspection of goods.**—In the absence of bad faith on the part of the inspectors the seller's refusal to deliver because he regarded the inspection as unfair will not avoid rescission. Camden Iron Works *v.* New York, 104 N. Y. App. Div. 272, 93 N. Y. Suppl. 754.

**Inability to perform.**—A distinct declaration by an authorized agent of the seller that the seller is unable to perform the contract and deliver the goods sold justifies a rescission. Lesson *v.* North British Oil, etc., Co., Ir. R. 8 C. L. 309.

**Time of shipment.**—Where one contracted to sell a specific cargo of wheat, described in a bought and sold note as shipped by a certain vessel as per bill of lading dated September or October, and which was all on board at the date of the contract, this did not amount to a condition so as to entitle the buyer to rescind the contract, on its turning out that the wheat was not shipped at the time mentioned. Gattorno *v.* Adams, 12 C. B. N. S. 560, 104 E. C. L. 560.

28. Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419, where the failure of the seller to deliver was due to its inability to obtain the cars necessary to make shipment.

**Place of delivery.**— Under the rule that in the absence of other agreement delivery shall be made at the place where the goods were when the sale was made the fact that through inadvertence the goods sold have been removed after the sale from the place at which they were at the moment of agreement will not justify the rescission of the contract. Kenner *v.* Allen, McGloin (La.) 214.

29. Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61; Blackburn *v.* Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Morgan *v.* McKee, 77 Pa. St. 228; Jonassohn *v.* Young, 4 B. & S. 296, 32 L. J. Q. B. 385, 11 Wkly. Rep. 962, 116 E. C. L. 296.

30. Johnson Forge Co. *v.* Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225.

31. Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61; Pope *v.* Porter, 102 N. Y. 566, 7 N. E. 304; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417; Hoare *v.* Rennie, 5 H. & N. 19, 29 L. J. Exch. 73, 8 Wkly. Rep. 80.

32. U. S. Iron Co. *v.* Sloss-Sheffield Steel, etc., Co., 71 N. J. L. 1, 58 Atl. 173; La Vallette *v.* Booth, 131 N. C. 36, 42 S. E. 446; Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366 [*affirming* 5 Fed. 768]; *In re* Kelly, 51 Fed. 194.

33. *Florida.*— Hunter *v.* Bradford, 3 Fla. 269.

*Kentucky.*— Kitchen *v.* Wilcox, 56 S. W. 514, 21 Ky. L. Rep. 1823.

*Louisiana.*— McCollom *v.* McCollom, 6 Rob. 506.

*Washington.*—Baker *v.* McAllister, 2 Wash. Terr. 48, 3 Pac. 581.

*Wisconsin.*— Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

*United States.*— Mayer *v.* U. S., 5 Ct. Cl. 317.

See 43 Cent. Dig. tit. "Sales," § 292.

**Sales of corporate stock.**— In the absence of fraudulent concealment or misrepresentation failure of title of a corporation to its property furnishes no ground for action of nullity of sales of stock based on error or breach of warranty. State *v.* North Louisiana, etc., R. Co., 34 La. Ann. 947.

**Sale of partnership property.**— Where a retail merchandise business was conducted under the name of only one of the two partners who owned the business, and this partner had authority to sell the property, one

is encumbered by mortgage,[34] or a lien for storage charges which the seller has agreed to pay;[35] but if a clear bill of sale is not to be given until payment has been made by the buyer, the seller has until that time to remove encumbrances, and there can be no rescission because at the time the contract was entered into there was a mortgage on the property.[36] A mere dispute as to the title is not such a defect as will justify a rescission.[37]

(D) *Defect in Quantity.* The buyer may rescind for defect in the quantity of the goods delivered,[38] but not where the defect is due merely to ordinary loss or breakage in transportation, as such loss is considered as contemplated by the contract.[39]

(E) *Defect in Quality.* According to the weight of authority the buyer may within a reasonable time rescind if the goods delivered are not of the quality represented.[40] If, however, the contract so provides the seller must be given an opportunity to replace the goods or remedy the defect,[41] and in one case it was

who purchased the entire stock from him without knowledge that it was owned by the firm was not entitled to rescind on learning that the goods were owned by the partnership. Webb *v.* Steiner, 113 Mo. App. 482, 87 S. W. 618.

**34.** Moreau *v.* Chauvin, 8 Rob. (La.) 157.

**35.** Malone *v.* Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170.

**36.** Weber *v.* Owens, 91 Ill. App. 418.

**37.** Computing Scales Co. *v.* Long, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294. And see The Electron, 74 Fed. 689, 21 C. C. A. 12; Consumers' Gas Co. *v.* American Electric Constr. Co., 50 Fed. 778, 1 C. C. A. 663.

**The reason** is that to adopt any other rule would make it possible for a purchaser to escape from his contract upon any claim coming to his notice, however baseless or absurd it might be. Computing Scales Co. *v.* Long, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294.

**38.** Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Heidelbaugh *v.* Cranston, 4 Pennew. (Del.) 464, 56 Atl. 367; Kuhlman *v.* Wood, 81 Iowa 128, 46 N. W. 738; Frost *v.* Smith, 7 Bosw. 108.

**39.** Hays *v.* Smith, McGloin (La.) 193.

**40.** *Georgia.*— Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137; Tufts *v.* Cheatham, 75 Ga. 865.

*Illinois.*— Electric Vehicle Co. *v.* Price, 138 Ill. App. 594; Starks *v.* Schlensky, 128 Ill. App. 1.

*Iowa.*— Helm *v.* Loveland, 136 Iowa 504, 113 N. W. 1082.

*Kansas.*— Fairbanks *v.* Walker, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. N. S. 558.

*Kentucky.*— Wiburg, etc., Co. *v.* Walling, (1908) 113 S. W. 832; Smith, etc., Co. *v.* Lewis, (1908) 112 S. W. 1113.

*Louisiana.*—Hawkins *v.* Brown, 3 Rob. 310; Icar *v.* Suares, 7 La. 517; Maurin *v.* Martinez, 5 Mart. 432.

*Missouri.*— Columbia River Packers' Assoc. *v.* Springfield Grocer Co., 129 Mo. App. 132, 108 S. W. 113; Grafeman Dairy Co. *v.* St. Louis Dairy Co., 96 Mo. App. 495, 70 S. W. 390.

*New Hampshire.*— Walker *v.* Davis, 65 N. H. 170, 18 Atl. 196.

*New Jersey.*— Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

*New York.*— American Art Metal Novelty Co. *v.* Bosselman, 91 N. Y. Suppl. 722.

*Pennsylvania.*— Kessler *v.* Perrong, 22 Pa. Super. Ct. 578.

*Tennessee.*— Garr *v.* Young, (Ch. App. 1901) 62 S. W. 631.

*Virginia.*— Virginia-Carolina Chemical Co. *v.* Carpenter, 99 Va. 292, 38 S. E. 143.

*Wisconsin.*— Fox *v.* Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. N. S. 1107. See 43 Cent. Dig. tit. "Sales," § 293.

**Extent of defect.**— Where there is a right of rescission as to the principal subject of an entire contract the right extends to all appendages attached to the principal subject. Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

**Latent defect.**— Crib-biting in a horse is a latent defect, authorizing rescission if the owner knew of such habit, even though the sale was made without warranty, and the purchaser bought at his own risk. Ducharme *v.* Charest, 23 Quebec Super. Ct. 82.

**Severable contract.**— Where the seller has acquiesced in the rescission he cannot afterward insist that the contract was severable. Gardiner *v.* McDonogh, 147 Cal. 313, 81 Pac. 964.

**In Louisiana** the buyer may rescind for a redhibitory defect existing at the time of sale (Lynch *v.* McRee, 18 La. Ann. 640; Boulin *v.* Maynard, 15 La. Ann. 658; Lemos *v.* Daubert, 8 Rob. 224; Riggs *v.* Duperrier, 19 La. 418); but not for a defect arising after the sale has become complete (Michoud *v.* Marquet, 4 La. Ann. 51; Nelson *v.* Lillard, 16 La. 336).

**In Vermont** it has been held that the difference must be one of kind or class and not a mere difference in quality. Hoadley *v.* House, 32 Vt. 179, 67 Am. Dec. 167.

**41.** Westinghouse Co. *v.* Gainor, 130 Mich. 393, 90 N. W. 52. But where a contract for the sale of five million starch cartons provided that if some were defective they might be replaced the word "some" meant a small or inconsiderable number, and if the number defective went beyond the commonly accepted meaning of the word "some" the buyer might rescind without giving the seller

held that this was necessary even though there was no provision in the contract to that effect.[42]

(F) *Breach of Warranty.* In the case of executory contracts of sale, the buyer may rescind for a breach of warranty, whether or not the seller has been guilty of fraud.[43] According to the weight of authority the buyer cannot, in the absence of fraud or an agreement giving him the right, rescind an executed contract of sale for a breach of warranty, his remedy in such case being on the warranty.[44] The breach of warranty neither rescinds the sale nor gives the vendee a right to rescind, but merely a right of action for damages.[45] There are, however, many decisions holding that the buyer may rescind an executed contract merely on the ground that there has been a breach of warranty, and it seems to be the established rule in some jurisdictions,[46] although in some cases it is insisted that the seller

an opportunity to replace. St. Louis Paper-Box Co. *v.* J. C. Huhinger Bros. Co., 100 Fed. 595, 40 C. C. A. 577.

The right of replacing goods may be waived by the seller. Westinghouse Co. *v.* Gainor, 130 Mich. 393, 90 N. W. 52.

Written notice of defects is waived, where the seller's agent is notified verbally and promises to remedy the defect. Sandwich Mfg. Co. *v.* Feary, 40 Nebr. 226, 58 N. W. 713 [*overruling* Sandwich Mfg. Co. *v.* Feary, 34 Nebr. 411, 51 N. W. 1026].

42. Davis *v.* Downs, 4 Mich. 530.

43. *Illinois.*— Doane *v.* Dunham, 65 Ill. 512; Starks *v.* Schlensky, 128 Ill. App. 1; Mayes *v.* Rogers, 47 Ill. App. 372.

*Kentucky.*— Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703, 22 Ky. L. Rep. 730; Puritan Mfg. Co. *v.* Renaker, 106 S. W. 813, 32 Ky. L. Rep. 593.

*Minnesota.*— Knoblauch *v.* Kronschnabel, 18 Minn. 300.

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Knoll, 57 Nebr. 790, 78 N. W. 394.

*United States.*— Pope *v.* Allis, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393.

44. *Connecticut.*— Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554, 48 Atl. 422; Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546; Scranton *v.* Mechanics' Trading Co., 37 Conn. 130.

*Georgia.*— Woodruff *v.* Groddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33

*Illinois.*— Owens *v.* Sturges, 67 Ill. 366; Doane *v.* Dunham, 65 Ill. 512; Skinner *v.* Mulligan, 56 Ill. App. 47; Mayes *v.* Rogers, 47 Ill. App. 372.

*Indiana.*— Hoover *v.* Sidener, 98 Ind. 290.

*Kentucky.*— See Lightburn *v.* Cooper, 1 Dana 273.

*Michigan.*— H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939.

*Minnesota.*— Lynch *v.* Curfman, 65 Minn. 170, 68 N. W. 5; Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149; Knoblauch *v.* Kronschnabel, 18 Minn. 300.

*Nebraska.*— Mundt *v.* Simpkins, 81 Nebr. 1, 115 N. W. 325.

*New Jersey.*— See Woodward *v.* Emmons, 61 N. J. L. 281, 39 Atl. 703.

*New York.*— Muller *v.* Eno, 14 N. Y. 597; Kiernan *v.* Rochelean, 6 Bosw. 148; Renaud *v.* Peck, 2 Hilt. 137; Langworthy *v.* Beardsley, 1 N. Y. City Ct. 170; Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588.

*Pennsylvania.*— Freyman *v.* Knecht, 78 Pa. St. 141; Kase *v.* John, 10 Watts 107, 36 Am. Dec. 148.

*South Carolina.*— Kauffman Milling Co. *v.* Stuckey, 40 S. C. 110, 18 S. E. 218; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192; Rivers *v.* Gruget, 2 Nott & M. 265.

*Tennessee.*— Belew *v.* Clark, 4 Humphr. 506; Allen *v.* Anderson, 3 Humphr. 581, 39 Am. Dec. 197.

*Texas.*— Wright *v.* Davenport, 44 Tex. 164; Jesse Franch Piano, etc., Co. *v.* Thomas, 36 Tex. Civ. App. 78, 80 S. W. 1063; Miller-Stone Mach. Co. *v.* Balfour, 25 Tex. Civ. App. 413, 61 S. W. 972.

*Vermont.*— Matteson *v.* Holt, 45 Vt. 336; Mayer *v.* Dwinell, 29 Vt. 298.

*Washington.*—Hulet *v.* Achey, 39 Wash. 91, 80 Pac. 1105.

*United States.*— Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847; Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595.

*England.*— Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193; Emanuel *v.* Deane, 3 Campb. 299; Toulmin *v.* Hedley, 2 C. & K. 157, 61 E. C. L. 157; Power *v.* Wells, Cowp. 818, 98 Eng. Reprint 1379.

*Canada.*— Hamilton Mfg. Co. *v.* Knight, 5 Brit. Col. 391; Finn *v.* Brown, 35 N. Brunsw. 335.

See 34 Cent. Dig. tit. "Sales," § 294.

Slight defect.— In some cases, however, stress is laid on the fact that the defect was slight and did not substantially affect the usefulness of the article. Skinner *v.* Mulligan, 56 Ill. App. 47; Rivers *v.* Gruget, 2 Nott & M. (S. C.) 265.

Technical breach.— Where the mortgagor sold the property under a warranty that it was free from encumbrance, and the mortgagee had given his verbal consent to the sale, there was but a technical breach of warranty, giving no right to the buyer to rescind. Chase *v.* Willard, 67 N. H. 369, 39 Atl. 901.

45. Lynch *v.* Curfman, 65 Minn. 170, 68 N. W. 5.

46. *California.*— Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440; Polhemus *v.* Heiman, 45 Cal. 573.

*Iowa.*— Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183; Upton Mfg. Co. *v.*

must be given an opportunity to remedy the defect.[47] Even in those jurisdictions where the right to rescind for breach of warranty is denied it is nevertheless held that there may be a rescission if the false warranty is accompanied by fraud,[48] or there is an agreement to take back the articles if not as warranted.[49]

(G) *Failure of Consideration.* Although the buyer may rescind for an entire failure of consideration,[50] a mere partial failure will not justify rescission,[51] at least unless such partial failure is as to a material part of the consideration.[52]

**4. Partial Rescission.** The rescission must be of the whole contract, and there cannot be a partial rescission by either the seller[53] or the buyer,[54] unless

Huiske, 69 Iowa 557, 29 N. W. 621; Rogers *v.* Hanson, 35 Iowa 283.

*Maine.*— Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Downing *v.* Dearhorn, 77 Me. 457, 1 Atl. 407; Marston *v.* Knight, 29 Me. 341, 345, where the court said: "There does not appear to be any good reason why a purchaser should be compelled to retain a chattel, purchased upon a warranty, which is broken, and he put to his action for damages, when it may be altogether unsuitable to his wants, and not possessing those essential qualities absolutely necessary to make it useful to him. He relies upon the warranty, and the breach of it is equally injurious to him, whether the seller acted in good or bad faith."

*Maryland.*— Miller *v.* Grove, 18 Md. 242; Clements *v.* Smith, 9 Gill 156; Franklin *v.* Long, 7 Gill & J. 407.

*Massachusetts.*— Bryant *v.* Isburgh, 13 Gray 607, 74 Am. Dec. 655; Dorr *v.* Fisher, 1 Cush. 271; Clark *v.* Baker, 5 Metc. 452.

*Missouri.*— Branson *v.* Turner, 77 Mo. 489; Johnson *v.* Whitman Agricultural Co., 20 Mo. App. 100. But see Walls *v.* Gates, 6 Mo. App. 242.

*Nebraska.*— Mundt *v.* Simpkins, 81 Nebr. 1, 4, 115 N. W. 325, where the court said: "It is undoubtedly the better law that a sale of personal property with a warranty of quality, even without fraud on the part of the vendor, may be treated as a sale upon conditions subsequent, at the election of the purchaser, and in the event of a breach of warranty the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer, whether the vendor acted in good faith or bad faith."

*England.*— Curtis *v.* Hannay, 3 Esp. 82; Buchanan *v.* Parnshaw, 2 T. R. 745, 100 Eng. Reprint 401.

See 43 Cent. Dig. tit. "Sales," § 294.

**47.** Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710; McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280; Sandwich Mfg. Co. *v.* Feary, 34 Nebr. 411, 51 N. W. 1026.

**48.** Voorhees *v.* Earl, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595; McRae *v.* Lonsby, 130 Fed. 17, 64 C. C. A. 385; Rubin *v.* Sturtevant, 80 Fed. 930, 26 C. C. A. 259.

**49.** Latham *v.* Hartford, 27 Kan. 249; Muller *v.* Eno, 14 N. Y. 597; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148.

**50.** Losecco *v.* Gregory, 108 La. 648, 32 So. 985; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192; Carter *v.* Walker, 2 Rich. (S. C.) 40.

**51.** *Delaware.*— Stelwagon *v.* Wilmington Coal Gas Co., 2 Mart. 184, 42 Atl. 449.

*Kentucky.*— Kirtley *v.* Shinkle, 69 S. W. 723, 24 Ky. L. Rep. 608.

*Mississippi.*— Harman *v.* Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272.

*South Carolina.*— Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

*Vermont.*— Harrington *v.* Wells, 12 Vt. 505.

See 43 Cent. Dig. tit. "Sales," § 289.

**Opportunity to examine.**— Equity will not cancel a sale on the ground of partial failure of consideration, where the seller had opportunity to examine the consideration before the sale, and the buyer was not guilty of fraud. Vincent *v.* Berry, 46 Iowa 571.

**52.** Cruess *v.* Fessler, 39 Cal. 336.

**Sale of patent.**— Machines having been bought on the guaranty that they are not an infringement of a patent, the purchaser may, on the infringement being judicially ascertained, return them, without regard to their value with the infringing part eliminated. Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919.

**53.** *Illinois.*—Kellogg *v.* Turpie, 93 Ill. 265, 34 Am. Rep. 163; Waukesha Canning Co. *v.* Horner, 138 Ill. App. 564.

*Missouri.*— Lapp *v.* Ryan, 23 Mo. App. 436.

*New York.*— Stevens *v.* Hyde, 32 Barb. 171; Matteawan Co. *v.* Bentley, 13 Barb. 641.

*Vermont.*— Loomis *v.* Wainwright, 21 Vt. 520.

*Wisconsin.*— Weed *v.* Page, 7 Wis. 503.

See 43 Cent. Dig. tit. "Sales," § 266.

**54.** *Illinois.*— Harzfeld *v.* Converse, 105 Ill. 534; Kimball *v.* Lincoln, 7 Ill. App. 470.

*Indiana.*— Quwack *v.* Cruse, Wils. 320.

*Maine.*— Junkins *v.* Simpson, 14 Me. 364.

*Massachusetts.*— Morse *v.* Brackett, 98 Mass. 205; Clark *v.* Baker, 5 Metc. 452; Miner *v.* Bradley, 22 Pick. 457.

*Missouri.*— Sigerson *v.* Harker, 15 Mo. 101.

*New York.*— Dubois *v.* Hermance, 1 Thomps. & C. 293 [*affirmed* in 56 N. Y. 673]; Sherman *v.* Holmes, 48 N. Y. Super. Ct. 534; Shields *v.* Pettee, 2 Sandf. 262 [*affirmed* in 4 N. Y. 122].

*United States.*— Reynolds *v.* Palmer, 21 Fed. 433; Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233.

See 43 Cent. Dig. tit. "Sales," § 295.

the contract of sale is separable.[55] But it has been held in some jurisdictions that where a special mode of payment was agreed on and the payment received is not what the seller was entitled to expect, he may rescind to that extent.[56]

**5. Joint Contracts.** There can be no rescission of a joint contract by one of the purchasers without the joinder of the others,[57] especially where one of the purchasers has disposed of part of the property and cannot return it.[58]

**6. Estoppel to Rescind and Waiver of Right — a. Of Seller.** The seller may be estopped to rescind the sale by his conduct,[59] especially when such conduct tends to show an affirmance of the contract, as by the acceptance of further security,[60] by delivery of the goods without objection,[61] by seeking to hold the goods as security for payment of deferred payments after knowledge of fraud,[62] by failure to notify the purchaser at the time of breaches of a contract as to part payments that he intends to insist upon them as forfeitures, settlement of the amount due being subsequently made without such notification,[63] or by bringing suit for the purchase-price.[64] But the commencement of suit in ignorance of the

55. *Louisiana.*— Ladoux *v.* Armor, 4 Rob. 381.

*Missouri.*— Sigerson *v.* Harker, 15 Mo. 101.

*New York.*— Hochberger *v.* Baum, 85 N. Y. Suppl. 385.

*North Carolina.*— Wooten *v.* Walters, 110 N. C. 251, 14 S. E. 734, 736.

*Wisconsin.*— Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

See 43 Cent. Dig. tit. "Sales," §§ 266, 295.

**Rescission impracticable.**— The rule allowing a partial rescission only for defects in some of the articles necessarily yields when it is impracticable, as where the purchaser gives in exchange a house and lot which cannot be divided. Roberts *v.* Rodes, 3 Mart. N. S. (La.) 100.

56. Wigand *v.* Sichel, 4 Abb. Dec. (N. Y.) 592, 3 Keyes 120, 33 How. Pr. 174; Pierce *v.* Drake, 15 Johns. (N. Y.) 475; Willson *v.* Force, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Jaffrey *v.* Wolf, 4 Okla. 303, 47 Pac. 496; Loomis *v.* Wainwright, 21 Vt. 520; Mann *v.* Stowell, 3 Pinn. (Wis.) 220, 3 Chandl. 243. *Contra*, Kellogg *v.* Turpie, 93 Ill. 265, 34 Am. Rep. 163; Stevens *v.* Hyde, 32 Barb. (N. Y.) 171.

57. Robinson *v.* Siple, 129 Mo. 208, 31 S. W. 788; Brewster *v.* Wooster, 58 N. Y. Super. Ct. 10, 9 N. Y. Suppl. 312 [*reversed* on other grounds in 131 N. Y. 473, 30 N. E. 489].

58. Robinson *v.* Siple, 129 Mo. 208, 31 S. W. 788.

59. Where the seller terminated a contract by which he was to furnish certain patented articles, and demanded arbitration as to the purchaser's financial responsibility because of its refusal to furnish security, he cannot justify his course on the ground that other causes existed which might have been made grounds for terminating the contract. Brush-Swan Electric Light Co. *v.* Brush Electric Co., 41 Fed. 163.

60. Bridgeford *v.* Adams, 45 Ark. 136.

61. Columbia Mfg. Co. *v.* Hastings, 121 Fed. 328, 57 C. C. A. 504.

**Illustration.**— Thus he waives his right to rescind the sale for non-payment of the price on delivery where he delivered the goods without demanding payment, and did not notify the buyer of his intention to rescind, or offer to return a payment made him on account, until after the buyer had tendered the balance of the price. Seeds *v.* Simpson, 16 Ohio St. 321.

**Ignorance of rights.**— That the seller, in a contract containing an option to purchase within a certain time, failed to object to conveying until advised of his rights under the contract, does not prevent him from canceling the contract for failure of the buyer to exercise the option. Neill *v.* Hitchman, 201 Pa. St. 207, 50 Atl. 987.

62. James Music Co. *v.* Bridge, 134 Wis. 510, 114 N. W. 1108.

63. Little Rock Cooperage Co. *v.* Lanier, 83 Ark. 548, 104 S. W. 221.

64. *Arkansas.*— Little Rock Bank *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

*Connecticut.*— Bulkley *v.* Morgan, 46 Conn. 393.

*Illinois.*— Streator Tile Works *v.* Coe, 53 Ill. App. 483; Hanchett *v.* Riverdale Distillery Co., 15 Ill. App. 57.

*Michigan.*— Galloway *v.* Holmes, 1 Dougl. 330.

*Missouri.*— Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305; Mapes *v.* Burns, 72 Mo. App. 411.

*Nebraska.*— Chadron First Nat. Bank *v.* Tootle, 59 Nebr. 44, 80 N. W. 264; Chadron First Nat. Bank *v.* McKinney, 47 Nebr. 149, 66 N. W. 280.

*Texas.*— Allyn *v.* Willis, 65 Tex. 65; Wachsmuth *v.* Sims, (Civ. App. 1895) 32 S. W. 821.

*England.*— Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139; Strutt *v.* Smith, 1 C. M. & R. 312, 3 L. J. Exch. 357, 4 Tyrw. 1019; Smith *v.* Field, 5 T. R. 402, 2 Rev. Rep. 630, 101 Eng. Reprint 225.

See 43 Cent. Dig. tit. "Sales," § 268.

But see Crafts *v.* Belden, 99 Mass. 535, where under the provisions of Gen. St. c. 127, § 2, cl. 5, it was held that if an assignee in insolvency, in suing the buyer of goods sold by the debtor, with a view to an unlawful preference, joins a count in contract for the price with a count in tort for their

existence of ground of rescission will not operate as an estoppel,[65] and generally there must be knowledge of the existence of grounds of rescission in order that the conduct of the seller shall estop him.[66] The acceptance of a check in part payment will not estop the seller to rescind for the buyer's failure to pay for instalments,[67] nor is he estopped to rescind because he already has security for the purchase-price,[68] nor because after default he expresses a desire for performance, where the purchaser does not accede but insists on immediate delivery without the notice to which the seller is entitled.[69] So also an estoppel as to one ground of rescission will not operate as an estoppel as to other grounds.[70]

**b. Of Buyer.** The buyer may be estopped to rescind if without objection he accepts the goods,[71] and pays part of the purchase-price,[72] or requests an extension of time for payment,[73] and especially will an acceptance of the goods operate as an estoppel if the buyer has examined or has had an opportunity to examine them before acceptance.[74] So too retaining the goods without objection after

conversion it is not a waiver of his right to rescind the sale, when it appears that all the counts were intended to disaffirm it.

**Dismissal of action.**— The fact that the action was dismissed does not avoid the effect as an estoppel. Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019 [*affirming* 10 N. Y. Suppl. 884].

**65.** Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Deere *v.* Morgan, 114 Iowa 287, 86 N. W. 271; Kraus *v.* Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182; Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 428, 25 N. Y. Suppl. 200.

**66.** Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436.

**Ignorance of fraud.**— The erasure by the seller of the words "without recourse" from the indorsement of the vendees upon notes given in part payment of the price, and the protesting of the notes for non-payment, was not such an election to affirm the contract as will bar a rescission thereof for fraud, where the rescission was prayed for before the protest was made, and it does not appear that the fraud had been discovered when the erasure was made. Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858.

**67.** Eastern Forge Co. *v.* Corbin, 182 Mass. 590, 66 N. E. 419. Where defendant gave plaintiff written notice that it rescinded the contract of sale for breach by plaintiff of a covenant to pay for all goods within sixty days, and plaintiff replied, inclosing a check for the amount then due, such fact did not show a waiver by defendant of the right to rescind in the absence of a showing that it received the check, or of what became of it, or that, if it did receive the check, defendant took it unconditionally. Wilkinson *v.* Blount Mfg. Co., 169 Mass. 374, 47 N. E. 1020.

**68.** Perkins *v.* Bailey, 99 Mass. 61, 96 Am. Dec. 689.

**69.** Alpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444.

**70.** Wilkinson *v.* Blount Mfg Co., 169 Mass. 374, 47 N. E. 1020. See also Jung Brewing Co. *v.* Konrad, 137 Wis. 107, 118 N. W. 548.

**Continuing breaches.**— If a continuing contract is broken by the buyer and the seller elects to enforce the contract, this operates as an estoppel to rescind as to such breach; but if the breaches continue the seller is not bound by his first election. Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356, 53 N. Y. Suppl. 950.

**71.** Glen *v.* Whitaker, 51 Barb. (N. Y.) 451; Jeffrey Mfg. Co. *v.* Central Coal, etc., Co., 93 Fed. 408; Howard *v.* Cristie, 33 Nova Scotia 367.

**72.** Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422; Lowber *v.* Selden, 11 How. Pr. (N. Y.) 526; Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177, 52 Pac. 379.

**Delivery in instalments.**— Where delivery is in instalments payment for one or more of such instalments will not estop the buyer to rescind for default as to other instalments. Evans *v.* Chicago, etc., R. Co., 26 Ill. 189.

**Payment of interest.**— Where a buyer notified the seller of its rescission of the sale because of fraud, but afterward, with full knowledge of the fraud, paid the seller the interest on the balance of the price, the rescission was abandoned. Guarantee Sav., etc., Co. *v.* Moore, 35 N. Y. App. Div. 421, 54 N. Y. Suppl. 787.

**73.** Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158.

**74.** *Connecticut.*— Scranton *v.* Mechanics' Trading Co., 37 Conn. 130.

*Iowa.*— Winelander *v.* Jones, 77 Iowa 401, 42 N. W. 333.

*Kentucky.*— American Harrow Co. *v.* Martin, 36 S. W. 178, 18 Ky. L. Rep. 432; Nelson *v.* Overman, 38 S. W. 882, 19 Ky. L. Rep. 161.

*Louisiana.*— Forsman *v.* Mace, 111 La. 28, 35 So. 372; Rochel *v.* Berwick, 12 La. Ann. 847.

*Nebraska.*— Korbel *v.* Stocpol, 70 Nebr. 45, 96 N. W. 1022.

*New York.*— Arnold *v.* Norfolk, etc., Hosiery Co., 148 N. Y. 392, 42 N. E. 980 [*affirming* 76 Hun 15, 28 N. Y. Suppl. 638]; Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374.

*Texas.*— McGill *v.* Hall, (Civ. App. 1894) 26 S. W. 132.

*Vermont.*— Badger *v.* Whitcomb, 66 Vt. 125, 28 Atl. 877.

See 43 Cent. Dig. tit. "Sales," §§ 296, 297.

discovery of the fraud or defect,[75] and using,[76] selling, or otherwise dealing with the

**Inspection not disclosing defect.**—An acceptance, after inspection, of goods bought by sample, does not preclude the buyer from rescinding the contract for breach of warranty if such inspection does not disclose a defect then existing. Pennock *v.* Stygles, 54 Vt. 226.

**Acceptance from carrier.**—A purchaser of goods does not lose his right of rescission by accepting them from the carrier if on inspection he finds them defective and so notifies the seller within a reasonable time. Taylor *v.* Smith, [1893] 2 Q. B. 65, 61 L. J. Q. B. 331, 67 L. T. Rep. N. S. 39, 40 Wkly. Rep. 486; Creighton *v.* Pacific Coast Lumber Co., 12 Manitoba 546.

75. *California.*— Wilder *v.* Beede, 119 Cal. 646, 51 Pac. 1083.

*Georgia.*— Smith *v.* Estey Organ Co., 100 Ga. 628, 28 S. E. 392; Pearce *v.* Borg Chewing-Gum Co., 111 Ga. 847, 36 S. E. 457.

*Illinois.*— O'Donnell, etc., Brewing Co. *v.* Farrar, 163 Ill. 471, 45 N. E. 283.

*Kentucky.*— Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517.

*New York.*— National Keg, etc., Co. *v.* Baker, 21 Misc. 35, 46 N. Y. Suppl. 885.

*North Carolina.*— Sparks *v.* Messick, 65 N. C. 440.

*West Virginia.*— Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510, 41 S. E. 907.

**Demand for remedy of defects.**— Where the title to railway cars, built to order, passed at the time of shipment, the right of rescission, if any such thereafter existed on account of defects in the brakes, was lost by the purchaser's subsequent demand that the defects be remedied, and his expressed willingness to pay for the cars as soon as this was done, taken in connection with the seller's assurances that he would remedy the defects at his own cost, and his continued attempts to do so. Pullman Palace-Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94, 15 S. Ct. 503, 39 L. ed. 632. But see Tufts *v.* Hunter, 63 Minn. 464, 65 N. W. 922, holding that where, within a reasonable time after receiving the property, the vendee notified the vendor of defects therein, and that he would refuse to accept it unless the defects were remedied at once, he did not thereby deprive himself of the right to rescind in case the defects were not remedied within a reasonable time thereafter.

**Knowledge of defect.**— The fact that the purchaser of a horse took the animal to his stable after learning of a breach of warranty does not forfeit his right to rescind if he returns the horse to the seller within the time specified in the contract. Head *v.* Tattersall, L. R. 7 Exch. 7, 41 L. J. Exch. 4, 25 L. T. Rep. N. S. 631, 20 Wkly. Rep. 115.

**Further investigation or trial.**—Where, on notice of some material misrepresentation, the vendor suggests further investigation or trial, the vendee may take a further reasonable time therefor without waiving his right to rescind. Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593.

76. *Alabama.*— State *v.* Fields, 131 Ala. 201, 31 So. 6; Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422; Magee *v.* Billingsley, 3 Ala. 679.

*Illinois.*— Morgan *v.* Thetford, 3 Ill. App. 323.

*Iowa.*— Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193.

*Kansas.*— Gale Sulky Harrow Mfg. Co. *v.* Moore, 46 Kan. 324, 26 Pac. 703.

*Kentucky.*— Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189; McCulloch *v.* Scott, 13 B. Mon. 172, 56 Am. Dec. 561; Watts *v.* National Cash Register Co., 78 S. W. 118, 25 Ky. L. Rep. 1347.

*Maine.*— Libby *v.* Haley, 91 Me. 331, 39 Atl. 1004.

*Michigan.*— Foster *v.* Rowley, 110 Mich. 63, 67 N. W. 1077.

*Nebraska.*— Philleo *v.* Sandwich Mfg. Co., 15 Nebr. 625, 20 N. W. 98.

*New York.*— Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, 63 N. Y. Suppl. 649 [*affirmed* in 169 N. Y. 587, 62 N. E. 1094]; Dounce *v.* Dow, 6 Thomps. & C. 653 [*affirmed* in 64 N. Y. 411]; Waring *v.* Mason, 18 Wend. 425.

*Pennsylvania.*— Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753.

*Texas.*— Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857.

*Utah.*— Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177, 52 Pac. 379.

*United States.*— Lyon *v.* Bertram, 20 How. 149, 15 L. ed. 847; Jeffrey Mfg. Co. *v.* Central Coal, etc., Co., 93 Fed. 408; Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. 832; Buckstaff *v.* Russell, 79 Fed. 611, 25 C. C. A. 129; Dodsworth *v.* Hercules Iron Works, 66 Fed. 483, 13 C. C. A. 552.

*England.*— Campbell *v.* Fleming, 1 A. & E. 40, 3 L. J. K. B. 136, 3 N. & M. 834, 28 E. C. L. 44, holding also that the right to repudiate the contract is not afterward revived by the discovery of another incident in the same fraud.

See 43 Cent. Dig. tit. "Sales," § 299.

**Incidental use.**— Where plaintiff, after notifying defendant of a rescission of a purchase of a horse, which defendant refused to accept, placed the horse in a livery stable, and made no use of him except to drive him at intervals for exercise, he did not thereby exercise such dominion over the horse as to waive his right to insist on the rescission. Faust *v.* Koers, 111 Mo. App. 560, 86 S. W. 278.

**Refusal of seller to accept.**— Where the purchaser offers to restore the property and to rescind the sale after the discovery of the fraud but the seller refuses to accept the property and declines to rescind the sale, the title is reinvested in the seller and the subsequent retention and use of the property by the purchaser will not operate as a ratification of the sale as previously rescinded and the purchaser may then be held to retain the

property,[77] will estop the buyer to rescind. But a retention of the goods in ignorance of the existence of grounds for rescission,[78] or until the buyer has taken advice as to his rights,[79] or for the purpose of preserving the property from loss or destruction,[80] will not operate as an estoppel. The right to rescind is not affected by the destruction [81] or depreciation of the property not due to the fault of the buyer,[82] unless due to a defect known to him to exist at the time of the sale.[83] And where the goods purchased are confiscated by the government for failure to pay customs duties the buyer is not estopped to rescind because he appears in the proceedings to condemn the goods and claims title thereto.[84] Of course if the buyer elects to affirm the sale [85] and resort to another remedy [86] he cannot rescind. And he is estopped to rescind for default in delivery if he has granted an extension of time,[87] or if the default is occasioned by his own failure to perform.[88]

property as the seller's bailee. Fuller *v.* Chenault, (Ala. 1908) 47 So. 197.

**Use coupled with failure to return until price due.**—Where the evidence shows that the purchaser of a harvester used it parts of two years, and never in fact returned it to the agent of whom he purchased it, as required by the contract, or never offered to return it until the maturity of the note given for the price, he was not entitled to rescind. Acme Harvester Co. *v.* Carroll, 80 Nebr. 594, 114 N. W. 780.

**77.** *Georgia.*— Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497.

*Illinois.*— Wolf *v.* Dietzsch, 75 Ill. 205.

*Kentucky.*— Snyder *v.* Hegan, 40 S. W. 693, 19 Ky. L. Rep. 517.

*Louisiana.*— Ledoux *v.* Armor, 4 Rob. 381.

*New York.*— Cahen *v.* Platt, 40 N. Y. Super. Ct. 483 [*reversed* on other grounds in 69 N. Y. 348, 25 Am. Rep. 203]; Mason *v.* Wheeler, 2 Misc. 523, 24 N. Y. Suppl. 879.

*Pennsylvania.*— Gausler *v.* Bridges, 13 Pa. Super. Ct. 646.

*Vermont.*— Barrett *v.* Tyler, 76 Vt. 108, 56 Atl. 534; Downer *v.* Smith, 32 Vt. 1, 76 Am. Dec. 148.

*United States.*— Buckstaff *v.* Russell, 79 Fed. 611, 25 C. C. A. 129.

*Canada.*— Wurzburg *v.* Andrews, 28 Nova Scotia 387.

See 43 Cent. Dig. tit. "Sales," § 299.

**Attempt to sell.**— The mere fact that the buyer of personal property attempted to sell it will not deprive him of the right to rescind for fraud. Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

**78.** Fuller *v.* Chenault, (Ala. 1908) 47 So. 197; Hudson *v.* Roos, 72 Mich. 363, 40 N. W. 467; Norrington *v.* Wright, 5 Fed. 768 [*affirmed* in 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366].

**79.** Norton *v.* Dreyfuss, 106 N. Y. 90, 12 N. E. 428 [*reversing* 51 N. Y. Super. Ct. 491].

**80.** Keefuss *v.* Weilmunster, 89 N. Y. App. Div. 306, 85 N. Y. Suppl. 913.

**81.** Magee *v.* Billingsley, 3 Ala. 679; Morphy *v.* Blanchin, 18 La. Ann. 133; Chapman *v.* Mathews, 18 La. Ann. 118.

**Louisiana statute.**— Under the civil code, section 2511, if the subject of the sale has perished by a fortuitous event before the purchaser has instituted his redhibitory action, the loss must be borne by him. Kiper *v.* Nuttall, 1 Rob. 46.

**82.** Athey *v.* Olive, 34 Ala. 711. But the rule is otherwise if the damage is due to his negligence. Aultman *v.* Wirth, 54 Ill. App. 17.

**83.** Hart *v.* Edwards, 2 Bailey (S. C.) 306.

**84.** Hamrah *v.* Maloof, 127 N. Y. App. Div. 331, 111 N. Y. Suppl. 509.

**85.** Lilley *v.* Randall, 3 Colo. 298; Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189.

**Affirmance of contract.**— It has been held that where defendant's cross bill in an action for the price of a threshing machine alleges a breach of warranty, but prays for a rescission, the suit on the warranty is an affirmance of the contract, and will prevent a decree granting a rescission. Garr *v.* Young, (Tenn. Ch. App. 1901) 62 S. W. 631. But see Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280, holding that where, in an action for the price of goods sold, the defense was that the grates did not fulfil the seller's warranty, and judgment went against plaintiff, this amounted to a rescission of the sale, leaving the seller the owner of the goods.

**86.** Anderson *v.* Chicago Trust, etc., Bank, 195 Ill. 341, 63 N. E. 203 [*affirming* 93 Ill. App. 347]; Chicago Trust, etc., Bank *v.* Ball, 208 Ill. 256, 70 N. E. 305 [*reversing* 108 Ill. App. 321]; Tolman *v.* Coleman, 104 Ill. App. 70; Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193; Menefee *v.* Johnson, 2 Rob. (La.) 274; Krueger *v.* Armitage, 58 N. J. Eq. 357, 44 Atl. 167.

**Action for deceit.**—A vendee after suing his vendor for deceit in making the sale cannot obtain a rescission of the sale. Stuart *v.* Hayden, 72 Fed. 402, 18 C. C. A. 618. But see Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. 401.

**87.** De la Vergne Refrigerating Mach. Co. *v.* New Orleans, etc., R. Co., 52 La. Ann. 1733, 26 So. 455.

**88.** Kokomo Strawboard Co *v.* Inman, 11 N. Y. Suppl. 329 [*affirmed* in 134 N. Y. 92, 31 N. E. 248].

**Failure to notify seller to deliver.**— Where a seller agrees to deliver goods as required

**7. Conditions Precedent to Rescission — a. By Seller**[89] — (i) *Restoration of Consideration.*[90] The seller cannot rescind the contract of sale and at the same time retain the benefits of the contract.[91] Consequently he cannot as a rule rescind the sale unless he can put the buyer *in statu quo.*[92] He must as a condition precedent to rescission restore or offer to restore the price paid for the goods.[93] The seller cannot compel the buyer to come to him but must return the consideration to the buyer.[94] The return or offer to return the consideration must be within a reasonable time,[95] but a tender made at the trial of the action

delivery to begin on five days' notice and to continue "without further notice," the failure of the buyer to give notice after the first will not prevent rescission for the default of the seller. Merchants' Trust Co. *v.* Potter, 24 Pa. Super. Ct. 510.

**89. Conditions precedent to action for breach** see *infra,* VIII, F, 2.

**Conditions precedent to action for price** see *infra,* VIII, E, 1, e.

**90. As condition precedent to action for breach** see *infra,* VIII, F, 2.

**As condition precedent to action for price** see *infra,* VIII, E, 1, e, (I).

**91.** Washburn *v.* Cordis, 1 Misc. (N. Y.) 427, 21 N. Y. Suppl. 422.

**92.** Jones *v.* Anderson, 82 Ala. 302, 2 So. 911; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520, 22 R. I. 251, 47 Atl. 387; Poor *v.* Woodburn, 25 Vt. 234.

**When the buyer has made it impossible for the seller to place him in statu quo,** the rule does not apply. Wilson *v.* Challis, 39 Ill. App. 227; Gates *v.* Raymond, 106 Wis. 657, 82 N. W. 530.

**93.** *Alabama.*— Wilcox *v.* San Jose Fruit-Packing Co., 113 Ala. 519, 21 So. 376, 59 Am. St. Rep. 135; Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

*California.*— Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124; Coghill *v.* Boring, 15 Cal. 213.

*Georgia.*— Tidwell *v.* Burkett, 81 Ga. 84, 6 S. E. 816.

*Illinois.*— Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Bowen *v.* Schuler, 41 Ill. 192; Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Hanchett *v.* Sorg, 15 Ill. App. 493.

*Indiana.*— Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Johnson *v.* McLane, 7 Blackf. 501, 43 Am. Dec. 102.

*Indian Territory.*— Cherry *v.* Cox, 1 Indian Terr. 578, 45 S. W. 122.

*Louisiana.*— Delaneuville *v.* Duhe, 114 La. 62, 38 So. 20.

*Maine.*— Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Emerson *v.* McNamara, 41 Me. 565; Ayers *v.* Hewett, 19 Me. 281; Norton *v.* Young, 3 Me. 30.

*Massachusetts.*— Sears *v.* Ames, 117 Mass. 413; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

*Missouri.*— Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Wertheimer-Swartz Shoe Co. *v.* Springfield Exch. Bank, 56 Mo. App. 662.

*New Mexico.*— Crabtree *v.* Segrist, 3 N. M. 278, 6 Pac. 202.

*New York.*— Smith *v.* Ryan, 191 N. Y. 452, 84 N. E. 402, 123 Am. St. Rep. 609, 19 L. R. A. N. S. 461 [*reversing* on other grounds 116 N. Y. App. Div. 397, 101 N. Y. Suppl. 1011]; Stevens *v.* Hyde, 32 Barb. 171; Matteawan Co. *v.* Bentley, 13 Barb. 641; American Water-Works Co. *v.* Venner, 18 N. Y. Suppl. 379.

*Pennsylvania.*— Arbuthnot *v.* Smith, 18 Pa. Super. Ct. 22.

*Wisconsin.*— Weed *v.* Page, 7 Wis. 503.

See 43 Cent. Dig. tit. "Sales, § 271.

**Sufficiency of offer.**— Where A, desiring to rescind a contract with B, said to him: "I will give you back the notes, and you will give me back the goods," to which B replied: "I won't do that; not at present, anyhow," this was a sufficient offer by A to rescind, and a formal tender of the notes was not necessary. Leon *v.* Goldsmith, 69 Ill. App. 22.

**Independent sales.**—Where the sale sought to be rescinded consists of several purchases, the seller is entitled to treat them as independent sales; and all payments made on account may be applied to the first purchase, unless otherwise designated by the purchaser, and the seller would be entitled to rescind the other sales, without returning or offering to return the payments received on the first. Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784.

**Nothing due buyer.**— In order to rescind a contract of sale for non-payment of the price the seller must ordinarily tender so much of the price as has been paid, but where it seems likely that in final judgment there will be nothing due the buyer, such tender need not be made. The rule is no broader than the reason upon which it is founded. Delaneuville *v.* Duhe, 114 La. 62, 38 So. 20.

**Default of purchaser.**— Where plaintiff assigned patent rights to defendant, who agreed to pay the price in stated instalments, and stipulated that on default in any payment the contract might, at the option of plaintiff, be terminated, and all rights in and to the letters patent should be reassigned to him, free from all lien, claim, and encumbrance whatever, in case of a default, plaintiff could compel a reassignment without returning the instalments theretofore paid. Gibb *v.* Redway Mfg. Co., 20 Misc. (N. Y.) 43, 45 N. Y. Suppl. 329.

**94.** Cherry *v.* Cox, 1 Indian Terr. 578, 45 S. W. 122; Norton *v.* Young, 3 Me. 30; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

**95.** Weed *v.* Page, 7 Wis. 503.

**What is reasonable time.**— Where part of

to rescind is generally regarded as made in time.[96] To be valid it is not absolutely necessary that the tender should be made to the buyer. It may be made to a general assignee who has possession and control of the goods.[97] In determining the amount to be returned or tendered the seller may deduct the value of the use of the property,[98] and need not include either the amount paid by the buyer as duty on the goods imported,[99] revenue taxes,[1] or expenses incurred by the buyer to other parties in furtherance of a scheme to defraud the seller;[2] but freight which under the contract was to be deducted from the price must be returned.[3] It is no excuse for failure to return notes given for the purchase-price that they are worthless,[4] and there can of course be no rescission if the seller himself has made it impossible to restore the consideration.[5] But a restoration of the consideration is excused where the buyer has sold the goods, retaining the money received therefor,[6] or where the goods have been damaged by the fault of the buyer to an

the goods have been sold by the buyer an offer to turn the balance of the consideration as soon as the amount can be ascertained is in time. Symns *v.* Benner, 31 Nebr. 593, 48 N. W. 472.

**96.** *California.*— Coghill *v.* Boring, 15 Cal. 213.

*Illinois.*— Ryan *v.* Brant, 42 Ill. 78.

*Louisiana.*— Bourgeat *v.* Smith, 16 La. 467.

*Maine.*— Ayers *v.* Hewett, 19 Me. 281.

*Massachusetts.*— Thurston *v.* Blanchard, 22 Pick. 18, 33 Am. Dec. 700.

*New Hampshire.*— Wood *v.* Garland, 58 N. H. 154.

*New Jersey.*— Cowen *v.* Bloomberg, 66 N. J. L. 385, 49 Atl. 451.

*New York.*— Hathorne *v.* Hodges, 28 N. Y. 486; Delano *v.* Rice, 23 N. Y. App. Div. 327, 48 N. Y. Suppl. 295; Green *v.* Smith, 29 Hun 166; Ladd *v.* Moore, 3 Sandf. 589; Nellis *v.* Bradley, 1 Sandf. 560. But see Matteawan Co. *v.* Bentley, 13 Barb. 641.

*Ohio.*— Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394; Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio S. & C. Pl. Dec. 215, 4 Ohio N. P. 15.

*Oregon.*— Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858.

*Pennsylvania.*— Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69.

*Rhode Island.*— Sisson *v.* Hall, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206; Duval *v.* Mowry, 6 R. I. 479.

*Texas.*— Blalock *v.* Joseph Bowling Co., (Civ. App. 1898) 44 S. W. 305.

See 43 Cent. Dig. tit. "Sales," § 273.

**Offer to produce notes in court for cancellation.**— Where the seller stops goods in transit, rescinds the sale, and refuses to deliver, it is sufficient if, in a suit by the purchaser for the possession of the goods, the seller in his answer professes a readiness and makes an offer to produce in court for cancellation the notes given for the purchase-price. Fulton *v.* Thompson, 18 Tex. 278, such offer being held sufficient where the purchaser did not ask for the inspection of the notes before trial.

**Limitation of rule.**— Some decisions place a limitation on the rule, holding that a seller who received notes of third parties as part of the price cannot, on the ground that the notes are worthless, excuse his failure to return or tender them before rescission of the sale. Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858.

**Interpleader.**— Where a vendor seeks to rescind a contract of sale for fraud of the vendee, and is subsequently made plaintiff in an interpleader issue to determine the ownership of the goods sold, a tender by him at the trial of the issue, of notes given by the vendee in payment will be treated as if made at the date of rescission. Sloane *v.* Shiffer, 156 Pa. St. 59, 27 Atl. 67.

**97.** Bliss *v.* Cottle, 32 Barb. (N. Y.) 322, holding that tender may be made to the general assignee, who has the goods in his possession and under his control.

**98.** Woodard *v.* Fitzpatrick, 9 Dana (Ky.) 117.

**99.** Hoffman *v.* Steinan, 4 N. Y. St. 627.

**1.** Guckenheimer *v.* Angevine, 81 N. Y. 394.

**2.** J. I. Case Plow Works *v.* Ross, 74 Mo. App. 436.

**3.** Gibson *v.* Lancaster, 90 Tex. 540, 39 S. W. 1078; Parks *v.* Lancaster, (Tex. Civ. App. 1896) 38 S. W. 262.

**4.** Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Green *v.* Smith, 29 Hun (N. Y.) 166; Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858.

**Where the note of defendant is overdue** it seems that a return is unnecessary, if it be made to appear that it was still held and owned by the payee and not by a *bona fide* purchaser for value. Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413.

**5.** Dial *v.* Peterson, 34 Ill. App. 478.

**Notes destroyed.**— If notes given for the purchase-price have been destroyed the fact that they cannot be returned will not affect the right to rescind. Nash *v.* Caywood, 39 Ind 457.

**6.** *Illinois.*— Wilson *v.* Challis, 39 Ill. App. 227.

*Maryland.*— Peters *v.* Hilles, 48 Md. 506.

*Nebraska.*— Tootle *v.* Chadron First Nat. Bank, 34 Nebr. 863, 52 N. W. 396; Symns *v.* Benner, 31 Nebr. 593, 48 N. W. 472.

*Pennsylvania.*—Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69; Sloane *v.* Shiffer, 156 Pa. St. 59, 27 Atl. 67.

amount equal to the price.[7] Such restoration is also excused where the buyer has absconded.[8]

(II) *DEMAND.* If rescission was not declared at the time of default, demand is necessary as a condition precedent to rescission for non-payment of price.[9]

**b. By Buyer** [10] — (I) *RESTORATION OF PROPERTY* — (A) *Duty to Restore.* The general rule that to justify a rescission the parties must be placed *in statu quo* applies when rescission is sought by the buyer.[11] The rule that the parties must be placed *in statu quo* does not require an absolute and literal restoration of the parties to their former condition, but it is sufficient if such restoration is made as is reasonably possible and such as the merits of the case demand.[12] The buyer must as a condition precedent to rescission restore or offer to restore the property,[13]

*Rhode Island.*— Sisson *v.* Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206.

*Wisconsin.*— Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183, 73 N. W. 784.

**Replevin for goods sold.**— Where a portion of the goods have been sold, and replevin has been brought for the balance, defendant in replevin may, in consideration of the reduction of the amount of the claim property bond, waive the return of the purchase-money paid and agree that the replevin shall stand for the purpose of determining the balance due. Arbuthnot *v.* Smith, 18 Pa. Super. Ct. 22.

**Goods in custodia legis.**— In Pennsylvania it has been held that consideration must be returned, although the goods are in the custody of the sheriff under execution (Schwartz *v.* McCloskey, 156 Pa. St. 258, 27 Atl. 300); but the contrary rule is announced in Arkansas (Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975).

7. Phenix Iron Works Co. *v.* McEvony, 47 Nebr. 228, 66 N. W. 290, 53 Am. St. Rep. 527.

8. Hathorne *v.* Hodges, 28 N. Y. 486; Johnson *v.* Frew, 33 Hun (N. Y.) 193.

9. Prophit *v.* Robinson, 34 Miss. 141; Portland Ice Co. *v.* Connor, 24 Pa. Super. Ct. 493.

**Demand and protest.**— Demand of a notary and protest for non-payment of notes given for the price is a sufficient putting in default to authorize rescission. Bourgeat *v.* Smith, 16 La. 467.

**10. Conditions precedent to recovery of price** see *infra*, IX, A, 3.

11. Jemison *v.* Woodruff, 34 Ala. 143; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Barnsville First Nat. Bank *v.* Yocum, 11 Nebr. 328, 9 N. W. 84; Curran *v.* Hauser, 9 Ohio S. & C. Pl. Dec. 468, 6 Ohio N. P. 281 [*affirmed* in 61 Ohio St. 641, 57 N. E. 1132]; Mason *v.* Chappell, 15 Gratt. (Va.) 572.

**Rescission for fraud.**— Although one exercising the right of rescission must in general put the other party *in statu quo*, in cases of fraud, the defrauded party may rescind within a reasonable time after discovering the fraud, although the parties cannot be restored to their former position. Downer *v.* Smith, 32 Vt. 1, 76 Am. Dec. 148. Where the return of the property will not place the seller *in statu quo*, the rescission and return is not authorized unless the representations inducing the contract were made with intent to deceive. Curran *v.* Hauser, 9 Ohio S. & C. Pl. Dec. 468, 6 Ohio N. P. 281 [*affirmed* in 61 Ohio St. 641, 57 N. E. 1132].

**The buyer is bound only to put the seller in as good condition as he was before.**— Therefore where plaintiff, a tenant at will, agreed to vacate the premises in favor of defendant, if the latter would pay him for certain fixtures the sum he, plaintiff, had paid for them, and falsely represented as such sum an amount larger than the price he had actually paid, and defendant gave his note for the excessive amount, and received a lease for a term of years and possession of the premises from the landlord, defendant could not be required, as a condition of rescission for the fraud, to surrender the lease or assign it to plaintiff, as this would place plaintiff in a better condition than he was before. Preston *v.* Reeve, 65 N. H. 6, 17 Atl. 1057.

12. Fairbanks *v.* Walker, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. N. S. 558.

13. *Alabama.*— Ward *v.* Reynolds, 32 Ala. 384; Dill *v.* Camp, 22 Ala. 249. See also Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261.

*Illinois.*— Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815; Dowden *v.* Wilson, 108 Ill. 257; Howe Mach. Co. *v.* Rosine, 87 Ill. 105; Wolf *v.* Dietzsch, 75 Ill. 205; Buchenau *v.* Horney, 12 Ill. 336; Hemphill *v.* Miller, 75 Ill. App. 488.

*Indiana.*— Vogel *v.* Demorest, 97 Ind. 440; Cates *v.* Bales, 78 Ind. 285; De Ford *v.* Urbain, 48 Ind. 219; Love *v.* Oldham, 22 Ind. 51.

*Iowa.*— Parsons Band-Cutter, etc., Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580.

*Kansas.*— Cookingham *v.* Dusa, 41 Kan. 229, 21 Pac. 95.

*Kentucky.*— Stewart *v.* Dougherty, 3 Dana 479.

*Louisiana.*— Vancleave *v.* Nelson, 49 La. Ann. 621, 21 So. 734; Bach *v.* Barrett, 2 La. Ann. 955; Fazende *v.* Hagan, 9 Rob. 306; Barrett *v.* Bullard, 19 La. 281; Janin *v.* Franklin, 4 La. 198; Roberts *v.* Rodes, 3 Mart. N. S. 100.

*Maine.*— Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Sharp *v.* Ponce, 76 Me. 350.

*Minnesota.*— Auerbach *v.* Wunderlich, 76 Minn. 42, 78 N. W. 871.

*Mississippi.*— Jagers *v.* Griffin, 43 Miss. 134.

*New Hampshire.*— Sanborn *v.* Osgood, 16 N. H. 112.

and as a general rule cannot rescind if he has sold the goods or any part thereof,[14] although it has been held in some instances that he may tender the money received therefor and rescind.[15]

(B) *Sufficiency of Return or Tender.* As a general rule the buyer must return or tender all the property received,[16] and in as good condition as when received.[17]

*New Jersey.*— Byard *v.* Holmes, 33 N. J. L. 119.

*New Mexico.*— Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504.

*New York.*— Taylor *v.* Thompson, 62 N. Y. App. Div. 159, 70 N. Y. Suppl. 997; Woodruf *v.* Peterson, 51 Barb. 252; Central Bureau of Engraving *v.* J. W. Pratt Co., 60 Misc. 120, 111 N. Y. Suppl. 561.

*Ohio.*— Reed *v.* McGrew, 5 Ohio 375.

*Pennsylvania.*— Morris *v.* Govett, 4 Phila. 13.

*South Carolina.*— Oakes *v.* Shrewsbury, 2 Rich. 410; Benson *v.* Littlefield, 2 Mill 180.

*Tennessee.*— Kentucky Saw Works *v.* Little River Land, etc., Co., (Ch. App. 1897) 42 S. W. 527.

*Texas.*— Caldwell *v.* Dutton, 20 Tex. Civ. App. 369, 49 S. W. 723.

*Vermont.*— Hoadley *v.* House, 32 Vt. 179, 67 Am. Dec. 167; Smith *v.* Smith, 30 Vt. 139.

*Wisconsin.*— Becker *v.* Trickel, 80 Wis. 484, 50 N. W. 406.

*United States.*— Garland *v.* Bowling, 10 Fed. Cas. No. 5,242, Hempst. 710; Henckley *v.* Hendrickson, 11 Fed. Cas. No. 6,348, 5 McLean 170.

*England.*— Edwards *v.* Chapman, 4 Dowl. P. C. 732, 1 Gale 376, 5 L. J. Exch. 139, 1 M. & W. 231, Tyrw. & G. 481.

*Canada.*— Ducharme *v.* Charest, 23 Quebec Super. Ct. 82.

See 43 Cent. Dig. tit. "Sales," §§ 303, 304.

**Defect apparent at time of delivery.**—When property has not been tendered to the purchaser within the time specified by the contract, and, when sent, is so unsound as to justify his refusal to receive it, if sent within the time, he is not bound to return it, in order to rescind. Cabiness *v.* Herndon, Litt. Sel. Cas. (Ky.) 469.

**Note for price in hands of innocent holder.**—Where the note for the purchase-price has been transferred to an innocent holder and the buyer has been obliged to pay it, he may rescind for fraud without an offer to return the goods. Star Kidney Pad Co. *v.* Greenwood, 4 Can. L. T. Occ Notes 181.

14. *California.*— Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261.

*Illinois.*— Hemphill *v.* Miller, 75 Ill. App. 488.

*Louisiana.*— Peterson *v.* Burn, 3 La. Ann. 655; Ledoux *v.* Armor, 4 Rob. 381; Richard *v.* Parrott, 3 Rob. 75; Brown *v.* Duplantier, 1 Mart. N. S. 312.

*Maryland.*— Horn *v.* Buck, 48 Md. 358.

*Pennsylvania.*— Buffington *v.* Quantin, 17 Pa. St. 310.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40.

*Vermont.*—McCrillis *v.* Carlton, 37 Vt. 139, 86 Am. Dec. 700.

*Washington.*— Seattle Nat. Bank *v.* Powles, 33 Wash. 21, 73 Pac. 887.

*United States.*—Simpson *v.* Wiggin, 22 Fed. Cas. No. 12,887, 3 Woodb. & M. 413.

See 43 Cent. Dig. tit. "Sales," § 310.

**Sale of part before discovery of defect.**—A merchant who has bought a stock of flour may, on discovering its inferior quality, although not till after selling part of it, rescind by tendering back the undisposed of part. Bunch *v.* Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80.

15. Pikes Peak Paint Co. *v.* Masury, 19 Colo. App. 286, 74 Pac. 796; Hoadley *v.* House, 32 Vt. 179, 67 Am. Dec. 167.

**Returning identical property.**— In Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868, it was said that the buyer must return the identical goods. And in Cohen *v.* Ellis, 52 Hun (N. Y.) 133, 5 N. Y. Suppl. 133, it was held that a purchaser of bonds could not rescind his contract on the ground of fraudulent misrepresentations by the vendor, inducing the purchase by returning other bonds issued upon the organization of a new company to succeed to the business of the corporation issuing the first bonds, although the new bonds were worth more than the old. On the other hand it was held in Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634, that where one has purchased two thousand five hundred shares of stock and seeks to rescind the contract, it is no defense to the action that he has sold a part of the identical shares to a third person, since other shares of equal value could be returned in their stead.

16. *Illinois.*— Telford *v.* Albro, 60 Ill. App. 359.

*Iowa.*— Van Vechten *v.* Smith, 59 Iowa 173, 13 N. W. 94.

*Massachusetts.*— Miner *v.* Bradley, 22 Pick. 457.

*Missouri.*— Boeker *v.* Crescent Belting, etc., Co., 101 Mo. App. 429, 74 S. W. 385.

*New York.*— Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588.

*Ohio.*— Sportsman Shot Co. *v.* American Shot, etc., Co., 11 Ohio Dec. (Reprint) 821, 30 Cinc. L. Bul. 87.

See 43 Cent. Dig. tit. "Sales," § 305.

**Interest on commercial paper.**— The right of the buyer to rescind on account of fraudulent concealment a contract for the purchase of a note and mortgage is not defeated by his failure to return to the seller the amount of interest received by him from the mortgagor. Potter *v.* Taggart, 59 Wis. 1, 16 N. W. 553, 632.

17. Hanger *v.* Evins, 38 Ark. 334; Thompson *v.* Chambers, 13 Pa. Super. Ct. 213.

**Where property sold is damaged while in the possession of the purchaser without his fault,** he is not obliged in order to rescind the sale to repair the damage before rede-

But when goods sold by sample are delivered in instalments it is not necessary on rejection of certain instalments because not corresponding to the sample to return those already accepted.[18] If an actual return or tender of the goods is practicable a mere offer to return or notice that the goods are subject to the seller's order is ordinarily not sufficient,[19] but there must be an actual return or tender of the goods,[20] although an offer to return is generally regarded as sufficient when the parties are at a distance from each other and an actual manual delivery is impracticable.[21] The return or tender must be unconditional,[22] and for the purpose of rescission.[23] The return or tender of the goods must be made by one having authority to make it,[24] and must be made to the seller or his authorized representative.[25] Moreover the buyer must generally return or offer to return

livery or offer of redelivery to the vendor. Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593; Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485.

18. Russell *v.* Lilienthal, 36 Oreg. 105, 58 Pac. 890.

19. McCormick Harvesting Mach. Co. *v.* Allison, 116 Ga. 445, 42 S. E. 778; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Norton *v.* Young, 3 Me. 30; Coates *v.* Early, 46 S. C. 220, 24 S. E. 305; Carter *v.* Walker, 2 Rich. 40; Wilson *v.* Ferguson, Cheves 190.

**If a party acts with reasonable promptitude when the fraud is discovered,** a rescission of the contract will be effected by a *bona fide* offer to return the consideration received and by holding it in readiness to be delivered if the offer to return be refused. Cox *v.* Cline, 139 Iowa 128, 117 N. W. 48.

20. Dill *v.* Camp, 22 Ala. 249.

**Incorporeal thing.**—A purchaser of a right to vend a churn, given by parol, seeking to rescind the sale, sufficiently shows an offer to return the thing sold by alleging that he had offered to rescind the contract of sale. Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421.

**Sale of letters patent.**— To effect a rescission of sale, and recover back the purchase-price of letters patent declared to be invalid, it is only necessary that the vendee reassign and offer to return the letters. Sandage *v.* Studabaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363.

**Refusal to accept goods.**— Where a party contracts to manufacture specific goods, and delivers goods of a kind not conforming to the contract, and the buyer without delay informs the seller of that fact, and refuses to accept them, and does not use any of them, he need not manually return such rejected goods; but it is sufficient, to relieve him from liability to pay for them, if in due time he give the seller clearly to understand that he refuses to accept them. Rheinstrom *v.* Steiner, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. Rep. 699.

**Goods on trial.**— In an action to rescind a contract for the purchase of a piano on account of fraudulent representations where the evidence showed that, before plaintiff had decided to purchase the piano, defendant took it to her house without her consent or request, and was allowed to leave it on trial; that thereafter plaintiff purchased it and paid the consideration therefor; and that it remained there down to the week of the trial, a nonsuit, on the ground that there was no proof that plaintiff was in condition to return the piano at the time of trial, was not warranted, as the presumption is that it remained there for defendant. Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666.

21. Dill *v.* Camp, 22 Ala. 249; Barnett *v.* Stanton, 2 Ala. 195; Palmes *v.* Kendig, 15 La. Ann. 264; Rutter *v.* Blake, 2 Harr. & J. (Md.) 353, 3 Am. Dec. 550; P H., etc., Roots Co. *v.* New York Foundry Co., 56 Misc. (N. Y.) 687, 107 N. Y. Suppl. 742; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

**Illustration.**— It is not necessary that there should be a return of, or an offer to return, a horse which was purchased in a foreign market, to which he was taken and sold, when in a distant state his unsoundness is discovered. Carter *v.* Stennet, 10 B. Mon. (Ky.) 250.

22. Leslie *v.* Evans, 4 Ohio Dec. (Reprint) 307, 1 Clev. L. Rep. 273; Churchill *v.* Price, 44 Wis. 540.

23. Churchill *v.* Price, 44 Wis. 540.

**Purpose of return.**— The return of a piano by plaintiffs to the seller for purposes of repair does not constitute an attempt to restore the *status quo*, in furtherance of a purpose to rescind the contract of sale. Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483.

24. **Authority to return.**—A claim that a sale was rescinded, which is based upon an instruction from the husband of the buyer to the seller to come and take the goods away, cannot be sustained in the absence of proof that the husband had authority to give such instruction. Hornberger *v.* Feder, 30 Misc. (N. Y.) 121, 61 N. Y. Suppl. 865.

25. Parsons Band-Cutter, etc., Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580, holding that it is not necessary that the agent who negotiated the sale, and to whom tender was made, should agree to or acquiesce therein, but that it is sufficient if he at that time continued to represent his principal as when the sale was made. *Compare* Rutter *v.* Dowagiac Mfg. Co., 102 Minn. 367, 113 N. W. 910. In this case plaintiff purchased a seed drill from an agent of defendant under a contract providing that, if it did not work well, notice should be given to defendant or its agent, and if it could not be made to work, it should be returned to the agent, and the cash

the property to the place where the sale was consummated by delivery.[26] The return or tender must be made in a reasonable time,[27] and should be accompanied by an offer of compensation for the intermediate use of the property.[28]

(c) *Excuse For Failure to Return.* The failure of the buyer to restore the property as a condition precedent to rescission will be excused if the property is worthless,[29] and not rightly an article of sale or merchandise,[30] or if actual tender

and notes given therefor returned to the purchaser. Plaintiff claimed that the drill would not work, and that he rescinded the sale and returned the drill and sued for the amount of his note. It was held that notice to the agent that the drill did not work and its return to him were sufficient compliance with the contract, although the party was not defendant's agent at the time.

**Delivery to third person.**— The delivery of a machine by the purchaser to a third person, to be delivered to the seller, is insufficient to rescind the contract, where such third person retained possession and merely notified the sellers by letter concerning the machine. McCormick *v.* Barry, 10 Nebr. 207, 4 N. W. 1014.

**26.** Young *v.* Arntze, 86 Ala. 116, 5 So. 253; Tyler *v.* City of Augusta, 88 Me. 504, 34 Atl. 406; Mundt *v.* Simpkins, 81 Nebr. 1, 115 N. W. 325. But see Rood *v.* Priestley, 58 Wis. 255, 16 N. W. 546, holding that in order to relieve a purchaser of lumber from liability to accept after finding that it does not conform to the contract in dimensions and quality, it is not necessary for him to take it back to the depot to which it had been shipped, and from which he had removed it to his house, but that he discharges his duty by notifying the seller of the defects, and removing the lumber to some suitable and convenient place of his own selection, where it can be safely kept for the seller until he shall pay the advanced freight charges and take it into possession.

**27.** *Alabama.*— Dill *v.* Camp, 22 Ala. 249.

*Missouri.*— Manley *v.* Crescent Novelty Mfg. Co., 103 Mo. App. 135, 77 S. W. 489.

*New York.*— Schnitzler *v.* Kelly, 21 Misc. 327, 47 N. Y. Suppl. 146; Ketletas *v.* Fleet, 7 Johns. 324.

*Oklahoma.*— Luger Furniture Co. *v.* Street, 6 Okla. 312, 50 Pac. 125.

*Pennsylvania.*— Leaming *v.* Wise, 73 Pa. St. 173.

*Vermont.*— Boughton *v.* Standish, 48 Vt. 594.

*Wisconsin.*— Paige *v.* McMillan, 41 Wis. 337.

**Reasonable time.**— Where the buyers of goods, delivered under an agreement to hold them subject to the orders of the seller, if not satisfactory, returned the goods to the seller, after holding them a reasonable time, and using reasonable efforts to ascertain his wishes in regard to them, they did all that was required in the rescission of the agreement. Wahlert *v.* Weisberg, 70 Mo. App. 368.

**Tender at trial.**— Where plaintiff sued to cancel a sale for fraudulent representations within a month after discovering the fraud, and in the meantime did nothing in affirmance of the sale or to mislead defendant, and in his complaint offered to return the property and tendered it on the trial, an objection that he could not maintain his action because he did not tender a return thereof before bringing suit was untenable. Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134, 74 N. Y. Suppl. 496.

**Waiver of delay.**— If the delay was unreasonable and unwarranted the seller could waive the same; and whether he did so waive it was, under the facts, a question for the jury. Collins *v.* Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978. Where there are grounds for rescission of a sale by the purchaser, the fact that he delays returning a portion of the property is immaterial if, when it is returned, it is accepted by the other party without objection as to time. Aultman *v.* Miller, 52 Kan. 60, 34 Pac. 404.

**Effect of statute of limitations.**—Although, under the laws of Louisiana, the buyer has one year in which to bring his redhibitory action for the rescission of the sale for vice or defect in the thing sold, this does not affect the operation of the rule of law which requires the buyer in such cases to offer to return the property within a reasonable time. Andrews *v.* Hensler, 6 Wall. (U. S.) 254, 18 L. ed. 737.

**28.** Hanger *v.* Evins, 38 Ark. 334; Keck *v.* Jenney, 4 Ohio Dec. (Reprint) 173, 1 Clev. L. Rep. 90; Ford *v.* Oliphant, (Tex. Civ. App. 1895) 32 S. W. 437.

**29.** *Alabama.*— Pacific Guano Co. *v.* Mullen, 66 Ala. 582.

*Florida.*— Hancock *v.* Tucker, 8 Fla. 435.

*Georgia.*— Harris *v.* Daly, 121 Ga. 511, 49 S. E. 609.

*Illinois.*— Wolf *v.* Dietzsch, 75 Ill. 205.

*Indiana.*— Cates *v.* Bales, 78 Ind. 285.

*New Hampshire.*— Sanborn *v.* Osgood, 16 N. H. 112.

*Vermont.*— Smith *v.* Smith, 30 Vt. 139.

See 43 Cent. Dig. tit. "Sales," § 308.

**Possibility of repair.**—Although machinery purchased for six hundred dollars is, in its present condition, inefficient and worthless, yet where, by undisputed testimony, it appears that by the expenditure of fifty dollars it can be repaired and made to perform good work, it is not worthless so as to entitle the purchaser to keep it without paying for it. Trippe *v.* McLain, 87 Ga. 536, 13 S. E. 523.

**Evidence.**—Where a purchaser, after tender back, exposed the chattel for sale at public auction, the fact that no person would bid was not conclusive evidence that the chattel was of no value. Carter *v.* Walker, 2 Rich. (S. C.) 40.

**30.** Hancock *v.* Tucker, 8 Fla. 435.

is impracticable,[31] or if the seller has rendered a tender useless by some act or declaration,[32] such as a refusal to receive the property if tendered.[33]

(II) *Tender of Balance Due.* If money paid in advance by the buyer is to be forfeited in case the residue is not paid by a certain day, he must tender, or use his best endeavor to tender, the balance on or before the day limited in order to place the seller in default, so as to entitle the buyer to rescind and recover the advance payment.[34] But when the seller is already in default no tender of the balance due is necessary.[35]

**8. Time For Rescission — a. By Seller.** The seller must rescind if at all within a reasonable time after acquiring knowledge of the facts justifying rescission.[36] Whether the seller has exercised this right reasonably is generally a mixed

31. *Alabama.*— Barnett *v.* Stanton, 2 Ala. 195.

*Kentucky.*— Carter *v.* Stennet, 10 B. Mon. 250.

*Louisiana.*— Palmes *v.* Kendig, 15 La. Ann. 264; Lewis *v.* Morgan, 14 La. Ann. 401.

*Maryland.*— Rutter *v.* Blake, 2 Harr. & J. 353, 3 Am. Dec. 550.

*South Carolina.*— Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

*Vermont.*— Smith *v.* Smith, 30 Vt. 139.

See 43 Cent. Dig. tit. "Sales," § 308.

**Perishable goods.**— If vegetables sold were found to be in a decaying condition, the purchaser could rescind without an offer to return the goods. Richards *v.* Burke, 7 La. Ann. 242.

**That a return is impracticable at the time of instituting suit** is not a sufficient excuse for want of tender, if it was practicable at any time between the discovery of the vice and the institution of the suit, or even before the trial. Lewis *v.* Morgan, 14 La. Ann. 401.

**Sale of fixtures.**— The failure to return an article purchased, after discovery of alleged defects, cannot be excused under the claim that it is a fixture attached to the purchaser's building, where it appears that there is nothing to prevent its removal, if unsatisfactory. Logan *v.* Berkshire Apartment Assoc., 3 Misc. (N. Y.) 296, 22 N. Y. Suppl. 776 [*affirming* 1 Misc. 18, 20 N. Y. Suppl. 369].

**Loss of property.**— Loss of the property by a defect existing at the time of sale will excuse return. Chapman *v.* Matthews, 18 La. Ann. 118. But see Ward *v.* Reynolds, 32 Ala. 384.

**A loss after tender** must be borne by the seller. Nixon *v.* Bozeman, 11 La. Ann. 750.

32. Lewis *v.* Morgan, 14 La. Ann. 401; Abbott *v.* Marshall, 48 Me. 44. But see Cohen *v.* Ellis, 52 Hun (N. Y.) 133, 5 N. Y. Suppl. 133, holding that, in an action for rescission by the vendee of bonds bought and exchanged, an allegation that defendants caused the issuing of a circular proposing to him the scheme for the reorganization of the corporation and the exchange of the bonds, and thus induced him to effect the exchange, will not excuse plaintiff's conduct and entitle him to a rescission.

**Sale at instance of seller.**—A rescission by the buyer of an executed sale of certain bonds for fraud cannot be defeated by the seller on the ground that the buyer has parted with the bonds, and so cannot restore the *statu quo*, where he parted with them on the advice of the seller. Findlay *v.* Baltimore Trust, etc., Co., 97 Md. 716, 55 Atl. 379.

**Offer to replace.**— Proof of the vendor's offer, while the parties were in treaty to compromise their difficulties, to give the vendee other goods, excuses want of proof of an offer to return. Smith *v.* Taylor, 10 Rob. (La.) 133.

33. *Alabama.*— Barnett *v.* Stanton, 2 Ala. 181.

*Illinois.*— Matthews *v.* Fuller, 8 Ill. App. 529.

*Louisiana.*— Nott *v.* Marchesseau, 4 La. Ann. 344; Fuentes *v.* Caballero, 1 La. Ann. 27; Armstrong *v.* Mooney, 1 Rob. 167; Bowman *v.* Ware, 18 La. 597.

*Maine.*— Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593; Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77.

*Vermont.*— Bailey *v.* Manley, 77 Vt. 157, 59 Atl. 200; Barrett *v.* Tyler, 76 Vt. 108, 56 Atl. 534.

*Wisconsin.*— Potter *v.* Taggart, 54 Wis. 395, 11 N. W. 678.

*Canada.*— Ducharme *v.* Charest, 23 Quebec Super. Ct. 82.

See 43 Cent. Dig. tit. "Sales," § 308.

**Imposition of conditions.**— If the vendor refuses to accept a return of the goods, except for sale for the vendee's account, the necessity of proving an actual return is unnecessary. Ruben *v.* Lewis, 20 Misc. (N. Y.) 583, 46 N. Y. Suppl. 426. And see Hivert *v.* Licaze, 3 Rob. (La.) 357.

**Subsequent demand by seller.**—Although the refusal of the vendor to accept the property when the purchaser offers to return it dispensed with a more formal tender, the purchaser, if he still retains the property in his possession, must yield it up on the reasonable demand of the vendor, and his refusal to surrender on such demand, even after suit brought, will destroy the effect of his previous tender. Bennett *v.* Fail, 26 Ala. 605.

34. Bayley *v.* Duvall, 2 Fed. Cas. No. 1,139, 1 Cranch C. C. 283.

35. Dakota Stock, etc., Co. *v.* Price, 22 Nebr. 96, 34 N. W. 97.

36. *Alabama.*— Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

*Arkansas.*— Little Rock Cooperage Co. *v.* Lanier, 83 Ark. 548, 104 S. W. 221.

*Illinois.*— Hall *v.* Fullerton, 69 Ill. 448; Musick *v.* Gatzmeyer, 47 Ill. App. 329.

question of law and fact to be submitted to the jury,[37] but if the delay is for such period as to be unquestionably without cause, the court may so declare as a matter of law.[38] In the case of a sale on credit, the seller need not wait until the time of credit has expired,[39] although he may do so without being guilty of laches.[40] On the other hand the right to rescind for breach of the resolutory condition does not arise until the term of credit has expired.[41]

**b. By Buyer.** While it is not necessary that a buyer rescind a sale immediately upon his discovery of grounds therefor,[42] the buyer must exercise his right to rescind within a reasonable time after discovery of the facts justifying rescission.[43] What is a reasonable time must in each case depend on the circumstances

*Indiana.*— Sieveking *v.* Litzler, 31 Ind. 13.
*Missouri.*— Taylor *v.* Short, 107 Mo. 384, 17 S. W. 970; World Pub. Co. *v.* Hull, 81 Mo. App. 277; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407; Lapp *v.* Ryan, 23 Mo. App. 436.
*New York.*— Heilbronn *v.* Herzog, 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841 [*reversed* on other grounds in 165 N. Y. 98, 58 N. E. 759]; Hallahan *v.* Webber, 7 N. Y. App. Div. 122, 40 N. Y. Suppl. 103 [*reversing* 15 Misc. 327, 37 N. Y. Suppl. 613].
*Pennsylvania.*— Backentoss *v.* Speicher, 31 Pa. St. 324; Mann *v.* Salsberg, 17 Pa. Super. Ct. 280.
*Texas.*— Hunt *v.* Kellum, 59 Tex. 535.
*Vermont.*— Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.
*United States.*— Columbia Mfg. Co. *v.* Hastings, 121 Fed. 328, 57 C. C. A. 504.
See 43 Cent. Dig. tit. "Sales," § 274.

**In determining what is a reasonable time,** computation must be made from the discovery of the ground of rescission and not from the date of the sale. Wertheimer-Swartz Shoe Co. *v.* Faris, (Tenn. Ch. App.) 46 S. W. 336.

**Rescission within a month from the discovery of the fraud** on which the rescission is based is in time. Crossen *v.* Murphy, 31 Oreg. 114, 49 Pac. 858; Wertheimer-Swartz Shoe Co. *v.* Faris, (Tenn. Ch. App.) 46 S. W. 336.

**If no rights have intervened which would be prejudiced** it has been held that mere delay will not preclude rescission. Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277.

**37.** Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832.

**38.** World Pub. Co. *v.* Hull, 81 Mo. App. 277.

**39.** Kellogg *v.* Turpie, 2 Ill. App. 55; Seaver *v.* Dingley, 4 Me. 306.

**40.** Hathorne *v.* Hodges, 28 N. Y. 486.

**41.** Yaeger Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398.

**42.** Mastin *v.* Bartholomew, 41 Colo. 328, 92 Pac. 682.

**43.** *Alabama.*— Young *v.* Arntze, 86 Ala. 116, 5 So. 253; Dill *v.* Camp, 22 Ala. 249; Barnett *v.* Stanton, 2 Ala. 195.
*Arkansas.*— Hauger *v.* Evins, 38 Ark. 334.
*California.*— Gifford *v.* Carvill, 29 Cal. 589.
*Colorado.*—See Elgin Jewelry Co. *v.* Wilson, 42 Colo. 270, 93 Pac. 1107.
*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; Young *v.* Argo, 1 Marv. 156, 40 Atl. 719.
*Georgia.*— Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244.
*Illinois.*— Dorrance *v.* Dearborn Power Co., 233 Ill. 354, 84 N. E. 269 [*reversing* on other grounds 136 Ill. App. 86]; Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Wolf *v.* Dietzsch, 75 Ill. 205; Electric Vehicle Co. *v.* Price, 138 Ill. App. 594; Prickett *v.* McFadden, 8 Ill. App. 197.
*Iowa.*— Hirshhorn *v.* Stewart, 49 Iowa 418.
*Kentucky.*— Buford *v.* Brown, 6 B. Mon. 553; Gant *v.* Shelton, 3 B. Mon. 420; Stewart *v.* Dougherty, 3 Dana 479; Minor *v.* Kelly, 5 T. B. Mon. 272.
*Louisiana.*— Lewis *v.* Morgan, 14 La. Ann. 401.
*Maine.*— Cutler *v.* Gilbreth, 53 Me. 176.
*Maryland.*— Clements *v.* Smith, 9 Gill 156; Taymon *v.* Mitchell, 1 Md. Ch. 496.
*Mississippi.*— Rumsey, etc., Co. *v.* Jacob, (1908) 46 So. 168; Jagers *v.* Griffin, 43 Miss. 134.
*Missouri.*— Manley *v.* Crescent Novelty Mfg. Co., 103 Mo. App. 135, 77 S. W. 489.
*Nebraska.*— Barnesville First Nat. Bank *v.* Yocum, 11 Nebr. 328, 9 N. W. 84.
*New Jersey.*— Champitt *v.* Doyle, (1908) 70 Atl. 129. And see Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.
*New York.*— Cahen *v.* Platt, 40 N. Y. Super. Ct. 483; Provenzano *v.* Thayer Mfg. Co., 9 Daly 90; Schnitzler *v.* Kelly, 21 Misc. 327, 47 N. Y. Suppl. 146; Ketletas *v.* Fleet, 7 Johns. 324.
*Oklahoma.*— Robinson *v.* Roberts, 20 Okla. 787, 95 Pac. 246; Luger Furniture Co. *v.* Street, 6 Okla. 312, 50 Pac. 125.
*Oregon.*— Waymire *v.* Shipley, 52 Oreg. 464, 97 Pac. 807.
*Pennsylvania.*— Leaming *v.* Wise, 73 Pa. St. 173; Kessler *v.* Perrong, 22 Pa. Super. Ct. 578.
*Tennessee.*— Gilbert *v.* Hunnewell, 12 Heisk. 289; Rosson *v.* Hancock, 3 Sneed 434.
*Texas.*— Crutchfield *v.* Stanfield, 2 Tex. Unrep. Cas. 480.
*Vermont.*— Boughton *v.* Standish, 48 Vt. 594; Downer *v.* Smith, 32 Vt. 1, 76 Am. Dec. 148.
*Wisconsin.*— Paige *v.* McMillan, 41 Wis. 337.
See 43 Cent. Dig. tit. "Sales," §§ 304, 313.

**Laches.— A** purchaser of stock in a company who, as an inducement to the purchase, is given employment by it, loses his right

attending it,[44] such as the nature of the objection,[45] the location of the parties with respect to each other,[46] and the like.[47] Whether the right to rescind was

to disaffirm the purchase for fraud where, for a long time after obtaining knowledge of the facts, he continues in the employment, and fails to take any steps toward disaffirmance. Zimmele *v.* American Plaster Board Co., 1 N. Y. App. Div. 327, 37 N. Y. Suppl. 183.

**Warranty for specific period.**—Where a machine is warranted to work for a year the buyer has not the year in which to rescind for breach of warranty, but only a reasonable time. Upton Mfg. Co. *v.* Huiske, 69 Iowa 557, 29 N. W. 621.

**Immediate rescission unnecessary.**— To preserve a right to rescind a sale, it is not necessary to rescind immediately on the first discovery of a material misrepresentation, but the purchaser may waive that, and yet rescind on a subsequent discovery of other material misrepresentations. Mastin *v.* Bartholomew, 41 Colo. 328, 92 Pac. 682 (citing CONTRACTS, 9 Cyc 435); Pitcher *v.* Webber, 103 Me. 101, 68 Atl. 593.

**44.** Buford *v.* Brown, 6 B. Mon. (Ky.) 553; Luger Furniture Co. *v.* Street, 6 Okla. 312, 50 Pac. 125; Paige *v.* McMillan, 41 Wis. 337.

**45.** Numsen *v.* Levi, (Cal. 1894) 36 Pac. 657.

**46.** *Delaware.*— Wilson *v.* Fisher, 5 Houst. 395.

*Michigan.*— Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.

*Minnesota.*— Rosenfield *v.* Swenson, 45 Minn. 190, 47 N. W. 718.

*Washington.*— Kleeb *v.* Long-Bell Lumber Co., 27 Wash. 648, 68 Pac. 202.

*Canada.*— Brown *v.* Wiseman, 20 Quebec Super. Ct. 304.

**47. Illustrations.**— Where the vendor of a yoke of oxen represented them to be only seven years old, and the purchaser on the second day after the sale heard a farmer's opinion that they were much older, but continued five days longer to use them and then returned them, the right to rescind was exercised within a reasonable time. Matteson *v.* Holt, 45 Vt. 336. Evidence that the buyer refused to take the horses as soon as he saw them, and that, in his first conversation with the seller as soon as he saw him, he refused to take them, is sufficient to show that he acted promptly in disaffirming the contract. Schofield *v.* Conley, 126 Mich. 712, 86 N. W. 129. Where the buyer discovered the fraud the first week after buying a business, and notified the seller and demanded a return of his money, which was refused; and he carried on the business two months longer, when he rescinded absolutely, he had not forfeited his right to rescind. Boles *v.* Merrill, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308. Where the seller is a non-resident, and the purchaser does not know his place of business, or any agent to whom a tender can be made, an offer to return the implement, made six months after the purchase, to the first agent authorized to collect the notes given for the price, is in time. Gale Sulky Harrow Mfg. Co. *v.* Stark, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 739. Where the sellers of a stock of goods misrepresented that there were no debts, the purchasers did not wait more than a reasonable time before electing to rescind, although they learned on the night the invoice was begun that there was one debt, and a few days later learned of others, and continued to run the store for several days. Field Grocery Co. *v.* Conley, 104 S. W. 372, 31 Ky. L. Rep. 989.

**Unreasonable delay.**— The delay in exercising the right to rescind was, in view of the circumstances and in the absence of excuse, regarded as unreasonable in the following cases: Collins *v.* Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978 (three weeks); Rosenfield *v.* Swenson, 45 Minn. 190, 47 N. W. 718 (six weeks); Provenzano *v.* Thayer Mfg. Co., 9 Daly (N. Y.) 90 (one month); Kleeb *v.* Long-Bell Lumber Co., 27 Wash. 648, 68 Pac. 202 (two months). In the following cases the delay was from three to eight months: Gamble *v.* Tripp, 99 Cal. 223, 33 Pac. 851; Bailey *v.* Fox, 78 Cal. 389, 20 Pac. 868; Hirshhorn *v.* Stewart, 49 Iowa 418; Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158; Manley *v.* Crescent Novelty Mfg. Co., 103 Mo. App. 135, 77 S. W. 489; Houston *v.* Cook, 153 Pa. St. 43, 25 Atl. 622, 623; Gammon *v.* Abrams, 53 Wis. 323, 10 N. W. 479. In the following cases the delay was from one to three years: Williams *v.* Mitchell, 87 Cal. 532, 26 Pac. 632; Collins *v.* Townsend, 58 Cal. 608; Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483; Wamego First Nat. Bank *v.* Skinner, 4 Ida. 673, 43 Pac. 679; Rumsey, etc., Co. *v.* Jacob, (Miss. 1908) 46 So. 169; Kessler *v.* Perrong, 22 Pa. Super. Ct. 578; Benson *v.* Littlefield, 2 Mill (S. C.) 180; Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177, 52 Pac. 379; Patent Title Co. *v.* Stratton, 89 Fed. 174.

**Laches.**— Where merchandise brokers present to purchasers a memorandum of the sale, or "bought note," which is accepted by them, the latter cannot repudiate the sale seven days after part of the goods are shipped, and two days after they received invoices of such shipment, because the sellers did not give a certain guaranty required by the purchasers' contract with the brokers. Numsen *v.* Levi, (Cal. 1894) 36 Pac. 657. In an action by the receiver of a bank on a note given by defendant in payment of stock issued him, defendant could not set up fraud on the part of the bank in procuring him to subscribe for such stock, in order to avoid the note, where he failed to elect to rescind the contract until after suit was instituted against him, and after the rights of the bank's creditors to its assets had attached. Howard *v.* Turner, 155 Pa. St. 349, 26 Atl. 753, 35 Am. St. Rep. 883.

exercised within a reasonable time is usually regarded as a question for the jury;[48] but the time may be so short or so long as to justify the court in pronouncing it reasonable or unreasonable as a matter of law.[49] The time within which the right is exercised must be computed from the discovery of the fraud or defect on which rescission is based and not from the date of the sale.[50] But the buyer must use reasonable diligence to ascertain the facts,[51] especially if there is anything to put him on inquiry.[52] An inspection, trial, or test to determine whether the goods are of the quality specified must be made within a reasonable time,[53]

**48.** *Alabama.*— Barnett *v.* Stanton, 2 Ala. 195.

*Illinois.*— Doane *v.* Dunham, 79 Ill. 131.

*Indiana.*— Heintz *v.* Mueller, 27 Ind. App. 42, 59 N. E. 414.

*Maine.*— Libby *v.* Haley, 91 Me. 331, 39 Atl. 1004.

*Michigan.*—McNitt *v.* Henderson, 155 Mich. 214, 118 N. W. 974.

*Missouri.*— Manley *v.* Crescent Novelty Co., 103 Mo. App. 135, 77 S. W. 489; Johnson *v.* Whitman Agricultural Co., 20 Mo. App. 100.

*Oklahoma.*— Robinson *v.* Roberts, 20 Okla. 787, 95 Pac. 246. *Contra*, Luger Furniture Co. *v.* Street, 6 Okla. 312, 50 Pac. 125.

*Rhode Island.*—Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520.

*Wisconsin.*— Churchill *v.* Price, 44 Wis. 540; Paige *v.* McMillan, 41 Wis. 337.

*United States.*— Andrews *v.* Hensler, 6 Wall. 254, 18 L. ed. 737.

See 43 Cent. Dig. tit. "Sales," § 317.

**Contra.**— Collins *v.* Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978; Young *v.* Argo, 1 Marv. (Del.) 156, 40 Atl. 719.

**49.** Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483; Manley *v.* Crescent Novelty Mfg. Co., 103 Mo. App. 135, 77 S. W. 489; Metropolitan Rubber Co. *v.* Monarch Rubber Co., 74 Mo. App. 266; Viertel *v.* Smith, 55 Mo. App. 617; Johnson *v.* Whitman Aricultural Co., 20 Mo. App. 100; Kleeb *v.* Long-Bell Lumber Co., 27 Wash. 648, 68 Pac. 202; Gammon *v.* Abrams, 53 Wis. 323, 10 N. W. 479; Paige *v.* McMillan, 41 Wis. 337.

**50.** Welch *v.* Burdick, 101 Iowa 70, 70 N. W. 94; Chretien *v.* Theard, 11 Mart. (La.) 11; Taymon *v.* Mitchell, 1 Md. Ch. 496; Gridley *v.* Globe Tobacco Co., 71 Mich. 528, 39 N. W. 754.

**51.** Buford *v.* Brown, 6 B. Mon. (Ky.) 553.

**52.** Gilbert *v.* Hunnewell, 12 Heisk. (Tenn.) 289.

**Buyer put on inquiry.**— Plaintiff, who bought mortgages from defendant, relying on representations that the land was worth three or four times the amount of the mortgages, was not bound to rescind at once on discovering that the land was not worth that much, where the facts as he discovered them still induced him to believe that the land was worth twice as much as the amount of the mortgages. Simonds *v.* Cash, 136 Mich. 558, 99 N. W. 754.

**53.** *Arkansas.*— Berman *v.* Woods, 38 Ark. 351.

*Connecticut.*— C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604.

*Illinois.*— Doane *v.* Dunham, 79 Ill. 131.

*Pennsylvania.*—Spiegelberg *v.* Karr, 24 Pa. Super. Ct. 339.

*Canada.*— Brown *v.* Wiseman, 20 Quebec Super. Ct. 304.

See 43 Cent. Dig. tit. "Sales," § 314.

**Applications of rule.**— When goods are bought as corresponding to samples, and so appear, a reasonable delay in examining is proper; but, when they are not supposed to conform to samples, great promptness is required on the part of the vendee both in examining and rescinding the sale with as little delay as the usual methods of business will permit. Farrington *v.* Smith, 77 Mich. 550, 43 N. W. 927. Where a party agrees to furnish at a fixed price a certain quantity of bags capable of holding two bushels each, and delivers bags of a smaller size, which the agent of the vendee fills, sews up, and carries to a warehouse, where they remain six or eight days, when the vendee for the first time sees them, and then notifies the vendor that they are not of the proper capacity, and on the sale day takes them back to the vendor, who refuses to receive them, the delay was not unreasonable either on the agreement or on the common count in assumpsit. Waldo *v.* Halsey, 48 N. C. 107. Where goods sold are delivered in three shipments, and each lot is inspected within ten days after its arrival, and the vendor notified of the rejection of the whole one month after the arrival of the first shipment, the delay in inspection and rejection is so great as to be held unreasonable as a matter of law. Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. The purchaser of a horse represented to be sound has the right to retain the horse a sufficient length of time fully to establish whether or not he is sound, and, if not sound, whether the unsoundness is of such a nature as to seriously affect his value for the use for which he was purchased, and if the purchaser takes no longer time than is reasonably necessary, his offer to return is seasonable. Gridley *v.* Glove Tobacco Co., 71 Mich. 528, 39 N. W. 754.

**Custom as to time of inspection.**— On a purchase of goods by a dealer from a wholesale merchant in original packages with special reference to a usage or custom not to examine the goods until opened by the dealers to sell to customers, an examination made by the purchaser upon his opening packages to sell to customers is within a reasonable time, provided the goods are opened for sale in due course of trade. Doane *v.* Dunham, 79 Ill. 131.

and the buyer is guilty of laches precluding rescission if he delays making such inspection or test for an unreasonable time.[54] A delay on the part of the buyer in exercising his right to rescind will, however, be excused if it is due to the promises of the seller that the defect would be remedied,[55] or his requests that further trial be made,[56] or other acts and declarations of the seller tending to induce delay.[57]

**c. Where Contract Gives Option to Rescind.** Where there is an option in the contract to rescind, if the time within which the option can be exercised is prescribed, such condition must be complied with,[58] and a failure to comply therewith terminates the option and the sale becomes absolute.[59] In any event the option must be exercised within a reasonable time.[60]

**9. Acts Constituting Rescission.**[61] The intention to exercise the right of rescission must be shown either by notice,[62] clearly indicating the pur-

**Specific time allowed for inspection.**— Under a contract for the sale of a machine providing that if it should not operate as recommended it would be returned after four months, the purchaser has a reasonable time after the four months within which to return the machine. Dickey *v.* Winston Cigarette Mach. Co., 117 Ga. 131, 43 S. E. 493.

**54.** *Illinois.*— McMillan *v.* De Tamble, 93 Ill. App. 65.

*Maine.*— Cutler *v.* Gilbreth, 53 Me. 176.

*Missouri.*— Tower *v.* Pauly, 51 Mo. App. 75.

*Pennsylvania.*—Spiegelberg *v.* Karr, 24 Pa. Super. Ct. 339.

*Canada.*— Brown *v.* Wiseman, 20 Quebec Super. Ct. 304.

See 43 Cent. Dig. tit. "Sales," § 314.

**Province of court and jury.**— Where linens are purchased by sample, and there is an undisputed delay of five months before an inspection to determine whether the goods were of the quality purchased, the court may say as a matter of law that a rescission of the contract of purchase cannot be allowed. Spiegelberg *v.* Karr, 24 Pa. Super. Ct. 339.

**55.** *Delaware.*— Young *v.* Argo, 1 Marv. 156, 40 Atl. 719.

*Illinois.*— Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394.

*Kentucky.*— Nichols, etc., Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136.

*North Dakota.*—Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583.

*Vermont.*— Powell *v.* Woodworth, 46 Vt. 378.

See 43 Cent. Dig. tit. "Sales." § 316.

**Failure of seller to keep promise to repair.** — Where the purchaser of a farming implement, after using it and discovering its defects, demands of the vendor that he at once repair the same, and such vendor promises to do so immediately, but fails and refuses to give any further attention to the matter, and after such failure and refusal the purchaser continues to retain and use the header during the harvest season, and for two or more months thereafter, the return or offer to return after that time comes too late. Cookingham *v.* Dusa, 41 Kan. 229, 21 Pac. 95.

**56.** Collins *v.* Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978; Humbert *v.* Larson, 99 Iowa 275, 68 N. W. 703.

**57.** Campbell Printing Press, etc., Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799; Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158; Jackson *v.* Foley, 53 N. Y. App. Div. 97, 65 N. Y. Suppl. 920; Wegenaar *v.* Dechow, 33 N. Y. App. Div. 12, 53 N. Y. Suppl. 240.

**58.** Patten *v.* Smith, 5 Conn. 196; Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854.

**Premature rescission.**— Where one purchases stock in a business corporation under an option for rescission after one year, a tender of the stock, made before the expiration of the year, is premature. Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634.

**59.** Patten *v.* Smith, 5 Conn. 196; Hotchkiss *v.* Oliver, 5 Den. (N. Y.) 314; Wilson *v.* Davis, 5 Watts & S. (Pa.) 521; Patent Title Co. *v.* Stratton, 89 Fed. 174.

**Excuse for failure.**— If the exercise of the option within the time prescribed is rendered impossible by the conduct of the other party the failure is excused. Pierce *v.* Lukens, 144 Cal. 397, 77 Pac. 996.

**60.** *Delaware.*—Coverdale *v.* Rickards, (1907) 69 Atl. 1065.

*Illinois.*— Pennell *v.* McAfferty, 84 Ill. 364.

*Michigan.*— Singer Mfg. Co. *v.* Cullaton, 90 Mich. 639, 51 N. W. 687.

*Minnesota.*— Paulson *v.* Osborne, 35 Minn. 90, 27 N. W. 203.

*Nebraska.*— Clark *v.* Deering, 29 Nebr. 293, 45 N. W. 456; Seiberling *v.* Brauer, 24 Nebr. 510, 39 N. W. 591.

**Question for jury.**— What is a reasonable time to exercise the option to rescind is a question for the jury. Warder *v.* Bowen, 31 Minn. 335, 17 N. W. 943. Where the facts on the issue whether a buyer, under an agreement authorizing the return of the goods bought on their being unsatisfactory, offered to return the goods within a reasonable time, were in dispute, the question was for the jury, to be determined by the nature of the articles sold, the usual course of the particular business, and the other circumstances. Coverdale *v.* Rickards, (Del. 1907) 69 Atl. 1065.

**61.** Under option in contract see *supra*, IV, B, 2, a.

**62.** McFadden *v.* Henderson, 128 Ala. 221,

pose,[63] or by other acts and conduct evincing a purpose to abandon the contract, such as a refusal to perform,[64] the bringing of an action to rescind,[65] a retaking of the goods by action,[66] or otherwise,[67] or an acceptance of them when tendered by the buyer.[68] A resale of the goods by the seller will also be regarded as a rescis-

29 So. 640; Larson *v.* Minneapolis Threshing Mach. Co., 92 Minn. 62, 99 N. W 623; McCormick Harvesting Mach. Co. *v.* Knoll, 57 Nebr. 790, 78 N. W. 394; Jones *v.* Wessel, 40 Nebr. 116, 58 N. W. 723; McClure *v.* Williams, 5 Sneed (Tenn.) 718.

**When unnecessary.**— If notice would be futile, it is unnecessary (Triplet *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975), as where the conduct of the other party has been such as to indicate that it was his intention to abandon the contract (Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742).

**63.** *Alabama.*— Bennett *v.* Fail, 26 Ala. 605.

*Colorado.*— A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545, 31 Pac. 945.

*Illinois.*— Weill *v.* American Metal Co., 182 Ill. 128, 54 N. E. 1050 [*affirming* 80 Ill. App. 406].

*New York.*—Bridge *v.* Penniman, 51 N. Y. Super. Ct. 183 [*affirmed* in 105 N. Y. 642, 12 N. E. 19]; Liftchild *v.* Johnson, 1 Sweeny 459.

*Ohio.*— Seeds *v.* Simpson, 16 Ohio St. 321.

See 43 Cent. Dig. tit. "Sales," §§ 276, 319.

**Complaint insufficient.**— A mere complaint that the property is defective is not sufficient as a notice of rescission. McDermott *v.* Cannon, 14 La. Ann. 313; Borgfeldt *v.* Wood, 92 Hun (N. Y.) 260, 36 N. Y. Suppl. 612, 3 N. Y. Annot. Cas. 46; Spiegelberg *v.* Karr, 24 Pa Super. Ct. 339; Churchill *v.* Price, 44 Wis. 540.

**Countermanding order.**—Countermanding an order for goods is in effect a notice of rescission (Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117), but only if given to the principal (Smith *v.* Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735); and notice to a broker who is in effect the agent of the party giving the notice is not sufficient (Ghirardelli *v.* McDermott, 22 Cal. 539).

**64.** *Illinois.*— Holbrook *v.* Electric Appliance Co., 90 Ill. App. 86.

*Massachusetts.*— King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

*New York.*—Riendeau *v.* Bullock, 20 N. Y. Suppl. 976 [*modified* in 147 N. Y. 269, 41 N. E. 561].

*United States.*— Florence Min. Co. *v.* Brown, 124 U. S. 385, 8 S. Ct. 531, 31 L. ed. 424.

*Canada.*—Bingham *v.* Mulholland, 25 U. C. C. P. 210.

**65.** Hamilton Brown Shoe Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913.

**66.** *Connecticut.*— Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547, 48 Atl. 425.

*Delaware.*— Fait, etc., Co. *v.* Truxton, 1 Pennew, 24, 39 Atl. 457.

*Indiana.*— Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Mahoney *v.* Gano, 2 Ind. App. 107, 27 N. E. 315.

*New York.*— Morris *v.* Rexford, 18 N. Y. 552; Thompson *v.* Fuller, 5 Silv. Sup. 41, 8 N. Y. Suppl. 62, 16 N. Y. Suppl. 486; Wallace *v.* O'Gorman, 3 Silv. Sup. 441, 6 N. Y. Suppl. 890 [*affirmed* in 126 N. Y. 638, 27 N. E. 411]; Crossman *v.* Universal Rubber Co., 57 N. Y. Super. Ct. 459, 8 N. Y. Suppl. 539 [*reversed* on other grounds in 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91].

*Pennsylvania.*— Mann *v.* Salsberg, 17 Pa. Super. Ct. 280.

*South Carolina.*— Bacon *v.* Sondley, 3 Strobh. 542, 51 Am. Dec. 646.

*Texas.*— Heinze *v.* Marx, 4 Tex. Civ. App. 599, 23 S. W. 704.

**Contra.**— Stoeser *v.* Springer, 7 Ont. App. 497, holding that bringing replevin for the property is not notice of rescission.

**Judgment for defendant.**— The defeat of the seller in replevin is not a rescission of the sale which will bar an action for the price. Ames *v.* Moir, 130 Ill. 582, 22 N. E. 535 [*affirming* 27 Ill. App. 88].

**Attachment.**— An attachment in aid of an action for the price is not such an action for the recovery of the goods as will constitute an election to rescind. Hollis *v.* Friedman. 112 Ga. 699, 37 S. E. 971.

**67.** *Iowa.*— Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434, stoppage by seller of goods *in transitu* and resale.

*New York.*— Sloane *v.* Van Wyck, 4 Abb. Dec. 250, 5 Transcr. App. 98.

*South Dakota.*— Greder *v.* Stahl, (1908) 115 N. W. 1129.

*Texas.*— Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

*Vermont.*— Martin *v.* Eames, 26 Vt. 476.

*Wisconsin.*— Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

See 43 Cent. Dig. tit. "Sales," § 278.

But see Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479, holding that the detention, by vendors, of goods sold, on the insolvency and assignment for benefit of creditors by the vendees, does not rescind the contract of sale.

**Wrongful retaking.**— A wrongful retaking amounting to a conversion of the goods does not operate as a rescission. Baumann *v.* Moseley, 73 Hun (N. Y.) 40, 25 N. Y. Suppl. 882 [*affirmed* in 145 N. Y. 620, 40 N. E. 163].

**Demand not rescission.**— A mere demand for the return of the goods does not amount to a rescission. Mottram *v.* Heyer, 5 Den. (N. Y.) 629; Hathaway *v.* O'Gorman Co., 26 R. I. 476, 59 Atl. 397.

**68.** Beal *v.* Minneapolis Threshing Mach. Co., 84 Mo. App. 539; Grouse *v.* Wolf, 4 Misc. (N. Y.) 535, 24 N. Y. Suppl. 703; Collins *v.* Brooks, 20 How. Pr. (N. Y.) 327; Healy *v.* Utly, 1 Cow. (N. Y.) 345; Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520.

sion.[69] On the part of the buyer, a refusal to accept the goods when tendered for delivery,[70] unless retracted before the seller has acted thereon,[71] amounts to a rescission.[72] So too a return or tender of the property by the buyer operates as a rescission [73] if made for that purpose.[74] But a mere offer to rescind by either party unaccepted cannot have effect as a rescission,[75] unless there is an absolute right of rescission.[76] In any event acts relied on as constituting a rescission of the contract must have been performed by the party or his authorized agent.[77] Whether the acts of the parties have been such as to amount to a rescission is for the jury.[78]

**10. Action For Rescission — a. In General.** Rescission of the contract of sale by action is properly within the jurisdiction of equity,[79] and will not as a rule be granted in an action on the contract which should be treated as void.[80]

**Denial of grounds of rescission.**— But an acceptance of the goods tendered if accompanied by an absolute denial of the grounds of rescission and a tender back after examination is not a rescission. Schultz *v.* Bradley, 4 Daly (N. Y.) 29 [*reversed* on other grounds in 57 N. Y. 646].

**Possession under foreclosure.**— Taking possession for the purpose of foreclosing a mortgage on the goods is not a rescission. Avery Planter Co. *v.* Peck, 86 Minn. 40, 89 N. W. 1123.

69. *Iowa.*— Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434.

*New York.*— Fancher *v.* Goodman, 29 Barb. 315; Grouse *v.* Wolf, 4 Misc. 535, 24 N. Y. Suppl. 763.

*Pennsylvania.*— Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456, 30 Atl. 212.

*Tennessee.*— McClure *v.* Williams, 5 Sneed 718.

*Wisconsin.*— Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

*England.*— Gomery *v.* Bond, 3 M. & S. 378.

*Canada.*— White *v.* Smith, 28 Nova Scotia 5.

See 43 Cent. Dig. tit. "Sales," § 278.

**Limitations of rule.**— It does not amount to a rescission when the resale is in consequence of the buyer's refusal to carry out his contract. Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406; Ashbrook *v.* Hite, 9 Ohio St. 357, 75 Am. Dec. 468); or is made by the seller as agent of the buyer to protect the interests of the parties (Grist *v.* Williams, 111 N. C. 53, 15 S. E. 889, 32 Am. St. Rep. 782; Hurlburt *v.* Simpson, 25 N. C. 233).

**Resale by purchaser.**— A contract for the sale of oil, to be delivered on ten days' notice by the purchaser, is not rescinded by a subsequent sale of the oil by the purchaser through brokers at a price less than that of the previous contract, at which the former seller became the purchaser, the oil not having passed out of his actual possession. Warden *v.* Marshall, 99 Mass. 305.

70. Alden *v.* Hart, 161 Mass. 576, 37 N. E. 742; Ackerman *v.* Voorhies, 33 N. Y. Super. Ct. 487; Pictou Bank *v.* Harvey, 14 Can. Sup. Ct. 617, 7 Can. L. T. Occ. Notes 130; Thompson *v.* Smith, 21 U. C. C. P. 1; Don *v.* Law, 12 U. C. C. P. 460. But see Midland R. Co. *v.* Ontario Rolling Mills, 10 Ont. App. 677.

71. Greaner *v.* Mullen, 15 Pa. St. 200.

72. **Requesting delay in shipment** of perishable goods justifies the seller in regarding the contract as rescinded by the buyer. Bigelow *v.* Chapman, 43 Ill. App. 561.

73. *Iowa.*— Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

*Minnesota.*— Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

*Missouri.*— Boeker *v.* Crescent Belting, etc., Co., 101 Mo. App. 429, 74 S. W. 385.

*New Hampshire.*— Spaulding *v.* Hanscom, 67 N. H. 401, 32 Atl. 154.

*New York.*— Cushman *v.* De Mallie, 46 N. Y. App. Div. 379, 61 N. Y. Suppl. 878.

*Vermont.*— Gates *v.* Bliss, 43 Vt. 299.

See 43 Cent. Dig. tit. "Sales," § 318.

*Compare* Fuller *v.* Chenault, 157 Ala. 46, 47 So. 197.

74. A return of the goods for the purpose of having them replaced by better goods corresponding to those contracted for does not operate as a rescission. Mason *v.* Smith, 130 N. Y. 474, 29 N. E. 749 [*affirming* 5 Silv. Sup. 346, 8 N. Y. Suppl. 301].

75. Keystone Mfg. Co. *v.* Hampton, 141 Ala. 415, 37 So. 552; Harris *v.* Rowland, 23 Ala. 644; Graham *v.* Bardin, 1 Patt. & H. (Va.) 206.

76. Morrill *v.* Aden, 19 Vt. 505.

77. Creasy *v.* Gray, 88 Mo. App. 454; St. Paul Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499.

78. Claflin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721.

79. Scruggs *v.* Driver, 31 Ala. 274; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Bohannon *v.* Kerr, 1 B. Mon. (Ky.) 87; Hardwick *v.* Forbes, 1 Bibb (Ky.) 212; Baltimore Sugar Refining Co. *v.* Campbell, etc., Co., 83 Md. 36, 34 Atl. 369; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463.

**In Louisiana** the question of fraud may be inquired into collaterally in proceedings commenced by seizure. Kirkland *v.* New Orleans Gaslight, etc., Co., 1 La. Ann. 299.

80. Carter *v.* Walker, 2 Rich. (S. C.) 40.

**Form of action.**— An action by the buyer of a warranted machine, brought, after he had returned it, against the vendor and his guarantor, alleging its return and claiming recovery of a greater amount than the selling

The purchaser may, however, in an action by the seller to enforce his lien obtain a rescission by cross bill.[81] But on the failure of his action to rescind the purchaser cannot change his action to one for damages or diminution of price.[82] It is no defense to the action that the ground of rescission was removed after the suit was brought;[83] and in an action by the buyer of a business his incompetency to manage it is not a defense.[84]

**b. Pleading and Evidence.** In an action to rescind the party seeking rescission must plead,[85] and prove the grounds of rescission.[86] If the purchaser brings suit to rescind after a great lapse of time the question of his right is not one of waiver, but of election, and therefore defendant need not plead that plaintiff waived his right to rescind.[87] Fraud will not be presumed,[88] but the proof need not be direct and positive.[89] The fraud may be shown by circumstances [90] and declarations of the parties,[91] and it is not necessary that the proof should show fraud beyond a reasonable doubt.[92] If the fraud is based on misrepresentations it must be shown what the false statement was; [93] and when false statements as to financial condition are relied on, the falsity of the statements may be shown by judicial records,[94] or by statements made to a commercial agency,[95] if it is also shown that the buyer made such statements.[96]

**c. Trial and Judgment.** The rules applicable in trials generally [97] are appli-

price, is one for rescission of the contract, and not merely for damages. Clarke *v.* McGetchie, 49 Iowa 437.

Sequestration.— The seller, suing for a dissolution of the sale, may, on proper affidavit, have the property sequestered. Daugherty *v.* Vance, 30 La. Ann. 1246.

81. Spoor *v.* Tilton, 97 Va. 379, 33 S. E. 609.

82. Peterson *v.* Burn, 3 La. Ann. 655; Ledoux *v.* Armor, 4 Rob. (La.) 381.

83. Stevenson *v.* Marble, 84 Fed. 23.

84. Jackson *v.* Foley, 53 N. Y. App. Div. 97, 65 N. Y. Suppl. 920.

85. Houghtaling *v.* Hills, 59 Iowa 287, 13 N. W. 305; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; Dorman *v.* Weakley, (Tenn. Ch. App.) 39 S. W. 890.

Sufficiency of pleading.— A complaint setting out the facts constituting the grounds for rescission is sufficient, although it does not specifically demand rescission. Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

Issues and proof.— Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor. Chadron First Nat. Bank *v.* McKinney, 47 Nebr. 149, 66 N. W. 280. In an action to rescind a contract for the sale of diseased hogs represented to be sound, plaintiff was not bound to prove that the representations were known by defendant to be false, and were made with intent to deceive, although the petition contained such allegations, the facts being non-essential. Carter *v.* Cole, (Tex. Civ. App. 1897) 42 S. W. 369.

86. *Delaware.*—Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Kansas.*— Flohr *v.* Schwartzberg, 9 Kan. App. 215, 59 Pac. 666.

*Michigan.*— Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373.

*New Jersey.*— Garrison *v.* Technic Electrical Works, 63 N. J. Eq. 806, 52 Atl. 1131 [*affirming* 59 N. J. Eq. 440, 45 Atl. 612].

*New York.*— Hotchkins *v.* Martin, 11 N. Y. Suppl. 806; Hotchkins *v.* Malone Third Nat. Bank, 11 N. Y. Suppl. 220.

*Texas.*— Cole *v.* Carter, 22 Tex. Civ. App. 457, 54 S. W. 914.

*United States.*— Hager *v.* Thompson, 1 Black 80, 17 L. ed. 41.

Shifting burden of proof.— When the vendee has proven that there have been false representations made, the burden shifts, and the vendor is called upon to show that they did not influence the purchase. Garrison *v.* Technic Electrical Works, 63 N. J. Eq. 806, 52 Atl. 1131 [*affirming* 59 N. J. Eq. 440, 45 Atl. 612].

87. Mattauch *v.* Riddell Automobile Co., 138 Iowa 22, 115 N. W. 509.

88. Fish *v.* Cleland, 33 Ill. 238.

89. Sheridan *v.* Pease, 93 Ill. App. 219.

90. Sheridan *v.* Pease, 93 Ill. App. 219; Cecile *v.* St. Denis, 14 La. 184; Johnson *v.* Groff, 22 Pa. Super. Ct. 85.

91. Burroughs *v.* Nettles, 7 La. 113; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

92. Sparks *v.* Dawson, 47 Tex. 138.

Number of witnesses.— In an action to rescind for defects, it is sufficient if the defects are proved by one witness. Armor *v.* Huie, 14 La. 346.

93. Hoyle *v.* Southern Saw Works, 105 Ga. 123, 31 S. E. 137.

94. Cowen *v.* Bloomberg, 69 N. J. L. 462, 55 Atl. 36; Whiting Mfg. Co. *v.* Fourth St. Nat. Bank, 15 Pa. Super. Ct. 419.

95. Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

96. Meyers *v.* Bloom, 20 Tex. Civ. App. 554, 50 S. W. 217.

97. See TRIAL.

cable in actions to rescind.[98] The judgment in the action to rescind should correspond to the demand in the complaint,[99] and must correspond to the findings.[1] If the property has been disposed of by the buyer a judgment for the value or price is proper, and it need not be in the alternative.[2] Otherwise the judgment should order a return of the property, and if it does not a new trial should be granted.[3]

**11. Operation and Effect of Rescission.** A rescission, whether by agreement or *in invitum*, terminates all the rights of the parties under the original contract,[4] and they cannot be revived except by the assent of both parties.[5] The title to the goods is revested in the seller,[6] and he cannot maintain an action for the

98. **Instructions.**— In actions to rescind a sale an instruction predicated on the assumption that plaintiff did not rely on the false representations of defendant is properly refused where there is no evidence on which to base such assumption. Richardson-Roberts-Byrne Dry-Goods Co. *v.* Goodkind, 22 Mont. 462, 56 Pac. 1079; Crutcher *v.* Schick, 10 Tex. Civ. App. 676, 32 S. W. 75. And since the sufficiency of the evidence is for the jury to determine an instruction on the weight of evidence is erroneous. Willis *v.* Strickland, (Tex. Civ. App. 1899) 50 S. W. 159.

**Questions of law.**— Where there is no conflict in the evidence as to the facts, and it appears that the time which has elapsed between a knowledge by the buyer of the defects in the article warranted and the time of the attempted rescission is so great that under no circumstances appearing in the evidence the jury will be warranted in holding a rescission within a reasonable time, the court may decide the question as a matter of law and deny the purchaser's right to rescind. Mattauch *v.* Riddell Automobile Co., 138 Iowa 22, 115 N. W. 509.

**Directing verdict.**— Where the right to rescind is based on the buyer's false statements as to his financial condition it is error to direct a verdict for plaintiff because the financial statement was false as the question to be determined is whether the statement showed the buyer to be solvent when in fact he was insolvent. Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217.

99. Berkey *v.* Lefebure, 125 Iowa 76, 99 N. W. 710.

**Form.**— Defendants, owners of a second mortgage which was without consideration, assigned it to J under an agreement that he should sell it and pay them one thousand dollars. By means of fraudulent representations, J induced plaintiff to sell him clothing, subject to an examination of the title to the mortgaged land, which was made, on the request and at the expense of J, by a title company. Defendants waived the payment of the one thousand dollars by J, and agreed to accept a bill of sale of the clothing as security therefor, and also as security for the sum of five hundred dollars to be advanced by them in payment of interest due on the first mortgage, and of two hundred and fifty dollars to be advanced by them for examination of the title and for charges on the goods. It was held that if defendants were injured by the act of J, that was no reason why plaintiff, in enforcing his rights, should pay the sum which J agreed to pay them for the second mortgage and the seven hundred and fifty dollars advanced by them, and there was no objection to the form of a decree failing to provide for such payment by plaintiff. Light *v.* Jacobs, 183 Mass. 206, 66 N. E. 799.

**Costs.**— In an action by a vendee to rescind the contract of sale for fraud, the court may, in its order that the sale and conveyances be set aside, and that an accounting between the parties be had before a referee, also adjudge that the vendor pay the costs so far as accrued, although no final judgment has been rendered. Stoppleman *v.* Paetz, 75 Wis. 510, 44 N. W. 834.

1. Schelling *v.* Bischoff, 59 N. Y. Super. Ct. 562, 13 N. Y. Suppl. 600.

2. McHatton *v.* Rhodes, 143 Cal. 275, 76 Pac. 1036, 101 Am. St. Rep. 125; Crossen *v.* Murphy, 30 Oreg. 114, 49 Pac. 858. Where the consideration for the sale of a piano was two hundred dollars in money and an organ, a judgment for the vendee in an action for the rescission of the contract, for the amount of the consideration, although it operates to leave the seller in possession of both the organ and piano, is not a contravention of the rules that a contract cannot be partly affirmed and partly rescinded. Bell *v.* Anderson, 74 Wis. 638, 43 N. W. 666.

3. Harris *v.* Daly, 121 Ga. 511, 49 S. E. 609.

4. *Alabama.*— Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63.

*Illinois.*— Follansbee *v.* Adams, 86 Ill. 13; Foster *v.* Smith, 56 Ill. 209.

*Maryland.*— Mitchell *v.* Wedderburn, 68 Md. 139, 11 Atl. 760.

*Michigan.*— American White Bronze Co. *v.* Gillette, 88 Mich. 231, 50 N. W. 136, 26 Am. St. Rep. 286; Todd *v.* Everett, 78 Mich. 595, 44 N. W. 583.

*Nebraska.*— Backes *v.* Schlick, 82 Nebr. 289, 117 N. W. 707.

*Wisconsin.*— Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

See 43 Cent. Dig. tit. "Sales," § 325.

5. Kinney *v.* Kiernan, 49 N. Y. 164.

6. *Alabama.*— Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63.

*Illinois.*— Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500.

price.[7] But if the property has been sold by the purchaser, the seller is entitled to the proceeds.[8] If, however, the sale is fully executed and there is no pretense of fraud title is not revested by rescission but only by resale.[9] On rescission by the seller for the default of the buyer, the former is entitled to compensation for the use of the property,[10] and for its depreciation due to such use,[11] or to the neglect of the buyer;[12] but he is not entitled to compensation for depreciation not due to either of such causes.[13] The purchaser is entitled to a return of the purchase-price[14] with interest.[15] But he cannot recover damages when he is

*Kentucky.*— Duncan *v.* Baird, 8 Dana 101.

*Louisiana.*—Nixon *v.* Bozeman, 11 La. Ann. 750; Derepas *v.* Shallus, 15 La. 371.

*New York.*— Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Suppl. 235.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40.

*Vermont.*— Martin *v.* Eames, 26 Vt. 476.

*England.*— Read *v.* Hutchinson, 3 Campb. 352.

**Attempt to rescind.**— A mere attempt to rescind not consummated does not invest the title in the seller. American Lumber, etc., Co. *v.* Taylor, 137 Fed. 321, 70 C. C. A. 21.

**Refusal to receive goods.**— Where the buyer having the right to rescind because the goods are not in accordance with the contract tenders them to the seller who refuses to receive them the title remains in the buyer. Damon *v.* Nelson, 17 Ill. App. 72.

7. Foster *v.* Smith, 56 Ill. 209; Jacquin *v.* Warren, 40 Ill. 459; Kinney *v.* Kiernan, 49 N. Y. 164; Hart *v.* Haight, 10 N. Y. Suppl. 798; Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992; Hewison *v.* Ricketts, 63 L. J. Q. B. 711, 71 L. T. Rep. N. S. 191, 10 Reports 558.

8. Avila *v.* Lockwood, 98 N. Y. 32.

9. Hornberger *v.* Feder, 30 Misc. (N. Y.) 121, 61 N. Y. Suppl. 865.

10. Dawson Mfg. Co. *v.* Brunswick, etc., R. Co., 51 Ga. 136; Nichols, etc., Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136; King *v.* Price, 2 Chit. 416, 18 E. C. L. 714.

**Use of saloon license.**— Where a saloon is sold, including the vendor's license, the vendor is not entitled, on the rescission of the contract, after the vendees had taken possession of the saloon and operated it for two months, to any damages for the "use of the license," where it does not appear that it was transferred in the manner required by Gen. Laws, c. 102, § 10. Fleming *v.* Hanley, 21 R. I. 141, 42 Atl. 520.

**On rescission by the buyer** and recovery of the purchase-money he cannot set off as against the seller's claim to compensation for use of the property the use of the purchase-money paid. Murray *v.* Mann, 2 Exch. 539, 12 Jur. 634, 17 L. J. Exch. 256.

11. Nichols Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136.

12. Bourgeat *v.* Smith, 16 La. 467; Coon *v.* Reed, 1 Hilt. (N. Y.) 511.

13. Bigger *v.* Bovard, 20 Kan. 204; Hurd *v.* Birch, 11 N. Y. St. 870.

14. *Colorado.*— Falke *v.* Brule, 17 Colo. App. 499, 68 Pac. 1054.

*Indiana.*— Fruits *v.* Pearson, 25 Ind. App. 235, 57 N. E. 158.

*Iowa.*— Redman *v.* Malvin, 23 Iowa 296.

*Massachusetts.*— Hallwood Cash Register Co. *v.* Lafkin, 179 Mass. 143, 60 N. E. 473; Attleborough Nat. Bank *v.* Rogers, 125 Mass. 339.

*Missouri.*— White *v.* Salisbury, 33 Mo. 150; Spangler *v.* Kite, 47 Mo. App. 230.

*New York.*— Loader *v.* Brooklyn Chair Co., 64 N. Y. App. Div. 615, 72 N. Y. Suppl. 297; Higgins *v.* Crouse, 63 Hun 134, 17 N. Y. Suppl. 696; Raymond *v.* Bearnard, 12 Johns. 274, 7 Am. Dec. 317.

*Pennsylvania.*— Lare *v.* Westmoreland Specialty Co., 155 Pa. St. 33, 25 Atl. 812; Terry *v.* Wenderoth, 147 Pa. St. 519, 23 Atl. 763; Laubach *v.* Laubach, 73 Pa. St. 387.

*Tennessee.*— Williams *v.* Hurt, 2 Humphr. 68.

See 43 Cent. Dig. tit. "Sales," § 327.

**Where a seller consents to the rescission of the contract of sale,** the law raises an implied agreement on his part to refund the price paid. Greder *v.* Stahl, (S. D. 1908) 115 N. W. 1129.

**Evidence.**— In an action to recover money paid on rescission of a sale for fraud, evidence as to the market value of the goods at the time and place of delivery was immaterial. Weil *v.* Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243.

**Assessments on corporate stock.**— Where one procured a sale of stock by false representations as to its value, a purchaser, on rescission of the sale, is entitled to reimbursement for the price, and also for an assessment paid on such stock. Keen *v.* James, 39 N. J. Eq. 527, 51 Am. Rep. 29.

**Failure to return note.**— Where the sale of a chattel on credit is rescinded by the seller, the fact that the latter fails to deliver the vendee's note on the return of the chattel does not make him guilty of a conversion of the chattel, the rescission of the sale rendering the note valueless. Volking *v.* Huckabay, 67 Miss. 206, 7 So. 325.

**Default of buyer.**— Where, under a contract for the sale of goods deliverable on future days at a fixed price, payable at specified times, the purchaser fails to pay a part of the price at time appointed for its payment, the vendor may rescind the contract, and is not liable to pay back any part of the money already received, even though it exceed what the goods already delivered at the agreed price would amount to. Dwinel *v.* Howard, 30 Me. 258.

15. Moreau *v.* Chauvin, 8 Rob. (La.) 157; Donavan *v.* Mooney, 5 La. 57; Higgins *v.* Crouse, 63 Hun (N. Y.) 134, 17 N. Y. Suppl. 696; Lare *v.* Westmoreland Specialty Co., 155 Pa. St. 33, 25 Atl. 812. But see Dowlin

himself in the wrong;[16] nor can he recover damages for a breach of the contract of sale[17] or for freight paid.[18] The buyer is entitled to compensation for the expense of keeping the property for the seller after a tender thereof,[19] but not for an indefinite time.[20] If the property tendered is not accepted the buyer should resell on the seller's account,[21] and in such case he is responsible only for the proceeds,[22] any loss falling on the vendor.[23]

## V. PERFORMANCE OF CONTRACT.[24]

**A. In General — 1. Title of Seller — a. In General.** It is essential to the performance of the contract so as to render the buyer liable for the price that the seller should transfer to him a valid title to the goods.[25] It does not, however, affect the sufficiency of the performance that the seller is not the actual owner or does not convey his own title,[26] or that he is not in possession.[27] The obligation of the seller is fulfilled if he conveys a good marketable title,[28] and if he is in a position to transfer such a title the buyer cannot avoid liability by a refusal to accept in the absence of other objection.[29]

**b. Defects in Title and Waiver Thereof.** The existence of a valid lien upon

*v.* New Orleans, etc., R. Co., 5 Rob. (La.) 5, where it was held that one who had been allowed a certain discount on paying cash was not entitled to interest at the same rate on rescission.

16. Fancher *v.* Goodman, 29 Barb. (N. Y.) 315.

17. Kansas Refrigerating Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943 (warranty of quality); McCormick Harvesting Mach. Co. *v.* Brown, 5 Nebr. (Unoff.) 354, 98 N. W. 697; Hunt County Oil Co. *v.* Scott, 28 Tex. Civ. App. 213, 67 S. W. 451.

18. Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832.

19. Carter *v.* Walker, 2 Rich. (S. C.) 40.

20. Dawson *v.* Vickery, 150 Ill. 398, 37 N. E. 910; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

**Excuse for delay.**— When the vendee in an executory contract of sale has rejected and returned the goods, but the vendor has refused to receive them, in an action by the vendor for the price, evidence of attempts to induce the vendor to arbitrate is competent on behalf of the vendee to explain a delay in selling the goods to save loss. Rubin *v.* Sturtevant, 80 Fed. 930, 26 C. C. A. 259.

**Question for jury.**— Whether a buyer, after rejecting a shipment of goods, waited an unreasonable time and incurred unreasonable expense before selling them for the seller's account is for the jury. Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

21. Hitchcock *v.* Griffin, etc., Co., 99 Mich. 447, 58 N. W. 373, 41 Am. St. Rep. 624; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703; Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340.

22. Rubin *v.* Sturtevant, 80 Fed. 930, 26 C. C. A. 259.

23. Bacon *v.* Cobb, 45 Ill. 47.

24. **Agreement to rescind** see *supra*, IV, B, 2.

**Breach of contract as ground for rescission** see *supra*, IV, B, 3, c.

25. *Georgia.*—Northington-Munger-Pratt Co. *v.* Farmers' Gin, etc., Co., 119 Ga. 851, 47 S. E. 200; Phinizy *v.* Few, 19 Ga. 66.

*Illinois.*— McPherson *v.* Hall, 44 Ill. 264; Siegel *v.* Brooke, 25 Ill. App. 207. See also Matson *v.* Repley, 98 Ill. App. 479 [*affirmed* in 196 Ill. 269, 63 N. E. 677].

*Indiana.*— Marshall *v.* Duke, 51 Ind. 62.

*Louisiana.*—Alexander *v.* Gusman, 16 La. Ann. 251.

*New York.*— Croninger *v.* Crocker, 62 N. Y. 151.

*Pennsylvania.*— Miller *v.* Westerhoff, 14 Pa. Super. Ct. 604, 18 Lanc. L. Rev. 17.

*Wisconsin.*— Parish *v.* McPhee, 102 Wis. 241, 78 N. W. 421.

**Articles covered by patent.**— The fact that certain goods bought by defendant, unknown to him, were covered by a patent constituted such a defect of title as warranted him in refusing to accept or pay for them. Siegel *v.* Brooke, 25 Ill. App. 207.

**Transfer of qualified interest.**— It may be shown by the facts and circumstances of the sale that the seller did not intend to assert ownership therein, but to transfer only the qualified interest which he might have therein. Meyer *v.* Mehrhoff, 19 Mo. App. 682. And see Krumbhaar *v.* Birch, 83 Pa. St. 426.

26. Bell *v.* Offutt, 10 Bush (Ky.) 632; Boinest *v.* Leignez, 2 Rich. (S. C.) 464.

27. Reynolds *v.* Fitzpatrick, 23 Mont. 52, 57 Pac. 452.

28. Boinest *v.* Leignez, 2 Rich. (S. C.) 464; Deering Harvester Co. *v.* Kelly, 103 Fed. 261, 43 C. C. A. 225.

**Stone from public land.**— One who takes stone from public land has a good marketable title thereto. Sullivan *v.* Schultz, 22 Mont. 541, 57 Pac. 279.

29. Bell *v.* Offutt, 10 Bush (Ky.) 632; Johnson *v.* Rayner, 25 N. Y. App. Div. 598, 49 N. Y. Suppl. 959, 27 N. Y. Civ. Proc. 102; Morris *v.* Grant, 34 Hun (N. Y.) 377. But see Alexander *v.* Gusman, 16 La. Ann. 251.

the property is such a defect in the title as will avoid the buyer's liability,[30] and it is immaterial that the person holding the lien is willing to waive it.[31] But the mere fact that there is a lien of record will not have that result if it is not in fact an enforceable lien.[32] So also the successful interposition of an adverse claim to the property is a defect in title relieving the buyer from liability;[33] but even when the seller's title is defective if he has acted in good faith the buyer cannot maintain an action as for failure to perform, or resist payment of the purchase-money so long as he is undisturbed in his possession.[34] Knowledge on the part of the buyer of a defect in the seller's title before the sale estops him from raising that objection to the sufficiency of the performance.[35]

**c. Subsequently Acquired Title.** Where the seller has no title at the time of the sale but subsequently acquires title, the title so acquired inures to the benefit of the buyer.[36]

**2. Bills of Sale[37] — a. In General.** Since title to personal property may in the absence of statute providing otherwise pass by delivery,[38] the execution and

**30.** Chenault *v.* Bush, 84 Ky. 528, 2 S. W. 160, 8 Ky. L. Rep. 490; Saxton *v.* Krein, 107 Mich. 62, 64 N. W. 868; Miller *v.* Westerhoff, 14 Pa. Super. Ct. 604, 18 Lanc. L. Rev. 17; Kelly *v.* Berry, 39 Wis. 669.

**Foreclosure of mortgage.**— Where defendant purchased negroes which were afterward seized and sold under a mortgage on them given by the former owner, and defendant repurchased them under the mortgage sale, he was not bound to pay the former owner any part of the purchase-money, but only interest or hire during the time he had the negroes in possession before the sale for foreclosure. Alexander *v.* Maxwell, Rich. Eq. Cas. (S. C.) 302.

**Pledged stock.**— That stock sold is pledged is not necessarily a defect in title. Ortmann *v.* Fletcher, 117 Mich. 501, 76 N. W. 63.

**Waiver by seller of objections based on lien.**— Where, at the time of the seller's offering to deliver property to the buyer according to contract, there are adverse liens upon the property, but the seller furnishes security against them to the buyer's satisfaction, and the latter refuses to accept the property on the sole ground that it is of defective quality, this is a waiver of the objection founded on the existence of the liens. Kelly *v.* Berry, 39 Wis. 669.

**31.** Dunham *v.* Pettee, 4 E. D. Smith 500 [*reversed* on other grounds in 8 N. Y. 508].

**32.** Burns *v.* Munger, 45 Hun (N. Y.) 75.

**Validity of lien.**— Where the bill of sale of a stock of goods to certain creditors, in satisfaction of their claims, stipulated that the sale and settlement should be void if the goods "be replevied or attached or levied upon by other creditors . . . or said sale to be declared void by a jury or the courts," the two clauses should be read as meaning substantially the same thing, and the sale did not become void merely because an attachment or levy was made, but only when judicially determined to be valid as against such creditors' title. Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271 [*affirming* 21 Ill. App. 464].

**33.** Phinizy *v.* Few, 19 Ga. 66; Marshall *v.* Duke, 51 Ind. 62.

**Failure of buyer to contest claim.**— Where a suit is brought to recover a slave of a vendee, who refers the matter in controversy to arbitrators without the authority or consent of his vendor, who sold the slave *bona fide*, and when he might have cast plaintiff in an action at law, the vendee has no remedy in equity against the vendor, if he loses the slave by the award. Dust *v.* Conrod, 5 Munf. (Va.) 411.

**Disclaimer of adverse title.**— Any interest in seed shipped by plaintiffs to defendant being disclaimed by O, title of O cannot be urged in avoidance of defendant's liability on his promise to pay plaintiffs for seed shipped by them to him. National Cotton-Oil Co. *v.* Taylor, (Tex. Civ. App. 1898) 45 S. W. 478.

**34.** *Alabama.*— McKenzie *v.* Wimberly, 86 Ala. 195, 5 So. 468; Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.

*Arkansas.*— Sumner *v.* Gray, 4 Ark. 467, 38 Am. Dec. 39.

*New Hampshire.*— Buss *v.* Putney, 38 N. H. 44.

*Pennsylvania.*—Krumbhaar *v.* Birch, 83 Pa. St. 426.

*Vermont.*— Clayton *v.* Scott, 43 Vt. 553.

**35.** Pipes *v.* Shiff, 10 La. Ann. 301; Millcreek Tp. *v.* Brighton Stock Yards Co., 27 Ohio St. 435; Fry *v.* Lucas, 29 Pa. St. 356. But see Forbes *v.* Drumm, 15 La. Ann. 707.

**Notice to buyer.**— Where reference to a deed to the vendor of slaves is made in an act of sale of the slaves, so as to become part of the act and place it within the vendee's knowledge, the vendee is charged with notice of any matters in his vendor's title. Carian *v.* Rieffel, 2 Mart. N. S. (La.) 619.

**36.** Davis *v.* Tingle, 8 B. Mon. (Ky.) 539; Frazer *v.* Hilliard, 2 Strobh. (S. C.) 309; Sherman *v.* Champlain Transp. Co., 31 Vt. 162. But see Scranton *v.* Clark, 39 N. Y. 220, 100 Am. Dec. 430. And *compare* Head *v.* Goodwin, 37 Me. 181.

**37.** Of slaves see Slaves,

**Purchase of cattle without** see Animals, 2 Cyc. 436.

**38.** See *infra*, VI, A, 4, b.

delivery of a bill of sale is not, unless required by agreement, necessary to a performance by the seller.[39] The statute may, however, require that the sale of particular kinds of property shall be by bill of sale.[40] It is not essential that the writing should be in any particular form so long as it shows an intent to transfer the property for a consideration.[41] The writing may be in the form of a receipt acknowledging payment of the consideration for the property therein described;[42] but it must show a present transfer,[43] although it is not essential that it should recite the fact of delivery of the property.[44]

**b. Execution and Delivery.** The bill of sale must be duly executed,[45] but it is not necessary that it should be executed by both parties in order to be binding on both.[46] To operate as a transfer of the property the bill of sale must be delivered,[47] and possession of the instrument is usually sufficient evidence of delivery;[48] but delivery will not be presumed from possession if it appears that there was never any intent on the part of the seller to give possession or to deliver.[49] And generally any act of the seller to be considered as showing delivery must be accompanied by a clear intent to deliver.[50]

39. Thompson *v.* Richards, 14 Mich. 172; Tatum *v.* Jameson, 2 Humphr. (Tenn.) 298.

**Construction of agreement.**— An agreement to "sign off" requires delivery of tangible personal property and notes payable to bearer, unless there was a request, which the buyer would have a right to insist on, for written evidence of the transfer. Thompson *v.* Richards, 14 Mich. 172.

40. See Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

**Stock under control.**— A sale by brand of horses rounded up and under control of a herder on the range is not within the purview of Rev. St. art. 4564, which requires a bill of sale in case of a sale of horses by brand while running on the range. Scofield *v.* Douglass, (Tex. Civ. App. 1895) 30 S. W. 817.

41. Bellerby *v.* Thomas, 105 Ga. 477, 30 S. E. 425; Bangs *v.* Friezen, 36 Minn. 423, 32 N. W. 173 (where the writing stated, "I agree to sell," instead of "I sell"); McAllister *v.* McAllister, 34 N. C. 184 (where the writing recited that for value received the seller relinquished to the buyer his right and title to the property).

**Definition.**— A bill of sale is a written agreement by which one person transfers his rights to or interest in personal chattels to another. Berry *v.* Robinson, 122 Ga. 575, 50 S. E. 378; Putnam *v.* McDonald, 72 Vt. 4, 47 Atl. 159.

42. Finney *v.* Lucy, (Ala. 1905) 39 So. 583; Bush *v.* Bradford, 15 Ala. 317.

43. Crane *v.* Pearson, 49 Me. 97.

**Receipted statement of account.**—Where defendant sold a bicycle to plaintiff, a written instrument executed by him to plaintiff, "Terms cash. P. to M., dr., one bicycle, $47.50. Paid July 27, 1896," was not sufficient to constitute a bill of sale, since it did not contain words importing a transfer of title, but was merely a receipted statement of account. Putnam *v.* McDonald, 72 Vt. 4, 47 Atl. 159.

**Note for purchase-money.**— A note given by the buyer providing that the title to the personalty shall remain in the seller until the money is paid is not a bill of sale. Berry *v.* Robinson, 122 Ga. 575, 50 S. E. 378.

44. Walker *v.* Hays, 15 La. Ann. 640.

45. Dorsey *v.* Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557.

**A seal is not necessary** to the effectiveness of a bill of sale. Tribble *v.* Oldham, 5 J. J. Marsh. (Ky.) 137.

**Proof of execution.**— The execution of the bill of sale may be proved by testimony of a subscribing witness. Hemphill *v.* Dixon, 11 Fed. Cas. No. 6,346*a*, Hempst. 235.

46. Finney *v.* Lucy, (Ala. 1905) 39 So. 583, where the writing was in the form of a receipt for the purchase-money.

47. *Connecticut.*—Alsop *v.* Swathel, 7 Conn. 500.

*Massachusetts.*— Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115.

*Michigan.*— Doyle *v.* Mizner, 40 Mich. 160.

*New York.*— Bryant *v.* Bryant, 42 N. Y. 11; Govin *v.* De Miranda, 76 Hun 414, 27 N. Y. Suppl. 1049.

*United States.*— Blewett *v.* U. S., 10 Ct. Cl. 235.

See 43 Cent. Dig. tit. "Sales," § 344.

48. Collins *v.* Bankhead, 1 Strobh. (S. C.) 25; Blewett *v.* U. S., 10 Ct. Cl. 235.

**Sufficiency of delivery.**— When the seller left the bill of sale in his desk with a letter to the buyer saying it was for him, the buyer taking possession thereof, there was a sufficient delivery. Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22.

49. Brand *v.* Focht, 1 Abb. Dec. (N. Y.) 185, 3 Keyes 409, 2 Transcr. App. 357, 5 Abb. Pr. N. S. 225.

50. Alsop *v.* Swathel, 7 Conn. 500; Thompson *v.* Easton, 31 Minn. 99, 16 N. W. 542.

**Evidence of delivery.**— That a bill of sale has been executed, acknowledged, and recorded is evidence of a delivery to and acceptance by the purchaser, and may under many circumstances establish the fact, especially where unexplained. Knoche *v.* Perry, 90 Mo. App. 483. But see Govin *v.* De Miranda, 76 Hun (N. Y.) 414, 27 N. Y. Suppl. 1049.

**c. Filing or Recording.**[51] As between the parties to a sale, as a general rule, it is not necessary to the validity thereof that a bill of sale of the goods be recorded;[52] and as between the parties recording it is not necessary, although intended as security and not as an absolute conveyance.[53] Under some statutes, however, a bill of sale of certain kinds of property (cattle running on a range) must be recorded or it does not take effect in favor of any one for any purpose,[54] at least unless the vendee has received and actually taken possession.[55]

**d. Operation and Effect.** A bill of sale is generally conclusive on both parties,[56] although it is signed by the seller only.[57] It conveys a good title as against the seller or any one claiming under him,[58] entitling the buyer to immediate possession.[59]

**3. Performance of Conditions.** If a condition is imposed on one of the parties to the sale, as a condition precedent to the performance by the other party, there must be a full and complete performance of such condition to put such other party in default,[60] unless such performance is waived.[61] If no time is fixed for the performance of conditions they must be performed within a reasonable time.[62] If conditions are concurrent or dependent neither party can maintain an action for breach by the other party without showing performance of conditions on his own part, or an offer to perform, although it is not certain from the terms which is to do the first act.[63] In the case of independent agreements the failure to perform

**Delivery to third person.**—Where the maker of a bill of sale placed it in the hands of a third person to keep, or to hold it subject to the order of the depositor, there was no delivery, actual or constructive, to the other party. Alsop *v.* Swathel, 7 Conn. 500.

**51.** As to bona fide purchasers see *infra*, VI, B. 1, c. (II), (D).

As to third persons see *infra*, VI, A, 7, b.

Conditional sales see *infra*, X, J, 4.

**52.** Heisch *v.* Bell, 11 N. M. 523, 70 Pac. 572; Cocke *v.* Trotter, 10 Yerg. (Tenn.) 213; Lemon *v.* Bacon, 15 Fed. Cas. No. 8,241, 4 Cranch C. C. 466.

**53.** Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

**54.** Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604.

**55.** Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

**56.** Tribble *v.* Oldham, 5 J. J. Marsh. (Ky.) 137; Welsh *v.* Terrebonne, 6 La. Ann. 78.

**57.** Finney *v.* Lucy, (Ala. 1905) 39 So. 583.

**58.** Evans *v.* Herring, 27 N. J. L. 243.

**Effect to transfer property.**— Under the live stock law (Laws (1897), Act No. 6), providing that a transfer of live stock on a range may be made by a sale and delivery of the brand, but not prohibiting the sale or transfer of live stock in any other manner, the owner of an undivided interest in cattle on a range can transfer the same, as any other personal property, without delivery, by a bill of sale properly executed, acknowledged, and recorded, conveying his interest in the cattle. Brill *v.* Christy, 7 Ariz. 217, 63 Pac. 757.

**Question for jury.**— Whether the seller intended by a bill of sale to vest immediate title in the buyer should under proper instruction be submitted to the jury. Jones *v.* Hook, 47 Mo. 329.

**59.** Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

**60.** *Alabama.*— Austill *v.* Hieronymus, 124 Ala. 376, 27 So. 255.

*California.*— Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159.

*Indiana.*— Bressler *v.* Kelly, 34 Ind. App. 235, 72 N. E. 613.

*New York.*— Steinhardt *v.* Bingham, 182 N. Y. 326, 75 N. E. 403 [*affirming* 90 N. Y. App. Div. 149, 85 N. Y. Suppl. 1044]; Higgins *v.* Delaware, etc., R. Co., 60 N. Y. 553; Bidwell *v.* Overton, 13 N. Y. Suppl. 274, 26 Abb. N. Cas. 402.

*South Carolina.*— Equitable Mfg. Co. *v.* Cooley, 69 S. C. 332, 48 S. E. 267.

*Vermont.*—Lawrence *v.* Davey, 28 Vt. 264.

*Wisconsin.*— Kellogg *v.* Nelson, 5 Wis. 125.

*United States.*— Straus *v.* J. M. Russell Co., 85 Fed. 589.

*England.*— Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730; Kingdom *v.* Cox, 5 C. B. 522, 12 Jur. 336, 17 L. J. C. P. 155, 57 E. C. L. 522; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228; Hickox *v.* Adams, 34 L. T. Rep. N. S. 404.

**Time within which performance of conditions sufficient.**— If persons buy hay which is to be pressed by them and removed from the seller's premises, they have a right to press the hay within the time that by the terms of their contract they were to remove it. Austin *v.* Langlois, 81 Vt. 223, 69 Atl. 739.

**61.** Brown *v.* Ellis, 103 Ky. 303, 45 S. W. 94, 19 Ky. L. Rep. 2023; Young Bros. Mach. Co. *v.* Young, 111 Mich. 118, 69 N. W. 152; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

**62.** Kingdom *v.* Cox, 5 C. B. 522, 17 L. J. C. P. 155, 12 Jur. 336, 57 E. C. L. 522; Barber *v.* Taylor, 5 M. & W. 527, 9 L. J. Exch. 21.

**63.** *Illinois.*— Stoolfire *v.* Royse, 71 Ill. 223.

is not such a breach as terminates the liability of the other party but it gives him a right to sue for or recoup his damages.[64]

**B. Delivery — 1. In General.** The term "delivery" is used in the law of sales in very different senses, being used in some instances to denote a change of title and in others to denote change of possession.[65] Delivery as denoting change of title is treated elsewhere in this article.[66] The present discussion is concerned only with delivery as effecting a change of possession in performance of the contract.

**2. Obligation to Deliver.** If payment according to the terms of the contract is a condition precedent there is no obligation to deliver until payment is made.[67] But as a general rule the obligation of the seller to deliver the goods and of the buyer to pay the price are concurrent conditions. This is of course true where the contract of sale so provides,[68] and delivery and payment are concurrent conditions where no time of payment and delivery is agreed on,[69] where the contract is silent as to the time of payment,[70] where there is no stipulation for delay on either side,[71] or where no time is specified for delivery.[72] While it is not incumbent on the seller to deliver until the buyer is ready to pay,[73] yet it is as much the duty of the seller to deliver as for the buyer to accept and pay for the goods,[74]

*New York.*— Lester *v.* Jewett, 11 N. Y. 453; Kelley *v.* Upton, 5 Duer 336.

*Pennsylvania.*—Keeler *v.* Schmertz, 46 Pa. St. 135; Levering *v.* Phillips, 7 Pa. St. 387; Harris' Appeal, 9 Pa. Cas. 233, 12 Atl. 743.

*Vermont.*— Perry *v.* Wheeler, 24 Vt. 286; Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Livermore *v.* Brauer, 128 Fed. 265, 62 C. C. A. 647.

**64.** *Arkansas.*— Magnolia Compress Co. *v.* Smith, 75 Ark. 503, 88 S. W. 563.

*Maine.*— Haynes *v.* Hayward, 41 Me. 488.

*Massachusetts.*— Knight *v.* New England Worsted Co., 2 Cush. 271.

*Missouri.*—Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938.

*New York.*— Bladsworth *v.* Rosenblatt, 20 Misc. 357, 45 N. Y. Suppl. 931.

*England.*— Eastern Counties R. Co. *v.* Philipson, 16 C. B. 2, 24 L. J. C. P. 140, 81 E. C. L. 2.

**65.** Shelton *v.* French, 33 Conn. 489; Morse *v.* Sherman, 106 Mass. 430; Bloyd *v.* Pollock, 27 W. Va. 75.

**66.** See *infra*, VI, A, 4, b.

**67.** Austill *v.* Hieronymus, 124 Ala. 376, 27 So. 255; Allen *v.* Hartfield, 76 Ill. 358; Woolsey *v.* Axton, 192 Pa. St. 526, 43 Atl. 1029; Bloxam *v.* Sanders, 4 B. & C. 941, 7 D. & R. 396, 28 Rev. Rep. 519, 10 E. C. L. 868.

**68.** *California.*— Fruit *v.* Phelps, 4 Cal. 282.

*Illinois.*—Harber Bros. Co. *v.* Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676 [*affirming* 52 Ill. App. 146]; Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226; Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Allen *v.* Hartfield, 76 Ill. 358; Stoolfire *v.* Royse, 71 Ill. 223.

*Indiana.*— Johnson *v.* Powell, 9 Ind. 566.

*Kentucky.*— Estill *v.* Jenkins, 4 Dana 75; Asberry *v.* Macklin, 3 T. B. Mon. 9.

*Massachusetts.*— West *v.* Platt, 127 Mass. 367.

*New York.*— Tipton *v.* Feitner, 20 N. Y. 423; Lester *v.* Jewett, 11 N. Y. 453; Draper *v.* Jones, 11 Barb. 263; Kelley *v.* Upton, 5 Duer 336.

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*Pennsylvania.*—Keeler *v.* Schmertz, 46 Pa. St. 135; Levering *v.* Phillips, 7 Pa. St. 387.

*Texas.*— Kelly *v.* Webb, 27 Tex. 368.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

*England.*—Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890. See 43 Cent. Dig. tit. "Sales," § 350.

**69.** Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

**70.** Metz *v* Albrecht, 52 Ill. 491; Mitchell *v.* Georgia R., etc., Co., 6 Rich. (S. C.) 188.

**71.** Speyer *v.* Colgate, 67 Barb. (N. Y.) 192.

**72.** Henkle *v.* Smith, 21 Ill. 238.

**73.** *California.*— Fruit *v.* Phelps, 4 Cal. 282.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Illinois.*—Harber Bros. Co. *v.* Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676 [*affirming* 52 Ill. App. 146]; Stoolfire *v.* Royse, 71 Ill. 223.

*New York.*— James *v.* Hamilton, 2 Hun 630, 5 Thomps. & C. 183 [*affirmed* in 63 N. Y. 616].

*Ohio.*—Simmons *v.* Green, 35 Ohio St. 104.

*Pennsylvania.*— Keeler *v.* Schmertz, 46 Pa. St. 135.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*United States.*—Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

*England.*— Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

*Canada.*— Greenham *v.* Watt, 25 U. C. Q. B. 365.

**74.** *Alabama.*— Davis *v.* Adams, 18 Ala. 264.

*California.*— Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Illinois.*— Lassen *v.* Mitchell, 41 Ill. 101; Hungate *v.* Rankin, 20 Ill. 639.

*New York.*— Speyer *v.* Colgate, 67 Barb. 192.

and the right of the seller to enforce the contract depends on his showing performance,[75] or an offer to perform,[76] or a readiness and willingness to perform.[77] The obligation of the seller to deliver may be fixed by payment [78] or by tender of payment with demand and notice to deliver.[79] If under the terms of the contract the obligation to deliver is absolute, the seller cannot impose an additional condition on delivery.[80] There is no obligation to deliver when the contract has been definitely repudiated by the buyer,[81] or where he insists on conditions not contemplated by the contract.[82]

**3. Demand, Notice, or Tender by Buyer — a. In General.** In order to put the seller in default for non-delivery a demand on the part of the buyer is usually necessary when the obligations of the parties are concurrent,[83] or the goods are deliverable at the request of the buyer,[84] or are to be called for by him,[85] as when the delivery is to be made at the residence or place of business of the seller.[86] If no time is fixed for delivery the buyer must make demand,[87] and, if delivery is to be made on or before a certain day at the option of the buyer, demand is necessary to put the seller in default before that day.[88] A readiness to receive the goods and pay the price is, however, sufficient without a demand if by the terms of the contract the goods are deliverable within a certain fixed time,[89] or are deliver-

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*Texas.*— Kelly *v.* Webb, 27 Tex. 368.

*England.*— Jones *v.* Gibbons, 8 Exch. 920, 22 L. J. Exch. 347, 1 Wkly. Rep. 438.

But see Hapgood *v.* Shaw, 105 Mass. 276, where the court said that when payment and delivery are concurrent there is nothing to be done by either party, and if nothing is done by either neither party is in default, and neither party can hold the other for breach of contract.

**Impossibility of performance.**— Where a contract for the delivery of certain goods at a stated time and place became impossible of performance according to its terms, the seller was not entirely relieved from any obligation, but was bound to make tender of the best delivery possible. J. H. Larabee Co. *v.* Crossman, 100 N. Y. App. Div. 499, 92 N. Y. Suppl. 565 [*affirmed* in 184 N. Y. 586, 77 N. E. 1189].

**75.** Stoolfire *v.* Royse, 71 Ill. 223; Summers *v.* Sleeth, 45 Ind. 598; Kelley *v.* Upton, 5 Duer (N. Y.) 336; Armstrong *v.* Heide, 47 Misc. (N. Y.) 609, 94 N. Y. Suppl. 434; Jones *v.* Marsh, 22 Vt. 144.

**76.** See *infra*, V, B, 5.

**77.** See *infra*, V, B, 4.

**78.** Barr *v.* Logan, 5 Harr. (Del.) 52; Flower *v.* Taliaferro, 3 La. 88; Murray *v.* Larabie, 8 Mont. 208, 19 Pac. 574; Gray *v.* Walton, 107 N. Y. 254, 14 N. E. 191.

**79.** See *infra*, V, B, 3.

**80.** Manda *v.* Etienne, 93 N. Y. App. Div. 609, 87 N. Y. Suppl. 588; Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829; Durocher *v.* McLaren, 16 Quebec Super. Ct. 257.

**81.** McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370.

**Waiver of obligation.**— Where payment was to be made on delivery a demand for a credit of ten days, without which the buyer refused to accept the goods, is a waiver of the obligation to deliver. Ackerman *v.* Astoria Veneer Mills, etc., Co., 11 N. Y. Suppl. 528.

**82.** Cochran *v.* Chetopa Mill, etc., Co., (Ark. 1908) 114 S. W. 711.

**83.** See *supra*, V, B, 2.

**84.** Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829; Cottrell *v.* Smokeless Fuel Co., 129 Fed. 174 [*reversed* on other grounds in 148 Fed. 594]; Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24; Great Northern R. Co. *v.* Harrison, 12 C. B. 576, 22 L. J. C. P. 49, 74 E. C. L. 576.

**Contract construed and held not to require demand for delivery** see Nicholls *v.* American Steel, etc., Co., 117 N. Y. App. Div. 21, 102 N. Y. Suppl. 227 [*affirmed* in 191 N. Y. 554, 85 N. E. 1113].

**85.** Posey *v.* Scales, 55 Ind. 282; Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Andrews *v.* Cheney, 62 N. H. 404; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

**86.** Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

**87.** Peak *v.* Hollingsworth, 5 Ind. 120; Pratt *v.* Craft, 19 La. Ann. 130; Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

**88.** Phelps *v.* McGee. 18 Ill. 155; Posey *v.* Scales, 55 Ind. 282; Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235.

**89.** *Arkansas.*— Patterson *v.* Jones, 13 Ark. 69, 56 Am. Dec. 296.

*Indiana.*— Mountjoy *v.* Adair, 1 Ind. 254, Smith 96.

*Kentucky.*—Shrewsberry *v.* Buckleys, 4 Bibb 260 (delivery to be made in instalments); Mitchell *v.* Gregory, 1 Bibb 449, 4 Am. Dec. 655; Chandler *v.* Robertson, 9 Dana 291.

*Louisiana.*— Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487, 37 So. 38.

*Massachusetts.*— Dyer *v.* Rich, 1 Metc. 180.

*New York.*— Mount *v.* Lyon, 49 N. Y. 552.

able at the seller's option.[90] A demand when necessary need not be in writing unless it is so stipulated.[91]

**b. Notice.** If the buyer is to designate the place of delivery or the vessel on which the goods are to be delivered, such designation is a condition precedent to the obligation of the seller and must be made,[92] and notice given thereof,[93] and of the buyer's readiness to receive the goods.[94] So too if the buyer is to designate the quantity to be delivered at any particular time,[95] and if no particular quality is contracted for but the buyer is given the option to designate the size or quality of the articles to be furnished, he must give notice to the seller of the size and quality desired.[96] If the contract provides that shipment shall be made at such time as the buyer may direct, and contrary to such provision shipment is made immediately without directions from the buyer he is not liable on the contract unless he waives the premature shipment and accepts the goods.[97]

**c. Tender of Payment.** While a payment or tender of the price amounts to a demand,[98] it is not necessary that a demand should be accompanied by an actual tender of the price;[99] but it is generally sufficient that the buyer is ready and willing to receive the goods and pay the price.[1]

**d. Time of Demand or Notice.** Time of making demand depends largely on the provisions of the contract of sale;[2] but in any event it must be in a reasonable

*North Carolina.*— Cole *v.* Hester, 31 N. C. 23.

See 43 Cent. Dig. tit. "Sales," § 357.

90. Brooklyn Oil Refinery *v.* Brown, 38 How. Pr. (N. Y.) 444.

91. Fruit *v.* Phelps, 4 Cal. 282.

92. Walton *v.* Black, 5 Houst. (Del.) 149; Christy *v.* Stafford, 22 Ill. App. 430 [*affirmed* in 123 Ill. 463, 14 N. E. 680]; Sutherland *v.* Allhusen, 14 L. T. Rep. N. S. 666.

**Sufficiency of designation.**— Where plaintiffs sold defendant a quantity of steel blooms, for which they had contracted with one S, to be delivered f. o. b., with shipping directions as per a freight contract in the hands of S, and accepted by plaintiffs, the transfer to defendant of the freight contract in the hands of S was a complete provision by defendant for the shipment, and no notice as to shipping directions was required from him. Dwight *v.* Eckert, 117 Pa. St. 490, 12 Atl. 32.

93. Woolner *v.* Hill, 47 N. Y. Super. Ct. 470 [*reversed* on other grounds in 93 N. Y. 576].

**If the buyer is to furnish cars** for goods bought on an entire contract to deliver on or before a specified date, he must give the seller reasonable notice of the arrival of the cars so as to enable the seller by reasonable diligence to complete the delivery on a specified date and if the notice is not given the seller is not bound to deliver any of the goods. Pinkham *v.* Haynes, 103 Me. 112, 68 Atl. 642.

94. Walton *v.* Black, 5 Houst. (Del.) 149.

**Agreement to give notice.**— Notice of readiness to receive the goods must be given if such was the agreement of the parties. Sanborn *v.* Benedict, 78 Ill. 309.

**Buyer to provide container.**— On a sale of wheat, the buyer to provide bags for sacking it, the buyer must provide the bags to put the seller in default. Kellogg *v.* Nelson, 5 Wis. 125.

95. Spratt *v.* Merchants', etc., Nat. Bank, 4 Pa. Cas. 107, 7 Atl. 98.

96. Kirwan *v.* Roberts, 99 Md. 341, 58 Atl. 32.

**A mere option to designate the size or quality** does not impose such a duty, however, if a particular size or quality is provided for in the contract as in the absence of a designation it is the duty of the seller to deliver the size specified. American Tin-Plate Co. *v* Trotter, 105 Fed. 478.

97. Schmick *v.* Simmons, (Tex. Civ. App. 1908) 107 S. W. 568.

98. Barr *v.* Logan, 5 Harr. (Del.) 52; Bradley *v.* Michael, 1 Ind. 551.

99. Crosby *v.* Watkins, 12 Cal. 85; Woolner *v.* Hill, 93 N. Y. 576.

1. *California.*— Fruit *v.* Phelps, 4 Cal. 282.

*Georgia.*— Phillips *v.* Williams, 39 Ga. 597.

*Illinois.*— Metz *v.* Albrecht, 52 Ill. 491; Sexton *v.* Brown, 36 Ill. App. 281.

*Massachusetts.*— West *v.* Platt, 127 Mass. 367.

*New York.*— Woolner *v.* Hill, 93 N. Y. 576; Bronson *v.* Wiman, 8 N. Y. 182 [*affirming* 10 Barb. 406]; Vail *v.* Rice, 5 N. Y. 155; Sears *v.* Conover, 34 Barb. 330 [*affirmed* in 4 Abb. Dec. 179, 3 Keyes 113, 33 How. Pr. 324]; Coonley *v.* Anderson, 1 Hill 519. And see Isaacs *v.* New York Plaster Works, 67 N. Y. 124; Speyer *v.* Colgate, 67 Barb. 192; Lawrence *v.* Everett, 11 N. Y. Suppl. 881; Cook *v.* Ferral, 13 Wend. 285.

*North Carolina.*— Grandy *v.* Small, 48 N. C. 8; Grandy *v.* McCleese, 47 N. C. 142, 64 Am. Dec. 574.

*Pennsylvania.*— Lockhart *v.* Bonsall, 77 Pa. St. 53.

*Rhode Island.*—Guilford *v.* Mason, 22 R. I. 422, 48 Atl. 386.

*Vermont.*— Packer *v.* Button, 35 Vt. 188.

*England.*—Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252.

2. See Dox *v.* Dey, 3 Wend. (N. Y.) 356

time,[3] although this requirement may be and is waived if no objection is made on that ground.[4] If by the terms of the contract the purchaser is to give notice of the place of delivery, the notice should be given such length of time before the date fixed for delivery as to enable the seller to comply with the terms of the contract.[5] Where notice of readiness to receive delivery is sent by mail, nothing being said as to the method of giving notice, the seller is not bound by such notice until actual receipt thereof, and is not in default in making delivery if he acts promptly thereafter.[6]

**e. Circumstances Excusing Demand or Tender.** As the law does not require one to do a thing which is vain and fruitless,[7] demand or tender of payment is excused if the seller has repudiated the contract; [8] but the refusal must be explicit and positive.[9] A demand or tender by the buyer is excused if to the knowledge of the buyer the seller has sold the goods to a third person,[10] or by assignment has put it out of his power to deliver,[11] or if the seller cannot be found.[12] A tender

(holding that where goods were sold to be delivered on demand, payment to be made on a day certain, the seller was put in default, although the demand was not made until after the time for payment had elapsed, the agreements being independent); Noe *v.* Hodges, 3 Humphr. (Tenn.) 162 (holding that on a contract for the delivery of hogs, in which no time or place of delivery is specified, a demand at the residence of the buyer is sufficient, without ten days' previous notice thereof, under the provisions of the act of 1807, chapter 95, section 1).

3. Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

**What is reasonable time.**— Under a contract made on July 20, to sell and deliver wool in "a reasonable time, viz., within two weeks," a demand on August 12 is sufficient. Chadwick *v.* Butler, 28 Mich. 349. A demand not made until a year after the date of the contract in which no time was fixed for delivery is not made in a reasonable time. Hume *v.* Mullins, 35 S. W. 551, 18 Ky. L. Rep. 108.

**When reasonable time commences to run.**— Upon a contract for the sale and delivery of goods upon demand, the reasonable time within which the buyer may demand the goods does not begin to run until the seller calls upon him to do so. Cameron *v.* Wells, 30 Vt. 633.

4. Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

5. West *v.* Newton, 1 Duer (N. Y.) 277.

6. Burhans *v.* Corey, 17 Mich. 282.

7. Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8; Parker *v.* Pettit, 43 N. J. L. 512.

8. *Kansas.*— Thompson *v.* Warner, 31 Kan. 533, 3 Pac. 339.

*Maryland.*— Williams *v.* Woods, 16 Md. 220.

*Missouri.*— Price *v.* Vanstone, 40 Mo. App. 207.

*Nebraska.*— Post *v.* Garrow, 18 Nebr. 682, 26 N. W. 580.

*New Jersey.*— Parker *v.* Pettit, 43 N. J. L. 512.

*New York.*— Sampson *v.* Lewis, 8 N. Y. St. 346.

*North Carolina.*— Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586. But see Grandy *v.* Small, 48 N. C. 8 (holding that if refusal is put on untenable ground, the buyer is not excused); Grandy *v.* McCleese, 47 N. C. 142, 64 Am. Dec. 574.

*Texas.*— Fisher *v.* Dow, 72 Tex. 432, 10 S. W. 455.

**Illustration.**— Under a contract to deliver two hundred and forty car-loads of timber during a year, in quantities of twenty car-loads a month, to be shipped upon orders given by the purchaser to the seller, to places designated in the orders, if the seller expressly refuses to fill the orders which under the contract he was bound to fill, the purchaser is not under obligation to go through the idle form of giving orders in order to hold the seller for a breach of his contract to deliver two hundred and forty car-loads during the year. Seligman *v.* Beecher, 36 Pa. Super. Ct. 475.

**Declaration to third person.**— The declaration of the seller to a third person that he would not be able to deliver does not excuse tender of performance by the buyer. McDonald *v.* Williams, 1 Hilt. (N. Y.) 365.

9. Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266, holding that under a contract to deliver stock a declaration by the seller that the stock is hypothecated but will be delivered as soon as he can get it reduced is not a refusal to deliver.

10. *Delaware.*— Lea *v.* Ennis, 6 Houst. 433.

*Georgia.*— Foster *v.* Leeper, 29 Ga. 294.

*Louisiana.*— Marchesseau *v.* Chaffee, 4 La. Ann. 24.

*Minnesota.*— Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8.

*New York.*— Kester *v.* Reynolds, 6 Hun 626; Crist *v.* Armour, 34 Barb. 378; Sears *v.* Conover, 34 Barb. 330 [*affirmed* in 4 Abb. Dec. 179, 3 Keyes 113, 33 How. Pr. 324].

*North Carolina.*— Harriss *v.* Williams, 48 N. C. 483, 67 Am. Dec. 253.

*Vermont.*— Packer *v.* Button, 35 Vt. 188.

11. Woolner *v.* Hill, 93 N. Y. 576. But see Spratt *v.* Merchants, etc., Nat. Bank, 4 Pa. Cas. 107, 7 Atl. 98, holding that demand or tender is not necessarily excused by insolvency.

12. Guilford *v.* Mason, 22 R. I. 422, 48 Atl. 386.

of the price is also excused if measurement is necessary to determine the amount due and it is not made within the time specified.[13]

**4. Readiness to Deliver and Notice Thereof — a. Ability and Readiness to Deliver.** Although under the terms of the contract there is no absolute obligation on the seller to deliver,[14] yet in order to put the buyer in default he must be in a position to perform or show a readiness so to do,[15] and if he is able, ready, and willing to deliver it is a performance so far as the seller is concerned.[16] On the other hand if by reason of his negligence he is unable to perform,[17] or has put it out of his power to perform, as by a sale of the property to a third person, it is a breach of his contract.[18]

**b. Notice.** The seller must give notice of his readiness to deliver if he has agreed to do so,[19] or if there is uncertainty as to the place [20] or time [21] of delivery, or if delivery is to be made at the option of the seller,[22] and a sufficient notice will fix the liability of the buyer.[23]

**13.** Lowry *v.* Barelli, 21 Ohio St. 324.

**14.** See *supra*, V, B, 2.

**15.** *Iowa.*— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235.

*Kentucky.*— Shrewsberry *v.* Buckleys, 4 Bibb 260.

*New York.*— Stemmerman *v.* Kelly, 122 N. Y. App. Div. 669, 107 N. Y. Suppl. 379.

*Oregon.*— Schneider *v.* Oregon Pac. R. Co., 20 Oreg. 172, 25 Pac. 391.

*Pennsylvania.*— Byers *v.* Bonsall, 3 Pittsh. 482.

*Texas.*— Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ App. 587, 33 S. W. 987.

*Vermont.*— Phelps *v.* Hubbard, 51 Vt. 489; Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

*England.*— Jackson *v.* Allaway, 8 Jur. 63, 13 L. J. C. P. 84, 6 M. & G. 942, 7 Scott N. R. 875, 46 E. C. L. 942.

See 43 Cent. Dig. tit. "Sales," § 352.

**Property in possession of another.**— A vendor cannot recover for breach of a contract to purchase horses where he was unable to make delivery on the contract date because the horses were in possession of a third person, who claimed an interest therein and refused to surrender possession of them. Davis *v.* Gilliam, 14 Wash. 206, 44 Pac. 119.

**16.** Boston, etc., Iron Works *v.* Montague, 135 Mass. 319; Lewis *v.* Craft, 39 Oreg. 305, 64 Pac. 809.

**Appropriation of specific article not necessary.**— In order to constitute a readiness and willingness to perform it is not necessary that specific articles should have been appropriated by the seller for delivery. Dunlop *v.* Grote, 2 C. & K. 153, 61 E. C. L. 153; Baker *v.* Firminger, 28 L. J. Exch. 130.

**Question for jury.**— Whether the seller was able to perform at the time the buyer waived tender is for the jury. Stokes *v.* MacKay, 82 Hun (N. Y.) 449, 31 N. Y. Suppl. 706 [*affirmed* in 147 N. Y. 223, 41 N. E. 496].

**17.** Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Boies *v.* Vincent, 24 Iowa 387; Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587, 33 S. W. 987.

**18.** Shreveport Cotton Oil Co. *v.* Friedlander, 112 La. 1059, 36 So. 853; Hart *v.* Summers, 38 Mich. 399; Ashley *v.* Dixon, 48 N. Y. 430, 8 Am. Rep. 559.

**Pledged stock.**— On a sale of stock the fact that it is pledged does not show an inability to deliver, where it appears that large quantities of it were for sale and buyers few. Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

**19.** Quarles *v.* George, 23 Pick. (Mass.) 400; Stokes *v.* Brown, 2 Sweeny (N. Y.) 457; Fowler *v.* Rigney, 5 Abb. Pr. N. S. (N. Y.) 182.

**20.** McNairy *v.* Bishop, 8 Dana (Ky.) 150; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221; Dwight *v.* Eckert, 117 Pa. St. 490, 12 Atl. 32; Davies *v.* McLean, 28 L. T. Rep. N. S. 113, 21 Wkly. Rep. 264.

**Place of delivery.**— If the place of delivery is different from that of the residence or place of business of the vendee, he must be notified of such delivery. Henkle *v.* Smith, 21 Ill. 238.

**Place of delivery certain.**— If the place of delivery is certain notice thereof need not be given. Erskine *v.* Erskine, 13 N. H. 436; Williams *v.* Johnston, 26 N. C. 233.

**21.** McNairy *v.* Bishop, 8 Dana (Ky.) 150; Spooner *v.* Baxter, 16 Pick. (Mass.) 409; Sears *v.* Conover, 34 Barb. (N. Y.) 330 [*affirmed* in 4 Abb. Dec. 179, 3 Keyes 113, 33 How. Pr. 324] (sale of growing crops); Cullum *v.* Wagstaff, 48 Pa. St. 300.

**Time uncertain.**— In Kirkpatrick *v.* Alexander, 44 Ind. 595, it was held that under a contract providing for delivery in "the first half of August" notice of delivery must be given. But in Kirkpatrick *v.* Alexander, 60 Ind. 95, it was said that non-delivery before August 16 was equivalent to notice that delivery would be made on that day.

**22.** McNairy *v.* Bishop, 8 Dana (Ky.) 150; Stokes *v.* Brown, 2 Sweeny (N. Y.) 457; Brooklyn Oil Refinery *v.* Brown, 38 How. Pr. (N. Y.) 444; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221; Weiseger *v.* Wheeler, 14 Wis. 101.

**23.** Bishops *v.* McNary, 2 B. Mon. (Ky.) 132, 36 Am. Dec. 592; Wilson *v.* Broom, 6 La. Ann. 381.

**Notice held sufficient.**— Notice to one of two joint contracting parties of the time and place when and where property will be delivered is sufficient to charge them, in an action

**5. Tender of Delivery or Offer to Perform — a. In General.** An offer on the part of the seller to perform his part of the contract by delivery of the goods is sufficient to fix the liability of the buyer.[24] The offer must, however, be in the form of an actual tender of performance,[25] and a mere readiness to make a tender in the absence of the buyer is not sufficient.[26] But if the seller attends at the place of delivery and the buyer does not appear a formal tender is not necessary.[27] The tender to be effective must be unconditional,[28] conforming to the terms of the contract,[29] and must be made at the time and place mentioned in the con-

against the buyers, for their failure to take the property. Bishops *v.* McNary, 2 B. Mon. (Ky.) 132, 36 Am. Dec. 592. Where a contract for the sale of growing hops provided for their delivery between September 20 and October 20, payment to be made on delivery and acceptance, a delivery of a portion of the hops during the time specified, with notice by the seller of his readiness to deliver the balance, was sufficient notice to the purchasers as to the date when the hops would be delivered to render them liable for the agreed price on the delivery and acceptance of the balance two days later. Meeker *v.* Johnson, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148.

**Notice held insufficient.**— Where a contract for the sale and removal by the buyer of five buildings bound the buyer to complete the removal within fifteen days, and to start within twenty-four hours' notice, a notice given the buyer to take possession of and remove three buildings was ineffective, as against the buyer, for any purpose. Lippman *v.* Hauben, 47 Misc. (N. Y.) 668, 94 N. Y. Suppl. 520. Vendors of hogs covenanted to deliver a fixed number in pens to be selected by them within ten miles of a certain place. A notice to the vendees that they would deliver a portion of the hogs at a certain place at a fixed date was not sufficient on the presumption that when the vendee arrived at such place he would receive a notice of delivery at the same or some other suitable place of the balance of the hogs. McNairy *v.* Bishop, 8 Dana (Ky.) 150.

**Time of giving notice.**—A notice left at the residence of a purchaser, on the fourteenth of the month, when he was absent on business in another county, of an intended delivery on the sixteenth, was insufficient. McNairy *v.* Bishop, 8 Dana (Ky.) 150. Under a contract to purchase merchandise, to be delivered at the seller's option between the date of the contract and a specified date, four days' notice of delivery to be given, in order to sustain an action for refusal to receive the merchandise, the seller must give the four days' notice on or before the fourth day before the day specified in the contract. Fowler *v.* Rigney, 5 Abb. Pr. N. S. (N. Y.) 182. To the same effect see Quaries *v.* George, 23 Pick. (Mass.) 400.

24. *California.*— Crocker *v.* Field's Biscuit, etc., Co., 93 Cal. 532, 29 Pac. 225.

*Illinois.*— Stoolfire *v.* Royse, 71 Ill. 223; Aultman *v.* Henderson, 32 Ill. App. 311.

*Iowa.*— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235.

*Louisiana.*—Blackman *v.* Hoey, 18 La. Ann. 23.

*Missouri.*— Crown Vinegar, etc., Co. *v.* Wehrs, 59 Mo. App. 493.

*New Hampshire.*—Haynes *v.* Thom, 28 N. H. 386.

*New York.*— Tipton *v.* Feitner, 20 N. Y. 423; Lester *v.* Jewett, 11 N. Y. 453; Munn *v.* Barnum, 24 Barb. 283; Kelley *v.* Upton, 5 Duer 336; Armstrong *v.* Heide, 47 Misc. 609, 94 N. Y. Suppl. 434; Kaufman *v.* Canary, 21 Misc. 302, 47 N. Y. Suppl. 152; Nicholson *v.* Paston, 11 N. Y. Suppl. 567.

*North Carolina.*— Hurlburt *v.* Simpson, 25 N. C. 233.

*Pennsylvania.*— Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291.

*Tennessee.*— Coleman *v.* Hudson, 2 Sneed 463; Wells-Jones Plow Co. *v.* Deeds, 1 Tenn. Ch. App. 400.

*Vermont.*— Phelps *v.* Hubbard, 51 Vt. 489.

*Washington.*— Fox *v.* Utter, 6 Wash. 299, 33 Pac. 354.

*England.*— Dorriens *v.* Hutchinson, 1 Smith K. B. 420.

See 43 Cent. Dig. tit. "Sales," § 358.

**Contra.**— Webber *v.* Minor, 6 Bush (Ky.) 463, 99 Am. Dec. 688, holding that there must be delivery actual or constructive.

**Refusal to accept.**— Where plaintiff tendered the stock on the day agreed on for making the transfer, and defendant refused to accept it, plaintiff need not wait till the end of the day, but might sell the stock to another immediately after the tender and refusal. Dorriens *v.* Hutchinson, 1 Smith K. B. 420.

**Where no place is specified for delivery** the place of business of the seller is the place at which the buyer must make payment, and the seller make delivery, and a tender of delivery is unnecessary. Halvordson *v.* Grossman, 107 N. Y. Suppl. 627. And see Scott *v.* Miller, 114 N. Y. App. Div. 6, 99 N. Y. Suppl. 609.

25. McPherson *v.* Gale, 40 Ill. 368.

26. McPherson *v.* Hall, 44 Ill. 264; McPherson *v.* Gale, 40 Ill. 368.

27. McNairy *v.* Bishop, 8 Dana (Ky.) 150; Howard *v.* Holbrook, 9 Bosw. (N. Y.) 237; Bordenave *v.* Gregory, 5 East 107, 1 Smith K. B. 306.

28. Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241; Robinson *v.* Batchelder, 4 N. H. 40.

**Any condition,** however small, vitiates a tender. Robinson *v.* Batchelder, 4 N. H. 40.

**Demand for payment.**— On a sale of goods to be paid for on delivery, tender of the goods was sufficient, although coupled with a demand for the purchase-price. Rice *v.* Appel, 111 Iowa 454, 82 N. W. 1001.

29. Lovering *v.* Buck Mountain Coal Co.,

tract.[30] Even if delivery at the designated time and place is impossible the seller is bound to tender the best delivery possible.[31] If the goods are so bulky and ponderous or of such a nature that actual physical tender is impossible, an offer to deliver is a substantial performance,[32] or the tender may be symbolical, as by a tender of a warehouse receipt [33] or of a sample of the goods.[34]

**b. Identity and Condition of Goods.** If the articles sold are capable of specific delivery the tender must be of the specific articles.[35] The goods offered must be in proper condition for delivery, and if part is damaged he must separate the undamaged from the damaged and tender the former.[36]

**c. Quantity and Quality of Goods.** The tender must be of goods of the proper quantity and quality.[37] A tender of a large number of the specific kind of articles with a proposal that the buyer shall select the number purchased is a substantial offer of performance if there is no material difference in the quality of the articles tendered.[38] But if the contract requires the delivery of goods of a specified

54 Pa. St 291; Jefferson *v.* Querner, 30 L. T. Rep. N. S. 867.

**30.** Benton *v.* Bidault, 6 La. Ann. 30; Hepke *v.* Schmalholz, 7 N. Y. Suppl. 67; Musselman *v.* Stoner, 31 Pa. St. 265.

**Goods deliverable on demand.**— An agreement to deliver a portion of the goods within a certain time if demanded, and the remainder within a certain time thereafter if called for, is not performed by having the goods ready for delivery within the time specified, since they were not deliverable till demanded. Chase *v.* Flanders, 2 N. H. 417.

**Opportunity for examination.**— A tender of bulky articles must be made in reasonable time so as to afford the buyer an opportunity to examine them before the day of delivery. Croninger *v.* Crocker, 62 N. Y. 151. See also Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64, where it was held that a tender without affording opportunity for inspection was not sufficient. To the same effect is Isherwood *v.* Whitmore, 2 Dowl. P. C. N. S. 548, 7 Jur. 535, 12 L. J. Exch. 318, 11 M. & W. 347.

**Extension of time.**— If after an offer to deliver the time of delivery is extended, there must be a new offer to put the buyer in default. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

**Waiver.**— Acceptance of property when tendered waives a failure to tender in time. Emery *v.* Langley, 1 Ida. 694.

**31.** J. H. Labaree Co. *v.* Crossman, 100 N. Y. App. Div. 499, 92 N. Y. Suppl. 565 [*affirmed* in 184 N. Y. 586, 77 N. E. 1189].

**32.** Sanborn *v.* Benedict, 78 Ill. 309; Pollen *v.* Le Roy, 30 N. Y. 549; Myers *v.* Davis, 26 Barb. (N. Y.) 367; Smith *v.* Wheeler, 7 Oreg. 49, 33 Am. Rep. 698.

**33.** McPherson *v.* Hall, 44 Ill. 264 (holding that the receipts must be genuine and the goods not subject to charges); McPherson *v.* Gale, 40 Ill. 368; Hayden *v.* De Mets, 34 N. Y. Super. Ct. 344 [*affirmed* in 53 N. Y. 426]. *Compare* Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Dunham *v.* Petter, 1 Daly (N. Y.) 112, where a custom-house permit was tendered.

**34.** Midland Elevator Co. *v.* Cleary, 56 Mo. App. 268.

**35.** Treat *v.* Richardson, 47 Conn. 582; Blackman *v.* Hoey, 18 La. Ann. 23; Jefferson *v.* Querner, 30 L. T. Rep. N. S. 867.

**Trees to be grown.**— A contract to deliver at a certain price a quantity of trees of a specified kind, to be grown after the contract, does not confine the seller to deliver any particular individual trees, but a tender of any trees answering the description in the contract will be a compliance therewith. Parsons *v* Woodward, 22 N. J. L. 196.

**Description of goods.**— On a sale of "cultivators" the seller satisfied the obligation of his contract by tendering to the buyer cultivators without wheels. Harpell *v.* Collard, 6 Can. L. J. 212.

**36.** Clark *v.* Baker, 11 Metc. (Mass.) 186, 45 Am. Dec. 199.

**Condition for delivery.**— A contract for the purchase by defendant from plaintiff of linseed oil in certain quantities, which provides "that the oil tendered to the defendant should be pure, raw linseed oil, well settled, and in good cooperage," does not mean that the oil must be in wooden barrels at the time of a tender, in order to make it effectual, but it is sufficient to put it in barrels when shipping instructions are received. Mann *v.* National Linseed Oil Co., 87 Hun (N. Y.) 558, 34 N. Y. Suppl. 481.

**37.** Allen *v.* Pennell, 51 Iowa 537, 2 N. W. 385; Stemmerman *v.* Kelly, 122 N. Y. App. Div. 669, 107 N. Y. Suppl. 379.

**Modified tender.**— If a tender is made of too large a quantity and such tender is subsequently modified by a tender of the exact quantity this is substantial performance. Hawes *v.* Lawrence, 3 Sandf. (N. Y.) 193.

**38.** Davis *v.* Adams, 18 Ala. 264; Lockhart *v.* Bonsall, 77 Pa. St. 53. But see Hamilton *v.* Finnegan, 117 Iowa 623, 91 N. W. 1039, holding that a seller of fifty-one shares of stock is put in a position to recover the purchase-price, the purchaser refusing to take and pay for it, where he brings into court one certificate of fifty-six shares of stock, transferable only on the books of the corporation on surrender of the certificate. See also *Re* Keighley, 7 Aspin. 418, 70 L. T. Rep. N. S. 155.

**Delivery to person designated by buyer.**— So where the buyer ordered a machine to be delivered to A for him and six machines ex-

quality, a tender of a larger quantity of different grades from which the purchaser might with great labor select the proper quantity of the specified quality is not a sufficient tender.[39] A tender of goods not conforming to the requirements of the contract as to quality is not a sufficient tender,[40] although such a tender may be made good by a subsequent tender of proper goods.[41]

**d. Waiver of Tender.** No tender is necessary when the contract has been definitely repudiated by the buyer,[42] as by a refusal to accept delivery if tendered,[43] or notice to the seller that the buyer is unable to accept and pay for the goods.[44] So too when the contract provides that the buyer shall from time to time specify the sizes and styles of the articles wanted a refusal to specify dispenses with the necessity of a tender.[45] And it has been held that where the contract of sale is to deliver a definite quantity of goods during a year's time, a certain number of carloads to be shipped each month on orders given by the purchaser, and the purchaser fails to give orders for a number of car-loads, it is *prima facie* not necessary for the seller in order to save himself from being in default to tender such car-loads at the purchaser's residence or place of business.[46]

**6. Place of Delivery — a. When Place Is Designated.** Under a contract of sale which provides for delivery at a specified place, a delivery at such place must be made to fix the liability of the buyer,[47] and it is not sufficient that the goods

actly alike were delivered to A for six purchasers, this was a sufficient tender, as it was not necessary that one particular one should be set apart for the buyer or marked with his name, he being offered the liberty to select any one of the six. Ganson *v.* Madigan, 9 Wis. 146.

39. Cash *v.* Hinkle, 36 Iowa 623; Croninger *v.* Crocker, 62 N. Y. 151; Flint *v.* Standard Rope, etc., Co., 52 N. Y. App. Div. 459, 65 N. Y. Suppl. 238; Hoffman *v.* King, 58 Wis. 314, 17 N. W. 136; Rylands *v.* Kreitman, 19 C. B. N. S. 351, 115 E. C. L. 351. But see Beasley *v.* Lovel, 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 551, where the buyer denied that any of the animals tendered conformed to the contract and it was held that this relieved the seller of the duty of selecting and weighing, and was a good tender.

40. Collins *v.* Delaporte, 115 Mass. 159; Empire State Phosphate Co. *v.* Heller, 61 Fed. 280, 9 C. C. A. 504.

41. Borrowman *v.* Free, 4 Q. B D. 500, 48 L. J. Q. B. 65; Tetley *v.* Shand, 25 L. T. Rep. N. S. 658, 20 Wkly. Rep. 206.

42. McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Stumpf *v.* Mueller, 17 Mo. App. 283; Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370.

43. *Illinois.*— McPherson *v.* Walker, 40 Ill. 371.

*Iowa.*— Loftus *v.* Riley, 83 Iowa 503, 50 N. W. 17.

*Kansas.*— Grant *v.* Pendery, 15 Kan. 236.

*Minnesota.*— Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

*Nebraska.*— Lapham *v.* Bossemeyer, 5 Nebr. (Unoff.) 343, 98 N. W. 699.

*New York.*— Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Kiley *v.* Lee Canning Co., 105 N. Y. App. Div. 633, 93 N. Y. Suppl. 986; Van Sickle *v.* Nester, 34 Hun 64; Vaupell *v.* Woodward, 2 Sandf. Ch. 143.

*Ohio.*— Beasley *v.* Lovel, 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 551.

*South Dakota.*— Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

*United States.*— Calhoun *v.* Vechio, 4 Fed. Cas. No. 2,310, 3 Wash. 165; Hughes *v.* U. S., 4 Ct. Cl. 64; Gibbons *v.* U. S., 2 Ct. Cl. 421 [*affirmed* in 8 Wall. 269, 19 L. ed. 453].

See 43 Cent. Dig. tit. "Sales," § 363.

**Effect of refusal to receive.**— Where one who has agreed to purchase goods to be manufactured notifies the seller, after receiving part of the goods, not to deliver any more, the seller may decline to treat the contract as broken, and proceed to manufacture and tender the residue of the goods. John A. Roebling's Sons' Co. *v.* Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 [*reversing* 28 Ill. App. 184].

44. Hayden *v.* De Mets, 34 N. Y. Super. Ct. 344 [*affirmed* in 53 N. Y. 426].

45. George Delker Co. *v.* Hess Spring, etc., Co., 138 Fed. 647, 71 C. C. A. 97.

46. Seligman *v.* Beecher, 36 Pa. Super. Ct. 475.

47. *Iowa.*— Cash *v.* Hinkle, 36 Iowa 623.

*Louisiana.*— Benton *v.* Bidault, 6 La. Ann. 30; Lincoln *v.* Visoso, 3 Mart. N. S. 325.

*Maine.*— Savage Mfg. Co. *v.* Armstrong, 19 Me. 147; Howard *v.* Miner, 20 Me. 325.

*New York.*—Tinsley *v.* Weidinger, 15 Daly 534, 8 N. Y. Suppl. 476 [*affirming* 7 N. Y. Suppl. 260, and *affirmed* in 130 N. Y. 676, 29 N. E. 1035]; Hepke *v.* Schmalholz, 7 N. Y. Suppl. 67.

*Pennsylvania.*— Millard *v.* Morse, 32 Pa. St. 506.

*Tennessee.*— Clark *v.* Cuson, 3 Head 55.

See 43 Cent. Dig. tit. "Sales," § 214.

**Delivery at warehouse.**—A covenant to deliver goods at a warehouse does not require the covenantor to put them in the warehouse. Duckham *v.* Smith, 5 T. B. Mon. (Ky.) 372.

**Delivery alongside vessel.**— Where the con-

are ready for delivery at another place near by.[48] Generally the fact that the goods are to be inspected or weighed at another place will not affect the rule;[49] but the rule is subject to exception when the right to inspect carries with it the right to reject,[50] or other circumstances render it necessary to construe the contract as providing for delivery at the place of inspecting and measuring.[51]

**b. Where No Place Is Designated.** In the absence of any provision in the contract fixing a place for delivery the general rule is that the delivery shall be made at the place where the goods are at the time of the sale,[52] and this will usually be the place of business of the seller,[53] or of manufacture,[54] or of shipment.[55] The rule may, however, be modified by circumstances,[56] a custom of the trade,[57] or the understanding of the parties that delivery shall be made at the place of business or warehouse of the buyer.[58] So too if the goods are bulky and cumbersome,

tract provides for delivery alongside a vessel to be provided by the purchaser a delivery on the wharf before the vessel arrives is not a compliance with the contract. McCandish *v.* Newman, 1 Phila. (Pa.) 268.

**Designation in the alternative.**—Where a contract of sale specified that delivery should be made to a certain railway, which ran through two places, where the sellers maintained their business office and factory, respectively, delivery to the railway at the factory, instead of at the place where the sellers' business office was located, constituted a sufficient delivery under the contract. Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648.

**Option to make other delivery.**— Where the contract for the sale of ice stipulated that at least three fourths of the quantity sold should be stored in designated houses, the ice to become defendant's property when cut, provided, however, that plaintiff should have a right "to make up the quantity to be delivered as aforesaid by purchase or otherwise," indemnifying defendant for any additional expense occasioned thereby, any ice purchased under the proviso need not be stored in such houses, but might be delivered elsewhere, the seller paying any additional expense thereby caused. Fisher *v.* Newark City Ice Co., 62 Fed. 569, 10 C. C. A. 546.

**Delivery impossible.**— If delivery at the place specified in the contract is impossible through no fault of the seller, he may make the best delivery possible. J. H. Labarre Co. *v.* Crossman, 100 N. Y. App. Div. 499, 92 N. Y. Suppl. 565 [*affirmed* in 184 N. Y. 586, 77 N. E. 1189]. And see Lockhart *v.* Bonsall, 77 Pa. St. 53.

48. Kirkpatrick *v.* Alexander, 60 Ind. 95; Clark *v.* Cuson, 3 Head (Tenn.) 55.

49. Watson Coal, etc., Co. *v.* James, 72 Iowa 184, 33 N. W. 622; McKee *v.* Wild, 52 Nebr. 9, 71 N. W. 958; Diehl *v.* McCormick, 143 Pa. St. 584, 22 Atl. 1033.

50. Lesser *v.* Perkins, 4 N. Y. Suppl. 53 [*affirmed* in 123 N. Y. 629, 25 N. E. 952].

51. Western Mill, etc., Co. *v.* Blanchard, 1 Wash. 230, 23 Pac. 839.

52. *California.*— Mattingly *v.* Roach, 84 Cal. 207, 23 Pac. 1117.

*Illinois.*— Bosworth *v.* Frankberger, 15 Ill. 508. And see Smith *v.* Gillett, 50 Ill. 290.

*Indiana.*— Bailey *v.* Ricketts, 4 Ind. 488.

*Kentucky.*— Buckley *v.* Frankfort, 44 S. W. 139, 19 Ky. L. Rep. 1667.

*Louisiana.*—Kenner *v.* Allen, McGloin 214.

*New York.*— Bronson *v.* Gleason, 7 Barb. 472.

See 43 Cent. Dig. tit. "Sales," § 215.

**Mistake as to location.**—Where the place of delivery is not declared to be material, and without intent to defraud or deceive the property is stated to be at one place, when in fact it is at another, such error will not avoid the contract. Kenner *v.* Allen, McGloin (La.) 214.

53. Bailey *v.* Ricketts, 4 Ind. 488; Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365; Bronson *v.* Gleason, 7 Barb. (N. Y.) 472; Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377.

**Buyer to remove goods.**— If the buyer is to remove the goods the place of delivery is the premises of the seller. Gray *v.* Walton, 107 N. Y. 254, 14 N. E. 191.

**Purchase through broker.**—Where goods are ordered through a foreign agent, and the custom of the trade makes the place of purchase the place of delivery, the contract of purchase will be so construed. Lowenstein *v.* Bennet, 19 Ohio Cir. Ct. 616, 10 Ohio Cir. Dec. 530.

54. Leeds *v.* Bredall, 2 Rob. (La.) 105; Swanke *v.* McCarty, 81 Wis. 109, 51 N. W. 92.

55. Mobile Fruit, etc., Co. *v.* McGuire, 81 Minn. 232, 83 N. W. 833; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203 [*reversing* 40 N. Y. Super. Ct. 483]; Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1901) 60 S. W. 1030. But see Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144.

56. Barr *v.* Myers, 3 Watts & S. (Pa.) 295, holding that if the time of delivery is certain, the place of delivery is the buyer's place of business or residence. And to the same effect see La Farge *v.* Rickert, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209.

**Buyer's option.**— In Bean *v.* Simpson, 16 Me. 49, it was held that if no place is appointed in the contract for the delivery of specific articles, it is the duty of the seller to ascertain from the buyer where he will receive them.

57. Williams *v.* Adams, 3 Sneed (Tenn.) 359.

58. Field *v.* Runk, 22 N. J. L. 525; Bron-

the seller is not obliged to carry them to the buyer, but before delivery should request the buyer to appoint a place of delivery.[59]

**c. Appointment of Place.** The contract may confer upon the buyer the right to appoint the place of delivery,[60] and in such case if the buyer fails to make a designation the seller is excused.[61] Thus if the delivery is to be made on the buyer's vessel, the buyer must name the ship,[62] and notify the seller of her location.[63] If the contract provides in general terms that delivery is to be made in a certain city, the buyer has the right to fix the particular place within such city where delivery shall be made.[64] If the place of delivery is at the seller's option, he must make the designation and notify the buyer in order to fix his liability;[65] and if delivery is to be made by a designated time he must exercise his option within the time permitted.[66] In any event notice of the appointment of a place of delivery must be given within a reasonable time,[67] and a delivery at the place designated is of course a complete discharge of the seller's obligation.[68]

**d. Delivery by Carrier.** If delivery is made by carrier the place of shipment

son *v.* Gleason, 7 Barb. (N. Y.) 472; Williams *v.* Adams, 3 Sneed (Tenn.) 359; McLaughlin *v.* Marston, 78 Wis. 670, 47 N. W. 1058. And see Holtz *v.* Peterson, 98 Iowa 741, 62 N. W. 19, where the delivery was based on the provision of the code, section 2098.

59. Allen *v.* Woods, 24 Pa. St. 76; Barr *v.* Myers, 3 Watts & S. (Pa.) 295; Mallory *v.* Lyman, 4 Chandl. (Wis.) 143.

**Seller's option.**—If bulky articles are deliverable at the seller's option he should notify the buyer of the place of delivery. Weiseger *v.* Wheeler, 16 Wis. 492.

60. Knox *v.* Mayne, Ir. R. 7 C. L. 557. And see Slaughter *v.* Moore, 17 Tex. Civ. App. 233, 42 S. W. 372, holding that a contract for the sale of cattle in pasture, providing that the purchaser has the right to have the cattle delivered at M or at C, and that the cattle are to be passed upon and graded at the pasture, and counted at C or M, at the purchaser's option, gives the purchaser the privilege of receiving the cattle at the pasture.

**Cumbersome articles.**—Where the goods are bulky and cumbersome and no place of delivery is fixed the seller should ask the buyer to appoint a place of delivery. Allen *v.* Woods, 24 Pa. St. 76; Barr *v.* Myers, 3 Watts & S. (Pa.) 295; Mallory *v.* Lyman, 4 Chandl. (Wis.) 143.

**Usage of trade.**—Where, by usage, inspectors of lumber are agents of both purchaser and seller, if an inspector deliver lumber at a different place than that designated by the purchaser, who refuses to receive it at the place where it is deposited, and the lumber is there destroyed by fire, the purchaser is not liable for the price to the seller, upon whom the loss must fall. Buie *v.* Browne, 28 N. C. 404.

61. McNairy *v.* Bishop, 8 Dana (Ky.) 150; Lucas *v.* Nichols, 5 Gray (Mass.) 309; Canney *v.* Brown, 40 Minn. 461, 42 N. W. 354.

**Designation by the assignee of the buyer is a sufficient designation.** Mewherter *v.* Price, 11 Ind. 199.

62. Walton *v.* Black, 5 Houst. (Del.) 149; Sutherland *v.* Allhusen, 14 L. T. Rep. N. S. 666.

**Duty to furnish vessel.**—Where delivery is to commence July 10 or "as soon thereafter as vessel can be ready" the vessel must be furnished within a reasonable time. Whiting *v.* Gray, 27 Fla. 482, 8 So. 726, 11 L. R. A. 526. And see Bolton *v.* Riddle, 35 Mich. 13.

63. Woolner *v.* Hill, 47 N. Y. Super. Ct. 470 [*reversed* on other grounds in 93 N. Y. 576].

64. Stillwell *v.* Bowling, 36 Mo. 310.

**Limitation on power of appointment.**—On a sale of pork "packed at Milwaukee or Chicago," stipulating for delivery "at any warehouse in the city of Milwaukee, or in the city of Chicago, which the [purchaser] may appoint," the purchaser is limited to the appointment of a warehouse in the same city in which the pork was packed. Weiseger *v.* Wheeler, 14 Wis. 101.

65. Weiseger *v.* Wheeler, 16 Wis. 492.

66. Mueller *v.* Pels, 94 Ill. App. 353 [*affirmed* in 192 Ill. 76, 61 N. E. 472].

67. West *v.* Newton, 1 Duer (N. Y.) 277.

**What is reasonable time.**—A designation within ten days after the making of the contract is within reasonable time. Boyd *v.* Gunnison, 14 W. Va. 1.

68. Choctaw, etc., R. Co. *v.* Colorado Fuel, etc., Co., 93 Fed. 742, 35 C. C. A. 568.

**Compliance with designation.**—Where a contract to deliver five thousand barrels of oil at points on a railroad provides that the place of delivery shall be designated by the buyer, upon his designating a station whose siding has not room to hold the requisite cars, the seller may properly put the oil on the nearest sidings, ready to be moved thither as soon as room is made for it; and it is the buyer's duty to be ready to receive and pay for the oil at the time stated in his notice. Lockhart *v.* Bonsall, 77 Pa. St. 53. The mere arrival of goods at a wharf within the limits of a city, where delivery was to be made at a place therein to be designated by the buyers, does not constitute a delivery to the buyers, where they had designated a

is ordinarily the place of delivery,[69] but by the terms of the agreement the place of delivery may be fixed at the town or city where the buyer resides or does business,[70] or at his place of business,[71] and in such case a delivery at the carrier's station or terminal in that town is usually sufficient,[72] although no notice was given to the buyer of the arrival of the goods.[73] Thus a delivery "on track" at a certain city is complete when the cars are left in the general receiving yards and it is not necessary that the cars should be placed on tracks running to the buyer's warehouse.[74] Ordinarily when goods are to be shipped by the seller and at his expense, to the place of business of the buyer, such place is the place of delivery;[75] but the prepayment of freight by the seller does not conclusively show that the place of delivery is the buyer's place of business.[76] Similarly if the agreement is to sell goods "f. o. b." at a designated place such place will ordinarily be regarded as the place of delivery;[77] but the effect of the "f. o. b." depends on the connection in which it is used, and if used in connection with the

different place of delivery. Morel *v.* Stearns, 43 Misc. (N. Y.) 639, 88 N. Y. Suppl. 416.

**69.** Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144; Mobile Fruit, etc., Co. *v.* McGuire, 81 Minn. 232, 83 N. W. 833; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203 [*reversing* 40 N. Y. Super. Ct. 483]; Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1901) 60 S. W. 1030; Swanke *v.* McCarty, 81 Wis. 109, 51 N. W. 92. And see *infra*, V, B, 8, l, (I).

**70.** Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144.

**Place unfit for delivery.**—Where delivery is to be made at a certain dock in which the buyers have rights, the expense of making such dock fit for delivery must be borne by the buyers. Matter of Shell Transport, etc., Co., 20 T. L. R. 517.

**Contract held to provide for delivery at city where buyer resides.**— Plaintiffs engaged to import structural beams and deliver them to a structural company, whose works were at Everett. The contract, however, required payment on delivery to the structural company at Boston. It was held that plaintiffs were only required to deliver at Boston, and that, when the beams were landed on the wharf and the structural company notified, plaintiffs' contract was performed. Houdlette *v.* Dewey, 200 Mass. 419, 86 N. E. 790.

**71.** Sterling Coal Co. *v.* Silver Spring Bleaching, etc., Co., 162 Fed. 848, 89 C. C. A. 520.

**72.** Capehart *v.* Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60; Applegate *v.* Hogan, 9 B. Mon. (Ky.) 69; McKee *v.* Wild, 52 Nebr. 9, 71 N. W. 958; Bloyd *v.* Pollock, 27 W. Va. 75. But see McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441, where delivery was by barge, and it was held that the delivery was not complete, although the barge had arrived at and had been tied up to the buyer's wharf.

**Delivery on side-track.**—Where plaintiff contracted to ship defendant a car of wheat, to a certain point, where defendant was to take the wheat and haul it to his mill, and pay therefor when weighed on his scales at the mill, and the car was side-tracked by the railroad company at the point designated, where an unusual freshet washed the car from the track on the night following its arrival, and the wheat was lost, there had been a delivery of the wheat to defendant, and that he was liable for the price. Sedgwick *v.* Cottingham, 54 Iowa 512, 6 N. W. 738.

**Delivery on certain premises.**—A contract to deliver coal "into the shed at pumping station or grounds adjacent thereto" is not complied with by delivering the coal on a dock eighty feet from the coal shed and separated from it by a road. Goderich *v.* Holmes, 32 Can. Sup. Ct. 211.

**73.** A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545, 31 Pac. 945; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272.

**74.** A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545, 31 Pac. 945.

**75.** Devine *v.* Edwards, 101 Ill. 138; Sumner *v.* Thompson, 31 Nova Scotia 481.

**76.** Dannemiller *v.* Kirkpatrick, 201 Pa. St. 218, 50 Atl. 928. And see Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534; McLaughlin *v.* Marston, 78 Wis. 670, 47 N. W. 1058.

**77.** *Alabama.*— Capehart *v.* Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60; Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 14 So. 672.

*California.*— Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

*Illinois.*— Knapp Electrical Works *v.* New York Insulated Wire Co., 157 Ill. 456, 42 N. E. 147.

*Indiana.*— Kilmer *v.* Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271.

*Kansas.*— Hunter Bros. Milling Co. *v.* Kramer, 71 Kan. 468, 80 Pac. 963.

*Maryland.*— Samuel M. Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 68 L. R. A. 795.

*Nebraska.*— Havens *v.* Grand Island Light, etc., Co., 41 Nebr. 153, 59 N. W. 681.

*Pennsylvania.*— Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134; Dwight *v.* Eckert, 117 Pa. St. 490, 12 Atl. 32; American Bridge Co. *v.* Duquesne Steel Foundry Co., 28 Pa. Super. Ct. 479.

words fixing the price only it will not be construed as fixing the place of delivery.[78]

**e. Waiver of Place.** The acceptance of the goods at a place other than the place designated for the delivery is a waiver of delivery at such place.[79] The mere silence of the buyer as to the proper place of delivery, although with intent to mislead the seller, will not estop him to insist on delivery at the place designated, if in fact the seller was not misled.[80] If the seller agrees to deliver and keep on hand a designated quantity of the goods sold at plaintiff's place of business at all times, the requirement is not waived by the fact that the buyer contracts with a third party to freight, insure, unload, or haul and store the goods.[81]

**f. Evidence.** If the parties to a contract for the delivery of goods at a certain place, enter into a second contract for the delivery of another lot of the same goods, in which no place of delivery is mentioned, it will be presumed that the same place of delivery was intended.[82] Where the seller and buyer live in different places the burden is on the buyer in an action for the price to show that delivery was to be made at his place of business.[83]

**g. Questions For Jury.** Where the contract fails to designate the place of delivery the question should be left to the jury,[84] and where delivery is by carrier it is for the jury to determine whether the delivery was to be made at the buyer's place of business or to the carrier only.[85]

**7. Time of Delivery**[86] **— a. When Time Is Fixed by the Contract — (i) *In General.*** If the contract specifies the time when delivery is to be made, time is of the essence of the contract,[87] and if delivery is not made within the time

78. Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534, holding that the words "prices f. o. b. Omaha" did not fix the place of delivery at Omaha. And see Hobart *v.* Littlefield, 13 R. I. 341.

**An agreement "to bill f. o. b."** a certain city does not import an obligation on the part of the seller to deliver in that city. Dannemiller *v.* Kirkpatrick, 201 Pa. St. 218, 50 Atl. 928.

79. Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Minneapolis Threshing Mach. Co. *v.* Hutchins, 65 Minn. 89, 67 N. W. 807; Bock *v.* Healy, 8 Daly (N. Y.) 156; Locke *v.* Williamson, 40 Wis. 377.

80. Bates *v.* Benninger, 2 Cinc. Super. Ct. (Ohio) 568.

81. Sterling Coal Co. *v.* Silver Spring Bleaching, etc., Co., 162 Fed. 848, 89 C. C. A. 520.

82. Bacon *v.* Cobb, 45 Ill. 47.

83. Janney *v.* Sleeper, 30 Minn. 473, 16 N. W. 365.

84. Bosworth *v.* Frankberger, 15 Ill. 508.

**Delivery to subsequent purchasers.**—Where defendants contracted to sell "steel bow sockets for the year 1888" on stipulated terms, it was a question for the jury whether defendants were bound to fill orders for sockets to be sent direct to purchasers from the original buyers, such purchasers and the original buyers living in different cities and states. Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854.

85. McLaughlin *v.* Marston, 78 Wis. 670, 47 N. W. 1058.

86. **Delivery on Sunday** see SUNDAY.

87. *Indiana.*— Ellinger *v.* Comstock, 13 Ind. App. 696, 41 N. E. 351.

*Missouri.*— Barber *v.* Ozark Imp. Co., 131 Mo. App. 717, 111 S. W. 846; Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574.

*New York.*— Biele *v.* Levy, 107 N. Y. Suppl. 607.

*Pennsylvania.*— Lester *v.* McDowell, 18 Pa. St. 91.

*Texas.*— Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

*Wisconsin.*— Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017.

*United States.*—Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920.

*England.*—Wimshurst *v.* Deeley, 2 C. B. 253, 52 E. C. L. 253.

*Canada.*— Coleman *v.* McDermott, 1 Err. & App. (U. C.) 445.

See 43 Cent. Dig. tit. "Sales," § 217.

*Compare* Gude *v.* H. J. Bailey Co., 4 Ga. App. 226, 61 S. E. 135, holding that under Civ. Code (1895), § 3675, subd. 8, declaring that time is not, generally, of the essence of a contract, but may become so by express stipulation or reasonable construction, where a contract of sale of personal property fixes a time for delivery, it is a question of construction whether in the particular case the time fixed for delivery is a material part of the contract.

**When a date for delivery is mentioned in a contract of sale,** the goods must be delivered on that day, and, if not, the purchaser may usually refuse to accept a subsequent tender; and in ordinary cases, where no specified time for delivery is mentioned, delivery must be made within a reasonable time after the making of the contract. Robinson Clay

agreed on the buyer is not liable.[88] In such case the buyer may refuse to accept the goods,[89] or he may receive them and rely on his right to damages for the breach,[90] unless his acceptance is under such circumstances as to constitute a waiver of the breach.[91] On the other hand, if the buyer refuses to accept delivery

Product Co. *v.* American Locomotive Co., 56 Misc. (N. Y.) 589, 107 N. Y. Suppl. 69.

**Option to take stock.**—Where defendant agreed to secure to plaintiff a bid of a certain amount of stock which he held as trustee for plaintiff within a year, and, failing so to do, to take the stock from him at his option at the end of the year for a named sum, time is not of the essence of the agreement and it was not necessary that the stock should be transferred on the precise day when the year expired. Duchemin *v.* Kendall, 149 Mass. 171, 21 N. E. 242, 3 L. R. A. 784.

**Delivery "within ninety days."**—Where plaintiff ordered a certain amount of salt to be taken within ninety days, and defendant receipted the order, stating that he had entered the order for salt "to be taken out within the next ninety days," and would ship the same on instructions, time was of the essence of the contract, and plaintiff could not enforce delivery after the expiration of the time specified. Wilson *v.* Empire Dairy-Salt Co., 50 N. Y. App. Div. 114, 63 N. Y. Suppl. 565.

**Time indefinite.**—Where a contract for the sale of paving bricks required shipments to begin 'about October 20, 1900," time was not of the essence of the agreement. O'Brien *v.* Higley, 162 Ind 316, 70 N. E. 242. And see White *v.* McMillan, 114 N. C. 349, 19 S. E. 234; Ballantyne *v.* Watson, 30 U. C. C. P. 529. *Compare* New Bedford Copper Co. *v.* Southard, 95 Me 209, 49 Atl. 1062.

**Contracts construed and held not to fix definite time for delivery** see Meyer *v.* Stone Valley Distilling Co., 128 N Y. App. Div. 161, 112 N. Y. Suppl. 615; Sumrell *v.* International Salt Co., 148 N. C. 552, 62 S. E. 619.

88. *Indiana.*—Ellinger *v.* Comstock, 13 Ind. App. 696, 41 N. E. 351.

*Iowa.*—Cash *v.* Hinkle, 36 Iowa 623.

*Louisiana.*—Benton *v.* Bidault, 6 La. Ann. 30.

*New York.*—Reynolds *v.* Spencer, 92 Hun 275, 36 N. Y. Suppl. 750.

*Pennsylvania.*—Musselman *v.* Stoner, 31 Pa. St. 265; Clark *v.* Wright, 5 Phila. 439.

*South Dakota.*—Fountain City Drill Co. *v.* Lindquist, (1908) 114 N. W. 1098.

*Tennessee.*—Clark *v.* Cuson, 3 Head 55.

*Texas.*—Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

*United States.*—Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644; Henderson *v.* McFadden, 112 Fed. 389, 50 C. C. A. 304; Titcomb *v.* U. S., 14 Ct. Cl. 263.

*England.*—Plevins *v.* Downing, 1 C. P. D. 220, 45 L. J. C. P 695, 35 L. T. Rep. N. S. 263; Coddington *v.* Paleologo, 36 L. J. Exch. 73, L. R. 2 Exch. 193, 15 L. T. Rep. N. S. 581, 15 Wkly. Rep. 961.

**Construction of contract.**—An agreement dated Sept. 26, 1888, to purchase cattle then being fed by the seller, providing that part should be delivered at once, part in two weeks, part "in October next, the remainder by the twenty-fifth of November," is not ambiguous as to the time when the last cattle are to be delivered but requires the last delivery to be made Nov. 25, 1888. Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998. Where a contract stated in a declaration was to deliver stock on the 27th of February and the contract proved was to deliver stock on the settling day, which at that time was fixed for, and understood by the parties to mean, the 27th of February, the proof supported the declaration. Wickes *v.* Gordon, 2 B. & Ald. 335, 1 Chit. 60, 18 E. C. L. 47.

**Delivery as condition precedent.**—If delivery is made a condition precedent to payment and payment is fixed for a certain day delivery must be made by that time. Evans *v.* Harris, 19 Barb. (N. Y.) 416. And see Staunton *v.* Wood, 16 Q. B. 638, 15 Jur. 1123, 71 E. C. L. 638. *Compare* Allen *v.* Hartfield, 76 Ill. 358.

89. *Kentucky.*—White, etc., Hat Co. *v.* Carson, 77 S. W. 366, 25 Ky. L. Rep. 1230.

*Missouri.*—Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574.

*New York.*—Rouse *v.* Lewis, 4 Abb. Dec. 121, 2 Keyes 352.

*Texas.*—Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

*United States.*—Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920; Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644.

*England.*—Coddington *v.* Paleologo, L. R. 2 Exch. 193, 36 L. J. Exch. 73, 15 L. T. Rep. N. S. 581, 15 Wkly. Rep. 961.

90. *Georgia.*—Poland Paper Co. *v.* Foote, etc., Co., 118 Ga. 458, 45 S. W. 374; Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

*Iowa.*—Medart Pulley Co. *v.* Dubuque Turbine, etc., Mill Co., 121 Iowa 244, 96 N. W. 770.

*Kansas.*—Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

*Kentucky.*—Belcher *v.* Sellards, 43 S. W. 676, 19 Ky. L. Rep. 1571.

*Michigan.*—Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

*Missouri.*—Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574.

*Oregon.*—Sutton *v.* Clarke, 42 Oreg. 525, 71 Pac. 794.

*Virginia.*—O. H. Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

*Wisconsin.*—Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190.

91. Acceptance after time as waiver of delay see *infra*, V, B, 7, c, (II).

at the time designated, the seller is not obliged to deliver after that date.[92] If delivery at the time fixed is impossible, although no fault of the seller, he should nevertheless tender the best delivery possible.[93]

(II) *DELIVERY WITHIN CERTAIN PERIOD.* Where delivery is to be made between certain dates the seller is not bound to deliver until the last day.[94] So if the agreement is that delivery shall be made within a designated month the seller has until the last day of the month to make delivery,[95] and a delivery by

92. Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057. See also Faddis *v.* Mason, 122 Fed. 410, 59 C. C. A. 27.

93. J. H. Labaree Co. *v.* Crossman, 100 N. Y. App. Div. 499, 92 N. Y. Suppl. 565 [*affirmed* in 184 N. Y. 586, 77 N. E. 1189]; Whitney *v.* Hop Bitters Mfg. Co., 2 N. Y. Suppl. 438 [*affirmed* in 121 N. Y. 682, 24 N. E. 1098]. And see Lockhart *v.* Bonsall, 77 Pa. St. 53.

94. *Illinois.*— Harman *v.* Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017; Grosvenor *v.* Magill, 37 Ill. 239.

*Kentucky.*— Estill *v.* Jenkins, 4 Dana 75. But see Sousely *v.* Burns, 10 Bush 87, where it was held that the purchaser might require delivery at any time within the dates specified but that his failure so to do fixed the last day as the day of delivery.

*New York.*— Croninger *v.* Crocker, 62 N. Y. 151; Park *v.* Chateaugay Iron Co., 8 N. Y. St. 507. *Compare* Fowler *v.* Rigney, 5 Abb. Pr. N. S. 182, holding that if the contract provides for delivery between the dates of the contract and a certain specified date the last day for delivery is the day before the date specified.

*Ohio.*— Nixon *v.* Nixon, 21 Ohio St. 114.

*Pennsylvania.*— Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138.

See 43 Cent. Dig. tit. "Sales," § 217.

**In Indiana** it has been held that if the time of delivery is fixed within a period "from" a certain date "to" a certain other date, both days are excluded. Newby *v.* Rogers, 40 Ind. 9; Cook *v.* Gray, 6 Ind. 335.

**Delivery within a year.**— Under a contract to deliver one thousand tons of bark per year for five years, the contractor has the whole of each year in which to deliver the one thousand tons. Curtiss *v.* Howell, 39 N. Y. 211.

**Delivery during the season.**— Under a contract to ship and deliver three thousand tons of plaster stone during the season, the right to the whole season for making the delivery is limited by a further provision that the stone is to be delivered as fast as vessels can be obtained at the point of shipment; and the contract is broken by the seller's refusal to deliver two cargoes shipped by him during the season. Isaacs *v.* New York Plaster Works, 67 N. Y. 124.

**The buyer may demand delivery** after the expiration of the period within which the delivery was to be made if the seller does not complete the delivery within the period. O'Neill *v.* James, 43 N. Y. 84.

**Buyer to call for goods.**—Where buyer is to call for the goods within a certain period, and fails to do so, the seller is not obliged to deliver thereafter. Brown *v.* Ray, 33 N. C. 222.

**A forfeit for delay** in delivery within a certain time must be calculated from the last day of the period within which delivery was to be completed. Bergheim *v.* Blaenavon Iron, etc., Co., L. R. 10 Q. B. 319, 44 L. J. Q. B. 92, 32 L. T. Rep. N. S. 451, 23 Wkly. Rep. 618.

95. Pixley *v.* Boynton, 79 Ill. 351; New Bedford Copper Co. *v.* Southard, 95 Me. 209, 49 Atl. 1062; Brooklyn Oil Refinery *v.* Brown, 61 N. Y. 643; Morel *v.* Stearns, 43 Misc. (N. Y.) 639, 88 N. Y. Suppl. 416.

**"First half of August."**—A contract to deliver "during the first half of August" requires delivery to be made by noon of August 16. Grosvenor *v.* Magill, 37 Ill. 239; Kirkpatrick *v.* Alexander, 44 Ind. 595, 60 Ind. 95.

**Delivery "within six weeks."**— Defendant on April 28, 1903, ordered by letter from plaintiff a certain number of frames to be delivered within six weeks. This order was accepted, and on May 8 defendant ordered another lot of frames, writing on the foot of his letter of April 28: "Note. Increase the above order to 5 M. of each." It was held that the second order should be construed as made on the same terms as the first, and that plaintiff was bound to deliver all the goods within six weeks. Robert Gair Co. *v.* Armstrong, 107 N. Y. Suppl. 5.

**"During next two months."**—A contract dated June 17 providing for delivery "during the next two months" allowed the seller the entire months of July and August in which to make delivery. Bissell *v.* Beard, 28 L. T. Rep. N. S. 740.

**Purpose for which articles are intended.**— Under a contract for the sale of brick to be used in building a sewer "delivery at the rate of three hundred thousand bricks per month" does not require the seller to deliver three hundred thousand brick early enough in each month to enable the buyer to lay them within the same month, but as the contract for building the sewer called for its completion by August 1, the seller must deliver the last instalment in time to complete the sewer by that date. Consolidated Coal, etc., Co. *v.* Mercer, 16 Ind. App. 504, 44 N. E. 1005.

**Delivery in instalments.**— Under a contract to sell five hundred and sixty tons of coal, to be delivered as plaintiffs might order, not more than two hundred tons to be ordered in any one month, the contract being signed September 12, and the first order, made in September, being for two hundred tons, defendants had a month from that date in which

carrier at the usual place on that day is good, although the buyer did not actually receive the goods until the next day.[96]

(III) *HOUR OF DELIVERY.* As a general rule the seller has the whole of the day named in which to deliver,[97] especially if the buyer is present to receive the goods,[98] and there is time to weigh and inspect the goods so as to complete the delivery before midnight.[99] If, however, time must be allowed for the examination of the goods by daylight, delivery must be made before sunset.[1] So too the parties may by their contract limit the hour of delivery, and where the contract provides for delivery during the first half of a month of thirty-one days delivery must be made by noon of the sixteenth day.[2]

(IV) *SHIPMENT BY CARRIER.* Where the contract provides that the goods are to be shipped within a certain period, the time of shipment is usually regarded as material,[3] and it is not a compliance with the contract if the goods are shipped before [4] or after the time specified.[5] The contract is, however, satisfied if the goods are on board the car or vessel, and it does not require that the car shall leave the station or the vessel clear and sail within such period, if the seller believes that transit will begin in a reasonable time.[6] Where goods were ordered for

to deliver the two hundred tons. Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

**96.** Morel *v.* Stearns, 37 Misc. (N. Y.) 486, 75 N. Y. Suppl. 1082 [*reversing* 36 Misc. 846, 74 N. Y. Suppl. 1138]; Cochran Cotton Seed Oil Co. *v.* Haebler, 1 Misc. (N. Y.) 20, 20 N. Y. Suppl. 371 [*affirmed* in 2 Misc. 251, 21 N. Y. Suppl. 945 (*affirmed* in 142 N. Y. 664, 37 N. E. 570)]. *Compare* Cox *v.* Todd, 7 D. & R. 131, 4 L. J. K. B. O. S. 34, 16 E. C. L. 277, holding that where barley was sold upon a contract to "deliver alongside a sloop or warehouse at G. or H., at the buyer's option, in all April or sooner," and the barley was brought into deck at G on the twenty-ninth of April, the contract was broken, inasmuch as it would have taken four days to unload the vessel and deliver the cargo into the buyer's possession.

**97.** Adams *v.* Dale, 29 Ind. 273; Cochran Cotton Seed Oil Co. *v.* Haebler, 2 Misc. (N. Y.) 251, 21 N. Y. Suppl. 945 [*affirmed* in 142 N. Y. 664, 37 N. E. 570, and *affirming* 1 Misc. 20, 20 N. Y. Suppl. 371]; Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138.

**98.** Sweet *v.* Harding, 19 Vt. 587; Startup *v.* Macdonald, 12 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593. *Compare* Scott *v.* Miller, 66 Ill. 273.

**99.** Berry *v.* Nall, 54 Ala. 446; Startup *v.* Macdonald, 12 L. J. Exch. 477, 6 M. & G. 593, 7 Scott N. R. 269, 46 E. C. L. 593.

**1.** Croninger *v.* Crocker, 62 N. Y. 151. And see Larimore *v.* Hornbaker, 21 Ind. 430.

**2.** Grosvenor *v.* Magill, 37 Ill. 239; Kirkpatrick *v.* Alexander, 44 Ind. 595, 60 Ind. 95.

**3.** Bidwell *v.* Overton, 13 N. Y. Suppl. 274, 26 Abb. N. Cas. 402; Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730.

**4.** Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730. *Compare* Alexander *v.* Vanderzee, L. R. 7 C. P. 530, 20 Wkly. Rep. 871.

**5.** Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57; Brandt *v.* Lawrence, 1 Q. B. D. 344, 46 L. J. Q. B. 237, 24 Wkly Rep. 749. See also Peace River Phosphate Co. *v.* Graffin, 58 Fed. 550.

**6.** Clark *v.* Lindsay, 19 Mont. 1, 47 Pac. 102, 61 Am. St. Rep. 479; Ledon *v.* Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245 [*reversing* 47 Hun 616]; Schwann *v.* Clark, 9 Misc. (N. Y.) 117, 29 N. Y. Suppl. 289 [*affirming* 7 Misc. 242, 27 N. Y. Suppl. 262]; Bowers *v.* J. B. Worth Co., 129 N. C. 36, 39 S. E. 635; Busk *v.* Spence, 4 Campb. 329. But see Alexander *v.* Vanderzee, L. R. 7 C. P. 530, 20 Wkly. Rep. 871, where a contract for shipment in June and (or) July, seller's option, was construed to mean that the goods must be loaded so as to sail in those months and not that the goods must be loaded in those months.

**Construction of contract.**— Where defendants contracted to purchase from plaintiff one half the cargo per Wachusett, "chartered to load" not exceeding twenty-two hundred tons nitrate of soda, to arrive at New York, "bought to be a March and or April shipment" from the west coast of South America; and it was the custom of the trade, known to both parties, for the vendor to sell after having entered into an executory contract for the purchase of the product on the west coast of South America, to be delivered there or shipped according to order, the words, "bought to be a March and or April shipment," referred to the original purchase by plaintiff, and did not bind plaintiff to ship the goods during those months. Browne *v.* Paterson, 165 N. Y. 460, 59 N. E. 296 [*reversing* 36 N. Y. App. Div. 167, 55 N. Y. Suppl. 404]. A contract by a lumber dealer of Lowell "to furnish all the lumber for Rodman's house in Roxbury, delivered in Boston, first floor to be delivered on the cars by the first day of August next," is fulfilled by a delivery on the cars at Lowell, by the first day of August, of a sufficient portion of the lumber for the first floor, although it does not reach Boston until after that day. Allen *v.* Kimball, 12 Cush. (Mass.) 268. Defendant sold and agreed to deliver to plaintiff one hundred thousand barrels of cement, and

delivery on a certain date at a point so distant that they could not possibly have reached the place at that date, a shipment on that date will be sufficient.[7]

(v) *PREMATURE DELIVERY.* When the time of delivery is fixed it is not as a rule a sufficient performance if the seller delivers the goeds before such time.[8] The buyer may, however, waive objection for premature delivery by acceptance of the goods.[9]

**b. When Time Is Not Fixed by Contract — (I)** *IN GENERAL.* When the time of delivery is not fixed or is stated in general and indefinite terms, time is not of the essence of the contract.[10] The law implies, however, that if no time is fixed, delivery shall be made within a reasonable time,[11] in the absence of anything to

plaintiff to receive and pay for the same. One half was to be delivered the first year, and the remainder the following year, at either one of two ports on Lake Superior, at plaintiff's option. The contract contained the following provision: "Shipments to be made [by defendant] after navigation opens and continue throughout the season in 5,000 to 10,000 barrel lots as required by said second party [plaintiff]; shipments to be made on or before October 15th of each year. Said second party shall give 30 days' notice of shipments to be made, in advance." It was held that such provision contemplated shipments by water in five thousand to ten thousand barrel lots throughout the season; that the provision for notice was for the benefit of both parties, and required plaintiff to give thirty days' notice in advance of each of such shipments, especially in view of another provision for tests of the cement requiring twenty-eight days' time, and the taking of samples for such tests at the factory "approximately on the date that notice of shipment is given." Alpena Portland Cement Co. *v.* Backus, 156 Fed. 944, 84 C. C. A. 444.

**Prompt shipment.**—A stipulation for prompt shipment is not complied with by placing the goods on board a vessel in a port blockaded by ice. Tobias *v.* Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509.

**Shipment from seaboard.**—Where a contract for sale of grain requires shipment from seaboard not later than April, a delivery to an agent of a steamship company in St. Louis at any time during the month is not sufficient, as the seller was obligated to get the grain to port in time for it to be shipped from there in April. James *v.* Crown Cereal Co., 90 Mo. App. 227.

**Mode of shipment.**—A contract to ship goods "at Manila per sailing vessel . . . direct to New York or via Hong Kong, during . . . April or May," requires the goods to be on board a sailing vessel within the time specified, and a shipment at Manila in May, on steamer for Hong Kong, and transhipment to a sailing vessel at the latter port in June, is not a compliance therewith. Lefferts *v.* Weld, 167 Mass. 531, 46 N. E. 107. But *compare* Thornton *v.* Simpson, Holt N. P. 164, 3 E. C. L. 72, 2 Marsh. 267, 6 Taunt. 556, 1 E. C. L. 752, where a contract for shipment, "the ship's name to be declared as soon as known," was construed as allowing shipment in more than one vessel.

**Putting goods on lighters** to be taken out to the vessel is a shipment within the condition. Gattorno *v.* Adams, 12 C. B. N. S. 560, 104 E. C. L. 560. And see Busk *v.* Spence, 4 Campb. 329.

7. Whitney *v.* Hop Bitters Mfg. Co., 2 N. Y. Suppl. 438 [*affirmed* in 121 N. Y. 682, 24 N. E. 1098].

8. Tascott *v.* Rosenthal, 10 Ill. App. 639; George *v.* Dean, 17 Mo. App. 332; Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730. But see Dodge *v.* Barnes, 31 Me. 290, holding that a transfer of stock in a corporation, in compliance with a contract of sale, two days earlier than the day stipulated, is a substantial and sufficient compliance with the contract.

9. Lee *v.* Bangs, 43 Minn. 23, 44 N. W. 671.

10. Montgomery *v.* Thomson, 152 Cal. 319, 92 Pac. 866; O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242; Pratt *v.* Lincoln, (Me. 1888) 13 Atl. 689; White *v.* McMillan, 114 N. C. 349, 19 S. E. 234; Ballantyne *v.* Watson, 30 U. C. C. P. 529. But *compare* New Bedford Cooper Co. *v.* Southard, 95 Me. 209, 49 Atl. 1062.

11. *Arkansas.*— Long *v.* Abeles, 77 Ark. 150, 91 S. W. 29.

*Delaware.*—Walker *v.* Taylor, 4 Pennew. 118, 53 Atl. 357.

*Georgia.*— Northington-Munger Pratt Co. *v.* Farmers' Gin, etc., Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210.

*Illinois.*— Coyne *v.* Avery, 189 Ill. 378, 59 N. E. 788 [*affirming* 91 Ill. App. 347]; Henkle *v.* Smith, 21 Ill. 238.

*Iowa.*— Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235.

*Kentucky.*— Hume *v.* Mullins, 35 S. W. 551, 18 Ky. L. Rep. 108.

*Maryland.*— Bagby *v.* Walker, 78 Md. 239, 27 Atl. 1033; Kriete *v.* Myer, 61 Md. 558.

*Michigan.*— Bollenbacher *v.* Reid, 155 Mich. 277, 118 N. W. 933.

*Minnesota.*— Palmer *v.* Breen, 34 Minn. 39, 24 N. W. 322; Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

*Missouri.*— Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365.

*Nebraska.*—McGinnis *v.* R. K. Johnson Co., 74 Nebr. 356, 104 N. W. 869.

*New York.*— Browne *v.* Paterson, 165 N. Y. 460, 59 N. E. 296 [*reversing* 36 N. Y. App. Div. 167, 55 N. Y. Suppl. 404]; Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811 [*affirming* 27 N Y. App.

show that an immediate delivery is intended.[12] But that an immediate delivery is intended may appear from the terms of the contract,[13] or the circumstances attending the transaction;[14] and if such intent does appear time is of the essence of the contract.[15] So too when the time of delivery is referred to in general or indefinite terms the contract will be construed reasonably in view of the circumstances.[16] Where goods are to be delivered "by the first boat" it is sufficient to send them by the first boat that receives general freight, although a boat under special charter had sailed before.[17] A contract to deliver during "the season" requires a delivery during the current season only.[18] A contract to deliver for "spring

Div. 22, 50 N. Y. Suppl. 251]; Cragin *v.* O'Connell, 50 N. Y. App. Div. 339, 63 N. Y. Suppl. 1071 [*affirmed* in 169 N. Y. 573, 61 N. E. 1128]; Arthur *v.* Wright, 57 Hun 22, 10 N. Y. Suppl. 368 [*affirmed* in 132 N. Y. 547, 30 N. E. 865]; New Haven, etc., Co. *v.* Quintard, 1 Sweeny 89, 6 Abb. Pr. N. S. 128; Smith *v.* Halligan, 9 N. Y. St. 425; Palen *v.* Haake, 2 N. Y. Suppl. 6.

*North Carolina.*— Hurlburt *v.* Simpson, 25 N. C. 233.

*Pennsylvania.*— Muskegon Curtain-Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132, 19 Atl. 1008.

*Texas.*— Ullman *v.* Babcock, 63 Tex. 68.

*Virginia.*— Smith *v.* Snyder, 82 Va. 614.

*West Virginia.*— Boyd *v.* Gunnison, 14 W. Va. 1.

*Wisconsin.*— Lippert *v.* Saginaw Milling Co., 108 Wis. 512, 84 N. W. 831.

*United States.*— Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

*England.*— De Waal *v.* Adler, 12 App. Cas. 141, 56 L. J. P. C. 25; Macdonald *v.* Longbottom, 1 F. & F. 538.

*Canada.*— Ballantyne *v.* Watson, 30 U. C. C. P. 529; Mahaffy *v.* Baril, 11 Quebec Super. Ct. 475.

See 43 Cent. Dig. tit. "Sales," § 218.

**Fulfilment of condition.**—A contract to buy a colt "if sound at five months old" does not require delivery on the last day of the five months, but within a reasonable time thereafter. Dawley *v.* Potter, 19 R. I. 372, 36 Atl. 92.

**12.** Loftus *v.* Riley, 83 Iowa 502, 50 N. W. 17; Hardesty *v.* Pittsburg Steel Co., 89 S. W. 260, 28 Ky. L. Rep. 367; Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680; Hurlburt *v.* Simpson, 25 N. C. 233. And see Pratt *v.* Croft, 19 La. Ann. 130.

**13.** Stock *v.* Towle, 97 Me. 408, 54 Atl. 918, holding that a sale "transit car" meant a sale of goods then in transit to place of delivery.

**14.** Henderson *v.* McFadden, 112 Fed. 389, 50 C. C. A. 304. And see Jones *v.* Fowler, 1 Sweeny (N. Y.) 5, 37 How. Pr. 104.

**Consequential damages.**— Where the purchaser of a pipe intended for a ditch in course of construction notified the seller that, if it was not delivered at once, there was danger of the caving in of the ditch and the seller agreed to deliver at once, without notifying the purchaser that in the event of his failure to do so he would not be liable for any damages occasioned by the delay, these were facts from which the jury might have found an implied agreement by the seller to assume the special liability for damages caused by his negligent delay in failing to deliver the pipe, and the fact that the purchaser makes no attempt to get the pipe elsewhere, but relies on the promise of the seller to immediately furnish it, although he knows the ditch is in danger of caving in, is not such negligence as will prevent a recovery for damages by the caving in of the ditch, which results from the negligence of the seller in failing to deliver the pipe, which was sold by the latter with a knowledge of the circumstances. Lonergan *v.* Waldo, 179 Mass. 135, 60 N. E. 479, 88 Am. St. Rep. 365.

**15.** Stock *v.* Towle, 97 Me. 408, 54 Atl. 918; Henderson *v.* McFadden, 112 Fed. 389, 50 C. C. A. 304.

**16.** Bell *v.* Hatfield, 121 Ky. 560, 89 S. W. 544, 28 Ky. L. Rep. 515, 2 L. R. A. N. S. 529, holding that a contract for the sale of cattle, requiring delivery on a certain day or within a few days thereafter, expires within a reasonable time after the day specified. Where one sold goods to be delivered as fast as a third person delivered them to the seller the buyer had no right to set a time within which the seller must complete the delivery, or be deemed guilty of breach. Smith *v.* Snyder, 82 Va. 614.

**Applications of rule.**—A contract for delivery "about Nov. 1" is complied with by delivery on November 10 (White *v.* McMillan, 114 N. C. 349, 19 S. E. 234. And see O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242); and a contract to deliver "about the last of May or June" is complied with by delivery the last day of June (New Bedford Copper Co. *v.* Southard, 95 Me. 209, 49 Atl. 1062, holding also that if the goods were to be used for a ship to arrive "about April" and the vessel was delayed, the seller might deliver within a reasonable time after her arrival, although such reasonable time extended beyond the last of June); so under a contract to deliver goods sold "about June, 1906," delivery may be made during the month of June, or in a reasonable time thereafter (Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358).

**17.** Johnson *v.* Chambers, 12 Ind. 102.

**18.** Lehigh Valley Coal Co. *v.* Curtis, 22 Ill. App. 394, in this case the season of navigation. And see Hume *v.* Netter, (Tex. Civ. App. 1903) 72 S. W. 865, when delivery was to be made during "running season of 1901 and 1902."

shipment" requires at least that delivery should be made before July 1.[19] In construing such indefinite expression as to time the purpose for which the goods are intended will be taken into consideration. For example a sale of coal "for the winter trade" requires delivery to be made before the end of March;[20] and a sale of fruit trees to be delivered "this fall" requires that delivery shall be made at a time suitable for planting.[21]

(II) *DELIVERY "IMMEDIATELY" OR "AT ONCE."* A delivery to be made "immediately" or "at once" must be made without delay or as promptly as circumstances, in view of the usual course of business, will permit.[22] That is to say the delivery must be made within a reasonable time.[23]

(III) *DELIVERY "AS SOON AS POSSIBLE," "EARLIEST POSSIBLE."* When the contract provides for delivery "as soon as possible" the seller is entitled to a reasonable time,[24] in view of all the circumstances,[25] such as the necessities of manufacture,[26] or of putting the goods in condition for delivery.[27] The term does not mean immediately or that the seller must stop all his other work and

**19.** Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212.

**20.** McGinnis *v.* R. K. Johnson Co., 74 Nebr. 356, 104 N. W. 869.

**21.** Weltner *v.* Riggs, 3 W. Va. 445, holding that a delivery November 22 in freezing weather did not comply with the contract.

**22.** Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244; Chicago Sugar Refining Co. *v.* Armington, 67 Ill. App. 538.

**23.** Rhoades *v.* Cotton, 90 Me. 453, 38 Atl. 367; Fisher *v.* Boynton, 87 Me. 395, 32 Atl. 995; Hirsch *v.* Annin, 28 Misc. (N. Y.) 228, 58 N. Y. Suppl. 1019; Robinson *v.* Brooks, 40 Fed. 525. And see Soper *v.* Creighton, 93 Me. 564, 45 Atl. 840, 74 Am. St. Rep. 375, where the goods were "to be shipped promptly."

**24.** *Illinois.*— Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534 [*affirming* 107 Ill. App. 47].

*Iowa.*— Tufts *v.* McClure, 40 Iowa 317.

*Michigan.*— Bliss Furniture Co. *v.* Norris, 129 Mich. 11, 87 N. W. 1041; Webb *v.* Leominster Shirt Co., 101 Mich. 136, 59 N. W. 397.

*North Carolina.*— Waddell *v.* Reddick, 24 N. C. 424.

*Pennsylvania.*—Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924.

*United States.*— Robinson *v.* Brooks, 40 Fed. 525.

*England.*— Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 27 Wkly. Rep. 221; Atwood *v.* Emery, 1 C. B. N. S. 110, 26 L. J. C. P. 73, 5 Wkly. Rep. 19, 87 E. C. L. 110.

See 43 Cent. Dig. tit. "Sales," § 219.

**Illustrations.**— Defendants ordered a safe from plaintiff to be shipped "as soon as possible." Upon receipt of the order plaintiff had no finished safes on hand, but rushed to completion one in process of manufacture, using all proper diligence, and shipping it nineteen days after receipt of the order. It appeared that the customary time for filling an order by the manufacture of a new safe was thirty days. It was held that the shipment was a substantial compliance with the order. Victor Safe, etc., Co. *v.* O'Neil, 48 Wash. 176, 93 Pac. 214. So under a contract to deliver as soon as possible after September 15, a delivery on November 15 was held sufficient. Widman *v.* Straukamp, 94 N. Y. Suppl. 18.

**Duty to furnish vessel.**—Where delivery is to commence July 10, or "as soon thereafter as vessel can be ready," the vessel must be furnished within a reasonable time. Whiting *v.* Gray, 27 Fla. 482, 8 So. 726, 11 L. R. A. 526. See also Bolton *v.* Riddle, 35 Mich. 13.

**Modification of contract as to quantity.**— That a contract for the sale of one engine to be shipped as soon as possible was modified by substituting two engines for the one originally contracted for did not change the requirement that the same should be shipped as soon as possible. Berry *v.* Fairbanks, (Tex. Civ. App. 1908) 112 S. W. 427.

**Evidence.**—Where a written contract for the sale of an engine called for delivery "as soon as possible," parol evidence that the seller's agent was advised by the buyer of the importance to the buyer of the greatest expedition in shipping the engine by reason of the harvesting season which would begin at a designated date was admissible to enable the court to construe the quoted clause, and to enable the jury to determine whether the undertaking was performed within the meaning of the contract. Berry *v.* Fairbanks, (Tex. Civ. App. 1908) 112 S. W. 427.

**Question for jury.**—Whether a seller in a contract for the sale of an engine, to be shipped as soon as possible, complied with the contract, is a mixed question of fact and law, and the court should interpret the meaning of the contract, and the jury should apply the evidence in the determination of whether or not the undertaking was performed within the meaning of the contract. Berry *v.* Fairbanks, (Tex. Civ. App. 1908) 112 S. W. 427.

**25.** Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

**26.** Webb *v.* Leominster Shirt Co., 101 Mich. 136, 59 N. W. 397; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 27 Wkly. Rep. 221.

**27.** Tufts *v.* McClure, 40 Iowa 317.

devote himself to that particular order.[28] But the seller must nevertheless act with all reasonable diligence or without unreasonable delay.[29] It has been held that a requirement that the shipment of goods should be the "earliest possible" must be construed as meaning that the goods should be sent as soon as the seller could possibly send them, and that it signified rather more than that the goods should be sent within a reasonable time.[30]

(IV) *DELIVERY "SHORTLY."* In a contract for the sale of personal property to be delivered "shortly," it is the duty of the seller to tender delivery within a reasonable time, and if he tenders delivery after such time the buyer may reject.[31]

(V) *RIGHT TO APPOINT TIME OF DELIVERY* — (A) *Buyer's Option.* Where delivery is to be made at the buyer's option, the seller has no right to deliver and the buyer is not obliged to receive the goods until his option is exercised,[32] it being the duty of the buyer to notify the seller to make delivery.[33] Where the time of delivery is at the option of the buyer he must at least exercise his right within a reasonable time,[34] and the seller is entitled to a reasonable time after notice to make delivery,[35] but he cannot delay delivery beyond a reasonable time.[36] If delivery is to be made on or before a certain day at the option of the buyer, the seller has until such last day to make delivery, in absence of any demand by the buyer,[37] and the failure of the buyer to exercise his option is equivalent to a demand for delivery on the last day.[38] The buyer may demand deliveries from time to time as he needs the goods,[39] or he may order the whole to be delivered at any time within the period fixed;[40] but he must at least order deliveries so that they may be complete at the expiration of the period.[41]

(B) *Seller's Option.* If the seller is given the option of delivering the goods at any time within a stated period he must to bind the buyer give notice of his

**28.** Childs *v.* Omaha Paraphernalia House, 80 Nebr. 673, 114 N. W. 941.

**29.** Childs *v.* Omaha Paraphernalia House, 80 Nebr. 673, 114 N. W. 941; Rhodes *v.* Cleveland Rolling-Mill Co., 17 Fed. 426.

**30.** Robinson Clay Product Co. *v.* American Locomotive Co., 56 Misc. (N. Y.) 589, 107 N. Y. Suppl. 69.

**31.** Cincinnati Glass, etc., Co. *v.* Stephens, 3 Ga. App. 766, 60 S. E. 360.

**32.** Maddox *v.* Wagner, 111 Ga. 146, 36 S. E. 609; Peak *v.* Hollingsworth, 5 Ind. 120; Davis *v.* Fowler, 20 N. Y. App. Div. 633, 47 N. Y. Suppl. 221; Roth *v.* Haviland, 19 Misc. (N. Y.) 317, 44 N. Y. Suppl. 474; St. Louis Hay, etc., Co. *v.* U. S., 191 U. S. 159, 24 S. Ct. 47, 48 L. ed. 130 [*affirming* 37 Ct. Cl. 281].

**33.** Posey *v.* Scales, 55 Ind. 282; Smith *v.* Watson, 88 Iowa 73, 55 N. W. 68; Pratt *v.* Craft, 19 La. Ann. 130; Nathan *v.* Lewis, 12 Ohio Dec. (Reprint) 121, 1 Handy 239.

**Failure to call for delivery.**— An obligation to deliver goods when called for cannot, by mere lapse of time, become an obligation to pay money. West *v.* Cutting, 19 Vt. 536.

**34.** Sanborn *v.* Benedict, 78 Ill. 309; Lehigh Valley Coal Co. *v.* Curtis, 22 Ill. App. 394; Peak *v.* Hollingsworth, 5 Ind. 120. And see Wichert *v.* Stafford, 25 Ill. App. 218.

**Rules of exchange.**—Where a sale of flour is made under the rules of the Boston chamber of commerce, according to which the purchaser's reasonable time for "ordering out" the flour is fourteen days, and the contract provides that the flour is to be "ordered out" within a reasonable time, the seller is not liable for failure to ship flour ordered out after fourteen days from sale. King *v.* Faist, 161 Mass. 449, 37 N. E. 456.

**35.** Farman *v.* Ratcliff, Wils. (Ind.) 145; Loftus *v.* Riley, 83 Iowa 503, 50 N. W. 17; Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; Snelling *v.* Hall, 107 Mass. 134.

**36.** Murphy *v.* Toner, 19 Ind. 228.

**37.** Phelps *v.* McGee, 18 Ill. 155; Quarles *v.* George, 23 Pick. (Mass.) 400; Cleveland *v.* Sterrett, 70 Pa. St. 204.

**Offer to deliver.**—Where, under a contract of sale of goods, delivery at buyer's option on or before a certain date, the time of delivery was extended after an offer to deliver, the buyer was not in default unless a new offer of delivery was made at the close of such extended time. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

**38.** Sousely *v.* Burns, 10 Bush (Ky.) 87; Chandler *v.* Robertson, 9 Dana (Ky.) 291.

**39.** The Alida, 1 Fed. Cas. No. 200, Abb. Adm. 173.

**40.** Branower *v.* Independent Match Co., 83 N. Y. App. Div. 370, 82 N. Y. Suppl. 224. But see Rogers *v.* Love, 2 Humphr. (Tenn.) 417, where under a contract to supply a certain quantity of material as the buyer should need it for manufacture, it was held that the buyer could not demand and have delivered the whole amount at once.

**41.** Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599; Reed *v.* Illinois Cent. R. Co., 75 S. W. 200, 25 Ky. L. Rep. 389.

election to deliver before the last day of the period or such last day will be the day of delivery,[42] in which case no notice is necessary.[43] If no time is fixed but the seller is given the option of delivery he must notify the buyer of his election,[44] and the buyer is not bound to receive the goods unless notice is given.[45] The notice must be given within a reasonable time,[46] and the seller must make delivery within a reasonable time;[47] but if he fixes the time of delivery on a certain day he must deliver on that day.[48]

(VI) *WHAT IS REASONABLE TIME.* The question as to what is a reasonable time for the delivery of the goods by the seller is to be determined by the circumstances attending the particular transaction,[49] such as the character of the goods,[50] and the purpose for which they are intended,[51] the ability of the seller to produce the goods if they are to be manufactured,[52] the facilities available for

**42.** Kirkpatrick *v.* Alexander, 60 Ind. 95; Richey *v.* Shinkle, 36 Kan. 516, 13 Pac. 795; Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; York *v.* Newland, 10 Humphr. (Tenn.) 330.

**Condition of cattle.**—Where cattle were deliverable at seller's option, under a contract providing that they were "to be weighed up on full feed and shrunk three per cent. at any time," between certain dates, the cattle were deliverable at any time within such period when on full feed. Farmer *v.* Thrift, 94 Iowa 374, 62 N. W. 804.

**43.** Kirkpatrick *v.* Alexander, 60 Ind. 95.

**44.** Cullum *v.* Wagstaff, 48 Pa. St. 300; Weltner *v.* Riggs, 3 W. Va. 445; Weiseger *v.* Wheeler, 14 Wis. 101.

**45.** Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212.

**46.** Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212.

**47.** Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212; McGinnis *v.* R. K. Johnson Co., 74 Nebr. 356, 104 N. W. 869; Weltner *v.* Riggs, 3 W. Va. 455.

**48.** Gath *v.* Lees, 3 H. & C. 558.

**49.** *Delaware.*— Walker *v.* Taylor, 4 Pennew. 118, 53 Atl. 357.

*Maryland.*— Kriete *v.* Myer, 61 Md. 558.

*Minnesota.*— Palmer *v.* Breen, 34 Minn. 39, 24 N. W. 322.

*Missouri.*— State *v.* King, 44 Mo. 238.

*New York.*— H. Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133, 82 N. Y. Suppl. 474; Robinson Clay Product Co. *v.* American Locomotive Co., 56 Misc. 589, 107 N. Y. Suppl. 69; Palen *v.* Haake, 2 N. Y. Suppl. 6.

*England.*— Ellis *v.* Thompson, 7 L. J. Exch. 185, 3 M. & W. 445.

**Illustrations.**—Where on a sale in April by agent, the seller repudiated the contract because the agent had not followed his instructions and finally, after a long dispute, the seller in June agreed to and did deliver the goods, it was held that either the buyer must be considered to have allowed an extension of time for the performance of the original contract or the delivery of the flour had relation to a new contract taking effect from the time at which the seller signified his intention to execute the order therefor. Williams *v.* Wheeler, 8 C. B. N. S. 299, 98 E. C. L. 299.

**50.** Walker *v.* Taylor, 4 Pennew. (Del.) 118, 53 Atl. 357; Kriete *v.* Myer, 61 Md. 558; Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

**51.** New Bedford Copper Co. *v.* Southard, 95 Me. 209, 49 Atl. 1062; Rhoades *v.* Cotton, 90 Me. 453, 38 Atl. 367; McGinnis *v.* R. K. Johnson Co., 74 Nebr. 356, 104 N. W. 869; Weltner *v.* Riggs, 3 W. Va. 445.

**52.** *Arkansas.*— Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052.

*Georgia.*— Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244.

*Illinois.*— Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534 [*affirming* 107 Ill. App. 47].

*Michigan.*— Bliss Furniture Co. *v.* Norris, 129 Mich. 11, 87 N. W. 1041; Webb *v.* Leominster Shirt Co., 101 Mich. 136, 59 N. W. 397.

*England.*— Atwood *v.* Emery, 1 C. B. N. S. 110, 26 L. J. C. P. 73, 5 Wkly. Rep. 19, 87 E. C. L. 110.

**Illustrations.**—Where a contract made March 6, 1897, provided for the delivery of ten thousand bicycle wrenches and two thousand were delivered by Oct. 7, 1897, but no more had been delivered up to July 16, 1898, the court would not be justified in deciding, as a matter of law, that a reasonable time for performance had not elapsed. Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235, 72 N. Y. Suppl. 662. A reasonable time to supply lumber sufficient to fill a contract for a certain number of feet above that contained in a certain boom would be such time as would be required, in the usual and customary manner of rafting, by the boom company, to obtain and make up the requisite quantity. Grant *v.* Merchants', etc., Bank, 35 Mich. 515.

**Reasonable time is to be measured,** not by the particular existing staff and appliances of the seller's business, but by the time in which a reasonably diligent manufacturer of the same class as the seller would take in carrying out the contract. Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 27 Wkly. Rep. 221.

**Changes in order.**— Where goods to be manufactured were ordered in February but, numerous changes having been ordered, the goods were not finished and delivered until

transportation,[53] and the distance the goods must be carried,[54] and the usual course of business in the particular trade.[55]

c. Waiver of Delay — (1) *In General.* The buyer may waive a failure to deliver in time by his acts and declarations,[56] as by objecting to the delivery on other grounds,[57] by failing to object with knowledge of the delay,[58] by requesting or consenting to a delay,[59] by requesting an extension of time for payment because

July, the delivery was nevertheless in reasonable time. H. Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133, 82 N. Y. Suppl. 474.

53. Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 [*affirmed* in 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. N. S. 11]; Waddell *v.* Reddick, 24 N. C. 424.

**Delay in shipment held reasonable.**—Where the circumstances showed that the goods were wanted immediately and they could have been shipped within a day or two, a delay of a week or ten days was reasonable. Robinson *v.* Brooks, 40 Fed. 525. A shipment of wheat on June 13 is not a compliance with a contract entered into on May 25, which calls for the delivery of the wheat at a certain place "as soon as possible" by lake transportation, although vessels for transportation are difficult to obtain, where the usual time of lake transportation is six days, and but a few hours are required to load the wheat for shipment, and where the sellers knew at the time of making the contract that vessel room was difficult to obtain, and shipped wheat to third persons between the date of the contract and the date of shipment, some of it being on other contracts made after that in question. Arthur *v.* Wright, 57 Hun (N. Y.) 22, 10 N. Y. Suppl. 368 [*affirmed* in 132 N. Y. 547, 30 N. E. 865]. A delay of eighteen days in making shipment on an order received May 1 for goods wanted by May 30 was reasonable. Rhoades *v.* Cotton, 90 Me. 453, 38 Atl. 367. See also Fisher *v.* Boynton, 87 Me. 395, 32 Atl. 995, when a delay of nineteen days was held to be reasonable. Where a contract for the purchase of a car-load of flour was made, by telegraph, between Stanfold and Quebec, on the twenty-seventh of May, and the flour was not put on board the cars for conveyance to defendant until the twenty-seventh of June, and only actually tendered for delivery at Stanfold on the twentieth of July, the delay was reasonable. Mahaffy *v.* Baril, 11 Quebec Super. Ct. 475.

54. Boyd *v.* Gunnison, 14 W. Va. 1, holding that seventeen days was a reasonable time when the goods had to be carried from a small station in West Virginia to New York.

55. *Arkansas.*— Long *v.* Abeles, 77 Ark. 150, 91 S. W. 29.

*Delaware.*— Walker *v.* Taylor, 4 Pennew. 118, 53 Atl. 357.

*Georgia.*— Inman *v.* Barnum, 115 Ga. 117, 41 S. E. 244.

*Missouri.*— Joseph *v.* Andrews Co., 72 Mo. App. 551.

*United States.*— The Alida, 1 Fed. Cas. No. 200, Abb. Adm. 173.

**Season of trade.**— In Murphy *v.* Jones, 19 Ind. 228, in view of the shortness of the season for dealing in hogs and the uncertainty of proper weather for the pork business, a delay of eight days in delivery of hogs was held to be unreasonable.

56. Scott *v.* Jackson, 89 Cal. 258, 26 Pac. 898; Austin Mfg. Co. *v.* Snouffer, (Iowa 1905) 102 N. W. 128; Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591; Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625.

57. Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810 [*affirming* 6 N. Y. App. Div. 492, 39 N. Y. Suppl. 595]; Hess *v.* Kaufherr, 128 N. Y. App. Div. 526, 112 N. Y. Suppl. 832; Germain Fruit Co. *v.* Roberts, 8 Pa. Super. Ct. 500, 43 Wkly. Notes Cas. 241.

58. Flagg *v.* Dryden, 7 Pick. (Mass.) 52; Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625.

**Timely objection.**—Where the consignee did not know till shortly before the vessel arrived that the goods were not shipped within the stipulated time, his failure to object while the vessel was still at sea was not a waiver of his right to do so on her arrival, the other party not being prejudiced by such omission. Lefferts *v.* Weld, 167 Mass. 531, 46 N. E. 107.

**Failure to respond to notice.**—Where the contract called for shipment June 30, and the name of the vessel on which the seller intended to ship the goods was not communicated to the buyer until August 16, a failure to respond to such notice did not estop the buyer to repudiate the contract for delay on receiving notice of the marks and numbers in December. Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811 [*affirming* 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251].

59. *Arkansas.*— Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052.

*California.*— Scott *v.* Jackson, 89 Cal. 258, 26 Pac. 898.

*Georgia.*—Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132.

*Illinois.*— Scott *v.* Miller, 66 Ill. 273; Wichert *v.* Stafford, 25 Ill. App. 218.

*Massachusetts.*— Flagg *v.* Dryden, 7 Pick. 52.

*Michigan.*— Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

*New York.*— General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928; A. B. Farquhar Co. *v.* New River Mineral Co., 87 N. Y. App. Div. 329, 84 N. Y. Suppl. 802.

*Washington.*— Washington Iron Works *v.* McNaught, 35 Wash. 10, 76 Pac. 301.

of the delay,[60] or by demanding delivery after the time specified,[61] provided the demand is complied with according to its terms.[62] If the delay is once waived the right to insist on delivery within the specified time cannot be reasserted;[63] but where there is a failure to deliver within the time specified, and a new contract is made by which the seller becomes entitled to be paid for only such of the goods as the buyer can use, and he declines the goods and the buyer is unable to use them the seller cannot recover therefor.[64] And an offer to waive damages resulting from the breach of a contract as to time of performance, on condition that the other party thereafter make prompt delivery, becomes a valid agreement only on compliance with the condition.[65]

(II) *By Acceptance.* In many cases the general rule has been laid down so far as the buyer's obligation to pay the price is concerned that an acceptance of the goods waives the objection that they were not delivered in time,[66] especially when the acceptance is without protest.[67] According to many decisions, however, mere acceptance does not of itself waive the buyer's claim for damages because of delay in delivery.[68] And this is necessarily so when the acceptance is accom-

*Wisconsin.*— Barnes *v.* Stacy, 79 Wis. 55, 48 N. W. 53.

*England.*— Hickman *v.* Haynes, L. R. 10 C. P. 598, 44 L. J. C. P. 358, 32 L. T. Rep. N. S. 873, 23 Wkly. Rep. 872.

See 43 Cent. Dig. tit. "Sales," § 363.

60. Arkansas City Canning Co. *v.* Dunston, (Kan. 1901) 64 Pac. 1025.

61. Tidwell *v.* Southern Engine, etc., Works, 87 Ark. 52, 112 S. W. 152; Austin Mfg. Co. *v.* Snouffer, (Iowa 1905) 102 N. W. 128; Boas *v.* Thatcher Car, etc., Co., 8 Misc. (N. Y.) 443, 28 N. Y. Suppl. 659; Nicholas *v.* Venable, 2 Misc. (N. Y.) 109, 20 N. Y. Suppl. 851; Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

**No waiver of damages.**—Where time of performance is an essential element of a contract for the sale of goods, request for delivery shows only an intention not to rescind, and does not constitute a waiver of the buyer's right to accept the goods and recover damages. Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574.

62. Reynolds *v.* Spencer, 92 Hun (N. Y.) 275, 36 N. Y. Suppl. 750; Hirsch *v.* Annin, 28 Misc. (N. Y.) 228, 58 N. Y. Suppl. 1019.

63. Dobson *v.* U. S., 31 Ct. Cl. 422.

64. Chase & Co. *v.* Rosenwald, 107 N. Y. Suppl. 35.

65. Gude *v.* J. F. Bailey Co., 4 Ga. App. 226, 61 S. E. 135.

66. *Idaho.*— Emery *v.* Langley, 1 Ida. 694.

*Illinois.*— Harber Bros. Co. *v.* Moffatt Cycle Co., 151 Ill. 84, 37 N. E. 676 [*affirming* 52 Ill. App. 146]; Hayner *v.* Sherrer, 2 Ill. App. 536.

*Indiana.*— Ohio Falls Car Co. *v.* Menzies, 90 Ind. 83, 46 Am. Rep. 195.

*Maine.*— Barry *v.* Palmer, 19 Me. 303; Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252.

*Maryland.*— Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753.

*Massachusetts.*— Flagg *v.* Dryden, 7 Pick. 52.

*Michigan.*— Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625. But see Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57, where the buyer expressly stated at the time that acceptance was not under the existing contract but under a new agreement

*Minnesota.*— Minneapolis Threshing Mach. Co. *v.* Hutchins, 65 Minn. 89, 67 N. W. 807.

*New York.*— Bailey *v.* Western Vermont R. Co., 18 Barb. 112; Bock *v.* Healy, 8 Daly 156.

*Oregon.*— Sutton *v.* Clark, 42 Oreg. 525, 71 Pac. 794.

*Pennsylvania.*— McKay *v.* McKenna, 173 Pa. St. 581, 34 Atl. 236; Anspach *v.* Heft, 57 Pa. St. 326.

*Texas.*— George K. McMechen, etc., Co. *v.* Hubbard, (Civ. App. 1900) 59 S. W. 919, but in this case the acceptance was in the face of the seller's insistence that he would hold the buyer liable for the price in any court.

*West Virginia.*— Manss-Bruning Shoe Mfg. Co. *v.* Prince, 51 W. Va. 510, 41 S. E. 907.

See 43 Cent. Dig. tit. "Sales," § 458.

67. Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Flagg *v.* Dryden, 7 Pick. (Mass.) 52; Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638; Lester *v.* U. S., 1 Ct. Cl. 52.

**Premature delivery** is waived by acceptance of the goods without objection. Lee *v.* Bangs, 43 Minn. 23, 44 N. W. 671.

68. *Georgia.*— Alabama Constr. Co. *v.* Continental Car, etc., Co., 131 Ga. 365, 62 S. E. 160; Poland Paper Co. *v.* Foote, etc., Co., 118 Ga. 458, 45 S. E. 374; Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; Gude *v.* J. F. Bailey Co., 4 Ga. App. 226, 61 S. E. 135.

*Illinois.*— Ledgerwood *v.* Bushnell, 128 Ill. App. 555; Ramsey *v.* Tully, 12 Ill. App. 463.

*Iowa.*— Medart Patent Pulley Co. *v.* Dubuque Turbine, etc., Co., 121 Iowa 244, 96 N. W. 770; Hansen *v.* Kirtley, 11 Iowa 565.

*Kansas.*— Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

*Kentucky.*— Belcher *v.* Sellards, 43 S. W. 676, 19 Ky. L. Rep. 1571. But see Lucile Min. Co. *v.* Fairbanks, 87 S. W. 1121, 27 Ky. L. Rep. 1100, which was, however, by a divided court.

panied by a reservation of the right to claim damages.[69] Acceptance may, however, be regarded as evidence of a waiver,[70] although to constitute an absolute waiver it must be under circumstances clearly manifesting an intent to waive,[71] such as payment of the price.[72] So too when the acceptance is forced by stress of circumstances, the goods being absolutely needed, and the buyer being unable to procure them elsewhere, acceptance will not waive damages for delay.[73] While the acceptance of a part of the goods waives delay in the delivery of such portion,[74] it does not bind the buyer to accept subsequent delayed deliveries.[75]

**d. Evidence.** Where the delivery is to be made within a certain period the burden is on the seller to show that he was ready to deliver on the last day.[76] If delivery is to be made during the season evidence that the seller shipped other cargoes is competent as tending to show that he could have obtained the necessary vessels before the season closed;[77] and when the buyer is to furnish the vessel evidence as to whether he sent a vessel to the place at the time specified is admis-

*Massachusetts.*— Garfield, etc., Coal Co. *v.* Pennsylvania Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020.

*Michigan.*— Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

*North Carolina.*— Spiers *v.* Halsted, 74 N. C. 620.

*Oregon.*— Sutton *v.* Clarke, 42 Oreg. 525, 71 Pac. 794.

*Texas.*— Strain *v.* Pauley Jail Bldg., etc., Co., 80 Tex. 622, 16 S. W. 625.

*Virginia.*— Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

*Washington.*— Dignan *v.* Spurr, 3 Wash. 309, 28 Pac. 529.

*Wisconsin.*— Schweickhart *v.* Stuewe, 71 Wis. 1, 36 N. W. 605, 5 Am. St. Rep. 190. And see Anderson *v.* Savoy, 137 Wis. 44, 118 N. W. 217.

*United States.*— Sterling Coal Co. *v.* Silver Spring Bleaching, etc., Co., 162 Fed. 848, 89 C. C. A. 520.

See 43 Cent. Dig. tit. "Sales," § 458.

**The contrary doctrine** has been laid down in a number of decisions. Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204; Baldwin *v.* Farnsworth, 10 Me. 414; Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625; Minneapolis Threshing Mach. Co. *v.* Hutchins, 65 Minn. 89, 67 N. W. 807. And is sustained by the weight of authority in New York. Roby *v.* Reynolds, 65 Hun (N. Y.) 486, 20 N. Y. Suppl. 386; Bock *v.* Healy, 8 Daly (N. Y.) 156; Wallace, etc., Co. *v.* Valentine, 10 Misc. (N. Y.) 645, 32 N. Y. Suppl. 121. Although in Gaylord *v.* Karst, 17 N. Y. Suppl. 720 [*reversing* 13 N. Y. Suppl. 589], where the contract was for building materials to be supplied, the court basing its decision on the analogy to building contracts held that the acceptance was not a waiver of damages. And in Belknap Machine Addressing, etc., Co. *v.* Racine, 20 Misc. (N. Y.) 708, 46 N. Y. Suppl. 348, where the contract was to manufacture and deliver a certain quantity of goods by a certain time, it was held that an acceptance of a part after such time with notice that only what was then on hand would be accepted did not waive the right to refuse the rest. See also Reading Hardware Co. *v.* Pierce, 129 N. Y. App. Div. 292, 113 N. Y. Suppl. 331.

69. Hubley Mfg., etc., Co. *v.* Ives, 21 R. I. 191, 42 Atl. 876; *In re* Kelly, 51 Fed. 194. And see Bock *v.* Healy, 8 Daly (N. Y.) 156.

70. Hansen *v.* Kirtley, 11 Iowa 565.

71. *Georgia.*— Poland Paper Co. *v.* Foote, etc., Co., 118 Ga. 458, 45 S. E. 374. And see Moore *v.* H. B. Smith Mach. Co., 4 Ga. App. 151, 60 S. E. 1035.

*Illinois.*— Ramsey *v.* Tully, 12 Ill. App. 463.

*Kentucky.*— Belcher *v.* Sellards, 43 S. W. 676, 19 Ky. L. Rep. 1571.

*North Carolina.*— Spiers *v.* Halsted, 74 N. C. 620.

*Virginia.*— Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

*Washington.*— Dignan *v.* Spurr, 3 Wash. 309, 28 Pac. 529.

See 43 Cent. Dig. tit. "Sales," § 458.

72. Poland Paper Co. *v.* Foote, etc., Co., 118 Ga. 458, 45 S. E. 374; Medart Pulley Co. *v.* Dubuque Turbine, etc., Co., 121 Iowa 244, 96 N. W. 770; Barry *v.* Palmer, 19 Me. 303; Reid *v.* Field, 83 Va. 26, 1 S. E. 395, giving note for price.

73. Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

**Ability to procure goods elsewhere.**— Damages for the delay in the delivery of property purchased cannot be set off against the price when the property is accepted and retained by the purchaser, who could have avoided such damage by the purchase of other property. Blakeslee Mfg. Co. *v.* Hilton, 5 Pa. Super. Ct. 184, 18 Pa. Co. Ct. 553.

74. Ohio Falls Car Co. *v.* Menzies, 90 Ind. 83, 46 Am. Rep. 195; Avery *v.* Willson, 81 N. Y. 341, 37 Am. Rep. 503; Bailey *v.* Western Vermont R. Co., 18 Barb. (N. Y.) 112; Eagle Square Mfg. Co. *v.* Andrew, 11 N. Y. Suppl. 234.

75. Phillips *v.* Taylor, 101 N. Y. 639, 4 N. E. 727; Belknap Mach. Addressing, etc., Co. *v.* Racine, 20 Misc. (N. Y.) 708, 46 N. Y. Suppl. 348; Elliott *v.* Espenhain, 59 Wis. 272, 18 N. W. 1. See also Stein *v.* Metzger, 18 Ill. App. 251, where the contract contained a provision for return of goods not delivered.

76. York *v.* Newland, 10 Humphr. (Tenn.) 330.

77. Isaacs *v.* New York Plaster Works, 67 N. Y. 124.

sible to show whether there was an extension of time.[78] Generally evidence merely explanatory of the delay in delivery is immaterial.[79]

**e. Questions For Jury.** Where the delivery depends on the time of shipment, the time when the vessel sailed is a question for the jury.[80] So too where delivery is to be made on demand, the question as to the exact time when demand should be made is for the jury.[81] If under the contract delivery is to be made in a reasonable time, what is a reasonable time is usually regarded as a question for the jury;[82] and so too is the question whether delivery was made at a reasonable hour.[83] Whether there has been a waiver of delay in delivering is also a question for the jury.[84]

**8. What Constitutes Delivery**[85] **— a. In General.** No particular act or formal ceremony is necessary to make a delivery. Any act done with intent to transfer possession and dominion is sufficient.[86] What constitutes delivery must to a large extent depend on the nature of the goods,[87] the nature of the particular

**78.** Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

**Date of delivery.**— On an issue whether a load of peas was delivered by plaintiff to defendant on the second or fifth day of a certain month, where it was conceded that defendant's son hauled the load, testimony hy the employer that the son did not work for him on the second day but did work for him on the fifth was competent. Kiley *v.* Lee Canning Co., 105 N. Y. App. Div. 633, 93 N. Y. Suppl. 986.

**Sufficiency of the evidence** is considered in Carter *v.* Dodd, 186 Mass. 386, 71 N. E. 803.

**79.** Woods *v.* Miller, 55 Iowa 169, 7 N. W. 484, 39 Am. Rep. 170; Nightingale *v.* Eiseman, 121 N. Y. 288, 24 N. E. 475 [*affirming* 50 Hun 189, 2 N. Y. Suppl. 779].

**80.** Grace *v.* Browne, 86 Fed. 155, 29 C. C. A. 621.

**81.** Steagall *v.* McKellar, 20 Tex. 265.

**82.** *Illinois.*— Henkle *v.* Smith, 21 Ill. 238.

*Indiana.*— Meek *v.* Spencer, 8 Ind. 118.

*Maryland.*— Bagby *v.* Walker, 78 Md. 239, 27 Atl. 1033.

*Minnesota.*— Roberts *v.* Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680.

*Missouri.*— Joseph *v.* Andrews Co., 72 Mo. App. 551.

*New Jersey.*— New Jersey School, etc., Furniture Co. *v.* Somerville Bd. of Education, 58 N. J. L. 646, 35 Atl. 397.

*New York.*— Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 [*affirmed* in 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811]; Hirsch *v.* Annin, 28 Misc. 228, 58 N. Y. Suppl. 1019.

**Contra.**— Echols *v.* New Orleans, etc., R. Co., 52 Miss. 610; McGinnis *v.* R. K. Johnson Co., 74 Nebr. 356, 104 N. W. 869, where the question was regarded as one for the court.

**83.** Cousins *v.* Bowling, 100 Mo. App. 452, 74 S. W. 168.

**84.** Tobias *v.* Lisberger, 6 N. Y. Suppl. 823; Strain *v.* Pauley Jail Bldg., etc., Co., 80 Tex. 622, 16 S. W. 625.

**85.** Delivery as essential to pass title see *infra*, VI, A, 4.

On sale of vessel see Shipping, II, E, 5.

**86.** Dodge *v.* Jones, 7 Mont. 121, 14 Pac. 707.

**Weighing or measuring.**— In the absence of any agreement weighing or measuring the goods to determine the quantity is not essential to a good delivery. Kaufman *v.* Stone, 25 Ark. 336; Burr *v.* Williams, 23 Ark. 244; Colwell *v.* Keystone Iron Co., 36 Mich. 51; Barker *v.* Reagan, 4 Heisk. (Tenn.) 590. But see Jones *v.* Pearce, 25 Ark. 545; Maher *v.* Girard, 10 Quebec Super. Ct. 304. If on the other hand there is an agreement to that effect a delivery is not complete until the goods are weighed or measured. Mowry Car, etc., Works *v.* Shorter, 8 Ohio Dec. (Reprint) 290, 7 Cinc. L. Bul. 32. And see Bogy *v.* Rhodes, 4 Greene (Iowa) 133.

**87.** *Arizona.*— Gant *v.* Broadway, 2 Ariz. 315, 15 Pac. 862.

*Indiana.*— Weatherly *v.* Higgins, 6 Ind. 73; Avery Mfg. Co. *v.* Emsweller, 31 Ind. App. 291, 67 N. E. 946.

*Maine.*— Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 572; Boynton *v.* Veazie, 24 Me. 286.

*Massachusetts.*— Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

*Minnesota.*— Brewster *v.* Leith, 1 Minn. 56.

*Missouri.*— Caldwell *v.* Garner, 31 Mo. 131.

*New Jersey.*— Ott *v.* Sutcliffe, (Ch. 1905) 60 Atl. 965.

*New York.*— Shindler *v.* Houston, 1 Den. 48.

*Pennsylvania.*— Long *v.* Knapp, 54 Pa. St. 514; Haynes *v.* Hunsicker, 26 Pa. St. 58.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

*Wisconsin.*— Douglass *v.* Garrett, 5 Wis. 85.

*United States.*— Crapo *v.* Kelly, 16 Wall. 610, 21 L. ed. 430.

*England.*— Salter *v.* Woollams, 10 L. J. C. P. 145, 2 M. & G. 650, 3 Scott N. R. 59, 40 E. C. L. 789.

See 43 Cent. Dig. tit. "Sales," § 367.

**Turning cattle into pasture.**— Where range stock is the subject of a contract of sale, the gathering together of the stock and turning it out of the inclosed pasture of the seller into the inclosed pasture of the purchaser is a sufficient delivery. Woods *v.* Faurot, 14 Okla. 171, 77 Pac. 346.

business to which the transaction is incident,[88] and the circumstances attending the transaction.[89] The law does not require the parties to the sale to perform acts extremely inconvenient if not impossible.[90] But while an actual manual delivery may not be necessary,[91] especially where the sale is of bulky and cumbersome articles,[92] yet mere words are not sufficient to transfer possession but must be accompanied by some act to effect a change of possession.[93] The acts or circumstances which are to be regarded as tantamount to delivery must be of such a character as to indicate an actual intent to change the possession,[94] and this implies in addition to the intent of the seller to deliver an intent on the part of the buyer to receive and accept,[95] although he need not take manual possession.[96] Generally if a particular mode of delivery is stipulated for in the contract that mode must be followed.[97]

**b. Actual or Constructive Delivery.** The word "delivery" in the law of sales may signify either an actual or a constructive delivery.[98] Actual delivery con-

88. Boynton *v.* Veazie, 24 Me. 286; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726.

89. Caldwell *v.* Garner, 31 Mo. 131; Haynes *v.* Hunsicker, 26 Pa. St. 58; Douglass *v.* Garrett, 5 Wis. 85.

90. Avery Mfg. Co. *v.* Emsweller, 31 Ind. App. 291, 67 N. E. 946; Boynton *v.* Veazie, 24 Me. 286.

91. Long *v.* Knapp, 54 Pa. St. 514; Douglass *v.* Garrett, 5 Wis. 85. *Compare* Allen *v.* Smith, 10 Mass. 308.

92. *Arizona.*— Gant *v.* Broadway, 2 Ariz. 315, 15 Pac. 862.

*Illinois.*— Hart *v.* Wing, 44 Ill. 141; Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294; May *v.* Tallman, 20 Ill. 443.

*Indiana.*— Avery Mfg. Co. *v.* Emsweller, 31 Ind. App. 291, 67 N. E. 946.

*Maryland.*— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294; Van Brunt *v.* Pike, 4 Gill 270, 45 Am. Dec. 126.

*New York.*— Myers *v.* Davis, 26 Barb. 367 [*reversed* on other grounds in 22 N. Y. 487].

*United States.*— Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

*England.*— Chaplin *v.* Rogers, 1 East 192, 6 Rev. Rep. 249.

See 43 Cent. Dig. tit. "Sales," § 371.

**Removal not essential.**—Where the buyer and seller of heavy machines, such as presses and linotype machines, act in good faith, a valid delivery may be made without the removal of the machines from their location at the time of the sale, especially when the future business of the buyer is intended to be carried on at the same place. Ott *v.* Sutcliffe, (N. J. Ch. 1905) 60 Atl. 965.

93. Audenreid *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

94. Bailey *v.* Ogden, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241; Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200; Lester *v.* McDowell, 18 Pa. St. 91.

95. *Illinois.*— Thorn *v.* Danzinger, 50 Ill. App. 306.

*Massachusetts.*— Gowing *v.* Knowles, 118 Mass. 232; Knight *v.* Mann, 118 Mass. 143.

*Mississippi.*— Cole *v.* Bryant, 73 Miss. 297, 18 So. 655.

*New Hampshire.*— Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

*New York.*— Kinne *v.* Ford, 43 N. Y. 587.

**Return of goods.**— In an action for the price of goods sold, it appearing that the goods were delivered, but returned the next day to the seller, without any explanation of the action, or assignment of cause therefor, there was sufficient evidence of a delivery. O'Connor *v.* Hitzler, 20 Colo. App. 385, 80 Pac. 474.

96. Hart *v.* Wing, 44 Ill. 141; May *v.* Tallman, 20 Ill. 443; Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907.

97. *Connecticut.*— Woodruff *v.* Noyes, 15 Conn. 335.

*Massachusetts.*—Lefferts *v.* Weld, 167 Mass. 531, 46 N. E. 107.

*New York.*— Bidwell *v.* Overton, 13 N. Y. Suppl. 274, 26 Abb. N. Cas. 402; Corning *v.* Colt, 5 Wend. 253.

*North Dakota.*— Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

*United States.*— Filley *v.* Pope, 115 U. S. 213, 6 S. Ct. 19, 29 L. ed. 372 [*reversing* 9 Fed. 65, 3 McCrary 190]. But see Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616.

*England.*— Wackerbarth *v.* Masson, 3 Campb. 270.

**Delivery free on board.**—A contract to deliver lumber "free on board cars" at the destination is unambiguous, and not open to construction by proof of custom or otherwise; the provision requiring the seller to deliver on board cars at the destination free to be taken by the buyer without impediment, and there was no such delivery when to take possession the buyer was bound to pay the freight. Chandler Lumber Co. *v.* Radke, 136 Wis. 495, 118 N. W. 185.

**Mistake in terms.**—A mere variance between the contract and the invoice accompanying the delivery, as to the terms of sale, immediately corrected does not render the delivery insufficient. Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648.

98. *Delaware.*— Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

sists in giving to the buyer or his servants or accredited agent the real possession of the goods sold.[99] Constructive delivery comprehends all of those acts which, although not truly conferring real possession of the goods sold, have been held *constructione juris* equivalent to acts of real delivery,[1] and in this sense includes symbolical or substituted delivery.[2] Both actual and constructive delivery contemplate the absolute giving up of the control and custody of the goods on the part of the seller and the assumption of the same by the buyer.[3]

**c. Persons to Whom Delivery May Be Made.** A delivery in performance of the contract must be to the buyer,[4] or in the case of joint buyers to one of them,[5] or to the assignee of the contract of sale in the absence of instructions to the contrary,[6] or to the accredited agent of the buyer.[7] A delivery to a third person cannot operate as a delivery to the buyer,[8] unless it is made at the request of the buyer,[9] and to a person appointed by the buyer to receive the goods,[10] such as a warehouseman.[11] A delivery to the officer and the application of the goods to the payment of the buyer's debts in garnishment proceedings may also be regarded as a complete delivery.[12]

**d. Identity of Goods.** If the contract calls for specific goods it cannot be performed by the delivery of other goods of like kind,[13] unless performance in

*Kentucky.*— Webber *v.* Minor, 6 Bush 463, 99 Am. Dec. 688.

*Minnesota.*— McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393.

*Missouri.*— Swafford *v.* Spratt, 93 Mo. App. 631, 67 S. W. 701.

*New York.*— Shindler *v.* Houston, 1 Den. 48 [*reversed* on other grounds in 1 N. Y. 261, 49 Am. Dec. 316].

99. Shindler *v.* Houston, 1 Den. (N. Y.) 48; Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

1. Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9.

2. *Maine.*— Boynton *v.* Veazie, 24 Me. 286.

*Maryland.*—Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

*Missouri.*— Swafford *v.* Spratt, 93 Mo. App. 631, 67 S. W. 701.

*New York.*— Shindler *v.* Houston, 1 Den. 48.

*Pennsylvania.*— Bolin *v.* Huffnagle, 1 Rawle 9.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

*United States.*—Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99. And see *infra*, V, B, 8, m.

3. Brown *v.* Dickerson, 2 Marv. (Del.) 119, 42 Atl. 421; Swafford *v.* Spratt, 93 Mo. App. 631, 67 S. W. 701.

4. Flower *v.* Taliaferro, 3 La. 88.

5. Adler *v.* Wagner, 47 Mo. App. 25.

**Direction as to delivery by one of two joint vendees.**—A delivery of goods described in a contract of sale to one of the vendees, in the name of both as previously directed by the other who was absent at the time of delivery, is a sufficient delivery to both. Blumenthal *v.* Greenberg, 130 Cal. 384, 62 Pac. 599.

**Property divisible.**—Where two persons agree to purchase personal property which is divisible into portions alike in quality and value, the vendor cannot treat the contract as the individual promise of each purchaser to take his aliquot share, and, without the consent of all parties, deliver half the property to one purchaser, and recover for the other's refusal to accept the balance. Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36, 57 N. Y. Suppl. 534.

6. Martin *v.* Orndorff, 22 Iowa 504.

7. McKinney *v.* Wilson, 133 Mass. 131; Palmer *v.* Crosby, 11 Gray (Mass.) 46; Rickey *v.* Stewart, 45 Minn. 437, 48 N. W. 22.

**Waiver.**—Where the seller of goods failed to consign them to the broker who had been designated, and the purchaser refused to accept the goods on the ground that the price stated in the invoice was excessive, but made no objection as to the consignment, and offered to accept the drafts for the goods at a certain price, any breach of the contract because of consignment not having been made to the proper broker was waived. Manda *v.* Etienne, 93 N. Y. App. Div. 609, 87 N. Y. Suppl. 588.

8. Winslow *v.* Kelley, 12 Me. 513; Hart *v.* Tyler, 15 Pick. (Mass.) 171. *Compare* Cool *v.* Snover, 38 Mich. 562, holding that proof that the property was taken away by a third person is incompetent without proof connecting the seller with such act.

9. Morrison *v.* Day, (Ky. 1887) 3 S. W. 411; Stern *v.* Filene, 14 Allen (Mass.) 9; Bement *v.* Smith, 15 Wend. (N. Y.) 493.

10. Wing *v.* Clark, 24 Me. 366.

**Delivery of an article sold to a person appointed to receive it is a delivery to the vendee.** Wing *v.* Clark, 24 Me. 366; Dutton *v.* Solomonson, 3 B. & C. 582, 7 Rev. Rep. 883; Harwood *v.* Lester, 3 B. & P. 617; Dawes *v.* Peck, 3 Esp. 12, 8 T. R. 330, 4 Rev. Rep. 675, 101 Eng. Reprint 1417.

11. Trotter *v.* McAfee, 1 Stew. (Ala.) 59; Hill *v.* Morgan, 4 Mart. N. S. (La.) 475.

12. Ockington *v.* Richey, 41 N. H. 275.

13. *Alabama.*— Shackelford *v.* Sloss Iron, etc., Co., 140 Ala. 329, 36 So. 1005.

*Connecticut.*— Treat *v.* Richardson, 47 Conn. 582.

strict compliance with the contract is waived.[14] If, however, the sale is of goods of a certain quality only, and does not refer to specific goods, it is sufficient if the seller delivers goods corresponding to the description.[15] So where the sale is by a manufacturer or producer unless it is especially agreed that the goods shall be of the seller's production or manufacture, it is sufficient if he delivers goods of the proper quality, although he did not produce or manufacture them.[16]

**e. Condition of Goods.** A contract for the sale of a machine fit for use is not satisfied by delivery in parts,[17] or if it is not at the time of delivery fully equipped to do the work for which it was intended.[18] And a sale of lumber of different dimensions "to be delivered assorted in lengths" requires the seller to assort the lumber in making delivery.[19] On the other hand a sale of a crop of raisins to be cured and delivered at the packing house does not require that the raisins should be cured before being brought to the packing house but is complied with if they are properly cured and packed after arriving there.[20]

*Illinois.*— Hammond *v.* Cragin Mfg. Co., 33 Ill. App. 216; Condee *v.* Cripps, 12 Ill. App. 81.

*Indiana.*— Hiatt *v.* Harris, 28 Ind. 379; Lowry *v.* Cooper, 21 Ind. 269; Alexander *v.* Dunn, 5 Ind. 122.

*Iowa.*— Webster-Gruber Marble Co. *v.* Dryden, 90 Iowa 37, 57 N. W. 637, 48 Am. St. Rep. 417.

*Kentucky.*— Mason *v.* Cowan, 1 B. Mon. 7.

*Louisiana.*— Blackman *v.* Hoey, 18 La. Ann. 23.

*Missouri.*— George *v.* Dean, 17 Mo. App. 332.

*New Hampshire.*— King *v.* Rochester, 67 N. H. 310, 39 Atl. 256.

*New York.*— Shields *v.* Pettee, 2 Sandf. 262 [*affirmed* in 4 N. Y. 122].

*Pennsylvania.*— Clark *v.* Wright, 5 Phila. 439.

*Wisconsin.*— Leonard *v.* Warriner, 13 Wis. 179.

*United States.*— Dold *v.* U. S., 13 Ct. Cl. 97 [*affirmed* in 154 U. S. 645, 14 S. Ct. 1187, 24 L. ed. 1103].

**Goods to be shipped.**—A contract for the sale of five hundred tons of "No. 1 'Eglinton' Scotch pig iron, for shipment in March, 1880, from Great Britain to New York by sail or steam vessels, at seller's option, deliverable 'ex vessels,' on arrival," is complied with, although the seller did not ship the iron, but bought iron which had been shipped from Glasgow in March and on its arrival offered it to the purchaser. Cunningham *v.* Judson, 100 N. Y. 179, 2 N. E. 915 [*reversing* 30 Hun 63].

**Description of goods.**—A merchant who ordered needles of a wholesale dealer was not justified in returning the goods without examination because they were shipped as "notions." Coates *v.* Hurst, 65 Mo. App. 256.

**Acceptance of other goods.**— Where the owner of iron mines contracted to sell and deliver ores taken from his mines, the fact that the purchaser, during a portion of the period covered by the contract, accepted deliveries of ore not produced from the seller's own mines, did not bind the purchaser to continue to receive such ore in performance of the contract. Shackelford *v.* Sloss Iron, etc., Co., 140 Ala. 329, 36 So. 1005.

**Limitation of rule.**— The rule does not apply to sales of grain on exchange (Gregory *v.* Wendell, 40 Mich. 432); nor generally to sales of corporate stock (Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Noyes *v.* Spaulding, 27 Vt. 420). But see Dyer *v.* Rich, 1 Metc. (Mass.) 180, holding that a contract to transfer a certificate of ten shares of stock in a corporation to be capitalized for one hundred thousand dollars, divided into not more than two hundred shares, is unfulfilled by a tender of a certificate of ten shares of the stock of such corporation, divided into seventy shares, and of which only thirty-five thousand dollars are paid in.

14. Lowry *v.* Cooper, 21 Ind. 269.

15. Walker *v.* Taylor, 4 Pennew. (Del.) 118, 53 Atl. 357; Hay *v.* Leigh, 48 Barb. (N. Y.) 393; Wheeler *v.* Britton, 17 N. Y. Suppl. 749 [*affirmed* in 137 N. Y. 628, 33 N. E. 745]; Johnson *v.* Pierce, 16 Ohio St. 472; Cincinnati, etc., R. Co. *v.* Citizens' Nat. Bank, 11 Ohio Dec. (Reprint) 50, 24 Cinc. L. Bul. 198. But see Citizens' Nat. Bank *v.* Cincinnati, etc., R. Co., 11 Ohio Dec. (Reprint) 703, 29 Cinc. L. Bul. 15; Wait *v.* Baker, 2 Exch. 1.

16. Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485; T. Wilce Co. *v.* Kelley Shingle Co., 130 Mich. 319, 89 N. W. 957; Parsons *v.* Woodward, 22 N. J. L. 196; Hayward *v.* Daniel, 91 L. T. Rep. N. S. 319.

17. Wood Mowing, etc., Mach. Co. *v.* Gaertner, 63 Mich. 520, 30 N. W. 106.

18. Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

**"Manufactured state."**—Where a contract for the sale of dust collectors for ore pulverizers provided that the apparatus should be shipped in a "manufactured state," failure to rivet the joints of certain pipes before shipping was not a breach, it appearing that the seller usually shipped its apparatus without riveting the pipes. Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562.

19. Hoffman *v.* King, 58 Wis. 314, 17 N. W. 136.

20. Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

**f. Placing Goods at Disposal of Buyer.** As a general rule in the absence of a contrary agreement the seller is not bound to send or carry the goods to the buyer,[21] but he fulfils his obligation by leaving or placing them at the buyer's disposal so that he may remove them without lawful obstruction,[22] especially if manual delivery is impracticable because of the bulk of the articles,[23] in which case it is sufficient if the goods are pointed out to the buyer or he is told to take them away,[24] or, the goods being at a distance from the place of sale, the buyer is told to go and take them.[25] And when goods are manufactured for the buyer it is a sufficient delivery if when completed they are set apart and placed at the disposal or subject to the orders of the buyer.[26] But the goods must be so placed that the buyer has access to them for the purpose of taking possession.[27]

**g. Selection and Appropriation.**[28] Where the goods sold are part of a large quantity in bulk there is no delivery until the portion sold is selected and appropriated to the buyer.[29] Such selection and appropriation may be indicated by segregating them from the common mass,[30] or by marking them as the property

**21.** Davis *v.* Alpha Portland Cement Co., 134 Fed. 274 [*affirmed* in 142 Fed. 74, 73 C. C. A. 388].

**22.** *Maine.*— Means *v.* Williamson, 37 Me. 556; Leballister *v.* Nash, 24 Me. 316.

*Missouri.*— Glasgow *v.* Nicholson, 25 Mo. 29. See also Sigerson *v.* Kahmann, 39 Mo. 206.

*New York.*— Shindler *v.* Houston, 1 Den. 48 [*reversed* on other grounds in 1 N. Y. 261, 49 Am. Dec. 316].

*Pennsylvania.*—Leedom *v.* Philips, 1 Yeates 527.

*Texas.*— Griffin *v.* Wright, 1 Tex. App. Civ. Cas. § 638.

*Vermont.*— Chamberlain *v.* Farr, 23 Vt. 265; Carpenter *v.* Dole, 13 Vt. 578.

*United States.*— Davis *v.* Alpha Portland Cement Co., 134 Fed. 274 [*affirmed* in 142 Fed. 74, 73 C. C. A. 388].

See 43 Cent. Dig. tit. "Sales," § 375.

**23.** Glasgow *v.* Nicholson, 25 Mo. 29; Myers *v.* Davis, 26 Barb. (N. Y.) 367 [*reversed* on other grounds in 22 N. Y. 489]; Shindler *v.* Houston, 1 Den. (N. Y.) 48 [*reversed* on other grounds in 1 N. Y. 261, 49 Am. Dec. 316].

**24.** Beller *v.* Block, 19 Ark. 566; Phillips *v.* Moor, 71 Me. 78; Jewett *v.* Warner, 12 Mass. 300, 7 Am. Dec. 74; Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Shindler *v.* Houston, 1 Den. (N. Y.) 48 [*reversed* on other grounds in 1 N. Y. 261, 49 Am. Dec. 316].

**Goods not ready for delivery.**— If something yet remains to be done by the seller with regard to the goods, merely pointing them out and surrendering dominion is not a sufficient delivery. Lambeth *v.* Wells, 12 Rob. (La.) 51.

**Mode of delivery agreed on.**—Where a written executory contract of sale specifies the terms of delivery, delivery is not shown as a matter of law by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of some of the conditions under which the delivery was to be made. Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

**25.** Patrick *v.* Meserve, 18 N. H. 300; Jennings *v.* Webster, 7 Cow. (N. Y.) 256.

**26.** *Georgia.*— Denman *v.* Cherokee Iron Co., 56 Ga. 319.

*Massachusetts.*— Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Middlesex Co. *v.* Osgood, 4 Gray 447.

*Missouri.*— Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

*New York.*— Wheelock *v.* Tanner, 39 N. Y. 481; Buedingen Mfg. Co. *v.* Royal Trust Co., 90 N. Y. App. Div. 267, 85 N. Y. Suppl. 621 [*affirmed* in 181 N. Y. 563, 74 N. E. 1115]; Bates *v.* Conkling, 10 Wend. 389.

*South Carolina.*— Dozier *v.* Johnston, 2 Hill 297.

*Tennessee.*— Wells-Jones Plow Co. *v.* Deeds, 1 Tenn. Ch. App. 400.

*Wisconsin.*— Pratt *v.* Peck, 70 Wis. 620, 36 N. W. 410.

See 43 Cent. Dig. tit. "Sales," § 375.

**27.** Hungerford *v.* Winnebago Tug Boat, etc., Co., 33 Wis. 303.

**Access of buyer.**— On a sale of a stock of goods in a house owned by the buyer and to which he has access, if nothing remains to be done by way of setting them apart or separating them no further delivery is necessary. Griffin *v.* Wright, 1 Tex. App. Civ. Cas. § 638.

**28. As affecting transfer of title** see *infra*, VI, A, 3, d.

**29.** Warren *v.* Kirk, 24 La. Ann. 150; McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393; Haldeman *v.* Duncan, 51 Pa. St. 66; Lum *v.* Hale, (Tex. Civ. App. 1903) 75 S. W. 359.

**Actual selection necessary.**—A mere agreement to measure and pile lumber or the employment of one to do so is not sufficient to constitute a delivery. The lumber must be actually measured and piled. Everett *v.* Clements, 9 Ark. 478; Illinois Cent. R. Co. *v.* Cassell, 17 Ill. 389.

**30.** *California.*— Squires *v.* Payne, 6 Cal. 654.

*Georgia.*— Tift *v.* Wight, etc., Co., 113 Ga. 681, 39 S. E. 503.

*Mississippi.*— Stamps *v.* Bush, 7 How. 255.

*Oregon.*— La Vie *v.* Tooze, 46 Oreg. 206, 79 Pac. 413.

of the buyer.[31] It is not necessary that the exact quantity should be segregated to constitute such selection a delivery.[32] But mere selection and segregation will not operate as delivery if in fact the conduct of the parties is such that no intent of the seller to surrender dominion can be inferred.[33] If the buyer is present and it is then and there agreed that he is entitled to take away from the common mass the quantity sold, weighing and measuring are not essential to a valid delivery.[34] And when specific articles are sold if they are marked as purchased by the buyer and set aside for him this is such an appropriation as will constitute a delivery.[35]

**h. Property in Possession of Buyer.** If at the time of the sale the property is already in the possession of the buyer no formal delivery is necessary to complete the transfer and fix his liability.[36]

**i. Property in Possession of Seller.**[37] There may be a complete delivery, although the goods remain in the possession of the seller, if they are marked and set aside for the buyer,[38] or the purchaser assumes such control of the property as reasonably to indicate a change of ownership,[39] or the seller's possession is as agent [40] or agister,[41] or at the request of the buyer,[42] under an agreement to store or care for the property,[43] especially if the goods have been marked as belonging

*South Carolina.*— Dozier *v.* Johnston, 2 Hill 297.

*Tennessee.*— Barker *v.* Reagan, 4 Heisk. 590; Wells-Jones Plow Co. *v.* Deeds, 1 Tenn. Ch. App. 400.

See 43 Cent. Dig. tit. "Sales," § 353.

31. Squires *v.* Payne, 6 Cal. 654; Tift *v.* Wight, etc., Co., 113 Ga. 681, 39 S. E. 503; Jewett *v.* Lincoln, 14 Me. 116, 31 Am. Dec. 36; Wells-Jones Plow Co. *v.* Deeds, 1 Tenn. Ch. App. 400.

**Contract to deliver on cars.**—Where lumber is to be delivered on cars, a selection and marking of lumber in the seller's yards is not a delivery. Binghamton First Nat. Bank *v.* Peck, 61 N. Y. App. Div. 258, 70 N. Y. Suppl. 471. But see La Vie *v.* Tooze, 46 Oreg. 206, 79 Pac. 413, where it was held that, although a contract for the sale of a crop of hops specified the shipping station as the place for delivery, the sale and delivery is complete where the parties meet at the farm on which the crop was grown and there sort, weigh, and brand the bales, the buyer paying the balance of the price, and the seller agreeing to haul the same to the station at a future time.

32. Smith *v.* Friend, 15 Cal. 124; Squires *v.* Payne, 6 Cal. 654. *Compare* Leballister *v.* Nash, 24 Me. 316.

**Ascertainment of quantity.**—In the absence of an agreement to that effect, weighing is not essential to a good delivery. Kaufman *v.* Stone, 25 Ark. 336; Burr *v.* Williams, 23 Ark. 244; Barker *v.* Reagan, 4 Heisk. 590. But if stipulated for in the contract the goods must be weighed to make a good delivery. McCready *v.* Wright, 5 Duer (N. Y.) 571; Mowry Car, etc., Works *v.* Shorter, 8 Ohio Dec. (Reprint) 290, 7 Cinc. L. Bul. 32. And see Bogy *v.* Rhodes, 4 Greene (Iowa) 133.

33. Slaughter *v.* Moore, 17 Tex. Civ. App. 233, 42 S. W. 372.

34. Nash *v.* Brewster, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409.

**Waiver.**— The refusal of the buyer to receive and accept the goods relieves the seller of the duty to select and weigh them. Beasley *v.* Lovel, 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 551.

35. Merrill *v.* Parker, 24 Me. 89; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Brewster *v.* Leith, 1 Minn. 56; Austin *v.* Dawson, 75 N. C. 523.

**A survey of logs by a person mutually agreed on by the parties to a sale thereof, and the marking of the logs, constitute a sufficient delivery.** Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 572.

**Setting apart by third person.**—Where one sells goods not in his possession but which he orders from a third person, the fact that such person sets apart the goods for the buyer does not constitute a delivery to the buyer. Brock *v.* McCaffrey, 3 Pa. Super. Ct. 431.

36. Taylor *v.* Freret, 9 La. Ann. 437; Larochette *v.* Her Husband, 5 Rob. (La.) 494; Walker *v.* Blake, 37 Me. 373; Nichols *v.* Patten, 18 Me. 231, 35 Am. Dec. 713; Chapman *v.* Searle, 3 Pick. (Mass.) 38; Hayden *v.* Frederickson, 59 Nebr. 141, 80 N. W. 494.

37. **Transfer of title** see *infra*, VI, A, 4, c, (v).

38. Merrill *v.* Parker, 24 Me. 89; Anderson *v.* Scot, 1 Campb. 235 note.

39. Rayer *v.* Rice, 36 Pa. Super. Ct. 178.

40. Highlander *v.* Fluke, 5 Mart. (La.) 442.

**Property in possession of agent of seller.**— Where the property is in possession of an agent of the seller, and he is notified of the sale and is appointed agent of the buyer to forward the articles, there is a constructive delivery. Van Brunt *v.* Pike, 4 Gill (Md.) 270, 45 Am. Dec. 126.

41. Bertelson *v.* Bower, 81 Ind. 512.

42. Robinson *v.* Berkey, 111 Iowa 550, 82 N. W. 972; Wheelock *v.* Tanner, 39 N. Y. 481; Salomon *v.* Corbett, 38 N. Y. App. Div. 262, 57 N. Y. Suppl. 18.

43. Ingalls *v.* Herrick, 108 Mass. 351, 11

to the purchaser,[44] and nothing further remains to be done by either party to complete the sale.[45] But if something remains to be done to the goods by the seller, there is no delivery.[46] Similarly it does not affect the delivery if the goods remain in the possession of the seller under a contract of hiring,[47] or with permission to use them,[48] or because the seller retains the key to the building in order to have access to goods of his own in the same building.[49]

**j. Property in Possession of Third Person.**[50] When the goods are at the time of the sale in the possession of a third person actual manual delivery is not necessary,[51] but it is sufficient if the goods are pointed out and turned over to the buyer [52] who arranges with such third person to hold the goods on his behalf.[53] So the payment by the buyer for the pasturage of a horse or his keep in a livery stable, after his purchase, the seller having previously paid therefor, constitutes a constructive delivery of the animal.[54]

**k. Transfer of Premises on Which Goods Are Located.** Where a vendor of land sells at the same time personal property located thereon, a surrender of possession of the land to the vendee is a sufficient delivery of the personalty,[55] unless there is a stipulation in the contract for a more formal delivery.[56] So when a husband sells personal property on a farm to his wife and abandons the farm to her there is a sufficient delivery;[57] and a tenant by surrendering possession of the leased premises to his landlord sufficiently delivers personal property thereon which he has sold to the landlord.[58]

**l. Delivery to Carrier** [59] — (i) *In General.* Ordinarily a delivery of goods by the seller to the carrier designated by the purchaser, or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser,

Am. Rep. 360; Ropes *v.* Lane, 11 Allen (Mass.) 591; Chapman *v.* Searle, 3 Pick. (Mass.) 38; Barrett *v.* Goddard, 2 Fed. Cas. No. 1,046, 3 Mason 107.

**44.** Ropes *v.* Lane, 11 Allen (Mass.) 591; Barrett *v.* Goddard, 2 Fed. Cas. No. 1,046, 3 Mason 107.

**45.** Means *v.* Williamson, 37 Me. 556.

**46.** Lambeth *v.* Wells, 12 Rob. (La.) 51, sale of cotton to be ginned and baled.

**Mathematical computation.**— The fact that an inventory of the goods has not been footed up to ascertain the total amount due will not render the delivery incomplete if the price of each article has been agreed on. Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198.

**Driving cattle to railroad.**— If the delivery is complete at the place of sale the fact that the seller is to drive the cattle to the railroad station for the buyer does not affect it. Burcham *v.* Griffith, 31 Nebr. 778, 48 N. W. 824. And see also Blanton *v.* Langston, 60 Tex. 149, where the buyer after a delivery of cotton arranged with the seller to have the latter transport it to a gin.

**47.** Blake *v.* Jones, Bailey Eq. (S. C.) 141, 21 Am. Dec. 530; Williams *v.* Porter, 41 Wis. 422.

**48.** Smith *v.* Nevitt, Walk. (Miss.) 370, 12 Am. Dec. 715.

**49.** Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198.

**50. Transfer of title** see *infra*, VI, A, 4, c, (IV).

**51.** Gant *v.* Broadway, 2 Ariz. 315, 15 Pac. 862; Jones *v.* Shaw, 8 Pa. Super. Ct. 487, 43 Wkly. Notes Cas. 168.

**52.** Field *v.* Simco, 7 Ark. 269; Dixon *v.* Buck, 42 Barb. (N. Y.) 70.

**53.** *Arkansas.*— Field *v.* Simcoe, 7 Ark. 269.

*Illinois.*— Jones *v.* Antrim, 94 Ill. App. 93.

*Indiana.*— Avery Mfg. Co. *v.* Emsweller, 31 Ind. App. 291, 67 N. E. 946.

*Iowa.*— Aultman *v.* Nilson, 112 Iowa 634, 84 N. W. 692.

*New Hampshire.*—Lane *v.* Sleeper, 18 N. H. 209.

*New York.*— Dixon *v.* Buck, 42 Barb. 70.

*Pennsylvania.*— Brown *v.* McCaffrey, 40 Wkly. Notes Cas. 69.

*Vermont.*— Rothchild *v.* Rowe, 44 Vt. 389 See 43 Cent. Dig. tit. "Sales," § 374.

**Waiver of delivery.**—Where the purchaser permits the person in possession to use the machine for a definite time as a matter of favor he waives delivery; but mere submitting to such use, because of the person's refusal to give it up till certain work was done, would not constitute a waiver. Edwards *v.* Meadows, 71 Ala. 42.

**54.** Stockwell *v.* Baird, 1 Marv. (Del.) 420, 31 Atl. 811; Bullard *v.* Wait, 16 Gray (Mass.) 55.

**55.** Hall *v.* Morrison, 92 Ga. 311, 18 S. E. 293; Sharon *v.* Shaw, 2 Nev. 289, 90 Am. Dec. 546; De Ridder *v.* McKnight, 13 Johns. (N. Y.) 294. And see Bunting *v.* Saltz, 84 Cal. 168, 24 Pac. 167.

**56.** Hall *v.* Morrison, 92 Ga. 311, 18 S. E. 293.

**57.** Pearson *v.* Quist, 79 Iowa 54, 44 N. W. 217.

**58.** Pacheco *v.* Hunsacker, 14 Cal. 120. See also Clark *v.* French, 23 Me. 221, 39 Am. Dec. 618.

**59. As transferring title** see *infra*, VI, A, 4, c, (VIII).

is a delivery to the purchaser,[60] the carrier becoming the agent or bailee of the

60. *Alabama.*— Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Hill *v.* Gayle, 1 Ala. 275.

*Arkansas.*— Burton *v.* Baird, 44 Ark. 556.

*Colorado.*— Hill *v.* Fruita Mercantile Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172.

*Connecticut.*— Whiting *v.* Farrand, 1 Conn. 60.

*Georgia.*— McCullough *v.* Armstrong, 118 Ga. 424, 45 S. E. 379; Mann *v.* Glauber, 96 Ga. 795, 22 S. E. 405; Falvey *v.* Richmond, 87 Ga. 99, 13 S. E. 261; Dunn *v.* State, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; Watkins *v.* Paine, 57 Ga. 50. But *compare* Loyd *v.* Wight, 20 Ga. 574, 65 Am. Dec. 636.

*Illinois.*— Carthage *v.* Munsell, 203 Ill. 474, 67 N. E. 831; Stafford *v.* Walter, 67 Ill. 83; Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Carthage *v.* Duvall, 105 Ill App. 123 [*affirmed* in 202 Ill. 234, 66 N. E. 1099]; Munsell *v.* Carthage, 105 Ill. App. 119 [*affirmed* in 203 Ill. 474, 67 N. E. 831]; Jones *v.* People, 99 Ill. App. 305; Clancey *v.* People, 99 Ill. App. 303; Schlesinger *v.* West Shore R. Co., 88 Ill. App. 273; Des Moines, etc., R. Co. *v.* Block-Pollak Iron Co., 88 Ill. App. 79.

*Indiana.*—Kilmer *v.* Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271.

*Kansas.*—Garfield Tp. *v.* Dodsworth, 9 Kan. App. 752, 58 Pac. 565; Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956.

*Maine.*— State *v.* Intoxicating Liquors, 98 Me. 464, 57 Atl. 798.

*Maryland.*— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

*Massachusetts.*— Silvestri *v.* Missocchi, 165 Mass. 337, 43 N. E. 114; Foster *v.* Rockwell, 104 Mass. 167; Fisher *v.* Minot, 10 Gray 260; Putnam *v.* Tillotson, 13 Metc. 517. And see Garfield, etc., Coal Co. *v.* Pennsylvania Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020.

*Michigan.*— People *v.* Andre, 153 Mich. 531, 117 N. W. 55.

*Minnesota.*— Kessler *v.* Smith, 42 Minn. 494, 44 N. W. 794.

*Mississippi.*— Planters' Oil Mill, etc., Co. *v.* Falls, (1901) 29 So. 786; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

*Missouri.*— State *v.* Rosenberger, 212 Mo. 648, 111 S. W. 509, 126 Am. St. Rep. 580, 20 L. R. A. N. S. 284; State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; Comstock *v.* Affœlter, 50 Mo. 411; Bloom's Son Co. *v.* Haas, 130 Mo. App. 122, 108 S. W. 1078; R. J. Schwab, etc., Co. *v.* Frieze, 107 Mo. App. 553, 81 S. W. 1174; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Meyer Bros. Drug Co. *v.* McMahan, 50 Mo. App. 18.

*Nebraska.*— Butts *v.* Hensey, 73 Nebr. 421, 102 N. W. 1011; McKee *v.* Bainter, 52 Nebr. 604, 72 N. W. 1044; Havens *v.* Grand Island Light, etc., Co., 41 Nebr. 153, 59 N. W. 681.

*New Hampshire.*— Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612; Arnold *v.* Prout, 51 N. H. 587.

*New York.*— Ledon *v.* Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245 [*reversing* 47 Hun 616]; Mee *v.* McNider, 109 N. Y. 500, 17 N. E. 424 [*affirming* 39 Hun 345]; Higgins *v.* Murray, 73 N. Y. 252; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Glen *v.* Whitaker, 51 Barb. 451; Mayer *v.* Beggs, 9 Misc. 352, 29 N. Y. Suppl. 702; Brown *v.* Bowe, 7 N. Y. St. 387; Hague *v.* Porter, 3 Hill 141.

*North Carolina.*— Hunter *v.* Randolph, 128 N. C. 91, 38 S. E. 288; Ober *v.* Smith, 78 N. C. 313.

*North Dakota.*— Witte Mfg. Co. *v.* Reilly, 11 N. D. 203, 91 N. W. 42.

*Oregon.*— Allen *v.* Agee, 15 Oreg. 551, 16 Pac. 637, 3 Am. St. Rep. 206.

*Pennsylvania.*—Bacharach *v.* Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; Garbracht *v.* Com., 96 Pa. St. 449, 42 Am. Rep. 550; Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264; Schmertz *v.* Dwyer, 53 Pa. St. 335; Bolton *v.* Ackerman, 8 Pa. Co. Ct. 549; Rickey *v.* Tutelman, 19 Pa. Super. Ct. 403.

*Rhode Island.*— Hobart *v.* Littlefield, 13 R. I. 341.

*Tennessee.*— Boyd *v.* Mosely, 2 Swan 661.

*Texas.*—Greif *v.* Seligman, (Civ. App. 1904) 82 S. W. 533.

*Washington.*— Roy *v.* Griffin, 26 Wash. 106, 66 Pac. 120.

*Wisconsin.*— Swanke *v.* McCarty, 81 Wis. 109, 51 N. W. 92; Ranney *v.* Higby, 5 Wis. 62; Ranney *v.* Higby, 4 Wis. 154.

*United States.*— Andrews *v.* U. S., 41 Ct. Cl. 48 [*affirmed* in 207 U. S. 229, 28 S. Ct. 100, 52 L. ed. 185].

*England.*— Fragano *v.* Long, 4 B. & C. 219, 6 D. & R. 283, 3 L. J. K. B. O. S. 177, 10 E. C. L. 551; Dutton *v.* Solomonson, 3 B. & P. 582, 7 Rev. Rep. 883; Honeywood *v.* Stone, 2 Chit. 142, 23 Rev. Rep. 745, 18 E. C. L. 553; Dawes *v.* Peck, 3 Esp. 12, 8 T. R. 330, 4 Rev. Rep. 675, 101 Eng. Reprint 1417.

See 43 Cent. Dig. tit. "Sales," §§ 377, 378.

**Necessity for express or implied consent of buyer.**— But a delivery to the carrier without the consent of the buyer either express or implied is not a delivery to the consignee. Everett *v.* Parks, 62 Barb. (N. Y.) 9; Hague *v.* Porter, 3 Hill (N. Y.) 141; Cobb *v.* Arundell, 26 Wis. 553. And see The Francis, 9 Fed. Cas. No. 5,036, 2 Gall. 391.

**Place of delivery.**—Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400, 8 Jur. N. S. 58, 31 L. J. Exch. 92, 10 Wkly. Rep. 109, 5 L. T. Rep. N. S. 399.

**Delivery for transportation to place other than that designated.**— But where the contract provided for delivery f. o. b. New York, a delivery to a carrier for transportation to Baltimore without orders from the buyer was

buyer.[61] The delivery should be of goods of the proper quality and in the proper quantity.[62] The fact that the purchaser has a right of inspection and approval on receipt does not change the rule.[63] Delivery to a carrier is not delivery to the buyer if the seller is bound to deliver at the buyer's residence or place of business,[64] the carrier in such case being the agent of the seller.[65] But such agency ceases when the goods arrive at their destination,[66] or are accepted and paid for.[67]

(II) *Delivery Through Intermediary.* A delivery by direction of the buyer to a third person as intermediary to ship the goods is a good delivery to the buyer.[68]

(III) *Retention of Right of Disposal.* The delivery to the carrier must be such a transfer of possession as will remove the goods wholly from the dominion of the seller,[69] and such as to entitle the purchaser to demand the goods of the carrier;[70] consequently it is not a delivery to the buyer if the seller reserves the

not a delivery to the buyer. International Money Box Co. *v.* Southern Trust, etc., Co., 93 N. Y. App. Div. 309, 87 N. Y. Suppl. 881.

**Tender to carrier refused.**—Where the carrier refuses to receive goods tendered by the seller and the latter thereupon takes the goods away and keeps them there is no delivery. Butler *v.* Hirzel, 35 Misc. (N. Y.) 143, 71 N. Y. Suppl. 455.

**61.** *Georgia.*— Williams *v.* Coleman, 117 Ga. 393, 43 S. E. 715.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456.

*North Carolina.*— Bowers *v.* J B. Worth Co., 129 N. C. 36, 39 S. E. 635.

*Oregon.*— Allen *v.* Agee, 15 Oreg. 551, 16 Pac. 637, 3 Am. St. Rep. 206.

*Vermont.*— Strong *v.* Dodds, 47 Vt. 348.

*England.*— Wait *v.* Baker, 2 Exch. 1. But see Vigers *v.* Sanderson, [1901] 1 K. B. 608, 6 Com. Cas. 99, 70 L. J. K. B. 383, 84 L. T. Rep. N. S. 464, 17 T. L. R. 316, 49 Wkly. Rep. 411.

See 43 Cent. Dig. tit. "Sales," § 378.

**Limitation of rule.**— It has been held that the carrier is not the agent of the buyer to the extent that the latter is liable in the event of a misdelivery. Williams *v.* Coleman, 117 Ga. 393, 43 S. E. 715.

**Agency for both parties.**—Where goods on shipboard consigned to the captain are sold while at sea, to be delivered to the purchaser or his agent at the port of destination, and no agent of the purchaser presents himself to receive them, the captain is deemed the agent of the seller in delivering, and of the buyer in receiving, the goods. Smith *v.* Davenport, 34 Me. 520. *Compare* Jones *v.* Davis, 3 Houst. (Del.) 68.

**62.** Reynolds *v.* Spencer, 92 Hun (N. Y.) 275, 36 N. Y. Suppl. 750; Gutwillig *v.* Zuberbier, 41 Hun (N. Y.) 361; Mee *v.* McNider, 39 Hun (N. Y.) 345 [*affirmed* in 109 N. Y. 500, 17 N. E. 424]; Vigers *v.* Sanderson, [1901] 1 K. B. 608, 6 Com. Cas. 99, 70 L. J. K. B. 383, 84 L. T. Rep. N. S. 464, 49 Wkly. Rep. 411, 17 T. L. R. 316. And see Price *v.* Engelke, 68 N. J. L. 567, 53 Atl. 698.

**Proper quantity.**— The agency of the officers of a railroad company to a consignee after delivery of goods extends only to goods rightfully shipped, and which belonged to such consignee when shipped or delivered for shipment. Bowers *v.* J. B. Worth Co., 129 N. C. 36, 39 S. E. 635.

**63.** Mee *v.* McNider, 39 Hun (N. Y.) 345 [*affirmed* in 189 N. Y. 500, 17 N. E. 424].

**64.** *Colorado.*— Hill *v.* Fruita Mercantile Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172; Hanauer *v.* Bartels, 2 Colo. 514.

*Kansas.*— Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956.

*New Jersey.*—McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441.

*New York.*— Murray *v.* J. J. Nichols Mfg. Co., 11 N. Y. Suppl. 734.

*Oregon.*— Herring-Marvin Co. *v.* Smith, 43 Oreg. 315, 72 Pac. 704, 73 Pac. 340.

*Texas.*— Greif *v.* Seligman, (Civ. App. 1904) 82 S. W. 533.

*West Virginia.*— Bloyd *v.* Pollock, 27 W. Va. 75.

*United States.*— Thompson *v.* Cincinnati, etc., R. Co., 23 Fed. Cas. 13,950, 1 Bond 152

See 43 Cent. Dig. tit. "Sales," § 377.

**65.** Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730, 50 Pac. 956; McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441; Braddock Glass Co. *v.* Irwin, 153 Pa. St. 440, 25 Atl. 490.

**66.** Capehart *v.* Furman Farm Imp. Co., 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60.

**67.** Hanauer *v.* Bartels, 2 Colo. 514; Lummis *v.* Millville Mfg. Co., 72 N. J. L. 25, 60 Atl. 219.

**68.** J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 70 Pac. 669; Stern *v.* Filene, 14 Allen (Mass.) 9. Where an agent or carrier was authorized to receive merchandise to transport to the buyer, delivery by his direction on board the barge of another person was sufficient to charge the purchaser. Thompson *v.* Menck, 4 Abb. Dec. (N. Y.) 400, 2 Keyes 82.

**69.** Toledo, etc., Ry. Co. *v.* Gilvin, 81 Ill. 511; Wenger *v.* Barnhart, 55 Pa. St. 300.

**Delivery alongside vessel.**—Where the contract provides for delivery alongside a vessel to be furnished by the purchaser delivery on a wharf before the vessel arrives is not a compliance with the contract. McCandish *v.* Newman, 1 Phila. (Pa.) 268.

**70.** Doyle *v.* Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100.

right of disposal of the goods,[71] by consigning them to his own order,[72] or by taking the bill of lading in his own name and retaining the same,[73] or making the delivery of the bill of lading conditional on the payment of the price.[74] If, however, the bill of lading, although taken out in the name of another, is duly indorsed and tendered to the buyer the delivery is good.[75]

(IV) *RIGHTS AND DUTIES AS TO TRANSPORTATION* — (A) *Selection of Carrier and Route.* Where no particular carrier or route is specified in the contract, the seller may ship the goods by the ordinary means and usual routes of carriage.[76] If, however, the buyer has designated the carrier and route by which shipment shall be made, there can be no valid delivery by carrier unless the seller ships by the designated carrier,[77] from the designated port,[78] and by the

**71.** Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Toledo, etc., R. Co *v.* Gilvin, 81 Ill. 511; Colles *v.* Lake Cities Electric R. Co., 22 Ind. App. 86, 53 N. E. 256.

**Reservation of right.**— The seller cannot after an unqualified delivery to the carrier by subsequent acts change such delivery. Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264.

**72.** *Georgia.*— Redd *v.* Burres, 58 Ga. 574, holding that delivery to a carrier is not delivery to the buyer unless the goods are consigned to him.

*Illinois.*— Ward *v.* Taylor, 56 Ill. 494.

*Indiana.*— Sohn *v.* Jervis, 101 Ind. 578, 1 N. E. 73.

*Kansas.*— Armstrong *v.* Coyne, 64 Kan. 75, 67 Pac. 537.

*Maryland.*— Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

*Missouri.*— Hunter Bros. Mill Co. *v.* Stanley, 132 Mo. App. 308, 111 S. W. 869.

*Virginia.*— Aultman, etc. Mach. Co. *v.* Gay, 108 Va. 647, 62 S. E. 946.

**Name of consignor.**— It is not essential that there shall be a literal compliance as to the person in whose name as consignor the bill of lading shall be issued. Gray *v.* Gannon, 6 Thomps. & C. (N. Y.) 245.

**Removal of goods by agent of seller.**— Where goods are consigned by the seller to himself, care of his agent, the act of the agent in setting up and removing the goods from the car does not constitute a delivery to the carrier. Aultman, etc., Mach. Co. *v.* Gay, 108 Va. 647, 62 S. E. 946.

**Effect of acceptance.**— The fact that a vendee accepted a portion of the goods consigned to the vendor was not a waiver of the delivery of the remaining goods consigned to the vendee according to the contract. Van Valkenburgh *v.* Gregg, 45 Nebr. 654, 63 N. W. 949.

**73.** Sears *v.* Martin, 145 Ala. 663, 39 So. 722; McKelvey *v.* Perham, 31 Mont. 602, 79 Pac. 253.

**Retention of bill of lading not conclusive.**— But the fact that the shipper retains the bill of lading is not conclusive of his intent, and it may be shown that he intended the delivery to the carrier to pass the right of possession. Litchfield Bank *v.* Elliott, 83 Minn. 469, 86 N. W. 454. And see Hunter *v.* Randolph, 128 N. C. 91, 38 S. E. 288; Ober *v.* Smith, 78 N. C. 313.

**A mere receipt for the goods taken from the carrier in the name of the seller does not affect the delivery.** Dr. A. P. Sawyer Medicine Co. *v.* Johnson, 178 Mass. 374, 59 N. E. 1022. And see Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

**Necessity of bill of lading.**— There is no rule of law which, in the absence of usage, obliges the seller of goods delivered to be carried on a railroad, and thence forwarded by steamboat, to take out an "internal bill of lading," and forward it to the purchaser at or about the time of sending the goods. Johnson *v.* Stoddard, 100 Mass. 306.

**74.** *Georgia.*— Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513.

*Maryland.*— Seaboard Air Line R. Co. *v.* Phillips, 108 Md. 285, 70 Atl. 232.

*Missouri.*— Hunter Bros. Mill Co. *v.* Stanley, 132 Mo. App. 308, 111 S. W. 869; Southern Lumber Co. *v.* Mercantile Lumber, etc., Co., 89 Mo. App. 141.

*Nebraska.*— Van Valkenburgh *v.* Gregg, 45 Nebr. 654, 63 N. W. 949.

*Pennsylvania.*— Hylton *v.* Symes, 7 Phila. 96.

*Wisconsin.*— Doyle *v.* Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100.

**75.** Cleveland *v.* Heidenheimer, (Tex. Civ. App. 1898) 44 S. W. 551.

**76.** Phœnix Lock Works *v.* Capelle Hardware Co., 9 Houst. (Del.) 232, 32 Atl. 79; Ober *v.* Smith, 78 N. C. 313. But see Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586, holding that it is the duty of the buyer to designate a carrier.

**77.** Wheelhouse *v.* Parr, 141 Mass. 593, 6 N. E. 787. See also Fearn *v.* Richardson, 12 La. Ann. 752; Bidwell *v.* Overton, 26 Abb. N. Cas. (N. Y.) 402, 13 N. Y. Suppl. 274. But *compare* Thornton *v.* Simpson, Holt N. P. 164, 3 E. C. L. 72, 2 Marsh. 267, 6 Taunt. 556, 1 E. C. L. 752.

**Particular vessel.**— Where the contract called for shipment of sugar by a particular vessel, and it was actually loaded on such vessel, the purchaser's duty to receive it was not affected by the fact that, during the voyage, owing to an accident to the vessel, part of the sugar was transferred to another vessel for transportation. Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616.

**Sailing vessel or steamer.**— A contract to ship by sailing vessel is not performed by shipping by steamer. Lefferts *v.* Weld, 167 Mass. 531, 46 N. E. 107.

**78.** Pierson *v.* Crooks, 42 Hun (N. Y.)

designated route,[79] and the goods are properly directed in accordance with the provisions of the contract.[80]

(B) *Duty to Furnish Means of Transportation.* If the goods are to be delivered to the purchaser at the point of shipment it is generally his duty to furnish the cars or other means of transportation from such point.[81] Thus where the contract is to deliver "f. o. b." at the place of shipment it is *prima facie* the duty of the buyer to furnish the car or vessel in which the goods shall be shipped.[82] But the agreement when considered in the light of attending circumstances or the construction thereof by the parties may shift the obligation of furnishing the means

571 [*affirmed* in 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831]; Filley *v.* Pope, 115 U. S. 213, 6 S. Ct. 19, 29 L. ed. 372 [*reversing* 9 Fed. 65, 3 McCrary 190].

79. Fleming *v.* Mills, 5 Mich. 420; Jones *v.* Schneider, 22 Minn. 279; Corning *v.* Colt, 5 Wend. (N. Y.) 253; Filley *v.* Pope, 115 U. S. 213, 6 S. Ct. 19, 29 L. ed. 372. But see Iasigi *v.* Rosenstein, 141 N. Y. 414, 36 N. E. 509 [*reversing* 65 Hun 591, 20 N. Y. Suppl. 491], where there was no regular route of transportation as that designated.

**Waiver.**— Shipment by wrong route is waived by acceptance of the goods without timely objection. Gray *v.* Farmer, 19 Nebr. 69, 26 N. W. 593; Wood *v.* Malone, 131 Pa. St. 554, 18 Atl. 984.

80. Woodruff *v.* Noyes, 15 Conn. 335.

81. Lozes *v.* Segura Sugar Co., 52 La. Ann. 1844, 28 So. 249; Vredenburg *v.* Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 So 122.

**Freight and other expenses** see *supra*, III, C, 2, 3, 4.

**Shipment in buyer's cars.**— If the shipment is to be made in cars owned by the buyer it is his duty to furnish them. National Coal Tar Co. *v.* Malden, etc., Gaslight Co., 189 Mass. 234, 75 N. E. 625; Palestine Cotton Seed Oil Co. *v.* Corsicana Cotton Oil Co., 25 Tex. Civ. App. 614, 61 S. W. 433.

**Delay in furnishing vessel.**— Under a contract to cut cedar posts during the winter of 1871–1872, and deliver them on the rail of vessels to be furnished by the vendees, at a specified price, where the vessels were not furnished until 1874, the purchasers were not entitled to deduct the cost of taking the posts from the beach where the vendors had delivered them for shipping, and placing them on the rail of the vessel. Bolton *v.* Riddle, 35 Mich. 13.

**Delay in loading.**— Where the contract required the seller of ice to load each boat within twenty-four hours after arrival, or pay ten dollars per day on each boat after the twenty-four hours expired, and the purchasers, understanding that but one boat could be loaded at a time, hired and sent several boats to get the ice, and the masters demanded no demurrage, the purchasers were not entitled to demurrage for boats not loaded within twenty-four hours after arrival, where several arrived at one time. Riendeau *v.* Bullock, 147 N. Y. 269, 41 N. E. 561.

**Refusal to deliver.**— Where a contract for the sale of hay provides that the purchaser shall furnish cars, and the hay is not delivered at the time mentioned in the contract, and the delay is due to the fault of both parties, and subsequently the seller notifies the purchaser of his absolute refusal to deliver the hay, and thereafter sells it to another party, the purchaser is not required to do a useless thing, and provide and tender cars to receive the hay which the seller had absolutely refused to deliver. Price *v.* Beach, 20 Pa. Super. Ct. 291.

82. Hocking *v.* Hamilton, 158 Pa. St. 107, 27 Atl. 836; Kunkle *v.* Mitchell, 56 Pa. St. 100; Davis *v.* Alpha Portland Cement Co., 134 Fed. 274 [*affirmed* in 142 Fed. 74, 73 C. C. A. 388]; Evanston Elevator, etc., Co. *v.* Castner, 133 Fed. 409; Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419; Chicago Lumber Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207; Forrestt *v.* Aramayo, 9 Aspin. 134, 83 L. T. Rep. N. S. 335; Sutherland *v.* Allhusen, 14 L. T. Rep. N. S. 666. See also Armitage *v.* Insole, 14 Q. B. 728, 14 Jur. 619, 19 L. J. Q. B. 202, 68 E. C. L. 728; Marshall *v.* Jamieson, 42 U. C. Q. B. 115. And see Dwight *v.* Eckert, 117 Pa. St. 490, 12 Atl. 32; Howland *v.* Brown, 13 U. C. Q. B. 199.

**The rule in Wisconsin.**—Although the supreme court of Wisconsin in Boyington *v.* Sweeney, 77 Wis. 55, 45 N. W. 938, followed the rule laid down in the cases cited above, that case has in effect been overruled and the contrary rule adopted in Vogt *v.* Shienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756. In this case the court relying on the general rule that one who undertakes to accomplish a certain result, by necessary implication agrees to supply all the means necessary to such result, decided on the authority of John O'Brien Lumber Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337, that it was the seller's duty to furnish cars for the transportation of the goods under the conditions stated in the text. It is to be remarked, however, that the contract in the case relied on was not a contract of sale but a logging contract under which defendant agreed to cut timber on plaintiffs' land and load the logs on cars. It was further stipulated that delay on the part of the railroad company should extend the time of performance, and that defendant should be liable for damages to the railroad company's equipment due to his negligence. The court regarded the clause as to the effect of defaults due to delays on the part of the railroad company as indicating the intent of the parties that defendant should furnish the cars and distinguished the Boyington case.

of transportation on the seller.[83] If the parties have themselves put a construction upon the contract by one or the other assuming to furnish the cars, this construction will be adopted whether such duty was assumed by the buyer,[84] or by the seller.[85]

(c) *Risks of Transportation.*[86] Where a particular place of delivery is designated the risk of transportation is generally on the seller,[87] even though the actual transportation is by the purchaser if it is under supervision of the seller.[88] But of course the seller does not bear the risk of transportation after a complete delivery to the buyer,[89] as when delivery to the carrier is a delivery to the buyer.[90] It is the duty of the seller to take usual and reasonable precautions to secure the safe delivery of the goods,[91] and he will be liable for a failure to insure if he is instructed so to do.[92] But he is not liable for failure to insure the goods in the

**83.** Harman *v.* Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017; Davis *v.* Alpha Portland Cement Co., 134 Fed. 274 [*affirmed* in 142 Fed. 74, 73 C. C. A. 388].

**Illustration.**—Where, under a contract for the sale and shipment of coal by a coal company, which provided that deliveries should be made "f. o. b. cars" at the mine, during several months the seller obtained from the railroad companies all cars in which shipments were made, and excused delays to the purchaser on the ground of shortage of cars, without making any claim that the purchaser was bound to furnish the same, the contract must be construed as requiring the seller, and not the purchaser, to furnish cars. American Trust, etc., Bank *v.* Zeigler Coal Co., 165 Fed. 34, 91 C. C. A. 72.

**84.** Harman *v.* Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017; St. Louis Consol. Coal Co. *v.* Schneider, 163 Ill. 393, 45 N. E. 126.

**85.** Davis *v.* Alpha Portland Cement Co., 142 Fed. 74, 73 C. C. A. 388 [*affirming* 134 Fed. 274]. See also Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419.

**86. Loss of goods as defense to action for work and labor** see WORK AND LABOR.

**87.** *Louisiana.*— Maillard *v.* Nihoul, 21 La. Ann. 412.

*Massachusetts.*— Taylor *v.* Cole, 111 Mass. 363.

*New Jersey.*— McNeal *v.* Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. Rep. 441.

*New York.*— Murray *v.* J. J. Nichols Mfg. Co., 11 N. Y. Suppl. 734.

*Pennsylvania.*— Braddock Glass Co. *v.* Irwin, 153 Pa. St. 440, 25 Atl. 490.

*United States.*— Peace River Phosphate Co. *v.* Grafflin, 58 Fed. 550; Thompson *v.* Cincinnati, etc., R. Co., 23 Fed. Cas. No. 13,950, 1 Bond. 152.

See 43 Cent. Dig. tit. "Sales," § 354.

**Shipment at buyer's expense.**—Where the goods were to be delivered to the express company for shipment to the buyer's place of business at his expense, the seller is not responsible for damage in transmit. Loomis *v.* Corbin, 29 Conn. 60.

**88.** Allis *v.* Voight, 90 Mich. 125, 51 N. W. 190. See also Cushman *v.* Holyoke, 34 Me. 289, where logs were delivered in the woods, the quantity to be determined at the mill, and it was held that if the purchaser used ordinary care in transporting the logs to the mill he was not liable for those lost.

**89.** Iron Cliffs Co. *v.* Buhl, 42 Mich. 86, 3 N. W. 269; Lummis *v.* Millville Mfg. Co., 71 N. J. L. 25, 60 Atl. 219.

**90.** McCullough Bros. *v.* Armstrong, 118 Ga. 424, 45 S. E. 379.

**91.** Ward *v.* Taylor, 56 Ill. 594; Wilson *v.* Western Fruit Co., 11 Ind. App. 89, 38 N. E. 827; Clarke *v.* Hutchins, 14 East 475.

**"Well packed."**— Where, in an action to recover the price of a lot of glass sold, defendant resisted the claim on the ground that it was not "well packed," as ordered, it was erroneous to instruct the jury that the term "well packed" means so packed as to bear transportation by the proposed route. King *v.* Nelson, 36 Iowa 509.

**Where the car is to be loaded by the seller,** his responsibility ends when he has properly loaded and delivered it to the carrier. But if he should fail in any particular in properly loading the car and delivering it to the carrier in proper condition and the goods are by reason thereof injured in transit, the buyer is not bound to receive the same, nor does the property in the goods pass to him until the obligation of the shipper is discharged with reasonable care and diligence. Fruit Dispatch Co. *v.* Sturges, 28 Ohio Cir. Ct. 65 [*affirmed* in 73 Ohio St. 351, 78 N. E. 1125].

**Evidence.**— Plaintiff sold a car-load of fruit to defendant and agreed to deliver it on the car at the shipping point. It was held that, in an action to recover the contract price in which defendant alleged that plaintiff neglected to take proper care of the fruit in loading it and shipping it, evidence of the general custom of the trade in handling such property was competent for the purpose of showing what was reasonably necessary under the circumstances. Fruit Dispatch Co. *v.* Sturges, 28 Ohio Cir. Ct. 65 [*affirmed* in 73 Ohio St. 351, 78 N. E. 1125].

**92.** Walsh *v.* Frank, 19 Ark. 270; New York Tartar Co. *v.* French, 154 Pa. St. 273, 26 Atl. 425; Ranney *v.* Higby, 4 Wis. 154, holding further that the duty to insure may be imposed by custom of the trade.

**Amount of insurance.**— Where the contract provides for insurance the contract price should be regarded as the value for insurance

absence of instructions,[93] nor for accepting a bill of lading restricting the liability of the carrier if that was the only way the carrier would accept the goods.[94] The seller will, however, be held liable for his negligence as by shipping by the wrong carrier,[95] by the wrong route,[96] or in a car not designated for transportation of goods of the character shipped.[97] If the goods are misdirected a delivery to the carrier is not a good delivery and the seller is liable for the loss of the goods caused thereby.[98] In the event of delivery at the wrong place the seller must bear the loss if the goods are there destroyed.[99] If the goods are not to be shipped before a certain time and are shipped before that time and are lost the seller must bear the loss,[1] even though the goods were not destroyed until after they had been received by the purchaser, if their destruction was not due to his fault.[2]

**m. Symbolical Delivery.**[3] When the nature of the goods is such as to render actual delivery impracticable there may be a symbolical delivery.[4] That is to say the possession may be transferred by the delivery of something symbolical of the goods or some *indicia* of the property,[5] such as giving to the buyer the key

purposes. Blodgett *v.* Foster, 120 Mich. 392, 79 N. W. 625.

**Form of policy.**— Where the goods sold constitute but part of the cargo an insurance on the whole cargo "free from particular average" is not proper insurance. Hickox *v.* Adams, 34 L. T. Rep. N. S. 404. See also Canada Hardware Co. *v.* Suren-Hartmann Co., 24 Quebec Super. Ct. 430.

**93.** Bartlett *v.* Jewett, 98 Ind. 206; Hanan *v.* Bowles, 25 La. Ann. 453. And see Castle *v.* Playford, 7 Exch. 98, 41 L. J. Exch. 44, 26 L. T. Rep. N. S. 315, 20 Wkly. Rep. 440, where the purchaser took upon himself "all risks and dangers of the sea."

**Cancellation of policy.**— Where after shipping goods which he had sold to B, A procured insurance thereon, which, after the loss of the goods, the company canceled on the ground that B already had a prior insurance on the same, in an action for the price, B was not entitled to recoup the amount of the canceled policy, as, if he had a prior policy, he could recover his loss on that, and if not, the cancellation of the other policy was void, and he could recover thereon. Halpin *v.* Stanard, 60 Miss. 822.

**94.** Stafford *v.* Walter, 67 Ill. 83; Gordon *v.* Ward, 16 Mich. 360.

**95.** Fearn *v.* Richardson, 12 La. Ann. 752.

**96.** Fleming *v.* Mills, 5 Mich. 420.

**Effect of quarantine regulations.**—Where fruit sold was shipped by an unusual route, which was the only one to be used at the time by reason of quarantine restrictions, the buyer cannot hold the seller for damages on that account, since, under Rev. St. arts. 4321, 4324, the governor is empowered to quarantine any point when he has reason to believe that there is danger from any infectious disease, and every citizen is charged with knowledge of his quarantine proclamation. Mobile Fruit, etc., Co. *v.* Boero, (Tex. Civ. App. 1900) 55 S. W. 361.

**97.** Wilson *v.* Western Fruit Co., 11 Ind. App. 89, 38 N. E. 827. And see De Stefano *v.* Todaro, (Tex. Civ. App. 1895) 33 S. W. 390, where it was held that a seller of vegetables who ships them in a properly ventilated car is not chargeable with injury thereto caused by the closing of the ventilators in transit.

**98.** Finn *v.* Clark, 10 Allen (Mass.) 479, 12 Allen 522. And see Woodruff *v.* Noyes, 15 Conn. 335.

**Error not causing loss.**— Error in the direction on the package will not render the seller liable for loss of the goods in the absence of anything to show that the loss was due to such error. Garretson *v.* Selby, 37 Iowa 529, 18 Am. Rep. 14.

**99.** Buie *v.* Browne, 28 N. C. 404.

**1.** Tascott *v.* Rosenthal, 10 Ill. App. 639; Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227.

**2.** Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227. See also Davis *v.* Fowler, 20 N. Y. App. Div. 633, 47 N. Y. Suppl. 221.

**3. As passing title against third persons** see *infra*, VI, A, 4, a, (II).

**4.** *Maine.*— Boynton *v.* Veazie, 24 Me. 286.

*Maryland.*— Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

*New York.*— Horst *v.* Montauk Brewing Co., 118 N. Y. App. Div. 300, 103 N. Y. Suppl. 381; Salmon *v.* Brandmeier, 104 N. Y. App. Div. 66, 93 N. Y. Suppl. 271.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

*United States.*— Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

See 43 Cent. Dig. tit. "Sales," § 381.

**5.** Chaplin *v.* Rogers, 1 East 192, 6 Rev. Rep. 249.

**Indicia of property.**— In the sale of oxen, a delivery of brass knobs, which had been worn upon their horns, is not a symbolical or constructive delivery of the oxen, unless specially so agreed. Clark *v.* Draper, 19 N. H 419.

**Intent to change possession.**— The delivery of the symbol or *indicia* of property must be with the intent to thereby change the possession of the property in performance of the contract. Edwards *v.* Meadows, 71 Ala. 42; Durnford *v.* Brooks' Syndics, 3 Mart. (La.) 222; Parks *v.* Hall, 2 Pick. (Mass.) 206; Bonner *v.* Marsh, 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754; Clark *v.* Draper, 19 N. H. 419.

of the building in which the goods are deposited,[6] or by giving the buyer an order for the goods directed to the person in possession,[7] a warehouse receipt,[8] bill of

6. *California.*— Schurtz *v.* Romer, 82 Cal. 474, 23 Pac. 118.

*Delaware.*— Stockwell *v.* Baird, 1 Marv. 420, 31 Atl. 811.

*Massachusetts.*— Packard *v.* Dunsmore, 11 Cush. 282.

*New York.*— Gray *v.* Davis, 10 N. Y. 285. *Compare* Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364.

*Pennsylvania.*— Barr *v.* Reitz, 53 Pa. St. 256.

*Vermont.*— Chappel *v.* Marvin, 2 Aik. 79, 16 Am. Dec. 684.

*England.*— Chaplin *v.* Rogers, 1 East 192, 6 Rev. Rep. 249.

See 43 Cent. Dig. tit. "Sales," § 381.

**Building as personalty.**— The delivery of a shop, so separated from the realty as to be an article of personal property, may well be effected by delivery of the key, although that delivery takes place at a distance from the shop itself. Vining *v.* Gilbreth, 39 Me. 496.

**Retention of key.**—When the buyer's agent was put in possession of the goods, the fact that the seller retained the keys and possession of the building did not render the delivery incomplete. Clark *v.* Shannon, etc., Co., 117 Iowa 645, 91 N. W. 923.

7. *Alabama.*— Magee *v.* Billingsley, 3 Ala. 679.

*California.*— Stevens *v.* Stewart, 3 Cal. 140, holding that such delivery is good if it can be immediately followed by actual delivery.

*Delaware.*— Jones *v.* Davis, 3 Houst. 68.

*Illinois.*— McCormick *v.* Hadden, 37 Ill. 370.

*Louisiana.*— D'Armand *v* Sheriff, 21 La. Ann. 198.

*Maryland.*— Merrick *v.* Bradley, 19 Md. 50.

*Massachusetts.*— Scudder *v.* Bradbury, 106 Mass. 422.

*Michigan.*— Perkins *v.* Dacon, 13 Mich. 81, holding, however, that it is a question of intent.

*Missouri.*— Sigerson *v.* Harker, 15 Mo. 101.

*New York.*— McCready *v.* Wright, 5 Duer 571; Stanton *v.* Small, 3 Sandf. 230.

*South Carolina.*— Frazer *v.* Hilliard, 2 Strobh. 309.

*England.*— Young *v.* Lambert, L. R. 3 P. C. 142, 39 L. J. P. C. 21, 22 L. T. Rep. N. S. 499, 6 Moore P. C. N. S. 406, 18 Wkly. Rep. 497, 16 Eng. Reprint 779; Salter *v.* Woollams, 10 L. J. C. P. 145, 2 M. & G. 650, 3 Scott N. R. 59, 40 E. C. L. 789.

See 43 Cent. Dig. tit. "Sales," § 382.

**Acceptance of order.**— In a few cases the courts have laid stress on the fact that the order had been accepted. Merrick *v.* Bradley, 19 Md. 50; Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Young *v.* Lambert, L. R. 3 P. C. 142, 39 L. J. P. C. 21, 22 L. T. Rep. N. S. 499, 6 Moore P. C. N. S. 406, 18 Wkly. Rep. 497, 16 Eng. Reprint 779. And it has also been held that there must be a presentment of the order and an agreement of the person in possession to hold the goods thereafter as bailee of the buyer. Edwards *v.* Meadows, 71 Ala. 42. And see *In re* Clifford, 5 Fed. Cas. No. 2,893, 2 Sawy. 428.

**Identification of goods.**— In D'Armand *v.* Sheriff, 21 La. Ann. 198, it was said that to constitute a delivery the order must identify the goods. But in Frazer *v.* Hilliard, 2 Strobh. (S. C.) 309, it was held that a particular description by numbers and marks is not necessary, if the particular parcel intended is otherwise well known.

**Property not in possession.**— If the property alleged to be in the possession of a third person is not actually in his possession an order for delivery to the buyer is not a delivery of the property. Cofield *v.* Clark, 2 Colo. 101.

**Goods in bond.**— Goods in a United States bonded warehouse, on which the duties have not been paid, are not subject to the order of the owner, and an order by the owner for delivery to the buyer, even though presented to and accepted by the warehouseman, will not be good as a symbolical delivery. *In re* Clifford, 5 Fed. Cas. No. 2,893, 2 Sawy. 428.

**Time of delivery.**— In the case of a sale of flour, to be delivered on a certain day, the delivery of an order on a barge, in which the flour is, is not a delivery according to the contract, where the flour is not actually delivered upon the order. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133.

8. *Alabama.*—Allen *v.* Maury, 66 Ala. 10.

*California.*— Horr *v.* Barker, 8 Cal. 609.

*Georgia.*— Rawls *v.* Saulsbury, 66 Ga. 394.

*Illinois.*— McPherson *v.* Gale, 40 Ill. 368.

*Iowa.*— Adams *v.* Foley, 4 Iowa 44.

*Kentucky.*— Newcomb *v.* Cabell, 10 Bush 460.

*Louisiana.*— Nusbaum *v.* Marks, 20 La. Ann. 379; Meeker *v.* Vredenburg, 15 La. Ann. 438. But see Gragard's Succession, 106 La. 298, 30 So. 885.

*New York.*— Whitlock *v.* Hay, 58 N. Y. 484; Hayden *v.* De Mets, 34 N. Y. Super. Ct. 344 [*affirmed* in 53 N. Y. 426]. *Compare* Horst *v.* Montauk Brewing Co., 118 N. Y. App. Div. 300, 103 N. Y. Suppl. 381; Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364.

*Ohio.*— Toledo Second National Bank *v.* Walbridge, 19 Ohio St. 419, 2 Am. Dec. 419.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

See 43 Cent. Dig. tit. "Sales," § 383.

**Receipt must represent specific goods.**— It has been held that if the warehouse receipt does not represent specific goods, but indeterminate goods, such as bales of cotton, to be taken indiscriminately from cotton on hand at the date of the receipt, the delivery of the receipt is not a delivery of the goods. Gragard's Succession, 106 La. 298, 30 So. 885. And see also Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726, where stress was laid on the fact that the warehouse receipt identified the goods.

lading,[9] bill of sale,[10] or other documents indicative of ownership,[11] such as an invoice of the goods with an assignment of the goods indorsed upon it,[12] a weigher's certificate,[13] or a ginner's receipt for cotton.[14] So it has been held that the delivery of a part of the goods will operate as a delivery of the whole if such is the intent of the parties;[15] but in the absence of anything to show that such was the intent a delivery of a part will not be so regarded.[16] The mere taking away of an inconsiderable portion as a sample is of course not even a symbolical delivery,[17] although by agreement of the parties the delivery of a sample may be a complete delivery.[18]

**n. Evidence.**[19] In a contract for the sale of property, the presumption is that the seller has the property on hand and ready to deliver, in the absence of

**Goods must be free from lien.**— To render delivery of a warehouse receipt a good delivery it must appear that the receipt is genuine and that the goods are free from charges. McPherson *v.* Hall, 44 Ill. 264.

**Custom-house permit.**—A tender, by the seller of goods, of an unindorsed custom-house permit, authorizing a delivery of the goods by the warehouseman, is a sufficient offer of delivery of the goods, it appearing that the permit was sufficient, if indorsed by the vendor, to enable the buyer to take possession. Dunham *v.* Pettee, 1 Daly (N. Y.) 112.

**9.** Jones-Pope Produce Co. *v.* Breedlove, (Ark. 1904) 83 S. W. 924; Prince *v.* Boston, etc., R. Corp., 101 Mass. 542, 100 Am. Dec. 129; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99; Sanders *v.* Maclean, 11 Q. B. D. 327, 5 Aspin. 160, 52 L. J. Q. B. 481, 49 L. T. Rep. N. S. 462, 31 Wkly. Rep. 698; *Re* Salomon, 8 Aspin. 599, 81 L. T. Rep. N. S. 325.

**Intent of parties.**— The effect of a delivery of a bill of lading depends, however, on the intent of the parties. Bonner *v.* Marsh, 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754.

**10.** *Arkansas.*— Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536.

*South Carolina.*— Southworth *v.* Sebring, 2 Hill 587.

*Texas.*— Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

*United States.*— Crapo *v.* Kelly, 16 Wall. 610, 21 L. ed. 430; Gibson *v.* Stevens, 8 How. 384, 12 L. ed. 1123.

*England.*— Atkinson *v.* Maling, 2 T. R. 462, 1 Rev. Rep. 524, 100 Eng. Reprint 249, grand bill of sale of ship.

See 43 Cent. Dig. tit. "Sales," § 384.

**Where there is nothing to prevent actual delivery** it has been held that the delivery of a bill of sale is not effectual as a symbolical delivery. Burge *v.* Cone, 6 Allen (Mass.) 412.

**Cattle roaming at large.**— The delivery of a "written descriptive bill of sale" of cattle roaming at large, together with a delivery of the branding iron, is not a delivery of the cattle. Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135.

**11.** Pierce *v.* Gibson, 2 Ind. 408; Smoot *v.* Baldwin, 1 Mart. N. S. (La.) 528; Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364.

**Recording instrument.**—Where a negotiable note contained a statement that a piano was given as collateral security for its payment, joined with a power of sale; but no conveyance of a piano was expressed, nor was there any defeasance providing for reversion of the title to the maker of the note the recording of the note did not amount to a constructive delivery of the piano. Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115.

**Policy of insurance.**— The transfer of a policy of insurance does not show a delivery of the property covered thereby in the absence of any other act indicating an intent to deliver. McCloskey *v.* Alabama Cent. Bank, 16 La. Ann. 284.

**12.** Gardner *v.* Howland, 2 Pick. (Mass.) 599.

**13.** Glasgow *v.* Nicholson, 25 Mo. 29.

**14.** Waller *v.* Parker, 5 Coldw. (Tenn.) 476.

**15.** Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294; Boynton *v.* Veazie, 24 Me. 286; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Parks *v.* Hall, 2 Pick. (Mass.) 206.

**Property at different places.**— In Williams *v.* Moore, 5 N. H. 235, it was held that where the property was in different places a delivery of the part at one place did not amount to a delivery of the whole. But in Shurtleff *v.* Willard, 19 Pick. (Mass.) 202, this was considered a sufficient delivery of the whole if the parties so intended it.

**16.** Durnford *v.* Brooks, 3 Mart. (La.) 222.

**17.** Dierson *v.* Petersmeyer, 109 Iowa 233, 80 N. W. 389; Carver *v.* Lane, 4 E. D. Smith (N. Y.) 168.

**18.** Midland El. Co. *v.* Cleary, 56 Mo. App. 268.

**19. Evidence held sufficient to show delivery.**— The evidence was considered sufficient to show a delivery in the following cases: De Laval Dairy Supply Co. *v.* Steadman, 6 Cal. App. 651, 92 Pac. 877; Helfrich Saw, etc., Mill Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795; Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907; Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280, 65 S. W. 784; Kroder *v.* Siegel Hardware Co., 113 N. Y. Suppl. 575; Sidney School Furniture Co. *v.* Warsaw School-Dist., 122 Pa. St. 494, 15 Atl. 881, 9 Am. St. Rep. 124; North Pac. Lumber Co. *v.* Carroll, 48 Wash. 163, 93 Pac. 212. In the following cases the evidence was considered insufficient: Small *v.* Paulk, 96 Ga. 781, 22 S. E. 336; Carpenter *v.* Butterfield, 34 Mich. 97; Puritan Mfg. Co. *v.* Toti, (N. M. 1908) 94 Pac. 1022; Callman *v.*

evidence to the contrary.[20] While there is a presumption that goods charged on the seller's books were delivered, such presumption is disputable,[21] and in accordance with general rules the burden is on the party alleging delivery to prove it.[22] The fact of delivery may be proved by direct testimony,[23] such as the testimony of the person who shipped[24] or delivered the goods.[25] Yet direct testimony is not essential,[26] and delivery may be shown by circumstances,[27] as that the goods were seen in the buyer's possession.[28] Admission by the buyer of the correctness of an account for goods is proof of delivery.[29] Evidence as to former deliveries is admissible to show that a delivery was intended by the acts of the parties.[30] A bill of lading is admissible to show delivery by carrier.[31] Where an order for goods was given, the fact that the order was taken up does not conclusively show delivery.[32]

**o. Questions For Jury.** Whether the parties intended that the acts should constitute a delivery is for the jury,[33] and so too is the ultimate fact whether there has been a performance of the contract by delivery.[34]

**9. Quantity Delivered — a. When Quantity Is Definitely Fixed** — (i) *Deficiency in Quantity Delivered.* Generally a specification of quantity

Bruckenfeld, 108 N. Y. Suppl. 1070; Brinn *v.* Cohen, 107 N. Y. Suppl. 37.

**20.** Brown *v.* Trinidad Asphalt Mfg. Co., 210 Mo. 260, 109 S. W. 22.

**21.** Clarke *v.* Magruder, 2 Harr. & J. (Md.) 77.

**Identification of articles.**— The testimony of a witness that he knew of the delivery of a part of the articles charged to defendant, and another part to defendant's overseer, without any evidence as to the particular articles, or their value, is not sufficient to justify a judgment for plaintiff for any amount. Higgs *v.* Shehee, 4 Fla. 382.

**22.** Hill *v.* Nichols, 50 Ala. 336; Ingraham *v.* Whitmore, 75 Ill. 24.

**23.** Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

**24.** Price *v.* Kohn, 99 Ill. App. 115; Rosenthal *v.* Miller, 79 Iowa 130, 44 N. W. 245; Bozzoni *v.* Woodward, 10 N. Y. Suppl. 644.

**25.** Hoguet *v.* Mommer, 78 Hun (N. Y.) 459, 29 N. Y. Suppl. 146.

**26.** Lance *v.* Pearce, 101 Ind. 595, 1 N. E. 184.

**27.** Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

**Goods to be manufactured.**—Where the buyer's right to recover was defeated if the goods were, in law, delivered on complete manufacture, although remaining in defendant's factory, evidence that the goods were to be retained by defendant at his own risk till they were actually delivered on plaintiff's orders was admissible. Guild *v.* Huwer, 1 Misc. (N. Y.) 432, 21 N. Y. Suppl. 429.

**28.** Stern *v.* Frommer, 10 Misc. (N. Y.) 219, 30 N. Y. Suppl. 1067. But see Williams *v.* Allen, 10 Humphr. (Tenn.) 337, 51 Am. Dec. 709, holding that a mere assumption of ownership or control by the purchaser will not be sufficient evidence of a delivery. At most it affords merely a presumption of delivery, which may be repelled by evidence showing that the title remained in the vendor.

**29.** Phillips *v.* Purington, 15 Me. 425; New York Ice Co. *v.* Parker, 21 How. Pr. (N. Y.) 302.

**30.** Gray *v.* Gannon, 6 Thomps. & C. (N. Y.) 245.

**31.** Putnam *v.* Tillotson, 13 Metc. (Mass.) 517.

**Conclusiveness.**— The recital of delivery in a bill of sale is not conclusive. Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139.

**32.** McClure *v.* Byrd, 2 Overt. (Tenn.) 21.

**33.** Clark *v.* Shannon, etc., Co., 117 Iowa 645, 91 N. W. 923; Pratt *v.* Chase, 40 Me. 269; Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. 533; Perkins *v.* Dacon, 13 Mich. 81; Smith *v.* Lynes, 5 N. Y. 41 [*reversing* 3 Sandf. 203].

**34.** *Alabama.*— Thomas *v.* Degraffenreid, 17 Ala. 602.

*California.*— Smith *v.* Friend, 15 Cal. 124.

*Illinois.*— Wood *v.* Roach, 52 Ill. App. 388.

*Iowa.*— Clark *v.* Shannon, etc., Co., 117 Iowa 645, 91 N. W. 923.

*Maine.*— Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

*Maryland.*— Byer *v.* Etnyre, 2 Gill 150, 41 Am. Dec. 410.

*Massachusetts.*— Wilson *v.* Russell, 136 Mass. 211; Weld *v.* Came, 98 Mass. 152; Hardy *v.* Potter, 10 Gray 89.

*Michigan.*— Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. 533; Perkins *v.* Dacon, 13 Mich. 81.

*Missouri.*—Harrigan *v.* Welch, 49 Mo. App. 496; Houghtaling *v.* Ball, 19 Mo. 84, 59 Am. Dec. 331.

*North Dakota.*— Reeves *v.* Bruening, 13 N. D. 157, 100 N. W. 241.

*Oregon.*— Southwell *v.* Beezley, 5 Oreg. 143.

*Pennsylvania.*— Goss Printing Press Co. *v.* Jordan, 171 Pa. St. 474, 32 Atl. 1031.

See 43 Cent. Dig. tit. "Sales," § 493.

**Symbolical delivery.**—A symbolical or constructive delivery is a mixed question of law and fact, and entitles either party to ask instructions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which

in a contract of sale will be regarded as material.[35] The full quantity contracted for must be delivered at the time and place specified to constitute a sufficient delivery,[36] and the buyer is in general not obliged to accept or pay for a less quantity,[37] the failure of the seller to deliver the quantity specified constituting a total breach of the contract.[38] But under the terms of the contract delivery of all at one time may not be contemplated, and in such case the buyer cannot refuse a partial delivery if it is made in time.[39] If, however, in the case of a deficient delivery the buyer retains the portion delivered he is liable for the part so accepted and retained.[40] Some courts deny the seller's right to recover

the delivery is to be deduced. Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

**35.** Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 112 Fed. 414, 58 C. C. A. 648; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

**36.** *California.*— Dabovich *v.* Emeric, 12 Cal. 171.

*Massachusetts.*— See Wheeler *v.* Parks, 15 Gray 527, where there was a sale of both real and personal property and a delivery of the personalty only.

*Michigan.*— Scully *v.* Detroit Iron Furnace Co., 132 Mich. 333, 93 N. W. 885.

*New York.*— Mount *v.* Lyon, 49 N. Y. 552; Kein *v.* Tupper, 42 How. Pr. 437; Davenport *v.* Wheeler, 7 Cow. 231.

*Pennsylvania.*— Rochester, etc., Oil Co. *v.* Hughey, 56 Pa. St. 322.

*Vermont.*— Blish *v.* Granger, 6 Vt. 340.

*United States.*— Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. 414, 58 C. C. A. 648.

See 43 Cent. Dig. tit. "Sales," § 387.

**Proportionate quantity.**—Where a contract for the sale of two thousand tons of ice provided that in case of the seller's inability "to lay up a full supply of ice," he was only bound to deliver such portion of the amount contracted for "as the quantity of ice laid up be to their full supply," the words "full supply" applied to the capacity of the seller's icehouses, and therefore, under the contract, he was only bound to deliver the proportionate amount which by the exercise of reasonable diligence he was able to lay up. Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45.

**37.** *California.*— Polhemus *v.* Heiman, 45 Cal. 573; Dabovich *v.* Emeric, 12 Cal. 171.

*Connecticut.*— Downs *v.* Marsh, 29 Conn. 409; Wright *v.* Barnes, 14 Conn. 518.

*Illinois.*— Rockford, etc., R. Co. *v.* Lent, 63 Ill. 288.

*Indiana.*— Smith *v.* Lewis, 40 Ind. 98; Coates *v.* Huffine, 13 Ind. App. 182, 41 N. E. 465.

*Maryland.*— Salmon *v.* Boykin, 66 Md. 541, 7 Atl. 701.

*Missouri.*—Murphy *v.* St. Louis, 8 Mo. App. 483.

*New Hampshire.*— Hale *v.* Taylor, 45 N. H. 405.

*New Jersey.*— Price *v.* Engelke, 68 N. J. L. 567, 53 Atl. 698.

*New York.*— Brown *v.* Norton, 50 Hun 248, 2 N. Y. Suppl. 869; Hill *v* Heller, 27 Hun 416; American Water-Works Co. *v.* Venner, 18 N. Y. Suppl. 379.

*Pennsylvania.*— Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

*South Carolina.*— Pratt *v.* Frasier, 72 S. C. 368, 51 S. E. 983.

*West Virginia.*— Greenbrier Lumber Co. *v.* Ward, 36 W. Va. 573, 15 S. E. 89.

*Wisconsin.*— Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

*United States.*— Kalamazoo Corset Co. *v.* Simon, 129 Fed. 144 [*affirmed* in 129 Fed. 1005]; Havemeyer *v.* Wright, 5 Fed. 773.

*England.*— Reuter *v.* Sala, 4 C. P. D. 239, 48 L. J. C. P. 492, 40 L. T. Rep. N. S. 476, 27 Wkly. Rep. 631; Borrowman *v.* Drayton, 2 Ex. D. 15, 3 Aspin. 303, 46 L. J. Exch. 273, 35 L. T. Rep. N. S. 727, 25 Wkly. Rep. 194.

*Canada.*— McPhail *v.* Clements, 1 Manitoba 165.

See 43 Cent. Dig. tit. "Sales," § 387.

**Damage to part of goods.**— Where the defective delivery is due to the fact that a part of the goods are damaged the buyer is not obliged to accept the undamaged portion (Keeler *v.* Vandervere, 5 Lans. (N. Y.) 313), but may do so if he so desires (Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515, 22 How. Pr. 87).

**Purchase by bill of lading.**—Where the buyer agrees to take the goods as per bill of lading he cannot refuse to accept because of a deficiency in quantity. Hudon Cotton Co. *v.* Canada Shipping Co., 13 Can. Sup. Ct. 401.

**Amount arriving deliverable.**— Under a sale of a specific quantity, the buyer to take what arrives deliverable, the buyer cannot refuse to accept a deficient delivery, if it is what arrived deliverable. Arbuthnot *v.* Streckeisen, 35 L. J. C. P. 305.

**38.** Dabovich *v.* Emeric, 12 Cal. 171.

**39.** Brandt *v.* Lawrence, 46 L. J. Q. B. 237, 1 Q. B. D. 344, 24 Wkly. Rep. 749. And see Leidemann *v.* Gray, 3 Jur. N. S. 219, 26 L. J. Exch. 162, 5 Wkly. Rep. 294.

**40.** *Alabama.*—Gibbony *v.* Wayne, 141 Ala. 300, 37 So. 436; Watson *v.* Kirby, 112 Ala. 436, 20 So. 624; Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388.

*California.*—Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681; Willamette Steam Mills Lumbering, etc., Co. *v.* Union Lumber, etc., Co., 94 Cal. 156, 29 Pac. 773; Polhemus *v.* Heiman, 45 Cal. 573; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

on a partial delivery. Thus in New York the rule has been adopted that on a partial delivery the buyer is not liable for the part delivered in the absence of any waiver of full compliance.[41] The rule has, however, been modified and the seller allowed to recover in cases where the buyer by his conduct has waived a full delivery.[42] The New York rule has been followed in some other jurisdictions.[43]

(II) *EXCESSIVE QUANTITY DELIVERED.* So too a delivery in excess of the quantity contracted for is not a proper delivery,[44] and although the buyer

*Connecticut.*— Downs *v.* Marsh, 29 Conn. 409.

*Delaware.*— Heidelbaugh *v.* Cranston, 4 Pennew. 464, 56 Atl. 367; Shimp *v.* Siedel, 6 Houst. 421.

*Illinois.*— Defenbaugh *v.* Weaver, 87 Ill. 132; Richards *v.* Shaw, 67 Ill. 222; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189.

*Indiana.*— Epperly *v.* Bailey, 3 Ind. 72.

*Iowa.*— Jemmison *v.* Gray, 29 Iowa 537.

*Kansas.*— Southwestern Stage Co. *v.* Peck, 17 Kan. 271, but in this case the failure to deliver was due to the buyer's refusal to pay for a portion already delivered.

*Louisiana.*— Seghers *v.* New Orleans Imp., etc., Co., 1 Rob. 239.

*Massachusetts.*— Bowker *v.* Hoyt, 18 Pick. 555.

*Michigan.*— Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522; Wilson *v.* Wagar, 26 Mich. 452; Clark *v.* Moore, 3 Mich. 55.

*Minnesota.*— Mead *v.* Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299; Churchill *v.* Holton, 38 Minn. 519, 38 N. W. 611; Robson *v.* Bohn, 22 Minn. 410.

*Missouri.*— Rickey *v.* Zeppenfeldt, 64 Mo. 277. And see Briggs *v.* Morgan, 104 Mo. App. 62, 78 S. W. 295, holding that the recovery is not under the contract but for the reasonable value only.

*Nevada.*— Kennedy *v.* Schwartz, 13 Nev. 229.

*New Hampshire.*— Flanders *v.* Putney, 58 N. H. 358.

*Pennsylvania.*— Roberts *v.* Beatty, 2 Penr. & W. 63, 21 Am. Dec. 410.

*Texas.*— Day *v.* Cross, 59 Tex. 595.

*Wisconsin.*— Vaughan *v.* Howe, 20 Wis. 497.

*United States.*— Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. 414, 58 C. C. A. 648.

*England.*— Shipton *v.* Casson, 5 B. & C. 378, 8 D. & R. 130, 4 L. J. K. B. O. S. 199, 11 E. C. L. 505; Morgan *v.* Gath, 3 H. & C. 748, 11 Jur. N. S. 654, 34 L. J. Exch. 165, 11 L. T. Rep. N. S. 96, 13 Wkly. Rep. 756. See also Devaux *v.* Conolly, 8 C. B. 640, 19 L. J. C. P. 71, 65 E. C. L. 640.

See 43 Cent. Dig. tit. "Sales," § 388.

**41.** Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Timmons *v.* Nelson, 66 Barb. (N. Y.) 594; Shipway *v.* Rofrano, 28 Misc. (N. Y.) 230, 58 N. Y. Suppl. 1111; Levene *v.* Rabitte, 2 N. Y. Suppl. 389; Paige *v.* Ott, 5 Den. (N. Y.) 406; Mead *v.* Degolyer, 16 Wend. (N. Y.) 632; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258 [*affirmed* in 18 Wend. 187].

**42.** Avery *v.* Willson, 81 N. Y. 341, 37 Am. Rep. 503. And see Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814; Silberman *v.* Fretz, 12 N. Y. App. Div. 328, 42 N. Y. Suppl. 559. See also Norrington *v.* Cook, 2 Thomps. & C. (N. Y.) 423 [*affirmed* in 59 N. Y. 655]; O'Neill *v.* Crotty, 16 Daly (N. Y.) 474, 12 N. Y. Suppl. 280; Eagle Square Mfg. Co. *v.* Andrew, 11 N. Y. Suppl. 234. So too if delivery is to be in instalments payment to be made for each instalment, the seller may recover for instalment delivered, although full delivery is not made. Per Lee *v.* Beebe, 13 Hun (N. Y.) 89.

**43.** Haslack *v.* Mayers, 26 N. J. L. 284; Russell *v.* Stewart, 64 N. C. 487; Dula *v.* Cowles, 47 N. C. 454, 52 N. C. 290, 75 Am. Dec. 463; Witherow *v.* Witherow, 16 Ohio 238. But see Bletsch *v.* Robinson, 4 Ohio Dec. (Reprint) 504, 2 Clev. L. Rep. 282.

**44.** *Indiana.*— Houston *v.* Miner, 5 Blackf. 89.

*Massachusetts.*— Rommel *v.* Wingate, 103 Mass. 327.

*Michigan.*— Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904.

*Missouri.*— Landesman *v.* Gumersell, 16 Mo. App. 459.

*New York.*— Winterbotham *v.* Paine, 53 N. Y. Super. Ct. 186; Downer *v.* Thompson, 2 Hill 137 [*reversed* on other grounds in 6 Hill 208].

*Pennsylvania.*— Stevenson *v.* Burgin, 49 Pa. St. 36.

*England.*— Cunliffe *v.* Harrison, 6 Exch. 903, 20 L. J. Exch. 325; Hart *v.* Mills, 15 L. J. Exch. 200, 15 M. & W. 85; Dixon *v.* Fletcher, 3 M. & W. 146.

See 43 Cent. Dig. tit. "Sales," § 387.

**Time of shipment.**—Where, in accordance with a contract, a seller delivers a number of bags of peanuts to a carrier under the contract for shipment on the date fixed, the fact that two days later he placed a number of other bags in the car, with the station agent's consent, and the bill of lading was changed so as to include the latter bags, such transaction in no way delaying shipment, will not prevent recovery for the original number of bags, since such transaction did not work any damage to the buyer. Bowers *v.* J. B. Worth Co., 129 N. C. 36, 39 S. E. 635.

**Offer to reduce excess.**—Where plaintiff sold defendants ten thousand dollars worth of his stock of goods, and agreed to reduce the stock to that sum by a certain date, when the transfer was to be made, and an invoice taken on the day fixed showed a large excess, which plaintiff proposed to withdraw, in order to reduce the stock to the sum agreed, or to sell defendants on credit, plaintiff's failure to re-

may if he so elects retain the amount designated by the contract and reject the excess [45] no obligation is imposed on him to select the proper quantity out of the excessive quantity delivered but he may reject the whole,[46] especially when the selection of the proper quantity would be troublesome and laborious,[47] or the buyer did not have the privilege of separating and receiving less than the whole quantity shipped.[48] If he elects to retain the whole quantity delivered he is of course bound for the excess.[49] Being entitled to reject the whole if he retains a part less than the amount contracted for he is liable only for the part retained.[50]

**b. Quantity Indefinite** — (i) *In General.* If the quantity to be delivered is stated in indefinite terms, merely a maximum and a minimum limit being fixed, to constitute a sufficient delivery the seller must deliver at least the quantity specified as the minimum limit,[51] and within those limits the buyer is bound to accept the delivery,[52] but he is not bound to accept a delivery in excess of the maximum limit;[53] and on the other hand the seller is not obliged to deliver in

duce the stock by the day fixed did not release defendants from the contract. Whitla *v.* Moore, 164 Pa. St. 451, 30 Atl. 257.

**45.** Pittsburgh Plate Glass Co. *v.* MacDonald, 182 Mass. 593, 66 N. E. 415; Lamb *v.* Traitel, 12 Misc. (N. Y.) 140, 32 N. Y. Suppl. 1075; Williamson *v.* North Pacific Lumber Co., 42 Oreg. 153, 70 Pac. 387, 532; Levy *v.* Green, 1 E. & E. 969, 5 Jur. N. S. 1245, 28 L. J. Q. B. 319, 7 Wkly. Rep. 486, 102 E. C. L. 969. But see Morse *v.* Brackett, 98 Mass. 205; Ormond *v.* Henderson, 77 Miss. 34, 24 So. 170.

**46.** Cash *v.* Hinkle, 36 Iowa 623; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703; Tarling *v.* O'Riorden, L. R. 2 Ir. 8; *Re* Keighley, 7 Aspin. 418, 70 L. T. Rep. N. S. 155; Rylands *v.* Kreitman, 19 C. B. N. S. 351, 115 E. C. L. 351; Cunliffe *v.* Harrison. 6 Exch. 903, 20 L. J. Exch. 325. But see Davis *v.* Adams, 18 Ala. 264.

**Goods not ordered.**—Where the delivery was deficient in quantity as to the goods actually ordered but included goods not ordered which were distinguishable from the others, the delivery was not sufficient to impose on the buyer the obligation to accept. Levy *v.* Green, 1 E. & E. 969, 5 Jur. N. S. 1245, 28 L. J. Q. B. 319, 7 Wkly. Rep. 486, 102 E. C. L. 969.

**Sale by package.**— One who orders a certain number of papers of needles, each to contain two needles, cannot refuse to accept such papers because some of them contain three needles, no additional charge therefor being made. Shrimpton *v.* Warmack, 72 Miss. 208, 16 So. 494.

**47.** Croninger *v.* Crocker, 62 N. Y. 151; Flint *v.* Standard Rope, etc., Co., 52 N. Y. App. Div. 459, 65 N. Y. Suppl. 238; Hoffman *v.* King, 58 Wis. 314, 17 N. W. 136.

**48.** Shrimpton *v.* Brice, 109 Ala. 640, 20 So. 10.

**49.** Caldwell *v.* Dawson, 4 Metc. (Ky.) 121; Clark *v.* Moore, 3 Mich. 55; Levino *v.* Moore Co., 97 N. Y. App. Div. 109, 89 N. Y. Suppl. 573; Hecla Iron Works *v.* Milliken, 48 N. Y. App. Div. 574, 62 N. Y. Suppl. 959; Randall *v.* National Ice Co., 19 N. Y. Suppl. 633 [*affirmed* in 138 N. Y. 644, 34 N. E. 513]; Duford *v.* Patrick, 15 N. Y. Suppl. 285; Goodyear Rubber Co. *v.* Foster, 1 Ont. 242.

**50.** Hart *v.* Mills, 15 L. J. Exch. 200, 15 M. & W. 85.

**51.** Heisel *v.* Volkmann, 55 N. Y. App. Div. 607, 67 N. Y. Suppl. 271; A. B. Farquhar Co. *v.* New River Mineral Co., 40 Misc. (N. Y.) 404, 82 N. Y. Suppl. 241 [*reversed* on other grounds in 87 N. Y. App. Div. 329, 84 N. Y. Suppl. 802]; Greenbrier Lumber Co. *v.* Ward, 36 W. Va. 573, 15 S. E. 89; Standard Sugar Refinery *v.* Castano, 43 Fed. 279; Leeming *v.* Snaith, 16 Q. B. 275, 15 Jur. 988, 20 L. J. Q. B. 164, 71 E. C. L. 275; Tamvaco *v.* Lucas, 1 E. & E. 581, 5 Jur. N. S. 1258, 28 L. J. Q. B. 301, 7 Wkly. Rep. 568, 102 E. C. L. 592.

**Sale of animals by weight.**—A sale of hogs "to weigh two hundred and twenty-five pounds and over" means that the animals must weigh at least two hundred and twenty-five pounds each. Cash *v.* Hinkle, 36 Iowa 623. If the contract is that the hogs shall weigh from twenty-five to one hundred pounds the seller can deliver hogs of any weight within those limits. Nixon *v.* Nixon, 21 Ohio St. 114. When the contract was for the sale of a certain number of hogs "averaging three hundred pounds," it was held to limit only the minimum average and to be complied with by a delivery of hogs averaging three hundred and twenty pounds. Marshall *v.* Piles, 3 Bush (Ky.) 249. And in Houston *v.* Miner, 5 Blackf. (Ind.) 89, it was held that a contract to sell a certain number of hogs weighing on an average one hundred and eighty pounds was complied with by a delivery of hogs weighing on an average one hundred and ninety-five pounds. See also McCormick *v.* Hamilton, 23 Gratt. (Va.) 561, holding that each animal should be weighed separately where the contract is for the sale of two hundred hogs, "each to weigh not less than 180 pounds."

**52.** Heisel *v.* Volkmann, 55 N. Y. App. Div. 607, 67 N. Y. Suppl. 271.

**53.** Lamb *v.* Traitel, 12 Misc. (N. Y.) 140, 32 N. Y. Suppl. 1075; *Re* Keighley, 7 Aspin. 418, 70 L. T. Rep. N. S. 155; Tamvaco *v.* Lucas, 1 E. & E. 581, 5 Jur. N. S. 731, 28

excess of such limit.[54] If the sale is in bulk the delivery is not insufficient in the absence of fraud because the quantity does not correspond to the estimates.[55] And generally when the quantity is indefinite the acceptance of a certain quantity does not bind the buyer to accept more,[56] but he is of course bound for the amount actually delivered and accepted.[57] If after sale of a cargo of goods, the buyer accepts an offer to sell "another cargo" on certain terms, the words "another cargo" will be construed to mean another cargo of the same quantity as the former one, and the contract is not objectionable for failure to fix the amount of the goods to be furnished.[58]

(II) *"About," "More or Less."* If the quantity of goods sold is specified in the contract such specification will be regarded as determinative and is not rendered indefinite because qualified by the words "about" or "more or less."[59] The use of such words merely provides for such slight variations as are necessarily due to accident or to the inherent difficulty of making delivery of the exact quantity sold.[60] While a delivery of a quantity varying materially from the quantity specified is not a good delivery,[61] the delivery of a quantity not varying materially from that specified is a good delivery which the buyer is bound to

L. J. Q. B. 150, 1 L. T. Rep. N. S. 161, 102 E. C. L. 581.

**54.** Bloomington Canning Co. *v.* Union Can Co., 94 Ill. App. 62. And see Staver Carriage Co. *v.* Park Steel Co., 104 Fed. 200, 43 C. C. A. 471.

**55.** Jackson *v.* Builders' Wood Working Co., 91 Hun (N. Y.) 435, 36 N. Y. Suppl. 227; Gage *v.* Carpenter, 107 Fed. 886, 47 C. C. A. 39.

**Difference excessive.**— In Lamb *v.* Traitel, 12 Misc. (N. Y.) 140, 32 N. Y. Suppl. 1075, where a quantity of lithographer's stone was sold in bulk and estimated by the seller to be between two and three tons, it was held that the buyer was not bound to accept a delivery of between nine and ten tons, the difference being excessive.

**56.** Russell *v.* Wisconsin, etc., R. Co., 39 Minn. 145, 39 N. W. 302.

**57.** *Connecticut.*—Abbott *v.* Myse, 15 Conn. 254.

*Michigan.*— McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578.

*New York.*— Hecla Iron Works *v.* Milliken, 48 N. Y. App. Div. 574, 65 N. Y. Suppl. 959.

*Wisconsin.*— Mason *v.* H. Whitbeck Co., 35 Wis. 164.

*United States.*— Winterport Granite, etc., Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898, Holmes 99.

See 43 Cent. Dig. tit. "Sales," § 191.

**Application of doctrine of caveat emptor.**— One buying goods by the specific quantity has the right to rely on the accuracy of the seller's bills as to the quantity delivered and the rule of *caveat emptor* does not apply. Ransom *v.* Masten, 4 N. Y. Suppl. 781, 5 N. Y. Suppl. 952.

**58.** Maydwell *v.* Rogers Lumber Co., 159 Fed. 930, 87 C. C. A. 110.

**59.** Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 961; Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Budge *v.* United Smelting, etc., Co., 104 Fed. 498, 43 C. C. A. 665; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

**"Any less number that may arrive."**— In a contract of sale of "115 bales, containing 18,440 (or any less number that may arrive) East India hides" shipped by a named vessel, the words in parenthesis refer to the number of bales and, ninety-seven bales arriving, a delivery thereof was a good delivery. Beckh *v.* Page, 5 C. B. N. S. 708, 5 Jur. N. S. 735, 28 L. J. C. P. 164, 94 E. C. L. 708 [*affirmed* in 7 C. B. N. S. 861, 5 Jur. N. S. 1405, 28 L. J. C. P. 341, 7 Wkly. Rep. 588, 97 E. C. L. 861].

**60.** *California.*— Polhemus *v.* Heiman, 45 Cal. 573.

*Georgia.*— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

*Illinois.*— Tilden *v.* Rosenthal, 41 Ill. 385, 89 Am. Dec. 388.

*Kentucky.*— Totten *v.* Cooke, 2 Metc. 275.

*United States.*— Moore *v.* U. S., 196 U. S. 157, 25 S. Ct. 202, 49 L. ed. 428 [*reversing* 38 Ct. Cl. 590]; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

*England.*— Cross *v.* Eglin, 2 B. & Ad. 106, 9 L. J. K. B. O. S. 145, 22 E. C. L. 53; Morris *v.* Levison, 1 C. P. D. 155, 45 L. J. C. P. 409, 34 L. T. Rep. N. S. 576, 24 Wkly. Rep. 517.

See 43 Cent. Dig. tit. "Sales," § 191.

**61.** *Illinois.*— Tilden *v.* Rosenthal, 41 Ill. 385, 89 Am. Dec. 388, variation of one third.

*Indiana.*— Kirwan *v.* Van Camp Packing Co., 12 Ind. App. 1, 39 N. E. 536.

*Ohio.*— Creighton *v.* Comstock, 27 Ohio St. 548, variation of thirty per cent.

*United States.*— Moore *v.* U. S., 196 U. S. 157, 25 S. Ct. 202, 49 L. ed. 428 [*reversing* 38 Ct. Cl. 590], variation of seven per cent.

*England.*— Cross *v.* Eglin, 2 B. & Ad. 106, 9 L. J. K. B. O. S. 145, 22 E. C. L. 53; Reuter *v.* Sala, 4 C. P. D. 239, 48 L. J. C. P. 492, 40 L. T. Rep. N. S. 476, 27 Wkly. Rep. 631.

See 43 Cent. Dig. tit. "Sales," § 191.

accept.[62] If, however, the sale is in bulk, the quantity being estimated at "about" a certain quantity "more or less," a delivery of the whole is a good delivery, although the actual quantity is much less or much greater than the quantity specified.[63] A third condition may arise, as where the sale is of such quantity as the buyer may need or the seller may produce in a certain time, estimated at "about" a certain quantity "more or less." In such case the quantity to be delivered and accepted is not the quantity named, nor that quantity with slight variation, but the quantity required by the buyer or produced by the seller.[64]

(III) *AS MUCH AS MAY BE REQUIRED.* Under a contract to sell all the goods of a certain kind the buyer may order or require, the seller is bound absolutely to deliver such quantity of the specified goods as may be called for by the purchaser,[65] and the purchaser is bound to accept all deliveries tendered within the limits of his requirements.[66] Generally the obligation in either case is not affected by any mere estimate of the quantity that will be needed,[67] although if a maxi-

**62.** Cabot *v.* Winsor, 1 Allen (Mass.) 546 (variation of five per cent); Holland *v.* Rea, 48 Mich. 218, 12 N. W. 167 (variation of five and one half per cent); Budge *v.* United Smelting, etc., Co., 104 Fed. 498, 43 C. C. A. 665. And see Kellogg *v.* Norman, 74 N. Y. 596, where it was said that the number specified is not controlling and the buyer must take what is offered within reason.

**Variance between bought and sold notes.**— Where one of the bought and sold notes describes the quantity of sugar sold to be "about 240 cases," and the other bought and sold note describes it as "about 250 cases," the price of the quantity furnished may be recovered notwithstanding this variance. Howell *v.* Maas, 13 Daly (N. Y.) 221.

**63.** Patterson *v.* Judd, 27 Mo. 563; Faulconer *v.* Samples, 57 Mo. App. 302; McCrea *v.* Longstreth, 17 Pa. St. 316; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A. 626; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406; McConnel *v.* Murphy, L. R. 5 P. C. 203, 28 L. T. Rep. N. S. 713, 21 Wkly. Rep. 609; McLay *v.* Perry, 44 L. T. Rep. N. S. 152.

**Illustrations.**—A contract for the sale of a pile of fertilizer estimated by seller to contain "253⅓ tons, more or less," is binding on purchaser, although the pile contains seven hundred and two seven-tenths tons, where purchaser relied on his own judgment as to amount. Navassa Guano Co. *v.* Commercial Guano Co., 93 Ga. 92, 18 S. E. 1000. An agreement to sell a "cargo of old railroad iron, to be shipped per barque Charles Williams, about 300 or 350 tons," is complied with by a delivery of as much as that vessel, if seaworthy and in good order, can carry, although only two hundred and twenty-seven tons. Pembroke Iron Co. *v.* Parsons, 5 Gray (Mass.) 589. Where one sold an invoice of sugar on bond a vessel containing seven hundred tons more or less "to arrive" and part of the sugar was damaged on the voyage, the seller was bound to deliver only so much as arrived and was not liable for the quantity lost on the voyage. Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515, 22 How. Pr. 87.

**64.** Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Tancred *v.* Scotland Steel Co., 15 App. Cas. 125, 62 L. T. Rep. N. S. 738; Cockerell *v.* Aucompte, 2 C. P. N. S. 440, 3 Jur. N. S. 844, 26 L. J. C. P. 194, 5 Wkly. Rep. 633, 89 E. C. L. 440. And see Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A. 626. But *compare* Budge *v.* United Smelting, etc., Co., 104 Fed. 498, 43 C. C. A. 665, where the buyer covenanted to take and pay for a definite quantity.

**65.** Kaufman *v.* Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462; New York Cent. Ironworks Co. *v.* U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967; Levey *v.* New York Cent., etc., R. Co., 4 Misc. (N. Y.) 415, 24 N. Y. Suppl. 124 [*affirmed* in 144 N. Y. 649, 39 N. E. 493]; Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459.

**Construction of contract.**— In the absence of evidence explaining the ambiguity, a contract signed by defendant, and reciting, "Bought of [plaintiffs] all the colored nails for the year 1887," at a certain price, to be delivered monthly, plaintiffs not being manufacturers thereof, and defendant needing the materials for the manufacture of woolens, is an agreement to purchase as many nails as defendant will need during said year. Hall *v.* Chamberburg Woolen Co., 187 Pa. St. 18, 40 Atl. 986, 52 L. R. A. 689.

**66.** Levey *v.* New York Cent., etc., R. Co., 4 Misc. (N. Y.) 415, 24 N. Y. Suppl. 124 [*affirmed* in 144 N. Y. 649, 39 N. E. 493]; Lynd *v.* Apponaug Bleaching, etc., Co., 20 R. I. 344, 39 Atl. 188.

**Continuing order.**—Where an order for the manufacture of a certain number of boxes was first given, with orders for delivery from time to time, the stock on hand to be constantly kept up to such number, the order was a continuing one for the manufacture of such a number of boxes, binding the buyer to receive, within a reasonable time, the number manufactured, after an order for delivery, to keep the stock up to the required number, unless the buyer, at the time of the delivery, notified the manufacturer not to manufacture more stock. Neff *v.* Klepfer, 16 Misc. (N. Y.) 49, 37 N. Y. Suppl. 654.

**67.** Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A.

mum limit is fixed the seller is under no obligation to deliver or the buyer to accept a quantity in excess of such limit.[68] The seller may, however, claim the right to deliver up to the limit if within the requirements of the buyer.[69] But the obligation of the seller to deliver is confined to such quantity as may be actually needed by the buyer for the purpose specified,[70] irrespective of any limits that may be fixed by the contract,[71] and he is not obliged to deliver goods for other and speculative purposes,[72] or for a period beyond that named in the contract.[73] The fact that the goods are not actually needed at the time they are ordered does not, however, affect the seller's obligation to deliver.[74] On the other hand the seller is entitled to furnish all the buyer may actually need of the specific goods and not merely such amount as the buyer shall call for.[75] The seller is relieved from making delivery and the buyer from accepting if the latter discontinues the use of the goods [76] or goes out of business as an individual and enters into a partnership.[77]

(IV) *SALE OF ENTIRE OUTPUT OR PRODUCTION.* A sale of the entire output of a certain article produced by the seller during a specified time binds the seller to deliver and the buyer to accept all that the seller produces.[78] The amount to be delivered is not controlled by any words of mere estimate of the quantity likely to be produced; [79] but if the contract fixes a minimum quantity the seller must deliver at least that quantity.[80]

626; Tancred *v.* Scotland Steel Co., 15 App. Cas. 125, 62 L. T. Rep. N. S. 738. But see Budge *v.* United Smelting, etc., Co., 104 Fed. 498, 43 C. C. A. 665, where in view of the stipulations the contract was construed as requiring the purchaser to accept deliveries up to the amount estimated.

**68.** Bloomington Canning Co. *v.* Union Can Co., 94 Ill. App. 62; Merriam *v.* U. S., 107 U. S. 437, 2 S. Ct. 536, 27 L. ed. 530.

**69.** Ready *v.* J. L. Fulton Co., 86 N. Y. App. Div. 202, 83 N. Y. Suppl. 627 [*reversed* on other grounds in 179 N. Y. 399, 1 N. E. 317].

**70.** Laclede Constr. Co. *v.* T. J. Moss Tie Co., 185 Mo. 25, 84 S. W. 76; Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384.

**71.** Fletcher *v.* Germain, 82 Mich. 247, 46 N. W. 368; Staver Carriage Co. *v.* Park Steel Co., 104 Fed. 200, 43 C. C. A. 471; Cockerell *v.* Aucompte, 2 C. B. N. S. 440, 3 Jur. N. S. 844, 26 L. J. C. P. 194, 5 Wkly. Rep. 633, 89 E. C. L. 440.

**72.** Cullinan *v.* Standard Light, etc., Co., (Tex. Civ. App. 1901) 65 S. W. 689; Moore *v.* Paris Oil, etc., Co., 9 Tex. Civ. App. 27, 29 S. W. 821.

**73.** Manhattan Oil Co. *v.* Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553.

**74.** Whitehouse *v.* Liverpool New Gas-Light Co., 5 C. B. 798, 17 L. J. C. P. 237, 57 E. C. L. 798.

**75.** United Engineering, etc., Co. *v.* Broadnax, 136 Fed. 351, 69 C. C. A. 177 [*affirming* 128 Fed. 649].

**Independent covenants.**—A covenant to deliver all that the buyer may require, and a covenant by the buyer not to purchase elsewhere, are independent. Eastern Counties R. Co. *v.* Philipson, 16 C. B. 2, 24 L. J. C. P. 140, 81 E. C. L. 2.

**76.** McKeever *v.* Canonsburg Iron Co., 138 Pa. St. 184, 16 Atl. 97, 20 Atl. 938, holding that where defendant, after contracting to buy from plaintiff as much coal as he should "require" for his mill, substitutes natural gas for part of the fuel used in the mill, he is bound to take from plaintiff all the coal he still uses in his mill, but not the amount he would have used without gas.

**77.** Drake *v.* Vorse, 52 Iowa 417, 3 N. W. 465.

**78.** Kellogg *v.* Norman, 74 N. Y. 596; Herrer *v.* Gaines, 63 N. C. 72; McConnel *v.* Murphy, L. R. 5 P. C. 203, 28 L. T. 713, 21 Wkly. Rep. 609; Leeming *v.* Snaith, 16 Q. B. 275, 20 L. J. Q. B. 164, 15 Jur. 988, 71 E. C. L. 275.

**Time of delivery.**—A contract for the sale of the entire output of certain coal mines, at prices payable in monthly instalments, for the coal at the mines, the buyer agreeing to ship and pay for at least a certain quantity per annum, provided so much is furnished him, cannot be construed, because of circumstances existing when it was made, to require him to take the coal monthly, in such quantities as to keep the seller's works and workmen reasonably employed, as they had customarily been and were at the time of the contract. Shipman *v.* Saltsburg Coal Co., 62 Fed. 145, 10 C. C. A. 311.

**Overstatement of amount.**—An overstatement as to the amount of goods ready for delivery under a contract, which the buyer is bound to take when ready, is immaterial, unless made to mislead the buyer, and unless he is misled by it to his prejudice. Edward Hines Lumber Co. *v.* Alley, 73 Fed. 603, 19 C. C. A. 599.

**79.** Kellogg *v.* Norman, 74 N. Y. 596; Herren *v.* Gaines, 63 N. C. 72; McConnel *v.* Murphy, L. R. 5 P. C. 203, 28 L. T. Rep. N. S. 713, 21 Wkly. Rep. 609.

**80.** Leeming *v.* Snaith, 16 Q. B. 275, 15 Jur. 988, 20 L. J. Q. B. 164, 71 E. C. L. 275.

(v) *Option as to Quantity.* The quantity sold may be at the option of one of the parties. If the option is a general one the obligation to deliver or accept is absolutely at the election of the seller [81] or the buyer,[82] as the case may be. The option may be limited, however, in that either a maximum or a mimimum quantity is specified. In such case if the option is with the seller he is of course bound to deliver at least the mimimum amount,[83] and any additional quantity he may choose to deliver up to the maximum limit.[84] If the option is with the buyer he may require a delivery up to the maximum limit of quantity.[85]

**c. Sales by Weight or Measure.** As a general rule on a sale by weight or measure statutory weights or measures are understood.[86] But the true value of weights and measures used in specifying the quantity may be varied by agreement,[87] or by the circumstances surrounding the transaction.[88] So where it is agreed that the containers of the goods sold shall be taken as holding a certain quantity, and this method of measurement is pursued for several years, the purchaser cannot subsequently insist that the quantity shall be ascertained by weight.[89] Similarly on a sale of bales of cotton the parties may agree on the exact weight of a bale but if they do not it will be inferred that the parties contemplated bales of the usual weight.[90] In the absence of any agreement or statute

**81.** Abbott *v.* Wyse, 15 Conn. 254; Loughery *v.* McIlvain, 1 Leg. Gaz. (Pa.) 239.

**Grain of different qualities.**— If a contract wherein a party sells "10,000 bushels of barley, according to samples Nos. 1 and 2," fails to specify the quantity of each, it is optional with the seller how much of each kind he will deliver. Metz *v.* Albrecht, 52 Ill. 491.

**Exercise of option.**— The seller must exercise his option at the time of the delivery and he cannot subsequently by a further delivery increase the quantity. Johnson *v.* Hays, 5 Ohio St. 101.

**82.** Duluth *v.* Dunn, 40 Minn. 301, 41 N. W. 1049; Camden Iron Works *v.* Camden, 60 N. J. Eq. 211, 47 Atl. 220; Matador Land, etc., Co. *v.* White, 82 Tex. 477, 18 S. W. 603.

**Construction of contract.**—A contract providing that defendant should buy so much of plaintiff's stock as remained unsold on a certain day, not to exceed one thousand dollars in value, and should take only such goods as he should select, does not make it optional with defendant whether he shall take any goods but merely gives him a right of selection. Jacobson *v.* Sullivan, 152 Mass. 480, 25 N. E. 973, 9 L. R. A. 508.

**83.** Small *v.* Quincy, 4 Me. 497.

**Construction of option.**—Where plaintiff wrote defendants, "Please enter our order for 3,000,000 to 4,000,000 feet one-inch lumber, to be delivered as wanted," the option as to whether three million or four million feet should be delivered under the contract was in defendants, since, the contract being unilateral, defendants would be required to do the first act to make the contract complete by delivering the lumber; and this, notwithstanding the letter required the lumber to be delivered "as wanted," those words having reference to the manner of delivery only, and not to the amount. Illinois Glass Co. *v.* Three States Lumber Co., 90 Ill. App. 599.

**84.** Small *v.* Quincy, 4 Me. 497; Nixon *v.* Nixon, 21 Ohio St. 114. *Compare* Adeline Sugar Factory Co. *v.* Evangeline Oil Co., 121 La. 961, 46 So. 935.

**85.** Highlands Chemical, etc., Co. *v.* Matthews, 76 N. Y. 145 [*affirming* 43 N. Y. Super. Ct. 39]; A. B. Farquhar Co. *v.* New River Mineral Co., 87 N. Y. App. Div. 329, 84 N. Y. Suppl. 802 [*reversing* 40 Misc. 404, 92 N. Y. Suppl. 241]; Clark *v.* U. S., 1 Ct. Cl. 243 [*affirmed* in 131 U. S. appendix lxxxv, 18 L. ed. 915]. See also Cameron *v.* Wells, 30 Vt. 633.

**Notice of election.**— Under a contract for the sale of five thousand to ten thousand bushels of coal, at the option of the purchaser, to be delivered between certain dates, the purchaser, if he desires to take more than five thousand bushels, must notify the seller of his election a reasonable time before the commencement of the period within which it was to be delivered. Xenia Gas Light, etc., Co. *v.* Gardner, 26 Ohio St. 584.

**86.** Milk *v.* Christie, 1 Hill (N. Y.) 102; Clark *v.* Pinney, 7 Cow. (N. Y.) 681; Forsyth *v.* North American Oil Co., 53 Pa. St. 168; Farmers' High School *v.* Potter, 43 Pa. St. 134. *Compare* Rogers *v.* Allen, 47 N. H. 529.

**Public weigher.**— One buying cotton which had previously been weighed at the public scales, without any stipulation for reweighing, will be considered as purchasing by the wharfinger's weights, although there may be a deficiency between such weights and a reweighing. Conner *v.* Robinson, 2 Hill (S. C.) 354.

**87.** Smith *v.* Brown, 46 Nebr. 230, 64 N. W. 714.

**88.** Kennedy *v.* Oswego, etc., R. Co., 67 Barb. (N. Y.) 169, holding that while ordinarily a "cord" of wood calls for one hundred and twenty-eight cubic feet, on a sale of wood three feet in length to the knowledge of the buyer, he is not entitled to full cords of one hundred and twenty-eight cubic feet.

**89.** McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578.

**90.** Davis *v.* Adams, 18 Ala. 264.

**Number specified.**—An agreement to deliver a certain number of bales is not complied

fixing the value of weights and measures resort may be had to custom to determine the meaning of the contract.[91] If the measure used to designate the quantity is variable, it will be construed as referring to the average quantity contained in such a measure.[92]

**d. "Car-Load" or "Cargo."** Where the goods are sold by the "car-load" the term may be construed by the custom of trade,[93] but in the absence of any agreement or particular custom it will ordinarily be held to mean the capacity of a car used for transporting the particular kind of goods sold.[94] So too a sale of a "cargo" of goods means ordinarily the entire load of the vessel,[95] and is limited only by the capacity of the vessel.[96]

**e. Delivery in Instalments.**[97] Where, under an entire contract, delivery is to be made in instalments a failure to deliver an instalment is a breach of the contract,[98] each failure constituting a distinct breach;[99] but the seller may recover for instalments accepted.[1] If the quantity of each instalment is fixed the buyer is not bound to accept any instalment of less quantity,[2] but if he does accept the less quantity he is liable therefor.[3] On a failure to deliver an instalment the buyer cannot be forced to receive in subsequent instalments a greater quantity than that fixed for an instalment in order that the deficiency may be made up;[4] and on the other hand if the seller at the request of the buyer has delivered less than the quantity called for in any instalment, he cannot be called on to make up all the deficiency in one delivery but is entitled to a reasonable time.[5] When

with by the delivery of a less number, although the bales delivered are unusually heavy. Berry *v.* Nall, 54 Ala. 446.

91. Helm *v.* Bryant, 11 B. Mon (Ky.) 64, holding that by custom the term "cwt." means one hundred and twelve pounds.

**Lumber scale.**—Where it is the custom of the locality to use a certain scale in scaling logs, a measurement by that method is conclusive. Heald *v.* Cooper, 8 Me. 32.

92. O'Donohue *v.* Leggett, 134 N. Y. 40, 31 N. E. 269 [*affirming* 5 Silv. Sup. 601, 8 N. Y. Suppl. 426].

93. Bullock *v.* Finley, 28 Fed. 514.

94. Bullock *v.* Finley, 28 Fed. 514.

**Minimum size of car-load.**—Where a car-load of whitewood varies from thirty-five thousand to sixty thousand feet, a contract to furnish whitewood by the car-load calls for car-loads not to contain less than thirty-five thousand feet. Indianapolis Cabinet Co. *v.* Herrmann, 7 Ind. App. 462, 34 N. E. 579. In the absence of any fixed custom the sale of a "car-load" of hogs is properly completed by a delivery of a "double deck" car-load. Hanley *v.* Canadian Packing Co., 21 Ont. App. 119.

95. Borrowman *v.* Drayton, 2 Ex. D. 15, 3 Aspin. 303, 46 L. J. Exch. 273, 35 L. T. Rep. N. S. 727, 24 Wkly. Rep. 194; Kreuger *v.* Blanck, 39 L. J. Exch. 160, L. R. 5 Exch. 179, 23 L. T. Rep. N. S. 128, 18 Wkly. Rep. 813.

96. Pembroke Iron Co. *v.* Parsons, 5 Gray (Mass.) 589. *Compare* Bourne *v.* Seymour, 16 C. B. 337, 1 Jur. N. S. 1001, 24 L. J. C. P. 202, 3 Wkly. Rep. 511, 81 E. C. L. 337, where in view of the provisions of the contract the contract was construed as an absolute sale of the quantity specified irrespective of the capacity of the vessel.

97. **Effect of failure as ground for rescission** see *supra*, IV, B, 3, c, (II), (B).

98. *New Jersey.*— Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. Rep. 611, 30 L. R. A. 61; U. S. Iron Co. *v.* Sloss-Sheffield Steel, etc., Co., 71 N. J. L. 1, 58 Atl. 173.

*New York.*— Pope *v.* Porter, 102 N. Y. 366, 7 N. E. 304; Elting Woolen Co. *v.* Martin, 5 Daly 417.

*North Carolina.*— La Vallette *v.* Booth, 131 N. C. 36, 42 S. E. 446.

*Rhode Island.*— King Philip Mills *v.* Slater, 12 R. I. 82, 34 Am. Rep. 603.

*United States.*— Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920 [*reversing* 17 Fed. 426]; Norrington *v.* Wright, 115 U. S. 188, 6 S. Ct. 12, 29 L. ed. 366 [*affirming* 3 Fed. 768]; *In re* Kelly, 51 Fed. 194.

99. Gallum *v.* Seymour, 76 Wis. 251, 45 N. W. 115; *Ex p.* Llansamlet Tin Plate Co., L. R. 16 Eq. 155.

**Subsequent deliveries.**— Under a contract to deliver five hundred tons of coal as ordered, not more than two hundred tons to be ordered in any one month, after the contract is exhausted by maximum orders, which defendant has failed to fill each month as required, any subsequent deliveries accepted by plaintiffs must be applied to the several breaches in the order of their occurrence. Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

1. Kennedy *v.* Schwartz, 13 Nev. 229.

2. Hoare *v.* Rennie, 5 H. & N. 19, 29 L. J. Exch. 73, 8 Wkly. Rep. 80. *Compare* Brandt *v.* Lawrence, 1 Q. B. D. 344, 46 L. J. Q. B. 237, 24 Wkly. Rep. 749.

3. Haines *v.* Tucker, 50 N. H. 307.

4. Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678, 9 Atl. 691.

5. Tyers *v.* Rosedale, etc., Iron Co., L. R. 10 Exch. 195, 44 L. J. Exch. 130, 33 L. T. Rep. N. S. 56, 23 Wkly. Rep. 871. See also to

delivery is to be made in two equal instalments an over delivery on the first instalment accepted by the buyer will be carried over on the second instalment.[6] If the goods are of different qualities, the seller is not, in the absence of an agreement so to do, bound to deliver all of one quality in any particular instalment or instalments.[7]

**f. Determination of Quantity** — (i) *In General.* In determining the quantity that must be delivered under the contract consideration should be given to the whole contract, including the collateral documents and agreements,[8] the purpose of the transaction,[9] and, if the sale is of goods suitable for a certain market or peculiar to a certain trade, to the custom of such market or trade.[10] Of course in accordance with general rules a practical construction by the parties will control.[11]

(ii) *Effect of Special Agreement.* If a particular method of ascertaining the quantity delivered is agreed upon by the parties such method will of course be applied and will usually be conclusive on the parties in the absence of fraud.[12] If the quantity is to be determined by measurement by a third per-

the same effect Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

**6.** Pierce *v.* Smith, 25 N. H. 208.

**7.** Baldwin *v.* Napa, etc., Wine Co., 1 Cal. App. 215, 81 Pac. 1037; Kiley *v.* Lee Canning Co., 105 N. Y. App. Div. 633, 93 N. Y. Suppl. 986.

**8.** Scully *v.* Detroit Iron Furnace Co., 132 Mich. 333, 93 N. W. 885; Brown *v.* Starret, 67 Mich. 577, 35 N. W. 163 (where a contract for the sale of brick was in view of the provisions as to payment construed as a sale of five hundred thousand brick); Crooks *v.* Rumball, 17 N. Y. App. Div. 622, 45 N. Y. Suppl. 361 (where the invoice specified the number of piles of lumber sold and kind and quantity in each pile, and it was held that the buyer was entitled to the quantity of each kind specified in the invoice).

**Construction of contract.**— In Keefe *v.* Chaffee, 11 Wash. 292, 39 Pac. 676, it appeared that plaintiff, a shingle manufacturer, wrote defendant that it desired to contract for the sale of the entire output of its mills, and defendant replied, stating that he could use a certain amount of shingles at a certain price. Plaintiff then wired, accepting defendant's "terms," and requesting orders. Defendant, before any shipment was made, wired plaintiff to ship five car-loads, stating that he had written. The letter acknowledged receipt of plaintiff's telegram, and repeated the orders, and also stated that defendant would take one hundred cars at the price named. Plaintiff, after receipt of the telegram and letter, shipped the five cars as directed, and later wrote, acknowledging receipt of the last letter, and stating that it had twenty cars which it would be ready to ship as soon as it could get cars. It was held that the correspondence did not show a contract for the one hundred cars.

**Deduction for moisture.**—A contract to deliver five hundred tons of copper ore, to be paid for at certain specified prices per ton according to the quality of the ore, to be ascertained by an assay, provided that "the moisture be deducted as usual from the weight of the ore," should be construed as an agreement to deliver that weight of copper in a moist state, the deduction for moisture having reference to the amount to be paid for the ore. Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92.

**9.** Beck, etc., Lith. Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859.

**10.** Davis *v.* Adams, 18 Ala. 264; Merick *v.* McNally, 26 Mich. 374; American Brass, etc., Co. *v.* Ingersoll, 27 Misc. (N. Y.) 783, 57 N. Y. Suppl. 738.

**11.** Baldwin *v.* Napa, etc., Wine Co., 1 Cal. App. 215, 81 Pac. 1037; Beck, etc., Lith. Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859; Totten *v.* Cooke, 2 Metc. (Ky.) 275; McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578. And see Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755, where a custom to measure stone in the completed structure was regarded as competent.

**12.** *Illinois.*— Newlan *v.* Dunham, 60 Ill. 233.

*Louisiana.*— Danner *v.* Otis, McGloin 137.

*New York.*— Randall *v.* National Ice Co., 19 N. Y. Suppl. 633 [*affirmed* in 138 N. Y. 644, 34 N. E. 513].

*Pennsylvania.*— Herdic *v.* Bilger, 47 Pa St. 60; Payne *v.* Lloyd, 2 Wkly. Notes Cas. 45.

*Texas.*— Keeble *v.* Black, 4 Tex. 69.

*Wisconsin.*—Scott *v.* Whitney, 41 Wis. 504.

See 43 Cent. Dig. tit. "Sales," § 194.

**Illustrations.**—Where a contract for the delivery of coal in instalments provided for the making of payments in instalments according to estimates and certificates of the vendee's engineer, the estimates and certificates of the engineer were conclusive on the parties in the absence of any claim of fraud or mistake as to the quantity or value of the coal delivered. Price *v.* New York, 104 N. Y. App. Div. 198, 93 N. Y. Suppl. 967. Where on a shipment of goods from a foreign country, foreign weights are agreed upon as determining the quantity, the buyer will be bound thereby, although it appears on arrival of the goods that there is actually a shortage. Heller *v.* Ellentown Mfg. Co., 39 Hun (N. Y.) 547. Under a contract to furnish "enough" pine blocks to pave a certain viaduct, payment to be made monthly as

son, an actual measurement may be insisted on and the parties will not be bound by a mere estimate;[13] but if an estimate without measurement is agreed on such an estimate will be binding in the absence of fraud.[14] So where the goods are in several packages the whole quantity may be ascertained by determining the quantity in one package and approximating the total quantity.[15]

(III) *EVIDENCE.* Where the contract provides that weights at the place of delivery shall control, the presumption in the absence of evidence to the contrary is that the same amount which was loaded at the place of shipment reached the place of delivery.[16] Generally the burden is on the seller in an action for the price to show that he delivered the exact quantity called for by the contract;[17] and generally the quantity of goods as billed or entered in the books will be regarded as correct in the absence of a showing to the contrary.[18] Extrinsic evidence may be resorted to for the purpose of determining the quantity of the goods sold,[19]

estimates are allowed by the common council and approved by the mayor for deliveries during the previous month, the quantity to be paid for was to be determined by measurement of the completed work, and not by measurement of the material at the time of delivery. Fromme *v.* O'Donnell, 124 Wis. 529, 103 N. W. 3.

**Estoppel.**—Where a seller has set apart property for a purchaser, by the survey or assortment of a person other than the one agreed upon, and such property has been received by the purchaser, or by any one to whom his right to it has been transferred, the seller cannot, by denying the validity of his own acts, reclaim the property, on the ground that there is no proof that the purchaser consented to such survey or assortment. Frost *v.* Goddard, 25 Me. 414.

**Waiver.**—Whether the method of determining the quantity was waived by the conduct of the parties was considered in Taylor *v.* Butters, etc., Salt, etc., Co., 103 Mich. 1, 61 N. W. 5; Cole *v.* Champlain Transp. Co., 26 Vt. 87.

**Effect of custom.**—Although the custom in the port of New York, upon a purchase of grain in store, is for the purchaser to select a measurer, who is thereupon employed by the board of measurers to measure the grain, and the measurement and leaving the grain in the storehouse is by the custom a delivery to the purchaser, where the measurer was so employed by the board, upon an order from the vendor, this was a substantial compliance with the custom, and a valid delivery of the grain. McCready *v.* Wright, 5 Duer (N. Y.) 571.

13. McAndrews *v.* Santee, 57 Barb. (N. Y.) 193, 7 Abb. Pr. N. S. 408.

**Scaling lumber.**— On a sale of lumber to be scaled by a surveyor one should be selected who can make a legal survey. Nutter *v.* Bailey, 32 Me. 504. And if no particular method of scaling is stipulated for the statutory method will be followed. Rogers *v.* Allen, 47 N. H. 529.

**Place of measurement.**— Ordinarily the place of delivery is the place where the quantity will be determined by measurement or weighing. Caldwell *v.* Dawson, 4 Metc. (Ky.) 121; Madden *v.* Lemke, 86 Mich. 139, 48 N. W. 785; Gillett *v.* Bowman, 43 Mich. 477, 5 N. W. 661; Boyd *v.* Merchants', etc., Peanut Co., 25 Pa. Super. Ct. 199. But see Totten *v.* Cooke, 2 Metc. (Ky.) 275.

14. Easterlin *v.* Rylander, 59 Ga. 292; Keeble *v.* Black, 4 Tex. 69; Scott *v.* Whitney, 41 Wis. 504. *Compare* Warner *v.* Feige, 65 Mich. 92, 31 N. W. 766.

15. Randall *v.* National Ice Co., 19 N. Y. Suppl. 633 [*affirmed* in 138 N. Y. 644, 34 N. E. 513].

**Presumptions.**—Where hay in stacks is sold under an agreement that all of the stacks should be measured in a certain way, and the actual weight of one stack should be taken, it will be presumed that the object of such measurements and of the weighing of one stack was to establish the rule that, as the measurement of the stack to be weighed was to the actual weight thereof, so the entire measurements of the stacks were to the entire weight thereof. Morford *v.* Frye, 13 Wash. 244, 43 Pac. 46.

**Where rule not applicable.**— Under an agreement to estimate the quantity of logs sold, by an average to be ascertained from sawing a certain number, the buyer is not bound by the result, where the seller directed that only the best logs should be selected for that purpose. Boyce *v.* Barker, 119 Mich. 157, 77 N. W. 692.

16. Mountain City Mill Co. *v.* Link Milling Co., 92 Mo. App. 474.

17. Coats *v.* Huffine, 13 Ind. App. 482, 41 N. E. 465. *Compare* Dickerson *v.* Sparks, 17 Ill. 178.

18. Parsons *v.* Sutton, 39 N. Y. Super. Ct. 544 [*affirmed* in 66 N. Y. 92]; Henderson *v.* Wasserman, 12 N. Y. Suppl. 151; Johnson *v.* Van Name, 4 N. Y. Suppl. 523.

**Uncertainty in proof.**— Where the vendees agreed to pay for an estimated quantity of merchandise, and undertook to weigh and keep an account of it, any uncertainty in the proof of the deficiency must be taken most strongly against them. Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83.

19. Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343.

**Other purchases.**—A question asked of defendant, as a witness, as to when he had bought so large an order before, was proper as showing an improbability that a dealer carrying a small stock in a small town should

as by proof of counts made by both parties for the purpose of comparison,[20] way-bills issued by the carrier,[21] and weigh checks issued by the buyer's agent in the usual course of business.[22] And where the sale is in car-load lots evidence is admissible to show what is customarily regarded as a car-load of the particular commodity.[23] Rules applicable to the weight and sufficiency of evidence generally [24] apply in actions arising out of sales in respect to the quantity included in the contract.[25]

(IV) *Questions For Jury.* Where the language used to designate the quantity is uncertain the construction thereof is for the jury,[26] and when the quantity to be delivered is known the question whether the proper quantity has been delivered is for the jury.[27]

**g. Waiver of Objections as to Quantity.** Objections to the quantity are waived when the buyer selects and invoices the goods himself,[28] or objects to the delivery wholly on other grounds with knowledge of the difference in quantity;[29] but there will be no waiver if the buyer was ignorant of the deficiency.[30] So too objections based on the quantity delivered are waived if the buyer accepts the goods delivered with knowledge that the quantity is not as stipulated,[31] or if he fails to ascertain the fact, opportunity therefor being given.[32] Acceptance of a

make a large purchase on time. Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912.

20. Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 1 S. Ct. 178, 27 L. ed. 319.

**Preparation for market.**—Where raw material was sold under an agreement that the buyer should prepare it for the market and the weight should then be ascertained, and the mode adopted was one which would reduce the weight, evidence as to the weight when delivered was admissible for the purpose of approximating the weight it could have had if properly prepared for market. Long *v.* Regen, 119 Pa. St. 403, 13 Atl. 442.

21. Sullivan *v.* Boley, 24 Fla. 501, 5 So. 244.

22. Milligan *v.* Butcher, 23 Nebr. 683, 37 N. W. 596.

**Receipts.**— It was not error, the number of brick sold being in controversy, to admit, on behalf of plaintiff, the receipts given by defendant to the teamsters for the amount of brick delivered to him. Mumford *v.* Dickert, etc., Sulphur Co., 5 Utah 476, 17 Pac. 123.

23. Price *v.* Vanstone, 40 Mo. App. 207.

24. See Evidence, 16 Cyc. 821.

25. See Alexander *v.* Barrett, 46 Ill. 226; Smith *v.* Brown, 46 Ill. 186; Morford *v.* Frye, 13 Wash. 244, 43 Pac. 46.

26. Cullum *v.* Wagstaff, 48 Pa. St. 300.

27. O'Sullivan *v.* New York Lumber Corp., 62 N. Y. Suppl. 487 [*reversing* 29 Misc. 604, 61 N. Y. Suppl. 493].

28. Hernandez *v.* Babcock, 13 La. 587.

29. Sutton *v.* Risser, 104 Iowa 631, 74 N. W. 23; Knox *v.* Schoenthal, 13 N. Y. Suppl. 7. But see Hill *v.* Heller, 27 Hun (N. Y.) 416; Perry *v.* Mt. Hope Iron Co., 16 R. I. 318, 15 Atl. 87.

**Question for jury.**—Whether there has been a waiver by an objection based on other grounds is for the jury. Downer *v.* Thompson, 6 Hill (N. Y.) 208 [*reversing* 2 Hill 137].

30. O'Donohue *v.* Leggett, 5 Silv. Sup. (N. Y.) 601, 8 N. Y. Suppl. 426 [*affirmed* in 134 N. Y. 40, 31 N. E. 269].

31. *Illinois.*— Heath, etc., Mfg. Co. *v.* National Linseed Oil Co., 197 Ill. 632, 64 N. E. 732 [*affirming* 99 Ill. App. 90].

*Kansas.*— Wood *v.* Dickerson, 34 Kan. 137, 8 Pac. 205.

*Massachusetts.*— Chapman *v.* Briggs Iron Co., 6 Gray 530.

*New York.*— Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814; Fitch *v.* Carpenter, 43 Barb. 40.

*Wisconsin.*— Barton *v.* Kane, 18 Wis. 262. See 43 Cent. Dig. tit. "Sales," § 464.

**Claim for damages.**—Whether the buyer waived his claim for damages for deficiency in delivery is for the jury. Smith *v.* Wall, 12 Colo. 363, 21 Pac. 42.

**Effect of payment.**—Where plaintiff agreed to sell milk to defendant for a year, beginning April 1, and defendant agreed to pay therefor at a certain rate if plaintiff should furnish the same quantity in November, December, and January as in May, June, and July, but otherwise at a lesser rate, payments to be made monthly, and defendant paid each month at the greater rate, but plaintiff did not furnish the quantity as provided in the contract, so that he was overpaid for the milk furnished, it was held that the monthly payments made by defendant did not constitute either an accord and satisfaction, or an account stated, or voluntary payments, but that so much thereof as were overpayments were made under a mistake of fact. Davis *v.* Kling, 77 Hun (N. Y.) 598, 28 N. Y. Suppl. 1026.

32. Gamble *v.* Knott, 40 Ga. 199; Bogue *v.* Newcomb, 1 Thomps. & C. (N. Y.) 251 [*affirmed* in 58 N. Y. 674].

**Failure to notify seller.**—Where the purchaser of a drug store does not call the attention of the seller to a deficiency in the number of bottles sold within a reasonable time, in order to allow the seller to verify such deficiency, the deficiency cannot be set up as a

part will not waive a deficiency on the completion of delivery,[33] unless the contract is entire.[34]

**10. Quality of Goods Delivered — a. When Quality Is Not Specified — (i)** *In General.* Although in the absence of a definite agreement as to quality no particular quality will be implied,[35] and the seller is not bound to furnish goods of the best quality,[36] yet he cannot fulfil his contract by furnishing articles of the poorest quality,[37] but must at least furnish articles of a fair average quality,[38]

deduction from the purchase-price in a suit to redeem from a purchase-money chattel mortgage. Higbie *v.* Rogers, 63 N. J. Eq. 368, 50 Atl. 366 [*reversing* (Ch. 1901) 48 Atl. 554].

33. Cofield *v.* Clark, 2 Colo. 101; Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Visscher *v.* Greenbank Alkali Co., 11 Hun (N. Y.) 159.

**Conditional acceptance.**— On a sale of logs an acceptance of part on the condition that the balance will bring the total number of feet up to the required amount does not bind the purchaser if there is a deficiency. Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

34. Morse *v.* Brackett, 98 Mass. 205; Swift *v.* Opdyke, 43 Barb. (N. Y.) 274; Carpenter *v.* Brainerd, 37 Vt. 145.

35. Wilson *v.* Lawrence, 139 Mass. 318, 1 N. E. 278; Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904. And see Gray *v.* Gannon, 6 Thomps. & C. (N. Y.) 245.

**Seller's option.**— If the seller is given the option of supplying articles of any designated grades the purchaser cannot complain that the grade selected was not the best. Evans *v.* Western Brass Mfg. Co., 118 Mo. 548, 24 S. W. 175.

**Natural deterioration.**— A delivery of hoop iron cannot be rejected because it has rusted necessarily in view of the season and method of transportation. Bull *v.* Robison, 2 C. L. R. 1276, 10 Exch. 342, 24 L. J. Exch. 165, 2 Wkly. Rep. 623.

36. Thompson *v.* Maxwell, 71 Ill. 144; Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664, 29 So. 265; Lanata *v.* O'Brien, 13 La. Ann. 229. And see Brewington *v.* Mesker, 51 Mo. App. 348; City, etc., R. Co. *v.* Basshor, 82 Md. 397, 33 Atl. 635, holding that an agreement to furnish boilers that will give two hundred horse power each does not bind one to furnish boilers giving that power with the best economy in the consumption of coal.

**Right to cull.**—The right to buy at a stipulated price any part or the whole of certain refuse lumber does not include the right to cull and pick it over for the best pieces. Waterman *v.* Morrell, 68 Cal. 217, 9 Pac. 71.

37. Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664, 29 So. 265.

**New or second-hand.**— Purchase of a machine from a dealer implies that the machine sold shall be new; that is, not second hand, or the worse for wear. Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533.

38. Lanata *v.* O'Brien, 13 La. Ann. 229; Warner *v.* Arctic Ice Co., 74 Me. 475; Strongitharm *v.* North Lonsdale Iron, etc., Co., 21 T. L. R. 357.

**Average quality.**— Where it is provided in a contract that a bunch of cattle of average quality shall be tendered between a maximum and minimum condition, at least more than one fourth should be above the minimum grade to comply with the terms of the contract. Vassau *v.* Campbell, 79 Minn. 167, 81 N. W. 829. A contract to furnish machinery for a first-class oil mill is not to be construed as meaning first class of the particular manufacturer making the contract, but first class generally. Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

**Goods of particular factory.**— Where a manufacturer of goods, known in the market by numbers distinguishing the different qualities, contracts to sell and deliver goods from his factory of certain numbers, in an action upon the contract it is not material whether the goods delivered are of equal or inferior quality to those of corresponding numbers manufactured at other factories, or whether they are or are not merchantable. If they are the numbers contracted for as manufactured at the contractor's factory, the contract is fulfilled. Beck *v.* Sheldon, 48 N. Y. 365. See also Strongitharm *v.* North Lonsdale Iron, etc., Co., 21 T. L. R. 357; Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041, holding that under a contract for the purchase of certain manufactured articles, providing that such articles should be made "from the patterns" of a certain company manufacturing such goods, and that "no change from said patterns" should be made without the consent of the purchaser, the manufacturer was not required to use the identical patterns which had been used by the company referred to, but only to furnish articles in which there was no change, as to the several parts thereof from the finished product of such company.

**Quality of compounded articles.**—Where an order for two articles mixed is given to a manufacturer of such a mixture, without specifying the proportion of each article, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for the market. Konitzky *v.* Meyer, 49 N. Y. 571.

**Quality determined by prior sales.**— Where the contract recited that goods to be manufactured should be "same as last" made for the purchaser, the contract only bound the seller to furnish goods of the quality of the lot last furnished, and did not oblige it to furnish goods that were perfect. Koch *v.* Bamford Bros. Silk Mfg. Co., 69 N. J. L.

and such as are merchantable.[39] The mere fact that the value of the goods is not equal to the price paid is immaterial;[40] but if the purchaser inquires the price of goods of the best quality, and, on being given quotations which did not specify the quality, orders the goods, the sale is of the best quality of that class of goods,[41] and an agreement for the best quality is not complied with by furnishing goods of an average quality[42] A sale of goods "with all faults" covers such defects in quality as are not inconsistent with the identity of the goods as described.[43]

(II) *LIABILITY FOR DEFECTIVE GOODS.*[44] In the absence of fraud on a sale of goods without warranty or particular agreement as to quality, the seller is not answerable for defects,[45] whether obvious or latent,[46] the rule of *caveat emptor* applying in all its force.[47] Where the sale is by the manufacturer of the

252, 55 Atl. 271. And see Smith *v.* Gray, 56 Ill. 419.

**39.** Barrow *v.* Penick, 110 La. 572, 34 So. 691; Peck *v.* Armstrong, 38 Barb. (N. Y.) 215; Howard *v.* Hoey, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; Ketchum *v.* Wells, 19 Wis. 25.

**40.** *California.*— Sanborn *v.* Cunningham, (1893) 33 Pac. 894.

*Georgia.*— Leonard *v.* Peeples, 30 Ga. 61.

*Indiana.*— Sohn *v.* Jervis, 101 Ind. 578, 1 N. E. 73.

*Massachusetts.*— Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230.

*New York.*— Nicholson *v.* Paston, 11 N. Y. Suppl. 567.

*Pennsylvania.*— Shirley *v.* Keagy, 126 Pa. St. 282, 17 Atl. 607.

*Vermont.*— Wallace *v.* Stone, 38 Vt. 607.

**41.** Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881.

**42.** Eastern Ice Co. *v.* King, 86 Va. 97, 9 S. E. 506.

**43.** Whitney *v.* Boardman, 118 Mass. 242.

**44.** **Implied warranty against defects** see *infra*, VII, D, 6, e.

**Return of goods as condition precedent to defense of action for price** see *infra*, VIII, E, 4, a, (IV).

**45.** *Alabama.*— Boit *v.* Maybin, 52 Ala. 252; Preston *v.* Dunham, 52 Ala. 217.

*Arkansas.*— James *v.* Bocage, 45 Ark. 284.

*Georgia.*— Holcomb *v.* Cable Co., 119 Ga. 466, 46 S. E. 671; Johnson *v.* Andrews, 28 Ga. 17.

*Illinois.*— Nickle *v.* Williamson, 44 Ill. 48; Nichols *v.* Guibor, 20 Ill. 285; Archdale *v.* Moore, 19 Ill. 565.

*Iowa.*— Neally *v.* Wilhelm, 4 Greene 240, 61 Am. Dec. 118.

*Louisiana.*—Lynch *v.* Kennedy, 27 La. Ann. 464; Barclay *v.* Conrad, 7 La. 261.

*Maryland.*— Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28; Taymon *v.* Mitchell, 1 Md. Ch. 496.

*Massachusetts.*— Wilson *v.* Lawrence, 139 Mass. 318, 1 N. E. 278.

*Mississippi.*— Otts *v.* Alderson, 10 Sm. & M. 476.

*New York.*— Rudderow *v.* Huntington, 3 Sandf. 252; Goldrich *v.* Ryan, 3 E. D. Smith 324; Moses *v.* Mead, 1 Den. 378, 43 Am. Dec. 676; Welsh *v.* Carter, 1 Wend. 185, 19 Am. Dec. 473; Holden *v.* Dakin, 4 Johns. 421.

*Pennsylvania.*— Heilbruner *v.* Wayte, 51 Pa. St. 259; Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741; Ames *v.* Owens, 2 C. Pl. 99.

*South Carolina.*— Thompson *v.* Lindsay, 1 Treadw. 236, 3 Brev. 305; Neilson *v.* Dickenson, 1 Desauss. Eq. 133.

*Tennessee.*— Westmoreland *v.* Dixon, 4 Hayw. 223, 9 Am. Dec. 763.

*Vermont.*— Henderson *v.* Ward, 27 Vt. 432.

*Virginia.*— Wilson *v.* Shackleford, 4 Rand. 5.

*Wisconsin.*— Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

*United States.*— Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301. And see The Monte Allegre, 9 Wheat. 616, 6 L. ed. 174.

See 43 Cent. Dig. tit. "Sales," § 391.

**46.** *Georgia.*— Hoffman *v.* Oates, 77 Ga. 701.

*Indiana.*— Ricketts *v.* Hays, 13 Ind. 181.

*Louisiana.*— White *v.* Hill, 10 La. Ann. 189; Briant *v.* Marsh, 19 La. 391.

*New York.*— Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; American Forcite Powder Mfg. Co. *v.* Brady, 4 N. Y. App. Div. 95, 38 N. Y. Suppl. 545.

*Tennessee.*— Crabtree *v.* Cheatham, 2 Yerg. 138.

See 43 Cent. Dig. tit. "Sales," § 399.

**47.** *Alabama.*— Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

*Illinois.*— Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294.

*Iowa.*— Dean *v.* Morey, 33 Iowa 120.

*Kansas.*— Kinkel *v.* Winne, 67 Kan. 100, 72 Pac. 548, 62 L. R. A. 596.

*Mississippi.*— Watkins *v.* Guthrie, (1905) 38 So. 370.

*New York.*— Beirne *v.* Dord, 2 Sandf. 89; Eaton *v.* Waldron, 67 Hun 551, 22 N. Y. Suppl. 504; Heller *v.* Altman, 91 N. Y. Suppl. 769; Howard *v.* Hoey, 23 Wend. 350, 35 Am. Dec. 572.

*North Carolina.*—Fulenwider *v.* Poston, 48 N. C. 528; Duckworth *v.* Walker, 46 N. C. 507; Caldwell *v.* Smith, 20 N. C. 193.

*Pennsylvania.*— Lord *v.* Grow, 39 Pa. St. 88, 80 Am. Dec. 504; Lighty *v.* Shorb, 3 Penr. & W. 447, 24 Am. Dec. 334.

*Tennessee.*—Goad *v.* Johnson, 6 Heisk. 340.

*Virginia.*— Proctor *v.* Spratley, 78 Va. 254.

*United States.*— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987; Lindley *v.* Hunt, 22 Fed. 52.

See 43 Cent. Dig. tit. "Sales," § 401.

goods, however, the rule is in some jurisdictions more strict and he is held liable for defects.[48] But in either case there can be no recovery for superior quality.[49]

**b. When Quality Is Designated** [50] — (i) *In General.* If there is a specific agreement as to quality no additional condition will be implied,[51] or read into the contract by construction.[52] So where the quality of the goods is designated in general terms a delivery of goods within that description is sufficient and the buyer has no right to demand goods of a particular make.[53] But if goods of a particular quality are contracted for, it is not sufficient that the goods delivered are merchantable.[54] The agreement as to quality must be substantially complied with,[55] and if there is a failure of such compliance as to a material part of the

**Rule of caveat emptor.**— The rule of *caveat emptor* is that if the buyer does not exact a warranty of quality but trusts to his own judgment, he must bear the loss if the quality is not what he expected it to be. The rule assumes that each party acts in good faith. Welsh *v.* Carter, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473.

**48.** *Illinois.*— Archdale *v.* Moore, 19 Ill. 565.

*Indiana.*— Page *v.* Ford, 12 Ind. 46.

*Louisiana.*— Barclay *v.* Conrad, 7 La. 261.

*Minnesota.*— Wisconsin Red Pressed-Brick Co. *v.* Hood, 60 Minn. 401, 62 N. W. 550, 51 Am. St. Rep. 539.

*New Hampshire.*— Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

*New York.*— Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422.

See 43 Cent. Dig. tit. "Sales," § 397.

**Contra.**— Matthews *v.* Hartson, 3 Pittsb. (Pa.) 86.

**49.** Perkinson *v.* Fehlig, 21 Mo. App. 327; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

**50. Contract construed and held to be sufficiently definite as to quality** see Hobe Lumber Co. *v.* McGrath, 104 Minn. 345, 116 N. W. 652.

**51.** Davis *v.* Allen, 77 S. W. 1125, 25 Ky. L. Rep. 1424; Baird *v.* Grand Rapids School Furniture Co., 98 Mich. 457, 57 N. W. 729. Under a contract for "cool and sweet oats," the oats need not meet the requirements of any grade. It is only necessary that they arrive at their destination "cool and sweet." Gregg *v.* Wooliscroft, 52 Ill. App. 214.

**52.** City, etc., R. Co. *v.* Basshor, 82 Md. 397, 33 Atl. 635; Trotter *v.* Heckscher, 42 N. J. Eq. 251, 7 Atl. 353; Taylor *v.* Dalton, 3 F. & F. 263.

**Sale of set of books.**— Where defendant agreed to purchase of plaintiff a work in twelve volumes, and to pay for each volume as delivered, and plaintiff agreed to publish a sketch and portrait of defendant, plaintiff could recover for eleven volumes delivered, although no sketch or portrait had been published, as the twelfth volume, not then published, might contain them. White *v.* Corbin, 86 N. Y. Suppl. 216.

**53.** Page *v.* Proctor, 5 Ont. 238. See also Leggat *v.* Sands' Ale Brewing Co., 60 Ill. 158.

**54.** McDonald *v.* Gardner, 56 Wis. 35, 13 N. W. 689.

**55.** *California.*— Johnson-Locke Mercantile Co. *v.* Howard, (1901) 65 Pac. 953.

*Connecticut.*— Moline Jewelry Co. *v.* Dinnan, 81 Conn. 111, 70 Atl. 634, 17 L. R. A. N. S. 1119.

*Iowa.*— Prior *v.* Schmeiser, 100 Iowa 299, 69 N. W. 525; Loftus *v.* Riley, 83 Iowa 503, 50 N. W. 17.

*Michigan.*— American Hoist, etc., Co. *v.* Johnson, 114 Mich. 172, 72 N. W. 154; Howard *v.* Bellows, 49 Mich. 620, 14 N. W. 570.

*New York*— Hecla Iron Works *v.* Milliken, 48 N. Y. App. Div. 574, 62 N. Y. Suppl. 959; Baylis *v.* Weibezahl, 42 Misc. 178, 85 N. Y. Suppl. 355; Mackintosh *v.* Hawley, 13 N. Y. St. 434.

*Vermont.*— Viall *v.* Hubbard, 37 Vt. 114.

*United States.*— U. S. Sugar Refinery *v.* Providence Steam, etc., Pipe Co., 62 Fed. 375, 10 C. C. A. 422.

*England.*— Lucas *v.* Bristow, E. B. & E. 907, 5 Jur. N. S. 68, 27 L. J. Q. B. 364, 6 Wkly. Rep. 685, 96 E. C. L. 907.

*Canada.*— Thompson *v.* Dyment, 13 Can. Sup. Ct. 303; Mooers *v.* Gooderham, 14 Ont. 451.

**Material defect.**— Where plaintiff was to furnish a monument of "good white marble," and the material was of that description, but had a discoloration on it occasioned by accident, and which by lapse of time and exposure to the air would disappear, the discoloration was a material defect, and defendant was fully justified in refusing to accept the monument. Viall *v.* Hubbard, 37 Vt. 114. But see Lyndon Granite Co. *v.* Farrar, 53 Vt. 585, holding that where defendant contracted for a headstone of "blue Rutland marble," a "whitish streak," which was natural and would disappear after exposure to the air, and in no way impaired the durability and value of the stone, was not a material defect.

**Better quality or value.**— Where a contract provides that the tender of a bunch of cattle of a certain age shall be made at a specified time, an offer of cattle older than the specified age, although perhaps of more value, will not satisfy the terms of such contract. Vassau *v.* Campbell, 79 Minn. 167, 81 N. W. 829. And see Ellison Furniture, etc., Co. *v.* Langever, (Tex. Civ. App. 1908) 113 S. W. 178, holding that under a contract to construct an electric light sign with a specified number of lamps in the border, the buyer need not accept a sign containing a less number, although the lesser number be more desirable from the standpoint of beauty or utility, the

goods[56] the buyer will not be bound to accept them.[57] The seller cannot of course be

doctrine of substantial compliance being inapplicable. *Compare* Holt *v.* Sims, 94 Minn. 157, 102 N. W. 386, holding that where plaintiff had agreed to install a heating plant with a No. 3 boiler, but furnished a No. 5 boiler of a better and greater heating capacity, it was a substantial compliance with the contract.

**Substantial compliance.**— A contract to deliver logs of a certain average diameter is complied with if the average of the whole amount delivered is within the stipulation, although some are below the stipulated diameter. Wolf *v.* Boston Veneer Box Co., 109 Mass. 68. Where a special bullet manufactured for a firearms company was packed in a blue or buff box, as furnished by the maker or the company, respectively, a dealer accustomed only to the buff box cannot refuse to accept such bullets, furnished in compliance with his order by a jobber, because they were packed in blue boxes bearing the name of the maker, with which he was not familiar. Forke *v.* E. C. Meacham Arms Co., (Tex. 1892) 19 S. W. 550.

**A contract to sell lumber "to be of fair average quality** with the six cars heretofore shipped," such cars having contained five different qualities of lumber, does not require a delivery of lumber of the different qualities in the same relative proportion, but a delivery of a fair average is sufficient. Butterfield *v.* Herren, 80 Wis. 240, 49 N. W. 826.

**Goods of different qualities.**— Where the contract calls for a delivery of goods of two qualities in the proportion of three to two, a delivery in which the inferior quality exceeds two fifths is not a good delivery. McArdle *v.* Atha, 29 Hun (N. Y.) 219. See also Grant *v.* Merchants', etc., Bank, 35 Mich. 515.

**Construction of contract.**—Where defendant's agent on being solicited for a coal order, and being asked by plaintiff's salesman what he would pay, stated he had been buying "Indiana egg, double screened coal, absolutely clean, for $1.75," and, after a telephone conversation with plaintiff's office, the salesman stated to defendant's agent, "We will put it in here for $1.75," an order given for "Indiana egg coal" pursuant to such negotiations requires defendant to furnish double screened coal. Indiana Fuel Supply Co. *v.* Indianapolis Basket Co., 41 Ind. App. 658, 84 N. E. 776.

**56.** *Kentucky.*— Fogg *v.* Rodgers, 84 Ky. 558, 2 S. W. 248, 8 Ky. L. Rep. 504.

*Massachusetts.*— Deutsch *v.* Pratt, 149 Mass. 415, 21 N. E. 1072.

*Minnesota.*— Vassau *v.* Campbell, 79 Minn. 167, 81 N. W. 829.

*Nebraska.*— Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

*New York.*—Hecla Iron Works *v.* Milliken, 48 N. Y. App. Div. 574, 62 N. Y. Suppl. 959.

*Pennsylvania.*— McHenry *v.* Bulifant, 207 Pa. St. 15, 56 Atl. 226.

*Canada.*— Thompson *v.* Dyment, 13 Can. Sup. Ct. 303.

**Illustration.**— A contract of sale of twenty-five cars of "number one hay" at a certain amount per ton, to be shipped, with provision that, if any part of it did not grade No. 1, the buyer was to have the privilege of having any part or all of the twenty-five cars graded, and fixing a price for other grades, does not allow of delivery of any kind of hay, but requires that the great bulk of it be No. 1, so that there is not a sufficient performance, more than half the hay tendered not being of that grade. Bloomingdale *v.* Hewitt, 40 N. Y. App. Div. 208, 58 N. Y. Suppl. 9 [*affirmed* in 170 N. Y. 568, 62 N. E. 1094].

**57.** *Kentucky.*— Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703, 22 Ky. L. Rep. 730.

*Massachusetts.*—West End Mfg. Co. *v.* P. R. Warren Co., 198 Mass. 320, 84 N. E. 488; National Rubber Co. *v.* Sweet, 129 Mass. 36.

*Michigan.*— Where a contract provided for the sale of certain lumber, less what mill culls there might be among it, at a certain price per one thousand, there was no sale of the culls, so that whatever culls were shipped the buyer was entitled to reject. Godkin *v.* Weber, 154 Mich. 207, 114 N. W. 924, 117 N. W. 628, 20 L. R. A. N. S. 498.

*Minnesota.*— Haase *v.* Nonnemacher, 21 Minn. 486.

*Missouri.*— F. W. Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Heimann *v.* Hatcher Mercantile Co., 106 Mo. App. 438, 80 S. W. 729; Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1; Bush *v.* Fisher, 85 Mo. App. 1; Halpin *v.* Manny, 33 Mo. App. 388.

*New York.*—Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Seixas *v.* Ockershausen, 43 Hun 559; Pierson *v.* Crooks, 42 Hun 571 [*affirmed* in 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831]; Stonehill Wine Co. *v.* Lupo, 110 N. Y. Suppl. 408; Fischer *v.* Keilly, 15 N. Y. St. 399 [*affirmed* in 3 N. Y. Suppl. 757].

*Ohio.*— Bellaire Stove Co. *v.* Midland Steel Co., 66 Ohio St. 1, 63 N. E. 587.

*England.*— Sinidino *v.* Kitchen, Cab. & E. 217.

*Canada.*— Lewis *v.* Barré, 14 Manitoba 32.

**Method of packing.**— Where defendant contracted to deliver rice "in double bags," to be shipped for New York, and there was evidence that rice in single bags would not readily sell in the American market, and that in New York double bags were considered essential for transit to the west, the packing in double bags affected the quality and description of the rice sold, and the buyer was entitled to reject it if sent in single bags. Makin *v.* London Rice Mill Co., 20 L. T. Rep. N. S. 705, 17 Wkly. Rep. 768. But see Gower *v.* Von Dedalzen, 3 Bing. N. Cas. 717, 3 Hodges 94, 1 Jur. 285, 6 L. J. C. P. 198, 4 Scott 453, 32 E. C. L. 331. One who contracts to sell and deliver on board cars barreled spirits, knowing that such goods are to be exported, by implication agrees that the

required to furnish goods of any quality except that specified.[58] Unless qualified by conditions indicating that a different meaning was intended,[59] the designation of quality will be construed as it is generally understood among dealers in goods forming the subject-matter of the contract.[60]

(II) *BRAND.* If the article sold is designated by a particular brand the buyer is not bound to receive an article of any other quality; [61] and on the other hand the obligation of the seller is fulfilled if he delivers the goods known by that brand, although they are not in fact of good quality.[62]

(III) *"GOOD" OR "SOUND" GOODS.* A designation of the article as "good" or "sound" means that it shall be of medium quality,[63] according to the custom

barrels shall be properly filled and suitable for such transportation, and is liable for leakage caused by defects, although they were latent defects in the wood of which such barrels are made. Stevens *v.* Pincoffs, 9 Ohio Dec. (Reprint) 479, 14 Cinc. L. Bul. 110.

58. National Rubber Co. *v.* Sweet, 129 Mass. 36.

**Right of selection.**— If the buyer is given the right of selection within certain limits as to quality, a selection made must be within such limits. Groot *v.* Story, 41 Vt. 533.

59. Cape Cod Cranberry Sales Co. *v.* Whitney, 177 Mass. 385, 59 N. E. 70; T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513. As the quality of oil depends on the time of the year when it is made, a specification as to the time of making the oil controls the mere name of the oil specified in the contract Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386.

60. *Illinois.*— Foos *v.* Sabin, 84 Ill. 564.

*Massachusetts.*—Sherley *v.* McCormick, 135 Mass. 126; Monk *v.* Beal, 2 Allen 585.

*Missouri.*— Whitmore *v.* Coates, 14 Mo. 9.

*New York.*— Abel *v.* Murphy, 45 Misc. 638, 91 N. Y. Suppl. 26.

*England.*— Josling *v.* Kingsford, 13 C. B. N. S. 447, 9 Jur. N. S. 947, 32 L. J. C. P. 94, 7 L. T. Rep. N. S. 790, 11 Wkly. Rep. 377, 106 E. C. L. 447; Frith *v.* Mitchell, 4 F. & F. 464.

*Canada.*— Bunnel *v.* Whitlaw, 14 U. C. Q. B. 241.

**Clear lumber.**— An order for a specified number of boards, clear stock, without knots, the boards to be two eighths of an inch thicker than boards furnished under a previous transaction, does not call for a single piece of board, and does not prohibit the gluing together of boards to meet the required dimensions. Hermann Lumber Co. *v.* Heidelberg, 46 Misc. (N. Y.) 465, 92 N. Y. Suppl. 256.

**"Seed barley."**— A sale of "seed barley" is complied with by the delivery of barley fit for sowing, and if the term "seed barley" meant barley fit for malting purposes, the fact ought to be shown by clear and irresistible evidence. Carter *v.* Crick, 4 H. & N. 412, 28 L. J. Exch. 238, 7 Wkly. Rep. 507.

**Healthy animals.**— Ewe sheep which are pregnant in October and November are not in an unhealthy condition, within a contract of sale of ewes which requires them to be "in healthy condition at time of delivery." Olson *v.* Port Huron Live Stock Assoc., 18 Mont. 392, 45 Pac. 549, 33 L. R. A. 557.

**Place of production.**— On a sale of pitch pine timber from Savannah "of fair average quality," where it appears that there are several qualities of such timber, that produced in Central America being of better quality than that from Savannah, there is a sufficient performance by a delivery of a fair average of Savannah pitch pine timber. Jones *v.* Clarke, 2 H. & N. 725, 27 L. J. Exch. 165.

**"No. 1 Superfine" flour** means that the flour shall be sweet of that grade. Bain *v.* Gooderham, 15 U. C. Q. B. 33.

61. O'Donohue *v.* Leggett, 134 N. Y. 40, 31 N. E. 269 [*affirming* 5 Silv. Sup. 601, 8 N. Y. Suppl. 426]; May *v.* MacDougall, 18 Can. Sup. Ct. 700; Hedstrom *v.* Toronto Car Wheel Co., 8 Ont. App. 627; Bertram *v.* Massey Mfg. Co., 15 Ont. 516; Bunnel *v.* Whitlaw, 14 U. C. Q. B. 241.

**A sale of "Scott & Co.'s mess pork"** is not performed by a delivery of pork which had merely passed through S. & Co.'s hands, although bearing their brand, but calls for pork of their manufacture. Powell *v.* Horton, 2 Bing. N. Cas. 668, 2 Hodges 12, 5 L. J. C. P. 204, 3 Scott 110, 29 E. C. L. 710.

**Mistake in designation of brand.**— Where lead sold was designated as "Walker, Parker & Walker brand," where in fact there was no such brand of lead known to the trade, the contract is satisfied by the delivery of lead branded "Walkers, Parker & Co." Pollen *v.* Le Roy, 10 Bosw. (N. Y.) 38 [*affirmed* in 30 N. Y. 549]. To the same effect see Hopkins *v.* Hitchcock, 14 C. B. N. S. 65, 9 Jur. N. S. 896, 32 L. J C. P. 154, 8 L. T. Rep. N. S. 204, 11 Wkly. Rep. 597, 108 E. C. L. 65.

62. Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331. And see Taylor *v.* Dalton, 3 F. & F. 263.

63. Boskowitz *v.* Baker, 74 Ill. 264; Goss *v.* Turner, 21 Vt. 437.

**Choice quality.**— An allegation of a tender of hops of an average of the best product of a crop produced upon certain premises, and that defendants exerted their utmost to produce a crop "of choice quality, in sound condition, of good color, and fully matured," does not show a compliance with a contract to deliver, absolutely, hops of that quality

of the trade,[64] and suitable for the purpose for which it is intended.[65] But "good" does not imply any absolute quality but only that the article shall be good of its kind.[66]

(IV) *"MERCHANTABLE" GOODS.* Similarly where it is provided that the articles sold shall be "merchantable," the articles must be of a quality such as is generally sold in the market[67] and suitable for the purpose for which they are intended,[68] although not of the best quality.[69] If, however, the word "merchantable" has a technical meaning in the locality where the sale is made it will be presumed that the word was used in the technical sense.[70]

(V) *"SATISFACTORY" GOODS.* Where the contract of sale is to furnish some chattel which shall be satisfactory to the buyer, and the object of the contract is to gratify taste or sensibilities, serve personal convenience, or satisfy individual preference, it is very generally held that the question whether the chattel furnished is satisfactory is for the sole determination of the buyer and that the courts cannot inquire into the reasons for his determination in case he declares that he is not satisfied.[71] So there are some decisions which apparently extend this doctrine to cases where the question is not one of taste but merely of operative fitness or mechanical utility.[72] On the other hand there are decisions that hold that the buyer must show reasons for his dissatisfaction,[73] and that the law will

and condition, to be produced upon said premises. Lilienthal *v.* McCormick, 86 Fed. 100.

**"Cribbing" horse.**— Cribbing, affecting the health and condition of a horse, so as to render him less able to perform service and of less value, is unsoundness. Washburn *v.* Cuddihy, 8 Gray (Mass.) 430.

**64.** Meeker *v.* Denison, Brayt. (Vt.) 237.

**"On basis of pure."**— A contract for sale of growing flax "on basis of pure" means that the seed shall be clean and unmixed with chaff and the like. Glass *v.* Blazer, 91 Mo. App. 564.

**65.** Reynolds *v.* Palmer, 21 Fed. 433; Peck *v.* U. S., 14 Ct. Cl. 84.

**66.** Wallace *v.* Stone, 38 Vt. 607. And see Gregg *v.* Wooliscroft, 52 Ill. App. 214.

**67.** *Delaware.*— Walton *v.* Black, 5 Houst. 149; Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64.

*Indiana.*— Blake *v.* Hedges, 14 Ind. 566.

*Maine.*— Crane *v.* Roberts, 5 Me. 419.

*New York.*— Hamilton *v.* Ganyard, 2 Abb. Dec. 314, 3 Keyes 45, 31 How. Pr. 639 note [*affirming* 34 Barb. 204].

*Ohio.*— Cullen *v.* Bimm, 37 Ohio St. 236. See 43 Cent. Dig. tit. "Sales," § 197.

**Merchantable corn.**— Corn is not in "good merchantable order," unless it be well ripened and of intrinsically good quality, as well as clean, dry, and well packed. Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204 [*affirmed* in 2 Abb. Dec. 314, 3 Keyes 45, 31 How. Pr. 639 note].

**Place of delivery.**— The mere fact that goods are to be delivered at a certain place does not require that they should be "merchantable" there, in the absence of a stipulation to that effect. Minneapolis Threshing Mach. Co. *v.* Higgins, 71 Ill. App. 506. And see Stockwell *v.* Craig, 20 Me. 378. But see Ragland *v.* Butler, 18 Gratt. (Va.) 323, holding that, under a contract to deliver merchantable lumber at Richmond, the usage of the trade at that place could be resorted to to determine what was merchantable lumber.

**68.** Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Wood *v.* U. S., 11 Ct. Cl. 680.

**69.** Blake *v.* Hedges, 14 Ind. 566.

**70.** Pacific Coast El. Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544.

**71.** *Connecticut.*— Zaleski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446, bust.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978, horse.

*Massachusetts.*— Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463 (suit of clothes); McCarren *v.* McNulty, 7 Gray 139 (bookcase).

*Michigan.*— Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57 (horses); Gibson *v.* Cranage, 39 Mich. 49, 33 Am. Rep. 351 (portrait).

*New York.*— Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; Hall *v.* Pierce, 83 N. Y. App. Div. 312, 82 N. Y. Suppl. 61; Gray *v.* New Jersey Cent. R. Co., 11 Hun 70 (book); Hoffman *v.* Gallaher, 6 Daly 42 (work of art); Barry *v.* Rainey, 27 Misc. 772, 57 N. Y. Suppl. 766 (portrait); Gray *v.* Alabama Nat. Bank, 10 N. Y. Suppl. 5 [*affirmed* in 14 N. Y. Suppl. 155] (design for bank drafts).

*Pennsylvania.*— Adams Radiator, etc., Works *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893 (steam radiator for dwelling-houses); Hartman *v.* Blackburn, 7 Pittsb. Leg. J. 140 (set of teeth).

*Rhode Island.*— Pennington *v.* Howland, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774, portrait.

*England.*— Andrews *v.* Belfield, 2 C. B. N. S. 779, 89 E. C. L. 779, carriage.

**72.** Goodrich *v.* Van Nortwick, 43 Ill. 445; Reeves *v.* Chandler, 113 Ill. App. 167; Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 35 N. W. 841; Walter A. Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591.

**73.** May *v.* Hoover, 112 Ind. 455, 14 N. E. 472; Hummel *v.* Stern, 21 N. Y. App. Div.

say that what in reason ought to satisfy a contracting party does satisfy him.[74] The weight of authority, however, is against both of these views, the rule that has received its sanction being that if the buyer is honestly and in good faith dissatisfied, it is immaterial that he ought in fact to be satisfied and that his dissatisfaction is unreasonable;[75] that the law will not make contracts for people *sui juris*.[76] It is, however, very distinctly recognized in this line of decisions that the dissatisfaction must be real and in good faith, and not result from caprice or a dishonest design to be dissatisfied in any event.[77] If the contract provides that the thing sold will operate "in a satisfactory manner," it will be construed to mean in a manner satisfactory to a reasonable person and not to the satisfaction of the purchaser however unreasonable he may be.[78]

(VI) *Fitness For Purpose Intended.* Generally an article to be of good or merchantable quality must be suitable for the purpose for which it is intended,[79]

544, 48 N. Y. Suppl. 528. And see Flint *v.* Cook, 102 Ind. 391, 1 N. E. 633.

**74.** Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; Gray *v.* Alabama Nat. Bank, 10 N. Y Suppl. 5 [*affirmed* in 14 N. Y. Suppl. 155]. And see Miesell *v.* Globe Mut. L. Ins. Co., 76 N. Y. 115; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469.

**75.** *Illinois.*— Buckley *v.* Meidroth, 93 Ill. App. 460, acetylene gas generator.

*Iowa.*— Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860; Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 260, 86 N. W. 284.

*Massachusetts.*— Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356, 53 N. E. 862.

*Minnesota.*— Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636; McCormick Harvesting Mach. Co. *v.* Chesron, 33 Minn. 32, 21 N. W. 846.

*Pennsylvania.*— Adams Radiator, etc., Works *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893; Howard *v.* Smedley, 140 Pa. St. 81, 21 Atl. 253; Seeley *v.* Welles, 120 Pa. St. 69, 13 Atl. 736; Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207; Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433.

*Vermont.*— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

*Wisconsin.*— Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099; Warder, etc., Co. *v.* Whitish, 77 Wis. 430, 46 N. W. 540; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

*United States.*— Silsby Mfg. Co. *v.* Chico, 24 Fed. 893.

**76.** Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

**77.** Buckley *v.* Meidroth, 93 Ill. App. 460; Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207; Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 27 Pa. Super. Ct. 433; Daggett *v.* Johnson, 49 Vt. 345; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528; Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099; Warder, etc., Co. *v.* Whitish, 77 Wis. 430, 46 N. W. 540; Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

**78.** Lockwood Mfg. Co. *v.* Mason Regulator Co., 183 Mass. 25, 66 N. E. 420.

**79.** *California.*— Coburn *v.* California Portland Cement Co., 144 Cal. 81, 77 Pac. 771.

*Illinois.*— Misner *v.* Granger, 9 Ill. 69; Elgin *v.* Shoenberger, 59 Ill. App. 384 [*affirmed* in 164 Ill. 80, 45 N. E. 434].

*Iowa.*— Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

*Louisiana.*— Lobdell *v.* Parker, 3 La. 328.

*New York.*— Piel *v.* National Cooperage Co., 85 N. Y. App. Div. 613, 82 N. Y. Suppl. 1031; Thompson *v.* Chatham Waterworks Co., 51 N. Y. App. Div. 621, 64 N. Y. Suppl. 340.

*South Carolina.*— Daniel Pratt Gin Co. *v.* Timmerman, 62 S. C. 437, 40 S. E. 941.

*Tennessee.*— Gregson *v.* New Soddy Coal Co., (Ch. App. 1899) 54 S. W. 113.

*Texas.*— Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Easterly *v.* Jones, 1 Tex. App. Civ. Cas. § 189.

*Wisconsin.*— Ketchum *v.* Wells, 19 Wis. 25.

*United States.*— McGowan *v.* American Pressed Tan Bark Co., 121 U. S. 575, 7 S. Ct. 1315, 30 L. ed. 1027; Reynolds *v.* Palmer, 21 Fed. 433; Peck *v.* U. S., 14 Ct. Cl. 84; Wood *v.* U. S., 11 Ct. Cl. 680

See 43 Cent. Dig. tit. "Sales," § 394.

**What is fitness.**— Where an order for a book provided for the attachment of a calendar on the outside cover, but did not specify how it was to be placed, the fact that the calendar was placed upside down was no ground for refusal to accept the book, there being nothing to show that plaintiff's contention that that was the proper way to place it, considering the nature and use of the book, was not correct. Standard Advertising Co. *v.* Gutman, 33 Misc. (N. Y.) 759, 67 N. Y. Suppl. 849.

**Buyer not obliged to alter conditions.**— Where coal was sold for use on steamships and proved to be unsuitable, being too hard to burn without the aid of blowers, the buyer was not obliged to put blowers on the steamships to adapt them to burn hard coal. Heron *v.* Davis, 3 Bosw. (N. Y.) 336.

and the fact that the goods were not to be of the best quality does not change the rule.[80] The buyer is not released, however, because the goods are unfit for the purpose for which they were intended if the quality is specified,[81] or if they were selected by the buyer himself,[82] or manufactured according to his design.[83]

(VII) *REJECTION OR ACCEPTANCE.*[84] If the goods are to be of a specified quality and are defective it is the duty of the buyer to return them within a reasonable time.[85] But he is entitled to a reasonable time to discover the defects [86] and to learn what are his rights in the premises.[87] If he accepts the goods and retains them knowing that they are not of the quality agreed on, he is liable for their value.[88] And a failure to return the goods or at least notify the seller of their rejection within a reasonable time will have the same effect.[89] Where,

**80.** Lathrop *v.* Hickson, 67 Ga. 445.

**81.** Scott *v.* McDonald, 83 Ga. 28, 9 S. E. 770; Horner *v.* Parkhurst, 71 Md. 110, 17 Atl. 1027; Chicago *v.* Greer, 9 Wall. (U. S.) 726, 19 L. ed. 769.

**82.** Barnes *v.* Stacy, 79 Wis. 55, 48 N. W. 53.

**83.** Provenzano *v.* Thayer Mfg. Co., 9 Daly (N. Y.) 90; McInnes *v.* Rittenhouse, (Pa. 1889) 16 Atl. 818; Chester Steel Castings Co. *v.* Brownscombe, 7 Kulp (Pa.) 136.

**84.** Acceptance as waiver of breach of warranty see *infra*, VII, I, 3.

**85.** *Illinois.*— Guggenheim *v.* Hoffman, 128 Ill. App. 289.

*Michigan.*— Black *v.* Delbridge, etc., Co., 90 Mich. 56, 51 N. W. 269.

*Mississippi.*— Ferguson *v.* Oliver, 8 Sm. & M. 332.

*Missouri.*— Heimann *v.* Hatcher Mercantile Co., 106 Mo. App. 438, 80 S. W. 729.

*New York.*— Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Freeman *v.* Clute, 3 Barb. 424; Fisher *v.* Merwin, 1 Daly 234; Greenthal *v.* Schneider, 52 How. Pr. 133; Howard *v.* Hoey, 23 Wend. 350, 35 Am. Dec. 572.

*Pennsylvania.*— Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924; Dailey *v.* Green, 15 Pa. St. 118; R. Rothschilds Sons' Co. *v.* McLaughlin, 6 Pa. Super. Ct. 347.

*Texas.*— Streeper *v.* Frieberg, 3 Tex. App. Civ. Cas. § 240.

*Vermont.*— Esty *v.* Read, 29 Vt. 278.

*Wisconsin.*— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

**86.** Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881.

**87.** Norton *v.* Dreyfuss, 106 N. Y. 90, 12 N. E. 428.

**88.** *Delaware.*— Harper *v.* Baird, 3 Pennew. 110, 50 Atl. 326.

*Georgia.*— Houser *v.* Gurr, 88 Ga. 433, 14 S. E. 594; Watkins *v.* Paine, 57 Ga. 50.

*Indiana.*— Barkalow *v.* Pfeiffer, 38 Ind. 214.

*Iowa.*— Mackey *v.* Swartz, 60 Iowa 710, 15 N. W. 576; Fear *v.* Jones, 6 Iowa 169.

*Kentucky.*— Kerr *v.* Smith, 5 B. Mon. 552.

*Louisiana.*— Holland *v.* Toole, 6 La. Ann. 426.

*Maine.*— Goodhue *v.* Butman, 8 Me. 116.

*Missouri.*—Black River Lumber Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Nugent *v.* Armour Packing Co., (App. 1904) 81 S. W. 506; Arthur Fritsch Foundry, etc., Co. *v.* Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136.

*New York.*— Richardson *v.* Levi, 69 Hun 432, 22 N. Y. Suppl. 352; U. S. Trust Co. *v.* Harris, 2 Bosw. 75; H. Herrmann Lumber Co. *v.* Heidelberg, 46 Misc. 465, 92 N. Y. Suppl. 256; National Keg, etc., Co. *v.* Baker, 21 Misc. 35, 46 N. Y. Suppl. 885; Logan *v.* Berkshire Apartment House, 3 Misc. 296, 22 N. Y. Suppl. 776 [*affirming* 1 Misc. 18, 20 N. Y. Suppl. 369]; Sprague *v.* Blake, 20 Wend. 61.

*Pennsylvania.*— Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St 405, 50 Atl. 924; Krauskopf *v.* Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506; Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186.

*South Carolina.*— Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660.

*Texas.*— Deadrick *v.* Rice, 26 Tex. 567.

*Vermont.*— Cole *v.* Champlain Transp. Co., 26 Vt. 87.

*Washington.*— Childs Lumber, etc., Co. *v.* Page, 28 Wash. 128, 68 Pac. 373.

*Wisconsin.*— H. McCormick Lumber Co. *v.* Winans, 126 Wis. 649, 105 N. W. 945; Prince *v.* Overholser, 75 Wis. 646, 44 N. W. 775.

*United States.*— Garland *v.* Bowling, 10 Fed. Cas. No. 5,242, Hempst. 710.

*England.*— Harnor *v.* Groves, 15 C. B. 667, 3 C. L. R. 406, 24 L. J. C. P. 53, 3 Wkly. Rep. 168, 80 E. C. L. 667.

*Canada.*— Bertram *v.* Massey Mfg. Co., 15 Ont. 516. See also Leggatt *v.* Clarry, 13 Ont. 105; McClure *v.* Kreuteziger, 6 Ont. 480.

**Acceptance under misrepresentation.**— Acceptance of articles of a different quality because of misrepresentation of the seller that they are as suitable for the purpose as the designated quality does not bind the buyer. Myers *v.* Menefee, 30 Tex. Civ. App. 28, 68 S. W. 540.

**Right to set off damages.**— The buyer may, however, set off damages for the defects. Leonard *v.* Johnson Forge Co., 3 Pennew. (Del.) 104, 50 Atl. 541; Arthur Fritsch Foundry, etc., Co. *v.* Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136.

**89.** Ellis *v.* Roche, 73 Ill. 280; Haase *v.* Nonnemacher, 21 Minn. 486; Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

however, goods sold are delivered in instalments, the acceptance of an instalment which does not comply with the requirements of the contract is not a waiver of the seller's right to reject subsequent instalments which also fail to comply with such requirements;[90] but he is not entitled, after such acceptance, to refuse to accept the residue of the goods unless they also fail to comply with the contract,[91] especially where the seller promises to remedy the defects in the goods accepted and that the balance shall conform to the contract.[92]

(VIII) *PART OF GOODS DEFECTIVE.* If the contract of sale is entire, and part of the goods sold do not fulfil its requirements, the buyer may reject all,[93] if he acts within a reasonable time after discovery that the contract has not been complied with.[94] But on the other hand he cannot accept part of the goods and reject the balance because of their non-compliance with the requirements of the contract.[95] If the contract is severable, the buyer may accept such of the goods as comply with the contract and reject such as do not.[96] In any event the buyer is liable for the price of such part as he accepts.[97]

(IX) *EXISTENCE AND CAUSE OF DEFECTS.* In order to be available to the buyer the defects must of course exist at the time of the sale.[98] The buyer cannot take advantage of a defect due to the manner of use by him,[99] or to his failure to take proper care of the goods,[1] or where the inefficiency of the article is due to a number of contributing causes of which the defect in the article itself is but one.[2]

**Sale of goods by buyer.**— The buyer may sell the goods that are defective to reimburse himself for expenses paid or to protect the seller from loss. Barnett *v.* Terry, 42 Ga. 283; Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1; Columbian Nat. Bank *v.* White, 65 Mo. App. 677.

**90.** *California.*— Coburn *v.* California Portland Cement Co., 144 Cal. 81, 77 Pac. 771.

*Illinois.*— Hubbard *v.* George, 49 Ill. 275; U. S. Printing Co. *v.* H. O. Wilbur Printing Co., 98 Ill. App. 20.

*Kentucky.*— Cook *v.* Brandeis, 3 Metc. 555.

*Missouri.*— American Paper Pail, etc., Co. *v.* Oakes, 64 Mo. App. 235.

*Nebraska.*— Norfolk Beet Sugar Co. *v.* Berger, 1 Nebr. (Unoff.) 151, 95 N. W. 336.

*New York.*— Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Visscher *v.* Greenbank Alkali Co., 11 Hun 159; Kipp *v.* Meyer, 5 Hun 111. And see Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

**91.** Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

**92.** Baylis *v.* Weibenzahl, 42 Misc. (N. Y.) 178, 85 N. Y. Suppl. 355.

**93.** *Kentucky.*— Fogg *v.* Rodgers, 84 Ky. 558, 2 S. W. 248, 8 Ky. L. Rep. 504.

*Minnesota.*— Vassau *v.* Campbell, 79 Minn. 167, 81 N. W. 829.

*Nebraska.*— Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

*New York.*— Keeler *v.* Vandervere, 5 Lans. 313; Blum *v.* Daly, 22 Misc. 342, 49 N. Y. Suppl. 136.

*Pennsylvania.*— Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856.

*England.*— Levy *v.* Green, 1 E. & E. 969, 5 Jur. N. S. 1245, 28 L. J. Q. B. 319, 7 Wkly. Rep. 486, 102 E. C. L. 969.

**94.** Fogg *v.* Rodgers, 84 Ky. 558, 2 S. W. 248, 8 Ky. L. Rep. 504.

**95.** Mansfield *v.* Trigg, 113 Mass. 350; Morse *v.* Brackett, 98 Mass. 205; Clark *v.* Baker, 5 Metc. (Mass.) 452; Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510, 41 S. E. 907. And see Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194.

**Application of rule.**— Eight bags of wool bearing the same distinctive mark, and kept in a warehouse separate from other merchandise, having been shown as one lot of a particular kind of wool to a purchaser, who, after opening some of the bags and making such other examination as he saw fit, said that he would take the whole lot, were sold to him at one time, for one price per pound, and delivered to him together under a single bill of parcels. It was held that the contract of sale was an entire contract, which he could not rescind in part on discovering that the wool in one of the bags was of a different kind. Morse *v.* Brackett, 98 Mass. 205.

**96.** U. S. Printing Co. *v.* H. O. Wilbur Co., 98 Ill. App. 20; Visscher *v.* Greenbank Alkali Co., 11 Hun (N. Y.) 159.

**97.** Hummer *v.* Brenneman, 89 Ill. App. 460; Vaughan *v.* Howe, 20 Wis. 497.

**98.** Myers *v.* McFarlane, 2 Treadw. (S. C.) 686, 3 Brev. 513. And see Cornish *v.* Shelton, 12 La. Ann. 415.

**99.** May Mantel Co. *v.* U. S Blow-Pipe Co., 93 Ga. 778, 21 S. E. 142. *Compare* Callender Insulating, etc., Co. *v.* Badger, 30 Ill. App. 314, 33 Ill. App. 90.

**Continued use.**— If the buyer continues the use of the defective article without repairs, thus enhancing the defects, he cannot claim increased damages. Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

**1.** Travis *v.* Jenkins, 30 How. Pr. (N. Y.) 152.

**2.** Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664, 29 So. 265.

**c. Sale by Sample** [3] — (I) *What Constitutes.* The mere exhibition of a sample by the seller does not amount to such a designation of quality as to constitute a sale by sample,[4] especially when the quality of the article to be furnished is expressly described in the contract without reference to the sample,[5] or the parties agree that the goods ordered shall differ from the sample in some important particular.[6] To constitute a sale by sample it must appear that the parties contracted solely with reference to the sample, with the understanding that the bulk was like it,[7] and whenever the designation of the quality is by reference to a sample the sale is by sample.[8] As a circumstance tending to show a sale by sample the fact that an examination of the goods in bulk was inconvenient or impossible may be considered.[9] But a sale is not a sale by sample when there is full opportunity afforded to examine the goods in bulk,[10] and it is expressly stated that the sale must be on examination.[11] The sale is not the less one by sample because the purchaser personally took the samples from the bales,[12] or tested the correctness of the sample by taking a second sample.[13]

(II) *Rights of Parties.* On a sale by sample the obligation rests on the seller to deliver goods corresponding to the sample,[14] and if they do not corre-

**3. Implied warranty on sale by sample** see *infra*, VII, D, 6, e, (VI).

**4.** *Georgia.*— Imperial Portrait Co. *v.* Bryan, 111 Ga. 99, 36 S. E. 291.

*Maryland.*— Gunther *v.* Atwell, 19 Md. 157.

*Massachusetts.*— Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612.

*Minnesota.*— Walter A. Wood Harvester Co. *v.* Ramberg, 60 Minn. 219, 61 N. W. 1132.

*Missouri.*— Columbia River Packers' Assoc. *v.* Springfield Grocer Co., 129 Mo. App. 132, 108 S. W. 113.

*New York.*— Ames *v.* Jones, 77 N. Y. 614; Waring *v.* Mason, 18 Wend. 425.

See 43 Cent. Dig. tit. "Sales," § 188.

**5.** Imperial Portrait Co. *v.* Bryan, 111 Ga. 99, 36 S. E. 291; Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612. See also Walter A. Wood Harvester Co. *v.* Ramberg, 60 Minn. 219, 61 N. W. 1132.

**6.** Day *v.* Raguet, 14 Minn. 273; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118], where it was agreed that the goods should be of better quality than the sample.

**Variation from sample.**— Under a contract to furnish "a six-ton scale," equal in every respect to another scale which is referred to, it is sufficient to furnish a scale equal in all material respects, for the purpose of weighing six tons, to the one referred to; and it is not necessary to furnish a scale equal to the sample, if the latter has greater strength than is necessary for that purpose. Lothrop *v.* Otis, 7 Allen (Mass.) 435.

**7.** Imperial Portrait Co. *v.* Bryan, 111 Ga. 99, 36 S. E. 291; Gunther *v.* Atwell, 19 Md. 157; Day *v.* Raguet, 14 Minn. 273; Proctor *v.* Spratley, 78 Va. 254. And see Columbia River Packers' Assoc. *v.* Springfield Grocer Co., 129 Mo. App. 132, 108 S. W. 113.

**Preparation of sample.**— In sales by samples prepared by a state inspector, his agency in preparing them is as much in behalf of the buyer as the seller; and neither has cause of complaint or right of redress, either against the other, for any mistake as to condition or quality, if, with mutual knowledge and good faith, they buy and sell upon the credit of such samples. Gunther *v.* Atwell, 19 Md. 157.

**Question for jury.**— Whether a sale was by sample or upon plaintiff's own judgment is a question of intention, and a fact to be left to the jury. Jones *v.* Wasson, 3 Baxt. (Tenn.) 211.

**8.** Penn *v.* Smith, 93 Ala. 476, 9 So. 609; Butterfield *v.* Butterfield, 18 Colo. App. 323, 71 Pac. 639; Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594; Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Lydia Cotton Mills *v.* Prairie Cotton Co., 156 Fed. 225, 84 C. C. A. 129.

**9.** Beirne *v.* Dord, 2 Sandf. (N. Y.) 89; Jacobs *v.* Day, 5 Misc. (N. Y.) 410, 25 N. Y. Suppl. 763.

**10.** Eaton *v.* Waldron, 67 Hun (N. Y.) 551, 22 N. Y. Suppl. 504; Selser *v.* Roberts, 105 Pa. St. 242; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383, 19 L. ed. 987.

**11.** Kellogg *v.* Barnard, 14 Fed. Cas. No. 7,661, 6 Blatchf. 279 [*affirmed* in 10 Wall. 383, 19 L. ed. 987].

**12.** Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Nunnelly *v.* Goodwin, (Tenn. Ch. App. 1896) 39 S. W. 855.

**13.** Gallagher *v.* Waring, 9 Wend. (N. Y.) 20 [*affirmed* in 18 Wend. 425].

**14.** Gallagher *v.* Waring, 9 Wend. (N. Y.) 20 [*affirmed* in 18 Wend. 425]; Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. (N. Y.) 440; Rose *v.* Beatie, 2 Nott & M. (S. C.) 538.

**Sample selected by third person.**— Under a contract for the sale of teas of the quality of a sample to be selected by a third person, the seller is liable only in case of fraud, where a sample of inferior quality is selected. Cheongwo *v.* Jones, 5 Fed. Cas. No. 2,638, 3 Wash. 359.

**Ignorance of seller.**— A seller's ignorance that cotton sold by him was falsely packed does not exempt him from liability for the difference between the value of the bales in

spond there is a breach of the contract on the part of the seller [15] entitling the buyer to reject the goods [16] and relieving him from liability for the price if he returns them,[17] or entitling him to sue for and recover the difference if he retains them.[18] If only part of the goods are defective and the contract is divisible,[19] or the buyer reserves the right to return all or a part of the goods,[20] he may return those not corresponding to the sample and retain the remainder. For the purpose of determining whether the goods do conform to the sample the buyer has the right to an inspection and examination of the goods in bulk.[21] The inspection should be made within a reasonable time [22] and at the place of delivery.[23]

their actual condition and what the value would have been if the quality throughout the bale had been uniform with the samples. Fuller *v.* Cowell, 8 La. Ann. 136, 58 Am. Dec. 676.

**Construction of contract.**— Acceptance of an offer for "staves, guaranteed equal to sample . . . on which the average width is 5½ inches," called for staves equal in dimensions to the samples, whether more or less than such width. Caraway *v.* Kentucky Refining Co., 163 Fed. 189, 90 C. C. A. 59.

**15.** International Tile, etc., Co. *v.* Ahlers, 18 N. Y. Suppl. 883.

**16.** *Delaware.*— Love *v.* Barnesville Mfg. Co., 3 Pennew. 152, 50 Atl. 536.

*Illinois.*— Webster *v.* Granger, 78 Ill. 230.

*Indiana.*— Gatling *v.* Newell, 9 Ind. 572.

*New York.*— Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835; Brigg *v.* Hilton, 10 Daly 292.

*Texas.*— Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405.

*England.*— Azemar *v.* Casella, L. R. 2 C. P. 431, 36 L. J. C. P. 124 [*affirmed* in L. R. 2 C. P. 677, 36 L. J. C. P. 263, 16 L. T. Rep. N. S. 571, 15 Wkly. Rep 998].

See 43 Cent. Dig. tit. "Sales," § 400.

**Loss or impairment of goods.**— A merchant who purchases goods by sample, and sells some of them to customers, cannot, after his store is destroyed by fire, and he has included the goods in his proofs of loss, claim that he has not accepted them. Telford *v.* Albro, 60 Ill. App. 359.

**Sufficiency of rejection.**— Where yarn was sold by sample, and, after receipt of it, defendant made tests to ascertain whether its strength was as great as that of the sample, and, finding that it was not, immediately notified plaintiffs that he held the yarn subject to their order, and requested what disposition should be made thereof, there was a sufficient rejection; the yarn having been shipped directly from the spinner, in England, to defendant, in Illinois, and plaintiffs, the sellers, being located in New York. Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

**Right to remedy defects.**— A trade custom, which imports into a contract for the sale of goods by sample, containing an arbitration clause, a term that the purchaser shall not be entitled to reject the goods on account of variation between the sample and the bulk, provided the variation is such that it can reasonably be remedied by an abatement of the price, and does not affect the purpose for which the goods were purchased, is a good custom. *In re* Walkers, [1904] 2 K. B. 152, 9 Com. Cas. 174, 73 J. J. K. B. 325, 90 L. T. Rep. N. S. 454, 20 T. L. R. 274, 53 Wkly. Rep. 794.

**Sale subject to acceptance by customer of buyer.**— Where a contract for the sale of goods by plaintiff to defendant by sample provides that the goods are "subject to return if rejected," and plaintiff knows that the goods are for a customer of defendant, the right to return does not depend on whether the goods are up to sample, but whether or not they are accepted by the customer; and the fact that defendant shipped them to his customer without inspection is immaterial. Lyon *v.* Motley, 9 Misc. (N. Y.) 500, 30 N. Y. Suppl. 218.

**17.** Hanson *v.* Busse, 45 Ill. 496; Home Lightning Rod Co. *v.* Neff, 60 Iowa 138, 14 N. W. 216; Hollender *v.* Koetter, 20 Mo. App. 79; E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 78 Hun (N. Y.) 615, 29 N. Y. Suppl. 110 [*reversed* on other grounds in 149 N. Y. 300, 43 N. E. 859].

**18.** Webster *v.* Granger, 78 Ill. 230.

**19.** Slayden-Kirksey Woolen Mills *v.* Spring, 116 Ill. App. 27. See also Hubbard *v.* George, 49 Ill. 275.

**Entire contract.**— Where the contract is entire and the buyer accepts part of the goods he cannot reject the balance on the ground that they were not in accordance with the sample in the absence of proof that they were defective. Simon *v.* Wood, 17 Misc. (N. Y.) 607, 40 N. Y. Suppl. 675. Where a bill of goods is purchased by sample, delivery to be made in three allotments, the buyers have a right to receive and use the first allotment without waiting to see whether the sellers will fulfil their contract by delivering the residue, and by doing so they do not become liable for the price of that allotment, regardless of whether or not the sellers fulfil their contract. Schwartz *v.* Hirsch, 56 Misc. (N. Y.) 618, 107 N. Y. Suppl. 796.

**20.** Argensinger *v.* Cline, 69 Iowa 57, 24 N. W. 599, 28 N. W. 435.

**21.** Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl 536; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835; Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405; Lorymer *v.* Smith, 1 B. & C. 1, 2 D. & R. 23, 8 E. C. L. 1.

**22.** Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

**23.** Towers *v.* Dominion Iron, etc., Co., 11

**d. Determination of Quality** — (I) *IN GENERAL.* In the absence of any stipulation to the contrary the quality of the goods is to be determined as of the place of sale.[24] The parties may, however, agree upon a method of determining the quality, and in such case the determination is conclusive.[25] Although the quality cannot, in the absence of an agreement to that effect, be determined by the judgment of one of the parties alone,[26] they may so agree,[27] and if such an agreement is embodied in the contract, the party on whom the authority is conferred must exercise honest judgment and good faith in his decision.[28]

(II) *INSPECTION AND APPROVAL* — (A) *The Right in General.* The purchaser has generally the right to an inspection and examination of the goods in order to determine whether they are of the quality contracted for.[29] It is the duty of the seller to afford an opportunity for inspection,[30] and if such opportunity is not afforded or inspection is prevented by the acts of the seller there

Ont. App. 315; Oelrichs *v.* Trent Valley Woollen Mfg. Co., 20 Ont. App. 673 [*affirmed* in 23 Can. Sup. Ct. 682].

**24.** Minneapolis Threshing Mach. Co. *v.* Higgins, 71 Ill. App. 506; Schreiber *v.* Butler, 84 Ind. 576; Stockwell *v.* Craig, 20 Me. 378. *Compare* Deifendorff *v.* Gage, 7 Barb. (N. Y.) 18. And see Baker *v.* McKinney, 87 Mo. App. 361, holding that the quality of goods sold is to be determined by the market grades at the place of delivery.

**25.** Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629, where the parties agreed that the articles should conform to certain specifications. And see Houser *v.* Gurr, 88 Ga. 433, 14 S. E. 594, where the parties agreed that the goods were not merchantable.

**26.** Mulliner *v.* Bronson, 114 Ill. 510, 2 N. E. 671; Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

**Both parties to participate.**—Where a contract provided that lumber was to be "subject to the grades adopted by the Southern Lumber Manufacturers' Association," but did not specify by whom the grading was to be done, the reasonable inference was that both parties were to participate. Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 30 C. C. A. 260.

**27.** Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57.

**28.** Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318.

**29.** *California.*—J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 70 Pac. 669.

*Delaware.*—Love *v.* Barnesville Mfg. Co., 33 Pennew. 152, 50 Atl. 536.

*Michigan.*— Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64.

*Missouri.*— Hunter Bros. Mill Co., *v.* Stanley, 132 Mo. App. 308, 111 S. W. 869.

*New Hampshire.*— Holmes *v.* Gregg, 66 N. H. 621, 28 Atl. 17.

*New York.*— Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

*Tennessee.*— Charles *v.* Carter, 96 Tenn. 607, 36 S. W. 396.

*Texas.*— Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405.

*Vermont.*— Bruce *v.* Bishop, 43 Vt. 161.

*England.*— Lorymer *v.* Smith, 1 B. & C. 1, 2 D. & R. 23, 8 E. C. L. 1.

*Canada.*— George *v.* Glass, 14 U. C. Q. B. 514.

See 43 Cent. Dig. tit. "Sales," § 403.

**Right of inspection mutual.**—A stockholder, agreeing to sell his stock for such price as a fair examination into the condition of the company may show it to be worth, is entitled to have the investigation bargained for. Hager *v.* Thompson, 1 Black (U. S.) 80, 17 L. ed. 41.

**Second inspection.**—The buyer cannot exact as a further condition after invoicing and examining the goods that the seller should allow him to make a reëxamination of the goods, and a comparison thereof with the invoice previously made, in order to verify the accuracy of the same, before final acceptance. Knopf *v.* Hansen, 37 Minn. 215, 33 N. W. 781. And to the same effect see Wilson *v.* Elliott, 57 N. H. 316; Albree *v.* Philadelphia Co., 201 Pa. St. 165, 50 Atl. 984. The contract may, however, provide for a second inspection, in which case it will be conclusive. American Bridge Co. *v.* Duquesne Steel Foundry Co., 28 Pa. Super. Ct. 479.

**Shipment in seller's name as affecting right.**— The right of a buyer to inspect goods bought is not affected by the fact that the seller shipped them to the point of delivery in his own name. Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92.

**If no condition is attached to an order for goods,** or acceptance, there is no right of inspection, but merely an implied warranty that the goods are merchantable and reasonably fit for the purpose for which intended. Cochran *v.* Chetowah Mill, etc., Co., 88 Ark. 343, 114 S. W. 711.

**Question for jury.**—Whether the buyer waived the right of inspection is usually a question for the jury. Kronman *v.* Roush Produce Co., 3 Ga. App. 152, 59 S. E. 320.

**30.** Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326; Lamhden *v.* Hill, 6 Houst. (Del.)

is no proper delivery in performance of the contract.[31] The buyer may waive his right to inspect by a refusal to accept the goods based on other grounds,[32] or by accepting the goods without asserting his right.[33] But receipt of the goods, will not have such effect if there is no opportunity to examine the goods until after they are received,[34] or if under the terms of the contract inspection is to take place after such receipt.[35]

(B) *Agreement For Inspection.* Where the contract provides for inspection by a competent inspector "to be agreed upon," the agreement upon an inspector before the inspection is not necessary, but it is sufficient that, before the inspection is complete, the seller agrees to accept as inspector a person chosen by the buyer.[36] Where there is a sufficient agreement for an inspection of the goods such stipulation becomes a condition precedent [37] which must be complied with before there can be a sufficient performance of the contract to bind the purchaser,[38] but the condition being chiefly for the purchaser's benefit may be waived by him.[39]

(C) *Place of Inspection.* In the absence of any special agreement the place of delivery is generally the place of inspection;[40] but where delivery is made by carrier the place of final destination is usually the place of inspection.[41] The

29; Goddard *v.* Cunningham, 10 Fed. Cas. No. 5,490*a*, 16 Reporter 7.

**Time of day.**— Under an executory contract of sale of goods, where daylight is required for the proper examination, and assortment of the goods tendered, time should be given the purchaser to make such examination before sunset. Croninger *v.* Crocker, 62 N. Y. 151.

**Question for jury.**—Whether the buyer had an opportunity to inspect the goods is for the jury to determine. Kronman *v.* Roush Produce Co., 3 Ga. App. 152, 59 S. E. 320; Pugsley *v.* Devlin, 9 N. Y. Suppl. 630 [*affirmed* in 130 N. Y. 688, 30 N. E. 67].

**31.** Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326; Bruce *v.* Bishop, 43 Vt. 161; Goddard *v.* Cunningham, 10 Fed Cas. No. 5,490*a*, 16 Reporter 7.

**Application of rule.**—A shipment of goods with a sight draft accompanying the bill of lading, payment being made a condition precedent to the delivery of the bill of lading, there being no offer of inspection, deprives the buyer of his right and is not a sufficient tender of performance. Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64; Charles *v.* Carter, 96 Tenn. 607, 36 S. W. 396.

**Expenses of inspection.**—In the absence of a stipulation to the contrary the expenses incident to an inspection are to be borne by the seller. Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Silberman *v.* Clark, 96 N. Y. 522; American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. 350.

**32.** Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

**33.** Hano *v.* Simons, 92 N. Y. Suppl. 337; Duford *v.* Patrick, 15 N. Y. Suppl. 285.

**Offer to waive.**—Where the purchaser of an article, which is attached before its delivery to him, offers to take and pay for it without inspection if the seller will have it released from the attachment, and the latter refuses so to do, the purchaser is not estopped from afterward examining the article and refusing to accept it, if it does not conform to the contract. Mowry Car, etc., Works *v.* Shorter, 8 Ohio Dec. (Reprint) 290, 7 Cinc. L. Bul. 32.

**34.** Davis *v.* Koenig, 165 Pa. St. 347, 30 Atl. 976.

**Illustration.**— Thus where lumber in carload lots is ordered and delivered, the purchaser does not accept the lumber by unloading it for inspection. Wiburg, etc., Co. *v.* Walling, (Ky. 1908) 113 S. W. 832.

**35.** Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

**36.** Thomson *v.* Matheson, 30 Can. Sup. Ct. 357.

**37.** Dustan *v.* McAndrew, 10 Bosw. (N. Y.) 130 [*affirmed* in 44 N. Y. 72]; Goodall *v.* Smith, 46 U. C. Q. B. 388.

**38.** Carr *v.* Louden, 79 S. W. 211, 25 Ky. L. Rep. 1984; U. S. *v.* Wormer, 13 Wall. (U. S.) 25, 20 L. ed. 530; Goodall *v.* Smith, 46 U. C. Q. B. 388.

**Assignment of contract.**—Where the contract of sale has been assigned a demand for inspection must be made upon the seller, and not alone upon the assignor. Dustan *v.* McAndrew, 10 Bosw. (N. Y.) 130 [*affirmed* in 44 N. Y. 72].

**39.** Ballantyne *v.* Watson, 30 U. C. C. P. 529.

**40.** Oelrichs *v.* Trent Valley Woollen Mfg. Co., 20 Ont. App. 673 [*affirmed* in 23 Can. Sup. Ct. 682]; Towers *v.* Dominion Iron, etc., Co., 11 Ont. App. 315.

**Where the quality of goods is to be determined at the place of delivery,** a determination of the amount of moisture at a place sixty-two miles distant was not according to the contract. Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 661, 9 Atl. 694.

**Place of manufacture.**—Where no place of delivery is designated the place of manufacture is the place of delivery and consequently the place of inspection E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 149 N. Y. 300, 43 N. E. 859.

**41.** Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703; Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831 [*affirming* 42 Hun 571]; Holt *v.*

inspection in such case should usually be made as the goods are delivered by the carrier,[42] but this may be modified by the terms of the agreement.[43] The parties may agree, however, that the place of inspection shall be at the place of shipment [44] or some intermediate point.[45] The provisions of the contract in this regard may of course be waived.[46]

(D) *Time of Inspection.* The inspection of the goods regarded as either a duty imposed on the buyer or as a right to be exercised by him should be made within a reasonable time.[47]

(E) *Mode of Inspection.* If the parties agree that the quality of the goods shall be determined by an inspection to be made by a particular person, such determination is conclusive,[48] whether it is based upon reasonable grounds or

Pie, 120 Pa. St. 425, 14 Atl 389; Fogel *v.* Brubaker, 122 Pa. St. 7, 15 Atl. 692; Lewis *v.* Barre, 14 Manitoba 32. But see Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539; Dyment *v.* Thomson, 12 Ont. App. 659.

**Delivery to vessel.**— Under a contract to deliver goods "on the rail of vessels furnished" inspection is to be made at the place of shipment and not the place of destination. Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657.

**42.** McClure *v.* Jefferson, 85 Wis. 208, 54 N. W. 777.

**43.** Gorman *v.* Kennedy, 126 Mich. 182, 85 N. W. 458, holding that on a sale of curbstone to be delivered f. o. b. at Detroit, the stone to conform to specification of the board of public works, the place of inspection and acceptance was not on the cars, but on the streets, where the inspection was made by the board of public works. And see Hyde *v.* Love, 63 Ill. App. 43, holding that where a contract provided that all iron delivered under it should be inspected on the car, and that no allowance should be made for broken castings unless the same were found broken on the car, the inspection provided for was only for the purpose of ascertaining whether the castings were broken, and did not bar the purchaser from afterward objecting that the castings were not according to specifications, or had sand in the cores. To the same effect see Salomon *v.* King, 63 N. J. L. 39, 42 Atl. 745.

**44.** Goodall *v.* Smith, 46 U. C. Q. B. 388.

**45.** Cefalu *v.* Fitzsimmons-Derrig Co., 65 Minn. 480, 67 N. W. 1018.

**46.** Cefalu *v.* Fitzsimmons-Derrig Co., 65 Minn. 480, 67 N. W. 1018; Midland El. Co. *v.* Cleary, 77 Mo. App 298.

**47.** *Alabama.*— Hudson *v.* Germain Fruit Co., 95 Ala. 621, 10 So. 920.

*Connecticut.*—Cohen *v.* Pemberton, 53 Conn. 221, 2 Atl. 315, 35 Am. Rep. 101.

*Illinois.*— Doane *v.* Dunham, 65 Ill. 512; Guggenheim *v.* Hoffman, 128 Ill. App. 289.

*Mississippi.*— Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

*New Jersey.*— Salomon *v.* King, 63 N. J. L. 39, 42 Atl. 745.

*New York.*—Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470, 94 N. Y. Suppl. 777; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

*Tennessee.*— Charles *v.* Carter, 96 Tenn. 607, 36 S. W. 396.

*Wisconsin.*— Boothby *v.* Scales, 27 Wis. 626.

*United States.*— Tasker *v.* Crane Co., 55 Fed. 449; Goddard *v.* Cunningham, 10 Fed. Cas. No. 5,490*a*.

See 43 Cent. Dig. tit. "Sales," § 404.

**Sale on credit.**—Where a specific term of credit is extended upon a sale of goods, accompanied by a representation that they are of superior quality or of a certain grade, the opportunity of examination should be taken advantage of before the bill becomes due. Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307, 85 N. Y. Suppl. 633.

**48.** *Maine.*— Crane *v.* Roberts, 5 Me. 419.

*Maryland.*— Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; Lynn *v.* Baltimore, etc., R. Co., 60 Md. 404, 45 Am. Rep. 741.

*Michigan.*— Robinson *v.* Detroit, etc., R. Co., 84 Mich. 658, 48 N. W. 205; McLennan *v.* McDermid, 50 Mich. 379, 15 N. W. 518; Savercool *v.* Farwell, 17 Mich. 308

*Missouri.*— Nofsinger *v* Ring, 71 Mo. 149, 36 Am. Rep. 456; Gratiot St. Warehouse Co. *v.* Wilkinson, 94 Mo. App. 528, 68 S. W. 581; Del Bondio *v.* Jacob Dold Packing Co., 79 Mo. App. 465.

*New York.*— Camden Iron Works *v.* New York, 104 N. Y. App. Div. 272, 93 N. Y. Suppl. 754; Carleton *v.* Lombard, 72 Hun 254, 25 N. Y. Suppl. 570; Heron *v.* Davis, 3 Bosw. 336.

*Pennsylvania.*— Lucas Coal Co. *v.* Delaware, etc., Canal Co., 148 Pa. St. 227, 23 Atl. 990.

*South Carolina.*— Brooke *v.* Laurens Milling Co., 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780.

*Texas.*— Gorham *v.* Dallas, etc., R. Co., (Civ. App. 1907) 106 S. W. 930.

*England.*— De Cew *v.* Clark, 19 U. C. C. P. 155.

*Canada.*— Thomson *v.* Matheson, 30 Can. Sup. Ct. 357; Patterson *v.* Larsen, 36 N. Brunsw. 4.

See 43 Cent. Dig tit "Sales," §§ 200, 202.

But see Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

**Nature of stipulation.**— A condition in a

not,[49] and cannot be impeached except for fraud, bad faith, or failure to exercise honest judgment.[50] But fraud or bad faith or a failure to exercise honest judgment will afford grounds for refusal to be bound by the inspector's determination.[51] If a particular mode of inspection is provided for, that mode should be followed, and no other, or it will not be binding;[52] but in the absence of any stipulation the inspection should be made in the customary manner,[53] that is, in

selling contract that the article shall be tested by a particular person in the purchaser's employ is not a condition precedent to be performed by the seller, but merely a mutual agreement that such person may make the test. Hubbard *v.* Chapman, 34 N. Y. App. Div. 252, 54 N. Y. Suppl. 527 [*affirmed* in 165 N. Y. 609, 58 N. E. 1088].

**Selection of inspector.**—Where a contract for the sale of lumber provided: "The inspection of this lumber to be made after the same is landed here (Windsor), by a competent inspector to be agreed upon between buyer and seller," it was not essential for the parties to agree upon an inspector before the inspection was begun; and a person chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied. Thomson *v.* Matheson, 30 Can. Sup. Ct. 357.

**Alternative stipulation.**—When a contract for the sale of goods by its terms provides that the property is to be delivered "subject to the inspection of B, or other mutually satisfactory," neither party has the right to demand inspection by any other person, unless B neglects or refuses. The fact that B is one of the sellers makes no difference. Dustan *v.* McAndrew, 44 N. Y. 72 [*affirming* 10 Bosw. 130].

**In Kentucky** it has been held that under a contract for the sale of lambs, providing that they should be graded by the buyer, the determination of the buyer was not conclusive because if he had the absolute power of rejection the contract would not be mutually binding. Sanders *v.* Bond, 66 S. W. 635, 23 Ky. L. Rep. 2084.

**Inspection by seller.**—Where the buyer of lumber agrees to accept the same on the seller's inspection, he cannot reject the lumber on the ground of defects as to quality, unless there is such a substantial difference between the lumber contracted for and that delivered as to raise an inference of fraud on the part of the seller. Wiburg, etc., Co. *v.* Walling, (Ky. 1908) 113 S. W. 832.

49. Haegerstrand *v.* Anne Thomas Steamship Co., 10 Com. Cas. 67.

50. Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179, 82 S. W. 1128; Gratiot St. Warehouse Co. *v.* Wilkinson, 94 Mo. App. 528, 68 S. W. 581; Lucas Coal Co. *v.* Delaware, etc., Canal Co., 148 Pa. St. 227, 23 Atl. 990; Brooks *v.* Laurens Milling Co., 78 S. C. 200, 58 S. C. 806, 125 Am. St. Rep. 780; Gorham *v.* Dallas, etc., R. Co., (Tex. Civ. App. 1907) 106 S. W. 930.

**Incompetency of an inspector** chosen by the parties is no ground for refusal to accept goods, where a part thereof has already been accepted on the inspector's examination. Wallace *v.* Curtiss, 36 Ill. 156.

**Fraud of seller.**— It is ground for setting aside the report of a committee appointed by a city to examine an engine which it had bought on probation that the seller, knowing of a defect, stood by and failed to call attention to it, and suffered an examination to be made under circumstances calculated to conceal the defect. Henderson *v.* Allen, 7 Ky. L. Rep. 589.

**Estoppel to impeach.**— One who contracts for the purchase of goods at a sum to be fixed by appraisers, and who, knowing of the misconduct of the appraisers, accepts possession of the goods without complaint, and never offers to return, is estopped from alleging such misconduct as a defense in an action to recover the amount of the appraisement. Garis *v.* Hopkins, 2 Lehigh Val. L. Rep. 279.

**Evidence held insufficient to show that inspection was made in bad faith.**— Gorham *v.* Dallas, etc., R. Co., (Tex. Civ. App. 1907) 106 S. W. 930.

51. Ennis *v.* Borner, 100 Fed. 12, 40 C. C. A. 249; Mack *v.* Sloteman, 21 Fed. 109.

52. Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Steele *v.* Nashville Corp., 10 Yerg. (Tenn.) 296.

**Sale of corporate stock.**— Where, in a negotiation with the sole owner of the stock of a corporation for the sale of an interest therein, a list of the corporate liabilities is made out as a basis of negotiation, and in the list are placed debts contracted in the individual name of such sole owner for the benefit of the corporation, such debts are to be considered in determining whether the corporate liabilities exceed the amount warranted. Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903.

**Waiver.**—Where by a written contract for the purchase of a lot of first-sort hops, the hops were to be inspected and branded by S, and they were inspected and pronounced by S to be first-sort, but were not branded as such by him, and the vendor's agent offered to telegraph to S for permission to put the brand on, and one of the vendees stated that the vendees would not require it, or that it would make no difference, the vendees were estopped from insisting upon the omission to brand as a defense to an action to recover the price of the hops. Clinton *v.* Brown, 41 Barb. (N. Y.) 226.

**Question for jury.**—Whether an inspection of lumber was made under the specifications contained in the contract of sale is for the jury. Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500.

53. McLennan *v.* McDermid, 50 Mich. 379,

the manner which is usual and customary in the particular trade to which the transaction in question belongs.[54]

(F) *Rejection and Notice Thereof.* If, on inspection, the goods are proved to be unsuitable or not according to the contract they may be rejected and returned to the seller,[55] and if the defects are obvious a failure to reject is equivalent to approval.[56] Actual return may be rendered unnecessary by the circumstances of the transaction or the nature of the goods, and in such cases notice to the seller of the rejection is sufficient.[57] But, in any event, the option to reject must be exercised and notice thereof given within a reasonable time,[58] unless a definite period is fixed by the contract.[59]

(G) *Effect of Approval or Failure to Inspect.* The buyer becomes bound to pay the price and cannot complain if the quality of the goods is inferior if he accepts them after an inspection or an opportunity to inspect,[60] although he fails

15 N. W. 518. *Compare* Bushnell *v.* Geo. F. King Bridge Co., 140 Iowa 405, 118 N. W. 407, holding that where plaintiff agreed to sell defendant a certain amount of lumber to fill specifications in the contract, and on delivery defendant rejected part of the lumber, after an inspection by its own inspector and the inspector of the county with which defendant was under contract to build a bridge, the question to be determined in an action for the price of the lumber being whether the lumber shipped complied with the terms of the contract, it was wholly immaterial how the inspection was made.

54. Tasker *v.* Crane Co., 55 Fed. 449.

55. Craver *v.* Hornburg, 26 Kan. 94; Starr *v.* Torrey, 22 N. J. L. 190; Smith *v.* Love, 64 N. C. 439; Easterly *v.* Jones, 1 Tex. App. Civ. Cas. § 189.

**Offer to remedy defects.**—According to some decisions, if the seller offers to remedy the defects he should be given an opportunity to do so. Rouse *v.* Printers' Exch. Co., 12 Misc. (N. Y.) 114, 33 N. Y. Suppl. 55.

**Disposition of rejected goods.**— If the buyer subsequently finds a purchaser for the rejected goods and sells the same, he is liable to the seller for the price. Sampica *v.* Hurd, 14 N. Y. St. 316.

56. Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204.

57. Carondelet Iron Works *v.* Moore, 78 Ill. 65; Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1 [*affirmed* in 1 Abb. Dec. 500, 3 Keyes 467, 3 Transcr. App. 49]; Herrmann Lumber Co. *v.* Heidelberg, 46 Misc. (N. Y.) 465, 92 N. Y. Suppl. 256; Smith *v.* Love, 64 N. C. 439, where goods were necessarily destroyed in determining the quality.

**Notice sufficient.**— The buyer of logs, although agreeing to inspect them at point intermediate that of shipment and delivery, a place where they were transferred from cars to boats, is not, after inspection, obliged to prevent rejected logs from going further, but merely to give the seller notice of the result of inspection. Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204.

**Notice is not necessary** where the buyer was told to throw away such goods as were not in conformity with the contract. Wright *v.* St. Louis Hoop, etc., Co., 73 Ill. App. 264.

58. *Illinois.*— Carondelet Iron Works *v.* Moore, 78 Ill. 65.

*Kansas.*— Craver *v.* Hornburg, 26 Kan. 94.

*Maine.*— Attwood *v.* Clark, 2 Me. 249.

*Michigan.*— Day Leather Co. *v.* Michigan Leather Co., 141 Mich. 533, 104 N. W. 797.

*Missouri.*— Pierce Steam Heating Co, *v.* A. Siegel Gas Fixture Co., 60 Mo. App. 148.

*New York.*— H. Herrmann Lumber Co. *v.* Heidelberg, 46 Misc. 465, 92 N. Y. Suppl. 256.

*Texas.*— Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

See 43 Cent. Dig. tit. "Sales," § 406.

**What is reasonable time.**—Where the seller lived only three miles from the buyer a return of cattle found to be unsatisfactory should be made within one day. Young *v.* Argo, 1 Marv. (Del.) 156, 40 Atl. 719.

**Entire contract.**— Under an entire contract the buyer has the right to wait until the whole quantity is ready for delivery before he is called upon to accept or reject. Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326.

**When single test insufficient.**—Where a contract does not provide that the efficiency of machinery shall be tested and determined by a single test, but does provide that the final payment shall be made when such machines are "completed, tested and accepted, considering that thirty days after completion to be a satisfactory time for the acceptance of the above machines," it does not entitle a rejection upon a single test, even though unsatisfactory in results, where such test is made within five days after the completion of the machinery. Mallers *v.* McKenzie Furnace Co., 135 Ill. App. 322 [*affirmed* in 231 Ill. 561, 83 N. E. 451].

59. Allyn *v.* Burns, 37 Ind. App. 223, 76 N. E. 636.

60. *Alabama.*— Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

*California.*—Bullock *v.* Consumers' Lumber Co., (1892) 31 Pac. 367.

*Delaware.*— Harper *v.* Baird, 3 Pennew. 110, 50 Atl. 326.

*Georgia.*— American Car Co. *v.* Atlanta St. R. Co., 100 Ga. 254, 28 S. E. 40; Harder *v.* Carter, 97 Ga. 273, 23 S. E. 82.

to make the inspection.[61] In such cases the rule of *caveat emptor* applies with especial force.[62]

(III) *EVIDENCE* — (A) *Presumptions and Burden of Proof.* Where the pur-

*Illinois.*— Barker *v.* Turnbull, 51 Ill. App. 226. And see Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547.

*Indiana.*— Pattison *v.* Jenkins, 33 Ind. 87.

*Kentucky.*— Jones *v.* McEwan, 91 Ky. 373, 16 S. W. 81, 12 Ky. L. Rep. 966, 12 L. R. A. 399; O'Bannon *v.* Reif, 7 Dana 320; Albin Co. *v.* Kentucky Table Co., 67 S. W. 13, 23 Ky. L. Rep. 2261.

*Louisiana.*— Poutz *v.* Theard, 23 La. Ann. 246; McGuire *v.* Kearny, 17 La. Ann. 295.

*Massachusetts.*— Giles Lith., etc., Co. *v.* Chase, 149 Mass. 459, 21 N. E. 765, 14 Am. St. Rep. 439, 4 L. R. A. 480.

*Michigan.*— Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352.

*Minnesota.*— Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150.

*Missouri.*— Black River Lumber Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Crawford *v.* Elliott, 78 Mo. 497.

*New York.*—Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57 [*affirming* 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350]; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 515; McCormick *v.* Sarson, 45 N. Y. 265, 6 Am. Rep. 80; Patch *v.* Smith, 105 N. Y. App. Div. 208, 94 N. Y. Suppl. 692; New York State Monitor Milk Pan Co. *v.* Remington, 41 Hun 218 [*affirmed* in 109 N. Y. 143, 16 N. E. 48]; Neaffie *v.* Hart, 4 Lans. 4; Mason *v.* Smith, 5 Silv. Sup. 346, 8 N. Y. Suppl. 301; Shaw *v.* Lighthouse, 4 Silv. Sup. 134, 7 N. Y. Suppl. 271; Eagle Works *v.* Churchill, 2 Bosw. 166; Bolles *v.* Valentine, 15 Daly 41, 2 N. Y. Suppl. 710; James *v.* Libby, 44 Misc. 210, 88 N. Y. Suppl. 812; Casselli *v.* Mosso, 90 N. Y. Suppl. 371. *Compare* Meagley *v.* Hoyt, 12 N. Y. St. 357.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

*Texas.*— Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Ranger *v.* Hearne, 37 Tex. 30; Maud *v.* Coppinger, 23 Tex. Civ. App. 128, 56 S. W. 127.

*United States.*— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222; Carleton *v.* Jenks, 80 Fed. 937, 26 C. C. A. 265; Calhoun *v.* Vechio, 4 Fed. Cas. No. 2,310, 3 Wash. 165.

**Failure to reject.**— The failure of a buyer of logs to reject them at a point intermediate that of shipment and delivery, agreed on as the place of inspection, is equivalent to approval, the defects, if existing, being patent. Fraser *v.* Ross, 1 Pennew. (Del.) 348, 41 Atl. 204.

**61.** *Alabama.*— Hudson *v.* Germain Fruit Co., 95 Ala. 621, 10 So. 920.

*Arkansas.*—Dillard *v.* Moore, 7 Ark. 166.

*Delaware.*— Lambden *v.* Hill, 6 Houst. 29.

*Illinois.*— McLeod *v.* Andrews, etc., Co., 116 Ill. App. 646.

*Indiana.*— O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242.

*Kentucky.*— Dinwiddie *v.* Nash, 86 S. W. 517, 27 Ky. L. Rep. 668.

*Louisiana.*— Frank *v.* Hollander, 35 La. Ann. 582; Bloom *v.* Beebe, 15 La. Ann. 65.

*Minnesota.*— Potter *v.* Holmes, 87 Minn. 477, 92 N. W. 411; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

*Mississippi.*— Watkins *v.* Guthrie, (1905) 38 So. 370.

*New York.*— Hargous *v.* Stone, 5 N. Y. 73; Fox *v.* Everson, 27 Hun 355.

*Pennsylvania.*— Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40; Field *v.* Schuster, 26 Pa. Super. Ct. 82; Waymart Water Co. *v.* Waymart, 4 Pa. Super. Ct. 211.

*United States.*— Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. 832; Reynolds *v.* Palmer, 21 Fed. 433.

*Canada.*— Labrecque *v.* Duckett, 22 Quebec Super. Ct. 135. But see Creighton *v.* Pacific Coast Lumber Co., 12 Manitoba 546.

**Quantity submitted for inspection.**— On a sale of posts where the buyer's inspector went to the place of delivery but refused to inspect because not enough were on the ground, saying that he would inspect when several car-loads had been gotten out, the buyer was not estopped to reject posts of the same quality subsequently delivered. Missouri, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1896) 35 S. W. 199. See also Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326, holding that under an entire contract the buyer is entitled to wait until the whole quantity is delivered before he is called on to accept or reject the goods.

**Temporary denial of right.**—A merely temporary denial of the right to inspect does not excuse a failure to inspect, an opportunity being thereafter afforded. Hudson *v.* Germain Fruit Co., 95 Ala. 621, 10 So. 920; Naas *v.* Welter, 92 Minn. 404, 100 N. W. 211.

**Failure to inspect is not excused** because the seller had made previous tenders of defective articles (Cunningham *v.* Clark, 50 Ga. 39), or where it is due to the fault of the buyer himself (Savercool *v.* Farwell, 17 Mich. 308).

**62.** *Alabama.*— Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

*Illinois.*— Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294.

*Iowa.*— Dean *v.* Morey, 33 Iowa 120.

*Kansas.*— Kinkel *v.* Winne, 67 Kan. 100, 72 Pac. 548, 62 L. R. A. 596.

*Mississippi.*— Watkins *v.* Guthrie, (1905) 38 So. 370.

*New York.*— Eaton *v.* Waldron, 67 Hun 551, 22 N. Y. Suppl. 504; Heller *v.* Altman, 91 N. Y. Suppl. 769; Welsh *v.* Carter, 1 Wend. 185, 19 Am. Dec. 473.

*Pennsylvania.*— Lord *v.* Grow, 39 Pa. St. 88, 80 Am. Dec. 504.

*United States.*— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987; Carleton *v.* Jenks, 80 Fed. 937, 26 C. C. A. 265; Lindley *v.* Hunt, 22 Fed. 52.

chaser refuses to accept the goods as being of a quality inferior to that contracted for, the burden is on the seller to show that the goods are of such quality, in an action for the price of the goods or for damages.[63] After acceptance of the goods the presumption is that they are of the agreed quality,[64] and the burden is on the buyer to show that they were not of the agreed quality.[65] So too in an action by the buyer to recover damages for defects in quality the burden of proof is on the buyer; [66] and where goods were sold as damaged the buyer has the burden of proving that between the sale and delivery they suffered further damage.[67]

(B) *Admissibility* — (1) IN GENERAL. If the contract is ambiguous as to the quality of the goods sold parol evidence may be resorted to to explain it,[68] but parol evidence is not admissible to show that a sale not purporting to be a sale by sample is in fact such a contract.[69] The quality of the goods delivered may be shown by the declarations and admissions of the parties,[70] by testimony as to the condition of the goods while in transit,[71] or on arrival at destination; [72] but testimony as to the defective condition of the goods some time after their delivery is not generally admissible.[73] Evidence as to the price for which the buyer resold

*Canada.*— Borthwick *v.* Young, 12 Ont. App. 671.

See 43 Cent. Dig. tit. "Sales," § 401.

**No opportunity for inspection.**— On a sale of goods when the buyer has no opportunity of inspection, the maxim *caveat emptor* does not apply. Mooers *v.*. Gooderham, 14 Ont. 451.

**63.** *Alabama.*— Penn *v.* Smith, 98 Ala. 560, 12 So. 818.

*California.*— Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

*Connecticut.*— Merriman *v.* Chapman, 32 Conn. 146.

*Illinois.*— Wolf *v.* Dietzsch, 75 Ill. 205.

*Iowa.*— Parker *v.* Hendrie, 3 Iowa 263.

*Michigan.*— Simons *v.* Ypsilanti Paper Co., 77 Mich. 185, 43 N. W. 864.

*New York.*— Patterson Gas Governor Co. *v.* Bayne, 16 Misc. 69, 37 N. Y. Suppl. 656; Patterson Gas Governor Co. *v.* Glenby, 4 Misc. 532, 24 N. Y. Suppl. 575 [*affirmed* in 9 Misc. 126, 29 N. Y. Suppl. 279].

*Washington.*— Pacific Coast El. Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544.

*United States.*— Union Pac. R. Co. *v.* Clopper, 131 U. S. appendix cxcii, 26 L. ed. 243.

See 43 Cent. Dig. tit. "Sales," § 475.

**64.** Atkins *v.* Cobb, 56 Ga. 86.

**The burden of showing acceptance** is, however, on the seller. Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

**65.** Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497; Atkins *v.* Cobb, 56 Ga. 86; Edwards *v.* Plaquemine Ice, etc., Co., 46 La. Ann. 360, 15 So. 61.

**66.** Peterkin *v.* Oglesby, 30 La. Ann. 907; Mackie *v.* Davis, 13 La. Ann. 475; Lowe *v.* Nelson, 7 La. Ann. 646. See also Davis *v.* Janin, 3 La. Ann. 712.

**The presumption of unsoundness at the** time of sale from its existence three days later may be rebutted. Cornish *v.* Shelton, 12 La. Ann. 415.

**67.** Gerard *v.* Prouty, 34 Barb. (N. Y.) 454. *Compare* Hosmer *v.* Baer, 5 La. Ann. 35, holding that where corn was sold at sixty-eight cents per bushel, when prime corn was selling at seventy-five cents per bushel, the buyer will not be presumed to have inferred, from the price paid, that the corn was damaged.

**68.** Johnson *v.* Hamilton, 24 Oreg. 320, 33 Pac. 571; Jones *v.* Clarke, 2 H. & N. 725, 27 L. J. Exch. 165.

**69.** Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Wiener *v.* Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775.

**70.** Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693; Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9; Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1.

**Prospectus.**— Printed circulars and posters are admissible to show what has been claimed as to the quality of goods where it appears that there has been no change in manufacture since the circulars were issued. Wilcox *v.* Henderson, 64 Ala. 535.

**Reduction in price.**—Where the seller assented to a reduction in price, he may show that the reduction was assented to to avoid controversy and not as an admission of defects in quality. West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

**71.** Lawrence *v.* White, 15 Fed. Cas. No. 8,147, 5 McLean 108.

**72.** Cleveland Stone Co. *v.* Monroe County Oolitic Stone Co., 11 Ind. App. 423, 39 N. E. 172.

**73.** Cantwell Eagle Brewing Co. *v.* Horst, 61 Ill. App. 330; Welch *v.* Norton, 73 Iowa 721, 36 N. W. 758. But see Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533, holding that testimony that the machine was second-hand was admissible, although determined by an examination made several months after the sale, the machine not having been used meantime. See also Aultman *v.* Miller, 52 Kan. 60, 34 Pac. 404, holding that lapse of time did not render the testimony incompetent but merely affected its weight.

**If the defect appeared within a few days after the sale,** it may be shown that a defect of such nature must have existed at the time of the sale. Banks *v.* Botts, 10 La. 42.

the goods is also admissible.[74] Evidence that merchants generally would consider the goods to be of a certain quality is not admissible unless founded on proof of a custom.[75] While evidence as to the mere possibility of the existence of circumstances which would affect the quality is not admissible,[76] the actual spurious character of the article may of course be shown.[77] The quality of the article may also be shown by evidence as to its fitness for the purposes for which it was intended,[78] the results of its use,[79] and, in the case of a sale of machinery, by the character of its product.[80]

(2) Inspection and Results Thereof. Testimony as to the quality of goods must as a rule be based on personal knowledge,[81] but, if based on such knowledge, as acquired by examination and observation, it is admissible.[82] Evidence tending to show an inspection and approval by a person agreed on for that purpose is admissible,[83] as is also the evidence of such person as to the results of his inspection.[84] It may, however, be shown that the defects revealed by the inspection trial or test were due to the lack of skill or mismanagement of the buyer.[85] Evidence as to the inspection of other goods of the same kind is not admissible.[86]

(3) Comparison With Other Goods. Evidence is admissible to show the characteristics of goods of the quality contracted for [87] and their value,[88] and this value may be compared with that of the goods actually sold and delivered.[89] It may also be shown that the goods were of a fair average quality of their kind.[90] Evidence comparing the goods sold with other similar goods sold at or about the same time to other persons, although considered admissible in some jurisdictions,[91] is rejected in others,[92] and a similar difference of opinion exists as to evidence tending to show that other machines of the same kind worked well elsewhere.[93] So too it has been held that the buyer may show the worthlessness

74. Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790. *Contra*, Cohen *v.* Simpson, (Tex. Civ. App. 1895) 32 S. W. 59.

75. Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 39 Am. Rep. 170.

76. Whitley *v.* Ramspeck, 74 Ga. 391.

77. Parmelee *v.* Knox, 24 Kan. 113.

78. Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

**Relevancy to issue.**— In an action for the price of certain boot patterns, where the only issue is as to whether the patterns were made as ordered, a letter written by plaintiff to defendant, advising him to have the patterns made in the regular way, instead of as suggested by defendant, is immaterial. White *v.* Adams, 77 Iowa 295, 42 N. W. 199.

79. Claghorn *v.* Lingo, 62 Ala. 230; De Loach *v.* Hardee, 64 Ga. 94; Toledo Sav. Bank *v.* Rathmann, 78 Iowa, 288, 43 N. W. 193.

80. West *v.* Conesus Lake Salt Min. Co., 4 N. Y. St. 384.

81. Smith *v.* Groneweg, 40 Minn. 178, 41 N. W. 939.

82. Aultman *v.* York, 71 Tex. 261, 9 S. W. 127.

83. Newhall *v.* Hamilton, 128 Mass. 463.

84. Jones *v.* Cordele Guano Co., 94 Ga. 14, 20 S. E. 265; Brigham *v.* Retelsdorf, 73 Iowa 712, 36 N. W. 715; Imbrie *v.* Wetherbee, 70 Mich. 103, 37 N. W. 910; U. S. Sugar Refinery *v.* Providence Steam, etc., Co., 62 Fed. 375, 10 C. C. A. 422.

85. Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1; Gibbon *v.* Hughes, 76 Wis. 409, 45 N. W. 538; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

86. Barr *v.* Borthwick, 19 Oreg. 578, 25 Pac. 360.

87. Groetzinger *v.* Kann, 165 Pa. St. 578, 30 Atl. 1043, 44 Am. St. Rep. 676.

88. Eiseman *v.* Heine, 2 N. Y. App. Div. 319, 37 N. Y. Suppl. 861 [*reversed* on other grounds in 158 N. Y. 45, 52 N. E. 667].

89. Anniston Lime, etc., Co. *v.* Lewis, 107 Ala. 535, 18 So. 326; Brewer *v.* Housatonic R. Co., 107 Mass. 277.

90. Davis *v.* Adams, 18 Ala. 264; Tomlinson *v.* Earnshaw, 112 Ill. 311.

91. Wilcox *v.* Henderson, 64 Ala. 535; Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113 [*affirming* 54 Ill. App. 287]; Worden *v.* Hitter, 35 Minn. 244, 28 N. W. 503; Ames *v.* Quimby, 106 U. S. 342, 1 S. Ct. 116, 27 L. ed. 100.

**Comparison with former deliveries.**—When delivery is in instalments, the seller may show that a certain instalment was equal in quality to a prior instalment which had been accepted. Loftus *v.* Riley, 83 Iowa 503, 50 N. W. 17.

92. Henkel *v.* Burke, (Me. 1887) 10 Atl. 249; Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192; Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290; Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

93. **Evidence held admissible.**— Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538.

**Evidence held inadmissible.**— Fox *v.* Stockton Combined Harvester, etc., Works, 83 Cal. 333, 23 Pac. 295; Osborne *v.* Simmerson, 73 Iowa 509, 35 N. W. 615.

of other similar goods bought from the same seller,[94] and, for the purpose of proving that the goods delivered were not as ordered, may compare them with samples from other merchants.[95] Where a machine was rejected as defective, evidence as to a comparison between the work of such machine and a good machine subsequently purchased is admissible as showing that the first was defective,[96] but no comparison with other kinds of machines doing similar work is admissible.[97]

(c) *Weight and Sufficiency.*[98] Proof as to quality must as a rule be affirmative,[99] and evidence that the goods were well manufactured of the best material cannot prevail against positive and uncontradicted testimony that they were found defective as soon as put in use.[1] But where it is shown that the design furnished by the buyer, in accordance with which the goods were made, was defective proof of perfect material and construction may be sufficient.[2] Ordinarily in the absence of anything to show that defects were caused by conditions existing during carriage of the goods evidence that they were in good condition when shipped is insufficient to overcome evidence of defects when delivered;[3] but when the goods were transported during a season of wet weather the fact that the goods arrived at their destination damaged by wet weather does not show that they were damaged when shipped.[4] On the other hand, proof that a machine was running in good order and without repairs two years after delivery is sufficient to show that it was of good quality.[5]

94. Wilcox *v.* Henderson, 64 Ala. 535; Sandwich Mfg. Co. *v.* Nicholson, 36 Kan. 383, 13 Pac. 597.

95. Imbrie *v.* Wetherbee, 70 Mich. 103, 37 N. W. 910.

96. Davis *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040.

**Competency of witness.**—Evidence that machines made by the sellers of the same kind as that for which the note sued on was given worked satisfactorily, given by witnesses who had never seen that machine work, is inadmissible. Richmond Second Nat. Bank *v.* Wheeler, 75 Mich. 546, 42 N. W. 963.

97. Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263, 39 N. W. 54; Chariton Plow Co. *v.* Davidson, 16 Nebr. 374, 20 N. W. 256.

98. **The sufficiency of the evidence** as to the quality of the goods in view of a conflict of evidence was considered in Allen Buggy Co. *v.* Bush, 96 Ga. 772, 22 S. E. 330; McMenomy *v.* Talbot, 84 Cal. 279, 23 Pac. 1099; Wolff *v.* Falvey, 83 Ga. 796, 10 S. E. 270; Perkins *v.* Schneider, 54 Minn. 368, 56 N. W. 39; Woodrum *v.* Gross, 90 Va. 60, 17 S. E. 764; Knox *v.* Garland, 2 Call (Va.) 241.

99. Western Historical Co. *v.* Schmidt, 56 Wis. 681, 14 N. W. 822.

**Proof of adulteration.**—On an issue as to whether a quantity of tallow sold to plaintiff by defendant was adulterated, it appeared that two barrels, when melted, were found to contain thirty per cent of marble dust. On this discovery the remaining eighty-three barrels were inspected, and, after taking a thin skimming off the top, each barrel was found to contain a gritty matter throughout. The eighty-three barrels were used in connection with other tallow, and the kettles in which they were melted contained a large quantity of a substance similar to that deposited on melting the first two barrels. It appeared that, at about the time of the sale, defendant had at its works a quantity of marble, and there was no evidence that defendant had any use for marble dust, unless for purposes of adulteration. The evidence was sufficient to enable the jury to find that the eighty-three barrels of tallow were adulterated, and to estimate the amount of adulteration in the entire quantity of tallow. Meagley *v.* Hoyt, 88 Hun (N. Y.) 328, 34 N. Y. Suppl. 790.

**Comparison with other goods.**—There is no evidence to sustain a defense, in an action for the price of yarn sold, that the yarn was unsound and unmerchantable, when it is simply shown that other yarn than that in suit, purchased from plaintiff by defendant, was defective, and it is uncertain whether the defect was inherent in the yarn at the time of its delivery. Wallace *v.* Blake, 15 Daly (N. Y.) 158, 3 N. Y. Suppl. 934 [*reversing* 2 N. Y. Suppl. 403].

1. Fuchs *v.* Morris, 81 Hun (N. Y.) 536, 30 N. Y. Suppl. 1017. And see Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

2. W. O. Hickok Mfg. Co. *v.* Blackhall, 88 Hun (N. Y.) 80, 34 N. Y. Suppl. 620 [*affirmed* in 152 N. Y. 646, 46 N. E. 1152]

3. Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

4. Galbreath *v.* Condon, 48 Kan. 748, 30 Pac. 124.

**Defects at time of delivery.**—Proof that a machine broke down of its own weight while being carefully removed from the cars is sufficient to show that it was defective. Hoult *v.* Baldwin, 78 Cal. 410, 20 Pac. 864, A buyer of mirrors cannot recover on the seller's contract to insure their safe arrival in a certain depot by proof that they were first found to be injured after being transported two miles from the depot. Schastey *v.* Bache, 9 Daly (N. Y.) 484.

5. Maas *v.* Montgomery Iron Works, 88

(IV) *QUESTIONS FOR JURY.* Where there is any uncertainty in the description of the quality of the goods, the construction is for the jury.[6] It is also for the jury to determine what constitutes a defect,[7] and whether a defect actually exists.[8]

**e. Liability For Injuries Due to Defects.**[9] A seller of defective articles is liable for injuries to persons or property caused by such defects in a direct action for the injury,[10] or the buyer may plead the injury in an action for the price.[11] The rule has been applied in a case of a sale of unwholesome provisions,[12] hay,[13] drugs of a kind not ordered,[14] defective boiler,[15] defective firearms,[16] gun cartridges,[17] impure oils,[18] and diseased animals.[19] But in the absence of defect the seller is not liable because of the intrinsically dangerous nature of the article.[20]

**f. Sales on Trial or Approval** — (1) *IN GENERAL.* The contract of sale may provide for a trial or test to determine whether the goods are satisfactory and that the buyer may return the goods if after such trial they prove to be unsatisfactory.[21] Under a contract of this character the obligation of both parties is

Ala. 323, 6 So. 701. And see Aultman *v.* York, 71 Tex. 261, 9 S. W. 127.

**6.** Pollen *v.* Le Roy, 30 N. Y. 549 [*affirming* 10 Bosw. 38]; Barker *v.* Freeland, 91 Tenn. 112, 18 S. W. 60.

**7.** Marshall *v.* Keefe, (Cal. 1893) 34 Pac. 89; Lindsay *v.* Davis, 30 Mo. 406.

**8.** Durfee *v.* Newkirk, 83 Mich. 522, 47 N. W. 351; McKay *v.* Evans, 48 Mich. 597, 12 N. W. 868; Clark *v.* Detroit Locomotive Works, 32 Mich. 348; Staines *v.* Shore, 16 Pa. St. 200, 55 Am. Dec. 492.

**9.** See NEGLIGENCE, 29 Cyc. 478 *et seq.*

**10.** *Iowa.*— Sherrod *v.* Langdon, 21 Iowa 518.

*Kentucky.*— Greenby *v.* Brooks, 13 Ky. L. Rep. 298.

*Maryland.*— State *v.* Fox, 79 Md. 514, 29 Atl. 601, 47 Am. St. Rep. 424, 24 L. R. A. 679.

*Massachusetts.*— French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440.

*New York.*— Van Bracklin *v.* Fonda, 12 Johns. 468, 7 Am. Dec. 339. *Compare* Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 513, holding that after five years' use the seller is not liable to one who used the article with the purchaser's consent.

*Texas.*— Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280. See 43 Cent. Dig. tit. "Sales," § 402.

**Faulty design.**—A furniture dealer who sold a folding bed, manufactured by others, without warranty, which proved to be dangerous to persons using it, not from defective parts, but from inherent defects, resulting from faulty design, which neither he nor the purchaser could discover unless skilled in mechanics, was not liable for injuries resulting from the defects, where the sale was made upon inspection, and the terms thereof were put in writing. White *v.* Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592.

**Contributory negligence.**— The buyer must, however, take reasonable precautions to prevent injury to his property. Graham *v.* Eiszner, 28 Ill. App. 269.

**11.** Rose *v.* Wallace, 11 Ind. 112.

**12.** Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Peckham *v.* Holman, 11 Pick. (Mass.) 484; Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Van Bracklin *v.* Fonda, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339.

**13.** French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440, destruction of cow by eating hay on which white lead had been spilled.

**14.** Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280, delivery of another article than paris green resulting in destruction of cotton crop by worms which paris green was purchased for the purpose of destroying.

**15.** Page *v.* Ford, 12 Ind. 46.

**16.** Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788; Langridge *v.* Levy, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337].

**17.** Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607.

**18.** Stowell *v.* Standard Oil Co., 139 Mich. 18, 102 N. W. 227; Elkins *v.* McKean, 79 Pa. St. 493. And see Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824; Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

**19.** Rose *v.* Wallace, 11 Ind. 112; Sherrod *v.* Langdon, 21 Iowa 518; Greenby *v.* Brooks, 13 Ky. L. Rep. 298.

**Disease communicated to person.**—Where the vendor of a horse fraudulently conceals the fact that it is afflicted with glanders, he is liable for the death of one employed to care for the horse, who contracts the disease, if such is the probable and natural consequence of contact therewith. State *v.* Fox, 79 Md. 514, 29 Atl. 601, 47 Am. St. Rep. 424, 24 L. R. A. 679.

**20.** Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64. And see Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788; Glaser *v.* Seitz, 35 Misc. (N. Y.) 341, 71 N. Y. Suppl. 942.

**21.** Hawley Down-Draft Furnace Co. *v.* Southern Chemical, etc., Co., 51 La. Ann. 914, 25 So. 470; Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Schlesinger *v.* Stratton, 9 R. I. 578; Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591.

**Construction of contract.**—A contract for

suspended until the purchaser's satisfaction is gained or waived.[22] The buyer is not bound to accept until after trial is made,[23] and if the goods are unsatisfactory he may return them and his reasons therefor cannot be questioned [24] so long as his determination is made in good faith.[25] In some jurisdictions sales on trial are, according to the wording of the stipulation, differentiated into those which provide absolutely for a trial and those which do not. Thus it has been held in New York that if the contract provides that the machine sold should be kept if it worked well, the buyer was bound to give it a fair trial; but if it provided merely that it should be kept if it suited the buyer he was not bound to give it a trial before rejecting it.[26] Sales on trial are in the nature of bailments,[27] under which the buyer is, pending the trial, not liable for loss of or injury to the goods unless he is guilty of negligence.[28]

(II) *Mode of Trial.* When the sale is dependent on trial or test, the vendee must properly apply the article sold to the use for which it was purchased if he would claim that when applied it did not serve,[29] and it should be properly and fairly tested.[30] On a sale of machinery it may be the duty of the seller under

the sale of machinery to be set up "ready to run" by the seller, which provided that one fourth of the price should be paid when the machinery was delivered, one fourth ten days after the successful operation of the same, and the remainder ninety days after the successful operation of the same, cannot be construed to require the machinery to stand a test of ten days' successful operation before the second payment became due, and of ninety days before the final payment should be due. Patch Mfg. Co. *v.* Tinsman, 94 Fed. 1023 [*affirmed* in 101 Fed. 373, 41 C. C. A. 388].

**Mental reservation.**— The buyer cannot by a mental reservation of his intention or a mere statement that he takes the property on trial convert what is in fact an absolute sale into a sale on trial. Somers *v.* McLaughlin, 57 Wis. 358, 15 N. W. 442.

**Question for jury.**—Whether there was any material defect in a drill sold and delivered to a buyer, under an agreement that he might return it if not satisfactory, is a question of fact for the jury. Coverdale *v.* Rickards, (Del. 1907) 69 Atl. 1065.

**22.** Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636.

**23.** Mansfield Mach. Works *v.* Lowell, 62 Mich. 546, 29 N. W. 105.

**24.** *Alabama.*— Rumsey *v.* Bessemer, 138 Ala. 329, 35 So. 353.

*Illinois.*— Goodrich *v.* Van Nortwick, 43 Ill. 445.

*Massachusetts.*— Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356, 53 N. E. 862.

*Michigan.*— Platt *v.* Broderick, 70 Mich. 577, 38 N. W. 579; Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57.

*Missouri.*— McCormick *v.* Finch, 100 Mo. App. 641, 75 S. W. 373.

*New York.*— Gray *v.* New Jersey Cent. R. Co., 11 Hun 70; Crane *r.* Schloss, 13 N. Y. Suppl. 581 [*affirmed* in 14 N. Y. Suppl. 886]. *Compare* Hummel *v.* Stern, 21 N. Y. App. Div. 544, 48 N. Y. Suppl. 528.

*Ohio.*— Wilbur *v.* Bingham, 3 Ohio Cir. Ct. 459, 2 Ohio Cir. Dec. 262.

*Pennsylvania.*— Howard *r.* Smedley, 140 Pa. St. 81, 21 Atl. 253; Seeley *v.* Welles, 120 Pa. St. 69, 13 Atl. 736; Singerly *v.* Thayer, 108 Pa. St. 291, 2 Atl. 230, 56 Am. Rep. 207; Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 19 Pa. Super. Ct. 501, 27 Pa. Super. Ct. 433.

*Vermont.*— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

*West Virginia.*— Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591.

See 43 Cent. Dig. tit "Sales," § 409 *et seq.*

**Subject to approval.**—Where the goods are of the quality designated the buyer cannot capriciously reject them because they are sold "subject to approval." De Bavier *v.* Funke, 21 N. Y. Suppl. 410 [*affirmed* in 142 N. Y. 633, 37 N. E. 566].

**25.** *Massachusetts.*—Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356, 53 N. E. 862.

*Ohio.*— Wilbur *v.* Bingham, 3 Ohio Cir. Ct. 459, 2 Ohio Cir. Dec. 262.

*Pennsylvania.*— Seeley *v.* Welles, 120 Pa. St. 69, 13 Atl. 736.

*Vermont.*— McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

*Wisconsin.*— Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

*United States.*— Silsby Mfg. Co. *v.* Chico, 24 Fed. 893.

See 43 Cent. Dig. tit. "Sales," §§ 409, 410.

**26.** Grant *v.* Burch, 26 Hun (N. Y.) 376.

**27.** O'Donnell *v.* Wing, 121 Ga. 717, 49 S. E. 720.

**28.** *Missouri.*— Pike Electric Co. *v.* Richardson Drug Co., 42 Mo. App. 272.

*New Jersey.*— Perrine *v.* Serrell, 30 N. J. L. 454.

*New York.*— Lord *v.* Kenny, 13 Johns. 219. *Compare* Carter *v.* Wallace, 32 Hun 384.

*South Carolina.*— La Borde *v.* Ingraham, 1 Nott & M. 419.

*Virginia.*— Williams *r.* Moore, 3 Munf. 310.

See 43 Cent. Dig. tit. "Sales," § 417.

**29.** Callender Insulating, etc., Co. *v.* Badger, 30 Ill. App. 314, 33 Ill. App. 90.

**30.** Zimmerman *r.* Robinson, 118 Iowa 117, 91 N. W. 918; Delahunty Dyeing Mach. Co. *r.* Pennsylvania Knitting Mills, 19 Pa. Super.

the contract to set up the machine and conduct or assist in making the test;[31] but the fact that the buyer himself set it up does not affect his rights, if his act did not interfere with the trial.[32] The question for determination is not whether the machine sold can be made to work in a manner satisfactory to the seller when operated by his skilled employees, but whether it can be made so to work by the employees of the buyer,[33] and it is no objection that the buyer's employees were inexperienced.[34] The most that is demanded of the buyer is that he bring to trial honesty of purpose according to his capacity, and he is not bound to exercise even the skill of ordinary persons.[35] If a certain period is fixed for making the trial the buyer has the full period in which to make the test;[36] but he is not bound to let the trial continue for the full period and may stop it whenever he is convinced that the article is unsatisfactory.[37] In the absence of any special agreement the trial should be made within a reasonable time.[38]

(III) *APPROVAL AND ACCEPTANCE.* On the fulfilment of the condition and acceptance of the goods sold on trial the sale becomes complete and the buyer is liable for the price,[39] and the same result will follow if he waives a complete test and accepts the articles.[40] The failure of the buyer to exercise the option

Ct. 501, 27 Pa. Super. Ct. 433; McClure *v.* Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528.

**31.** Walter A. Wood Mach. Co *v.* Gaertner, 55 Mich. 453, 21 N. W. 885; Reaney *v.* Culbertson, 21 Pa. St. 507.

**Expense of trial or test.**—Where a seller delivers poorer goods than are ordered, without notifying the buyer of their inferiority, he must stand the reasonable and necessary expense of testing them. Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881. Where one agrees to furnish machinery and run the same on a test, he, and not the purchaser, is liable for oil furnished by the buyer and used in the test. American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. 350.

**32.** Platt *v.* Broderick, 70 Mich. 577, 38 N. W. 579; Cowan *v.* Fisher, 31 Ont. 426, holding that the sellers of a machine, who agree that the inventor shall personally superintend the putting up and starting of the machine, may recover the purchase-price where another competent person sets it up on the inventor's refusal to do so, on the ground that the breach of the agreement may be satisfied by damages.

**33.** Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 19 Pa. Super. Ct. 501, 27 Pa. Super. Ct. 433.

**Compliance with certain tests.**— If the machine is to show a certain capacity or durability when submitted to specific tests, the fact that it withstood such test at the hands of an official inspector is sufficient. Mussinan *v.* New York Steam Co., 42 N. Y. App. Div. 625, 58 N. Y. Suppl. 1009.

**34.** Howard *v.* Smedley, 140 Pa. St. 81, 21 Atl. 253.

**35.** Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528.

**36.** Springfield Engine Stop Co. *v.* Sharp, 184 Mass. 266, 68 N. E. 224.

**Length of test.**— Under an agreement to fit a mill with machinery, the last instalment to be paid "when the machinery has been running thirty days and proves satisfactory," the vendor of the machinery is not entitled to thirty days' trial, but only to a reasonable time, which may be much less if it becomes apparent that the machinery is not adapted to the purpose. Cleaver *v.* Bullock, 111 Pa. St. 441, 4 Atl. 852.

**37.** Williams Mfg. Co. *v.* Standard Brasa Co., 173 Mass. 356, 53 N. E. 862.

**38.** Griswold *v.* Scott, 13 Ga. 210; McDonald *v.* Pierson, 38 Barb. (N. Y.) 128.

**A delay of one year** after receiving the machine and of four months after defendants were in position to test it is unreasonable. S. C. Forsaith Mach. Co. *v.* Mengel, 99 Mich. 280, 58 N. W. 305.

**39.** Cannon *v.* Griffith, 3 Kan. App. 506, 43 Pac. 829.

**Sale of several articles.**— On a sale of a feed cutter, horse power, and belt, on trial the buyer may accept the feed cutter and reject the other articles. Silvernail *v.* Rust, 88 Wis. 458, 60 N. W. 787.

**40.** Chase's Patent El. Co. *v.* Boston Tow-Boat Co., 155 Mass. 211, 29 N. E. 470; Hutches *v.* J. I. Case Threshing Mach. Co., (Tex. Civ. App. 1896) 35 S. W. 60; Dodge *v.* Dickson Mfg. Co., 113 Fed. 218, 51 C. C. A. 175.

**Failure of the buyer to make the trial provided for** is equivalent to an approval and acceptance. McDonald *v.* Pierson, 38 Barb. (N. Y.) 128; Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Thomson-Houston Electric Co. *v.* Brush-Swan Electric Light, etc., Co., 31 Fed. 535.

**Trial prevented by buyer.**— If the trial provided for in the contract is prevented by the buyer, he waives such stipulation. Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014.

**Excuse for failure to make test.**—The opinion of experts that a machine sold on trial will not work up to the stipulation in the contract is no excuse for the failure to make the required test. McDonald *v.* Pierson, 38 Barb. (N. Y.) 128. So it has been held that a failure to make the test required is not excused by the fact that a similar article

within a reasonable time, the article being retained, is equivalent to an acceptance,[41] and the mere fact that the buyer complained to the seller of the unsatisfactory character of the goods is not sufficient to change the effect of his conduct.[42] So too it amounts to an acceptance if the buyer so misuses the property as to materially impair its value.[43] But it does not amount to an acceptance that the buyer retained the article at the request of the seller,[44] or retained and used it on the failure of the seller to remove it after due notice so to do.[45]

(IV) *EXERCISE OF RIGHT TO REJECT OR RETURN* — (A) *In General.* Where the contract provides for a return of the goods if not satisfactory, the buyer cannot relieve himself from liability for the price, unless he returns or offers to return them,[46] and the offer to return must be unconditional.[47] But the buyer is relieved from the obligation to return if he is informed that the seller will not receive the article,[48] or if on an offer to return the seller fails to give shipping directions.[49] The seller may recover damages if the buyer wrongfully detains the article,[50] or if, the article being returned, it has been so injured while in the buyer's possession as to materially impair its value.[51] If the right of return is properly exercised the buyer is of course relieved of liability.[52]

(B) *Notice.*[53] If no return is stipulated for, there need be neither a return nor an offer to return, notice of the rejection being sufficient.[54] The contract

bought from the seller by another person had been tested and rejected. Waters Heater Co. *v.* Mansfield, 48 Vt. 378. But see Waters' Patent Heater Co. *v.* Smith, 120 Mass. 444, holding that, if it had been ascertained by actual trial that machines exactly similar were necessarily incapable from their construction of doing what was promised for them, it was not necessary to put the particular one to the test of actual experiment.

41. *Illinois.*— Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621; Underwood *v.* Wolf, 31 Ill. App. 637 [*affirmed* in 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40].

*Maryland.*— Delamater *v.* Chappell, 48 Md. 244; Spickler *v.* Marsh, 36 Md. 222.

*Massachusetts.*— Pennsylvania Iron Works Co. *v.* Hygeian Ice, etc., Co., 185 Mass. 366, 70 N. E. 427.

*Missouri.*— Quinn *v.* Stout, 31 Mo. 160; Curtiss *v.* Driggs, 25 Mo. App. 175.

*New York.*— Cassidy *v.* Le Fevre, 45 N. Y. 562 [*affirming* 57 Barb. 313] (repairs allowed to be made); Golden Gate Concentrator Co. *v.* Caplice, 55 N. Y. Super. Ct. 439.

*Pennsylvania.*— Dewey *v.* Erie Borough, 14 Pa. St. 211, 53 Am. Dec. 533.

*Rhode Island.*— Schlesinger *v.* Stratton, 9 R. I. 578.

*Wisconsin.*— Fintel *v.* Cook, 88 Wis. 485, 60 N. W. 788.

See 43 Cent. Dig. tit. "Sales," § 411.

**Retention and use.**—Where defendant to whom plaintiff had sold a harvesting machine, to be paid for if it should prove satisfactory, after using the machine for a day and a half decided to return it for defects, but, in order to finish his harvesting, used it the next day, and then offered to return it, there was an acceptance, by which defendant waived his right to return it. Palmer *v.* Banfield, 86 Wis. 441, 56 N. W. 1090.

**Election to keep and repair.**— Where purchasers of machinery which the seller stipulates shall "perform in a satisfactory manner" do not return it at the expiration of the time given for trial, but notify the seller that unless he puts the machinery into "satisfactory working condition" they will have it done at his expense, they elect to keep it, and are liable for the price, less the amount required to put it into satisfactory working order. Stutz *v.* Loyal-Hanna Coal, etc., Co., 131 Pa. St. 267, 18 Atl. 875.

**Where the purchaser disables himself from returning by mortgaging the property,** there is an acceptance and he is liable for the price. *In re* Ward, 57 Minn. 377, 59 N. W. 311.

42. Empire Steam Pump Co. *v.* Inman, 59 Hun (N. Y.) 230, 12 N. Y. Suppl. 948.

43. Ray *v.* Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187. See also Taylor *v.* Tillotson, 16 Wend. (N. Y.) 494.

44. McCormick Harvesting Mach. Co. *v.* Dodkins, 73 S. W. 1129, 24 Ky. L. Rep. 2306; Snody *v.* Shier, 88 Mich. 304, 50 N. W. 252; Osborne *v.* Everett, (Pa. 1888) 15 Atl. 723; Aultman *v.* McFallon, 11 Fed. 836.

45. Cooke *v.* Underhill Mfg. Co., 57 Hun (N. Y.) 107, 10 N. Y. Suppl. 446 [*affirmed* in 138 N. Y. 610, 33 N. E. 728]; Dawes *v.* Peebles, 6 Fed. 856.

46. Osborn *v.* Stanley, 35 Ill. 102, 85 Am. Dec. 347; Nichols *v.* Guibor, 20 Ill. 285; Hastings *v.* Adams, 67 Vt. 119, 30 Atl. 804.

47. Howard *v.* Hayes, 47 N. Y. Super. Ct. 89 [*affirmed* in 90 N. Y. 643].

48. Sycamore Marsh Harvester Co. *v.* Grundrad, 16 Nebr. 529, 20 N. W. 832.

49. Colles *v.* Swensberg, 90 Mich. 223, 51 N. W. 275.

50. Redmond *v.* American Mfg. Co., 121 N. Y. 415, 24 N. E. 924 [*affirming* 56 N. Y. Super. Ct. 372, 3 N. Y. Suppl. 823].

51. Taylor *v.* Tillotson, 16 Wend. (N. Y.) 494.

52. Smith *v.* Minnesota Transfer Packing Co., 38 Minn. 450, 38 N. W. 204.

53. Under warranty see *infra*, VII, G.

54. *Minnesota.*— McCormick Harvesting

may provide that notice of defects shall be given to the seller, and in such case the notice stipulated for must be given to relieve the buyer from liability for the price.[55] Such notice may, however, be waived,[56] as where the seller agrees to make inquiry as to the result himself.[57]

(c) *Time and Place For Return or Rejection.* If the contract limits the time within which the trial is to be made and the article accepted, the option to reject and return must be exercised promptly on or before the expiration of the period limited,[58] and he cannot elect to reject and return the property after the period limited has expired.[59] Any unnecessary application of the article to his advantage and benefit is consistent only with a decision to become or continue owner;[60] at least unless the continued use is necessary to obviate serious inconvenience resulting from the making of the trial.[61] In the absence of any limitation as to time, the option to reject must be exercised and notice thereof given within a reasonable time.[62] What is a reasonable time depends on the circumstances.[63]

Mach. Co. *v.* Chesrown, 33 Minn. 32, 21 N. W. 846.

*Missouri.*— Esterly *v.* Campbell, 44 Mo. App. 621.

*New Jersey.*— Starr *v.* Torrey, 22 N. J. L. 190.

*Vermont.*— Gibson *v.* Vail, 53 Vt. 476.

*Wisconsin.*— Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 69 Wis. 454, 34 N. W. 509.

See 43 Cent. Dig. tit. "Sales," § 414.

*Compare* Vanpelt *v.* Kendall, Ga. Dec. 75.

But see Aiken *v.* Hyde, 99 Mass. 183.

**55.** Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621; Aultman *v.* Morse, 14 Fed. 152.

**56.** Osborne *v.* Everett, (Pa. 1888) 15 Atl. 723; Aultman *v.* Morse, 14 Fed. 152.

**57.** Wartman *v.* Breed, 117 Mass. 18; Gibson *v.* Vail, 53 Vt. 476; Suit *v.* Bonnell, 33 Wis. 180.

**58.** *Illinois.*— Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621.

*Indiana.*— Barlow *v.* Thompson, 46 Ind. 384.

*Minnesota.*—Latham *v.* Bausman, 39 Minn. 57, 38 N. W. 776.

*Missouri.*— Curtiss *v.* Driggs, 25 Mo. App. 175.

*New Jersey.*— Columbia Rolling Mill Co. *v.* Beckett Foundry, etc., Co., 55 N. J. L. 391, 26 Atl. 888.

*North Carolina.*— Moore *v.* Piercy, 46 N. C. 131.

*Pennsylvania.*— Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308.

**Computation of time.**—Where the contract provides that, if a machine is not satisfactory, the vendee shall give notice thereof to the vendor within ninety days, in computing the time, the machine should be deemed erected when properly placed in position to perform the work intended, even though in some parts it was not yet strictly and skilfully adjusted. Cook *v.* Flint, 2 Ind. App. 41, 28 N. E. 200.

**59.** Phelps-Bigelow Windmill Co. *v.* Piercy, 41 Kan. 763, 21 Pac. 793. But see Springfield Engine Stop Co. *v.* Sharp, 184 Mass. 266, 68 N. E. 224, holding that where a specified period is allowed for trial the buyer has a reasonable time within which to elect to accept or reject.

**Waiver.**—A provision in a contract of sale requiring the purchaser to notify the seller of defects in the machine immediately after giving the same a ten days' trial is not waived by the seller's attempt to remedy defects pursuant to a notice given long after the stipulated period, where the contract expressly provides that such attempt shall not have this effect. Boyer *v.* Neel, 50 Mo. App. 26.

**60.** Fox *v.* Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. N. S. 1107; Palmer *v.* Banfield, 86 Wis. 441, 56 N. W. 1090.

**Illustration.**— One who after testing a harvesting machine purchased by him and discovering that it is unsatisfactory continues to use it, not in order to make a further test, but to complete his harvest, accepts the machine and loses his right to return it. Palmer *v.* Banfield, 86 Wis. 441, 56 N. W. 1090.

**61.** Fox *v.* Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. N. S. 1107.

**62.** *Alabama.*— Rumsey *v.* Bessemer, 138 Ala. 329, 35 So. 353.

*Delaware.*— Coverdale *v.* Rickards, (1907) 69 Atl. 1065.

*Georgia.*— Griswold *v.* Scott, 13 Ga. 210.

*Illinois* — Osborn *v.* Stanley, 35 Ill. 102, 85 Am. Dec. 347; Frederick *v.* Case, 28 Ill. App. 215. But see Nichols *v.* Guibor, 20 Ill. 285.

*Kansas.*— Craver *v.* Hornburg, 26 Kan. 94.

*Maryland.*— Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75.

*Michigan.*— Childs *v.* O'Donnell, 84 Mich. 533, 47 N. W. 1108.

*Missouri.*— Quinn *v.* Stout, 31 Mo. 160; Esterly *v.* Campbell, 44 Mo. App. 621.

*New York.*— Crandall *v.* Haskins, 10 N. Y. St. 107.

*Pennsylvania.*— Dewey *v.* Erie Borough, 14 Pa. St. 211, 53 Am. Dec. 533.

*Vermont.*— Gibson *v.* Vail, 53 Vt. 476.

See 43 Cent. Dig. tit. "Sales," §§ 413, 414.

**63.** Crandall *v.* Haskins, 10 N. Y. St. 107; Boothby *v.* Scales, 27 Wis. 626.

**What is reasonable time illustrated.**— Where a cotton gin was taken upon trial, in the spring of the year, with an agreement

If no place of return is designated, the buyer's place of residence or business is the place of return.[64]

(v) *RIGHT TO REPAIR OR REPLACE.* A stipulation that if the machine sold proves defective on a trial of a designated period the seller shall repair the defect applies only to defects discovered within the period.[65] If the contract gives the seller the privilege of replacing the machine, the buyer's right of rejection is not absolute, but the seller may insist on his right to substitute a new machine.[66] If the seller fails to exercise his option to repair or replace within a reasonable time the buyer may then reject the machine.[67]

**g. Estoppel and Waiver as to Defects in Quality**[68] — (i) *IN GENERAL.* The buyer is estopped to complain of defects in the goods when he had knowledge or notice thereof at the time of the sale,[69] or retains the goods after a reasonable time in which to make inspection has elapsed,[70] or when he selects the article himself,[71] or directs how it shall be constructed.[72] So too if he refuses to accept the goods on other grounds he cannot afterward object on the ground that they are defective.[73]

(ii) *ACCEPTANCE OF GOODS.*[74] In the absence of fraud or breach of war-

to purchase, if it answered its purpose, and notice was sent, in October following, that it would not perform, and that he would not keep it, the buyer made his election seasonably. Hall *v.* Merriwether, 19 Tex. 224.

**Question for jury.**—What is a reasonable time within which the offer to return should be made is a question for the jury. Crandall *v.* Haskins, 10 N. Y. St. 107; Boothby *v.* Scales, 27 Wis. 626.

**64.** Backus Mfg. Co. *v.* Feldman, 9 Misc. (N. Y.) 387, 30 N. Y. Suppl. 189.

**Return is not waived by the refusal of the seller's agent to specify a place of return,** where he advises the buyer that he has no authority in the matter but must await instructions from the seller. Zimmerman *v.* Robinson, 118 Iowa 117, 91 N. W. 918.

**65.** Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737, holding that after such period the seller was not bound to repair.

**Notice to make repairs.**—Where the seller of a harvester, on its failure to do good work, agreed to repair it so that it could do good work at the next harvest, the agreement providing that the purchaser should give notice two days before he wished to start the machine, and actually made certain repairs several weeks before harvest and informed the purchaser that the machine was all right, after such assurance no necessity existed for the purchaser to give the notice provided for in the agreement. Plano Mfg. Co. *v.* Kesler, 15 Ind. App. 110, 43 N. E. 925.

**66.** Davis *v.* Butrick, 68 Iowa 94, 26 N. W. 27; Pinney *v.* Hall, 1 Hill (N. Y.) 89.

**67.** Price *v.* Marthen, 124 Mich. 690, 83 N. W. 1021.

**68. Knowledge of defects as affecting existence of implied warranty** see *infra*, VII, D, 6, e, (XI).

**69.** *Indiana.*— Quwack *v.* Cruse, Wils. 320.

*Louisiana.*— Bell *v.* Lacy, 16 La. Ann. 51; Edwards *v.* Glasson, 12 La. Ann. 586; Phipps *v.* Berger, 12 La. Ann. 111; Hough *v.* Vickers, 6 La. Ann. 724; Jourdan *v.* Virgil, 5 La. Ann. 40; Clarke *v.* Lockhart, 10 Rob. 5; Lemos *v.* Daubert, 8 Rob. 225.

*Missouri.*— Dooly *v.* Jinnings, 6 Mo. 61.

*North Carolina.*— Brittain *v.* Israel, 10 N. C. 222.

*Wisconsin.*— Prince *v.* Overholser, 75 Wis. 646, 44 N. W. 775.

See 43 Cent. Dig. tit. "Sales," § 437.

**Extent of buyer's knowledge.**— The vendee's knowledge that the slave was diseased will not defeat his redhibitory action. It must be shown that he knew the disease was incurable, or assumed all risks. Hepp *v.* Parker, 8 Mart. N. S. (La.) 473. A reference in the sale to the act by which the vendor himself acquired a slave, and which stated that the slave was a runaway, will not bring home to the vendee a knowledge of the defect. Winn *v.* Twogood, 9 La. 422.

**Knowledge to be clearly shown.**— The knowledge of the existence of a disease in a slave, by the buyer, which would deprive him of his action to rescind the sale for a redhibitory vice, must be clearly established. It will not be sufficient to prove merely that there was some conversation about the health of the slave, although the vendee may have said "he knew all about the slave." Girod *v.* Belknap, 12 La. Ann. 791.

**70.** Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

**71.** McKinnon Mfg. Co. *v.* Alpena Fish Co., 102 Mich. 221, 60 N. W. 472. But *compare* U. S. Electric Fire-Alarm Co. *v.* Big Rapids, 78 Mich. 67, 43 N. W. 1030.

**72.** Archdale *v.* Moore, 19 Ill. 565; Davidson *v.* Clark, 36 Ill. App. 313; Schuchman *v.* Winterbottom, 58 N. Y. Super. Ct. 105, 9 N. Y. Suppl. 733 [*affirmed* in 130 N. Y. 699, 30 N. E. 63]; Provenzano *v.* Thayer Mfg. Co., 9 Daly (N. Y.) 91; McInnes *v.* Rittenhouse, (Pa. 1889) 16 Atl. 818; Chester Steel Castings Co. *v.* Brownscombe, 7 Kulp (Pa.) 136.

**73.** Smith *v.* Pettee, 70 N. Y. 13; Meincke *v.* Falk, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157. But see Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

**74. As waiver of breach of warranty** see *infra*, VII, I, 3.

ranty, the acceptance of the goods delivered, without protest, waives any defects in quality,[75] especially where the acceptance is after inspection or an opportunity

**75.** *California.*— Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722.

*Georgia.*— Houser *v.* Gurr, 88 Ga. 433, 14 S. E. 594.

*Indiana.*— O'Brien *v.* Higly, 162 Ind. 316, 70 N. E. 242; Barkalow *v.* Pfeiffer, 38 Ind. 214; Ricketts *v.* Hays, 13 Ind. 181; Fellows *v.* Stevens, 1 Blackf. 508. But see Wilson *v.* Western Fruit Co., 11 Ind. App. 89, 38 N. E. 827, where the goods were worthless.

*Iowa.*— Keniston *v.* Todd, 139 Iowa 287, 117 N. W. 674; Schopp *v.* Taft, 106 Iowa 612, 76 N. W. 843; Aultman-Taylor Mach. Co. *v.* Ridenour, 96 Iowa 638, 65 N. W. 980; Berthold *v.* Seevers Mfg. Co., 89 Iowa 506, 56 N. W. 669; Mackey *v.* Swartz, 60 Iowa 710, 15 N. W. 576; Fear *v.* Jones, 6 Iowa 169.

*Kentucky.*— Dana *v.* Boyd, 2 J. J. Marsh. 587; Allison *v.* Noble, 1 Litt. 279, 12 Am. Dec. 230.

*Louisiana.*— Cazelar *v.* Walker, 17 La. Ann. 236; Holland *v.* Toole, 6 La. Ann. 426.

*Maine.*— Goodhue *v.* Butman, 8 Me. 116.

*Maryland.*— Mulliken *v.* Boyce, 1 Gill 60.

*Massachusetts.*— Chase's Patent Elevator Co. *v.* Boston Tow-Boat Co., 155 Mass. 211, 29 N. E. 470; Eastern R. Co. *v.* Benedict, 15 Gray 289.

*Michigan.*— Talbot Paving Co. *v.* Gorman, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96; Comstock *v.* Sanger, 51 Mich. 497, 16 N. W. 872.

*Minnesota.*— Singer *v.* Brockamp, 33 Minn. 501, 24 N. W. 189; Lee *v.* Bangs, 43 Minn. 23, 44 N. W. 671.

*Mississippi.*— American Steel Hoop Co. *v.* Searles, 93 Miss. 1, 46 So. 411.

*Missouri.*— Graff *v.* Foster, 67 Mo. 512; Stevens *v.* McKay, 40 Mo. 224; Nugent *v.* Armour Packing Co., (App. 1904) 81 S. W. 506; Tufts *v.* Morris, 87 Mo. App. 98.

*Nebraska.*— Cohen *v.* Hawkins, 74 Nebr. 249, 104 N. W. 179.

*New Jersey.*— Fitch *v.* Archibald, 29 N. J. L. 160; Trotter *v.* Heckscher, 42 N. J. Eq. 251, 7 Atl. 353.

*New York.*— Durbrow, etc., Mfg. Co. *v.* Cuming, 35 N. Y. App. Div. 376, 54 N. Y. Suppl. 818; Fitch *v.* Carpenter, 43 Barb. 40; Marcus *v.* Thornton, 44 N. Y. Super. Ct. 411; U. S. Trust Co. *v.* Harris, 2 Bosw. 75; Warren *v.* Van Pelt, 4 E. D. Smith 202; Ely *v.* O'Leary, 2 E. D. Smith 355; Wilmerding *v.* Strouse, 112 N. Y. Suppl. 1091; Smith *v.* Servis, 11 N. Y. Suppl. 301; Sprague *v.* Blake, 20 Wend. 61.

*Ohio.*— Bowman Lumber Co. *v.* Anderson, 70 Ohio St. 16, 70 N. E. 503; Rhodes *v.* Powers Coal Co., 4 Ohio Dec. (Reprint) 185, 1 Clev. L. Rep. 99.

*Pennsylvania.*— Louis Werner Saw-Mill Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924; Krauskopf *v.* Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506; Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186; Morse *v.* Arnfield, 15 Pa. Super. Ct. 140.

*South Carolina.*— Massillon Sign & Poster Co. *v.* Buffalo Lick Springs Co., 81 S. C. 114, 61 S. E. 1098; Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660.

*Tennessee.*— Attleboro Mfg. Co. *v.* Calhoun, 1 Tenn. Ch. App. 42.

*Texas.*— Seay *v.* Diller, (1891) 16 S. W. 642; Deadrick *v.* Rice, 26 Tex. 567; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10; Streeper *v.* Frieberg, 3 Tex. App. Civ. Cas. § 240.

*Vermont.*— Esty *v.* Read, 29 Vt. 278; Cram *v.* Watson, 28 Vt. 22; Cole *v.* Champlain Transp. Co., 26 Vt. 87.

*Washington.*— Williams *v.* Miller, 1 Wash. Terr. 88.

*Wisconsin.*— McCormick Lumber Co. *v.* Winans, 126 Wis. 649, 105 N. W. 945; J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859; Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; Locke *v.* Williamson, 40 Wis. 377.

*United States.*— Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629; Garland *v.* Bowling, 10 Fed. Cas. No. 5,242, Hempst. 710.

See 43 Cent. Dig. tit. "Sales," § 460.

**Patent defects.**— If a buyer accepts goods which are patently defective he is estopped to deny that they are not of the character bargained for. Staiger *v.* Soht, 191 N. Y. 527, 84 N. E. 1120 [*affirming* 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342]; Brooke *v.* Laurens Milling Co., 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780; Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 899; Vanderhorst *v.* McTaggert, 2 Bay (S. C.) 498; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Gorham *v.* Dallas, etc., R. Co., (Tex. Civ. App. 1907) 106 S. W. 930.

**Acceptance after repairs.**— Where the seller of a machine which turned out to be defective took it back to repair it, and, after repairing it, returned it to the purchaser, who gave no subsequent notice to the seller of any defect, the seller might recover of the purchaser so much as the machine was reasonably worth. Frankenfield *v.* Freyman, 13 Pa. St. 56.

**Acceptance at reduced price.**— Where the purchaser of a machine, after objecting that it is not of the standard required by his contract of purchase, agrees to retain it at a reduced price, he cannot afterward object to its quality. James *v.* Bocage, 45 Ark. 284. And see Mason *v.* Smith, 5 Silv. Sup. (N. Y.) 346, 8 N. Y. Suppl. 301. Where defendants purchased ore of a certain quality at a certain price, and ore of inferior quality was delivered, and accepted by defendants, they can reduce the price agreed on to the extent of the damages sustained by the delivery of such inferior ore, notwithstanding it was accepted. Leonard *v.* Johnson Forge Co., 3 Pennew. (Del.) 104, 50 Atl. 541. See also King *v.* Paddock, 18 Johns. (N. Y.) 141.

to inspect and examine the goods,[76] and is accompanied by a payment of the

**Price varying with quality.**— Where a contract for sale of logs provides that the purchaser shall pay at one rate for good, sound, merchantable logs, and at another rate for inferior logs, a mere acceptance of the logs cannot be held to be an acceptance of the entire lot as being good, sound, and merchantable; and this, although the logs may have been so marked by a scaler whose only business it was to scale the number of feet in the logs. Early *v.* Chippewa Logging Co., 68 Wis. 112, 31 N. W. 714.

**Acceptance by agent.**— Where a buyer selects an employee to receive the materials bought, and the employee accepts some which are not of the character bargained for, the buyer is bound by his acceptance, although the employee had no knowledge of the terms of the contract. Gorham *v.* Dallas, etc., R. Co., (Tex. Civ. App. 1907) 106 S. W. 930.

**Question for jury.**— Whether there was such an acceptance as waived defects in quality is for the jury. Hale Mfg. Co. *v.* American Saw Co., 43 Mich. 250, 5 N. W. 300.

**76.** *Alabama.*— Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Watson *v.* Kirby, 112 Ala. 436, 20 So. 624; Hudson *v.* Germain Fruit Co., 95 Ala. 621, 10 So. 920.

*Arkansas.*— Dillard *v.* Moore, 7 Ark. 166.

*California.*— Bullock *v.* Consumers' Lumber Co., (1892) 31 Pac. 367.

*Delaware.*— Harper *v.* Baird, 3 Pennew. 110, 50 Atl. 326.

*Georgia.*—American Car Co. *v.* Atlantic St. R. Co., 100 Ga. 254, 28 S. E. 40; Harder *v.* Carter, 97 Ga. 273, 23 S. E. 82.

*Illinois.*— McLeod *v.* Andrews, etc., Co., 116 Ill. App. 646; Barker *v.* Turnbull, 51 Ill. App. 226.

*Indiana.*— O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242; Pattison *v.* Jenkins, 33 Ind. 87.

*Kentucky.*— Jones *v.* McEwan, 91 Ky. 373, 16 S. W. 81, 12 Ky. L. Rep. 966, 12 L. R. A. 399; O'Bannon *v.* Relf, 7 Dana 320; Dinwiddie *v.* Nash, 86 S. W. 517, 27 Ky. L. Rep. 668; Albin Co. *v.* Kentucky Table Co., 67 S. W. 13, 23 Ky. L. Rep. 2261.

*Louisiana.*— Frank *v.* Hollander, 35 La. Ann. 582; Poutz *v.* Theard, 23 La. Ann. 246; McGuire *v.* Kearny, 17 La. Ann. 295; Bloom *v.* Beebe, 15 La. Ann. 65.

*Massachusetts.*— Chase's Patent El. Co. *v.* Boston Tow-Boat Co., 155 Mass. 211, 29 N. E. 470; Giles Lith., etc., Co. *v.* Chase, 149 Mass. 459, 21 N. E. 765, 14 Am. St. Rep. 439, 4 L. R. A. 480.

*Michigan.*— Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352.

*Minnesota.*— Potter *v.* Holmes, 87 Minn. 477, 92 N. W. 411; Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150; Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

*Mississippi.*— Watkins *v.* Guthrie, (1905) 38 So. 370.

*Missouri.*— Black River Lumber Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210.

*New York.*— Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57 [*affirming* 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350]; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 515; McCormick *v.* Sarson, 45 N. Y. 265, 6 Am. Rep. 80; Hargous *v.* Stone, 5 N. Y. 73; Patch *v.* Smith, 105 N. Y. App. Div. 208, 94 N. Y. Suppl. 692; Smith *v.* Coe, 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350 [*affirmed* in 170 N. Y. 162, 63 N. E. 57], 57 N. Y. App. Div. 631, 68 N. Y. Suppl. 274; Eagle Works *v.* Churchill, 2 Bosw. 166; New York State Monitor Milk Pan Co. *v.* Remington, 41 Hun 218 [*affirmed* in 109 N. Y. 143, 16 N. E. 48]; Neaffie *v.* Hart, 4 Lans. 4; Shaw *v.* Lighthouse, 4 Silv. Sup. 134, 7 N. Y. Suppl. 271; Bolles *v.* Valentine, 15 Daly 41, 2 N. Y. Suppl. 710; Stuart *v.* Manhattan Bath Tub Co., 34 Misc. 165, 68 N. Y. Suppl. 816; Budd *v.* McCann, 110 N. Y. Suppl. 1051; Casselli *v.* Mosso, 90 N. Y. Suppl. 371; Stewart *v.* Gibbs, 1 Alb. L. J. 102.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

*Pennsylvania.*— Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40; Field *v.* Schuster, 26 Pa. Super. Ct. 82.

*Texas.*— Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Ranger *v.* Hearne, 37 Tex. 30; Maud *v.* Coppinger, 23 Tex. Civ. App. 128, 56 S. W. 127; Hutches *v.* J. I. Case Threshing Mach. Co., (Civ. App. 1896) 35 S. W. 60.

*Washington.*— Childs Lumber, etc., Co. *v.* Page, 28 Wash. 128, 68 Pac. 373.

*United States.*— Carleton *v.* Jenks, 80 Fed. 937, 26 C. C. A. 265; Reynolds *v.* Palmer, 21 Fed. 433; Calhoun *v.* Vechio, 4 Fed. Cas. No. 2,310, 3 Wash. 165.

*Canada.*— Labrecque *v.* Duckett, 22 Quebec Super. Ct. 135.

See 43 Cent. Dig. tit. "Sales," §§ 440, 461.

**Defect not discoverable on inspection.**—A seller's obligation as to the quality of oil delivered survived acceptance by an inspector, if a defect therein was latent, and was such as would not appear upon an inspection to ascertain whether the oil accepted corresponded with that described in the contract. Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422. See also Brown *v.* Sayles, 27 Vt. 227.

**Partial inspection.**— Where partial failure of consideration is alleged in defense to an action on notes given for the price of property, a charge is erroneous where it directs a deduction for the deficiencies if plaintiff prevented a full and satisfactory examination, as defendant's knowledge of facts acquired by partial investigation would not be obliterated by any hindrance to further inspection interposed by plaintiff. Merrill *v.* Taylor, 72 Tex. 293, 10 S. W. 532.

**Time and place of inspection.**— Where a contract of sale of lumber provided for grading the same according to certain rules, without saying by whom it should be graded, and during the whole period of dealings it was graded by the purchaser after reaching its destination, and accounts rendered monthly to the seller, who made no objection, it was error to instruct the jury that

price,[77] or followed by a resale,[78] or by the retention and use of the goods.[79] Waiver of defects does not result from a single instance of use after notice to the seller to remove the goods,[80] or from use for the purpose of testing the article,[81] or while efforts are being made to remedy defects.[82] Merely receiving the article will not amount to a waiver, unless followed by an acceptance.[83] An acceptance to operate as a waiver

when the vendor, at his mill, delivered the lumber to the purchaser's agent, and the latter accepted it, this was an acceptance of all of it as merchantable lumber. Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 30 C. C. A. 260.

**77.** *Delaware.*— Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64.

*Georgia.*— Liquid Carbonic, etc., Co. *v.* Paulk, 3 Ga. App. 372, 59 S. E. 1125.

*Louisiana.*— Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664, 29 So. 265.

*New York.*— Weaver *v.* Wisner, 51 Barb. 638; Budd *v.* McCann, 110 N. Y. Suppl. 1051.

*Texas.*— Wren *v.* Kiedel, (Civ. App. 1894) 27 S. W. 848.

*Virginia.*— Proctor *v.* Spratley, 78 Va. 254.

*Compare* Taylor *v.* Cole, 111 Mass. 363. holding that payment of the price with knowledge of defects was not conclusive evidence of waiver of claim for damages for defective condition.

**Independent covenants.**— If the stipulation as to payment is an independent condition, payment will not be evidence of a waiver. Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223.

**Part payment.**— The fact that a buyer of goods has made a part payment thereon does not preclude him from objecting to their quality in an action brought for the price. Atkins *v.* Cobb, 56 Ga. 86.

**Payment of note in hands of innocent purchaser.**— Where a note given by the purchaser of personal property has, before maturity, passed into the hands of an innocent holder for value and without notice, payment of the note by the maker does not bar his right to recover damages for breach of the contract of sale. Creighton *v.* Comstock, 27 Ohio St. 548.

**Renewal of note for price.**— The giving of new notes in renewal of some given for a defective machine, on the agreement that it should be made good, is not a waiver of the right to a counter-claim for the defects. Case *v.* Grim, 77 Ind. 565.

**78.** *Georgia.*— Liquid Carbonic, etc., Co. *v.* Paulk, 3 Ga. App. 372, 59 S. E. 1125.

*Illinois.*— Burns *v.* Mays, 88 Ill. 233; Houston *v.* Clark, 62 Ill. App. 174.

*Indiana.*— Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030.

*New York.*— Richardson *v.* Levi, 69 Hun 432, 22 N. Y. Suppl. 352; Carr *v.* Sullivan, 68 Hun 246, 22 N. Y. Suppl. 972; Fairbank Canning Co. *v.* Metzger, 43 Hun 71 [*reversed* on other grounds in 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753].

*Oregon.*— Lenz *v.* Blake, 44 Oreg. 569, 76 Pac. 356.

*Virginia.*— Proctor *v.* Spratley, 78 Va. 254.

*England.*— Street *v.* Blay, 2 B. & Adol. 456, 22 E. C. L. 193.

See 43 Cent. Dig. tit. "Sales," § 462.

**Sale before defects are discovered.**— A resale of a small portion of the goods before the defects are discovered will not operate as a waiver. Armsby Co. *v.* Shewmake, 113 Ga. 1086, 39 S. E. 473.

**Resale to prevent loss.**— A sale of goods to prevent loss after an unqualified refusal to accept is not a waiver. Tripis *v.* Gamble, (Tex. Civ. App. 1894) 28 S. W. 244.

**79.** *Illinois.*— De Kalb Implement Works *v.* White, 59 Ill. App. 171; McBride *v.* McClure, 49 Ill. App. 612.

*Kansas.*— Tufts *v.* Mabie, 7 Kan. App. 129, 53 Pac. 84.

*Massachusetts.*— Springfield Engine Stop Co. *v.* Sharp, 184 Mass. 266, 68 N. E. 224.

*New Jersey.*— Woodward *v.* Emmons, 61 N. J. L. 281, 39 Atl. 703.

*New York.*— Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253]; Brown *v.* Foster, 108 N. Y. 387, 15 N. E. 608; Ellison *v.* Creed, 34 N. Y. App. Div. 15, 53 N. Y. Suppl. 1054; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464, 50 N. Y. Suppl. 691; Wiles *v.* Provost, 6 N. Y. App. Div. 1, 39 N. Y. Suppl. 461; Schuchman *v.* Winterbottom, 58 N. Y. Super. Ct. 105, 9 N. Y. Suppl. 733 [*affirmed* in 130 N. Y. 699, 30 N. E. 63]; Turl *v.* Knabe, 26 Misc. 770, 56 N. Y. Suppl. 1017; Logan *v.* Berkshire Apartment House, 3 Misc. 296, 22 N. Y. Suppl. 776 [*affirming* 1 Misc. 18, 20 N. Y. Suppl. 369]. But see Ballenbacher *v.* Finney, 12 N. Y. St. 568.

*North Carolina.*— Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718.

*Wisconsin.*— Walter A. Wood Mowing, etc., Mach. Co. *v.* Calvert, 89 Wis. 640, 62 N. W. 532; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 56 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135.

*United States.*— Hercules Iron Works *v.* Dodsworth, 57 Fed. 556.

**80.** Schwartz *v.* Church of Holy Cross, 60 Minn. 183, 62 N. W. 266; Chambers *v.* Lancaster, 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253 [*affirmed* in 160 N. Y. 342, 54 N. E. 707]; Walter A. Wood Mowing, etc., Mach. Co. *v.* Calvert, 89 Wis. 640, 62 N. W. 532.

**81.** Creamery Package Mfg. Co. *v.* Benton County Creamery Co., 120 Iowa 584, 95 N. W. 188; Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Philadelphia Whiting Co. *v.* Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Phelps *v.* Whitaker, 37 Mich. 72.

**82.** Crabtree *v.* Potts, 108 Ill. App. 627.

**83.** Armsby Co. *v.* Shewmake, 113 Ga. 1086, 39 S. E. 473; Van Winkle *v.* Wilkins, 81 Ga.

must, however, be unconditional,[84] with knowledge of the defect,[85] and must not have been induced by fraud or misrepresentation,[86] or by stress of circumstances making such acceptance necessary.[87] On the other hand a refusal to accept must also be unqualified and certain,[88] and mere complaint or protest is not sufficient.[89] So a failure to reject or return goods within a reasonable time will be construed as an acceptance waiving defects.[90]

(III) *ACCEPTANCE OF PART OF GOODS.* The acceptance of a part of the goods, while waiving defects as to the part accepted,[91] does not waive defects as to the remainder,[92] unless the contract is entire.[93] The buyer cannot of course refuse the remainder if it is of the proper quality.[94]

**11. EXCUSES FOR DEFAULT OR DELAY IN DELIVERY — a. In General.** Where there has been default or delay in delivery the circumstances under which such default or delay occurred may or may not excuse the failure to perform according to the nature thereof. The circumstances may be within the control of the seller,[95] they may arise from causes beyond his control,[96] they may depend on contingencies covered by the stipulations of the contract,[97] or they may arise from causes within the control of the buyer.[98]

93. 7 S. E. 644, 12 Am. St. Rep. 299; Creighton *v.* Pacific Coast Lumber Co., 12 Manitoba 546.

84. Tarver *v.* Richardson, 2 Stew. & P. (Ala.) 231; Camors *v.* Gomila, 9 Mo. App. 205.

**Supplemental agreement.**— Where a purchaser of sausages, which were to be dry enough for export, accepted them under a supplemental agreement that the seller would make good any claim made for too much fat, such agreement was a waiver of the effect of the acceptance as a concession that the seller had complied with the contract. James *v.* Libby, 103 N. Y. App. Div. 256, 92 N. Y. Suppl. 1047 [*reversing* 44 Misc. 210, 88 N. Y. Suppl. 812].

85. Eagan Co. *v.* Johnson, 82 Ala. 233, 2 So. 302; Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. 373, 23 Ky. L. Rep. 1834; Taylor *v.* Mueller, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199; Ancrum *v.* Wehmann, 15 S. C. 118.

86. Dutchess Co. *v.* Harding, 49 N. Y. 321; Myers *v.* Menifee, 30 Tex. Civ. App. 28, 68 S. W. 540.

87. Industrial Works *v.* Mitchell, 114 Mich. 29, 72 N. W. 25; Andrews *v.* Eastman, 41 Vt. 134, 98 Am. Dec. 570; Ketchum *v.* Wells, 19 Wis. 25. But see Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.

88. Bascom *v.* Danville Stove, etc., Co., 182 Pa. St. 427, 38 Atl. 510; American Watch Tool Co. *v.* Reed Mfg. Co., 18 Pa. Super. Ct. 24.

89. Wiles *v.* Provost, 6 N. Y. App. Div. 1, 39 N. Y. Suppl. 461; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.

90. *Illinois.*— Ellis *v.* Roche, 73 Ill. 280.

*Minnesota.*— Haase *v.* Nonnemacher, 21 Minn. 486.

*New York.*— Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Adams *v.* Mayer, 56 N. Y. Super. Ct. 572, 4 N. Y. Suppl. 715; Fisher *v.* Merwin, 1 Daly 234; Hospital Supply Co. *v.* O'Neill, 10 Misc. 655, 31 N. Y. Suppl. 792 [*affirmed* in 155 N. Y. 634, 49 N. E. 1098]; Greenthal *v.* Schneider, 52 How. Pr. 133.

*Oregon.*— Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

*Pennsylvania.*— Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405, 50 Atl. 924; Dailey *v.* Green, 15 Pa. St. 118.

*Wisconsin.*— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

**Ascertainment of rights.**— The fact that a purchaser of goods manufactured on his order, while refusing to pay for them on the ground that they did not correspond with the order, refused to give them up before taking advice as to his rights in the premises, does not, as matter of law, show an acceptance of the goods under the contract. Norton *v.* Dreyfuss, 106 N. Y. 90, 12 N. E. 428.

91. Cook *v.* Brandeis, 3 Metc. (Ky.) 555.

92. *California.*— Flint *v.* Lyon, 4 Cal. 17.

*Illinois.*— Hubbard *v.* George, 49 Ill. 275; U. S. Printing Co. *v.* H. O. Wilbur Co., 98 Ill. App. 20.

*Kentucky.*— Cook *v.* Brandeis, 3 Metc. 555.

*Louisiana.*—Huntington *v.* Lowe, 3 La. Ann. 377.

*Missouri.*— American Paper Pail, etc., Co. *v.* Oakes, 64 Mo. App. 235; Armstrong *v.* Johnson Tobacco Co., 41 Mo. App. 254; Hollfield *v.* Black, 20 Mo. App. 328.

*Nebraska.*— Farmer *v.* Gray, 16 Nebr. 401, 20 N. W. 276.

*North Carolina.*— Freeman *v.* Skinner, 31 N. C. 32.

*Washington.*— Pacific Coast El. Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544.

See 43 Cent. Dig. tit. "Sales," § 470.

93. Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194; Mitchell *v.* Le Clair, 165 Mass. 308, 43 N. E. 117; Gilbert *v.* Lichtenberg, 98 Mich. 417, 57 N. W. 259.

94. McFadden *v.* Wetherbee, 63 Mich. 390, 29 N. W. 881; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

95. See *infra*, V, B, 11, b.

96. See *infra*, V, B, 11, c.

97. See *infra*, V, B, 11, d.

98. See *infra*, V, B, 11, e.

**b. Circumstances Within the Control of Seller.** If the default or delay is due to circumstances or causes within the control of the seller, he is not excused. Thus the non-performance is not excused if it is due to the failure of the seller to keep on hand a sufficient supply of the goods sold,[99] or if he has by his own acts put it out of his power to perform.[1] So a failure to deliver goods of the proper quality is not excused because of mistake in sending goods of the wrong kind,[2] or because the wrong delivery was due to the fraud of the seller's employee.[3]

**c. Impossibility of Performance** — (i) *In General.* The general rule that no impossibility arising subsequent to the making of the contract will excuse the performance thereof [4] is of course applicable to the contract of sale;[5] and a seller who promises unconditionally to deliver takes the risk of being unable to perform, although his inability is caused by inevitable accident, or circumstances beyond his control.[6] There is, however, a distinction between cases where the contract is to do something impossible of performance and those where the contract is to do something possible in itself but performance of which is prevented by the occurrence of inevitable accident, although not foreseen by the party and not within his control.[7]

(ii) *Inability to Obtain Goods.* Where the contract of sale is unconditional it is no excuse for non-delivery that the seller's factory or the one on which he relied to obtain the goods has been destroyed or forced to close through natural causes,[8] or that the goods cannot be obtained in the market.[9] The seller is regarded as an insurer to the extent of making good the loss.[10] So where the

99. Easton *v.* Jones, 193 Pa. St. 147, 44 Atl. 264; Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061; Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 285, 38 S. E. 141; James River, etc., Co. *v.* Adams, 17 Gratt. (Va.) 427. And see Phillips *v.* Taylor, 101 N. Y. 639, 4 N. E. 727 [*affirming* 49 N. Y. Super. Ct. 318]. *Compare* Boies *v.* Vincent, 24 Iowa 387.

**Recovery for goods not taken.**— An ice company undertaking to furnish ice from day to day from its surplus product to another company, which was to pay for a certain amount whether taken or not, cannot recover for ice not taken, the failure to take being caused by the first company's neglect to keep a surplus and furnish the amount required from day to day. Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 285, 38 S. E. 141.

1. De Waal *v.* Adler, 12 App. Cas. 141, 56 L. J. P. C. 25, where a failure to deliver certificates of stock was due to the sending of the stock to England.

2. Camden Consol. Oil Co. *v.* Schlens, 59 Md. 31, 43 Am. Rep. 537; Lampson *v.* Cummings, 52 Mich. 491, 18 N. W. 232.

3. Camden Consol. Oil Co. *v.* Schlens, 59 Md. 31, 43 Am. Rep. 537.

4. See Contracts, 9 Cyc. 627.

5. Benjamin Sales (6th Am. ed.) 748.

6. *Alabama.*— Jones *v.* Anderson, 82 Ala. 302, 2 So. 911; Young *v.* Foster, 7 Port. 420.

*Illinois.*— Summers *v.* Hibbard, 153 Ill 102, 38 N. E. 899, 46 Am. St. Rep. 872 [*affirming* 50 Ill. App. 381]; Bacon *v.* Cobb, 45 Ill. 47.

*Louisiana.*— Eugster *v.* West, 35 La. Ann. 119, 48 Am. Rep. 232.

*New York.*— Tobias *v.* Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Oakley *v.* Morton, 11 N. Y. 25, 62 Am. Dec. 49; Boker *v.* Demorest Mfg. Co., 28 Misc. 263, 59 N. Y. Suppl. 826. But see New Haven, etc., Co. *v.* Quintard, 6 Abb. Pr. N. S. 128, 1 Sweeny 89.

*Pennsylvania.*— Bradley *v.* McHale, 19 Pa. Super. Ct. 300.

*United States.*— Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644.

*England.*— Hale *v.* Rawson, 4 C. B. N. S. 85, 4 Jur. N. S. 363, 27 L. J. C. P. 189, 6 Wkly. Rep. 339, 93 E. C. L. 85; Kearon *v.* Pearson, 7 H. & N. 386, 31 L. J. Exch. 1, 10 Wkly. Rep. 12; Barker *v.* Hodgson, 3 M. & S. 267, 15 Rev. Rep. 485.

*Compare* Love *v.* Barnesville Mfg. Co., 3 Penncw. (Del.) 152, 50 Atl. 536, holding that a vendor is not liable for a failure to deliver caused by the act of God, in the absence of an undertaking to the contrary.

7. Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644. And see Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.

8. Summers *v.* Hibbard, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872 [*affirming* 50 Ill. App. 381]; Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Eddy *v.* Clement, 38 Vt. 486; Jones *v.* U. S., 96 U. S. 24, 24 L. ed. 644.

9. *Michigan.*—Maxwell *v.* Kellogg, 55 Mich. 606, 22 N. W. 60.

*New York.*— Phillips *v.* Taylor, 101 N. Y. 639, 4 N. E. 727 [*affirming* 49 N. Y. Super. Ct. 318]; Boker *v.* Demorest Mfg. Co., 28 Misc. 263, 59 N. Y. Suppl. 826.

*Vermont.*— Eddy *v.* Clement, 38 Vt. 486.

*Wisconsin.*— Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

*United States.*— Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Youqua *v.* Nixon, 30 Fed. Cas. No. 18,189, Pet. C. C. 221.

10. Summers *v.* Hibbard, 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872.

real ground for failure to deliver is inability to furnish the goods, and there were constant demands by the buyer for delivery, the non-delivery cannot be justified on the ground that the buyer failed to give the notice required by the contract.[11]

(III) *Performance Difficult or Burdensome.* Default or delay is not excused because performance has become difficult, dangerous, or burdensome.[12] Thus it is no excuse that delivery is dangerous because of the existence of war,[13] or because a pestilence prevails,[14] or that it is difficult because of the inclemency of the weather.[15] It will not excuse delivery that, because of new laws or regulations enacted after the making of the contract, additional burdens will be imposed on the seller.[16]

(IV) *Deficiency in Facilities For Transportation* — (A) *Route of Transportation.* In accordance with the general rule it has usually been held that the seller is not excused from delivery by the obstruction of routes of transportation, whether due to the freezing of waterways,[17] seizure of a railway by the government,[18] freshets,[19] or other causes,[20] unless such contingencies are expressly provided for in the contract,[21] and especially will the rule prevail where other routes of transportation were open to the seller.[22]

(B) *Means of Transportation.* A failure to deliver under the terms of the contract is not excused by the inability of the seller to procure cars,[23] or other means of transportation,[24] unless there is a stipulation covering such contingency,[25]

11. San Jacinto Oil Co. *v.* Texas Co., (Tex. Civ. App. 1907) 105 S. W. 1163.

12. *Illinois.*— Bacon *v.* Cobb, 45 Ill. 47.
*New York.*— Baker *v.* Johnson, 42 N. Y. 126.
*Tennessee.*— Elsey *v.* Stamps, 10 Lea 709.
*Vermont.*— Eddy *v.* Clement, 38 Vt. 486.
*United States.*— U. S. *v.* Smoot, 15 Wall. 36, 21 L. ed. 107.
*England.*— Barker *v.* Hodgson, 3 M. & S. 267, 15 Rev. Rep. 485.

13. Elsey *v.* Stamps, 10 Lea (Tenn.) 709.

14. Barker *v.* Hodgson, 3 M. & S. 267, 15 Rev. Rep. 485. But see Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536.

15. Kitizinger *v.* Sanborn, 70 Ill. 146. But *compare* White *v.* Kearney, 9 Rob. (La.) 495; Terwilliger *v.* Knapp, 2 E. D. Smith (N. Y.) 86.

16. Baker *v.* Johnson, 42 N. Y. 126; U. S. *v.* Smoot, 15 Wall. (U. S.) 36, 21 L. ed. 107.

17. Eugster *v.* West, 35 La. Ann. 119, 48 Am. Rep. 232; Tobias *v.* Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451; Kearon *v.* Pearson, 7 H. & N. 386, 31 L. J. Exch. 1, 10 Wkly. Rep. 12.

18. Bacon *v.* Cobb, 45 Ill. 47. See also Brandeis *v.* U. S., 3 Ct. Cl. 99, where the government agreed to permit the vendor to use the road.

19. Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; New Haven, etc., Co. *v.* Quintard, 1 Sweeny (N. Y.) 89, 6 Abb. Pr. N. S. 128. But see Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291, where the only route by which the goods could possibly be shipped was destroyed by a freshet.

20. Fleishman *v.* Meyer, 46 Oreg. 267, 80 Pac. 209; McDonald *v.* Gardner, 56 Wis. 35, 13 N. W. 689; Dodge *v.* Van Lear, 7 Fed. Cas. No. 3,956, 5 Cranch C. C. 278.

**Temporary stoppage.**— A merely temporary existence of causes stopping navigation will not excuse a total failure to perform. Rowland *v.* Lehigh Coal, etc., Co., 28 Pa. St. 215.

21. Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388, holding that the condition, "water transportation permitting," implied not only a proper stage of water in the river but that boats should ply the stream capable of carrying the goods.

22. Fleishman *v.* Meyer, 46 Oreg. 267, 80 Pac. 209; McDonald *v.* Gardner, 56 Wis. 35, 13 N. W. 689.

23. Seligman *v.* Beecher, 36 Pa. Super. Ct. 475; Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 90 N. W. 1094. And see Hoff *v.* Pilling, 134 Fed. 294.

**Inability of the seller to obtain all the cars necessary for his business** does not excuse his failure to deliver goods sold to the buyer when he had enough cars for that purpose. Tradewater Coal Co. *v.* Lee, 68 S. W. 400, 24 Ky. L. Rep. 215.

24. Young *v.* Foster, 7 Port. (Ala.) 420, where the contract was to deliver by a certain boat which proved to be of insufficient capacity. And see Eppens *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52, L. R. A. 811 [*affirming* 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251], holding that personal inability of the seller to take advantage of shipping facilities is not available either to disprove unreasonable delay or excuse it.

25. Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388 (where the delivery was to be made "water transportation permitting" and it was held that this implied the existence of boats plying on the river); Phillips *v.* Pilling, 215 Pa. St. 64, 64 Atl. 396 (holding that a stipulation excusing delivery "if there should be a shortage of cars" means a shortage at the place of shipment); Jessup, etc., Paper Co. *v.* Piper, 133 Fed. 108 (hindrances beyond control includes shortage of cars). And see Consolidated Coal Co. *v.* Mexico Fire Brick Co., 66

and even in such case he must show that he made a reasonable effort to procure transportation.[26]

(c) *Delay in Transportation.* Generally the seller is excused for delay in delivery when such delay is due to delays in transportation over which the seller had no control,[27] especially where the contract of sale contains a stipulation to that effect.[28]

(v) *Loss or Destruction of Property.* Where the sale is of specified goods which, without the seller's fault, are lost or destroyed before the day of delivery, the seller is excused from delivery and the buyer from obligation to pay.[29] In such cases a condition is implied in the contract, the effect of which is to relieve the seller from the obligation to perform.[30] The principle when applied to the sale of crops to be produced may, however, be modified by circumstances. Thus, while the seller will be excused by the loss of the crop, by natural causes, if the sale is of a specific crop to be grown on specific land,[31] or if the nature of the crop is such that ordinary market stock cannot be substituted for it,[32] he will not be excused if the crop is not specific or to be grown on particular land,[33] and the article can be procured elsewhere.[34]

Mo. App. 296; Hatfield *v.* Thomas Iron Co., 208 Pa. St. 478, 57 Atl. 950, where shortage of cars was included in the words "other causes" in a stipulation excusing delivery because of strikes or other causes.

26. Speer *v.* Cowles, 72 N. C. 265.

27. White *v.* Kearney, 9 Rob. (La.) 495; Terwilliger *v.* Knapp, 2 E. D. Smith (N. Y.) 86; Trowbridge *v.* Harrison, 2 Misc. (N. Y.) 572, 21 N. Y. Suppl. 917; Peace River Phosphate Co. *v.* Grafflin, 58 Fed. 550.

**Consequential damages.**— Pending the passage of the Wilson tariff bill of 1894, defendant filled an order for lard at Chicago to be shipped to plaintiffs in Cuba, the goods to be delivered to the purchasers at the point of shipment, but delay, for which defendants were in no way responsible, occurred in forwarding a part of it by vessel from New Orleans, and before it reached Havana plaintiffs had to pay duties imposed thereon by the Spanish government in retaliation for the passage of the Wilson bill, and which, but for the delay, would not have been collected. It was held that the risk of such a result was taken by plaintiffs, and they could not claim reimbursement from defendants therefor. Coca *v.* Morris, 107 Fed. 688, 46 C. C. A. 558.

**In Pennsylvania** it has been held that where the seller undertakes to deliver by carrier, the latter is the seller's agent, and the seller cannot therefore excuse his failure to deliver on the ground that the delay was due to the fault of the carrier. Braddock Glass Co. *v.* Irwin, 153 Pa. St. 440, 25 Atl. 490.

28. Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132.

29. *California.*— Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681.

*Illinois.*— Seckel *v.* Scott, 66 Ill. 106; Rice *v.* Weber, 48 Ill. App. 573.

*Louisiana.*— Losecco *v.* Gregory, 108 La. 648, 32 So. 985.

*New York.*— Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415; Curtiss *v.* Prinderville, 53 Barb. 186.

*Wisconsin.*— Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395, 80 N. W. 471; McMillan *v.* Fox, 90 Wis. 173, 62 N. W. 1052.

*England.*— Howell *v.* Coupland, 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. Rep. N. S. 832, 24 Wkly. Rep. 470; Rugg *v.* Minnett, 11 East 210, 10 Rev. Rep. 475.

See 43 Cent. Dig. tit. "Sales," § 426.

**Agreement to insure.**— A provision in the contract that the seller shall keep the goods insured and assign the policies to the buyer as his interest may appear does not affect the rule that the seller is excused by the destruction of the property. Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395, 80 N. W 471.

**Lost animals.**— One who agrees to sell, and deliver at a certain time and place, his herd of cattle, provided the whole number can be found and collected then and there, but makes no effort to find a part of the herd, is liable for a breach of the stipulation to deliver. Boies *v.* Vincent, 24 Iowa 387. And see Herrington *v.* Holman, 25 Tex. Suppl. 256.

30. Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415; Howell *v.* Coupland, 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. Rep. N. S. 832, 24 Wkly. Rep. 470.

**Damage to property.**— Slight damages occurring to the subject-matter of an executory contract of sale will not excuse the vendor for refusing to deliver, on the vendee's offer to accept the property with a reasonable deduction for damages. Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. 878.

31. Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681; Losecco *v.* Gregory, 108 La. 648, 32 So. 985; Howell *v.* Coupland, 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. Rep. N. S. 832, 24 Wkly. Rep. 470.

32. Rice *v.* Weber, 48 Ill. App. 573.

33. Anderson *v.* May, 50 Minn. 280, 52 N. W. 530, 36 Am. St. Rep. 642, 17 L. R. A. 555.

34. McGehee *v.* Hill, 4 Port. (Ala.) 170,

(vi) *Impossibility Created by Law.* The seller is excused from performance where it is rendered impossible by reason of some action taken by or under authority of law.[35] It is, however, no excuse that, because of a change in the law, the performance has been rendered more expensive or burdensome.[36]

**d. Stipulations Excusing Default or Delay** — (i) *In General.* The contract of sale may provide that in certain contingencies a failure to deliver shall be excused. A common form of stipulation is that the seller shall be excused if delivery is prevented "by strikes, accidents or other causes beyond the control" of the seller, and when embodied in the contract is binding on the buyer,[37] and when such a stipulation exists it will exclude other excuses.[38] To excuse the seller under such stipulation the failure to deliver must have been caused by a contingency falling naturally within its provisions.[39] But the exception of "other causes" in such a stipulation will include a failure to deliver due to an inability to procure cars for the transportation of the goods.[40] It is, however, incumbent on the seller to make at least a reasonable effort to perform, and if he does not the stipulation will not protect him.[41] So too the merely temporary existence of

29 Am. Dec. 277; Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

35. J. H. Labaree Co. *v.* Crossman, 100 N. Y. App. Div. 499, 92 N. Y. Suppl. 565 [*affirmed* in 184 N. Y. 586, 77 N. E. 1189], refusal of board of health to allow goods to be landed. See also Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678, 9 Atl. 691. But see Bradley *v.* McHale, 19 Pa. Super. Ct. 300, holding that under a contract to sell and deliver a two-story frame store building, and to place the building on a foundation on a lot of ground owned by the buyer, it is no defense that the borough authorities refused to permit the seller to move the building over the streets.

**Defense insufficient.**— It is no answer to an action against the vendor of goods to be shipped at St. Petersburg on a particular day, in certain ships, that such goods were seized by the Russian government on board lighters for the purpose of loading the ships, and that the ships cut their cables and put to sea to avoid an embargo. Splidt *v.* Heath, 2 Camp. 57 note, 11 Rev. Rep. 663.

36. Baker *v.* Johnson, 42 N. Y. 126; U. S. *v.* Smoot, 15 Wall. (U. S.) 36, 21 L. ed. 107.

37. Widman *v.* Straukamp, 94 N. Y. Suppl. 18.

**Construction of stipulation.**— The term, "water transportation permitting," in a contract of sale providing for the delivery of merchandise at certain points, implies not only that the water should be adequate, but that a boat or boats should ply the stream within the time contemplated for delivery, capable of carrying the goods, and, any of these conditions being absent without the fault of the vendor or his agent, it was excused from making delivery Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388.

38. Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38.

39. Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920.

**Applications of rule.**— The stipulation will not cover a failure to keep on hand the necessary material for manufacture of the goods (Cleveland Rolling-Mill Co. *v.* Rhodes, 121 U. S. 255, 7 S. Ct. 882, 30 L. ed. 920); a failure to deliver due to mere difficulty in procuring labor if it could have been obtained by a reasonable effort at prices not prohibitive (Thomas Iron Co. *v.* Jackson Iron Co., 131 Mich. 130, 91 N. W. 137); a failure to deliver due to pro rating with other customers of the seller (Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., 134 N. C. 574, 47 S. E. 116); or a failure due to differences between the parties as to the manner of delivery, although material and labor were scarce (Union Trust Co. *v.* Webber-Seely Hardware Co., 73 Ark. 584, 84 S. W. 784).

40. Consolidated Coal Co. *v.* Mexico Fire-Brick Co., 66 Mo. App. 296; Hatfield *v.* Thomas Iron Co., 208 Pa. St. 478, 57 Atl. 950; Jessup, etc., Paper Co. *v.* Piper, 133 Fed. 108.

**"Shortage of cars" construed.**— Where a contract for a sale of coal from a designated mine provides that "if there should be a shortage of cars, shipment will be divided from time to time in fair proportion on all orders," the "shortage of cars" means a shortage at the mine. Phillips *v.* Pilling, 215 Pa. St. 64, 64 Atl. 396.

41. Thomas Iron Co. *v.* Jackson Iron Co., 131 Mich. 130, 91 N. W. 137; Speer *v.* Cowles, 72 N. C. 265; Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487; Jessup, etc., Paper Co. *v.* Piper, 133 Fed. 108.

**What is reasonable effort to perform.**— Where, in an action for non-delivery of coal under a contract to ship five thousand tons in the course of nine months, "but, if prevented or obstructed by breaches or other unavoidable occurrences on the railroads or at the mines, no claim for damages will be allowed," such breaches were proved, it was correct to instruct the jury that defendant was not bound to deliver to plaintiffs the whole amount of their order to the exclusion of other customers, but that his obligation would be satisfied by the delivery to them of such a proportion of his reduced means of supply as the amount of plaintiffs' order

the contingency will not excuse the seller if he is able to deliver after the contingency has ceased to exist.[42]

(II) *STRIKE CLAUSE.* The effect of a clause excusing a failure to deliver due to strikes depends on the wording of the stipulation. A stipulation excusing delivery when prevented by strikes refers to such strikes as might be the proximate cause of preventing the seller from handling the product of its plant, not such as, indirectly and remotely acting in conjunction with other and independent and efficient causes, might affect the seller's business and cause the handling of his product to be attended with inconvenience and difficulty.[43] If, however, the clause refers to general strikes, the seller is not excused unless the strike is general.[44] If the sale is made subject to strikes, accidents, or causes beyond the seller's control, the seller is not liable for deficiencies on his part in shipments due to a strike or a shortage of cars or other causes beyond his control, if he treats the buyer fairly and ratably with reference to other parties with whom he was dealing, and is not required to deliver to the buyer the whole amount of his order to the exclusion of other customers.[45] If the sale is subject to strikes beyond the control of the seller, the strike must be so far beyond his control as to render

bore to the whole amount of defendant's sales, including the ordinary amount of his home trade. Oakman *v.* Boyce, 106 Mass. 477.

**Ability to procure goods.**— Where a contract for the sale by defendant to plaintiff of a designated number of cases of canned tomatoes contained a stipulation that if by the destruction of defendant's cannery by fire, or if on account of strikes, or from any other cause over which he had no control, he was prevented from performing the contract, he should not be liable for any damages for such failure, the contract did not restrict defendant from procuring the tomatoes to fill the contract from his own or neighborhood fields, and therefore, in case of the destruction of the tomato crop in such field by frost, he was required to make necessary efforts to procure the necessary material elsewhere. Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487. A contract whereby plaintiff agreed to deliver to defendant such oil as it should need for a certain period, and providing that plaintiff should not be liable for damages from failure to supply oil when due to the act of God or unavoidable accidents, the complete exhaustion of the oil wells in the vicinity, or the revocation of certain leases by the lessors, and further providing that, except where plaintiff should be "unable for the last aforesaid causes to deliver the oil which may be demanded of him under this contract," he should during the term be required to supply defendant all the crude oil which it should require, did not contemplate the release of plaintiff from the obligation to supply oil on the revocation of the leases therein mentioned, if, after such revocation, there should be oil enough produced from other wells in the vicinity with which to supply defendant under the contract. Wilson *v.* Alcatraz Asphalt Co., 142 Cal. 182, 75 Pac. 787.

**42.** Rowland *v.* Lehigh Coal, etc., Co., 28 Pa. St. 215. See also De Oleaga *v.* West Cumberland Iron, etc., Co., 4 Q. B. D. 472, 48 L. J. Q. B. 753, 41 L. T. Rep. N. S. 342, 27 Wkly. Rep. 870, where delivery was excused if freight rates were above a designated amount, and it was held that the sellers were entitled to deliver goods which they had previously withheld while freights were above the limits, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract.

**43.** Consolidated Coal Co. *v.* Jones, etc., Co., 232 Ill. 326, 83 N. E. 851. *Compare* Hesser-Milton-Renaban Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 90 N. W. 1094, holding that if the clause excepts strikes in general terms it may be shown that such language refers to local strikes or strikes existing only in the seller's works.

**44.** Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38.

**Construction of stipulation.**— Where a "strike clause" in a contract for the delivery of coal in Pittsburg only provides for the contingencies of "a general strike or shutdown in the Pittsburg district," the penalties, provisions, or conditions therein provided for will not be enforced and applied to a condition of general suspension of coal mining, enforced by intimidation and violence, that reached to transportation and mining and everything connected with a supply of coal throughout all districts from which a supply could he drawn for Pittsburg. New York, etc., Gas Coal Co. *v.* Pittsburgh, 6 Pa. Dist. 122.

**45.** Garfield, etc., Coal Co. *v.* Pennsylvania Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020, holding, however, that the seller could not offer such causes as excuse for his failure to keep his contract with the buyer proportionally with other parties with whom he had contracted, where he could have done so without discriminating against those entitled under his contracts, and where, after the exigency upon which he relied to excuse his non-performance had arisen, he made new contracts with others for the sale of coal, which he fulfilled.

performance impossible.[46] If the clause provides that the seller will use every effort to fulfil the contract, but that he will not be liable for damages for non-fulfilment if his business is so interrupted by strikes as to materially decrease production in his plant, a strike causing such decrease will relieve him from liability for damages, although the strike was caused by a reduction of wages.[47] A seizure by the carrier of coal *en route* to the buyer is within the clause, there being a scarcity of coal because of a strike in the mines.[48] Where the contract provides that deliveries shall be subject to strikes, the existence of a strike merely suspends deliveries during the strike and does not terminate the contract,[49] and the seller is therefore bound to resume deliveries within a reasonable time after the strike has ceased.[50]

**e. Circumstances Within Control of Buyer** — (I) *IN GENERAL.* The failure of the seller to perform is excused when performance is prevented by the acts and conduct of the buyer,[51] as for example by acts or conduct preventing the seller from obtaining the goods to fulfil his contract,[52] by acts and conduct indicating an intent to abandon the contract and refuse performance thereof,[53] or by the failure of the buyer to perform conditions imposed on him by the contract,[54] as for instance conditions affecting the use of the goods.[55] So too the seller is excused if the goods are to be used for the purpose of defrauding others.[56]

(II) *FAILURE TO PROVIDE FACILITIES FOR DELIVERY* — (A) *In General.* If the buyer agrees to place the goods in condition for delivery his failure to do

**46.** Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

**47.** Delaware, etc., R. Co. *v.* Bowns, 58 N. Y. 573 [*reversing* 36 N. Y. Super. Ct. 126].

**48.** Davis *v.* Columbia Coal Min. Co., 170 Mass. 391, 49 N. E. 629.

**49.** Cottrell *v.* Smokeless Fuel Co., 129 Fed. 174 [*reversed* on other grounds in 148 Fed. 594, 78 C. C. A. 368]; Fish *v* Hamilton, 112 Fed. 742, 50 C. C. A. 509; King *v.* Parker, 34 L. T. Rep. N. S. 887. *Compare* Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 51 C. C. A. 213, where the contract was for the purchase of all coke manufactured by the seller during a fixed period, and it was held that the strike clause could not be construed as postponing the performance so as to extend the time beyond the limit fixed.

**50.** Fish *v.* Hamilton, 112 Fed. 742, 50 C. C. A. 509; King *v.* Parker, 34 L. T. Rep. N. S. 887.

**51.** *Arkansas.*— Townes *v.* Oklahoma Mill Co., 85 Ark. 596, 109 S. W. 548.

*Illinois.*— Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40 [*affirming* 31 Ill. App. 637].

*Indiana.*— O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242.

*New York.*— Rouse *v.* Lewis, 4 Abb. Dec. 121, 2 Keyes 352; Duryea *v.* Bonnell, 18 N. Y. App. Div. 151, 45 N. Y. Suppl. 435; Taylor *v.* Risley, 28 Hun 141.

*Oregon.*— La Follett *v.* Mitchell, 42 Oreg. 465, 69 Pac. 916, 95 Am. St. Rep. 780.

*Pennsylvania.*— McAvoy *v.* Commonwealth Title Ins., etc., Co., 27 Pa. Super. Ct. 271.

See 43 Cent. Dig. tit. "Sales," § 431.

**The unauthorized act of a foreman of a purchaser** in directing the seller to stop delivery will not excuse the seller's failure to deliver the property at the time and place called for by the contract. Moulding *v.* Prussing, 70 Ill. 151.

**Excuse pro tanto.**— Under a contract for deliveries of bran throughout a month, the seller could insist on delivery of part of the bran during the first half of the month, and by preventing this the buyer absolved the seller *pro tanto* from the performance of the contract. Townes *v.* Oklahoma Mill Co., 85 Ark. 596, 109 S. W. 548.

**52.** Taylor *v.* Risley, 28 Hun (N. Y.) 141; Kountz *v.* Citizens' Oil Refining Co., 72 Pa. St. 392.

**53.** *Maryland.*—Eckenrode *v.* Canton Chemical Co., 55 Md. 51.

*Minnesota.*— Armstrong *v.* St. Paul, etc., Coal, etc., Co., 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029.

*North Carolina.*— Shaw *v.* Grandy, 50 N. C. 56.

*United States.*— Scully Steel, etc., Co. *v.* Old Meadow Rolling-Mill Co., 108 Fed. 732, 47 C. C. A. 646.

*Canada.*— Langlois *v.* Ennis, 16 Quebec Super. Ct. 64.

**Imposing additional conditions** not justified by the contract is not such a breach by the buyer as will excuse non-performance. Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

**Probable abandonment.**— Where after a part of the goods have been delivered as required, information that probably no further requisitions would be made does not excuse non-performance if in fact additional deliveries are called for. Browne *v.* U. S., 30 Ct. Cl. 124.

**54.** Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590; Slauson *v.* Albany R. Co., 60 N. Y. 606; Austin *v.* Langlois, 81 Vt. 223, 69 Atl. 739.

**55.** Slauson *v.* Albany R. Co., 60 N. Y. 606.

**56.** Church *v.* Proctor, 66 Fed. 240, 13 C. C. A. 426.

so will excuse the seller's failure to deliver.[57] So it has been held in some jurisdictions that if the buyer of grain agrees to furnish sacks therefor, his failure will excuse the seller from delivery;[58] but in others the failure of the buyer to furnish the facilities for packing has been regarded as excusing the seller only from packing as agreed and not from making delivery.[59] If goods are to be delivered on cars the failure of the buyer to furnish a place of storage while being loaded is no excuse for non-delivery.[60]

(B) *Means of Transportation.* Where by the terms of the contract it is the duty of the buyer to furnish cars or other means of transportation [61] his failure so to do will excuse the failure of the seller to deliver; [62] but of course the performance of the obligation thus imposed on the buyer may itself be prevented by the acts of the seller, in which case the failure of the buyer affords no excuse.[63] So too if the seller absolutely refuses to deliver, he cannot afterward excuse himself on the ground of the buyer's failure to furnish cars.[64]

(III) *FAILURE TO GIVE INSTRUCTIONS AS TO DELIVERIES.* Non-performance by the seller is excused if the buyer, when obligated so to do by the contract, fails to order deliveries; [65] or to give instructions as to the size, quality, or quantity of the articles desired; [66] or to give proper shipping directions.[67]

**57.** Bembridge *v.* Stoddard, 4 Ind. 587 (grain to be threshed); Barker *v.* Davies, 47 Nebr. 78, 66 N. W. 11 (hay to be baled).

**58.** Russell *v.* Witt, 38 Ind. 9; Kellogg *v.* Nelson, 5 Wis. 125.

**59.** Low *v.* Forbes, 14 Ill. 423; McKee *v.* Retter, 10 Ill. 315; McNairy *v.* Gathings, 52 Miss. 592.

**60.** Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607.

**61.** See *supra*, V, B, 8, l, (IV), (B).

**62.** *Florida.*— Whiting *v.* Gray, 27 Fla. 482, 8 So. 726, 11 L. R. A. 526.

*Louisiana.*— Lozes *v.* Segura Sugar Co., 52 La. 1844, 28 So. 249; Vredenburgh *v.* Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 So. 122.

*Michigan.*— McKinnon Mfg. Co. *v.* Alpena Fish Co., 102 Mich. 221, 60 N. W. 472.

*New York.*— Blossom *v.* Shotter, 128 N. Y. 679, 29 N. E. 145 [*affirming* 59 Hun 481, 13 N. Y. Suppl. 523]; Ketcham *v.* Hiller, 48 Barb. 596.

*Oregon.*— Smith *v.* Wheeler, 7 Oreg. 49, 33 Am. Rep. 698.

*Pennsylvania.*— Hocking *v.* Hamilton, 158 Pa. St. 107, 27 Atl. 836.

*Wisconsin.*— Boyington *v.* Sweeney, 77 Wis. 55, 45 N. W. 938.

*United States.*— Evanston El., etc., Co. *v.* Castner, 133 Fed. 409; Chicago Lumber Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207.

*England.*— Forrestt *v.* Aramayo, 9 Aspin. 134, 83 L. T. Rep. N. S. 335.

See 43 Cent. Dig. tit. "Sales," § 432.

**63.** Palestine Cotton-Seed Oil Co. *v.* Corsicana Cotton-Oil Co., (Tex. Civ. App. 1901) 61 S. W. 433.

**64.** Price *v.* Beach, 20 Pa. Super. Ct. 291.

**65.** New Bedford Copper Co. *v.* Southard, 95 Me. 209, 49 Atl. 1062; Comora *v.* Mariano, 24 Misc. (N. Y.) 755, 53 N. Y. Suppl. 856; *In re* Millbourne Mills Co., 165 Fed. 109.

**66.** Allen *v.* Robinson, 2 Barb (N. Y.) 341; Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981; Welch *v.* Bradley, 41 Vt. 308; Hinckley *v.* Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967 [*affirming* 17 Fed. 584].

**67.** Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294, 18 N. E. 735; Osgood *v.* Groseclose, 159 Ill. 511, 42 N. E. 886 [*affirming* 58 Ill. App. 29]; Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586.

**Designation of place.**— Where a contract provides that goods are to be delivered at any place on the banks of a river between points stipulated, and that the purchaser may designate the place of delivery between such points, it is no defense to the seller, in an action upon the contract for non-delivery, that no place was designated by the purchasers, as it was the duty of the seller to make delivery at any convenient point which he might select between the places designated in the contract. Hartfield *v.* Patton, 11 Fed. Cas. No. 6,158*a*, Hempst. 268.

**Delay at request of buyer.**— Although shipping directions are given, the seller may still recover where, at the subsequent request of the buyer, made before the time named for shipment, shipment is indefinitely delayed, and no other instructions are given. Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294, 18 N. E. 735.

**Sufficiency of shipping directions.**— Where plaintiffs contracted with S for a quantity of steel blooms, to be shipped as per a freight contract in the hands of S, accepted by plaintiffs; and also bought blooms from M, who had a contract for them with S, subsequently selling the blooms under both contracts to defendant, plaintiffs were liable to defendant for the failure of S to deliver the blooms according to both contracts, although they were not notified of the shipping directions given under the contract with M. Dwight *v.* Eckert, 117 Pa. St. 490, 12 Atl. 32.

**Waiver.**— The giving of shipping directions is waived if the seller puts it out of his power to deliver as by a voluntary assignment. Woolner *v.* Hill, 93 N. Y. 576.

(iv) *Extension of Time.* Delay in making delivery is excused if at the request or with the assent of the buyer the time is extended.[68]

(v) *Refusal to Accept.* The failure of the seller to make delivery is excused when the buyer has requested him to discontinue deliveries,[69] or has refused to accept deliveries tendered,[70] and the fact that the rejection of the goods was in good faith does not affect the result.[71] While the failure of the buyer to be present at the time and place of performance to receive the goods will ordinarily excuse a failure on the part of the seller to deliver,[72] such will not be the

**68.** *Arkansas.*— Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark 275, 79 S. W. 1052.

*California.*— Scott *v.* Jackson, 89 Cal. 258, 26 Cal. 898.

*Georgia.*— Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132.

*Illinois.*— Scott *v.* Miller, 66 Ill. 273.

*Massachusetts.*— Flagg *v.* Dryden, 7 Pick. 52.

*Michigan.*— Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

*New York.*— General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928 [*affirming* 83 N. Y. Suppl. 1106]; A. B. Farquhar Co. *v.* New River Mineral Co., 87 N. Y. App. Div. 329, 84 N. Y. Suppl. 802 [*reversing* 40 Misc. 404, 82 N. Y. Suppl. 241]; H. Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133, 82 N. Y. Suppl. 474.

*Washington.*— Washington Iron Works *v.* McNaught, 35 Wash. 10, 76 Pac. 301.

*Wisconsin.*— Barnes *v.* Stacy, 79 Wis. 55, 48 N. W. 53.

*England.*— Hickman *v.* Haynes, L. R. 10 C. P. 598, 44 L. J. C. P. 358, 32 L. T. Rep. N. S. 873, 23 Wkly. Rep. 872.

**69.** Robson *v.* Bohn, 27 Minn. 333, 7 N. W. 357.

**70.** *Delaware.*— Love *v.* Barnesville Mfg. Co., 3 Pennew. 152, 50 Atl. 536.

*Georgia.*— Carolina Portland Cement Co. *v.* Columbia Imp. Co., 3 Ga. App. 483, 60 S. E. 279.

*Illinois.*— Franklin *v.* Krum, 70 Ill. App. 649.

*Kentucky.*— Walker *v.* Kirwan, 90 S. W. 244, 28 Ky. L. Rep. 738; Morris *v.* Globe Refining Co., 59 S. W. 12, 22 Ky. L. Rep. 911.

*Maryland.*— Eckenrode *v.* Canton Chemical Co., 55 Md. 51.

*Missouri.*— McClelland *v.* Picher Lead, etc., Co., 85 Mo. 636; Cousins *v.* Bowling, 100 Mo. App. 452, 74 S. W. 168; Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567.

*New York.*— Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. 844 [*affirming* 57 N. Y. Super. Ct. 226, 6 N. Y. Suppl. 509]; Cunningham *v.* Judson, 100 N. Y. 179, 2 N. E. 915; Lackawanna Mills *v.* Weil, 21 N. Y. App. Div. 492, 47 N. Y. Suppl. 585 [*affirmed* in 162 N. Y. 642, 57 N. E. 1114]; Duryea *v.* Bonnell, 18 N. Y. App. Div. 151, 45 N. Y. Suppl. 435; Todd *v.* Gamble, 67 Hun 38, 21 N. Y. Suppl. 739.

*North Carolina.*— Wilson *v.* Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250.

*Oregon.*— Smith *v.* Wheeler, 7 Oreg. 49, 33 Am. Rep. 698.

*Pennsylvania.*— Grove *v.* Donaldson, 15 Pa. St. 128.

*Rhode Island.*— Providence Coal Co. *v.* Coxe, 19 R. I. 380, 35 Atl. 210.

*Tennessee.*— Coleman *v.* Hudson, 2 Sneed 463.

*United States.*— Cresswell Ranch, etc., Co. *v.* Martindale, 63 Fed. 84, 11 C. C. A. 33.

*England.*— Honck *v.* Muller, 7 Q. B. D. 92, 50 L. J. Q. B. 529, 45 L. T. Rep. N. S. 202, 29 Wkly. Rep. 830. But see Simpson *v.* Crippin, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. Rep. N. S. 546, 21 Wkly. Rep. 141.

*Canada.*— Tufts *v.* Poness, 32 Ont. 51.

See 43 Cent. Dig. tit. "Sales," § 435.

**What constitutes refusal.**— The fact that the consignee, by agreement with the carrier, the latter being protected by a bond, was allowed to take freight in advance of presentation of the bill of lading, did not make it incumbent on him to obtain possession of a consignment, where the agreement with the consignor was that the bill should be delivered on payment of the purchase-price, and the consignor negligently detained the bill. Ramish *v.* Kirschbraun, 107 Cal. 659, 40 Pac. 1045. Where a purchaser of goods, to be manufactured for him, before delivery, wrote the seller that the purchaser would not need the goods for some time, but that, if some of them were on hand, the purchaser would take them, although he would prefer not to do so, the letter could not be construed as a refusal to accept. Southern Car Mfg., etc., Co. *v.* Scullin-Gallagher Iron, etc., Co., 38 Tex. Civ. App. 112, 85 S. W. 845.

**Grounds of refusal.**— In an action on a contract of sale providing for payment "on delivery," and authorizing plaintiff to draw for the amount, when defendant refused to accept the goods because he was unable to pay therefor, it is immaterial that they were sent "C. O. D." White *v.* McMillan, 114 N. C. 349, 19 S. E. 234.

**Severable contract.**— If the contract is severable, a refusal of the buyer to accept one of the several articles will not excuse a failure to deliver the others. Herzog *v.* Purdy, 119 Cal. 99, 51 Pac. 27.

**71.** Cresswell Ranch, etc., Co. *v.* Martindale, 63 Fed. 84, 11 C. C. A. 33.

**72.** Madden *v.* Lemke, 86 Mich. 139, 48 N. W. 785; Smith *v.* Wheeler, 7 Oreg. 49, 33 Am. Rep. 698; Kern *v.* Zeigler, 13 W. Va. 707.

effect if a place of storage is provided pending notice to the buyer according to the contract of the seller's intent to deliver.[73]

(vi) *DEFAULT IN PAYMENT.*[74] Where the sale is for cash, the seller is excused from making delivery if the buyer fails or refuses to pay the price.[75] So too when delivery is to be in instalments a failure or refusal to pay for an instalment already delivered excuses a failure to make further deliveries.[76] If, how-

**73.** Elliot *v.* Carneal, 2 A. K. Marsh. (Ky.) 308.

**Place for storage.**— Where G was to furnish a certain amount of cut granite to plaintiff, and was to be permitted to use certain specified premises for piling granite, he was not entitled to all of the space on the premises unless needed, and, all of it never having been needed, he was not excused from performance on the ground that plaintiff had failed to perform by furnishing such space. Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029 [*affirming* 40 Misc. 530, 82 N. Y. Suppl. 944].

**74. As ground for rescission** see *infra*, IV, B, 3, c, (I), (B).

**Waiver of default in payment** see *infra*, V, D, 7.

**75.** *Alabama.*— Robbins *v.* Harrison, 31 Ala. 160.

*California.*— Minaker *v.* California Canneries Co., 138 Cal. 239, 71 Pac. 110; Scribner *v.* Schenkel 128 Cal. 250, 60 Pac. 860.

*Delaware.*— Walton *v.* Black, 5 Houst. 149; Barr *v.* Logan, 5 Harr. 52.

*Florida.*— Stokes *v.* Baars, 18 Fla. 656.

*Illinois.*— Bradley *v.* King, 44 Ill. 339; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189; Ainsworth *v.* Roush, 109 Ill. App. 299.

*Indiana.*— Kirby *v.* Studebaker, 15 Ind. 45.

*Kansas.*— Jennings *v.* West, 40 Kan. 372, 19 Pac. 863.

*Maine.*— Merrill *v.* Stanwood, 52 Me. 65.

*Maryland.*— Bollman *v.* Burt, 61 Md. 415.

*Michigan.*— Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742; Chapman *v.* Dease, 34 Mich. 375.

*Minnesota.*— Palmer *v.* Breen, 34 Minn. 39, 24 N. W. 322.

*Mississippi.*— Ingersoll *v.* Kendall, 13 Sm. & M. 611.

*Nebraska.*— Walter *v.* Reed, 34 Nebr. 544, 52 N. W. 682.

*New York.*— Aikin *v.* Davis, 45 Barb. 44; Bailey *v.* Western Vermont R. Co., 18 Barb. 112; Partridge *v.* Gildermeister, 6 Bosw. 57 [*affirmed* in 3 Abb. Dec. 461, 1 Keyes 93]; Soltau *v.* Goodyear Vulcanite Co., 12 Misc. 131, 33 N. Y. Suppl. 77; Clarkson *v.* Carter, 3 Cow. 84.

*Ohio.*— Warner *v.* Porter, 2 Ohio Dec. (Reprint) 26, 1 West. L. Month. 104.

*Pennsylvania.*— Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

*Tennessee.*— Barker *v.* Reagan, 4 Heisk. 590.

*Wisconsin.*— Murphy *v.* Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113.

*United States.*— Masters *v.* Barreda, 18 How. 489, 15 L. ed. 466; Union Pressed Brick Co. *v.* Fultonham Brick, etc., Tile Co., 112 Fed. 920, 50 C. C. A. 615.

See 43 Cent. Dig. tit. "Sales," § 434.

**Readiness to deliver.**— The refusal to pay does not relieve the seller from showing that he was ready and willing to perform. Hawley *v.* Mason, 9 Dana (Ky.) 32, 33 Am. Dec. 522. It has been held in an action for breach of contract to deliver goods, the defense being a rescission of the contract for an alleged failure by plaintiff to make the payments agreed on, that defendant offered to deliver the goods if plaintiff would pay cash for them did not limit recovery to nominal damages, where the offer was not made in good faith and defendant was in fact unable to furnish the goods as agreed. Harrison *v.* Argyle Co., 128 N. Y. App. Div. 81, 112 N. Y. Suppl. 477.

**Place of delivery.**— The seller cannot refuse to deliver, because the buyer refused or was not ready to pay at a place other than the place of delivery. Kester *v.* Reynolds, 6 Hun (N. Y.) 626; Lewis *v.* Craft, 39 Oreg. 305, 64 Pac. 809.

**Readiness to pay.**— The seller is not excused if the buyer is ready and willing to pay at the time he makes demand for delivery. Berry *v.* Nall, 54 Ala. 446; Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586.

**Failure to make advances.**— Where the buyer is to make advances his refusal so to do does not excuse delivery, if the deliveries already made do not equal the advances. Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

**76.** *Delaware.*— Leonard *v.* Johnson Forge Co., 3 Pennew. 104, 50 Atl. 541.

*Georgia.*— Branch *v.* Palmer, 65 Ga. 210.

*Louisiana.*— Landèche *v.* Sarpy, 37 La. Ann. 835.

*Maryland.*— Webster *v.* Moore, 108 Md. 572, 71 Atl. 466.

*New York.*— Raabe *v.* Squier, 148 N. Y. 81, 42 N. E. 516; Nichols *v.* Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561 [*affirming* 18 N. Y. Suppl. 623].

*Ohio.*— Contractors, etc., Supply Co. *v.* Alta Portland Cement Co., 26 Ohio Cir. Ct. 49.

*United States.*— Scully Steel, etc., Co. *v.* Old Meadow Rolling-Mill Co., 108 Fed. 732, 47 C. C. A. 646.

*England.*— *Ex p.* Chalmers, 42 L. J. Bankr. 2, 21 Wkly. Rep. 138 [*affirmed* in L. R. 8 Ch. 289, 42 L. J. Bankr. 37, 28 L. T. Rep. N. S. 325, 21 Wkly. Rep. 349]; Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370; Ebbw Vale Steel, etc., Co. *v.* Blaina Iron Co., 6 Com. Cas. 33. But see Mersey Steel, etc., Co. *v.* Naylor, 9 App.

ever, the contract is entire a failure to pay when a part delivery has been made does not excuse the seller from completing the delivery.[77]

(VII) *INSOLVENCY OF BUYER.*[78] Where the sale is on credit the seller is excused from delivery if the buyer has absconded,[79] or has become insolvent.[80] If, however, the buyer is ready to substitute cash for the credit, his insolvency does not excuse the seller.[81]

(VIII) *INSUFFICIENCY OF SECURITIES.* The failure to deliver is also excused if the buyer fails or is unable to furnish the security for the price stipulated for in the contract,[82] or if the security furnished becomes worthless.[83]

**12. SALE OR RETURN[84] — a. In General.** A contract of sale which provides that the buyer may return to the seller all of the goods that remain on hand at a stated time has been termed a contract of sale or return.[85] There are other

Cas. 434, 53 L. J. Q. B. 497, 51 L. T. Rep. N. S. 637, 32 Wkly. Rep. 989.

See 43 Cent. Dig. tit. "Sales," § 434.

**77.** Union Trust Co. *v.* Webber-Seely Hardware Co., 73 Ark. 584, 84 S. W. 784; Bersch *v.* Sander, 37 Mo. 104; Mount *v.* Lyon, 49 N. Y. 552.

**Right to inspect.**— On a sale of five car-loads of oats by sample, the buyer is entitled to inspect the oats before paying a draft drawn for the price; and where the shipment embraces two car-loads only, and the buyer refuses to pay the draft covering the price of these, upon the ground that the cars have not arrived, and he has had no opportunity to inspect, and thereupon the banker causes the draft to be protested for non-payment, this does not justify the seller in not sending forward the other three cars. Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513.

**Payment to be made as goods are loaded.**— If the contract provides that the buyer is to pay for the goods as fast as they are loaded on the cars, the fact that the contract is entire does not avoid the effect of his refusal to pay. Easton *v.* Jones, 193 Pa. St. 147, 44 Atl. 264.

**78. As ground for rescission** see *supra*, IV, B, 3, c, (I), (C).

**79.** Cook *v.* West, 3 Rob. (La.) 331, under code.

**80.** *Iowa.*— Rappleye *v.* Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139.

*Minnesota.*— Crummey *v.* Raudenbush, 55 Minn. 426, 56 N. W. 1113.

*Mississippi.*— Hunter *v.* Talbot, 3 Sm. & M. 754.

*New York.*— Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292; Benedict *v.* Field, 16 N. Y. 595.

*Ohio.*— Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531, although the buyer had given his note.

*Texas.*— Ullman *v.* Babcock, 63 Tex. 68. But see Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587, 33 S. W. 987.

See 43 Cent. Dig. tit. "Sales," § 430.

"Insolvent," as used in this connection, means merely a general inability to pay one's debts. Crummey *v.* Raudenbush, 55 Minn. 426, 56 N. W. 1113.

**81.** Pardee *v.* Kanady, 100 N. Y. 121, 2 N. E. 885. See also Trescott *v.* Gross, 29 Ill. App. 543.

**82.** Stoolfire *v.* Royse, 71 Ill. 223; O'Brien *v.* Higley, 102 Ind. 316, 70 N. E. 242; Cornwall *v.* Haight, 8 Barb. (N. Y.) 327 [*reversed* on other grounds in 21 N. Y. 462]

**83.** Benedict *v.* Field, 16 N. Y. 595 [*affirming* 4 Duer 154]; Bruce *v.* Burr, 5 Daly (N. Y.) 510 [*affirmed* in 67 N. Y. 237]; Waldron *v.* Stevens, 12 Wend. (N. Y.) 100. But see Bicknall *v.* Waterman, 5 R. I. 43, holding that where a concluded agreement for the exchange of a specified lot of cotton for a specified note of a third person, at an agreed price for the cotton, has been made through a broker acting for both parties, the note of the purchaser of the cotton to be given for the difference, and nothing remains to be done but to deliver the cotton and receive the notes, it is no defense, to an action for not delivering the cotton upon tender of the notes, that before the contract was entered into the maker of the first-named note had failed, both parties and the broker being at the time of contract ignorant of the failure; the law implying, in such contract of exchange, no warranty of the solvency of the maker of the note at the time of the contract.

**Payment by check.**— Where the buyer and seller of merchandise agreed that the seller should retain the goods until he found out that the check given in payment therefor was good, and the seller deposited the check in the bank at which he kept his deposits, for collection, the bank collecting the check, and crediting the seller with the proceeds, the seller could not deny knowledge of the payment of the check. Kugel *v.* Angell, 74 Conn. 546, 51 Atl. 533.

**84. Return as constituting rescission** see *supra*, IV, B, 9.

**85.** *Alabama.*— Robinson *v.* Fairbanks, 81 Ala. 132, 1 So. 552.

*Connecticut.*— Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582.

*Georgia.*— Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925.

*Illinois.*— House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

*Kentucky.*— Jameson *v.* Gregory, 4 Metc. 363.

*Missouri.*— Jacob Strauss Saddlery Co. *v.* Kingman, 42 Mo. App. 208.

See 43 Cent. Dig. tit. "Sales," §§ 419, 421.

contracts which are also known as contracts of sale or return, namely, when the seller delivers the goods under an agreement by the buyer to return the goods or pay the price.[86] In these classes of contracts the property passes to the buyer by delivery subject only to be defeated by the performance of the condition subsequent.[87] Consequently if by the terms of the contract payment of the price is made a condition precedent to the passing of the property the contract is not one of sale or return.[88]

**b. Time and Place For Return.** If no particular time is fixed for the return of the goods they must be returned in a reasonable time,[89] but if a particular time is fixed the return must be made within that time.[90] If no place is designated for the return it is incumbent on the buyer to seek the seller.[91]

**c. Effect of Failure to Return.** On a failure to return within the time limited or, if no time is fixed, within a reasonable time, the sale becomes absolute and the buyer is liable for the price,[92] and no demand is necessary to fix his liability.[93] The loss or destruction of the property is no excuse for the failure to return as, the title being in him, the buyer is liable for the loss.[94] If, however, the seller

**Property returnable.**— The buyer can return only the property the return of which is stipulated for, and he cannot under the privilege thus granted return goods on the ground that they are damaged. Langston *v.* Bitting, 96 Ga. 410, 23 S. E. 308.

**86.** Holbrook *v.* Armstrong, 10 Me. 31; Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953; Fuller *v.* Buswell, 34 Vt. 107.

**Distinguished from bailment.**—Contracts of sale or return are to be distinguished from bailments in that there is no absolute obligation to return the identical thing, but the buyer may at his option pay the price. Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953; Buswell *v.* Bicknell, 17 Me. 344, 35 Am. Dec 262; Holbrook *v.* Armstrong, 10 Me. 31. *Compare* Hunt *v.* Wyman, 100 Mass. 198. A consignment of goods to the "care" of another, to be shipped to a foreign country and there sold to the best advantage, any loss resulting from sale below invoice price to be borne by the consignors, and profits in excess to be equally divided, and consignee to bear expense of shipment and to return free of charge any goods not sold is not a contract of sale or return but a bailment. Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093.

**87.** Wailes *v.* Howison, 93 Ala. 375, 9 So. 594; Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582; Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925; Buswell *v.* Bicknell, 17 Me. 344, 35 Am. Dec. 262. *Compare* Lindsey *v.* Gordon, 13 Me. 60.

**88.** Wailes *v.* Howison, 93 Ala. 375, 9 So. 594; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

**89.** Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Lang *v.* Severance, 5 Silv. Sup. (N. Y.) 334, 8 N. Y Suppl. 238.

**What is not reasonable time.**— Where goods were delivered in December, 1886, with the privilege of returning unsold goods, a return in February, 1888, was not within a reasonable time. Lang *v.* Severance, 5 Silv. Sup. (N. Y.) 334, 8 N. Y. Suppl. 238. See also House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307, where the goods were kept for three years.

**Question for jury.**— Whether the rejection of the goods was within a reasonable time is ordinarily a question for the jury. Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307, 85 N. Y. Suppl. 633.

**90.** Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925.

**Construction as to time.**— Where goods are sold under an agreement that the vendee might return them at the end of four months if he found himself unable to build up a trade for them, he is not bound to return them on the last day of the four months, but may do so in a reasonable time thereafter. Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925.

**Computation of time.**— Where goods were sold with privilege of exchange for other goods "within 15 days from date of invoice," the date of invoice is the day the goods are shipped, although a prior date may be written on the face of the invoice. Merchants' Exch. Co. *v.* Weisman, 132 Mich. 353, 93 N. W. 869.

**91.** White *v.* Perley, 15 Me. 470.

**92.** *Illinois.*— House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Jones *v.* Wright, 71 Ill. 61.

*Kentucky.*— Jameson *v.* Gregory, 4 Metc. 363.

*New York.*— Griffin *v.* Keith, 1 Hilt. 58.

*Utah.*— Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953.

*Vermont.*— Fuller *v.* Buswell, 34 Vt. 107.

*England.*— Moss *v.* Sweet, 16 Q. B. 493, 15 Jur. 536, 20 L. J. Q. B. 167, 71 E. C. L. 493, 3 Eng. L. & Eq. 311.

See 43 Cent. Dig. tit. "Sales," § 420.

**93.** Jones *v.* Wright, 71 Ill. 61; White *v.* Perley, 15 Me. 470.

**94.** Mann *v.* Trabue, 1 Mo. 709; Jacob Strauss Saddlery Co. *v.* Kingman, 42 Mo. App. 208; Fuller *v.* Buswell, 34 Vt. 107; Sturm *v.* Boker, 150 U. S. 312 14 S. Ct. 99, 37 L. ed. 1093.

denies the right of the buyer to return the goods, the latter is not liable if they are lost or destroyed.[95]

**13. Sales to Arrive — a. In General.** The sale may be conditioned "on arrival" of the goods, or of goods "to arrive," these phrases meaning the same thing.[96] Generally such contracts are conditional on the arrival of the goods, not of the vessel, and, if no goods arrive, the contract is at an end, relieving the seller of his obligation to deliver.[97] The contract may, however, be conditioned on the safe arrival of the vessel, and in such case the seller is bound, although no goods arrive, as the contract is absolute to deliver if the vessel arrives, although the goods are not on board.[98] A sale of goods to arrive by a particular date does not import that the goods must arrive on the day, but merely that the seller is bound to deliver and the buyers to accept only goods that have arrived by that day, and if no goods arrive the contract is at an end.[99]

**b. Particular Vessel.** If the contract is for the sale of goods to arrive by a particular ship, the arrival of the goods in that ship is a condition precedent, and if, in transit, they are transferred to another ship and arrive in that ship, the seller is not bound to deliver, although the ship originally named also arrived.[1] If there is a stipulation that the seller shall give the buyer notice of the name of the vessel as soon as known to him strict compliance with such stipulation is a condition precedent,[2] but a slight error in the name of the vessel will not justify a refusal of the goods.[3]

**c. Goods Not Consigned to Seller.** Ordinarily the condition in a sale to arrive by a particular vessel is not fulfilled, so as to make the seller answerable for non-delivery, by the arrival of goods of the proper description but not consigned to the seller, and with which he did not intend to deal.[4] But if the goods arriving are the same that the seller expected to sell, in the belief that they were consigned to him, he is answerable for non-delivery, although they were not in fact so consigned.[5]

**d. Quantity and Quality of Goods.** On a sale of a certain quantity to arrive, if the quantity stipulated does not arrive the buyer is not bound to accept, and conversely the seller is not bound to deliver,[6] but the rule is otherwise if there is

**95.** Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925.

**96.** Johnson *v.* Macdonald, 6 Jur. 264, 12 L. J. Exch. 99, 9 M. & W. 600.

**97.** Middleton *v.* Ballingall, 1 Cal. 446; Shields *v.* Pettee, 4 N. Y. 122 [*affirming* 4 N. Y. Super. Ct. 262]; Dike *v.* Reitlinger, 23 Hun (N. Y.) 241; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670; Hawes *v.* Humble, 2 Campb. 327 note, 11 Rev. Rep. 722 note; Boyd *v.* Siffkin, 2 Campb. 326, 11 Rev. Rep. 721; Johnson *v.* Macdonald, 6 Jur. 264, 12 L. J. Exch. 99, 9 M. & W. 600. But *compare* Lovatt *v.* Hamilton, 5 M. & W. 639.

**98.** Hale *v.* Rawson, 4 C. B. N. S. 85, 4 Jur. N. S. 363, 27 L. J. C. P. 189, 6 Wkly. Rep. 339, 93 E. C. L. 85, where the sale was "on arrival of" a named vessel.

**99.** Rogers *v.* Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276. And see Alewyn *v.* Pryor, R. & M. 406, 27 Rev. Rep. 763, 21 E. C. L. 781.

**1.** Lovatt *v.* Hamilton, 5 M. & W. 639. Such contracts import that the ship and goods shall arrive at the usual port in the ordinary course of navigation, and if the ship is wrecked the seller is not answerable for non-delivery, although the goods were saved and could have been forwarded to the proper port by other means. Idle *v.* Thornton, 3 Campb. 274, 13 Rev. Rep. 799. See also Smith *v.* Myers, L. R. 7 Q. B. 139, 41 L. J. Q. B. 91, 26 L. T. Rep. N. S. 103, 20 Wkly. Rep. 186, where the contract was for goods to arrive on a particular voyage of the ship named, and it was held that arrival of similar goods on another voyage was not within the contract.

**2.** Buck *v.* Spence, 4 Campb. 329; Graves *v.* Legg, 2 C. L. R. 1266, 9 Exch. 709, 23 L. J. Exch. 228.

**3.** Smith *v.* Pettee, 70 N. Y. 13, where the contract was for goods to arrive on the "Christopher," and the goods arrived on the "St. Christopher."

**4.** Hayward *v.* Scougall, 2 Campb. 56, 11 Rev. Rep. 662; Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681; Simond *v.* Braddon, 2 C. B. N. S. 324, 3 Jur. N. S. 719, 26 L. J. C. P. 198, 5 Wkly. Rep. 594, 89 E. C. L. 324; Vernede *v.* Weber, 1 H. & N. 311, 25 L. J. Exch. 326.

**5.** Fischel *v.* Scott, 15 C. B. 69, 2 C. L. R. 1774, 80 E. C. L. 69; Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681.

**6.** Matthews *v.* Hobby, 48 Barb. (N. Y.) 167; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112,

no specific agreement as to quantity.[7] So too the goods arriving must generally be of the quality agreed on,[8] although if there is an express warranty the buyer may accept the goods and sue for the breach.[9]

**C. Acceptance — 1. Obligation to Accept and Remove Goods — a. In General.** While the obligation to deliver implies a reciprocal obligation to accept,[10] yet as delivery and acceptance are concurrent conditions the duty to accept does not arise unless there is a sufficient delivery,[11] or offer to deliver.[12] Therefore the buyer is not bound to accept unless the delivery is made at the proper place [13] and time,[14] or if the delivery is not of the proper quantity,[15] or the goods not of the proper quality,[16] or if the goods are not shipped from the place designated in the contract.[17] He is not bound to accept without an opportunity to inspect the goods.[18] On the other hand if the delivery or offer to deliver is good the buyer is bound to accept,[19] and a proper delivery is sufficient to bind the buyer, although he refuses to accept.[20] If the contract is such that the seller is not bound to send the goods and he places them at the disposal of the buyer, affording him reasonable facilities to remove them,[21] the buyer is bound to accept and remove them.[22]

**b. Time of Acceptance and Removal.** The buyer is not bound to accept the goods on the day of their arrival if that is not the day of delivery.[23] If no definite time for acceptance is fixed, ordinarily acceptance may and should be within a reasonable time,[24] although it may be the duty of the buyer to accept the goods at once if time is of the essence of the contract,[25] or the goods are in danger of loss.[26]

20 Am. Dec. 670; Lovatt *v.* Hamilton, 5 M. & W. 639.

**7.** Covas *v.* Bingham, 2 C. L. R. 212, 2 E. & B. 836, 18 Jur. 596, 23 L. J. Q. B. 26, 75 E. C. L. 836.

**8.** Shields *v.* Pettee, 2 Sandf. (N. Y.) 262 [*affirmed* in 4 N. Y. 122]; Vernede *v.* Weber, 1 H. & N. 311, 25 L. J. Exch. 326. But *compare* Simond *v.* Braddon, 2 C. B. N. S. 324, 3 Jur. N. S. 719, 26 L. J. C. P. 198, 5 Wkly. Rep. 594, 89 E. C. L. 324.

**9.** Dike *v.* Reitlinger, 23 Hun (N. Y.) 241.

**10.** *Georgia.*— Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122.

*Maryland.*— Kirwan & Riggs *v.* Roberts, 99 Md. 341, 58 Atl. 32.

*Missouri.*— Worth *v.* Herbert, 59 Mo. App. 560.

*New York.*— Clark *v.* Dales, 20 Barb. 42.

*Tennessee.*— Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

**11.** See *supra*, V, B, 2.

**12.** See *supra*, V, B, 5.

**13.** See *supra*, V, B, 6.

**14.** See *supra*, V, B, 7.

**15.** See *supra*, V, B, 9.

**16.** See *supra*, V, B, 10.

**17.** Filley *v.* Pope, 115 U. S. 213, 6 S. Ct. 19, 29 L. ed. 372.

**18.** See *supra*, V, B, 10, d, (II).

**19.** *Georgia.*— Wholesale Mercantile Co. *v.* Jackson, 2 Ga. App. 776, 50 S. E. 106.

*Illinois.*— Garden City Wire, etc., Co. *v.* Kause, 67 Ill. App. 108.

*Kansas.*— Ferry Co. *v.* Ballinger, 8 Kan. App. 756, 60 Pac. 824.

*Kentucky.*— Walker *v.* Kirwan 90 S. W. 244, 28 Ky. L. Rep. 738.

*Maryland.*—Kirwan *v.* Roberts, 99 Md. 341, 58 Atl. 32.

*Michigan.*— T. Wilce Co. *v.* Kelley Shingle Co., 130 Mich. 319, 89 N. W. 957.

*Missouri.*— Moran Bolt, etc., Mfg. Co. *v.* St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

*Nebraska.*— Backes *v.* Black, 5 Nebr. (Unoff.) 74, 97 N. W. 321.

*New York.*— Lehmaier *v.* Standard Specialty, etc., Co., 123 N. Y. App. Div. 431, 108 N. Y. Suppl. 402.

*North Dakota.*— Reeves *v.* Corrigan, 3 N. D. 415, 57 N. W. 80.

*Tennessee.*— Fitzpatrick *v.* Fain, 3 Coldw. 15.

*United States.*— Lehman *v.* Salzgeber, 124 Fed. 479; Faddis *v.* Mason, 122 Fed. 410, 59 C. C. A. 27; Edward Hines Lumber Co. *v.* Alley, 73 Fed. 603, 19 C. C. A. 599.

See 43 Cent. Dig. tit. "Sales," § 445.

**20.** Richey *v.* Shinkle, 36 Kan. 516, 13 Pac. 795; Monarch *v.* Matthews, 9 S. W. 500, 10 Ky. L. Rep. 482; Rodman *v.* Guilford, 112 Mass. 405; Nichols *v.* Morse, 100 Mass. 523; Barton *v.* McKelway, 22 N. J. L. 165.

**21.** See *supra*, V, B, 8, f.

**22.** Chamberlain *v.* Farr, 23 Vt. 265; Carpenter *v.* Dole, 13 Vt. 578.

**23.** Cumberland Nursery Co. *v* Sudberry, (Tex. Civ. App. 1899) 54 S. W. 27; Hill *v.* Chipman, 59 Wis. 211, 18 N. W. 160.

**24.** McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640; Sanborn *v.* Benedict, 78 Ill. 309; Cragin *v.* O'Connell, 50 N. Y. App. Div. 339, 63 N. Y. Suppl. 1071 [*affirmed* in 169 N. Y. 573, 61 N. E. 1128]; Dunn *v.* Mayo Mills, 134 Fed. 804, 67 C. C. A. 450.

**25.** Henderson *v.* McFadden, 112 Fed. 389, 50 C. C. A. 304.

**26.** Morrell *v.* Koerner-Parker Lumber Co., 51 Mo. App. 592, goods which would be exposed to pillage.

If the time of delivery is limited to a certain period, within which delivery is to be made at the buyer's option, he is at least obliged to accept the goods at the end of the period.[27] If the goods are to be removed by the buyer, and no time is fixed, he may and must remove them within a reasonable time.[28] Failure to accept and remove within the time specified is waived by subsequent deliveries.[29]

**c. Refusal or Failure to Accept or Remove.** Where delivery is made of goods under a valid contract and conforming to the contract, at the place and in the manner agreed on, the buyer's failure or refusal to accept does not relieve him from liability for the price.[30] The seller may on the buyer's refusal to accept resell the goods and recover the difference in price.[31] Mere delay in removing the goods does not forfeit the buyer's right to the property,[32] but merely renders him liable for damages which the seller sustains thereby,[33] expense of storage,[34] and demurrage.[35]

**d. Excuses For Failure to Accept or Remove.** The failure of the buyer to accept and remove the goods is excused when the seller in making delivery has failed to comply with the conditions of the contract,[36] unless they are of an immaterial character,[37] such as drawing on the buyer for the price before delivery,[38] and this is especially true when the mistake is corrected as soon as called to the seller's attention.[39] If, however, the seller persists in his claim to impose other conditions than those named in the contract the buyer will be absolved from his obligation.[40] The buyer is of course not excused from acceptance because circum-

27. Richey *v.* Shinkle, 36 Kan 516, 13 Pac. 795; Nichols *v.* Bishop, 136 Mass. 349.

28. *Alabama.*— Heflin *v.* Bingham, 56 Ala. 566, 28 Am. Rep. 776.

*Florida.*— Whiting *v.* Gray, 27 Fla. 482, 8 So. 726, 11 L. R. A. 526.

*Illinois.*— Wichert *v.* Stafford, 25 Ill. App. 218.

*Michigan.*— Bolton *v.* Riddle, 35 Mich. 13.

*New Hampshire.*— Howe *v.* Batchelder, 49 N. H. 204.

*New York.*— Warren *v.* Leland, 2 Barb. 613.

*Vermont.*— Danforth *v.* Walker, 40 Vt. 257. See 43 Cent. Dig. tit. "Sales," § 447.

29. Gray *v.* Delaware, etc., R. Co., 48 N. Y. Super. Ct. 121.

30. *Connecticut.*—Fish *v.* Spicer, (1905) 60 Atl. 696.

*Massachusetts.*— Nichols *v.* Morse, 100 Mass. 523.

*New York.*— Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272.

*Oregon.*— Brigham *v.* Hebbard, 28 Oreg. 386, 43 Pac. 383; Schneider *v.* Oregon Pac. R. Co., 20 Oreg. 172, 25 Pac. 391.

*Vermont.*— Chamberlain *v.* Farr, 23 Vt. 265.

31. McCord *v.* Laidley, 87 Ga. 221, 13 S. E. 509; Johnson *v.* Listman Mill Co., 79 Ill. App. 435.

32. Halstead *v.* Jessup, 150 Ind. 85, 49 N. E. 821; Davis *v.* Emery, 61 Me. 140, 14 Am. Rep. 553; Bowser *v.* Birdsell, 49 Mich. 5, 12 N. W. 888; Briggs *v.* Ottman, 15 Daly (N. Y.) 46, 3 N. Y. Suppl. 49. But see Ogden *v.* Lucas, 48 Ill. 492.

**Stipulation as to removal.**— If there is a stipulation as to what will excuse a failure to remove, a failure from other causes not stipulated is a breach of contract terminating the buyer's right to enforce it. Adams *v.* Ames, 19 Wash. 425, 53 Pac. 546.

33. Halstead *v.* Jessup, 150 Ind. 85, 49 N. E. 821; Davis *v.* Emery, 61 Me. 140, 14 Am. Rep. 553; Dibblee *v.* Corbett, 9 Abb. Pr. (N. Y.) 200.

34. Lehman *v.* Skelton, 46 Ala. 310; Ducey Lumber Co. *v.* Lane, 58 Mich. 520, 25 N. W. 508; Dayton *v.* Rowland, 1 Daly (N. Y.) 446.

35. Blanchard *v.* Pacific Rolling-Mill Co., (Cal. 1894) 36 Pac. 584.

**Goods arriving in bond.**— Where goods arriving in bond are purchased, the buyer may refuse to receive them until the proper papers are obtained from the custom-house without incurring any liability for demurrage, although the removal of the goods might have been sooner effected by the illegal consent of a subordinate government officer. Gillespie *v.* Durand, 3 E. D. Smith (N Y.) 531.

36. Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159, (1903) 71 Pac. 697; Munsey *v.* Butterfield, 133 Mass. 492; Steinhardt *v.* Bingham, 182 N. Y. 326, 75 N. E. 403 [*affirming* 90 N. Y. App. Div. 149, 85 N. Y. Suppl. 1044].

37. Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648; Stresovich *v.* Kesting, 63 Mo. App. 57; Worth *v.* Herbert, 59 Mo. App. 560.

38. McCord *v.* Laidley, 87 Ga. 221, 13 S. E. 509. And see Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92, holding that the fact that a seller of goods to be shipped to the place of delivery shipped the same in his own name, and drew, in the ordinary course of business, a draft on the buyer, with the bill of lading attached, did not justify the buyer in refusing acceptance of the goods.

39. Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648; Jesse French Piano, etc., Co. *v.* Wallace, 84 Mo. App. 378.

40. Kaufman *v.* Austin, 57 Ga. 87.

stances arise which render the goods unavailable for the use contemplated at the time of the sale,[41] or because their use would no longer be profitable.[42]

**2. Acts Constituting Acceptance — a. In General.** Acceptance may precede as well as follow delivery,[43] and in such case may be by express words.[44] Acceptance of goods in performance of the contract of sale both comprehends physical receipt and mental assent.[45] To constitute an acceptance of goods something more than words is necessary.[46] And the mere receipt of goods is insufficient to show an acceptance,[47] especially where the buyer has the right of inspection;[48] but there must be some act on the part of the buyer indicating an intent to receive the goods in performance of the contract and to retain and exercise dominion over them.[49] The acceptance may be by a third person acting as the buyer's agent,[50] or by one who has repurchased from the buyer.[51]

**b. Acts of Ownership** — (1) *In General.* An acceptance may be indicated by the exercise of acts of ownership,[52] as by branding cattle,[53] mortgaging the property,[54] requesting the seller to retain possession for the buyer,[55] or taking an inventory and acceptance of keys to a building where the property is stored.[56] But where the purchaser orders goods of a certain class, and the seller ships a part of the goods ordered and also other goods not ordered, the purchaser may pay for the goods ordered without making himself liable for the price of the other

41. Gray *v.* Long, (Cal. 1894) 37 Pac. 380.

42. Moses *v.* Allen, 91 Md. 42, 46 Atl. 323. See also Penn *v.* Smith, 104 Ala. 445, 18 So. 38.

43. Cross *v.* O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Bazzoni *v.* Woodward, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 644; Stockton *v.* Rogers, 15 Misc. (N. Y.) 468, 37 N. Y. Suppl. 213 [*affirmed* in 17 Misc. 138, 39 N. Y. Suppl. 400].

44. Bazzoni *v.* Woodward, 57 Hun (N. Y.) 590, 10 N. Y. Suppl. 644.

45. Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771; *In re* George M. Hill Co., 123 Fed. 866, 59 C. C. A. 354.

46. Edwards *v.* Grand Trunk R. Co., 54 Me. 105; Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Shindler *v.* Houston, 1 N. Y. 261, 49 Am. Dec. 316; Kellogg *v.* Witherhead, 6 Thomps. & C. (N. Y.) 525; Duplex Safety Boiler Co. *v.* McGinness, 64 How. Pr. (N. Y.) 99.

47. *Delaware.*— Grier *v.* Simpson, 8 Houst. 7, 31 Atl. 587.

*Kentucky.*— White, etc., Hat Co. *v.* Carson, 77 S. W. 366, 25 Ky. L. Rep. 1230.

*Massachusetts.*— Gowing *v.* Knowles, 118 Mass. 232.

*Missouri.*— Calhoun *v.* Paule, 26 Mo. App. 274.

*New York.*— Dowdle *v.* Bayer, 9 N. Y. App. Div. 308, 41 N. Y. Suppl. 184; Fitzsimmons *v.* Woodruff, 1 Thomps. & C. 3.

*United States.*— *In re* George M. Hill Co., 123 Fed. 866, 59 C. C. A. 354.

But see Butler *v.* Lawshe, 74 Ga. 352.

**Joint purchasers.**— An acknowledgment of the receipt of goods, by one of two joint purchasers, is not binding upon the other, who is the only defendant to an action for the price, and, although indorsed upon the contract for the goods, is not admissible in such action. Wing *v.* Evans, 73 Iowa 409, 35 N. W. 495.

**Promise of seller to correct defects.**— A receipt of articles on the promise of the seller to correct defects complained of is not an acceptance if such defects are not corrected. Belt *v.* Stetson, 26 Minn. 411, 4 N. W. 779.

48. Knohlauch *v.* Kronschnabel, 18 Minn. 300; Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831.

49. Edwards *v.* Grand Trunk R. Co., 54 Me. 105; Herbert *v.* Winters, 15 Mont. 552, 39 Pac. 906; Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771.

**Refusal withdrawn.**— Where, after a buyer returned goods sold as unsatisfactory, and notified the seller that the goods were refused and were at the seller's risk, the buyer again ordered the railroad company holding the goods to return them to it, such direction constituted an acceptance of the goods. Kupfer *v.* Michigan Clothing Co., 141 Mich. 325, 104 N. W. 582.

50. Goldstein *v.* Hochberg, 86 N. Y. Suppl. 11.

**Carrier as agent.**— The employment of an express company by a buyer to forward goods purchased, but not accepted, does not constitute the carrier the buyer's agent to accept. Salomon *v.* King, 63 N. J. L. 39, 42 Atl. 745.

51. Baylis *v.* Weibezahl, 42 Misc. (N. Y.) 178, 85 N. Y. Suppl. 355.

52. *Georgia.*— Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497.

*Iowa.*— Rock Island Plow Co. *v.* Meredith, 107 Iowa 498, 78 N. W. 233.

*New York.*— Pease *v.* Copp, 67 Barb. 132.

*South Dakota.*— Stewart *v.* Gilruth, 8 S. D. 181, 65 N. W. 1065.

*Washington.*— Moore *v.* Perrott, 2 Wash. 1, 25 Pac. 906.

See 43 Cent. Dig. tit. "Sales," § 451.

53. Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135.

54. Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417.

55. Armstrong *v.* Turner, 49 Md. 589.

56. Gray *v.* Davis, 10 N. Y. 285.

goods, and where he returns such other goods within a reasonable time, he is not liable therefor.[57]

(II) *RETENTION AND USE.* Generally acceptance will be implied if the buyer retains and uses the goods as his own,[58] and the mere fact that he complained of defects in the goods will not affect this result.[59] The effect of the use of the article may, however, be modified by the circumstances surrounding such use,[60] as where the use is for the purpose of trial,[61] especially when the seller represents that the machine on trial can and will be made to work properly.[62] But it will be regarded as an acceptance if the buyer uses more of the article than is fairly and reasonably necessary in making the test,[63] or prolongs the trial beyond a reasonable period.[64]

(III) *DEALING IN THE GOODS.* An acceptance will also be implied if the

**57.** Goldstandt-Powell Hat Co. *v.* Coff, 19 Okla. 243, 91 Pac. 862.

**58.** *Illinois.*— Borden, etc., Co. *v.* Fraser, 118 Ill. App. 655; Smith *v.* Ainsworth, 64 Ill. App. 157; De Kalb Implement Works *v.* White, 59 Ill. App. 171; McBride *v.* McClure, 49 Ill. App. 612.

*Kansas.*— Tufts *v.* Mahie, 7 Kan. App. 129, 53 Pac. 84.

*Kentucky.*— Noel *v.* Kauffman Buggy Co., 106 S. W. 237, 32 Ky. L. Rep. 576; McCormick Harvesting Mach. Co. *v.* Dodkins, 73 S. W. 1129, 24 Ky. L. Rep. 2306.

*Mississippi.*— Stillwell, etc., Co. *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

*New Jersey.*— Woolward *v.* Emmons, 61 N. J. L. 281, 39 Atl. 703.

*New York.*— Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253]; Brown *v.* Foster, 108 N. Y. 387, 15 N. E. 608; Ellison *v.* Creed, 34 N. Y. App. Div. 15, 53 N. Y. Suppl. 1054; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464, 50 N. Y. Suppl. 691; Wiles *v.* Provost, 6 N. Y. App. Div. 1, 39 N. Y. Suppl. 461; Normington *v.* Cook, 2 Thomps. & C. 423 [*affirmed* in 59 N. Y. 655]; Schuchman *v.* Winterbottom, 58 N. Y. Super. Ct. 105, 9 N. Y. Suppl. 733 [*affirmed* in 130 N. Y. 699, 30 N. E. 63]; Merriam Paper Co. *v.* New York Market Gardeners' Assoc., 58 Misc. 236, 108 N. Y. Suppl. 1038; Turl *v.* Knable, 26 Misc. 770, 56 N. Y. Suppl. 1017; Logan *v.* Berkshire Apartment House, 3 Misc. 296, 22 N. Y. Suppl. 776 [*affirming* 1 Misc. 18, 20 N. Y. Suppl. 369]. But see Ballenbacher *v.* Finney, 12 N. Y St. 568.

*North Carolina.*— Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718.

*Vermont.*— Dennis *v.* Stoughton, 55 Vt. 371.

*Wisconsin.*— Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135; Walter A. Wood Mowing, etc., Mach. Co. *v.* Calvert, 89 Wis. 640, 62 N. W. 532.

*United States.*— Hercules Iron Works *v.* Dodsworth, 57 Fed. 556.

See 43 Cent. Dig. tit. "Sales," § 454.

**What constitutes use.**— In an action for the price of mirrors where defendant's testimony showed that the mirrors were put up against her orders, while she was attending to a customer; that they were so placed that when any one passed by them in the room they could not help looking in them, and that was the only way in which they were used, it was error to charge that if the mirrors "were made use of for any length of time, no matter how short a time it may have been, there was an acceptance" on the part of defendant. Hudson *v.* Roos, 76 Mich. 173, 42 N. W. 1099.

**Loan to third person.**— One to whom a corn harvester was delivered on a contract that if it worked well he should keep it, and pay for it, accepts it by loaning it to another for use, and such other person using it, without the knowledge or consent of the seller. Hensen *v.* Beebe, 111 Iowa 534, 82 N. W. 942.

**A single act of use** is not such an act of ownership as will indicate acceptance, if the use does not affect the condition or value of the property. Schwartz *v.* Holy Cross Church, 60 Minn. 183, 62 N. W. 266.

**59.** De Kalb Implement Works *v.* White, 59 Ill. App. 171; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464, 50 N. Y. Suppl. 691; Wiles *v.* Provost, 6 N. Y. App. Div. 1, 39 N. Y. Suppl. 461; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135; Hercules Iron Works *v.* Dodsworth, 57 Fed. 556. And see Noel *v.* Kauffman Buggy Co., 106 S. W. 237, 32 Ky. L. Rep. 576, holding that where vehicles shipped defendants by plaintiff were not as ordered, the fact that plaintiff's agent gave defendants permission to use the vehicles temporarily until they could be replaced by others of the desired kind did not authorize defendants to use the vehicles until they were practically worthless, and then decline to pay for them.

**60.** Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860.

**61.** Creamery Package Mfg. Co. *v.* Benton County Creamery Co., 120 Iowa 584, 95 N. W. 188.

**62.** Crabtree *v.* Potts, 108 Ill. App. 627; Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Phelps *v.* Whitaker, 37 Mich. 72.

**63.** Zipp Mfg. Co. *v.* Pastorino, (Wis. 1904) 97 N. W. 904. And see Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135.

**64.** Springfield Engine Stop Co. *v.* Sharp, 184 Mass. 266, 68 N. E. 224.

buyer retains the goods and resells them or a portion of them,[65] but a mere offer to sell before inspection, on delivery by the carrier, does not amount to an acceptance,[66] and the fact that an employee of the buyer unauthorizedly sold a small portion of the goods does not amount to an acceptance, where the buyer repudiated the sale upon learning of it, and directed the employee to replace the portion sold.[67]

**c. Failure to Reject or Return Goods.** An acceptance of the goods will be implied if the buyer fails within a reasonable time to reject them,[68] or to return them to the seller.[69] If, however, the seller, after notice that the goods are unsatisfactory, asks an opportunity to remedy the defect, and there is nothing to show that either party considered the time for acceptance as running, no acceptance will be implied on the part of the purchaser at the end of the time for acceptance limited in the contract.[70]

**3. Effect of Acceptance.** The acceptance may be conditional,[71] in which case

**65.** *Illinois.*— Telford *v.* Albro, 60 Ill. App. 359.

*Indiana.*— Pottlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030.

*Iowa.*— Rock Island Plow Co. *v.* Meredith, 107 Iowa 498, 78 N. W. 233.

*Kentucky.*— Duckwall *v.* Brooke, 65 S. W. 357, 23 Ky. L. Rep. 1459.

*Maine.*— Walcott *v.* Richman, 94 Me. 364, 47 Atl. 901.

*Michigan.*— George D. Sisson Lumber, etc., Co. *v.* Haak, 139 Mich. 383, 102 N. W. 946; Sullivan *v.* Sullivan, 70 Mich. 583, 38 N. W. 472.

*New York.*— Kienle *v.* Klingman, 24 Misc. 708, 53 N. Y. Suppl. 788; Levison *v.* Seybold Mach. Co., 22 Misc. 327, 49 N. Y. Suppl. 148; Carr *v.* Sullivan, 68 Hun 246, 22 N. Y. Suppl. 972; Babcock *v.* Hutchinson, 4 Lans. 276.

*Oregon.*—Lenz *v.* Blake-McFall Co., 44 Oreg. 569, 76 Pac. 356.

*Vermont.*— Brown *v.* Nelson, 66 Vt. 660, 30 Atl. 94.

*Wisconsin.*— White *v.* Hanchett, 21 Wis. 415.

See 43 Cent. Dig. tit. "Sales," § 454.

And see Liquid Carbonic, etc., Mfg. Co. *v.* Paulk, 3 Ga. App. 372, 59 S. E. 1125.

**Advertising goods for sale.**— A catalogue issued by defendant to the trade, listing certain goods previously delivered by plaintiff, is admissible to show acceptance of the goods. Kraus *v.* J. H. Mohlman Co., 18 Misc. (N. Y.) 430, 42 N. Y. Suppl. 23.

**66.** Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539.

**67.** Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539.

**68.** *Connecticut.*— Downs *v.* Marsh, 29 Conn. 409.

*Illinois.*— Ellis *v.* Roche, 73 Ill. 280.

*New Hampshire.*— Small *v.* Stevens, 65 N. H. 209, 18 Atl. 196.

*Pennsylvania.*— Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186.

*Wisconsin.*— Barton *v.* Kane, 18 Wis. 262.

See 43 Cent. Dig. tit. "Sales," § 453.

And see Noel *v.* Kauffman Buggy Co., 106 S. W. 237, 32 Ky. L. Rep. 576.

**Counter proposal.**— Where a buyer, who notifies the seller that he will return the goods because not delivered in time, fails to reply to a letter from the seller offering to give an extra credit if he will keep them, and he does not reship them, his assent to the seller's proposition will be presumed. Ford *v.* Friedman, 40 W. Va. 177, 20 S. E. 930.

**69.** *Connecticut.*— C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604; Treadwell *v.* Reynolds, 39 Conn. 31.

*Illinois.*— Mayes *v.* Rogers, 47 Ill. App. 372.

*Iowa.*— Frey-Sheckler Co. *v.* Iowa Brick Co., 104 Iowa 494, 73 N. W. 1051.

*Massachusetts.*—Wheeler *v.* Klaholt, 178 Mass. 141, 59 N. E. 756; Hoobs *v.* Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Hedden *v.* Roberts, 134 Mass. 38, 45 Am. Rep. 276.

*Minnesota.*— Haase *v.* Nonnemacher, 21 Minn. 486.

*Missouri.*— Gaff *v.* Homeyer, 59 Mo. 345.

*New York.*— Smith *v.* Coe, 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350 [*affirmed* in 170 N. Y. 162, 63 N. E. 57], 68 N. Y. Suppl. 274, 57 N. Y. App. Div. 631; Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, 54 N. Y. Suppl. 449 [*affirmed* in 165 N. Y. 617, 59 N. E. 1119]; Glen *v.* Whitaker, 51 Barb. 451; Fisher *v.* Merwin, 1 Daly 234; MacEvoy *v.* Aronson, 46 Misc. 622, 92 N. Y. Suppl. 724; Hospital Supply Co. *v.* O'Neill, 10 Misc. 655, 31 N. Y. Suppl. 792 [*affirmed* in 155 N. Y. 634, 49 N. E. 1098]; Greenthal *v.* Schneider, 52 How. Pr. 133.

*Oregon.*— Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

*Pennsylvania.*— Dailey *v.* Green, 15 Pa. St. 118.

*Wisconsin.*— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

*United States.*—Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. 83, 8 C. C. A. 14.

See 43 Cent. Dig. tit. "Sales," §§ 452, 453.

**Order for goods.**— Failure to return an order for goods was held to show an acceptance of the goods in Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470, 94 N. Y. Suppl. 777; Salmon *v.* Brandmeier, 104 N. Y. App. Div. 66, 93 N. Y. Suppl. 271.

**70.** Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65.

**71.** Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

it will not constitute a binding acceptance unless the condition is complied with,[72] but if absolute it cannot be withdrawn.[73] It relates back to the time of the sale[74] and binds the buyer for the price.[75] Where a large part of the goods have been accepted, the buyer cannot refuse to carry out the contract as to the balance on the ground of uncertainty in the contract as to the quality of the goods sold, the presumption being that the remainder was to be of the same quality as that accepted, and customary for the purposes needed.[76]

**4. Evidence.** Delivery of goods at the agreed place raises a presumption of acceptance,[77] especially where it appears that nothing remained for the seller to do,[78] or that any objection was made by the buyer.[79] Use creates a presumption of acceptance which, however, may be rebutted, the burden being on the buyer to show non-acceptance.[80] For the purpose of showing whether there has been an acceptance of the goods testimony as to declarations of the buyer is admissible,[81] but not declarations made prior to delivery.[82] Testimony as to acts of ownership exercised after suit was begun is inadmissible as there must have been acceptance prior to suit to justify a recovery,[83] and even when acts of ownership are shown, testimony in explanation thereof is proper.[84] Testimony as to payment of the price is admissible as tending to show acceptance.[85] Evidence is admissible tending to show a rejection and return of the goods,[86] or an offer to return,[87] but it may also be shown that the rejection was not in good faith.[88]

**72.** Parr *v.* Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

**73.** Gray *v.* Long, (Cal. 1894) 37 Pac. 380; Smith *v.* Ainsworth, 64 Ill. App. 157; Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753.

**74.** Austin *v.* Dawson, 75 N. C. 523.

**75.** *Georgia.*— Strickland *v.* Parlin, etc., Co., 118 Ga. 213, 44 S. E. 997.

*Iowa.*— Schopp *v.* Taft, 106 Iowa 612, 76 N. W. 843; Frey-Sheckler Co. *v.* Iowa Brick Co., 104 Iowa 494, 73 N. W. 1051.

*Kentucky.*— Noel *v.* Kauffman Buggy Co., 106 S. W. 237, 32 Ky. L. Rep 576; Stein Brewing Co. *v.* Eberhard, 62 S. W. 881, 23 Ky. L. Rep. 325.

*Maine.*— Pearce *v.* Norton, 10 Me. 252.

*Michigan.*— Root, etc., Co. *v.* Walton Salt Assoc., 140 Mich. 441, 103 N. W. 844.

*New York.*— Manda *v.* Etienne, 93 N. Y. App. Div. 609, 87 N. Y. Suppl. 588; Consequa *v.* Fanning, 3 Johns. Ch. 587.

*North Carolina.*—Dodson *v.* Moore, 64 N. C. 512.

*Vermont.*— Harrington *v.* Lee, 33 Vt. 249; Blish *v.* Granger, 6 Vt. 340.

**Acceptance of property as that of third person.**— That one who knowingly received and used the property of the vendor, delivered under an agreement of sale, has notified the vendor when he received it, that he refused to accept it, as his property, but accepted it as that of a third person, and that he has paid such third person for it, does not relieve him from liability to the vendor for the purchase-price. Central Coal, etc., Co. *v.* Good, 120 Fed. 793, 57 C. C. A. 161.

**76.** Blue Grass Traction Co. *v.* Hedges, 104 S. W. 370, 31 Ky. L. Rep. 1005.

**77.** White *v.* Harvey, 85 Me. 212, 27 Atl. 106.

**Goods on shipboard.**— The vendee's knowledge that the goods are on shipboard creates no presumption of constructive acceptance. Stevens *v.* Stewart, 3 Cal. 140.

**78.** Nichols *v.* Morse, 100 Mass. 523.

**79.** U. S. Reflector Co. *v.* Rushton, 7 Daly (N. Y.) 410.

**80.** Goodwin Mfg. Co. *v.* Arthur Fritsch Foundry, etc., Co., 115 Mo. App. 382, 89 S. W. 911.

**Insufficient delivery.**— It will not be presumed as a matter of law that fixtures purchased for a store have been accepted by the purchaser, if it appears from an affidavit of defense that the fixtures delivered differed, not only in quality and value, but in kind, from those contracted for, and that there was a contemporaneous refusal to accept them, followed by express notice, repeated from time to time, to reconstruct them so as to make them conform to the contract, or remove them. Loeper *v.* Haas, 24 Pa. Super. Ct. 184.

**81.** Fletcher *v.* Cole, 23 Vt. 114.

**82.** Pierson *v.* Spaulding, 67 Mich. 640, 35 N. W. 699.

**83.** Black *v.* Delbridge, etc., Co., 90 Mich. 56, 51 N. W. 269.

**84.** Hale *v.* Taylor, 45 N. H. 405.

**85.** Valley Iron Works Mfg. Co. *v.* Grand Rapids Flouring Mill Co., 85 Wis. 274, 55 N. W. 693; Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510.

**86.** Reigner *v.* Bryan, 8 N. Y. Suppl. 215; Reber *v.* Schitler, 141 Pa. St. 640, 21 Atl. 736.

**87.** Sycamore Marsh Harvester Co. *v.* Grundrad, 16 Nebr. 529, 20 N. W. 832.

**88.** Van Camp Packing Co. *v.* McGuire, 86 Hun (N. Y.) 210, 33 N. Y. Suppl. 210; Mumford *v.* Dickert, etc., Sulphur Co., 5 Utah 476, 17 Pac. 123.

**Sufficiency of the evidence** to show an acceptance or rejection of the goods is considered in Yale *v.* Yale, 13 Conn. 185, 33 Am. Dec. 393; Union League Club *v.* Blymer Ice Mach. Co., 104 Ill. App. 106 [*affirmed* in 204

**5. Questions For Jury.** The existence of facts tending to show an acceptance of the goods is ordinarily for the jury,[89] as well as the ultimate fact of acceptance,[90] unless the law can pronounce upon a state of facts relative to a sale of goods that there is or is not a delivery and acceptance, in which case it is a question of law for the court.[91] So whether the buyer waives his right to reject for defective quality is ordinarily a question for the jury.[92]

**D. Payment — 1. Obligation to Pay.** As a general rule the obligation of the buyer to pay the price is a condition concurrent with the obligation of the seller to deliver,[93] especially when the contract provides merely that payment is to be made on delivery,[94] or where no time or place of payment for goods is specified in the contract of sale,[95] and although in such case the obligation of the buyer to pay is not absolute until there is a delivery,[96] yet he must be ready to

Ill. 117, 68 N. E. 409]; Amundson *v.* Standard Printing, etc., Co., 140 Iowa 464, 118 N. W. 789; Dowell *v.* Williams, 40 Kan. 753, 20 Pac. 487 [*following* Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600]; Detroit Trust Co. *v.* Glazier Stove Co., 55 Mich. 81, 118 N. W. 722; Tompkins *v.* Lamb, 121 N. Y. App. Div. 366, 106 N. Y. Suppl. 6 [*affirmed* in 195 N. Y. 518, 88 N. E. 1133]; Bensler *v.* Locke, 4 Misc. (N. Y.) 486, 24 N. Y. Suppl. 364; Donohue *v.* Hammel, 1 N. Y. Suppl. 401.

89. Norton *v.* Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Washington *v.* Johnson, 7 Humphr. (Tenn.) 468.

90. *Indiana.*— Coates *v.* Huffine, 13 Ind. App. 182, 41 N. E. 465.

*Maine.*— Houdlette *v.* Tallman, 14 Me. 400.

*Michigan.*—Crane *v.* Wilson, 105 Mich. 554, 63 N. W. 506.

*Minnesota.*— St. Anthony Lumber Co. *v.* Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274.

*Mississippi.*— Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

*New York.*—Isbell-Porter Co. *v.* Heineman, 126 N. Y. App. Div. 713, 111 N. Y. Suppl. 332; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340.

*Utah.*— Lauer *v.* Richmond Co-operative Mercantile Inst., 8 Utah 305, 31 Pac. 397.

*Wisconsin.*— Rood *v.* Priestley, 58 Wis. 255, 16 N. W. 546; Kahn *v.* Klabunde, 50 Wis. 235, 6 N. W. 888.

See 43 Cent. Dig. tit. "Sales," § 495.

**Mixed question of law and fact.**— Where a wholesaler sues for the price of goods sold and delivered, and the defense is that the goods were not the goods ordered, and that they were returned within two weeks after receipt and were never exposed to sale, and the evidence is conflicting, the issue of acceptance is one of mixed law and fact for the jury. Goldstandt-Powell Hat Co. *v.* Cuff, 19 Okla. 243, 91 Pac. 862.

91. Houdlette *v.* Tallman, 14 Me. 400.

92. Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539.

93. *California.*— Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Illinois.*— Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Stoolfire *v.* Royse, 71 Ill. 223; Henkle *v.* Smith, 21 Ill. 238.

*New York.*— Speyer *v.* Colgate, 67 Barb. 192; Draper *v.* Jones, 11 Barb. 263; Kelley *v.* Upton, 5 Duer 336.

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*Texas.*— Kelly *v.* Webb, 27 Tex. 368.

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

*England.*— Nelson *v.* Patrick, 2 C. & K. 641, 61 E. C. L. 641; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

See 43 Cent. Dig. tit. "Sales," § 231.

94. *California.*— Fruit *v.* Phelps, 4 Cal. 282.

*Illinois.*— Harber Bros. Co. *v.* Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676 [*affirming* 52 Ill. App. 146]; Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226; Allen *v.* Hartfield, 76 Ill. 358; Stoolfire *v.* Royse, 71 Ill. 223; Metz *v.* Albrecht, 52 Ill. 491.

*Indiana.*— Johnson *v.* Powell, 9 Ind. 566.

*Kentucky.*— Estill *v.* Jenkins, 4 Dana 75; Asberry *v.* Macklin, 3 T. B. Mon. 9.

*Massachusetts.*— West *v.* Platt, 127 Mass. 367.

*New York.*— Tipton *v.* Feitner, 20 N. Y. 423; Lester *v.* Jewett, 11 N. Y. 453; Genin *v.* Thompkins, 12 Barb. 265; Draper *v.* Jones, 11 Barb. 263.

*Pennsylvania.*— Keeler *v.* Schmertz, 46 Pa. St. 135; Levering *v.* Phillips, 7 Pa. St. 387.

*Texas.*— Kelly *v.* Webb, 27 Tex. 368.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*England.*— Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252.

95. Bollenbacher *v.* Reid, 155 Mich. 277, 118 N. W. 933; Eaton *v.* Blackburn, 52 Oreg. 300, 96 Pac. 870, 97 Pac. 539.

96. *Alabama.*— Nesbitt *v.* McGebee, 26 Ala. 748.

*California.*— Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Illinois.*— Lassen *v.* Mitchell, 41 Ill. 101; Hungate *v.* Rankin, 20 Ill. 639.

*Michigan.*—Boyden *v.* Moore, 35 Mich. 411.

*New York.*— Speyer *v.* Colgate, 67 Barb. 192; See *v.* Bernheimer, 38 N. Y. Super. Ct. 40; Lackawanna Mills *v.* Weil, 21 N. Y. App. Div. 492, 47 N. Y. Suppl. 585 [*affirmed* in 162 N. Y. 642, 57 N. E. 1114].

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

pay to put the seller in default.[97] Payment may, however, be made a condition precedent by the terms of the contract.[98] The obligation to pay will of course become absolute on a proper delivery,[99] or an acceptance of the goods,[1] or at the expiration of the period fixed for trial and approval;[2] and in such case the buyer cannot impose additional conditions as precedent to payment.[3] But the obligation to pay may be modified by stipulations in the nature of conditions precedent to payment, in which case such conditions must be performed before the obligation to pay can be enforced.[4] Where goods delivered were such as were ordered,

*Texas.*— Kelley *v.* Webb, 27 Tex. 368.

*England.*— Jones *v.* Gibbons, 8 Exch. 920, 22 L. J. Exch. 347, 1 Wkly. Rep. 438. See also Staunton *v.* Wood, 16 Q. B. 638, 15 Jur. 1123, 71 E. C. L. 638.

See 43 Cent. Dig. tit. "Sales," §§ 231, 232.

97. *California.*— Fruit *v.* Phelps, 4 Cal. 282.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Illinois.*— Harber Bros. Co. *v.* Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676 [*affirming* 52 Ill. App. 146]; Stoolfire *v.* Royse, 71 Ill. 223; Metz *v.* Albrecht, 52 Ill. 491.

*Massachusetts.*— Hapgood *v.* Shaw, 105 Mass. 276, holding that, when payment and delivery are concurrent, there is nothing to be done by either party, and if nothing is done by either, neither party is in default, and neither party can hold the other for breach of contract.

*Missouri.*— Southwestern Freight, etc., Express Co. *v.* Plant, 45 Mo. 517.

*New York.*—James *v.* Hamilton, 2 Hun 630, 5 Thomps. & C. 183 [*affirmed* in 63 N. Y. 616]; Aikin *v.* Davis, 45 Barb. 44; Porter *v.* Rose, 12 Johns. 209, 7 Am. Dec. 306.

*Ohio.*— Simmons *v.* Green, 35 Ohio St. 104.

*Pennsylvania.*— Keeler *v.* Schmertz, 46 Pa. St. 135.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

*England.*— Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252; Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

*Canada.*—Greenham *v.* Watt, 25 U. C. Q. B. 265.

See 43 Cent. Dig. tit. "Sales," § 230 *et seq.*

98. *Alabama.*— Austill *v.* Hieronymus, 124 Ala. 376, 27 So. 255.

*Michigan.*— W. & A. McArthur Co. *v.* Bay City Old Second Nat. Bank, 122 Mich. 223, 81 N. W. 92.

*New York.*— Leibel *v.* Light, 25 Misc. 732, 55 N. Y. Suppl. 705.

*Vermont.*— Scott *v.* Morse, 22 Vt. 466.

*England.*— Sanders *v.* Maclean, 11 Q. B. D. 327, 5 Aspin. 160, 52 L. J. Q. B. 481, 49 L. T. Rep. N. S. 462, 31 Wkly. Rep. 698.

**Where there is a sale of goods to be paid for in cash on delivery,** payment is a condition precedent to passing title to the vendee, and if on delivery payment is refused, and the goods are appropriated by the vendee to his own use, an action against him for the value will lie. Masoner *v.* Bell, 20 Okla. 618, 95 Pac. 239, 18 L. R. A. N. S. 166.

99. See *supra*, V, B.

**Readiness to deliver.**— Under a contract for the manufacture of puzzles, requiring the manufacturer to ship the puzzles "to some address to be designated in N. below 23d St.," but proving further that all work, as fast as finished, was to be held subject to the shipping instructions of the inventor, and that it was to be the latter's property "after completion," shipment to N was not a condition precedent to recovery of the contract price of their manufacture, but payment was to be made when they were finished and ready for delivery at the factory. Buedingen Mfg. Co. *v.* Royal Trust Co., 90 N. Y. App. Div. 267, 85 N. Y. Suppl. 621 [*affirmed* in 181 N. Y. 563, 74 N. E. 1115].

**Modification as to quantity.**— When a certain quantity of lumber has been agreed on, and the party who was to receive it refuses to accept the whole, he must give particular notice as to what quantity he will receive, or he will be liable to pay for the amount agreed on, if the same is delivered at the place appointed therefor. Blish *v.* Granger, 6 Vt. 340.

**Part payment "on consignment."**— Under a contract for the sale of a quantity of gunstocks of specified dimensions, thirty cents each of the price to be paid "on consignment," and the balance on receipt of the "inspector's report," if the stocks consigned corresponded to the description, the seller was entitled to the thirty cents each before inspection, and although some were rejected on inspection. Cady *v.* Turnbull, 74 Ark. 130, 84 S. W. 1025.

1. See *supra*, V, C, 3.

**Part payment as an advance.**— One who has bought and received poultry at different times cannot resist payment therefor by proof of a written receipt for a sum less than its value, given to him by the seller at the commencement of their dealings, "to buy poultry, at ten dollars per hundred." Delaney *v.* Towns, 1 Allen (Mass.) 407.

**Approval of bill.**— Where a contract for the sale of lumber provided that all bills should be "O K'd" by B, the buyer cannot avoid his obligation to pay because bills were not so "O K'd" when he actually received, accepted, and used the lumber. Wilson *v.* Hunter, 25 Fla. 469, 6 So. 432.

2. See *supra*, V, B, 10, f.

3. Barnett *v.* Pyle, 35 Tex. Civ. App. 22, 79 S. W. 1093; Clement *v.* Durocher, 16 Quebec Super. Ct. 479.

4. *Colorado.*— Daniels *v.* Knight Carpet Co., 15 Colo. 56, 24 Pac. 572.

the fact that the purchaser could not use them does not relieve him from liability to pay therefor.[5]

**2. Demand.** If payment is to be made at a specified time demand is not necessary to fix the buyer's obligation,[6] although the rule is otherwise if the time is uncertain.[7]

**3. Sales For Cash — a. In General.** If the contract of sale is silent as to the time of payment the law implies that payment shall be made on delivery,[8]

*Indiana.*— Bressler *v.* Kelly, 34 Ind. App. 235, 72 N. E. 613.

*Maryland.*— Mulliken *v.* Boyce, 1 Gill 60.

*Oregon.*— Bussard *v.* Hibler, 42 Oreg. 500, 71 Pac. 642.

*Tennessee.*— Boyd *v.* Fletcher, 12 Heisk. 649.

*United States.*— Church *v.* Cheape, 64 Fed. 961.

**Bond guaranteeing gross profits in sales by buyer.**— Where, in a contract for the sale of goods, the seller agreed to send to a bank for the buyer a bond in which the seller would guarantee the gross profits in sales by the buyer to a certain amount, on condition that the buyer pay for the goods at a fixed time, the sending of the bond was a condition precedent to the requirement of payment. Equitable Mfg. Co. *v.* J. B. Davis Co., 130 Ga. 67, 60 S. E. 262.

**Taking inventory.**— A contract to purchase a partnership stock of goods when an inventory of the assets and liabilities of the firm shall have been taken and matter adjusted makes the taking of the inventory and adjustment a condition precedent to the liability of the buyer for the purchase-price. Bresser *v.* Kelly, 34 Ind. App. 235, 72 N. E. 613.

**Shipment of goods.**— Where a contract is for the seller to ship goods from one place to the buyer at another place, and no time or place is prescribed for payment, the shipment is to be precedent to the payment. New Haven, etc., Co. *v.* Quintard, 1 Sweeny (N. Y.) 89, 6 Abb. Pr. N. S. 128.

**Independent conditions.**— On a sale of merchandise to be delivered in New York at a specified price on a credit of thirty days, and to be subject to inspection in Pensacola, whither it was destined by the buyer, the agreement to pay and the provision for inspection were independent. Delafield *v.* De Grauw, 1 Abb. Dec. (N. Y.) 500.

5. Dubinski Electric Works *v.* J. Lang Electric Co., (Tex. Civ. App. 1908) 111 S. W. 169.

6. Way *v.* Wakefield, 7 Vt. 223.

7. Warren *v.* Wheeler, 8 Metc. (Mass.) 97; Tiernan *v.* Napier, Peck (Tenn.) 212; Brandon Mfg. Co. *v.* Morse, 48 Vt. 322.

**Where the time to commence payment is fixed as of a certain date** the amount is to be paid on demand after that date. Mehan *v.* Thompson, 71 Me. 492.

8. *Alabama.*— Robbins *v.* Harrison, 31 Ala. 160; J. R. Thompson *v.* Lewis, 31 Ala. 497.

*California.*— J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 70 Pac. 669; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Illinois.*— Canadian Bank *v.* McCrea, 106 Ill. 281; Dwyer *v.* Duquid, 70 Ill. 307; Metz *v.* Albrecht, 52 Ill. 491; Ainsworth *v.* Roush, 109 Ill. App. 299.

*Indiana.*— Terwilliger *v.* Murphy, 104 Ind. 32, 3 N. E. 404; Robinson *v.* Marney, 5 Blackf. 329. See, however, Wright *v.* Maxwell, 9 Ind. 192, holding that payment must be made within a reasonable time.

*Maryland.*— Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795.

*Michigan.*— Lamont *v.* La Fevre, 96 Mich. 175, 55 N. W. 687.

*Missouri.*— Southwestern Freight, etc., Express Co. *v.* Plant, 45 Mo. 517.

*Nebraska.*— Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835.

*New York.*— Genin *v.* Tompkins, 12 Barb. 265; Cornwall *v.* Haight, 8 Barb. 327 [*reversed* on other grounds in 21 N. Y. 462]; Talmadge *v.* White, 35 N. Y. Super. Ct. 218; Coonley *v.* Anderson, 1 Hill 519; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. 56.

*Ohio.*—Coil *v.* Willis, 18 Ohio St. 28; Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*Oregon.*— Tenny *v.* Mulvaney, 8 Oreg. 129.

*Texas.*— Howard *v.* Emerson, (Civ. App. 1901) 65 S. W. 382.

*Vermont.*— Turner *v.* Moore, 58 Vt. 455, 3 Atl. 467.

*Wisconsin.*— Goldsmith *v.* Bryant, 26 Wis. 34.

*United States.*— Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

See 43 Cent. Dig. tit. "Sales," § 230.

**Payment in advance.**— Where A covenanted to deliver to B, "between the 1st and 15th of November," so many hogs, "for which B was to give" so much per hundred, payable, etc., "one dollar in the head to be paid in advance," these were concurrent covenants, on which neither party could maintain an action without averring performance or a readiness to perform on his part, and the last clause required the payment of one dollar per head, to be made at the time of the delivery, and not before. Estill *v.* Jenkins, 4 Dana (Ky.) 75.

**Payment in cash and notes.**— A promise to pay for goods partly in cash, and the remainder by a note payable at a future date, is not a promise to pay on delivery. Harlow *v.* Sass, 38 Mo. 34.

**Daily deliveries and payments.**— Where an executory contract of sale is evidenced by two contemporaneous writings, one signed by each of the parties, that by the seller de-

the presumption being that a cash sale is intended.[9] Under such a contract the seller is entitled to demand payment immediately on delivery,[10] irrespective of the right of the buyer to inspect the goods [11] and is not under any obligation to part with his property until payment is made.[12]

**b. Delivery in Instalments.** Where delivery is in instalments and there is no agreement as to the terms of payment, it will be implied that payments are to be concurrent with delivery.[13] So too where the goods are to be delivered in instalments as ordered, payment must usually be made for each instalment ordered and delivered.[14] But when the contract is entire the mere fact that for convenience deliveries are made in instalments does not impose an obligation to pay for each instalment, but payment is not due until the delivery is com-

claring the "terms of sale cash," and that by the purchaser reciting, "I shall pay bills daily," the two should be construed together to mean that bills are to be presented and payment made each day for the goods delivered during that day, the buyer having the whole day in which to make payment. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157 [*affirming* 57 Ill. App. 507]. But see Genin *v.* Tompkins, 12 Barb. (N. Y.) 265, holding that under a strictly cash sale the buyer has not the whole day in which to make payment.

**Construction of contract.**— That, under an agreement for the sale of a press, part payment was to be made sixty days after the press was in running order, when the notes for the remainder were to be executed, did not prohibit a cash payment prior thereto. Amundson *v.* Standard Printing, etc., Co., 140 Iowa 464, 118 N. W. 789.

9. *Colorado.*— Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314.

*Massachusetts.*— Dixon *v.* Williamson, 173 Mass. 50, 52 N. E. 1067. But see Warren *v.* Wheeler, 8 Metc. 97, holding that payment must be made on demand.

*Missouri.*— Southwestern Freight, etc., Express Co. *v.* Plant, 45 Mo. 517; Whitman Agricultural Assoc. *v.* National R., etc., Assoc., 45 Mo. App. 90.

*Nebraska.*— Baker *v.* McDonald, 74 Nebr. 595, 104 N. W. 923, 1 L. R. A. N. S. 474.

*New Jersey.*—Brehen *v.* O'Donnell, 34 N. J. L. 408.

*Vermont.*— Kitson Mach. Co. *v.* Holden, 74 Vt. 104, 52 Atl. 271. See, however, Brandon Mfg. Co. *v.* Morse, 48 Vt. 322, holding that payment was due on demand.

*Wisconsin.*— Pratt *v.* S. Freeman, etc., Mfg. Co. 115 Wis. 648, 92 N. W. 368.

**Effect of custom.**—Where goods are ordered by mail from a merchant accustomed to sell the buyer on credit, and nothing is said as to the terms of the sale, payment is not a condition precedent. Brooks *v.* Geo. H. Friend Paper Co., 94 Tenn. 701, 31 S. W. 160. But see Mihills Mfg. Co. *v.* Day, 50 Iowa 250, holding that a seller who has reasonable grounds for believing that the buyer is in embarrassed circumstances has a right to demand the cash, or reasonable security, before delivering the goods, even if the course of dealing between the parties were otherwise with respect to time of payment.

10. Johnson *v.* Powell, 9 Ind. 566; Davis Sewing Mach. Co. *v.* McGinnis, 45 Iowa 538; Bauer *v.* Blaha, 88 N. Y. Suppl. 933.

11. Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1 [*affirmed* in 1 Abb. Dec. 500, 3 Keyes 467, 3 Transcr. App. 49]; Whitney *v.* McLean, 4 N. Y. App. Div. 449, 38 N. Y. Suppl. 793. *Compare* Shindler *v.* Houston, 1 N. Y. 261, 49 Am. Dec. 316 [*reversing* 1 Den. 48].

**Right to inspect.**— Under a contract providing for the cash sale of goods f. o. b. at the place of manufacture, the fact, if conceded, that the buyer had the right to inspect the goods before acceptance would not govern the express provisions of the contract as to the place of delivery and payment, and postpone the obligation of payment until delivery at the residence of the buyer. Samuel M. Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795.

12. *Kentucky.*— Asberry *v.* Macklin, 3 T. B. Mon. 9.

*Missouri.*— Stresovich *v.* Kesting, 63 Mo. App. 57.

*New York.*— Beacon Falls Rubber Shoe Co. *v.* Burns, 79 N. Y. App. Div. 639, 79 N. Y. Suppl. 819; Aikin *v.* Davis, 45 Barb. 44; Cornwall *v.* Haight, 8 Barb. 327 [*reversed* on other grounds in 21 N. Y. 469]; Thompson *v.* Leslie, 14 N. Y. Suppl. 472.

*Vermont.*— Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467.

*Wisconsin.*— Goldsmith *v.* Bryant, 26 Wis. 34.

See 43 Cent. Dig. tit. "Sales," § 230.

**Garnishment of buyer.**— On a contract for a cash sale, the vendee is not entitled to possession until the money is paid to the seller, although the vendee has been garnished on account thereof. Sanborn *v.* Shipherd, 59 Minn. 144, 60 N. W. 1089.

13. *California.*—Veerkamp *v.* Hulburd Canning, etc., Co., 58 Cal. 229, 41 Am. Rep. 265.

*Illinois.*— Metz *v.* Albrecht, 52 Ill. 491.

*Indiana.*— Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848.

*Maryland.*— Bollman *v.* Burt, 61 Md. 415.

*Massachusetts.*— Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409.

*New York.*— Talmage *v.* White, 35 N. Y. Super. Ct. 218; Leibel *v.* Light, 25 Misc. 732, 55 N. Y. Suppl. 705.

*Oregon.*— Tenny *v.* Mulvaney, 8 Oreg. 129.

14. Pineville Lumber Co. *v.* Thompson, 46

plete;[15] and a rescission of the contract by the seller does not impose on the buyer any obligation to pay for goods already delivered before the time for completing it has expired.[16] If, however, the buyer is not bound to accept a partial delivery and does so, the contract providing for payment on delivery, the seller is entitled to immediate payment for the portion delivered.[17]

**4. Sales on Credit — a. In General.** When property is sold without any expectation of immediate payment it is a sale on credit,[18] and the length of time for which payment is deferred, whether one day or a longer period, is of no consequence.[19] In a sale on credit time is of the essence of the contract as to payment,[20]

Minn. 502, 49 N. W. 204; State *v.* Davis, 53 N. J. L. 144, 20 Atl. 1080.

15. McGeehee *v.* Hill, 1 Ala. 140; Timmons *v.* Nelson, 66 Barb. (N. Y.) 594; Williams *v.* Sherman, 48 Barb. (N. Y.) 402; Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560; Boyd *v.* Sullivan, 15 Ont. 492.

**Construction by parties.**— The time of payment in case of a delivery in instalments under an entire contract will, however, be governed by the intention of the parties as evidenced by their course of dealing. King *v.* Reedman, 49 L. T. Rep. N. S. 473. See also Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016; Rochester Printing Co. *v.* Kellogg, 17 N. Y. Suppl. 279.

16. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157.

17. Matthews *v.* Hobby, 48 Barb. (N. Y.) 167; Lawrence *v.* Davey, 28 Vt. 264.

18. Anstedt *v.* Sutter, 30 Ill. 164; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

**Discount for cash.**— The fact that a sale is for a price fixed, less a certain discount for cash, does not import a sale on credit. Samuel M. Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297; Moss *v.* Katz, 69 Tex. 411, 6 S. W. 764. If, however, there is an option of cash payment at a discount or by bill at three months, the mere failure to give the bill does not convert it into a cash sale. Anderson *v.* Carlisle Horse Clothing Co., 21 L. T. Rep. N. S. 760. But see Rugg *v.* Weir, 16 C. B. N. S. 471, 111 E. C. L. 471.

**Construction of contract.**— Plaintiff contracted to sell goods as might be required by defendant during a specified period, payment to be made the twentieth of the month for the goods shipped the preceding month. After the expiration of the contract plaintiff agreed to sell a specified quantity of similar goods to be delivered at intervals and paid for on receipt of invoice and bill of lading. Subsequently defendant ordered additional goods. Plaintiff replied that he would enter the order for the additional goods, "terms same as present order," and sent a memorandum providing for cash payment on receipt of each invoice. Defendant modified the memorandum by adding "same as last," which was accepted by plaintiff. It was held, that the words "same as last" referred to the second agreement, and not to the first, especially in view of the fact that the parties so interpreted the words. Licking Rolling Mill Co. *v.* Synder, 89 S. W. 249, 28 Ky. L. Rep. 357. Where the purchaser of a machine on credit wrote the seller, telling him he might send the machine at once, provided he made the bill a certain postdate, and stated that he was going away, but would look after the bill on his return, and added, "You may send one of the ragpickers that you recommended, with the machine," the sale of the ragpicker was on credit, as a matter of law, and it was error to leave that question to the jury. James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

**Custom of trade.**— Where it was a custom of trade to deliver goods sold for cash to be paid for on delivery, and call for a check in two or three days, such delay was not a credit, but simply an extension of time for the performance of the conditions. Fleeman *v.* McKean, 25 Barb. (N. Y.) 474.

**Credit granted on condition.**— Where, by the terms of a contract of sale, the purchaser is given time within which to pay on condition that he secure the debt, by his refusal to perform the condition the consideration for the grant of time fails, and the price is payable at once. Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314. If there is an agreement on the sale of goods that credit should be given, and as a security an agreement by the purchaser to give an acceptance, even though the purchaser refuses to give such acceptance, the period of credit still stands. Rabe *v.* Otto, 89 L. T. Rep. N. S. 562, 20 T. L. R. 27. See also Hoskins *v.* Duperoy, 9 East 498, 6 Esp. 58; Mussen *v.* Price, 4 East 147. But a condition as to an extension of credit must be complied with. Nickson *v.* Jepson, 2 Stark. 227, 3 E. C. L. 388.

**Evidence.**— If there be proof of the sale and delivery of goods, and no proof of payment, the presumption of the common law is that they were sold on credit. Edmunds *v.* Wiggin, 24 Me. 505. The burden is, however, on the purchaser to show that the sale was on credit. Whitlock *v.* Bueno, 1 Hilt. (N. Y.) 72. Evidence of the buyers' financial condition is admissible as showing an improbability of giving time on the purchase. Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912. The sufficiency of the evidence to show that the sale was on credit is considered in Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Zimmern *v.* Heinecke, 17 N. Y. Suppl. 728.

19. Anstedt *v.* Sutter, 30 Ill. 164; Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

20. Contractors', etc., Supply Co. *v.* Alta Portland Cement Co., 26 Ohio Cir. Ct. 49.

and although there is no obligation to pay until the term of credit has expired,[21] yet as soon as the term has expired the obligation becomes absolute.[22]

**b. Term of Credit.** The term of credit may be definitely fixed by the contract,[23] or it may be uncertain, as when payment is not to be made until returns from a sale of the goods can be received [24] or where payment is to be made as sales are made.[25] Such provisions do not, however, prolong the term of credit indefinitely but only for a reasonable time.[26] Even when the term of credit is fixed the contract may provide that the insolvency of the buyer or his discontinuance in business shall terminate the credit.[27] The term of credit for goods sold for subsequent delivery does not begin to run until the delivery of the goods,[28] or if there are several deliveries under an entire contract not for any specific articles but of goods of a kind, quality, and amount specified from the date of last delivery.[29] If the contract is divisible the term of credit for any particular article runs from the delivery of that article and not from the time the last article is delivered.[30] The buyer has the whole of the last day of the term in which to make payment.[31]

**5. Mode and Sufficiency of Payment or Tender — a. In General.** Payment unless otherwise agreed must of course be in legal tender,[32] and payment by check

21. Perego *v.* Purdy, 1 Hilt. (N. Y.) 269; Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L. 661, 7 L. J. K. B. O. S. 139; Paul *v.* Dod, 2 C. B. 800, 10 Jur. 335, 15 L. J. C. P. 177, 52 E. C. L. 800; Strutt *v.* Smith, 1 C. M. & R. 312, 3 L. J. Exch. 357, 4 Tyrw. 1019; Broomfield *v.* Smith, 2 Gale 114, 5 L. J. Exch. 155, 1 M. & W. 542, Tyrw. & G. 929.

22. French Wax Figure Co. *v.* Jupp Baxter Co., 21 Ohio Cir. Ct. 764, 12 Ohio Cir. Dec. 76; Brooke *v.* White, 1 B. & P. N. R. 330; Miller *v.* Shawe [*cited* in Mussen *v.* Price, 4 East 147, 149]; De Symons *v.* Minchwich, 1 Esp. 430.

23. Hardy *v.* Cheney, 42 Vt. 417.

**Illustrations.**— An agreement between A and B to cultivate multicaulus trees in partnership, A to furnish B with six hundred roots, at two dollars and fifty cents each, and B to pay A for one half of the same at that rate as soon as he could obtain funds by using all due diligence, and, if not paid within one month, with interest from date, was a sale at a credit of one month, which was not conditioned on the power of raising money. Moran *v.* Green, 21 N. J. L. 562. In an action for the price of goods sold where it appeared that plaintiff wrote defendant that his terms were "30 days, net, from date of shipment, or a cash discount of 5 per cent., if paid within 10 days from date of shipment," and defendant replied, "Will accept the cash price of 5 per cent. off," and plaintiff acknowledged receipt of such reply, defendant did not have the option to pay in thirty days from date of shipment, but payment became due ten days from the date of shipment. Godfrey *v.* Anderson, 12 Tex. Civ. App. 64, 33 S. W. 997. A sale at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option, is in effect a nine months' credit. Helps *v.* Winterbottom, 2 B. & Ad. 431, 9 L. J. K. B. O. S. 258, 22 E. C. L. 184.

**Election.**— Upon a sale of goods at six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt till they are expired. Price *v.* Nixon, 2 Rose 438, 5 Taunt. 338, 1 E. C. L. 179.

**Evidence as to term of credit** is considered in West *v.* Platt, 127 Mass. 367; Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166; Hardy *v.* Cheney, 42 Vt. 417.

24. Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

25. Campbell *v.* Heney, 128 Cal. 109, 60 Pac. 532; Goodale *v.* Hoy, 56 Iowa 242, 9 N. W. 130; Toombs *v.* Stockwell, 131 Mich. 633, 92 N. W. 288.

26. Johnson *v.* Plowman, 49 Barb. (N. Y.) 472; Fisher *v.* Hopkins, 4 Wyo. 379, 34 Pac. 899, 62 Am. St. Rep. 38. And see Campbell *v.* Heney, 128 Cal. 109, 60 Pac. 532.

**Custom.**— A sale of a horse, with the understanding that the purchaser should pay for it when he should receive certain wages, which by custom of the country would be due at the next Christmas, and that he could not pay for it until he received his wages, was a sale on credit until the next Christmas, and not until the receipt of the wages. Webber *v.* Pankey, 23 Ark. 205.

27. Warren *v.* Cash, 143 Ala. 158, 39 So. 124; Lindsey *v.* Flebbe, 5 Colo. App. 218, 38 Pac. 397. See also Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

28. Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307, 85 N. Y. Suppl. 633.

**Computation of time.**— In computing the time of credit on a mercantile contract, the day on which the contract was made is to be excluded. Webb *v.* Fairmaner, 6 Dowl. P. C. 549, 7 L. J. Exch. 140, 3 M. & W. 473.

29. Langford *v.* Mackay, 12 Ill. App. 223.

30. People *v.* Grant, 138 Mich. 60, 100 N. W. 1006.

31. Smith *v.* Walton, 5 Houst. (Del.) 141; Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506, 42 N. E. 157 [*affirming* 57 Ill. App. 507]; Sturz *v.* Fisher, 38 N. Y. App. Div. 457, 56 N. Y. Suppl. 479; Smiley *v.* Barker, 83 Fed. 684, 28 C. C. A. 9.

32. McKee *r.* Baden, 3 Gill (Md.) 237;

is not sufficient [33] unless it is accepted as such.[34] By agreement, however, payment may be made in labor [35] or property,[36] but it must be made in the mode specified.[37] The purchaser takes upon himself the risk of making payment to the proper person.[38] In the absence of agreement to the contrary the place of delivery is the place of payment,[39] but this may be controlled by custom.[40]

Crowl *v.* Goodenberger, 112 Mich. 683, 71 N. W. 485; Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835.

**Alternative stipulations.**— A contract to pay for goods in gold coin or its equivalent in United States currency is not an alternative one as to mode of payment but merely fixes the price. Moppin *v.* Ætna Axle, etc., Co., 41 Conn. 27. See also Berry *v.* Nall, 54 Ala. 446.

**Surrender of seller's note.**— A seller is not obliged to accept in payment for chattels sold his own promissory note held by an undisclosed principal of the buyer, but can reclaim, or refuse to deliver, the things sold, upon the offer of such note. Bush *v.* Bender, 113 Pa. St. 94, 4 Atl. 213.

**Effect of agreement.**— The usual custom of collecting the purchase-money of goods, under a contract of sale between parties resident in different cities by draft, will not govern the express provisions of the contract fixing a mode of payment. Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795.

**Payment from particular fund.**— The word "receipts," as used in the indorsement of a contract for the purchase of machinery for a creamery that the buyer shall reserve a certain sum each day from the daily "receipts" of the creamery, and remit the balance to the seller, until the machinery is paid for, means the gross receipts from the creamery. Creamery Package Mfg. Co. *v.* Benton County Creamery Co., 120 Iowa 584, 95 N. W. 188.

**33.** Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266; Behrends *v.* Beyschlag, 50 Nebr. 304, 69 N. W. 835; Aiken *v.* Davis, 45 Barb. (N. Y.) 44.

**34.** Rawls *v.* Saulsbury, 66 Ga. 394; White *v.* Howard, 1 Sandf. (N. Y.) 81; Amer *v.* Folk, 27 Misc. (N. Y.) 634, 58 N. Y. Suppl. 397 [*reversed* on other grounds in 27 Misc. 634, 59 N. Y. Suppl. 532].

**Worthless check.**— Effect of giving worthless check see Loughman *v.* Barry, Ir. R. 6 C. L. 457.

**Right to reasonable time to procure cash.**— But if a check is tendered in payment and is refused the buyer is entitled to a reasonable time thereafter in which to procure the cash. Bass *v.* White, 65 N. Y. 565.

**35.** Duckworth *v.* Johnson, 8 Ala. 309.

**36.** Leathers *v.* Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661; Crowl *v.* Goodenberger, 112 Mich. 683, 71 N. W. 485; Hillestad *v.* Hostetter, 46 Minn. 393, 49 N. W. 192; Brown *v.* Sayles, 27 Vt. 227. See also Lindsey *v.* Gordon, 13 Me. 60.

**Option as to kind of property.**— Where defendant offered to purchase railroad ties of plaintiffs, and pay in stock of either of two corporations, as plaintiffs might elect, and plaintiffs wrote that they would sell the ties at the price offered, and take stock "in either the G. or D. roads," this did not necessarily mean that the option was to be exercised by defendant. Aldrich *v.* Bay State Constr. Co., 186 Mass. 489, 72 N. E. 53.

**Where right to elect lost.**— Where a purchaser has an election to pay either in money or property, if he fails to tender property on the day fixed for payment he loses his election, and the vendor has the right to demand money. Crowl *v.* Goodenberger, 112 Mich. 683, 71 N. W. 485.

**37.** Ellis *v.* Whitney, (Tex. Civ. App. 1908) 111 S. W. 158, in which case it appeared that plaintiff was working for defendant under a contract with several teams of mules. One team began to fail, and the parties made an agreement whereby defendant bought a new team to take its place; the bill of sale being made to defendant, and it being agreed that plaintiff was to pay defendant the purchase-price of three hundred dollars and interest by allowing fifty dollars to be deducted from his monthly payments for work, and upon full payment was to receive the mules. After one instalment of fifty dollars had been paid, plaintiff violated his contract by quitting defendant's service. It was held that plaintiff could only obtain title to the mules according to the agreement, and defendant was not obliged to accept the balance of the price after plaintiff had left his service and given him the mules.

**38.** Crumbacker *v.* Tucker, 9 Ark. 365; Sawyer *v.* Symns, 39 Kan. 148, 17 Pac. 799; Gallup *v.* Lederer, 1 Hun (N. Y.) 282, 3 Thomps. & C. 710.

**39.** Rees *v.* Henn, 60 Iowa, 747, 14 N. W. 127.

**Construction of contract.**— In Owens *v.* Jackson, (Tex. Civ. App. 1902) 65 S. W. 1125, the contract was contained in a telegram to defendant as follows: "Wire f. o. b. Boston price scoured wool sight draft bill of lading;" and a reply by defendant, "Will take forty cents per pound f. o. b. here for scoured twelve months wool." Defendant claimed that the word "here" designated the place of payment, and not the place of delivery f. o. b. After sending an acceptance, plaintiff wired that payment was to be made in Boston by a sight draft, but this defendant refused, and required plaintiff to arrange with a designated bank for payment before shipments commenced, in compliance with which the bank designated was notified that it might make payments. It was held that plaintiff's actions showed acceptance of defendant's construction of the contract as to place of payment.

**40.** Mand *v.* Trail, 92 Ind 521, 47 Am.

**b. Notes or Other Obligations.**[41] By agreement of the parties payment may be made by draft,[42] note, or order; but the mere giving of a note or order for the price will not constitute payment[43] unless the parties so agree.[44] Objections because of variance between the form of notes given and those which the seller agreed to accept may be waived by him and he may maintain his owner-

Rep. 163, holding that in an action on a contract by telegram, by which plaintiffs, who were merchants in Baltimore, Md., bought of defendant, a merchant in Indiana, five carloads of wheat, but which is silent as to the time and place of payment, a custom among merchants in Indiana may be proved to show that payment was to be made in Baltimore on the arrival of the wheat.

**41.** As affecting transfer of title see *infra*. VI, A, 5, d.

**42.** Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54, holding that an agreement by the seller to deliver from day to day, for a period extending over several months, and by the buyer to pay on the first day of each month in drafts, drawn by the seller on the buyer at twenty days' sight, does not restrict the seller to drawing on the first of each month but a single draft for all the goods delivered during the preceding month.

**Insolvency of buyer.**— The secretary of a company engaged in the manufacture of bicycle tires sold a bill of goods to a company manufacturing bicycles, and also bought a number of bicycles from the latter. The tires were to be billed from the manufacturers, and paid for by a draft on the secretary, who was to charge the amount against the sum he owed for bicycles. It was held, in an action by the tire company against the bicycle company, that defendant became the debtor of plaintiff, and that the mode of payment, if binding on plaintiff at all, was binding only during the solvency of the secretary. Sercombe-Bolte Mfg. Co. *v.* John P. Lovell Arms Co., 171 Mass. 175, 50 N. E. 535.

**43.** Triplett *v.* Mansur, etc., Implement Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; Nissen *v.* Tucker, 46 N. C. 176.

**44.** Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712; W. H. H. Peck Co. *v.* Gordon, 112 Mich. 487, 70 N. W. 1034; Cave *v.* Hall, 5 Mo. 59. See also Crawford *v.* Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

**Alteration of note.**— Where plaintiff was to give defendant a note for certain property purchased, and defendant prepared the note, which plaintiff signed and returned to defendant; but before doing so, without defendant's knowledge, he erased a clause in the note making it negotiable, the acceptance of the note by defendant without examination when it was handed back to him was not negligence, and his giving an order thereupon for delivery of the property did not constitute a settlement which precluded him from refusing to retain the note or to deliver the property on learning of the erasure. Frum *v.* Keeney, 109 Iowa 393, 80 N. W. 507.

**Obligation of third person.**— Where a contract of sale of chattels provides that the purchaser shall pay by an order on a third person, and a note to be executed by such person to the seller, but the contract does not appear on its face to be made for such person's benefit, his mere approval creates no liability on his part, but the seller must show that such person promised to pay him, and that he made the contract and delivered the property in reliance on such promise. McCartney *v.* Hubbell, 52 Wis. 360, 9 N. W. 61. In Challoner *v.* Boyington, 83 Wis. 399, 53 N. E. 694, it was held that, when the note of a third person is received on the sale of goods, the note will be deemed to have been taken by the vendor in satisfaction, unless the contrary is expressly proved. On a sale by plaintiffs to defendants of lumber, to be paid for in promissory notes secured by mortgage executed by a third party and held by defendants, where nothing was said about defendants indorsing the notes, any assignment or transfer of the notes that would convey the title would fulfil the contracts in regard to them on the part of defendants. Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305.

**Liability as indorser.**— Where a purchaser of goods transfers without indorsement a note in payment, and in a suit thereafter brought on the note a set-off is established by the maker, the seller may resort to the purchaser for the price of the goods. Jones *v.* Yeargain, 12 N. C. 420.

**Assumption of debt by buyer.**— Where defendant assumed the payment of a certain note as a part of the consideration of a purchase, plaintiffs agreeing to sign a renewal of the note as defendant's sureties if he should not be ready to pay at maturity, defendant, when sued for a breach of his agreement, cannot rely upon plaintiffs' breach of their agreement without alleging that he requested them to renew the note after its maturity. Muir *v.* Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. L. Rep. 14.

**Authority of agent.**— Where a contract authorized agents to sell machinery, taking two notes in payment, the action of the agents in taking three notes not being in accordance with the contract, the seller was under no obligation to accept them. Plano Mfg. Co. *v.* Eich, (Iowa 1904) 97 N. W. 1106.

**Approval of paper.**— A sale for approved indorsed paper means, in law, a sale for paper which ought to be approved, and not for paper such as the seller may approve. Guier *v.* Page, 4 Serg. & R. (Pa.) 1. See also Hodgson *v.* Davies, 2 Campb. 530, 11 Rev. Rep. 789.

**Effect of delay.**— Upon an agreement to execute notes in payment of the price of goods sold, they must be executed within a reasonable time, or the whole sum becomes due forthwith. Hays *v.* Weatherman, 14 Ind. 341.

ship in them so long as the rights of innocent purchasers for value are not involved.[45]

c. Deductions.[46] If there is neither warranty nor fraud in the sale of a chattel, a defect in the quality does not entitle the buyer to any diminution in the price on that account.[47] He purchases at his peril.[48] If an article sold be of the slightest value to either the vendor or vendee, it will suffice by way of consideration for a promise to pay the agreed price, however disproportionate to the real value.[49] If, however, there is fraud on the part of the seller, the buyer, although he retains the goods without offering to return them, is entitled in case the goods are defective in quality, to a diminution in the purchase-price on account of such defects,[50] and if the goods are wholly worthless, this would present a complete defense to an action for the purchase-price, although no offer was made to return them.[51] Likewise if title to part of the chattels sold fails, the purchaser is entitled to a deduction *pro tanto* in the price agreed on;[52] and where there is a failure of title to all the chattels sold, the purchaser can treat the transaction as presenting an instance of an entire failure of consideration.[53] And the buyer may by the provisions of

45. South Bend Iron-Works *v.* Cottrell, 31 Fed. 254.

46. Effect of warranty see *infra*, VII, J, 3.

47. Hawkins *v.* King, 30 Ga. 909; Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Gihon *v.* Levy, 2 Duer (N. Y.) 176; Johnson *v.* Titus, 2 Hill (N. Y.) 606; Welsh *v.* Carter, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473; Sweet *v.* Colgate, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266; Seixas *v.* Woods, 2 Cai. (N. Y.) 48, 2 Am. Dec. 215. And see Barnum *v.* Barnum, 8 Conn. 469, 21 Am. Dec. 689. But see Road Commissioners *v.* Macon, 2 Brev. (S. C.) 105, where it was held that commissioners of roads selling an estray as public agents are not liable for any implied warranty for a defect in the animal sold. But if the money be not paid over, defendant, the purchaser, may claim a discount for the unsoundness of the thing sold.

Illustration.— In the case of Chandelor *v.* Lopus, Cro. Jac. 4, 79 Eng. Reprint 3, it was held that for selling a jewel, which was affirmed to be a bezoar stone, when it was not, no action lay, unless defendant knew it was not a bezoar stone, or had warranted it to be one.

Failure to inspect.— One who fails to inspect at the place of shipment goods sold without special warranty is not entitled to a reduction of the purchase-price on the ground that the goods were of inferior quality, where an inspection would have disclosed their condition. Labrecque *v.* Duckett, 22 Quebec Super. Ct. 135.

Knowledge of defect.— Where plaintiffs offered cattle for delivery under their contract with defendants, to which defendants objected on account of their quality and the manner of their delivery, defendants could not, in the absence of consent by plaintiffs, receive the cattle, and compel plaintiffs to submit to a discount on the price. Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

Under the Louisiana statutes the buyer is given the right to claim a reduction of the price when the thing sold, although not of the character required by the contract, is susceptible of use. Civ. Code, art. 2541 *et seq.* Unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price than entirely to avoid the sale, especially when the real value of the thing bears any reasonable proportion to the price agreed on. Beale *v.* De Gruy, 2 La. 468. Where a part of the goods are defective the purchaser will be relieved from paying for that part. C. S. Burk *v.* Laplace, 46 La. Ann. 722, 15 So. 293. Where goods were purchased in New Orleans to be shipped to Boston, which on arrival at the latter port were found damaged, and sold at a loss, after notifying the seller, and refusal to accept, it appearing from the evidence that they were damaged when sold in New Orleans, the purchaser is entitled to a deduction of the price, the amount of which is to be ascertained by the difference between the price for which they were sold and the market price of the articles in New Orleans at the date of the original sale. Foster *v.* Baer, 6 La. Ann. 442. The provisions of the statute cannot be extended so as to compel the party who has contracted for a filtering plant of fixed capacity as to quality, quantity, and in other respects, to pay some part of the price for a plant not capable of accomplishing the purposes specified in the contract. National Water Purifying Co. *v.* New Orleans Waterworks Co., 48 La. Ann. 773, 19 So. 865.

48. Seixas *v.* Woods, 2 Cai. (N. Y.) 48, 2 Am. Dec. 215.

49. Johnson *v.* Titus, 2 Hill (N. Y.) 606.

50. Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; Wade *v.* Scott, 7 Mo. 509.

51. Ferguson Implement Co. *v.* Parmer, 128 Mo. App. 300, 107 S. W. 469.

52. Hoffman *v.* Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783. And see Judkins *v.* Earl, 7 Me. 9.

53. Hoffman *v.* Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783; Eichholz *v.* Bannister, 17 C. B. N. S. 708, 11 Jur. N. S. 15, 34 L. J. C. P. 105, 12 L. T. Rep. N. S. 76, 13 Wkly. Rep. 96, 112 E. C. L. 708. And

the contract be entitled to certain deductions under specified conditions.[54] Where the buyer is entitled to a certain discount if payment is made before a certain time, the discount can be claimed only on full payment before the expiration of the time specified.[55]

**d. Tender.** A tender in payment of the price is not sufficient unless it is made at the proper time[56] and place,[57] of the proper amount,[58] and in a proper medium of payment.[59] A tender of a check is not sufficient.[60] Under an agree-

see Orr *v.* Burwell, 15 Ala. 378. *Compare* Wright *v.* Shorter, 56 Ga. 72.

**54.** Llewellyn Steam Condenser Mfg. Co. *v.* Malter, 76 Cal. 242, 18 Pac. 271; Hawley *v.* Brumagim, 33 Cal. 394; Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 170 N. Y. 599, 70 N. E. 1096]; Ames *v.* Quimby, 96 U. S. 324, 24 L. ed. 635; Gottschalk Co. *v.* Distilling, etc., Co., 62 Fed. 901.

**Payment in instalments.**— When payment is to be made in instalments any deduction from the price should be taken from the earlier instalment in the absence of any other agreement. Bennett *v.* McGillan, 28 Fed. 411.

**Purchase of going concern.**— An agreement by the seller of a newspaper business to pay any "indebtedness" of the paper contracted before the sale did not include the settlement of uncompleted advertising contracts for which the seller was paid in advance by the advertisers. Blew *v.* Collins, 61 Minn. 418, 63 N. W. 1091.

**Commissions.**— Where plaintiff agreed to deliver logs to defendant at a stated price per thousand feet, and the latter agreed to pay at the end of each month for the logs delivered during the month, "after deducting for all advances" and commissions at a specified rate, defendants were not entitled to commissions on disbursements made when they were indebted to plaintiff for logs delivered under the contract. Lee *v.* Byrne, 75 Ala. 132.

**Agreement for allowance.**— Where one agrees to allow a person a certain percentage off of the purchase-price of goods bought by him at a certain auction, the fact that some of the goods were bought by a third party, for the joint benefit of himself and the person with whom the agreement was made, does not affect the right of the latter to an allowance on the price. Nixon *v.* Zuricalday, 144 N. Y. 300, 39 N. E. 340.

**Agreement to repair.**— Where plaintiff sold a bicycle to defendant on monthly payments of ten dollars, with an agreement to keep it in repair, and defendant, with plaintiff's knowledge, took it for repairs to the manufacturer, which were made without charge, except in one instance, when four dollars and fifty cents was demanded by the manufacturer, and paid by defendant, in the absence of evidence that plaintiff acquiesced in such payment, or assumed to reimburse defendant therefor, defendant could not deduct it from his payment. Equitable General Providing Co. *v.* Stein, 16 Misc. (N. Y.) 582, 38 N. Y. Suppl. 774.

**Sea damage.**— Where, on a sale of hides through a broker, the bought and sold note of the broker, after reciting the sale, concludes: "No allowance except for sea damages. Price 12 cents per pound cash," the contract is for the purchase of all the hides at the price of twelve cents per pound, subject to a deduction from the price at the usual fair rate for any of the hides that were sea damaged. Bacon *v.* Gilman, 4 Lans. (N. Y.) 456, 60 Barb. 640 [*affirmed* in 57 N. Y. 656].

**55.** Kellogg *v.* Barrett, 12 N. Y. Suppl. 670. *Compare* Godfrey *v.* Anderson, 12 Tex. Civ. App. 64, 33 S. W. 997, holding that where a merchant sells goods at "a cash discount of 5 per cent., if paid within 10 days from date of shipment," in an action for the price, on failure of the buyer to pay in ten days, defendant is entitled to the five per cent discount. It was said that the appellant having sold the goods on ten days' time, at a discount of five per cent, and having sued on such contract for the purchase-price must allow such discount.

**Computation of discount.**— Where goods were sold under a written contract at so much per load, "to be taken by the dock account and paid for in cash, allowing 2½ per cent. discount within fourteen days from the date; the goods to be taken on board and the duty deducted," and the duty was payable by the buyer, the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty. Smith *v.* Blandy, R. & M. 260, 21 E. C. L. 746.

**56.** Minear *v.* Phelps, 112 Mich. 84, 70 N. W. 422.

**57.** Minear *v.* Phelps, 112 Mich. 84, 70 N. W. 422; Aiken *v.* Davis, 45 Barb. (N. Y.) 44.

**58.** Bass *v.* White, 7 Lans. (N. Y.) 171.

**Amount.**— Where on the sale of personal property the amount to be paid is to be determined by measurement of the property, a measurement which was grossly unfair as the result of fraud or mistake is not binding, and a tender based thereon does not entitle the purchaser to possession. Baker *v.* McDonald, 74 Nebr. 595, 104 N. W. 923, 1 L. R. A. N. S. 474.

**59.** Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 178 N. Y. 599, 70 N. E. 1096], holding that a tender by a purchaser of goods of the larger portion of the price in gold or legal tender notes and the balance in United States or national bank-notes was good where no objection was made.

**60.** Bass *v.* White, 7 Lans. (N. Y.) 171; Aiken *v.* Davis, 45 Barb. (N. Y.) 44.

**Waiver of objection.**— Where the buyer

ment to accept notes in payment, a tender of worthless notes is insufficient.[61] Tender is excused where the seller has refused to fulfil his agreement to deliver,[62] and by inability to find the seller at his residence or usual place of business or after a careful search for him at the specified time for payment.[63] If a valid tender is refused the buyer is not obliged to make a second tender.[64] Where, in an action for a breach of contract for the sale of goods, the seller showed that he offered to deliver, but was prevented by the buyer's refusal to accept, and the buyer showed that the seller refused to allow the buyer to inspect the goods when offered, the question of a tender of the price was not in issue.[65]

**e. Interest.** The buyer is liable for interest on the purchase-price from the time the same becomes due,[66] and in the case of a cash sale from the delivery of the goods.[67] On a sale on credit interest begins to run from the expiration of the term of credit,[68] unless by the terms of the contract interest is payable from the date thereof.[69]

**f. Evidence.** No presumption of payment arises from the fact of delivery where nothing is said as to whether the sale is for cash or on credit,[70] and a recital of payment in a bill of sale has been held not to be conclusive of the fact.[71]

**6. Default and Excuses Therefor.** A default in making payment of the purchase-price may be ground for rescission of the contract,[72] or may be relied

tenders his check for the proper amount in payment and no objection is made to the amount or form of tender, the seller cannot afterward object that the tender was not in money. Johnson-Locke Mercantile Co. *v.* Howard, (Cal. 1901) 65 Pac. 953.

61. Roget *v.* Merritt, 2 Cai. (N. Y.) 117.

62. Biggers *v.* Pace, 5 Ga. 171; Abels *v.* Glover, 15 La. Ann. 247; Cornwell *v.* Haight, 21 N. Y. 462; Anderson *v.* Sherwood, 56 Barb. (N. Y.) 66; Bicknall *v.* Waterman, 5 R. I. 43.

63. Mathis *v.* Thomas, 101 Ind. 119; Guilford *v.* Mason, 22 R. I. 422, 48 Atl. 386.

64. Mathis *v.* Thomas, 101 Ind. 119.

**Tender of security.**— Where defendant contracted to deliver property to plaintiff, who agreed to furnish certain security, plaintiff was not excused for failure to deliver security on demand, merely because he had previously tendered it to defendant, who, for the time, declined to receive it. Dills *v.* Dougherty, 6 Dana (Ky.) 253.

65. Felsberg *v.* Moore, 84 Ark. 399, 106 S. W. 197.

66. *Kentucky.*— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

*Minnesota.*—Cooper *v.* Reaney, 4 Minn. 528.

*New York.*— Lackawanna Mills *v.* Weil, 21 N. Y. App. Div. 492, 47 N. Y. Suppl. 585 [*affirmed* in 162 N. Y. 642, 57 N. E. 1114]; Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323.

*Ohio.*— Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313.

*Texas.*— Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Barnett *v.* Pyle, 35 Tex. Civ. App. 22, 79 S. W. 1093.

See 43 Cent. Dig. tit. "Sales," § 499.

**Defect in title.**— Where different parties claim a lien on slaves sold for a note not negotiable, the vendee may retain the price until his title be quieted, and can be charged no interest. Miles *v.* Oden, 8 Mart. N. S. (La.) 214, 19 Am. Dec. 177.

67. *Alabama.*— Shields *v.* Same, 31 Ala. 53; Waring *v.* Henry, 30 Ala. 721.

*Georgia.*— Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221.

*Illinois.*— Maltman *v.* Williamson, 69 Ill. 423.

*Massachusetts.*— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624.

*South Carolina.*— Dotterer *v.* Bennett, 5 Rich. 295.

See 43 Cent. Dig. tit. "Sales," § 499.

And see Marx *v.* Raley, 6 Cal. App. 479, 92 Pac. 519.

68. Goulds Mfg. Co. *v.* Munckenbeck, 20 N. Y. App. Div. 612, 47 N. Y. Suppl. 325; Bannerman *v.* Fullerton, 5 Nova Scotia 200.

69. Stark *v.* Anderson, 104 Mo. App. 128, 78 S. W. 340.

**Interest payable in instalments.**— Where the price is not exigible until after five years on payment of interest at the commencement of each year, the failure to pay the second year's interest will not forfeit the term; no such penalty being expressed or implied. Bacchus *v.* Moreau, 7 Rob. (La.) 539.

70. Robbins *v.* Harrison, 31 Ala. 160.

71. Rice *v.* Hancock, Harp. (S. C.) 393; Lewis *v.* Castleman, 27 Tex. 407. But see Cousins *v.* Bowling, 100 Mo. App. 452, 74 S. W. 168, holding that a statement in a memorandum of a contract of sale that money given the seller was a payment is binding, and it cannot be shown that it was given as a forfeit. See also Hull *v.* Pitrat, 45 Fed. 94.

72. See *supra*, IV, B, 3, c, (I), (B).

**Specific agreement.**— An agreement for the sale of coal provided that the failure to make the first payment should render the agreement void, where no money was tendered until five months after the day pointed out, and not until two months after the formal notice of forfeiture, the agreement was

on by the seller to excuse his default or delay in making delivery.[73] In accordance with general rules if the buyer has bound himself to a certain time or mode of payment, difficulty or impossibility of performance not due to the fault of the seller will not excuse his default.[74] But if the purchase-money is to be sent by express, the buyer is not liable for delay of the express company.[75] Failure or refusal of the seller to make a proper delivery will of course excuse default on the part of the buyer.[76] But where there is a substantial compliance on the part of the seller, a slight variance in the performance of his part of the contract from the provisions thereof will not excuse default on the part of the buyer.[77]

**7. Waiver of Default.** While payment at the time specified or implied in the contract may be waived by the seller [78] a waiver on condition will not become binding unless the condition is complied with.[79] Delivery of the goods without demanding payment is not necessarily a waiver of payment on delivery, but such conduct may be explained and controlled by other evidence.[80] So too where

properly canceled. Russell *v.* Stewart, 204 Pa. St. 211, 53 Atl. 771. Under a contract providing for annual payments and conditioned that, should any annual payment become due, and default be made sixty days after demand, the contract should be null and void, the contract was terminable for the benefit of the buyer as well as of the seller, and, where default has been made in payment, it cannot be recovered by suit, as the contract is then avoided for all purposes. Williamson *v.* Hill, 154 Mass. 117, 27 N. E. 1008, 13 L. R. A. 690.

**73.** See *supra*, V, B, 11, e, (VI).

**74.** Thompson *v.* Ray, 46 Ala. 224; Hughes *v.* Eschback, 7 D. C. 66; Felix *v.* Bevington, 52 Mo. App. 403; Meeker *v.* Johnson, 5 Wash. St. 718, 32 Pac. 772, 34 Pac. 148. And see Seligman *v.* Beecher, 36 Pa. Super. Ct. 475.

**75.** Halsey *v.* Hurd, 11 Fed. Cas. No. 5,967, 6 McLean 102.

**76.** *California.*— Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

*Illinois.*— Sloan *v.* Thornhill, 68 Ill. App. 331.

*Maryland.*— Bollman *v.* Burt, 61 Md. 415.

*Michigan.*— Sherwood *v.* Hecox, 35 Mich. 202.

*Minnesota.*— Robson *v.* Bohn, 27 Minn. 333, 7 N. W. 357.

*Pennsylvania.*— Rockwell Mfg. Co. *v.* Cambridge Springs Co., 21 Pa. Co. Ct. 248.

*Wisconsin.*— Williams *v.* Thrall, 101 Wis. 337, 76 N. W. 599.

See 43 Cent. Dig. tit. "Sales," § 509.

**Quality of goods.**— Where a receiver, having contracted to sell a certain quantity of lumber, of different grades, at a uniform price, a higher price to be charged in case of partial performance and breach, payments to be made at stated intervals, cited the buyer to show why the contract should not be annulled for non-payment of an instalment, and the court gave him ten days in which to make the payment, the fact that the buyer, before expiration of the ten days, ordered the receiver to deliver the cheaper grade of lumber, which was refused, did not excuse him from his default, and throw the default on the receiver, since, if this were so, the buyer could claim the best quality, as well as the poorest, and secure it at the uniform price, to the extent of the advance payments made by him, despite his default. Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207, 416.

**Refusal to credit.**— Where goods are in fact sold and delivered to a person, the declaration of the seller that he did not or would not credit that person on his own responsibility is not sufficient to discharge from liability the person to whom the goods were so sold and delivered. Hicks *v.* Bailey, 16 Tex. 229.

**77.** Hatch *v.* Hall, 48 Wash. 109, 92 Pac. 936.

**78.** Glenny *v.* Lacy, 1 N. Y. Suppl. 513; Witte Mfg. Co. *v.* Reilly, 11 N. D. 203, 91 N. W. 42; Clark *v.* Bache, 186 Pa. St. 343, 40 Atl. 484.

**79.** Equitable Mfg. Co. *v.* Biggers, 119 Ga. 100, 45 S. E. 962.

**80.** Seed *v.* Lord, 66 Me. 580; Ullman *v.* Barnard, 7 Gray (Mass.) 554; Tyler *v.* Freeman, 3 Cush. (Mass.) 261; Straus *v.* J. M. Russell Co., 85 Fed. 589. See also Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226, where delivery was in instalments.

**Controlling circumstances.**— The fact that upon a consignor's delivery of property to a carrier, and taking a bill of lading therefor, he retains the bill of lading, draws on the consignee for the price, sells the draft, and pledges the bill of lading, which represents the property shipped, to secure it, instead of sending the bill direct to the consignee, is a rebuttal of the presumption that it was an absolute delivery to the consignee, with intent to waive payment on delivery. Thomas *v.* Florida First Nat. Bank, 66 Ill. App. 56.

**In New York** delivery without demanding payment is regarded as a waiver in the absence of evidence to show a contrary intent. Smith *v.* Lynes, 5 N. Y. 41 [*affirming* 3 Sandf. 203]; Albert *v.* R. Lewis Steiner Mfg. Co., 42 Misc. 522, 86 N. Y. Suppl. 162; Hennequin *v.* Sands, 25 Wend. 640; Lupin *v.* Marie, 6 Wend. 77, 21 Am. Dec. 256. And see Gibson *v.* Tobey, 46 N. Y. 637, 7 Am.

a note for the price is to be given on delivery the fact that delivery is made without receiving the note is not necessarily a waiver of the default.[81] Whether the delivery was made under such circumstances as to constitute a waiver is in such cases regarded as a question for the jury.[82] Default is not waived by a failure to cancel the contract on non-payment,[83] nor by basing a refusal to deliver on other grounds.[84] An unqualified acceptance of payments made after the time agreed on waives the delay,[85] and an acceptance of past-due instalments, accompanied by a renewal of the contract, will waive a forfeiture for such non-payment.[86] An agreement to give secured notes in payment is waived by the acceptance of unsecured notes,[87] and default in refusing to comply with a sale without opportunity for testing the goods sold is waived where the seller executes a new contract with a provision permitting such test.[88]

## VI. OPERATION AND EFFECT.

**A. Transfer of Title — 1. In General — a. Executory and Executed Contracts.**[89] In order to pass the title to goods as against the seller or those claiming under him there must be a valid existing and completed contract of sale.[90] Under a completed contract of sale the property in the goods passes at once from the seller to the buyer,[91] at the place where the contract becomes com-

Rep. 397, where delivery was accompanied by an implied understanding that it was conditional on payment. It is, however, held that delivery of an instalment without payment is not a waiver as to subsequent instalments. Barnes *v.* Denslow, 9 N Y. Suppl. 53 [*affirmed* in 130 N. Y. 687, 30 N. E. 67].

**Buyer taking possession.**— Where the buyer takes possession of his own motion there is no such delivery as waives payment. Riley *v.* Wheeler, 42 Vt. 528. But see Rice *v.* McLarren, 42 Me. 157.

**81.** Pond Mach. Tool Co. *v.* Robinson, 38 Minn. 272, 37 N. W. 99; Rinehart *v.* Olwine, 5 Watts & S. (Pa.) 157.

**82.** Wells *v.* Merle, etc., Mfg Co., 66 Ill. App. 292; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Witte *v.* Reilly, 11 N. D. 203, 91 N. W. 42.

**83.** Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226.

**84.** Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226.

**85.** Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536.

**86.** Hill *v.* Townsend, 69 Ala. 286, holding, however, that it would not waive a subsequent default.

**87.** Thomason *v.* Dill, 30 Ala. 444; Aultman *v.* Wirth, 54 Ill. App. 17; Saunders *v.* Turbeville, 2 Humphr. (Tenn.) 272.

**88.** Colean Mfg. Co. *v.* Blanchett, 16 N. D. 341, 113 N. W. 614.

**89.** Intention of parties see *infra*, VI, A, 2, a.

**90.** *Alabama.*— Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754.

*Connecticut.*— Forbes *v.* Marsh, 15 Conn. 384.

*Illinois.*— Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Taylor *v.* Turner, 87 Ill. 296; H. A. Pitt's Sons Mfg. Co. *v.* Poor, 7 Ill. App. 24.

*Indiana.*— Holderman *v.* Miller, 102 Ind. 356, 1 N. E. 719.

*Michigan.*— Winner *v.* Williams, 62 Mich. 363, 28 N. W. 904.

*New York.*— Binghamton First Nat. Bank *v.* Peck, 61 N. Y. App. Div. 258, 70 N. Y. Suppl. 471; Westcott *v.* Tilton, 1 Duer 53; Balz *v.* Shaw, 13 Misc. 181, 34 N. Y. Suppl. 5 [*affirming* 11 Misc. 643, 32 N. Y. Suppl. 791].

*Pennsylvania.*— Clark *v.* Jack, 7 Watts 375.

*Tennessee.*— Hawthorne *v.* Bowman, 3 Sneed 524.

*Vermont.*— Grant *v.* King, 14 Vt. 367.

*England.*— Felthouse *v.* Bindley, 11 C. B. N. S. 869, 31 L. J. C. P. 204, 6 L. T. Rep. N. S. 157, 10 Wkly. Rep. 423, 103 E. C. L. 869 [*affirmed* in 7 L. T. Rep. N S. 835, 11 Wkly. Rep. 429].

**Knowledge and assent of buyer.**— An attempt to transfer the property without the knowledge of the apparent buyer is inoperative to pass the title. Day *v.* Griffith, 15 Iowa 104; Hinckley *v.* Bridgham, 46 Me. 450; Town *v.* Griffith, 17 N. H. 165.

**Defeasible contracts.**— Third persons cannot avail themselves of a collateral agreement between the parties by which the sale is made defeasible on certain conditions. The Ocean, 18 Fed. Cas. No. 10,401, 1 Sprague 535.

**Consideration.**— Where the seller cannot deny the consideration no other person can deny it. Pope *v.* Cheney, 68 Iowa 563, 27 N. W. 754. See also Finn *v.* Hempstead, 24 Ark. 111.

**91.** *Illinois.*— Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476.

*New York.*— Dunnigan *v.* Crummey, 44 Barb. 528.

*South Dakota.*— Hull *v.* Caldwell, 3 S. D. 451, 54 N. W. 100.

*Tennessee.*— Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

*Washington.*— Brodack *v.* Morsbach, 38 Wash. 72, 80 Pac. 275.

plete,[92] and for this reason the agreement is frequently called an executed contract.[93] The sale is, however, an executory contract,[94] if the seller merely promises to transfer the property at some future day,[95] or the agreement contemplates the performance of some act or condition necessary to complete the transfer.[96] Under such a contract until the act is performed or the condition fulfilled which is necessary to convert the executory into an executed contract, no title passes to the buyer as against the seller or persons claiming under him.[97] While certain

*Wisconsin.*— James Music Co. *v.* Bridge, 134 Wis. 510, 114 N. W. 1108.

*England.*— Tarling *v.* Baxter, 6 B. & C. 360, 9 D. & R. 272, 5 L. J. K. B. O. S. 164, 30 Rev. Rep. 355, 13 E. C. L. 169; Joyce *v.* Swann, 8 D. & R. 343; Phillimore *v.* Barry, 1 Campb. 513, 10 Rev. Rep. 742.

**Separate property of married woman.**— Where a wife's title to a farm owned by her, and carried on by her and a minor son, is cut off by foreclosure, and, while she is holding over, in the absence of her husband, she sells crops, which she had harvested before judgment in ejectment against her brought by the purchaser at the foreclosure, in the absence of proof of fraud, the buyer of the crops acquires good title as against the purchaser of the land at the foreclosure sale and as against the husband's creditors. Van Etten *v.* Currier, 4 Abb. Dec. (N. Y.) 475, 3 Keyes 329 [*affirming* 29 Barb. 644].

**Rights of purchaser.**— The purchaser of personal property subsequently attached for a debt of the original owner may maintain an action against an attaching officer for an injury done by him to it after the purchase. Richardson *v.* Kimball, 28 Me. 463.

**92.** *Massachusetts.*— Finch *v.* Mansfield, 97 Mass. 89.

*Nebraska.*— Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534; Havens *v.* Grand Island Light, etc., Co., 41 Nebr. 153, 59 N. W. 681.

*New Hampshire.*— Felton *v.* Fuller, 29 N. H. 121.

*Texas.*— Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341.

*Wisconsin.*— Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

**93.** Dunnigan *v.* Crummey, 44 Barb. (N. Y.) 528; Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797; Brodack *v.* Morsbach, 38 Wash. 72, 80 Pac. 275.

**94.** See Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797, distinguishing and explaining the difference between the terms "executed" and "executory" as applied to contracts of sale.

**95.** Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073.

**A sale of goods to arrive** by shipment upon a vessel is not an executed but is an executory contract under which no present title passes. Middleton *v.* Ballingall, 1 Cal. 446; Shields *v.* Pettie, 4 N. Y. 122 [*affirming* 2 Sandf. 262]; Benedict *v.* Field, 4 Duer (N. Y.) 154 [*affirmed* in 16 N. Y. 595]; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670.

**96.** *Arkansas.*— Jackson *v.* Jones, 22 Ark. 158.

*California.*— Cardinell *v.* Bennett, 52 Cal. 476.

*Illinois.*— Gibson *v.* Chicago Packing, etc., Co., 108 Ill. App. 100.

*Indiana.*— Lester *v.* East, 49 Ind. 588; Straus *v.* Ross, 25 Ind. 300.

*Louisiana.*— White *v.* White, 50 La. Ann. 104, 23 So. 95; Chevremont *v.* Fulton, 19 La. 248.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1; Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150.

*Nebraska.*— Wallingford *v.* Burr, 15 Nebr. 204, 18 N. W. 67.

*New Jersey.*— Brock *v.* O'Donnell, 45 N. J. L. 441 [*affirmed* in 49 N. J. L. 230, 10 Atl. 708].

*New York.*— Bacon *v.* Gilman, 57 N. Y. 656; Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470, 94 N. Y. Suppl. 777.

*North Carolina.*— Davis *v.* Boyd, 51 N. C. 249; Branson *v.* Gales, 7 N. C. 312.

*Oklahoma.*— American Soda Fountain Co. *v.* Gerrer's Bakery, 14 Okla. 258, 78 Pac. 115.

*Tennessee.*— Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

*Texas.*— Smith *v.* Texas, etc., R. Co., 101 Tex. 405, 108 S. W. 819 [*modifying* (Civ. App. 1907) 105 S. W. 528].

*Wisconsin.*— Smith *v.* Barron County, 44 Wis. 686.

**Question for jury.**— Whether a contract is complete or merely executory is for the jury. Grant *v.* Lower, 3 Tex. App. Civ. Cas. § 232.

**97.** *Arkansas.*— Ferrier *v.* Wood, 9 Ark. 85.

*California.*— Cardinell *v* Bennett, 52 Cal. 476.

*Connecticut.*— Seymour *v.* Ives, 46 Conn. 109.

*Illinois.*— Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Newell *v.* Grant Locomotive Works, 50 Ill. App. 611.

*Iowa.*— Snyder *v.* Tibbals, 32 Iowa 447.

*Kentucky.*— Calvert *v.* Sasseen, 4 Metc. 245.

*Louisiana.*— Abat *v.* Atkinson, 21 La. Ann. 414; Garrett *v.* Crooks, 15 La. Ann. 483; Marshall *v.* Morehouse Parish, 14 La. Ann. 689; Knox *v.* Payne, 13 La. Ann. 361.

*Massachusetts.*— Young *v.* Austin, 6 Pick. 280.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1.

*Mississippi.*— Berry *v.* Waterman, 71 Miss. 497, 15 So. 234; Smith *v.* Sparkman, 55 Miss. 649, 30 Am. Rep. 537.

terms and expressions standing alone import an executed [98] or executory contract,[99] they are by no means conclusive but must be construed with reference to other provisions of the contract and according to what appears to have been the real intention of the parties,[1] and so a mere recital in the writing evidencing the contract that the article is "sold" or that the buyer has "purchased" it does not necessarily make the contract executed;[2] while on the other hand a recital that the seller "agrees to sell" is not conclusive that the title was not intended to pass immediately.[3]

**b. Goods Not in Existence or Not Acquired.** A contract of sale is necessarily executory if at the time of the contract the property is not in existence,[4] or has not been acquired by the seller,[5] although it has been held that if the property has a potential existence the sale is not invalid,[6] and that the property will vest in the buyer upon its coming into existence,[7] or upon its acquisition by the seller.[8]

*Missouri.*— Zwisler *v.* Storts, 30 Mo. App. 163.

*New Hampshire.*— Smart *v.* Batchelder, 57 N. H. 140.

*New York.*— Lighthouse *v.* Buffalo Third Nat. Bank, 25 N. Y. App. Div. 630, 52 N. Y. Suppl. 488 [*reversed* on other grounds in 162 N. Y. 336]; Hopkins *v.* Davis, 23 N. Y. App. Div. 235, 48 N. Y. Suppl. 745.

*North Carolina.*— Wilson *v.* Purcell, 33 N. C. 502; May *v.* Gentry, 20 N. C. 249.

*Pennsylvania.*— Sneathen *v.* Grubbs, 88 Pa. St. 147.

*Tennessee.*— Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

*Texas.*— Low *v.* Broad, (Civ. App. 1903) 77 S. W. 28.

*Vermont.*— Miller *v.* Cushman, 38 Vt. 593.

*Wisconsin.*— Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017; State *v.* Milwaukee Chamber of Commerce, 121 Wis. 110, 98 N. W. 930.

*United States.*— Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. 878; H. B. Claflin Co. *v.* Kern, 55 Fed. 578.

**Acts which must be done** before title passes see *infra*, VI, A, 2, d.

**Question for jury.**— Whether all that is necessary to complete the contract has been done is for the jury. Kelsea *v.* Haines, 41 N. H. 246.

**The time when the sale becomes complete** so as to pass the property as against creditors and subsequent purchasers is a question for the jury. Roberts *v.* Fargo First Nat. Bank, 8 N. D. 474, 79 N. W. 993

**98.** McCrae *v.* Young, 43 Ala. 622, holding that the words, "I have this day sold," import a completed transaction.

**99.** Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291], holding that while the words "agrees to sell" import an executory contract, they are not conclusive to this effect.

**1.** Windmuller *v.* Fleming, 129 Ill. App. 476; Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291].

**2.** Frazier *v.* Simmons, 139 Mass. 531, 3 N. E. 112 (holding that the words "we have purchased" do not necessarily import a present transfer of property to the buyer, if it appears that such was not the intention of the parties); Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292 (holding that the words "we have to-day sold" do not necessarily import an executed sale, but that they must be construed in connection with the rest of the contract); Gallup *v.* Sterling, 22 Misc. (N. Y.) 672, 49 N. Y. Suppl. 942 (holding that the word "sold" does not necessarily imply a change of title); Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670 (holding that the word "sold" will be construed as meaning "contracted to sell," if it appears that the contract was intended to be executory); Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544 (holding that the words "hereby sells" do not constitute an executed sale if it otherwise appears that such was not the intention of the parties); Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. 878 (holding that the fact that the memorandum of sale states that the buyer "purchased" the goods does not render the transfer of title complete, if it otherwise appears that the contract was intended to be executory).

**3.** Windmuller *v.* Fleming, 129 Ill. App. 476; Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291]; Brodack *v.* Morsbach, 38 Wash. 72, 80 Pac. 275.

**4.** *Arkansas.*— Deutsch *v.* Dunham, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21.

*Kentucky.*— Whitehead *v.* Root, 2 Metc. 584.

*Michigan.*— Bates *v.* Smith, 83 Mich. 347, 47 N. W. 249.

*New York.*— Andrew *v.* Newcomb, 32 N. Y. 417.

*Pennsylvania.*— Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.

**Goods to be manufactured or produced** see *infra*, VI, A, 3, e.

**Validity of sale** as affected by existence of subject-matter see *supra*, II, C, 2.

**5.** Maskelinski *v.* Wazsinenski, 20 N. Y. Suppl. 533. See also *supra*, II, C, 2, c, (I).

**Validity of sale** of goods to be acquired see *supra*, II, C, 2, c.

**6.** See *supra*, II, C, 2, b.

**7.** Andrew *v.* Newcomb, 32 N. Y. 417; McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

**8.** Maskelinski *v.* Wazsinenski, 20 N. Y.

**2. Specific Goods — a. Intention of Parties.** When the contract is for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, or in other words, if the goods are specific whether the contract of sale is executed or executory depends solely on the intention of the parties,[9] or as otherwise expressed, where neither the statute of frauds nor the rights of creditors are involved, the title will pass whenever the parties intend it to;[10] and while this intention must be manifested at the time the bargain is made,[11] it may be shown by circumstances as well as declarations,[12] and very slight acts are often sufficient to evince such intention.[13] The parties may make whatever agreement they see fit as to when the title shall pass,[14] and where the language of the agreement clearly and unequivocally manifests such intention, it will control;[15] but if, as

Suppl. 533, holding that where a person sells a horse which he does not own but expects to buy, and receives a portion of the purchase-price, the contract is executory and passes no title to the purchaser, but that when the seller does purchase the horse the title will vest in his vendee.

**9.** *Alabama.*— Weedon *v.* Clark, 94 Ala. 505, 10 So. 307.

*Arkansas.*— Pierce *v.* Lyman, 28 Ark. 550.

*California.*— Hewlet *v.* Flint, 7 Cal. 264.

*Colorado.*— Prowers *v.* Nowles, 42 Colo. 442, 94 Pac. 347.

*Connecticut.*— Wells *v.* McNerney, 74 Conn. 675, 51 Atl. 1064.

*Georgia.*— Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Jordan *v.* Jones, 110 Ga. 47, 35 S. E. 151; Flanders *v.* Maynard, 58 Ga 56; Cheney *v.* Dalton, 46 Ga. 401.

*Illinois.*— Rhea *v.* Riner, 21 Ill. 526; Callaghan *v.* Myers, 89 Ill. 566; Windmuller *v.* Fleming, 129 Ill. App. 476; Gibson *v.* Chicago Packing, etc., Co., 108 Ill. App. 100.

*Kansas.*— Barber *v.* Thomas, 66 Kan. 463, 71 Pac. 845; O'Farrel *v.* McClure, 5 Kan. App. 880, 47 Pac. 160; Kneeland *v.* Renner, 2 Kan. App. 451, 43 Pac. 95.

*Massachusetts.*— Sherwin *v.* Mudge, 127 Mass. 547; Foster *v.* Ropes, 111 Mass. 10; Martin *v.* Adams, 104 Mass. 262; Cox *v.* Jackson, 6 Allen 108; Riddle *v.* Varnum, 20 Pick. 280; Mason *v.* Thompson, 18 Pick. 305.

*Michigan.*— Scotten *v.* Sutter, 37 Mich. 526; McDonough *v.* Sutton, 35 Mich. 1; Wilkinson *v.* Holiday, 33 Mich. 386.

*New Jersey.*— Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073.

*New York.*— Terry *v.* Wheeler, 25 N. Y. 520; Bacon *v.* Gilman, 57 N. Y. 656.

*Ohio.*— Warner *v.* Porter, 2 Disn. 124.

*Oregon.*— Haines *v.* McKinnon, 35 Oreg. 573, 57 Pac. 903; Wadhams *v.* Balfour, 33 Oreg. 313, 51 Pac. 642.

*Texas.*— Irvin *v.* Edwards, 92 Tex. 258, 47 S. W. 719.

*Vermont.*— Towsley *v.* Dana, 1 Aik. 344.

*Washington.*— Pacific Lounge, etc., Co. *v.* Rudebeck, 15 Wash. 336, 46 Pac. 392; Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542.

*West Virginia.*— Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432; Huntington Bank *v.* Napier, 41 W. Va. 481, 23 S. E. 800; Morgan *v.* King, 28 W. Va. 1, 57 Am. Rep. 633.

*Wisconsin.*— Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18; Thayer *v.* Davis, 75 Wis. 205, 43 N. W. 902; Morrow *v.* Campbell, 30 Wis. 90; Morrow *v.* Reed, 30 Wis. 81.

*United States.*— Hatch *v.* Standard Oil Co., 100 U. S. 124, 25 L. ed. 554; U. S. *v.* Woodruff, 22 Wall. 180, 22 L. ed. 863.

*England.*— Seath *v.* Moore, 11 App. Cas. 350, 5 Aspin. 586, 55 L. J. P. C. 54, 54 L. T. Rep. N. S. 690; Shepherd *v.* Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148, 24 L. T. Rep. N. S. 857, 20 Wkly. Rep. 1; Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 336, 20 Wkly. Rep. 769; Young *v.* Matthews, L. R. 2 C. P. 127, 36 L. J. C. P. 61, 15 L. T. Rep. N. S. 182; Falk *v.* Fletcher, 18 C. B. N. S. 403, 11 Jur. N. S. 176, 34 L. J. C. P. 146, 13 Wkly. Rep. 346, 114 E. C. L. 403; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438; Gilmour *v.* Supple, 11 Moore P. C. 551, 6 Wkly. Rep. 445, 14 Eng. Reprint 803.

*Canada.*— Bush *v.* Fry, 15 Ont. 122; Mason *v.* Great Western R. Co., 31 U. C. Q. B. 73.

**Buyer's option.**— The words "we have purchased" do not necessarily import a present transfer of the property, if it appears that the intention of the parties was otherwise; and the words, "payable and deliverable buyer's option, sixty days," go to show that a present transfer of title was not intended. Frazier *v.* Simmons, 139 Mass. 521, 2 N. E. 112. And see Kelley *v.* Upton, 5 Duer (N. Y.) 336.

**Seller's option.**—A contract for the sale of shares of stock at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent. per annum," effects a sale *in præsenti.* Currie *v.* White, 45 N. Y. 822.

**10.** Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

**11.** Foster *v.* Ropes, 111 Mass. 10.

**12.** Callaghan *v.* Myers, 89 Ill. 566.

**13.** Hoeffler *v.* Carew, 135 Wis. 605, 116 N. W. 241.

**14.** Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Wilkinson *v.* Holiday, 33 Mich. 386.

**15.** Wadhams *v.* Balfour, 32 Oreg. 313, 51

frequently happens, the intention is not clearly manifested, it must be ascertained by the rules of construction,[16] considering not only the language of the agreement, but also the subject-matter, situation of the parties, and other circumstances surrounding the transaction.[17] The courts have laid down certain rules in regard to when title passes, based upon the performance or non-performance of certain acts, or the existence or non-existence of certain facts and circumstances;[18] but they are merely rules of evidence to aid in ascertaining the intention of the parties,[19] and while a more or less conclusive presumption arises therefrom that the title was or was not intended to pass, it is not conclusive,[20] and will not control if a contrary intention is otherwise shown.[21] So where the intention of the parties is not clear, but must be determined from the facts and circumstances of the case, it is a question of fact for the jury.[22]

**b. Illegality, Fraud, or Insolvency.**[23] No title to the goods sold passes by a sale which is invalid because of illegality,[24] and the rule has also been laid down in many cases that, if the sale is procured by fraud, no title passes to the buyer as against the seller,[25] unless the seller in some way subsequently ratifies the

Pac. 642; Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

16. Windmuller *v.* Fleming, 129 Ill. App. 476; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

17. Buskirk Bros. *v.* Peck, 57 W. Va. 360, 50 S. E. 432; Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18.

18. Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

19. Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

20. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Wilkinson *v.* Holiday, 33 Mich. 386; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642; Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18.

21. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642; Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432; Roberts *v.* McWatty, 123 Wis. 598. 102 N. W. 18.

**Application of rule to particular acts, facts, and circumstances** see *infra*, VI, A, 2, d.

22. Prowers *v.* Nowles, 42 Colo. 442, 94 Pac. 347; Blodgett *v.* Hovey, 91 Mich. 571, 52 N. W. 149; Lobdell *v.* Horton, 71 Mich. 681, 40 N. W. 28; Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Toohey *v.* Plummer, 65 Mich. 688, 32 N. W. 897; Fuller *v.* Bean, 34 N. H. 290; Falk *v.* Fletcher, 18 C. B. N. S. 403, 11 Jur. N. S. 176, 34 L. J. C. P. 146, 13 Wkly. Rep. 346, 114 E. C. L. 403.

23. **Fraud as affecting validity of assent** see *supra*, II, E, 8, d.

**Fraud as a ground of rescission** see *supra*, IV, B, 3, a.

24. Duperier *v.* Flanders, 21 La. Ann. 719.

**But as against a wrong-doer,** even if the sale is voidable for illegality because not conforming to statute, the buyer gets a title which will support trover against the wrong-doer. Bartlett *v.* Hoyt, 29 N. H. 317.

25. *California.*— Amer *v.* Hightower, 70 Cal. 440, 11 Pac. 697; Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

*Florida.*— Hammond *v.* Lynes, 21 Fla. 118.

*Georgia.*— Landauer *v.* Cochran, 54 Ga. 533.

*Illinois.*— American Merchants' Union Express Co. *v.* Willsie, 79 Ill. 92; Schweizer *v.* Tracy, 76 Ill. 345.

*Indiana.*— Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

*Kansas.*— Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032.

*Louisiana.*— Harris *v.* Denison, 8 La. 543; Prall *v.* Peet, 3 La. 274; Gasquet *v.* Johnston, 2 La. 514.

*Maine.*— Jordan *v.* Parker, 56 Me. 557.

*Maryland.*— Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

*Massachusetts.*— Wiggin *v.* Day, 9 Gray 97; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97.

*Missouri.*— Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Reid *v.* Lloyd, 52 Mo. App. 278; Thomas *v.* Freligh, 9 Mo. App. 151.

*New Jersey.*— Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

*New York.*— Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. 493; King *v.* Phillips, 8 Bosw. 603; Delin *v.* Stohl, 2 N. Y. Civ. Proc. 222; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323; Root *v.* French, 13 Wend. 570, 28 Am. Dec. 482; Van Cleef *v.* Fleet, 15 Johns. 147; Durell *v.* Haley, 1 Paige 492, 19 Am. Dec. 444.

*Pennsylvania.*— Perlman *v.* Sartorius, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. Rep. 834; Ensign *v.* Hoffield, 2 Pa. Cas. 504, 4 Atl. 189.

*Texas.*— Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084; Blum *v.* Jones, (Civ. App. 1893) 23 S. W. 844.

*Vermont.*— Redington *v.* Robert, 25 Vt. 686; Hodgeden *v.* Hubbard, 18 Vt. 504, 46 Am. Dec. 167.

*United States.*— Browning *v.* De Ford, 178

sale;[26] but in other cases it is expressly held that such a sale is not void but merely voidable,[27] and that the title passes to the fraudulent buyer, subject, however, to be divested upon a rescission by the seller,[28] provided the property has not passed into the hands of the *bona fide* purchaser.[29] Mere insolvency of the buyer is not of itself sufficient to prevent the passing of the property, when not accompanied by fraud.[30]

**c. Unconditional Sale.** Where there is an unconditional contract for the sale of specific goods in a deliverable state, unless a different intention appears, the property in the goods passes to the buyer when the contract is made without payment of the price or delivery of the goods,[31] notwithstanding the buyer cannot

U. S. 196, 20 S. Ct. 876, 44 L. ed. 1033 [*affirming* 8 Okla. 239, 60 Pac. 534]; Jaffrey *v.* Brown, 29 Fed. 476; Carnahan *v.* Bailey, 28 Fed. 519; De Wolf *v.* Babbett, 8 Fed. Cas. No. 4,220, 4 Mason 289.

See 43 Cent. Dig. tit. "Sales," § 523.

**Giving worthless check.**— The rule that a fraudulent purchase of goods gives no title to the buyer as against the seller applies where the goods are paid for by check and the buyer knows or has reason to know that there are no funds to meet it. American Merchants' Union Express Co. *v.* Willsie, 79 Ill. 92; Hawse *v.* Crowe, R. & M. 414, 21 E. C. L. 784. See also Read *v.* Hutchinson, 3 Camph. 352; Noble *v.* Adams, Holt N. P. 248, 3 E. C. L. 105, 2 Marsh. 366, 7 Taunt. 59, 2 E. C. L. 259, 17 Rev. Rep. 445.

**Fraudulent acts after the sale** and delivery of the property to the buyer will not affect his title thereto. Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637.

**Fraud between buyer and remote seller.**— While the creditor of a firm in failing circumstances who makes such false representations to a third party as to induce him to sell goods to the firm on credit, and who afterward obtains such goods in payment of his preëxisting debts, incurs a clear liability in a direct action against him, he is not thereby incapacitated from purchasing the goods. State *v.* Schulein, 45 Mo. 521.

**26.** Amer *v.* Highlower, 70 Cal. 440, 11 Pac. 697; Ash *v.* Putnam, 1 Hill (N. Y.) 302.

**27.** Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587, 12 So. 598; Bliss *v.* Cottle, 32 Barb. (N. Y.) 322; Stevens *v.* Hyde, 32 Barb. (N. Y.) 171.

**28.** Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Bliss *v.* Cottle, 32 Barb. (N. Y.) 322; Stevens *v.* Hyde, 32 Barb. (N. Y.) 171.

**Creditors of seller.**— Unsecured general creditors of the seller cannot be heard to assert a right which they may possess to rescind the sale for fraud inducing thereto. Kingsley *v.* McGrew, 48 Nebr. 812, 67 N. W. 787.

**Right to rescind for fraud** see *supra*, IV, B, 3, a.

**29.** Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587, 12 So 598; Bliss *v.* Cottle, 32 Barb. (N. Y.) 322.

**Bona fide purchasers** see *infra*, VI, B, 2, f.

**30.** *Alabama.*— Johnston *v.* Bent, 93 Ala. 160, 9 So. 581; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

*Arkansas.*— Mack *v.* Adler, 48 Ark. 70, 2 S. W. 345.

*Colorado.*— Burchinell *v.* Hirsh, 5 Colo. App. 500, 39 Pac. 352.

*Illinois.*— Brown *v.* Bierman, 24 Ill. App. 574.

*Indiana.*— Sweet *v.* Campbell, 14 Ind. App. 570, 43 N. E. 236.

*Mississippi.*— Klein *v.* Rector, 57 Miss. 538.

*Ohio.*— Weitz *v.* Wenham, 10 Ohio Cir. Ct. 348, 6 Ohio Cir. Dec. 563.

*Wisconsin.*— Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

*United States.*— Conyers *v.* Ennis, 6 Fed. Cas. No. 3,149, 2 Mason 236.

**Insolvency subsequent to the sale** will not prevent the passing of title, although the seller may have a remedy for the price by lien or stoppage *in transitu* according to the situs of the property. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

**What constitutes fraud.**— The question as to whether a purchase of goods on credit by an insolvent is fraudulent or not depends upon whether he bought them without intending to pay therefor. Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 43 Atl. 637.

**31.** *Alabama.*— McCrae *v.* Young, 43 Ala. 622; Magee *v.* Billingsley, 3 Ala 679.

*Arkansas.*— Lynch *v.* Daggett, 62 Ark. 592, 37 S. W. 227.

*California.*— Gardiner *v.* McDonogh, 147 Cal. 313, 81 Pac. 964; Bill *v.* Fuller, 146 Cal. 50, 79 Pac. 592; Mason *v.* Lievre, 145 Cal. 514, 78 Pac. 1040.

*Delaware.*— England *v.* Forbes, 7 Houst. 301, 31 Atl. 895; Cleaver *v.* Ogle, 1 Houst. 453.

*Georgia.*— Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Allen *v.* Hollis, 31 Ga. 143.

*Illinois.*— Barker *v.* Bushnell, 75 Ill. 220; Barrow *v.* Window, 71 Ill. 214; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

*Indiana.*— Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; Bertelson *v.* Bower, 81 Ind. 512; Lester *v.* East, 49 Ind. 588; Cloud *v.* Moorman, 18 Ind. 40; Sherry *v.* Picken, 10 Ind. 375; Wright *v.* Maxwell, 9 Ind. 192; Henline *v.* Hall, 4 Ind. 189; Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760.

*Kansas.*— Barber *v.* Thomas, 66 Kan. 463, 71 Pac. 845; O'Farrel *v.* McClure, (App. 1896) 47 Pac. 160.

*Kentucky.*— Kenton *v.* Ratcliffe, 105 Ky.

take away the goods until the price is paid or tendered,[32] unless the sale is on credit,[33] since, if the contract is not within the statute of frauds,[34] it is not essential to the passing of title, in the absence of any agreement or intention to the contrary, that there should be either a delivery of the goods,[35] or payment therefor.[36]

376, 49 S. W. 14, 20 Ky. L. Rep. 1239; Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36; Newcomb *v.* Cabell, 10 Bush 460; Buffington *v.* Ulen, 7 Bush 231; Sweeney *v.* Owsley, 14 B. Mon. 413; Willis *v.* Willis, 6 Dana 48; Paul *v.* Becker, 39 S. W. 499, 19 Ky. L. Rep. 214.

*Louisiana.*— Marshall *v.* Morehouse Parish, 14 La. Ann. 689; Barrett *v.* His Creditors, 12 Rob. 474; Lambeth *v.* Wells, 12 Rob. 51; Thomson *v.* Mylne, 11 Rob. 349; Cook *v.* West, 3 Rob. 331; Slocomb *v.* Arkansas Real Estate Bank, 2 Rob. 92; Copley *v.* Dowell, 1 Rob. 26.

*Maine.*— Levasseur *v.* Cary, (1886) 3 Atl. 461; Phillips *v.* Moor, 71 Me. 78; Chase *v.* Willard, 57 Me. 157; Wing *v.* Clark, 24 Me. 366.

*Massachusetts.*— Townsend *v.* Hargraves, 118 Mass. 325; Morse *v.* Sherman, 106 Mass. 430; Manger *v.* Crosby, 117 Mass. 330; Haskins *v.* Warren, 115 Mass. 514; Parsons *v.* Dickinson, 11 Pick. 352.

*Michigan.*— Kling *v.* Fries, 33 Mich. 275; *In re* Hicks, 20 Mich. 280.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1; Rail *v.* Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.

*Mississippi.*— Garland *v.* Stewart, 31 Miss. 314.

*Missouri.*— Glass *v.* Blazer, 91 Mo. App. 564.

*Nebraska.*—Allen *v.* Rushfort, 82 Nebr. 663, 118 N. W. 657; Baker *v.* McDonald, 74 Nebr. 595, 104 N. W. 923, 1 L. R. A. N. S. 474.

*New Hampshire.*— Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Clark *v.* Greeley, 62 N. H. 394; Felton *v.* Fuller, 29 N. H. 121; Clark *v.* Draper, 19 N. H. 419.

*New Jersey.*— Brock *v.* O'Donnell, 45 N. J. L. 441; Bates *v.* Elmer Glass Mfg. Co., (Ch. 1888) 14 Atl. 273.

*New York.*— Hayden *v.* Demets, 53 N. Y. 426; Waldron *v.* Romaine, 22 N. Y. 368; Morey *v.* Medbury, 10 Hun 540; Welch *v.* Moffat, 1 Thomps. & C. 575; Snell *v.* Thorp, 15 N. Y. Suppl. 411; Hall Safe, etc., Co. *v.* Reike, 2 N. Y. City Ct. 271; Olyphant *v.* Baker, 5 Den. 379; De Fonclear *v.* Shottenkirk, 3 Johns. 170; Lansing *v.* Turner, 2 Johns. 13.

*North Carolina.*— McArthur *v.* Mathis, 133 N. C. 142, 45 S. E. 530; Jenkins *v.* Jarrat, 70 N. C. 255 [*distinguishing* May *v.* Gentry, 20 N. C. 249]; State *v.* Fuller, 27 N. C. 26.

*Ohio.*— Hooben *v.* Bidwell, 16 Ohio 509, 47 Am. Dec. 386; Davis *v.* Parker, 5 Ohio S. & C. Pl. Dec. 152, 7 Ohio N. P. 382.

*Oregon.*— Haines *v.* McKinnon, 35 Oreg. 573, 57 Pac. 903.

*South Carolina.*— Frazer *v.* Hilliard, 2 Strobh. 309.

*South Dakota.*— Hull *v.* Caldwell, 3 S. D. 451, 54 N. W. 100.

*Tennessee.*—Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797; Broyles *v.* Lowrey, 2 Sneed 22; Miller *v.* Koger, 9 Humphr. 231; Goodrum *v.* Smith, 3 Humphr. 542; Potter *v* Coward, Meigs 22.

*Texas.*— Epstein *v.* Meyer Bros. Drug Co., 82 Tex. 572, 18 S. W. 592; Owens *v.* Clark, 78 Tex. 547, 15 S. W. 101; Brewer *v.* Blanton, 66 Tex. 532, 1 S. W. 572; Hunt *v.* Kellum, 59 Tex. 535; Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Downey *v.* Taylor, (Civ. App. 1898) 48 S. W. 541; Goldberg *v.* Bussey, (Civ. App. 1898) 47 S. W. 49; Sanger *v.* Thomasson, (Civ. App. 1898) 44 S. W. 408; Loeb *v.* Crow, 15 Tex. Civ. App. 537, 40 S. W. 506. See also Scarbrough *v.* Alcorn, 74 Tex. 358, 12 S. W. 72.

*Vermont.*— Evarts *v.* Butler, Brayt. 216; Davis *v.* Bradley, 24 Vt. 55.

*Virginia.*—Chapman *v.* Campbell, 13 Gratt. 105.

*Washington.*— Pacific Lounge, etc., Co. *v.* Rudebeck, 15 Wash. 336, 46 Pac. 392.

*West Virginia.*— Buskirk *v.* Peck, 57 W. Va 360, 50 S. E. 432.

*Wisconsin.*— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359; Thayer *v.* Davis, 75 Wis. 205, 43 N. W. 902.

*United States.*— Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180 [*reversing* 25 Ct. Cl. 126]; Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

*England.*— Seath *v.* Moore, 11 App. Cas. 350, 5 Aspin. 586, 55 L. J. P. C. 54, 54 L. T. Rep. N. S. 690; Sweeting *v.* Turner, L. R. 7 Q. B. 310, 41 L. J. Q. B. 58, 25 L. T. Rep. N. S. 796, 20 Wkly. Rep. 185; Martindale *v.* Smith, 1 Q. B. 389, 1 G. & D. 1, 5 Jur. 932, 10 L. J. Q. B. 155, 41 E. C. L. 592; Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 41 L. J. C. P. 228, 27 L. T. Rep. N. S. 336, 20 Wkly. Rep. 1035; Tarling *v.* Baxter, 6 B. & C. 360, 9 D. & R. 272, 5 L. J. K. B. O. S. 164, 30 Rev. Rep. 355, 13 E. C. L. 169; Dixon *v.* Yates, 5 B. & Ad. 313, 2 L. J. K. B. 198, 2 N. & M. 177, 27 E. C. L. 137; Phillimore *v.* Barry, 1 Campb. 513, 10 Rev. Rep. 742; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Barr *v.* Gibson, 1 H. & H. 70, 7 L. J. Exch. 124, 3 M. & W. 390; Gilmour *v.* Supple, 11 Moore P. C. 551, 6 Wkly. Rep. 445, 14 Eng. Reprint 803.

32. Jenkins *v.* Jarrat, 70 N. C. 255; Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222.

33. Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222.

34. See Rail *v.* Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471; Hatch *v.* Standard Oil Co., 100 U. S. 124, 25 L. ed. 554.

Statute of frauds as applicable to sales of goods see FRAUDS, STATUTE OF, 20 Cyc. 238.

35. See *infra*, VI, A, 4, a.

36. See *infra*, VI, A, 5, a.

**d. Acts Which Must Be Done Before Title Passes** — (1) *In General.* If by the terms of the agreement any condition remains to be performed precedent to the vesting of title,[37] or any material act connected with the subject-matter remains to be done, between the seller and the buyer,[38] as in relation to the delivery,[39] or to identify the goods,[40] or to determine the quantity,[41] the quality,[42] or the price,[43] the title to the property does not as a general rule pass until such act or condition is performed; and it is not necessary that there should be any express agreement that something further is to be done, but it is sufficient if it appears from the circumstances of the case to be necessary;[44] but upon such performance, if nothing has occurred in the meanwhile to defeat the transfer, it will then take place,[45] and a performance as to a part of the property may operate

37. *Connecticut.*— Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519.

*Illinois.*— Gibson *v.* Chicago Packing, etc., Co., 108 Ill. App. 100.

*Nebraska.*— Sutro *v.* Hoile, 2 Nebr. 186.

*New York.*— Von Keller *v.* Schulting, 50 N. Y. 108.

*Oregon.*— Case Threshing Mach. Co. *v.* Smith, 16 Oreg. 381, 18 Pac. 641.

*Pennsylvania.*— Brown *v.* Reber, 30 Pa. Super. Ct. 114.

*United States.*— Hull *v.* Pitrat, 45 Fed. 94.

*Canada.*— Ross *v.* Eby, 28 U. C. C. P. 316.

**Making bill of sale.**—Although a bill of sale is generally unnecessary to pass title, if the parties so agree the sale is not complete so as to pass title until a bill of sale is executed. Lovelace *v.* Stewart, 23 Mo. 384; Wallingford *v.* Burr, 15 Nebr. 204, 18 N. W. 67.

38. *Alabama.*— Darden *v.* Lovelace, 52 Ala. 289; Hudson *v.* Weir, 29 Ala. 294.

*Georgia.*— Cheney *v.* Dalton, 46 Ga. 401.

*Indiana.*— Dixon *v.* Duke, 85 Ind. 434; Moffatt *v.* Green, 9 Ind. 198; Branigan *v.* Hendrickson, 17 Ind. App. 198, 46 N. E. 560.

*Iowa.*— Snyder *v.* Tibbals, 32 Iowa 447; McClung *v.* Kelley, 21 Iowa 508.

*Kentucky.*—Calvert *v.* Sasseen, 4 Metc. 245.

*Louisiana.*— Abat *v.* Atkinson, 21 La Ann. 414.

*Maine.*— Stone *v.* Peacock, 35 Me. 385.

*Massachusetts.*— Westfield *v.* Mayo, 122 Mass. 100, 23 Am. Rep. 292; Sumner *v.* Hamlet, 12 Pick. 76.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1; Martin *v.* Hurlbut, 9 Minn. 142.

*Mississippi.*— Berry *v.* Waterman, 71 Miss. 497, 15 So. 234; Smith *v.* Sparkman, 55 Miss. 649, 30 Am. Rep. 537.

*Missouri.*— Hening *v.* Powell, 33 Mo. 468.

*Nebraska.*— Sutro *v.* Hoile, 2 Nebr. 186.

*New Hampshire.*— Smart *v.* Batchelder, 57 N. H. 140; Messer *v.* Woodman, 22 N. H 172, 53 Am. Dec. 241.

*New York.*— Bacon *v.* Gilman, 57 N. Y 656; Stiles *v.* Howland, 32 N. Y. 309; Keeler *v.* Vandervere, 5 Lans. 313; Vincent *v.* Conklin, 1 E. D. Smith 203.

*Pennsylvania.*— Sneathen *v.* Grubbs, 88 Pa. St. 147.

*Tennessee.*—Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797; Williams *v.* Allen, 10 Humphr. 337, 51 Am. Dec. 709.

*Texas.*— Cooper *v.* Bumpass Caleb, 1 Tex. App. Civ. Cas. § 498.

*Vermont.*— Gibbs *v.* Benjamin, 45 Vt. 124.

*United States.*— Wheeler *v.* Walton, etc., Co., 64 Fed. 664; H. B. Claflin Co. *v.* Kern, 55 Fed. 578.

*England.*— Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Logan *v.* Le Mesurier, 11 Jur. 1091, 6 Moore P. C. 116, 13 Eng. Reprint 628; Gilmour *v.* Supple, 11 Moore P. C. 551, 6 Wkly. Rep. 445, 14 Eng. Reprint 803.

**Between seller and his vendor.**— If the act that remains to be done is not between the seller and the buyer, but between the seller and his vendor, it will not prevent the property passing to the buyer. Whitehouse *v.* Frost, 12 East 614, 11 Rev. Rep. 491.

**After delivery.**—Where hogs are sold and delivered the fact that the seller is to take them back into possession and fatten them to a certain weight does not prevent the property from passing. Johnson *v.* Hays, 5 Ohio St. 181.

**Question for jury.**—Whether any material act remains to be done before title can pass is a question for the jury. Slade *v.* Lee, 94 Mich. 127, 53 N. W. 929; Gates *v.* Winooski Lumber Co., 10 Fed. Cas. No. 5,270, 18 Nat. Bankr. Reg. 31.

39. See *infra*, VI, A, 2, d, (II); VI, A, 4, c, (VIII), (B).

40. See *infra*, VI, A, 3.

41. See *infra*, VI, A, 2, d, (IV).

42. See *infra*, VI, A, 2, d, (V).

43. See *infra*, VI, A, 2, d, (III).

44. Fagan *v.* Faulkner, 5 Ark. 161.

45. *Minnesota.*— Fredette *v.* Thomas, 57 Minn. 190, 58 N. W. 984.

*Missouri.*— Groff *v.* Belche, 62 Mo. 400.

*New York.*— Bacon *v.* Gilman, 57 N. Y. 656.

*Ohio.*— Parker *v.* Davis, 13 Ohio Cir. Ct. 631, 6 Ohio Cir. Dec. 684.

*Tennessee.*— Bond *v.* Greenwald, 4 Heisk. 453.

*Texas.*— International, etc., R. Co. *v.* Ogburn, 26 Tex. Civ. App. 217, 63 S. W. 1072; Vance *v.* Hartzell, (App. 1891) 18 S. W. 88.

*England.*— Banbury, etc., R. Co. *v.* Daniel, 54 L. J. Ch. 265, 33 Wkly. Rep. 321.

*Canada.*— Montreal Bank *v.* McWhirter, 17 U. C. C. P. 506; Wilson *v.* Shaver, 3 Ont. L. Rep. 110.

**Severance from realty.**—Where a sale is made of standing timber to be cut by the buyer, title does not pass until it has been severed from the realty (Pfistner *v.* Bird, 43

as a transfer of title as to that part,[46] although the title to the residue as to which there has been no such performance will not be affected.[47] The foregoing rules are, however, in accordance with the general rule previously stated,[48] subject to the intention of the parties,[49] and while the fact that something remains to be done affords a presumption that the title was not intended to pass until its performance, the presumption is not conclusive,[50] and if it appears that such was the intention the title will pass, notwithstanding something remains to be done to ascertain and fix the rights of the parties.[51]

(II) *Where Goods Are to Be Put in Deliverable State.* If under a contract for the sale of specific goods the seller is bound to do something to the goods for the purpose of putting them in a deliverable state, that is, into a condition in which the buyer is bound to accept them, unless a different intention appears the property does not pass until such thing is done.[52] Thus where trees

Mich. 14, 4 N. W. 625); but the title will pass upon its severance (Nelson *v.* Nelson, 6 Gray (Mass.) 385; Fitch *v.* Burk, 38 Vt. 683; Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432); unless a contrary intention appears (see Buskirk *v.* Peck, *supra*); if cut within the time prescribed by the contract (Plummer *v.* Prescott, 43 N. H. 277); although it is not removed from the land (Plummer *v.* Prescott, *supra*). So also on a sale of stones on a farm if the buyer pays therefor, and removes them from one part of the premises to the other, this constitutes a severance and vests title in the buyer. Fulton *v.* Norton, 64 Me. 410.

**Evidence.**— It is proper to permit the seller to read to the jury extracts from their warehouse books showing original entries relating to the sale, and to exhibit unsigned sale notes and invoices to show that all things necessary to vest title have been done. Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

**46.** Rugg *v.* Minett, 11 East 210, 10 Rev. Rep. 475.

**47.** Rugg *v.* Minett, 11 East 210, 10 Rev. Rep. 475; Hanson *v.* Meyer, 6 East 614, 2 Smith K. B. 670, 8 Rev. Rep. 572. And see Simmons *v.* Swift, 5 B. & C. 857, 8 D. & R. 693, 5 L. J. K. B. O. S. 10, 29 Rev. Rep. 438, 11 E. C. L. 712.

**48.** See *supra*, VI, A, 2, a.

**49.** *Colorado.*— Prower *v.* Nowles, 42 Colo. 442, 94 Pac. 347.

*Iowa.*— Welch *v.* Spies, 103 Iowa 389, 72 N. W. 548; Smyth *v.* Ward, 46 Iowa 339.

*Michigan.*— Wilkinson *v.* Holiday, 33 Mich. 386.

*Missouri.*— Swartz *v.* Chappell, 19 Mo. 304.

*New York.*— Bacon *v.* Gilman, 57 N. Y. 656.

*Wisconsin.*— Roberts *v.* McWatty, 123 Wis. 598, 102 N. W. 18.

*England.*— Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 336, 20 Wkly. Rep. 769; Young *v.* Matthews, L. R. 2 C. P. 127, 36 L. J. C. P. 61, 15 L. T. Rep. N. S. 182; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Furley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

*Canada.*— Montreal Bank *v.* McWhirter, 17 U. C. C. P. 506.

**Question for jury.**—Whether the intent is that the property shall pass notwithstanding something remains to be done is ordinarily a question for the jury. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

**50.** Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Wilkinson *v.* Holiday, 33 Mich. 386.

**51.** Welch *v.* Spies, 103 Iowa 389, 72 N. W. 548; Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

**52.** *Alabama.*— Darden *v.* Lovelace, 52 Ala. 289.

*Illinois.*— Stanley *v.* Robinson, 14 Ill. App. 480.

*Indiana.*— Dixon *v.* Duke, 85 Ind. 434; Lester *v.* East, 49 Ind. 588; Straus *v.* Ross, 25 Ind. 300.

*Iowa.*— McClung *v.* Kelley, 21 Iowa 508.

*Kansas.*— Hughes *v.* Wiley, 36 Kan. 731, 14 Pac. 269.

*Massachusetts.*— Sumner *v.* Hamlet, 12 Pick. 76.

*Michigan.*— Wilkinson *v.* Holiday, 33 Mich. 386.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1; Malone *v.* Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170; Martin *v.* Hurlbut, 9 Minn. 142.

*Mississippi.*— Ouilette *v.* Davis, 69 Miss. 762, 12 So. 21.

*New York.*— Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291].

*North Carolina.*— Allman *v.* Davis, 26 N. C. 12.

*Oregon.*— Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

*Vermont.*— Hale *v.* Huntley, 21 Vt. 147.

*Washington.*— North Pacific Lumbering etc., Co. *v.* Kerron, 5 Wash. 214, 31 Pac. 595; Meeker *v.* Johnson, 3 Wash. 247, 24 Pac. 542.

*West Virginia.*— Young *v.* Edwards, 64 W. Va. 67, 60 S. E. 992.

*United States.*— U. S. *v.* Woodruff, 22 Wall. 180, 22 L. ed. 863.

*England.*— Seath *v.* Moore, 11 App. Cas. 350, 5 Aspin. 586, 55 L. J. C. P. 54, 54 L. T. Rep. N. S. 690; Anderson *v.* Morice, L. R. 10 C. P. 609, 44 L. J. C. P. 341, 33 L. T. Rep. N. S. 355, 24 Wkly. Rep. 30 [*affirmed* in 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. C. P. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14];

are to be trimmed,[53] cotton to be ginned and baled,[54] fish to be dried,[55] crops to be gathered or threshed,[56] cattle to be fattened,[57] hops to be baled,[58] machinery to be set up,[59] or lumber to be sawed or planed,[60] the doing of such thing is presumptively a condition precedent to the transfer of property. Ordinarily, however, as soon as the acts necessary to put the goods in a deliverable condition are performed the title will pass,[61] and if it appears that it was the intention of the parties that the property should pass at once, notwithstanding the goods were to be put in a deliverable condition, such intention will prevail.[62] The fact that something is to be done to the goods after delivery will not prevent the property from passing.[63]

(III) *Ascertainment of Price* — (A) *Weighing, Measuring, or Testing* — (1) In General. As a general rule where there is a contract for the sale of specific goods which are in a deliverable state, but it is necessary to weigh, measure, test, or do some other act with reference thereto, for the purpose of ascertaining the price to be paid, the property in the goods, unless a contrary intention appears, does not pass until such act is done,[64] and this rule is particularly

Young *v.* Matthews, L. R. 2 C. P. 127, 36 L. J. C. P. 61, 12 L. T. Rep. N. S. 182; Rugg *v.* Minett, 11 East 210, 10 Rev. Rep. 475; Boswell *v.* Kilborn, 8 Jur. N. S. 443, 6 L. T. Rep. N. S. 79, 15 Moore P. C. 309, 10 Wkly. Rep. 517, 15 Eng. Reprint 511; Laidler *v.* Burlinson, 6 L. J. Exch. 160, 2 M. & W. 602.

**Unfinished article.**—Where a sale is made of an unfinished article which the seller is to finish and deliver, no title passes until it has been finished. Halterline *v.* Rice, 62 Barb. (N. Y.) 593; Pritchett *v.* Jones, 4 Rawle (Pa.) 260.

**Goods to be manufactured or produced** see *infra*, VI, A, 3, c.

**53.** Acraman *v.* Morrice, 8 C. B. 449, 14 Jur. 69, 19 L. J. C. P 57, 65 E. C. L. 449.

**54.** Screws *v.* Roach, 22 Ala. 675; Smith *v.* Sparkman, 55 Miss. 649, 30 Am. Rep. 537; Bond *v.* Greenwald, 4 Heisk (Tenn.) 453; U. S. *v.* Woodruff, 22 Wall. (U. S.) 180, 22 L. ed. 863.

**55.** Foster *v.* Ropes, 111 Mass. 10.

**56.** *California.*— Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

*Illinois.*— Low *v.* Freeman, 12 Ill. 467.

*Kansas.*— Hughes *v.* Wiley, 36 Kan. 731, 14 Pac. 269; Larkin *v.* Johnson, 8 Kan. App. 114, 54 Pac. 690.

*Massachusetts.*— Wesoloski *v.* Wyoski, 186 Mass. 495, 71 N. E. 982.

*Missouri.*— Groff *v.* Belche, 62 Mo. 400.

*New Jersey.*— Thompson *v.* Conover, 32 N. J. L. 466.

*Oregon.*— Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

*Tennessee.*— Parman *v.* Marshall, (Ch. App. 1899) 51 S. W. 116.

**57.** Lester *v.* East, 49 Ind. 588; Rourke *v.* Bullens, 8 Gray (Mass.) 549; Restad *v.* Engemoen, 65 Minn. 148, 67 N. W. 1146. See also Branigan *v.* Hendrickson, 17 Ind. App. 198, 46 N. E. 560.

**After delivery.**— But where hogs have been sold and delivered the fact that the seller is to take them into possession and fatten them does not prevent the passing of the property. Johnson *v.* Hays, 5 Ohio St. 101.

**58.** Keeler *v.* Vandervere, 5 Lans. (N. Y.) 313; Backhaus *v.* Buells, 43 Oreg. 558, 72 Pac. 976, 73 Pac. 342

**59.** Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; Kitson Mach. Co. *v.* Holden, 74 Vt. 104, 52 Atl. 271. But see Mauger *v.* Crosby, 117 Mass. 330.

**60.** Chambers *v.* Austin, 57 N. Y. App. Div. 359, 68 N. Y. Suppl. 53; Cooper *v.* Bumpass, 1 Tex. App. Civ. Cas. § 498. See also Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270.

**61.** Rugg *v.* Minett, 11 East 210, 10 Rev. Rep. 475; Langton *v.* Higgins, 4 H. & N. 402, 28 L. J. Exch. 252, 7 Wkly. Rep. 489. See also *supra*, VI, A, 2, d, (I).

**62.** Welch *v.* Spies, 103 Iowa 389, 72 N. W. 548; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642; Barker *v.* Freeland, 91 Tenn. 112, 18 S. W. 60; Butterworth *v.* McKinly, 11 Humphr. (Tenn.) 206; Young *v.* Matthews, 36 L. J. C. P. 61, L. R. 2 C. P. 127, 15 L. T. Rep. N. S. 182.

**Effect of intention** generally see *supra*, VI, A, 2, a.

**63.** *Louisiana.*— Hunt *v.* Suares, 9 La. 434.

*Maine.*— Bryant *v.* Crosby, 40 Me. 9.

*Massachusetts.*— Mount Hope Iron Co. *v.* Buffington, 103 Mass. 62.

*New York.*— Dunnigan *v.* Crummey, 44 Barb. 528.

*Ohio.*— Johnson *v.* Hays, 5 Ohio St. 101.

*Tennessee.*— Rawls *v.* Patterson, 1 Baxt. 372.

*Wisconsin.*— Morrow *v.* Reed, 30 Wis. 81.

*England.*— Greaves *v.* Hepke, 2 B. & Ald. 131, 20 Rev. Rep. 381; Hammond *v.* Anderson, 1 B. & P. N. R. 69, 2 Campb. 243, 8 Rev. Rep. 763.

*Canada.*—Wilson *v.* Shaver, 1 Int. L. Rep. 107.

**64.** *Alabama.*— Hudson *v.* Weir, 29 Ala. 294; Screws *v.* Roach, 22 Ala. 675; Batre *v.* Simpson, 4 Ala. 305; Magee *v.* Billingsley, 3 Ala. 679.

*Arkansas.*— Jones *v.* Pearce, 25 Ark. 545.

*Georgia.*— Deadwyler *v.* Karow, 131 Ga. 227, 62 S. E. 172, 19 L. R. A. N. S. 197.

*Illinois.*— Toledo, etc., R. Co. *v.* Chew, 67 Ill. 378; Home Ins. Co. *v.* Heck, 65 Ill. 111.

*Indiana.*— Pittsburg, etc., R. Co. *v.* Noel,

applicable where the goods are to be paid for when delivered.[65] Some of the cases state the rule broadly without express reference to whether such acts are to be done by the buyer or the seller,[66] and while others state it with reference to acts to be done by the seller or by the seller in connection with the buyer,[67] they do not always expressly so limit it;[68] and in some cases it has been expressly held that the rule applies regardless of whether the act is to be performed by the buyer or the seller,[69] or by a third person,[70] and that the property will not pass,

77 Ind. 110; Lester *v.* East, 49 Ind. 588; Strauss *v.* Ross, 25 Ind. 300; Branigan *v.* Hendrickson, 17 Ind. App. 198, 46 N. E. 560.

*Kansas.*— Larkin *v.* Johnson, 8 Kan. App. 114, 54 Pac. 690.

*Kentucky.*— McCoy *v.* Fraley, (1908) 113 S. W. 444.

*Maine.*— Houdlette *v.* Tallman, 14 Me. 400.

*Massachusetts.*— Wesoloski *v.* Wysoski, 186 Mass. 495, 71 N. E. 982; Sherwin *v.* Mudge, 127 Mass. 547; Barnard *v.* Poor, 21 Pick. 378; Riddle *v.* Varnum, 20 Pick. 280; Macomber *v.* Parker, 13 Pick. 175.

*Michigan.*— Lingham *v.* Eggleston, 27 Mich. 324; Begole *v.* McKenzie, 26 Mich. 470.

*New Hampshire.*—Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Prescott *v.* Locke, 51 N. H. 94, 12 Am. Rep. 55; Fuller *v.* Bean, 34 N. H. 290; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

*New York.*— Chapman *v.* Kent, 3 Duer 224; Olyphant *v.* Baker, 5 Den. 379; Andrew *v.* Dieterich, 14 Wend. 31; Ward *v.* Shaw, 7 Wend. 404; Russell *v.* Nicoll, 3 Wend. 112, 20 Am. Dec. 670.

*North Carolina.*— Porter *v.* Bridgers, 132 N. C. 92, 43 S. E. 551; Devane *v.* Fennell, 24 N. C. 36.

*Ohio.*— Warner *v.* Porter, 2 Ohio Dec. (Reprint) 26, 1 West. L. Month. 104.

*Oregon.*— Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

*Pennsylvania.*— Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134; Nicholson *v.* Taylor, 31 Pa. St. 128, 72 Am. Dec. 728; Nesbit *v.* Burry, 25 Pa. St. 208; Lester *v.* McDowell, 18 Pa. St. 91.

*Tennessee.*— Williams *v.* Allen, 10 Humphr. 337, 51 Am. Dec. 709.

*Vermont.*— Gibbs *v.* Benjamin, 45 Vt. 124.

*Wisconsin.*— Smith *v.* Barron County Sup'rs, 44 Wis. 686.

*England.*— Simmons *v.* Swift, 5 B. & C. 857, 8 D. & R. 693, 5 L. J. K. B. O. S. 10, 29 Rev. Rep. 438, 11 E. C. L. 712; Withers *v.* Lyss, 4 Campb. 237, Holt N. P. 18, 16 Rev. Rep. 781, 3 E. C. L. 18; Hanson *v.* Meyers, 6 East 614, 2 Smith K. B. 670, 8 Rev. Rep. 572; Logan *v.* Le Mesurier, 11 Jur. 1091, 6 Moore P. C. 116, 13 Eng. Reprint 628.

*Canada.*— Ross *v.* Hannan, 19 Can. Sup. Ct. 227.

See 43 Cent. Dig. tit. "Sales," § 525.

**If the mode of ascertaining the price fails** before it has been acted upon no title passes to the buyer. Neshit *v.* Burry, 25 Pa. St. 208.

**In Louisiana** under the civil code where goods are not sold in a lump but are sold by weight, tale, or measure, the sale is not complete until they are weighed, counted, or measured (Peterkin *v.* Martin, 30 La. Ann. 894; Duncan *v.* Holt, 21 La. Ann. 235; Rhea *v.* Otto, 19 La. Ann. 123; Seris *v.* Bellocq, 17 La. Ann. 146; Goodwyn *v.* Pritchard, 10 La. Ann. 249; Larue *v.* Rugely, 10 La. Ann. 242); although it is not essential to the completeness of the contract that the articles should be weighed, counted, or measured in the presence of the buyer (Hill *v.* Morgan, 4 Mart. N. S. 475).

65. Ward *v.* Shaw, 7 Wend. (N. Y.) 404; Porter *v.* Bridgers, 132 N. C. 92, 43 S. E. 551; Warner *v.* Porter, 2 Ohio Dec. (Reprint) 26, 1 West. L. Month. 104.

66. *Indiana.*— Pittsburg, etc., R. Co. *v.* Noel, 77 Ind. 110.

*Massachusetts.*— Wesoloski *v.* Wysoski, 186 Mass. 495, 71 N. E. 982.

*Oregon.*— Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

*Pennsylvania.*— Lester *v.* McDowell, 18 Pa. St. 91.

*Wisconsin.*— Smith *v.* Barron County, 44 Wis. 686.

*England.*— Withers *v.* Lyss, 4 Campb. 237, Holt N. P. 18, 16 Rev. Rep. 781, 3 E. C. L. 18.

67. *Iowa.*— McClung *v.* Kelley, 21 Iowa 508.

*Kansas.*— Shepard *v.* Lynch, 26 Kan. 377.

*Kentucky.*— Crawford *v.* Smith, 7 Dana 59; Gibson *v.* Ray, 89 S. W. 474, 28 Ky. L. Rep. 444; Burke *v.* Shannon, 43 S. W. 223, 19 Ky. L. Rep. 1170.

*Michigan.*— Tyler Lumber Co. *v.* Charlton, 128 Mich. 299, 87 N. W. 268, 55 L. R. A. 301; Lingham *v.* Eggleston, 27 Mich. 324.

*Minnesota.*— Martin *v.* Hurlbut, 9 Minn. 142.

*New Jersey.*— Boswell *v.* Green, 25 N. J. L. 390.

*New York.*— Kein *v.* Tupper, 52 N. Y. 550.

*Tennessee.*— Parman *v.* Marshall, (Ch. App. 1899) 51 S. W. 116.

*Virginia.*—Haxall *v.* Willis, 15 Gratt. 434.

*Washington.*— Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544.

*United States.*— U. S. *v.* Woodruff, 22 Wall. 180, 22 L. ed. 863.

*England.*— Zagury *v.* Furnell, 2 Campb. 240, 11 Rev. Rep. 704; Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 568, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

68. See cases cited *supra*, note 67.

69. Hoffman *v.* Culver, 7 Ill. App. 450; Fuller *v.* Bean, 34 N. H. 290; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241; Ward *v.* Shaw, 7 Wend. (N. Y.) 404; Gibbs *v.* Benjamin, 45 Vt. 124.

70. Fuller *v.* Bean, 34 N. H. 290.

although the act is to be done by the buyer alone.[71] Other cases, however, make a distinction according to which party is to perform the act,[72] it being held that the rule that title does not pass should be limited to cases where the weighing, measuring, or other act is to be done by the seller or at least by the seller in connection with the buyer;[73] and that, if the seller has done all that is required of him with respect to the property, the title will pass, although something remains to be done by the buyer to ascertain the exact price,[74] particularly where there has been a delivery to the buyer.[75] As to the necessity for such acts as a prerequisite to the passing of title there is a clear distinction between cases where such acts are necessary to identify the goods and cases where the goods are already identified and such acts are merely for the purpose of ascertaining the price to be paid.[76] In the latter case the performance of such acts and the ascertainment of the price is not absolutely essential to the passing of title,[77] and whether they are to be performed and the price ascertained before the property passes depends upon the intention of the parties,[78] the general rule that the property does not pass until such acts are performed affording merely a presumption to this effect

**71.** Hoffman *v.* Culver, 7 Ill. App. 450.

**72.** Burke *v.* Shannon, 43 S. W. 223, 19 Ky. L. Rep. 1170; Haxall *v.* Willis, 15 Gratt. (Va.) 434; Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

**73.** Haxall *v.* Willis, 15 Gratt. (Va.) 434; Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

**74.** *Arkansas.*— King *v.* Jarman, 35 Ark. 190, 37 Am. Rep. 11.

*Kentucky.*— Burke *v.* Shannon, 43 S. W. 223, 19 Ky. L. Rep. 1170.

*Michigan.*— Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

*Virginia.*— Haxall *v.* Willis, 15 Gratt. 434.

*United States.*—U. S. *v.* Woodruff, 22 Wall. 180, 22 L. ed. 863.

*England.*— Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

**75.** Semple *v.* Northern Hardwood Lumber Co., (Iowa 1908) 115 N. W. 899; Haxall *v.* Willis, 15 Gratt. (Va.) 434.

**Delivery before weighing, measuring, or testing** see *infra*, VI, A, 2, d, (III), (A), (2).

**76.** *California.*— Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

*Iowa.*—Allen *v.* Elmore, 121 Iowa 24, 96 N. W. 769.

*Nebraska.*— Allen *v.* Rushford, 72 Nebr. 907, 101 N. W. 1028.

*New York.*— Sanger *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404; Groat *v.* Gile, 51 N. Y. 431; Crofoot *v.* Bennett, 2 N. Y. 258.

*Texas.*— Boaz *v.* Schneider, 69 Tex. 128, 6 S. W. 402.

*Virginia.*— Haxall *v.* Willis, 15 Gratt. 434.

**77.** *California.*—Lassing *v.* James, 107 Cal. 348, 40 Pac. 534.

*Colorado.*— Young *v.* Minkler, 14 Colo. App. 204, 59 Pac. 622.

*Iowa.*— Allen *v.* Elmore, 121 Iowa 24, 96 N. W. 769.

*Maryland.*— Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767.

*Nebraska.*—Allen *v.* Rushford, 72 Nebr. 907, 101 N. W. 1028.

*New Jersey.*— Boswell *v.* Green, 25 N. J. L. 390.

*New York.*— Sanger *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404; Crofoot *v.* Bennett, 2 N. Y. 258.

*North Carolina.*— Morgan *v.* Perkins, 46 N. C. 171.

*Texas.*— Boaz *v.* Schneider, 69 Tex. 128, 6 S. W. 402.

*Virginia.*— Haxall *v.* Willis, 15 Gratt. 434.

*England.*— Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 336, 20 Wkly. Rep. 769.

**If the goods sold are clearly identified,** then, although it may be necessary to number, weigh, or measure them in order to ascertain the price of the whole at the rate agreed upon between the parties, the title will pass. Sanger *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404; Crofoot *v.* Bennett, 2 N. Y. 258.

**78.** *Iowa.*—Allen *v.* Elmore, 121 Iowa 24, 96 N. W. 769.

*Maryland.*— Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767.

*Massachusetts.*— Riddle *v.* Varnum, 20 Pick. 280.

*Michigan.*— Byles *v.* Colier, 54 Mich. 1, 19 N. W. 565.

*New Hampshire.*— Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450.

*New Jersey.*— Boswell *v.* Green, 25 N. J. L. 390.

*England.*— Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438; Logan *v.* Lemesurier, 11 Jur. 1091, 6 Moore P. C. 116, 13 Eng. Reprint 628.

*Canada.*— Wilson *v.* Shaver, 3 Ont. L. Rep. 110.

**It is ordinarily a question for the jury** whether the parties intended that the title should pass prior to the performance of the acts necessary to ascertain the price. Wesoloski *v.* Wysoski, 186 Mass. 495, 71 N. E. 982.

which is not conclusive;[79] and it has been held that if it further appears that the sale was on credit, there is no presumption that the parties did not intend that the title should pass until the price was ascertained.[80] So if it appears that the parties so intended the property will pass, although the acts necessary for ascertaining the price to be paid have not been performed,[81] and a delivery to the buyer is strong evidence of such an intention.[82] So also where weighing, measuring, or testing is necessary the title will ordinarily vest in the buyer as soon as such acts are performed,[83] although he may not be entitled to possession until the price is paid or secured.[84]

(2) Delivery Before Weighing, Measuring, or Testing. When the goods are to be weighed, measured, or tested for the ascertainment of the price, actual delivery of the goods before such act has been done is evidence of an intention to pass the property at once,[85] and such intention is also shown by a constructive

**79.** Byles *v.* Colier, 54 Mich. 1, 19 N. W. 565.

**80.** Allen *v.* Elmore, 121 Iowa 24, 96 N. W. 769. See also Sanger *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404.

**81.** *Alabama.*— Smith *v.* State, 84 Ala. 438, 4 So. 683; Aderholt *v.* Embry, 78 Ala. 185.

*Arkansas.*— Flask *v.* Tindall, 39 Ark. 571.

*Illinois.*— Straus *v.* Minzesheimer, 78 Ill. 492; Shelton *v.* Franklin, 68 Ill. 333; Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85; Bell *v.* Farrar, 41 Ill. 400; Vehmeyer *v.* Earl, 22 Ill. App. 522.

*Iowa.*— Allen *v.* Elmore, 121 Iowa 24, 96 N. W. 769.

*Kansas.*— Caywood *v.* Timmons, 31 Kan. 394, 2 Pac. 566; Shepard *v.* Lynch, 26 Kan. 377.

*Kentucky.*— Hagins *v.* Combs, 102 Ky. 165, 43 S. W. 222, 19 Ky. L. Rep. 1165; Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36; Newcomb *v.* Cabell, 10 Bush 460.

*Maryland.*—Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767.

*Massachusetts.*— Riddle *v.* Varnum, 20 Pick. 280; Macomber *v.* Parker, 13 Pick. 175; Sumner *v.* Hamlet, 12 Pick. 76.

*Michigan.*— Byles *v.* Colier, 54 Mich. 1, 19 N. W. 565; Colwell *v.* Keystone Iron Co., 36 Mich. 51; Wilkinson *v.* Holiday, 33 Mich. 386.

*New Hampshire.*— Kelsea *v.* Haines, 41 N. H. 246.

*New York.*— Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260]; Bacon *v.* Gilman, 57 N. Y. 656; Dexter *v.* Bevins, 42 Barb. 573; Chapin *v.* Potter, 1 Hilt. 366; Rice *v.* Heath, 5 N. Y. St. 244; Olyphant *v.* Baker, 5 Den. 379.

*North Carolina.*— Morgan *v.* Perkins, 46 N. C. 171.

*Pennsylvania.*— Dennis *v.* Alexander, 3 Pa. St. 50; Leonard *v.* Winslow, 2 Grant 139; Gatzmer *v.* Moyer, 9 Pa. Cas. 567, 13 Atl. 540.

*Virginia.*— Haxall *v.* Willis, 15 Gratt. 434.

*West Virginia.*—Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432; Huntington Bank *v.* Napier, 41 W. Va. 481, 23 S. E. 800; Morgan *v.* King, 28 W. Va. 1, 57 Am. Rep. 633.

*Wisconsin.*—Fromme *v.* O'Donnell, 124 Wis. 529, 103 N. W. 3; Cook *v.* Van Horne, 76 Wis. 520, 44 N. W. 767; Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619; Morrow *v.* Delaney, 41 Wis. 149; Pike *v.* Vaughn, 39 Wis. 499; Morrow *v.* Campbell, 30 Wis. 90; Morrow *v.* Reed, 30 Wis. 81; Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

*England.*— Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 336, 20 Wkly. Rep. 769; Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

*Canada.*—Wilson *v.* Shaver, 3 Ont. L. Rep. 110.

See 43 Cent. Dig. tit. "Sales," § 525.

**82.** See *infra*, VI, A, d, (III), (A), (2).

**83.** Crawford *v.* Smith, 7 Dana (Ky.) 59; Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198; Gilmour *v.* Supple, 11 Moore P. C. 551, 6 Wkly. Rep. 445, 14 Eng. Reprint 803; Montreal Bank *v.* McWhirter, 17 U. C. C. P. 506. See also *infra*, VI, A, 2, d, (III), (C).

**84.** Crawford *v.* Smith, 7 Dana (Ky.) 59.

**85.** *Alabama.*—Aderholt *v.* Embry, 78 Ala. 185; Shealy *v.* Edwards, 73 Ala. 175, 49 Am. Rep. 43; Allen *v.* Maury, 66 Ala. 10; Magee *v.* Billingsley, 3 Ala. 679.

*Arkansas.*— Chamblee *v.* McKenzie, 31 Ark. 155.

*California.*— Gates *v.* Carquinez Packing Co., 78 Cal. 439, 21 Pac. 1.

*Connecticut.*— Upson *v.* Holmes, 51 Conn. 500.

*Illinois.*— Foster *v.* Magill, 119 Ill. 75, 8 N. E. 771; Gravett *v.* Mugge, 89 Ill. 218; O'Keefe *v.* Kellogg, 15 Ill. 347.

*Indiana.*— Moffatt *v.* Green, 9 Ind. 198.

*Iowa.*— Semple *v.* Northern Hardwood Lumber Co., (1908) 115 N. W. 899; Sedgwick *v.* Cottingham, 54 Iowa 512, 6 N. W. 738; Bogy *v.* Rhodes, 4 Greene 133.

*Maine.*— Cushman *v.* Holyoke, 34 Me. 289.

*Massachusetts.*— Odell *v.* Boston, etc., R Co., 109 Mass. 50; Richmond Iron Works *v.* Woodruff, 8 Gray 447; Barnard *v.* Poor, 21 Pick. 378; Riddle *v.* Varnum, 20 Pick. 280; Macomber *v.* Parker, 13 Pick. 175.

*Michigan.*— Colwell *v.* Keystone Iron Co., 36 Mich. 51.

*Mississippi.*— Jordan *v.* Harris, 31 Miss. 257.

*Missouri.*— McMillan *v.* Schweitzer, 87 Mo. 402; Ober *v.* Carson, 62 Mo. 209; Keiler *v.*

delivery;[86] but if it otherwise appears that it was the intention of the parties that such weighing, measuring, or testing should be done before the title should pass, this intention will control notwithstanding there has been an actual delivery of the goods.[87]

(3) Loss or Destruction of Goods Before Act Is Done. If the goods are lost or destroyed while in possession of the seller and before the weighing, measuring, or other act by which the price is to be determined is done, the loss must fall upon the seller,[88] and the buyer may recover any advance made upon the purchase-price;[89] but if lost or destroyed after they have been delivered to the buyer with the intention of passing the title, the loss must fall upon the buyer,[90] and although the weighing or measuring originally contemplated has become impossible, the amount may be otherwise established and the seller recover therefor.[91]

(B) *Other Modes of Ascertaining Price.* The contract may contemplate the doing of other acts for the purpose of fixing the price, such as making an inventory or invoice,[92] or the arrangement of the terms of credit,[93] and under the general rule such acts must be performed before the property will pass,[94] although as in other cases the intention of the parties will control.[95]

Tutt, 31 Mo. 301; Cunningham *v.* Ashbrook, 20 Mo. 553.

*New York.*—Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260]; Tyler *v.* Strang, 21 Barb. 198.

*Oregon.*— Barr *v.* Borthwick, 19 Oreg. 578, 25 Pac. 360.

*Pennsylvania.*— Dennis *v.* Alexander, 3 Pa. St. 50; Scott *v.* Wells, 6 Watts & S. 357, 40 Am. Dec. 568.

*Tennessee.*— Bond *v.* Greenwald, 4 Heisk. 453; Williams *v.* Adams, 3 Sneed 359.

*Texas.*— Baker *v.* Guinn, (Civ. App. 1895) 32 S. W. 370.

*Vermont.*— Baldwin *v.* Doubleday, 59 Vt. 7, 8 Atl. 576.

*Virginia.*— Haxall *v.* Willis, 15 Gratt. 434.

*Washington.*— Izett *v.* Stetson, etc., Mill Co., 22 Wash. 300, 60 Pac. 1128.

*Wisconsin.*—Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619; McConnell *v.* Hughes, 29 Wis. 537.

*United States.*— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222; Barrett *v.* Goddard, 3 Fed. Cas. No. 1,406, 3 Mason 107.

*England.*— Hammond *v.* Anderson, 1 B. & P. N. R. 69, 2 Campb. 243, 8 Rev. Rep. 763. And see Turley *v.* Bates, 2 H. & C. 200, 10 Jur. N. S. 368, 33 L. J. Exch. 43, 10 L. T. Rep. N. S. 35, 12 Wkly. Rep. 438.

**Effect of delivery** generally see *infra*, VI, A, 4, b.

**If the goods are actually delivered** this shows an intention to complete the sale by the delivery, and that the weighing, measuring, or counting shall not be considered a part of the contract of sale, but merely as referring to the adjustment of the final settlement in regard to the price, and the sale will be as complete as a sale upon credit before the actual payment of the price. Macomber *v.* Parker, 13 Pick. (Mass.) 175; Cunningham *v.* Ashbrook, 20 Mo. 553.

86. Gans *v.* Holland, 37 Ark. 483; King *v.* Jarman, 35 Ark. 190, 37 Am. Rep. 11; Shepard *v.* Lynch, 26 Kan. 377; Boswell *v.* Green, 25 N. J. L. 390; Morrow *v.* Reed, 30 Wis. 81.

87. Ballantyne *v.* Appleton, 82 Me. 570, 20 Atl. 235.

**Effect of intention** generally see *supra*, VI, A, 2, a.

**It is a question for the jury** whether the delivery was for the purpose of passing the property notwithstanding the price was to be ascertained by weighing. Cunningham *v.* Ashbrook, 20 Mo. 553.

88. Deadwyler *v.* Karow, 131 Ga. 227, 62 S. E. 172, 19 L. R. A. N. S. 197; Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134; Williams *v.* Allen, 10 Humphr. (Tenn.) 337, 51 Am. Rep. 709.

89. Williams *v.* Allen, 10 Humphr. (Tenn.) 337, 51 Am. Rep. 709.

90. *Connecticut.*— Upson *v.* Holmes, 51 Conn. 500.

*Iowa.*— Sedgwick *v.* Cottingham, 54 Iowa 512, 6 N. W. 738.

*Maine.*— Cushman *v.* Holyoke, 34 Me. 289.

*New York.*— Burroughs *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260].

*Vermont.*— Baldwin *v.* Doubleday, 59 Vt. 7, 8 Atl. 576.

*Wisconsin.*— Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619.

*England.*— Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 336, 20 Wkly. Rep. 769.

**Effect of delivery** before weighing, measuring, or testing see *supra*, VI, A, 2, d, (III), (A), (2).

91. Upson *v.* Holmes, 51 Conn. 500; Baldwin *v.* Doubleday, 59 Vt. 7, 8 Atl. 576; Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619.

92. Gunn *v.* Newcomb, 82 Iowa 468, 48 N. W. 989; Parker *v.* Davis, 13 Ohio Cir. Ct. 631, 6 Ohio Cir. Dec. 684; Roberts *v.* McWalty, 123 Wis. 598, 102 N. W. 18.

93. Stiles *v.* Howland, 32 N. Y 309.

94. Sherwin *v.* Mudge, 127 Mass. 547. See also Roberts *v.* McWalty, 123 Wis. 598, 102 N. W. 18.

95. Flask *v.* Tindall, 39 Ark. 571; Roberts *v.* McWalty, 123 Wis. 598, 102 N. W. 18.

(c) *Arithmetical Calculation of Price.* As soon as the act contemplated to ascertain the price has been performed the property passes,[96] although the arithmetical calculation of the price has not been made.[97]

(iv) *Weighing, Measuring, or Testing For Other Purposes.* The necessity for weighing, measuring, or testing the goods may be either for the purpose of ascertaining the price to be paid,[98] or for the purpose of identifying the goods or ascertaining their quantity or quality,[99] and in cases of the latter character the general rule also applies that the title does not pass until such acts are done.[1]

(v) *Inspection to Determine Quality.* Cases in which an inspection for the purpose of determining the quality of the goods is provided for are within the application of the rule that if any act remains to be done in relation to the goods the property does not pass;[2] but as in other cases the intention of the parties

**The sale is not necessarily incomplete** because an inventory is necessary to fix the amount to be paid, and the property will pass at once if such is the intention of the parties. Flask *v.* Tindall, 39 Ark. 571.

**96.** *Kentucky.*— Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

*New York.*— Bacon *v.* Gilman, 57 N. Y. 656; Bayne *v.* Hard, 77 N. Y. App. Div. 251, 79 N. Y. Suppl. 208 [*affirmed* in 174 N. Y. 534, 66 N. E. 1104].

*Ohio.*— Parker *v.* Davis, 13 Ohio Cir. Ct. 631, 6 Ohio Cir. Dec. 684.

*Pennsylvania.*— Records *v.* Philadelphia, etc., R. Co., 9 Phila. 55.

*Texas.*— International, etc., R. Co. *v.* Ogburn, 26 Tex. Civ. App. 217, 63 S. W. 1072.

*Canada.*— Montreal Bank *v.* McWhirter, 17 U. C. C. P. 506.

**97.** Bradley *v.* Wheeler, 44 N. Y. 495; Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198; Tansley *v.* Turner, 2 Bing. N. Cas. 151, 1 Hodges 267, 4 L. J. C. P. 272, 2 Scott 238, 29 E. C. L. 478; Lockhart *v.* Pannell, 22 U. C. C. P. 597.

**If a mere mathemetical computation** is the only thing remaining to be done in order to determine the price to be paid, the general rule that the sale is not complete so long as anything remains to be done to ascertain the price does not apply. Davis *v.* Beason, 77 Tex. 604, 14 S. W. 198.

**98.** See *supra*, VI, A, 2, (III), (A).

**99.** Fagan *v.* Faulkner, 5 Ark. 161; Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Frost *v.* Woodruff, 54 Ill. 155; Low *v.* Freeman, 12 Ill. 467; Blodgett *v.* Hovey, 91 Mich. 571, 52 N. W. 149; Hahn *v.* Fredericks, 30 Mich. 223, 18 Am. Rep. 119.

**1.** *Alabama.*— Mobile Savings Bank *v.* Fry, 69 Ala. 348.

*Arkansas.*—Fagan *v.* Faulkner, 5 Ark. 161.

*California.*— Blackwood *v.* Cutting Mfg. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

*Illinois.*— Frost *v.* Woodruff, 54 Ill. 155; Low *v.* Freeman, 12 Ill. 467.

*Maine.*— Pinkham *v.* Appleton, 82 Me. 574, 20 Atl. 237; Ballantyne *v.* Appleton, 82 Me. 570, 20 Atl. 235.

*Michigan.*— Blodgett *v.* Hovey, 91 Mich. 571, 52 N. W. 149; Hahn *v.* Fredericks, 30 Mich. 223, 18 Am. Rep. 119.

*Minnesota.*— Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150; Martin *v.* Hurlbut, 9 Minn. 142.

*New Hampshire.*— Smart *v.* Batchelder, 57 N. H. 140; Ockington *v.* Richey, 41 N. H. 275; Warren *v.* Buckminster, 24 N. H. 336.

*New Jersey.*— Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

*New York.*— Joyce *v.* Adams, 8 N. Y. 291; Rapelye *v.* Mackie, 6 Cow. 250.

*North Carolina.*— Devane *v.* Fennell, 24 N. C. 36.

*Oregon.*— Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495; Rosenthal *v.* Kahn, 19 Oreg. 571, 24 Pac. 989; Lownsdale *v.* Hunsaker, 2 Oreg. 101, 88 Am. Rep. 465.

*Tennessee.*—Parman *v.* Marshall, (Ch. App. 1899) 51 S. W. 116.

*Virginia.*— Dixon *v.* Myers, 7 Gratt. 240.

*Wisconsin.*— Galloway *v.* Week, 54 Wis. 604, 12 N. W. 10; Pike *v.* Vaughn, 39 Wis. 499.

*England.*— Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Wallace *v.* Breeds, 13 East 522, 1 Rose 109, 12 Rev. Rep. 423; Shepley *v.* Davis, 1 Marsh. 252, 5 Taunt. 617, 15 Rev. Rep. 598, 1 E. C. L. 317; White *v.* Wilks, 1 Marsh. 2, 5 Taunt. 176, 14 Rev. Rep. 735, 1 E. C. L. 98; Busk *v.* Davis, 2 M. & S. 397, 5 Taunt. 622 note, 15 Rev. Rep. 288, 1 E. C. L. 319. *Compare* Whitehouse *v.* Frost, 12 East 614, 11 Rev. Rep. 491.

*Canada.*—Ross *v.* Hannan, 19 Can. Sup. Ct. 227; Robertson *v.* Strickland, 28 U. C. Q. B. 221.

**2.** *Alabama.*— Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165.

*Arkansas.*— Deutsch *v.* Dunham, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21.

*California.*— Gardiner *v.* McDonogh, 147 Cal. 313, 81 Pac. 964.

*Michigan.*— Wagar *v.* Farrin, 71 Mich. 370, 38 N. W. 865. *Compare* Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

*New Jersey.*— Smith *v.* York Mfg. Co., 58 N. J. L. 242, 33 Atl. 244.

*New York.*— Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292; Cornell *v.* Clark, 104 N. Y. 451, 10 N. E. 888; Kein *v.* Tupper, 52 N. Y. 550 [*affirming* 42 How. Pr. 437]; Chapin *v.* Fitzgerald, 1 Silv. Sup. 349, 5 N. Y. Suppl.

will prevail,[3] and, if there is a delivery of the goods without an inspection, unless the delivery is not absolute but merely conditional and to afford an opportunity for inspection,[4] the property will ordinarily be held to pass by such delivery,[5] and the right of inspection become a condition subsequent instead of precedent.[6] Similarly the property in the goods will pass if there is an acceptance without inspection,[7] or a refusal to inspect.[8]

**e. Sale on Trial or Approval.** A sale on trial or approval is in the nature of an option to purchase the goods if they prove to be satisfactory,[9] or a sale upon condition precedent,[10] and its operation as regards the transfer of title is to be distinguished from what is commonly known as a sale or return.[11] Where goods are sold on trial or approval or if satisfactory to the buyer the contract is executory,[12] and the property in the goods does not pass until the buyer has expressly or impliedly manifested his approval or acceptance,[13] unless a different intention

722 [*affirmed* in 127 N. Y. 670, 28 N. E. 255]; Levy *v.* Weir, 38 Misc. 361, 77 N. Y. Suppl. 917.

*Pennsylvania.*— Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134.

*West Virginia.*—Hood *v.* Blooch, 29 W. Va. 244, 11 S. E. 910.

*Wisconsin.*— Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829; Bayley *v.* Anderson, 71 Wis. 417, 36 N. W. 863.

*United States.*— Pope *v.* Allis, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393.

3. Byles *v.* Colier, 54 Mich. 1. 19 N. W. 565; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

4. Rindskopf *v.* De Ruyter, 39 Mich. 1, 33 Am. Rep. 340; Cornell *v.* Clark, 104 N. Y. 451, 10 N. E. 888.

5. *Alabama.*—Allen *v.* Maury, 66 Ala. 10.

*Michigan.*— Kuppenheimer *v.* Wertheimer, 107 Mich. 77, 64 N. W. 952, 61 Am. St. Rep. 317.

*New York.*—Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260].

*Oregon.*— Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

*Wisconsin.*— Olson *v.* Mayer, 56 Wis. 551, 14 N. W. 640.

6. Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642. See also Allen *v.* Maury, 66 Ala. 10; Magee *v.* Billingsley, 3 Ala. 679.

7. McClure *v.* Jefferson, 85 Wis. 208, 54 N. W. 777.

8. Potter *v.* Holmes, 87 Minn. 477, 92 N. W. 411.

9. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Hunt *v.* Wyman, 100 Mass. 198; State *v.* Betz, 207 Mo. 589, 106 S. W. 64.

10. Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859.

11. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Hunt *v.* Wyman, 100 Mass. 198; State *v.* Betz, 207 Mo. 589, 106 S. W. 64.

Sale or return see *infra*, VI, A, 2, f.

The difference between a sale on trial or approval and a sale or return is that in the former the title does not pass until the option to purchase is exercised, while in the latter it passes at once subject to the right to rescind and return. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Hunt *v.* Wyman, 100 Mass. 198; Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859.

12. Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415, 88 N. W. 948; Wilson *v.* Stratton, 47 Me. 120; Hopkins *v.* Davis, 23 N. Y. App. Div. 235, 48 N. Y. Suppl. 745; Case Threshing Mach. Co. *v.* Smith, 16 Oreg. 381, 18 Pac. 641.

13. *Colorado.*— Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

*Georgia.*— O'Donnell *v.* Wing, 121 Ga. 717, 49 S. E. 720.

*Indiana.*— Reed Smokeless Furnace Co. *v.* State, 34 Ind. App. 265, 72 N. E. 615.

*Iowa.*— Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415, 88 N. W. 948; Mowbray *v.* Cady, 40 Iowa 604.

*Louisiana.*— Jochams *v.* Ong, 45 La. Ann. 1289, 14 So. 247.

*Massachusetts.*— Hunt *v.* Wyman, 100 Mass. 198; Stevens *v.* Cunningham, 3 Allen 491; Phelps *v.* Willard, 16 Pick. 29.

*Michigan.*— Pierce *v.* Cooley, 56 Mich. 552, 23 N. W. 310.

*Missouri.*— State *v.* Betz, 207 Mo. 589, 106 S. W. 64; State *v.* O'Neil Lumber Co., 77 Mo. App. 538.

*Nebraska.*— Charter Gas-Engine Co. *v.* Coleridge State Bank, 54 Nebr. 743, 74 N. W. 1070.

*New York.*— Hopkins *v.* Davis, 23 N. Y. App. Div. 235, 48 N. Y. Suppl. 745; Carter *v.* Wallace, 35 Hun 189; McDonald *v.* Pierson, 38 Barb. 128; Smith *v.* Clews, 12 N. Y. Suppl. 471 [*affirmed* in 124 N. Y. 664, 27 N. E. 854].

*North Carolina.*— Glasscock *v.* Hazell, 109 N. C. 145, 13 S. E. 789.

*North Dakota.*— Colean Mfg. Co. *v.* Blanchett, 16 N. D. 341, 113 N. W. 614.

*Oregon.*— Case Threshing Mach. Co. *v.* Smith, 16 Oreg. 381, 18 Pac. 641.

*South Carolina.*—Southern *v.* Cunningham, 11 Rich. 533.

*Texas.*— Hall, etc., Wood-Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715.

*Vermont.*— Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

*West Virginia.*— Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St Rep. 859.

*United States.*— *In re* George M. Hill Co., 123 Fed. 866, 59 C. C. A. 354.

appears;[14] but acceptance and approval to pass title in the goods may be express, or may be implied from the conduct of the buyer, as by his failure to reject and return the goods.[15]

**f. Sale or Return.** A sale or return is in the nature of a sale with an option to return if unsatisfactory,[16] or a sale upon condition subsequent,[17] and differs from a sale on trial or approval.[18] In the case of a sale or return the property in the goods passes to the buyer at once subject only to a defeasance by a return of the goods,[19] unless it appears that the intention is that the title shall remain in the seller,[20] as where payment of the price is made a condition precedent to the passing of the property.[21] If the buyer fails to return the goods within the time limited or within a reasonable time the sale becomes absolute.[22]

**g. Consignment For Sale.**[23] Ordinarily where goods are consigned by one person to another for sale by the latter, the title thereto remains in the consignor;[24]

*England.*— Weiner *v.* Gill, 74 L. J. K. B. 845, [1905] 2 K. B. 172, 92 L. T. Rep. N. S. 843, 53 Wkly. Rep. 553, 10 Com. Cas. 213, 21 T. L. R. 478; Elphick *v.* Barnes 5 C. P. D. 321, 44 J. P. 651, 49 L. J. C. P. 698, 29 Wkly. Rep. 139.

See 43 Cent. Dig. tit. "Sales," §§ 557, 558.

14. Weil *v.* Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. Rep. 243; James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

15. O'Donnell *v.* Wing, 121 Ga. 717, 49 S. E. 720; Fiss, etc., Horse Co *v* Kiernan, 108 N. Y. Suppl. 1105. See also *supra*, V, B, 10, f.

**But a mere failure to return** the property does not, as a matter of law, convert the transaction into a complete sale. It may be evidence of a determination of the option to purchase, but is only evidence, and it loses its effect even as evidence if the property is destroyed before there is any opportunity for trial in order to determine the option. Hunt *v.* Wyman, 100 Mass. 198.

16. Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Hunt *v.* Wyman, 100 Mass. 198.

17. Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859.

18. See *supra*, VI, A, 2, e.

19. *Alabama.*— Stevens *v.* Hertzler, 109 Ala. 423, 19 So. 838; Foley *v.* Felrath, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39; Wailes *v.* Howison, 93 Ala. 375, 9 So. 594; Robinson *v.* Fairbanks, 81 Ala. 132, 1 So. 552; Allen *v.* Maury, 66 Ala. 10.

*Connecticut.*— Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582.

*Georgia.*— Newburger *v.* Hoyt, 86 Ga. 508, 12 S. E. 925.

*Iowa.*— Wind *v.* Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219.

*Kentucky.*— Jameson *v.* Gregory, 4 Metc. 363.

*Maine.*— Perkins *v.* Douglass, 20 Me. 317; Buswell *v.* Bickell, 17 Me. 344, 35 Am. Dec. 262; Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630; Lindsey *v.* Gordon, 13 Me. 60; Holbrook *v.* Armstrong, 10 Me. 31.

*Massachusetts.*— McKinney *v.* Bradlee, 117 Mass. 321.

*Nebraska.*— Omaha Nat. Bank *v.* Kraus, 62 Nebr. 77, 86 N. W. 906.

*New York.*—Shafarman *v.* Loman, 32 Misc. 726, 66 N. Y. Suppl. 380.

*Pennsylvania.*— Keohane *v.* Quinn, 18 Pa. Super. Ct. 443.

*Rhode Island.*— Schlesinger *v.* Stratton, 9 R. I. 578.

*West Virginia.*— Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859.

See 43 Cent. Dig. tit. "Sales," § 559.

**Option to return goods not resold.**— Where goods are consigned at a price certain, with a provision that the buyer may, if he fails to resell them, return them to the seller, the contract is one of sale with an option to rescind. Omaha Nat. Bank *v.* Kraus, 62 Nebr. 77, 86 N. W. 906.

20. Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582.

21. Wailes *v.* Howison, 93 Ala. 375, 9 So. 594; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118.

22. Jameson *v.* Gregory, 4 Metc. (Ky.) 363; Greacen *v.* Poehlman, 191 N. Y. 493, 84 N. E. 390. See also *supra*, V, B, 12, c.

**Reasonable time.**—Where a contract for the "sale or return" of goods fixes no time within which to return the goods, the legal obligation of the buyer is to return them within a reasonable time. Greacen *v.* Poehlman, 191 N. Y. 493, 84 N. E. 390.

**Pledge of goods.**—Where goods delivered "on sale or return" are pledged by the buyer, the pledging of the goods by him is "an act adopting the transaction" within the Sale of Goods Act (1893), so as to pass the property in the goods to him, and consequently the pledgee obtains a good title to the goods as against the seller. Kirkham *v.* Attenborough, [1897] 1 Q. B. 201, 66 L. J. Q. B. 149, 75 L. T. Rep. N. S. 543, 45 Wkly. Rep. 213.

23. See, generally, FACTORS AND BROKERS, 19 Cyc. 120.

24. *Arkansas.*—Alexander *v.* Tomlinson, 40 Ark. 216.

*Colorado.*— Colorado Soap Co. *v.* Burns, 2 Colo. App. 89, 29 Pac. 915.

*Georgia.*— Redd *v.* Burrus, 58 Ga. 574.

*Illinois.*—Osborne *v.* Rich, 53 Ill. App. 661; Matson *v.* Taylor, 35 Ill. App. 549; Rosencranz, etc., Co. *v.* Hanchett, 30 Ill. App. 283.

*Iowa.*— Warder *v.* Hoover, 51 Iowa 491, 1 N. W. 795.

but whether the consignee is to be considered as a buyer or an agent depends upon the intention of the parties,[25] and upon the real nature of the transaction rather than the language which the parties may have employed.[26] So where the transaction is such that the consignee acquires complete dominion over the goods with the right to sell them upon such terms and conditions as he may see fit, and is bound to pay the consignor a stipulated price therefor, it amounts to a sale and delivery and the title passes to the consignee,[27] and such transfer of title is not affected by the fact that the goods are not to be paid for until resold by the consignee,[28] or that he has an option of returning the goods which he has not resold.[29]

**3. Goods or Articles Not Ascertained — a. In General.** The subject-matter of the sale may be goods or articles which, although in existence at the date of the contract, have not been identified as the particular goods sold. In such case the contract is executory and the property in the goods does not pass until the goods have been identified and appropriated to the contract,[30] particularly where

*Maine.*— Boston, etc., R. Co. *v.* Warrior Mower Co., 76 Me. 251; Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547.

*Maryland.*— Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

*Massachusetts.*— Meldrum *v.* Snow, 9 Pick. 441, 20 Am. Dec. 489.

*Mississippi.*— Bonner *v.* Marsh, 10 Sm. & M. 376, 48 Am. Dec. 754.

*Missouri.*— Sproule *v.* McNulty, 7 Mo. 62.

*Montana.*— Helena First Nat. Bank *v.* McAndrews, 5 Mont. 325, 5 Pac. 879, 51 Am. Rep. 81.

*New York.*— Cole *v.* Mann, 62 N. Y. 1 [*affirming* 3 Thomps. & C. 380]; Adee *v.* Demorest, 54 Barb. 43; Dennistown *v.* Barr, 28 N. Y. Suppl. 255, 31 Abb. N. Cas. 21.

*Canada.*—Ames-Holden Co. *v.* Hatfield, 29 Can. Sup. Ct. 95.

See 43 Cent. Dig. tit. "Sales," § 560.

**Title to goods consigned to factor** see Factors and Brokers, 19 Cyc. 120.

**25.** Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Walter A. Wood Mowing, etc., Mach. Co. *v.* Brooke, 30 Fed. Cas. No. 17,980, 2 Sawy. 576, 9 Nat. Bankr. Reg. 395.

**The construction which the parties have put** upon the agreement will be adopted where the language of the agreement is such that it might be construed either as a sale to the consignee or a consignment of the goods to him to be sold for the consignor. Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235.

**26.** Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Buffum *v.* Descher, 1 Nebr. (Unoff.) 736, 96 N. W. 352. See also Smith *v.* Barker, 102 Ala. 679, 15 So. 340.

**The use of the word "consigned"** cannot take from the transaction its real character (Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309); and a shipment of goods in accordance with an order for their purchase cannot be changed to a consignment by the seller merely by indorsing the invoice "consigned to" the buyer, such invoice not being received until after the goods have been received and accepted (Acme Silver Co *v.* Perret, 4 Manitoba 501).

**27.** Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; Buffum *v.* Descher, 1 Nebr. (Unoff.) 736, 96 N. W. 352; Walter A. Wood Mowing, etc., Mach. Co. *v.* Brooke, 30 Fed. Cas. No. 17,980, 2 Sawy. 576, 9 Nat. Bankr. Reg. 395.

**28.** Buffum *v.* Descher, 1 Nebr. (Unoff.) 736, 96 N. W. 352; Walter A. Wood Mowing, etc., Mach. Co. *v.* Brooke, 30 Fed. Cas. No. 17,980, 2 Sawy. 576, 9 Nat Bankr. Reg. 395.

**29.** Omaha Nat. Bank *v.* Kraus, 62 Nebr. 77, 86 N. W. 906.

**If the agreement is that the goods are to be paid for on delivery** the transaction is a sale to the consignee, whether such payment is made or not, and notwithstanding the goods are to be sold by the consignee on commission and he is given the privilege of returning unsold portions thereof. Warder *v.* Hoover, 51 Iowa 491, 1 N. W 795.

**30.** *Alabama.*—Block *v.* Maas, 65 Ala. 211; Browning *v.* Hamilton, 42 Ala. 484.

*Arkansas.*— Jackson *v.* Jones, 22 Ark. 158.

*California.*— Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Caruthers *v.* McGarvey, 41 Cal. 15; McLaughlin *v.* Piatti, 27 Cal. 451.

*Georgia.*— Lewis *v.* Lofley, 60 Ga. 559.

*Iowa.*— Davis *v.* Budd, 60 Iowa 144, 14 N. W. 211; Cook *v.* Logan, 7 Iowa 142.

*Maine.*— Levasseur *v.* Cary, (1886) 3 Atl. 461.

*Massachusetts.*— Young *v.* Austin, 6 Pick. 280.

*Michigan.*— Joseph *v.* Braudy, 112 Mich. 579, 70 N. W. 1101; Pierson *v.* Spaulding, 67 Mich. 640, 35 N. W. 699.

*Minnesota.*— Day *v.* Gravel, 72 Minn. 159, 75 N. W. 1; Chandler *v.* De Graff, 27 Minn. 208, 6 N. W. 611.

*New Hampshire.*—Andrews *v.* Cheney, 62 N. H. 404.

*New Jersey.*— Hires *v.* Hurff, 39 N. J. L. 4; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

*New York.*— Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Crofoot *v.* Bennett, 2 N. Y. 258; Burrall *v.* Jacot, 1 Barb. 165; Currie *v.* White, 1 Sweeny 166; Rapelye *v.* Mackie, 6 Cow. 250.

the sale is of goods which are not a part of any known or specific mass.[31] The subject-matter of the sale may, however, be a portion of a known or specific mass,[32] or may be goods not constituting a part of any specific mass but of an agreed kind which have not yet been set apart, identified, or appropriated to the contract.[33]

**b. Goods Part of a Specific Mass** — (I) *In General.* On a sale of goods which are part of a specific mass two conditions may arise: The mass may consist of goods of different kinds, qualities, sizes, weights, or values,[34] such as animals of a herd,[35] or trees upon the land of the seller,[36] in which case a selection is necessary to identify the particular articles sold;[37] or the mass may be of a uniform kind, quality, or value,[38] such as oil or grain in bulk,[39] or consisting of units, such as bags or barrels, of uniform size, quality, and value,[40] in which case the identification is complete upon a simple separation of the necessary quantity from the mass, and according to some decisions even a separation is not absolutely essential in order to pass title to the part sold.[41]

(II) *Constituents of Mass Different.* Where the goods or articles sold are part of a specific mass the constituents of which differ in kind, quality, or value the property does not pass until the articles have been identified by selection.[42] If, however, the sale includes all the goods or articles of a particular

*North Carolina.*— Wood *v.* Atkinson, 6 N. C. 87.

*Pennsylvania.*— McCandlish *v.* Newman, 22 Pa. St. 460; Leonards *v.* Winslow, 2 Grant 139; Brown *v.* McCaffrey, 40 Wkly. Notes Cas. 69.

*Texas.*— Harbert *v.* Neill, 49 Tex. 143; Goldberg *v.* Bussey, (Civ. App. 1898) 47 S. W. 49.

*United States.*— Pope *v.* Allis, 115 U. S. 363, 6 S. Ct. 69, 29 L. ed. 393.

*Canada.*— Gowans *v.* Consolidated Bank of Canada, 43 U. C. Q. B. 318.

31. *Iowa.*— Davis *v.* Budd, 60 Iowa 144, 14 N. W. 211.

*Minnesota.*— Martin *v.* Hurlbut, 9 Minn. 142.

*New York.*— Wilson *v.* Empire Dairy-Salt Co., 50 N. Y. App. Div. 114, 63 N. Y. Suppl. 565.

*Pennsylvania.*— McCandlish *v.* Newman, 22 Pa. St. 460.

*United States.*— Taylor *v.* Fall River Ironworks, 124 Fed. 826.

*England.*—Austen *v.* Craven, 1 Marsh. 4 note, 4 Taunt. 644, 13 Rev. Rep. 714.

Goods not part of specific mass see *infra*, VI, A, 3, c.

32. See *infra*, VI, A, 3, b.

33. See *infra*, VI, A, 3, c.

34. Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

35. McLaughlin *v.* Piatti, 27 Cal. 451.

36. Dunkart *v.* Rineheart, 89 N. C. 354.

37. See *infra*, VI, A, 3, b, (II).

38. Chapman *v.* Shepard, 39 Conn. 413; Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

39. Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282 (grain in bulk); Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334 (grain in bulk); Whitehouse *v.* Frost, 12 East 614, 11 Rev. Rep. 491 (oil in bulk).

40. Chapman *v.* Shepard, 39 Conn. 413 (bags of meal); Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726 (barrels of flour).

41. See *infra*, VI, A, 3, b, (III).

42. *Alabama.*— McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640.

*California.*— McLaughlin *v.* Piatti, 27 Cal. 451.

*Connecticut.*— Chapman *v.* Shepard, 39 Conn. 413.

*Illinois.*— Bauman Loan Co. *v.* Hatowsky, 107 Ill. App. 181.

*Indiana.*— Lester *v.* East, 49 Ind. 588.

*Massachusetts.*— Ropes *v.* Lane, 9 Allen 502.

*Michigan.*— Wagar *v.* Farrin, 71 Mich. 370, 38 N. W. 865; Foster *v.* Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171; Cass *v.* Gunnison, 68 Mich. 147, 35 N. W. 45; Hahn *v.* Fredericks, 30 Mich. 223, 18 Am. Rep. 119.

*Minnesota.*— Dodge *v.* Rogers, 9 Minn. 223.

*Mississippi.*—Williams *v.* Sayers, 79 Miss. 50, 29 So. 995.

*New Hampshire.*— Ockington *v.* Richey, 41 N. H. 275; Warren *v.* Buckminster, 24 N. H. 336.

*New Jersey.*— Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282.

*New York.*— Foot *v.* Marsh, 51 N. Y. 288; Chambers *v.* Austin, 57 N. Y. App. Div. 359, 68 N. Y. Suppl. 53.

*North Carolina.*— Dunkart *v.* Rineheart, 89 N. C. 354.

*Ohio.*—Woods *v.* McGee, 7 Ohio, Pt. II, 127, 30 Am. Dec. 220.

*Oregon.*— Lownsdale *v.* Hunsaker, 2 Oreg. 101, 88 Am. Rep. 465.

*Pennsylvania.*— Brownfield *v.* Johnson, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48; Hutchinson *v.* Hunter, 7 Pa. St. 140.

*Texas.*— Edwards *v.* Irvin, (Civ. App. 1898) 45 S. W. 1026; Tyler Lumber Co. *v.* Rosenfield, 3 Tex. App. Civ. Cas § 344.

*Washington.*— Steaubli *v.* Blaine Nat. Bank, 11 Wash. 426, 39 Pac. 814; Anderson

kind or quality which the mass contains, and this kind or quality is clearly distinguishable from the other kinds and qualities, the identification is sufficient,[43] and it is not necessary that the articles should be specially marked or separated from the other articles of different kind and quality;[44] but if the sale does not include all the goods or articles of a particular kind or quality, there must be a separation of the part sold from the remainder of the same kind or quality.[45]

(III) *CONSTITUENTS OF MASS UNIFORM OR ALIKE.* Where the sale is of a part of a specific mass the constituents of which are identical in kind, quality, or value, selection is of course unnecessary,[46] and there is a conflict of authority as to whether it is even necessary that there should be a separation.[47] The general rule and that which seems to be supported by the weight of authority is that even when the constituents of the mass are of the same kind, quality, and value, the property in any portion thereof will not pass by a contract of sale unless the portion has been identified by separation.[48] On the other hand there is a line of

*v.* Crisp, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419.

*Canada.*— Malcolm *v.* Harnish, 27 Nova Scotia 262.

43. Ropes *v.* Lane, 9 Allen (Mass.) 502.

On a sale of a certain number of trees of a particular description upon the seller's land, if it appears that there are not more than the number specified of that description upon his land, the property is sufficiently identified and title passes. Dunkart *v.* Rincheart, 89 N. C. 354.

44. Ropes *v.* Lane, 9 Allen (Mass.) 502.

45. Ropes *v.* Lane, 9 Allen (Mass.) 502. And see *infra*, VI, A, 3, b, (III).

46. Kingman *v.* Holmquist, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604.

47. See Kingman *v.* Holmquist, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604; and cases cited *infra*, notes 48, 49.

48. *Alabama.*—Gresham *v.* Bryan, 103 Ala. 629, 15 So. 849; Warten *v.* Strane, 82 Ala. 311, 8 So. 231; Fry *v.* Mobile Sav. Bank, 75 Ala. 473; Mobile Sav. Bank *v.* Fry, 69 Ala. 348; Browning *v.* Hamilton, 42 Ala. 484.

*Arkansas.*— Upham *v.* Dodd, 24 Ark. 545.

*California.*— Callender *v.* McLeod, 74 Cal. 376, 16 Pac. 194; Caruthers *v.* McGarvey, 41 Cal. 15; McLaughlin *v.* Piatti, 27 Cal. 451.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Georgia.*— Phillips *v.* Dean, 76 Ga. 10; Huntington *v.* Chisholm, 61 Ga. 270; Lewis *v.* Lofley, 60 Ga. 559.

*Illinois.*— O'Keefe *v.* Kellogg, 15 Ill. 347; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Conboy *v.* Petty, 60 Ill. App. 17.

*Indiana.*— Commercial Nat. Bank *v.* Gillette, 90 Ind. 268, 46 Am. Rep. 222.

*Iowa.*— Martin *v.* Lesan, 129 Iowa 573, 105 N. W. 996; Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918; Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868; Courtright *v.* Leonard, 11 Iowa 32; Cook *v.* Logan, 7 Iowa 142.

*Kentucky.*— May *v.* Hoaglan, 9 Bush 171; Pabst Brewing Co. *v.* Com., 107 S. W. 728, 32 Ky. L. Rep. 1010; Stein Brewing Co. *v.* Eberhard, 62 S. W. 881, 23 Ky. L. Rep. 325.

*Maine.*— Lawry *v.* Ellis, 85 Me. 500, 27 Atl. 518; Morrison *v.* Dingley, 63 Me. 553; Stone *v.* Peacock, 35 Me. 385; Brewer *v.* Smith, 3 Me. 44, 14 Am. Dec. 213.

*Maryland.*— Reeder *v.* Machen, 57 Md. 56.

*Massachusetts.*— Keeler *v.* Goodwin, 111 Mass. 490; Ropes *v.* Lane, 9 Allen 502; Scudder *v.* Worster, 11 Cush. 573; Young *v.* Austin, 6 Pick. 280. But see Damon *v.* Osborn, 1 Pick. 476, 11 Am. Dec. 229.

*Michigan.*— Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057.

*Missouri.*—Adam Roth Grocer Co. *v.* Lewis, 69 Mo. App. 446; England *v.* Mortland, 3 Mo. App. 490.

*Nebraska.*—Holmes *v.* Bailey, 16 Nebr. 300, 20 N. W. 304.

*New Hampshire.*— Jeraulds *v.* Brown, 64 N. H. 606, 15 Atl. 123; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Bailey *v.* Smith, 43 N. H. 141; Gilman *v.* Hill, 36 N. H. 311; Banchor *v.* Warren, 33 N. H. 183; Warren *v.* Buckminster, 24 N. H. 330; Davis *v.* Hill, 3 N. H. 382, 14 Am. Dec. 373.

*New Jersey.*— Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

*New York.*— Gardiner *v.* Suydam, 7 N. Y. 357 [*distinguished* in Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334]; Stevens *v.* Eno, 10 Barb. 95.

*North Carolina.*— Hill *v.* Robison, 48 N. C. 501; Waldo *v.* Belcher, 33 N. C. 609; Wood *v.* Atkinson, 6 N. C. 87.

*Oregon.*— La Vie *v.* Crosby, 43 Oreg. 612, 74 Pac. 220; Benson *v.* Keller, 37 Oreg. 120, 60 Pac. 918; Hubler *v.* Gaston, 9 Oreg. 66, 42 Am. Rep. 794.

*Pennsylvania.*— Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521; Golder *v.* Ogden, 15 Pa. St. 528, 53 Am. Dec. 618; Euwer *v.* Van Giesen, 6 Wkly. Notes Cas. 363.

*Tennessee.*—Williamson *v.* Steele, 3 Lea 527, 31 Am. Rep. 652; Parman *v.* Marshall, (Ch. App. 1899) 51 S. W. 116; Ford *v.* Measle, (Ch. App. 1900) 56 S. W. 1036.

*Texas.*— Dallas Nat. Bank *v.* Davis, 78 Tex. 362, 14 S. W. 706; Allen *v.* Melton, 64 Tex. 218; Harbert *v.* Neill, 49 Tex. 143; Atterbury *v.* Biggerstaff, 36 Tex. 177; Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274; Goldberg *v.* Bussey, (Civ. App. 1898) 47 S. W. 49.

*Utah.*— Robbins *v.* Chipman, 1 Utah 335, 2 Utah 347.

well considered cases in which the intention of the parties is regarded as the controlling factor, and the rule is laid down that, although the goods sold have not been separated from the mass, the property therein will pass if such was the intention of the parties,[49] it being held that a distinction should be made between cases where the goods, although part of a specific mass, consist of parcels or units which are distinguishable and cases where they are not,[50] and that in the latter

*Wisconsin.*— Galloway *v.* Week, 54 Wis. 604, 12 N. W. 10; Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.

*England.*— Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Snell *v.* Heighton, Cab. & E. 95; Godts *v.* Rose, 17 C. B. 229, 1 Jur. N. S. 1173, 25 L. J. C. P. 61, 4 Wkly. Rep. 129, 84 E. C. L. 229; Campbell *v.* Mersey Docks, etc., Board, 14 C. B. N. S. 412, 8 L. T. Rep. N. S. 245, 11 Wkly. Rep. 596, 108 E. C. L. 412; Wallace *v.* Breeds, 13 East 522, 1 Rose 109, 12 Rev. Rep. 423; Busk *v.* Davis, 1 Marsh. 258 note, 2 M. & S. 397, 5 Taunt. 622 note, 15 Rev. Rep. 288, 1 E. C. L. 319; Shepley *v.* Davis, 1 Marsh. 252, 5 Taunt. 617, 15 Rev. Rep. 598. 1 E. C. L. 317; White *v.* Wilks, 1 Marsh. 2, 5 Taunt. 176, 14 Rev. Rep. 735, 1 E. C. L. 98.

*Canada.*— Ross *v.* Hannan, 19 Can. Sup. Ct. 227; Ross *v.* Hurteau, 18 Can. Sup. Ct. 713; Temple *v.* Close, Cass. Dig. 765; Pew *v.* Lawrence, 27 U. C. C. P. 402; Walsh *v.* Brown, 18 U. C. C. P. 60; McDougall *v.* Elliott, 20 U. C. Q. B. 299.

See 43 Cent. Dig. tit. "Sales," §§ 562, 640.

**Sale to partners.**—Where lumber is sold to two persons who on the same day form a partnership to deal in lumber, the fact that the portion sold to each was not separated from the mass does not prevent the property from passing, as in such case they take as tenants in common and separation would serve no useful purpose. Smith *v.* Jones, 63 Ark. 232, 37 S. W. 1052.

**Goods to which seller has not title.**—Where one contracts for the sale of bark, to which he has no title, and also makes a contract with another for the purchase thereof, which contract describes it as one thousand cords of bark on certain land, whereon are piled about two thousand cords, no title passes under the former contract until separation to identify the goods. Lighthouse *v.* Buffalo Third Nat. Bank, 162 N. Y. 336, 56 N. E. 738 [*reversing* 25 N. Y. App. Div. 630, 52 N. Y. Suppl. 488].

**Mode of designation.**—Where one of four similar articles in a room is sold and nothing remains to be done except to designate the particular one sold, a subsequent removal by the seller of three of such articles is a sufficient designation of the one remaining as the one sold, the title to which will vest in the buyer. Clark *v.* Griffith, 24 N. Y. 595.

**Question for jury.**—Whether there has been a separation and appropriation to pass the property is for the jury. Dows *v.* Morewood, 10 Barb. (N. Y.) 183.

49. *Alabama.*—Aderholt *v.* Embry, 78 Ala. 185.

*Connecticut.*— Chapman *v.* Shepard, 39 Conn. 413.

*Florida.*— Watts *v.* Hendry, 13 Fla. 523.

*Georgia.*— Phillips *v.* Ocmulgee Mills, 55 Ga. 633.

*Illinois.*— Conboy *v.* Petty, 60 Ill. App. 117; Wood *v.* Roach, 52 Ill. App. 388; Riebling *v.* Tracy, 17 Ill. App. 158.

*Iowa.*— Welch *v.* Spies, 103 Iowa 389, 72 N. W. 548.

*Kansas.*— Kingman *v.* Holmquist, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604; Howell *v.* Pugh, 27 Kan. 702; Bailey *v.* Long, 24 Kan. 90.

*Maine.*—Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56.

*Michigan.*— Crapo *v.* Seybold, 36 Mich. 444.

*Minnesota.*— Jennison *v.* Thompson, 68 Minn. 333, 71 N. W. 380 (holding that intent is a question for the jury); Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222; Nash *v.* Brewster, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409.

*New Jersey.*— Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282 [*reversing* 39 N. J. L. 4].

*New York.*— Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Rodee *v.* Wade, 47 Barb. 53.

*North Dakota.*— O'Keefe *v.* Leistikow, 14 N. D. 355, 104 N. W. 515.

*Ohio.*— Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426.

*Pennsylvania.*— Brownfield *v.* Johnson, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48.

*Texas.*—Anderson *v.* Levyson, 1 Tex. App. Civ. Cas. § 926.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

*West Virginia.*— Buskirk Bros. *v.* Peck, 57 W. Va. 360, 50 S. E. 432.

*Wisconsin.*— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

**The converse proposition** is also true, and the title will not pass if it appears that such was the intention of the parties Bailey *v.* Long, 24 Kan. 90; Rodee *v.* Wade, 47 Barb. (N. Y.) 53.

**Agreement to hold subject to buyer's order.** — The execution and delivery by the seller of a receipt for a part of the purchase-money, declaring that he holds the goods subject to the buyer's order, shows an intention to transfer the title, although the part sold has not been separated from the general mass. Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334.

**In California** it is provided by Civ. Code, § 1140, that "the title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Greenbaum *v.* Martinez, 86 Cal. 459, 25 Pac. 12.

50. *Connecticut.*—Chapman *v.* Shepherd, 39 Conn. 413.

case there is nothing to prevent the passing of title to the portion of the goods sold, although they are not actually separated from the mass if such is the intention of the parties;[51] and this intention may be either express or implied.[52] So the property sold will ordinarily be held to pass, although not separated from the general mass, where it has been paid for,[53] or there has been a delivery,[54] although such delivery is merely constructive,[55] as by the giving and acceptance of an order for the delivery of the goods addressed to the warehouseman or other person in whose custody they are.[56]

**c. Goods Not Part of Specific Mass.** The contract of sale may relate to goods of a particular description but not part of a specific mass, as when goods are ordered from a dealer. Under such contracts the property in the goods does not pass to the buyer until there has been appropriation of specific goods to the contract.[57]

*Kansas.*— Kingham *v.* Holmquist, 36 Kan. 735, 14 Pac. 168, 59 Am. Rep. 604.

*New Jersey.*— Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282.

*New York.*— Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334.

*Wisconsin.*— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

**There is a distinction** between cases where the goods consist of units which are distinguishable from each other, such as horses and cattle, and cases where the units are not distinguishable, as grain in a storehouse or oil in tanks, and in cases of the latter character there may well exist an intention to transfer title to a number of bushels or gallons, although they have not been measured out of and separated from the mass. State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

51. Chapman *v.* Shepard, 39 Conn. 413; Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334.

52. Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498.

53. Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56; Levasseur *v.* Cary, (Pa. 1886) 3 Atl. 461.

54. Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56, where there was a partial delivery, although the entire amount sold had not been separated from the general mass.

**Delivery to common agent.**—Where goods bought by two different purchasers are delivered to a common agent the title passes, although their respective portions have not been designated or set apart. Ropes *v.* Lane, 9 Allen (Mass.) 502. So also where a part of the mass is sold to one buyer and the remainder to another, and the whole is delivered to the first for himself and as agent of the other, the title passes as to both portions. Cloud *v.* Moorman, 18 Ind. 40.

**Delivery of whole mass.**—Where the whole mass is delivered to the buyer for the purpose of separating his part the title to his part passes at once. Weld *v.* Cutler, 2 Gray (Mass.) 195; Lamprey *v.* Sargent, 58 N. H. 241; Crofood *v.* Bennett, 2 N. Y. 258.

**Delivery of more than amount sold.**— The fact that more is delivered than the amount sold will not prevent the passing of title to the amount sold where it is all of the same kind and quality, and there is nothing to do so except to take away from the common mass the required amount. Smith *v.* Friend, 15 Cal. 124; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86, 3 N. W. 269. *Compare* Downer *v.* Thompson, 6 Hill (N. Y.) 208.

55. Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726.

56. *Massachusetts.*— Cushing *v.* Breed, 14 Allen 376, 92 Am. Dec. 777.

*New York.*— Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Hoyt *v.* Hartford F. Ins. Co., 26 Hun 416 [*affirmed* in 96 N. Y. 650].

*Ohio.*— Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426.

*Virginia.*— Pleasants *v.* Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

*United States.*— Brooke *v.* Scoggins, 4 Fed. Cas. No. 1,936, 11 Nat. Bankr. Reg. 258.

*England.*—Whitehouse *v.* Frost, 12 East 614, 11 Rev. Rep. 491.

**Until some act takes place** by which the relations of the warehouseman in respect to the property have been modified in accordance with the contract of sale, so that he may be considered as bailee for the seller and buyer respectively, according to their several interests, and is thus released *pro tanto* from his liability to the seller alone, title to any specific portion of the goods does not pass to the buyer, and so no title passes if the order is revoked before it is presented. Keeler *v.* Goodwin, 111 Mass. 490. Where, however, a certain number of parcels are sold from a stock stored in a warehouse by a bailee who is notified by both parties of the sale, and at the request of the buyer he agrees to keep the parcels over until called for, there is a sufficient delivery to pass title, although the particular parcels have not been separated from the others if all are of like size and quality. Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974.

**Sale of whole mass.**—Where the whole of a specific mass is sold to different purchasers, orders on the warehouseman being given, which are accepted by him and new receipts issued to the various purchasers, the property will pass to the different purchasers without separation. Horr *v.* Barker, 11 Cal. 393, 70 Am. Dec. 791; Horr *v.* Barker, 8 Cal. 603.

57. *Georgia.*— Clarke *v.* Wolfe, 115 Ga. 320, 41 S. E. 581.

**d. Selection, Separation, or Appropriation** — (I) *In General.* Appropriation, selection, or separation to pass the property must be an actual choice of a specific article or specific goods to be supplied in performance of the contract,[58] and must be manifested by some unequivocal act, a mere intention to appropriate being insufficient.[59] Moreover the act of appropriation must be complete and in fulfilment of the contract.[60] Thus if the seller is to deliver at a particular time and at a particular place, merely setting the goods aside with the intent to make delivery is not such an appropriation as will pass the property in the goods.[61] So also where the goods are to be loaded the property in them does not pass as the separate portions are put in the car or vessel, but there is no appropriation until the loading is complete.[62]

(II) *Acts Constituting Appropriation.* Any act indicating a definite intention to appropriate the goods to the contract is sufficient, such as setting apart and marking the goods for the buyer,[63] pointing out the goods to the buyer [64] or to the warehouseman in whose custody they are,[65] putting the goods in the

*Illinois.*— Toledo, etc., R. Co. *v.* Chew, 67 Ill. 378.

*Iowa.*— Davis *v.* Budd, 60 Iowa 144, 14 N. W. 211.

*Massachusetts.*— New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

*Minnesota.*— McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393.

*Montana* — Adlam *v.* McKnight, 32 Mont. 349, 80 Pac. 613.

*Nebraska.*— Robinson *v.* Stricklin, 73 Nebr. 242, 102 N. W. 479.

*New Hampshire.*— Andrews *v.* Cheney, 62 N. H. 404.

*New York.*— Wilson *v.* Empire Dairy-Salt Co., 50 N. Y. App. Div. 114, 63 N. Y. Suppl. 565.

*Oregon.*— Backhaus *v.* Buells, 43 Oreg. 558, 72 Pac. 976, 73 Pac. 342.

*Pennsylvania.*— McCandlish *v.* Newman, 22 Pa. St. 460.

*Virginia.*— American Hide, etc., Leather Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

*Washington.*— North Pacific Lumbering, etc., Co. *v.* Kerron, 5 Wash. 214, 31 Pac. 595.

*United States.*— Taylor *v.* Fall River Ironworks, 124 Fed. 826.

*England.*— Stock *v.* Inglis, 9 Q. B. D. 708, 4 Aspin. 596, 52 L. J. Q. B. 30, 47 L. T. Rep. N. S. 416, 31 Wkly. Rep. 455; Wait *v.* Baker, 2 Exch. 1, 17 L. J. Exch. 307; Austen *v.* Craven, 1 Marsh. 4 note, 4 Taunt. 644, 13 Rev. Rep. 714.

**58.** Wait *v.* Baker, 2 Exch. 1, 17 L. J. Exch. 307. See also Andrews *v.* Cheney, 62 N. H. 404.

**59.** Miller Grate Co. *v.* Hay, 54 Ill. App. 567, holding that merely looking at goods constituting part of a mass, and making a memorandum giving a description of what would be taken, is not such a segregation as will pass title.

**60.** Taylor *v.* Fall River Ironworks, 124 Fed. 826. See also New York Home Ins. Co. *v.* Heck, 65 Ill. 111.

The word "appropriation" may be used in different senses. It may mean a selection by the seller where he has the right to choose the article which he is to supply in performance of his contract, or it may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, yet the property may not pass in either case. On the other hand the word "appropriation" may be used in another sense, as applying to a case where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. Wait *v.* Baker, 2 Exch. 1, 17 L. J. Exch. 307.

**61.** Harkey *v.* Evans, (Ark. 1886) 1 S. W. 707; Davis *v.* Meyer, 47 Ark. 210, 1 S. W. 95; Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646; Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Schreyer *v.* Kimball Lumber Co., 54 Fed. 653, 4 C. C. A. 547.

**62.** Walker *v.* Collier, 37 Ill. 362; Rochester, etc., Oil Co. *v.* Hughey, 56 Pa. St. 322; Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. 552; Anderson *v.* Morice, 1 App. Cas. 713, 3 Aspin. 290, 46 L. J. C. P. 11, 35 L. T. Rep. N. S. 566, 25 Wkly. Rep. 14.

**63.** *Kentucky.*— Hagins *v.* Combs, 102 Ky. 165, 43 S. W. 222, 19 Ky. L. Rep. 1165.

*Massachusetts.*— Mitchell *v.* Le Clair, 165 Mass. 308, 43 N. E. 117; Ropes *v.* Lane, 9 Allen 502.

*Vermont.*— Griswold *v.* Scott, 66 Vt. 550, 29 Atl. 1013.

*United States.*— Thompson *v.* Gray, 1 Wheat 75, 4 L. ed. 40; Dillard *v.* Paton, 19 Fed. 619.

*Canada.*— Wilson *v.* Shaver, 1 Ont. L. Rep. 107.

**64.** Young *v.* Matthews, L. R. 2 C. P. 127, 36 L. J. C. P. 61, 15 L. T. Rep. N. S. 182.

**65.** Coffey *v.* Quebec Bank, 20 U. C. C. P. 110.

**Identification of goods.**— On a sale of six hundred and twenty-five sacks of corn out of a large number to arrive, an order to the railroad company to deliver the sacks to the purchaser as fast as they arrive entitles him to the first six hundred and twenty-five sacks to arrive and is a sufficient appropriation. Sahlman *v.* Mills, 3 Strobh. (S. C.) 384, 51 Am. Dec. 630.

receptacles therefor supplied by the buyer,[66] or otherwise putting them in deliverable shape.[67] The appropriation may be indicated by a delivery of the goods [68] or their delivery to a carrier.[69] Where the goods sold constitute a part of a specific mass a removal of all of the remainder of the mass is a sufficient segregation and appropriation of the part sold,[70] or if the whole mass is delivered to the buyer for the purpose of selecting and removing therefrom his part, the title to such part will pass immediately upon the delivery of the mass.[71]

(III) *PERSON MAKING APPROPRIATION.* While the selection and appropriation of the goods may be made by either party or both parties,[72] yet where the goods sold are not specific the property does not pass until an appropriation of the specific goods has been made with the assent of both parties,[73] and so an appropriation by the seller alone will not pass title unless assented to by the buyer.[74] This assent may, however, be either express or implied,[75] and may be given by one party either before [76] or after the act of appropriation by the other.[77] Where by the terms of the contract the seller is to do some act with reference to the goods which from its nature cannot be done until there is an appropriation, he is impliedly authorized to make it;[78] and if the goods sold constitute a part of a specific mass and the whole mass is delivered to the buyer, he is authorized to select and appropriate the part purchased.[79] If the seller is simply to procure goods of a certain kind and hold them until called for by the buyer, an appropriation of particular goods by the seller will not, in the absence of prior authority, pass title unless assented by the buyer,[80] although it has been held that if the buyer does not call for the goods and exercise his right of selection within the time limited by the contract, the title will pass.[81] Where by the terms and con-

66. Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885; Langton *v.* Higgins, 4 H. & N. 402, 28 L. J. Exch. 252, 7 Wkly. Rep. 489.

67. See *supra*, VI, A, 2, d, (II).

68. See *infra*, VI, A, 4, b.

69. See *infra*, VI, A, 4, c, (VIII), (A).

70. Horr *v.* Barker, 6 Cal. 489; Valentine *v.* Brown, 18 Pick. (Mass.) 549; Clark *v.* Griffith, 24 N. Y. 595.

**Although an insufficient amount is left** it does not affect the title of the purchaser to that which is left. Valentine *v.* Brown, 18 Pick. (Mass.) 549.

71. Weld *v.* Cutter, 2 Gray (Mass.) 195; Lamprey *v.* Sargent, 58 N. H. 241; Williams *v.* Blum, 2 Tex. App. Civ. Cas. § 501.

72. Wait *v.* Baker, 2 Exch. 1, 17 L. J. Exch. 307.

73. Andrews *v.* Cheney, 62 N. H. 404; American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705; Jenner *v.* Smith, L. R. 4 C. P. 270; Campbell *v.* Mersey Dock, etc., Bd., 14 C. B. N. S. 412, 8 L. T. Rep. N. S. 245, 11 Wkly. Rep. 596, 108 E. C. L. 412.

74. Andrews *v.* Cheney, 62 N. H. 404; Jenner *v.* Smith, L. R. 4 C. P. 270; Campbell *v.* Mersey Dock, etc., Bd., 14 C. B. N. S. 412, 8 L. T. Rep. N. S. 245, 11 Wkly. Rep. 596, 108 E. C. L. 412.

75. Campbell *v.* Mersey Dock, etc., Bd., 14 C. B. N. S. 412, 8 L. T. Rep. N. S. 245, 11 Wkly. Rep. 596, 108 E. C. L. 412.

76. Campbell *v.* Mersey Dock, etc., Bd., 14 C. B. N. S. 412, 8 L. T. Rep. N. S. 245, 11 Wkly. Rep. 596, 108 E. C. L. 412; Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885.

**Where a whole mass of grain has been inspected** and approved, and the buyer sends sacks to the seller to be filled, this constitutes a prior assent and the title passes as soon as the grain is put in the sacks by the seller. Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885.

77. Rhode *v.* Thwaites, 6 B. & C. 388, 9 D. & R. 293, 5 L. J. K. B. O. S. 163, 30 Rev. Rep. 363, 13 E. C. L. 181; Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885.

78. Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270; Smith *v.* Edwards, 156 Mass. 221, 30 N. E. 1017.

**Such appropriation is assented to in advance** by the buyer on the condition that the goods shall answer the requirements of the contract. Smith *v.* Edwards, 156 Mass. 221, 30 N. E. 1017.

79. Weld *v.* Cutler, 2 Gray (Mass.) 195; Lamprey *v.* Sargent, 58 N. H. 241.

80. Andrews *v.* Cheney, 62 N. H. 404.

81. Williams *v.* Leon, etc., Land Co., (Tex. Civ. App. 1900) 55 S. W. 374. See also Willard *v.* Perkins, 44 N. C. 253, where on a sale of a certain number of barrels of rosin for which the buyer paid at the time and was to call for upon a certain date, and which he did not call for at the time agreed on, after which the rosin was destroyed, it was held that, although no particular barrels of rosin had been set apart and appropriated to the contract, the loss must fall upon the buyer, not, however, because it had become his prop-

ditions of the contract the appropriation is to be made by the seller, the title ordinarily passes as soon as he has made such appropriation;[82] but the title will not pass if such appropriation is not made in accordance with the terms of the contract,[83] as where the goods appropriated are not the kind or quality agreed upon,[84] or are not shipped at the time stipulated,[85] unless the buyer with knowledge of the facts subsequently assents thereto;[86] but if the appropriation is made in accordance with the terms of the contract, the title passes without any subsequent assent on the part of the buyer.[87]

(IV) *OPERATION AND EFFECT.* In the absence of anything to show a contrary intent the property in the goods passes to the buyer when the selection, separation, and appropriation is complete,[88] provided nothing else remains to be done to complete the contract,[89] and the effect of the separation and appropriation is not destroyed because the goods are subsequently intermixed with the original mass.[90] Until the appropriation is completed, however, a tentative selection is not conclusive and may be withdrawn and other goods substituted provided they comply with the contract.[91]

erty but because by not calling for it it should be held to remain at his risk.

**82.** Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270; Rhode *v.* Thwaites, 6 B. & C. 388, 9 D. & R. 293, 5 L. J. K. B. O. S. 163, 30 Rev. Rep. 363, 13 E. C. L. 181; Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885.

The title passes as soon as any act is done by the seller identifying the property and it is set apart with the intention unconditionally to apply it in fulfilment of the contract. Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

**83.** Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646.

**84.** Gardner *v.* Lane, 12 Allen (Mass.) 39; Aultman *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478.

**85.** Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646, holding that, where the goods were to be selected by the seller and shipped on a certain date, a selection and shipment on a prior date is not an appropriation according to the terms of the contract and will not pass title to the goods.

**86.** Gardner *v.* Lane, 12 Allen (Mass.) 39, holding that in such case the title will vest in the buyer only after and by virtue of such assent.

**87.** Colorado Springs Live Stock Co. *v.* Godding, 20 Colo. 249, 38 Pac. 58. See also Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504.

On a sale of goods by sample the title passes upon a delivery actual or constructive of goods of the proper kind, quality, and quantity. Boothby *v.* Plaisted, 51 N. H. 436, 12 Am. Rep. 140; Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642. *Compare* Jenner *v.* Smith, L. R. 4 C. P. 270. In such cases the condition precedent consists in a delivery of goods which conform to the sample and not in the acceptance, unless some particular manner of acceptance is agreed upon and the passing of title is made to depend thereon. Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

**88.** *Indiana.*— Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270.

*Iowa.*— Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918.

*Kentucky.*— Newcomb *v.* Cabell, 10 Bush 460.

*Massachusetts.*— Mitchell *v.* Le Claire, 165 Mass. 308, 43 N. E. 117; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Rice *v.* Codman, 1 Allen 377.

*Michigan.*— People *v.* Sheehan, 118 Mich. 539, 77 N. W. 88.

*Missouri.*— Southwestern Freight, etc., Press Co. *v.* Standard, 44 Mo. 71, 100 Am. Dec. 255; Dowell *v.* Taylor, 2 Mo. App. 329.

*New Hampshire.*— Lamprey *v.* Sargent, 58 N. H. 241.

*New York.*— Sanyer *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404.

*North Carolina.*— Warbritton *v.* Savage, 49 N. C. 382.

*Pennsylvania.*— Gonser *v.* Smith, 115 Pa. St. 452, 8 Atl. 770; Smyth *v.* Craig, 3 Watts & S. 14; Records *v.* Philadelphia, etc., R. Co., 9 Phila. 55.

*Texas.*— Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684.

*United States.*— Thompson *v.* Gray, 1 Wheat. 75, 4 L. ed. 40; Dillard *v.* Paton, 19 Fed. 619.

*England.*— Rhode *v.* Thwaites, 6 B. & C. 388, 9 D. & R. 293, 5 L. J. K. B. O. S. 163, 30 Rev. Rep. 363, 13 E. C. L. 181; Langton *v.* Waring, 18 C. B. N. S. 315, 11 L. T. Rep. N. S. 633, 13 Wkly. Rep. 347, 114 E. C. L. 315.

*Canada.*— Wilds *v.* Smith, 2 Ont. App. 8; Wilson *v.* Shaver, 1 Ont. L. Rep. 107; Johnson *v.* Logan, 32 Nova Scotia 28.

**89.** Simpson *v.* Ceresco State Bank, 55 Nebr. 240, 75 N. W. 554.

**90.** Groff *v.* Belche, 62 Mo. 400; Aldridge *v.* Johnson, 7 E. & B. 885, 3 Jur. N. S. 913, 26 L. J. Q. B. 296, 5 Wkly. Rep. 703, 90 E. C. L. 885.

**91.** Stanford *v.* McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, holding that under a sale of a certain number of bushels of flax to be taken from the common mass of flax raised by the seller and delivered by the seller to the buyer on a certain day, the

**e. Goods to Be Manufactured or Produced** — (1) *In General.* A contract for the sale of an article not in existence but to be manufactured is an executory contract,[92] under which no property in the article will pass during the progress of the work nor until the article is completed and ready for delivery,[93] unless a contrary intention clearly appears,[94] and this rule is not necessarily affected by the fact that the buyer furnishes a part of the material,[95] or superintends the work of manufacture or construction,[96] or pays the price in advance,[97] or in instalments as the work progresses,[98] or even by the fact that during the process of

seller has until the day of delivery to determine what particular flax he will deliver, and that the fact that he previously makes a tentative selection of the flax which he intends to deliver does not vest any title to that particular flax in the buyer, but that the seller may change his mind and substitute other flax of like kind and quality. See also Andrews *v.* Cheney, 62 N. H. 404.

**92.** *California.*— Hallidie *v.* Sutter St. R. Co., 63 Cal. 575.

*Illinois.*— Wollensak *v.* Briggs, 119 Ill. 453, 10 N. E. 23 [*affirming* 20 Ill. App. 50]; Rothwell *v.* Luken, 60 Ill. App. 150.

*Indiana.*— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303.

*Louisiana.*— Witt Shoe Co. *v.* Seegars, 122 La. 145, 47 So. 444.

*Maine.*— Pettengill *v.* Merrill, 47 Me. 109.

*New Jersey.*— Elliott *v.* Edwards, 35 N. J. L. 265.

*New York.*— Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335 [*affirming* 13 Daly 144]; Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291]; Schwab *v* Oatman, 129 N. Y. App. Div. 274, 113 N. Y. Suppl. 910 [*affirming* 56 Misc. 393, 106 N. Y. Suppl. 741]; Comfort *v.* Kiersted, 26 Barb. 472.

*Oregon.*— Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

*Texas.*— Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165; Gammage *v.* Alexander, 14 Tex. 414.

**93.** *Illinois.*— Schneider *v.* Westerman, 25 Ill. 514; Rothwell *v.* Luken, 60 Ill. App. 150.

*Indiana.*— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303.

*Maine.*— Pettengill *v.* Merrill, 47 Me. 109.

*Massachusetts.*— Williams *v.* Jackman, 16 Gray 514.

*New York.*— Low *v.* Austin, 20 N. Y. 181; Decker *v.* Furniss, 14 N. Y. 611 [*reversing* 3 Duer 291]; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Comfort *v.* Kiersted, 26 Barb. 472.

*North Carolina.*— Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

*Oregon.*— Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

*Pennsylvania.*— Leonard *v.* Winslow, 2 Grant 139; Diamond Glass Co. *v.* Ladwig, 33 Pa. Super. Ct. 506.

*Texas.*— Gammage *v.* Alexander, 14 Tex. 414.

*United States.*— River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466; Wheeler *v.* Walton, etc., Co., 64 Fed. 664.

*England.*— Bellamy *v.* Davey, [1891] 3 Ch. 540, 60 L. J. Ch. 778, 65 L. T. Rep. N. S. 308, 40 Wkly. Rep. 118; Atkinson *v.* Bell, 8 B. & C. 277, 6 L. J. K. B. O. S. 258, 2 M. & R. 292, 15 E. C. L. 142; Laidler *v.* Burlinson, 6 L. J. Exch. 160, 2 M. & W. 602; Mucklow *v.* Mangles, 1 Taunt. 318, 9 Rev. Rep. 784.

See 43 Cent. Dig. tit. "Sales," § 571.

**Although the article is partly completed** at the time of the sale, if the seller is to complete and deliver it the title does not pass until completion. Halterline *v.* Rice, 62 Barb. (N. Y.) 593.

**Articles to be affixed to another.**— In the case of articles to be manufactured and affixed to another title does not pass until they are affixed or appropriated by the buyer. Tropp *v.* Armitage, 1 H. & H. 442, 3 Jur. 249, 8 L. J. Exch. 107, 4 M. & W. 687; Goss *v.* Quinton, 7 Jur. 901, 12 L. J. C. P. 173, 3 M. & G. 825, 4 Scott N. R. 471, 42 E. C. L. 430.

**94.** Williams *v.* Jackman, 16 Gray (Mass.) 514.

**95.** West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Matter of Non-Magnetic Watch Co., 89 Hun (N. Y.) 196, 34 N. Y. Suppl. 1017; Wright *v.* O'Brien, 5 Daly (N. Y.) 54. See also Dittmar *v.* Norman, 118 Mass. 319. *Compare* Brown *v.* Haughton, 3 Pittsb. (Pa.) 15.

**96.** Williams *v.* Jackman, 16 Gray (Mass.) 514; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55. And see Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139. But see Clarke *v.* Spence, 4 A. & E. 448, 2 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206.

**Evidence of intention.**— The fact that the work is to be carried on under the superintendence of the buyer or his agent is some evidence of an intention to transfer the title before completion but is not conclusive. Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 85 E. C. L. 772.

**97.** West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Mucklow *v.* Mangles, 1 Taunt. 318, 9 Rev. Rep. 784.

**98.** *California.*— Yukon River Steamboat Co. *v.* Gratto, 136 Cal. 538, 69 Pac. 252.

*Connecticut.*— Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170.

*Delaware.*— Green *v.* Hall, 1 Houst. 506 [*affirmed* in 1 Houst. 546, 71 Am. Dec. 96].

*Illinois.*— Wollensak *v.* Briggs, 119 Ill. 453, 10 N. E. 23 [*affirming* 20 Ill. App. 50].

*Indiana.*— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303. But see Sandford *v.* Wiggins Ferry Co., 27 Ind. 522.

*Massachusetts.*— Williams *v.* Jackman, 16 Gray 514; Bennett *v.* Platt, 9 Pick. 558. See also Wilson *v.* Russell, 136 Mass. 211.

construction the article is so identified and appropriated to the contract that the seller would be bound to deliver that particular article and could not substitute another similar article, which would otherwise correspond with the agreement.[99] But while the general rule is that the property does not pass until the article is finished and delivered or at least ready for delivery, unless a contrary intention appears,[1] it is equally true that it is competent for the parties to agree that the article to be manufactured or produced shall from the beginning or at any stage of its production be the property of the buyer,[2] and the courts will not enforce any arbitrary rules of construction as to when the title passes,[3] but will carry into effect the intention of the parties as shown by the terms of the agreement and the facts and circumstances surrounding the transaction.[4] So if it appears that such was the intention of the parties, the title will pass, although the article has not been completed.[5]

(II) *Necessity of Delivery and Acceptance.* Generally the article must not only be completed but must be delivered,[6] especially to pass the prop-

*New Jersey.*— Elliott *v.* Edwards, 35 N. J. L. 265.

*New York.*— Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Matter of Carter, 21 N. Y. App. Div. 118, 47 N. Y. Suppl. 383; Halterline *v.* Rice, 62 Barb. 593; Wright *v.* O'Brien, 5 Daly 54; Merritt *v.* Johnson, 7 Johns. 473, 5 Am. Dec. 289.

*North Carolina.*— Williams *v.* Chapman, 118 N. C. 943, 24 S. E. 810.

*Pennsylvania.*— Scull *v.* Shakespear, 75 Pa. St. 297; Forsyth *v.* Dickson, 1 Grant 26.

*United States.*— Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; Bacon *v.* The Poconoket, 67 Fed. 262; The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143.

*England.*—Bellamy *v.* Davey, [1891] 3 Ch. 540, 60 L. J. Ch. 778, 65 L. T. Rep. N. S. 308, 40 Wkly. Rep. 118; Laidler *v.* Burlinson, 6 L. J. Exch. 160, 2 M. & W. 602. But see Clarke *v.* Spence, 4 A. & E. 448, 1 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206; Woods *v.* Russell, 5 B. & Ald. 942, 24 Rev. Rep. 621, 7 E. C. L. 512.

See 43 Cent. Dig. tit. "Sales," § 573.

**Evidence of intention.**— The fact that payments are made as the work progresses is evidence of an intention to transfer title prior to completion, and while not conclusive may, in connection with other circumstances, be sufficient to establish such intention. Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 85 E. C. L. 772. See also Clarke *v.* Spence, 4 A. & E. 448, 1 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206.

**99.** Andrews *v.* Durant, 11 N. Y. 35, 41, 62 Am. Dec. 55, where it is said that in such cases "there would seem to be more reason for holding that the property was transferred; still, it has never been held that this was enough to pass the title."

**Although the seller may intend particular goods** in process of manufacture for the person ordering them, he may nevertheless deliver them to another and vest title in that other, and, although he may be liable to an action for so doing, still a good title is given to the person to whom they are delivered. Atkinson *v.* Bell, 8 B. & C. 277, 6 L. J. K. B. O. S. 258, 2 M. & R. 292, 15 E. C. L. 142.

**Effect of new agreement.**—Where a contract is made for a buggy to be manufactured by the seller for a certain price and after it is completed except the painting and trimming the parties make a new agreement, by which that particular buggy is sold to the buyer for a less price, which is paid, the seller to retain the buggy and paint it and then deliver it to the buyer who is to complete it by trimming, the title pass at the time of the second agreement. Butterworth *v.* McKinley, 11 Humphr. (Tenn.) 206.

**1.** Williams *v.* Jackman, 16 Gray (Mass.) 514; Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139. And see cases cited *supra*, notes 92, 93.

**2.** Cowgill *v.* Ford, 2 Houst. (Del.) 164; Wright *v.* O'Brien, 5 Daly (N. Y.) 54.

**3.** Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139.

**4.** Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139. See also Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303; Diamond Glass Co. *v.* Ladwig, 33 Pa. Super. Ct. 506.

**The foundation of the rule** that title does not pass until the article is completed and ready for delivery is the presumed intention of the parties, and if it appears that their intention was otherwise such intention will be upheld and enforced. Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 85 E. C. L. 772.

**5.** Cowgill *v.* Ford, 2 Houst. (Del.) 164; Wright *v.* O'Brien, 5 Daly (N. Y.) 54; Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 85 E. C. L. 772; Upper Canada Bank *v.* Killaly, 21 U. C. Q. B. 9.

**6.** *Connecticut.*— Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170.

*Illinois.*— Updike *v.* Henry, 14 Ill. 378.

*Indiana.*— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303.

*Nebraska.*— Goodman *v.* Kennedy, 10 Nebr. 270, 4 N. W. 987.

*New Jersey.*—West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

*New York.*— McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Sut-

erty as against creditors of or subsequent purchasers from the seller.[7] At least the property should be tendered or otherwise appropriated to the buyer,[8] and separated from the general mass of manufactured goods,[9] notice thereof being given to the buyer.[10] It is also very generally held that there must be an acceptance by the buyer.[11] Actual express acceptance is not, however, necessary, but acceptance will be implied in the absence of objection,[12] and as the buyer is bound to accept if the goods correspond to the specifications of the order,[13] in such cases

ton *v.* Campbell, 2 Thomps. & C. 595; Wright *v.* O'Brien, 5 Daly 54; Merritt *v.* Johnson, 7 Johns. 473, 5 Am. Dec. 289.

*North Carolina.*— Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117.

*Pennsylvania.*— Forsyth *v.* Dickson, 1 Grant 26.

*United States.*— Buffum *v.* Merry, 4 Fed. Cas. No. 2,112, 3 Mason 478; The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143.

See 43 Cent. Dig. tit. "Sales," § 572.

**Effect of delivery.**— The title to an article to be manufactured passes on delivery actual or constructive. Shepard *v.* King, 96 Ga. 81, 23 S. E. 113; Brewer *v.* Salisbury, 9 Barb. (N. Y.) 511; Clemens *v.* Davis, 7 Pa. St. 263; Hoffman *v.* Hartman, 11 Pa. Co. Ct. 73.

**7.** *Alabama.*— Sawyer *v.* Ware, 36 Ala. 675.

*Illinois.*— Storey *v.* Agnew, 2 Ill. App. 353.

*New York.*— Johnson *v.* Hunt, 11 Wend. 135.

*Pennsylvania.*— Mitchell *v.* Com., 37 Pa. St. 187; Pritchett *v.* Jones, 4 Rawle 260.

*Vermont.*— Hale *v.* Huntley, 21 Vt. 147.

*Washington.*— North Pacific Lumbering, etc., Co. *v.* Kerron, 5 Wash. 214, 31 Pac. 595.

See 43 Cent. Dig. tit. "Sales," § 641.

**8.** *Illinois.*— Rothwell *v.* Luken, 60 Ill. App. 150; Stanley *v.* Robinson, 14 Ill. App. 480.

*Indiana.*— Fordice *v.* Gibson, 129 Ind. 7, 28 N. E. 303.

*Iowa.*— Moline Scale Co. *v.* Beed, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272.

*Maine.*— Pettengill *v.* Merrill, 47 Me. 109.

*Massachusetts.*— Williams *v.* Jackman, 16 Gray 514.

*Michigan.*— Haynes *v.* Quay, 134 Mich. 229, 95 N. W. 1082; First Nat. Bank *v.* Crowley, 24 Mich. 492.

*Mississippi.*— McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163.

*New Jersey.*— West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

*New York.*— Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335 [*affirming* 13 Daly 144]; Halterline *v.* Rice, 62 Barb. 593; Comfort *v.* Kiersted, 26 Barb. 472.

*Oregon.*— Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

*Pennsylvania.*— McCandlish *v.* Newman, 22 Pa. St. 460; Leonard *v.* Winslow, 2 Grant 139.

*Texas.*— Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165.

**Appropriation.**— The title to tools manufactured by one person for another passes to the latter on the use by the manufacturer of the tools in the manufacture for the purchaser of a certain number of articles, for the manufacture of which the tools were intended, under an agreement by the manufacturer, accepted by the purchaser, to manufacture such articles for the purchaser with such tools, on payment of a specified amount therefor within a specified period after notice that the manufacture of the tools has been completed. Leggo *v.* Welland Vale Mfg. Co., 2 Ont. L. Rep. 45.

**9.** New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

**10.** Schneider *v.* Westerman, 25 Ill. 514; Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Marquette First Nat. Bank *v.* Crowley, 24 Mich. 492; Higgins *v.* Murray, 4 Hun (N. Y.) 565 [*affirmed* in 73 N. Y. 252].

**11.** *California.*— Hallidie *v.* Sutter St. R. Co., 63 Cal. 575.

*Connecticut.*—Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170.

*Maine.*— Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640.

*Michigan.*— Wagar *v.* Farrin, 71 Mich. 370, 38 N. W. 865.

*New Jersey.*—West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

*New York.*— Halterline *v.* Rice, 62 Barb. 593.

*Pennsylvania.*— Leonard *v.* Winslow, 2 Grant 139.

*Texas.*— Gammage *v.* Alexander, 14 Tex. 414.

*United States.*— Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139.

*Canada.*— Lewis *v.* Barré, 14 Manitoba 32.

**By agreement.**—Acceptance may be made necessary by the terms of the contract. Sherwood *v.* Saginaw, etc., R. Co., 53 Mich. 317, 19 N. W. 14; Matter of Non-Magnetic Watch Co. of America, 89 Hun (N. Y.) 196, 34 N. Y. Suppl. 1017.

**12.** McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163; Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787. And see Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165.

**13.** See *supra*, V, C, 1.

**Goods not corresponding to order.**— If the goods do not correspond to the order the buyer is not bound to accept them and the title will not pass if he refuses to do so (Hallidie *v.* Sutter St. R. Co., 63 Cal. 575); and where the contract contemplates that the buyer is to take and test the article to ascertain if it will answer the purpose intended, this acceptance will not pass title

the property will pass, although the buyer refuses to accept.[14] The intention of the parties will, however, govern,[15] and if such intention appears the property will pass on completion and appropriation without delivery or acceptance,[16] or even before its final completion.[17]

(III) *Crops or Animals to Be Grown or Produced.*[18] Where the subject-matter of the sale is crops or trees to be grown or produced the contract is an executory one under which no present title passes to the buyer;[19] but the title will pass as soon as the crop appears or comes into existence,[20] or at least as soon as it is matured,[21] unless under the contract something still remains to be done between the buyer and the seller in relation thereto,[22] or the crop to be produced must conform to certain specifications,[23] no actual change of possession being necessary to make the sale complete even as against third persons.[24] So also under a sale of unborn animals the title will pass as soon as the animal is born.[25]

**4. Delivery of Goods — a. Necessity of Delivery** — (I) *As Between the Parties.* In accordance with the rule already stated,[26] unless otherwise provided by statute,[27] or unless a contrary intention appears, on a sale of specific

so as to prevent its subsequent rejection and return for defects not apparent or known to the buyer at the time he accepted it (Sias *v.* Bates, 18 Vt. 579); but where the contract provides that the buyer is to inspect the article at the place of manufacture and he does so inspect it and accepts it, the title will pass notwithstanding the existence of latent defects which are discovered only after the article is put in use (Pullman Palace-Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94, 15 S. Ct. 503, 39 L. ed. 632).

**14.** Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963; Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Ballentine *v.* Robinson, 46 Pa. St. 177; Moore *v.* Perrot, 2 Wash. 1, 25 Pac. 906. And see Bement *v.* Smith, 15 Wend. (N. Y.) 493.

**15.** Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170; Young *v.* Matthews, L. R. 2 C. P. 127, 36 L. J. C. P. 61, 15 L. T. Rep. N. S. 182; Banbury, etc., R. Co. *v.* Daniel, 54 L. J. Ch. 265, 33 Wkly. Rep. 321.

**16.** *Delaware.*— Cowgill *v.* Ford, 2 Houst. 164.

*Indiana.*— Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270.

*Massachusetts.*— Beaumont *v.* Crane, 14 Mass. 400.

*Michigan.*— Brewer *v.* Michigan Salt Assoc., 47 Mich. 526, 11 N. W. 370; Whitcomb *v.* Whitney, 24 Mich. 486. And see Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

*New York.*— Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. 844; Higgins *v.* Murray, 4 Hun 565 [*affirmed* in 73 N. Y. 252]; Wright *v.* O'Brien, 5 Daly 54.

*North Carolina.*— Williams *v.* Chapman, 118 N. C. 943, 24 S. E. 810.

*Pennsylvania.*— Gonser *v.* Smith, 115 Pa. St. 452, 8 Atl. 770.

*Rhode Island.*— Spicers *v.* Harvey, 9 R. I. 582.

*Canada.*— Kelsey *v.* Rogers, 32 U. C. C. P. 624; Burton *v.* Bellhouse, 20 U. C. Q. B. 60; Burnett *v.* McBean, 16 U. C. Q. B. 466.

**17.** See *supra*, VI, A, 3, e, (I).

**18. Validity of sale** see *supra*, II, C, 2, b.

**19.** *Iowa.*— Snyder *v.* Tibbals, 32 Iowa 447.

*Minnesota.*— Welter *v.* Hill, 65 Minn. 273, 68 N. W. 26.

*New Jersey.*— Parsons *v.* Woodward, 22 N. J. L. 196.

*New York.*— Andrew *v.* Newcomb, 32 N. Y. 417.

*Vermont.*— Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

*United States.*— Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180.

**General rule** as to transfer of title to goods not in existence see *supra*, VI, A, 1, b.

**20.** Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9; Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180.

**Dairy products.**— Under a sale of the dairy products to be produced from cows upon a dairy farm the title passes as soon as such products come into existence. Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9.

**21.** Andrew *v.* Newcomb, 32 N. Y. 417.

**22.** Snyder *v.* Tibbals, 32 Iowa 447; Welter *v.* Hill, 65 Minn. 273, 68 N. W. 26.

**Acts necessary to put goods in deliverable state** see *supra*, VI, A, 2, d, (II).

**Ascertainment of price** see *supra*, VI, A, 2, d, (III).

**23.** Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176, holding that in such case the buyer has a right of inspection to ascertain if the crop meets the requirements of the contract, and that notwithstanding the crop is grown and tendered by the seller the title does not pass unless it is accepted by the buyer, although in case of a wrongful refusal to accept it he would be liable in damages.

**24.** Bellows *v.* Wells, 36 Vt. 599.

**25.** Fonville *v.* Casey, 5 N. C. 389, 4 Am. Dec. 559; McCarty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262. *Compare* Maize *v.* Bowman, 13 Ky. L. Rep. 233.

**26.** See *supra*, VI, A, 2, c.

**27.** Bailey *v.* Moore, 60 N. C. 86, holding, however, that even under a statute in regard to the sale of slaves, requiring a delivery to pass title, the delivery need not be made at

goods the property will pass as between the parties without a delivery of the goods,[28] especially where there has been payment of the price.[29] This presumption must, however, yield to agreements or circumstances from which a contrary intention can be inferred.[30] Thus an intention that the property shall not pass until delivery is shown if the goods are to be transported by the seller to a particular place and to be paid for on delivery,[31] or if delivery is necessary by the terms of the contract,[32] or as a means of identifying the goods.[33] But the question

the time of the contract, but that the title will vest in the buyer whenever the slave is delivered, or, if at large, is captured by and taken possession of by the buyer.

**28.** *Alabama.*— Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100, 16 So. 29; Darnell *v.* Griffin, 46 Ala. 520; McCoy *v.* Moss, 5 Port. 88.

*Arkansas.*— Cockrell *v.* Warner, 14 Ark. 345; Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311; Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536.

*California.*— Driscoll *v.* Driscoll, 143 Cal. 528, 77 Pac. 471; Kirk *v.* Roberts, (1892) 31 Pac. 620; Visher *v.* Webster, 13 Cal. 58.

*Illinois.*— Webster *v.* Granger, 78 Ill. 230; Sidwell *v.* Lobly, 27 Ill. 438.

*Indiana.*— Henline *v.* Hall, 4 Ind. 189; Ramsey *v.* Kochenour, 8 Blackf. 325.

*Iowa.*— Austin *v.* Easton, 25 Iowa 159.

*Kentucky.*— Newcomb *v.* Cabell, 10 Bush 460; Buffington *v.* Ulen, 7 Bush 231.

*Louisiana.*— Sholars *v.* Hardee, 28 La. Ann. 259; Taylor *v.* Twenty-Five Bales of Cotton, 26 La. Ann. 247.

*Maine.*— Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87; Wing *v.* Clark, 24 Me. 366.

*Maryland.*— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

*Massachusetts.*— Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112.

*Michigan.*— Kling *v.* Fries, 33 Mich. 275; Whitcomb *v.* Whitney, 24 Mich. 486.

*Mississippi.*— Ingersoll *v.* Kendall, 13 Sm. & M. 611.

*Missouri.*— Wheless *v.* Meyer, etc., Grocer Co., (App. 1909) 120 S. W. 708; Harding *v.* Manard, 55 Mo. App. 364.

*New Hampshire.*— Felton *v.* Fuller, 29 N. H. 121; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

*New Jersey.*— Frazier *v.* Fredericks, 24 N. J. L. 162.

*New York.*— Burt *v.* Dutcher, 34 N. Y. 493; Connor *v.* Williams, 2 Rob. 46; Olyphant *v.* Baker, 5 Den. 379.

*North Carolina.*— Cox *v.* Gordon, 13 N. C. 522.

*Ohio.*— Hooben *v.* Bidwell, 16 Ohio 509, 47 Am. Dec. 386.

*Pennsylvania.*— McCandlish *v.* Newman, 22 Pa. St. 460; Leonard *v.* Winslow, 2 Grant 139.

*Tennessee.*— Goodrum *v.* Smith, 3 Humphr. 542.

*Texas.*— Downey *v.* Taylor, (Civ. App. 1898) 48 S. W. 541; Pierce *v.* Moore, 1 Tex. App. Civ. Cas. § 909.

*Vermont.*— Gleason *v.* Owen, 35 Vt. 590; Fletcher *v.* Howard, 2 Aik. 115.

*United States.*— Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180 [*reversing* 25 Ct. Cl. 126]; Sutherland *v.* Brace, 73 Fed. 624, 19 C. C. A. 589; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99; Winsor *v.* McLellan, 30 Fed. Cas. No. 17,887, 2 Story 492; Winterport Granite, etc., Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898, Holmes 99.

See 43 Cent. Dig. tit. "Sales," § 529.

**29.** *Alabama.*— Darnell *v.* Griffin, 46 Ala. 520.

*Arkansas.*— Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311.

*Massachusetts.*— Lord *v.* Edwards, 148 Mass. 476, 20 N. E. 161, 12 Am. St. Rep. 581, 2 L. R. A. 519.

*Michigan.*— Davis *v.* Ransom, 4 Mich. 238.

*Mississippi.*— Beauchamp *v.* Comfort, 42 Miss. 94; Cassell *v.* Backrack, 42 Miss. 56, 97 Am. Dec. 436, 2 Am. Rep. 590

*Texas.*— Pierce *v.* Moore, 1 Tex. App. Civ. Cas. § 909.

See 43 Cent. Dig. tit. "Sales," § 529.

**30.** *Alabama.*— Weedon *v.* Clark, 94 Ala. 505, 10 So. 307.

*Georgia.*— Pate *v.* Wyly, 118 Ga. 262, 45 S. E. 217; Russell *v.* Abbott, 91 Ga. 178, 16 S. E. 1005; Cheney *v.* Dalton, 46 Ga. 401.

*Louisiana.*— Lozes *v.* Segura Sugar Co., 52 La. Ann. 1844, 28 So. 249; Bancker *v.* Brady, 26 La. Ann. 749; Gleason *v.* Sykes, 18 La. Ann. 627; Boone *v.* Pelichet, 13 La. Ann. 203, under code.

*Maryland.*— Franklin *v.* Long, 7 Gill & J. 407.

*Missouri.*— Lovelace *v.* Stewart, 23 Mo. 384.

*New York.*— Caulkins *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461.

*Pennsylvania.*— Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134.

*Tennessee.*— Cole *v.* Rankin, (Ch. App. 1896) 42 S. W. 72.

*Texas.*— Edwards *v.* Irvin, (Civ. App. 1898) 45 S. W. 1026.

*Wisconsin.*— Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829; Thomas *v.* Tolford, 70 Wis. 155, 35 N. W. 293.

*United States.*— *In re* Schujahn, 120 Fed. 938, 57 C. C. A. 228.

**31.** See *infra*, VI, A, 4, c, (VIII), (B).

**32.** Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648; Palmer *v.* Roath, 86 Mich. 602, 49 N. W. 590; McCandlish *v.* Newman, 1 Phila. (Pa.) 268.

**Condition waived.**—A condition requiring delivery to pass the property may be waived. Scott *v.* King, 12 Ind. 203; Clark *v.* Norwood, 19 La. Ann. 116.

**33.** Stafford *v.* Anders, 8 Fla. 34.

as to the intention of the parties in regard to the transfer of title is usually one for the determination of the jury.[34]

(II) *As to Third Persons* — (A) *In General.* While it is well settled that as between the parties a delivery is not essential to a transfer of title,[35] the general rule is that as against creditors of or subsequent purchasers from the seller, there must be a delivery of the goods,[36] and it does not affect this rule that the price has been paid,[37] or notes given therefor.[38] But delivery is not essential to pass the property in the goods as against trespassers or wrong-doers.[39]

(B) *Change of Possession.* It is ordinarily held that the delivery required by the rule above stated in order to pass title as against creditors of or subsequent purchasers from the seller [40] must be a delivery in its natural sense, that is, a change of possession,[41] and that there must be an actual, visible, and continuous change of possession,[42] such as to apprise those accustomed to deal with the seller that

**34.** Dyer *v.* Libby, 61 Me. 45; Toohey *v.* Plummer, 69 Mich. 345, 37 N. W. 297.

**35.** See *supra*, VI, A, 4, a, (I).

**36.** *Arkansas.*— Hight *v.* Haines, 56 Ark. 98, 19 S. W. 235.

*California.*— Crocker *v.* Cunningham, 122 Cal. 547, 55 Pac. 404; Kelly *v.* Murphy, 70 Cal. 560, 12 Pac. 467; James *v.* Fulkerth, (1885) 7 Pac. 768; Bell *v.* McClellan, 67 Cal. 283, 7 Pac. 699.

*Colorado.*— Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226; Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

*Illinois.*— McCann *v.* Meyer, 4 Ill. App. 376.

*Indiana.*— Kirkpatrick *v.* Snyder, 33 Ind. 169.

*Kansas.*— Birks *v.* French, 21 Kan. 238.

*Louisiana.*— Fouché *v.* Stewart, 32 La. Ann. 215; Shultz *v.* Morgan, 27 La. Ann. 616; Meagher *v.* Reading, 23 La. Ann. 436; Cullom *v.* Guillot, 18 La. Ann. 608; Von Phul *v.* Powell, 17 La. Ann. 165; Hill *v.* Hanney, 15 La. Ann. 654; Lambeth *v.* Wells, 12 Rob. 51; Cook *v.* West, 3 Rob. 331; Copley *v.* Dowell, 1 Rob. 26; Adams *v.* Day, 14 La. 503; Wilson *v.* Smith, 12 La. 375; Garritson *v.* His Creditors, 7 La. 551; Verdier *v.* Leprete, 4 La. 41; Gasquet *v.* Johnston, 2 La. 514; Olivier *v.* Townes, 2 Mart. N. S. 93; McNeill *v.* Glass, 1 Mart. N. S. 261; Peabody *v.* Carrol, 9 Mart. 295, 13 Am. Dec. 305; Fisk *v.* Chandler, 7 Mart. 24; Ramsey *v.* Stevenson, 5 Mart. 23, 12 Am Dec. 468; Norris *v.* Mumford, 4 Mart. 20; Durnford *v.* Brooks, 3 Mart. 222.

*Maine.*— Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538; McNaughton *v.* Leonard, (1888) 13 Atl. 584; Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Vining *v.* Gilbreth, 39 Me. 496; Richardson *v.* Kimball, 28 Me. 463.

*Massachusetts.*— Veazie *v.* Somerby, 5 Allen 280; Lanfear *v.* Sumner, 17 Mass. 110, 9 Am. Dec. 119.

*Missouri.*— State *v.* Frank, 22 Mo. App. 46.

*New Hampshire.*— Crawford *v.* Forristall, 58 N. H. 114; Smart *v.* Batchelder, 57 N. H. 140.

*New Jersey.*— Woodruff *v.* Clark, 42 N. J. L. 198.

*New York.*— Brady *v.* Cassidy, 104 N. Y. 147, 10 N. E. 131; Thompson *v.* Blanchard, 4 N. Y. 303; Seymour *v.* Montgomery, 4 Abb. Dec. 207, 1 Keyes 463.

*Pennsylvania.*— Miller *v.* Browarsky, 130 Pa. St. 372, 18 Atl. 643; Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Mitchell *v.* Com., 37 Pa. St. 187; Norcross *v.* Insurance Companies, 17 Pa. St. 429, 55 Am. Dec. 571; Farrell *v.* Nathans, 1 Phila. 557. But see Finch Mfg. Co. *v.* Stirling, 3 Lack. Leg. N. 273.

*Vermont.*— Moore *v.* Kelley, 5 Vt. 34, 26 Am. Dec. 283; Fletcher *v.* Howard, 2 Aik. 115, 16 Am. Dec. 686.

*Wisconsin.*— Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829.

**37.** Jennings *v.* Flanagan, 5 Dana (Ky.) 217, 30 Am. Dec. 683; Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Mitchell *v.* Com., 37 Pa. St. 187. But see Hauser *v.* Beatty, 93 Mich. 499, 53 N. W. 628.

**38.** Lee *v.* Bullard, 3 La. Ann. 462.

**39.** Williams *v.* Franklin, 7 Mart. N. S. (La.) 670; Cartland *v.* Morrison, 32 Me. 190; Parsons *v.* Dickinson, 11 Pick. (Mass.) 352.

**Sale of goods at sea.**—Where goods are sold while at sea, the buyer has constructive possession, and the fact that before they are unladen an inspector is put on board, his custody thereof to secure the lien of the United States for duties is not a divestment of the title and possession of the buyer as against a wrong-doer. Howland *v.* Harries, 12 Fed. Cas. No. 6,794, 4 Mason 497.

**40.** See *supra*, VI, A, 4, a, (II), (A).

**41.** Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433.

**42.** *Arkansas.*— Harkey *v.* Evans, (1886) 1 S. W. 707.

*California.*— Crocker *v.* Cunningham, 122 Cal. 547, 55 Pac. 404; Kelly *v.* Murphy, 70 Cal. 560, 12 Pac. 467; James *v.* Fulkerth, (1885) 7 Pac. 768; Bell *v.* McClellan, 67 Cal 283, 7 Pac. 699; Samuels *v.* Gorham, 5 Cal. 226.

*Colorado.*— Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226.

*Connecticut.*—Seymour *v.* O'Keefe, 44 Conn. 128; Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

*Iowa.*— McIntosh *v.* Wilson, 81 Iowa 339, 46 N. W. 1003; Nuckolls *v.* Pence, 52 Iowa 581, 3 N. W. 631; Hickok *v.* Buell, 51 Iowa

the ownership of the goods is changed,[43] or in other words such a manifest, continued, and open change of possession as to indicate to the world a change of title;[44] and so it is not sufficient that there has been an actual delivery and actual change of possession if the goods are returned to the apparent possession of the seller so as to indicate that there had been no actual change of title.[45] In the application of this rule, however, certain qualifications must be recognized, depending upon the character and situation of the property,[46] and as against creditors a change of possession is not necessary in the case of property which at the time of the sale is not subject to execution or attachment.[47] So also actual notice of the sale may take the place of a change of possession,[48] either as against a creditor of or a subsequent purchaser from the seller.[49]

**b. Effect of Delivery.** A delivery to the buyer will, in the absence of anything to indicate a contrary intent, transfer the property in the goods as against the seller, his creditors, or subsequent purchasers,[50] although the price has not been

655, 2 N. W. 512; Smith *v.* Champney, 50 Iowa 174.

*Kentucky.*— Townsend *v.* Frazee, 54 S. W. 722, 21 Ky. L. Rep. 1183.

*Louisiana.*—Merritt *v.* Burgess, 7 Rob. 434; Bell *v.* Dowly, 5 Rob. 18; Monday *v.* Wilson, 4 La. 338; Madry *v.* Young, 3 La. 160; Smoot *v.* Baldwin, 3 Mart. N. S. 84.

*Missouri.*— State *v.* Hall, 45 Mo. App. 298.

*New Hampshire.*— McDonough *v.* Prescott, 62 N. H. 600.

*Pennsylvania.*— Barr *v.* Reitz, 53 Pa. St. 256; Eckfeldt *v.* Frick, 4 Phila. 116; Barr *v.* Reitz, 14 Pittsb. Leg. J. 423.

*Vermont.*— Judd *v.* Langdon, 5 Vt. 231; Moore *v.* Kelley, 5 Vt. 34, 26 Am. Dec. 283; Boardman *v.* Keeler, 1 Aik. 158, 15 Am. Dec. 670.

See 43 Cent. Dig. tit. "Sales," § 632.

**A contrary rule** has been laid down in some cases, it being held that the fact that there has been no change of possession merely raises a presumption of fraud, which is not conclusive but open to explanation. Meade *v.* Smith, 16 Conn. 346; Shaddon *v.* Knott, 2 Swan (Tenn.) 358, 58 Am. Dec. 63.

**In Michigan** the statute makes a sale which is not accompanied by an actual delivery and continued change of possession *prima facie* fraudulent as to creditors of and subsequent purchasers from the seller, so that the burden is upon the buyer to show the good faith of the transaction (Molitor *v.* Robinson, 40 Mich. 200); but if it is shown to have been in good faith the sale is not invalid as against creditors or subsequent purchasers because it was not accompanied by an actual delivery (Hauser *v.* Beaty, 93 Mich. 499, 53 N. W. 628).

**Repurchase by seller.**— The seller by buying back a chattel and taking it in payment of the balance of the price does not, if there is no change of possession, acquire title thereto as against attaching creditors. Nicholson *v.* Merstetter, 68 Mo. App. 441.

43. Herr *v.* Denver Milling, etc., Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641; Stanley *v.* Robbins, 36 Vt. 422.

**Change of possession.**— In respect to the appearance of a change in the possession of personal property required in order to protect it from attachment by the creditors of the vendor, it is held that on the one hand the purchaser must see to it that he so acts with regard to the property so to indicate by the appearances to an observer a change in the possession, and on the other hand that creditors of the vendor are bound to see what others can see, and judge and act upon it with that prudence that is required of men in business affairs. Stanley *v.* Robbins, 36 Vt. 422.

44. Seymour *v.* O'Keefe, 44 Conn. 128; State *v.* Hall, 45 Mo. App. 298. See also Smith *v.* Champney, 50 Iowa 174.

45. Norton *v.* Doolittle, 32 Conn. 405; Crouch *v* Carrier, 16 Conn. 505, 41 Am. Dec. 156. See also Barr *v.* Reitz, 53 Pa. St. 256.

46. See *infra*, VI, A, 4, c, (I).

47. Bellows *v.* Wells, 36 Vt. 599, holding that a sale of growing crops which require annual planting and cultivation is not within the application of the rule requiring a change of possession as against creditors, since the rule proceeds upon the ground that permitting the former owner to remain in the apparent ownership of the property gives him a false credit by which creditors might be injured, but that the reason of the rule cannot apply to property which at the time of the sale was not subject to attachment.

48. Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112; Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Haskell *v.* Greely, 3 Me. 425; Dieckman *v.* Young, 87 Mo. App. 530; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

49. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245. But see Hart *v.* Farmers', etc., Bank, 33 Vt. 252, holding that while notice is available against a subsequent purchaser it is not effective against an attaching creditor.

50. *Alabama.*— Rattary *v.* Cook, 50 Ala. 352.

*California.*— Gardiner *v.* McDonogh, 147 Cal. 313, 81 Pac. 964; Hewlet *v.* Flint, 7 Cal. 264.

*Colorado.*— Finding *v.* Hartman, 14 Colo. 596, 23 Pac. 1004; Colorado Trading, etc., Co. *v.* Oliver, 20 Colo. App. 257, 78 Pac. 308.

*Connecticut.*— Patten *v.* Smith, 5 Conn. 196.

*Illinois.*— Callaghan *v.* Myers, 89 Ill. 566; Pease *v.* Dawson, 97 Ill. App. 620 [*affirmed*

paid,[51] and something still remains to be done,[52] provided there is an acceptance actual or implied,[53] unless the buyer is bound to accept, in which case the title

in 197 Ill. 340, 64 N. E. 366]; Washburne *v.* Burke, 84 Ill. App. 587.

*Kentucky.*— Shadoan *v.* Kenney, 56 S. W. 506, 21 Ky. L. Rep. 1819.

*Louisiana.*— Stevens *v.* Wellington, 1 La. Ann. 72; Weld *v.* Donlin, 13 La. 460.

*Maine.*— Hotchkiss *v.* Hunt, 49 Me. 213; Veazie *v.* Holmes, 40 Me. 69.

*Massachusetts.*— Taber *v.* Lawrence, 134 Mass. 94; Gardner *v.* Lane, 9 Allen 492, 85 Am. Dec. 779.

*Minnesota.*— Fredette *v.* Thomas, 57 Minn. 190, 58 N. W. 984; Yallop-De Groot Co. *v.* Minneapolis, etc., R. Co., 33 Minn. 482, 24 N. W. 185.

*Missouri.*— Gatzweiler *v.* Morgner, 51 Mo. 47.

*Nevada.*— Clute *v.* Steele, 6 Nev. 335.

*New Hampshire.*— Mandigo *v.* Healey, 69 N. H. 94, 45 Atl. 318.

*New York.*— Ohio, etc., R. Co. *v.* Kasson, 37 N. Y. 218; Suydam *v.* Hotchkiss, Lalor 96.

*Oregon.*— Wadhams *v.* Balfour, 32 Oreg. 313, 51 Pac. 642.

*Rhode Island.*— Hathaway *v.* O'Gorman Co., 26 R. I. 476, 59 Atl. 397.

*Tennessee.*— Potter *v.* Coward, Meigs 22.

*Vermont.*— Hunt *v.* Thurman, 15 Vt. 336, 40 Am. Dec. 683.

*Washington.*— Knox *v.* Fuller, 23 Wash. 34, 62 Pac. 131.

*Wisconsin.*— Murphy *v.* Sagola Lumber Co., 125 Wis. 363, 103 N. W. 1113; Lum *v.* Hoag, 31 Wis. 687.

*United States.*— Wyoming Nat. Bank *v.* Dayton, 102 U. S. 59, 26 L. ed. 77; Carnahan *v.* Bailey, 28 Fed. 519; Buffum *v.* Merry, 4 Fed. Cas. No. 2,112, 3 Mason 478; Harper *v.* Dougherty, 11 Fed. Cas. No. 6,087, 2 Cranch C. C. 284.

*Canada.*— Mason *v.* Hatton, 41 U. C. Q. B. 610.

**A sale of personal property while under attachment,** where delivery can be made, will vest the title in the buyer subject to the attachment and prior to any subsequent attachment. Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688.

**Defective contract.**— Where a contract has been carried out and title to the property vested by delivery, an attaching creditor cannot assail the contract because it was executed in the name of only one of the original owners. Finding *v.* Hartman, 14 Colo. 596, 23 Pac. 1004.

**51.** Nicol *v.* Crittenden, 55 Ga. 497; Green *v.* Rowland, 16 Gray (Mass.) 58; Sandler *v.* Bresnaham, 53 Mich. 567, 19 N. W. 188; McDonald *v.* Clearwater Shortline R. Co., 164 Fed. 1007.

**Payment of price** generally see *infra*, VI, A, 5.

**52.** *Alabama.*— Francis-Chenoweth Hardware Co. *v.* Gray, 104 Ala. 236, 15 So. 911, 53 Am. St. Rep. 37; Shealy *v.* Edwards, 73 Ala. 175, 49 Am. Rep. 43.

*Arkansas.*— Anderson-Tully Co. *v.* Rozelle, 68 Ark. 307, 57 S. W. 1102.

*Illinois.*— Straus *v.* Minzesheimer, 78 Ill. 492.

*Indiana.*— Hollinsworth *v.* Bates, 3 Blackf. 340.

*Louisiana.*— Shuff *v.* Morgan, 9 Mart. 592.

*Massachusetts.*— Ropes *v.* Lane, 11 Allen 591.

*Michigan.*— Van Wert *v.* Olney, etc., Grocer Co., 100 Mich. 328, 59 N. W. 139.

*Texas.*— Baker *v.* Gninn, 4 Tex. Civ. App. 539, 23 S. W. 604.

**Delivery before weighing, measuring, or testing** to ascertain price see *supra*, VI, A, 2, d, (III), (A), (2).

**53.** *Alabama.*— Southern R. Co *v.* Spragins, 131 Ala. 319, 30 So. 824; Ezell *v.* English, 6 Port. 311.

*Colorado.*— Colorado Trading, etc., Co. *v.* Oliver, 20 Colo. App. 257, 78 Pac. 308.

*Illinois.*— Home Ins. Co. *v.* Heck, 65 Ill. 111; Gilbert *v.* Forest City Furniture Co., 72 Ill. App. 186; Sweet *v.* Scherber, 42 Ill. App. 237.

*Indiana.*— Bishplinghoff *v.* Bauer, 52 Ind. 519.

*Iowa.*— Smyth *v.* Ward, 46 Iowa 339; Cox *v.* Burns, 1 Iowa 64

*Maryland.*— Young *v.* Mertens, 27 Md. 114.

*Massachusetts.*— Plunger El. Co. *v.* Day, 184 Mass. 130, 68 N. E. 16; Gardner *v.* Lane, 9 Allen 492, 85 Am. Dec. 779.

*Michigan.*—Whitney *v.* Hall, 82 Mich. 580, 47 N. W. 27; Shipman *v.* Graves, 41 Mich. 675, 3 N. W. 177.

*Minnesota.*— Carter *v.* Cream of Wheat Co., 73 Minn. 315, 76 N. W. 55.

*Mississippi.*— Cole *v.* Bryant, 73 Miss. 297, 18 So. 655.

*Missouri.*— Lovelace *v.* Stewart, 23 Mo. 384; W. Irving Schermerhorn Bros. Co. *v.* Herold, 81 Mo. App. 461.

*Nebraska.*— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

*New Hampshire.*— Weld *v.* Hadley, 1 N. H. 295.

*New York.*— Stephens *v.* Santee, 49 N. Y. 35 [*reversing* 51 Barb. 532]; Cannings *v.* Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Fey *v.* Smith, 3 Daly 386; Hampshire Paper Co. *v.* Hunt, 9 N. Y. St. 31.

*North Dakota.*— Nichols, etc., Co. *v.* Paulson, 6 N. D. 400, 71 N. W. 136.

*Pennsylvania.*— Fogel *v.* Brubaker, 122 Pa. St. 7, 15 Atl. 692.

*Rhode Island.*—Hathaway *v.* O'Gorman Co., 26 R. I. 476, 59 Atl. 397.

*Texas.*— Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421.

*Vermont.*— Redington *v* Roberts, 25 Vt. 686.

*Wisconsin.*— Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829; McClure *v.* Jefferson, 85 Wis. 208, 54 N. W. 777.

*United States.*—The Frances, 9 Cranch 183, 3 L. ed. 698.

will pass upon delivery, although he refuses to do so.[54] So ordinarily a delivery and acceptance will, in the absence of fraud, divest the seller of his title to the goods;[55] but the property will not pass if the delivery was procured by fraud,[56] or mistake,[57] or is incomplete,[58] or conditional,[59] or is such as the buyer is not bound

*England.*— Morgan *v.* Gath, 3 H. & C. 748, 11 Jur. N. S. 654, 34 L. J. Exch. 165, 11 L. T. Rep. N. S. 96, 13 Wkly. Rep. 756.

*Canada.*— Barrett *v.* Rapelje, 4 U. C. Q. B. O. S. 175; Gooderham *v.* Dash. 9 U. C. C. P. 413; Mason *v.* Hatton, 41 U. C. Q. B. 610.

**Delivery to third person.**—Where goods were delivered to a third person instead of to the buyer, and the buyer accepted the delivery to such third person as sufficient by unconditionally demanding the flour of him, and by offering to pay the charges due thereon, the title vested in the buyer. Hanauer *v.* Bartels, 2 Colo. 514. So also on a sale of a life insurance policy a delivery of the bill of sale and the policy to a third person to hold and deliver the same to the buyer upon the death of the seller is sufficient to pass title thereto. Williams *v.* Guile, 46 Hun (N. Y.) 645 [*affirmed* in 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366].

**Waiver of delivery.**—A stipulation in a written contract of sale of a lot of cotton that "delivery is accepted" will relieve the seller from any further delivery and place the property at the risk of the buyer. Dupleix *v.* Gallien, 21 La. Ann. 534.

**Goods in transit.**— If, while goods are *in transitu*, the consignee disagrees to the consignment, and refuses to accept the goods, any person may at the request of the consignee receive and take care of them until the consignor can have notice of the disagreement; and an intermediate attachment of such goods for the consignee's debt would not be valid as against the consignor's rights. Lane *v.* Jackson, 5 Mass. 157.

**54.** Montgomery *v.* Thompson, 152 Cal. 319, 92 Pac. 866; Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963; Ballantine *v.* Robinson, 46 Pa. St. 177; Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. 330.

**If the seller has fully complied** with his part of the contract by delivering or tendering at the proper time goods which comply with the terms of the contract, and does so with the intention of transferring the title thereto, the title will pass to the buyer, although he refuses to accept. Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. 330.

**55.** *Colorado.*— Persse *v.* Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951.

*Illinois.*— Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257.

*Indiana.*—Rechtin *v.* McGary, 117 Ind. 132, 19 N. E. 731.

*Louisiana.*— Dennistown *v.* Malard, 2 La. Ann. 14.

*Michigan.*— Sullivan *v.* Sullivan, 76 Mich. 101, 42 N. W. 1090.

*Mississippi.*— Hazelhurst Lumber Co. *v.* J. A. Fay, etc., Co., (1895) 18 So. 485.

*Nebraska.*— Gray *v.* Peterson, 64 Nebr. 671, 90 N. W. 559.

*New York.*— Alvord *v.* Latham, 31 Barb. 294; Durbrow *v.* McDonald, 5 Bosw. 130; Caldwell *v.* Bartlett, 3 Duer 341.

*Ohio.*— Johnson *v.* Hays, 5 Ohio St. 101.

*Pennsylvania.*— Freedman *v.* Morrow Shoe Mfg. Co., 122 Pa. St. 25, 15 Atl. 690; Wylie's Appeal, 90 Pa. St. 210.

*Tennessee.*— Woods *v.* Burroughs, 2 Head 202.

*Vermont.*— Redington *v.* Roberts, 25 Vt. 686.

*United States.*— Van Winckle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880.

**Where the goods are delivered at the place designated** by the buyer or his agent and are accepted and paid for in pursuance of the contract, the title passes and the goods are not subject to attachment by creditors of the seller. Pusey *v.* Potomac Bridge Co., 8 Md. 470.

**56.** Galbraith *v.* Davis, 4 La. Ann. 95; Parmele *v.* McLaughlin, 9 La. 436; Gasquet *v.* Johnston, 2 La. 514; Prall *v.* Peet's Curator, 3 La. 274; Mechanics', etc., Bank *v.* Farmers', etc., Nat. Bank, 60 N. Y. 40; Brower *v.* Peabody, 13 N. Y. 121 [*affirming* 18 Barb. 599, 2 Abb. Pr. 211, 10 How. Pr. 125]; Blossom *v.* Champion, 37 Barb. (N. Y.) 554 [*reversing* 28 Barb. 217]; Logan *v.* Smith, 14 Phila. (Pa.) 114; Towsley *v.* Dana, 1 Aik. (Vt.) 344.

**Fraud in procuring sale as affecting transfer of title** see *supra*, VI, A, 2, b.

**Right to maintain trespass.**—After a delivery of goods sold, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring an action of trespass against the person taking them away. McCarty *v.* Vickery, 12 Johns. (N. Y.) 348.

**57.** Lelar *v.* Brown, 15 Pa. St. 215.

**58.** Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

**59.** *Louisiana.*— Parmele *v.* McLaughlin, 9 La. 436.

*Massachusetts.*— Fogg *v.* Millis, 138 Mass. 443; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545.

*New York.*— Cornell *v.* Clark, 104 N. Y. 451, 10 N. E. 888; Fleeman *v.* McKean, 25 Barb. 474; Bassett *v.* Spofford, 2 Daly 432; Klee *v.* Grant, 4 Misc. 88, 23 N. Y. Suppl. 855 [*reversing* 2 Misc. 412, 21 N. Y. Suppl. 1010].

*North Carolina.*— Devane *v.* Fennell, 24 N. C. 36.

*North Dakota.*— Nichols, etc., Co. *v.* Paulson, 6 N. D. 400, 71 N. W. 136.

*Wisconsin.*— Bayley *v.* Anderson, 71 Wis. 417, 36 N. W. 863.

*Canada.*— Smith *v.* Hobson, 16 U. C. Q. B. 368.

to accept,[60] as where the goods do not conform to the requirements of the contract,[61] or are not delivered at the time stipulated,[62] unless the buyer does in fact accept them.[63] So also while a delivery is perhaps the most significant fact as indicating an intention to transfer the title, it is not conclusive,[64] and notwithstanding there has been a delivery the property will not pass if it appears that such was the intention of the parties,[65] as when payment is made a condition precedent to the passing of the property.[66]

**c. Mode and Sufficiency of Delivery and Change of Possession** — (1) *In General.* In cases where a delivery is necessary to pass title as between the parties,[67] such delivery must be made in accordance with the terms of the contract;[68] but except as affected by the provisions of the contract, whether particular acts are sufficient to constitute a delivery which will pass title depends primarily upon whether they were so intended by the parties.[69] As against creditors of and subsequent purchasers from the seller the general rule is that the delivery must consist in an actual and continuous transfer of possession;[70] but this rule must be applied in view of the character and situation of the property and circumstances of the particular case,[71] and although such possession as the purchaser

**Express condition unnecessary.**— To constitute a conditional delivery it is not necessary that the seller should declare the condition in express terms at the time of the delivery, but it is sufficient if the intent of the parties that the delivery be conditional can be inferred from their acts and the circumstances of the case. Gibson *v.* Chicago Packing, etc., Co., 108 Ill. App. 100.

**Waiver of condition by buyer.**— Where the buyer is to be allowed to test the goods before final acceptance, this is a condition in his favor which he may waive, and the seller has no right to insist that the goods shall not be accepted until tested, and if the buyer does any act which shows that he has waived such condition and accepted the goods delivered, the title will vest in him. Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 808.

**Where a seller's agent makes an unauthorized conditional delivery** of property to the buyer, the seller cannot convert such delivery into an unconditional one so as to pass title to the buyer against his consent and refusal to accept. Nichols, etc., Co. *v.* Paulson, 6 N. D. 400, 71 N. W. 136.

60. Alsberg *v.* Latta, 30 Iowa 442; Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841; Porter Mfg. Co. *v.* Edwards, 29 Hun (N. Y.) 509.

**Right to inspect.**— The delivery is not complete so as to impose on the buyer the duty to accept and thus pass the title, if the buyer has the right to inspect the goods before acceptance. Chapin *v.* Fitzgerald, 1 Silv. Sup. (N. Y.) 349, 5 N. Y. Suppl. 722 [*affirmed* in 127 N. Y. 670, 28 N. E. 255]; Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

61. Alsberg *v.* Latta, 30 Iowa 442; Gardner *v.* Lane, 12 Allen (Mass.) 39; Pryor *v.* Portsmouth Cattle Co., 6 N. M. 44, 27 Pac. 327.

62. Sweet *v.* Scherber, 38 Ill. App. 578; Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646; Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841; Porter Mfg. Co. *v.* Edwards, 29 Hun (N. Y.) 509.

63. Hanauer *v.* Bartels, 2 Colo. 514; Gardner *v.* Lane, 12 Allen (Mass.) 39.

**The buyer may waive** any conditions which are for his benefit, and a non-compliance with which would justify a refusal to accept the goods, and upon such waiver the title will pass to him. Hanauer *v.* Bartels, 2 Colo. 514; Van Winckle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880.

**Question for jury.**— Whether there has been an acceptance where such fact has to be determined from the acts and conduct of the buyer is a question of fact for the jury. Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841.

64. Sherwood *v.* Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; Wilkinson *v.* Holiday, 33 Mich. 386.

65. Warren Mfg. Co. *v.* Norwich Bleaching, etc., Co., 56 Conn. 70, 13 Atl. 135; Ballantyne *v.* Appleton, 82 Me. 570, 20 Atl. 235; Wilkinson *v.* Holiday, 33 Mich. 386; Page *v.* Smith, 13 Oreg. 410, 10 Pac. 833.

66. Com. *v.* Adair, 89 S. W. 1130, 28 Ky. L. Rep. 657.

**Payment of price** generally see *infra*, VI, A, 5.

67. See *supra*, VI, A, 4, a, (I).

68. *Indian Territory.*—Baird Bros. *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648.

*Minnesota.*— Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646.

*Nebraska.*— Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841.

*New York.*—Porter Mfg. Co. *v.* Edwards, 29 Hun 509.

*Ohio.*— Mowry Car, etc., Works *v.* Shorter, 8 Ohio Dec. (Reprint) 290, 7 Cinc. L. Bul. 32.

**Effect of delivery** not in compliance with terms of contract see *supra*, VI, A, 4, b.

69. Dyer *v.* Libby, 61 Me. 45; Williams *v.* Guile, 46 Hun (N. Y.) 645 [*affirmed* in 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366]; Texas, etc., R. Co. *v.* Beard, 68 Tex. 264, 4 S. W. 483.

**Intention of parties** as to transfer of title generally see *supra*, VI, A, 2, a.

70. See *supra*, VI, A, 4, a, (II), (B).

71. *Arkansas.*— Puckett *v.* Reed, 31 Ark. 131.

can reasonably take must be taken,[72] it is not essential even as against creditors and subsequent purchasers that there should in all cases be an actual manual delivery or a change of possession at the time of the sale.[73] So no actual delivery and transfer of possession is necessary where from the nature or situation of the property it is impossible or impracticable,[74] as in the case of goods which at the time of the sale are situated at a distance,[75] whether on land or water,[76] or which are of such a bulky or ponderous nature that an actual manual delivery is impracticable.[77] The most that is demanded is that there shall be such a delivery and change of possession as may be practicable in view of the character and situation of the property,[78] and very slight acts will be sufficient where the sale is in good faith.[79] If the property is so situated that an immediate delivery is impossible it is sufficient if the buyer takes possession as soon as he is able to do so,[80] and where from the character or condition of the goods an actual manual delivery is impracticable, a constructive or symbolical delivery is sufficient.[81] So also in determining what is an actual delivery the nature of the property and circumstances attending the sale must be taken into consideration,[82] and as a general

*Illinois.*— Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

*Massachusetts.*— Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

*New Hampshire.*— Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

*Pennsylvania.*— Barr *v.* Reitz, 53 Pa. St. 256.

**72.** See Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

**73.** Puckett *v.* Reed, 31 Ark. 131; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

**74.** *Arkansas.*— Puckett *v.* Reed, 31 Ark. 131.

*Illinois.*— Ticknor *v.* McClelland, 84 Ill. 471; Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

*Massachusetts.*— Rice *v.* Austin, 17 Mass. 197; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202.

*Missouri.*— Rickey *v.* Zeppenfeldt, 64 Mo. 277.

*New Hampshire.*— Corning *v.* Records, 69 N. H. 390, 46 Atl. 462, 76 Am. St. Rep. 178.

*Pennsylvania.*— Leonard *v.* Winslow, 2 Grant 139.

*Vermont.*— Kingsley *v.* White, 57 Vt. 565; Evarts *v.* Butler, Brayt. 216.

*Wyoming.*— Kinney *v.* Rock Springs First Nat. Bank, 10 Wyo. 115, 67 Pac. 471, 98 Am. St. Rep. 972.

*United States.*— *In re* Pease Car, etc., Works, 134 Fed. 919.

**75.** Putnam *v.* Dutch, 8 Mass. 287; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

**76.** Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480. But see Burnell *v.* Robertson, 10 Ill. 282.

**77.** Puckett *v.* Reed, 31 Ark. 131; Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591; Rice *v.* Austin, 17 Mass. 197; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Kingsley *v.* White, 57 Vt. 565.

**78.** *Arkansas.*— Puckett *v.* Reed, 31 Ark. 131.

*California.*— Montgomery *v.* Hunt, 5 Cal. 366.

*Illinois.*— Straus *v.* Minzesheimer, 78 Ill. 492; Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

*Maine.*— Haskell *v.* Greely, 3 Me. 425.

*Massachusetts.*— Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

*New York.*— McNamara *v.* Edmister, 11 Hun 597.

*Pennsylvania.*— Barr *v.* Reitz, 53 Pa. St. 256.

*Vermont.*— Kingsley *v.* White, 57 Vt. 565; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

*England.*— Manton *v.* Moore, 7 T. R. 67, 101 Eng. Reprint 858.

**Posting a notice** on a crib of corn that the contents are the property of a certain person to whom the corn has been sold is sufficient to pass the title thereto, as against creditors or subsequent purchasers from the seller. Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591.

**79.** Stinson *v.* Clark, 6 Allen (Mass.) 340.

**80.** Putnam *v.* Dutch, 8 Mass. 287; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec 480. And see *infra*, VI, A, 4, c, (II).

**81.** Puckett *v.* Reed, 31 Ark. 131; Rice *v.* Austin, 17 Mass. 197.

**Constructive or symbolical delivery** see *infra*, VI, A, 4, c, (X).

**82.** Barr *v.* Reitz, 53 Pa. St 256, 258, where the court said: "The principle which underlies all the cases is, that there must be an actual separation of the property from the possession of the former owner at the time of the sale, or within a reasonable time afterward, according to the nature of the property delivered. But in effectuating this change, what difference does it make whether the property be removed from the owner or the owner remove from the property? It is not the mere place the property occupies which gives color of possession to the former owner, but it is the connection the place

rule it is sufficient to pass the property as against third persons if there is on the part of the buyer an assertion of ownership by acts of dominion and control over the goods.[83] Whether there has been a sufficient delivery and change of possession is ordinarily a question for the jury.[84]

(II) *Time of Delivery or Change of Possession.* Where a delivery is necessary to pass title as between the parties, it must be made at the time stipulated in the contract; [85] but in the absence of express stipulation it is not necessary as between the parties that the delivery should be at the time of the contract.[86] As against creditors of or subsequent purchasers from the seller, the buyer must, if it is practicable to do so, take possession at once,[87] or at least within a reasonable time,[88] that is, as soon as the nature of the subject-matter and the circumstances of the case will permit; [89] but the delivery need not be immediate, the buyer being entitled to what is a reasonable time according to the character and situation of the property and other circumstances of the case for acquiring possession.[90] So in cases where an immediate delivery is impossible, as in the case of a ship at sea or property situated at a distance, the buyer will acquire a good title if he takes possession within a reasonable time after it is possible for him to do so,

itself has with the owner indicating his apparent control over it."

**83.** *California.*— Ross *v.* Sedgwick, 69 Cal. 247, 10 Pac. 400.

*Colorado.*— Flick *v.* Graham, 5 Colo. App. 88, 37 Pac. 37.

*Illinois.*— Straus *v.* Minzesheimer, 78 Ill. 492.

*Iowa.*— Pope *v.* Cheney, 68 Iowa 563, 27 N. W. 754.

*Massachusetts.*— Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Washburn Iron Co. *v.* Russell, 130 Mass. 543; Rice *v.* Austin, 17 Mass. 197.

*Missouri.*— Huggins Cracker, etc., Co. *v.* Ellis, 45 Mo. App. 585.

*Pennsylvania.*— Williams *v.* Bristol Rolling Mill Co., 174 Pa. St. 299, 34 Atl. 442; Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740.

**Control of building.**— Where a buyer rents a building in which articles sold to him are stored and keeps them stored there, locked up, and insures them, such possession is sufficient to vest title in him as against creditors of the seller. McCartney *v.* Kraper, 84 Ill. App. 266. On the sale of a stock of liquors and bar fixtures in a saloon, there is a sufficient delivery and change of possession to pass title as against creditors of the seller, where the saloon is locked up and the key delivered to the buyer, and the seller is not thereafter in or about the place. Howe *v.* Johnson, 117 Cal. 37, 48 Pac. 978. A sale by a lodging-house keeper of the furniture in the house to a lodger is accompanied by a sufficient delivery and change of possession to protect the buyer as against the seller's creditors where he takes possession of the house, notifies the inmates, and continues in possession. Ross *v.* Sedgwick, 69 Cal. 247, 10 Pac. 400.

**84.** *Alabama.*—Robinson *v.* Hirschfelder, 59 Ala. 503.

*Illinois.*— Straus *v.* Minzesheimer, 78 Ill. 492.

*Indiana.*— Cloud *v.* Moorman, 18 Ind. 40.

*Iowa.*— Horsley *v.* Hairsine, 77 Iowa 141, 41 N. W. 597.

*Pennsylvania.*— McGuire *v.* James, 143 Pa. St. 521, 22 Atl. 751; Rothermel *v.* Marr, 98 Pa. St. 285; Pearson *v.* Carter, 94 Pa. St. 156; Smith *v.* Crisman, 91 Pa. St. 428; Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200.

*Texas.*— Brown *v.* Gupton, (Civ. App. 1894) 29 S. W. 88.

**85.** Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646; Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841. See also *supra*, VI, A, 4, b.

**86.** Bailey *v.* Moore, 60 N. C. 86, holding that, although a delivery is necessary, the title will vest in the buyer whenever the delivery is made or he acquires possession.

**87.** Seymour *v.* O'Keefe, 44 Conn. 128; Ingraham *v.* Wheeler, 6 Conn. 277.

**88.** State *v.* Hall, 45 Mo. App. 298; Carpenter *v.* Mayer, 5 Watts (Pa.) 483.

**What is a reasonable time** does not depend upon the convenience of the buyer but upon what time it is reasonably necessary for acquiring possession. Seymour *v.* O'Keefe, 44 Conn. 128.

**89.** Carpenter *v.* Mayer, 5 Watts (Pa.) 483.

**90.** Samuels *v.* Gorham, 5 Cal. 226; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581. But see Burnell *v.* Robertson, 10 Ill. 282, holding that under a sale of various articles which are scattered over a considerable area of country, the buyer, although he is proceeding with all reasonable despatch to get possession thereof, will not acquire title as against creditors of the seller who attach goods included in the sale before the buyer actually acquires possession.

**Although the statute requires immediate delivery,** a delivery within a reasonable time, in view of the character and situation of the property and the circumstances of the transaction, will be held to be sufficient. Samuels *v.* Gorham, 5 Cal. 226.

**Delivery prevented by wrong-doer.**— Where after a sale and before the buyer in the exercise of ordinary care and diligence can get possession of the property, a trespasser takes the property and secretes it and then it is

although the property has been attached before he could acquire possession.[91] In some cases it has been held that the buyer acquires a good title as against creditors if he acquires and retains possession of the goods prior to the levy of a creditor's execution or attachment,[92] although he did not do so within a reasonable time;[93] but on the contrary it has been held that if there has been an unreasonable delay the buyer does not acquire a good title as against creditors, although he acquires possession before the levy is made.[94] What is a reasonable time under the circumstances for acquiring possession is ordinarily a question of fact for the jury,[95] but under some circumstances may be a question of law for the court.[96]

(III) *PROPERTY IN POSSESSION OF BUYER.* Where the goods sold are already in the possession of the buyer at the time of the sale, no further act of delivery is ordinarily essential;[97] but if the buyer has been in possession as servant of the seller, there must be something to indicate the change in the character of his possession,[98] and the same rule applies to a joint or concurrent possession by the buyer and seller.[99]

(IV) *PROPERTY IN POSSESSION OF THIRD PERSON.* Since as between the parties it is not necessary that the seller shall be in possession of the property at the time of the sale,[1] or that there shall be a delivery to the buyer,[2] the property will ordinarily pass, unless a contrary intention appears, although the goods are in possession of a third person.[3] As against creditors of and subsequent pur-

attached by a creditor of the seller, the title of the buyer is not affected. Parsons *v.* Dickinson, 11 Pick. (Mass.) 352.

**91.** Meade *v.* Smith, 16 Conn. 346; Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508; Putnam *v.* Dutch, 8 Mass. 287; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

**Ship at sea.**— On the sale of a ship at sea it is sufficient if possession is taken on her arrival in port (Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508); and the same rule applies to a ship or cargo which at the time of the sale is in a distant port (Putnam *v.* Dutch, 8 Mass. 287; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253).

**92.** McIntosh *v.* Smiley, 107 Mo. 377, 17 S. W. 979; Toney *v.* Goodley, 57 Mo. App. 235; McKinley *v.* Ensell, 2 Gratt. (Va.) 333; Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

**93.** McIntosh *v.* Smiley, 107 Mo. 377, 17 S. W. 979; Toney *v.* Goodley, 57 Mo. App. 235.

**94.** Carpenter *v.* Mayer, 5 Watts (Pa.) 483.

**95.** Samuels *v.* Gorham, 5 Cal. 226; Meade *v.* Smith, 16 Conn. 346; Ingraham *v.* Wheeler, 6 Conn. 277.

**96.** State *v.* Hall, 45 Mo. App. 298.

**97.** Macomber *v.* Parker, 13 Pick. (Mass.) 175; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480; Manton *v.* Moore, 7 T. R. 67, 101 Eng. Reprint 858.

**Goods on land of buyer.**— Where one person has piled wood upon the land of another, it is constructively in the possession of the latter, and the acceptance by the landowner of an offer to sell the wood is an acceptance of the wood at the point where it lies and operates as a change of title. Texas, etc., R. Co. *v.* Beard, 68 Tex. 264, 4 S. W. 483.

**Sale of crop raised on shares.**— Where A leases B's land on shares and plants and cultivates a crop, and while the crop is growing B by an instrument in writing sells to A all his interest in the crop, A has all the possession of which the crop is susceptible, and the mere fact that B occupies the farmhouse on the land does not amount to a possession by him of the part sold to A. Visher *v.* Webster, 13 Cal. 58.

**98.** Grum *v.* Barney, 55 Cal. 254.

**99.** Flanagan *v.* Wood, 33 Vt. 332. See also Hall *v.* Parsons, 15 Vt. 358; Allen *v.* Edgerton, 3 Vt. 442.

**If it would be doubtful to a candid observer which of the parties has the ownership and control of the property, the law resolves the doubt against the party who should make the change of possession open and visible to the world.** Flanagan *v.* Wood, 33 Vt. 332.

**1.** Erwin *v.* Arthur, 61 Mo. 386. And see *supra*, II, C, 4.

**2.** See *supra*, VI, A, 4, a, (I).

**3.** *Arkansas.*— Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381.

*Connecticut.*— New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

*Illinois.*— Shelton *v.* Franklin, 68 Ill. 333.

*Louisiana.*— Meeker *v.* Vredenburg, 15 La. Ann. 438.

*Maine.*— Chase *v.* Willard, 57 Me. 157; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87.

*Maryland.*— Franklin *v.* Long, 7 Gill & J. 407.

*Missouri.*— Erwin *v.* Arthur, 61 Mo. 386; Sigerson *v.* Kahmann, 39 Mo. 206; Williams *v.* Gray, 39 Mo. 201; Harding *v.* Manard, 55 Mo. App. 364; Allgear *v.* Walsh, 24 Mo. App. 134; Nance *v.* Metcalf, 19 Mo. App. 183.

*Nebraska.*— Uhl *v.* Robison, 8 Nebr. 272.

*New York.*— Goodwin *v.* Kelly, 42 Barb. 194; Olyphant *v.* Baker, 5 Den. 379; Carter *v.* Jarvis, 9 Johns. 143.

chasers from the seller a distinction has been made in the application of the general rule requiring a change of possession, between cases where the property is left in the possession of the seller and where it is in the possession of a third person;[4] and where the property is in possession of a third person a further distinction is made according to the relations of such person to the buyer or seller;[5] but as to what will satisfy the rule the authorities are not uniform even in the same jurisdiction.[6] It has been held that it is sufficient as against creditors and subsequent purchasers if notice of the sale is given to the third person in possession,[7] unless his possession is of such a character that it does not convey any notice to the world of the change of ownership,[8] as where he is the servant of the seller,[9] and in some cases it has been held that it is not even necessary that he should be notified of the sale;[10] but in other cases it is held that such notice is necessary,[11] and in some cases that such third person must expressly or impliedly consent to hold the property for or as the bailee of the buyer.[12] It is sufficient if an order for the

*Tennessee.*— Rawls *v.* Patterson, 1 Baxt. 372.

*Vermont.*— Wooley *v.* Edson, 35 Vt. 314.

*United States.*— Winterport Granite, etc., Co. *v.* The Jasper, 30 Fed. Cas. No. 17,898, Holmes 99.

See 43 Cent. Dig. tit. "Sales," § 533.

**Tortious possession.**— A sale of chattels without delivery will pass title as against the seller, although the chattels are at the time in the tortious possession of another. Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87.

**Suspensory condition.**— Where it is agreed upon the sale of personal property which is to be affixed to realty and on which the seller takes a mortgage to secure a part of the price that delivery is not to be made by the agent of the railroad company, to whom the property is shipped, until the owner of the realty shall indorse on the mortgage his recognition of the rights of the mortgagee, the title passes at the time of the sale; delivery being merely suspended until the indorsement of such recognition. *In re* Hicks, 20 Mich. 280.

4. Flanagan *v.* Wood, 33 Vt. 332; Pierce *v.* Chipman, 8 Vt. 334. See also Creps *v.* Dunham, 69 Pa. St. 456.

**Property remaining in possession of seller** see *infra*, VI, A, 4, c, (v).

5. Flanagan *v.* Wood, 33 Vt. 332; Hall *v.* Parsons, 15 Vt. 358.

**Agent of buyer.**— If the third person in possession is the agent of the buyer this is a sufficient delivery of possession to the buyer. Hall *v.* Parsons, 15 Vt. 358.

**Servant of seller.**— If the third person in possession is the servant of the seller, his possession is, as regards third persons, the possession of the seller, and although he is notified of the sale this is not a sufficient delivery and change of possession as against creditors and subsequent purchasers. Flanagan *v.* Wood, 33 Vt. 332; Sleeper *v.* Pollard, 28 Vt. 709, 67 Am. Dec. 741.

6. See Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433; Wooley *v.* Edson, 35 Vt. 214.

7. *Idaho.*— Lufkins *v.* Collins, 2 Ida. (Hash.) 150, 7 Pac. 95.

*Maine.*— Moulton *v.* Lawrence, 50 Me. 100.

*Massachusetts.*— Carpenter *v.* Hale, 8 Gray 157; Tuxworth *v.* Moore, 9 Pick. 347, 20 Am. Dec. 479.

*Pennsylvania.*—Commonwealth Bank *v.* Delbanco, 1 Phila. 104.

*Rhode Island.*— Anthony *v.* Wheatons, 7 R. I. 490.

*Texas.*— Owens *v.* Clark, 78 Tex. 547, 15 S. W. 101.

*Vermont.*— Wing *v.* Peabody, 57 Vt. 19; Willard *v.* Lull, 17 Vt. 412; Pierce *v.* Chipman, 8 Vt. 334; Barney *v.* Brown, 2 Vt. 374, 19 Am. Dec. 720.

**The consent of the bailee is not necessary,** as, if he is notified of the sale, he becomes keeper for the true owner by operation of law. Pierce *v.* Chipman, 8 Vt. 334.

8. Flanagan *v.* Wood, 33 Vt. 332.

9. Flanagan *v.* Wood, 33 Vt. 332; Sleeper *v.* Pollard, 28 Vt. 709, 67 Am. Dec. 741.

10. Sansee *v.* Wilson, 17 Iowa 582; Thierman Co. *v.* Laupheimer, 55 S. W. 925, 21 Ky. L. Rep. 1631. See also Walling *v.* Miller, 15 Cal. 38, where, however, the sale was of an undivided interest and held to be in effect the assignment of a mere chose in action.

11. Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433; Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Hildreth *v.* Fitts, 53 Vt. 684; Wooley *v.* Edson, 35 Vt. 214; Marshall *v.* Towne, 28 Vt. 14.

**The third person must understand** that he holds the control for, and that his possession thereafter is, the possession of the buyer, otherwise there is no apparent change of possession available to the creditor or officer making the attachment. Hildreth *v.* Fitz, 53 Vt. 684.

12. Hallgarten *v.* Oldham, 135 Mass 1, 46 Am. Rep. 433.

**Character of bailment.**— In the application of this rule a distinction has been suggested based upon the character of the bailment, it being said that if such person has no right or interest in the property but is a mere custodian or keeper for the owner, there would be some propriety in requiring that he should assent to become the keeper for or the bailee of the buyer, but that if the person in possession has a right of possession in himself and is not a mere naked bailee, the buyer has no choice, and that all that he can or

property is given to the buyer and accepted by the person in possession;[13] or without any presentation and acceptance of the order if such third person is notified of the sale;[14] or, it has been held, without either presentation or notice if the buyer has not been guilty of any unreasonable delay in respect to such presentation or notice.[15]

(v) *Property Remaining in Possession of Seller.* Unless a contrary intention appears the property will pass as between the parties, although the goods remain in the custody of the seller as bailee of the buyer,[16] and notwithstanding the seller has a right to retain possession, until the price is paid;[17] but under the rule requiring an actual change of possession a sale of goods which remain in the possession of the seller vests no property in the buyer as against creditors and subsequent purchasers,[18] nor is it sufficient that there is an actual change of possession if it is merely temporary and the property is returned to the possession of the seller.[19] There will, however, be a delivery and change of possession sufficient to pass the property as against third persons, although the goods remain in the apparent possession of the seller, if it clearly appears that he is in possession merely as an employee of the buyer,[20] or that he is in possession as a

should be required to do is to give the bailee notice of the sale. See Wooley *v.* Edson, 35 Vt. 214.

**13.** Barrows *v.* Harrison, 12 Iowa 588; Wells *v.* Biscoe, 3 Gill (Md.) 406; Rawls *v.* Deshler, 4 Abb. Dec. (N. Y.) 12, 3 Keyes 572, 3 Transcr. App. 91 [*affirming* 28 How. Pr. 66].

**14.** Anthony *v.* Wheatons, 7 R. I. 490.

**15.** Puckett *v.* Reed, 31 Ark. 131; Gibson *v.* Stevens, 8 How. (U. S.) 384. 12 L. ed. 1123. But see Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433.

**16.** *Alabama.*— McCrae *v.* Young, 43 Ala. 622; Thomason *v.* Dill, 30 Ala. 444.

*California.*— Clark *v.* Rush, 19 Cal. 393.

*Delaware.*— Cowgill *v.* Ford, 2 Houst. 164.

*Illinois.*— Barker *v.* Bushnell, 75 Ill. 220; Cruikshank *v.* Cogswell, 26 Ill. 366; Rothwell *v.* Alves, 60 Ill. App. 156; Race *v.* Hansen, 12 Ill. App. 605.

*Indiana.*— Bertelson *v.* Bower, 81 Ind. 512.

*Mississippi.*— Beauchamp *v.* Comfort, 42 Miss. 94; Cassell *v.* Backrack, 42 Miss. 56, 97 Am. Dec. 436, 2 Am. Rep. 590.

*Missouri.*— Wheless *v.* Meyer, etc., Grocer Co., (App. 1909) 120 S. W. 708.

*New York.*— Wheelock *v.* Tanner, 39 N. Y. 481; Wooster *v.* Sherwood, 25 N. Y. 278; Dexter *v.* Norton, 55 Barb. 272 [*affirmed* in 47 N. Y. 62]; Hall's Safe, etc., Co. *v.* Reike, 2 N. Y. City Ct. 271; Olyphant *v.* Baker, 5 Den. 379; Lansing *v.* Turner, 2 Johns. 13.

*North Carolina.*— Worth *v.* Northam, 26 N. C. 102.

*Pennsylvania.*— Pittsburgh Glass Co. *v.* Electrical Supply, etc., Co., 39 Wkly. Notes Cas. 14.

*Texas.*— Midland Nat. Bank *v.* Strickland, 32 Tex. Civ. App. 91, 74 S. W. 588.

*United States.*— Barrett *v.* Goddard, 3 Fed. Cas. No. 1,406, 3 Mason 107.

**An assignee of the buyer** acquires title to the goods, although they are still in the hands of the seller and have never been in possession of the first buyer. Woods *v.* Nixon, Add. (Pa.) 131, 1 Am. Dec. 364.

**17.** Wheless *v.* Meyer, etc., Grocer Co., (Mo. App. 1909) 120 S. W. 708.

**18.** *Connecticut.*— Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

*Iowa.*— Boothby *v.* Brown, 40 Iowa 104.

*Massachusetts.*— Packard *v.* Wood, 4 Gray 307.

*New Hampshire.*— Janelle *v.* Denoncour, 68 N. H. 1, 44 Atl. 63.

*United States.*— Dooley *v.* Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. ed. 457 [*affirming* 88 Fed. 446, 31 C. C. A. 582].

*Canada.*— Doyle *v.* Lasher, 16 U. C. C. P. 263.

**Rebuttable presumption of fraud.**—In some cases it has been held that the retention of possession by the seller merely raises a presumption of fraud, which is not conclusive but may be rebutted. Shaul *v.* Harrington, 54 Ark. 305, 15 S. W. 835; Mead *v.* Smith, 16 Conn. 346; Shaddon *v.* Knott, 2 Swan (Tenn.) 558, 58 Am. Dec. 63.

**19.** Norton *v.* Doolittle, 32 Conn. 405; Morris *v.* Hyde, 8 Vt. 352, 30 Am. Dec. 475.

**20.** Bird *v.* Andrews, 40 Conn. 542; Gontier *v.* Thomas, 4 Rob. (La.) 435; Carpenter *v.* Clark, 2 Nev. 243.

**Buyer or seller as servant.**—Where the buyer of stock is the servant of the seller and so remains keeping the stock in his employer's pasture as before, there may nevertheless have been an actual change of possession sufficient as against creditors of the seller (Webster *v.* Anderson, 42 Mich. 554, 4 N. W. 288, 26 Am. Rep. 452); but while the buyer may employ the seller, yet if he leaves him in entire charge of the property or in such apparently entire charge that there is no apparent change of possession or means by which third persons can take notice that there has been any change it is not sufficient (Etchepare *v.* Aguirre, 91 Cal. 288, 28 Pac. 668, 929, 25 Am. St. Rep. 180).

**Employment of seller's servant.**— Where cattle sold were in charge of an agent of the seller, and on presentation of an order from the seller the agent pointed out the cattle declaring that he delivered them to the buyer, the employment of such agent to take charge of the cattle for the buyer does not render

bailee,[21] or trustee for the buyer;[22] but there must be some act or circumstance to indicate the change in the character of his possession and give notice to the world of the change of ownership,[23] or the possession will be regarded as continuing in the seller.[24] If the seller becomes a tenant of the buyer his possession as tenant is the possession of the buyer, and is not evidence of his continued ownership.[25]

the delivery and change of possession incomplete. Montgomery *v.* Hunt, 5 Cal. 366. But see Sleeper *v.* Pollard, 28 Vt. 709, 67 Am. Dec. 741, holding that merely requesting a servant in charge of the seller's barn to take care of a part of the hay therein for a buyer is not such a substantial, visible change of possession as will prevail against creditors of the seller.

21. *Connecticut.*— Partridge *v.* Wooding, 44 Conn. 277.

*Iowa.*— Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112.

*Maine.*— Hotchkiss *v.* Hunt, 49 Me. 213; Boynton *v.* Veazie, 24 Me. 286.

*Massachusetts.*— Stone *v.* Hodges, 14 Pick. 81. But see Rourke *v.* Bullens, 8 Gray 549, where the sale was otherwise incomplete.

*Nebraska.*— Dexter *v.* Citizens' Nat. Bank, 4 Nebr. 380, 94 N. W. 530.

*New York.*— McNamara *v.* Edmister, 11 Hun 597; Tallman *v.* Kearney, 3 Thomps. & C. 412; Hunn *v.* Bowne, 2 Cai. 38.

*Ohio.*— Johnson *v.* Hays, 5 Ohio St. 101.

*Pennsylvania.*—Warwick Iron Co. *v.* Honeybrook First Nat. Bank, 10 Pa. Cas. 14, 13 Atl. 79.

*Virginia.*— McKinley *v.* Ensell, 2 Gratt. 333.

**Incidental use.**— The fact that the brother of the vendor drove the team sold both before and after the sale cannot be regarded as conclusive evidence against the continuity of possession in the purchaser. O'Gara *v.* Lowry, 5 Mont. 427, 5 Pac. 583.

22. Hardwick *v.* Robinson, 1 Stew. & P. (Ala.) 99. And see Jones *v.* Hall, 58 N. C. 26.

**Sale by father to minor son.**— A father may contract with his minor son to pay the latter wages for his services, and may, in satisfaction of the debt, deliver to him personal property. In such cases the possession of the father becomes that of the son, and the property will not be subject to attachment for the purchase-money, although found in the possession of the father. Such possession is not inconsistent with the minor's title as against third persons. Hargrove *v.* Turner, 112 Ga. 134, 37 S. E. 89, 81 Am. St. Rep. 24.

23. *California.*— Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180.

*Connecticut.*— Hull *v.* Sigsworth, 48 Conn. 258, 40 Am. Rep. 167.

*Iowa.*— Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512; Boothby *v.* Brown, 40 Iowa 104.

*Ohio.*— Fiser *v.* Flickingham Wheel Co., 28 Ohio Cir. Ct. 501.

*United States.*— Dooley *v.* Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. ed. 457 [*affirming* 88 Fed 446, 31 C. C. A. 582].

**Sale by husband to wife.**— Where a husband sells to his wife who is living with him on a farm certain farm animals, and there is no delivery except the delivery of a bill of sale, the animals remaining in the possession of the husband, and being used by him in the same manner as before the sale, there is no sufficient delivery or change of possession as against creditors. McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200.

**Buyer as employee of seller.**— If the buyer is a servant of the seller and the goods sold remain in the apparent possession of the seller without anything to indicate the change of ownership, there is not a sufficient change of possession as against creditors and subsequent purchasers. Hull *v.* Sigsworth, 48 Conn. 258, 40 Am. Rep. 167 [*distinguishing* Elmer *v.* West, 47 Conn. 56]; Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512.

**If the goods remain in the same building** where they have been kept before the sale and there is no change in the occupancy or possession of the building which is the property and in possession of the seller, the change of possession is not sufficient. Boothby *v.* Brown, 40 Iowa 104.

**The absence of acts of ownership or control** on the part of the seller is not sufficient evidence of an actual transfer of possession to the buyer. Hickok *v.* Buell, 51 Iowa 655, 2 N. W. 512; Boothby *v.* Brown, 40 Iowa 104.

**Sale of stock of goods.**— Where the owner of a store sells his stock of goods to another and a new sign is put on the building bearing the name of the buyer, and bills are thereafter made out in the name of the buyer, there is a sufficient change of possession, although the seller remains in the store assisting the buyer in attending to the business. Rothermel *v.* Marr, 98 Pa. St. 285. *Compare* Young *v.* Poole, (Cal. 1887) 13 Pac. 492. But it is not sufficient where no notice of the sale is given, and the only acts indicating a change of ownership consist in insuring the goods in the name of the buyer, opening a new set of books, billing goods sold in the name of the buyer, and placing the proceeds to his credit, the stock of goods remaining in the custody of the same persons as before. Dooley *v.* Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. ed. 457 [*affirming* 88 Fed. 446, 31 C. C. A. 582].

**Merely walking around a pile of lumber** which is left on the land and in the apparent possession of the seller is not sufficient to obviate the necessity of other notice as against a subsequent purchaser. Black Rock Bank *v.* Decker, 65 Ark. 33, 44 S. W. 220.

24. Boothby *v.* Brown, 40 Iowa 104.

25. Talcott *v.* Wilcox, 9 Conn. 134. See also Clark *v.* McGrath, (Tex. Civ. App. 1893) 22 S. W. 527. But see Packard *v.* Wood, 4 Gray (Mass.) 307.

(VI) *SEGREGATION AND SETTING APART.* Although the goods remain in the physical possession of the seller, yet there is such a delivery as will pass the property in the goods even as against third persons if they are segregated and set apart for the buyer,[26] or marked as his property.[27] If, however, the goods are part of a mass merely marking them without separating them from the mass is not sufficient.[28]

(VII) *POINTING OUT OR PLACING GOODS AT DISPOSAL OF BUYER.* In many cases it is sufficient to pass the property in the goods, even as against third persons, if the seller points them out with a declaration that they are turned over to the buyer as his property,[29] or places them at the disposal of the buyer who is given access to and opportunity to remove them,[30] particularly if the character of the goods is such that an actual manual delivery is impracticable.[31] The buyer should, however, without unreasonable delay, remove the goods, or at least exercise some acts of ownership or control over them,[32] as it is not alone sufficient that the goods are pointed out to the buyer if he afterward exercises no act of ownership over them,[33] or that he has access to and a right to remove them if he makes no attempt to do so;[34] nor is it sufficient merely that they have been placed upon the land of the buyer.[35] The sale must of course be otherwise complete,[36] and it must be the intention of the parties that the property shall pass.[37]

**26.** *Massachusetts.*—Morse *v.* Sherman, 106 Mass. 430.

*Michigan.*— World Mfg. Co. *v.* Hamilton-Kenwood Cycle Co., 123 Mich. 620, 82 N. W. 528; Whitcomb *v.* Whitney, 24 Mich. 486.

*Missouri.*— Collins *v.* Wayne Lumber Co., 128 Mo. 451, 31 S. W. 24.

*New York.*— Brewer *v.* Salisbury, 9 Barb. 511; Schwab *v.* Oatman, 56 Misc. 393, 106 N. Y. Suppl. 741.

*Pennsylvania.*— Pittsburg Glass Co. *v.* Doubleday, 2 Pa. Super. Ct. 170; Hoffman *v.* Hartman, 11 Pa. Co. Ct. 73.

*Tennessee.*— Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401.

*Vermont.*— Griswold *v.* Scott, 66 Vt. 550, 29 Atl. 1013.

*Wisconsin.*— Fletcher *v.* Ingram, 46 Wis. 191, 50 N. W. 424.

*United States.*— *In re* Pease Car, etc., Works, 134 Fed. 919.

But see Calcutt *v.* Ruttan, 13 U. C. Q. B. 146.

**27.** Barker *v.* Livingston County Nat. Bank, 30 Ill. App. 591; State *v.* Knapp, etc., Co., 13 Mo. App. 467; Cady *v.* Zimmerman, 20 Mont. 225, 50 Pac. 553; Kennedy *v.* Whittie, 27 Nova Scotia 460. But see Dougherty *v.* Haggerty, 96 Pa. St. 515 (holding that marking by the seller, the buyer not being present, is not such an irrevocable appropriation as will pass the property as against third persons); Doyle *v.* Lasher, 16 U. C. C. P. 263.

**28.** Trimble *v.* Keet, 65 Mo. App. 174. See also Davis *v.* Meyer, 47 Ark. 210, 1 S. W. 95.

**29.** Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729; Stinson *v.* Clark, 6 Allen (Mass.) 340; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Hopkins *v.* Partridge, 71 Tex. 606, 10 S. W. 214. But see McCann *v.* Meyer, 4 Ill. App. 376 (holding that merely pointing out machines, neither party touching them, was not a good delivery); Shepard *v.* Briggs, 26 Vt. 149.

**30.** *Alabama.*— Smith *v.* State, 84 Ala. 438, 4 So. 683.

*Maine.*— Bucknam *v.* Nash, 12 Me. 474, where the buyer took possession with consent of the seller.

*Michigan.*— Ferguson *v.* Arthur, 128 Mich. 297, 87 N. W. 259.

*Tennessee.*—Bond *v.* Greenwald, 4 Heisk. 453.

*Texas.*—Williams *v.* Blum, 2 Tex. App. Civ. Cas. § 501.

See 43 Cent. Dig. tit. "Sales," § 534.

**31.** Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

**Character of property** as affecting sufficiency of delivery and change of possession see *supra*, VI, A, 4, c, (I).

**32.** *California.*—Chaffin *v.* Doub, 14 Cal. 384.

*Connecticut.*— Seymour *v.* O'Keefe, 44 Conn. 128.

*Nevada.*— Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540.

*Pennsylvania.*— Haynes *v.* Hunsicker, 26 Pa. St. 58.

*Vermont.*— Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

*Wisconsin.*— Webber *v.* Roddis, 22 Wis. 61.

**Failure to remove.**— If the failure to remove the goods is not the fault of the buyer, the property will pass. Haynes *v.* Hunsicker, 26 Pa. St. 58. But if he makes no attempt to remove the goods, it is not such a delivery as will pass the property as against third persons. Seymour *v.* O'Keefe, 44 Conn. 128; Smith *v.* Champney, 50 Iowa 174.

**33.** Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540.

**34.** Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180.

**35.** Kansas City, etc., Cement Co. *v.* Reese, 3 Kan. App. 135, 42 Pac. 832.

**36.** Fagan *v.* Faulkner, 5 Ark. 161. See also Kirkpatrick *v.* Snyder, 33 Ind. 169.

**37.** Jackson *v.* Carson, 160 Mass. 215, 35 N. E. 483.

(VIII) *DELIVERY TO OR THROUGH CARRIER* — (A) *In General.* Since a delivery to a carrier is under proper conditions a delivery to the buyer,[38] a delivery to the carrier designated by the purchaser or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser is sufficient to transfer the property in the goods,[39] subject, however, to the seller's lien,[40] or right of stoppage *in transitu*;[41] and the rule applies, although the goods are not specific,[42] the delivery in such case being equivalent to an appropriation

**38.** See *supra*, V, B, 8, 1, (I).

**39.** *Alabama.*— Guntersville Bank *v.* Jones Cotton Co., 156 Ala. 525, 46 So. 971.

*Arkansas.*— Hope Lumber Co. *v.* Foster, etc., Hardware Co., 53 Ark. 196, 13 S. W. 731.

*California.*— Gates *v.* Carquinez Packing Co., 78 Cal. 439, 21 Pac. 1.

*Colorado.*— Hill *v.* Fruita Mercantile Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. Rep. 172.

*Indiana.*—Rechtin *v.* McGary, 117 Ind. 132, 19 N. E. 731.

*Indian Territory.*—Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648.

*Iowa.*—Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144, 56 N. W. 417.

*Louisiana.*— Chaffe *v.* Heyner, 31 La. Ann. 594.

*Maryland.*— Ricards *v.* Wedemeyer, 75 Md. 10, 22 Atl. 1101.

*Massachusetts.*— Odell *v.* Boston, etc., R. Co., 109 Mass. 50.

*Minnesota.*—Yallop-De Groot Co. *v.* Minneapolis, etc., R. Co., 33 Minn. 482, 24 N. W. 185.

*Montana.*— Helena First Nat. Bank *v.* McAndrews, 7 Mont. 150, 14 Pac. 763.

*New York.*— Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Waldron *v.* Romaine, 22 N. Y. 368; Smith *v.* Edwards, 29 Hun 493; Glen *v.* Whitaker, 51 Barb. 451; Chapman *v.* Kent, 3 Duer 224; Grosvenor *v.* Phillips, 2 Hill 147; People *v.* Haynes, 14 Wend. 546, 28 Am. Dec. 530.

*North Carolina.*—Albemarle Lumber Co. *v.* Wilcox, 105 N. C. 34, 10 S. E. 871; Gwyn *v.* Richmond, etc., R. Co., 85 N. C. 429, 39 Am. Rep. 708.

*Texas.*— Woods *v.* Half, 44 Tex. 633; Gulf, etc., R. Co. *v.* Rotter, (Civ. App. 1907) 104 S. W. 402; Orthwein *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364.

*United States.*— The Mary and Susan, 1 Wheat. 25, 4 L. ed. 27; Low *v.* Andrews, 15 Fed. Cas. No. 8,559, 1 Story 38.

*England.*— Johnson *v.* Lancashire, etc., R. Co., 3 C. P. D. 499, 39 L. T. Rep. N. S. 448, 27 Wkly. Rep. 459.

**40.** Carthage *v.* Duvall, 105 Ill. App. 123 [*affirmed* in 202 Ill. 234, 66 N. E. 1099]; Munsell *v.* Carthage, 105 Ill. App. 119 [*affirmed* in 203 Ill. 474, 67 N. E. 831]; State *v.* Peters, 91 Me. 31, 39 Atl. 342.

**41.** *Illinois.*— Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Bliss *v.* Geer, 7 Ill. App. 612.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

*New Jersey.*— Kelsea *v.* Ramsey, etc., Mfg. Co., 55 N. J. L. 320, 26 Atl. 907, 22 L. R. A. 415.

*New York.*— Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Waldron *v.* Romaine, 22 N. Y. 368; People *v.* Haynes, 14 Wend. 546, 28 Am. Dec. 530.

*Pennsylvania.*— Schmertz *v.* Dwyer, 53 Pa. St. 335.

*Texas.*— Gulf, etc., R. Co. *v.* Rotter, (Civ. App. 1907) 104 S. W. 402.

*United States.*— Blum *v.* The Caddo, 3 Fed. Cas. No. 1,573, 1 Woods 64.

*England.*— Dawas *v.* Peck, 3 Esp. 12, 8 T. R. 330, 4 Rev. Rep. 675, 101 Eng. Reprint 1417.

**Right of stoppage in transitu** see *infra*, VIII, B.

**42.** *Alabama.*— Foley *v.* Felrath, 98 Ala. 176, 13 So. 485, 39 Am. St. Rep. 39; Pilgreen *v.* Stale, 71 Ala. 368.

*Arkansas.*— Burton *v.* Baird, 44 Ark. 556.

*Georgia.*— Watkins *v.* Paine, 57 Ga. 50.

*Illinois.*— Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Carthage *v.* Duvall, 105 Ill. App. 123 [*affirmed* in 202 Ill. 234, 66 N. E. 1099]; Munsell *v.* Carthage, 105 Ill. App. 119 [*affirmed* in 203 Ill. 474, 67 N. E. 831]; Bliss *v.* Geer, 7 Ill. App. 612.

*Indiana.*— Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

*Maine.*— State *v.* Peters, 91 Me. 31, 39 Atl. 342; Torrey *v.* Corliss, 33 Me. 333; Barry *v.* Palmer, 19 Me. 303.

*Maryland.*— Campbell *v.* Ehlen, 76 Md. 93, 24 Atl. 420.

*Massachusetts.*— Lord *v.* Edwards, 148 Mass. 476, 20 N. E. 161, 12 Am. St. Rep. 581, 2 L. R. A. 519; Odell *v.* Boston, etc., R. Co., 109 Mass. 50; Finch *v.* Mansfield, 97 Mass. 89; Putnam *v.* Tillotson, 13 Metc. 517.

*Michigan.*— Althouse *v.* McMillan, 132 Mich. 145, 92 N. W. 941; Kuppenheimer *v.* Wertheimer, 107 Mich. 77, 64 N. W. 952, 61 Am. St. Rep. 317.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; Hening *v.* Powell, 33 Mo. 468.

*Nebraska.*— Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534.

*New Hampshire.*— Arnold *v.* Prout, 51 N. H. 587.

*New Jersey.*— Kelsea *v.* Ramsey, etc., Mfg. Co., 55 N. J. L. 320, 26 Atl. 907, 22 L. R. A. 415.

*New York.*— Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402.

*North Carolina.*— Upshur Guano Co. *v.* Malloy, 104 N. C. 674, 10 S. E. 472.

*Oregon.*— Barr *v.* Borthwick, 19 Oreg. 578, 25 Pac. 360.

by the seller.[43] The rule presupposes, however, that the delivery is complete,[44] that the goods are of the kind and quality ordered,[45] that they are shipped according to the directions given by the buyer,[46] and that the goods are consigned in the name of the buyer or the bill of lading is indorsed or delivered so as to confer on him the right to receive the goods from the carrier without reservation.[47] The

*Pennsylvania.*— Diehl *v.* McCormick, 143 Pa. St. 584, 22 Atl. 1033; Bacharach *v.* Chester Freight Line, 133 Pa. St. 414, 19 Atl. 409; Schmertz *v.* Dwyer, 53 Pa. St. 335.

*Rhode Island.*— Hobart *v.* Littlefield, 13 R. I. 341.

*Texas.*— Greif *v.* Seligman, (Civ. App. 1904) 82 S. W. 533.

*Wisconsin.*— Sarbecker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624; Ranney *v.* Higby, 4 Wis. 154.

*United States.*— Easton *v.* Wostenholm, 137 Fed. 524, 70 C. C. A. 108; Blum *v.* The Caddo, 3 Fed. Cas. No. 1,573, 1 Woods 64; Low *v.* Andrews, 15 Fed. Cas. No. 8,559, 1 Story 38.

*England.*— Vale *v.* Bayle, Cowp. 294, 98 Eng. Reprint 1094; Snee *v.* Prescot, 1 Atk. 248, 26 Eng. Reprint 157; Fragano *v.* Long, 4 B. & C. 219, 6 D. & R. 283, 3 L. J. K. B. O. S. 177, 10 E. C. L. 551; Dutton *v.* Solomonson, 3 B. & P. 582, 7 Rev. Rep. 883; Cooke *v.* Ludlow, 2 B. & P. N. R. 119; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Dawes *v.* Peck, 3 Esp. 12, 8 T. R. 330, 4 Rev. Rep. 675, 101 Eng. Reprint 1417; Groning *v.* Mendham, 5 M. & S. 189; Godfrey *v.* Furzo, 3 P. Wms. 185, 24 Eng. Reprint 1022; Copeland *v.* Lewis, 2 Stark. 33, 3 E. C. L. 305.

See 43 Cent. Dig. tit. "Sales," § 535.

**Limitation of rule.**— The rule that delivery by the seller to a carrier transfers the title to the buyer does not apply to a sale between parties not distant from each other, without clear proof that he was a common carrier in the legal sense. A drayman carrying from one part of a city to another is not conclusively a common carrier. Charles *v.* Lasher, 20 Ill. App. 36.

**Goods not ordered.**— Delivery of goods to a carrier, to be shipped to one who has not ordered them, does not vest in such consignee the title to the goods; and the shipper may, while the goods are in transit, order them delivered to another person. Ruhl *v.* Corner, 63 Md. 179. But if by a course of dealing between a merchant in a city and another in the country, the former is authorized to send goods to the latter without special order, the property in goods so sent vests in the latter from the delivery to the carrier. Morberger *v.* Hackenberg, 13 Serg. & R. (Pa.) 26.

**43.** *Maryland.*— Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177.

*Massachusetts.*— Smith *v.* Edwards, 156 Mass. 221, 30 N. E. 1017; Frank *v.* Hoey, 128 Mass. 263; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Claflin *v.* Boston, etc., R. Co., 7 Allen 341.

*Minnesota.*— Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646.

*Washington.*— Osborne *v.* Van Atten, 3 Wash. Terr. 53, 13 Pac. 242.

*England.*— Green *v.* Sichel, 7 C. B. N. S. 747, 29 L. J. C. P. 213, 6 Jur. N. S. 827, 2 L. T. Rep. N. S. 745, 8 Wkly. Rep. 663, 97 E. C. L. 747; Calcutta, etc., Steam Nav. Co. *v.* De Matlos, 33 L. J. Q. B. 214, 10 L. T. Rep. N. S. 246, 12 Wkly. Rep. 560.

**44.** Jones *v.* Bradner, 10 Barb. (N. Y.) 193.

**45.** *Illinois.*— Wolf *v.* Dietzsch, 75 Ill. 205; Ellis *v.* Roche, 73 Ill. 280.

*Massachusetts.*— Smith *v.* Edwards, 156 Mass. 221, 30 N. E. 1017.

*Michigan.*— Kuppenheimer *v.* Wertheimer, 107 Mich. 77, 64 N. W. 952, 61 Am. St. Rep. 317.

*Washington.*— Osborne *v.* Van Atten, 3 Wash. Terr. 53, 13 Pac. 242.

*Wisconsin.*— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

**46.** Woodruff *v.* Noyes, 15 Conn. 335; McDonald *v.* Pearre, 5 Ga. App. 130, 62 S. E. 830; Hoover *v.* Maher, 51 Minn. 269, 53 N. W. 646; Hills *v.* Lynch, 3 Rob. (N. Y.) 42.

**Wrong delivery.**— Where the seller of merchandise agreed with the vendee to deliver it on board a brig lying at pier No. 9, North river, but by mistake of the carman it was delivered to another brig lying at pier No. 9, East river, and a receipt for the merchandise was signed by the master of the latter brig, which sailed before the mistake was discovered, and the seller then delivered similar merchandise on the other brig in fulfilment of his contract, it was held that the title to the merchandise shipped on the wrong brig remained in the vendor, so that he could sue such brig for the value thereof. Wilson *v.* Truxillo, 29 Fed. Cas. No. 17,841.

**Failure to insure.**— Where a seller delivers goods to a carrier uninsured when they have been ordered by the buyer to be shipped insured, and the goods are lost, the seller cannot recover the price from the buyer. McDonald *v.* Pearre, 5 Ga App. 130, 62 S. E. 830.

**47.** *Alabama.*— Jones *v.* Sims, 6 Port. 236, 33 Am. Dec. 313.

*Louisiana.*— Chaffe *v.* Heyner, 31 La. Ann. 594.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

*Nevada.*— West *v.* Humphrey, 21 Nev. 80, 25 Pac. 446.

*New Mexico.*— Orange County Fruit Exch. *v.* Hubbell, 10 N. M. 47, 61 Pac 121.

*New York.*— Smith *v.* Edwards, 29 Hun 493; Jones *v.* Bradner, 10 Barb. 193.

*North Carolina.*— Albemarle Lumber Co. *v.* Wilcox, 105 N. C. 34, 10 S. E. 871; Gwyn *v.* Richmond, etc., R. Co., 85 N. C. 429, 39 Am. Rep. 708.

*Texas.*— Orthwein *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364.

property will not pass if the seller retains the right of disposal of the goods,[48] or the passing of the property is made conditional on the payment of the price.[49]

(B) *Where Goods Are to Be Carried to Place of Delivery.* Under the general rule that the property does not pass if any act connected with the subject-matter remains to be done,[50] if the goods sold are to be transported by the seller to the place of delivery, the property, unless a different intention appears, will not pass until this is done.[51] As soon, however, as the delivery is completed the property

*United States.*— Grove *v.* Brien, 8 How. 429, 12 L. ed. 1142; The Mary and Susan, 1 Wheat. 25, 4 L. ed. 27.

*England.*— Tregelles *v.* Sewell, 7 H. & N. 574; Browne *v.* Hare, 4 H. & N. 822, 5 Jur. N. S. 711, 29 L. J. Exch. 6, 7 Wkly. Rep. 619.

**Indorsement of bill of lading.**— Where a manufacturer, under directions from the seller of goods, ships them directly to the purchaser, and the bill of lading is made out in the name of the seller, who indorses it to the purchaser, the title, on indorsement of the bill of lading and delivery of the goods to the carrier, passes to the purchaser. Mitchell *v.* Baker, 208 Pa. St. 377, 57 Atl. 760.

**Change of possession.**— Where the buyer is named as consignee and the bill of lading is deposited in the mail for transmission to him, there is a complete change of possession. Fetter *v.* Field, 1 La. Ann. 80.

**In whom title vests.**— Where a bill of lading for goods consigned is special to deliver the goods to the consignee for the use or on account of a third party, the property in the goods vests in the latter and not in the consignee. Richardson *v.* Hutchinson, 20 Fla. 21. Where a wire company instructed its correspondents to purchase iron rods for it, and to take and receive the bills of lading therefor, to hold as security for the repayment of the purchase-money, the title to the goods vested in the correspondents, although the company's agents obtained possession of bills of lading from the shippers, where they immediately indorsed and delivered them to the correspondents in exchange for the latter's acceptances. Baring *v.* Galpin, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

48. See *infra*, VI, A, 6.

49. See *infra*, VI, A, 5.

50. See *supra*, VI, A, 2, d.

51. *Alabama.*—Robinson *v.* Hirschfelder, 59 Ala. 503.

*Colorado.*— Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

*Connecticut.*— Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212.

*Georgia.*— Russell *v.* Abbott, 91 Ga. 178, 16 S. E. 1005.

*Kansas.*— Hunter Bros. Milling Co. *v.* Kramer, 71 Kan. 468, 80 Pac. 963.

*Kentucky.*— Com. *v.* Adair, 121 Ky. 689, 89 S. W. 1130, 28 Ky. L. Rep. 657; Herrman *v.* Whitescarver, 89 Ky. 633, 13 S. W. 103, 11 Ky. L. Rep. 786; Brown *v.* Childs, 2 Duv. 314; Miller *v.* Somerset Cedar Post, etc., Co., 51 S. W. 615, 21 Ky. L. Rep. 424.

*Maine.*—Wilson *v.* Stratton, 47 Me. 120.

*Maryland.*— Salmon *v.* Boykin, 66 Md. 541, 7 Atl. 701.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

*Nebraska.*— Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534.

*New Jersey.*— Conn *v.* Reed, 73 N. J. L. 112, 62 Atl. 271.

*New York.*— Evans *v.* Harris, 19 Barb. 416; Chapman *v.* Kent, 3 Duer 224; Bates *v.* New Orleans, etc., R. Co., 4 Abb. Pr. 72, 13 How. Pr. 516; Field *v.* Moore, Lalor 418; McDonald *v.* Hewett, 15 Johns. 349, 8 Am. Dec. 241.

*North Carolina.*— Acme Paper Box Factory *v.* Atlantic Coast Line R. Co., 148 N. C. 421, 62 S. E. 557; Branson *v.* Gales, 7 N. C. 312.

*Ohio.*— Ormsbee *v.* Machir, 20 Ohio St. 295.

*Pennsylvania.*— Sneathen *v.* Grubbs, 88 Pa. St. 147; Doverspike *v.* Jewart, 2 Pa. Super. Ct. 313, 38 Wkly. Notes Cas. 491.

*South Carolina.*— Neil *v.* Cheves, 1 Bailey 537.

*Tennessee.*— McDowell *v.* Murfreesboro, 103 Tenn. 726, 54 S. W. 976; East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. 272.

*Texas.*— Crowdus *v.* Sanders, 3 Tex. App. Civ. Cas. § 461.

*Washington.*— Northern Pac. Lumbering, etc., Co. *v.* Kerron, 5 Wash. 214, 31 Pac. 595.

*United States.*— The Venus, 8 Cranch 253, 3 L. ed. 553; Buckingham *v.* Dake, 112 Fed. 258, 50 C. C. A. 492; McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Blewett *v.* U. S., 10 Ct. Cl. 235.

*England.*— Calcutta, etc., Steam Nav. Co. *v.* De Mattos, 32 L. J. Q. B. 322, 11 Wkly. Rep. 1024; Wheeler *v.* Pearson, 5 Wkly. Rep. 227.

**Payment of freight by seller.**— Where an agreement to sell and ship property to a distant point does not expressly provide for delivery, the fact that the seller is to pay the freight and furnish the property at the destination for a specified price, without cost to the buyer, is some evidence that the title was not to pass until delivery was made. Hunter Bros. Milling Co. *v.* Kramer, 71 Kan. 468, 80 Pac. 963. But the mere fact that the seller contracts to see the goods "f. o. b." at the buyer's place of business does not, in the absence of an agreement to the contrary, cause the title in the goods to remain in the seller after delivery to the carrier and until they arrive at the buyer's place of business, but merely means that the seller will pay the freight to that place. Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534.

will pass,[52] and the property will pass notwithstanding the seller is to make such delivery if such is the intention of the parties,[53] and this intention may be inferred from a payment of the price.[54]

(IX) *DELIVERY TO THIRD PERSON.* It is sufficient to pass the property as against creditors or subsequent purchasers if delivery is made to a third person on account of the buyer,[55] or to a warehouseman designated by the buyer to receive the goods.[56]

(X) *CONSTRUCTIVE OR SYMBOLICAL DELIVERY* — (A) *In General.* Since as between the parties, in the absence of any agreement or intention to the contrary, an actual delivery is not necessary,[57] a constructive or symbolical delivery is sufficient,[58] particularly in cases where an actual delivery is impracticable,[59] and even as against third persons, if the nature or situation of the goods is such that an actual delivery is impracticable, the property may be transferred to the buyer by a constructive or symbolical delivery.[60] Such delivery may be made by the delivery of some symbol, such as the key of the building containing the goods,[61]

**Sale of logs.**— A contract for the sale of timber under which the seller, upon cutting and skidding the logs, is to be paid a certain price per thousand feet, and upon banking them is to receive an additional sum, and when they are put afloat by the seller he is to receive the balance due, remains executory until the logs are put afloat, and while upon the bank of the stream the purchaser is not entitled to take possession thereof. Strong *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919.

**Waiver as to place.**— The buyer may waive delivery at the place specified and accept the property elsewhere, and thereby render the sale complete. Robinson *v.* Hirschfelder, 59 Ala. 503.

52. Fry *v.* Lucas, 29 Pa. St. 356.

53. *Arkansas.*— Lynch *v.* Daggett, 62 Ark. 592, 37 S. W. 227.

*Georgia.*— Morris *v.* Winn, 98 Ga. 482, 25 S. E. 562.

*Iowa.*— Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112.

*Kentucky.*— Hagins *v.* Combs, 102 Ky. 165, 43 S. W. 222, 19 Ky. L. Rep. 1165.

*Louisiana.*—Alling *v.* Bach, 2 La Ann. 746, under code.

*Maine.*— Dyer *v.* Libby, 61 Me. 45; Bethel Steam Mill Co. *v.* Brown, 57 Me. 2, 99 Am. Dec. 572.

*Massachusetts.*—Weld *v.* Came, 98 Mass. 152.

*Minnesota.*— Rail *v.* Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.

*Missouri.*— Toney *v.* Goodley, 57 Mo. App. 235.

*New York.*— Terry *v.* Wheeler, 25 N. Y. 520.

**Question for jury.**— Whether the intention was that the property should pass before the delivery was completed is a question for the jury. Dyer *v.* Libby, 61 Me. 45.

54. Penley *v.* Bessey, 87 Me. 530, 33 Atl. 21; Burcham *v.* Griffeth, 31 Nebr. 778, 48 N. W. 824; Terry *v.* Wheeler, 25 N. Y. 520; Gray *v.* New York, 46 N. Y. Super. Ct. 494.

55. Birge *v.* Edgerton, 28 Vt. 291; Pittman *v.* Staton, 11 Gratt. (Va.) 99.

**Third person as tenant.**— A delivery to a third person for the buyer is sufficient, although such person is the seller's tenant. Chase *v.* Snow, 48 Vt. 436.

56. Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Byrnes *v.* Hatch, 77 Cal. 241, 19 Pac. 482; Hunter *v.* Wright, 12 Allen (Mass.) 548.

57. See *supra*, VI, A, 4, a, (I).

58. Mitchell *v.* McLean, 7 Fla. 329; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 752; Boynton *v.* Veazie, 24 Me. 286; Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

59. Boynton *v.* Veazie, 24 Me. 286; Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

60. *Arkansas.*— Puckett *v.* Reed, 31 Ark. 131.

*Maine.*—Vining *v.* Gilbreth, 39 Me. 496; Haskell *v.* Greely, 3 Me. 425.

*Massachusetts.*—Russell *v.* O'Brien, 127 Mass. 349; Gardner *v.* Howland, 2 Pick. 599; Rice *v.* Austin, 17 Mass. 197.

*Mississippi.*— Jordan *v.* Harris, 31 Miss. 257.

*Pennsylvania.*— Barr *v.* Reitz, 53 Pa. St. 256.

*Wisconsin.*— Sharp *v.* Carroll, 66 Wis. 62, 27 N. W. 832.

*United States.*— Gibson *v.* Stevens, 8 How. 384, 12 L. ed. 1123.

See 43 Cent. Dig. tit. "Sales," § 637.

**Character of goods.**—While a symbolical delivery may be sufficient in the case of actual chattels, such as logs in a boom, and which are as capable of possession by one party as the other, and the parties intend an immediate and unqualified transfer to the buyer, the rule does not apply to the sale of grass which at the time is not matured and not fit to be cut, and is not intended to be cut until grown, and plucking a handful of such grass and delivering it to the buyer is not a constructive delivery which will pass title as against third persons. Lamson *v.* Patch, 5 Allen (Mass.) 586, 81 Am. Dec. 765.

61. *Maine.*— Vining *v.* Gilbreth, 39 Me. 496.

a bill of sale,[62] ginner's receipt,[63] warehouse receipt or order,[64] bill of lading,[65] or other documents constituting *indicia* of title.[66] Such a delivery should, however, be followed by some act on the part of the buyer tending to show ownership and control of the goods.[67]

(B) *Warehouse Receipt or Order.*[68] Where the goods are deposited in a warehouse, the property therein will pass by the delivery of a warehouse receipt,[69] or an order on the warehouseman or other person actually in possession, for the delivery of the goods to the purchaser,[70] provided the transfer of the receipt is assented to, or the order accepted by, the warehouseman,[71] or he is notified of the sale,[72] and if, the goods sold being part of a mass, there is an appropriation.[73]

*Massachusetts.*— Packard *v.* Dunsmore, 11 Cush. 282.

*New York.*—Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364.

*Pennsylvania.*— Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740; Barr *v.* Reitz, 53 Pa. St. 256.

*Wisconsin.*— Sharp *v.* Carroll, 66 Wis. 62, 27 N. W. 832.

*Canada.*— Lockhart *v.* Pannell, 22 U. C. C. P. 597.

See 43 Cent. Dig. tit. "Sales," § 637.

62. Collins *v.* Wayne Lumber Co., 128 Mo. 451, 31 S. W. 24; Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222; Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

63. Puckett *v.* Reed, 31 Ark. 131, holding further that the delivery of a ginner's receipt is sufficient as against creditors, although the cotton is attached before the ginner is notified of the sale or the receipt presented to him, if there is no unreasonable delay in presenting it.

64. See *infra*, VI, A, 4, c, (X), (B).

65. See *infra*, VI, A, 4, c, (X), (C).

66. Gardner *v.* Howland, 2 Pick. (Mass.) 599 (invoice); Clement *v.* Michigan Clothing Co., 110 Mich. 458, 68 N. W. 224 (assignment of judgment); Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123; Zwinger *v.* Samuda, Holt N. P. 395, 3 E. C. L. 159, 1 Moore C. P. 12, 7 Taunt. 265, 2 E. C. L. 356, 18 Rev. Rep. 476 (dock warrant).

67. Comaita *v.* Kyle, 19 Nev. 38, 5 Pac. 666; Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540; Janney *v.* Howard, 150 Pa. St. 339, 24 Atl. 740.

68. Property in possession of third person generally see *supra*, VI, A, 4, c, (IV).

69. *California.*— Horr *v.* Barker, 8 Cal. 609.

*Florida.*— Mitchell *v.* McLean, 7 Fla. 329.

*Kentucky.*— Newcomb *v.* Cabell, 10 Bush 460.

*Louisiana.*— Rice *v.* Kendall, 10 La. Ann. 15.

*Massachusetts.*— Farnum *v.* Pitcher, 151 Mass. 470, 24 N. E. 590.

*Wisconsin.*— Fenelon *v.* Hogoboom, 31 Wis. 172.

*United States.*— Brooke *v.* Scoggins, 4 Fed. Cas. No. 1,936.

70. *California.*— Horr *v.* Barker, 8 Cal. 603, 11 Cal. 393, 70 Am. Dec. 791.

*Illinois.*— Van Duzor *v.* Allen, 90 Ill. 499; Webster *v.* Granger, 78 Ill. 230; Peterson *v.* Bostrom, 99 Ill. App. 210.

*Indiana.*— Cloud *v.* Moorman, 18 Ind. 40; Legg *v.* Leyman, 8 Blackf. 148.

*Maine.*— Warren *v.* Milliken, 57 Me. 97.

*Massachusetts.*— Russell *v.* O'Brien, 127 Mass. 349; Hatch *v.* Lincoln, 12 Cush. 31; Hatch *v.* Bayley, 12 Cush. 27.

*Michigan.*— Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974.

*Mississippi.*— Jordan *v.* Harris, 31 Miss. 257.

*Texas.*— Adoue *v.* Seeligson, 54 Tex. 593.

*Washington.*— Sweeney *v.* Frank Waterhouse, 39 Wash. 507, 81 Pac. 1005.

*England.*— Greaves *v.* Hepke, 2 B. & Ald. 131, 20 Rev. Rep. 381; Tucker *v.* Ruston, 2 C. & P. 86, 12 E. C. L. 465; Moore *v.* Campbell, 2 C. L. R. 1084, 10 Exch. 323, 23 L. J. Exch. 310.

*Canada.*— Tucker *v.* Ross, 19 U. C. Q. B. 295.

See 43 Cent. Dig. tit. "Sales," §§ 537, 637.

**Conditional order.**— A delivery order conditional on payment will not pass the property unless the condition is complied with. Godts *v.* Rose, 17 C. B. 229, 1 Jur. N. S. 1173, 25 L. J. C. P. 61, 4 Wkly. Rep. 129, 84 E. C. L. 229.

71. Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433; Mayer *v.* Beggs, 9 Misc. (N. Y.) 352, 29 N. Y. Suppl. 702; Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426; Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Hammond *v.* Anderson, 1 B. & P. N. R. 69, 2 Campb. 243, 8 Rev. Rep. 763; Stonard *v.* Dunkin, 2 Campb. 344, 11 Rev. Rep. 724; Whitehouse *v.* Frost, 12 East 614, 11 Rev. Rep. 491; Pearson *v.* Dawson, E. B. & E. 448, 4 Jur. N. S. 1015, 27 L. J. Q. B. 248, 96 E. C. L. 448; Jones *v.* Henderson, 3 Manitoba 433. See also Norris *v.* Mumford, 4 Mart. (La.) 20.

**Necessity for assent or acceptance.**— As against creditors and subsequent purchasers it has been held that the transfer of the receipt must be assented to or the order accepted by the warehouseman (Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433); but on the other hand it has been held that this is not essential if the buyer has not been guilty of any unreasonable delay in presenting the order or receipt or in giving notice thereof (Puckett *v.* Reed, 31 Ark. 131; Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123).

72. See *supra*, VI, A, 4, c, (IV).

73. Coffey *v.* Quebec Bank, 20 U. C. C. P.

But the acceptance of the delivery order will not transfer the property if something remains to be done, such as weighing or measuring, to identify the goods or ascertain the quantity sold.[74]

(c) *Bill of Lading or Shipping Receipt.* A bill of lading or shipping receipt is regarded as symbolical of the goods, so that a transfer and delivery of the document is sufficient to pass the property in the goods,[75] provided the delivery of the bill of lading is unconditional,[76] is made by one rightfully in possession thereof,[77] and is not intended as a mere pledge.[78]

(XI) *PARTIAL DELIVERY.* An entire executory contract of sale may be divisible in the performance thereof so that, if such is the intent of the parties, a delivery of a part of the goods will pass the property in such part to the buyers,[79]

110. *Compare* Cockburn *v.* Sylvester, 27 U. C. C. P. 34.

**Goods part of specific mass** see *supra*, VI, A, 3, b.

**Payment of warehouse rent** for unascertained goods is not sufficient to show a delivery which will pass title. White *v.* Wilks, 1 Marsh. 2, 5 Taunt. 176, 14 Rev. Rep. 735, 1 E. C. L. 98.

74. Batre *v.* Simpson, 4 Ala. 305; Ropes *v.* Lane, 9 Allen (Mass.) 502; Kein *v.* Tupper, 52 N. Y. 550 [*affirming* 33 N. Y. Super. Ct. 465]; Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Withers *v.* Lyss, 4 Camph. 237, Holt N. P. 18, 16 Rev. Rep. 781, 3 E. C. L. 18; Busk *v.* Davis, 1 Marsh. 258 note, 2 M. & S. 397, 5 Taunt. 622 note, 15 Rev. Rep. 288. See also Brooke *v.* Scoggins, 4 Fed. Cas. No. 1,936, 11 Nat. Bankr. Reg. 258.

**Acts which must be done** before title passes see *supra*, VI, A, 2, d.

75. *Alabama.*— McCormick *v.* Joseph, 77 Ala. 236.

*Connecticut.*— Baring *v.* Galpin, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

*Illinois.*— Rumsey *v.* Nickerson, 35 Ill. App. 188.

*Louisiana.*— Flash *v.* Schwabacker, 32 La. Ann. 356; Landis *v.* Darling, 2 Rob. 70.

*Maryland.*— Ruhl *v.* Corner, 63 Md. 179.

*Massachusetts.*— Stevens *v.* Boston, etc., R. Corp., 8 Gray 262; Chandler *v.* Sprague, 5 Metc. 306, 38 Am. Dec. 404; Pratt *v.* Parkman, 24 Pick. 42; Allen *v.* Williams, 12 Pick. 297.

*Minnesota.*— Van Dusen *v.* Piper, 42 Minn. 43, 43 N. W. 684.

*Mississippi.*— Bonner *v.* Marsh, 10 Sm. & M. 376, 48 Am. Dec. 754.

*Missouri.*— Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

*New York.*— City Bank *v.* Rome, etc., R. Co., 44 N. Y. 136; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489]; Buffalo Mar. Bank *v.* Fiske, 9 Hun 363 [*affirmed* in 71 N. Y. 353]; Indiana Nat. Bank *v.* Colgate, 4 Daly 41.

*Ohio.*— Jordan *v.* James, 5 Ohio 88.

*Oregon.*— Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635.

*United States.*— St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434; Allen *v.* Jones, 24 Fed. 11; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99; The Idaho, 12 Fed. Cas. No. 6,997, 5 Ben. 280; Walter *v.* Ross, 29 Fed. Cas. No. 17,122, 2 Wash. 283.

*England.*— Barber *v.* Meyerstein, L. R. 4 H. L. 317, 39 L. J. C. P. 187, 22 L. T. Rep. N. S. 808, 18 Wkly. Rep. 1041; Pease *v.* Gloahec, L. R. 1 P. C. 219, 35 L. J. P. C. 66, 15 L. T. Rep. N. S. 6, 15 Wkly. Rep. 201.

See 43 Cent. Dig. tit. "Sales," §§ 538, 637.

**Existence of contract.**— For the delivery of a bill of lading to pass the property in the goods, there must have been a contract of sale existing. Bonner *v.* Marsh, 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754; Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635.

**Goods to be manufactured.**— On a sale of flour to be manufactured an instrument styled a "bill of lading," dated before the flour had been manufactured, by which a transportation company acknowledged the receipt of the flour and agreed to transport it cannot be considered a bill of lading such as will by its indorsement transfer the property. Union R., etc., Co. *v.* Yeager, 34 Ind. 1.

76. Ramish *v.* Kirschbraun, 107 Cal. 659, 40 Pac. 1045.

77. Cahn *v.* Pocketts Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, 8 Aspin. 516, 4 Com. Cas. 168, 68 L. J. Q. B. 515, 80 L. T. Rep. N. S. 269, 15 T. L. R. 247, 47 Wkly. Rep. 422 [*reversing* [1898] 2 Q. B. 61, 8 Aspin. 415, 3 Com. Cas. 197, 67 L. J. Q. B. 625, 79 L. T. Rep. N. S. 55, 14 T. L. R. 426], holding that where on a shipment of goods a bill of lading is sent to the buyer with draft for acceptance, and the buyer without accepting the draft transfers the bill of lading to a subpurchaser, who pays for the goods in good faith without notice of any lack of authority on the part of his vendor to deal with the bill of lading, the original buyer had obtained possession of the bill of lading with the consent of the original seller within the meaning of the Sale of Goods Act of 1893, so as to pass title to the subpurchaser and defeat the original seller's right of stoppage *in transitu*.

78. Sewell *v.* Burdick, 10 App. Cas. 74, 5 Aspin. 376, 54 L. J. Q. B. 126, 52 L. T. Rep. N. S. 445, 33 Wkly. Rep. 461. See also McPherson *v.* Neuffer, 11 Rich. (S. C.) 267.

79. *Georgia.*— Wilson *v.* Paulsen, 57 Ga. 596.

even as against third persons;[80] but where a specific quantity is sold to be loaded on a car or vessel, the property in the goods does not pass as fast as they are loaded,[81] unless it appears that such was the intention of the parties.[82] In some cases it has been held that a delivery of a part of the goods is sufficient to pass title to the whole,[83] even as against creditors of the seller;[84] but in others it has been held that a partial delivery to the buyer does not pass title to the part not delivered.[85]

**5. Payment of Price — a. In General.** It is not essential to a transfer of the property in goods sold that the price should be actually paid,[86] even where the buyer is not entitled to possession until such payment is made;[87] nor is it essential that the price be fixed if the parties have agreed on a method by which it is to be determined.[88] The title will also pass as against creditors and subsequent purchasers without payment, if there has been a delivery to the buyer.[89] But even as between the parties the title will not pass until payment if by the terms of the contract such payment is a condition precedent,[90] or it otherwise appears

*Indiana.*— Keen *v.* Preston, 24 Ind. 395.
*Massachusetts.*— Mason *v.* Thompson, 18 Pick. 305.
*Michigan.*— Summers *v.* Wagner, 87 Mich. 272, 49 N. W. 570.
*Minnesota.*— Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.
*Texas.*— Extence *v.* Stewart, (Civ. App. 1894) 26 S. W. 896.
*Vermont.*— Hunt *v.* Thurman, 15 Vt. 336, 40 Am. Dec. 683.
*West Virginia.*— Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432.
*United States.*— Guy *v.* U. S., 25 Ct. Cl. 61.

**80.** State *v.* Knapp, etc., Co., 13 Mo. App. 467; Bush *v.* Barfield, 1 Coldw. (Tenn.) 92.

**81.** Summers *v.* Wagner, 87 Mich. 272, 49 N. W. 570; Gilbert *v.* New York Cent., etc., R. Co., 4 Hun (N. Y.) 378, 6 Thomps. & C. 662; Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. 552.

**82.** Summers *v.* Wagner, 87 Mich. 272, 49 N. W. 570.

**83.** Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56; Hobbs *v.* Carr, 127 Mass. 532; Legg *v.* Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Damon *v.* Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229.

**84.** Hobbs *v.* Carr, 127 Mass. 532.

**85.** Berry *v.* Waterman, 71 Miss. 497, 15 So. 234; Wanamaker *v.* Yerkes, 70 Pa. St. 443.

**86.** *Arkansas.*— Beller *v.* Block, 19 Ark. 566.
*Connecticut.*— Colegrove *v.* Snow, 45 Conn. 88.
*Indiana.*— Smith *v.* Dallas, 35 Ind. 255; Henline *v.* Hall, 4 Ind. 189.
*Kentucky.*— Sweeney *v.* Owsley, 14 B. Mon. 413; Denny *v.* Campbell, 4 S. W. 301, 9 Ky. L. Rep. 367.
*Louisiana.*— Alling *v.* Bach, 2 La. Ann. 746, under code.
*Maine.*— Levasseur *v.* Cary, (1886) 3 Atl. 461; Wing *v.* Clark, 24 Me. 366; Bucknam *v.* Nash, 12 Me. 474.
*Michigan.*— Bonn *v.* Haire, 40 Mich. 404; Kling *v.* Fries, 33 Mich. 275.
*Minnesota.*— Rail *v.* Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.
*Missouri.*— Frazier *v.* Atchison, etc., R. Co., 104 Mo. App. 355, 78 S. W. 679.
*New Hampshire.*— Kent *v.* Porter, 18 N. H. 50.
*New York.*— Olyphant *v.* Baker, 5 Den. 379.
*North Carolina.*— Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519; Jenkins *v.* Jarrett, 70 N. C. 255.
*Pennsylvania.*— Pier *v.* Duff, 63 Pa. St. 59.
*South Carolina.*— Frazer *v.* Hilliard, 2 Strobh. 309.
*Tennessee.*— Goodrum *v.* Smith, 3 Humphr. 542.
*United States.*— Briggs *v.* U. S., 143 U. S. 346, 12 S. Ct. 391, 36 L. ed. 180 [*reversing* 25 Ct. Cl. 126].
See 43 Cent. Dig. tit. "Sales," § 542.
Unconditional sales generally see *supra*, VI, A, 2, c.
Payment deferred.— The mere fact that payment for grain is deferred to the time of shipment and is to be made against shipping receipts does not show that the title does not pass until shipment. Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722.

**87.** Jenkins *v.* Jarrett, 70 N. C. 255; Broyles *v.* Lowrey, 2 Sneed (Tenn.) 22; Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222.

**88.** *Alabama.*— Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; Wilkinson *v.* Williamson, 76 Ala. 163; Shealy *v.* Edwards, 73 Ala. 175, 49 Am. Rep. 43.
*Georgia.*— Daniel *v.* Hannah, 106 Ga. 91, 31 S. E. 734.
*Illinois.*— Callaghan *v.* Myers, 89 Ill. 566.
*Kentucky.*— Hagins *v.* Combs, 102 Ky. 165, 43 S. W. 222, 19 Ky. L. Rep. 1165.
*North Carolina.*— Phifer *v.* Erwin, 100 N. C. 59, 6 S. E. 672.
*Pennsylvania.*— Pier *v.* Duff, 63 Pa. St. 59.
*Wisconsin.*— McConnell *v.* Hughes, 29 Wis. 537.
Validity of contract as affected by fixing of price see *supra*, II, D.

**89.** Nicol *v.* Crittenden, 55 Ga. 497; Green *v.* Rowland, 16 Gray (Mass.) 58; Sandler *v.* Bresnaham, 53 Mich. 567, 19 N. W. 188; McDonald *v.* Clear Water Short Line R. Co., 164 Fed. 1007.

**90.** Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93; Young *v.* Kansas Mfg. Co., 23 Fla. 394,

that such was the intention of the parties,[91] unless the condition as to payment is waived.[92]

**b. Sale on Credit.** Where the sale is on credit, unless a different intention is manifested by agreement or otherwise, the property in the goods passes on delivery to the buyer,[93] and in the absence of delivery the property may pass except as to third persons, although the seller retains the right of possession until the price is paid.[94] If, however, the parties, by the terms of the agreement or otherwise, show that the intention was that the property should remain in the seller until the whole price is paid such intention will be given effect.[95] The most common form of contract of this nature is the "conditional sale" so called.[96]

**c. When Sale Is For Cash.** While sales made for cash or cash on delivery are not strictly speaking conditional sales,[97] they are frequently so called,[98] and are conditional in the sense that payment is to be precedent to or at least concurrent with delivery.[99] So it is ordinarily held that where the sale is expressly for cash or cash on delivery, no title passes to the buyer until payment is made,[1] unless

2 So. 817; George *v.* Stubbs, 26 Me. 243; Taylor *v.* Applebaum, 154 Mich. 682, 118 N. W. 492. See also *infra*, VI, A, 5, c.

**91.** Kohler *v.* Hays, 41 Cal. 455; Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Miller *v.* Jones, 66 Barb. (N. Y.) 148; Kelley *v.* Upton, 5 Duer (N. Y.) 336; Hull *v.* Pitrat, 45 Fed. 94. See also *infra*, VI, A, 5, c.

**Intention of parties** as affecting transfer of title generally see *supra*, VI, A, 2, a.

**92.** Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817.

**Waiver of payment** see *infra*, VI, A, 5, e.

**93.** *Illinois.*— Bell *v.* Farrar, 41 Ill. 400.

*Indiana.*— Smith *v.* Dallas, 35 Ind. 255.

*Kentucky.*— Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

*Maryland.*— Bristol Nat. Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

*Massachusetts.*— Blanchard *v.* Fitzpatrick, 146 Mass. 24, 14 N. E. 919.

*Michigan.*—Blaisdell *v.* Todd, 33 Mich. 176.

*Missouri.*— Ford *v.* Dyer, 148 Mo. 528, 49 S. W. 1091.

*New Hampshire.*— Kent *v.* Porter, 18 N. H. 50.

*New York.*— Sanger *v.* Waterbury, 116 N. Y. 371, 22 N. E. 404; Bayne *v.* Hard, 77 N. Y. App. Div. 251, 79 N. Y. Suppl. 208 [*affirmed* in 174 N. Y. 534, 66 N. E. 1104].

*Texas.*— Houston Ice, etc., Co. *v.* Edgewood Distilling Co., (Civ. App. 1901) 63 S. W. 1075.

**Cash or credit.**— Where goods are ordered by mail from a merchant who is accustomed to sell to the buyer on credit, and nothing is said as to the terms of the sale, payment is not a condition precedent to the vesting of title in the buyer. Brooks *v.* George A. Friend Paper Co., 94 Tenn. 701, 31 S. W. 160.

**Modification of contract.**—Where goods are sold partly on credit and the contract is modified by substituting more expensive goods on condition that the balance shall be paid on delivery, the title does not pass unless such payment is made. Scher *v.* Roher, 34 Misc. (N. Y.) 792, 69 N. Y. Suppl. 929.

**94.** Owens *v.* Weedman, 82 Ill. 409. See also Bradley *v.* Michael, Smith (Ind.) 346.

**95.** George *v.* Stubbs, 26 Me. 243; Hull *v.* Pitrat, 45 Fed. 94.

**96.** See *infra*, X.

**97.** Johnson Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Hart *v.* Boston, etc., R. Co., 72 N. H. 410, 56 Atl. 920; Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

**Conditional sales** see *infra*, X.

**98.** Evansville, etc., R. Co. *v.* Erwin, 84 Ind. 457; Stone *v.* Perry, 60 Me. 48; Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

**99.** Drake *v.* Scott, 136 Ala. 261, 33 So. 873, 96 Am. St. Rep. 25; Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Kelley *v.* Upton, 5 Duer (N. Y.) 336.

**Although a part of the price has been paid** the buyer acquires no right of possession until the whole amount is paid. Owens *v.* Weedman, 82 Ill. 409.

**1.** *Alabama.*— Drake *v.* Scott, 136 Ala. 261, 33 So. 873, 96 Am. St. Rep. 25.

*California.*— Hilmer *v.* Hills, 138 Cal. 134, 70 Pac. 1080.

*Georgia.*— Wheeler, etc., Mfg. Co. *v.* Irish American Dime Sav. Bank, 105 Ga. 57, 31 S. E. 48; Bergan *v.* Magnus, 98 Ga. 514, 25 S. E. 570.

*Illinois.*— Sibley *v.* Tie, 88 Ill. 287; Roddin *v.* Shurley, 66 Ill. 23; Ryan *v.* Kimberly, 118 Ill. App. 361; Hoffman *v.* Culver, 7 Ill. App. 450.

*Indiana.*— Lanman *v.* McGregor, 94 Ind. 301; Evansville, etc., R. Co. *v.* Irwin, 84 Ind. 457; Rauh *v.* Waterman, 59 Ind. App. 344, 61 N. E. 743, 63 N. E. 42.

*Iowa.*— Budlong *v.* Cottrell, 64 Iowa 234, 20 N. W. 166.

*Maine.*— Ballantyne *v.* Appleton, 82 Me. 570, 20 Atl. 235; Stone *v.* Perry, 60 Me. 48; Houdlette *v.* Tallman, 14 Me. 400.

*Massachusetts.*—Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137.

*Minnesota.*— Globe Milling Co. *v.* Minneapolis El. Co., 44 Minn. 153, 46 N. W. 306.

*Mississippi.*— Crane *v.* Davis, (1896) 21 So. 17.

the condition as to payment is waived by the seller,[2] although there may have been a delivery of the goods.[3] In some jurisdictions there are statutes expressly providing that in the case of certain sales title shall not pass until payment is made.[4] A cash sale is not, however, necessarily a conditional sale;[5] but although it is expressly for cash, or cash on delivery, payment of the price may or may not be a condition precedent to the transfer of title, according to the intention of the parties.[6] If by the use of such terms the parties understand merely that no credit is to be given and that the seller will insist upon his right to retain pos-

*Missouri.*— Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070; Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Howard *v.* Haas, 131 Mo. App. 499, 109 S. W. 1076; Sharp *v.* Hawkins, 129 Mo. App. 80, 107 S. W. 1087; Johnston *v.* Parrott, 92 Mo. App. 199; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Strauss *v.* Hirach, 63 Mo. App. 95.

*New Hampshire.*— Hart *v.* Boston, etc., R. Co., 72 N. H. 410, 56 Atl. 920; Paul *v.* Read, 52 N. H. 136.

*New Jersey.*— Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

*New York.*—Pierson *v.* Hoag, 47 Barb. 243; Whitcomb *v.* Hungerford, 42 Barb. 177; Kelley *v.* Upton, 5 Duer 336; Lange *v.* Pisch, 9 Misc. 475, 30 N. Y. Suppl. 220.

*Oklahoma.*— McIver *v.* Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. N. S. 693.

*Pennsylvania.*— Blair *v.* Clark, 37 Pa. Super. Ct. 44.

*Tennessee.*— Harding *v.* Metz, 1 Tenn. Ch. 610.

*Texas.*— Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881; Joseph *v.* Cannon, 11 Tex. Civ. App. 295, 32 S. W. 241.

*Utah.*— Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510.

*West Virginia.*— Haines *v.* Cochran, 26 W. Va. 719.

*United States.*— Copland *v.* Bosquet, 6 Fed. Cas. No. 3,212, 4 Wash. 588.

*England.*— Godts *v.* Rose, 17 C. B. 229, 1 Jur. N. S. 1173, 25 L. J. C. P. 61, 4 Wkly. Rep. 129, 84 E. C. L. 229.

**2.** Wheeler, etc., Mfg. Co. *v.* Irish-American Dime Sav. Bank, 105 Ga. 57, 31 S. E. 48; Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Paul *v.* Read, 52 N. H. 136; Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510.

**Waiver of condition** as to payment see *infra*, VI, A, 5, e.

**3.** *Alabama.*— Drake *v.* Scott, 136 Ala. 261, 33 So. 873, 96 Am. St. Rep. 25.

*Missouri.*— Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

*New Jersey.*— Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

*New York.*— Lange *v.* Pisch, 9 Misc. 475, 30 N. Y. Suppl. 220.

*Pennsylvania.*— Blair *v.* Clark, 37 Pa. Super. Ct. 44.

*Texas.*—Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

*Utah.*— Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510.

**Effect of delivery** as to waiver of payment see *infra*, VI, A, 5, e.

**4.** Lehman *v.* Warren, 53 Ala. 535; Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 47 S. E. 320; Roberts *v.* Savannah, etc., R. Co., 75 Ga. 225; Gunn *v.* Knoop, 73 Ga. 510; Sparrow *v.* Pate, 67 Ga. 352; Flanders *v.* Maynard, 58 Ga. 56.

**In Alabama** the statute (Rev. Code, § 1164) provides that "no cotton sold by commission merchants to brokers or buyers shall be considered as delivered and the ownership given up until the same is fully paid for." Lehman *v.* Warren, 53 Ala. 535.

**In Georgia** the statute provides that "cotton, corn, rice, crude turpentine, spirits turpentine, rosin, pitch, tar, or other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer: Provided, that in cases where the whole or any part of the property has been delivered to the buyer, the right of the seller to collect the purchase-money shall not be affected by its subsequent loss or destruction." Butler *v.* Georgia, etc., R. Co., 119 Ga. 959, 47 S. E. 320. The title of the seller may be asserted by him even as against a *bona fide* purchaser from his vendee. Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765. The statute applies only to planters and commission merchants, but a planter may avail himself of the statute in regard to a sale of cotton whether it was produced by him or acquired from another. Butler *v.* Georgia, etc., R. Co., *supra*. So also the statute applies to sales by commission merchants on their own account as well as to sales made by them as representatives of a planter. Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 104 Ga. 403, 30 S. E. 888. A cash sale of cotton delivered on Saturday is not converted into a credit sale because on the following Monday the seller receives a check for the price, deposits it in a bank draws against the account, and marks the bill paid. Charleston, etc., Co. *v.* Pope, 122 Ga. 577, 50 S. E. 374.

**5.** Wabash, etc., R. Co. *v.* Shryock, 9 Ill. App. 323; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244; Clark *v.* Greeley, 62 N. H. 394.

**6.** Wabash, etc., R. Co. *v.* Shryock, 9 Ill. App. 323; Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Clark *v.* Greeley, 62 N. H. 394.

**Use of terms.**— The expressions "cash," "cash down," or "cash on delivery," as used

session until payment is made, the contract is so far executed as to pass title to the buyer;[7] but if it is understood that the property in the goods is to remain in the seller until the price is paid no title passes until payment.[8] Even where the contract does not expressly provide as to the time of payment, if there is no provision for credit it will be presumed that the sale is for cash,[9] and that payment and delivery are to be concurrent,[10] so that until payment is made the buyer acquires no right to possession;[11] but whether payment is a condition precedent to the passing of title depends primarily upon the intention of the parties.[12] In some cases it has been held that since, where the time of payment is not stipulated, the sale is presumed to be for cash,[13] the general rule as to cash sales applies, and that the title does not pass until payment is made unless the condition is waived,[14] particularly if there has been no delivery.[15] Other cases, however, apply the general rule previously stated in regard to unconditional sales,[16] holding that, if the goods are specific and the contract is otherwise complete, the property, unless a contrary intention appears, passes at once,[17] subject to the seller's

in sales, may be used in two different senses; one where the words indicate simply that the goods must be paid for before the buyer is entitled to possession, and the other where they indicate an intention not to part with the title until the price is paid. A cash sale is not as a matter of law either a conditional or an unconditional sale. Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

7. Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

8. Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450; Clark *v.* Greeley, 62 N. H. 394; Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

9. *Maine.*— Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 Atl. 69.

*Massachusetts.*— Scudder *v.* Bradbury, 106 Mass. 422.

*Minnesota.*—Sanborn *v.* Shipherd, 59 Minn. 144, 60 N. W. 1089; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

*Ohio.*— Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*Pennsylvania.*— Welsh *v.* Bell, 32 Pa. St. 12.

*Vermont.*— Turner *v.* Moore, 58 Vt. 455, 3 Atl. 467.

10. *California.*— Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266.

*Illinois.*— Wabash, etc., R. Co. *v.* Shryock, 9 Ill. App. 323.

*Minnesota.*— Sanborn *v.* Shipherd, 59 Minn. 144, 60 N. W. 1089; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

*Ohio.*— Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*South Carolina.*—Pickett *v.* Cloud, 1 Bailey 362.

11. Sanborn *v.* Shipherd, 59 Minn. 144, 60 N. W. 1089; Pickett *v.* Cloud, 1 Bailey (S. C.) 362.

12. Wabash, etc., R. Co. *v.* Shryock, 9 Ill. App. 323.

13. Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558; Welsh *v.* Bell, 32 Pa. St. 12. And see cases cited *infra*, note 14.

14. *Maine.*— Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 Atl. 69; Phillips *v.* Hunnewell, 4 Me. 376.

*Missouri.*—Sharp *v.* Hawkins, 129 Mo. App. 80, 107 S. W. 1087; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179.

*North Carolina.*— Hughes *v.* Knott, 138 N. C. 105, 50 S. E. 586.

*Ohio.*— Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*Pennsylvania.*— Welsh *v.* Bell, 32 Pa. St. 12.

*Vermont.*— Turner *v.* Moore, 58 Vt. 455, 3 Atl. 467.

15. Welsh *v.* Bell, 32 Pa. St. 12.

**Effect of delivery.**— Where nothing is said as to the time of payment the presumption is that it is a cash sale, but a delivery is presumptively a waiver of the condition which attaches to a cash sale, so that the title will pass to the buyer. Scudder *v.* Bradbury, 106 Mass. 422. And see *infra*, VI, A, 5, e.

16. See *supra*, VI, A, 2, c.

17. *Alabama.*— Magee *v* Billingsley, 3 Ala. 679.

*Illinois.*— Barrow *v.* Window, 71 Ill. 214; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

*Indiana.*— Cloud *v.* Moorman, 18 Ind. 40; Sherry *v.* Picken, 10 Ind. 375; Bradley *v.* Michael, Smith 346.

*Kentucky* — Sweeney *v.* Owsley, 14 B. Mon. 332; Willis *v.* Willis, 6 Dana 48.

*Maine.*— Wing *v.* Clark, 24 Me. 366.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514; Morse *v.* Sherman, 106 Mass. 430.

*New Hampshire.*— Clark *v.* Draper, 19 N. H. 419.

*New York.*— Hayden *v.* De Mets, 53 N. Y. 426; Morey *v.* Medbury, 10 Hun 540; Welch *v.* Maffat, 1 Thomps. & C. 575.

*North Carolina.*— Richardson *v.* Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733; Jenkins *v.* Jarrett, 70 N. C. 255.

*Tennessee.*— Broyles *v.* Lowrey, 2 Sneed 22; Potter *v.* Coward, Meigs 22.

*Virginia.*— Chapman *v.* Campbell, 13 Gratt. 105.

*United States.*— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

lien,[18] so as to place the goods at the risk of the buyer,[19] although he is not entitled to possession until payment is made or tendered.[20] This rule does not apply, however, if there is any other condition to be performed or act done with reference to the thing sold, as for the purpose of identifying it, putting it in a deliverable state, or ascertaining the price.[21] Of course if by the contract payment of the price is a condition on which the passing of the property depends, the property will not pass until the condition is fulfilled.[22]

**d. When Note or Security Is to Be Given.** Where by the contract the giving of a note or other security in payment of the price is a condition on which the transfer of the property depends the property does not pass until the condition is fulfilled,[23] unless the condition is waived;[24] but the mere fact that payment is to be made in this manner is not inconsistent with the immediate transfer of the property if such is the intention,[25] and where the intention is not clear the question is one of fact dependent on all the circumstances.[26] The condition may be

18. Haskins *v.* Warren, 115 Mass. 514; Morse *v.* Sherman, 106 Mass. 430; Clark *v.* Draper, 19 N. H. 419; Welch *v.* Moffat, 1 Thomps. & C. (N. Y.) 575.

19. *Illinois.*— Barrow *v.* Window, 71 Ill. 214.

*Kentucky.*— Sweeney *v.* Owsley, 14 B. Mon. 413; Willis *v.* Willis, 6 Dana 48.

*Maine.*— Wing *v.* Clark, 24 Me. 366.

*North Carolina.*— Richardson *v.* Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733.

*Virginia.*— Chapman *v.* Campbell, 13 Gratt. 105.

**Risk of loss or injury** generally see *infra*, VI, A, 9, b.

20. *Illinois.*— Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514.

*New Hampshire.*— Clark *v.* Draper, 19 N. H. 419.

*North Carolina.*— Richardson *v.* Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733.

*United States.*— Leonard *v.* Davis, 1 Black 476, 17 L. ed. 222.

*Canada.*— Rogers *v.* Devitt, 25 Ont. 84; Butters *v.* Stanley, 21 U. C. C. P. 402.

21. Magee *v.* Billingsley, 3 Ala. 679.

**Acts which must be done before title passes** see *supra*, VI, A, 2, d.

22. Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93; Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519; George *v.* Stubbs, 26 Me. 243; Lenoir *v.* Dibrell, 1 Tex. App. Civ. Cas. § 1110.

23. *California.*—Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

*Georgia.*—Mathewson *v.* Belmont Flouring Mills Co., 76 Ga. 357.

*Indiana.*— Kountz *v.* Hart, 17 Ind. 329; Platter *v.* Acker, 13 Ind. App. 417, 41 N. E. 832.

*Iowa.* —Amundson *v.* Standard Printing, etc., Co., 140 Iowa 464, 118 N. W. 789.

*Kentucky.*— Bainbridge *v.* Caldwell, 4 Dana 211.

*Massachusetts.*— Ullman *v.* Barnard, 7 Gray 554; Whitwell *v.* Vincent, 4 Pick. 449, 16 Am. Dec. 355.

*New Hampshire.*— Parker *v.* Mitchell, 5 N. H. 165.

*New York.*— Osborn *v.* Gantz, 60 N. Y. 540 [*affirming* 38 N. Y. Super. Ct. 148].

*North Carolina.*— Millhiser *v.* Erdman, 98 N. C. 292, 3 S. E. 521, 2 Am. St. Rep. 334.

*Ohio.*— Bonham *v.* Hamilton, 66 Ohio St. 82, 63 N. E. 597.

*Pennsylvania.*— Brown *v.* Reber, 30 Pa. Super. Ct. 114.

*South Dakota.*— Baskerville *v.* Johnson, 20 S. D. 88, 104 N. W. 913; J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

*Texas.*— Lang *v.* Rickmers, 70 Tex. 108, 7 S. W. 527; Mechanics' Bank *v.* Gullett Gin Co., (Civ. App. 1898) 48 S. W. 627; Austin *v.* Welch, 31 Tex. Civ. App. 526, 72 S. W. 881.

*United States.*— Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

*England.*— Walker *v.* Clyde, 10 C. B. N. S. 381, 100 E. C. L. 381.

See 43 Cent. Dig. tit. "Sales," § 544.

**Transfer of note.**—Where the seller transfers without recourse the purchase-money notes to another, the transferee does not acquire title to the property but is simply a creditor of the purchaser to whom title has passed. Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686.

24. Smith *v.* Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368.

25. Duncan *v.* Lewis, 1 Duv. (Ky.) 183; Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493, 33 S. W. 154.

**Indorsement of note.**—Where one of the terms of the contract of sale is that the notes for the price shall be indorsed by a certain person, but it appears that the sale was made without reservation of title, and that the indorsement was to be given merely as additional security and not intended as a condition precedent, a failure to obtain such indorsement will not prevent the passing of title. Hazlehurst Lumber Co. *v.* J. A. Fay, etc., Co., (Miss. 1895) 18 So. 485.

26. *Indiana.*— Platter *v.* Acker, 13 Ind. App. 417, 41 N. E. 832.

*New Hampshire* — Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450.

*New Jersey.*— Brock *v.* O'Donnell, 45 N. J. L. 441 [*affirmed* in 49 N. J. L. 230, 10 Atl. 708].

waived by the seller,[27] as by an unconditional delivery of the goods.[28] Unless a different intention appears, however, where the goods are to be paid for on delivery by bill, note, or other security it is generally held that this is a condition precedent to the transfer of the property,[29] and that unless the condition is waived the title will not pass until it is complied with, although there has been a delivery of the goods.[30]

**e. Waiver of Payment** — (i) *In General.* The condition as to payment or security is one which may be waived by the seller, in which case title to the goods sold will vest in the buyer, although the condition has not been performed.[31] Such condition will ordinarily be held to be waived by an unconditional delivery of the goods by the seller to the buyer without requiring payment or security,[32]

*New York.*— Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49; Williams *v.* Insurance Co. of North America, 1 Hilt. 345.

*Canada.*— McCall *v.* Gillespie, 24 N. Brunsw. 98.

**27.** Smith *v.* Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368.

**28.** England *v.* Forbes, 7 Houst. (Del.) 301, 31 Atl. 895; Smith *v.* Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; Mills *v.* Hallock, 2 Edw. (N. Y.) 652.

**Waiver of payment** see *infra*, VI, A, 5, e.

**29.** *Florida.*— Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817.

*Iowa.*— Thorpe *v.* Fowler, 57 Iowa 541, 11 N. W. 3.

*Maine.*— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Seed *v.* Lord, 66 Me. 580; Stone *v.* Perry, 60 Me. 48.

*Massachusetts.*—Salomon *v.* Hathaway, 126 Mass. 482; Armour *v.* Pecker, 123 Mass. 143; Hirschorn *v.* Canney, 98 Mass. 149; Whitney *v.* Eaton, 15 Gray 225; Coggill *v.* Hartford, etc., R. Co., 3 Gray 545; Tyler *v.* Freeman, 3 Cush. 261; Hill *v.* Freeman, 3 Cush. 257.

*New York.*— Russell *v.* Minor, 22 Wend. 659.

*Pennsylvania* — Nicholson *v.* Taylor, 31 Pa. St. 128, 72 Am. Dec. 728.

*Vermont.*— Chalmers *v.* McAuley, 68 Vt. 44, 33 Atl. 767.

*Wisconsin.*— Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

*England.*— Bishop *v.* Shillito, 2 B. & Ald. 329 note, 20 Rev. Rep. 457 note.

**30.** Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817; Seed *v.* Lord, 66 Me. 580; Armour *v.* Pecker, 123 Mass. 143; Whitney *v.* Eaton, 15 Gray (Mass.) 225.

**Waiver of payment** see *infra*, VI, A, 5, e.

**31.** Crawford *v.* Spraggins, 109 Ala. 353, 19 So. 372; Neal *v.* Boggan, 97 Ala. 611, 11 So. 809; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220. And see cases cited *infra*, notes 32–35.

**32.** *Alabama.*— Crawford *v.* Spraggins, 109 Ala. 353, 19 So. 372; Neal *v.* Boggan, 97 Ala. 611, 11 So. 809; Blackshear *v.* Burke, 74 Ala. 239.

*Delaware.*— England *v.* Forbes, 7 Houst. 301, 31 Atl. 895.

*Georgia.*— Wheeler, etc., Mfg. Co. *v.* Irish-American Dime Sav. Bank, 105 Ga. 57, 31 S. E. 48.

*Illinois.*— Riley *v.* DuBois, 14 Ill. App. 236; Martin *v.* Wirts, 11 Ill. App. 567.

*Indiana.*— Moffatt *v.* Green, 9 Ind. 198.

*Louisiana.*— Lee *v.* Galbraith, 5 La. Ann. 343.

*Maine.*— Pinkham *v.* Appleton, 82 Me. 574, 20 Atl. 237; Mixer *v.* Cook, 31 Me. 340.

*Maryland.*—Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767; Foley *v.* Mason, 6 Md. 37; Powell *v.* Bradlee, 9 Gill & J. 220.

*Massachusetts.*— Mauger *v.* Crosby, 117 Mass. 330; Freeman *v.* Nichols, 116 Mass. 309; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446; Smith *v.* Dennie, 6 Pick. 262, 17 Am. Dec. 368; Carleton *v.* Sumner, 4 Pick. 516.

*Minnesota.*— Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

*Missouri.*— Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; Oester *v.* Sitlington, 115 Mo. 247, 21 S. W. 820.

*Nebraska.*— Allen *v.* Rushford, 72 Nebr. 907, 101 N. W. 1028; Sutro *v.* Hoile, 2 Nebr. 186.

*New Jersey.*— Leatherbury *v.* Connor, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672; Heller *v.* Elliott, 44 N. J. L. 467; Cole *v.* Berry, 42 N. J. L. 308, 36 Am. Rep. 511.

*New York.*— Husted *v.* Ingraham, 75 N. Y. 251; Smith *v.* Lynes, 5 N. Y. 41 [*affirming* 3 Sandf. 203]; Rawls *v.* Deshler, 4 Abb. Dec. 12, 3 Keyes 572, 3 Transcr. App. 91; Wheeler, etc., Mfg. Co. *v.* Keeler, 65 Hun 508, 20 N. Y. Suppl. 388; Morey *v.* Medbury, 10 Hun 540; Durbrow *v.* McDonald, 5 Bosw. 130; Ives *v.* Humphreys, 1 E. D. Smith 196; Leavitt *v.* Rosenthal, 84 N. Y. Suppl. 530; Furniss *v.* Hone, 8 Wend. 247; Chapman *v.* Lathrop, 6 Cow. 110, 16 Am. Dec. 433; Buck *v.* Grimshaw, 1 Edw. 140.

*Pennsylvania.*— Mackaness *v.* Long, 85 Pa. St. 158; Bowen *v.* Burk, 13 Pa. St. 146; Clemson *v.* Davidson, 4 Binn. 405; Leedom *v.* Phillips, 1 Yeates 527; Logan *v.* Smith, 14 Phila. 114.

*Washington.*— Knox *v.* Fuller, 23 Wash. 34, 62 Pac. 131; Baker *v.* Heidinger, 17 Wash. 679, 50 Pac. 569; Seattle, etc., R. Co. *v.* Claussen-Sweeney Brewing Co., 5 Wash. 462, 32 Pac. 102.

*West Virginia.*— Freeport Stone Co. *v.* Carey, 42 W. Va. 276, 23 S. E. 183.

*Wisconsin.*— Thompson *v.* Wedge, 50 Wis. 642, 7 N. W. 560; Pitts *v.* Owen, 9 Wis. 152.

provided it is not procured by fraud,[33] even though the delivery is constructive,[34] or is made to a carrier.[35] The fact that there has been a delivery without requiring payment or security does not, however, necessarily constitute a waiver of such condition,[36] but merely creates a presumption to this effect,[37] which will not control if it otherwise appears that the delivery was not intended to be absolute but was merely conditional.[38] Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by all the facts and circumstances of the case,[39] and so it is ordinarily a question of fact for the jury.[40] If the sale is for cash the mere acceptance of a check does not constitute an absolute payment or waiver of the condition as to payment.[41]

(II) *CONDITIONAL DELIVERY*. Where the seller delivers the goods condi-

*United States.*— Halliday *v.* Hamilton, 11 Wall. 560, 20 L. ed. 214; Duponte Co. *v.* Shields Constr. Co., 162 Fed. 198 [*affirmed* in 171 Fed. 305]; Dininny *v.* Myers, 68 Fed. 943.

**Buyer obtaining possession.**—Where goods are sold for cash, to be paid for on delivery, the prepayment of the price being a condition precedent, the mere fact that the buyer obtains possession does not operate to pass title to him (Bergan *v.* Magnus, 98 Ga. 514, 25 S. E. 570); but if the buyer takes the goods away without paying for them the seller should immediately reclaim them (Mackaness *v.* Long, 85 Pa. St. 158).

33. Ives *v.* Humphreys, 1 E. D. Smith (N. Y.) 196; Chapman *v.* Lathrop, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433; Logan *v.* Smith, 14 Phila. (Pa.) 114.

34. Clark *v.* Rush, 19 Cal. 393; Collins *v.* Wayne Lumber Co., 128 Mo. 451, 31 S. W. 24.

**Changing character of goods.**—Where, after a sale of liquor upon condition that it is to be paid for before being used, the buyer is allowed to change its quality from rum to neutral spirits, this is a sufficient delivery to render the spirits liable to seizure by creditors of the buyer, although neither payment nor actual delivery has been made. Terrill *v.* Hays, 24 La. Ann. 428.

35. See *infra*, VI, A, 5, e, (III).

36. Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817; Seed *v.* Lord, 66 Me. 580; Ferguson *v.* Clifford, 37 N. H. 86; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49 [*reversing* 44 Hun 434]; Rathowsky *v.* Dunn, 64 N. Y. Suppl. 934; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

37. Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817.

38. See *infra*, VI, A, 5, e, (II).

39. *Florida.*— Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817.

*Maine.*— Lewenberg *v.* Hayes, 91 Me. 104, 39 Atl. 469, 64 Am. St. Rep. 215; Merrill Furniture Co. *v.* Hill, 87 Me. 17, 32 Atl. 712; Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Seed *v.* Lord, 66 Me. 580; Stone *v.* Perry, 60 Me. 48.

*Massachusetts.*— Silsby *v.* Boston, etc., R. Co., 176 Mass. 158, 57 N. E. 376; Brownville Main Slate Co. *v.* Hill, 175 Mass. 532, 56 N. E. 706; Wigton *v.* Bowley, 130 Mass. 252; Salomon *v.* Hathaway, 126 Mass. 482; Armour *v.* Pecker, 123 Mass. 143; Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Hirschorn *v.* Canney, 98 Mass. 149; Farlow *v.* Ellis, 15 Gray 229; Whitney *v.* Eaton, 15 Gray 225; Hill *v.* Freeman, 3 Cush. 257; Smith *v.* Dennie, 6 Pick. 262, 17 Am. Dec. 368; Carleton *v.* Sumner, 4 Pick. 516; Whitwell *v.* Vincent, 4 Pick. 449, 16 Am. Dec. 355.

*Minnesota.*— Globe Milling Co. *v.* Minneapolis El. Co., 44 Minn. 153, 46 N. W. 306; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

*Missouri.*— Straus *v.* Hirsch, 63 Mo. App. 95.

*New Hampshire.*— Paul *v.* Reed, 52 N. H. 136; Ferguson *v.* Clifford, 37 N. H. 86; Fuller *v.* Bean, 34 N. H. 290.

*New York.*— Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805; Empire State Type Foundry Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49; Parker *v.* Baxter, 86 N. Y. 586; Osborn *v.* Gantz, 60 N. Y. 540; Hammett *v.* Linneman, 48 N. Y. 399; Smith *v.* Lynes, 5 N. Y. 41; Pequeno *v.* Taylor, 38 Barb. 375; Furniss *v.* Hone, 8 Wend. 247.

**Insufficiency of delivery.**—Where there is a custom of trade to deliver goods sold for cash to be paid for on delivery and call for a check in two or three days, the putting of the goods on board a vessel does not indicate an intention to make an unconditional delivery, unless there is an expectation that the vessel will sail before the expiration of the three days. Fleeman *v.* McKean, 25 Barb. (N. Y.) 474.

40. *Florida.*— Young *v.* Kansas Mfg. Co., 23 Fla. 394, 2 So. 817.

*Indiana.*— Curme *v.* Rauh, 100 Ind. 247.

*Maryland.*— Powell *v.* Bradlee, 9 Gill & J. 220.

*New York.*— Rathowsky *v.* Dunn, 64 N. Y. Suppl. 934.

*United States.*— Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

41. Globe Milling Co. *v.* Minneapolis El. Co., 44 Minn. 153, 46 N. W. 306; Johnson-Brinkman *v.* Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179. And see *infra*, VI, A, 5, e, (II).

**A check on a bank** is not payment unless expressly so received, but is payment only when the money is received on it, and there is no presumption from the mere fact of

tionally and without any intention of waiving payment or security the property does not pass;[42] and, in order to render a delivery conditional within the application of this rule, it is not necessary that there should be any express declaration to that effect,[43] but it is sufficient if it appears that such was the understanding of the parties,[44] or that the delivery was made in the expectation of immediate payment,[45] the question being primarily one of intention as shown by all the facts and circumstances of the case,[46] although a mere secret or undisclosed intention on the part of the seller is not of itself sufficient to make the delivery conditional.[47] So if the seller delivers on an understanding express or implied that he is to receive immediate payment or security he may reclaim the goods,[48] or if he delivers on

accepting the check that it is taken in absolute payment. Johnson-Brinkman Commission *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615.

**But if the check is regarded as cash** by both parties and there is no fraud or mistake, it constitutes payment and title passes to the buyer. Logan *v.* Smith, 14 Phila. (Pa.) 114.

**42.** *Massachusetts.*—Armour *v.* Pecker, 123 Mass. 143; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545.

*Missouri.*— Dannefelser *v.* Weigel, 27 Mo. 45; State *v.* Green Tree Brewery Co., 32 Mo. App. 276.

*New Hampshire.*— Dudley *v.* Sawyer, 41 N. H. 326.

*New York.*— Farmers', etc., Nat. Bank *v.* Hazeltine, 78 N. Y. 104, 34 Am. Rep. 518; Kinsey *v.* Leggett, 71 N. Y. 387; Draper *v.* Jones, 11 Barb. 263.

*Ohio.*— Edwards *v.* Glancy, 1 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 253.

*Pennsylvania* — Windle *v.* Moore, 1 Chest. Co. Rep. 409.

*Utah.*— Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510.

*United States.*— Copland *v.* Bosquet, 6 Fed. Cas. No. 3,212, 4 Wash. 588; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

**Entire contract.**—That a delivery shall not constitute a waiver of payment because conditional, it must be conditional as to the whole of the property. Pequeno *v.* Taylor, 38 Barb. (N. Y.) 375.

**43.** Whitwell *v.* Vincent, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244; Harding *v.* Metz, 1 Tenn. Ch. 610; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

**44.** Whitwell *v.* Vincent, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Draper *v.* Jones, 11 Barb. (N. Y.) 263; Hall, etc., Wood-Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715.

**45.** *Indiana.*— Curme *v.* Rauh, 100 Ind. 247.

*Massachusetts.*— Com. *v.* Devlin, 141 Mass. 423, 6 N. E. 64.

*Missouri.*— Strauss *v.* Hirseh, 63 Mo. App. 95.

*New Hampshire.*— Paul *v.* Reed, 52 N. H. 136.

*Ohio.*— Wabash El. Co. *v.* Toledo First Nat. Bank, 23 Ohio St. 311.

*Tennessee.*— Harding *v.* Metz, 1 Tenn. Ch. 610.

**A mere handing over** of the goods in the expectation of immediate payment does not constitute an absolute delivery. Miller *v.* Jones, 66 Barb. (N. Y.) 148; Leven *v.* Smith, 1 Den. (N. Y.) 571.

**46.** Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261. See also *supra*, VI, A, 5, e, (I).

**47.** Fishback *v.* Van Dusen, 33 Minn. 111, 22 N. W. 244.

**48.** *Alabama.*— Drake *v.* Scott, 136 Ala. 261, 33 So. 873, 96 Am. St. Rep. 25; Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93; Shines *v.* Steiner, 76 Ala. 458.

*Illinois.*— Van Duzor *v.* Allen, 90 Ill. 499; Sibley *v.* Tie, 88 Ill. 287; Allen *v.* Hartfield, 76 Ill. 358; Gibson *v.* Chicago Packing, etc., Co., 108 Ill. App. 100.

*Indiana.*— Curme *v.* Rauh, 100 Ind. 247; Evansville, etc., R. Co. *v.* Erwin, 84 Ind. 457.

*Kentucky.*— Bainbridge *v.* Caldwell, 4 Dana 211.

*Maine.*— Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 Atl. 69; Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Seed *v.* Lord, 66 Me. 580.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514; Goodwin *v.* Boston, etc., R. Co., 111 Mass. 487; Whitney *v.* Eaton, 15 Gray 225; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Whitwell *v.* Vincent, 4 Pick. 449, 16 Am. Dec. 355; Barrett *v.* Pritchard, 2 Pick. 512, 13 Am. Dec. 449; Marston *v.* Baldwin, 17 Mass. 606.

*Minnesota.*— Carter *v.* Cream of Wheat Co., 73 Minn. 315, 76 N. W. 55.

*Mississippi.*— Hoover *v.* Wells, 33 Miss. 536.

*Missouri.*— Strauss *v.* Hirseh, 63 Mo. App. 95.

*Nebraska.*— Sutro *v.* Hoile, 2 Nebr. 186.

*New Hampshire.*— Hart *v.* Boston, etc., R. Co., 72 N. H. 410, 56 Atl. 920; Paul *v.* Reed, 52 N. H. 136; Ferguson *v.* Clifford, 37 N. H. 86.

*New Jersey.*— Hirseh *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

*New York.*— Hammett *v.* Linneman, 48 N. Y. 399; Adams *v.* Roseoe Lumber Co., 2 N. Y. App. Div. 47, 37 N. Y. Suppl. 265 [*affirmed* in 159 N. Y. 176, 53 N. E. 805]; Morey *v.* Medbury, 10 Hun 540; Hill *v.* McKenzie, 1 Hun 110, 3 Thomps. & C. 122; Miller *v.* Jones, 66 Barb. 148; Dows *v.* Dennistoun, 28 Barb. 393; Fleeman *v.* McKean, 25 Barb. 474; Kidd *v.* Belden, 19 Barb. 266; Schmidt *v.* Kattenborn, 2 Hilt. 157; Leven *v.* Smith, 1 Den. 571; Aeker *v.* Campbell, 23

payment by check in lieu of cash and the check is dishonored he may reclaim the property.[49]

(III) *Delivery to Carrier.* Where a delivery to a carrier is equivalent to a delivery to the buyer,[50] the condition as to payment or security may be waived by an unconditional delivery to the carrier;[51] but such condition is not waived if the delivery to the carrier is merely conditional,[52] as where the carrier is instructed not to deliver the goods unless payment is made.[53] The seller may also reserve the right of property in the goods, notwithstanding delivery by taking a bill of lading in such form as to indicate an intention to so reserve the right.[54]

**f. Effect of Payment or Tender** — (I) *In General.* In the absence of other conditions upon which the passing of the property in the goods shall depend, the property passes on payment,[55] or tender,[56] or by the acceptance of the seller's draft for the price.[57] But while a payment of the price is strong evidence of an intention to pass title,[58] it does not necessarily have this effect even as between the parties,[59] and as against creditors and subsequent purchasers the payment of the price does not pass title if there has been no delivery of the goods,[60] unless they have notice of the sale before their rights accrue.[61] The mere loan of money

Wend. 372; Palmer *v.* Hand, 13 Johns. 434, 7 Am. Dec. 392; Keeler *v.* Field, 1 Paige 312; Haggerty *v.* Palmer, 6 Johns. Ch. 437.

*North Carolina.*— Shelton *v.* Yancy, 12 N. C. 370.

*Ohio.*—Wabash El. Co. *v.* Toledo First Nat. Bank, 23 Ohio St. 311.

*Oklahoma.*— McIver *v.* Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. N. S. 696.

*Pennsylvania.*— Henderson *v.* Lauck, 21 Pa. St. 359; Harris *v.* Smith, 3 Serg. & R. 20; National Refining, etc., Co. *v.* Miller, 7 Phila. 97; Moore *v.* Laird, 1 Chest. Co. Rep. 529.

*Tennessee.*— Harding *v.* Metz, 1 Tenn. Ch. 610.

*Utah.*— Paulson *v.* Lyon, 26 Utah 438, 73 Pac. 510.

*Vermont.*— Riley *v.* Wheeler, 42 Vt. 528.

*Wisconsin.*— Fenelon *v.* Hogoboom, 31 Wis. 172; Goldsmith *v.* Bryant, 26 Wis. 34; Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

*United States.*— Bauendahl *v.* Horr, 2 Fed. Cas. No. 1,113, 7 Blatchf. 548; De Wolf *v.* Babbett, 8 Fed. Cas. No. 4,220, 4 Mason 289.

*England.*— Weiner *v.* Gill, [1905] 2 K. B. 172, 10 Com. Cas. 213, 74 L. J. K. B. 845, 92 L. T. Rep. N. S. 843, 21 T. L. R. 478, 53 Wkly. Rep. 553.

49. *Georgia.*— Charleston, etc., R. Co. *v.* Pope, 122 Ga. 577, 50 S. E. 374.

*Illinois.*— Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Mathews *v.* Cowan, 59 Ill. 341.

*Minnesota.*— Globe Milling Co. *v.* Minneapolis El. Co., 44 Minn. 153, 46 N. W. 306.

*Missouri.*— Johnson-Brinkman Commission Co. *v.* Kansas City Cent. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179.

*Ohio.*— Hodgson *v.* Barrett, 33 Ohio St. 63, 31 Am. Rep. 527.

*England.*— Loughnan *v.* Barry, Ir. R. 5 C. L. 538, Ir. R. 6 C. L. 457; Hawse *v.* Crowe, R. & M. 414, 21 E. C. L. 784. But see Noble *v.* Adams, Holt N. P. 248, 3 E. C. L. 105, 2 Marsh. 366, 7 Taunt. 59, 2 E. C. L. 259, 17 Rev. Rep. 445.

50. See *supra*, VI, A, 4, c, (VIII).

51. Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

**Effect of unconditional delivery** generally see *supra*, VI, A, 5, e, (I).

52. Baker *v.* Bourcicault, 1 Daly (N. Y.) 23; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261.

**Conditional delivery** generally see *supra*, VI, A, 5, e, (II).

53. Baker *v.* Bourcicault, 1 Daly (N. Y.) 23.

54. See *infra*, VI, A, 6.

55. *Maine.*— Penley *v.* Bessey, 87 Me. 530, 33 Atl. 21.

*Maryland.*— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

*Vermont.*— Patton *v.* Cardiner, 72 Vt. 47, 47 Atl. 110.

*Washington.*— Hawley *v.* Kenoyer, 1 Wash. Terr. 609.

*United States.*— Schreiber *v.* Andrews, 101 Fed. 763, 41 C. C. A. 663 [*affirming* 93 Fed. 367].

56. See *infra*, VI, A, 5, f. (III).

57. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; De Wolf *v.* Gardner, 12 Cush. (Mass.) 19, 59 Am. Dec. 165; Dows *v.* Cobb, 12 Barb. (N. Y.) 310; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434.

58. Penley *v.* Bessey, 87 Me. 530, 33 Atl. 21.

59. West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Mucklow *v.* Mangles, 1 Taunt. 318, 9 Rev. Rep. 784.

**Goods or articles to be manufactured or produced** see *supra*, VI, A, 3, e, (I).

60. Ludwig *v.* Fuller, 17 Me. 162. 35 Am. Dec. 245; Mitchell *v.* Com., 37 Pa. St. 187. But see Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822.

**Necessity of delivery as against third persons** see *supra*, VI, A, 4, a, (II).

61. Ludwig *v.* Fuller, 17 Me. 162. 35 Am. Dec. 245.

to pay the purchase-price will not vest title in the lender,[62] but the parties may by their contract provide that the title shall pass to the person making the advances as security therefor.[63]

(II) *PART PAYMENT.*[64] The effect of a part payment as regards the transfer of title depends primarily upon the terms of the contract and intention of the parties,[65] and also whether as between the parties anything still remains to be done with reference to the subject-matter of the sale.[66] So in some cases a part payment will as between the parties operate as a transfer of the right of property,[67] so as to place the goods at the risk of the buyer,[68] although not conferring any right of possession until the balance of the price is paid.[69] But the mere fact of a part payment does not necessarily have the effect of passing title;[70] and if the contract is not to be complete until the price is fully paid, a part payment does not give the buyer any title to the goods,[71] or even an interest therein to the extent of the payments made.[72] If, however, the contract expressly provides that title to the goods shall vest in the buyer as the same are paid for, he will acquire title to the extent of the payments made.[73]

(III) *TENDER OF PAYMENT.* If the property in the goods is to pass on payment of the price, a tender of the price by the buyer to the seller will operate to pass the property,[74] provided it is made in cash,[75] and is of the proper amount,[76]

**62.** Moore *v.* New Orleans, 17 La. Ann. 312; Michoud *v.* Lacroix, 8 Mart. N. S. (La.) 445; New Hanover Bank *v.* Williams, 79 N. C. 129.

**63.** Jones *v.* Trawick, 31 Ala. 253; Tainter *v.* Lombard, 53 Me. 360, 87 Am Dec. 552; Ullman *v.* Barnard, 7 Gray (Mass.) 554.

**Effect of agreement as to creditors.**—Where a cotton dealer arranges with a bank to pay for cotton purchased by him upon condition that the bank is to have possession of and title to such cotton until reimbursed for its advances, and in a particular instance a purchase is made and the cotton delivered to the dealer himself, the bank paying the price thereof upon his check without having obtained either actual or constructive possession or having had any dealings with the seller, the title passes to the dealer and is subject to execution on a judgment against him as against the claim of the bank. Central Georgia Land, etc., Co. *v.* Macon Exch. Bank, 101 Ga. 345, 28 S. E. 863.

**64. Payment in instalments** as work progresses on goods to be manufactured or produced see *supra*, VI, A, 3, e, (I).

**65.** Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49 [*reversing* 44 Hun 434].

**66.** Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519; Jennings *v.* Flanagan, 5 Dana (Ky.) 217, 30 Am. Dec. 683.

**Separation from mass.**— Under a sale of a large pile of slate at so much per ton, to be paid for as parcels of it are from time to time taken away, the payment of a sum representing the price of a certain number of tons entitles the buyer to have this amount weighed off and separated for him, but until this is done, if no delivery has been made, no part of the slate becomes the property of the buyer. Young *v.* Austin, 6 Pick. (Mass.) 280.

**67.** Owens *v.* Weedman, 82 Ill. 409; Bradley *v.* Michael, Smith (Ind.) 346.

**68.** See Owens *v.* Weedman, 82 Ill. 409.

**69.** Owens *v.* Weedman, 82 Ill. 409; Bradley *v.* Michael, Smith (Ind.) 346; Minzeskeimer *v.* Heine, 4 E. D. Smith (N. Y.) 65.

**70.** Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519; Jennings *v.* Flanagan, 5 Dana (Ky.) 217, 30 Am. Dec. 683.

**Earnest or part payment** does not necessarily or always transfer the title to the property for which it has been given. It merely binds the contract. Jennings *v.* Flanagan, 5 Dana (Ky.) 217, 30 Am. Dec. 683.

**71.** Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769; Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49 [*reversing* 44 Hun 434]; Pierson *v.* Hoag, 47 Barb. (N. Y.) 243; West *v.* Bolton, 4 Vt. 558; Robinson *v.* Thoma, 30 Wash. 129, 70 Pac. 240.

**If the sale is conditional** and the title is not to vest in the buyer until full payment is made, a part payment does not give him any title, although the goods have been delivered to him. West *v.* Bolton, 4 Vt. 558.

**72.** Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49 [*reversing* 44 Hun 434]. *Compare* Fenelon *v.* Hogoboom, 31 Wis. 172.

**73.** Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207, 416.

**74.** McLeod *v.* Powe, 12 Ala. 9; Clough *v.* Ray, 20 N. H. 558; Wright *v.* Shattuck, 4 Northwest. Terr. 455 [*affirmed* in 5 Northwest. Terr. 264].

**75.** Hughes *v.* Daniels, 87 Mich. 190, 49 N. W. 542; Robinson *v.* Thoma, 30 Wash. 129, 70 Pac. 240; Wilmarth *v.* Mountford, 30 Fed. Cas. No. 17,774, 4 Wash. 79.

**A deposit in a bank** to the credit of the seller is not a sufficient tender. Robinson *v.* Thoma, 30 Wash. 129, 70 Pac. 240.

**76.** Jennings *v.* West, 40 Kan. 372, 19 Pac. 863; Greenwood Grocery Co. *v.* Canadian County Mill, etc., Co., 72 S. C. 450, 52 S. E. 191, 110 Am. St. Rep. 627, 2 L. R. A. N. S. 79.

and if a valid tender has been made by the buyer and refused by the seller it is not necessary for the buyer to make a second tender.[77]

**6. Reservation of Right of Property — a. In General.**[78] Although the property in the goods will ordinarily pass on delivery,[79] yet it will not do so if the intention clearly appears on the part of the seller, to retain the *jus disponendi* or right of property,[80] using the term as distinguished from a mere reservation of a lien.[81] The right of property may be reserved by delivery in escrow to await payment,[82] or by delivery to a warehouseman taking the receipt in the name of the seller;[83] but the question usually arises on delivery to a carrier which as a general rule is a delivery to the buyer passing the property,[84] unless by the mode of shipment the right of property is reserved.[85]

**b. Consignment to Seller or His Order.** Where goods are shipped and by the bill of lading or shipping receipt are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods,[86] even though the shipment is in care of the buyer.[87] But the evidence afforded by the mode of shipment as to the seller's intention is not conclusive,[88] and the property in the goods will be held to have passed to the buyer if such appears to have been the intention of the parties,[89] as for instance where the per-

77. Mathis *v.* Thomas, 101 Ind. 119.

78. Conditional sales see *infra*, X.

79. See *supra*, VI, A, 4, b.

80. Hudson Trust, etc., Inst. *v.* Carr-Curran Paper-Mills Co., 58 N. J. Eq. 59, 43 Atl. 418; Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

**What constitutes.**— A mere understanding between the vendor of timber and the vendee thereof that the vendor is to have the purchase-money before the staves into which the timber is to be manufactured are sold does not amount to a reservation of title. Neal *v.* Cone, 76 Ark. 273, 88 S. W. 952.

**A parol reservation of title** where the sale is by an unconditional bill of sale is of no effect. Scarbrough *v.* Alcorn, 74 Tex. 358, 12 S. W. 72.

**A fraudulent attempt** to reserve the *jus disponendi* after delivery cannot affect the buyer's right of property. Ogle *v.* Atkinson, 1 Marsh. 323, 5 Taunt. 759, 15 Rev. Rep. 647, 1 E. C. L. 389. And see Walley *v.* Montgomery, 3 East 585, 7 Rev. Rep. 526.

81. See *infra*, VIII, A.

82. Wright *v.* Maxwell, 9 Ind. 192; Nichols, etc., Co. *v.* Paulson, 6 N. D. 400, 71 N. W. 136.

83. Peck *v.* Armstrong, 38 Barb. (N. Y.) 215.

84. See *supra*, VI, A, 4, c, (VIII), (A).

85. See *infra*, VI, A, 6, b, c, d, e.

86. *Alabama.*— McCormick *v.* Joseph, 77 Ala. 236; Jones *v.* Brewer, 79 Ala. 545.

*Arkansas.*— Berger *v.* State, 50 Ark. 20, 6 S. W. 15.

*Iowa.*— Baker *v.* Chicago, etc., R. Co., 98 Iowa 438, 67 N. W. 376; Forcheimer *v.* Stewart, 65 Iowa 593, 22 N. W. 886, 54 Am. Rep. 30.

*Massachusetts.*— Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

*Minnesota.*— Minnesota Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151.

*Missouri.*— Bergman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992.

*Montana.*— Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

*New Hampshire.*— Peoria First Nat. Bank *v.* Northern R. Co., 58 N. H. 203.

*Ohio.*— Bellefontaine *v.* Vassaux, 55 Ohio St. 323, 45 N. E. 321.

*Pennsylvania.*— Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626.

*Tennessee.*— Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Cole *v.* Rankin, (Ch. App. 1896) 42 S. W. 72.

*Texas.*— Grayson County Nat. Bank *v.* Nashville, etc., R. Co., (Civ. App. 1904) 79 S. W. 1094.

*United States.*— Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Guerard *v.* The Lovespring, 42 Fed. 853; Seeligson *v.* Philbrick, 30 Fed. 600; The San Jose Indiano, 21 Fed. Cas. No. 12,322, 2 Gall. 268 [*affirmed* in 1 Wheat. 208, 4 L. ed. 73].

*England.*— Ellershaw *v.* Magniac, 6 Exch. 570 note; Wait *v.* Baker, 2 Exch. 1, 17 L. J. Exch. 307.

**Shipment f. o. b.**— The fact that the delivery was to be free on board does not affect the rule. Jones *v.* Brewer, 79 Ala. 545; Niemeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534. In England, however, such fact is regarded as indicating an intention to pass the property in the goods. Browne *v.* Hare, 4 H. & N. 822, 5 Jur. N. S. 711, 29 L. J. Exch. 6, 7 Wkly. Rep. 619. *Compare* Ogg *v.* Shuter, 1 C. P. D. 47, 3 Aspin. 77, 45 L. J. C. P. 44, 33 L. T. Rep. N. S. 492, 24 Wkly. Rep. 100 [*reversing* L. R. 10 C. P. 159, 44 L. J. C. P. 161, 32 L. T. Rep. N. S. 114, 23 Wkly. Rep. 319].

87. Ward *v.* Taylor, 56 Ill. 494.

88. Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

89. *Maryland.*— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

son who is apparently the seller is in fact the buyer's agent in the transaction,[90] or the goods are shipped for the account and at the risk of the buyer.[91] But on the other hand, even in such cases an intention that the property shall not pass may appear from other circumstances and should be given effect.[92]

**e. Consignment to Buyer.** If the goods are shipped in the name of the buyer as consignee or the bill of lading is indorsed to him this is strong evidence of an intent to pass the property free of any reservation.[93] But even in such cases the right of property may be reserved so that it will not pass to the buyer if the bill of lading stipulates for delivery to the seller, his agent or order,[94] or if the seller retains the bill of lading.[95]

**d. Bill of Lading With Draft Attached.** If where there is a consignment to the seller, his agent, or order, the bill of lading is forwarded to the seller's agent with draft attached to be delivered to the buyer on payment, the seller thereby manifests an intention to reserve the property in the goods,[96] and the property does not pass until the draft is paid.[97] And even when the buyer is named as consignee,

*Massachusetts.*— Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

*Michigan.*— Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. 533.

*United States.*— Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214.

*England.*— Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, 47 L. J. Exch. 418, 38 L. T. Rep. N. S. 597; Browne *v.* Hare, 4 H. & N. 822, 5 Jur. N. S. 711, 29 L. J. Exch. 6, 7 Wkly. Rep. 619. See also Key *v.* Cotesworth, 7 Exch. 595, 22 L. J. Exch. 4 (where by indorsing the bill of lading the seller waived his right); Wilmshurst *v.* Bowker, 12 L. J. Exch. 475, 7 M. & G. 882, 49 E. C. L. 882.

**90.** Van Casteel *v.* Booker. 2 Exch. 691. And see Straus *v.* Wessel, 30 Ohio St. 211.

**91.** Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698; Walley *v.* Montgomery, 3 East 585, 7 Rev. Rep. 526.

**92.** Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568; Mason *v.* Great Western R. Co., 31 U. C. Q. B. 73.

**93.** Wigton *v.* Bowley, 130 Mass. 252; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Hobart *v.* Littlefield, 13 R. I. 341; Greenwood Grocery Co. *v.* Canadian County Mill, etc., Co., 72 S. C. 450, 52 S. E. 191, 110 Am. St. Rep. 627, 2 L. R. A. N. S. 79.

**94.** Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163; Grayson County Nat Bank *v.* Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. 1094.

**95.** Pomeroy *v.* Will, 5 Ohio Dec. (Reprint) 34, 2 Am. L. Rec. 1. But see Hope Lumber Co. *v.* Foster, etc., Hardware Co., 53 Ark. 196, 13 S. W. 731.

**Retention of bill of lading.**— Until the bill of lading is parted with, no title to the property passes from the owner or shipper, nor does any right to the possession or ownership of the goods vest in the consignee, and the production of the bill of lading by its holder, the possession of which he had never parted with, proves conclusively that he was the shipper and owner. Hauterman *v.* Bock, 1 Daly (N. Y.) 366.

**96.** *Alabama.*— Jones *v.* Brewer, 79 Ala. 545.

*California.*— Ramish *v.* Kirschbraun, 107 Cal. 659, 40 Pac. 1045.

*Iowa.*— Forcheimer *v.* Stewart, 65 Iowa 593, 22 N. W. 886, 54 Am. Rep. 30.

*Kentucky.*— Kentucky Refining Co. *v.* Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 84 Am. St. Rep. 468, 42 L. R. A. 353, 20 Ky. L. Rep. 778.

*Massachusetts.*— Libby *v.* Ingalls, 124 Mass. 503; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

*Minnesota.*— Security Bank *v.* Luttgren, 29 Minn. 363, 13 N. W. 151.

*Montana.*— Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. Rep. 698.

*Tennessee.*— Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

*Vermont.*— Joslyn *v.* Grand Trunk R. Co., 51 Vt. 92.

*United States.*— North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 8 S. Ct. 266, 31 L. ed. 287; Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Portland Flouring Mills Co. *v.* British, etc., Mar. Ins. Co., 130 Fed. 860, 65 C. C. A. 344 [*affirming* 124 Fed. 855]; Seeligson *v.* Philbrick, 30 Fed. 600; *In re* Forty Sacks of Wool, 14 Fed. 643.

*England.*— Turner *v.* Liverpool Docks, 6 Exch. 543, 20 L. J. Exch. 393.

*Canada.*— Mason *v.* Great Western R. Co., 31 U. C. Q. B. 73.

**97.** *Alabama.*— Jones *v.* Brewer, 79 Ala. 545.

*Iowa.*— Baker *v.* Chicago, etc., R. Co., 98 Iowa 438, 67 N. W. 376.

*Kentucky.*— Kentucky Refining Co. *v.* Globe Refining Co., 104 Ky. 559, 47 S. W. 602, 20 Ky. L. Rep. 778, 42 L. R. A. 353.

*Maryland.*— Hopkins *v.* Cowen, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124.

*Massachusetts.*— Alderman *v.* Eastern R. Co., 115 Mass. 233; Chicago First Nat. Bank *v.* Bayley, 115 Mass. 228. And see Ullman *v.* Barnard, 7 Gray 554.

*Michigan.*— W. & A. McArthur Co. *v.* Old Second Nat. Bank, 122 Mich. 223, 81 N. W. 92.

*Missouri.*— Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992.

if the bill of lading with draft attached is sent to the seller's agent or bank for collection the property in the goods is reserved and does not pass to the buyer until payment.[98] A different intention may, however, be indicated by the circumstances of the transaction and will of course control,[99] but an intention to pass the property will not be inferred from the delivery of an invoice to the buyer.[1] If the buyer obtains possession of the goods without payment of the draft, he does not thereby acquire any right of property;[2] but when the draft is paid by the buyer and the bill of lading delivered to him the property in the goods passes.[3] If the draft attached to the bill of lading is a time draft this imports a sale on credit and the bill should be delivered on acceptance of the draft,[4] unless there are instructions to hold until payment or circumstances indicating that the bill is to be held to secure both acceptance and payment;[5] but the bill should not be delivered until the draft is accepted.[6] The acceptance of the draft is a condition

*Rhode Island.*— Vaughan *v.* New York, etc., R. Co., 27 R. I. 235, 61 Atl 695.

*Texas.*— Grayson County Nat. Bank *v.* Nashville, etc., R. Co., (Civ. App. 1904) 79 S. W. 1094.

*United States.*— Portland Flouring Mills Co. *v.* British, etc., Mar. Ins. Co., 130 Fed. 860, 65 C. C. A. 344 [*affirming* 124 Fed. 855]; Seeligson *v.* Philbrick, 30 Fed. 600; Treadwell *v.* Anglo-American Packing Co., 13 Fed. 22.

*England.*— Brandt *v.* Bowlby, 2 B. & Ad. 932, 1 L. J. K. B. 14, 22 E. C. L. 390; Moakes *v.* Nicolson, 19 C. B. N. S. 290, 34 L. J. C. P. 273, 12 L. T. Rep. N. S. 573, 115 E. C. L. 290. But see Jenkyns *v.* Brown, 14 Q. B. 496, 14 Jur. 505, 19 L. J. Q. B. 286, 68 E. C. L. 496, where it is said that the buyer has the general property subject to the special property of the holder of the bill of lading, the right of possession being deferred until payment.

**98.** *California.*— Hilmer *v.* Hills, 138 Cal. 134, 70 Pac. 1080.

*Massachusetts.*— Newcomb *v.* Boston, etc., R. Co., 115 Mass. 230; Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92. But see Wigton *v.* Bowley, 130 Mass. 252, holding that the fact that the bill of lading was with draft attached is not conclusive and that the intention of the seller should control.

*Minnesota.*— Freeman *v.* Kraemer, 63 Minn. 242, 65 N. W. 455.

*New York.*— Indiana Nat. Bank *v* Colgate, 4 Daly 41.

*North Carolina.*— Sims *v.* Norfolk, etc., R. Co., 130 N. C. 556, 41 S. E. 673.

*Ohio.*— Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

*South Carolina.*— State *v.* Maloney, 81 S. C. 226, 62 S. E. 215; Greenwood Grocery Co. *v.* Canadian County Mill, etc., Co., 72 S. C. 450, 52 S. E. 191.

*Vermont.*— Burditt *v.* Howe, 69 Vt. 563, 38 Atl. 240.

*United States.*— Merchants' Exch. Bank *v.* McGraw, 59 Fed. 972, 8 C. C. A. 420.

*Canada.*— Corby *v.* Williams, 7 Can. Sup. Ct. 470.

**99.** Wigton *v.* Bowley, 130 Mass. 252; Hobart *v.* Littlefield, 13 R. I. 341; Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, 47 L. J. Exch. 418, 38 L. T. Rep. N. S. 597; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84.

**Question for jury.**— Where the evidence is conflicting as to whether property to be transported by a carrier was to be delivered to the vendors or the vendee, the fact that the bill of lading was deposited in the post-office attached to a draft on the vendee for the purchase-money does not, in the absence of evidence that the bill was properly indorsed, raise a conclusive presumption that the title has passed to the vendee, but the question of ownership is for the jury. Alabama Great Southern R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356.

**1.** Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626; Dows *v.* Milwaukee Nat. Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261; Shepherd *v.* Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148, 24 L. T. Rep. N. S. 857, 20 Wkly. Rep. 1. *Compare* Jenkyns *v.* Brown, 14 Q. B. 496, 14 Jur. 505, 19 L. J. Q. B. 286, 68 E. C. L. 496.

**2.** Stollenwerck *v.* Thacher, 115 Mass. 224; Moors *v.* Kidder, 106 N. Y. 32, 12 N. E. 818; Farmers', etc., Nat. Bank *v.* Brown, 42 N. Y. Super. Ct. 522; Bassett *v.* Spofford, 2 Daly (N. Y.) 432 [*affirmed* in 45 N. Y. 387, 6 Am. Rep. 101]; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261; Shepherd *v.* Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148, 24 L. T. Rep. N. S. 857, 20 Wkly. Rep. 1. And see Evansville, etc., R. Co. *v.* Erwin, 84 Ind. 457.

**3.** Forcheimer *v.* Stewart, 65 Iowa 593, 22 N. W. 886, 54 Am. Rep. 30; Treadwell *v.* Anglo-American Packing Co., 13 Fed. 22; Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, 47 L. J. Exch. 418, 38 L. T. Rep. N. S. 597.

**4.** Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Boston Nat. Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434.

**5.** Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

**6.** Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626.

precedent to the passing of title;[7] but upon its acceptance the title passes to the buyer,[8] unless it otherwise appears that it was not the intention to make a sale on credit, in which case the title will not pass upon acceptance but only when the draft is paid.[9]

**e. Shipment C. O. D.** There is a conflict of authority as to the effect of a shipment C. O. D.[10] In some cases it has been held that the property remains in the seller until payment has been made by the buyer,[11] the carrier being considered as the agent of the seller;[12] but in other cases it is held that where the shipment is C. O. D. the carrier is the agent of the buyer for the purpose of transportation,[13] and of the seller for the purpose of collection,[14] and that unless a contrary intention appears the property in the goods passes upon their delivery to the carrier,[15] although the buyer is not entitled to possession until payment is made,[16] and that the fact that the seller has prepaid the charges of transportation does not affect the rule.[17] The question has most frequently arisen in regard to sales of intoxicating liquors.[18]

**7. Bill of Sale or Other Conveyance — a. In General.** In the absence of statute a bill of sale is not essential in order to pass the property in the goods sold.[19] If the contract provides for the giving of a bill of sale the title will ordi-

**7.** Mathewson *v.* Belmont Flouring Mills Co., 76 Ga. 357; Chicago Mar. Bank *v.* Wright, 48 N. Y. 1; Dodge *v.* Johnson, 3 Thomps. & C. (N. Y.) 237; Pennsylvania R. Co. *v.* Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. Rep. 626.

**8.** Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434.

**9.** Security Bank *v.* Luttgren, 29 Minn. 363, 13 N. W. 151.

**10.** See State *v.* Rosenberger, 212 Mo. 648, 111 S. W. 509, 126 Am. St. Rep. 580, 20 L. R. A. 284; American Express Co. *v.* Iowa, 196 U. S. 133, 25 S. Ct. 182, 49 L. ed. 417.

**11.** Wagner *v.* Hallack, 3 Colo. 176; State *v.* Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586; U. S. *v.* Shriver, 23 Fed. 134. See also Crabb *v.* State, 88 Ga. 584, 15 S. E. 455.

**12.** State *v.* Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586.

**13.** Pilgreen *v.* State, 71 Ala. 368; State *v.* Intoxicating Liquors, 98 Me. 464, 57 Atl. 798; State *v.* Mullin, 78 Ohio St. 358, 85 N. E. 556, 125 Am. St. Rep. 710, 18 L. R. A. N. S. 609.

**14.** Pilgreen *v.* State, 71 Ala. 368; State *v.* Mullin, 78 Ohio St. 358, 85 N. E. 556, 125 Am. St. Rep. 710, 18 L. R. A. N. S. 609.

**15.** *Alabama.*— Pilgreen *v.* State, 71 Ala. 368.

*Illinois.*— Carthage *v.* Munsell, 203 Ill. 474, 67 N. E. 831 [*affirming* 105 Ill. App. 119].

*Maine.*— State *v.* Intoxicating Liquors, 98 Me. 464, 57 Atl. 798; State *v.* Peters, 91 Me. 31, 39 Atl. 342.

*Missouri.*— State *v.* Rosenberger, 212 Mo. 648, 111 S. W. 509, 126 Am. St. Rep. 580, 20 L. R. A. N. S. 284 [*disapproving* State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406].

*New York.*— Higgins *v.* Murray, 73 N. Y. 252. But see Baker *v.* Bourcicault, 1 Daly 23.

*Ohio.*— State *v.* Mullin, 78 Ohio St. 358, 85 N. E. 556, 125 Am. St. Rep. 710, 18 L. R. A. N. S. 609.

*Pennsylvania.*— Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

*Texas.*— Keller *v.* State, (Cr. App. 1905) 87 S. W. 669.

**Intention of parties.**— If it clearly appears from the terms of the agreement or other circumstances of the case that the parties did not intend that title should pass until final delivery and payment, such intention will control. Cole *v.* Rankin, (Tenn. Ch. App. 1896) 42 S. W. 72.

**16.** Pilgreen *v.* State, 71 Ala. 368; State *v.* Mullin, 78 Ohio St. 358, 85 N. E. 556, 125 Am. St. Rep. 710, 18 L. R. A. N. S. 609.

**17.** State *v.* Intoxicating Liquors, 98 Me. 464, 57 Atl. 798.

**18.** See Intoxicating Liquors, 23 Cyc. 185, 186.

**19.** *Alabama.*— Sanders *v.* Stokes, 30 Ala. 432; Todd *v.* Hardie, 5 Ala. 698.

*Louisiana.*— Casey *v.* Pennoyer, 6 La. Ann. 776.

*Maryland.*— Dentzel *v.* City, etc., R. Co., 90 Md. 434, 45 Atl. 201.

*Massachusetts.*— Stockbridge *v.* West Stockbridge, 14 Mass. 257.

*Mississippi.*— Blewett *v.* Evans, 42 Miss. 804; Fatheree *v.* Fletcher, 31 Miss. 265.

*Missouri.*— Gatzweiler *v.* Morgner, 51 Mo. 47; Kuhler *v.* Tobin, 61 Mo. App. 576; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220; Davis *v.* Loftin, 6 Tex. 489.

See 43 Cent. Dig. tit. "Sales," § 574.

**In Texas** the statute requires bills of sale in the case of sales of stock running on the range (Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23; Hickman *v.* Hickman, 5 Tex. Civ. App. 99, 27 S. W. 31); and if there is neither a bill of sale nor a delivery the sale is a nullity and passes no title (Hickman *v.* Hickman, *supra*); but if the animals have been delivered to the buyer the only

narily remain in the seller until the bill of sale is given,[20] or the buyer takes possession,[21] but if the goods are delivered the title of the buyer will not be affected by the failure of the seller to make the bill of sale as agreed.[22] While the bill of sale takes effect from its delivery,[23] the delivery need not, in order to pass title, be made to the buyer, but may be made to some third person for him;[24] but there must be some delivery or act on the part of the seller showing an intention to deliver and make the instrument effective,[25] particularly as against third persons.[26] Generally on the execution and delivery of a bill of sale the property in the goods passes from the seller to the buyer,[27] and entitles the latter to the immediate possession,[28] provided the instrument evidences a present sale,[29] properly identifies the

effect of not taking a bill of sale is to make the possession *prima facie* illegal. It is not conclusively so and the title will pass without the bill of sale if it is shown that the sale was *bona fide* and for a sufficient consideration, and that no evasion of the law was intended (Colorado First Nat. Bank *v.* Brown, 85 Tex. 80, 23 S. W. 862; Wells *v.* Littlefield, 59 Tex. 556).

**20.** Wilson *v.* Russell, 136 Mass. 211; Lovelace *v.* Stewart, 23 Mo. 384; Wallingford *v.* Burr, 15 Nebr. 204, 18 N. W. 67.

**Waiver.**— A condition in a contract of sale that title shall not pass until the delivery of the bill of sale, being solely for the security of the vendor, the non-delivery thereof cannot be urged as a defense to an action for the purchase-price as showing the commencement of the action before the title has passed, as the vendor may waive such condition. Yori *v.* Cohn, 26 Nev. 206, 65 Pac. 945, 67 Pac. 212.

**21.** Wilson *v.* Russell, 136 Mass. 211.

**22.** Todd *v.* Hardie, 5 Ala. 698; McKinney *v.* Fort, 10 Tex. 220.

**23.** Inlow *v.* Com., 6 T. B. Mon (Ky.) 72; Walsh *v.* Brown, 4 N. Y. Suppl. 79.

**24.** Inlow *v.* Com., 6 T. B. Mon. (Ky.) 72; Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115.

**25.** Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Doyle *v.* Mizner, 40 Mich. 160; Brand *v.* Focht, 1 Abb. Dec. (N. Y.) 185, 3 Keyes 409, 2 Transcr. App. 357, 5 Abb. Pr. 225.

**26.** Inlow *v.* Com., 6 T. B. Mon (Ky.) 72; Copelly *v.* Deverges, 11 Mart. (La.) 641; Walsh *v.* Brown, 4 N. Y. Suppl. 79.

**27.** *Alabama.*— Thomason *v.* Dill, 30 Ala. 444.

*Connecticut.*— Crug *v.* Gorham, 74 Conn. 541, 51 Atl. 519.

*Georgia.*— Hays *v.* Callaway, 58 Ga. 288.

*Kentucky.*— Inlow *v.* Com., 6 T. B. Mon. 72.

*Missouri.*— Caldwell *v.* Garner, 31 Mo. 131.

*Montana.*— State *v.* Conrow, 19 Mont. 104, 47 Pac. 640.

*New Jersey.*— Evans *v.* Herring, 27 N. J. L. 243.

*North Dakota.*— Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

*Pennsylvania.*— Leonard *v.* Winslow, 2 Grant 139.

*Rhode Island.*— Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

*South Carolina.*— Prime *v.* Yates, 3 Brev. 559, 2 Treadw. 770.

**Bill of sale as security.**— Where one has taken a bill of sale of a vessel absolute in form, but designed as collateral security, and afterward purchases and pays for the part of the vessel so held by him, but receives no other instrument of transfer, such purchase and payment will pass the title between the parties. McLellan *v.* Osborne, 51 Me. 85. Where a bill of sale of a slave is by the direction of the purchaser executed by the vendor to a third person, and delivered to him as a security for the repayment of the purchase-money advanced by him, the subsequent repayment of the money by the purchaser cannot at law divest the title out of such grantee. Jones *v.* Trawick, 31 Ala. 253.

**Condition construed.**— The fact that the vendor in a bill of sale of cattle fails to comply with an agreement to rent the brand contained therein does not prevent title from passing to his vendee. Hecht *v.* Johnson, 3 Wyo. 277, 21 Pac. 1080.

**Person to whom title passes.**— The property vests in the person named as buyer in the bill of sale, although in fact he takes merely as trustee. Haden *v.* Tucker, 38 Ala. 399; Beard *v.* Childress, 4 Ala. 411. But see Haskell *v.* Jones, 24 Me. 222. Where a purchaser of property takes the bill of sale in the name of a third person without the previous or subsequent assent, authority, or knowledge of such person, or any delivery of the bill of sale or property to him, actual or constructive, no title passes to the person named in the bill of sale. Dudley *v.* Deming, 34 Conn. 169.

**28.** Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370; Hutchins *v.* Gilchrist, 23 Vt. 82.

**29.** *Alabama.*— Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603.

*Georgia.*— Bellerby *v.* Thomas, 105 Ga. 477, 30 S. E. 425.

*Iowa.*— Roundy *v.* Kent, 75 Iowa 662, 37 N. W. 146.

*Wisconsin.*— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359; Cook *v.* Van Horne, 76 Wis. 520, 44 N. W. 767; Morrow *v.* Delaney, 41 Wis. 149.

*United States.*—Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. ed. 854.

See 43 Cent. Dig. tit. "Sales," § 575.

**A bill of parcels** receipted by the seller is not *per se* evidence of an unexecuted contract to deliver the goods, but is *prima facie* evidence of a contract executed. Richardson *v.* Peyton, 20 Fed. Cas. No. 11,794, 1 Cranch C. C. 418.

goods,[30] and was not procured by fraud.[31] If these elements concur actual delivery of the goods is not necessary to pass the property as between the parties,[32] or even as against creditors of or subsequent purchasers from the seller,[33] provided the sale is made in good faith,[34] particularly where such third persons have notice of the sale.[35] If the instrument does not show a present sale the contract is executory merely and no title passes,[36] and although certain terms are used which alone would import a present sale the title will not pass if it otherwise appears that such was the intention of the parties.[37]

**b. Registration.** In the absence of statute it is not necessary that a bill of

An invoice does not of itself operate to pass the property. Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

**30.** *California.*—Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199.

*Georgia.*— Phillips *v.* Dean, 76 Ga. 10.

*North Dakota.*— Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

*Oregon.*— Commercial Nat. Bank *v.* Davidson, 18 Oreg. 57, 22 Pac. 517.

*Pennsylvania.*—Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354.

*South Carolina.*— Hinson *v.* Pickett, 1 Hill Eq. 35.

*Texas.*— Robertson *v.* Hunt, 77 Tex. 321, 14 S. W. 68.

*Wisconsin.*— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359; Morrow *v.* Delaney, 41 Wis. 149.

**31.** Hogan *v.* Holeman, 14 Phila. (Pa.) 484, 594; The Barge No. 6, 8 Fed. 48.

**32.** *Arkansas.*— White *v.* McCracken, 60 Ark. 613, 31 S. W. 882; Trieber *v.* Andrews, 31 Ark. 163.

*California.*— Crill *v.* Doyle, 53 Cal. 713.

*Kentucky.*— Inlow *v.* Com., 6 T. B. Mon. 72; Smart *v.* Clift, 4 Bibb 518.

*Maine.*—Richardson *v.* Kimball, 28 Me. 463.

*Maryland.*— Stewart *v.* Spedden, 5 Md. 433.

*Massachusetts.*— Philbrook *v.* Eaton, 134 Mass. 398; Thrall *v.* Hill, 110 Mass. 328; Ridgway *v.* Bowman, 7 Cush. 268.

*Missouri.*—Williams *v.* Gray, 39 Mo. 201.

*New York.*— Fuller *v.* Claflin, 51 Hun 609, 4 N. Y. Suppl. 92; James *v.* Hamilton, 2 Hun 630, 5 Thomps. & C. 183 [*affirmed* in 63 N. Y. 616]; Heine *v.* Anderson, 2 Duer 318.

*North Carolina.*— Gwynn *v.* Hodge, 49 N. C. 168.

*South Carolina.*— Southworth *v.* Sebring, 2 Hill 587; Younge *v.* Moore, 1 Strobh. 48; Jaggers *v.* Estes, 2 Strobh. Eq. 343, 49 Am. Dec. 674.

*Texas.*— Robertson *v.* Hunt, 77 Tex. 321, 14 S. W. 68; Brewer *v.* Blarton, 66 Tex. 532, 1 S. W. 572; Maddox *v.* Dabney, (Civ. App. 1894) 27 S. W. 901.

*Vermont.*— Hutchins *v.* Gilchrist, 23 Vt. 82.

*Washington.*—Anderson *v.* Land, 5 Wash. 493, 32 Pac. 107, 34 Am. St. Rep. 875.

*United States.*—Washington *v.* Wilson, 29 Fed. Cas. No. 17,240, 2 Cranch C. C. 153.

See 43 Cent. Dig. tit. "Sales," § 577.

**33.** *Illinois.*— O'Leary *v.* Bradford, 39 Ill. App. 182.

*Iowa.*— Tiffany *v.* Anderson, 55 Iowa 405, 7 N. W. 683.

*Louisiana.*— Cawthorn *v.* McDonald, 1 Rob. 55.

*Maine.*— Hotchkiss *v.* Hunt, 49 Me. 213.

*Maryland.*— Paine *v.* Young, 56 Md. 314.

*Massachusetts.*— Green *v.* Holmes, 125 Mass. 46 note; Dugan *v.* Nichols, 125 Mass. 43; Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318. But see Packard *v.* Wood, 4 Gray 307.

*Michigan.*— Hauser *v.* Beaty, 93 Mich. 499, 53 N. W. 628.

*New York.*— Klinck *v.* Kelly, 63 Barb. 622; Steele *v.* Taft, 22 Hun 453; Schoonmaker *v.* Vervalen, 9 Hun 138.

*Pennsylvania.*— Schumacher *v.* Eby, 24 Pa. St. 521. But see Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938.

*Vermont.*— Bellows *v.* Wells, 36 Vt. 599.

See 43 Cent. Dig. tit. "Sales," § 642.

**In Colorado,** under a statute making sales, unless accompanied by delivery and change of possession, fraudulent and void as to creditors, it is held that where one takes a bill of sale of goods without taking possession of the goods, a subsequent mortgage of the same goods by the seller gives the mortgagee a superior lien on the goods, although he knew of the bill of sale when the mortgage was given. Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226.

**Priorities.**— Where different persons claim the same goods by conveyances equally valid, he who first acquires the possession has the better title (Jewett *v.* Lincoln, 14 Me. 116, 31 Am. Dec. 36); provided the second buyer is without notice of the first sale (Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354).

**34.** Schoonmaker *v.* Vervalen, 9 Hun (N. Y.) 138.

**35.** O'Leary *v.* Bradford, 39 Ill. App. 182; Ottumwa First Nat. Bank *v.* Reno, 73 Iowa 145, 34 N. W. 796; Tiffany *v.* Anderson, 55 Iowa 405, 7 N. W. 683. *Contra*, Allen *v.* Steiger, 17 Colo. 552, 31 Pac. 226, under provisions of statute.

**36.** Love *v.* Crook, 27 Ala. 624; Brown *v.* Brooks, 52 N. C. 93; Carnes *v.* Apperson, 2 Sneed (Tenn.) 562.

**37.** Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; Carnes *v.* Apperson, 2 Sneed (Tenn.) 562.

**Question for jury.**— Whether the seller intended by a bill of sale to vest immediate title in the buyer should, if the evidence is conflicting, be submitted to the jury under proper instructions. Jones *v.* Hook, 47 Mo. 329.

sale should be filed or recorded.[38] In some states, however, it is provided by statute that in order to pass the property as against creditors and subsequent purchasers where possession is retained by the seller, the bill of sale must be filed or recorded.[39] But such a statute does not apply where the property is in the possession of a person not the seller,[40] where there is a delivery and change of possession,[41] or where the subsequent purchaser has actual notice of the sale.[42]

**8. Reconveyance to Seller — a. In General.** The property in the goods may be revested in the seller by a rescission of the contract,[43] by a return of the goods

38. *Alabama.*— Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670.

*Georgia.*— Cecil *v.* Gazan, 65 Ga. 689.

*Kentucky.*— Inlow *v.* Com., 6 T. B. Mon. 72.

*New Hampshire.*— Janelle *v.* Denoncour, 68 N. H. 1, 44 Atl. 63.

*North Carolina.*— Leak *v.* Wadesboro Bank, 149 N. C. 17, 62 S. E. 733. See also Green *v.* Kornegay, 49 N. C. 66, 67 Am. Dec. 261.

**In Texas** the statute requires sales of stock running upon the range by the sale and delivery of the brands and marks to be by a bill of sale duly recorded (Rankin *v.* Bell, 85 Tex. 28, 19 S. W. 874; Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23; Black *v.* Vaughan, 70 Tex. 47, 7 S. W. 604); but the statute does not apply to sales where the sale is only of certain animals without any "sale and delivery of the brands and marks" (Rainwater-Boogher Hat Co. *v.* O'Neal, 7 Tex. Civ. App. 242, 26 S. W. 462; Nance *v.* Barber, 7 Tex. Civ. App. 111, 26 S. W. 151); nor does it apply to cattle outside of the state (Ft. Worth Nat. Bank *v.* Daugherty, 81 Tex. 301, 16 S. W. 1028), or to cases where the sale is accompanied by a delivery to the buyer (Colorado First Nat. Bank *v.* Brown, 85 Tex. 80, 23 S. W. 862; Rainwater-Boogher Hat Co. *v.* O'Neal, *supra*; Boutwell *v.* Hiltpold, (Tex. App. 1890) 15 S. W. 501), although the cattle are afterward returned to the range (Boutwell *v.* Hiltpold, *supra*), provided the intention is to convey only the stock and not the brand (Rainwater-Boogher Hat Co. *v.* O'Neal, *supra*). If the bill of sale is duly recorded the title passes without delivery of the stock. Dallas Nat. Bank *v.* Davis, (Tex. Civ. App. 1896) 36 S. W. 144.

**Sales of slaves** were required by statute in Tennessee to be made by bill of sale duly recorded. Stevens *v.* Bomar, 9 Humphr. (Tenn.) 546; Dillard *v.* Dillard, 3 Humphr. (Tenn.) 41; Johnson *v.* Morgan, 2 Humphr. (Tenn.) 115; Banks *v.* Thomas, Meigs (Tenn.) 28; Neely *v.* Wood, 10 Yerg. (Tenn.) 486; Douglas *v.* Morford, 8 Yerg. (Tenn.) 373.

**Record as notice.**— Since a bill of sale is not required by law to be recorded a record of it is not notice to creditors of the seller. Janelle *v.* Denoncour, 68 N. H. 1, 44 Atl. 63. But see McCall *v.* Lewis, 1 Strobh. (S. C.) 442.

**Exempt property.**— A bill of sale is valid as between the parties, although it is not recorded, and if the property sold is exempt property of the seller it is also valid as to creditors. Heisch *v.* Bell, 11 N. M. 523, 70 Pac. 572.

39. Jordan *v.* Lendrum, 55 Iowa 478, 8 N. W. 311; Clary *v.* Frayer, 8 Gill & J. (Md.) 398; Hambleton *v.* Hayward, 4 Harr. & J. (Md.) 443.

**Who may record.**— A vendor of personal property may act as the agent of the vendee in filing the bill of sale for record and managing the property for him. Thomas *v.* Hillhouse, 17 Iowa 67. So also a parish judge may record his own bill of sale which will then be valid as against third persons. Tessier *v.* Hall, 7 Mart. (La.) 411.

**Effect of recording.**— The execution of the bill of sale and its acknowledgment and recording vests in the buyer the same interest as in the case of a sale accompanied by a transfer of possession. Clary *v.* Frayer, 8 Gill & J. (Md.) 398; Hambleton *v.* Hayward, 4 Harr. & J. (Md.) 443.

**Effect of delay in recording.**— A failure to record a bill of sale within ten days after its execution, as required by statute, renders it void only as to such persons as have obtained intervening rights after its execution and before it was filed for record, and not as to creditors who became such after it was recorded. Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

40. Campbell *v.* Hamilton, 63 Iowa 293, 19 N. W. 220.

41. Dowdell *v.* Wilcox, 64 Iowa 721, 21 N. W. 147; Cronan *v.* Fox, 50 N. J. L. 417, 14 Atl. 119.

42. Ottumwa First Nat. Bank *v.* Reno, 73 Iowa 145, 34 N. W. 796; Tiffany *v.* Anderson, 55 Iowa 405, 7 N. W. 683.

43. *Alabama.*— Milner, etc., Co. *v.* Deloach Mill Mfg. Co., 139 Ala. 645, 36 So. 765, 101 Am. St. Rep. 63; Williamson *v.* Sammons, 34 Ala. 691.

*Illinois.*— Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500.

*Kentucky.*— Duncan *v.* Baird, 8 Dana 101.

*Louisiana.*— Nixon *v.* Bozeman, 11 La. Ann. 750; Derepas *v.* Shallus, 15 La. 371.

*Massachusetts.*— Beecher *v.* Mayall, 16 Gray 376.

*Missouri.*— Kloes *v.* Wurmser, 34 Mo. App. 453.

*New York.*— Flynn *v.* Ledger, 48 Hun 465, 1 N. Y. Suppl. 235. But see Hornberger *v.* Feder, 30 Misc. 121, 61 N. Y. Suppl. 865.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40.

*Vermont.*— Martin *v.* Eames, 26 Vt. 476.

*England.*— Read *v.* Hutchison, 3 Campb. 352.

**Modification of contract.**— After a verbal sale of chattels has been consummated by delivery, neither a subsequent change in the mode of payment, nor the subsequent acceptance of a bill of sale operates as a dives-

under a contract of sale or return,[44] by a substitution of other goods for those originally sold,[45] by breach of conditions on which title depends,[46] or by repurchase.[47]

**b. Agreements For Repurchase and Reconveyance.** The contract of sale may provide for a repurchase by and reconveyance to the seller.[48] Such agreements are valid and will be enforced,[49] provided the conditions upon which such repurchase is to be made are complied with,[50] and on the consummation thereof the property in the goods will immediately revest in the seller,[51] even as against the creditors of the buyer.[52] The reconveyance must be with the knowledge and

titure of the title. Sanders *v.* Stokes, 30 Ala. 432. Where a machine is sold through an agent who receives in part payment a note payable in two and one-half months, a subsequent written agreement under which the seller returns the note and which recites that the purchaser agrees to pay for the use of the machine a certain sum per month, or in default thereof to return it, the amounts so paid to be deducted from the purchase-price if the purchaser buys the machine, does not operate to transfer the title back to the seller. Singer Mfg. Co. *v.* Cullaton, 90 Mich. 639, 51 N. W. 687.

**Defense of suit for price.**— Where a vendee of personalty successfully defends a suit for the purchase-price, on the ground of deceit and a tender back, the personalty becomes the property of the vendor. Overstreet *v.* Gallaher, 42 Ark. 208. *Compare* Charleston *v.* Cohen, 2 Speers (S. C.) 408.

44. Sutton *v.* Crosby, 54 Barb. (N. Y.) 80.

**But until the goods are received** by the seller the title does not revest in him. Chase *v.* Union Stone Co., 63 How. Pr. (N. Y.) 336.

45. Grady *v.* Leavell, 1 Dana (Ky.) 427.

46. Sutherland *v.* Brace, 73 Fed. 624, 19 C. C. A. 589 [*affirming* 71 Fed. 469, 18 C. C. A. 199].

**Performance of conditions by seller.**— Where the contract provides that in case of the non-performance of certain conditions the seller shall return the purchase-price received by him and that the goods shall then become again his sole property, the title does not revest in him upon the non-performance of the other conditions until he has returned the purchase-price. Heald *v.* Macgowan, 14 N. Y. Suppl. 280 [*affirmed* in 128 N. Y. 612, 28 N. E. 252].

**Agreement not constituting condition.**— On a sale of corporate stock made in part consideration of a promise that the corporation would not set up any claim against the seller on account of past transactions, such promise is not a condition on which title depends so that on suit brought by the corporation the title to the stock would revert to the seller. Jackson *v.* Grant, 18 N. J. Eq. 145.

47. See *infra*, VI, A, 8, b.

48. Logwood *v.* Hussey, 60 Ala. 417; Bogan *v.* Martin, 8 Ala. 807; Munnerlin *v.* Birmingham, 22 N. C. 358, 34 Am. Dec. 402; Poindexter *v.* McCannon, 16 N. C. 373, 18 Am. Dec. 591; Thompson *v.* Chumney, 2 Tex. 389; Strider *v.* Reid, 2 Gratt. (Va.) 38; Kroesen *v.* Seevers, 5 Leigh (Va.) 434.

**Sale or security.**— A written agreement, whereby the owner of goods agreed to hold the same as consignee of the firm to whom he was indebted for part payment of the price thereof, and to pay over the proceeds thereof as they were sold, did not vest title thereto in said firm, where it did not appear that the debt was thereby extinguished, nor that there was any payment or agreement by said firm to pay for said goods, nor that any inventory was taken thereof, and it was shown that the valuation placed on the goods by the debtor was in excess of the actual value thereof, and that the creditor accepted the instrument as security for the payment of the debt. Crawford *v.* Spraggins, 109 Ala. 353, 19 So. 372.

**Intent.**— Whether an agreement putting the seller in possession of the property amounts to a resale is a question of intent. Smith *v.* Hargrave, 10 N. C. 560.

**Transfer of title.**— A sale with a collateral agreement to repurchase, if merely colorable and for the purpose of enabling the selling corporation to make a certain report as to the character of its assets, does not constitute a transfer in law of the title. People *v.* Corrigan, 195 N. Y. 1, 87 N. E. 792 [*reversing* 129 N. Y. App. Div. 62, 113 N. Y. Suppl. 504].

49. Spence *v.* Steadman, 49 Ga. 133.

50. Wilhite *v.* Ryan, 66 Ala. 106; Hickman *v.* Cantrell, 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; Scott *v.* Britton, 2 Yerg. (Tenn.) 215.

51. Folsom *v.* Cornell, 150 Mass. 115, 22 N. E. 705.

**A mere agreement to repurchase** will not pass the title. McCormick *v.* Fuller, (Iowa 1880) 6 N. W. 149. And see Chapman *v.* Searle, 3 Pick. (Mass.) 38.

**Effect of reconveyance.**— A retrocession of property does not obliterate the ownership of the purchaser, which existed during the interval between the sale and retrocession, nor affect privileges acquired on the property under said ownership. Wilmot *v.* The Onachita Belle, 32 La. Ann. 607.

**Question for jury.**— Whether there has been a repurchase is for the jury. Astoria Veneer Mills *v.* Looschen, 91 Hun (N. Y.) 545, 36 N. Y. Suppl. 753.

52. *California.*— Le Cacheux *v.* Cutter, 6 Cal. 514.

*Connecticut.*— Tomlinson *v.* Roberts, 25 Conn. 477, 68 Am. Dec. 367.

*Illinois.*— Forster *v.* New Albany Second Nat. Bank, 61 Ill. App. 272.

*Maine.*— Hotchkiss *v.* Hunt, 49 Me. 213.

*Massachusetts.*—Grout *v.* Hill, 4 Gray 361.

*Pennsylvania.*— Clemson *v.* Davidson, 5 Binn. 392.

assent of the seller,[53] and must usually be attended by the same formalities as an original sale as to delivery or payment.[54] As against creditors and subsequent purchasers there must ordinarily be an actual redelivery of the goods and change of possession,[55] unless such creditors or purchasers have notice of the resale;[56] but in the application of this rule regard must be had to the nature and situation of the property and other circumstances of the case, and an actual manual delivery is not in all cases essential.[57] It is a sufficient redelivery as against creditors and subsequent purchasers if there is a delivery to a warehouseman, subject to the order of the original seller,[58] or even where the original buyer retains possession, if he does so under an agreement to hold as bailee of the original seller,[59] or as his agent for the purpose of selling the goods.[60]

**9. Rights and Liabilities of Parties — a. Title and Right of Buyer** — (i) *In General.* A purchaser of goods can acquire only the rights of his vendor.[61] Consequently a purchaser of goods acquires no property therein as against the true owner, if they were stolen,[62] or are sold by one who, although in possession,

*Wisconsin.*— Sanborn *v.* Hunt, 10 Wis. 436.

**A mere agreement** to reconvey not executed will not revest title in the seller as against creditors of the buyer. Chapman *v.* Searle, 3 Pick. (Mass.) 38.

**Power of sale.**— An agreement that the vendor of certain personal property may resell it on non-payment of the purchase-money and pay himself from the proceeds does not create a trust which can be enforced as against a subsequent purchaser with or without notice. Webb *v.* Walker, 7 Cush. (Mass.) 46.

**Failure to reclaim goods.**— Where goods sold are actually delivered to the purchaser, notice by him, given fifteen days later, that he will not accept them, does not reinvest the seller with the title, as against the purchaser's creditors, in the absence of any steps by the seller to reclaim them until after their seizure on attachment as the property of the purchaser. Colcord *v.* Dryfus, 1 Okla. 228, 32 Pac. 320.

**53.** Daugherty *v.* Fowler, 44 Kan. 628, 25 Pac. 40, 10 L. R. A. 314; Lane *v.* Jackson, 5 Mass. 157.

**54.** Cumberland Mfg. Co. *v.* Wheatley, 9 App. Cas. (D. C.) 334; Hart *v.* Kessler, 53 Minn. 546, 55 N. W. 742; Klein *v.* Rector, 57 Miss. 538; Stiles *v.* Howland, 32 N. Y. 309.

**Goods not ascertained.**— If the goods to be reconveyed are not identified there must be a separation from the mass to complete the contract. Chandler *v.* De Graff, 27 Minn. 208, 6 N. W. 611.

**Statutory provisions.**— Where one who has sold and delivered goods on credit takes them back in payment of the price, the transaction is not a rescission of the sale, as the sale has become complete, and the title has vested, but is a resale by the buyer to the seller, and therefore within Gen. St. § 1454, making a sale invalid as against creditors and innocent purchasers, where the vendor retains possession, unless a bill of sale is recorded. Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615, 34 Pac. 161.

**55.** Lapp *v.* Pinover, 27 Ill. App. 169; Nicholson *v.* Merstetter, 68 Mo. App. 441.

**Limitation of rule.**— Where by the terms of the agreement or by fair implication therefrom, the article sold is to remain in possession of the seller, the original buyer, for a specific time or for a specific purpose, as a part of the consideration, and the sale is otherwise complete, the possession of such seller will be considered as the possession of the buyer and the delivery will be complete and sufficient. Hotchkiss *v.* Hunt, 49 Me. 213.

**56.** McCormicks *v.* Fuller, 56 Iowa 43, 8 N. W. 800.

**57.** Ayres *v.* McCandless, 147 Pa. St. 49, 23 Atl. 344, holding that in the case of lumber which has been shipped to the buyer and subsequently resold to the original seller, it is a sufficient redelivery if the piles of lumber are marked as being the property of the latter.

**58.** Forster *v.* New Albany Second Nat. Bank, 61 Ill. App. 272; Sturtevant *v.* Orser, 24 N. Y. 538, 82 Am. Dec. 321.

**59.** Shaul *v.* Harrington, 54 Ark. 305, 15 S. W. 855.

**60.** Davis *v.* Fairclough, 63 Mo 61.

**61.** *Alabama.*— Brainerd *v.* McDevitt, 21 Ala. 119.

*Arkansas.*— Smith *v.* Jones, 8 Ark. 109.

*Louisiana.*— Linton *v.* Guillotte, 10 Rob. 357; Cook *v.* West, 3 Rob. 331; Wells *v.* Walker, 8 La. 14; Barfield *v.* Hewlett, 4 La. 118.

*Maine.*— Bradeen *v.* Brooks, 22 Me. 463.

*New York.*— Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739.

*North Carolina.*— Cheshire *v.* Cheshire, 37 N. C. 569.

*Ohio.*— Jones *v.* The Commerce, 14 Ohio 408.

*Pennsylvania.*— McMahon *v.* Sloan, 12 Pa. St. 229, 51 Am. Dec. 601.

*England.*— Farquharson *v.* King, [1902] A. C. 325, 71 L. J. K. B. 667, 86 L. T. Rep. N. S. 810, 18 T. L. R. 665, 51 Wkly. Rep. 94; Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406.

**62.** Breckinridge *v.* McAfee, 54 Ind. 141; Collins *v.* Ralli, 20 Hun (N. Y.) 246 [*affirmed* in 85 N. Y. 637]; Conlan *v.* Latting,

has no title thereto,[63] unless authorized by the owner to make the sale,[64] and he

3 E. D. Smith (N. Y.) 353; Farquharson *v.* King, [1902] A. C. 325, 71 L. J. K. B. 667, 86 L. T. Rep. N. S. 810, 18 T. L. R. 665, 51 Wkly. Rep. 94; Payne *v.* Wilson, [1895] 2 Q. B. 537, 65 L. J. Q. B. 150, 73 L. T. Rep. N. S. 12, 15 Reports 239 note, 43 Wkly. Rep. 657; Hargreave *v.* Spink, [1892] 1 Q. B. 25, 61 L. J. Q. B. 318, 65 L. T. Rep. N. S. 650, 40 Wkly. Rep. 254; Walker *v.* Matthews, 8 Q. B. D. 109, 51 L. J. Q. B. 243, 46 L. T. Rep. N. S. 915, 30 Wkly. Rep. 338; Bowman *v.* Yielding, (Mich. T. 3 Vict.) 3 Ont. Case Law Dig. 6203.

**Property substituted for that stolen.**— Where a thief traded a mare stolen by him for a gray horse and then traded the gray horse to plaintiff for a black horse and thereafter one acquiring the black horse at execution sale sold it to defendant for value, the horse traded to plaintiff not having been stolen, title to the horses in that trade passed, as the parties intended, and hence defendant had title. Lightman *v.* Boyd, 132 Ala. 618, 32 So. 714.

**Captured property.**— When goods are captured in war property therein passes to the captor who may thereafter convey a good title as against the one from whom the goods were taken. Cessna *v.* Thurman, 1 Bush (Ky.) 292, 89 Am. Dec. 628.

**63.** *Alabama.*— Moore *v.* Robinson, 62 Ala. 537.

*Arkansas.*— Crumbacker *v.* Tucker, 9 Ark 365; Smith *v.* Jones, 8 Ark. 109.

*Colorado.*— Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

*Illinois.*— Burton *v.* Curyea, 40 Ill. 320, 89 Am. Dec. 350; McCully *v.* Hardy, 13 Ill. App. 631.

*Indiana.*— Marshall *v.* Beeber, 53 Ind. 83

*Kansas.*— Sargent *v.* Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063; Hoy *v.* Griggs, 46 Kan. 58, 26 Pac. 467; Babcock *v.* Dieter, 30 Kan. 172, 2 Pac. 504.

*Kentucky.*— Chandler *v.* Ferguson, 2 Bush 163; Lowry *v.* Beckner, 5 B. Mon. 41; Parks *v.* Richardson, 4 B. Mon. 276; Pool *v.* Adkisson, 1 Dana 110. And see Caldwell *v.* Caldwell, 4 J. J. Marsh. 16.

*Louisiana.*— Russell *v.* Kunemann, 19 La. Ann. 517; Alexander *v.* Gusman, 16 La. Ann. 251; Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662; Parmele *v.* McLaughlin, 9 La. 436; Wells *v.* Walker, 8 La. 21.

*Maine.*— Staples *v.* Bradbury, 8 Me. 181, 23 Am. Dec. 494.

*Massachusetts.*—Whitney *v.* Beckford, 105 Mass. 267; Wilkins *v.* Holmes, 5 Cush. 147; Spring *v.* Coffin, 10 Mass. 31.

*Minnesota.*— Hedderly *v.* Backus, 53 Minn. 27, 55 N. W. 116.

*Mississippi.*— Clarke *v.* Edwards, 44 Miss. 778; Butler *v.* Hicks, 11 Sm. & M. 78.

*Nebraska.*— Stough *v.* Stefani, 19 Nebr. 468, 27 N. W. 445.

*Nevada.*— Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737.

*New Jersey.*— Ruckman *v.* Decker, 23 N. J. Eq. 283.

*New York.*— Farmers', etc., Nat. Bank *v.* Atkinson, 74 N. Y. 587; Spaulding *v.* Brewster, 50 Barb. 142; Linnen *v.* Cruger, 40 Barb. 633; Heyl *v.* Burling, 1 Cai. 14. And see Bassett *v.* Lederer, 1 Hun 274, 3 Thomps. & C. 671.

*Oklahoma.*— Quinton *v.* Cutlip, 1 Okla. 302, 32 Pac. 269.

*Pennsylvania.*— Quinn *v.* Davis, 78 Pa. St. 15; Moore *v.* Whitney, 1 Leg. Chron. 1.

*South Carolina.*— Hill *v.* Burgess, 37 S. C. 601, 15 S. E. 963.

*Texas.*— Russell *v.* Oppenheimer, 1 Tex. App. Civ. Cas. § 269.

*United States.*— Burckle *v.* The Tapperheten, 4 Fed. Cas. No. 2,141.

**Possession as evidence of ownership.**— While possession is *prima facie* evidence of ownership of every species of personal property, yet he who deals with such possession upon the mere evidence which possession affords takes upon himself the risk that there is another and true owner. Moore *v.* Robinson, 62 Ala. 537.

**Estoppel of owner.**— Where one has wrongfully taken the property of another and sold it, not as agent, but on his own account, mere silence upon the part of the owner does not confirm the sale. The confirmation must rest upon some consideration upholding it, or upon an estoppel. The owner, upon discovery of the wrong, is not required to make immediate efforts to regain his property, and silence, short of the time prescribed by the statute of limitations, will not bar his claim. Hamlin *v.* Sears, 82 N. Y. 327.

**Possession by wrong-doer.**— The conversion of chattels does not pass the title to the wrong-doer, and before judgment obtained for their value the owner may pass the title to a third person. Howe *v.* Johnson, 117 Cal. 37, 48 Pac. 978.

**Unrecorded loan.**— Under a Kentucky statute it has been held that a purchaser of property which has been held by the seller for five years under an unrecorded loan acquires a good title thereto provided the sale is absolute and not merely conditional. Gaines *v.* Wiggs, 9 B. Mon. (Ky.) 282.

**64.** See Moore *v.* Robinson, 62 Ala. 537.

**Sale by agent.**— Although the goods are rightfully in possession of an agent of the owner, a sale made by the agent without authority to do so conveys no title unless ratified by the owner. Moore *v.* Robinson, 62 Ala. 537. A statute providing that an agent not having the documentary evidence of title, who shall be intrusted with possession of any merchandise for sale, shall be deemed the true owner, so as to give validity to any contract for the sale or disposition thereof for any money advanced, or negotiable instrument or other obligation in writing given, by such other person on the faith thereof, does not apply where a person intrusted with merchandise simply as an agent for the sale thereof disposes of it by barter. Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265.

is liable to the true owner for the value of the goods.[65] Unless the buyer occupies the position of a *bona fide* purchaser he takes the goods subject to any valid liens existing thereon.[66]

(II) *PRIORITIES.* As a general rule between purchasers of personal property the elder title will in the absence of fraud prevail;[67] but under the rule requiring an actual delivery and change of possession as against subsequent purchasers,[68] it is held that where the same goods are sold to different buyers and the sales are otherwise equally valid, the buyer who first lawfully acquires the possession has the better title,[69] provided the second buyer is without notice of the first sale.[70]

(III) *PURCHASERS FROM BUYER.* One claiming under the buyer who does

65. *Indiana.*— Marshall *v.* Beeber, 53 Ind. 83.

*Kansas.*— Babcock *v.* Dieter, 30 Kan. 172, 2 Pac. 504.

*Kentucky.*— Pool *v.* Adkisson, 1 Dana 110.

*Louisiana.*— Russell *v.* Kunemann, 19 La. Ann. 517.

*Nevada.*— Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737.

*Tennessee.*— Floro *v.* Sims, 1 Overt. 16.

**Nature of agreement.**— Where a buyer orders coal from a dealer and the dealer afterward without the knowledge of the buyer contracts with another dealer to fill the order, the buyer is not liable to the dealer who fills the order, as he had no contract with such dealer and the first dealer in selling the coal did not act as agent of the second dealer. Carroll *v.* Benedictine Soc., 88 Md. 317, 41 Atl. 784.

**Liability for profits.**— A purchaser of a chattel with notice of a defect of title is liable to the true owner for profits received therefrom. Baird *v.* Bland, 5 Munf. (Va.) 492.

66. *Alabama.*— Smith *v.* Zurcher, 9 Ala. 208; Jackson *v.* Gewin, 9 Ala. 114.

*Arkansas.*— Talieferro *v.* Barnett, 37 Ark. 511.

*Connecticut.*— Smith *v.* Prince, 14 Conn. 472.

*Florida.*— Carter *v.* Bennett, 6 Fla. 214.

*Kansas.*— Cooper *v.* Brown, 23 Kan. 582.

*Louisiana.*— Flower *v.* Lane, 6 Mart. N. S. 151.

*New York.*—Carrington *v.* Ward, 71 N. Y. 360.

*Pennsylvania.*—Mairs *v.* Taylor, 40 Pa. St. 446.

*South Carolina.*— Cape Fear Steamboat Co. *v.* Conner, 3 Rich. 335.

*Vermont.*— Shepard *v.* Briggs, 26 Vt. 149.

*United States.*— Pollard *v.* Saltonstall, 56 Fed. 861; Clarke *v.* Southwick, 5 Fed. Cas. No. 2,863, 1 Curt. 297.

**Lien of bailee.**— Where the goods are in possession of a bailee of the vendor, a bill of sale entitles the purchaser to demand the possession of the property of the bailee at once; and, if the latter claims a lien upon the property, it is his duty to make a positive claim, if not to state its nature and amount, and, failing so to do, his refusal to deliver the property amounts to a conversion. Heine *v.* Anderson, 2 Duer (N. Y.) 318.

**Subsequent liens.**— A purchaser of a growing crop takes the property subject to subsequent liens for advances made prior to notice of the sale. Conger *v.* Crouch, 21 Mo. App. 46.

67. Butler *v.* Roll, Ga. Dec. 37; Laux *v.* Glass, 1 Tex. App. Civ. Cas. § 1180.

**Goods in custodia legis.**— The assent of the sheriff to the sale by defendant of goods levied upon by execution will not divest the title of a purchaser under a previous sale made by defendant. Frost *v.* Hill, 3 Wend. (N. Y.) 386.

**Where different bills of lading are given** to different persons, the question as to the transfer of the property does not depend upon the mere priority of signing the bills of lading, but upon the one on whose account the goods were delivered by the seller. Stevens *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 262.

**First sale incomplete.**—Where a contract of sale is made but the buyer is not entitled to possession until the price is paid and before there has been any payment or delivery the goods are sold to a second buyer, who makes full payment and receives the goods without notice of the first sale, the latter acquires a good title to the goods. Miller *v.* Cushman, 38 Vt. 593.

**Right of first buyer to purchase-money notes.**— Where the owner of land deeds the fee to his nephew, reserving a life-estate, and sells all his personalty on the place to the nephew, but possession remains with him, and is not taken by the buyer until after his death and the seller has disposed of some of the property, taking notes therefor in his name, in the absence of evidence that the buyer had reconveyed the property to the seller, or that he had any notice or reason to suspect that the latter claimed it in hostility to his title, the notes belong to the buyer. Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

68. Burnell *v.* Robertson, 10 Ill. 282; Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538. And see *supra*, VI, A, 4, a, (II), (B).

69. Walker *v.* Collier, 37 Ill. 362; Burnell *v.* Robertson, 10 Ill. 282; Cummings *v.* Gilman, 90 Me. 524, 38 Atl. 538; Jewett *v.* Lincoln, 14 Me. 116, 31 Am. Dec. 36; Lanfear *v.* Sumner, 17 Mass. 110, 9 Am. Dec. 119; Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354. And see Summons *v.* Beaubien, 36 Mo. 307.

70. Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354.

not occupy the position of *bona fide* purchaser [71] takes only the title of the buyer.[72] He cannot hold the original seller for fraud or misrepresentation in the sale unless they were practised on him also; [73] and on the other hand the seller cannot impose conditions on the sale, which will run with the goods and be binding on subsequent purchasers from the buyer, although they have notice thereof.[74]

**b. Risk of Loss or Injury** — (I) *In General.* In the absence of statute or agreement the risk of loss or injury as between the buyer and the seller depends upon which party has title to the goods at the time such loss or injury occurs,[75] and so if the title has passed the risk will be upon the buyer, although he may not at the time be entitled to the possession; [78] but an absolute and unqualified obligation assumed by the seller to deliver the goods may place the risk upon him until delivery, irrespective of the question of the passing of title.[77] As a rule under a merely executory contract the risk of loss of or injury to the goods is on the seller.[78] Consequently the risk is on the seller if anything remains to be done to complete the sale, as counting, weighing, or measuring to determine the quantity or price,[79] or the goods are to be selected and identified; [80] but this risk may be assumed by the buyer,[81] or imposed on him by statute.[82]

(II) *Before Delivery.* If until delivery the sale is not complete the goods

**71.** See *infra*, VI, B.

**72.** *California.*— Putnam *v.* Lamphier, 36 Cal. 151.

*Connecticut.*— Brown *v.* Fitch, 43 Conn. 512.

*Illinois.*— Taylor *v.* Turner, 87 Ill. 296.

*Indiana.*— Leffler *v.* Watson, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467.

*Iowa.*— Oswego Starch Factory *v.* Lendrum. 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

*Michigan.*— Sullivan *v.* Sullivan, 76 Mich. 101, 42 N. W. 1090.

*New Hampshire.*— Bradley *v.* Obear, 10 N. H 477.

*New York.*— Bliss *v.* Cottle, 32 Barb. 322.

*Vermont.*— Poor *v.* Woodburn, 25 Vt. 234.

**73.** Binnard *v.* Spring, 42 Barb. (N. Y.) 470; Crockett *v.* Alexander, 5 Heisk. (Tenn.) 106; Simpson *v.* Wiggin, 22 Fed. Cas. No. 12,887, 3 Woodb. & M. 413.

**74.** Garst *v.* Hall, etc., Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; McGruther *v.* Pitcher, [1904] 2 Ch. 306, 73 L. J. Ch. 653, 91 L. T Rep. N. S. 678, 20 T. L. R. 652, 53 Wkly. Rep. 138. But see Harrington *v.* Neville, 83 Mo. App. 589.

**75.** Upson *v.* Holmes, 51 Conn. 500; Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260]; Miller *v.* Seaman, 176 Pa. St 291, 35 Atl. 134; Williams *v.* Allen, 10 Humphr. (Tenn.) 337, 51 Am. Dec. 709.

**76.** Richardson *v.* Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733. See also Simmons *v.* Swift, 5 B. & C. 857, 8 D. & R. 693, 5 L J. K. B. O. S. 10, 29 Rev. Rep. 438, 11 E. C. L. 712.

**77.** Bigler *v.* Hall, 54 N. Y. 167.

**78.** Garrett *v.* Crooks, 15 La. Ann. 483; Wilson *v.* Clark, 60 N. H. 352; Thomas *v.* Tolford, 70 Wis. 155, 35 N. W. 293.

**79.** *Kentucky.*— Crawford *v.* Smith, 7 Dana 59.

*Louisiana.*— Hamilton *v.* Eimer, 20 La. Ann. 391; Rhea *v.* Otto, 19 La. Ann. 123; Seris *v.* Bellocq, 17 La. Ann. 146; Shuff *v.* Morgan, 9 Mart. 592.

*Maine.*— Cushman *v.* Holyoke, 34 Me. 289.

*Michigan.*— Wagar *v.* Farrin, 71 Mich. 370, 38 N. W. 865.

*New York.*— Gerard *v.* Prouty, 34 Barb. 454; Rapelye *v.* Mackie, 6 Cow. 250.

*Pennsylvania.*— Lester *v.* McDowell, 18 Pa. St. 91.

*Tennessee.*— Williams *v.* Allen, 10 Humphr. 337, 51 Am. Dec. 709.

*Virginia.*— Dixon *v.* Myers, 7 Gratt. 240.

*England.*— Simmons *v.* Swift, 5 B. & C. 857, 8 D. & R. 693, 5 L. J. K. B. O. S. 10, 29 Rev. Rep. 438, 11 E. C. L. 712.

**Waiver.**— The waiver of the benefit of the civil code, article 2433, which puts the thing sold at the risk of the seller until the weighing, is the waiver of an important legal right, and an expressed or implied agreement to waive it must be distinctly proved. Goodwyn *v.* Pritchard, 10 La. Ann. 249.

**80.** *Alabama.*— Browning *v.* Hamilton, 42 Ala. 484.

*Iowa.*— Davis *v.* Budd, 60 Iowa 144, 14 N. W. 211.

*Maine.*— Levasseur *v.* Cary, (1886) 3 Atl. 461.

*New Hampshire.*— Bailey *v.* Smith, 43 N. H. 141.

*Pennsylvania.*— Hutchinson *v.* Hunter, 7 Pa. St. 140.

**81.** Elmore *v.* Kearny, 23 La. Ann. 479; Hamilton *v.* Eimer, 20 La. Ann. 391; Kelham *v.* Carroll, 20 La. Ann. 111.

**82.** Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 104 Ga. 403, 30 S. E. 888, holding that the provision in the acts of 1853–1854, page 56, as amended by the acts of 1884-1885, pages 45, 52, that a purchaser of cotton under a sale for cash shall be liable to the seller for the destruction of the cotton before payment of the price is not unconstitutional, although the act further provides that under such a sale the title shall not pass to the purchaser, until the price has been paid.

are ordinarily at the risk of the seller;[83] but the intent of the parties will govern, and if such intention appears the risk may be on the buyer even before delivery.[84] So too if the sale by its terms is complete without delivery the risk of loss is on the buyer before delivery,[85] notwithstanding something remains to be done to ascertain the amount due.[86] If delivery is prevented by the failure of the buyer to furnish transportation facilities as he agreed to do he and not the seller must bear the loss of the goods.[87]

(III) *AFTER DELIVERY*. After the delivery is complete the goods are at the buyer's risk,[88] unless the property in the goods is retained by the seller,[89] and this is true, although the goods must still be weighed or measured in order to ascertain the amount due the seller,[90] or some other act remains to be done by

**83.** *Indiana.*— Temple *v.* Aders, 38 Ind. 506; Ricketts *v.* Hays, 13 Ind. 181.

*Kentucky.*— Brown *v.* Childs, 2 Duv. 314.

*Louisiana.*— Maillard *v.* Nihoul, 21 La. Ann. 412; Blackman *v.* Hoey, 18 La. Ann. 23; Lincoln *v.* Visoso, 3 Mart. N. S. 325.

*Michigan.*— Allis *v.* Voight, 90 Mich. 125, 51 N. W. 190.

*Missouri.*— Fairbanks *v.* Richardson Drug Co., 42 Mo. App. 262; George *v.* Dean, 17 Mo. App. 332.

*New Hampshire.*— Towne *v.* Davis, 66 N. H. 396, 22 Atl. 450.

*New York.*— Bigler *v.* Hall, 54 N. Y. 167; Chase *v.* Union Stone Co., 63 How. Pr. 336; Williams *v.* Littlefield, 12 Wend. 362.

*Ohio.*— Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456.

*Pennsylvania.*— Miller *v.* Seaman, 176 Pa. St. 291, 35 Atl. 134; Bigley *v.* Risher, 63 Pa. St. 152; McCandish *v.* Newman, 1 Phila. 268.

*Tennessee.*— East Tennessee, etc., R. Co. *v.* Nelson, 1 Coldw. 272.

*England.*— Elphick *v.* Barnes, 5 C. P. D. 321, 44 J. P. 651, 49 L. J. C. P. 698, 29 Wkly. Rep. 139.

See 43 Cent. Dig. tit. "Sales," § 354.

**84.** Barker *v.* Freeland, 91 Tenn. 112, 18 S. W. 60; Morgan *v.* King, 28 W. Va. 1, 57 Am. Rep. 633.

**85.** *California.*— Girdner *v.* Beswick, 69 Cal. 112, 10 Pac. 278.

*Georgia.*— Allen *v.* Hollis, 31 Ga. 143.

*Kentucky.*— Sweeney *v.* Owsley, 14 B. Mon. 413.

*Louisiana.*— Rhea *v.* Otto, 19 La. Ann. 123.

*Maine.*— Penley *v.* Bessey, 87 Me. 530, 33 Atl. 21; Chase *v.* Willard, 57 Me. 157; Wing *v.* Clark, 24 Me. 366.

*New York.*— Terry *v.* Wheeler, 25 N. Y. 520.

*Ohio.*— Davis *v.* Parker, 5 Ohio S. & C. Pl. Dec. 152, 7 Ohio N. P. 382.

*Tennessee.*— Goodrum *v.* Smith, 3 Humphr. 542.

*Wisconsin.*— Upham Mfg. Co. *v.* Sanger, 80 Wis. 34, 49 N. W. 28.

**Right to proceeds of insurance.**— Where, in an action for the price of goods, alleged to have been sold defendant, and which were burnt, as defendant claimed, before delivery, it appears that plaintiffs had collected a large amount of insurance on open policies, obtained before the sale, "on tobacco in hogsheads, their own, or held by them on account of others, where they are legally liable, or sold, but not delivered," defendant is entitled to his *pro rata* share of such insurance. Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

**86.** Upson *v.* Holmes, 51 Conn. 500; Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619.

**87.** American Oak Extract Co. *v.* Ryan, 104 Ala. 267, 15 So. 807; Delahoussaye *v.* Adeline Sugar Factory Co., 50 La. Ann. 544, 23 So. 619.

**88.** *Georgia.*— Denman *v.* Cherokee Iron Co., 56 Ga. 319.

*Illinois.*— Telford *v.* Albro, 60 Ill. App. 359; McKinzie *v.* Stretch, 53 Ill. App. 184; Riley *v.* DuBois, 14 Ill. App. 236.

*Indiana.*— Ewing *v.* French, 1 Blackf. 353.

*Iowa.*— Butterick Pub. Co. *v.* Bailey, 105 Iowa 326, 75 N. W. 189; Sedgwick *v.* Cottingham, 54 Iowa 512, 6 N. W. 738; Dierkson *v.* Cass County Mill, etc., Co., 42 Iowa 38.

*Kentucky.*— Monarch *v.* Matthews, 9 S. W. 500, 10 Ky. L. Rep. 482.

*Louisiana.*— Fearn *v.* Malthy, 9 La. Ann. 8; Kiper *v.* Nuttall, 1 Rob. 46.

*Maine.*— Phillips *v.* Moor, 71 Me. 78; Rice *v.* McLarren, 42 Me. 157; Pearce *v.* Norton, 10 Me. 252.

*Massachusetts.*— Foster *v.* Rockwell, 104 Mass. 167.

*Minnesota.*— Mobile Fruit, etc., Co. *v.* McGuire, 81 Minn. 232, 83 N. W. 833.

*Mississippi.*— Strauss *v.* National Parlor Furniture Co., 76 Miss. 343, 24 So. 703.

*New York.*— Waldron *v.* Romaine, 22 N. Y. 368.

*Pennsylvania.*— Dailey *v.* Green, 15 Pa. St. 118; Bolton *v.* Ackerman, 8 Pa. Co. Ct. 549.

*South Carolina.*— Bunch *v.* Smith, 4 Rich. 581.

*Vermont.*— Griswold *v.* Scott, 66 Vt. 550, 29 Atl. 1013; Hunt *v.* Thurman, 15 Vt. 336, 40 Am. Dec. 683.

*West Virginia.*— Bloyd *v.* Pollock, 27 W. Va. 75.

*Wisconsin.*— Pratt *v.* Peck, 70 Wis. 620, 36 N. W. 410; Ranney *v.* Higby, 5 Wis. 62.

*England.*— Tregelles *v.* Sewell, 7 H. & N. 574; Browne *v.* Hare, 4 H. & N. 822, 5 Jur. N. S. 711, 29 L. J. Exch. 6, 7 Wkly. Rep. 619.

See 43 Cent. Dig. tit. "Sales," § 354.

**89.** Wolf *v.* Di Lorenzo, 21 Misc. (N. Y.) 521, 47 N. Y. Suppl. 719. See also *supra*, VI, A, 6.

**90.** Upson *v.* Holmes, 51 Conn. 500; Sedg-

the seller in relation to the goods.[91] So too the goods are at the risk of the buyer after a valid tender and refusal to accept,[92] or if the goods are placed at his disposal with access for the purpose of removal.[93] But the tender or delivery must be one that the buyer is bound to accept,[94] and if there is a tender or delivery of a quantity greater than the contract calls for the buyer is not liable for the loss or injury to the goods.[95] If after delivery the seller retains possession of the property by permission of the buyer or under an agreement to take care of the property for a certain time, he is bound to exercise only the care of a reasonably prudent man,[96] and is not responsible for a loss not due to his lack of care.[97]

**B. Bona Fide Purchasers — 1. Who Are Bona Fide Purchasers — a. In General.**[98] In order to constitute one a *bona fide* purchaser and entitled to protection as such,[99] he must have purchased in good faith,[1] without notice,[2] and for a valuable consideration;[3] but the good faith required to constitute one a *bona fide* purchaser is with reference to the original and not the intermediate seller.[4]

**b. Title of Purchaser.** To entitle one to protection as a *bona fide* purchaser, the goods should be delivered to him,[5] and he must have acquired the legal title.[6]

wick *v.* Cottingham, 54 Iowa 512, 6 N. W. 738; Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42 [*affirming* 8 Hun 260]; Gill *v.* Benjamin, 64 Wis. 362, 25 N. W. 445, 54 Am. Rep. 619; Pike *v.* Vaughn, 39 Wis. 499.

91. Hunt *v.* Suares, 9 La. 434.

92. Heinberg *v.* Cannon, 36 Fla. 601, 18 So. 714; Smith *v.* Sherwood, 2 Tex. 460; Weathered *v.* Golden, (Tex. Civ. App. 1896) 34 S. W. 761; Sawyer, etc., Co. *v.* Robertson, 1 Ont. L. Rep. 297.

93. *Alabama.*— Rattary *v.* Cook, 50 Ala. 352.

*Louisiana.*— Gleason *v.* Sykes, 18 La. Ann. 627.

*Maine.*— Levasseur *v.* Cary, (1886) 3 Atl. 461; Chase *v.* Willard, 57 Me. 157.

*Mississippi.*— Garland *v.* Stewart, 31 Miss. 314.

*New York.*— Hall's Safe, etc., Co. *v.* Reike, 2 N. Y. City Ct. 271.

94. Gilbert *v.* Merriam, etc., Saddlery Co., 26 Nebr. 194, 42 N. W. 11.

95. Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296, 3 N. W. 904; Winterbotham *v.* Paine, 52 N. Y. Super. Ct. 186.

96. Strong *v.* Morgan, 8 Ida. 269, 67 Pac. 1123; Milliken *v.* Randall, 89 Me. 200, 36 Atl. 75.

97. *Alabama.*— Thomason *v.* Dill, 30 Ala. 444.

*California.*— Clark *v.* Rush, 19 Cal. 393.

*Illinois.*— Race *v.* Hansen, 12 Ill. App. 605.

*Indiana.*— Bertelson *v.* Bower, 81 Ind. 512.

*Mississippi.*— McKay *v.* Hamblin, 40 Miss. 472.

*New York.*— Dexter *v.* Norton, 55 Barb. 572; Olyphant *v.* Baker, 5 Den. 379; Lansing *v.* Turner, 2 Johns. 13.

*Tennessee.*— Bond *v.* Greenwald, 4 Heisk. 453.

*England.*— Rugg *v.* Minett, 11 East 210, 10 Rev. Rep. 475.

98. **Bona fide purchaser defined** see 5 Cyc. 719.

99. See *infra*, VI, B, 2.

1. Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20; Green *v.* Humphry, 50 Pa. St. 212.

**Question for jury.**— Whether the purchase was made in good faith is a question for the jury. Cass *v.* Gunnison, 58 Mich. 108, 25 N. W. 52; Cooper Mfg. Co. *v.* De Forest, 5 N. Y. App. Div. 43, 38 N. Y. Suppl. 1038; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Eichenlaub *v.* Hall, 163 Pa. St. 201, 29 Atl. 919; Green *v.* Humphry, 50 Pa. St. 212.

**Subject-matter.**— The fact that the purchaser of a stock of goods did not know just what goods were in the stock does not affect his standing as a *bona fide* purchaser. Farwell *v.* Prescott, 11 N. Y. Suppl. 833.

2. See *infra*, VI, B, 1, c.

3. See *infra*, VI, B, 1, d.

4. Dudley *v.* Abner, 52 Ala. 572; Williams *v.* Tilt, 36 N. Y. 319 [*affirming* 6 Bosw. 299].

5. Kinsey *v.* Leggett, 71 N. Y. 387.

**Delivery to bona fide purchaser.**— The rule of law that where a sale of chattels is made, accompanied by delivery to the vendee without condition, with intent to transfer the title, or if the delivery be coupled with the condition of immediate payment, such condition being unknown to the party to whom the vendee sells, a *bona fide* purchaser from the vendee acquires a title, although the original sale was void for fraud, does not apply to a case where the chattels sold by the vendee had not been delivered, nor any part of the price paid, so that such purchaser's loss, if the owner recover the goods, is only one of anticipated profit. Such a purchaser's title will not avail against the owner of the goods. Beavers *v.* Lane, 6 Duer (N. Y.) 232.

6. *California.*— California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320.

*New York.*— Peabody *v.* Fenton, 3 Barb. Ch. 451.

*North Carolina.*— Jones *v.* Zollicoffer, 4 N. C. 645, 7 Am. Dec. 708.

*Ohio.*— Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Larrowe *v.* Beam, 10 Ohio 498.

*Tennessee.*— Womack *v.* Smith, 11 Humphr. 478, 54 Am. Dec. 51.

**An assignee of an equitable interest** is not within the application of the rule as to *bona fide* purchasers. California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320.

**Tenant.**— One who succeeds to the posses-

**c. Notice** — (I) *IN GENERAL.* Where the purchaser has notice that the seller's title is defective he is not a *bona fide* purchaser or entitled to protection as such,[7] although he has paid an adequate consideration,[8] unless the consideration was paid before notice was received,[9] since to constitute one a *bona fide* pur-

sion of personal property as a tenant has none of the equities of a *bona fide* purchaser. Richards *v.* Alden, 1 Grant (Pa.) 247.

7. *Alabama.*— Chandler *v.* Higgins, (1905) 39 So. 576.

*Arkansas.*— Maddox *v.* Reynolds, 72 Ark. 440, 81 S. W. 603.

*California.*— Wendling Lumber Co. *v.* Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

*Georgia.*— Crittenden *v.* Coleman, 74 Ga. 331.

*Iowa.*— A. A. Cooper Wagon, etc., Co. *v.* Barnt, 123 Iowa 32, 98 N. W. 356.

*Kansas.*— Phillips *v.* Reitz, 16 Kan. 396.

*Kentucky.*— Hall *v.* Frick Co., 106 S. W. 1186, 32 Ky. L. Rep. 768.

*Louisiana.*— Martin *v.* Curtis, 3 Mart. N. S. 105.

*Michigan.*— Schloss *v.* Feltus, 96 Mich. 619, 55 N. W. 1010, 36 L. R. A. 161.

*Minnesota.*— Armstrong *v.* Freimuth, 78 Minn. 94, 80 N. W. 862; Hayden *v.* Dwyer, 47 Minn. 246, 50 N. W. 200. See also Gaertner *v.* Western El. Co., 104 Minn. 467, 116 N. W. 945.

*Missouri.*— Tootle *v.* Buckingham, 190 Mo. 183, 88 S. W. 619; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437.

*New Hampshire.*— Patten *v.* Moore, 32 N. H. 382.

*New York.*— Porter *v.* Parks, 49 N. Y. 564; Bassett *v.* Lederer, 1 Hun 274, 3 Thomps. & C. 671; Penfield *v.* Dunbar, 64 Barb. 239; Mitchell *v.* Worden, 20 Barb. 253.

*North Carolina.*— Simpson *v.* Houston, 56 N. C. 487.

*Ohio.*— Marmaduke *v.* Harvey, 2 Cinc. Super. Ct. 291.

*Oklahoma.*— Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

*Pennsylvania.*— Garrard *v.* Pittsburgh, etc., R. Co., 29 Pa. St. 154.

*South Carolina.*— Hill *v.* Burgess, 37 S. C. 604, 15 S. E. 963; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

*Tennessee.*— Carson *v.* Jones, (Ch. App. 1900) 60 S. W. 175.

*Texas.*— Abilene Mill, etc., Co *v.* Finley, (Civ. App. 1896) 34 S. W. 311.

*United States.*— Stout *v.* The Richard J. Carney, 53 Fed. 927, 4 C. C. A. 111.

**Rescission of prior sale.**— Where one knows of a sale for future delivery, and also of the vendee's repudiation thereof, he may buy of the vendor. Wren *v.* Kuhler, 68 Mo. App. 680.

**Retention of possession.**— A purchaser who has had actual notice of the prior sale cannot, as a *bona fide* purchaser, rely on the fact that there was no change of possession. Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112; Haskell *v.* Greeley, 3 Me. 425; Dieckman *v.* Young, 87 Mo. App. 530; Hart *v.* Farmers, etc., Bank, 33 Vt. 252; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

**No title in claimant.**— Where the claimant of goods failed to show title in himself it was immaterial whether or not subsequent purchasers had notice of his alleged rights before their purchase. Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521. See also Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

**Capacity in which knowledge is acquired.**— An executor who has purchased bonds with the funds of the estate which as an individual he knew were invalid is not a *bona fide* purchaser. De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158. Where defendant had been in complainant's employment long enough to know that the necessities of complainant's business in selling and redeeming trading stamps required that such stamps should not be dealt in by the public generally, he was not an innocent purchaser without notice in purchasing issued stamps for resale. Sperry, etc., Co. *v.* Temple, 137 Fed. 992. The fact that one was a bookkeeper of the vendee and as such received the invoices of the goods does not charge him with notice of a reservation of title in the contract of sale. Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496.

**Invalid instrument.**— If the instrument affecting the title is invalid the fact that the purchaser had actual notice of it will not affect his rights as a *bona fide* purchaser. Weill *v.* Zacher, 92 Ill. App. 296.

**Notice of a prior invalid sale** does not affect the purchaser's right. Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

**Agreement to give mortgage.**— Where the purchaser of personalty located in a certain place has notice of another's claim to a mortgage thereon, before taking the bill of sale, equity will direct the execution of a mortgage by the purchaser on such personalty as was in such place at the time of the purchase, and still remaining in the purchaser's hands. Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732.

**Question for jury.**— The fact of notice is a question for the jury. American-German Nat. Bank *v.* Gray, etc., Hardware Co., 129 Ky. 105, 110 S. W. 393, 33 Ky. L. Rep. 547; Blacker *v.* Ryan, 65 Mo. App. 230; Hines *v.* Perry, 25 Tex. 443.

8. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Grossman *v.* Walters, 11 N. Y. Suppl. 471; Dean *v.* Connelly, 6 Pa. St. 239; Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105.

**Consideration** see *infra*, VI, B, 1, d.

9. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Maddox *v.* Reynolds, 72 Ark. 440, 81 S. W. 603; The Hercules, 12 Fed. Cas. No. 6,400, Brown Adm. 560.

**Notice before full payment.**— If the purchaser has notice before the transaction is

chaser he must have been without notice not only at the time of the contract but also at the time of the payment of the purchase-money; [10] but notice acquired only after payment will not affect the title of the purchaser.[11]

(II) *WHAT CONSTITUTES NOTICE* — (A) *In General.* Notice within the application of the rule above stated [12] is not synonymous with and need not necessarily amount to actual knowledge.[13] The notice may be either actual or constructive,[14] and a knowledge of facts sufficient to put the buyer upon inquiry is equivalent to notice of such facts as the inquiry would have disclosed; [15] but notice to be implied must have knowledge as its source and basis,[16] and the mere existence of facts and circumstances sufficient to put the buyer on inquiry but from which notice cannot be conclusively presumed is not sufficient in the absence of any information or knowledge of such facts and circumstances.[17] So the fact that certain matters are of common repute in the community is not alone sufficient to charge the buyer with notice of such facts.[18] The notice must also be sufficiently definite to charge the buyer with knowledge of the existence of some defect of title or claim against the property.[19] It is not sufficient that some third person has expressed to the buyer a mere opinion or suspicion, without any facts to justify it, adverse to the character of the seller,[20] or the validity of his title to the goods;[21] nor is a friendly intimacy between the buyer and seller sufficient to charge the former with knowledge of the latter's financial affairs.[22] Even actual notice once given is not necessarily good forever, and a person may be a *bona fide* purchaser if at the time of the sale he has forgotten the existence of such notice.[23]

completed he is a *bona fide* purchaser only to the extent of the payments made before notice. Dows *v.* Kidder, 84 N. Y. 121; Sargent *v.* Eureka Spund Apparatus Co., 46 Hun (N. Y.) 19.

10. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Peters *v.* Brandon, (Kan. App. 1897) 48 Pac. 870; Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; Arnholt *v.* Hartwig, 73 Mo. 485; Greenlee *v.* Marquis, 49 Mo. App. 290; Patten *v.* Moore, 32 N. H. 382.

**If the purchaser receives notice before payment** of the purchase-money, although after the making of the contract, he is not entitled to protection as a *bona fide* purchaser. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658. So, although the buyer has given his check for the purchase-price, but with the understanding that it is not to be paid at once, and instructs his banker to withhold payment until further orders, and the check is not negotiated, its payment upon direction of the buyer, given after notice of a defect of title, will not make him a *bona fide* purchaser. Arnholt *v.* Hartwif, 73 Mo. 485.

11. The Hercules, 12 Fed. Cas. No. 6,400, Brown Adm. 560.

12. See *supra*, VI, B, 1, c, (I).

13. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Cleveland Woolen Mills Co. *v.* Sibert, 81 Ala. 140, 1 So. 773.

14. See *infra*, VI, B, 1, c, (II), (B).

15. See *infra*, VI, B, 1, c, (II), (C).

16. Cleveland Woolen Mills Co. *v.* Sibert, 81 Ala. 140, 1 So. 773.

17. Cleveland Woolen Mills Co. *v.* Sibert, 81 Ala. 140, 1 So. 773.

**Advertisement.**— A purchaser is not chargeable with notice that the property was stolen because the fact was advertised in the newspapers. Connor *v.* Bank, 14 Pittsb. Leg. J. N. S. 370.

18. Cleveland Woolen Mills Co. *v.* Sibert, 81 Ala. 140, 1 So. 773. *Compare* Lewis *v.* Castelman, 27 Tex. 407.

19. Reed *v.* Gannon, 3 Daly (N. Y.) 414 [*reversed* on other grounds in 50 N. Y. 345]. See also The Hercules, 12 Fed. Cas. No. 6,400, Brown Adm. 560.

**Where land is leased for the purpose of being cleared** and prepared for cultivation, the tenant having the right to dispose of timber cut on parts of the land which he is clearing, a provision in the lease limiting this right of the tenant to such parts of the land as are being cleared and prepared for cultivation is not sufficient to charge purchasers of the timber with knowledge of the wrongful act of the tenant in cutting the timber from other parts of the land. Cramer *v.* Groseclose, 53 Mo. App. 648.

**On a sale of growing timber by a landowner** who takes back a mortgage from the buyer which is not recorded, the constructive possession of the seller as owner of the land is not notice of his claim to the timber as to one purchasing from his vendee upon the faith of his bill of sale. Patten *v.* Moore, 32 N. H. 382.

20. Gosney *v.* Frost, 27 Ill. 53.

21. Nicholls *v.* McShane, 16 Colo. App. 165, 64 Pac. 375; Gosney *v.* Frost, 27 Ill. 53.

22. Norton *v.* Lumpkin, 83 Iowa 335, 49 N. W. 1015.

23. Lord *v.* Wilkinson, 56 Barb. (N. Y.) 593, holding that while the fact that notice has been received raises a presumption of bad faith it is not conclusive but subject to be rebutted by proof that such notice has been forgotten, the sufficiency and reasonableness of such explanation being a ques-

So also notice of claims of one kind or character will not amount to notice of claims of another kind.[24]

(B) *Actual or Constructive Notice.* It is not essential that the purchaser should have actual notice of defects in the title,[25] but such notice may be constructive,[26] as by the registration of the instrument affecting the title,[27] by knowledge of facts sufficient to put the purchaser on inquiry,[28] or by notice to some person standing in such relation to the buyer that the notice is equivalent to notice to the buyer.[29] So notice to the purchaser will be implied from notice to his agent,[30] where it results from the transaction in which the agent is acting for his principal.[31]

(C) *Facts Putting Purchaser on Inquiry.* Knowledge on the part of the purchaser of facts and circumstances which ought reasonably to excite suspicion and put him on inquiry is sufficient to charge him with notice of facts that he might have ascertained by the exercise of ordinary diligence.[32] Thus a purchaser

tion for the jury, considering the length of time since the notice was given, its particularity, and the other circumstances of the case.

**24.** Wilson *v.* Stewart, 69 Ala. 302, holding that notice to a purchaser of crops from a tenant that the landlord claims a lien thereon for rent is not notice that he also claims a lien for advances made to the tenant.

**25.** Lomax *v.* Le Grand, 60 Ala. 537; D. M. Sechler Carriage Co. *v.* Lane, 71 Ill. App. 360; Danforth *v.* Dart, 4 Duer (N. Y.) 101; Parker *v.* Hall, 2 Head (Tenn.) 641. But see Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318; Seavy *v.* Dearborn, 19 N. H. 351.

**26.** Garrard *v.* Pittsburgh, etc., R. Co., 29 Pa. St. 154; Parker *v.* Hall, 2 Head (Tenn.) 641.

**27.** See *infra*, VI, B, 1, c, (II), (D).

**28.** See *infra*, VI, B, 1, c, (II), (C).

**29.** Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. 671.

**Notice to an attaching officer** of a previous sale by the debtor is notice to the creditor. Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112.

**30.** Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. 671; Carson *v.* Jones, (Tenn. Ch. App. 1900) 60 S. W. 175.

**Agent for two principals.**— Where a person who is an officer of two corporations transfers securities issued by one to the other, with knowledge that they are subject to an infirmity which renders them invalid except in the hands of a *bona fide* holder for value, his knowledge is not the knowledge of the transferee. De Kay *v.* Hackensack Waters Co., 38 N. J. Eq. 158.

**31.** Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. 671.

**32.** *Alabama.*— Maxwell *v.* Brown Shoe Co., 114 Ala. 304, 21 So. 1009; Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879; Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657; Traywick *v.* Keeble, 93 Ala. 498, 8 So. 573; Manasses *v.* Dent, 89 Ala. 565, 8 So. 108; Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140, 1 So. 773; Boggs *v.* Price, 64 Ala. 514; Spencer *v.* Godwin, 30 Ala. 355; Smith *v.* Zurcher, 9 Ala. 208.

*Arkansas.*— Maddox *v.* Reynolds, 72 Ark. 440, 81 S. W. 603; Christian *v.* Greenwood, 23 Ark. 258, 79 Am. Dec. 104.

*California.*— Williams *v.* Tam, 131 Cal. 64, 63 Pac. 133.

*Illinois.*— Hunter *v.* Whitfield, 89 Ill. 229; Watt *v.* Scofield, 76 Ill. 261; D. M. Sechler Carriage Co. *v.* Lane, 71 Ill. App. 360; Cowling *v.* Estes, 15 Ill. App. 255.

*Indiana.*— Kuhns *v.* Gates, 92 Ind. 66; Mahoney *v.* Gano, 2 Ind. App. 107, 27 N. E. 315.

*Iowa.*— Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

*Kansas.*— Phillips *v.* Reitz, 16 Kan. 396; Patterson *v.* Temple, 5 Kan. App. 442, 49 Pac. 342.

*Kentucky.*— Cotton *v.* Hart, 1 A. K. Marsh. 56.

*Louisiana.*— Reid *v.* Mayo, 45 La. Ann. 1091, 13 So. 799; Fetter *v.* Field, 1 La. Ann. 80.

*Mississippi.*— Buck *v.* Paine, 50 Miss. 648; McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99.

*Missouri.*— Standard Oil Co. *v.* Meyer Bros. Drug Co., 74 Mo. App. 446; Dawson *v.* Coffey, 48 Mo. App. 109.

*New Hampshire.*— Johnson *v.* Willey, 46 N. H. 75; Cooper *v.* Newman, 45 N. H. 339.

*New York.*— McLachlin *v.* Brett, 34 Hun 478 [*affirmed* in 105 N. Y. 391, 12 N. E. 17]; Van Schoonhoven *v.* Curley, 21 Hun 205 [*affirmed* in 86 N. Y. 187]; Bassett *v.* Lederer, 1 Hun 274, 3 Thomps. & C. 676; Danforth *v.* Dart, 4 Duer 101; Caldwell *v.* Bartlett, 3 Duer 341; Pringle *v.* Phillips, 5 Sandf. 157; Edwards *v.* Dooley, 13 N. Y. St. 596.

*North Carolina.*— Simpson *v.* Houston, 56 N. C. 487.

*Oklahoma.*— Kansas Moline Plow Co. *v.* Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33 [*overruling* Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330].

*Pennsylvania.*— Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Walsh *v.* Stille, 2 Pars. Eq. Cas. 17.

*South Carolina.*— Maybin *v.* Kirby, 4 Rich. Eq. 105; Footman *v.* Pendergrass, 3 Rich. Eq. 33.

*Tennessee.*— Levins *v.* W. O. Peeples Grocery Co., (Ch. App. 1896) 38 S. W. 733.

with knowledge that the seller is a tenant is chargeable with notice of the landlord's lien for rent,[33] and a purchaser of goods shipped by carrier is also bound to make inquiry as to the bills of lading,[34] and is charged with notice of facts as to the state of the title shown by such documents.[35] Inadequacy of price is also an element to be considered in determining whether the purchase was in good faith and without notice,[36] particularly where the purchase is made out of the usual course of trade or there are other suspicious circumstances connected with the transaction.[37] A purchaser is not, however, chargeable with notice of a fact, although a reasonable inquiry on his part would disclose its existence, unless the law casts upon him the duty of making such inquiry,[38] and this duty exists only when he has knowledge of facts sufficient to excite such inquiry or which would naturally and reasonably be calculated to awaken a suspicion of the existence of the main fact with notice of which he is sought to be charged.[39] No general rule can well be laid down as to what will or will not be sufficient to put the buyer upon inquiry in any particular case,[40] but the facts and circumstances must be sufficient to arouse the suspicion of an ordinarily prudent person,[41] and the buyer is chargeable with notice only of such facts as by the use of ordinary care and diligence he would probably have discovered.[42] The true rule with respect to notice has been said to be that the circumstances must be such as not only lead

*Texas.*— Hines *v.* Perry, 25 Tex. 443.

*Vermont.*— Shaw *v.* Beebe, 35 Vt. 205.

*United States.*— Walbrun *v.* Babbitt, 16 Wall. 577, 21 L. ed. 489; The Nancy Dell, 14 Fed. 744.

See 43 Cent. Dig. tit. "Sales," § 683.

**A purchaser from an assignee** under a void assignment who is shown the deed of assignment but fails to read it is not an innocent purchaser without notice. Crittenden *v.* Coleman, 74 Ga. 331.

**A purchaser of property in possession of a sheriff** by virtue of irregular attachment proceedings is bound to know that amendments may be made by which the proceedings may be sustained, and hence cannot succeed in his claim to the property on the theory that he was an innocent purchaser. Seass *v.* Manion, 92 Ill. App. 471.

**Duplicate bill of lading.**—A purchaser from the consignee of goods in transit who takes a bill of lading marked "duplicate" is put on inquiry as to what disposition has been made of the "original," and does not acquire title as against the consignor who has sent the original to a bank with a draft attached for acceptance. Castanola *v.* Missouri Pac. R. Co., 24 Fed. 267.

33. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657; Atkinson *v.* James, 96 Ala. 214, 10 So. 846; Manasses *v.* Dent, 89 Ala. 565, 8 So. 108; Boggs *v.* Price, 64 Ala. 514; Lomax *v.* Le Grand, 60 Ala. 537; Hunter *v.* Whitfield, 89 Ill. 229; Watt *v.* Scofield, 76 Ill. 261; Dawson *v.* Coffey, 48 Mo. App. 109. See also Toney *v.* Goodley, 57 Mo. App. 235; Lehman *v.* Stone, (Tex. App. 1891) 16 S. W. 784.

**Extent of purchaser's knowledge.**— If the purchaser does not know that the property sold was raised on the rented premises his knowledge that the seller is a tenant is not sufficient to put him on inquiry in regard to a lien, especially when the seller is a dealer in farm produce. Toney *v.* Goodley, 57 Mo. App. 235.

34. City Bank *v.* Rome, etc., R. Co., 44 N. Y. 136.

35. Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Columbia Second Nat. Bank *v.* Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Shaw *v.* Merchants' Nat. Bank, 101 U. S. 557, 25 L. ed. 892.

36. Pelham *v.* Chattahoochie Grocery Co., 156 Ala. 500, 47 So. 172.

37. Loeb *v.* Flash, 65 Ala. 526; Calhoun *v.* Burnett, 40 Miss. 599; Singer Mfg. Co. *v.* Hudson, 4 Mo. App. 145; Anderson *v.* Nicholas, 28 N. Y. 600 [*affirming* 5 Bosw. 121]; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20; Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 451.

38. Kyle *v.* Ward, 81 Ala. 120, 1 So. 468; State *v.* Merritt, 70 Mo. 275.

39. Kyle *v.* Ward, 81 Ala. 120, 1 So. 468.

40. Hines *v.* Perry, 25 Tex. 443.

**Question for jury.**— Whether the facts and circumstances are sufficient to put the buyer upon inquiry is ordinarily a question for the jury. Kops Bros. Co. *v.* Smith, 137 Mich. 28, 100 N. W. 169; Pinkerton Bros. Co. *v.* Bromley, 119 Mich. 8, 77 N. W. 307; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

41. *Connecticut.*— Plumb *v.* Ives, 39 Conn. 120.

*Illinois.*— Hanchett *v.* Kimbark, (1885) 2 N. E. 512; Gosney *v.* Frost, 27 Ill. 53.

*Michigan.*— Bates *v.* Smith, 83 Mich. 347, 47 N. W. 249.

*Minnesota.*— Cochran *v.* Stewart, 21 Minn. 435.

*New York.*— Birdsall *v.* Russell, 29 N. Y. 220.

**A mere doubt** irrespective of how vague or unreasonable it may be is not necessarily sufficient to put the buyer on inquiry (Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658); but a suspicion as to the existence of a fact may be sufficient to put a person on inquiry as to its existence, although he does not fully believe in its existence (Kyle *v.* Ward, 81 Ala. 120, 1 So. 468).

42. Cochran *v.* Stewart, 21 Minn. 435.

to but direct the course of inquiry which if pursued will end in the discovery of the facts with notice of which the buyer is to be charged.[43] If, however, the facts and circumstances are such as to put a reasonably prudent man upon inquiry, it is the duty of the buyer to make such inquiry,[44] and if he fails or refuses to do so he must take the consequences as if he had received actual notice;[45] but if where the buyer's suspicions are aroused he makes a proper inquiry and is in good faith satisfied as to the state of the title, he should be regarded as a *bona fide* purchaser.[46]

(D) *Filing and Registration.* If the instrument affecting the title of the seller is duly filed and recorded the record is constructive notice to the purchaser,[47] provided it is filed in the proper office,[48] and if recorded within the time prescribed by the statute it is constructive notice even to purchasers between the date of execution and the date of registration.[49] If, however, such an instrument is not required to be recorded the record thereof will not constitute constructive notice;[50]

43. Engel *v.* Salomon, 41 Ill. App. 411; Birdsall *v.* Russell, 29 N. Y. 220. But see Hines *v.* Perry, 25 Tex. 443, holding that an instruction that "the information necessary to constitute notice must point out the records or persons from whom the title . . . could be ascertained, or it will not be sufficient to constitute notice," is too stringent as to the degree of definiteness required.

**Although something is omitted** by the buyer which an ordinarily prudent person would have done, he is not charged with notice of facts which the act omitted if done would not have revealed. Cochran *v.* Stewart, 21 Minn. 435.

**The mere expression of a suspicion** by a third person to the buyer as to the validity of the seller's title, without any facts stated to justify such suspicion, does not impose upon the buyer the duty of interrupting his regular business and running about the country to see if it is well or ill founded. Gosney *v.* Frost, 27 Ill. 53.

**Notice of the insolvency of the seller** is not alone sufficient to put the buyer upon inquiry as to whether the seller is making the sale in order to defraud his creditors where the buyer has no notice of such intention. State *v.* Merritt, 70 Mo. 275.

**Knowledge that the seller is transferring his goods with intent to defraud his creditors** is not alone sufficient to charge the buyer with notice that the seller procured the goods fraudulently. Engel *v.* Salomon, 41 Ill. App. 411.

44. Sechler Carriage Co. *v.* Lane, 71 Ill. App. 360; Pinkerton Bros. Co. *v.* Bromley, 119 Mich. 8, 77 N. W. 307; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157; Kansas Moline Plow Co. *v.* Sherman, 3 Okla. 204, 41 Pac. 623, 32 L. R. A. 33.

**Authority to sell.**— Where the buyer is notified that the seller's wife has a half interest in the goods sold, he is put upon inquiry as to the authority of the seller to represent his wife in making the sale. Williams *v.* Tam, 131 Cal. 64, 63 Pac. 133.

**Knowledge of non-payment.**— Where an unexecuted agreement has been made for the sale of goods, and the goods remain in possession of the vendor, one who buys from the vendee with notice that he has not paid for the goods is put on inquiry to ascertain whether the first vendee is entitled to the goods without payment on delivery. Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

45. Sechler Carriage Co. *v.* Lane, 71 Ill. App. 360; Danforth *v.* Dart, 4 Duer (N. Y.) 101; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157. And see cases cited *supra*, note 32.

46. Keller *v.* Meyer, 74 Mo. App. 318.

47. *Alabama.*— Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

*Arkansas.*—Morton *v.* Williamson, 72 Ark. 390, 81 S. W. 235.

*Connecticut.*— Plumb *v.* Ives, 39 Conn. 120.

*Georgia.*— Charles *v.* Valdosta Foundry, etc., Co., 4 Ga. App. 733, 62 S. E. 493.

*Maryland.*— Kreuzer *v.* Cooney, 45 Md. 582.

*South Carolina.*— McCall *v.* Lewis, 1 Strobh. 442.

*Tennessee.*— Parker *v.* Hall, 2 Head 641.

*Wyoming.*— Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

See 43 Cent. Dig. tit. "Sales," § 684.

**Notation for record.**— Under the registration act of Tennessee if an instrument in writing which is required to be recorded is received by the register and noted in the book kept for such purpose, it has the same effect as if it were actually spread upon the registration books. Flowers *v.* Wilkes, 1 Swan (Tenn.) 408.

**Place of record.**—A deed of personal property, although recorded in the county of the grantor's residence, is not notice to a subsequent purchaser from the grantor in another county to which he removed, and in which the deed was not recorded. Lewis *v.* Castleman, 27 Tex. 407. But see Parker *v.* Hall, 2 Head (Tenn.) 641.

48. Wing *v.* Thompson, 78 Wis. 256, 47 N. W. 606; Bunn *v.* Valley Lumber Co., 51 Wis. 376, 8 N. W. 232. And see Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467; Cadle *v.* McLean, 48 Wis. 630, 4 N. W. 755.

49. Dale *v.* Arnold, 2 Bibb (Ky.) 605.

50. Williams *v.* Logan, 32 Ga. 165; Morel *v.* Houstoun, R. M. Charlt. (Ga.) 284; Mueller *v.* Engeln, 12 Bush (Ky.) 441; Janelle *v.* Denoncour, 68 N. H. 1, 44 Atl. 63; Braxton *v.* Bell, 92 Va. 229, 23 S. E. 289.

while on the other hand the fact that the instrument should have been, but was not, recorded does not entitle one to the protection of a *bona fide* purchaser if he had actual notice of such instrument.[51]

(E) *Judicial Records and Proceedings.* Notice of judgments and other records of the courts is implied,[52] as well as notice of the facts that might be disclosed by inquiry based on knowledge of the pendency of a suit affecting the title,[53] or the fact that an attachment has been levied upon the goods sold.[54]

**d. Consideration** — (I) *In General.* To constitute one a *bona fide* purchaser and entitle him to protection as such, he must have purchased not only without notice of defects in the title,[55] but also for a valuable consideration,[56] and he cannot be considered as a *bona fide* purchaser until he has actually paid the purchase-price,[57] or become irrevocably bound for its payment.[58]

(II) *Payment of Value* — (A) *In General.* To constitute a valuable consideration within the application of the above rule it is necessary that the purchaser should part with something of value,[59] incur some new obligation,[60]

*Compare* McCall *v.* Lewis, 1 Strobh. (S. C.) 442.

In **Virginia,** Code (1887), §§ 2463, 2464, and 2465 do not authorize the recordation of any contracts for the sale of personal property except those made in consideration of marriage, and except in such cases the record is not notice to subsequent purchasers for value. Braxton *v.* Bell, 92 Va. 229, 23 S. E. 289 [*disapproving* Alexandria First Nat. Bank *v.* Turnbull, 32 Gratt. (Va.) 695, 34 Am. Rep. 791].

**Foreign registration.**— Registration of an instrument in a foreign state is not evidence of notice, and such registration cannot be shown without first showing that it is made notice by the laws of such state. Tatum *v.* Young, 1 Port. (Ala.) 298.

51. Hudson *v.* Warner, 2 Harr. & G. (Md.) 415.

52. Ellis *v.* Woods, 9 Rich. Eq. (S. C.) 19, holding that where a will has been admitted to probate, and is on record in the ordinary's office, the law implies notice of a trust relating to personal property contained in it.

**Records of foreign courts.**— Where the parties reside in Texas and the property is located there, the record of a will in Mississippi is not notice to the purchaser of facts affecting the title. Warren *v.* Dickerson, 3 Tex. 460.

53. Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472.

54. Maddox *v.* Reynolds, 72 Ark. 440, 81 S. W. 603; Cooper *v.* Newman, 45 N. H. 339; McLachlin *v.* Brett, 34 Hun (N. Y.) 478 [*affirmed* in 105 N. Y. 391, 12 N. E. 17].

**Although property is allowed to remain in the hands of the attachment debtor,** a purchaser who has knowledge of facts sufficient to put him upon inquiry as to whether the property is then under attachment is chargeable with notice of all such facts as he would have learned by reasonable inquiry. Cooper *v.* Newman, 45 N. H. 339.

55. See *supra,* VI, B, 1, c.

56. *Alabama.*—Chandler *v.* Higgins, (1905) 39 So. 576; Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879; Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658.

*California.*—California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320.

*Louisiana.*—Guarantee Trust, etc., Deposit Co. *v.* Holzell, 107 La. 745, 31 So. 999.

*Michigan.*—Schloss *v.* Feltus, 96 Mich. 619, 55 N. W. 1010, 36 L. R. A. 161.

*Minnesota.*— Hicks *v.* Stone, 13 Minn. 434.

*Mississippi.*— McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99.

*Nebraska.*— Nebraska Moline Plow Co. *v.* Blackburn, 74 Nebr. 246, 104 N. W. 178; Regier *v.* Shreck, 47 Nebr. 667, 66 N. W. 618.

*New York.*—Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Crawford *v.* Dox, 5 Hun 507.

*Oklahoma.*— Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

*South Carolina.*— Cummings *v.* Coleman, 7 Rich. Eq. 509, 62 Am. Dec. 402.

*Texas.*— Lewis *v.* Castleman, 27 Tex. 497.

*Vermont.*— Downs *v.* Belden, 46 Vt. 674.

*United States.*— Rison *v.* Knapp, 20 Fed. Cas. No. 11,861, 1 Dill. 187, 4 Nat. Bankr. Reg. 349.

See 43 Cent. Dig. tit. "Sales," § 686.

57. Patten *v.* Moore, 32 N. H. 382.

**Effect of notice before payment** see *supra,* VI, B, 1, c, (I).

58. Nebraska Moline Plow Co. *v.* Blackburn, 74 Nebr. 246, 104 N. W. 178. But see Everitt *v.* Farmers', etc., Bank, 82 Nebr. 191, 117 N. W. 401.

59. McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99; Regier *v.* Shreck, 47 Nebr. 667, 66 N. W. 618; Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103; Cummings *v.* Coleman, 7 Rich. Eq. (S. C.) 509, 62 Am. Dec. 402.

**Usury.**— If the consideration is entire and tainted with usury, the purchaser cannot be regarded as a purchaser in good faith, but it is otherwise if the consideration is divisible and usury enters into only a part of it. Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140.

60. Lewis *v.* Bell, (Tex. Civ. App.) 40 S. W. 747. See also Peters *v.* Brandon, (Kan. App. 1899) 48 Pac. 870.

**Application of rule.**— A purchaser of goods who agrees with the seller to pay the price

relinquish some security,[61] or do some act on the faith of the purchase which cannot be retracted,[62] and which would leave the buyer in a worse position if his purchase should be set aside,[63] a mere agreement by the buyer which he can avoid in case his title proves defective being insufficient.[64] It is not, however, necessary that the consideration should be paid in money,[65] or that it should be paid directly to the seller.[66] The consideration paid should be fair and such as would not excite surprise or suspicion,[67] and while it is not necessary that it should be for the full value of the property,[68] yet where the consideration is inadequate and the transaction is not in the usual course of business, or there are other suspicious circumstances sufficient to put the buyer on notice, he cannot claim protection as a *bona fide* purchaser.[69]

(B) *Payment by Note.* One who makes payment by note is not a *bona fide* purchaser unless the note is negotiable,[70] and even where a negotiable note is given for the purchase-price it must have been paid or assigned to an innocent holder before notice;[71] but if the note given in payment has been negotiated before notice the buyer is a *bona fide* purchaser.[72]

(C) *Purchase on Credit.* To constitute one a *bona fide* purchaser the payment of the consideration must be made at the time of purchase,[73] and conse-

on notes given by the latter to third persons on which the purchaser is already liable as indorser incurs no new obligation and is not a purchaser who has paid the price. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658. A promise by a surety to the principal to pay the debt as consideration for chattels sold to him by the principal does not change his relation to the creditor and so does not make him a purchaser for value. Peters *v.* Brandon, (Kan. App. 1899) 48 Pac. 870.

61. McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99; Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App. 633, 25 S. W. 805.

62. McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99.

63. Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App. 633, 638, 25 S. W. 805, where it is said that "a *bona fide* purchaser may be defined as one who advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position, if his purchase should be set aside."

64. Peters *v.* Brandan, (Kan. App. 1899) 48 Pac. 870.

65. Soule *v.* Shotwell, 52 Miss. 536.

**Discharge of preëxisting debt** see *infra*, VI, B, 1, d, (II), (D).

**Payment by note** see *infra*, VI, B, 1, d, (II), (B).

66. Hanchett *v.* Kimbark, (Ill. 1885) 2 N. E. 512, holding that the payment of a claim against the seller is a sufficient consideration, although the claim is fraudulent if the buyer did not know that it was fraudulent.

**A mere conditional promise** to pay a debt of the seller out of notes and accounts turned over to the purchaser of goods is not a valuable consideration. Hamilton-Brown Shoe Co. *v.* Brown, 6 Tex. Civ. App. 633, 25 S. W. 805.

67. Babcock Printing Press Mfg. Co. *v.* Herbert, 137 N. C. 317, 49 S. E. 349.

68. Dent *v.* Portwood, 21 Ala. 588. See also Babcock Printing Press Mfg. Co. *v.* Herbert, 137 N. C. 317, 49 S. E. 349.

**Question for jury.**— Whether two thousand six hundred dollars, seven hundred dollars of which is in cash, is such a reasonable price for a stock of goods worth three thousand five hundred dollars as to establish the good faith of a purchase from one who had acquired the goods fraudulently is a question for the jury. Preston *v.* Threefoot, (Miss. 1899) 24 So. 703.

69. Loeb *v.* Flash, 65 Ala. 526; Calhoun *v.* Burnett, 40 Miss. 599; Singer Mfg. Co. *v.* Hudson, 4 Mo. App. 145; Reed *v.* Gannon, 50 N. Y. 345; Anderson *v.* Nicholas, 28 N. Y. 600 [*affirming* 5 Bosw. 121]; Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 451.

**Inadequacy of price** as putting buyer on inquiry see *supra*, VI, B, 1, c, (II), (C).

70. Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628; Perkins *v.* Frank, (Tex. Civ. App. 1901) 64 S. W. 236.

**The burden of proof** is on the buyer to show that the note given was negotiable. Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

**Part payment in cash.**— Where part of the consideration is paid in cash and the balance by a non-negotiable note, the buyer will be protected as a *bona fide* purchaser only to the extent of the amount of the cash payment. Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, 22 Am. St. Rep. 77, 11 L. R. A. 628.

71. Wetmore *v.* Woods, 62 Mo App. 265; Greenlee *v.* Marquis, 49 Mo. App. 290; Nebraska Moline Plow Co. *v.* Blackburn, 74 Nebr. 246, 104 N. W. 178.

72. Norton *v.* Lumpkin, 83 Iowa 335, 49 N. W. 1015.

**If the note has been partly paid** and has passed into the hands of the seller's assignee in insolvency, there is a valuable consideration, and the buyer is a *bona fide* purchaser for value. Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124.

73. Schloss *v.* Feltus, 96 Mich. 619, 55 N. W. 1010, 36 L. R. A. 161.

quently if the goods are bought on credit the buyer cannot be regarded as a *bona fide* purchaser.[74]

(D) *Preëxisting Debt.* Where the goods are taken in payment of a preëxisting debt the rule in most jurisdictions is that this is not a valuable consideration and the purchaser is not to be regarded as a *bona fide* purchaser,[75] but in some jurisdictions the contrary rule prevails,[76] provided there is an actual satisfaction of the indebtedness.[77] It has also been held that if the purchaser surrenders a valuable

**74.** Jetton *v.* Tobey, 62 Ark. 84, 34 S. W. 531; Partridge *v.* Rubin, 15 Daly (N. Y.) 344, 6 N. Y. Suppl. 657. And see Loeb *v.* Flash, 65 Ala. 526; Reed *v.* Brown, 89 Iowa 454, 56 N. W. 661, 48 Am. St. Rep. 406.

**75.** *Arkansas.*— Sheeks-Stephens Store Co. *v.* Richardson, 76 Ark. 282, 88 S. W. 983; Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark. 87, 37 S. W. 409.

*California.*— Sargent *v.* Sturn, 23 Cal. 359, 83 Am. Dec. 118.

*Delaware.*— Truxton *v.* Fait, etc., Co., 1 Pennew. 483, 42 Atl. 431, 73 Am. St. Rep. 81.

*Iowa.*— Phelps, etc., Co. *v.* Samson, 113 Iowa 145, 84 N. W. 1051; P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

*Kansas.*— Henderson *v.* Gibbs, 39 Kan. 679, 18 Pac. 926.

*Maine.*— Hurd *v.* Bickford, 85 Me. 217, 27 Atl. 107, 35 Am. St. Rep. 353; Jordan *v.* Parker, 56 Me. 557.

*Massachusetts.*— Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97.

*Michigan.*— Kops Bros. Co. *v.* Smith, 137 Mich. 28, 100 N. W. 169; Schloss *v.* Feltus, 103 Mich. 525, 61 N. W. 797, 36 L. R. A. 161.

*New Hampshire.*— Sleeper *v.* Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; Bradley *v.* Obear, 10 N. H. 477.

*New York.*— Stevens *v.* Brennan, 79 N. Y. 254; Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Kennedy *v.* National Union Bank, 23 Hun 494; Penfield *v.* Dunbar, 64 Barb. 239; Gowing *v.* Warner, 29 Misc. 593, 61 N. Y. Suppl. 500 [*affirmed* in 30 Misc. 593, 62 N. Y. Suppl. 797]; Victoria Paper Mills Co. *v.* New York, etc., Co., 27 Misc. 179, 57 N. Y. Suppl. 397; Cowles *v* Kiehel, 65 N. Y. Suppl. 349; Northrup *v* American Exch. Bank, 7 N Y. St. 582; Root *v.* French, 13 Wend. 570, 28 Am. Dec. 482.

*Ohio.*— Wheeling, etc., R. Co. *v.* Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; Grever *v.* Taylor, 53 Ohio St. 621, 42 N. E. 829; Eaton *v.* Davidson, 46 Ohio St. 355, 21 N. E. 442.

*Pennsylvania.*— Burton *v.* Peterson, 12 Phila. 397.

*Texas.*— Morrison *v.* Adoue, 76 Tex. 255, 13 S. W. 166; Lewis *v.* Bell, (Civ. App. 1897) 40 S. W. 747; Avery *v.* Mansur, etc., Implement Co., (Civ. App. 1896) 37 S. W. 466; Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App 633, 25 S. W. 805. *Compare* Anderson *v.* Levyson, 1 Tex. App. Civ. Cas. § 926.

*Vermont.*— Downs *v.* Belden, 46 Vt. 674.

*Washington.*— Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902.

*United States.*—Henry L. Crane Boot, etc., Co. *v.* Trentman, 34 Fed. 620; Western Land, etc., Co. *v.* Plumb, 27 Fed. 598.

See 43 Cent. Dig. tit. "Sales," § 688.

**Preëxisting debt of another.**— A person who buys goods and parts with nothing of value at the time they are received, but merely applies them on a debt due from his son to the seller, is not a *bona fide* purchaser. Logan *v.* Oklahoma Mill Co., 14 Okla. 402, 79 Pac. 103.

**76.** *Alabama.*— Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Peterson *v.* Steiner, 108 Ala. 629, 18 So. 688; Hornthall *v.* Schonfeld, 79 Ala. 107; Spira *v.* Hornthall, 77 Ala. 137. *Compare* Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

*Georgia.*— Forbes *v.* Chisholm, 84 Ga. 641, 11 S. E. 554.

*Illinois.*— Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; King *v.* Brown, 24 Ill. App. 579.

*Mississippi.*— Soule *v.* Shotwell, 52 Miss. 236. *Compare* McLeod *v.* First Nat. Bank, 42 Miss. 99.

*Missouri.*— Redpath *v.* Lawrence, 42 Mo. App. 101; Lawrence *v.* Owens, 39 Mo. App. 318; Feder *v.* Abrahams, 28 Mo. App. 454; Hess *v.* Clark, 11 Mo. App. 492.

*Oklahoma.*— See Phelps, etc., Co. *v.* Halsell, 11 Okla. 1, 65 Pac. 340, where, however, it also appeared that the seller was a fraudulent vendee and that the original owner had been guilty of laches in regard to rescinding the sale.

*Wisconsin.*— Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747; Shufeldt *v.* Pease, 16 Wis. 659.

**77.** Spira *v.* Hornthall, 77 Ala. 137.

**An absolute extinguishment** of an antecedent debt in consideration of a simultaneous transfer of property constitutes the individual a purchaser for value to the same extent as if he had paid the money. Soule *v.* Shotwell, 52 Miss. 236.

**But a mere agreement to receive** goods in payment of an existing indebtedness where the creditor has not materially changed his position or given up anything of value, such as surrendering the evidence of indebtedness or a prior security, is not sufficient. Spira *v.* Hornthall, 77 Ala. 137.

**Merely entering a credit** on a past-due account for the value of the property is not sufficient to constitute the creditor a purchaser for value. Loeb *v.* Flash, 65 Ala. 526; Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165.

security for the debt this constitutes a new consideration constituting him a *bona fide* purchaser,[78] and that the same rule applies if he receives the goods in part payment of the debt and extends the time for the payment of the balance.[79] But it is a general rule that one who takes the goods merely as security for a preëxisting debt is not a *bona fide* purchaser,[80] unless there is a new consideration in the form of an extension of time for the payment of the debt.[81] If a valuable consideration is paid the purchaser is entitled to protection as a *bona fide* purchaser, although a part of the consideration is a preëxisting debt,[82] provided such payment is made in good faith; [83] but a mere promise to pay a part of the consideration in cash is

**78.** Foster *v.* Ambler, 24 Fla. 519, 5 So. 263; Finks *v.* Buck, (Tex. Civ. App. 1894) 27 S. W. 1094.

**A surrender of worthless securities** does not constitute a new or valuable consideration within the rule. Fairbanks *v.* Sargent, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490, 6 L. R. A. 475 [*reversing* 39 Hun 588].

**Dismissal of attachment suit.**— Where a creditor sued on his claim, and attached goods, and garnished debtors, and in consideration of the giving of a mortgage dismissed his attachment and garnishment proceedings, and paid the costs, this constitutes a new consideration, and if not chargeable with notice, he is a *bona fide* purchaser for the value of the mortgaged goods, as against the vendor seeking to rescind the sale on account of fraud. Large, etc., Co. *v.* Samuel Nott & Son, (Nebr. 1901) 95 N. W. 484.

**79.** Button *v.* Rathbone, 118 N. Y. 666, 23 N. E. 122, holding that in such case there is a new consideration sufficient to constitute the buyer a *bona fide* purchaser.

**80.** *Alabama.*— Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

*California.*—Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

*Colorado.*—Reid *v.* Bird, 15 Colo. App. 116, 61 Pac. 353.

*Indiana.*— Rauh *v.* Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42.

*Iowa.*— P. Cox Shoe Mfg. Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

*Kansas.*— John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675.

*Kentucky.*— Carstairs *v.* Charles A. Kelley Co., 29 S. W. 622, 17 Ky. L. Rep. 309.

*Maine.*— Abbott *v.* Marshall, 48 Me. 44.

*Mississippi.*— Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297, 22 So. 952.

*Missouri.*— Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Kemper, etc., Dry-Goods Co. *v.* Kidder Sav. Bank, 81 Mo. App. 280; Strauss *v.* Hirsch, 63 Mo. App. 95; Watson *v.* Sidney F. Woody Printing Co., 56 Mo. App. 145; Swofford Bros. Dry Goods Co. *v.* Jacobs, 2 Mo. App. Rep. 1334.

*Nebraska.*— Phenix Iron Works Co. *v.* McEvony, 47 Nebr. 228, 66 N. W. 290, 53 Am. St. Rep. 527; Henry *v.* Vliet, 36 Nebr. 138, 54 N. W. 122, 19 L. R. A. 590 [*overruling* 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. Rep. 478]; Tootle *v.* Chadron First Nat. Bank, 34 Nebr. 863, 52 N. W. 396.

*New York.*— Stevens *v.* Brennan, 79 N. Y. 254; Asher *v.* Deyoe, 77 Hun 531, 28 N. Y. Suppl. 890.

*Ohio.*— Miehle Printing Press, etc., Co. *v.* Andrews-Jones Printing Co., 18 Ohio Cir. Ct. 158, 10 Ohio Cir. Dec. 1; Goldsmith *v* Hain, 1 Ohio Cir. Ct. 333, 1 Ohio Cir. Dec. 185.

*Pennsylvania.*—Callendar *v.* Kelly, 190 Pa. St. 455, 42 Atl. 957.

*Texas.*— Wolf *v.* Lachman, (Civ. App. 1892) 20 S. W. 867.

*Utah.*— Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 234, 52 Pac. 282.

*Vermont.*— Poor *v* Woodburn, 25 Vt. 234.

*United States.*— Johnson *v.* Peck, 13 Fed. Cas. No. 7,404, Woodb. & M. 334.

**Person holding under purchaser.**— Where goods are obtained on fraudulent representations with no intent to pay for them, and then mortgaged to secure preëxisting debts of the purchaser, and thereafter, with the consent of all parties to the mortgage, the goods are conveyed to a third person in trust, to devote the proceeds to the payment of the debts secured by the mortgage, such person merely represents the mortgagees and is not a purchaser for value. McGraw *v.* Solomon, 83 Mich. 442, 47 N. W. 345.

**81.** Adam, etc., Co. *v.* Stewart, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; Watson *v.* Sidney F. Woody Printing Co., 56 Mo. App. 145; La Manna *v.* Munroe, 48 N. Y. App. Div. 495, 62 N. Y. Suppl. 984.

**Actual extension.**— A clause in a chattel mortgage, given to secure a preëxisting debt, providing for a thirty days' extension of the payment of such indebtedness, is not sufficient to constitute the mortgagee a *bona fide* purchaser of the mortgaged goods, as against persons who were induced to sell them by the mortgagor's fraud, where the mortgagee takes immediate possession of the goods under a clause in the mortgage authorizing him so to do, so that in reality there is no extension of the time of payment. Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347.

**82.** *Arkansas.*— Gavin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; Woolridge *v.* Thiele, 55 Ark. 45, 17 S. W. 340.

*Maine.*— Titcomb *v.* Wood, 38 Me. 561.

*Michigan.*— Zucker *v.* Karpeles, 88 Mich. 413, 50 N. W. 373.

*New Hampshire.*— Kingsbury *v.* Smith, 13 N. H. 109.

*Ohio.*— Pike *v.* Equitable Nat. Bank, 2 Ohio S. & C. Pl. Dec. 1, 1 Ohio N. P. 205.

*Texas.*— Wear, etc., Dry-Goods Co. *v.* Crews, 23 Tex. Civ. App. 667, 57 S. W. 73.

See 43 Cent. Dig. tit. "Sales," § 691.

**83.** Victoria Paper Mills Co. *v.* New York,

not equivalent to actual payment and is not sufficient to constitute the buyer a *bona fide* purchaser.[84]

(III) *CREDITORS AS BONA FIDE PURCHASERS.* Protection as to *bona fide* purchasers will not be extended to attaching or judgment creditors,[85] or assignees for the benefit of creditors,[86] unless the debts were contracted subsequently to the sale and on the faith of the apparent ownership.[87]

**2. RIGHTS AND LIABILITIES — a. In General.** A *bona fide* purchaser acquires a valid title to the goods irrespective of any defects in the title of his vendor,[88] and is not affected by any secret equities,[89] or liens on the property.[90] Such a

etc., Co., 27 Misc. (N. Y.) 179, 57 N. Y. Suppl. 397, holding that where goods fraudulently bought are transferred in payment of an antecedent debt, the fact that a small sum is also paid on the advice of lawyers, that there might be no question as to the validity of the sale, is insufficient to make such second purchaser a *bona fide* purchaser for value.

**84.** Reed *v.* Brown, 89 Iowa 454, 56 N. W. 661, 48 Am. St. Rep. 406.

**85.** *Arkansas.*— Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283.

*California.*—Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

*Illinois.*—Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Schweizer *v.* Tracy, 76 Ill. 345.

*Iowa.*— Thomas *v.* Hillhouse, 17 Iowa 67.

*Kentucky.*— Lane *v.* Robinson, 18 B. Mon. 623.

*Massachusetts.*— Thaxter *v.* Foster, 153 Mass. 151, 26 N. E. 434.

*New York.*— Van Cleef *v.* Fleet, 15 Johns. 147.

*Pennsylvania.*—Crane Iron Co. *v.* Farmers', etc., Nat. Bank, 3 Pa. Co. Ct. 589.

*Texas.*— Hall, etc., Wood Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715.

*Vermont.*— Field *v.* Stearns, 42 Vt. 106.

*Washington.*— Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

**86.** Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; Paine *v.* Aberdeen Hotel Co., 60 Miss. 360.

**87.** Van Duzor *v.* Allen, 90 Ill. 499; Schwartz *v.* McCloskey, 156 Pa. St. 258, 27 Atl. 300.

**Estoppel of seller.**— A vendor of merchandise, who has given credit to the buyer on false and fraudulent statements of assets made by him, cannot exercise the right to rescind at the expense of other creditors who discounted paper of the buyer in ignorance of such fraudulent procurement of credit, and in reliance upon representations as to the standing of the buyer made to them by the vendor, who was partially paid by the proceeds of the paper so discounted. Preston *v.* Spaulding, 120 Ill. 208, 10 N. E. 903 [*reversing* in part 18 Ill. App. 341].

**88.** *Alabama.*— Peterson *v.* Steiner, 108 Ala. 629, 18 So. 688.

*Illinois.*— Hanchett *v.* Kimbark, (1885) 2 N. E. 512.

*Michigan.*— Bates *v.* Smith, 83 Mich. 347, 47 N. W. 249.

*Missouri.*— Barbee *r.* Crawford, 132 Mo. App. 1, 111 S. W. 614.

*New York.*— Mather *v.* Freelove, 3 N. Y. St. 424.

*North Carolina.*— Southerland *v.* Webb, 15 N. C. 245.

*Ohio.*— Page *v.* Sandusky, etc., R. Co., 2 Ohio Dec. (Reprint) 716, 4 West. L. Month. 644.

*South Carolina.*—Caston *v.* Cunningham, 3 Strobh. 59.

*South Dakota.*— La Crosse Boot, etc., Mfg. Co. *r.* Mons Anderson Co., 9 S. D. 560, 70 N. W. 877.

*Texas.*— Therriault *v.* Compere, (Civ. App. 1898) 47 S. W. 750.

*United States.*— Walker *v.* Miller, 59 Fed. 869, 8 C. C. A. 331; Cope *v.* Romeyne, 6 Fed. Cas. No. 3,207, 4 McLean 384; Pollard *v.* U. S., 4 Ct. Cl. 328 [*affirmed* in 154 U. S. 577, 14 S. Ct. 1214, 19 L. ed. 620].

**89.** Shearer *v.* Barrett, Lalor (N. Y.) 70. See also Skinner *v.* Oakes, 10 Mo. App. 45.

**90.** *Alabama.*— Scaife *v.* Stovall, 67 Ala. 237; Marsh *v.* Elsworth, 37 Ala. 85.

*Arkansas.*— Bledsoe *v.* Mitchell, 52 Ark. 158, 12 S. W. 390; Andrews *v.* Cox, 42 Ark. 473, 48 Am. Rep. 68; Puckett *v.* Reed, 31 Ark. 131.

*Delaware.*— Mears *v.* Waples, 4 Houst. 62.

*Georgia.*— Thornton *v.* Carver, 80 Ga. 397, 6 S. E. 915; Frazer *v.* Jackson, 46 Ga. 621.

*Illinois.*— Finney *v.* Harding, 136 Ill. 573, 27 N. E. 289, 12 L. R. A. 605; Prettyman *v.* Unland, 77 Ill. 206; Hadden *v.* Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80; Esterly Harvesting Co. *v.* Hill, 36 Ill. App. 99; Howe *v.* Clark, 23 Ill. App. 145.

*Indiana.*— Fowler *v.* Hawkins, 17 Ind. 211.

*Iowa.*— Nesbitt *v.* Bartlett, 14 Iowa 485.

*Kansas.*— Scully *v.* Porter, 3 Kan. App. 493, 43 Pac. 824.

*Louisiana.*— Britton *v.* Harvey, 47 La. Ann. 259, 16 So. 747.

*Maine.*— Mosher *v.* Smith, 67 Me. 172; Crane *v.* Pearson, 49 Me. 97.

*Missouri.*— Toney *v.* Goodley, 57 Mo. App. 235; Skinner *v.* Oakes, 10 Mo. App. 45.

*Nebraska.*— Gillilan *v.* Kendall, 26 Nebr. 82, 42 N. W. 281, 18 Am. St. Rep. 766.

*New York.*— Marsh *v.* Titus, 3 Hun 550, 6 Thomps. & C. 29.

*North Carolina.*— Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

*Tennessee.*— Davis *v.* Parks, 6 Yerg. 252.

*Texas.*— Long *r.* Dennis, 1 Tex. App. Civ. Cas. § 1121.

*Vermont.*— Howard *r.* Witters, 60 Vt. 578, 15 Atl. 303.

purchaser acquires, however, only the title and estate of his vendor.[91] Subsequent *bona fide* purchasers from the seller will be protected against the prior sale if there has been no change of possession;[92] but actual delivery is sufficient even as against a *bona fide* purchaser,[93] and where two parties in good faith purchase the same property the one first receiving possession has the better title.[94]

**b. Validity of Seller's Title.** While ordinarily a person having no title can convey none even to a *bona fide* purchaser,[95] the rule is otherwise if the title of the seller is merely voidable and has not been avoided at the time of the sale.[96] The rights of a *bona fide* purchaser are not affected by the mere fact that his vendor acquired the property by an illegal sale,[97] as by a sale on Sunday,[98] or acquired the property as the result of a wager,[99] provided the wager was fairly won.[1] A bill of sale made by one mentally incompetent is invalid even as to *bona fide* purchasers from the buyer,[2] and where personal property is sold by an infant, he may on coming of age rescind the sale and recover the property from one who is a *bona fide* purchaser from his vendee;[3] but undue influence on the part of a husband

*Virginia.*— Braxton *v.* Bell, 92 Va. 229, 23 S. E. 289.

*Wisconsin.*— Andrews *v.* Jenkins, 39 Wis. 476.

*United States.*— Sheppard *v.* Newhall, 47 Fed. 468; The Detroit, 7 Fed. Cas. No. 3,832, Brown Adm. 141.

See 43 Cent. Dig. tit. "Sales," § 663.

**Landlord's lien.**—Under statutes giving a landlord a lien on the crops or other property of the tenant it has been held in some states that such lien may be enforced even against a *bona fide* purchaser. Blake *v.* Counselman, 95 Iowa 219, 63 N. W. 679; Evans *v.* Collins, 94 Iowa 432, 62 N. W. 810; Richardson *v.* Peterson, 58 Iowa 724, 13 N. W. 63; Warren *v.* Jones, 70 Miss. 202, 14 So. 25; Eason *v.* Johnson, 69 Miss. 371, 12 So. 446; Belcher *v.* Grimsley, 88 N. C. 88; Davis *v.* Wilson, 86 Tenn. 519, 8 S. W. 151; Phillips *v.* Maxwell, 1 Baxt. (Tenn.) 25. But see Chism *v.* Thomson, 73 Miss. 410, 19 So. 210. In other jurisdictions, however, the general rule applies that a *bona fide* purchaser without notice takes free from the landlord's lien. See cases cited *supra* this note, in support of text.

**91.** *Alabama* — Lyde *v.* Taylor, 17 Ala. 270.

*California.*— California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320.

*Georgia.*— Mayer *v.* Wiltberger, Ga. Dec. Pt. II, 20.

*New York.*— Wheelwright *v.* Depeyster, 1 Johns. 471, 3 Am. Dec. 345.

*Rhode Island.*— Woods *v.* Nichols, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773.

*West Virginia.*— Ullman *v.* Biddle, 53 W. Va. 415, 44 S. E. 280.

**Life-estate.**— A *bona fide* purchaser from one who has only a life-estate in a chattel acquires no greater estate than that of his vendor. Lyde *v.* Taylor, 17 Ala. 270.

**92.** *Arkansas.*— Hight *v.* Harris, 56 Ark. 98, 19 S. W. 235.

*Indiana.*— Sloan *v.* Kingore, 3 Ind. 549.

*Kansas.*— Birks *v.* French, 21 Kan. 238.

*Louisiana.*— Verdier *v.* Leprete, 4 La. 41; Meagher *v.* Reading, 23 La. Ann. 436; Cullom *v.* Guillot, 18 La. Ann. 608.

*Massachusetts.*— Veazie *v.* Somerby, 5 Allen 280.

*New Hampshire.*— Crawford *v.* Forristall, 58 N. H. 114.

*New York.*— Thompson *v.* Blanchard, 4 N. Y. 303; Seymour *v.* Montgomery, 4 Abb. Dec. 207, 1 Keyes 463.

*Pennsylvania.*— Miller *v.* Browarsky, 130 Pa. St. 372, 18 Atl. 643; Shannon *v.* Minney, 130 Pa. St. 280, 18 Atl. 741; Davis *v.* Bigler, 62 Pa. St. 242, 1 Am. Rep. 393; Farrell *v.* Nathans, 1 Phila. 557.

**Necessity for delivery and change of possession** as against subsequent purchasers see *supra*, VI, A, 4, a, (II), (A), (B).

**Necessity of identification.**—Where a crop was planted and a sale made in the spring of a certain amount of it, which did not embrace the whole crop or any particular part, such as the part first gathered, etc., there was no sufficient identification to pass title as against a *bona fide* purchaser of a part of the crop. Huntington *v.* Chisholm, 61 Ga. 270.

**93.** Ohio, etc., R. Co. *v.* Kasson, 37 N. Y. 218; Stafford *v.* Webb, Lalor (N. Y.) 213.

**Effect of delivery** generally see *supra*, VI, A, 4, b.

**94.** Thomas *v.* Ramsey, 47 Mo. App. 84. And see *supra*, VI, A, 9, a, (II).

**95.** See *infra*, VI, B, 2, c.

**96.** Arnett *v.* Cloudas, 4 Dana (Ky.) 299; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Cochran *v.* Stewart, 21 Minn. 435. And see *infra*, VI, B, 2, f.

**97.** Marks *v.* Hapgood, 24 Me. 407.

**98.** Horton *v.* Buffinton, 105 Mass. 399.

**99.** Holland *v.* Swain, 94 Ill. 154.

**1.** Hodge *v.* Sexton, 1 Hun (N. Y.) 576, 4 Thomps. & C. 54, holding that where a person stakes a watch on a throw of the dice and loses by reason of a trick or cheat on the part of his adversary, to whom the stakeholder delivers the watch, and who sells it to an innocent purchaser, no authority to the stakeholder to deliver the watch can be implied unless the bet was fairly won, and the winner acquires no title thereto and can convey none even to a *bona fide* purchaser.

**2.** Harris *v.* Harris, 64 Cal. 108, 28 Pac. 63.

**3.** Hill *v.* Anderson, 5 Sm. & M. (Miss.) 216.

by which his wife is induced to sell property will not affect the rights of a *bona fide* purchaser from her vendee.[4]

**c. Purchase From One Having No Title.** While the general rule is that one who has no title to goods or authority to sell, but at most a mere possession, can tansfer no property therein as against the true owner even to a *bona fide* purchaser,[5] yet if the true owner has clothed him with apparent ownership so that authority to sell may be implied, a *bona fide* purchaser will take the title free from any claim by the owner,[6] as where there has been a delivery of the goods to the

**4.** Blanchard *v.* Castille, 19 La. 362.

**5.** *Alabama.*—Johnson *v.* Boyles, 26 Ala. 576.

*Colorado.*— Smith Premier Typewriter Co. *v.* Stidger, 18 Colo. App. 261, 71 Pac. 400.

*Connecticut.*— Harrison *v.* Clark, 74 Conn. 18, 49 Atl. 186.

*Georgia.*— Padgett *v.* Ford, 117 Ga. 508, 43 S. E. 1002; Papot *v.* Gibson, 7 Ga. 530.

*Illinois.*— Klein *v.* Seibold, 89 Ill. 540; Charles Moe Co. *v.* J. H. Logue Co., 108 Ill. App. 128; Reid *v.* Sheffy, 99 Ill. App. 189; Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544; Sargeant *v.* Marshall, 28 Ill. App. 177; Hutchinson *v.* Oswald, 17 Ill. App. 28. But see Cooper *v.* Chicago Cottage Organ Co., 58 Ill. App. 248.

*Indiana.*— Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Payne *v.* June, 92 Ind. 252.

*Louisiana.*— Conner *v.* Hill, 6 La. Ann. 7; Moore *v.* Lambeth, 5 La. Ann. 66; Denis *v.* Clague, 7 Mart. N. S. 93.

*Maryland.*— Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385; Johnson *v.* Frisbie, 29 Md. 76, 96 Am. Dec. 508.

*Massachusetts.*—Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394.

*Michigan.*—Taylor *v.* Applebaum, 154 Mich. 682, 118 N. W. 492; O'Neill *v.* Thompson, 152 Mich. 396, 116 N. W. 399.

*Mississippi.*— Unger *v.* Abbott, 92 Miss. 563, 46 So. 68; Ketchum *v.* Brennan, 53 Miss. 596. *Compare* Roach *v* Anderson, 28 Miss. 234.

*New York.*— Smith *v.* Clews, 114 N. Y. 190, 21 N. E. 160, 11 Am. St. Rep. 627, 4 L. R. A. 392 [*affirming* 12 N. Y. Suppl. 471]; Ballard *v.* Burgett, 40 N. Y. 314; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452 [*affirming* 40 Barb. 397]; Linnen *v.* Cruger, 40 Barb. 633; Wilson *v.* Nason, 4 Bosw. 155; Saltus *v.* Everett, 20 Wend. 267, 32 Am. Dec. 541; Williams *v.* Merle, 11 Wend. 80, 25 Am. Dec. 604.

*Ohio.*— Brockhaus *v.* Klein, 8 Ohio Dec. (Reprint) 487, 8 Cinc. L. Bul. 205.

*Pennsylvania.*— Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334.

*South Carolina.*— Carmichael *v.* Buck, 10 Rich. 332, 70 Am. Dec. 226.

*Texas.*— Evans *v.* Murray, 27 Tex. 383; Manley *v.* Culver, 20 Tex. 143; Case *v.* Jennings, 17 Tex. 661; Sandford *v.* Wilson, 2 Tex. App. Civ. Cas. § 247; Gammel *v.* Couts, 1 Tex. App. Civ. Cas. § 1168; Mayes *v.* Bruton, 1 Tex. App. Civ. Cas § 699; Russell *v.* Oppenheimer, 1 Tex. App. Civ. Cas. § 269.

*Utah.*— Turnbow *v.* Beckstead, 25 Utah 468, 71 Pac. 1062.

*Vermont.*— Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216.

*West Virginia.*— Ullman *v.* Biddle, 53 W. Va. 415, 44 S. E. 280.

*United States.*— Gentry *v.* Singleton, 128 Fed. 679, 63 C. C. A. 231 [*affirming* 4 Indian Terr. 346, 69 S. W. 898].

*England.*— Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406.

See 43 Cent. Dig. tit. "Sales," § 660.

**Forfeiture.**—A forfeiture of goods for violation of the Non-Intercourse Act of 1809 takes place upon the commission of the offense and avoids a subsequent sale to an innocent purchaser, although before seizure or suit. U. S. *v.* The Mars, 8 Cranch (U. S.) 417, 3 L. ed. 609; U. S. *v.* Nineteen Hundred Sixty Bags of Coffee, 8 Cranch (U. S.) 398, 3 L. ed. 602.

**Ratification.**— The fact that an owner of property sold without authority by a third person to a *bona fide* purchaser makes no demand for its return, and neither informs him of his claim as owner, nor commences replevin, for nine weeks after learning of the sale, does not amount to a ratification of the sale. Harrison *v.* Clark, 74 Conn. 18, 49 Atl. 186.

**Mortgagor in possession.**—Where A makes a bill of sale of a horse to B, acknowledging the receipt of payment by two notes and at the same time takes back a writing stating the purchase of the horse, and that it is to remain the property of A until the notes become due, the transaction is merely a contract of sale or a sale and a mortgage back, and in either case A is entitled to the horse on a failure of payment of the notes as against a *bona fide* purchaser from B without notice before the notes became due. Lane *v.* Borland, 14 Me. 77, 31 Am. Dec. 33.

**Possession by public officer.**— The possession of goods by a public officer does not carry with it such *indicia* of title or authority to sell as will protect a *bona fide* purchaser. Johnson *v.* Frishie, 29 Md. 76, 96 Am. Dec. 508; Quinton *v.* Cutlip, 1 Okla. 302, 32 Pac. 269.

**The making of expenditures** by a *bona fide* purchaser in repairing the property while in his possession gives him no lien thereon. Clark *v.* Hale, 34 Conn. 398.

**If the property is destroyed** while in possession of a *bona fide* purchaser he is not liable if it was without any fraud or fault on his part. Joyce *v.* Poydras de la Lande, 6 La. 277.

**6.** *Alabama.*— Thomas *v.* Wallace, 5 Ala. 268.

buyer,[7] or where the sale is made by a trustee,[8] or by an agent who has been clothed with the apparent ownership and authority to sell.[9]

**d. Purchase in Market Overt.**[10] In England protection is extended to purchasers in market overt in a limited class of retail transactions, and all shops in London are markets overt for the purpose of their own trade,[11] but outside of the city markets overt exist only by grant or prescription.[12] By a purchase in market overt the title obtained is good against all the world.[13] To constitute a sale in market overt the whole transaction must take place and the sale be completed within the open market.[14] It is not absolutely essential that the interior of the room where the transaction takes place shall be visible from the outside,[15] but the sale must be open, and a sale in a show-room of a shop to which access can be had only by special permission is not within the exception.[16] The custom of markets overt does not exist in the United States,[17] and consequently the rule of

*Illinois.*— Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Dial *v.* Peterson, 34 Ill. App. 478.

*Louisiana.*— Miles *v.* Oden, 8 Mart. N. S. 214, 19 Am. Dec. 177.

*Maine.*— Tourtellott *v.* Pollard, 74 Me. 418.

*Minnesota.*—Flanigan *v.* Pomeroy, 85 Minn. 264, 88 N. W. 761.

*Missouri.*— Ess *v.* Griffith, 128 Mo. 50, 30 S. W. 343; Third Nat. Bank *v.* Smith, 107 Mo. App. 178, 81 S. W. 215; McClure *v.* Tipton School Dist., 66 Mo. App. 84.

*New York.*— Porter *v.* Parks, 49 N. Y. 564; Crocker *v.* Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Goodenough *v.* Spencer, 46 How. Pr. 347.

*South Carolina.*— Folk *v.* Sanders, 36 S. C. 582, 15 S. E. 732; Vermonet *v.* Delaire, 2 Desauss. Eq. 323.

*Virginia.*— Fitzhugh *v.* Anderson, 2 Hen. & M. 289, 3 Am. Dec. 625.

**Retention of possession after rescission.**— Where a completed sale of goods is rescinded by the parties, but the seller permits the buyer to retain possession, and so invests him with apparent authority to sell, a *bona fide* purchaser will acquire a good title thereto. Gardiner *v.* McDonough, 147 Cal. 313, 81 Pac. 964.

**Joint tenants of safety deposit box.**— The rule that where one of two innocent persons must suffer through the fraud of a third person, he must bear the loss who placed it in the power of the third person to commit the fraud, does not apply to the case of two persons having a safety deposit box in common, and one of them, without authority, abstracting therefrom, and transferring to an innocent purchaser for value, a certificate of stock indorsed in blank belonging to the other. Bangor Electric Light, etc., Co. *v.* Robinson, 52 Fed. 520.

7. See *infra*, VI, B, 2, e.

8. See *infra*, VI, B, 2, j.

9. See *infra*, VI, B, 2, k.

10. **Market overt defined** see 26 Cyc. 819.

**Right of bailor** to recover from a purchaser in market overt see BAILMENTS, 5 Cyc. 210 text and note 72.

11. Wilkinson *v.* King, 2 Camph. 335.

**Sale to shopkeeper.**— The doctrine as to sales in market overt in the city of London does not apply to a sale by a customer to a shopkeeper. Hargreave *v.* Spink, [1892] 1 Q. B. 25, 61 L. J. Q. B. 318, 65 L. T. Rep. N. S. 650, 40 Wkly. Rep. 254.

**Sale of vessel.**—A ship is not like an ordinary chattel, which passes by delivery, and there is no market overt for ships. Hooper *v.* Gumm, L. R. 2 Ch. 282, 36 L. J. Ch. 605, 16 L. T. Rep. N. S. 107, 15 Wkly. Rep. 464.

12. Benjamin *v.* Andrews, 5 C. B. N. S. 299, 4 Jur. N. S. 41, 27 L. J. M. C. 310, 6 Wkly. Rep. 692, 94 E. C. L. 299.

**Outside of London.**—A sale by public auction at a horse repository, out of the city of London, is not a sale in market overt. Lee *v.* Bayes, 18 C. B. 599, 2 Jur. N. S. 1093, 25 L. J. C. P. 249, 86 E. C. L. 599.

13. Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Hartop *v.* Hoave, 3 Atk. 44, 26 Eng. Reprint 828.

**Sale of stolen property.**— The right of a purchaser of stolen property is, however, modified by statute 24 & 25 Vict. c. 96, § 100, relating to the restoration of the property to the owner on conviction of the thief. See Walker *v.* Matthews, 8 Q. B. D. 109, 51 L. J. Q. B. 243, 46 L. T. Rep. N. S. 915, 30 Wkly. Rep. 338.

14. Crane *v.* London Dock Co., 5 B. & S. 313, 10 Jur. N. S. 984, 33 L. J. Q. B. 224, 10 L. T. Rep. N. S. 372, 12 Wkly. Rep. 745, 117 E. C. L. 313.

15. Lyons *v.* De Pass, 11 A. & E. 326, 39 E. C. L. 190, 9 C. & P. 68, 4 Jur. 505, 9 L. J. Q. B. 51, 3 P. & D. 177.

16. Hargreave *v.* Spink, [1892] 1 Q. B. 25, 61 L. J. Q. B. 318, 65 L. T. Rep. N. S. 650, 40 Wkly. Rep. 254.

17. *Illinois.*— Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278.

*Maryland.*— Browning *v.* Magill, 2 Harr. & J. 308.

*Massachusetts.*— Towne *v.* Collins, 14 Mass. 500; Dame *v.* Baldwin, 8 Mass. 518.

*New York.*— Roberts *v.* Dillon, 3 Daly 50; Hoffman *v.* Carow, 22 Wend. 285; Wheelwright *v.* Depeyster, 1 Johns. 471, 3 Am. Dec. 345.

*Ohio.*— Roland *v.* Gundy, 5 Ohio 202.

*Pennsylvania.*— Lecky *v.* McDermott, 8 Serg. & R. 500; Hardy *v.* Metzgar, 2 Yeates 347; Hosack *v.* Weaver, 1 Yeates 478.

*South Carolina.*— Carmichael *v.* Buck, 10 Rich. 332, 70 Am. Dec. 226.

*caveat emptor* applies without distinction to all sales which are otherwise within the application of such rule.[18]

**e. Effect of Delivery.** As a delivery of goods is usually effective to pass the title to the buyer,[19] a *bona fide* purchaser from one upon whom apparent ownership has been conferred by delivery will be protected,[20] even where the original purchase-price has not been paid.[21] In some cases it has been held that a delivery to the buyer will pass title so as to protect an innocent purchaser, irrespective of the terms of the contract or intention of the parties;[22] but in other cases it is held that the rule does not apply if the passing of title is conditional upon payment,[23] or there is a reservation of the property in the goods,[24] the decisions being based on the ground that a person without title can convey none.[25]

**f. Misrepresentation and Fraud.** Where the original sale was induced by fraud and misrepresentation the original seller cannot unless he has disaffirmed the sale recover the goods from a subsequent *bona fide* purchaser.[26] This rule is based

*Texas.*— Sandford *v.* Wilson, 2 Tex. App. Civ. Cas. § 247.

*Vermont.*— Griffith *v.* Fowler, 18 Vt. 390.

*United States.*— Ventress *v.* Smith, 10 Pet. 161, 9 L. ed. 382.

See 43 Cent. Dig. tit. "Sales," § 659.

18. *Arkansas.*— Sadler *v.* Lewers, 42 Ark. 148.

*North Carolina.*— Belcher *v.* Grimsley, 88 N. C. 88.

*Oregon.*— Church *v.* Melville, 17 Oreg. 413, 21 Pac. 387; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

*Pennsylvania.*—Hardy *v.* Metzgar, 2 Yeates 347.

*Texas.*— Gulf, etc., R. Co. *v.* Taylor, 18 Tex. Civ. App. 571, 45 S. W. 749.

*Virginia.*— Taylor *v.* Stone, 2 Munf. 314.

19. See *supra*, VI, A, 4, b.

20. *California.*—Wright *v.* Solomon, 19 Cal. 64, 79 Am. Dec. 196.

*District of Columbia.*— Bridget *v.* Cornish, 1 Mackey 29.

*Illinois.*— Young *v.* Bradley, 68 Ill. 553.

*Indiana.*— Harris *v.* Mercer, 22 Ind. 329; Bell *v.* Cafferty, 21 Ind. 411.

*Iowa.*— Perkins *v.* Anderson, 65 Iowa 398, 21 N. W. 696.

*Louisiana.*— Marks *v.* Landry, 9 Rob. 525; Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662.

*Michigan.*— Cass *v.* Gunnison, 68 Mich. 147, 36 N. W. 45.

*Missouri.*— Skilling *v.* Bollman, 6 Mo. App. 76.

*New York.*— Comer *v.* Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; Western Transp. Co. *v.* Marshall, 37 Barb. 509 [*affirmed* in 4 Abb. Dec. 575, 4 Transcr. App. 366, 6 Abb. Pr. N. S. 280].

See 43 Cent. Dig. tit. "Sales," § 673.

21. *Alabama.*— Robinson *v.* Pogue, 86 Ala. 257, 5 So. 685.

*Illinois.*— Western Union Cold Storage Co. *v.* Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30 [*affirming* 73 Ill. App. 410]; Young *v.* Bradley, 68 Ill. 553; Western Union R. Co. *v.* Wagner, 65 Ill. 197; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Brundage *v.* Camp, 21 Ill. 330; Ashland Block Assoc. *v.* Edward Thompson Co., 94 Ill. App. 501; Farquharson *v.* United Typewriter, etc., Co., 94 Ill. App. 350; Sargeant *v.* Marshall, 28 Ill. App. 177.

*Massachusetts.*— Goodwin *v.* Boston, etc., R. Co., 111 Mass. 487.

*Minnesota.*— Cochran *v.* Stewart, 57 Minn. 499, 59 N. W. 543.

*Missouri.*— Skilling *v.* Bollman, 6 Mo. App. 76.

*New York.*— Smith *v.* Lynes, 5 N. Y. 41; Western Transp. Co. *v.* Marshall, 37 Barb. 509 [*affirmed* in 4 Abb. Dec. 575, 4 Transcr. App. 366, 6 Abb. Pr. N. S. 280]; Blossom *v.* Champion, 28 Barb. 217; Durbrow *v.* McDonald, 5 Bosw. 130.

*Ohio.*— Edwards *v.* Glancy, 1 Ohio Cir. Ct. 453, 1 Ohio Cir. Dec. 253.

*Virginia.*— Old Dominion Steamship Co. *v.* Burckhardt, 31 Gratt. 664.

See 43 Cent. Dig. tit. "Sales," § 676.

**Statutory provisions.**— Under Civ. Code (1895), § 3546, providing that cotton sold by planters or commission men on cash sale shall not become the property of the buyer until fully paid for, although it may have been delivered, the title of the seller remains undivested until payment in full of the purchase-price, and may be asserted by him, even as against a *bona fide* purchaser from his vendee. Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765. See also Savannah Cotton-Press Assoc. *v.* MacIntyre, 92 Ga. 166, 17 S. E. 1023.

22. Young *v.* Bradley, 68 Ill. 553. See also Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341.

**Although as between the parties the delivery is conditional,** if there is an actual delivery a *bona fide* purchaser from the vendee will acquire a good title. Comer *v.* Cunningham, 77 N. Y. 391, 33 Am. Rep. 626.

23. Hirschorn *v.* Canney, 98 Mass. 149; Deshon *v.* Bigelow, 8 Gray (Mass.) 159; National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. Rep. 566, 9 L. R. A. 263; Sargeant *v.* Gile, 8 N. H. 225; Old Dominion Steamship Co. *v.* Burckhardt, 31 Gratt. (Va.) 664.

24. Freeman *v.* Kraemer, 63 Minn. 242, 65 N. W. 455.

25. Deshon *v.* Bigelow, 8 Gray (Mass.) 159.

26. *Alabama.*— Wilk *v.* Key, 117 Ala. 285, 23 So. 6; George L Peterson Co. *v.* Steiner, 108 Ala. 629, 18 So. 688; Robinson *v.* Levi,

upon the ground that the original sale is not void but merely voidable at the election of the seller,[27] and that by delivery the original seller has invested the original purchaser with apparent ownership and authority to sell,[28] and should therefore be the one to suffer from the fraud of his immediate purchaser.[29] The rule does not apply, however, where the nature of the fraud is such that there was never

81 Ala. 134, 1 So. 554; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Spira *v.* Hornthall, 77 Ala. 137.

*Arkansas.*— Sadler *v.* Lewers, 42 Ark. 148.

*California.*— Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

*Connecticut.*— Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

*Delaware.*— England *v.* Forbes, 7 Houst. 301, 31 Atl. 895; Truxton *v.* Fait, etc., Co., 1 Pennew. 483, 42 Atl. 431, 72 Am. St. Rep. 81.

*Georgia.*— Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Wright *v.* Zeigler, 70 Ga. 501; Kern *v.* Thurber, 57 Ga. 172.

*Illinois.*— Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12 [*affirming* 61 Ill. App. 420]; Schweitzer *v.* Tracy, 76 Ill. 345; Chicago Dock Co. *v.* Foster, 48 Ill. 507; Bowen *v.* Schuler, 41 Ill. 192; Henshaw *v.* Bryant, 5 Ill. 97; Reid *v.* Sheffy, 99 Ill. App. 189; Armstrong *v.* Lewis, 38 Ill. App. 164; Frey *v.* Harrison, 29 Ill. App. 300.

*Indiana.*— Curme *v.* Rauh, 100 Ind. 247; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383.

*Iowa.*— Hutchinson *v.* Watkins, 17 Iowa 475. See also Perkins *v.* Anderson, 65 Iowa 398, 21 N. W. 696.

*Kentucky.*— American German Nat. Bank *v.* Gray, etc., Hardware Co., 129 Ky. 105, 110 S. W. 393, 33 Ky. L. Rep. 547; Gibson *v.* Moore, 7 B. Mon. 92; Arnett *v.* Cloudas, 4 Dana 299.

*Louisiana.*— Foster *v.* Foster, 11 La. 401.

*Maine.*— Titcomb *v.* Wood, 38 Me. 561; Ditson *v.* Randall, 33 Me. 202; Gilbert *v.* Hudson, 4 Me. 345; Seaver *v.* Dingley, 4 Me. 306.

*Maryland.*— Hall *v.* Hinks, 21 Md. 406.

*Massachusetts.*— Hoffman *v.* Noble, 6 Metc. 68, 39 Am. Dec. 711; Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

*Michigan.*— McGraw *v.* Henry, 83 Mich. 442, 47 N. W. 345.

*Minnesota.*— Cochran *v.* Stewart, 21 Minn. 435.

*Mississippi.*—Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587, 12 So. 598.

*Missouri.*— Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Depew *v.* Robards, 17 Mo. 580; Lawless *v.* Guelbreth, 8 Mo. 139; Reid *v.* Lloyd, 52 Mo. App. 278.

*Nebraska.*— Homan *v.* Laboo, 2 Nebr. 291.

*New Hampshire.*— Porell *v.* Cavanaugh, 69 N. H. 364, 41 Atl. 860; Bradley *v.* Obear, 10 N. H. 477.

*New Jersey.*— Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

*New York.*—Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Williams *v.* Tilt, 36 N. Y. 319, 2 Transcr. App. 133 [*affirming* 6 Bosw. 299]; Western Transp. Co. *v.* Marshall, 37 Barb. 509 [*affirmed* in 4 Abb. Dec. 575, 4 Transcr. App. 366, 6 Abb. Pr. N. S. 280]; Dows *v.* Rush, 28 Barb. 157; Caldwell *v.* Bartlett, 3 Duer 341; Hinck *v.* Wilmerding, 17 Misc. 71, 39 N. Y Suppl. 842; Hochberger *v.* Baum, 85 N. Y. Suppl. 385; Grossman *v.* Walters, 11 N. Y. Suppl. 471 [*affirmed* in 132 N. Y. 594, 30 N. E. 1151]; Conrow *v.* Branscom, 3 N. Y. St. 129; Trigg *v.* Hitz, 17 Abb. Pr. 436; Lewis *v.* Palmer, Lalor 68; Mowrey *v.* Walsh, 8 Cow. 238.

*North Dakota.*— Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225.

*Ohio.*— Schaeffer *v.* Macqueen, 1 Disn. 453, 12 Ohio Dec. (Reprint) 728; Pike *v.* Equitable Nat. Bank, 2 Ohio S. & C. Pl. Dec. 1, 1 Ohio N. P. 205.

*Pennsylvania.*— Neff *v.* Landis, 110 Pa. St. 204, 1 Atl. 177; Sinclair *v.* Healy, 40 Pa. St. 417, 80 Am. Dec. 589; Thompson *v.* McKean, 1 Ashm. 129.

*Tennessee.*— Arendale *v.* Morgan, 5 Sneed 703.

*Texas.*— Davis *v.* Loftin, 6 Tex. 489.

*Virginia.*— Jones *v.* Christian, 86 Va. 1017, 11 S. E. 984.

*United States.*— Carnahan *v.* Bailey, 28 Fed. 519; Johnson *v.* Peck, 13 Fed. Cas. No. 7,404, 1 Woodb. & M. 334.

See 43 Cent. Dig. tit. "Sales," §§ 665, 674.

**27.** Arnett *v.* Cloudas, 4 Dana (Ky.) 299; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Cochran *v.* Stewart, 21 Minn. 435.

**28.** *Illinois.*— Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476.

*Kentucky.*—Arnett *v.* Cloudas, 4 Dana 299.

*Maryland.*— Hall *v.* Hinks, 21 Md. 406; Powell *v.* Bradlee, 9 Gill & J. 220.

*Minnesota.*— Cochran *v.* Stewart, 21 Minn. 435.

*New York.*— Paddon *v.* Taylor, 44 N. Y. 371; Barnard *v.* Campbell, 65 Barb. 286 [*affirmed* in 55 N. Y. 456, 14 Am. Rep. 289]; Dows *v.* Greene, 32 Barb. 490 [*affirmed* in 24 N Y. 638]; Bliss *v.* Cottle, 32 Barb. 322; Stevens *v.* Hyde, 32 Barb. 171; Williams *v.* Birch, 6 Bosw. 299 [*affirmed* in 36 N. Y. 319, 2 Transcr. App. 133]; Caldwell *v.* Bartlett, 3 Duer 341.

*Tennessee.*— Hawkins *v.* Davis, 5 Baxt. 698.

*Texas.*— Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460.

*Virginia.*— Williams *v.* Given, 6 Gratt. 268.

*Wisconsin.*— Singer Mfg. Co. *v.* Sammons, 49 Wis. 316, 5 N. W. 788.

See 43 Cent. Dig. tit. "Sales," § 674.

**29.** Cochran *v.* Stewart, 21 Minn. 435; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703.

any contract at all between the original parties,[30] but merely a delivery induced by fraud without any intention of selling to the person to whom the goods are delivered,[31] as where a delivery is made to one who fraudulently represents that he is purchasing as the agent of another,[32] or as a member of and on behalf of a firm;[33] where, although there is a voidable contract induced by fraud, there has been no delivery to the fraudulent buyer but he has wrongfully obtained possession without the owner's knowledge or consent;[34] or where the second purchaser did not know of or rely upon any *indicia* of title with which the original seller may have invested the first buyer.[35]

**g. Property Procured by Wrongful or Felonious Acts.** A *bona fide* purchaser is not protected as against the claim of the true owner where the seller has obtained possession of the property by wrongful acts,[36] if without any delivery by or consent on the part of the owner,[37] as where the goods were obtained by means of a trespass.[38] The rule has also been laid down that a *bona fide* purchaser is not protected where his vendor obtained the goods by means of a felony;[39] but it has been held that the act must have been a felony at common law,[40] and that a *bona fide* purchaser will be protected where his vendor acquired the goods by fraudulent

30. Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406; Hardman *v.* Booth, 1 H. & C. 803, 9 Jur. N. S. 81, 32 L. J. Exch. 105, 7 L. T. Rep. N. S. 638, 11 Wkly. Rep. 239; Higgins *v.* Burton, 26 L. J. Exch. 342, 5 Wkly. Rep. 683.

31. Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406.

**One who fraudulently misrepresents his identity** and procures goods from the owner who believes that he is selling to an entirely different person acquires no title and can convey none to a *bona fide* purchaser. Cundy *v.* Lindsay, 3 App. Cas. 459, 14 Cox C. C. 93, 47 L. J. Q. B. 481, 38 L. T. Rep. N. S. 573, 26 Wkly. Rep. 406.

32. Smith Premier Typwriter Co. *v.* Stidger, 18 Colo. App. 261, 71 Pac. 400; Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

**Pretended officer of corporation.**—Where goods were bought in the name of a corporation which was never organized, by a person who represented himself as being the manager of the alleged corporation, the seller was not divested of title, and a purchaser of the goods from such alleged manager, although for value and without notice, acquired no title as against the seller. Wyckoff *v.* Vicary, 75 Hun (N. Y.) 409, 27 N. Y. Suppl. 103.

33. Alexander *v.* Swackhamer, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394.

34. Dean *v.* Yates, 22 Ohio St. 388.

35. Globe Milling Co. *v.* Minneapolis El. Co., 44 Minn. 153, 46 N. W. 306.

36. *Delaware.*— Boulden *v.* Gough, 4 Pennew. 48, 54 Atl. 693.

*Kentucky.*— Reid *v.* King, 89 Ky. 388, 12 S. W. 772, 11 Ky. L. Rep. 615; Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251.

*Maine.*— Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206.

*New York.*— Anderson *v.* Nicholas, 28 N. Y. 600 [*affirming* 5 Bosw. 121]; Hodge *v.* Sexton, 1 Hun 576, 4 Thomps. & C. 54; Caldwell *v.* Bartlett, 3 Duer 341; Ross *v.* Cassidy, 27 How. Pr. 416; Barrett *v.* Warren, 3 Hill 348.

*Ohio.*— Frank *v.* Ingalls, 41 Ohio St. 560.

*Oregon.*— Surles *v.* Sweeney, 11 Oreg. 21, 4 Pac. 469.

*Pennsylvania.*— McQuale *v.* North American Smelting Co., 208 Pa. St. 504, 57 Atl. 984; Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

**Extent of liability.**—Where one tortiously cuts and carries away trees from another's land, and sells a part of them to one who has no knowledge of the tort of his vendor, the owner of the trees, in trover against them jointly, can recover of the purchaser only the value of the part of the trees purchased by him. Moody *v.* Whitney, 34 Me. 563.

37. Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Dean *v.* Yates, 22 Ohio St. 388; Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

38. Reid *v.* King, 89 Ky. 388, 12 S. W. 772, 11 Ky. L. Rep. 615; Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251.

39. Russell *v.* Favier, 18 La. 585, 36 Am. Dec. 662; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703; Gulf, etc., R. Co. *v.* Taylor, 18 Tex. Civ. App. 571, 45 S. W. 749. See also Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

**A conviction of the felon is not necessary** in order to entitle the owner to reclaim the goods as against one who has purchased from the felon. Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20.

40. Fassett *v.* Smith, 23 N. Y. 252 [*overruling* Andrew *v.* Dieterich, 14 Wend. (N. Y.)

or false pretenses, although such acts are by statute a felony.[41] It has been held, however, that the true distinction depends upon whether the goods were feloniously taken without the owner's consent or whether he was merely induced to deliver them with intent to pass title by representations amounting by statute to a felony,[42] and that in the latter case a *bona fide* purchaser will be protected;[43] while on the other hand any wrongful taking without the owner's consent, although not amounting to a misdemeanor, will defeat the right of a *bona fide* purchaser to such protection.[44]

**h. Stolen Property.** A *bona fide* purchaser obtains no title against one from whom the goods were stolen,[45] except in the case of negotiable instruments.[46]

**i. Purchase From Bailee.** A sale by a mere bailee can pass no property as against the true owner of the goods even to a *bona fide* purchaser;[47] but if the

31]; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

41. Sawyer Lumber Co. *v.* Boston, etc., R. Co., 173 Mass. 502, 53 N. E. 912; American Sugar Refining Co. *v.* Fancher, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757; Fassett *v.* Smith, 23 N. Y. 252; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

42. Cochran *v.* Stewart, 21 Minn. 435; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Malcom *v.* Loveridge, 13 Barb. N. Y.) 372; Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 451.

43. Cochran *v.* Stewart, 21 Minn. 435; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372.

44. See Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372.

45. *California.*— Swin *v.* Wilson, 90 Cal. 126, 37 Pac. 33, 25 Am. St. Rep. 110, 13 L. R. A. 605.

*Georgia.*— Huff *v.* Odom, 49 Ga. 395.

*Illinois.*— Sharp *v.* Parks, 48 Ill. 511, 95 Am. Dec. 565; Cassidy *v.* Elk Grove Land, etc., Co., 58 Ill. App. 39.

*Indiana.*— Robinson *v.* Skipworth, 23 Ind. 311.

*Missouri.*— Wilson *v.* Crocket, 43 Mo. 216, 97 Am. Dec. 389.

*New York.*— Robinson *v.* Dauchy, 3 Barb. 20; Lovell *v.* Shea, 60 N. Y. Super. Ct. 412, 18 N. Y. Suppl. 193.

*Texas.*— Dodd *v.* Arnold, 28 Tex. 97.

*United States.*— Bangor Electric Light, etc., Co. *v.* Robinson, 52 Fed. 520.

See 43 Cent. Dig. tit. "Sales," § 667.

**Owner's knowledge of previous thefts.**— In trover for certain sugar sold defendant by a shipping clerk in the employ of plaintiffs as his own property, the fact that such clerk had, on a previous occasion, while employed as salesman, embezzled money from plaintiffs, did not charge them with the risk of future thefts, and preclude them from reclaiming property thereafter stolen by him. Ball-Barnhart-Putman Co. *v.* Lane, 135 Mich. 275, 97 N. W 727.

**Agreement between buyer and owner.**—An agreement between a *bona fide* purchaser of stolen property and its owner, whereby the former is permitted to retain a portion upon returning the remainder, is void for want of consideration. Morgan *v.* Hodges, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438.

46. Jones *v.* Nellis, 41 Ill. 482, 89 Am. Dec. 389; Dutchess County Mut. Ins. Co. *v.* Hachfield, 73 N. Y. 226.

**Bona fide holder for value of commercial paper** see COMMERCIAL PAPER, 7 Cyc. 924.

**Effect of statute.**—A statute providing that "all property" obtained by larceny, robbery, or burglary shall be restored to the owner, and that no sale, although in good faith on the part of the purchaser, shall divest the owner of his right to "such property," does not affect the common-law rule in regard to *bona fide* purchasers of negotiable paper, and a government bond which passes like a bank-bill by delivery merely is within the application of such rule. Jones *v.* Nellis, 41 Ill. 482, 89 Am. Dec. 389.

47. *Connecticut.*— Hart *v.* Carpenter, 24 Conn. 427.

*Illinois.*— Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Montague *v.* Ficklin, 18 Ill. App. 99.

*Indiana.*— Kitchell *v.* Vanadar, 1 Blackf. 356, 12 Am. Dec. 249; Ingersoll *v.* Emmerson, Smith 77.

*Iowa.*— Baehr *v.* Clark, 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717.

*Kentucky.*— Chism *v.* Woods, Hard. 531, 3 Am. Dec. 740.

*Maryland.*— Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332.

*New Hampshire.*— Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

*New Jersey.*— Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549.

*New York.*— Austin *v.* Dye, 46 N. Y. 500; Smith *v.* Clews, 33 Hun 501 [*reversed* on other grounds in 105 N. Y. 283, 11 N. E. 622, 59 Am. Rep. 502].

*Pennsylvania.*— Henry F. Miller, etc., Piano Co. *v.* Parker, 155 Pa. St. 208, 26 Atl. 303, 35 Am. St. Rep. 873; Quinn *v.* Davis, 78 Pa. St. 15; Crist *v.* Kleber, 79 Pa. St. 290; Chamberlain *v.* Smith, 44 Pa. St. 431.

*Vermont.*— Heacock *v.* Walker, 1 Tyler 338.

See 43 Cent. Dig. tit. "Sales," § 669.

**Although the bailee has a right to purchase** the goods on paying a certain price therefor, a sale by him before he has made such payment does not pass title to his vendee. Sargent *v.* Gile, 8 N. H. 325.

owner has conferred upon such bailee authority to sell the goods a sale made pursuant to such authority will convey a good title to the buyer.[48]

**j. Purchase From Trustee.** A *bona fide* purchaser of trust property from the trustee without notice of the trust will be protected.[49]

**k. Purchase From Agent.**[50] The mere possession of property by one, although as agent of the owner, is not sufficient to enable him to pass title as against the owner by a sale of the property even to a *bona fide* purchaser;[51] and where property is delivered to a private agent to be sold for the benefit of the owner, a sale by the agent to his own creditor in payment of his own debt will not divest the title of the owner, although the sale is to a *bona fide* purchaser;[52] but the protection given to *bona fide* purchasers extends to purchasers from an agent who has not only the possession but has also been clothed with an apparent ownership and authority to sell.[53] So also where the agent has been authorized to sell, the title of a *bona fide* purchaser is not affected by the fact that the agent's authority has been revoked if the sale is made and the property delivered before notice of such revocation,[54] or by the fact that the power of attorney under which the sale was made was procured by fraud;[55] nor is the title of a *bona fide* purchaser affected by the fact that the agent subsequently embezzles the purchase-money,[56] or that by reason of his fraud or misconduct the owner of the property fails to receive the proceeds of the sale.[57]

**l. Purchase From Bona Fide Purchaser.** As a *bona fide* purchaser takes a good title, a purchaser from him, although with notice, also takes a good title,[58]

**Sale changed to bailment.**—Where a parol contract of sale has been completely executed, and subsequently the seller and purchaser by an agreement in writing change the contract to a bailment, and thereafter the goods are sold and delivered to a third person, who had no notice of a written agreement of bailment, the purchaser takes a good title as against the original owner. Scott *v.* Massey, 18 Pa. Super. Ct. 372.

**48.** Smith *v.* Clews, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502 [*reversing* 33 Hun 501]

**49.** *Florida.*— Foster *v.* Ambler, 24 Fla. 519, 5 So. 263.

*Georgia.*— Johnson *v.* Sirmans, 69 Ga. 617.

*Mississippi.*— Wyse *v.* Dandridge, 35 Miss. 672, 72 Am. Dec. 149.

*North Carolina.*— Christmas *v.* Mitchell, 38 N. C. 535.

*Pennsylvania.*— Eureka Knitting Co. *v.* Snyder, 36 Pa. Super. Ct. 336.

*South Carolina.*— *Ex p.* Williams, 18 S. C. 299; Henderson *v.* Dodd, Bailey Eq. 138; Hudnal *v.* Wilder, 4 McCord 294, 17 Am. Dec. 744.

*Tennessee.*— Eaves *v.* Gillespie, 1 Swan 128.

See 43 Cent. Dig. tit. "Sales," § 670.

**Property bought with trust funds.**—An innocent purchaser of property bought with trust funds will be protected. Johnson *v.* Sirmans, 69 Ga. 617.

**But where warrants show on their face** that they are trust property, a purchaser is chargeable with notice and cannot be regarded as a *bona fide* purchaser. McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99.

**50.** See, generally, PRINCIPAL AND AGENT, 31 Cyc. 1349 *et seq.*

**51.** McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Spraights *v.* Hawley, 39 N. Y. 441, 10 Am. Dec. 452 [*affirming* 40 Barb. 397]; Linnen *v.* Cruger, 40 Barb. (N. Y.) 633. See also *supra*, VI, B, 2, c; and, generally, PRINCIPAL AND AGENT, 31 Cyc. 1352.

**52.** Parsons *v.* Webb, 8 Me. 38, 22 Am. Dec. 220.

**53.** McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Henry *v.* Philadelphia Warehouse Co., 81 Pa. St. 76; Calais Steamboat Co. *v.* Scudder, 2 Black (U. S.) 372, 17 L. ed. 282. See also *supra*, VI, B, 2, c; PRINCIPAL AND AGENT, 31 Cyc. 1353 text and note 14.

**54.** Jones *v.* Hodgkins, 61 Me. 480.

**55.** Lawless *v.* Guelbreth, 8 Mo. 139.

**56.** A. H. Whitney *v.* Burnham, 40 Mo. App. 340.

**57.** Miles *v.* Oden, 8 Mart. N. S. (La.) 214, 19 Am. Dec. 177.

**58.** *Alabama.*— Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628.

*Connecticut.*— See Ketchum *v.* Packer, 65 Conn. 544, 33 Atl. 499, where the rule is recognized but the facts of the particular transaction did not bring it within the application of the rule.

*Illinois.*— Montague *v.* Hanchett, 20 Ill. App. 222.

*New York.*— Morris *v.* Grant, 34 Hun 377.

*Pennsylvania.*— Seeley *v.* Garey, 109 Pa. St. 301, 5 Atl. 666; Connor *v.* Bank, 14 Pittsb. Leg. J. N. S. 370.

*South Carolina.*—Fretwell *v.* Neal, 11 Rich. Eq. 559.

*Vermont.*— Barber *v.* Richardson, 57 Vt. 408.

*Virginia.*— Montgomery *v.* Rose, 1 Patt. & H. 5; Ashby *v.* Harrison, 1 Patt. & H. 1.

*United States.*— The D. M. French, 7 Fed. Cas. No. 3,938, 1 Lowell 43.

See 43 Cent. Dig. tit. "Sales," § 678.

unless such purchaser was a former purchaser with notice, of the same property prior to its sale to the *bona fide* purchaser.[59]

**m. Bona Fide Purchase From Purchaser With Notice.** While it has been held that a *bona fide* purchaser without notice from a purchaser with notice is not affected by such notice,[60] yet under some circumstances the original purchaser with notice acquires no title and can convey none even to an innocent purchaser without notice.[61]

**3. Actions — a. In General.** As a general rule the owner of property which has been wrongfully taken and sold to a *bona fide* purchaser cannot maintain an action against the latter to recover its possession until after he has made a demand for its return.[62]

**b. Pleading.** In an action against one who relies upon the defense of being a *bona fide* purchaser, he must not only allege the purchase and a *bona fide* payment of the consideration with circumstantiality of details,[63] but he must positively deny notice,[64] or knowledge of any facts sufficient to put him upon inquiry,[65] not only at the time of the contract but down to and at the time of the payment of the purchase-money,[66] and must positively aver that such payment has been made.[67]

**c. Evidence — (i)** *Burden of Proof.* As a general rule the burden is upon one claiming to be a *bona fide* purchaser to establish this fact.[68] In some cases, however, it has been held that while the burden is upon such purchaser to show in the first instance that his purchase was for value,[69] if this is shown the

**59.** The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78 [*affirming* 49 Fed 587], holding that where one sells property which he knows is subject to the lien of an unrecorded mortgage, to a *bona fide* purchaser without notice, the *bona fide* purchaser can convey a good title to all the world except the wrong-doer, who after taking with notice of the mortgage fraudulently sold it to one without notice, but that as against such wrong-doer when the title revests in him, the lien of the mortgage is revived.

**60.** Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628; Claiborne *v.* Holland, 88 Va. 1046, 14 S. E. 915. See also Behn *v.* New Jersey Nat. Bank, 65 N. J. L. 591, 48 Atl. 527.

**61.** Palmer *v.* Clarke, 31 Ga. 351; Wooster *v.* Sherwood, 25 N. Y. 278.

**62.** Wood *v.* Cohen, 6 Ind 455, 63 Am. Dec. 389; Gillet *v.* Roberts, 57 N Y. 28.

But if the bona fide purchaser has sold property purchased by him which previously had been stolen from the owner, such disposition of the property constitutes a conversion and he is liable to the owner for its value without any prior demand. Robinson *v.* Skipworth, 23 Ind. 311 [*distinguishing* Wood *v.* Cohen, 6 Ind. 455, 63 Am. Dec. 389].

**63.** Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

**64.** Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879; Pond *v.* Obaugh, 16 Ark. 94; Aiken *v.* Smith, 1 Sneed (Tenn.) 304.

**Sufficiency of denial.**— The denial of notice must be a denial of any notice of the existence of plaintiff's rights and not merely a denial of notice of the instruments or title papers evidencing or establishing such rights. Aiken *v.* Smith, 1 Sneed (Tenn.) 304.

**65.** Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 16 So. 879.

**66.** Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275, 15 So. 879; Pond *v.* Obaugh, 16 Ark. 94.

**67.** Aiken *v.* Smith, 1 Sneed (Tenn.) 304.

**68.** *Arkansas.*— Fomby *v.* Colquitt, 56 Ark. 537, 20 S. W. 413.

*Iowa.*— Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

*Kansas.*— Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618; Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514; Easter *v.* Allen, 8 Allen 7.

*Michigan.*— Cappon, etc, Leather Co. *v.* Preston Nat. Bank, 114 Mich. 263, 72 N. W. 180; Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146, 59 N. W. 395.

*Missouri.*— Reid *v.* Lloyd, 52 Mo. App. 278; Leedom *v.* J. M. Ward Furniture, etc., Co., 38 Mo. App. 425.

*New York.*— Benedict *v.* Williams, 48 Hun 123; Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Suppl. 797 [*affirming* 29 Misc. 593, 61 N. Y. Suppl. 500]; King *v.* Jacobson, 12 N. Y. Suppl. 584.

*Ohio.*— Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*Pennsylvania.*— Bughman *v.* Central Bank, 159 Pa. St. 94, 28 Atl. 209; Levy *v.* Cooke, 143 Pa. St. 607, 22 Atl. 857; Neff *v.* Landis, 110 Pa. St. 204, 1 Atl. 177; Tainter *v.* Hyneman, 6 Phila. 202.

*United States.*— Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417.

See 43 Cent. Dig. tit. "Sales," § 701.

**Contra.**— Ellwood Mfg. Co. *v.* Faulkner, 87 Ill. App. 294.

**69.** Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658; Kyle *v.* Ward, 81 Ala. 120, 1 So. 468; Roswald *v.* Imbs, 78 Ala. 315; Spira *v.* Hornthall, 77 Ala. 137.

burden of proof then shifts,[70] and that the burden is then upon the adverse party to show that the purchase was with notice.[71]

(II) *ADMISSIBILITY.* Upon the issue as to whether a particular purchase was *bona fide* the evidence to be admissible must be relevant to such issue,[72] but any evidence otherwise competent is admissible which tends to prove or disprove the *bona fides* of the transaction.[73] Evidence of other separate and distinct transactions between the parties is not admissible on the issue of good faith in the purchase in question,[74] and evidence of the insolvency of the original purchaser, not shown to have come to the knowledge or notice of the subpurchaser, is incompetent.[75] It may, however, be shown that the original purchase was made with intent not to pay,[76] and that on the resale it was attempted to keep the vendor's creditors in ignorance thereof, such evidence being relevant on the issue of good faith.[77]

(III) *WEIGHT AND SUFFICIENCY.* The general rules as to the weight and sufficiency of evidence [78] apply in regard to determining the issue as to whether a particular purchase was or was not *bona fide*.[79]

## VII. WARRANTIES.[80]

**A. Definition.** A warranty is a statement or representation made by the

70. Kyle *v.* Ward, 81 Ala. 120, 1 So. 468, holding that in an action by one claiming to be the owner of goods against one claiming to be a *bona fide* purchaser from a fraudulent vendee of the owner, the burden is in the first instance upon plaintiff to show fraud in the original transaction and then upon defendant to show that he was a purchaser for value, after which the burden of proof again shifts to plaintiff to show that defendant had notice of the fraud.

71. Scheuer *v.* Goetter, 102 Ala. 313, 14 So. 774; Kyle *v.* Ward, 81 Ala. 120, 1 So. 468; Roswald *v.* Imbs, 78 Ala. 315; Spira *v.* Hornthall, 77 Ala. 137; Hanchett *v.* Kimbark, (Ill. 1885) 2 N. E. 512; Strickland *v.* Leggett, 21 N. Y. Suppl. 356; Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496. *Contra*, Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217, holding that a purchaser from a fraudulent vendee has the burden of proving that he bought without knowledge of the fraud or notice of facts sufficient to put him on inquiry, and this notwithstanding the complaint alleges that he knew of the fraud and the allegation is denied in the answer.

**Notice of unrecorded mortgage.**— On a question as to whether the purchaser of a vessel took it without notice of a prior unrecorded chattel mortgage, the fact that the mortgagee failed to record his mortgage places the burden of proof upon the latter. Stout *v.* The Richard J. Carney, 53 Fed. 927, 4 C. C. A. 111.

72. Churchill *v.* Lee, 77 N. C. 341.

73. Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522; Gillet *v.* Phelps, 12 Wis. 392.

74. Norton *v.* Lumpkin, 83 Iowa 335, 49 N. W. 1015.

75. Lathrop *v.* Selleck, 70 N. Y. App. Div. 357, 74 N. Y. Suppl. 1101.

76. Singer *v.* Goldenburg, 17 Mo. App. 549. And see Standard Oil Co. *v.* Meyer Bros. Drug Co., 74 Mo. App. 446.

77. Reid *v.* Johnson, 100 Mich. 445, 59 N. W. 141.

78. See, generally, EVIDENCE, 17 Cyc. 753.

79. *Alabama.*— Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657, evidence held sufficient to show notice.

*Arkansas.*— Bledsoe *v.* Mitchell, 52 Ark. 158, 12 S. W. 390, evidence held insufficient to show notice.

*California.*— Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625, 56 Pac. 776, evidence held insufficient to show notice or facts sufficient to put purchaser on inquiry.

*Iowa.*— Norton *v.* Lumpkin, 83 Iowa 335, 49 N. W. 1015, evidence held insufficient to show bad faith on the part of defendant.

*Kentucky.*— Collins *v.* Rosenham, 43 S. W. 726, 19 Ky. L. Rep. 1445, holding that evidence that defendant bought the whisky in question at forty cents per gallon cash from one who had bought it at fifty cents per gallon on four months' time is not sufficient to show a fraudulent understanding and conspiracy to defraud the original seller.

*Missouri.*— Price *v.* Lederer, 33 Mo. App. 426, evidence held sufficient to show knowledge or at least facts sufficient to put defendant on inquiry as to the fraud of his immediate vendor.

*New York.*— McPherren *v.* Homan, 2 N. Y. App. Div. 264, 37 N. Y. Suppl. 706 (evidence held insufficient to show bad faith on the part of defendant); Grossman *v.* Walters, 11 N. Y. Suppl. 471 (evidence held sufficient to show knowledge of fraud).

*Washington.*— Goodyear Rubber Co. *v.* Schreiber, 29 Wash. 94, 69 Pac. 648, evidence held insufficient to show notice on the part of defendant.

*United States.*— Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417 (evidence held sufficient to charge defendant with notice that the goods had been procured by fraud); Stout *v.* The Richard J. Carney, 53 Fed. 927, 4 C. C. A. 111 (evidence held sufficient to show that the purchase was not *bona fide*).

See 43 Cent. Dig. tit. "Sales," § 702.

80. Breach of warranty as ground for rescission see *supra*, IV, B, 3, c, (II), (F).

seller of goods, contemporaneously with and as a part of the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them.[81] A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase.[82] A warranty is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties.[83]

**B. Nature of Warranty — 1. In General.** A warranty is not one of the essential elements of a sale,[84] but is a collateral undertaking.[85]

81. Black L. Dict. [*quoted* in Elgin Jewelry Co. *v.* Estes, 122 Ga. 807, 810, 50 S. E. 939].

Other definitions are: "A collateral undertaking forming a part of the contract by the agreement of the parties, express or implied." Benjamin Sales, p. 599, § 610 [*quoted* in Brackett *v.* Martens, 4 Cal. App. 249, 254, 87 Pac. 410; Ellis *v.* Abell, 10 Ont. App. 226, 241].

"An express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." Lord Abinger, in Chanter *v.* Hopkins, 4 M. & W. 399, 404 [*quoted* in Lunt *v.* Wrenn, 113 Ill. 168, 175; Neave *v.* Arntz, 56 Wis. 174, 176, 14 N. W. 41; Stucley *v.* Bailey, 1 H. & C. 405, 415, 31 L. J. Exch. 483, 10 Wkly. Rep. 720; Hamilton Mfg. Co. *v.* Victoria Lumber, etc., Co., 4 Brit. Col. 101, 111; Stewart *v.* Sculthorp, 25 Ont. 544, 555].

"An express or implied statement of something which the party undertakes shall be part of a contract and though part of the contract, yet collateral to the express object of it." Lunt *v.* Wrenn, 113 Ill. 168, 175; Columbian Iron Works, etc., Co. *v.* Douglas, 84 Md. 44, 65, 34 Atl. 1118, 57 Am. St. Rep. 362, 33 L. R. A. 103; Flint-Walling Mfg. Co. *v.* Ball, 43 Mo. App. 504; Jones *v.* George, 61 Tex. 345, 349, 48 Am. Rep. 280.

"A warranty consists in representations and statements of and concerning the condition and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about." Pemberton *v.* Dean, 88 Minn. 60, 63, 92 N. W. 478, 479, 97 Am. St. Rep. 503, 60 L. R. A. 331.

"A statement or representation of fact made by the vendor as to the character or quality of the article sold or the title thereto, whereby the vendor promises that the thing is, or shall be, as represented. It is otherwise defined as a statement of fact as to the article sold, coupled with an agreement to make the statement good." Afflick *v.* Streeter, 125 Mo. App. 703, 707, 103 S. W. 112.

"A representation concerning a matter of fact, both expressed and intended as binding the person making it to its truth, is called a 'warranty,' and produces a legal contract obligation." Hogan *v.* Shuart, 11 Mont. 498, 507, 28 Pac. 969.

"An agreement by the vendor, that the thing he sells is of a certain kind, character or quality, affecting its value to the vendee." Smith *v.* Holbrook, Sheld. (N. Y.) 474, 477.

"A stipulation in writing, on the literal truth or fulfilment of which the validity of the entire contract depends." Levell *v.* Royal Arcanum, 9 Misc. (N. Y.) 257, 258, 30 N. Y. Suppl. 205.

"An affirmation by the seller, that the property proposed to be sold belongs to him, or is of the description or quality alleged." Brown *v.* Tuttle, 66 Barb. (N. Y.) 169, 173.

"An express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it." 2 Schouler Pers. Prop. 327 [*quoted* in Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 265, 23 N. E. 372, 16 Am. St. Rep. 753].

"An absolute undertaking *in presenti*, as well as *in futuro*, against the defect, or for the quantity or quality contemplated by the parties in the subject-matter of the contract." Sturges *v.* Circleville Bank, 11 Ohio St. 153, 169, 78 Am. Dec. 296.

"A statement of fact as to an article sold, coupled with an agreement to make the statement good." Ingraham *v.* Union R. Co., 19 R. I. 356, 359, 33 Atl. 875, 876.

82. Biddle Warranty Sale Chattels, §§ 1, 2 [*quoted* in Haines *v.* Neece, 116 Mo. App. 499, 92 S. W. 919, 923; Danforth *v.* Crookshanks, 68 Mo. App. 311, 316]. And see Smith *v.* Borden, 160 Ind. 223, 228, 66 N. E. 681, 683, in which it was said: "Any positive representation, assertion, or affirmation, made by the seller during the pendency of the negotiations for the sale, not the mere expression of opinion or belief, which fairly expresses the intention of the seller to warrant the article or property sold to be what it is represented, will constitute an express warranty."

83. Black L. Dict.

Another definition.—"An implied warranty is one which, not being expressly made, the law implies by the facts of the sale." Bouvier L. Dict.

84. Strawbridge *v.* Warfield, 4 La. 20; Bayon *v.* Vavasseur, 10 Mart. (La.) 61; Benjamin Sales (6th Am. ed.) § 929.

85. Morris *v.* Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34; Stucley *v.* Baily, 1 H. & C. 405, 31 L. J. Exch. 483, 10 Wkly.

**2. Executed or Executory Contracts.** While there can be no effective warranty, no warranty that will serve as the basis of an action unless there is a completed sale,[86] this does not mean that there can be no warranty in an executory sale. It is entirely competent for the vendor in an executory contract to make an absolute warranty,[87] and in some classes of executory contracts warranties will always be implied.[88] Although ordinarily a warranty of quality does not survive inspection and acceptance of the goods,[89] if the seller intends to extend the warranty beyond delivery and make himself responsible if the goods are not as represented, and the other party so understands the contract he is bound.[90] But if the buyer rejects the article because not corresponding to the terms of an executory contract he may have an action for failure to deliver but not on the warranty.[91] On the other hand if the buyer retains and uses the article he may have his remedy on the warranty.[92] The distinction rests not on the fact that the contract was in its inception executory or executed but on the fact whether the contract becomes an executed sale.[93]

**3. Distinguished From Other Grounds of Liability — a. In General.** A distinction must be observed between warranties and other grounds of liability, such as independent agreements for repairs,[94] or for indemnity against claims of prospective purchasers from the buyer,[95] or options to return the goods if not satisfactory.[96]

**b. Non-Performance.** A distinction is also to be noted between warranty and the liability for mere non-performance. Thus where the contract is for the sale of a designated article and another is delivered, there is no warranty to sell the article designated on which a right of action can be based but the remedy is for non-performance,[97] and where the contract is for the delivery of goods of a

Rep. 740; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399. And see Jones *v.* Alley, 17 Minn. 292.

**86.** Harley *v.* Golden State, etc., Ironworks, 66 Cal. 238, 5 Pac. 160; Osborn *v.* Gantz, 60 N. Y. 540; Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219; Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193.

**87.** Polhemus *v.* Heiman, 45 Cal 573; Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196; Scott *v.* Raymond, 31 Minn. 437, 18 N. W. 274; Haase *v.* Nonnemacher, 21 Minn. 486; Mandel *v.* Buttles, 21 Minn. 391; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Parks *v.* Morris Ax, etc., Co, 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

**88.** Carleton *v.* Lombard, 72 Hun (N. Y.) 254, 25 N. Y. Suppl. 570.

**89.** Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1902) 69 S. W. 196, holding, however, that the rule is otherwise where an inadequate inspection and consequent acceptance are induced by the seller's fraudulent method of loading.

**90.** Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193; Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

**91.** Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

**92.** Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196; Brigg *v.* Hilton, 99 N Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719. But see McConnell *v.* Jones, 19 Ind. 328; Ricketts *v.* Hays, 13 Ind. 181; Sprague *v.* Blake, 20 Wend. (N. Y.) 61; Hart *v.* Wright, 17 Wend. (N. Y.) 267.

**93.** Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Rust *v.* Eckler, 41 N. Y. 488; Lawton *v.* Keil, 61 Barb. (N. Y.) 558.

**94.** Lamson Consol. Store Service Co. *v.* Conyngham, 11 Misc. (N. Y.) 428, 32 N. Y. Suppl. 129.

**95.** James *v.* Libby, 44 Misc. (N. Y.) 210, 88 N. Y. Suppl. 812 [*reversed* on other grounds in 103 N. Y. App. Div. 256, 92 N. Y. Suppl. 1097].

**96.** Childs *v.* O'Donnell, 84 Mich. 533, 47 N. W. 1108; Gentilli *v.* Starace, 59 N. Y. Super. Ct. 449, 14 N. Y. Suppl. 764 [*affirmed* in 133 N. Y. 140, 30 N. E. 660]; Van Allen *v.* Allen, 1 Hilt. (N. Y.) 524; Crandell *v.* Haskins, 10 N. Y. St. 107.

**97.** Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399.

**Quantity sold.**—Where plaintiff alleges the sale of a certain quantity of hay, being the balance of a stack after reserving a part, and defendants produce evidence that they bought only so much of the balance as might be good hay, and that they received only one load, the hay not being good, the question is not one of warranty, but how much was sold. Taylor *v.* Ballard, 1 N. Y. Suppl. 884.

**Nature of relief.**—Although the rights of parties who buy under an express or implied warranty as to the thing sold differ somewhat in reference to the remedy from those who contract for one thing and receive another, where the article received has been consumed in testing it, and rescission is impracticable or impossible, the relief is the same whether the action be on the warranty

certain quality, but the particular article to be delivered is not ascertained, there is no warranty that the goods when delivered shall be of the quality mentioned, and the failure to deliver goods of such quality is not a breach of warranty but a breach of the contract.[98]

**c. Conditions.** Warranties are to be distinguished from stipulations in the nature of conditions,[99] in that conditions are statements or premises forming the basis of the contract on a breach of which the parties may treat the contract as at an end,[1] whereas a warranty is collateral to the contract and a breach thereof does not terminate the contract but gives only an action for damages.[2]

**d. Misrepresentations and Fraud.** There is a definite distinction between representation and warranty, although it is sometimes difficult to determine whether a given statement is the one or the other. A representation is an antecedent statement made as an inducement to the contract but not a part of or an element in the contract,[3] whereas a warranty becomes by agreement a part of the contract.[4] The untruthfulness of a representation unless material or fraudulent will not affect the contract.[5] On the other hand, in the case of a warranty it is immaterial whether the seller knew his statements were untrue or not.[6] A statement is none the less a warranty because it is false and fraudulent.[7] In

or for a breach of the contract of sale. Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

98. McConnell *v.* Jones, 19 Ind. 328; Ricketts *v.* Hays, 13 Ind. 181; Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Lawton *v.* Keil, 61 Barb. (N. Y.) 558.

99. Columbian Iron Works, etc., Co. *v.* Douglas, 84 Md. 44, 34 Atl. 1118, 57 Am. St. Rep. 362, 33 L. R. A. 103; Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196; J. I. Case Threshing Mach. Co. *v.* Smith, 16 Oreg. 381, 18 Pac. 641; Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447, 36 L. J. Q. B. 270.

**Warranty or condition.**—Where a contract for furnishing storage battery equipments for street cars provided that "the plant will be considered satisfactory if it fulfills the following conditions"; that each car should run twelve miles an hour over a suitable track, carrying fifty passengers; that with additional battery cells it should draw a trailer, loaded to a given weight; that a set of batteries once fully charged should propel a car twenty-five miles; these provisions were not merely conditions under which the vendor might compel the acceptance of the equipment, and which were waived by an acceptance, but were warranties for the breach of which damages could be recovered. Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37.

1. Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718; Benjamin Sales (6th Am. ed.) §§ 854–857.

2. Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718. See also Carleton *v.* Lombard, 72 Hun (N. Y.) 254, 25 N. Y. Suppl. 570.

**Warranty or condition.**—Where plaintiff made written proposals to defendant, a street car company, to furnish a trial car with electric storage batteries, to be operated by defendant for sixty days, and, if not then shown to be unsatisfactory, plaintiff was to furnish additional storage batteries equipments at specified prices, and accompanying these proposals was a letter wherein plaintiff agreed that in the event the equipments were furnished under the proposals "we will guaranty for a period of four years . . . that the cost of renewal of batteries . . . shall not exceed $2.50 per year," on the cars at plaintiff's factory, this was not a collateral condition but a part of the contract and a warranty of the character and durability of the batteries. Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37.

3. Benjamin Sales (6th Am. ed.), § 853.

4. Behn *v.* Burness, 3 B. & S 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751; Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 80 E. C. L. 130.

5. See *supra*, II, E, 8, c.

6. *Connecticut.*— Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

*Delaware.*— Tyre *v.* Causey, 4 Harr. 425.

*Georgia.*— Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121; Burge *v.* Stroberg, 42 Ga. 88.

*Kentucky.*—Carstarphen *v.* Graves, 1 A. K. Marsh. 435; Bedford *v.* Magibben, 13 S. W. 1082, 12 Ky. L. Reep. 193.

*Massachusetts.*— Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122.

*Mississippi.*— McKee *v.* Jones, 67 Miss. 405, 7 So. 348.

*New York.*— Brisbane *v.* Parsons, 33 N. Y. 332; Ross *v.* Mather, 47 Barb. 582 [*reversed* on other grounds in 51 N. Y. 108, 10 Am. Rep. 562].

*Pennsylvania.*— Vanleer *v.* Earle, 26 Pa. St. 277; Smith *v.* Williams, 1 Law Rep. 263.

*South Carolina.*— Martin *v.* Howil, 2 Treadw. 750.

*Tennessee.*— Waterbury *v.* Russell, 8 Baxt. 159.

*Texas.*— Sanders *v.* Britton, (Civ. App. 1898) 47 S. W. 550, (Civ. App.) 45 S. W. 209; Morris *v.* Parker, 15 Tex. Civ. App. 117, 38 S. W. 259.

7. Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep.

the case of a warranty, however, the rights of the purchaser rest in contract, while in the case of misrepresentation and fraud they are based on the tort.[8]

**4. Subjects of Warranty.** Any material matter may be the subject of warranty, such as the title, quality, or value, and if so stipulated a warranty may cover future defects and events as well as present conditions.[9]

**5. Parties — a. Persons Liable.** A seller is of course bound by his own warranty or that of his authorized agent;[10] but he is not bound by a warranty attached to the article by the manufacturer thereof by the mere act of sale.[11] So too a

804; Carter *v.* Abbott, 33 Iowa 180; Waterbury *v.* Russell, 8 Baxt. (Tenn.) 159.

**Instruction.**— In an action for the price of a cow, where the defense is a breach of warranty that the cow was a breeder, an instruction that the jury must find for defendant if the cow was represented and warranted to be a breeder, is not misleading as requiring both a representation and a warranty. Palmer *v.* Mt. Sterling Nat. Bank, 18 S. W. 234, 13 Ky. L. Rep. 790.

8. Rose *v.* Hurley, 39 Ind. 77; Carstarphen *v.* Graves, 1 A. K. Marsh. (Ky.) 435.

9. *Louisiana.*— Flash *v.* American Glucose Co., 38 La. Ann. 4.

*Missouri.*— Branson *v.* Turner, 77 Mo. 489; Zinn *v.* Hyatt, 60 Mo. App. 627.

*Wisconsin.*— Congar *v.* Chamberlain, 14 Wis. 258.

*United States.*— Osborn *v.* Nicholson, 13 Wall. 654, 20 L. ed. 689.

*England.*— Eden *v.* Parkison, Dougl. (3d ed.) 732, 99 Eng. Reprint 468.

See 43 Cent. Dig. tit. "Sales," § 714.

**Freezing.**— The seller of fruit trees may warrant that they will not freeze or that, if they should, they would come out alive in the spring after being buried in a certain manner. Congar *v.* Chamberlain, 14 Wis. 258.

10. **Authority of agent to warrant** see Principal and Agent, 31 Cyc. 1353.

**Limitation of agent's authority.**—Where a contract of warranty executed in duplicate, one part retained by each of the parties, contains a provision that no agent has authority to change the warranty, it is a notice to the purchaser of a limitation upon the authority of the agents of the seller, and that they cannot waive or dispense with an express condition of the contract. Furneaux *v.* Esterly, 36 Kan. 539, 13 Pac. 824.

**Warranty by principal.**— In an action by A to recover the price of a reaper sold to B, under a contract reserving to B all rights under a warranty indorsed thereon by C, whereby it was agreed that the machine should be taken back if defective, B could enforce the warranty as to a return, as if it had been signed by A. Musselman *v.* Wise, 84 Ind. 248.

**Recovery of freight.**—Where a purchaser of wheat, after having paid the freight thereon according to the terms of his contract, refuses to receive the wheat because of a breach of a warranty by the vendor, he can recover the amount paid as freight from the vendor, but not from the carrier. Jack *v.* Des Moines, etc., R. Co., 53 Iowa 399, 5 N. W. 537.

**Substituted purchaser.**—Where, at an auction sale of slaves, under an execution, a slave was knocked down to A, who a few minutes afterward consented that B should have the benefit of his bid, and the latter was substituted for him in the bill of sale, there was no sale from A to B such as would imply a warranty of title. Whitson *v.* Fowlkes, 1 Head (Tenn.) 533, 73 Am. Dec. 184.

**Sale by apparent owner.**—Where persons having the apparent title to chattels sell them with a covenant to pay all liens thereon, and the real owner permits the consideration to be paid to such persons, the latter cannot escape liability on their covenant because they are only mortgagees. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67. *Compare* National School Furnishing Co. *v.* Cole, 30 Ill. App. 156.

**Calling vendee in warranty.**— Plaintiff in execution levied on and sold the household goods of a debtor, purchased them himself, and left them in the debtor's possession. Afterward the property was again seized on an execution by another creditor, and plaintiff enjoined the execution, claiming the property. Pending the injunction, plaintiff made a conveyance to a third person with an express renunciation of any warranty on his part as vendor. It was held in an action on the injunction bond that it was anomalous for plaintiff to call in warranty said third person, and it could not be permitted. Whitehead *v.* Tulane, 11 La. Ann. 302.

**Sale by agent or principal.**— In an action on notes where a counter-claim for breach of warranty was pleaded and plaintiffs claimed that they were agents of the manufacturer and did not own the machine when sold, it was error to instruct that the mere fact, if so found, that such sale was made by plaintiffs, whether as agents or principals, required the jury to disregard all evidence that plaintiffs were not the owners of such machine at the time of such sale. Tinsley *v.* Fruits, 20 Ind. App. 534, 51 N. E. 111.

11. Pemberton *v.* Dean, 88 Minn. 60, 92 N. W. 478, 97 Am. St. Rep. 503, 60 L. R. A. 331.

**Recital in conveyance.**—A recital in a bill of sale that the article was warranted by the former seller is not a warranty by the present seller. Davis *v.* Iverson, 5 S. D. 295, 58 N. W. 796.

**Agreement to sell.**—A covenant to assign a chattel in as full a manner as A had assigned it to the covenantor does not bind the covenantor to insert a covenant of warranty in such assignment. Morrill *v.* Worthington, 14 Mass. 389.

bank collecting a draft with bill of lading attached does not become liable on a warranty as to the quality of the goods.[12] An officer may be liable on an express warranty made by him on a public sale.[13] And a personal representative in making sale of the effects of a deceased person may bind himself by a warranty.[14] A joint owner is, however, not bound by the warranty of his coöwner unless he expressly authorized the warranty.[15] Neither is a pledgee to whom the price is paid liable on an implied warranty on a sale by the owner.[16]

**b. Persons Who May Rely on Warranty.** Ordinarily a warranty is addressed to some particular person,[17] and the buyer alone can avail himself thereof.[18] A warranty on the sale of personalty does not run with the property,[19] and assignees of or purchasers from the buyer cannot avail themselves thereof as against the original seller,[20] unless the assignee or purchaser assumes payment of the original

12. German-American Bank *v.* Craig, 70 Nebr. 41, 96 N. W. 1023.

13. Worthy *v.* Johnson, 8 Ga. 236; Kearly *v.* Duncan, 1 Head (Tenn.) 397, 73 Am. Dec. 179.

14. Stoudenmeier *v.* Williamson, 29 Ala. 558; Craddock *v.* Stewart, 6 Ala. 77.

15. Holmes *v.* Wood, 32 Ind. 201.

**Joint purchasers.**— One acting as agent of another in a joint purchase cannot, when they are sued jointly for the price of the article purchased, be called in warranty by his co-defendant. Spotts *v.* Lange, 7 La. 182.

**Security for seller.**—Where A gave his receipt under seal for the purchase-money of a slave sold by him for a term of years, and in the same instrument stipulated to give a good title when called on and B also sealed the same paper, prefixing the word "security" to his name, this was not the joint covenant of both, nor the joint and the several covenant of each, to convey a good title. Slater *v.* Magraw, 12 Gill & J. (Md.) 265.

16. Baker *v.* Arnot, 67 N. Y. 448 [*affirming* 2 Hun 682, 5 Thomps. & C. 215]; Ketchum *v.* Stevens, 19 N. Y. 499 [*affirming* 6 Duer 463]. But see Hartwig *v.* Gordon, 37 Nebr. 657, 56 N. W. 324.

17. Montreal Bank *v.* Thayer, 7 Fed. 622, 2 McCrary 1.

**Joint owners.**—A covenant that an interest has not been impaired, contained in a contract selling such interest to A and B, in equal proportions to each, is joint. Buckner *v.* Hamilton, 16 Ill. 487.

18. Phillips *v.* Vermillion, 91 Ill. App. 133; Thisler *v.* Keith, 7 Kan. App. 363, 52 Pac. 619; Clark *v.* People's Collateral Loan Co., 46 Mo. App. 248.

**Contract of sale or agency.**— Contract between manufacturer and local dealer authorizing the latter to make warranty as agent of the former see Osborne *v.* Josselyn, 92 Minn 266, 99 N. W. 890.

**Drawee of draft for purchase-price.**—Where a draft drawn by the purchaser for the purchase-price is accepted by the drawee who has no interest in the contract of sale such drawee cannot avail himself of a breach of warranty in defense to a suit on the draft. Coolidge *v.* Burnes, 25 Ark. 241.

**Right to recover for injuries due to defects.**—Where plaintiff's father purchased a pear burner under a warranty, such warranty was enforceable only in an action by the father, and could not be made the basis of an action by plaintiff for injuries sustained by the bursting of the burner. Talley *v.* Beever, 33 Tex. Civ. App. 675, 78 S. W. 23.

**Injury to buyer's wife.**— False representations as to the kindness of a horse sold to the husband of the female plaintiff by defendant do not constitute a cause of action on the part of the wife for injuries sustained by her because of the vicious character of the horse, it not appearing that defendant made any representations to her, or to any agent of hers, or with any expectation or intent that she would act upon them. Carter *v.* Harden, 78 Me. 528, 7 Atl. 392.

19. Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288; Boyd *v.* Whitfield, 19 Ark. 447; Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918, 22 Ky. L. Rep. 1510; Bordwell *v.* Collin, 45 N. Y. 494.

**Privity of contract wanting.**— There is no privity of contract between the vendor in one sale and the vendees of the same property in subsequent sales. Each vendee as a general rule can resort only to his immediate vendor. Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288.

20. *Arkansas.*— Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288; Boyd *v.* Whitfield, 19 Ark. 447.

*Florida.*— Kendig *v.* Giles, 9 Fla. 278.

*Georgia.*— Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; Dukes *v.* Nelson, 27 Ga. 457; Broughton *v.* Badgett, 1 Ga. 75.

*Illinois.*— Zuckermann *v.* Solomon, 73 Ill. 130.

*Kentucky.*— Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918, 22 Ky. L. Rep. 1510.

*New York.*— Bordwell *v.* Collie, 45 N. Y. 494.

*United States.*— Post *v.* Burnham, 83 Fed. 79, 27 C. C. A. 455.

See 43 Cent. Dig. tit. "Sales," § 716.

**Recourse to manufacturer.**— One who purchases a manufactured article from a dealer, taking at the same time a collateral contract guaranty from the manufacturer, cannot, by tendering the property to the manufacturer, recover from him the money paid to the dealer for the article. Johnson *v.* Whitman Agricultural Co., 20 Mo. App. 100.

purchase-price,[21] or the warranty is specifically assigned to the second purchaser,[22] or by a usage of the trade a warranty inures to the benefit of subsequent purchasers.[23]

**6. Consideration.** While no separate consideration is necessary to support a warranty made at the time and as a part of the transaction of sale,[24] a warranty made after the contract of sale is completed is inoperative unless there is a new consideration to support it,[25] the original consideration being exhausted by the transfer of the property in the goods without warranty.[26] But a new consideration is not necessary if the warranty is inserted in the contract merely to make it conform to the original agreement,[27] or to support a written warranty executed subsequent to the transfer of the property in compliance with the parol agreement made at the time of the sale.[28] Where by mutual agreement the contract is modified by including a warranty therein as an inducement to the buyer to complete the contract in accordance with prior negotiations, the warranty is supported by a sufficient consideration.[29] But if the sale is already complete so as to pass the property in the goods, modification by including a warranty merely to influence the buyer to perform is not based on a new considera-

21. Boyd *v.* Whitfield, 19 Ark. 447; Crook *v.* Baltimore, etc., R. Co., 80 Md. 338, 30 Atl. 701.

**Subsequently acquired interest.**—Where three joint contractors executed notes in payment for an ice machine, and thereafter a fourth person acquired an interest in the machine, and the four signed a note in renewal of one of the old notes, such fourth person is a party to the contract of warranty, and entitled to enforce it jointly with the others. York Mfg. Co. *v.* Bonnell, 24 Ind. App. 667, 57 N. E. 590.

**Notes of subsequent purchaser as collateral.**—The fact that the notes of the subsequent purchaser were turned over to the original seller as collateral security by the original buyer does not give the subsequent purchaser any rights against the original seller on the warranty. Thisler *v.* Keith, 7 Kan App. 363, 52 Pac. 619.

22. Ranney *v.* Meisenheimer, 61 Mo. App. 434.

23. Conestoga Cigar Co *v.* Finke, 144 Pa. St. 159, 22 Atl. 868, 13 L. R. A. 438.

24. McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202; Standard Underground Cable Co. *v.* Denver Consol. Electric Co., 76 Fed. 422, 22 C. C. A. 258.

25. *Delaware.*—Burton *v.* Young, 5 Harr. 233.

*Georgia.*—Brooks *v.* Matthews, 78 Ga. 739, 3 S. E. 627; Baldwin *v.* Daniel, 69 Ga. 782.

*Illinois.*—Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Dec. 437.

*Indiana.*—Summers *v.* Vaughan, 35 Ind. 323, 9 Am. Rep. 741.

*Maine.*—White *v.* Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592.

*Massachusetts.*—Hogins *v.* Plympton, 11 Pick. 97; McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202.

*Minnesota.*—Aultman *v.* Kennedy, 33 Minn. 339, 23 N. W. 528.

*Missouri.*—Moomaw *v.* Emerson, 80 Mo. App 318.

*North Carolina.*—McDugald *v.* McFadgin, 51 N. C. 89.

*North Dakota.*—Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

*South Carolina.*—Wilson *v.* Ferguson, Cheves 190.

*Wisconsin.*—Morehouse *v.* Comstock, 42 Wis. 626; Congar *v.* Chamberlain, 14 Wis. 258.

*United States.*—Morris *v.* Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34.

*England.*—Roscorla *v.* Thomas, 3 Q. B. 234, 2 G. & D. 508, 6 Jur. 929, 11 L. J. Q. B. 214, 43 E. C. L. 713.

See 43 Cent. Dig. tit. "Sales," § 718.

**Warranty under seal imports a consideration.** McCeney *v.* Duvall, 21 Md. 166; Wilson *v.* Ferguson, Cheves (S. C.) 190.

**Sufficiency of consideration.**—Where the vendee of a threshing machine refused to pay the price, for an alleged breach of warranty, and the vendor, without objecting that the vendee had lost the right to urge that defense by having failed to notify the vendor of the alleged breach, as provided in the contract of sale, agreed to make the machine conform with the original warranty in consideration of the vendee's giving a note for the price, the agreement of the vendor was not without consideration. Hansen *v.* Gaar, 63 Minn. 94, 65 N. W. 254.

26. Summers *v.* Vaughan, 35 Ind. 323, 9 Am. Rep. 741.

27. McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202; Spalding *v.* Conant, 146 Mass. 292, 15 N. E. 638; Munn *v.* Perkins, 1 Sm. & M. (Miss.) 412.

**Correction of defects.**—Where a written warranty was delivered, prior to a sale of paint, as an inducement to the sale, and was objected to because the seller's signature thereto was typewritten, and was returned for a written signature, a contention that as it was not delivered, when formally executed, until after the sale, it was without consideration, was untenable. Barton *v.* Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599.

28. Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753.

29. Stoudemeier *v.* Williamson, 29 Ala. 558; Congar *v.* Chamberlain, 14 Wis. 258. But see Dunham *v.* Barnes, 9 Allen (Mass.) 352.

tion.[30] A modification of the warranty before acceptance of the goods does not require a new consideration.[31]

**C. Express Warranties — 1. In General.** An express warranty may be oral or in writing,[32] and may be made directly or through the medium of another.[33] It may be in the form of a printed general warranty [34] on the back of the order for goods,[35] and over the printed signature of the seller,[36] and if relied on by the purchaser to the knowledge of the seller is valid, although not countersigned by the seller's agent as specified in the printed conditions.[37] A warranty may also be contained in a letter [38] properly referred to and made a part of the contract.[39] On a subsequent sale an assignment of the bill of sale does not necessarily constitute a warranty by the assignor,[40] unless the conditions of the sale are specifically referred to in the indorsement.[41] A warranty, like any other contract, is voidable if induced by misrepresentation on the part of the buyer whether fraudulent or not [42] or by mistake.[43]

**2. Warranty as Part of the Contract.** To constitute an express warranty the statement made must be part of the contract.[44] It must be part of the negotiations of the contract,[45] and be included therein when the agreement is finally

**30.** Fletcher *v.* Nelson, 6 N. D. 94, 69 N. W. 53.

**31.** Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Blaess *v.* Nichols, etc., Co., 115 Iowa 373, 88 N. W. 829.

**32.** Parker *v.* McFerrin, 103 Ala. 132, 15 So. 518; Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Lindsay *v.* Davis, 30 Mo. 406.

**Denial of warranty by extraneous writing.** — Where a parol sale of goods was with a warranty, a written notice accompanying the goods, stating that the vendor sells no goods with a warranty, does not show a rescission of the parol contract as a matter of law. Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

**Revocation of warranty.**— In an action for breach of warranty of a cow sold at public auction, a charge that if the jury found that while bids were being taken defendant was asked, in plaintiff's presence, if he would warrant the cow in certain particulars, and that he replied that he would warrant nothing, it would revoke a warranty prior thereto, was properly refused. To have such effect, the statement must be made in plaintiff's hearing, as well as in his presence. Bronson *v.* Leach, 74 Mich. 713, 42 N. W. 174.

**Substitution.**—Where a band cutter and feeder was sold under a warranty, and thereafter the seller and purchaser entered into an agreement that, if the feeder would not work, a feeder of another description should be substituted, the latter contract was in addition to the original contract of warranty, and not a substitute therefor, which would prevent an action on the original warranty. Blaess *v.* Nichols, etc., Co., 115 Iowa 373, 88 N. W. 829.

**33.** Englehardt *v.* Clanton, 83 Ala. 336, 3 So. 680, holding that where a vendor makes representations concerning an article purchased of him, for a specific purpose, and afterward the vendee, as the agent of another, makes a similar purchase for the same purpose, the latter may show such former representations made to his agent to establish a warranty.

**34.** Hefner *v.* Haynes, 89 Iowa 616, 57 N. W. 421, holding that where O, on selling a horse to J, delivered an instrument, partly written and partly printed and signed by O, reciting: "Office of O. O. Heffner, Importer of . . . Horses. . . . Horses constantly on hand. . . . Every animal registered and guaranteed a breeder. . . . Sold this day to J. L. Haynes one imported horse, and, if [it] don't give satisfaction, [it] may be exchanged for another," this was a warranty that the horse was an average breeder. And see Aultman Taylor Mach. Co. *v.* Ridenour, 96 Iowa 638, 65 N. W. 980.

**35.** Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533.

**36.** Cedar Rapids First Nat. Bank *v.* Erickson, 20 Nebr. 580, 31 N. W. 387.

**37.** Cedar Rapids First Nat. Bank *v.* Erickson, 20 Nebr. 580, 31 N. W. 387.

**38.** Albany, etc., Iron, etc., Co. *v.* Lundberg, 121 U. S. 451, 7 S. Ct. 958, 30 L. ed. 982.

**39.** See *infra*, VII, C, 2.

**40.** Houston *v.* Burney, 2 Sm. & M. (Miss.) 583.

**41.** Long *v.* Anderson, 62 Ind. 537.

**42.** Rivers *v.* Dubose, 10 Ala. 475.

**43.** Clopton *v.* Martin, 11 Ala. 187.

**44.** Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Warder *v.* Bowen, 31 Minn. 335, 17 N. W. 943; Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416; Richardson *v.* Grandy, 49 Vt. 22; Morris *v.* Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34.

**45.** Bothwell *v.* Farwell, 74 Iowa 324, 37 N. W. 392; Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139.

**Verbal representation.**—A verbal representation of the seller to the buyer of a horse in the course of dealing that he may depend upon it the horse is "perfectly quiet and free from vice" is a warranty. Cave *v.* Coleman, 7 L. J. K. B. O. S. 25, 3 M. & R. 2.

concluded.[46] And if in fact the various negotiations and acts in completion of the contract constitute but one transaction, a warranty given during the progress thereof will be valid, although some time elapsed between the warranty and the actual completion of the sale.[47] Warranty cannot be predicated on statements made after the sale is complete,[48] unless the warranty is made in pursuance of the original contract, although actually made thereafter,[49] in which case it will relate back to the time when the original contract was made.[50]

**3. Words Importing Warranty.** Although to constitute an express warranty there must be an express undertaking in so many words to warrant,[51] no particular

**Statements made pending public sale.**—Representations of an administrator as to the age and soundness of a horse, made privately to one who subsequently buys the horse of the administrator at auction, constitute an express warranty. Crossman *v.* Johnson, 63 Vt. 333, 22 Atl. 608, 13 L. R. A. 678.

**46.** *Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377.

*Illinois.*— Vogel *v.* Scott, 66 Ill. 426.

*Iowa.*— Bothwell *v.* Farwell, 74 Iowa 324, 37 N. W. 392.

*Massachusetts.*— Whitehead, etc., Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. W. 736.

*Missouri.*— Ransberger *v.* Ing, 55 Mo. App. 621.

*Nebraska.*— Stryker *v.* Crane, 33 Nebr. 690, 50 N. W. 1132.

*New Hampshire.*— Webster *v.* Hodgkins, 25 N. H. 128.

*New York.*— Wilmot *v.* Hurd, 11 Wend. 584.

*North Carolina.*— Erwin *v.* Maxwell, 7 N. C. 241, 9 Am. Dec. 602.

*Wisconsin.*— Congar *v.* Chamberlain, 14 Wis. 258; Morehouse *v.* Comstock, 42 Wis. 626.

*United States.*— Randall *v.* Rhodes, 20 Fed. Cas. No. 11,556, 1 Curt. 90.

*England.*— Kain *v.* Old, 2 B. & C. 627, 4 D. & R. 52, 2 L. J. K. B. O. S. 102, 26 Rev. Rep. 497, 9 E. C. L. 274; Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475; Camac *v.* Warriner, 1 C. B. 356, 9 Jur. 162, 50 E. C. L. 354; Wood *v.* Smith, 4 C. & P. 45, 8 L. J. K. B. O. S. 50, M. & M. 539, 5 M. & R. 124, 19 E. C. L. 399; Stucley *v.* Baily, 1 H. & C. 405, 31 L. J. Exch. 483, 10 Wkly. Rep. 740.

See 43 Cent. Dig. tit. "Sales," §§ 722, 724.

**A statement to a third person** not made a part of the negotiations or of the contract when complete cannot be the basis of a warranty. Sipple *v.* Breen, 1 Harr. (Del.) 16.

**Part payment.**—A binding warranty may be made after part payment of the purchase-money under a contract of sale, but before the property is delivered. Douglass *v.* Moses, 89 Iowa 40, 56 N. W. 271, 48 Am. St. Rep. 353.

**Waiver.**—A seller giving a bill of sale containing a warranty, and thereupon receiving the purchase-money, waives the contention that the contract of sale was completed by a previous oral acceptance of the buyer's offer to purchase, which did not provide for a warranty. Udell *v.* Sarafian, 19 Misc. (N. Y.) 542, 43 N. Y. Suppl. 1092.

**47.** Wilmot *v.* Hurd, 11 Wend. (N. Y.) 584; Way *v.* Martin, 140 Pa. St. 499, 21 Atl. 428; Falconer *v.* Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Pinney *v.* Andrus, 41 Vt. 631.

**Separate transactions.**—Where defendants gave an order for a threshing machine of a certain kind, on the back of which order was a printed warranty of that kind of machine, but plaintiff, not having that kind of machine in stock, sold defendants one of an antiquated pattern, under a separate verbal contract, the warranty on the back of the order did not apply to the machine furnished. Nichols *v.* Hail, 6 Nebr. 432. To the same effect see Morehouse *v.* Comstock, 42 Wis. 626. And see Byrd *v.* Campbell Printing Press, etc., Co., 90 Ga. 542, 16 S. E. 267.

**Substitution of goods.**—A warranty of a machine sold may, however, by agreement of the parties, be transferred to another machine substituted for the first. Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394.

**New agreement.**—Where, after an agreement for an exchange of horses had been made between the parties and consummated by a delivery, plaintiff returned the horse he had received, and, after rescinding the first agreement, a new bargain was made, by which defendant sold his horse to plaintiff for one hundred dollars, the representations and warranties made by defendant on the first bargain did not enter into and form a part of the second, so as to constitute a warranty on the sale. Shull *v.* Ostrander, 63 Barb. (N. Y.) 130.

**48.** Kinch *v.* Haynes, 58 Misc. (N. Y.) 499, 111 N. Y. Suppl. 618; Erwin *v.* Maxwell, 7 N. C. 241, 9 Am. Dec. 602; Holmes *v.* Tyson, 147 Pa. St. 305, 23 Atl. 564, 15 L. R. A. 209.

**49.** Vogel *v.* Scott, 66 Ill. 426. See also Cameron *v.* Ottinger, 1 Head (Tenn.) 27, holding that where a vendor of a slave, ten months after the sale and a week after the death of the slave, gave his vendee an instrument, under seal and witnessed, in the nature of a warranty of soundness, reciting a verbal warranty at the time of the sale, this instrument did not merge the verbal warranty, and that, although incapable of supporting a suit on it, the paper should have gone to the jury as evidence of the verbal warranty recited in it.

**50.** Savage *v.* Eakins, 31 Ill. App. 267.

**51.** Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416. And see Merriam Paper Co. *v.* New York Market Gardeners' Assoc., 58

form of words is essential,[52] and it is not necessary that the word "warrant" should be used.[53] The word "warrant" is not so technical that it may not be supplied by others. It is enough if the words used are not dubious or equivocal, and if it appears from the whole evidence that the affirmant intended to warrant and did not intend to express a mere matter of judgment or opinion.[54] In cases where the law implies a warranty, a party cannot secure the benefits of an express warranty by the use of words expressly stating the obligations which the law implies without such words.[55]

**4. Intention of Parties.** An affirmation made by the seller with respect to the thing sold amounts to a warranty if it appears to have been so intended and understood by the parties,[56] and not as a mere matter of opinion or judg-

Misc. (N. Y.) 236, 108 N. Y. Suppl. 1038; Woodridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

52. *Alabama.*— Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804.

*California.*— Polhemus *v.* Heiman, 45 Cal. 573; Moore *v.* McKinlay, 5 Cal. 471.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377; O'Neal *v.* Bacon, 1 Houst. 215.

*Georgia.*— Burge *v.* Stroberg, 42 Ga. 88.

*Illinois.*— Robinson *v.* Harvey, 82 Ill. 58; Thorne *v.* McVeagh, 75 Ill. 81; Reed *v.* Hastings, 61 Ill. 266; Adams *v.* Johnson, 15 Ill. 345; Hawkins *v.* Berry, 10 Ill. 36; Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Dec. 437.

*Indiana.*— Jones *v.* Quick, 28 Ind. 125.

*Michigan.*— Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762.

*Mississippi.*— Otts *v.* Alderson, 10 Sm. & M. 476; Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.

*Missouri.*— Carter *v.* Black, 46 Mo. 384; Lindsay *v.* Davis, 30 Mo. 406; Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123; Danforth *v.* Crookshanks, 68 Mo. App. 311; Anthony *v.* Potts, 63 Mo. App. 517; Ransberger *v.* Ing, 55 Mo. App. 621.

*New Hampshire.*— Morrill *v.* Wallace, 9 N. H. 111.

*New York.*— Heath Dry Gas Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Heath Dry Gas Co. *v.* Hurd, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410 [*reversed* on other grounds in 193 N. Y. 255, 86 N. E. 18]; Rogers *v.* Ackerman, 22 Barb. 134; Murray *v.* Smith, 4 Daly 277; Warren *v.* Van Pelt, 4 E. D. Smith 202; Petty *v.* Fish, 31 Misc. 739, 63 N. Y. Suppl. 192 [*affirming* 30 Misc. 828, 61 N. Y. Suppl. 1127]; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

*North Carolina.*—Woodridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

*Pennsylvania.*— Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; McAllister *v.* Morgan, 29 Pa. Super. Ct. 476.

*Tennessee.*— McGregor *v.* Penn, 9 Yerg. 74.

*Vermont.*— Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571.

See 43 Cent. Dig. tit. "Sales," § 729.

**Refusal to warrant.**—A representation as to quality with an express refusal to guaranty the quality cannot be made the basis of a warranty. Williams *v.* Louisiana Lumber Co., 105 La. 99, 29 So. 491.

53. *Arkansas.*—Buckman *v.* Haney, 11 Ark. 339.

*Illinois.*— Wheeler *v.* Reed, 36 Ill. 81; Hawkins *v.* Berry, 10 Ill. 36.

*Indiana.*— Jones *v.* Quick, 28 Ind. 125.

*Iowa.*— Callanan *v.* Brown, 31 Iowa 333.

*Minnesota.*— Warder *v.* Bowen, 31 Minn. 335, 17 N. W. 943.

*Mississippi.*— Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.

*Nebraska.*— Unland *v.* Garton, 48 Nebr. 202, 66 N. W. 1130; Erskine *v.* Swanson, 45 Nebr. 767, 64 N. W. 216; Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

*New Hampshire.*— Morrill *v.* Wallace, 9 N. H. 111.

*New York.*— Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Blakeman *v.* Mackay, 1 Hilt. 266; Warren *v.* Van Pelt, 4 E. D. Smith 202; Petty *v.* Fish, 31 Misc. 739, 63 N. Y. Suppl. 192 [*affirming* 30 Misc. 828, 61 N. Y. Suppl. 1127]; Jones *v.* Mayer, 16 Misc. 586, 38 N. Y. Suppl. 801; Whitney *v.* Sutton, 10 Wend. 411; Roberts *v.* Morgan, 2 Cow. 438; Chapman *v.* Murch, 19 Johns. 290, 10 Am. Dec. 227.

*Pennsylvania.*— Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Neilson *v.* Wetherill, 1 Phila. 207.

*Tennessee.*— McGregor *v.* Penn, 9 Yerg. 74.

*England.*— Hopkins *v.* Tanqueray, 15 C. B. 130, 2 C. L. R. 842, 18 Jur. 608, 23 L. J. C. P. 162, 2 Wkly. Rep. 475, 80 E. C. L. 130.

See 43 Cent. Dig. tit. "Sales," § 729.

54. Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437.

55. Heath Dry Gas Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18.

56. *Alabama.*— Claghorn *v.* Lingo, 62 Ala. 230; Barnett *v.* Stanton, 2 Ala. 181.

*Arkansas.*— Buckman *v.* Haney, 11 Ark. 339.

*California.*— McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687; Polhemus *v.* Heiman, 45 Cal. 573.

*Delaware.*— O'Neal *v.* Bacon, 1 Houst. 215; Tyre *v.* Causey, 4 Harr. 425.

*Illinois.*— Phillips *v.* Vermillion, 91 Ill. App. 133.

*Indiana.*— Jones *v.* Quick, 28 Ind. 125; House *v.* Fort, 4 Blackf. 293.

ment.[57] The rule is broadly stated in most decisions that a mere affirmation does not constitute a warranty unless shown to be so intended and understood by the parties, and not as a mere matter of opinion;[58] that in the contract of warranty, there must be an agreement of the minds of the contracting parties as in all other contracts.[59] And while there are decisions to the effect that the actual intent of the seller to warrant the thing sold is immaterial if the affirmations made — whether written or oral — and relied on by the buyer as an inducement to purchase, import a warranty,[60] that the seller is responsible for the language he uses,

*Maine.*— Hillman *v.* Wilcox, 30 Me. 170.
*Massachusetts.*— Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.
*Michigan.*— Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762.
*Mississippi.*— Otts *v.* Alderson, 10 Sm. & M. 476; Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.
*Missouri.*— Matlock *v.* Meyers, 64 Mo. 531.
*New Hampshire.*— Morrill *v.* Wallace, 9 N. H. 111.
*New York.*— Murray *v.* Smith, 4 Daly 277; Warren *v.* Van Pelt, 4 E. D. Smith 202.
*Pennsylvania.*— Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Herman *v.* Brinker, 17 Pa. Super. Ct. 177.
*Vermont.*— Richardson *v.* Grandy, 49 Vt. 22; Foster *v.* Caldwell, 18 Vt. 176.
*Virginia.*— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865; Mason *v.* Chappell, 15 Gratt. 572.
*England.*— Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634, 100 Eng. Reprint 450.
See 43 Cent. Dig. tit. "Sales," § 728.

**57.** Hillman *v.* Wilcox, 30 Me. 170; Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437. And see cases cited in the preceding notes.

**58.** *Arkansas.*— James *v.* Bocage, 45 Ark. 284. And see Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429.
*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978.
*Georgia.*— Terhune *v.* Dever, 36 Ga. 648.
*Illinois.*— Wheeler *v.* Reed, 36 Ill. 81; Adams *v.* Johnson, 15 Ill. 345; Ender *v.* Scott, 11 Ill. 35; Hawkins *v.* Berry, 10 Ill. 36.
*Indiana.*— Humphreys *v.* Comline, 8 Blackf. 516; House *v.* Fort, 4 Blackf. 293.
*Iowa.*— McGrew *v.* Forsythe, 31 Iowa 179.
*Kentucky.*— Bacon *v.* Brown, 3 Bibb 35.
*Maine.*— Bryant *v.* Crosby, 40 Me. 9.
*Maryland.*— Osgood *v.* Lewis, 2 Harr. & G. 495.
*Michigan.*— Switzer *v.* Pinconning Lumber Co., 59 Mich. 488, 26 N. W. 762.
*Minnesota.*— Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416; Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139.
*Missouri.*— Matlock *v.* Meyers, 64 Mo. 531.
*Nebraska.*— Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.
*New York.*— Warren *v.* Van Pelt, 4 E. D. Smith 202; Oneida Mfg. Co. *v.* Lawrence, 4 Cow. 440; Swett *v.* Colgate, 20 Johns. 196, 11 Am. Dec. 266; Seixas *v.* Woods, 2 Cai. 48.
*North Carolina.*— Horton *v.* Green, 66 N. C 596; Henson *v.* King, 48 N. C. 419; Baum *v.* Stevens, 24 N. C. 411; Erwin *v.* Maxwell, 7 N. C. 241, 9 Am. Dec. 602.
*Pennsylvania.*— Holmes *v.* Tyson, 147 Pa. St. 305, 23 Atl. 564, 15 L. R. A. 209; Bigler *v.* Flickinger, 55 Pa. St. 279; Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741; McAllister *v.* Morgan, 29 Pa. Super. Ct. 476; Krauskopf *v.* Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506; Herman *v.* Brinker, 17 Pa. Super. Ct. 177; Benhead *v.* Scott, 1 Phila. 84.
*Vermont.*— Enger *v.* Dawley, 62 Vt. 164, 19 Atl. 478; Bond *v.* Clark, 35 Vt. 577; Foster *v.* Caldwell, 18 Vt. 176; Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571.
*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.
*Wisconsin.*— Austin *v.* Nickerson, 21 Wis. 542.
*England.*— Chandler *v.* Lopus, Cro. Jac. 4, 79 Eng. Reprint 3.

**59.** Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

**60.** *Kentucky.*— McClintock *v.* Emick, 87 Ky. 160, 166, 7 S. W. 903, 9 Ky. L. Rep. 995, where the court said: "If the vendor expressly warranted the article to be sound, and did not merely express a belief as to it, then he is liable without regard to his intention. He has lulled the vendee into security as to its condition, and he will not, and ought not, in good morals, to be heard to say that he did not intend the purchaser to rely upon the warranty"); Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317.
*Nebraska.*— Erskine *v.* Swanson, 45 Nebr. 767, 64 N. W. 216, in which it was said that if a vendor of property knows that representations made by him as to the soundness or condition of the property sold are regarded by his vendee as warranties on the part of the vendor and believed in, relied, and acted upon as such by the vendee, then the vendor is estopped from asserting that such representations were not warranties. Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.
*New York.*— Hawkins *v.* Pemberton, 51 N. Y. 198, 202, 10 Am. Rep. 595, where the court said: "If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not." Naylor *v.* McSwegan, 2 Misc. 255, 21 N. Y. Suppl. 930.

and cannot escape liability by claiming that he did not intend to convey the impression which his representations were calculated to produce,[61] it is not believed that there is any conflict between this and the preceding proposition, as it amounts to no more than an application of the well settled principle that the secret intention of the parties, if different from the expressed intention, will not prevail, as the law looks to what the parties said as indicating the real intention.[62] The true aim in construing every agreement, that of warranty included, is of course to reach the real intention of the parties to it. This is accomplished, not by taking what they may afterward say their intentions were, but what they appear to have been from the words employed, the occasion of using them, and all accompanying facts and circumstances explanatory thereof.[63] It has been said that the decisive test in determining whether the affirmation was intended as a warranty is whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge and on which the buyer may also be expected to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter, not.[64]

**5. Necessity For Reliance on Warranty.**[65] In order to maintain an action for breach of warranty it must be shown that the warranty was relied on.[66] While the affirmation or promise need not have been the sole inducement to the purchase it must have been an operative cause.[67]

**6. Knowledge of Defects — a. Of Buyer** — (i) *Obvious and Latent Defects.* While as a general rule a general warranty will cover all latent defects,[68] it is also the rule that, except in certain cases hereinafter stated,

*Washington.*—Northwestern Lumber Co. *v.* Callendar, 36 Wash. 492, 79 Pac. 30; Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

*Wisconsin.*—Neave *v.* Arntz, 56 Wis. 174, 176, 14 N. W. 41, where the court said: "It is true, the defendant denies having 'warranted' the reaper, but he admits the statements which, in law, constitute a warranty. Having admitted the facts which, in law, constitute a warranty, his denial of the warranty is a mere denial that the law is what it is."

61. Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 595. And see Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.

62. See Contracts, 9 Cyc. 578; and Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.

63. Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.

64. Benjamin Sales 659. See also the following cases approving this rule: Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; Stryker *v.* Crane, 33 Nebr. 690, 50 N. W. 1132; Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55; Reese *v.* Bates, 94 Va. 321, 26 S. E. 865; Pasley *v.* Freeman, 3 T. R. 57, 1 Rev. Rep. 634, 100 Eng. Reprint 450.

65. Question for jury see *infra*, VII, J, 3, l, (II), (A).

66. *Illinois.*—Evans *v.* Schriver Laundry Co., 57 Ill. App. 150; Wilcox *v.* Carson, 29 Ill. App. 70.

*Iowa.*—Richardson *v.* Coffman, 87 Iowa 121, 54 N. W. 356.

*Maryland.*—Taymon *v.* Mitchell, 1 Md. Ch. 496.

*Minnesota.*—Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416.

*Nebraska.*—Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491; Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55; Little *v.* Woodworth, 8 Nebr. 281.

*New York.*—Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Crocker-Wheeler Electric Co. *v.* Johns-Pratt Co., 29 N. Y. App. Div. 300, 51 N. Y. Suppl. 793; Coates *v.* Harvey, 10 N. Y. St. 276; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

Contra.—Shordan *v.* Kyler, 87 Ind. 38, holding that the buyer may recover for breach of an express warranty in the sale of goods, although he was not induced by the warranty to make the purchase and did not rely thereon.

67. Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286. And see Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Tewksbury *v.* Bennett, 31 Iowa 83.

If the buyer relies partly upon an examination and test of the article sold, but mainly upon the representations of the seller, and these representations were with the intent that they should be relied upon, it is a warranty upon which he may recover. Keely *v.* Turbeville, 11 Lea (Tenn.) 339.

68. *Alabama.*—Brown *v.* Freeman, 79 Ala. 406; Livingston *v.* Arrington, 28 Ala. 424.

*Arkansas.*—Thompson *v.* Bertrand, 23 Ark. 730.

*Delaware.*—Burton *v.* Young, 5 Harr. 233.

*Georgia.*—Snowden *v.* Waterman, 28 S. E. 121, 100 Ga. 588; Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L. R. A. 374; Hook *v.* Stovall, 21 Ga. 69.

*Illinois.*—Hodgman *v.* State Line, etc., R. Co., 45 Ill. App. 395.

a general warranty does not cover an obvious defect.[69] The reason for the rule rests on the presumed intention of the parties who cannot be supposed, the one to assert and the others to rely, on what they know to be untrue.[70] The rule that a general warranty will not extend to visible defects does not apply where the seller uses art to conceal and succeeds in concealing such defects,[71] or misrepresents their nature and effect.[72] Nor does it extend to an apparent defect to understand the nature of which requires special skill, knowledge, or judgment,[73] as where the defect is visible but the nature and effect thereof is not apparent or understood by the buyer.[74] And a warranty may be so expressed as to protect

*Iowa.*— Raeside *v.* Hamm, 87 Iowa 720, 54 N. W. 1079; Storrs *v.* Emerson, 72 Iowa 390, 34 N. W. 176.

*Massachusetts.*— Brown *v.* Bigelow, 10 Allen 242.

*Missouri.*— Thompson *v.* Botts, 8 Mo. 710.

*New York.*— Parks *v.* Morris, etc., Co., 54 N. Y. 586.

*North Carolina.*—Love *v.* Miller, 104 N. C. 582, 10 S. E. 685.

*Wisconsin.*— Vates *v.* Cornelius, 59 Wis. 615, 18 N. W. 474.

See 43 Cent. Dig. tit. "Sales," § 738.

69. *Alabama.*— Brown *v.* Freeman, 79 Ala. 406; Livingston *v.* Arrington, 28 Ala. 424; Ricks *v.* Dillahunty, 8 Port. 133.

*Arkansas.*—Thompson *v.* Bertrand, 23 Ark. 730; Jordan *v.* Foster, 11 Ark. 139.

*Colorado.*— Huston *v.* Plato, 3 Colo. 402.

*Georgia.*— Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L. R. A. 374; Marshall *v.* Drawhorn, 27 Ga. 275.

*Indiana.*— Connersville *v.* Wadleigh, 7 Blackf. 102, 41 Am. Dec. 214.

*Kansas.*— Scott *v.* Geiser, 70 Kan. 500, 80 Pac. 955, 70 Kan. 498, 78 Pac. 823.

*Louisiana.*— Berret *v.* Adams, 10 La. Ann. 77; Campbell *v.* Botts, 5 La. Ann. 106; Lebesque *v.* Bonin, 3 Rob. 12.

*Massachusetts.*— Brown *v.* Bigelow, 10 Allen 242.

*Minnesota.*—Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196; McCormick *v.* Kelly, 28 Minn. 135, 9 N. W. 675.

*Missouri.*— Stewart *v.* Dugin, 4 Mo. 245, 28 Am. Dec. 348; Knoepker *v.* Ahman, 99 Mo. App. 30, 72 S. W. 483.

*New Hampshire.*— Leavitt *v.* Fletcher, 60 N. H. 182.

*New York.*— Bennett *v.* Buchan, 76 N. Y. 386; Birdseye *v.* Frost, 34 Barb. 367; Gilbert Car Mfg. Co. *v.* Mann, 3 N. Y. St. 301; Schuyler *v.* Russ, 2 Cai. 202.

*Pennsylvania.*—Mulvany *v.* Rosenberger, 18 Pa. St. 203.

*South Carolina.*—Scarborough *v.* Reynolds, 13 Rich. 98.

*Tennessee.*—Fisher *v.* Pollard, 2 Head 314, 75 Am. Dec. 740; Long *v.* Hicks, 2 Humphr. 305.

*Texas.*— Williams *v.* Ingram, 21 Tex. 300.

*Vermont.*— Drew *v.* Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; Morrill *v.* Bemis, 37 Vt. 155; Hill *v.* North, 34 Vt. 604.

*England.*— Margetson *v.* Wright, 7 Bing. 603, 5 M. & P. 606, 20 E. C. L. 269.

See 43 Cent. Dig. tit. "Sales," §§ 713, 739, 792.

**Calling original vendor in warranty.**— A vendor who, when sued in redhibition, alleges that the defect was apparent, cannot recover against his own vendor cited in warranty. Lemos *v.* Daubert, 8 Rob. (La.) 225.

**Actual or constructive notice.**— Either actual or constructive notice of defects in property purchased will estop the purchaser from claiming a breach of warranty as to such defects. Bennett *v.* Buchan, 76 N. Y. 386.

70. Chadsey *v.* Greene, 24 Conn. 562; Brown *v.* Bigelow, 10 Allen (Mass.) 242; Hill *v.* North, 34 Vt. 604.

71. *Connecticut.*— Chadsey *v.* Greene, 24 Conn. 562.

*Illinois.*— Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615.

*Kentucky.*— Robertson *v.* Clarkson, 9 B. Mon. 506.

*Maine.*— Irving *v.* Thomas, 18 Me. 418.

*Massachusetts.*— Henshaw *v.* Robins, 9 Metc. 83, 43 Am. Dec. 367.

*Texas.*— Fay Fruit Co. *v.* Talerico, (Civ. App. 1902) 69 S. W. 196.

*Vermont.*— Pinney *v* Andrus, 41 Vt. 631.

72. Chatfield *v.* Frost, 3 Thomps. & C. (N. Y.) 357.

73. *Arkansas.*— Jordan *v.* Foster, 11 Ark. 139.

*Delaware.*— Burton *v.* Young, 5 Harr. 233.

*New York.*— Birdseye *v.* Frost, 34 Barb. 367.

*South Carolina.*—Stucky *v.* Clyburn, Cheves 186, 34 Am. Dec. 590; Limehouse *v.* Gray, 3 Brev. 231.

*Vermont.*— Pinney *v.* Andrus, 41 Vt. 631; Hill *v.* North, 34 Vt. 604.

See 43 Cent. Dig. tit. "Sales," § 792.

74. Brown *v.* Bigelow, 10 Allen (Mass.) 242; Chatfield *v.* Frost, 3 Thomps. & C. (N. Y.) 357; Wilson *v.* Ferguson, Cheves (S. C.) 190; Hill *v.* North, 34 Vt. 604, 615, where the court said: "The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them. All other defects, though apparent to some extent, but still equivocal and doubtful in their character, whether they are permanent or temporary, or whether they are mere harmless blemishes or but partially developed unsoundness, must be understood to be included and covered by a general warranty; and warranties are usually asked and given to protect purchasers against the risk presented by such cases."

the buyer against the consequences of patent defects,[75] especially where the nature and extent of the defect may reasonably be supposed to be more within the knowledge of the seller than the buyer.[76] However, the intention that the warranty should cover the defects should be clearly and unequivocally manifested.[77]

(II) *Inspection, Examination, or Test.* Where there is an express warranty the buyer is under no obligation to inspect or examine the goods purchased, but may rely on the warranty.[78] The main purpose of a warranty is often to excuse examination and render examination unnecessary.[79] And even if the buyer does make an examination of the goods, this does not necessarily do away with the effect of the warranty.[80] A purchaser may examine the goods and exercise his own judgment, and at the same time may protect himself by taking a warranty.[81]

**b. Of Seller.** Where there is a warranty it is immaterial whether the seller knew his statements were untrue or not,[82] unless the seller limits the warranty

**75.** *Georgia.*— Fletcher *v.* Young, 69 Ga. 591; Marshall *v.* Drawhorn, 27 Ga. 275.

*Illinois.*— Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615.

*Massachusetts.*— Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485.

*Minnesota.*— Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143; McCormick *v.* Kelly, 28 Minn. 135, 9 N. W. 675.

*Mississippi.*— Shewalter *v.* Ford, 34 Miss. 417.

*Missouri.*— Branson *v.* Turner, 77 Mo. 489; Woods *v.* Thompson, 114 Mo. App. 38, 88 S. W. 1126; June *v.* Falkinburg, 89 Mo. App. 563; Samuels *v.* Guin, 49 Mo. App. 8.

*Nebraska.*—Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491, 43 Nebr. 348, 61 N. W. 625.

*South Carolina.*—Wallace *v.* Frazier, 2 Nott & M. 516.

*Vermont.*— Pinney *v.* Andrus, 41 Vt. 631; Hill *v.* North, 34 Vt. 604.

*England.*— Leddard *v.* Kain, 2 Bing. 183, 3 L. J. C. P. O. S. 246, 9 Moore C. P. 356, 27 Rev. Rep. 582, 9 E. C. L. 537.

**Warranty covering obvious and hidden defects.**— A warranty that certain metallic cylinders shall "finish sound" requires only that the shells should, when finished, be free from cracks and air holes, both obvious and hidden. H. H. Franklin Mfg. Co. *v.* Lamson, etc., Mfg. Co., 189 Mass. 344, 75 N. E. 624, 3 L. R. A. N. S. 345.

**Purchase of second-hand machine.**— In an action to recover damages for breach of warranty of quality and fitness on the sale of a second-hand electric dynamo, it was error for the court to define a second-hand machine, and tell the jury that such a machine was not as good as a new one. Waupaca Electric Light, etc., Co. *v.* Milwaukee Electric R., etc., Co., 112 Wis. 469, 88 N. W. 308.

**76.** Branson *v.* Turner, 77 Mo. 489.

**77.** Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143. And see Marshall *v.* Drawhorn, 27 Ga. 275; McCormick *v.* Kelly, 28 Minn. 135, 9 N. W. 675.

**78.** *Alabama.*— Brown *v.* Freeman, 79 Ala. 406.

*Georgia.*— North Georgia Milling Co. *v.* Henderson El. Co., 130 Ga. 113, 60 S. E. 258; Springer *v.* Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 153; Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143.

*Massachusetts.*— Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

*Texas.*— Barnum Wire, etc., Works *v.* Seley, 34 Tex. Civ. App. 47, 77 S. W. 827.

*Washington.*— Tacoma Coal Co *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

**79.** Brown *v.* Freeman, 79 Ala. 406; Meickley *v.* Parsons, 66 Iowa 63, 23 N. W. 265, 55 Am. Rep. 261.

**80.** Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

**81.** Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; Woods *v.* Thompson, 114 Mo. App. 38, 88 S. W. 1126.

**82.** *Alabama.*— Riddle *v.* Webb, 110 Ala. 599, 18 So. 323; Ricks *v.* Dillahunty, 8 Port. 133.

*Connecticut.*— Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338.

*Delaware.*— Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377; Tyre *v.* Causey, 4 Harr. 425.

*Georgia.*— Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121; Burge *v.* Stroberg, 42 Ga. 88.

*Kentucky.*— Carstarphen *v.* Graves, 1 A. K. Marsh. 435; Bedford *v.* Magibben, 13 S. W. 1082, 12 Ky. L. Rep. 193.

*Maryland.*— Hyatt *v.* Boyle, 5 Gill & J. 110, 25 Am. Dec. 276.

*Massachusetts.*— Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122.

*Michigan.*— Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609.

*Mississippi.*— McKee *v.* Jones, 67 Miss. 405, 7 So. 348; McLeod *v.* Tutt, 1 How. 288.

*New York.*— Brisbane *v.* Parsons, 33 N. Y. 332; Lewis *v.* Doyle, 13 N. Y. App. Div. 291, 43 N. Y. Suppl. 201; Moore *v.* Noble, 53 Barb. 425; Ross *v.* Mather, 47 Barb. 582 [*reversed* on other grounds in 51 N. Y. 108]; Carley *v.* Wilkins, 6 Barb. 557.

*North Dakota.*— Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103.

*Pennsylvania.*— Vanleer *v.* Earle, 26 Pa. St. 277; Irwin *v.* Rankin, Add. 146; Wilson

by the extent of his knowledge.[83] But a warranty does not cease to be such because the statements were false and fraudulently made.[84]

**7. Exclusion of Warranty by Written Instrument.**[85] The purchaser cannot avail himself of a parol warranty where the contract of sale is in writing.[86] If the

*v.* Belles, 22 Pa. Super. Ct. 477; Smith *v.* Williams, 1 Law Rep. 263.

*South Carolina.*— Martin *v.* Howil, 2 Treadw. 750.

*Tennessee.*—Waterbury *v.* Russell, 8 Baxt. 159; Hogg *v.* Cardwell, 4 Sneed 151.

*Texas.*— Sanders *v.* Britton, (Civ. App. 1898) 47 S. W. 550, (Civ. App.) 45 S. W. 209; Norris *v.* Parker, 15 Tex. Civ. App. 117, 38 S. W. 259.

*England.*—Anonymous, Lofft. 146, 98 Eng. Reprint 579.

See 43 Cent. Dig. tit. "Sales," § 726.

**Disclaimer of knowledge.**— If the seller disclaims all knowledge as to the horse offered for sale, except such as he has gained from the written pedigree, there is no warranty. Dunlop *v.* Waugh, 1 Peake N P. 123.

**Instruction.**— An instruction that a warrantor must have known that the property was not as represented, in order to constitute a breach, is not cured by another correct charge as to warranty. Sanders *v.* Britton, (Tex. Civ. App. 1898) 47 S. W. 550, (Civ. App.) 45 S. W. 209.

**83.** White *v.* Slatter, 5 La. Ann. 29; Hubby *v.* Stokes, 22 Tex. 217. But see Collins *v.* McCargo, 6 Sm. & M. (Miss.) 128, holding that a warranty of freedom from defects, "so far as I know or believe," is an unlimited warranty of soundness.

**Instructions.**— Where the seller had made certain representations as to the qualities and condition of the article sold so far as he knew, and no evidence of any artifice on his part in making such qualification is shown, an instruction submitting the question of the seller's intent to deceive is properly refused. Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715.

**84.** Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804; Carter *v.* Abbott, 33 Iowa 180; Waterbury *v.* Russell, 8 Baxt. (Tenn.) 159. See also Marsh *v.* Webber, 16 Minn. 418; Conner *v.* Crunk, 2 Head (Tenn.) 246.

**85. Exclusion of implied warranty by written instrument** see *infra*, VII, D, 3.

**86.** *Alabama.*— Whitehead *v.* Lane, etc., Co., 72 Ala. 39.

*Connecticut.*—Mullain *v.* Thomas, 43 Conn. 252.

*Georgia.*— Martin *v.* Moore, 63 Ga. 531; Baldwin *v.* Daniel, 69 Ga. 782.

*Illinois.*—Robinson *v.* McNeill, 51 Ill. 225; Graham *v.* Eiszner, 28 Ill. App. 269.

*Indiana.*—Johnson *v.* McCabe, 37 Ind. 535; McClure *v.* Jeffrey, 8 Ind. 79.

*Iowa.*— Shepherd *v.* Gilroy, 46 Iowa 193.

*Kansas.*—Diebold Safe, etc., Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53; Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809; Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943.

*Kentucky.*—Worland *v.* Secrest, 106 Ky. 711, 51 S. W. 445, 21 Ky. L. Rep. 363; Ramsey *v.* Beedle, 8 Ky. L. Rep. 702.

*Louisiana.*— Buhler *v.* McHatton, 9 La. Ann. 192.

*Maryland.*— Thomson *v.* Gortner, 73 Md. 474, 21 Atl. 371.

*Massachusetts.*— Salem India-Rubber Co. *v.* Adams, 23 Pick. 256; Frost *v.* Blanchard, 97 Mass. 155.

*Michigan.*— McCray Refrigerator, etc., Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599.

*Minnesota.*— McCormick Harvesting-Mach. Co. *v.* Thompson, 46 Minn. 15, 48 N. W. 415.

*New York.*— Eighmie *v.* Taylor, 98 N. Y. 288; Jackson *v.* Helmer, 73 N. Y. App. Div. 134, 77 N. Y. Suppl. 835; Engelhorn *v.* Reitlinger, 55 N. Y. Super. Ct. 485, 14 N. Y. St. 749 [*affirmed* in 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. N. S. 548]; Chamberlain *v.* Van Campen, 7 N. Y. St. 99; Reed *v.* Von Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Vrooman *v.* Phelps, 2 Johns. 177; Wilson *v* Marsh, 1 Johns. 503; Mumford *v.* McPherson, 1 Johns. 414, 3 Am. Dec. 339; Hungerford Co. *v.* Rosenstein, 19 N. Y. Suppl. 471 [*affirmed* in 138 N. Y. 640, 34 N. E. 512].

*Tennessee.*— McKenzie *v.* Kerr, 5 Sneed 539.

*Vermont.*— Bond *v.* Clark, 35 Vt. 577; Reed *v.* Wood, 9 Vt. 285.

*West Virginia.*— Johnston *v.* Mendenhall, 9 W. Va. 112.

*Wisconsin.*— J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013; Cooper *v.* Cleghorn, 50 Wis. 113, 6 N. W. 491; Baker *v.* Henderson, 24 Wis. 509.

*United States.*— Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837; De Witt *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896; Randall *v.* Rhodes, 20 Fed. Cas. No. 11,556, 1 Curt. 90.

*England.*— Kain *v.* Old, 2 B. & C. 627, 4 D. & R. 52, 2 L. J. K. B. O. S. 102, 26 Rev. Rep. 497, 9 E. C. L. 274.

*Canada.*— Northey Mfg. Co. *v.* Sanders, 31 Ont. 475.

See 43 Cent. Dig. tit. "Sales," § 721.

**Effect of custom.**— A custom, whereby the specification of the invoice weight of cloth in a bill of sale is construed as a warranty that the actual weight is substantially the same as the invoice weight, is not admissible to add to a bill of sale containing no warranty. Rice *v.* Codman, 1 Allen (Mass.) 377.

**Successive sales.**— Where defendant, by written contract, sold plaintiff a one half interest in a jack, without warranty, the contract giving plaintiff the privilege of purchasing the other half within a certain time, the written contract without warranty did not preclude the parties from making a verbal contract for the sale of the second half with warranty. Storer *v.* Taber, 83 Me. 387, 22 Atl. 256.

contract contains no warranty, this indicates the intention of the parties that there should be no warranty,[87] and if the contract contains a warranty, this excludes all parol warranties,[88] in the absence of fraud [89] or mistake,[90] or unless there has been a subsequent modification of the contract.[91] The rule has of course no application if the writing does not purport to be the actual contract of sale,[92] such as an order for the goods,[93] a note for the price,[94] a receipt,[95] a guaranty attached to a bill of goods,[96] an ordinary bill of parcels of goods sold receipted by the seller,[97] or a memorandum insufficient to satisfy the requirements of the

87. Johnston *v.* Mendenhall, 4 W. Va. 112.

88. *Alabama.*— Barnes *v.* Blair, 16 Ala. 71; Wren *v.* Wardlaw, Minor 363, 12 Am. Dec. 60.

*California.*—Ft. Collins First Nat. Bank *v.* Hughes, (1896) 46 Pac. 272.

*Connecticut.*—Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 82.

*Georgia.*— Allen *v.* Young, 62 Ga. 617.

*Iowa.*— Barrett *v.* Wheeler, 71 Iowa 662, 33 N. W. 230; Nichols *v.* Wyman, 71 Iowa 160, 32 N. W. 258; Shepherd *v.* Gilroy, 46 Iowa 193. And see Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497.

*Kansas.*— Farmers' Stock Breeding Assoc. *v.* Scott, 53 Kan. 534, 36 Pac. 978.

*Kentucky.*— Smith *v.* Miller, 2 Bibb 616.

*Louisiana.*— Goodloe *v.* Hart, 2 La. 446.

*Michigan.*— John Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; Rumely *v.* Emmons, 85 Mich. 511, 48 N. W. 636; Nichols *v.* Crandall, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412.

*North Dakota.*— Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

*South Carolina.*— Wood *v.* Ashe, 1 Strobh. 407; Smith *v.* McCall, 1 McCord 220, 10 Am. Dec. 666.

*United States.*—Wilson *v.* New U. S. Cattle Ranch Co., 73 Fed. 994, 20 C. C. A. 241; Empire State Phosphate Co. *v.* Heller, 61 Fed. 280, 9 C. C. A. 504; Chandler *v.* Tompson, 30 Fed. 38.

*England.*— Budd *v.* Fairmaner, 8 Bing. 48, 21 E. C. L. 439, 5 C. & P. 78, 24 E. C. L. 462, 1 L. J. C. P. 16, 1 Moore & S. 74.

See 43 Cent. Dig. tit. "Sales," § 721.

**Where the contract contains an express warranty of title** the buyer cannot rely on a parol warranty of soundness. Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287; Wood *v.* Ashe, 1 Strobh. (S. C.) 407. *Compare* Routh *v.* Caron, 64 Tex. 289.

**By agent.**— Evidence of a parol warranty on the part of the seller of personal property is not incompetent by reason of the fact that after the sale his agent who made it gave to the purchaser his written warranty of the property. The buyer may take a warranty from both principal and agent if each saw fit to give a warranty. Kelly *v.* Clow Reaper Mfg. Co., 20 Minn. 88. It has been held, however, that where a written contract for the sale of a machine specified the warranties undertaken by the seller, and stipulated that no warranties, other than those expressly stated in the contract, should be binding on him, he was not responsible for an additional warranty subsequently made by his agent; and, upon the trial of an action brought by the seller against the purchaser for the price of the machine, evidence of such warranty, made by the agent, was inadmissible. McCormick Harvesting Mach. Co. *v.* Allison, 116 Ga. 445, 42 S. E. 778.

89. Whitehead *v.* Lane, etc., Co., 72 Ala. 39; McMullen *v.* Carson, 48 Kan. 263, 29 Pac. 317; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339; Horner *v.* Fellows, 1 Dougl. (Mich.) 51; Phelps, etc., Windmill Co. *v.* Parker, (Tex. Civ. App. 1895) 30 S. W. 365.

**Fraudulent representations.**— The existence of an express written warranty does not exclude a defense based on fraudulent misrepresentations inducing the sale. Huckabee *v.* Alloritton, 10 Ala. 657; Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540 [*reversing* 54 N. Y. Super. Ct. 315]; Steward *v.* Coesvelt, 1 C. & P. 23, 12 E. C. L. 26; Grant *v.* Bontz, 10 Fed. Cas. No. 5,694, 2 Cranch C. C. 184.

**If the written warranty is accepted by the buyer through fraud of the seller's agent,** he may show a verbal warranty. Aultman *v.* Falkum, 51 Minn. 562, 53 N. W. 875.

90. Huston *v.* Peterson, 2 Kan App. 315, 43 Pac. 101.

91. Thomas *v.* Barnes, 156 Mass. 581, 31 N. E. 683.

92. Hersom *v.* Henderson, 21 N. H. 224, 53 Am. Dec. 185; Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476; Allen *v.* Pink, 1 H. & H. 207, 7 L. J. Exch. 206, 4 M. & W. 140.

**Incomplete bill of sale.**—When a bill of sale is incomplete and on its face shows that it does not contain the contract, the existence of a warranty may be shown by parol. Ruff *v.* Jarrett, 94 Ill. 475; Foot *v.* Bentley, 44 N. Y. 166, 4 Am. Rep. 652.

93. Jackson *v.* Mott, 76 Iowa 263, 41 N. W. 12; McCormick Harvesting Mach. Co. *v.* Arnold, 116 Ky. 508, 76 S. W. 323, 25 Ky. L. Rep. 663; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63.

**If, however, the order contains the complete contract** a warranty cannot be shown by parol. Diebold Safe, etc., Co. *v.* Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53.

94. Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543; Gale Sulky Harrow Mfg. Co. *v.* Stark, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 739.

95. Filkins *v.* Whyland, 24 N. Y. 338 [*affirming* 24 Barb. 379].

96. Richey *v.* Daemicke, 86 Mich. 647, 49 N. W. 516.

97. Atwater *v.* Clancy, 107 Mass 369; Dunham *v.* Barnes, 9 Allen (Mass.) 352. But see Lamb *v.* Crafts, 12 Metc. (Mass.) 353.

statute of frauds.[98] So a parol warranty is not affected by a written warranty not agreed on between the parties.[99]

**8. Descriptive Recitals in Instrument Containing Express Warranty.** Where, in a contract of sale, the description of a chattel is followed by express words of warranty, the warranty does not extend to the descriptive recital.[1]

**9. Statements Constituting Warranties[2] — a. In General.** If during the course of a sale the seller makes representations which are positive representations of fact and not mere matters of opinion or judgment, for the purpose of inducing the buyer to purchase, and which are accepted and relied on by him in making the contract of purchase, such representations will constitute an express warranty.[3]

98. Curtis *v.* Soltau, 16 Daly (N. Y.) 490, 12 N. Y. Suppl. 285 [*following* Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 111]

99. Valerius *v.* Hockspiere, 87 Iowa 332, 54 N. W. 136.

1. Sharp *v.* Sturgeon, 66 Mo. App. 191.

**Applications of rule.**— Thus where there is an express written warranty of title a mere recital that the subject of the sale is sound does not amount to a warranty of soundness. Smith *v.* Miller, 2 Bibb (Ky.) 616. So where there is a warranty of soundness a recital as to age does not constitute a warranty. Banfield *v.* Bruton, 7 B. Mon. (Ky.) 108; Willard *v.* Stevens, 24 N. H. 271; March *v.* Phelps, 61 N. C. 560; Hill *v.* North, 34 Vt. 604; Budd *v.* Fairmaner, 8 Bing. 48, 21 E. C. L. 439, 5 C. & P. 78, 24 E. C. L. 462, 1 L. J. C. P. 16, 1 M. & S. 74. Nor will a recital that the animal is quiet to ride and drive be construed as a warranty. Anthony *v.* Halstead, 37 L. T. Rep. N. S. 433. To the same effect see Smith *v.* Miller, 2 Bibb (Ky.) 616. But see Blythe *v.* Speake, 23 Tex. 429.

2. **Affirmations as amounting to warranty of quality** see *infra*, VII, C, 9, e, (I).

**As question for jury** see *infra*, VII, J, 3, l, (II), (A).

3. *Arkansas.*— Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377; Burton *v.* Young, 5 Harr. 233.

*Illinois.*— Robinson *v.* Harvey, 82 Ill. 58; Reed *v.* Hastings, 61 Ill. 266; Ender *v.* Scott, 11 Ill. 35; Hawkins *v.* Berry, 10 Ill. 36.

*Indiana.*— Jones *v.* Quick, 28 Ind. 125.

*Iowa.*— Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822; Briggs *v.* H. Rumely Co., 96 Iowa 202, 64 N. W. 784; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Callanan *v.* Brown, 31 Iowa 333.

*Kentucky.*—Chestnut *v.* Ohler, (1908) 112 S. W. 1101; Lamme *v.* Gregg, 1 Metc. 444, 71 Am. Dec. 489.

*Maine.*— Bryant *v.* Crosby, 40 Me. 9.

*Maryland.*—Crenshaw *v.* Slye, 52 Md. 140; Osgood *v.* Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317; Taymon *v.* Mitchell, 1 Md. Ch. 496.

*Massachusetts.*— Harrington *v.* Smith, 138 Mass. 92.

*Minnesota.*—Warder *v.* Bowen, 31 Minn. 335, 17 N. W. 943; Torkelson *v.* Jorgenson, 28 Minn. 383, 10 N. W. 416; Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139.

*Mississippi.*—Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.

*Nebraska.*— Burr *v.* Redhead, etc., Co., 52 Nebr. 617, 72 N. W. 1058; Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

*New York.*— Fairbank Canning Co. *v.* Metzger, 118 N. Y. 265, 23 N. E. 372, 16 Am. St. Rep. 753; Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 595 [*reversing* 6 Rob. 42]; Sweet *v.* Bradley, 24 Barb. 549; Rogers *v.* Ackerman, 22 Barb. 134; Blakeman *v.* Mackay, 1 Hilt. 266; Warren *v.* Van Pelt, 4 E. D. Smith 202; Petty *v.* Fish, 31 Misc. 739, 63 N. Y. Suppl. 192 [*affirming* 30 Misc. 828, 61 N. Y. Suppl. 1127]; Naylor *v.* McSwegan, 2 Misc. 255, 21 N. Y. Suppl. 930; Whitney *v.* Sutton, 10 Wend. 411; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

*North Carolina.*— Wrenn *v.* Morgan, 148 N. C. 101, 61 S. E. 641; Foggart *v.* Blackweller, 26 N. C. 238.

*North Dakota.*— Hazelton Boiler Co. *v.* Fargo Gas, etc., Co., 4 N. D. 365, 61 N. W. 151.

*Pennsylvania.*—Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Herman *v.* Brinker, 17 Pa. Super. Ct. 177.

*Tennessee.*— Waterbury *v.* Russell, 8 Baxt. 159; Hogg *v.* Cardwell, 4 Sneed. 151.

*Texas.*— Blythe *v.* Speake, 23 Tex. 429.

*Vermont.*— Beals *v.* Olmstead, 24 Vt. 114, 58 Am. Dec. 150.

*Wisconsin.*— Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916; Neave *v.* Arntz, 56 Wis. 174, 14 N. W. 41; Elkins *v.* Kenyon, 34 Wis. 93; Giffert *v.* West, 33 Wis. 617; Austin *v.* Nickerson, 21 Wis. 542; Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757; Smith *v.* Justice, 13 Wis. 600.

*United States.*— Shippen *v.* Bowen, 122 U. S. 575, 7 S. Ct. 1283, 30 L. ed. 1172.

**Sale of note and mortgage.**— Upon the sale of a note and mortgage, the maker of which is known by both parties to be insolvent, if the vendor represents the mortgage to be good as an inducement to the vendee to buy, and the latter buys, relying upon such representation, this is a warranty. Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

**Sale of seed.**— A statement in a sale of seed that it is a certain kind, the fact not being ascertainable by inspection, amounts to a warranty as to kind. Wolcott *v.* Mount, 38 N. J. L. 496, 20 Am. Rep. 425; White *v.*

What a man positively affirms, with the view to induce another to part with his property, if relied on and confided in, he should be held to undertake and promise to be true. An affirmation in regard to an existing fact, distinctly and positively made in the negotiations for trade, should be regarded as a contract, and enforced as a warranty.[4]

Miller, 71 N. Y. 118, 27 Am. Rep. 13 [*affirming* 7 Hun 427]; Passenger *v.* Thorburn, 35 Barb. (N. Y.) 17 [*affirmed* in 34 N. Y. 634, 90 Am. Dec. 753]; Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916. And see Reiger *v.* Worth Co., 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865.

**Place where seed was grown.**— Where defendant sold seed to plaintiff as the seed of a variety known as "flat Dutch cabbage seed," raised by Van Wycklen on Long Island, who raised it in a locality peculiarly adapted for raising seed that would head into cabbages, such statement amounted to a warranty that it was not only the seed of that variety, but that it had been raised by Van Wycklen on Long Island. Van Wyck *v.* Allen, 6 Daly (N. Y.) 376 [*affirmed* in 69 N. Y. 61, 25 Am. Rep. 136].

**Early variety.**— Where, on selling seed peas to a market gardener, plaintiff's agent expressly guaranteed them to "pick four or five days earlier than any other seed on the market," plaintiff is responsible for damages resulting from a breach of such warranty. Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388.

**Time of sailing or arrival.**— Recitals in the contract as to the time of sailing of the vessel containing the goods or the time of their arrival are not warranties. Hawes *v.* Lawrence, 4 N. Y. 345 [*affirming* 3 Sandf. 193]; Rogers *v.* Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276. But see Redlands Orange Growers' Assoc. *v.* Gorman, 161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718 (holding that where a seller contracts to ship fruit to a buyer not later than a specified date, such stipulation as to the time of shipment is a warranty); Gorrissen *v.* Perrin, 2 C. B. N. S. 681, 3 Jur. N. S. 867, 27 L. J. C. P. 29, 5 Wkly. Rep. 709, 89 E. C. L. 681 (where a sale of goods "now on passage" was held to be a warranty that the goods were then on passage); Oppenheim *v.* Fraser, 34 L. T. Rep. N. S. 524 (where it was held to be a question for the jury whether on the sale of ship the recital "now at Rangoon" was a warranty or condition).

**Mode of shipment.**— Where defendants contracted to purchase from plaintiff one-half the cargo per Wachusett, chartered to load not exceeding two thousand two hundred tons nitrate of soda, to arrive at New York, and a marginal note on the contract provided that, should the vessel named be lost before reaching landing port, another vessel should be substituted, there was no warranty that the goods should be shipped per Wachusett. Browne *v.* Paterson, 165 N. Y. 460, 59 N. E. 296 [*reversing* 36 N. Y. App. Div. 167, 55 N. Y. Suppl. 404]. See also Johnson *v.* Macdonald, 6 Jur. 264, 12 L. J. Exch. 99, 9 M. & W. 600, where a sale of goods "to arrive ex Daniel Grant" was held not to be a warranty that the goods should arrive by the "Daniel Grant."

**Indirect statements.**—A statement by an agent, in selling the goods of his principal, that he has authority from the principal to warrant the goods sold, does not of itself constitute a warranty in law. Wilcox *v.* Henderson, 64 Ala. 535.

**Promissory warranty.**—Where plaintiff bought a defective machine, which he had taken on trial, the seller agreeing that it would repair and fix it so that it would do good work, the undertaking of the seller was a promissory warranty against known defects, and for its breach plaintiff had a right of action, although the purchase-price of the machine was still unpaid, and although he had the privilege of returning the machine. Fitzpatrick *v.* Osborne, 50 Minn. 261, 52 N. W. 861.

**Construction of stipulation.**—Where plaintiffs by letter offered to install certain grates and blowers under defendant's boilers, saying that prompt acceptance would be necessary so that the apparatus could be installed the next Sunday, and that part of the work might have to go over till the next Sunday, but that there would be no delay in the operation of the plant, there was no warranty that after the apparatus was installed it would so operate that there would never be any delay in the operation of the plant because of it. Beggs *v.* James Hanley Brewing Co., 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44.

**Modification of contract.**—Where plaintiff, after examining drawings furnished by defendant, contracted to construct for him in accordance therewith a machine which would work "smoothly and well," the fact that changes in the plans and the machine were afterward found to be necessary, and that defendant authorized them, and promised to pay the additional expense, will not relieve plaintiff from compliance with his warranty. Giles *v.* San Antonio Foundry Co., (Tex. Civ. App. 1897) 42 S. W. 1020.

4. Sweet *v.* Bradley, 24 Barb. (N. Y.) 549.

**Sale of bonds.**— In the sale of a lot of city bonds where it was alleged that "the defendants agreed that the principal and interest of the bonds was or should be guarantied and provided for by a sinking fund set aside for that purpose"; "that such representations and agreements for the securing of bonds were a material part of the contract," etc., the representations alleged constitute a warranty that the bonds were or would be secured by an adequate fund for their ultimate payment. Callanan *v.* Brown, 31 Iowa 333.

**Liability to sickness.**—Where the owner of an ox represented to a purchaser that the

**b. Statements of Opinion or Commendation.**[5] Representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty.[6] Nor can a warranty be predicated on statements which are at most

animal had not been brought from the mountains during that season, and was therefore not liable to distemper, the representations constituted a warranty. Bryce *v.* Parker, 11 S. C. 337.

**Non-infringement of patent.**—An agreement by the seller of a "heater," "to protect the sale from infringements on other heaters," amounts to a warranty that the article sold is not an infringement of any patent. Croninger *v.* Paige, 48 Wis. 229, 4 N. W. 106.

**Statements as to price.**—The seller's declaring he will sell as cheap as the same goods can be bought in a city named is not a warranty obliging him to reduce the agreed price to the price current in the city named on that day. Falkner *v.* Lane, 58 Ga. 116.

5. Questions for jury see *infra*, VII, J, 3, l, (II), (A).

6. *Alabama.*— Shiretzki *v.* Kessler, (1904) 37 So. 422; Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804; Farrow *v.* Andrews, 69 Ala. 96; Ricks *v.* Dillahunty, 8 Port. 133.

*Arkansas.*—Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; O'Neal *v.* Bacon, 1 Houst. 215; Tyre *v.* Causey, 4 Harr. 425.

*Georgia.*— Ragsdale *v.* Shipp, 108 Ga. 817, 34 S. E. 167.

*Illinois.*—Carondelet Iron Works *v.* Moore, 78 Ill. 65; Reed *v.* Hastings, 61 Ill. 266; Wheeler *v.* Reed, 36 Ill. 81; Adams *v.* Johnson, 15 Ill. 345; Hawkins *v.* Berry, 10 Ill. 36; Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Dec. 437; Roberts *v.* Applegate, 48 Ill. App. 176 [*affirmed* in 153 Ill. 210, 38 N. E. 676].

*Indiana.*— Myers *v.* Conway, 62 Ind. 474.

*Iowa.*—Tewkesbury *v.* Bennett, 31 Iowa 83.

*Kentucky.*— Lamme *v.* Gregg, 1 Metc. 444, 71 Am. Dec. 489.

*Maryland.*— Chilton *v.* Jones, 4 Harr. & J. 62.

*Massachusetts.*— Henshaw *v.* Robins, 9 Metc. 83, 43 Am. Dec. 367.

*Michigan.*—Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762.

*Minnesota.*— Holt *v.* Sims, 94 Minn. 157, 102 N. W. 386.

*Missouri.*— Matlock *v.* Meyers, 64 Mo. 531; Lindsay *v.* Davis, 30 Mo. 406; Bates County Bank *v.* Anderson, 85 Mo. App. 351.

*Montana.*— Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406.

*Nebraska.*— Burr *v.* Redhead, etc., Co., 52 Nebr. 617, 72 N. W. 1058; Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55; Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

*New York.*— Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Ouis *v.* Halloran, 74 N. Y. App. Div. 621, 77 N. Y. Suppl. 196; Lawton *v.* Keil, 61 Barb. 558; Rogers *v.* Ackerman, 22 Barb. 134; Hunter *v.* Stege, 59 N. Y. Super. Ct. 17, 12 N. Y. Suppl. 557; Coates *v.* Harvey, 10 N. Y. St. 276; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

*North Carolina.*— Osborne *v.* McCoy, 107 N. C. 726, 12 S. E. 383; Horton *v.* Green, 66 N. C. 596; Henson *v.* King, 48 N. C. 419; Baum *v.* Stevens, 24 N. C. 411.

*Pennsylvania.*— Jackson *v.* Wetherill, 7 Serg. & R. 480.

*Texas.*— Blythe *v.* Speake, 23 Tex. 429.

*Vermont.*— Bond *v.* Clark, 35 Vt. 577; Foster *v.* Caldwell, 18 Vt. 176; Wason *v.* Rowe, 16 Vt. 525.

*Virginia.*—Mason *v.* Chappell, 15 Gratt. 572.

*Wisconsin.*— Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507; White *v.* Stelloh, 74 Wis. 435, 43 N. W. 99; Tenney *v.* Cowles, 67 Wis. 594, 31 N. W. 221.

*United States.*— Schroeder *v.* Trubee, 35 Fed. 652.

*England.*— Power *v.* Barham, 4 A. & E. 473, 31 E. C. L. 216, 7 C. & P. 356, 32 E. C. L. 654, 1 Harr. & W. 683, 5 L. J. K. B. 88, 1 M. & Rob. 507, 6 N. & M. 62; Carter *v.* Crick, 4 H. & N. 412, 28 L. J. Exch. 238, 7 Wkly. Rep. 507.

See 43 Cent. Dig. tit. "Sales," § 731.

**Sale of patent.**— A statement, by one selling patent rights, that the patented article was "a valuable and useful improvement" is but an expression of opinion, on which the buyer has no right to rely. Bain *v.* Withey, 107 Ala. 223, 18 So. 217.

**Power of mill stream.**—A statement by the vendor, in the sale of a mill and water power, that "the stream would furnish water to run the mill day and night eight months of the year" is a mere expression of opinion and does not constitute a warranty. Clark *v.* Ralls, 50 Iowa 275.

**Mode of packing.**—Where defendant was present at plaintiff's packing and keeping of certain fruit trees sold by him to defendant, plaintiff's assurances that the trees were not injured thereby did not amount to a warranty but a mere expression of opinion. Baker *v.* Henderson, 24 Wis. 509.

**Sale of article as purchased.**—Where, in a parol agreement for the sale of a certain amount of sound corn, to be delivered, the seller stated that he had just purchased the corn from some other person as sound corn, and would sell it as such, this was nothing but a representation of belief and not a warranty. The purchaser could have refused acceptance or returned the goods, and thus protected himself from loss. Lawton *v.* Keil, 61 Barb. (N. Y.) 558.

**Speculative declarations.**— Declarations as to the amount of wool that certain sheep would yield, and the time in which the vendee could pay for them, and whether he would have wool left after paying, are mere speculations as to the future, and cannot import a warranty; but the rule is otherwise as to declarations that said sheep were young and healthy. Bryant *v.* Crosby, 40 Me. 9.

merely matters of commendation,[7] such representations falling within the maxim *simplex commendatio non obligat.*[8] There must be an affirmation as to the quality or condition of the thing sold, not asserted as a matter of opinion or belief, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, which is so received and relied on by the purchaser.[9] No expression of opinion, however strong, would import a warranty.[10]

**c. Matter of Description.**[11] Mere words of description in an executory contract of sale do not ordinarily constitute a warranty.[12] But it is very generally held that a description or designation of the goods by name, brand, or kind is a warranty that they are of the kind or character described,[13] and that this is so

**Disclaimer of knowledge.**— It is not a warranty to sell a horse as of the age stated in a written pedigree, if at the time the seller declared that he knew nothing of the horse's age but what he learned from the written pedigree. Dunlop *v.* Waugh, 1 Peake, N. P. 123.

**Instructions.**— In an action for breach of warranty of a mare the court properly refused to instruct the jury to determine whether the seller asserted a fact of which the purchaser was ignorant, or merely stated his opinion in regard to a matter of which he had no special knowledge, and in which the purchaser might be expected to exercise his own judgment, when the seller had told the purchaser that he knew the mare to be "sound in every respect," and that he would warrant her to be so. Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609. But in an action for breach of warranty as to the age of sheep sold, an instruction that if defendant knew the ages, and had means of knowledge, the jury should consider these facts, with all other facts in evidence, in determining whether he stated such ages as his opinion or as facts, is proper. Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

7. *Alabama.*— Englehardt *v.* Clanton, 83 Ala. 336, 3 So. 680; Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804.

*Arkansas.*— Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429.

*Iowa.*— McDonald Mfg. Co. *v.* Thomas, 53 Iowa 558, 5 N. W. 737; Tewkesbury *v.* Bennett, 31 Iowa 83.

*Michigan.*— Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198.

*New York.*— League Cycle Co. *v.* Abrahams, 27 Misc. 548, 58 N. Y. Suppl. 306; Stumpp, etc., Co. *v.* Lynher, 84 N. Y. Suppl. 912.

*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.

**Warranty, not commendation.**—Where a purchaser orders a certain machine by letter, stating that it is to do specific work, and the seller answers, accepting the order, and stating, "You may rely on having a first-rate machine, which will do your work in a satisfactory manner," these last words are not mere words of commendation, but are to be construed as part of the contract, and constituting a warranty. Whitehead, etc., Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

8. Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804; Taymon *v.* Mitchell, 1 Md. Ch. 496.

9. Robinson *v.* Harvey, 82 Ill. 58.

10. Bryant *v.* Crosby, 40 Me. 9; Henshaw *v.* Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367.

11. **Implied warranty from sales by description** see *infra*, VII, D, 6, e, (v).

12. St. Anthony, etc., Elevator Co. *v.* Princeton Roller Mill Co., 104 Minn. 401, 116 N. W. 935; Heath Dry Gas. Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18; Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Staiger *v.* Soht, 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342 [*affirmed* in 191 N. Y. 527, 84 N. E. 1120]. And see Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335; Robinson *v.* Flint, 58 Barb. (N. Y.) 100.

**The description of goods for the purpose of identification** is not a warranty. Rollins *v.* Northern Land, etc., Co., 134 Wis. 447, 114 N. W. 819.

13. *California.*— Flint *v.* Lyon, 4 Cal. 17.

*Georgia.*— De Loach Mill Mfg. Co. *v.* Tutweiler Coal, etc., Co., 2 Ga. App. 493, 58 S. E. 790, where it was said that an express warranty may be created as a part of a contract of sale by the use of such terms of description of the article sold as preclude any danger of mistaking or confusing that article with any other.

*Maryland.*— Gunther *v.* Atwell, 19 Md. 157.

*Massachusetts.*— Hogins *v.* Plympton, 11 Pick. 97.

*New York.*— White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Dounce *v.* Dow, 64 N. Y. 411; Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 590; Van Wyck *v.* Allen, 6 Daly 376 [*affirmed* in 69 N. Y. 61, 25 Am. Rep. 136].

*Wisconsin.*— Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

*United States.*— Walker *v.* Gooch, 48 Fed. 656; Bertram *v.* Lyon, 3 Fed. Cas. No. 1,362, 1 McAllister 53 [*affirmed* in 20 How. 149, 15 L. ed. 847].

*England.*— Allan *v.* Lake, 18 Q. B. 560, 83 E. C. L. 560; Nichol *v.* Godts, 10 Exch. 191, 23 L. J. Exch. 314.

See 43 Cent. Dig. tit. "Sales," § 730.

**The description of goods sold as "standard Alabama No. 1 soft and Alabama foundry No. 2 pig iron"** is equivalent to an express warranty that the goods are what they are described to be. De Loach Mill Mfg. Co. *v.* Tutweiler Coal, etc., Co., 2 Ga. App. 493, 58 S. E. 790.

**Statement as to sizes.**—A memorandum of

whether the vendor knew his affirmation to be false or not, because the injury by deception is just as great whether it be wilful or innocent.[14] The rule is just. It holds a dealer responsible for breach of a contract when he sells a thing as being of a particular kind, if it does not answer the description, the vendee not knowing whether the vendor's representations are true or false but relying upon them as true.[15] In sales of the character under consideration there is no warranty of quality,[16] unless the description carries with it a well known and generally understood quality.[17] If, however, the goods are described as of a certain quality, the words of description will be construed as a warranty of quality,[18] especially if the quality is a material and essential part of the description.[19]

**d. Statements in Catalogues and Other Advertisements.** If the statements are relied on by the purchaser, a warranty may be predicated of statements con-

sale which simply set forth certain sizes and classes of lumber, and fixed the selling price thereof, should be construed as describing the kind of lumber wanted, and not as a warranty as to its width and thickness. Brown *v.* Baird, 5 Okla. 133, 48 Pac. 180. To the same effect see Neff *v.* McNeeley, 1 Nebr. (Unoff.) 416, 96 N. W. 150.

**Sale of pictures.**— The description of a picture as by a particular named artist is not necessarily a warranty. Jendwine *v.* Slade, 2 Esp. 572, 5 Rev. Rep. 754. But it is evidence of a warranty from which the jury may find an express warranty. Power *v.* Barham, 4 A. & E. 473, 31 E. C. L. 216, 7 C. & P. 356, 32 E. C. L. 654, 1 Harr. & W. 683, 5 L. J. K. B. 88, 1 M. & Rob. 507, 6 N. & M. 62; De Sewhanberg *v.* Buchanan, 5 C. & P. 343, 24 E. C. L. 597; Lomi *v.* Tucker, 4 C. & P. 15, 19 E. C. L. 385. See also Colorado Dry Goods Co. *v.* W. P. Dunn Co., 18 Colo. App. 409, 71 Pac. 887, where plaintiff purchased a number of engravings for advertisement purposes, on which was printed, "The War Congress of the United States," containing the pictures of all the members of congress at the date of the commencement of the war with Spain, except the six successors of members who had died, and whose portraits were in the engraving, but it was not shown that at the date of the passage of the declaration of war any successors of the deceased members had been elected, and it was held that there was no breach of the warranty, if it was such, contained in the title of the picture.

**14.** Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

**15.** Hoffman *v.* Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. Rep. 916.

**16.** Whitman *v.* Freese, 23 Me. 212; Gunther *v.* Atwell, 19 Md. 157; Hogins *v.* Plympton, 11 Pick. (Mass.) 97; Dounce *v.* Dow, 64 N. Y. 411; Waeber *v.* Talbot, 43 N. Y. App. Div. 180, 59 N. Y. Suppl. 396 [*affirmed* in 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712]; Zabriskie *v.* Central Vermont R. Co., 13 N .Y. Suppl. 735 [*affirmed* in 131 N. Y. 72, 29 N. E. 1006]. And see Carondelet Iron Works *v.* Moore, 78 Ill. 65; Kleeb *v.* Bard, 7 Wash. 41, 34 Pac. 138.

**Scope of warranty.**—An agreement to "examine, salt, brine, repack, and brand" a lot of pork, and "guarantee New Orleans inspection" is not a warranty of any particular quality but merely that the pork should pass inspection at New Orleans as branded whatever the quality designated might be. Warren *v.* Palmer, 24 Mo. 78.

**17.** Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213; Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 595 [*reversing* 6 Rob. 42]; Feiger *v.* Worth, 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865; Schreiber *v.* Andrews, 101 Fed. 763, 41 C. C. A. 663 (wheat described is "No. 2 hard"); Walker *v.* Gooch, 48 Fed. 656.

**18.** *Indiana.*— Richmond Trading, etc., Co. *v.* Farquar, 8 Blackf. 89.

*Maryland.*— Osgood *v.* Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317.

*Massachusetts.*— Day *v.* Mapes-Reeve Constr. Co., 174 Mass. 412, 54 N. E. 878; Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

*Minnesota.*— Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359.

*New York.*— Udell *v.* Sarafian, 19 Misc. 542, 43 N. Y. Suppl. 1092; Levy *v.* American Wax, etc., Mfg. Co., 24 Misc. 204, 52 N. Y. Suppl. 637.

*North Carolina.*— Love *v.* Miller, 104 N. C. 582, 10 S. E. 685; Lewis *v.* Rountree, 78 N. C. 323.

*Ohio.*— Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209.

*Pennsylvania.*— Joseph *v.* Richardson, 2 Pa. Super. Ct. 208, 38 Wkly. Notes Cas. 487.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643. And see Osborn *v.* Hart, 23 L. T. Rep. N. S. 851, 19 Wkly. Rep. 331.

*Canada.*— Chisholm *v.* Proudfoot, 15 U. C. Q. B. 203.

**Acceptance of order.**—When an order for a machine describes it on acceptance of the order with a warranty that it will do good work the description becomes part of the warranty. Aultman-Taylor Mach. Co. *v.* Ridenour, 96 Iowa 638, 65 N. W. 980.

**19.** Packham *v.* Davis, 93 Ala. 474, 9 So. 509; Edgar *v.* Joseph Breck, etc., Corp, 172 Mass. 581, 52 N. E. 1083; Henshaw *v.* Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am.

tained in the catalogue of the seller,[20] circulars,[21] or advertisements relating to the goods.[22] If the statements are mere expressions of opinion,[23] or are not intended to be and are not relied on as warranties, they cannot be availed of as such,[24] and a purchaser cannot avail himself of representations in a circular the contents of which were not known to him.[25]

**e. Statements as to Quality or Condition**[26] — (i) *In General.* A direct and positive affirmation or promise of a fact as to the quality of the goods made by the seller at the time of the sale as an inducement to the sale and on which the purchaser relied amounts to an express warranty of quality,[27] and this rule

Dec. 420. And see Hogins *v.* Plympton, 11 Pick. (Mass.) 97.

**20.** Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Morris *v.* Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34; Gee *v.* Lucas, 16 L. T. Rep. N. S. 357.

**Supplemental catalogue.**— The statement of a horse's age in a supplemental catalogue of sale is not a warranty where the catalogue proper contained the conditions of sale, and the statement that "ages and heights of horses are approximated by owners, and are believed to be correct, but are not guarantied," since persons buying under a supplemental catalogue are chargeable with notice that they must look elsewhere for the terms and conditions of sale. Henry *v.* Salisbury, 14 N. Y. App. Div. 526, 43 N. Y. Suppl. 851.

**21.** Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509, holding that where the manufacturer of a musical instrument offered to sell it by letter, stating the terms of the sale and calling attention to a circular advertising the instrument which he had sent by the same mail, which circular stated that the instrument was warranted for five years, the offer of the warranty in the circular became a part of the offer of sale and, on acceptance a part of the contract of purchase. And see Charter Gas-Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019; Robson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518. *Compare* Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Monumental Bronze Co. *v.* Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850. But see Berman *v.* Woods, 38 Ark. 351, holding that the purchaser of an article cannot rely upon statements made by the manufacturer in circulars relating to the article as a warranty that it will do what is stated. See also Prideaux *v.* McMurray, 2 F. & F. 225.

**Testimonials from other purchasers.**— The fact that a vendor presented to a purchaser a circular, with testimonials, of a meat-cooler offered by him for sale, and said that his cooler was the only one in the world that would keep meat any length of time properly, is not sufficient to sustain a finding that he guaranteed the same to keep meat as long as the testimonials claimed it would. Richey *v.* Daemicke, 86 Mich. 647, 49 N. W. 516.

**22.** Blake *v.* Watson, 45 Conn. 323, 29 Am. Rep. 683; Calhoun *v.* Vechio, 4 Fed. Cas. No. 2,310, 3 Wash. C. C. 165; McVeigh *v.* Messersmith, 16 Fed. Cas. No. 8,931, 5 Cranch C. C. 316. And see Reiger *v.* Worth Co., 130 N. C. 268, 41 S. E. 377, 89 Am. St. Rep. 865. But see Ransberger *v.* Ing, 55 Mo. App. 621, holding that an advertisement of a future sale cannot be the basis of a warranty unless it is made a part of the contract at the time the sale is completed.

**Taken with faults.**—Where an advertisement described the vessel as "copper fastened," the statement was a warranty, although it also recited that the vessel was "to be taken with all faults." Shepherd *v.* Kain, 5 B. & Ald. 240, 24 Rev. Rep. 344, 7 E. C. L. 137.

**23.** Roberts *v.* Applegate, 153 Ill. 210, 38 N. E. 676 [*affirming* 48 Ill. App. 176].

**24.** Enger *v.* Dawley, 62 Vt. 164, 19 Atl. 478.

**25.** Landman *v.* Bloomer, 117 Ala. 312, 23 So. 75.

**26. Affirmations as amounting to warranty in general** see *supra*, VII, C, 9, a.

**27.** *California.*— Polhemus *v.* Heiman, 45 Cal. 573.

*Delaware.*— Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377; Burton *v.* Young, 5 Harr. 233.

*Georgia.*— Burge *v.* Stroberg, 42 Ga. 88.

*Illinois.*— Sparling *v.* Marks, 86 Ill. 125; Robinson *v.* Harvey, 82 Ill. 58.

*Iowa.*— Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751; Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652; Hughes *v.* Funston, 23 Iowa 257.

*Kentucky.*— Dickens *v.* Williams, 2 B. Mon. 374; Lamme *v.* Gregg, 1 Metc. 444, 71 Am. Dec. 489; Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317.

*Maine.*— Randall *v.* Thornton, 43 Me. 226, 69 Am. Dec. 56; Bryant *v.* Crosby, 40 Me. 9; Hillman *v.* Wilcox, 30 Me. 170.

*Maryland.*— Potomac Steamboat Co. *v.* Harlan, etc., Co., 66 Md. 42, 4 Atl. 903; Osgood *v.* Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317.

*Minnesota.*— Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814.

*Mississippi.*— Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.

*Missouri.*— Carter *v.* Block, 46 Mo. 384; Steel *v.* Brown, 19 Mo. 312.

*New Hampshire.*— Morrill *v.* Wallace, 9 N. H. 111.

*New York.*— Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Hawkins *v.* Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Brown *v.* Tuttle, 66 Barb. 169; Morgan *v.* Powers, 66 Barb. 35;

is especially applicable in cases where such positive affirmation or promise

Sweet *v.* Bradley, 24 Barb. 549; Carley *v.* Wilkins, 6 Barb. 557; Van Wyck *v.* Allen, 6 Daly 376; Jones *v.* Mayer, 16 Misc. 586, 38 N. Y. Suppl. 801; American Writing Mach. Co. *v.* Bushnell, 9 Misc. 462, 30 N. Y. Suppl. 228; Naylor *v.* McSwegan, 2 Misc. 255, 21 N. Y. Suppl. 930; Chase *v.* Nichols, 9 N. Y. Suppl. 878; Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440; Chapman *v.* Murch, 19 Johns. 290, 10 Am. Dec. 227; Cramer *v.* Bradshaw, 10 Johns. 484.

*North Carolina.*— Foggert *v.* Blackweller, 26 N. C. 238.

*North Dakota.*— Hazelton Boiler Co. *v.* Fargo Gas, etc., Co., 4 N. D. 365, 61 N. W. 151.

*Tennessee.*— Kearly *v.* Duncan, 1 Head 397, 73 Am. Dec. 179.

*Texas.*— Blythe *v.* Speake, 23 Tex. 429; Ellis *v.* Riddick, 34 Tex. Civ. App. 256, 78 S. W. 719.

*Vermont.*— Crossman *v.* Johnson, 63 Vt. 333, 22 Atl. 608, 13 L. R. A. 678; Drew *v.* Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122.

*Virginia.*— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865; Mason *v.* Chappell, 15 Gratt. 572.

*Wisconsin.*— King *v.* Graef, 136 Wis. 548, 117 N. W. 1058; Trego *v.* Roosevelt Min. Co., 136 Wis. 315, 117 N. W. 855; Milwaukee Rice Mach. Co. *v.* Hamacek, 115 Wis. 422, 91 N. W. 1010; Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

*England.*— Percival *v.* Oldacre, 18 C. B. N. S. 398, 114 E. C. L. 398; Hort *v.* Newry, 1 L. J. K. B. O. S. 237.

See 43 Cent. Dig. tit. "Sales," § 732.

**Sufficiency of affirmation.**—An affirmation that a horse is not lame, accompanied by the declaration of the owner that he would not be afraid to warrant him, is enough to establish a warranty. Cook *v.* Moseley, 13 Wend. (N. Y.) 277.

**General statements.**—Where the vendor at a public auction sale of a number of horses publicly stated "that all horses which would then and there be offered for sale had been driven single," and that all horses which were not safe to drive single would be specified when sold, if horses were afterward sold without any statement as to whether they were safe to drive single, there was a warranty that they were safe. Ingraham *v.* Union R. Co., 19 R. I. 356, 33 Atl. 875.

**Indirect warranty.**— In McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537, a contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with proper care. If upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc., and it was held that the warranty was not all embraced in the provision that it was "well made, of good material, and durable with proper care," but the contract warranted the machine to "work well."

**As to future event.**—Where A wrote to B that he had a fine steer for sale, and that the steer had a sore under his neck, "but that don't hurt him; it is most well," and B wrote that if the steer was as good as represented he would buy it, and that A might send it, A's statement that the sore would get well amounted to a warranty. Branson *v.* Turner, 77 Mo. 489. And see Ellis *v.* Riddick, 34 Tex. Civ. App. 256, 78 S. W. 719.

**Guaranty to pass inspection.**—A guaranty that the articles shall pass inspection is a warranty of quality of the goods sold. Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

**Acceptance of order.**—Where the buyer offered to purchase iron "quality to be strictly neutral," and the seller's acceptance was in terms "quality of iron to be neutral" there was an express warranty. Philadelphia, etc., Coal, etc., Co. *v.* Hoffman, 1 Pa. Cas. 405, 4 Atl. 848. To the same effect see Groetzinger *v.* Kann, 165 Pa. St. 578, 30 Atl. 1043, 44 Am. St. Rep. 676.

**Sale by brand.**—Where, in an action for the price of "Standard" rubber belting sold in July, 1887, defendants set off a breach of warranty in a lot of belting of the same brand sold them in May, 1886, for which they paid before discovering its worthlessness, and plaintiff claims that it never warranted the "Standard" belting which it claimed to have first put on the market in 1886, an order from defendants in 1885 for good "Standard" belting, "warranted," and plaintiff's invoice describing the belting as "Standard," are admissible to show a warranty as claimed by defendants. Gutta Percha, etc., Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N. W. 28.

**Qualified acceptance.**—Where a buyer ordered one hundred thousand bicycle handle bar stem castings, as per sample submitted, to be made of the best grade of steel suitable for the purpose, and the seller agreed to furnish "100,000 handle bar stem castings to be made of steel," the seller only warranted that the character of the metal used should be steel, and not that it should be of the best grade or suitable for the purpose intended. Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53.

**Qualified warranty.**—Where a fertilizer is warranted "as to its effect on crops only as to the analysis of the state inspector as evidenced by his brand on each and every package," the purchaser takes every risk save that of the genuineness of the inspector's brand. Jackson *v.* Langston, 61 Ga. 392. And see Allen *v.* Young, 62 Ga. 617.

**Indefinite statement.**—Where a firm writes to their agent, with regard to the condition of a lot of hams shipped to the agent, that "there is an occasional ham sour in the marrow," but that the hams as a body were not sour, which letter the agent showed to a proposed buyer of the hams, the statement contained in the letter was too indefinite to constitute a warranty that less than a third of

is made in response to a direct inquiry on the part of the buyer,[28] or in contemplation of the purpose for which the goods are purchased.[29]

(II) *SOUNDNESS.* A direct and positive affirmation that an animal is sound amounts to a warranty of soundness,[30] and so too does an affirmation that the animal is "all right." [31] But a warranty of soundness cannot be predicated on a statement that the animal is a "good" one,[32] or upon a statement that is expressed merely as a matter of judgment, opinion, or belief.[33]

(III) *FITNESS FOR PURPOSE.* Of course a direct affirmation that an article is suitable for the purpose for which it is purchased is a warranty,[34] and so too a warranty may be predicated on a direct affirmation of quality made in con-

the hams were sour in the marrow. Wiggin *v.* Butcher, 154 Mass. 447, 28 N. E. 677.

**Warranty or stipulation as to price.**— Where in a contract for the sale of varnish stipulations as to quality were followed by the words: "Turpentine copal varnish at 65 cts. per gallon; turpentine japan dryer at 55 cts. per gallon," the letter terms were but stipulations as to price, and imported no warranty that the goods delivered should be articles known to the trade by those names, and of a certain standard of quality. De Witt *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896.

**28.** Riddle *v.* Webb, 110 Ala. 599, 18 So. 323; Faust *v.* Koers, 111 Mo. App. 560, 86 S. W. 278; Money *v.* Fisher, 92 Hun (N. Y.) 347, 36 N. Y. Suppl. 862; Blakeman *v.* Mackey, 1 Hilt. (N. Y.) 266. But see Kircher *v.* Conrad, 9 Mont. 191, 23 Pac. 74, 18 Am. St. Rep. 731, 7 L. R. A. 471; Erwin *v.* Maxwell, 7 N. C. 241, 9 Am. Dec. 602.

**Future conduct.**— But an affirmation in response to a question as to past conduct of a horse cannot form the basis of a warranty as to its future conduct. McMaster *v.* Smith, 3 N. Y. St. 481.

**29.** See *infra*, VII, C, 9, e, (III).

**30.** *Alabama.*— Riddle *v.* Webb, 110 Ala. 599, 18 So. 323.

*Delaware.*— Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377.

*Massachusetts.*— Brown *v.* Bigelow, 10 Allen 242.

*Michigan.*— Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917.

*Minnesota.*— Marsh *v.* Webber, 13 Minn. 109.

*Missouri.*— Faust *v.* Koers, 111 Mo. App. 560, 86 S. W. 278.

*Vermont.*— Hobart *v.* Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693.

**Qualified warranty.**—Where the seller warranted the horse to be sound everywhere, except a kick on the leg, this was a qualified warranty. Jones *v.* Cowley, 4 B. & C. 445, 6 D. & R. 533, 3 L. J. K. B. O. S. 263, 10 E. C. L. 653. And see Garment *v.* Baris, 2 Esp. 673.

**Indirect statements.**—Where a note given for the price of a horse stated that it was given for a horse "a little thick-winded," such words did not amount to an express warranty that the horse was sound, and that the little thick-windedness would not hurt it. Bullard *v.* Brewer, 118 Ga. 918, 45 S. E. 711.

**"Warrant and defend."**—A statement in the bill of sale that "I hereby warrant and defend" the property sold is a warranty of soundness. Livingston *v.* Arrington, 28 Ala. 424; Duff *v.* Ivy, 3 Stew. (Ala.) 140. *Contra,* Roseman *v.* Hughey, Rice (S. C.) 437.

**31.** McClintock *v.* Emick, 87 Ky. 160, 7 S. W. 903, 9 Ky. L. Rep. 995; Little *v.* Woodworth, 8 Nebr. 281; Smith *v.* Justice, 13 Wis. 600.

**32.** Matlock *v.* Meyers, 64 Mo. 531; Hardy *v.* Anderson, 7 Kulp (Pa.) 396.

**33.** Lindsay *v.* Davis, 30 Mo. 406; Osborne *v.* McCoy, 107 N. C. 726, 12 S. E. 383; Wason *v.* Rowe, 16 Vt. 525.

**Dealer's talk.**—Where an auctioneer, in offering for sale a lot of sheep, stated that they were "a nice lot of young, sound sheep," the representation did not amount to a warranty. McGraw *v.* Forsythe, 31 Iowa 179.

**34.** Trench *v.* Hardin County Canning Co., 67 Ill. App. 269; Conkling *v.* Standard Oil Co., 138 Iowa 596, 176 N. W. 822; Clarke *v.* Johnson Foundry, etc., Co., 42 S. W. 844, 19 Ky. L. Rep. 973; Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123; Elkins *v.* Kenyon, 34 Wis. 93.

**Intent immaterial.**—Where the sellers of an irrigating pump and plant knew the use for which it was intended, and selected the land and the pump, and expressly represented that it would accomplish the work of irrigation, and warranted the machinery for that purpose, it constitutes a warranty, if the buyer relied thereon, whether or not the seller intended it. Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. 414.

**Substitution of article.**—Where one contracted to sell an engine of a certain make, size, and capacity, with knowledge that it was to be used to run a sawmill, and furnished an engine of another size under a guaranty that the latter would develop the capacity of the engine contracted for, the guaranty must be construed as a warranty that the engine furnished would develop for the particular use the same power as the engine contracted for. Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

**Comparison with other goods.**—A warranty that a machine is capable with proper management of doing as much as other machines of like size and proportions is not an absolute warranty that it is sufficient for a special purpose, but only that it is as fit for the purpose as other machines of like size and proportions. Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478.

templation of the purpose for which it was desired.[35] But no warranty of fitness for purpose is imported by a statement that the article is "good," [36] or that it will be finished in a "first-class workmanlike manner." [37] And a provision in a contract that a machine sold is "to be complete in everything for working" is not an express warranty that the machine would do the work for which it was purchased.[38]

(IV) *Comparison With Sample or Other Goods.* It is a warranty of quality where the seller affirms that the goods sold are equal or superior to other goods of like kind on the market,[39] or that they shall correspond to the sample.[40] So too a warranty of quality is imported in an affirmation that the goods sold shall be equal to certain other goods [41] then being sold to other parties [42] or equal to goods theretofore furnished to the buyer.[43]

**f. Statements as to Title.**[44] An affirmation by the seller that the goods are his or that he is the owner constitutes a warranty of title,[45] and he will be liable

35. *Illinois.*— Crabtree *v.* Kile, 21 Ill. 180; Emrick *v.* Merriman, 23 Ill. App. 24.

*Indiana.*— Street *v.* Chapman, 29 Ind. 142.

*Iowa.*— Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

*Minnesota.*— J. I. Case Threshing Mach. Co. *v.* McKinnon, 82 Minn. 75, 84 N. W. 646; Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814.

*Missouri.*— Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123.

*New York.*— Van Wyck *v.* Allen, 69 N. Y. 61, 25 Am. Rep. 136; Dounce *v.* Dow, 57 N. Y. 16; Day *v.* Pool, 63 Barb. 506 [*affirmed* in 52 N. Y. 416, 11 Am. Rep. 719]; Richardson *v.* Mason, 53 Barb. 601.

*Virginia.*— Herron *v.* Dibrell, 87 Va. 289, 12 S. E. 674.

*Wisconsin.*— Roe *v.* Bacheldor, 41 Wis. 360; Smith *v.* Justice, 13 Wis. 600.

36. Greenthal *v.* Schneider, 52 How. Pr. (N. Y.) 133. And see Strauss *v.* Salzer, 58 Misc. (N. Y.) 573, 109 N. Y. Suppl. 734.

37. Bancroft *v.* San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496, (Cal. 1897) 47 Pac. 684.

38. McGraw *v.* Fletcher, 35 Mich. 104.

39. *Arkansas.*—Buckman *v.* Haney, 11 Ark. 339.

*Illinois.*— Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 [*reversing* 77 Ill. App. 59]; Aultman *v.* Weber, 28 Ill. App. 91.

*Iowa.*— Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784; Stevens *v.* Bradley, 89 Iowa 174, 56 N. W. 429. And see Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.

*New York.*— Cerley *v.* Wilkins, 6 Barb. 557; Parks *v.* Morris Ax, etc., Co., 41 How. Pr. 18.

*Virginia.*— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

*Wisconsin.*— Winkler *v.* Patten, 57 Wis. 405, 15 N. W. 380; Neave *v.* Arntz, 56 Wis. 174, 14 N. W. 41.

But see House *v.* Fort, 4 Blackf. (Ind.) 293.

See 43 Cent. Dig. tit. "Sales," § 735.

**Sale by sample and description.**—Where goods are sold, by sample, and by description as well, with a warranty that they shall correspond with both the description and sample. it is not sufficient that the bulk of the goods correspond with the sample, if they do not also correspond with the description; and the vendee may retain them and rely upon his warranty as to description. Miamisburg Twine, etc., Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175.

**Breach.**— In an action on a warranty guaranteeing that the engine sold was capable, with proper management, of doing as much as other machines of like size and proportions, it was error to submit the question of a breach thereof to the jury on evidence as to the ability of the engine to maintain fifteen horse power, where it was not shown that engines of like size and proportions could maintain fifteen horse power. Trapp *v.* New Birdsall Co., 99 Wis. 458, 75 N. W. 77.

40. Smith *v.* Foote, 81 Hun (N. Y.) 128, 30 N. Y. Suppl. 679; Dike *v.* Reitlinger, 23 Hun (N. Y. 241; Brower *v.* Lewis, 19 Barb. (N. Y.) 574; Russell *v.* Nicolopulo, 8 C. B. N. S. 362, 2 L. T. Rep. N. S. 185, 8 Wkly. Rep. 415, 98 E. C. L. 362; Clark *v.* Schwartz, 2 Wkly. Rep. 16.

41. Brigg *v.* Hilton, 11 Daly (N. Y.) 335.

42. Pearson *v.* Martin, 38 Wis. 265.

43. Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006 [*affirming* 13 N. Y. Suppl. 735]; Empire State Bag Co. *v.* McDermott, 89 N. Y. App. Div. 234, 85 N. Y. Suppl. 787; Moore *v.* King, 57 Hun (N. Y.) 224, 10 N. Y. Suppl. 651 [*affirmed* in 134 N. Y. 596, 31 N. E. 624]; Bagley *v.* Cleveland Rolling-Mill Co., 21 Fed. 159; Allan *v.* Lake, 18 Q. B. 560, 83 E. C. L. 560.

**Implied warranty from sale by sample** see *infra*, VII, D, 6, e, (VI).

44. **Implied warranty** of title see *infra*, VII, D, 6, b.

45. Balte *v.* Bedemiller, 37 Oreg. 27, 60 Pac. 601, 82 Am. St. Rep. 737; Medina *v.* Stoughton, 1 Ld. Raym. 593, 91 Eng. Reprint 1297.

**Property not in seller's possession.**—Where a bill of sale conveys all right, title, and interest in a liquor-tax certificate, the seller expressly warrants the sale, although the certificate was not at the time in his possession. Frank *v.* Forgotston, 30 Misc. (N. Y.) 816, 61 N. Y. Suppl. 1118 [*reversed* on other grounds in 31 Misc. 726, 65 N. Y. Suppl. 229].

on his warranty, although the purchaser knew the title was not perfect.[46] A warranty of title cannot, however, be predicated on a recital "I have sold," [47] or on the words "warrant and defend," nor the words "warrant to be good, sound property, and healthy." [48] So it has been held that a recital in a conveyance of a street railway franchise that it was "duly given" by the city council does not amount to an express warranty that the seller had good title to the franchise conveyed.[49]

**g. Statements as to Value.** While representations as to value are usually regarded as "dealer's talk," [50] value may nevertheless be made the subject of warranty in a sale;[51] and if the seller makes a representation as to value which is intended as a warranty, and it enters as a constituent element into the transaction, it will then become a part of the contract and may be enforced as a warranty.[52] But a statement as to quality is not a warranty of value.[53]

**h. Statements as to Quantity.** Statements as to the weight or quantity of the goods are usually regarded as mere expressions of opinion and not as warranties.[54] Such statements may, however, constitute warranties if expressions are used showing an intent on the part of the seller to bind himself by the statements.[55]

**D. Implied Warranties — 1. In General.** Under proper circumstances

46. Neville *v.* Hughes, 104 Mo App. 455, 79 S. W. 735.

47. Bayse *v.* Briscoe, 13 B. Mon. (Ky.) 474.

48. Cowan *v.* Silliman, 15 N. C. 46.

49. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

50. Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228. And see Picard *v.* McCormick, 11 Mich. 68.

51. Picard *v.* McCormick, 11 Mich. 68.

52. Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228.

**Value of shares.**—Where at the time of transfer of bank stock to plaintiff as part of the price of land conveyed by him, the grantee stated that the bank was organized under the laws of Pennsylvania; that the stock was worth one hundred cents on the dollar; and that it was good, high dividend paying stock, the statement was an express warranty that the stock was worth its face value, and that the bank was duly organized as stated. Titus *v.* Poole, 73 Hun (N. Y.) 383, 26 N. Y. Suppl. 451 [*affirmed* in 145 N. Y. 414, 40 N. E. 228].

**Desirability of shares as investment.**—Representations of fact as to the property of an oil company, its productiveness, and other conditions relating to the value and desirability of its shares as an investment, are proper elements of a warranty in the sale of the stock, and are not objectionable, as relating to property other than the thing sold. Phillips *v.* Crosby, 69 N. J. L. 612, 55 Atl. 814.

**Ambiguous statement.**—A contract providing for the exchange of a stock of merchandise for real estate, the stock to be invoiced "as per the following mark," is sufficiently indefinite and ambiguous to justify the refusal of an instruction that such provision was a warranty that the goods actually cost what they were marked. Webb *v.* Steiner, 113 Mo. App. 482, 87 S. W. 618.

**Price.**—A statement as to the cost is not a warranty that the price so fixed was the price actually paid by the seller. Mason *v.* Thornton, 74 Ark. 46, 84 S. W. 1048.

**Sale of shares of stock.**—The owners of stock in a very large and growing corporation gave an option for the purchase of the stock. The option was given on Feb. 24, 1899, and was dated Feb. 1, 1899, and recited that the corporation was the owner of the assets and indebted to the amount shown in an annexed schedule; but appended to the schedule was a paper entitled "Explanatory Notes," which stated that the schedule was prepared from the balance sheet of April, 1898, and corresponded therewith, except that the bills payable had been increased and might thereafter be increased according to the requirements of the business, and except as to the statement of the values of certain stocks and good-will, and as to the value of certain patents belonging to the company. There was evidence that the sellers had stated, before the option was accepted, that they could not and did not intend any warranty of the floating indebtedness. It was held that the recital, schedule, and the explanatory notes did not amount to a warranty. Worthington *v.* Herrmann, 89 N. Y. App. Div. 627, 88 N. Y. Suppl. 76 [*affirmed* in 180 N. Y. 559, 73 N. E. 1134].

53. Gingles *v.* Caldwell, 21 Ala. 444; Lightburn *v.* Cooper, 1 Dana (Ky.) 273.

54. Rice *v.* Codman, 1 Allen (Mass.) 377; Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762; Montreal River Lumber Co. *v.* Mihills, 80 Wis. 540, 50 N. W. 507; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622.

"Say about" are words of estimate only and do not amount to a warranty of quantity. McConnel *v.* Murphy, L. R. 5 P. C. 203, 28 L. T. Rep. N. S. 713, 21 Wkly. Rep. 609. See also Bourne *v.* Seymour, 16 C. B. 337, 1 Jur. N. S. 1001, 24 L. J. C. P. 202, 3 Wkly. Rep. 511, 81 E. C. L. 337.

55. Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762. See also Whitney *v.* Thatcher, 117 Mass. 523, holding that a

unless excluded by the existence of express warranties,[56] or other terms of the contract,[57] certain warranties may be implied in a complete contract of sale, whether oral or written,[58] except sales by public or quasi-public officers.[59] The implication of a warranty must, however, rest on rules of law and cannot be based on custom or usage.[60]

**2. Effect of Custom or Usage.**[61] Although it has been held in some cases that a warranty may be implied by custom,[62] the decided weight of authority is to the effect that a warranty will not be implied by usage or custom when none is implied by the common law,[63] nor can custom or usage be shown against a warranty implied by law.[64] To permit this to be done, it has been said, would be extremely pernicious in its consequences and render vague and uncertain all the rules of law on the sale of chattels.[65] Custom or usage may, however, be resorted to to explain a warranty implied by law,[66] and show its extent.[67]

**3. Written Contracts.** While it has been held in some instances that no warranty will be implied when the contract of sale is in writing,[68] most of the cases involved the question of quality and must therefore be regarded as mere variations of statement of the general rule,[69] although on the theory that it is in the nature of an addition by parol to a written contract the principle has been applied to other warranties.[70] Certainly the general rule is well established by authority that warranties may be implied when the contract is in writing as well as when it is oral,[71] and especially has the rule been asserted as to the implied warranty of title.[72]

provision, in a contract of sale of two hundred and fifty gunny bags to arrive by ship, that they shall "average four hundred and forty pounds gross per bale, or no sale, buyer's option," was a warranty only against deficiency in weight, and the contract was not voidable on account of their averaging nearly four hundred and fifty pounds.

**56.** See *infra*, VII, D, 4.

**57.** See *infra*, VII, D, 5.

**58.** See *infra*, VII, D, 3.

**59.** Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Evans *v.* Dendy, 2 Speers (S. C.) 9, 42 Am. Dec. 356; O'Neall *v.* Abney, 2 Bailey (S. C.) 317; Road Com'rs *v.* Macon, 2 Brev. (S. C.) 105; Prescott *v.* Holmes, 7 Rich. Eq. (S. C.) 9. But see Deloach *v.* Elder, 14 La. Ann. 662.

**60.** See *infra*, VII, D, 2.

**61.** **Customs and usages** generally see Customs and Usages, 28 Cyc. 1028.

**62.** Sumner *v.* Tyson, 20 N. H. 384; Fatman *v.* Thompson, 2 Disn. (Ohio) 482; Snowden *v.* Warder, 3 Rawle (Pa.) 101 [*overruled* in Coxe *v.* Heisley, 19 Pa. St. 243]; Morley *v.* Attenborough, 3 Exch. 500, 13 Jur. 282, 18 L. J. Exch. 148; Jones *v.* Bowden, 4 Taunt. 847, 14 Rev. Rep. 683.

**63.** *Kentucky.*—Baird *v.* Matthews, 6 Dana 129.

*Massachusetts.*— Dodd *v.* Farlow, 11 Allen 426, 87 Am. Dec. 726; Dickinson *v.* Gay, 7 Allen 29, 83 Am. Dec. 656.

*New York.*—Thompson *v.* Ashton, 14 Johns. 316.

*Pennsylvania.*— Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220.

*United States.*— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987.

See 43 Cent. Dig. tit. "Sales," § 745.

**64.** Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547; Whitmore *v.* South Boston Iron Co., 2 Allen (Mass.) 52.

**65.** Thompson *v.* Ashton, 14 Johns. (N. Y.) 316.

**66.** Baird *v.* Matthews, 6 Dana (Ky.) 129; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383, 19 L. ed. 987.

**67.** Baird *v.* Matthews, 6 Dana (Ky.) 129.

**68.** Walker *v.* Johnson, 116 Ill. App. 145; Ramming *v.* Caldwell, 43 Ill. App. 175.

**69.** See *infra*, VII, D, 6, e.

**70.** Sparks *v.* Messick, 65 N. C. 440, involving warranty of title.

**71.** *Georgia.*— Elgin Jewelry Co. *v.* Estes, 122 Ga. 807, 50 S. E. 939.

*Iowa.*— Ideal Heating Co. *v.* Kramer, 127 Iowa 137, 102 N. W. 840; Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

*New York.*— Cooper *v.* Payne, 103 N. Y. App. Div. 118, 93 N. Y. Suppl. 69 [*reversed* on other grounds in 186 N. Y. 334, 78 N. E. 1075].

*South Carolina.*— Wood *v.* Ashe, 3 Strobh. 64.

*Tennessee.*— Topp *v.* White, 12 Heisk. 165; Word *v.* Cavin, 1 Head 506.

*Wisconsin.*—Boothby *v.* Scales, 27 Wis. 626; Merriam *v.* Field, 24 Wis. 640.

*England.*— Shepherd *v.* Pybus, 11 L. J. C. P. 101, 3 M. & G. 868, 4 Scott N. R. 434, 42 E. C. L. 452.

**72.** Miller *v.* Van Tassel, 24 Cal. 459; Sanborn *v.* Jackman, 60 N. H. 569; Topp *v.* White, 12 Heisk. (Tenn.) 165; Word *v.* Cavin, 1 Head (Tenn.) 506; Trigg *v.* Faris, 5 Humphr. (Tenn.) 343. *Contra*, Sparks *v.* Messick, 65 N. C. 440.

**Assignment of bill of sale.**—Where a bill of sale is assigned the assignor may be liable on an implied warranty of title. Shattuck *v.* Green, 104 Mass. 42.

**4. Exclusion by Express Warranty.**[73] An express warranty will exclude an implied warranty on the same or a closely related subject.[74] Thus an express warranty of quality will exclude an implied warranty of fitness for the purpose intended.[75] But an express warranty on one subject does not exclude an implied warranty on an entirely different subject.[76] And so an express warranty of title will not exclude an implied warranty of soundness[77] or an implied warranty of

**73. Exclusion of oral warranty by express warranty** see *supra*, VII, C, 7.

**74.** *Alabama.*— Barnes *v.* Blair, 16 Ala. 71.

*California.*—Kullman *v.* Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 Pac. 369.

*Georgia.*— Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143; Holcomb *v.* Cable Co., 119 Ga. 466, 46 S. E. 671; Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854; Johnson *v.* Latimer, 71 Ga. 470; Stimpson Computing Scale Co. *v.* Taylor, 4 Ga. App. 567, 61 S. E. 1131; De Loach Mill Mfg. Co. *v.* Tutweiler Coal, etc., Iron Co., 2 Ga. App. 493, 58 S. E. 790.

*Illinois.*— White *v.* Gresham, 52 Ill. App. 399.

*Indiana.*—Sullivan Mach. Co. *v.* Breeden, 40 Ind. App. 631, 82 N. E. 107.

*Iowa.*— Bucy *v.* Pitts Agricultural Works, 89 Iowa 464, 56 N. W. 541; Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

*Kentucky.*—Coffman *v.* Allin, Litt. Sel. Cas. 200; Guhy *v.* Nichols, etc., Co., 109 S. W. 1190, 33 Ky. L. Rep. 237; Gaar *v.* Hodges, 90 S. W. 580, 28 Ky. L. Rep. 889.

*Michigan.*— McGraw *v.* Fletcher, 35 Mich. 104.

*New Hampshire.*—Deming *v.* Foster, 42 N. H. 165.

*New York.*— Carleton *v.* Lombard, 72 Hun 254, 25 N. Y. Suppl. 570.

*North Carolina.*— Lanier *v.* Auld, 5 N. C. 138, 3 Am. Dec. 680.

*South Carolina.*—Stucky *v.* Clyburn, Cheves 186, 34 Am. Dec. 590; McLaughlin *v.* Horton, 1 Hill 383.

*Wisconsin.*— Walton *v.* Cody, 1 Wis. 420.

*United States.*— Buckstaff *v.* Russell, 79 Fed. 611, 25 C. C. A. 129; Sleeper *v.* Wood, 60 Fed. 888, 9 C. C. A. 289.

See 43 Cent. Dig. tit. "Sales," § 760.

**Scope of warranty.**— Guaranty by a seedsman that oats sold by him for seeding purposes were "in good condition, choice stock, and well cleaned" did not amount to a guaranty that they were free from mustard seed so as to exclude an implied warranty. Bell *v.* Mills, 78 N. Y. App. Div. 42, 80 N. Y. Suppl. 34.

**Provisions.**—Where plaintiffs entered into an agreement with the East Indian Company for the conveyance of troops to Bombay, and defendant undertook to supply plaintiffs with troop stores, "guaranteed to pass survey of the East India Company's officers," this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended. Bigge *v.* Parkinson, 7 H. & N. 955, 8 Jur. N. S. 1014, 31 L. J. Exch. 301, 7 L. T. Rep. N. S. 92, 10 Wkly. Rep. 349.

**Limitation as to warranty.**—A written warranty that the goods are warranted only against breakage caused by manifest defects in material excludes all other warranties of quality. Dowagiac Mfg. Co. *v.* Mahon, 13 N. D. 516, 101 N. W. 903.

**Agreement to replace.**—Where a contract for the sale of a buggy sold by description provided that if, on account of defective material, any part of the vehicle should break within a specified time, the seller would replace it, such provision did not deprive the purchaser of his rights under the warranty of quality implied on the sale. Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183. So too a provision in a written contract for the sale of jewelry that if any of the articles failed to wear satisfactorily they would be replaced within five years, although headed with the word "warranty," is not an express warranty which will exclude an implied warranty of merchantability. Elgin Jewelry Co. *v.* Estes, 122 Ga. 807, 50 S. E. 939.

**75.** *Georgia.*— Johnson *v.* Latimer, 71 Ga. 470; De Loach Mill Mfg. Co. *v.* Tutweiler Coal, etc., Iron Co., 2 Ga. App. 493, 58 S. E. 790.

*Indiana.*—Reeves *v.* Byers, 155 Ind. 535, 58 N. E. 713.

*Iowa.*— Berthold *v.* Seevers Mfg. Co., 89 Iowa 506, 56 N. W. 669.

*Michigan.*— McGraw *v.* Fletcher, 35 Mich. 104.

*Minnesota.*— Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359.

*Missouri.*— Walter A. Wood Mowing, etc., Mach. Co. *v.* Bobbst, 56 Mo. App. 427; Boyer *v.* Neel, 50 Mo. App. 26; International Pavement Co. *v.* Smith, etc., Mach. Co., 17 Mo. App. 264.

*Nebraska.*— Smith *v.* Evans, 13 Nebr. 314, 14 N. W. 406.

*New York.*— Prentice *v.* Dike, 6 Duer 220.

*Wisconsin.*—Dwight Bros. Paper Co. *v.* Western Paper Co., 114 Wis. 414, 90 N. W. 444; J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013; Milwaukee Boiler Co *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

*United States.*— DeWitt *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896.

See 43 Cent. Dig. tit. "Sales," § 760.

**76.** Wilcox *v.* Owens, 64 Ga. 601; Ideal Heating Co. *v.* Kramer, 127 Iowa 137, 102 N. W. 840; Bucy *v.* Pitts Agricultural Works, 89 Iowa 464, 56 N. W. 541; Aultman *v.* Hunter, 82 Mo. App. 632; Boothby *v.* Scales, 27 Wis. 626. And see Hawley Down Draft Furnace Co. *v.* E. Van Winkle Gin, etc., Works, 4 Ga. App. 85, 60 S. E. 1008.

**77.** Castellano *v.* Peillon, 2 Mart. N. S. (La.) 466; Trimmier *v.* Thomson, 10 S. C. 164; Wood *v.* Ashe, 3 Strobh. (S. C.) 64;

merchantability.[78] Nor does an express warranty of quality exclude an implied warranty of title,[79] or an express warranty that the article should be in good order exclude an implied warranty of fitness for the purpose intended.[80] So where the buyer waives an express warranty he may rely on the warranty implied by law.[81]

**5. Refusal to Warrant.** When the seller has expressly refused to give a warranty, no warranty can be implied by law.[82]

**6. Subjects of Implied Warranty — a. In General.** Generally speaking an implied warranty may arise as to any subject relating to the property sold, such as the title,[83] merchantability,[84] fitness for purpose intended,[85] and genuineness of the article sold.[86] So too there is a general warranty implied that goods to be manufactured shall fill the terms of the contract.[87] There is not, however, as a rule any implied warranty of quality,[88] or value,[89] or even of quantity;[90] but if the goods are to be paid for by weight as determined by the seller's scales there is an implied warranty that the scales shall be lawful scales.[91] In the case of a sale of a crop to be produced, no warranty of its continued existence will be implied.[92]

**b. Title**[93] — (i) *In General.* By the early English rule no warranty of title was implied in a sale;[94] but in later decisions it was recognized that the doctrine

Banks *v.* Hughes, 1 McCord 537; Wells *v.* Spears, 1 McCord (S. C.) 421; Houston *v.* Gilbert, 3 Brev. (S. C.) 63, 5 Am. Dec. 542.

**78.** Merriam *v.* Field, 24 Wis. 640.

**79.** Lanier *v.* Aulds, 5 N. C. 138, 3 Am. Dec. 680.

**80.** Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

**81.** Parsons Band-Cutter, etc., Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580, holding that where a contract of sale provided that the machine sold must be paid for before delivery in order that an express warranty contained in the contract should become effective, and delivery was made by the seller before payment was demanded, and the buyer refused to settle until after a trial of the machine, the seller acquiescing, there was a waiver of the express warranty, and the buyer could rely upon the warranty, implied by law, that the machine was adapted to the use intended. *Contra*, Guhy *v.* Nichols, etc., Co., 109 S. W. 1190, 33 Ky. L. Rep. 237.

**82.** *Arkansas.*— Hartin Commission Co. *v.* Pelt, 76 Ark. 177, 88 S. W. 929.

*Illinois.*—Fauntleroy *v.* Wilcox, 80 Ill. 477.

*Iowa.*— Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678.

*Minnesota.*— Lynch *v.* Curfman, 65 Minn. 170, 68 N. W. 5.

*Mississippi.*—Hutcheson *v.* Minis, 7 Sm. & M. 388.

*New York.*—Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835.

*South Carolina.*— Boinest *v.* Leignez, 2 Rich. 464; Farr *v.* Gist, 1 Rich. 68; Habersham *v.* Rodrigues, 1 Speers 314; McLean *v.* Green, 2 McMull. 17; Smith *v.* State Bank, Riley Eq. 113.

*Texas.*— See Wood *v.* Ross, (Civ. App. 1894) 26 S. W. 148, holding that on a sale of a stallion, where a contract contains no express warranty and states that he is "in bad fix" no warranty will be implied.

*United States.*—Moore *v.* The Charles Morgan, 17 Fed. Cas. No. 9,754.

See 43 Cent. Dig. tit. "Sales," § 761.

**What constitutes a refusal.**—Where, on the sale of a negro, the vendor executed a bill of sale, warranting the title, but refusing to insert a clause of warranty as to soundness, saying "that he never required it when he bought, and would not insert it when sold," and "that the price was a good one, and sufficient evidence that he thought the negro sound," the court refused to disturb a verdict for plaintiff in an action for an implied warranty. Habersham *v.* Rodrigues, 1 Speers (S. C.) 314.

**Limitation of warranty.**—Where a contract for the sale of second-hand machinery was written on a blank form which was used by the seller for the sale of both new and second-hand machinery, the fact that a printed warranty therein declared that it did not apply to second-hand machinery, or machines which were not manufactured by the seller, did not preclude the existence of an implied warranty of suitableness, the machine having been purchased for a specific purpose to the seller's knowledge. New Birdsall Co. *v.* Keys, 99 Mo. App. 458, 74 S. W. 12.

**83.** See *infra*, VII, D, 6, b.

**84.** See *infra*, VII, D, 6, d.

**85.** See *infra*, VII, D, 6, e, (III).

**86.** See *infra*, VII, D, 6, c.

**87.** Field *v.* Kinnear, 4 Kan. 476.

**88.** See *infra*, VII, D, 6, e.

**89.** Jones *v.* Garlington, 44 S. C. 533, 22 S. E. 741; Colburn *v.* Matthews, 1 Strobh. (S. C.) 232.

**90.** Davis *v.* Murphy, 14 Ind. 158; Nester *v.* Michigan Land, etc., Co., 69 Mich. 290, 37 N. W. 278.

**91.** Clifton *v.* Sparks, 82 Mo. 115.

**92.** Losecco *v.* Gregory, 108 La. 648, 32 So. 985; Howell *v.* Coupland, 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. Rep. N. S. 832, 24 Wkly. Rep. 470.

**93.** Express warranty of title see *supra*, VII, C, 9, f.

**94.** Morley *v.* Attenborough, 3 Exch. 500, 13 Jur. 282, 18 L. J. Exch. 148. So nu-

of *caveat emptor* did not make it incumbent on the vendee to inquire into the title,[95] and that in the case of goods sold in open shop there is an implied warranty of title.[96] The general rule both in England and this country is now well established that on a sale of goods there is an implied warranty of title,[97] especially if the sale is for a fair price,[98] and the goods are in the possession of the seller at the

merous were the exceptions recognized in this case that Lord Campbell said in Sims *v.* Marryat, 17 Q. B. 281, 79 E. C. L. 281, the exceptions "well nigh eat up the rule."

**95.** Allen *v.* Hopkins, 13 L. J. Exch. 316, 13 M. & W. 94.

**96.** Eichholz *v.* Bannister, 17 C. B. N. S. 708, 11 Jur. N. S. 15, 34 L. J. C. P. 105, 12 L. T. Rep. N. S. 76, 13 Wkly. Rep. 96, 112 E. C. L. 708. See also Snell *v.* Bickley, 2 F. & F. 56. In Baguely *v.* Hawley, L. R. 2 C. P. 625, 36 L. J. C. P. 328, 17 L. T. Rep. N. S. 116, one of the judges adhered to the doctrine that there was no implied warranty of title but the decision was based on other grounds.

**97.** *Alabama.*—Williamson *v.* Sammons, 34 Ala. 691; Ricks *v.* Dillahunty, 8 Port. 133; Cozzins *v.* Whitaker, 3 Stew. & P. 322.

*Connecticut.*— Starr *v.* Anderson, 19 Conn. 338.

*Florida.*— Lines *v.* Smith, 4 Fla. 47.

*Georgia.*— Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

*Illinois.*— Morris *v.* Thompson, 85 Ill. 16; Woodruff *v.* Thorne, 49 Ill. 88; Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Linton *v.* Porter, 31 Ill. 107.

*Indiana.*— Marshall *v.* Duke, 51 Ind. 62.

*Kentucky.*— Chancellor *v.* Wiggins, 4 B. Mon. 201, 39 Am. Dec. 499.

*Michigan.*— White *v.* Robinson, 50 Mich. 73, 14 N. W. 704.

*Minnesota.*— Johnston *v.* Laybourin, 56 Minn. 332, 57 N. W. 933.

*New Hampshire.*— Sargent *v.* Currier, 49 N. H. 310, 6 Am. Rep. 524.

*New Jersey.*— Gould *v.* Bourgeois, 51 N. J. L. 361, 18 Atl. 64; Stoutenborough *v.* Haviland, 15 N. J. L. 266.

*New York.*—Edick *v.* Crimm, 10 Barb. 445; Bechet *v.* Smithers, 50 N. Y. Super. Ct. 381; Beckmann *v.* Bormann, 3 E. D. Smith 409; Smith *v.* Ruggles, 3 N. Y. Suppl. 329; Heermance *v.* Vernoy, 6 Johns. 5; Defreeze *v.* Trumper, 1 Johns. 274, 3 Am. Dec. 329; Carman *v.* Trude, 25 How. Pr. 440.

*Oklahoma.*— Clevenger *v.* Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. N. S. 410.

*Pennsylvania.*— Whitaker *v.* Eastwick, 75 Pa. St. 229; Bixler *v.* Saylor, 68 Pa. St. 146; Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 653; Dorsey *v.* Jackman, 1 Serg. & R. 42, 7 Am. Dec. 611; Boyd *v.* Bopst, 2 Dall. 91, 1 L. ed. 302; Wilson *v.* Belles, 22 Pa. Super. Ct. 477; Beidler *v.* Miller, 1 Woodw. 222.

*South Carolina.*— Moore *v.* Lanham, 3 Hill 299; Colcock *v.* Goode, 3 McCord 513.

*Tennessee.*— Word *v.* Cavin, 1 Head 506; Charlton *v.* Lay, 5 Humphr. 496; Gookin *v.* Graham, 5 Humphr. 480; Trigg *v.* Faris, 5 Humphr. 343.

*Vermont.*— Sherman *v.* Champlain Transp. Co., 31 Vt. 162; Strong *v.* Barnes, 11 Vt. 221, 34 Am. Dec. 684.

*United States.*— Gaylor *v.* Copes, 16 Fed. 49, 4 Woods 158.

*England.*— Raphael *v.* Burt, Cab. & E. 325.

*Canada.*— Dickie *v.* Dunn, 1 Northwest. Terr. 83; McFatridge *v.* Robb, 24 Nova Scotia 506.

See 43 Cent. Dig. tit. "Sales," § 749.

**Contra.**— O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

**Under the Georgia code,** if the contract of sale does not contain an express warranty of title the law implies one. Elgin Jewelry Co. *v.* Estes, 122 Ga. 807, 50 S. E. 939; Rice *v.* Lockhart, 3 Ga. App. 741, 60 S. E. 357; Lovvorn *v.* Eldorado Jewelry Co., 1 Ga. App. 349, 57 S. E. 926.

**Good faith** on the part of the seller in an unqualified sale does not relieve him from his liability on his implied warranty of title. Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440.

**Sale of attached judgment.**— One who, on recovering judgment in an action in which he has attached a judgment held by defendant against a third person, agrees with another to bid in, at his risk, the judgment at execution sale for the full amount of his own judgment, and transfers the title so obtained to such other for the amount of his judgment and costs of execution sale, impliedly warrants a valid title to the judgment so bid in. Flandrow *v.* Hammond, 148 N. Y. 129, 42 N. E. 511.

**Payment of duties.**—With reference to a sale of imported goods, made at a time when the port at which the sale was made was in the occupation of military forces in insurrection against the United States, by whom the collection of duties had been for a long period interrupted, the presumption is that the parties contracted with reference to the state of affairs existing at the time, and that the seller did not warrant that the duties had been paid. Snodgrass *v.* Adams, 21 La. Ann. 136.

**Rights of bona fide purchaser.**— In an action on an implied warranty of title, a *bona fide* second purchaser may recover from the vendor the value of the chattels reclaimed from him by a prior purchaser, who, having procured the sale to himself by fraudulent representations, has obtained possession of part thereof, provided the vendor had done nothing to disaffirm such prior purchaser's title on the ground of the fraud. Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57.

**Title subsequently acquired** by the seller inures to the benefit of the buyer. Fowles *v.* Vallandigham, 43 Ill. 269.

**98.** *Kansas.*—Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225.

time of the sale,[99] unless it clearly appears that the seller intended to transfer only such interest in the goods as he might have.[1]

(II) *Possession of Seller.* In most jurisdictions a distinction has been made between cases where the goods are in possession of the seller and those where they are not,[2] it being stated as the rule that a warranty of title is implied when the goods are in possession of the seller at the time of sale,[3] the implication resting on the theory that possession is equivalent to an affirmation of title.[4] But even the presumption raised by possession must yield if there are other facts putting the purchaser on inquiry.[5] According to the weight of authority no such warranty will be implied if he is not in possession.[6] In such cases the maxim

*Mississippi.*— Long *v.* Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118.

*New Jersey.*— Beninger *v.* Corwin, 24 N. J. L. 257.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220.

*Wisconsin.*— Lane *v.* Romer, 2 Pinn. 404, 2 Chandl. 61.

See 43 Cent. Dig. tit. "Sales," § 749.

99. See *infra*, VII, D, 6, b, (II).

1. *Kansas.*— Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225.

*Massachusetts.*— Stratton *v.* Hill, 134 Mass. 27.

*New Jersey.*— Gould *v.* Bourgeois, 51 N. J. L. 361, 18 Atl. 64.

*New York.*— Cohn *v.* Ammidown, 120 N. Y. 398, 24 N. E. 944.

*Tennessee.*—Gookin *v.* Graham, 5 Humphr. 480.

*Vermont.*— Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

*West Virginia.*— Cogar *v.* Burns Lumber Co., 46 W. Va. 256, 33 S. E. 219.

*Canada.*— Dickie *v.* Dunn, 1 Northwest. Terr. 83.

See 43 Cent. Dig. tit. "Sales," § 749.

2. 2 Kent Comm. 478. The distinction, although upheld in Medina *v.* Stoughton, 1 Ld. Raym. 593, 91 Eng. Reprint 1297, was repudiated in Morley *v.* Attenborough, 3 Exch. 500, 13 Jur. 282, 18 L. J. Exch. 148; Pasley *v.* Freeman, 3 T. R. 51, 1 Rev. Rep. 634, 100 Eng. Reprint 450, and Eichholz *v.* Bannister, 17 C. B. N. S. 708, 11 Jur. N. S. 15, 34 L. J. C. P. 105, 12 L. T. Rep. N. S. 76, 13 Wkly. Rep. 96, 112 E. C. L. 708.

3. *Arkansas.*— Boyd *v.* Whitfield, 19 Ark. 447.

*California.*— Gross *v.* Kierski, 41 Cal. 111.

*Kansas.*— Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225.

*Maine.*— Maxfield *v.* Jones, 76 Me. 135; Huntingdon *v.* Hall, 36 Me. 501, 58 Am. Dec. 765.

*Massachusetts.*— Stratton *v.* Hill, 134 Mass. 27; Whitney *v.* Heywood, 6 Cush. 82.

*Michigan.*— Hunt *v.* Sackett, 31 Mich. 18.

*Minnesota.*— Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694; Davis *v.* Smith, 7 Minn. 414.

*Mississippi.*— Storm *v.* Smith, 43 Miss. 497; Long *v.* Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118.

*Missouri.*— Robinson *v.* Rice, 20 Mo. 229; Dryden *v.* Kellogg, 2 Mo. App. 87.

*New York.*— Cohn *v.* Ammidown, 120 N. Y. 398, 24 N. E. 944; McCoy *v.* Artcher, 3 Barb. 323; Bechet *v.* Smithers, 50 N. Y. Super. Ct. 381.

*North Carolina.*— Lanier *v.* Auld, 5 N. C. 138, 3 Am. Dec. 680.

*Tennessee.*— Topp *v.* White, 12 Heisk. 165; Word *v.* Cavin, 1 Head 506.

*Washington.*— Baker *v.* McAllister, 2 Wash. Terr. 48, 3 Pac. 581.

*West Virginia.*— Jarrett *v.* Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Byrnside *v.* Burdett, 15 W. Va. 702.

*Wisconsin.*— Edgerton *v.* Michaels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

*United States.*— Houser *v.* U. S., 39 Ct. Cl. 508; Deatz *v.* U. S., 38 Ct. Cl. 355.

See 43 Cent. Dig. tit. "Sales," § 750.

Presumption.— In the absence of evidence to the contrary the possession of the seller will be presumed. Long *v.* Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118.

4. Shattuck *v.* Green, 104 Mass. 42; McCoy *v.* Artcher, 3 Barb. (N. Y.) 323.

5. Bergen *v.* Riggs, 34 Ill. 170, 85 Am. Dec. 304.

6. *Indiana.*— Norton *v.* Hooten, 17 Ind. 365; Lackey *v.* Stouder, 2 Ind. 376.

*Mississippi.*— Storm *v.* Smith, 43 Miss. 497; Long *v.* Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118.

*Montana.*— Budd *v.* Power, 8 Mont. 380, 20 Pac. 820.

*New York.*— Scranton *v.* Clark, 39 Barb. 273 [*affirmed* in 39 N. Y. 220, 100 Am. Dec. 430]; Edick *v.* Crim, 10 Barb. 445; McCoy *v.* Artcher, 3 Barb. 323.

*Tennessee.*— Word *v.* Cavin, 1 Head 506; Scott *v.* Hix, 2 Sneed 192, 62 Am. Dec. 458.

*West Virginia.*— Byrnside *v.* Burdett, 15 W. Va. 702.

See 43 Cent. Dig. tit. "Sales," § 750.

Property in custodia legis.—An assignment of a right to personal property, then under an execution, carries with it no warranty of title. Hopkins *v.* Grinnell, 28 Barb. (N. Y.) 533.

In New Jersey it has been said that possession is merely a circumstance to be taken into consideration in determining whether there was an implied warranty of title or whether the seller intended to transfer merely his interest, no real distinction existing between the cases where there was and where there was no possession. Gould *v.* Bourgeois, 51 N. J. L. 361, 18 Atl. 64.

*caveat emptor* applies.[7] It is, however, conceded that a constructive possession is sufficient.[8]

(III) *KNOWLEDGE OF DEFECTS.* If the buyer has knowledge of the defects in the seller's title no warranty will be implied,[9] but the mere fact that the buyer knows the source of the seller's title does not charge him with notice of defects.[10] The theory of the rule is that the seller knows his title better than the buyer can possibly know it, and this is sufficient to support the implied warranty.[11] Similarly the buyer's knowledge of the existence of an apparent encumbrance does not charge him with notice that the encumbrance will ripen into a paramount title.[12]

(IV) *SALE OF PATENTED ARTICLE.* On the sale of a patented article there is an implied warranty of title,[13] or of the right of the buyer to use the same without eviction.[14]

(V) *OFFICIAL SALES.* No warranty of title is implied in official sales, such as sales by a judicial officer, sheriff, or auctioneer,[15] or by an executor, administrator, or trustee.[16]

**c. Genuineness.** There is implied a warranty of genuineness on a sale of notes,[17] bonds,[18] or other securities.[19] There is, however, no implied warranty that municipal officers who issued the securities sold had lawful authority to do so.[20]

7. Norton *v.* Hooten, 17 Ind. 365; Long *v.* Hickingbottom, 28 Miss. 772, 64 Am. Dec. 118; Scranton *v.* Clark, 39 Barb. (N. Y.) 273 [*affirmed* in 39 N. Y. 220, 100 Am. Dec. 430].

8. Shattuck *v.* Green, 104 Mass. 42; Whitney *v.* Heywood, 6 Cush. (Mass.) 82; Budd *v.* Power, 9 Mont. 99, 22 Pac. 499.

9. Sibley *v.* Beard, 5 Ga. 550; Turriff *v.* McHugh, 1 Northwest. Terr. 186.

10. Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225; Davis *v.* Smith, 7 Minn. 414.

11. Davis *v.* Smith, 7 Minn. 414.

12. Ranney *v.* Meisenheimer, 61 Mo. App. 434; Dresser *v.* Ainsworth, 9 Barb. (N. Y.) 619.

13. Sanborn *v.* Jackman, 60 N. H. 569; Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec. 583.

14. Pacific Iron Works *v.* Newhall, 34 Conn. 67; Electro-Dynamic Co. *v.* The Electron, 56 Fed. 304. But see Hall *v.* Conder, 2 C. B. N. S. 22, 3 Jur. N. S. 366, 26 L. J. C. P. 138, 89 E. C. L. 22 [*affirmed* in 2 C. B. N. S. 53, 3 Jur. N. S. 963, 26 L. J. Ch. 288, 5 Wkly. Rep. 742, 89 E. C. L. 53].

15. The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174; Chapman *v.* Speller, 14 Q. B. 621, 14 Jur. 25, 19 L. J. Q. B. 239, 68 E. C. L. 621. And see Peto *v.* Blades, 5 Taunt. 657, 15 Rev. Rep. 609, 1 E. C. L. 338.

**Sale by claimant.**—A sale by a claimant, who has given bond to the sheriff under the sheriff's interpleader act, of goods (levied upon) left in his possession, conveys no title, unless he is the owner; and the person who buys them takes them with an implied warranty of the title of the vendor, nothing more. Moore *v.* Whitney, 1 Leg. Chron. (Pa.) 1.

16. Bingham *v.* Maxcy, 15 Ill. 295; Mockbee *v.* Gardner, 2 Harr. & G. (Md.) 176; Storm *v.* Smith, 43 Miss. 497.

**Sale under power in mortgage.**— There is no implied warranty of title in a sale by trustees under a power of sale in a mortgage. Cohn *v.* Ammidown, 120 N. Y. 398, 24 N. E. 944.

17. Bell *v.* Cafferty, 21 Ind. 411; Merriam *v.* Wolcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69; Johnson *v.* Titus, 2 Hill (N. Y.) 606. *Compare* Curtis *v.* Brooks, 37 Barb. (N. Y.) 476, holding that where plaintiff purchased of defendant a note made by a *feme sole*, who, however, since the making of the note and before this purchase, had married defendant, which fact defendant stated to plaintiff before completion of the purchase, there was no implied warranty by defendant, either of the validity of the note or of the legal effect of the facts of the case.

18. Donaldson *v.* Newman, 9 Mo. App. 235; Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440.

19. *Connecticut.*— Turner *v.* Tuttle, 1 Root 320.

*Illinois.*— Tyler *v.* Bailey, 71 Ill. 34.

*Maryland.*— Buck *v.* Doyle, 4 Gill 478, 45 Am. Dec. 176.

*Minnesota.*— J. G. Shaw Blank Book Co. *v.* Maybell, 86 Minn. 241, 90 N. W. 392.

*Missouri.*—Presbury *v.* Morris, 18 Mo. 165.

*New Jersey.*— Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523.

See 43 Cent. Dig. tit. "Sales," § 753.

**A pledgee** of securities to whom the purchase-money is paid on a sale by the owner is not liable as on an implied warranty if the securities prove to be forgeries. Baker *v.* Arnot, 67 N. Y. 448; Ketchum *v.* Stevens, 19 N. Y. 499 [*affirming* 6 Duer 463].

**Sale of steamship ticket.**— By the mere sale of a steamship ticket the seller does not undertake to transport the buyer, nor contract that the carrier will do so, nor bind himself for anything except the genuineness of the ticket. Elston *v.* Fieldman, 57 Minn. 70, 58 N. W. 830.

20. White *v.* Robinson, 50 Mich. 73, 14 N. W. 704.

**d. Merchantability.** In all executory contracts of sale without opportunity to inspect there is an implied warranty that the goods shall be merchantable of their kind.[21]

**e. Quality** — (I) *In General.* It is the general rule that in a sale of goods, although for a fair price, there is no implied warranty of quality or soundness,[22]

21. *Arkansas.*— Main *v.* Dearing, 73 Ark. 470, 84 S. W. 640; Bunch *v.* Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

*California.*— Bill *v.* Fuller, 146 Cal. 50, 79 Pac. 592.

*Georgia.*— Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811; Wilcox *v.* Hall, 53 Ga. 635; Gammell *v.* Gunby, 52 Ga. 504; Radcliff *v.* Gunby, 46 Ga. 464; Walters *v.* Croasdale, 43 Ga. 204.

*Illinois.*— Fish *v.* Roseberry, 22 Ill. 288; Babcock *v.* Trica, 18 Ill. 420, 68 Am. Dec. 560; Hausen *v.* U. S. Brewing Co., 70 Ill. App. 265.

*Iowa.*— Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; McClung *v.* Kelley, 21 Iowa 508.

*Maine.*— Campion *v.* Marston, 99 Me. 410, 59 Atl. 548.

*Maryland.*— Hyatt *v.* Boyle, 5 Gill & J. 110, 25 Am. Dec. 276.

*Massachusetts.*—Alden *v.* Hart, 161 Mass. 576, 37 N. E. 742; Murchie *v.* Cornell, 155 Mass. 60, 29 N. E. 207, 31 Am. St. Rep. 526, 14 L. R. A. 492; Baker *v.* Frobisher, Quincy 4.

*New Jersey.*— Fitch *v.* Archibald, 29 N. J. L. 160.

*New York.*— Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799 [*reversing* 10 Misc. 140, 30 N. Y. Suppl. 929]; Dowdle *v.* Bayer, 9 N. Y. App. Div. 308, 41 N. Y. Suppl. 184; William Anson Wood, etc., Co. *v.* Thayer, 50 Hun 516, 3 N. Y. Suppl. 465; Hamilton *v.* Ganyard, 34 Barb. 204 [*affirmed* in 2 Abb. Dec. 314, 3 Keyes 45, 31 How. Pr. 639 note]; Newbery *v.* Wall, 35 N. Y. Super. Ct. 106 [*affirmed* in 65 N. Y. 484]; Cleu *v.* McPherson, 1 Bosw. 480; Baylis *v.* Weibezahl, 42 Misc. 178, 85 N. Y. Suppl. 355; Gallagher *v.* Waring, 9 Wend. 20.

*Ohio.*— See Oil Well Supply Co. *v.* Davidson, 28 Ohio Cir. Ct. 731 [*affirmed* in 75 Ohio St. 611, 80 N. E. 1130].

*Pennsylvania.*— Wilson *v.* Belles, 22 Pa. Super. Ct. 477; Edwards *v.* Hathaway, 1 Phila. 547.

*Texas.*— Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

*Wisconsin.*— Merriam *v.* Field, 39 Wis. 578; Ketchum *v.* Wells, 19 Wis. 25.

*United States.*— English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

*England.*— Wren *v.* Holt, [1903] 1 K. B. 610, 67 J. P. 191, 72 L. J. K. B. 340, 88 L. T. Rep. N. S. 282, 19 T. L. R. 292, 51 Wkly. Rep. 435; Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Laing *v.* Fidgeon, 4 Campb. 169, 6 Taunt. 108, 16 Rev. Rep. 589, 1 E. C. L. 531; Gardiner *v.* Gray, 4 Campb. 144, 16 Rev. Rep. 764; Morgan *v.* Gath, 3 H. & C. 748, 11 Jur. N. S. 654, 34 L. J. Exch. 165, 11 L. T. Rep. N. S. 96, 13 Wkly. Rep. 756.

See 43 Cent. Dig. tit. "Sales," § 747.

**Crop to be produced.**— Future crops of fruit are "merchandise not then in existence," under Cal. Civ. Code, § 1768, providing that "one who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties." Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep 199.

**Refuse material.**—Where refuse material resulting from the manufacture of articles is sold, there is no implied warranty that the material, when delivered, shall be of merchantable quality as a manufactured article. Holden *v.* Clancy, 58 Barb. (N. Y.) 590.

**Custom of trade.**—Where there is an implied warranty as to the merchantability of canned peas sold, it does not extend beyond the acceptance of the peas, where it was the custom of the trade, well known to the purchasers, to make an examination whereby imperfections in the peas or in the liquid could be discovered. Waeber *v.* Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712 [*affirming* 43 N. Y. App. Div. 180, 59 N. Y. Suppl. 396].

**Purchase after trial or test.**—Where defendant receives a machine on three months' trial, at the end of which time he points out its defects, and refuses to purchase on the offer made by the seller, but afterward buys it on terms proposed by himself, he cannot rely on the code, section 2651, which provides for an implied warranty in certain cases that the article sold is merchantable, but that "the purchaser must exercise caution in detecting defects," since defendant had full knowledge of the machine. Byrd *v.* Campbell Printing Press, etc., Co., 90 Ga. 542, 16 S. E. 267.

22. *Alabama.*— Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

*Connecticut.*— Dean *v.* Mason, 4 Conn. 428, 10 Am. Dec. 162.

*Illinois.* — Telluride Power Transmission Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319 [*affirming* 103 Ill. App. 647]; Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587 [*affirming* 65 Ill. App. 656]; Morris *v.* Thompson, 85 Ill. 16; Archdale *v.* Moore, 19 Ill. 565; Borden, etc., Co. *v.* Fraser, 118 Ill. App. 655; Ramming *v.* Caldwell, 43 Ill. App. 175.

*Indiana.*— Davis *v.* Murphy, 14 Ind. 158; Humphreys *v.* Comline, 8 Blackf. 516; Court

or that the mass of goods is of uniform quality throughout,[23] the law presuming that a buyer who fails to exact an express warranty relies on his own judgment.[24] The rule of *caveat emptor* is therefore applied,[25] especially where there has been

*v.* Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.

*Kentucky.*— Scott *v.* Renick, 1 B. Mon. 63, 35 Am. Dec. 177.

*Maryland.*— Johnston *v.* Cope, 3 Harr. & J. 89, 5 Am. Dec. 423.

*Massachusetts.* — Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230; Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.

*Missouri.* — Matlock *v.* Meyers, 64 Mo. 531; McCurdy *v.* McFarland, 10 Mo. 377; Norris *v.* Reinstedler, 90 Mo. App. 626; Anthony *v.* Potts, 63 Mo. App. 517.

*New Jersey.*— Beninger *v.* Corwin, 24 N. J. L. 257.

*New York.*— Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Van Riper *v.* Ackerman, 3 E. D. Smith 58; Perkins *v.* Harrison, 2 N. Y. City Ct. 111; Hart *v.* Wright, 17 Wend. 267 [*affirmed* in 18 Wend. 449]; Holden *v.* Dakin, 4 Johns. 421; Defreeze *v.* Trumper, 1 Johns. 274, 3 Am. Dec. 329; Seixas *v.* Woods, 2 Cai. 48, 2 Am. Dec. 215.

*North Carolina.*— Dickson *v.* Jordan, 33 N. C. 166, 53 Am. Dec. 403; Lanier *v.* Auld, 5 N. C. 138, 3 Am. Dec. 680.

*Ohio.*— Hadley *v.* Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Gibson *v.* Hamell, Tapp. 79.

*Pennsylvania.*— Warren *v.* Philadelphia Coal Co., 83 Pa. St. 437; Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 653; Dixon *v.* McClutchey, Add. 322; Cannon *v.* Young, 5 Pa. Dist. 772, 19 Pa. Co. Ct. 239; McNeal *v.* Banks, 6 Kulp 371.

*Rhode Island.*— King *v.* Quidmick Co., 14 R. I. 131.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220; Joy *v.* National Exch. Bank, 32 Tex. Civ. App. 398, 74 S. W. 325; Wood *v.* Ross, (Civ. App. 1894) 26 S. W. 148.

*Vermont.*— Penniman *v.* Pierson, 1 D. Chipm. 394.

*Virginia.*— Gerst *v.* Jones, 32 Gratt. 518, 34 Am. Rep. 773; Mason *v.* Chappell, 15 Gratt. 572.

*United States.*— Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987; Pulitzer Pub. Co. *v.* Rumford Falls Paper Co., 121 Fed. 519, 58 C. C. A. 629; Gage *v.* Carpenter, 107 Fed. 886, 47 C. C. A. 39; Sleeper *v.* Wood, 60 Fed. 888, 9 C. C. A. 289; Reynolds *v.* Palmer, 21 Fed. 433; Houser *v.* U. S., 39 Ct. Cl. 508.

See 43 Cent. Dig. tit. "Sales," §§ 743, 754.

**Contra.**—Ashley *v.* Reeves, 2 McCord (S. C.) 432; Rose *v.* Beatie, 2 Nott & M. (S. C.) 538; Missroon *v.* Waldo, 2 Nott & M. (S. C.) 76; Eastland *v.* Longshorn, 1 Nott & M. (S. C.) 194; Barnard *v.* Yates, 1 Nott & M. (S. C.) 142; Crawford *v.* Wilson, 2 Mill (S. C.) 353; Lester *v.* Graham, 1 Mill (S. C.) 182; Thompson *v.* Lindsay, 3 Brev. (S. C.) 305; Champneys *v.* Johnson, 2 Brev. (S. C.) 268; Furman *v.* Miller, 2 Brev. (S. C.) 127; Vaughan *v.* Campbell, 2 Brev. (S. C.) 53; Whitefield *v.* McLeod, 2 Bay (S. C.) 380, 1 Am. Dec. 650; State *v.* Gaillard, 2 Bay (S. C.) 11, 1 Am. Dec. 628; Timrod *v.* Shoolbred, 1 Bay (S. C.) 324, 1 Am. Dec. 620.

**In Georgia,** where a written contract for the sale of personalty does not contain any express warranty as to the quality of the goods, the law raises an implied warranty. Elgin Jewelry Co. *v.* Estes, 122 Ga. 807, 50 S. E. 939; Rice *v.* Lockhardt, 3 Ga. App. 741, 60 S. E. 357; Lovvorn *v.* Eldorado Jewelry Co., 1 Ga. App. 349, 57 S. E. 926.

**Civil law doctrine.**— Under the civil law in a sale for a fair price a warranty of quality is implied. Champneys *v.* Johnson, 2 Brev. (S. C.) 268. See also Fee *v.* Sentell, 52 La. Ann. 1957, 28 So. 279.

**In judicial sales** there is no warranty of quality implied. The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174.

**Effect of custom.**— Custom and usage cannot be resorted to for the purpose of implying a warranty of quality. Baird *v.* Matthews, 6 Dana (Ky.) 129; Barnard *v.* Kellogg, 10 Wall. (U. S.) 383, 19 L. ed. 987.

**Sale at reduced price.**—Where complainant, who usually obtained three dollars per cubic foot for marble when its soundness was guaranteed, and two dollars per cubic foot unguaranteed, sold a large quantity to defendant for one dollar and seventy-five cents per cubic foot, and all the marble was inspected by the agent of defendant before shipment, and it was well known to the trade that about a third of such marble, although apparently sound, was defective, no guaranty of soundness could be implied from the custom of the trade. Stamps *v.* Tennessee Producers' Marble Co., (Tenn Ch. App. 1900) 59 S. W. 769.

**23.** Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83; Shatto *v.* Abernathy, 35 Minn. 538, 29 N. W. 325; Salisbury *v.* Stainer, 19 Wend. (N. Y.) 159, 32 Am. Dec. 427; Whitaker *v.* Eastwick, 75 Pa. St. 229; Jenning *v.* Gratz, 3 Rawle (Pa.) 168, 23 Am. Dec. 111. But see Colcock *v.* Goode, 3 McCord 513.

See 43 Cent. Dig. tit. "Sales," § 756.

**24.** Court *v.* Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247; Reynolds *v.* Palmer, 21 Fed. 433.

**25.** *Arkansas.*— Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978.

*Illinois.*— Morris *v.* Thompson, 85 Ill. 16; Horwich *v.* Western Brewery Co., 95 Ill. App. 162; Martin *v.* Roehm, 92 Ill. App. 87; Rockford Wholesale Grocery Co. *v.* Stevenson, 65 Ill. App. 609.

*Indiana.*—Court *v.* Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.

*Iowa.*— Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678.

*Kansas.*— National Oil Co. *v.* Rankin, 68 Kan. 679, 75 Pac. 1013.

an inspection or an opportunity to inspect,[26] or the buyer's knowledge or opportunity for knowledge of the defects equals that of the seller.[27] This general rule is, however, subject to certain exceptions, where the goods are purchased from the producer or manufacturer,[28] where they are purchased for a particular purpose known to the seller,[29] where the purchase is by description,[30] where the purchase is of provisions and like articles for domestic consumption,[31] or where the sale is by sample.[32]

(II) *Deterioration During Shipment.* While there is an implied warranty that goods to be shipped will be fit for shipment and properly packed,[33] there is no warranty implied that they will bear shipment or any warranty against deterioration during shipment.[34]

(III) *Fitness For Particular Purpose.* There is no general implication of warranty that the goods sold are fit for the purpose for which they are purchased if the seller is not informed of such purpose,[35] especially where the buyer inspects or has an opportunity to inspect the goods;[36] but an implied warranty of fitness will arise if they are purchased for a particular purpose of which the buyer informs the seller,[37] and the rule applies especially if the seller is a dealer

*Massachusetts.*— Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230.

*Minnesota.*— Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196.

*New York.*— Hunter *v.* Stege, 59 N. Y. Super. Ct. 17, 12 N. Y. Suppl. 557.

*North Carolina.*— Dickson *v.* Jordan, 33 N. C. 166, 53 Am. Dec. 403.

*Ohio.*—Hadley *v.* Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454.

*Virginia.*—Gerst *v.* Jones, 32 Gratt. 518, 34 Am. Rep. 773.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643.

*Canada.*— Higgins *v.* Clish, 34 Nova Scotia 135.

See 43 Cent. Dig. tit. "Sales," § 746.

**Contra.**— Barnard *v.* Yates, 1 Nott & M. (S. C.) 142.

26. See *infra*, VII, D, 6, e, (XI), (B).

27. See *infra*, VII, D, 6, e, (XI), (A).

28. See *infra*, VII, D, 6, e, (IV).

29. See *infra*, VII, D, 6, e, (III).

30. See *infra*, VII, D, 6, e, (V).

31. See *infra*, VII, D, 6, e, (VII).

32. See *infra*, VII, D, 6, e, (VI).

33. Mann *v.* Everston, 32 Ind. 355. *Compare* Lanata *v.* O'Brien, 13 La. Ann. 229.

34. Leggat *v.* Sands' Ale Brewing Co., 60 Ill. 158; Mann *v.* Everston, 32 Ind. 355; Perkins *v.* Harrison, 2 N. Y. City Ct. 111; Bull *v.* Robison, 2 C. L. R. 1276, 10 Exch. 342, 24 L. J. Exch. 165, 2 Wkly. Rep. 623.

**Deterioration before removal.**—Where a farmer bought of a miller a sack of bran for his cows, but before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby, it was held that the buyer had no remedy against the seller of the bran. Lukens *v.* Freiund, 27 Kan. 664, 51 Am. Rep. 429.

35. *Alabama.*— Perry *v.* Johnston, 59 Ala. 648.

*Illinois.*— Titley *v.* Enterprise Stone Co., 127 Ill. 457, 20 N. E. 71.

*Indiana.*—Humphreys *v.* Comline, 8 Blackf. 516.

*Iowa.*— Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678.

*Michigan.*— Talbot Paving Co. *v.* Gorman, 103 Mich. 403, 61 N. W. 655, 27 L. R. A. 96.

*North Carolina.*— Dickson *v.* Jordan, 33 N. C. 166, 53 Am. Dec. 403.

*Pennsylvania.*— Sellers *v.* Stevenson, 163 Pa. St. 262, 29 Atl. 715.

*Wisconsin.*—Rollins *v.* Northern Land, etc., Co., 134 Wis. 447, 114 N. W. 819; Williams *v.* Slaughter, 3 Wis. 347.

*England.*— Jones *v.* Padgett, 24 Q. B. D. 650, 59 L. J. Q. B. 261, 62 L. T. Rep. N. S. 934, 38 Wkly. Rep. 782.

See 43 Cent. Dig. tit. "Sales," § 772.

**Contra.**— Fee *v.* Centell, 52 La. Ann. 1957, 28 So. 279.

**In South Carolina** a seller of personal property without an express warranty or representation of value is held to warrant the article sold to be of value for the purpose to which it is ordinarily applied. Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557.

36. See *infra*, VII, D, 6, e, (XI), (B).

37. *Alabama.*— Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422; Kennebrew *v.* Southern Automatic Electric Shock Mach. Co., 106 Ala. 377, 17 So. 545; Perry *v.* Johnston, 59 Ala. 648.

*Arkansas.*— Bunch *v.* Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80.

*District of Columbia.*—Armour *v.* Gundersheimer, 23 App. Cas. 210.

*Illinois.*—Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647 [*affirmed* in 208 Ill. 218, 70 N. E. 319].

*Indiana.*— Oil-Well Supply Co. *v.* Priddy, 41 Ind. App. 200, 83 N. E. 623; Fitzmaurice *v.* Puterbaugh, 17 Ind. App. 318, 45 N. E. 524; Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557; Merchants', etc., Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

*Iowa.*— Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

in the article [38] or is a manufacturer thereof.[39] If, however, a specific article, or one known, defined, and described, is ordered and furnished there is no implied warranty of fitness for particular purpose, although the seller is informed of such

*Kentucky.*— Miller *v.* Gaither, 3 Bush 152; Marbury Lumber Co. *v.* Stearns Mfg. Co., 107 S. W. 200, 32 Ky. L. Rep. 739.

*Michigan.*— Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

*Minnesota.*— Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755.

*Missouri.*— Ferguson Implement Co. *v.* Parmer, 128 Mo. App. 300, 107 S. W. 469; Moore *v.* Koger, 113 Mo. App. 423, 87 S. W. 602; Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179, 82 S. W. 1128; Skinner *v.* E. F. Kerwin Ornamental Glass Co., 103 Mo. App. 650, 77 S. W. 1011; Aultman *v.* Hunter, 82 Mo. App. 632; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Lee *v.* J. B. Sickles Saddlery Co., 38 Mo. App. 201.

*Nebraska.*— Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

*New York.*— William Anson Wood Mower, etc., Co. *v.* Thayer, 50 Hun 516, 3 N. Y. Suppl. 465. *Compare* Merriam Paper Co. *v.* New York Market Gardeners' Assoc., 58 Misc. 236, 108 N. Y. Suppl. 1038.

*Ohio.*— Byers *v.* Chapin, 28 Ohio St. 300. And see Oil Well Supply Co. *v.* Davidson, 28 Ohio Cir. Ct. 731 [*affirmed* in 75 Ohio St. 611, 80 N. E. 1130].

*Oregon.*— Lenz *v.* Blake, 44 Oreg. 569, 76 Pac. 356.

*Pennsylvania.*— Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149; McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188.

*Tennessee.*—Overton *v.* Phelan, 2 Head 445.

*Texas.*— Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280.

*Vermont.*— Beals *v.* Olmstead, 24 Vt. 114, 58 Am. Dec. 150.

*Virginia.*— Gerst *v.* Jones, 32 Gratt. 518, 34 Am. Rep. 773.

*Wisconsin.*— Ketchum *v.* Wells, 19 Wis. 25; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202.

*England.*— Preist *v.* Last, [1903] 2 K. B. 148, 72 L. J. K. B. 657, 89 L. T. Rep. N. S. 33, 19 T. L. R. 527, 51 Wkly. Rep. 678; Macfarlane *v.* Taylor, L. R. 1 H. L. Sc. 245, 18 L. T. Rep. N. S. 214; Randall *v.* Newson, 46 L. J. Q. B. 259, 2 Q. B. D. 102, 36 L. T. Rep. N. S. 164, 25 Wkly. Rep. 313; Wallis *v.* Russell, [1902] 2 Ir. 585; Wilson *v.* Dunville, L. R. 4 Ir. 249; Jones *v.* Bright, 5 Bing. 533, 7 L. J. C. P. O. S. 213, 3 M. & P. 155, 30 Rev. Rep. 728, 15 E. C. L. 708. See also English Sales Goods Act (1893) § 14, subs. 1. *Compare* Gray *v.* Cox, 4 B. & C. 108, 10 E. C. L. 502, 1 C. & P. 184, 12 E. C. L. 115, 6 D. & R. 200, 28 Rev. Rep. 769.

See 43 Cent. Dig. tit. "Sales," §§ 772, 774.

**Statement of purpose — sufficiency.**—Statements of the purpose for which a chattel is to be used, not specific in detail, and not accompanied by reliance on the seller's judgment, are insufficient to raise an implied warranty of fitness. Morris *v.* Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34.

**Extent of knowledge.**— In an action to recover the price of plumbago sold and delivered, no implied warranty arises from the knowledge of the seller of the use to which the material was to be applied, where it appears that the seller did not know that the plumbago was to be used in the manufacture of crucibles, although he had general knowledge that defendants were in that business, but that they also sold plumbago when it did not suit their purpose. Walker *v.* Taylor, 19 Pa. Super. Ct. 39. See also Gillespie *v.* Cheney, [1896] 2 Q. B. 59, 65 L. J. Q. B. 552.

**Statutory provisions.**— Rev. Code, § 2706, providing that, where the failure of consideration is "partial, an apportionment must be made according to the facts of each case," imports a warranty in every sale that the chattel sold is reasonably suited to the use intended and that no latent defects are left undisclosed. Williams *v.* Wylly, 45 Ga. 580. See also Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418, holding that in a suit for breach of warranty, it is not error to charge Civ. Code (1895), § 3555, to the effect that in ordinary sales there is an implied warranty that the article sold is suitable for the use intended.

**Uniform quality.**—While there is a warranty that the goods are reasonably fit for the purpose, there is no implied warranty that the quality is uniform throughout. Shatto *v.* Abernethy, 35 Minn. 538, 29 N. W. 325; Whitaker *v.* Eastwick, 75 Pa. St. 229.

**Qualified warranty.**—Where the seller does not expressly refuse to warrant, but points out patent defects, and states how they may be repaired, there is an implied warranty that when those repairs are made the machine will be fit for the purposes for which he knows it to be intended. Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

38. Armour *v.* Gundersheimer, 23 App. Cas. (D. C.) 210; Little *v.* Van Syckle, 115 Mich. 480, 73 N. W. 554; Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

**Denial of special knowledge.**— In an action for breach of warranty in the sale of an article for a particular purpose, an instruction that if defendant was a dealer in the article purchased, and plaintiff relied on his judgment and skill, there was an implied warranty, is erroneous, in view of the fact that defendant had testified that he told plaintiff that he had no personal knowledge of the article purchased. Englehardt *v.* Clanton, 83 Ala. 336, 3 So. 680.

39. See *infra*, VII, D, 6, e, (IV).

purpose,[40] for the reason that an undertaking as to fitness is not implied when the buyer gets what he bargained for.[41] So too there is no implied warranty that the article is as suitable for the purpose as other articles of the same kind.[42]

(IV) *SALE BY PRODUCER OR MANUFACTURER.* In a sale of an article by the producer or manufacturer thereof there is an implied warranty that it is of sound material and free from latent defects growing out of the process of manufacture.[43] The reason is that the probability of the maker's knowledge is so strong

**40.** *Georgia.*— J. O. Fay, etc., Co. *v.* Dudley, 129 Ga. 314, 58 S. E. 826.

*Illinois.*— Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587 [*affirming* 65 Ill. App. 656]; Chicago House Wrecking Co. *v.* Durand, 105 Ill. App. 175.

*Louisiana.*— Dreyfus *v.* Lourd, 111 La. 21, 35 So. 369.

*Maryland.*— Warren Glass Works Co. *v.* Keystone Coal Co., 65 Md. 547, 5 Atl. 253; Rasin *v.* Conley, 58 Md. 59; Rice *v.* Forsyth, 41 Md. 389.

*Massachusetts.*—Hight *v.* Bacon, 126 Mass. 10, 30 Am. Rep. 639; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331.

*Minnesota.*— Holt *v.* Sims, 94 Minn. 157, 102 N. W. 386; Wisconsin Red Pressed Brick Co. *v.* Hood, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418; Wisconsin Red Pressed Brick Co. *v.* Hood, 54 Minn. 543, 56 N. W. 165, 60 Minn. 401, 62 N. W. 550, 51 Am. St. Rep. 539; Goulds *v.* Brophy, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150.

*Missouri.*— W. R. Colchord Mach. Co. *v.* Loy-Wilson Foundry, etc., Co., 131 Mo. App. 540, 110 S. W. 630.

*New Hampshire.*— Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26; Deming *v.* Foster, 42 N. H. 165.

*New Jersey.*— Ivans *v.* Laury, 67 N. J. L. 153, 50 Atl. 355.

*New York.*— Manning *v.* National Saw Co., 126 N. Y. App. Div. 325, 110 N. Y. Suppl. 685; Cafre *v.* Lockwood, 22 N. Y. App. Div. 11, 47 N. Y. Suppl. 916; Badger *v.* Pippey, 12 N. Y. St. 684.

*Ohio.*— Curran *v.* Hauser, 9 Ohio S. & C. Pl. Dec. 468, 6 Ohio N. P. 281.

*Pennsylvania.*— American Home Sav. Bank Co. *v.* Guardian Trust Co., 210 Pa. St. 320, 59 Atl. 1108; Jarecki Mfg. Co. *v.* Kerr, 165 Pa. St. 529, 30 Atl. 1019, 44 Am. St. Rep. 674; Port Carbon Iron Co. *v.* Groves, 68 Pa. St. 149.

*Rhode Island.*— Beggs *v.* James Hanley Brewing Co., 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44.

*South Carolina.*— Ober, etc., Co. *v.* Blalock, 40 S. C. 31, 18 S. E. 264.

*Tennessee.*— Blue Springs Min. Co. *v.* McIlvien, 97 Tenn. 225, 36 S. W. 1094.

*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.

*England.*— Robertson *v.* Amazon Tug, etc., Co., 7 Q. B. D. 598, 4 Aspin. 496, 51 L. J. Q. B. 68, 46 L. T. Rep. N. S. 146, 30 Wkly. Rep. 308; Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Wilson *v.* Dunville, L. R. 4 Ir. 249; Prideaux *v.* McMurray, 2 F. & F. 225; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399.

See 43 Cent. Dig. tit. "Sales," § 776.

**41.** Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587.

**42.** Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422; Robinson Mach. Works *v.* Chandler, 56 Ind. 575; Rasin *v.* Conley, 58 Md. 59.

**43.** *Connecticut.*—Bailey *v.* Nickols, 2 Root 407, 1 Am. Dec. 83.

*Illinois.*— Beers *v.* Williams, 16 Ill. 69; Price *v.* Kohn, 99 Ill. App. 115.

*Kansas.*— Nixa Canning Co. *v.* Lehmann-Higginson Grocery Co., 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653.

*New York.*— Heath Dry Gas Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18; Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799 [*reversing* 10 Misc. 140, 30 N. Y. Suppl. 929]; Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Rogers *v.* Beckrich, 46 N. Y. App. Div. 429, 61 N. Y. Suppl. 725; Durbrow, etc., Mfg. Co. *v.* Cuming, 35 N. Y. App. Div. 376, 54 N. Y. Suppl. 818; Maurer *v.* Bliss, 14 Daly 150, 6 N. Y. St. 224 [*affirmed* in 116 N. Y. 665, 22 N. E. 1135]; Weber *v.* Demuth, 3 N. Y. Suppl. 658.

*Ohio.*— Rodgers *v.* Niles, 11 Ohio St. 48, 78 Am. Dec. 290.

*Pennsylvania.*—Chambers *v.* Crawford, Add. 150.

*Tennessee.*— Tennessee River Compress Co. *v.* Leeds, 97 Tenn. 574, 37 S. W. 389.

*Vermont.*— Pease *v.* Sabin, 38 Vt. 432, 91 Am. Dec. 364.

*Wisconsin.*— J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

See 43 Cent. Dig. tit. "Sales," § 755.

**Under statute.**— There is no implied warranty of quality of personal property sold (Comp. Laws, § 3628), except where the seller is manufacturer thereof (Comp. Laws, § 3633). McCormick Harvesting Mach. Co. *v.* Watson, 5 S. D. 9, 57 N. W. 945. See also Standard Rope, etc., Co. *v.* Olmen, 13 S. D. 296, 83 N. W. 271.

**Sale by importer.**—Where it appears that the seller of goods did not manufacture, but merely imported, the articles, the presumed knowledge of latent defects is not to be inferred. B. P. Ducas Co. *v.* American Silk Dyeing, etc., Co., 48 Misc. (N. Y.) 411, 95 N. Y. Suppl. 590. A woolen merchant and importer, selling cloth not of his own manufacture to a tailor, does not impliedly warrant the quality or fitness thereof, even as to

that the court presumes its existence without proof.[44] And where the article is purchased for a particular use made known to the seller there is an implied warranty that the article is reasonably fit for the use for which it was purchased.[45]

latent defects. Strauss *v.* Salzer, 58 Misc. (N. Y.) 573, 109 N. Y. Suppl. 734.

**Raw material supplied by another.**—When defendant, a machinist and founder, sold a piece of wrought-iron shafting, of which he was not the maker, but which he turned and prepared for the reception of pulleys, and which he supposed to be sound, to be used in running machinery in a carriage shop, and the shaft, upon being put to the described use, broke, because of a flaw and an imperfect weld, there was no implied warranty of its soundness. Bragg *v.* Morrill, 49 Vt. 45, 24 Am. Rep. 102.

**Use of ordinary care.**—Where, pursuant to an order therefor, a forge company agreed to procure the necessary steel, and forge the same into a specified shape with the required finish, to be used by an engine company for a piston rod for some engine to be sold by the latter, the measure of the former's liability on the contract was ordinary care in selecting the material and forging the same pursuant to the specifications, and it was not liable on an implied warranty for defects in the rod, either in respect to the steel or as to its make or manufacture, if they were not discoverable by such care. Rollins Engine Co. *v.* Eastern Forge Co., 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441.

**Vendor ordering goods.**—A seller of a manufactured article, who is not the manufacturer, whom the seller directed to ship the goods direct to the buyer, without examination by the seller, does not impliedly warrant such article free from latent defects, and fit for the purpose intended. Reynolds *v.* Mayor, 39 N. Y. App. Div. 218, 57 N. Y. Suppl. 106. To the same effect see Archdale *v.* Moore, 19 Ill. 565; Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.

**Sale or contract of agency.**—A contract obligating one of the parties to push a sale of the other's coal for one year, and to pay for all he may order at an agreed price, but not requiring him to take any definite amount, is not a contract of purchase and sale of articles to be produced carrying with it an implied warranty of quality, but an agency. Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60, 27 Pac. 238.

44. Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

45. *Alabama.*— Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

*Arkansas.*— Main *v.* Dearing, 73 Ark. 470, 84 S. W. 640; Curtis, etc., Mfg. Co. *v.* Williams, 48 Ark. 325, 3 S. W. 517.

*Illinois.*— Hallock *v.* Cutler, 71 Ill. App. 471; Murray Iron Works Co. *v.* Dekalb Electric Co., 103 Ill. App. 78.

*Indiana.*— Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Robinson Mach. Works *v.* Chandler, 56 Ind. 575; Brenton *v.* Davis, 8 Blackf. 317, 44 Am. Dec. 769; Crane *v.* Lord, Wils. 263.

*Iowa.*— Conkling *v.* Standard Oil Co., 137 Iowa 596, 116 N. W. 822; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

*Maryland.*— Queen City Glass Co. *v.* Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447.

*Massachusetts.*— West End Mfg. Co. *v.* P. R. Warren Co., 198 Mass. 320, 84 N. E. 488; Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 321, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884; Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 885; Hight *v.* Bacon, 126 Mass. 10, 30 Am. Rep. 639.

*Michigan.*— West Michigan Furniture Co. *v.* Diamond Glue Co., 127 Mich. 651, 87 N. W. 92.

*Mississippi.*— Brown *v.* Murphee, 31 Miss. 91.

*New York.*— Heath Dry Gas Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18; Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 36 Am. St. Rep. 635, 37 L. R. A. 799 [*reversing* 10 Misc. 140, 30 N. Y. Suppl. 929]; Carleton *v.* Lumbard, 149 N. Y. 137, 43 N. E. 422; Edwards *v.* New York, etc., R. Co., 98 N. Y. 245, 50 Am. Rep. 659; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 515; Cooper *v.* Payne, 103 N. Y. App. Div. 118, 93 N. Y. Suppl. 69 [*reversed* on other grounds in 183 N. Y. 334, 78 N. E. 1076]; Cram *v.* Gas Engine, etc., Co., 75 Hun 316, 26 N. Y. Suppl. 1069; Maurer *v.* Bliss, 14 Daly 150, 6 N. Y. St. 224; Charlotte, etc., R. Co. *v.* Jesup, 44 How. Pr. 447.

*North Carolina.*— Thomas *v.* Simpson, 80 N. C. 4.

*Ohio.*— Hauser *v.* Curran, 8 Ohio S. & C. Pl. Dec. 495, 5 Ohio N. P. 224.

*Pennsylvania.*— Philadelphia, etc., Coal, etc., Co. *v.* Hoffman, 1 Pa. Cas. 405, 4 Atl. 848; Oshorne *v.* Walley, 8 Pa. Super. Ct. 193; Ulrich *v.* Stohrer, 12 Phila. 199.

*South Carolina.*— Robson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518.

*South Dakota.*— Standard Rope, etc., Co. *v.* Olmen, 13 S. D. 296, 83 N. W. 271.

*Tennessee.*— Tennessee River Compress Co. *v.* Leeds, 97 Tenn. 574, 37 S. W. 389; Overton *v.* Phelan, 2 Head 445.

*Texas.*— Houk *v.* Berg, (Civ. App. 1907) 105 S. W. 1176.

*Vermont.*— Harris *v.* Waite, 51 Vt. 480, 31 Am. Rep. 694.

*Wisconsin.*—J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013; Merrill *v.* Nightingale, 39 Wis. 247; Leopold *v.* Van Kirk, 27 Wis. 152; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Walton *v.* Cody, 1 Wis. 420; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108, 3 S. Ct. 537, 28 L. ed. 86; Davis Calyx Drill Co. *v.* Mallory,

But if the buyer orders a specific article, or a known, described article, there is no warranty of fitness for purpose, although the manufacturer is informed of such purpose;[46] and this rule is especially applicable when the article is manufactured according to plans and specifications submitted by the buyer.[47] So where an article is of a general character and is not ordered specifically for a particular purpose there is no implied warranty that it will answer the purposes of the buyer.[48]

(v) *SALE BY DESCRIPTION.* When an article which the buyer has not seen is sold by description there is an implied warranty that the article shall be of the

137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; Nashua Iron, etc., Co. *v.* Brush, 91 Fed. 213, 33 C. C. A. 456; Dawes *v.* Peebles, 6 Fed. 856; Cunningham *v.* Hall, 6 Fed. Cas. No. 3,482, 1 Sprague 404.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Olivant *v.* Bayley, 5 Q. B. 288, Dav. & M. 373, 7 Jur. 1130, 13 L. J. Q. B. 34, 48 E. C. L. 288; Jones *v.* Bright, 5 Bing. 533, 7 L. J. C. P. O. S. 213, 3 M. & P. 155, 30 Rev. Rep. 728, 15 E. C. L. 708; Brown *v.* Edgington, Drinkw. 106, 10 L. J. C. P. 66, 2 M. & G. 279, 2 Scott N. R. 496, 40 E. C. L. 601; Shepherd *v.* Pybus, 11 L. J. C. P. 101, 3 M. & G. 868, 4 Scott N. R. 434, 42 E. C. L. 452.

See 43 Cent. Dig. tit. "Sales," § 773.

**Rule restated.**—Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer and relies upon the manufacturer's judgment and not his own. Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643 [*approved* in Queen City Glass Co. *v.* Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447; Rice *v.* Forsyth, 41 Md. 389].

**Superior knowledge of plaintiff — Effect.**— Where plaintiff agreed to manufacture for defendant certain hollow metallic cylinders warranted to "finish sound," and it appeared that defendant knew more of the purpose for which the cylinders were intended than plaintiff did, there was no implied warranty that they should be suitable for the use intended. H. H. Franklin Mfg. Co. *v.* Lamson, etc., Mfg. Co., 189 Mass. 344, 75 N. E. 624.

**What is manufactured article.**— Firewood is not a manufactured article, the sale of which creates a warranty, under Civ. Code, § 1770, that it is reasonably fit for the purpose for which it was ordered or intended to be used. Correio *v.* Lynch, 65 Cal. 273, 3 Pac. 889.

**46.** *Colorado.*— Oil Creek Gold Min. Co. *v.* Fairbanks, 19 Colo. App. 142, 74 Pac. 543.

*Maryland.*— Warren Glass-Works Co. *v.* Keystone Coal Co., 65 Md. 547, 5 Atl. 253; Raisin *v.* Conley, 58 Md. 59.

*Massachusetts.*— Day *v.* Mapes-Reeve Constr. Co., 174 Mass. 412, 54 N. E. 878. And see Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 885.

*Michigan.*— McCray Refrigerator, etc., Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599.

*Minnesota.*— Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Goulds *v.* Brophy, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392.

*New York.*— Dounce *v.* Dow, 64 N. Y. 411.

*Pennsylvania.*— Chippewa Lumber, etc., Co. *v.* Howard, 18 Pa. Super. Ct. 423.

*Rhode Island.*— Beggs *v.* James Hanley Brewing Co., 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44.

*Wisconsin.*— Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

*United States.*— Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. ed. 837; Davis Calyx Drill Co. *v.* Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53; Buckstaff *v.* Russell, 79 Fed. 611, 25 C. C. A. 129; Grand Ave. Hotel Co. *v.* Wharton, 79 Fed. 43, 24 C. C. A. 441; Ottawa Bottle, etc., Co. *v.* Gunther, 31 Fed. 208.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Ollivant *v.* Bayley, 5 Q. B. 288, Dav. & M. 373, 7 Jur. 1130, 13 L. J. Q. B. 34, 48 E. C. L. 288; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399.

**47.** *California.*— Bancroft *v.* San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496.

*Illinois.*— Shoenberger *v.* McEwen, 15 Ill. App. 496.

*Massachusetts.*— Cunningham *v.* Hall, 4 Allen 268.

*Minnesota.*— Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359.

*New York.*— Smith *v.* Coe, 170 N. Y. 162, 63 N. E. 57 [*affirming* 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350]; Durbrow, etc., Mfg. Co. *v.* Cuming, 35 N. Y. App. Div. 376, 54 N. Y. Suppl. 818; Cram *v.* Gas Engine, etc., Co., 75 Hun 316, 26 N. Y. Suppl. 1069.

*Wisconsin.*— H. McCormick Lumber Co. *v.* Winans, 126 Wis 649, 105 N. W. 945; J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

**48.** Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 885.

kind described,[49] but no warranty of quality will be implied,[50] or fitness for a particular purpose,[51] except that when the goods are described as of a particular grade or quality well known in the trade a warranty that they are of such grade is implied.[52]

**49.** *Georgia.*—Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657; Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L. R. A. 374; Wilcox *v.* Hall, 53 Ga. 635.

*Illinois.*— Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647 [*affirmed* in 208 Ill. 218, 70 N. E. 319].

*Iowa.*— Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183; Forcheimer *v.* Stewart, 65 Iowa 593, 22 N. W. 886, 54 Am. Rep. 30.

*Maine.*— Briggs *v.* Hunton, 87 Me. 145, 32 Atl. 794, 47 Am. St. Rep. 318; Warner *v.* Arctic Ice Co., 74 Me. 475.

*Missouri.*— Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179, 82 S. W. 1128; Long *v.* J. K. Armsby Co., 43 Mo. App. 253; Catchings *v.* Hacke, 15 Mo. App. 51; Whitaker *v.* McCormick, 6 Mo. App. 114.

*New Jersey.*— Ivans *v.* Laury, 67 N. J. L. 153, 50 Atl. 355.

*New York.*— Waeber *v.* Talbot, 43 N. Y. App. Div. 180, 59 N. Y. Suppl. 396 [*affirmed* in 167 N. Y. 48, 60 N. E. 288, 52 Am. St. Rep. 712]; Gubner *v.* Vick, 6 N. Y. St. 4.

*North Dakota.*— Northwestern Cordage Co. *v.* Rice, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563.

*Ohio.*— Edmands *v.* Hiltz, 1 Ohio Dec. (Reprint) 81, 2 West. L. J. 45.

*Pennsylvania.*— Whitaker *v.* Eastwick, 75 Pa. St. 229; Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 653; Borrekins *v.* Bevan, 3 Rawle 23, 23 Am. Dec. 85; Wilson *v.* Belles, 22 Pa. Super. Ct. 477.

*Vermont.*— Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.

*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.

*England.*— Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 857, 25 Wkly. Rep. 730; Varley *v.* Whipp, [1900] 1 Q. B. 513, 69 L. J. Q. B. 333, 48 Wkly. Rep. 363; Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Josling *v.* Kingsford, 13 C. B. N. S. 447, 32 L. J. C. P. 94, 9 Jur. N. S. 947, 7 L. T. Rep. N. S. 790, 11 Wkly. Rep. 377, 106 E. C. L. 447; Kirkpatrick *v.* Gowan, Ir. R. 9 C. L. 521. And see Gompertz *v.* Bartlett, 2 C. L. R. 395, 2 E. & B. 849, 18 Jur. 266, 23 L. J. Q. B. 65, 2 Wkly. Rep. 43, 75 E. C. L. 849.

See 43 Cent. Dig. tit. "Sales," § 728.

**Filling order.**—Whether filling an order for goods of a specific description implies a warranty of kind is for the jury. Baker *v.* Lyman, 38 U. C. Q. B. 498.

**50.** *Illinois.*— Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587 [*affirming* 65 Ill. App. 656].

*Kentucky.*— Baird *v.* Matthews, 6 Dana 129.

*Maryland.*— Gunther *v.* Atwell, 19 Md. 157.

*Massachusetts.*— Mixer *v.* Coburn, 11 Metc. 559, 45 Am. Dec. 230; Winsor *v.* Lombard, 18 Pick. 57.

*Nebraska.*— Patrick *v.* Norfolk Lumber Co., 81 Nebr. 267, 115 N. W. 780.

*New Jersey.*— Ivans *v.* Laury, 67 N. J. L. 153, 50 Atl. 355; Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

*New York.*— Waeber *v.* Talbot, 43 N. Y. App. Div. 180, 59 N. Y. Suppl. 396 [*affirmed* in 167 N. Y. 48, 60 N. E. 288, 52 Am. St. Rep. 712]; Hotchkiss *v.* Gage, 26 Barb. 141.

*Pennsylvania.*— Ulmer *v.* Ryan, 137 Pa. St. 309, 20 Atl. 705; Chippewa Lumber, etc., Co. *v.* Howard, 18 Pa. Super. Ct. 423.

*Virginia.*— Mason *v.* Chappell, 15 Gratt. 572.

*England.*— Kirkpatrick *v.* Gowan, Ir. R. 9 C. L. 521.

*Canada.*— Paul *v.* Glasgow Corp., 3 F. (Ct. Sess.) 119.

See 43 Cent. Dig. tit. "Sales," § 758.

**Comparison with other goods.**—Where a charge that there was no warranty of the goods sold is modified by another charge that, if the sale was based on goods previously furnished, they should be equal in quality to those previously furnished the instructions as to implied warranty are sufficient. Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587 [*affirming* 65 Ill. App. 656].

**51.** Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678; Whitmore *v.* South Boston Iron Co., 2 Allen (Mass.) 52; Wisconsin Red Pressed-Brick Co. *v.* Hood, 60 Minn. 401, 62 N. W. 550, 51 Am. St. Rep. 539; Healy *v.* Brandon, 66 Hun (N. Y.) 515, 21 N. Y. Suppl. 390 [*affirmed* in 142 N. Y. 681, 37 N. E. 825].

**52.** *Iowa.*— Forcheimer *v.* Stewart, 65 Iowa 593, 22 N. W. 886, 54 Am. Rep. 30.

*Massachusetts.*— Gould *v.* Stein, 149 Mass. 570, 22 N. E. 47, 14 Am. St. Rep. 455, 5 L. R. A. 213.

*North Dakota.*— Northwestern Cordage Co. *v.* Rice, 5 N. D. 432, 67 N. W. 298, 57 Am. St. Rep. 563.

*Pennsylvania.*— Holloway *v.* Jacoby, 120 Pa. St. 583, 12 Atl. 487, 6 Am. St. Rep. 737.

*United States.*— Schreiber *v.* Andrews, 101 Fed. 763, 41 C. C. A. 663.

*England.*— Preist *v.* Last, [1903] 2 K. B. 148, 72 L. J. K. B. 657, 89 L. T Rep. N. S. 33, 19 T. L. R. 527, 51 Wkly. Rep. 678; Wren *v.* Holt, [1903] 1 K. B. 610, 67 J. P. 191, 72 L. J. K. B. 340, 88 L. T. Rep. N. S. 282, 19 T. L. R. 292, 51 Wkly. Rep. 435.

*Canada.*—Mader *v.* Jones, 10 Nova Scotia 82.

**Description of article as "good."**— The warranty implied in a written contract of sale of "good" potatoes was that those delivered were of the kind agreed on as regarded imperfections not discoverable at the

(VI) *SALE BY SAMPLE.*[53] On a sale by sample there is an implied warranty that the bulk of the goods is equal to the sample in kind and quality.[54] Where the sale is by the manufacturer of the goods there is an implied warranty that the goods sold are free from latent defects not discoverable by ordinary examination;[55] but the rule is otherwise where the sale is by a dealer who is not the manufacturer of the goods.[56] There is no warranty of fitness for the purpose

time of reception thereof by ordinary attention; therefore a breach of implied warranty was made out by a finding that those delivered were not such as the agreement called for, and it was not necessary that there be a finding that those delivered were not reasonably fit for the purpose for which they were bought. Northern Supply Co. *v* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984. *Compare* Barrett *v.* Hall, 1 Aik. (Vt.) 269.

**53. Performance of contract in general** see *supra*, V, B, 10, c.

**54.** *Alabama.*— Magee *v.* Billingsley, 3 Ala. 679.

*California.*— Hughes *v.* Bray, 60 Cal. 284.

*Delaware.*— Love *v.* Barnesville Mfg. Co., 3 Pennew. 152, 50 Atl. 536.

*Illinois.*—Spring *v.* Slayden-Kirksey Woolen Mills, 106 Ill. App. 579.

*Iowa.*— Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692.

*Louisiana.*— Hall *v.* Plassan, 19 La. Ann. 11; Clarke *v.* Lockhart, 10 Rob. 5; Phillipi *v.* Gove, 4 Rob. 315.

*Massachusetts.*— Williams *v.* Spafford, 8 Pick. 250; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122.

*Missouri.*— Texas Fruit Co. *v.* Lane, 101 Mo. App. 712, 74 S. W. 400; Voss *v.* McGuire, 18 Mo. App. 477.

*New York.*— Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321 [*affirming* 2 Sandf. 89]; Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235, 72 N. Y. Suppl. 662; Abel *v.* Murphy, 43 Misc. 648, 88 N. Y. Suppl. 256; Washington Hydraulic Press Brick Co. *v.* Sinnott, 92 N. Y. Suppl. 504; Bernstein *v.* Loomis, 87 N. Y. Suppl. 134; Waring *v.* Mason, 18 Wend. 425; Boorman *v.* Jenkins, 12 Wend. 566, 27 Am. Dec. 158; Beebe *v.* Robert, 12 Wend. 413, 27 Am. Dec. 132.

*Ohio.*— Dayton *v.* Hooglund, 39 Ohio St. 671.

*Texas.*— Whittaker *v.* Hueske, 29 Tex. 355; Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264; Hume *v.* Sherman Oil, etc., Co., 27 Tex. Civ. App. 366, 65 S. W. 390; Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405; Wilkirson *v.* Randle, (Civ. App. 1895) 29 S. W. 431.

*United States.*— Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

*England.*— Hibbert *v.* Shee, 1 Campb. 113, 10 Rev. Rep. 649. See also Megaw *v.* Malloy, L. R. 2 Ir. 530, where the sample exhibited was taken from the cargo of one vessel while the bulk actually sold and delivered was the cargo of another vessel.

See 43 Cent. Dig. tit. "Sales," §§ 769–771.

**In Pennsylvania** a sale by sample implies a warranty only that the goods shall correspond to the sample in kind and be merchantable, and there is no warranty that they shall correspond in quality. Selser *v.* Roberts, 105 Pa. St. 242; Boyd *v.* Wilson, 83 Pa. St. 319, 24 Am. Rep. 176; Fraley *v.* Bispham, 10 Pa. St. 320, 51 Am. Dec. 486; Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 4 Pa. Cas. 35, 7 Atl. 65. This was apparently the early doctrine also in Massachusetts. Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420.

**Mixed goods.**—Although there is a warranty, when goods are sold by sample, that each package shall correspond with the sample, yet, if the goods consist of different varieties of the same article, and the sample is formed by mixing proportional parts of the different varieties and qualities together the warranty is that the whole quantity, if mixed together, would be of a quality equal to the sample. It is no breach of the warranty that some of the packages are inferior to the sample, so long as it fairly represents the whole. Leonard *v.* Fowler, 44 N. Y. 289. And see Mure *v.* Donnell, 12 La. Ann. 369.

**Change or deterioration.**— The warranty is limited to the condition of the goods at the time of the sale and does not cover changes or deterioration thereafter. Hall *v.* Plassan, 19 La. Ann. 11.

**Person taking sample.**— The rule that upon a sale of goods by sample there is an implied warranty that the goods delivered shall correspond with the sample is not varied by the fact that the sample was made by a warehouseman in whose keeping the goods were placed, and that the vendor believed the sample to be a fair specimen of the goods sold, especially if he himself received and exhibited the sample to the vendee. Whittaker *v.* Hueske, 29 Tex. 355. Where the agent of the buyer cuts samples of cotton in the presence of the owner's agent, and the samples are clean, but the bales had been repacked after damage by fire, and there would have been no sale if the samples had shown the quality of the cotton, it justifies a charge of implied warranty. Wilkirson *v.* Randle, (Tex. Civ. App. 1895) 29 S. W. 431.

**55.** Price *v.* Kohn, 99 Ill. App. 115; Nixa Canning Co. *v.* Lehmann-Higginson Grocer Co., 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653; Drummond *v.* Von Ingen, 12 App. Cas. 284, 56 L. J. Q. B. 563, 57 L. T. Rep. N. S. 1, 36 Wkly. Rep. 20; Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 41 L. J. C. P. 228, 27 L. T. Rep. N. S. 336, 20 Wkly. Rep. 1035; Mody *v.* Gregson, L. R. 4 Exch. 49, 38 L. J. Exch. 12, 19 L. T. Rep. N. S. 458, 17 Wkly. Rep. 176.

**56.** Dickinson *v.* Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Bradford *v.* Manly, 13

intended,[57] nor ordinarily that the goods are merchantable,[58] although the facts and circumstances of the case may justify the inference that this condition is superadded to the contract.[59] The warranty implied is not strictly speaking a warranty of quality, but merely that the seller shall deliver goods of the quality of the sample.[60] To constitute a sale by sample so that a warranty will be implied it must appear that the parties contracted with reference to the sample,[61] with the understanding that the sample represented the quality of the bulk.[62] The mere fact that a sample was exhibited at the time of the sale does not make it a sale by sample so as to imply a warranty.[63]

(VII) *SALE OF PROVISIONS.* There is no implied warranty of the quality of provisions when they are sold merely as merchandise,[64] as for instance when the articles are sold to a middleman[65] or are sold to a dealer for the purpose of

Mass. 139, 7 Am. Dec. 122; Parkinson *v.* Lee, 2 East 314, 6 Rev. Rep. 429.

**57.** Crocker-Wheeler Electric Co. *v.* Johns-Pratt Co., 29 N. Y. App. Div. 300, 51 N. Y. Suppl. 793 [*affirmed* in 164 N. Y. 593, 58 N. E. 1086]; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192; Sayers *v.* London, etc., Flint Glass, etc., Co., 27 L. J. Exch. 294, 1 F. & F. 63. But *compare* Drummond *v.* Van Ingen, 12 App. Cas. 284, 56 L. J. Q. B. 563, 57 L. T. Rep. N. S. 1, 36 Wkly. Rep. 20; Leggett *v.* Young, 29 N. Brunsw. 675.

**58.** Baker *v.* Frobisher, Quincy (Mass.) 4; Parkinson *v.* Lee, 2 East 314, 6 Rev. Rep. 429; Benjamin Sales (5th ed.), p. 644.

**59.** Benjamin Sales (5th ed.), p. 646. And see Leggett *v.* Young, 29 N. Brunsw. 675.

**60.** Gunther *v.* Atwell, 19 Md. 157; Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301. See also Carter *v.* Crick, 4 H. & N. 412, 28 L. J. Exch. 238, 7 Wkly. Rep. 507.

**61.** Gunther *v.* Atwell, 19 Md. 157; Henry *v.* Talcott, 175 N. Y. 385, 67 N. E. 617, 13 N. Y. Annot. Cas. 219; Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321 [*affirming* 2 Sandf. 89]; Reynolds *v.* Palmer, 21 Fed. 433.

**62.** Gunther *v.* Atwell, 19 Md. 157; Cousinery *v.* Pearsall, 40 N. Y. Super. Ct. 113; Reynolds *v* Palmer, 21 Fed. 433.

**Manufacture according to model.**—Where defendant agreed to manufacture bicycle wrenches after the model submitted by plaintiff, and that such wrenches should be made in a first-class manner, and in every way equal to the model submitted, the sale was by sample, and plaintiff was entitled to damages for wrenches not equal to the model. Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235, 72 N. Y. Suppl. 662.

**Variations from sample.**—Where one purchasing goods from a manufacturer orders by sample, but at the same time requires numerous changes and variations in the article to be manufactured, the transaction is not a sale by sample; and hence there is no implied warranty that the quality of the manufactured article shall correspond to the sample exhibited. Smith *v.* Coe, 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350, 57 N. Y. App. Div. 631, 68 N. Y. Suppl. 274.

**63.** Beirne *v.* Dord, 5 N. Y. 95, 55 Am. Dec. 321 [*affirming* 2 Sandf. 89, 4 Duer 69]; Hargous *v.* Stone, 5 N. Y. 73; Cousinery *v.* Pearsall, 40 N. Y. Super. Ct. 113; Gardiner *v.* Gray, 4 Campb. 144, 16 Rev. Rep. 764.

**Reliance on representations of agent.**—Where the buyer's agent in the absence of the seller took samples of grain, which he inspected and submitted to the buyer, who, to the seller's knowledge, purchased on the agent's representations that the samples were fair samples, there was no sale by sample, within Civ. Code, § 1766. Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722.

**Examination of specific packages.**—Where the purchaser opens and examines one of several bales, and is at liberty to open others, but omits to do so, and the quality of the goods in those not examined does not correspond with that opened, he cannot allege that the sale was by sample or contend for damages as on an implied warranty. Salisbury *v.* Stainer, 19 Wend. (N. Y.) 159, 32 Am. Dec. 437.

**Sample not referred to.**—Where, upon a sale of goods, the seller produces a sample and represents that the bulk is of equal value, if there is a sale note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action for a deceitful representation Meyer *v.* Everth, 4 Campb. 22, 15 Rev. Rep. 722.

**Sale by description.**—Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description it is not material for the vendor to show that they correspond with a sample exhibited at the time of the sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract. Tye *v.* Fynmore, 3 Campb. 462, 14 Rev. Rep. 809.

**64.** Emerson *v.* Brigham, 10 Mass. 197, 6 Am. Dec. 109.

**65.** Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210 [*reversing* 58 Ill. App. 382]. But see Butler *v.* Wendel, 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329, where it was held that a baker impliedly warrants the wholesomeness of bread sold to a peddler in his employ at a discount. In this case it was said: "Bread is an article sold for immediate consumption and never enters into com-

resale,[66] especially where the seller himself is not a regular dealer,[67] it being held that in such transactions the rule of *caveat emptor* applies.[68] The rule prevails even when the seller knows that the buyer intends to resell to the consumer.[69] But there is at least a warranty that the articles shall be merchantable.[70] It is, however, the general rule that where the sale is for immediate consumption there is an implied warranty that the food is wholesome and fit for the purpose,[71] irrespective of the seller's knowledge of defects therein.[72] A sale of articles to be used as food for animals is on

merce, and as one of the prime necessaries of life is of no use unless it is good for food."

66. *Arkansas.*— Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288.

*Massachusetts.*— Giroux *v.* Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472; Howard *v.* Emerson, 110 Mass. 320, 14 Am. Rep. 608.

*Minnesota.*— Hanson *v.* Hartse, 70 Minn. 282, 73 N. W. 163, 68 Am. St Rep. 527; Ryder *v.* Neitge, 21 Minn. 70.

*New York.*— Hyland *v.* Sherman, 2 E. D. Smith 234; Kinch *v.* Haynes, 58 Misc. 499, 111 N. Y. Suppl. 618; Cotton *v.* Reed, 25 Misc. 380, 54 N. Y. Suppl. 143; Moses *v.* Mead, 1 Den. 378, 43 Am. Dec. 676 [*affirmed* in 5 Den. 617].

*Texas.*— Houk *v.* Berg, (Civ. App. 1907) 105 S. W. 1176.

*Vermont.*— Warren *v.* Buck, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754.

See 43 Cent. Dig. tit. "Sales," §§ 777, 778.

**In England** the decisions are not in accord as to whether there is an implied warranty on the sale of food. In Benjamin Sales (5th ed.), 632, it was said the responsibility of a victualer, vintner, brewer, butcher, or cook for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute that they shall make good any damage caused by their sale of unwholesome food. And see as sustaining this position Roswell *v.* Vaughan, Cro. Jac. 196, 79 Eng. Reprint 171; Burnby *v.* Rollitt, 11 Jur. 827, 17 L. J. Exch. 190, 16 M. & W. 644. On the other hand it seems to be laid down broadly in some decisions that on a contract to supply goods for food there is an implied warranty that the goods shall be fit for consumption. See Beer *v.* Walker, 46 L. J. C. P. 677, 37 L. T. Rep. N. S. 278, 25 Wkly. Rep. 880; Stancliffe *v.* Clarke, 7 Exch. 439, 16 Jur. 430, 21 L. J Exch. 129. According to some decisions there is no implied warranty of wholesomeness where the sale is in open market and the selection is made by the buyer. Emmerton *v.* Matthews, 7 H. & N. 586, 8 Jur. N. S. 61, 31 L. J. Exch. 139, 5 L. T. Rep. N. S. 681, 10 Wkly. Rep. 346; Smith *v.* Baker, 40 L. T. Rep. N. S. 261. But the rule has been declared to be otherwise if the selection is made by the seller on whose judgment the buyer relies. Frost *v.* Aylesbury Dairy Co., [1905] 1 K. B. 608, 74 L. J. K. B. 386, 92 L. T. Rep. N. S. 527, 21 T. L. R. 300, 53 Wkly. Rep. 354; Wallis *v.* Russell, [1902] 2 Ir. 585.

67. Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210 [*reversing* 58 Ill. App. 382]; Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884; Giroux *v.* Stedman, 145 Mass. 439, 14 N. E. 538, 1 Am. St. Rep. 472; Burnby *v.* Rollitt, 11 Jur. 827, 17 L. J. Exch. 190, 16 M. & W. 644.

68. Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288.

**Sale of drugs.**— In the sale of drugs by a druggist, the rule of *caveat emptor* does not apply. Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689.

69. Howard *v.* Emerson, 110 Mass. 320, 14 Am. Rep. 608; Hanson *v.* Hartse, 70 Minn. 282, 73 N. W. 163, 68 Am. St. Rep. 527; Warren *v.* Buck, 71 Vt. 44, 42 Atl. 979, 76 Am. St. Rep. 754.

**Limitations of rule — Absence of opportunity to inspect.**— Where a wholesaler ships food to a dealer who is obliged to pay therefor before inspection, and the seller knows that the food is purchased for consumption as such, the buyer has the right to rely on the supposition that the goods will be of the quality ordered and suitable for the purpose he designed, and there is an implied warranty that the goods are fit for food. Copas *v.* Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690.

70. Hansen *v.* U. S. Brewing Co., 70 Ill. App. 265; Leopold *v.* Vankirk, 27 Wis. 152. And see Deason *v.* McNeill, 132 Ill. App. 304; Harman *v.* Bennett, 1 F. & F. 400.

71. *Arkansas.*— Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288.

*Illinois.*—Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210 [*reversing* 58 Ill. App. 382].

*Michigan.*— Hoover *v.* Peters, 18 Mich. 51.

*New York.*—Burch *v.* Spencer, 15 Hun 504; Divine *v.* McCormick, 50 Barb. 116.

*Texas.*— Houk *v.* Berg, (Civ. App. 1907) 105 S. W. 1176.

**In Massachusetts** where the sale of an article of food is made by a dealer, and the selection thereof is left to him, there is an implied condition of the sale that the article shall be fit for food, whether supplied under a preëxisting contract, or in response to an order not given in person, or whether the order is given in person in the dealer's shop; but, where the articles are selected by the buyer, the dealer is not liable because the provisions are not fit for food, in the absence of knowledge on his part that they are unsound. Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884.

72. Wiedeman *v.* Keller, 171 Ill. 93, 49 N. E. 210 [*reversing* 58 Ill. App. 382]. But see Julien *v.* Laubenberger, 16 Misc. (N. Y.) 646, 38 N. Y. Suppl. 1052.

the implied warranty that they are fit for that purpose, if the purpose is known to the seller, and there is no inspection by the buyer,[73] but not otherwise.[74] The implied warranty as to food intended for human use is not extended to food stuff for animals,[75] nor is there any warranty that the food will increase the weight of the animals.[76]

(VIII) *SALE OF MACHINERY.* On a sale of machinery there is in general an implied warranty that the machine is reasonably adapted to the purpose for which it is purchased.[77] No such warranty is implied, however, on the sale of a second-hand machine.[78] There is, moreover, no warranty that a machine designed for a general use is suitable for a particular purpose or use,[79] or that a known and designated machine purchased by name will serve a specific purpose,[80] especially where the machine is made according to the plans and specifications of the buyer.[81] So too there is no implied warranty that a machine is as suitable for the purpose as other machines of the same class.[82]

**73.** Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389. And see Houston Cotton Oil Co. *v.* Trammell, 72 S. W. 244 [*reversed* on other grounds in 96 Tex. 598, 74 S. W. 899]; Houk *v.* Berg, (Tex. Civ. App. 1907) 105 S. W. 1176.

**74.** National Cotton Oil Co. *v.* Young, 74 Ark. 144, 85 S. W. 92, 109 Am. St. Rep. 71; Lukens *v.* Freiund, 27 Kan. 664, 51 Am. Rep. 429; Jackson *v.* Harrison, 2 F. & F. 782.

**75.** See cases cited in preceding note.

**76.** Union Oil-Mill Co. *v.* Kennedy, 105 La. 738, 30 So. 111.

**77.** *Alabama.*— Kennebrew *v.* Southern Automatic Electric Shock Mach. Co., 106 Ala. 377, 17 So. 545.

*Georgia.*— Smith *v.* Hightower, 76 Ga. 629.

*Illinois.*— Hallock *v.* Cutler, 71 Ill. App. 471; Lanz *v.* Wachs, 50 Ill. App. 262.

*Indiana.*— McClamrock *v.* Flint, 101 Ind. 278.

*Iowa.*— Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Rose *v.* Meeks, 91 Iowa 715, 59 N. W. 30.

*Missouri.*— Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804; Skinner *v.* E. F. Kerwin Ornamental Glass Co., 103 Mo. App. 650, 77 S. W. 1011; Creasy *v.* Gray, 88 Mo. App. 454.

*New York.*— Cooper *v.* Payne. 103 N. Y. App. Div. 118, 93 N. Y. Suppl. 69 [*reversed* on other grounds in 186 N. Y. 334, 78 N. E. 1076].

*Ohio.*— Hauser *v.* Curran, 8 Ohio S. & C. Pl. Dec. 495, 5 Ohio N. P. 224.

*Pennsylvania.*— Osborne *v.* Walley, 8 Pa. Super. Ct. 193.

*Tennessee.*— Southern Brass, etc., Co. *v.* Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614; Tennessee River Compress Co. *v.* Leeds, 97 Tenn. 574, 37 S. W. 389.

*Wisconsin.*— Merrill *v.* Nightingale, 39 Wis. 247.

*United States.*— Moore *v.* The Charles Morgan, 17 Fed. Cas. No. 9,754.

*Canada.*— Crompton, etc., Loom Works *v.* Hoffman, 5 Ont. L. Rep. 554.

**Single purpose.**—Where a machine was intended to feed a threshing machine, and could not have been adapted to any other use, there was an implied warranty that it was adapted to the use intended, and that it would reasonably perform the service required. Parsons Band-Cutter, etc., Co. *v.* Mallinger, 122 Iowa 703, 98 N. W. 580.

**78.** Ramming *v.* Caldwell, 43 Ill. App. 175; Norris *v.* Reinstedler, 90 Mo. App. 626; Joy *v.* National Exch. Bank, 32 Tex. Civ. App. 398, 74 S. W. 325. See also Chalmers *v.* Harding, 17 L. T. Rep. N. S. 571. But see New Birdsall Co. *v.* Keys, 99 Mo. App. 458, 74 S. W. 12, holding that a provision in a contract for the sale of second-hand machinery that the seller's agent had no authority to bind the seller by any preliminary, collateral, or additional contract to that expressed in the writing did not prevent the implication of a warranty of suitableness to the purpose for which the machinery was sold.

**79.** Fairhanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Davis Calyx Drill Co. *v.* Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; Grand Ave. Hotel Co. *v.* Wharton, 79 Fed. 43, 24 C. C. A. 441.

**Special product.**— There is an implied, if not an express, warranty, on the sale of a goring loom, that it shall be fit for the purpose of making a web similar to a piece furnished to the seller at the time of the sale, with a statement that the loom was required for the making of a similar piece of web. Crompton, etc., Loom Works *v.* Hoffman, 5 Ont. L. Rep. 554.

**80.** Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Seitz *v.* Brewers Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837; Moore *v.* The Charles Morgan, 17 Fed. Cas. No. 9,754; Olivant *v.* Bayley, 5 Q. B. 288, Dav. & M. 373, 7 Jur. 1130, 13 L. J. Q. B. 34, 48 E. C. L. 288; Prideaux *v.* Bunnett, 1 C. B. N. S. 613, 87 E. C. L. 613; Chanter *v.* Hopkins, 1 H. & H. 377, 3 Jur. 58, 8 L. J. Exch. 14, 4 M. & W. 399; Chalmers *v.* Harding, 17 L. T. Rep. N. S. 571.

**81.** Shoenberger *v.* McEwen, 15 Ill. App. 496; Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359; Durbrow, etc., Mfg. Co. *v.* Cuming, 35 N. Y. App. Div. 376, 54 N. Y. Suppl. 818; J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

**82.** Robinson Mach. Works *v.* Chandler, 56 Ind. 575.

(IX) *SALE OF SEEDS.* On a sale of seeds there is an implied warranty that the seeds are fit to sow and will germinate.[83] If the sale is by the producer there is an implied warranty that the seed is free from latent defects arising from the mode of cultivation,[84] and reasonably free from foreign matter.[85] But if a particular kind of seed is purchased by name, the warranty implied is only that the seed is of the kind designated,[86] and there is no warranty that the seed will germinate or is fit for the intended purpose.[87]

(X) *SALE OF FERTILIZERS.* On a sale of fertilizer, while there is an implied warranty that the article is reasonably suitable for the purpose for which it is purchased,[88] there is no warranty that it is adapted to use on all kinds of land,[89] or that it will produce as good results as another fertilizer.[90] If a specific kind of fertilizer is ordered by name there is no implied warranty of its fitness, but only that it is the kind of fertilizer designated.[91]

(XI) *KNOWLEDGE OF DEFECTS* [92] — (A) *In General.* It is a general rule that no warranty as to quality or fitness for purpose will be implied when the defects in the article are known to the buyer,[93] or he has knowledge of facts sufficient to put him on inquiry or charge him with notice,[94] or if the buyer has equal opportunity with the seller, to discover the defects,[95] unless there is *suppressio veri*

**83.** Shaw *v.* Smith, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; Shatto *v.* Abernethy, 35 Minn. 538, 29 N. W. 325; Johnson *v.* Sproull, 50 Mo. App. 121; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Gubner *v.* Vick, 6 N. Y. St. 4. See also Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438. But see Gachet *v.* Warren, 72 Ala. 288 (holding that on a sale of "rust proof oats" by sample to a farmer, there is no implied warranty that they are reasonably fit for immediate planting); Pinder *v.* Button, 7 L. T. Rep. N. S. 269, 11 Wkly. Rep. 25.

**Special purpose.**—Where a seed grower sells seed peas to a market gardener in compliance with his request for the earliest peas, there is an implied warranty that the peas are of such character. Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388.

**84.** White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13; Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388; Prentice *v.* Fargo, 53 N. Y. App. Div. 608, 65 N. Y. Suppl. 1114 [*affirmed* in 173 N. Y. 593, 65 N. E. 1121].

**85.** Bell *v.* Mills, 78 N. Y. App. Div. 42, 80 N. Y. Suppl. 34.

**Qualified warranty.**— The fact that defendant, in selling seed wheat to plaintiff, stated that plaintiff might have it for ninety cents per bushel if he would take it "just as it is," or "just as it is, without cleaning," did not relieve him from liability on his implied warranty that it was suitable for sowing, but evidently had reference only to its unclean condition. Prentice *v.* Fargo, 53 N. Y. App. Div. 608, 65 N. Y. Suppl. 1114 [*affirmed* in 173 N. Y. 593, 65 N. E. 1121].

**86.** Gubner *v.* Vick, 6 N. Y. St. 4.

**87.** Gardner *v.* Winter, 117 Ky. 382, 78 S. W. 143, 25 Ky. L. Rep. 1472, 63 L. R. A. 647.

**88.** Barry *v.* Usry, 70 Ga. 711; Wilcox *v.* Hall, 53 Ga. 635; Gammell *v.* Gunby, 52 Ga. 504; Sims *v.* Howell, 49 Ga. 620; Boit *v.* Williams, 47 Ga. 620; Radcliff *v.* Gunby, 46 Ga. 464; Walters *v.* Croasdale, 43 Ga. 204. But see Farrow *v.* Andrews, 69 Ala. 96.

**89.** Wilcox *v.* Hall, 53 Ga. 635; Boit *v.* Williams, 47 Ga. 620.

**90.** Rasin *v.* Conley, 58 Md. 59.

**91.** Rasin *v.* Conley, 58 Md. 59; Walker *v.* Pue, 57 Md. 155; G. Ober, etc., Co. *v.* Blalock, 40 S. C. 31, 18 S. E. 264; Mason *v.* Chappell, 15 Gratt. (Va.) 572.

**Breach as to analysis.**— While there is no implied warranty as to the effect of a fertilizer on crops, it may be shown that the crops were not benefited for the purpose of showing that the fertilizer did not conform to the guaranteed analysis. Jones *v.* Cordele Guano Co., 94 Ga. 14, 20 S. E. 265. See also Towerson *v.* Aspatria Agricultural Co-operative Soc., 27 L. T. Rep. N. S. 276.

**92.** Express warranties see *supra*, VII, C, 6.

**93.** Young *v.* Plattner Implement Co., 41 Colo. 65, 91 Pac. 1109; Byrd *v.* Campbell Printing Press, etc., Co., 90 Ga. 542, 16 S. E. 267; Hogue *v.* Simonson, 94 N. Y. App. Div. 139, 87 N. Y. Suppl. 1065; Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557; Watson *v.* Boatwright, 1 Rich. (S. C.) 402; Miller *v.* Yarborough, 1 Rich. (S. C.) 48; Wood *v.* Ashe, 3 Strobh. (S. C.) 64.

**One of two defects known to purchaser.**— Where it appears that at the time of the sale the article purchased had two infirmities, one of which was known to the purchaser, but as to the other there was no notice, and there was no evidence that the unknown infirmity contributed to any loss, the purchaser could not recover. Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456.

**94.** Williams *v.* Vance, Dudley (S. C.) 97; Carnochan *v.* Gould, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

**95.** *Delaware.*—Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978.

*New York.*— Bartlett *v.* Hoppock, 34 N. Y. 118, 88 Am. Dec. 428; Rinschler *v.* Jeliffe, 9 Daly 469.

or *suggestio falsi* on the part of the seller.[96] If the circumstances are such that the seller may be presumed to have superior knowledge in regard to the goods, a warranty will be implied.[97]

(B) *Inspection by Buyer.* In accordance with the general principle,[98] it is also the rule that no warranty of quality or fitness for purpose will be implied if the goods are inspected by the buyer,[99] or if he has an opportunity to inspect the

*North Carolina.*— Hudgins *v.* Perry, 29 N. C. 102.

*Pennsylvania.*— Lord *v.* Grow, 39 Pa. St. 88, 80 Am. Dec. 504.

*South Carolina.*— Miller *v.* Yarborough, 1 Rich. 48.

*Texas.*— Needham *v.* Dial, 4 Tex. Civ. App. 141, 23 S. W. 240.

*Vermont.*— Stevens *v.* Smith, 21 Vt. 90.

*West Virginia.*— Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

*United States.*— Gage *v.* Carpenter, 107 Fed. 886, 47 C. C. A. 39; Dooley *v.* Gallagher, 7 Fed. Cas. No. 3,996, 3 Hughes 214.

See 43 Cent. Dig. tit. "Sales," § 764.

**Relative opportunity.**— An implied warranty by a seller of an article which is in existence, as to quality or against defects which are not obvious, arises only where the circumstances are such as entitle the buyer to rely upon the knowledge or opportunity of inspection which the seller possesses and he does not possess. Gage *v.* Carpenter, 107 Fed. 886, 47 C. C. A. 39.

**Matters of opinion.**— Where the seller of a horse called the attention of the purchaser, who had driven horses for twenty years, to a swelling on the horse's leg, and stated that it would go away when the horse was worked, the statement was a mere expression of opinion; and the buyer, being in as good a situation as the seller to judge of the effect of the swelling, should be deemed to have made his purchase with full knowledge of the defect. Quis *v.* Halloran, 74 N. Y. App. Div. 621, 77 N. Y. Suppl. 196.

**96.** Court *v.* Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247; Robertson *v.* Wallis, 10 La. Ann. 214; Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Watson *v.* Boatwright, 1 Rich. (S. C.) 402; Wood *v.* Ashe, 3 Strobh. (S. C.) 64; Carnochan *v.* Gould, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

**Fraud or misrepresentation.**— If by fraud or misrepresentation the buyer is misled respecting the character, extent, or probable consequences of the defect of which he has notice, a warranty will be implied. Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557.

**97.** Lord *v.* Grow, 39 Pa. St. 88, 80 Am. Dec. 504.

**98.** See *supra*, VII, D, 6, e, (XI), (A).

**99.** *Alabama.*— Perry *v.* Johnston, 59 Ala. 648; Barnett *v.* Stanton, 2 Ala. 195.

*Illinois.*— Horwich *v.* Western Brewery Co., 95 Ill. App. 162; I Rayner *v.* Rees, 58 Ill. App. 292; Becker *v.* Brawner, 18 Ill. App. 39.

*Indiana.*— Bowman *v.* Clemmer, 50 Ind. 10; Humphreys *v.* Comline, 8 Blackf. 516.

*Massachusetts.*— Hight *v.* Bacon, 126 Mass. 10, 30 Am. Rep. 639.

*Michigan.*— Nester *v.* Michigan Land, etc., Co., 69 Mich. 290, 37 N. W. 278.

*Missouri.*— Doyle *v.* Parish, 110 Mo. App. 470, 85 S. W. 646.

*New Hampshire.*— Deming *v.* Foster, 42 N. H. 165.

*New York.*— Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, 54 N. Y. Suppl. 449 [*affirmed* in 165 N. Y. 617, 59 N. E. 1119]; Rinschler *v.* Jeliffe, 9 Daly 469.

*Pennsylvania.*— Lord *v.* Grow, 39 Pa. St. 88, 80 Am. Dec. 504; Wilson *v.* Belles, 22 Pa. Super. Ct. 477; Walker *v.* Taylor, 19 Pa. Super. Ct. 39.

*South Carolina.*— Miller *v.* Yarborough, 1 Rich. 48.

*Wisconsin.*— J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013.

*England.*— Parsons *v.* Sexton, 4 C. B. 899, 16 L. J. C. P. 181, 11 Jur. 849, 56 E. C. L. 899; Fitzgerald *v.* Iveson, 1 F. & F. 410.

*Canada.*— Laurie *v.* Croucher, 23 Nova Scotia 293.

See 43 Cent. Dig. tit. "Sales," § 766.

**Sufficiency of inspection.**— Where a purchaser of seed oats merely opened one of several sacks, and taking a handful of the oats, noticed the size and color before turning them over to his servant to be sown, and there was a large quantity of mustard seed evenly distributed through the oats, which was readily distinguishable on spreading the oats thinly on any flat surface or even on the hand, a finding that the purchaser made a reasonable examination, and that such foreign seeds were not discoverable, was not justified. Bell *v.* Mills, 68 N. Y. App. Div. 531, 74 N. Y. Suppl. 224.

**Examination of sample boxes.**— Defendant stated to plaintiff, a dealer in fruit, that he wished to purchase grape fruit, and plaintiff directed defendant to examine a load of boxes that stood in front of plaintiff's store. Those of the boxes which were examined contained grape fruit, and the load of boxes was sold to defendant, being billed as grape fruit; but some of the boxes did not contain grape fruit. It was held in an action for the price, wherein it appeared that it was the custom in the market to sell fruit in bulk by sample boxes, the purchaser opening a few boxes and then making his offer, that the rule of *caveat emptor* had no application. Abel *v.* Murphy, 43 Misc. (N. Y.) 648, 88 N. Y. Suppl. 256.

**Presence at time of sale.**— The fact that the purchaser was present, looking at the hogs, for some time before the sale, and that he testifies that he had made up his mind to buy them if they should sell cheap enough, does not show that the purchase was to be without warranty of soundness. Powell *v.* Chittick, 89 Iowa 513, 56 N. W. 652.

goods and fails to do so,[1] unless some artifice is used by the seller to prevent an examination.[2] A warranty will, however, be implied if no opportunity to inspect is given,[3] or if the defects are of such nature that they would not be ordinarily discoverable on inspection.[4]

(c) *Obvious and Latent Defects.* There is no implied warranty in regard to defects which are obvious, or discoverable on simple inspection,[5] unless fraudulent

**Acceptance at reduced price.**— Where plaintiff ordered cabbages, and examined the shipment on its arrival, and, finding them badly heated and not of the kind ordered, refused to accept them, but afterward took them at a reduced price, he purchased at his own risk, and was without recourse on the seller. Earl *v.* Westfall Commission Co., 70 Ark. 61, 66 S. W. 148.

**Inspection after delivery** is not necessarily a waiver of warranty. English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

**1.** *Arkansas.*— National Cotton Oil Co. *v.* Young, 74 Ark. 144, 85 S. W. 92, 109 Am. St. Rep. 71.

*California.*— Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722; Byrne *v.* Jansen, 50 Cal. 624; Moore *v.* McKinley, 5 Cal. 471.

*Illinois.*—Telluride Power Transmission Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319 [*affirming* 103 Ill. App. 647]; Martin *v.* Roehm, 92 Ill. App. 87; Rockford Wholesale Grocery Co. *v.* Stevenson, 65 Ill. App. 609.

*Indiana.*— Bowman *v.* Clemmer, 50 Ind. 10.

*Iowa.*— Burnett *v.* Hensley, 118 Iowa 575, 92 N. W. 678.

*Maryland.*— Horner *v.* Parkhurst, 71 Md. 110, 17 Atl. 1027; Taymon *v.* Mitchell, 1 Md. Ch. 496.

*Missouri.*— Moore *v.* Koger, 113 Mo. App. 423, 87 S. W. 602.

*New Hampshire.*— Deming *v.* Foster, 42 N. H. 165.

*New York.*— Waeber *v.* Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712 [*affirming* 43 N. Y. App. Div. 180, 59 N. Y. Suppl. 396]; Bell *v.* Mills, 68 N. Y. App. Div. 531, 74 N. Y. Suppl. 224; Rinschler *v.* Jeliffe, 9 Daly 469; Boessneck *v.* Taylor, 46 Misc. 63, 91 N. Y. Suppl. 360.

*Pennsylvania.*— Scully *v.* Miller, 29 Leg. Int. 230.

*South Carolina.*— Sullivan *v.* Huff, 24 S. C. 348.

*West Virginia.*— Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

*Wisconsin.*— T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Dodge *v.* Dickson Mfg. Co., 113 Fed. 218, 51 C. C. A. 175.

*England.*— Horsfall *v.* Thomas, 1 H. & C. 90, 8 Jur. N. S. 721, 31 L. J. Exch. 322, 6 L. T. Rep. N. S. 462, 10 Wkly. Rep. 650.

*Canada.*— Peters *v.* Hamilton, 19 N. Brunsw. 284; Higgins *v.* Clish, 34 Nova Scotia 135; Laurie *v.* Croucher, 23 Nova Scotia 293.

See 43 Cent. Dig. tit. "Sales," § 767.

**Contra.**— Moultrie Repair Co. *v* Hill, 120 Ga. 730, 48 S. E. 143.

**Inspection of like articles.**— There is no implied warranty of fitness in the sale of a machine where the buyer has an opportunity to inspect a similar machine known to him to be in operation in the same city. Curran *v.* Hauser, 4 Ohio S. & C. Pl. Dec. 449 [*reversed* on other grounds in 8 Ohio S. & C. Pl. Dec. 495, 5 Ohio N. P. 224].

**2.** Byrne *v.* Jansen, 50 Cal. 624; Huntington *v.* Lowe, 3 La. Ann. 377.

**3.** *California.*— Moore *v.* McKinley, 5 Cal. 471.

*District of Columbia.*— Armour *v.* Gundersheimer, 23 App. Cas. 210.

*Iowa.*— Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

*New York.*— Van Wyck *v.* Allen, 69 N. Y. 61, 25 Am. Rep. 136 [*affirming* 6 Daly 376]; Newbery *v.* Wall, 35 N. Y. Super. Ct. 106 [*affirmed* in 65 N. Y. 484]; Carleton *v.* Lombard, 72 Hun 254, 25 N. Y. Suppl. 570.

*Oregon.*— Morse *v.* Union Stock-Yard Co., 21 Oreg. 289, 28 Pac. 2, 14 L. R. A. 157.

*Vermont.*— Best *v.* Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570.

*West Virginia.*— Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

*Wisconsin.*— Merriam *v.* Field, 39 Wis. 578; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Dawes *v.* Peebles, 6 Fed. 856.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Wieler *v.* Schilizzi, 17 C. B. 619, 25 L. J. C. P. 89, 4 Wkly. Rep. 209, 84 E. C. L. 619.

**Facilities for inspection.**— It is not sufficient that inspection would be inconvenient but it must be impracticable. Hyatt *v.* Boyle, 5 Gill & J. (Md.) 110, 25 Am. Dec. 276.

**4.** See *infra*, VII, D, 6, e, (XI), (C).

**5.** *Georgia.*— Ragsdale *v.* Shipp, 108 Ga. 817, 34 S. E. 167.

*Louisiana.*— Fee *v.* Sentell, 52 La. Ann. 1957, 28 So. 279; Szymanski *v.* Urquhart, 5 La. Ann. 491; Huntington *v.* Lowe, 3 La. Ann. 377; Richardson *v.* Johnson, 1 La. Ann. 389.

*Missouri.*— Moore *v.* Koger, 113 Mo. App. 423, 87 S. W. 602; Anthony *v.* Potts, 63 Mo. App. 517; Thompson *v.* Botts, 8 Mo. 710.

*Nebraska.*— Omaha Coal, etc., Lime Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

*North Carolina.*— Hudgins *v.* Perry, 29 N. C. 102.

*South Carolina.*—Vanderhorst *v.* MacTaggart, 1 Brad. 269, 2 Am. Dec. 667.

*United States.*— Carleton *v.* Jenks, 80 Fed. 937, 26 C. C. A. 265.

See 43 Cent. Dig. tit. "Sales," § 765.

means were resorted to by the seller to conceal the defect.[6] As to latent defects, the seller warrants that none are known to him and not disclosed,[7] and in the case of a sale by a manufacturer or producer a warranty is implied that there are no latent defects known to him,[8] or defects which are not discoverable by the buyer on ordinary inspection.[9] There is no implied warranty as to latent defects of which in the nature of things the seller could not have knowledge.[10]

**E. Construction and Scope of Warranties — 1. In General.** Warranties will be given a reasonable construction[11] according to the obvious and usual import of the language used.[12] A written warranty is not controlled by collateral conditions not brought to the knowledge of the buyer.[13] If the contract of sale

6. Richardson *v.* Johnson, 1 La. Ann. 389.

7. Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

**By statute.**—Where the vendor, who had owned a mare three years, stated, on selling her, that her shortness of breath was caused by epizootic, when in fact it was caused by another disease, which soon made her worthless, there was a breach of warranty under the code, section 2651, providing that the vendor of chattels warrants that he knows of no latent defect undisclosed. Perdue *v.* Harwell, 80 Ga. 150, 4 S. E. 877.

**Knowledge of seller.**— In an action for a breach of the implied warranty that the seller knows of no latent defects undisclosed, it was error to charge, in substance, that defendant would be liable, not only in the event he actually knew, but also if he ought to have known, of the diseased condition of the stock when he made the sale. Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121.

8. Downing *v.* Dearborn, 77 Me. 457, 1 Atl. 407.

9. *Georgia.*— Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110.

*Minnesota.*— Leitch *v.* Gillette-Herzog Mfg. Co., 64 Minn. 434, 67 N. W. 352.

*Missouri.*— Moore *v.* Koger, 113 Mo. App. 423, 87 S. W. 602.

*New York.*— Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799; Van Wyck *v.* Allen, 69 N. Y. 61, 25 Am. Rep. 136 [*affirming* 6 Daly 376]; Osborn *v.* American Ink Co., 29 Misc. 648, 61 N. Y. Suppl. 70; Pennsylvania, etc., Oil Co. *v.* Spitelnik, 27 Misc. 557, 58 N. Y. Suppl. 311; League Cycle Co. *v.* Abrahams, 27 Misc. 548, 58 N. Y. Suppl. 306. But see Hart *v.* Wright, 17 Wend. 267 [*affirmed* in 18 Wend. 449].

*United States.*— Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108, 3 S. Ct. 537, 28 L. ed. 86.

10. *Indiana.*— Burns *v.* Fletcher, 2 Ind. 372.

*Maryland.*— Farren *v.* Demeron, 99 Md. 323, 58 Atl. 367.

*Michigan.*— McKinnon Mfg. Co. *v.* Alpena Fish Co., 102 Mich. 221, 60 N. W. 472.

*New York.*— Julian *v.* Laubenberger, 16 Misc. 646, 38 N. Y. Suppl. 1052.

*Tennessee.*— Goad *v.* Johnson, 6 Heisk. 340.

**Illustration.**— Where defendant's superintendent prepared plans and specifications for machinery connected with a movable grain tower, and plaintiff contracted to manufacture and furnish such machinery, with certain exceptions, including a spur wheel, which it agreed to purchase from another manufacturer, and which it did purchase in the rough, and furnished to defendant as a part of the machinery, there was no implied condition in the executory contract for the sale of such machinery that the wheel was free from concealed defects, which occurred in the process of manufacture, and which could have been discovered only by destruction of the wheel. Howard Iron Works *v.* Buffalo El. Co., 113 N. Y. App. Div. 562, 99 N. Y. Suppl. 163 [*affirmed* in 188 N. Y. 619, 81 N. E. 1166].

**Future defects.**— Where a bull calf at the time of sale is but three months old, free from apparent defect, and present to the view of the purchaser, it cannot be held as a matter of law that his sterility, which transpired two years later, existed at the time of sale, and that there was an implied warranty that he would possess the power of procreation at maturity. White *v.* Stelloh, 74 Wis. 435, 43 N. W. 99. To the same effect see McQuaid *v.* Ross, 85 Wis. 492, 55 N. W. 705, 39 Am. St. Rep. 864, 22 L. R. A. 187.

11. Burge *v.* Stroberg, 42 Ga. 88.

12. Hawley *v.* Brumagim, 33 Cal. 394, holding that a warranty that shares of stock shall be worth a certain amount "on" a certain day cannot be construed as meaning "on or before" the day named. McClelland *v.* Stewart, L. R. 12 Ir. 125.

**Nationality of vessel.**— A warranty that a ship is American does not mean that she is American built but that she is the property of an American citizen. Wilson *v.* Backhouse, 2 Peake N. P. 119.

**Evidence of custom.**— A guaranty, in a sale of skins, that they should not "lose over six per cent. from invoice weight," is explicit, the legal effect of which cannot be affected by proof of a custom to construe such guaranties to mean that the seller will make a deduction from the price if the loss of weight exceeds the amount specified, and that the buyer shall not reject the skins because of such loss of weight. Gotze *v.* Dunphy, 82 Hun (N. Y.) 611, 31 N. Y. Suppl. 302.

13. Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388. See also Barton *v.* Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599, holding that on a sale of paint with a warranty that it would not turn yellow, crack, or scale off, and that it would be as described in the

stipulates that the seller does not "guarantee" except "in title," the defense of unsoundness is thereby excluded.[14] If the contract provides for a refund of the price if the article does not comply with certain conditions, a non-compliance with any one or more of the conditions less than all will authorize a return.[15]

**2. Conditions and Limitations.** A warranty may be conditioned to take effect only on the performance of certain acts by the buyer,[16] such as payment of the price,[17] or if the goods are for resale, on payment by the subpurchaser.[18] The warranty may be conditional on a test or trial to be made by the purchaser for a specified time, and in such case a breach cannot be predicated unless the condition is fulfilled.[19] Similarly the warranty may be conditioned that it shall be deemed fulfilled after a trial for a certain limited time.[20] So if the test is to be made by a particular person his decision is conclusive.[21] Such conditions will, however, be strictly construed against the seller,[22] and will not be read into the

seller's circulars if applied in accordance with instructions, a pamphlet sent to the buyer prior to the sale, describing the paint, and containing the statement that it should not be applied to green timber, was no part of the contract, and the buyers were not bound thereby.

14. Branch *v.* James, 4 Ga. App. 90, 60 S. E. 1027.

15. Thompson *v.* O'Neil, 155 Ala. 411, 46 So. 229.

16. Osborne *v.* Mullikin, 88 Mo App. 350; Wallace *v.* Rogers, 2 N. H. 506; Smith *v.* Borst, 63 Barb. (N. Y.) 57. See also Baer's Sons Grocer Co. *v.* Cutting Fruit-Packing Co., 42 W. Va. 359, 26 S. E. 191.

**Independent condition.**— A covenant by one selling a newspaper plant, warranting the title, and a covenant by the purchaser to continue the publication for a year, were not mutually dependent, but mere separate and distinct obligations. Neville *v.* Hughes, 104 Mo. App. 455, 79 S. W. 735.

17. Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280.

18. Warren, etc., Mfg. Co. *v.* Watson, 92 Iowa 759, 60 N. W. 481.

19. Thisler *v.* Hopkins, 85 Ill. App. 207; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437.

**Mode of trial or test.**— Where an engine is sold under a warranty that it is capable of developing twenty-five horse power when tested according to a designated system, a finding that there was a breach of warranty is sustained by evidence that in actual use under conditions satisfactory to the seller it could not develop more than fifteen horse power, although no test was made according to the prescribed method. Kinnard Press Co. *v.* Stanley, 70 Kan. 770, 79 Pac. 661.

20. Aultman *v.* Wykle, 36 Ill. App. 293. See also Bayliss *v.* Hennessey, 54 Iowa 11, 6 N. W. 46, where the contract provided that "the use of the machine in cutting five acres shall be conclusive evidence that the warranty is fulfilled."

**Computation of time.**— Where a reaping machine is sold on the condition that the purchaser "shall have one day to give it a fair trial," the term "day" is to be understood with reference to the usage of farmers in the working of such machines, and means an entire day, and not merely the remainder of the day upon which the machine is first used. Fuller *v.* Schroeder, 20 Nebr. 631, 31 N. W. 109.

**"During harvest."**— Where a reaping and mowing machine was sold on condition that, if kept during harvest without giving notice of defects, it should be deemed to fill the warranty, the term "harvest" did not mean the time of cutting a second crop, but the usual harvest season. Wendall *v.* Osborne, 63 Iowa 99, 18 N. W. 709.

**Commencement of period.**— Where a contract whereby a traction engine was sold provided that use of the same after the expiration of six days from the day of its first use should be conclusive evidence of the fulfilment of the warranty, the first day of use from which the limitation would run was the day after the seller's expert had put the machine in supposedly good order and left its future operation to the purchaser. Shearer *v.* Gaar, 41 Tex. Civ. App. 39, 90 S W. 684.

21. McParlin *v.* Boynton, 8 Hun (N. Y.) 449 [*affirmed* in 71 N. Y. 604].

22. Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497; Parsons Band Cutter, etc., Co. *v.* Gadeke, (Nebr. 1901) 95 N. W. 850; Gillespie *v.* Cheney, [1896] 2 Q. B. 59, 65 L. J. Q. B. 552.

**Limitation of condition.**— Where a stallion was warranted "serviceably sound as a serving stallion," and it was also agreed that, if he should not prove himself to be a fifty per cent foal getter, the buyer should return him, and receive another horse of equal value, a further stipulation that the seller should not be bound by the conditions of the guaranty unless the buyer should submit to him a monthly report showing the condition of the horse, and the number of mares tried and reserved each month from date of purchase, was applicable only to the horse's capacity as a foal getter, and an action for breach of the warranty of soundness could be maintained without having submitted such reports. Montgomery *v.* Hanson, 122 Iowa 222, 97 N. W. 1081.

**Provision for inspection.**— A condition for inspection by the buyer of a car-load of oranges at its destination in Texas after shipment from California is not inconsistent with a warranty of quality. Fay Fruit Co. *v.*

warranty by construction.[23] The seller cannot by provisions in the contract of sale divest himself of the power to make a subsequent contract by parol, or frame conditions for his benefit.[24]

**3. Time to Which Warranty Relates.** Unless otherwise expressed a warranty relates only to the time of sale and does not cover future defects not then in existence or inherent in the article,[25] and this is true, although the contract is for

Talerico, (Tex. Civ. App. 1902) 69 S. W. 196.

23. Sloan *v.* Gibson, 4 Mo. 32.

24. Nichols, etc., Co. *v.* Maxon, 76 Kan. 607, 92 Pac. 545.

25. *Arkansas.*— Haskill *v.* Sevier, 25 Ark. 152.

*Florida.*— Walker *v.* Gatlin, 12 Fla. 9.

*Georgia.*— McCoy *v.* Wily, 50 Ga. 126; Bass *v.* Ware, 34 Ga. 386; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255; Hand *v.* Armstrong, 34 Ga. 232.

*Illinois.*— Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 77 Ill. App. 59.

*Indiana.*— Bowman *v.* Clemmer, 50 Ind. 10.

*Iowa.*— Bothwell *v.* Farwell, 74 Iowa 324, 37 N. W. 392.

*Kentucky.*— Porter *v.* Ralston, 6 Bush 665.

*Louisiana.*— Baker *v.* Irwin, 5 La. Ann. 588; Allen *v.* Campbell, 5 La. Ann. 754; McLellan *v.* Williams, 11 La. Ann. 721; Hall *v.* Plassan, 19 La. Ann. 11.

*Mississippi.*— Blewett *v.* Evans, 42 Miss. 804; Bradford *v.* Jenkins, 41 Miss. 328.

*Missouri.*— Phillips *v.* Evans, 38 Mo. 305; Stewart *v.* Dugin, 4 Mo. 245, 28 Am. Dec. 348; Sloan *v.* Gibson, 4 Mo. 32.

*North Carolina.*— West *v.* Hall, 64 N. C. 43.

*South Carolina.*— Lowry *v.* McBurney, 1 Mill 237.

*Texas.*— McDaniel *v.* White, 32 Tex. 488; Wade *v.* De Witt, 20 Tex. 398; Murphy *v.* Crain, 12 Tex. 297; McKinney *v.* Fort, 10 Tex. 220.

*Wisconsin.*— Smith *v.* Swarthout, 15 Wis. 550; Miller *v.* McDonald, 13 Wis. 673.

*United States.*— English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

*England.*— Liddard *v.* Kain, 2 Bing. 183, 3 L. J. C. P. O. S. 246, 9 Moore C. P. 356, 27 Rev. Rep. 582, 9 E. C. L. 537.

See 43 Cent. Dig. tit. "Sales," § 787.

**Date of contract.**— Where a bill of sale of a slave containing a covenant of warranty was dated at the time of the sale, and expressed in the present tense, but was not in fact executed until several weeks after, the covenant related to the time of its date, and proved what the parties intended — that the slave was warranted sound at that time, and not at the time the writing was delivered. Butler *v.* Elliston, 4 Dana (Ky.) 87. To the same effect see Brown *v.* Frazier, 2 Mill (S. C.) 413.

**Warrant as to future.**— Where defendant company contracted by letter to pay plaintiff, in stock of the company, for work to be done, and guaranteed the stock to be worth par "inside of one year from date," the period of the guaranty related to the date of the letter and not the date of completion of the work and issuing of the stock. Times Co. *v.* North Carolina Steel, etc., Co., 114 N. C. 224, 19 S. E. 147.

**Symptoms of unsoundness.**— In assumpsit for breach of warranty of a slave, where it was alleged that the slave was unsound, in that he was afflicted with chronic rheumatism, it was not necessary to show that the symptoms existed at the time of the sale, as subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed. Crouch *v.* Culbreath, 11 Rich. (S. C.) 9. *Compare* McGill *v.* Harris, 36 Nova Scotia 414.

**Development of disease.**— In an action for breach of warranty in the sale of horses, it was not error to instruct that if the horses, when delivered to plaintiff, had at that time contracted the disease, although it did not develop until after the horses came to plaintiff's possession, it constituted an unsoundness under the warranty. McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493.

**Inventory value of goods.**— A guaranty that a stock of goods will inventory at "wholesale prices" a certain sum should be construed to mean the wholesale prices at which the goods were purchased, and not their market value at the date of making the guaranty. Dodge *v.* Dunham, 41 Ind. 186.

**Indebtedness of corporation.**— On the sale of an interest in a corporation by the sole owner of the stock, in which the liabilities of the corporation are warranted not to exceed a certain sum, the amount of liabilities should be computed as of the time specified in the contract, and no diminution after such time should be considered; and if the warranty is broken at the specified time the purchaser can repudiate the contract. Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903.

**Earning capacity of railroad.**— A statement in an advertisement of railroad bonds for sale, that "the road is in successful operation and earning net more than the interest on all its bonds," was a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper, but that the road was then on a paying basis and was steadily earning net more than the interest on all its bonds. Blake *v.* Watson, 45 Conn. 323, 29 Am. Rep. 683.

**Present or future warranty.**— A warranty, in a sale of young fruit trees, that they were really harvest apple trees and would produce early harvest apples, is a present warranty that the trees were what they were represented to be, and not a future warranty, to

future delivery.[26] That is to say a breach of warranty can be predicated only on a loss caused by a defect which existed at the time of the sale.[27] Consequently a warranty of quality will not cover deterioration of the goods during shipment,[28] unless by the terms of the contract the goods are to be transported by the seller to the place of delivery.[29] Similarly a warranty that the article sold is as good as any other article of like kind in use or on the market refers only to the time of the sale, and not to like articles put on the market subsequently.[30] The warranty may by its terms be limited to a time prior to the date of the sale.[31]

**4. Duration of Warranty.** Notwithstanding the general rule that a warranty relates only to the time of sale, it has been held in some cases that the warranty survives for a reasonable time after acceptance for the discovery of defects that are ascertainable only by use.[32] So too a warranty of the condition or capacity of a machine is broken, although it temporarily fulfils the requirements if it gets out of order from time to time, or under proper management does not ordinarily turn out the stipulated quantity of work.[33] A warranty may by the terms of

become effective after the lapse of years. Gregory *v.* Underhill, 6 Lea (Tenn.) 207.

**Warranty taking effect after trial.**—Where plaintiff contracted to furnish defendant with one storage battery street car, to be operated for sixty days on trial, and if it was then satisfactory they were to furnish a number of storage battery equipments for other cars, with certain warranties as to amount of work, durability, etc., the warranties did not go into effect until the trial car had performed its functions. Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37.

**Warranty of title** has reference only to the condition of the title at the time of the sale and is not intended to protect the title against future events. Blewett *v.* Evans, 42 Miss. 804.

**26.** Luthy *v.* Waterbury, 140 Ill. 664, 30 N. E. 351 [*affirming* 39 Ill. App. 317]; Price *v.* Barr, Litt. Sel. Cas. (Ky.) 216. And see Merrick *v.* Bradley, 19 Md. 50.

**27.** Baker *v.* Irwin, 5 La. Ann. 588; Brown *v.* Edwards, 97 Me. 564, 55 Atl. 492; Stewart *v.* Dugin, 4 Mo. 245, 28 Am. Dec. 348; Murphy *v.* Crain, 12 Tex. 297; McKinney *v.* Fort, 10 Tex. 220; Schuwirth *v.* Thumma, (Tex. Civ. App. 1902) 66 S. W. 691.

**Instruction.**—In assumpsit for breach of warranty of the soundness of a horse, which became blind within a month after the sale, a charge based upon the condition of his eyes at the time of sale is abstract, when the only evidence before the jury relates to their condition a month previous to that time. Brown *v.* Jones, 24 Ala. 463.

**28.** English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

**29.** Drews *v.* Ann River Logging Co., 53 Minn. 199, 54 N. W. 1110, holding that where the contract was made at S to deliver good grain f. o. b. at B, the court properly refused to charge that, if the grain was as represented when the trade was made at S, the warranty was satisfied, notwithstanding the grain was to be delivered on board the cars at B; and if it deteriorated in value before delivery, without fault on defendant's part, the loss would fall upon plaintiff. See also Kentucky Refining Co. *v.* Shreveport Cotton Oil Co., 112 La. 838, 36 So. 750, holding that where a contract for the delivery of oil stipulates that the quality is guaranteed at destination, and a controversy arises as to the quality, it appearing that it could have deteriorated from having been put in unclean tanks, or other causes, the vendor cannot ask that samples of the oil taken before shipment be considered in settling the controversy.

**30.** Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 77 Ill. App. 59.

**Comparison with other articles.**—A warranty that the machine sold will "do as good work under all circumstances as any harvester binder" means any binder then in use, and not one subsequently constructed by the seller or other manufacturer. Best *v.* Kempf, 64 Mo. App. 460.

**31.** Worthington *v.* Herrmann, 89 N. Y. App. Div. 627, 88 N. Y. Suppl. 76 [*affirmed* in 180 N. Y. 559, 73 N. E. 1134], where a sale of stock in a corporation made on Feb. 1, 1899, recited that on February 24, the corporation was the owner of the assets, and indebted to the amount shown in an annexed schedule, but appended to the schedule was a paper which stated that the schedule was prepared from the balance sheet of April, 1898, and it was held that if there was a warranty it did not apply to the indebtedness of the corporation on Feb. 1, 1899.

**32.** Hall *v.* Plassan, 19 La. Ann. 11; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; White Mfg. Co. *v.* De La Vergne Refrigerating Mach. Co., 84 N. Y. Suppl. 192; Buchanan *v.* Parnshaw, 2 T. R. 745, 100 Eng. Reprint 401.

**Development of defect.**—Proof that the horse, sold with a warranty that it was true to harness, balked after seven weeks from the time it was sold, relates to a time too remote to be admissible to show a breach of warranty. Smith *v.* Swarthout, 15 Wis. 550.

**33.** Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359; Pritchard *v.* Fox, 49 N. C. 140; Minnesota Thresher Mfg. Co. *v.* Hanson, 3 N. D. 81, 54 N. W. 311. See also Walker *v.* Milner, 4 F. & F. 745, where it was held that

the agreement be a continuing one and apply to future deliveries under the contract.[34] On the other hand, a warranty may be limited so as to cover only defects discovered within a certain time, in which case the warranty continues in force only for the designated period,[35] and defects not discovered within the period are at the purchaser's risk,[36] unless the limitation is waived.[37]

**5. Warranty of Title.** A warranty of title refers only to the condition of the title at the time of the sale,[38] and is a warranty only against a superior title,[39] or existing encumbrances,[40] and not that the title will not be disputed.[41] The warranty is broken if at the time of the sale the seller had no title,[42] or there is an outstanding paramount title.[43] There must, however, be an eviction of the buyer,[44] actual or constructive, such as a recovery of judgment by one having an

a warranty of the quality of a safe was broken, the safe being broken open six years after the sale. But see Danville Coal, etc., Co. *v.* Viltner Mfg. Co., 79 S. W. 225, 25 Ky. L. Rep. 1974, holding that a warranty attending the sale of an ice plant that it shall be capable of producing a certain quantity of crystal-clear ice every twenty-four hours, which is not reached during the first season of its operation, will not be construed to extend to subsequent years.

**34.** Gale Mfg. Co. *v.* Cribb, 55 Wis. 414, 13 N. W. 233; Cleveland Linseed Oil Co. *v.* Buchanan, 120 Fed. 906, 57 C. C. A. 498. But see Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053 [*reversing* 1 Silv. Sup. 129, 5 N. Y. Suppl. 168]. In this case defendants' agent called on plaintiffs at their carpet factory, stating that he was introducing wool oil, which was a new process of manufacture, sold only by defendants, and that defendants would guarantee plaintiffs against any damage to their carpets arising from its use. Plaintiffs ordered one barrel, stating that if it worked well they would order more. It was held that the warranty was not a continuing one, and it was error therefore to submit to the jury whether defendant's agent intended to bind them for future sales to plaintiffs.

**35.** Johansmeyer *v.* Kearney, 37 Misc. (N. Y.) 785, 76 N. Y. Suppl. 930; Chapman *v.* Gwyther, L. R. 1 Q. B. 463, 7 B. & S. 417, 35 L. J. Q. B. 142, 14 L. T. Rep. N. S. 477, 14 Wkly. Rep. 671; Smart *v.* Hyde, 1 Dowl. P. C. N. S. 60, 10 L. J. Exch. 479, 8 M. & W. 723.

**Limitation of warranty.**— By a written warranty on a sale of a steam thresher engine the sellers warranted the engine as well made, of good materials, and that, if properly run, fired, and managed, it was capable of developing the rated power. It was agreed that deficiencies in general adaptation for developing the rate of power should be reported in writing within ten days after starting the engine, and that all warranty on the engine should terminate and expire. It was held that under such a limitation the liability of the seller as to general defects warranted against and not being deficiencies in general adaptation for developing the rated power was limited to such as might be discovered before the close of the year, and as to deficiencies in general adaptation for developing the rated power to such as might be discovered within ten days after the engine was started. Nichols *v.* Knowles, 31 Minn. 489, 18 N. W. 413.

**Instructions.**— In an action for the price of vehicles, where defendant pleaded breach of a warranty against defects, which, as to certain defects, was to continue indefinitely, and as to others for one year, it was not error to refuse an instruction that the jury should not consider evidence of defects not observed until after the expiration of a year. Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154.

**36.** Beasley *v.* Huyett, etc., Mfg. Co., 92 Ga. 273, 18 S. E. 420; Wilson *v.* Ward, 159 Ind. 21, 64 N. E. 458; Blodget *v.* Detroit Safe Co., 76 Mich. 538, 43 N. W. 451.

**37.** Johansmeyer *v.* Kearney, 37 Misc. (N. Y.) 785, 76 N. Y. Suppl. 930; Lee *v.* Neumen, 15 S. D. 642, 91 N. W. 320.

**38.** Blewett *v.* Evans, 42 Miss. 804.

**39.** Atkins *v.* Hosley, 3 Thomps. & C. (N. Y.) 322; Shober *v.* Robinson, 6 N. C. 33.

**40.** Close *v.* Crossland, 47 Minn. 500, 50 N. W 694; Dresser *v.* Ainsworth, 9 Barb. (N. Y.) 619; Smith *v.* Ruggles, 3 N. Y. Suppl. 329; Baker *v.* McAllister, 2 Wash. Terr. 48, 3 Pac. 581; Insurance Co. of North America *v.* Johnson, 70 Fed. 794, 17 C. C. A. 416.

**Deduction from purchase-money.**—The buyer of personal property with covenant of warranty may discharge an existing lien upon the property purchased, and deduct the amount from the unpaid balance of the purchase-money. Harper *v.* Dotson, 43 Iowa 232.

**41.** Jones *v.* Hood, (Tex. Civ. App. 1898) 46 S. W. 71.

**42.** Tipton *v.* Triplett, 1 Metc. (Ky.) 570; Chancellor *v.* Wiggins, 4 B. Mon. (Ky) 201, 39 Am. Dec. 499; Quackenboss *v.* Lansing, 6 Johns. (N. Y.) 49; Goodloe *v.* White, 9 Humphr. (Tenn.) 528; Trevino *v.* Hein, 2 Tex. App. Civ. Cas, § 105.

**Lost property.**—A buyer may recover for a breach of an implied warranty of title, although the subject-matter of the sale has been lost or destroyed. Beckmann *v.* Bormann, 3 E. D. Smith (N. Y.) 409.

**43.** Atkins *v.* Hosley, 3 Thomps. & C. (N. Y.) 322.

**44.** *Arkansas.*— Hynson *v.* Dunn, 5 Ark. 395, 41 Am. Dec. 100; Sumner *v.* Gray, 4 Ark. 467, 38 Am. Dec. 39.

adverse title,[45] or a surrender to a valid adverse claim,[46] but it is not necessary

*Illinois.*— Sturges *v.* Miller, 80 Ill. 241.
*Kentucky.*— Jones *v.* Bigstaff, 95 Ky. 395, 25 S. W. 889, 15 Ky. L. Rep. 821, 44 Am. St. Rep. 245; Tipton *v.* Triplett, 1 Metc. 570.
*Maryland.*— Fenwick *v.* Forrest, 5 Harr. & J. 414.
*Minnesota.*— Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.
*Mississippi.*— Storm *v.* Smith, 43 Miss. 497; Brown *v.* Smith, 5 How. 387.
*Missouri.*— Morrison *v.* Edgar, 16 Mo. 411, 57 Am. Dec. 236.
*New York.*— O'Brien *v.* Jones, 91 N. Y. 193; McGiffin *v.* Baird, 62 N. Y. 329; Atkins *v.* Hosley, 3 Thomps. & C. 322.
*South Carolina.*— McCullough *v.* Madison, Rice 38.
*Vermont.*— Clayton *v.* Scott, 43 Vt. 553.
See 43 Dig. tit. "Sales," § 800.

**Validity of adverse claim.**—An eviction is not a breach unless it is by a title actually superior. Boyd *v.* Day, 3 Bush (Ky.) 617; Richardson *v.* Tipton, 2 Bush (Ky.) 202; Lewis *v.* King, 1 Bush (Ky.) 419; Cessna *v.* Thurman, 1 Bush (Ky.) 292, 89 Am. Dec. 628; Plummer *v.* Newdigate, 2 Duv. (Ky.) 1, 87 Am. Dec. 479; Fenwick *v.* Forrest, 5 Harr. & J. (Md.) 414; Hannah *v.* Chadwick, 2 Tex. App. Civ. Cas. § 517. See also Myers *v.* Smith, 27 Md. 91, where the buyer of a crop was dispossessed under a distress for rent.

**Provisional taking in replevin.**—Where a buyer of mortgaged personalty does not surrender it on demand of the mortgagee, but defends an action brought by him for the recovery thereof, the provisional taking of the property in claim and delivery before determination of the principal action decides nothing as to the title, and is not an eviction warranting an action by the buyer against the seller before the decision of the principal suit. Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694. But see Hodges *v.* Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545, holding that where a third person held a mortgage on the horse at the time of the sale, and since the sale has taken possession of the horse under a warranty in a pending claim and delivery proceeding against plaintiff there is a breach of the warranty.

**Judgment in replevin.**—Where the record does not disclose on what grounds the judgment was obtained, and it does not appear that the judgment depended on the state of the title at the time of sale, a breach is not shown. Moore *v.* Bostwick, 23 Mich. 507.

**Notice of infringement of patent.**— Mere notice by a third party of his claim that an article purchased infringes a patent owned by him is not of itself an eviction of the purchaser, so as to show a breach of the seller's implied warranty of a right to use. American Electric Constr. Co. *v.* Consumers' Gas Co., 47 Fed. 43 [*affirmed* in 50 Fed. 778, 1 C. C. A. 663].

**Right of seller against prior vendor.**—A seller of a chattel, of which the buyer has been lawfully dispossessed, and who has paid the latter's claim for indemnity, may proceed against the seller from whom he bought on the implied warranty of title. Bordewell *v.* Colie, 1 Lans. (N. Y.) 141 [*affirmed* in 45 N. Y. 494]. On the other hand the vendee of a chattel cannot recover from his vendor on the implied warranty of title, when it appears that not he, but his vendee, was dispossessed of the chattel by the legal owner, and that he has not reimbursed such second vendee, or been made liable by him for the value of the chattel. Myers *v.* Bowen, 3 Colo. App. 537, 34 Pac. 585.

**45.** Harris *v.* Rowland, 23 Ala. 644; Pickett *v.* Ford, 4 How. (Miss.) 246; O'Brien *v.* Jones, 91 N. Y. 193; McGiffin *v.* Baird, 62 N. Y. 329; Lee *v.* Gause, 24 N. C. 440.

**Payment of judgment not necessary.**— It is sufficient if a judgment has been recovered against the buyer and it is not essential that the judgment should have been paid. Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508; Burt *v.* Dewey, 31 Barb. (N. Y.) 540 [*reversed* on other grounds in 40 N. Y. 283, 100 Am. Dec. 282]. But see Salle *v.* Light, 4 Ala. 700, 39 Am. Dec. 317.

**46.** Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694; Dryden *v.* Kellogg, 2 Mo. App 87; Cahill *v.* Smith, 101 N. Y. 355, 4 N. E. 739; Sweetman *v.* Prince, 26 N. Y. 224; Trevino *v.* Hein, 2 Tex. App. Civ. Cas. § 105.

**Defense of title.**—When suit is brought by a third person against the purchaser the seller may intervene and defend the suit. Parker *v.* Nolan, 37 Tex. 85. Or if the seller is notified by the purchaser of the pendency of the suit and fails to defend, the purchaser may decline to contest the claim and look to the seller on the warranty. Vienne *v.* Harris, 14 La. Ann. 382; Hall *v.* Aitkin, 25 Nebr. 360, 41 N. W. 192. See also Baltimore Steam Packet Co. *v.* Garrison, 6 Daly (N. Y.) 246. The refusal of the seller to defend after notice excuses a formal demand to defend. Schnurmacher *v.* Kennedy, 88 N. Y. Suppl. 943. If, however, the purchaser does not notify the vendor of suit brought, and the vendor has no opportunity to defend, an action cannot be maintained for breach of warranty of title. Houser *v.* U. S., 39 Ct. Cl. 508.

**Acquiescence by advice of seller.**— If the purchaser being dispossessed brings suit to recover the property, the seller joining therein, and before trial dismisses the suit on the advice of the seller, this amounts to an acknowledgment by the seller of the validity of the adverse claim. Vickery *v.* Chambers, 95 Ga. 665, 22 S. E. 688. But where the purchaser is by the circumstances of the case obliged to bring suit to defend his title notice to the seller to prosecute the action imposes on him no obligation so to do. Daniels *v.* Street, 15 Ark. 307.

**Duty of seller to clear title.**—Where chattels sold were forcibly taken from the buyer

that the buyer should wait for an adjudication against him or actual dispossession.[47] The theory of the rule is that there must be an actual loss by the defect in or failure of title and not a mere contingency of loss.[48] The mere existence of a right against the property without any attempt to enforce it against the purchaser is not sufficient.[49]

**6. Warranty of Quality and Fitness For Purpose — a. In General.** A warranty of quality unless so expressed is not to be construed as importing the best or exceptionally good quality, but only that the article is reasonably good, comparing favorably with other articles of like kind,[50] in view of the average quality

under an adverse claim and notes given in payment were deposited on condition that, if the seller should make the title good, they should be delivered to him, but otherwise to the buyer, the condition should be construed as a special warranty against the adverse claim, and did not bind the seller to establish his title in a separate action against the claimant but the failure so to do could be shown in defense to an action on the notes. Cheatham *v.* Wilbur, 1 Dak. 335, 46 N. W. 580.

**Failure of justice.**— The purchaser of a steamer who alleges that he has been evicted by order of a court of competent jurisdiction for debts secured by lien and privileges contracted by his vendor previous to the sale cannot claim restitution of the portion of the price paid by him, nor retain the balance, where he had at his disposal adequate proof to repel the claims on which the alleged eviction was effected, but which was not heard, solely because the only judge present, who had authority to grant an injunction applied for by the purchaser, had been counsel for one of the parties, and would not act on the application, and where the vendor was not a party to the proceedings, or notified of them. A vendor is not liable, under his warranty, for a failure of justice resulting from such an accident. Cockerell *v.* Smith, 1 La. Ann. 1.

**Effect of notice.**— If the purchaser of a horse with warranty of title has once given notice to the vendor that an action has been brought against him to recover the property sold, the vendor is bound to take notice of all subsequent proceedings without further notice. Blasdale *v.* Babcock, 1 Johns. (N. Y.) 517.

47. Young *v.* Lillard, 1 A. K. Marsh. (Ky.) 481; Dryden *v.* Kellogg, 2 Mo. App. 87; Cahill *v.* Smith, 101 N. Y. 355, 4 N. E. 739; Sweetman *v.* Prince, 26 N. Y. 224; Trevino *v.* Hein, 2 Tex. App. Civ. Cas. § 105.

48. Higbie *v.* Rogers, 63 N. J. Eq. 368, 50 Atl. 366 [*reversing* (N. J. Ch. 1901) 48 Atl. 554]; O'Brien *v.* Jones, 91 N. Y. 193; Hull *v.* Caldwell, 3 S. D. 451, 54 N. W. 100.

**Time to sue.**—Where the buyer of mortgaged property does not surrender the same upon the demand of the mortgagee, but defends an action brought by him for the recovery thereof, an action by him against the seller for damages or to recover the consideration paid is premature while the suit by the mortgagee is pending. Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

49. Terrell *v.* Stevenson, 97 Ga. 570, 25 S. E. 352.

50. *Iowa.*—Conneautsville First Nat. Bank *v.* Robinson, 105 Iowa 463, 75 N. W. 334.

*Minnesota.*— Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814.

*Missouri.*— Bates County Bank *v.* Anderson, 85 Mo. App. 351.

*Wisconsin.*— Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478.

*England.*— Wieler *v.* Schilizzi, 17 C. B. 619, 25 L. J. C. P. 89, 4 Wkly. Rep. 209, 84 E. C. L. 619.

*Canada.*— Denison *v.* Taylor, 6 Ont. L. Rep. 93, 2 Com. L. Rep. 1.

**Capacity of machine.**—A warranty that a cotton press will press "at the rate of 60 bales per hour" is not a warranty that it will press at that rate for a day of ten hours, but only for a limited time. Hazlehurst Compress, etc., Co. *v.* Boomer, etc., Compress Co., 48 Fed. 803, 1 C. C. A. 102. A warranty that stationary engines will develop rated horse power on a fixed fuel consumption is not a warranty of the fuel economy of the engines when carrying any less load than required to develop their rated horse power; it appearing that such engines will not run with the same fuel economy at an under load as at the rated load. Ames *v.* Norwich Light Co., 122 N. Y. App. Div. 319, 106 N. Y. Suppl. 952.

**Attachments supplied by buyer.**—Where a heating plant was installed under a contract requiring the purchaser to furnish flues of a sufficient draft for the ranges used in connection with the system, but there was nothing showing that a greater draft than ordinarily used with such ranges was required, the furnishing of flues capable of supplying the draft usually required for such ranges was a sufficient compliance with the contract by the purchaser to defeat a defense to an action for a breach of warranty that the purchaser had not furnished flues according to contract. Brummett *v.* Nemo Heater Co., 177 Mass. 480, 59 N. E. 58.

**Comparison with other articles.**— Plaintiff contracted to furnish glue for a specific use to defendants, who were furniture manufacturers, the contract providing that the quality was to be "up to standard, or the same as has been delivered during past sixty days." Plaintiff understood the use to be made of the glue, and prior to the making of the contract had supplied defendants with samples for testing purposes. It was held that the contract was a warranty that the glue should be

of such articles,[51] and a warranty in general terms that an article is suitable for general purposes is not a warranty that it is suitable for any special purpose,[52] or, in the case of a machine, that it will do the work as economically as some other machine.[53] Nevertheless a warranty that a machine is in working order is not merely a warranty that the machine will operate but that it will do the work it is intended to do in a proper manner.[54] A warranty that is specific must be fulfilled according to its terms, and if loss occurs through any defect in the article within the terms of the warranty, it is a breach for which the seller is liable.[55] So

equal to that furnished during the testing period. American Glue Co. *v.* Rayburn, 150 Mich. 616, 114 N. W. 395. In an action on a warranty guaranteeing that an engine sold was capable, with proper management, of doing as much as other engines of like size and proportions, it was error to submit the question of a breach thereof to the jury on evidence as to the ability of the engine to maintain fifteen horse power, its rated power, and to run a threshing outfit requiring that power, as the warranty was not as to horse power, but was as to its ability to do as much as other engines generally of like size and proportions. Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478. See also Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 77 Ill. App. 59, holding that a warranty that certain engines, built according to certain specifications, shall be equal or superior to any engine on the market, includes only such other engines as are of the same specifications with the engines in question.

**Warranty of superior quality.**—An express warranty that an animal sold was of superior quality and free from vices was not sustained by proof that such animal was as good as the ordinary run of animals. Zinn *v.* Hyatt, 60 Mo. App. 627.

**Statutory provisions.**—A sale of flour for exportation warranted superfine requires that it shall be good and merchantable as superfine according to the act of April 15, 1835, relating to the inspection of flour. Adams *v.* Rogers, 9 Watts (Pa.) 121.

51. Glidden *v.* Pooler, 50 Ill. App. 36.

**Animals for breeding purposes.**—Where a Percheron stallion is warranted a "sure foal getter," and it appears that the Percheron breed did not, on an average, get in foal more than fifty per cent of the mares served, the warranty must be interpreted with reference to that fact. Glidden *v.* Pooler, 50 Ill. App. 36. To the same effect see Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814. But the requirements of such a warranty were not satisfied where, with proper handling, only eight mares out of fifty-five served were gotten with foal. McCorkell *v.* Karhoff, 90 Iowa 545, 58 N. W. 913.

**Uniformity of quality.**—A warranty of quality presupposes that the goods shall be uniformly of the quality designated. Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326.

**Defects in plan of construction** are not covered by a warranty of good workmanship. J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013.

52. Reeves *v.* Byers, 155 Ind. 535, 58 N. E. 713; Edwards *v.* Collson, 5 Lans. (N. Y.) 324.

**Capacity of boiler.**—A contract for a boiler "to be allowed 130 pounds of steam working pressure by United States inspectors" does not call for one warranted to produce and maintain one hundred and thirty pounds working pressure but merely that it will sustain such pressure. Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

53. Davis Calyx Drill Co. *v.* Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, where it was said that such a covenant can be introduced by express contract only.

54. Leggoe *v.* Mayer, 2 Pa. Super. Ct. 529, 39 Wkly. Notes Cas. 247.

55. *New York.*— Lichtenstein *v.* Rabolinsky, 98 N. Y. App. Div. 516, 90 N. Y. Suppl. 247 [*affirmed* in 184 N. Y. 520, 76 N. E. 1099, 91 N. Y. Suppl. 615]; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110].

*Pennsylvania.*— Wyckoff *v.* Artley, 142 Pa. St. 467, 21 Atl. 877; Wilson *v.* Belles, 22 Pa. Super. Ct. 477.

*Texas.*— McKinney *v.* Fort, 10 Tex. 220.

*Washington.*— Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

*Canada.*— Hardy *v.* Fairbanks, 2 Nova Scotia 432.

**Illustrations.**—A warranty that lumber is of "first quality" is broken if it is not properly seasoned so that by reason of shrinkage joints open in the woodwork. Rockwell Mfg. Co. *v.* Cambridge Springs Co., 21 Pa. Co. Ct. 248. So too a warranty by the manufacturer of a gasoline engine that it is safe, reliable, and can be run without danger is broken by an explosion from an unknown cause. Charter Gas-Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019.

**Maximum and minimum quality.**—Where melting pots used in glass making are warranted to withstand a temperature of from one thousand eight hundred to two thousand seven hundred degrees there is no breach if the pots melt at a temperature of from two thousand to two thousand four hundred degrees. Stackfleth *v.* Demuth Glass Mfg. Co., 25 Misc. (N. Y.) 482, 54 N. Y. Suppl. 989.

**Negotiable paper.**—A warranty that a note is collectable is not broken if the maker was solvent at the date of maturity. Meeker *v.* Denison, Brayt. (Vt.) 237. So a warranty

a warranty of fitness for purpose is a specific warranty of quality, and is broken no matter what the general quality may be, if the article is not in fact suitable for the purpose specified.[56]

**b. Use of Article.** A warranty of quality or fitness for purpose contemplates reasonably good management in the use of the article[57] by persons of ordinary

that a promissory note is the genuine one of the maker is not broken because the maker was an infant when the note was made and became payable, since such a warranty affirms nothing respecting the validity of the note as a binding obligation. Baldwin *v.* Van Deusen, 37 N. Y. 487. But a warranty that certain county warrants were "genuine and regularly issued" is broken if they do not bear the seal of the county. Smeltzer *v.* White, 92 U. S. 390, 23 L. ed. 508.

**Book-accounts.**—Where book-accounts are transferred with a warranty that they are existing and unpaid, if they are in fact paid or have never existed, it constitutes a breach of the warranty. J. G. Shaw Blank Book Co. *v.* Maybell, 86 Minn. 241, 90 N. W. 392.

**Sale of animals.**—A warranty that a pony is gentle is broken if he proves vicious immediately after the sale. Hafner *v.* McCaffrey, 19 Misc. (N. Y.) 138, 43 N. Y. Suppl. 279. So a warranty that horses are "kind in every respect" is broken if one of the horses is in the habit of making sudden plunges without cause. Hall *v.* Colyer, 5 Silv. Sup. (N. Y.) 235, 8 N. Y. Suppl. 801.

**Kind in harness.**—Where a horse had been sold under a warranty that he was sound and kind in all harness, the fact that, after he had been driven safely before a hansom cab, he ran away for some unknown reason, does not show a breach of warranty; it appearing that the cab was improperly suited to his build, and that he had previously been gentle. Brown *v.* Horowitz, 35 Misc. (N. Y.) 287, 71 N. Y. Suppl. 702.

**A warranty that a horse is sure-footed** and all right in every way, excepting only stumbling from temporary causes, is broken if he has such an organic defect that his stumbling can only be avoided by a peculiar mode of shoeing, which the vendee, using reasonable diligence, cannot discover. Morse *v.* Pitman, 64 N. H. 11, 4 Atl. 880.

**Warranty that horse is "all right."**—A warranty that a horse, partly blind, "was all right, except that he would sometimes shy," is not as a matter of law a representation that the horse was partially blind, so as to relieve the vendor of liability on his warranty. Kingsley *v.* Johnson, 49 Conn. 462.

**Where a horse was warranted to be kind and true, and of sound wind,** the fact that on being taken from the seller's stable to that of the buyer it became so stiff as to be scarcely able to move was not a breach of the warranty. Johansmeyer *v.* Kearney, 37 Misc. (N. Y.) 785, 76 N. Y. Suppl. 930.

**Warranty that article shall pass inspection.** —Where plaintiff sold defendant hose under a guaranty that it would pass inspection of the fire department and underwriters, and it appeared that the fire department could not approve the hose, because it failed to conform to certain of its requirements, defendant could not be held liable because the hose had not been officially rejected by the fire department after a test. Eureka Fire Hose Co. *v.* Reynolds, 86 N. Y. Suppl. 753.

**Proof that a horse is a "good drawer"** only will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." Coltherd *v.* Puncheon, 2 D. & R. 10, 1 L. J. K. B. O. S. 2, 16 E. C. L. 65.

**56.** Sims *v.* Howell, 49 Ga. 620; O. H. Jewell Filter Co. *v.* Kirk, 102 Ill. App. 246 [*affirmed* in 200 Ill. 382, 65 N. E. 698]; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340.

**Scope of warranty.**—In an action on a promissory note where the defense was breach of warranty in the sale of a mowing machine for which the note was given, and defendant testified that the machine was warranted to cut "ordinary" grass, and that it worked all right, except that it would not cut "wire" grass, but there was no evidence that "wire" grass was "ordinary" grass, a verdict for defendant should be set aside. Minneapolis Harvester Works *v.* Hedges, 11 Nebr. 46, 7 N. W. 531.

**Sale of heater.**—A contract to furnish and put up a furnace in defendant's house, which provided that plaintiff would complete it "ready for use," and contained a specific guaranty of heating capacity, and stated that, on notice of its failure to properly heat the house, plaintiff would have an option to make it heat properly or remove it, embodies an express warranty that it would be suitable for heating the house, so that if it fails to heat as specified, and emits gas in great quantities, and plaintiff attempts to fix it, but fails, and defendant refuses to accept it, the contract price cannot be recovered. Fuller-Warren Co. *v.* Shurts, 95 Wis. 606, 70 N. W. 683.

**57.** Pennell *v.* McAfferty, 84 Ill. 364; E. B. Constantine Mfg. Co. *v.* Reynolds, 123 N. Y. App. Div. 555, 108 N. Y. Suppl. 36; Brown *v.* Horowitz, 35 Misc. (N. Y.) 287, 71 N. Y. Suppl. 702; Mack *v.* Sloteman, 21 Fed. 109; Johnson *v.* Moore, 34 Nova Scotia 85. In Gaar *v.* Hicks, (Tenn. Ch. App. 1897) 42 S. W. 455, it was held that no breach of a warranty that a carriage is fit to transport a clover huller from farm to farm is shown by the fact that an arched sill, forming part of such carriage, broke while the carriage was being hauled with another vehicle which was chained to the rear axle, and materially increased the strain.

**Knowledge and skill of buyer.**—In the sale of a special kind of a known general ma-

skill and experience,[58] and is not broken where the failure of the article to give satisfaction is due to mismanagement by the purchaser,[59] although if an actual defect exists the effect thereof as a breach of warranty is not destroyed because enhanced by mismanagement.[60] A warranty of a machine extends only to the capacity of the machine when operated by the power for which it is designed, although attachments are supplied for use with another power in case of failure of the first.[61] And generally a warranty of a machine presupposes that it shall be operated under proper conditions suitable to its use,[62] and that the specification of conditions under which the machine was to be used will be adhered to.[63] But a breach of warranty will not be excused because the conditions were not favorable if the seller did not specify in the agreement the conditions under which the machine was to be set up and operated.[64]

**c. Warranty of Whole as Warranty of Part.** A warranty of a machine or apparatus covers the whole and every essential part thereof,[65] so that a failure of part of a machine to work smoothly and well is a breach of a general warranty that the machine as a whole would so work.[66] But a warranty of a machine does

terial for a particular purpose, the circumstances implying a warranty that the material is reasonably fit for the purpose intended if the special material sold requires a different manner of treatment in applying it to the purpose intended than that required in the use of the same general material of other kinds, and this different requirement is known to the seller and not to the buyer, the warranty is broken if the buyer treats the material as similar material is customarily treated, and if, so used, it does not prove reasonably fit for the purpose. Omaha Coal, etc., Co. *v.* Fay, 37 Nebr. 68, 55 N. W. 211.

**Injury due partially to negligence.**—Where a buggy is sold on a warranty for one year, an action will lie for breach of warranty if the buggy proves defective, with proper use, during the year, although it may also be injured to some extent by reckless driving. Null *v.* Watkins, 60 Ill. App. 256.

58. Woodruff *v.* Weeks, 28 Conn. 328; Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297; Gammar *v.* Borgain, 27 Iowa 369; Fuller *v.* Schroeder, 20 Nebr. 631, 31 N. W. 109. See also Burk *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382, holding that a warranty providing that, on notice of the insufficiency of the machine sold, the seller shall send a competent man to remedy the defect, the purchaser rendering assistance, does not require the seller to teach the purchaser how to operate the machine, and if the failure of the machine is due to the unskilfulness of the purchaser, the seller may recover the price.

**Instructions of seller.**—Where cement is sold for use in plastering a dwelling with a warranty of fitness for that purpose, unskilfulness in the manner of applying the cement is no defense to an action for breach of the warranty, if the manner employed was one adopted from instructions furnished for the seller. Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118.

59. Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562; Callahan *v.* Morse, 37 Mo. App. 189; E. B. Constantine Mfg. Co. *v.* Reynolds, 123 N. Y. App. Div. 555, 108 N. Y. Suppl. 36; Miller *v.* F. R. Patch Mfg. Co., 101 N. Y. App. Div. 22, 91 N. Y. Suppl. 870; Geddes *v.* Pennington, 5 Dow. 159, 3 Eng. Reprint 1287.

60. Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.

61. Whittier Mach. Co. *v.* Graffam, 156 Mass. 415, 31 N. E. 485, where a hydraulic elevator designed to be operated by steam pumps and pressure tanks was also supplied with attachments for connecting with the water main.

62. *Maryland.*— Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753.

*Missouri.*— Tower *v.* Pauley, 76 Mo. App. 287.

*New York.*— Howard *v.* American Mfg. Co., 15 Misc. 4, 36 N. Y. Suppl. 430 [*affirmed* in 162 N. Y. 347, 56 N. E. 986]; Bierman *v.* City Mills Co., 10 Misc. 140, 30 N. Y. Suppl. 929 [*reversed* on other grounds in 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799].

*Wisconsin.*— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

*United States.*— Mack *v.* Sloteman, 21 Fed. 109.

63. Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; Mack *v.* Sloteman, 21 Fed. 109.

64. Creamery Package Mfg. Co. *v.* Benton County Creamery Co., 120 Iowa 584, 95 N. W. 188.

65. Raynor *v.* Bryant, 43 Kan. 492, 23 Pac. 601; Watson *v.* Beckett, 2 Kan. App. 232, 43 Pac. 787; Fairbanks *v.* De Lissa, 36 Mo. App. 711; Miller *v.* F. R. Patch Mfg. Co., 101 N. Y. App. Div. 22, 91 N. Y. Suppl. 870; Gaar *v.* Hicks, (Tenn. Ch. App. 1897) 42 S. W. 455.

66. Giles *v.* San Antonio Foundry Co., (Tex. Civ. App. 1897) 42 S. W. 1020.

**Entire contract.**—A provision in an order for a machine that the failure of the warranty as to any separate part or attachment of the machine shall not affect the liability of the purchaser, except as to such part or attachment, does not apply to a part or at-

not necessarily extend to or include attachments by means of which such machine is operated.[67]

**d. Warranty of Soundness.** A warranty that an animal is sound implies the absence of any defect or disease which impairs or in its progress will impair the animal's natural usefulness for the purpose for which it is purchased,[68] and is breached by any defects which render it permanently less serviceable,[69] although the defect may not be fully developed at the time of the sale,[70] and although the

tachment furnished with the machine at a gross price. Robinson *v.* Berkey, 111 Iowa 550, 82 N. W. 972.

67. Griggs *v.* Stone, 51 N. J. L. 549, 18 Atl. 1094, 7 L. R. A. 48; Troy Laundry Co. *v.* Henry, 23 Oreg. 232, 31 Pac. 484, holding that on a sale of a machine and the shaft and pulleys with which it was to be operated a warranty on the machine did not cover the pulleys.

**Attachments excepted from warranty.**— Where a contractor agrees to build an experimental machine, the first under a new patent, on plans to be approved by the patentee, with warranty for the workmanship and materials of his own shop, but expressly excepting from the warranty the boiler and other parts bought outside, and the working of the machine as a whole, the relative capacity of the boiler and engines is not a matter of the contractor's workmanship, nor is he liable for an error therein. Cyclone Steam Snowplow Co. *v.* Vulcan Iron Works, 52 Fed. 920, 3 C. C. A. 352.

68. Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; Kiddell *v.* Burnard, C. & M. 291, 6 Jur. 327, 11 L. J. Exch. 268, 9 M. & W. 668, 41 E. C. L. 162; Coates *v.* Stephens, 2 M. & Rob. 157. And see Putt *v.* Duncan, 2 Ill. App. 461.

**"Sound and kind," a warranty of soundness** see Brown *v.* Bigelow, 10 Allen (Mass.) 242.

**"Sound and free from disease"** imports that a horse is not diseased. Johnson *v.* Wallower, 15 Minn. 472.

**"Sound and right"** imports that a horse is right in conduct and behavior as to all matters materially affecting its value as well as in physical condition. Walker *v.* Hoisington, 43 Vt. 608.

**"Sound mind and health"** imports that a slave is sound in mind and sound in health. Harrell *v.* Norvill, 50 N. C. 29.

**"Soundness"** of a slave extends to mind and body. Simpson *v.* McKay, 34 N. C. 141, 143.

**Roaring is not unsoundness** in a horse, unless it is shown to proceed from some disease or organic defect. Bassett *v.* Collis, 2 Campb. 523, 11 Rev. Rep. 786.

**Result of defect not apparent.**— Mere badness of shape is not unsoundness, although lameness may result at a future time. Bailey *v.* Forrest, 2 C. & K. 131, 61 E. C. L. 131; Brown *v.* Elkington, 10 L. J. Exch. 336, 8 M. & W. 132; Dickinson *v.* Follett, 1 M. & Rob. 299. But where a splint was visible at the time of the sale and afterward caused lameness, the seller was nevertheless liable on his warranty. Margetson *v.* Wright, 8 Bing. 454, 1 L. J. C. P. 128, 1 Moore & S. 622, 21 E. C. L. 617; Smith *v.* Bryant, 10 Jur. N. S. 1107, 11 L. T. Rep. N. S. 346, 13 Wkly. Rep. 79. Bone spavin in the hock is unsoundness in a horse, whether it produces lameness apparent at the time of the warranty or not, and although it may not produce lameness for years after. Watson *v.* Denton, 7 C. & P. 85, 32 E. C. L. 512.

**A cough** unless proved to be of quite a temporary nature is an unsoundness. Shillitoe *v.* Claridge, 2 Chitt. 425, 18 E. C. L. 719.

**The habit of making sudden plunges without cause** is unsoundness in a horse. Hall *v.* Colyer, 55 Hun (N. Y.) 611, 8 N. Y. Suppl. 801.

**Crib-biting** which has not yet produced disease or alteration of structure is not an unsoundness, but is a vice, under a warranty that a horse is sound and free from vice. Scholefield *v.* Robb, 2 M. & Rob. 210. See also Broennenburgh *v.* Haycock, Holt N. P. 630, 17 Rev. Rep. 682, 3 E. C. L. 247.

**Want of castrating** in a male mule does not meet an allegation of unsoundness. Duckworth *v.* Walker, 46 N. C. 507.

**Question for jury.**— The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict for a preponderance of conflicting evidence. Lewis *v.* Peake, 2 Marsh. 431, 7 Taunt. 153, 17 Rev. Rep. 475, 2 E. C. L. 303.

69. *Illinois.*— Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; Devine *v.* Ryan, 115 Ill. App. 498.

*Michigan.*—Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601.

*Pennsylvania.*— Southard *v.* Haywood, 32 Leg. Int. 4.

*Texas.*— Snyder *v.* Baker, (Civ. App. 1896) 34 S. W. 981.

*England.*— Holliday *v.* Morgan, 1 E. & E. 1, 5 Jur. N. S. 69, 28 L. J. Q. B. 9, 7 Wkly. Rep. 7, 102 E. C. L. 1; Onslow *v.* Eames, 2 Stark. 81, 19 Rev. Rep. 680, 3 E. C. L. 326.

**Scope of warranty.**— The seller of a slave does not warrant that the slave will not be attacked by disease within the time limited, nor that he will resist the disease without the aid of medicine or medical treatment; but he does warrant against any incurable disease. McLellan *v.* Williams, 11 La. Ann. 721. But see Coates *v.* Stephens, 2 M. & Rob. 157.

70. Mosely *v.* Gordon, 16 Ga. 384; Fondren *v.* Durfee, 39 Miss. 324; Shewalter *v.* Ford, 34 Miss. 417; McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493.

defect was not known to the seller.[71] The warranty does not extend to temporary and curable defects not impairing the present usefulness of the animal,[72] and in some cases the rule is laid down broadly that temporary and curable defects do not constitute a breach of warranty,[73] although the weight of authority is to the effect that a warranty of soundness is broken if the animal at the time of the sale has any infirmity which renders it temporarily less valuable or less fit for present use, although such infirmity is not permanent.[74] Generally a mere predisposition to a disease undeveloped into actual disease is not unsoundness.[75] But there is unsoundness where there is a physical condition showing that the seeds of a disease had been planted in an animal's system which afterward develop into the perfect disease.[76]

7. WARRANTY OF MERCHANTABILITY. Where goods sold by a manufacturer under a descriptive term known in the trade to a buyer for further manufacture are known to be likely to take fire under the conditions to which they will be subjected, but the goods are properly describable under the term used, and are fit for sale and some valuable use under the description, the implied warranty of merchantability is satisfied.[77]

**F. Effect of Breach.** On a breach of warranty the buyer is not bound to accept rescission and a return of the purchase-money,[78] but may recover his damages in an independent action,[79] or set up a counter-claim in an action for the price,[80] or if the goods are worthless defeat an action for the price.[81] As a warranty is not an agreement to indemnify it is not necessary that there should have been an actual loss to the buyer to constitute a breach.[82]

**G. Notice of Defects to Seller — 1. IN GENERAL.** Ordinarily, unless it is so stipulated in the contract, the buyer is not obliged to give the seller notice of defects in order to avail himself of a breach of the warranty,[83] either in an action

71. Mitchell *v.* Pinkney, 127 Iowa 696, 104 N. W. 286.

72. Roberts *v.* Jenkins, 21 N. H. 116, 53 Am. Dec. 169.

73. Whitney *v.* Taylor, 54 Barb. (N. Y.) 536; Gadsden *v.* Raysor, 9 Rich. (S. C.) 276; Smith *v.* Rice, 1 Bailey (S. C.) 648; Garment *v.* Barrs, 2 Esp. 673; Bolden *v.* Brogden, 2 M. & Rob. 113.

74. Buford *v.* Gould, 35 Ala. 265; Marshall *v.* Wood, 16 Ala. 806; Kornegay *v.* White, 10 Ala. 255; Kenner *v.* Harding, 85 Ill. 264, 28 Am. Rep. 615; Roberts *v.* Jenkins, 21 N. H. 116, 53 Am. Dec. 169; Elton *v.* Brogden, 4 Campb. 281; Kiddell *v.* Burnard, C. & M. 291, 6 Jur. 327, 11 L. J. Exch. 268, 9 M. & W. 668, 41 E. C. L. 162; Elton *v.* Jordan, 1 Stark. 127, 2 E. C. L. 56. And see Thompson *v.* Bertrand, 23 Ark. 730.

75. Fry *v.* Throckmorton, 2 B. Mon. (Ky.) 450; Woodbury *v.* Robbins, 10 Cush. (Mass.) 520; Herndon *v.* Bryant, 39 Miss. 335. *Compare* Dean *v.* Traylor, 8 Ga. 169.

76. Woodbury *v.* Robbins, 10 Cush. (Mass.) 520.

77. Leavitt *v.* Fiberoid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 885, holding, however, that where goods, bought from a manufacturer under a known trade designation, as ordinarily manufactured, although highly inflammable, were not commonly liable to take fire when subjected to the usual heat in further manufacture, and there was no inspection or other circumstance showing that the manufacturer and buyer dealt at arm's length, and the goods delivered were liable to take fire in the ordinary process of further manufacture and had no substantial value for any use, there was a breach of the implied warranty of the manufacturer that the goods were merchantable for the ordinary uses to which goods of that name were put.

78. Marshall *v.* Wood, 16 Ala. 806.

79. See *infra*, VII, J, 3, a.

80. See *infra*, VII, J, 3, b.

81. Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

82. Muller *v.* Eno, 14 N. Y. 597.

83. *Maine.*— Marshall *v.* Perry, 67 Me. 78.

*Michigan.*— American Glue Co. *v.* Rayburn, 150 Mich. 616, 114 N. W. 395.

*Missouri.*— Johnson *v.* Blanks, 34 Mo. 255.

*Pennsylvania.*— Dean *v.* Herrold, 37 Pa. St. 150.

*Rhode Island.*—Beane *v.* Tinkham, 14 R. I. 197.

*England.*— Freeman *v.* Baker, 5 B. & Ad. 797, 27 E. C. L. 336, 5 C. & P. 475, 24 E. C. L. 663, 3 L. J. K. B. 17, 2 N. & M. 446.

See 43 Cent. Dig. tit. "Sales," § 806.

**Warranty of title.**—Where a buyer does not notify the seller of suit brought to dispossess so that the seller has no opportunity to defend the title the buyer cannot avail himself of the breach of warranty. Houser *v.* U. S., 39 Ct. Cl. 508.

**Substitution of contract.**—Where a defendant purchased a traction engine of complainant, with warranties, the contract providing that notice of defects must be given within ten days, and the engine proving defective,

for damages for such breach [84] or by way of counter-claim and recoupment in an action for the price.[85] But if the contract provides that in case defects develop the seller shall have notice and an opportunity to replace or repair the article, notice of the defects must be given to fix the seller's liability,[86] and the seller's right to notice is not affected by a further provision for the return of the article if defective.[87] The failure to give notice will not, however, prevent the buyer from holding the seller liable for fraud in substituting inferior goods for those actually purchased.[88]

**2. Time of Giving Notice.** Where the contract provides that notice must be given within a specified time the condition is imperative.[89] And under a provi-

defendant notified complainant at the same time substituting a proposition, which was accepted by complainant, to take another engine of like pattern, which "should be perfect in all particulars," at a specified price, the second purchase was not governed by the former contract, as to notice of defects. Russell *v.* Hudson, (Tenn. Ch. App. 1896) 37 S. W. 1001.

**84.** *Connecticut.*— Kellogg *v.* Denslow, 14 Conn. 411.

*Illinois.*— Crabtree *v.* Kile, 21 Ill. 180.

*Indiana.*— Ferguson *v.* Hosier, 58 Ind. 438.

*Maryland.*—McCeney *v.* Duvall, 21 Md. 166.

*Massachusetts.*— Vincent *v.* Leland, 100 Mass. 432.

*New York.*— Muller *v.* Eno, 14 N. Y. 597.

*North Carolina.*— Lewis *v.* Rountree, 78 N. C. 323.

*Texas.*—Westinghouse Electric Mfg. Co. *v.* Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

*Vermont.*—Richardson *v.* Grandy, 49 Vt. 22.

*Wisconsin.*— Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*England.*— Fielder *v.* Starkin, 1 H. Bl. 17, 2 Rev. Rep. 700.

See 43 Cent. Dig. tit. "Sales," § 1227.

**85.** Cook *v.* Tavener, 41 Ill. App. 642; Muller *v.* Eno, 14 N. Y. 597; Gautier *v.* Douglass Mfg. Co., 13 Hun (N. Y.) 514; Warren *v.* Van Pelt, 4 E. D. Smith (N. Y.) 202; Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295; Getty *v.* Rountree, 2 Pinn. (Wis.) 379, 54 Am. Dec. 138, 2 Chandl. 28.

**86.** *Indiana.*— Seiberling *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38.

*Kentucky.*— J. I. Case Threshing Mach. Co. *v.* Harp, (1908) 113 S. W. 488; Guhy *v.* Nichols, etc., Co., 109 S. W. 1190, 33 Ky. L. Rep. 237; Davis *v.* J. I. Case Threshing Mach. Co., 80 S. W. 1145, 26 Ky. L. Rep. 235; Frick Co. *v.* Morgan, 69 S. W. 1072, 24 Ky. L. Rep. 836; Osborne *v.* Traylor, 8 Ky. L. Rep. 359.

*Michigan.*— Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339.

*Minnesota.*— Beckett *v.* Gridley, 67 Minn. 37, 69 N. W. 622.

*Nebraska.*—Aultman *v.* Stichler, 21 Nebr. 72, 31 N. W. 241.

*New York.*— Hills *v.* Bannister, 8 Cow. 31.

*South Dakota.*— Acme Harvesting Mach. Co. *v.* Barkley, (1908) 118 N. W. 690.

*Texas.*— Equitable Mfg. Co. *v.* Stevens, (Civ. App. 1900) 60 S. W. 350; Aultman *v.* McKinney, (Civ. App. 1894) 26 S. W. 267; Aultman *v.* York, 1 Tex. Civ. App. 484, 20 S. W. 851.

*Wisconsin.*—Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553; Trapp *v.* New Birdsall Co., 99 Wis. 458, 75 N. W. 77.

*United States.*— Sloan *v.* Wolf Co., 124 Fed. 196, 59 C. C. A. 612.

See 43 Cent. Dig. tit. "Sales," §§ 806, 1228.

**Limitation of rule.**—A stipulation requiring notice to be given within a given time does not apply where the goods are not of the description contracted for. Gordon *v.* Macintosh, [1883] W. N. 103 [*reversing* 31 Wkly. Rep. 232].

**Excuse for failure to give notice.**— In an action for the purchase-price of a machine, where the defense was breach of warranty, the fact that the company which sold plaintiff the machine had ceased to exist at the time of the alleged breach of warranty did not relieve him from giving notice thereof, where its successor was practically the same company, and defendant did not attempt to give notice of the breach to any one. Acme Harvesting Mach. Co. *v.* Barkley, (S. D. 1908) 118 N. W. 690.

**Instructions.**— Where by the contract of purchase the purchasers agree to report to the sellers within a time limited all defects, it is error for the court, in its instructions to the jury in an action on the contract, to treat the contract as allowing the purchasers an indefinite period in which to discover and complain of such defects, there being evidence that they had full opportunity to do so within the time limited, and also that they had waived the defects complained of; and the fact that the purchasers in their pleadings alleged that the sellers had perpetrated a fraud upon them by falsely representing the qualities of the property sold makes no difference. Malsby *v.* Young, 104 Ga. 205, 30 S. E. 854.

**87.** Osborne *v.* Wigent, 127 Mich. 624, 86 N. W. 1022; Nichols, etc., Co. *v.* Chase, 103 Wis. 570, 79 N. W. 772.

**88.** Pratt *v.* Morris, 87 S. W. 783, 27 Ky. L. Rep. 1035; Folkes *v.* Pratt, 86 Miss. 254, 38 So. 224.

**89.** Moline, etc., Co. *v.* Pereau, 52 Nebr. 577, 72 N. W. 956; Johansmeyer *v.* Kearney, 37 Misc. (N. Y.) 785, 76 N. Y. Suppl. 930; Smart *v.* Hyde, 1 Dowl. P. C. N. S. 60, 10 L. J. Exch. 479, 8 M. & W. 723.

**Trial or test.**— Upon a sale of a combined reaper and mower, with warranty to put it in

sion for immediate notice the buyer should act promptly.[90] If the time for giving notice is not specified it should be given within a reasonable time.[91] Notwithstanding a requirement that notice of defects be given within a specified time, if the defects are not discovered because not developed within that time, it is sufficient to give notice within a reasonable time after their development.[92] What is a reasonable time for giving notice depends upon the facts and circumstances of the particular case.[93]

**3. Mode and Sufficiency of Notice.** If the contract provides that written notice shall be given to the seller such a provision will ordinarily be enforced.[94]

order on notice that upon one day's trial it did not work well, the buyer was not bound to give notice until he had tried it for use both as reaper and mower. McCormick *v.* Basal, 50 Iowa 523.

**Premature notice.**—Where the warranty of a machine provides that "if, upon one day's trial," it does not work well, "the purchaser shall give immediate notice to" the sellers or their agent, a notice that it did not work well, given by the purchaser to the agent after about one-half day's trial, is premature, and not a compliance with the contract. McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537.

**Difficulty of examination.**—Where a bill of toilet articles was sold to a druggist under a contract providing that the purchaser should examine the goods at once upon their arrival, and notify the seller within five days if they were not equal to samples shown by the salesman, the seller was entitled to recover the price if no complaint was made within five days, even though, from the nature of the goods, no examination could have been made within five days from the date of delivery. Pratt *v.* Morris, 87 S. W. 783, 27 Ky. L. Rep. 1035.

**Delivery in instalments.**—Where a contract of sale provided that the purchaser should examine and inspect the goods, and each part thereof, at once upon their arrival, and give notice within five days from the date of arrival if the goods failed to comply with a warranty, notice within five days of the receipt of part of the goods of defects in another part, which had been received more than five days before the notice, was insufficient. Pratt *v.* Morris, 87 S. W. 783, 27 Ky. L. Rep. 1035.

**Waiver.**— Failure to give notice within the prescribed time is waived where the delay is caused by the desire and efforts of the seller to remedy defects. Watertown Nat. Bank, etc., Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131.

**90.** Lewis *v.* Hubbard, 1 Lea (Tenn.) 436, 27 Am. Rep. 775. See also Manton *v.* Perry, 29 Ohio Cir. Ct. 187.

**91.** Walter A. Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; Acme Harvesting Mach. Co. *v.* Barkley, (S. D. 1908) 118 N. W. 690; Hume *v.* Sherman Oil, etc., Co., 27 Tex. Civ. App. 366, 65 S. W. 390; Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

**Construction of warranty.**— A warranty that "if, in one week from the time of starting, it shall not perform" as warranted "the purchaser agrees to notify" the vendor, must be construed as providing that if after a week's trial, the machine did not do the work it was warranted to do, notice should be given within a reasonable time and not necessarily within the week. Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149. See also Holt Mfg. Co. *v.* Dunnigan, 22 Wash. 134, 60 Pac. 128.

**92.** Gaar *v.* Hill, 49 S. W. 202, 20 Ky. L. Rep. 1325.

**Where the defects are latent, and the purchaser notifies the seller immediately after discovery there is no waiver of the breach.** North Baltimore Bottle Glass Co. *v.* Altpeter, 133 Wis. 112, 113 N. W. 435.

**93.** Birdseye *v.* Davis, 2 McCord (S. C.) 296. And see Fearl *v.* Hanna, 129 Pa. St. 588, 18 Atl. 556.

**Reasonable time.**— Notice not given for two years was not within reasonable time. Frick Co. *v.* Morgan, 69 S. W. 1072, 24 Ky. L. Rep. 836; Russell *v.* Newdigate, 44 S. W. 973, 19 Ky. L. Rep. 1965. A delay of over two months was not reasonable. Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553. A delay of over one month was held to be unreasonable in Pennsylvania Iron Works Co. *v.* Hygeian Ice, etc., Co., 185 Mass. 366, 70 N. E. 427.

**94.** Nichols, etc., Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136; Aultman, etc., Co. *v.* Gunderson, 6 S. D. 226, 60 N. W. 859, 55 Am. St. Rep. 837; Trapp *v.* New Birdsall Co., 99 Wis. 458, 75 N. W. 77; Tomlinson *v.* Morris, 6 Can. L. T. Occ. Notes 394.

**Notice by registered letter.**— Under a contract of sale of an engine stipulating that, if it failed to work as warranted, the purchaser should give written notice to defendants' agent, and also to defendants by "registered letter," written notice to the agent, and defendants by letter, although not registered, is sufficient; the requirement that the letter to defendants be registered being merely directory. Badgett *v.* Frick, 28 S. C. 176, 5 S. E. 355.

**Letter left with agent.**—Where the contract for a machine provides that notice of failure of the machine to satisfy the warranty should be sent by registered letter; and defendant got the local agent to write a letter for him to the effect that the machine was unsatisfactory; which letter defendant signed and left with the agent to be registered, notice to the seller was presumed, although the agent testified that he did not write or send any

But where the agent of the seller is actually present at the time the trial or test is made and has personal knowledge of the defect, written notice to the seller is not necessary;[95] nor is written notice necessary where the seller acts on verbal complaints and attempts to remedy the defects.[96] The giving of notice in the manner required is not necessary if the seller acts under some notice given.[97] So too the seller's agent may for the purpose of giving notice be the agent of the buyer.[98] Notice to a general agent is ordinarily notice to the seller,[99] but notice to a local agent is insufficient,[1] and so too is notice to a state agent if he is in fact a selling agent only.[2] If the contract provides that notice shall be given to the local agent and to the seller at his place of business notice to both must be given,[3]

letter for defendant, but notified the company to send a man to see about the machine. Aultman-Taylor Mach. Co. *v.* Ridenour, 96 Iowa 638, 65 N. W. 980.

Protest.—Where goods were shipped by sea a protest signed and sworn to by the buyer on the arrival of the goods does not constitute notice to the seller of defects. Murchie *v.* Cornell, 155 Mass. 60, 29 N. E. 207, 31 Am. St. Rep. 526, 14 L. R. A. 492.

95. *Indiana.*—McCormick Harvesting Mach. Co. *v.* Embree, 94 Ind. 85; Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382.

*Iowa.*— Peterson *v.* Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 66 N. W. 96, 59 Am. St. Rep. 399; Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79.

*Kansas.*— Champion Mach. Co. *v.* Mann, 42 Kan. 372, 22 Pac. 417.

*Minnesota.*— Flatt *v.* Osborne, 33 Minn. 98, 22 N. W. 440.

*Nebraska.*—Sandwich Mfg. Co. *v.* Feary, 40 Nebr. 226, 58 N. W. 713; McCormick Harvesting Mach. Co. *v.* Machmuller, 1 Nebr. (Unoff.) 80, 95 N. W. 507. But see Heagney *v.* J. I. Case Threshing Mach. Co., 4 Nebr. (Unoff.) 745, 96 N. W. 175, holding that where a contract of warranty provides for notice of defects to be given to the vendor, and that any assistance given by the vendor in remedying any alleged defect, either before or after ten days' trial, shall not be any excuse for failure of the purchaser to keep the conditions of the warranty, notice to the agent of a vendor of defects in a machine, obtained from assisting in setting it up, was not such a notice as complied with the conditions of the warranty.

*South Dakota.*— Acme Harvesting Mach. Co. *v.* Barkley, (1908) 118 N. W. 690.

**Character in which knowledge is acquired.** — The fact that one or more experts of the manufacturer were in the neighborhood on other business, and examined the machine in question, did not take the place of the notice. Aultman, etc., Co. *v.* Gunderson, 6 S. D. 226, 60 N. W. 859, 55 Am. St. Rep. 837.

**Delivery to agent for repairs.**— Delivery of the machine to the agent of the seller to be repaired under the terms of the contract is notice to the seller. Henderson *v.* Almond, 22 Ga. 365. See also Port Huron Engine, etc., Co. *v.* Smith, 21 Ind. App. 233, 52 N. E. 106.

96. Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121.

97. Buchanan *v.* Minneapolis Threshing Mach. Co., (N. D. 1908) 116 N. W. 335.

98. Acker *v.* Kimmie, 37 Kan. 276, 15 Pac. 248; Nichols *v.* Root, 35 Minn. 363, 29 N. W. 160; Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149.

99. Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856; Aultman, etc., Co. *v.* Frazier, 5 Kan. App. 202, 47 Pac. 156; Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149. But see J. I. Case Threshing Mach. Co. *v.* Ebbighausen, 11 N. D. 466, 92 N. W. 826.

1. Nichols, etc., Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136.

2. Irle *v.* Nichols, etc., Co., 89 Ill. App. 619.

3. J. I. Case Threshing Mach. Co. *v.* Lyons, 72 S. W. 356, 24 Ky. L. Rep. 1862; Frick Co. *v.* Morgan, 69 S. W. 1072, 24 Ky. L. Rep. 836; Weise *v.* Birdsall Co., 35 Mo. App. 229; Fahey *v.* Esterley Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

**Notice to agent.**—Where the contract of sale of machinery provided that, in case of breach of warranty, notice should be given to the local agent of defendant who sold the property, notice to a local agent of defendant is a sufficient compliance with the contract, even though the sale had been made by another agent. Boley *v.* Walter A. Wood Mowing, etc., Mach. Co., 62 Mo. App. 139. But where the contract specifically provides that notice must be given to the agent from whom the goods were received, notice to another agent is insufficient. Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478.

**Warranty by agent.**—Where the sale of a binder is made by agents on their own account, upon the understanding that if it does not work successfully, and the manufacturers have meanwhile become insolvent, they themselves will receive it back, and the warranty also of the manufacturers, upon which such sales are usually made, is adopted, declaring that before the binder can be returned notice must be given to the manufacturers, and an opportunity given to remedy the defect, it is not necessary to notify the manufacturers, in order to defend successfully against an action by the agents for the price, where such notice was given to the agents. Campbell *v.* Wray, 5 Ind. App. 155, 31 N. E. 824.

**Notice to seller.**—Where plaintiffs sold an engine to defendants, manufactured by the A Co., under a warranty requiring defendants to notify the latter of any defects therein, notice of which was given to plaintiff, and

unless this requirement is waived.[4] If the contract so provides the notice must specify the particulars in which the article is defective in order to fix the seller's liability, and a mere general statement that it is not satisfactory or does not "work well" is insufficient,[5] and in an action for breach of the warranty the buyer is confined to the objections stated in his notice.[6]

**4. Waiver of Notice.** Want of or defects in the notice required by the contract may be waived by the seller,[7] by a request that the buyer shall give the article an additional trial or test,[8] or by a promise to remedy all defects;[9] and a delay in giving notice is waived if it is caused by the efforts of the seller or his agent to make the machine work properly.[10] If the seller or his authorized agent acts on the notice received and undertakes to remedy the defects it is a waiver of the objection that the notice was not in the proper form,[11] or was not given in time.[12] The theory of the cases is that as the notice is for the benefit of the seller, if he acts on it he waives any objection thereto.[13] But an unauthorized visit of an agent without

the president of the A Co. testified as plaintiff's witness that, if notice had been given to that company as required by the contract, it would have been sent to plaintiff, that the latter might send an expert to repair the engine, defendant's failure to send such notice to the A Co. did not relieve plaintiff from liability on the warranty. E. T. Kenney Co. *v.* Anderson, 81 S. W. 663, 26 Ky. L. Rep. 367, 83 S. W. 581, 26 Ky. L. Rep. 1217.

**4.** Nichols *v.* Knowles, 31 Minn. 489, 18 N. W. 413.

**5.** Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

**Notice held sufficient.**—Where a warranty given on the sale of machinery requires the purchaser, in case of failure to conform to the warranty, to give written notice to the vendor and its agent, stating particularly what parts and wherein it fails to fill the warranty, a notice stating that the separator failed to clean the grain without wasting it is sufficient. Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

**General expressions of dissatisfaction** are not equivalent to notice of defects. Pennsylvania Ironworks Co. *v.* Hygeian Ice, etc., Co., 185 Mass. 366, 70 N. E. 427; Locke *v.* Williamson, 40 Wis. 377.

**6.** Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 89 N. Y. Suppl. 142.

**7.** Nichols *v.* Root, 35 Minn. 363, 29 N. W. 160; Nichols *v.* Knowles, 31 Minn. 489, 18 N. W. 413.

**Knowledge of facts.**— To constitute waiver of a condition of a warranty specifically requiring notice of defects, there must be actual knowledge of all the facts, and an acquiescence in the failure of the other party to have lived up to the letter of his contract. Advance Thresher Co. *v.* Pierce, 74 Mo. App. 676.

**3.** Dollarhide *v.* Hopkins, 72 Ill. App. 509.

**9.** Aultman *v.* Richardson, 21 Ind. App. 211, 52 N. E. 86; Sandwich Mfg. Co. *v.* Feary, 40 Nebr. 226, 58 N. W. 713; Equitable Mfg. Co. *v.* Stevens, (Tex. Civ. App. 1900) 60 S. W. 350.

**10.** Watertown Nat. Bank, etc., Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; Seiberling *v.* Newlon, 16 Ind. App. 374, 43 N. E. 151.

**11.** *Illinois.*— Jacobs *v.* Crumbaker, 67 Ill. App. 391; Avery Planter Co. *v.* Rigg, 56 Ill. App. 599; Aultman *v.* Wirth, 54 Ill. App. 17.

*Indiana.*— Port Huron Engine, etc., Co. *v.* Smith, 21 Ind. App. 233, 52 N. E. 106; Huber Mfg. Co. *v.* Busey, 16 Ind. App. 410, 43 N. E. 967; Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

*Iowa.*— Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497; Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784; Dean *v.* Nichols, etc., Co., 95 Iowa 89, 63 N. W. 582; Davis *v.* Butrick, 68 Iowa 94, 26 N. W. 27; Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280.

*Kentucky.*— Advance Thresher Co. *v.* Curd, 85 S. W. 690, 27 Ky. L. Rep. 492; E. T. Kenney Co. *v.* Anderson, 81 S. W. 663, 26 Ky. L. Rep. 367, 83 S. W. 581, 26 Ky L. Rep. 1217.

*Minnesota.*— Massachusetts Loan, etc., Co. *v.* Welch, 47 Minn. 183, 49 N. W. 740.

*Nebraska.*— Parsons Band Cutter, etc., Co. *v.* Gadeke, (1901) 95 N W. 850; Aultman *v.* Trout, 27 Nebr. 199, 42 N. W. 1024.

*Oklahoma.*— Baker *v.* Nichols, etc., Co., 10 Okla. 685, 65 Pac. 100.

*Pennsylvania.*— Osborne *v.* Walley, 8 Pa. Super. Ct. 193.

See 43 Cent. Dig. tit. "Sales," § 810.

**12.** Nichols, etc., Co. *v.* Wiedemann, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; Osborne *v.* Walley, 8 Pa. Super. Ct. 193. But see Wendell *v.* Osborne, 63 Iowa 99, 18 N. W. 709, holding that where on the sale of a machine the warranty states that "keeping the machine during harvest . . . without giving notice [of defects] . . . shall be deemed conclusive evidence that the machine fills the warranty," no complaint made after that time can affect the rights of the parties, and an attempt thereafter, by the vendors, to remedy the defects, is no waiver of the conditions of the warranty.

**13.** E. T. Kenney Co. *v.* Anderson, 81 S. W. 663, 26 Ky. L. Rep. 367, 83 S. W. 581, 26 Ky. L. Rep. 1217; Baker *v.* Nichols, etc., Co., 10 Okla. 685, 65 Pac. 100.

the knowledge of the seller will not amount to a waiver,[14] and a waiver of notice of one defect will not operate as a waiver of subsequent notice of a new defect.[15]

**H. Opportunity to Remedy Defects.** Unless there is a definite condition to that effect the buyer is not obliged, as a condition precedent to recovery on the warranty, to allow the seller to remedy defects.[16] If, however, the contract so stipulates no liability for a breach of warranty attaches until the seller has had an opportunity to remedy defects,[17] but on such opportunity being afforded by proper notice [18] the failure or refusal of the seller to act fixes his liability.[19] So too an unsuccessful effort to remedy the defects renders the seller liable on his warranty,[20] and the buyer is not bound to allow him a second opportunity.[21] On the other hand an offer on the part of the seller to remedy defects not accepted by the buyer releases the seller from liability on the warranty,[22] provided the offer or effort

14. J. I. Case Threshing Mach. Co. *v.* Ebbighausen, 11 N. D. 466, 92 N. W. 826; Trapp *v.* New Birdsall Co., 109 Wis. 543, 85 N. W. 478.

15. Northern Electrical Mfg. Co. *v.* H. M. Benjamin Coal Co., 116 Wis. 130, 92 N. W. 553.

16. Russell *v.* Hudson, (Tenn. Ch. App. 1896) 37 S. W. 1001.

**Remedying defects before delivery.**— The seller has the right before formal delivery to remedy any defects. Black *v.* Herbert, 111 Mich. 638, 70 N. W. 138.

17. *Colorado.*— Canon City Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. 1030.

*Georgia.*— Mayes *v.* McCormick Harvesting Mach. Co., 110 Ga. 545, 35 S. E. 714.

*Illinois.*— Aultman *v.* Henderson, 32 Ill. App. 331.

*Indiana.*— Seiberling *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38.

*Iowa.*— Gaar *v.* Halverson, 128 Iowa 603, 105 N. W. 108; Osborne *v.* West, (1905) 103 N. W. 118.

*Kentucky.*— Bardwell *v.* Southern Engine, etc., Works, (1908) 113 S. W. 97; Lucile Min. Co. *v.* Fairbanks, 87 S. W. 1121, 27 Ky. L. Rep. 1100.

*North Carolina.*— Allen *v.* Tompkins, 136 N. C. 208, 48 S. E. 655.

*Tennessee.*— Gaar *v.* Hicks, (Ch. App. 1897) 42 S. W. 455.

*Texas.*— Equitable Mfg. Co. *v.* Stevens, (Civ. App. 1900) 60 S. W. 350.

*Wisconsin.*— Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249, 89 N. W. 160; Nichols, etc., Co. *v.* Chase, 103 Wis. 570, 79 N. W. 772.

See 43 Cent. Dig. tit. "Sales," § 809.

**Expense of repairs.**— Under an agreement to remedy defects the seller is of course liable for the cost of the repairs. Raynor *v.* Bryant, 43 Kan. 492, 23 Pac. 601; Watson *v.* Beckett, 2 Kan. App. 232, 43 Pac. 787; Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629. And even in the absence of such agreement, the seller may be liable for repairs rendered necessary because of his errors or neglect in installing machinery. Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674.

18. See *supra*, VII, G.

19. *Georgia.*— National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783.

*Iowa.*— Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183; McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556, 53 N. W. 310.

*Kentucky.*— Clarke *v.* Johnson Foundry, etc., Co., 42 S. W. 844, 19 Ky. L. Rep. 973.

*Minnesota.*— Tunell *v.* Osborne, 31 Minn. 343, 17 N. W. 944.

*Missouri.*— Osborne *v.* Henry, 70 Mo. App. 19; Skeen *v.* Springfield Engine, etc., Co., 34 Mo. App. 485.

*North Dakota.*— Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

**Excuse for failure to repair — Strike.**— There is a breach of the agreement of the seller of an engine to replace defective parts, where, on a defective part breaking, it refuses to replace it because unable to do so on account of a strike at its works. Puget Sound Iron, etc., Works *v.* Clemmons, 32 Wash. 36, 72 Pac. 465.

**Natural wear.**—Where the seller of an engine agreed to furnish new parts if it should prove defective in material or workmanship within a year, in an action for the price, the defense being a breach of warranty, the jury should have been instructed that plaintiff did not agree to make good the natural wear of the machine. Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113.

**Instruction.**—A charge that it was the duty of the seller to ascertain and remedy any "defect" was not bad for the use of the word "defect," on the theory that it had no application to any want of efficiency in the invention, but referred merely to some improper adjustment or weakness, since a defect is a fault, or the absence of anything necessary for perfection. Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297.

20. Keystone Mfg. Co. *v.* Yeager, 55 S. W. 682, 21 Ky. L. Rep. 1542.

21. Electric Supply, etc., Co. *v.* Consolidated Light, etc., Co., 42 W. Va. 583, 26 S. E. 188.

22. Mayes *v.* McCormick Harvesting Mach. Co., 110 Ga. 545, 35 S. E. 714; Gaar *v.* Halverson, 128 Iowa 603, 105 N. W. 108; McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537.

to repair is made within what is, under the circumstances of the particular case, a reasonable time.[23]

**I. Waiver of Breach of Warranty — 1. In General.** A breach of warranty may be waived by the buyer by express agreement,[24] and in some jurisdictions and under certain circumstances a waiver will be implied if the buyer knowing of the defects fails to give notice thereof to the seller,[25] or accepts, retains, or uses the articles,[26] or pays the price therefor.[27] A waiver will not be implied from an offer to rescind,[28] nor from a purchase of additional goods after knowledge of a breach of warranty as to the first lot.[29] A mere acknowledgment that the goods were satisfactory will not amount to a waiver.[30]

**2. Failure to Give Notice of Defects.** As in the absence of agreement no obligation rests on the buyer to give notice of defects constituting a breach of warranty,[31] his failure to give such notice will not operate as a waiver of the breach.[32]

**Compliance by seller.**—Where a contract of sale of personalty provided that, if any part of it was found defective, the vendors would, on notice, replace that part on board the cars at their factory, it limited the liability of the vendors for furnishing a worthless turbine wheel to placing a first-class wheel on board the cars at their factory, and imposed on the purchaser the duty to notify of the defect. Sloan *v.* Wolf Co., 124 Fed. 196, 59 C. C. A. 612.

23. Mayes *v.* McCormick Harvesting Mach. Co., 110 Ga. 545, 35 S. E. 714; Sandwich Mfg. Co. *v.* Feary, 34 Nebr. 411, 51 N. W. 1026.

**What is reasonable time.**—Where the seller's agent agreed to send an expert to remedy defects Thursday morning, his failure to send such expert until Thursday afternoon was unreasonable. Sandwich Mfg. Co. *v.* Feary, 40 Nebr. 226, 58 N. W. 713 [*overruling* Sandwich Mfg. Co. *v.* Feary, 22 Nebr. 53, 33 N. W. 485, 34 Nebr. 411, 51 N. W. 1026]. Where persons engaged in buying by the carload imported horses for breeding purposes, and, selling them singly, sell one with the guaranty that he shall be a sure foal-getter, and that, in case he shall not prove so, they will take him back and return the price, or replace him with one of the same breeding and price, they have a reasonable time, on his being returned, and another of the same breed and color being demanded, in which to furnish another; and two weeks is such a reasonable time. Christie *v.* Crawford, 152 Mich. 400, 116 N. W. 202.

24. Aultman, etc., Co. *v.* Donnell, 9 Kan. App. 813, 60 Pac. 482; Aultman *v.* McKinney, (Tex. Civ. App. 1894) 26 S. W. 267.

**Waiver by failure to pay.**—A provision that the failure of the buyer to settle for machinery shall constitute a waiver of the warranty is binding. Robinson *v.* Berkey, 100 Iowa 136, 69 N. W. 434, 62 Am. St. Rep. 549. But such provision may be waived by the seller. Thus where a clause in a warranty provided that "if the purchaser does not make full settlement in cash or approved notes for the machine upon its delivery to him, he thereby waives all claims under this warranty," the fact that the machine was delivered by the seller on the buyer's premises, without requesting settlement by note, and a note was accepted a month thereafter, and retained by the seller, with full knowledge of all the facts, constitutes a waiver of the seller's right to rely on said clause. Trapp *v.* New Birdsall Co., 99 Wis. 458, 75 N. W. 77.

**Liability of agent.**— Provision in defendant's contract of agency that if he, as plaintiff's agent, should deliver any machine to a customer before it was settled for by cash or note, he should be personally liable, and waive all claims under the warranty, does not prevent him setting up the warranty, where he purchases a machine himself, giving his own note, and then sells it to another on time, without taking a note. Minnesota Thresher Mfg. Co. *v.* Wolfram, 96 Wis. 481, 71 N. W. 809.

**Substitution of goods.**—An agreement to substitute other goods for those which prove defective is a waiver of the breach of warranty. R. B. Gage Mfg. Co. *v.* Woodward, 17 R. I. 464, 23 Atl. 16. But by agreement the substitution may not have that effect. Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

25. See *infra*, VII, I, 2.

26. See *infra*, VII, I, 3.

27. See *infra*, VII, I, 4.

28. Graham *v.* Bardin, 1 Patt. & H. (Va.) 206. See also Marshall *v.* Wood, 16 Ala. 806, holding that where the buyer after a breach of the warranty promises to consider the proposition of the seller to rescind the contract and to give notice whether he would accept such proposition or not before he instituted suit his failure to give such notice does not amount to a waiver or discharge of the seller's liability.

29. Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

30. McManus *v.* Watkins, 55 Mo. App. 92.

**Examination of adverse title.**— If a vendee, on being informed that an adverse title was set up to the property, examines that title, and expresses himself satisfied with his own, it does not deprive him of his right of action against his vendor on a breach of his warranty title. Harris *v.* Rowland, 23 Ala. 644.

31. See *supra*, VII, G, 1.

32. Muller *v.* Eno, 14 N. Y. 597 [*reversing* 3 Duer 421]; Butler *v.* Kellogg, 4 Daly (N. Y.) 108; Spedding *v.* Townsend, 2 N. Y.

If, however, the contract provides that notice of defects shall be given to the seller to afford him an opportunity to remedy them, failure to give such notice will be regarded as waiving the breach of warranty.[33]

**3. Acceptance or Retention of Goods — a. In General.** It is perhaps the rule in all jurisdictions that a warranty either express or implied survives acceptance or retention of the goods as to defects not discoverable on inspection, whether the contract be executed or executory.[34] But according to many decisions on an executory contract of sale, where there is an implied warranty, acceptance is a waiver of patent defects.[35] And in most jurisdictions the rule is laid down without

Suppl. 657; Eastern Ice Co. *v.* King, 86 Va. 97, 9 S. E. 506; Tacoma Coal Co *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890; Waupaca Electric Light, etc., Co. *v.* Milwaukee Electric R., etc., Co., 112 Wis. 469, 88 N. W. 308; Morehouse *v.* Comstock, 42 Wis. 626; Bonnell *v.* Jacobs, 36 Wis. 59.

**Warranty of title.**— In an action by the buyer of goods against a seller for a breach of an implied warranty of title, on the ground that the goods belonged to another, who had recovered judgment against plaintiff for converting them, plaintiff's omission to give notice to the seller in a suit brought against him by the real owner of the property will only prevent his recovering of the seller any of the costs of that suit, and will throw on him the burden of proving that the seller had no title to the property at the time he sold it to him. Burt *v.* Dewey, 31 Barb. (N. Y.) 540 [*reversed* on other grounds in 40 N. Y. 283, 100 Am. Dec. 482].

33. *Arkansas.*— Duffie *v.* Pratt, 76 Ark. 74, 88 S. W. 842; Pratt *v.* Meyer, 75 Ark. 206, 87 S. W. 123.

*Dakota.*— J. I. Case Threshing Mach. Co. *v.* Vennum, 4 Dak. 92, 23 N. W. 563.

*Illinois.*— Aultman *v.* Wykle, 36 Ill. App. 293.

*Indiana.*— Brown *v.* Russell, 105 Ind. 46, 4 N. E. 428.

*Indian Territory.*— Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648.

*Iowa.*— Russell *v.* Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348; Nichols *v.* Wyman, 71 Iowa 160, 32 N. W. 258.

*Kansas.*— Furneaux *v.* Esterly, 36 Kan. 539, 13 Pac. 824.

*Kentucky.*—J. I. Case Threshing Mach. Co. *v.* Lyons, 72 S. W. 356, 24 Ky. L. Rep. 1862.

*Missouri.*— Pratt *v.* S. J. Langston Mercantile Co., 111 Mo. App. 96, 85 S. W. 134; Kingman *v.* Schulenberger, 64 Mo. App. 548; Deere *v.* Hucht, 27 Mo. App. 1; Craycroft *v.* Walker, 26 Mo. App. 469.

*Nebraska.*— Smith *v.* Evans, 13 Nebr. 314, 14 N. W. 406.

*New York.*— Geiser Mfg. Co. *v.* Taylor, 55 N. Y. App. Div. 638, 67 N. Y. Suppl. 30.

*Texas.*— Aultman *v.* York, 1 Tex Civ. App. 484, 20 S. W. 851.

*Washington.*— Stover *v.* Rogers, 3 Wash. 603, 28 Pac. 906.

See 43 Cent. Dig. tit. "Sales," § 821.

34. *Alabama.*— Brown *v.* Freeman, 79 Ala. 406.

*Arkansas.*— Thompson *v.* Bertrand, 23 Ark. 730.

*Indiana.*— Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Kansas City First Nat. Bank *v.* Grindstaff, 45 Ind. 158.

*Michigan.*—Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.

*Minnesota.*— Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755; Cosgrove *v.* Bennett, 32 Minn. 371, 20 N. W. 359; Scott *v.* Raymond, 31 Minn. 437, 18 N. W. 274.

*New York.*— Hooper *v.* Story, 155 N. Y. 171, 49 N. E. 773; Bierman *v.* City Mills Co., 151 N. Y. 482, 45 N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799; Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358; Parks *v.* Morris Ax, etc., Co., 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Conor *v.* Dempsey, 49 N. Y. 665; Heath Dry Gas Co. *v.* Hurd, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410 [*reversed* on other grounds in 193 N. Y. 255, 86 N. E. 18]; Crane Co. *v.* Collins, 103 N. Y. App. Div. 480, 93 N. Y. Suppl. 174; Tansley *v.* Higgins, 88 N. Y. Suppl. 1005.

*North Carolina.*— Love *v.* Miller, 104 N. C. 582, 10 S. E. 685; Lewis *v.* Rountree, 78 N. C. 323.

*Texas.*— Ricker Nat. Bank *v.* Brown, (Civ. App. 1897) 43 S. W. 909.

*England.*— Josling *v.* Kingsford, 13 C. B. N. S. 447, 9 Jur. N. S. 947, 32 L. J. C. P. 94, 7 L. T. Rep. N. S. 790, 11 Wkly. Rep. 377, 106 E. C. L. 447.

**Illustrations.**—Where plaintiff received and resold a lot of carbureters manufactured by defendant under a warranty against defects, and they were returned to plaintiff as defective and he had them repaired and the defects remedied, plaintiff's failure to offer to return the defective carbureters to defendant was not a waiver of the latter's breach of warranty, since it was impossible to learn of the defects until they had been sold and used. Heath Dry Gas Co. *v.* Hurd, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410 [*reversed* on other grounds in 193 N. Y. 255, 86 N. E. 18].

35. Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Leitch *v.* Gillette-Herzog Mfg. Co., 64 Minn. 434, 67 N. W. 352; Thompson *v.* Libby, 35 Minn. 443, 29 N. W. 150; Maxwell *v.* Lee, 34 Minn. 511, 27 N. W. 196; Hazen *v.* Wilhelmie, 68 Nebr. 79, 93 N. W. 920; Staiger *v.* Soht, 191 N. Y. 527, 84 N. E. 1120 [*affirming* 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342]; Waeber *v.* Talbott, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep 712; Bierman *v.* City Mills Co., 151 N. Y. 482, 45

qualification that the acceptance or retention of goods sold does not waive a breach of warranty, and that it makes no difference whether the contract of sale is executed or executory, the warranty express or implied, or the defect patent or latent.[36] And in one jurisdiction it is held that, whether the contract be

N. E. 856, 56 Am. St. Rep. 635, 37 L. R. A. 799; Dounce *v.* Dow, 64 N. Y. 411; Crane Co. *v.* Collins, 103 N. Y. App. Div. 480, 93 N. Y. Suppl. 174; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340; Bell *v.* Mills, 68 N. Y. App. Div. 531, 74 N. Y. Suppl. 224; Baylis *v.* Weibezahl, 42 Misc. (N. Y.) 178, 85 N. Y. Suppl. 355; Lifschitz *v.* McConnel, 80 N. Y. Suppl. 253. And see Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804.

**36.** *Arkansas.*—Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

*California.*— Polhemus *v.* Heiman, 45 Cal. 573.

*Illinois.*— Underwood *v.* Wolf, 131 Ill. 452, 23 N. E. 598, 19 Am. St. Rep. 40; Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621; Owens *v.* Sturges, 67 Ill. 366; Doane *v.* Dunham, 65 Ill. 512; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Daily *v.* Smith-Heppen Co., 111 Ill. App. 319; Hodgman *v.* State Line, etc., R. Co., 45 Ill. App. 395.

*Indiana.*— Hege *v.* Newsom, 96 Ind. 426; Ferguson *v.* Hosier, 58 Ind. 438.

*Iowa.*— Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692; King *v.* Towsley, 64 Iowa 75, 19 N. W. 859; McCormick *v.* Dunville, 36 Iowa 645; Rogers *v.* Hanson, 35 Iowa 283; Aultman *v.* Theirer, 34 Iowa 272. And see Raeside *v.* Hamm, 87 Iowa 720, 54 N. W. 1079. *Compare* Electric Storage Battery Co. *v.* Waterloo, etc., R. Co., 138 Iowa 369, 116 N. W. 144, 19 L. R. A. N. S. 1183, holding that a buyer of storage batteries and electrical equipment, who accepted and used the same for many months without complaining, and without relying on any warranty, until an action was commenced to enforce payment, could not rely on a breach of warranty to defeat a recovery.

*Kansas.*— Graff *v.* Osborne, 56 Kan. 162, 42 Pac. 704.

*Maine.*— Morse *v.* Moore, 83 Me. 473, 22 Atl. 362, 23 Am. St. Rep. 783, 13 L. R. A. 224.

*Maryland.*— Central Trust Co. *v.* Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493.

*Massachusetts.*— Douglass Axe Mfg. Co. *v.* Gardner, 10 Cush. 88; Dorr *v* Fisher, 1 Cush. 271.

*Mississippi.*— Stillwell, etc., Co. *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

*Missouri.*— Lamar Water, etc., Co. *v.* Lamar, 140 Mo. 145, 39 S. W. 768; Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; Branson *v.* Turner, 77 Mo. 489; Compton *v.* Parsons, 76 Mo. 455; Murphy *v.* Gay, 37 Mo. 535; Wade *v.* Scott, 7 Mo. 509; Strauss *v.* American Chewing Gum Co., 134 Mo. App. 110, 114 S. W. 73; Ferguson Implement Co. *v.* Parmer, 128 Mo. App. 300, 107 S. W. 469; Alabama Steel, etc., Co. *v.* Symons, 110 Mo. App. 41, 83 S. W. 78; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Edwards *v.* Noel, 88 Mo. App. 434; Schoenberg *v.* Loker, 88 Mo. App. 387; Triplett *v.* Montgomery, 81 Mo. App. 141; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Osborne *v.* Henry, 70 Mo. App. 19; Tall *v* Chapman, 66 Mo. App. 581; Werner *v.* O'Brien, 40 Mo. App. 483.

*North Carolina.*— Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718; Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917. *Compare* Thomas *v.* Simpson, 80 N. C. 4.

*Ohio.*— Dayton *v.* Hooglund, 39 Ohio St. 671.

*Oklahoma.*— J. Rosenbaum Grain Co. *v.* Pond Creek Mill, etc., Co., (1908) 98 Pac. 331.

*Pennsylvania.*— Holloway *v.* Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. Rep. 737; Borrekins *v.* Bevan, 3 Rawle 23, 23 Am. Dec. 85.

*Texas.*— Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Wright *v.* Davenport, 44 Tex. 164; Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264; Taylor Cotton-Seed Oil, etc., Co. *v.* Pumphrey, (Civ. App. 1895) 32 S. W. 225; Hayden *v.* Houghton, (Civ. App. 1894) 24 S. W. 803. *Compare* Ellis *v.* Riddick, 34 Tex. Civ. App. 256, 78 S. W. 719

*Vermont.*— Best *v.* Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570.

*Washington.*— Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

*Wisconsin.*— Optenberg *v.* Skelton, 109 Wis. 241, 85 N. W. 356; Churchill *v.* Price, 44 Wis. 540; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737. But see Olson *v.* Mayer, 56 Wis. 551, 14 N. W. 640; Locke *v.* Williamson, 40 Wis. 377, holding that if defects are patent a warranty of quality in an executory contract is waived.

*United States.*— English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416; English *v.* Spokane Commission Co., 48 Fed. 196.

*England.*— Randall *v.* Newson, 2 Q. B. D. 102, 46 L. J. Q. B. 259, 36 L. T. Rep. N. S. 164, 25 Wkly. Rep. 313; Pateshall *v.* Tranter, 3 A. & E. 103, 1 Harr. & W. 178, 4 L. J. K. B. 162, 4 N. & M. 649, 30 E. C. L. 69 [*following* Fielder *v.* Starkin, 1 H. Bl. 17, 2 Rev. Rep. 700].

*Canada.*— See Wurzburg *v.* Andrews, 28 Nova Scotia 387.

See 43 Cent. Dig. tit. "Sales," § 818.

**In Kentucky,** where the sale is *in præsenti,* the purchaser has the right to rely upon the warranty without examination or inspection of the article, and acceptance and retention does not waive the warranty. Cook *v.* Gray, 2 Bush 121; O'Bannon *v.* Relf, 7 Dana 320; Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317. But where there is

executed or executory, acceptance or retention of the goods sold does not waive an express warranty, and it makes no difference that the buyer had an opportunity to inspect the goods and that the defects were discoverable on inspection, or were in fact discovered by him.[37]

**b. Effect of Special Provisions in the Contract of Sale.** Where the contract contains a stipulation for the return of the goods if the warranty is not fulfilled, or that the possession and use of the goods beyond a specified period shall be conclusive evidence that the warranty is fulfilled, retention and use after the period designated is a waiver of the breach of warranty.[38] There will be no waiver,

a contract to deliver goods or chattels of a particular description or quality at a future day, and the vendee after inspecting them or after having had a fair opportunity to inspect, receives them, he cannot thereafter recover or recoup damages for defects in the goods. While some of these cases characterize the undertaking as to quality to be a warranty, others regard it as an essential part of the contract a compliance with which precedes the vendee's obligation to receive the goods. Webb *v.* Milford Shoe Co., 128 Ky. 308, 108 S. W. 229, 32 Ky. L. Rep. 1175; Jones *v.* McEwan, 91 Ky. 373, 16 S. W. 81, 12 Ky. L. Rep. 966, 12 L. R. A. 399; Cook *v.* Gray, 2 Bush 121; Kerr *v.* Smith, 5 B. Mon. 552; O'Bannon *v.* Relf, *supra*; Yeiser *v.* Russell, 83 S. W. 574, 26 Ky. L. Rep 1151; Bannon *v.* St. Bernard Coal Co., 39 S. W. 252, 18 Ky. L. Rep. 1050. By acceptance he furnishes conclusive evidence that the goods are of the quality covenanted to be delivered. Cook *v.* Gray, *supra*.

**Under the statutes of Georgia** no duty rests upon the purchaser, who has bought goods under an express warranty, to inspect the article purchased, or to exercise care in discovering any defects. He may rely on the contractual obligation of the seller that he will deliver goods of the quality warranted. North Georgia Milling Co. *v.* Henderson El. Co., 130 Ga. 113, 60 S. E. 258; Carolina Portland Cement Co. *v.* Turpin, 126 Ga. 677, 55 S. E. 925; Springer *v.* Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 53; Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143; Cook *v.* Finch, 117 Ga. 541, 44 S. E. 95; Woodruff *v.* Groddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33; Sizemore *v.* Woolard, 3 Ga. App. 261, 59 S. E. 833. If, however, the articles be defective and the buyer knows of the fact, and with such knowledge accepts them, he will be deemed to have waived the defects and cannot recoup damages arising therefrom (North Georgia Milling Co. *v.* Henderson El. Co., *supra*; Carolina Portland Cement Co. *v.* Turpin, 126 Ga. 677, 55 S. E. 925; Springer *v.* Indianapolis Brewing Co., *supra*; Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360, 20 Am. St. Rep. 329, 6 L. R. A. 374; Jesse French Piano, etc., Co. *v.* Barber, 5 Ga. App. 344, 63 S. E. 233; Sizemore *v.* Woolard, 3 Ga. App. 261, 59 S. E. 833) unless he complains of such defects and the seller tells him to retain and pay for the article, and that he will remedy the defects (Jesse French Piano. etc., Co. *v.* Barber, *supra*). As respects implied warranties, acceptance constitutes a waiver of all defects which might have been discovered by ordinary care before delivery. Cook *v.* Finch, *supra*; De Loach Mill Mfg. Co. *v.* Tutweiler, Coal, etc., Co., 2 Ga. App. 493, 58 S. E. 790. The rule is otherwise, however, as to defects which are latent or concealed. De Loach Mill Mfg. Co. *v.* Tutweiler Coal, etc., Co., *supra*.

37. Henry *v.* Talcott, 175 N. Y. 385, 67 N. E. 617; Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006; Kent *v.* Friedman, 101 N. Y. 616, 3 N. E. 905; Foot *v.* Bentley, 44 N. Y. 166, 4 Am. Rep. 652; Rust *v.* Eckler, 41 N. Y. 488; Muller *v.* Eno, 14 N. Y. 597; Norwich Light Co. *v.* Ames, 122 N. Y. App. Div. 319, 106 N. Y. Suppl. 952 (holding that the buyer may retain the goods without waiving the warranty, after testing them and proving that they are defective); Staiger *v.* Soht, 116 N. Y. App. Div. 874, 102 N. Y. Suppl. 342 [*affirmed* in 191 N. Y. 527, 84 N. E. 1120]; Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, 63 N. Y. Suppl. 649; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511, 58 N. Y. Suppl. 609; J. L. White Furnace Co. *v.* C. W. Miller Transfer Co., 59 Misc. (N. Y.) 66, 109 N. Y. Suppl. 796. But see Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719, where it was said that where there is an express warranty on an executory contract of sale, the purchaser may retain and use the property and have his remedy upon the warranty except as to defects which are open and visible.

**Sales by sample.**—Where goods are sold by sample with a warranty that they shall correspond with the sample the vendee may recover damages for a breach of the warranty, although he has accepted the goods after an opportunity for inspection. Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; Kent *v.* Friedman, 101 N. Y. 616, 3 N. E. 905; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Meagley *v.* Hoyt, 88 Hun (N. Y.) 328, 34 N. Y. Suppl. 790.

**Same rules applicable to express warranties whether sale be executed or executory** see Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719.

**No rescission where contract executed.**—Where the sale is executed and the warranty is express there can be no rescission, and failure to return the goods does not waive the warranty. Rust *v.* Eckler, 41 N Y. 488.

38. *Georgia.*— Gray *v.* Consolidated Ice Mach. Co., 103 Ga. 115, 29 S. E. 604.

however, where notice is given of the defects as provided in the contract, for the purpose of affording the seller an opportunity to remedy the defects.[39] Where the contract provides that acceptance shall not waive a breach of warranty, the fact that the purchaser accepted the article after a test which led him to believe that it complied with the contract in all respects does not preclude him from thereafter maintaining an action for breach of warranty.[40]

**c. Retention and Use Induced by Request of Seller.** Where the retention and use has been induced by the request or promises of the seller there is no waiver of the warranty.[41]

**4. Payment of Price.** In some jurisdictions payment of the purchase-price or the giving of a note therefor with knowledge of defects constituting a breach of warranty is regarded as a waiver of the breach,[42] and even a promise to pay has been given a like effect,[43] especially when accompanied by an extension of time;[44] but according to the weight of authority, payment, part payment, or the giving of notes for the purchase-price is not a waiver of a breach of warranty unless an intent to waive such breach is proven,[45] especially if made without knowledge of

*Idaho.*— Murphy *v.* Russell, 8 Ida. 133, 67 Pac. 421.

*Illinois.*— Underwood *v.* Wolf, 31 Ill. App. 637 [*affirmed* in 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40].

*Indiana.*— Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382.

*Iowa.*— Massillon Engine, etc., Co. *v.* Schirmer, (1903) 93 N. W. 599.

*Kentucky.*— Gaar *v.* Hodges, 90 S. W. 580, 28 Ky. L. Rep. 889.

*Michigan.*— Stoddard Mfg. Co. *v.* Miller, 107 Mich. 51, 64 N. W. 948; Potter *v.* Lee, 94 Mich. 140, 53 N. W. 1047.

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Hartman, 35 Nebr. 629, 53 N. W. 566.

*New York.*— Merritt *v.* Emery, 12 N. Y. App. Div. 621, 42 N. Y. Suppl. 688.

*North Dakota.*— Minnesota Thresher Mfg. Co. *v.* Lincoln, 4 N. D. 410, 61 N. W. 145.

*Texas.*— Shearer *v.* Gaar, 41 Tex. Civ. App. 39, 90 S. W. 684; J. I. Case Threshing Mach. Co. *v.* Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; Thomas Mfg. Co. *v* Griffin, 16 Tex. Civ. App. 188, 40 S. W. 755. And see Swann *v.* Lowe, (App. 1892) 18 S. W. 789.

*Wisconsin.*— Kingman *v.* Watson, 97 Wis. 596, 73 N. W. 438.

*Canada.*— John Abell Engine, etc., Works Co. *v.* McGuire, 13 Manitoba 454.

**Trial of machine.**—Where on trial by the seller the machine proved defective so that the purchaser refused to accept it, the fact that on the following day he tried it by himself did not constitute such continued use as would estop him from claiming that the warranty was not fulfilled. Weston *v.* Card, 96 Mich. 373, 56 N. W. 26.

**Several warranties.** — Where a warranty provided that the machine was well made, of good materials, and durable, and also was conditioned for return if it could not be made to work well, if there was an acceptance of the machine under such last provision, such fact would not, as a matter of law, bar a recovery for a breach of the warranty as to make, materials, and durability. McCormick Harvesting Mach. Co. *v.* Fields, 90 Minn. 161, 95 N. W. 886.

39. McCormick Harvesting Mach. Co. *v.* Hays, 89 Ind. 582; Aultman *v.* Theirer, 34 Iowa 272; Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1.

40. Scott *v.* Keeth, 152 Mich. 547, 116 N. W. 183.

41. *Georgia.*— Jesse French Piano, etc., Co. *v.* Barber, 5 Ga. App. 344, 63 S. E. 233.

*Indiana.*— Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215; Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856.

*Kentucky.*— South Bend Pulley Co. *v.* W. E. Caldwell Co., 55 S. W. 208, 21 Ky. L. Rep. 1363, 54 S. W. 12, 21 Ky. L. Rep. 1084.

*Michigan.*— Aultman *v.* Knapp, 105 Mich. 205, 63 N. W. 66.

*Minnesota.*— Massachusetts L. & T. Co. *v.* Welch, 47 Minn. 183, 49 N. W. 740.

*Missouri.*— Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

*Nebraska.*— Parsons Band Cutter, etc., Co. *v.* Gadeke, 1 Nebr. (Unoff.) 605, 95 N. W. 850; McCormick Harvesting Mach. Co. *v.* Machmuller, 1 Nebr. (Unoff.) 80, 95 N. W. 507.

*Tennessee.*— Gaar *v.* Stark, (Ch. App.) 36 S. W. 149.

*Wisconsin.*— Osborne *v.* McQueen, 67 Wis. 392, 29 N. W. 636; Fairfield *v.* Madison Mfg. Co., 38 Wis. 346.

42. Lunsford *v.* Malsby, 101 Ga. 39, 28 S. E. 496; Osborne *v.* Birdsall, 57 N. Y. App. Div. 41, 67 N. Y. Suppl. 1049. See also Thomson *v.* Sexton, 15 S. C. 93.

43. Vanderbeek *v.* Francis, 75 Conn. 467, 53 Atl. 1015.

44. Blue Springs Min. Co. *v.* McIlvien, 97 Tenn. 225, 36 S. W. 1094. And see Adler *v.* Robert Portner Brewing Co., 65 Md. 27, 2 Atl. 918.

45. *Illinois.*—Bretz *v.* Fawcett, 29 Ill. App. 319; Contrall *v.* Fawcett, 2 Ill. App. 569. But see Crabtree *v.* Crawford, 25 Ill. 248, holding that where A purchased of B for five hundred dollars two horses, one of which was lame at the time, but was warranted by B to recover and A, eight months afterward, sold the lame horse to a third party for two hundred and fifty dollars, who gave his note to B for the price in the place of

the defects,[46] or if the purchaser is induced by the promise of the seller to remedy the defects.[47] So too when seasonable demand for damages for defects has been made payment of the price will not operate as a waiver.[48]

**J. Remedies For Breach of Warranty**[49]— **1. In General.** The remedy of the buyer for a breach of warranty in the sale of goods may be by a return of the goods,[50] the contract being rescinded,[51] and recovery of the price paid,[52] by an action for damages,[53] or by a counter-claim or recoupment in an action by the seller for the price.[54]

**2. Return of Goods — a. In General.** In the absence of an agreement giving him the right to return the goods it is the rule in most jurisdictions that the buyer in an executed contract of sale of goods cannot on a breach of warranty return the goods, his remedy in such case being on the warranty.[55] On the other hand

A, and A gave his note for two hundred and fifty dollars to B for the balance due on the contract, A could not afterward set up a breach of warranty as a defense to the last mentioned note.

*Iowa.*— Keniston *v.* Todd, 139 Iowa 287, 117 N. W. 674; Aultman *v.* Wheeler, 49 Iowa 647. See also Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784, holding that the giving of a note for the price of a threshing machine, after a trial of it in threshing one kind of grain, is not a settlement for it "after having tried it," within the meaning of a clause, in the contract for its sale, providing that a settlement for it after having tried it estops the purchaser from all claims for damages for breach of warranty.

*Massachusetts.*— Gilmore *v.* Williams, 162 Mass. 351, 38 N. E. 976.

*Minnesota.*— Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1.

*Mississippi.*—Dancey *v.* Sugg, 46 Miss. 606.

*Missouri.*— Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380; Murphy *v.* Gay, 37 Mo. 535; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Fadley *v.* Smith, 23 Mo. App. 87.

*Wisconsin.*— Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

*United States.*— Johnson *v.* Roy, 112 Fed. 256, 50 C. C. A. 237; Walker *v.* Gooch, 48 Fed. 656.

See 43 Cent. Dig. tit. "Sales," § 823.

**Intent of parties.**— The question of waiver by payment depends wholly on the intent of the parties. Toledo Sav. Bank *v.* Rathmann, 78 Iowa 288, 43 N. W. 193; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; C. H. Dean Co. *v.* Standifer, 37 Tex. Civ. App. 181, 83 S. W. 230; Johnson *v.* Roy, 112 Fed. 256, 50 C. C. A. 237; Ottawa Bottle, etc., Co. *v.* Gunther, 31 Fed. 208.

**Defects subsequently discovered.**—Where on the remedying of certain known defects payment is made, there is no waiver of defects subsequently discovered. Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342.

**Waiver of defenses to note.**—Although a note given for the purchase-price of goods contains a waiver of all defenses to the note, the buyer is not estopped to counter-claim for breach of warranty. Osborne *v.* McQueen, 67 Wis. 392, 29 N. W. 636.

**Extension of time.**—A promise to pay is not conclusively a waiver of breach, although accompanied by an extension of time, but such extension is evidence of an intent to waive. Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113.

**46.** Bowers Rubber Co. *v.* Blasdel, (Cal. 1897) 47 Pac. 931; Nauman *v.* Ullman, 102 Wis. 92, 78 N. W. 159.

**47.** *Illinois.*— Kingman *v.* Meyer, 70 Ill. App. 476.

*Indiana.*— York Mfg. Co. *v.* Bonnell, 24 Ind. App. 667, 57 N. E. 590.

*Minnesota.*— Osborne *v.* Carpenter, 37 Minn. 331, 34 N. W. 163.

*Missouri.*— Courtney *v.* Boswell, 65 Mo. 196; Hayner *v.* Churchill, 29 Mo. App. 676.

*New York.*— Huck *v.* Bischoff, 84 N. Y. Suppl. 173.

*Texas.*— Aultman, etc., Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861.

*Wisconsin.*— Harrison *v.* Crocker, 39 Wis. 68.

See 43 Cent. Dig. tit. "Sales," § 823.

**48.** Davis Provision Co. *v.* Fowler Bros., 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205 [*affirmed* in 163 N. Y. 580, 57 N. E. 1108].

**49.** Remedies of seller generally see *infra*, IX.

**50.** See *infra*, VII, J, 2.

**51.** Rescission for breach of warranty see *supra*, IV, B, 3, c, (II), (F).

**52.** See *infra*, VII, J, 2, a.

**Alternative actions.**—An action to recover the purchase-money on rescission for breach of warranty and an action for damages for the breach are alternative actions. Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

**53.** See *infra*, VII, J, 3.

**54.** See *infra*, VII, J, 3, b.

**55.** *Connecticut.*— Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554, 48 Atl. 422; Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546; Scranton *v.* Mechanics Trading Co., 37 Conn. 130.

*Georgia.*—Woodruff *v.* Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33.

*Illinois.*— Doane *v.* Dunham, 65 Ill. 512; Skinner *v.* Mulligan, 56 Ill. App. 47; Mayes *v.* Rogers, 47 Ill. App. 372.

*Indiana.*— Hoover *v.* Sidener, 98 Ind. 290; Marsh *v.* Low, 55 Ind. 271.

*Michigan.*— H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., 129 Mich. 209,

in other jurisdictions it has been held that the buyer may resort to either remedy,[56] and this right is recognized generally when the sale is executory.[57]

**b. As a Condition Precedent.** In the absence of a stipulation to that effect it is not necessary that the buyer should return or offer to return the goods in order to avail himself of a breach of warranty either by an action for damages,[58] or by

88 N. W. 473, 56 L. R. A. 939; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339; Nichols *v.* Crandall, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412.

*Minnesota.*— Lynch *v.* Curfman, 65 Minn. 170, 69 N. W. 5; Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149; Knoblauch *v.* Kronschnabel, 18 Minn. 300.

*New Jersey.*— See Woodward *v.* Emmons, 61 N. J. L. 281, 39 Atl. 703.

*New York.*— Muller *v.* Eno, 14 N. Y. 597; Kiernan *v.* Rocheleau, 6 Bosw. 148; Renaud *v.* Peck, 2 Hilt. 137; Billson *v.* Hall, etc., Constr. Co., 43 Misc. 620, 88 N. Y. Suppl. 245; Kanrich *v.* Wise, 92 N. Y. Suppl. 790; Langworthy *v.* Beardsley, 1 N. Y. City Ct. 170; Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588.

*Pennsylvania.*— Eshleman *v.* Lightner, 169 Pa. St. 46, 32 Atl. 63; Kase *v.* John, 10 Watts 107, 36 Am. Dec. 148; Blair *v.* Ford China Co., 26 Pa. Super Ct. 374.

*South Carolina.*— Kaufman Milling Co. *v.* Stuckey, 40 S. C. 110, 18 S. E. 218; Rivers *v.* Gruget, 2 Nott & M. 265.

*Tennessee.*— Belew *v.* Clark, 4 Humphr. 506; Allen *v.* Anderson, 3 Humphr. 581, 39 Am. Dec. 197.

*Texas.*— Wright *v.* Davenport, 44 Tex. 164; Jesse French Piano, etc., Co. *v.* Thomas, 36 Tex. Civ. App. 78, 80 S. W. 1063; Miller-Stone Mach. Co. *v.* Balfour, 25 Tex. Civ. App. 413, 61 S. W. 972; Aultman *v.* McKinney, (Civ. App. 1894) 26 S. W. 267.

*Vermont.*— Mayer *v.* Dwinell, 29 Vt. 298; West *v.* Cutting, 19 Vt. 536.

*Washington.*— Hulet *v.* Achey, 39 Wash. 91, 80 Pac. 1105.

*United States.*— Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595; Thomas China Co. *v.* C. W. Raymond Co., 135 Fed 25, 67 C. C. A. 629.

*England.*— Couston *v.* Chapman, L. R. 2 H. L. Sc. 250; Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447, 36 L. J. Q. B. 270; Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193; Dawson *v.* Collis, 10 C. B. 523, 20 L. J. C. P. 116, 2 L. M. & P. 14, 70 E. C. L. 523. See also Toulmin *v.* Hedley, 2 C. & K. 157, 61 E. C. L. 157.

See 43 Cent. Dig. tit. "Sales," §§ 812, 1208.

**56.** *California.*— Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440; Pollemus *v.* Heiman, 45 Cal. 573.

*Iowa.*— Timken Carriage Co. *v.* Smith, 123 Iowa 554, 99 N. W. 183; Laporte Imp. Co. *v.* Brock, 99 Iowa 485, 68 N. W. 810, 61 Am. St. Rep. 245; McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556, 53 N. W. 310; Upton Mfg. Co. *v.* Huiske, 69 Iowa 557, 29 N. W. 621; Rogers *v.* Hanson, 35 Iowa 283.

*Kentucky.*— Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317; Ruby Carriage Co. *v.* Kremer, 81 S. W. 251, 26 Ky. L. Rep. 274. *Compare* Lightburn *v.* Cooper, 1 Dana 273.

*Maine.*— Milliken *v.* Skillings, 89 Me. 180, 36 Atl. 77; Downing *v.* Dearborn, 77 Me. 457, 1 Atl. 407; Marston *v.* Knight, 29 Me. 341.

*Maryland.*— McCaney *v.* Duvall, 21 Md. 166; Miller *v.* Grove, 18 Md. 242; Clements *v.* Smith, 9 Gill 156; Franklin *v.* Long, 7 Gill & J. 407; Hyatt *v.* Boyle, 5 Gill & J. 110, 25 Am. Dec. 276; Taymon *v.* Mitchell, 1 Md. Ch. 496.

*Massachusetts.*— Bryant *v.* Isburgh, 13 Gray 607, 74 Am. Dec. 655; Dorr *v.* Fisher, 1 Cush. 271; Clark *v.* Baker, 5 Metc. 452.

*Missouri.*— Branson *v.* Turner, 77 Mo. 489; New Birdsall Co. *v.* Keys, 99 Mo. App. 458, 74 S. W. 12; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Tall *v.* Chapman, 66 Mo. App. 581; Kerr *v.* Emerson, 64 Mo. App. 159; Johnson *v.* Whitman Agricultural Co., 20 Mo. App. 100. But see Walls *v.* Gates, 6 Mo. App. 242.

*Nebraska.*— Sloan Commission Co. *v.* Fry, 4 Nebr. (Unoff.) 647, 95 N. W. 862.

*Oklahoma.*— Osborne *v.* Walther, 12 Okla. 20, 69 Pac. 953.

*Wisconsin.*— Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154. But see Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec 138, 2 Chandl. 28.

*United States.*— Sloan *v.* Wolf Co., 124 Fed. 196, 59 C. C. A. 612; English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

See 43 Cent. Dig. tit. "Sales," §§ 812, 1208.

**Other remedy provided.**— There can be no return of the goods if another remedy is specifically provided by the terms of the contract. Cross *v.* Pearson, 17 Ind. 612.

**57.** *California.*— Hoult *v.* Baldwin, 67 Cal. 610, 8 Pac. 440; Polhemus *v.* Heiman, 45 Cal. 573.

*Kansas.*— Field *v.* Kinnear, 4 Kan. 476.

*Massachusetts.*— Clark *v.* Baker, 5 Metc. 452.

*Minnesota.*— Knoblauch *v.* Kronschnabel, 18 Minn. 300.

*Missouri.*— Alabama Steel, etc., Co. *v.* Symons, 110 Mo. App. 41, 83 S. W. 78; Calhoun *v.* Paule, 26 Mo. App. 274.

*New York.*— Murray *v.* Smith, 4 Daly 277; Pomeroy *v.* Shaw, 2 Daly 267.

*England.*— Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 193.

See 43 Cent. Dig. tit. "Sales," §§ 812, 1208.

**58.** *Alabama.*— Marshall *v.* Wood, 16 Ala. 806; Milton *v.* Rowland, 11 Ala. 732; Kornegay *v.* White, 10 Ala. 255.

way of counter-claim or recoupment.[59] But in order to bar a recovery of the price, the goods must have been returned or tendered, unless they are worthless

*Arkansas.*— Plant *v.* Condit, 22 Ark. 454.
*California.*— Hughes *v.* Bray, 60 Cal. 284.
*Illinois.*— Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381; Crabtree *v.* Kile, 21 Ill. 180; Devine *v.* Ryan, 115 Ill. App. 498; McMillan *v.* De Tamble, 93 Ill. App. 65.
*Indiana.*— Harrisburg Car Mfg. Co. *v.* Sloan, 120 Ind. 156, 21 N. E. 1088; Ferguson *v.* Hosier, 58 Ind. 438.
*Iowa.*— Short *v.* Matteson, 81 Iowa 638, 47 N. W. 874; Storrs *v.* Emerson, 72 Iowa 390, 34 N. W. 176.
*Kentucky.*— Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317; Ewing *v.* Hauss, 50 S. W. 249, 20 Ky. L. Rep. 1883.
*Maryland.*— Horn *v.* Buck, 48 Md. 358; Lane *v.* Lantz, 27 Md. 211.
*Massachusetts.*— Vincent *v.* Leland, 100 Mass. 432.
*Minnesota.*— Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636; Scott *v* Raymond, 31 Minn. 437, 18 N. W. 274.
*Missouri.*— Ross *v.* Barker, 30 Mo. 385; Thompson *v.* Botts, 8 Mo. 710; Martin *v.* Maxwell, 18 Mo. App. 176.
*New Jersey.*— Phillips *v.* Crosby, 69 N. J. L. 612, 55 Atl. 814.
*New York.*— Parks *v.* Morris Ax, etc., Co., 54 N. Y. 586; Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719 [*affirming* 63 Barb. 506]; Rust *v.* Eckler, 41 N. Y. 488; McCall Co. *v* Eagan, 89 N. Y. App. Div. 330, 85 N. Y. Suppl. 792 [*affirmed* in 181 N. Y. 572, 74 N. E. 1119]; Lichtenstein *v.* Rabolinsky, 75 N. Y. App. Div. 66, 77 N. Y. Suppl. 792; Ames *v.* Norwich Light Co., 22 N. Y. App. Div. 249, 47 N. Y. Suppl. 743; Messenger *v.* Pratt, 3 Lans. 234; Wadley *v.* Davis, 63 Barb. 500; Brigg *v.* Hilton, 11 Daly 335; Murray *v.* Smith, 4 Daly 277; Osborn *v.* American Ink Co., 29 Misc. 648, 61 N. Y. Suppl. 70; Romeo *v.* Garafolo, 21 Misc. 166, 47 N. Y. Suppl. 91 [*affirmed* in 25 N. Y. App. Div. 191, 49 N. Y. Suppl. 114]; Beeman *v.* Banta, 10 N. Y. St. 325 [*affirmed* in 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779]; Waring *v.* Mason, 18 Wend. 425.
*North Carolina.*— Lewis *v.* Rountree, 78 N. C. 323; Toris *v.* Long, 1 N. C. 13.
*North Dakota.*— Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.
*Pennsylvania.*— Borrekins *v.* Bevan, 3 Rawle 23, 23 Am. Dec. 85.
*South Carolina.*— Parker *v.* Pringle, 2 Strobh. 242; Ashley *v.* Reeves, 2 McCord 432.
*Tennessee.*— Southern Brass, etc., Co. *v.* Exeter Mach. Works, 109 Tenn. 67, 70 S. W. 614; Garr *v.* Young, (Ch. App. 1901) 62 S. W. 631.
*Texas.*— Smith *v.* Oldham, 26 Tex. 533; Westinghouse Electric Mfg. Co. *v.* Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.
*Vermont.*— Richardson *v.* Grandy, 49 Vt. 22; Houghton *v.* Carpenter, 40 Vt. 588.
*Wisconsin.*— Naumen *v.* Ullman, 102 Wis. 92, 78 N. W. 159; Bonnell *v.* Jacobs, 36 Wis. 59; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.
*United States.*— Andrews *v.* Schreiber, 93 Fed. 367.
*England.*— Fielder *v.* Starkin, 1 H. Bl. 17, 2 Rev. Rep. 700.
See 43 Cent. Dig. tit. "Sales," § 1227.

**59.** *Arkansas.*—Williams *v.* Miller, 21 Ark. 469.
*Georgia.*— Woodruff *v.* Graddy, 91 Ga. 333, 17 S. E. 264, 44 Am. St. Rep. 33.
*Illinois.*— Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40 [*affirming* 31 Ill. App. 637]; Aultman *v.* Johnson, 45 Ill. App. 313; Cook *v.* Tavener, 41 Ill. App. 642; Brown *v.* Reinholdt, 41 Ill. App. 599.
*Indiana.*— Hillenbrand *v.* Stockman, 123 Ind. 598, 24 N. E. 370; Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557.
*Kentucky.*— Harrigan *v.* Advance Thresher Co., 81 S. W. 261, 26 Ky. L. Rep. 317; South Bend Pulley Co. *v.* W. E. Caldwell Co., 54 S. W. 12, 21 Ky. L. Rep. 1084, 55 S. W. 208, 21 Ky. L. Rep. 1363; Bernard Leas Mfg. Co. *v.* Waller, 36 S. W. 531, 18 Ky. L. Rep. 346.
*Michigan.*— Hull *v.* Belknap, 37 Mich. 179.
*Minnesota.*— Scott *v.* Raymond, 31 Minn. 437, 18 N. W. 274.
*Mississippi.*— Ferguson *v.* Oliver, 8 Sm. & M. 332.
*Missouri.*— Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; New Birdsall Co. *v.* Keys, 99 Mo. App. 458, 74 S. W. 12; Miles *v.* Withers, 76 Mo. App. 87; Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477.
*New York.*— Marshuetz *v.* McGreevy, 23 Hun 408; Buhrman *v.* Baylis, 14 Hun 608; Nichols *v.* Townsend, 7 Hun 375; Marcus *v.* Thornton, 44 N. Y. Super. Ct. 411; Murray *v.* Smith, 4 Daly 277; Warren *v.* Van Pelt, 4 E. D. Smith 202.
*North Dakota.*— Minnesota Thresher Mfg. Co. *v.* Hanson, 3 N. D. 81, 54 N. W. 311.
*Ohio.*— Dayton *v.* Hooglund, 30 Ohio St. 671.
*Pennsylvania.*— Steigleman *v.* Jeffries, 1 Serg. & R. 477, 7 Am. Dec. 626.
*South Carolina.*— Trimmier *v.* Thomson, 10 S. C. 164; Parker *v.* Pringle, 2 Strobh. 242.
*Texas.*— Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264; Palmer *v.* Wilks, 17 Tex. 105; Houchins *v.* Williams, (Civ. App. 1894) 25 S. W. 730.
*Vermont.*— Best *v.* Flint, 58 Vt. 543, 5 Atl. 192, 56 Am. Rep. 570.
*Wisconsin.*—Buffalo Barb Wire Co. *v.* Phillips, 67 Wis. 129, 30 N. W. 295; Merrill *v.* Nightingale, 39 Wis. 247; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.
See 43 Cent. Dig. tit. "Sales," § 1220.

**Warranty that goods shall be satisfactory.** — Where the warranty is that the goods shall be satisfactory to the buyer, he cannot

for any purpose,[60] as it is not sufficient that they are worthless for the particular purpose for which they were sold.[61]

e. **Under Provisions of Contract.** The contract of warranty may, however, provide that if the article fails to fulfil the warranty it shall be returned to the seller, and in such case the condition is part of the warranty and must be complied with,[62] and the fact that within the time stipulated notice of dissatisfaction

if he retains the goods recoup damages in an action for the price. Campbell Printing-Press Co. *v.* Thorp, 36 Fed. 414, 1 L. R. A. 645.

**60.** *Alabama.* — Eastern Granite Roofing Co. *v.* Chapman, 140 Ala. 440, 37 So. 199, 103 Am. St. Rep. 58; Jemison *v.* Woodruff, 34 Ala. 143; Davis *v.* Dickey, 23 Ala. 848; Cozzins *v.* Whitaker, 3 Stew. & P. 322.

*Illinois.*— Aultman *v.* Johnson, 45 Ill. App. 313; Brown *v.* Reinholdt, 41 Ill. App. 599.

*Indiana.*— Fleetwood *v.* Dorsey Mach. Co., 95 Ind. 491; Lafayette Agricultural Works *v.* Phillips, 47 Ind. 259; Dill *v.* O'Ferrell, 45 Ind. 268; Mullikin *v.* Latchem, 7 Blackf. 136; Barry Saw, etc., Co. *v.* Campbell, 13 Ind. App. 455, 41 N. E. 955.

*Iowa.*— Massillon Engine, etc., Co. *v.* Schirrer, (1903) 93 N. W. 599.

*Kansas.*— Aultman *v.* Mickey, 41 Kan. 348, 21 Pac. 254.

*Kentucky.*— McCormick Harvesting Mach. Co. *v.* Arnold, 116 Ky. 508, 76 S W. 323, 25 Ky. L. Rep. 663; Miller *v.* Gaither, 3 Bush 152; Bernard Leas Mfg. Co. *v.* Waller, 36 S. W. 531, 17 Ky. L. Rep. 346.

*Missouri.*— Brown *v.* Weldon, 99 Mo. 564, 13 S. W. 342; Ferguson *v.* Huston, 6 Mo. 407; McCormick Harvesting Mach. Co. *v.* Brady, 67 Mo. App. 292; Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477.

*New Hampshire.*— Shepherd *v.* Temple, 3 N. H. 455.

*New York.*— Cluster Gaslight Co. *v.* Baker, 90 N. Y. Suppl. 1034; Boorman *v.* Jenkins, 12 Wend. 566, 27 Am. Dec. 158.

*Ohio.*— Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

*South Dakota.*— Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

*Tennessee.*— Franklin *v.* Ezell, 1 Sneed 497.

*Texas.*— Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53; Seley *v.* Parker, (Civ. App. 1898) 45 S. W. 1026; Hayden *v.* Houghton, (Civ. App. 1894) 24 S. W. 803.

*United States.*— Cincinnati Siemens-Lungren Gas Illuminating Co *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411; Campbell Printing-Press Co. *v.* Thorp, 36 Fed. 414, 1 L. R. A. 645.

*England.*— Curtis *v.* Hannay, 3 Esp. 82; Lewis *v.* Cosgrave, 2 Taunt. 2.

**61.** Crenshaw *v.* Looker, 185 Mo. 375, 84 S. W. 885; McCormick Harvesting Mach. Co. *v.* Brady, 67 Mo. App. 292; Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477. See also Schoenberg *v.* Loker, 88 Mo. App. 387; Warder *v.* Fisher, 48 Wis. 338, 4 N. W. 470. But see Cooper *v.* Hall, 22 Nebr. 168, 34 N. W. 349, where the goods were suitable only for the purpose for which they were purchased.

**62.** *Georgia.*— J. A. Fay, etc., Co. *v.* Dudley, 129 Ga. 314, 58 S. E. 826.

*Iowa.*— Bomberger *v.* Griener, 18 Iowa 477.

*Missouri.*— Jasper County Bank *v.* Barts, 130 Mo. App. 635, 109 S. W. 1057.

*New Jersey.*—Sturtevant Mill Co. *v.* Kingsland Brick Co., 74 N. J. L. 492, 70 Atl. 732.

*New York.*— Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, 54 N. Y. Suppl. 449 [*affirmed* in 165 N. Y. 617, 59 N. E. 1119]; J. L. White Furnace Co. *v.* C. W. Miller Transfer Co., 59 Misc. 66, 109 N. Y. Suppl. 796.

*Texas.*— Haynes *v.* Plano Mfg. Co., 36 Tex. Civ. App. 567, 82 S. W. 532; J. I. Case Threshing Mach. Co. *v.* Hall, 32 Tex. Civ. App. 214, 73 S. W. 835.

*Wisconsin.*— Manny *v.* Glendinning, 15 Wis. 50.

*England.*— Bywater *v.* Richardson, 1 A. & E. 508, 3 L. J. K. B. 164, 3 N. & M. 748, 28 E. C. L. 246.

*Canada.*— Hamilton *v.* Northey Mfg. Co., 31 Ont. 468.

See 43 Cent. Dig. tit. "Sales," §§ 811, 812, 1209.

**Posted notice requiring return.** — Where there is a general warranty of a horse, the fact that there was a notice posted on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury for them to say whether this formed any part of the original contract. Best *v.* Osborn, 2 C. & P. 74, R. & M. 290, 12 E. C. L. 458.

**Limitation of condition.**— If there are several warranties and the condition for return is attached to only one of them, it will not be extended to the others. McCormick Harvesting Mach. Co. *v.* Fields, 90 Minn. 161, 95 N. W. 886; Milburn Wagon Co. *v.* Nisewarner, 90 Va. 714, 19 S. E. 846.

**Sale of several animals.**—Where a cow and young calf were purchased by plaintiff for breeding purposes under a catalogue reciting that a cow and calf should be treated as one animal, and under a warranty that all animals of breeding age were guaranteed breeders, and that, in case of a failure to breed after a satisfactory trial, the animal might be returned, with the reserved right to the seller for the period of six months to try the animal and return her to the buyer if she proved a breeder, plaintiff was not bound to return the calf as a condition to his right to return the cow as a non-breeder under the contract. White *v.* Miller, (Iowa 1906) 105 N. W. 993.

is given will not relieve the buyer from the conditions of the contract.[63] The condition may be that the article shall be deemed to fulfil the warranty unless returned within a specified time.[64] Under such conditions if the buyer retains the goods he cannot avail himself of the breach,[65] either in an action for damages,[66] or by way of recoupment or counter-claim.[67] If the provision of the contract is not imperative but merely permits the buyer to return the property, he may, at his election, resort to that remedy or to his remedy on the warranty, the remedies being cumulative.[68] So too the contract may impose on the seller the duty of

63. J. A. Foy, etc., Co. *v.* Dudley, 129 Ga. 314, 58 S. E. 826.

64. Buchanan *v.* Parnshaw, 2 T. R. 745, 100 Eng. Reprint 401.

**Excuse for failure to return.**— The death of the animal within the term specified is an excuse for the failure to return. Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601.

**Waiver of condition.**—Where a buyer of warranted machinery, under an agreement stipulating that six days' possession and use of the machinery should be conclusive evidence that it complied with the warranty, kept and used such machinery six days, it was competent for an assignee of the purchase-money notes and the mortgage given to secure them to waive such stipulation, and agree to take back the machinery if it did not comply with the warranty. Lee *v.* Neumen, 15 S. D. 642, 91 N. W. 320. So too where the buyer sues to recover the consideration for machinery purchased, alleging that it was to be returned if the machinery proved unsatisfactory, and defendant fails to plead provisions of the written contract for retention of the machinery, if satisfactory, after four days' trial, such provision is waived. Westinghouse Co. *v.* Meixel, 72 Nebr. 623, 101 N. W. 238.

65. Charter Gas, etc., Co. *v.* Barton, (Ala. 1905) 39 So. 985; Avery Planter Co. *v.* Peck, 86 Minn. 40, 89 N. W. 1123; Rowell *v.* Oleson, 32 Minn. 288, 20 N. W. 227 [*overruled* on other grounds in Wm. Lindeke Land Co. *v.* Levy, 76 Minn. 365, 79 N. W. 314]; Osborne *v.* Henry, 70 Mo. App. 19; Kirk *v.* Seeley, 63 Mo. App. 262; Kingman *v.* Watson, 97 Wis. 596, 73 N. W. 438.

**Retention without use.**—Where a contract of warranty of sale of machinery provides that its use for five days without complaint shall be conclusive evidence of fulfilment of warranty, a retention of the machinery without complaint for five days after its first use, without actually using it for five days, does not have that effect. Kinnard Press Co. *v.* Stanley, 70 Kan. 770, 79 Pac. 661.

66. *Indiana.*— F. C. Austin Mfg. Co. *v.* Clendenning, 21 Ind. App. 459, 52 N. E. 708.

*Kansas.*— Davis *v.* Gosser, 41 Kan. 414, 21 Pac. 240.

*Pennsylvania.*—Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632.

*England.*— Hinchcliffe *v.* Barwick, 5 Ex. D. 177, 44 J. P. 615, 49 L. J. Exch. 495, 42 L. T. Rep. N. S. 492, 28 Wkly. Rep. 940; Adam *v.* Richards, 2 H. Bl. 573, 3 Rev. Rep. 568.

*Canada.*— Hamilton *v.* Northey Mfg. Co., 31 Ont. 468.

See 43 Cent. Dig. tit. "Sales," § 1228.

**Transfer of note for price.**—Where a buyer gave his note for the price of a rock crusher, and agreed to return it if it failed to do certain work as represented; and the seller agreed, on such failure, to receive it, and to cancel the contract of sale, the transfer of the note by the seller to an innocent purchaser, and payment thereof by the buyer, did not enable him to recover damages for the failure of the crusher to do the work, where he had not previously offered to return it, and the seller had not refused to receive it. F. C. Austin Mfg. Co. *v.* Clendenning, 21 Ind. App. 459, 52 N. E. 708.

67. *Arkansas.*— Sessions *v.* Hartsook, 23 Ark. 519.

*Illinois.*— Hoover *v.* Doetsch, 45 Ill. App. 631.

*Iowa.*—Williams *v.* Donaldson, 8 Iowa 108.

*Kentucky.*— McCormick Harvesting Mach. Co. *v.* Arnold, 116 Ky. 508, 76 S. W. 323, 25 Ky. L. Rep. 663.

*Michigan.*—Horner *v.* Fellows, 1 Dougl. 51.

*Missouri.*— Nichols-Shepard Co. *v.* Rhoadman, 112 Mo. App. 299, 87 S. W. 62.

*North Dakota.*— James *v.* Bekkedahl, 10 N. D. 120, 86 N. W. 226.

See 43 Cent. Dig. tit. "Sales," § 1221.

68. *Connecticut.*— Shupe *v.* Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339.

*Illinois.*—Cook *v.* Lantz, 116 Ill. App. 472; Kemp *v.* Freeman, 42 Ill. App. 500.

*Iowa.*— Ellwood *v.* McDill, 105 Iowa 437, 75 N. W. 340; Hefner *v.* Haynes, 89 Iowa 616, 57 N. W. 421; Love *v.* Ross, 89 Iowa 400, 56 N. W. 528; McCormick *v.* Dunville, 36 Iowa 645.

*Massachusetts.*— Douglass Axe Mfg. Co. *v.* Gardner, 10 Cush. 88.

*Minnesota.*— Gaar *v.* Patterson, 65 Minn. 449, 68 N. W. 69; Mandel *v.* Buttles, 21 Minn. 391.

*Missouri.*—Moore *v.* Emerson, 63 Mo. App. 137.

*New Jersey.*—Perrine *v.* Serrell, 30 N. J. L. 454.

*New York.*— Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 89 N. Y. Suppl. 142; Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614, 54 N. Y. Suppl. 449 [*affirmed* in 165 N. Y. 617, 59 N. E. 1119].

*North Carolina.*—Blacknall *v.* Rowland, 118 N. C. 418, 24 S. E. 1.

*Texas.*— Osborne *v.* Poindexter, (Civ. App. 1896) 34 S. W. 299; McGill *v.* Hall, (Civ. App. 1894) 26 S. W. 132.

remedying defects or taking back the machine, in which case it is not incumbent on the buyer to return the machine in order to avail himself of the breach of warranty as a defense in an action for the price.[69]

**d. Time of Return.** The purchaser is entitled to a reasonable time within which to test the articles purchased for defects and to return them if not as warranted.[70] If the contract specifies the time within which return shall be made, a compliance with the contract in this regard is necessary.[71]

**e. Mode and Sufficiency of Return.** There must as a rule be an actual return or a valid tender of the goods [72] which must be made at the place designated for the

*United States.*— Thornton *v.* Wynn, 12 Wheat. 183, 6 L. ed. 595; Eyers *v.* Haddem, 70 Fed. 648.

**Right of buyer to enforce condition.**— Where a horse is sold on a warranty of soundness, with the agreement to permit its return if there is a breach of such warranty, the right so to return and recover back the purchase-price can be enforced. Kugel *v.* McEnroe, 115 Ill. App. 419.

**Effect of return.**—When an article is sold on condition that it may be returned if it does not correspond with a warranty, and the article is returned and accepted unconditionally by the vendor, the contract is terminated, and the vendor cannot recover the price, although he can show that there was no breach of the warranty. Manny *v.* Glenddinning, 15 Wis. 50.

**69.** Warder, etc., Co. *v.* Myers, 70 Nebr. 15, 96 N. W. 992.

**70.** *Kentucky.*—Vogel *v.* Moore, 84 S. W. 557, 27 Ky. L. Rep. 94; Nichols, etc., Co. *v.* Caldwell, 80 S. W. 1099, 26 Ky. L. Rep. 136; J. I. Case Threshing Mach. Co. *v.* Lyons, 72 S. W. 356, 24 Ky. L. Rep. 1862.

*Maine.*— Noble *v.* Buswell, 96 Me. 73, 51 Atl. 244; Wingate *v.* King, 23 Me. 35.

*Missouri.*— Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477.

*Nebraska.*—Von Dohren *v.* John Deere Plow Co., 71 Nebr. 276, 98 N. W. 830; Davis *v.* Hartlerode, 37 Nebr. 864, 56 N. W. 731.

*Pennsylvania.*— Providence Steam-Engine Co. *v.* Lochiel Iron Co., 31 Leg. Int. 341.

*South Carolina.*—Mitchell *v.* Dubose, 1 Mill 360.

See 43 Cent. Dig. tit. "Sales," § 813.

**Retention and use of the goods for a day and a half after discovery of the breach** and retention for another day thereafter is an election to affirm the sale. Von Dohren *v.* John Deere Plow Co., 71 Nebr. 276, 98 N. W. 830.

**Offer of return held to be made within reasonable time** see Kullman *v.* Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 Pac. 369.

**Computation of time.**—Where, on the sale of a chattel, it was agreed that, if it should prove defective, it might be returned within two weeks, the purchaser was entitled to the whole of the last day of the fortnight, and a return between nine and ten o'clock P. M. on such day was sufficient. Cornell *v.* Fox, 95 N. Y. App. Div. 71, 88 N. Y. Suppl. 482.

**Question for jury.**— Whether the goods were returned in a reasonable time is for the jury. McCormick Harvesting Mach. Co. *v.* Warfield, 33 N. Y. App. Div. 513, 53 N. Y. Suppl. 737. And see Salina Implement, etc., Co. *v.* Haley, 77 Kan. 72, 93 Pac. 579.

**Instructions.**—A judgment for defendant on his counter-claim will not be reversed because the court told the jury that defendant's offer to return the goods must have been made within a reasonable time after the defects were discovered; no instruction being asked by plaintiff to the effect that defendant could not recover on his counter-claim unless he offered to return the goods within a reasonable time after the defects might, by the exercise of ordinary care, have been discovered. South Bend Pulley Co. *v.* W. E. Caldwell Co., 54 S. W. 12, 21 Ky. L. Rep. 1084, 55 S. W. 208, 21 Ky. L. Rep. 1363.

**71.** Barlow *v.* Thompson, 46 Ind. 384; Adam *v.* Richards, 2 H. Bl. 573, 3 Rev. Rep. 568.

**Excuse for failure to return.**—Where one of the conditions of the contract was that if the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty and the horse was removed by plaintiff, and while being ridden fell, and was so injured that it could not safely be returned on the second day after the sale, but plaintiff gave notice to defendant on that day that the animal was not according to warranty, and was unfit to travel, the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty. Chapman *v.* Withers, 20 Q. B. D. 824; 57 L. J. Q. B. 457, 37 Wkly. Rep. 29.

**Delay induced by seller.**—A prompt return is excused if the delay is induced by the misrepresentations or promises of the seller. Adam *v.* Richards, 2 H. Bl. 573, 3 Rev. Rep. 568.

**Reasonable time after waiver of requirement.**—Where the seller waives the requirement that goods be returned within a specified time, in order to remedy defects, the purchaser is entitled to a reasonable time within which to make return after efforts to remedy defects have ceased. Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 1 L. R. A. N. S. 142. And see Salina Implement, etc., Co. *v.* Haley, 77 Kan. 72, 93 Pac. 579.

**72.** Crenshaw *v.* Looker, 185 Mo. 375, 84 S. W. 885.

**Notice of defects.**—Where it is provided, in the sale of a machine with warranty, that

return.[73] If no place is designated a return to the place where the purchase is made is sufficient;[74] and it has been held that under these circumstances a return is unnecessary.[75] There is not a valid return binding on the seller if the goods have been misused and damaged by the purchaser;[76] but otherwise it is sufficient if the goods are in as good condition as when received, although the provision for return stipulates that they shall be in good condition.[77]

**f. Waiver or Refusal by Seller.** The return of the goods for breach of warranty will be regarded as waived where the failure to return or the delay is caused by conduct of the seller in requesting the buyer to retain the goods for further trial,[78] or by a promise by the seller to remedy the defects,[79] or by an attempt of the seller's agent to remedy the defects after the expiration of the time limited without objection on the ground that notice had not been given.[80] So too on the refusal of the seller to receive the goods the duty of the buyer is fulfilled and any further tender or effort to return is waived.[81]

before it shall be returned for defects notice of and an opportunity to remedy the defects shall be given, such notice, in the absence of any effort to remedy the defects, is equivalent to notice of a desire to return the machine, and a specific offer therefore to return is not necessary. Campbell *v.* Wray, 5 Ind. App. 155, 31 N. E. 824.

**Fixtures.** — Where mantels purchased for certain rooms have imperfections amounting to a breach of warranty, the purchaser is not required to take the mantels out and return them, but the seller, if he abandons the attempt to fulfil his contract, and wishes to recover the mantels, must remove them, and restore the rooms where placed to their original condition. International Tile, etc., Co. *v.* Ahlers, 18 N. Y. Suppl. 883.

**73.** Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149.

**Return to town where received.**—A provision in a contract for the sale of a threshing machine that it should be returned to the place where received in case it failed to fulfil the warranty is sufficiently complied with by notice to the vendor that the machine was in the town in which it was received, subject to his order. Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784.

**74.** Cornell *v.* Fox, 95 N. Y. App. Div. 71, 88 N. Y. Suppl. 482.

**75.** Osborn *v.* Rawson, 47 Mich. 206, 10 N. W. 201.

**76.** Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623; Matthews *v.* Moran, 19 Misc. N. Y. 24, 42 N. Y. Suppl. 968.

**77.** Rosenthal *v.* Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. N. S. 678; Head *v.* Tattersall, L. R. 7 Exch. 7, 41 L. J. Exch. 4, 25 L. T. Rep. N. S. 631, 20 Wkly. Rep. 115.

**78.** White *v.* Miller, (Iowa 1906) 105 N. W. 993; Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601; Osborne *v.* Mullikin, 88 Mo. App. 350; Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477; Osborne *v.* Everett, (Pa. 1888) 15 Atl. 723.

**Second tender unnecessary.** — If a tender has been made and the seller has requested an additional trial or test a second tender is unnecessary. Merchants', etc., Sav. Bank *v.* Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

**Pleading.** — In an action for the price of a harvesting machine, where the answer alleged a breach of the contract of warranty; that defendant gave notice to plaintiff's agent, and offered to return the machine, but the latter requested him to retain it where it was, and he would have it boxed and shipped to plaintiffs; and that the agent then agreed to receive the machine on defendant's premises, although the waiver was not clearly pleaded, the facts stated were sufficient to justify the admission of evidence of waiver. McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537.

**79.** *Illinois.*— Jacobs *v.* Crumbaker, 67 Ill. App. 391; Osborne *v.* Flood, 11 Ill. App. 408.

*Iowa.*— Massillon Engine, etc., Co. *v.* Shirmer, 122 Iowa 699, 98 N. W. 504, (1903) 93 N. W. 599; Warder *v.* Robertson, 75 Iowa 585, 39 N. W. 905; King *v.* Towsley, 64 Iowa 75, 19 N. W. 859.

*Minnesota.*— McCormick Harvesting Mach. Co. *v.* McNicholas, 66 Minn. 384, 69 N. W. 36.

*Missouri.*— Miles *v.* Withers, 76 Mo. App. 87.

*Nebraska.*— Seymour *v.* Phillips, 61 Nebr. 282, 85 N. W. 72.

See 43 Cent. Dig. tit. "Sales," § 816.

**80.** Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 111 Am. St. Rep. 209, 1 L. R. A. N. S. 142.

**81.** *Illinois.*— Kingman *v.* Meeks, 56 Ill. App. 272.

*Iowa.*— Padden *v.* Marsh, 34 Iowa 522; Hall *v.* Ætna Mfg. Co., 30 Iowa 215.

*Kansas.*— Champion Mach. Co. *v.* Mann, 42 Kan. 372, 22 Pac. 417; Osborne *v.* Ehrhard, 37 Kan. 413, 15 Pac. 590.

*Missouri.*— Osborne *v.* Mullikin, 88 Mo. App. 350.

*New York.*— Cornell *v.* Fox, 95 N. Y. App. Div. 71, 88 N. Y. Suppl. 482; Lichtenstein *v.* Rabolinsky, 75 N. Y. App. Div. 66, 77 N. Y. Suppl. 792; Abel *v.* Murphy, 43 Misc. 648, 88 N. Y. Suppl. 256.

*Texas.*—Hume *v.* Sherman Oil, etc., Co., 27 Tex. Civ. App. 366, 65 S. W. 390.

**Premature return.**—Where the seller of a horse, which he had agreed to take back if unsatisfactory, objected to taking him back,

**3. Actions and Counter-Claims For Breach of Warranty — a. Right of Action.** A breach of warranty express or implied affords a valid ground of action against the seller for damages.[82] The buyer cannot, however, maintain an action for damages for breach of warranty until the sale is complete and title has passed.[83]

**b. Right to Defend, Counter-Claim, or Recoup in Action by Seller** — (I) *In General.* Where there has been a breach of warranty express or implied, the buyer may set off or counter-claim his damages sustained by reason of such breach in an action for the price of the goods,[84] or in an action on a note given for

on the ground that he was in bad condition, an objection that the tender back was premature was waived. Rosenthal *v.* Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. N. S. 678.

**Liability for loss.**—Where a buyer refused to accept the goods, and returned them to the seller, the seller was bound to use reasonable care to make the buyer's loss as light as possible, which duty was not fulfilled by refusing to receive the goods and allowing them to stand on the sidewalk in front of his place of business until removed by the city authorities as a nuisance. Empire State Bag Co. *v.* McDermott, 89 N. Y. App. Div. 234, 85 N. Y. Suppl. 787.

**82.** *California.*— Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

*Colorado.*— Smith *v.* Mayer, 3 Colo. 207.

*Georgia.*— Pound *v.* Williams, 119 Ga. 904, 47 S. E. 218.

*Illinois.*— Crabtree *v.* Kile, 21 Ill. 180.

*Indiana.*— Gatling *v.* Newell, 9 Ind. 572; House *v.* Fort, 4 Blackf. 293.

*Kentucky.*— Cook *v.* Gray, 2 Bush 121.

*Minnesota.*— Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

*North Dakota.*— Acme Harvesting Mach. Co. *v.* Barkley, (1908) 118 N. W. 690.

*Ohio.*—Allen *v.* Hass, 27 Ohio Cir. Ct. 727.

*Texas.*—Ellis *v.* Tips, 16 Tex. Civ. App. 82, 40 S. W. 524.

*Wisconsin.*— Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572; Bonnell *v.* Jacobs, 36 Wis. 59.

*England.*— Gompertz *v.* Denton, 1 Cromp. & M. 207, 1 Dowl. P. C. 623, 2 L. J. Exch. 82, 3 Tyrw. 233; Payne *v.* Whale, 7 East 274, 3 Smith K. B. 130; Lovegrove *v.* Fisher, 2 F. & F. 128.

See 43 Cent. Dig. tit. "Sales," § 1210.

**Certainty of loss on other grounds.**— In a sale of county railroad aid bonds without qualification, the seller will be held liable to the buyer for the amount paid therefor by reason of the breach of his implied warranty of title and genuineness, even though, had the bonds been as warranted, the buyer would have lost the same owing to their invalidity, for which the seller was not liable. Richardson *v.* Marshall County, 100 Tenn. 346, 45 S. W. 440.

**83.** English *v.* Hanford, 75 Hun (N. Y.) 428, 27 N. Y. Suppl. 672; Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082.

**84.** *California.*— Browning *v.* McNear, 145 Cal. 272, 78 Pac. 722; Earl *v.* Bull, 15 Cal. 421; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Erie City Iron Works *v.* Tatum, 1 Cal. App. 286, 82 Pac. 92.

*Colorado.*— Smith *v.* Mayer, 3 Colo. 207.

*Connecticut.*— Hitchcock *v.* Hunt, 28 Conn. 343.

*Georgia.*— Pound *v.* Williams, 119 Ga. 904, 47 S. E. 218; Taylor *v.* Griswold, 32 Ga. 569; Williamson *v.* Walker, 24 Ga. 257, 71 Am. Dec. 119; Wright *v.* Findley, 21 Ga. 59.

*Illinois.*— Owens *v.* Sturges, 67 Ill. 366; Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381; Crabtree *v.* Kile, 21 Ill. 180; Newton Rubber Works *v.* Home Rattan Co., 100 Ill. App. 421; Krause *v.* Scott, 86 Ill. App. 238; Gibbs, etc., Mfg. Co. *v.* Kaszezyki, 18 Ill. App. 623.

*Indiana.*— Love *v.* Oldham, 22 Ind. 51.

*Iowa.*— Bixby *v.* Denison Normal School Assoc., (1899) 78 N. W. 234; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369.

*Kentucky.*— Cook *v.* Gray, 2 Bush 121; Culver *v.* Blake, 6 B. Mon. 528. But see Kelso *v.* Frye, 4 Bibb 493.

*Maine.*— Henkel *v.* Burke, (1887) 10 Atl. 249.

*Maryland.*— Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Queen City Glass Co. *v.* Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447.

*Michigan.*—Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272.

*Minnesota.*—Allen *v.* Swenson, 53 Minn. 133, 54 N. W. 1065.

*Missouri.*— Nelson *v.* Johnson, 25 Mo. 430; Myers *v.* Hay, 3 Mo. 98; June *v.* Falkinburg, 89 Mo. App. 563; Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184; Voss *v.* McGuire, 18 Mo. App. 477. And see Lewis *v.* Muse, 130 Mo. App. 194, 108 S. W. 1107.

*Nebraska.*— McConnell *v.* Lewis, 58 Nebr. 188, 78 N. W. 518.

*New Jersey.*— Higbie *v.* Rogers, 63 N. J. Eq. 368, 50 Atl. 366 [*reversing* (Ch. 1901) 48 Atl. 554].

*New York.*—Ames *v.* Norwich Light Co., 122 N. Y. App. Div. 319, 106 N. Y. Suppl. 952; Reab *v.* McAlister, 8 Wend. 109 [*affirming* 4 Wend. 483].

*North Carolina.*— Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718.

*Ohio.*— Timmons *v.* Dunn, 4 Ohio St. 680; Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40; Parker *v.* Pringle, 2 Strobh. 242.

*Tennessee.*— Sample *v.* Looney, 1 Overt. 85. But see Henning *v.* Vanhook, 8 Humphr. 678.

*Vermont.*—Walker *v.* Hoisington, 43 Vt. 608.

the price,[85] but not in an action by the seller for the recovery of the goods.[86] The right to counter-claim exists, although the buyer has sold the goods to another.[87] The breach of warranty is regarded in some jurisdictions as a defense *pro tanto* as upon a failure of consideration;[88] but it is not a complete defense[89] unless the goods are worthless.[90] In other jurisdictions the rule is that breach of warranty cannot be pleaded as a defense, the goods being retained, but only as a counter-claim.[91]

(11) *Separate or Distinct Transactions.* The right to recoupment or

*Washington.*—Baker *v.* McAllister, 2 Wash. Terr. 48, 3 Pac. 581.

*Wisconsin.*— Bonnell *v.* Jacobs, 36 Wis. 59; Rosebrook *v.* Runals, 32 Wis. 415; Getty *v.* Rountree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Hercules Iron Works *v.* Dodsworth, 57 Fed. 556; West, etc., Mfg. Co. *v.* Ansonia Brass, etc., Co., 4 Fed. 145.

*Canada.*— Crompton, etc., Loom Works *v.* Hoffman, 5 Ont. L. Rep. 554; Cull *v.* Roberts, 28 Ont. 591.

See 43 Cent. Dig. tit. "Sales," § 1214.

**Not inconsistent with defense of payment.**—Where, in an action for the balance due on a sale of goods, defendant claims that he settled the balance by turning over certain property to plaintiff, he may also show a breach of warranty by way of recoupment, as the two defenses are not inconsistent, for defendant has a right to pay the price and then sue for breach of warranty, or, having paid it, to recoup the damages. Helwig *v.* Lascowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378.

**Breach of warranty of title.**—A sale of chattels for a sound price carries with it an implied warranty of title in the vendor, and the vendee may pay any sum he deems necessary to clear the vendor's title, and obtain possession, and show such payment as a set-off to a suit against him for the purchase-money, or maintain a suit against the vendor for the amount as for money paid to his use. Lane *v.* Romer, 2 Pinn. (Wis.) 404, 2 Chandl. 61.

**Waiver of defenses.**—Although, in a note given for the purchase-price of a machine, the maker expressly waives all defense thereto, he may, in an action on the note, counter-claim for damages for a breach of a warranty of the machines, a counter-claim being in the nature of an original action and not a defense. Osborne *v.* McQueen, 67 Wis. 392, 29 N. W. 636.

**Opening judgment.**—A judgment by confession for the price of goods sold will not be opened to let in a defense of breach of warranty unless it is alleged and proved that the vendor is unable to respond in damages on account of the breach. Evans *v.* Schriver Laundry Co., 57 Ill. App. 150.

**85.** *Alabama.*—Wood *v.* Fowler, 37 Ala. 55.

*California.*— Snow *v.* Holmes, 71 Cal. 142, 11 Pac. 856.

*Indiana.*— Rose *v.* Wallace, 11 Ind. 112; York Mfg. Co. *v.* Bonnell, 24 Ind. App. 667, 57 N. E. 590.

*Iowa.*— Donahue *v.* Prosser, 10 Iowa 276.

*Minnesota.*— Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604; Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149; Stevens *v.* Johnson, 28 Minn. 172, 9 N. W. 677; Geiser Threshing Mach. Co. *v.* Farmer, 27 Minn. 428, 8 N. W. 141.

*Mississippi.*— Millsaps *v.* Merchants', etc., Bank, 69 Miss. 918, 13 So. 837.

*Missouri.*—Wade *v.* Scott, 7 Mo. 509.

*New Hampshire.*— Rumsey *v.* Sargent, 21 N. H. 397.

*South Dakota.*— Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572.

*Texas.*—Aultman, etc., Co. *v.* Hefner, 67 Tex. 54, 2 S. W. 861.

See 43 Cent. Dig. tit. "Sales," § 1215.

**86.** Singer Mfg. Co. *v.* Smith, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897; Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845; Blair *v.* Johnson, 111 Tenn. 111, 76 S. W. 912.

**87.** Dukes *v.* Nelson, 27 Ga. 457; York Mfg. Co. *v.* Bonnell, 24 Ind. App. 667, 57 N. E. 590. *Compare* Broughton *v.* Badgett, 1 Ga. 75.

**Joint purchasers.**—The fact that one of several joint purchasers has sold his interest to the others does not affect his right to counter-claim in an action for the price if he has not also disposed of his rights in the cause of action against the seller for breach of warranty. Lewellen *v.* Crane, 113 Ind. 289, 15 N. E. 515.

**88.** Williams *v.* Wylly, 45 Ga. 580; Dukes *v.* Nelson, 27 Ga. 457; Pratt *v.* Johnson, 100 Me. 443, 62 Atl. 242; Poulton *v.* Lattimore, 9 B. & C. 259, 7 L. J. K. B. O. S. 225, 4 M. & R. 208, 17 E. C. L. 122. See also Ferguson *v.* Oliver, 8 Sm. & M (Miss.) 332; Rumsey *v.* Sargent, 21 N. H. 397.

**89.** Warner *v.* Reardon, 2 Dana (Ky.) 219. See also Morrison *v.* Clifford, 17 Fed. Cas. No. 9,846, 1 Cranch C. C. 585.

**90.** Thompson *v.* Wheeler, etc., Mfg. Co., 29 Kan. 476; Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

**Form of verdict.**—Where the defenses in an action on a note given for a scale are failure of consideration and breach of warranty, and the evidence warrants the jury's finding such failure, it is their duty to allow nothing on the warranty, and to return a verdict for defendant. Toledo Sav. Bank *v.* Rathmann, 78 Iowa 288, 43 N. W. 193.

**91.** Earl *v.* Bull, 15 Cal. 421; Norton *v.* Dreyfuss, 106 N. Y. 90, 12 N. E. 428; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511, 58 N. Y. Suppl. 609 [*affirmed* in 166 N. Y. 612, 59 N. E. 1127]; Atwater *v.* Orford Copper Co., 85 N. Y. Suppl. 426; Peerless Reaper

counter-claim is not confined to the action for the price of the identical goods as to which breach of warranty is claimed, but the counter-claim may be pleaded in an action for the price of other goods subsequently purchased under the same or another contract.[92]

(III) *Persons Against Whom Defense or Counter-Claim May Be Pleaded.* Where the sale was made to an agent, the breach of warranty may be pleaded, in an action for the price, by either the principal or the agent who has not disclosed his principal.[93] A buyer may plead breach of warranty against an indorsee or assignee who is not a *bona fide* purchaser of a note given for the price.[94] Breach of warranty is not available to a third person whose note has been accepted for the purchase-price,[95] or to one who merely guarantees the payment of the price.[96] Where the note of two persons is taken on a sale to one of them breach of warranty is available only as a defense and not as set-off, as the claims are not mutual.[97] If, however, a note is given by one of several purchasers, a breach of warranty is available in an action on the note.[98]

(IV) *Time When Counter-Claim Must Be Made.* The right to counter-claim is not prejudiced by delay but may be exercised at any time when the seller brings action for the price,[99] and it does not affect his right that he has not asserted it until after making payments on account.[1]

(V) *Extent of Recovery.* The buyer may show not only the diminished value of the goods but also damage suffered by the breach in excess of the seller's claim.[2] But in an action on one of several notes given for the price, if it does not appear that the notes were received as payment the buyer cannot recover in excess of the amount due on the note.[3]

**c. Form of Action.** Where there is a false and fraudulent warranty the buyer may of course sue in tort for the deceit,[4] but he is not confined to this remedy. He has an option to sue in contract for breach of the warranty or in tort for the deceit.[5] He cannot be deprived of his action in contract upon representations

Co. *v.* Conway, 79 Wis. 622, 48 N. W. 854; Croninger *v.* Paige, 48 Wis. 229, 4 N. W. 106.

**92.** Chicago Rubber Clothing Co. *v.* Powers, 91 Mich. 466, 51 N. W. 1116; Gutta Percha, etc., Mfg. Co. *v.* Wood, 84 Mich. 452, 48 N. W. 28; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Seymour *v.* Davis, 2 Sandf. (N. Y.) 239; Judd *v.* Dennison, 10 Wend. (N. Y.) 512; Needham *v.* Pratt, 40 Ohio St. 186; Carman *v.* Franklin F. Ins. Co., 6 Watts & S. (Pa.) 155. *Compare* Walter A. Wood Mowing, etc., Mach. Co. *v.* Seaver, 90 Mich. 546, 51 N. W. 637.

**93.** Dukes *v.* Nelson, 27 Ga. 457; Driggs *v.* Schuyler, 1 N. Y. Suppl. 493.

**94.** Stockton Sav., etc., Soc. *v.* Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181, 21 L. R. A. 406; Comparet *v.* Johnson, 6 Blackf. (Ind.) 59; Goodwin *v.* Morse, 9 Metc. (Mass.) 278.

**Mortgaged property.**—A purchaser of mortgaged property assuming the mortgage may plead the breach in an action by the mortgagee. Flower *v.* Lane, 6 Mart. N. S. (La.) 151.

**95.** Delano *v.* Rawson, 10 Bosw. (N. Y.) 286. But see Lines *v.* Smith, 4 Fla. 47, holding that the sale of a slave carries with it an implied warranty of title, and that if the vendor had no title, there would be no consideration for the promise, and the failure of consideration or want of title may be set up as a defense, whether the party promising or a third person was the purchaser.

**96.** Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905 [*reversing* 69 Hun 90, 23 N. Y. Suppl. 536].

**97.** Johnson *v.* Kelley, 67 Vt. 386, 31 Atl. 849.

**98.** Gordon *v.* Swift, 46 Ind. 208.

**99.** Estell *v.* Myers, 54 Miss. 174; Centaur Cycle Co. *v.* Hill, 7 Ont. L. Rep. 110.

**Limitation in contract.**—A stipulation in a contract of sale that no action for breach of warranty nor claim for recoupment of damages should be made after the year of the sale cannot deprive the buyer of his defense on the warranty in an action on the purchase-price notes. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

**1.** Elliott *v.* Puget Sound, etc., Steam Ship Co., 22 Wash. 220, 60 Pac. 410.

**2.** Love *v.* Oldham, 22 Ind. 51; Bradley *v.* Rea, 14 Allen (Mass.) 20; Huff *v.* Broyles, 26 Gratt. (Va.) 283; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810.

**3.** Reuter *v.* St. Louis, 43 Wis 693; Aultman, etc., Co. *v.* Hetherington, 42 Wis. 622; Aultman *v.* Jett, 42 Wis. 488. To the same effect see Johnson *v.* Kelley, 67 Vt. 386, 31 Atl. 849.

**4.** Louisiana Molasses Co. *v.* Ft. Smith Wholesale Grocery Co., 73 Ark. 542, 84 S. W. 1047; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

**5.** *Arkansas.*— Winter *v.* Bandel, 30 Ark. 362.

amounting to a warranty because they were made by the seller *malo animo*.[6] There are also cases which hold that even in the absence of fraud, on a breach of the warranty, the buyer may sue either in contract or tort,[7] and others which adopt this rule in case of express warranties.[8] The better rule, however, is that, in the absence of fraud, the action should be in contract on the warranty.[9] It has been said, and very properly, that it is entirely inconsistent with the doctrine of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive.[10]

**d. Election of Remedy.** A buyer when sued for the price need not plead his damages for breach of warranty in set-off but may elect to resort to his action for damages,[11] but if he pleads set off and succeeds therein he cannot afterward maintain an action for other damages and expenses.[12] If the buyer retains the goods he can resort only to his action for damages,[13] and although he may plead rescission and damages for breach of warranty he cannot have affirmative relief on both pleas.[14] Where the breach of warranty is of such a nature as to justify a return, the buyer cannot be compelled to elect between a return and damages, as he may

*Georgia.*— Dawson *v.* Pennaman, 65 Ga. 698.

*Kentucky.*— Massie *v.* Crawford, 3 T. B. Mon. 218.

*Maine.*— Hillman *v.* Wilcox, 30 Me. 170.

*Massachusetts.*— Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

*New Hampshire.*— Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

*Rhode Island.*— Demers *v.* Andrews Bros., (1908) 69 Atl. 923.

*Tennessee.*— Rosson *v.* Hancock, 3 Sneed 434.

*England.*— Wood *v.* Smith, 4 C. & P. 45, 8 L. J. K. B. O. S. 50, M. & M. 539, 5 M. & R. 124, 19 E. C. L. 399.

See 43 Cent. Dig. tit. "Sales," § 1207.

6. Louisiana Molasses Co. *v.* Ft. Smith Wholesale Grocery Co., 73 Ark. 542, 84 S. W. 1047; Hillman *v.* Wilcox, 30 Me. 170; Houston *v.* Gilbert, 3 Brev. (S. C.) 63, 5 Am. Dec. 542.

7. *Delaware.*— Tyre *v.* Causey, 4 Harr. 425.

*Illinois.*— Wallace *v.* Tanner, 118 Ill. App. 639.

*Indiana.*— House *v.* Fort, 4 Blackf. 293.

*Massachusetts.*— Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884; Norton *v.* Doherty, 3 Gray 372, 63 Am. Dec. 758. These cases overrule by implication Emerson *v.* Brigham, 10 Mass. 197, 6 Am. Dec. 109.

*Michigan.*— Carter *v.* Glass, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240. And see Arnold *v.* White, 153 Mich. 607, 117 N. W. 164; Beebe *v.* Knapp, 28 Mich. 53.

*United States.*— Schuchardt *v.* Allens, 1 Wall. 359, 17 L. ed. 642.

*England.*— Williamson *v.* Allison, 2 East 446. And see Stuart *v.* Wilkins, Dougl. (3d ed.) 16, 99 Eng. Reprint 15.

8. Fowler *v.* Abrams, 3 E. D. Smith (N. Y.) 1; Vanleer *v.* Earle, 26 Pa. St. 277; Trice *v.* Cockran, 8 Gratt. (Va.) 442, 56 Am. Dec. 151.

9. Scott *v.* Holland, 132 Ala. 389, 31 So. 514; Brooke *v.* Cole, 108 Ga. 251, 33 S. E. 849; Dawson *v.* Pannaman, 65 Ga. 698; Crooker *v.* Willard, 28 N. H. 134; Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401; Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562; Moore *v.* Noble, 53 Barb. (N. Y.) 425; Evertson *v.* Miles, 6 Johns. (N. Y.) 138.

Assumpsit is the proper form of action for breach of warranty. Hillman *v.* Wilcox, 30 Me. 170; Rew *v.* Barber, 3 Cow. (N. Y.) 272; Thompson *v.* Ashton, 14 Johns. (N. Y.) 316; Evertson *v.* Miles, 6 Johns. (N. Y.) 138.

Covenant or assumpsit.—Where a bill of sale of a slave has no attesting witness, covenant or assumpsit may be maintained on the warranty of soundness. Maxwell *v.* Miller, 33 N. C. 272.

General or special counts.— On a breach of warranty where the parties agree to estimate the damage at a certain sum less than the buyer had paid for the horse, the buyer may recover either on a count for money had and received, or by a special count on a breach of warranty. Rivers *v.* Cain, 3 McCord (S. C.) 239.

10. Mahurin *v.* Harding, 28 N. H. 128, 59 Am. Dec. 401.

11. Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Cook *v.* Moseley, 13 Wend. (N. Y.) 277. To the same effect see McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109, 50 S. W. 606.

12. Huff *v.* Broyles, 26 Gratt. (Va.) 283.

13. Scalf *v.* Tompkins, 61 Tex. 476.

14. Baylis *v.* Weibezahl, 42 Misc. (N. Y.) 178, 85 N. Y. Suppl. 355. But it was held in Kesler *v.* Robson, 16 Tex. 119, that the buyer might be put to his election between rescission and recovery of damages. See also Brush *v.* Smith, 111 Iowa 217, 82 N. W. 467, holding that where one count of petition was on a warranty and another count on false and fraudulent representations made to induce the sale, it was not error to instruct that, if the jury found for plaintiff on one of the counts, he could not recover on the other, as the two causes of action grew out of the same transaction.

be entitled to both.[15] If he sues for rescission, he is not estopped to bring an action for damages until final judgment for a rescission.[16]

**e. Conditions Precedent.** The right to maintain an action or counter-claim for breach of warranty depends on the performance by the buyer of all conditions precedent,[17] except such as are immaterial,[18] unless a sufficient excuse for failure to perform exists.[19] It is not, however, a condition precedent that there should have been notice of defects,[20] or a return or tender of the goods,[21] unless the contract so provides.[22] And payment of the purchase-price is not a condition precedent to an action for damages [23] unless the sale is conditional and title does not pass until payment.[24] So conviction under a statute making it an offense to sell animals affected with a contagious disease is not a condition precedent to an action for breach of warranty in selling animals affected with such disease.[25] If the buyer has resold the goods it is not necessary that there should have been a recovery against him to entitle him to sue or counter-claim.[26] And where there is a breach of the warranty of title by recovery of judgment against the buyer by one having a paramount title, it has been held not to be a condition precedent to an action for the breach that the buyer should have paid the judgment.[27] Nor is it necessary that there should have been an actual eviction.[28] If, however, there has been an eviction a final adjudication of the claim of the party setting up paramount title is not a condition precedent to an action for the breach.[29] It is not essential that the buyer should have taken steps to prevent a loss.[30]

**15.** Kimball, etc., Mfg. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558.

**16.** Enterprise Soap Works *v.* Sayers, 51 Mo. App. 310.

**17.** *Dakota.*— J. I. Case Threshing Mach. Co. *v.* Vennum, 4 Dak. 92, 23 N. W. 563.

*Illinois.*— Hasenwinkle Grain Co. *v.* Dooley, 130 Ill. App. 75.

*Iowa.*— Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79.

*Missouri.*— Nichols-Shepard Co *v.* Rhoadman, 112 Mo. App. 299, 87 S. W. 62.

*Nebraska.*— Worden *v.* Marsh Harvester Co., 11 Nebr. 116, 7 N. W. 756; Nichols *v.* Hail, 4 Nebr. 210.

*Vermont.*— Reynolds *v.* Roberts, 57 Vt. 392.

*United States.*— Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233.

See 43 Cent. Dig. tit. "Sales," § 1229.

**Waiver of condition.**—A stipulation that purchasers of property would give a mortgage on delivery, and pay the freight to the place of delivery, must be presumed to have been waived by the sellers, or complied with, where the property was delivered without objection, all the notes executed by the purchasers paid excepting the last, and the property left in the purchaser's possession. Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215.

**18.** Campbell *v.* Lodge No. 99 A. F. & A. M., 76 Kan. 400, 92 Pac. 53.

**Conditions held immaterial.**—A written contract for the sale of a heating plant contained certain warranties conditioned on payment of the price under its terms. When the plant was installed, it failed to fulfil the warranties. It was held that the failure of the purchaser to pay the first instalment, which was due when the plant was installed, did not estop him from setting up a breach of warranty in an action for the price. Campbell *v.* Lodge No. 99 A. F. & A. M., 76 Kan. 400, 92 Pac. 53. Where a written contract for the sale of personalty contains warranties conditioned on payment of the price according to its terms, failure to pay the first instalment when due will not estop the purchaser from relying on the breach, where the failure furnished no excuse for the neglect of the vendor to remedy the breach. Campbell *v.* Lodge No. 99 A. F. & A. M., 76 Kan. 400, 92 Pac. 53.

**19.** Hasenwinkle Grain Co. *v.* Doolay, 130 Ill. App. 75.

**20.** See *supra*, VII, G.

**21.** See *supra*, VII, J, 2, b.

**22.** See *supra*, VII, J, 2, c.

**23.** Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Frohreich *v.* Gammon, 28 Minn. 476, 11 N. W. 88; Volland *v.* Baker, 32 Nebr. 391, 49 N. W. 381, 13 L. R. A. 140; Wiggins *v.* Hunter, Harp. (S. C.) 80.

**24.** English *v.* Hanford, 75 Hun (N. Y.) 428, 27 N. Y. Suppl. 672 See also Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082.

**25.** Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103.

**26.** Broughton *v.* Badgett, 1 Ga. 75; York Mfg. Co. *v.* Bonnell, 24 Ind. App. 677, 57 N. E. 590; Beall *v.* Pearre, 12 Md. 550. See also Dukes *v.* Nelson, 27 Ga. 457.

**27.** Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508. But see Salle *v.* Light, 4 Ala. 700, 39 Am. Dec. 317; Burt *v.* Dewey, 40 N. Y. 283, 100 Am. Dec. 482 [*reversing* 31 Barb. 540].

**28.** National Metal Edge Box Co. *v.* Gotham, 125 N. Y. App. Div. 101, 109 N. Y. Suppl. 450.

**29.** Clevenger *v.* Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. N. S. 410.

**30.** Figge *v.* Hill, 61 Iowa 430, 16 N. W. 339, holding that where the purchaser of certain town coupon bonds could, by due diligence, have collected them before they had

Conditions precedent may be waived by the seller and such waiver may be either express or implied.[31]

**f. Defenses.** It is not a defense to the action for breach of warranty that the seller offered to return the price, and the buyer refused to accept the proposal,[32] or that the buyer received a profit on a resale of the goods.[33] Neither is it a defense that the buyer attempted to prevent the transfer of a note given for the price.[34] It is no defense that the goods were destroyed by accident after commencement of the action.[35] And where the breach actually existed at the time of the sale, the fact that the buyer did not take steps he might have taken to prevent loss from the defect is not a defense.[36] If the seller received goods as part of the purchase-price damages for defects therein cannot be set off unless there was a warranty against such defects.[37] Where on the advice of the seller the purchaser settles a claim of title set up by a third person, the seller is estopped to deny the purchaser's right to recover the amount paid in settlement of the claim.[38]

**g. Parties.** Where the transfer is made by several distinct bills of sale executed by the several owners of their respective interests, actions for breach of warranty should be brought on the several covenants of warranty and not against the sellers jointly.[39] A surety of the buyer is not a necessary party to a cross petition for breach of warranty.[40] Notice to the seller to defend the title to the goods under his warranty makes him privy to the record to the extent to which his rights are adjudged.[41]

**h. Pleading** — (1) *In General.* The essential allegations of a pleading where a breach of warranty is relied on to support a claim for damages are: (1) The terms of the warranty; (2) the breach; and (3) the facts from which damages for its breach are to be inferred.[42] In assumpsit for breach of warranty the buyer must declare specially on the contract.[43] In an action for the price an answer setting up damages for breach of warranty constitutes a counter-claim.[44] It is

been decided invalid in a quo warranto proceeding, he was bound to do so; but that after such proceeding he was not bound to try to collect or to return them before bringing suit on the warranty under which they were sold.

31. Campbell *v.* Lodge No. 99 A. F. & A. M., 76 Kan. 400, 92 Pac. 53; Laing *v.* Pelton Water Wheel Co., 122 N. Y. App. Div. 677, 107 N. Y. Suppl. 686.

32. Riley *v.* Hicks, 81 Ga 265, 7 S. E. 173.

Settlement.—Where, after it was discovered that an engine sold under a warranty of suitableness was defective, plaintiff supplied a new governor, and granted a credit on the belief that such governor would remedy all defects in the working of the engine, which proved not to be true, the granting of such credit did not relieve plaintiff from liability for future damages resulting from an effort to use the engine. Erie City Iron Works *v.* Tatum, 1 Cal. App. 286, 82 Pac. 92.

33. Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657; Andrews *v.* Schreiber, 93 Fed. 367.

34. Doyle *v.* Parish, 110 Mo. App. 470, 85 S. W. 646.

35. Heilman *v.* Pruyn, 122 Mich. 301, 81 N. W. 97, 80 Am. St. Rep. 570.

36. Welch *v.* Brooks, 10 Rich. (S. C.) 123.

37. Fondren *v.* Durfee, 39 Miss. 324.

Nature of claim.—In an action for damages for breach of warranty, defendant cannot, as a counter-claim, recover either the contract price, where the breach consisted in defendant's failure to deliver the article which he agreed to deliver, or the value of the article, where the value is not proved. Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Suppl. 320 [*affirmed* in 130 N. Y. 681, 29 N. E. 1034].

38. National Metal Edge Box Co. *v.* Gotham, 125 N. Y. App. Div. 101, 109 N. Y. Suppl. 450.

39. Stoddard *v.* Gage, 41 Me. 287.

40. Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 1 L. R. A. N. S. 142.

41. Davis *v.* Wilbourne, 1 Hill (S. C.) 27, 26 Am. Dec. 154.

42. Segerstrom *v.* Swenson, 105 Minn. 115, 117 N. W. 478; Plano Mfg. Co. *v.* Richards, 86 Minn. 94, 96, 90 N. W. 120, in which it was said: "Each of these elements of the cause of action is essential to be pleaded and proved, and it cannot be assumed that the averment of one is of more importance than of the other, or the omission of one is technical, and the other is substantial."

43. Russell *v.* Gillmore, 54 Ill. 147; Stuart *v.* Wilkins, Dougl. (3d ed.) 18, 99 Eng. Reprint 15.

The action of general indebitatus assumpsit, containing only the common counts, is an improper action to try a warranty. Russell *v.* Gillmore, 54 Ill. 147; Power *v.* Wells, Cowp. 818, 98 Eng. Reprint 1379.

44. Schurmeier *v.* English, 46 Minn. 306, 48 N. W. 1112.

generally sufficient if the warranty and the breach thereof are substantially alleged, although the pleading is informal.[45] A specific description of the property that is the subject-matter of the sale and warranty is not necessary.[46]

(11) *EXISTENCE OF WARRANTY* — (A) *In General.* In order that a warranty may be availed of it must be pleaded.[47] Where a general warranty is relied on it is not necessary to state whether it is an express or an implied warranty,[48] and even if an express warranty is alleged, it is not error for the court to instruct on the theory of an implied warranty.[49] So too if the allegation is insufficient

**Sufficiency of counter-claim.**—Where a counter-claim alleged that plaintiffs sold defendant certain property; that to induce defendant to purchase, plaintiffs represented and warranted to defendant that the property was of a good and marketable quality; that defendant, relying on said representation, purchased said property, etc., and that it was not as warranted, to his damage, etc., the words "sale" and "purchase" sufficiently implied a transfer of title from plaintiffs to defendant on a valid consideration, either paid, or liability assumed, and that the counter-claim was not demurrable. Hessell *v.* Johnson, 70 Wis. 538, 36 N. W. 417.

**45.** Goodenough *v.* Snow, 27 Vt. 720.

**Performance of conditions precedent.**—Under Burns Rev. St. (1901) § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part in an action on a purchase-money note, an answer setting up breach of warranty is not defective for omission of a general allegation of performance by defendants of the conditions on their part, where it specifically avers performance of every material condition of the agreement, or sets out a sufficient excuse for their failure to comply with such conditions. Kenney *v.* Bevilheimer, 158 Ind. 643, 64 N. E. 215.

**Sufficiency of allegations.**—Where a declaration alleged a breach of a warranty in a sale of oil stock, consisting of false representations as to the land of the company, number of wells in active operation, and dividends that were being paid, and further averred that defendant represented himself to be a director, and familiar with the affairs of the company, and that plaintiff purchased the stock relying upon such representations, which were wholly false, and that the stock was wholly without value, and the consideration paid therefor was wholly lost to plaintiff, while it did not disclose facts sufficient to sustain a cause of action for deceit or for the recovery of money had and received, it was held to be sufficient as a complaint in an action to recover damages for breach of warranty. Phillips *v.* Crosby, 69 N. J. L. 612, 55 Atl. 814.

**Nature of action.**—An action on a contract of sale need not be designated in specific terms "an action for breach of warranty," to enable plaintiff to recover damages arising from a failure to furnish an article of the character provided for by the contract. Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640.

**Ground of action.**—A buyer cannot recover for defects in the article purchased, on the strength of a subsequent agreement, where his complaint does not show that his action was based on such agreement. F. C. Austin Mfg. Co. *v.* Clendenning, 21 Ind. App. 459, 52 N. E. 708.

**46.** Warfield *v.* Curd, 5 Dana (Ky.) 318; Price *v.* Barr, Litt. Sel. Cas. (Ky.) 216.

**47.** Wooldridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

**48.** Long *v.* J. K. Armsby Co., 43 Mo. App. 253; Hoe *v.* Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

**49.** Long *v.* J. K. Armsby Co., 43 Mo. App. 253; Reynolds *v.* Mayor, 39 N. Y. App. Div. 218, 57 N. Y. Suppl. 106. But see B. P. Ducas Co. *v.* American Silk Dyeing, etc., Co., 48 Misc. (N. Y.) 411, 95 N. Y. Suppl. 590.

**An allegation that defendant agreed** to construct carbureters for plaintiff in a careful and skilful manner, and plaintiff relying on said contract and believing they were so constructed, etc., accepted them and used them, stated an express warranty of quality. Heath Dry Gas Co. *v.* Hurd, 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410.

**A complaint does not show an express warranty** where it alleges only what the law would imply. Heath Dry Gas Co. *v.* Hurd, 193 N. Y. 255, 86 N. E. 18 [*reversing* 124 N. Y. App. Div. 68, 108 N. Y. Suppl. 410].

**For cases in which the allegations were held sufficient** to show a warranty see Murphy *v.* Stelling, 8 Cal. App. 702, 97 Pac. 672; Masten *v.* Bartholomew, 41 Colo. 328, 92 Pac. 682; Hanson *v.* Gronlen, (N. D. 1908) 115 N. W. 666.

**Alternative allegation.**—An allegation that defendants expressly "or" impliedly warranted that a quantity of Paris green sold to plaintiff would kill potato bugs was bad for ambiguity and uncertainty. Kent *v.* Halliday, 23 R. I. 182, 49 Atl. 700.

**Allegations held not inconsistent.**— The defenses of breach of express warranty of a machine, and the failure thereof, on account of its worthlessness, to answer the special purpose for which it was bought, such purpose having been made known to the seller at the time of sale, the latter not being a defense of breach of implied warranty, are not objectionable as inconsistent defenses. Keystone Implement Co. *v.* Leonard, 40 Mo. App. 477. So too in an action against dealers in seeds for damages for failure of plaintiff's millet crop, two paragraphs of the

as an allegation of an express warranty it may be held after verdict a sufficient allegation of implied warranty.[50]

(B) *Affirmation or Promise.* In charging an express warranty there must be an allegation of direct affirmation or promise;[51] and although the use of the word "warrant" is not necessary,[52] an allegation that the seller represented certain facts to be true is not an allegation of warranty.[53] The terms of the warranty should also be set forth with reasonable certainty,[54] and it should appear that it was made at the time of the sale.[55] It is not necessary to allege whether the war-

complaint, one counting on a breach of express warranty, as to the variety, and the other on a breach of implied warranty as to the quality of the variety ordered, are not inconsistent. Gardner *v.* Winter, 117 Ky. 882, 78 S. W. 143, 25 Ky. L. Rep. 1472, 63 L. R. A. 647.

**50.** Payne *v.* Rodden, 4 Bibb (Ky.) 304, 7 Am. Dec. 739.

**51.** *Massachusetts.*— Cooper *v.* Landon, 102 Mass. 58.

*Minnesota.*— Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139.

*Nebraska.*— Unland *v.* Garton, 48 Nebr. 202, 66 N. W. 1130.

*Pennsylvania.*— Baugh & Sons Co. *v.* Mitchell, 15 Pa. Co. Ct. 1 [*affirmed* in 166 Pa. St. 577, 31 Atl. 341].

*West Virginia.*— Wolf *v.* Spence, 39 W. Va. 491, 20 S. E. 610.

See 43 Cent. Dig. tit. "Sales," § 1235.

**Sufficiency of allegation.**—A statement in a justice's court alleging that defendant guaranteed that certain hogs which he sold to plaintiff were healthy and in good condition, well knowing that they were sick, sufficiently pleads a contract of warranty. Narr *v.* Norman, 113 Mo. App. 533, 88 S. W. 122. And in an action for the price of goods sold, an answer was sufficient as setting up a breach of warranty which alleged that "plaintiff represented and warranted" the articles sold in the respects named, and that they were warranted to be worth "as much or more than the sum agreed upon by the parties therefor." Segerstrom *v.* Swenson, 105 Minn. 115, 117 N. W. 478.

**Warranted "as good as samples."**— In an action for goods sold an averment that the seller "warranted the goods ordered to be like and as good as the samples," and assigning a breach, justifies the inference of an express warranty, and is sufficient. Tyrell *v.* Rockwell, 2 C. Pl. (Pa.) 223.

**Warranty and breach.**—Where, in an action on a note given for the price of a windmill, defendant's answer alleged that plaintiffs represented that the machine was capable of furnishing power to grind twenty or thirty bushels of grain per hour in a moderate wind, and with a very light wind would pump an abundance of water, and that defendant, relying on such representations, purchased the machine, but that it would pump only a very small stream under the force of a very strong wind, and required a very high and strong wind to enable it to grind from one to two bushels of grain per hour, and that plaintiffs had made vain attempts to make the same comply with such representations, and that the machine was wholly worthless, it sufficiently averred an express warranty of the property and a breach thereof. Smith *v.* Borden, 160 Ind. 223, 66 N. E. 681.

**A counter-claim** alleging that defendant consulted plaintiff's agents for the purpose of securing a hot-water heater for his house, giving to the agents a description of the house, together with the size of the rooms, etc.; that the agent gave him the amount of pipe and size of the radiators required, and stated that a particular heater was the best one for the purpose; that, relying upon such statements, he purchased the heater, which proved to be defective, and failed to work properly, alleged an express warranty that the heater was fit for the purpose of properly heating the house. H. B. Smith Co. *v.* Williams, 29 Ind. App. 336, 63 N. E. 318.

**52.** Smith *v.* Borden, 160 Ind. 223, 66 N. E. 681; Hughes *v.* Funston, 23 Iowa 257. See also Bergeler *v.* Michael, 84 Wis. 627, 54 N. W. 995.

**53.** Bedell *v.* Stevens, 28 N. H. 118; Fanning *v.* International Seed Co., 89 Hun (N. Y.) 146, 35 N. Y. Suppl. 10; Stever *v.* Lamoure, Lalor (N. Y.) 352. But see Bergeler *v.* Michael, 84 Wis. 627, 54 N. W. 995, holding that a complaint alleging that defendant represented a certain horse to be fit for breeding purposes, and that plaintiff, believing and relying on such representations, purchased it, and further alleging that the representations were false, sufficiently alleges an express warranty of the horse and a breach thereof.

**54.** Penn *v.* Stuart, 11 Ark. 41; Gould *v.* Gage, 118 Pa. St. 559, 12 Atl. 476; Kaufman *v.* Cooper Iron Min. Co., 105 Pa. St. 537.

**Immaterial facts.**— In an action for a breach of warranty on a sale of personal property, sold under a penalty in case of unsoundness, it is not necessary to set forth the agreement respecting the penalty, as it could not be enforced, and is therefore immaterial. Howard *v.* Chiles, 8 B. Mon. (Ky.) 377.

**55.** Zimmerman *v.* Morrow, 28 Minn. 367, 10 N. W. 139; Wightman *v.* Carlisle, 14 Vt. 296; Curtis *v.* Moore, 15 Wis. 134. *Compare* Williams *v.* Harris, 2 How. (Miss.) 627.

**Sufficiency of allegations.**—An answer which alleges that a stallion was warranted and represented to be of certain breeding, as shown by a pedigree which plaintiff agreed, but failed, to furnish, and that the purchase was made on plaintiff's representations as to the pedigree, sufficiently shows that the

ranty was in writing or by parol.[56] Where an implied warranty is relied on facts must be alleged from which a promise may be implied,[57] such as that the seller was a manufacturer or that the article was sold for a special purpose.[58]

(c) *Consideration.* While the consideration should be alleged,[59] it is generally sufficient if it is alleged in general terms,[60] and it is not necessary to state the amount actually paid.[61]

(III) *SCIENTER.* In an action or counter-claim for damages arising from a false warranty, the falsity is the gist of the buyer's claim and knowledge of the falsity by the seller need not be alleged,[62] unless the warranty is against defects "so far as known" to the seller.[63] While allegations of fraud do not necessarily change the action or counter-claim from one on the warranty,[64] if fraud is relied

representations were made contemporaneously with the purchase. Settles *v.* Holman, (Tex. Civ. App. 1896) 33 S. W. 880.

**56.** Warren *v.* Cash, 143 Ala. 158, 39 So. 124; Parker *v.* McFerrin, 103 Ala. 132, 15 So. 518. But see Voneiff *v.* Braunreuter, 11 Pa. Co. Ct. 554.

**57.** Troy Grocery Co. *v.* Potter, 139 Ala. 359, 36 So. 12; Parker *v.* McFerrin, 103 Ala. 132, 15 So. 518; Misner *v.* Granger, 9 Ill. 69; Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

**Allegations held sufficient to show implied warranty** see Oil-Well Supply Co. *v.* Priddy, 41 Ind. App. 200, 83 N. E. 623.

**58.** Fitzmaurice *v.* Puterbaugh, 17 Ind. App. 318, 45 N. E. 524; Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557; Bird *v.* Mayer, 8 Wis. 362.

**Sufficiency of allegations.**—Allegations in a complaint that "defendant contracted and agreed to deliver to the plaintiff . . . one tank car of well-settled new process linseed oil . . . for use in its business of manufacturing table and enameled oilcloth, and which defendant well knew was to be used in its said business and to manufacture table and enameled oilcloths" are sufficient to raise and support an implied warranty of fitness in a sale by a manufacturer for a particular purpose. Cleveland Linseed Oil Co. *v.* Buchanan, 120 Fed. 906, 57 C. C. A. 498.

**59.** Curtis *v.* Moore, 15 Wis. 134; Cross *v.* Bartlett, 8 L. J. C. P. O. S. 22, 3 M. & P. 537.

**A variance** between the pleadings and the proof in respect of the consideration is fatal. Penn *v.* Stuart, 11 Ark. 41.

**60.** Howard *v.* Chiles, 8 B. Mon. (Ky.) 377; Badger *v.* Burleigh, 13 N. H. 507; Wightman *v.* Carlisle, 14 Vt. 296. But see Price *v.* Barr, Litt. Sel. Cas. (Ky.) 216.

**61.** McMillan *v.* Theaker, 12 Ohio 24.

**62.** *Alabama.*—Wren *v.* Wardlaw, Minor 363, 12 Am. Dec. 60.

*Connecticut.*— Booth *v.* Northrop, 27 Conn. 325.

*Illinois.*— Wallace *v.* Tanner, 118 Ill. App. 639.

*Indiana.*— House *v.* Fort, 4 Blackf. 293.

*Kentucky.*— Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433, 23 Ky. L. Rep. 584, 98 Am. St. Rep. 406, 54 L. R. A. 417.

*Mississippi.*— Williams *v.* Harris, 2 How. 627.

*New Jersey.*— Becker *v.* Atchason, 70 N. J. L. 157, 56 Atl. 172 [*affirmed* in (1904) 59 Atl. 1117].

*New York.*— Holman *v.* Dord, 12 Barb. 336; Fowler *v.* Abrams, 3 E. D. Smith 1; Holman *v.* Dord, 2 Edm. Sel. Cas. 270.

*North Carolina.*— Blanton *v.* Wall, 49 N. C. 532.

*Ohio.*— Gartner *v.* Corwine, 57 Ohio St. 246, 48 N. E. 945.

*Rhode Island.*— Ingraham *v.* Union R. Co., 19 R. I. 356, 33 Atl. 875; Place *v.* Merrill, 14 R. I. 578.

*South Carolina.*— Houston *v.* Gilbert, 3 Brev. 63, 5 Am. Dec. 542.

*Vermont.*— Pinney *v.* Andrus, 41 Vt. 631; Goodenough *v.* Snow, 27 Vt. 720; Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571.

*Virginia.*— Trice *v.* Cockran, 8 Gratt. 442, 56 Am. Dec. 151.

*England.*— Gresham *v.* Postan, 2 C. & P. 540, 12 E. C. L. 721; Williamson *v.* Allison, 2 East 446.

See 43 Cent. Dig. tit. "Sales," § 1235.

**Personal injuries.**—Where powder for use in a flash lamp is bought on the reliance of the warranties of the manufacturer and seller that it contains no explosive compound and is safe for use in an ordinary flash lamp, a scienter need not be alleged in an action to recover damages for breach of warranty for injuries received by the buyer from explosion of the powder in an ordinary flash lamp. Wood *v.* E. & H. T. Anthony, 79 N. Y. App. Div. 111, 79 N. Y. Suppl. 829.

**63.** Parlin *v.* Bundy, 18 Vt. 582.

**64.** Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751; Hughes *v.* Funston, 23 Iowa 257; Bosworth *v.* Higgins, 4 Silv. Sup. (N. Y.) 203, 7 N. Y. Suppl. 210.

**The fact that it is alleged that the representations were not only untrue, but fraudulent,** will not prevent a recovery for breach of warranty. Chestnut *v.* Ohler, (Ky. 1908) 112 S. W. 1101; Shoe *v.* Maerky, 35 Pa. Super. Ct. 270.

**Joinder.**—Allegations in a petition charging defendant with a breach of warranty in a sale of personal property, and also charging him with knowledge of the falsity of such warranty, at the time of the sale, may be joined. Gartner *v.* Corwine, 57 Ohio St. 246, 48 N. E. 945.

**Amendment.**—Where a complaint counting on breach of warranty unnecessarily character-

on as the basis of plaintiff's right of recovery it is necessary that a *scienter* should be alleged.[65]

(IV) *INDUCEMENT AND RELIANCE.* It should be alleged that the warranty was made as an inducement to the purchase and was relied on as such.[66]

(V) *CHARACTER OF DEFECTS.* It is not necessary to allege that the defects were not obvious,[67] or that the buyer was ignorant of the defects.[68]

(VI) *BREACH.* A breach of warranty must be alleged by direct affirmation.[69] Generally a mere allegation that there was a breach is insufficient; it must appear in what respects the warranty was false,[70] and that the defects were within the

ized the representations alleged to have constituted the warranty as having been "fraudulently" made, there was no error in allowing the complaint to be amended after the evidence was in, by striking out the word "fraudulently," as the rights of parties were not prejudiced thereby. Bosworth *v.* Higgins, 4 Silv. Sup. (N. Y.) 203, 7 N. Y. Suppl. 210.

**65.** Smith *v.* Miller, 2 Bibb (Ky.) 616; Wood *v.* Ashe, 3 Strobh. (S. C.) 64; Houston *v.* Gilbert, 3 Brev. (S. C.) 63, 5 Am. Dec. 542; Goodenough *v.* Snow, 27 Vt. 720; Dowding *v.* Mortimer, 2 East 450 note.

**66.** *Indiana.*— Lincoln *v.* Ragsdale, 7 Ind. App. 354, 31 N. E. 581.

*Minnesota.*— See Miamisburg Twine, etc., Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175.

*Missouri.*— Kenney *v.* James, 50 Mo. 316.

*Oregon.*— Abilene Nat. Bank *v.* Nodine, 26 Oreg. 53, 37 Pac. 47.

*Wisconsin.*— Red Wing Mfg. Co. *v.* Moe, 62 Wis. 240, 22 N. W. 414; Austin *v.* Nickerson, 21 Wis. 542.

But see McClintock *v.* Emick, 87 Ky. 160, 7 S. W. 903, 9 Ky. L. Rep. 995, where it was held that where there is a positive unequivocal representation of a fact it is not necessary that the vendee in suing upon the warranty should allege that vendor intended that plaintiff should rely upon it.

**Sufficiency of allegations.**—Where a complaint alleged that during negotiations for the sale of a horse defendant stated the animal would work well in hauling heavy loads, and that he would warrant the horse in that regard; that plaintiff, relying on such assurance, bought the horse; that it was unfit for such use, which defendant well knew; and that plaintiff was damaged by the breach of warranty, the cause of action set forth was one for damages for a fraudulent warranty, notwithstanding the absence of an express allegation that the false warranty was made with intent to induce plaintiff to purchase the horse. Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63.

**Sale of note and mortgage.**—An allegation that at the sale and transfer of a note and mortgage "the defendant represented to the plaintiff that said mortgage was good, and a valid security for the payment of said note, and the plaintiff supposed and verily believed, at the time he bought the same as aforesaid, the said mortgage to be good, and that it was a valid and sufficient security," etc., is a sufficient allegation that plaintiff purchased on the faith of defendant's representations. Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

**Amendment.**— In an action for breach of warranty in the sale of horses, it was proper to permit an amendment to the declaration by inserting an allegation that plaintiff relied on the warranty in purchasing. Lewis *v.* Bracken, 97 Ga. 337, 22 S. E. 943.

**67.** Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730; Labeaume *v.* Poetlington, 21 Mo. 35.

**68.** Zimmerman *v.* Druecker, 15 Ind. App. 512, 44 N. E. 557.

**69.** Lincoln *v.* Ragsdale, 7 Ind. App. 354, 31 N. E. 581; Lucile Min. Co. *v.* Fairbanks, 87 S. W. 1121, 27 Ky. L. Rep. 1100; Lemmon *v.* Hanley, 28 Tex. 219.

**70.** *California.*— Dabovich *v.* Emeric, 7 Cal. 209.

*Indiana.*— Aultman *v.* Seichting, 126 Ind. 137, 25 N. E. 894; McClamrock *v.* Flint, 101 Ind. 278; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; McClure *v.* Jeffrey, 8 Ind. 79; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312; Seiberling *v.* Rodman, 14 Ind. App. 460, 43 N. E. 38.

*Maryland.*— Fenwick *v.* Forrest, 5 Harr. & J. 414.

*Ohio.*— Fred. W. Wolf Co. *v.* Sheriff St. Market, etc., Co., 11 Ohio Cir. Dec. 582; Jonte *v.* Toledo Foundry, etc., Co., 5 Ohio S. & C. Pl. Dec. 162, 7 Ohio N. P. 388.

*Pennsylvania.*— Gould *v.* Gage, 118 Pa. St. 559, 12 Atl. 476; Lee *v.* Baylie, 10 Pa. Cas. 570, 13 Atl. 950.

See 43 Cent. Dig. tit. "Sales," §§ 1238, 1244.

**Test of machine.**— It is not necessary to allege that a machine was property tested. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716. Especially when notice of defects was given to the seller as it was then his duty to make the test. Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856. But the rule is otherwise if the terms of the warranty required a test to determine the capacity of the machine. Robinson Mach. Works *v.* Chandler, 56 Ind. 575.

**Inability to discover defect.**— In an action for the price of an engine, an answer setting up that the machine was warranted first-class, etc., but that it did not work properly, and that defendant was unable to discover the defect, was sufficient, although it did not show the defect. Lane, etc., Co. *v.* City Electric Light, etc., Co., 31 Tex. Civ. App. 449, 72 S. W. 425.

terms of the warranty.[71] If these facts appear the allegation is sufficient.[72] It is not necessary to allege evidential facts.[73] Thus where there is a breach of the warranty of soundness it is sufficient to allege unsoundness without describing the specific defects constituting unsoundness.[74] If notice of defects must be given under the terms of the contract an allegation that notice was "duly" given is sufficient.[75]

(VII) *DAMAGES.* To authorize a recovery of damages for breach of warranty, the amount of damages must be alleged,[76] and if special damages are claimed it should appear that they are such as were contemplated by the parties at the

**71.** Woolfolk *v.* Beach, 61 Ga. 67; Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850; H. B. Smith Co. *v.* Williams, 29 Ind. App. 336, 63 N. E. 318; Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623.

**72.** Hardwick *v.* Wilson, 40 Ind. 321; Warman-Black-Chamberlain Co. *v.* Indianapolis Mortar, etc., Co., 36 Ind. App. 259, 75 N. E. 672; Seiberling *v.* Tatlock, 13 Ind. App. 345, 41 N. E. 841; Walter A. Wood Mowing, etc., Mach. Co. *v.* Irons, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672; Schurtz *v.* Kleinmeyer, 36 Iowa 392; Crowell *v.* Harvey, 30 Nebr. 570, 46 N. W. 709; Rakestraw *v.* Woodward, 25 Pa. Super. Ct. 165; Loeper *v.* Haas, 24 Pa. Super. Ct. 184.

**Particular allegations held sufficient to show breach** see Mastin *v.* Bartholomew, 41 Colo. 328, 92 Pac. 682; Hanson *v.* Gronlie, (N. D. 1908) 115 N. W. 666.

**Manner of use.**— In an action for breach of warranty that a furnace would heat a particular house to seventy degrees in zero weather, it was not incumbent on plaintiff to aver that the furnace was used by him in a reasonable and careful manner, where it was alleged that it was "insufficient and incapable of heating said dwelling to 70 degrees" in such weather. Tower *v.* Pauly, 67 Mo. App. 632.

**Allegations held sufficient.**—An answer in an action for the price of a separator, sold with a warranty that it should perform good work, which alleges that it crushed the wheat, and did not properly separate it, but carried off large quantities with the straw, sufficiently states its defects. Springfield Engine, etc., Co. *v.* Kennedy, 7 Ind. App. 502, 34 N. E. 856. In an action for the price of a reaping machine, an answer alleging that the machine was warranted to be made of good material, and that with proper management it would do good work, but that it was not in certain particulars well made, and would not with proper management do good work, is not insufficient on demurrer. Walter A. Wood Mowing, etc., Mach. Co. *v.* Field, 8 Ind. App. 107, 35 N. E. 516. An answer alleging that the machine warranted did not thresh clean, but carried much unthreshed grain through the cylinder, which passed on to the stack, and was wasted and lost to defendant and his customers, and broke and destroyed large quantities of the kernels; that, under proper and skilful management, it could scarcely thresh enough grain to pay running expenses; could not do half the work that ordinary separators of the size did in the same county; that so it had been, and was, wholly worthless, is specific enough as to defects. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

**Unsatisfactory work.**—In an action on non-negotiable notes given for a drilling outfit, an answer that the machinery was sold to be used in prospecting for mineral, on a warranty that it would do satisfactory work, and would drill fifteen feet per day in solid limestone, and that defendants found it unsuitable for drilling in stone, and that it would not work in the locality for which it was intended and warranted, and that defendants had offered to return the same, sufficiently stated a defense for breach of warranty to authorize the introduction of evidence thereof. Maugh *v.* Hornbeck, 98 Mo. App. 389, 72 S. W. 153.

**73.** Warren *v.* Cash, 143 Ala. 158, 39 So. 124.

**Worthlessness of goods.**— It is not necessary to allege that the goods are worthless. Tinsley *v.* Fruits, 20 Ind. App. 524, 51 N. E. 111.

**74.** *Alabama.*— Stone *v.* Watson, 37 Ala. 279.

*Indiana.*— Leeper *v.* Shawman, 12 Ind. 463.

*Iowa.*— Schurtz *v.* Kleinmeyer, 36 Iowa 392.

*Texas.*— Blythe *v.* Speake, 23 Tex. 429; Palmer *v.* Wilks, 17 Tex. 105.

*Vermont.*— Wheeler *v.* Wheelock, 33 Vt. 144, 78 Am. Dec 617; Parlin *v.* Bundy, 18 Vt. 582. But see Martin *v.* Blodget, 1 Aik. 375.

**Construction of allegations.**—A declaration alleging as a special breach diseased knees and also unsoundness cannot be construed as containing a specification of unsoundness only in the knees. Thompson *v.* Bertrand, 23 Ark. 730.

**75.** Hume *v.* Sherman Oil, etc., Co., 27 Tex. Civ. App. 366, 65 S. W. 390.

**76.** Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56.

**Assumpsit or breach of warranty.**—A petition to recover money spent by a purchaser of a machine under a contract of warranty in installing it and in making alterations and repairs in it, which alleged that the sums specified were advanced and expended for the special benefit, at the request, and for the use of the seller, constituted an action on an implied assumpsit, and not for damages for breach of the warranty. Griffith *v.* Williams Patent Crusher, etc., Co., 103 Mo. App. 32, 77 S. W. 330.

**Sufficiency of allegations.**—A complaint for damages for a breach of a warranty of the soundness of a chattel sold and delivered, al-

time the contract was made.[77] The various items of damages need not be alleged but may be pleaded in gross.[78] A mere allegation that the goods are not worth the price is not sufficient;[79] but it must appear that because of the breach of warranty the goods are of less value than they would be had the warranty been fulfilled,[80] or there should be a direct allegation that the buyer was damaged in a named suit by the breach.[81]

(VIII) *MATTERS IN DEFENSE.* Infancy is a good plea in bar of an action on a warranty.[82] *Non assumpsit* is not a good plea in an action for breach of a special warranty.[83] An objection that action upon a warranty is prematurely brought is not available unless pleaded.[84] Where a counter-claim for breach of warranty of goods includes articles specifically mentioned, a reply that plaintiff did not warrant all the several articles mentioned stated conjunctively is insufficient.[85] Objections to the answer based on its failure to deny directly the warranty and breach alleged made for the first time when findings based on the pleadings were proposed by plaintiff will not be considered.[86]

leging the sale of the chattel at an agreed value, and a warranty of its soundness, and averring unsoundness at the time of the sale, "to the damage of the plaintiff" in a certain sum, sufficiently alleges that such unsoundness diminished the value of the chattel. Ferguson *v.* Hosier, 58 Ind. 438.

**77.** Ellis *v.* Tips, 16 Tex. Civ. App. 82, 40 S. W. 524. *Compare* Roberts *v.* Fleming, 31 Ala. 683.

**Sufficiency of allegations as to special damages** see Cleveland Punch, etc., Works Co. *v.* Consumers Carbon Co., 25 Ohio Cir. Ct. 307.

**Expense as matter of damage.**—A counter-claim for breach of warranty in the sale of sheep is not objectionable because of items for care, feed, and expense of keeping the sheep; the question whether the breach of warranty is the proximate cause of these damages being a matter relating to the proof and not to the pleadings. Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176.

**78.** Fred. W. Wolf Co. *v.* Sheriff St. Market, etc., Co., 11 Ohio Cir. Dec. 582.

**79.** Kern *v.* Saul, 14 Ind. App. 72, 42 N. E. 496.

**80.** Means *v.* Means, 88 Ind. 196; Gray *v.* Rich, 10 Ind. 430; Plano Mfg. Co. *v.* Richards, 86 Minn. 94, 90 N. W. 120; Weed *v.* Weinberger, 12 Pa. Super. Ct. 12. And see Acme Harvesting Mach. Co. *v.* Barkley, (S. D. 1908) 118 N. W. 690.

**Exact loss indeterminate.**— In an action for the price of goods an allegation that it was impossible, before expiration of the term of guaranty, to state the exact amount of loss defendant would sustain by reason of the defects but, for the reasons stated, defendant believed and was prepared to prove that it equaled the sum sued for, is sufficient, although not stating with reasonable accuracy the market value of the goods furnished. Newton Rubber Works *v.* Kahn, 186 Pa. St. 306, 40 Atl. 483.

**Allegation held sufficient.**— In an action on a note for machinery, in which a breach of warranty is relied on, an averment that on account of its defects the machine was not worth more than the four hundred dollars which had been paid on account of its purchase, is sufficient as to the amount of damages sustained by reason of the defects and breach of warranty, although not precise. Kenney *v.* Bevilheimer, 158 Ind. 653, 64 N. E. 215.

**Time of making objection.**— In an action for breach of warranty, the failure to plead facts showing the difference between the value of the thing sold and its value had it been as warranted is a substantial omission which may be raised after verdict on motion for judgment. Plano Mfg. Co. *v.* Richards, 86 Minn. 94, 90 N. W. 120.

**81.** Eldridge *v.* Hargreaves, 30 Nebr. 638, 46 N. W. 923.

**Allegations held insufficient.**— In an action to recover the price of certain sacks of flour sold defendant, an affidavit of defense alleging the purchase of certain barrels of flour which was of bad quality, that a small portion of the amount sold was returned to him by his customers, and that his direct loss was one hundred and nineteen dollars and fifty cents, but failing to allege the price paid for the barrels of flour, whether they were part of the goods mentioned in plaintiffs' statement, the prices at which he sold, the quantity and value of the flour returned by his customers and not returned by him to plaintiffs, the reasons for the return of the flour by his customers, and that he gave warranties of the flour relying on plaintiffs' representations, was insufficient. Kennedy *v.* Aber, 1 Pa. Dist. 770, 11 Pa. Co. Ct. 570.

**Specific loss on each article.**—Where the buyer alleges a specific loss on each article sold by him, that the prices obtained were the best obtainable, and all that the articles were worth, the allegations are sufficient. Bacon *v.* Scott, 154 Pa. St. 250, 26 Atl. 422.

**82.** Green *v.* Greenbank, 2 Marsh. 485, 17 Rev. Rep. 529.

**83.** Cress *v.* Henry, 1 Browne Appendix (Pa.) 66.

**84.** Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753.

**85.** Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394.

**86.** Mandeville *v.* Newton, 119 N. Y. 10, 23 N. E. 920.

**i. Issues and Proof** — (i) *In General.* It is of course the general rule that in either an action or counter-claim for damages for breach of warranty, evidence as to issues not raised by the pleadings is inadmissible.[87] The evidence admitted must be relevant to the issues raised.[88]

(ii) *General Issue or General Denial.* According to some decisions under the general issue or general denial in an action for the price a breach of warranty may be shown by way of recoupment [89] or in defense.[90] It is, however, the rule in some jurisdictions that notice of the special matter must be given.[91] In an action for breach of warranty defendant cannot under a general denial prove a release of the claim for damages.[92]

(iii) *Nature and Grounds of Action.* If the only issue raised by the pleadings is that of false and fraudulent representations, a breach of warranty cannot be shown;[93] and conversely under an allegation of breach of warranty fraud cannot be proved.[94] If both fraud and breach of warranty are alleged

**Inconsistent pleading.**—Where in an action on notes given for the price, a warranty indorsed on the notes is set out as part thereof, plaintiff cannot in his reply to a counter-claim based on a breach of such warranty impeach the consideration of such warranty when it is also alleged that the indorsement on the note was a condition for its signature. Snyder *v.* Johnson, 69 Nebr. 266, 95 N. W. 692.

**87.** Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56; Abraham *v.* Browder, 114 Ala. 287, 21 So. 818; North Collins Bank *v.* Cary Safe Co., 42 N. Y. App. Div. 233, 59 N. Y. Suppl. 643.

**What is not a new issue.**— In an action for the price of certain buggies, where defendant sought recoupment for defects therein, and plaintiff's testimony tended to show that on complaint by defendant as to such defects plaintiff furnished repairs which defendant agreed to accept as satisfaction, an instruction that, if the jury found that such agreement had been made, it displaced the original agreement, and plaintiff was entitled to recover thereon, did not erroneously inject a new issue into the case. Jackson Sleigh Co. *v.* Holmes, 129 Mich. 370, 88 N. W. 895.

**88.** McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118.

**Applications of rule.**—Where the only issue was as to the condition of a machine when delivered to the buyer evidence as to whether he was a fit person to operate the machine is not admissible. McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390. So too in the absence of an averment of the purpose for which the article was bought it cannot be shown that it was worthless for the purpose for which it was bought Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56. Similarly an allegation of compliance with conditions of the warranty will not authorize the admission of evidence that compliance was waived. Safety Fund Nat. Bank *v.* Westlake, 21 Mo. App. 565.

**Several issues.**— In an action on a note for the price of a machine, where defendant pleaded failure of consideration, evidence to show how the machine operated, and that it was worthless, was proper, and should not be excluded for failure to lay the foundation for proving by oral testimony the contents of a written warranty elsewhere alleged in the answer. Aultman, etc., Co. *v.* Trainer, 74 Iowa 417, 38 N. W. 126.

**89.** Owens *v.* Sturges, 67 Ill. 366; Murray *v.* Carlin, 67 Ill. 286: McCormick Harvesting Mach. Co. *v.* Robinson, 60 Ill. App. 253; Comparet *v.* Johnson, 6 Blackf. (Ind.) 59; Allen *v.* Hooker, 25 Vt. 137. But see Garvey *v.* Hauck, 85 Mo. App. 14; and VII, I, 3, h, (vi).

**90.** Robinson *v.* Windham, 9 Port. (Ala.) 397.

**Matter in defense of breach.**—Where defendant pleaded a breach of warranty, to which plaintiff replied generally, as the plea did not purport to be on a written warranty plaintiff could, on a written warranty being introduced, show that the writing was procured by fraud. Morrow *v.* Bailey, 2 W. Va. 326.

**91.** Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601; Stever *v.* Lamoure, Lalor (N. Y.) 352; Kinnear *v.* Thomas, 1 Ohio Dec. (Reprint) 413, 9 West. L. J. 187.

**Sufficiency of notice.**— The notice filed with the plea of the general issue under circuit court rule 7c, in an action on a note for the purchase-price of a stallion, stating that the horse was purchased on the assurance that he was serviceably sound, when he was not, but was afflicted with a certain disease, which made him sterile and ultimately caused his death, is broad enough to permit recoupment of any damages resulting from breach of the guaranty of his being serviceably sound. Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601.

**92.** Milhollin *v.* Sharp, 13 Ind. App. 697, 41 N. E. 552.

**93.** Stanley *v.* Norris, 4 Blackf. (Ind.) 353; Humbert *v.* Larson, 89 Iowa 258, 56 N. W. 454; Cooper *v.* Landon, 102 Mass. 58; Sweeney *v.* Vroman, 60 Wis. 278, 19 N. W. 46. But see Sherman *v.* Johnson, 56 Barb. (N. Y.) 59, holding that even if plaintiff fails to establish the fraud, if he clearly makes out an implied warranty he can recover.

**94.** Dean *v.* Mason, 4 Conn. 428, 10 Am.

there may be a recovery on the warranty, or, by proving scienter, on the fraud.[95]

(IV) *FORM, NATURE, AND EXTENT OF WARRANTY.* Where a warranty is alleged in general terms, the presumption is that it is a parol warranty and proof of a written warranty is not admissible.[96] On the other hand if a written warranty is pleaded, a parol warranty cannot be shown.[97] Nor is proof of implied warranty admissible unless the necessary facts from which a warranty would be implied are alleged.[98] If the petition appears to have been intended to declare on both an express and implied warranty, proof of an implied warranty makes out a case for plaintiff, although the petition is very indefinite, if no exceptions have been urged against it.[99] The promise or warranty must be truly stated and proved as alleged.[1] But it is not necessary that the proof should be in the exact language of the allegation.[2]

(V) *BREACH.* A breach cannot be shown under a mere plea of non-performance of contract.[3] The evidence as to the breach must correspond to the allegation, and under an averment of a breach of one kind a breach of an entirely different kind cannot be shown.[4]

(VI) *DAMAGES.* Damages resulting from a breach of warranty must be pleaded in order to render proof thereof admissible.[5] And while a general allega-

Dec. 162; Wiggins *v.* Long, 9 Humphr. (Tenn.) 140.

**95.** Vail *v.* Strong, 10 Vt. 457.

**96.** Morgan *v.* Gaar, etc, 64 Ind 213. See also Houston *v.* Burney, 2 Sm. & M. (Miss.) 583. But see Rogers *v.* Beckrich, 46 N. Y. App. Div. 429, 61 N. Y. Suppl. 725, holding that an averment that the articles purchased were warranted to be fit and proper for the purpose for which they were designed is supported by proof of either an implied or an express warranty.

**97.** Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312; Barrett *v.* Wheeler, 66 Iowa 560, 24 N. W. 38; Gibson *v.* Hamell, Tapp. (Ohio) 47.

**98.** Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, 23 S. W. 385, 1118. And see Bartlett *v.* Hoppock, 34 N. Y. 118, 88 Am. Dec. 428.

**99.** Houk *v.* Berg, (Tex. Civ. App. 1907) 105 S. W. 1176.

**1.** Penn *v.* Stuart, 11 Ark. 41; Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. 584; Standefer *v.* Aultman, etc., Mach. Co., 34 Tex. Civ. App. 160, 78 S. W. 552.

**Proof of warranty.**— The fact that a complaint for the price of goods sold refers to a warranty as "the warranty herein indorsed," while the warranty is on the same face of the paper, below and distinctly separated from, the agreement by rules and lines, does not render such warranty inadmissible in evidence. Musselman *v.* Wise, 84 Ind. 248.

**Terms of warranty.**—Where defendants in an action for goods sold and delivered rely on a breach of warranty that the "goods were merchantable and fit to be manufactured into cloaks for ordinary wear" proof of a warranty that the goods were equal to those purchased at a previous time is not admissible. Dommerich *v.* Garfunkel, 32 Misc. (N. Y.) 740, 65 N. Y. Suppl. 564 [*affirmed* in 33 Misc. 743, 67 N. Y. Suppl. 167].

**Limited warranty.**— To entitle defendant in an action for damages for breach of warranty to show that the terms of the warranty were limited the fact must be pleaded. Hogan *v.* Carland, 5 Yerg. (Tenn.) 283.

**General or special warranty.**—Where plaintiff alleged a special warranty to be based on a given test, and defendant denied that the test to be applied was that alleged by plaintiff, and set up a different test, and there is evidence tending to support the contention of each, an instruction that if the jury found that there was a general warranty, and a breach thereof, they should find for plaintiff, is erroneous. Bedford *v.* Magibben, 13 S. W. 1082, 12 Ky. L. Rep. 193.

**Extent of warranty.**— Under an allegation of warranty of eight cases of goods a warranty of only seven cases may be shown. Atwater *v.* Clancy, 107 Mass. 369.

**2.** Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900.

**3.** Chambers *v.* Lancaster, 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253 [*affirmed* in 160 N. Y. 342, 54 N. E. 707].

**Matters of defense.**— Under a plea of no warranty the seller cannot show that there was no breach. Smith *v.* Parsons, 8 C. & P. 199, 34 E. C. L. 688.

**4.** Snowden *v.* Waterman, 100 Ga. 588, 28 S. E. 121; National Time Recorder Co. *v.* Iowa Mantel Mfg. Co., 108 Ill. App. 95; Sprout *v.* Newton, 48 Hun (N. Y.) 209.

**5.** Register Gazette Co. *v.* Larash, 109 Ill. App. 236.

**Sufficiency of allegation.**—Where, in an action to recover the purchase-price of steam boilers, the answer pleaded as a partial defense that by the contract of sale the boilers were warranted to be of the best quality of workmanship and material, but that, on being put into service, they were found to be of inferior quality, both in workmanship and material, and alleged the difference in value between the boilers as sold and as delivered, such answer, especially under code practice and pleading, was sufficient to entitle defendant to show by way of reduction of plaintiff's recovery the diminished value of the boilers

tion of damage is sufficient to admit proof of damages necessarily resulting from the breach,[6] there can be no proof of expense incurred or other special damages unless specially pleaded;[7] but if evidence as to special elements of damage not pleaded is admitted without objection it may be considered by the jury.[8]

(VII) *MATTERS TO BE PROVED.* In an action or counter-claim for breach of warranty all material allegations as to the existence of the warranty, the breach and the damage thereform must be proved.[9] Where the right of recovery is based solely on a breach of warranty allegations of knowledge of the falsity of the warranty or fraud are immaterial and need not be proved.[10]

(VIII) *VARIANCE* — (A) *Existence and Terms of Warranty.* The proof of warranty must correspond to the allegation as to its terms and if it does not the variance will be fatal.[11] Thus proof of a qualified warranty will not support an

by reason of defective workmanship and material. Florence Oil, etc., Co. *v.* Farrar, 109 Fed. 254, 48 C. C. A. 345.

6. Meacham *v.* Cooper, 36 Minn. 227, 30 N. W. 669.

**Allegation of worthlessness.**—Where the purchaser of a machine, claiming damages for a breach of warranty thereof, alleged that the machine was entirely worthless, he may show what damages he suffered, although the machine had some value. Massillon Engine, etc., Co. *v.* Shirmer, 122 Iowa 699, 98 N. W. 501, (1903) 93 N. W. 599. See also McConnell *v.* Lewis, 58 Nebr. 188, 78 N. W. 518.

7. *Georgia.*— Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110.

*Illinois.*— Wallace *v.* Tanner, 118 Ill. App. 639.

*Iowa.*— Cole *v.* Laird, 121 Iowa 146, 96 N. W. 744.

*Kansas.*— Frick Co. *v.* Falk, (App. 1899) 62 Pac. 167.

*Kentucky.*— Cockran *v.* Bowles, 4 Bibb 233.

*Maine.*— Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

*Minnesota.*— Meacham *v.* Cooper, 36 Minn. 227, 30 N. W. 669.

*North Carolina.*— Huvett, etc., Mfg. Co. *v.* Gray, 111 N. C. 92, 15 S. E. 940.

See 43 Cent. Dig. tit. "Sales," § 1252.

8. Leitner *v.* Goodwin, 60 Ga. 148.

9. Booth *v.* Northrop, 27 Conn. 325; Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338; Massie *v.* Crawford, 3 T. B. Mon. (Ky.) 218; Day *v.* Raguet, 14 Minn. 273; Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

**Form of warranty.**—Although a person may maintain an action on an implied warranty of soundness, where there is an express warranty of title only, yet he must produce the deed as evidence of the sale, and to show that there is no express covenant contrary to the implied warranty on which his action is brought. Allen *v.* Potter, 2 McCord (S. C.) 323.

**Description of property.**— In an action on the case for breach of warranty, the allegation of price in the declaration must be regarded as descriptive of the article, and therefore must be proved. Johnson *v.* McDaniel, 15 Ark. 109.

**Surplusage.**— In case for deceit by a warranty that a horse was well and sound, where a breach was alleged that he was not well and sound, but that he was infected with glanders, and otherwise unsound and diseased, the allegation as to the glanders might be struck out as surplusage, there being a sufficient breach without it, and it need not therefore be proved. Fisk *v.* Hicks, 31 N. H. 535.

10. *Connecticut.*— Booth *v.* Northrop, 27 Conn. 325.

*Indiana.*— House *v.* Fort, 4 Blackf. 293.

*Kentucky.*— Massie *v.* Crawford, 3 T. B. Mon. 218.

*Maryland.*— Osgood *v.* Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317.

*Minnesota.*— Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814; Wilson *v.* Fuller, 58 Minn. 149, 59 N. W. 988; Johnson *v.* Wallower, 15 Minn. 472.

*North Carolina.*— Blanton *v.* Wall, 49 N. C. 532.

*Ohio.*— Gartner *v.* Corwine, 57 Ohio St. 246, 48 N. E. 945.

*Rhode Island.*— Fogerty *v.* Barnes, 16 R. I. 627, 18 Atl. 982; Place *v.* Merrill, 14 R. I. 578.

*Vermont.*— Pinney *v.* Andrus, 41 Vt. 631; Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571.

*Virginia.*— Gerst *v.* Jones, 32 Gratt. 518, 34 Am. Rep. 773; Trice *v* Cockran, 8 Gratt. 442, 46 Am. Dec. 151.

*Washington.*—Ford *v.* Smith, 48 Wash. 398, 93 Pac. 909.

*United States.*— Shippen *v.* Bowen, 122 U. S. 575, 7 S. Ct. 1283, 30 L. ed. 1172.

*England.*— Gresham *v.* Postam, 2 C. & P. 540, 12 E. C. L. 721.

See 43 Cent. Dig. tit. "Sales," § 1253.

11. Moor *v.* Dewees, Litt. Sel. Cas. (Ky.) 227; Whitney *v.* Houghton, 127 Mass. 527; Goulding *v.* Skinner, 1 Pick. (Mass.) 162; Martin *v.* Edwards, 11 Humphr. (Tenn.) 374.

**Joint warranty.**—Where an action is founded on a joint contract of sale, laid in the declaration, the joint contract is essential to the joint warranty of sale, and requires strict proof, in whatever form of action plaintiff may sue. Stockfleet *v.* Fryer, 2 Strobh. (S. C.) 301.

**Sale of several slaves.**— In an action for breach of warranty of the soundness of a slave where the declaration alleged that defendant had warranted a certain negro woman to be sound, and the covenant of warranty was a receipt for the purchase-money for three slaves, in which defendant did

allegation of an absolute warranty.[12] But the fact that the warranty proved is not in the same words as the warranty alleged will not constitute a fatal variance if it appears that the two expressions as generally understood and used are of the same import,[13] especially where the pleading purports only to set out the contract substantially.[14]

(B) *Consideration.* A material variance between the consideration alleged and that proved will be fatal;[15] but there is no variance where the consideration is alleged as a certain sum and the proof is of an acceptance for that sum,[16] or that the price was paid in specific articles,[17] or that the price was paid partly in cash and partly in property,[18] unless the various items do not amount to the consideration alleged.[19]

(C) *Breach and Notice Thereof.* The breach of warranty relied on must be proved as laid, and an allegation of warranty that a horse sold was gentle when in fact he was not gentle is not supported by proof that he was not well broken.[20] Where the allegation of breach is that a horse sold had a certain disease, proof that the animal had seeds of such disease which developed into a perfect disease is not a variance.[21] An allegation that notice of the breach was given as required

"warrant them sound," the covenant of warranty might be considered distributively as applicable to each slave, and there was no variance. McCeney *v.* Duvall, 21 Md. 166. But where plaintiff set forth a bill of sale of one slave and a warranty, and the bill of sale produced in evidence was of two slaves and a warranty, it was held that there was a variance. Tutt *v.* McLeod, 3 How. (Miss.) 223.

**Failure to set forth all the terms.**— Failure of the notice, filed with the plea of the general issue under circuit court rule 7c in an action on a note given for the purchase-price of a stallion, to set forth, with the guaranty, in the contract of sale of his being serviceably sound and the breach thereof, the duty imposed by such contract of returning the horse for trade and the subsequent waiver of the provision therefor does not create a fatal variance. Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601.

**Description of property.**—Where a mortgage on a traction engine described it as a compound engine, and the pleadings on a counter-claim for breach of warranty admitted that the warranty was on the machine sold to defendant, which was in fact a compound engine, the fact that the written warranty called for a "simple" traction engine, and that the proof described the compound engine sold, was not such a variance as to preclude a recovery on the counter-claim. J. I. Case Threshing Mach. Co. *v* Myers, 69 S. W. 956, 24 Ky. L. Rep. 724.

12. Deming *v.* Foster, 42 N. H. 165; Logan *v.* Holland, 25 Tex. 398.

13. *Connecticut.*— Ferris *v.* Comstock, 33 Conn. 513.

*Illinois.*— Phelan *v.* Andrews, 52 Ill. 486.

*Massachusetts.*— Hastings *v.* Lovering, 2 Pick. 214, 13 Am. Dec. 420.

*New York.*— Oneida Mfg. Soc. *v.* Lawrence, 4 Cow. 440.

*Vermont.*— Henry *v.* Henry, 1 D. Chipm. 265.

*Wisconsin.*— Leopold *v.* Van Kirk, 29 Wis. 548.

14. Phelan *v.* Andrews, 52 Ill. 486, holding that where the declaration in an action for breach of warranty of two steam boilers alleged that they "were intended for driving a grist mill" in a certain place, while the contract did not mention the purpose or the place for which they were to be used there was no variance as there was no averment in the declaration that the contract stated they were to be so used, and as it purported only to substantially set out the contract.

15. *Arkansas.*—Buckman *v.* Haney, 11 Ark. 339; Penn *v.* Stuart, 11 Ark. 41.

*Connecticut.*— Pulford *v.* Johnson, 35 Conn. 30; Ferris *v.* Comstock, 33 Conn. 513.

*Ohio.*— McMillan *v.* Theaker, 12 Ohio 24.

*Vermont.*— Allen *v.* Lansing, 10 Vt. 114.

*England.*— Blyth *v.* Bampton, 3 Bing. 472, 4 L. J. C. P. O. S. 157, 11 Moore C. P. 387, 11 E. C. L. 233.

**Conditional promise.**— In an action on a warranty of a horse, where the consideration stated for the warranty was that plaintiff would purchase the horse for £63; but the consideration proved was that plaintiff would give that sum, and, if the horse was lucky, would give defendant £5 more, or the buying of another horse, there was no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting in point of law to a promise. Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 104.

16. Brown *v.* Jones, 24 Ala. 463.

17. Webster *v.* Hodgkins, 25 N. H. 128.

18. Saxty *v.* Wilkin, 1 D. & L. 281, 7 Jur. 704, 12 L. J. Exch. 381, 11 M. & W. 622; Hands *v.* Burton, 9 East 349.

19. Harrington *v.* Worden, 1 Mich. 487.

20. Bodurtha *v.* Phelon, 2 Allen (Mass.) 347.

21. Woodbury *v.* Robbins, 10 Cush. (Mass.) 520.

**Inconsistent proof.**—Where a complaint for breach of warranty in the sale of a horse alleged that the horse so sold gave the glanders to another horse belonging to plaintiff and the answer denied such sickness of such

by the provisions of the contract is not supported by evidence of a waiver of such notice.[22]

**j. Evidence** — (i) *Presumptions and Burden of Proof.* The burden of proof is on the party relying on a breach of warranty to show the warranty,[23] and the breach thereof.[24] The burden of proof is also on such party to show the

other horse, defendant could not, under such answer, show that such other horse, at the time plaintiff purchased him, was affected with a disease that would run into glanders if not checked, or impeach the former owner of such horse, who testified that it was sound when sold to plaintiff. Johnson *v.* Wallower, 15 Minn. 472.

**22.** Nichols *v.* Larkin, 79 Mo 264.

**23.** *Colorado.*— Colorado Dry Goods Co. *v.* W. P. Dunn Co., 18 Colo. App. 409, 71 Pac. 887.

*Illinois.*— Burns *v.* Nichols, 89 Ill. 480; Milk *v.* Moore, 39 Ill. 584; Wadleigh *v.* Robbins, 74 Ill. App. 126.

*Massachusetts.*— Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507; Lothrop *v.* Otis, 7 Allen 435.

*Missouri.*— Monumental Bronze Co. *v.* Doty, 92 Mo. App. 5; Garvey *v.* Hauck, 85 Mo. App. 14.

*New York.*— Raines *v.* Totman, 64 How. Pr. 493.

*Texas.*— C. H. Dean Co. *v.* Standifer, 37 Tex. Civ. App. 181, 83 S. W. 230.

*Washington.*— Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

*West Virginia.*— Wallace *v.* Douglas, 58 W. Va. 102, 51 S. E. 869.

*United States.*— Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202.

See 43 Cent. Dig. tit. "Sales," §§ 1258, 1259.

**Parol or written.**— There is no presumption that warranty is parol, although not averred that it is in writing. Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491. But see O'Neal *v.* Rumeley Co., 53 S. W. 521, 21 Ky. L. Rep. 936.

**Reliance on judgment of dealer.**— In an action against a dealer for the sale for food of an unsound chicken under an implied warranty that it was fit for food the buyer has the burden of proving that in making the purchase he relied on the skill and judgment of the dealer in selecting the same. Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884.

**24.** *District of Columbia.*— Purity Ice Co. *v.* Hawley Down Draft Furnace Co., 22 App. Cas. 573.

*Illinois.*— Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837 [*affirming* 47 Ill. App. 630]; Milk *v.* Moore, 39 Ill. 584; Erie City Iron Works *v.* Dempsey, 77 Ill. App. 667; Cook *v.* Tavener, 41 Ill. App. 642; Canton First Nat. Bank *v.* McCann, 4 Ill. App. 250.

*Indiana.*— McKendry *v.* Sinker, 1 Ind. App. 263, 27 N. E. 506.

*Iowa.*— Hoffman *v.* Hampton Independent School Dist., 96 Iowa 319, 65 N. W. 322.

*Kansas.*— Acme Harvester Co. *v.* Erne, 63 Kan. 858, 66 Pac. 1004.

*Kentucky.*— Tipton *v.* Triplett, 1 Metc. 570.

*Louisiana.*— Whitney Iron Works *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

*Massachusetts.*— Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507; Lothrop *v.* Otis, 7 Allen 435; Cunningham *v.* Hall, 4 Allen 268; Dorr *v.* Fisher, 1 Cush. 271.

*Michigan.*— Keystone Mfg. Co. *v.* Forsyth, 123 Mich. 626, 82 N. W. 521.

*Minnesota.*— Beckett *v.* Gridley, 67 Minn. 37, 69 N. W. 622.

*Mississippi.*— Stillwell, etc., Co. *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

*Missouri.*— Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594; Monumental Bronze Co. *v.* Doty, 92 Mo. App. 5; Garvey *v.* Hauck, 85 Mo. App. 14.

*New York.*— Deeley *v.* Heintz, 40 N. Y. App. Div. 612, 57 N. Y. Suppl. 583 [*affirmed* in 169 N. Y. 129, 62 N. E. 158].

*North Dakota.*— Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

*Oregon.*— Schumann *v.* Wager, 36 Oreg. 65, 58 Pac. 770.

*Pennsylvania.*— Miller *v.* James Smith Woolen Mach. Co., 220 Pa. St. 181, 69 Atl. 598.

*Texas.*— C. H. Dean Co. *v.* Standifer, 37 Tex. Civ. App. 181, 83 S. W. 230.

*Washington.*— Tacoma Coal Co. *v.* Bradley, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

*West Virginia.*— Wallace *v.* Douglas, 58 W. Va. 102, 51 S. E. 869.

*United States.*— Buckstaff *v.* Russell, 151 U. S. 626, 14 S. Ct. 448, 38 L. ed. 292; Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202.

See 43 Cent. Dig. tit. "Sales," § 1260.

**Breach of warranty of title.**—When there is an outstanding mortgage, and the mortgagee obtains the possession of the property by replevin, and the vendee begins an action on implied warranty of title before the final adjudication of the mortgagee's claim, the burden is on the vendee to prove a valid pre-existing mortgage before he can recover on the warranty. Clevenger *v.* Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. N. S. 410.

**Allegation of compliance with warranty.**— Where the petition, in an action for the price of machinery sold, alleges compliance with a contract requiring such machines to be as good or better, and work as well or better, than a sample machine, and defendant pleads a breach of such warranty in that the machines furnished were not as good, and did not work as well, as the sample machines, the burden is on plaintiff to show that the machines were as good as the

damages resulting from the breach,[25] and a performance of the conditions on which the right to assert the warranty depends.[26] So where he has accepted, retained, or failed to return the property, the presumption is that he waived defects,[27] and the burden is on him to show such reasonable excuse for his acts as will rebut the presumption.[28] The burden is of course on the seller to show matters relied on in defense of his liability for breach of warranty, as where he alleges that the insufficiency is due to lack of proper care on the buyer's part.[29]

(II) *ADMISSIBILITY* — (A) *Existence of Warranty.* The existence of a warranty may be shown by declarations and representations of the seller made during

sample. Roth *v.* Continental Wire Co., 94 Mo. App. 236, 68 S. W. 594.

**Defects within terms of warranty.**— The burden is on the buyer to show that the defects complained of are within the terms of the warranty. H. H. Franklin Mfg. Co. *v.* Lamson, etc., Mfg. Co., 189 Mass. 344, 75 N. E. 624, 3 L. R. A. N. S. 345.

**Cause of defect.**—Where plaintiff sold defendants, by sample, molasses, to be delivered f. o. b., and, in an action for price, defendants declined to pay, on the ground that it was not equal in grade to the sample furnished, they should sustain the averment that the tanks in which the molasses was received were not the cause of their deterioration. Prejean *v.* Wogan, 110 La. 362, 34 So. 476.

**Warranty of quantity.**—Where plaintiff's claim was based on a shortage in the guaranteed weight of a quantity of peas sold to him by defendant while in storage at a distant place, the burden of proof was on plaintiff, and was not shifted by proof that the peas weighed less than the guaranteed weight three months after the sale, when there was ample opportunity for a change in the amount during the interval. Lieberman *v.* Lippert, 109 Wis. 1, 85 N. W. 126.

**Warranty of title.**—The fact that the goods a short time before a sale with warranty had belonged to another raises no presumption that at the time of the sale they did not belong to the vendor, they having then been in his possession. Tipton *v.* Triplett, 1 Metc. (Ky.) 570.

**Failure to repair.**—Where, in an action on a note, defendant pleads that the consideration was an organ sold under a covenant of warranty, and that there was an agreement to repair certain defects, which plaintiff refused to carry out, it is incumbent on defendant to prove a breach of the agreement and introduce evidence showing damages. Carter *v.* Minton, 119 Ga. 474, 46 S. E. 658.

**25.** Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456; J. I. Case Threshing-Mach. Co. *v.* Haven, 65 Iowa 359, 21 N. W. 677; National Metal Edge Box Co. *v.* Gotham, 125 N. Y. App. Div. 101, 109 N. Y. Suppl. 450; Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924; Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202.

**Failure to sustain burden.**—Where, in an action for the price of paper boxes, the answer alleged that the boxes were warranted grease-proof, but they were not, and plaintiffs proved the sale and delivery and acceptance of the boxes, and defendant introduced no evidence as to damages suffered by him, plaintiffs were entitled to judgment for the purchase-price; B. & C. Comp. § 799, providing that the party having the affirmative of an issue must prove it. Lenz *v.* Blake, 44 Oreg. 569, 76 Pac. 356.

**Quantity of goods defective.**— In an action for breach of warranty in delivering articles not in conformity with the contract it cannot be inferred that all were defective because some were. J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013.

**Presumption as to value.**— It will be presumed, in an action for breach of warranty, when there is no evidence to the contrary, that the price for which the article sold was its represented value. Garr *v.* Young, (Tenn. Ch. App. 1901) 62 S. W. 631. *Compare* Gutta Percha, etc., Mfg. Co. *v.* Cleburne, (Tex. Civ. App. 1908) 107 S. W. 157.

**26.** Landman *v.* Bloomer, 117 Ala. 312, 23 So. 75; Acme Harvester Co. *v.* Erne, 63 Kan. 858, 66 Pac. 1004; Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

**27.** Wells *v.* Selwood, 61 Barb. (N. Y.) 238; Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53.

**Presumption of fact.**— The presumption raised by failure to return the goods is one of fact only and not of law. Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53.

**28.** Whitney Iron-Works *v.* Reuss, 40 La. Ann. 112, 3 So. 500; Wells *v.* Selwood, 61 Barb. (N. Y.) 238; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.

**29.** Wingate *v.* Johnson. 126 Iowa 154, 101 N. W. 751; Oregon Auto-Dispatch *v.* Portland Cordage Co., 51 Oreg. 583, 94 Pac. 36, 95 Pac. 498. But see Johnson *v.* Wallower, 15 Minn. 472.

**The maxim "res ipsa loquitur"** relates to cases involving negligence, and has no application to an alleged breach of warranty that a rope would be sufficient to lower a safe. Oregon Auto-Dispatch *v.* Portland Cordage Co., 51 Oreg. 583, 94 Pac. 36, 95 Pac. 498.

**Matter of defense.**—Where hose was sold with a warranty that it would pass the fire department inspection, if the fire department had nominal requirements, which were not enforced, it was for plaintiff, in an action for the price, to show that fact. Eureka

the negotiations,[30] by conversations between the parties,[31] by pamphlets exhibited to the buyer to induce the purchase,[32] and by advertisements of the sale.[33] Evidence as to the buyer's reliance on the warranty is admissible,[34] but testimony as to whether the seller had intended to deceive the buyer is irrelevant on the question of warranty.[35] An express warranty cannot be shown by evidence of custom or usage in relation to sales of similar articles;[36] but a custom to sell certain goods by sample may be proved for the purpose of showing that a particular sale was by sample and thereby created an implied warranty.[37] In an action on an implied warranty evidence as to the price of the goods is immaterial.[38] Where goods are purchased for a particular purpose evidence tending to show that the purchaser was ignorant of the kind needed and relied on the seller's judgment is admissible for the purpose of showing an implied warranty.[39] Where

Fire Hose Co. *v.* Reynolds, 86 N. Y. Suppl. 753.

**30.** Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214; Davis *v.* Sweeney, 80 Iowa 391, 45 N. W. 1040; Tuttle *v.* Brown, 4 Gray (Mass.) 457, 64 Am. Dec. 80.

**Person making representations.**— In a sale by a corporation representations of the general manager are competent (Decker *v.* Gutta-Percha, etc., Mfg. Co., 61 Hun (N. Y.) 516, 16 N. Y. Suppl. 352), or if the sale is by a firm the representations of one of the partners may be shown (Eldridge *v.* Hargreaves, 30 Nebr. 638, 46 N. W. 923).

**To rebut evidence of warranty.**— The poor credit of the vendee cannot be shown to rebut evidence of a warranty where the sale was made on credit, but at a price above the cash market value of the article, and security taken for the purchase-price. Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

**Scope of warranty.**—Where an elevator was of ample capacity under its proper steam power, and the question was whether the contract warranted its capacity when the power was furnished by water pressure instead of by steam, evidence that the two kinds of power are so different in their mode of operation as to require different kinds of machinery and appliances is competent. Whittier Mach. Co. *v.* Graffam, 156 Mass. 415, 31 N. E. 485.

**Explanation of terms.**— In an action for a breach of warranty of goods sold under a contract consisting of a correspondence between the parties, a contract between them for the sale of similar goods, referring to previous dealings between the parties as to the quality of goods to be thereafter delivered, is competent as showing the meaning of the descriptive terms used in the correspondence constituting the contract in suit. Deeley *v.* Heintz, 40 N. Y. App. Div. 612, 57 N. Y. Suppl. 583 [*affirmed* in 169 N. Y. 129, 62 N. E. 158].

**Purpose of evidence.**— Evidence tending to prove a warranty is not to be excluded because it also tends to show an attempt to rescind the contract in part only. Nichols *v.* Townsend, 7 Hun (N. Y.) 375.

**Res inter alios acta.**— On an issue as to a warranty by a seller of the value of certain stock sold to plaintiff, evidence that he made such a warranty of the same kind of stock sold to another is inadmissible. Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488.

**Statements to third persons.**— In an action on an alleged warranty of broom-corn seed, it is error to admit, over the objection of defendant, evidence of his statements or representations to outside parties concerning the seed as being of a particular kind. Phillips *v.* Vermillion, 91 Ill. App. 133. Where, however, in an action for breach of express warranty in the sale of oil as suitable for cooling purposes, evidence that, on the day prior to the sale, a third person, at the request and in the presence of plaintiff, telephoned to defendant, and that defendant assured the third person that the oil was safe for cooling purposes, was admissible. Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822.

**31.** Driesbach *v.* Lewisburg Bridge Co., 81 Pa. St. 177. But see Aultman *v.* Falkum, 47 Minn. 414, 50 N. W. 471.

**Scope of warranty.**—Where the agent who made the sale, on learning that the harvester did not work well, came with his employees promptly, without written notice, and endeavored unsuccessfully to make it work so as to give satisfaction, these acts of the local agent and his employees being admissible, conversations had by the buyer with them while they were at work on the harvester were competent evidence as to the conditions of the warranty. Easterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846.

**32.** Landman *v.* Bloomer, 117 Ala. 312, 23 So. 75; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4.

**33.** McGaughey *v.* Richardson, 148 Mass. 608, 20 N. E. 202.

**34.** Rogers *v.* Ferris, 107 Mich. 126, 64 N. W. 1048; Milwaukee Rice Machinery Co. *v.* Hamacek, 115 Wis. 422, 91 N. W. 1010.

**35.** Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344.

**36.** Eldridge *v.* Hargreaves, 30 Nebr. 638, 46 N. W. 923; Coates *v.* Harvey, 2 N. Y. Suppl. 5; Wetherill *v.* Neilson, 20 Pa. St. 448, 54 Am. Dec. 741.

**37.** Cassidy *v.* Begoden, 38 N Y. Super. Ct. 180; Beirne *v.* Dord, 2 Sandf. (N. Y.) 89; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158.

**38.** Hughes *v.* Funston, 23 Iowa 257.

**39.** Skinner *v.* E F. Kerwin Ornamental

property sold with warranty was exchanged for other property evidence as to the ownership of such other property and the circumstances attending the transaction is competent for the purpose of showing whether the warranty was transferred to the property taken in exchange.[40] As a general warranty does not extend to known or obvious defects, parol proof is competent to show that at the time of the sale the buyer had knowledge of defects in the thing sold.[41] However, an express warranty cannot be contradicted by mere loose statements regarding the property made during the negotiations.[42]

(B) *Breach of Warranty* — (1) IN GENERAL. Evidence as to a breach of warranty to be admissible must show a breach strictly within the terms of the warranty,[43] and must show facts and not a mere opinion of the witness.[44] Testimony as to the general quality of goods produced by the manufacturers and that those purchased were the best they could make is irrelevant.[45] So too evidence that the seller had paid a very low price for the goods is incompetent to show that they could not have been of the quality he warranted them to be.[46] It may, however, be shown that the goods could not be sold by the buyer as goods of the quality for which he bought them but only as of a lower grade;[47] but whether the purchaser selling to other parties warranted the goods as fully as the original

Glass Co., 103 Mo. App. 650, 77 S. W. 1011.

40. Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476.

41. Campbell *v.* Botts, 5 La. Ann. 106; Bennett *v.* Buchan, 76 N. Y. 386; Schuyler *v.* Russ, 2 Cai. (N. Y.) 202; Fisher *v.* Pollard, 2 Head (Tenn.) 314, 75 Am. Dec. 740; Long *v.* Hicks, 2 Humphr. (Tenn.) 305. And see Adams *v.* Snyder, 8 Kan. App. 245, 55 Pac. 498; Knoepker *v.* Ahman, 99 Mo. App. 30, 72 S. W. 483. *Contra*, Shackleford *v.* Gooch, 1 Bibb (Ky.) 583.

42. Deming *v.* Foster, 42 N. H. 165.

43. Hamlin *v.* Rogers, 78 Ga. 631, 3 S. E. 259, holding that under the statutory warranty as to chemical analysis of a fertilizer and an additional agreement that the seller was not to be held responsible for its practical results, or for its effect upon crops, evidence to show that the fertilizer failed to benefit his crops, although properly cultivated on suitable soil, with a propitious season; and that, if the fertilizer had been as represented on the sacks, the crops would have been benefited by its use, was properly rejected, as the statute only requires a warranty that the fertilizer shall contain substantially the ingredients indicated by the analysis attached to it, and the evidence offered did not directly tend to disprove such compliance. See also Aherin *v.* O'Brien, 18 N. Y. Suppl. 821.

**Particular evidence held competent.**— If it appears that an engine of twenty-five horse power would have been sufficient to run plaintiff's mill evidence that the engine purchased would not run the mill is competent to show that it was not of twenty-five horse power as warranted. Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

**Following specifications.**—Where a vessel was to be constructed of pine plank, it may be shown that the defects complained of were naturally incident to the use of pine. Cunningham *v.* Hall, 4 Allen (Mass.) 268.

**Notice of breach.**— In an action on a warranty of a machine, a since discharged agent of the manufacturer who made the warranty may testify that, when the breakage occurred, the purchaser came to him, and notified him, not to bind his former principal with notice to make good the warranty, but to show that the purchaser was diligent in endeavoring to notify the warrantor. Smoots *v.* Foster, 16 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 218.

**Evidence to show compliance with warranty.**— Plaintiff's assays of ores were not competent as tending to show that the roaster which he contracted to erect at defendant's mine complied with the warranty that it would properly handle with a certain result mill concentrates of a described quality; only one of the samples assayed being shown to have been taken from the mine in question, and this not conforming to the kind and quality of ore specified in the warranty. Trego *v.* Roosevelt Min. Co., 136 Wis. 315, 117 N. W. 855.

**Evidence of false statements made by the seller as to his experience in manufacturing** machines is immaterial and properly excluded where the machine sold is capable of doing the work for which it was guaranteed. Miller *v.* James Smith Woolen Mach. Co., 220 Pa. St. 181, 69 Atl. 598.

44. Strével *v.* Hempstead, 44 Barb. (N. Y.) 518. *Compare* Kuntzman *v.* Weaver, 20 Pa. St. 422, 59 Am. Dec. 740.

**Quality of goods.**—Where goods were sold with warranty, and the defense to an action for part of their price was grounded on a breach thereof, an inquiry as to whether part of the goods were sound that had been returned as unsound was relevant on the cross-examination of plaintiff, who had testified as to the contract and its performance. Hull *v.* Belknap, 37 Mich. 179.

45. Fuchs *v.* Morris, 81 Hun (N. Y.) 536, 30 N. Y. Suppl. 1017.

46. Ockershausen *v.* Durant, 141 Mass. 338, 5 N. E. 523.

47. Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209.

seller is immaterial.[48] It is not essential that one testifying to a defect constituting a breach of soundness should identify the animal with certainty;[49] but where a defect in the quality of certain goods is pleaded in an action for the price, the evidence of plaintiff's salesman that the goods of which defendant complained to him were not part of those bought of plaintiff is competent.[50] Testimony tending to show that the animal purchased had a contagious disease which was communicated to other animals is competent to show unsoundness.[51] If witnesses have testified that horses were sound, evidence that they offered to buy them at a price nearly equal to that paid by plaintiff is properly excluded.[52] It may be shown that the failure to comply with the warranty was due to mismanagement of the buyer,[53] and that when properly handled the machine or other article complied with the warranty.[54] Evidence as to the buyer's efforts to remedy defects is ordinarily admissible to show his good faith;[55] but evidence that the buyer could have remedied the defects if he had known how is immaterial where the machine was sold with the understanding that it was defective and that the buyer was to remedy the defects.[56] Evidence as to the payment of part of the price without complaint of defects is admissible to show a waiver of breach,[57] but the circumstances of the payment may be shown to rebut the presumption of waiver arising from such payment.[58] In respect of warranty of title the document by virtue of which a third person claims the property is admissible.[59] Where the thing sold is stock, evidence of a decision appointing a receiver for the company which issued the stock is admissible on the question of breach of warranty of title.[60]

(2) TRIAL OR TEST. For the purpose of showing a failure of the warranty evidence as to the result of a trial or test of the article sold is admissible,[61] provided such tests are made under proper conditions,[62] and by the proper per-

48. Richardson *v.* Mason, 53 Barb. (N. Y.) 601.

49. Kuntzman *v.* Weaver, 20 Pa. St. 422, 59 Am. Dec. 740.

**Identity of animal.**— In an action for breach of warranty that a horse was gentle, it was competent to ask a witness the name of the horse, as tending to identify him; but an answer that he had heard him called "the big-legged runaway horse" was irresponsive, and calculated to prejudice defendant. Jones *v.* Ross, 98 Ala. 448, 13 So. 319.

50. Vogel *v.* Moore, 84 S. W 557, 27 Ky. L. Rep. 94.

**Identity of article warranted.**— In an action for the price of sewing-machines, each of which was sold with a written warranty numbered to correspond with the machine, the warranties being the same in every other respect, it is not error to allow defendant to prove various defects in the different machines constituting a breach of the warranty, without first proving the number of each of such machines. Raynor *v.* Bryant, 43 Kan. 492, 23 Pac. 601.

51. Wallace *v.* Wren, 32 Ill. 146; Dunbar *v.* Briggs, 13 Nebr. 332, 14 N. W. 414.

52. Hobart *v.* Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693. And see Boylan *v.* McMillan, 137 Iowa 142, 114 N. W. 630, holding that where breach of an express warranty as to the health of horses sold is set up as a defense to an action on a note given for their price, evidence is not admissible that defendant bid in one of them at a sale which he subsequently held, nor that some of the horses were prize-winners at county fairs preceding the sale to defendant.

53. Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751; McKay *v.* Johnson, 108 Iowa 610, 79 N. W. 390.

54. Swanson *v.* Allen, 108 Iowa 419, 79 N. W. 132.

55. Woody *v.* Bennett, 88 Cal. 241, 26 Pac. 117.

56. Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857.

57. Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1.

58. Cantrall *v.* Fawcett, 2 Ill. App. 569; Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209.

59. Johnson *v.* Frisbie, 29 Md. 76, 96 Am. Dec. 508; Hodges *v.* Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545.

60. Brooks *v.* Camak, 130 Ga. 213, 60 S. E. 456.

61. Osborne *v.* Carpenter, 37 Minn. 331, 34 N. W. 163; Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547; Earl *v.* Lefler, 46 Hun (N. Y.) 9; Larrison *v.* Payne, 1 Silv. Sup. (N. Y.) 232, 5 N. Y. Suppl. 221.

62. Schuwirth *v.* Thumma, (Tex. Civ. App. 1902) 66 S. W. 691.

**Conditions of test.**—Where a contract for the enlargement of a flour mill contained a warranty that the enlarged mill should have a certain increased capacity, and should produce a certain proportion of a specified grade of flour from a particular mixture of wheat, to prove a breach of the warranty, the mill owner was not restricted to proof of a test

son.[63] The fact that the test was not made within a reasonable time affects only the weight and not the competency of the evidence.[64] Although the contract provides for a trial other evidence of defects is nevertheless admissible.[65]

(3) Comparison With Other Articles. Evidence as to how other machines of like pattern worked is not admissible to show a compliance with the warranty.[66] The buyer may, however, show that other machines worked well under similar conditions for the purpose of establishing the fact that the fault was with the machine purchased and not with the conditions.[67] And generally while comparison with other goods or articles is not admissible unless the conditions are the same,[68] evidence as to the suitableness of other articles under like conditions may be introduced for the purpose of showing that the failure of the article purchased was due to defects therein and not to improper conditions.[69] Whether the article in question is as good as other articles of like kind on the market is irrelevant,[70] unless the warranty is that the article sold is as good as any other article,[71] and in such case to admit evidence by way of comparison there must be evidence of the quality of the goods with which comparison is to be made.[72]

(4) Condition Before and After Sale. While evidence as to defects must as a rule relate to the time of sale and not to a subsequent period,[73] unless connected

with that particular wheat, but might show the total output of his mill for a length of time after the enlargement. Edward P. Allis Co. *v.* Columbia Mill Co., 65 Fed. 52, 12 C. C. A. 511.

63. Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297.

64. Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233.

65. Ganson *v.* Madigan, 13 Wis. 67.

66. Murray *v.* Brooks, 41 Iowa 45; Brummett *v.* Nemo Heater Co., 177 Mass. 480, 59 N. E. 58; Osborne *v.* Bell, 62 Mich. 214, 28 N. W. 841. But see Paulson *v.* Osborne, 35 Minn. 90, 27 N. W. 203.

67. National Bank, etc., Co. *v.* Dunn, 106 Ind. 110, 6 N. E. 131; Kramer *v.* Messner, 101 Iowa 88, 69 N. W. 1142; Paulson *v.* Osborne, 35 Minn. 90, 27 N. W. 203.

**Management of machine.**— On an issue of breach of an express warranty that a machine is well built, of good material, and of a certain capacity, if properly managed, it is improper to receive testimony that the general design of the machine is wrong; the testimony must be limited to the actual condition of the particular machine and its capacity. If it appears, however, that this machine failed to do the work warranted, it is competent, as tending to show that it was properly handled, to prove that other machines of like make and in the hands of other experienced persons also failed to do the work. Lyon *v.* Martin, 31 Kan. 411, 2 Pac. 790.

68. Lake *v.* Clark, 97 Mass. 346.

69. Dempster Mill Mfg. Co. *v.* Fitzwater, 6 Kan. App. 24, 49 Pac. 624; Brooks *v.* McDonnell, 41 Wis. 139.

70. Erie City Iron Works *v.* Dempsey, 77 Ill. App. 667; McCormick Harvesting Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561; Marsh *v.* Snyder, 14 Nebr. 237, 15 N. W. 341.

**Tests of other machines.**— In an action for the price of an engine guaranteed to make a saving in fuel "equal to that claimed for the Corliss," the report of exposition commissioners on tests made of the Corliss and other engines is rightly excluded, in the absence of a showing that such report was in the contemplation of the parties at the time of the guaranty. Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

71. *Illinois.*—Aultman *v.* Weber, 28 Ill. App. 91.

*Minnesota.*—Osborne *v.* Carpenter, 37 Minn. 331, 34 N. W. 163.

*New York.*— Larrison *v.* Payne, 1 Silv. Sup. 232, 5 N. Y. Suppl. 221.

*Vermont.*— Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.

*Virginia.*— Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

**Fitness for purpose.**— In an action against a manufacturer of cotton seed meal for breach of warranty in a sale thereof, samples of meal from other mills may be admitted to show that the meal furnished under the contract was not reasonably fit for feeding cattle as agreed, without showing how such samples were obtained, or whether they showed the average meal turned out by such mills. Taylor Cotton-Seed Oil, etc., Co. *v.* Pumphrey, (Tex. Civ. App. 1895) 32 S. W. 225.

72. Dwight Bros. Paper Co. *v.* Western Paper Co., 114 Wis. 414, 90 N. W. 444.

73. Postel *v.* Oard, 1 Ind. App. 252, 27 N. E. 584; Titus *v.* Poole, 73 Hun (N. Y.) 383, 26 N. Y. Suppl. 451 [*affirmed* in 145 N. Y. 414, 40 N. E. 228]; Marsh *v.* Nordyke, etc., Co., (Pa. 1888) 15 Atl. 875; Walton *v.* Cottingham, 30 Tex. 772. See also Foote *v.* Woodworth, 66 Vt. 216, 28 Atl. 1034. But see Hollingsworth *v.* Sharp, 66 Iowa 331, 23 N. W. 731, holding that under a warranty that a wire-binding harvester would do good work with a twine attachment, evidence that a twine attachment placed thereon some time after the sale would not do good work tends to show that at the time of sale the harvester was not adapted for such attachment, and is

with the time of sale or the time immediately preceding,[74] it is admissible to show that defects existed prior to the sale.[75] If the warranty is in the nature of a continuing warranty the evidence need not be confined to the time of the sale.[76]

(5) REPAIRS. Evidence as to the amount spent by the buyer in repairs is admissible on the question of value at the time of the purchase.[77]

(c) *Damages.* On the issue as to damages evidence is admissible as to the amount paid for the goods,[78] their value at the time of the sale[79] or within a short time of the sale,[80] what the value of the goods would be if they were as warranted,[81] and their value in view of the defects,[82] and also the cost of remedying such

admissible to support the defense of breach of warranty.

**Matter of defense.**— In an action against a nurseryman for a breach of warranty in the sale of peach trees which proved untrue to their label, evidence that the trees were injured by cold weather after the action was brought is incompetent. Angell *v.* Pruyn, 126 Mich. 16, 85 N. W. 258.

74. Gingles *v.* Caldwell, 21 Ala. 444; Bristol *v.* Galway, 68 Conn. 248, 36 Atl. 44; Daniells *v.* Aldrich, 42 Mich. 58, 3 N. W. 253.

**Permanency of defect.**— In an action upon a warranty of a horse, whose eyes were sore at the time of the sale, evidence of the condition of the eyes a year afterward was admissible for the purpose of showing that the disease was not temporary but permanent. Such evidence would not be proper *per se* to show the condition at the time of the sale. There should also be evidence of the condition in the intermediate time. Freyman *v.* Knecht, 78 Pa. St. 141.

**The opinion of an expert, who examined a lame horse three weeks after his purchase, as** to the length of time the lameness had existed, is incompetent to show breach of warranty, there being no proof of the character and probable cause of such unsoundness. Sledge *v.* Scott, 56 Ala. 202.

**Extension of time for trial.**— In an action for the price of a harvester it was shown in defense that the machine was sold under a warranty in 1888, but, failing to work satisfactorily, it was returned to the seller. By agreement the contract was extended one year, the buyer to give the machine a trial in 1889. It failed to work then, and was again returned. The admission of evidence of defects existing in 1888 was not error where it was shown that the machine's work was unsatisfactory in the same respects in both years. Plano Mfg. Co. *v.* Jackson, 38 Ill. App. 104.

**Soundness.**—In an action for breach of warranty of soundness defendant is entitled to introduce evidence to rebut any presumption that the disease which plaintiff claims constituted unsoundness existed in a formed state at the time of sale, and was of a permanent nature. McCeney *v.* Duvall, 21 Md. 166.

75. Starke *v.* Dicks, 2 Ind. App. 125, 28 N. E. 214; Dickens *v.* Williams, 2 B. Mon. (Ky.) 374; Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609; Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550.

76. Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.

77. Marbury Lumber Co. *v.* Stearns Mfg. Co., 107 S. W. 200, 32 Ky. L. Rep. 739.

78. Woody *v.* Bennett, 88 Cal. 241, 26 Pac. 117; Cary *v.* Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013; Chaplin *v.* Warner, 23 Wis. 448. But see Perrine *v.* Serrell, 30 N. J. L. 454; Rutan *v.* Ludlam, 29 N. J. L. 398.

79. Wilson *v.* Reedy, 33 Minn. 503, 24 N. W. 191.

**Admissions of seller.**— In an action for breach of warranty in the sale of a horse, statements and representations of defendant as to the value of the horse, made at the time of the sale, although not admissible to vary the contract of sale, are properly received as admissions bearing on the question of damages. Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143.

80. Stone *v.* Watson, 37 Ala. 279.

81. Stone *v.* Watson, 37 Ala. 279; Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143; Harrell *v.* Broome, (Tex. Civ. App. 1899) 50 S. W. 1077.

**Composite machines.**— In an action by the purchaser of a refrigerating plant for damages for breach of warranty, where the value of the plant as it was when accepted by plaintiff was arrived at by evidence showing the value of certain portions of the plant, which plaintiff had used, and that the other portions were entirely worthless, the admission of such evidence for the purpose of arriving at the damages was not error. Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 89 N. Y. Suppl. 142. But in an action by a purchaser to recover damages for a breach of warranty in the sale of a coal burning engine with a straw-burning attachment, it appearing that the engine as a coal burner was a complete machine, irrespective of the straw-burning device, it was error to reject testimony tending to show the value of the engine independently of the straw-burning attachment. Benson *v.* Port Huron Engine, etc., Co., 83 Minn. 321, 86 N. W. 327.

**Goods of different qualities.**—Where the contract for the sale of a quantity of dates, of two kinds, makes no distinction as to the respective values of the two kinds, evidence is incompetent, in an action for the breach of warranty of the merchantable condition of one of the kinds; as furnished, to show that such kind was not worth as much as the other kind. Levi *v.* Dimmick, 99 Cal. 490, 34 Pac. 79.

82. Woody *v.* Bennett, 88 Cal. 241, 26 Pac. 117; Boynton Furnace Co. *v.* Messner, 97

defects.[83] It may also be shown whether the buyer took such steps as were necessary to prevent unnecessary loss.[84] Evidence as to an offer of third persons not familiar with their character to buy the goods at a certain price is not competent to show value,[85] nor can it be shown at what price the buyer resold the goods.[86] Evidence fixing the value long after the sale is incompetent.[87] If the breach is not proved evidence as to damages is properly excluded.[88] If after discovering the breach of warranty the purchaser induces his vendee to accept it and makes a settlement with him therefor, evidence of the settlement is admissible on the question of damages sustained by breach of warranty.[88]

(III) *WEIGHT AND SUFFICIENCY.* Where breach of warranty is pleaded either as a ground of action or as a counter-claim, the warranty and the breach thereof must be established by a preponderance of evidence;[90] and if the buyer affirms and defendant denies the warranty, the buyer cannot recover in the absence of corroborating evidence.[91] It is not, however, essential that the evi-

Iowa 254, 66 N. W. 65; Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1; Johnston Harvester Co. *v.* Clark, 31 Minn. 165, 17 N. W. 111; Osborne *v.* McQueen, 67 Wis. 392, 29 N. W. 636.

**Retail or wholesale price.**— In an action by a florist against a seed dealer for breach of warranty that lily bulbs sold by defendant to plaintiff would produce a certain kind of lily, on an issue of the market value of the crop actually produced, evidence of the price paid for a wholesale quantity of lilies at a retail store may be rejected as uninstructive with regard to growers' prices. Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

**Contradictory evidence.**— In a suit for the price of a harvester, where the defense was a breach of warranty, and it appeared that there was no trouble in cutting or lifting the grain, but the machine would not bind more than half of it, a question "what a self-binder is worth that fails to be useful as a machine of that character, if it is of no use as a binder or harvester," was improper. Aultman *v.* Ginn, 1 N. D. 402, 48 N. W. 336.

**83.** Wheeler, etc., Mfg. Co. *v.* Thompson, 33 Kan. 491, 6 Pac. 902; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253; Johnston Harvester Co. *v.* Clark, 31 Minn. 165, 17 N. W. 111. But see Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

**84.** Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

**85.** Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec 93.

**86.** Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969; Roe *v.* Hanson, 5 Lans. (N. Y.) 304; J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013. But see Houston *v.* Starnes, 34 N. C. 313.

**87.** Times Co. *v.* North Carolina Steel, etc., Co., 114 N. C. 224, 19 S. E. 147; Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081; Milwaukee Rice Mach. Co. *v.* Hamacek, 115 Wis. 422, 91 N. W. 1010.

**88.** Whitney Iron-Works *v.* Reuss, 40 La. Ann. 112, 3 So. 500.

**89.** Rogers *v.* Petrified Bone Min. Co., 158 Fed. 799, 86 C. C. A. 59 [*affirming* 150 Fed. 445].

**90.** *Illinois.*— Cook *v.* Tavener, 41 Ill. App. 642.

*Iowa.*— McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537.

*New York.*— Raines *v.* Totman, 64 How. Pr. 493.

*North Dakota.*— James *v.* Bekkedahl, 10 N. D. 120, 86 N. W. 226.

*Oregon.*— Schumann *v.* Wager, 36 Oreg. 65, 58 Pac. 770; Druck *v.* Nicolai, 16 Oreg. 512, 19 Pac. 650.

*Pennsylvania.*— Pratt *v.* Paules, 8 Pa. Cas. 40, 4 Atl. 751.

*Texas.*— Asb *v.* Beck, (Civ. App. 1902) 68 S. W. 53.

**Fraud.**— In an action for damages for a fraudulent warranty on the sale of a chattel, an instruction that plaintiff, to recover, was bound to produce the "greater weight of evidence to establish the facts alleged constituting fraud," and to establish his case "by a clear preponderance of the evidence," was not erroneous as not requiring plaintiff to establish his case "by clear and satisfactory proof." Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63.

**91.** *Colorado.*— Colorado Dry Goods Co. *v.* W. P. Dunn Co., 18 Colo. App. 409, 71 Pac. 887.

*Kentucky.*— Palmer *v.* Mt. Sterling Nat. Bank, 18 S. W. 234, 13 Ky. L. Rep. 790.

*Michigan.*— Deuel *v.* Higgins, 9 Mich. 223.

*Minnesota.*— Geiser Threshing Mach. Co. *v.* Dresden, 29 Minn. 169, 12 N. W. 453.

*New York.*— Raines *v.* Totman, 64 How. Pr. 493.

**Evidence held sufficient to show warranty** see Oil-Well Supply Co. *v.* Priddy, 41 Ind. App. 200, 83 N. E. 623; Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822; Mitchell *v.* Emmons, 104 Me. 76, 71 Atl. 321; Thompson *v.* Morse, 94 Me. 359, 47 Atl. 900; Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N S. 855; Smilie *v.* Hobbs, 64 N. H. 75, 5 Atl. 711; Messenger *v.* Pratt, 3 Lans. (N. Y.) 234; Osborne *v.* Walther, 12 Okla. 20, 69 Pac. 953; Newberry *v.* Bennett, 38 Fed. 308, 13 Sawy. 632.

**Evidence held insufficient to show warranty** see Electric Storage Battery Co. *v.* Waterloo, etc., R. Co., 138 Iowa 369, 116 N. W. 144; J. I. Case Threshing Mach. Co. *v.* Lyons, 72

dence should be more direct or positive than in other civil actions.[92] There can be no recovery unless damage by reason of the breach is shown.[93] In fixing the value of the property as an element of the measure of damages the price paid is *prima facie* evidence of value but is not conclusive.[94]

**k. Damages**[95] — (1) *In General.* The elements of substantial damages are many and vary according to the particular circumstances of the case. It is, however, elementary that only such damages may be recovered as are direct, certain, or liquidated,[96] and which result naturally and directly from the

S. W. 356, 24 Ky. L. Rep. 1862; Farrell *v.* Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. N. S. 884; Forster Vinegar Mfg. Co. *v.* Guggemos, 98 Mo. 391, 11 S. W. 966; McDonald *v.* Nuse, 12 Misc. (N. Y.) 507, 33 N. Y. Suppl. 661.

**Action against prior seller.**—A judgment recovered against a seller of goods for breach of an implied warranty of soundness is not evidence which will enable him to recover against the person from whom he bought on a like warranty, notwithstanding such first seller had notice of the action in which the judgment was recovered. Smith *v.* Moore, 7 S. C. 209, 24 Am. Rep. 479.

**Reliance on warranty.**— It is not essential that the purchaser of personal property on the trial should testify that he relied on the assurance by the vendor which constitutes the warranty, if the circumstances are such as to justify the inference that he did so. J. I. Case Threshing-Mach. Co. *v.* McKinnon, 82 Minn. 75, 84 N. W. 646.

**92.** Kornegay *v.* White, 10 Ala. 255; Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286.

**For evidence held sufficient to show:** A breach of warranty of quality of goods see Northwest Thresher Co. *v.* Hulburt, 103 Minn. 276, 115 N. W. 159; Evertson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 83; Punteney-Mitchell Mfg. Co. *v.* T. G. Northwall Co., 70 Nebr. 688, 97 N W. 1040; Schroeder *v.* Coatesville Rolling Mill Co., 31 N. Y. App Div. 295, 52 N. Y. Suppl. 731 [*affirmed* in 164 N. Y. 587, 58 N. E. 1092]; Conestoga Cigar Co. *v.* Finke, 144 Pa. St. 159, 22 Atl. 868, 13 L. R. A. 438; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810. And see Moneyweight Scale Co. *v.* Hjerpe, 106 Minn. 47, 118 N. W. 62. Gentleness of horse see Staats *v.* Byers, 68 N. Y. App. Div. 634, 73 N. Y. Suppl. 893 [*affirmed* in 174 N. Y. 508, 66 N. E. 1117]. Soundness of horse see Dunbar *v.* Briggs, 13 Nebr. 332, 14 N. W. 414; Robinson *v.* Snow, (Tex. Civ. App. 1903) 74 S. W. 328. Capacity of heater see Cassady *v.* Horton, 32 Misc. (N. Y.) 148, 65 N. Y. Suppl. 626. Quality of fruit trees see De Foe *v.* Wilmas, 99 Mo. App. 24, 72 S. W. 475. Capacity of machine see Seiberling *v.* Brauer, 24 Nebr. 510, 39 N. W. 591. Animal as a breeder see Hutchings *v.* Cole, 42 Ill. App. 261.

**For evidence held insufficient to show:** A breach of warranty of quality of goods see Forster Vinegar Mfg. Co. *v.* Guggemos, 98 Mo. 391, 11 S. W. 966; Star Lubricating Oil Works *v.* White, 34 Nebr. 542, 52 N. W. 572; Shoe *v.* Maerky, 35 Pa. Super Ct. 270; Miller *v.* Greenleaf, (Tex. Civ. App. 1891) 18 S. W. 89. The capacity and quality of machines see Crenshaw *v.* Looker, 185 Mo. 375, 84 S. W. 885; Rosso *v.* Milwaukee Harvester Co., 2 Nebr. (Unoff.) 212, 96 N. W. 213; Flath *v.* Casselman, 10 N. D. 419, 87 N. W. 988. Animal as a breeder see Hartley *v.* Furgeson, 50 Wash. 309, 97 Pac. 234.

**For evidence held insufficient to show entire failure of consideration** see Keniston *v.* Todd, 139 Iowa 287, 117 N. W. 674.

**93.** Thompson *v.* Martin, 84 Ga. 11, 10 S. E. 369; Hooper *v.* Story, 155 N. Y. 171, 49 N. E. 773 [*affirming* 79 Hun 53, 29 N. Y. Suppl. 639]; Van Allen *v.* Allen, 1 Hilt. (N. Y.) 524; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Suppl. 448; Gilbert *v.* Gossard, (Tex. Civ. App. 1903) 73 S. W. 989.

**Damages.**— The sufficiency of the evidence as to the amount of damages was considered in Osborne *v.* Huntington, 37 Minn. 275, 33 N. W. 789; Atkin Bros. Co. *v.* Southern Grain Co., 130 Mo. App. 542, 109 S. W. 88; Narr *v.* Norman, 113 Mo. App. 533, 88 S. W. 122; Lyon *v.* Moore, 35 Nebr. 636, 53 N. W. 573; Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388; Mix *v.* Staples, 17 N. Y. Suppl. 775.

**94.** Overbay *v.* Lighty, 27 Ind 27; Storer *v.* Taber, 83 Me. 387, 22 Atl. 256; Layson *v.* Wilson, 37 Mo. App. 636.

**Value.**— Sufficiency of evidence to show value is considered in Black *v.* Dudley, 75 N. Y. App. Div. 72, 77 N. Y. Suppl. 766; Dwight Bros. Paper Co. *v.* Western Paper Co., 114 Wis. 414, 90 N. W. 444.

**Defective attachments.**— In an action for breach of warranty of a harvester and binder, where the defects complained of were in the binding attachment solely, and the harvester is admitted to work satisfactorily, and may be separated at a moderate expense, or supplied with a new binder, testimony that the machine, as a harvester and binder, was worthless, will not justify a finding fixing the value thereof at a sum different and much less than the undisputed evidence shows it to be worth as a harvester. Osborne *v.* Carpenter, 37 Minn 331, 34 N. W. 163. To the same effect see Dodds *v.* McCormick Harvesting Mach. Co., 62 Nebr. 759, 87 N. W. 911.

**95.** See, generally, DAMAGES, 13 Cyc. 1.

**96.** Florence Wagon Works *v.* Trinidad Asphalt Mfg. Co., 145 Ala. 677, 40 So. 49; F. Hammar Paint Co. *v.* Glover, 47 Kan. 15, 27 Pac. 130; Lenz *v.* Blake, 44 Oreg. 569, 76 Pac. 356.

breach,[97] and which may reasonably be regarded as within the contemplation of the parties at the time of the sale as the probable consequence of a breach.[98] There

**Statement of damages.**—Where a buyer, before suit, has submitted to the seller a statement of his damages in consequence of the article sold being of an inferior quality to what it was warranted, he is not limited in the suit subsequently commenced to the amount specified in such statement, but may recover all the damages he can show he has sustained. Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132.

**Nominal damages.**— On a breach of warranty there arises at once a right to nominal damages. F. Hammar Paint Co. *v.* Glover, 47 Kan. 15, 27 Pac. 130; Vogel *v.* Osborne, 34 Minn. 454, 26 N. W. 453.

**Amount of damages.**— In an action for damages for breach of warranty, where a set-off to a certain amount was admitted, an instruction that if the jury find for plaintiff they should, after ascertaining his damages, deduct therefrom the amount of the set-off, was not, as suggesting that plaintiff's damages must exceed the amount of the set-off, erroneous, where defendant did not request another instruction, and the jury found that plaintiff's damages largely exceeded the set-off. Poland *v.* Miller, 95 Ind. 387, 48 Am. Rep. 730.

**Excess of counter-claim.**— The court properly instructed the jury that if they found, from the evidence, that defendants were entitled to damages on their counter-claim in any sum less than the aggregate amount of the notes sued on, it should be credited thereon, and that, if such damage equaled the amount of the notes, they should find for defendants, and, if greater than the sum of the notes, they should find for defendants the excess. Bean *v.* Taylor, 61 S. W. 31, 22 Ky. L. Rep. 1665.

**97.** *Alabama.*— Florence Wagon Works *v.* Trinidad Asphalt Mfg. Co., 145 Ala. 677, 40 So. 49.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261.

*Illinois.*— Crabtree *v.* Kile, 21 Ill. 180; O. H. Jewell Filter Co. *v.* Kirk, 102 Ill. App. 246 [*affirmed* in 200 Ill. 382, 65 N. E. 698]; Heenan *v.* Redmen, 101 Ill. App. 603.

*Kentucky.*— Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433, 23 Ky. L. Rep. 584, 98 Am. St. Rep. 406, 54 L. R. A. 417; Marbury Lumber Co. *v.* Stearns Mfg. Co., 107 S. W. 200, 32 Ky. L. Rep. 739.

*Nebraska.*— Burr *v.* Redhead, Norton, Lathrop Co., 52 Nebr. 617, 72 N. W. 1058.

*New York.*— Dommerich *v.* Garfunkel, 28 Misc. 433, 58 N. Y. Suppl. 1006.

*North Carolina.*— Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

*Oregon.*— Drake *v.* Sears, 8 Oreg. 209.

*Pennsylvania.*— McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188.

*Texas.*— Danner *v.* Ft. Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. 856.

*Vermont.*— Pinney *v.* Andrus, 41 Vt. 631.

*Wisconsin.*— Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

*United States.*— Cleveland Linseed Oil Co. *v.* Buchanan, 120 Fed. 906, 57 C. C. A. 498.

*England.*— Dingle *v.* Hare, 7 C. B. N. S. 145, 6 Jur. N. S. 679, 29 L. J. C. P. 143, 1 L. T. Rep. N. S. 38, 97 E. C. L. 145.

**Mental suffering.**— In an action for damages for breach of warranty as to the character and quality of a rooming house sold by defendant to plaintiff, damages for humiliation and mental agony resulting to plaintiff were not recoverable. Walsh *v.* Meyer, 40 Wash. 650, 82 Pac. 938.

**Insufficient directions as to use.**—Where appellants warranted a safe to be burglar proof, but gave incomplete directions for locking it, they were liable for the amount stolen therefrom by reason of its not being properly locked, if the directions were followed. Deane *v.* Michigan Stove Co., 69 Ill. App 106. But see Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4, holding that, on the breach of a warranty that a safe is burglar proof, the loss of valuables taken therefrom is not an element of damages.

**Defect in part of goods.**— There can of course be a recovery only for such of the goods as are actually defective. Meagley *v.* Hoyt, 125 N. Y. 771, 26 N. E. 719; Smith *v.* Sipe, 11 Ohio Dec. (Reprint) 275, 25 Cinc. L. Bul. 394.

**98.** *Arkansas.*— De Loach Mill Mfg. Co. *v.* Bonner, 64 Ark. 510, 43 S. W. 504.

*Indiana.*— Elwood Planing Mills Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621.

*Kentucky.*— Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433, 23 Ky. L. Rep. 584, 98 Am. St. Rep. 406, 54 L. R. A. 417; Marbury Lumber Co. *v.* Stearns Mfg. Co., 107 S. W. 200, 32 Ky. L. Rep. 739; Danville Coal, etc., Co. *v.* Viltner Mfg. Co., 79 S. W. 225, 25 Ky. L. Rep. 1974.

*Maine.*— Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

*New York.*— Birdsinger *v.* McCormick Harvesting Mach. Co., 95 N. Y. App. Div. 621, 88 N. Y. Suppl. 1092 [*affirmed* in 183 N. Y. 487, 76 N. E. 611, 3 L. R. A. N. S. 1047]; Birdsinger *v.* McCormick Harvesting Mach. Co., 92 N. Y. App. Div. 35, 86 N. Y. Suppl. 781; Detroit White Lead Works *v.* Knaszak, 13 Misc. 619, 34 N. Y. Suppl. 924.

*North Carolina.*— Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

*Pennsylvania.*— Philadelphia, etc., Coal, etc., Co. *v.* Hoffman, 1 Pa. Cas. 405, 4 Atl. 848.

*Texas.*— Aultman, etc., Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243; Danner *v.* Ft. Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. 856.

*Washington.*— Puget Sound Iron, etc., Works *v.* Clemmons, 32 Wash. 36, 72 Pac. 465.

*Wisconsin.*— Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am.

can be no recovery of damages which are remote and speculative.[99] The damages may be enhanced by special circumstances increasing the loss.[1] But of course there can be no recovery of such enhanced damages, if they were caused or contributed to by an insufficiency of the article in its form or size which was designated by the buyer,[2] or by persisting in the use thereof after knowledge of defects,[3] or by the negligence of the buyer.[4]

(II) *Time and Place by Which Determinable.* Although in some cases it is said that the damages are to be determined as of the time and place of sale,[5] the rule as it is generally stated is that the damages are to be determined as of the time and place of delivery.[6]

St. Rep. 984; Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

**Damages in contemplation of parties.**— In an action to recover the price of goods sold, evidence that defendant resold the goods to third persons, who used them; that they proved worthless; and that defendant thereby lost trade and custom, and suffered much damage, is not admissible to sustain a defense of breach of warranty, where defendant testified that he bought the goods for his own use, and there is no evidence that plaintiff knew that defendant was in the habit of selling such goods. Detroit White Lead Works *v.* Knaszak, 13 Misc. (N. Y.) 619, 34 N. Y. Suppl. 924.

**Loss of raw material.**— Damages for the breach of a warranty on the sale of a sawmill cannot include a claim growing out of the loss of timber prepared for conversion into lumber, by reason of the failure of such mill to operate as warranted, where such damages were not contemplated at the time of such sale. De Loach Mill Mfg. Co. *v.* Bonner, 64 Ark. 510, 43 S. W. 504.

**Sale of notes with warranty of solvency.**— Where the holder of notes given as the purchase-price of land indorsed and transferred the same, falsely representing that the makers were solvent, and knowing that the makers had surrendered the bond for title on which the notes were given, he is personally liable for the amount of the notes, although the transferee held collateral security. Vance *v.* McBurnett, 94 Ga. 251, 21 S. E. 520.

**99.** *Alabama.*— Marshall *v.* Gantt, 15 Ala. 682.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261.

*Iowa.*— Peoples' Sav. Bank *v.* Waterloo, etc., Rapid Transit Co., 118 Iowa 740, 92 N. W. 691.

*Kansas.*— F. Hammar Paint Co. *v.* Glover, 47 Kan. 15, 27 Pac. 130.

*Minnesota.*— Johnston Harvester Co. *v.* Clark, 31 Minn. 165, 17 N. W. 111.

*New York.*— Detroit White Lead Works *v.* Knaszak, 13 Misc. 619, 34 N. Y. Suppl. 924.

*Rhode Island.*— Kent *v.* Halliday, 23 R. I. 182, 49 Atl. 700.

*England.*— Spedding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133.

**1.** Frohreich *v.* Gammon, 28 Minn. 476, 11 N. W. 88.

**Defect in heater.**— In an action for damages for breach of a warranty of an apparatus for heating a house, damages arising from a failure to heat a room in a house used as a physician's office by plaintiff, the rental value of which was shown to be a certain sum per month, are recoverable. Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640.

**2.** Nashua Iron, etc., Co. *v.* Brush, 91 Fed. 213, 33 C. C. A. 456.

**3.** *Iowa.*— Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193.

*Kansas.*— Gale Sulky Harrow Mfg. Co. *v.* Moore, 46 Kan. 324, 26 Pac. 703.

*Kentucky.*— Danville Coal, etc., Co. *v.* Viltner Mfg. Co., 79 S. W. 225, 25 Ky. L. Rep. 1974.

*New York.*— Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, 63 N. Y. Suppl. 649 [*affirmed* in 169 N. Y. 587, 62 N. E. 1094]; Draper *v.* Sweet, 66 Barb. 145.

*Pennsylvania.*— McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188.

*Tennessee.*— Gaar *v.* Stark, (Ch. App. 1895) 36 S. W. 149.

See 43 Cent. Dig. tit. "Sales," § 1299.

**Additional expense.**— Where plaintiff guaranteed that certain machinery sold by it to defendant would "deliver pulp 50% dry," the extra expense of transporting the manufactured product, by reason of increased weight caused by the failure of the machinery to produce pulp in such condition, could not be recovered by defendant in an action for the purchase-price of such machinery. Bagley etc., So. *v.* Saranac River Pulp, etc., Co., 16 N. Y. Suppl. 657 [*affirmed* in 135 N. Y. 626, 32 N. E. 132].

**4.** Foote *v.* Woodworth, 66 Vt. 216, 28 Atl. 1034; Pinney *v.* Andrus, 41 Vt. 631.

**5.** *Alabama.*— Buford *v.* Gould, 35 Ala. 265.

*Arkansas.*— Thompson *v.* Bertrand, 23 Ark. 730.

*Illinois.*— McClure *v.* Williams, 65 Ill. 390.

*Louisiana.*— Iberia Cypress Co. *v.* Von Schoeler, 121 La. 72, 46 So. 105.

*Minnesota.*— Wilson *v.* Reedy, 33 Minn. 503, 24 N. W. 191.

*Missouri.*— Brown *v.* Emerson, 66 Mo. App. 63; McCormick Harvesting Mach. Co. *v.* Heath, 65 Mo. App. 461.

*New York.*— Cary *v.* Gruman, 4 Hill 625, 40 Am. Dec. 299.

*South Dakota.*— Hermon *v.* Silver, 15 S. D. 476, 90 N. W. 141.

See 43 Cent. Dig. tit. "Sales," § 1287.

**6.** *California.*— Krasilnikoff *v.* Dundon, 8 Cal. App. 406, 97 Pac. 172, holding, however, that where personal property is sold on a warranty to be used at some place other than the place of sale and delivery, and this is

(III) *DIFFERENCE IN VALUE.* The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted,[7] and in the application of the rule it is held

known to the seller, damages may be estimated with reference to values at the place where the property is to be used, and in such case the conditions existing at that place are presumed to be within the contemplation of the parties in making the contract of warranty.

*Georgia.*—Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657.

*Illinois.*— Houston *v.* Wendnagel, 135 Ill. App. 95; Atlas Furniture Co. *v* E. S. Higgins Carpet Co., 71 Ill. App. 17.

*Kansas.*— Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

*Kentucky.*— Heilman Milling Co. *v.* Hotaling, 53 S. W. 655, 21 Ky. L. Rep. 950.

*Massachusetts.*— Whitehead, etc., Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

*New York.*— Lattin *v.* Davis, Lalor 9.

*Pennsylvania.*— Morse *v.* Arnfield, 15 Pa. Super. Ct. 140.

*Texas.*— Tripis *v.* Gamble, (Civ. App. 1894) 28 S. W. 244; Miles *v.* Patterson, 2 Tex. Civ. App. § 783.

*Wisconsin.*— Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

See 43 Cent. Dig. tit. "Sales," § 1287.

**Place of use.**— The general rule of damages on a breach of warranty on a sale of personal property is the difference between the value of the article sold in its defective condition and the market value of the article at the place where it is to be used in its condition represented by the vendor. Converse *v.* Burrows, 2 Minn. 229.

7. *Alabama.*— Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Buford *v.* Gould, 35 Ala. 265; Stoudenmeier *v.* Williamson, 29 Ala. 558; Worthy *v.* Patterson, 20 Ala. 172; Marshall *v.* Wood, 16 Ala. 806; Kornegay *v.* White, 10 Ala. 255.

*Arkansas.*— Murry *v.* Meredith, 25 Ark. 164; Tatum *v* Mohr, 21 Ark. 349.

*California.*— Silberhorn Co. *v.* Wheaton, (1897) 51 Pac. 689.

*Delaware.*— Collins *v.* Tigner, 5 Pennew. 345, 60 Atl. 978; Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377; Burton *v.* Young, 5 Harr. 233.

*Georgia.*—Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657; Berry *v.* Shannon, 98 Ga. 459, 25 S. E. 514, 58 Am. St. Rep. 313; Porter *v.* Pool, 62 Ga. 238; Hook *v.* Stovall, 26 Ga. 704.

*Illinois.*— E. A. Moore Furniture Co. *v.* Sloane, 166 Ill. 457, 46 N. E. 1128 [*affirming* 64 Ill. App. 581]; Thorne *v.* McVeagh, 75 Ill. 81; McClure *v.* Williams, 65 Ill. 390; Wallace *v.* Wren, 32 Ill. 146; Strawn *v.* Cogswell, 28 Ill. 457; Woodworth *v.* Woodburn, 20 Ill. 184; Hennan *v.* Redmen, 101 Ill. App. 603; Skinner *v.* Mulligan, 56 Ill. App. 47; Glidden *v.* Pooler, 50 Ill. App. 36; Miller *v.* Law, 44 Ill. App. 630.

*Indiana.*— Cline *v.* Myers, 64 Ind. 304; Ferguson *v.* Hosier, 58 Ind. 438; Tritlipo *v.* Lacy, 55 Ind. 287; Booher *v.* Goldsborough, 44 Ind. 490; Street *v.* Chapman, 29 Ind. 142; Overbay *v.* Lighty, 27 Ind. 27; Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543; Green *v.* Witte, 5 Ind. App. 343, 32 N. E. 214.

*Iowa.*—Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Douglass *v.* Moses, (1896) 65 N. W. 1004; Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857; Love *v.* Ross, 89 Iowa 400, 56 N. W. 528; Douglass *v.* Moses, 89 Iowa 40, 56 N. W. 271, 48 Am. St. Rep. 353; Short *v.* Matteson, 81 Iowa 638, 47 N. W. 874; Jackson *v.* Mott, 76 Iowa 263, 41 N. W. 12; Lacey *v.* Straughan, 11 Iowa 258.

*Kansas.*— Weybrick *v.* Harris, 31 Kan. 92, 1 Pac. 271; Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437, 57 Pac. 43.

*Kentucky.*— Danville Coal, etc., Co. *v.* Viltner Mfg. Co., 79 S. W. 225, 25 Ky. L. Rep. 1974; Ewing *v.* Hauss, 50 S. W. 249, 20 Ky. L. Rep. 1883; Sharpe *v.* Bettis, 32 S. W. 395, 17 Ky. L. Rep. 673.

*Louisiana.*— Iberia Cypress Co. *v.* Von Schoeler, 121 La. 72, 46 So. 105.

*Maine.*— Noble *v.* Buswell, 96 Me. 73, 51 Atl. 244; Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310; Moulton *v.* Scruton, 39 Me. 287.

*Maryland.*— Horn *v.* Buck, 48 Md. 358.

*Massachusetts.*— Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 855; Whitmore *v.* South Boston Iron Co., 2 Allen 52; Tuttle *v.* Brown, 4 Gray 457, 64 Am. Dec. 80.

*Michigan.*— Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 92. And see Chester *v.* Crawford, 152 Mich. 400, 116 N. W. 202.

*Minnesota.*— Miamisburg Twine, etc., Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175; Hansen *v.* Gaar, 63 Minn. 94, 65 N. W. 254; Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3; Frohreich *v.* Gammon, 28 Minn. 476, 11 N. W. 88; Converse *v.* Burrows, 2 Minn. 229.

*Mississippi.*— Stillwell, etc., Co. *v.* Biloxi Canning Co., 78 Miss. 779, 29 So. 513.

*Missouri.*— Stearns *v.* McCullough, 18 Mo. 411; Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123; Narr *v.* Norman, 113 Mo. App. 533, 88 S. W. 122; Doyle *v.* Parish, 110 Mo. App. 470, 85 S. W. 646; Brown *v.* Emerson, 66 Mo. App. 63; McCormick Harvesting Mach. Co. *v.* Heath, 65 Mo. App. 461; Layson *v.* Wilson, 37 Mo. App. 636; Hayner *v.* Churchill, 29 Mo. App. 676; Brown *v.* Weldon, 27 Mo. App. 251 [*affirmed* in 99 Mo. 564, 13 S. W. 342].

*Montana.*— Hogan *v.* Shuart, 11 Mont. 498, 28 Pac. 969.

*Nebraska.*— Dunn *v.* Bushnell, 63 Nebr.

that the fact that the goods were actually worth the price which was paid for

568, 88 N. W. 693, 93 Am. St. Rep. 474; Brown *v.* Rogers, 20 Nebr. 547, 31 N. W. 75; Birdsall *v.* Carter, 11 Nebr. 143, 7 N. W. 751.

*New Jersey.*— Perrine *v.* Serrell, 30 N. J. L. 454.

*New York.*— Beeman *v.* Banta, 118 N. Y. 538, 23 N. E. 887, 16 Am. St Rep. 779; Muller *v.* Eno, 14 N. Y. 597; Ames *v.* Norwich Light Co., 115 N. Y. App. Div. 185, 100 N. Y. Suppl. 932; McCarthy *v.* Ellers, 107 N. Y. App. Div. 219, 94 N. Y. Suppl. 1109; Long *v.* Chapman, 97 N. Y. App. Div. 241, 89 N. Y. Suppl. 841; Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235, 72 N. Y. Suppl. 662; Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610, 63 N. Y. Suppl. 640; Zuller *v.* Rogers, 7 Hun 540; Wells *v.* Selwood, 61 Barb. 238; Roberts *v.* Carter, 28 Barb. 462; Sharon *v.* Mosher, 17 Barb. 518; Kiernan *v.* Rocheleau, 6 Bosw. 148; Prentice *v.* Dike, 6 Duer 220; Renaud *v.* Peck, 2 Hilt. 137; Fales *v.* McKeon, 2 Hilt. 53; Steinhardt *v.* Phelps, 32 Misc. 730, 66 N. Y. Suppl. 311; McQuade *v.* Newman, 88 N. Y. Suppl. 363; Aherin *v.* O'Brien, 18 N. Y. Suppl. 821; Chace *v.* Nichols, 9 N. Y. Suppl. 878; Hunt *v.* Van Deusen, 3 N. Y. Suppl. 75; Kays *v.* Eugert, 8 N. Y. St. 505; Cary *v.* Gruman, 4 Hill 625, 40 Am. Dec. 299. *Compare* North Collins Bank *v.* Cary Safe Co., 42 N. Y. App. Div. 233, 59 N. Y. Suppl. 643; Edwards *v.* Collson, 5 Lans. 324; Sears *v.* Bailey, 58 Misc. 145, 110 N. Y. Suppl. 467; Bodger *v.* Hills, 113 N. Y. Suppl. 879.

*North Carolina.*— Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627; Huyett, etc., Mfg. Co. *v.* Gray, 126 N. C. 108, 35 S. E. 236, 124 N. C. 322, 32 S. E. 718; Hobbs *v.* Bland, 124 N. C. 284, 32 S. E. 683; Pritchard *v.* Fox, 49 N. C. 140.

*North Dakota.*—Aultman *v.* Ginn, 1 N. D. 402, 48 N. W. 336.

*Ohio.*— Beresford *v.* McCune, 1 Cinc. Super. Ct. 50.

*Pennsylvania.*— Seigworth *v.* Leffel, 76 Pa. St. 476; Struthers *v.* Clark, 30 Pa. St. 210; Cothers *v.* Keever, 4 Pa St. 168; Shoe *v.* Maerky, 35 Pa. Super. Ct. 270.

*South Carolina.*— Wallace *v.* Frazier, 2 Nott & M. 516.

*South Dakota.*— Hermon *v.* Silver, 15 S. D. 476, 90 N. W. 141 (under statute); Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

*Tennessee.*— Smith *v.* Cozart, 2 Head 526; McGavock *v.* Wood, 1 Sneed 181; Allen *v.* Anderson, 3 Humphr. 581, 39 Am. Dec. 197; Garr *v.* Young, (Ch. App. 1901) 62 S. W. 631.

*Texas.*— Wright *v.* Davenport, 44 Tex. 164; Aultman, etc., Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243; Danner *v.* Ft. Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. 856; Snyder *v.* Baker, (Civ. App. 1896) 34 S. W. 981; Tripis *v.* Gamble, (Civ. App. 1894) 28 S. W. 244; Miller *v.* Greenleaf, (Civ. App. 1891) 18 S. W. 89; Miles *v.* Patterson, 2 Tex. App. Civ. Cas. § 783; Russell *v.* Walker, 1 Tex. App. Civ. Cas. § 889; Howard *v.* Moore, 1 Tex. App. Civ. Cas. § 225.

*Vermont.*— Houghton *v.* Carpenter, 40 Vt. 588.

*Virginia.*— Thornton *v.* Thompson, 4 Gratt. 121.

*Washington.*— Walsh *v.* Meyer, 40 Wash. 650, 82 Pac. 938.

*Wisconsin.*— Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984; Parry Mfg. Co. *v.* Tobin, 106 Wis. 286, 82 N. W. 154; Park *v.* Richardson, etc., Co., 91 Wis. 189, 64 N. W. 859; J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013; Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572; Aultman, etc., Co. *v.* Hetherington, 42 Wis. 622.

*United States.*— Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Nashua Iron, etc., Co. *v.* Brush, 91 Fed. 213, 33 C. C. A. 456; Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241; Hercules Iron Works *v.* Dodsworth, 57 Fed. 556; Mack *v.* Sloteman, 21 Fed. 109.

*England.*— Jones *v.* Just, L. R. 3 Q. B. 197, 37 L. J. Q. B. 89, 18 L. T. Rep. N. S. 208, 16 Wkly. Rep. 643; Caswell *v.* Coare, 2 Campb. 82, 1 Taunt. 566, 10 Rev. Rep. 606, 11 Rev. Rep. 668; Dingle *v.* Hare, 7 C. B. N. S. 145, 6 Jur. N. S. 679, 29 L. J. C. P. 144, 1 L. T. Rep. N. S. 38, 97 E. C. L 145; Loder *v.* Kekulé, 3 C. B. N. S. 128, 4 Jur. N. S. 93, 27 L. J. C. P. 27, 5 Wkly. Rep. 884, 91 E. C. L. 128.

See 43 Cent. Dig. tit. "Sales," § 1285.

**Warranty of quantity.**—Where one sells timber, warranting that the quantity shall consist of a certain number of cords, the measure of damages for a breach of the warranty is not the market value of the wood, but a due proportion of the purchase-money, with interest. Parker *v.* Barlow, 93 Ga. 700, 21 S. E. 213. See also Harris *v.* Thayer, 125 Mass. 443.

**Fitness for particular purpose.**— The measure of damages recoverable for breach of warranty in the sale of an engine guaranteed to have sufficient power to do certain work is to be determined by the difference between its market value for any purpose and its value as warranted. Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632.

**Wholesale or retail price.**— The measure of damages for breach of a warranty of quality of a car-load of oranges intended for retail trade is their reasonable retail market value had they been in good condition, less the amount realized from a fair sale of them, and the market value of car-load lots is not the standard. Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1902) 69 S. W. 196.

**Value of defective article.**— In an action for breach of contract to manufacture a proper piston rod for an engine, an instruction that the measure of damages was the difference between the value of the piston rod as it was before it was broken and afterward was properly refused, since the rod, if actu-

them is immaterial.[8] The difference between the purchase-price and the actual value cannot be regarded as the measure of damages,[9] as in such case the purchaser recovers too small a sum if he has made a bad bargain and paid more than the goods were worth, and too great a sum if he has made a good bargain, paying less than the goods were worth.[10] It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase-price and the actual value of the goods;[11] but in nearly all of these cases the theory

ally defective, would seem to have been equally valuable after as it was before the defect was discovered. Rollins Engine Co. *v.* Eastern Forge Co., 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441.

**Defective material.**—Where bricks are bought by sample, but those delivered are not of the same quality as the sample, the buyer is entitled to show, in an action by the seller to recover the price, the value of his building with the defective bricks used in the wall, and the value as it would have been had the bricks been delivered according to the sample. New York Hydraulic Press Brick Co. *v.* Cunn, 43 Misc. (N. Y.) 330, 87 N. Y. Suppl. 168. To the same effect see Elwood Planing Mill Co. *v.* Harting, 21 Ind. App. 408, 52 N. E. 621. But see Washington Hydraulic Press Brick Co. *v.* Sinnott, 92 N. Y. Suppl. 504.

**Value of product.**—Where a warranty of goods sold to be made up into garments was broken, the buyer's recovery should not be limited to the difference between the value of the inferior goods and the price to be paid, but, having made the material into garments, he should be allowed to show that, owing to the quality of the material, the garments could not be sold, and had no value. Dommerick *v.* Garfunkel, 28 Misc. (N. Y.) 433, 58 N. Y. Suppl. 1006.

**Part payment.**—Where the article is retained by the buyer the amount of a part payment is not to be included in the damages. Himes *v.* Kiehl, 154 Pa. St. 190, 25 Atl. 632.

**Value for resale.**—Where eggs are sold on a warranty that they are of a certain quality, the measure of damages for a breach of the warranty is the difference between the price the eggs brought on resale by the buyer and that which they would have brought had the quality been as represented by the seller. Egbert *v.* Hanford Produce Co., 92 N. Y. App. Div. 252, 86 N. Y. Suppl. 1118.

**Warranty of price on resale.**—Where the seller of a large lot of pelts, after guaranteeing that the buyer should realize a certain profit, induced him to withhold them from resale on a declining market, the proper measure of damages for the breach was the difference between the price realized on resale and the price paid, plus the profit guaranteed. Morris *v.* Barrett, 24 Ohio St. 201.

**Defect of part of machine.**— In an action by a purchaser to recover damages for a breach of warranty in the sale of a coal-burning engine with a straw-burning attachment, it appeared that the engine, as a coal burner, was a complete machine, irrespective of the straw-burner device. The measure of damages was the difference in value, for any purpose, between the engine delivered and the combination sold, had it been as warranted. Benson *v.* Port Huron Engine, etc., Co., 83 Minn. 321, 86 N. W. 327. See also McCormick Harvester Mach. Co. *v.* McNicholas, 66 Minn. 384, 69 N. W. 36.

8. Hook *v.* Stovall, 26 Ga. 704; Douglass *v.* Moses, (Iowa 1896) 65 N. W. 1004.

9. Hook *v.* Stovall, 26 Ga. 704; Cothers *v.* Keever, 4 Pa. St. 168; McGavock *v.* Wood, 1 Sneed (Tenn.) 181; Park *v.* Richardson, etc., Co., 91 Wis. 189, 64 N. W. 859.

10. Park *v.* Richardson, etc., Co., 91 Wis. 189, 64 N. W. 859.

11. *Colorado.*— Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 61 Pac. 483; Cannon City Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. 1030.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261; Feagin *v.* Beasley, 23 Ga. 17; Badgett *v.* Broughton, 1 Ga. 591.

*Illinois.*— Crabtree *v.* Kile, 21 Ill. 180; Houston *v.* Wendnagel, 135 Ill. App. 95; Atlas Furniture Co. *v.* E. S. Higgins Carpet Co., 71 Ill. App. 17. But see Wallace *v.* Wren, 32 Ill. 146.

*Kansas.*— Wheeler, etc., Mfg. Co. *v.* Thompson, 33 Kan. 491, 6 Pac. 902.

*Kentucky.*— Harrigan *v.* Advance Threshing Co., 81 S. W. 261, 26 Ky. L. Rep. 317; Merkley *v.* Phillips, 53 S. W. 1037, 21 Ky. L. Rep. 1040.

*Missouri.*— Courtney *v.* Boswell, 65 Mo. 196; Miles *v.* Withers, 76 Mo. App. 87; Hayner *v.* Churchill, 29 Mo. App. 676.

*Nebraska.*— Punteney-Mitchell Mfg. Co. *v.* T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863.

*North Carolina.*— Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718.

*Texas.*— Routh *v.* Caron, 64 Tex. 289; Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658; Schuwirth *v.* Thumma, (Civ. App. 1902) 66 S. W. 691; Beard *v.* Miller, (App. 1890) 16 S. W. 655; Cullers *v.* Wilson, 2 Tex. App. Civ. Cas. § 816.

See 43 Cent. Dig. tit. "Sales," § 1286.

**Price or value.**— The measure of damages for breach of warranty is the difference between the actual value of the article sold and its value in the condition warranted, although its value as warranted exceeded the contract price; but, in case the vendee paid more for the article than its reasonable market value, his recovery is controlled by the purchase-price, rather than by the market value. Narr *v.* Norman, 113 Mo. App. 533, 88 S. W. 122.

undoubtedly is that, in accordance with the general rule, if there is no other evidence of the actual value of the goods the purchase-price will be regarded as such value.[12]

(IV) *PRICE.* If the right to rescind and return the goods exists and there is a return of the goods or a valid tender the measure of damages is the price paid.[13] So too where there is a stipulation that if the goods do not fulfil the warranty they will be taken back and the price paid or notes given therefor returned to the buyer, the measure of damages is the price paid or the value of the notes if they cannot be returned or a return is refused.[14] If the goods are worthless the price is the measure of damages irrespective of a return or tender.[15] To justify

See also Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123.

**Purchase-price as limit of recovery.**— In Snyder *v.* Baker, (Tex. Civ. App. 1896) 34 S. W. 981, the measure of damages is stated to be the difference between the value of the goods as warranted and the value as they actually exist, not to exceed the purchase-price and interest. The decision is based on Wright *v.* Davenport, 44 Tex. 164, which was an action for the purchase-price with a plea in reconvention. There is nothing in the language of the court to support it, but in the head-note it is stated that defendant, buyer, is entitled to an abatement of the purchase-price equal to the difference between the value of the article furnished and that contracted for.

12. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349.

*Georgia.*— Clark *v.* Neufville, 46 Ga. 261; Hook *v.* Stovall, 30 Ga. 418; Feagin *v.* Beasley, 23 Ga. 17.

*Indiana.*— Street *v.* Chapman, 29 Ind. 142; Overbay *v.* Lighty, 27 Ind. 27.

*Kansas.*— Wheeler, etc., Mfg. Co. *v.* Thompson, 33 Kan. 491, 6 Pac. 902.

*Maine.*— Storer *v.* Taber, 83 Me. 387, 22 Atl. 256.

*Mississippi.*— Hambrick *v.* Wilkins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631.

*Missouri.*— Hayner *v.* Churchill, 29 Mo. 676; Layson *v.* Wilson, 37 Mo. App. 636.

*North Dakota.*—Aultman *v.* Ginn, 1 N. D. 402, 48 N. W. 336.

*Pennsylvania.*— Seigworth *v.* Leffel, 76 Pa. St. 476.

*Texas.*— Routh *v.* Caron, 64 Tex. 289; Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658; Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53; Beard *v.* Miller, (App. 1890) 16 S. W. 655; Cullers *v.* Wilson, 2 Tex. App. Civ. Cas. § 816.

*Vermont.*— Houghton *v.* Carpenter, 40 Vt. 588.

*Virginia.*— Thornton *v.* Thompson, 4 Gratt. 121.

*Wisconsin.*— Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

*United States.*— South Covington, etc., St. R. Co. *v.* Gest, 34 Fed. 628.

**Price stated in bill of sale.**— In the absence of other evidence, the price recited in a bill of sale of a slave would be regarded as the price agreed upon by the parties and as his value if he had been sound as warranted. Tatum *v.* Mohr, 21 Ark. 349.

**Market value indeterminate.**—Where plaintiff sold defendant a machine representing it as of a certain capacity, but there is no machine on the market of such capacity, the measure of damages for a breach of warranty is not the difference between the value of a machine such as represented and that of the one delivered, but the difference between the purchase-price and the real value of the machine when delivered. Huyett-Smith Mfg. Co. *v.* Gray, 129 N. C. 438, 40 S. E. 178, 57 L. R. A. 193.

13. *Illinois.*— Morgan *v.* Ryerson, 20 Ill. 343.

*Iowa.*— Jackson *v.* Mott, 76 Iowa 263, 41 N. W. 12.

*Michigan.*— Felt *v.* Reynold's Fruit Evaporating Co., 52 Mich. 602, 18 N. W. 378.

*Missouri.*— Skeen *v.* Springfield Engine, etc., Co., 34 Mo. App. 485.

*Nebraska.*— Sycamore Marsh Harvester Co. *v.* Sturm, 13 Nebr. 210, 13 N. W. 202.

*New York.*— McCarthy *v.* Ellers, 107 N. Y. App. Div. 219, 94 N. Y. Suppl. 1109; Long *v.* Chapman, 97 N. Y. App. Div. 241, 89 N. Y. Suppl. 841; Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235, 72 N. Y. Suppl. 662; Lewis *v.* Doyle, 13 N. Y. App. Div. 291, 43 N. Y. Suppl. 201.

*England.*— Caswell *v.* Coare, 2 Campb. 82, 1 Taunt. 566, 10 Rev. Rep. 606, 11 Rev. Rep. 668.

14. White *v.* Miller, (Iowa 1906) 105 N. W. 993; Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8; Vogel *v.* Osborne, 34 Minn. 454, 26 N. W. 453; Boley *v.* Walter A. Wood Mowing, etc., Mach. Co., 62 Mo. App. 139.

15. *Alabama.*— Landman *v.* Bloomer, 117 Ala. 312, 23 So. 75; Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 18 So. 659, 54 Am. St. Rep. 188; Willis *v.* Dudley, 10 Ala. 933.

*Georgia.*— Feagin *v.* Beasley, 23 Ga. 17.

*Iowa.*— Wingate *v.* Johnson, 126 Iowa 154, 101 N. W. 751.

*Kentucky.*— Pennebaker *v.* Bell City Mfg. Co., (1908) 113 S. W. 829.

*Maryland.*— Lane *v.* Lantz, 27 Md. 211.

*Mississippi.*— Texada *v.* Camp, Walk. 150.

*Missouri.*— Small *v.* Bartlett, 96 Mo. App. 550, 70 S. W. 393.

*North Carolina.*— Williamson *v.* Canaday, 25 N. C. 349.

*South Carolina.*— Seibles *v.* Blackwell, 1 McMull. 56.

*Texas.*— Gutta Percha, etc., Co. *v.* Cleburne, (Civ. App. 1908) 107 S. W. 157;

a recovery of the price it must, however, appear that the goods were entirely worthless for any purpose.[16]

(v) *PROFITS.* Under the rule that no damages which are remote and speculative or not in contemplation of the parties can be recovered,[17] the loss of prospective profits is not an element of damages,[18] unless the seller knew of the existence of contracts on the part of the buyer from which such profits would accrue, and the sale was made in reference thereto,[19] or the profits were evidently within the contemplation of the parties,[20] and are capable of accurate proof.[21]

(vi) *EXPENSES* — (a) *In General.* Under the rule allowing a recovery of damages resulting naturally and directly from a breach of warranty,[22] any and all expenses the incurring of which can be traced directly and naturally to the

Westinghouse Electric Mfg. Co. *v.* Troell, 30 Tex. Civ. App. 200, 70 S. W. 324; Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53.

**Instruction.**— In an action for the price of a machine where defendant set up a breach of warranty and claimed that the machine was worthless, and the court charged that if defendant had shown that there was a warranty, which was broken, and that the machine was worthless, the money paid on account might be recovered, and at plaintiff's request stated that the correct rule of defendant's damages was the difference between the value of the machine, if it were perfect when delivered, and its value at the time of trial, inasmuch as defendant's evidence showed that the machine was worthless, and the court in the first instruction had said that the jury, before applying the rule, should so find, the instruction was not erroneous, although the latter one correctly stated the rule; the two instructions, under the circumstances, being identical. J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110].

**Part payment.**— In an action for the balance due on a sale, defended on the ground of a breach of warranty, an instruction that, if defendant could recover, she was entitled to recover the amount paid, to be applied on any difference between the article ordered and the article received, was misleading, since the rule when a partial payment has been made is that, if the payment exceeds the value of the article furnished, defendant is entitled to the excess, and cannot recover the full amount paid unless the article is utterly worthless for the purpose intended. Schumann *v.* Wager, 36 Oreg. 65, 58 Pac. 770.

16. Morgan *v.* Collins, 19 Ill. 126; J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

17. See *supra*, VII, J, 3, k, (I).

18. *Alabama.*— Moulthrop *v.* Hyett, 105 Ala. 493, 17 So. 32, 53 Am. St. Rep. 139.

*Illinois.*— Glidden *v.* Pooler, 50 Ill. App. 36.

*Iowa.*— Peoples' Sav. Bank *v.* Waterloo, etc., Rapid Transit Co., 118 Iowa 740, 92 N. W. 691; Alpha Checkrower Co *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Love *v.* Ross, 89 Iowa 400, 56 N. W. 528.

*Louisiana.*— Castellano *v.* Peillon, 2 Mart. N. S. 466.

*Missouri.*— Connoble *v.* Clark, 38 Mo. App. 476.

*New York.*— Lattin *v.* Davis, Lalor 9.

*North Carolina.*— Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Gifford *v.* Betts, 64 N. C. 62.

*Ohio.*— Knorr *v.* Reedy, 11 Ohio Dec. (Reprint) 465, 27 Cinc. L. Bul. 103.

*Oregon.*— Drake *v.* Sears, 8 Oreg. 209.

*Texas.*— Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689.

*Washington.*— Puget Sound Iron, etc., Works *v.* Clemmons, 32 Wash. 36, 72 Pac. 465.

*United States.*— English *v.* Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416.

*England.*—Clare *v.* Maynard, 6 A. & E. 519, 33 E. C. L. 282, 7 C. & P. 741, 32 E. C. L. 849, 6 L. J. K. B. 138, 1 N. & P. 701, 1 W. W. & H. 274.

See 43 Cent. Dig. tit. "Sales," §§ 1288, 1289.

19. *Illinois.*— Thorne *v.* McVeagh, 75 Ill. 81; Glidden *v.* Pooler, 50 Ill. App. 36.

*Kansas.*— Weybrick *v.* Harris, 31 Kan. 92, 1 Pac. 271.

*New York.*— Messmore *v.* New York Shot, etc., Co., 40 N. Y. 422.

*North Carolina.*—Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Lewis *v.* Rountree, 79 N. C. 122, 28 Am. Rep. 309.

*Canada.*— Sheard *v.* Horan, 30 Ont. 618.

And see Germain Fruit Co. *v.* J. K. Arnsby Co., 153 Cal. 585, 96 Pac. 319.

20. Punteney-Mitchell Mfg. Co *v.* T. G. Northwall Co., 70 Nebr. 688, 97 N. W. 1040; Drake *v.* Sears, 8 Oreg. 209; Aultman, etc., Mach. Co. *v.* Cappman, 36 Tex. Civ. App. 523, 81 S. W. 1243.

**Special machinery.**—Where the defense in an action for the contract price of a machine which cannot be bought in the market is breach of warranty, whereby the purchaser lost a sale of such machine, the measure of damages is the difference between what it would have cost to fulfil the contract and what the purchaser of the machine would have received if he had not been prevented from so doing. Carroll-Porter Boiler, etc., Co. *v.* Columbus Mach. Co., 55 Fed. 451, 5 C. C. C. A. 190.

21. Punteney-Mitchell Mfg. Co *v.* T. G. Northwall Co., 70 Nebr. 688, 97 N. W. 1040.

22. See *supra*, VII, J, 3, k, (I).

breach of the warranty are an element of damages,[23] and it is not necessary that such expenses should have been actually paid if the liability therefor is incurred.[24] Thus there may be a recovery of expenses incurred for freight,[25] or for the installa-

23. *Alabama.*— Kelly *v.* Cunningham, 36 Ala. 78.

*Arkansas.*— Murry *v.* Meredith, 25 Ark. 164; Tatum *v.* Mohr, 21 Ark. 349.

*Georgia.*— Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508.

*Illinois.*— Fisher *v.* Bertram, 100 Ill. App. 542; Glidden *v.* Pooler, 50 Ill. App. 36; Hodgman *v.* State Line, etc., R. Co., 45 Ill. App. 395.

*Iowa.*— Peoples' Sav. Bank *v.* Waterloo, etc., Rapid Transit Co., 118 Iowa 740, 92 N. W. 691; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369; Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184.

*Kentucky.*—South Bend Pulley Co. *v.* W. E. Caldwell Co., (1899) 54 S. W. 12, (1900) 55 S. W. 208.

*Louisiana.*— Bataille *v.* Firemen's Ins. Co., 2 Rob. 60.

*Missouri.*— Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123.

*New York.*— Ruben *v.* Lewis, 20 Misc. 583, 46 N. Y. Suppl. 426.

*Oregon.*— Drake *v.* Sears, 8 Oreg. 209.

*Wisconsin.*— J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 63 N. W. 1013.

*United States.*—McRae *v.* Lonsby, 130 Fed. 17, 64 C. C. A. 385.

See 43 Cent. Dig. tit. "Sales," § 1290.

**Insurance.**— In an action for false warranty in the sale of an engine, plaintiff is entitled only to damages naturally arising from the fraud, and cannot recover interest or insurance on such engine. Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917.

**Expense of defending action on note for price.**— E purchased a machine, and gave his negotiable note therefor, upon the condition that if it failed to do good work, and the defects were not remedied by the company selling it, his note would be returned to him upon a return of the machine. The machine proved to be defective, and was returned, but, instead of returning the note, the seller indorsed it before due to L. When L brought an action against E to recover on the note, E believing, and having some cause to believe, that the transfer was not *bona fide*, employed counsel to defend, but was unsuccessful. In an action for damages against the seller for breach of warranty, it was held that the defense against the note was judicious and apparently necessary, and that the expenses of counsel therein were a legitimate consequence of the wrongful action of defendant, and were properly taken into consideration by the jury. Osborne *v.* Ehrhard, 37 Kan. 413, 15 Pac. 590.

**Attorney's fees.**— In an action for breach of warranty plaintiff is not entitled to recover attorney's fees for prosecuting the action, where there is no allegation that defendant was guilty of deceit or acted in bad faith. Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220.

**Condemnation of food sold with warranty.** — Where food sold with a warranty is condemned in the hands of the purchaser who is convicted and fined under the Public Health Act the purchaser is entitled to recover as damages from the seller the costs imposed by the magistrate as these two payments flowed from the breach of warranty; but the fine could not be recovered in the absence of anything to show what considerations influenced the magistrate when he imposed it. Crage *v.* Fry, 67 J. P. 240, 1 Loc. Gov. 253.

**Collateral expense.**—Where cider was sold by plaintiff to defendant with a warranty as to quality, and at the same time plaintiff, at defendant's request, obtained certain labels to be used by defendant in selling the cider, the cost of obtaining which defendant agreed to pay, the fact that the cider failed to come up to the warranty, and that defendant was therefore entitled to return it, although a defense to an action for the price of the cider, was not a defense to a claim to recover the cost of the labels. Barrett *v.* Wheeler, 71 Iowa 662, 33 N. W. 230.

**Expenses paid by seller.**— On a breach of warranty by the seller of a power plant as to fuel economy in its use, the buyer is not entitled to damages on account of the seller adding forty feet to the length of the smokestack, where it was done at the seller's own expense, in good faith, and with the buyer's consent to increase the efficiency of the plant. Ames *v.* Norwich Light Co., 122 N. Y. App. Div. 319, 106 N. Y. Suppl. 952.

24. Kelly *v.* Cunningham, 36 Ala. 78; National Horse-Importing Co. *v.* Novak, 95 Iowa 596, 64 N. W. 616; F. Hammar Paint Co. *v.* Glover, 47 Kan. 15, 27 Pac. 130.

**Necessity of showing liability.**—In an action to recover for breach of warranty as to the capacity of a heater, evidence that, by reason of a defect constituting a breach of warranty, plaintiff had to take his son from work to watch the heater for three months, and that the son's time was worth a dollar a day, in the absence of proof of what the son's work was or whether he was paid for it, or that the father was entitled to the proceeds of the work from which the son was taken, or that he paid the son for watching the heater, or that he agreed to pay the son anything, does not warrant a verdict allowing the value of the son's services as an element of damages. Lockwood *v.* Dewey, 29 Misc. (N. Y.) 751, 60 N. Y. Suppl. 471.

25. Thorne *v.* McVeagh, 75 Ill. 81; Briggs *v.* M. Rumely Co., 96 Iowa 202, 64 N. W. 784; South Bend Pulley Co. *v.* W. E. Caldwell Co., 54 S. W. 12, 21 Ky. L. Rep. 1084, 55 S. W. 208, 21 Ky. L. Rep. 1363; Lattin *v.* Davis, Lalor (N. Y.) 9. But see Canon City

tion of machinery purchased which proves defective,[26] and expense due to the delay caused by the breach, such as the wages of idle hands, etc., may be recovered.[27] While there can be no recovery of expenses of making an examination of the goods,[28] the expense of a test made at the seller's request may be recovered.[29] On breach of warranty on the sale of a horse or other animal the expense of the animal's keep may be recovered,[30] and also the expense of the care of diseased animals and attempts to cure them.[31] It is, however, essential that the expenses for which claim is made shall have been incurred before knowledge of the breach,[32] except that where, on breach of a warranty of soundness of an animal, a tender in return is refused, the buyer is entitled to compensation for the keep of the animal for a reasonable time for the purpose of resale.[33]

(B) *Curing or Avoiding Consequences of Defects.* If the defect constituting the breach of warranty is capable of being remedied the measure of damages may be the expense of remedying the defect,[34] or of avoiding the consequences

Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. 1030, holding that where a contract of sale provided that, if the goods were not as warranted, the seller would refund the purchase-money, the buyer, on breach of the warranty, cannot recover the freight charges paid thereon, where the goods were delivered and the money to be paid was the price at the seller's place of business.

**26.** Drake *v.* Sears, 8 Oreg. 209; Accumulator Co. *v.* Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37. And see Huyett, etc., Mfg. Co. *v.* Gray, 111 N. C. 92, 15 S. E. 940. See also Griffith *v.* Williams Patent Crusher, etc., Co., 103 Mo. App. 32, 77 S. W. 330 (holding that such expenses are not reasonable unless the seller has agreed to pay them); Wood *v.* Carleton, 3 Silv. Sup. (N. Y.) 509, 6 N. Y. Suppl. 865 (holding that such expenses are not reasonable where the purchaser retains and continues to use the machine).

**Repairing defects in building.**—An implied warranty that elevators sold to defendant are suitable for the purpose for which they are to be used does not entitle him, in an action for the price, to set off the cost of repairing defects in his building in order to accommodate and properly operate the elevators. Reedy *v.* Weakley, (Tenn. Ch. App. 1897) 39 S. W. 739.

**27.** Zuller *v.* Rogers, 7 Hun (N. Y.) 540; Kester *v.* Miller, 119 N. C. 475, 26 S. E. 115; Optenberg *v.* Skelton, 109 Wis. 241, 85 N. W. 356. *Contra*, Sycamore Marsh Harvester Co. *v.* Sturm, 13 Nebr. 210, 13 N. W. 202; Osborne *v.* Barnett, 1 Tex. App. Civ. Cas. § 125.

**28.** Lifshitz *v.* McConnell, 80 N. Y. App. Div. 289, 80 N. Y. Suppl. 253.

**29.** Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604. *Compare* Sturtevant Mill Co. *v.* Kingsland Brick Co., 74 N. J. L. 492, 70 Atl. 732, holding that the expense in making a test provided for in a contract cannot be recouped in the absence from the contract of any provision that the seller should pay the expenses of the test.

**30.** Wallace *v.* Tanner, 118 Ill. App. 639; National Horse Importing Co. *v.* Novak, 95 Iowa 596, 64 N. W. 616; Love *v.* Ross, 89 Iowa 400, 56 N. W. 528; Short *v.* Matteson, 81 Iowa 638, 47 N. W. 874; Seibles *v.* Blackwell, 1 McMull. (S. C.) 56; Chesterman *v.* Lamb, 2 A. & E. 129, 4 N. & M. 195, 29 E. C. L. 78; Ellis *v.* Chinnock, 7 C. & P. 169, 32 E. C. L. 556; McKenzie *v.* Hancock, R. & M. 436, 21 E. C. L. 790.

**Extra care.**—Where a horse was warranted as to pedigree extra care and expense because of that fact is not an element of damages. Sharpe *v.* Bettis, 32 S. W. 395, 17 Ky. L. Rep. 673.

**31.** *Illinois.*— Heenan *v.* Redmen, 101 Ill. App. 603.

*Maryland.*— Horn *v.* Buck, 48 Md. 358.

*Missouri.*— Young *v.* Van Natta, 113 Mo. App. 550, 88 S. W. 123; Galbreath *v.* Carnes, 91 Mo. App. 512.

*New Jersey.*—Perrine *v.* Serrell, 30 N. J. L. 454.

*North Dakota.*— Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103.

*South Carolina.*— Farr *v.* Gist, 1 Rich. 68.

*Tennessee.*— McGavock *v.* Wood, 1 Sneed 181.

*Texas.*— Routh *v.* Caron, 64 Tex. 289.

**Contra.**— Cline *v.* Myers, 64 Ind. 304; Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3.

**32.** Elwood *v.* McDill, 105 Iowa 437, 75 N. W. 340; Aultman *v.* Stout, 15 Nebr. 586, 19 N. W. 464; Zuller *v.* Rogers, 7 Hun (N. Y.) 540.

**33.** Seibles *v.* Blackwell, 1 McMull (S. C.) 56; Ellis *v.* Chinnock, 7 C. & P. 169, 32 E. C. L. 556; McKenzie *v.* Hancock, R. & M. 436, 21 E. C. L. 790.

**34.** *Alabama.*— Florence Wagon Works *v.* Trinidad Asphalt Mfg. Co., 145 Ala. 677, 40 So. 49; Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509.

*Connecticut.*— Hitchcock *v.* Hunt, 28 Conn. 343.

*Illinois.*— Phelan *v.* Andrews, 52 Ill. 486.

*Iowa.*— Bixby *v.* Denison Normal School Assoc., (1899) 78 N. W. 234.

*Kansas.*— F. Hammar Paint Co. *v.* Glover, 47 Kan. 15, 27 Pac. 130.

*Maine.*— Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

*Massachusetts.*—Whitehead, etc., Mach. Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736.

*Missouri.*— Reeds *v.* Lee, 64 Mo. App. 683.

thereof,[35] and in computing such expense the loss of time of the purchaser and his employees may be included.[36] But such loss of time cannot be included if the contract of sale provides that the seller shall have an opportunity to remedy the defects.[37]

(VII) *EFFECT OF RESALE.* While the amount received on a resale of the goods does not affect the buyer's right to recover damages,[38] except in so far as such amount may, in the absence of other evidence, be considered as evidence of the value of the goods,[39] any loss directly resulting from the breach of warranty on a resale of the goods may be an element of damages.[40] Thus if the buyer resells the goods with a similar warranty and the subpurchaser recovers judgment on such warranty against the buyer the amount of such judgment is the measure of damages against the original seller,[41] and in addition thereto the buyer may recover

*Nebraska.*— Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118.

*New York.*—New York State Monitor Milk-Pan Co. *v.* Remington, 109 N. Y. 143, 16 N. E. 48; Miller *v.* F. R. Patch Mfg. Co., 101 App. Div. 22, 91 N. Y. Suppl. 870; Long *v.* Chapman, 97 N. Y. App. Div. 241, 89 N. Y. Suppl. 841; Rochevot *v.* Wolf, 96 N. Y. App. Div. 506, 89 N. Y. Suppl. 142; Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38, 63 N. Y. Suppl. 649 [*affirmed* in 169 N. Y. 587, 62 N. E. 1094]; Lockwood *v.* Dewey, 28 Misc. 751, 60 N. Y. Suppl. 471.

*Ohio.*— Smoot *v.* Foster, 16 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 218.

*Tennessee.*— Reedy *v.* Weakley, (Ch. App. 1897) 39 S. W. 739.

*Texas.*— Masterson *v.* Heitmann, 38 Tex. Civ. App. 476, 87 S. W. 227; Dilley *v.* Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237; Graves *v.* Hillyer, (Civ. App. 1899) 48 S. W. 889.

*Wisconsin.*— J. I. Case Plow Works *v.* Niles, etc., Co., 107 Wis. 9, 82 N. W. 568; Williams *v.* Thrall, 101 Wis. 337, 76 N. W. 599.

*United States.*— Hercules Iron Works *v.* Dodsworth, 57 Fed. 556.

*Canada.*— Crompton, etc., Loom Works *v.* Hoffman, 5 Ont. L. Rep. 554.

See 43 Cent. Dig. tit. "Sales," § 1289.

**Expenses unreasonably or unnecessarily incurred** will not be allowed. Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 223.

**35.** Phelan *v.* Andrews, 52 Ill. 486; Nye, etc., Co. *v.* Snyder, 56 Nebr. 754, 77 N. W. 118; Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984; Hudmon *v.* Cuyas, 57 Fed. 355, 6 C. C. A. 381; Carroll-Porter Boiler, etc., Co. *v.* Columbus Mach. Co., 55 Fed. 451, 5 C. C. A. 190.

**36.** Huyett, etc., Mfg. Co. *v.* Saile, 45 Ill. App. 562; Dilley *v.* Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237. See also Cassidy *v.* Le Fevre, 45 N. Y. 562.

**37.** McCormick *v.* Vanatta, 43 Iowa 389; Kingsland, etc., Mfg. Co. *v.* Board, 60 Mo. App. 662; Smoots *v.* Foster, 16 Ohio Cir. Ct. 612, 9 Ohio Cir. Dec. 218. But *compare* Canon City Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. 1030; Cassidy *v.* Le Fevre, 45 N. Y. 562.

**38.** *Georgia.*— Berry *v.* Shannon, 98 Ga. 459, 25 S. E. 514, 58 Am. St. Rep. 313.

*Illinois.*— Wheelock *v.* Berkeley, 138 Ill. 153, 27 N. E. 942.

*Iowa.*— Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193.

*Massachusetts.*— Brown *v.* Bigelow, 10 Allen 242.

*Minnesota.*— Miamisburg Twine, etc., Co. *v.* Wohlhuter, 71 Minn. 484, 74 N. W. 175.

*Mississippi.*— Texada *v.* Camp, Walk. 150.

*Missouri.*—Brown *v.* Emerson, 66 Mo. App. 63.

*New York.*— Black *v.* Dudley, 75 N. Y. App. Div. 72, 77 N. Y. Suppl. 766; Comstock *v.* Hutchinson, 10 Barb. 211; Bodger *v.* Hills, 113 N. Y. Suppl. 879.

*United States.*—Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224.

See 43 Cent. Dig. tit. "Sales," § 1298.

**39.** Milton *v.* Rowland, 11 Ala. 732; Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657; Berry *v.* Shannon, 98 Ga. 458, 25 S. E. 514, 58 Am. St. Rep. 313; Dukes *v.* Nelson, 27 Ga. 457; Woodward *v.* Thacher, 21 Vt. 580, 52 Am. Dec. 73; Dingle *v.* Hare, 7 C. B. N. S. 145, 6 Jur. N. S. 679, 29 L. J. C. P. 143, 1 L. T. Rep. N. S. 38, 97 E. C. L. 145.

**40.** Cleveland Linseed Oil Co. *v* Buchanan, 120 Fed. 906, 57 C. C. A. 498.

**41.** *Massachusetts.*— Reggia *v.* Braggiotti, 7 Cush. 166.

*New York.*— Carleton *v.* Lombard, 19 N. Y. App. Div. 297, 46 N. Y. Suppl. 120 [*affirmed* in 162 N. Y. 628, 57 N. E 1106].

*Tennessee.*— Reese *v.* Miles, 99 Tenn. 398, 41 S. W. 1065.

*United States.*—Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. 159.

*England.*— Pennell *v.* Woodburn, 7 C. & P. 117, 32 E. C. L. 528; Healey *v.* Woodcock, 1 F. & F. 532; Lewis *v.* Peake, 2 Marsh. 431, 7 Taunt. 153, 17 Rev. Rep. 475, 2 E. C. L. 303.

See 43 Cent. Dig. tit. "Sales," § 1298.

**Claims by subpurchasers.**— In an action brought by a purchaser on a breach of warranty on a sale of goods, evidence given by subpurchasers who had bought portions of the goods with a similar warranty, that they had made claims against the purchaser for breach of warranty is admissible as the

the expenses incurred in defending the action brought by the subpurchaser,[42] provided proper notice was given to the seller to defend.[43] The expenses incurred in making the abortive sale may also be included in the damages.[44] Where goods are sold ostensibly for the use of the buyer and a resale by him is not contemplated by the seller, damages arising from such resale, such as the loss of trade or custom by reason of the poor quality of the goods, are not recoverable.[45]

(VIII) *INTEREST.* Interest will in general be allowed on the amount of damages.[46] It is allowable from the date of the breach, and not from the date of the contract.[47]

(IX) *INJURIES TO PROPERTY.* Where raw material is purchased to be used in connection with other material, loss or injury to such other components by reason of defects in the raw material purchased is an element of damages,[48] as

natural and probable result of the breach of the original contract, and notwithstanding none of the claims have been satisfied. Randall *v.* Raper, E. B. & E. 84, 4 Jur. N. S. 662, 27 L. J. Q. B. 266, 6 Wkly. Rep. 445, 96 E. C. L. 84.

**42.** Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Carleton *v.* Lombard, 19 N. Y. App. Div. 297, 46 N. Y. Suppl. 120 [*affirmed* in 162 N. Y. 628, 57 N. E. 1106]; Pennell *v.* Woodburn, 7 C. & P. 117, 32 E. C. L. 528; Lewis *v.* Peake, 2 Marsh. 431, 7 Taunt. 153, 17 Rev. Rep. 475, 2 E. C. L. 303. But see Joseph *v.* Richardson, 2 Pa. Super. Ct. 208, 38 Wkly. Notes Cas. 487.

**Improvident defense.**— If from the circumstances of the case the defense of the action brought by the subpurchasers is rash and improvident, the costs of such defense cannot be recovered. Wrightup *v.* Chamberlain, Arn. 28, 2 Jur. 328, 7 Scott 598.

**43.** Erie City Iron Works *v.* Tatum, 1 Cal. App. 286, 82 Pac. 92; Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Carleton *v.* Lombard, 19 N. Y. App. Div. 297, 46 N. Y. Suppl. 120 [*affirmed* in 162 N. Y. 628, 57 N. E. 1106].

**44.** Hodgman *v.* State Line, etc., R. Co., 45 Ill. App. 395; Punteney-Mitchell Mfg. Co. *v.* T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863.

**General expenses.**— Expenditures made in advertising, and losses incurred in the general or miscellaneous business of the purchasers, cannot be allowed as damages, as the relation between such expenditure and the breach is too remote and uncertain. Carroll-Porter Boiler, etc., Co. *v.* Columbus Mach. Co., 55 Fed. 451, 5 C. C. A. 190.

**45.** Detroit White Lead Works *v.* Knaszak, 13 Misc. (N. Y.) 619, 34 N. Y. Suppl. 924. See also Sutherland *v.* Round, 57 Fed. 467, 6 C. C. A. 428.

**46.** *Alabama.*— Buford *v.* Gould, 35 Ala. 265; Stoudenmeier *v.* Williamscn, 29 Ala. 558; Rowland *v.* Shelton, 25 Ala. 217; Marshall *v.* Wood, 16 Ala. 806; Kornegay *v.* White, 10 Ala. 255.

*Connecticut.*— Ferris *v.* Comstock, 33 Conn. 513.

*Florida.*— McKay *v.* Lane, 5 Fla. 268.

*Georgia.*— Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508.

*Kentucky.*— Wood *v.* Wood, 1 Metc. 512; South Bend Pulley Co. *v.* W. E. Caldwell Co., 54 S. W. 12, 21 Ky. L. Rep. 1084, 55 S. W. 208, 21 Ky. L. Rep. 1363. But see Scott *v.* Clarkson, 1 Bibb 277.

*Louisiana.*— Burham *v.* Hart, 15 La. Ann. 517.

*Michigan.*— Christie *v.* Crawford, 152 Mich. 400, 116 N. W. 202; Felt *v.* Reynolds Rotary Fruit Evaporating Co., 52 Mich. 602, 18 N. W. 378.

*Minnesota.*— Merrick *v.* Wiltse, 37 Minn. 41, 33 N. W. 3; Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373, 13 N. W. 149.

*Mississippi.*— Noel *v.* Wheatly, 30 Miss. 181; Texada *v.* Camp, Walk. 150.

*Missouri.*— Courtney *v.* Boswell, 65 Mo. 196.

*North Carolina.*— Critcher *v.* Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Williamson *v.* Canaday, 25 N. C. 349.

*Tennessee.*— Crittenden *v.* Posey, 1 Head 311.

*Texas.*— Routh *v.* Caron, 64 Tex. 289; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280; Ash *v.* Beck, (Civ. App. 1902) 68 S. W. 53.

See 43 Cent. Dig. tit. "Sales," § 1293.

**Contra.**— Moulton *v.* Scruton, 39 Me. 287; White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Suppl. 320 [*affirmed* in 130 N. Y. 681, 29 N. E. 1034].

**Where the damages are not certain on the face of the contract** and are ascertainable only upon evidence as to values in a foreign country interest should not be allowed. Krasilnikoff *v.* Dundon, 8 Cal. App. 406, 97 Pac. 172.

**In South Carolina** it has been held that on failure of warranty of title interest on the price paid from the time of sale is recoverable (Ware *v.* Weathnall, 2 McCord (S. C.) 413), but that in an action for breach of warranty of soundness interest is not recoverable (Ancrum *v.* Slone, 2 Speers (S. C.) 594).

**47.** Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358.

**48.** Swain *v.* Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385 [*affirming* 12 N. Y. Suppl. 155]; Bostock *v.* Nicholson, [1904] 1 K. B. 725, 9 Com Cas. 200, 73 L. J. K. B. 524, 91 L. T. Rep. N. S. 626, 20 T. L. R. 342, 53 Wkly. Rep. 155.

well as the decreased value of the manufactured article.[49] And generally damages may be recovered if because of the defects warranted against there results injury to other property of the buyer[50] or loss of property.[51] Thus loss or injury of other animals by contact with diseased animals is an element of damages.[52] But

**49.** Wait *v.* Borne, 123 N. Y. 592, 25 N. E. 1053 [*reversing* 1 Silv. Sup. 129, 5 N. Y. Suppl. 168]; Milburn *v.* Belloni, 39 N. Y. 53, 100 Am. Dec. 403 [*reversing* 34 Barb. 607, 12 Abb. Pr. 451]; Moore *v.* King, 57 Hun (N. Y.) 224, 10 N. Y. Suppl. 651 [*affirmed* in 134 N. Y. 596, 31 N. E. 624]; Park *v.* Morris Axe, etc., Co., 41 How. Pr. (N. Y.) 18.

**50.** Page *v.* Ford, 12 Ind. 46; Leavitt *v.* Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. N. S. 855; Bruce *v.* Fiss, etc., Horse Co., 26 Misc. (N. Y.) 472, 56 N. Y. Suppl. 234 [*reversed* on other grounds in 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96]; Jones *v.* Mayer, 16 Misc. (N. Y.) 586, 38 N. Y. Suppl. 801; Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

**Elements of damage.**—When a boiler is sold with an express warranty, and, on account of its explosion, a mill owned by plaintiff has been compelled to remain idle for some time, the rental value of the mill for that time is to be considered in estimating the damages. Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341.

**Sale of unsound feed for animals.**— The measure of damages in an action for breach of warranty of the quality of oats sold for horse feed, where the oats contained matter which killed a portion of the vendee's horses, made some sick, and permanently injured others, was the value of the horses killed, the difference in value of the injured horses before and after the injury, the loss of the use of the horses while sick, and the expense of medical treatment and medicine. Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389. See also Houston Cotton Oil Co. *v.* Trammell, 96 Tex. 598, 74 S. W. 899 [*reversing* (Civ. App. 1903) 72 S. W. 244]; Wilson *v.* Dunville, L. R. 6 Ir. 210.

**Injury to property of third person.**— In an action for breach of warranty in regard to materials purchased by plaintiff of defendant, and used by plaintiff in certain work for a third person, plaintiff cannot recover merely on proof of damage to the property of such third person, caused by the use of the defective materials, but he must prove also the damage to himself resulting therefrom. Sherman *v.* Billings, 90 Hun (N. Y.) 544, 36 N. Y. Suppl. 69.

**Injury due to delay.**—Where plaintiff sold to defendants about the commencement of the harvest a harvesting machine, the quality and capacity of which he warranted, and which he understood was purchased by them for use in harvesting a large crop of grain belonging to them, defendants could not recover, for a breach of the warranty, damages for injury to the grain from delay in harvesting, while they were experimenting with the machine, and attempting to make it work. Wilson *v.* Reedy, 32 Minn. 256, 20 N. W. 153.

**Finding as to extent of injury.**— In an action for the price of potatoes, where the purchaser alleged as a counter-claim that those delivered rotted, and ruined good potatoes with which they were placed, the seller could not complain that a verdict that fifty bushels were so lost was based on conjecture, because the evidence was undisputed that seventy-five bushels were destroyed. Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

**51.** Cincinnati Butchers' Supply Co. *v.* Steinmetz, 35 Ind. App. 228, 73 N. E. 950; Beeman *v.* Banta, 118 N Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280; C. H. Dean Co. *v.* Standifer, 37 Tex. Civ. App. 181, 83 S. W. 230; Osborne *v.* Poindexter, (Tex. Civ. App. 1896) 34 S. W. 299.

**Warranty of safe as burglar proof.**— In the absence of fraud or bad faith, the proper measure of damages in a suit by the purchaser of a safe against the maker, who warranted it "burglar proof," is the difference between the value of the safe as it was, and what it would have been worth if it had been as represented, and not the damages sustained in the loss of valuables taken out of the safe by the burglars who effected an entrance into it. Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4. But *compare* Deane *v.* Michigan Stove Co., 69 Ill. App. 106, where it was held that if the seller gave insufficient directions as to locking the safe, the loss of valuables stolen therefrom by reason of such failure was an element of damage.

**52.** *Delaware.*— Cummins *v.* Ennis, 4 Pennew. 424, 56 Atl. 377.

*Georgia.*— Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110; Lewis *v.* Bracken, 97 Ga. 337, 22 S. E. 943.

*Iowa.*— Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286; Joy *v.* Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184.

*Kansas.*—State Bank of Commerce *v.* Dody, 71 Kan. 98, 79 Pac. 1092; Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227.

*Massachusetts.*— Bradley *v.* Rea, 14 Allen 20.

*Minnesota.*— Marsh *v.* Webber, 16 Minn. 418.

*Mississippi.*— McKee *v.* Jones, 67 Miss. 405, 7 So. 348.

*Texas.*— Routh *v.* Caron, 64 Tex. 289.

*England.*— Smith *v.* Green, 1 C P. D. 92, 45 L. J. C. P. 28, 33 L. T. Rep. N. S. 572, 24 Wkly. Rep. 142; Mullett *v.* Mason, L. R. 1 C. P. 559, Harr. & R. 779, 12 Jur. N. S. 547, 35 L. J. C. P. 299, 14 L. T Rep. N. S. 558, 14 Wkly. Rep. 898.

**Expenses of quarantine.**— The vendee of a lot of mules, some of which are infected with

there can be no recovery for injuries which are the result of the buyer's negligence [53] in not using ordinary care in the treatment of the defect [54] or in using the article after knowledge of the defects.[55]

(x) *Injuries to Business.* Damages for injuries to business which are the proximate result of the breach of warranty are recoverable.[56]

(xi) *Personal Injuries.* There is a diversity of opinion as to whether personal injuries due to defects warranted against are an element of damage. It is conceded, however, in many well considered cases that personal injuries may be regarded as an element of damages where such must have been the natural and direct result, as when an inherently dangerous article is sold as safe for use and the warranty is in effect a warranty that the article is not dangerous to use; [57] and it has been further held that damages for personal injuries are recoverable, although there was no fraud in the warranty.[58] But where the warranty is merely that a machine is of good material and durable a personal injury due to the breaking of the machine cannot be regarded as an element of damage, as it cannot be presumed that it was in the contemplation of the parties.[59] The seller is not liable for injuries to a third person not a party to the contract,[60] unless the article was purchased to the knowledge of the seller expressly for the use of such third person,[61] or the buyer by reason of his relation to such person is liable to him for the

a contagious disease, which they soon after communicate to others in the lot, may, in a suit for a breach of an implied warranty, recover the purchase-price of all stock thus lost, together with expenses that he has properly and reasonably incurred, in quarantining stock to prevent a spread of the disease, and in doctoring and otherwise taking care of them. Snowden *v.* Waterman, 105 Ga. 384, 31 S. E. 110. To the same effect see Cummins *v.* Ennis, 4 Pennew. (Del.) 424, 56 Atl. 377; Lewis *v.* Bracken, 97 Ga 337, 22 S. E. 943.

**53.** Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

**Instructions.**—An instruction that plaintiff could not recover for loss to his own hogs, in an action for the sale of diseased hogs, if he negligently permitted the diseased hogs to be mixed therewith, was not erroneous, as eliminating the question of plaintiff's knowledge of the condition of the purchased hogs, as it is to be considered in determining his freedom from negligence. Brush *v.* Smith, 111 Iowa 217, 82 N. W. 467.

**54.** Pinney *v.* Andrus, 41 Vt. 631.

**55.** Case *v.* Stevens, 137 Mass 551; Bruce *v.* Fiss, etc., Horse Co., 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96. See also Allen *v.* Tompkins, 136 N. C. 208, 48 S. E. 655.

**56.** Swain *v.* Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385 [*affirming* 12 N. Y. Suppl. 155] (holding that where defendant sold plaintiff coloring matter for ice cream, which being used made customers sick, plaintiff could recover for the injury to his business due to the loss of trade occasioned thereby); North Baltimore Bottle Glass Co. *v.* Altpeter, 133 Wis. 112, 113 N. W. 435. *Compare* Bostock *v.* Nicholson, [1904] 1 K. B. 725, 9 Com. Cas. 200, 73 L. J. K. B. 524, 91 L. T. Rep. N. S. 626, 20 T. L. R. 342, 53 Wkly. Rep. 155.

**57.** Tyler *v.* Moody, 111 Ky. 191, 63 S. W. 433, 23 Ky. L. Rep. 584, 98 Am. St. Rep. 406, 54 L. R. A. 417; Wood *v.* Anthony, 79 N. Y. App. Div. 111, 79 N. Y. Suppl. 829; George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118; Langridge *v.* Levy, 6 L. J. Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337]. And see Bruce *v* Fiss, etc., Horse Co., 26 Misc. (N. Y.) 472, 56 N. Y. Suppl. 234 [*reversed* on other grounds in 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96]; Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357 [*reversing* 9 Q. B. D. 302, 51 L. J. Q. B. 465, 47 L. T. Rep. N. S. 163, 30 Wkly. Rep. 749], where there was a warranty that a horse was gentle and suitable to drive.

**58.** Bruce *v.* Fiss, etc., Horse Co., 26 Misc. (N. Y.) 472, 56 N. Y. Suppl. 234 [*reversed* on other grounds in 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96].

**In Alabama** it is held that the seller is not liable for personal injuries unless the warranty is fraudulent or the affirmation so recklessly made as to be equivalent to bad faith. Jones *v.* Ross, 98 Ala. 448, 13 So. 319.

**59.** Birdsinger *v.* McCormick Harvesting Mach. Co., 183 N. Y. 487, 76 N. E. 611, 3 L. R. A. N. S. 1047 [*affirming* 92 N. Y. App. Div. 35, 86 N. Y. Suppl. 781].

**60.** Carter *v.* Harden, 78 Me. 528, 7 Atl. 392; Talley *v.* Beever, 33 Tex. Civ. App. 675, 78 S. W. 23; Longmeid *v.* Holliday, 6 Exch. 761, 20 L. J. Exch. 430.

**Injuries to wife of buyer.**— Damage resulting from the loss of the services of one's wife, etc., resulting from injuries sustained by reason of a defective wagon, cannot be recouped under a contract warranting the soundness of such wagon in an action brought for its purchase-price. Rode *v.* Arney, 115 Ill. App. 629.

**61.** George *v.* Skivington, L. R 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N S. 495, 18 Wkly. Rep. 118; Langridge *v.* Levy, 6 L. J.

injury.[62] The buyer cannot of course recover consequential damages for breach of warranty if his negligence contributed to the injury,[63] or if he persisted in the use of the article after knowledge that it was unsafe.[64]

(XII) *SALE OF SEEDS OR PLANTS.* On a sale of seed with warranty that it is of a particular kind or quality, the buyer may recover as damages, for a breach of warranty, the difference between the value of the crop raised and what would have been the value of the crop had the seed been as warranted,[65] less the expense of raising such crop.[66] In case the seed is wholly worthless, the measure of damages is the price paid for the seed, the expenses of preparing the land and seeding it, and interest,[67] with a deduction if the labor expended on the land is of benefit to it.[68] If the seed actually furnished is injurious to the land such injury is also an element of the damages.[69] If fruit trees are purchased to be set out with a warranty as to variety and quality, which is broken, the measure of damages is the difference between the value of the land as occupied by the trees actually furnished and what the value would have been if the trees had been as warranted.[70]

(XIII) *WARRANTY OF TITLE.* On a breach of the warranty of title the measure of damages is, according to the rule laid down in some jurisdictions, the actual loss, expressed usually as the value of the property.[71] In other jurisdic-

Exch. 137, 2 M. & W. 519 [*affirmed* in 1 H. & H. 325, 7 L. J. Exch. 387, 4 M. & W. 337].

**62.** Vogan *v.* Oulton, 81 L. T. Rep. N. S. 435, 16 T. L. R. 37.

**Liability of buyer to person injured.**— Where an employer bought from an experienced maker the best appliance made by him for the use intended, which appliance should have lasted for years, but broke, at a hidden flaw, after a proper usage of two months, since the employer is not liable to his servant for injuries caused thereby, he cannot recover from the maker, as part of his damages for breach of warranty, money he has paid without suit, to his servant, for such injuries. Roughan *v.* Boston etc., Block Co., 161 Mass. 24, 36 N. E. 461.

**63.** Razey *v.* J. B. Colt Co., 106 N. Y. App. Div. 103, 94 N. Y. Suppl. 59.

**64.** Bruce *v.* Fiss, etc., Horse Co., 47 N. Y. App. Div. 273, 62 N. Y. Suppl. 96.

**65.** *Massachusetts.*— Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

*Nebraska.*— Dunn *v.* Bushnell, 63 Nebr. 568, 88 N. W. 693, 93 Am. St. Rep. 474.

*New Jersey.*—Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438 [*affirmed* in 38 N. J. L. 496, 20 Am. Rep. 425].

*New York.*— White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; Van Wyck *v.* Allen, 69 N. Y. 61, 25 Am. Rep. 136; Passinger *v.* Thorburn, 34 N. Y. 634, 90 Am. Dec. 753 [*affirming* 35 Barb. 17]; Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388; Schutt *v.* Baker, 9 Hun 556; Gubner *v.* Vick, 6 N. Y. St. 4.

*England.*—Wagstaff *v.* Short Horn Dairy Co., Cab. & E. 324.

See 43 Cent. Dig. tit. "Sales," § 1294.

**66.** Dunn *v.* Bushnell, 63 Nebr. 568, 88 N. W. 693, 93 Am. St. Rep. 474; Passinger *v.* Thorburn, 34 N. Y. 634, 90 Am. Dec. 753 [*affirming* 35 Barb. 17]; Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145, 73 N. Y. Suppl. 388; Van Wyck *v.* Allen, 6 Daly (N. Y.) 376 [*affirmed* in 69 N. Y. 61, 25 Am Rep. 136].

**Extent of recovery.**—A tenant in an action on a breach of contract of warranty by the vendor of seed sold him for use on the demised premises may recover the full indemnity which it was the object of the contract to secure, including the loss to the landlord, as such contract inures to the landlord. Phillips *v.* Vermillion, 91 Ill. App. 133.

**67.** Butler *v.* Moore, 68 Ga. 780, 45 Am. Rep. 508. And see Ferris *v.* Comstock, 33 Conn. 513; Reiger *v.* Worth, 127 N. C. 230, 37 S. E. 217, 80 Am. St. Rep. 798, 52 L. R. A. 362, where it was held that, where a seller of certain seed rice guarantees that it will grow, but it fails to do so, and it is too late to plant another crop after its worthlessness is discovered, the buyer's measure of damages is the amount paid for the rice, in preparing the soil for the seed, and for planting the same, and also a reasonable rent for the land for the year, less the amount for which he could have rented the land to be put in crops other than rice after it was too late to sow the same. *Compare* Van Wyck *v.* Allen, 6 Daly (N Y.) 376 [*affirmed* in 69 N. Y. 61, 25 Am. Rep. 136], holding that if no crop at all is produced the measure of damages is the fair value of the crop which would have been produced under ordinary circumstances if the seed had complied with the warranty, deducting what it would have cost to harvest and prepare the crop for market.

**68.** Ferris *v.* Comstock, 33 Conn. 513.

**69.** Fox *v.* Everson, 27 Hun (N. Y.) 355.

**70.** Shearer *v.* Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125. To the same effect see Heilman *v.* Pruyn, 122 Mich. 301, 81 N. W. 97, 80 Am. St Rep. 570.

**71.** *Arkansas.*— Marlatt *v.* Clary, 20 Ark. 251.

*Iowa.*— Brennecke *v.* Heald, 107 Iowa 376, 77 N. W. 1063.

tions, however, the measure of damages is the price paid, with interest thereon.[72] The purchaser is also entitled to recover expenses incurred in defending the title, if notice was given to the seller to afford him an opportunity to defend;[73] but not to attorneys' fees in the absence of special statutory authorization.[74] If no

*Massachusetts.*— Grose *v.* Hennessey, 13 Allen 389.

*Minnesota.*—Hendrickson *v.* Back, 74 Minn. 90, 76 N. W. 1019; Close *v.* Crossland, 47 Minn. 500, 50 N. W. 694.

*United States.*— Sanders *v.* Hamilton, 21 Fed. Cas. 12,294, Brunn. Col. Cas. 20, 3 N. C. 226, 282.

*Canada.*— Confederation Life Assoc. *v.* Lobatt, 27 Ont. App. 321.

**Good-will of business.**—An instruction that plaintiff's damages for breach of contract for the sale of property was the value of the property "and rights" is not misleading, where the good-will of the business was part of the consideration, and one of the rights which was claimed to have been lost by plaintiff. Brennecke *v.* Heald, 107 Iowa 376, 77 N. W. 1063.

**Shares of stock.**— Where a member of a partnership, the property of which is represented by transferable certificates of shares, transfers, with a warranty of title, his share, which has not been fully paid, he is liable to the transferee for the amount unpaid. Jamison *v.* Harbert, 87 Iowa 186, 54 N. W. 75.

**Judgment for conversion.**— The measure of damages in an action by a buyer for the breach of warranty of title is the value of the goods, not exceeding the amount he was compelled to pay a third person recovering a judgment against him for the conversion of the goods. Shultis *v.* Rice, 114 Mo. App. 274, 89 S. W. 357.

**Covenant to convey seller's interest.**— Where A covenanted to convey to B his right, title, and interest in a slave, but not to warrant the title, and A had only a naked legal title to the slave, which was tainted with fraud, the measure of damages was only the value of A's interest, and, that being merely nominal, B could recover only nominal damages. Whitehead *v.* Ducker, 11 Sm. & M. (Miss.) 98.

**72.** *Colorado.*— Morgan *v.* Hendrie, 34 Colo. 25, 81 Pac. 700.

*Georgia.*— Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220.

*Kentucky.*—Wood *v.* Wood, 1 Metc. 512.

*Louisiana.*— Sullivan *v.* Goldman, 19 La. Ann. 12; Dyson *v.* Phelps. 14 La. Ann. 722.

*Massachusetts.*— Handy *v.* Aldrich, 168 Mass. 34, 46 N. E. 429.

*Mississippi.*— Noel *v.* Wheatly, 30 Miss. 181.

*New York.*— Burt *v.* Dewey, 31 Barb. 540 [*reversed* on other grounds in 40 N. Y. 283]; Atkins *v.* Hosley, 3 Thomps. & C. 322; Armstrong *v.* Percy, 5 Wend. 535.

*Oregon.*—Arthur *v.* Moss, 1 Oreg. 193.

*South Carolina.*— Glover *v.* Hutson, 2 McMull. 109; Ware *v.* Weathnall, 2 McCord 413; Henning *v.* Withers, 3 Brev. 458, 6 Am. Dec. 589.

*Tennessee.*— Crittenden *v.* Posey, 1 Head 311. But see Brown *v.* Woods, 3 Coldw. 182.

*Texas.*— Harrell *v.* Broome, (Civ. App. 1899) 50 S. W. 1077.

See 43 Cent. Dig. tit. "Sales," § 1296.

**Expenses incurred on faith of title.**— The measure of damages for breach of warranty, as against the original warrantor, cannot be increased by contracts or expenses subsequently incurred or paid by the vendee on account of independent warranties to later purchasers. Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220. To the same effect see Speeding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133.

**No recovery for loss of profit.**— The purchaser cannot on a breach of the warranty of title recover for the loss of a good bargain. Noel *v.* Wheatly, 30 Miss. 181.

**Partial failure of title.**— On a sale of property with warranty of title, which proves to be encumbered, the purchaser is entitled to recover as damages only the amount paid to clear the title with costs. Western *v.* Short, 12 B. Mon. (Ky.) 153. See also Moorehead *v.* Davis, 92 Ind. 303 (holding that where there is a partial failure of title. the damages should bear the same proportion to the whole purchase-money as the value of the part to which the title fails bears to the whole property, estimated at the price paid); Carman *v.* Trude, 25 How. Pr. (N. Y.) 440 (where there was a partial failure of title on the sale of a patent right, and it was held that the purchaser was entitled to recover the difference between the value of the right actually transferred and that warranted to exist).

**73.** *Alabama.*— Rowland *v.* Shelton, 25 Ala. 217.

*Arkansas.*— Marlatt *v.* Clary, 20 Ark. 251.

*Georgia.*— Smith *v.* Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220.

*Indiana.*— Bash *v.* Young, 2 Ind. App. 297, 28 N. E. 344.

*Maine.*— Eldridge *v.* Wadleigh, 12 Me. 371.

*Mississippi.*— Noel *v.* Wheatly, 30 Miss. 181.

*Missouri.*— Johnson *v.* Blanks, 34 Mo. 255; Shultis *v.* Rice, 114 Mo. App. 274, 89 S. W. 357.

*New York.*— Jennings *v.* Whittemore, 2 Thomps. & C. 377; Schnurmacher *v.* Kennedy, 88 N. Y. Suppl. 943; Armstrong *v.* Percy, 5 Wend. 535. *Compare* Weston *v.* Chamberlain, 56 Barb. 415.

*Oregon.*— Balte *v.* Bedemiller, 37 Oreg. 27, 60 Pac. 601, 82 Am. St. Rep. 737.

*Tennessee.*— Brown *v.* Woods, 3 Coldw. 182.

*United States.*— Houser *v.* U. S , 39 Ct. Cl. 508.

*England.*— Spedding *v.* Nevell, L. R. 4 C. P. 212, 38 L. J. C. P. 133.

**74.** Schnurmacher *v.* Kennedy, 88 N. Y. Suppl. 943; Armstrong *v.* Percy, 5 Wend. (N. Y.) 535. And see Smith *v.* Williams,

actual damage has been suffered by the purchaser only nominal damages can be recovered.[75]

**l. Trial** — (I) *In General.* Where breach of warranty is alleged in defense in an action on a note, given for the price of goods, plaintiff cannot acquire the right to open and close by unnecessary allegations in his complaint and reply that he purchased the note for a valuable consideration before maturity and without notice of any defense.[76] Where the answer pleads breach of warranty and also rescission, the statement of defendant's counsel in his opening that the defense is breach of warranty is not in abandonment of the defense of rescission.[77] A sale of the goods may be ordered pending an action for breach of warranty.[78]

(II) *Questions For Jury* — (A) *Existence and Scope of Warranty.* Ordinarily it is a question for the determination of the jury whether a statement made by the seller to the buyer is a warranty,[79] or whether such statement is

117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220.

**75.** O'Brien *v.* Jones, 91 N. Y 193; Burt *v.* Dewey, 40 N. Y. 283. 100 Am. Dec. 482.

**76.** Steele *v.* Hinshaw, 14 Ind. App. 384, 42 N. E. 1034.

**77.** Shaen *v.* Gumpert, 4 N. Y Suppl. 553.

**78.** Bartholomew *v.* Freeman, 3 C. P. D. 316, 38 L. T. Rep. N. S. 814, 26 Wkly. Rep. 743.

**79.** *Alabama.*— Claghorn *v.* Lingo, 62 Ala. 230; Williams *v.* Cannon, 9 Ala 348; Ricks *v.* Dillahunty, 8 Port. 133.

*Arkansas.*— Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429; Buckman *v.* Haney, 11 Ark. 339.

*California.*— McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687; Polhemus *v.* Heiman, 45 Cal. 573.

*Georgia.*— Terhune *v.* Dever, 36 Ga. 648.

*Illinois.*— Thorne *v.* McVeagh, 75 Ill. 81; Kankakee Stone, etc., Co. *v.* Ugrow, 36 Ill. App. 448.

*Indiana.*— Jones *v.* Quick, 28 Ind. 125; House *v.* Fort, 4 Blackf. 293.

*Iowa.*— Figge *v.* Hill, 61 Iowa 430, 16 N. W. 339; Hughes *v.* Funston, 23 Iowa 257.

*Kentucky.*— Lamme *v.* Gregg, 1 Metc. 444, 71 Am. Dec. 489.

*Massachusetts.*— Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581, 52 N. E. 1083.

*Michigan.*— Dake Engine Mfg. Co. *v.* Hurley, 99 Mich. 16, 57 N. W. 1044.

*Mississippi.*— Kinley *v.* Fitzpatrick, 4 How. 59, 34 Am. Dec. 108.

*New Hampshire.*— Morrill *v.* Wallace, 9 N. H. 111.

*New Jersey.*—Phillips *v.* Crosby, 70 N. J. L. 785, 59 Atl. 142; Wolcott *v.* Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

*New York.*— Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228; Riley *v.* Rea, 18 N. Y. Suppl. 597.

*North Carolina.*— Harriss *v.* Canaday, 149 N. C. 81, 62 S. E. 771; Wrenn *v.* Morgan, 148 N. C. 101, 61 S. E. 641; Starnes *v.* Erwin, 32 N. C. 226; Foggart *v.* Blackweller, 26 N. C. 238; Baum *v.* Stevens, 24 N. C. 411.

*North Dakota.*— Larson *v.* Calder, 16 N. D. 248, 113 N. W. 103.

*Pennsylvania.*— Herman *v.* Brinker, 17 Pa. Super. Ct. 177; Neilson *v.* Wetherill, 1 Phila. 207.

*Vermont.*— Hobart *v.* Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; Foster *v.* Caldwell, 18 Vt. 176.

*Wisconsin.*— Boothby *v.* Scales, 27 Wis. 626.

*United States.*— Shippen *v.* Bowen, 122 U. S. 575, 7 S. Ct. 1283, 30 L. ed. 1172.

*England.*— Power *v.* Barham, 4 A. & E. 473, 31 E. C. L. 216, 7 C. & P. 356, 32 E. C. L. 654, 1 Harr. & W. 683, 5 L. J. K. B. 88, 1 M. & Rob. 507, 6 N. & M. 62.

**Actual or constructive intent.**— The jury must be satisfied that the vendor actually, and not constructively, consented to be bound for the truth of his representation. McAllister *v.* Morgan, 29 Pa. Super. Ct. 476.

**Character of sale.**— Whether the sale was one from description only, or whether it was a sale by sample, from which a warranty could be implied, is for the jury. Henry *v.* Talcott, 175 N. Y. 385, 67 N. E. 617, 13 N. Y. Annot. Cas. 219 [*reversing* 71 N. Y. App. Div. 616, 76 N. Y. Suppl. 1032].

**Fact not intention.**— The question for the jury is not whether the vendor intended to warrant, but whether he did warrant, and this is to be determined by the language used. Smith *v.* Justice, 13 Wis. 600.

**Terms of contract.**— Where plaintiff sues for a breach of warranty of seed sold, and defendant relies on a notice on the packages and bill heads, which plaintiff saw, to relieve him from the warranty, whether this notice formed a part of the contract is a question for jury. Coates *v.* Harvey, 2 N. Y. Suppl. 5.

**Substituted contract.**— Whether a warranty contained in the original contract of sale is included in a contract substituted therefor is for the jury. Powers *v.* Briggs, 139 Mich. 664, 103 N. W. 194. See also Olson *v.* Aultman Co., 81 Minn. 11, 83 N. W. 457.

**Implied warranty.**— In an action to recover the price of goods sold and delivered, binding instructions for plaintiff are proper, where defendants have failed to show any facts from which an implied warranty of quality could be legitimately drawn, and it also appears that they had used all the material purchased, and had not returned

merely an expression of opinion.[80] And the question with the jury should always be, do the words proven fairly show that they were intended and understood by the parties at the time of the sale or exchange as a warranty? If they do, then they must be so considered.[81] Where, however, the evidence is such as leaves no doubt as to the legal force of the language of the representation, the court may, and should, declare its effect.[82] It is a question for the jury whether the buyer relied on the statement as a warranty,[83] or upon his own knowledge in making the purchase.[84] The construction of a written warranty is for the court,[85] but ordinarily when the warranty is oral it is for the jury to interpret the language used.[86]

(B) *Breach of Warranty and Damages Therefor.* It is a question for the jury whether there has been a breach of the warranty,[87] or whether the defect is within

or offered to return any of it. Walker *v.* Taylor, 19 Pa. Super. Ct. 39. Where a seller denied in his pleading and evidence that any express warranty had been made in the sale of goods, and the buyer pleaded implied warranty, as well as express warranty, the buyer was entitled to have the issue of implied warranty considered; there being evidence on which a finding of implied warranty could rest. Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822.

**Sufficiency of evidence** to warrant a submission to the jury is considered in Sauerman *v.* Simmons, 74 Ark. 563, 86 S. W. 429; Conkling *v.* Standard Oil Co., 138 Iowa 596, 116 N. W. 822; Scott *v.* Raymond, 31 Minn. 437, 18 N. W. 274; Wilbur *v.* Cartright, 44 Barb. (N. Y.) 536; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Brower *v.* Lewis, 19 Barb. (N. Y.) 574; Quintard *v.* Newton, 5 Rob. (N. Y.) 72; Coates *v.* Harvey, 10 N. Y. St. 276.

**80.** *Alabama.*— Bradford *v.* Bush, 10 Ala. 386.

*California.*— McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687.

*Maryland.*— Horner *v.* Parkhurst, 71 Md. 110, 17 Atl. 1027.

*Missouri.*— Galbreath *v.* Carnes, 91 Mo. App. 512; Ramsberger *v.* Ing, 55 Mo. App. 621.

*Nebraska.*— Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.

*New York.*— Murray *v.* Smith, 4 Daly 277.

*North Carolina.*— McKinnon *v.* McIntosh, 98 N. C. 89, 3 S. E. 840.

*Vermont.*— Beals *v.* Olmstead, 24 Vt. 114, 58 Am. Dec. 150; Beeman *v.* Buck, 3 Vt. 53, 21 Am. Dec. 571.

*Wisconsin.*— Congar *v.* Chamberlain, 14 Wis. 258.

See 43 Cent. Dig. tit. "Sales," § 1304.

**Soundness.**— Whether an affirmation of soundness was a warranty is for the jury. Humphreys *v.* Comline, 8 Blackf. (Ind.) 516; Tuttle *v.* Brown, 4 Gray (Mass.) 457, 64 Am. Dec. 80; Duffee *v.* Mason, 8 Cow. (N. Y.) 25; McFarland *v.* Newman, 9 Watts (Pa.) 55, 34 Am. Dec. 497; Bond *v.* Clark, 35 Vt. 577; Foster *v.* Caldwell, 18 Vt. 176.

**81.** Jones *v.* Quick, 28 Ind. 125

**82.** Halliday *v.* Briggs, 15 Nebr. 219, 18 N. W. 55.

**83.** Jones *v.* Quick, 28 Ind. 125; Dake Engine Mfg. Co. *v.* Hurley, 99 Mich. 16, 57 N. W. 1044; Woods *v.* Thompson, 114 Mo. App. 38, 88 S. W. 1126; Galbreath *v.* Carnes, 91 Mo. App. 512.

**Sufficiency of evidence** to warrant a submission to the jury of the question whether the purchaser relied on the statements as a warranty is considered in Woods *v.* Thompson, 114 Mo. App. 38, 88 S. W. 1126.

**84.** Toner *v.* Zell, 149 Pa. St. 458, 27 Atl. 304; Venning *v.* Gantt, Cheves (S. C.) 87.

**85.** Claghorn *v.* Lingo, 62 Ala. 230.

**86.** Americus Grocery Co. *v.* Brackett, 119 Ga. 489, 46 S. E. 657; Lindsay *v.* Davis, 30 Mo. 406; Brooks *v.* McDonnell, 41 Wis. 139.

**87.** *Alabama.*— Kennebrew *v.* Southern Automatic Electric Shock Mach. Co., 105 Ala. 377, 17 So. 545.

*Illinois.*—Lanz *v.* Wachs, 50 Ill. App. 262; Kankakee Stone, etc., Co. *v.* Ugrow, 36 Ill. App. 448.

*Kentucky.*—Gardner *v.* Winter, 117 Ky. 382, 78 S. W. 143, 25 Ky. L. Rep. 1472, 63 L. R. A. 647.

*Michigan.*— Van Hoesen *v.* Cameron, 54 Mich. 609, 20 N. W. 609. And see American Glue Co. *v.* Rayburn, 150 Mich. 616, 114 N. W. 395.

*New Hampshire.*— Alexander *v.* Dutton, 58 N. H. 282; Haynes *v.* Flanders, 27 N. H. 210.

*New York.*— Egbert *v.* Hanford Produce Co., 92 N. Y. App. Div. 252, 86 N. Y. Suppl. 1118; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340; Carleton *v.* Lombard, 19 N. Y. App. Div. 297, 46 N. Y. Suppl. 120 [*affirmed* in (1900) 56 N. E. 1133].

*North Carolina.*— Tyson *v.* Tyson, 92 N. C. 288.

*Ohio.*— Covalt *v.* Thompson, 2 Ohio Dec. (Reprint) 374, 2 West. L. Month. 546.

*Pennsylvania.*— Whitaker *v.* Alexander Lumber Co., 3 Pa. Super. Ct. 325; Butz *v.* Manwiller, 2 Woodw. 260.

*Washington.*—Buchanan *v.* Laber, 39 Wash. 410, 81 Pac. 911; Elliott *v.* Puget Sound Steamship Co., 22 Wash. 220, 60 Pac. 410.

**Identity of goods.**— Where, in an action for the price of goods sold under a warranty, the evidence on behalf of defendant tended to show that the goods received were different from those inspected by the purchaser at the place where bought, it raises an issue of fact as to the identity of the goods and breach of

the exceptions of the warranty,[88] or is due to causes arising subsequently to the sale,[89] such as improper use or mismanagement.[90] The amount of damages for the breach is also for the jury,[91] and their verdict will not ordinarily be disturbed.[92]

(c) *Notice of Defects and Return of Goods.* It is also a question for the jury whether notice of defects was given as required by the contract.[93] So too whether a reasonable time has been allowed for the seller to remedy the defects is for the jury,[94] and whether under a condition providing for a return of the goods the return was made within a reasonable time.[95] It is also a question for the jury whether the notice was waived by the seller.[96]

(d) *Waiver.* Whether there has been a waiver of the warranty and the breach thereof is also for the jury.[97]

(iii) *INSTRUCTIONS.* The instructions should be responsive to and cover the

warranty which should have been submitted to a jury. Hutchinson *v.* Doyle, 170 N. Y. 577, 63 N. E. 60.

**Sufficiency of evidence** to warrant submission to the jury of the fact of breach is considered in McCormick Harvesting Mach. Co. *v.* Brower, 94 Iowa 144, 62 N. W. 700; Davis *v.* J. I. Case Threshing Mach. Co., 80 S. W. 1145, 26 Ky. L. Rep. 235; Morgan *v.* Powers, 66 Barb. (N. Y.) 35.

**88.** McFall *v.* Walker, 25 Tex 327.

**89.** Leopold *v.* Van Kirk, 27 Wis. 152.

**90.** Avery Planter Co. *v.* Rigg, 56 Ill. App. 599; Mack *v.* Sloteman, 21 Fed. 109.

**91.** Dill *v.* O'Ferrell, 69 Ind. 500; Otto *v.* Braman, 142 Mich. 185, 105 N. W. 601; Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921; Liebermann *v.* Lippert, 109 Wis. 1, 85 N. W. 126.

**Abatement of price.**— Where, in an action for the balance of the price of onion sets, the evidence showed that they were in bad condition when delivered, it was for the jury to determine whether the agreed price should be abated, although the purchaser had not returned them to the seller, as he could retain them and bring his cross action for breach of implied warranty of merchantableness, or prove their real value and abate recovery *pro tanto*. Frith *v.* Hollan, 133 Ala. 583, 32 So. 494, 91 Am. St. Rep. 54.

**92.** Dill *v.* O'Ferrell, 69 Ind. 500.

**93.** McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537.

**Trial of machine and notice of defects.**— Where defendant in an action on notes given for the price of a machine claimed damages for the breach of warranty, and a letter from him, given in evidence, showed that he allowed three months to elapse before giving the machine a trial, and the oral testimony showed that the trial was made promptly, and a notice given to plaintiff's agent that the machine did not work, it was proper to submit to the jury the question whether the trial was made in a reasonable time. Keystone Mfg. Co. *v.* Forsythe, 123 Mich. 626, 82 N. W. 521.

**Good faith of purchaser.**— Where purchasers obtained a credit on the account for goods sold, and obtained an extension of time for payment, and presented no claim for breach of warranty of quality until they filed their answer in an action for the price, such facts should be considered by the jury on the question as to defendants' good faith. Fuller *v.* Harris, 48 Wash. 519, 93 Pac. 1080.

**94.** Robinson *v.* Berkey, 111 Iowa 550, 82 N. W. 972.

**Remedying defects.**— Whether the purchaser of a threshing machine has complied with the requirement of the contract of sale that he "furnish friendly assistance to remedy the defects" is a question for the jury, where the first man sent by the seller spent part of a day trying without success to make the machine work, and left, stating that he would bring an expert, and on his bringing him several days later, the purchaser refused to assist, except to operate the engine. Zimmerman *v.* Robinson, 118 Iowa 117, 91 N. W. 918.

**Time to remedy defects.**— Whether the purchaser of a machine gave it a reasonable test, and whether, after notifying the seller that it was unsatisfactory, and receiving his promise to send an expert, reasonable time was allowed him to arrive on the scene and remove the difficulty, is a question for the jury. Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188, 93 N. W. 297.

**95.** Webster City First Nat. Bank *v.* Dutcher, 128 Iowa 413, 104 N. W. 497, 1 L. R. A. N. S. 142; Warder, etc., Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591; South Bend Pulley Co. *v.* W. E. Caldwell Co., 54 S. W. 12, 21 Ky. L. Rep. 1084; Bailey *v.* Emerson, 87 Mo. App. 220; Berry *v.* Walter A. Wood Mowing, etc., Mach. Co., 62 Mo. App. 41; Skeen *v.* Springfield Engine, etc., Co., 34 Mo. App. 485. But see Powers *v.* Briggs, 139 Mich. 664, 103 N. W. 194.

**96.** Buchanan *v.* Laber, 39 Wash. 410, 81 Pac. 911.

**97.** *Iowa.*— Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Robinson *v.* Berkey, 111 Iowa 550, 82 N. W. 972.

*Massachusetts.*—Brummett *v.* Nemo Heater Co., 177 Mass. 480, 59 N. E. 58.

*Missouri.*— Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113.

*Texas.*— Hayden *v.* Houghton, (Civ. App. 1894) 24 S. W. 803.

*United States.*— English *v.* Spokane Commission Co., 48 Fed. 196.

See 43 Cent. Dig. tit. "Sales," § 1308.

issues raised,[98] and should be sufficiently specific.[99] Where the gravamen of the action is breach of warranty, although fraud is also alleged, instructions permitting a recovery on proof of fraud without proof of warranty are not proper,[1] although such instructions should be given if the pleading raise both the issue of breach of warranty and misrepresentation and fraud.[2] If the declaration counts on express warranty and also on an implied warranty, an instruction which ignores one class of warranty is improper;[3] but if the declaration counts only on an express warranty it is not error to withdraw from the jury the question of implied warranty.[4] Moreover, the instructions should be restricted to the breach of the particular warranty on which the action is based, and instructions allowing recovery for other defects not covered by such warranty are erroneous.[5] If the warranty covers several defects it is proper to instruct the jury to find for the purchaser if any of such defects exist if the pleadings are broad enough to cover such defects, although special defects are made the ground of complaint.[6] An instruction which invades the province of the jury as to the existence of a warranty or its breach is of course improper.[7] A refusal by the court to give

98. Skipper *v.* Johnson, 21 Ga. 310; Mathers *v.* Morris, 95 Ill. App. 541; Monumental Bronze Co. *v.* Doty, 92 Mo. App. 5; Klipstein *v.* Raschein, 117 Wis. 248, 94 N. W. 63.

**Sufficiency of instructions** to cover the issues see Fraternal Constr. Co. *v.* Jackson Foundry, etc., Co., 89 S. W. 265, 28 Ky. L. Rep. 383.

**False issue.**— An instruction which raises a false issue is erroneous. Barton *v.* Chicago Fire Proof Covering Co., 113 Mo. App. 462, 87 S. W. 599.

**Fraud of seller.**— In an action on a note given for the purchase-price of horses, where defendant pleaded fraudulent concealment of the true condition of some of the horses, and there is evidence tending to support the plea, the court should instruct on that issue. Boylan *v.* McMillan, 137 Iowa 142, 114 N. W. 630.

**Instructions held to be within issues** see Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121.

**Instructions held proper as excluding immaterial issues** see Sherwood *v.* Hulett, 134 Wis. 561, 114 N. W. 1111.

99. Hein *v.* Mildebrandt, 134 Wis. 582, 115 N. W. 121, holding certain instruction to be sufficiently specific.

1. Bartholomew *v.* Bushnell, 20 Conn. 271, 52 Am. Dec. 338; Wallace *v.* Wren, 32 Ill. 146; Abel *v.* Murphy 43 Misc. (N. Y.) 648, 88 N. Y. Suppl. 256.

2. Nations *v.* Love, (Tex. Civ. App. 1894) 26 S. W. 232.

3. Thorne *v.* McVeagh, 75 Ill. 81; Boylan *v.* McMillan, 137 Iowa 142, 114 N. W. 630.

**Sufficiency of instruction.**— In an action by a buyer for a breach of warranty of quality where he alleged both an express and an implied warranty, and there was evidence that it was the purpose and intent of the transaction to furnish goods suitable for the buyers' trade, an instruction to find for the buyer if the jury found that it was the understanding that the goods were to be good and merchantable, and they were not so, but not mentioning express warranty, was not objectionable, as submitting only that theory to the jury. Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1902) 69 S. W. 196.

4. Douglass *v.* Moses, 89 Iowa 40, 56 N. W. 271, 48 Am. St. Rep. 353.

5. Walter A. Wood Mowing, etc., Mach. Co. *v.* Field, 8 Ind. App. 107, 35 N. E. 516; Storrs *v.* Emerson, 72 Iowa 390, 34 N. W. 176; Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406.

**What constitutes breach.**— In an action by the seller for the price of dust collectors for ore pulverizers warranted to both convey and separate ore, a charge that, if the machine failed to do both, there was a breach of the warranty, was not objectionable as requiring a failure to both convey and separate, to constitute a breach. Allington, etc., Mfg. Co. *v.* Detroit Reduction Co., 133 Mich. 427, 95 N. W. 562.

**Scope of instruction.**— Where, in an action for breach of warranty on the sale of cattle, there was no claim that there was any breach, save that the animals had a certain disease, and no other breach submitted to the jury, an instruction that if there was a warranty of any or all of the cattle, and it had been broken, plaintiff was entitled to damages, was not erroneous, on the theory that it did not limit the jury to the particular breach relied on. Mitchell *v.* Pinckney, 127 Iowa 696, 104 N. W. 286.

**Modification of warranty.**— Where the original warranty was modified and a warranty differing in terms agreed on, instructions which submitted questions as to breach of the first warranty, and allowed them to award defendant damages for such breach were erroneous. Dake Engine Mfg. Co. *v.* Hurley, 99 Mich. 16, 57 N. W. 1044.

6. Johnson *v.* Wallower, 15 Minn. 472.

7. *Indiana.*— Reynolds *v.* Cox, 11 Ind. 262; Oil-Well Supply Co. *v.* Priddy, 41 Ind. App. 200, 83 N. E. 623.

*Iowa.*—McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556, 53 N. W. 310.

*Maine.*—Works *v.* Croswell, (1887) 10 Atl. 494.

instructions as to matters which are already covered by the general instructions given is not prejudicial.[8]

(IV) *VERDICT AND FINDINGS.* The verdict and findings must be certain and conform to the issues,[9] and be supported by the evidence,[10] but are not objectionable because of errors in the use of technical phrases,[11] and the seller cannot complain if the verdict is more favorable to him than his pleadings warrant.[12] Special findings must be consistent with and support the general verdict.[13]

(V) *JUDGMENT.* A judgment rendered on the theory of a breach of warranty cannot be supported unless the breach was pleaded originally or by way of amendment at the trial.[14] On a recovery by the purchaser of the price or whole value of the goods, the property therein is by the judgment restored to the seller on satisfaction thereof,[15] and if by error the property is disposed of by the buyer, he must account to the seller for the value.[16] But on the purchase of several articles and a claim of breach of warranty as to one, there cannot be a judgment for the whole price and an order for the return of all the articles.[17]

(VI) *REVIEW.* The verdict of the jury as to the existence of the warranty and the breach thereof will not be disturbed on appeal when there is evidence to support it.[18] Nor will the finding as to the amount of damages be set aside if fairly justified by the evidence.[19] Where the general verdict is supported the fact that the special findings were not justified by the evidence will not call for a reversal of the judgment.[20] The admission of parol testimony that the machinery was erected in accordance with a plan furnished by the seller and the overruling of the seller's objection to such evidence on the ground that the plan should be produced is harmless when no attempt is made to show that the plan was deviated from.[21] Where, in an action for damages for breach of warranty, the general

*North Carolina.*— Drake *v.* Bains, 53 N. C. 122; Henson *v.* King, 48 N. C. 419.

*Ohio.*— Hadley *v.* Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454.

*Wisconsin.*— Larson *v.* Aultman, etc., Co., 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

**Directing verdict.**— Evidence held insufficient to authorize the directing of a verdict for defendants see Excelsior Coal Co. *v.* Gildersleeve, 160 Fed. 47, 87 C. C. A. 202.

**8.** Chadsey *v.* Greene, 24 Conn. 562; Horner *v.* Parkhurst, 71 Md. 110, 17 Atl. 1027.

**9.** Aultman, etc., Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243.

**Sufficiency of verdict.**— In an action for damages caused by a false warranty in the sale of a horse a sealed verdict to the effect "that the horse was lame otherwise than warranted on the sale, that there was a warranty, and that the plaintiff was entitled to $95 damages," is in substance a general verdict for ninety-five dollars and properly received as such by the court. Ross *v.* Mather, 47 Barb. (N. Y.) 582.

**Absence of finding.**— In an action for goods sold, the absence of a finding on the facts alleged in the answer as constituting a purchase with warranty, of which it avers a breach, is equivalent to a finding against defendant as to such facts. Levi *v.* Allen, 15 Ind. App. 38, 43 N. E. 571.

**Construction of particular verdict** see Liljeblad *v.* Sasse, (Tex. Civ. App. 1908) 108 S. W. 787.

**10.** American Seeding Mach. Co. *v.* Slocum, 58 Misc. (N. Y.) 458, 108 N. Y. Suppl. 1042.

**11.** Anderson *v.* Duffield, 8 Tex. 237.

**12.** Milhollin *v.* Sharp, 13 Ind. App. 697, 41 N. E. 552.

**13.** Hook *v.* Stovall, 26 Ga. 704, 30 Ga. 418; Blacker *v.* Slown, 114 Ind. 322, 16 N. E. 621; Oregon Auto-Dispatch *v.* Portland Cordage Co., 51 Oreg. 583, 94 Pac. 36, 95 Pac. 498.

**14.** Lamson Consol. Store-Service Co. *v.* Hartung, 18 N. Y. Suppl. 143.

**15.** Ash *v.* Beck, (Tex. Civ. App. 1902) 68 S. W. 53.

**16.** E. T. Kenney Co. *v.* Anderson, 83 S. W. 581, 26 Ky. L. Rep. 1217, 81 S. W. 663, 26 Ky. L. Rep. 367.

**17.** McCarthy *v.* Ellers, 107 N. Y. App. Div. 219, 94 N. Y. Suppl. 1109.

**18.** *California.*— McLennan *v.* Ohmen, 75 Cal. 558, 17 Pac. 687.

*Michigan.*— Croly *v.* Pollard, 71 Mich. 612, 39 N. W. 853.

*Mississippi.*— Greenville Brick, etc., Co. *v.* Hyatt, etc., Mfg. Co., (1891) 11 So. 471.

*Nebraska.*— Bartling *v.* Behrends, 20 Nebr. 211, 29 N. W. 472.

*New York.*— Kilsby *v.* De Forest, 76 N. Y. App. Div. 283, 78 N. Y. Suppl. 536.

**19.** Dill *v.* O'Ferrell, 69 Ind. 500; Wyckoff *v.* Horan, 39 Minn. 429, 40 N. W. 563; Flatt *v.* Osborne, 33 Minn. 98, 22 N. W. 440; Nichols *v.* Miller, 34 Nebr. 459, 51 N. W. 1035; Davidson Steam Pump Co. *v.* Peerless Mfg. Co., 13 N. Y. Suppl. 268.

**20.** Short *v.* Matteson, 81 Iowa 638, 47 N. W. 874.

**21.** Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548.

verdict is for defendant, instructions as to the measure of damages are immaterial.[22] If defendant in an action for the price counter-claims only as to part of the claim he cannot complain of an instruction which makes the breach of warranty a defense to the whole claim.[23]

## VIII. REMEDIES OF SELLER.

**A. Lien — 1. Manner of Creation — a. Arising From Possession.** In the absence of contract provision to the contrary an unpaid seller who is still in possession of the goods has a lien thereon for the purchase-price,[24] unless he has expressly or by implication waived it,[25] and so long as he remains in possession the lien is valid, even as against third persons claiming under the buyer.[26] Actual physical possession is not essential, it being sufficient if the seller retains such possession as will preserve in him an actual control of the property;[27] and the seller may enforce his lien if he has actual possession, although as agent or bailee for the buyer.[28]

**22.** Simpson *v.* Baxter, 41 Kan. 540, 21 Pac. 634.

**23.** Becker *v.* Puels, 10 N. Y. Suppl. 99.

**Instruction not harmless.**— Where the issue was whether or not the representation made amounted to a warranty the assumption by the judge in his charge that the representation was a warranty will not be legalized or rendered harmless because the jury would have been warranted in finding a verdict for plaintiff upon the ground of fraud, for it cannot be known that their verdict was not induced by the charge of the court. Williams *v.* Cannon, 9 Ala. 348.

**24.** *California.*— Eads *v.* Kessler, 121 Cal. 244, 53 Pac. 656.

*Illinois.*— Owens *v.* Weedman, 82 Ill. 409.

*Maryland.*— Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396.

*Massachusetts.*— Ware River R. Co. *v.* Vibbard, 114 Mass. 447; Arnold *v.* Delano, 4 Cush. 33, 50 Am. Dec. 754; Barrett *v.* Pritchard, 2 Pick. 512, 13 Am. Dec. 449; Parks *v.* Hall, 2 Pick. 206.

*Michigan.*— Burke *v.* Dunn, 117 Mich. 430, 75 N. W. 931.

*Minnesota.*— Meyers *v.* McAllister, 94 Minn. 510, 103 N. W. 564.

*Missouri.*— Southwestern Freight, etc., Press Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

*New York.*— Cragin *v.* O'Connell, 50 N. Y. App. Div. 339, 63 N. Y. Suppl. 1071 [*affirmed* in 169 N. Y. 573, 61 N. E. 1128].

*Pennsylvania* — White *v.* Welsh, 38 Pa. St. 396; Camden Nat. State Bank *v.* Korting Gas Engine Co., 3 Pa. Dist. 604.

*West Virginia.*— Curtin *v.* Isaacsen, 36 W. Va. 391, 15 S. E. 171.

*England.*— Lord *v.* Price, L. R. 9 Exch. 54, 43 L. J. Exch. 49, 30 L. T. Rep. N. S. 271, 22 Wkly. Rep. 318; Miles *v.* Gorton, 2 Cromp. & M. 504, 3 L. J. Exch. 155, 4 Tyrw. 295; *Ex p.* Twining, 5 Jur. 536, 1 Mont. D. & De G. 691; Houlditch *v.* Desanges, 2 Stark. 337, 20 Rev. Rep. 692, 3 E. C. L. 434.

See 43 Cent. Dig. tit. "Sales," § 861.

**Election to consider conversion as sale.**— Where defendant unlawfully possessed himself of and converted plaintiff's property to his own use, the right of election which the latter has to consider such conversion a sale cannot be used to create a lien for the debt thereby produced on goods held by defendant for the purpose of being sold by him as a factor for plaintiff. Thacher *v.* Hannahs, 4 Rob. (N. Y.) 407.

**Substitution of purchaser.**— A vendor, who by his contract of sale vests an absolute title in the property sold in the vendee, has no lien in equity upon such property, by reason of an unpaid mortgage given by him upon other property to secure to his vendor of a portion of the property sold, the price of that portion, although the vendee has by agreement been substituted in his place for the payment of the price of that portion of the property sold to him. Schroeder *v.* Paterson, 4 R. I. 516, 70 Am. Dec. 163.

**Settlement of mutual accounts.**— Where after a settlement of mutual accounts of which the price of goods sold constitutes merely one item it is discovered that the seller of the goods has paid too much in settlement, he cannot regard such overpayment as unpaid purchase-money on the sale and have a lien therefor. Hodgkins *v.* Dennet, 55 Me. 559.

**25.** See *infra*, VIII, A, 4.

**26.** *Indiana.*— Perrine *v.* Barnard, 142 Ind. 448, 41 N. E. 820.

*Missouri.*— Vogelsang *v.* Fisher, (1894) 28 S. W. 873.

*New York.*— Palmer *v.* Hand, 13 Johns. 434, 7 Am. Dec. 392.

*Wisconsin.*— Bohn Mfg. Co. *v.* Hynes, 83 Wis. 388, 53 N. W. 684.

*United States.*— Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879 [*affirmed* in 53 Fed. 19, 3 C. C. A. 399].

*England.*— Grice *v.* Richardson, 3 App. Cas. 319, 47 L. J. P. C. 48, 37 L. T. Rep. N. S. 677, 26 Wkly. Rep. 358.

**27.** Woodland Co. *v.* Mendenhall, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 445.

**28.** Grice *v.* Richardson, 3 App. Cas. 319, 47 L. J. P. C. 48, 37 L. T. Rep. N. S. 677, 26 Wkly. Rep. 358; Townley *v.* Crump, 4 A. & E. 58, 1 Harr. & W. 564, 5 L. J. K. B.

**b. Reserved in Contract.** A lien on the goods may be reserved to the unpaid seller by the provisions of the contract.[29] This lien is good as against subsequent purchasers taking with notice,[30] or not for value,[31] but not as against *bona fide* purchasers for value.[32] It is provided in some states by statute that the contract reserving a lien must be recorded in order that the lien shall be valid against creditors and subsequent purchasers in good faith;[33] but registration is not necessary as between the parties.[34]

**c. Statutory Lien.** In some states a lien is given by statute to the unpaid vendor.[35] But statutes declaring that personal property shall not be exempt from

14, 5 N. & M. 606, 31 E. C. L. 45; Miles *v.* Gorton, 2 Cromp. & M. 504, 3 L. J. Exch. 155, 4 Tyrw. 295. And see Benjamin Sales (5th ed.) 831. *Compare* Barnhill *v.* Howard, 104 Ala. 412, 16 So. 1; Sloan *v.* Kingore, 3 Ind. 549.

**29.** *Alabama.*— Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 46.

*California.*— Cayton *v.* Walker, 10 Cal. 450.

*Georgia.*— Mitchell *v.* Castlen, 5 Ga. App. 134, 62 S. E. 731.

*Kentucky.*— Peneix *v.* Rogers, 49 S. W. 447, 20 Ky. L. Rep. 1469.

*Maine.*— Sawyer *v.* Fisher, 32 Me. 28.

*Minnesota.*— Fletcher *v.* Lazier, 58 Minn. 326, 59 N. W. 1040.

*Missouri.*— Farmer *v.* Moore, 73 Mo. App. 527.

*South Carolina.*— Welsh *v.* Usher, 2 Hill Eq. 167, 29 Am. Dec. 63.

*Texas.*— Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53, 14 S. W. 245.

*United States.*—Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740.

See 43 Cent. Dig. tit. "Sales," § 859.

**Goods to be manufactured.**— It is competent for parties to agree, upon the purchase and sale of property, that the vendor shall retain a lien upon the articles manufactured from the property sold, as well as upon the property itself, and in such case the lien will attach as fast as the new articles come into existence. Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

**Substitution of contract.**— Where a contract for the sale of machinery and land stated the consideration in the aggregate, and reserved a lien on all the property therefor, and a subsequent contract stated a separate consideration for the machinery, and recited the execution of the buyer's note therefor, and stipulated that this new contract was not to affect the original contract, "except in regard to the above property," and except that the vendor "is given about one year in which to perfect his title to the property described in said contract and clear up the liens thereon," as no lien on the machinery was reserved by the new contract, none exists, the new contract being a substitution for the original one as to the machinery. Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874, 20 Ky. L. Rep. 254.

**Equitable lien.**— Where the purchaser of goods agrees to give the vendor a mortgage on them to secure the purchase-price, but the mortgage is not executed, an equitable lien arises on the goods in favor of the vendor. Husted *v.* Ingraham, 75 N. Y. 251; Alexander *v.* Heriot, Bailey Eq. (S. C.) 223.

**An oral reservation of a lien** is valid between the parties (Burnham *v.* Marshall, 56 Vt. 365); but not as against third persons (Gay *v.* Hardeman, 31 Tex. 245).

**30.** Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56; State *v.* Mason, 96 Mo. 127, 9 S. W. 19; Evans *v.* Sanborn, (Tex. 1891) 18 S. W. 703; Coleman *v.* Dunman, 67 Tex. 390, 3 S. W. 319; New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399 [*affirming* 48 Fed. 879].

**31.** State *v.* Mason, 96 Mo. 127, 9 S. W. 19; Conrad *v.* Fisher, 37 Mo. App 352, 8 L. R. A. 147; Arnold *v.* Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357.

**32.** Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Lawrence *v.* Owens, 39 Mo. App. 318; Hawk *v.* Applegate, 37 Mo. App. 32; Haggerty *v.* Palmer, 6 Johns. Ch. (N. Y.) 437; Neff *v.* Baker, 82 Va. 401, 4 S. E. 620. And see College Park Electric Belt Line *v.* Ide, 15 Tex. Civ. App. 273, 40 S. W. 64.

**Rights and liabilities of bona fide purchasers** generally see *supra*, VI, B, 2.

**33.** See the statutes. And see Daniels *v.* Thompson, 48 Ill. App. 393; New Home Sewing Mach. Co. *v.* Beals, 44 Nebr. 816, 62 N. W. 1092; Hoyt, etc., Co. *v.* Weiss, 10 Tex. Civ. App. 462, 32 S. W. 86; Bugbee *v.* Stevens, 53 Vt. 389.

**If the instrument is fraudulently withheld from registration** the lien will not affect the rights of creditors who became such on the strength of the buyer's apparent ownership. Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282, 71 N. W. 389.

**Retention of possession by the seller** is a substitute for registration. Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370.

**34.** Cameron *v.* Jones, 41 Tex Civ. App. 4, 90 S. W. 1129.

**35.** See the statutes of the several states; and the cases cited *infra*, this note.

**La. Civ. Code, art. 3227,** provides that the vendor of movables has a preference over other creditors of the vendee, whether the sale was made on credit or not, if the property remains in the possession of the vendee. In the case of the sale of agricultural products the statute gives a special lien for five days whether the goods remain in the hands of the vendee or not. See Gumbel *v.* Beer, 36 La. Ann. 484. An exchange with money consideration is a sale to the extent of such consideration giving the vendor a privi-

execution on a judgment for the purchase-price do not create a lien in favor of the vendor.[36]

**2. Extent of Lien.** The lien extends only to the purchase-price and does not

lege (Furniss' Succession, 34 La. Ann. 1013), and a sale to a creditor who gives credit for the price on the debtor's account and immediately resells for the same price is a valid sale securing the creditor a vendor's privilege (Gay *v.* Crichlow, 29 La. Ann. 122). But one who loans another money with which to purchase property, or pays for the property for another, has no vendor's lien or privilege thereon (Labouisse *v.* Orleans Cotton-Rope, etc., Co., 43 La. Ann. 245, 9 So. 204); and the pledgee under a bill of sale not being an owner, no vendor's privilege arises from the execution by him of a counter bill of sale retransferring the pledged property to the pledgor or owner (Elstner-Martin Grocery Co. *v.* Lamont, 113 La. 894, 37 So. 868); and where, under a contract of sale, by agreement between the seller, the buyer, and a third person, such third person is substituted as buyer, the original buyer does not become a vendor so as to be entitled to a vendor's lien for the amount agreed to be paid to him under the agreement (Claycomb *v.* Bisbee, 38 La. Ann. 575). The lien provided for by the Louisiana statute may be assigned with the claim for the purchase-money (Jeckell *v.* Fried, 18 La. Ann. 192); and is not dependent on the solvency or insolvency of the buyer but is absolute (Converse *v.* Hill, 14 La. Ann. 89); and extends to the interest as it becomes due on the price (Caldwell *v.* His Creditors, 9 La. 265), and continues as long as the buyer is in possession (Flint *v.* Rawlings, 20 La. Ann. 557; Penn *v.* Ott, 12 La. Ann. 233; Lee *v.* Galbraith, 5 La. Ann. 343; Laughlin *v.* Ganahl, 11 Rob. 140; Hobson *v.* Davidson's Syndic, 8 Mart. 422, 13 Am. Dec. 294. But see Loeb *v.* Blum, 25 La. Ann. 232), and, except in the case of the special privilege on agricultural products (Hawkins *v.* Beer, 37 La. Ann. 53; Elkin *v.* Harvy, 20 La. Ann. 545; Allen *v.* Jones, 24 Fed. 11), is lost if the goods are sold and delivered to another (Musson *v.* Elliott, 30 La. Ann. 147; Delgado *v.* Wilbur, 25 La Ann. 82; Flint *v.* Rawlings, *supra*; Laughlin *v.* Ganahl, *supra*; Willard *v.* Parker, 7 Mart. N. S. 483; Erwin *v.* Torrey, 8 Mart. 90, 13 Am. Dec. 279), unless the subpurchaser assumes payment of the original seller's claim (Powers *v.* Hubbell, 12 La. Ann. 413). The lien covers the goods in the buyer's possession (Millaudon *v.* New Orleans Water Co., 11 Mart. 279; Milne *v.* Amelung's Syndics, 2 Mart. 209), and the proceeds thereof (Whipple *v.* Hertzberger, 11 La. Ann. 475; Thayer *v.* Goodale, 1 La. 221; Prall *v.* Peet's Curator, 3 La. 274); and the vendor's privilege need not be recorded unless the property becomes attached to the realty (Swoop *v.* St. Martin, 110 La. 237, 34 So. 426; Gary *v.* Burguires, 12 La. Ann. 227; State Trust Co. *v.* De la Vergne Refrigerating Mach. Co., 105 Fed. 468, 44 C. C. A. 556. And see Carlin *v.* Gordy, 32 La. Ann. 1285). Where a husband purchases property during the existence of the community relation, and during such community transfers it to his wife by a *dation en paiement*, the wife's ownership is subordinate to the right of the community vendor. Louis Grunewald Co. *v.* Thompson, 104 La. 61, 28 So. 847. Whether the sale is subject to the privilege conferred by the Louisiana statute depends on the place of contract. Welsh's Succession, 111 La. 801, 35 So. 913, 64 L. R. A. 823; Erman *v.* Lehman, 47 La. Ann. 1651, 18 So. 650; McLane *v.* Creditors, 47 La. Ann. 134, 16 So. 764; Newman *v.* Sheriff, 43 La. Ann. 712, 9 So. 439; McIlvaine *v.* Legare, 36 La. Ann. 359; Tyree *v.* Sands, 24 La. Ann. 363; Brent *v.* Shouse, 16 La. Ann. 158, 79 Am. Dec. 573; Overend *v.* Robinson, 10 La. Ann. 728; Whiston *v.* Stodder, 8 Mart. 95, 13 Am. Dec 281; G. A. Gray Co. *v.* Taylor Bros. Iron Works Co., 66 Fed. 686, 14 C. C. A. 56.

**Cal. Civ. Code, § 3049,** gives a lien which, however, is merely declaratory of the common-law rule as to the lien of a seller in possession, and the lien contemplated therein exists only under a complete sale which passes title to the property, and does not attach where there was a mere executory contract to sell upon compliance with certain conditions by the party proposing to buy. Eads *v.* Kessler, 121 Cal. 244, 53 Pac. 656.

**Miss. Code, § 1255,** declares that "no property shall be exempt from execution when the purchase money thereof forms, in whole or in part, the debt on which the judgment is founded"; and the amendatory act of March 11, 1884, provides that "if the plaintiff shall desire to establish a lien on such personal property while in the hands of the first vendee, he shall . . . make affidavit stating that such property was sold by him for the debt . . . sued on," etc. This statute has been construed as giving the seller a lien only so long as the property remains in the hands of the first vendee. Frank *v.* Robinson, 65 Miss. 162, 3 So. 253.

**36.** Howell *v.* Crawford, 77 Ark. 12, 89 S. W. 1046; Barton *v.* Sitlington, 128 Mo. 164, 30 S. W. 514; Lippmann *v.* Campbell, 53 Mo. App. 121; Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16. And see Parker *v.* Rodes, 79 Mo. 88; Haworth *v.* Franklin, 74 Mo. 106; Norris *v.* Brunswick, 73 Mo. 256.

**Kirby Dig. Ark. § 4966,** providing that in an action for the price of property in possession of the vendee the court may order such property sequestrated, applies only where the property is in the possession of the vendee, and does not give a lien which can be enforced by seizing the property after it has passed into the hands of third parties who have purchased the same for value, although such parties may have had notice that the purchase-money had not been paid. Neal *v.* Cone, 76 Ark. 273, 88 S. W. 952. And see Roach *v.* Johnson, 71 Ark. 344, 74 S. W. 299; Creanor *v.* Creanor, 36 Ark. 91.

cover other claims by the seller against the buyer,[37] and will extend to property exchanged for the original goods only if so stipulated,[38] and not otherwise.[39] A lien on personal property, consisting of perishable articles, provisions, raw materials for manufacturing purposes, and implements is not to be construed so as to tie up the property from use, nor so that the same kind and amount of property shall be forthcoming in future, without a stipulation to that effect; but the purchaser is bound to make good only such waste thereof as shall have arisen from his fraud, wilful default, or misconduct, and to give up the remains on hand when he surrenders the property in satisfaction of the debt.[40]

**3. Priorities.** The lien of the vendor is inferior to other prior liens;[41] but is superior to the rights of all subsequent lienors with notice[42] and of attaching creditors.[43]

**4. Waiver or Loss of Lien and Revival — a. General Rules.** The seller's lien is lost when payment is made or legally tendered,[44] and may be waived by acts or agreements inconsistent with its existence,[45] as where the seller consents to a

**37.** Crommelin *v.* New York, etc., R. Co., 1 Abb. Dec. (N. Y.) 472, 4 Keyes 90; British Empire Shipping Co. *v.* Somes, E. B. & E. 353, 96 E. C. L. 353 [*affirmed* in 8 H. L. Cas. 338, 6 Jur. N. S. 761, 30 L. J. Q. B. 229, 2 L. T. Rep. N. S. 54, 8 Wkly. Rep. 707, 11 Eng. Reprint 459]. But see Holtz *v.* Peterson, 98 Iowa 741, 62 N. W. 19, under Code, § 2102, giving a seller of cattle a lien for their feed after tender.

**38.** Kelsey *v.* Kendall, 48 Vt. 24.

**39.** Cowart *v.* Cowart, 3 Lea (Tenn.) 57.

**40.** Williams *v.* Price, 5 Munf. (Va.) 507.

**41.** Echols *v.* Head, 68 Ga. 152.

**42.** Bean *v.* Johnson, 32 S. W. 175, 17 Ky. L. Rep. 585; New York Cent. Trust Co. *v.* Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; Denison *v.* Shuler, 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734.

**A statutory lien on agricultural products** is superior to all other liens if enforced within five days after delivery, under La. Act, March 15, 1855. Miltenberger *v.* Hetch, 13 La. Ann. 528. And see Harris *v.* Nicolopulo, 38 La. Ann. 12.

**43.** Northern Bank *v.* Deckebach, 83 Ky. 154; Tuthill *v.* Skidmore, 124 N. Y. 148, 26 N. E. 348; Ward *v.* Camp, 67 Vt. 461, 32 Atl. 236.

**44.** *In re* Seymour, 83 Mich. 496, 47 N. W. 321 (holding that where the seller takes the note of another than the purchaser, it constitutes payment, and is a discharge of the purchase-money lien); Martindale *v.* Smith, 1 Q. B. 389, 1 G. & D. 1, 5 Jur. 932, 10 L. J. Q. B. 155, 41 E. C. L. 592. And see Johnson *v.* Dickinson, 78 N. Y. 42. holding that the acceptance of a dividend in bankruptcy extinguishes the lien.

**But a mere recital in the bill of sale that payment has been made** is not conclusive on the seller. Vaughn *v.* Wood, 5 Ala. 304.

**45.** Pickett *v.* Bullock, 52 N. H. 354; Matter of Leith, L. R. 1 P. C. 296, 12 Jur. N. S. 967, 36 L. J. P. C. 17, 4 Moore P. C. N. S. 158, 15 Wkly. Rep. 534, 16 Eng. Reprint 276.

**Where the lien is reserved in the contract** (see *supra*, VIII, A, 1, b), it may be waived by agreement (Finn *v.* Donahue, 87 Mich. 292, 49 N. W. 632), and as to third persons by laches in enforcing the lien after default in payment (St. Louis Iron, etc., Works *v.* Kimball, 53 Ill. App. 636), and payment of the price terminates the lien (Cory *v.* Barnes, 63 Vt. 456, 21 Atl. 384, holding that where the vendee paid the amount due, and the vendor agreed to indorse such payment on the note, but did not do so, and afterward the parties agreed to apply such payment to another note, in the interval between the payment and the agreement to apply it on the other note, the vendor had no lien on the property). But if by the terms of the agreement the lien is reserved on all of the articles until the whoe amount is paid payment of the price of one of the articles does not release the lien thereon (Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56), nor will a commingling of the goods with other articles belonging to the buyer terminate the lien if they can be easily separated (General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101), and a reserved lien is not lost by delivery of the goods (Barnett *v.* Mason, 7 Ark. 253; Woodland Co. *v.* Mendenhall, 82 Minn. 483, 85 N. W. 164, 83 Am. St Rep. 445; Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740), nor by taking a note for the price (Crosby *v.* Redman, 70 Me. 56). Where, on original sales, notes are given to secure payment, and on their maturity new notes are given, not corresponding to those maturing, but for the balance due on account of the various sales, such sales are still distinct; the intention being, by giving the renewal notes for the balance, simply to extend the time of payment and not merge the various accounts, so as to deprive the seller of the benefit of his lien under the original agreement of sale. Campbell Printing Press, etc., Co. *v.* Walker, 9 N. Y. St. 722.

**The Louisiana statutory lien** (see *supra*, VIII, A, 1, c) may be waived by delivery with the express agreement that the goods are delivered free from the lien (Miltenberger *v.* Hetch, 13 La. Ann. 528), and is lost by the laches of the seller (Blackstone *v.* His Creditors, 3 Rob. 219; Fulton Co. *v.* Wright, 12 La. 386, where a draft was accepted and through the laches of the seller was not paid), or by a novation of the debt (Adler

resale by the buyer,[46] or to a mortgage;[47] but bringing suit and recovering a judgment for the price does not waive the lien, so long as the seller remains in possession,[48] although if the goods are sold to be paid for on delivery and thereafter the seller, without attempting to regain possession, sues and obtains judgment and partial satisfaction, the lien is lost;[49] and similarly where one having a claim for the price of articles usually exempt from execution has a specific lien on the articles for the price, and obtains a judgment for them in connection with other claims, he waives the lien and cannot enforce it for a portion of his entire judgment.[50] The lien is waived by implication when the sale is on credit,[51] or a note or security payable *in futuro* is taken for the price;[52] but the giving of a demand note for the price is not such a payment as divests the lien,[53] and although a sale is on credit, if the buyer permits the goods to remain in the seller's possession until credit has expired, the lien revives, although the buyer be solvent;[54] and the same rule applies where bills or notes given for the price are dishonored while the seller still has possession of the goods;[55] and furthermore the lien is revived

*v.* Burton Lumber Co., 46 La. Ann. 379, 15 So. 156); but the renewal of notes is not a novation within this rule (Bergeron *v.* Patin, 34 La. Ann. 534; Saul *v.* Nicolet, 15 La. 246; Hobson *v.* Davidson, 8 Mart. 422, 13 Am. Dec. 294; Cox *v.* Rabaud, 4 Mart. 11), and there is no presumption of novation of debt for purchase-money, such as to extinguish the vendor's lien, arising from the giving of a receipt acknowledging receipt of price, "payment being all satisfactory and in notes" (Adler *v.* Burton Lumber Co., *supra*). The lien is lost if the goods become so intermingled with other goods of the buyer that they cannot be identified (Payne *v.* Buford, 106 La. 83, 30 So. 263; Newman *v.* Cannon, 44 La. Ann. 579, 10 So. 933; Newman *v.* Cannon, 43 La. Ann. 712, 9 So. 439; Shakspeare *v.* Ware, 38 La. Ann 570; Scannell *v.* Beauvais, 38 La. Ann. 217; Lambert *v.* Saloy, 37 La. Ann. 3; Bonnabel *v.* Rabeneau, 4 Rob. 419; Ferguson *v* His Creditors, 19 La. 278; Stackhouse *v.* Foley, 1 Mart. 228), or become attached to and incorporated in the realty (Swoop *v.* St. Martin, 110 La. 237, 34 So. 426). However, in view of the provisions of the statute, the extension of credit or taking of a note for the price does not affect the lien. Adler *v.* Burton Lumber Co., *supra*; Terry *v.* Terry, 10 La. 68.

**46.** Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

**But a consent to a resale of a part of the goods** will not waive the lien as to the remainder. Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

**Sufficiency of contract.**— The fact that the vendor, while goods are still in his possession, and after notice of a subsale, inquires of the purchaser whether he shall ship to the subvendee, and asks repeatedly for a shipping order both from the vendee and subvendee, does not show a waiver of the vendor's lien, entitling the subvendee to possession on subsequent insolvency of the purchaser. Robinson *v.* Morgan, 65 Vt. 37, 25 Atl. 899.

**47.** Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023.

**48.** Woodland Co. *v.* Mendenhall, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 44; Rhodes *v.* Mooney, 43 Ohio St 421, 4 N. E. 233; Scrivener *v.* Great Northern R. Co., 19 Wkly. Rep. 388. But see Clark *v.* Erwin, 72 Miss. 926, 18 So. 419.

**49.** Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140.

**50.** Hickok *v.* Fay, 36 Barb. (N. Y.) 9.

**51.** *Maine.*— Cutler *v.* Pope, 13 Me. 377.

*Massachusetts.*— Arnold *v.* Delano, 4 Cush. 33, 50 Am. Dec. 754.

*Missouri.*— Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

*North Carolina.*— McCraw *v.* Gilmer, 83 N. C. 162.

*Pennsylvania.*— Greaves *v.* Hendricks, 16 Haz. Reg. 344.

*United States.*— Parker *v.* Byrnes, 18 Fed. Cas. No. 10,728, 1 Lowell 539.

See 43 Cent. Dig. tit "Sales," § 883.

**Extension of time for payment.**—A seller of chattels does not waive his right to the possession thereof by extending the time of payment of the price, in the absence of an agreement that the right of property was to remain in the buyer during the extension. Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

**52.** *Kentucky.*—Westinghouse Electric Mfg. Co. *v.* Citizens' St. R. Co., 68 S. W. 463, 24 Ky. L. Rep. 334.

*Michigan.*— Dummer *v.* Smedley, 110 Mich. 466, 68 N. W. 260, 38 L R. A. 490; *In re* Seymour, 83 Mich. 496, 47 N. W. 321.

*Missouri.*— Vogelsang *v* Fisher (1894) 28 S. W. 873; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

*United States.*— *In re* Leland, 15 Fed. Cas. No. 8,234, 10 Blatchf. 503.

*England.*— Valpy *v.* Oakeley, 16 Q. B. 941, 16 Jur. 38, 20 L. J. Q. B. 380, 71 E. C. L. 941.

See 43 Cent. Dig. tit. "Sales," § 883.

**53.** Clark *v.* Draper, 19 N. H. 419.

**54.** Martindale *v.* Smith, 1 Q. B. 395, 1 G. & D. 1, 5 Jur. 932, 10 L. J. Q. B. 155, 41 E. C. L. 592; Bunney *v.* Poyntz, 4 B. & Ad. 568, 2 L. J. K. B. 55, 1 N. & M. 229, 24 E. C. L. 250. See also Owens *v.* Weedman, 82 Ill. 409.

**55.** Tuthill *v.* Skidmore, 1 N Y. Suppl.

on the insolvency of the buyer, although the credit has not expired or the notes have not matured.[56] The lien will not revive, however, where the note has become barred by the statute of limitations.[57]

**b. Effect of Delivery of Goods.** The right to a lien is lost if the seller delivers the goods to the purchaser,[58] or to one as bailee for the purchaser;[59] but the lien is not lost if the delivery is conditional and subject to the lien;[60] nor where payment and delivery are immediate and concurrent acts, payment to be made on delivery, which, however, is refused.[61] The lien is not divested by a constructive

445 [*affirmed* in 124 N. Y. 148, 26 N. E. 348]; Valpy *v.* Oakeley, 16 Q. B. 941, 16 Jur. 38, 20 L. J. Q. B. 380, 71 E. C. L. 941; Dixon *v.* Yates, 5 B. & Ad. 313, 2 L. J. K. B. 198, 2 N. & M. 177, 27 E. C. L. 137; Griffiths *v.* Perry, 1 E. & E. 680, 5 Jur. N. S. 1076, 28 L. J. Q. B. 204, 102 E. C. L. 680.

**56.** *Massachusetts.*— Arnold *v.* Delano, 4 Cush. 33, 50 Am. Dec. 754

*Minnesota.*— Crummey *v.* Raudenbush, 55 Minn. 426, 56 N. W. 1113.

*Missouri.*—Vogelsang *v.* Fisher, 128 Mo. 386, 31 S. W. 13; Southwestern Freight, Press Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255.

*Ohio.*— Ensel *v.* Levy, 9 Ohio Dec. (Reprint) 180, 11 Cinc L. Bul. 163.

*Vermont.*— Robinson *v.* Morgan, 65 Vt. 37, 25 Atl. 899.

*United States.*— McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; *In re* Batchelder, 2 Fed. Cas. No. 1,099, 2 Lowell 245.

*England.*— Grice *v.* Richardson, 3 App. Cas. 319, 47 L. J. P. C. 48, 37 L. T. Rep. N. S. 677, 26 Wkly. Rep. 358; Gunn *v.* Bolckow, L. R. 10 Ch. 491, 44 L. J. Ch. 732, 32 L. T. Rep. N. S. 781, 23 Wkly. Rep. 739.

**57.** Moore *v.* Lesueur, 33 Ala. 237.

**58.** *Alabama.*— Blackshear *v.* Burke, 74 Ala. 239; Stringfellow *v.* Ivie, 73 Ala. 209.

*Arkansas.*— Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334, 21 S. W. 652; Obermier *v.* Core, 25 Ark. 562.

*Georgia.*— Johnson *v.* Farnum, 56 Ga. 144.

*Indiana.*— Slack *v.* Collins, 145 Ind. 569, 42 N. E. 910.

*Maine.*— Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

*Massachusetts.*— Haskins *v.* Warren, 115 Mass. 514; Douglas *v.* Shumway, 13 Gray 498; Arnold *v.* Delano, 4 Cush. 33, 50 Am. Dec. 754.

*Michigan.*— Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054.

*Minnesota.*—Meyers *v.* McAllister, 94 Minn. 510, 103 N. W. 564.

*Missouri.*— Brownell, etc., Car Co. *v.* Barnard, 116 Mo. 667, 22 S. W. 503.

*Nebraska.*— Allen *v.* Rushford, 72 Nebr. 907, 101 N. W. 1028.

*New York.*— A. F. Engelhardt Co. *v.* Benjamin, 5 N. Y. App. Div. 475, 39 N. Y. Suppl. 31; Lupin *v.* Marie, 6 Wend. 77, 21 Am. Dec. 256.

*Ohio.*— Stewart *v.* Hopkins, 30 Ohio St. 502.

*Pennsylvania.*— Welsh *v.* Bell, 32 Pa. St. 12; Bowen *v.* Burk, 13 Pa. St. 146.

*Tennessee.*— Boyd *v.* Mosely, 2 Swan 661.

*Texas.*— Lewis *v.* Steiner, 84 Tex. 364, 19 S. W. 516.

*Virginia.*— James *v.* Bird, 8 Leigh 510, 31 Am. Dec. 668.

*Wisconsin.*— Thompson *v.* Wedge, 50 Wis. 642, 7 N. W. 560.

*United States.*—Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740; *In re* Leland, 15 Fed. Cas. No. 8,234, 10 Blatchf. 503; Parker *v.* Byrnes, 18 Fed. Cas. No. 10,728, 1 Lowell 539.

*Canada.*— Wyatt *v.* Toronto Bank, 8 U. C. C. P. 104; Mason *v.* Hatton, 41 U. C. Q. B. 610.

See 43 Cent. Dig. tit. "Sales," § 879.

**Goods to be manufactured.**— A sale of goods, stipulating that they shall be delivered as fast as wanted for manufacturing, and that, when manufactured, they shall be warehoused, subject only to the vendor's order, and drawn out for vendee on certain payments being made, vests the property in the vendee on delivery, and gives the vendor a lien only on the goods warehoused. Hewlet *v.* Flint, 7 Cal. 264.

**Partial delivery.**— A delivery of part of the goods terminates the lien only as to the part so delivered. White *v.* Adkins, 18 Ala. 636; McElwee *v.* Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Payne *v.* Shadbolt, 1 Campb. 427; Hanson *v.* Meyer, 6 East 614, 2 Smith K. B. 670. 8 Rev. Rep 572.

**Deposit in government warehouse.**— The lien of an unpaid vendor upon distilled spirits is not destroyed by placing them in a government warehouse, in charge of a government storekeeper. Vogelsang *v.* Fisher, 128 Mo. 386, 31 S. W. 13; Vogelsang *v.* Fisher, (Mo. 1894) 28 S. W. 873; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

**Where the goods had been delivered, but were returned to the seller,** who refused to receive them, the lien was not revived. Leavy *v.* Kinsella, 39 Conn. 50.

**59.** Muskegon Booming Co. *v.* Underhill, 43 Mich. 629, 5 N. W. 1073; *In re* Batchelder, 2 Fed. Cas. No. 1,099, 2 Lowell 245.

**60.** Bradeen *v.* Brooks, 22 Me. 463; Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53, 14 S. W. 245.

**61.** Osborne *v.* Gantz, 38 N. Y. Super. Ct. 148 [*affirmed* in 60 N. Y. 540]; Palmer *v.* Hand, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392.

**Delivery by mistake.**— Where delivery of goods to the purchaser is made in reliance on the contemporaneous payment, which turned out not to have been actually made, the intention of the seller to waive his lien will be negatived, and possession may be taken as if no delivery had occurred. Carson *v.* Shantz, 3 Phila. (Pa.) 47

delivery so long as the vendor retains the actual possession,[62] by himself or his agent.[63]

**5. Enforcement.** It has been held that the seller's lien may be enforced by attachment,[64] or by a bill in equity,[65] but the lien conferred by statute [66] must be enforced in the manner provided by the statute.[67] The enforcement of a lien reserved by a sale of the property will not bar an action of assumpsit for the balance due.[68] The pleadings must allege facts necessary to show the existence of the lien and the right to enforce it,[69] and one seeking to subject the proceeds of the goods to his lien should show what specific property represents or was

**Delivery becoming absolute.**— Where a locomotive was sold on condition that it be paid for on delivery, but was delivered without payment, and afterward, without attempting to recover possession, the vendor sued for the price, and by judgment and garnishment secured partial satisfaction, the sale became absolute and the reserved lien was lost. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140.

**It is a question for the jury whether payment was waived** and delivery made absolute. Potter Printing Press Co. *v.* Schreiner, 47 N. Y. App. Div. 530, 62 N. Y. Suppl. 492.

**62.** Safford *v.* McDonough, 120 Mass. 290; Vogelsang *v.* Fisher, (Mo. 1894) 28 S. W. 873; Southwestern Freight, etc., Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; White *v.* Welsh, 38 Pa. St. 396. But see Chapman *v.* Searle, 3 Pick. (Mass.) 38.

**Sufficiency of delivery.**— Where a seller of pig iron has pointed it out to the buyer for the purpose of delivering it, and the latter has taken possession, the lien of the seller is lost, since such acts, being done with the intent and for the purpose of making delivery, were sufficient to pass the title to the property to the buyer. Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396.

**Delivery of keys.**— Where the vendor allowed the vendee to place the goods under lock and key upon the vendor's premises, and delivered the key to the vendee, but retained the key of the external inclosure, the vendee had not such a possession as terminated the lien. Milgate *v.* Kebble, 10 L. J. C. P. 277, 3 M. & G. 100, 3 Scott N. R. 358, 42 E. C. L. 61.

**Delivery orders.**— The giving of a delivery order does not as a general rule transfer the possession so as to terminate the lien. Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233; McEwan *v.* Smith, 2 H. L. Cas. 309, 13 Jur. 265, 9 Eng. Reprint 1109; Lackington *v.* Atherton, 8 Jur. 407, 13 L. J. C. P. 140, 7 M. & G. 360, 8 Scott N. R. 38, 49 E. C. L. 360. It may so operate, however, if it is the custom of the particular trade. Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205, 46 L. J. Ch. 418, 36 L. T. Rep. N. S. 395, 25 Wkly. Rep. 457. But see Gunn *v.* Bolckow, L. R. 10 Ch. 491, 44 L. J. Ch. 732, 32 L. T. Rep. N. S. 781, 23 Wkly. Rep. 739.

**An undertaking by the vendor to deliver** goods sold, addressed to the purchaser, does not estop the vendor from asserting his right of lien against a subpurchaser. Farmeloe *v.* Bain, 1 C. P. D. 445, 45 L. J. C. P. 264, 34 L. T. Rep. N. S. 324.

**63.** Seymour *v.* Newton, 105 Mass. 272.

**64.** Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27.

**65.** Cole *v.* Smith, 24 W. Va. 287; Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879; Perkins *v.* U. S. Electric Light Co., 16 Fed. 513, 21 Blatchf. 308.

**Jurisdiction.**— An equitable lien upon personalty created by a contract for sale thereof in Arkansas is enforceable in the Indian Territory after the purchaser has removed thither with the property. Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

**66.** See *supra*, VIII, A, 1, c.

**67.** Monroe Bldg., etc., Assoc. *v.* Johnston, 51 La. Ann. 470, 25 So. 383 (by seizure and sale); Reeves *v.* Bruening, 16 N. D. 398, 114 N. W. 313.

**Liens on agricultural products.**— The special lien accorded by Code, art. 3227, to the seller of an agricultural product of the United States in New Orleans, for five days after delivery if the price be unpaid, will be enforced where the commodity is seized within that time. Gumbel *v.* Beer, 36 La. Ann. 484.

**68.** Montgomery Furniture Co *v.* Hardaway, 104 Ala. 100, 16 So. 29.

**69.** Graham *v.* Thornton, (Miss. 1891) 9 So. 292, holding that a bill in equity by a vendor to subject the personalty sold to his claim, which is not sworn to, and contains no description of the property, and under which no writ is sued out for seizure of the property, establishes no lien.

**Affidavit.**— An affidavit to foreclose a lien must state the time when the debt was demanded sufficiently to show that it was then due. Gilbert *v.* Marshall, 56 Ga. 148.

**Sufficiency of complaint.**— A complaint alleging that defendant contracted with plaintiff for the purchase of certain furniture and fixtures described; that plaintiff was to have a lien for the price, payment to be made within one hundred and eighty days; that pursuant to such agreement defendant took possession of the property; that the price was due and unpaid; and that defendant was still in possession; and praying for judgment for the amount of the price, and a decree

acquired by the proceeds.[70] Where, however, the contract is admitted by the pleadings on both sides it may be enforced by the court without the verdict of the jury establishing it.[71] The action to enforce the lien being an affirmance of the contract, a judgment recognizing the seller as owner of the goods or vacating the sale is not justified.[72]

**B. Stoppage In Transitu**[73] — **1. Nature of Right.** An unpaid seller who has parted with the possession of the goods may, if the buyer is or becomes insolvent, stop the goods in transit; that is to say, he may resume possession of the goods, so long as they are in the course of transit,[74] and may retain them until payment or tender of the price.[75] The right exists only while the goods are in transit;[76] that is to say, until the goods have come into the actual or constructive possession of the buyer or one lawfully claiming under him.[77] This privilege of the seller was first recognized in equity but has since been adopted as a rule of law,[78] and is one with which courts of equity will not in general interfere.[79] The

for sale of the property, is sufficient in such an action. Horr *v.* Powe, 18 Wash. 536, 52 Pac. 235.

**70.** Wright *v.* Texas Moline Plow Co., 40 Tex. Civ. App. 434, 90 S. W. 905.

**71.** Day *v.* Cross, 59 Tex. 595.

**72.** Adler *v.* Wolff, 36 La. Ann. 169; Perkins *v.* U. S. Electric Light Co., 16 Fed. 513, 21 Blatchf. 308.

**73. Stoppage in transitu as affecting carriers and their liens for carriage** see Carriers, 6 Cyc. 435.

**74. Duration of transit** see *infra*, VIII, B, 6.

**75.** Inslee *v.* Lane, 57 N. H. 454; Babcock *v.* Bonnell, 80 N. Y. 244.

**76.** *Georgia.*— Branan *v.* Atlantic, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

*Illinois.*— Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

*Iowa.*— Greve *v.* Dunham, 60 Iowa 108, 14 N. W. 130.

*Louisiana.*— Williams *v.* Dotterer, 111 La. 822, 35 So. 921; Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

*Maine.*— Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Missouri.*— Heinz *v.* Railroad Transfer Co., 82 Mo. 233.

*Nebraska.*— Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534; Schuster *v.* Carson, 28 Nebr. 612, 44 N. W. 734; Chicago, etc., R. Co. *v.* Painter, 15 Nebr. 394, 19 N. W. 488.

*Nevada.*— More *v.* Lott, 13 Nev. 376.

*New Hampshire.*— Hall *v.* Dimond, 63 N. H. 565, 3 Atl. 423; Inslee *v.* Lane, 57 N. H. 454.

*New Jersey.*— Shepard, etc., Lumber Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695.

*New York.*— Stevens *v.* Wheeler, 27 Barb. 658; Lupin *v.* Marie, 2 Paige 169 [*affirmed* in 6 Wend. 77, 21 Am. Dec. 256].

*Ohio.*— Schaettle *v.* Benedict, 1 Disn. 445, 12 Ohio Dec. (Reprint) 723.

*Pennsylvania.*— White *v.* Welsh, 38 Pa. St. 396; Hays *v.* Mouille, 14 Pa. St. 48.

*Texas.*— Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

*United States.*— Conyers *v.* Ennis, 6 Fed. Cas. No. 3,149, 2 Mason 236.

*England.*— Morley *v.* Hay, 7 L. J. K. B. O. S. 104, 3 M. & R. 696.

See 43 Cent. Dig. tit. "Sales," § 837.

**77.** *Connecticut.*— Aguirre *v.* Parmelee, 22 Conn. 473.

*Florida.*— Smith *v.* Gail, 44 Fla. 803, 33 So. 527.

*Maine.*— Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Massachusetts.*— Naylor *v.* Dennie, 8 Pick. 198, 19 Am. Dec. 319; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63.

*Nevada.*— More *v.* Lott, 13 Nev. 376.

*New Hampshire.*— Hall *v.* Dimond, 63 N. H. 565, 3 Atl. 423; Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580; Atkins *v.* Colby, 20 N. H. 154.

*New York.*— Stevens *v.* Wheeler, 27 Barb. 658; Mottram *v.* Heyer, 5 Den. 629.

*Pennsylvania.*— Hays *v.* Mouille, 14 Pa. St. 48.

*Vermont.*— Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768.

*England.*— *Ex p.* Rosevear China Clay Co., 48 L. J. Bankr. 100, 11 Ch. D. 560, 40 L. T. Rep. N. S. 730, 27 Wkly. Rep. 591; Coventry *v.* Gladstone, L. R. 6 Eq. 44, 37 L. J. Ch. 492, 16 Wkly. Rep. 837.

**Sale of logs.**— Where logs are bargained and sold, to be delivered "over the dam" at the outlet of Moosehead lake, thence to be driven by a certain log-driving company to the purchaser's booms and mill, the right of stoppage *in transitu* remains in the seller until the logs come into the actual possession of the buyer at his boom; and, the buyer having become insolvent in the meantime, the seller has the right to resume the possession of the logs. Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

**78.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Gibson *v.* Carruthers, 11 L. J. Exch. 138, 8 M. & W. 321.

**79.** Straker *v.* Ewing, 34 Beav. 147, 11 Jur. N. S. 127, 11 L. T. Rep. N. S. 588, 13 Wkly. Rep. 286, 55 Eng. Reprint 590; Wiseman *v.* Vandeputt, 2 Vern. Ch. 203, 23 Eng. Ch. 732.

right seems to have been based on the custom of merchants,[80] and rests on the reasonable ground that in equity one man's goods should not be applied to the payment of another's debts.[81] As the right does not arise until the seller's lien is gone, and as it presupposes that the seller has parted with the possession as well as the property in the goods,[82] it is sometimes regarded as a mere extension of the seller's lien.[83] If, however, the goods were shipped to pay a precedent debt no right of stoppage exists.[84]

**2. Insolvency of Buyer as Basis of Right.** The right of stoppage *in transitu* arises only on the buyer's insolvency;[85] but if such insolvency exists, and the whole price has not been paid, the right of stoppage arises, whether the sale is on credit or not.[86] It is immaterial whether the insolvency arose after, or existed at the time of, the sale, provided it was at that time unknown to the seller;[87] but if the insolvency is known to the seller at the time of the sale he cannot exer-

80. Snee *v.* Prescot, 1 Atk. 245, 26 Eng. Reprint 157; Gibson *v.* Carruthers, 11 L. J. Exch. 138, 8 M. & W. 321.

81. D'Aquila *v.* Lambert, Ambl. 399, 27 Eng. Reprint 266, 2 Eden 75, 28 Eng. Reprint 824.

82. Inslee *v.* Lane, 57 N. H. 454.

**Possession of goods.**— The doctrine as to stoppage *in transitu* presupposes, not only that the property of the goods has passed to the consignee, but that the possession is in a third person in transit to the consignee. It cannot apply to a case where the actual or constructive possession remains in the shipper or his exclusive agents. The San Jose Indiano, 21 Fed. Cas. No. 12,322, 2 Gall. 268 [*affirmed* in 1 Wheat. 208, 4 L. ed. 73].

83. Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Gwyn *v.* Richmond, etc., R. Co., 85 N. C. 429, 39 Am. Rep. 708.

84. Clark *v.* Mauran, 3 Paige (N. Y.) 373; Summeril *v.* Elder, 1 Binn. (Pa.) 106; Wood *v.* Roach, 1 Yeates (Pa.) 177, 2 Dall. 180, 1 L. ed. 340, 1 Am. Dec. 276; Smith *v.* Bowles, 2 Esp. 578.

**But where there are mutual accounts** between the parties a consignor is not obliged to wait until such accounts are adjusted in order to exercise the right of stoppage. Wood *v.* Jones, 7 D. & R. 126, 16 E. C. L. 274.

85. *Alabama.*— Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Smith *v.* Barker, 102 Ala. 679, 15 So. 340.

*Illinois.*— Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

*Maine.*— Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50; Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Maryland.*— O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

*Michigan.*— Gustine *v.* Phillips, 38 Mich. 674.

*Montana.*— Walsh *v.* Blakely, 6 Mont. 194, 9 Pac. 809.

*Nebraska.*— Schuster *v.* Carson, 28 Nebr. 612, 44 N. W. 734.

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454.

*New York.*— Stevens *v.* Wheeler, 27 Barb. 658.

*Ohio.*— Jordan *v.* James, 5 Ohio 88; Schaettle *v.* Benedict, 1 Disn. 445, 12 Ohio Dec. (Reprint) 723.

*Pennsylvania.*— White *v.* Welsh, 38 Pa. St. 396; Wood *v.* Roach, 1 Yeates 177, 2 Dall. 180, 1 L. ed. 340, 1 Am. Dec. 276.

*Wisconsin.*— James Music Co. *v.* Bridge, 134 Wis. 510, 114 N. W. 1108.

*United States.*— Ryberg *v.* Snell, 21 Fed. Cas. No. 12,190, 2 Wash. 403; The San Jose Indiano, 21 Fed. Cas. No. 12,322, 2 Gall. 268 [*affirmed* in 1 Wheat 208, 4 L. ed. 73].

*England.*— D'Aquila *v.* Lambert, Ambl. 399, 27 Eng. Reprint 266, 2 Eden 75, 28 Eng. Reprint 824; Smith *v.* Bowles, 2 Esp. 578; Wiseman *v.* Vendeputt, 2 Vern. Ch. 203, 23 Eng. Reprint 732.

See 43 Cent. Dig. tit. "Sales," § 827.

**Provisional stoppage.**— The right of stoppage *in transitu* may be exercised provisionally without actual insolvency of the consignee; but if insolvency does not take place, the right does not arise, and the act is a nullity. The Constantia, 6 C. Rob. 321. And see Snee *v.* Prescot, 1 Atk. 245, 26 Eng. Reprint 157.

86. *Iowa.*— Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639; Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587.

*Louisiana.*— Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

*Maine.*— Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Massachusetts.*— Keeler *v.* Goodwin, 111 Mass. 490; Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63.

*Missouri.*— Heinz *v.* Railroad Transfer Co., 82 Mo. 233.

*Nebraska.*— Schuster *v.* Carson, 28 Nebr. 612, 44 N. W. 734.

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454; Atkins *v.* Colby, 20 N. H. 154.

*Ohio.*— Benedict *v.* Schaettle, 12 Ohio St. 515.

*Texas.*— Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

*Wisconsin.*—Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

See 43 Cent. Dig. tit. "Sales," § 828.

87. *Alabama.*— Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

cise the right.[88] Direct proof of insolvency, such as an adjudication of bankruptcy or insolvency, is not essential;[89] but the insolvency may be shown by circumstances,[90] insolvency with respect to stoppage *in transitu* meaning a general inability to pay, as shown by stoppage of payment;[91] and it has even been held that it is sufficient to show that the buyer is embarrassed and probably not able to pay his debts.[92]

**3. Property Subject to Stoppage.** The right of stoppage *in transitu* extends

*Louisiana.*— Blum *v.* Marks, 21 La. Ann. 268, 99 Am. Dec. 725.

*Maryland.*— O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

*Michigan.*— Gustine *v.* Phillips, 38 Mich. 674.

*Missouri.*— Schwabacher *v.* Kane, 13 Mo. App. 126.

*Nevada.*— Fenkhausen *v.* Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732.

*New Hampshire.*— Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

*North Carolina.*— Farrell *v.* Richmond, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 11 Am. St. Rep. 760, 3 L. R. A. 647.

*Ohio.*—Benedict *v.* Schaettle, 12 Ohio St. 515.

*Pennsylvania.*— Bender *v.* Bowman, 2 Pearson 517.

*Texas* — Houston, etc., R. Co. *v.* Poole, 63 Tex. 246.

See 43 Cent. Dig. tit. "Sales," § 829.

**Contra.**— Rogers *v.* Thomas, 20 Conn. 53 [*discussed* and *disapproved* in Benedict *v.* Schaettle, 12 Ohio St. 515], holding that the right of stoppage existed only where the insolvency arose after the sale and could not be resorted to when the insolvency existed at the time of the sale, although unknown to the seller.

**88.** O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284; Evans Garden Cultivator Co. *v.* Missouri, etc., R. Co., 64 Mo. App. 305; Fenkhausen *v.* Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; Buckley *v.* Furniss, 15 Wend. (N. Y.) 137.

**Presumption as to knowledge.**—Where parties sell goods on a credit, the presumption of law, in absence of proof to the contrary, is that they believed the purchaser to be solvent and able to pay for them. O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

**89.** O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284; Durgy Cement, etc., Co. *v.* O'Brien, 123 Mass. 12; Hays *v.* Mouille, 14 Pa. St. 48; Bender *v.* Bowman, 2 Pearson (Pa.) 517.

**90.** Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580; Schaettle *v.* Benedict, 1 Disn. (Ohio) 445, 12 Ohio Dec. (Reprint) 723; Hays *v.* Mouille, 14 Pa. St. 48.

**Circumstances showing insolvency.**— Evidence that a corporation failed to pay a claim for lumber sold for more than ten months after it became due, and after demand therefor had been made; that the seller, while endeavoring to collect the claim, found that there was no such corporation located at the place given in the order for the lumber as its place of business; and that its name was not in the city directory, sustains a finding that it was insolvent, so as to justify the seller in stopping the goods in transit. Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

**91.** *Maryland.*— O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

*Massachusetts.*— Durgy Cement, etc., Co. *v.* O'Brien, 123 Mass. 12.

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454.

*Pennsylvania.*— Bender *v.* Bowman, 2 Pearson 517.

*Texas.*— Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

See 43 Cent. Dig. tit. "Sales," § 830.

**An overt act of insolvency such as actual stoppage of payment is unnecessary,** inability to pay being sufficient to give the right of stoppage. Benedict *v.* Schaettle, 12 Ohio St. 515.

**It is sometimes provided by statute** that a person is insolvent, allowing the right of stoppage *in transitu*, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so. Cal. Civ. Code (1903), § 3077; N. D. Rev. Codes (1899), § 4848; S. D. Civ. Code (1903), § 2164.

**Different meanings of "insolvency" defined** see Insolvency, 22 Cyc. 1256.

**92.** Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; More *v.* Lott, 13 Nev. 376.

**But the issue of an attachment against the buyer** is not necessarily evidence of insolvency (Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114; Gustine *v.* Phillips, 38 Mich. 674); and thus where a vendor who has on closing of his vendee's store by attachment endeavored to exercise his right of stoppage *in transitu* as to certain of the goods attached intervenes as claimant in the attachment suit, evidence that the vendee had a large amount of property in another state is admissible to prove the solvency of the vendee when the vendor attempted to exercise the right of stoppage (Bayonne Knife Co. *v.* Umbenhauer, *supra*).

**Absconding buyer.**—A seller cannot stop goods in transit simply because the buyer absconded before they reached him, where the buyer's insolvency is not shown. Smith *v.* Barker, 102 Ala. 679, 15 So. 340. But see Schwabacher *v.* Kane, 13 Mo. App. 126, holding that if the buyer converts his visible property into cash and absconds, he is insolvent within the rule allowing stoppage of goods *in transitu*.

to the goods themselves and the net proceeds thereof,[93] and the right of stoppage existing at the time of an attachment laid on the goods is not defeated or impaired by the attachment nor altered by a sale of the goods under order of the court, but embraces the proceeds of the sale, in the custody of the court.[94] Property sold in violation of statute, as for instance intoxicating liquors, may be stopped in transit, but the right in such case cannot be enforced by replevin.[95]

**4. Who May Exercise Right.** The right of stoppage *in transitu* may be exercised not only by the seller himself but also by persons occupying a position substantially similar to that of the unpaid seller.[96] Thus the right may be exercised by a consignor or factor who has purchased the goods with his own money or on his own credit,[97] by the seller of an interest in an executory contract,[98] by one consigning goods to his factor, although the factor has made advances or has a joint interest with the consignor,[99] by a general agent of the seller,[1] especially if his act is ratified by the principal,[2] or by an agent specially authorized by indorse-

**93.** Berndtson *v.* Strang, L. R. 3 Ch. 588, 37 L. J. Ch. 665, 19 L. T. Rep. N. S. 40, 16 Wkly. Rep. 1025; *Ex p.* Falk, 14 Ch. D. 446, 4 Aspin. 280, 42 L. T. Rep. N. S. 780, 28 Wkly. Rep. 785.

**Insurance.**— The right of stoppage *in transitu* does not extend over policy moneys paid in respect of insurance effected upon the goods by the vendee. Berndtson *v.* Strang, L. R. 3 Ch. 588, 37 L. J. Ch. 665, 19 L. T. Rep. N. S. 40, 16 Wkly. Rep. 1025.

**Remittance of money.**—Where a party remits money on a particular account for a particular purpose, and the consignee becomes insolvent, it may be stopped *in transitu*. Smith *v.* Bowles, 2 Esp. 578. See also Muller *v.* Pondir, 55 N. Y. 325, 14 Am. Rep. 259.

**94.** Hause *v.* Judson, 4 Dana (Ky.) 7, 29 Am. Dec. 377; O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

**95.** Howe *v.* Stewart, 40 Vt. 145. And see Jones Liens, § 868.

**96.** Gossler *v.* Schepeler, 5 Daly (N. Y.) 476; Feise *v.* Wray, 3 East 93, 6 Rev. Rep. 551.

**Purchase by seller on joint account.**— Where the seller of goods, under a contract to deliver them on shipboard, enters into a contract with a third party to purchase such goods on joint account, each party to furnish one half of the funds, the joint venture and the interest of such third party ends with a delivery of the goods on shipboard to the purchaser of such seller, and thereafter the title to such goods is in the purchaser, subject to the seller's right of stoppage *in transitu*, and that when such right is exercised by the seller it is for his own benefit, and not for the benefit of the other party to the joint venture. *In re* Comstock, 6 Fed. Cas. No. 3,079, 3 Sawy. 320, 12 Nat. Bankr. Reg. 110.

**Shipment on order of third person.**—Where D of Omaha, ordered a bill of lumber of S, of Dallas, and S, not having the lumber, sent the order to N, at Waldo, requesting him to ship the lumber to D, on account of S, and send him the invoice and bill of lading, N was not D's vendor, but merely consignor, and hence he could not, on the insolvency of S, exercise the right of stoppage *in transitu*. Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Nebr. 321, 74 N. W. 670, 40 L. R. A. 534. So too where A ordered goods of B, who transmitted the order to C, with directions to fill it and ship to A, all three living in different places, and C, in accordance with his directions from B, shipped the goods to A, and sent the bill and bill of lading to B, who failed before the goods reached A, C had no right of stoppage *in transitu* as against A. Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614. And see Pennell *v.* Alexander, 3 E. & B. 283, 18 Jur. 627, 23 L. J. Q. B. 171, 77 E. C. L. 283.

**97.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Seymour *v.* Newton, 105 Mass. 272; Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Gossler *v.* Schepeler, 5 Daly (N. Y.) 476; Tucker *v.* Humphrey, 4 Bing. 516, 6 L. J. C. P. O. S. 92, 1 M. & P. 378 note, 13 E. C. L. 614; Hawkes *v.* Dunn, 1 Cromp. & J. 519, 9 L. J. Exch. O. S. 184, 1 Tyrw. 413; Feise *v.* Wray, 3 East 93, 6 Rev. Rep. 551. But see Gwyn *v.* Richmond, etc., R. Co., 85 N. C. 429, 39 Am. Rep. 708.

**One who is merely surety for the price** cannot stop the goods *in transitu*. Siffken *v.* Wray, 6 East 371, 2 Smith K. B. 480. But it has been held that under Act 19 & 20 Vict. c. 97, a surety has such right. Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233.

**98.** Jenkyns *v.* Usborne, 13 L. J. C. P. 196, 7 M. & G. 678, 8 Scott N. R. 505, 49 E. C. L. 678.

**99.** Kinloch *v.* Craig, 4 Bro. P. C. 47, 2 Eng. Reprint 32, 3 T. R. 119, 100 Eng. Reprint 487, 858, 1 Rev. Rep. 664; Newson *v.* Thornton, 6 East 17, 2 Smith K. B. 207, 8 Rev. Rep. 378.

**1.** Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580; Bell *v.* Moss, 5 Whart. (Pa.) 189; Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188; Fraser *v.* Witt, L. R. 7 Eq. 64, 19 L. T. Rep. N. S. 440, 17 Wkly. Rep. 92; Hutchings *v.* Nunes, 10 Jur. N. S. 109, 9 L. T. Rep. N. S. 125, 1 Moore P. C. N. S. 243, 15 Eng. Reprint 629; Whitehead *v.* Anderson, 11 L. J. Exch. 157, 9 M. & W. 518. But see McDonald *v.* McPherson, 12 Can. Sup. Ct. 416.

**2.** Durgy Cement, etc., Co. *v.* O'Brien, 123

ment of the bill of lading by the consignor and its transmission to such agent with instructions to take possession of the goods.[3]

**5. Against Whom Right May Be Exercised.** The right of stoppage may be exercised against the insolvent buyer and persons claiming under him, except those who claim under a transfer of the bill of lading for value and in good faith.[4]

Mass. 12; Hutchings *v.* Nunes, 10 Jur. N. S. 109, 9 L. T. Rep. N. S. 125, 1 Moore P. C. N. S. 243, 15 Eng. Reprint 692, where the ratification, although mailed before did not reach the agent until after the stoppage.

**Time of ratification.**— If the agent acts without authority, a ratification after the buyer has demanded the goods of the carrier is too late. Bird *v.* Brown, 4 Exch. 786, 14 Jur. 132, 19 L. J. Exch. 154.

3. Morison *v.* Gray, 2 Bing. 260, 3 L. J. C. P. O. S. 261, 9 Moore C. P. 484, 9 E. C. L. 570.

4. *Alabama.*— Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

*Illinois.*— Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

*Maine.*— Lee *v.* Kimball, 45 Me. 172.

*Maryland.*— Bristol Nat. Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

*Missouri.*— Dymock *v.* Missouri, etc., R. Co., 54 Mo. App. 400.

*New York.*— Becker *v.* Hallgarten, 86 N. Y. 167; Western Transp. Co. *v.* Marshall, 4 Abb. Dec. 575, 4 Transcr. App. 366, 6 Abb. Pr. N. S. 280; Dows *v.* Greene, 32 Barb. 490 [*affirmed* in 24 N. Y. 638]; Ives *v.* Polak, 14 How. Pr. 411.

*Texas.*— Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

*United States.*— St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99; Schmidt *v.* The Pennsylvania, 21 Fed. Cas. No. 12,464, 7 Wkly. Notes Cas. (Pa.) 98 [*affirmed* in 4 Fed. 548].

*England.*— Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, 8 Aspin. 516, 4 Com. Cas. 168, 68 L. J. Q. B. 515, 80 L. T. Rep. N. S. 269, 15 T. L. R. 247, 47 Wkly. Rep. 422; Leask *v.* Scott, 2 Q. B. D. 376, 46 L. J. Q. B. 576, 36 L. T. Rep. N. S. 784, 25 Wkly. Rep. 654; Pease *v.* Gloahec, L. R. 1 P. C. 219, 12 Jur. N. S. 677, 35 L. J. P. C. 66, 15 L. T. Rep. N. S. 6, 3 Moore P. C. N. S. 556, 15 Wkly. Rep. 201, 16 Eng. Reprint 210; Lickbarrow *v.* Mason, 4 Bro. P. C. 57, 2 Eng. Reprint 39, 1 H. Bl. 357, 2 H. Bl. 211, 2 T. R. 63, 100 Eng. Reprint 35, 5 T. R. 367, 683, 101 Eng. Reprint 206, 380, 6 T. R. 131, 101 Eng. Reprint 473; Kemp *v.* Canavan, 15 Ir. C. L. 216.

*Canada.*— Clementson *v.* Grand Trunk R. Co., 42 U. C. Q. B. 263.

See 43 Cent. Dig. tit. "Sales," § 836.

**One who takes a transfer of a bill of lading in payment of a preëxisting debt** is a purchaser for value. Denver First Nat. Bank *v.* Schmidt, 6 Colo. App. 216, 40 Pac. 479; Lee *v.* Kimball, 45 Me. 172; Dymock *v.* Midland Nat. Bank, 67 Mo. App. 97; Shepard, etc., Lumber Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434. But see Koontz *v.* Wheeling, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 478, 5 Ohio N. P. 15; Rodger *v.* Comptoir d'Escompte de Paris, L. R. 2 P. C. 393, 38 L. J. P. C. 30, 21 L. T. Rep. N. S. 33, 5 Moore P. C. N. S. 538, 17 Wkly. Rep. 468, 16 Eng. Reprint 618.

**One who takes a transfer of the bill with knowledge of the buyer's insolvency** is not a purchaser in good faith. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Vertue *v.* Jewell, 4 Campb. 31. But mere knowledge that the goods had not been paid for does not imply bad faith on the part of the purchaser. Shepard, etc., Lumber Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695.

**The transferee of a duplicate bill of lading** is put on inquiry as to the original bill and is not a *bona fide* purchaser. Castanola *v.* Missouri Pac. R. Co., 24 Fed. 267. And see The Tigress, Brown & L. 38, 9 Jur. N. S. 361, 32 L. J. Adm. 97, 8 L. T. Rep. N. S. 117, 11 Wkly. Rep. 538.

**Substituted bills of lading.**—Where M shipped flour on the U road to G, and sent him the U road's bills of lading therefor, and G delivered them to the C road, took new bills of lading for further shipment of the flour, and sold them to plaintiff, when in fact the flour was in the possession of the U road, in another state, and G failed the same day, and plaintiff notified the U road of its ownership of the property, and after plaintiff's claim, M stopped the flour *in transitu*, the equities of M and plaintiff's were equal, and plaintiff's legal title would prevail, since M's lien for the purchase-price by way of stoppage *in transitu* was not asserted before plaintiff's rights intervened. Ætna Nat. Bank *v.* Union Pac. R. Co., 69 Mo. App. 246.

**Sufficiency of transfer.**—Where an ocean bill of lading was drawn to "E. H., or assigns," the drawee being a railroad agent at New York, who attended to the transhipment of goods, and he shipped the goods to San Francisco, and transmitted the bill of lading to the purchaser without indorsement, and the purchaser indorsed the bills, and delivered them as security for advances, the shipper's right to retake possession of the goods was unaffected by the purchaser's indorsement and transfer of the bills of lading, as "E. H." having failed to indorse them, no title to the goods passed. Sheppard *v.* Newhall, 54 Fed. 306, 4 C. C. A. 352 [*reversing* 47 Fed. 468, and *following* St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434].

**Fraudulent transfer.**— The rule that the right of stoppage *in transitu* may be defeated

The right may therefore be asserted against ordinary purchasers from the buyer to whom neither possession nor a bill of lading has been given,[5] or attaching creditors,[6] or an assignee for the benefit of creditors before delivery;[7] but delivery to the buyer's assignee or trustee in bankruptcy terminates the transit and destroys the right,[8] and a delivery of the goods to a pledgee will have the same effect.[9] The doctrine of stoppage *in transitu* is not abrogated by the United States Bankruptcy

by a sale to a third person, and an indorsement of the bill of lading in good faith for a valuable consideration, does not apply to an apparent sale, made fraudulently, without consideration, for the purpose of defeating the right. Rosenthal *v.* Dessau, 11 Hun (N. Y.) 49.

**Circumstances of transfer.**— The fact that a transfer of a bill of lading to a bank, as security, was after its doors were closed for the day for the purpose of deposit and check, does not affect its right as against the vendor, who stops the goods in transit, although, before its doors are again opened, it learns of the insolvency of the vendee. Denver First Nat. Bank *v.* Schmidt, 6 Colo. App. 216, 40 Pac. 479.

**Subpurchaser as consignee.**—Where a buyer resold the property to defendant, and the seller shipped it to defendant, and sent the bills of lading to defendant as consignee, no further transfer was necessary to defeat the seller's right of stoppage *in transitu* for insolvency of the buyer. Shepard, etc., Lumber Co. *v.* Burroughs, 62 N. J. L. 469, 41 Atl. 695.

**In the case of bona fide pledge by indorsement of a bill of lading** the seller holds the goods subject to the lien of the pledgee. Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188; Kemp *v.* Falk, 7 App. Cas. 573, 5 Aspin. 1, 52 L. J. Ch. 167, 47 L. T. Rep. N. S. 454, 31 Wkly. Rep. 125; Matter of Westzinthus, 5 B. & Ad. 817, 3 L. J. K. B. 56, 2 N. & M. 644, 27 E. C. L. 344. *Compare* Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. Rep. 434; Florsheim *v.* Howell, 33 La. Ann. 1184.

5. *Georgia.*— Branan *v.* Atlantic, etc., R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. Rep. 26.

*Illinois.*— Delta Bag Co. *v.* Kearns, 112 Ill. App. 269.

*Indiana.*— Pattison *v.* Culton, 33 Ind. 240, 5 Am. Rep. 199.

*Iowa.*— Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639.

*Massachusetts.*— Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29.

*Missouri.*— Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992.

*Ohio.*— Koontz *v.* Wheeling, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 478, 5 Ohio N. P. 15.

*England.*— Craven *v.* Ryder, Holt N. P. 100, 3 E. C. L. 48, 2 Marsh. 127, 6 Taunt. 433, 1 E. C. L. 690, 16 Rev. Rep. 644.

See 43 Cent. Dig. tit. "Sales," § 832.

But see Schmidt *v.* The Pennsylvania, 21 Fed. Cas. No. 12,464 [*affirmed* in 4 Fed. 548].

**Assent to sale.**—When goods are sold to one person, who, before delivery to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage *in transitu*. Eaton *v.* Cook, 32 Vt. 58.

6. *Alabama.*— Bayonne Knife Co. *v.* Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. Rep. 114.

*California.*— Blackman *v.* Pierce, 23 Cal. 508.

*Connecticut.*— Woodruff *v.* Noyes, 15 Conn. 335.

*Iowa.*— Greve *v.* Dunham, 60 Iowa 108, 14 N. W. 130.

*Kentucky.*— Wood *v.* Yeatman, 15 B. Mon. 270; Hause *v.* Judson, 4 Dana 7, 29 Am. Dec. 377.

*Louisiana.*— Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

*Maryland.*— O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

*Mississippi.*— Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. 267; Morris *v.* Shryock, 50 Miss. 590; Dickman *v.* Williams, 50 Miss. 500.

*Missouri.*— Estey *v.* Truxel, 25 Mo. App. 238.

*Nebraska.*— Schuster *v.* Carson, 28 Nebr. 612, 44 N. W. 734; Chicago, etc., R. Co. *v.* Painter, 15 Nebr. 394, 19 N. W. 488.

*New York.*— Clark *v.* Lynch, 4 Daly 83; Buckley *v.* Furniss, 15 Wend. 137.

*North Carolina.*— Farrell *v.* Richmond, etc., R. Co., 102 N. C. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. Rep. 760.

*Ohio.*— Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Benedict *v.* Schaettle, 12 Ohio St. 515.

*Pennsylvania.*—Allen *v.* Mercier, 1 Ashm. 103; Bender *v.* Bowman, 2 Leg. Gaz. 178; Mouille *v.* Hays, 4 Pa. L. J. Rep. 413.

*Tennessee.*— Mississippi Mills *v.* Union, etc., Bank, 9 Lea 314. But see Boyd *v.* Mosely, 2 Swan 661.

See 43 Cent. Dig. tit. "Sales," § 832.

**The fact that the creditor paid the freight** to the carrier does not affect the seller's right of stoppage. Greve *v.* Dunham, 60 Iowa 108, 14 N. W. 130.

7. Tufts *v.* Sylvester, 79 Me. 213, 9 Atl. 357, 1 Am. St. Rep. 303; Lentz *v.* Flint, etc., R. Co., 53 Mich. 444, 19 N. W. 138; Harris *v.* Hart, 6 Duer (N. Y.) 606 [*affirmed* in 17 N. Y. 249]; Bell *v.* Moss, 5 Whart. (Pa.) 189.

8. Conyers *v.* Ennis, 4 Fed. Cas. No. 3,149, 2 Mason 236; Inglis *v.* Usherwood, 1 East 515; Ellis *v.* Hunt, 3 T. R. 464, 1 Rev. Rep. 743, 100 Eng. Reprint 679.

9. Brook Iron Co. *v.* O'Brien, 135 Mass. 442.

Act,[10] and the fact that a consignee has been adjudicated a bankrupt and a receiver or trustee appointed for the estate does not affect the right of the consignor to stop the goods in transit.[11]

**6. Duration and Termination of Transit; Delivery — a. General Rules; Delivery to Buyer or Subpurchaser.** Transit includes not only carriage of goods to destination, but delivery there according to the terms of the contract,[12] and even though the buyer fails or refuses to take possession the transit is not terminated.[13] But the transit is terminated so as to preclude the seller from stopping the goods if before the exercise of the right the goods are delivered to the buyer or a subpurchaser,[14] or to a third person on the buyer's order,[15] although in the latter case the effect of the delivery may depend on the purpose for which the order was given.[16] But the giving of delivery orders is not alone a delivery of

**10.** 30 U. S. St. at L. 544, c. 541 [U. S. Comp. St. (1901) p. 3418].

**11.** *In re* Darlington Co., 163 Fed. 385.

**12.** Jacobs *v.* Bentley, 86 Ark. 186, 110 S. W. 594, holding that the right of an unpaid seller to stop goods *in transitu* is not defeated by the mere arrival of the goods at their destination, but may be exercised until transit is ended by the coming of the goods into the vendee's actual possession or his constructive possession by a delivery to his agent. Kemp *v.* Falk, 7 App. Cas. 573, 5 Aspin. 1, 52 L. J. Ch. 167, 47 L. T. Rep. N. S. 454, 31 Wkly. Rep. 125.

**13.** *Arkansas.*— Mason *v.* Wilson, 43 Ark. 172.

*Colorado.*— Weber *v.* Baessler, 3 Colo. App. 459, 34 Pac. 261.

*Iowa.*— Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587; Alsberg *v.* Latta, 30 Iowa 442.

*Massachusetts.*— Scholfield *v.* Bell, 14 Mass. 40. And see Naylor *v.* Dennie, 8 Pick. 198, 19 Am. Dec. 319.

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454.

*Ohio.*— Wheeling, etc., R. Co. *v.* Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

*Pennsylvania.*— Jenks *v.* Fulmer, 160 Pa. St. 527, 28 Atl. 841; Kahnweiler *v.* Buck, 2 Leg. Gaz. 118.

*England.*— Bolton *v.* Lancashire, etc., R. Co., L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. 137, 13 L. T. Rep. N. S. 764, 14 Wkly. Rep. 430; Bartram *v.* Farebrother, 4 Bing. 579, 6 L. J. C. P. O. S. 125, 1 M. & P. 515, 29 Rev. Rep. 639, 13 E. C. L. 644; James *v.* Griffin, 6 L. J. Exch. 241, 2 M. & W. 623. See 43 Cent. Dig. tit. "Sales," § 846.

**14.** *Kentucky.*— Ford *v.* Sproule, 2 A. K. Marsh. 528, 12 Am. Dec. 439.

*Louisiana.*— Williams *v.* Dotterer, 111 La. 822, 35 So. 921.

*Missouri.*— Klein *v.* Fischer, 30 Mo. App. 568.

*Nebraska.*— U. S. Wind Engine Co. *v.* Oliver, 16 Nebr. 612, 21 N. W. 463.

*New York.*— Stevens *v.* Wheeler, 27 Barb. 658; Hollingsworth *v.* Napier, 3 Cai. 182, 2 Am. Dec. 268.

*Texas.*— Schneider *v.* Leibes, 3 Tex. App. Civ. Cas. § 286.

*United States.*— The Natchez, 31 Fed. 615; Conyers *v.* Ennis, 6 Fed. Cas. No. 3,149, 2 Mason 236.

*England.*— Hawes *v.* Watson, 2 B. & C. 540, 4 D. & R. 22, 2 L. J. K. B. O. S. 83, R. & M. 6, 26 Rev. Rep. 448, 9 E. C. L. 238; Coxe *v.* Harden, 4 East 211, 217, 1 Smith K. B. 20, 7 Rev. Rep. 570; Wright *v.* Lawes, 4 Esp. 82; Noble *v.* Adams, Holt N. P. 248, 3 E. C. L. 105, 2 Marsh. 366, 7 Taunt. 59, 2 E. C. L. 259, 17 Rev. Rep. 445.

See 43 Cent. Dig. tit. "Sales," § 837 *et seq.*

**Delivery on buyer's trucks.**— Where manufacturers at one town contracted to deliver goods free on board at another, and would have sent the goods thither in their own name but for a subsequent arrangement with the purchasers, under which the goods were loaded in trucks sent by the purchasers, the transit was at an end in law when the goods were loaded in the trucks. Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205, 46 L. J. Ch. 418, 36 L. T. Rep. N. S. 395, 25 Wkly. Rep. 457.

**Redelivery to seller.**— If there has been an actual delivery to the buyer, a redelivery to the seller for the special purpose of having the goods repacked for shipment will not revive the right of stoppage. Valpy *v.* Gibson, 4 C. B. 837, 11 Jur. 826, 16 L. J. C. P. 241, 56 E. C. L. 837.

**Delivery to assignee in insolvency.**— A delivery to an assignee, for benefit of creditors or trustee in insolvency or bankruptcy, is a sufficient delivery. Millard *v.* Webster, 54 Conn. 415, 8 Atl. 470; McElroy *v.* Seery, 61 Md. 389, 48 Am. Rep. 110; Ellis *v.* Hunt, 3 T. R. 464, 1 Rev. Rep. 743, 100 Eng. Reprint 679.

**A delivery to the administrator** of the buyer is sufficient to terminate the transit. Conyers *v.* Ennis, 6 Fed. Cas. No. 3,149, 2 Mason 236.

**A delivery of goods to an attaching officer** in possession of the buyer's place of business is not a delivery to the buyer. Jenks *v.* Fulmer, 160 Pa. St. 527, 28 Atl. 841; Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. Rep. 796. And see Sherman *v.* Rugee, 55 Wis. 346, 13 N. W. 241. And a delivery to a mortgagee in possession is not sufficient. Kingman *v.* Denison, 84 Mich. 608, 48 N. W. 26, 22 Am. St. Rep 711, 11 L. R. A. 347. And see Condict *v.* Rosenfield, 36 Tex. 23.

**15.** Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658.

**16.** Halff *v.* Allyn, 60 Tex. 278.

the goods so as to terminate the transit,[17] unless such is the understood custom of the particular trade,[18] or the carrier attorns to the holder of the order.[19] It is not necessary that the goods should have been taken into the very hands of the buyer himself,[20] but a delivery on the wharf which is the buyer's usual place of receiving goods is sufficient;[21] and so too it is a sufficient delivery if the goods are appropriated or marked for the buyer.[22] If there was an actual delivery to the buyer the transit is at an end irrespective of an undisclosed reservation on his part,[23] or his unwillingness to receive the goods.[24] The transit is not terminated by the seizure of the goods under an attachment or execution at the suit of a creditor of the buyer.[25]

**b. Partial Delivery.** A delivery of part of the goods is not, so far as the right of stoppage *in transitu* is concerned, a constructive delivery of the whole, unless the circumstances indicate that the part delivery was intended to have that effect,[26] and the right of stoppage is therefore terminated only as to the part actually delivered, and still exists as to the residue of the goods.[27]

**c. Delivery to Agent or Warehouseman.** Generally the transit is terminated by a delivery on account of the buyer, to a designated warehouseman or one who customarily receives goods for the buyer,[28] or to an agent of the

**17.** Gunn *v.* Bolckow, L. R. 10 Ch. 491, 44 L. J. Ch. 732, 32 L. T. Rep. N. S. 781, 23 Wkly. Rep. 739; Coventry *v.* Gladstone, L. R. 6 Eq. 44, 37 L. J. Ch. 492, 16 Wkly. Rep. 837.

**The fact that the goods were transferred upon the records of the warehouse** to the buyer did not affect the seller's right of stoppage. Mohr *v.* Boston, etc., R. Co., 106 Mass. 67.

**18.** Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 5 Ch. D. 205, 46 L. J. Ch. 418, 36 L. T. Rep. N. S. 395, 25 Wkly. Rep. 457.

**19.** Lackington *v.* Atherton, 8 Jur. 407, 13 L. J. C. P. 140, 7 M. & G. 360, 8 Scott N. R. 38, 49 E. C. L. 360; Pooley *v.* Great Eastern R. Co., 34 L. T. Rep. N. S. 537.

**20.** Ellis *v.* Hunt, 3 T. R. 464, 1 Rev. Rep. 743, 100 Eng. Reprint 679.

**21.** Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768.

**22.** Swanwick *v.* Sothern, 9 A. & E. 895, 1 P. & D. 648, 36 E. C. L. 465; Stoveld *v.* Hughes, 14 East 308, 12 Rev. Rep. 523; Cooper *v.* Bill, 3 H. & C. 722, 34 L. J. Exch. 161, 12 L. T. Rep. N. S. 466.

**23.** Smith *v.* Gail, 44 Fla. 803, 33 So. 527.

**24.** Heinekey *v.* Earle, 8 E. & B. 410, 4 Jur. N. S. 848, 28 L. J. Q. B. 79, 6 Wkly. Rep. 687, 92 E. C. L. 410.

**25.** *Massachusetts.*— Durgy Cement, etc., Co. *v.* O'Brien, 123 Mass. 12.

*Ohio.*— Benedict *v.* Schaettle, 12 Ohio St. 515.

*Pennsylvania.*— Hays *v.* Mouille, 14 Pa. St. 48; Bender *v.* Bowman, 2 Pearson 517; Eastern Lumber Co. *v.* Gill, 9 Pa. Co. Ct. 630.

*Texas.*— Tillman *v.* Kansas City Distilling Co., 3 Tex. App. Civ. Cas. § 285.

*Vermont.*— Kitchen *v.* Spear, 30 Vt. 545.

*Wisconsin.*— Sherman *v.* Rugee, 55 Wis. 346, 13 N. W. 241.

*England.*— Oppenheim *v.* Russell, 3 B. & P. 42, 6 Rev. Rep. 604; Smith *v.* Goss, 1 Campb. 282, 10 Rev. Rep. 684.

*Canada.*— McLean *v.* Breithaupt, 12 Ont. App. 383.

See 43 Cent. Dig. tit. "Sales," § 842.

**26.** Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; Hamburger *v.* Rodman, 9 Daly (N. Y.) 93; Buckley *v.* Furniss, 17 Wend. (N. Y.) 504; *In re* Bearns, 2 Fed. Cas. No. 1,191, 18 Nat. Bankr. Reg. 500; *Ex p.* Gibbes, 1 Ch. D. 101, 45 L. J. Bankr. 10, 33 L. T. Rep. N. S. 479, 24 Wkly. Rep. 298; Betts *v.* Gibbons, 2 A. & E. 57, 4 L. J. K. B. 1, 4 N. & M. 64, 29 E. C. L. 47; Crawshay *v.* Eades, 1 B. & C. 181, 2 D. & R. 288, 1 L. J. K. B. O. S. 90, 25 Rev. Rep. 348, 8 E. C. L. 78; Hammond *v.* Anderson, 1 B. & P. N. R. 69, 2 Campb. 243, 8 Rev. Rep. 763; Miles *v.* Gorton, 2 Cromp. & M. 504, 3 L. J. Exch. 155, 4 Tyrw. 295; Slubey *v.* Heyward, 2 H. Bl. 504, 3 Rev. Rep. 386; Jones *v.* Jones, 18 L. J. Exch. 481, 8 M. & W. 431; Tanner *v.* Scovell, 14 L. J. Exch. 321, 14 M. & W. 28.

**27.** *Kentucky.*— Secomb *v.* Nutt, 14 B. Mon. 324.

*Maine.*— Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

*Massachusetts.*— Mohr *v.* Boston, etc., R. Co., 106 Mass. 67.

*New York.*— Buckley *v.* Furniss, 17 Wend. 504.

*United States.*— *In re* Bearns, 2 Fed. Cas. No. 1,191.

*England.*— Bolton *v.* Lancashire, etc., R. Co., L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. 137, 13 L. T. Rep. N. S. 764, 14 Wkly. Rep. 430; *Ex p.* Cross, Fonbl. 215; Tanner *v.* Scovell, 14 L. J. Exch. 321, 14 M. & W. 28.

**28.** Muskegon Booming Co. *v.* Underhill, 43 Mich. 629, 5 N. W. 1073 (delivery of logs to boom company); Frazer *v.* Hilliard, 2 Strobh. (S. C.) 309; Hoover *v.* Tibbits, 13 Wis. 79; Tucker *v.* Humphrey, 4 Bing. 516, 6 L. J. C. P. O. S. 92, 1 M. & P. 378 note, 13 E. C. L. 614; Richardson *v.* Goss, 3 B. & P. 119, 6 Rev. Rep. 727; Dodson *v.* Wentworth, 6 Jur. 1066, 12 L. J. C. P. 59, 4 M. & G. 1080, 5

buyer;[29] but the purpose of the delivery to the agent is to be taken into consideration.[30] Thus a delivery to the buyer's agent whose duty it is to pack the goods and forward them when the final destination is determined terminates the transit;[31] but the transit is not terminated if the delivery is to an agent for the purpose of having the goods forwarded to the agreed destination,[32] or for the purpose of having the transit continued from an intermediate point to the agreed destination.[33] On the other hand, the delivery to an agent will terminate the transit if he is to hold the goods pending orders from the buyer as to their final destination or is to forward them to a new destination not contemplated in the original shipment.[34] The distinction is that in the one case the delivery to the agent is merely for the purpose of having the original transit continued, whereas in the other case the delivery to the agent is for the purpose of changing the transit and substituting a new destination.[35] An order for delivery at a warehouse or particular place within the original destination is not such a change of destination as terminates the transit.[36]

**d. Delivery on Buyer's Ship.** Where by the terms of the bill of lading the goods are deliverable to the buyer or his assignee, delivery on board the buyer's own ship does not show a delivery to him necessarily precluding stoppage *in transitu*.[37] A distinction is recognized in England between such cases and those where the ship is merely chartered by the buyer, and in the latter case the right

Scott N. R. 821, 43 E. C. L. 555; Wentworth *v.* Outhwaite, 12 L. J. Exch. 172, 10 M. & W. 436.

**29.** Mason *v.* Wilson, 43 Ark. 172; McFetridge *v.* Piper, 40 Iowa 627; Schoninger *v.* Day, 61 Mo. App. 366; O'Neal *v.* Day, 53 Mo. App. 139; Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658.

**30.** Halff *v.* Allyn, 60 Tex. 278.

**31.** Scott *v.* Pettit, 3 B. & P. 469, 7 Rev. Rep. 804; Leeds *v.* Wright, 3 B. & P. 320, 4 Esp. 243, 7 Rev. Rep. 779. But see Loeschman *v.* Williams, 4 Campb. 181, 16 Rev. Rep. 772.

**32.** Aguirre *v.* Parmelee, 22 Conn. 473; Hays *v.* Mouille, 14 Pa. St. 48; Jackson *v.* Nichol, 5 Bing. N. Cas. 508, 8 L. J. C. P. 294, 7 Scott 577, 35 E. C. L. 274.

**33.** *California.*— Blackman *v.* Pierce, 23 Cal. 508; Markwald *v.* His Creditors, 7 Cal. 213.

*Massachusetts.*— Mohr *v.* Boston, etc., R. Co., 106 Mass. 67.

*Minnesota.*— Lewis *v.* Sharvey, 58 Minn. 464, 59 N. W. 1096.

*New York.*— Harris *v.* Pratt, 17 N. Y. 249 [*affirming* 6 Duer 606]; Holbrook *v.* Vose, 6 Bosw. 76; Covell *v.* Hitchcock, 23 Wend. 611; Buckley *v.* Furniss, 15 Wend. 137, 17 Wend. 504.

*Ohio.*— Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

*Pennsylvania.*— Cabeen *v.* Campbell, 30 Pa. St. 254; Pottinger *v.* Hecksher, 2 Grant 309.

*South Carolina.*— Parker *v.* McIver, 1 Desauss. Eq. 274, 1 Am. Dec. 656.

*Texas.*— Halff *v.* Allyn, 60 Tex. 278. And see Condict *v.* Rosenfield, 36 Tex. 23.

*England.*— Lyons *v.* Hoffnung, 15 App. Cas. 391, 6 Aspin. 551, 59 L. J. P. C. 79, 63 L. T. Rep. N. S. 293, 39 Wkly. Rep. 390; Bethell *v.* Clark, 19 Q. B. D. 553, 57 L. T. Rep. N. S. 627, 36 Wkly. Rep. 185 [*affirmed* in 20 Q. B. D. 615, 6 Aspin. 346, 67 L. J. Q. B. 302, 59 L. T. Rep. N. S. 808, 36 Wkly. Rep. 611]; *Ex p.* Watson, 5 Ch. D. 35, 46 L. J. Bankr. 97, 36 L. T. Rep. N. S. 75, 25 Wkly. Rep. 489; Coates *v.* Railton, 6 B. & C. 422, 9 D. & R. 593, 5 L. J. K. B. O. S. 209, 30 Rev. Rep. 385, 13 E. C. L. 196; Nicholls *v.* Le Feuvre, 2 Bing. N. Cas. 81, 29 E. C. L. 447, 7 C. & P. 91, 32 E. C. L. 515, 1 Hodges 255, 4 L. J. C. P. 281, 2 Scott 146; Smith *v.* Goss, 1 Campb. 282, 10 Rev. Rep. 684.

See 43 Cent. Dig. tit. "Sales," § 841.

**34.** *Minnesota.*—Lewis *v.* Sharvey, 58 Minn. 464, 59 N. W. 1096.

*New York.*— Harris *v.* Pratt, 17 N. Y. 249 [*affirming* 6 Duer 606].

*Pennsylvania.*— Cabeen *v.* Campbell, 30 Pa. St. 254; Hays *v.* Mouille, 14 Pa. St. 48; Pottinger *v.* Hecksher, 2 Grant 309.

*Vermont.*— Guilford *v.* Smith, 30 Vt. 49.

*United States.*— Biggs *v.* Barry, 3 Fed. Cas. No. 1,402, 2 Curt. 259.

*England.*— *Ex p.* Miles, 15 Q. B. D. 39, 54 L. J. Q. B. 566; Kendall *v.* Marshall, 11 Q. B. D. 356, 52 L. J. Q. B. 313, 48 L. T. Rep. N. S. 951, 31 Wkly. Rep. 597; *Ex p.* Gibbes, 1 Ch. D. 101, 45 L. J. Bankr. 10, 33 L. T. Rep. N. S. 479, 24 Wkly. Rep. 298; Dixon *v.* Baldwen, 5 East 175; Jobson *v.* Eppenheim, 21 T. L. R. 468. And see Fraser *v.* Witt, L. R. 7 Eq. 64, 19 L. T. Rep. N. S. 440, 17 Wkly. Rep. 92.

**35.** Harris *v.* Pratt, 17 N. Y. 249 [*affirming* 6 Duer 606].

**36.** Lewis *v.* Sharvey, 58 Minn. 464, 59 N. W. 1096.

**37.** Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9; Thompson *v.* Stewart, 7 Phila. (Pa.) 187; Schotsmans *v.* Lancashire, etc., R. Co., L. R. 2 Ch. 332, 36 L. J. Ch. 361, 16 L. T. Rep. N. S. 189, 15 Wkly. Rep. 537; *Re* Bruno, 6 Aspin. 138, 56 L. T. Rep. N. S. 577, 4 Morr. Bankr. Cas. 146.

of stoppage is held still to exist;[38] but the general rule in the United States recognizes no such distinction between the cases where the ship is merely chartered by the buyer or is owned by him, and in either case the right of stoppage exists if the goods are consigned to the buyer at his residence or place of business, but ceases where the goods are shipped on board a vessel appointed by the vendee to be transported, not to his residence or to be received by him, but to other markets.[39] But it must be noted that in this, as in other matters relating to delivery, it is the intention of the parties which controls; if the delivery on board of the vessel is intended to be the delivery of the goods, transit then ceases, but if, although put on the buyer's own vessel, his goods are consigned to him at his place of business or at the port of delivery or anywhere else in fact than on the vessel, transit continues until the goods reach the point designated.[40]

**e. Delivery to Carrier, and Possession of Carrier After Arrival at Destination.** A delivery of the goods to a common carrier for transportation is not such a delivery to the buyer as will terminate the transit and preclude the seller's right of stoppage,[41] even though the carrier is one selected by the buyer,[42] and under the bills of lading the goods are deliverable to the buyer or his assignee,[43] and the transit continues so long as the goods are in the possession of connecting carriers and middlemen.[44] So too the transit is not terminated on a delivery of the goods to a local transfer company for cartage to the buyer's place of business,[45] although it has been held in some cases that the transit is ended if the transfer company has general authority from the buyer to receive and receipt for goods arriving.[46] If, however, goods sold to be paid for on delivery are put on board a vessel appointed by the vendee, not to be transported to him or delivered for his use at a place of his appointment, but to be shipped by such vessel in his name from his place of residence or business to a third person, there is no right of stoppage after the goods are embarked.[47] The transit is not terminated by the arrival of the goods at their destination,[48] unless the carrier parts with the control of the

**38.** Berndtson *v.* Strang, L. R. 3 Ch. 588, 37 L. J. Ch. 665, 19 L. T. Rep. N. S. 40, 16 Wkly. Rep. 1025; Rodger *v.* Comptoir d'Escompte de Paris, L. R. 2 P. C. 393, 38 L. J. P. C. 30, 21 L. T. Rep. N. S. 33, 5 Moore P. C. N. S. 538, 17 Wkly. Rep. 468, 16 Eng. Reprint 618; *Ex p.* Rosevear China Clay Co., 11 Ch. D. 560, 48 L. J. Bankr. 100, 40 L. T. Rep. N. S. 730, 27 Wkly. Rep. 591; Fraser *v.* Witt, L. R. 7 Eq. 64, 19 L. T. Rep. N. S. 440, 17 Wkly. Rep. 92; Moakes *v.* Nicolson, 19 C. B. N. S. 290, 34 L. J. C. P. 273, 12 L. T. Rep. N. S. 573, 115 E. C. L. 290; Bohtlingk *v.* Inglis, 3 East 381, 7 Rev. Rep. 490. But see Fowler *v.* McTaggart, 1 East 522 note, 7 T. R. 442 note, 4 Rev. Rep. 485, 101 Eng. Reprint 1066; Inglis *v.* Usherwood, 1 East 515.

**39.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63.

**40.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Ilsley *v.* Stubbs, 9 Mass. 65, 6 Am. Dec. 29; Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63.

**41.** Aguirre *v.* Parmelee, 22 Conn. 473; Johnson *v.* Eveleth, 93 Me. 306, 45 Atl. 35, 48 L. R. A. 50.

**42.** Lyons *v.* Hoffnung, 15 App. Cas. 391, 6 Aspin. 551, 59 L. J. P. C. 79, 63 L. T. Rep. N. S. 293, 39 Wkly. Rep. 390; Bethell *v.* Clark, 20 Q. B. D. 615, 6 Aspin. 346, 57 L. J. Q. B. 302, 59 L. T. Rep. N. S. 808, 36 Wkly. Rep. 611; *Ex p.* Rosevear China Clay Co., 48 L. J. Bankr. 100, 11 Ch. D. 560, 40 L. T. Rep. N. S. 730, 27 Wkly. Rep. 591; Thompson *v.* Trail, 2 C. & P. 334, 30 Rev. Rep. 242, 12 E. C. L. 602.

**43.** Ruck *v.* Hatfield, 5 B. & Ald. 632, 24 Rev. Rep. 507, 7 E. C. L. 345; Brindley *v.* Cilgwyn State Co., 55 L. J. Q. B. 67. But see Wilmshurst *v.* Bowker, 12 L. J. Exch. 475, 7 M. & G. 882, 8 Scott N. R. 571, 49 E. C. L. 882.

**44.** Buckley *v.* Furniss, 15 Wend. (N. Y.) 137, 17 Wend. 504; Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Cabeen *v.* Campbell, 30 Pa. St. 254; *In re* Foot, 9 Fed. Cas. No. 4,907, 11 Blatchf. 530.

**45.** White *v.* Mitchell, 38 Mich. 390; Scott *v.* William B. Grimes Dry-Goods Co., 48 Mo. App. 521; Jenks *v.* Fulmer, 160 Pa. St. 527, 28 Atl. 841; Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796. And see Weber *v.* Baessler, 3 Colo. App. 459, 34 Pac. 261.

**46.** Shoninger *v.* Day, 61 Mo. App. 366; O'Neal *v.* Day, 53 Mo. App. 139. But see Scott *v.* William B. Grimes Dry-Goods Co., 48 Mo. App. 521.

**47.** Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607. And see Stubbs *v.* Lund, 7 Mass. 453, 5 Am. Dec. 63; Treadwell *v.* Aydlett, 9 Heisk. (Tenn.) 388.

**48.** *Arkansas.*— Mason *v.* Wilson, 43 Ark. 172.

*Iowa.*— McFetridge *v.* Piper, 40 Iowa 627.

*Massachusetts.*— Naylor *v.* Dennie, 8 Pick. 198, 19 Am. Dec. 319.

goods to the buyer;[49] and so long as the goods remain in the carrier's possession either on the cars, in the warehouse, or on the wharf the transit has not ended.[50] The transit has, however, come to an end, so as to prevent a stoppage by the seller, if the carrier stores the goods as the agent of the consignee or one claiming under him,[51] or if, the freight being paid and the goods receipted for, they remain in the carrier's hands merely awaiting removal,[52] or if the goods are delivered to an agent selected by the carrier to hold the goods as agent of the buyer.[53]

**f. Entry in Custom-House or Deposit in Bonded Warehouse.** The transit is

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454.

*England.*— Coventry *v.* Gladstone, L. R. 6 Eq. 44, 37 L. J. Ch. 492, 16 Wkly. Rep. 837; Holst *v.* Pownal, 1 Esp. 240.

See 43 Cent. Dig. tit. "Sales," § 838.

**49.** Smith *v.* Gail, 44 Fla. 803, 33 So. 527.

**50.** *Dakota.*— Powell *v.* McKechnie, 3 Dak. 319, 19 N. W. 410.

*Georgia.*— Ocean Steamship Co. *v.* Ehrlich, 88 Ga. 502, 14 S. E. 707, 30 Am. St. Rep. 164; Macon, etc., R. Co. *v.* Meador, 65 Ga. 705.

*Iowa.*— Clapp *v.* Peck, 55 Iowa 270, 7 N. W. 587; Alsberg *v.* Latta, 30 Iowa 442; O'Neil *v.* Garrett, 6 Iowa 480.

*Kansas.*— Symns *v.* Schotten, 35 Kan. 310, 10 Pac. 328.

*Massachusetts.*— Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375, 54 L. R. A. 435.

*New Hampshire.*— Inslee *v.* Lane, 57 N. H. 454.

*Ohio.*— Wheeling, etc., R. Co. *v.* Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. Rep. 435; Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

*Pennsylvania.*— Bender *v.* Bowman, 2 Pearson 517.

*Vermont.*— Kitchen *v.* Spear, 30 Vt. 545.

*Wisconsin.*— Jeffris *v.* Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

*England.*— *Ex p.* Barrow, 6 Ch. D. 783, 46 L. J. Ch. 71, 36 L. T. Rep. N. S. 325, 25 Wkly. Rep. 466; *Ex p.* Watson, 5 Ch. D. 35, 46 L. J. Bankr. 97, 36 L. T. Rep. N. S. 75, 25 Wkly. Rep. 489; Tucker *v.* Humphrey, 4 Bing. 516, 6 L. J. C. P. O. S. 92, 1 M. & P. 378 note, 13 E. C. L. 614; Edwards *v.* Brewer, 6 L. J. Exch. 135, 2 M. & W. 375.

*Canada.*— Morgan Envelope Co. *v.* Boustead, 7 Ont. 697.

See 43 Cent. Dig. tit. "Sales," § 838.

**Goods sold from warehouse.**— The fact that the consignee of boxes of tobacco agree with the carrier that they be set aside by it in the depot to be sold and the proceeds used to pay past due freights, the balance if any to go to the consignee, did not show such actual delivery as to prevent a stoppage *in transitu* by the consignor. Macon, etc., R. Co. *v.* Meador, 65 Ga. 705.

**Question for jury.**— As affecting the right of stoppage *in transitu* on account of the insolvency of the vendee, it is a question for the jury whether the transit was ended when the vendee, being unable to pay the freight, was, to save demurrage, allowed by the railroad company to unload the cars and pile the goods in its yard until he could pay the freight. Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71. So too where goods forwarded by rail arrive at their destination and the carrier notified the consignee thereof, but they were not delivered for several days and until after the appointment of a receiver of the consignee's property, the question whether the consignee by allowing the goods to remain with the carrier intended in the exercise of the right of a purchaser to return goods after insolvency, to preserve the right of the seller to stop *in transitu*, was for the jury. Harding Paper Co. *v.* Allen, 65 Wis. 576, 27 N. W. 329.

**Delay of agent.**— Even if the continued possession of the carrier is due to the delay of the agent in making delivery the transit is not terminated. Anderson *v.* Fish, 16 Ont. 476 [*affirmed* in 17 Ont. App. 28].

**51.** McFetridge *v.* Piper, 40 Iowa 627; Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580; Williams *v.* Hodges, 113 N. C. 36, 18 S. E. 83; Taylor *v.* Great Eastern R. Co., [1901] 1 K. B. 774, 6 Com. Cas. 121, 70 L. J. K. B. 499, 84 L. T. Rep. N. S. 770, 17 T. L. R. 394, 49 Wkly. Rep. 431; Harman *v.* Anderson, 2 Campb. 242, 11 Rev. Rep. 706; Allan *v.* Gripper, 2 Cromp. & J. 218, 1 L. J. Exch. 71, 2 Tyrw. 217.

**Evidence of agency.**— Where goods were stored by the carrier because the freight was not paid and the property removed in the time required by the carrier's rules, and the consignee testified that a few days after the arrival of the goods he telephoned to the carrier's agent to store them, and did not remember what the agent said, but thought he said "all right," and the agent testified that he stored the goods in the usual course of business without directions from any one, the evidence was insufficient to show that the goods were stored by direction of the consignee, so as to make the carrier his bailee, and terminate the consignor's right of stoppage *in transitu*. Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375, 54 L. R. A. 435.

**52.** Langstaff *v.* Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49; Foster *v.* Frampton, 6 B. & C. 107, 13 E. C. L. 60, 2 C. & P. 469, 12 E. C. L. 681, 9 D. & R. 108, 5 L. J. K. B. O. S. 71, 30 Rev. Rep. 255; Rowe *v.* Pickford, 1 Moore C. P. 526, 8 Taunt. 83, 19 Rev. Rep. 466, 4 E. C. L. 51.

**53.** Lane *v.* Robinson, 18 B. Mon. (Ky.) 623.

not terminated by the possession of the goods by officers of customs prior to entry,[54] or by entry in the custom-house the duties remaining unpaid.[55] If, however, the buyer or the subpurchaser gives bond for the payment of duties and deposits the goods in his own name in a bonded warehouse the transit is at an end, and the right of stoppage no longer exists.[56]

**g. Interception of Goods by Buyer and Reshipment.** The transit may be intercepted and terminated by the buyer's taking possession of the goods at an intermediate point,[57] and if the original transit is ended by a delivery to the buyer or his agent, a reshipment by the buyer or his agent is not such a renewal of the transit as will revive the right of stoppage.[58] If, however, the agent of the buyer in intercepting the goods acts as agent of the sellers of other goods accompanying those in question, this does not affect the right of the seller of the particular goods to stop them in transit.[59]

**7. Waiver or Loss of Right.** The right of stoppage *in transitu* may be waived by delay in exercising it,[60] by consent to a resale by the buyer,[61] or by an election to resort to another remedy, such as attachment;[62] but if the attachment is levied by mistake as to the existence of the right of stoppage and is immediately dismissed on discovery of the mistake,[63] or is induced by the fraud of the buyer,[64] the right of stoppage is not lost; nor is the right waived by the unauthorized act of the seller's attorney in bringing an action for the price, if it is promptly repudiated by the seller.[65] The right is not as a general rule lost by receiving part payment of the price,[66] by receiving a bill of exchange or draft,[67] or by taking

**54.** Donath *v.* Broomhead, 7 Pa. St. 301; Burnham *v.* Winsor, 4 Fed. Cas. No. 2,180.

**55.** Holbrook *v.* Vose, 6 Bosw. (N. Y.) 76; Harris *v.* Hart, 6 Duer (N. Y.) 606 [*affirmed* in 17 N. Y. 249]; Hauterman *v.* Bock, 1 Daly (N. Y.) 366; Western Transp. Co. *v.* Hawley, 1 Daly (N. Y.) 327; Mottram *v.* Heyer, 5 Den. (N. Y.) 629 [*reversing* 1 Den. 483]; Northey *v.* Field, 2 Esp. 613; Lewis *v.* Mason, 36 U. C. Q. B. 590; Burr *v.* Wilson, 13 U. C. Q. B. 478.

**56.** Cartwright *v.* Wilmerding, 24 N. Y. 521; Sheppard *v.* Newhall, 54 Fed. 306, 4 C. C. A. 352; Wiley *v.* Smith, 2 Can. Sup. Ct. 1 [*overruling* Graham *v.* Smith, 27 U. C. C. P. 1; Howell *v.* Alport, 12 U. C. C. P. 375]. But see *In re* Bearns, 2 Fed. Cas. No. 1,191, 18 Nat. Bankr. Reg. 500.

**57.** Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324; Jordan *v.* James, 5 Ohio 88. And see Stevens *v.* Wheeler, 27 Barb. (N. Y.) 658.

**58.** *Massachusetts.*— Brooke Iron Co. *v.* O'Brien, 135 Mass. 442.

*New York.*— Becker *v.* Hallgarten, 86 N. Y. 167; Harris *v.* Pratt, 17 N. Y. 249 [*affirming* 6 Duer 606].

*Pennsylvania.*— Cabeen *v.* Campbell, 30 Pa. St. 254; Hays *v.* Mouille, 14 Pa. St. 48; Pottinger *v.* Hecksher, 2 Grant 309.

*Vermont.*— Guilford *v.* Smith, 30 Vt. 49.

*United States.*— Biggs *v.* Barry, 3 Fed. Cas. No. 1,402, 2 Curt. 259.

*England.*— *Ex p.* Miles, 15 Q. B. D. 39, 54 L. J. Q. B. 566; Kendall *v.* Marshall, 11 Q. B. D. 356, 52 L. J. Q. B. 313, 48 L. T. Rep. N. S. 951, 31 Wkly. Rep. 597; *Ex p.* Gibbes, 1 Ch. D. 101, 45 L. J. Bankr. 10, 33 L. T. Rep. N. S. 479, 24 Wkly. Rep. 298; Fraser *v.* Witt, L. R. 7 Eq. 64, 19 L. T. Rep. N. S. 440, 17 Wkly. Rep. 92; Dixon *v.* Baldwen, 5 East 175; Jobson *v.* Eppenheim, 21 T. L. R. 468.

*Canada.*— Mollison *v.* Lockhart, 30 N. Brunsw. 398.

See 43 Cent. Dig. tit. "Sales," § 847.

**Transfer to warehouse.**— An order for the delivery of the goods at a particular warehouse within the town originally designated as the destination is not a direction to start the goods to another destination, so as to deprive the seller of his right of stoppage *in transitu*. Lewis *v.* Sharvey, 58 Minn. 464, 59 N. W. 1096.

**59.** Hays *v.* Mouille, 14 Pa. St. 48.

**60.** Baltimore, etc., R. Co. *v.* Davis, 9 Pa. Cas. 147, 12 Atl. 335.

**61.** Eaton *v.* Cook, 32 Vt. 58; Audenried *v.* Randall, 2 Fed. Cas. No. 644, 3 Cliff. 99.

**62.** Woodruff *v.* Noyes, 15 Conn. 335.

**63.** Fox *v.* Willis, 60 Tex. 373.

**64.** Allyn *v.* Willis, 65 Tex. 65.

**65.** Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

**66.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489; Jordan *v.* James, 5 Ohio 88; Burnham *v.* Winsor, 4 Fed. Cas. No. 2,180; Feise *v.* Wray, 3 East 93, 6 Rev. Rep. 551; Edwards *v.* Brewer, 6 L. J. Exch. 135, 2 M. & W. 375; Hodgson *v.* Loy, 7 T. R. 440, 4 Rev. Rep. 483, 101 Eng. Reprint 1065.

**Where the buyer compounds with his creditors,** including the seller, and the composition is secured by bills, the right of stoppage *in transitu* is lost, although the whole composition money has not yet been paid. Nichols *v.* Hart, 5 C. & P. 179, 24 E. C. L. 514.

**67.** *Illinois.*— Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 59 Ill. App. 451.

*Maine.*— Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Massachusetts.*— Seymour *v.* Newton, 105 Mass. 272.

*New York.*— Ainis *v.* Ayres, 62 Hun 376, 16 N. Y. Suppl. 905.

the buyer's note for the price,[68] unless it is accepted as actual payment;[69] but it is held that the acceptance of the note, order, or accepted bill of a third person, without the indorsement or guaranty of the buyer, divests the right.[70]

**8. Enforcement.** The right of stoppage *in transitu* may be exercised by notice to the carrier,[71] or other person in whose custody the goods are at the time,[72] and actual taking possession by the seller is not essential,[73] and it has been held that it is not even essential that the notice to the carrier should contain a formal demand of redelivery.[74] So too the right may be exercised by filing a claim to the fund in court derived from the sale of the goods under legal process,[75] and if the seller has taken proper steps by notice to exercise his right of stoppage he may enforce his claim to the goods by an action against an officer who has taken the goods under process against the buyer,[76] and to such an action the buyer is not a necessary party.[77] It is not necessary that a note or bill given for the price should

*United States.*— Burnham *v.* Winsor, 4 Fed. Cas. No. 2,180.

*England.*— Kinloch *v.* Craig, 4 Bro. P. C. 47, 2 Eng. Reprint 32, 3 T. R. 119, 783, 100 Eng. Reprint 487, 858, 1 Rev. Rep. 664; Feise *v.* Wray, 3 East 93, 6 Rev. Rep. 551; Edwards *v.* Brewer, 6 L. J. Exch. 135, 2 M. & W. 375.

See 43 Cent. Dig. tit. "Sales," § 849.

**68.** *Indiana.*— Rogers *v.* Schneider, 13 Ind. App. 23, 41 N. E. 71.

*Iowa.*— Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639.

*Massachusetts.*— Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375, 54 L. R. A. 455.

*Ohio.*— Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531.

*Pennsylvania.*— Hays *v.* Mouille, 14 Pa. St. 48.

See 43 Cent. Dig. tit. "Sales," § 849.

**69.** Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639. And see Parker *v.* Byrnes, 18 Fed. Cas. No. 10,728, 1 Lowell 539.

**70.** Eaton *v.* Cook, 32 Vt. 58.

**71.** *Iowa.*—Felix *v.* Brandstetter Co., (1902) 89 N. W. 971.

*Kansas.*— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

*New Hampshire.*— Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

*New York.*— Mottram *v.* Heyer, 5 Den. 629.

*England.*— Berndtson *v.* Strang, L. R. 4 Eq. 481, 36 L. J. Ch. 879, 16 L. T. Rep. N. S. 583, 15 Wkly. Rep. 1168; *Ex p.* Watson, 5 Ch. D. 35, 46 L. J. Bankr. 97, 36 L. T. Rep. N. S. 75, 25 Wkly. Rep. 489.

*Canada.*— Ascher *v.* Grand Trunk R. Co., 36 U. C. Q. B. 609.

See 43 Cent. Dig. tit. "Sales," § 853.

**Mailing notice** to the carrier is not sufficient unless it was received. Millard *v.* Webster, 54 Conn. 415, 8 Atl. 470.

**Rights of carrier.**— In case the agent of the seller of goods notifies the carrier not to deliver them, the carrier has the right to a reasonable time to ascertain the facts, and the agent to produce his authority and to furnish an indemnity. Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

**Notice to ship-owner.**— Notice of stoppage *in transitu* given to a ship-owner imposes no duty on him to communicate the notice to the master of the ship, and it is not effectual until communicated to the master. *Ex p.* Falk, 14 Ch. D. 446, 4 Aspin. 280, 42 L. T. Rep. N. S. 780, 28 Wkly. Rep. 785.

**Goods taken from carrier on legal process.** — Notice to the carrier of goods to secure the right of stoppage *in transitu* is not necessary where they have been already taken out of his hands by legal process. Schwabacher *v.* Kane, 13 Mo. App. 126.

**72.** Mottram *v.* Heyer, 5 Den. (N. Y.) 629; Whitehead *v.* Anderson, 11 L. J. Exch. 157, 9 M. & W. 518. And see Bell *v.* Moss, 5 Whart. (Pa.) 189.

**Notice to a customs officer** is not sufficient but notice must be given to the carrier as well. Mottram *v.* Heyer, 5 Den. (N. Y.) 629; Ascher *v.* Grand Trunk R. Co., 36 U. C. Q. B. 609.

**Notice to a consignee** to hold proceeds of the goods is not sufficient. Phelps *v.* Comber, 29 Ch. D. 813, 5 Aspin. 428, 54 L. J. Ch. 1017, 52 L. T. Rep. N. S. 873, 33 Wkly. Rep. 829.

**73.** Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Northey *v.* Field, 2 Esp. 613; Holst *v.* Pownal, 1 Esp. 240.

**74.** Reynolds *v.* Boston, etc., R. Co., 43 N. H. 580.

**75.** O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

**76.** Wolf *v.* Shepherd, 103 Ala. 241, 15 So. 519; Pottinger *v.* Heckshcr, 2 Grant (Pa.) 309; Litt *v.* Cowley, Holt N. P. 338, 3 E. C. L. 138, 2 Marsh. 457, 7 Taunt. 169, 2 E. C. L. 310, 17 Rev. Rep. 482.

**Action against assignee.**—Where goods in a custom-house, before entry for importation from a foreign country were stopped *in transitu* by the seller, the purchasers having made an assignment for the benefit of creditors, an action could be maintained by the sellers to compel the purchasers and their assignees to indorse or assign and deliver the bills of lading and invoices to the sellers to enable them to enter the goods. Strahlheim *v.* Wallach, 12 Daly (N. Y.) 313.

**77.** Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

be tendered as a condition precedent to stoppage,[78] or that the amount received in part payment should be returned.[79]

**9. Operation and Effect.** The enforcement of the right of stoppage *in transitu* does not rescind the sale,[80] but simply restores the seller to the position in which he was before he parted with the possession so as to enable him to exercise his rights as an unpaid seller.[81] The retaking of the merchandise by the seller in transit from the possession of the carrier, in an action of replevin of which the transferee of the bill of lading had no notice, and the recovery of judgment in favor of the seller in such action, do not bar the right of the transferee of the bill of lading to maintain an action against the seller for conversion.[82]

**C. Recovery of Goods or Their Proceeds — 1. Nature and Grounds of Right.** If the sale is absolute and possession is taken by the buyer, the seller cannot as a general rule retake the goods for non-payment of the price,[83] in the absence of misrepresentation or fraud;[84] but if the sale is for cash so that property therein does not pass until payment, unless the seller has waived his right to cash payment,[85] he may, in the event of non-payment, reclaim the goods from the buyer,[86]

**78.** Hays *v.* Mouille, 14 Pa. St. 48; Mouille *v.* Hays, 4 Pa. L. J. Rep. 413; Edwards *v.* Brewer, 6 L. J. Exch. 135, 2 M. & W. 375. But see Brewer Lumber Co. *v.* Boston, etc., R. Co., 179 Mass. 228, 60 N. E. 548, 88 Am. St. Rep. 375, 54 L. R. A. 435.

**79.** Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

**80.** *Kansas.*— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

*Maine.*— Newhall *v.* Vargas, 13 Me. 93, 29 Am. Dec. 489.

*Ohio.*— Jordan *v.* James, 5 Ohio 88.

*Tennessee.*— McGill *v.* Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210.

*England.*— Matter of Humbertson, De Gex 262, 8 Jur. 675.

*Canada.*— Brassert *v.* McEwen, 10 Ont. 179. See 43 Cent. Dig. tit. "Sales," § 855.

**81.** *Kansas.*— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

*Maine.*— Newhall *v.* Vargas, 15 Me. 93, 29 Am. Dec. 489.

*New York.*— Babcock *v.* Bonnell, 80 N. Y. 244.

*Ohio.*— Jordan *v.* James, 5 Ohio 88.

*Tennessee.*— McGill *v.* Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210.

*England.*— Matter of Humbertson, De Gex 262, 8 Jur. 675; Jeffs *v.* Wood, 2 P. Wms. 128, 24 Eng. Reprint 668.

*Canada.*—Brassert *v.* McEwen, 10 Ont. 179. See 43 Cent. Dig. tit. "Sales," § 855.

**Title to goods.**— The exercise of the right of stoppage *in transitu* by a vendor, by replevying the goods before they reach the vendee, revests title in the vendor as against a creditor of the vendee, attaching the goods before the vendor replevied them. O'Neil *v.* Garrett, 6 Iowa 480.

**A stoppage in transitu puts the seller in constructive possession** of the goods so that he cannot recover of a subpurchaser on a loss of the goods by flood. McGill *v.* Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210.

**82.** Rawls *v.* Deshler, 4 Abb. Dec. (N. Y.) 12, 3 Keyes 572, 3 Transcr. App. 91.

**83.** McNail *v.* Ziegler, 68 Ill. 224; McCraw *v.* Gilmer, 83 N. C. 162; Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289.

**84.** See *infra*, VIII, C, 2.

**85.** *Illinois.*— Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257.

*Kentucky.*— Ford *v.* Sproule, 2 A. K. Marsh. 528, 12 Am. Dec. 439.

*Louisiana.*— Lee *v.* Galbraith, 5 La. Ann. 343; Hill *v.* Morgan, 4 Mart. N. S. 475.

*Maine.*— Mixer *v.* Cook, 31 Me. 340.

*Maryland.*— Bristol Nat. Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 16 Atl. 214, 9 Am. St. Rep. 443, 1 L. R. A. 767.

*Massachusetts.*— Freeman *v.* Nichols, 116 Mass. 309.

*New Jersey.*— Leatherbury *v.* Connor, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. Rep. 672.

*New York.*—Furniss *v.* Hone, 8 Wend. 247; Buck *v.* Grimshaw, 1 Edw. 140.

*Pennsylvania.*— Thompson *v.* Taylor, 15 Phila. 250; Landry *v.* Thomas, 3 Phila. 300. See also Backentoss *v.* Speicher, 31 Pa. St. 324.

*Tennessee.*— Smith *v.* Atkinson, 4 Heisk. 625.

*United States.*— Halliday *v.* Hamilton, 11 Wall. 560, 20 L. ed. 214.

See 43 Cent. Dig. tit. "Sales," § 892 *et seq.*

**86.** *Alabama.*— Shines *v.* Steiner, 76 Ala. 458.

*California.*—Sere *v.* McGovern, 65 Cal. 244, 3 Pac. 859.

*Illinois.*— Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Schumacher *v.* Edward P. Allis Co., 70 Ill. App. 556; Wells *v.* Merle, etc., Mfg. Co., 66 Ill. App. 292; Harrison Mach. Works *v.* Miller, 29 Ill. App. 567; Chicago Hide, etc., Nat. Bank *v.* West, 20 Ill. App. 61.

*Missouri.*— Strauss *v.* Hirsch, 63 Mo. App. 95; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179; J. M. Brunswick, etc., Co. *v.* Martin, 20 Mo. App. 158.

*New York.*— Osborn *v.* Gantz, 60 N. Y. 540 [*affirming* 38 N. Y. Super. Ct. 148]; Russell *v.* Minor, 22 Wend. 659.

or from third persons claiming under him.[87] So too the seller may reclaim the goods from one claiming under the buyer if the sale was merely executory;[88] but if the sale is on credit, non-payment will not affect the rights of third persons,[89] unless the agreement is that the seller shall retain title or possession until

*Wisconsin.*— Goldsmith *v.* Bryant, 26 Wis. 34.

*United States.*—Sprague Canning Mach. Co. *v.* Fuller, 158 Fed. 588, 86 C. C. A. 46.

See 43 Cent. Dig. tit. "Sales," § 892.

**87.** *Alabama.*— Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93; Lehman *v.* Warren, 53 Ala. 535.

*California.*— Roberts *v.* Evans, 43 Cal. 380.

*Delaware.*— Fait, etc., Co. *v.* Truxton, 1 Pennew. 24, 39 Atl. 457.

*Georgia.*—Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765.

*Illinois.*— Canadian Bank of Commerce *v.* McCrea, 106 Ill. 281; Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390.

*Indiana.*—Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; Lanman *v.* McGregor, 94 Ind. 301.

*Kansas.*— Schulein *v.* Hainer, 48 Kan. 249, 29 Pac. 171.

*Louisiana.*— Allen *v.* Buisson, 35 La. Ann. 108; Burckett *v.* Hopson, 19 La. Ann. 489; Miller *v.* Schneider, 19 La. Ann. 300, 92 Am. Dec. 535; Johnson *v.* Bloodworth, 12 La. Ann. 699; Fetter *v.* Field, 1 La. Ann. 80; Copley *v.* Flint, 6 Rob. 54.

*Massachusetts.*—Armour *v.* Pecker, 123 Mass. 143; Haskell *v.* Rice, 11 Gray 240; Whitwell *v.* Vincent, 4 Pick. 449, 16 Am. Dec. 355.

*Minnesota.*— Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

*Mississippi.*— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769.

*Missouri.*— State *v.* Green Tree Brewery Co., 32 Mo. App. 276; Thomas *v.* Freligh, 9 Mo. App. 151.

*Nebraska.*— Henry *v.* Vliet, 36 Nebr. 138, 54 N. W. 122, 19 L. R. A. 590, 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. Rep. 478.

*New York.*— Tuthill *v.* Bogart, 79 N. Y. 215; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101 [*affirming* 2 Daly 432]; Adams *v.* Roscoe Lumber Co., 2 N. Y. App. Div. 47, 37 N. Y. Suppl. 265 [*affirmed* in 159 N. Y. 176, 53 N. E. 805]; Hicks *v.* Cleveland, 39 Barb. 573; Clark *v.* Lynch, 4 Daly 83; Bates *v.* New Orleans, etc., R. Co., 4 Abb. Pr. 72, 13 How. Pr. 516; Acker *v.* Campbell, 23 Wend. 372; Haggerty *v.* Palmer, 6 Johns. Ch. 437; Keeler *v.* Field, 1 Paige 312.

*Ohio.*— Pullman Palace Car Co. *v.* Globe Rolling Mill Co., 4 Ohio Cir. Ct. 301, 2 Ohio Cir. Dec. 558.

*Oklahoma.*— Browning *v.* De Ford, 8 Okla. 239, 60 Pac. 534.

*Pennsylvania.*— Sheffer *v.* Montgomery, 65 Pa. St. 329.

*Texas.*— Morrison *v.* Adoue, 76 Tex. 255, 13 S. W. 166; Hall *v.* Hargadine-McKittrick Dry-Goods Co., 23 Tex. Civ. App. 149, 55 S. W. 747; Wilson *v.* Carroll, (Civ. App. 1899) 50 S. W. 222.

*Wisconsin.*— Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

*United States.*— Kelly *v.* Deming, 5 Fed. 677, 2 McCrary 453; Maddux *v.* Usher, 16 Fed. Cas. No. 8,936, 2 Hask. 261; Sawyer *v.* Turpin, 21 Fed. Cas. No. 12,410, 2 Lowell 29, 5 Nat. Bankr. Reg. 339. See also Winchester *v.* Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300 [*affirming* 64 Fed. 664].

*Canada.*— Polson *v.* Degeer, 12 Ont. 275.

See 43 Cent. Dig. tit. "Sales," § 593.

**Recovery of part of goods.**— Where a sale of goods is for cash, and after getting possession the vendee refuses to pay for a portion of the goods, the vendor may maintain replevin for such portion. Thompson *v.* McLean, 10 N. Y. Suppl. 411.

**Where the seller has been guilty of fraud** and the buyer offers to rescind but the seller refuses, the latter cannot thereafter maintain replevin for the goods on the ground of rescission. Myers *v.* Townsend, 103 Iowa 569, 72 N. W. 761.

**88.** *Colorado.*—Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

*Illinois.*— Newell *v.* Grant Locomotive Works, 50 Ill. App. 611.

*Iowa.*— Mowbray *v.* Cady, 40 Iowa 604.

*Louisiana.*— Marshall *v.* Morehouse Parish, 14 La. Ann. 689.

*Massachusetts.*— Phelps *v.* Willard, 16 Pick. 29; Young *v.* Austin, 6 Pick. 280.

*New York.*— Smith *v.* Clews, 12 N. Y. Suppl. 471 [*affirmed* in 124 N. Y. 664, 27 N. E. 854].

See 43 Cent. Dig. tit. "Sales," § 890 *et seq.*

**89.** Lalance-Grosjean Mfg. Co. *v.* Wolff, 28 La. Ann. 942; Southwick *v.* Smith, 29 Me. 228; Blanchard *v.* Fitzpatrick, 146 Mass. 24, 14 N. E. 919; Steinwender *v.* Creath, 44 Mo. App. 356. And see Bentley *v.* Snyder, 101 Iowa 1, 69 N. W. 1023, holding that an ordinary sale of merchandise on credit does not establish trust relations between the parties, giving the seller a lien on the goods or their proceeds, which can be enforced against a transferee of the buyer, in the absence of fraud.

**Indorsement of note.**— Where the terms of sale of machinery required that the notes for the price be indorsed by a certain person, and there was testimony that the indorsement was to be given merely as additional security, and the buyer declined to make a contract reserving title to the seller, and fastened the machinery to his mill as a permanent fixture, while the fact that the buyer never intended to procure the indorsement might render the contract voidable between him and the seller it gave the seller no rights as against the holder of a prior vendor's lien on the mill. Hazlehurst Lumber Co. *v.* J. A. Fay, etc., Co., (Miss. 1895) 18 So. 485.

the price is paid,[90] and if there has been such a delivery to and acceptance by the buyer as to pass the property in the goods the seller cannot in the absence of fraud assert title thereto against one holding under the buyer;[91] but the seller may reclaim the goods in the hands of subsequent purchasers from or creditors of the buyer if the buyer has not accepted the goods so as to acquire property therein,[92] or if the delivery is not such as he is obliged to accept,[93] or something remains to be done to complete the delivery or acceptance.[94]

**2. Effect of Misrepresentation or Fraud of Buyer.** Fraud or misrepresentation on the part of the buyer entitles the seller to reclaim the goods from the buyer,[95]

**90.** Coe *v.* Bicknell, 44 Me. 163; Covell *v.* Hill, 6 N. Y. 374.

**91.** *Colorado.*— Persse *v.* Atlantic-Pacific R. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951.

*Delaware.*— Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

*Illinois.*— Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257.

*Indiana.*— Rechtin *v.* McGary, 117 Ind. 132, 19 N. E. 731.

*Louisiana.*— Dennistoun *v.* Malard, 2 La. Ann. 14.

*Michigan.*— Sullivan *v.* Sullivan, 76 Mich. 101, 42 N. W. 1090.

*Mississippi.*— Hazlehurst Lumber Co. *v.* J. A. Fay, etc., Co., (1895) 18 So. 485.

*New York.*—Alvord *v.* Latham, 31 Barb. 294; Durbrow *v.* McDonald, 5 Bosw. 130; Caldwell *v.* Bartlett, 3 Duer 341.

*Ohio.*— Johnson *v.* Hays, 5 Ohio St. 101.

*Pennsylvania.*— Freedman *v.* Morrow Shoe Mfg. Co., 122 Pa. St. 25, 15 Atl. 690; Wylie's Appeal, 90 Pa. St. 210.

*Tennessee.*—Woods *v.* Burrough, 2 Head 202.

*Vermont.*— Redington *v.* Roberts, 25 Vt. 686.

See 43 Cent. Dig. tit. "Sales," § 890 *et seq.*

**92.** *Illinois.*— Gilbert *v.* Forest City Furniture Co., 72 Ill. App. 186.

*Iowa.*— Cox *v.* Burns, 1 Iowa 64.

*Massachusetts.*— Lane *v.* Jackson, 5 Mass. 157.

*Michigan.*— Shipman *v.* Graves, 41 Mich. 675, 3 N. W. 177.

*Missouri.*—W. Irving Schermerhorn Bros. Co. *v.* Herold, 81 Mo. App. 461.

*Nebraska.*— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

**93.** Sweet *v.* Scherber, 38 Ill App. 578; Alsberg *v.* Latta, 30 Iowa 442; Graves *v.* Morse, 45 Nebr. 604, 63 N. W. 841; Porter Mfg. Co. *v.* Edwards, 29 Hun (N. Y.) 509.

**94.** Chapin *v.* Fitzgerald, 1 Silv. Sup. (N. Y.) 349, 5 N. Y. Suppl. 722 [*affirmed* in 127 N. Y. 670, 28 N. E. 255]; Vincent *v.* Conklin, 1 E. D. Smith (N. Y.) 203.

**95.** *Alabama.*— McCormick *v.* Joseph, 77 Ala. 236; Spira *v.* Hornthall, 77 Ala. 137.

*Connecticut.*— Morrill *v.* Blackman, 42 Conn. 324.

*Georgia.*— Silvey *v.* Tift, 123 Ga. 804, 51 S. E. 748; Hughes *v.* Winship Mach. Co., 78 Ga. 793, 4 S. E. 6; Johnson *v.* O'Donnell, 75 Ga. 453.

*Illinois.*— Hayes *v.* Houston, 86 Ill. 487; American Merchants' Union Exp. Co. *v.* Willsie, 79 Ill. 92; Patton *v.* Campbell, 79 Ill. 72; Henshaw *v.* Bryant, 5 Ill. 97; Fisher *v.* Brown, 111 Ill. App. 486; Hacker *v.* Munroe, 61 Ill. App. 420.

*Indiana.*— Brower *v.* Goodyer, 88 Ind. 572; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506; Waterbury *v.* Miller, 13 Ind. App. 197, 41 N. E. 383; Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028.

*Louisiana.*— Prall *v.* Pet, 3 La. 274.

*Maine.*— Wheelden *v.* Lowell, 50 Me. 499.

*Massachusetts.*— Dow *v.* Sanborn, 3 Allen 181; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

*Michigan.*—Silberman *v.* Munroe, 104 Mich. 352, 62 N. W. 555; Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60.

*Minnesota.*— Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

*Mississippi.*— Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297, 22 So. 952.

*Missouri.*— Kemper, etc., Dry-Goods Co. *v.* Kidder Sav. Bank, 72 Mo. App. 226; Goebel *v.* Troll, 71 Mo. App. 123; Swafford Bros. Dry-Goods Co. *v.* Jacobs, 66 Mo. App. 362; Herboth *v.* Gaal, 47 Mo. App. 255.

*Nebraska.*— Field *v.* Morse, 54 Nebr. 789, 75 N. W. 58.

*New York.*— Hennequin *v.* Naylor, 24 N. Y. 139; Van Neste *v.* Conover, 20 Barb. 547; King *v.* Phillips, 8 Bosw. 603; Williams *v.* Birch, 6 Bosw. 299 [*affirmed* in 36 N. Y. 319, 2 Transcr. App. 133]; Tuthill *v.* Skidmore, 1 N. Y. Suppl. 445 [*affirmed* in 124 N. Y. 148, 26 N. E. 348].

*North Carolina.*—Wilson *v.* White, 80 N. C. 280.

*Texas.*— Hall, etc., Wood-Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. 715; Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; Morrison *v.* Adone, 76 Tex. 255, 13 S. W. 166; Walsh *v.* Leeper Hardware Co., (Civ. App. 1899) 50 S. W. 630.

*Utah.*— Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 234, 52 Pac. 282.

*Wisconsin.*— Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

*United States.*— Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; *In re* Hildebrant, 120 Fed. 992; Jaffrey *v.* Brown, 29 Fed. 476.

See 43 Cent. Dig. tit. "Sales," § 893.

But see Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345, holding that a seller of goods who relied entirely on a guarantee of payment by his salesman has no right of action to recover the goods on the ground of fraudulent representations made by the buyer to the salesman, and hence the latter having

or from subsequent purchasers from him with notice,[96] or from his creditors.[97] The seller must, however, base his right on the original fraud, and cannot rely on the fact that there was fraud in the subsequent transfer;[98] and the mere

paid for the goods the seller cannot maintain replevin therefor to the guarantor's use.

**96.** *Georgia.*— Wolfe *v.* Claflin, 81 Ga. 64, 6 S. E. 599.

*Illinois.*— Huthmacher *v.* Lowman, 66 Ill. App. 448; Wiener *v.* Straus, 66 Ill. App. 110; Morrill *v.* Corbin, 13 Ill. App. 81.

*Indiana.*— Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506; Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028.

*Louisiana.*— Parmele *v.* McLaughlin, 9 La. 436.

*Maine.*— Herrick *v.* Kingsley, 12 Me. 278; Seaver *v.* Dingley, 4 Me. 306.

*Maryland.*— Hyde *v.* Ellery, 18 Md. 496.

*Massachusetts.*— Manning *v.* Albee, 11 Allen 520; Dow *v.* Sanborn, 3 Allen 181.

*Minnesota.*— Slagle *r.* Goodnow, 45 Minn. 531, 48 N. W. 402.

*Missouri.*— Wingate *v.* Buhler, 62 Mo. App. 418; Reid *v.* Lloyd, 52 Mo. App. 278; Herboth *v.* Gaal, 47 Mo. App. 255; Thomas *v.* Freligh, 9 Mo. App. 151.

*New Jersey.*— Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

*New York.*—Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Coursey *v.* Coe, 24 N. Y. App. Div. 271, 48 N. Y. Suppl. 495; Grossman *v.* Walters, 11 N. Y. Suppl. 471 [*affirmed* in 132 N. Y. 594, 30 N. E. 1151]; Mather *v.* Freelove, 3 N. Y. St. 424; Conrow *v.* Branscom, 3 N. Y. St. 129; Allison *v.* Matthieu, 3 Johns. 235.

*Texas.*— Walsh *v.* Leeper Hardware Co. (Civ. App. 1899) 50 S. W. 630.

See 43 Cent. Dig. tit. "Sales," § 890 *et seq.*

And see Luckey *v.* Roberts, 25 Conn. 486.

**It is immaterial that such third person did not participate in the buyer's fraud.** Traywick *v.* Keeble, 93 Ala. 498, 8 So. 573.

**97.** *Alabama.*— Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

*California.*—Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

*Colorado.*—Reid *v.* Bird, 15 Colo. App. 116, 61 Pac. 353.

*Delaware.*— Fait, etc., Co. *v.* Truxton, 1 Pennew. 24, 39 Atl. 457.

*Georgia.*—Landauer *v.* Cochran, 54 Ga. 533.

*Illinois.*— Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500; Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390.

*Iowa.*—Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

*Kansas.*— Wafer *v.* Harvey County Bank, 46 Kan. 597, 26 Pac. 1032.

*Kentucky.*— Hopkins County Bank *v.* Coffman, 56 S. W. 718, 22 Ky. L. Rep. 141; Carstairs *v.* Charles A. Kelley Co., 29 S. W. 622, 17 Ky. L. Rep. 309.

*Louisiana.*—Gasquet *v.* Johnston, 2 La. 514.

*Maine.*— Jordan *v.* Parker, 56 Me. 557; Hawes *r.* Dingley, 17 Me. 341.

*Maryland.*— Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

*Massachusetts.*— Atwood *v.* Dearborn, 1 Allen 483, 79 Am. Dec. 755; Wiggin *r.* Day, 9 Gray 97; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97.

*Michigan.*— Shipman *r.* Seymour, 40 Mich. 274.

*Missouri.*— Hartt *r.* McNeil, 47 Mo. 526; Bidault *r.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305.

*New Hampshire.*—Bradley *v.* Obear, 10 N. H. 477.

*New Jersey.*—Collins *v.* Cooley, (Ch. 1888) 14 Atl. 574; Williamson *r.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

*New York.*— Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Joslin *v.* Cowee, 60 Barb. 48; Bliss *r.* Cottle, 32 Barb. 322; Stevens *r.* Hyde, 32 Barb. 171; King *v.* Phillips, 8 Bosw. 603; Lewis *v.* Flack, 16 Daly 240, 10 N. Y. Suppl. 535; Schwabeland *v.* Buchler, 8 Misc. 86, 28 N. Y. Suppl. 523; Hitchcock *v.* Covill, 0 Wend. 167 [*affirmed* in 23 Wend. 611]; Van Cleef *v.* Fleet, 15 Johns. 147; Lloyd *v.* Brewster, 4 Paige 537, 27 Am. Dec. 88; Durell *v.* Haley, 1 Paige 492, 19 Am. Dec. 444.

*Ohio.*— Goldsmith *r.* Hain, 1 Ohio Cir. Ct. 333, 1 Ohio Cir. Dec. 185.

*Pennsylvania.*— Pottinger *v.* Hecksher, 2 Grant 309; Ensign *r.* Hoffield, 2 Pa. Cas. 504, 4 Atl. 189; Eastern Lumber Co. *v.* Gill, 9 Pa. Co. Ct. 630.

*Texas.*— Friedman *r.* Boyd, (Civ. App. 1895) 31 S. W. 531; Williams *v.* Kohn, (Civ. App. 1894) 28 S. W. 920; Blum *v.* Jones, (Civ. App. 1893) 23 S. W. 844.

*Vermont.*— Poor *v.* Woodburn, 25 Vt. 234; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46.

*Wisconsin.*— Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

*United States.*— Browning *v.* De Ford, 178 U. S. 196, 20 S. Ct. 876, 44 L. ed. 1033 [*affirming* 8 Okla. 239, 60 Pac. 534]; Donaldson *v.* Farwell, 93 U. S. 631, 23 L. ed. 993; Jaffrey *v.* Brown, 29 Fed. 476.

See 43 Cent. Dig. tit. "Sales," § 890 *et seq.*

But see Dickson *v.* Culp, 9 Baxt. (Tenn.) 57, holding that if a creditor of one who has obtained possession of goods by fraud perpetrated upon the seller attaches the goods before any step taken by the seller to avoid the sale, the rights of such creditor are superior to those of the seller.

**Effect of fraudulently concealing facts.**— The fraudulent omission by the buyer to state among his liabilities certain debts owing his wife and son-in-law did not give the seller a right to replevy goods sold on credit, and in reliance on such statement, where such debts did not affect the buyer's insolvency. Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137.

**98.** Franklin Sugar Refining Co. *r.* Collier,

fact of insolvency of the buyer will not alone so taint his title that the seller can reclaim the goods.[99]

**3. Change of Form or Intermixture With Other Goods.** The seller may follow and reclaim the goods, although the form thereof has been changed.[1] If, however, the goods have been commingled with other goods so that they cannot be identified the right of reclamation is lost.[2]

**4. Right to Follow Proceeds.** The seller having a right of reclamation may follow the proceeds of the goods so long as they can be identified,[3] and this is true if they can be traced, although they have become part of a common fund;[4] but the right is lost if they have been so mingled with other funds as to become indistinguishable.[5]

**5. Estoppel, Waiver, or Ratification — a. General Rules.** The seller having full knowledge of the facts may ratify the sale and waive the right to reclaim the goods by accepting payment,[6] by transfer of a note given for the price,[7] or by taking security,[8] but such right is not waived by a mere demand of payment.[9]

89 Iowa 69, 56 N. W. 279; Ross *v.* Miner, 101 Mich. 1, 59 N. W. 425.

**99.** *Alabama.*— Johnson *v.* Bent, 93 Ala. 160, 9 So. 581.

*Arkansas.*— Mack *v.* Adler, 48 Ark. 70, 2 S. W. 345.

*Colorado.*— Burchinell *v.* Hirsh, 5 Colo. App. 500, 39 Pac. 352.

*Illinois.*— Brown *v.* Bierman, 24 Ill. App. 574.

*Indiana.*— Sweet *v.* Campbell, 14 Ind. App. 570, 43 N. E. 236.

*Mississippi.*— Klien *v.* Rector, 57 Miss. 538.

*Missouri.*— Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339; Sweet *v.* Sullivan, 77 Mo. App. 128.

*Texas.*— Walsh *v.* Leeper Hardware Co., (Civ. App. 1899) 50 S. W. 630.

*Wisconsin.*— Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

*United States.*— Conyers *v.* Ennis, 6 Fed. Cas. No. 3,149, 2 Mason 236.

See 43 Cent. Dig. tit. "Sales," § 890.

**1.** Thompson *v.* Conover, 30 N. J. L. 329; Joslin *v.* Cowee, 60 Barb. (N. Y.) 48 [*reversed* on other grounds in 52 N. Y. 90]. But see Bennet *v.* Gilbert, 194 Ill. 403, 62 N. E. 847 [*affirming* 94 Ill. App. 505].

**Manufactured product.**— Where the sellers of logs on default by the buyers were to have a right to take the lumber manufactured from such logs, sell the same, pay themselves, and turn over to the buyers any surplus, the title and right of possession to such lumber vested in the sellers on default, and after demand and refusal they could maintain replevin, under Wis. Rev. St. c. 123. Sutherland *v.* Brace, 73 Fed. 624, 19 C. C. A. 589 [*affirming* 71 Fed. 469, 18 C. C. A. 199].

**2.** Newman *v.* Cannon, 43 La. Ann. 712, 9 So. 439; Kingsley *v.* McGrew, 48 Nebr. 812, 67 N. W. 787. But see Henderson *v.* Lauck, 21 Pa. St. 359, holding that where corn was delivered, to be paid for on delivery of the last load, and, as delivered, was placed on a heap with other corn of the vendee, in the presence of the vendor, and the corn was not paid for, the vendor, having made the delivery relying on the promise of the vendee, might maintain replevin for the corn, notwithstanding the intermixture.

**3.** Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390; Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266, 52 N. Y. Suppl. 925; Sheffer *v.* Montgomery, 65 Pa. St. 329.

**Injunctions to restrain a disposal of the proceeds** will lie at the suit of the vendor when a subpurchaser has sold the goods after notice of the seller's claim. Fargo *v.* Rider, (Tex. Civ. App. 1896) 36 S. W. 340.

**4.** Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio S. & C. Pl. Dec. 215, 4 Ohio N. P. 15.

**5.** New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

**6.** Overton *v.* Brown, 63 Mo. App. 49.

**Retention of note; instructions.**— In a trial of the right of property between sellers claiming the goods sold for the fraud of the purchaser and attaching creditors of the purchaser, it is error to charge that the refusal of the sellers to surrender a note executed by the purchaser for the price cannot be an affirmance where it was not clear whether the note was retained as an indemnity for the goods disposed of by the purchaser or whether in retaining it the sellers intended to affirm the sale. Raby *v.* Sweetzer, 12 Tex. Civ. App. 380, 34 S. W. 779.

**7.** Whitford *v.* Chace, 7 R. I. 322.

**8.** Joslin *v.* Cowee, 52 N. Y. 90 [*reversing* 60 Barb. 48].

**9.** Manning *v.* Albee, 11 Allen (Mass.) 520; Boyd *v.* Shiffer, 156 Pa. St. 100, 27 Atl. 60.

**A mere offer to receive payment** is not an affirmance if such offer is not accepted and acted on by the buyer. Roberts *v.* Evans, 43 Cal. 380.

**Necessity of knowledge of the fraud.**— In trover by the seller against subpurchasers from an alleged fraudulent purchaser, where there was evidence that, before plaintiff learned of the insolvency and fraud of its vendee, it sent an agent with instructions to collect the price; and, on learning of such vendee's fraud and insolvency, it withdrew all authority from the agent and rescinded the sale, an instruction that if plaintiff or its

Where goods are sold C. O. D. and payment not made on delivery and the seller instead of asserting his right of reclamation gives an extension of time, he cannot on the subsequent insolvency of the purchaser reclaim the goods.[10] As against third persons the seller will be estopped to reclaim the goods if he has held out the buyer as the owner of the goods,[11] has authorized the transfer,[12] or has accepted an order for the delivery of the goods to such third person;[13] and the right is lost by recognizing the title of such third person,[14] or by failing to disaffirm the contract within a reasonable time after knowledge of the facts.[15]

**b. Effect of Election of Inconsistent Remedy.** Bringing suit for the price after full knowledge of the facts is generally held to be such an affirmance of the sale as will estop the seller to reclaim the goods,[16] although the suit is voluntarily discontinued;[17] but where such suit is brought before notice of the fraud which is a ground of rescission, it does not estop the seller,[18] particularly if it was instituted by an agent without the seller's knowledge or consent.[19] The seller cannot maintain an action for recovery of the goods or in the alternative the price

agent had notice that such vendee was insolvent, and had sold the chattels to defendants, and, after such knowledge, had endeavored to collect the price from such vendee, this was an affirmance of the sale, and the verdict must be for defendant was erroneous, as the fact of agency was improperly assumed as proved, and as there could be no ratification without a knowledge of the fraud, knowledge of mere insolvency being insufficient. Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658.

**10.** Victor Safe, etc., Co. *v.* Texas State Trust Co., 101 Tex. 94, 104 S. W. 1040 [*affirming* (Civ. App. 1907) 99 S. W. 1049].

**11.** Bristol Nat. Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; Orth *v.* Bauer, 39 Minn. 31, 38 N. W. 758.

**12.** Gavigan *v.* Evans, 45 Mich. 597, 8 N. W. 545.

**13.** Pearson *v.* Dawson, E. B. & E. 448, 4 Jur. N. S. 1015, 27 L. J. Q. B. 248, 96 E. C. L. 448.

**14.** Woodley *v.* Coventry, 2 H. & C. 164, 9 Jur. N. S. 548, 32 L. J. Exch. 185, 8 L. T. Rep. N. S. 249, 11 Wkly. Rep. 599.

**15.** Windsor *v.* Cruise, 79 Ga. 635, 7 S. E. 141; Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796; Hallahan *v.* Webber, 7 N. Y. App. Div. 122, 40 N. Y. Suppl. 103 [*reversing* 15 Misc. 327, 37 N. Y. Suppl. 613, 2 N. Y. Annot. Cas. 333].

**When sale must be disaffirmed.**— Where property is obtained from the owner by means of a fraudulent purchase thereof on credit, the purchaser giving his notes for the purchase-money, payable at a future day, and before the maturity of the notes the purchaser absconds, after having transferred the property to a third person, the original vendor is not bound to proceed to disaffirmance of the contract, by seizing or replevying the goods immediately after the purchaser has absconded, but is justified in waiting untill the maturity of the notes; and such delay will not be deemed a ratification of the sale. Hathorne *v.* Hodges, 28 N. Y. 486.

**16.** *Alabama.*— Fuller *v.* Eames, 108 Ala. 464, 19 So. 366.

*California.*— Seligman *v.* Kalkman, 8 Cal. 207.

*Connecticut.*—Crompton *v.* Beach, 62 Conn. 24, 25 Atl. 446, 36 Am. St. Rep. 323, 18 L. R. A. 187.

*Iowa.*— Seeley *v.* Seeley-Howe-LeVan Co., 128 Iowa 294, 103 N. W. 961.

*Kentucky.*— Dietz *v.* Sutcliffe, 80 Ky. 650.

*Massachusetts.*— Bailey *v.* Hervey, 135 Mass. 172.

*Nebraska.*— Hughes *v.* Coburn, 35 Nebr. 526, 53 N. W. 388.

*New Jersey.*— Heller *v.* Elliott, 45 N. J. L. 564.

*New York.*— Conrow *v.* Little, 115 N. Y 387, 22 N. E. 346, 5 L. R. A. 693 [*reversing* 41 Hun 395]; Beloit Bank *v.* Beale, 34 N. Y. 473 [*affirming* 7 Bosw. 611, 11 Abb. Pr. 375, 20 How. Pr. 331]; Wilmot *v.* Richardson, 4 Abb. Dec. 614.

*Texas.*— Krause *v.* Marx, 5 Tex. Civ. App. 397, 23 S. W. 708.

*Wisconsin.*— Weed *v.* Page, 7 Wis. 503.

*United States.*— Dibblee *v.* Sheldon, 7 Fed. Cas. No. 3,889, 10 Blatchf. 178.

See 43 Cent. Dig. tit. "Sales," § 890 *et seq.*

**Joinder in bankruptcy** against the buyer does not prevent the seller from reclaiming the goods for fraud in the sale. Powers *v.* Benedict, 88 N. Y. 605.

**17.** Cooper *v.* Smith, 109 Mich. 458, 67 N. W. 516; Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880. But see Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840 [*reversing* 52 Mo. App. 407, and *following* Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615].

**18.** Wright *v.* George W. McAlpin Co., 35 S. W. 1039, 18 Ky. L. Rep. 226; Goodger *v.* Finn, 10 Mo. App. 226; Hays *v.* Midas, 104 N. Y. 602, 11 N. E. 141 [*affirming* 39 Hun 460]; Myers *v.* Taber, 5 Silv. Sup. (N. Y.) 598, 7 N. Y. Suppl. 857; Underhill *v.* Ramsey, 2 N. Y. Suppl. 451 [*affirmed* in 125 N. Y. 681, 26 N. E. 750].

**19.** Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255.

thereof.[20] If the buyer has sold a portion of the goods, bringing an action for the price of the portion so sold is not an affirmance as to the unsold portion so as to estop the seller from reclaiming that portion,[21] and so too the seller may replevy the part unsold and bring trover for the portion sold;[22] but where a seller of personalty retains a mortgage lien for the price with a provision that he may proceed either by foreclosure or trover, and he forecloses, he cannot thereafter maintain trover for any portion of the property which the officer failed to seize under the levy on foreclosure.[23] If an action in disaffirmance of the sale is commenced, the election thus made to disaffirm is not revoked by subsequent steps to recover the purchase-price, not brought to a successful conclusion.[24]

**6. Actions — a. Right of Action.** Where the contract of sale is voidable only and not void, as where there has been misrepresentation and fraud on the part of the buyer, the seller can maintain trover or replevin for the goods.[25] If there is no executed sale rescission is unnecessary to give the right to retake the goods;[26] but if the sale is executed the seller must have disaffirmed it so as to have the right of possession.[27] In such cases, where the sale is executed but the contract

**20.** Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Wear-Boogher Dry-Goods Co. *v.* Crews, 23 Tex. Civ. App. 667, 57 S. W. 73. But see De L'Homme *v.* De Kerlegand, 4 La. 353.

**21.** *Connecticut.*— Morford *v.* Peck, 46 Conn. 380.

*Massachusetts.*— Browning *v.* Bancroft, 8 Metc. 278.

*New Hampshire.*— Sleeper *v.* Davis, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377.

*New York.*— Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351, 67 N. Y. Suppl. 284; Hersey *v.* Benedict, 15 Hun 282. And see Powers *v.* Benedict, 88 N. Y. 605.

*Texas.*— Raby *v.* Sweetzer, 12 Tex. Civ. App. 380, 34 S. W. 779; Manhattan Cloak, etc., Co. *v.* Marx, (Civ. App. 1893) 23 S. W. 707; Heinze *v.* Marx, 4 Tex. Civ. App. 599, 23 S. W. 704.

*United States.*— *In re* Hildebrant, 120 Fed. 992.

See 43 Cent. Dig. tit. "Sales," § 898.

**22.** Singer *v.* Schilling, 74 Wis. 369, 43 N. W. 101. And see Lee *v.* Burnham, 82 Wis. 209, 52 N. W. 255.

**23.** Mitchell *v.* Castlen, 5 Ga. App. 134, 62 S. E. 731.

**24.** Moller *v.* Tuska, 87 N. Y. 166; Kinney *v.* Kiernan, 49 N. Y. 164; Equitable Co-operative Foundry Co. *v.* Hersee, 33 Hun (N. Y.) 169 [*affirmed* in 103 N. Y. 25, 9 N. E. 487]. But see Coffee *v.* Pleasants, 6 Ohio Dec. (Reprint) 812, 8 Am. L. Rec. 312.

**Failure to make objection.**— Where the vendor of goods which had been obtained by false pretenses replevied part of them on account of the fraud, and, pending the replevin suit, proved a claim against the estate of the vendee, who had made a general assignment for the price of the goods not replevied, no objection to this proof being made, making such proof did not waive plaintiff's right to replevy, since under Pub. St. c. 157, §§ 35, 36, the court of insolvency could at any time expunge the proof, or allow it to be amended into one for goods fraudulently obtained. Raphael *v.* Reinstein, 154 Mass. 178, 28 N. E. 141.

**Instituting an attachment in another state** against the buyer of goods, to recover their price from him, does not affect the creditor's right of action, previously commenced by him in this state, against third persons, to recover possession of the same goods on account of fraud in the sale. King *v.* Phillips, 8 Bosw. (N. Y.) 603.

**An action for damages for obtaining goods through false pretenses** is in disaffirmance of the sale, and not inconsistent with a replevin action previously brought by the seller to recover the goods. Welch *v.* Seligman, 72 Hun (N. Y.) 138, 25 N. Y. Suppl. 363.

**25.** Wendling Lumber Co. *v.* Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029; Amer *v.* Hightower, 70 Cal. 440, 11 Pac. 697; American-German Nat. Bank *v.* Gray, etc., Hardware Co., 33 Ky. L. Rep. 547, 110 S. W. 393; Tyler *v.* Freeman, 3 Cush. (Mass.) 261; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493; Cary *v.* Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323.

**26.** Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Loeffel *v.* Pohlman, 47 Mo. App. 574; Klee *v.* Grant, 4 Misc. (N. Y.) 88, 23 N. Y. Suppl. 855 [*reversing* 2 Misc. 412, 21 N. Y. Suppl. 1010, 17 N. Y. Suppl. 845].

**27.** *Illinois.*— Mathews *v.* Reinhardt, 43 Ill. App. 169 [*affirmed* in 149 Ill. 635, 37 N. E. 85].

*Iowa.*— Morse *v.* Hamill, 97 Iowa 631, 66 N. W. 892.

*Missouri.*— Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Cahn *v.* Reid, 18 Mo. App. 115.

*New York.*— Wise *v.* Grant, 140 N. Y. 593, 35 N. E. 1078; Pinckney *v.* Darling, 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411 [*affirmed* in 158 N. Y. 728, 53 N. E. 1130]; George Borgfeldt *v.* Wood, 92 Hun 260, 36 N. Y. Suppl. 612, 3 N. Y. Annot. Cas. 46 [*affirmed* in 154 N. Y. 784, 49 N. E. 1097]; Bliss *v.* Cottle, 32 Barb. 322; Stevens *v.* Hyde, 32 Barb. 171; Schwabeland *v.* Buchler, 8 Misc. 86, 28 N. Y. Suppl. 523; Steel *v.* Rosenburg, 33 N. Y. Suppl. 716, 24 N. Y. Civ. Proc. 340. But see White *v.* Dodds, 42 Barb. 554, 18 Abb. Pr. 250, 28 How. Pr. 197.

was induced by fraud, it is sufficient if the seller disaffirms the contract as soon as the fraud is discovered.[28]

**b. Conditions Precedent** — (I) *DEMAND.* Where the seller reclaims the goods from the buyer because of fraud demand before suit is unnecessary;[29] but if the property is lawfully in the possession of the buyer there can be no reclamation for non-payment of price without demand, in the absence of fraud.[30] Thus when the goods are delivered on trial to be paid for or returned, the seller cannot retake them without a demand;[31] but if the goods are delivered conditionally and the condition is not complied with, a previous demand is unnecessary.[32] Where the goods are in the possession of a third person claiming under the buyer demand is necessary if the possession of such person is not tortious as against the seller,[33] but the rule is otherwise if the possession of such third person is tortious.[34] A demand on the officer in possession is sufficient without a demand on the buyer.[35]

(II) *RESTORATION OF CONSIDERATION.* If the seller bases his right of recovery on rescission he must as a general rule offer to put the buyer *in statu quo* by a return of the consideration paid,[36] or a return of the property given in

*Pennsylvania.*— Schwartz *v.* McCloskey, 156 Pa. St. 258, 27 Atl. 300.

*United States.*— Hadden *v.* Natchaug Silk Co., 84 Fed. 80.

But see John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675, holding that bringing replevin for the goods is in itself a sufficient disaffirmance.

**Effect of rescission.**— A seller, on rescinding the sale, becomes at once entitled to the possession of the goods, so as to entitle him to bring replevin (Code Civ. Proc. § 1690, subd. 3), although they have been seized under attachment. Depew *v.* Beakes, 16 N. Y. App. Div. 631, 44 N. Y. Suppl. 774.

**28.** American Sugar-Refining Co. *v.* Fancher, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757 [*reversing* 81 Hun 56, 30 N. Y. Suppl. 482].

**29.** Farwell *v.* Hanchett, 19 Ill. App. 620 [*affirmed* in 120 Ill. 573, 11 N. E. 875]; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; Carl *v.* McGonigal, 58 Mich. 567, 25 N. W. 516.

**30.** New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326; Darling *v.* Tegler, 30 Mich. 54; Smith *v.* Newland, 9 Hun (N. Y.) 553; Arosemena *v.* Hinckley, 43 N. Y. Super. Ct. 43.

**31.** Witherby *v.* Sleeper, 101 Mass. 138. But see Peck *v.* Bonebright, 75 Iowa 98, 39 N. W. 213, 1 L. R. A. 155, holding that where one who has taken chattels on trial with the right to purchase on payment at a stated time defaults in making the payment, the owner may replevy the chattels without a previous demand.

**32.** Salomon *v.* Hathaway, 126 Mass. 482; Tyler *v.* Freeman, 3 Cush. (Mass.) 261.

**33.** Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121; Fairbank *v.* Phelps, 22 Pick. (Mass.) 535.

**Unauthorized demand.**— If a seller seeks to recover goods from an assignee of a purchaser on the ground of fraud, his subsequent ratification of an unauthorized demand on the assignee for the goods cannot avail the seller. Bliss *v.* Cottle, 32 Barb. (N. Y.) 322.

**34.** Blanchard *v.* Child, 7 Gray (Mass.) 155; Bussing *v.* Rice, 2 Cush. (Mass.) 48; Velsian *v.* Lewis, 15 Oreg. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

**Title in issue.**— In an action by a vendor to recover goods on the ground that the sale was induced by fraud, where they have been attached by creditors as the property of the vendee, the gist of the action is the title to the property, and no demand is necessary. Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

**Terms of sale.**— Where the buyer purchased property from the seller under an agreement that the purchase-price should be payable in instalments, and that the seller might retake the property upon failure to pay any instalment when it fell due, and before the first instalment fell due the buyer sold the property to a third person, the latter took no better title to the property than the buyer, and therefore the seller was entitled to maintain replevin against the third person without demand. Brown *v.* Fitch, 43 Conn. 512.

**Assignee for benefit of creditors.**— When a sale is invalid owing to the false representations made by the buyer, an action of replevin for the property sold may be maintained by the seller against one who stands in the shoes of the buyer without any prior demand for the property. Burnham *v.* Ellmore, 66 Mo. App. 617. But see Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404, holding that the possession of the assignee is not tortious.

**35.** Wise *v.* Grant, 20 N. Y. Suppl. 828.

**36.** Hamilton *v.* Singer Mfg. Co., 54 Ill. 370; McGuire *v.* Bradley, 118 Ill. App. 59; Adam, etc., Co. *v.* Stewart, 157 Ind. 678, 61 N. E. 1002, 87 Am. St. Rep. 240; John H. Hibben Dry-Goods Co. *v.* Hicks, 26 Ind. App. 646, 59 N. E. 938; Rock Island Implement Co. *v.* First Nat. Bank, 9 Kan. App. 96, 57 Pac. 1050; Baker *v.* McDonald, 74 Nebr. 595, 104 N. W. 923, 1 L. R. A. N. S. 474. But see Sisson *v.* Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206, holding that

exchange.[37] But return of the consideration is not essential as a condition precedent to action if it is worthless,[38] or if it was not in fact accepted but merely retained for the buyer;[39] and in the case of partial payment, the amount received need not be returned if the amount still due exceeds the value of the goods replevied,[40] or if a portion of the goods has been sold the value of which exceeds the amount paid,[41] and a repayment of expenses incurred by the buyer in relation to the goods sold is unnecessary.[42] In an action against a third person

replevin may be maintained for the recovery of goods alleged to have been fraudulently obtained under the guise of a contract of sale without the return before suit of money paid as a part of the consideration.

Illegal sale.— 3 Howell Annot. St. § 2136*v*, imposing a penalty for selling an animal affected with a contagious or infectious disease, does not make the trade of a glandered horse so absolutely void that the defrauded person can replevy the horse he exchanged without prior demand and tender back of the boot money. Havey *v.* Petrie, 100 Mich. 190, 59 N. W. 187.

Effect of agreement for compromise.— Although plaintiff waives his right to bring replevin for goods sold to defendant because fraudulently purchased, where, being suspicious of this, he enters into a compromise whereby defendant returns part of them and plaintiff agrees not to sue for recovery of the remainder until the bill therefor is due, yet where defendant enters into the agreement with an intent to fraudulently dispose of the goods, and immediately proceeds to do so, plaintiff may bring replevin without first offering to return the goods obtained by him under the compromise. Munzer *v.* Stern, 105 Mich. 523, 63 N. W. 513, 55 Am. St. Rep. 468.

Where the contract contains an express condition for a return of the property on failure to make payments as stipulated, an action of claim and delivery may be maintained without an offer to return payments made under the contract. Dodge *v.* Carter, 140 Cal. 663, 74 Pac. 292.

Refusal to perform indivisible contract.— Where on a sale for cash the purchaser makes a payment on account and accepts and takes possession of a part of the goods, but refuses to accept the remainder or to pay the balance of the price, the sale being indivisible, the seller can maintain replevin to recover the entire quantity of goods from the possession of the purchaser, and he is not bound to restore the payment which has been made before he can repossess himself of the property, as the case is not one of rescission of contract. Thompson *v.* McLean, 14 N. Y. Suppl. 55. And see Haskell *v.* Montague, 40 Mich. 742.

A vendor taking a note cannot as a general rule replevy the chattel until the note has been surrendered or adjudged void (Moriarity *v.* Stofferan, 89 Ill. 528; Hibben Dry Goods Co. *v.* Hicks, 26 Ind. App. 646, 59 N. E. 938; Gittings *v.* Carter, 49 Iowa 338. And see Thomas *v.* Dickinson, 65 Hun (N. Y.) 5, 19 N. Y. Suppl. 600, where the action was for damages, and it was held that a return of the note was necessary), it being held in many cases sufficient, however, if the note is produced at the trial with an offer to surrender or cancel it (Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; White *v.* Dodds, 42 Barb. (N. Y.) 554, 18 Abb. Pr. 250, 28 How. Pr. 197; Pequeno *v.* Taylor, 38 Barb. (N. Y.) 375; Fraschieris *v.* Henriques, 36 Barb. (N. Y.) 276; Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Dec. 394; Duval *v.* Mowry, 6 R. I. 479. See also Farwell *v.* Hanchett, 120 Ill. 573, 11 N. E. 875 [*reversing* 19 Ill. App. 620]; Doane *v.* Lockwood, 115 Ill. 490, 4 N. E. 500). An offer by plaintiff to return promissory notes given for the purchase-price is too late if made after verdict. Ayres *v.* Hewitt, 19 Me. 281. But where a note is given as a conditional payment for goods, it is not necessary to return the note in order to entitle the vendor to bring his suit for the goods sold. Clark *v.* Young, 1 Cranch (U. S.) 181, 2 L. ed. 74; Bauendahl *v.* Horr, 2 Fed. Cas. No. 1,113, 7 Blatchf. 548. In replevin for goods obtained by fraud and paid for by a note on time with worthless securities, the mere fact that plaintiff has transferred the note for value before the replevin, and never reclaimed it, will not defeat the action. Manning *v.* Albee, 14 Allen (Mass.) 7, 92 Am. Dec. 736.

37. Stone *v.* Barrett, 34 Mo. App. 15; White Sewing Mach. Co. *v.* McBride, 27 Mo. App. 470.

Renunciation of interest in business.— A vendor seeking to rescind a contract for the sale of goods, in consideration of which he has received an agreement for an interest in the business to be done under a patent in a particular state and a license to manufacture the patented article, may, on renouncing his interest under such agreement and license, without any reconveyance, recover the goods sold, if otherwise entitled to redeem them. Poe *v.* Stockton, 39 Mo. App. 550.

38. Mahone *v.* Reeves, 11 Ala. 345; Manning *v.* Albee, 11 Allen (Mass.) 520.

39. Vancleave *v.* Beach, 110 Ind. 269, 11 N. E. 228; Bauendahl *v.* Horr, 2 Fed. Cas. No. 1,113, 7 Blatchf. 548.

40. Scher *v.* Roher, 34 Misc. (N. Y.) 792, 69 N. Y. Suppl. 929; Lewisohn *v.* Apple, 12 N. Y. Civ. Proc. 274.

41. John V. Farwell Co. *v.* Hilton, 84 Fed. 293, 39 L. R. A. 579.

42. Soper Lumber Co. *v.* Halstead, etc., Co., 73 Conn. 547, 48 Atl. 425; John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12, 61 Pac. 675; Adams *v.* O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Keep Mfg. Co. *v.* Moore, 11 Lea (Tenn.) 285.

not a *bona fide* purchaser such person cannot raise the question whether the seller has restored the consideration paid by the buyer.[43]

**c. Defenses and Offsets.** In an action to recover the goods the buyer may plead damages for false representations by the seller as to the quality of the goods and that the amount already paid is equal to the value of the goods,[44] and may show that he has sold and parted with the title to the goods to persons not parties to the action;[45] but in replevin for the specific goods defendant cannot set up a breach of covenants,[46] and cannot plead payments for repairs in the absence of anything to show that the repairs were required by reason of defects;[47] and if defendant gives a bond and retains the goods, claiming them as fixtures and part of the realty, the action in replevin is in effect converted to an action for damages, and defendant cannot plead in defense the existence of mortgages on the property.[48] The buyer may offset damages sustained by reason of latent defects in the property;[49] but not a debt owing him by the seller in an entirely separate transaction,[50] or prospective profits.[51] A subsequent purchaser cannot impeach the title of his immediate vendor,[52] nor can he set off as against the original seller amounts owing him by the original buyer under whom he claims.[53]

**d. Time to Sue, Limitations, and Laches.** The right to sue for a recovery of the goods must be exercised promptly after the right accrues;[54] but if no rights have intervened which would be prejudiced thereby mere delay will not affect the seller's right.[55] Where the sale is on credit the seller need not wait until the term of credit has expired to bring his action for recovery of the goods on the ground of fraud of the buyer.[56]

**e. Parties.** Several sellers who have been induced by fraud to sell goods to the same buyer may unite in an action against creditors of the buyer to recover their goods;[57] and where the buyer has come into possession through fraud, and has attempted to create a lien on the goods, the lienor who has seized the goods under his lien and the purchaser at the sale are joint wrong-doers, and the seller may proceed against any one or any number of them at his election without releasing the others.[58] So too where the goods are taken from the buyer on execu-

**43.** Benesch *v.* Waggner, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; Schoonmaker *v.* Kelly, 42 Hun (N. Y.) 299; Pearse *v.* Pettis, 47 Barb. (N. Y.) 276; Nellis *v.* Bradley, 1 Sandf. (N. Y.) 560; Dolle *v.* Rhinehart, 7 N. Y. Suppl. 731.

**44.** Johnson *v.* St. Louis Butchers' Supply Co., 60 Ark. 387, 30 S. W. 429.

**45.** McMorran *v.* Murphy, 68 Mich. 246, 36 N. W. 60.

**46.** Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845.

**47.** J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. D. 530, 91 N. W. 82.

**48.** Ott *v.* Specht, 8 Houst. (Del.) 61, 12 Atl. 721.

**49.** Smith *v.* Citizens Gas, etc., Co., 5 Wkly. Notes Cas. (Pa.) 97.

**50.** Guilbeau *v.* Melancon, 28 La. Ann. 627.

**51.** Mackey *v.* Millar, 6 Phila. (Pa.) 527.

**52.** Conley *v.* Thornton, 81 Ga. 154, 7 S. E. 127.

**53.** Dows *v.* Dennistoun, 28 Barb. (N. Y.) 393.

**54.** *Alabama.*— Jones *v.* Anderson, 82 Ala. 302, 2 So. 911.

*Illinois.*— Hall *v.* Fullerton, 69 Ill. 448; Musick *v.* Gatzmeyer, 47 Ill. App. 329.

*Indiana.*— Sieveking *v.* Litzler, 31 Ind. 13.

*Kentucky.*— Gibson *v.* Moore, 7 B. Mon. 92.

*Missouri.*—World Pub. Co. *v.* Hull, 81 Mo. App. 277; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407 [*reversed* on other grounds in 126 Mo. 344, 28 S. W. 870, 47 Am. St. Rep. 675, 26 L. R. A. 840]; Lapp *v.* Ryan, 23 Mo. App. 436.

*New York.*— Heilbronn *v.* Herzog, 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841 [*reversed* on other grounds in 165 N. Y. 98, 58 N. E. 759]; Hallahan *v.* Webber, 7 N. Y. App. Div. 122, 40 N. Y. Suppl. 103.

*Pennsylvania.*— Backentoss *v.* Speicher, 31 Pa. St. 324.

*Tennessee.*—Wertheimer-Swartz Shoe Co. *v.* Faris, (Ch. App. 1898) 46 S. W. 336.

*Texas.*— Hunt *v.* Kellum, 59 Tex. 535.

*Vermont.*— Tilton Safe Co. *v.* Tisdale, 48 Vt. 83.

*Wisconsin.*— Goldsmith *v.* Bryant, 26 Wis. 34.

See 43 Cent. Dig. tit. "Sales," § 903.

**55.** Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277 [*reversed* on other grounds in 29 N. J. Eq. 311].

**56.** Kellogg *v.* Turpie, 2 Ill. App. 55; Yaeger Milling Co. *v.* Lawler, 39 La. Ann. 572, 2 So. 398; Hall *v.* Gilmore, 40 Me. 578; Seaver *v.* Dingley, 4 Me. 306; Mackinley *v.* McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522.

**57.** Cohen *v.* Wolff, 92 Ga. 199, 17 S. E. 1029.

**58.** Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

Personal liability.—Where the members of

tion the seller may proceed against the officer without making the buyer a party.[59]

**f. Pleading** — (I) *Declaration or Complaint.* The seller must allege all the facts on which his right to reclaim the goods is based, such as non-payment,[60] or fraud,[61] although in some cases it is held sufficient if plaintiff pleads a general claim of property and wrongful detention by defendant;[62] and it has been held sufficient to permit the introduction of evidence of fraud if the seller alleges ownership and the right of possession in himself and that defendant claims title under a pretended contract of sale.[63] A variance between the complaint or declaration and the proof must be as to a material fact to be fatal.[64]

(II) *Plea or Answer.* A defendant who relies on fraud on the part of the seller must allege that he was misled,[65] and injured thereby.[66] Where the right to recover is based on non-payment, defendant under a general denial may show partial payment and damages for breach of warranty.[67] An allegation in the answer that the contract of sale is in fact a mortgage under which defendant is entitled to an accounting is demurrable as stating a legal conclusion.[68]

**g. Evidence** — (I) *Presumption and Burden of Proof.* In the absence of direct evidence of the value of the goods the inference is that they were worth the price to be paid.[69] The burden is on the seller to identify the goods sought to

defendant firm conspired with defendant D to purchase goods on credit of the firm, and to conceal the proceeds, and, in furtherance of such conspiracy, purchased goods from plaintiffs, and D converted to his own use money and goods so obtained, he was liable to a personal judgment for the amount thereof. Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

**59.** Ide *v.* Gilbert, 62 Ill. App. 524.

**60.** Haven *v.* Place, 28 Minn. 551, 11 N. W. 117.

**Issues and proof.**— In an action of claim and delivery, each party alleging general ownership and right of possession in himself, where defendant, in support of his claim, introduces in evidence what purports to be a bill of sale from plaintiff, the latter may prove in rebuttal that there had never been in fact any sale or delivery of the property; that the bill of sale had been signed to be placed in escrow until a proposed trade had been completed; and that the person named as vendee therein had fraudulently and unlawfully obtained possession of it. Grinnell *v.* Young, 41 Minn. 186, 42 N. W. 929.

**61.** Clinton *v.* Estes, 20 Ark. 216.

**Sufficiency of allegations of fraud.**— In an action to recover goods obtained by vendees through false representations as to their financial condition, an allegation that on a certain date the vendees had made a statement concerning their financial condition, which showed them to have a large amount of assets over liabilities, while in fact they were insolvent, and did not intend to pay for the goods, is sufficiently specific (Mitchell *v.* Bloom, (Tex. Civ. App. 1898) 46 S. W. 406); and where, in replevin by a seller, alleging that the purchaser induced the sale by "false and fraudulent representations . . . as to his solvency and financial condition and standing," a more specific statement is not insisted on, written statements by the purchaser, furnished the seller at his request, and showing the purchaser's assets and liabilities and general financial standing, are admissible (Kuh, etc., Co. *v.* Glucklick, 120 Iowa 504, 94 N. W. 1105).

**An allegation of fraud against the purchaser of goods for cash will not be sustained** by the circumstances of his having tendered plaintiff in payment some of plaintiff's own overdue notes. Foley *v.* Mason, 6 Md. 37.

**Fraud on the part of a purchaser must be** alleged. Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93.

**Under an allegation of false representations only** suppression of facts cannot be shown. Franklin Sugar Refining Co. *v.* Collier, 89 Iowa 69, 56 N. W. 279. But under an allegation that false representations were made to plaintiffs it may be shown that they were made to an agent. Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. 867.

**62.** Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618; Bliss *v.* Cottle, 32 Barb. (N. Y.) 322.

**63.** Nolan *v.* Jones, 53 Iowa 387, 5 N. W. 572.

**64.** Burnham *v.* Jacobs, 66 Mo App. 628, holding that a variance as to the date of the sale is immaterial.

**Matter of description.**— In a declaration in replevin, an allegation following the description of the goods, "being an invoice . . . sold . . . to Edward T. Adams & Co., of . . ." is mere description; and the declaration is not objectionable on proof that the goods were sold to "E. T. A." Caldwell *v.* Bowen, 80 Mich. 382, 45 N. W. 185.

**65.** Smith *v.* Estey Organ Co., 100 Ga. 628, 28 S. E. 392.

**66.** Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421.

**67.** Aultman *v.* Forgey, 10 Ind. App. 397, 36 N. E. 939.

**68.** Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845.

**69.** Grossman *v.* Walters, 11 N. Y. Suppl. 471 [*affirmed* in 132 N. Y. 594, 30 N. E. 1151].

be recovered, as those sold to the buyer,[70] and to show his title thereto.[71] If the ground of recovery is fraud the burden is on the seller to show the fraud;[72] but on proof that the sale was induced by the fraud of the buyer the burden is on one claiming under him to show that he paid value for the goods,[73] and then on plaintiff to prove that the subpurchaser had notice of the fraud of the vendee when he purchased or before he paid the price.[74]

(II) *ADMISSIBILITY.* In actions to recover the goods sold or their proceeds the general rules as to admissibility of evidence[75] apply.[76] Evidence of the insolvency of the purchaser is competent on the issue of fraud,[77] and as tending to show fraud evidence may be admissible of other transactions,[78] and that the buyer made excessive purchases of goods.[79] On the issue of insolvency evidence is admissible as to the buyer's financial condition shortly after the sale,[80] as to the value of his stock at the time of the sale,[81] and as to the character and extent of his business,[82] and as tending to show the buyer's true financial condition an inventory made by him is admissible,[83] and the seller may show that the buyer made false statements as to his financial standing,[84] and that the seller relied on

**70.** Wells *v.* Sperry, (Tex. Civ. App. 1894) 27 S. W. 900. But see Benesch *v.* Weil, 69 Md. 276, 14 Atl. 666.

**71.** Hovey *v.* Grant, 55 N. H. 497.

**72.** Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Ellwood Mfg. Co. *v.* Faulkner, 87 Ill. App. 294.

**73.** Wilk *v.* Key, 117 Ala. 285, 23 So. 6. And see Reid *v.* Bird, 15 Colo. App. 116, 61 Pac. 353.

**74.** Wilk *v.* Key, 117 Ala. 285, 23 So. 6.

**75.** See EVIDENCE, 16 Cyc. 821.

**76.** Fulliam *v.* Hagens, 83 Iowa 763, 50 N. W. 215; Veazie *v.* Somerby, 5 Allen (Mass.) 280; Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646; Huyett, etc., Mfg. Co. *v.* Gray, 111 N. C. 87, 15 S. E. 939.

**77.** Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493.

**Knowledge of the buyer of the fact of his insolvency** may be shown on the issue of fraud. Ralph *v.* Fon Dersmith, 10 Pa. Super. Ct. 481.

**78.** Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523, 4 So. 658 (holding, however, that while to establish a fraudulent transfer or conveyance of property, other transactions occurring at or about the same time may be competent evidence, as proving the insolvency and fraudulent intent of the grantor, they are not sufficient to invalidate the conveyance as against the grantee); Kirschbaum *v.* Jasspon, 119 Mich. 452, 78 N. W. 473; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

**Evidence of the institution by other creditors of suits to recover property sold** to the debtor is incompetent in a replevin suit to prove a fraudulent purchase of the property in controversy. White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060.

**79.** Kirschbaum *v.* Jasspon, 119 Mich. 452, 78 N. W. 473; Blum *v.* Jones, (Tex. Civ. App. 1893) 23 S. W. 844.

**Where there is evidence of a conspiracy** between the buyer and a third person in purchasing goods on credit with intent to fail it may be shown that some of the goods passed into the hands of such third person after the buyer's failure. McKenzie *v.* Weineman, 116 Ala. 194, 22 So. 508.

**80.** Waples-Platter Co. *v.* Turner, 83 Fed. 64, 27 C. C. A. 439.

**81.** Phelps, etc., Co. *v.* Samson, 113 Iowa 145, 84 N. W. 1051.

**82.** Kuh, etc., Co. *v.* Glucklick, 120 Iowa 504, 94 N. W. 1105, holding that the purchaser's cash book was admissible for that purpose.

**83.** Morris *v.* Wells, 4 Silv. Sup. (N. Y.) 34, 7 N. Y. Suppl. 61.

**84.** Kuh, etc., Co. *v.* Glucklick, 120 Iowa 504, 94 N. W. 1105; Hartt *v.* McNeil, 47 Mo. 526.

**Oral or written representations.**— The seller may show that oral representations were made and relied on, although written representations were made at the same time. Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216.

**Completeness of statement.**— In replevin for goods through alleged fraud of the buyer, testimony is inadmissible to show that a statement of assets and liabilities, certified by the buyer to the seller, was not intended to show all the liabilities, the liability column having been left blank except for one entry. Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297, 22 So. 952.

**Falsity of statement.**— In replevin for goods alleged to have been sold defendant on false representations as to his credit, it was error to refuse to permit defendant's clerk to testify as to the falsity of a written statement of his accounts sent by defendant to plaintiff, and to show by plaintiff's credit man that credit was extended on such statement. Goodyear Rubber Co. *v.* Schreiber, 29 Wash. 94, 69 Pac. 648.

**Motive of buyer.**— In replevin for goods purchased on credit under an alleged false representation by the buyer as to his solvency, a deed of assignment thereafter given by him to a third person, who interpleaded, is admissible in evidence as subsequent conduct of the buyer, and to show with what motives he made such statements. Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137.

them in extending credit.[85] But to render evidence of false statements admissible it must be shown when they were made,[86] and that they were made with the authority of the buyer;[87] and declarations and admissions of the buyer as to his financial condition, while admissible against him,[88] are not admissible as against third persons if not made in their presence.[89]

(III) *WEIGHT AND SUFFICIENCY.* To entitle the seller to recover, the evidence should be clear and convincing,[90] and should properly identify the goods.[91] Fraud must be clearly established and not left to mere inference or suspicion,[92] and when the rights of third persons are involved proof that there was no sale to the apparent buyer under whom such persons claim must be particularly clear and convincing.[93]

**h. Trial.** The rules governing the conduct of trials of civil actions generally [94] apply to actions by the seller for the recovery of the goods or the proceeds thereof.[95] Questions of fact are for the jury,[96] aided by proper instructions from the court,[97]

**False statements and reports made to commercial agencies** are admissible (Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618; Schwartz *v.* Mittenthal, (Tex. Civ. App. 1899) 50 S. W. 182), if authorized by the buyer (Rome Furniture, etc., Co. *v.* Walling, (Tenn. Ch. App. 1900) 58 S. W. 1094).

85. Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216; Goodyear Rubber Co. *v.* Schrieber, 29 Wash. 94, 69 Pac. 648.

86. McKensie *v.* Rothschild, 119 Ala. 419, 24 So. 716.

87. Moore *v.* Hinsdale, 77 Mo App. 217.

88. Brock *v.* Garson, 117 Mich. 550, 76 N. W. 111.

89. Brock *v.* Garson, 117 Mich. 550, 76 N. W. 111; Sommer *v.* Adler, 36 N. Y. App. Div. 107, 55 N. Y. Suppl. 483; Horowitz *v.* Jacobs, 34 Misc. (N. Y.) 402, 69 N. Y. Suppl. 746.

90. Fougeres *v.* Zacharie, 5 J. J. Marsh. (Ky.) 504.

**Evidence that the seller said he would only send the good C. O. D.** which the buyer assented to is sufficient to show that the seller did not rely on the buyer's representations as to credit. Leavitt *v.* Rosenthal, 84 N. Y. Suppl. 530.

91. Leavitt *v.* Rosenthal, 84 N. Y. Suppl. 530.

92. Hoeninghaus *v.* Cantor, 12 N. Y. Suppl. 564.

93. Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

94. See TRIAL.

95. Gardner *v.* Lane, 98 Mass. 517, holding that in an action of replevin the court is not bound to try the right of the vendor's assignees in insolvency whose title has accrued during the pendency of the action.

**Direction of verdict.**— If it is admitted that the seller never had title to certain parts of a machine which were supplied by the buyer, a verdict for such parts should be directed for the buyer. Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991.

**Framing issues.**— In a suit to recover goods on the ground of fraud where the court refused to hear proof that some of the goods, although conforming to the general description of the goods sold, had not in fact been purchased from the seller, or if they had they had been paid for, it was proper, on motion for a new trial, to frame an issue to try those facts. Claflin *v.* Beaver, 35 Fed. 259.

**Findings** that the buyer knew he was insolvent when purchasing the goods and did not disclose the fact, and that he did not intend to pay for the goods but intended to defraud the seller, are sufficient to support a judgment for plaintiff, although it is not found that there was any actual misrepresentation as to solvency. Goodman *v.* Sampliner, 23 Ind. App. 72, 54 N. E. 823.

96. See the cases cited *infra*, this note.

**Thus it is for the jury to say** whether the sale was induced by the fraud of the buyer (Phelps, etc., Co. *v.* Samson, 113 Iowa 145, 84 N. W. 1051; Fox *v.* Webster, 46 Mo. 181; Poe *v.* Stockton, 39 Mo. App. 550; Mauger *v.* Slavin, 11 N. Y. App. Div. 483, 42 N. Y. Suppl. 331; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. Rep. 902); and if it is shown that he was insolvent, whether he intended to pay (Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339). So too it is for the jury to say whether payment and delivery were to be concurrent so that title did not pass on failure to pay (Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49 [*reversing* 44 Hun 434]), or whether payment on delivery was waived by the seller (George W. Merrill Furniture Co. *v.* Hill, 87 Me. 17, 32 Atl. 712); and if notes were given by the buyer, whether they were given as collateral or in settlement of the price (Walkau *v.* Manitowoc Seating Co., 105 Ill. App. 130).

**But the fact that the buyer confessed judgment** three months after the sale, without evidence as to his financial condition at either date, does not warrant submitting to the jury the issue of his insolvency at the time of the sale. Diller *v.* Nelson, 10 Pa. Super. Ct. 449.

97. Oester *v.* Sitlington, 115 Mo. 247, 21 S. W. 820, holding that an instruction that the seller might recover the goods if they were not paid for as required by a condition of the contract is erroneous unless it requires the jury to find that the condition had not been waived.

**Fraud.**— Instructions on the issue of fraud-

which instructions must conform to the issues raised,[98] and to the facts which there is evidence tending to prove,[99] and must not tend to multiply unimportant issues.[1] An error in instructions is not cured by subsequent instructions unless they state clearly the law governing the case and fairly supply what was missing in the former instructions.[2]

**i. Judgment and Amount of Recovery.** A judgment for defendant in replevin restores the possession to the buyer but does not impair the seller's rights under the contract,[3] the latter being compelled, however, to seek his remedy in another action.[4] If judgment is for the seller he can recover only the goods sold in reliance on the false representations,[5] and if judgment is for the value instead of the goods the amount of recovery is the contract price and interest,[6] less any amount that has been paid thereon;[7] and similarly if such a judgment is for defendant the amount of his recovery is the value of his interest in the goods.[8] If the action is against the buyer and an officer holding the goods under an execution and the officer fails to answer, and the action fails because there was no rescission, the court will not on dismissing the action order a restoration of the goods to the officer.[9]

**D. Resale — 1. Existence of Right — a. In England.** In England the right of the seller to resell the goods on the failure of the buyer to perform his contract is not free from doubt. It seems that he may resell and give good title as against

ulent representations should be based on and relate to the statements shown by the evidence to have been made (Cantor *v.* Claflin, 12 N. Y. Suppl. 759 [*affirmed* in 128 N. Y. 598, 28 N. E. 251]), and if the gravamen of the action is fraud an instruction as to the effect of the transactions between the seller and the buyer which leaves out the element of fraud is erroneous (Thaxter *v.* Foster, 153 Mass. 151, 26 N. E. 434; Shelly *v.* Heater, 17 Nebr. 505, 23 N. W. 521); but if there is no evidence of fraud an instruction based on the theory that the sale was fraudulent is properly refused (Cohn *v.* Stringfellow, 100 Ala. 242, 14 So. 286. See also Kirschbaum *v.* Jasspon, 123 Mich. 314, 82 N. W. 69). Where the seller alleges false statements as to financial condition and an intent not to pay, an instruction that there can be no recovery unless the intent not to pay is shown is erroneous, as there may be a recovery if there were false representations on which the seller relied. W. W. Johnson Co. *v.* Triplett, 66 Ark. 233, 50 S. W. 455; Reid *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359; Kirschbaum *v.* Jasspon, 123 Mich. 314, 82 N. W. 69.

98. Roberts, etc., Shoe Co. *v.* Shepherd, 96 Mo. App. 698, 70 S. W. 931.

99. Ross *v.* Miner, 101 Mich. 1, 59 N. W. 425, holding that when the evidence shows that defendants, up to the time of the purchase, had paid their obligations at maturity; that their assets equaled their liabilities, and a new partner was expected to contribute cash equal to one third the capital, an instruction that they were then insolvent is properly refused. See also Schoeneman *v.* Chamberlin, 37 N. Y. App. Div. 628, 55 N. Y. Suppl. 845.

1. Standard Oil Co. *v.* Meyer Bros. Drug Co., 84 Mo. App. 76, where the instruction was that the seller had no lien the gravamen of the action being fraud.

2. Whitten *v.* Fitzwater, 129 N. Y. 626, 29 N. E. 298 [*reversing* 11 N. Y. Suppl. 297].

3. Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788.

**Although defendant pleads and shows overpayment** in defense he is not entitled to a judgment for the overpayment. Baldwin *v.* Burrows, 95 Ind. 81.

4. Sheppard *v.* Newhall, 47 Fed. 468.

5. Moore *v.* Hinsdale, 77 Mo. App. 217.

**Default judgment.**— In replevin by a seller on the ground that the sale was induced by the purchaser's fraud, in which the purchaser's trustee in bankruptcy is substituted as defendant, and the purchaser himself makes default, default judgment for the value of the goods not found is properly rendered against the purchaser, the substitution having been made on the trustee's own motion. Kuh, etc., Co. *v.* Glucklick, 120 Iowa 504, 94 N. W. 1105.

**On a judgment for plaintiff the seller takes title to the goods as a general owner** and not as a special owner. Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

6. Herbert *v.* Stanford, 12 Ind. 503; Keitt *v.* Counts, 15 S. C. 493; Halff *v.* Wangemann, (Tex. Civ. App. 1899) 54 S. W. 937. But see Stevens *v.* Low, 2 Hill (N. Y.) 132.

7. Arosemena *v.* Hinckley, 43 N. Y. Super. Ct. 43; Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90.

8. Peck *v.* Bonebright, 75 Iowa 98, 39 N. W. 213, 1 L. R. A. 155; Gentry *v.* Templeton, 47 Mo. App. 55.

9. Sheehan *v.* Golden, 85 Hun (N. Y.) 462, 33 N. Y. Suppl. 109.

**Rights of third parties.**— In a suit to rescind a sale for fraud, wherein a writ of sequestration was issued, claims of third persons to the property cannot be considered. Parks *v.* Lancaster, (Tex. Civ. App. 1896) 38 S. W. 262.

the original purchaser,[10] and the right of resale seems to be recognized in the case of perishable goods,[11] and of course where there is an express reservation of the right, although even in such case the contract is regarded as rescinded.[12] In either case he may recover the difference in price and expenses, the only distinction being in the form of remedy. Thus on resale under express reservation, the contract being rescinded, the seller may bring an action for damages for loss of price and expenses,[13] while in the other cases the action is brought on the original contract for the actual loss, composed of the difference in price and expenses.[14] But it seems that such resale, even on the buyer's default, is a breach of contract for which damages may be recovered by him, although only the actual damages suffered, that is, the difference between the contract price and the market value may be recovered; and if there be no proof of such difference the recovery will be for nominal damages only.[15]

**b. In the United States.** In the United States the rule is well settled that where the goods are in his possession the seller may, without committing a breach of the contract, resell the goods if the original buyer refuses without justifiable cause to receive and pay for them,[16] and may recover the loss sustained in the

**10.** Milgate *v.* Kebble, 10 L. J. C. P. 277, 3 M. & G. 100, 3 Scott N. R. 358, 42 E. C. L. 61. *Compare* Lord *v.* Price, L. R. 9 Exch. 54, 43 L. J. Exch. 49, 30 L. T. Rep. N. S. 271, 22 Wkly. Rep. 318.

**11.** Maclean *v.* Dunn, 4 Bing. 722, 6 L. J. C. P. O. S. 184, 1 M. & P. 761, 29 Rev. Rep. 714, 13 E. C. L. 710.

**12.** Lamond *v.* Duvall, 9 Q. B. 1030, 11 Jur. 266, 16 L. J. Q. B. 136, 58 E. C. L. 1030.

**13.** Lamond *v.* Duvall, 9 Q. B. 1030, 11 Jur. 266, 16 L. J. Q. B. 136, 58 E. C. L. 1030.

**In Canada** it has been held that there is no rescission by resale under express reservation of the right. John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454.

**14.** Maclean *v.* Dunn, 4 Bing. 722, 6 L. J. C. P. O. S. 184, 1 M. & P. 761, 29 Rev. Rep. 714, 13 E. C. L. 710.

**15.** Valpy *v.* Dakeley, 16 Q. B. 941, 16 Jur. 38, 20 L. J. Q. B. 380, 71 E. C. L. 941; Griffiths *v.* Perry, 1 E. & E. 680, 5 Jur. N. S. 1076, 28 L. J. Q. B. 204, 102 E. C. L. 680. And see Benjamin Sales (5th ed.) 932 *et seq.*

**16.** *Alabama.*— Penn *v.* Smith, 93 Ala. 476, 9 So. 609; West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

*California.*— King *v.* Sheward, 97 Cal. 235, 31 Pac. 1107.

*Colorado.*— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

*Delaware.*— Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64; Barr *v.* Logan, 5 Harr. 52.

*Georgia.*— Camp *v.* Hamlin, 55 Ga. 259.

*Illinois.*— Bagley *v.* Findlay, 82 Ill. 524; Olcese *v.* Mobile Fruit, etc., Co., 112 Ill. App. 281 [*affirmed* in 211 Ill. 539, 71 N. E. 1084]; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407.

*Indiana.*— Johnson *v.* Powell, 9 Ind. 566.

*Iowa.*— Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

*Kentucky.*— Cook *v.* Brandeis, 3 Metc. 555; Doherty *v.* Merchants' Nat. Bank, 52 S. W. 832, 21 Ky. L. Rep. 628.

*Louisiana.*— Judd Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352; White *v.* Kearney, 9 Rob. 495; Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291.

*Maine.*— Berlaiwsky *v.* Rosenthal, 104 Me. 62, 71 Atl. 69; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

*Mississippi.*— American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117; Swann *v.* West, 41 Miss. 104.

*Missouri.*—McClelland *v.* Picher Lead, etc., Co., 85 Mo. 636; Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Rep. 52; Baker *v.* McKinney, 87 Mo. App. 361; Logan *v.* Carroll, 72 Mo. App. 613; Dobbins *v.* Edmonds, 18 Mo. App. 307.

*New York.*— General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928; Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Hayden *v.* Demets, 53 N. Y. 426; Pollen *v.* Le Roy, 30 N. Y. 549; Petrie *v.* Stark, 79 Hun 550, 29 N. Y. Suppl. 881; Baumann *v.* Moseley, 63 Hun 492, 18 N. Y. Suppl. 563; Merriam *v.* Kellogg, 58 Barb. 445; O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67 [*affirmed* in 91 N. Y. 193]; Crooks *v.* Moore, 1 Sandf. 297; Bogart *v.* O'Regan, 1 E. D. Smith 590; Levy *v.* Glassberg, 92 N. Y. Suppl. 50; Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374.

*North Carolina.*— Hurlburt *v.* Simpson, 25 N. C. 233.

*Ohio.*— Diem *v.* Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; Hadley *v.* Pugh, Wright 554; Ashley *v.* Walker, 15 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 285.

*Pennsylvania.*— McCombs *v.* McKennan, 2 Watts & S. 216, 37 Am. Dec. 505; Hooper *v.* Bromley Bros. Carpet Co., 11 Pa. Super. Ct. 634; Barney *v.* Clarke, 6 Pittsh. Leg. J. N. S. 69.

*South Carolina.*— Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611.

*Tennessee.*— Granberry *v.* Frierson, 2 Baxt. 326; Barker *v.* Reagan, 4 Heisk. 590; Williams *v.* Godwin, 4 Sneed 557.

difference between the contract price and the price received on resale,[17] and the

*Texas.*— Weathered *v.* Golden, (Civ. App. 1896) 34 S. W. 761.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*Washington.*— Schott Co. *v.* Stone, 35 Wash. 252, 77 Pac. 192.

*United States.*— Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281; Hayes *v.* Nashville, 80 Fed. 641, 26 C. C. A. 59; McCulloh *v.* Smith, 44 Fed. 12; Hughes *v.* U. S., 4 Ct. Cl. 64.

See 43 Cent. Dig. tit. "Sales," § 915.

**Perishable goods.**— The remedy by resale is especially applicable where the goods are perishable. Tustin Fruit Assoc. *v.* Earl Fruit Co., (Cal. 1898) 53 Pac. 693; Camp *v.* Hamlin, 55 Ga. 259; Gilly *v.* Henry, 8 Mart. (La.) 402, 13 Am. Dec. 291. But the fact that the goods are perishable does not impose on the seller the duty of resale. Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

**Difficulty in finding transportation** will not justify a resale where title has passed to the buyer. Schmertz *v.* Dwyer, 53 Pa. St. 335.

**The new purchaser takes a good title** on a resale of goods by the seller. O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67 [*affirmed* in 91 N. Y. 193].

**Resale not a rescission.**— The fact that meat sold on the open market on the buyer's account was not "smoked meat," whereas the meat contracted for by the buyer was of that class, did not constitute a rescission by the seller of the contract of sale, where it was shown that smoking was a process which the meat was submitted to immediately prior to shipment, and the buyer failed to give any shipping directions, and the meat was sold on the seller's home market without shipment. Bonds *v.* Thomas J. Lipton Co., 85 Miss. 209, 37 So. 805.

**No obligation to resell.**— Although, on a purchaser's refusal to accept goods, the seller may resell, and recover the difference between the contract price and the price obtained, he is under no obligation to do so. Schwartzenbach *v.* Hass, 36 Misc. (N. Y.) 806, 74 N. Y. Suppl. 884. Thus where a buyer refused to allow the seller to sell goods which the buyer had declined to take on the ground that the scales on which they were being weighed did not give correct weights, and the seller refused to allow the goods to be weighed on other scales, the seller was relieved of the duty, if any, because of the lien reserved on the goods for the price thereof, to sell such part of the goods as the buyer declined to take, and apply the proceeds in reduction of damages. Allen *v.* Rushforth, 82 Nebr. 663, 118 N. W. 657.

17. *Alabama.*— Penn *v.* Smith, 93 Ala. 476, 9 So. 609; West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

*Arizona.*— Slaughter *v.* Marlow, 3 Ariz. 429, 31 Pac. 547.

*California.*— King *v.* Sheward, 97 Cal. 235, 31 Pac. 1107.

*Colorado.*— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

*Delaware.*— Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64; Barr *v.* Logan, 5 Harr. 52.

*Illinois.*— Kadish *v.* Young, 108 Ill. 170, 48 Am. Rep. 548; Bagley *v.* Findlay, 82 Ill. 524; Ullmann *v.* Kent, 60 Ill. 271; Olcese *v.* Mobile Fruit, etc., Co., 112 Ill. App. 281 [*affirmed* in 211 Ill. 539, 71 N. E. 1084].

*Indiana.*— Johnson *v.* Powell, 9 Ind. 566.

*Iowa.*— Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144; Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998.

*Kentucky.*—Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687, 18 Ky. L. Rep. 851; Cook *v.* Brandeis, 3 Metc. 555.

*Louisiana.*— Bartley *v.* New Orleans, 30 La. Ann. 264; Judd Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352; White *v.* Kearney, 9 Rob. 495; Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291.

*Maine.*— Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

*Massachusetts.*— Boston, etc., Iron Works *v.* Montague, 135 Mass. 319; McLean *v.* Richardson, 127 Mass. 339.

*Michigan.*— Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057; Van Den Bosch *v.* Bouwman, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336; Doty *v.* Nixon, 109 Mich. 266, 67 N. W. 116.

*Mississippi.*— American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117.

*Missouri.*— McClelland *v.* Picher Lead, etc., Co., 85 Mo. 636; Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Rep. 52; Ingram *v.* Matthien, 3 Mo. 209; Baker *v.* McKinney, 87 Mo. App. 361; Logan *v.* Carroll, 72 Mo. App. 613; Strauss *v.* Labsap, 59 Mo. App. 260; Dobbins *v.* Edmonds, 18 Mo. App. 307.

*New York.*— General Electric Co. *v.* National Contracting Co., 178 N. Y. 369, 70 N. E. 928; Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Hayden *v.* Demets, 53 N. Y. 426; Dustan *v.* McAndrew, 44 N. Y. 72; Pollen *v.* Le Roy, 30 N. Y. 549; Petrie *v.* Stark, 79 Hun 550, 29 N. Y. Suppl. 881; Baumann *v.* Moseley, 63 Hun 492, 18 N. Y. Suppl. 563; Almy *v.* Simonson, 52 Hun 535, 5 N. Y. Suppl. 696; Merriam *v.* Kellogg, 58 Barb. 445; Lewis *v.* Greider, 49 Barb. 606 [*affirmed* in 51 N. Y. 231]; Crooks *v.* Moore, 1 Sandf. 297; Schultz *v.* Bradley, 4 Daly 29; Bogart *v.* O'Regan, 1 E. D. Smith 590; Levy *v.* Glassberg, 92 N. Y. Suppl. 50; Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374.

*North Carolina.*— Hurlburt *v.* Simpson, 25 N. C. 233.

*Ohio.*— Ashley *v.* Walker, 15 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 285; Hadley *v.* Pugh, Wright 554.

*Pennsylvania.*— Bowser *v.* Cessna, 62 Pa. St. 148; McCombs *v.* McKennan, 2 Watts & S. 216, 37 Am. Dec. 505; Moody *v.* McTaggart, 29 Pa. Super. Ct. 465; Hooper *v.* Bromley Bros. Carpet Co., 11 Pa. Super. Ct. 634; Barney *v.* Clarke, 6 Pittsb. Leg. J. N. S. 69.

expenses of making the sale,[18] and in addition the cost of storage, interest, and an allowance for his time as agent in reselling.[19] In making such resale the seller acts as agent of the buyer,[20] but not in such a literal sense as to confer on the buyer any title or interest in the property,[21] and the seller cannot as agent of the buyer purchase additional goods to induce the sale of the first lot and charge the buyer with the loss sustained on the whole.[22]

**2. Necessity of Notice.** Whether notice of the intent to resell must be given the buyer is a question upon which there seems to be an almost irreconcilable conflict of authority which can be solved only upon the ground that whether such notice is necessary depends upon the peculiar circumstances of each case, some cases holding notice to be necessary upon the facts as therein set forth,[23]

*South Carolina.*— Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611.

*Tennessee.*— Granberry *v.* Frierson, 2 Baxt. 326; Barker *v.* Reagan, 4 Heisk. 590; Williams *v.* Godwin, 4 Sneed 557.

*Texas.*— Weathered *v.* Golden, (Civ. App. 1896) 34 S. W. 761.

*Virginia.*—Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

*Washington.*—Schott Co. *v.* Stone, 35 Wash. 252, 77 Pac. 192.

*United States.*— Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281; Baltimore, etc., R. Co *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419; Hayes *v.* Nashville, 80 Fed. 641, 26 C. C. A. 59; Hughes *v.* U. S., 4 Ct. Cl. 64.

See 43 Cent. Dig. tit. "Sales," § 924.

**But where the contract for the original sale was void,** the seller cannot recover the difference between the contract price and the amount for which the seller afterward sold them, where the buyer never received the goods. Curtis *v.* Piedmont Lumber Co., 114 N. C. 530, 19 S. E. 374.

**Defective goods.**— The seller cannot recover from a buyer who refuses to accept the goods the difference between the agreed price and the price obtained on a resale, where the evidence indicates that the goods as tendered to the buyer were not merchantable or did not correspond with the samples. Duncan *v.* Holt, 21 La. Ann. 235. See also Gotze *v.* Dunphy, 2 N. Y. Suppl. 854.

**If part of the price has been paid** the seller may resell, accounting to the buyer for the proceeds. Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 121; Owens *v.* Weedman, 82 Ill. 409.

**Surplus proceeds.**— Where machinery is sold under an agreement that, on default of payment, the seller may resume possession, and sell the machinery, and apply the net proceeds toward payment of the balance unpaid, the original purchaser is not entitled to be credited with the price of a resale of the machinery, if such resale is conditional and no part of the price has been paid, although, if the sale is carried out and the purchase-money paid, the original purchaser will then have recourse against the seller for any amount coming to him out of the proceeds. John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454. But see Miltenberger *v.* Hill, 17 La. Ann. 52, holding that on resale the first purchaser has no claim to excess proceeds.

18. Springer *v.* Berry, 47 Me. 330; Pollen *v.* Le Roy, 30 N. Y. 549 [*affirming* 10 Bosw. 38]; Ashley *v.* Walker, 15 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 285.

**Traveling expenses of the seller** incurred in making resale cannot be included. Penn *v.* Smith, 93 Ala. 476, 9 So. 609.

**Where a part of the goods are defective** or not of the quality required by the contract of sale, the seller cannot recover the expense of boxing and reselling the defective portion. La Rue *v.* Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179.

**Where a seller retains goods for some time** after the buyer's refusal to accept, before reselling, he cannot charge the buyer with the storage, nor with the taxes on the goods. Tripp *v.* Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746.

**Repairs.**— One who sells a threshing engine and separator under an agreement authorizing him, in case of default, to resume possession of the property and sell the same, and apply the net proceeds toward the payment of the balance unpaid, is justified in making repairs on the machinery, after its abandonment by the purchaser, before payment in full, by which its value is increased more than the amount expended for repairs, and in charging the cost of such repairs against the proceeds of the resale; but until such resale is made the cost of the repairs should not be charged against the original purchaser. John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454.

19. Vanstory Clothing Co. *v.* Stadiem, 149 N. C. 6, 62 S. E. 778.

20. Swann *v.* West, 41 Miss. 104; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Dustan *v.* McAndrew, 44 N. Y. 72; Merriam *v.* Kellogg, 58 Barb. (N. Y.) 445; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374.

21. Moore *v.* Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. Rep. 692 [*reversing* 87 Hun 334, 34 N. Y. Suppl. 212].

22. Brunswick Grocery Co. *v.* Lamar, 116 Ga. 1, 42 S. E. 366.

23. *Georgia.*— Davis Sulphur Ore Co. *v.* Atlanta Guano Co., 109 Ga. 607, 34 S. E. 1011.

*Illinois.*— Bagley *v.* Findlay, 82 Ill. 524; Neuberger *v.* Rountree, 18 Ill. App. 610.

*Indiana.*— Dill *v.* Mumford, 19 Ind. App. 609, 49 N. E. 861.

and others, decided under different circumstances, holding such notice unnecessary.[24] While the buyer is entitled to protection from unnecessary loss, if the circumstances of the sale were such that the buyer would not suffer unnecessary loss the failure to give express notice is not fatal,[25] and in any event it is not essential that notice of the time and place of sale should be given.[26] But even in the cases holding notice not to be absolutely necessary it is recognized and indorsed as a wise precaution.[27] If notice is necessary it must be given before the resale,[28] but no particular form of notice is necessary, it being sufficient that the buyer is informed that the seller intends to protect himself in this manner.[29]

**3. Mode and Conduct of Resale.** The manner of sale is within the reasonable discretion of the seller;[30] but it should be made in good faith and in the mode best calculated to produce a fair price for the goods,[31] and as the seller acts as agent

*New York.*— Sawyer *v.* Dean, 114 N. Y. 469, 21 N. E. 1012; Pollen *v.* Le Roy, 30 N. Y. 549; McEachron *v.* Randles, 34 Barb. 301; Mallory *v.* Lord, 29 Barb. 454; Case *v.* Simmons, 4 Silv. Sup. 180, 7 N. Y. Suppl. 253; Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374.

*Ohio.*— Ent *v.* Evans, 1 Cinc. Super. Ct. 509.

*Pennsylvania.*— Bowser *v.* Cessna, 62 Pa. St. 148; Barney *v.* Clarke, 6 Pittsb. Leg. J. N. S. 69.

*Tennessee.*— Granberry *v.* Frierson, 2 Baxt. 326.

*Texas.*— Leonard *v.* Portier, (Civ. App. 1890) 15 S. W. 414. But see Waples *v.* Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727.

*Virginia.*— American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705; Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

*Wisconsin.*— Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368. But see Lindon *v.* Eldred, 49 Wis. 305, 5 N. W. 862.

*United States.*— Hayes *v.* Nashville, 80 Fed. 641, 26 C. C. A. 59.

See 43 Cent. Dig. tit. "Sales," § 919 *et seq.*

**24.** *Alabama.*— West *v.* Cunningham, 9 Port. 104, 33 Am. Dec. 300.

*Colorado.*— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

*Illinois.*— Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 [*affirming* 61 Ill. App. 279]; Maulding *v.* Steele, 105 Ill. 644; Ullmann *v.* Kent, 60 Ill. 271.

*Kentucky.*— Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687, 18 Ky. L. Rep. 851.

*Michigan.*— Kellogg *v.* Frohlich, 139 Mich. 612, 102 N. W. 1057.

*Missouri.*— Ingram *v.* Matthien, 3 Mo. 209.

*New York.*— Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; Mann *v.* National Linseed Oil Co., 87 Hun 558, 34 N. Y. Suppl. 481; Lewis *v.* Greider, 49 Barb. 606 [*affirmed* in 51 N. Y. 231]; Schultz *v.* Bradley, 4 Daly 29 [*reversed* on other grounds in 57 N. Y. 646].

See 43 Cent. Dig. tit. "Sales," § 919.

**25.** McDonald Cotton Co. *v.* Mayo, (Miss. 1905) 38 So. 372.

**26.** *Colorado.*— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

*New York.*— Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; Pollen *v.* Le Roy, 30 N. Y. 549 [*overruling* McEachron *v.* Randles, 34 Barb. 301]; Lewis *v.* Greider, 49 Barb. 606 [*affirmed* in 51 N. Y. 231].

*Texas.*— Leonard *v.* Portier, (Civ. App. 1890) 15 S. W. 414.

*Virginia.*— Rosenbaum *v.* Weeden, 18 Gratt. 785, 98 Am. Dec. 737.

*Wisconsin.*— Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

See 43 Cent. Dig. tit. "Sales," § 919.

**27.** Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; Lewis *v.* Greider, 49 Barb. (N. Y.) 606 [*affirmed* in 51 N. Y. 231]. And see cases cited in the preceding notes.

**28.** Case *v.* Simonds, 4 Silv. Sup. (N. Y.) 180, 7 N. Y. Suppl. 253.

**Notice of an intention to sell on the ensuing day** was sufficient where the parties lived in the same town. Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

**It is sufficient if notice was mailed** to the buyer in the absence of evidence that he failed to receive it. Whitney *v.* McLean, 4 N. Y. App. Div. 449, 38 N. Y. Suppl. 793.

**29.** Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998 (holding that a letter informing the buyer that the goods are ready for delivery and that if he fails to receive them the seller will take steps authorized by law to protect himself is sufficient notice to warrant the seller's selling to another on the buyer's failure to receive the goods, and to charge the buyer with the loss. The notice need not set forth how the seller intends to protect himself); Winslow *v.* Harriman Iron Co., (Tenn. Ch. App. 1897) 42 S. W. 698 (holding that a notice to the effect that collection will be enforced and, "if necessary, we will sell for your account, and charge you with the difference or loss we may sustain," is sufficient).

**30.** Penn *v.* Smith, 98 Ala. 560, 12 So. 818.

**31.** *Alabama.*— Penn *v.* Smith, 98 Ala. 560, 12 So. 818; Lamkin *v.* Crawford, 8 Ala. 153.

*Colorado.*— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

*Illinois.*— Morris *v.* Wilbaux, 159 Ill. 627, 43 N. E. 837 [*affirming* 47 Ill. App. 630]; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407.

*Missouri.*— Ingram *v.* Matthien, 3 Mo. 209.

*New York.*— Dustan *v.* McAndrew, 44 N. Y. 72; Crooks *v.* Moore, 1 Sandf. 297.

of the original buyer [32] he is held to the same degree of care, judgment, and fidelity as an agent in possession of goods with instructions to sell to the best advantage.[33] Although the sale may be by public auction,[34] it is not necessary that it should be, unless that is the usual mode of selling that particular kind of goods,[35] and thus ordinarily the resale may be by private sale if it is conducted fairly,[36] but if the custom is to sell through a broker, the goods should be offered through a broker's agency.[37] The sale should be for cash.[38] Slight irregularities in making the sale will not invalidate it,[39] and the mere fact that the seller bought in a portion or all of the goods himself is no ground of objection if the price obtained is a fair one.[40]

**4. Time and Place.** The seller of goods who, on refusal of the purchaser to accept, elects to resell them at the buyer's risk, is not bound to resell at the contract place for delivery and within the contract time for delivery,[41] and it is not in general the duty of the seller to resell immediately,[42] the most that can be demanded of him being held to be that he shall sell at the earliest practicable moment;[43]

*Tennessee.*— Hogg *v.* Cardwell, 4 Sneed 151.

*Texas.*— Carver *v.* Graves, 47 Tex. Civ. App. 481, 106 S. W. 903.

See 43 Cent. Dig. tit. "Sales," § 921.

**The burden is on the seller** to show that the sale was fairly conducted. Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App 219, 59 Pac. 879.

**Perishable goods.**— Where a vendor, on refusal of the vendee to receive the goods, sold them, as being perishable, for his account at the highest possible price, a verdict giving him the difference between such price and the contract price is justified, although the price for which he sold them was below the market price. Williams *v.* Robb, 104 Mich. 242, 62 N. W. 352.

**Decline in price.**— When the vendor, on the vendee's refusal to accept the goods, sells the goods at a much lower price than that of the contract, a decline in the price of the article after the contract of sale was made, and continuing till the resale, is competent to justify the resale at the lower price. Penn *v.* Smith, 104 Ala. 445, 18 So. 38.

32. See *supra*, VIII, D, 1, b.

33. Bagley *v.* Findlay, 82 Ill. 524; Dustan *v.* McAndrew, 44 N. Y. 72. But see Morris *v.* Wilbaux, 159 Ill. 627, 43 N. E. 837.

34. *Georgia.*— Camp *v.* Hamlin, 55 Ga. 259.

*Louisiana.*— Judd Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352; White *v.* Kearney, 9 Rob. 495; Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291.

*Missouri.*— Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Dec. 52.

*New York.*— Almy *v.* Simonson, 52 Hun 535, 5 N. Y. Suppl. 696; Sands *v.* Taylor, 5 Johns. 395, 4 Am. Dec. 374.

*Wisconsin.*— Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

See 43 Cent. Dig. tit. "Sales," § 921.

**The seller should show the manner of sale,** when and where the auction took place, what notice of it was given, how the sale was conducted, who were the purchasers of the various lots, and at what price, especially where it appears that the actual value of the goods was equal to the contract price. Camp *v.* Hamlin, 55 Ga. 259.

**Conclusiveness of sale.**— A resale at public auction at the place of delivery, after notice to the purchaser, when fairly made, with reasonable diligence, judgment, and care, will fix the market value of the goods. John A. Roebling's Sons' Co. *v.* Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 [*reversing* 28 Ill. App. 184]. See also Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 728, 53 L. R. A. 867.

35. Mann *v.* National Linseed Oil Co., 87 Hun (N. Y.) 558, 34 N. Y. Suppl. 481; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

36. Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Bartley *v.* New Orleans, 30 La. Ann. 264; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415; Schultz *v.* Bradley, 4 Daly (N. Y.) 29 [*reversed* on other grounds in 57 N. Y. 646]; Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368. But see Benton *v.* Bidault, 6 La. Ann. 30; Case *v.* Simonds, 4 Silv. Sup. (N. Y.) 180, 7 N. Y. Suppl. 253, holding that where the seller made no effort to sell the hops except to one person, and sold them at private sale, and there is no evidence that the price was a fair one, such resale will not fix the measure of damages to be recovered of defendants.

37. Pollen *v.* Le Roy, 30 N. Y. 549; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

38. Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368, holding that the fact that the vendor rejected a larger offer on credit does not prevent the sale being evidence of the market value of the property.

39. Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368.

40. Strauss *v.* Labsap, 59 Mo. App. 260; Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750, 82 Am. St. Rep. 728, 53 L. R. A. 867; Lindon *v.* Eldred, 49 Wis. 305, 5 N. W. 862. And see Judd Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352.

41. North Georgia Milling Co *v.* Henderson Elevator Co., 130 Ga. 113, 60 S. E. 258.

42. Dustan *v.* McAndrew, 10 Bosw. (N. Y.) 130 [*affirmed* in 44 N. Y. 72].

43. Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19, holding that if the buyer ex-

but it is generally his duty to resell within a reasonable time,[44] and if he does not the original buyer is not liable for loss due to the delay;[45] but even if there is delay, in the absence of any evidence as to the market value of the goods at the time of the refusal to accept, the price received on resale will be regarded as the market value.[46] Where, on the other hand, the seller sells immediately upon a breach by the buyer of the contract of sale, and before the time fixed for acceptance under the contract, neither the amount realized at such resale nor the market price on the day of the sale is material in an action by the seller for the buyer's breach of contract.[47] If the price of goods for future delivery is to be controlled by the market at a particular place a resale at that place is proper;[48] and if there is no market for the goods at the place of delivery resale may be made at the place where the market is controlling;[49] and generally the seller should resell at the place where he can get the best price and readiest sale not out of the usual course of trade,[50] the rule being that both as to the time and the place of sale, the seller should exercise good faith and try to realize the best price he can,[51] and the buyer may protect himself by seeing that the property brings a fair price, and he may induce a third person to buy at the sale.[52]

**5. Actions.** In an action to recover the difference between the contract price and the price received on resale the complaint must allege that the resale was for market value and that plaintiffs sustained a loss,[53] and where notice of intent to

presses himself as being uncertain whether or not he will accept the goods the seller is not obliged to sell at once, but may wait a reasonable time to allow the purchaser to determine whether he will take them.

**44.** Brooke *v.* Robson, 3 Ga. App. 136, 59 S. E. 323 (holding that it must appear that the resale was made without unreasonable delay after an honest effort to get the best price obtainable); Logan *v.* Carroll, 72 Mo. App. 613; Carver *v.* Graves, 47 Tex. Civ. App. 481, 106 S. W. 903; Alden Spear's Sons Co. *v.* Hubinger, 129 Fed. 538, 64 C. C. A. 68; Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419; Guy *v.* U. S., 25 Ct. Cl. 61.

**What is a reasonable time** depends on circumstances. Where the refusal to accept was on December 29, a resale on the twentieth of the following January was within a reasonable time (Lindon *v.* Eldred, 49 Wis. 305, 5 N. W. 862), and a resale within two weeks was regarded as made within a reasonable time (Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590; Almy *v.* Simonson, 52 Hun (N. Y.) 535, 5 N. Y. Suppl. 696; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737). On the other hand, under a contract of sale of seeds, a wait of ten days on a falling market, and until the season was nearly over, before attempting to make a resale, was not due diligence. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26. Whether a sale within a month was within a reasonable time has been held to be a question for the jury. Ashley *v.* Walker, 15 Ohio Cir. Ct. 660, 8 Ohio Cir. Dec. 285.

**45.** Guy *v.* U. S., 25 Ct. Cl. 61. And see cases cited *supra*, note 44.

**46.** Jochams *v.* Ong, 45 La. Ann. 1289, 14 So. 247.

**47.** Brooke *v.* Laurens Milling Co., 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780.

**48.** Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998.

**49.** Anderson *v.* Frank, 45 Mo. App. 482 [*distinguishing* Rickey *v.* Tenbroeck, 63 Mo. 563], holding that under a contract for the purchase of wool to be delivered at Latham, Kan., where it appeared that there was no local market for wool at Latham; that the nearest market was Kansas City, but that it was a limited one, the controlling market being St. Louis, the sale was properly made at the latter place.

**50.** Lewis *v.* Greider, 49 Barb. (N. Y.) 606 [*affirmed* in 51 N. Y. 231].

**51.** Saladin *v.* Mitchell, 45 Ill. 79; Waples *v.* Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. Rep. 727; Alden Speare's Sons Co. *v.* Hubinger, 129 Fed. 538, 64 C. C. A. 68; Baltimore, etc., R. Co. *v.* Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419.

**Contract construed** as not operating as an implied guaranty by the seller of the market price on the day of resale see Brooke *v.* Laurens Milling Co., 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780.

**52.** Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92, holding also that where a seller violated the contract, and, on the buyer's refusal to accept the goods, sold them with a view of charging the buyer with the difference in price, the buyer might, without losing his right to sue for the part payment, obtain the property, thereby enabling him to fulfil contracts made in reliance on his contract with the seller.

**53.** Sutton *v.* Cronin, 3 Rob. (N. Y.) 493.

**A complaint which alleges all the facts** as to the refusal of the buyer to accept and pay for the goods, the resale, and the loss by reason of the difference in prices is sufficient. Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1, 29 Pac. 529.

**Complaint stating one cause of action.**— A complainant alleging a sale by plaintiff to

resell is necessary,[54] that such notice was given.[55] Proof that the seller sold the goods as agent of the buyer and that the sale resulted in a deficiency is competent, and authorizes a recovery for the deficiency.[56] Evidence of a witness that he advised the seller as to the best method of resale is admissible as tending to show the seller's good faith.[57] Whether a seller who, upon the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price and that obtained on the resale has exercised reasonable diligence to sell within a reasonable time, and at the best price he could obtain, is a question for the jury.[58] The seller cannot in such an action recover damages as for a repudiation of the contract.[59]

**E. Actions For Price or Value — 1. Right of Action — a. In General.** A right of action to recover the price or value of goods exists whenever the transaction is in effect a sale of the goods,[60] and arises as a matter of course on the failure of the buyer to pay the price as agreed.[61] Conversely, the right of action

defendant of hops at an agreed price, a portion of which was paid, to be delivered at a time and place certain, when the remainder of the purchase-price was to be paid, a delivery of the goods as agreed, defendant's failure to receive or pay for them, their sale by plaintiff, after notice to defendant, for the best price that could be obtained, and a claim for caring for them, and for the difference between the contract and the selling price, states but one cause of action. House *v.* Babcock, 17 N. Y. Suppl. 640.

**A count for goods bargained and sold** is not proper in an action for the difference between the contract price and the price obtained on resale. Haas *v.* Thompkins, 2 Pa. L. J. Rep. 16.

**Justification of resale.**— An allegation, in the complaint in an action to recover the difference between the agreed price of goods sold for delivery on payment therefor, and the price brought on resale on failure of defendant to pay therefor, that defendant was indulged for over a year longer than his original agreement allowed him to pay for and receive the goods, is a sufficient averment that a reasonable time was given him to comply with his contract before resale. Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260.

**54.** See *supra*, VIII, D, 2.

**55.** Leonard *v.* Portier, (Tex. Civ. App. 1890) 15 S. W. 414.

**56.** Isaacs *v.* Terry, etc., Co. 56 Misc. (N. Y.) 586, 107 N. Y. Suppl. 136 [*reversed* on other grounds in 125 N. Y. App. Div. 532, 109 N. Y. Suppl. 792].

**57.** Penn *v.* Smith, 98 Ala. 560, 12 So. 818.

**58.** Carver *v.* Graves, 47 Tex. Civ. App. 481, 106 S. W. 903.

**59.** Heidenheimer *v.* Cleveland, 11 Tex. Civ. App. 546, 32 S. W. 826.

**60.** Levy *v.* Gillis, 1 Pennew. (Del.) 119, 39 Atl. 785; Davis *v.* Maltz, 57 Mich. 496, 24 N. W. 861; Carpenter *v.* Butterfield, 34 Mich. 97; Millard *v.* Morse, 32 Pa. St. 506; Hawley *v.* Moody, 24 Vt. 603.

**Where on applying to purchase goods the buyer receives a due-bill** from the seller promising to deliver them on demand, it is in effect a sale of the goods and the action will lie. Monroe *v.* Hoff, 5 Den. (N. Y.) 360.

**Delivery on orders.**—Where non-transferable orders drawn by defendant on itself, and payable to plaintiff, were received by the latter, at the request of defendant, in payment for goods sold to those to whom the orders were delivered, and plaintiff's accounts were checked up each month, and the orders returned to defendant, plaintiff can recover as for goods sold and delivered. East Texas, etc., Lumber Co. *v.* Barnwell, 78 Tex. 328, 14 S. W. 782.

**On a contract of sale or return,** if the goods are retained an unreasonable time or after a demand for their return, the seller may sue for the price. Tuckerman *v.* Floyd, 106 Mass. 72; Beverley *v.* Lincoln Gas Light, etc., Co., 6 A. & E. 829, 7 L. J. Q. B. 113, 2 N. & P. 283, 33 E. C. L. 434; Johnson *v.* Kirkaldy, Arn. & H. 7, 4 Jur. 988; Harrison *v.* Allen, 2 Bing. 4, 9 E. C. L. 456, 1 C. & P. 235, 12 E. C. L. 142, 2 L. J. C. P. O. S. 97, 9 Moore C. P. 28; Moss *v.* Sweet, 16 Q. B. 493, 15 Jur. 536, 20 L. J. Q. B. 167, 71 E. C. L. 493; Bailey *v.* Gouldsmith, Peake 78; Harvie *v.* Clarkson, 6 U. C. Q. B. 27.

**61.** *Georgia.*— Hodges *v.* Smith, 118 Ga. 789, 45 S. E. 617.

*Indiana.*— Bicknell *v.* Buck, 58 Ind. 354; Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382.

*Kansas.*—Southwestern Stage Co. *v.* Peek, 17 Kan. 271.

*Louisiana.*— Van Wart *v.* Hopkins, 5 La. Ann. 266.

*New York.*—Bridgford *v.* Crocker, 60 N. Y. 627; Nichols *v.* Scranton Steel Co., 18 N. Y. Suppl. 623 [*affirmed* in 137 N. Y. 471, 33 N. E. 561]; Stocksdale *v.* Schuyler, 8 N. Y. Suppl. 813 [*affirmed* in 130 N. Y. 674, 29 N. E. 1034].

*Pennsylvania.*— Clarke *v.* Dill, 8 Pa. Cas. 164, 11 Atl. 82.

*Texas.*— Corbett *v.* Sayers, 29 Tex. Civ. App. 68, 69 S. W. 108.

*Virginia.*— American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

**Delivery in instalments.**— The owner of a contract by which a party becomes a subscriber to a set of books, to be delivered one

for the price cannot exist if the transaction is not a sale,[62] as where the goods are delivered in payment of a preëxisting debt,[63] or the transaction is an exchange of property,[64] or where the transaction is a bailment;[65] but where one has converted the goods of another to his use, the latter may waive the tort and sue in assumpsit for the price.[66] And where the buyer refuses to accept the goods or a part thereof the seller, if he makes a proper tender, may nevertheless maintain an action for the price.[67]

volume at a time, and agrees to pay therefor on delivery at the rate of so much per volume, may recover for any volume or volumes delivered and unpaid for, notwithstanding delivery of all the volumes in the set may not have been made. Barrie *v.* Jerome, 112 Ill. App. 329.

**Mode of payment.**— Where the price is to be paid in labor but the seller r fuses to allow payment to be made as agreed the buyer is not in default and an action for the price will not lie. Duckworth *v.* Johnson, 8 Ala. 309.

**If there has been a partial performance by the buyer** the seller may sue for the balance of the price. Allen *v.* D. H. Ranck Pub. Co., 98 Ill. App. 44; Smith *v.* Coolidge, 68 Vt. 516, 35 Atl. 432, 54 Am. St. Rep. 902.

**Special agreement.**— Where the seller of a piano took from the purchaser another one which had been injured by an expressman, agreeing to look to the expressman for the difference between the price of the new one and the value of the one injured, and the purchaser disclaimed any authority to represent the expressman, the seller could not recover such difference from the purchaser. M. Steinert, etc., Co. *v.* Jackson, 190 Mass. 428, 76 N. E. 905.

**But if payment has been made** the fact that the seller by false representations has been induced to pay the buyer an amount equal to the price so paid will not support an action for the price. Cockrell *v.* Wood, 51 Nebr. 269, 70 N. W. 944.

62. Burnham *v.* Roberts, 70 Ill. 19; Griffin *v.* Gratwick, etc., Lumber Co., 97 Mich. 557, 56 N. W. 1034; Southard *v.* Walsh, 77 N. Y. 301; Parsons *v.* Sexter, 2 C. & K. 266, 61 E. C. L. 266; Clarke *v.* Bulmer, 1 D. & L. 367, 12 L. J. Exch. 463, 11 M. & W. 243.

**Application of rule.**— An action for goods sold and delivered will not lie against an agent employed to sell on commission (Thomas Mfg. Co. *v.* Watson, 85 Me. 300, 27 Atl. 176; Ayres *v.* Sleeper, 7 Metc. (Mass.) 45; Read *v.* Bertrand, 20 Fed. Cas. No. 11,601, 4 Wash. 514. See also Weed *v.* Butterfield, 1 D. Chipm. (Vt.) 161); a pledgee who has sold the goods and appropriated the proceeds (Stiles *v.* Selinger, 2 Mackey (D. C.) 429); a trespasser who has cut and carried away timber (Allen *v.* Woodward, 22 N. H. 544. But see Goldthwaite *v.* Kempton, 13 N. H. 449); or where a tenant in common has sold the chattels held in common and appropriated the proceeds (Williams *v.* Chadbourne, 6 Cal. 559).

**Sale by servant.**— Where the foreman of a carriage maker sold a carriage on his own account to his creditor in payment of the debt, it was held that the carriage maker could not maintain an action against the purchaser for the price of the carriage; that he must affirm the contract of sale, in which case he would only be entitled to what the foreman received, or disaffirm it, and bring trover for the carriage. Whitlock *v.* Heard, 3 Rich. (S. C.) 88.

63. Wilby *v.* Harris, 13 Mass. 496; Cushman *v.* Hall, 28 Vt. 656. And see Snow *v.* Prescott, 12 N. H. 535.

64. Mitchell *v.* Gile, 12 N. H. 390

65. Cruikshank *v.* Henry, 6 Blackf. (Ind.) 19; Orand *v.* Mason, 1 Swan (Tenn.) 196.

**But the action will lie against a bailee under a bailment convertible into a sale** at his option where the bailee has sold the goods. Moses *v.* Taylor, 6 Mackey (D. C.) 255. See also Bianchi *v.* Nash, 5 L. J. Exch. 252, 1 M. & W. 545, Tyrw. & G. 916, where plaintiff loaned an article to defendant on the understanding that if it was damaged defendant was to have it and pay for it, and the article being damaged while in his possession plaintiff was entitled to maintain an action for goods sold and delivered.

66. Hill *v.* Davis, 3 N. H. 384. And see ASSUMPSIT, 4 Cyc. 332 *et seq.*, where the matter is discussed at length.

67. *Delaware.*— Phœnix Lock Works *v.* Capelle Hardware Co., 9 Houst. 232, 32 Atl. 79.

*Iowa.*— McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.

*Massachusetts.*— Mitchell *v.* Le Clair, 165 Mass. 308, 43 N. E. 117; White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

*Michigan.*— National Cash Register Co. *v.* Dehn, 139 Mich. 406, 102 N. W. 965.

*Minnesota.*—Wood *v.* Michaud, 63 Minn. 478, 65 N. W. 963.

*Missouri.*— McCormack *v.* Gilliland, 76 Mo. 655; Walker *v.* Nixon, 65 Mo. App. 326; Dobbins *v.* Edmonds, 18 Mo. App. 307.

*New York.*— Terwilliger *v.* Knapp, 2 E. D. Smith 86; Hass *v.* Pettingill, 29 Misc. 318, 60 N. Y. Suppl. 495; Levy *v.* Glassberg, 92 N. Y. Suppl. 50; Kokomo Strawboard Co. *v.* Inman, 11 N. Y. Suppl. 329 [*affirmed* in 134 N. Y. 92, 31 N. E. 248]; Silver *v.* Connolly, 12 N. Y. St. 616.

*North Carolina.*— National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100.

*Ohio.*— Hadly *v.* Pugh, Wright 554.

*Pennsylvania.*— Ballentine *v.* Robinson, 46 Pa. St. 177.

*United States.*—Kinkead *v.* Lynch, 132 Fed. 692; Habeler *v.* Rogers, 131 Fed. 43, 65

**b. When Right Accrues** — (I) *In General.* Where the sale is for cash the right to maintain an action for the price arises at once,[68] and if the contract while still partly executory is repudiated by the buyer a right of action accrues at once, not only for the breach of contract but for the price of all the goods delivered before the repudiation.[69] So too where the buyer is bound to pay within a reasonable time, the right of action arises immediately upon the refusal of the buyer to pay.[70] And if delivery is to be made in instalments, payment to be on delivery, the seller may maintain suit for a past due instalment, although the whole contract is not completed.[71]

(II) *Sale on Credit; Note or Security.* Where the sale is on credit an action for the price cannot ordinarily be brought before the term of credit has expired,[72] unless the credit is conditional, in which case such an action will lie

C. C. A. 281; Bockwalter *v.* Clark, 10 Fed. 793, 11 Biss. 126.

See 43 Cent. Dig. tit. "Sales," § 933.

**Where there is an executory sale of goods not specific,** and before they are separated from the bulk and set aside to the buyer the buyer notifies the seller not to ship the goods and refuses to accept them, an action will not lie for the price of the goods, but for damages for the refusal to accept them. Unexcelled Fire-Works Co. *v.* Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. Rep. 788.

**If the buyer has the right of inspection or trial** a suit for the price cannot be maintained unless there has been an acceptance. Grier *v.* Simpson, 8 Houst. (Del.) 7, 31 Atl. 587; Cole *v.* Homer, 53 Mich. 438, 19 N. W. 135; Potter *v.* Holmes, 65 Minn. 377, 68 N. W. 63.

**Refusal to remove from cars.**— Where a buyer who has accepted the goods refuses to remove them from the cars of a common carrier, the seller is not required to accept the proceeds of a sale of the goods made by the carrier, but is entitled to sue for and recover the contract price. Olcese *v.* Mobile Fruit, etc., Co., 211 Ill. 539, 71 N. E. 1084 [*affirming* 112 Ill. App. 281].

**If the refusal to accept is due to an attempt of the seller to change the terms of the contract** no action for the purchase-price will lie. Becker *v.* Calderwood, 102 Iowa 529, 69 N. W. 536, 71 N. W. 425.

68. McRae *v.* Morrison, 35 N. C. 46.

**Cash or notes.**—Where a contract for the sale of goods provides for a payment in cash or by notes on delivery, a demand for cash payment or the execution of the notes, and a refusal, at any time after the delivery, convert the seller's claim into a money demand, and he can recover the price without showing that a time had been agreed on for the execution of the notes, and that such time had expired before the commencement of the action. Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415. And see Matthews *v.* McGrath, 2 N. Y. Suppl. 659.

**Special agreement construed.**—Where on a sale of ties payment is to be made "within five days after notice has been received by" the buyer "that all ties have been delivered, and after the same have been counted by" defendant, "and known to be delivered as claimed," the seller is not entitled to commence an action for the recovery of the amount due under the contract until five days have elapsed after such counting and acceptance. Frederickson *v.* Ayer, 93 Wis. 217, 67 N. W. 35.

69. *California.*— Hale *v.* Trout, 35 Cal. 229.

*Michigan.*— Jenness *v.* Shaw, 35 Mich. 20.

*Minnesota.*— Robson *v.* Bohn, 27 Minn. 333, 7 N. W. 357.

*Pennsylvania.*— Hocking *v.* Hamilton, 158 Pa. St. 107, 27 Atl. 836.

*Vermont.*— Tyson *v.* Doe, 15 Vt. 571.

70. Sutton *v.* Clarke, 42 Oreg. 525, 71 Pac. 794.

71. Glenn *v.* Miller, 38 S. W. 1086, 18 Ky. L. Rep. 1022. See also Cole *v.* Cheovenda, 4 Colo. 17, where defendant agreed to deliver to plaintiff a certain number and kind of cattle each month for a year at a fixed price per hundred weight, payable on delivery. After a few months, defendant became unable to furnish the requisite number and quality, and agreed that plaintiff should supply himself and that defendant would pay the difference between the beef so purchased and the contract price. It was held that defendant could recover for the price of each lot when delivered, and that plaintiff could recover the difference due him upon any one or more of the purchases at his election.

72. *Alabama.*— Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Illinois.*— Daniels *v.* Osborn, 71 Ill. 169; Kellogg *v.* Turpie, 2 Ill. App. 55.

*Maryland.*— Phelan *v.* Crosby, 2 Gill 462.

*New York.*— Yale *v.* Coddington, 21 Wend. 175.

*North Carolina.*— Gudger *v.* Fletcher, 29 N. C. 372.

*Pennsylvania.*— Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327.

*Vermont.*— Eddy *v.* Stafford, 18 Vt. 235.

*Canada.*— Moore *v.* Kuntz, 44 U. C. Q. B. 309; Silliman *v.* McLean, 13 U. C. Q. B. 544; Wakefield *v.* Gorrie, 5 U. C. Q. B. 159. See also Magrath *v.* Tinnin, 6 U. C. Q. B. O. S. 484.

See 43 Cent. Dig. tit. "Sales," § 990.

**Insolvency intervening.**— Notice given by a purchaser of goods to the seller before the

if the condition is not complied with, although the term of credit has not expired.[73] A refusal to accept part of the goods moreover terminates the contract as to the obligation to deliver and as to the term of credit and enables the seller to sue at once for the price of the quantity delivered.[74] So too if the sale is on credit induced by the fraud of the buyer the seller may sue before the term of credit as expired.[75] If a note for the price is given and accepted no right of action accrues until the maturity of the note;[76] and if the goods are to be paid for by note or bill

expiration of the credit allowed therefor that he will not be able to pay for them at the expiration of such period will not alone operate as a waiver of the credit, and entitle the seller to sue before its expiration. Keller *v.* Strasburger, 90 N. Y. 379 [*affirming* 23 Hun 625].

**Payment in instalments.**— Where a city's contract for the purchase of a road scraper expressly provides for payment in yearly instalments, recovery cannot be had for the full purchase-price in an action brought when the first instalment only is due. Hunt *v.* Markle, 12 Ind. App. 335, 40 N. E. 151.

**Reservation of part of price.**— Where a contract for the delivery of lumber provides for a cash payment of four fifths of the price of each instalment of the lumber, the balance to be paid at the end of a year, and the buyer fails to pay cash, he is not liable to suit for the reserved portion until the expiration of the year. Tucker *v.* Billing, 3 Utah 82, 5 Pac. 554.

**Mistake as to term of credit.**— Where defendant purchased goods of plaintiffs, each party supposing that a credit of six months was given, and each being mistaken in the belief that the credit of a third party had also been pledged for payment of the price, the vendors could not, upon the discovery of the mistake, treat the sale as though made for cash, and they could not maintain an action for the price before the expiration of the six months. Thayer *v.* Ballou, 32 Vt. 234.

**73.** Clark *v.* Smith, 9 Conn. 379; Wineman *v.* Walters, 53 Mich. 470, 19 N. W. 150. See also Hoover *v.* Cary, 86 Iowa 494, 53 N. W. 415.

**74.** Tyson *v.* Doe, 15 Vt. 571. And see Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737, 100 N. W. 860, holding that, although under the contract the purchase-price of goods sold is not due till thirty days after they are installed and accepted, yet defendant, having absolutely rejected them, plaintiff need not wait till the end of the thirty days before suing for the price.

**In California** it is held that where the contract provides unconditionally for a term of credit to be given the purchaser the action cannot be maintained until such term has expired in the absence of fraud inducing the credit, even though the purchaser has repudiated the contract and refused to accept or pay for the goods. Tatum *v.* Ackerman, 148 Cal. 357, 83 Pac. 151, 113 Am. St. Rep. 276, 3 L. R. A. N. S. 908.

**75.** *Alabama.*— Pope *v.* Nance, 1 Stew. 354, 18 Am. Dec. 60.

*Massachusetts.*— Manufacturers', etc., Bank *v.* Gore, 15 Mass. 75, 8 Am. Dec. 83.

*New York.*—Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 [*reversing* 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841]; Wigand *v.* Sichel, 4 Abb. Dec. 592, 3 Keyes 120, 33 How. Pr. 174; Westcott *v.* Ainsworth, 9 Hun 53; Reid *v.* Martin, 4 Hun 590; Kayser *v.* Sichel, 34 Barb. 84 [*affirmed* in 4 Abb. Dec. 592, 3 Keyes 120]; Roth *v.* Palmer, 27 Barb. 652; Eppens *v.* McGrath, 3 N. Y. Suppl. 213; Talcott *v.* Rosenberg, 4 N. Y. St. 17; White *v.* Harrison, 1 N. Y. City Ct. 482; Pierce *v.* Drake, 15 Johns. 475; Willson *v.* Foree, 6 Johns. 110, 5 Am. Dec. 195.

*Oklahoma.*— Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

*United States.*— Barrett *v.* Koella, 2 Fed. Cas. No. 1,048, 5 Biss. 40.

See 43 Cent. Dig. tit. "Sales," §§ 934, 990.

But see Galloway *v.* Holmes, 1 Dougl. (Mich.) 330, holding that the law of New York enabling a vendor, of whom goods have been purchased fraudulently on a credit, to maintain assumpsit against the vendee for the price of the goods before the credit has expired, affects the remedy only, and does not apply, to enable the vendor to maintain a similar action in Michigan to recover the price of goods sold in New York.

**Fraud as to time of payment.**— If the seller of the goods draws a bill for the amount on the buyer, and by mistake extends the time of payment therein beyond the time agreed on by the parties, and the buyer fraudulently seizes upon the mistake and accepts the bill, to entrap the other party for his own advantage and the other's injury the seller may treat the bill as void, and maintain an action for goods sold. Hervey *v.* Harvey, 15 Me. 357.

**Transfer in fraud of creditors.**— Where one who has obtained goods upon credit fraudulently disposes of his property for the purpose of cheating his creditors, the credit is avoided, and suit may be brought for the price of the goods, although the term for which credit was given has not expired. Arnold *v.* Shapiro, 29 Hun (N. Y.) 478.

**Anticipating defense.**— Where, in an action for goods sold and delivered, the answer sets up that notes were given in payment and that they were not due, it may be shown on the trial that the credit granted by accepting the notes was obtained by fraud, as plaintiff was not bound to anticipate the defense and allege the fraudulent character of the extended credit. Claflin *v.* Taussig, 7 Hun (N. Y.) 223.

**76.** Sturz *v.* Fischer, 19 N. Y. App. Div.

payable at a future day and the note or bill is not given the seller cannot sue on the common counts for the price until the term of credit has expired,[77] unless there is a condition that on failure to comply with the stipulation as to the note the whole price is to become due and owing,[78] or unless the buyer has renounced the contract,[79] but the seller may proceed immediately for breach of the agreement.[80]

**c. Persons Who May Sue.** Although the action for goods sold may ordinarily be maintained by the person who has the legal interest in the goods,[81] a merely colorable title is insufficient to support an action for the price;[82] and the fact that one to whom the goods were consigned for sale made advances thereon does not give him the right to sue for the price.[83] Similarly if the buyer orders goods of one person and they are actually supplied by another at the request of the first person, such other cannot maintain an action for the price;[84] and where one sells goods

198, 45 N. Y. Suppl. 1009; Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647.

**Notes not taken in payment.**— One who, after selling goods payable on demand, takes the buyer's time notes for the amount, does not extend the time unless the notes are received in payment, and he may sue for the price before the notes mature, and recover after a reasonable tender of the notes. Moore *v.* Fitz, 59 N. H. 572.

**77.** *Illinois.*— Manton *v.* Gammon, 7 Ill. App. 201.

*Iowa.*— Hall *v.* Hunter, 4 Greene 539. See also Reeves *v.* Lamm, 120 Iowa 283, 94 N. W. 839, where the contract provided that if the note was not given as stipulated "this order shall stand as the purchaser's written obligation, and have the same force and effect" as a note, and it was held that an action brought prior to the date at which the note would have matured if given was premature.

*Massachusetts.*— Hunneman *v.* Grafton, 10 Metc. 454.

*Mississippi.*— Crawford *v.* Avery, 35 Miss. 205.

*New Hampshire.*— Dodge *v.* Waterman, 36 N. H. 186.

*New York.*— Yale *v.* Coddington, 21 Wend. 175.

*North Carolina.*— Thompson *v.* Morris, 6 N. C. 248.

*United States.*— Magner *v.* Johnston, 16 Fed. Cas. No. 8,954, 3 Cranch C. C. 249.

See 43 Cent. Dig. tit. "Sales," § 991.

**When goods are sold, the buyer to pay therefor in town orders payable at a future day,** and he fails to procure the orders, the seller cannot maintain *indebitatus assumpsit* for the goods before the time when the orders were to be payable has expired. Before that time his only remedy is by an action for breach of the special contract. Hunneman *v.* Grafton, 10 Metc. (Mass.) 454.

**Purchaser's option.**— If an article is sold, to be paid for by giving a note payable in one, two, or five years, at the option of the purchaser, and no note is demanded, and no election is asked for or made, no recovery can be had for the article until the five years have expired. Scott *v.* Montague, 16 Vt. 164. And where the sale is for cash in thirty days, with five per cent off, or notes at four months with two per cent off, at the buyer's option, a suit is prematurely brought, where nothing more appears than that more than thirty days had passed, and cash had not been paid. Vietor *v.* Henlein, 67 How. Pr. (N. Y.) 486. But under an option to pay in thirty days, or give a four months' note, if the purchaser fails to make payment or give the note, an action may be brought for the price at the expiration of the thirty days. Matthews *v.* McGrath, 2 N. Y. Suppl. 659.

**78.** Campbell *v.* Buller, 32 Mo. App. 646; Wheeler *v.* Harrah, 14 Oreg. 325, 12 Pac. 500; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284; Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120; Rice *v.* Andrews, 32 Vt. 691. But see Allen *v.* Ford, 19 Pick. (Mass.) 217, holding that an action will not lie immediately for goods sold on a credit where there is merely a non-performance of a condition that security should be given.

**Demand is necessary** to put the buyer in default as to the security. Martin *v.* Fuller, 16 Vt. 108.

**79.** McCormick *v.* Basal, 46 Iowa 235.

**80.** Hunneman *v.* Grafton, 10 Metc. (Mass.) 454; Yale *v.* Coddington, 21 Wend. (N. Y.) 175; Thompson *v.* Morris, 6 N. C. 248; Eddy *v.* Stafford, 18 Vt. 235.

**81.** Heald *v.* Warren, 22 Vt. 409. See also Barry *v.* Worcester, 143 Mass. 476, 10 N. E. 186, where a colorable transfer of the land on which gravel sold was situated was held not to affect the seller's right to maintain an action for the price.

**Sale by agent.**— Where a portion of certain goods were the sole property of one person, and the residue the sole property of another, who had authority from the first to sell the first's part, the one so authorized may maintain an action for the whole in his own name. Harris *v.* Johnston, 3 Cranch (U. S.) 311, 2 L. ed. 450. And see Lewis *v.* Greider, 49 Barb. (N. Y.) 606 [*affirmed* in 51 N. Y. 231].

**82.** Bradley *v.* Hale, 8 Allen (Mass.) 59.

**83.** Robinson *v.* Talbot, 121 Mass. 513.

**84.** Peirce *v.* Closterhouse, 96 Mich. 124, 55 N. W. 663; Central Pennsylvania Tel., etc., Co. *v.* Thompson, 112 Pa. St. 118, 3 Atl. 439. But *compare* Child *v.* Wofford, 3 Ala. 564, holding that where a person ordered goods of a member of a partnership and the partnership of which he was a member for-

to another, under an agreement with a third person that the third person will pay for the goods if the buyer does not, if such third person pays for the goods he cannot maintain an action for the price in the seller's name against the buyer.[85]

**d. Persons Liable.** The price of goods delivered to a third person can be recovered from the one giving the order therefor,[86] but there can be no recovery against the one to whom the seller charged the goods unless an express or implied contract with such person is shown.[87] So too on a resale or transfer of right under the contract of sale, the original seller not being a party thereto cannot maintain an action for the price against the subpurchaser;[88] and similarly where the buyer pays the price to a third person claiming to own the goods, the seller cannot maintain an action for the price against such third person, his right of action if any being against the buyer.[89]

**e. Conditions Precedent** — (i) *In General; Performance by Seller.* As a general rule the right of action depends on the substantial performance of the contract by the seller,[90] and he cannot recover the price unless there has been

warded the goods to the buyer without a bill of lading, the buyer supposing them to have been forwarded by the partner individually, the partnership might maintain an action for goods sold and delivered against the buyer.

**Substitution of parties.**— Where, in an action for the value of an elevator, plaintiff contended that, before any work had been done under a written contract between defendant and another, it was orally agreed between plaintiff and defendant that plaintiff should do the work, and should be substituted for the contractor in the written contract, it was no objection to plaintiff's right to maintain the suit that the written contract had not been assigned to plaintiff by the original contractor. Plunger Elevator Co. *v.* Day, 184 Mass. 130, 68 N. E. 16.

85. Barnes *v.* Blackiston, 2 Harr. & J. (Md.) 376.

86. Cobb *v.* James H. Rice Co., 60 Ill. App. 523.

87. Williams *v.* Chadbourne, 6 Cal. 559. See also Carpenter *v.* Butterfield, 34 Mich. 97.

88. Shepich *v.* Kent Lumber Co., 19 Wash. 296, 53 Pac. 160.

89. Martin *v.* Chouteau Land, etc., Co., 104 Mo. App. 232, 78 S. W. 673.

90. *California.*— Fowler *v.* Fisk, 12 Cal. 112.

*Colorado.*— Holt Live Stock Co. *v.* Watkins, 21 Colo. 531, 43 Pac. 121.

*Illinois.*— Havana Press Drill Co. *v.* Scurlock, 23 Ill. App. 426.

*Kentucky.*— Carson *v.* Allen, 6 Dana 395; Warner *v.* Reardon, 2 Dana 219.

*Maryland.*— Mulliken *v.* Boyce, 1 Gill 60.

*Missouri.*— McCormick Harvesting Mach. Co. *v.* Mackey, 100 Mo. App. 400, 74 S. W. 388.

*New Mexico.*— Staab *v.* Ortiz, 3 N. M. 33, 1 Pac. 857.

*New York.*— Dunham *v.* Pettee, 8 N. Y. 508; Lackawanna Mills *v.* Weil, 78 Hun 348, 29 N. Y. Suppl. 114 (holding that where defendants' object that goods sold to them by plaintiff are not according to contract, and plaintiff thereupon allows a rebate on the goods delivered, and agrees to alter the portion not delivered, so as to comply with the contract, plaintiff thereby admits that the contract has not been performed, and an action brought before such alterations are made is premature); Terry *v.* Haitz, 9 N. Y. St. 649; Mead *v.* Degolyer, 16 Wend. 632.

*Ohio.*— Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313.

*Vermont.*— New England Granite Works *v.* Bailey, 69 Vt. 257, 37 Atl. 1043.

*Virginia.*— Page *v.* Winston, 2 Munf. 298.

*United States.*— U. S. Sugar Refinery *v.* Edward P. Allis Co., 105 Fed. 881, 45 C. C. A. 108; Springfield Milling Co. *v.* Bonnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Church *v.* Cheape, 64 Fed. 961.

See 43 Cent. Dig. tit. "Sales," § 958.

**Entire contract.**— Under Civ. Code, § 1439, providing that, before a party to a contract can compel another to perform any act under it, he must fulfil all conditions precedent imposed upon himself, one who has agreed with a contractor to furnish "all the couplings to be used in the construction of said pipe line," at a fixed rate per pound, cannot enforce payment before all the material has been delivered, and hence his cause of action against the owner of the structure does not accrue till the last delivery. Bridgeport First Nat. Bank *v.* Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45.

**Where goods sold are to be tested by a particular person** in the employ of the buyer, but before the test can be made such person has been discharged by the buyer, a test made by another person agreed on by the parties is sufficient to bind the buyer for the price. Hubbard *v.* Chapman, 34 N. Y. App. Div. 252, 54 N. Y. Suppl. 527 [*affirmed* in 165 N. Y. 609, 58 N. E. 1088]. Generally, on a satisfactory test, although differing from the test provided for in the contract, there is a substantial performance entitling the seller to recover the price. Louisiana Electric Light, etc., Co. *v.* Bass Foundry, etc., Works, 69 Fed. 65, 16 C. C. A. 130. And similarly where an agreement for the sale of a machine provided that the inventor should personally inspect the placing and

a delivery actual or constructive,[91] or a tender or offer of performance,[92] unless the conduct of the buyer has been such as to plainly indicate that tender would be futile,[93] and if possession and title remain in the seller and the purchaser repu-

setting of it in operation, and the machine was delivered, but, the inventor refusing to go, the vendors sent another competent person to set it up, the vendors were nevertheless entitled to recover the price, on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and therefore was not to be considered as a condition precedent, but as a distinct covenant, the breach of which could be satisfied by damages. Cowan *v.* Fisher, 31 Ont. 426.

**91.** *Georgia.*— Mountain City Mill Co. *v.* Butler, 109 Ga. 469, 34 S. E. 565.

*Illinois.*— Morris *v.* Wilbaux, 159 Ill. 627, 43 N. E. 837 [*affirming* 47 Ill. App. 630]; Barrow *v.* Window, 71 Ill. 214; Heath, etc., Mfg. Co. *v.* Flannery, 58 Ill. App. 300.

*Maine.*— Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Sackett *v.* Lowell, 32 Me. 164; Savage Mfg. Co. *v.* Armstrong, 19 Me. 147.

*Massachusetts.*— Hart *v.* Tyler, 15 Pick. 171.

*Michigan.*— Jackson *v.* Evans, 8 Mich. 476.

*Minnesota.*— Mead *v.* Rat Portage Lumber Co., 93 Minn. 343, 101 N. W. 299; McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10; Jones *v.* Schneider, 22 Minn. 279.

*Mississippi.*— Scott *v.* Wood, 41 Miss. 661.

*Nebraska.*— F. C. Austin Mfg. Co. *v.* Colfax County, 67 Nebr. 101, 93 N. W. 145.

*New York.*— Hager *v.* King, 38 Barb. 200; Pratt *v.* Gulick, 13 Barb. 297; Moses *v.* Banker, 2 Sweeny 267; Solomon *v.* Neidig, 1 Daly 200; Machale *v.* Leber, 88 N. Y. Suppl. 958; Champlin *v.* Rowley, 18 Wend. 187; Babcock *v.* Stanley, 11 Johns. 178.

*South Dakota.*— Oshorne *v.* Martin, 4 S. D. 297, 56 N. W. 905.

*Texas.*— Southern Car Mfg., etc., Co. *v.* Scullin-Gallagher Iron, etc., Co., 38 Tex. Civ. App. 112, 85 S. W. 845.

*Virginia.*— Lewis *v.* Weldon, 3 Rand. 71.

*Wisconsin.*— Ganson *v.* Madigan, 13 Wis. 67.

*Canada.*— Watson *v.* Gorren, 6 U. C. Q. B. 542; Lane *v.* Melville, 3 U. C. Q. B. O. S. 124.

See 43 Cent. Dig. tit. "Sales," § 959.

**Condition precedent to delivery.**—Where plaintiff sold a certain amount of hay to defendant at a certain price per ton, on the agreement that the hay should be baled by defendant, and hauled by plaintiff to the railroad station, plaintiff was not under obligation to haul the hay until defendant baled it; and, on the latter's failure to bale the same within a reasonable time, plaintiff could recover the price. Barker *v.* Davies, 47 Nebr. 78, 66 N. W. 11.

**It is sufficient that the goods were placed at the buyer's disposal** in the absence of any express stipulation to make a complete delivery. Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Muckey *v.* Howenstine, 3 Thomps. & C. (N. Y.) 28.

**Delivery in escrow** to be delivered to the purchaser on payment is a sufficient delivery on the part of the seller. Obery *v.* Lander, 179 Mass. 125, 60 N. E. 378.

**If title has passed, the destruction of the goods before delivery** is complete does not affect the seller's right to recover for the portion delivered. Hayes *v.* Gross, 9 N. Y. App. Div. 12, 40 N. Y. Suppl. 1098 [*affirmed* in 162 N. Y. 610, 57 N. E. 1112].

**Where the contract is apportionable there may be a recovery pro tanto** in case of a partial performance, the buyer deducting damages caused by failure of the seller to fully perform. Goodwin *v.* Merrill, 13 Wis. 658; Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., 81 Fed. 261, 26 C. C. A. 389. And see *infra*, VIII, E. 4, b, (II). But on a breach by the seller of the contract by entire failure to deliver the goods contracted for there can of course be no recovery. Joseph Joseph, etc., Co. *v.* Schonthal Iron, etc., Co., 99 Md. 382, 58 Atl. 205; Hallwood Cash-Register Co. *v.* Lufkin, 179 Mass. 143, 60 N. E. 473; American Art Metal Novelty Co. *v.* Bosselman, 91 N. Y. Suppl. 722.

**92.** *California.*— Plath *v.* Kitzmuller, 52 Cal. 491.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Indiana.*— Shipps *v.* Atkinson, 8 Ind. App. 505, 36 N. E. 375.

*Louisiana.*— Benton *v.* Bidault, 6 La. Ann. 30.

*Mississippi.*— McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163; Farrar *v.* Gaillard, Walk. 269.

*New York.*— Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Holmes, etc., Co. *v.* Morse, 53 Hun 58, 5 N. Y. Suppl. 940; Kelley *v.* Upton, 5 Duer 336; Mackie *v.* Egan, 6 Misc. 95, 26 N. Y. Suppl. 13; Bement *v.* Smith, 15 Wend. 493.

*Oregon.*— Smith *v.* Wheeler, 7 Oreg. 49, 33 Am. Rep. 698.

*Rhode Island.*— Hargraves *v.* A. B. Pitkin Mach. Co., 19 R. I. 426, 34 Atl. 738.

*Texas.*— Keppert *v.* Aultman, (App. 1901) 61 S. W. 410.

See 43 Cent. Dig. tit. "Sales," § 959.

**A conditional tender** is not sufficient. Filley *v.* Walker, 28 Nebr. 506, 44 N. W. 737.

**93.** Bonds *v.* Thomas J. Lipton Co., 85 Miss. 209, 37 So. 805; E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 149 N. Y. 300, 43 N. E. 859; Partridge *v.* Gildermeister, 6 Bosw. (N. Y.) 57 [*affirmed* in 3 Abb. Dec. 461, 1 Keyes 93]; Weil *v.* Unique Electric Device Co., 39 Misc. (N. Y.) 527, 80 N. Y. Suppl. 484; Levy *v.* Glassberg, 92 N. Y. Suppl. 50; McHenry *v.* Bulifant, 207 Pa. St.

diates the contract, the seller's remedy is only for damages for breach of contract and not for the price of goods sold,[94] although it has been held that if the seller retains title merely as security and the goods are never delivered, the seller may waive the security and sue to recover the contract price,[95] the bringing of an action for the price being held to be such a waiver.[96] If the seller agrees to take back the property if not satisfactory he cannot on refusal to receive it sue for the price;[97] but a mere option to retake the property will not affect his right to sue for the price.[98] If a note is executed in payment of the price, the seller must surrender or offer to surrender it, in order to sue for the price.[99] So if the note of a third person is taken in payment the seller cannot rescind the agreement and sue for the price without returning or offering to return the note.[1] But securities transferred merely as collateral need not be returned.[2]

(II) *DEMAND.* Where the sale is for cash on delivery no demand is necessary as a condition precedent to an action for the price;[3] and it is held that where

15, 56 Atl. 226; Moore *v.* U. S., 17 Ct. Cl. 17. But see Stokes *v.* Mackay, 82 Hun (N. Y.) 449, 31 N. Y. Suppl. 706 [*affirmed* in 147 N. Y. 223, 41 N. E. 496], holding that a waiver of tender on a sale of bonds does not dispense with the necessity of producing the bonds at the trial.

**Waiver by terms of contract.**— Under a contract for the sale of stock providing that if defendant "has not made tender of said $4,500 on or before said 1 January, 1894, said [defendant] . . . shall at that time be obliged to accept said stock at the agreed price of $4,500" plaintiff was not required to tender the stock before instituting suit for the purchase-price. Prest *v.* Cole, 183 Mass. 283, 67 N. E. 246.

**94.** Oklahoma Vinegar Co. *v.* Carter, 116 Ga. 140, 42 S. E. 378, 94 Am. St. Rep. 112, 59 L. R. A. 122; Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370, 81 N. W. 10; Herring-Marvin Co. *v.* Smith, 43 Oreg. 315, 72 Pac. 704, 73 Pac. 340; Atkinson *v.* Bell, 8 B. & C. 277, 6 L. J. K. B. O. S. 258, 2 M. & R. 292, 15 E. C. L. 142; Boswell *v.* Kilborn, 8 Jur. N. S. 443, 6 L. T. Rep. N. S. 79, 15 Moore P. C. 309, 10 Wkly. Rep. 517, 15 Eng. Reprint 511.

**If the parties have made an agreement to that effect** there may be a right of action, and the relation of debtor and creditor may exist for the price of the goods, although the property has not passed. Waterous Engine Works *v.* Wilson, 11 Manitoba 287.

**Where the title has passed resale is not necessary** as a condition precedent to a recovery of the price on the buyer's refusal to perform. West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300; Lassing *v.* James, 107 Cal. 348, 40 Pac. 534.

**95.** Dowagiac Mfg. Co. *v.* Mahon, 13 N. D. 516, 101 N. W. 903; Tufts *v.* Poness, 32 Ont. 51.

**96.** Dowagiac Mfg. Co. *v* Mahon, 13 N. D. 518, 101 N. W. 903.

**97.** Marion Mfg. Co. *v.* Harding, 155 Ind. 648, 58 N. E. 194.

**Removal of goods.**— Where the purchaser of a furnace claims that it is defective, and so notifies the vendor and directs its removal, and the vendor sues for the balance, but after commencement of suit removes the furnace, he is not entitled to recover for parts of the furnace which he was unable to remove. Roesch *v.* Young, 111 Ill. App. 34.

**98.** Marvin Safe Co. *v.* Emanuel, 21 Abb. N. Cas. (N. Y.) 181 [*reversed* on other grounds in 14 N. Y. St. 681].

**99.** Hoag *v.* Hay, 103 Iowa 291, 72 N. W. 525.

**Fraud.**— Where a sale of goods under a contract, giving a specified time to pay therefor, is fraudulently procured by the purchaser, and bills of exchange are given therefor, the seller may bring action for the value of the goods without first returning the bills of exchange. Crown Cycle Co. *v.* Brown, 39 Oreg. 285, 64 Pac. 451.

**1.** Cushing *v.* Wyman, 38 Me. 589; Estabrook *v.* Swett, 116 Mass. 303; Martin *v.* Roberts, 5 Cush. (Mass.) 126; Coolidge *v.* Brigham, 1 Metc. (Mass.) 547; Fisher *v.* Fredenhall, 21 Barb. (N. Y.) 82; Baker *v.* Robbins, 2 Den. (N. Y.) 136. And see Wilkinson *v.* Williams, 29 Fed. Cas. No. 17,677*a*, 2 Hayw. & H. 1.

**Worthless notes or securities** need not be returned (Blalock *v.* Phillips, 38 Ga. 216; Estabrook *v.* Swett, 116 Mass. 303; Wilkinson *v.* Williams, 29 Fed. Cas. No. 17,677*a*, 2 Hayw. & H. 1); or a note barred by statute (Schroeder *v.* Frey, 60 Hun (N. Y.) 58, 12 N. Y. Suppl. 625, 14 N. Y. Suppl. 71 [*affirmed* in 131 N. Y. 562, 30 N. E. 66]).

**2.** Butman *v.* Howell, 144 Mass. 66, 10 N. E. 504.

**3.** *Arizona.*— Agua Fria Copper Co. *v.* Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983.

*Indiana.*— Rend *v.* Boord, 75 Ind. 307.

*Iowa.*— Davis Sewing Mach. Co. *v.* McGinnis, 45 Iowa 538.

*Louisiana.*— Reine *v.* Poumairat, 8 La. Ann. 282.

*New York.*— Locklin *v.* Moore, 5 Lans. 307 [*affirmed* in 57 N. Y. 360]; Maguire *v.* Durant, 20 N. Y. Suppl. 617.

See 43 Cent. Dig. tit. "Sales," § 957.

**A person who buys property which has been stolen,** and afterward sells it in good

the contract is to pay for the goods at a time and place agreed, the commencement of the action is in itself a sufficient demand, the evidence of the debtor's refusal to pay being a matter affecting merely the question of costs.[4] But where the price is to be paid by note or other security, a demand is necessary to enable the seller to recover the price in money,[5] and a demand is also necessary if the price is to be paid in specific personal property or merchandise,[6] or if the contract stipulates for a demand.[7] Where the contract is for a sale or return by a day certain, an action may be maintained without a demand on the failure of the buyer to return the goods on the day stipulated.[8]

**2. Nature and Form of Action — a. In General.** An action for goods sold and delivered will lie only when the contract is fully executed on the part of the seller,[9] otherwise the action should be for goods bargained and sold,[10] but even then the sale must be complete to the extent that the title has passed,[11] and if

faith, and without any knowledge of the theft, is liable to the owner for its value, and no demand need be made before the commencement of an action. Robinson *v.* Skipworth, 23 Ind. 311.

**Where the buyer is to take the goods** away notice to him is necessary. Hazard *v.* Van Amringe, 4 Binn. (Pa.) 289.

4. Lockin *v.* Moore, 5 Lans. (N. Y.) 307 [*affirmed* in 57 N. Y. 360]; Maguire *v.* Durant, 1 Misc. (N. Y.) 509, 20 N. Y. Suppl. 617.

5. Offutt *v.* Morancy, 12 Rob. (La.) 92; Osborne *v.* Bell, 62 Mich. 214, 28 N. W. 841 (holding that where notes of two parties are to be given in payment, demand on both is necessary before suit brought); Russell *v.* Englehardt, 23 Mo. App. 36; Martin *v.* Fuller, 16 Vt. 108. But see Linderman *v.* Disbrow, 31 Wis. 465, holding that where plaintiff sold certain property to defendant, the latter agreeing to pay therefor in notes of third persons which were to be due on or before Jan. 1, 1871, he might recover the price of the goods sold without showing a specific demand for such notes, where it appeared that he had demanded payment long before suit brought and after the notes had become due and defendant had peremptorily refused to make any payment whatever.

**In the absence of demand suit must be upon the specific promise.**— Martin *v.* Fuller, 16 Vt. 108.

**Sufficiency of demand.**— Where the seller requests the buyer to take the property, and pay for it by note and security as agreed, and he refuses to do so, no more formal demand for the note and security is necessary. Foster *v.* Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120.

6. Goldsmith *v.* Greenly, 7 Houst. (Del.) 371, 32 Atl. 250; Hunt *v.* Westervelt, 4 E. D. Smith (N. Y.) 225; McBain *v.* Austin, 16 Wis. 87, 82 Am. Dec. 705. But see Coffin *v.* Fulton, 3 Brewst. (Pa.) 73.

7. Simmons *v.* Cahoon, 68 N. C. 393.

8. White *v.* Perley, 15 Me. 470.

9. *Alabama.*— Dukes *v.* Leowie, 13 Ala. 457.

*Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 19 Atl. 248.

*Florida.*— Sullivan *v.* Boley, 24 Fla. 501, 5 So. 244.

*Illinois.*— Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709 [*affirming* 70 Ill. App. 72]; Olcese *v.* Mobile Fruit, etc., Co., 112 Ill. App. 281 [*affirmed* in 211 Ill. 539, 71 N. E. 1084].

*Maine.*— Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798; Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

*Michigan.*— Begole *v.* McKenzie, 26 Mich. 470.

*Minnesota.*— Restad *v.* Engemoen, 65 Minn. 148, 67 N. W. 1146.

*New Hampshire.*— Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

*New Jersey.*— Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367.

*New York.*— Harding *v.* Elliott, 47 N. Y. App. Div. 624, 62 N. Y. Suppl. 293.

*North Carolina.*— Allman *v.* Davis, 24 N. C. 12.

*United States.*— Hyde *v.* Liverse, 12 Fed. Cas. No. 6,972, 1 Cranch C. C. 408.

*England.*— Elliott *v.* Heginbotham, 2 Car. & K. 545, 61 E. C. L. 545; Forbes *v.* Smith, 11 Wkly. Rep. 574.

*Canada.*— Moor *v.* Boyd, 23 U. C. Q. B. 459.

See 43 Cent. Dig. tit. "Sales," § 927 *et seq.*

**It is not necessary that there should have been an actual express acceptance** to support the action for goods sold and delivered. Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555, holding that it was sufficient if the goods were received by the buyer and were in his possession.

10. Pusey, etc., Co. *v.* Dodge, 3 Pennew. (Del.) 63, 49 Atl. 248; Atwood *v.* Lucus, 53 Me. 508, 89 Am. Dec. 713; Allman *v.* Davis, 24 N. C. 12; Forbes *v.* Smith, 11 Wkly. Rep. 574.

**Price agreed on.**— To sue for goods bargained and sold, plaintiff must prove a certain price agreed upon; if he cannot, there should be a special count for not accepting. Elvidge *v.* Richardson, 3 U. C. Q. B. 149.

11. *Delaware.*— Pusey, etc., Co. *v.* Dodge, 3 Pennew. 63, 49 Atl. 248.

*Illinois.*— Brand *v.* Henderson, 107 Ill. 141.

*New Hampshire.*— Clay *v.* Bohonon, 54 N. H. 474.

*New Jersey.*— Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367; Doremus *v.* Howard, 23 N. J. L. 390.

the title remains in the seller the action must be on the special contract.[12] There may be a recovery even if the property sold is attached to the realty, such as standing timber,[13] or a building,[14] if delivery is made, but not otherwise.[15] A suit in equity will not lie if the seller has not exhausted his legal remedy.[16]

**b. Assumpsit** — (i) *In General.* It is not necessary that the price should have been agreed on in order to maintain assumpsit,[17] and even if the goods are sold under a special agreement, assumpsit will lie, if the terms thereof have been complied with by the seller.[18] Where goods are sold on credit assumpsit will lie at the expiration of the credit.[19] A seller is not, however, confined to assumpsit or trover, but may recover in book-account if he had the right, by the contract or course of dealing between him and the buyer, to charge the articles sold to the buyer, and did so charge them on his books.[20]

(ii) *As Depending Upon Mode of Payment.* If there is a special agreement to pay in any way other than money it must be specially declared upon;[21] but there may be a recovery on a count for goods sold and delivered if

*England.*— Rohde *v.* Thwaites, 6 B. & C. 388, 9 D. & R. 293, 5 L. J. K. B. O. S. 163, 30 Rev. Rep. 363, 13 E. C. L. 181. And see Elliott *v.* Heginbotham, 2 C. & K. 545, 61 E. C. L. 545.

See 43 Cent. Dig. tit. "Sales," § 938.

**12.** Pusey, etc., Co. *v.* Dodge, 3 Pennew. (Del.) 63, 49 Atl. 248; John Deere Plow Co. *v.* Gorman, 9 Kan. App. 675, 59 Pac. 177; Clay *v.* Bohonon, 54 N. H. 474. But see Jaeggli *v.* Phears, 30 Tex. Civ. App. 212, 70 S. W. 330.

**But the seller may waive a provision that title shall remain in him** and recover on the common counts. Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709 [*affirming* 70 Ill. App. 72].

**13.** Upson *v.* Holmes, 51 Conn. 500.

**14.** Keyser *v.* Sunapee Dist. No. 8, 35 N. H. 477.

**15.** Gilliam *v.* Towles, 15 Ark. 64.

**16.** Woolfolk *v.* Kemper, 31 Mo. App. 421.

**17.** Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Snodgrass *v.* Broadwell, 2 Litt. (Ky.) 353.

**18.** *Alabama.*— Maas *v.* Montgomery Iron Works, 88 Ala. 323, 6 So. 701.

*Georgia.*— Schmidt *v.* Wambacker, 62 Ga. 321.

*Illinois.*— Eggleston *v.* Buck, 24 Ill. 262.

*Maryland.*— Hartlove *v.* Durham, 86 Md. 689, 39 Atl. 617.

*Massachusetts.*— Knight *v.* New England Worsted Co., 2 Cush. 271.

*Missouri.*— Sweeney *v.* Willing, 6 Mo. 174.

*New York.*— Swan Lamp Mfg. Co. *v.* Brush-Swan Electric Light Co., 61 N. Y. Super. Ct. 11, 18 N. Y. Suppl. 869; C. B. Keogh Mfg Co. *v.* Eisenberg, 7 Misc. 79, 27 N. Y. Suppl. 356 [*affirmed* in 149 N. Y. 592, 44 N. E. 1123]; Clark *v.* Fairchild, 22 Wend. 576. But see Wood *v.* Edwards, 19 Johns. 205; Robertson *v.* Lynch, 18 Johns. 451.

*North Carolina.*— McRae *v.* Morrison, 35 N. C. 46.

See 43 Cent. Dig. tit. "Sales," § 928.

**Against guarantor.**— A seller cannot maintain *indebitatus assumpsit* on a collateral promise guaranteeing payment of goods sold to a third person, but must declare on the special undertaking. Bickham *v.* Irwin, 3 Yeates (Pa.) 66.

**19.** Reynolds *v.* Cleveland, 4 Cow. (N. Y.) 282, 15 Am. Dec. 369; McRae *v.* Morrison, 35 N. C. 46.

**But if the credit has not expired** assumpsit will not lie in the absence of fraud. Phelan *v.* Crosby, 2 Gill (Md.) 462.

**Balance due on settlement.**— Although assumpsit may lie upon an implied promise to pay a balance found due, yet it does not preclude the general action of assumpsit for goods sold and delivered, and the settlement may be used as evidence to regulate the sum recovered. Clark *v.* Edgell, 26 Vt. 108.

**Failure to accept goods.**— The vendor, suing for breach of contract of sale by the vendee's failure to accept the goods, and bringing the action before all the purchase-money is due, cannot recover on the common counts. Worthington *v.* Staunton, 16 W. Va. 208.

**20.** Victor Sewing Mach. Co. *v.* Weeks, 49 Vt. 342.

**21.** *Delaware.*— Pusey, etc., Co *v.* Dodge, 3 Pennew. 63, 49 Atl. 248; Goldsmith *v.* Greenly, 7 Houst. 371, 32 Atl. 250.

*Maine.*— Slayton *v.* McDonald, 73 Me. 50.

*Massachusetts.*— Baylies *v.* Fettyplace, 7 Mass. 325. But see Goodrich *v.* Lafflin, 1 Pick. 57.

*Michigan.*— Pierson *v.* Spaulding, 61 Mich. 90, 27 N. W. 865.

*Missouri.*— Galway *v.* Shields, 66 Mo. 313, 27 Am. Rep. 351.

*New Hampshire.*— Ranlett *v.* Moore, 21 N. H. 336; Mitchell *v.* Gile, 12 N. H. 390.

*England.*— Rees *v.* Manner, 3 Smith K. B. 119.

*Canada.*— Hoskins *v.* Mitcheson, 14 U. C. Q. B. 551; Hill *v.* Stanton, 2 U. C. Q. B. 149.

See 43 Cent. Dig. tit. "Sales," §§ 929, 932.

**In Vermont** the cases lay down a contrary doctrine and hold that where goods are sold or services are performed under a special contract for payment in other goods or in services, and the time of payment has elapsed and payment has not been made according to the contract, such special agreement is no obstacle to a recovery in general assumpsit or by an

the sale is for money or its equivalent,[22] or for a note, draft, or bill of exchange which is not paid;[23] and thus generally whether the goods are sold for cash or a note, draft, or other security is to be given, on the failure of the buyer to perform there may be a recovery on the common counts.[24]

**3. Election of Remedy.** Where the buyer has been guilty of fraud in inducing the sale the right of the seller to avoid the contract and recover the goods[25] is not exclusive, but he may sue in contract for the price;[26] but a suit to recover the price of the goods sold and another to recover the goods on the ground of fraud in the buyer cannot be maintained at the same time,[27] and if the seller rescinds the sale he cannot recover the price as such;[28] and while, where the sale is induced by fraud, the seller may declare in tort or contract, having made his election he is bound by it.[29] Other proceedings to enforce collection of the debt, such as attachment, do not, however, affect the right of the seller to bring an

action on book-account. Kent *v.* Bowker, 38 Vt. 148 [*distinguishing* Mitchell *v.* Gile, 12 N. H. 390]; Waterman *v.* Stimpson, 24 Vt. 508; Porter *v.* Munger, 22 Vt. 191; Stearns *v.* Haven, 16 Vt. 87; Wainwright *v.* Straw, 15 Vt. 215, 40 Am. Dec. 675.

**22.** Pope *v.* Robinson, 1 Stew. (Ala.) 415; Moppin *v.* Ætna Axle, etc., Co., 41 Conn. 27; Monticello School Town *v.* Grant, 104 Ind. 168, 1 N. E. 302.

**23.** *Connecticut.*— Cummings *v.* Gleason, 72 Conn. 587, 45 Atl. 353, under Practice Book, p. 12, § 1, rule 2, permitting the use of the common counts for the commencement of an action when there is an appropriate general statement of the real cause of action on which plaintiff relies.

*Illinois.*— McMillan *v.* Bethold, 35 Ill. 250.

*Indiana.*— Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

*Maine.*— Pool *v.* Tuttle, 11 Me. 468, 26 Am. Dec. 552.

*Michigan.*— Gardner *v.* Gorham, 1 Dougl. 507.

*Missouri.*— Sweeney *v.* Willing, 6 Mo. 174.

*New York.*— Guilford *v.* Mulkin, 85 Hun 489, 33 N. Y. Suppl. 134; Butler *v.* Haight, 8 Wend. 535.

*Pennsylvania.*— Reid *v.* Morrison, 2 Watts & S. 401; Leas *v.* James, 10 Serg. & R. 307.

See 43 Cent. Dig. tit. "Sales," § 931.

**Election between counts.**— Where plaintiff counts on a draft or bill of exchange and for goods sold and delivered, he may abandon the count on the draft and recover under the common count. Freas *v.* Truitt, 2 Colo. 489; Slocomb *v.* Lurty, 22 Fed. Cas. No. 12,949, Hempst. 431.

**Effect of fraud of buyer.**— Where the buyer gave his note for the price, but subsequently by fraud and misrepresentation induced the seller to give up the note on payment of part thereof, the latter may recover the balance in an action for goods sold and delivered. Blodgett *v.* Webster, 24 N. H. 91. But it is held that where there is an express contract to take a note for the goods, which is not paid at maturity, no agreement to pay in money can be implied by reason of the alleged fraud in inducing the seller to take the note. Auger *v.* Thompson, 3 Ont. App. 19; Sheriff *v.* McCoy, 27 U. C. Q. B. 597.

**24.** *Illinois.*— Dwyer *v.* Duquid, 70 Ill. 307.

*Iowa.*— Hall *v.* Hunter, 4 Greene 539.

*Massachusetts.*— Gray *v.* White, 108 Mass. 228.

*Michigan.*— Stone *v.* Nichols, 43 Mich. 16, 4 N. W. 545; Gibbs *v.* Blanchard, 15 Mich. 292.

*New Hampshire.*— Chamberlin *v.* Perkins, 55 N. H. 237.

*New York.*— Corlies *v.* Gardner, 2 Hall 345; Johnson *v.* Smith, Anth. N. P. 81; Kingman *v.* Hotaling, 25 Wend. 423.

*United States.*— Slocomb *v.* Lurty, 22 Fed. Cas. No. 12,949, Hempst. 431.

See 43 Cent. Dig. tit. "Sales," §§ 930, 931.

**25.** See *supra*, VIII, C, 2.

**26.** *California.*— Seligman *v.* Kalkman, 8 Cal. 207.

*Illinois.*— Fisher *v.* Brown, 111 Ill. App. 486.

*Kentucky.*— Dietz *v.* Sutcliffe, 80 Ky. 650.

*Maine.*— Hervey *v.* Harvey, 15 Me. 357.

*New York.*— Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 [*reversing* 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841]; Wigand *v.* Sichel, 4 Abb. Dec. 592, 3 Keyes 120, 33 How. Pr. 174; Roth *v.* Palmer, 27 Barb. 652; Talcott *v.* Rosenberg, 4 N. Y. St. 17; Vellerman *v.* King, 2 Edm. Sel. Cas. 371; Cary *v.* Hotailing, 1 Hill 311, 37 Am. Dec. 323.

*Oklahoma.*— Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

*South Carolina.*— Bunch *v.* Smith, 4 Rich. 581.

*Washington.*— Ankeny *v.* Clark, 1 Wash. 549, 20 Pac. 583.

See 43 Cent. Dig. tit. "Sales," § 934.

**27.** Seligman *v.* Kalkman, 8 Cal. 207.

**28.** Folsom *v.* Cornell, 150 Mass. 115, 22 N. E. 705; Allen *v.* Ford, 19 Pick. (Mass.) 217; Stewart *v.* Huntington, 124 N. Y. 127, 26 N. E. 289.

**29.** People *v.* Kelly, 1 Abb. Pr. N. S. (N. Y.) 432. *Compare* Wright *v.* Ritterman, 4 Rob. (N. Y.) 704, 1 Abb. Pr. N. S. 428, holding that one who brings an action on the contract for goods fraudulently purchased may at any time before judgment discontinue and bring tort for conversion.

**Estoppel.**— To estop one who has been induced by false representations to sell goods from suing to enforce the contract and recover the price, on the ground that by intermediate acts he has disaffirmed it, the acts

action for the price, such proceeding being in affirmance of the sale and not inconsistent with another suit for the same purpose;[30] but ordinarily an action for the price is barred by an action in replevin to recover the goods, such proceeding being by way of disaffirming the sale,[31] although such an action has been held not to be barred by a prior action in replevin where such action has been voluntarily discontinued,[32] or the recovery defeated because the goods have passed into the hands of an innocent third person, the replevin suit not operating in such event as a rescission of the contract of sale.[33] The seller may sue for the price or for damages where there has been a breach of contract by the buyer,[34] but having elected to pursue one of his remedies he cannot resort to the other.[35] If the seller, induced thereto by the fraud of the buyer, takes in payment a note of a third person, or other security, he may on discovery of the fraud maintain an action for goods sold and delivered.[36]

**4. Defense and Offsets — a. Defense — (i)** *In General.* In an action for the price of goods sold defendant may interpose as a general rule such defenses as are open in actions for breach of contract generally.[37] Defendant may plead undue influence,[38] or a compromise of the claim;[39] that the goods have been retaken by the seller,[40] or were delivered in payment of a debt due the alleged

of disaffirmance must have been effective, and must have extended to the entire contract. Kinney *v.* Kiernan, 2 Lans. (N. Y.) 492 [*reversed* on other grounds in 49 N. Y. 164].

**Where a vendor of personalty sues on notes** taken for the purchase-price, and finds that a judgment thereon cannot be obtained because of proceedings in bankruptcy, he may abandon the action, and sue in tort, on the ground that the goods were obtained by fraud. Standard Sewing Mach. Co. *v.* Alexander, 68 S. C. 506, 47 S. E. 711.

**30.** Crossman *v.* Universal Rubber Co., 127 N. Y. 34, 27 N. E. 400, 13 L. R. A. 91 [*reversing* 57 N. Y. Super. Ct. 459, 8 N. Y. Suppl. 539]. See also Kingsbury *v.* Kettle, 90 Mich. 476, 51 N. W. 541.

**Concurrent remedies.**— Where the seller received notice from a bank that the purchaser had deposited the price of the goods with it, subject to the seller's order when the goods were delivered, the mere fact that the seller might have waived the bank's promise to pay and proceeded against the funds deposited by purchaser, by garnishment or execution, is no defense to an action against the purchaser and the bank for the purchase-price. Austin Mfg. Co. *v.* Decker, 109 Iowa 277, 80 N. W. 312.

**31.** Morris *v.* Rexford, 18 N. Y. 552; Wile *v.* Brownstein, 35 Hun (N. Y.) 68; Thompson *v.* Fuller, 16 N. Y. 486.

**32.** Bolton Mines Co. *v.* Stokes, 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789.

**33.** Ames *v.* Moir, 130 Ill. 582, 22 N. E. 535 [*affirming* 27 Ill. App. 88].

**34.** *Delaware.*— Darby *v.* Hall, 3 Pennew. 25, 50 Atl. 64; Barr *v.* Logan, 5 Harr. 52.

*Illinois.*— Bagley *v.* Findlay, 82 Ill. 524.

*Kentucky.*— Cook *v.* Brandeis, 3 Metc. 555.

*Mississippi.*— American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117.

*Missouri.*— Dobbins *v.* Edmonds, 18 Mo. App. 307.

*New York.*— Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Mason *v.* Decker, 72 N. Y. 595, 28 Am. Rep. 190; Bridgford *v.* Crocker, 60 N. Y. 627; Hayden *v.* Demets, 53 N. Y. 426; Dustan *v.* McAndrew, 44 N. Y. 72; Baumann *v.* Moseley, 63 Hun 492, 18 N. Y. Suppl. 563; Merriam *v.* Kellogg, 58 Barb. 445; Levy *v.* Glassberg, 92 N. Y. Suppl. 50; Silver *v.* Connolly, 12 N. Y. St. 616.

*Ohio.*— Hadly *v.* Pugh, Wright 554.

*Pennsylvania.*— Clarke *v.* Dill, 8 Pa. Cas. 164, 11 Atl. 82.

*United States.*— Hughes *v.* U. S., 4 Ct. Cl. 64.

See 43 Cent. Dig. tit. "Sales," §§ 918, 941.

**35.** Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Rinehart *v.* Olwine, 5 Watt & S. (Pa.) 157.

**36.** Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421; Pierce *v.* Drake, 15 Johns. (N. Y.) 475; Bell *v.* Ballance, 12 N. C. 391. And see Cochran *v.* Cummings, 4 Dall. (Pa.) 250, 1 L. ed. 820; Loomis *v.* Wainwright, 21 Vt. 520.

**But a mere expression of opinion as to the solvency of the maker of the note,** although false, is not such fraud as will entitle the seller to sue for the price. Homer *v.* Perkins, 124 Mass. 431, 26 Am. Rep. 677.

**37.** See, generally, Contracts, 9 Cyc. 693.

**38.** Sour Mash Distilling Co. *v.* Cavanagh, 4 Pa. Co. Ct. 373.

**39.** Rumpp *v.* Brandeis, 1 Wkly. Notes Cas. (Pa.) 111.

**An offer of compromise** by the seller rejected by the buyer is no defense to an action for the price. Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470, 94 N. Y. Suppl. 777.

**40.** Morris *v.* Rexford, 18 N. Y. 552; Case *v.* Boughton, 11 Wend. (N. Y.) 106.

**Conversion by the seller, of goods sold,** after delivery, does not prevent recovery by him of the purchase-price, the buyer not having counter-claimed for the conversion. Salomon *v.* Corbett, 38 N. Y. App. Div. 262, 57 N. Y. Suppl. 18.

**Notice not to remove property without payment.**— It is no defense to an action for

buyer;[41] that they were purchased from another who had both title and possession,[42] or were not those purchased and were rejected by the purchaser;[43] that they were returned to the seller and received by him without objection;[44] or that the seller failed to repair as agreed.[45] But it is no defense that there is a dispute between joint owners as to their title;[46] that the goods were destroyed after delivery;[47] that the purchase was improvident, the buyer being overpersuaded thereto;[48] that the sale by which the seller acquired title was in fraud of creditors;[49] that there was a delay in the delivery of the goods, unless damage resulted therefrom;[50] or that payment was made to a third person by mistake,[51] and delay in presenting a check given in payment is not a defense in the absence of prejudice from the delay.[52] A plea of payment not expressly or by implication applied to the particular transaction is not available,[53] and in the absence of an agreement for a specific quantity a deficiency in quantity is not a defense;[54] and while the buyer may have been entitled to inspection before acceptance it is no defense that he

the price of two buildings sold on credit, one of which has been removed by the purchaser, that before the expiration of the term of credit the seller gave him notice not to remove the other until the price was paid, such notice not preventing defendant from removing the property. The case might be otherwise, however, if plaintiff had actually prevented defendant from removing the property, and retained it in his possession. Demmon *v.* Locke, 2 Gray (Mass.) 183.

41. Thieme *v.* Henderson, 82 N. Y. App. Div. 566, 81 N. Y. Suppl. 543.

42. Sheridan First Nat. Bank *v.* C. D. Woodworth Co., 7 Wyo. 11, 49 Pac. 406, where plaintiff who was not in possession claimed under an invalid bill of sale.

43. Perkins Windmill Co. *v.* Kelly, 141 Mich. 459, 104 N. W. 663.

44. Warder, etc., Co. *v.* Pischer, 110 Wis. 363, 85 N. W. 968.

45. Blount *v.* Edison General Electric Co., 106 Ga. 197, 32 S. E. 113.

But when the agreement to repair is a subsequent, independent, voluntary agreement, it cannot be relied on as a defense. Buntain *v.* Dutton, 21 Ill. 190.

46. Hobkirk *v.* Green, 26 Misc. (N. Y.) 18, 55 N. Y. Suppl. 605.

47. Hayes *v.* Gross, 9 N. Y. App. Div. 12, 40 N. Y. Suppl. 1098 [*affirmed* in 162 N. Y. 610, 57 N. E. 1112].

48. Powell *v.* Price, 111 Mo. App. 320, 85 S. W. 924. See Furber *v.* Fogler, 97 Me. 585, 55 Atl. 514, holding that, in the absence of fraud, a party cannot interpose as a defense that the property was not worth what he supposed it to be.

49. Cudd *v.* Williams, 39 S. C. 452, 18 S. E. 3; Sheridan First Nat. Bank *v.* C. D. Woodworth Co., 7 Wyo. 11, 49 Pac. 406.

That the amount due was by agreement retained in fraud of the seller's creditors is not a good defense, as such agreement did not relieve him of liability to account for it. Block *v.* Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. ed. 476.

50. Jones *v.* Maxton, 197 Ill. 248, 64 N. E. 328 [*affirming* 100 Ill. App. 201]; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511, 58 N. Y. Suppl. 609 [*affirmed* in 166 N. Y. 612, 59 N. E. 1127]; Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553.

Route of shipment.— Where lumber was ordered to be shipped in accordance with the shipping directions, and the freight rate was the same by either of the routes, that by which defendants directed the lumber to be shipped, and that by which it was actually shipped, and defendant suffered no damages by reason of the failure of plaintiffs to ship it in compliance with its directions, the breach of the contract is not vital, but is *damnum absque injuria*. Anaconda Copper Min. Co. *v.* Houston, 107 Ill. App. 183. See also Christner *v.* John, 2 Pa. Super. Ct. 78, holding that a mistake in addressing a shipment made on the purchaser's order, to a third person, is no defense, where the goods were in fact received and used by such person.

51. Headley Lumber Co. *v.* Cranford, (Miss. 1905) 38 So. 548; Cobb *v.* Beall, 1 Tex. 342.

52. Fritz *v.* Kennedy, 119 Iowa 628, 93 N. W. 603.

53. Morgan *v.* Hayes, 98 Wis. 313, 73 N. W. 786.

54. Brown *v.* Anderson, 77 Cal. 236, 19 Pac. 487, holding that where plaintiff agreed to sell to defendant, for a gross sum, all the prunes and other fruits "that may grow or be produced during the year 1884," on a certain farm, plaintiff could recover the full sum, although the crop was an almost total failure in respect to quantity. See also United Fruit Co. *v.* Bisese, 25 Pa. Super Ct. 170, holding that where the purchaser of fruit refuses to pay for it solely on the ground that the fruit was frozen on its arrival, he cannot subsequently, in an action against him for the purchase-money, allege as a ground for refusal that the quantity sent was in excess of the quantity ordered.

The buyer could not plead estoppel on the theory of voluntary payment where, on a sale of gold, the purchaser claimed that the proper quantity had not been delivered and the seller under protest delivered enough to make up the alleged deficiency, in an action for the price of the amount so delivered. Meyer *v.* Clark, 45 N. Y. 285 [*affirming* 2 Daly 497].

was refused inspection until payment of freight and delivery by carrier.[55] The buyer cannot rely on a breach of agreement due to his fault[56] or his request.[57] In assumpsit on the implied contract for goods sold and delivered and retained by the purchaser, defendant cannot plead in bar an express contract of sale and its breach;[58] and when the contract is divisible a breach as to a part thereof is no defense to an action for the price of goods actually delivered in accordance with the contract.[59]

(II) *Misrepresentation or Fraud.* Fraud and misrepresentation on the part of the seller inducing the sale may be pleaded in defense to an action for the price;[60] but where the buyer accepts a bill of sale without warranty which shows on its face that he took at his own risk, he cannot defend a suit on a note given for the purchase-money, on the ground of misrepresentation without fraud.[61] To be available as a defense it is not necessary that the fraud should have been the sole inducement.[62] The fact that the buyer has brought suit against the seller for fraud inducing the sale does not preclude him from pleading the fraud in an action on the note given for the price.[63]

(III) *Failure of Consideration* — (A) *In General.* It may be pleaded in defense to an action for the price that there has been an entire failure of consideration,[64] as for example where the goods are worthless, or worthless for the

**55.** Trenton Rubber Co. *v.* Small, 3 Pa. Super. Ct. 8, 39 Wkly. Notes Cas. 281.

**56.** Hayden *v.* Frederickson, 59 Nebr. 141, 80 N. W. 494 (where the buyer refused to join with the seller in making an inventory as provided in the contract); Kenniston *v.* Ham, 29 N. H. 507 (where the buyer revoked the authority of a third person to determine the value of the goods). And see Crocker *v.* Muller, 40 Misc. (N. Y.) 685, 83 N. Y. Suppl. 189, holding that defendant cannot defeat an action for the price of a book he ordered, because it did not contain a biographical sketch of his life; the contract providing that he was to send the data to plaintiff within a certain time, and he testifying merely that he mailed it, without showing to whom or when, or that the postage was paid.

**Where a buyer contracted to use the materials purchased exclusively in its own trade,** the seller's failure to fill orders for materials intended in whole or in part for delivery to third parties pursuant to contracts made with them is no defense. Trinidad Asphalt Mfg. Co. *v.* Trinidad Asphalt Refining Co., 119 Fed. 134, 55 C. C. A. 566.

**57.** De Witt *v.* Culpepper, 66 S. C. 467, 45 S. E. 1, where the seller agreed to advertise the goods but the advertisement was stopped at the buyer's request

**58.** Dalton *v.* Bunn, 137 Ala. 175, 34 So. 841.

**59.** Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., 134 N. C. 574, 47 S. E. 116.

**60.** *California.*— Flint *v.* Lyon, 4 Cal. 17.
*Illinois.*— Ray *v.* Virgin, 12 Ill. 216.
*Indiana.*— Davis *v.* Jackson, 22 Ind. 233; Matlock *v.* Todd, 19 Ind. 130.
*Kentucky.*—Thornton *v.* Johnson, 2 B. Mon. 459.
*Mississippi.*— Harman *v.* Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272.
*Missouri.*— Barron *v.* Alexander, 27 Mo. 530.
*Pennsylvania.*— Rumsey *v.* Shaw, 212 Pa. St. 576, 61 Atl. 1109; Krumbhaar *v.* Birch, 83 Pa. St. 426; Weimer *v.* Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Price *v.* Lewis, 17 Pa. St. 51, 55 Am. Dec. 536.
*Tennessee.*— Keely *v.* Turbeville, 11 Lea 339.
*Texas.*— Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857.
See 43 Cent. Dig. tit. "Sales," § 966.

**The fact that the buyer failed to comply with his agreement to execute a mortgage** to secure his note for the unpaid part of the price does not preclude him from relying on fraudulent representations by the seller as a defense to an action on the note. Cash *v.* Delong, 53 S. W. 1037, 21 Ky. L. Rep. 1063.

**61.** Stewart *v.* Bradford, 26 Ala. 410.

**62.** Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421.

**63.** Smith *v.* Carlson, 36 Minn. 220, 30 N. W. 761; Wiltsie *v.* Northam, 3 Bosw. (N. Y.) 162.

**64.** *California.*— Flint *v.* Lyon, 4 Cal. 17.
*Illinois.*— Oertel *v.* Schroeder, 48 Ill. 133.
*Nebraska.*— Warder, etc., Co. *v.* Myers, 70 Nebr. 15, 96 N. W. 992.
*New York.*— Delafield *v.* De Grauw, 9 Bosw. 1.
*South Carolina.*— Matlock *v.* Gibson, 8 Rich. 437.
*Vermont.*— Morrill *v.* Aden, 19 Vt. 505.
See 43 Cent. Dig. tit. "Sales," § 962 *et seq.*

**Destruction of property.**—A purchaser of goods under an agreement that no property therein shall pass until it is paid for cannot set up, as a defense to notes given for the purchase-price, a total failure of consideration, or a partial ascertained failure, on the destruction by fire of the goods some time after they had been set up and used in the buyer's mill. Goldie, etc., Co. *v.* Harper, 31 Ont. 284.

purpose for which sold;[65] but the buyer cannot plead that the article was worthless where he accepted it after inspection or trial, and there is no fraud on the part of the seller.[66] So too where a note or bill of exchange is given for the price a failure to deliver is a failure of consideration constituting a defense to an action on the note.[67] But a partial failure of consideration is not, in the absence of fraud or warranty, an absolute defense,[68] but may be shown to defeat recovery

**Injunction** will lie to restrain an action on a note given for the purchase-price where there is an entire failure of consideration. Ewing *v.* Chase, 2 Del. Ch. 278.

**The fact that plaintiff had wrongfully foreclosed a mortgage given to secure the price,** and caused the goods to be sold, did not constitute a total failure of consideration. Juchter *v.* Boehm, 63 Ga. 71.

**A renewal of a note** given for the purchase-price with knowledge of the quality of the goods is a waiver of the defense of failure of consideration. American Car Co. *v.* Atlanta St. R. Co., 100 Ga. 254, 28 S. E. 40.

**The fact that defendant has made partial payments** does not estop him from pleading failure of consideration. Danforth *v.* Crookshanks, 68 Mo. App. 311.

**65.** *Georgia.*— Coates *v.* Cook, 101 Ga. 586, 28 S. E. 982; Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811.

*Illinois.*— Beers *v.* Williams, 16 Ill. 69.

*Iowa.*— McCormick Harvesting Mach. Co. *v.* Brower, 94 Iowa 144, 62 N. W. 700.

*Missouri.*— Murphy *v.* Gay, 37 Mo. 535; Barr *v.* Baker, 9 Mo. 850; Schoenberg *v.* Loker, 88 Mo. App. 387.

*Oklahoma.*— Frick *v.* Reynolds, 6 Okla. 638, 52 Pac. 391, holding also that a defense of failure of consideration for two notes given as part consideration for a horse which was falsely represented to be sound, and which died soon after the sale, if it prevails, goes to the whole of the notes, and does not require any proof of value to warrant the jury in determining that the horse was worthless.

*Texas.*— Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857.

**To sustain a plea of failure of consideration on a sale of fertilizer** on the ground that the fertilizer was worthless it must appear that the poor crop resulted from the worthlessness of the fertilizer. Wilcox *v.* Howard, 51 Ga. 298.

**The buyer is liable for the price agreed to be paid for worthless stock of a corporation** in the absence of fraud, where he receives that for which he contracted, although it was known by the seller to be worthless. Hunting *v.* Downer, 151 Mass. 275, 23 N. E. 832; Peck Colorado Co. *v.* Stratton, 95 Fed. 741. See Shirts *v.* Irons, 37 Ind. 98.

**Estoppel to allege worthlessness.**— The purchaser of an interest in a patent, who has in his turn assigned it to a third party for a valuable consideration, cannot, in the absence of warranty or fraudulent representation, defend an action for the purchase-money, on the ground of the worthlessness of the patent. Thomas *v.* Quintard, 5 Duer (N. Y.) 80. But see Live Stock Co. *v.* White, 90 Mo. App. 498, holding that the fact that a purchaser of certain goods with the right to sell them in a certain county made several sales will not estop him to show that the goods were worthless, when sued for the purchase-price, and their worthlessness will be a question for the jury.

**Article still in use.**— In an action on a note given for the price of a traction engine, a plea of a total failure of consideration, in that the machine was worthless, is not sustained when defendant admits that he still has the engine in use, that it would make steam enough to saw wood, and that he has threshed with it since commencement of the suit. Belden *v.* Church, 23 Ill. App. 473.

**66.** Deifendorff *v.* Gage, 7 Barb. (N. Y.) 18; Thomas Mfg. Co. *v.* Griffin, 16 Tex. Civ. App. 188, 40 S. W. 755; Haley *v.* Manning, 2 Tex. Civ. App. 17, 21 S. W. 711.

**67.** *California.*— Plate *v.* Vega, 31 Cal. 383.

*Florida.*— Stafford *v.* Anders, 8 Fla. 34.

*Illinois.*— Corwith *v.* Colter, 82 Ill. 585.

*Indiana.*— Barnes *v.* Stevens, 62 Ind. 226.

*Kentucky.*—Streshley *v.* Powell, 12 B. Mon. 178.

*Minnesota.*— Deering Harvester Co. *v.* Melheim, 83 Minn. 359, 86 N. W. 348.

*New York.*— Murphy *v.* Lippe, 35 N. Y. Super. Ct. 542; Bell *v.* Spotts, 50 How. Pr. 162 [*affirmed* in 40 N. Y. Super. Ct. 552].

*Pennsylvania.*— Pittsburgh Second Nat. Bank *v.* Anderson, 14 Pa. Co. Ct. 513.

See 43 Cent. Dig. tit. "Sales," § 964.

**Modification of contract.**—Where a consignee, not being pleased with the goods shipped, had ordered them stopped at a certain place, and then agreed to take the goods on condition that the consignor would furnish other articles in exchange for such as might prove unsalable, the agreement does not impose on the consignor the duty to deliver the goods, so that his failure to do so did not constitute a failure of consideration Richardson *v.* Comstock, 21 Ark. 69.

**68.** *Alabama.*— Ricks *v.* Dillahunty, 8 Port. 133.

*California.*— Blumenthal *v.* Greenberg, 130 Cal. 384, 62 Pac. 599.

*Connecticut.*— Drew *v.* Roe, 41 Conn. 41.

*Illinois.*— Richards *v.* Betzer, 53 Ill. 466; Stocks *v.* Scott, 89 Ill. App. 615 [*affirmed* in 188 Ill. 266, 58 N. E. 990]; Dearborn Foundry Co. *v.* Rielly, 79 Ill. App. 281; Brewer *v.* Christian, 9 Ill. App. 57.

*Maine.*— Furber *v.* Fogler, 97 Me. 585, 55 Atl. 514.

*New York.*— Welling *v.* Ivoroyd Mfg. Co.,

*pro tanto*;[69] and a defendant sued on an implied assumpsit for goods sold and delivered may show that the contract price is not the reasonable value, although such contract price is *prima facie* evidence of such value,[70] and if partial delivery is made failure to deliver the balance is a partial failure of consideration constituting a good defense as to the part not delivered.[71] But the fact that agreements made by the seller which have not been fulfilled constituted additional considerations for the purchase will not avail to defeat an action for the price where the value of such considerations is unliquidated and no particular part of the money to be paid was apportioned to them.[72]

(B) *By Failure of Title.* If there is an absolute failure of title by reason of which the goods are taken from the possession of the purchaser and lost to him there is an entire failure of consideration constituting a defense to an action for the price;[73] but want of consideration on the ground of failure of title is no defense, so long as the buyer is not disturbed in his possession of the goods,[74]

15 N. Y. App. Div. 116, 44 N. Y. Suppl. 374 [*affirmed in* 162 N. Y. 599, 57 N. E. 1128]; Smadback *v.* Wolffe, 21 Misc. 82, 46 N. Y. Suppl. 968.

*North Carolina.*— Max *v.* Harris, 125 N. C. 345, 34 S. E. 437; Johnston *v.* Smith, 86 N. C. 498; Winslow *v.* Wood, 70 N. C. 430; Baines *v.* Drake, 50 N. C. 153; McEntyre *v.* McEntyre, 34 N. C. 299.

*North Dakota.*— International Soc. *v.* Hildreth, 11 N. D. 262, 91 N. W. 70.

*Ohio.*— Simmons Hardware Co. *v.* Bucket Pump Co., 18 Ohio Cir. Ct. 878, 10 Ohio Cir. Dec. 285.

*Pennsylvania.*— Eagan *v.* Call, 34 Pa. St. 236, 75 Am. Dec. 653; Butz *v.* Manwiller, 2 Woodw. 260.

*Vermont.*— Blaney *v.* Pelton, 60 Vt. 275, 13 Atl. 564; Morrill *v.* Aden, 19 Vt. 505.

*United States.*— Elminger *v.* Drew, 8 Fed. Cas. No. 4,416, 4 McLean 388.

See 43 Cent. Dig. tit. "Sales," § 964 *et seq.*

**Defect due to fault of buyer.**— The failure to put on the goods certain printed matter, to be communicated by defendants before the time for delivery, is not a defense where defendants had never made any such communication, but disputed the contract, and absolutely refused to receive the goods. Kaufman *v.* Canary, 21 Misc. (N. Y.) 302, 47 N. Y. Suppl. 152.

69. *Massachusetts.*— Perley *v.* Balch, 23 Pick. 283, 34 Am. Dec. 56; Harrington *v.* Stratton, 22 Pick. 510.

*Missouri.*— Aultman *v.* Hunter, 82 Mo. App. 632; Danforth *v.* Crookshanks, 68 Mo. App. 311.

*New Jersey.*—Bouker *v.* Randles, 31 N. J. L. 335.

*Texas.*— Nations *v.* Thomas, 25 Tex. Suppl. 221.

*Washington.*— Bay View Brewing Co. *v.* Tecklenberg, 19 Wash. 469, 53 Pac. 724.

*Wisconsin.*— Herman *v.* Gray, 79 Wis. 182, 48 N. W. 113.

See 43 Cent. Dig. tit. "Sales," § 962 *et seq.*

**Reduction to be determined by agreement.** — A provision in the contract that there should be a reduction from the price of any old or damaged goods, such reduction is to be agreed upon by the parties, cannot be enforced where there is no evidence that, after the delivery of the goods to the purchaser, and before their appropriation by him to his own use, he either agreed upon or demanded of the seller that an agreement be made as to the amount to be deducted. Underwood *v.* Caldwell, 102 Ga. 16, 29 S. E. 164.

70. Redman *v.* Adams, 165 Mo. 60, 65 S. W. 300.

71. Stafford *v.* Anders, 8 Fla. 34.

72. Peck Colorado Co. *v.* Stratton, 95 Fed. 741.

73. Sturges *v.* Miller, 80 Ill. 241; Linton *v.* Porter, 31 Ill. 107; Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314; Freligh *v.* Platt, 5 Cow. (N. Y.) 494.

**Wrongful taking of property.**— The fact that a sawmill for the price of which plaintiff sued had been wrongfully taken from defendants after they had used it for three years does not support a plea of failure of consideration, there being no complaint of the original transaction. Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189.

**Injunction against seller.**— In an action by the seller of logs to recover their price from the buyer, where the buyer alleged non-delivery because of proceedings enjoining the seller from selling and delivering the logs, defendant may show such injunction proceedings by producing a certified copy of the record, notwithstanding the buyer was not a party to such suit, where he was served with a copy of the injunction. Cogar *v.* Burns Lumber Co., 46 W. Va. 256, 33 S. E. 219.

**Purchase of encumbrance by buyer.**—Where a seller agrees to deliver logs free from all encumbrances, the buyer cannot, by purchasing an encumbrance, defeat the seller's recovery, when he has delivered logs enough at the contract price to pay off the encumbrance and leave a balance due. Gordon *v.* Cleveland Sawmill, etc., Co., 123 Mich. 430, 82 N. W. 230.

74. *Alabama.*— Johnson *v.* Oehmig, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; Ogburn *v.* Ogburn, 3 Port. 126.

unless the seller was guilty of fraud in relation to the title, in which event actual loss of possession is held not to be essential.[75] It is no defense if he surrenders the property, without proof that the alleged superior title was in fact paramount;[76] but if the purchaser to avoid suit pays the price to the claimant it will be a defense on proof that the title was in fact in such claimant;[77] and if the buyer has extinguished the claimant's title by payment of less than the purchase-price, he will be allowed an abatement to the amount which he paid to perfect the title.[78] If payment of an encumbrance is part of the purchase-price, there is no failure of consideration.[79]

(iv) *Condition Precedent to Interposition of Defense.*[80] If the defense of fraud is set up to defeat the action, there must be a rescission of the contract by the buyer,[81] and a return or offer of return of the goods,[82] unless they are worthless.[83] So too if defects in quality are urged in defense there must be

*Georgia.*— Huffman Min., etc., Co. *v.* Georgia, etc., Min. Co., 116 Ga. 701, 43 S. E. 74.

*Illinois.*— Linton *v.* Porter, 31 Ill. 107.

*Indiana.*— Conard *v.* Dowling, 8 Blackf. 38.

*Maine.*— Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314.

*Mississippi.*— Headley Lumber Co. *v.* Cranford, (1905) 38 So. 548.

*New Hampshire.*— Springfield *v.* Drake, 58 N. H. 19.

*New York.*— McGiffin *v.* Baird, 62 N. Y 329; Rundle *v.* Gordon, 27 N. Y. App. Div. 452, 50 N. Y. Suppl. 353; Freligh *v.* Platt, 5 Cow. 494. And see Seymour *v.* Montgomery, 4 Abb. Dec. 207, 1 Keyes 463.

*North Carolina.*—Webster *v.* Laws, 89 N. C. 224.

*South Carolina.*— Watts *v.* Buck, 1 Strobh. 291.

See 44 Cent. Dig. tit. "Sales," § 967.

But see Estelle *v.* Peacock, 48 Mich. 469, 12 N. W. 659, holding that, although the vendee of personal property retains and converts it to his own use, he may resist a suit for the purchase-price on the ground that his vendor had no title, where the claimant himself, to save a multiplicity of suits, has assumed the defense under an arrangement that the vendee shall pay him for the property if the defense prevails.

**Infringement of patent.**— The mere fact that it is claimed that the article sold is an infringement of a patent is not such a failure of title as will avail the purchaser who has had the undisturbed use and possession of the article. Lowman *v.* Excelsior Stove Pattern Co., 104 Ala. 367, 16 So. 17; Geist *v.* Stier, 134 Pa. St. 216, 19 Atl. 505; Consumers' Gas Co. *v.* American Electric Constr. Co., 50 Fed. 778, 1 C. C. A. 663 [*affirming* 47 Fed. 43].

**75.** Johnson *v.* Oehmig, 95 Ala. 189, 10 So. 430, 36 Am. St. Rep. 204; Southwestern R. Co. *v.* Papot, 67 Ga. 675; Case *v.* Hall, 24 Wend. (N. Y.) 102, 36 Am. Dec. 605.

**76.** Cargill *v.* Walker, 1 Stew. & P. (Ala.) 223.

**77.** Matheny *v.* Mason, 73 Mo. 677, 39 Am. Rep. 541. But see Vibbard *v.* Johnson, 19 Johns. (N. Y.) 77, holding that payment must have been compelled by action brought by the true owner.

**78.** Moore *v.* Lanham, 3 Hill (S. C.) 299.

**79.** Howell *v.* Lemon, 3 Ind. 492.

**80.** Conditions precedent to interposing offset see *infra*, VIII, E, 4, b, (IV).

**81.** Young *v.* Arntze, 86 Ala. 116, 5 So. 253; Rohrbacher *v.* Kleebauer, 119 Cal. 260, 51 Pac. 341; Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550; Upper San Joaquin Canal Co. *v.* Roach, 78 Cal. 552, 21 Pac. 304; Bain *v.* Wilson, 1 J. J. Marsh. (Ky.) 202; Harrington *v.* Lee, 33 Vt. 249.

**Notice of rescission of the contract is not necessary** to enable the buyer to defend an action for the price, where the article was not seen by him before the purchase, but he bought upon faith of false representations as to its character, made by the seller, and the article was never received or accepted by him. Foulk *v.* Eckert, 61 Ill. 318.

**82.** *Indiana.*— Howard *v.* Cadwalader, 5 Blackf. 225.

*Iowa.*— Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623; Johnson *v.* Barney, 1 Iowa 531.

*Kentucky.*— Bain *v.* Wilson, 1 J. J. Marsh. 202.

*New York.*— Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335 [*affirming* 13 Daly 144]; Youngs *v.* Kent, 2 Sweeny 248; Burton *v.* Stewart, 3 Wend. 236, 20 Am. Dec. 692.

*Ohio.*— Ohio Forging Co. *v.* Lamb, 9 Ohio Dec. (Reprint) 199, 11 Cinc. L. Bul. 190.

See 43 Cent. Dig. tit. "Sales," § 972.

But see Cushwa *v.* Forrest, 6 Fed. Cas. No. 3,517, 4 Cranch C. C. 37.

**Delivery to third person procured by fraud.** — In an action for goods sold and delivered to a third person under a written order of defendant, it is not necessary, in order to defeat the action for fraud, to show that the goods were returned on discovery of the fraud, where it is shown that they were so delivered without the authority of defendant, who signed the instrument on the false representation that it was a mere recommendation of the goods described. Martindale *v.* Harris, 26 Ohio St. 379.

**83.** Burton *v.* Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; Withers *v.* Green, 9 How. (U. S.) 213, 13 L. ed. 109; Boggs *v.* Wann, 58 Fed. 681.

**Reassignment of a patent found to be invalid** is not necessary to enable the pur-

a return of the goods,[84] unless it appears that the goods are worthless;[85] and where a breach of condition is relied on as an absolute defense there must also be a rescission of the contract and a return of the goods.[86] If, however, defects are urged merely as a defense *pro tanto* a return or offer to return is unnecessary.[87]

**b. Recoupment, Set-Off, and Counter-Claim** — (i) *General Rules.* The general rules in regard to the rights of recoupment, set-off, and counter-claim [88] apply in actions by the seller to recover the price or value of goods sold.[89] Thus defendant may offset damages sustained by reason of a breach of the contract by the seller,[90] such as a breach of an agreement not to sell articles of the same character to others,[91] or damages due to the fraud or misrepresentation of the seller,[92]

chaser to plead want of consideration to an action for the price. Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

84. Armstrong *v.* Johnson Tobacco Co., 41 Mo. App. 254.

85. Compton *v.* Parsons, 76 Mo. 455; Kerr *v.* Haymaker, 20 Mo. App. 350.

86. Fairbanks *v.* Owens, 46 Ill. App. 80, where defendant pleaded a violation of the contract by the vendor in selling similar goods in territory prohibited by the contract, and it was held that defendant could not return the goods without paying for them, but it was his duty to return them before he could escape all liability, and that if he did not do so he could only recoup damages occasioned by the vendor's breach of contract.

87. Brown *v.* Freeman, 70 Ala. 406; Harrington *v.* Stratton, 22 Pick. (Mass.) 510; Rasberry *v.* Moye, 23 Miss. 320; Sewall *v.* Gibbs, 1 Hall (N. Y.) 663; Renaud *v.* Peck, 2 Hilt. (N. Y.) 137.

88. See Recoupment, Set-Off, and Counter-Claim, 34 Cyc. 618.

89. Berdell *v.* Johnson, 18 Barb. (N. Y.) 559, holding that, in an action to recover the price of goods sold to defendant, a counter-claim for loss sustained by defendant upon a quantity of pork previously sold to him by plaintiff as inspected pork of good quality, which turned out to be of bad quality, and tainted and rotten, is bad on demurrer.

**If payment has been made in excess of the value of the goods,** such amount may be offset in an action for the price. Smith *v.* Steinkamper, 16 Mo. 150. Thus an amount paid in excess of the value of the goods in consequence of misrepresentation by the seller of the value of the goods may be offset (Anschutz *v.* Miller, 20 Fed. 376); and in an action to recover the balance due on a note in part executed for shares of stock which plaintiff fraudulently represented to be of a designated sum, when in fact it was worthless, defendant might plead as a counter-claim the amount which plaintiff represented the stock was worth (Frazier *v.* Gooding, 13 Ky. L. Rep. 176).

**Election of other remedy.**— In an action for the price of lumber sold, the vendee may set off his damages on account of the non-delivery of part of the lumber deliverable under the same contract, notwithstanding he has recovered judgment for such damages, if an appeal from the judgment is pending. King *v.* Bradley, 44 Ill. 342. But where a seller removed part of the goods covered by the bill of sale, and claimed the right to remove others, the purchaser's remedies to refuse payment until the goods taken away should be returned, or to offset the value of the goods removed against the purchase-price, are inconsistent, and a choice of one precludes the other. Brady *v.* Cassidy, 9 Misc. (N. Y.) 107, 29 N. Y. Suppl. 45 [*affirmed* in 145 N. Y. 171, 39 N. E. 814].

90. Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, 18 Am. Rep. 621; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189; Loughridge *v.* Allen, 38 S. W. 698, 18 Ky. L. Rep. 894.

91. Blauner *v.* Williams Co., 36 Misc. (N. Y.) 173, 73 N. Y. Suppl. 165 [*affirming* 34 Misc. 823, 69 N. Y. Suppl. 749].

**Agreement to maintain price.**— The buyer in an action for the price may counter-claim for damages for the breach of the seller's agreement to maintain the price of the article. Lozier *v.* Hannan, 12 Colo. App. 59, 54 Pac. 399.

92. *Alabama.*— Ward *v.* Reynolds, 32 Ala. 384.

*California.*— Field *v.* Austin, 131 Cal. 379, 63 Pac. 692.

*Illinois.*— Hoerner *v.* Giles, 53 Ill. App. 540.

*Indiana.*— Love *v.* Oldham, 22 Ind. 51.

*Massachusetts.*— Kilgore *v.* Bruce, 166 Mass. 136, 44 N. E. 108.

*Missouri.*— Wade *v.* Scott, 7 Mo. 509; Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484.

*New York.*— Kennedy *v.* Crandall, 3 Lans. 1; Payne *v.* Cutler, 13 Wend. 605; Reab *v.* McAlister, 8 Wend. 109; Beecker *v.* Vrooman, 13 Johns. 302.

*North Carolina.*— May *v.* Loomis, 140 N. C. 350, 52 S. E. 728.

*Ohio.*— Timmons *v.* Dunn, 4 Ohio St. 680.

*Pennsylvania.*— Rumsey *v.* Shaw, 25 Pa. Super Ct. 386.

*Tennessee.*— Hogg *v.* Cardwell, 4 Sneed 151.

*Texas.*— Suttle *v.* Hutchinson, (Civ. App. 1895) 31 S. W. 211.

*Washington.*— Griffith *v.* Strand, 19 Wash. 686, 54 Pac. 613.

See 43 Cent. Dig. tit. "Sales," § 975.

But see Johnson *v.* Wideman, Rice (S. C.) 325.

or due to a failure of consideration,[93] or resulting from a partial failure of title,[94] or damages from breakage during transportation to the place of delivery.[95] So too the buyer may offset damages for injuries to goods while they are in the seller's possession if such injuries were due to the seller's negligence.[96] But as in other cases the damages must not be so remote and uncertain as not to have been within the probable contemplation of the parties,[97] and the rule that unliquidated damages are not the proper subject of a set-off[98] applies;[99] and as a general rule defendant's claim to be available must arise out of the same contract or transaction as that on which plaintiff's demand is founded or be connected with the subject of the action,[1] although under statutes and codes allowing as a counter-claim in an action on contract any other cause of action on contract,[2] in an action for the price of the goods defendant may counter-claim any other cause of action in his favor against plaintiff arising on contract;[3] and generally if the claim of defendant arises out of a separate part of the same contract it will be available;[4] and if there is but one contract the fact that deliveries were separate

**The fact that defendants had sold all their rights to another** did not estop them to plead as the basis of a counter-claim, in an action for the price of a patent right and a machine manufactured thereunder, false representations by the seller that the patent was not an infringement of a former one. Pratt *v.* Hawes, 118 Wis. 603, 95 N. W. 965.

**93.** Miller *v.* Gaither, 3 Bush (Ky.) 152; Stacy *v.* Kemp, 97 Mass. 166.

**Goods in hands of receiver.**— In an action for the price of goods sold to defendant, the fact that the goods were in the hands of a receiver appointed at the suit of plaintiff presents no ground for a counter-claim as a conversion by plaintiff. Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140.

**94.** Bice *v.* Walker, 131 Mich. 311, 91 N. W. 128; Tabor *v.* Harriman, 59 N. H. 226.

**Invalidity of patent.**—Where defendant, in an action for the price of a patented article, interposes as a defense that the article purchased infringed a patent, and that he offered to return the same to plaintiff, but has failed to keep good his offer to return, he may counter-claim, in the vendor's action, the damages accruing to him from the fact that the article infringes a patent, viz., the difference between the value of the article with the right to use it, and its value without that right. Croninger *v.* Paige, 48 Wis. 229, 4 N. W. 106.

**95.** Tillyer *v.* Van Cleve Glass Co., 13 Ohio Cir. Ct. 99, 7 Ohio Cir. Dec. 209.

**96.** Barrow *v.* Window, 71 Ill. 214; Phillips *v.* Patillo, 18 Tex. 518.

**97.** Warder *v.* Myers, 2 Nebr (Unoff.) 507, 89 N. W. 387, holding that damages for injury to grain not harvested in time because of the seller's failure to repair the harvesting machine for the following season as agreed, are too remote to enable the buyer to recoup in an action for the price.

**98.** See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 696.

**99.** Allen *v.* McNew, 8 Humphr. (Tenn.) 46.

**Thus on a sale of goods which were insured,** the purchaser cannot in an action for the price set off a claim against the seller, founded on his unauthorized compromise with the insurance company on the loss of the goods. McCauley *v.* Sheldens, 30 Ga. 832.

**1.** *Illinois.*— Barker *v.* Turnbull, 51 Ill. App. 226.

*Kentucky.*— Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865. See also Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795.

*New York.*— Berdell *v.* Johnson, 18 Barb. 559; Seymour *v.* Davis, 2 Sandf. 239; Batterman *v.* Pierce, 3 Hill 171.

*Ohio.*— Loomis *v.* Rochester Eagle Bank, 10 Ohio St. 327.

*Tennessee.*— Allen *v.* McNew, 8 Humphr. 46.

*West Virginia.*— Sterling Organ Co. *v.* House, 25 W. Va. 64.

See 43 Cent. Dig. tit. "Sales," § 985 *et seq.*

**Claims founded on tort.**—A claim that plaintiff maliciously and without probable cause brought a previous action for the price prematurely is not a proper counter-claim (Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349), nor is a claim bond on an alleged wrongful attachment in an action for the price (Jones *v.* Swank, 54 Minn. 259, 55 N. W. 1126).

**2.** See the statutes of the several states; and, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 689.

**3.** Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223, under Code Civ. Proc. § 435.

**4.** Ketchum *v.* Larkin, 88 Iowa 215, 55 N. W. 472 (where a contract for the sale of a corn-sheller contained an agreement to supply work in shelling corn); Batterman *v.* Pierce, 3 Hill (N. Y.) 171 (where on a sale of wood, the vendor agreed to indemnify the vendees against any damage occurring to the wood by the burning of the adjoining fallow and on burning the fallow the wood was destroyed by the fire and it was held that the vendees might recoup their damages arising from the loss of the wood); Singer Mfg. Co. *v.* Christian, 211 Pa. St. 534, 60 Atl. 1087 (where on a sale of a sewing machine the seller agreed to furnish the buyer with sufficient work out of the profits on which the machine could be paid for).

does not preclude a counter-claim for damages arising under one delivery in an action for the price of the goods included in the other delivery.[5] But a transaction which is, in its inception, single, may by subsequent agreement be converted into two distinct transactions so that a claim arising in one cannot be offset in an action founded on the other.[6] Equitable set-off is available under the same circumstances as in other actions on contract,[7] but will not be allowed to aid defendant in the perpetration of a fraudulent scheme against plaintiff.[8]

(II) *DEFAULT IN PERFORMANCE BY SELLER; DEFICIENCY IN QUANTITY OR QUALITY.* Defendant may also in such an action plead damages due to a default in the performance of the contract by the seller,[9] as for example a failure to deliver the goods contracted for,[10] or delay in delivery,[11] or deficiency in

**Defendant may set off a claim for goods furnished plaintiff,** under an agreement that the goods forming the basis of plaintiff's demand should be paid for by goods from defendant's store. Croucher *v.* Gunn, 2 Can. L. T. Occ. Notes 107, 14 Nova Scotia 370. *Compare* Oland *v.* Bertram, 8 Can. L. T. Occ. Notes 61, 19 Nova Scotia 512.

**Where the same instrument provides for delivery of two separate lots** of merchandise but is so framed that it creates two distinct contracts, damages for refusal to deliver the second lot cannot be offset by way of counter-claim in a suit on the note given for the price of the first lot brought by the indorsee of the note. Loomis *v.* Eagle Bank, 10 Ohio St. 327.

5. Scudder-Gale Grocer Co. *v.* Russell, 65 Ill. App. 281; Tipton *v.* Feitner, 20 N. Y. 423.

**Separate deliveries under a parol sale, void under the statute of frauds,** constitute distinct sales, and therefore in an action for the price of one delivery of goods defendant cannot recoup for fraud in the sale of the other deliveries. Seymour *v.* Davis, 2 Sandf. (N. Y.) 239.

**Transactions constituting one contract.**— Where defendant at the same time ordered of plaintiff a buggy and a stage-coach, the orders, however, being separate, the purchase constituted but one transaction, so that, in an action for the price of one vehicle, recoupment could be had for the non-delivery of the other. Benjamin *v.* Richards, 51 Mich. 110, 16 N. W. 255.

6. Mahaska County State Bank *v.* Christ, 82 Iowa 56, 47 N. W. 886, where a sale of two horses was converted into two distinct transactions by a modification of the agreement as to one of the horses.

7. Porter *v.* Roseman, 165 Ind. 255, 112 Am. St. Rep. 222, 74 N. E. 1105, where the doctrine of equitable set-off was applied where an employee of defendant owed money to plaintiff, and, in order to meet notes which he had given for the debt, misappropriated money belonging to defendant, and with such money took up the notes which had been transmitted by plaintiff to a bank for collection, and it was held in an action by plaintiff for goods sold and delivered to defendant that he could set off his claim for the money received by plaintiff from defendant's employee.

**Grounds of equitable set-off generally see** RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 636.

8. Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569.

9. Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 673, holding that where a plaintiff ships oil in unseasoned casks, whereby it is lost, the consignee, on being sued for the price, may set up by way of recoupment the damages sustained by reason of the loss of the oil.

**But not if the default is due to the buyer's request.** New Jersey Steel Tube Co. *v.* Riehl, 9 Pa. Super. Ct. 220; Voorheis *v.* Fry, (Tex. Civ. App. 1899) 52 S. W. 580.

10. Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; Jones *v.* National Printing Co., 13 Daly (N. Y.) 92; Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629.

**Where the failure to deliver was due to the fault of the buyer** in failing to provide a place for delivery as agreed he cannot recoup damages for the failure to deliver. Day *v.* Jeffords, 102 Ga. 714, 29 S. E. 591.

11. *Georgia.*— Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

*Illinois.*— Cooke *v.* Preble, 80 Ill. 381.

*Indiana.*— Berkey, etc., Furniture Co. *v.* Hascall, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.

*Kentucky.*— Albin Co. *v.* Demorest Mfg. Co., 56 S. W. 982, 22 Ky. L. Rep. 245.

*Michigan.*— Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466.

*Missouri.*— Redlands Orange Growers' Assoc. *v.* Gorman, 76 Mo. App. 184.

*New York.*— Phillips *v.* Taylor, 101 N. Y. 639, 4 N. E. 727.

*Texas.*— Saunders *v.* Weekes, (Civ. App. 1900) 55 S. W. 33.

*Vermont.*— Eddy *v.* Clement, 38 Vt. 486.

*United States.*— Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816. But see Minneapolis Gas-Light Co. *v.* Kerr-Murray Mfg. Co., 122 U. S. 300, 7 S. Ct. 1187, 30 L. ed. 1190.

*Canada.*— Pictou Iron Foundry, etc., Co. *v.* Archibald, 30 Nova Scotia 262, holding, however, that the burden is on the buyer to show damage.

See 43 Cent. Dig. tit. "Sales," § 976.

**Damages due to delay in delivering machinery.**—A buyer of machinery is entitled to set off, against the price, loss of the value of the use of the plant during a delay in

quantity,[12] or quality, fitness, and condition,[13] even when the goods have been

delivery, including items for loss of time and services of defendant's manager, for extra labor made necessary by reason of the delay, and for loss of orders for the installation of electric lights resulting from such delay (Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816); and in an action on a note given for machinery defendant may plead loss of profits capable of exact computation, and due to a delay in delivery if the damages resulting from such loss are such as must have been within the contemplation of the parties when entering into the contract (Gore *v.* Malsby, 110 Ga. 893, 36 S. E. 315. And see Industrial Works *v.* Mitchell, 114 Mich. 29, 72 N. W. 25; Jones *v.* National Printing Co., 13 Daly (N. Y.) 92). But it is held that in the absence of stipulation or circumstances from which an understanding can be inferred loss of profits will not be regarded as within the contemplation of the parties. Howard *v.* Stillwell, etc., Mfg. Co., 139 U. S. 199, 11 S. Ct. 500, 35 L. ed. 147.

12. *Alabama.*— Harralson *v.* Stein, 50 Ala. 347; Robertson *v.* Davenport, 27 Ala. 574.

*Arkansas.*—Wilman *v.* Mizer, 60 Ark. 281, 30 S. W. 31.

*California.*— Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Georgia.*— Savannah Electric R. Co. *v.* Tennessee Coal, etc., Co., 98 Ga. 189, 26 S. E. 741; Finney *v.* Cadwallader, 55 Ga. 75; Daniel *v.* Trice, 31 Ga. 162; Cherry *v.* Sutton, 30 Ga. 875.

*Illinois.*—W. H. Purcell Co. *v.* Sage, 200 Ill. 342, 65 N. E. 723 [*affirming* 90 Ill. App. 160]; Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529 [*affirming* 56 Ill. App. 248]; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189; Beldam *v.* Lewisohn, 51 Ill. App. 47.

*Indiana.*— Epperly *v.* Bailey, 3 Ind. 72.

*Mainc.*— Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

*Massachusetts.*—Westcott *v.* Nims, 4 Cush. 215.

*Michigan.*— Thorn *v.* Morgan, etc., Co., 135 Mich. 51, 97 N. W. 43; Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522; Wilson *v.* Wagar, 26 Mich. 452; Clark *v.* Moore, 3 Mich. 55.

*Missouri.*— Rickey *v.* Zeppenfeldt, 64 Mo. 277.

*New Hampshire.*— Flanders *v.* Putney, 58 N. H. 358.

*New York.*— Patton *v.* Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. 621 [*affirming* 45 Hun 248].

*Ohio.*— Upton *v.* Julian, 7 Ohio St. 95.

*Pennsylvania.*— Fessler *v.* Love, 43 Pa. St. 313.

*Tennessee.*— Porter *v.* Woods, 3 Humphr. 56, 39 Am. Dec. 153.

*United States.*— McNamara *v.* Home Land, etc., Co., 121 Fed. 797, 58 C. C. A. 245.

*Canada.*— Bauld *v.* Fraser, 37 Can. L. J. 363, 34 Nova Scotia 178.

See 43 Cent. Dig. tit. "Sales," § 977.

**Refusal to fill further orders.**— If the seller agrees to fill orders, the agreement to be terminated by notice, a refusal to supply goods without previous notice of election to terminate the agreement is a breach on which recoupment can be based. Sterling Organ Co. *v.* House, 25 W. Va. 64. See also Ellis *v.* Miller, 164 N. Y. 434, 58 N. E. 516 [*reversing* 22 N. Y. App. Div. 33, 47 N. Y. Suppl. 624]. But refusal to fill further orders is not a ground of offset in an action for the price of goods actually sold and delivered, in the absence of contract binding the seller to fill such further orders. Hughes Paint, etc., Co. *v.* Wright, 111 Mo. App. 43, 85 S. W. 919; Penn Shovel Co. *v.* Phelps, 24 Pa. Super. Ct. 595.

**Proof of damages necessary.**— Defendant claiming damages, in an action to recover for timber sold him under contract, for failure to deliver the full amount purchased, cannot recover without proof that other timber could not have been procured in place of that not delivered, and of its market value at the time and place of delivery. Kinports *v.* Breon, 193 Pa. St. 309, 44 Atl. 436.

**Estoppel by new agreement.**—Where, in an action for the contract price of goods, it appeared that all the goods were not delivered at the time agreed upon, and that thereafter a further contract was made, canceling the former ones as to the goods not delivered, the substituted contracts were new and independent agreements, and damages for failure to deliver the goods to which they related could not be recouped under notice of recoupment under the first contracts. Thorn *v.* Morgan, etc., Co., 135 Mich. 51, 97 N. W. 43.

**An agreement to rescind** not carried into effect does not estop defendant to plead a counter-claim, because of default in delivery. Roman *v.* Boston Trading Co., 87 Mo. App. 186.

13. *Illinois.*— Cooke *v.* Preble, 80 Ill. 381.

*Kentucky.*—Wallace *v.* Knoxville Woolen Mills, 117 Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445.

*Louisiana.*— Edwards *v.* Plaquemine Ice, etc., Co., 46 La. Ann. 360, 15 So. 61.

*Massachusetts.*— Hilliard *v.* Weeks, 173 Mass. 304, 53 N. E. 818; Westcott *v.* Nims, 4 Cush. 215.

*New York.*— Stewart *v.* Bock, 1 Hilt. 122, 3 Abb. Pr. 118; Payne *v.* Cutler, 13 Wend. 605; Beecker *v.* Vrooman, 13 Johns. 302.

*North Carolina.*—Hurst *v.* Everett, 91 N. C. 399.

*Ohio.*— Upton *v.* Julian, 7 Ohio St. 95.

*Oklahoma.*— Diebold Safe, etc., Co. *v.* Holt, 4 Okla. 479, 46 Pac. 512.

*Oregon.*— Dean Pump Works *v.* Astoria Iron Works, 40 Oreg. 83, 66 Pac. 605.

*Pennsylvania.*— Howland Pulp Co. *v.* Jessup, etc., Paper Co., 21 Pa. Super. Ct. 495; Smith *v.* Citizens Gas, etc., Co., 5 Wkly. Notes Cas. 97.

*Rhode Island.*— King *v.* Quidnick Co., 14 R. I. 131.

accepted and used,[14] especially if the defects are discoverable only by use.[15] There can, however, be no recoupment for consequential damages resulting from continued use after knowledge of defects.[16] The fact that there has been a partial payment does not affect the right to recoup.[17]

(III) *EXPENSES.* Expenses incurred by the buyer in consequence of the seller's default can be set-off or counter-claimed only where they are such as naturally resulted from the seller's default,[18] and are of such character as to afford a basis for an implied promise to pay.[19] With this limitation in view, an offset may be based on a claim for expenses incurred in repairing,[20] or avoiding the consequences of defects,[21] or in defending or clearing the title.[22] Defendant may also offset freight paid, for which by the contract the seller was liable,[23] and customs

*South Carolina.*— Mitchum *v.* Richardson, 3 Strobh. 254.

*Wisconsin.*— Getty *v.* Roundtree, 2 Pinn. 379, 54 Am. Dec. 138, 2 Chandl. 28.

*United States.*— Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816; Miller *v.* Smith, 17 Fed. Cas. No. 9,590, 1 Mason 437.

*Canada.*— Exchange Bank *v.* Stinson, 32 U. C. C. P. 158.

See 43 Cent. Dig. tit. "Sales," § 977.

**Intermingling good and defective articles.**— Where defendant receives lumber at a freight depot intermingled with which are worthless culls, he may set off against the charge for all the lumber the ratable charge for the worthless lumber and the freight paid thereon. Wilbur Lumber Co. *v.* Oberheck Bros. Mfg. Co., 96 Wis. 383, 71 N. W. 605.

**Loss of right of rescission.**—Where a purchaser has lost the right to rescind a purchase of railway cars on account of defects in the brakes, and refused to use the cars, the purchaser's only remedy, when sued for the price, is to reduce the recovery by an amount sufficient to procure the substitution of new brakes for the defective ones. Pullman Palace Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94, 15 S. Ct. 503, 39 L. ed. 632.

**Effect of sale of goods by buyer.**— The fact that defendant sold the goods to a third party for a consideration equal to the price did not preclude him from claiming damages because of defects in the goods. Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439, 19 So. 459.

**14.** Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 S. E. 987 [*reversing* 77 Ill. App. 59]. But see Minnesota Thresher Mfg. Co. *v.* Gruben, 6 Kan. App. 665, 50 Pac. 67.

**Loss of trade.**—Where one receives goods which are defective and elects to dispose of them and pay for them, not the contract price, but their real value, he cannot, in an action for the price, counter-claim for loss of trade occasioned by his selling the inferior quality of goods. Stewart *v.* Townsend, 41 Fed. 320.

**15.** Wallace *v.* Knoxville Woolen Mills, 78 S. W. 192, 25 Ky. L. Rep. 1445.

**16.** Johnson *v.* Winship Mach. Co., 108 Ga. 554, 33 S. E. 1013.

**17.** Overton *v.* Phelan, 2 Head (Tenn.) 445.

**18.** Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53, holding also that the price of new tools required to be purchased by reason of alleged defects in the goods furnished were not a proper subject of counter-claim where there was no proof that the tools could not be used for any other purpose.

**19.** Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

**Amount paid by the buyer to third persons for raw material** used in manufacturing the article purchased cannot be set off against the price unless made at the request of the seller. Collins *v.* Richmond Stove Co., 63 Conn. 356, 28 Atl. 534.

**20.** Cochran *v.* Jones, 85 Ga. 678, 11 S. E. 811; Frenzel *v.* Miller, 37 Ind. 1, 10 Am. Rep. 62; Saunders *v.* Weeks, (Tex. Civ. App. 1900) 55 S. W. 33; Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816.

**Where the work was done pursuant to agreement** between the buyer and the manufacturers who supplied the machine to the seller for delivery to the buyer, the cost of the work cannot be set off against the purchase-price. Borden, etc., Co. *v.* Fraser, 118 Ill. App. 655.

**21.** Macgowan *v.* Whiting, 9 Daly (N. Y.) 86; Thomas China Co. *v.* C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629.

**Where a seller of sheep delivered diseased animals,** which the buyer retained without rescinding or offering to rescind, the buyer was not entitled, in an action for the price of the sheep, to set off expense which he had been compelled to incur in caring for the sheep, because of their diseased condition. Steiger *v.* Fronhofer, 43 Oreg. 178, 72 Pac. 693.

**22.** Bice *v.* Walker, 131 Mich. 311, 91 N. W. 128; American Cushman Tel. Co. *v.* Noble, 98 Mich. 67, 56 N. W. 1100; Tabor *v.* Harriman, 59 N. H. 226; Lane *v.* Romer, 2 Pinn. (Wis.) 404, 2 Chandl. 61.

**23.** Equitable Mfg. Co. *v.* Howard, 140 Ala. 252, 37 So. 106.

**There can be no recoupment if the freight was not actually paid.**— Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.

**If paid contrary to the seller's orders** freight cannot be recouped or set off. Hofius *v.* Stimson Mill Co., 21 Wash. 113, 57 Pac. 342.

**Freight and cartage on goods rejected because not conforming to contract** may be off-

duties which he was compelled to pay in order to obtain possession and which were to be paid by the seller.[24]

(IV) *CONDITIONS PRECEDENT TO INTERPOSING COUNTER-CLAIM.*[25] The general rules as to conditions precedent to the interposition of defenses, in an action for the price,[26] apply to offsets or defenses *pro tanto*. Thus defendant must as a condition precedent to the interposition of an offset show a substantial performance of the conditions of the contract to be by him performed.[27] It is not, however, essential that the buyer should rescind the contract or offer to return the goods in order to recoup for fraud,[28] deficiency in quantity,[29] or defects in quality.[30]

**5. VENUE.** An action for the price of goods sold and delivered is properly brought in the county where the price is to be paid,[31] and in the absence of contract to the contrary the place of payment and of bringing action has been held to be the county of the buyer's residence.[32]

**6. PARTIES.** The rules relating to parties in civil actions generally [33] apply to parties in actions for the price or value of goods sold.[34] Thus unless expressly

set. Coit *v.* Schwartz, 29 Kan. 344. But in an action for milk sold and delivered, a claim for freight paid to return sour milk could not be sustained, where there was no allegation that plaintiff requested that the sour milk should be returned. Deacon *v.* Uhlman, 21 Pa. Super. Ct. 381.

**Freight paid by mistake** where there had been no acceptance of the goods can be recovered. White Branch McConkin Shelton Hat Co. *v.* Carson, 77 S. W. 366, 25 Ky. L. Rep. 1230.

**Increased freight due to improper loading** is a proper subject of set-off. Tyler Car, etc., Co. *v.* Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807.

24. Fitch *v.* Archibald, 29 N. J. L. 160.

25. See generally RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 664 *et seq.*

26. See *supra*, VIII, E, 4, a, (IV).

27. Enoch Morgan's Sons' Co. *v.* Smith, 132 N. Y. 591, 30 N. E. 749 [*reversing* 15 Daly 355, 7 N. Y. Suppl. 648]; Zunz *v.* Heroy, 15 Daly (N. Y.) 411, 7 N. Y. Suppl. 644.

**To support a counter-claim for failure to deliver goods to be delivered in instalments** and paid for as delivered, defendant must show that all prior deliveries have been paid for. Skehan *v.* Rummel, 124 Ind. 347, 24 N. E. 1089; Bright *v.* Dean, 2 N. Y. Suppl. 658.

28. Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484; Rumsey *v.* Shaw, 25 Pa. Super. Ct. 386.

29. Traverse *v.* Montpelier Carriage Co., 62 Vt. 67, 19 Atl. 715.

30. Bushman *v.* Taylor, 2 Ind. App. 12, 28 N. E. 97, 50 Am. St. Rep. 228; Graff *v.* Osborne, 56 Kan. 162, 43 Pac. 704; Cavender *v.* Roberson, 33 Kan. 626, 7 Pac. 152; Peterson *v.* Door, etc., Lumber Co., 51 Mich. 86, 16 N. W. 243; Macgowau *v.* Whiting, 9 Daly (N. Y.) 86; King *v.* Paddock, 18 Johns. (N. Y.) 141.

**Where the contract is executory** the rule is otherwise, the only exception to this rule being cases of express warranty or of fraud, or where from the nature of the contract there could be no examination of the goods by the vendee. Coplay Iron Co. *v.* Pope, 13 Daly (N. Y.) 144 [*affirmed* in 108 N. Y. 232, 15 N. E. 335].

31. Eastern Granite Co. *v.* Heim, 89 Iowa 698, 57 N. W. 437, decided under Code, § 2581.

**Under Vt. Rev. St. c. 26, § 16,** providing that suits before a justice of the peace to recover for goods sold shall be brought in the town where the goods were sold or defendant resides, where one who has an established business in one town is transiently in another and makes a sale there the action may be brought in the town where the established business is conducted, as the statute does not refer to such single or incidental acts of selling. Stone *v.* Hazen, 25 Vt. 178; Wainwright *v.* Berry, 3 Vt. 423. *Compare* Richardson *v.* Stevens, 41 Vt. 120, where the sale was by an itinerant vendor who had no established place of business and it was held that an action for the price must be brought either in the town where the sale was made or where defendant resides.

32. Russell *v.* Heitmann, (Tex. Civ. App. 1905) 86 S. W. 75; Walthew *v.* Milby, 3 Tex. App. Civ. Cas. § 119.

**An agreement to pay for goods over the counter at the purchaser's place of business** is sufficient to make the money payable in the county in which the business is conducted. Miller *v.* McDannell, 1 Tex. Unrep. Cas. 258.

33. See PARTIES, 30 Cyc. 1.

34. See the cases cited *infra*, this note; and notes 35, 36.

**One to whom the seller has promised a half interest** in the profits of the contract is not a necessary party. Nugent *v.* Armour Packing Co., (Mo. App. 1904) 81 S. W. 506.

**Where a bank indorsed on the contract of sale a certificate** reciting that the purchaser had deposited the price of the goods in the bank subject to the seller's order, the seller could on completion of his contract maintain an action against the purchaser and the bank concurrently. F. C. Austin Mfg. Co. *v.* Decker, 109 Iowa 277, 80 N. W. 312.

allowed by statute an action for the purchase-price of goods cannot be maintained in his own name by one of several joint owners;[35] but on a sale to several an action against one may be maintained in the absence of anything to show that the liability was joint.[36]

**7. Pleading — a. Declaration or Complaint** — (i) *In General.* The rules governing complaints or declarations in civil actions generally[37] are applicable to actions for the price or value of goods sold.[38] Generally if plaintiff states only

**35.** Halliday *v.* Doggett, 6 Pick. (Mass.) 359; Goodspeed *v.* Wasatch Silver Lead Works, 2 Utah 263. But see Williams v. Haskins, 66 Vt. 378, 29 Atl. 371, holding that where owners of adjoining farms treat the products thereof as common property, yet if each has the right as against third persons to deal with it wholly as his own, a sale by either works a severance of the joint interest so that the one selling may sue in his own name for the price.

**36.** Isaacs *v.* Logan, 10 Pa. Co. Ct. 272.

**Severance of cause of action.**—Where one contracts in writing with three persons to give a bill of sale of two thirds of a vessel to two of them, and of one third to the other, and, in pursuance of the contract, does convey two thirds, this is not a severance of the cause of action. Marshall *v.* Smith, 15 Me. 17.

**Election of defendants.**— Where the seller in consequence of the buyer's statements believes him to be the sole owner of the business, but it afterward appears that the buyer's wife is the sole owner, the seller must elect which he will regard as the debtor and cannot make both principal defendants. Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860.

**37.** See Pleading, 31 Cyc. 92.

**38.** See cases cited *infra*, this note.

**Under Ala. Code, p. 792,** which provides that, in an action on an account, the complaint shall allege that the claim is "for merchandise, goods and chattels sold by the plaintiff to the defendant," a complaint was sufficient which alleged that plaintiff claimed "of defendant the sum of $100 for a mule that plaintiff sold to defendant." Smith *v.* Dick, 95 Ala. 311, 10 So. 845.

**Statement of cause of action held sufficient** see Tynon *v.* Crowell, 3 Indian Terr. 346, 58 S. W. 565 (holding that a complaint which states that defendants are indebted to plaintiff in a given sum, as will appear by the original citation thereto attached, which citation alleges the same debt for goods furnished defendants and for which they agreed to pay, and that no part of such debt had been paid, although demanded, and that plaintiff had a verdict in the Indian court before transfer to the United States court, states a good cause of action); Allen *v.* Rushford, 72 Nebr. 907, 101 N. W. 1028 (where the petition set out a contract for the sale of an entire crop of standing hay, with the price, part payment, acceptance, removal of a portion of the crop, the number of tons in the crop, and the failure to pay for the same); Smith *v.* Ferguson, 33 N. Y. App. Div. 561, 53 N. Y. Suppl. 1097 (holding that in an action for goods sold and delivered, time of payment for which is extended by a note, a complaint alleging sale of goods by plaintiff to a firm, consisting of defendant and another, the death of the other, continuance of defendant as sole survivor, delivery of note by defendant to plaintiff for the amount of the bill after death of the other, and the nonpayment of the note, and demanding judgment for the amount of the bill, interest, and costs, states a sufficient cause of action); Steelton Planing Mills Co. *v.* Kunkel, 20 Pa. Super. Ct. 72 (where a statement of claim for lumber sold and delivered set forth the price, the date when same was sold and delivered, the kind and amount of lumber, defendant's promise to pay, the price specified, and his failure to pay).

**Surplusage.**— Where the complaint for goods sold also alleged that defendant agreed to release plaintiff from all claims and demands, present or future, arising out of such transactions, such portion of the alleged agreement is executory, and may be rejected as surplusage. Doyle *v.* Shuttleworth, 41 Misc. (N. Y.) 42, 83 N. Y. Suppl. 609.

**Joinder of counts.**— A count for breach of a contract to furnish certain articles is one on contract and may be joined with a count to recover for goods sold. Waggy *v.* Scott, 29 Oreg. 386, 45 Pac. 774. So too a count alleging that plaintiff sold and delivered goods to defendant on credit, that defendant was insolvent and bought the goods without intent to pay for them is a count on contract which may be joined with other counts confessedly on contract (Roth *v.* Palmer, 27 Barb. (N. Y.) 652); and where goods are sold to a corporation and a note taken therefor signed by an agent supposed to have authority, but it transpires that he did not in fact have authority, the seller anticipating a defense to the note may join in the same declaration a count for goods sold and delivered and a count on the note (Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59). Interest on the price of goods sold is not a separate cause of action, and a statement that a certain sum sued for is for interest does not render the complaint ambiguous. Friend, etc., Lumber Co. *v.* Miller, 67 Cal. 464, 8 Pac. 40.

**Amendment.**— In assumpsit for goods sold and delivered, the declaration may be amended by adding a special count founded on the special contract (Clay *v.* Bohonon, 54 N. H. 474), or by setting up an agreement of sale, offer of delivery, and refusal to accept (Penn *v.* Smith, 93 Ala. 476, 9 So. 609). So a count may be added for money due on an accounting and settlement (Root *v.* O'Neil,

so much of the contract as shows his right to recover it is sufficient,[39] as is usually a complaint in the ordinary form of a count in assumpsit.[40]

(11) *Particular Averments.* There must be a description of the goods sold contained in or attached to the complaint,[41] and the complaint must show definitely by whom,[42] and to whom,[43] the goods were sold, and must allege either the agreed price, or if no price was agreed on, the value of the goods,[44] and that

24 Pa. St. 326), or for money had and received and on an account stated (Triebel *v.* Deysher, 2 Woodw. (Pa.) 15), but not for the other money counts (Triebel *v.* Deysher, *supra*).

39. Adams *v.* Davis, 16 Ala. 748; Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815; Fry *v.* Colborn, 17 Ind. App. 96, 46 N. E. 351.

40. Magee *v.* Kast, 49 Cal. 141; Richards *v.* Burroughs, 62 Mich. 117, 28 N. W. 755.

**That special counts joined therewith are faulty is immaterial** if the common counts are sufficient. State St. Methodist Church *v.* Gordon, 31 N. J. L. 264.

41. O'Hara *v.* Reed, 1 Pennew. (Del.) 138, 39 Atl. 776; Johnson *v.* Ellis, 17 Nebr. 608, 24 N. W. 214; Altoona Concrete Constr., etc., Co. *v.* Knickerbocker Contracting Co., 29 Pa. Super. Ct. 512, holding that a statement of claim for lumber and building material sold and delivered is not such as to require an affidavit of defense, where the statement, as to a very large number of the items, fails to set forth the kind, quality, and condition of the material furnished, or the sizes of various doors and window frames alleged to have been sold and delivered.

**A bill of particulars** of the account sued on need not be filed where the sale was in bulk for a lump sum, without inventory, and where, before commencement of the action, the goods were resold to various persons. Tibbet *v.* Zurbuch, 22 Ind. App. 354, 52 N. E. 815.

**A declaration for goods sold and delivered as described in an account annexed is sufficient** without particularizing the goods in the declaration if the description in the account annexed is sufficient. Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630; Rider *v.* Robbins, 13 Mass. 284; Kinder *v.* Shaw, 2 Mass. 398; Genesee Paper Co. *v.* Bogert, 23 Pa. Super. Ct. 23.

**In an action on account stated** it is not necessary to describe the goods. Collins *v.* McCrummen, 3 Mart. N. S. (La.) 166.

**It is not essential that the value should be stated separately** where the articles themselves are specified. Blanchard *v.* Hunter, 7 Pa. Co. Ct. 552.

**Plaintiff's right of ownership in the property** is not an essential averment. Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548.

42. Pioneer Fuel Co. *v.* Hager, 57 Minn. 76, 58 N. W. 828, 47 Am. St. Rep. 574.

43. Mershon *v.* Randall, 4 Cal. 324.

**But where it is alleged that the goods were sold and delivered to defendant and others** at defendant's request, it is not necessary to state who such others are. Hubbard *v.* Beckwith, 1 Bibb (Ky.) 492.

44. Bowen *v.* Phelps County School Dist. No. 3, 10 Nebr. 265, 4 N. W. 981; Macksoud *v.* Dildarian, 93 N. Y. Suppl. 382. But see Laing *v.* Fidgeon, 4 Campb. 169, 6 Taunt. 108, 16 Rev. Rep. 589, 1 E. C. L. 531, holding that where the price is not agreed on the contract may be declared on as for a reasonable price.

**Averment of price.**— Where a contract for the sale of a piano has the price blank filled out "(#295) dollars," it fails to show a price, and a petition in an action for the purchase-price should aver that the sign and figures inserted in the blank were intended to represent the purchase-price in dollars. Jesse French Piano, etc. Co. *v.* Wallace, 84 Mo. App. 378.

**A declaration with account annexed** as follows: "To balance due on agreed price of [certain articles] $420. Amount of price $500. Credit by cash $35, and cash $45" sufficiently alleges the price. Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630.

**Price to be fixed at future date.**— A complaint, alleging that plaintiff sold and delivered to defendant certain wheat, for which he agreed to pay within twelve cents a bushel of the Cincinnati market, to be determined by the Cincinnati papers, at any time which plaintiff might select within a year from the delivery of the wheat, and that within the year plaintiff notified defendant that he would on that day set the price of the wheat as per the Cincinnati papers of that date, and that wheat was worth in Cincinnati, on that day, two dollars and seventy cents per bushel, and that plaintiff fixed the price on that day and demanded the payment therefor, which defendant refused, sufficiently states a cause of action. Jones *v.* Cook, 35 Ind. 175.

**Price of value.**— A complaint in an action for goods sold and delivered, containing an averment that they were sold "at and for prices mutually agreed upon," cannot be construed as stating a cause of action on a *quantum valebat*. Vedder *v.* Leamon, 70 N. Y. App. Div. 252, 75 N. Y. Suppl. 413.

**A reference to a bill of particulars** attached to the complaint, in which, it is alleged, are "detailed certain payments," presumably made upon the alleged sale, does not amount to an allegation of value of the goods. Macksoud *v.* Dildarian, 93 N. Y. Suppl. 382.

**Inconsistent allegations.**— If a declaration for goods sold and delivered alleges the goods to have been sold for a stipulated price, and then state a promise to pay the worth of the goods, alleging them to be worth the sum previously stated, it is bad on special demurrer. Gist *v.* Cicot, 4 Blackf. (Ind.) 126.

defendant promised expressly or impliedly to pay for them,[45] and must show non-payment.[46] Plaintiff must allege performance on his part of all conditions precedent to a right of recovery,[47] and the sale and delivery being the essential facts on which the right of plaintiff depends should be distinctly averred,[48] it

45. Kelly *v.* Burke, 132 Ala. 235, 31 So. 512; Foerster *v.* Kirkpatrick, 2 Minn. 210; Bowen *v.* Phelps County School Dist. No. 3, 10 Nebr. 265, 4 N. W. 981; Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

**Under Code Civ. Proc. § 142,** requiring the complaint to contain a statement of the facts constituting the cause of action in ordinary language, where a complaint alleges the sale and delivery of goods as a cause of action, it is not necessary to allege a promise of defendants to pay. Glenny *v.* Hitchins, 4 How. Pr. (N. Y.) 98, 2 Code Rep. 56.

**Request for payment.**— A declaration alleging that the buyer promised to pay on request, and concluding with the general breach of non-payment, is good without averring a special request. Walker *v.* Welch, 13 Ill. 674.

46. Goodman *v.* Gordon, 87 Ind. 126; S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135; Bowen *v.* Phelps County School Dist. No. 3, 10 Nebr. 265, 4 N. W. 981; Donald *v.* Gearhardt, 42 Misc. (N. Y.) 269, 86 N. Y. Suppl. 598. But see Salisbury *v.* Stinson, 10 Hun (N. Y.) 242.

**Liberal construction.**— A complaint which alleges a sale by plaintiff to defendant of the property described therein, for a specified price, and a delivery of the property to defendant, that defendant purchased of plaintiff the said property for an agreed price set out therein; and that plaintiff demands judgment for such amount, and interest from day of sale and delivery, is sufficient under Rev. St. § 2668, requiring the allegations of pleadings to be construed liberally with a view to substantial justice, although the complaint does not allege that any part of the price remains unpaid. Rossiter *v.* Schultz, 62 Wis. 655, 22 N. W. 839.

**When demand became due.**— The petition in an action for goods sold is not demurrable for failure to show when the demand became due, where it alleges that it is past due, and unpaid, and an account showing when it became due is attached and made a part of the petition. Petri *v.* Neimeyer, (Tex. Civ. App. 1894) 26 S. W. 266.

**Debt not due.**— In an action on a note given for the price of goods where defendant pleads that the note is not due plaintiff may show that the credit was obtained by fraud, although he has not alleged fraud in the complaint, as he is not bound to anticipate the defense pleaded. Claflin *v.* Taussig, 7 Hun (N. Y.) 223.

47. Armor *v.* Fisk, 1 Colo. 148 (holding, however, that where an agreement to pay the balance of the purchase-price of property was upon condition that plaintiff should defeat a pending suit, and no such suit was pending, the obligation becomes single, as the condition is impossible to be performed and the sum payable on such condition may be recovered without any averment of performance or of excuse for non-performance of the condition); Moses *v.* Banker, 2 Sweeny (N. Y.) 267. But see Hard *v.* Seeley, 47 Barb. (N. Y.) 428, holding that if the conditions are independent an averment of performance is not essential.

**In an action on the guaranty** of the payment of a certain amount of a third person's bill for goods, on condition of the delivery of the full bill on receipt of the guaranty, an averment that plaintiff, on receipt of the guaranty, sold and delivered to the third person certain goods of a specified value, is sufficient as an averment of performance of the condition, as there is a reasonable intendment in the complaint that the delivery was of all the goods sold. McCreery *v.* Duncan, 53 N. Y. Super. Ct. 448.

**Where the buyer was to advance the freight** to be deducted from the price on settlement, but he refused to receive the goods, it is not necessary for the seller to aver payment of the freight as the refusal to receive was a denial of the freight. Ragland *v.* Butler, 18 Gratt. (Va.) 323.

**Fulfilment of conditions to be performed by the buyer** need not be averred. Malter *v.* Cutting Fruit Packing Co., (Cal. 1901) 66 Pac. 582, where grapes sold were to be picked and cured by the buyer. And see Hubbard *v.* Chapman, 34 N. Y. App. Div. 252, 54 N. Y. Suppl. 527 [*affirmed* in 165 N. Y. 609, 58 N. E. 1088], where the sale was conditioned on a test to be made by a particular person in the buyer's employ.

**Compliance with or waiver of a warranty** may be averred generally. Bragg *v.* Bamberger, 23 Ind. 198; Buckstaff *v.* Russell, 151 U. S. 626, 14 S. Ct. 448, 38 L. ed. 292. Thus where a machine was sold with a warranty and an agreement that the continued use thereof should be regarded as a waiver of the warranty an allegation of continued use is sufficient as an averment of waiver. Bragg *v.* Bamberger, 23 Ind. 198. And where the complaint sets out a contract to sell goods of a certain quality and character, an allegation of delivery and acceptance carries with it the implication that the goods were of the kind and quality warranted. Fairbanks *v.* Midvale Min., etc., Co., 105 Mo. App. 644, 80 S. W. 13.

48. *California.*— Philip *v.* Durkee, 108 Cal. 300, 41 Pac. 407.

*Indiana.*— Bricky *v.* Irwin, 122 Ind. 51, 23 N. E. 694; Drudge *v.* Leiter, 18 Ind. App. 694, 49 N. E. 34, 63 Am. St. Rep. 359, holding that a complaint alleging the delivery of a certain quantity of wheat, of a certain market value, by plaintiff to defendants, "and that in this way, and for said wheat,

being sufficient, however, if a sale and delivery at defendant's request is alleged, to allege that defendant is indebted to plaintiff in a certain sum therefor, which is now due, and that he has paid no part thereof;[49] and it seems that it is not necessary to aver that the goods were sold and delivered at the request of defendant when

the said defendants became indebted to the plaintiff in said sum," etc., was insufficient in that it did not show a contract of sale and breach thereof.

*Montana.*— Smith *v.* Perham, 33 Mont. 309, 83 Pac. 492, holding that a complaint in an action for goods sold, which alleges that during a time specified plaintiff furnished and delivered to defendant certain goods of a specified value, that defendant received the same and used them for his own use, and that he has not paid therefor, states no cause of action, its allegations not being inconsistent with a gift.

*Texas.*— Love *v.* Doak, 5 Tex. 343.

*Utah.*— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

*England.*— Stapleton *v.* Shelburne, 1 Bro. P. C. 215, 1 Eng. Reprint 523.

**It is a sufficient averment of delivery or tender,** if it is alleged that defendant applied for and received the goods under the contract (Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412), or that he took possession thereof (Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098. And see Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548, holding that an allegation that defendants took possession of the property under the contract is not open to the construction that defendants took tortious possession thereof); and a petition which states that defendants were building a railroad, that plaintiffs delivered ties at the railroad, and that defendants received and used them, shows a sufficient cause of action for the value of the ties (Miller *v.* Duff, 34 Mo. 167); and although the delivery was not strictly in compliance with the terms of the contract a recital of the facts and an averment that defendant accepted the delivery without objection is sufficient as stating a cause of action (Bedell *v.* Kowalsky, 99 Cal. 236, 33 Pac. 904). An averment that defendant is indebted to plaintiff for goods bought of him in a certain year, upon which defendant paid a part of the price, leaving a balance due, etc., implies that the goods were delivered to defendant (Winslow *v.* Bradley, 15 Wis. 394), and an averment that goods were shipped and that the seller has fully performed his contract but defendant "fails and refuses to perform his part of the contract and has wholly made default" sufficiently alleges delivery in an action on a contract whereby certain tombstones were to be shipped by plaintiff to defendant, for which a specified price was to be paid "when delivered" (Jaeggli *v.* Phears, 30 Tex. Civ. App. 212, 70 S. W. 330); and a general allegation of performance has been held sufficient without alleging delivery in definite terms (Totten *v.* Cooke, 2 Metc. (Ky.) 275).

**Acceptance of order.**— An averment in the complaint, in an action for the price of goods sold, that at the time plaintiffs received defendants' written order for goods they "accepted and approved said order and contract and wrote [defendants] a postal card," etc., implies that the order was accepted by sending such communication, and pleads no other legal acceptance. J. Thompson, etc., Mfg. Co. *v.* Perkins, 97 Iowa 607, 66 N. W. 874.

**When delivery is not alleged plaintiff** is not entitled to judgment on the pleadings for the price of articles which he was to manufacture and deliver to defendant, due a certain time after the articles were delivered (Midvale Steel Co. *v.* Camden Iron Works, 129 Fed. 246); but where the complaint proceeded on the theory that the goods were the property of defendants, and subject to their direction as to delivery, and alleged plaintiffs' readiness to deliver all the goods and defendants' refusal to accept and pay, the failure to allege the actual fact that a certain portion of the goods had been delivered and accepted did not impair plaintiffs' right to recover for the entire quantity so long as they had fully performed on their part as regarded the goods still in their possession (Kaufman *v.* Canary, 21 Misc. (N. Y.) 302, 47 N. Y. Suppl. 152 [*affirming* 20 Misc. 726, 45 N. Y. Suppl. 1143]); and acceptance and delivery of the articles sold need not be alleged where it is an agreed price that is sued for and not articles sold and delivered, for it may that the articles were not to be delivered until the price should have been paid (Milliken *v.* Waldron, 89 Me. 394, 36 Atl. 630).

**49.** *California.*— Abadie *v.* Carrillo, 32 Cal. 172.

*Colorado.*— Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314.

*Illinois.*— Reed *v.* Walker, 52 Ill. 333.

*Montana.*— S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

*Nebraska.*— Tessier *v.* Reed, 17 Nebr. 105, 22 N. W. 225.

*New York.*— Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Phillips *v.* Bartlett, 9 Bosw. 678.

*Pennsylvania.*— Kamber *v.* Becker, 27 Pa. Super. Ct. 266.

*Texas.*— Guthrie *v.* Mann, (Civ. App. 1896) 35 S. W. 710.

See 43 Cent. Dig. tit. "Sales," § 995.

**Under Nebr. Code Civ. Proc. § 129,** a petition which states that certain goods were sold and delivered by plaintiffs to defendants, sets forth a copy of the account, alleges that there are no credits thereon, and no part thereof has been paid, and that there is due from defendants to plaintiffs a definite sum, is not subject to demurrer as not stating a cause of action. Stubendorf *v.* Sonnenschein, 11 Nebr. 235, 9 N. W. 91.

the sale is stated to have been made to him directly, the contract of sale and delivery of goods, and a delivery thereof, implying an agreement;[50] the rule being otherwise, however, where delivery was to a third person and not to the buyer.[51] Under a contract for sale or return it should also be alleged that return has been demanded and refused;[52] but if plaintiff waives a conversion of the goods and sues in assumpsit for the value thereof, it is not necessary to allege the facts constituting the conversion;[53] and it is not necessary to aver that the quality of the goods was as represented,[54] that the article was satisfactory,[55] or that a machine sold worked well.[56] The complaint need not state where the goods were sold,[57] and the date of the sale is immaterial if payment is due.[58] An averment that defendant is indebted to plaintiff in a specific sum and that no part thereof has been paid is equivalent to an averment that the amount is due and unpaid.[59]

**b. Plea, Answer, or Affidavit of Defense** — (i) *In General.* The general rules relating to pleas, answers, or affidavits of defense in civil actions[60] are applicable in actions for the price or value of goods sold.[61] It is generally sufficient if the answer denies each and every allegation of the complaint not specifically admitted,[62] and where the complaint is for goods "sold and delivered," a denial that the goods were "sold and delivered" is not evasive as being in the con-

**50.** Acome *v.* American Mineral Co., 11 How. Pr. (N. Y.) 24. But see McEwen *v.* Morey, 60 Ill. 32.

**51.** Smith *v.* Leland, 2 Duer (N. Y.) 497. See also Fry *v.* Colburn, 17 Ind. App. 96, 46 N. E. 351.

**52.** Crosby *v.* Tichenor, 6 Blackf. (Ind.) 418, where the declaration was held to satisfy this rule.

**An admission of a bailment cannot be implied** where in an action for the price of goods sold on memorandum the complaint alleges a delivery of the goods on memorandum, to be held and returned by defendants at their risk during a reasonable time, and, if not returned within a reasonable time, to pay the value thereof. Oelbermann *v.* Jarman, 12 N. Y. Suppl. 383.

**53.** Galvin *v.* Mac Min., etc., Co., 14 Mont. 508, 37 Pac. 366; Doherty *v.* Shields, 86 Hun (N. Y.) 303, 33 N. Y. Suppl. 497. See also Willis *v.* Morse, 4 Silv. Sup. (N. Y.) 83, 7 N. Y. Suppl. 304, holding that where the complaint declares on contract and also sets out facts showing fraud and conversion the latter allegations may be struck out as surplusage.

**54.** Neal *v.* Shelwalter, 5 Ind. App. 147, 31 N. E. 848.

**55.** Buckstaff *v.* Russell, 151 U. S. 626, 14 S. Ct. 448, 38 L. ed. 292.

**56.** McClamrock *v.* Flint, 101 Ind. 278.

**57.** Behlow *v.* Shore, 91 Cal. 141, 27 Pac. 546.

**Place of delivery.**— A complaint in an action for the price of goods sold, alleging a proposition by plaintiffs to sell, which fixed the place of delivery aboard the cars at one town, and a written acceptance by defendant, changing such place of delivery to another town, and the ratification by plaintiffs of the qualified acceptance, was sufficient as a declaration on a contract for the delivery of goods on the cars at the town named by defendant. Mesker *v.* Heath, (Tex. Civ. App. 1896) 34 S. W. 374.

**58.** McLaughlin *v.* Turner, 16 Fed. Cas. No. 8,875, 1 Cranch C. C. 476.

**Averaging dates of delivery.**— A complaint for goods sold on a credit of thirty days, verified less than thirty days after the delivery of part of the goods, alleging that, "by averaging dates of delivery, the whole account has become due, and defendant has not paid the same," although stating facts from which the probable existence of a partial defense might be inferred is not, for that reason, insufficient on demurrer. Newell Bros. Mfg. Co. *v.* Grunwald, 1 N. Y. Suppl. 434.

**An averment of sale and delivery at divers times between certain dates is sufficient** without alleging a specific date for each transaction. Read *v.* Walker, 52 Ill. 333. And see Deacon *v.* Uhlman, 21 Pa. Super. Ct. 381, holding that a statement of claim reciting that plaintiffs sold and delivered to defendant, in the month of March, 1901, two thousand three hundred and ninety-nine quarts of milk, and, in the month of April, 1901, two thousand three hundred and sixteen quarts of milk, at the price of three and one-half cents per quart, the price agreed between them, making the total indebtedness therefor one hundred sixty-five dollars and three cents, is sufficient without stating the date of each transaction.

**59.** Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902.

**60.** See PLEADING, 31 Cyc. 126.

**61.** McKenna *v.* Hoy, 76 Iowa 322, 41 N. W. 29, holding that in an action for the price of a team an answer alleging that plaintiff received the note of one G, in payment, and gave his own note to defendant for the difference between the price of the team and the amount of G's note, is an admission that the price of the team was the difference between the amount of plaintiff's note and the sum due on G's.

**62.** Rawlings *v.* Alexander, 8 Misc. (N. Y.) 514, 28 N. Y. Suppl. 748.

junctive; [63] but defendant's pleading, whether in form an answer, plea, or affidavit of defense must set forth the facts necessary to constitute a substantial defense, mere general averments amounting to legal conclusions being insufficient,[64] and must be responsive to plaintiff's claim,[65] and must state definitely and directly the facts relied on to defeat such claim.[66] A mere denial of indebtedness is insufficient,[67] as is also a simple allegation of overcharge without specifying the par-

**63.** Feldman *v.* Shea, 7 Ida. 717, 59 Pac. 537.

**64.** Cropley *v.* Vogeler, 2 App. Cas. (D. C.) 28; Hardenburgh *v.* Fish, 61 N. Y. App. Div. 333, 70 N. Y. Suppl. 415; Williams *v.* Sawyers, 155 Pa. St. 129, 25 Atl. 1049; American Electric Constr. Co. *v.* Consumers' Gas Co., 47 Fed. 43 [*affirmed* in 50 Fed. 778, 1 C. C. A. 663].

**An affidavit of defense that the goods charged to defendant** were "excessive in amount," not specifying the excess, is insufficient, as too vague. Jenkinson *v.* Hilands, 146 Pa. St. 380, 23 Atl. 394.

**65.** Smith *v.* Dick, 95 Ala. 311, 10 So. 845; Cropley *v.* Vogeler, 2 App. Cas. (D. C.) 28; Seelav *v.* McKenzie, 92 N. Y. Suppl. 350; Laferty *v.* Sheriff, (Pa. 1888) 16 Atl. 90; Armor Lith. Co. *v.* Allegheny Mach. Co., 1 Mona. (Pa.) 84. See also Westcott *v.* Reiff, 75 N. Y. Suppl. 488, holding that in an action for the price of goods, where the complaint averred that plaintiff sold "certain goods, wares, and merchandise" to defendant, a defense that, between the dates alleged, defendant ordered of plaintiff "certain slate goods," which, when delivered, were cracked, and that, on plaintiff's request, defendant sold them on plaintiff's account, and paid the proceeds to plaintiff, but not alleging that the property mentioned in the defense was the same as that mentioned in the complaint was demurrable.

**A denial that defendant agreed or promised to pay money sued for** constitutes no defense, where allegations in the petition that the goods were sold at defendant's special instance and request, and at prices set out in an itemized account filed therewith, are not controverted. Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795.

**66.** *Illinois.*— Townsend *v.* Water Com'rs, 63 Ill. 26, 14 Am. Rep. 109.

*Indiana.*— Bacon *v.* Markley, 46 Ind. 116.

*New York.*— Flournoy *v.* Osgood, 99 N. Y. App. Div. 270, 90 N. Y. Suppl. 972.

*Pennsylvania.*— Heckscher *v.* American Tube, etc., Co., 137 Pa. St. 421, 20 Atl. 804; Fish *v.* Barr, 22 Pa. Super. Ct. 131; Drake *v.* Irvine, 10 Pa. Co. Ct. 486; Tunis Lumber Co. *v.* Henwood Co., 18 Lanc. L. Rev. 114.

*United States.*— Kenworthy *v.* Hirst, 124 Fed. 995.

**Denial of delivery.**— A statement in the affidavit of defense that defendant received no notice of a certain shipment of goods made to him by plaintiff, and that, as far as he knows, they were not delivered in his name, is insufficient, as against a claim for the price of the shipment. McKay *v.* McKenna, 173 Pa. St. 581, 34 Atl. 236.

**A denial on information and belief** that defendant purchased goods of plaintiff is insufficient. Weill *v.* Crittenden, 139 Cal. 488, 73 Pac. 238.

**A plea based on delay in delivery** should allege the time fixed for delivery (Hitchcock *v.* Turnhull, 44 Minn. 475, 47 N. W. 153), that the delay was due to the fault of plaintiff (Smith *v.* Baxter, 13 Ind. 151), and should also set out the particulars of the loss or damage suffered by defendant by reason of the default or delay (Carnahan Stamping, etc., Co. *v.* Foley, 23 Pa. Super. Ct. 643; Wilmot, etc., Mfg. Co. *v.* Pennsylvania Bolt, etc., Co., 21 Pa. Super. Ct. 490; Gausler *v.* Bridges, 13 Pa. Super. Ct. 646; Delaware Electric, etc., Co. *v.* Curran, 24 Pa. Co. Ct. 505, 8 Del. Co. 139), and where the contract of sale was in writing and the treasurer and manager of the seller corporation fixed the time of delivery by a collateral agreement, the authority of the officer should be alleged (Twining *v.* Roberts, 16 Pa. Super. Ct. 4, 8 Del. Co. 143).

**Where the seller agreed to release the goods sold from a lien** for storage rent, and the purchaser accepted a draft for the price without obtaining delivery of the goods, an allegation in the answer in an action on such draft that the vendor, although often requested to do so, has failed to pay such charges, and has failed and refused to deliver the goods, or any part thereof, is, as against a motion for judgment on the pleadings, sufficient to show a demand for a delivery of the goods. Malone *v.* Minnesota Stone Co., 36 Minn. 325, 31 N. W. 170.

**Payment.**— Where an account is attached to the declaration as an exhibit an allegation that the last payment shown by said account was made and accepted as payment in full of the amount due is sufficient as a plea of payment (White *v.* Safe Harbor Match Co., 106 Fed. 109); and an allegation that defendant has paid for all goods "received by him in the transaction" in issue is an admission of the sale and delivery and a plea of payment (Ketelman *v.* Chicago Brush Co., 65 Nebr. 429, 91 N. W. 282); but a plea that defendant made payment in goods and money is not good as a plea of accord and satisfaction unless it is alleged that plaintiff accepted the goods in satisfaction (Sinard *v.* Patterson, 3 Blackf. (Ind.) 353).

**67.** *Colorado.*— Moffit-West Drug Co. *v.* Lyneman, 10 Colo. App. 249, 50 Pac. 736.

*Kentucky.*— Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795.

*Montana.*— Higgins *v.* Germaine, 1 Mont. 230.

*New York.*— Hardenburgh *v.* Fish, 61 N. Y.

ticular items;[68] but a general plea of non-performance of conditions on the part of the seller is good.[69]

(II) *Particular Averments* — (A) *Existence and Nature of Contract.* An affidavit of defense which denies positively and directly that defendant purchased the goods and that he ever received the goods or any portion thereof is sufficient,[70] as is also a plea that defendant purchased the goods merely as agent of the real buyer, as the seller well knew;[71] and so too it is sufficient if defendant pleads definitely that he did not purchase from plaintiff but from a third person;[72] but it is not sufficient to deny that he purchased the goods if it is not also denied that the goods were received and used;[73] and in an action for goods sold and delivered, an affidavit of defense which simply denies that defendant bought or received the goods for which suit is brought, and does not deny the execution of a contract for the sale and delivery of said goods, and a delivery or an attempt to deliver in pursuance of such contract is not sufficient.[74] A defense that the contract was one of consignment and not of sale must be specially pleaded.[75]

(B) *Misrepresentation and Fraud.* If misrepresentation is the basis of the defense, the allegations must show representations which in law amount to a warranty,[76] or that they were fraudulent.[77] Allegations of fraud must be direct and certain,[78] and a general plea which does not set out definitely the facts on which the fraud is based is insufficient. The circumstances constituting the fraud should be specified,[79] and it must appear that the fraud alleged was con-

App. Div. 333, 70 N. Y. Suppl. 415; Lamb *v.* Hirschberg, 1 Misc. 108, 20 N. Y. Suppl. 678.

*Wisconsin.*— Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

But see Flowers *v.* Slater, 2 Ohio Dec. (Reprint) 336, 2 Cinc. L. Bul. 445, holding that where an action is brought to recover for property sold and delivered, and the evidence shows a sale or exchange and a payment as a condition of the delivery, an answer that defendant is not indebted is not sufficient.

**Frivolous answer.**— An answer, in an action for goods sold and delivered, admitting a sum due as stated in the complaint, but denying that it became due on a certain date, is frivolous. Aiken *v.* Haskins, 27 Misc. (N. Y.) 629, 59 N. Y. Suppl. 486 [*affirmed* in 48 N. Y. App. Div. 638, 63 N. Y. Suppl. 1104].

68. Gausler *v.* Bridges, 13 Pa. Super. Ct. 646; Nellis *v.* Reiter, 2 Wkly. Notes Cas. (Pa.) 203.

69. Andre *v.* Morrow, 65 Miss. 315, 3 So. 659, 7 Am. St. Rep. 658.

**A plea setting up failure to perform a condition collateral to a written contract** should allege that the condition was omitted from the writing by mistake or fraud. McKegney *v.* Widekind, 6 Bush (Ky.) 107.

70. Barker *v.* Fairchild, 168 Pa. St. 246, 31 Atl. 1102; Caldwell *v.* Prendergest, 14 Wkly. Notes Cas. (Pa.) 125.

71. Gibbons *v.* Dabney, 2 Wkly. Notes Cas. (Pa.) 490.

72. Manufacturing Co. *v.* Harding, 3 Pa. Co. Ct. 150.

**But if the complaint alleges that plaintiff sold the goods as agent of another,** an answer setting up that the goods belonged to a third person and not to plaintiff, and that they were sold by such third person, is insufficient, if it does not deny delivery by plaintiff and his agency for such third person. Reilly *v.* Cook, 13 Abb. Pr. (N. Y.) 255, 22 How. Pr. 93.

73. Ewer *v.* Laughlin, 22 Pittsb. Leg. J. N. S. (Pa.) 317; Hunsicker *v.* Arnold, 1 Wkly. Notes Cas. (Pa.) 589; Reis *v.* Herman, 1 Wkly. Notes Cas. (Pa.) 84. But see Friel *v.* Custer, 23 Pa. Super. Ct. 466.

74. Register Co. *v.* Flaherty, 12 Pa. Co. Ct. 475.

75. Wallace *v.* Blake, 128 N. Y. 676, 28 N. E. 603 [*affirming* 58 N. Y. Super. Ct. 13, 8 N. Y. Suppl. 862].

76. Raines *v.* Dooley, 23 Ark. 329.

77. Raines *v.* Dooley, 23 Ark. 329.

78. Stever *v.* Lamoure, Lalor (N. Y.) 352; Blanton *v.* Craven, 173 Pa. St. 374, 34 Atl. 437; Goodwin *v.* Schott, 159 Pa. St. 552, 28 Atl. 356, 358.

79. *Alabama.*— Lawton *v.* Ricketts, 104 Ala. 430, 16 So. 59.

*Arizona.*— History Co. *v.* Dougherty, 3 Ariz. 387, 29 Pac. 649, holding that the mere use of the word "fraudulently" is an insufficient allegation of fraud, in the absence of allegations of fact.

*Arkansas.*— Hynson *v.* Dunn, 5 Ark. 395, 41 Am. Dec. 100.

*Florida.*— Jones *v.* Streeter, 8 Fla. 83.

*Indiana.*— Patterson *v.* Lord, 47 Ind. 203; Keller *v.* Johnson, 11 Ind. 337, 71 Am. Dec. 355. But see Elliott *v.* Coggshall, 4 Blackf. 238, 29 Am. Dec. 365.

*Montana.*— Budd *v.* Power, 8 Mont. 380, 20 Pac. 820.

*New York.*— Hunt *v.* Mails, 1 Code Rep. 118.

*Texas.*—Riley *v.* Treanor, (Civ. App. 1894) 25 S. W. 1054; Morgan *v.* Vandermark, 1 Tex. App. Civ. Cas. § 511.

See 43 Cent. Dig. tit. "Sales," § 1015.

nected with the transaction described in the statement of claim,[80] and the plea should allege the seller's knowledge of the falsity of his representations,[81] or that he made the representations without knowing them to be true,[82] his intent to deceive,[83] the buyer's reliance thereon,[84] and that damage resulted therefrom.[85] If rescission for fraud is relied on an offer to return must be alleged.[86] An affidavit of defense alleging defects in the quality of the goods furnished must state definitely and specifically the defects relied upon[87] and the damages sustained thereby.[88]

(c) *Defects in Quality.* It is not sufficient to allege merely that the goods were defective or inferior in quality to those ordered, and that damage resulted, but the character of the defect should be specified,[89] and there must be a distinct

**Answer held sufficiently to allege fraud in sale of a mule** see Brooks *v.* Matthews, 78 Ga. 739, 3 S. E. 627.

80. Kennedy *v.* Aber, 1 Pa. Dist. 770, 11 Pa. Co. Ct. 570.

81. Conant *v.* Terre Haute Nat. State Bank, 121 Ind. 323, 22 N. E. 250; Shook *v.* Singer Mfg. Co., 61 Ind. 520; Cunningham *v.* Smith, 10 Gratt. (Va.) 255, 60 Am. Dec. 333.

**Fraudulent concealment.**— In an action for the purchase-price of a distiller's brand, an answer setting up that defendant purchased on the faith of plaintiff's representation that the brand was of good repute, and that plaintiff fraudulently concealed from defendant the fact that he had destroyed the value of the brand by the manufacture of a large quantity of inferior whisky, states a good defense. Dant *v.* Head, 90 Ky. 255, 13 S. W. 1073, 12 Ky. L. Rep. 153, 29 Am. St. Rep. 369.

82. Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. 92, where the seller made representations which he did not know to be true. And see Thompson *v.* Varnin, 4 J. J. Marsh. (Ky.) 254.

83. Lefler *v.* Field, 52 N. Y. 621; Cote *v.* Christy, 10 Pa. Super. Ct. 318, 44 Wkly. Notes Cas. 438.

84. *Alabama.*— Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

*Indiana.*— Jones *v.* Frost, 51 Ind. 69.

*Minnesota.*— Loveland *v.* Gravel, 95 Minn. 135, 103 N. W. 721.

*New York.*—Star Steamship Co. *v.* Mitchell, 1 Abb. Pr. N. S. 396.

*Texas.*— Morgan *v.* Vandermark, 1 Tex. App. Civ. Cas. § 511.

**Knowledge of buyer.**—A plea to an action on a promissory note, alleging that "it was obtained by fraud and circumvention, in this, that the plaintiff represented himself to be the owner of [certain stock] worth $300, being the property for which the note was given, when in truth, plaintiff had not that number, nor were they good and valuable as represented" is bad, inasmuch as it does not allege that plaintiff used any means to deceive or circumvent defendant, and it was in his power by ordinary precaution to have ascertained the value and number. Sims *v.* Klein, 1 Ill. 302. See also Welling *v.* Schiller, 27 Ill. App. 284.

85. Parker *v.* Jewett, 52 Minn. 514, 55 N. W. 56.

**The extent of damage** should be shown. Parker *v.* Jewett, 55 Minn. 514, 55 N. W. 56. But see Fleming *v.* Toler, 7 Gratt. (Va.) 310, holding that the amount of damage need not be alleged if there is a prayer for judgment in bar of the action.

86. American Banking, etc., Co. *v.* Donnelly, 9 Wkly. Notes Cas. (Pa.) 573.

**Allegation of rescission of the contract** held sufficient see Davis Coal, etc., Co. *v.* Price, 175 Pa. St. 155, 34 Atl. 444; Dupuy *v.* Arnold, 1 Wkly. Notes Cas. (Pa.) 157; Stout *v.* Mullen, 1 Wkly. Notes Cas. (Pa.) 150.

87. Wile, etc., Co. *v.* Onsel, 10 Pa. Co. Ct. 659.

**Affidavits of defense alleging deficiency in quantity or quality held sufficient** see Edison Electric Light Co. *v.* McCorkell, 161 Pa. St. 227, 28 Atl. 1083; Tennessee Lumber Co. *v.* Garrison, 10 Pa. Cas. 67, 13 Atl. 454; Bihn *v.* Worrall, 4 Lanc. L. Rev. (Pa.) 194; Nichols *v.* Fleming, 2 Wkly. Notes Cas. (Pa.) 15.

88. Lane *v.* Penn Glass Sand Co., 172 Pa. St. 252, 33 Atl. 570; Badger *v.* McKay, 9 Wkly. Notes Cas. (Pa.) 528; Cornell *v.* Parry, 2 Wkly. Notes Cas. (Pa.) 611.

89. *Alabama.*— Penn *v.* Smith, 93 Ala. 476, 9 So. 609.

*Florida.*— Jones *v.* Streeter, 8 Fla. 83.

*Georgia.*— Spinks *v.* Washington, 96 Ga. 756, 22 S. E. 326.

*Illinois.*— Hough *v.* Gage, 74 Ill. 257.

*Indiana.*—Aermotor Co. *v.* Earl, 18 Ind. App. 181, 47 N. E. 685.

*Kentucky.*— Vogel *v.* Moore, 84 S. W. 557, 27 Ky. L. Rep. 94.

*New York.*— Castles *v.* Woodhouse, 1 Code Rep. 72.

*Pennsylvania.*— Vollmer *v.* Magowan, 180 Pa. St. 110, 36 Atl. 571; Ogden *v.* Beatty, 137 Pa. St. 197, 20 Atl. 620, 21 Am. St. Rep. 862; Fuhrman *v.* Stackman, 28 Pa. Super. Ct. 154; Genesee Paper Co. *v.* Bogert, 23 Pa. Super. Ct. 23; Wile, etc., Co. *v.* Onsel, 10 Pa. Co. Ct. 659; Bonneville *v.* Hamilton, 8 Kulp 216; Kress Stationery Co. *v.* Hallock, 7 Kulp 313; Anderson *v.* Williams, 44 Wkly. Notes Cas. 418; Connett *v.* Brooks, 11 Wkly. Notes Cas. 283; Taylor *v.* North, 3 Wkly. Notes Cas. 77.

*Texas.*— Barnard *v.* Robertson, (Civ. App. 1895) 29 S. W. 697; A. J. Anderson Electric

allegation of loss suffered by the buyer.[90] So too a general allegation that the article was not fit for the purpose intended is insufficient, in the absence of an allegation of express warranty or of the facts on which an implied warranty would arise, as that it was furnished for a particular purpose.[91] If the contract provided that notice of defects should be given the plea must allege notice.[92]

(D) *Rescission and Return of Goods.* Where a rescission of the contract is relied on as a defense it must be specifically pleaded,[93] and it must be alleged that

Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1894) 27 S. W. 504; Wood *v.* Ross, (Civ. App. 1894) 26 S. W. 148.

See 43 Cent. Dig. tit. "Sales," §§ 1011, 1018.

**The price of the goods returned** should be stated in an affidavit of defense alleging that a portion of the goods charged against deponent were subsequently returned to plaintiff and received by him for which plaintiff failed to give deponent credit. Weil *v.* Michael, 10 Wkly. Notes Cas. (Pa.) 337.

**Specification of defects held sufficient** see Simpson *v.* Karr, 22 Pa. Super. Ct. 8.

**Adulterated liquors.**— A mere averment in an affidavit of defense that liquors were impure, vitiated, and adulterated, without averring that such impurity, vitiation, or adulteration impaired the quality or value of the goods, or stating facts which would necessarily imply such infirmity, is not sufficient to prevent judgment, in an action for the price of liquors sold and delivered. Spellman *v.* Kelly, 27 Pa. Super. Ct. 39. But see Rheinstrom *v.* Wolf, 26 Pa. Super. Ct. 559, holding that an averment that defendant was a licensed wholesale dealer, that he distributed the liquors to his customers, when it was discovered that the liquors were impure, vitiated, and adulterated, and in consequence defendant lost customers and suffered damages, is sufficient as an allegation that the quality was impaired.

**In an action on a promissory note** given for the purchase-price of a chattel an answer of "no value" in the article purchased is no defense for the buyer unless coupled with averment of warranty, fraud, or some fault on the part of the seller. Myers *v.* Conway, 62 Ind. 474; Smith *v.* Baxter, 13 Ind. 151; Phillips *v.* Bradbury, 3 Blackf. (Ind.) 388; Pulhamus *v.* Pursel, 2 Pa. L. J. Rep. 141.

**An answer showing that the goods were wholly worthless** is good on demurrer (Morehead *v.* Murray, 31 Ind. 418; Davis *v.* Sweeney, 75 Iowa 45, 39 N. W. 174); but an answer alleging that a clock purchased was of "no value" as a timepiece does not show an entire failure of consideration, since the clock may have had value other than as a timepiece (Speak *v.* Warner, 5 J. J. Marsh. (Ky.) 68).

90. Jones *v.* Streeter, 8 Fla. 83; Sweigard *v.* Consumers' Ice Mfg., etc., Co., 15 Pa. Super. Ct. 285.

**Special damages.**— An affidavit of defense, setting up special damages for loss of existing contracts for work by reason of plaintiff's delay in delivering the machinery, must allege that, at the time of the sale, plaintiff had knowledge of defendant's contracts for work, and that the sale was made in view thereof. Keystone Drilling Co. *v.* Stahl, 17 Pa. Co. Ct. 498.

**Sale by sample.**— In an action on a contract for sale of tobacco by sample, an affidavit of defense setting up that a portion of the tobacco was unfit for the purposes for which it was purchased, and that the purchase-price of such portion amounted to sixty dollars, was sufficient to prevent a judgment as to such amount. Straus *v.* Welsh, 29 Pa. Super. Ct. 437.

91. Misner *v.* Granger, 9 Ill. 69; Connersville *v.* Wadleigh, 6 Blackf. (Ind.) 297; Woodruff *v.* Hensley, 26 Ind. App. 592, 60 N. E. 312.

**Fitness for purpose.**— Where the plea in an action for the price of a horse does not allege that it was sold for any particular purpose, the words "the purpose for which it was bought" in the allegation that it was utterly worthless for the purpose for which it was bought are properly struck out. Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56.

**Denial of use.**— In an action to recover the price of paper sold to a publisher of a newspaper, an affidavit of defense is insufficient in averring that a certain amount of the paper, of a value named, was waste paper, and unfit for the purposes for which it was ordered by defendant from plaintiff, and could not be used by defendant for any purpose whatever, without any averment that it was not used. Genesee Paper Co. *v.* Bogert, 23 Pa. Super. Ct. 23.

**An allegation that a machine did not work well** is not sufficient in the absence of any averment that the failure was due to a defect in the machine. Flint *v.* Cook, 102 Ind. 391, 1 N. E. 633.

92. Beasley *v.* Huyett, etc., Mfg. Co., 92 Ga. 273, 18 S. E. 420.

93. McCormick *v.* Barry, 10 Nebr. 207, 4 N. W. 1014; Sloan Commission Co. *v.* Fry, 4 Nebr. (Unoff.) 647, 95 N. W. 862; Haas *v.* Selig, 26 Misc. (N. Y.) 191, 55 N. Y. Suppl. 439 [*affirmed* in 27 Misc. 504, 58 N. Y. Suppl. 328]; Steiger *v.* Fronhofer, 43 Oreg. 178, 72 Pac. 693.

**Grounds of rescission.**— In an action for goods sold, a plea that the contract was obtained by misrepresentation as to the place where the goods were manufactured, and that as soon as defendants learned of such fact they rescinded the contract, etc., was not objectionable, in that it was not shown that the contract was rescinded on account of the misrepresentation of a material fact, or that

the goods were returned or tendered in return.[94] So too an answer based on failure of consideration because of defects in the quality of the goods should allege that the goods were returned or tendered;[95] but where the defense is fraud, set up to defeat plaintiff's recovery *pro tanto*, rescission and offer to return need not be alleged.[96]

(E) *Recoupment, Set-Off, and Counter-Claim.*[97] Allegations of matter relied on as a set-off or counter-claim must be definite[98] and set out all the essential facts on which such offset is based.[99] Thus a counter-claim for freight paid must allege that the freight was paid at the request of plaintiff and not voluntarily,[1] and if the counter-claim is based on goods furnished to another on account of plaintiff it must appear that they were delivered on plaintiff's request;[2] but a counter-claim based on the failure of the seller to supply the goods contracted for, alleging that defendant was obliged to buy the goods at a price in excess of the contract price, is good, although it does not distinctly allege that the price so paid was the market price.[3] Where delivery and payment were concurrent

defendants were induced to enter into the contract by reason of the alleged misrepresented facts, or that it was not shown that any injury was sustained on account of the alleged misrepresentation. Brenard Mfg. Co. *v.* Citronelle Mercantile Co., 140 Ala. 602, 37 So. 509.

**94.** Burns *v.* Barnes, 58 Ind. 436; Rose *v.* Hurley, 39 Ind. 77; Donahue *v.* Prosser, 10 Iowa 276; Sloan Commission Co. *v.* Fry, 4 Nebr. (Unoff.) 647, 95 N. W. 862; Steiger *v.* Fronhofer, 43 Oreg. 178, 72 Pac. 693.

**Sufficiency of allegation.**—An answer which states that a threshing-machine separator for which the note in suit was given proved to be utterly worthless, and that defendant notified plaintiff's agent of the fact, and gave him an opportunity to repair it or to take it off his hands, sufficiently shows an offer to return the property. Aultman, etc., Co. *v.* Trainer, 80 Iowa 451, 45 N. W. 757.

**Return of all the goods.**— It should be alleged that the goods returned were all the goods which defendant had purchased under the contract in issue. Arons *v.* Kopf, 21 Pa. Super. Ct. 123.

**95.** *Alabama.*— Bessemer Ice Delivery Co. *v.* Brannen, 138 Ala. 157, 35 So. 56.

*Iowa.*—Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537, 75 N. W. 369.

*New York.*— Coplay Iron Co. *v.* Pope, 108 N. Y. 232, 15 N. E. 335 [*affirming* 13 Daly 144].

*North Carolina.*— Sapona Iron Co. *v.* Holt, 64 N. C. 335.

*Pennsylvania.*—American Watch Tool Co. *v.* Reed Mfg. Co., 18 Pa. Super. Ct. 24.

*South Carolina.*— Fewell *v.* Deane, 43 S. C 257, 21 S. E. 1.

*United States.*—Christy *v.* Cummins, 5 Fed. Cas. No. 2,708, 3 McLean 386.

*Canada.*— Dominion Bag Co. *v.* Charles A. Bull Produce Co., 5 Quebec Pr. 175.

See 43 Cent. Dig. tit. "Sales," § 1022.

**Sufficient allegations.**— An answer alleging that the goods were worthless or were not of the quality represented and warranted and that they were tendered back to the seller is good as against a general demurrer. Smith *v.* Borden, 160 Ind. 223, 66 N. E. 681; Tecumseh Facing Mills *v.* Sweet, 25 Ind. App. 284, 58 N. E. 93; Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

**Illegal sale.**— A plea which sets up as a defense to an action for purchase-money that the sale was illegal need not offer to return the property. Barker *v.* Justice, 41 Miss. 240.

**96.** Field *v.* Austin, 131 Cal. 379, 63 Pac. 692; Hillenbrand *v.* Stockman, 123 Ind. 598, 24 N. E. 370; Rogers *v.* McKnight, 4 J. J. Marsh. (Ky.) 154; Hardwick *v.* Hardwick, 4 Bibb (Ky.) 569.

**97. Substantive law regarding offsets** see *supra*, VIII, E, 4, b.

**98.** Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Charles E. Dustin Co. *v.* Petersburg Inv. Co., 126 Fed. 816.

**Information and belief.**— Allegations as to defects in quality made on information and belief are not sufficient as a counter-claim. Weaver *v.* Bonnell, 15 Misc. (N. Y.) 456, 37 N. Y. Suppl. 212.

**99.** Lane *v.* Whitehouse, 46 Ind. 389; Herman *v.* Gray, 79 Wis. 182, 48 N. W. 113.

**Title and possession.**— In an action against a railroad company for the price of ties sold and delivered, a plea in set-off that a portion was taken from the company's own lands, of which fact defendant was first apprised after their delivery, is bad on demurrer, for not averring possession in the seller at the time of sale, so a warranty of title could be implied, nor any affirmation of title. Illinois Cent. R. Co. *v.* Leidig, 64 Ill. 151.

**A plea may be good as an offset, although it is not sufficient as an absolute defense.** — Rotan *v.* Nichols, 22 Ark. 244, where it was held that the plea was sufficient as setting up matter for recoupment in damages, although, in the absence of any averment of a return, or offer to return, or excuse for not doing so, it was not good as setting up a total failure of consideration.

**1.** Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

**2.** Briggs *v.* Seymour, 17 Wis. 255.

**3.** McCaw Mfg. Co. *v.* Felder, 115 Ga. 408, 41 S. E. 664.

conditions, and defendant seeks to counter-claim damages for failure to deliver, the answer must allege an offer or readiness to pay.[4]

**c. Reply.** The general rules as to replies in civil actions [5] apply to actions for the price or value of the goods sold.[6] Thus the allegations of the answer should be specifically admitted or denied,[7] and a reply that is merely an argumentative denial is not sufficient.[8] Where the defenses are a failure of consideration and a breach of warranty an amendment to the reply alleging that defendant did not offer to rescind or return the goods is properly stricken off, as it alleges nothing affecting defendant's right to recover on either of his defenses.[9]

**d. Issues, Proof, and Variance** — (i) *Issues and Proof* — (a) *In General.* The usual rules relating to issues and proof in civil actions [10] are applicable to actions for the price or value of goods sold.[11] Thus the fact that non-essential averments are not proved or are disproved will not affect the right to recover if the cause of action stated is substantially supported by the evidence; [12] but every material allegation necessary to establish the cause of action or defense must be proved,[13] such as allegations regarding the sale and delivery [14] and the price or

4. Chambers *v.* Frazier, 29 Ohio St. 362.

5. See Pleading, 31 Cyc. 241.

6. Warren *v.* Cash, 143 Ala. 158, 39 So. 124 (holding that where the plea merely denies that the account sued on was due when suit was brought, a reply pleading the special condition on which the account was to become due short of the period of credit is not necessary to let in proof of the condition); Stoddard *v.* Kelly, 50 Ala. 452 (holding that a plea that plaintiff represented the animal sold as sound whereas it was in fact unsound is fully met and answered by a reply alleging that plaintiff sold the property in his representative capacity and made no representations as to soundness); Hunter *v.* Leavitt, 36 Ind. 141 (holding that to a plea alleging defects in goods manufactured for defendant, a reply alleging that the goods were manufactured under the direction of defendant's authorized agent and that the note in suit was given by defendant after inspection of the goods is sufficient).

To a plea in set-off for damages a replication setting up a judgment for such damages recovered by the buyer from which an appeal is pending is no answer. King *v.* Bradley, 44 Ill. 342.

7. Brenard Mfg. Co. *v.* Citronelle Mercantile Co., 140 Ala. 602, 37 So. 509; American Button-Hole, etc., Co. *v.* Thornton, 28 Minn. 418, 10 N. W. 425.

Assignment of cause of action.— Where an action is brought by an assignee in the name of the assignor and the assignment is pleaded, a replication is good, setting up that the action is brought by the assignee. Rumsey *v.* Cunningham, 6 Can. L. T. Occ. Notes 490, 18 Nova Scotia 357.

8. Magnuson *v.* Billings, 152 Ind. 177, 52 N. E. 803.

9. Toledo Sav. Bank *v.* Rathmann, 78 Iowa 288, 43 N. W. 193.

10. See Pleading, 31 Cyc. 670.

11. Blaise *v.* Anderson, 35 Minn. 306, 28 N. W. 922, holding that, under an allegation that the "title to [the property] was not satisfactory," it may be shown that there was a chattel mortgage on the property.

Interest sold.— In a complaint for personal property sold and delivered, an averment that plaintiff sold a greater interest than he did in fact dispose of does not, under the issue raised by a general denial, prevent his recovering the value of the interest defendant purchased from him. Vanaukin *v.* Smith, 25 Ind. 249.

Where plaintiffs admit that credit has not expired defendant's insolvency and fraud may be proved without averring them. Eppens *v.* McGrath, 3 N. Y. Suppl. 213.

Where the answer is merely a general denial it is not essential that plaintiff should prove the non-existence of defects. Bancroft *v.* Sheehan, 21 Hun (N. Y.) 550.

12. Childers *v.* R. C. Stone Milling Co., 99 Mo. App. 264, 72 S. W. 1077.

Allegations that defendant obtained credit by false representations may be treated as surplusage, the sale and delivery being proved. Dodge *v.* Eckert, 71 Hun (N. Y.) 257, 24 N. Y. Suppl. 1074.

To sustain a defense of failure of consideration it is not necessary to show a breach of warranty. Aultman, etc., Co. *v.* Trainer, 80 Iowa 451, 45 N. W. 757.

13. New York Store Mercantile Co. *v.* Chapman, 78 Mo. App. 616, holding that where the theory of the complaint is that defendant was to pay for the goods out of the proceeds of the sale thereof, plaintiff must prove such sale or a conversion by defendant.

If a failure of title is relied on, in that the goods were taken under a prior mortgage, the mortgage and its validity must be proved. Hanna *v.* Buckley, 48 Nebr. 127, 66 N. W. 1122.

14. Burnham *v.* Roberts, 70 Ill. 19; Robbins *v.* St. Louis, etc., R. Co., 34 Mo. App. 609.

Admission in an action for the price of shoes that a certain amount was due, except as it might be reduced by proof of offsets or settlement, makes proof of delivery of the shoes unnecessary. Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534 [*affirming* 107 Ill. App. 47].

value.[15] Proof must be restricted to the issues raised by the pleadings or notice of special matter;[16] but although plaintiff declares on the contract he may recover on the common counts if recovery cannot be had on the contract as pleaded,[17] and the contract is admissible in evidence, although not specially counted on.[18]

(B) *General Issue or General Denial.* Under the general issue or general denial defendant may show that he purchased of a third person claiming to sell in his own right;[19] may introduce evidence as to the value of the

**Under an order for goods delivery and acceptance must be proved** (Harman *v.* Bennett, 1 F. & F. 400; Anderson *v.* Hodgson, 5 Price 630); but where consignees of wheat sold to a third person agreed to collect the price before delivery, and failed to do so, in an action against them by the consignors, an allegation in the complaint that the wheat was delivered to them by the railroad company is redundant, and need not be proved, it appearing that the wheat was in cars and subject to their order as consignees (Scanlan *v.* Hodges, 52 Fed. 354, 3 C. C. A. 113).

**Delivery prevented.**— A showing that there was no actual delivery, but that delivery was prevented by defendants' refusal to receive the goods at the time and place when and where they were ordered, did not constitute a failure of proof. Butler *v.* Hirzel, 87 N. Y. App. Div. 462, 84 N. Y. Suppl. 693 [*affirmed* in 181 N. Y. 520, 73 N. E. 1120].

15. Albro *v.* Figuera, 60 N. Y. 630; Lambert *v.* Seely, 2 Hilt. (N. Y.) 429.

16. *Colorado.*— Lozier *v.* Hannan, 12 Colo. App. 59, 54 Pac. 399.

*Iowa.*— Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787; Osborne *v.* Simmerson, 73 Iowa 509, 35 N. W. 615.

*Massachusetts.*— Vale *v.* Butler, 111 Mass. 55.

*Michigan.*— Taylor *v.* Butters, etc., Salt, etc., Co., 103 Mich. 1, 61 N. W. 5.

*Mississippi.*— Bacot *v.* Hazlehurst Lumber Co., (1898) 23 So. 481.

*Missouri.*— Madison *v.* Danville Min. Co., 65 Mo. App. 564.

*Nebraska.*— Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395.

*New York.*— Doyle *v.* Beaupre, 17 N. Y. Suppl. 287 [*affirmed* in 137 N. Y. 558, 33 N. E. 337].

*North Carolina.*— National Cash Register Co. *v.* Hill, 136 N. C. 272, 48 S. E. 637, 68 L. R. A. 100, holding that under a plea that the order for the goods was given to an agent on the agreement that it was not to be sent to plaintiff until defendants should so instruct, a defense that the order had been countermanded before delivery cannot be shown.

See 43 Cent. Dig. tit. "Sales," § 1025 *et seq.*

**Where the pleadings admit and the evidence shows a sale on trial** evidence as to a warranty and breach thereof is immaterial to the issue. Reeves *v.* Cress, 73 Minn. 261, 76 N. W. 26.

**Evidence that the seller converted a portion of the goods** is not admissible under allegations of false representations as to quantity. Brooker *v.* Hetzelgesser, 35 Ind. 537.

17. *California.*— Ruiz *v.* Norton, 4 Cal. 359.

*Connecticut.*— Vanderbeek *v.* Francis, 75 Conn. 467, 53 Atl. 1015; Collins *v.* Richmond Stove Co., 63 Conn. 356, 28 Atl. 534.

*Illinois.*— Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502, 25 N. E. 960.

*Louisiana.*— Boyd *v.* Howard, 4 Mart. N. S. 178; Boyd *v.* Howard, 3 Mart. N. S. 286; Gilly *v.* Henry, 8 Mart. 402, 13 Am. Dec. 291.

*Maryland.*— Myers *v.* Smith, 27 Md. 43.

*New York.*— Sherman *v.* New York Cent. R. Co., 22 Barb. 239.

See 43 Cent. Dig. tit. "Sales," § 1027.

**Fair and reasonable value.**— An allegation in the complaint that defendant agreed to pay the fair and reasonable value of the timber did not necessarily render the action one on an express contract of sale, and therefore plaintiff was entitled to recover on a *quantum meruit* for the timber received by defendant. Lansburgh *v.* Walsh, 12 Misc. (N. Y.) 124, 33 N. Y. Suppl. 45 [*affirming* 8 Misc. 693, 28 N. Y. Suppl. 1149].

**Several counts.**— Where a declaration contains one count on a promissory note claimed to have been given for the sale of goods, and another count for goods sold and delivered, and plaintiff gives the note in evidence in support of the first count, and the evidence introduced by defendant, together with that introduced by plaintiff in rebuttal, proves the sale and delivery of the goods, and that the note was never accepted in payment, plaintiff may recover on the count for goods sold and delivered. Jones *v.* Kennedy, 11 Pick. (Mass.) 125.

18. Tumlin *v.* Bass Furnace Co., 93 Ga. 594, 20 S. E. 44; Brierre *v.* Cereal Sugar Co., 102 Mo. App. 622, 77 S. W. 111.

**Under a count for goods sold and delivered,** orders drawn by defendant on plaintiff, not expressed to be payable in goods, may be given in evidence. Snodgrass *v.* Broadwell, 2 Litt. (Ky.) 353.

19. Hawkins *v.* Borland, 14 Cal. 413, holding also that under a general denial of a complaint for cattle sold and delivered defendant may prove that the cattle were not to be paid for until fattened and killed and that sufficient time had not elapsed to fatten them.

**Existence of contractual relation.**— Where plaintiffs, who had sold ties to one to whom defendant had sublet a portion of its contract to deliver ties to a railway company, alleged a contractual relation between plain-

goods [20] or the prior course of dealing between the parties;[21] and may prove that the term of credit has not expired;[22] that the article delivered was not the one purchased;[23] that the transaction was a gift and not a sale;[24] or was not a sale to defendant but to a third person;[25] or was in payment of a debt to defendant;[26] partial[27] or entire failure of consideration;[28] that the sale was in fact on a consideration previously fully executed and created no indebtedness;[29] that the contract was rescinded before the goods were shipped;[30] that there was no acceptance of the terms of the contract as proposed or delivery of the goods;[31] or that payment was made on delivery.[32] But in *indebitatus assumpsit* for goods sold and delivered where there has been a sale in point of fact, it cannot be shown under a *non assumpsit* that plaintiff had no title to the goods at the time of sale;[33] and under a general denial or the general issue it cannot be shown that there were defects in the quality of the goods,[34] that a check received as a conditional payment was not presented in time,[35] or that the contract of sale was subsequently modified;[36] and under such a plea special damages for delay in delivery cannot be shown.[37] So matters relied on by way of set-off and counter-claim must be specially pleaded,[38] as must also the defense that the goods were of inferior quality;[39] and although it was formerly held that illegality of the contract might be shown under the

tiffs and defendant, it was proper under a general denial to show that no such relation existed, and that defendant had paid the subcontractor in full for the ties. Haralson *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1901) 62 S. W. 788.

20. Munn *v.* Pope, 2 Stew. (Ala.) 498.

21. Dietrich *v.* Dreutel, 43 Hun (N. Y.) 342.

22. Daniels *v.* Osborn, 71 Ill. 169; Waterhouse *v.* Levine, 182 Mass. 407, 65 N. E. 822; Broomfield *v.* Smith, 2 Gale 114, 5 L. J. Exch. 155, 1 M. & W. 542, Tyrw. & G. 929.

23. Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533; Montgomery *v.* Gann, 51 Mo. App. 187; Cousins *v.* Paddon, 2 C. M. & R. 547, 5 L. J. Exch. 49, 5 Tyrw. 535.

**But where there was an inspection by the buyer** it will be presumed in the absence of a specific allegation to the contrary that the goods delivered were the goods purchased. Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798.

24. Blatz *v.* Lester, 54 Mo. App. 283.

25. Alpert *v.* Bright, 74 Conn. 614, 51 Atl. 521; Wiedeman *v.* Hedges, 63 Nebr. 103, 88 N. W. 170.

**That the purchaser was merely an agent for another** whose name was disclosed and to whom the credit was given may be shown under the general issue. Merritt *v.* Briggs, 57 N. Y. 651.

26. Simmons *v.* Wilde, 25 Misc. (N. Y.) 497, 54 N. Y. Suppl. 1039.

27. Manning *v.* Winter, 7 Hun (N. Y.) 482.

28. Payne *v.* Cutler, 13 Wend. (N. Y.) 605.

29. Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

30. Wilson *v.* J. H. Flickinger Co., 76 N. Y. App. Div. 399, 78 N. Y. Suppl. 746.

31. Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528.

32. Bussey *v.* Barnett, 1 Dowl. P. C. N. S. 646, 11 L. J. Exch. 211, 9 M. & W. 312. But see Littlechild *v.* Banks, 7 Q. B. 739, 9 Jur. 1096, 14 L. J. Q. B. 356, 53 E. C. L. 739.

33. Walker *v.* Mellor, 11 Q. B. 478, 63 E. C. L. 478, 2 C. & K. 346, 61 E. C. L. 346, 12 Jur. 268, 17 L. J. Q. B. 103.

34. Weil *v.* Unique Electric Device Co., 39 Misc. (N. Y.) 527, 80 N. Y. Suppl. 484; Knabe *v.* Flameless Gas Stove Co., 19 Misc. (N. Y.) 152, 43 N. Y. Suppl. 205.

**In an action against the contractor and owner by a subcontractor** to recover for materials furnished for use in the building, the owner cannot under a general denial show that the contractor did not fulfil his contract. McGuire *v.* Quintana, 52 Cal. 427.

35. Fritz *v.* Kennedy, 119 Iowa 628, 93 N. W. 603.

36. Crum *v.* Yundt, 12 Ind. App. 308, 40 N. E. 79; Wallace *v.* Blake, 58 N. Y. Super. Ct. 13, 8 N. Y. Suppl. 862 [*affirmed* in 128 N. Y. 676, 28 N. E. 603].

37. Lovegrove *v.* Christman, 164 Pa. St. 390, 30 Atl. 385.

**Shipment by wrong route.**— In an action for the price of goods sold and delivered, the defense that plaintiff sent them by a different railroad from that directed must be pleaded to be available. Farmer *v.* Gray, 16 Nebr. 401, 20 N. W. 276.

38. Denham *v.* Bryant, 139 Mass. 110, 28 N. E. 691; McCormick *v.* Sarson, 1 Sweeny (N. Y.) 161; O'Neill *v.* Crotty, 16 Daly (N. Y.) 474, 12 N. Y. Suppl. 280; Stevens *v.* Sonto, 2 N. Y. Suppl. 484.

**Basis of counter-claim.**— Where, in an action for the price of goods sold, the answer sets up a counter-claim for defendant's work in superintending the construction of a building under a written contract, it is error to admit evidence of additional superintendence under an alleged verbal contract not pleaded in the answer. Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929.

39. Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022; Wallace *v.* Blake,

general issue,[40] the present rule is that the defense must be specially pleaded,[41] and the same rule applies to the defense of account stated;[42] but in an action, not on an account stated, but merely to recover the balance of the alleged purchase-price of goods, where plaintiff introduces in evidence an invoice of the goods delivered by him to, and retained by, defendant, defendant may show that the invoice contains an error as to the price, without having specifically pleaded it;[43] and delivery to an agent of defendant may be shown, although the fact of agency was not pleaded.[44] Where the sale was for a note or a discount for cash a tender of the note cannot be proved unless pleaded.[45]

(c) *Parties to the Contract.* Under an allegation of a sale to defendant alone, evidence of a sale to him and another jointly is inadmissible;[46] and where the declaration is in the common counts only it cannot be shown that the goods were sold by a firm since dissolved and that the claim passed to plaintiff personally.[47] Where plaintiff alleges a sale to defendant as an individual and defendant alleges that he purchased the goods in his capacity as manager of a corporation the only issue is whether the contract was with defendant individually or as representative of a corporation, and the question whether defendant is liable as a stock-holder is not involved.[48]

(d) *Fraud and Misrepresentation.* While it has been held that fraud on the part of the seller may be shown under a general denial,[49] there are also cases to the contrary,[50] and it is held that fraud cannot be shown under a plea of breach of warranty.[51] It is not essential, however, to specifically allege of what the misrepresentations consisted,[52] or that plaintiff knew them to be false when he made them;[53] and under a plea of false and fraudulent representations in quality justifying a rescission and return of the property defendant may show defects in reduction of damages.[54]

(ii) *Variance.* The general rule that the proof must correspond substantially with the allegations and that a variance between the nature and elements of plaintiff's cause of action as alleged and as proved is fatal[55] applies to actions for the price or value of goods sold.[56] Thus plaintiff cannot, under a complaint for

128 N. Y. 676, 28 N. E. 603 [*affirming* 58 N. Y. Super. Ct. 13, 8 N. Y. Suppl. 862]; Holendyke *v.* Newton, 50 Wis. 635, 7 N. W. 558; Crawford *v.* Earl, 38 Wis. 312. But see Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856, holding that where defendant relies on a rescission of the contract before shipment he may also show that the goods shipped were not of the proper quality.

**Where the only issue was whether the alleged agent of the purchaser was in fact his agent,** the fact that the quality of the goods was defective cannot be shown. Lauter *v.* Simpson, 2 Ind. App. 293, 28 N. E. 324.

**Where the averment is that fruit trees were damaged in transit** proof that they were improperly packed is admissible. Phœnix *v.* Lamb, 29 Iowa 352.

40. Dixie *v.* Abbott, 7 Cush. (Mass.) 610.

41. Miller *v.* Donovan, 11 Ida. 545, 83 Pac. 608; Granger *v.* Ilsley, 2 Gray (Mass.) 521; Dwyer Brick Works *v.* Flanagan, 87 Mo. App. 340.

42. Rishel *v.* Weil, 31 Misc. (N. Y.) 70, 63 N. Y. Suppl. 178 [*affirming* 30 Misc. 805, 61 N. Y. Suppl. 1112].

43. Edwards, etc., Lumber Co. *v.* Baker, 2 N. D. 289, 50 N. W. 718.

44. Wagener *v.* Kirven, 56 S. C. 126, 34 S. E. 18.

45. Hirschberg *v.* Marx, 94 N. Y. Suppl. 342.

46. Cunningham *v.* Hobart, 7 Gray (Mass.) 423.

**In an action for goods furnished "defendant and his sons"** plaintiff may show that goods were on defendant's written order furnished to another besides his sons. McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853.

47. Hatzenbuhler *v.* Lewis, 51 Mich. 585, 17 N. W. 67, 273.

48. Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279.

49. Bell *v.* Sheridan, 21 D. C. 370; Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102, 41 Am. Dec. 214; Simmons *v.* Cutreer, 12 Sm. & M. (Miss.) 584.

50. Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Woodhouse *v.* Swift, 7 C. & P. 310, 32 E. C. L. 629

51. Shirk *v.* Mitchell, 137 Ind. 185, 36 N. E. 850.

52. Goodsell *v.* Trumbull, 135 Mass. 99.

53. Browne *v.* Moore, 32 Mich. 254.

54. Fleming *v.* Toler, 7 Gratt. (Va.) 310; Withers *v.* Greene, 9 How. (U. S.) 213, 13 L. ed. 109.

55. See Pleading, 31 Cyc. 700 *et seq.*

56. Simpson *v.* Porter Bros. Co., 140 Cal.

goods sold and delivered, recover for trespass *de bonis asportatis*,[57] or trover and conversion,[58] a consignment for sale,[59] on account stated,[60] on an agreement to sell,[61] a contract for storage,[62] an exchange,[63] or on a contract of guaranty or indemnity;[64] and an action for the price of goods sold and delivered cannot be maintained on proof of a tender and refusal;[65] and generally the seller cannot recover if the contract proved differs materially from that alleged in his complaint,[66] or upon proof of the sale of articles materially different from those specified in the complaint.[67] A material variance as to the price of the goods is also

667, 74 Pac. 286 (holding that the allegation of a sale is not supported by proof that defendant's liability is on the acceptance of an order for the amount of the price on a sale to a third person); Wilder *v.* Colby, 134 Mass. 377 (holding that if plaintiff declares in *indebitatus assumpsit* for goods sold and delivered, evidence that the goods were sold on credit, which has not expired, will not justify a recovery); Link *v.* Vaughn, 17 Mo. 585; Gammage *v.* Alexander, 14 Tex. 414 (holding that if the complaint is for goods sold and delivered, it will not support a recovery for failure to accept and pay for goods bargained and sold). And see Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

**The vital question in determining whether there is a material and fatal variance** is whether defendant has been misled by the allegations of the complaint, and if he has not the variance will be regarded as immaterial. Gaar *v.* Brundage, 89 Minn. 412, 94 N. W. 1091. Thus if the contract proved is actually a sale the mere fact that it is designated a loan is not a variance. Cowan *v.* De Hart, 84 N. Y. Suppl. 576.

57. Link *v.* Vaughn, 17 Mo. 585.

58. Phillips *v.* Mastbrook, 24 Mo. App. 129.

59. Colman *v.* Price, 1 Blackf. (Ind.) 303; Fitch *v.* Asher, 56 Miss. 571; Young *v.* Woodward, 44 N. H. 250; J. I. Case Plow Works *v.* Morris, 17 Tex. Civ. App. 6, 42 S. W. 652. But see Hull *v.* Richardson, 4 Gray (Mass.) 598.

60. Consolidated Car Heating Co. *v.* Kahn, 84 N. Y. Suppl. 919; Riverside Lumber Co. *v.* Lee, 7 Tex. Civ. App. 522, 27 S. W. 161.

61. Brink *v.* Chicago, etc., R. Co., 23 Iowa 473.

62. Barrows *v.* Wampler, 24 Ind. App. 472, 56 N. E. 935.

63. Vail *v.* Strong, 10 Vt. 457.

64. Hobbs *v.* Gross, 94 Ga. 637, 21 S. E. 579; Booth *v.* Newton, 46 N. Y. App. Div. 175, 61 N. Y. Suppl. 727; Shaw *v.* Fleming, 174 Pa. St. 52, 34 Atl. 555; Trask *v.* Duval, 24 Fed. Cas. No. 14,143, 4 Wash. 97.

65. Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

**A variance as to the delivery is not material** in the absence of anything to show that defendant was misled. Butler Bros. *v.* Hirzel, 87 N. Y. App. Div. 462, 84 N. Y. Suppl. 693 [*affirmed* in 181 N. Y. 520, 73 N. E. 1120]. But it is material if there is a variance as to the time when (Richmond Standard Steel, etc., Co. *v.* Chesterfield Coal Co., 102 Va. 417, 46 S. E. 397), or the place where delivery is to be made (Peck *v.* Waters, 104 Mass. 345).

66. Keller *v.* Webb, 126 Mass. 393; Read *v.* Smith, 1 Allen (Mass.) 519; Smith *v.* Shell, 82 Mo. 215, 52 Am. Rep. 365; Harris *v.* Kasson, 79 N. Y. 381.

**That the complaint does not set out the contract in detail** and the contract admitted in evidence contains terms not material to the issue does not constitute a variance if defendant was not misled. Farnsworth *v.* Holderman, 3 Utah 381, 4 Pac. 337.

**Allegations of an absolute sale are not supported by proof of a sale conditional** on the payment of the purchase-price. Mansfield *v.* Strauss, 68 N. Y. Suppl. 682; Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476.

**An averment of an implied contract** is not supported by proof of a written order specifying the price. Gaar *v.* Fritz, 60 Minn. 346, 62 N. W. 391.

**As to the date of the sale** plaintiff is not held to strict proof. Buckeye Buggy Co. *v.* Dickey, 122 Ga. 290, 50 S. E. 66; Jackson-Vanarsdall Distilling Co. *v.* Moore, 61 S. W. 368, 22 Ky. L. Rep. 1749; National Lancers *v.* Lovering, 30 N. H. 511; Brown *v.* Cody, 164 N. Y. 594, 58 N. E. 1085 [*affirming* 23 N. Y. App. Div. 210, 48 N. Y. Suppl. 1054]; Pearce *v.* Tootle, 75 Tex. 148, 12 S. W. 536.

**Where the complaint alleges a contract in writing proof of a verbal contract** is not a fatal variance. Patterson *v.* Keystone Min. Co., 30 Cal. 360.

67. Upton *v.* Winchester, 106 Mass. 330 (holding that an averment of a sale of oak lumber is not supported by proof of a sale of different kinds of lumber under an agreement that it should be delivered and received as oak); Robbins *v.* Otis, 1 Pick. (Mass.) 368; Feurth *v.* Anderson, 87 Mo. 354; Cleaver *v.* Garner, 133 Pa. St. 419, 19 Atl. 408.

**A variance as to the description of the property** will not be material unless the words of description are essential to the identification or to show the quality or quantity. Jackson *v.* Reich, 3 Misc. (N. Y.) 86, 22 N. Y. Suppl. 366; Clauson *v.* Goodrich, 70 Wis. 672, 36 N. W. 6.

**Plaintiff may recover the price of live stock** under a count averring the sale of goods and merchandise. Powell *v.* Robinson, 2 Wkly. Notes Cas. (Pa.) 370.

**A material variance as to the quantity sold** and delivered is a fatal variance. Colton *v.* King, 2 Allen (Mass.) 317; Stotesbury *v.* Power, 27 Mont. 469, 71 Pac. 675, where

fatal;[68] but not an immaterial variance, it being sufficient if the price is proved substantially as alleged.[69] It is generally material and thus fatal if there is a variance between the pleadings and the proof as to the parties to the sale.[70]

**8. Evidence — a. Presumptions and Burden of Proof.** As is the general rule in other civil actions,[71] the burden of proof is on the party having the affirmative of the issue.[72] Thus in actions to recover the price or value of goods sold the burden is on plaintiff to prove the existence and validity of the contract of sale,[73]

there was an allegation of sale of one hundred and twenty-five thousand pounds of barley and proof of delivery of less than eighteen thousand pounds. But there was not a fatal variance where the complaint alleged a delivery of forty-one thousand bricks, and the proof showed a delivery of forty-one thousand two hundred and twenty-eight bricks. Brown *v.* Morris, 83 N. C. 251.

**68.** Churchill *v.* Wilkins, 1 T. R. 447, 99 Eng. Reprint 1189.

**Market price.**—An allegation that the sale was for the highest market price at a particular place is not supported by proof of a contract which did not specify any price at any place. McEwen *v.* Morey, 60 Ill. 32. But where the complaint alleged an agreement to pay what materials were reasonably worth, and the proof showed an agreement to pay the regular market price, the variance was not fatal. Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 51 Pac. 555.

**An allegation that defendants agreed to pay the value of the goods** is not supported by proof of a sale for an agreed price. Davisson *v.* Ford, 23 W. Va. 617.

**69.** Bond *v.* Greenwald, 7 Baxt. (Tenn.) 466; Cave *v.* Coleman, 7 L. J. K. B. O. S. 25, 3 M. & R. 2.

**Terms of payment.**— Where the complaint alleged in one count the sale and delivery to defendant of certain machinery at the agreed price of three thousand five hundred dollars, to be paid by defendant, and in the second count the delivery of like property of the value of three thousand five hundred dollars, for which defendant was indebted to plaintiff, was alleged, proof that the payment was to be in real estate of that value, and the transfer of certain real property was shown, was not a material variance. Dampf *v.* Greener, 11 N. Y. St. 90.

**The fact that the price proved was slightly less** than that averred is not a material variance. Iverson *v.* Duhay, 39 Minn. 325, 40 N. W. 159.

**An allegation that the sale was partly for cash and partly on credit** is supported by proof that the sale was partly for cash and that a note should be given for the balance. James *v.* Adams, 16 W. Va. 245.

**70.** *Alabama.*— Lee *v.* Wimberly, 102 Ala. 539, 15 So. 444.

*Colorado.*— Miller *v.* Hallock, 9 Colo. 551, 13 Pac. 541.

*Georgia.*— Hobbs *v.* Gross, 94 Ga. 637, 4 S. E. 579.

*Illinois.*— Ruggles *v.* Blank, 15 Ill. App. 436.

*Louisiana.*— Shaw *v.* Noble, 15 La. Ann. 305.

*Massachusetts.*— Brown *v.* Holbrook, 4 Gray 102.

See 43 Cent. Dig. tit. "Sales," § 1041.

**Proof that the goods were furnished through other parties** is not a variance. Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177.

**Sale by agent.**— If in an action by a seller of goods individually to recover the price it appears that the contract was with him as an agent for another, there can be no recovery. Messenger *v.* Woge, 20 Colo. App. 275, 78 Pac. 314.

**Substitution of buyers.**— In an action to recover the value of goods alleged to have been sold by plaintiff to defendant, where there is only proof of a sale by plaintiff to a third party, and of a subsequent contract between such third party and defendant, whereby the latter agreed to pay to plaintiff the original price of the goods sold, the variance is fatal. Benson *v.* Dean, 40 Minn. 445, 42 N. W. 207. But see Vulcan Iron Works *v.* Burrell Constr. Co., 39 Wash. 319, 81 Pac. 836, holding that evidence showing the existence of the contract for the sale of goods by plaintiff to another, and the subsequent adoption, without assignment, of that contract by defendant as its own, is not a variance, or at least not a material variance, from a complaint alleging the sale and delivery of the goods to defendant.

**An allegation of sale to defendant is not supported by proof of a sale to a third person,** payment being guaranteed by defendant. Booth *v.* Newton, 46 N. Y. App. Div. 175, 61 N. Y. Suppl. 727; Shaw *v.* Fleming, 174 Pa. St. 52, 34 Atl. 555; Hall *v.* Huntoon, 17 Vt. 244, 44 Am. Dec. 332. See also Kelly *v.* Thompson, 5 Wash. 785, 32 Pac. 752. But proof that the goods were sold on the credit of defendant alone and delivered to a third person by his direction will support an averment of sale to defendant. Walker *v.* Richards, 41 N. H. 388; Rogers *v.* Verona, 1 Bosw. (N. Y.) 417.

**71.** See Evidence, 16 Cyc. 926 *et seq.*

**72.** Parcher *v.* Holmes, 68 N. H. 166, 44 Atl. 101, holding that where payment was to be made in cattle to be weighed in defendant's presence, and plaintiff took possession of them without defendant's knowledge, the burden was on him to show the weight.

**73.** *Alabama.*— American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

*Connecticut.*— Alpert *v.* Bright, 74 Conn. 614, 51 Atl. 521.

*Delaware.*— Heidelbaugh *v.* Cranston, 4 Pennew. 464, 56 Atl. 367.

*Illinois.*— Arnold *v.* Tobey, 6 Ill. App. 288.

*Maine.*— Edmunds *v.* Wiggin, 24 Me. 505.

and the terms thereof,[74] the price or value,[75] the delivery and acceptance of the goods and the amount thereof,[76] and his compliance with the contract, or a waiver of its provision by the buyer,[77] and he has also the burden of proving that goods delivered or tendered complied with the contract.[78] It is not incumbent on plaintiff, however, to show negatively a failure on the part of defendant to pay the price, payment being an affirmative defense which should be set up and proved by defendant;[79] and similarly the title of the seller will in the absence of proof to the contrary be presumed.[80] The burden is on defendant to prove

*Minnesota.*— Geiser Mfg. Co. *v.* Yost, 90 Minn. 47, 95 N. W. 584; Russell *v.* Wisconsin, etc., R. Co., 39 Minn. 145, 39 N. W. 302.

*New York.*— Rose *v.* Wells, 36 N. Y. App. Div. 593, 55 N. Y. Suppl. 874; Ampel *v.* Seifert, 84 N. Y. Suppl. 122.

*United States.*— Schutz *v.* Jordan, 141 U. S. 213, 11 S. Ct. 906, 35 L. ed. 705 [*affirming* 32 Fed. 55].

See 43 Cent. Dig. tit. "Sales," § 1045.

**Authority to sell.**— Where a purchaser of fertilizer alleges in defense of an action for the price that the seller had not at the time of the sale complied with the code, section 379, providing that fertilizer must not be sold or exchanged without a license from the commissioner authorizing the seller to deal therein, the burden is on the seller to prove his authority. Brown *v.* Raisin Fertilizer Co., 124 Ala. 221, 26 So. 891.

74. Morrison *v.* Clark, 7 Cush. (Mass.) 213; Hebbard *v.* Haughian, 70 N. Y. 54.

**Payment by note, agreement to indorse.**— Where the answer alleged that plaintiffs were to accept in payment certain promissory notes secured by mortgage, executed by a third party, and the reply denied that plaintiffs agreed to receive the notes in payment unless defendants should indorse them, the burden was on plaintiffs to prove an agreement to indorse. Paine *v.* Smith, 33 Minn. 495, 24 N. W. 305.

**Alteration of contract.**— Where plaintiff claims that certain provisions of the written order for goods were erased before acceptance the burden is on him to show that fact. Patton-Worsham Drug Co. *v.* Stark, (Tex. Civ. App. 1905) 89 S. W. 799.

**A sale for cash will be presumed** in the absence of evidence to the contrary. Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912.

75. Edmunds *v.* Wiggin, 24 Me. 505; Meyer *v.* Jewell, 88 N. Y. Suppl. 972; Breemer *v.* Burgess, 2 Wash. Terr. 290, 5 Pac. 733, 840.

76. *Arkansas.*— Collins *v.* Gage, 69 Ark. 659, 64 S. W. 878.

*Maine.*— Edmunds *v.* Wiggin, 24 Me. 505.

*Minnesota.*— Geiser Mfg. Co. *v.* Yost, 90 Minn. 47, 95 N. W. 584.

*Missouri.*—Martin *v.* Williams, 96 Mo. App. 249, 70 S. W. 249. But see Church *v.* Fagin, 43 Mo. 123, holding that where defendant alleges that plaintiff contracted to deliver to him a certain quantity exceeding the amount actually delivered, the burden of proving such contract is on defendant.

*New York.*— Brinn *v.* Cohen, 107 N. Y. Suppl. 37.

**Excuse for non-delivery.**— The burden is on plaintiff to establish an excuse for non-delivery of the goods. Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388.

**Admission as to part.**— Where the complaint alleges delivery by plaintiff at various times of a large number of items set out, and the answer admits that plaintiff furnished certain items, but denies all other allegations of the complaint, it does not relieve plaintiff from proving delivery of each item. Hoffman House *v.* Hoffman House Cafe, 36 N. Y. App. Div. 176, 55 N. Y. Suppl. 763.

**An instruction,** after explaining the right of the buyer to repudiate a sale of goods manufactured to order within a reasonable time, stating that the question is submitted to the jury whether the buyer used reasonable diligence in disclaiming the sale, is not erroneous, as placing the burden on the buyer to disprove an acceptance. Johnson *v.* Hibbard, 29 Oreg. 184, 44 Pac. 287, 54 Am. St. Rep. 787.

77. Harper *v.* Baird, 3 Pennew. (Del.) 110, 50 Atl. 326.

78. McCall Co. *v.* Jacobson, 139 Mich. 455, 102 N. W. 969; Lewis *v.* Barré, 14 Manitoba 32.

**Sale by sample.**— When it is shown that the sale of goods by plaintiff to defendant was by sample, it devolves on plaintiff to show that the goods correspond with the sample, or that defendant, by accepting the goods, waived his right to reject them. Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405.

**Quality fixed by statute.**— Under Rev. Laws, c. 56, §§ 56, 57, making it a criminal offense to sell milk which on analysis is shown to contain less than the percentage of milk solids or milk fat therein specified, the burden of proof, in an action to recover for milk sold, that the milk had not been watered, and contained the statutory amount of solids, was on plaintiff, since a delivery of any other kind of milk would fail, as a matter of description, to be a compliance with the contract to sell and deliver milk. Copeland *v.* Boston Dairy Co., 184 Mass. 207, 68 N. E. 218.

79. Christian *v.* Bryant, 102 Ga. 561, 27 S. E. 666.

80. Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227; McNabb *v.* Whissel, 75 N. Y. App. Div. 626, 78 N. Y. Suppl. 269.

**Wood cut from plaintiff's land.**— Where the complaint alleges a sale of wood cut by

matters affirmatively alleged in defense,[81] such as payment,[82] offset,[83] fraud,[84] or rescission,[85] or modification of the contract,[86] or that he inspected and rejected the goods within a reasonable time; [87] and if defendant relies on the breach of alleged conditions, the burden is on him to prove both the conditions and the breach; [88] and similarly if defects in quality are relied on the burden is on defendant to show the existence of the defects.[89]

**b. Admissibility** — (1) *Existence and Terms of Contract.* Parol evidence is not admissible to vary express terms of the written contract,[90] but the consideration can be inquired into,[91] and parol evidence is admissible to show

defendant from plaintiff's land, and the answer alleges that the wood was cut from adjoining land not belonging to plaintiff, the burden is on plaintiff to show that the wood was cut from his land. Gilmore *v.* Wilbur, 18 Pick. (Mass.) 517. And see Morgan *v.* Garretson, etc., Lumber Co., 105 Mo. App. 239, 79 S. W. 997.

**81.** *Georgia.*— Griner *v.* Baggs, 4 Ga. App 232, 61 S. E. 147, holding that where, in an action for the price of cotton-seed meal sold as fertilizing material, the defense is made that the cotton-seed meal was neither branded nor tagged as required by law, the burden is on the buyer to establish the same.

*Illinois.*— Smith *v.* Cornell, 59 Ill. 66; Waukesha Canning Co. *v.* Horner, 138 Ill. App. 564, holding that where there is evidence tending to show the sale and delivery of merchandise and its acceptance by the vendee, the burden of showing that such merchandise was not such as was called for by the contract rests upon such vendee.

*Kentucky.*— Middleton *v.* Kentucky Lumber Co., 66 S. W. 42, 23 Ky. L. Rep. 1751.

*Missouri.*— Arnold *v.* Cason, 95 Mo. App. 426, 69 S. W. 34.

*Wisconsin.*— Lessel *v.* Zillmer, 105 Wis. 334, 81 N. W. 403.

**If defendant claims that the goods were not to be paid for until sold by him,** the burden is on him to establish such defense. Heidelbaugh *v.* Cranston, 4 Pennew. (Del.) 464, 56 Atl. 367; Johnson *v.* Plowman, 49 Barb. (N. Y.) 472. And a merchant sued for the price of goods which he agreed to pay for by weekly remittances from the proceeds of sales, after deducting expenses, has the burden of explaining why he failed to make remittances for certain weeks. Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235.

**The burden of proof as to consideration,** where defendant claims a failure thereof, is on him, and not on plaintiff, so that defendant, showing only a partial failure, must furnish the evidence from which the extent of the failure may be determined. Gutta Percha, etc., Mfg. Co. *v.* Cleburne, (Tex. 1908) 112 S. W. 1047.

**82.** Christian *v.* Bryant, 102 Ga. 561, 27 S. E. 666; Coleman *v.* Mollere, 22 La. Ann. 106; May *v.* Behrends, (Tex. Civ. App. 1899) 50 S. W. 413.

**83.** Cook *v.* Malone, 128 Ala. 662, 29 So. 653; Gem Knitting Mills *v.* Empire Printing, etc., Co., 3 Ga. App. 709, 60 S. E. 365.

**84.** Briggs *v.* Humphrey, 5 Allen (Mass.) 314; National Cash Register Co. *v.* Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349.

**85.** Keller *v.* Strauss, 35 Misc. (N. Y.) 35, 70 N. Y. Suppl. 126.

**86.** Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892; Wheeler *v.* Mabrey, 65 Mo. 166.

**Substitution of contracts.— If,** in an action for the price of goods alleged to have been sold under a written contract, defendant claims they were sold under a subsequent new oral contract, the burden is on him to prove that the goods were delivered under such contract. Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884.

**87.** Muncie Wheel, etc., Co. *v.* Finch, 150 Mich. 274, 113 N. W. 1107; Cafre *v.* Lockwood, 22 N. Y. App. Div. 11, 47 N. Y. Suppl. 916.

**If defendant relies on an alleged right to return unsold goods** the burden is on him to establish such right. Keller *v.* Strauss, 35 Misc. (N. Y.) 35, 70 N. Y. Suppl. 126.

**88.** Osgood *v.* Groseclose, 159 Ill. 511, 42 N. E. 886 [*affirming* 58 Ill. App. 29]; Marquis *v.* Temple, 14 Ky. L. Rep. 768; Springfield Seed Co. *v.* Walt, 94 Mo. App. 76, 67 S. W. 938.

**89.** Moulton *v.* Baer, 78 Ga. 215, 2 S. E. 471; Toole *v.* Davenport, 63 Ga. 160; Sharples *v.* Angell, 46 N. Y. App. Div. 329, 61 N. Y. Suppl. 643; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538. But see Zoller *v.* Morse, 130 Mass. 267, holding that in a suit for the price of meat sold and delivered, the answer to which is a general denial, the burden is on plaintiff to prove that the meat was good.

**Where goods are sold under an agreement that they should prove satisfactory,** the burden is on the buyer to show that goods rejected were legally unsatisfactory. Kupfer *v.* Michigan Clothing Co., 141 Mich. 325, 104 N. W. 582.

**90.** Plano Mfg. Co. *v.* Eich, (Iowa 1904) 97 N. W. 1106; Wheeler Condenser, etc., Co. *v.* R. G. Packard Co., 83 N. Y. App. Div. 288, 82 N. Y. Suppl. 165 [*affirmed* in 178 N. Y. 571, 70 N. E. 1111]; Nicholas *v.* Venable, 2 Misc. (N. Y.) 109, 20 N. Y. Suppl. 851.

**Evidence as to misrepresentations by plaintiff's salesman** concerning the place where the goods were manufactured is not objectionable as tending to vary or add to the written contract. Brenard Mfg. Co. *v.* Citronelle Mercantile Co., 140 Ala. 602, 38 So. 509.

**91.** Deatly *v.* Murphy, 3 A. K. Marsh (Ky.) 472.

elements of the contract which, as appears on its face, were omitted;[92] and while preliminary negotiations are merged in the written contract to the extent that they cannot be shown to vary or add to its terms,[93] on the issue as to whether there was a binding contract or whether either of the parties knew of or assented to terms and stipulations contained therein, it is competent to show the preliminary negotiations,[94] the conduct of the parties after the alleged sale,[95] prior dealings between the parties,[96] and plaintiff's knowledge of the nature of defendant's business.[97] If there is a definite agreement as to terms it is not admissible to show a custom or usage as to such terms[98] or transactions with other parties;[99] and evidence as to the custom of plaintiff in giving notice of the acceptance of contracts is not admissible to show that the contract was accepted;[1] nor is evidence that an order for goods was countermanded competent unless it is shown that the letter or other notice of the countermand was received by plaintiff.[2]

(II) *PARTIES.* Evidence tending to identify the real buyer is competent,[3] and it may be proved that delivery was made to defendant's alleged agent,[4] or to defendant's tenant who was authorized to purchase on defendant's credit.[5] So

**92.** Niles *v.* Sire, 46 Misc. (N. Y.) 321, 94 N. Y. Suppl. 586 [*affirmed* in 108 N. Y. App. Div. 366, 95 N. Y. Suppl. 1149].

**93.** O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242; American Electrical Works *v.* New England Electric R. Constr. Co., 186 Mass. 546, 72 N. E. 64; Baltimore Refrigerating, etc., Co. *v.* Wetzel, 162 Fed. 117, 89 C. C. A. 117.

**Evidence as to the unexpressed intent** of defendant in making the contract is not admissible. Nugent *v.* Armour Packing Co., (Mo. App. 1904) 81 S. W. 506.

**94.** *Alabama.*— Steen *v.* Sanders, 116 Ala. 155, 22 So. 498.

*Iowa.*— Bonnot Co. *v.* Newman, 109 Iowa 580, 80 N. W. 655.

*Michigan.*— Ortmann *v.* Fletcher, 117 Mich. 501, 76 N. W. 63.

*New York.*—Kumberger *v.* Congress Spring Co., 158 N. Y. 339, 53 N. E. 3.

*Pennsylvania.*— E. Frank Coe Co. *v.* Eichenberg, 22 Pa. Super. Ct. 287.

*Texas.*— Compagnie Des Metaux Unital *v.* Victoria Mfg. Co., (Civ. App. 1908) 107 S. W. 651; Dorsey Printing Co. *v.* Gainesville Cotton Seed Oil Mill, etc., Co., 25 Tex. Civ. App. 456, 61 S. W. 556.

*Canada.*— McCatherine *v.* Brewer, 37 Can. L. J. N. S. 248.

**95.** A. Hirschman Co. *v.* Kiewel, 79 Minn. 239, 82 N. W. 574; Graham *v.* Harrower, 18 How. Pr. (N. Y.) 144.

**A receipt and also a delivery order** given by plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shown to be in existence before the sale, is admissible as affording some evidence of the sale having taken place on the day of the documents. Morgan *v.* Whitmore, 6 Exch. 716, 20 L. J. Exch. 289.

**96.** Joseph Joseph, etc., Co *v.* Schonthal Iron, etc., Co., 99 Md. 382, 58 Atl. 205.

**97.** Joseph Joseph Bros. Co. *v.* Schonthal Iron, etc., Co., 99 Md. 382, 58 Atl. 205 But see O'Brien *v.* Higley, 162 Ind. 316, 70 N. E. 242, holding that on a sale of paving brick by sample, the buyer's paving contract with the city, and the bond accompanying it, were inadmissible in an action for the price of the brick.

**98.** Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

**99.** T. J. Moss Tie Co. *v.* Huff, 32 Ind. App. 466, 70 N. E. 86; Grasmier *v.* Wolf, (Iowa 1902) 90 N. W. 813; Slaughter *v.* Ditto, 33 Ky. L. Rep. 5, 108 S. W. 882; American Cushman Tel. Co. *v.* Noble, 98 Mich. 67, 56 N. W. 1100.

**1.** Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884.

**2.** Burwell, etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222.

**3.** Rose *v.* Weinberger, 112 Ga. 628, 37 S. E. 868; Watson *v.* Winston, (Tex. Civ. App. 1897) 43 S. W. 852.

**Purchaser as agent for wife.**— In an action to recover for goods sold, on an issue as to whether defendant purchased for himself, or as the agent of his wife, evidence that the business for which the goods were purchased was owned and conducted by him in the name of his wife was competent, although tending to show that he carried it on in her name for the purpose of defrauding his creditors. Botefuhr *v.* Rometsch, 34 Oreg. 491, 56 Pac. 808.

**Evidence of the financial standing of the buyer** is immaterial if defendant is identified as the buyer. Maher *v.* Willson, 3 N. Y. Suppl. 80 [*affirmed* in 123 N. Y. 655, 23 N. E. 954].

**Evidence of the publication of a notice** in a newspaper that defendant, the alleged buyer, had sold his store and business is not admissible, such publication being of itself no notice to plaintiff of the sale. Haas *v.* C. B. Cones, etc., Mfg. Co., 25 Ind. App. 469, 58 N. E. 499.

**4.** Fitch *v.* Metropolitan Hotel Supply Co., 69 N. Y. App. Div. 611, 74 N. Y. Suppl. 616; Missouri, etc., R. Co. *v.* Yale, 27 Tex. Civ. App. 10, 65 S. W. 57; Andresen *v.* Upham Mfg. Co., 120 Wis. 561, 98 N. W. 518.

**5.** Murtagh *v.* Dempsey, 85 N. Y. App. Div. 204, 83 N. Y. Suppl. 296.

it may be shown that the alleged buyer had exercised acts of ownership,[6] and that the goods were charged to defendant on the books of plaintiff.[7] On an issue as to who was the real seller direct testimony as to ownership of the property is admissible,[8] and it may also be shown to whom payments had been made,[9] and testimony tending to show that the real seller was a corporation of which plaintiff was manager is admissible;[10] but in an action for goods sold, where it is shown that plaintiff was the owner of the goods, defendant's testimony that he supposed he was dealing with plaintiff as an officer of a corporation is not competent, for, having obtained the property, defendant cannot hold it and refuse to pay for it.[11]

(III) *PRICE OR VALUE.* In determining the value of the goods evidence is admissible to show whether the goods were scarce or plentiful,[12] and that the goods were defective;[13] and evidence of the value of the goods with and without the disputed articles may be given when there is a dispute as to the goods sold.[14] If the agreed price is the cost of material and construction, an invoice showing those facts is admissible;[15] but not if the sale is for the market price of the completed article.[16] Generally where there is an agreed price evidence of value is not admissible;[17] but where suit is on the common counts the contract is admissible to show the value,[18] and evidence of the value of the goods is admissible for the purpose of showing the reasonableness of the contract;[19] and where the contract price is disputed, evidence as to the market price is admissible, but only as bearing on the probability of what was the contract price.[20] So also evidence as

6. Mt. Lincoln Coal Co. *v.* Lane, 23 Colo. 121, 46 Pac. 632.

7. Love *v.* Ramsey, 139 Mich. 47, 102 N. W. 279; Kesler *v.* Cheadle, 12 Okla. 489, 72 Pac. 367; Davis *v.* Emmons, 32 Oreg. 389, 51 Pac. 652; Murphy *v.* Cress, 2 Whart. (Pa.) 33.

**Existence of order.**—Where plaintiff claimed to have received an order from defendants, which they denied, it was competent for them to show, on cross-examination of plaintiff and his bookkeeper, whether plaintiff kept an order book in his business, and whether it contained an entry of the disputed order. Oltarsh *v.* Lewis, 88 N. Y. Suppl. 127.

8. Mullaney *v.* Evans, 33 Oreg. 330, 54 Pac. 886. And see Randall *v.* Ditch, 123 Iowa 582, 99 N. W. 190.

9. Mullaney *v.* Evans, 33 Oreg. 330, 54 Pac. 886.

10. Stark *v.* McClosky, 2 N. Y. Suppl. 737.

11. Pizzutielle *v.* Graham, 56 Misc. (N. Y.) 584, 106 N. Y. Suppl. 1099.

12. Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

13. Birdsall Co. *v.* Palmer, 74 Md. 201, 21 Atl. 705; Moffet *v.* Sackett, 18 N. Y. 522.

14. Staats *v.* Hausling, 22 Misc. (N. Y.) 526, 50 N. Y. Suppl. 222.

**But when material is supplied for a building** evidence as to the amount of material necessary to such a building does not tend to show that the specific amount was furnished. Gibson *v.* J. Snow Hardware Co., 94 Ala. 346, 10 So. 304.

15. North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584.

16. Althouse *v.* Alvord, 28 Wis. 577.

17. Morrison *v.* Bartholomew, 9 Colo. App. 27, 47 Pac. 410; McCormick *v.* Sadler, 14 Utah 463, 47 Pac. 667; Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. 138, 23 C. C. A. 89.

18. City, etc., R. Co. *v.* Basshor, 82 Md. 397, 33 Atl. 635.

**In an action on quantum meruit for the price of a machine** delivered, and alleged to have been accepted in place of one contracted for, evidence as to the difference in value between the machine contracted for and the one installed was inadmissible for the purpose of showing the value of the machine alleged to have been accepted. Isbell-Porter Co. *v.* Heineman, 126 N. Y. App. Div. 713, 111 N. Y. Suppl. 332.

19. Rice *v.* Appel, 111 Iowa 454, 82 N. W. 1001; Grabowsky *v.* Baumgart, 128 Mich. 267, 87 N. W. 891. But see Post *v.* Voorhees, 118 Mich. 366, 76 N. W. 912, holding that it is not competent for plaintiff to prove the value of the goods, unless defendant has introduced evidence to show that the value is much less than the price claimed, to show the improbability of the contract.

**In case of fraud** the true value may be shown in diminution of the price. Wade *v.* Scott, 7 Mo. 509; Beecker *v.* Vrooman, 13 Johns. (N. Y.) 302.

20. Copeland *v.* Brockton St. R. Co., 177 Mass. 186, 58 N. E. 639, 83 Am. St. Rep. 274; Vedder *v.* Leamon, 70 N. Y. App. Div. 252, 75 N. Y. Suppl. 413.

**Prices fixed by another manufacturer.**—Plaintiff having contracted to sell glass to defendant during a season, at prices depending on those to be fixed by the A Glass Co., circular letters purporting to be addressed by such company to its customers, shown to be the means by which it informed its customers of its prices, received in the regular course of business, and recognized and acted on by such company, are admissible in an action for the price of glass sold by plaintiff to defendant. Matthews Glass Co. *v.* Burk, 162 Ind. 608, 70 N. E. 371.

to the market price at places other than the place of sale is not admissible,[21] and evidence is not admissible as to the value of the article for a special purpose,[22] and it cannot be shown what was the market price an unreasonable time after the sale.[23]

(IV) *RESCISSION.* In an action for the price of goods, defended on the ground of rescission, evidence that defendant tendered a return of the goods and was then holding them subject to plaintiff's order is admissible,[24] and a reconveyance of the goods to plaintiff may be shown;[25] and when rescission was prevented by the promises of plaintiff to make good the deficiency on which the right to rescind was based, proof of such facts is competent.[26]

(V) *DELIVERY AND ACCEPTANCE.* Delivery and acceptance may be shown by direct testimony or by evidence as to the circumstances and acts of the parties,[27] as by evidence of a delivery to a carrier,[28] or the mode of shipment.[29] Where delivery was to one of two defendants evidence that they were partners is admissible;[30] and where the defense is delay in delivery evidence is admissible to show that the delay was due to the fault of defendant;[31] but evidence tending to show special damage by reason of delay in delivery is not admissible unless it appears that plaintiff knew of the special conditions,[32] to prove which knowledge evidence of conversations between a witness and plaintiff before the execution of the contract is admissible.[33]

(VI) *QUANTITY.* Records of shipments are admissible on the issue as to the quantity delivered;[34] and where the quantity of goods sold which were removed and weighed by the buyer is in issue, testimony as to the space occupied by the goods and the space occupied by a ton is admissible as tending to show the amount occupying such space.[35] Where by the contract the seller was obliged to furnish goods only for the buyer's own use, contracts by which the buyer agreed to furnish the goods to third persons are admissible as showing a breach of the contract on his part;[36] and if defendant pleads default in delivery it may be shown that he was obliged to buy goods from other persons to supply the deficiency.[37] On

**21.** Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

**22.** Bouton *v.* Reed, 13 Gray (Mass.) 530.

**23.** Vickery *v.* Evans, 16 Ind. 331, where evidence as to the price a year after the sale was held to be inadmissible.

**Offers to purchase all of plaintiff's goods for a year** are incompetent to show the market value at any particular time. Clews *v.* Reilly, 6 N. Y. Suppl. 640.

**24.** Osborne *v.* Ringland, 122 Iowa 329, 98 N. W. 116.

**25.** Kentucky Lumber Co. *v.* Middleton, 41 S. W. 48, 19 Ky. L. Rep. 471.

**Time of rescission.**— Where the cause of action had accrued at the time the action was commenced, it was error to allow plaintiffs to prove the subsequent rescission of the contract by defendant. Johnson *v.* Hamilton, 24 Oreg. 320, 33 Pac. 571.

**26.** Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. 92.

**27.** Equitable Mfg. Co. *v.* Martin, 145 Ala. 667, 39 So. 769; Greenleaf *v.* Hamilton, 94 Me. 118, 46 Atl. 798.

**Under a declaration in attachment** based on an account for the price of cars, evidence was admissible to show that the cars were in the possession and use of defendant very shortly after the date of the sale. Alabama Constr. Co. *v.* Consolidated Car, etc., Co., 131 Ga. 365, 62 S. E. 160.

**28.** Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563, 23 So. 798; Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235.

**Bills of lading** showing the shipment thereof were admissible as tending to prove the issue and to corroborate a witness who testified that the goods ordered were shipped. Butler *v.* Ederheimer, 55 Fla. 544, 47 So. 23.

**29.** Bertha Mineral Co. *v.* Morrill, 171 Mass. 167, 50 N. E. 534.

**Delivery in two lots** may be shown, although the order did not call for shipment in that manner. Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715.

**30.** Blumenthal *v.* Greenberg, 130 Cal. 384, 62 Pac. 599.

**31.** McKinnon Mfg. Co. *v.* Alpena Fish Co., 102 Mich. 221, 60 N. W. 472.

**32.** Simpson Brick-Press Co. *v.* Marshall, 5 S. D. 528, 59 N. W. 728.

**33.** Gorham *v.* Dallas, etc., R. Co., (Tex. Civ. App. 1907) 106 S. W. 930.

**34.** St. Louis Consolidated Coal Co. *v.* Polar Wave Ice Co., 106 Fed. 798, 45 C. C. A. 638.

**35.** Alger *v.* Morrill, 68 Vt. 598, 35 Atl 483.

**36.** Trinidad Asphalt Mfg. Co. *v.* Trinidad Asphalt Refining Co., 119 Fed. 134, 55 C. C. A. 566.

**37.** Baxter *v.* Gibson, 27 Misc. (N. Y.) 812, 57 N. Y. Suppl. 815.

a sale by weight shown by agreed scales evidence as to weight on other scales is immaterial;[38] but where a car-load of produce purchased by defendant is not weighed at the shipping point, but is weighed *en route* on railroad scales in the usual manner, the weight as determined by the railroad scales constitutes the best evidence of the weight of the produce and is admissible.[39]

(VII) *QUALITY*. Upon an issue of false representations as to the quality of the goods it may be shown that artificial means had been resorted to to conceal defects;[40] and if it is claimed that false representations were made by an agent as to the quality of the goods ordered, evidence that the agent making such statements had authority to make them is admissible;[41] and generally upon a defense of false representations inducing the purchase, it is competent to show the alleged representations, their falsity, and reliance upon them,[42] the reliance upon them being a matter to which defendants alone could give direct testimony.[43] On the issue as to the quality of the goods sold, evidence of tests of other but similar goods is admissible;[44] and evidence as to a comparison with other goods furnished by other persons is admissible for the purpose of showing whether the seller had complied with his contract;[45] and as relevant to the issue of quality evidence may be admitted to show the terms of a receipt given to the carrier after inspection of the goods,[46] that defendant had used expressions in commendation of the goods,[47] that the article was satisfactory if properly used,[48] the opinion of an expert,[49] or that the damage claimed by defendant to be due to the goods sold was in fact due to the inferiority of other goods,[50] and the steps taken by plaintiff to correct the alleged defects;[51] but on a sale by sample, the goods being shipped in two lots, it is not proper to admit testimony that one lot was not equal to the

38. Colorado Trading, etc., Co. *v.* Oliver, 20 Colo. App. 257, 78 Pac. 308.

39. Schott *v.* Swan, 21 S. D. 639, 114 N. W. 1005.

40. Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 54 N. Y. Suppl. 72.

41. Wilcox *v.* Henderson, 64 Ala. 535.

42. City Nat. Bank *v.* Jordan, 139 Iowa 499, 117 N. W. 758.

43. City Nat. Bank *v.* Jordan, 139 Iowa 499, 117 N. W. 758.

44. Hindry *v.* McPhee, 11 Colo. App. 398, 53 Pac. 389; Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.

**Quality of other machines.**— In an action for the price of a machine which defendant claimed did not work well, evidence that it was identical in construction with another machine, which worked to the purchaser's satisfaction, is admissible. Mayes *v.* McCormick Harvesting Mach. Co., 110 Ga. 545, 35 S. E. 714.

45. Louisville Lith. Co. *v.* Schedler, 63 S. W. 8, 23 Ky. L. Rep. 465.

**Shipments to other purchasers.**— On an issue as to the condition of rice purchased when delivered to the carrier, evidence that at the same time the shipment was made the sellers also made shipments of rice to other purchasers out of the same rice in bulk, which were received by such purchasers without complaint, was wholly irrelevant. Bloom's Son Co. *v.* Haas, 130 Mo. App. 122, 108 S. W. 1078.

46. Schopp *v.* Taft, 106 Iowa 612, 76 N. W. 843.

47. Hook *v.* Stovall, 26 Ga. 704; Russell *v.* Newdigate, 44 S. W. 973, 19 Ky. L. Rep. 1965.

**But such statements may be explained and limited.**— Elwood *v.* McDill, 105 Iowa 437, 75 N. W. 340.

48. Glaeser *v.* Hoeffner, 68 Mo. App. 158.

**Method of use.** — Plaintiff may show that the goods when properly used gave satisfaction as tending to show that the defect was not in the goods but due to improper methods of using them. Blair *v.* Ford China Co., 26 Pa. Super. Ct. 374. On the other hand in an action to recover the price of fertilizer evidence that defendant had made skilful application of the fertilizer and found it worthless was admissible to prove failure of consideration. Pacific Guano Co. *v.* Mullen, 66 Ala. 582. But the fact that defendant followed the advice of plaintiff given without consideration is not material. Wilch *v.* Phelps, 16 Nebr. 515, 20 N. W. 840.

49. Fletcher *v.* Southern, 41 Ind. App. 550, 84 N. E. 526.

50. Fuller *v.* Harris, 48 Wash. 519, 93 Pac. 1080.

51. Muskegon Curtain-Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132, 19 Atl. 1008, holding that where plaintiff contracted with a manufacturer to replace defective goods shipped defendant, and the latter, after examining samples, directed the manufacturer to complete the order, the contract between plaintiff and the manufacturer is admissible in evidence in an action for the price on defendant's refusal to receive the goods.

**Evidence as to the amount paid by defendant for alterations and repairs** is not competent to show the nature and extent of the defect. Logan *v.* Berkshire Apartment Assoc., 3 Misc. (N. Y.) 296, 22 N. Y. Suppl. 776.

sample in an action for the price of the other lot;[52] and where a machine broke down on trial, but after repair was accepted and used by defendant, evidence as to the cause of the original break-down is immaterial.[53] Evidence as to the price the goods were sold for on the refusal of the buyer to accept them is immaterial,[54] and so too is evidence as to the loss suffered by the buyer on resale;[55] and in the absence of fraud evidence as to the price paid by plaintiff for the goods is immaterial;[56] and the fact that defendant offered to accept the goods at a reduced price is immaterial if such offer was not accepted.[57] While evidence as to the market value of similar goods of good quality is admissible on the issue as to quality,[58] and while it may be shown what value was placed on the goods for insurance purposes,[59] the value or condition of the particular goods long after the sale cannot be shown for the purpose of establishing the quality at the time of sale.[60]

(VIII) *PAYMENT.* Evidence as to payment must be connected with the transaction in issue to be admissible,[61] and thus on the issue of payment evidence is not admissible as to defendant's habit of paying bills promptly;[62] and evidence that payment was made to plaintiff's clerk in other goods is immaterial, the authority of the clerk not being shown.[63] When goods were delivered to defendant by a third person from whom plaintiff bought them such third person may testify that defendant did not pay him.[64]

**c. Weight and Sufficiency** — (I) *TO WARRANT RECOVERY BY PLAINTIFF.* There must be a preponderance of evidence in favor of plaintiff to establish the existence of a contract of sale,[65] the terms thereof,[66] compliance therewith on his part,[67] the price or value of the goods,[68] and if put in issue by the pleadings

52. Cook *v.* Sheehan, 16 S. D. 92, 91 N. W. 452.

53. Boothe *v.* Squaw Springs Water Co., 142 Cal. 573, 76 Pac. 385.

54. Carey *v.* Baldwin, 61 N. Y. Suppl. 581.

55. German-American Provision Co. *v.* Jones, 87 Miss. 277, 39 So. 521.

56. Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019.

57. Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390, 45 Atl. 456.

58. Clark *v.* Scammell, 31 N. Brunsw. 265.

59. Ryals *v.* Johnson County Sav. Bank, 106 Ga. 525, 32 S. E. 645.

60. Houghton Implement Co. *v.* Doughty, 14 N. D. 331, 104 N. W. 516; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.

61. Torinus *v.* Matthews, 21 Minn. 99.

62. May *v.* Behrends, (Tex. Civ. App. 1899) 50 S. W. 413.

63. Burger *v.* Limbach, 42 Mich. 162, 3 N. W. 942.

64. Martin *v.* Shannon, 101 Iowa 620, 70 N. W. 720.

65. Seay *v.* Sanders, 88 Mo. App. 478.

**A bill of sale to defendant** followed by payments thereon and the exercise of acts of ownership is sufficient to show the purchase. Mount Lincoln Coal Co. *v.* Lane, 23 Colo. 121, 46 Pac. 632.

**Evidence held sufficient** to show the existence of a contract of sale (see Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884; Meade *v.* Bell, 35 N. Y. App. Div. 627, 54 N. Y. Suppl. 756; Luxemburger Tuchfabriken *v.* Meyer, 31 N. Y. App. Div. 52, 52 N. Y. Suppl. 955; Fraser *v.* McCurdy, 35 Nova Scotia 467); that the contract was one of consignment and not sale (see Berman *v.* Goldsand, 22 Misc. (N. Y.) 735, 49 N. Y. Suppl. 1098; Ampel *v.* Seifert, 84 N. Y. Suppl. 122); that the contract was not in writing (see Janney Mfg. Co. *v.* Banta, 83 S. W. 130, 26 Ky. L. Rep. 1089); countermand of the order for goods (see Conkling *v.* Nicholas, 133 Mich. 651, 95 N. W. 745).

**In an action for the price of goods delivered on defendant's order to a third party,** evidence held insufficient to show that the order covered the goods sued for see Brown *v.* Grossman, 128 N. Y. App. Div. 496, 112 N. Y. Suppl. 827.

66. Rauer *v.* Merani, 130 Cal. 616, 63 Pac. 31, 61 Pac. 76; Jaques *v.* Parker, 188 Mass. 94, 74 N. E. 301; Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484; Goldstein *v.* Nathan, 88 N. Y. Suppl. 980.

**To vary the terms of a written contract** the evidence of fraud or mistake must be clear and convincing. Lenz *v.* Spencer, 28 Pa. Super. Ct. 31.

67. American Label Co. *v.* Kander, 93 N. Y. Suppl. 1108.

68. Dalhoff Constr. Co. *v.* Maurice, 86 Ark. 162, 110 S. W. 218.

**Evidence held sufficient to show price or value of the goods** see Redwood City Salt Co. *v.* Whitney, 153 Cal. 421, 95 Pac. 885; Jones *v.* De Muth, 137 Wis. 120, 118 N. W. 542, holding that where, in an action for the reasonable value of goods sold and delivered, the evidence showed that the seller on two occasions had sent to the buyer bills for the goods, specifying a designated price, and that the buyer received them but made no re-

the identity of the parties thereto,[69] and in general plaintiff's right of recovery under the contract as proved must appear by a preponderance of evidence;[70] but if there is sufficient evidence to make a *prima facie* case it is error to grant a nonsuit;[71] and such a case is made by evidence tending to show that the articles were furnished and that the items are correct, due, and unpaid,[72] and proof of possession and control of personal property by plaintiff and of sale and delivery thereof to defendant is *prima facie* sufficient to sustain an action for the price;[73] and

sponse thereto, a finding that such designated price was the reasonable value was supported by evidence.

69. *Colorado.*— Bullion Milling Co. *v.* Gates Iron Works, 18 Colo. App. 472, 72 Pac. 603.

*Missouri.*— Crosno *v.* J. W. Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275.

*New Jersey.*— Esher *v.* Meeker, 72 N. J. L. 39, 60 Atl. 35.

*New York.*— Campbell *v.* Emslie, 101 N. Y. App. Div. 369, 91 N. Y. Suppl. 1069 [*affirmed* in 184 N. Y. 589, 77 N. E. 1183].

*Wisconsin.*— Zoesch *v.* Thielman, 105 Wis. 117, 80 N. W. 1107.

**A pass-book** for goods, made out in the name of defendant's mother, with whom he lived, is not conclusive against the claim that credit was given to defendant, and that the goods were supplied to him at his request. Wilshusen *v.* Binns, 19 Misc. (N. Y.) 547, 43 N. Y. Suppl. 1085.

70. Hardeman *v.* Bell, 120 Ga. 342, 47 S. E. 919; Jefferson Bank *v.* Gossett, 86 N. Y. Suppl. 752; Brock *v.* Aspenleiter, 70 Hun (N. Y.) 98, 23 N. Y. Suppl. 1099.

**Proof of receipt of registered letter.**— Where, in an action for the balance on the price of a piano, the seller testified that he ordered another piano, and by registered letter notified the buyer that the same had come and that he was ready to substitute it for the one delivered, which was not satisfactory, and the buyer testified that he knew nothing thereof, and the registry receipt for the letter was not produced, the seller failed to sustain the burden of proof, which on that issue was on him. Garvin *v.* Montenegro-Riehm Music Co., 104 S. W. 964, 31 Ky. L. Rep. 1182.

**Evidence held to warrant recovery for plaintiff** see Daniel *v.* Siegel-Cooper Co., 54 Fla. 265, 44 So. 949; Mitchell *v.* Henry Vogt Mach. Co., 3 Ga. App. 542, 60 S. E. 295; Herpolsheimer *v.* Acme Harvester Co., 83 Nebr. 53, 119 N. W. 30; Childs *v.* Omaha Paraphernalia House, 80 Nebr. 673, 114 N. W. 941 (where, in an action to recover for the price of certain goods ordered, but not accepted because not delivered in time, evidence was held to sustain judgment for plaintiff); Canadian Fish Co. *v.* McShane, 80 Nebr. 551, 114 N. W. 594, 127 Am. St. Rep. 791, 14 L. R. A. N. S. 443; Wendel *v.* Goldsmith, 125 N. Y. App. Div. 167, 109 N. Y. Suppl. 233 (where evidence in an action on a note given for the balance of the price of a horse, wherein the defense was made that plaintiff had guaranteed the horse to be sound, while in fact the horse was foundered, was held to support a verdict for plaintiff); Robinson Clay Product Co. *v.* American Locomotive Co., 56 Misc. (N. Y.) 589, 107 N. Y. Suppl. 69; Scheuer *v.* Rosenbaum, 110 N. Y. Suppl. 260; Schott *v.* Swan, 21 S. D. 639, 114 N. W. 1005.

**Evidence held not to warrant recovery by plaintiff** see Globe Bank, etc., Co. *v.* Riggleberger, 109 S. W. 333, 33 Ky. L. Rep. 96; Schlatter *v.* Young, 197 Mass. 36, 83 N. E. 2 (holding that in an action against the purchaser of a greenhouse under a mortgage foreclosure on an account for coal delivered to the person in possession of the greenhouse, the evidence did not justify a finding of fact or ruling of law that defendant accepted or received any benefit from plaintiff's acts or was indebted for the items of plaintiff's account); Feinstein *v.* Hindes, 111 N. Y. Suppl. 837; Thomsen *v.* Alexander, 107 N. Y. Suppl. 718 (holding that a judgment against a corporation for goods sold and delivered cannot be sustained, the evidence showing that plaintiff's claim existed against its president individually, and was evidenced by his promissory note, several months before defendant was incorporated, and that defendant never dealt with or incurred any liability to plaintiff).

71. Buckeye Buggy Co. *v.* Dickey, 122 Ga. 290, 50 S. E. 66; Beck Duplicator Co. *v.* Fulghum, 118 Ga. 836, 45 S. E. 675; Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612; Swancey *v.* Parrish, 62 S. C. 240, 40 S. E. 554.

**Evidence in attachment for the price held sufficient to make out a prima facie case** see Alabama Constr. Co. *v.* Continental Car, etc., Co., 131 Ga. 365, 62 S. E. 160.

72. Bowe *v.* Gress Lumber Co., 86 Ga. 17, 12 S. E. 177.

**An admission** by defendant that he bought the article set forth in the account sued on, the price being stated for each article, establishes *prima facie* the correctness of the account. White *v.* Crane, 62 Ga. 399; Dodge *v.* Dickson Mfg. Co., 113 Fed. 218, 51 C. C. A. 175. And generally an admission of indebtedness by defendant is sufficient to prevent judgment for him. Catlett *v.* Brookhaven Lumber Co., (Miss. 1905) 38 So. 329; Hunt *v.* Mewis, 17 Nebr. 422, 23 N. W. 10.

73. Hutchinson *v.* Phillips, 11 Ark. 270; People *v.* Cotteral, 115 Mich. 43, 73 N. W. 19; Fitzpatrick *v.* Caplin, 4 E. D. Smith (N. Y.) 365; Brown *v.* Grossman, 108 N. Y. Suppl. 653 (holding that where, in an action for the price of goods alleged to have been sold to defendants, plaintiffs offered evidence that the goods were ordered by defendants, and delivered at their request to another concern, occupying a part of the loft occupied

it is generally sufficient to show that the seller has performed such acts as would vest title in the buyer.[74]

(II) *As to Matters of Defense.* To justify a judgment for defendant there must be a preponderance of evidence to support the defenses set up,[75] as for instance where the defense is that the goods were defective in quality [76] or shipped in bad condition.[77] So too where recoupment of damages for non-delivery

by defendants, plaintiffs established a *prima facie* case); Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186.

**Proof that goods were ordered** and were sent out for delivery and charged to the buyer is sufficient in the absence of countervailing proof. Clifford *v.* Gienger, 10 Colo. App. 83, 52 Pac. 223; Hubbard *v.* Seitz, 58 Nebr. 351, 78 N. W. 620; Sherwin-Williams Co. *v.* Dederick, 39 N. Y. App. Div. 641, 56 N. Y. Suppl. 657.

**Receipt of goods of the kind ordered** with evidence that defendant had ordered goods only of plaintiff is sufficient to sustain a judgment for plaintiff when the only issue is the identity of the goods. Cefalu *v.* Fitzsimmon-Derrig Co., 70 Minn. 255, 73 N. W. 648.

**Sufficiency of the evidence** to show a sale and delivery see Cassidy *v.* Hyland, 120 Mass. 221; Baker *v.* Loring, 92 Hun (N. Y.) 61, 36 N. Y. Suppl. 644; Hammersen *v.* Schleicher, 26 Misc. (N. Y.) 811, 57 N. Y. Suppl. 272; Muller *v.* Greenwald, 94 N. Y. Suppl. 427; Bennett *v.* Henderson, 2 Stark. 550, 3 E. C. L. 526.

74. Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612.

**Sufficiency of the evidence to show a completed sale passing title** see Young *v.* Minkler, 14 Colo. App. 204, 59 Pac. 622.

75. Harvey *v.* Henry, 108 Iowa 168, 78 N. W. 850.

**Evidence of a shortage** in three car-loads out of several hundred delivered is not of itself sufficient to show a shortage in the others. Hoffman *v.* Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427.

**Failure of consideration.**— In an action for the price of goods sold, where defendant pleaded a failure of consideration, and there was no evidence showing to what extent the consideration failed, it was proper to render verdict for plaintiff. Ingram *v.* McCaskey Register Co., 3 Ga. App. 569, 60 S. E. 291. Similarly where, in an action on notes given for a soda fountain, it appears that a deduction was made to cover some alleged defects, and that defendant continued to use the fountain and accepted the deduction as an adjustment, there is a failure to sustain the defense of failure of consideration. Carbonating Apparatus Co. *v.* Geary, 122 N. Y. App. Div. 410, 106 N. Y. Suppl. 768.

**Evidence held to warrant a finding that plaintiff's salesman falsely and fraudulently represented** that the blank attached to the declaration containing the articles alleged to have been sold was the same as the blank kept by defendant, and that defendant signed the contract relying thereon see Price *v.* Rosenberg, 200 Mass. 36, 85 N. E. 887.

**Evidence held to sustain defense of sale on memorandum** see El Dorado Jewelry Co. *v.* Hartung, 36 Pa. Super. Ct. 463.

76. Beggs *v.* James Hanley Brewing Co., 27 R. I. 385, 62 Atl. 373, 114 Am. St. Rep. 44.

**Sufficiency of evidence** as to defense that goods were inferior in quality (see German-American Provision Co. *v.* Jones, 87 Miss. 277, 39 So. 521; Harwood *v.* Breese, 73 Nebr. 521, 103 N. W. 55; Metz *v.* Virgil Practice Clavier Co., 26 Misc. (N. Y.) 726, 56 N. Y. Suppl. 1081; Isseks *v.* Nelson, 91 N. Y. Suppl. 756; Houghton Implement Co. *v.* Doughty, 14 N. D. 331, 104 N. W. 516; Computing Scales Co. *v.* Long, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294; Atlanta Guano Co. *v.* Phipps, (Tenn. Ch. App. 1897) 41 S. W. 1087; Jones *v.* Emerson, 41 Wash. 33, 82 Pac. 1017); that plaintiff recognized defendant's claim to an abatement of price because of defects (see Stamps *v.* Tennessee Producers' Marble Co., (Tenn. Ch. App. 1900) 59 S. W. 769); that certain attachments to the machine supplied by plaintiff were for the purpose of curing defects and not a charge on defendant (see Boothe *v.* Squaw Springs Water Co., 142 Cal. 573, 76 Pac. 385); to rebut defense of defects in quality (see Kentucky Saw Works *v.* Little River Land, etc., Co., (Tenn. Ch. App. 1897) 42 S. W. 527); that there was a proper trial or inspection (see Warder, etc., Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591; Underfeed Stoker Co. *v.* Detroit Salt Co., 135 Mich. 431, 97 N. W. 959; Patch *v.* Smith, 105 N. Y. App. Div. 208, 94 N. Y. Suppl. 692); that there was an acceptance (see Sharpsville Furnace Co. *v.* Allegheny Bessemer Steel Co., 184 Pa. St. 55, 39 Atl. 20); that the goods were in good condition when shipped (see Bullock *v.* Bird, 43 S. W. 234, 19 Ky. L. Rep. 641); that the failure of machine to work properly was due to defects in attachments supplied by defendant (see Thompson *v.* Chatham Waterworks Co., 51 N. Y. App. Div. 621, 64 N. Y. Suppl. 340); that the failure of a machine to develop the agreed capacity was due to a modification of the plan of construction at the request of defendant (see Robinson Mach. Co. *v.* Hazel Kirk Gas Coal Co., 204 Pa. St. 177, 53 Atl. 772).

77. Cohn *v.* Levinson, 35 Pa. Super. Ct. 382, holding that where a purchaser of wearing apparel directs the seller to deliver it to an express company for transportation to the purchaser's home, and the seller complies with the direction, the purchaser cannot resist payment for the apparel on the evidence alone of the express company's agent at the place of the purchaser's residence that, when the package was received, the paper wrap-

is sought defendant must prove the damages by a preponderance of evidence;[78] and the evidence to support a defense based on delay in delivery must be clear and certain,[79] as must also be proof of payment.[80]

**9. Trial — a. In General.** The rules governing the trial of civil actions generally[81] govern actions for the price or value of goods sold.[82] If there is no conflict of evidence on a given issue the question becomes one of law for the court;[83] but if the evidence is contradictory and presents a definite issue of fact, it should be submitted to the jury.[84] Generally the existence and terms of the

pings had been torn or destroyed in part, and the contents had become soiled and damaged. In such a case the mere fact that the package arrived in bad condition raised no presumption of failure of duty on the part of the seller.

**78.** Wachsmuth *v.* Heil, 1 Colo. App. 196, 28 Pac. 17; Robertson *v.* Schumann, 7 Hun (N. Y.) 79.

**79.** Robinson Clay Product Co. *v.* American Locomotive Co., 56 Misc. (N. Y.) 589, 107 N. Y. Suppl. 69 (where in an action for goods sold and delivered, evidence was examined, and held to support defendant's contention that a delay of thirty-nine days in sending the goods justified defendant's cancellation of the contract); Scott *v.* Texas Constr. Co., (Tex. Civ. App. 1900) 55 S. W. 37.

**80.** Hitchings *v.* Kayser, 65 N. Y. App. Div. 302, 72 N. Y. Suppl. 749 [*affirmed* in 171 N. Y. 636, 63 N. E. 1118].

**Sufficiency or insufficiency of evidence to show payment** see Armstrong *v.* Rorick, 142 Mich. 80, 105 N. W. 29; Hawver *v.* Ingalls, 93 Minn. 371, 101 N. W. 604; Cruse *v.* Holstein Lumber Co., (Nebr. 1903) 97 N. W. 295; Morris *v.* Hofferberth, 81 N. Y. App. Div. 512, 81 N. Y. Suppl. 403 [*affirmed* in 180 N. Y. 545, 73 N. E. 1127].

**81.** See Trial.

**82.** Butler *v.* Hirzel, 87 N. Y. App. Div. 462, 84 N. Y. Suppl. 693 [*affirmed* in 181 N. Y. 520, 73 N. E. 1120] (holding that where the parties submitted to the court the question whether as matter of law there was a delivery, and seemed content to have the case depend on that point alone, the trial judge, although deciding that there was no delivery, was not debarred from directing judgment for plaintiff on the merits); Wolf *v.* Di Lorenzo, 21 Misc. (N. Y.) 521, 47 N. Y. Suppl. 719 (holding that where plaintiff seeks a recovery on the theory of an absolute sale he cannot at the trial shift his ground and ask a recovery of an instalment on the theory of a conditional sale); Wilson *v.* Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250 (holding that if the issues are broad enough to permit defendant to present every phase of the defense, it is not error to refuse further issues tendered by defendant).

**83.** Brenard Mfg. Co. *v.* Citronelle Mercantile Co., 140 Ala. 602, 37 So. 509; Colorado Trading, etc., Co. *v.* Oliver, 20 Colo. App. 257, 78 Pac. 308; Field *v.* Schuster, 26 Pa. Super. Ct. 82; Martin *v.* Petty, (Tex. Civ App. 1904) 79 S. W. 878.

**Modification by conduct.**— Where there is no dispute as to the acts of the parties but the sole question is as to the effect of such acts as modifying the contract or constituting a new contract, it is a question of law for the court. Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489, 75 N. Y. Suppl. 106.

**84.** *District of Columbia.*— Smith *v.* Ross, 31 App. Cas. 348.

*Georgia.*— Eldorado Jewelry Co. *v.* Hitchcock, 130 Ga. 778, 61 S. E. 855; Gude *v.* H. J. Bailey Co., 4 Ga. App. 226, 61 S. E. 135.

*Illinois.*— Olcese *v.* Mobile Fruit, etc., Co., 211 Ill. 539, 71 N. E. 1084 [*affirming* 112 Ill. App. 281].

*Maryland.*— Joseph Joseph Bros. Co. *v.* Schonthal Iron, etc., Co., 99 Md. 382, 58 Atl. 205.

*Massachusetts.*— Knight *v.* New England Worsted Co., 2 Cush. 271.

*Missouri.*— Martin *v.* Williams, 96 Mo. App. 249, 70 S. W. 249.

*New York.*— Roots Co. *v.* New York Foundry Co., 56 Misc. 687, 107 N. Y. Suppl. 742.

*Pennsylvania.*— Patterson *v.* Brace, 198 Pa. St. 107, 47 Atl. 950; Barnett *v.* Becker, 25 Pa. Super. Ct. 22; Woolman *v.* Hancock Ice Co., 18 Pa. Super. Ct. 596.

*South Carolina.*— Walker *v.* Ayer, 80 S. C. 292, 61 S. E. 557.

*Texas.*— Ennis-Brown Co. *v.* Caffarelli, (Civ. App. 1902) 67 S. W. 1048.

*United States.*— Crane *v.* Crane, 105 Fed. 869, 45 C. C. A. 96.

See 43 Cent. Dig. tit. "Sales," § 1064.

**Evidence held sufficient to warrant submission to jury** see National Cash Register Co. *v.* Dehn, 155 Mich. 99, 118 N. W. 724 (in an action to recover the price of cash registers sold defendants, evidence on the question whether the machines received were the ones ordered); Moore *v.* Rose, 130 Mo. App. 668, 108 S. W. 1105 (holding that in an action for goods sold, the testimony of plaintiff, "I think the entire purchase price was something like $85," made in response to the question, "What did that bill of goods amount to?" is sufficient to carry the case to the jury on the question of value); Morgan *v.* Heitmann, 121 N. Y. App. Div. 568, 106 N. Y. Suppl. 253 (an action for a balance of the price due on a contract for the printing of posters); Chautauqua Lake Mills *v.* Hewes, 55 Misc. (N. Y.) 634, 106 N. Y. Suppl. 1026 (holding in an action for the price of goods sold that positive testimony of plaintiff that defendants purchased the goods, as against that of both defendants,

contract of sale are questions for the jury,[85] and when the construction of the contract depends on extrinsic evidence the interpretation thereof is for the jury.[86] It is also a question for the jury whether the goods were delivered under the contract,[87] and whether there was a deficiency in quantity,[88] or defect in quality;[89] whether defendant relied on the representations as to quality or the facts could have been ascertained by inspection;[90] whether there had been a proper trial or test of the goods purchased;[91] whether there was an unqualified acceptance of the goods;[92] whether the defective goods were returned or tendered in a reasonable time, as provided by the contract;[93] whether defendant was bound to accept and pay for goods shipped C. O. D., without examination;[94] whether there was a

who denied receiving same, presents a question of fact for the jury).

85. *Delaware.*— Heidelbaugh *v.* Cranston, 4 Pennew. 464, 56 Atl. 367.

*Michigan.*— Gorman *v.* Kennedy, 126 Mich. 182, 85 N. W. 458.

*New York.*— New York Hydraulic Press Brick Co. *v.* Gunn, 43 Misc. 330, 87 N. Y. Suppl. 168.

*Oklahoma.*—Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528.

*Pennsylvania.*— Allum *v.* Nolle, 25 Pa. Super. Ct. 220; Tunkhannock Ice Co. *v.* Franklin, 22 Pa. Super. Ct. 147.

**Whether by reason of fraud or mistake** the contract sued on did not contain the whole agreement between the parties was a question for the jury. L. A. Becker Co. *v.* Alvey, 86 S. W. 974, 27 Ky. L. Rep. 832.

**Entirety of contract.**— Whether a contract under which several shipments are made is an entire contract entitling the purchaser to recoup for damages due to delay in any one of the shipments, or whether each shipment represents a separate contract entitling the purchaser to recover only those damages flowing directly from the contract breached, is for the jury. Gem Knitting Mills *v.* Empire Printing, etc., Co., 3 Ga. App. 709, 60 S. E. 365. Where plaintiffs' traveling salesman took two orders for goods from defendant — one order to be shipped immediately and the other at a future date — and the testimony as to the transaction was conflicting, the question whether there was one contract, or separate contracts for each order, was properly submitted to the jury. Brown *v.* Snider, 126 Mich. 198, 85 N. W. 570.

**Who are the parties to the contract** is a question for the determination of the jury. Klumph *v.* Bousfield, 112 Mich. 68, 70 N. W. 317; Williams *v.* Brandt, 90 N. Y. App. Div. 607, 86 N. Y. Suppl. 389.

86. Chase *v.* Ainsworth, 135 Mich. 119, 97 N. W. 404; Dannemiller *v.* Kirkpatrick, 201 Pa. St. 218, 50 Atl. 928; Providence Mach. Co. *v.* Laurens Cotton Mills, 98 Fed. 198.

87. Welsbach Light Co. *v.* Mayhew, 51 N. Y. App. Div. 157, 64 N. Y. Suppl. 600.

**Delay in delivery due to fraudulent conduct of seller.**— Where there is evidence tending to show that the delay in delivery is due to the fraudulent conduct of the seller, it is error to direct a verdict for plaintiff. Cox *v.* Indiana Drug, etc., Co., (Miss. 1905) 37 So. 835.

88. Boyce *v.* Barker, 119 Mich. 157, 77 N. W. 692; Howland Pulp Co. *v.* Jessup, etc., Paper Co., 21 Pa. Super. Ct. 495.

**Whether there was a substantial performance** of the contract in relation to delivery is for the jury. Eastern Forge Co. *v.* Baizley, 21 Pa. Super. Ct. 504.

89. *Illinois.*— Chicago Tip, etc., Co. *v.* Beardsley, 86 Ill. App. 184.

*Iowa.*— McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 260, 86 N. W. 284.

*Missouri.*— Conklin *v.* Redemeyer-Hollister Commission Co., 86 Mo. App. 190.

*New York.*— Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249, 82 N. Y. Suppl. 835; Charter Gas-Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019; New York Hydraulic Press Brick Co. *v.* Gunn, 43 Misc. 330, 87 N. Y. Suppl. 168; Carey *v.* Baldwin, 61 N. Y. Suppl. 581.

*Pennsylvania.*— Hagen Co. *v.* Greenwood, 27 Pa. Super. Ct. 239.

*South Carolina.*— Ingram *v.* Sumter Music House, 51 S. C. 281, 28 S. E. 936.

*Texas.*— Bryan Cotton-Seed Oil Mill *v.* Fuller, (Civ. App. 1900) 57 S. W. 924.

**Capacity of machine.**— In an action for the price of a refrigerating machine, a peremptory instruction for plaintiff is erroneous, where he guaranteed the machine to make an average quantity of ice per day, and there was evidence that it did not do the work. Biloxi Canning Co. *v.* Stillwell-Bierce, etc., Co., (Miss. 1899) 25 So. 366.

**Agreement to repair.**— Whether the seller complied with his agreement to repair the machine within a reasonable time is for the jury. Price *v.* Marthen, 124 Mich. 690, 83 N. W. 1021.

90. McRae *v.* Lonsby, 130 Fed. 17, 64 C. C. A. 385.

91. Smith *v.* Council Bluffs Independent School Dist., 112 Iowa 35, 83 N. W. 810; Underfeed Stoker Co. *v.* Hudson County Consumers' Brewing Co., 70 N. J. L. 649, 58 Atl. 296; Harrisburg Foundry, etc., Works *v.* Lebanon, 195 Pa. St. 331, 45 Atl. 1062.

92. Parker *v.* Fenwick, 138 N. C. 209, 50 S. E. 627.

93. Rumsey *v.* Bessemer, 138 Ala. 329, 35 So. 353; Laird *v.* Cole, 121 Iowa 146, 96 N. W. 744; Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75; Acme Electric Lamp Co. *v.* Kingston Carriage Co., 31 Misc. (N. Y.) 823, 64 N. Y. Suppl. 377.

94. Louisville Lith. Co. *v.* Schedler, 63 S. W. 8, 23 Ky. L. Rep. 465.

waiver of a condition of the contract;[95] whether there was a breach of the contract by defendant excusing plaintiff from further performance;[96] whether there had been a full or partial payment of the price;[97] whether there was unreasonable delay in making payment;[98] and whether cash payment had been waived;[99] and it is also within the province of the jury to assess the amount of recovery to which plaintiff is entitled,[1] and to that end to determine what is the value of the goods purchased.[2]

**b. Instructions.** The rules relating to instructions in civil actions generally[3] apply in actions for the price or value of goods sold,[4] and as in other actions the parties are upon request entitled to full instructions correctly stating the law.[5] The instructions must be unambiguous,[6] stating clearly the issues involved,[7]

95. Henkins *v.* Miller, 45 Ill. App. 34.

What constitutes a waiver is a question of law for the court. Henkins *v.* Miller, 45 Ill. App. 34.

96. U. S. *v.* Molloy, 127 Fed. 953, 62 C. C. A. 585.

97. Coons *v.* Sanguinetti, 90 N. Y. App. Div. 615, 86 N. Y. Suppl. 367.

98. Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, 51 N. E. 587 [*affirming* 65 Ill. App. 656].

99. Drum-Flato Commission Co. *v.* Zeb. F. Crider Commission Co., 165 Mo. 84, 65 S. W. 239.

1. Day Bros. Lumber Co. *v.* Daniel, 23 Ky. L. Rep. 285, 62 S. W. 866; McAfee *v.* Dix, 101 N. Y. App. Div. 69, 91 N. Y. Suppl. 464.

**Amount of interest.**— In an action to recover for the price of certain iron pipe, the trial court may properly submit to the jury whether, under the evidence, interest should be allowed plaintiff on the amount found due from the date of the last delivery or from a later date, and refuse a prayer offered by defendant allowing interest only from the date of the commencement of the suit. District of Columbia *v.* Camden Iron Works, 15 App. Cas. (D. C.) 198 [*affirmed* in 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948].

2. Coxe *v.* Anoka Waterworks, etc., Co., 91 Minn. 50, 97 N. W. 459; Isbell-Porter Co. *v.* Heineman, 126 N. Y. App. Div. 713, 111 N. Y. Suppl. 332; Diamond Soda Water Mfg. Co. *v.* Hegeman, 74 N. Y. App. Div. 430, 77 N. Y. Suppl. 417.

3. See TRIAL.

4. See the cases cited *infra*, this note; and notes 5–18.

**Following language of statute.**— Under Cr. Code, c. 10, § 76, making it a misdemeanor for a person to sell domestic animals knowing them to be infected with a contagious or infectious disease, an instruction as to the non-liability of a purchaser of animals to pay for them if they were infected with an "infectious" disease is not erroneous because it omits the adjective "contagious." Stryker *v.* Crane, 33 Nebr. 690, 50 N. W. 1132.

5. Helm *v.* Loveland, 136 Iowa 504, 113 N. W. 1082; Booth *v.* Newton, 46 N. Y. App. Div. 175, 61 N. Y. Suppl. 727 (holding that the refusal of a request to instruct in accordance with defendant's theory of the case is erroneous when the instructions as given do not adequately present the issue); Nichols *v.* Nehrbass, 22 Misc. (N. Y.) 90, 48 N. Y. Suppl. 713.

**Failure to instruct cannot be made the ground of exception** in the absence of a request (Packard *v.* Clapp, 11 Gray (Mass.) 124), or if the point is substantially covered by other portions of the charge (McKnight *v.* Mathews, 10 Pa. Cas. 588, 11 Atl. 676; Pierpont Mfg. Co. *v.* Goodman Produce Co., (Tex. Civ. App. 1900) 60 S. W. 347; Walter A. Wood Reaping, etc., Mach. Co. *v.* Stenel, 71 Wis. 71, 36 N. W. 636).

**Modification or refusal of requested instruction.**—A requested instruction may be modified to conform to the issues and evidence (Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360; B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139), in order to avoid confusing or misleading the jury (Culver *v.* Scott, etc., Lumber Co., 53 Minn. 360, 55 N. W. 552); and is properly refused if it is not supported by evidence (Allyn *v.* Burns, 37 Ind. App. 223, 76 N. E. 636; National Horse Importing Co. *v.* Novak, 105 Iowa 157, 74 N. W. 759; Kernan *v.* Crook, 100 Md. 210, 59 Atl. 753; Kertscher *v.* Picken, 88 N. Y. Suppl. 384; Bascom *v.* Danville Stove, etc., Co., 182 Pa. St. 427, 38 Atl. 510; Atlantic Phosphate Co. *v.* Sullivan, 34 S. C. 301, 13 S. E. 539; Huff *v.* Kinloch Paint Co., (Tex. Civ. App. 1908) 110 S. W. 467; Weatherford Mach., etc., Co. *v.* Tate, (Tex. Civ. App. 1908) 109 S. W. 406), or if it ignores any of the issues (Anderson *v.* English, 121 Ala. 272, 25 So. 748; Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75; Patterson *v.* Brace, 198 Pa. St. 107, 47 Atl. 950; Ellis *v.* Riddick, 34 Tex. Civ. App. 256, 78 S. W. 719).

6. Raisin Fertilizer Co. *v.* J. J. Barrow, Jr. Co., 97 Ala. 694, 12 So. 388; Matthews *v.* Freker, 68 Ark. 190, 57 S. W. 262; Warder, etc., Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591; Anderson *v.* Baird, 40 S. W. 923, 19 Ky. L. Rep. 444.

7. Huff *v.* Wallick, 16 Ill. App. 644; Heilbronn *v.* Herzog, 165 N. Y. 98, 58 N. E. 759 [*reversing* 33 N. Y. App. Div. 311, 53 N. Y. Suppl. 841].

**An instruction as to what would constitute a proper test of a machine** is erroneous if it does not comply with all the conditions provided for in the contract in regard to how the machine is to be tested. Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263, 39 N. W. 54.

and they must not be inconsistent,[8] or misleading,[9] and should conform to the pleadings,[10] and cover all the issues raised,[11] but should not inject into the case issues not raised by the pleadings,[12] or invade the province of the jury,[13]

8. Thummel *v.* Dukes, 82 Mo. App. 53; Parkins *v.* Missouri Pac. R. Co., 72 Nebr. 331, 101 N. W. 1013, 4 Nebr. (Unoff.) 13, 96 N. W. 683; Dawson Town, etc., Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464.

**An instruction stating the amount** to which plaintiff would be entitled under the contract, if entitled to recover at all, is not inconsistent with a statement of defendants' right to recoupment. Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40 [*affirming* 31 Ill. App. 637].

9. *Alabama.*— Meyer Bros. Drug Co. *v.* Puckett, 139 Ala. 331, 35 So. 1019; Oklahoma Vinegar Co. *v.* Hamilton, 132 Ala. 593, 32 So. 306.

*Florida.*— Demens *v.* Le Moyne, 26 Fla. 323, 8 So. 442.

*Illinois.*— Creager *v.* Blank, 32 Ill. App. 615

*Iowa.*— Warder, etc., Co. *v.* Horne, 110 Iowa 285, 81 N. W. 591; Aufderheide *v.* Hunt, 64 Iowa 133, 19 N. W. 878.

*Missouri.*— Nugent *v.* Armour Packing Co., (App. 1904) 81 S. W. 506; Esterly Harvesting Mach. Co. *v.* Criswell, 58 Mo. App. 471; Gill *v.* Reed, 55 Mo. App. 246.

*Pennsylvania.*— Sidney School Furniture Co. *v.* Warsaw School Dist., 130 Pa. St. 76, 18 Atl. 604; McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188.

*South Carolina.*— Burns *v.* Mills, 31 S. C. 53, 9 S. E. 689.

*Texas.*— Drumm Seed, etc., Co. *v.* Bell, (Civ. App. 1895) 29 S. W. 796.

*Washington.*— Williams *v.* Ninemire, 23 Wash. 393, 63 Pac. 534.

**That an instruction is not technically correct** is no ground of objection if it is a substantially correct statement and not misleading or ambiguous. Florence, etc., R. Co. *v.* Tennent, 32 Colo. 71, 75 Pac. 410; Bowers *v.* Hanna, 101 Iowa 660, 70 N. W. 745.

**Delivery.**—An instruction that delivery to the carrier, in the absence of any agreement as to place of delivery, is delivery to the purchaser, but that the jury should consider not only the place of the contract but all of the circumstances in determining whether the property was to be delivered at the home of the buyer or only to the carrier, was not misleading as laying stress on the place of delivery. Burns *v.* Goddard, 72 S. C. 355, 51 S. E. 915.

**Acceptance.**—Where in an action for the price of goods there is evidence that the purchaser refused the goods because not of satisfactory quality, and had merely permitted them to be put in his yard for convenience, it was error to instruct the jury to find an acceptance, without stating what would amount to an acceptance. Courtney *v.* Knabe, etc., Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

**Transfer of title between parties.**— In an action for goods, sold and delivered, an instruction that the title to goods passed upon their delivery at the place agreed upon is misleading and prejudicial, when the evidence leaves it in doubt whether such was the intent of the parties. Holly *v.* St. Louis, etc., R. Co., 34 Mo. App. 202.

10. Freeman, etc., News Co. *v.* Mencken, 115 Ga. 1017, 42 S. E. 369; Ferris *v.* Marshall, 1 Nebr. (Unoff.) 377, 96 N. W. 602; Houston, etc., R. Co. *v.* Ryan, (Tex. Civ. App. 1896) 38 S. W. 221.

11. *Alabama.*—American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

*Illinois.*— Driscoll *v.* Duryee, 66 Ill. 35; Hovey *v.* Thompson, 37 Ill. 538; Chamberlain *v.* Bain, 27 Ill. App. 634; Chicago Safe, etc., Co. *v.* Cremen, 27 Ill. App. 331.

*Missouri.*— Forster Vinegar Mfg. Co. *v.* Guggemos, 98 Mo. 391, 11 S. W. 966; Swink *v.* Anthony, 96 Mo. App. 420, 70 S. W. 272.

*New York.*— Lesser *v.* Perkins, 4 N. Y. Suppl. 53 [*affirmed* in 123 N. Y. 629, 25 N. E. 952].

*Pennsylvania.*—Sidney School-Furniture Co. *v.* Warsaw School Dist., 130 Pa. St. 76, 18 Atl. 604.

*Wisconsin.*— Warder, etc., Co. *v.* Pischer, 110 Wis. 363, 85 N. W. 968.

**Instructions held sufficient to present all the issues** see Smith *v.* Council Bluffs Independent School Dist., 112 Iowa 35, 83 N. W. 810; Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147; Borum *v.* Allen, 84 S. W. 760, 27 Ky. L. Rep. 262; Helfrich Saw, etc., Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795; Bialy *v.* Krause, 142 Mich. 158, 105 N. W. 149; Milligan *v.* Butcher, 23 Nebr. 683, 37 N. W. 596; Southern Pine Lumber Co. *v.* Fries, 2 Nebr. (Unoff.) 691, 96 N. W. 71; Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

12. *Georgia.*— Freeman, etc., News Co. *v.* Mencken, 115 Ga. 1017, 42 S. E. 369.

*Kentucky.*— Helfrich Saw, etc., Mill Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795.

*North Carolina.*— Gaines *v.* McAllister, 122 N. C. 340, 29 S. E. 844; Burton *v.* Wilkes, 66 N. C. 604.

*Texas.*— Merrill *v.* Taylor, 72 Tex. 293, 10 S. W. 532.

*Washington.*—Belle City Mfg. Co. *v.* Kemp, 27 Wash. 111, 67 Pac. 580.

13. *Alabama.*— Fuller *v.* Gray, 116 Ala. 238, 22 So. 576; Raisin Fertilizer Co. *v.* J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388.

*Arkansas.*— Jones-Pope Produce Co. *v.* Breedlove, (1904) 83 S. W. 924.

*Michigan.*— Lovejoy *v.* Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

*Mississippi.*— Kimbrough *v.* Ragsdale, 69 Miss. 674, 13 So. 830.

*North Carolina.*— Powers *v.* Erwin, 108 N. C. 522, 13 S. E. 208.

*Texas.*— Gutta Percha, etc., Mfg. Co. *v.* Cleburne, (1908) 112 S. W. 1047; Pierpont

or weigh the evidence.[14] Instructions to be unobjectionable must be warranted by the evidence,[15] and should not ignore any material portion thereof;[16] and if an instruction is not warranted by the evidence it is objectionable, although correctly stating the law;[17] but if when construed together the instructions considered as a whole properly state the issues and the law they are sufficient.[18]

**10. Verdict, Judgment, and Amount of Recovery — a. Verdict and Findings.** The rules governing verdicts and findings in actions for the price of goods sold are the same as those applicable in civil actions generally.[19] The findings must con-

Mfg. Co. *v.* Goodman Produce Co., (Civ. App. 1900) 60 S. W. 347.

*Wisconsin.*— Keeler *v.* Jacobs, 87 Wis. 545, 58 N. W. 1107.

**Existence of contract.**— In an action for goods sold and delivered, it is error to instruct the jury that, if they are unable to say whether there was a contract between the parties with reference to the goods they should find for defendant, because, in the absence of a contract, the jury might properly have found that the goods were delivered upon an implied contract for what they were reasonably worth. Squire Dingee Co. *v.* McDonald, 61 Ill. App. 607.

**14.** Cleveland *v.* Heidenheimer, (Tex. Civ. App. 1898) 44 S. W. 551.

**15.** *Alabama.*— Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422.

*Georgia.*— Wholesale Mercantile Co. *v.* Jackson, 2 Ga. App. 776, 59 S. E. 106.

*Illinois.*— Olcese *v.* Mobile Fruit, etc., Co., 211 Ill. 539, 71 N. E. 1084 [*affirming* 112 Ill. App. 281]; Chamberlain *v.* Bain, 27 Ill. App. 634.

*Kentucky.*— Noel *v.* Kauffman Buggy Co., 106 S. W. 237, 32 Ky. L. Rep. 576.

*Michigan.*— Kupfer *v.* Michigan Clothing Co., 141 Mich. 325, 104 N. W. 582.

*Missouri.*— Franz *v.* William Barr Dry Goods Co., 132 Mo. App. 8, 111 S. W. 636; Nugent *v.* Armour Packing Co., (App. 1904) 81 S. W. 506.

*Nebraska.*— Bowie *v.* Spaids, 26 Nebr. 635, 42 N. W. 700.

*Pennsylvania.*— Braddock Glass Co. *v.* Irwin, 153 Pa. St. 440, 25 Atl. 490.

*Texas.*— McAfee *v.* Meadows, 32 Tex. Civ. App. 105, 75 S. W. 813; Drumm Seed, etc., Co. *v.* Bell, (Civ. App. 1895) 29 S. W. 796.

*Wisconsin.*— Thayer *v.* Davis, 75 Wis. 205, 43 N. W. 902.

**Instructions held justified by the evidence** see Underfeed Stoker Co. *v.* Hudson County Consumers' Brewing Co., 70 N. J. L. 649, 58 Atl. 296; Marshall *v.* Macon County Sav. Bank, 108 N. C. 639, 13 S. E. 182.

**16.** *Connecticut.*— Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546.

*Illinois.*— Nichols *v.* Mercer, 44 Ill. 250; Goldberg *v.* Einstein, 44 Ill. App. 272; Ardinger *v.* Wright, 38 Ill. App. 98; Chicago Safe, etc., Co. *v.* Cremen, 27 Ill. App. 331.

*Maryland.*— Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75.

*Michigan.*— Morris *v.* Osterhout, 55 Mich. 262, 21 N. W. 339.

*Minnesota.*— Wilder *v.* De Cou, 18 Minn. 470.

*Washington.*— Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

*Wisconsin.*— J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

**Failure to refer to evidence** that could not have the effect of qualifying the proposition of law set forth in the instruction does not render the charge objectionable. Hartshown *v.* Byrne, 147 Ill. 418, 35 N. E. 622 [*affirming* 45 Ill. App. 250].

**17.** Steen *v.* Sanders, 116 Ala. 155, 22 So. 498; McCall Co. *v.* Jennings, 26 Utah 459, 73 Pac. 639.

**18.** *Arkansas.*— Jones-Pope Produce Co. *v.* Breedlove, (1904) 83 S. W. 924.

*Colorado.*— Fitzhugh *v.* Spear, 8 Colo. App. 398, 46 Pac. 625.

*Indiana.*— Allyn *v.* Burns, 37 Ind. App. 223, 76 N. E. 636.

*Iowa.*— National Horse Importing Co. *v.* Novak, 105 Iowa 157, 74 N. W. 759.

*Missouri.*— Gaar *v.* Hill, 113 Mo. App. 10, 87 S. W. 609.

*Nebraska.*— Gray *v.* Farmer, 19 Nebr. 69, 26 N. W. 593.

*New York.*— Palmer *v.* Stryker, 12 N. Y. Suppl. 737.

*Pennsylvania.*— Whitehall Mfg. Co. *v.* Wise, 119 Pa. St. 484, 13 Atl. 298.

*Texas.*— Graves *v.* Hillyer, (Civ. App. 1899) 48 S. W. 889.

*Wisconsin.*— Baumbach *v.* Gessler, 82 Wis. 231, 52 N. W. 259.

*United States.*— Dawson Town, etc., Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464.

**Instructions more favorable to a party than he is entitled to** cannot be complained of by him (Collins *v.* Camors, 118 Ga. 646, 45 S. E. 454; Bostain *v.* De Laval Separator Co., 92 Md. 483, 48 Atl. 75; Wilson *v.* J. H. Flickinger Co., 76 N. Y. App. Div. 399, 78 N. Y. Suppl. 746); nor those less favorable to the opposing party than he was entitled to (Davis *v.* Davis, 100 Mich. 162, 58 N. W. 651, 97 Mich. 419, 56 N. W. 774).

**19.** See Trial.

**General verdict and special findings.**— Where a general verdict was returned for defendant, with answers to interrogatories, finding that defendant did not order the goods shipped; that plaintiff, in pursuance of the order, shipped the goods, and delivered the same to defendant; that defendant unloaded the same from the car, and sold some of them; that there was no evidence as to the value; and it did not appear that any price was agreed upon, or that any account was rendered to defendant, or that the goods

form to the issues raised by the pleadings,[20] but a failure to find on immaterial issues is not error.[21] Findings will if possible be construed so as to be consistent with each other and to support the judgment.[22] A finding that none of the allegations of defendant's answer or cross complaint are true is a sufficient finding on affirmative allegations of rescission and counter-claim;[23] and where there is no special finding on a plea in reconvention a general verdict for plaintiff for the full amount claimed is equivalent to a finding against defendant on such plea;[24] and in assumpsit a general finding that the goods were sold and delivered to defendant at his special instance and request is a sufficient finding as to the agreement and a promise to pay for the goods.[25]

**b. Judgment.** The judgment must conform to and be warranted by the pleadings and proof.[26] On a counter-claim in an action on one of several notes given for the price of goods, but not operating as payment, if defendant's damages exceed the amount of the note, the other notes not being due, defendant is not entitled to judgment for the excess;[27] and if defendant pleads in reconvention to recover that portion of the price already paid on the ground that the goods were not such as were contracted for a judgment for defendant for the amount so paid and giving plaintiff the goods is proper.[28] If the goods are still in the seller's hands and he sues for and recovers the price the judgment imports that the purchaser is the owner of the goods.[29]

**c. Amount of Recovery.** Ordinarily where the sale is for an agreed price the amount of recovery is the contract price,[30] and interest from the time payment

had ever been accepted, a motion for judgment for plaintiff nothwithstanding the verdict was properly denied. Gates Lumber Co. *v.* Todd, 22 Ind. App. 148, 53 N. E. 385.

**In two cross actions tried together,** one for the price of property sold and the other for fraud of the vendor, the jury, if they find the fraud and that the damages equaled or exceeded the purchase-money, may render a verdict for defendant in the first action, and for plaintiff in the second action for the excess of such damages, if any, over the purchase-money. If the damage is less than the price sued for, it should go in reduction of the price in the first action, and the verdict should be for defendant in the second action. Cook *v.* Castner, 9 Cush. (Mass.) 266.

**Sufficiency of findings to support judgment** see Woodland Bank *v.* Hiatt, 58 Cal. 234; Hildebrand *v.* Sattley Mfg. Co., 25 Ind. App. 218, 57 N. E. 594.

**20.** Palmer Steel, etc., Co. *v.* Heat, etc., Co., 160 Ind. 232, 66 N. E. 690; Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290; Braun *v.* Holtan, 87 N. Y. App. Div. 611, 84 N. Y. Suppl. 8.

**21.** Deutsch *v.* Pratt, 149 Mass. 415, 21 N. E. 1072; Terwilliger *v.* Ontario, etc., R. Co., 73 Hun (N. Y.) 335, 26 N. Y. Suppl. 268, [*reversed* on other grounds in 149 N. Y. 86, 43 N. E. 432].

**22.** Wiestner *v.* California Coke, etc., Co., 2 Cal. App. 314, 83 Pac. 461; Edmonsen *v.* Fort, 75 N. C. 404.

**23.** Brovelli *v.* Bianchi, 136 Cal. 612, 69 Pac. 416.

**24.** De Witt *v.* Berger Mfg. Co., (Tex. Civ. App. 1904) 81 S. W. 334.

**25.** Andresen *v.* Upham Mfg. Co., 120 Wis. 561, 98 N. W. 518.

**26.** Bullock *v.* Ueberroth, 121 Mich. 293, 80 N. W. 39; Hess *v.* Corwin, 109 Mo. App. 22, 84 S. W. 141; Flower City Plant Food Co. *v.* Roberts, 81 N. Y. App. Div. 249, 80 N. Y. Suppl. 1060; Kauffman Milling Co. *v.* Stuckey, 37 S. C. 7, 16 S. E. 192.

**Complete relief may be decreed in a suit in equity** for the value of goods. Mississippi Cotton Oil Co. *v.* Smith, (Miss. 1902) 33 So. 443.

**Action to set aside fraudulent transfer.**— Where an action is brought for goods sold and delivered, and also to set aside, as fraudulent, certain transfers of the debtor's property, it is error to dismiss the complaint, on failure to prove the alleged fraud, when the cause of action against the debtor is fully admitted, since in such case a personal judgment should be rendered against him. Magruder *v.* Clayton, 29 S. C. 407, 7 S. E. 844.

**If defendant is to give indorsed notes for the price** and refuses to comply with the agreement a money judgment against him is proper. Caldwell *v.* Dutton, 20 Tex. Civ. App. 369, 49 S. W. 723.

**27.** Aultman, etc., Co. *v.* Hetherington, 42 Wis. 622; Aultman *v.* Jett, 42 Wis. 488.

**28.** Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

**29.** American Grocery Co. *v.* Pirkl, 25 Misc. (N. Y.) 727, 55 N. Y. Suppl. 606.

**30.** *Michigan.*— Brown *v.* Harris, 139 Mich. 372, 102 N. W. 960.

*Missouri.*—Drumm-Flato Commission Co. *v.* Zeb. F. Crider Commission Co., 165 Mo. 84, 65 S. W. 239; Fairbanks *v.* Midvale Min., etc., Co., 105 Mo. App. 644, 80 S. W. 13; Henderson *v.* Davis, 74 Mo. App. 1.

*Nebraska.*— Boston Tea Co. *v.* Brubaker, 26 Nebr. 409, 42 N. W. 399.

*New York.*— Niles *v.* Sire, 46 Misc. 321,

was due,[31] subject, however, to deductions because of defects in quality,[32] default in delivery,[33] or breach of other conditions of the contract.[34] In the absence of, or upon failure to prove, a special agreement as to the price the seller may recover the reasonable value at the time of delivery;[35] and this is the measure if the seller

94 N. Y. Suppl. 586 [*affirmed* in 108 N. Y. App. Div. 366, 95 N. Y. Suppl. 1149]; Stuart *v.* Manhattan Bath Tub Co., 34 Misc. 165, 68 N. Y. Suppl. 816. And see Williams *v.* Sherman, 48 Barb. 402, holding that under a contract of sale of four hundred cords of wood, two hundred cords to be paid for at the rate of five dollars per cord, and two hundred cords at five dollars and twenty-five cents a cord, one hundred and fifty cords being delivered and accepted as a delivery under the contract, the jury should have been instructed, in fixing the amount of recovery, to allow for one half of the wood at the higher price and the other half at the lower price called for in the contract.

*Pennsylvania.*— Field *v.* Schuster, 26 Pa. Super. Ct. 82.

*Washington.*— Tilden *v.* Gordon, 25 Wash. 593, 66 Pac. 50.

**Where payment is to be made in other property** the measure of the recovery is the value of the property on a failure to convey. Rutan *v.* Hinchman, 29 N. J. L. 112.

**The value of labor and material** used in the manufacture of goods cannot be recovered under a complaint for the price of goods manufactured, sold, and delivered, where the manufacture was stopped by defendants before the completion of the goods. Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338, 39 S. W. 641.

**The fact that there was an error in the bill** rendered will not prevent a recovery of the price. Shapiro *v.* Jacoves, 18 Misc. (N. Y.) 473, 42 N. Y. Suppl. 91.

**Where before title passed the buyer notified the seller of his intention not to accept the goods,** in an action on a note given for the price of the goods, recovery is limited to the difference between the contract price and the value of the property at the time and place at which it was when the contract was broken. Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235.

**31.** Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65; Fairbanks *v.* Midvale Min., etc., Co., 105 Mo. App. 644, 80 S. W. 13; Kester *v.* Miller, 119 N. C. 475, 26 S. E. 115.

**Interest** cannot be recovered unless pleaded. De Groot *v.* Darby, 7 Rich. (S. C.) 118; Rice *v.* Hancock, Harp. (S. C.) 393.

**32.** *Colorado.*— Dolan *v.* John Douglas Co., 4 Colo. App. 280, 35 Pac. 670.

*Connecticut.*— McAlpin *v.* Lee, 12 Conn. 129, 30 Am. Dec. 609.

*Michigan.*— Chapman *v.* Dease, 34 Mich. 375.

*Missouri.*— Brockhaus *v.* Schilling, 52 Mo. App. 73.

*New York.*— Duford *v.* Patrick, 15 N. Y. Suppl. 285.

*North Carolina.*— Howie *v.* Rea, 70 N. C. 559.

*England.*— Germaine *v.* Burton, 3 Stark. 32, 3 E. C. L. 581.

**Damage before delivery.**— In an action by a vendor for the price of goods, where defendant seeks to recover for damages done to the property after the sale and before delivery, it is erroneous to allow the difference in value between the cash price and the value of the property when delivered, without evidence of the actual damages. Gerard *v.* Prouty, 34 Barb. (N. Y.) 454 [*affirmed* in 41 N. Y. 619].

**On failure of title** as to the major portion of the goods there can be no recovery *pro tanto* in the absence of allegations as to the relative value of the portions. Kriess *v.* Faron, 118 Cal. 142, 50 Pac. 388.

**Resale by purchaser.**— Where defendant contracted to purchase all the "merchantable" peaches grown on plaintiff's farm at a certain price per basket, plaintiff could only recover the price obtained by defendant for unmerchantable peaches sent him after notice by defendant that he would only pay such price for them. Darby *v.* Hall, 3 Pennew. (Del.) 25, 50 Atl. 64.

**For minor defects** the deduction should be on the amount necessary to remedy the defect. Hodge *v.* Tufts, 115 Ala. 366, 22 So. 422.

**That the seller knew the purpose for which the goods were to be used** does not entitle the buyer to a deduction from the price because of its inferior quality, in the absence of warranty. Woodridge *v.* Brown, 149 N. C. 299, 62 S. E. 1076.

**33.** Havana R., etc., R. Co. *v.* Walsh, 85 Ill. 58; Scribner *v.* Jacobs, 9 N. Y. Suppl. 856.

**Deduction on taking inventory.**— Where an inventory was to be taken, and proper deductions made from notes given for the price of goods, the buyer was not entitled to such deductions where no inventory was made, and it was not shown that the failure was due to the seller's fault. Henry *v.* McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172.

**Deficiency in quantity.**— In an action for the price of cotton, the loss in weight of the cotton should not be deducted in assessing the damages, where the allowance of such a loss was agreed upon in the correspondence constituting the contract of sale. Wilson *v.* Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250.

**34.** Silurian Mineral Spring Co. *v.* Kuhn, 65 Nebr. 646, 91 N. W. 508.

**35.** *Delaware.*— Heidelbaugh *v.* Cranston, 4 Pennew. 464, 56 Atl. 367.

*Kentucky.*— Clarke *v.* Johnson Foundry, etc., Co., 42 S. W. 844, 19 Ky. L. Rep. 973.

*Nevada.*— Livingston *v.* Wagner, 23 Nev. 53, 43 Pac. 290.

*New Jersey.*— Hill *v.* Hill, 1 N. J. L. 261, 1 Am. Dec. 206.

waives the contract and proceeds under the common counts.[36] If part of the goods are rejected and returned as not in accordance with the contract the amount of recovery is the value of the portion retained;[37] and where there is a partial delivery or a mere deficiency in the quantity delivered, and the contract is apportionable, the seller may recover the value of the goods delivered;[38] and if the goods are defective the seller may at least recover their value not to exceed the contract

*New York.*— Terwilliger *v.* Ontario, etc., R. Co., 73 Hun 335, 26 N. Y. Suppl. 268 [*reversed* on other grounds in 149 N. Y. 86, 43 N. E. 432].

*Pennsylvania.*— Philadelphia Co. *v.* Park, 138 Pa. St. 346, 22 Atl. 86.

**Recovery on implied agreement.**— Even though under some circumstances a party may recover on an implied agreement for the price of goods sold, where there was a special contract relating to the price, yet regard must be had to the special agreement so far that plaintiff cannot recover a higher price for his goods than he could have done if he had literally or duly observed the terms of the special contract. Carter *v.* McNeeley, 23 N. C. 448.

**Where the seller is absolved from performance** by a breach of the contract by the buyer but afterward the buyer, the government, forces a delivery by threats to withhold money justly due, the measure of plaintiff's recovery is the contract price. Gibbons *v.* U. S., 8 Wall. (U. S.) 269, 19 L. ed. 453.

**Only one recovery.**— Where it appeared that plaintiff had sold a quantity of logs to defendant, who paid him for a portion thereof and, a dispute arising, a portion of the number so paid for was resold by plaintiff, for which he was again paid, and the second buyer settled an action by defendant against plaintiff and himself by conveying land to defendant, it was held in an action for the price of the logs that the number resold should not be taken into account in favor of plaintiff as having been delivered to defendant. McDonald *v.* Pike, 60 Wis. 220, 19 N. W. 44. Thus where a contract, although invalid, is performed, and the contract price paid, the seller cannot thereafter maintain an action for the value on the ground that the value increased between the date of the contract and the date of delivery. St. Louis Hay, etc., Co. *v.* U. S., 191 U. S. 159, 24 S. Ct. 47, 48 L. ed. 130 [*affirming* 37 Ct. Cl. 281].

**If the buyer is entitled to avoid the sale for fraud** and elects to keep the goods he is liable for the value. Thomas *v.* Grise, 1 Pennew. (Del.) 381, 41 Atl. 883.

**Effect of tender.**— If defendant relies on a tender, this is an admission that so much is due, and plaintiff is entitled to recover the amount of the tender without proof. Johnson *v.* Triggs, 4 Greene (Iowa) 97.

**On a failure to prove the price or value** plaintiff can recover only nominal damages. Butcher *v.* Consolidated Trust Co., 44 N. Y. App. Div. 370, 60 N. Y. Suppl. 915.

**36.** Upstone *v.* Weir, 54 Cal. 124; Wilson *v.* King, 83 Ill. 232; Wickes Bros. *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

**Freight and dockage** cannot be recovered under the common counts for goods sold. Harvey *v.* Van De Mark, 71 Ill. 117; East, etc., Texas Lumber Co. *v.* Barnwell, 78 Tex. 328, 14 S. W. 782.

**Where there is no evidence of value,** except such as is involved in an offer of compromise made by defendant, the recovery cannot exceed the sum at which defendant agreed to compromise. Hopkins *v.* Rodgers, 91 N. Y. Suppl. 749.

**37.** Churchill *v.* Holton, 38 Minn. 519, 38 N. W. 611; Gardiner *v.* Schwab, 110 N. Y. 650, 17 N. E. 732; Shields *v.* Pettie, 4 N. Y. 122; Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. 202; Cram *v.* Watson, 28 Vt. 22. But see Terwilliger *v.* Knapp, 2 E. D. Smith (N. Y.) 86 (holding that the seller may recover the full value without regard to the price); Barnett *v.* Becker, 25 Pa. Super. Ct. 22.

**38.** *Alabama.*—Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

*California.*— Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Connecticut.*— Andrews *v.* Wheaton, 23 Conn. 112.

*Delaware.*— Shimp *v.* Siedel, 6 Houst. 421.

*Georgia.*— Sentell *v.* Mitchell, 28 Ga. 196.

*Illinois.*— George H. Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557 [*affirming* 51 Ill. App. 146]; Boynton *v.* Wicker, 45 Ill. 137; Evans *v.* Chicago, etc., R. Co., 26 Ill. 189. But see Defenbaugh *v.* Weaver, 87 Ill. 132, holding that if the buyer accepts the deficient delivery he is liable at the contract price for the portion accepted.

*Massachusetts.*— Eastern R. Co. *v.* Benedict, 15 Gray 289.

*Michigan.*— Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522; Chapman *v.* Dease, 34 Mich. 375; Wilson *v.* Wagar, 26 Mich. 452; Clark *v.* Moore, 3 Mich. 55.

*Minnesota.*— Robson *v.* Bohn, 22 Minn. 410.

*Missouri.*— Rickey *v.* Zeppenfeldt, 64 Mo. 277.

*Nevada.*— Kennedy *v.* Schwartz, 13 Nev. 229

*New Hampshire.*— Flanders *v.* Putney, 58 N. H. 358.

*New York.*— Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92, 31 N. E. 248 [*affirming* 11 N. Y. Suppl. 329].

*Utah.*— Tucker *v.* Billing, 3 Utah 82, 5 Pac. 554.

*United States.*— U. S. *v.* Molloy, 127 Fed. 953, 62 C. C. A. 585.

See 43 Cent. Dig. tit. "Sales," § 950.

**If the buyer waives full performance** and accepts a part delivery as compliance with the contract, the seller may recover the price. Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814.

price,[39] and, if the goods are accepted and used without objection, the full price.[40]

**d. Review.** Objections not urged below and properly reserved for review will not be considered on appeal,[41] and ordinarily a verdict or findings based on conflicting evidence will not be disturbed,[42] unless it clearly appears that material evidence has been disregarded;[43] and unless the error is prejudicial a judgment will not be reversed because of error in the admission or exclusion of evidence,[44] or the giving or refusing of instructions.[45]

**39.** *Alabama.*— Brown *v.* Peters, 94 Ala. 459, 10 So. 261.

*Georgia.*—Watkins *v.* Paine, 57 Ga. 50.

*Indiana.*— Bischof *v.* Lucas, 6 Ind. 26; Wynn *v.* Hidey, 2 Blackf. 123.

*Maine.*— Ponce *v.* Smith, 84 Me. 266, 24 Atl. 854.

*Maryland.*— Birdsall Co. *v.* Palmer, 74 Md. 201, 21 Atl. 705.

*Michigan.*—Wolverton *v.* McCabe, 81 Mich. 265, 45 N. W. 830; McLennan *v.* McDermid, 52 Mich. 468, 18 N. W. 222; Chapman *v.* Dease, 39 Mich. 333.

*Missouri.*— Murray *v.* Farthing, 6 Mo. 251.

*New York.*— Lascelles *v.* Miller, 4 Silv. Sup. 404, 7 N. Y. Suppl. 447 [*affirmed* in 130 N. Y. 640, 29 N. E. 151].

*North Carolina.*— Patapsco Guano Co. *v.* Tillery, 110 N. C. 29, 14 S. E. 639.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40.

*Texas.*— Wilkins *v.* Burns, (Civ. App. 1893) 25 S. W. 431; Alamo Mills Co. *v.* Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097.

*Utah.*— Mumford *v.* Dickert, etc., Sulphur Co., 5 Utah 476, 17 Pac. 123.

*United States.*— Fenton *v.* Braden, 8 Fed. Cas. No. 4,730, 2 Cranch C. C. 550.

See 43 Cent. Dig. tit. "Sales," § 950.

**40.** *Arkansas.*— Smith *v.* New Albany Rail Mill Co., 50 Ark. 31, 6 S. W. 225.

*Georgia.*— Page *v.* Dodson Printers' Supply Co., 106 Ga. 77, 31 S. E. 804.

*New Jersey.*— Smalley *v.* Hendrickson, 29 N. J. L. 371.

*Texas.*— Wilkins *v.* Burns, (Civ. App. 1893) 25 S. W. 431.

*Vermont.*— Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

**41.** Sentman *v.* Gamble, 69 Md. 293, 13 Atl. 38, 14 Atl. 673; Solomon *v.* Vinson, 31 Minn. 205, 17 N. W. 340.

**42.** *Colorado.*—Stock *v.* Schlewing, 19 Colo. App. 138, 73 Pac. 1090.

*Connecticut.*— Bulkley *v.* Waterman, 13 Conn. 328.

*Idaho.*— Coffin *v.* Bradbury, 3 Ida. 770, 35 Pac. 715, 95 Am. St. Rep. 37.

*Illinois.*— Cohen *v.* Van Sickle, 65 Ill. App. 70.

*Indiana.*— Kinney *v.* Blythe, 31 Ind. 140.

*Kansas.*— Vanausdeln *v.* Crenshaw, 16 Kan. 234.

*Minnesota.*— Pitz *v.* Kentucky, etc., Distilling, etc., Co., 94 Minn. 519, 101 N. W. 797.

*New Mexico.*— Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504.

*New York.*— Burnham *v.* Edison Electric Illuminating Co., 13 N. Y. App. Div. 363, 43 N. Y. Suppl. 242; Gleason *v.* Thom, 16 Misc. 29, 37 N. Y. Suppl. 680.

*Ohio.*— Burr *v.* Shute, 25 Ohio Cir. Ct. 735.

*Canada.*— Dempster *v.* Lewis, 33 Can. Sup. Ct. 292.

**The discretion of the trial court in granting a new trial** on the ground that the verdict is not supported by the evidence will not be reviewed. Grommes *v.* Shute, 46 Minn. 182, 48 N. W. 784.

**43.** H. Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133, 82 N. Y. Suppl. 474.

**44.** Dolan *v.* Paradice, 4 Colo. App. 314, 35 Pac. 987; Reynolds *v.* Palmer, 70 Ill. 288; Empire Steam Pump Co. *v.* Inman, 59 Hun (N. Y.) 230, 12 N. Y. Suppl. 948; Doyle *v.* Beaupre, 17 N. Y. Suppl. 287; Maher *v.* Willson, 3 N. Y. Suppl. 80 [*affirmed* in 123 N. Y. 655, 25 N. E. 954].

**Prejudicial error.**—Where the answer alleged that the goods were delivered under an agreement that they were to be applied to the payment of a debt owing by plaintiff's husband to defendant, the exclusion of evidence tending to prove the agreement, and the refusal to let the jury determine whether the goods were delivered under it, called for the reversal of a judgment in plaintiff's favor. Ruppel *v.* Donohue, 10 N. Y. Suppl. 100.

**45.** Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846; Cerf *v.* Badaraco, 6 N. M. 214, 27 Pac. 504; Warder, etc., Co. *v.* Whitish, 77 Wis. 430, 46 N. W. 540.

**Possibility of injury.**— In an action to recover for materials supplied, where defendant counter-claims for damages caused by not delivering the materials at the time agreed on, and there is evidence on which the jury would have been justified in finding for defendant on the counter-claim, a possibility of injury to defendant appears from an erroneous instruction that the jury might consider whether a subsequent receipt of the materials by defendant was not a waiver of his claim for damages, so that a judgment for plaintiff must be reversed. Gaylord *v.* Karst, 17 N. Y. Suppl. 720 [*reversing* 13 N. Y. Suppl. 589].

**Questions improperly submitted to jury.**— Where a contract for the manufacture of engravings and lithographs for theatrical purposes provided the manner and time of doing the work, and that it was to be called for by the party ordering it, the questions, when the theatrical season ended, and what was sufficient delivery, within the meaning of

**F. Actions For Damages — 1. Right of Action.** The seller has a right of action for damages where there has been a breach of the contract by the buyer,[46] such as a repudiation of the contract,[47] a refusal to accept the goods,[48] or return of the goods and refusal to pay therefor.[49] The action will also lie for an unreasonable delay in receiving the goods,[50] for failure to give notes for the price as agreed in the contract,[51] or for a breach of a condition of the contract,[52] and for deceit

the contract, were questions of law, depending on the construction and legal effect of the contract, and were improperly submitted to the jury, but as the court ruled on them, by refusing to set aside the verdict, the findings of the jury in that respect become harmless. Central Lith., etc., Co. *v.* Moore, 75 Wis. 170, 43 N. W. 1124, 17 Am. St. Rep. 186, 6 L. R. A. 788.

**46.** Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014; Morier *v.* Moran, 58 Ill. App. 235; Underhill *v.* North American Kerosene Gas Light Co., 36 Barb. (N. Y.) 354; Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165.

**If the seller must first purchase the goods** in order to supply the buyer under the contract he cannot, after having been notified by the vendee to make no more purchases on account of such contract, purchase potatoes and then recover of the vendee any loss that may be sustained on them by frost or rot. Danforth *v.* Walker, 40 Vt. 257.

**Several contracts.**—Where a selling contract provided that, in case of its breach by the buyer, delivery should be made under a prior contract between the same parties, and after revival of the prior contract through breach of the former it also was broken, damages for failure to receive the goods could be recovered under only one contract. Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356, 53 N. Y. Suppl. 950.

**Failure to order goods.**—Where a buyer contracts for a certain amount of goods which he agrees to order, accept, and pay for within a stipulated time, his failure to order the goods constitutes a breach of the contract. Vickers *v.* Electrozone Commercial Co., 67 N. J. L. 665, 52 Atl. 467.

**A provision in the contract that the rights** of the buyer shall be forfeited *ipso facto* upon a failure to comply with his part of the contract without the necessity of any action on the part of the seller does not make such forfeiture the extent of his liability or affect the right of the seller to recover damages for breach of the contract. Vickers *v.* Electrozone Commercial Co., 67 N. J. L. 665, 52 Atl. 467.

**If the conduct of the seller in refusing to** comply with stipulations of the contract is the cause of the purchaser's default an action for damages will not lie. Fowles *v.* Rupert, 138 Mich. 150, 101 N. W. 202.

**47.** *Kentucky.*— Jones *v.* Strode, 41 S. W. 562, 19 Ky. L. Rep. 1117.

*Mississippi.*— American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117.

*Texas.*— Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165.

*Vermont.*— Parker *v.* McKannon, 76 Vt. 96, 56 Atl. 536.

*West Virginia.*— Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719.

*United States.*— Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19.

**48.** *Illinois.*— Morier *v.* Moran, 58 Ill. App. 235; Thorn *v.* Danzinger, 50 Ill. App. 306.

*Kentucky.*— Jones *v.* Strode, 41 S. W. 562, 19 Ky. L. Rep. 1117.

*Maine.*— Greenleaf *v.* Gallagher, 93 Me. 549, 45 Atl. 829, 74 Am. St. Rep. 371.

*Michigan.*— Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64.

*New York.*— Butler *v.* Butler, 77 N. Y. 472, 33 Am. Rep. 648; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472, 62 N. Y. Suppl. 952; Underhill *v.* North American Kerosene Gas Light Co., 36 Barb. 354.

*South Carolina.*— Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673.

*Texas.*— Sonka *v.* Chatham, 2 Tex. Civ. App. 312, 21 S. W. 948.

*Virginia.*— American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

*West Virginia.*— Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719.

*England.*— Rabe *v.* Otto, 89 L. T. Rep. N. S. 562, 20 T. L. R. 27.

**Test necessary to complete sale.**—An action lies for breach of a contract to receive and test certain machinery, although there was to be no sale unless the machinery should be approved on such test. Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014.

**A refusal to give shipping directions is** equivalent to a refusal to accept the goods where they are deliverable at buyer's option. Weill *v.* American Metal Co., 182 Ill. 128, 54 N. E. 1050 [*affirming* 80 Ill. App. 406].

**The goods must conform to the contract in** order that a right of action shall exist for non-acceptance. Richard *v.* Haebler, 36 N. Y. App. Div. 94, 55 N. Y. Suppl. 583; Wright *v.* Ramp, 41 Oreg. 285, 68 Pac. 731. But although the goods are defective in quality so as to justify the buyer in his refusal to accept if he sells the goods on account of the seller at a loss, he is liable in damages. Houston *v.* Clark, 62 Ill. App. 174.

**49.** Groover *v.* Warfield, 50 Ga. 644.

**50.** Alleghany Iron Co. *v.* Teaford, 98 Va. 372, 31 S. E. 525.

**51.** Clarke *v.* Dill, 8 Pa. Cas. 164, 11 Atl. 82.

**52.** Anaconda Copper Min. Co. *v.* Houston, 107 Ill. App. 183; Indianapolis, etc., R. Co. *v.* McGuire, 62 Ind. 140; McMahan *v.* Stew-

practised by the buyer inducing the seller to take worthless paper in payment;[53] and the action for damages is not precluded by a resale.[54]

**2. Conditions Precedent.** In order to maintain an action for damages for a breach of the contract of sale by the buyer, the seller must show either a performance on his part or an offer to perform,[55] or at least an ability and readiness to perform.[56] If, however, performance on the part of the seller is to take place only on demand by or at the option of the buyer, tender of performance is not necessary.[57] So too if the purchaser repudiates the contract or notifies the seller that he will not accept the goods, a formal tender is not necessary,[58] and if after a partial performance by the seller the buyer repudiates the contract or refuses to perform the seller need not tender performance as to the balance.[59] While a

art, 23 Ind. 590; Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Nebr. 279, 62 N. W. 480; Backes *v.* Black, 5 Nebr. (Unoff.) 74, 97 N. W. 321.

**53.** Hawkins *v.* Appleby, 2 Sandf. (N. Y.) 421.

**Replevin for a portion of the goods** will not bar an action for damages for deceit and false representations. Lenox *v.* Fuller, 39 Mich. 268; Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 622, 25 N. Y. Suppl. 529; Hersey *v.* Benedict, 15 Hun (N. Y.) 282.

**54.** Comstock *v.* Price, 103 Ill. App. 19; Baney *v.* Killmer, 1 Pa. St. 30, 44 Am. Dec. 109; Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401. But see Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797, holding that a seller who seeks to recover from the buyer, after breach of contract by the latter, damages as ascertained by a resale, must sue for such damages and cannot sue for damages generally and then by virtue of a resale made after the commencement of the suit recover damages on the basis of such resale.

**55.** *Alabama.*— Davis *v.* Adams, 18 Ala. 264.

*California.*— Barron *v.* Frink, 30 Cal. 486; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

*Indiana.*— Campbell *v.* Miller, Wils. 412; Gardner *v.* Caylor, 24 Ind. App. 521, 56 N. E. 134.

*Louisiana.*— Shreveport Cotton Oil Co. *v.* Friedlander, 112 La. 1059, 36 So. 853.

*Missouri.*— Southern Lumber Co. *v.* Mercantile Lumber, etc., Co., 89 Mo. App. 141.

*New York.*— Gallup *v.* Sterling, 22 Misc. 672, 49 N. Y. Suppl. 942; Clark *v.* Fey, 4 N. Y. Suppl. 1 [*affirmed* in 121 N. Y. 470, 24 N. E. 703]. See also Iasigi *v.* Rosenstein, 65 Hun 591, 20 N. Y. Suppl. 491 [*reversed* on the facts in 141 N. Y. 414, 36 N. E. 509].

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*Texas.*— Kelly *v.* Webb, 27 Tex. 368; Shepard *v.* Weiss, (Civ. App. 1894) 28 S. W. 355.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

**Goods of specified quality.**— In an action to recover damages for breach of contract to purchase eggs, where it appears that plaintiffs contracted to sell eggs of a specified quality determined by the time of their storage, plaintiffs cannot recover unless they show that they tendered eggs of the description called for by the contract. Armour *v.* Beaver Valley Produce Co., 28 Pa. Super. Ct. 524.

**If the contract is severable a failure of** performance as to a portion thereof will not affect the right to recover damages for a breach as to the other portion. Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218.

**56.** *Idaho.*—Sweetser *v.* Mellick, 4 Ida. 201, 38 Pac. 403.

*Illinois.*— Lassen *v.* Mitchell, 41 Ill. 101; Franklin *v.* Krum, 70 Ill. App. 649.

*Michigan.*— Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64.

*New York.*— Newbery *v.* Furnival, 56 N. Y. 638 [*affirming* 46 How. Pr. 139].

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

**57.** Kingman *v.* Hanna Wagon Co., 176 Ill 545, 52 N. E. 328 [*affirming* 74 Ill. App. 22]; Bell *v.* Hatfield, 121 Ky. 560, 89 S. W. 544, 28 Ky. L. Rep. 515, 2 L. R. A. N. S. 529.

**58.** Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64; Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280, 65 S. W. 784; Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719; Watson *v.* Greenwood, 164 Fed. 294; Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281. See also Johnson *v.* Friedhoff, 7 Misc. (N. Y.) 484, 27 N. Y. Suppl. 982 [*reversing* 3 Misc. 631, 23 N. Y. Suppl. 665].

**Conduct equivalent to notice.**—Where the conduct of a buyer of goods is equivalent to notice to the other party that he will not comply with the contract on his part, a tender by the other party is not necessary as a condition precedent to a recovery for breach of the contract. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

**Place of delivery.**— In a contract to deliver goods at a certain place, if the authorized agents of the parties who contracted to take them refuse to take them at another place, on the ground that the goods are not of the quality or dimensions contracted for, it is not necessary, in order to maintain an action on the contract, that the goods be taken to the spot designated in the contract for delivery. Lindsey *v.* Singletary, (Tex. Civ. App. 1897) 43 S. W. 273.

**59.** Bailey *v.* Western Vermont R. Co., 18 Barb. (N. Y.) 112; Nichols *v.* Scranton Steel Co., 18 N. Y. Suppl. 623 [*affirmed* in 137 N. Y. 471, 33 N. E. 561].

demand for performance by the buyer is not generally necessary,[60] yet if performance by the buyer is at the seller's option there must be a demand.[61] If a note for the full price has been given and it is not shown to be worthless a return thereof is a condition precedent to an action for damages for failure to execute a note according to agreement.[62] So too an action for damages for false representations cannot be maintained while a note for the price not yet due is retained.[63] A resale is not a condition precedent to a recovery of damages for the buyer's breach of contract.[64]

**3. DEFENSES.** The buyer, in an action for damages brought by the seller, may show that the goods were defective;[65] that the goods tendered were not the identical goods purchased;[66] that the goods were not tendered within a reasonable time;[67] that there was a lien on the goods;[68] that the contract was induced by fraud of the seller;[69] that the breach had been waived;[70] or that plaintiff had abandoned the contract and defendant in accordance with a provision of the contract had undertaken to do the work and was still engaged in such performance.[71] A defense may, however, be waived by the conduct of the buyer.[72] It is no defense that the

**60.** Crawford *v.* Avery, 35 Miss. 205; Marks *v.* Englund, 37 N. Y. App. Div. 539, 56 N. Y. Suppl. 278.

**61.** Harvey *v.* Parsons, 36 Ill. 147.

**62.** Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79.

**63.** Thomas *v.* Dickinson, 65 Hun (N. Y.) 5, 19 N. Y. Suppl. 600. *Compare* Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

**64.** Barbee *v.* Laws, 15 Ind. 109; White *v.* Kearney, 9 Rob. (La.) 495. But see Telfener *v.* Russ, 145 U. S. 522, 12 S. Ct. 930, 36 L. ed. 800.

**65.** Crossman *v.* Lurman, 33 N. Y. App. Div. 422, 54 N. Y. Suppl. 72.

**A trial or test** is a condition precedent to a refusal to accept on the ground that the goods are unsatisfactory when the contract so provides. Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014.

**Defendant is estopped to set up defects in** the goods where he has repudiated the contract on other grounds. Kingman *v.* Hanna Wagon Co., 176 Ill. 545, 52 N. E. 328 [*affirming* 74 Ill. App. 22]; Braithwaite *v.* Foreign Hardwood Co., [1905] 2 K. B. 543, 10 Aspin. 52, 10 Com. Cas. 189, 74 L. J. K. B. 688, 92 L. T. Rep. N. S. 637, 21 T. L. R. 413.

**A request by the seller for inspection** for his own protection and to insure satisfaction on the part of the buyer with the information that he hesitated to ship the goods without inspection does not justify defendant's repudiation of the contract. Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590.

**66.** Raffles *v.* Wichelhaus, 2 H. & C. 906, 33 L. J. Exch. 160, holding that in an action for not accepting goods described in the contract as "to arrive ex Peerless from Bombay," a plea that defendant meant another ship of the same name, which sailed from Bombay two months earlier, and that plaintiff was not ready to deliver any goods which arrived by that ship, is good.

**67.** Soper *v.* Tyler, 73 Conn. 660, 49 Atl. 18.

**68.** Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

**69.** Young *v.* Arntze, 86 Ala. 116, 5 So. 253; H. T. Conde Implement Co. *v.* Grigsby, 82 S. W. 458, 26 Ky. L. Rep. 768, holding that the right of defendants to cancel an order they gave plaintiff for a certain kind of twine on the false representations of plaintiff's agent that the twine jobbers had gone into a trust whereby the kind of twine defendants wanted would not be sold in that territory, is not affected by St. (1903) § 3918, part of the anti-trust law forbidding such combinations, and providing that any contract in violation of such provisions shall be void, and that a purchaser from one doing business contrary to such provisions shall not be liable for the price.

**70.** Ketcham *v.* U. S., 40 Ct. Cl. 220.

**Mere silence by a seller,** after the buyer's breach of his contract to purchase the goods sold, does not constitute a waiver of the breach, where such silence in no manner changes the buyer's status, and the seller is under no duty to speak in order to prevent financial loss to the buyer. Wood *v.* Planters' Oil Mill, 76 Ark. 570, 90 S. W. 18.

**An offer by the seller to renew the contract** not accepted by the buyer is not a waiver of the contract. Riendeau *v.* Bullock, 147 N. Y. 269, 41 N. E. 561 [*reversing* 20 N. Y. Suppl. 976].

**Non-acceptance is not waived** where plaintiff, on objection by defendant to the quality of the goods, took them back solely for the purpose of examination and inspection. Schultz *v.* Bradley, 4 Daly (N. Y.) 29 [*reversed* on other grounds in 57 N. Y. 646].

**71.** Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503, where a contract to cut and deliver lumber provided that on the seller's neglect the buyer might proceed to do the work.

**72.** Behrman *v.* Newton, 103 Ala. 525, 15 So. 838, holding that if, while taking an inventory, the buyer of a stock of goods discovers that the prices being charged are in excess of those agreed on, and consents to the change, he will not, in an action for damages for breach of the contract, be allowed to set up such change as a defense.

contract by which the seller was to obtain the goods to deliver to the buyer was in itself illegal;[73] that the seller was not the sole owner of the goods;[74] that there were delays in delivery where such delays were due to defendant's request;[75] that the invoice did not state the terms of the sale, which was by written contract;[76] that the buyer has made small payments on the contract;[77] that plaintiff refused an offer for the property on less security which would have lessened the damages;[78] or that the seller himself has since abandoned the contract.[79] Where the contract which provides for delivery in instalments is severable the default of the seller as to one instalment is no defense to an action for damages for the refusal of the buyer to accept subsequent instalments.[80]

**4. When Right of Action Accrues.** The right of action for damages accrues immediately when the buyer repudiates the contract,[81] or refuses to execute a note in payment as stipulated in the contract,[82] or to give security.[83] An action may be commenced at once on a refusal to accept the goods,[84] without waiting for the term of credit to expire.[85]

**5. Pleading — a. Declaration or Complaint.** In an action for damages for breach of the contract the seller must declare specially therefor.[86] He must allege

**Estoppel to object to tender.**—Where defendant refused for a certain reason to receive goods shipped to him according to a contract of sale, but made no objection at the time on the ground that the tender was not sufficient, he cannot afterward raise such objection. Weill *v.* American Metal Co., 182 Ill. 128, 54 N. E. 1050 [*affirming* 80 Ill. App. 406]. See also Olcese *v.* Mobile Fruit, etc., Co., 211 Ill. 539, 71 N. E. 1084 [*affirming* 112 Ill. App. 281].

**Extent of waiver.**—Where defendant, having agreed to purchase all plaintiff's scrap iron for the ensuing sixty days, on discovering that plaintiff was purchasing iron from wholesalers to deliver to defendant, on account of a decline in price, refused to receive more iron; but later notified plaintiff to begin delivering again, and, after plaintiff had delivered a further quantity, again refused to receive more, the notification to plaintiff to begin delivering again constituted only a waiver of its right to stand on its first refusal, and did not constitute a new contract, waiving plaintiff's departure from the old. Helper *v.* MacKinnon Mfg. Co., 138 Mich. 593, 101 N. W. 804.

73. Saylor *v.* U. S., 14 Ct. Cl. 453.

74. Rhea *v.* Crunk, 12 Ind. App. 23, 39 N. E. 879.

75. Hauser, etc., Co. *v.* Tate, 105 Ky. 701, 49 S. W. 475, 20 Ky. L. Rep. 1716.

76. Equitable Mfg. Co. *v.* Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915.

77. McCombs *v.* McKennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505.

78. Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

79. Williams *v.* U. S., 15 Ct. Cl. 461.

80. Morgan *v.* McKee, 77 Pa. St. 228.

81. Hale *v.* Trout, 35 Cal. 229; Stribling *v.* Moore, 33 Tex. Civ. App. 297, 76 S. W. 593; Ontario Lantern Co. *v.* Hamilton Brass Mfg. Co., 27 Ont. App. 346.

82. *Illinois.*— Manton *v.* Gammon, 7 Ill. App. 201.

*Indiana.*— Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79.

*Missouri.*—Aultman *v.* Daggs, 50 Mo. App. 280.

*New York.*— Yale *v.* Coddington, 21 Wend. 175; Hanna *v.* Mills, 21 Wend. 90, 34 Am. Dec. 216.

*Ohio.*— Stephenson *v.* Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620.

*Pennsylvania.*—Rinehart *v.* Olwine, 5 Watts & S. 157.

*Texas.*— Young *v.* Dalton, 83 Tex. 497, 18 S. W. 819.

See 43 Cent. Dig. tit. "Sales," § 1091.

83. Barron *v.* Mullin, 21 Minn. 374.

84. Mountjoy *v.* Metzger, 9 Phila. (Pa.) 10, 21 Am. L. Reg. 442; James *v.* Adams, 16 W. Va. 245.

**Delivery in instalments.**—Where the purchaser of goods sold, to be delivered in instalments, refuses to receive one of such instalments, the seller cannot recover damages as for the refusal of all the property still to be delivered, unless the purchaser repudiates the entire contract, or intends to reject all further instalments. Lee *v.* J. B. Sickles Saddlery Co., 38 Mo. App. 201.

85. Cook *v.* Stevenson, 30 Mich. 242; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; James *v.* Adams, 16 W. Va. 245.

86. Burnham *v.* Roberts, 70 Ill. 19; American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

**Construction of pleadings.**—Where the cause of action stated is for the price of goods sold and delivered, allegations of damage by reason of non-acceptance of drafts drawn for the price do not make the action one for damages for breach of contract. Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54. See also Stewart *v.* Huntington, 124 N. Y. 127, 26 N. E. 289 [*affirming* 2 N. Y. Suppl. 205]. Although an item of damage is claimed upon a wrong theory, it should not be stricken from the complaint if it is an item which is properly recoverable and the allegations are sufficient to authorize a recovery. Henry H. Schott Co. *v.* Stone, 35 Wash. 252, 77 Pac. 192.

an agreement by defendant to accept and pay for the goods,[87] and a breach thereof.[88] If the contract calls for a future delivery an allegation of ownership at the date of the contract is immaterial.[89] The complaint must allege a performance by the seller of any conditions precedent,[90] and an offer or readiness to perform his part of the contract;[91] but if the delivery is at buyer's option a tender need not be averred,[92] and a failure to allege a tender of delivery is cured by an averment in the answer that defendant had notified plaintiff that he would not accept the goods.[93] If plaintiff relies on a waiver of performance at a particular time, such waiver must be alleged.[94] The complaint must allege damages by reason of the breach;[95] but a general allegation of damages is sufficient,[96] unless plaintiff seeks to recover special damages, in which case they must be specially pleaded.[97]

87. Robinson Consol. Min. Co. *v.* Johnson, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769.

**Sufficiency of allegation** as to existence of contract see Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260; Atlanta Buggy Co. *v.* Hess Spring, etc., Co., 124 Ga. 338, 52 S. E. 613, 4 L. R. A. N. S. 431; Bruce *v.* Smith, 44 Ind. 1.

88. Vice *v.* Brown, 22 Ind. App. 345, 53 N. E. 776, holding that it is sufficient if the breach is alleged generally.

**Allegation sufficient.**—A count alleging a delivery and a refusal by defendant to receive is good, the refusal being a breach of contract. Ragland *v.* Butler, 18 Gratt. (Va.) 323.

**Allegations insufficient** to show breach of contract by buyer see Grogan *v.* Chaffee, 6 Cal. App. 566, 92 Pac. 653.

89. Kleeb *v.* Bard, 7 Wash. 41, 34 Pac. 138.

90. James *v.* Adams, 16 W. Va. 245, where on a sale of a stock of goods the seller agreed to reduce the stock to a certain amount.

91. *California.*— Barron *v.* Frink, 30 Cal. 486.

*Illinois.*— McPherson *v.* Nelson, 44 Ill. 124.

*Indiana.*— Fell *v.* Muller, 78 Ind. 507; Johnson *v.* Powell, 9 Ind. 566.

*Kentucky.*— Gaff *v.* Nearsden Co., 56 S. W. 667, 22 Ky. L. Rep. 49.

*New York.*— Howie *v.* Kasnowitz, 83 N. Y. App. Div. 295, 82 N. Y. Suppl. 42; Armstrong *v.* Heide, 47 Misc. 609, 94 N. Y. Suppl. 434; Scheuer *v.* Rosenbaum, 33 Misc. 768, 67 N. Y. Suppl. 936; Gallup *v.* Sterling, 22 Misc. 672, 49 N. Y. Suppl. 942.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*England.*— Boyd *v.* Lett, 1 C. B. 222, 2 D. & L. 847, 14 L. J. C. P. 111, 50 E. C. L. 222.

**Deposit in escrow.**— In an action on a contract for the sale of stock, providing that the vendor should deposit it with a trust company to be delivered to the vendee upon payment, a complaint which avers such deposit need not make a tender of the stock. Reed *v.* Hayt, 109 N. Y. 659, 17 N. E. 418 [*affirming* 51 N. Y. Super. Ct. 121].

**Sufficiency of allegations.**— In an action by the seller for damages for breach of contract for the purchase of a certain number of hogs at a specified price, of a minimum weight, at a fixed time and place, if the complaint alleges that plaintiff had the hogs at the place and time fixed ready for delivery, and that defendant failed and refused to receive and pay for them, it is not necessary to allege further that the hogs were weighed and set apart for defendant. Dawson *v.* Byard, 41 Ind. 165. A complaint alleging that plaintiff was then and there able, ready, and willing and offered to perform all the terms and conditions of the contract to be performed by him during the term of the contract, is not objectionable for failing to allege in express terms that plaintiff had "fully complied with all the terms and conditions of the contract by him to be kept and performed." Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339.

92. McPherson *v.* Nelson, 44 Ill. 124; Posey *v.* Scales, 55 Ind. 282.

93. Weathered *v.* Golden, (Tex. Civ. App. 1896) 34 S. W. 761.

94. Scheuer *v.* Rosenbaum, 33 Misc. (N. Y.) 768, 67 N. Y. Suppl. 936 [*reversing* 32 Misc. 750, 65 N. Y. Suppl. 664].

95. Morrison *v.* American Dev., etc., Co., 5 Ida. 77, 47 Pac. 94.

96. Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020; Duryea *v.* Rayner, 20 Misc. (N. Y.) 544, 46 N. Y. Suppl. 437. But see Ridgley *v.* Mooney, 16 Ind. App. 362, 45 N. E. 348, holding that the complaint must allege the market price at the time and place of delivery.

**Sufficiency of allegation.**—A complaint in an action to recover for loss of oysters purchased by defendant, on the ground of his failure to accept them when tendered, which alleges that by reason thereof they were rendered worthless, is not insufficient as alleging no measure of damages. Andrews *v.* Lemeos, (Tex. Civ. App. 1901) 60 S. W. 1004.

**Laying damages at the contract price** does not make the complaint one for goods sold, and demurrable for failure to show delivery. Schleicher *v.* Montgomery Light Co., 114 Ala. 228, 21 So. 1014.

97. Miller *v.* Burch, 41 S. W. 307, 19 Ky. L. Rep. 629.

**The loss of profits** constitutes special damages and must be specially pleaded. Turney *v.* Peoria Grape Sugar Co., 65 Ill. App. 656; Miller *v.* Burch, 41 S. W. 307, 19 Ky. L. Rep. 629. But see Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020.

If there was a resale of the goods it must be alleged that the resale was at a loss.[98]

**b. Plea or Answer.** The requisites and sufficiency of the answer or affidavit of defense are governed by the rules applicable in civil actions generally.[99] Special matters of affirmative defense must be specially pleaded,[1] and sufficient facts alleged to show a good defense to the action.[2] Defendant may plead that his signature to the contract was procured by fraud,[3] but where fraud is relied on in defense the facts constituting the fraud must be alleged.[4] A counter-claim for damages because of negligent packing of the goods is bad in the absence of any averment of payment therefor.[5] A counter-claim for damages by reason of loss of profits on resale due to the inferior quality of the goods must allege that the contract was made in contemplation of existing contracts for resale and that no other goods were obtainable.[6] Where part of the goods were delivered and accepted a counter-claim for damages for defects therein is insufficient if it is not alleged that there was fraud or latent defect preventing defendant from discovering the inferiority of the goods.[7]

**c. Issues, Proof, and Variance.** The allegations and the proof must correspond and any material variance is fatal to a recovery,[8] but a variance which is not material may be disregarded.[9] It is not necessary for plaintiff to prove an agreement by defendant to purchase, where the contract set out in full in the answer contains an implied agreement.[10] If no affirmative defense is pleaded defendant cannot show the circumstances under which he signed the contract;[11] but under a plea of *non assumpsit* defendant may show that the goods were of inferior quality.[12] Where the complaint sets out the original contract and defendant pleads a modification thereof, plaintiff may show that by reason of a mistake therein the modified agreement should not be given the effect contended for.[13] Where the contract was for the manufacture and sale of goods of a particular quality an allegation that plaintiff manufactured "said goods," denied in the answer, is sufficient to admit testimony that the goods manufactured were in conformity with the contract.[14]

**98.** Halbert *v.* Newell, (Tex. Civ. App. 1894) 27 S. W. 767.

**99.** See PLEADING, 31 Cyc. 126.

**Sufficiency of affidavit of defense** see Wilson *v.* Phœnix Iron Co., 198 Pa. St. 416, 48 Atl. 258; Martinez *v.* Earnshaw, 143 Pa. St. 479, 22 Atl. 668.

**1.** Cleveland-Canton Springs Co. *v.* Goldsboro Buggy Co., 148 N. C. 533, 62 S. E. 637.

**2.** Backes *v.* Black, 5 Nebr. (Unoff.) 74, 97 N. W. 321, holding that an answer which states that after the contract was signed the buyer notified the seller that he would not accept the goods, and that when tendered he refused to receive them, without stating any excuse, does not show a defense.

**Inconsistent plea.**—A plea setting up matters inconsistent with the admissions is bad. Borrowman *v.* Rossel, 16 C. B. N. S. 58, 10 Jur. N. S. 679, 33 L. J. C. P. 111, 112 note, 10 L. T. Rep. N. S. 236, 12 Wkly. Rep. 580.

**3.** Tait *v.* Locke, 130 Mo. App. 273, 109 S. W. 105.

**4.** Hummel *v.* Tyner, 70 Ind. 84; Hardt *v.* Reeves, 4 Pa. Cas. 569, 8 Atl. 32, allegations held sufficient.

**5.** Schreiber *v.* Butler, 84 Ind. 576.

**6.** Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141.

**7.** Dreyfuss *v.* Foster, 3 N. Y. St. 278.

**8.** Nashville, etc., R. Co. *v.* Wood, 155 Ala. 263, 46 So. 561; Hart *v.* Tyler, 15 Pick. (Mass.) 171.

**Description of property.**—A material variance as to the description of the property sold is fatal. James *v.* Adams, 16 W. Va. 245.

**9.** Allen *v.* Jarvis, 20 Conn. 38.

**There is not a fatal variance** where the allegation is that defendant should pay a certain sum in cash and the balance on a certain credit and the proof is that he should pay a certain sum and give his note for the balance. James *v.* Adams, 16 W. Va. 245. Where plaintiff who was to deliver hogs at certain scales alleged that he had them ready for delivery at the time and place agreed on, and the proof was that he had them ready but had not actually driven them to the scales, the variance was not material. Carter *v.* Carter, 101 Ind. 450.

**10.** King-Keystone Oil Co. *v.* San Francisco Brick Co., 148 Cal. 87, 82 Pac. 849.

**11.** Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

**12.** Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753.

**13.** Nichols *v.* Scranton Steel Co., 18 N. Y. Suppl. 623 [*affirmed* in 137 N. Y. 471, 33 N. E. 561].

**14.** Hart *v.* Atlas Knitting Co., 77 Fed. 399, 23 C. C. A. 198.

**6. Evidence — a. Burden of Proof.** The burden is on plaintiff to prove all the facts necessary to show his right of recovery,[15] such as a compliance with and performance by him of his part of the contract,[16] or his readiness and willingness to perform,[17] and the burden is not shifted by defendant's averment of a want of performance,[18] or denial of the terms of the contract.[19] Plaintiff must also prove the amount of his damages.[20] The burden is of course on defendant to establish affirmative defenses.[21]

**b. Admissibility.** As in other civil actions, the evidence to be admissible must be relevant to the matters in issue;[22] but generally any evidence otherwise competent is admissible if it tends to establish the existence and terms of the contract,[23] or a proper performance by plaintiff of his part of the con-

15. McKenzie *v.* Stretch, 48 Ill. App. 410; Stebbins *v.* Leowolf, 3 Cush. (Mass.) 137, holding that where defendant refused to receive a transfer and pay for stock, the burden of proof is on plaintiff to show that at the time of the contract he held the amount of stock contracted to be sold free from any liability or obligation for the sale and transfer thereof.

**Sale of account.**— In an action for a breach of a contract to buy an account of plaintiff on a corporation, plaintiff is bound to prove his account by proper and legitimate evidence, the same as in a suit upon the account itself. Stettauer *v.* White, 98 Ill. 72.

16. Richard *v.* Haebler, 36 N. Y. App. Div. 94, 55 N. Y. Suppl. 583; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 [*affirmed* in 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811]; Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017; Pope *v.* Filley, 9 Fed. 65, 3 McCrary 190.

**Waiver or excuse.**—Where a contract for the sale of machinery required it to be shipped on or about February 1, in a mixed car, and it was shipped by local freight about forty days after the time specified, the burden of proving a waiver by the buyer of the terms of the contract, or legitimate excuse for its violation, was on the seller in an action by him to recover damages for the buyer's refusal to accept the machinery. Fountain City Drill Co. *v.* Lindquist, (S. D. 1908) 114 N. W. 1098.

**Extent of burden.**— In an action for refusing to carry out a contract to purchase gravel for ballasting defendant's road, where the making of any objection for unsuitability is denied, plaintiff need not prove both an offer of the gravel, to which no objection was made, and also that the gravel was suitable. Parkins *v.* Missouri Pac. R. Co., 4 Nebr. (Unoff.) 13, 96 N. W. 683.

17. Iroquois Furnace Co. *v.* Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237 [*affirming* 102 Ill. App. 68].

18. Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 [*affirmed* in 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811]. See also Grenawalt *v.* Roe, 136 Wis. 501, 117 N. W. 1017.

19. Duryea *v.* Rayner, 20 Misc. (N. Y.) 544, 46 N. Y. Suppl. 437.

20. Sweetser *v.* Mellick, 4 Ida. 201, 38 Pac. 403; Jones *v.* Jennings, 168 Pa. St. 493, 32 Atl. 51.

21. Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

22. Vandeventer *v.* Ford, 60 Ala. 610; Collins *v.* Shaw, 124 Mich. 474, 83 N. W. 146.

**Right to sell.**— On an issue as to whether defendant was justified in refusing to consummate an agreement to buy lumber because plaintiff's vendor retained a lien on the lumber, an objection to a question to plaintiff as to whether his vendor permitted him to sell lumber, without fixing the time or making any reference to the lumber in controversy, is properly sustained. Shores Lumber Co. *v.* Claney, 102 Wis. 235, 78 N. W. 451.

**Evidence as to other goods.**—Where defendant had contracted to purchase of plaintiff manufactured articles of certain specified kinds, it was proper, in an action on such contract, to reject evidence that plaintiff had manufactured and set aside for defendant articles of other kinds not mentioned in such contract. Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041.

**Where wheat of good quality was contracted for** proof offered to establish the fact that the wheat tendered was of the average quality raised and sold that season in the locality where the wheat in question was to be delivered is immaterial and properly rejected. Bracewell *v.* Self, 109 Ill. App. 140.

**Purchase of part of same goods from others.** — Evidence that some of the goods which defendant afterward contracted to purchase from another were a part of the lot for which plaintiff had contracted with which to fill defendant's order is inadmissible where it is not contended that all of the goods were defective. Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 101 N. W. 64.

23. Crandell *v.* Classen, 25 App. Cas. (D. C.) 5, letters of defendant.

**Where the contract is contained in two instruments** both of them are admissible in evidence, although plaintiff declares as on a single contract. Parlin, etc., Co. *v.* Boatman, 84 Mo. App. 67.

**Modification of contract.**— In an action for breach of a modified contract for the purchase of raisins by which it was agreed that defendant should take one car, instead of two, evidence that at the time of the modification the raisin market was rapidly declin-

tract,[24] or his readiness or ability to perform it.[25] Upon the issue of damages any evidence otherwise competent is admissible which tends to show the damages actually sustained by reason of the breach,[26] and so evidence is admissible to show the market price at the time of delivery and refusal to accept,[27] or the amount the goods brought on resale,[28] and it may be shown that by defendant's refusal to accept the goods they became worthless;[29] but the evidence must be relevant to the issue of damages,[30] and must conform to the proper measure of damages.[31] Evidence offered on behalf of defendant must also be material and relevant to the matters in issue;[32] but generally any evidence otherwise competent is admissible which tends to show that plaintiff failed to perform his part of the contract,[33] or tends to establish any matters of defense relied on.[34] So evidence is admissible on behalf of defendant to show that the goods tendered and refused were not of the kind or quality contracted for,[35] and plaintiff may in rebuttal introduce evidence tending to show that the alleged defects were not such as to justify a refusal to accept.[36] Defendant cannot, however, show defects in goods received and accepted without

ing was admissible to show a consideration moving defendant to make the new promise. Fresno Home Packing Co. *v.* Turle, 60 Misc. (N. Y.) 79, 111 N. Y. Suppl. 839.

24. Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020.

**Where the contract does not specify the time of delivery** evidence is admissible of any facts and circumstances proper to be considered in determining whether the delivery was made within a reasonable time. Norfolk, etc., R. Co. *v.* Duke, 107 Va. 764, 60 S. E. 96.

25. Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612 [*affirmed* in 169 N. Y. 571, 61 N. E. 1129].

26. Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612 [*affirmed* in 169 N. Y. 571, 61 N. E. 1129]; Parker *v.* McKannon, 76 Vt. 96, 56 Atl. 536; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19.

27. Peters *v.* Cooper, 95 Mich. 191, 54 N. W. 694; Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612 [*affirmed* in 169 N. Y. 571, 61 N. E. 1129]; Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. 202; James *v.* Adams, 16 W. Va. 245.

28. Camp *v.* Hamlin, 55 Ga. 259; Peters *v.* Cooper, 95 Mich. 191, 54 N. W. 694.

29. Riendeau *v.* Bullock, 147 N. Y. 269, 41 N. E. 561.

30. Isaacs *v.* Terry, etc., Co., 113 N. Y. Suppl. 731 [*reversed* on other grounds in 132 N. Y. App. Div. 657, 117 N. Y. Suppl. 369].

31. Redmond *v.* American Mfg. Co., 121 N. Y. 415, 24 N. E. 924 [*affirming* 56 N. Y. Super. Ct. 372, 3 N. Y. Suppl. 823].

**Evidence as to matters too speculative** to form a proper basis for the assessment of damages is inadmissible. Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 86 N. W. 954, 87 N. W. 886.

32. Vandeventer *v.* Ford, 60 Ala. 610; Ziegler *v.* Studebaker Bros. Mfg. Co., 28 Ill. App. 226.

33. Lehmaier *v.* Standard Specialty, etc., Co., 123 N. Y. App. Div. 431, 108 N. Y. Suppl. 402.

34. Iroquois Furnace Co. *v.* Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237 [*affirming* 102 Ill. App. 68], holding that where the defense is that by an arrangement with creditors the buyer executed a trust deed and certain notes, in which the seller's claim was included, and that further performance was waived, the trust deed and notes so executed are admissible in evidence.

**Where a delay in the delivery is set up as an excuse** for a refusal to accept goods and the contract does not specify the time of delivery, any legal evidence is admissible which tends to show that the delivery was not made within a reasonable time. Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811 [*affirming* 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251].

35. Collins *v.* Delaporte, 115 Mass. 159; Schofield *v.* Conley, 126 Mich. 712, 86 N. W. 129; Carrel *v.* Kalamazoo Cold Storage Co., 112 Mich. 34, 70 N. W. 323.

**Witnesses who worked in defendant's starch factory,** and were familiar with the construction and use of starch cartons, were properly permitted to compare the cartons shipped by plaintiff with the sample attached to the contract, and point out to the jury the differences and various alleged defects in plaintiff's cartons. St. Louis Paper-Box Co. *v.* J. C. Huhinger Bros. Co., 100 Fed. 595, 40 C. C. A. 577.

**Condition after rejection.**— Evidence as to the condition of prunes two months after they have been handled and boxed and rejected by a buyer is not competent to prove their condition when tendered to him. Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

**Speculative opinion.**— Evidence as to whether a heating plant would if installed operate as warranted was properly excluded as speculative. Ludlow *v.* Peck-Williamson Heating, etc., Co., 116 Ky. 608, 76 S. W. 377, 25 Ky. L. Rep. 831.

36. Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612 [*affirmed* in 169 N. Y. 571, 61 N. E. 1129].

**Adulterated articles.**—Where, in an action to recover for breach of a contract of sale of coffee, defendant's witness testified that the

objection as an excuse for a failure to order the full amount of goods called for by the contract and which were to be delivered within a certain time as ordered.[37]

**c. Weight and Sufficiency.** To sustain plaintiff's right of recovery the existence of the contract, the breach thereof, and the damages resulting therefrom must be shown by a preponderance of evidence,[38] and it must also appear by a preponderance of evidence that the seller has complied with the terms of the contract,[39] and that he has performed or is able to perform on his part.[40]

**7. Damages — a. In General.** The measure of damages for a breach by the buyer of the contract of sale is the actual injury sustained by the seller by reason thereof,[41] including whatever damages are the natural and probable result of the breach or may fairly be held to have been within the contemplation of the parties;[42] but not damages which are not the natural and probable result of the breach or could not fairly be considered as within the contemplation of the parties.[43] In the case of a part performance the seller is entitled to damages by reason of the breach as to the remainder.[44] In case of an unreasonable delay in receiving and accepting the goods the purchaser is liable for the damages necessarily caused by such delay,[45] and on the failure of the purchaser of timber to cut and remove it, damages sustained by the seller by being deprived of the use of the land for

coffee was covered with an opaque substance, it was error to refuse to allow plaintiff to show that such substance did not conceal any defects in the coffee, since under Pub. Health Laws (Laws (1893), c. 661), § 41, a sale of coated coffee is not illegal, unless so colored or coated that damage is concealed, or it is made to appear better or of greater value than it really is. Crossman *v.* Lurman, 46 N. Y. App. Div. 62, 61 N. Y. Suppl. 560.

37. Kingman *v.* Hanna Wagon Co., 74 Ill. App. 22. *Compare* Lehmaier *v.* Standard Specialty, etc., Co., 123 N. Y. App. Div. 431, 108 N. Y. Suppl. 402.

38. Wrenn *v.* Deveney, 74 Ga. 421; Shreveport Cotton Oil Co. *v.* Friedlander, 112 La. 1059, 36 So. 853.

**Sufficiency of evidence:** As to breach of contract and damages. Southwestern R. Co. *v.* Rowan, 43 Ga. 411; Broadnax *v.* United Engineering, etc., Co., 128 Fed. 649 [*affirmed* in 136 Fed. 351, 69 C. C. A. 177]. As to market value of goods. Kiley *v.* Lee Canning Co., 105 N. Y. App. Div. 633, 93 N. Y. Suppl. 986. To show receipt by seller of a letter modifying the contract as to time of delivery. Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 58 N. E. 19 [*affirming* 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251]. To show that the buyer had notified the seller of his election to cancel the order before the seller had mailed his acceptance thereof. L. J. Mueller Furnace Co. *v.* Meiklejohn. 121 Wis. 605, 99 N. W. 332.

39. Bracewell *v.* Self, 109 Ill. App. 140; Steinhardt *v.* Bingham, 90 N. Y. App. Div. 149, 85 N. Y. Suppl. 1044 [*affirmed* in 182 N. Y. 326, 75 N. E. 403].

40. Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281.

**Sufficiency of evidence** as to performance by seller see Crusel *v.* Hermitage Planting, etc., Co., 114 La. 920, 38 So. 648; Wright *v.* Thomas, etc., Commission Co., 111 Mo. App. 461, 86 S. W. 462.

**Substantial performance.**— In an action for breach of a contract of sale of flour, under which the purchaser had a right to examine before acceptance, a substantial performance of the contract is shown by evidence that the flour was shipped to order of the shipper, with notice attached to the bill of lading, and a subsequent order that defendant be given an opportunity to examine. Brooke *v.* Hill, 65 S. C. 142, 43 S. E. 390.

**Excuse for non-performance.**— In an action by a seller of a crop of potatoes against the purchaser for breach of the sale contract where plaintiff sets up as an excuse for non-performance an attachment levied at defendant's instance while the potatoes were being sacked for delivery, proof that the entire crop was seized by the officer and placed in the hands of the keeper at the instance of defendant, who was present, is sufficient to sustain plaintiff's excuse regardless of the officer's return. La Follett *v.* Mitchell, 42 Oreg. 465, 69 Pac. 916, 95 Am. St. Rep. 780.

41. *California.*—Coburn *v.* California Portland Cement Co., 144 Cal. 81, 77 Pac. 771.

*Connecticut.*— Allen *v.* Jarvis, 20 Conn. 38.

*Illinois.*— Cody *v.* American Educational Co., 131 Ill. App. 240.

*Indiana.*— Dolman *v.* Studebaker, 52 Ind. 286.

*Massachusetts.*— Barry *v.* Cavanagh, 127 Mass. 394.

**Breach of condition.**—Where a deduction in price is made on the sale of a slave on condition that the buyer will not remove him from the state, the seller may recover the amount of the deduction on a breach of the condition. Oldham *v.* Bentley, 6 B. Mon. (Ky.) 428.

42. Carolina Portland Cement Co. *v.* Columbia Imp. Co., 3 Ga. App. 483, 60 S. E. 279

43. Jones *v.* Gilmore, 91 Pa. St. 310.

44. Bach *v.* Lafayette City Council, 13 La. 549; Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567.

45. Dibble *v.* Corbett, 5 Bosw. (N. Y.) 202, 9 Abb. Pr. 200.

cultivation may be recovered.[46] So also if the buyer is to receive the goods in deliveries of a certain amount per day, the measure of damages for failure to take them in such amounts is the cost and expenses caused to the seller by such failure.[47] Where an article is delivered by a manufacturer to a prospective buyer to be tested, with the option of buying or returning it at a certain date, and he neither buys nor returns it, the manufacturer is entitled to recover the value of the article if it cannot be returned, and interest on such value during the period of wrongful detention up to the time of the trial as damages for such detention.[48] If no actual damage is shown the seller is at least entitled to nominal damages,[49] but in such cases he cannot recover more than nominal damages.[50] Exemplary or vindictive damages will not be allowed,[51] unless authorized by statute.[52]

**b. Non-Acceptance of Goods** — (1) *In General.* The general rule is that the measure of damages when the buyer repudiates the contract and refuses to receive and accept the goods is the difference between the contract price and the market value of the goods at the time and place of delivery,[53] and not the full

**46.** Furstenburg *v.* Fawsett, 61 Md. 184.

**47.** International Contracting Co. *v.* McNichol, 105 Fed. 553, where the contract was to receive gravel to be delivered by the seller at the rate of a certain number of cubic yards per day.

**48.** Redmond *v.* American Mfg. Co., 121 N. Y. 415, 24 N. E. 924 [*affirming* 56 N. Y. Super. Ct. 372, 3 N. Y. Suppl. 823], holding that in such case interest on the value and not the value of the use is the proper measure of damages for the detention.

**49.** National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472, 62 N. Y. Suppl. 952.

**50.** Turney *v.* Peoria Grape Sugar Co., 65 Ill. App. 656.

**51.** Smith *v.* Sherwood, 2 Tex. 460. See also, generally, DAMAGES, 13 Cyc. 113.

**52.** McDaniel *v.* Monroe, 63 S. C. 307, 41 S. E. 456.

**53.** *Alabama.*— Davis *v.* Adams, 18 Ala. 264.

*Arkansas.*— Nelson *v.* Hirschberg, 70 Ark. 39, 66 S. W. 347; Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 370.

*California.*— Scribner *v.* Schenkel, 128 Cal. 250, 60 Pac. 860; Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242, 41 Pac. 1020; Haskell *v.* McHenry, 4 Cal. 411; Levis *v.* Royal Packing, etc., Co., 1 Cal. App. 241, 81 Pac. 1086.

*Colorado.*— Kincaid *v.* Price, 18 Colo. App. 73, 70 Pac. 153.

*Connecticut.*— Allen *v.* Jarvis, 20 Conn. 38.

*Georgia.*— Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497; Wrenn *v.* Deveney, 74 Ga. 421; Camp *v.* Hamlin, 55 Ga. 259.

*Illinois.*— Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297 [*affirming* 63 Ill. App. 247]; Kadish *v.* Young, 108 Ill. 170, 43 Am. Rep. 548; Sanborn *v.* Benedict, 78 Ill. 309; McNaught *v.* Dodson, 49 Ill. 446; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407; Thurman *v.* Wilson, 7 Ill. App. 312.

*Indiana.*— Dwiggins *v.* Clark, 94 Ind. 49, 48 Am. Rep. 140; Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713; Dill *v.* Mumford, 19 Ind. App. 609, 49 N. E. 861; Browning *v.* Simons, 17 Ind. App. 45, 46 N. E. 86; Ridgley *v.* Mooney, 16 Ind. App. 362, 45 N. E. 348; Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848.

*Iowa.*— Hamilton *v.* Finnegan, 117 Iowa 623, 91 N. W. 1039; Osgood *v.* Bauder, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; McCracken *v.* Webb, 36 Iowa 551.

*Kansas.*— Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749.

*Kentucky.*— Williams *v.* Jones, 1 Bush 621; Sanders *v.* Bond, 66 S. W. 635, 23 Ky. L. Rep. 2084; Singer Mfg. Co. *v.* Cheney, 51 S. W. 813, 21 Ky. L. Rep. 550; Miller *v.* Burch, 41 S. W. 307, 19 Ky. L. Rep. 629.

*Maryland.*— Furstenburg *v.* Fawsett, 61 Md. 184.

*Massachusetts.*— Houghton *v.* Furbush, 185 Mass. 251, 70 N. E. 49; Barry *v.* Cavanagh, 127 Mass. 394.

*Michigan.*— Mohr Hardware Co. *v.* Dubey, 136 Mich. 677, 100 N. W. 127; Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657.

*Missouri.*— Brown *v.* Trinidad Asphalt Mfg. Co., 210 Mo. 260, 109 S. W. 22; Mexico First Nat. Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178; Rickey *v.* Tenbroeck, 63 Mo. 563; Whitmore *v.* Coates, 14 Mo. 9; Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590; Halliday *v.* Lesh, 85 Mo. App. 285; Parlin, etc., Co. *v.* Boatman, 84 Mo. App. 67; Gaibout *v.* Clark, 24 Mo. App. 426.

*Nebraska.*— Funke *v.* Allen, 54 Nebr. 407, 74 N. W. 832, 69 Am. St. Rep. 716; Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Nebr. 279, 62 N. W. 480; Dodge *v.* Kiene, 28 Nebr. 216, 44 N. W. 191.

*New Hampshire.*— Haines *v.* Tucker, 50 N. H. 307; Gordon *v.* Norris, 49 N. H. 376; Rand *v.* White Mountains R. Co., 40 N. H. 79.

*New York.*— Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203 [*affirming* 40 N. Y. Super. Ct. 483]; Bridgford *v.* Crocker, 60 N. Y. 627; Pollen *v.* Le Roy, 30 N. Y. 549; Belle of Bourbon Co. *v.* Leffler, 87 N. Y. App. Div. 302, 84 N. Y. Suppl. 385; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472, 62 N. Y. Suppl. 952; Fletcher *v.*

contract price of the goods,[54] and the buyer cannot avail himself of any rise in

Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612; Deery *v.* Williams, 27 N. Y. App. Div. 131, 50 N. Y. Suppl. 138; Gray *v.* New Jersey Cent. R. Co., 82 Hun 523, 31 N. Y. Suppl. 704; Hewitt *v.* Miller, 61 Barb. 567; Billings *v.* Vanderbeck, 23 Barb. 546; Stanton *v.* Small, 3 Sandf. 230; Schwartzenbach *v.* Haas, 36 Misc. 806, 74 N. Y. Suppl. 884; Perlman *v.* Levy, 109 N. Y. Suppl. 785; New York, etc., Granite Pav. Co. *v.* Howell, 7 N. Y. St. 494. *Compare* Springfield Iron Co. *v.* Kelley, 1 N. Y. Suppl. 351, where under the evidence the difference between the contract price and the market price at the time of commencing suit was allowed.

*North Dakota.*— Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

*Ohio.*— Cullen *v.* Bimm, 37 Ohio St. 236; Nixon *v.* Nixon, 21 Ohio St. 114; Lloyd Lumber Co. *v.* Solon, 17 Ohio Cir. Ct. 194, 9 Ohio Cir. Dec. 656.

*Pennsylvania.*— Guillon *v.* Earnshaw, 169 Pa. St. 463, 32 Atl. 545; Corser *v.* Hale, 149 Pa. St. 274, 24 Atl. 285; Fessler *v.* Love, 48 Pa. St. 407; Andrews *v.* Hoover, 8 Watts 239; Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327; Blair *v.* Ford China Co. 26 Pa. Super. Ct. 374; Hooper *v.* Bromley Bros. Carpet Co., 11 Pa. Super. Ct. 634; E. Keeler Co. *v.* Schott, 1 Pa. Super. Ct. 458, 38 Wkly. Notes Cas. 316; Newport, etc., R. Co. *v.* Seager, 19 Pa. Co. Ct. 465; Schnebly *v.* Shirtcliff, 7 Phila. 236.

*South Carolina.*— Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; Stack *v.* Charlotte, etc., R. Co., 10 S. C. 91.

*Tennessee.*— Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797; Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401.

*Texas.*— Welden *v.* Texas Continental Meat Co., 65 Tex. 487; Adler *v.* Kiber, 5 Tex. Civ. App. 415, 27 S. W. 23; Grant *v.* Duer, 2 Tex. App. Civ. Cas. § 570.

*Utah.*— McCall Co. *v.* Jennings, 26 Utah 459, 73 Pac. 639.

*Washington.*— Henry H. Schott Co. *v.* Stone, 35 Wash. 252, 77 Pac. 192.

*West Virginia.*— Acme Food Co. *v.* Older, 64 W. Va. 255, 61 S. E. 235; James *v.* Adams, 16 W. Va. 245; James *v.* Adams, 8 W. Va. 568; Hall *v.* Pierce, 4 W. Va. 107.

*Wisconsin.*— Saveland *v.* Western Wisconsin R. Co., 118 Wis. 267, 95 N. W. 130; Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26; Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648, 92 N. W. 368; T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513; Chapman *v.* Ingram, 30 Wis. 290.

*United States.*— Habeler *v.* Rogers, 131 Fed. 43, 65 C. C. A. 281; Duluth Furnace Co. *v.* Iron Belt Min. Co., 117 Fed. 138, 55 C. C. A. 154; Newark City Ice Co. *v.* Fisher, 76 Fed. 427, 22 C. C. A. 261; Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503; Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. 569, 12 C. C. A. 306; Fisher *v.* Newark City Ice Co., 62 Fed. 569, 10 C. C. A. 546; Rhodes *v.* Cleveland Rolling-Mill Co., 17 Fed. 426; McNaughter *v.* Cassally, 16 Fed. Cas. No. 8,911, 4 McLean 530.

*England.*— Boswell *v.* Kilborn, 8 Jur. N. S. 443, 6 L. T. Rep. N. S. 79, 15 Moore P. C. 309, 10 Wkly. Rep. 517, 15 Eng. Reprint 511; Philpotts *v.* Evans, 9 L. J. Exch. 33, 5 M. & W. 475.

*Canada.*— Chapman *v.* Larin, 4 Can. Sup. Ct. 349; Moore *v.* Logan, 5 U. C. C. P. 294; Brunskill *v.* Mair, 15 U. C. Q. B. 213.

See 43 Cent. Dig. tit. "Sales," §§ 1098, 1099.

**The time of the actual breach** determines the market price and not the time when defendant notified the seller of his intention not to receive the goods. Rhodes *v.* Cleveland Rolling-Mill Co., 17 Fed. 426. And the time of commencing suit may under some circumstances be regarded as the final repudiation and breach of the contract. Springfield Iron Co. *v.* Kelley, 1 N. Y. Suppl. 351; Roth *v.* Taysen, 8 Aspin. 120, 73 L. T. Rep. N. S. 628.

**Delivery during month.**— If the goods are to be delivered "during" a certain month, the market value on the last day of the month will be taken in estimating the damages. J. P. Gentry Co. *v.* Margolius, 110 Tenn. 669, 75 S. W. 959.

**Delivery at buyer's option.**—Where a contract for a sale of cattle required delivery at a certain place on a specified day or within a few days thereafter, the day to be designated by the buyer, but he failed to name a day, in an action for breach of the contract the measure of damages was the difference between the contract price and the market value of the cattle at the place of delivery on or within a few days after the date specified. Bell *v.* Hatfield, 121 Ky. 560, 89 S. W. 544, 28 Ky. L. Rep. 515, 2 L. R. A. N. S. 529.

**Postponement of delivery.**—When a vendor at the request of the purchaser, who is at the time fixed for delivery unable to take and pay for the goods, withholds delivery till a later date and at the date so fixed the purchaser refuses to accept delivery, the vendor is entitled to damages according to the market price at the later date. Hickman *v.* Haynes, L. R. 10 C. P. 598, 44 L. J. C. P. 358, 32 L. T. Rep. N. S. 873, 23 Wkly. Rep. 872.

**Delivery f. o. b.**— In an action for breach of an agreement by defendant to buy of plaintiff one car of bacon "f. o. b. Kansas City," the measure of damages, if plaintiff were entitled to recover, would be the difference between the contract price and the market value of the bacon in Kansas City at the time it was to be delivered, together with the cost of putting it on the cars for shipment. Woldert *v.* Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052.

54. Weltner *v.* Riggs, 3 W. Va. 445.

the market value after the time of delivery.[55] The market value means the usual and ordinary selling price of the goods at the place of delivery;[56] but if there is no market at the place of delivery the market value at the nearest point where there is a market may be taken,[57] and the mere absence of an immediate demand does not establish a want of market value but sales of similar property within a reasonable time may be considered in determining such value.[58] If the article has no market value the measure of damages is the difference between the contract price and the cost of producing it,[59] but to render such a measure of damages applicable there must be proof that the goods have no market value.[60] If there is no open market for the goods the difference between the contract price and the best offer which could be obtained may be taken as the measure of damages,[61] but this is not necessarily the measure of damages,[62] and the cost of production and delivery may be substituted for the market value.[63] If the market price at the time and place of delivery is as high as the contract price the seller is entitled only to nominal damages.[64] So also if there is no proof of the market value or of the absence of such a value, so as to let in proof of another standard of value, plaintiff is at least entitled to nominal damages;[65] but in the absence of such proof he cannot recover more than nominal damages.[66] The right of the seller to recover damages is not affected by the fact that after the breach of the contract by the buyer the goods were destroyed,[67] or that some of them were used by the seller.[68]

(II) *Goods to Be Procured or Manufactured.* Where the contract is for goods which are to be purchased or procured by the seller, the measure of damages is ordinarily the difference between the contract price and what it would cost the seller to procure them,[69] or in other words the profits which he would have made if he had been permitted to complete the contract.[70] It is the duty of the seller, however, after the buyer's breach of the contract to so act as not unnecessarily to increase the damages.[71] Where the contract is for goods to be produced

55. Bridgford *v.* Crocker, 60 N. Y. 627.

56. Parlin, etc., Co. *v.* Boatman, 89 Mo. App. 43.

57. Parlin, etc., Co. *v.* Boatman, 89 Mo. App. 43; Halliday *v.* Lesh, 85 Mo. App. 285; White *v.* Matador Land, etc., Co., 75 Tex. 465, 12 S. W. 866. *Compare* Barry *v.* Cavanagh, 127 Mass. 394.

58. Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

59. Cody *v.* American Educational Co., 131 Ill. App. 240; Indiana Canning Co. *v.* Priest, 16 Ind. App. 445, 45 N. E. 618; Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225 [*affirming* 74 Hun 569, 26 N. Y. Suppl. 662]; Dolph *v.* Troy Laundry Mach. Co., 28 Fed. 553.

60. Belle of Bourbon Co. *v.* Leffler, 87 N. Y. App. Div. 302, 84 N. Y. Suppl. 385.

61. Salem Iron Co. *v.* Lake Superior Consol. Iron Mines, 112 Fed. 239, 50 C. C. A. 213.

62. Puritan Coke Co. *v.* Clark, 204 Pa. St. 556, 54 Atl. 350.

63. Puritan Coke Co. *v.* Clark, 204 Pa. St. 556, 54 Atl. 350.

64. Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406 (where the contract price was "the prevailing market price"); Foos *v.* Sabin, 84 Ill. 564.

65. Fell *v.* Muller, 78 Ind. 507; Halliday *v.* Lesh, 85 Mo. App. 285; Petigor *v.* Ward, 36 Misc. (N. Y.) 816, 74 N. Y. Suppl. 867.

66. Brown *v.* Trinidad Asphalt Mfg. Co., 210 Mo. 260, 109 S. W. 22.

67. Neal *v.* Shewalter, 5 Ind. App. 147, 31 N. E. 848.

68. Mayberry *v.* Lilly Mill Co., 112 Tenn. 564, 85 S. W. 401.

69. American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oreg. 549, 46 Pac. 138; Danforth *v.* Walker, 37 Vt. 239; Roehm *v.* Horst, 91 Fed. 345, 33 C. C. A. 550 [*affirming* 84 Fed. 565, and *affirmed* in 178 U. S. 1, 20 S. Ct. 780, 44 L. ed. 958].

Where part of the goods have been purchased by the seller when notified by the buyer not to purchase any more, the measure of damages as to the balance still to be purchased is the difference between the contract price and what it would have cost the seller to procure them. Danforth *v.* Walker, 37 Vt. 239.

70. Carolina Portland Cement Co. *v.* Columbian Imp. Co., 3 Ga. App. 483, 60 S. E. 279; American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oreg. 549, 46 Pac. 138; Roehm *v.* Horst, 91 Fed. 345, 33 C. C. A. 550 [*affirming* 84 Fed. 565, and *affirmed* in 178 U. S. 1, 20 S. Ct. 780, 44 L. ed. 958].

In estimating the profits which the seller would have made he should be charged with all expenditures which he would have been required to make in getting the goods in hand and ready for delivery to the buyer. River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466.

71. Sonka *v.* Chatham, 2 Tex. Civ. App. 312, 21 S. W. 948, holding that where the buyer repudiates the contract before the goods are shipped, the seller should not ship

or manufactured by the seller, the measure of damages has been differently stated as being the difference between the contract price and the cost of manufacture and delivery,[72] the difference between the contract price and the market value of the goods,[73] and the profits which the seller would have made on the transaction,[74] based upon the difference between the contract price and the cost of production.[75] The theory underlying all of the decisions, however, is that the seller

them and thus subject the buyer to increased damages for transportation charges which would not have been a profit to the seller if the contract had been carried out.

72. *Illinois.*— Kingman *v.* Hanna Wagon Co., 74 Ill. App. 22 [*affirmed* in 176 Ill. 545, 52 N. E. 328].

*Iowa.*— Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041.

*Kentucky.*— Ludlow *v.* Peck-Williamson Heating, etc., Co., 116 Ky. 608, 76 S. W. 377, 25 Ky. L. Rep. 831; Hauser, etc., Co. *v.* Tate, 105 Ky. 701, 49 S. W. 475, 20 Ky. L. Rep. 1716; Nicola Bros. Co. *v.* Hurst, 88 S. W. 1081, 28 Ky. L. Rep. 87.

*Maryland.*— Eckenrode *v.* Canton Chemical Co., 55 Md. 51.

*Missouri.*— Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481, 48 S. W. 646.

*New York.*— Dryfoos *v.* Uhl, 69 N. Y. App. Div. 118, 74 N. Y. Suppl. 532.

*North Carolina.*— Cleveland Canton Springs Co. *v.* Goldsboro Buggy Co., 148 N. C. 533, 62 S. E. 637.

*Pennsylvania.*— Mitchell *v.* Baker, 208 Pa. St. 377, 57 Atl. 760; Winslow Bros. Co. *v.* Du Puy, 208 Pa. St. 98, 57 Atl. 189; Puritan Coke Co. *v.* Clark, 204 Pa. St. 556, 54 Atl. 350; Gallagher *v.* Whitney, 147 Pa. St. 184, 23 Atl. 560.

*Virginia.*— Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988.

*Wisconsin.*— McCall Co. *v.* Icks, 107 Wis. 232, 83 N. W. 300.

*United States.*— George Delker Co. *v.* Hess Spring, etc., Co., 138 Fed. 647, 71 C. C. A. 97; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19.

*England.*—Silkstone, etc., Coal, etc., Co. *v.* Joint Stock Coal Co., 35 L. T. Rep. N. S. 668.

See 43 Cent. Dig. tit. "Sales," § 1106.

**The full contract price is not a fair measure of damages** where the order is countermanded before the work of manufacture is begun as it would give plaintiff more than his actual damages. Moline Scale Co. *v.* Beed, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272.

73. *Kansas.*— Geiss *v.* Wyeth Hardware, etc., Co., 37 Kan. 130, 14 Pac. 463.

*Maine.*— Tufts *v.* Grewer, 83 Me. 407, 22 Atl. 382.

*Missouri.*— Kingsland, etc., Mfg. Co. *v.* St. Louis Malleable Iron Co., 29 Mo. App. 526.

*New York.*— Todd *v.* Gamble, 67 Hun 38, 21 N. Y. Suppl. 739.

*North Carolina.*— Heiser *v.* Mears, 120 N. C. 443, 27 S. E. 117; Clements *v.* State, 77 N. C. 142.

*Texas.*— W. T. Adams Mach. Co. *v.* Looney, (Civ. App. 1898) 47 S. W. 671.

*Vermont.*— Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

*United States.*— Southern Cotton-Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546; Dolph *v.* Troy Laundry Mach. Co., 28 Fed. 553; Mann *v.* U. S., 3 Ct. Cl. 404.

See 43 Cent. Dig. tit. "Sales," § 1106.

**If the article is utterly worthless** in the hands of the seller and cannot be sold by him he is entitled to recover the whole contract price. Allen *v.* Jarvis, 20 Conn. 38.

**If the goods have not been shipped** at the time the buyer repudiates the contract, the seller should not ship the goods or proceed further in performance of the contract, and in an action for the breach the measure of damages is the difference between the contract price and the market value of the goods as they were at the time of the breach. Tufts *v.* Lawrence, 77 Tex. 526, 14 S. W. 165; W. T. Adams Mach. Co. *v.* Looney, (Tex. Civ. App. 1898) 47 S. W. 671; Tufts *v.* Stuart, (Tex. App. 1893) 23 S. W. 834.

74. *California.*— Upstone *v.* Weir, 54 Cal. 124; Hale *v.* Trout, 35 Cal. 229.

*Delaware.*— Taylor *v.* Trustees of Poor, 1 Pennew. 555, 43 Atl. 613.

*Illinois.*— Beardsley *v.* Smith, 61 Ill. App. 340; Thorn *v.* Danzinger, 50 Ill. App. 306.

*Nebraska.*— Hale *v.* Hess, 30 Nebr. 42, 46 N. W. 261.

*Texas.*— Sabine Tram Co. *v.* Jones, (Civ. App. 1898) 43 S. W. 905.

*Wisconsin.*— Tufts *v.* Weinfeld, 88 Wis. 647, 60 N. W. 992.

*United States.*— Lincoln *v.* Levi Cotton Mills Co., 128 Fed. 865, 63 C. C. A. 333; Pittsburgh Bessemer Steel Rail Co. *v.* Hinckley, 17 Fed. 584 [*affirmed* in 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967]; Moore *v.* U. S., 17 Ct. Cl. 17.

**Provisions of contract.**—Where a contract for the manufacture and delivery of machinery provides that it shall not be countermanded except by consent of the seller or upon such terms as will indemnify the seller against loss of profits, expenses, and other costs incurred, the seller is entitled in case of a refusal on the part of the buyer to take the machinery to recover the profits which he would have made. Gibbes Mach. Co. *v.* Johnson, 81 S. C. 10, 61 S. E. 1027.

75. *California.*—Hale *v.* Trout, 35 Cal. 229.

*Illinois.*— Beardsley *v.* Smith, 61 Ill. App. 340.

*Nebraska.*— Hale *v.* Hess, 30 Nebr. 42, 46 N. W. 261.

*Texas.*— Sabine Tram Co. *v.* Jones, (Civ. App. 1898) 43 S. W. 905.

*United States.*— Moore *v.* U. S., 17 Ct. Cl. 17.

is entitled to such damages as will put him in the same position as if he had been permitted to complete the contract,[76] which ordinarily is the difference between the contract price and what it would have cost him to furnish the goods;[77] but the proper measure of compensation varies according to the facts and circumstances of the particular case,[78] particularly upon whether or not the goods have a market value,[79] whether or not they had already been manufactured at the time of the buyer's breach of the contract,[80] and whether they constitute a part of the ordinary commercial product of the seller's factory or something to be specially made for the buyer.[81] If the goods have already been manufactured at the time of the breach and they have a market value, the difference between the contract price and the market value is the proper measure of damages;[82] but if the goods have not been manufactured the proper measure of damages is the difference between the contract price and the cost of manufacturing them,[83] as the seller is entitled to the benefit of his contract and to any profit which he could make by manu-

**76.** Cody *v.* American Educational Co., 131 Ill. App. 240; James H. Rice Co. *v.* Pennsylvania Plate Glass Co., 88 Ill. App. 407; Gibbes Mach. Co. *v.* Johnson, 81 S. C. 10, 61 S. E. 1027; Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19; Roehm *v.* Horst, 91 Fed. 345, 33 C. C. A. 550 [*affirming* 84 Fed. 565]; Ketcham *v.* U. S., 40 Ct. Cl. 220.

**Under a continuing contract** to purchase all of the milk of plaintiff and his assignor for a period of five years, defendants having repudiated the contract, plaintiff was entitled to recover the difference between the market and the contract price of milk he would have produced during the contract period, regardless of the fact that after defendants' breach of contract plaintiff disposed of his milk business, and was therefore unable thereafter to perform the contract on his part. Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339.

**If profits are actually made notwithstanding the breach** by the buyer, defendant is entitled to have the same set off against plaintiff's estimated profits under the contract. Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19.

**77.** *Missouri.*— Bethold *v.* St. Louis Electric Constr. Co., 165 Mo. 280, 65 S. W. 784.

*New York.*— Lebmaier *v.* Standard Specialty, etc., Co., 123 N. Y. App. Div. 431, 108 N. Y. Suppl. 402.

*North Carolina.*—Cleveland-Canton Springs Co. *v.* Goldsboro Buggy Co., 148 N. C. 533, 62 S. E. 637.

*Pennsylvania.*— Muskegon Curtain-Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132, 19 Atl. 1008.

*United States.*— George Delker Co. *v.* Hess Spring, etc., Co., 138 Fed. 647, 71 C. C. A. 97; United Engineering, etc., Co. *v.* Broadnax, 136 Fed. 351, 69 C. C. A. 177 [*affirming* 128 Fed. 649]; Roehm *v.* Horst, 91 Fed. 345, 33 C. C. A. 550 [*affirming* 84 Fed. 565].

**78.** Cody *v.* American Educational Co., 131 Ill. App. 240; Southern Cotton Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546; Ontario Lantern Co. *v.* Hamilton Brass Mfg. Co., 27 Ont. App. 346.

**Statement of rule** as to the proper measure of damages under the different conditions which may arise in the case of goods to be manufactured by the seller see Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

**79.** Cody *v.* American Educational Co., 131 Ill. App. 240; Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; Southern Cotton-Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546.

**80.** Isaacs *v.* Terry, etc., Co., 125 N. Y. App. Div. 532, 109 N. Y. Suppl. 792 [*reversing* 56 Misc. 586, 107 N. Y. Suppl. 136]; River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466; Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

**81.** Southern Cotton-Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546.

**82.** River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466; Southern Cotton-Oil Co. *v.* Heflin, 99 Fed. 339, 39 C. C. A. 546; Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; Dolph *v.* Troy Laundry Mach. Co., 28 Fed. 553.

**83.** Isaacs *v.* Terry, etc., Co., 125 N. Y. App. Div. 532, 109 N. Y. Suppl. 792 [*reversing* 56 Misc. 586, 107 N. Y. Suppl. 136]; River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466.

**If part of the goods have been manufactured** at the time of the breach of contract by the buyer, the measure of damages as to the part completed is the difference between the contract price and the market price, but as to the part not manufactured the measure of damages is the difference between the contract price and the cost of manufacture. Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

**Procuring and use of materials.**— If materials have been purchased the difference between their market value and their cost, if the cost is greater than the market value, should be added to the actual cost of manufacturing and delivering the goods. Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489. If, however, the seller, after breach of contract by the buyer, uses the materials in manufacturing other goods which are sold at a profit, the profit so realized should be deducted. Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587, 33 S. W. 987.

facturing the goods at a less cost than the market price,[84] and on the other hand is not entitled to charge the buyer with a loss which he has not sustained in case the cost of manufacture would have been greater than such price.[85] So also if the goods are manufactured for a particular purpose, or for other reasons have no general market value, the rule of damages based on the difference between the contract price and the market value does not apply,[86] but the measure of damages should be the difference between the contract price and the cost of manufacture.[87] If the contract stipulates for a certain amount as liquidated damages, such provision will control.[88]

(III) *Effect of Resale.* In the absence of other evidence as to the market price, the price obtained on resale immediately or within a reasonable time after the breach of the contract may be regarded as the market price,[89] and the seller

**84.** Isaacs *v.* Terry, etc., Co., 125 N. Y. App. Div. 532, 109 N. Y. Suppl. 792 [*reversing* 56 Misc. 586, 107 N. Y. Suppl. 136]; River Spinning Co. *v.* Atlantic Mills, 155 Fed. 466.

**It is not necessary for the seller to manufacture the goods** and tender them to the buyer after the buyer has repudiated the contract, and then sue for the difference between the contract and market prices, but he is entitled to recover the difference between the contract price and what it would have cost him to manufacture them. Hinckley *v.* Pittsburgh Bessemer Steel Co., 121 U. S. 264, 7 S. Ct. 875, 30 L. ed. 967.

**85.** Kingman *v.* Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489.

**86.** Kingman *v.* Hanna Wagon Co., 176 Ill. 545, 52 N. E. 328; Cody *v.* American Educational Co., 131 Ill. App. 240.

**87.** *Illinois.*— Kingman *v.* Hanna Wagon Co., 176 Ill. 545, 52 N. E. 328; Cody *v.* American Educational Co., 131 Ill. App. 240.

*Kansas.*— Geiss *v.* Wyeth Hardware, etc., Co., 37 Kan. 130, 14 Pac. 463.

*New York.*— Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225 [*affirming* 74 Hun 569, 26 N. Y. Suppl. 662]; Kelso *v.* Marshall, 24 N. Y. App. Div. 128, 48 N. Y. Suppl. 728.

*North Carolina.*— Clements *v.* State, 77 N. C. 142.

*Pennsylvania.*— Ridgeway Dynamo, etc., Co. *v.* Pennsylvania Cement Co., 221 Pa. St. 160, 70 Atl. 557, 18 L. R. A. N. S. 613.

*United States.*— Yellow Poplar Lumber Co. *v.* Chapman, 74 Fed. 444, 20 C. C. A. 503; Olyphant *v.* St. Louis Ore, etc., Co., 28 Fed. 729; Cohen *v.* U. S., 15 Ct. Cl. 253.

**Although there is a market price for the class of goods** manufactured, the measure of damages is the difference between the contract price and cost of manufacture, if the general market value has been destroyed by the goods having been made up so as to show the name and address of the particular buyer for whom they were manufactured. Cody *v.* American Educational Co., 131 Ill. App. 240.

**Where a large quantity of goods is ordered** and it appears that no market could be found for such a large quantity and that the goods would deteriorate by being kept, the seller is entitled to recover the difference between the contract price and the cost of production. Kelso *v.* Marshall, 24 N. Y. App. Div. 128, 48 N. Y. Suppl. 728.

**Where blocks of granite are to be furnished** according to specifications given in advance, and are to be of a particular kind from certain quarries, the blocks are articles manufactured for a particular purpose and not such as would have a general market value, so that the measure of damages for breach of the contract should be considered with reference to the cost of production and not any market value. Broadnax *v.* United Engineering, etc., Co., 128 Fed. 649 [*affirmed* in 136 Fed. 351, 69 C. C. A. 177].

**Silicate of soda,** which is usually sold by the manufacturer directly to consumers, no stock being kept on hand, due to difficulty in keeping the same without deterioration, cannot be said to have a "market value" which can be taken as the criterion for estimating the damages for breach of a contract to purchase the same from a manufacturer. Todd *v.* Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225.

**88.** Tidwell *v.* Southern Engine, etc., Works, 87 Ark. 52, 112 S. W. 152.

**89.** *California.*— Gibbs *v.* Ranard, 86 Cal. 531, 25 Pac. 63.

*Kentucky.*— Marshall *v.* Piles, 3 Bush 249; Applegate *v.* Hogan, 9 B. Mon. 69; Sanders *v.* Bond, 66 S. W. 635, 23 Ky. L. Rep. 2084.

*Massachusetts.*—Whitney *v.* Boardman, 118 Mass. 242.

*Michigan.*— Madden *v.* Lemke, 86 Mich. 139, 48 N. W. 785; Simons *v.* Ypsilanti Paper Co., 77 Mich. 185, 43 N. W. 864.

*New York.*— Dustan *v.* McAndrew, 44 N. Y. 72; Pollen *v.* Le Roy, 30 N. Y. 549; Stengel *v.* Hewit, 37 Misc. 670, 76 N. Y. Suppl. 378; Fox *v.* Woods, 96 N. Y. Suppl. 117; Falkenberg *v.* O'Neill, 88 N. Y. Suppl. 378; Blick *v.* Fabian, 86 N. Y. Suppl. 207.

*Oklahoma.*— Mansur-Tebbetts Implement Co. *v.* Willet, 10 Okla. 383, 61 Pac. 1066, construing St. (1893) c. 26, § 2628.

*Pennsylvania.*— Girard *v.* Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327.

*South Carolina.*— Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660.

*Tennessee.*—Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797; Cole *v.* Zucarello, 104 Tenn. 64, 56 S. W. 850; Greer Mach.

may recover the difference between such price and the contract price.[90] The price obtained on resale is not, however, conclusively the market value,[91] especially where the resale is long after the breach,[92] or in a strange market.[93] It must appear that the seller used due diligence,[94] and made all reasonable efforts to obtain the best price, or that the price obtained was a fair one.[95] If the seller elects to keep the goods as his own and sue the buyer for breach of the contract, the fact that he afterward resold the goods cannot be taken advantage of by the buyer, although they were resold for more than the market price at the time of the breach of the contract.[96]

Co. *v.* McCrary, (Ch. App. 1899) 52 S. W. 1027.

*Texas.*— White *v.* Matador Land, etc., Co., 75 Tex. 465, 12 S. W. 866.

*Virginia.*— American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

*Wisconsin.*— Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

*United States.*— Pope *v.* Filley, 9 Fed. 65, 3 McCrary 190.

*Canada.*— George *v.* Glass, 14 U. C. Q. B. 514.

**Where there is no market** the price obtained on resale is evidence of the value of the goods. Lever *v.* Dunkirk Colliery Co., 43 L. T. Rep. N. S. 706.

**A sale of stock to the highest bidder** is a fair basis upon which to determine the amount of damages sustained by a purchaser's refusal to take the stock, when at the time of the sale the stock exchange has been closed by order of its governing committee, and the sale is made after proper notice to the purchaser, with opportunity for full and open competition. Clews *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183 [*reversing* 96 Fed. 648, 38 C. C. A. 473].

**Fraud of buyer.**—Where the buyer refuses to accept because of delay in delivery, and the delay was in fact caused by the fraudulent conduct of the buyer preventing delivery, the measure of damages is the difference between the contract price and the proceeds actually obtained on resale irrespective of the market value. Heidenheimer *v.* Cleveland, 11 Tex. Civ. App. 546, 32 S. W. 826.

**If the goods are perishable** the price that could be obtained on resale immediately after the breach must be taken as the market price and not the value after the goods — in this case fruit — had become decayed. Tustin Fruit Assoc. *v.* Earl Fruit Co., (Cal. 1898) 53 Pa. 693.

**Sale at request of buyer.**—Whether the contract is for the sale of goods or for manufacture and sale, if the purchaser has broken it by refusing to receive further shipments and has requested the seller to sell the goods for the best price obtainable, and he has done so, the seller's measure of damages is the difference between the price obtained and the contract price. Penn. Plate Glass Co. *v.* James H. Rice Co., 216 Ill. 567, 75 N. E. 246 [*affirming* 88 Ill. App. 407, 117 Ill. App. 356].

90. *Kentucky.*—Applegate *v.* Hogan, 9 B. Mon. 69; Sanders *v.* Bond, 66 S. W. 635, 23 Ky. L. Rep. 2084.

*Michigan.*— Madden *v.* Lemke, 86 Mich. 139, 48 N. W. 785.

*North Carolina.*— Clifton *v.* Newsom, 46 N. C. 108.

*Pennsylvania.*— McCombs *v.* McKenna, 2 Watts & S. 216, 37 Am. Dec. 505.

*South Carolina.*— Woods *v.* Cramer, 34 S. C. 508, 13 S. E. 660.

*Texas.*— White *v.* Matador Land, etc., Co., 75 Tex. 465, 12 S. W. 866.

*United States.*— Benjamin *v.* Maloney, 155 Fed. 494.

**Expenses of resale** see *infra*, VIII, F, 7, b, (IV).

**Where plaintiffs subscribed for stock** of a corporation, at the request of defendant, and on his agreement to take it if plaintiffs did not want it, it was held that defendant was, for breach of his agreement, liable to plaintiffs for the difference between what they had to give for it and what they subsequently sold it for. Herd *v.* Thompson, 149 Pa. St. 434, 24 Atl. 282.

91. Wilbor *v.* McGillicuddy, 3 La. 382; Gray *v.* New Jersey Cent. R. Co., 82 Hun (N. Y.) 523, 31 N. Y. Suppl. 704; Andrews *v.* Hoover, 8 Watts (Pa.) 239.

92. Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749; Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657; Pickering *v.* Bardwell, 21 Wis. 562; Roth *v.* Taysen, 8 Aspin. 120, 73 L. T. Rep. N. S. 628. See also Furstenburg *v.* Fawsett, 61 Md. 184; American Cotton Co. *v.* Herring, 84 Miss. 693, 37 So. 117.

93. Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77, 48 Pac. 749; Chapman *v.* Ingram, 30 Wis. 290.

94. Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

95. T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513.

**If the goods are resold without notice to** the buyer, the measure of the seller's damages is the difference between the contract price and the market value of the goods at the time and place of delivery, although they may have brought less than their market value at the resale. Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590.

96. Bridgford *v.* Crocker, 60 N. Y. 627, holding that, although the goods were resold for more than the market value, the seller is

(IV) *EXPENSES.* The expenses incurred by the seller by reason of the breach of the contract may generally be recovered as part of the damages,[97] such as extra expense incurred by reason of defendant's representations that he is ready for delivery, followed by repudiation,[98] expense of resale,[99] and expense for the keep of animals for a reasonable time in anticipation of a resale.[1] If, however, there is a market price at the time of delivery the seller cannot charge the buyer with the expense of keeping the goods in order to take advantage of a rise in the market,[2] and generally where the care of the goods is for the seller's own benefit he cannot recover the expense thereof.[3] If there is no market at the place of delivery and the value at the nearest market is taken, the cost of transportation may be added.[4] The seller may also recover freight advanced which by the terms of the contract the buyer was to pay.[5] If the goods are to be manufactured the seller may also recover for the cost of special tools made for that purpose.[6] Defendant is entitled to an allowance for the expenses incident to the seller's performance of the contract where his refusal is in time to prevent performance;[7] and if as a part of the contract of sale of a machine the seller was to furnish repairs for a specified time, the value of such repairs should be deducted from the amount of damages.[8]

(V) *WHERE TITLE HAS PASSED.* Where the performance by the seller is complete so as to pass title to the goods to the buyer, the measure of damages is the contract price.[9]

(VI) *COMPUTATION OF DAMAGES.* If the quantity of goods to be furnished under the contract is susceptible of exact proof, such proof must be made and the damages computed upon this basis;[10] but if not susceptible of exact proof, the quantity may be estimated and the damages computed according to such estimate.[11] If the contract fixes a maximum and minimum limit of quantity,

entitled to recover as damages for breach of the contract the difference between the contract price and the market price at the time fixed for delivery.

**97.** Halliday *v.* Lesh, 85 Mo. App. 285; Chapman *v.* Larin, 4 Can. Sup. Ct. 349. See also Ellithorpe Air Brake Co. *v.* Sire, 41 Fed. 662.

**98.** Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323; Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

**99.** *Massachusetts.*—Whitney *v.* Boardman, 118 Mass. 242.

*New York.*—Pollen *v.* Le Roy, 30 N. Y. 549.

*Tennessee.*—Hardwick *v.* American Can Co., 113 Tenn. 657, 88 S. W. 797.

*Virginia.*—American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

*United States.*—Pope *v.* Filley, 9 Fed. 65, 3 McCrary 190.

**Effect of resale** generally see *supra*, VIII, F, 7, b, (III).

**1.** McCracken *v.* Webb, 36 Iowa 551.

**2.** Thurman *v.* Wilson, 7 Ill. App. 312. See also Mexico First Nat. Bank *v.* Ragsdale, 171 Mo. 168, 71 S. W. 178.

**3.** Putnam *v.* Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394; Dreyfuss *v.* Foster, 3 N. Y. Suppl. 54.

**4.** Halliday *v.* Lesh, 85 Mo. App. 285; White *v.* Matador Land, etc., Co., 75 Tex. 465, 12 S. W. 866.

**5.** Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993.

**6.** Crocker *v.* Field's Biscuit, etc., Co., 93 Cal. 532, 29 Pac. 225. *Compare* Upstone *v.* Weir, 54 Cal. 124.

**7.** Windmuller *v.* Pope, 107 N. Y. 674, 14 N. E. 436; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19; Newark City Ice Co. *v.* Fisher, 76 Fed. 427, 22 C. C. A. 261.

**8.** Ludlow *v.* Peck-Williamson Heating, etc., Co., 116 Ky. 608, 76 S. W. 377, 25 Ky. L. Rep. 831.

**9.** Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. D. 547, 91 N. W. 330. See also Tufts *v.* Poness, 32 Ont. 51; Phillips *v.* Merritt, 2 U. C. C. P. 513.

**On a sale of stock** if the seller has actually transferred the stock on the books of the corporation so as to lose title the measure of damages is the contract price. Thompson *v.* Alger, 12 Metc. (Mass.) 428.

**Where goods are sold and part payment made** and the contract provides that they are to be delivered as required by the buyer and that if the delivery is not required by a certain date they shall be paid for on that date, and a delivery is not required by such date and the seller is ready and willing to deliver, he may recover the contract price and not merely the damages sustained by reason of the breach of the contract. Dunlop *v.* Grote, 2 C. & K. 153, 61 E. C. L. 153.

**10.** McCall Co. *v.* Icks, 107 Wis. 232, 83 N. W. 300.

**11.** Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, 58 N. Y. Suppl. 612 [*affirmed* in 169 N. Y. 571, 61 N. E. 1129], holding that where the contract was for a certain number of unidentified beef cattle of a class known as "canners," to be paid for at a certain rate per pound for the dressed carcasses, and the buyer repudiated the con-

but any amount in excess of the minimum is to be furnished only at the request of the buyer, and the contract is broken before the minimum quantity has been furnished, the computation should be based on the minimum quantity.[12] If articles of different qualities are to be furnished at the option of the buyer, it is not error to instruct the jury that the computation should be based on the assumption that the buyer would select those on which the seller would have realized the least profit;[13] but where the contract is that the buyer shall purchase from the seller at certain prices all the goods used by the former in his business, and the buyer breaks the contract by purchasing from others, the damages may be assessed according to the amounts and the qualities so purchased which could have been furnished by the seller.[14] Where the contract price was to be an agreed amount less than the price in a certain market, the market quotations published in a newspaper of recognized authority may be used as a basis in the computation of damages.[15] Interest is allowable as an element of plaintiff's damages.[16]

**c. Failure to Give Note or Other Property For Price.** On the breach by the buyer of his agreement to give a note for the price the measure of damages is the full price of the goods.[17] If the agreement is to give property in payment, on a breach thereof the measure of damages is the value of the property.[18]

**8. Trial — a. Questions For Jury.** If there is sufficient evidence to warrant its submission to the jury,[19] and the evidence is conflicting or different conclusions might reasonably be drawn therefrom, it is for the jury to determine any material issue of fact to which such evidence relates,[20] such as whether there was a sufficient performance by plaintiff[21] or offer to deliver the goods,[22] whether the buyer refused to accept the goods,[23] what constitutes a reasonable time for acceptance,[24] whether there had been any modification of the contract,[25] whether the goods were defective or not according to the contract,[26] whether a resale of the goods was fairly conducted,[27] what was the market value of the goods,[28] and the amount of damages to which plaintiff is entitled.[29] Where letters written by defendant are relied on by plaintiff as constituting a refusal to accept the goods,

tract and refused to receive any cattle, the jury might estimate the weight according to the testimony of witnesses as to the average weight of the dressed carcasses of cattle of this class and compute the damages accordingly.

12. Ready *v.* J. L. Fulton Co., 179 N. Y. 399, 72 N. E. 317.

13. Kimball *v.* Deere, 108 Iowa 676, 77 N. W. 1041.

14. Brush Electric Co.'s Appeal, 9 Pa. Cas. 37, 11 Atl. 654.

15. Nash *v.* Classen, 163 Ill. 409, 45 N. E. 276 [*affirming* 55 Ill. App. 356].

16. McCall Co. *v.* Icks, 107 Wis. 232, 83 N. W. 300.

17. *Indiana.*— Carnahan *v.* Hughes, 108 Ind. 225, 9 N. E. 79.

*Iowa.*— Hayden *v.* Reynolds, 54 Iowa 157, 6 N. W. 180.

*Massachusetts.*— Worthy *v.* Jones, 11 Gray 168, 71 Am. Dec. 696.

*Missouri.*—Aultman *v.* Daggs, 50 Mo. App. 280.

*Pennsylvania.*— Rinehart *v.* Olwine, 5 Watts & S. 157.

*Texas.*— Young *v.* Dalton, 83 Tex. 497, 18 S. W. 819; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

18. Lindsey *v.* Gordon, 13 Me. 60; Lyles *v.* Lyles, 6 Harr. & J. (Md.) 273.

19. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

20. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145; Blair *v.* Ford China Co., 26 Pa. Super. Ct. 374.

21. Baylis *v.* Weibezahl, 42 Misc. (N. Y.) 178, 85 N. Y. Suppl. 355.

22. Sloss Iron, etc., Co. *v.* Jackson Architectural Iron Works, 103 N. Y. App. Div. 316, 92 N. Y. Suppl. 1056.

23. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

24. Dunn *v.* Mayo Mills, 134 Fed. 804, 67 C. C. A. 450.

25. Phillips *v.* Arguimbau, 59 N. Y. Super. Ct. 189, 13 N. Y. Suppl. 605.

26. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

27. Fox *v.* Woods, 96 N. Y. Suppl. 117.

28. Lekas *v.* Schwartz, 56 Misc. (N. Y.) 594, 107 N. Y. Suppl. 145.

29. Dryfoos *v.* Uhl, 69 N. Y. App. Div. 118, 74 N. Y. Suppl. 532; Fox *v.* Woods, 94 N. Y. Suppl. 344; Allen *v.* Field, 130 Fed. 641, 65 C. C. A. 19.

When there is a conflict of testimony as to the controlling facts which must determine whether goods are made for a particular person, and to answer only a specific contract, or are merely general merchandise in the market, the disputed facts, if they are to have any bearing on the measure of damages, must be submitted to the jury for their determination. Blair *v.* Ford China Co., 26 Pa. Super. Ct. 374.

the question whether they should be so construed is for the jury if the interpretation thereof involves the consideration of extraneous facts.[30] That a witness for plaintiff testified to a fact alleged by defendant in his answer does not make it an admitted fact which need not be submitted to the jury.[31]

**b. Instructions.** The instructions in an action for damages for breach of contract by the buyer should conform to the pleadings and issues raised thereby,[32] and to the evidence,[33] and should be sufficiently certain and explicit fairly to present the issues.[34] If there has been a resale of the goods the court should instruct the jury as to the standard of diligence in making such sale.[35] The instructions must not be misleading,[36] or invade the province of the jury;[37] or on the other hand submit to the jury a question of law.[38]

**c. Verdict and Findings.** A verdict cannot be sustained which is clearly against the evidence and inconsistent therewith,[39] which is based upon an erroneous estimate as to the quantity of goods to be delivered under the contract,[40] or which shows that the jury misunderstood the case and the instructions of the court.[41] The absence of a finding on an immaterial issue is not ground for objection where the material facts are covered by the findings.[42]

**Whether expenses were reasonable** and proper elements of damage is for the jury. Fox *v.* Woods, 96 N. Y. Suppl. 117.

30. Western Mfg. Co. *v.* Kingman, 112 Fed. 246, 50 C. C. A. 221.

31. Brooke *v.* Hill, 65 S. C. 142, 43 S. E. 390.

32. Baldwin *v.* Napa, etc., Wine Co., 1 Cal. App. 215, 81 Pac. 1037; Stafford *v.* Christian, (Tex. Civ. App. 1904) 79 S. W. 595; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

**Where it is conceded at the trial** that the proper method of delivery was by tendering actual delivery of the goods, a refusal to instruct the jury that a tender of warehouse receipts was not sufficient is error. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

**Under general issue.**— In an action by a seller against the buyer for failure to accept goods purchased, an instruction that it is necessary for the seller to prove readiness to deliver is not objectionable, as not corresponding to the issues in the case; there being a plea of the general issue, although the principal defense was an affirmative one of rescission. Iroquois Furnace Co. *v.* Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237 [*affirming* 102 Ill. App. 68].

**Harmless error.**— In an action against a vendee for breach of a contract of sale, where the time of delivery is not in issue, an instruction that defendant waived the contract time for delivery is harmless. Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. 202.

33. Baird *v.* Pratt, 6 Indian Terr. 38, 89 S. W. 648; Redhead *v.* Wyoming Cattle Inv. Co., 126 Iowa 410, 102 N. W. 144.

**Slight evidence** is sufficient to justify an instruction. Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358.

34. Jackson *v.* Du Quoin Coal Min. Co., 194 Ill. 177, 62 N. E. 540; Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433; Norfolk, etc., R. Co. *v.* Duke, 107 Va. 764, 60 S. E. 96; Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358; Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

**Sufficiency of the instructions to cover the issues** see Schaaf *v.* Hamilton, 2 Nebr. (Unoff.) 577, 89 N. W. 614; Coxe *v.* Singleton, 139 N. C. 361, 51 S. E. 1019; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666; Alden Speare's Sons Co. *v.* Hubinger, 129 Fed. 538, 64 C. C. A. 68.

35. Gehl *v.* Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666.

36. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263, 93 N. W. 26.

37. Schofield *v.* Conley, 127 Mich. 712, 86 N. W. 129; Western Mfg. Co. *v.* Kingman, 112 Fed. 246, 50 C. C. A. 221.

**A mere expression of opinion** by the court in its charge as to some issue of fact arising in the case is not reversible error if the jury is ultimately left at full liberty to determine such issue. Alden Speare's Sons Co. *v.* Hubinger, 129 Fed. 538, 64 C. C. A. 68.

**Preponderance of evidence.**— An instruction that if the evidence is evenly balanced, or preponderates in favor of defendant, plaintiff cannot recover, is not objectionable, as requiring plaintiff to disprove the affirmative defense of rescission, in view of a further instruction that, in order to avail itself of that defense, defendant must show rescission by a preponderance of the evidence. Iroquois Furnace Co. *v.* Bignall Hardware Co., 201 Ill. 297, 66 N. E. 237 [*affirming* 102 Ill. App. 68].

38. Walter *v.* Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433.

39. Falkenberg *v.* O'Neill, 88 N. Y. Suppl. 378.

40. Bedell *v.* Kowalsky, 99 Cal. 236, 33 Pac. 904.

41. Falkenberg *v.* O'Neill, 88 N. Y. Suppl. 378.

42. Peterson *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 holding that the absence of findings that the goods were graded as provided in the contract of sale, and were tendered at the place specified, is immaterial, where the court finds that the refusal to ac-

## IX. REMEDIES OF BUYER.

**A. Recovery of Price — 1. Right of Action — a. In General.** The buyer of goods may, on certain grounds,[43] and upon compliance with certain conditions,[44] recover from the seller money paid or advanced upon the purchase-price. Where there has been no completed and binding contract of sale, money advanced in anticipation of the making of such a contract may be recovered,[45] and there may be a recovery of money paid under a mutual mistake of the parties.[46] So also if the goods are lost or destroyed while the contract is still executory and the title remains in the seller, the buyer may recover money paid or advanced to the seller.[47]

**b. Failure of Consideration.** The purchase-money paid by the buyer may be recovered back if there is a total failure of consideration, by reason of a failure of title,[48] or because the goods are wholly worthless [49] or had been destroyed prior

cept was based solely on the ground that the goods were not sound, merchantable, and of proper quality.

**43.** See *infra*, IX, A, 1, b, c, d, e, f, g, h, i.

**44. Conditions precedent** see *infra*, IX, A, 3.

**45.** Smith *v.* Weaver, 90 Ill. 392.

**46.** Norton *v.* Bohart, 105 Mo. 615, 16 S. W. 598; Ketchum *v.* Catlin, 21 Vt. 191.

**Mistake as to the subject-matter.**— Money paid by a buyer of goods to the seller in payment of the price, under the mutual mistake that the property existed at a certain place, may be recovered by the buyer in an action for money had and received. Ketchum *v.* Catlin, 21 Vt. 191.

**Payment in excess** of purchase-price by mistake see *infra*, IX, A, 1, f.

**47.** Powers *v.* Nowles, 42 Colo. 442, 94 Pac. 347; Joyce *v.* Adams, 8 N. Y. 291 [*reversing* 2 Sandf. 1]; Haldeman *v.* Duncan, 51 Pa. St. 66; Williams *v.* Allen, 10 Humphr. (Tenn.) 337, 51 Am. Dec. 709. See also *infra*, IX, A, 1, d.

**But if the title has passed** so as to place the goods at the risk of the buyer, he cannot recover where the loss was not due to any negligence on the part of the seller. Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56.

**48.** *Kentucky.*— Cook *v.* Redman, 2 Bush 52.

*Maine.*— Kneeland *v.* Willard, 59 Me. 445, smuggled property.

*Missouri.*— Porth *v.* Lux, 40 Mo. App. 162, stolen property.

*New York.*— Wolf *v.* Michael, 21 Misc. 86, 46 N. Y. Suppl. 991.

*Rhode Island.*— Peckham *v.* Kiernan, 13 R. I. 354.

*Tennessee.*— Charlton *v.* Lay, 5 Humphr. 496.

See 43 Cent. Dig. tit. "Sales," §§ 1115, 1122.

**Failure of title to a part of the goods** will not justify a recovery of the whole of the purchase-price where the contract is separable as to the goods. Leary *v.* Hegeman, 28 Misc. (N. Y.) 195, 59 N. Y. Suppl. 59. But the price may be recovered as to that part the title to which has failed. Brown *v.* Woods, 3 Coldw. (Tenn.) 182; Routh *v.* Caron, 64 Tex. 289.

**Knowledge of buyer.**— One who purchases lithographs and pays a part of the price, knowing that the lithographs infringe copyrights and will be seized before delivery, cannot recover the purchase-money on the ground of mistake merely because he thought his money would be returned, as the mistake is one of law. Leary *v.* Hegeman, 28 Misc. (N. Y.) 195, 59 N. Y. Suppl. 59.

**A purchaser of crops from a tenant** without the landlord's consent as required by Gen. St. (1889) par. 3620, who is restrained by the landlord from removing same, may recover, from the tenant or his estate, the amount paid. Mabry *v.* Harp, 53 Kan. 398, 36 Pac. 743.

**Seizure for non-payment of duties.**— Where after a sale of goods the goods are seized by the government for the non-payment of import duties by the seller and are condemned and confiscated, the buyer may recover from the seller the price paid. Hamrah *v.* Maloof, 127 N. Y. App. Div. 331, 111 N. Y. Suppl. 509.

**49.** *Colorado.*— Jones *v.* Hayden, 3 Colo. App. 305, 33 Pac. 76.

*Illinois.*— Tyler *v.* Bailey, 71 Ill. 34.

*Kentucky.*— Robinson *v.* Bright, 3 Metc. 30.

*Michigan.*— Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917.

*New Jersey.*— Wood *v.* Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523.

*New York.*— Stone *v.* Frost, 61 N. Y. 614.

*North Carolina.*— Page *v.* Einstein, 52 N. C. 147.

*Tennessee.*— Boyd *v.* Anderson, 1 Overt. 438, 3 Am. Dec. 762.

*Wisconsin.*— Lawton *v.* Howe, 14 Wis. 241.

See 43 Cent. Dig. tit. "Sales," §§ 1115, 1122.

**Counterfeit land warrants.**— Where land warrants prove to be counterfeit, the buyer may recover the purchase-price, and if he is afterward required to procure other warrants in lieu of the counterfeit warrants his right of recovery is not affected by the fact that the warrants were received as genuine by the government officials in the entry of lands and subsequently by issuing patents therefor. Tyler *v.* Bailey, 71 Ill. 34.

**Warrants void on face.**— One who pur-

to the contract of sale;[50] but the mere fact that the goods are worth less than the contract price is not such a failure of consideration as will support a recovery of the excess of the price over the value.[51]

**c. Misrepresentation and Fraud.** If the purchase was induced by fraud of the seller, the buyer may on rescission of the sale recover back the price paid.[52]

**d. Non-Delivery of Goods.** The buyer may recover the price or portion thereof that he has paid on the failure of the seller to deliver the goods,[53] although the failure was due to causes beyond the seller's control;[54] and the fact that the property was destroyed or lost does not affect his right,[55] unless the title to the goods had passed so as to place them at the risk of the buyer.[56] There can, however, be no recovery if the failure to deliver was due to the interference of the

chases county warrants which show on their face that they were issued in violation of law cannot recover the purchase-price, the warrants proving worthless, in the absence of fraud on the part of the seller. Christy *v.* Sullivan, 50 Cal. 337, 19 Am. Rep. 655.

**50.** Bataille *v.* Firemen's Ins. Co., 2 Rob. (La.) 60.

**51.** Weiler *v.* Bectell, 2 Ind. App. 228, 28 N. E. 333.

**52.** *Illinois.*— Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416.

*Indiana.*— Love *v.* Oldham, 22 Ind. 51.

*Louisiana.*— Lopez *v.* McAdam, 7 La. Ann. 58.

*Maine.*— Lord *v.* French, 61 Me. 420.

*New Hampshire.*— Fellows *v.* Judge, 72 N. H. 466, 57 Atl. 653.

*New York.*— Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936; Shedd *v.* Montgomery, 61 Barb. 507; Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588.

*Ohio.*—Allen *v.* Hass, 27 Ohio Cir. Ct. 727.

*Wisconsin.*— Page *v.* Dickerson, 28 Wis. 694, 9 Am. Rep. 532.

See 43 Cent. Dig. tit. "Sales," § 1116.

**Severable contract.**— Under a contract for the sale of a livery stable for twenty-four thousand dollars, together with the exclusive privilege of furnishing the guests of a certain hotel with carriages, which was alleged to be worth in itself five thousand dollars, the purchaser is entitled to recover back the five thousand dollars on proof that the vendor had falsely represented that he had such privilege, the contract being severable. Reybold *v.* Henry, 3 Houst. (Del.) 279.

**Purchase in payment of debt.**— One who is induced by fraud to enter into a contract for the purchase of a chattel in payment of a precedent debt, and in reliance upon representations made by the vendor as to the character and quality thereof, which prove false and fraudulent, may rescind the contract, and return the chattel, and such rescission may be set up in the reply in an action brought by him to recover the original debt. Johnson *v.* Hillstrom, 37 Minn. 122, 33 N. W. 547.

**Sale to town officers.**— Where plaintiffs, as highway commissioners, were induced by the false representations of defendant as to quality, etc., to purchase and pay for some lumber and the sum paid therefor was afterward allowed to the commissioners by the town board the credit given to the commissioners by the town did not impair their right to recover back the money paid defendant. Rose *v.* Depue, 1 Thomps. & C. (N. Y.) 16.

**Payment in excess** of the agreed price through fraud of seller see *infra*, IX, A, 1, f.

**53.** *Connecticut.*— Bush *v.* Canfield, 2 Conn. 485.

*New Hampshire.*— Danforth *v.* Dewey, 3 N. H. 79.

*North Carolina.*—Bell *v.* Hoffman, 92 N. C. 273.

*Tennessee.*— Harrison *v.* Chilton, 5 Yerg. 293.

*United States.*— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527.

*England.*— Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93, 65 L. J. Ch. 536, 74 L. T. Rep. N. S. 473, 44 Wkly. Rep. 536.

*Canada.*— Heffernan *v.* Berry, 32 U. C. Q. B. 518.

**On a failure of delivery of part of the goods** the buyer may recover the value of such part. Wilson *v.* Holley, 66 N. C. 408.

**Note to be valid on delivery.**— Where plaintiff executed a negotiable note to defendant, and took a receipt in the form: "Received from Walsh Bros., $350, one note for above, in payment for goods to be delivered or note to be invalid," it was not the intent of the parties that the note should be valid or operate as a payment until the goods were delivered and there can be no recovery on non-delivery. Walsh *v.* Cooper, 10 Wash. 513, 39 Pac. 127.

**Effect of receivership for seller.**— The liability of a company from which goods are ordered and not delivered, paid for by check, cannot be enforced by action to recover the check, when that has become part of a fund to which a receiver subsequently appointed is entitled. Rouse *v.* Calvin, 76 Ill. App. 362.

**54.** Rose *v.* Foord, 96 Cal. 152, 30 Pac. 1114 (legal proceedings); Denny *v.* Simons, 27 La. Ann. 438 (military interference).

**55.** Winn *v.* Morris, 94 Ga. 452, 20 S. E. 339; Larne *v.* Rugely, 10 La. Ann. 242; Bataille *v.* Firemen's Ins. Co., 2 Rob. (La.) 60; Coleman *v.* McDermott, 1 Grant Err. & App. 445 [*affirming* 5 U. C. C. P. 303].

**56.** Waldron *v.* Chase, 37 Me. 414, 59 Am. Dec. 56, holding that where title to the goods has passed so that they are at the buyer's risk he cannot recover the price where the destruction of the goods was not due to negligence on the part of the seller.

buyer,[57] or if it was the duty of the buyer to select,[58] or remove the goods,[59] and he failed to do so.

**e. Defects in Quality.** Where the price has been paid in advance and the goods delivered are of such inferior quality as to warrant their rejection the buyer may recover the amount so paid,[60] unless he retains and continues to use the goods for his own benefit.[61] The mere fact that the goods were defective does not, however, give him a right to recover the price, if paid after the goods were delivered.[62] The price may, however, be recovered if the goods were accepted on the express promise that defects would be remedied and this could not be done,[63] or if on notice of the defects the article is removed by the seller.[64]

**f. Payment in Excess.** The buyer is entitled to recover from the seller the amount of an overpayment which has been made by mistake,[65] as by reason of a

57. Leary *v.* Hegeman, 28 Misc. (N. Y.) 195, 59 N. Y. Suppl. 59.

58. Day *v.* Farley, 100 Mo. App. 633, 75 S. W. 177.

59. Shaw *v.* Carbrey, 13 Allen (Mass.) 462. *Compare* Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

60. *Illinois.*— Tyler *v.* Bailey, 71 Ill. 34.

*Indiana.*— Gossard *v.* Woods, 98 Ind. 195.

*Iowa.*— Jack *v.* Des Moines, etc., R. Co., 53 Iowa 399, 5 N. W. 537.

*Louisiana.*— Adler *v.* Wolff, 36 La. Ann. 169.

*Michigan.*— Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57.

*Missouri.*— Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

*New Jersey.*—Meader *v.* Cornell, 58 N. J. L. 375, 33 Atl. 960.

*New York.*— Bach *v.* Levy, 101 N. Y. 511, 5 N. E. 345; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118]; Peck *v.* Armstrong, 38 Barb. 215; Altschul *v.* Koven, 94 N. Y. Suppl. 558.

*Pennsylvania.*—*In re* Williams, 8 Pa. Co. Ct. 41.

*United States.*— Conrad *v.* Dater, 6 Fed. Cas. No. 3,127, 2 Biss. 342.

See 43 Cent. Dig. tit. "Sales," § 1125.

**In Louisiana** the buyer has a remedy for defects by an action for diminution of the price. Bonzano *v.* Auze, 10 La. Ann. 188; Farmer *v.* Fisk, 9 Rob. 351; Millar *v.* Coffman, 7 Mart. N. S. 556; Brown *v.* Duplantier, 1 Mart. N. S. 312; Bulkley *v.* Honold, 19 How. (U. S.) 390, 15 L. ed. 663. He may also sue for a rescission and recovery of the price. Melancon *v.* Robichaux, 17 La. 97; Back *v.* Meeks, 1 La. 309.

**Part of goods defective.**— When only a part of the goods are defective the buyer cannot recover the price of such part if the contract is entire but must in such case rescind and return all the goods. Clark *v.* Baker, 5 Metc. (Mass.) 452.

**Goods to be tested.**— Under a provision of a contract for the sale of a piano that it was to be tested by a person named, it was incumbent on the seller, within a reasonable time after the piano was tested and rejected, to deliver another, and on failure to do so the seller became liable to the buyer for the amount paid. Garvin *v.* Montenegro-Riehm Music Co., 104 S. W. 964, 31 Ky. L. Rep. 1182.

**Refusal of right to inspect goods.**— If where goods are shipped the seller refuses the buyer the right of inspecting them to ascertain if they are of the proper quality, the buyer may refuse to accept them and recover an amount advanced upon the purchase-price. Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92.

**Claim for defects to be adjusted.**— Where a complaint is based upon an alleged contract binding plaintiff to accept certain goods, to be delivered by defendant, even though they prove inferior, and to pay therefor and await an ultimate allowance and adjustment of losses resulting from such inferiority, plaintiff cannot establish his claim to recover for an overpayment, on the ground of inferior quality of the goods, by rejecting certain shipments as having been inferior, and repudiating all liability therefor. Clark *v.* Cliff Paper Co., 21 N. Y. App. Div. 623, 47 N. Y. Suppl. 251.

**Agreement to substitute other goods or refund price.**— Where goods are sold under an agreement that if they do not prove satisfactory the seller will substitute other goods or refund the price paid, and the goods are not satisfactory, if the seller fails to make such substitution the buyer may sue for and recover the price paid. Turnbull *v.* Seymour, 31 Minn. 196, 17 N. W. 278; Park *v.* Richardson, etc., Co., 81 Wis. 399, 51 N. W. 572.

61. Graham *v.* Hatch Storage Battery Co., 186 Mass. 226, 71 N. E. 532, holding that, although notice of rejection is seasonably given so that if adhered to the price paid might have been recovered, yet if the buyer after such notice continues to use the article in his business, such conduct amounts to an abandonment of the right of rejection and precludes a recovery of the price paid.

62. Frazier *v.* Harvey, 34 Conn. 469; Freeman *v.* Galbraith, Wright (Ohio) 592; Gaar *v.* Stark, (Tenn. Ch. App. 1895) 36 S. W. 149; Fortune *v.* Lingham, 2 Camph. 416; Payne *v.* Whale, 7 East 274, 3 Smith K. B. 130.

63. National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783.

64. Roesch *v.* Young, 111 Ill. App. 34.

65. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

mutual mistake as to the quantity of the goods,[66] or error in computation,[67] or where by reason of fraud on the part of the seller the buyer has paid more than the price agreed on.[68]

**g. Payment Voluntarily or Under Protest.** There can be no recovery of the price paid if the buyer with knowledge of facts entitling him to avoid the sale pays the price voluntarily,[69] and it makes no difference that the payment is made under protest,[70] or under threats of suit,[71] or other compulsion not amounting to legal duress.[72] If the payment is made under duress there may of course be a recovery;[73] and where the buyer has given his note for the purchase-price his subsequent payment of the note after it has been negotiated and has passed into the hands of a third person so as to cut off defenses thereto is not a voluntary payment to the seller.[74]

**h. Default or Fraud of Buyer.** The buyer cannot recover the price paid but will forfeit his advance payments if he wrongfully refuses to carry out the contract of sale,[75] either by refusing to make deferred payments,[76] or wrongfully refusing to receive the goods when tendered,[77] the seller being ready and willing to perform

66. Devine *v.* Edwards, 101 Ill. 138; Glover *v.* Collins, 18 N. J. L. 232; Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Scott *v.* Warner, 2 Lans. (N. Y.) 49; Hargous *v.* Ablon, 3 Den. (N. Y.) 406, 45 Am. Dec. 481.

**Where note is given in payment.**— Where the buyer has given his note in payment of the purchase-price and it has passed into the hands of a *bona fide* holder so that he has been compelled to pay the full amount of the note, he may recover the amount of the excess from the seller. Bennett *v.* Beidler, 16 Mich. 150. The buyer may also recover an excess payment where he has given his note and a judgment has been rendered in an action on the note, although in such action he did not object to any failure of consideration. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228.

**The mere fact that goods sold are worth less than the contract price will not authorize a recovery by the purchaser of the excess of the price so paid over the actual value of the goods.** Weller *v.* Bectell, 2 Ind. App. 228, 28 N. E. 333.

**More or less.**— Where the estimated quantity is agreed on as the quantity sold whether more or less there can be no recovery for a deficiency. McCrea *v.* Longstreth, 1 Phila. (Pa.) 70.

**Animals running at large.**— Where a person sells six mules under price, on the agreement that the purchaser shall recover the mules, they having escaped from a pasture, the latter cannot recover the price of a mule that he does not find. Puterbaugh *v.* Winchester, 29 Ill. 194.

67. Whitcomb *v.* Williams, 4 Pick. (Mass.) 228; Rosboro *v.* Peck, 48 Barb. (N. Y.) 92; Waldheim *v.* Shane, 9 Ohio Dec. (Reprint) 560, 15 Cinc. L. Bul. 84.

68. Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

69. *Arkansas.*— Vick *v.* Shinn, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26.

*Illinois.*— Frambers *v.* Risk, 2 Ill. App. 499.

*Michigan.*— Copas *v.* Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690.

*New Hampshire.*— Boutelle *v.* Melendy, 19 N. H. 196, 49 Am. Dec. 152. See also Holden *v.* Curtis, 2 N. H. 61, where judgment was obtained on a note given for the price, no defense in avoidance of the sale being pleaded by the buyer.

*New York.*— Altschul *v.* Koven, 94 N. Y. Suppl. 558.

*North Carolina.*— Matthews *v.* Smith, 67 N. C. 374.

*Pennsylvania.*— Armstrong *v.* Latimer, 165 Pa. St. 398, 30 Atl. 990.

See 43 Cent. Dig. tit. "Sales," §§ 1112, 1113.

**Failure of consideration.**— Although a payment is voluntarily made it may be recovered if the consideration for which it was given subsequently fails. Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379.

70. Copas *v.* Anglo-American Provision Co., 73 Mich. 541, 41 N. W. 690; Armstrong *v.* Latimer, 165 Pa. St. 389, 30 Atl. 990.

71. Matthews *v.* Smith, 67 N. C. 374.

72 Peterkin *v.* Martin, 30 La. Ann. 894, where, however, the buyer was held to be entitled to recover by reason of an understanding and agreement made with the seller at the time of the payment.

73. Lonergan *v.* Buford, 148 U. S. 581, 13 S. Ct. 684, 37 L. ed. 569 [*affirming* 6 Utah 301, 22 Pac. 164]; New York Consol. Card Co. *v.* U. S., 20 Ct. Cl. 174.

74. Hamrah *v.* Maloof, 127 N. Y. App. Div. 331, 111 N. Y. Suppl. 509.

75. Webb *v.* Steiner, 113 Mo. App. 482, 87 S. W. 618; Kane *v.* Jenkinson, 14 Fed. Cas. No. 7,607, 10 Nat. Bankr. Rep. 316.

76. *California.*— Rayfield *v.* Van Meter, 120 Cal. 416, 52 Pac. 666.

*Nebraska.*— Walter *v.* Reed, 34 Nebr. 544, 52 N. W. 682.

*New York.*— Haynes *v.* Hart, 42 Barb. 58.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*United States.*— Eddy, etc., Live-Stock Co. *v.* Blackburn, 70 Fed. 949, 17 C. C. A. 532.

See 43 Cent. Dig. tit. "Sales," § 1127.

77. *Illinois.*— Colvin *v.* Weedman, 50 Ill. 311.

*Iowa.*— Stevens *v.* Brown, 60 Iowa 403, 14 N. W. 735.

on his part.[78] So too if the buyer has been guilty of fraud in the transaction he cannot recover the purchase-price.[79] There may, however, be a recovery if the seller rescinds the contract,[80] or agrees to cancel it and repay the amount advanced.[81]

**i. Return of Goods to Seller.** The price paid may be recovered by the buyer when the goods have been returned to the seller and accepted and retained by him under an agreement for their return,[82] or a rescission of the contract.[83] To recover under a contract of sale or return there must, however, be an actual return or tender.[84]

**2. Form of Remedy.** While the buyer may in the event of fraud or default in performance by the seller, at his election, stand on the contract and bring an action for damages,[85] or avoid the contract and maintain an action for recovery of the price,[86] he cannot treat the sale as void in order to recover the price and valid in order to recover damages,[87] the remedies being inconsistent.[88] If he elects to avoid the sale and reclaim the consideration paid assumpsit for money had and received is a proper form of action; [89] and where the buyer has paid more than the price agreed on, he may, although such payment was procured by fraud on

*Kansas.*— Gibbons *v.* Hayden, 3 Kan. App. 38, 44 Pac. 445.

*Nebraska.*— Lexington Mill, etc., Co. *v.* Neuens, 42 Nebr. 649, 60 N. W. 893.

*Ohio.*— Beasley *v.* Lovel, 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 551.

See 43 Cent. Dig. tit. "Sales," § 1127.

**78.** Gibbons *v.* Hayden, 3 Kan. App. 38, 44 Pac. 445; Walter *v.* Reed, 34 Nebr. 544, 52 N. W. 682.

**79.** Johnson *v.* Jennings, 10 Gratt. (Va.) 1, 60 Am. Dec. 323.

**80.** Patterson *v.* Coats, 8 Blackf. (Ind.) 500; Fancher *v.* Goodman, 29 Barb. (N. Y.) 315; Carter *v.* Walker, 2 Rich. (S. C.) 40; Packer *v.* Button, 35 Vt. 188.

**A mere retaking of the goods** by the seller under an agreement that on default in payment of an instalment he might take possession is not a rescission entitling the buyer to recover the amount paid. Miller *v.* Steen, 34 Cal. 138.

**81.** Schreyer *v.* Kimball Lumber Co., 54 Fed. 653, 4 C. C. A. 547.

**82.** Chambers *v.* Harper, 83 Ga. 382, 9 S. E. 717; Morrison *v.* Woodley, 84 Ill. 192; Blair *v.* Collins, 15 La. Ann. 683; P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246, 34 N. Y. Suppl. 741.

**The loss of the property during shipment** in return does not prevent a recovery. Stinson *v.* Walker, 21 Me. 211.

**Stoppage in transitu** does not entitle the vendee to recover back a partial payment. Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

**83.** Kendall *v.* Wilson, 41 Vt. 567; Pepper *v.* Taylor, 54 Fed. 32, 4 C. C. A. 169.

**84.** Orvis *v.* Waite, 58 Ill. App. 504, holding that on a sale or return of stock, leaving the shares at a bank and notifying the seller is not sufficient.

**85.** See *infra*, IX, C.

**86.** *Indiana.*— Love *v.* Oldham, 22 Ind. 51.

*Maine.*— Garland *v.* Spencer, 46 Me. 528.

*Mississippi.*— Westmoreland *v.* Walker, 25 Miss. 76.

*Missouri.*— Parker *v.* Marquis, 64 Mo. 38.

*New York.*— Bowen *v.* Mandeville, 95 N. Y. 237 [*affirming* 29 Hun 42].

*Pennsylvania.*—Smith *v.* Bellows, 77 Pa. St. 441; Smethurst *v.* Woolston, 5 Watts & S. 106.

*Texas.*— Gregg *v.* Fitzhugh, 36 Tex. 127; Blythe *v.* Speake, 23 Tex. 429.

See 43 Cent. Dig. tit. "Sales," § 1109.

**In Louisiana** the buyer may proceed either by redhibitory action or by an action *quanti minoris*. Lewis *v.* Peets, 10 La. Ann. 489; Fisk *v.* Proctor, 4 La. Ann. 562; Farmer *v.* Fisk, 9 Rob. 351.

**87.** Junkins *v.* Simpson, 14 Me. 364.

**On waiver of a claim for damages** the only remedy allowed the purchaser is to return the goods and reclaim the consideration. Heagney *v.* J. I. Case Threshing Mach. Co., 4 Nebr. (Unoff.) 745, 96 N. W. 175.

**88.** Bowen *v.* Mandeville, 95 N. Y. 237 [*affirming* 29 Hun 42].

**89.** *Florida.*— Evans *v.* Givens, 22 Fla. 476.

*Massachusetts.*— Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

*Michigan.*— Ripley *v.* Case, 86 Mich. 261, 49 N. W. 46; Murphy *v.* McGraw, 74 Mich. 318, 41 N. W. 917.

*New Hampshire.*— Stevens *v.* Lyford, 7 N. H. 360; Danforth *v.* Dewey, 3 N. H. 79.

*New Jersey.*— Glover *v.* Collins, 18 N. J. L. 232.

*New York.*— Voorhees *v.* Earl, 2 Hill 288, 38 Am. Dec. 588; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. 285.

*North Carolina.*— Page *v.* Einstein, 52 N. C. 147.

*South Carolina.*— Byers *v.* Bostwick, 2 Mill 75; Martin *v.* Howil, 3 Brev. 547; Huckson *v.* Avant, 2 Brev. 264.

*United States.*— Nash *v.* Towne, 5 Wall. 689, 18 L. ed. 527.

See 43 Cent. Dig. tit. "Sales," § 1109.

**If there is no allegation of fraud or mistake** in an action brought for money had and received to recover payments made upon goods bought on the instalment plan, a nonsuit is properly granted. Martin *v.* Pollat-

the part of the seller, waive the tort and sue in assumpsit for money had and received to recover the amount of such excess.[90]

**3. Conditions Precedent — a. In General.** Where after goods are resold by the buyer it appears that there was an overpayment by reason of shortage in quantity, it is not a condition precedent to an action to recover the excess in price that the buyer should have reimbursed his vendee;[91] nor is it necessary, where the right of recovery is based on an alleged overpayment due to a mistaken belief that an inventory of the goods stated their cash value, that the contract should first be reformed.[92] In order to recover earnest money paid when the seller has repudiated or rescinded the contract a tender of performance by the buyer is not necessary.[93]

**b. Demand.** If the goods are to be delivered when called for there must of course be a demand in order to put the seller in default.[94] A demand may, however, be excused if the seller has before the time of performance wholly repudiated the contract,[95] or put it out of his power to perform by selling and delivering the goods to another.[96] Where demand has been made for the goods, a demand of the purchase-money is unnecessary before action;[97] and a demand for the purchase-money is also unnecessary where defendant has denied all liability and it is obvious that such demand would be a useless formality.[98] The notice of suit to recover the price is a sufficient demand where the duty of the seller to deliver was absolute.[99] If the consideration is to be returned on the return of the article if it proves unsatisfactory, a return of the article is a sufficient demand for the return of the consideration.[1] A demand for a return of the purchase-money is unnecessary if the seller has unequivocally repudiated any liability therefor.[2]

**c. Rescission and Restoration of Goods.** Where a recovery of the price paid is sought on the ground of fraud or defects in the goods, it is essential that there should be a rescission of the sale,[3] and a return of or offer to return the goods,[4] if

chek, 3 Misc. (N. Y.) 371, 22 N. Y. Suppl. 927 [*affirmed* in 6 Misc. 635, 25 N. Y. Suppl. 1142].

**90.** Stout *v.* Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619.

**91.** Denton *v.* Gill, 102 Md. 386, 62 Atl. 627, 3 L. R. A. N. S. 465.

**92.** Sheffield *v.* Hamlin, 26 Hun (N. Y.) 237.

**93.** Main *v.* King, 8 Barb. (N. Y.) 535; Packer *v.* Steward, 34 Vt. 127.

**94.** Andrews *v.* Cheney, 62 N. H. 404.

**95.** Brewster *v.* Wooster, 131 N. Y. 473, 30 N. E. 489 [*reversing* 58 N. Y. Super. Ct. 10, 9 N. Y. Suppl. 312]; Packer *v.* Button, 35 Vt. 188.

**96.** Fay *v.* Fitzpatrick, 130 Iowa 279, 105 N. W. 398; Robinson *v.* Clark, 20 La. Ann. 384.

**97.** Fancher *v.* Goodman, 29 Barb. (N. Y.) 315; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

**98.** Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8.

**99.** Fay *v.* Fitzpatrick, 130 Iowa 279, 105 N. W. 398.

**1.** Fuller *v.* Schroeder, 20 Nebr. 631, 31 N. W. 109.

**Rejection of the goods** is a sufficient demand where the contract provides for the repayment, on demand, of money advanced if the goods, when delivered, were not accepted because not of the quality agreed upon. Lilienthal *v.* McCormick, 86 Fed. 100.

**2.** Evenson *v.* Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8.

**3.** *Louisiana.*— Childs *v.* Wilson, 15 La. Ann. 512; Richardson *v.* Johnson, 1 La. Ann. 389.

*Michigan.*— Barbour *v.* Hurlburt, 137 Mich. 534, 100 N. W. 781.

*New Jersey.*— Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932.

*Pennsylvania.*— Morrow *v.* Rees, 69 Pa. St. 368.

*South Carolina.*— Carter *v.* Walker, 2 Rich. 40; Wharton *v.* O'Hara, 2 Nott & M. 65.

*England.*— Gompertz *v.* Denton, 1 Cromp. & M. 207, 1 Dowl. P. C. 623, 2 L. J. Exch. 82, 3 Tyrw. 233.

**Non-delivery.**— The court will not give judgment for the return of the price paid for goods on account of the non-delivery by the seller until the purchaser seeks to annul the contract for non-compliance by the seller with its provisions. Hart *v.* Adler, 19 La. Ann. 301.

**4.** *Alabama.*— Cozzins *v.* Whitaker, 3 Stew. & P. 322.

*Arkansas.*— Plant *v.* Condit, 22 Ark. 454.

*Indiana.*— Baldwin *v.* Marsh, 6 Ind. App. 533, 33 N. E. 973.

*Iowa.*— Hoffman *v.* Hampton Independent School Dist., 96 Iowa 319, 65 N. W. 322.

*Kentucky.*— Ruby Carriage Co. *v.* Kremer, 81 S. W. 251, 26 Ky. L. Rep. 274.

*Louisiana.*— Bloodgood *v.* Wilson, 10 La. Ann. 302. See also Morris *v.* Kendig, 15 La. Ann. 404. But see Cottle *v.* Wilson, 1 La.

they are of any value;[5] and where the recovery of the purchase-money is based on a failure of title there must be a return or offer of return of the property.[6] So too where by the terms of the contract the buyer has the option of returning the goods, a return is necessary to support an action for recovery of the price paid;[7] but if the goods are merely delivered to be tested and accepted if satisfactory, it is sufficient if the buyer gives notice to the seller within a reasonable time that they are not satisfactory and that he refuses to accept them without actually returning them.[8] A return or offer to return is not necessary if the goods are actually worthless,[9] or have been seized and confiscated by the government for non-payment of duties by the seller,[10] or if the seller declares that he will not receive the goods if tendered.[11] When a recovery of an overpayment due to deficiency in quantity is sought a rescission or return of the goods is not necessary.[12]

4. DEFENSES. It is not a defense to an action to recover the purchase-price on the ground of defects that the seller acted in good faith,[13] or that he ordered the best material for the manufacture of the goods,[14] and the buyer's knowledge of the defect is not a defense to an action to recover the purchase-money paid if there was an express agreement that the defect would be remedied.[15] While

Ann. 4 (where the return of a slave purchased was impossible by reason of his death); Castellano *v.* Peillon, 2 Mart. N. S. 466 (where the slave purchased was a runaway).

*Maine.*—Garland *v.* Spencer, 46 Me. 528.

*Michigan.*— Condon *v.* Hughes, 92 Mich. 367, 52 N. W. 638.

*Missouri.*—Walls *v.* Gates, 6 Mo. App. 242.

*New Jersey.*— Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932.

*Pennsylvania.*— Morrow *v.* Rees, 69 Pa. St. 368.

*South Carolina.*— Ashley *v.* Reeves, 2 McCord 432; Wharton *v.* O'Hara, 2 Nott & M. 65. *Compare* Banks *v.* Hughes, 1 McCord 537.

*Vermont.*— Warner *v.* Wheeler, 1 D. Chipm. 159, 6 Am. Dec. 717.

See 43 Cent. Dig. tit. "Sales," § 1131.

**Severable contract.**—Where various articles of furniture are sold each at a separate price, which is paid, and the purchaser, after all have been delivered, finds that one of the articles does not conform to the agreement and returns it, he may recover the amount paid for it without returning the other articles. Manning *v.* Humphreys, 3 E. D. Smith (N. Y.) 218.

**If the contract is entire** a recovery cannot be had for a part of the goods which prove to be defective, where because of use all the goods cannot be returned. Stelwagon *v.* Wilmington Coal-Gas Co., 2 Mart. (Del.) 184, 42 Atl. 449.

**Non-delivery of part of the goods** will not support a recovery of any part of the purchase-money, without a return of the goods delivered if the sale was for a gross sum. Miner *v.* Bradley, 22 Pick. (Mass.) 457.

**Sufficiency of notice and offer to return.**— Where certain goods arrive at their destination in a worthless condition, a letter to the seller stating the condition of the goods and requesting him to come and take them away and the latter's answer declining to do so but insisting that the goods are in good condition constitute a sufficient notice of the worthlessness of the goods and offer to return them. Stone *v.* Frost, 6 Lans. (N. Y.) 440 [*affirmed* in 61 N. Y. 614].

A failure to return will not affect the buyer's right of action if it was due to the request of the seller to retain the article until a new one could be substituted for it. Chickering *v.* Bromberg, 52 Ala. 528.

5. Morrow *v.* Rees, 69 Pa. St. 368; Wharton *v.* O'Hara, 2 Nott & M. (S. C.) 65; Warner *v.* Wheeler, 1 D. Chipm. (Vt.) 159, 6 Am. Dec. 717.

6. Gunnel *v.* Dade, 11 Fed. Cas. No. 5,869, 1 Cranch C. C. 427.

**Failure of title to part of goods.**—A vendee of personal property, in case of failure of title to a portion thereof, is not bound to rescind the contract *in toto*, but may retain so much as he has secured a title to, and recover damages for the loss of the residue. McKnight *v.* Devlin, 52 N. Y. 399, 11 Am. Rep. 715.

7. Henderson *v.* Wheaton, 139 Ill. 581, 28 N. E. 1100 [*affirming* 40 Ill. App. 538, and *distinguishing* Clark *v.* Weis, 87 Ill. 438, 29 Am. Rep. 60]. But *compare* George *v.* Braden, 70 Pa. St. 56, holding that a return before execution is issued is all that is necessary.

8. Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636.

9. Smith *v.* McNair, 19 Kan. 330, 27 Am. Rep. 117; Maas *v.* Scharbach, 13 Misc. (N. Y.) 215, 34 N. Y. Suppl. 234; Morrow *v.* Rees, 69 Pa. St. 368.

10. Hamrah *v.* Maloof, 127 N. Y. App. Div. 331, 111 N. Y. Suppl. 509.

11. Schultz *v.* O'Rourke, 18 Mont. 418, 45 Pac. 634.

12. Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579.

13. Farmer *v.* Fisk, 9 Rob. (La.) 351. *Compare* Moore *v.* King, 12 Mart. (La.) 261.

14. George Lawley, etc., Corp. *v.* Park, 138 Fed. 31, 70 C. C. A. 399.

15. National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783.

mere negligence of the buyer in discovering a mistake which resulted in overpayment will not prevent a recovery of the excess,[16] if the buyer is guilty of laches in seeking rescission because of defects he will lose his right of recovery.[17] If the goods are not in the possession of the seller, it is a defense to an action to recover the price because of non-delivery that the buyer took the risk of getting possession.[18] A tender of the amount paid by the buyer is no defense to the action but merely precludes a claim for interest.[19]

**5. Parties.** In an action to recover an overpayment due to a deficiency in quantity, purchasers from the buyer are not necessary parties.[20]

**6. Pleading — a. In General.** In an action by the buyer to recover purchase-money paid, he must, as in other civil actions, allege all the material facts upon which his right of recovery is based.[21] Thus if the ground of the action is fraud, it must be substantially alleged,[22] and a proper rescission of the contract shown,[23] and it should also be alleged that the goods were returned or tendered in return,[24] or that they were of no value.[25] If plaintiff relies on a waiver of the return of the goods he must plead it;[26] and defendant, if he relies on conditions in the contract, must plead them.[27]

**b. Issues, Proof, and Variance.** As in other civil actions, plaintiff can recover only upon the cause of action set forth in his complaint,[28] and a material variance between the allegations and the proof is fatal to a recovery.[29] So also only

16. Devine *v.* Edwards, 87 Ill. 177.

17. Rider *v.* Right, 10 La. Ann. 127. And see Condon *v.* Hughes, 92 Mich. 367, 52 N. W. 638.

18. Leau *v.* O'Hara, 1 McCord (S. C.) 19.

19. Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

20. Reed *v.* McDonald, 1 Cal. App. 458, 82 Pac. 639.

21. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444; Miller *v.* Van Tassel, 24 Cal. 459.

22. Evertson *v.* Miles, 6 Johns. (N. Y.) 138; McKinney *v.* Fort, 10 Tex. 220.

23. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444; Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932.

24. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444; Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203. But see Potter *v.* Taggart, 54 Wis. 395, 11 N. W. 678, holding that the omission of a complaint to state that plaintiff is ready and willing to restore the goods to defendant does not render it liable to a demurrer *ore tenus*, but that plaintiff will be required to prove on the trial that he is in condition to make such restoration and should make it then and there.

**Sufficiency of allegations.**—A complaint which alleges that plaintiff returned a horse which he had purchased from defendant and demanded a return of his money on the ground that the horse was not as represented, and that defendant accepted and retained the horse and promised to repay the money by a stated time, shows a complete rescission of the contract of sale, and states a cause of action for the recovery of the price paid. Kendall *v.* Hardebeck, 163 Ind. 373, 71 N. E. 957. But in an action to recover money paid for bonds on the ground that the purchaser has rescinded the sale for fraud, it is not sufficient to show an offer, more than a year after the sale, to assign all right, title, and interest of the purchaser in the bonds, the extent of such interest being left indefinite. Erwin *v.* Detwiler, 75 N. J. L. 420, 67 Atl. 932.

25. Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

**Sufficiency of allegation.**— If a complaint to recover the price paid for shares of stock construed as a whole alleges that the stock was worthless from its inception, it is not objectionable on the ground that it does not specifically allege that the stock was worthless at the time of the purchase. Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936.

26. Kinkead *v.* McCormick Harvesting Mach. Co., 106 Iowa 222, 76 N. W. 663.

27. Westinghouse Co. *v.* Meixel, 72 Nebr. 623, 101 N. W. 238.

28. Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

29. Stroud *v.* Pierce, 6 Allen (Mass.) 413; Delany *v.* Van Derveer, 7 N. Y. Suppl. 132.

**An allegation that the price was paid in money** is not supported by proof that it was paid by an order on a third person payable in specific articles. Stroud *v.* Pierce, 6 Allen (Mass.) 413.

**Variance not material.**—As a rescission of a contract of sale is in effect the same as a resale to the seller upon the terms of the original sale, a recovery may be had under a complaint alleging the former upon proof of the latter. Kelly *v.* Bliss, 61 Wis. 560, 21 N. W. 609.

**Variance from bill of particulars.**—A variance between the bill of particulars furnished by plaintiff and the proof adduced on the trial will be disregarded if it appears that it was not material and defendant was not misled thereby. Seaman *v.* Low, 4 Bosw. (N. Y.) 337.

such evidence is admissible as conforms to the allegations of the pleadings and the issues tendered thereby.[30] Where the action is to recover the price paid on the ground that the goods did not conform to the contract, evidence of damages on the theory of a breach of warranty is not admissible;[31] and where a recovery is sought because of a failure of title evidence as to warranty is inadmissible in the absence of any allegation as to warranty.[32] Under an allegation of voluntary payment without notice of the fraud, proof of an involuntary payment under duress with knowledge of the fraud is inadmissible.[33] Under a general denial defendant cannot show that the defect complained of was one which the buyer could have discovered by inspection.[34]

7. EVIDENCE.[35] In an action to recover an overpayment because of a deficiency in quantity the burden is on plaintiff to show the deficiency;[36] and where the defense is that the goods, the purchase-price of which the buyer seeks to recover, were injured while in plaintiff's possession, the burden is on the seller to show this fact.[37] Where the action is based on a failure of title, notes given by the seller providing that title to the goods should not pass until they were paid are admissible.[38] Evidence is admissible which tends to show misconduct or fraud on the part of the seller justifying plaintiff in refusing to complete the contract,[39] or that defendant had abandoned the contract;[40] and in an action by the buyer to recover a part payment after rejection of the goods, he is entitled to show the quality of the goods in justification of his refusal to accept them.[41] Where the recovery of an overpayment due to a deficiency in quantity is asked, a written contract containing stipulations for the determination of the quantity is admissible;[42] and the contract of sale is admissible on the issue as to the extent of the overpayment, and as explanatory of defendant's possession of the money.[43] Correspondence between the buyer and seller and between the buyer and a person for whom he had ordered the goods relative to the quality of the goods is admissible.[44] Where the ground of action is non-delivery, the sale being made by an agent, it may be shown that a demand was made on the agent.[45] Where the goods were sold at auction after rejection, at the instance of the buyer, the amount of the proceeds of such sale may be shown by the testimony of the buyer,[46] but

30. Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

Effect of bill of particulars.— Under a complaint alleging fraud, proof of fraud is not precluded because of a bill of particulars stating the payments of money to defendant and describing them as so much "money received by defendant, on account of stock which defendant never delivered to plaintiff," particularly where it does not appear that defendant was misled thereby as to the fact that plaintiff's claim was based upon the fraudulent representations of defendant. Seaman *v.* Low, 4 Bosw. (N. Y.) 337.

31. Clark *v.* Cliff Paper Co., 55 N. Y. App. Div. 625, 67 N. Y. Suppl. 3 [*affirmed* in 172 N. Y. 624, 65 N. E. 1115]; Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

32. Miller *v.* Van Tassel, 24 Cal. 459.

33. Phleger *v.* Weltner, 21 Mo. App. 580.

34. Hivert *v.* Lacaze, 3 Rob. (La.) 357.

35. Evidence admissible under pleadings see *supra*, IX, A, 6, b.

36. Reed *v.* McDonald, 1 Cal. App. 458, 82 Pac. 639.

37. McKnight *v.* Nichols, 147 Pa. St. 158, 23 Atl. 399.

38. Jensen *v.* McCormick, 26 Utah 142, 72 Pac. 630.

39. Kendall *v.* Young, 141 Ill. 188, 30 N. E. 538 [*affirming* 40 Ill. App. 391].

40. Kendall *v.* Young, 141 Ill. 188, 30 N. E. 538 [*affirming* 40 Ill. App. 391].

41. Plumb *v.* Bridge, 128 N. Y. App. Div. 651, 113 N. Y. Suppl. 92.

42. Reed *v.* McDonald, 1 Cal. App. 458, 82 Pac. 639.

Where a buyer sues to recover for loss of weights in cotton sold under written contracts made under the rules of the Interior Cotton Buyers' Association, which provide that the seller shall have the right to reweigh, if the buyer is dissatisfied with the weights, and it is shown that the broker of the seller consented to the buyer using the cotton before notice to the seller of the objection to the weights, so that it could not be reweighed, defendant can show that such broker had no authority to grant such permission. Revolution Cotton Mills *v.* Union Cotton Mills, 73 S. C. 43, 52 S. E. 674.

43. Phippen *v.* Morehouse, 50 Mich. 537, 15 N. W. 895.

44. Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

45. Fay *v.* Fitzpatrick, 130 Iowa 279, 105 N. W. 398.

46. Recknagel *v.* Le Cocq, 6 N. Y. St. 527.

if the goods were returned to the seller evidence as to the value of the goods is immaterial.[47] Plaintiff in an action to recover purchase-money paid, as in other civil actions, must support his right to recover by a preponderance of evidence.[48]

**8. Trial.** In an action to recover the price paid upon the seller's refusal to deliver goods under an oral contract, if the evidence is conflicting it is a question for the jury to determine what the terms of the contract were;[49] and in an action by the buyer to recover advances where the property was destroyed while still in the hands of the seller, the question as to whether the contract of sale was at the time executed or executory is for the jury.[50] It is a question for the jury whether the goods were of the quality called for by the contract,[51] and whether a return of the goods was within a reasonable time.[52] The instructions of the court must correctly inform the jury as to the law of the case,[53] the burden of proof,[54] and proper measure of recovery,[55] and must conform to the evidence adduced,[56] and must not be ambiguous or misleading.[57] The instructions must submit to the jury all the elements of the case proper for their consideration;[58] and on the other hand must not enlarge the issues tendered by the pleadings,[59] or authorize a recovery on a cause of action not alleged,[60] or in support of which no evidence has been produced.[61] Requested instructions which state the law correctly and are based upon evidence which is before the jury should be given,[62] but it is proper to refuse to charge on a theory of the defense that is wholly unsupported by or contrary to the evidence.[63]

**9. Judgment and Amount of Recovery.** Since a suit to recover the price of goods purchased is in disaffirmance of the sale,[64] the measure of recovery is the price or amount paid and not the value of the goods.[65] In case of non-delivery

**47.** Paulson *v.* Osborne, 35 Minn. 90, 27 N. W. 203.

**48.** See Evidence, 17 Cyc. 753 *et seq.*; and cases cited *infra*, this note.

**Sufficiency of evidence** to show: Fraud. Miller *v.* Curtis, 59 N. Y. Super. Ct. 127, 13 N. Y. Suppl. 604. Failure of title. Myers *v.* Smith, 27 Md. 91. Non-delivery. Mechanics', etc., Ins. Co. *v.* Hart, 48 La. Ann. 582, 19 So. 569. Readiness of plaintiff to receive the goods. McCoy *v.* Julien, 15 Iowa 371. Overpayment due to miscalculation. Bernstein *v.* Patterson, 33 Ill. App. 152. To show that there was no rescission. Bridge *v.* Penniman, 105 N. Y. 642, 12 N. E. 19 [*affirming* 51 N. Y. Super. Ct. 183]. To show that a contract of sale of bank stock was executory in regard to the next dividend to be paid thereon. Tayloe *v.* Riggs, 1 Pet. (U. S.) 591, 7 L. ed. 275 [*reversing* 20 Fed. Cas. No. 11,832, 2 Cranch 687].

**49.** Morse *v.* Ressler, 153 Mich. 512, 116 N. W. 1069.

**50.** Prowers *v.* Nowles, 42 Colo. 442, 94 Pac. 347.

**51.** George Lawley, etc., Corp. *v.* Park, 138 Fed. 31, 70 C. C. A. 399.

**Sufficiency of evidence** to warrant the submission to the jury of the issue as to quality see McAllister *v.* Morgan, 29 Pa. Super. Ct. 476.

**52.** Laubach *v.* Laubach, 6 Leg. Gaz. (Pa.) 110, 31 Leg. Int. 116.

**53.** Cole *v.* Carter, 22 Tex. Civ. App. 457, 54 S. W. 914.

**Instructions held sufficiently accurate** and particular in stating the law applicable to the matters in issue see Finn *v.* Clark, 12 Allen (Mass.) 522.

**54.** Cole *v.* Carter, 22 Tex. Civ. App. 457, 54 S. W. 914.

**55.** Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

**56.** McElwee *v.* Chandler, 198 Pa. St. 575, 48 Atl. 475; Smith *v.* Snyder, 77 Va. 432.

**57.** Smith *v.* Snyder, 77 Va. 432.

**58.** Eureka Cast Steel Co. *v.* Morden Frog, etc., Works, 23 Ill. App. 591; Fay Fruit Co. *v.* Talerico, 26 Tex. Civ. App. 345, 63 S. W. 656; Smith *v.* Snyder, 77 Va. 432.

**59.** Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

**60.** Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195, 60 N. E. 203.

**61.** Smith *v.* Snyder, 77 Va. 432.

**62.** Cole *v.* Carter, 22 Tex. Civ. App. 457, 54 S. W. 914; Smith *v.* Snyder, 77 Va. 432.

**63.** McElwee *v.* Chandler, 198 Pa. St. 575, 48 Atl. 475.

**64.** Wilkinson *v.* Ferree, 24 Pa. St. 190.

**65.** Wilkinson *v.* Ferree, 24 Pa. St. 190; Laubach *v.* Laubach, 30 Leg. Int. (Pa.) 109. See also Hauk *v.* Brownell, 120 Ill. 161, 11 N. E. 416.

**If the property is of any value** at the time of the sale, although unsound, its then value must be deducted from the price the buyer seeks to recover back or the property must be returned in as good condition. Tilman *v.* Stringer, 26 Ga. 171.

**Deduction of proceeds of sale.**—Where the buyer of goods after rescinding the contract of sale causes the same goods to be attached and sold in a suit in a foreign jurisdiction against the seller to recover the purchase-price, and later sues the seller *in personam* for the purchase-money, the seller in the latter suit is entitled to credit only for the

the buyer is also entitled to interest,[66] and on a failure of title as to a part of the goods the buyer may recover the price paid for that part with interest.[67] Where the goods have been delivered to and used by the buyer, who subsequently rescinds the sale and sues to recover the purchase-price, it has been held that there should be no allowance to defendant for the value of such use or to plaintiff for interest on his money, but that the one should offset the other.[68] On recovery of an overpayment because of deficiency, plaintiff is not entitled to recover duties and commissions paid on the deficiency;[69] and if the purchase was made by virtue of an option bought from a third person, the amount paid for such option cannot be recovered.[70] If the buyer has paid more than the agreed price he is entitled, in an action to recover the excess, to interest on such amount from the time of demand therefor but not from the date of payment.[71] Where the buyer has given his note for the purchase-price and it has passed into the hands of a *bona fide* holder, he may recover the amount of the note,[72] although it has not been paid;[73] but the judgment should provide that, upon a return of the note to plaintiff and a release of all liability thereon, the judgment should be satisfied.[74] It has also been held that the buyer has a lien on the goods for advances made on the purchase-price,[75] and that, in an action to recover the purchase-price on a rescission of the contract, a lien to secure such repayment is properly decreed.[76]

**B. Recovery of Goods — 1. Right of Action.** Where the contract of sale is executory a buyer who has neither the possession of the goods nor the right of possession can, on the failure of the seller to deliver, maintain only an action for the breach of contract,[77] and an action of replevin for the recovery of the goods will not lie.[78] The buyer may, however, maintain replevin for the goods if the

net profits of the sale under the judgment *in rem* and not for the reasonable value of the goods. Enterprise Soap Works *v.* Sayers, 55 Mo. App. 15.

66. Gregg *v.* Fitzhugh, 36 Tex. 127.

67. Routh *v.* Caron, 64 Tex. 289.

68. Scott *v.* Clarkson, 1 Bibb (Ky.) 277; Harvey *v.* Kendall, 2 La. Ann. 748; Farmer *v.* Fisk, 9 Rob. (La.) 351.

69. Hargous *v.* Ablon, 3 Den. (N. Y.) 406, 45 Am. Dec. 481.

70. Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241 [*reversing* 15 Ill. App. 480].

71. Ft. Smith Wagon Co. *v.* Baker, 84 Ark. 444, 105 S. W. 591.

72. Baker *v.* Brem, 103 N. C. 72, 9 S. E. 629, 4 L. R. A. 370; Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583; Fahey *v.* Esterly Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

73. Canham *v.* Plano Mfg. Co., 3 N. D. 229, 55 N. W. 583; Fahey *v.* Esterly Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

74. Fahey *v.* Esterly Mach. Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554.

75. Armstrong *v.* Darbro, 10 Ky. L. Rep. 984.

76. Scott *v.* Clarkson, 1 Bibb (Ky.) 277.

77. Havestick *v.* Fergus, 71 Ill. 105; Updike *v.* Henry, 14 Ill. 378; Boutell *v.* Warne, 62 Mo. 350; Barrett *v.* Turner, 2 Nebr. 172; Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

Action for breach of contract see *infra*, IX, C.

78. *Arkansas.*— Deutsch *v.* Dunham, 72 Ark. 141, 78 S. W. 767; Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678.

*Illinois.*— Havestick *v.* Fergus, 71 Ill. 105; Millay *v.* Dunn, 27 Ill. 516; Updike *v.* Henry, 14 Ill. 378; Stanley *v.* Robinson, 14 Ill. App. 480.

*Indiana.*— Minchrod *v.* Windoes, 29 Ind. 288.

*Kentucky.*— Gibson *v.* Ray, 89 S. W. 474, 28 Ky. L. Rep. 444. See also Willis *v.* Willis, 6 Dana 48.

*Maine.*— Pettengill *v.* Merrill, 47 Me. 109.

*Missouri.*— Boutell *v.* Warne, 62 Mo. 350; Suggett *v.* Cason, 26 Mo. 221.

*Nebraska.*— Graves *v.* Damrow, 28 Nebr. 271, 44 N. W. 234; Barrett *v.* Turner, 2 Nebr. 172.

*Oregon.*— La Vie *v.* Tooze, 43 Oreg. 590, 74 Pac. 210; Hamilton *v.* Gordon, 22 Oreg. 557, 30 Pac. 495.

*Wisconsin.*— Beckwith *v.* Philleo, 15 Wis. 223.

See 43 Cent. Dig. tit. "Sales," § 1141.

**No right** of possession passes under a bill of sale executed without consideration, the property remaining in defendant's possession. Myers *v.* Hausman, 2 Alb. L. J. (N. Y.) 48.

**Hypothecation of goods as security.**—Where a written contract consists of an executory agreement for the sale of hops, and a hypothecation of the crop as security for any damages which the seller may sustain by reason of the buyer's failure or refusal to perform his part of the contract, which damages are unliquidated, on a breach of the seller's contract the buyer is not entitled to the possession of the property, but is only entitled to have the same subjected to the payment of his debt after it has been ascertained by a judicial proceeding. Backhaus *v.* Buells, 43

title has passed so as to give him the right of possession,[79] or if being in possession the goods are wrongfully taken from him by the seller;[80] and this right of recovery of the goods the buyer may enforce against third persons claiming under the seller as purchasers[81] or creditors.[82]

**2. Conditions Precedent.** When the goods are bargained but not paid for a tender of payment is a condition precedent to replevin for the goods;[83] and if a third person is lawfully in possession, the action cannot be maintained in the absence of a demand and refusal.[84] Where on the sale of a stock of goods the seller remains in possession to conduct the business for the purchaser and account to him for the proceeds, a demand for an account is not necessary before action to recover possession if the seller has repudiated the contract by a denial of plaintiff's ownership.[85] A purchaser of property which had already been levied on to satisfy a judgment against the seller cannot maintain replevin against an officer subsequently levying an attachment at the suit of another creditor, without satisfying the judgment.[86]

**3. Defenses.** One who sells property in his possession in which other persons have, unknown to the buyer, a joint interest is estopped from setting this up as a defense to an action by the buyer for possession of the property;[87] and a seller who has by violence retaken possession of property which he has sold and delivered cannot defend an action of replevin on the ground of a failure of consideration;[88] but a seller who has regained possession is entitled to show in an action of replevin brought by the buyer that the sale was induced by fraud on the part of plaintiff.[89]

**4. Pleading.** Where plaintiff alleges generally that he is the owner of the property and on the trial produces a bill of sale under which he claims, it may be shown by parol evidence that it was intended as a mortgage, although defendant has not specially pleaded this fact;[90] and in an action against an officer claiming

Oreg. 558, 72 Pac. 976, 73 Pac. 342, 99 Am. St. Rep. 759.

**79.** Glass *v.* Blazer, 91 Mo. App. 564; Crounse *v.* Schrimpton, 10 Misc. (N. Y.) 51, 30 N. Y. Suppl. 809; Smyth *v.* Craig, 3 Watts & S. (Pa.) 14; Abraham *v.* Karger, 100 Wis. 387, 76 N. W. 330.

**The assignment of personal property for a valuable consideration**, although not accompanied by possession, is valid as between the parties and possession, if not voluntarily surrendered, may be obtained by an action of replevin. Boyle *v.* Rankin, 22 Pa. St. 168.

**An assignee of the purchaser** may maintain the action. Bullard *v.* Phillips, 3 La. 151.

**80.** Schenck *v.* Sithoff, 75 Ind. 485; Haines *v.* Cochran, 26 W. Va. 719; Deatz *v.* U. S., 38 Ct. Cl. 355.

**Purchase-money mortgage.**—Where the goods were taken from the buyer under a purchase-money mortgage the buyer may show that at the time possession was taken the damage to plaintiff by reason of a false warranty on the sale left nothing due on the mortgage. Aultman *v.* Richardson, 10 Ind. App. 413, 38 N. E. 532.

**81.** Elliott *v.* Stoddard, 98 Mass. 145; Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57; Gregory *v.* Wendell, 40 Mich. 432.

**82.** Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271; Kent Iron, etc., Co. *v.* Norbeck, 150 Pa. St. 559, 24 Atl. 737.

**Property seized for taxes.**—A purchaser of personal property which had been assessed for taxes, who purchased before any lien for the taxes had attached, is not a privy of the seller, so as to bar an action of replevin against the tax collector to recover such property seized by him. Tousey *v.* Post, 91 Mich. 631, 52 N. W. 57.

**83.** Bradley *v.* Michael, 1 Ind. 551; Hart *v.* Livingston, 29 Iowa 217; Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

**Sale on credit.**—Where a sale is on credit of eight months, a note to be given for the price, with approved surety and at a specified rate of interest, a tender of cash in payment is not sufficient to support replevin. Morgan *v.* East, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558.

**Payment of the actual consideration** is sufficient, although the buyer has not tendered or paid the consideration stated in the bill of sale. Schenck *v.* Sithoff, 75 Ind. 485.

**84.** Harris *v.* McCasland, 29 Ill. App. 430.

**85.** J. H. Hayes Woolen Co. *v.* McKinnon, 114 N. C. 661, 19 S. E. 761.

**86.** Brown *v.* Loesch, 3 Ind. App. 145, 29 N. E. 450.

**87.** Kaiger *v.* Brandenburg, 4 Ind. App. 497, 31 N. E. 211.

**88.** Applewhite *v.* Allen, 8 Humphr. (Tenn.) 697.

**89.** Butler *v.* Reynolds, 3 Thomps. & C. (N. Y.) 241.

**90.** O'Neill *v.* Murry, 6 Dak. 107, 50 N. W. 619; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

the goods under process against the seller, it may be shown under an averment of property in the seller that the sale to plaintiff was a sham or fraudulent sale.[91] In an action by a buyer to recover goods which defendant has stopped in transit, it is sufficient for defendant to allege that he is ready and willing to deliver to plaintiff all notes or securities given on the purchase-price without attaching them to his answer or producing them in court.[92]

**5. Evidence.** Where the action is against a third person claiming as purchaser from or creditor of the buyer the burden is on plaintiff to show that before such claim arose the sale was complete and title had passed to plaintiff.[93] If, however, it is sought to impeach plaintiff's title for fraud the burden is on defendant.[94] Any legal evidence is admissible to establish the terms of the sale to plaintiff,[95] and a delivery of the goods,[96] and declarations of the seller are admissible on the issue of delivery and change of possession.[97] Where plaintiff claims under a mortgagee, the mortgage and note are admissible to show the consideration.[98] In replevin against an officer holding under a judgment and execution the judgment-roll is admissible.[99] A subsequent purchaser from the seller may show that after the alleged sale to plaintiff the seller treated the property as his own.[1] When the sale was for cash, evidence as to any fraudulent representations by the buyer as to his ability to pay is immaterial as, the sale being for cash, such representations could not have induced delivery.[2] Evidence tending to show title in another than the creditor in attachment is immaterial.[3] On the issue whether a note given for the price was accepted by the seller, it may be shown that plaintiff, knowing that the note had been sold, altered it by erasing the clause making the note negotiable.[4] There must be a clear preponderance of evidence in favor of the party in whose favor judgment is rendered.[5]

**6. Trial and Judgment.** If the evidence on any material issue is conflicting, it should be submitted to the jury.[6] The instructions should define and cover all the material issues,[7] and if not satisfactory in that respect additional instructions if desired should be requested.[8] The instructions must be justified by the evidence,[9] and, in stating the evidence, must do so correctly.[10] On the issue whether the transfer to plaintiff was an absolute sale or a mortgage, a finding for plaintiff must be construed as a finding that the transaction was a sale.[11]

**91.** Seimon *v.* Allard, 15 Ill. App. 568; Wolfe *v.* Frederick, 59 Mich. 246, 26 N. W. 513; Adler *v.* Cole, 12 Wis. 188.

**92.** Fulton *v.* Thompson, 18 Tex. 278.

**93.** Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

**94.** Salmon *v.* Orser, 5 Duer (N. Y.) 511.

**95.** Dutton *v.* Kneebs, 80 Iowa 267, 45 N. W. 875; Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29.

**96.** La Vie *v.* Tooze, 43 Oreg. 590, 74 Pac. 210.

**97.** Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180; Phelps *v.* Cutler, 4 Gray (Mass.) 137.

**98.** Byrnes *v.* Hatch, 77 Cal. 241, 19 Pac. 482.

**99.** Humphreys *v.* Harkey, 55 Cal. 283.

**1.** Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289.

**2.** Knox *v.* Fuller, 23 Wash. 34, 62 Pac. 131.

**3.** Tognini *v.* Kyle, 17 Nev. 209, 30 Pac. 829, 45 Am. Rep. 442.

**4.** Frum *v.* Keeney, 109 Iowa 393, 80 N. W. 507.

**5.** Davis *v.* Getchell, 32 Nebr. 792, 49 N. W. 776; Kenova Transfer Co. *v.* Monongahela River Consol. Coal, etc., Co., 56 W. Va. 545, 49 S. E. 452.

**Sufficiency of evidence** to support judgment see Dutton *v.* Kneebs, 80 Iowa 267, 45 N. W. 875; Moss *v.* Johnson, 28 La. Ann. 308; Corcoran *v.* Sheriff, 19 La. Ann. 139; Medcalf *v.* Bush, 4 Wash. 386, 30 Pac. 325; S. C. Herbst Importing Co. *v.* Burnham, 81 Wis. 408, 51 N. W. 262.

**6.** Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792; Matthews *v.* Hobby, 48 Barb. (N. Y.) 167; McIver *v.* Williams, 83 Wis. 570, 53 N. W. 847.

**Property included.**— In an action to recover certain articles of personal property claimed by plaintiff to have been included in the sale of a house, if the evidence as to whether they were included is conflicting, the question is properly submitted to the jury. Flease *v.* Woodworth, 133 Wis. 678, 114 N. W. 124.

**Sufficiency of evidence to warrant submission to jury** see Hoffner *v.* Clark, 5 Whart. (Pa.) 545.

**7.** Bradford *v.* Taylor, 74 Tex. 175, 12 S. W. 20.

**8.** Nicol *v.* Crittenden, 55 Ga. 497.

**9.** Boaz *v.* Schneider, 69 Tex. 128, 6 S. W 402.

**10.** Middleton *v.* Wilson, 84 Ala. 264, 4 So. 228.

**11.** Parmenter *v.* Fitzpatrick, 14 N. Y.

The judgment should determine the rights of the parties in accordance with their separate interests in the property as shown by the evidence,[12] and if the interest of plaintiff is merely a special interest, a recovery for that interest only should be allowed.[13]

**C. Actions For Breach of Contract — 1. Right of Action — a. In General.** The buyer, if he is not himself in default,[14] may, upon a breach of the contract by the seller, maintain an action for the damages sustained,[15] unless his right of action has been waived,[16] or the seller's failure to perform was due to the acts of the buyer,[17] or the failure of the buyer to comply with some condition precedent to a performance by the seller.[18] In case of fraud an action for damages may be maintained, although there has been such a retention and use of the goods by the buyer after knowledge of the fraud as would preclude a rescission.[19]

**b. Non-Delivery or Delay.** A right of action for damages for breach of contract arises on the failure of the seller to deliver the goods as agreed,[20] or for a

Suppl. 748 [*reversed* on other grounds in 135 N. Y. 190, 31 N. E. 1032]. But see Susman *v.* Whyard, 149 N. Y. 127, 43 N. E. 413 [*reversing* 71 Hun 215, 25 N. Y. Suppl. 222].

**12.** Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525; Boutell *v.* Warne, 62 Mo. 350.

Accounting.— In an action of claim and delivery for property sold under a contract entitling the seller to retain possession and to be revested with title when the net profits paid to the buyer should amount to a certain sum, the seller is entitled to an account to ascertain the amount of profits paid over so that the buyer may be charged therewith in adjusting the rights of the parties. Hayes Woolen Co. *v.* McKinnon, 114 N. C. 661, 19 S. E. 761.

**13.** Adler *v.* Johnston, 2 Ohio Cir. Ct. 95, 1 Ohio Cir. Dec. 382.

**14.** Stephenson *v.* Cady, 117 Mass. 6. And see *infra*, IX, C, 3.

**15.** Cockran *v.* Bowles, 4 Bibb (Ky.) 233 (refusal of seller to execute a bill of sale with warranty as agreed in the contract of sale); Henry *v.* McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172 (refusal of seller of a stock of goods to procure credit for and become a partner of the buyer as agreed in the contract of sale).

Particular breaches of contract by seller see *infra*, IX, C, 1, b, c, d.

Agreement to repurchase.—A contract of sale by which goods are sold with an accompanying undertaking on the part of the seller to repurchase them within a specified time upon request of the buyer is valid and for failure to comply therewith an action for damages may be maintained. Smith *v.* Alexander, 128 Ill. App. 507.

Sale to third person.—Where an owner of a quarry, after agreeing to sell stone to another, leased the quarry to a third person, and the buyer's assent to the lease was conditional on suitable arrangements being made to protect him, which was not done, thereby terminating the buyer's right under his contract, he had a right of action for at least nominal damages. Ellis *v.* Nowell, 198 Mass. 367, 84 N. E. 435.

If there is a new contract in regard to the same subject-matter which entirely supersedes the first contract, no action can be maintained on the ground of a breach of the first contract. Consumers' Cotton-Oil Co. *v.* Ashburn, 81 Fed. 331, 26 C. C. A. 436.

**16.** South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

Right of action not waived.—A subsequent purchase by the buyer of the same goods from a broker of the seller is no waiver of the seller's breach of contract in refusing to deliver goods to the buyer. Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513. A breach of contract by the seller in refusing to deliver goods is not waived by the making of a new contract for other goods where it is distinctly stated that the two transactions are to have no connection with each other. Nebraska Bridge Supply, etc., Co. *v.* Conway, 127 Iowa 237, 103 N. W. 122, (1904) 98 N. W. 1024.

**17.** Rogers *v.* Fenimore, (Del. 1898) 41 Atl. 886; Kelly *v.* Fahrney, 123 Fed. 280, 59 C. C. A. 298.

**18.** Bembridge *v.* Stoddard, 4 Ind. 587 (where the sale was of shelled corn and the buyer was to furnish the seller a thresher to thresh the corn which he failed to do); Kellogg *v.* Nelson, 5 Wis. 125 (where on a sale of wheat the buyer was to furnish the bags into which it was to be put before delivery).

**19.** Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857.

**20.** *California.*— Cummings *v.* Dudley, 60 Cal. 383, 44 Am. Rep. 58; Jones *v.* Post, 6 Cal. 102.

*Georgia.*—Biggers *v.* Pace, 5 Ga. 171.

*Indiana.*— Daggy *v.* Cox, 19 Ind. 142.

*Louisiana.*— Gallagher *v.* Pike, 24 La. Ann. 344.

*New York.*— Townshend *v.* Shepard, 64 Barb. 39; Crist *v.* Armour, 34 Barb. 378; Zabriskie *v.* Central Vermont R. Co., 13 N. Y. Suppl. 735.

Even if title has passed the buyer may maintain an action for damages for non-delivery. Biggers *v.* Pace, 5 Ga. 171.

Continuing contract.—Where a seller contracted to furnish a buyer fruit from each steamer as it arrived at a certain price, and before the termination of the contract notified the buyer that he considered the con-

delay in delivery.[21] In the case of a partial delivery an action for damages will lie for the part not delivered,[22] the acceptance of the partial deliveries being no waiver of the breach.[23] If delivery was to be made in instalments each month, a failure to deliver the required quantity each month is a separate breach for which action will lie.[24] The right to sue for damages is terminated by a rescission by agreement,[25] but not by a mere notice of intent to rescind,[26] and the rescission will not affect a right of action which has already accrued.[27] Where the sale is of goods to arrive the obligation to deliver does not arise until the arrival, and a failure to deliver because of non-arrival does not give the buyer a right of action;[28] but if the failure to arrive is due to the failure of the seller to ship goods of the kind and quality contracted for, the buyer may maintain his action.[29] If the sale is of certain articles and the attachments thereto, without which the articles are unsalable, on the failure of the seller to furnish such attachments

tract at an end and refused to deliver further fruit thereunder, such act constituted a breach of the contract for which the buyer was entitled to recover. Underhill *v.* Buckman Fruit Co., 97 Md. 229, 54 Atl. 873.

**Property in possession of third person.**— Where an agent, subject to approval by his principal, sells a safe in the possession of a third person, and contracts that such third person shall deliver the same to the buyer, and the sale is approved by the principal, the principal is liable to the buyer on refusal of the third person to deliver the safe. Warner *v.* Thompson, 35 Kan. 27, 10 Pac. 110.

**Property not owned by seller.**— If one contracts absolutely to convey property not then owned by him, he will be liable in damages for a breach if he is not able to secure the same so as to make delivery. Northington-Munger-Pratt Co. *v.* Farmers' Gin, etc., Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210.

**Where goods stored in a warehouse are sold,** and a warrant for them delivered to the vendee upon payment of the purchase-money, and the warehouseman refuses to deliver the goods to the purchaser upon presentation of the warrant, an action lies against the vendor for the non-delivery of the goods. Thöl *v.* Hinton, 4 Wkly. Rep. 26.

**On a sale of all the cattle on a ranch** except a certain number to fill a previous contract with a different buyer, it is competent to show that such other contract called for cattle of a certain age, and if there are not enough cattle in the herd of that age to fill the contract, the seller cannot take cattle of other ages to make up the number, and if he does so will be liable to the second buyer for failure to deliver the cattle so taken. Lonergan *v.* Buford, 148 U. S. 581, 13 S. Ct. 684, 37 L. ed. 569 [*affirming* 6 Utah 301, 22 Pac. 164].

**Where hay was to be delivered when pressed** a refusal to permit the pressing to be done and to deliver the hay entitles the buyer to maintain an action for breach of contract. Spaulding *v.* Coon, 50 Mich. 622, 16 N. W. 169.

**Sale of goods needed for particular purpose.**—Where the agreement is to furnish all goods needed for a specified purpose a failure to deliver goods ordered is not a breach for which an action for damages will lie unless the goods were for the purpose specified. Laclede Constr. Co. *v.* T. J. Moss Tie Co., 185 Mo. 25, 84 S. W. 76. See also Snadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854.

**Evasion of contract.**—Where defendant contracted to sell to plaintiff all the lumber he should manufacture, or have manufactured for him, at a certain place, and having logs at that place which H had agreed to saw for him, entered into a contract by which he nominally sold them to H, but agreed to take his pay in lumber at a specified price, less than the market price, this was a mere device to evade his contract with plaintiff and he is liable for not delivering the lumber to him. Cain *v.* Weston, 26 Wis. 100.

21. Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591; Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184.

**Waiver.**— The mere acceptance of the goods after the time specified for delivery is not a waiver of a claim for damages for the delay. Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

**Time of delivery contingent.**—Where defendant having purchased old rails from a railroad company sold them to plaintiff, agreeing to deliver as fast as the railroad company delivered to him, plaintiff cannot, on delay of the company in delivering rails to defendant, purchase the rails elsewhere and hold defendant liable for the difference in price. Smith *v.* Snyder, 77 Va. 432.

22. Reynolds *v.* Bell, 84 Ala. 496, 4 So. 703; Cofield *v.* Clark, 2 Colo. 101.

**Deficiency in quantity** see *infra*, IX, C, 1, c.

23. *In re* Kelly, 51 Fed. 194.

24. Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

25. Hopkins *v.* Sickles, Wright (Ohio) 376.

26. Jones *v.* Post, 6 Cal. 102.

27. Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584; *In re* Kelly, 51 Fed. 194.

28. Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670.

29. Abe Stein Co. *v.* Robertson, 167 N. Y. 101, 60 N. E. 329 [*affirming* 38 N. Y. App. Div. 311, 57 N. Y. Suppl. 46].

the buyer is not obliged to purchase them elsewhere so as to relieve the seller from liability for the breach.[30] An action for non-delivery will not lie if the failure is due to a breach of the contract by plaintiff,[31] and a refusal to deliver at a place other than that fixed by the contract except upon other terms of payment is not a breach of the contract for which an action will lie.[32]

**c. Deficiency in Quantity.** Where the contract is for a specific quantity of goods a right of action arises for breach of contract if there is a deficiency in the quantity delivered;[33] but if the quantity is merely estimated there can be no recovery because of deficiency unless caused by the seller's fraud or mistake.[34] So also where the sale is of specific goods the buyer cannot maintain an action for breach of contract, where the failure to deliver the full amount is due to a destruction of a part of the goods before the time of delivery without fault on the part of the seller.[35]

**d. Delivery of Inferior Goods.** If the goods tendered or delivered are not of the kind or quality contracted for, the buyer may refuse to receive them and sue for damages for breach of the contract;[36] but if the goods are delivered and accepted there is a direct conflict of authority as to the right of the buyer to recover damages on the ground that they do not conform to the contract.[37] In some cases it is held that it is the duty of the buyer to inspect the goods at the time of delivery,[38] or within a reasonable time, according to the circumstances of the case,[39] and that in the absence of fraud or warranty he cannot subsequently recover damages for breach of contract on the ground of defects,[40] unless the

**30.** Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

**31.** Stephenson *v.* Cady, 117 Mass. 6, where by the terms of two executory contracts for the sale of goods, to be paid for on delivery, the deliveries under the second were to commence when the full quantity required by the first had been shipped and the purchaser refused to pay for goods delivered under the first unless the seller gave security for the entire fulfilment of the contracts.

**32.** Mitchell *v.* La Follett, 38 Oreg. 178, 63 Pac. 54. See also Whitaker *v.* Sterling, 136 Mich. 671, 99 N. W. 880.

**33.** Reynolds *v.* Bell, 84 Ala. 496, 4 So 703; Creighton *v.* Comstock, 27 Ohio St. 548; Merriam *v.* Field, 29 Wis. 592.

**Payment of losses arising on a resale of** the goods is not necessary to fix the right of action for deficiency in quantity. Johnson *v.* Staenglen, 85 Fed. 603, 29 C. C. A. 369.

**34.** Merriam *v.* Field, 29 Wis. 592.

**35.** Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681 (where the sale was of a specific quantity of specific varieties of fruit to be grown in specific orchards, and owing to an extraordinary drought the orchards did not produce sufficient fruit of the kind specified to fill the contract); Howell *v.* Coupland, L. R. 9 Q. B. 462, 43 L. J. Q. B. 201, 30 L. T. Rep. N. S. 677, 22 Wkly. Rep. 691 [*affirmed* in 1 Q. B. D. 258, 46 L. J. Q. B. 147, 33 L. T. Rep. N. S. 832, 24 Wkly. Rep. 470 (where the contract was for the sale of a certain number of tons of potatoes to be grown on certain land, and owing to a potato blight the crop partly failed so that the requisite number of tons was not produced, but all that were produced were delivered).

**36.** Aller *v.* Pennell, 51 Iowa 537, 2 N. W. 385; Stein Co. *v.* Robertson, 167 N. Y. 101, 60 N. E. 329 [*affirming* 38 N. Y. App. Div. 311, 57 N. Y. Suppl. 46]; Tompkins *v.* Lamb, 121 N. Y. App. Div. 366, 106 N. Y. Suppl. 6 [*affirmed* in 195 N. Y. 518, 88 N. E. 1133].

**37.** See Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741; Bagley *v.* Cleveland Rolling-Mill Co., 21 Fed. 159.

**38.** Copley Iron Co. *v.* Pope, 13 Daly (N. Y.) 144 [*affirmed* in 108 N. Y. 232, 15 N. E. 335].

**39.** Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; Hargous *v.* Stone, 5 N. Y. 73.

**40.** *Alabama.*— Ricks *v.* Dillahunty, 8 Port. 133.

*Illinois.*— Towell *v.* Gatewood, 3 Ill. 22, 33 Am. Dec. 437.

*Maine.*— Kingsbury *v.* Taylor, 29 Me. 508, 50 Am. Dec. 607.

*New York.*— Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 513, 74 N. E. 1118]; Wallace *v.* Blake, 15 Daly 158, 3 N. Y. Suppl. 934; Snell *v.* Moses, 1 Johns. 96; Giles Litho., etc., Printing Co. *v.* Recamier Mfg. Co., 12 N. Y. St. 169 [*reversed* on other grounds in 14 Daly 475, 15 N. Y. St. 354]. But see Mackintosh *v.* Hawley, 13 N. Y. St. 434.

*Pennsylvania.*— Carson *v.* Baillie, 19 Pa. St. 375, 57 Am. Dec. 659.

*Vermont.*— Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

**Conditional acceptance.**— If the goods are inspected and the buyer refuses to accept them because of defects and accepts them only upon an agreement by the seller to make good the defects and the latter fails

goods are rejected at the time of delivery [41] or are returned or tendered as soon as the defects are discovered.[42] The rule is, however, subject to certain exceptions,[43] and is more particularly applicable to cases where no part of the purchase-price has been paid and the buyer is in a position to reject the goods without sustaining any loss other than what might grow out of the difference between the contract and market prices.[44] In the application of the rule a distinction is also to be made according to the character of the defect and the opportunity of the buyer to discover it;[45] and while the buyer cannot ordinarily recover for defects of which he knows or which he could have ascertained by inspection,[46] he may recover for defects which could not be ascertained upon ordinary inspection at the time of delivery,[47] or which are not apparent until the goods are applied to some use which precludes a return thereof,[48] such as a defect in paint not apparent until it is applied upon a house,[49] or in coal not apparent until the coal is burned.[50] In other cases, however, it is held that while an acceptance or retention of the defective goods would preclude a rescission,[51] the buyer may accept and retain them and sue for damages because of such defects,[52] and that the acceptance is without effect except as evidence that the goods were not defective or that the defect was waived.[53]

**e. Time to Sue.** On an unqualified refusal of the seller to perform his con-

to do so, the buyer may recover damages. James *v.* Libby, 103 N. Y. App. Div. 256, 92 N. Y. Suppl. 1047 [*reversing* 44 Misc. 210, 88 N. Y. Suppl. 812].

41. Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118]; Copley Iron Co. *v.* Pope, 13 Daly (N. Y.) 144 [*affirmed* in 108 N. Y. 232, 15 N. E. 335]; Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

42. Pierson *v.* Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831; Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Heydecker *v.* Lombard, 7 Daly (N. Y.) 19.

**Where acceptance was procured by fraud** an offer to return is not necessary to entitle the buyer to maintain his suit on the contract for damages caused by delivery of inferior goods. McAroy *v.* Wright, 25 Ind. 22.

43. See Summers Fiber Co. *v.* Walker, 109 S. W. 883, 33 Ky. L. Rep. 153.

44. Summers Fiber Co. *v.* Walker, 109 S. W. 883, 33 Ky. L. Rep. 153. See also Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703, 22 Ky. L. Rep. 730; Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679.

45. Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006.

**If there is no opportunity for inspection** but the buyer is obliged to accept the goods without inspection, such acceptance does not preclude an action to recover damages for defects. Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703, 22 Ky. L. Rep. 730.

46. See Zabriskie *v.* Central Vermont R Co., 131 N. Y. 72, 29 N. E. 1006; and cases cited *supra*, note 40.

47. *Alabama.*— McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88.

*Kentucky.*—Wallace *v.* Knoxville Woolen Mills, 117 Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445.

*Michigan.*— Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

*New York.*— Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006.

*United States.*— Bagley *v.* Cleveland Rolling-Mills Co., 21 Fed. 159.

**The buyer is entitled to a reasonable time** for inspection and the discovery of defects, and if the defect is one which cannot be ascertained on ordinary inspection at the time of the delivery, he is entitled to recover if he discovers the defect within a reasonable time and notifies the seller promptly of the rejection upon the discovery of the defect. Tompkins *v.* Lamb, 121 N. Y. App. Div. 366, 106 N. Y. Suppl. 6 [*affirmed* in 195 N. Y. 518, 88 N. E. 1133].

48. Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006; Bagley *v.* Cleveland Rolling-Mills Co., 21 Fed. 159.

**Use of machinery.**—Where a buyer of motors and transmissions for use in automobiles gave them a proper test, and defects were not discovered until after the machinery had been installed in automobiles and sold to customers, the buyer was not required to return the machinery to recoup damages against the seller for the defects. Buick Motor Co. *v.* Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

49. McCaa *v.* Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88.

50. Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006.

51. See Tomlinson *v.* Quigley, 5 Houst. (Del.) 168; Electric Vehicle Co. *v.* Price, 138 Ill. App. 594.

52. Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741; Tomlinson *v.* Quigley, 5 Houst. (Del.) 168; John Hall Commission Co. *v.* Crook, 87 Miss. 445, 40 So. 20, 1006; Bagley *v.* Cleveland Rolling-Mills Co., 21 Fed. 159.

53. Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741.

tract, an action for the breach may be maintained, although the time for performance has not expired,[54] unless the buyer refuses to accept the seller's renunciation of the contract and continues to insist upon its performance and to treat the contract as subsisting.[55] So also where the seller has disposed of the goods, the buyer may after a tender of performance on his part before the expiration of the time of performance maintain an action for the breach.[56] Mere delay in bringing suit for a deficiency in quantity does not affect the right of action.[57]

**2. Form of Remedy.** Where the breach is a failure to deliver goods of the proper quality the remedy in the absence of fraud is by an action for breach of contract,[58] or if the buyer has made payment in advance he may avoid the contract and recover the price paid.[59] If there was also fraud on the part of the seller the buyer's remedy is either for breach of contract or for the fraud.[60] So too in case of non-delivery the buyer may sue for breach of contract,[61] or he may avoid the contract and sue for the price paid.[62] He cannot, however, treat the sale as void for the purpose of recovering the price and at the same time as in force in order to recover damages.[63] Where there is a mere failure to deliver the remedy is on the contract, and not by an action for conversion.[64]

**3. Conditions Precedent.** In order to entitle the buyer of goods to maintain an action for breach of the contract he must have performed or offered to perform his part of the agreement,[65] or at least have shown a readiness and willingness to perform,[66] unless the seller has refused or put it out of his power to perform the contract, and such fact is known to the buyer.[67] If payment and delivery

54. Pappenheimer Hardware Co. *v.* Harrison Wire Co., 8 Ohio Dec. (Reprint) 657, 9 Cinc. L. Bul. 131; Dingley *v.* Oler, 11 Fed. 372. But see South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110, holding that mere notice from the seller that he will not deliver does not authorize an action for non-delivery before the time of delivery.

55. Oppenheimer *v.* Brackman, etc., Milling Co., 32 Can. S. Ct. 689, holding that if the seller renounces the contract before the time of performance, this gives the buyer an immediate right of action for damages, but if the buyer refuses to accept such renunciation and continues to insist upon the performance and to treat the contract as subsisting, this right of action is gone and he can sue only for a breach for non-performance after the time for performance has expired.

56. Packer *v.* Steward, 34 Vt. 127.

57. Creighton *v.* Comstock, 27 Ohio St. 548, holding that a delay of six months in bringing suit for a deficiency in the quantity of goods is not of itself a waiver of the claim for damages.

58. Buckingham *v.* Osborne, 44 Conn. 133; Shields *v.* Reibe, 9 Ill. App. 598; Westmoreland *v.* Walker, 25 Miss. 76; Taylor *v.* Saxe, 134 N. Y. 67, 31 N. E. 258 [*reversing* 57 Hun 411, 10 N. Y. Suppl. 869]; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358 [*reversing* 2 Thomps. & C. 446]; Tompkins *v.* Lamb, 121 N. Y. App. Div. 366, 106 N. Y. Suppl. 6 [*affirmed* in 195 N. Y. 518, 88 N. E. 1133].

**In Louisiana** the remedy is by a redhibitory action or by action *quanti minoris*. Fisk *v.* Proctor, 4 La. Ann. 562; Richardson *v.* Johnson, 1 La. Ann. 389. The latter action will lie, although the buyer by disposing of the goods has disabled himself from bringing a redhibitory action. George *v.* Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432.

59. See *supra*, IX, A, 1, e.

60. *Connecticut.*— Ives *v.* Carter, 24 Conn. 392.

*Indiana.*— Love *v.* Oldham, 22 Ind. 51.

*Missouri.*— Parker *v.* Marquis, 64 Mo. 38.

*New York.*— Bowen *v.* Mandeville, 95 N. Y. 237 [*affirming* 29 Hun 42].

*Texas.*— Blythe *v.* Speake, 23 Tex. 429.

61. Barr *v.* Logan, 5 Harr. (Del.) 52.

**On a sale to a third person** of goods contracted to be manufactured and delivered to plaintiff, the contract being executory, plaintiff cannot adopt the sale as his own and hold the seller as agent but his only remedy is for a breach of the executory agreement to deliver them to himself. Sharp *v.* Simons, 49 Barb. (N. Y.) 407.

62. See *supra*, IX, A, 1; d.

63. Faris *v.* Lewis, 2 B. Mon. (Ky.) 375; Junkins *v.* Simpson, 14 Me. 364; Bowen *v.* Mandeville, 95 N. Y. 237 [*affirming* 29 Hun 42]. See also Wright *v.* Dudgeon, 138 Iowa 510, 116 N. W. 598.

64. Roll *v.* Black, Dudley (Ga.) 18.

65. Packer *v.* Button, 35 Vt. 188; Kellogg *v.* Nelson, 5 Wis. 125, where a buyer of wheat was to furnish bags for sacking the grain.

**Payment of instalment in advance.**— On a sale of goods part payment to be made in advance and the balance on delivery the buyer cannot maintain an action for non-delivery unless he has fulfilled the condition as to payment of the first instalment. Faber *v.* Hougham, 36 Oreg. 428, 59 Pac. 547, 1111. See also Lachmund *v.* Moore, 51 Oreg. 217, 94 Pac. 510.

66. Cook *v.* Ferral, 13 Wend. (N. Y.) 285; Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

67. Packer *v.* Button, 35 Vt. 188.

are concurrent it is a condition precedent to an action for damages for non-delivery that the buyer should tender the price and demand the goods,[68] or at least show a readiness to receive the goods and pay the price.[69] If the contract is to deliver the goods at a certain time a demand is not necessary;[70] but a demand is necessary if the goods are to be delivered on demand,[71] or if they are not of a portable character and the contract does not state the place of delivery;[72] and if they are to be delivered at a certain time and place and paid for on delivery, the buyer must be ready to receive, accept, and pay for the goods at such time and place;[73] but

68. *Georgia.*— Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; Pusey *v.* McElween Commission Co., 93 Ga. 773, 21 S. E. 150.

*Illinois.*—Hungate *v.* Rankin, 20 Ill. 639; Sexton *v.* Brown, 36 Ill. App. 281.

*Indiana.*— Chun *v.* Howard, 3 Blackf. 163.

*Iowa.*—Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

*Kentucky.*— Hume *v.* Mullins, 35 S. W. 551, 18 Ky. L. Rep. 108. But see Shrewsberry *v.* Buckleys, 4 Bibb 260.

*New York.*— Lawrence *v.* Everett, 11 N. Y. Suppl. 881.

*North Carolina.*—Grandy *v.* Small, 48 N. C. 8; Benners *v.* Howard, 1 N. C. 93, 1 Am. Dec. 583.

*Ohio.*— Hounsford *v.* Fisher, Wright 580.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*Texas.*—Kelly *v.* Webb, 27 Tex. 368.

*Vermont.*— Packer *v.* Button, 35 Vt. 188.

*England.*— Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

See 43 Cent. Dig. tit. "Sales," § 1157.

**A technical continuing tender** need not be kept up by the buyer to preserve his right of action. Phillips *v.* Williams, 39 Ga. 597.

**Where a sight draft is to accompany delivery** the buyer is not required to make a tender of payment before bringing suit for the non-delivery of the goods. Pakas *v.* Hollingshead, 60 N. Y. Suppl. 991.

69. *Alabama.*— Davis *v.* Adams, 18 Ala. 264.

*Connecticut.*— Hickock *v.* Hoyt, 33 Conn. 553.

*Illinois.*— Metz *v.* Albrecht, 52 Ill. 491; Funk *v.* Hough, 29 Ill. 145; Hough *v.* Rawson, 17 Ill. 588.

*Indiana.*— Beard *v.* Sloan, 30 Ind. 279; Bailey *v.* Ricketts, 4 Ind. 488; Smith *v.* Smith, 8 Blackf. 208; Chun *v.* Howard, 3 Blackf. 163.

*New York.*—Anderson *v.* Read, 106 N. Y. 333, 13 N. E. 292 [*reversing* 51 N. Y. Super. Ct. 326]; Bronson *v.* Wiman, 8 N. Y. 182 [*affirming* 10 Barb. 406]; Vail *v.* Rice, 5 N. Y. 155; Cook *v.* Ferral, 13 Wend. 285. But see Lawrence *v.* Everett, 11 N. Y. Suppl. 881, holding that there must be an actual tender, a mere readiness to pay being insufficient.

*North Carolina.*— Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88; Cole *v.* Hester, 31 N. C. 23.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*Washington.*— Neis *v.* O'Brien, 12 Wash. 358, 41 Pac. 59, 50 Am. St. Rep. 894.

*United States.*— Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

**An offer to perform** by a vendee who is ready and willing, followed by an absolute refusal by the vendor to deliver the goods, is sufficient to give the vendee a right of action; and the actual tender and payment of the consideration is not a condition precedent. West *v.* Platt, 127 Mass. 367.

70. Patterson *v.* Jones, 13 Ark. 69, 56 Am. Dec. 296; Mountjoy *v.* Adair, 1 Ind. 254, Smith 96; Mitchell *v.* Gregory, 1 Bibb (Ky.) 449, 4 Am. Dec. 655.

**Delivery during month.**—Where delivery was to be made as early as possible during a certain month, demand during the month was not necessary, and as failure to deliver during the month rendered compliance with the contract impossible, demand was not necessary thereafter as a condition precedent to action. Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487, 37 So. 38.

**Where delivery is to be made in monthly instalments,** a demand is not necessary to put the seller in default. Rowland *v.* Lehigh Coal, etc., Co., 28 Pa. St. 215.

**Under an agreement to transfer shares of stock** of the par value of five hundred dollars within a certain time, and if shares as described were not transferred the difference to be paid in money, demand for the shares is unnecessary before bringing action. Dyer *v.* Rich, 1 Metc. (Mass.) 180.

71. Smith *v.* Leavensworth, 1 Root (Conn.) 209; Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Letcher *v.* Taylor, Hard. (Ky.) 79; Snow *v.* Johnson, 1 Minn. 48.

**Independent covenants.**—Where goods are to be delivered on demand, and payment is to be made *in futuro*, an action will lie for non-delivery of the goods, although the demand is not made for them till after the time of payment has elapsed; and it is not necessary to allege payment, tender, or readiness to pay, by plaintiff, the agreements being independent. Dox *v.* Dey, 3 Wend. (N. Y.) 356.

72. Bradley *v.* Farrington, 4 Ark. 532, holding that in the case of a sale of corn or other farm produce, where the contract does not state the place of delivery, a demand is necessary. See also Cook *v.* Ferral, 13 Wend. (N. Y.) 285.

73. Vail *v.* Rice, 5 N. Y. 155; McDonald *v.* Williams, 1 Hilt. (N. Y.) 365; Cook *v.* Ferral, 13 Wend. (N. Y.) 285; Grandy *v.* McCleese, 47 N. C. 142; Cole *v.* Hester, 31 N. C. 23.

**Under Tenn. Act (1807), c. 95,** if the place

if the buyer was ready and willing to receive and pay for the goods at such time and place, it is not necessary that he should have actually paid or tendered the price.[74] A formal tender of payment or demand is not necessary if defendant has disposed of the goods,[75] or has otherwise put it out of his power to perform his contract,[76] or failed to do some act to be done by him before delivery and necessary to ascertain the amount to be paid;[77] and a refusal on the part of the seller to comply with his contract relieves the buyer from the necessity of showing a readiness to perform,[78] but there must be an actual refusal regarded as such by the parties at the time.[79]

**4. DEFENSES.** To an action for damages for non-delivery it is no defense that plaintiff had sold the goods to a third person before action was brought;[80] that the buyer accepted and paid for such portion of the goods as was delivered,[81] even after the time fixed for delivery;[82] that the buyer waived the stipulation

of delivery is fixed but not the time of delivery the buyer must give the seller ten days' notice of the time when he will attend, at the place specified in the contract, to receive the goods, and he cannot commence suit until after the expiration of the ten days. Powell *v.* Coward, 2 Overt. 326.

**74.** Crosby *v.* Watkins, 12 Cal. 85; Allen *v.* Pennell, 51 Iowa 537, 2 N. W. 385; Bronson *v.* Wiman, 8 N. Y. 182 [*affirming* 10 Barb. 406]; Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

**If the goods are to be paid for "as delivered"** it is not necessary for the buyer to tender the purchase-price in advance of delivery, and his failure to do so is no defense to an action for non-delivery. Felsberg *v.* Moore, 84 Ark. 399, 106 S. W. 197.

**75.** *Delaware.*— Lea *v.* Ennis, 6 Houst. 433.

*Iowa.*— Boies *v.* Vincent, 24 Iowa 387.

*Louisiana.*— Marchesseau *v.* Chaffee, 4 La. Ann. 24.

*Maine.*— Bassett *v.* Bassett, 55 Me. 127.

*Minnesota.*— Lieberman *v.* Isaacs, 43 Minn. 186, 45 N. W. 8.

*New Jersey.*—Parker *v.* Pettit, 43 N. J. L. 512.

*New York.*— Crist *v.* Armour, 34 Barb. 378.

*North Carolina.*— Harriss *v.* Williams, 48 N. C. 483, 67 Am. Dec. 253.

*Oregon.*— Bussard *v.* Hibler, 42 Oreg. 500, 71 Pac. 642.

*Vermont.*— Packer *v.* Button, 35 Vt. 188.

*England.*— Bowdell *v.* Parsons, 10 East 359.

See 43 Cent. Dig. tit. "Sales," § 1157.

**76.** Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056; Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579; Parker *v.* Pettit, 43 N. J. L. 512; Woolner *v.* Hill, 93 N. Y. 576. *Compare* Spratt *v.* Merchants', etc., Nat. Bank, 4 Pa. Cas. 107, 7 Atl. 98.

**If the seller informs the buyer** that he will be unable to deliver the goods no tender is necessary to fix defendant's liability for non-delivery. Crystal Palace Flouring Co. *v.* Butterfield, 15 Colo. App. 246, 61 Pac. 479.

**77.** Lowry *v.* Barelli, 21 Ohio St. 324.

**78.** *California.*— Stum *v.* Hadrich, 7 Cal. App. 241, 94 Pac. 82; Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 82 Pac. 1056.

*Colorado.*— Crystal Palace Flouring Co. *v.* Butterfield, 15 Colo. App. 246, 61 Pac. 479.

*Illinois.*— Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579.

*Maryland.*—Williams *v.* Woods, 16 Md. 220.

*Missouri.*—Walker *v.* Cooper, 97 Mo. App 441, 71 S. W. 370; Price *v.* Vanstone, 40 Mo. App. 207.

*Nebraska.*— Post *v.* Garrow, 18 Nebr. 682, 26 N. W. 580.

*New Jersey.*— Chess *v.* Vockroth, 75 N. J. L. 665, 70 Atl. 73.

*New York.*— Sampson *v.* Lewis, 8 N. Y. St. 346.

*North Carolina.*— Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88, 133 N. C. 306, 45 S. E. 642. But see Grandy *v.* McCleese, 47 N. C. 142, holding that a denial of the existence of the contract by the seller does not relieve the buyer from being ready to pay the price on a demand for the goods.

*Wisconsin.*— Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

**An actual tender need not be made** where on plaintiff's signifying his readiness to perform the seller refused to deliver. Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252.

**Demand.**—A party to a contract who has been informed by the adverse party that he will not supply the goods contracted for need not, in order to maintain an action for a breach of the contract, demand the goods. Packers' Fertilizer Assoc. *v.* Harris, 42 Ind. App. 240, 85 N. E. 375.

**Goods in possession of third person.**—Where the goods are in the possession of a third person who refuses to deliver them tender of the price is unnecessary. Thompson *v.* Warner, 31 Kan. 533, 3 Pac. 339.

**79.** Hanson *v.* Slaven, 98 Cal. 377, 33 Pac. 266.

**Although the seller has told a third person** that he would be unable to perform his contract the other party must nevertheless perform or tender performance on his part before he can maintain an action for non-delivery. McDonald *v.* Williams, 1 Hilt. (N. Y.) 365.

**80.** Gunter *v.* Sanchez, 1 Cal. 45.

**81.** Smith *v.* Droubay, 20 Utah 443, 58 Pac. 1112.

**82.** Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667.

as to time of delivery;[83] that plaintiff did not object when informed of defendant's intent to sell the goods to another;[84] or that defendant was mistaken as to his ownership of the goods sold.[85] When goods were to be delivered in instalments during the season, it is no defense to an action for failure to deliver the first two instalments that plaintiff was not ready and willing to receive and pay for the last instalment;[86] and where the sale was of specific goods an offer to deliver other goods of like kind is no defense to an action for non-delivery of the specific goods.[87] Where the contract was only to fill plaintiff's requirements the fact that plaintiff had sold a few of the goods to a third person is not a defense if such sale was made in good faith and merely as an accommodation and not for speculation.[88] Where goods of an inferior quality are delivered it is no defense that the inferior goods were delivered by mistake,[89] or that they were to be taken on the seller's measurement and inspection;[90] and where a part of the goods delivered do not conform to the contract and are rejected, the retention and use of the part which does conform to the contract will not preclude a recovery of damages;[91] but it is a good defense that the defects complained of were due to the buyer's failure to remove the goods within a reasonable time.[92] It is a good defense to an action for non-delivery that plaintiff was unable to pay for the goods;[93] that he has not performed conditions to be by him performed precedent to delivery;[94] or that he by his own acts prevented a delivery by defendant.[95] It is no defense to an action for damages for delay in delivery that the buyer accepted the articles when they were delivered.[96] If the buyer was to furnish specifications of the kind of goods desired it is a good defense that he has failed to do so,[97] and such a defense is not inconsistent with the further claim that the buyer had canceled the contract.[98] A defense may be waived by an unqualified repudiation of the contract.[99]

**83.** Hill *v.* Smith, 32 Vt. 433.

**84.** Martin *v.* Angell, 7 Barb. (N. Y.) 407.

**85.** Lister *v.* Windmuller, 52 N. Y. Super. Ct. 407.

**86.** Isaacs *v.* New York Plaster Works, 67 N. Y. 124 [*reversing* 40 N. Y. Super. Ct. 277].

**87.** Trotter *v.* Tousey, 131 Mich. 624, 92 N. W. 544.

**88.** H. D. Williams Cooperage Co. *v.* Scofield, 115 Fed. 119, 53 C. C. A. 23, holding, however, that if plaintiff ordered more than he needed so as to secure a stock for the succeeding year, that fact would constitute a defense, although it was not known to defendant at the time of his refusal to deliver.

**Contract to fill requirements.**—Where defendants were to fill plaintiffs' requirements for new barrels the fact that plaintiffs were accustomed to purchase barrels from their customers after they were emptied and use them again did not require them to purchase second-hand barrels instead of ordering new ones, when they were compelled to pay more than the contract price therefor. H. D. Williams Cooperage Co. *v.* Scofield, 125 Fed. 916, 60 C. C. A. 564.

**89.** Missouri, etc., Coal Co. *v.* Consolidated Coal Co., 127 Mo. App. 320, 105 S. W. 682.

**90.** Wiburg, etc., Co. *v.* Walling, (Ky. 1908) 113 S. W. 832, holding that while such an agreement might preclude a rescission of the contract or rejectment of the goods, it does not preclude a claim for damages for failure to deliver goods of the kind or quality agreed on.

**91.** Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500.

**92.** Summers Fiber Co. *v.* Walker, 109 S. W. 883, 33 Ky. L. Rep. 153.

**93.** Reader *v.* Knatchbull, 5 T. R. 218 note, 101 Eng. Reprint 123.

**94.** Bembridge *v.* Stoddard, 4 Ind. 587, where on a sale of grain the buyer was to furnish a thresher and thresh the grain and failed and refused to do so.

**95.** Kelly *v.* Fahrney, 123 Fed. 280, 59 C. C. A. 298, where plaintiff, who had originally transferred the stock to defendant, procured a creditor to attach the stock on the ground that the transfer was fraudulent as to creditors. See also Rogers *v.* Fenimore, (Del. 1898) 41 Atl. 886, holding that if the conduct of the buyer destroyed the seller's credit, so as to prevent him from purchasing wheat with which to fulfil a contract of sale, the buyer cannot recover for a failure to deliver the wheat.

**Effect of subsequent agreement.**— The unauthorized act of a buyer of cattle in cutting out from the herd a number of cattle is no defense if the matter was subsequently adjusted by the parties, and it was agreed that the herd as it then stood should be delivered under the contract. Slaughter *v.* Moore, 17 Tex. Civ. App. 233, 42 S. W. 372.

**96.** Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487, 37 So. 38.

**97.** Nickerson *v.* Gardner, 12 U. C. Q. B. 219.

**98.** Ault *v.* Dustin, 100 Tenn. 366, 45 S. W. 981.

**99.** Maskelinski *v.* Wazsinenski, 20 N. Y.

**5. Set-Off and Counter-Claim.** Defendant in an action for non-delivery cannot set off the price of the goods delivered under an illegal option additional to the main contract and at the same time deny plaintiff's right to damages for failure to deliver under the option on the ground of its illegality;[1] and where goods have been shipped to plaintiff and while being held by the carrier awaiting payment of the price the contract is repudiated by the seller and the rescission is acquiesced in by the buyer by suing out an attachment against the goods for damages for breach of the contract, the seller cannot counter-claim for the contract price.[2] On a sale of timber to be delivered at the stump, where the buyer fails to take a part of the timber and the seller retains it in its natural state, his only remedy is for unliquidated damages, and this he cannot plead in set-off in an action by the buyer against him.[3]

**6. Venue.** An action for damages for breach of a contract of sale is properly brought in the county where the contract was to be performed.[4]

**7. Parties.** Where goods are shipped on a bill of lading with draft attached the consignee may recover for defects in the goods against an assignee of the bill of lading,[5] and in an action by the buyer against the seller the latter may implead his vendor.[6]

**8. Pleading — a. Declaration or Complaint — (i)** *In General.* In an action by the buyer for a breach of contract the complaint must allege facts sufficient to show the existence of a contract of sale,[7] and that there has been a breach of such contract.[8] The contract must be pleaded according to its terms,[9] although a mere clerical error will not vitiate the complaint.[10] The complaint should set out a description of the goods,[11] the quantity sold,[12] and the consideration of the sale.[13] It is not, however, necessary to set out more of the contract than relates to the breach which is the cause of action,[14] and it is generally sufficient in an action for non-delivery if it is alleged generally that the goods contracted for were never delivered by reason of which plaintiff was compelled to purchase elsewhere at a higher price;[15] but if the complaint does not contain any irrelevant or impertinent matter it is not defective because it sets out the cause of action

Suppl. 533, holding that where the seller of a horse refuses to deliver, basing his refusal solely upon the ground that he had sold the horse too cheaply, he thereby waives any other defense.

1. Corcoran *v.* Lehigh, etc., Coal Co., 138 Ill. 390, 28 N. E. 759 [*reversing* 37 Ill. App. 577].

2. Bunch *v.* Potts, 57 Ark. 257, 21 S. W. 437.

3. Stewart *v.* Scott, 54 Ark. 187, 15 S. W. 463.

4. Bell County Brick Co. *v.* Cox, 33 Tex. Civ. App. 292, 76 S. W. 607, construing Rev. St. (1895) art. 1194, par. 5.

5. Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679.

6. Hudson *v.* Norwood, 13 Tex. Civ. App. 662, 35 S. W. 1075.

7. Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195.

8. Staver Carriage Co. *v.* Park Steel Co., 104 Fed. 200, 43 C. C. A. 471.

**Complaint held insufficient** to support a judgment for plaintiff see Alderman *v.* New Departure Bell Co., (Conn. 1904) 59 Atl. 408.

**If the contract is to supply plaintiff with material required for use** in his factory prior to a time stated, an allegation that material ordered and not delivered was required for use prior to such time is essential to the statement of a cause of action. Staver Carriage Co. *v.* Park Steel Co., 104 Fed. 200, 43 C. C. A. 471.

9. Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195; Penny *v.* Porter, 2 East 2.

10. Sorell *v.* Sorell, 5 Ala. 576.

11. Lindman *v.* Wolf, 47 Ind. 501.

12. McConnell *v.* Baker, 4 Blackf. (Ind.) 325.

**Reference to bill of sale.**—An allegation in a complaint that plaintiff bought "a quantity of malt, as will appear from the bill of sale," which is there stated, is sufficient without averment of the definite quantity. Cochran *v.* Goodman, 3 Cal. 244.

13. Manier *v.* Appling, 112 Ala. 663, 20 So. 978; Decker *v.* Birhap, Morr. (Iowa) 62; Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195.

**Contract importing consideration.**— In Indiana contracts of sale which are negotiable under the law merchant or assignable under the provisions of the statute import a consideration, and in an action thereon no consideration need be averred. Magic Packing Co. *v.* Stone-Ordean Wells Co., 158 Ind. 538, 64 N. E. 11.

14. Squier *v.* Hunt, 3 Price 68.

15. Cutting Fruit Packing Co. *v.* Canty, 141 Cal. 692, 75 Pac. 564; Halstead Lumber

more formally and elaborately than is necessary.[16] If it appears that the failure to deliver was due to the destruction of the goods in the hands of the seller, plaintiff should aver such facts as would show that title had not passed.[17] A general allegation of damages is sufficient to admit proof of general damages,[18] but if special damages are claimed they must be specially pleaded.[19]

(II) *Performance of Conditions Precedent.*[20] Plaintiff must allege a performance of any conditions precedent necessary to enable him to maintain the action, such as a demand or payment or tender of the purchase-money,[21] or a readiness to receive and pay for the goods,[22] unless prior to the time of performance the seller has disabled himself from performing the contract;[23] but if the

Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444. And see Hoopes *v.* East, 19 Tex. Civ. App. 531, 48 S. W. 764.

**Where non-delivery and delay in delivery** are the breaches relied on, the declaration should show what goods were not delivered, the delay that took place in the delivery of the others, and the damages caused thereby Dexter Spring, etc., Co. *v.* Springfield Malleable Iron Co., 31 Pittbs. Leg. J. N. S. (Pa.) 226.

16. Smith, etc., Co. *v.* Smith, 166 Pa. St. 563, 31 Atl. 343.

17. Camp *v.* Norton, 52 Barb. (N. Y.) 96.

18. Partridge *v.* Blanchard, 23 Minn. 69; Bussard *v.* Hibler, 42 Oreg. 500, 71 Pac. 642. See also Crystal Palace Flouring Co. *v.* Butterfield, 15 Colo. App. 246, 61 Pac. 479; Harrison *v.* Argyle Co., 128 N. Y. App. Div. 81, 112 N. Y. Suppl. 477. But see Denver, etc., R. Co. *v.* Hutchins, 31 Nebr. 572, 48 N. W. 398, holding that the complaint must set out the agreed price and the market price at the time of delivery.

19. Liljengren Furniture, etc., Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

**Damages for loss of profits** must be specially pleaded. Harper *v.* Miller, 27 Ind. 277.

20. **Conditions precedent** see *supra*, IX, C, 3.

21. *Georgia.*— Pusey *v.* McElveen Commission Co., 93 Ga. 773, 21 S. E. 150.

*Indiana.*— Magic Packing Co. *v.* Stone-Ordean Wells Co., 158 Ind. 538, 64 N. E. 11; Chun *v.* Howard, 3 Blackf. 163.

*Iowa.*— Decker *v.* Birhap, Morr. 62.

*Michigan.*— Thomas *v.* Greenwood, 69 Mich. 215, 37 N. W. 195.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*Vermont.*— Jones *v.* Marsh, 22 Vt. 144.

*Wisconsin.*— Hackbarth *v.* Wollner, 88 Wis. 476, 60 N. W. 704.

*England.*— Morton *v.* Lamb, 7 T. R. 125, 4 Rev. Rep. 395, 101 Eng. Reprint 890.

*Canada.*— Russell *v.* Rowe, 7 U. C. Q. B. 484.

See 43 Cent. Dig. tit. "Sales," § 1162.

**If the goods were to be delivered on demand** the complaint must allege a demand. Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Letcher *v.* Taylor, Hard. (Ky.) 79; Snow *v.* Johnson, 1 Minn. 48.

**Sufficiency of allegations.**— A complaint which alleges that plaintiff went to defendant's house to pay the purchase-price, but could not make the payment or tender the same because of defendant's absence; that plaintiff tendered the amount to defendant's family and they refused it; that on defendant's return he tendered it to him and it was refused; that defendant refused to keep the contract, and that plaintiff was at all times ready and willing to pay for the corn, and offered to perform the contract; and that defendant failed to perform any part of his contract is not demurrable, because it does not allege a specific demand for the property agreed to be sold, or that the tender was kept good. Thomas *v.* Mathis, 92 Ind. 560.

**An allegation that the goods were disposed** of by the seller supersedes the necessity of alleging a demand. Bowdell *v.* Parsons, 10 East 359. And in such case an allegation of the readiness of plaintiff to comply with his contract is sufficient. Hart *v.* Summers, 38 Mich. 399. See also Clarke *v.* Crandall, 27 Barb. (N. Y.) 73, holding that an averment that before the time when the delivery was to be made defendant notified plaintiff that he would not fulfil the contract, and had sold the property, and that plaintiff relying on that notice did not provide the funds to pay for or make ready to receive the property as he otherwise would have done is sufficient.

**Cure by subsequent pleading.**— Plaintiff's omission to allege a previous demand is not cured by defendant's plea of a tender since the suit. McMaster *v.* Brander, 2 Rob. (La.) 498.

22. *Illinois.*— Hough *v.* Rawson, 17 Ill. 588.

*Indiana.*— Magic Packing Co. *v.* Stone-Ordean Wells Co., 158 Ind. 538, 64 N. E. 11; Beard *v.* Sloan, 30 Ind. 279; Bailey *v.* Ricketts, 4 Ind. 488; Smith *v.* Smith, 8 Blackf. 208; Chun *v.* Howard, 3 Blackf. 163.

*North Carolina.*— Grandy *v.* Small, 50 N. C. 50; Cole *v.* Hester, 31 N. C. 23.

*Pennsylvania.*— Robison *v.* Tyson, 46 Pa. St. 286.

*South Carolina.*— Mitchell *v.* Georgia R., etc., Co., 6 Rich. 188.

*England.*— Waterhouse *v.* Skinner, 2 B. & P. 447; Rawson *v.* Johnson, 1 East 203, 6 Rev. Rep. 252.

*Canada.*— Wright *v.* Weed, 6 U. C. Q. B. 140.

See 43 Cent. Dig. tit. "Sales," § 1162.

23. Parker *v.* Pettit, 43 N. J. L. 512, holding that an averment of plaintiff's readiness to accept and pay for the goods purchased is not necessary where the vendor before the

goods are to be delivered at a particular time and place, and to be paid for on delivery, it is sufficient to allege a readiness and willingness to take and pay for the goods without alleging an actual tender,[24] and an averment of readiness at all times is sufficient without averring a readiness at the particular time stipulated for the delivery.[25]

**b. Plea or Answer.** A plea of tender of delivery must allege that the goods tendered were of the quality contracted for,[26] and must set forth the quantity,[27] and that they had always been and still were ready for delivery.[28] A plea that the time of delivery was extended is not good unless it is alleged that the extended time has not elapsed or that delivery has been made.[29] If defendant relies on the destruction of the goods to excuse delivery the answer must allege facts showing that the title had passed to plaintiff.[30] Where the action is for failure to deliver goods of the proper quality a plea alleging that under the contract all differences were to be settled by arbitration is insufficient if it does not aver that such arbitration was a condition precedent to suit.[31] An answer setting up a rescission of the contract and a breach by the buyer of the conditions as to payment is not objectionable because the defenses are inconsistent.[32] A notice attached to a plea of the general issue alleging a failure of the buyer to pay drafts for instalments delivered as agreed and his removal from the state is sufficient to present the defense of abandonment of the contract by the buyer.[33] A plea of fraud in falsely representing the market value of the goods, where both the value as falsely represented and the true value are alleged under a *videlicet* is bad.[34] A denial of the claim for damages must be direct and certain.[35]

**c. Issues, Proof, and Variance** — (i) *In General.*[36] Plaintiff can recover only upon the cause of action set forth in his complaint,[37] and only such evidence is admissible as conforms to the pleadings and issues tendered thereby.[38] An

time fixed for performance of the contract has disabled himself from performing it.

**24.** Funk *v.* Hough, 29 Ill. 145; Robinson *v.* Tyson, 46 Pa. St. 286.

It is not necessary to allege when and where the buyer was ready and willing to receive and pay for the goods, since such allegation necessarily refers to the time and place of delivery. Neis *v.* Yocum, 16 Fed. 168, 9 Sawy. 24.

**25.** Porter *v.* Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306.

**26.** Bradley *v.* King, 44 Ill. 339. And see Robertson *v.* Hayes, 15 U. C. Q. B. 293.

**27.** Dorman *v.* Elder, 3 Blackf. (Ind.) 490.

**28.** Dorman *v.* Elder, 3 Blackf. (Ind.) 490; Miller *v.* McClain, 10 Yerg. (Tenn.) 245; Tiernan *v.* Napier, Peck (Tenn.) 212; Stinson *v.* Branigan, 10 U. C. Q. B. 210; Hancock *v.* Gibson, 3 U. C. Q. B. 41.

**29.** Molson *v.* Bradburn, 25 U. C. Q. B. 457.

**30.** Scott *v.* King, 12 Ind. 203.

**31.** Hudmon *v.* Cuyas, 57 Fed. 355, 6 C. C. A. 381.

**32.** Bruce *v.* Burr, 67 N. Y. 237.

**33.** Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742.

**34.** Ainsworth *v.* Roush, 109 Ill. App. 299.

**35.** Roberts *v.* Andrews, 15 Pa. Super. Ct. 305. See also Roberts *v.* Andrews, 23 Pa. Co. Ct. 99.

Price paid for substitute.—Where the affidavit of defense goes to the entire claim in an action for damages by a purchaser, who, on failure of the seller to deliver the articles, goes into the market, and gets a substitute, it is enough to state that the price paid for the substitute was above the market price, without stating the market price. Hamilton *v.* Kirby, 199 Pa. St. 466, 49 Atl. 214.

A special plea by defendant that the lumber which was the consideration of the violated contract had declined in value does not limit the defense to such ground, where defendant specially denied all responsibility, and so denying put at issue plaintiff's action on the contract setting forth the different grades of lumber. Williams *v.* Louisiana Lumber Co., 105 La. 99, 29 So. 491.

**36.** See, generally, Pleading, 31 Cyc. 670.

**37.** Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384; Traver *v.* Shaefle, 33 Nebr. 531, 50 N. W. 683; Moffit-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351 [*reversing* 1 Indian Terr. 612, 43 S. W. 864].

Damages.—Where, on a failure to deliver a portion of the goods in January as agreed, there was an extension of time as to the remainder followed by another breach in July, and plaintiff declares on the original contract, alleging a breach in January, proof can be made only of such damages as resulted from the non-delivery in January, and there can be no recovery of damages based upon the advance in price between January and July without setting forth in the complaint the enlargement of the contract. Hill *v.* Smith, 32 Vt. 433.

**38.** Traver *v.* Shaefle, 33 Nebr. 531, 50 N. W. 683.

allegation that by reason of the non-delivery plaintiff was prevented from carrying on his business is sufficient to render admissible proof that plaintiff attempted to procure the goods elsewhere but was unable to do so.[39] Evidence of a waiver by defendant of a tender or offer of performance on the part of plaintiff is admissible, although the waiver was not alleged in the complaint.[40] All material allegations necessary to constitute the cause of action must be supported by proof,[41] and an allegation that plaintiff was ready and willing to receive the goods and pay for them is a material one and must be proved.[42] If loss of profits to be obtained on resale is claimed as damages proof must be made of the purchase-price and the price at which the goods were resold.[43]

(II) *UNDER GENERAL ISSUE.* Under the general issue defendant may prove as a defense *pro tanto* that plaintiff accepted part of the goods before the day fixed for delivery,[44] and for the purpose of showing that the contract set up by plaintiff was never made, he may prove that subsequently to the alleged sale plaintiff contracted to purchase the same goods on terms different from those alleged in the complaint.[45] But the readiness of defendant to deliver must be specially pleaded;[46] and where the contract was to furnish plaintiff with all the goods required by him in his business, the seller cannot show that plaintiff did not act in good faith in ordering goods unless such defense is pleaded;[47] but where the statute requires the buyer in certain cases to give notice of the time when he will receive the goods, the seller may avail himself of a want of notice without pleading facts to bring his case within the statute.[48]

(III) *VARIANCE.* As in other civil actions,[49] a material variance between the pleadings and the proof is fatal,[50] as in regard to the nature or terms of the contract,[51]

**Evidence admissible.**— Under plaintiff's allegation that under the contract he was to receive the same character of goods as previously purchased by him of defendant, it is proper to admit in evidence letters written by the parties before the contract was made showing the character of goods previously purchased. Cooper *v.* Webb, (Tex. Civ. App. 1894) 25 S. W. 151. Under a declaration for breach of a contract of sale of No. 2 corn, evidence is admissible of a contract of sale which does not specify the grade, or any particular lot of corn, where there is no evidence to show that when corn is purchased it does not mean good merchantable corn of the prevailing grade, which is shown to be No. 2. Kunder *v.* Smith, 45 Ill. App. 368. A declaration for breach of contract to deliver fruit trees alleging that it was represented that certain seedlings would bear a large white peach, good sellers, and defendant furnished such seedlings of a poor variety, justifies proof that, although such seedlings were delivered, they bore a worthless peach. Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443.

**In the absence of a motion for a specific statement** a complaint, in an action for failure to deliver cattle according to a contract of sale, setting forth in a general way the expense and loss occasioned, is sufficient to admit testimony as to expenses incurred by plaintiff in preparing a pasture, and employing men to search the range for the cattle. Farrer *v.* Caster, 17 Colo. App. 41, 67 Pac. 171.

39. Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

40. Woolner *v.* Hill, 93 N. Y. 576; Clark *v.* Bache, 186 Pa. St. 343, 40 Atl. 484.

41. Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137, 69 S. W. 384.

42. Robison *v.* Tyson, 46 Pa. St. 286.

43. Armeny *v.* Madsen, etc., Co., 111 Ill. App. 621.

44. Robinson *v.* Batchelder, 4 N. H. 40.

45. Davis *v.* McCrocklin, 34 Kan. 218, 8 Pac. 196.

46. York *v.* Newland, 10 Humphr. (Tenn.) 330.

47. New York Cent. Ironworks Co. *v.* U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967 [*affirming* 74 N. Y. Suppl. 1139].

48. Vance *v.* Jones, Peck (Tenn.) 329.

49. See PLEADING, 31 Cyc. 700.

50. *Connecticut.*— Kellogg *v.* Denslow, 14 Conn. 411.

*Illinois.*— Driggers *v.* Bell, 94 Ill. 223.

*Maryland.*— Hoke *v.* Wood, 26 Md. 453.

*Missouri.*— Barber *v.* Ozark Imp. Co., 131 Mo. App. 717, 111 S. W. 846.

*Texas.*— Flores *v.* Smith, 66 Tex. 115, 18 S. W. 224.

**Allegations of a failure to deliver cattle on demand,** according to the contract of sale, are not sustained by evidence of a failure to return earnest money paid on an agreement at the time of purchase that, if conditions to be subsequently ascertained should prove unsatisfactory, the earnest money would be refunded. Krebbs *v.* Holway, 58 Nebr. 65, 78 N. W. 397.

51. Robinson Consol. Min. Co. *v.* Johnson, 13 Colo. 258, 22 Pac. 459, 5 L. R. A. 769; Shomo *v.* Ransom, 92 Ga. 97, 18 S. E. 534 (where the allegation was of an uncon-

the subject-matter of the contract,[52] the time of delivery,[53] the place and mode of delivery,[54] the quantity of goods to be delivered,[55] the price,[56] or mode or terms of payment;[57] but the variance should not be regarded as material if the allegations and proof substantially correspond,[58] or the variance is not of such a character as to prejudice or mislead the adverse party.[59]

**9. Evidence — a. Presumptions and Burden of Proof.** The burden is on plaintiff generally to prove the existence and terms of the contract,[60] the breach thereof,[61] and the amount of damages.[62] The burden is also on plaintiff to prove

ditional sale and the proof showed a conditional sale); Mixer *v.* Williams, 17 Vt. 457.

**Construction of contract by parties.**— If the proof conforms to the contract as construed by the parties, there is no variance, although it does not conform to what would be the legal construction of the terms of the contract as alleged. Bloom *v.* Americus Grocery Co., 116 Ga. 784, 43 S. E. 54.

**52.** Kellogg *v.* Denslow, 14 Conn. 411; Flores *v.* Smith, 66 Tex. 115, 18 S. W. 224.

**53.** Hickock *v.* Hoyt, 33 Conn. 553; Driggers *v.* Bell, 94 Ill. 223; Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271.

**54.** Clark *v.* Todd, 1 D. Chipm. (Vt.) 213; Samuel *v.* Darch, 2 Stark. 60, 3 E. C. L. 316.

**Variance not material.**—Where the declaration alleges a promise to deliver goods at the sign-post in "Winchester Old Society" and the proof is a writing promising to deliver the same at the sign-post in "Winchester Center," there is no variance if it appears by other evidence that the places named are one and the same. Andrews *v.* Williams, 11 Conn. 326. So also, although the contract alleged as legally construed calls for delivery at one place and the one proved calls for delivery at another place, there is no variance if the parties themselves have construed the contract as requiring the delivery to be made at the latter place. Bloom *v.* Americus Grocery Co., 116 Ga. 784, 43 S. E. 54.

**55.** Touart *v.* Yellow Pine Lumber Co., 128 Ala. 61, 29 So. 4; Seibert *v.* Bach, 36 Ill. 195; Davidson *v.* Johnson, 31 Ill. 523; Mastin *v.* Toncray, 3 Ill. 216; Hoke *v.* Wood, 26 Md. 453. But see Potter *v.* Hopkins, 25 Wend. (N. Y.) 417.

**Variance not material.**—Where the complaint alleges an agreement to sell a certain number of twelve and one-half "pound kilo" boxes of apricots, but the written contract calls for a certain number of twelve and one-half "kilo" boxes of apricots, and the uncertainty of the complaint is not attacked by demurrer or objection to evidence, a finding of the trial court in regard to capacity in accordance with the contract by rejecting the word "pound" is proper, the variance not being fatal. Ellsworth *v.* Knowles, 8 Cal. App. 630, 97 Pac. 690.

**56.** Trunkey *v.* Hedstrom, 131 Ill. 204, 23 N. E. 587 [*affirming* 33 Ill. App. 397].

**Variance not material.**—Where the declaration on a contract to deliver specific articles does not state the value, but the proof is of a contract to deliver the same articles "of the value of 75 dollars," there is no material variance. Andrews *v.* Williams, 11 Conn. 326.

**57.** Metz *v.* Albrecht, 52 Ill. 491, holding that where the declaration alleges a contract for delivery in instalments, payment to be made only when the whole quantity is delivered, and the proof is that payment was to be made for each instalment as delivered, there is a fatal variance.

**58.** Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527.

**Variance not material.**—Where the declaration alleges a contract to sell "a crop of barley, supposed to be about nine hundred bushels," and the one produced in evidence is to sell "a crop of barley, about nine hundred bushels," there is no material variance. Coonley *v.* Anderson, 1 Hill (N. Y.) 519.

**59.** Potter *v.* Hopkins, 25 Wend. (N. Y.) 417; Farnsworth *v.* Holderman, 3 Utah 381, 4 Pac. 337; Cody *v.* Bemis, 40 Wis. 666; Nash *v.* Towne, 5 Wall. (U.S.) 689, 18 L. ed. 527.

**Variance not material.**— Proof of a sale and payment by a sight draft duly paid will support a declaration of a sale for so much "in hand paid." Nash *v.* Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527. Where the allegation is that plaintiff paid defendant for the goods, proof that a third person indebted to plaintiff delivered goods to defendant in payment, and plaintiff was given credit therefor is not a material variance. Cody *v.* Bemis, 40 Wis. 666.

**60.** Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119 (holding that an allegation by defendant of terms differing from those alleged in the complaint does not shift the burden of proof); Bacon *v.* Eccles, 43 Wis. 227.

**Modification of contract.**— If plaintiff relies upon a modification of the contract and bases his right to recover upon the contract as claimed to be modified, the burden is upon him to establish such fact. Meents *v.* Reiken, 42 Ill. App. 17.

**61.** Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536; Olcese *v.* Mobile Fruit, etc., Co., 112 Ill. App. 281 [*affirmed* in 211 Ill. 539, 71 N. E. 1084].

**Expiration of time for delivery.**— The burden is on plaintiff to show that the time for delivery has expired. Hume *v.* Netter, (Tex. Civ. App. 1903) 72 S. W. 865.

**62.** Schon-Klingstein Meat, etc., Co. *v.* Snow, 43 Colo. 538, 96 Pac. 182; Bloom *v.* Americus Grocery Co., 116 Ga. 784, 43 S. E. 54; De Wolf *v.* McGinnis, 106 Ill. 553; Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487, 37 So. 38.

**Purchase elsewhere.**— The burden is on plaintiff to show the price at which he supplied himself with the goods on defendant's failure to deliver. Morris *v.* Supplee, 208 Pa. St. 253, 57 Atl. 566.

his readiness and ability to perform,[63] and a demand on defendant for performance on his part,[64] unless prior to the time of performance defendant has notified plaintiff that he will not perform the contract,[65] or has put it out of his power to perform it.[66] If the contract of defendant is to deliver all of certain crops grown by him plaintiff must show that such crops were grown by defendant.[67] If payment is alleged by plaintiff and is admitted by defendant the presumption is that it was made within the time prescribed by the contract.[68] The burden is on defendant to establish any matters of affirmative defense relied on.[69] If defendant alleges a tender of the goods the burden is on him to prove that the goods tendered were of the proper quality,[70] and on a plea of rescission the burden is on him to show the fact.[71]

**b. Admissibility** — (i) *In General.* In actions by the buyer for breach of contract, any evidence otherwise competent is admissible which tends to prove or disprove a material fact in issue;[72] but evidence which is not relevant to the matters in issue is not admissible.[73] On the issue of performance by plaintiff, he

63. Kitzinger *v.* Sanborn, 70 Ill. 146; Pahlman *v.* King, 49 Ill. 266; Cummings *v.* Tilton, 44 Ill. 172; Isaacs *v.* New York Plaster Works, 40 N. Y. Super. Ct. 277 [*reversed* on other grounds in 67 N. Y. 124]; Brooklyn Oil Refinery *v.* Brown, 42 How. Pr. (N. Y.) 286; Simmons *v.* Green, 35 Ohio St. 104; Kunkle *v.* Mitchell, 56 Pa. St. 100; Robison *v.* Tyson, 46 Pa. St. 286.

A denial by defendant in his answer of the making of the agreement sued on does not relieve plaintiff of the burden of proving that he was ready to receive and pay for the goods. Simmons *v.* Green, 35 Ohio St. 104.

64. Pahlman *v.* King, 49 Ill. 266.

65. Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144, holding that a notice from the seller that he is unable to deliver the goods relieves the buyer from the necessity of proving that he was able, ready, and willing to receive and pay for them.

66. Crist *v.* Armour, 34 Barb. (N. Y.) 378, where prior to the time of performance defendant sold the goods to a third person.

67. Hartnett *v.* Baker, 4 Pennew. (Del.) 431, 56 Atl. 672.

68. Wolf *v.* Willitts, 35 Ill. 88.

69. F. W. Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275; San Jacinto Oil Co. *v.* Texas Co., 47 Tex. Civ. App. 477, 105 S. W. 1163.

Provisions of contract excusing delivery.— Where a contract for the sale and delivery of coal contains a clause making performance subject to strikes, accidents, shortage of cars, or other causes beyond the control of the seller, the burden is on the seller to show that the delivery was prevented by such causes. Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

Impossibility of performance.—Where one, under contract to sell and deliver a designated quantity of petroleum oil from his wells, failed to deliver, and relies on the defense that the wells did not produce sufficient oil to meet the contract, he has the burden of proving the defense. San Jacinto Oil Co. *v.* Texas Co., 47 Tex. Civ. App. 477, 105 S. W. 1163.

70. Bates *v.* Lyman, 35 Kan. 634, 12 Pac. 33.

71. F. W. Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275.

72. Young *v.* Arntze, 86 Ala. 116, 5 So. 253; Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422; Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29.

Evidence admissible.— In an action by the buyer against the seller for breach of contract, a written order for the goods is admissible in evidence if it was accepted by defendant, although it is not signed by plaintiff and there is no evidence that the salesman who signed it for defendant was authorized to do so. Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367. A letter written by the buyer containing matter concerning a compromise is admissible in evidence if limited by the court to the question as to whether the buyer had abandoned the contract. Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712. In an action for the breach of a contract of sale under the terms of which, the contract being indefinite, defendant had a reasonable time to make delivery, evidence of a conversation between plaintiff and defendant's agent when the contract was signed as to the time when delivery was contemplated, of directions as to delivery, and as to an explanation why indefinite language was used in fixing the date of delivery is admissible as determining what was a reasonable time to make delivery. Loomis *v.* Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358.

73. Armour Packing Co. *v.* Vietch-Young Produce Co., (Ala. 1903) 39 So. 680; Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500; Saddlery Hardware Mfg. Co. *v.* Hillsborough Mills, 68 N. H. 216, 44 Atl. 300, 73 Am. St. Rep. 569; Heller *v.* Heine, 42 Misc. (N. Y.) 188, 85 N. Y. Suppl. 389.

Where defendant claims the defects were due to a defective plan, plaintiff's evidence remotely tending to show that the plan was a suitable one for much smaller boilers, standing alone, is irrelevant on the question

may show a payment of the price,[74] or that when he went for the goods he was prepared to pay the price,[75] or that money was left at defendant's house, it appearing that he was absent purposely avoiding plaintiff,[76] and that he made a demand for performance on the part of defendant.[77] On the issue as to the breach of the contract by the seller any legal evidence tending to show such breach is admissible.[78] Thus it may be shown that the goods tendered in delivery were defective;[79] and on the theory that defendant failed to deliver the goods because he could get higher prices elsewhere, evidence as to the market price during the period covered by the contract is admissible.[80] In defense defendant may show any facts tending to excuse non-delivery,[81] or to show his readiness and willingness to deliver;[82] but if the failure to deliver is based on the fraud of plaintiff, evidence of fraud in other transactions is not admissible.[83] The general rule applies that parol evidence is not admissible to contradict or vary the terms of a written contract,[84] but is admissible to explain an ambiguity[85] or to show the meaning of technical terms and expressions;[86] and such evidence is also admissible to show an oral agreement in regard to a matter as to which the written contract is silent,[87] or to show the construction which the parties have placed upon the contract.[88]

(II) *NATURE AND EXTENT OF DAMAGES.* In actions by the buyer for breach of contract any evidence otherwise competent is admissible which tends to show the damages actually sustained by reason of such breach,[89] but evidence

whether the plan was suitable for a boiler of the size stipulated in the contract. Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741.

**74.** O'Connor *v.* Stevenson, 49 N. Y. App. Div. 630, 62 N. Y. Suppl. 898.

**Execution of notes.**— In an action on a contract for failure to deliver all the goods bought, plaintiff may prove that he executed certain notes in payment therefor, as required by the contract, and that he paid the notes when due, such evidence showing a compliance with the contract on his part. Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

**75.** Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88.

**76.** Hyde *v.* Payne, 10 N. Y. St. 837.

**77.** Fitzgerald Cotton Oil Co. *v.* Farmers Supply Co., 3 Ga. App. 212, 59 S. E. 713, holding that where the contract does not specify the time of delivery except that it is to be "as early as convenient," a letter from the buyer to the seller demanding a delivery and written after the expiration of a reasonable time is admissible to show that plaintiff demanded a performance and that defendant refused such demand.

**78.** Carleton *v.* Lombard, 149 N. Y. 137, 43 N. E. 422.

**79.** Gould *v.* Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90.

**80.** Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

**81.** Hawkins *v.* Brown, 30 Barb. (N. Y.) 206.

**Failure of buyer to supply cars.**—Where defendant attempts to excuse non-delivery on the ground that the buyer failed to supply tank cars in time for delivery within the period stipulated, it is proper to exclude evidence that it would take defendant six hours to load a tank car with oil, there being no evidence that plaintiff had any knowledge of defendant's facilities for loading. Palestine Cotton Seed Oil Co. *v.* Corsicana Cotton Oil Co., 25 Tex. Civ. App. 614, 61 S. W. 433.

**82.** Mitchell *v.* La. Follett, 38 Oreg. 178, 63 Pac. 54.

**Efforts to comply with contract.**— The fact that the sellers of coal had themselves contracted for the purchase of sufficient coal to supply their customers has no bearing on the question of the seller's liability for a breach of a contract for the delivery of coal to one of their customers, except as evidence that they had used every precaution to be prepared to deliver the coal in compliance with the terms of their agreement, and were prevented from so doing solely by a shortage of cars. Haff *v.* Pilling, 134 Fed. 294.

**83.** Barlow *v.* Wiley, 3 A. K. Marsh. (Ky.) 457.

**84.** Traver *v.* Shaefle, 33 Nebr. 531, 50 N. W. 683. See also, generally, EVIDENCE, 17 Cyc. 567 *et seq.*

**85.** Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 961. See also, generally, EVIDENCE, 17 Cyc. 662 *et seq.*

**86.** Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

**87.** Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 961, holding that where a written contract for the sale of oil is silent as to the capacity of the tank cars in which it is to be delivered, parol evidence is admissible to show that it was orally agreed between the parties that the tanks should be of a certain capacity.

**88.** St. Louis Consol. Coal Co. *v.* Jones, etc., Co., 232 Ill. 326, 83 N. E. 851 [*affirming* 120 Ill. App. 139].

**89.** Fisher *v.* Andrews, 94 Md. 46, 50 Atl. 407; Traver *v.* Shaefle, 33 Nebr. 531, 50 N. W.

is not admissible which is irrelevant [90] or does not conform to the proper measure of damages.[91] Where the action is based upon defects in the quality of the goods, evidence is admissible as to the actual value of the goods delivered.[92] In case of non-delivery evidence is admissible as to the market value of the goods contracted to be delivered; [93] but such evidence should ordinarily be limited to the market value at the time of the breach of the contract [94] and the place of delivery; [95] but if there is no market value at the exact time and place evidence is admissible as to the market value on other dates within a reasonable time before and after,[96] or at the nearest place where there is a market value for the goods.[97] The evidence should be limited to the market price at which the buyer could procure the goods, and not that for which he could sell them; [98] but the evidence is not limited to the market price for lots of the size contracted for,[99] particularly where it is not shown that the buyer could have procured the quantity which the seller had agreed to deliver by a single purchase; [1] and evidence is not admissible as to the probable effect upon the market price of putting upon the market or attempting to buy the quantity of goods contracted for.[2] If it is shown that the goods had no particular market value, evidence as to their actual value is admissible.[3] Evidence is admissible to show that plaintiff was obliged to buy in the market at an enhanced price,[4] and where the buyer has bought other goods in the market

683; Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

**Sale by sample.**—Where plaintiff attempted to show the value of the goods undelivered by testimony as to the value of certain samples, defendant could show that the goods undelivered, although pronounced satisfactory by plaintiff, were not equal in quality or value to the samples. Fisher *v.* Andrews, 94 Md. 46, 50 Atl. 407.

**90.** Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14 [*reversing* 11 N. Y. App. Div. 291, 42 N. Y. Suppl. 69].

**Evidence of wilfulness** on the part of the seller in breaking the contract is irrelevant and inadmissible, as his motive would not increase his liability in an action based upon a breach of the contract. Kelly *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

**91.** Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

**92.** Traver *v.* Shaefle, 33 Nebr. 531, 50 N. W. 683.

**93.** Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827; Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087; Mowry *v.* Kirk, 5 Ohio Dec. (Reprint) 431, 5 Am. L. Rec. 587.

**94.** Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087; McManus *v.* American Woolen Co., 126 N. Y. App. Div. 68, 110 N. Y. Suppl. 680; Freedman *v.* Dobson, 30 Misc. (N. Y.) 827, 61 N. Y. Suppl. 1115.

**If the market price is not normal** at the exact time of the breach but is unnaturally inflated or depressed by unlawful means, the fair market value is to be determined from the price before and after the day of delivery and from other sources. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

**Where the time of delivery has been indefinitely extended** the contract is not broken until the seller's refusal to deliver, and evidence of the market value of the goods at the time of such refusal is admissible. Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087.

**If the goods were bought for the purpose of resale** and this fact was known to the seller, evidence is admissible as to the market value between the time of the seller's refusal to deliver and the institution of the action. Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

**95.** Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827; Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1901) 60 S. W. 1030.

**96.** Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

**97.** Pearce *v.* Carter, 3 Houst. (Del.) 385; Livingston *v.* Klopper, 9 Ohio Dec. (Reprint) 185, 11 Cinc. L. Bul. 175.

**98.** Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

**99.** Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208.

**But if the buyer is a wholesale dealer** and bought the goods in question for sale to dealers and not in the retail market, evidence of the retail price of such goods is inadmissible, there being no claim for loss of profits. Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827.

**1.** Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

**2.** Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

**3.** Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

**4.** McFadden *v.* Henderson, 128 Ala. 221, 29 So. 640; Blalock *v.* Clark, 137 N. C. 140, 49 S. E. 88; Haff *v.* Pilling, 134 Fed. 294. See also Wilson *v.* Alcatraz Asphalt Co., 42 Cal. 182, 75 Pac. 787.

**To determine quality of goods.**— While the buyer cannot pay more than the market price and charge the seller with the excess, evidence of such a purchase is admissible for

defendant is entitled to show what he actually paid for them.[5] Where the circumstances authorize a recovery for profits,[6] it is competent to show that plaintiff had orders for goods such as defendant had agreed to deliver on which a profit would have been made,[7] and whether the goods were procurable in the market,[8] and the diligence of the buyer in attempting to procure them and the expenses incurred in so doing.[9] Evidence is also admissible to show that the seller had knowledge of the necessities of the buyer's business and that the failure to deliver the goods would affect his profits.[10]

**c. Weight and Sufficiency.**[11] There must of course be a preponderance of evidence to establish all the facts essential to a recovery by plaintiff [12] or relied on as a defense by defendant.[13] Slight evidence of plaintiff's readiness and willingness to receive and pay for the goods will be sufficient,[14] and it is sufficient *prima facie* as to plaintiff's ability to show that he had property and credit sufficient to enable him to raise the money;[15] and a demand for the goods at the time and place specified is *prima facie* evidence of his readiness to pay for them.[16] The inability of the seller to perform his contract is sufficiently shown by proof that he did not

the purpose of showing the quantity of goods for which defendant is chargeable. Cole *v.* Cheovenda, 4 Colo. 17.

5. Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

6. See *infra*, IX, C, 10, c, (VIII), (C).

7. Lapp *v.* Illinois Watch Co., 104 Ill. App. 255; Johnston *v.* Faxon, 172 Mass. 466, 52 N. E. 539; Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

**Testimony as to profits made by another dealer** at a point some distance from that at which plaintiff transacted business was not admissible to show the profits made in the business at that point, in the absence of evidence that the conditions with reference to the sale of the goods were similar at the two places, or that the profits ordinarily realized were the same. Currie Fertilizer Co. *v.* Krish, 74 S. W. 268, 24 Ky. L. Rep. 2471.

**If the goods have a market value** at the time and place of delivery, plaintiff is not entitled to show specific contracts for resales at a profit. McManus *v.* American Woolen Co., 126 N. Y. App. Div. 68, 110 N. Y. Suppl. 680.

8. Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971; Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584. *Compare* Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

9. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13; Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

10. Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

11. See, generally, EVIDENCE, 17 Cyc. 753.

12. Bruner *v.* Kansas Moline Plow Co., 7 Indian Terr. 506, 104 S. W. 816; Fox *v.* Walsh, 5 Rob. (La.) 222; Landreaux *v.* Campbell, 8 Mart. N. S. (La.) 478; Heller *v.* Heine, 42 Misc. (N. Y.) 188, 85 N. Y. Suppl. 389.

**Sufficiency of evidence to show:** The making of the contract. California Canneries Co. *v.* Scatena, 117 Cal. 447, 49 Pac. 462; Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Bristol *v.* Mente, 79 N. Y. App. Div. 67, 80 N. Y. Suppl. 52 [*affirmed* in 178 N. Y. 599, 70 N. E. 1096]; Hocking *v.* Hamilton, 122 Fed. 417, 59 C. C. A. 43. Right of plaintiff to maintain the action. Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826. Breach of contract generally. Harrison *v.* Argyle Co., 128 N. Y. App. Div. 81, 112 N. Y. Suppl. 477; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118]; Branower *v.* Independent Match Co., 83 N. Y. App. Div. 370, 82 N. Y. Suppl. 224; Masor *v.* Jacobus, 84 N. Y. Suppl. 589. Breach as to quality of goods. Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443. Breach as to delay in delivery. Bruner *v.* Kansas Moline Plow Co., 7 Indian Terr. 506, 104 S. W. 816. A rejection of the goods. Gilbert *v.* Alton, 88 N. Y. App. Div. 62, 84 N. Y. Suppl. 682.

**Sufficiency of evidence to warrant a recovery** by plaintiff see Heller *v.* Heine, 42 Misc. (N. Y.) 188, 85 N. Y. Suppl. 389; Sklarsky *v.* Marine Mfg., etc., Co., 33 Misc. (N. Y.) 761, 67 N. Y. Suppl. 897.

13. F. W. Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Hollister *v.* Bender, 1 Hill (N. Y.) 150.

**Evidence held sufficient to show:** That defendant's failure to perform the contract was due to conduct of plaintiff. Townes *v.* Oklahoma Mill Co., 85 Ark. 596, 109 S. W. 548. That plaintiff not only failed but refused to comply with his part of the contract. Blakeslee *v.* Reinhold Mfg. Co., 153 Mich. 230, 117 N. W. 92.

14. Kitzinger *v.* Sanborn, 70 Ill. 146.

**Sufficiency of the evidence** to show the buyer's ability and readiness to perform see Howell *v.* Dickerson, 104 Mo. App. 658, 78 S. W. 655; Bronson *v.* Wiman, 10 Barb. (N. Y.) 406 [*affirmed* in 8 N. Y. 182].

15. McGeehee *v.* Hill, 1 Ala. 140.

16. Biggers *v.* Pace, 5 Ga. 171; Wilks *v.* Atkinson, 1 Marsh. 412, 6 Taunt. 11, 1 E. C. L. 485; Squier *v.* Hunt, 3 Price 68.

have the goods at the time of demand.[17] If the breach relied on is the failure to deliver goods of the proper quality; unequivocal testimony that the goods tendered were inferior is not overcome by evidence of the good faith of the seller or that other goods of the same brand were of good quality.[18] The nature and extent of the damages must be proved with reasonable certainty.[19]

**10. Damages — a. In General.** On a breach of the contract of sale by the seller, the buyer is entitled to recover the actual damages he has sustained,[20] which are the natural and probable result of the breach [21] and may fairly be said to have been within the contemplation of the parties; [22] and although no actual damages are shown, the buyer may, if there has been a breach of the contract, recover at least nominal damages.[23] The buyer is not, however, entitled to

17. Sampson *v.* Lewis, 8 N. Y. St. 346.

18. Barkley-Gray Grocer Co. *v.* Kelley Cigar Co., (Cal. 1902) 69 Pac. 852.

19. *Colorado.*— Schon-Klingstein Meat, etc., Co. *v.* Snow, 43 Colo. 538, 96 Pac. 182; Staab *v.* Borax Soap Co., 12 Colo. App. 286, 55 Pac. 618.

*Iowa.*— Bradley *v.* Smith, (1898) 77 N. W. 506.

*Louisiana.*— Lowe *v.* Nelson, 7 La. Ann. 646.

*New York.*— Albert Gas Fixture Co. *v* Kabat, 109 N. Y. Suppl. 737.

*Wisconsin.*— Anderson *v.* Savoy, 137 Wis. 44, 118 N. W. 217.

**Sufficiency of evidence** as to damages see Ft. Smith Wagon Co. *v.* Baker, 84 Ark. 444, 105 S. W. 591; Orr *v.* Kenny, 150 Mich. 159, 114 N. W. 228; Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443; Brody *v.* Birnbaum, 108 N. Y. Suppl. 581; Wolf Co. *v.* Galbraith, 39 Tex. Civ. App. 351, 87 S. W. 390.

**Sufficiency of evidence to sustain verdict** for amount of damages awarded see German Ins. Bank *v.* Martin, (Ky. 1908) 114 S. W. 319.

**If plaintiff is prevented from definitely proving his damages** by an erroneous ruling of the court that there is no cause of action, and he has proved that he did sustain substantial damages, the judgment should not be affirmed on appeal upon the ground that the record failed to show definite proof of damages. Harman *v.* Washington Fuel Co., 228 Ill. 298, 81 N. E. 1017.

20. *Illinois.*— Van Arsdale *v.* Rundel, 82 Ill. 63.

*Louisiana.*— Doriocourt *v.* Lacroix, 29 La. Ann. 286.

*New York.*— Ellis *v.* Miller, 164 N. Y. 434, 58 N. E. 516 [*reversing* 22 N. Y. App. Div. 33, 47 N. Y. Suppl. 824].

*Pennsylvania.*— Arnold *v.* Blabon, 147 Pa. St. 372, 23 Atl. 575; Bradley *v.* McHale, 19 Pa. Super. Ct. 300.

*Virginia.*— Merryman *v.* Criddle, 4 Munf. 542.

*England.*— Chinery *v.* Viall, 5 H. & N. 288, 29 L. J. Exch. 180, 2 L. T. Rep. N. S. 466, 8 Wkly. Rep. 629.

**On a breach of the seller's agreement to take back** certain articles at a specified price the measure of the buyer's damage is the difference between the stipulated credit and the value of the goods in the market. Loughridge *v.* Allen, 38 S. W. 698, 18 Ky. L. Rep. 894. But see Sawyer *v.* McIntyre, 18 Vt. 27, holding that where the seller promised that if the articles were not resold within one year he would take back two of them and pay the vendee fifty dollars and interest, the measure of damages for failure to take them back was the fifty dollars stipulated, and interest.

**On a sale of a stock of goods** to be invoiced and delivered on a future day, the seller to make no additions to the stock, the measure of the buyer's damages, if the seller makes additions, is the difference between the price paid by him for the additional goods, and the market price at which he could have purchased them. Harrison *v.* Charlton, 37 Iowa 134.

21. Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255; Bussard *v.* Hibler, 42 Oreg. 500, 71 Pac. 642; Voght *v.* Shienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351 [*reversing* 1 Indian Terr. 612, 43 S. W. 864].

22. Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255; Voght *v.* Shienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351 [*reversing* 1 Indian Terr. 612, 43 S. W. 864].

**Fine for landing goods without permission.** — Where a seller, knowing that blasting powder could not be landed in a foreign country without permission, and that a failure to procure permission would render the consignee liable to a fine for attempting to land it, promises to deliver the powder to the consignee and to furnish the permission, he is, upon a failure to do so, liable to the consignee for the fine paid. Hecla Powder Co. *v.* Sigua Iron Co., 157 N. Y. 437, 52 N. E. 650 [*affirming* 91 Hun 429, 36 N. Y. Suppl. 838].

23. *Colorado.*— Staab *v.* Borax Soap Co., 12 Colo. App. 286, 55 Pac. 618.

*Delaware.*— Gruell *v.* Clark, 4 Pennew. 321, 54 Atl. 955.

*Kansas.*— York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788.

recover more than the actual damages sustained,[24] or which, in the absence of special circumstances known to the seller at the time the contract was made, are not the natural and probable result of the breach and not reasonably within the contemplation of the parties.[25] The fact that the breach was wilful does not affect the measure of damages in an action for breach of the contract,[26] and if, as it is his duty to do,[27] the buyer has been able to lessen his damages, he can recover only the damages actually sustained.[28]

**b. Agreements Relating to Damages.** The contract of sale may contain a stipulation as to the measure of damages in event of a breach, in which case such stipulation will govern,[29] provided the conditions under which the stipulation is to become operative are complied with.[30] So too an agreement made after the breach to accept a specific sum as liquidated damages will be enforced.[31]

**c. Non-Delivery of the Goods** — (i) *IN GENERAL.* Where the breach consists in the failure of the seller to deliver the goods the measure of damages is ordinarily the difference between the contract price and the market price of the goods at the time and place of delivery,[32] provided there is a market price

*South Dakota.*— Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

*United States.*— Moses *v.* Rasin, 14 Fed. 772.

24. Vosbury *v.* Mallory, 70 N. Y. App. Div. 247, 75 N. Y. Suppl. 480; Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

25. Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351 [*reversing* 1 Indian Terr. 612, 43 S. W. 864].

26. Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971. See also Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540, 23 S. Ct. 754, 47 L. ed. 1171.

27. Armeny *v.* Madson, etc., Co., 111 Ill. App. 621. And see *infra*, IX, C, 10, c, (VII).

28. Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

Reduction by purchase elsewhere see *infra*, IX, C, 10, c, (VII).

29. *Indiana.*— Street *v.* Chapman, 29 Ind. 142.

*Iowa.*— Black *v.* De Camp, 78 Iowa 718, 43 N. W. 625.

*Pennsylvania.*— Canavan *v.* Neeld, 189 Pa. St. 208, 42 Atl. 115.

*Texas.*— Hays *v.* Richie, (Civ. App. 1896) 34 S. W. 150.

*Wisconsin.*— Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

*England.*— Bergheim *v.* Blaenavon Iron, etc., Co., L. R. 10 Q. B. 319, 44 L. J. Q. B. 92, 32 L. T. Rep. N. S. 451, 23 Wkly. Rep. 618.

Agreement to take back goods.— Where in a bill of sale the seller agrees that if the articles are not resold within one year he will take back a certain number of them and pay the buyer a certain sum and interest, the amount of damages for failing to take them back is the amount stipulated and interest. Sawyer *v.* McIntyre, 18 Vt. 27.

30. Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487, where the stipulation as to liquidated damages was to take effect only if the seller notified the buyer of his intention not to deliver the whole quantity of goods contracted for.

31. Cochran *v.* Jewell, 71 Cal. 509, 12 Pac. 510.

32. *Alabama.*— Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255; Young *v.* Cureton, 87 Ala. 727, 6 So. 352; Clements *v.* Beatty, 87 Ala. 238, 6 So. 151; Harralson *v.* Stein, 50 Ala. 347.

*Arkansas.*— Hanna *v.* Harter, 2 Ark. 397.

*California.*— Crosby *v.* Watkins, 12 Cal. 85; Tobin *v.* Post, 3 Cal. 373.

*Colorado.*— Schon-Klingstein Meat, etc., Co. *v.* Snow, 43 Colo. 538, 96 Pac. 182; Staab *v.* Borax Soap Co., 12 Colo. App. 286, 55 Pac. 618.

*Connecticut.*— Marshall *v.* Clark, 78 Conn. 9, 60 Atl. 741, 12 Am. St. Rep. 84.

*Delaware.*— Gruell *v.* Clark, 4 Pennew. 321, 54 Atl. 955; Love *v.* Barnesville Mfg. Co., 3 Pennew. 152, 50 Atl. 536.

*Georgia.*— Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Sanders *v.* Allen, 124 Ga. 684, 52 S. E. 884; Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513; Piedmont Wagon Co. *v.* Hudgens, 4 Ga. App. 393, 61 S. E. 835.

*Illinois.*— Capen *v.* De Steiger Glass Co., 105 Ill. 185; Driggers *v.* Bell, 94 Ill. 223; Kitzinger *v.* Sanborn, 70 Ill. 146; Deere *v.* Lewis, 51 Ill. 254; Sleuter *v.* Wallbaum, 45 Ill. 43; Phelps *v.* McGee, 18 Ill. 155; Armeny *v.* Madson, etc., Co., 111 Ill. App. 621; Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144; Rau *v.* Trumbull, 68 Ill. App. 490; Andrews *v.* Himrod, 37 Ill. App. 124; Fletcher *v.* Patton, 21 Ill. App. 228; Buckley *v.* Holmes, 19 Ill. App. 530.

*Indiana.*— Connersville Wagon Co. *v.* McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294; Coffin *v.* State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188; Beard *v.* Sloan, 38 Ind. 128; Zehner *v.* Dale, 25 Ind. 433; Ward *v.* Burr, 5 Blackf. 116.

*Iowa.*— Bushnell *v.* Geo. E. King Bridge Co., 140 Iowa 405, 118 N. W. 407; Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827; Laporte Imp.

for goods of the character and quality contracted for by the buyer at such

Co. *v.* Brock, 99 Iowa 485, 68 N. W. 810, 61 Am. St. Rep. 245; Brown *v.* Sharkey, 93 Iowa 157, 61 N. W. 364; Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507; Harris *v.* Morgan, 62 Iowa 112, 17 N. W. 195; Jemmison *v.* Gray, 29 Iowa 537; Boies *v.* Vincent, 24 Iowa 387; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474.

*Kansas.*— Gray *v.* Hall, 29 Kan. 704.

*Kentucky.*— Parry Mfg. Co. *v.* Lyon, 111 Ky. 613, 64 S. W. 436, 23 Ky. L. Rep. 844; Denhard *v.* Hurst, 111 Ky. 546, 64 S. W. 393, 23 Ky. L. Rep. 789; Miles *v.* Miller, 12 Bush 134; Cole *v.* Ross, 9 B. Mon. 393, 50 Am. Dec. 517; Caldwell *v.* Reed, Litt. Sel. Cas. 366, 12 Am. Dec. 314; Tradewater Coal Co. *v.* Lee, 68 S. W. 400, 24 Ky. L. Rep. 215; Belcher *v.* Sellards, 43 S. W. 676, 19 Ky. L. Rep. 1571.

*Louisiana.*— Camors *v.* Madden, 36 La. Ann. 425.

*Maine.*— Berry *v.* Dwinel, 44 Me. 255.

*Maryland.*— McGrath *v.* Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450; Kribs *v.* Jones, 44 Md. 396; Williams *v.* Woods, 16 Md. 220; Williamson *v.* Dillon, 1 Harr. & G. 444.

*Massachusetts.*— Bartlett *v.* Blanchard, 13 Gray 429; Shaw *v.* Nudd, 8 Pick. 9.

*Michigan.*— McKercher *v.* Curtis, 35 Mich. 478; Chadwick *v.* Butler, 28 Mich. 349.

*Minnesota.*— Coxe *v.* Anoka Waterworks, etc., Co., 91 Minn. 50, 97 N. W. 459; Coxe *v.* Anoka Waterworks Electric Light, etc., Co., 87 Minn. 56, 91 N. W. 265; Olson *v.* Sharpless, 53 Minn. 91, 55 N. W. 125.

*Missouri.*— Northrup *v.* Cook, 39 Mo. 208; Howard *v.* Hass, 131 Mo. App. 499, 109 S. W. 1076; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Chalice *v.* Witte, 81 Mo. App. 84; Bush *v.* Fisher, 75 Mo. App. 1; Vanstone *v.* Hopkins, 49 Mo. App. 386; Griffith *v.* Kansas City Material, etc., Co., 46 Mo. App. 539; Price *v.* Vanstone, 40 Mo. App. 207; Murphy *v.* St. Louis, 8 Mo. App. 483.

*Nebraska.*— Forbes *v.* McClatchey, 52 Nebr. 182, 71 N. W. 1012; Boyer *v.* Cox, 34 Nebr. 813, 52 N. W. 715.

*New Hampshire.*— Stevens *v.* Lyford, 7 N. H. 360.

*New York.*— Saxe *v.* Penokee Lumber Co, 159 N. Y. 371, 54 N. E. 14 [*reversing* 11 N. Y. App. Div. 291, 42 N. Y. Suppl. 69]; Highlands Chemical, etc., Co. *v.* Matthews, 76 N. Y. 145 [*reversing* 43 N. Y. Super. Ct. 39]; Parsons *v.* Sutton, 66 N. Y. 92; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130 [*affirming* 1 E. D. Smith 463]; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Reeve *v.* Gallivan, 89 Hun 59, 34 N. Y. Suppl. 1000; Sternfels *v.* Clark, 2 Hun 122, 4 Thomps. & C. 396 [*affirmed* in 70 N. Y. 608]; Yorke *v.* Ver Planck, 65 Barb. 316; Havemeyer *v.* Cunningham, 35 Barb. 515, 22 How. Pr. 87; Hamilton *v.* Ganyard, 34 Barb. 204 [*affirmed* in 2 Abb. Dec. 314]; Clark *v.* Dales, 20 Barb. 42; Beals *v.* Terry, 2 Sandf. 127; Tinsley *v.* Weidinger, 15 Daly 534, 8 N. Y. Suppl. 476 [*affirming* 7 N. Y. Suppl. 260, and *affirmed* in 130 N. Y. 676, 29 N. E. 1035]; Seckel *v.* Siff, 32 Misc. 693, 66 N. Y. Suppl. 468; Belden *v.* Nicolay, 4 E. D. Smith 14; Falkenberg *v.* O'Neill, 88 N. Y. Suppl. 378; Park *v.* Chateaugay Iron Co., 8 N. Y. St. 507; Davis *v.* Shields, 24 Wend. 322 [*reversed* on other grounds in 26 Wend. 341]; Dey *v.* Dox, 9 Wend. 129, 24 Am. Dec. 137; Gregory *v.* McDowel, 8 Wend. 435; Taylor *v.* Read, 4 Paige 561.

*North Carolina.*— Crawford *v.* Geiser Mfg. Co., 88 N. C. 554.

*North Dakota.*— Talbot *v.* Boyd, 11 N. D. 81, 88 N. W. 1026; Patterson *v.* Plummer, 10 N. D. 95, 86 N. W. 111.

*Ohio.*— Smith *v.* Sloss-Marblehead Lime Co., 57 Ohio St. 518, 49 N. E. 695; Mowry *v.* Kirk, 5 Ohio Dec. (Reprint) 431, 5 Am. L. Rec. 587.

*Pennsylvania.*— Canavan *v.* Neeld, 189 Pa. St. 208, 42 Atl. 115; Willock *v.* Crescent Oil Co., 184 Pa. St. 245, 39 Atl. 77; Arnold *v.* Blabon, 147 Pa. St. 372, 23 Atl. 575; Boyd *v.* Merchants, etc., Peanut Co., 25 Pa. Super. Ct. 199; Marshall *v.* Campbell, 1 Yeates 36; Bear *v.* Harnish, 3 Brewst. 113; Miller *v.* Kennedy, 31 Pittsb. Leg. J. N. S. 274; Bonsall *v.* Kirkpatrick, 5 Pittsb. Leg. J. N. S. 69.

*Tennessee.*— Harris *v.* Rodgers, 6 Heisk. 626; Coffman *v.* Williams, 4 Heisk. 233; Thompson *v.* Woodruff, 7 Coldw. 401; Feder *v.* Gass, (Ch. App. 1900) 59 S. W. 175; College Mill Co. *v.* Fidler, (Ch. App. 1899) 58 S. W. 382.

*Texas.*— Ullman *v.* Babcock, 63 Tex. 68; Day *v.* Cross, 59 Tex. 595; Heilbroner *v.* Douglass, 45 Tex. 402; Woldert Grocery Co. *v.* Veltman, (Civ. App. 1904) 83 S. W. 224; Palestine Cotton-Seed Oil Co. *v.* Corsicana Cotton-Oil Co., (Civ. App. 1901) 61 S. W. 433; Specialty Furniture Co. *v.* Kingsbury, (Civ. App. 1901) 60 S. W. 1030; Steinlein *v.* S. Blaisdell, Jr., Co., (Civ. App. 1898) 44 S. W. 200; Tyler Car, etc., Co. *v.* Wettermark, 11 Tex. Civ. App. 399, 34 S. W. 807; Turnley *v.* Weiss, 1 Tex. App. Civ. Cas. § 1280; San Antonio Gas Co. *v.* Harber, 1 Tex. App. Civ. Cas. § 1123.

*Vermont.*— Worthen *v.* Wilmot, 30 Vt. 555.

*Virginia.*— Nottingham Coal, etc., Co. *v.* Preas, 102 Va. 820, 47 S. E. 823.

*Wisconsin.*— Anderson *v.* Savoy, 137 Wis. 44, 118 N. W. 217; Vogt *v.* Schienbeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756; Hill *v.* Chipman, 59 Wis. 211, 18 N. W. 160; Hammer *v.* Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

*United States.*— Roberts *v.* Benjamin, 124 U. S. 64, 8 S. Ct. 393, 31 L. ed. 334; Lillard *v.* Kentucky Distilleries, etc., Co., 134 Fed. 168, 67 C. C. A. 74; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 290, 34 C. C. A. 351 [*reversing* (Indian Terr. 1898) 43 S. W.

time and place,[33] and interest thereon from the time of the breach;[34] and if the delivery was to be made in instalments the same rules apply as to each instalment.[35] The damages are, however, subject to deduction for any expenses saved to the buyer by the non-delivery,[36] such as freight;[37] but if he has already paid warehouse charges on the goods he is entitled to recover such charges.[38]

(II) *Goods to Be Manufactured.* The difference between the contract price and the market price is also the measure of damages when the article is to be manufactured,[39] even though the market price is enhanced by the fact that

864]; Peace River Phosphate Co. *v.* Graffiin, 58 Fed. 550; Brooks *v.* Coquard, 18 Fed. 316, 5 McCrary 588; Barnard *v.* Conger, 2 Fed. Cas. No. 1,001, 6 McLean 497; *In re* Becker, 3 Fed. Cas. No. 1,208; Halsey *v.* Hurd, 11 Fed. Cas. No. 5,967, 6 McLean 102; Sievers *v.* North, 22 Fed. Cas. No. 12,847, 15 Alb. L. J. (N. Y.) 332; Thompson *v.* Cincinnati, etc., R. Co., 23 Fed. Cas. No. 13,950, 1 Bond 152; White *v.* Arleth, 29 Fed. Cas. No. 17,536, 1 Bond 319.

*England.*— Valpy *v.* Oakeley, 16 Q. B. 941, 16 Jur. 38, 20 L. J. Q. B. 380, 71 E. C. L. 941; Tyers *v.* Rosedale, etc., Iron Co., L. R. 8 Exch. 305, 42 L. J. Exch. 185, 29 L. T. Rep. N. S. 751, 21 Wkly. Rep. 793; Gainsford *v.* Carroll, 2 B. & C. 624, 4 D. & R. 161, 2 L. J. K. B. O. S. 112, 26 Rev. Rep. 495, 9 E. C. L. 273; Peterson *v.* Ayre, 13 C. B. 353, 76 E. C. L. 353; Josling *v.* Irvine, 6 H. & N. 512, 30 L. J. Exch. 78, 4 L. T. Rep. N. S. 251.

*Canada.*— Marsh *v.* Leggat, 8 Quebec Q. B. 221.

See 43 Cent. Dig. tit. "Sales," § 1175.

There are some exceptions to this rule, as in the case of goods which cannot be bought in the market or where there are no dealings to fix a market price, or goods specially made for a particular purpose. Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

Sale of note.— Where the evidence shows that plaintiff bought at a stipulated price a mortgage note held by defendant, and he refused to deliver it, the measnre of the damages is the difference between the contract price and the value of the note when it should have been delivered, and not the difference between the contract price and the face value of the note, although at a sheriff's sale shortly after of the mortgaged premises under foreclosure of a prior mortgage a sum was realized sufficient to meet the note in full. Kory *v.* Layman, 108 La. 247, 32 So. 441.

On a failure to deliver accounts purchased by plaintiff the measure of damages is what they would have sold for in the market. Sadler *v.* Bean, 37 Iowa 439.

Assurances by a seller that he will deliver the goods sold are mere repetitions of his original promise to deliver, and do not change the measure of damages for failure to deliver. Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

If the seller wrongfully resells the goods to a third person, the first buyer may recover at least the difference between the contract price and the price which the seller received for the goods less the reasonable costs and expenses of the resale (Granberry *v.* Frierson, 2 Baxt. (Tenn.) 326; Duncan *v.* McMahan, 18 Tex. 597); and where there is an agreement for a resale to the seller at the original purchase-price and the buyer sells to a third person, the original seller may recover the difference between the original purchase-price and the price for which the buyer resold the goods (Brent *v.* Richards, 2 Gratt. (Va.) 539).

In California the rules for estimating damages are prescribed by statute. Connell *v.* Harron, 7 Cal. App. 745, 95 Pac. 916.

**33.** See *infra*, IX, C, 10, c, (V), (B), (C).

**34.** *Iowa.*— Brown *v.* Sharkey, 93 Iowa 157, 61 N. W. 364.

*Kansas.*— Gray *v.* Hall, 29 Kan. 704.

*Louisiana.*— Stiff *v.* Nugent, 5 Rob. 217.

*Minnesota.*— Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.

*Nebraska.*— Forbes *v.* McClatchey, 52 Nebr. 182, 71 N. W. 1012.

*New York.*— Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130 [*affirming* 1 E. D. Smith 463]; Clark *v.* Dales, 20 Barb. 42; Beals *v.* Terry, 2 Sandf. 127; Taylor *v.* Read, 4 Paige 561.

*Pennsylvania.*— Miller *v.* Kennedy, 31 Pittsb. Leg. J. N. S. 274.

*Wisconsin.*— Vogt *v.* Schienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756.

In California under the provisions of the civil code interest is not allowable in actions for breach of contract for failure to deliver goods. Elsworth *v.* Knowles, 8 Cal. App. 630, 97 Pac. 690.

**35.** Hewson-Herzog Supply Co. *v.* Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129; Shreve *v.* Brereton, 51 Pa. St. 175; Haff *v.* Pilling, 134 Fed. 294; Roper *v.* Johnson, L. R. 8 C. P. 167, 42 L. J. C. P. 65, 28 L. T. Rep. N. S. 296, 21 Wkly. Rep. 384; Brown *v.* Muller, L. R. 7 Exch. 319, 41 L. J. Exch. 214, 27 L. T. Rep. N. S. 272, 21 Wkly. Rep. 18; Barningham *v.* Smith, 31 L. T. Rep. N. S. 540. See also *infra*, IX, C, 10, c, (V), (B).

**36.** Vogt *v.* Scheienbeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756.

**37.** Erwin *v.* Harris, 87 Ga. 333, 13 S. E. 513 (where the buyer was to pay the freight); McCormick Harvesting Mach. Co. *v.* Jensen, 29 Nebr. 102, 45 N. W. 160.

**38.** Bullard *v.* Stone, 67 Cal. 477, 8 Pac. 17.

**39.** *Connecticut.*— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

the article is patented.[40] If, however, the article to be manufactured has no market value, the measure of damages is the difference between the contract price and what it would cost to have the goods manufactured elsewhere.[41]

(III) *Market Price Equal to Contract Price.* If the market price is the same as or less than the contract price, the buyer is not entitled to recover any actual damages for breach of the contract to deliver,[42] unless special damages are claimed and proved;[43] and the same rule applies where the contract expressly provides for a sale at the market price;[44] but there being a technical breach of the contract, the buyer is entitled to recover nominal damages.[45]

(IV) *Goods Without Market Value.* If the goods are of such a nature that they have no recognized market value, the general rule will not apply;[46] but the measure of damages is the difference between the agreed price and the reasonable value of the goods,[47] which may be determined by those experienced in the value of such goods,[48] or even by the advanced price at which the buyer had agreed to sell them.[49] In the case of goods to be manufactured, the cost of having the goods made elsewhere may be taken as the value.[50]

(V) *Determination of Amount* — (A) *In General.* The market price to be taken as a basis for estimating damages for non-delivery is the market price at the time and place of delivery,[51] and the actual market price prevailing,[52] and not the price obtained upon exceptional sales,[53] or as it might possibly have been affected by an attempt to purchase goods of the amount contracted for.[54] The

*Indiana.*— Frink *v.* Tatman, 36 Ind. 259, 10 Am. Rep. 19.

*Kansas.*— Field *v.* Kinnear, 4 Kan. 476.

*Nebraska.*— Russell *v.* Horn, etc., Mfg. Co., 41 Nebr. 567, 59 N. W. 901.

*New York.*— Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118].

*North Carolina.*— Clements *v.* State, 77 N. C. 142.

See 43 Cent. Dig. tit. "Sales," § 1194.

40. Frink *v.* Tatman, 36 Ind. 259, 10 Am. Rep. 19.

41. Weed *v.* Draper, 104 Mass. 28; E. W. Bliss Co. *v.* Buffalo Tin Can Co., 131 Fed. 51, 65 C. C. A. 289.

42. *Illinois.*— Buckley *v.* Holmes, 19 Ill. App. 530.

*Iowa.*— Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208.

*Kansas.*— York-Draper Mercantile Co. *v.* Luck, 6 Kan. App. 629, 49 Pac. 788.

*Louisiana.*— Marchesseau *v.* Chaffee, 4 La. Ann. 24.

*New York.*— Strauss *v.* Scott, 59 N. Y. Suppl. 826, 29 N. Y. Civ. Proc. 81.

*Wisconsin.*— Merriman *v.* McCormick Harvesting Mach. Co., 96 Wis. 600, 71 N. W. 1050.

*United States.*— Barnard *v.* Conger, 2 Fed. Cas. No. 1,001, 6 McLean 497.

43. See Buckley *v.* Holmes, 19 Ill. App. 530.

44. Wire *v.* Foster, 62 Iowa 114, 17 N. W. 174.

45. Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208, holding, however, that a failure of the court to charge that plaintiff is entitled to nominal damages is not reversible error.

46. Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055; Patterson *v.* Plummer, 10 N. D. 95, 86 N. W. 111; Davis *v.* Grand Rapids School-Furniture Co., 41 W. Va. 717, 24 S. E. 630; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

47. Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644; Bush *v.* Fisher, 85 Mo. App. 1.

**The value of bank-stock** is presumed to be the par value in the absence of evidence to the contrary. Patterson *v.* Plummer, 10 N. D. 95, 86 N. W. 111.

48. Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644.

49. McKay *v.* Riley, 65 Cal. 623, 4 Pac. 667.

**The profit** may be regarded as the measure of damages when the article has no market value. Equitable Gas-Light Co. *v.* Baltimore Coal-Tar, etc., Co., 65 Md. 73, 3 Atl. 108; France *v.* Gaudet, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 Wkly. Rep. 622.

50. Weed *v.* Draper, 104 Mass. 28; E. W. Bliss Co. *v.* Buffalo Tin Can Co., 131 Fed. 51, 65 C. C. A. 289.

51. See *infra*, IX, C, 10, c, (V), (B), (C).

52. Thompson *v.* Howes, 14 La. Ann. 45; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

**The manner of ascertaining the value of corporate stock,** which the seller had failed to deliver, is to show its market value at the time it should have been delivered, with interest, or, if it had no market value then, to show the value of the property of the concern, as compared with its liabilities, at that time, the burden being on the seller to show that the stock was worth its face value. Beaty *v.* Johnston, 66 Ark. 529, 52 S. W. 129.

53. Thompson *v.* Howes, 14 La. Ann. 45.

54. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

price is not necessarily to be determined by the market price of lots of the same size as that contracted for,[55] but if the purchase is at wholesale the wholesale market price should be taken.[56] The market price should also be determined with reference to goods of the kind and quality contracted for,[57] and if there are several grades of the article the market price to be considered is that of the particular grade that is the subject of the sale, and not that of the article generally;[58] but when the goods sold are an imitation of a brand of goods not then in the market, the market price of another equivalent brand may be taken into consideration.[59]

(B) *Time.* The market price should be taken as of the time of the breach of the contract,[60] and not within a reasonable time thereafter,[61] provided there is a market price at such time,[62] and it is not at this particular time unnaturally inflated or depressed by unlawful means.[63] If the time of delivery has been extended the market price will be taken as of the time to which the delivery was postponed,[64] or if postponed indefinitely, at a reasonable time after demanding performance.[65] So also if no exact time of delivery is fixed by the contract the market price should be fixed as at a reasonable time.[66] If delivery is to be made in instalments the measure of damages for the breach of any instalment is to be computed on the market price at the time such instalment should have been delivered.[67] Although notice has been given of an intention not to deliver, the

55. Faulkner *v.* Closter, 79 Iowa 15, 44 N. W. 208; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

56. Marshall *v.* Clark, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84; Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827.

57. Cole *v.* Cheovenda, 4 Colo. 17.

58. O'Gara *v.* Ellsworth, 85 N. Y. App. Div. 216, 83 N. Y. Suppl. 120.

59. Dean *v.* Van Nostrand, 101 N. Y. 621, 4 N. E. 134.

60. *Illinois.*— Sleuter *v.* Wallbaum, 45 Ill. 43.

*New Hampshire.*— Trask *v.* Hamburger, 70 N. H. 453, 48 Atl. 1087.

*New York.*—McManus *v.* American Woolen Co., 126 N. Y. App. Div. 68, 110 N. Y. Suppl. 680; Norton *v.* Wales, 1 Rob. 561.

*Texas.*— Taylor *v.* McFatter, (Civ. App. 1908) 109 S. W. 395.

*United States.*— Shepherd *v.* Hampton, 3 Wheat 200, 4 L. ed. 369.

**If delivery is to be made at a distant point** to a carrier for shipment to the buyer, and no delivery is made, the market price at the time when the buyer first receives notice of the failure to deliver to the carrier may be taken as the basis in estimating the damages. Boyd *v.* L. H. Quinn Co., 18 Misc. (N. Y.) 169, 41 N. Y. Suppl. 391 [*affirming* 17 Misc. 278, 40 N. Y. Suppl. 370].

**Delivery on demand.**— If the goods sold are to be delivered on demand the damages should ordinarily be based on the value at the time of demand, but if before demand the seller has broken the contract of sale by selling the goods to a third person the value at the time of such sale should be taken. Boothe *v.* Boothe, 1 A. K. Marsh. (Ky.) 355.

**On a sale of corporate bonds** the measure of damages for breach of the contract is the highest value of the bonds, within the time after the breach of the contract in which the purchaser may reasonably indemnify himself by the purchase of similar bonds. Turner *v.* Jackson, (Tenn. Ch. App. 1899) 63 S. W. 511.

61. Sleuter *v.* Wallbaum, 45 Ill. 43.

62. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130, holding that if there is no market price at the exact date of the breach, the market price within a reasonable time before and after may be considered.

63. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

64. Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579; Brown *v.* Sharkey, 93 Iowa 157, 61 N. W. 364; Hill *v.* Smith, 34 Vt. 535; Ogle *v.* Vane, L. R. 3 Q. B. 272, 9 B. & S. 182, 37 L. J. Q. B. 77, 16 Wkly. Rep. 463.

**If there is no agreement to extend the time of delivery** the fact that after the time for delivery there are repeated demands and promises to deliver does not extend the time of delivery, and the buyer in case of a final refusal may recover the difference between the contract price and the market value at the agreed time for delivery. Norton *v.* Wales, 1 Rob. (N. Y.) 561. See also Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255. But see McDermid *v.* Redpath, 39 Mich. 372, holding that where the seller repeatedly promises to deliver the market value is fixed as of the time of the last promise.

65. Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579.

66. York-Draper Mercantile Co. *v.* Lusk, 45 Kan. 182, 25 Pac. 646; Camors *v.* Madden, 36 La. Ann. 425; Kipp *v.* Wiles, 3 Sandf. (N. Y.) 585; Blydenburgh *v.* Welsh, 3 Fed. Cas. No. 1,583, Baldw. 331.

67. *Georgia.*— Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

*Minnesota.*— Hewson-Herzog Supply Co. *v.*

market price as of the date when the delivery should have been made will be taken, and not the market price on the date of such notice; [66] but if the goods were deliverable within a certain period at the seller's option the market price on the day when he gave plaintiff notice of his intention not to deliver is to be taken in computing the damages, that day being the time of default.[69]

(c) *Place.* The market price must be determined as of the place of delivery,[70] provided the goods have a market price at such place.[71] If there is no market price at the place of delivery the true value is to be shown by the best evidence possible,[72] and in such cases the market price at other places, plus the expense of transportation to the place of delivery, may be used as a basis for computation; [73] and if the market price in the vicinity of the place of delivery is shown to depend on the market price at a large, well known, and active market, the market price at such place plus transportation charges may be considered.[74] If the place of delivery and place of destination are different, the market price at the destination less the cost of transportation may be resorted to.[75]

Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129.

*Missouri.*— Cobb *v.* Whitsett, 51 Mo. App. 146.

*Pennsylvania.*— Shreve *v.* Brereton, 51 Pa. St. 175.

*United States.*— Haff *v.* Pilling, 134 Fed. 294; Missouri Furnace Co. *v.* Cochran, 8 Fed. 463.

*England.*— Roper *v.* Johnson, L. R. 8 C. P. 167, 42 L. J. C. P. 65, 28 L. T. Rep. N. S. 296, 21 Wkly. Rep. 384; Brown *v.* Muller, L. R. 7 Exch. 319, 41 L. J. Exch. 214, 27 L. T. Rep. N. S. 272, 21 Wkly. Rep. 18; Barningham *v.* Smith, 31 L. T. Rep. N. S. 540.

**68.** *Kansas.*— York-Draper Mercantile Co. *v.* Lusk, 45 Kan. 182, 25 Pac. 646.

*Massachusetts.*— P. P. Emory Mfg. Co. *v.* Salomon, 178 Mass. 582, 60 N. E. 377.

*Michigan.*— Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

*New York.*— Kipp *v.* Wiles, 3 Sandf. 585.

*England.*— Leigh *v.* Paterson, 2 Moore C. P. 588, 20 Rev. Rep. 552.

**69.** Kehler *v.* Einstman, 38 Ill. App. 91. See also Follansbee *v.* Adams, 86 Ill. 13. But see Goyert *v.* Stoner, 9 Ohio Dec. (Reprint) 125, 11 Cinc. L. Bul. 53, holding that if the buyer does treat such notice as a breach the damages should be estimated as of the last day of the period.

**70.** *Indiana.*— McCollum *v.* Huntington, 51 Ind. 229.

*Iowa.*— Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827. See also Myer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692.

*Kansas.*— Field *v.* Kinnear, 4 Kan. 476.

*New Hampshire.*—Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

*New York.*— Rice *v.* Manley, 5 Thomps. & C. 14.

*Texas.*— Steinlein *v.* S. Blaisdell, Jr., Co., (Civ. App. 1898) 44 S. W. 200.

*United States.*— Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

**71.** Rice *v.* Manley, 5 Thomps. & C. (N. Y.) 14; Steinlein *v.* S. Blaisdell, Jr., Co., (Tex. Civ. App. 1898) 44 S. W. 200; Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. (U. S.) 471, 23 L. ed. 71.

**72.** Steinlein *v.* S. Blaisdell, Jr., Co., (Tex. Civ. App. 1898) 44 S. W. 200.

**73.** *Alabama.*— Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

*California.*— Dabovich *v.* Emeric, 12 Cal. 171.

*Connecticut.*— Marshall *v.* Clark, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84.

*Iowa.*— Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827.

*Maine.*— Berry *v.* Dwinel, 44 Me. 255.

*Minnesota.*— Coxe *v.* Anoka Waterworks, etc., Co., 87 Minn. 56, 91 N. W. 265.

*Missouri.*— Cobb *v.* Whitsett, 51 Mo. App. 146.

*New Hampshire.*— Stevens *v.* Lyford, 7 N. H. 360.

*New York.*— O'Gara *v.* Ellsworth, 85 N. Y. App. Div. 216, 83 N. Y. Suppl. 120; Rice *v.* Manley, 5 Thomps. & C. 14.

*Texas.*— Woldert Grocery Co. *v.* Veltman, (Civ. App. 1904) 83 S. W. 224.

*Virginia.*— Nottingham Coal, etc., Co. *v.* Preas, 102 Va. 820, 47 S. E. 823.

*United States.*— Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. 471, 23 L. ed. 71.

**The price at the nearest available market** where the goods could be procured should be taken. Grand Tower Min., etc., Co. *v.* Phillips, 23 Wall. (U. S.) 471, 23 L. ed. 71.

**Goods not kept in stock.**— There may be a market value of a particular commodity at a particular place, where it is to be delivered after sale, whether it is kept there constantly in stock for sale or not. Coxe *v.* Anoka Waterworks, etc., Co., 91 Minn. 50, 97 N. W. 459.

**74.** Graham *v.* Frazier, 49 Nebr. 90, 68 N. W. 367.

**75.** *Alabama.*— Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

*Iowa.*— Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507.

*Kentucky.*— Campbellsville Lumber Co. *v.* Bradlee, 96 Ky. 494, 29 S. W. 313, 16 Ky. L. Rep. 572.

*Missouri.*— Vanstone *v.* Hopkins, 49 Mo. App. 386.

(D) *Quantity on Which Damages Will Be Computed.* If no fixed quantity of goods is contracted for, but the purchase is of a "car-load," damages should be computed on the amount usually contained in an ordinary car.[78] Although the contract fixes a minimum and maximum limit as to quantity, if the option is with the buyer he may recover for goods ordered but not delivered above the minimum limit.[77] Where a part of the goods is delivered the measure of damages as to the part undelivered is the difference between the contract price and the market value of such part; [78] and where delivery is to be made in monthly instalments, in measuring damages, if the market price is fluctuating and the delivery in each month is inadequate, a delivery in any month will not be applied to the deficiency of the previous month but on the quantity agreed on for the month in which it was delivered.[79]

(E) *Continuing Contracts.* Where the contract is a continuing one to supply all the goods the buyer may require during the year, the refusal of the seller to carry out the contract does not entitle the buyer to compute his damages on the basis of the highest market price after such refusal, but the price at which he could purchase them at any time within the period.[80] Damages are, however, properly assessed for the full period covered by the contract; [81] and if the contract was renewed by notice as provided therein, on the refusal of the seller to deliver after the renewal, the buyer may recover damages for the whole of the second period.[82]

(VI) *Effect of Payment of Price.* In some cases it has been held that the rule of damages for breach of contract in failing to deliver goods is not affected by the fact that the price has been paid in advance,[83] and that the measure of damages should be based upon the value of the goods at the time of the breach; [84]

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Jensen, 29 Nebr. 102, 45 N. W. 160.

*Oregon.*— Hockersmith *v.* Hanley, 29 Oreg. 27, 44 Pac. 497.

*Wisconsin.*— Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

The cost of transportation should be added to the contract price and the difference between the cost as thus ascertained and the market value will constitute the measure of damages. Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731; National Coal Tar Co. *v.* Malden, etc., Gaslight Co., 189 Mass. 234, 75 N. E. 625.

Where the seller ships the goods to the wrong destination the measure of damages is the difference between the market value at such place and the place to which they should have been shipped and the difference in freight. Wilbur Lumber Co. *v.* Oberbeck Bros. Mfg. Co., 96 Wis. 383, 71 N. W. 605.

76. Seefeld *v.* Thacker, 93 Wis. 518, 67 N. W. 1142.

77. Connersville Wagon Co. *v.* McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294, 3 L. R. A. N. S. 709.

78. Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132.

79. Gallun *v.* Seymour, 76 Wis. 251, 45 N. W. 115.

80. Dingley *v.* Oler, 11 Fed. 372.

81. Hercules Coal, etc., Co. *v.* Central Inv. Co., 98 Ill. App. 427.

82. Willock *v.* Crescent Oil Co., 184 Pa. St. 245, 39 Atl. 77.

83. Hill *v.* Smith, 32 Vt. 433.

84. *Alabama.*— Rose *v.* Bozeman, 41 Ala. 678.

*Colorado.*— Cofield *v.* Clark, 2 Colo. 101.

*Illinois.*— Smith *v.* Dunlap, 12 Ill. 184.

*Kentucky.*— Yoder *v.* Allen, 2 Bibb 338.

*Michigan.*— Trotter *v.* Tousey, 131 Mich. 624, 92 N. W. 544.

*Mississippi.*— Bickell *v.* Colton, 41 Miss. 368.

*Nebraska.*— Winside State Bank *v.* Lound, 52 Nebr. 469, 72 N. W. 486.

*New Jersey.*— Weiland *v.* Townsend, (Ch. 1888) 13 Atl. 672.

*North Carolina.*— Homesley *v.* Elias, 75 N. C. 564.

*Pennsylvania.*— Smethurst *v.* Woolston, 5 Watts & S. 106.

*Tennessee.*— McDonald *v.* Hodge, 5 Hayw. 85.

*Vermont.*— Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92; Hill *v.* Smith, 32 Vt. 433; Worthen *v.* Wilmot, 30 Vt. 555.

*Washington.*— Belden *v.* Krom, 34 Wash. 184, 75 Pac. 636.

See 43 Cent. Dig. tit. "Sales," § 1184.

On an exchange of cotton for the note of a third person who had failed, all the parties being ignorant of his failure at the time of making the contract, the rule of damages, no other damages having been proved, is the value of the note in money at the time of contract, at the stipulated price for the cotton to be received in exchange, with interest upon that value from the day the cotton was demanded; the note, which had been deposited in the registry of the court, to be at the disposal of defendant. Bicknall *v.* Waterman, 5 R. I. 43.

Payment by note.— Where payment is by

but in other cases it has been held that where the price is paid in advance the general rule does not apply,[85] and that the measure of damages is the highest market price between the date of the breach and the commencement of the action,[88] or between the breach and the time of the trial,[87] unless there has been an unreasonable delay in regard to the institution [88] or prosecution of the action,[89] or there are other special circumstances which would make such measure of damages inequitable and unjust.[90] In such actions interest may be allowed.[91]

(VII) *ABILITY TO OBTAIN GOODS ELSEWHERE.* On a failure of the seller to deliver the goods the buyer may purchase the goods elsewhere, and the measure of damages will be the difference between the contract price and the price paid to obtain the goods; [92] and in some cases, since it is the duty of the buyer to do

a note which is indorsed by defendant, the note not being paid by the buyer, the measure of damages is the difference between the contract price and the market price at the time of the breach. Moses *v.* Rasin, 14 Fed. 772. But see Serviss *v.* Stockstill, 30 Ohio St. 418, holding that where defendant agrees to transfer to plaintiff letters patent for an alleged invention, or in default thereof to redeliver to plaintiff his notes given in payment for such patent right, and defendant fails to procure such patent, and transfers plaintiff's notes to other parties, the measure of plaintiff's damages is the amount necessary for lifting his notes from the holders, and not the value of the letters patent.

**85.** West *v.* Pritchard, 19 Conn. 212; Kent *v.* Ginter, 23 Ind. 1; Clark *v.* Pinney, 7 Cow. (N. Y.) 681.

**88.** Gilman *v.* Andrews, 66 Iowa 116, 23 N. W. 291; Stapleton *v.* King, 40 Iowa 278; Davenport *v.* Wells, 3 Iowa 242; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474. *Compare* Welch *v.* Urbany, 112 Iowa 531, 84 N. W. 497, where the purchase-price was paid by a deed to land and a note for the balance.

**87.** *California.*— Maher *v.* Riley, 17 Cal. 415.

*Connecticut.*— West *v.* Pritchard, 19 Conn. 212.

*Indiana.*— Kent *v.* Ginter, 23 Ind. 1. See also Harvey *v.* Myer, 9 Ind. 391.

*New York.*— Clark *v.* Pinney, 7 Cow. 681.

*Texas.*— Gregg *v.* Fitzhugh, 36 Tex. 127; Cartwright *v.* McCook, 33 Tex. 612; Calvit *v.* McFadden, 13 Tex. 324; Randon *v.* Barton, 4 Tex. 289.

**88.** Stapleton *v.* King, 40 Iowa 278; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474.

**89.** Clark *v.* Pinney, 7 Cow. (N. Y.) 681.

If plaintiff delays the prosecution of the action beyond what would be reasonable, the rule of damages should be the value at the time of the commencement of the action (Clark *v.* Pinney, 7 Cow. (N. Y.) 681) or the value of the article at the time for delivery with interest on that amount (Heilbroner *v.* Douglass, 45 Tex. 402).

**90.** Heilbroner *v.* Douglass, 45 Tex. 402.

**91.** *California.*— Maher *v.* Riley, 17 Cal. 415.

*Colorado.*— Cofield *v.* Clark, 2 Colo. 101.

*Connecticut.*— Bush *v.* Canfield, 2 Conn. 485.

*Illinois.*— Tyler *v.* Bailey, 71 Ill. 34.

*Mississippi.*— Bickell *v.* Colton, 41 Miss. 368.

But see Harvey *v.* Myer, 9 Ind. 391.

**92.** *Delaware.*— Hartnett *v.* Baker, 4 Pennew. 431, 56 Atl. 672.

*District of Columbia.*— Armour *v.* Gundersheimer, 23 App. Cas. 210.

*Illinois.*— Christopher, etc., Architectural Iron, etc., Co. *v.* Yeager, 105 Ill. App. 126 [*affirmed* in 202 Ill. 486, 67 N. E. 166]; Hercules Coal, etc., Co. *v.* Central Inv. Co., 98 Ill. App. 427.

*Iowa.*— Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787.

*Minnesota.*— Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Hewson-Herzog Supply Co. *v.* Minnesota Brick Co., 55 Minn. 530, 57 N. W. 129.

*New Jersey.*— Stone *v.* West Jersey Ice Mfg. Co., 65 N. J. L. 20, 46 Atl. 696.

*New York.*— Miller *v.* Stern, 25 Misc. 690, 55 N. Y. Suppl. 765 [*affirming* 24 Misc. 769, 53 N. Y. Suppl. 1109]; Albert Gas Fixture Co. *v.* Kabat, 109 N. Y. Suppl. 737; Zabriskie *v.* Central Vermont R. Co., 13 N. Y. Suppl. 735 [*affirmed* in 131 N. Y. 72, 29 N. E. 1006].

*Pennsylvania.*— Morris *v.* Supplee, 208 Pa St. 253, 57 Atl. 566; Canavan *v.* Neeld, 189 Pa. St. 208, 42 Atl. 115; Willock *v.* Crescent Oil Co., 184 Pa. St. 245, 39 Atl. 77; Frey *v.* Lilly, 11 York Leg. Rec. 104.

*Texas.*— Hamilton *v.* Schumacker, (App. 1891) 15 S. W. 715.

*United States.*— Ralli *v.* Rockmore, 111 Fed. 874.

*England.*— Hinde *v.* Liddell, L. R. 10 Q. B. 265, 44 L. J. Q. B. 105, 32 L. T. Rep. N. S. 449, 23 Wkly. Rep. 650.

*Canada.*— Feehan *v.* Hallinan, 13 U. C. Q. B. 440.

See 43 Cent. Dig. tit. "Sales," § 1188.

**Allowance for shrinkage.**— In an action for breach of a contract to furnish plaintiff a certain quantity of ice on shipboard in Maine, for which plaintiff was to pay according to its then weight, a verdict for the difference between the agreed price and that which plaintiff was compelled to pay for other ice is excessive, where no allowance was made for fifteen per cent shrinkage by melting that would have occurred in shipment to plaintiff in New York, which would in effect have operated as an increase of the agreed price

all that he reasonably can to mitigate the loss, he should exercise reasonable diligence to obtain the goods elsewhere,[93] and is entitled to a reasonable time for so doing,[94] and to an allowance for the expenses reasonably and necessarily incurred in making the repurchase.[95] But this rule is ordinarily without practicable application where the goods have a market value at the time and place of delivery;[96] and if the case is one where the ordinary rule of damages would apply, it is not necessary that the buyer should actually go into the market and repurchase at the market price in order to recover the difference between the contract price and the market price,[97] since by so doing no advantage would accrue to the seller;[98] but if the buyer does repurchase and at a price less than the market price, he can recover only the actual damages sustained and not the difference between the contract price and the market price,[99] unless the expenses incurred in making the repurchase are sufficient to counterbalance the difference in price.[1] So also if there is a market price at the time of the breach, the buyer must repurchase promptly, and if he waits until the price has risen and repurchases at the higher price, he can only recover the difference between the contract price and the market price at the time of the breach.[2] If, however, the buyer cannot obtain the goods contracted for in the market, he may recover for his actual loss resulting therefrom,[3] as for a loss sustained by reason of the necessity of putting up with inferior

per ton. Clark *v.* Stewart, 127 N. Y. 676, 27 N. E. 1078 [*reversing* 1 N. Y. Suppl. 892].

**If the goods are deliverable in instalments** during a period of three months the buyer need not wait until the end of the period before purchasing elsewhere, but on default in an instalment may supply the deficiency. Benton Fuel Co. *v.* O. W. Shipman Co., 136 Mich. 523, 99 N. W. 746.

**Under continuing contract.**— Where coal is not delivered pursuant to contract, a party having the right to call for delivery from time to time need not go into the market and purchase all the coal required at one time, but may go into such market and purchase the same from time to time as the demands of his business may require, and so fix the measure of his damages. Delaware, etc., Canal Co. *v.* Mitchell, 113 Ill. App. 429 [*affirmed* in 211 Ill. 379, 71 N. E. 1026]. See also Long *v.* Conklin, 75 Ill. 32.

**93.** *Illinois.*— Armeny *v.* Madson, etc., Co., 111 Ill. App. 621.

*Missouri.*— Consolidated Coal Co. *v.* Mexico Fire-Brick Co., 66 Mo. App. 296.

*North Carolina.*— Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., 134 N. C. 574, 47 S. E. 116.

*Pennsylvania.*— Crompton *v.* Restein, 2 Wkly. Notes Cas. 446.

*Wisconsin.*— Kelley *v.* La Crosse Carriage Co., 120 Mich. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

**On a failure to deliver coal to a manufacturer** the buyer cannot suspend the operation of his plant and recover damages therefor if it appears that coal could be procured elsewhere. Bannon *v.* St. Bernard Coal Co., 39 S. W. 252, 18 Ky. L. Rep. 1050.

**94.** Love *v.* Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536.

**95.** Long Pole Lumber Co. *v.* Saxon Lime, etc., Co., 108 Va. 497, 62 S. E. 349, holding, however, that the amount of such expenses must be shown with reasonable certainty.

**96.** Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14.

**97.** Rau *v.* Trumbull, 68 Ill. App. 490; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14; Nottingham Coal, etc., Co. *v.* Preas, 102 Va. 820, 47 S. E. 823.

**98.** Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, 54 N. E. 14; Nottingham Coal, etc., Co. *v.* Preas, 102 Va. 820, 47 S. E. 823.

**99.** Theiss *v.* Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. Rep. 638; Arnold *v.* Blabon, 147 Pa. St. 372, 23 Atl. 575.

**1.** Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029 [*reversing* 40 Misc. 530, 82 N. Y. Suppl. 944].

**2.** Rosenthal *v.* Empire Brick, etc., Co., 123 N. Y. App. Div. 503, 108 N. Y. Suppl. 347 [*modifying* 54 Misc. 633, 104 N. Y. Suppl. 769].

**3.** *Connecticut.*— Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521.

*Illinois.*— Armeny *v.* Madson, etc., Co., 111 Ill. App. 621.

*Kentucky.*— Tradewater Coal Co. *v.* Lee, 68 S. W. 400, 24 Ky. L. Rep. 215.

*Michigan.*— Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

*Minnesota.*— Paine *v.* Sherwood, 21 Minn. 225.

*New York.*— Miller *v.* Stern, 25 Misc. 690, 55 N. Y. Suppl. 765 [*affirming* 24 Misc. 769, 53 N. Y. Suppl. 1109].

*Pennsylvania.*— Culin *v.* Woodbury Glass Works, 108 Pa. St. 220.

*Wisconsin.*— Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

*United States.*— Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.

*England.*— France *v.* Gaudet, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, 19 Wkly. Rep. 622.

**The fact that the buyer tried to buy the** goods sold and not delivered in the open

goods,[4] by the enhanced price he is obliged to pay in some other market,[5] and if he was obliged to pay retail prices he may base his damages on such prices.[6] The theory is that the measure of damages is the difference between the contract price and the price at which the goods could be obtained at the time of the breach,[7] or, if they could not be obtained in the market, the difference between the contract price and what the goods would have been worth to the buyer at the time he should have received them.[8] The mere fact that the goods could not be obtained at the place of delivery does not affect the measure of damages if they could be obtained in the open market.[9] The purchase of a superior grade of goods will not entitle plaintiff to measure the damages by the price of such goods, but he is limited to the price of the kind of goods contracted for;[10] but if he is forced to buy goods of a better grade by inability to procure goods of the grade contracted for, he may recover the enhanced price.[11] Although the seller has notified the buyer of an intention not to deliver the goods, the latter is not required to purchase elsewhere before the time of delivery,[12] unless he can do so at or below the contract price;[13] and if he does purchase before the time of delivery at a price greater than the contract price, he does so at his own risk, and if at the time of delivery the market price is lower than the price at which he has purchased he cannot recover the difference between the price paid and the contract price but merely the difference between the contract price and the market price at the time of delivery,[14] and this notwithstanding he purchased in good faith believing that the market price would go higher.[15]

(VIII) *SPECIAL DAMAGES* — (A) *In General.* In view of the general rule that the buyer is entitled to recover the actual loss he has sustained by reason of the breach of the contract,[16] the buyer is entitled to recover any special damages he has suffered which are the proximate and actual results of the failure to deliver,[17] and which may reasonably be considered as within the contemplation of the parties at the time of the contract,[18] by reason of a knowledge of the special facts and

market and found that none could be had takes his measure of damages out of the general rule. Schwartz *v.* Morris, 61 Misc. (N. Y.) 335, 113 N. Y. Suppl. 524.

Where a failure to deliver supplies necessitates a reduction of plaintiff's logging crew the reduction of the output is a proper element of damages. Skagit R., etc., Co. *v.* Cole, 2 Wash. 57, 25 Pac. 1077.

4. McHose *v.* Fulmer, 73 Pa. St. 365.

5. Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495.

6. Haskell *v.* Hunter, 23 Mich. 305.

7. Tradewater Coal Co. *v.* Lee, 68 S. W. 400, 24 Ky. L. Rep. 215; Dennis *v.* Leaton, 72 Mich. 586, 40 N. W. 753; Hassard-Short *v.* Hardison, 114 N. C. 482, 19 S. E. 728; Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139.

8. Anderson *v.* Savoy, 137 Wis. 44, 118 N. W. 217.

9. Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255. But see Armour *v.* Gundesheimer, 23 App. Cas. (D. C.) 210, holding that the buyer is not bound to go beyond the local market.

10. Cole *v.* Cheovenda, 4 Colo. 17.

11. St. Louis Consolidated Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565; Thomas Iron Co. *v.* Jackson Iron Co., 131 Mich. 130, 91 N. W. 137.

12. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788; Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Harrison *v.* Argyle Co., 128 N. Y. App. Div. 81, 112 N. Y. Suppl. 477.

13. See York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788.

14. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788; Missouri Furnace Co. *v.* Cochran, 8 Fed. 463. But see Follansbee *v.* Adams, 86 Ill. 13, holding that the buyer may elect to treat the contract as broken at the date of the notice and recover the difference between the contract price and the market price at the time of the notice whether he repurchased or not.

15. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629, 49 Pac. 788; Missouri Furnace Co. *v.* Cochran, 8 Fed. 463.

16. See *supra*, IX, C, 10, a.

17. *Colorado.*— Richner *v.* Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178.

*Kansas.*— Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

*Michigan.*— Petrie *v.* Lane, 58 Mich. 527, 25 N. W. 504.

*Missouri.*— Chalic *v.* Witte, 81 Mo. App. 84.

*New York.*— Parsons *v.* Sutton, 66 N. Y. 92.

*Vermont.*— Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92.

18. *Arkansas.*— Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052.

*Colorado.*— Richner *v.* Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178.

circumstances from which such special damages would arise;[19] but only such damages as are the natural and probable result of the breach can be recovered unless the special circumstances from which the special damages would arise were known to the seller at the time the contract was entered into.[20]

(B) *Goods Bought For Special Purpose.* Where the goods are bought for a special purpose the ordinary rule of damages does not apply;[21] but special damages arising out of the failure to deliver will be allowed if such purpose was known to the seller,[22] or his knowledge of the circumstances was such that he may be charged with notice,[23] and the damages due to the defeat of that purpose reasonably within the contemplation of the parties.[24] So if the purpose was known the buyer may recover for additional expenses incurred in carrying out the purpose,[25] or the damages actually sustained by him as a result of the breach.[26] Thus the buyer may recover for damages to tobacco due to failure to deliver apparatus for curing the crop,[27] damage to a crop due to failure to deliver fertilizer,[28] damages to stock due to a failure to deliver feed,[29] and damages to meat due to failure to deliver

*Illinois.*— Lapp *v.* Illinois Watch Co., 104 Ill. App. 255.

*Maine.*— South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

*Michigan.*— Cuddy *v.* Major, 12 Mich. 368.

*Missouri.*— Chalice *v.* Witte, 81 Mo. App. 84.

*New York.*— Schnitzler *v.* Kelly, 21 Misc. 327, 47 N. Y. Suppl. 146.

*Texas.*— Harris *v.* Springfield First Nat. Bank, (Civ. App. 1898) 45 S. W. 311.

*Vermont.*— Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92.

*Wisconsin.*— Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971; Lippert *v.* Saginaw Milling Co., 108 Wis. 512, 84 N. W. 831.

19. Lapp *v.* Illinois Watch Co., 104 Ill. App. 255. And see cases cited *supra*, notes 17, 18.

**Profits** as an element of special damages see *infra*, IX, C, 10, c, (VIII), (C).

20. Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; Union Foundry Works *v.* Columbia Iron, etc., Co., 112 Ill. App. 183; Lapp *v.* Illinois Watch Co., 104 Ill. App. 255; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Moffitt-West Drug Co. *v.* Byrd, 92 Fed. 208, 34 C. C. A. 351 [*reversing* 1 Indian Terr. 612, 43 S. W. 864].

**Knowledge acquired after the price was fixed** is not sufficient to render the seller liable for special damages. Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052.

**Mere notice to a seller of some interest or probable action** of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods. Globe Refining Co. *v.* Landa Cotton-Oil Co., 190 U. S. 540, 23 S. Ct. 754, 47 L. ed. 1171.

21. Benton *v.* Fay, 64 Ill. 417; Den Bleyker *v.* Gaston, 97 Mich. 354, 56 N. W. 763.

22. *Colorado.*— Richner *v.* Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178.

*Illinois.*— Union Foundry Works *v.* Columbia Iron, etc., Co., 112 Ill. App. 183; Ramsey *v.* Tully, 12 Ill. App. 463.

*Kansas.*— Halstead Lumber Co. *v.* Sutton, 46 Kan. 192, 26 Pac. 444.

*Massachusetts.*— Bartlett *v.* Blanchard, 13 Gray 429.

*Minnesota.*— Paine *v.* Sherwood, 21 Minn. 225.

*Missouri.*— Chalice *v.* Witte, 81 Mo. App. 84; Shouse *v.* Neiswaanger, 18 Mo. App. 236.

*North Carolina.*— Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

*Wisconsin.*— Buffalo Barb Wire Co. *v.* Phillips, 64 Wis. 338, 25 N. W. 208.

**But the mere fact that the seller knows** that the goods bought are to be used for a special purpose does not render him liable for any damages except such as might reasonably have been within the contemplation of the parties in view of the character of the goods and the ability of the buyer to obtain other like goods in the market. Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

23. Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

24. Chalice *v.* Witte, 81 Mo. App. 84; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 311.

25. Chalice *v.* Witte, 81 Mo. App. 84.

**Preliminary expenses.**—Where plaintiff purchased of defendant structural iron, stating that he wished to use it in a building he was going to erect, in an action for refusal to deliver the iron defendant is not chargeable with the amount expended by plaintiff in grading his lot to receive the iron, the matter not having been within defendant's contemplation. Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644.

26. Ramsey *v.* Tully, 12 Ill. App. 463; Shouse *v.* Neiswaanger, 18 Mo. App. 236; Hammer *v.* Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

27. Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

28. Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52.

29. Richner *v.* Plateau Live Stock Co., 44 Colo. 302, 98 Pac. 178.

ice.[30] Special damages for injury to the buyer's business cannot be recovered unless the seller knew of the special circumstances and purpose for which the goods were wanted;[31] but if he knew of the circumstances, and that a failure to deliver would cause a suspension of business in the buyer's factory damages therefor may be allowed,[32] but only for such time as was reasonably necessary for the buyer to supply himself elsewhere.[33] So if on the failure to deliver coal purchased for a particular purpose the buyer is forced to buy a more expensive grade, he is entitled to recover for the difference in price.[34]

(c) *Profits.* The general rule of damages for non-delivery of goods excludes the element of profits,[35] and there cannot be any recovery of profits which are merely prospective and speculative.[36] A recovery may be had, however, for expected profits which are fairly within the contemplation of the parties,[37] and where the parties may be considered to have contracted in reference to a resale.[38] So it has been held in some jurisdictions that where it is known at the time the contract was entered into that the goods are being bought for resale, the measure of damages for non-delivery is the expected profit,[39] especially where the goods

30. Hammer *v.* Schoenfelder, 47 Wis. 455, 2 N. W. 1129.

31. Buffalo Barb Wire Co. *v.* Phillips, 64 Wis. 338, 25 N. W. 208; Peace River Phosphate Co. *v.* Grafflin, 58 Fed. 550. And see Porter *v.* Woods, 3 Humphr. (Tenn.) 56, 39 Am. Dec. 153.

32. Benton *v.* Fay, 64 Ill. 417; Fessler *v.* Love, 48 Pa. St. 407; Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

**The money value of time lost by the workmen in the buyer's factory** is not a proper specific element of recovery in an action for damages for non-delivery. Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674, 102 Am. St. Rep. 971.

33. Benton *v.* Fay, 64 Ill. 417.

34. St. Louis Consol. Coal Co. *v.* Block, etc., Smelting Co., 53 Ill. App. 565.

35. Mirandona *v.* Burg, 51 La. Ann. 1190, 25 So. 982; South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110. But see Southern Sawmill Co. *v.* Ducote, 120 La. 1052, 46 So. 20.

36. *Alabama.*— Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

*Colorado.*— Jones *v.* Nathrop, 7 Colo. 1, 1 Pac. 435.

*Georgia.*— Piedmont Wagon Co. *v.* Hudgens, 4 Ga. App. 393, 61 S. E. 835.

*Illinois.*— Benton *v.* Fay, 64 Ill. 417; Walker *v.* Johnson, 116 Ill. App. 145; Lapp *v.* Illinois Watch Co., 104 Ill. App. 255.

*Iowa.*— Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787.

*Louisiana.*— Mirandona *v.* Burg, 51 La. Ann. 1190, 25 So. 982.

*North Carolina.*— D. A. Tompkins Co. *v.* Dallas Cotton Mills, 130 N. C. 347, 41 S. E. 938.

*Pennsylvania.*— Sherman *v.* Roberts, 1 Grant 261.

*Tennessee.*— Pettee *v.* Tennessee Mfg. Co., 1 Sneed 381; Porter *v.* Woods, 3 Humphr. 56, 39 Am. Dec. 153.

*United States.*— Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184.

*Canada.*— Feehan *v.* Hallinan, 13 U. C. Q. B. 440.

See 43 Cent. Dig. tit. "Sales," § 1196.

**Anticipated profits to be made by the subpurchaser** cannot be taken into consideration. Peterson *v.* Ayre, 13 C. B. 353, 76 E. C. L. 353.

37. *Kentucky.*—Gunther *v.* Taylor, 63 S. W. 439, 23 Ky. L. Rep. 536.

*Maine.*— South Gardiner Lumber Co. *v.* Bradstreet, 97 Me. 165, 53 Atl. 1110.

*Massachusetts.*— Johnston *v.* Faxon, 172 Mass. 466, 52 N. E. 539.

*New York.*— Heinemann *v.* Heard, 2 Hun 324, 4 Thomps. & C. 666 [*reversed* on other grounds in 62 N. Y. 449].

*Pennsylvania.*— Imperial Coal Co. *v.* Port Royal Coal Co., 138 Pa. St. 45, 20 Atl. 937.

*Rhode Island.*— Collins *v.* Lavelle, 19 R. I. 45, 31 Atl. 434.

*Wisconsin.*— Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513, 55 N. W. 854.

**Goods for holiday trade.**—Where the seller knew that the goods had been ordered for the retail holiday trade and were not otherwise valuable to the buyer, the buyer was entitled to recover the loss of profits arising from a failure to deliver as required by the contract. Pitman *v.* Bloch Queensware Co., (Tex. Civ. App. 1908) 106 S. W. 724.

38. Hubbard *v.* Rowell, 51 Conn. 423; Orr *v.* Farmers' Alliance Warehouse, etc., Co., 97 Ga. 241, 22 S. E. 937; Lapp *v.* Illinois Watch Co., 104 Ill. App. 255; Weatherford Mach., etc., Co. *v.* Tate, (Tex. Civ. App. 1908) 109 S. W. 406.

39. *Indiana.*— Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712.

*Kentucky.*— Denhard *v.* Hurst, 111 Ky. 546, 64 S. W. 393, 23 Ky. L. Rep. 789; Bluegrass Cordage Co. *v.* Luthy, 98 Ky. 583, 33 S. W. 835, 17 Ky. L. Rep. 1126.

*Louisiana.*— Barr *v.* Henderson, 105 La. 691, 30 So. 158.

*New York.*— More *v.* Knox, 52 N. Y. App. Div. 145, 64 N. Y. Suppl. 1101 [*affirmed* in 169 N. Y. 591, 62 N. E. 1098].

*Texas.*— Weatherford Mach., etc., Co. *v.* Tate, (Civ. App. 1908) 109 S. W. 406.

cannot be otherwise procured in the market,[40] the damages being limited, however, to the profits on orders actually received by plaintiff;[41] but on the other hand the rule has been laid down that a mere general knowledge that goods are bought for resale will not render profits an element of damages.[42] It is generally conceded that the buyer cannot recover the profits on a special contract of resale unless the existence of such contract was disclosed to the seller.[43] If, however, the seller knows that the purchaser has existing contracts for resale, and the contract is made in contemplation of such resale, the buyer may recover as damages the profits he loses by reason of the breach.[44] There can be no recovery of profits on special contracts of resale made after the contract of purchase.[45]

(D) *Expenses.* Expenses incurred by the buyer in anticipation of a performance by the seller of his contract are a proper element of damages,[46] such as expenses in making sales;[47] but the buyer cannot recover for any expenses which would have been incurred irrespective of whether the seller complied with the contract or not.[48]

**d. Delay in Delivery** — (I) *In General.* The measure of damages for a delay in the delivery of goods is generally the difference in their value at the time when they were delivered and when they should have been delivered.[49] The

*Virginia.*— Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723.

*Washington.*— Lilly *v.* Lilly, 39 Wash. 337, 81 Pac. 852.

**The net profit** after deducting expenses and interest on deferred payments is the measure of damages. Fred W. Wolf Co. *v.* Galbraith, 39 Tex. Civ. App. 351, 87 S. W. 390.

**40.** Armeny *v.* Madson, etc., Co., 111 Ill. App. 621; Loescher *v.* Deisterberg, 26 Ill. App. 520; Currie Fertilizer Co. *v.* Krish, 74 S. W. 268, 24 Ky. L. Rep. 2471; Tradewater Coal Co. *v.* Lee, 68 S. W. 400, 24 Ky. L. Rep. 215; F. W. Kavanaugh Mfg. Co. *v.* Rosen, 132 Mich. 44, 92 N. W. 788; Miller *v.* Stern, 25 Misc. (N. Y.) 690, 55 N. Y. Suppl. 765 [*affirming* 24 Misc. 769, 53 N. Y. Suppl. 1109].

**On a breach of contract to manufacture patented motors** for a buyer, he is entitled to recover for profits lost on cash offers to purchase motors for immediate delivery as well as on binding contracts for motors to be delivered in the future which he was unable to fill because of the breach of contract. Sun Mfg. Co. *v.* Egbert, 37 Tex. Civ. App. 512, 84 S. W. 667.

**41.** Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466.

**42.** Marshall *v.* Clark, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84; Daugherty *v.* Herndon, 27 Tex. Civ. App. 175, 65 S. W. 891; Thol *v.* Henderson, 8 Q. B. D. 457, 46 J. P. 422, 46 L. T. Rep. N. S. 483; Williams *v.* Reynolds, 6 B. & S. 495, 11 Jur. N. S. 973, 34 L. J. Q. B. 221, 12 L. T. Rep. N. S. 728, 13 Wkly. Rep. 940.

**43.** *Alabama.*— Alabama Chemical Co. *v.* Geiss, 143 Ala. 591, 39 So. 255.

*Connecticut.*— Crug *v.* Gorham, 74 Conn. 541, 51 Atl. 519.

*Georgia.*— Sanders *v.* Allen, 124 Ga. 684, 52 S. E. 884; Huggins *v.* Southeastern Lime, etc., Co., 121 Ga. 311, 48 S. E. 933; Wappoo Mills *v.* Commercial Guano Co., 91 Ga. 396, 18 S. E. 308.

*Illinois.*— Andrews *v.* Himrod, 37 Ill. App. 124.

*New York.*— Schnitzler *v.* Kelly, 21 Misc. 327, 47 N. Y. Suppl. 146.

**44.** *Connecticut.*— Hubbard *v.* Rowell, 51 Conn. 423.

*Illinois.*— Van Arsdale *v.* Rundel, 82 Ill. 63; Lapp *v.* Illinois Watch Co., 104 Ill. App. 255.

*Iowa.*— Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721, 102 N. W. 787.

*Kansas.*— Stewart *v.* Power, 12 Kan. 596.

*New York.*— Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487 [*affirming* 3 Thomps. & C. 368].

*Texas.*— Woldert Grocery Co. *v.* Veltman, (Civ. App. 1904) 83 S. W. 224; A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., (Civ. App. 1894) 27 S. W. 504; Alamo Mills Co. *v.* Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. 1097.

*Wisconsin.*— Cockburn *v.* Ashland Lumber Co., 54 Wis. 619, 12 N. W. 49.

*United States.*— Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.

*England.*— Borries *v.* Hutchinson, 18 C. B. N. S. 445, 11 Jur. N. S. 267, 34 L. J. C. P. 169, 11 L. T. Rep. N. S. 771, 13 Wkly. Rep. 386.

*Canada.*— Watrous *v.* Bates, 5 U. C. C. P. 366.

**45.** Penn *v.* Smith, 104 Ala. 445, 18 So. 38; Hamilton *v.* Schumacher, (Tex. 1891) 15 S. W. 715.

**46.** Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220; Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112, 61 S. W. 644.

**47.** Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421.

**48.** Pittman *v.* Bloch Queensware Co., (Tex. Civ. App. 1908) 106 S. W. 724.

**49.** *California.*— Ramish *v.* Kirschbraun, 98 Cal. 676, 33 Pac. 780.

*Massachusetts.*— Clement, etc., Mfg. Co. *v.* Meserole, 107 Mass. 362.

buyer is, however, entitled to recover such damages as are the natural and probable result of the delay and should reasonably have been within the contemplation of the parties.[50] Thus there may be a recovery for the damage to crops caused by a delay in the delivery of harvesting machinery,[51] or to raw material by delay in delivery of machinery for manufacturing,[52] and for actual and necessary expenses incurred by reason of the delay,[53] such as demurrage on a vessel incurred by reason of the seller's delay in delivering goods for loading,[54] increased cost of freight and insurance,[55] and expenses in taking orders for goods in anticipation of timely delivery.[56] Special damages may be recovered for the delay where the goods were bought for a special purpose and this fact was known to the seller;[57] and where it is known that the buyer is under contract to supply the goods to a third person under penalty for delay, the amount of such penalty is a proper element of damages as being within the contemplation of the parties;[58] but special damages for delay are not recoverable unless the seller knew of the special circumstances giving rise to such damages;[59] and so if the seller did not know that the goods were to be used by the buyer in filling a particular order, special damages arising from his inability to fill such order on account of a delay in delivery cannot be recovered.[60] The buyer cannot of course recover any damages that may have resulted from his own negligence,[61] or which might have been avoided by purchasing the goods elsewhere.[62]

(II) *Rental Value or Value of Use.* The rental value is regarded as the proper measure of damages for delay in delivery of material for a build-

*Minnesota.*— Whalon *v.* Aldrich, 8 Minn. 346.

*New York.*— Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205 [*affirmed* in 163 N. Y. 580, 57 N. E. 1108].

*North Carolina.*— Spiers *v.* Halstead, 74 N. C. 620.

**Purchase at wholesale.**— Where coal is sold at wholesale the measure of damages for failure to deliver it within the contract time is the difference between the purchase-price and the wholesale market price on the day it should have arrived. Stecker *v.* Weaver Coal, etc., Co., 116 N. Y. App. Div. 772, 102 N. Y. Suppl. 89 [*affirmed* in 192 N. Y. 556, 85 N. E. 1116].

**50.** Garfield, etc., Coal Co. *v.* Pennsylvania Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020; Paine *v.* Sherwood, 21 Minn. 225; Iowa Mfg. Co. *v.* B. F. Sturtevant Co., 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. N. S. 575.

**The damages are limited,** however, to such as may reasonably be considered to have been within the contemplation of the parties at the time of making the contract as the probable result of the delay. Lippert *v.* Saginaw Milling Co., 108 Wis. 512, 84 N. W. 831.

**Damages too remote.**— Where there is a delay in the delivery of boats which the buyer intended to use in shipping produce, a depreciation in the value of the produce at the market to which he intended to ship is too remote and speculative to form an element of damages. Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387.

**51.** Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487, 37 So. 38; Smeed *v.* Foord, 1 E. & E. 602, 5 Jur. N. S. 291, 28 L. J. Q. B. 178, 7 Wkly. Rep. 266, 102 E. C. L. 602.

**52.** Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

**53.** Brownell *v.* Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326; Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Chatham *v.* Jones, 69 Tex. 744, 7 S. W. 600.

**54.** Garfield, etc., Coal Co. *v.* Pennsylvania, Coal, etc., Co., 199 Mass. 22, 84 N. E. 1020; Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

**55.** Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127.

**56.** Thorn *v.* Morgan, etc., Co., 135 Mich. 51, 97 N. W. 43, but not expenses incurred in taking orders after it became apparent that delivery would not be made in time to fill such orders.

**57.** Paine *v.* Sherwood, 21 Minn. 225; Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574; Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. N. S. 155; Iowa Mfg. Co. *v.* B. F. Sturtevant Co., 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. N. S. 575.

**58.** Sutton *v.* Wanamaker, 95 N. Y. Suppl. 525; Iowa Mfg. Co. *v.* B. F. Sturtevant Co., 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. N. S. 575. See also Sawdon *v.* Andrew, 30 L. T. Rep. N. S. 23. *Compare* Elbinger Actien-Gesellschafft *v.* Armstrong, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211, 30 L. T. Rep. N. S. 871, 23 Wkly. Rep. 127.

**59.** Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052; Ledgerwood *v.* Bushnell, 128 Ill. App. 555.

**60.** Ledgerwood *v.* Bushnell, 128 Ill. App. 555.

**61.** Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380.

**62.** Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Thorn *v.* Morgan, etc., Co., 135 Mich. 51, 97 N. W. 43; Standard Lumber

ing,[63] furnishings for a hotel,[64] engines for a boat,[65] or machinery for a factory,[66] unless the property for any cause has no rental value, in which case the value of the use to the injured party for such time as he was deprived of it should be considered.[67] Delay in the delivery of a specific article such as a machine will entitle the buyer to recover the value of its use during the period of delay,[68] but ordinarily the damages in such case cannot be computed on the loss of profits, as such profits are too uncertain and speculative.[69] The rental value can be recovered only for a reasonable time sufficient to allow an opportunity to procure the articles elsewhere.[70]

(III) *PROFITS ON RESALE.* While merely prospective or speculative profits that might be obtained on resale cannot be an element of damages for delay in delivery,[71] or the profits on advance sales made if the seller had no notice that the purchase was to fill such sales,[72] yet if the seller knows the goods are purchased for resale under a particular contract, the profits will be the measure of damages.[73] So where the seller of material knew the buyer intended to manufacture and resell, profits on orders taken in expectation of prompt delivery may be recovered.[74]

**e. Delivery of Defective Goods.** Where the breach consists of the failure to deliver goods of the quality contracted for the buyer is entitled to compensation for the injury suffered because of the defects,[75] and generally the measure of damages is the difference between the value of the goods contracted for and the value of the goods delivered;[76] but if the defective goods are rejected by the buyer

Co. *v.* Miller, etc., Lumber Co., 21 Okla. 617, 96 Pac. 761.

**63.** Long *v.* Abeles, 77 Ark. 150, 91 S. W. 29; Liljengren Furniture, etc., Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306; Boyle *v.* Reeder, 23 N. C. 607.

**64.** Berkey, etc., Furniture Co. *v.* Hascall, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.

**65.** Brownell *v.* Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326, where the engines were for a pleasure boat to be used at a summer resort.

**66.** Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052; D. A. Tompkins Co. *v.* Dallas Cotton Mills, 130 N. C. 347, 41 S. E. 938; Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. N. S. 155.

**67.** Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. N. S. 155.

**68.** *District of Columbia.*— Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. 524.

*Illinois.*— Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519.

*Missouri.*— Wall *v.* St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659, 87 S. W. 574.

*New York.*— Griffin *v.* Colver, 22 Barb. 587 [*affirmed* in 16 N. Y. 489, 69 Am. Dec. 718].

*Texas.*— Dilley *v.* Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237.

*United States.*— Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816.

**69.** *Alabama.*— Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333.

*Michigan.*— Allis *v.* McLean, 48 Mich. 428, 12 N. W. 640; McKinnon *v.* McEwan, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458.

*New York.*— Griffin *v.* Colver, 22 Barb. 587 [*affirmed* in 16 N. Y. 489, 69 Am. Dec. 718].

*North Carolina.*— Boyle *v.* Reeder, 23 N. C. 607.

*Pennsylvania.*— Keystone Drilling Co. *v.* Stahl, 17 Pa. Co. Ct. 498.

*South Carolina.*— Standard Supply Co. *v.* Carter, 81 S. C. 181, 62 S. E. 150, 19 L. R. A. N. S. 155.

*United States.*— Charles E. Dustin Co. *v.* St. Petersburg Inv. Co., 126 Fed. 816.

*Canada.*— Pictou Iron Foundry, etc., Co. *v.* Archibald, 30 Nova Scotia 262.

But if the profits can be shown with certainty they may be taken as the measure of damages. Dilley *v.* Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237.

**70.** Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052.

**71.** Titley *v.* Enterprise Stone Co., 127 Ill. 457, 20 N. E. 71; Stecker *v.* Weaver Coal, etc., Co., 116 N. Y. App. Div. 772, 102 N. Y. Suppl. 89 [*affirmed* in 192 N. Y. 556, 85 N. E. 1116].

**72.** Stecker *v.* Weaver Coal, etc., Co., 116 N. Y. App. Div. 772, 102 N. Y. Suppl. 89 [*affirmed* in 192 N. Y. 556, 85 N. E. 1116].

**73.** Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670, 27 Wkly. Rep. 221.

**74.** Thorn *v.* Morgan, etc., Co., 135 Mich. 51, 97 N. W. 43.

**75.** Lilley *v.* Randall, 3 Colo. 298; Fish *v.* Proctor, 4 La. Ann. 562; Miller-Stone Mach. Co. *v.* Balfour, 25 Tex. Civ. App. 413, 61 S. W. 972; Maynard *v.* Maynard, 49 Vt. 297.

Injury to other property by the breaking of a defective machine is a proper element of damages. Cotton *v.* Good, 11 U. C. Q. B. 153.

**76.** *Connecticut.*— McAlpin *v.* Lee, 12 Conn. 129, 30 Am. Dec. 609.

*Florida.*— Merritt *v.* Wittich, 20 Fla. 27.

*Georgia.*— Seaboard Lumber Co. *v.* Cornelia

he is entitled to recover according to the value of the goods contracted to be delivered regardless of the value of the goods tendered,[77] the measure of damages being the difference between the contract price and the market value of the goods contracted for.[78] If the article sold is of such nature that the defect can be remedied the measure of damages is the cost of curing the defect or replacing the defective part.[79] Ordinarily the general rule applies that the damages must be confined to such as are the natural and probable result of the breach or fairly within the contemplation of the parties,[80] and must exclude any damages which are the result of negligence on the part of the buyer in regard to inspecting and using the goods delivered.[81] Where, however, the goods are bought to be used for a special purpose known to the seller and by reason of their defective character cannot be used for such purpose, the buyer may recover special damages,[82] such

Planing Mill Co., 122 Ga. 370, 50 S. E. 121; Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299.

*Illinois.*— Strawn *v.* Cogswell, 28 Ill. 457.

*Indiana.*— McAroy *v.* Wright, 25 Ind. 22.

*Kentucky.*— Wallace *v.* Knoxville Woolen Mills, 117 Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445; Singleton *v.* Kennedy, 9 B. Mon. 222.

*Louisiana.*— Peterkin *v.* Martin, 30 La. Ann. 894; Slaughter *v.* McRae, 3 La. Ann. 455; Clarke *v.* Lockhart, 10 Rob. 5; Stiff *v.* Nugent, 5 Rob. 217; Brown *v.* Duplantier, 1 Mart. N. S. 312.

*Maryland.*— Sloan *v.* Allegheny Co., 91 Md. 501, 46 Atl. 1003; New York Cent. Trust Co. *v.* Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; Camden Consol. Oil Co. *v.* Schlens, 59 Md. 31, 43 Am. Rep. 537.

*Massachusetts.*— Deutsch *v.* Pratt, 149 Mass. 415, 21 N. E. 1072; Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127. See also Day *v.* Mapes-Reeve Constr. Co., 174 Mass. 412, 54 N. E. 878.

*Minnesota.*— St. Anthony Lumber Co. *v.* Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274; Converse *v.* Burrows, 2 Minn. 229.

*Missouri.*— Missouri, etc., Coal Co. *v.* Consol. Coal Co., 127 Mo. App. 320, 105 S. W. 682.

*Nebraska.*— Holmes *v.* Boydston, 1 Nebr. 346.

*New York.*— Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118]; Hano *v.* Simons, 92 N. Y. Suppl. 337.

*North Dakota.*— Fargo Gas, etc., Co. *v.* Fargo Gas, etc., Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593.

*Ohio.*— Rogers *v.* Morse, 2 Ohio Dec. (Reprint) 31, 1 West. L. Month. 178.

*Oregon.*— Bump *v.* Cooper, 19 Oreg. 81, 23 Pac. 806.

*Pennsylvania.*— Sample *v.* Crumptey, 13 Leg. Int. 85; Granite Mills *v.* Keystone Oil Cloth Co., 15 Montg. Co. L. Rep. 36; Stetson *v.* Croskey, 6 Phila. 10.

*Tennessee.*— Hurley *v.* Buchi, 10 Lea 346.

*Texas.*— Stark *v.* Alford, 49 Tex. 260; Millerstone Mach. Co. *v.* Balfour, 25 Tex. Civ. App. 413, 61 S. W. 972; American Well Works *v.* De Aguayo, (Civ. App. 1899) 53 S. W. 350; Harris *v.* Springfield First Nat. Bank, (Civ. App. 1898) 45 S. W. 311; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10. See also Mobile Fruit, etc., Co. *v.* Boero, (Civ. App. 1900) 55 S. W. 361.

*Vermont.*— Brock *v.* Clark, 60 Vt. 551, 15 Atl. 175; Ladd *v.* Lord, 36 Vt. 194.

*Virginia.*— Eastern Ice Co. *v.* King, 86 Va. 97, 9 S. E. 506.

*Wisconsin.*— Fish *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

*United States.*— Florence Oil, etc., Co. *v.* Farrar, 119 Fed. 150, 55 C. C. A. 656; Forman *v.* Miller, 9 Fed. Cas. No. 4,940, 5 McLean 218.

See 43 Cent. Dig. tit. "Sales," § 1200.

77. Tompkins *v.* Lamb, 121 N. Y. App. Div. 366, 106 N. Y. Suppl. 6 [*affirmed* in 195 N. Y. 518, 88 N. E. 1133].

78. Rhea Thielens Implement Co. *v.* Racine Malleable, etc., Iron Co., 89 Ill. App. 463.

79. Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052; Novelty Iron Works *v.* Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518; Dilley *v.* Ratcliffe, 29 Tex. Civ. App. 545, 69 S. W. 237; Stillwell, etc., Mfg. Co. *v.* Phelps, 130 U. S. 520, 9 S. Ct. 601, 32 L. ed. 1035; Marsh *v.* McPherson, 105 U. S. 709, 26 L. ed. 1139; Benjamin *v.* Hillard, 23 How. (U. S.) 149, 16 L. ed. 518; North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584.

**Expenses incurred in attempting to repair defects** may be a proper element of damages. Lalor *v.* Burrows, 18 U. C. C. P. 321; Cotton *v.* Good, 11 U. C. Q. B. 153.

**The time necessarily lost** in having a defective machine made good is a proper element of damages, but the time lost in working on with it in a defective condition is not. Cumming *v.* Garside, 6 Whart. (Pa.) 299.

80. Rhea Thielens Implement Co. *v.* Racine Malleable, etc., Iron Co., 89 Ill. App. 463; Hawkins *v.* Dietz, 27 Misc. (N. Y.) 200, 57 N. Y. Suppl. 751; Bostock *v.* Nicholson, [1904] 1 K. B. 725, 9 Com. Cas. 200, 73 L. J. K. B. 524, 91 L. T. Rep. N. S. 626, 20 T. L. R. 342, 53 Wkly. Rep. 155.

81. Hawkins *v.* Dietz, 27 Misc. (N. Y.) 200, 57 N. Y. Suppl. 751.

82. Wallace *v.* Knoxville Woolen Mills, 117

as the expense of procuring other goods or other expenses necessarily incident to a delay in completing a contract for which the goods were intended;[83] but such special damages cannot be recovered where the seller had no knowledge of the purpose for which the goods were to be used or the special circumstances from which such special damages would arise.[84] So also the loss of anticipated profits on a resale of the defective goods is not an element of damages,[85] unless the seller knew that the buyer had an existing contract to resell at a profit and that the purchase was made to fulfil such contract.[86] Where seed sold for planting proves to be of a different kind or quality from that contracted for, it has been held that the measure of damages is the difference between the value of the crop produced and that which would have been produced if the contract had been complied with,[87] and that where fruit trees of a certain variety are contracted for, the measure of damages for failure to furnish such quality is the value which would have been added to the premises if they had been of the variety ordered;[88] but there can be no recovery of such consequential damages if the buyer knew of the difference before planting.[89] If the defect is an injury to the goods happening through the neglect of the seller between the sale and the delivery the measure of damages is the actual damage irrespective of the price paid.[90]

**11. Trial — a. In General.** As in other civil actions,[91] the determination of questions of law is for the court.[92] So also if there is no conflict either by reason of a lack of evidence or of admissions by one party the court may direct a verdict;[93] but if there is any evidence sufficient to warrant a submission to the jury,[94] and the evidence on any of the material issues is conflicting, the questions presented

Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445; Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500.

**Damages done to machinery** by defective yarn sold for the purpose of being manufactured into hosiery while the buyer is giving the yarn a fair trial may be recovered if ordinary care was used in making such trial. Wallace *v.* Knoxville Woolen Mills, 117 Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445.

**83.** Canton Lumber Co. *v.* Liller, 107 Md. 146, 68 Atl. 500.

**84.** Bushnell *v.* Geo. E. King Bridge Co., 140 Iowa 405, 118 N. W. 407; Bostock *v.* Nicholson, [1904] 1 K. B. 725, 9 Com. Cas. 200, 73 L. J. K. B. 524, 91 L. T. Rep. N. S. 626, 20 T. L. R. 342, 53 Wkly. Rep. 155.

**85.** *Illinois.*— Rhea Thielens Implement Co. *v.* Racine Malleable, etc., Iron Co., 89 Ill. App. 463.

*Iowa.*— Allison *v.* Vaughan, 40 Iowa 421.

*Kentucky.*— Moore *v.* Payne, 7 Dana 380.

*Michigan.*— Henderson Lumber Co. *v.* Stilwell, 130 Mich. 124, 89 N. W. 718.

*New York.*— Blanchard *v.* Ely, 21 Wend. 342, 34 Am. Dec. 250.

*Pennsylvania.*— Low *v.* Craig, 8 Pa. Super. Ct. 622.

**86.** Rhea Thielens Implement Co. *v.* Racine Malleable, etc., Iron Co., 89 Ill. App. 463; Guetzkow Bros. Co. *v.* Andrews, 92 Wis. 214, 66 N. W. 119, 53 Am. St. Rep. 909, 52 L. R. A. 209.

**87.** Passinger *v.* Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; Hoopes *v.* East, 19 Tex. Civ. App. 531, 48 S. W. 764. *Contra*, Hurley *v.* Buchi, 10 Lea (Tenn.) 346, holding that the buyer is only entitled to recover the difference between the value of the seed contracted for and that delivered, the difference in the value of the crops which would be produced by the different qualities or varieties of the seed being too speculative to be considered as the measure of damages.

**88.** Long *v.* Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. Rep. 443. See also Rogers *v.* Morse, 2 Ohio Dec. (Reprint) 31, 1 West. L. Month. 178.

**89.** Oliver *v.* Hawley, 5 Nebr. 439.

**90.** Gerard *v.* Prouty, 34 Barb. (N. Y.) 454 [*affirmed* in 41 N. Y. 619].

**91.** See, generally, Trial.

**92.** Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**Construction of contract** see *supra*, III, H

**93.** Bottom *v.* Croal, 89 Mo. App. 613; Losse *v.* Peoria Cordage Co., 116 Wis. 129, 92 N. W. 559.

**94.** Star Bottling Co. *v.* Cleveland Faucet Co., 128 Mo. App. 517, 109 S. W. 802; Bradshaw *v.* Terrill Foundry, etc., Co., (Tex. Civ. App. 1907) 104 S. W. 509.

**Sufficiency of evidence to warrant submission** to the jury see Underhill *v.* Buckman Fruit Co., 97 Md. 229, 54 Atl. 873; Lowry *v.* Saginaw Specialty Co., 128 Mich. 246, 87 N. W. 194; James *v.* Libby, 103 N. Y. App. Div. 256, 92 N. Y. Suppl. 1047 [*reversing* 44 Misc. 210, 88 N. Y. Suppl. 812]; Peck *v.* Will, etc., Co., 98 N. Y. App. Div. 628, 90 N. Y. Suppl. 272; Ideal Wrench Co. *v.* Garvin Mach. Co., 92 N. Y. App. Div. 187, 87 N. Y. Suppl. 41 [*affirmed* in 181 N. Y. 573, 74 N. E. 1118]; Sutton *v.* Wanamaker, 95 N. Y. Suppl. 525.

**Evidence warranting a submission** to the jury on the issue as to which party was in default see Monroe *v.* Reynolds, 47 Barb.

by such issues are for the determination of the jury.[95] Under such a state of the evidence it is a question for the jury whether there was an existing contract of sale,[96] whether the buyer was ready and willing to perform [97] and had made proper demand for delivery,[98] whether defendant was excused from performance by a rescission of the contract,[99] whether non-performance was excused under a "strike clause," [1] whether the time for delivery had expired [2] or had been waived or extended,[3] whether performance by defendant was prevented by the acts of plaintiff,[4] whether plaintiff had exercised reasonable diligence in obtaining the goods elsewhere,[5] whether the goods had a market value at the time and place fixed for delivery,[6] whether plaintiff had waived his claim for damages,[7] whether the acts of defendant were such as to entitle plaintiff to special damages for expenses incurred,[8] and whether plaintiff's use of the defective article was reasonably prudent.[9]

**b. Instructions.** The instructions should fairly present all the issues in the case,[10] correctly informing the jury as to the measure of damages,[11] and should conform to the evidence [12] and the pleadings,[13] and should not be misleading,[14] or ignore any of the terms of the contract,[15] or undertake to determine a question of fact proper for the consideration of the jury,[16] or on the other hand submit to the jury a question of law.[17] It is proper to refuse requested instructions which

(N. Y.) 574; Faddis *v.* Mason, 122 Fed. 410, 59 C. C. A. 27.

**95.** Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Hyde *v.* Payne, 10 N. Y. St. 837; Boyd *v.* Merchants, etc., Peanut Co., 25 Pa. Super. Ct. 199.

**96.** Eiseman *v.* Heine, 158 N. Y. 45, 52 N. E. 667 [*reversing* 2 N. Y. App. Div. 319, 37 N. Y. Suppl. 861].

**97.** Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Blalock *v.* Clark, 133 N. C. 306, 45 S. E. 642; Burbank *v.* Wood, 48 N. C. 30; Catlin *v.* Jones, 52 Oreg. 337, 97 Pac. 546.

**98.** Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

**99.** Fenn *v.* Dryfoos, 69 N. Y. App. Div. 112, 74 N. Y. Suppl. 528; Wilber *v.* Leonard, 56 Hun (N. Y.) 364, 10 N. Y. Suppl. 350.

**1.** Smokeless Fuel Co. *v.* Seaton, 105 Va. 170, 52 S. E. 829.

**2.** Cinque *v.* Cassani, 43 N. Y. App. Div. 383, 60 N. Y. Suppl. 92; Schull *v.* New Birdsall Co., 15 S. D. 8, 86 N. W. 654.

**3.** Cinque *v.* Cassani, 43 N. Y. App. Div. 383, 60 N. Y. Suppl. 92.

**4.** Brauer *v.* Macbeth, 138 Fed. 977, 71 C. C. A. 231.

**5.** Barnesville Mfg. Co. *v.* Love, 3 Pennew. (Del.) 569, 52 Atl. 267.

**6.** Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

**7.** Berry *v.* Haldeman, 111 Mich. 667, 70 N. W. 325.

**8.** Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380.

**9.** Tatro *v.* Brower, 118 Mich. 615, 77 N. W. 274.

**10.** *Delaware.*— Barnesville Mfg. Co. *v.* Love, 3 Pennew. 569, 52 Atl. 267.

*Iowa.*— Tuttle-Chapman Coal Co. *v.* Coaldale Fuel Co., 136 Iowa 382, 113 N. W. 827.

*Michigan.*— Durfee *v.* Newkirk, 83 Mich. 522, 47 N. W. 351.

*Oregon.*— Hockersmith *v.* Hanley, 29 Oreg. 27, 44 Pac. 497.

*Texas.*— Wolf *v.* Galbraith, 35 Tex. Civ. App. 505, 80 S. W. 648.

**11.** Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**12.** Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052; Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004; Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320; Ernest *v.* Waggoner, (Tex. Civ. App. 1908) 108 S. W. 495.

**When the evidence discloses a contract of purchase with intent to resell** an instruction on the theory that the purchaser was merely a broker and had never been employed by the seller is not justified. Neal *v.* Andrews, (Tex. Civ. App. 1900) 60 S. W. 459.

**Commenting on evidence.**— In an action by the buyer to recover damages for failure of the seller to deliver goods, evidence of a fire occurring in the buyer's store several months after the transaction is immaterial and a reference thereto in the instructions as an "important factor" in the termination of his business is prejudicial error. Talcott *v.* Freedman, 149 Mich. 577, 113 N. W. 13.

**13.** Fegan *v.* Duvall Seed, etc., Separator Co., 92 Mo. App. 236; Earnest *v.* Wagoner, (Tex. Civ. App. 1908) 108 S. W. 495.

**And an instruction which misstates the defense pleaded** by defendant constitutes a reversible error. Earnest *v.* Waggoner, (Tex. Civ. App. 1908) 108 S. W. 495.

**14.** Fisher *v.* Andrews, 94 Md. 46, 50 Atl. 407; Rugg *v.* Moore, 110 Pa. St. 236, 1 Atl. 320.

**15.** Schneider Granite Co. *v.* J. C. Fink Mineral Milling Co., 78 Mo. App. 622.

**16.** Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004; Riley-Wilson Grocer Co. *v.* Seymour Canning Co., 129 Mo. App. 325, 108 S. W. 628; Hyde *v.* Payne, 10 N. Y. St. 837.

**17.** Talcott *v.* Freedman, 149 Mich. 577, 113

are not justified by the evidence,[18] or which do not fairly present the issues,[19] or would require the court to determine as a matter of law a question of fact in issue;[20] and if the requested instructions do not properly present the issues, it is within the province of the court to modify them.[21]

**c. Verdict, Findings, and Judgment.** The verdict and findings must conform to the pleadings[22] and to the evidence,[23] and must be consistent with each other,[24] and sufficient to support the judgment rendered.[25] Where defendant admits the breach of contract but denies a liability for the amount claimed as damages, and there is a material issue as to such amount undisposed of, it is error to render judgment on the pleadings.[26] An action on the case based on the delivery of inferior goods is barred by a judgment in an action of covenant on the same state of facts.[27]

**12. Review.** A verdict rendered on conflicting evidence will not be disturbed on appeal if there is any evidence sufficient to support it;[28] but if there is no evidence upon which the verdict can be sustained, the judgment rendered thereon must be reversed.[29] The judgment will not be disturbed for an error that is not prejudicial either in the admission of evidence,[30] the giving of instructions,[31] or other ruling upon the trial.[32]

## X. Conditional Sales.[33]

**A. In General.** Any contract of sale by the terms of which the buyer is to do something as a condition on which the passing of the property depends is a conditional sale,[34] under which the property will not pass until the condition is fulfilled, although the goods have been actually delivered into the possession of the buyer.[35] The term "conditional sale" is, however, commonly applied to a class of transactions where by the terms of the contract the possession of the goods

N. W. 13, construction of letters relied on to modify contract.

**18.** Blakeslee *v.* Reinhold Mfg. Co., 153 Mich. 230, 117 N. W. 92; Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96; Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

**19.** Sloan *v.* Allegheny Co., 91 Md. 501, 46 Atl. 1003; Emack *v.* Hughes, 74 Vt. 382, 52 Atl. 1061.

**20.** Blakeslee *v.* Reinhold Mfg. Co., 153 Mich. 230, 117 N. W. 92.

**21.** Midland El. Co. *v.* Cleary, 77 Mo. App. 298.

**22.** Peterson Bros. *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

**23.** New York House Wrecking Co. *v.* Jarvis, 87 N. Y. Suppl. 464.

**24.** Miller-Stone Mach. Co. *v.* Balfour, 25 Tex. Civ. App. 413, 61 S. W. 972, holding that findings that the value of the property at the time of the breach was two thousand dollars and that a year later the value was two thousand five hundred dollars were inconsistent.

**25.** Temple *v.* Aders, 38 Ind. 506; Plano Mfg. Co. *v.* Kesler, 15 Ind. App. 110, 43 N. E. 925; Connor *v.* S. Blaisdell, Jr., Co., (Tex. Civ. App. 1901) 60 S. W. 890.

**26.** Black *v.* De Camp, 75 Iowa 105, 39 N. W. 215.

**27.** Cutler *v.* Cox, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152.

**28.** Murphy *v.* Boker, 28 How. Pr. (N. Y.) 251.

**29.** Schon-Klingstein Meat, etc., Co. *v.* Snow, 43 Colo. 538, 96 Pac. 182.

**30.** Jones *v.* Wilson, 104 N. C. 9, 10 S. E. 79.

**31.** Meyer Bros. Drug Co. *v.* Ward, 15 Tex. Civ. App. 287, 39 S. W. 330.

An instruction more favorable to the objecting party than he was entitled to is not ground for reversal. Gunther *v.* Taylor, 63 S. W. 439, 23 Ky. L. Rep. 536; Housding *v.* Solomon, 127 Mich. 654, 87 N. W. 57; Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584.

**32.** Gunther *v.* Taylor, 63 S. W. 439, 23 Ky. L. Rep. 536, holding that an error in striking out material averments in defendant's answer is cured and therefore not ground for reversal where the court admitted evidence to prove such allegations and instructed the jury thereon as though they had not been stricken out.

**33.** Agreement affecting passage of title see *supra*, VI, A, 2, A.

Evidence to aid construction see *supra*, III, G.

Retention of possession by seller see Fraudulent Conveyances, 20 Cyc. 536.

Taxation of property sold conditionally see Taxation.

**34.** See *supra*, I, C.

**35.** Norton *v.* Hummel, 22 Ill. App. 194. See *supra*, VI, A, 2, d, (I).

A conditional sale is one in which the vesting of the title is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent. Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

is delivered to the buyer, but the property in them is to remain in the seller until payment of the price.[36] The use of the term "conditional sales" in connection with this class of contracts is, by writers generally, regarded as inaccurate if not indeed misleading,[37] as the transaction is not strictly speaking a sale but an agreement to sell.[38] An accurate use of the term "conditional sale" would confine it to a sale defeasible on a condition subsequent,[39] as for example where by the contract the property passes, but the sale is subject to rescission by the seller for non-payment of the price,[40] or where the property passes subject to the right on the part of the buyer to revest the property in the seller by a return of the goods.[41]

**B. Nature of Conditional Sale.**[42] Conditional sales must of course be distinguished from those contracts by the terms of which the property shall not pass until payment, but payment is to be made on delivery.[43] These contracts are also to be distinguished from transactions by the terms of which the buyer has the privilege of returning unsold goods.[44] It is the distinguishing feature of the so-called conditional sale that the title to or property in the goods remains in the seller until payment of the price;[45] but the buyer is entitled to the posses-

**36.** Tiffany Sales (2d ed.), p. 133.

**Effect of custom and statutory provisions.** — The use of the term "conditional sale" in connection with the class of contracts described above, where, although there is delivery to the buyer, the title to the property is reserved by the seller until payment of the price is, however, so common that it may fairly be regarded as fixed by custom. Moreover in many states statutes have been enacted which provide that contracts of this character shall be void against subsequent purchasers from him unless filed or recorded. See *infra*, X, J, 4, a. And contracts within the purview of these statutes are loosely denominated conditional sales. See Conn. Gen. St. (1902) § 4864; N. Y. Laws (1897), c. 418, § 112 [Wadhams N. Y. Consol. Laws (1909), p. 3031, § 62].

**"Instalment contracts."** — From the fact that the price is often payable in instalments such contracts are frequently called instalment contracts. Rothbun *v.* Waters, 1 N. Y. City Ct. 36.

**37.** See 1 Mechem Sales, §§ 558–563, 584; Tiffany Sales (2d ed.), p. 133.

**38.** See *supra*, I, B, C. See also Sanders *v.* Keber, 28 Ohio St. 630, where a delivery of chattels to be paid for in future instalments, title to remain in the original owner until payment, whereupon the property should be transferred, was construed as a bailment with a contract for a future sale. But *compare* Forsman *v.* Mace, 111 La. 28, 35 So. 372.

**Where a buyer refused to accept the goods,** but agreed to store them and purchase the goods whenever it received satisfactory assurance that it would have no trouble over another order which was then outstanding, it was not a conditional sale, whereby the title to the goods would vest upon the happening of a specified contingency, but was more in the nature of an option to buy, leaving the title to the goods in the seller. W. Irving Schermerhorn Bros. Co. *v.* Herold, 81 Mo. App. 461.

**39.** 1 Mechem Sales, § 560; Munson *v.* Munson, 24 Conn. 115.

**40.** See *supra*, IV, B, 2, a.

**41.** See *supra*, VI, A, 2, f.

**42. Other transactions** distinguished see *infra*, X, C.

**43.** Wheeler, etc., Mfg. Co. *v.* Irish American Dime Sav. Bank, 105 Ga. 57, 31 S. E. 48; Plymouth Stove Foundry Co. *v.* Fee, 182 Mass. 31, 64 N. E. 419; Johnson-Brinkman Commission Co. *v.* Kansas City Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Harrison *v.* Williamson, 2 Edw. (N. Y.) 430. See also *supra*, VI, A, 5, c.

**But sales for cash on delivery** have in some instances been regarded as conditional sales until the condition as to payment was complied with. Evansville, etc., R. Co. *v.* Erwin, 84 Ind. 457; Budlong *v.* Cottrell, 64 Iowa 234, 20 N. W. 166; Tyler *v.* Freeman, 3 Cush. (Mass.) 261.

**Parol evidence** is not admissible to show that a written contract of absolute sale was intended to be conditional. Finnigan *v.* Shaw, 184 Mass. 112, 68 N. E. 35.

**When the evidence is conflicting,** it is for the jury whether an oral contract of sale of chattels was on condition that title should not pass until payment, and, if so, whether the condition was waived. Goslen *v.* Campbell, 88 Me. 450, 34 Atl. 265.

**Offer to sell.** — Where an owner of a horse delivers him to one desiring to purchase, with the understanding that the purchaser could have a few days to make a cash payment, and deliver a note for the balance, and that if the payment was not made at that time the intending purchaser should pay a fixed sum per day for the use of the horse meantime, it constitutes an offer to sell, and not a conditional sale. Davis *v.* Giddings, 30 Nebr. 209, 46 N. W. 425.

**44.** Furst *v.* Augusta Commercial Bank, 117 Ga. 472, 43 S. E. 728; Keller *v.* Strauss, 35 Misc. (N. Y.) 35, 70 N. Y. Suppl. 126.

**45.** *Alabama.* — McKimmie *v.* E. E. Forbes Piano Co., 155 Ala. 259, 46 So. 772; Riley

sion and use of the goods until default in payment.[46] The security retained by the seller is not a lien, but a reservation of title and the right to pursue the property in specie.[47] If the transaction shows an intent to pass the title as well as

*v.* Dillon, 148 Ala. 283, 41 So. 768; Bronson *v.* Russell, 142 Ala. 360, 37 So. 672; Warren *v.* Liddell, 110 Ala. 232, 20 So. 89.

*Arkansas.*— McRea *v.* Merrifield, 48 Ark. 160, 2 S. W. 780.

*California.*— Perkins *v.* Mettler, 126 Cal. 100, 58 Pac. 384; Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339.

*Connecticut.*— *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163.

*Delaware.*— Staunton *v.* Smith, (1906) 65 Atl. 593.

*Florida.*— Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412, 1 So. 59.

*Illinois.*— Fleury *v.* Tufts, 25 Ill. App. 101.

*Indiana.*— Forrest *v.* Hamilton, 98 Ind. 91.

*Iowa.*— Moline Plow Co. *v.* Braden, 71 Iowa 141, 23 N. W. 247; Thorpe *v.* Fowler, 57 Iowa 541, 11 N. W. 3.

*Massachusetts.*— De La Vergne Refrigerating Mach. Co. *v.* Hub Brewing Co., 175 Mass. 419, 56 N. E. 584.

*Minnesota.*— Keystone Mfg. Co. *v.* Casselius, 74 Minn. 115, 76 N. W. 1028; Minneapolis Harvester Works *v.* Hally, 27 Minn. 495, 8 N. W. 597.

*Montana.*— Bennett Bros. Co. *v.* Tam, 24 Mont. 457, 62 Pac. 780.

*Nebraska.*—Racine-Sattley Co. *v.* Meiner, 79 Nebr. 33, 114 N. W. 602, 79 Nebr. 32, 112 N. W. 321; Richardson Drug Co. *v.* Plummer, 56 Nebr. 523, 76 N. W. 1086.

*New York.*— Goldsmith *v.* Levin, 8 N. Y. St. 313.

*North Carolina.*— Whitlock *v.* Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. N. S. 1214; Frick *v.* Hilliard, 95 N. C. 117; Parris *v.* Roberts, 34 N. C. 268, 55 Am. Dec. 415; Ballew *v.* Sudderth, 32 N. C. 176.

*North Dakota.*— Morrison Mfg. Co. *v.* Fargo Storage, etc., Co., 16 N. D. 256, 113 N. W. 605.

*Pennsylvania.*— McCullough *v.* Willey, 192 Pa. St. 176, 43 Atl. 999; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121.

*Utah.*— Freed Furniture, etc., Co. *v.* Sorensen, 28 Utah 419, 79 Pac. 564, 107 Am. St. Rep. 731.

*Washington.*— Page *v.* Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924; Edison General Electric Co. *v.* Walter, 10 Wash. 14, 38 Pac. 752.

*West Virginia.*— Huffard *v.* Akers, 52 W. Va. 21, 43 S. E. 124.

*United States.*— Bierce *v.* Hutchins, 205 U. S. 340, 27 S. Ct. 524, 51 L. ed. 828; Mishawaka Woolen Mfg. Co. *v.* Smith, 158 Fed. 885; Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435; Black Diamond Coal Min. Co. *v.* The H. C. Grady Co., 87 Fed. 232. See also Pontiac Buggy Co. *v.* Skinner, 158 Fed. 858; *In re* Morris, 156 Fed. 597.

**Adjustment of account.**— The fact that the parties to a conditional sale note determined and adjusted their accounts, a new note being given for the balance due, but containing the same reservation of title and provisions for enforcement, does not render the transaction an absolute sale with security for the debt. Freed Furniture, etc., Co. *v.* Sorensen, 28 Utah 419, 79 Pac. 564, 107 Am. St. Rep. 731.

**Insertion of a provision in the warranty of title clause** of a bill of sale that the warranty shall not be in force until the purchase-price is paid in full does not operate to change the character of the instrument, and convert it into a contract of conditional sale. Tagg *v.* Behring, 7 Pa. Cas. 318, 10 Atl. 782.

**Purchase for another.**—Where it was agreed that A should purchase some mules for B, the title to remain in A until paid for, and A bought the mules, but a bill of sale was made directly from the owner to B, it was not a conditional sale from A to B, and A had no title whatever to the mules. Ferguson *v.* Hetherington, 39 Ark. 438.

**Retention of title by agent.**— A contract reciting that the buyers therein had received from the agent of the seller certain property on payment of one hundred and twenty dollars cash, and an agreement to pay the balance in monthly instalments, evidenced by notes, and providing that on failure to pay either of the notes, or an attempt to remove or dispose of the property without the consent of the seller's agent, the agent might retake it wherever found, in which event all payments made thereon should be retained as rent therefor, and that the title to the property was retained by the agent for the seller until a full compliance with the terms of the agreement, is a conditional sale. Bronson *v.* Russell, 142 Ala. 360, 37 So. 672.

**Where the contract of sale of a piano** showed a reservation in the seller of a right to retake possession of the property on the buyer's failure to pay as agreed, it was in effect a reservation of title in the seller. Walters *v.* Americus Jewelry, etc., Co., 114 Ga. 564, 40 S. E. 803.

**The burden is on the seller** to show that the sale was conditional. Randolph *v.* Randolph, 3 Munf. (Va.) 99. See *infra*, X, L, 1, c, (VI).

**It is a question for the jury** whether a sale of goods is absolute or conditional. Sawyer *v.* Spofford, 4 Cush. (Mass.) 598; Richey *v.* Burnes, 83 Mo. 362; H. B. Claflin Co. *v.* Elliott Furniture Co., 58 N. J. L. 379, 34 Atl. 259; Crabtree *v.* Segrist, 3 N. M. 278, 6 Pac. 202; Kraemer *v.* Sieburg, 2 N. Y. Suppl. 393. And see Creegan *v.* Robertson, 74 Hun (N. Y.) 22, 26 N. Y. Suppl. 326.

**46.** Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Staunton *v.* Smith, (Del. 1906) 65 Atl. 593. See also Crimp *v.* McCormick Constr. Co., 71 Fed. 356, 18 C. C. A. 70.

**47.** Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Barton *v.* Groseclose, 11 Ida.

the possession with a mere reservation of a lien, the sale is not conditional but absolute.[48] The transaction is not the less a conditional sale because the promise to pay is absolute,[49] or notes for the price were given,[50] so long as they are not given in payment,[51] or because, on default, a sale of the property is to be made and any surplus paid to the buyer,[52] although this is regarded as a strong indication that an absolute sale and mortgage back is intended.[53]

**C. Distinguished From Other Transactions**[54] — **1. In General.** Contracts of conditional sale may take such form as the parties choose to give them, but the legal aspect must depend not upon the name which the parties have applied to the contract, nor upon the form of the instrument, but upon the intention as evidenced by the entire contract.[55]

227, 81 Pac. 623; Black Diamond Coal-Min. Co. *v.* The H. C. Grady, 87 Fed. 232.

**48.** Smith *v.* Prince, 14 Conn. 472; Byam *v.* Hampton, 57 Hun (N. Y.) 585, 10 N. Y. Suppl. 372; Frick *v.* Hilliard, 95 N. C. 117; Montgomery *v.* Collins, (Tex. Civ. App. 1895) 32 S. W. 1067; Black Diamond Coal-Min. Co. *v.* The H. C. Grady, 87 Fed. 232. See also Chicago Cottage Organ Co. *v.* Crambert, 78 Ohio St. 149, 84 N. E. 788; Chamberlain *v.* Dickey, 31 Wis. 68; Pontiac Buggy Co. *v.* Skinner, 158 Fed. 858.

**Enforcement of lien upon confirmation of contract as absolute sale** see *infra*, X, L, 1, e.

**49.** Perkins *v.* Mettler, 126 Cal. 100, 58 Pac. 384; Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285.

**But in Colorado** it has been held that the feature distinguishing conditional sales is that in such transactions there is no absolute obligation to pay the price and that optional payment is essential to a conditional sale. Andrews *v.* Colorado Sav. Bank, 20 Colo. 313, 36 Pac. 902; Tufts *v.* Brach, 8 Colo. App. 33, 44 Pac. 771; Cripple Creek First Cong. Church *v.* Grand Rapids School Furniture Co., 15 Colo. App. 46, 60 Pac. 948.

**Consideration.**— A contract of conditional sale, giving the possession and use of the goods to the buyer while title remains in the seller until full payment, affords a sufficient consideration for the buyer's absolute promise to pay the agreed price. Kilmer *v.* Money Weight Scale Co., 36 Ind. App. 568, 76 N. E. 271.

**50.** Triplett *v.* Mansur, etc., Implement Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339. See also McKimmie *v.* E. E. Forbes Piano Co., 155 Ala. 259, 46 So. 772; Racine Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602, 79 Nebr. 32, 112 N. W. 321.

**51.** Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160. See also Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602, 79 Nebr. 32, 112 N. W. 321.

**52.** Perkins *v.* Mettler, 126 Cal. 100, 58 Pac. 384; Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448; Herbert *v.* Rhodes-Burford Furniture Co., 106 Ill. App. 583; Bradley *v.* Benson, 93 Minn. 91, 100 N. W. 670; Keystone Mfg. Co. *v.* Cassellius, 74 Minn. 115, 76 N. W. 1028. But see Knowles Loom Works *v.* Knowles, (Del. 1906) 65 Atl. 26.

**Resale of part of goods by buyer.**— A contract of sale which provides that title to the property shall remain in the seller until payment of the price, except as to such as is resold, the proceeds of which shall at once become the property of the seller, is one of conditional, and not of absolute, sale, and its character is not changed by a provision that in case of default the seller may retake possession of all the property unsold and the proceeds of that sold, and that the latter shall be reduced to cash and applied on the purchaser's indebtedness, any surplus being paid to the purchaser. Monitor Drill Co. *v.* Mercer, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. N. S. 1035. *Compare* Mishawaka Woolen Mfg. Co. *v.* Smith, 158 Fed. 885.

**53.** Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Palmer *v.* Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; Knowles Loom Works *v.* Knowles, (Del. 1906) 65 Atl. 26.

**54.** Sale distinguished from other transactions see *supra*, I, D.

**Subscription to corporate stock distinguished** see CORPORATIONS, 10 Cyc. 416.

**55.** *California.*— Harron *v.* Wilson, 4 Cal. App. 488, 88 Pac. 512.

*Georgia.*— Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373.

*Kentucky.*— Greer *v.* Church, 13 Bush 430. See also Jones *v.* Jones, 112 S. W. 650, 33 Ky. L. Rep. 1036.

*Maine.*— Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250.

*Mississippi.*— Dederick *v.* Wolfe, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283.

*Missouri.*— A. A. Cooper Wagon, etc., Co. *v.* Wooldridge, 98 Mo. App. 648, 73 S. W. 724.

*Nebraska.*— Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602, 79 Nebr. 32, 112 N. W. 321.

*New York.*— Hughes *v.* Harlam, 166 N. Y. 427, 60 N. E. 22.

*North Dakota.*— Morrison Mfg. Co. *v.* Fargo Storage, etc., Co., 16 N. D. 256, 113 N. W. 605.

*Tennessee.*— Cowan *v.* Singer Mfg. Co., 92 Tenn. 376, 21 S. W. 663.

*United States.*— Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003. See also *In re* Morris, 156 Fed. 597.

See 43 Cent. Dig. tit. "Sales," § 1324 *et seq.*

**2. Bailment In General.**[56] A conditional sale is to be distinguished from a bailment, in which the bailee receives possession of the goods for a particular purpose upon an agreement to redeliver them to the bailor after the purpose has been fulfilled,[57] while in a conditional sale possession is delivered upon an agreement to sell and buy, the property in the goods to remain in the seller until payment of the price.[58]

**3. Bailment With Option to Buy.**[59] A bailment with an option on the part of the bailee to buy is merely a bailment.[60] If, however, the bailment is coupled

**56. Sale distinguished from bailment** see *supra*, I, D, 4.

**57.** Baker *v.* Priebe, 59 Nebr. 597, 81 N. W. 609; Rumpf *v.* Barto, 10 Wash. 382, 38 Pac. 1129; *In re* Angeny, 151 Fed. 959; Union Stock-Yards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 7 C. C. A. 660.

**58.** *Connecticut.*— Tomlinson *v.* Roberts, 25 Conn. 477, 68 Am. Dec. 367.

*Kentucky.*— Vaughn *v.* Hopson, 10 Bush 337.

*Maine.*— Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

*New York.*— Boon *v.* Moss, 70 N. Y. 465.

*North Carolina.*— Hamilton *v.* Highlands, 144 N. C. 279, 56 S. E. 929.

*North Dakota.*— Morrison Mfg. Co. *v.* Fargo Storage, etc., Co., 16 N. D. 256, 113 N. W. 605.

*Pennsylvania.*— Ott *v.* Sweatman, 166 Pa. St. 217, 31 Atl. 102 [*affirming* 3 Pa. Dist. 573, 15 Pa. Co. Ct. 97]; Dearborn *v.* Raysor, 132 Pa. St. 231, 20 Atl. 690; Forrest *v.* Nelson, 108 Pa. St. 481; Brunswick, etc., Co. *v.* Hoover, 95 Pa. St. 508, 40 Am. Rep. 674; Stadtfeld *v.* Huntsman, 92 Pa. St. 53, 37 Am. Rep. 661; Martin *v.* Mathiot, 14 Serg. & R. 214, 16 Am. Dec. 491; Babb *v.* Clemson, 10 Serg. & R. 419, 13 Am. Dec. 684; Clow *v.* Woods, 5 Serg. & R. 275, 9 Am. Dec. 346; Briggs Carriage Co. *v.* Parry Mfg. Co., 30 Pittsb. Leg. J. N. S. 95. But see Patterson *v.* Stevenson, 2 Pearson 205.

*Texas.*— Eason *v.* De Long, 38 Tex. Civ. App. 531, 86 S. W. 347.

*Vermont.*— Page *v.* Edwards, 64 Vt. 124, 23 Atl. 917.

*United States.*— *In re* Tice, 139 Fed. 52.

See 43 Cent. Dig. tit. "Sales," § 1325.

But see Whitney *v.* McConnell, 29 Mich. 12.

**Whatever it may be called,** and however hedged about with conditions, where there is a positive engagement on the part of the so-called bailee or lessee to pay a stipulated sum, upon which payment, without more, the goods are to be his, and a bill of sale to be executed therefor, this is nothing but a sale, and not a bailment, which the trustee in bankruptcy, representing creditors, may assert. *In re* Morris, 156 Fed. 597.

**Agreement to return — Bailment.**—A piano was delivered by a dealer to a customer under a written agreement for a definite term at a fixed rental, payable in instalments on days certain. The lease was terminable at any time at the will of the lessors, with an additional provision that, if the instalments of rent should be promptly paid as they became due until they amounted to a sum stated, the piano should become the property of the lessee. The lease contained an express covenant on the part of the lessee to return the property to the lessors on demand. There was this further provision: "All payments made are for rent and use of instrument and do not in any way apply to purchase." It was held that the contract was a bailment, and not a conditional sale. Painter *v.* Snyder, 22 Pa. Super. Ct. 603.

**A conditional sale may be converted into a bailment** on default. Thus in Wire Book-Sewing Mach. Co. *v.* Crowell, 4 Pa. Cas. 499, 8 Atl. 22, A agreed to purchase certain patented machines from B, and gave notes for the same, which he agreed to pay. B agreed to deliver a bill of sale for the machines, and a license to use them, upon payment of the notes at maturity. In the meantime the machines were to be delivered to A, but to remain the property of B, pending the payment of the notes in full, and, in the event of default, sums paid on account were to be treated as rent for the machines. C, a judgment creditor of A, levied on the machines while they were in the latter's possession, and subsequently bought them in at sheriff's sale. It was held that this was a case of conditional sale on credit, followed by a delivery of possession, with a provision to convert the sale into a bailment if the price should not be paid, and that this provision was not sufficient to convert the contract into a bailment *ab initio*.

**Possession on trial — Bailment.**— Where plaintiff entered into a written contract to sell a traction engine to P, in which it was stipulated that the latter, on the delivery of the engine, should execute notes for the purchase-price, secured by a mortgage on the engine, and that title should not pass till such settlement was concluded and accepted by plaintiff, and an agent of plaintiff, who had no power to waive the terms of the agreement, allowed P to take possession of the engine before such settlement, for the purpose of testing it, this was not a conditional sale, but merely a bailment. Gaar *v.* Nichols, 115 Iowa 223, 88 N. W. 382.

**59. Sale distinguished from bailment with option to buy** see *supra*, I, D, 4, d.

**60.** *Alabama.*— McCall *v.* Powell, 64 Ala. 254.

*Connecticut.*— Lambert Hoisting Engine Co. *v.* Carmody, 79 Conn. 419, 65 Atl. 141.

*Georgia.*— Evans *v.* Napier, 111 Ga. 102, 36 S. E. 426.

with an agreement by which the bailee is bound to buy, the transaction will be deemed a conditional sale.[61]

**4. Instrument in Form of Lease — a. In General.** In many cases instruments designated as and in the form of leases, and usually providing for the payment of rent and stipulating that in default of payment the lessor may retake the goods, but that on payment the property in the goods shall pass to the lessee, have been

*Iowa.*— Donnelly *v.* Mitchell, 119 Iowa 432, 93 N. W. 369.

*Massachusetts.*— Fairbank *v.* Phelps, 22 Pick. 535.

*Minnesota.*— Bjork *v.* Bean, 56 Minn. 244, 57 N. W. 657.

*Montana.*— Miles *v.* Edsall, 7 Mont. 185, 14 Pac. 701.

*Nebraska.*— McClelland *v.* Scroggin, 35 Nebr. 536, 53 N. W. 469.

*New York.*— Neidig *v.* Eifler, 18 Abb. Pr. 353.

*Pennsylvania.*— Cincinnati Equipment Co. *v.* Strang, 215 Pa. St. 475, 64 Atl. 678; Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774; Lippincott *v.* Scott, 198 Pa. St. 283, 47 Atl. 1115, 82 Am. St. Rep. 801; Brown *v.* Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. Rep. 780; Ditman *v.* Cottrell, 125 Pa. St. 606, 17 Atl. 504; Wheeler, etc., Mfg. Co. *v.* Heil, 115 Pa. St. 487, 8 Atl. 616, 2 Am. St. Rep. 575; Kaut *v.* Kessler, 114 Pa. St. 603, 7 Atl. 586; Edwards' Appeal, 105 Pa. St. 103; Dando *v.* Foulds, 105 Pa. St. 74; Christie's Appeal, 85 Pa. St. 463; Enlow *v.* Klein, 79 Pa. St. 488; Crist *v.* Kleber, 79 Pa. St. 290; Becker *v.* Smith, 59 Pa. St. 469; Henry *v.* Patterson, 57 Pa. St. 346; Rowe *v.* Sharp, 51 Pa. St. 26; Chamberlain *v.* Smith, 44 Pa. St. 431; Cope *v.* Singer Mfg. Co., 1 Mona. 650; Clark *v.* Jack, 7 Watts 375; Myers *v.* Harvey, 2 Penr. & W. 478, 23 Am. Dec. 60; Wertz *v.* H. W. Collender Co., 6 Pa. Cas. 361, 9 Atl. 331; Harris *v.* Shaw, 17 Pa. Super. Ct. 1; Stimpson Computing Scale Co. *v.* Schetrompf, 13 Pa. Super. Ct. 377; Lippincott *v.* Holden, 11 Pa. Super. Ct. 15; Jones *v.* Wands, 1 Pa. Super. Ct. 269, 38 Wkly. Notes Cas. 173; Wieder *v.* Roeschman, 13 Pa. Co. Ct. 94; Tufts *v.* Spengler, 3 Del. Co. 266; Jones *v.* Maxwell, 1 Lack. Leg. N. 191; Yinger *v.* Clark, 17 Lanc. L. Rev. 377, 7 North. Co. Rep. 298; Heizmann *v.* Rank, 2 Woodw. 469. *Compare* Lehigh Co. *v.* Field, 8 Watts & S. 232.

*United States.*— Case *v.* L'Oeble, 84 Fed. 582.

**Agreement for future sale.**— Where R, having contracted to write a certain book for plaintiff on a royalty, proposed that plaintiff should "loan" him certain reports to be used in preparation of the work, which, on completion of the work, should be charged to his account as an offset to royalties, which proposal plaintiff accepted, and delivered the books, such contract operated as a mere loan or bailment of the books, and was not a conditional sale thereof. Gilbert Book Co. *v.* Sheridan, 114 Mo. App. 332, 89 S. W. 555.

**Delivery without payment.**— Where purchasers of cattle fail to make a cash payment of the price, as required by contract, the fact that they are permitted to retain possession of the cattle, with the understanding that no title is to pass until payment shall be made on a day then agreed on, and until the sellers shall execute a bill of sale, does not render the transaction a conditional sale, but is a mere bailment. Farmers' Nat. Bank *v.* Henderson, (Tex. Civ. App. 1895) 29 S. W. 562.

**The rule in Pennsylvania** has by some writers been thought to be peculiar, but it is in fact in strict accord with the general rule stated in the text, the peculiarity, if any, arising from the application of the rule. It must be admitted that in some cases the facts were such that the transaction would in some jurisdictions be regarded as a conditional sale. See Dando *v.* Foulds, 105 Pa. St. 74. The effect of construing these contracts as bailments rather than conditional sales is to mitigate the severity of the rule that on a delivery of goods an agreement that the property shall remain in the seller until payment is void as against creditors of the buyer and *bona fide* purchasers from him. See Pennsylvania cases sited *supra* and *infra*, this note.

**Where a contract purports to be a letting of personalty** for hire on monthly payments for a term absolutely fixed, with a right reserved to the lessor to compel restitution of the property on default of payment of any of the monthly payments, that the agreement also provides that, if the lessee should be deprived of the use of any of the property by reason of the assertion of a title superior to that of the lessor, the weekly rental should decrease in proportion to the value of the articles of which the lessee would be deprived, does not affect such contract as one of bailment. Harris *v.* Shaw, 17 Pa. Super. Ct. 1.

**That a return of the property is not stipulated for** does not affect the construction of the contract as a bailment. Stiles *v.* Seaton, 200 Pa. St. 114, 49 Atl. 774; Harris *v.* Shaw, 17 Pa. Super. Ct. 1; Yinger *v.* Clark, 17 Lanc. L. Rev. 377, 7 North. Co. Rep. 298.

61. Morgan-Gardner Electric Co. *v.* Brown, 193 Pa. St. 351, 44 Atl. 459; Farquhar *v.* McAlevy, 142 Pa. St. 233, 21 Atl. 811, 24 Am. St. Rep. 497; Summerson *v.* Hicks, 134 Pa. St. 566, 19 Atl. 808; Peek *v.* Heim, 127 Pa. St. 500, 17 Atl. 984, 14 Am. St. Rep. 865; Haak *v.* Linderman, 64 Pa. St. 499, 3 Am. Rep. 612; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121; Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121, 28 Am. Dec. 691;

construed as contracts of conditional sale,[62] although it was expressly stipulated

Price *v.* McCallister, 3 Grant (Pa.) 248; Harper *v.* Hogue, 10 Pa. Super. Ct. 624; Ladley *v.* U. S. Express Co., 3 Pa. Super. Ct. 149; Kestner *v.* Keiser Cigar Co., 4 Pa. Dist. 479, 11 Montg. Co. Rep. 141.

62. *Alabama.*— Hill *v.* Townsend, 69 Ala. 286; Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104.

*California.*—Lundy Furniture Co. *v.* White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; Parke, etc., Co. *v.* White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Hegler *v.* Eddy, 53 Cal. 597; Kohler *v.* Hayes, 41 Cal. 455; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124.

*Colorado.*— Coors *v.* Reagan, 44 Colo. 126, 96 Pac. 966; Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260.

*Connecticut.*— Unmack *v.* Douglass, 75 Conn. 633, 55 Atl. 12; Loomis *v.* Bragg, 50 Conn. 228, 47 Am. Rep. 638; Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170; Hughes *v.* Kelly, 40 Conn. 148.

*Delaware.*— Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192.

*District of Columbia.*— Sanders *v.* Wilson, 19 D. C. 555; Bridget *v.* Cornish, 1 Mackey 29.

*Georgia.*— Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648; Cottrell *v.* Merchants', etc., Bank, 89 Ga. 508, 15 S. E. 944; Hays *v.* Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373.

*Illinois.*— Rosenbaum *v.* King, 114 Ill. App. 648.

*Indiana.*— Forrest *v.* Hamilton, 98 Ind. 91.

*Iowa.*— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

*Kansas.*— Fleck *v.* Warner, 25 Kan. 492.

*Kentucky.*— Greer *v.* Church, 13 Bush 430; Three Forks Lumber Co. *v.* Smith, 32 S. W. 167, 17 Ky. L. Rep. 566.

*Maine.*— Campbell *v.* Atherton, 92 Me. 66, 42 Atl. 232; Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250; Gorham *v.* Holden, 79 Me. 317, 9 Atl. 894.

*Massachusetts.*— Smith *v.* Aldrich, 180 Mass. 367, 62 N. E. 381; McCarthy *v.* Henderson, 138 Mass. 310; Bailey *v.* Hervey, 135 Mass. 172; Chase *v.* Ingalls, 122 Mass. 381.

*Michigan.*— Wickes *v.* Hill, 115 Mich. 333, 73 N. W. 375.

*Mississippi.*—Ham *v.* Cerniglia, 73 Miss. 290, 18 So. 577.

*Missouri.*— Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

*New Hampshire.*— Gerrish *v.* Clark, 64 N. H. 492, 13 Atl. 870.

*New Jersey.*— Cole *v.* Berry, 42 N. J. L. 308, 36 Am. Rep. 511.

*New York.*— Jacob *v.* Haefelien, 54 N. Y. App. Div. 570, 66 N. Y. Suppl. 1007; Campbell Printing Press, etc., Co. *v.* Oltrogge, 13 Daly 247; Equitable Gen. Providing Co. *v.* Eisentrager, 34 Misc. 179, 68 N. Y. Suppl. 866. See Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253.

*North Carolina.*— Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2; Wilcox *v.* Cherry, 123 N. C. 79, 31 S. E. 369; Singer Mfg. Co. *v.* Gray, 121 N. C. 168, 28 S. E. 257; Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90; Clark *v.* Hill, 117 N. C. 11, 23 S. E. 91, 57 Am. St. Rep. 574; Crinkley *v.* Egerton, 113 N. C. 444, 18 S. E. 669; A. D. Puffer, etc., Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682 [*distinguishing* A. D. Puffer, etc., Mfg. Co. *v.* Baker, 104 N. C. 148, 10 S. E. 254].

*Ohio.*— Sage *v.* Sleutz, 23 Ohio St. 1.

*Oregon.*— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

*Pennsylvania.*— Kelly Springfield Road Roller Co. *v.* Spyker, 215 Pa. St. 332, 64 Atl. 546; Morgan-Gardner Electric Co. *v.* Brown, 193 Pa. St. 351, 44 Atl. 459; Price *v.* McCallister, 3 Grant 248.

*Rhode Island.*— Carpenter *v.* Scott, 13 R. I. 477.

*South Dakota.*— Pringle *v.* Canfield, 19 S. D. 506, 104 N. W. 223.

*Tennessee.*— Cowan *v.* Singer Mfg. Co., 92 Tenn. 376, 21 S. W. 663; Meagher *v.* Hollenberg, 9 Lea 392; Singer Mfg. Co. *v.* Cole, 4 Lea 439, 40 Am. Rep. 20.

*Vermont.*— Nye *v.* Daniels, 75 Vt. 81, 53 Atl. 150; Collender Co. *v.* Marshall, 57 Vt. 232; Matthews *v.* Lucia, 55 Vt. 308; Whitcomb *v.* Woodworth, 54 Vt. 544; Bradley *v.* Arnold, 16 Vt. 382.

*Washington.*— Kidder *v.* Wittler-Corbin Mach. Co., 38 Wash. 179, 80 Pac. 301; Quinn *v.* Parke, etc., Mach. Co., 5 Wash. 276, 31 Pac. 866; De Saint Germain *v.* Wind, 3 Wash. Terr. 189, 13 Pac. 753.

*West Virginia.*— Baldwin *v.* Van Wagner, 33 W. Va. 293, 10 S. E. 716; McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

*United States.*— *In re* Morris, 156 Fed. 597; Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588; Unitype Co. *v.* Long, 143 Fed. 315, 74 C. C. A. 453 [*affirming* 136 Fed. 989]; Metropolitan Trust Co. *v.* Railroad Equipment Co., 108 Fed. 913, 48 C. C. A. 135; Kentucky Contracting, etc., Co. *v.* Continental Trust Co., 108 Fed. 1, 47 C. C. A. 143; Pittsburgh Locomotive, etc., Works *v.* Keokuk State Nat. Bank, 19 Fed. Cas. No. 11,198, 12 Alb. L. J. (N. Y.) 280, 1 N. Y. Wkly. Dig. 332.

See 43 Cent. Dig. tit. "Sales," §§ 1327–1331.

**Lease with privilege of purchase.**— Where a party buys cattle, and has the bill of sale made out in his own name, and leases the cattle to another at a certain rent, with the understanding that the tenant may purchase the same at any time during the hiring at a certain price, by paying the difference between the rent paid and the price, title meanwhile to remain in vendor, the transaction is a lease with privilege of purchase. Miles *v.* Edsall, 7 Mont. 185, 14 Pac. 701. See also Sumner *v.* Cottey, 71 Mo. 121; Neidig *v.* Eifler, 18 Abb. Pr. (N. Y.) 353; Otis *v.*

that the contract should not be regarded as a sale.[63] Especially will this construction be given to the contract where the form of the agreement was adopted merely to evade the statute relating to conditional sales.[64] Usually the rent reserved is for greater than the fair rental value of the goods and the sum of the instalments equals the value or agreed price.[65] In some cases, however, similar instruments containing an option on the part of the lessee to buy have been construed as leases.[66]

**b. As Sale Subject to Defeasance.** In a few jurisdictions instruments desiignated as leases and in the form of the instruments described above have been construed to be sales subject to be defeated by a non-performance of the condition — that is, present sales with a right of rescission on the part of the seller in case the buyer should fail to perform the condition.[67]

**c. As Chattel Mortgage.** In some cases instruments similar in character to those referred to in the preceding paragraph have been construed to be absolute

Wood, 3 Wend. (N. Y.) 498; Ludden, etc., Southern Music House *v.* Dusenbury, 27 S. C. 464, 4 S. E. 60; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

A contract with a dealer in safes, providing that a safe should be placed in the possession of the other party, who should pay "rent" therefor in six equal monthly instalments; that if this should be done the manufacturer would sell the safe for one dollar; that if default should be made in payment the manufacturer might terminate the lease, retake the safe, and retain the rent paid; and that the other party should keep the safe insured was a conditional sale, and not a lease. Herring-Marvin Co. *v.* Smith, 43 Oreg. 315, 72 Pac. 704, 73 Pac. 340.

**Sale with provision for lease on default.**— In Meagher *v.* Hollenberg, 9 Lea (Tenn.) 392, A contracted with B for the purchase of a piano, to be paid for in monthly instalments of a certain sum, or, in case of larger payments within a certain time, a deduction of ten per cent in the price to be made, the title to remain in B until it was wholly paid for, with the right to resume possession in case of default in any payment, in which case the payments made should be in full for the use thereof at the rate of the monthly instalments, and it was held that the contracts for purchase and rent were inconsistent with each other, and therefore the provision as to rent must be construed as conditional upon an election to avoid the contract of sale.

**An acknowledgment that the property is leased** cannot avail to convert a sale absolute in fact into a conditional sale as against a *bona fide* purchaser. Hintermister *v.* Lane, 27 Hun (N. Y.) 497.

**It is a question of law for the court** to determine whether a particular instrument is a lease or a conditional sale. Rosenbaum *v* King, 114 Ill. App. 648.

63. Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260; *In re* Morris, 156 Fed. 597. In Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 672, 23 L. ed. 1003, it was said that the transaction was not changed because it assumed the form of a lease, or because it was given that name by the parties.

**It is a mere subterfuge** to call such a transaction a lease. Murch *v.* Wright, 46 Ill. 487, 95 Am. Dec. 455.

64. Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666; Campbell Printing Press, etc., Co. *v.* Oltrogge, 13 Daly (N. Y.) 247.

65. See cases cited *supra*, note 62.

**A transaction in form a lease** of an organ for a year, the amount of rent reserved being equal to the value of the organ, will be treated as a conditional sale, and, not being recorded, and the organ being in the possession of the lessee or vendee, and there being nothing to put an attaching officer upon inquiry, it may be attached as the property of such vendee. Whitcomb *v.* Woodworth, 54 Vt. 544.

66. Lambert Hoisting Engine Co. *v.* Carmody, 79 Conn. 419, 65 Atl. 141; Ludden, etc., Southern Music House *v.* Hornsby, 45 S. C. 111, 22 S. E. 781 [*distinguishing* Singer Mfg. Co. *v.* Smith, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897]; Ludden, etc., Southern Music House *v.* Dusenbury, 27 S. C. 464, 14 S. E. 60.

**Lease without provision for purchase.**—An instrument in the form of a lease, transferring personal property for a fixed term, reserving a rent, with a provision for the return of the property at the end of the term, or sooner, on failure to comply with the requirements contained therein, is not a contract for conditional sale of goods. Singer Mfg. Co. *v.* Wolff, 70 N. J. L. 127, 56 Atl. 147.

67. Murch *v.* Wright, 46 Ill. 487, 95 Am. Dec. 455. *Compare* Lucas *v.* Campbell, 88 Ill. 447. The Illinois cases are cited with approval in Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260. And the rule seems to have been applied in early cases in Massachusetts. Newhall *v.* Kingsbury, 131 Mass. 445; Day *v.* Bassett, 102 Mass. 445; Vincent *v.* Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683. See also Currier *v.* Knapp, 117 Mass. 324. But see McCarthy *v.* Henderson, 138 Mass. 310; Bailey *v.* Hervey, 135 Mass. 172.

transfers with a reservation of a lien to secure the purchase-price and in effect chattel mortgages.[68]

**5. CHATTEL MORTGAGE.**[69] If goods are delivered to the buyer under an agreement whereby the property in the goods is transferred with a reservation of a lien to secure the purchase-price the transaction is a mortgage.[70] But if the goods are delivered under an agreement by virtue of which there is no conveyance of title, but the property in the goods is to remain in the seller until payment of the price, the transaction is not a mortgage but a conditional sale.[71] Generally the ques-

68. Greer *v.* Church, 13 Bush (Ky.) 430; Three Forks Lumber Co. *v.* Smith, 32 S. W. 167, 17 Ky. L. Rep. 566; Singer Mfg. Co. *v.* Smith, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897. See also Palmer *v.* Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60; Knittel *v.* Cushing, 57 Tex. 354, 49 Am. Rep. 598.

**In the leading** case of Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160, a contract between a car manufacturing company and a railroad company, whereby the former agreed to loan to the latter certain cars to be used on its road "for hire," recited that the car company had received from the railroad company its notes, together with bonds of the company as collateral; that the car company was to hold the notes as collateral security, collect them, and hold the proceeds for the safe return of the cars, the railroad company having the right to purchase the cars at any time during the term on paying the face of the notes; that until such payment was made in full the railroad company should have no right to the cars, except as to their use for hire, and they should remain the property of the car company, to be redelivered to the car company in default of payment of the notes; that, in event of such default and the election by the car company to take the cars, the sums collected on the notes should be retained by it for its own use, together with such sum to be realized from the sale of the cars as might be needed to make up the deficiency, the railroad company to receive the balance, if any; and that on payment by the latter of the notes the cars were to belong to it, and the car company should give a bill of sale thereof. The cars having been delivered to the railroad company and levied on by a judgment creditor of such company it was held that the contract was not a bailment or a conditional sale, but a mortgage.

69. **Sale distinguished from chattel mortgage** see *supra*, I, D, 5. See also CHATTEL MORTGAGES, 6 Cyc. 993.

70. *Alabama.*— Barnhill *v.* Howard, 104 Ala. 412, 16 So. 1.

*Kansas.*— Osborne *v.* Connor, 4 Kan. App. 609, 46 Pac. 327.

*Kentucky.*— Jones *v.* Jones, 112 S. W. 650, 33 Ky. L. Rep. 1036.

*North Carolina.*—Frick *v.* Hilliard, 95 N. C. 117.

*Ohio.*— Chicago Cottage Organ Co. *v.* Crambert, 78 Ohio St. 149, 84 N. E. 788; Chicago Cottage Organ Co. *v.* Biggs, 22 Ohio Cir. Ct. 392, 12 Ohio Cir. Dec. 497.

*United States.*— Herryford *v.* Davis, 102 U. S. 235, 26 L. ed. 160.

**Under the law of Kentucky,** a contract by which a bankrupt borrowed certain machinery from claimant under a written agreement reserving title in the claimant until the bankrupt paid certain prices specified therefor, etc., operated as an absolute sale of the machinery to the bankrupt, with a chattel mortgage back to secure the price. *In re* Ducker, 134 Fed. 43, 67 C. C. A. 117 [*affirming* 133 Fed. 771].

**One transaction.**— The fact that the sale and the giving of the chattel mortgage were one transaction, occurring at the same time, will not tend to show that the sale was conditional. Chicago Cottage Organ Co. *v.* Biggs, 22 Ohio Cir. Ct. 392, 12 Ohio Cir. Dec. 497.

**Construction of contract.**— An error of the court in construing a contract under which the possession of personal property was transferred, as a mortgage, instead of as a lease or conditional sale, is not ground for reversal, where it authorized plaintiff on default to take immediate possession, with or without notice, and defendant could not have been prejudiced by such misconstruction, and the relief decreed to plaintiff. Abacock *v.* St. Louis Type Foundry, 59 Tex. 514.

71. *Alabama.*— Bingham *v.* Vandergrift, 93 Ala. 283, 9 So. 280; Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104; Sumner *v.* Woods, 52 Ala. 94.

*Colorado.*— Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260.

*Connecticut.*— Roberts *v.* Norton, 66 Conn. 1, 33 Atl. 532.

*Georgia.*— Smith *v.* De Vaughn, 82 Ga. 574, 9 S. E. 425; Galt *v.* Jackson, 9 Ga. 151.

*Illinois.*— Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22 [*reversing* 67 Ill. App. 606]; Tutts *v.* Koumoungis, 73 Ill. App. 210; People *v.* Kirkpatrick, 69 Ill. App. 207.

*Indiana.*— Dunbar *v.* Rawles, 28 Ind. 225, 92 Am. Dec. 311; Plummer *v.* Shirley, 16 Ind. 380.

*Iowa.*— National Cash Register Co. *v.* Zangs, 127 Iowa 710, 104 N. W. 360.

*Massachusetts.*— Nichols *v.* Ashton, 155 Mass. 205, 29 N. E. 519; Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83.

*Michigan.*— American Harrow Co. *v.* Deyo, 134 Mich. 639, 96 N. W. 1055.

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Mills, 64 Nebr. 166, 89 N. W. 621.

*New York.*— Tompkins *v.* Fonda Glove

tion whether the transaction is a conditional sale or a mortgage is one of intent of the parties to be determined from a consideration of all the provisions of the contract,[72] and in some cases contracts of conditional sale have been held to be chattel mortgages within statutes requiring chattel mortgages to be recorded.[73]

Lining Co., 188 N. Y. 251, 80 N. E. 933 [*reversing* 105 N. Y. App. Div. 637, 93 N. Y. Suppl. 1149]; Coman *v.* Lakey, 80 N. Y. 345; Nash *v.* Weaver, 23 Hun 513; Grant *v.* Skinner, 21 Barb. 581; Brewster *v.* Baker, 20 Barb. 364 [*reversing* 16 Barb. 613].

*North Carolina.*— Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Vasser *v.* Buxton, 86 N. C. 335; Clayton *v.* Hester, 80 N. C. 275; Parris *v.* Roberts, 34 N. C. 268, 55 Am. Dec. 415; Ballew *v.* Sudderth, 32 N. C. 176; Ellison *v.* Jones, 26 N. C. 48.

*Texas.*— Dunn *v.* Elser, 2 Tex. App. Civ. Cas. § 720.

*Vermont.*— Rowan *v.* Union Arms Co., 36 Vt. 124.

*Virginia.*— McComb *v.* Donald, 82 Va. 903, 5 S. E. 558.

*West Virginia.*— McComb *v.* Donald, 82 Va. 903, 5 S. E. 558; McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

*Wisconsin.*— Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; W. W. Kimball Co. *v.* Mellon, 80 Wis. 133, 48 N. W. 1100.

*Wyoming.*— Studebaker Bros. Co. *v.* Mau, 14 Wyo. 68, 80 Pac. 151, 82 Pac. 2.

*United States.*— Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285 [*affirming* 4 Utah 197, 7 Pac. 865], where goods were delivered to a person and he gave notes in payment therefor, in which it was stipulated that title should not pass until the notes and interest were paid; that the vendor might take back the property whenever he deemed himself unsafe; and that, if he did not take it back, he might sell it, or, without sale, indorse its true value on the note, in which case the vendee should pay the balance as damages and rental for the goods. It was held that the transaction was not a mortgage, but a conditional sale. See also *In re* Newton, 153 Fed. 841, 83 C. C. A. 23; The Marina, 19 Fed. 760.

See 43 Cent. Dig. tit. "Sales," §§ 1332, 1333.

**Allegations in pleading.**— Where an instrument is in form a conditional sale, and alleged in a bill to enforce it to be a conditional sale, it will not, on demurrer, be held a mortgage; and, if circumstances making it in fact a mortgage do not appear from the bill, they must be set up by plea or answer. Smith *v.* Hope, 47 Fla. 295, 35 So. 865.

72. *California.*— Palmer *v.* Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60, holding that as against a *bona fide* mortgagee of the purchaser, provisions in a contract of sale that the property is borrowed, and that the title is to remain in the seller until the price is paid, are ineffectual to constitute the transaction an executory contract of sale, where the possession is delivered and the promise to pay is absolute, and where, under the contract, the seller is bound upon default, on repossessing himself of the property, to resell it, and to account to the purchaser for the proceeds in excess of the contract price and expenses.

*Florida.*— Smith *v.* Hope, 47 Fla. 295, 35 So. 865.

*Louisiana.*— Watson *v.* James, 15 La. Ann. 386.

*Michigan.*— Damm *v.* Mason, 98 Mich. 237, 57 N. W. 123.

*Minnesota.*— Berlin Mach. Works *v.* Security Trust Co., 60 Minn. 161, 61 N. W. 1131.

*South Carolina.*— Perkins *v.* Loan, etc., Bank, 43 S. C. 39, 20 S. E. 759; Talbott *v.* Sandifer, 27 S. C. 624, 4 S. E. 152.

*Wisconsin.*— Strong *v.* Hoskin, 85 Wis. 497, 55 N. W. 852.

*United States.*— Beardsley *v.* Beardsley, 138 U. S. 262, 11 S. Ct. 318, 34 L. ed. 928, holding that a contract reading, "I hold of the stock of the . . . railway company thirty-three thousand two hundred and fifty dollars or one thousand three hundred and fifty shares, which is sold to . . . and which, though standing in my name, belongs to him, subject to a payment of eight thousand dollars," is an executed contract, by which the ownership passes to the purchaser, with a reservation of title in the seller as security for the purchase-money.

**Illustration.**— A contract for the purchase of machinery and mill equipment provided that the title to the machinery and equipment should remain in the seller until payment of the price; that failure to execute notes and deliver the same as provided in the contract, or to pay any of the amount specified at maturity, should entitle the seller to take possession of the machinery and other property named, and sell it by private or public sale after thirty days' advertisement, without process of law, and retain any balance unpaid, together with interest, traveling expenses, and attorney's and other fees connected with collection, and pay the buyers any surplus, and collect from them any deficiency. It was held that such contract was not a conditional sale, but at most an equitable mortgage. D. A. Tompkins Co. *v.* Monticello Cotton Oil Co., 137 Fed. 625.

**Parol evidence is admissible** to show that an instrument on its face a conditional sale is in fact a mortgage. Hudson *v.* Wilkinson, 45 Tex. 444; Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Morgan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87. In Alabama such evidence is admissible in equity but not in an action at law. Bates *v.* Crowell, 122 Ala. 611, 25 So. 217.

73. Colorado Sav. Bank *v.* Metropolitan Theater Co., (Colo. 1894) 36 Pac. 902;

In some states all reservations of title intended as security for the purchase-price are by judicial decision or statute declared to be chattel mortgages,[74] and of course if the transaction is clearly intended merely to secure a debt the contract must be construed to be a mortgage and not a conditional sale.[75]

**6. PLEDGE.**[76] A conditional sale is to be distinguished from a pledge which is a bailment to secure payment of a debt or the performance of some other act.[77]

**7. CONSIGNMENT FOR SALE OR OTHER AGENCY.** Where goods are delivered by one person to another to sell on behalf of the former, the transaction is an agency to sell or consignment for sale.[78] But if from the whole agreement, however designated, it appears that it is the intention of the parties that the property in the

Andrews *v.* Colorado Savings Bank, (Colo. 1894) 36 Pac. 902; Harling *v.* Creech, 88 Tex. 300, 31 S. W. 357; Garretson *v.* De Poyster, (Tex. 1890) 16 S. W. 106; Clark *v.* West Pub. Co., (Tex. Civ. App. 1894) 26 S. W. 527; Hart *v.* Barney, etc., Mfg. Co., 7 Fed. 543.

**Applicability of chattel mortgage provisions** to conditional sales see *infra*, X, J, 4, a.

74. Clark *v.* Bright, 30 Colo. 199, 69 Pac. 506; Tufts *v.* Beach, 8 Colo. App. 33, 44 Pac. 771; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Perkins *v.* Loan, etc., Bank, 43 S. C. 39, 20 S. E. 759; Herring *v.* Cannon, 21 S. C. 212, 53 Am. Rep. 661; Straub *v.* Screven, 19 S. C. 445; Talmadge *v.* Oliver, 14 S. C. 522; Key *v.* Brown, 67 Tex. 300, 3 S. W. 443; Hall *v.* Keating Implement, etc., Co., 33 Tex. Civ. App. 526, 77 S. W. 1054; Parlin, etc., Co. *v.* Davis, (Tex. Civ. App. 1903) 74 S. W. 951; Clark *v.* West Pub. Co., (Tex. Civ. App. 1894) 26 S. W. 527. And see Baldwin *v.* Crow, 86 Ky. 679, 7 S. W. 146, 8 Ky. L. Rep. 836.

**Question for jury.**— Where, in conversion by a seller against a mortgagee of the buyer, the evidence showed that the sale was on condition that the buyer should pay a sum in cash and execute his note for the balance, that this was never done, that the buyer remained in possession for two years, and had performed work in value to liquidate the purchase-price, the question whether the transaction was a conditional sale, or whether the seller sold the property and reserved title as security for payment of the price, was a question for the jury. Slayton *v.* Horsey, (Tex. Civ. App. 1906) 91 S. W. 799.

75. *Alabama.*—Williamson *v.* Culpepper, 16 Ala. 211, 50 Am. Dec. 175.

*Indiana.*— Plummer *v.* Shirley, 16 Ind. 380.

*Kentucky.*— Baldwin *v.* Crow, 86 Ky. 679, 7 S. W. 146, 8 Ky. L. Rep. 836.

*Missouri.*— Kollock *v.* Emmert, 43 Mo. App. 566.

*New York.*— See Hughes *v.* Harlam, 166 N. Y. 427, 60 N. E. 22, holding that where by a written agreement the owner of personalty transfers it subject to the condition that, if he paid the amount of a certain note, the transfer should be null and void, but that, in the event of his death before payment, the transfer should be unconditional and absolute, such agreement is a mortgage, and not a conditional sale.

*Texas.*— Thompson *v.* Terry, 3 Tex. App. Civ. Cas. § 28.

*Washington.*— Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

*Wisconsin.*— Strong *v.* Hoskin, 85 Wis. 497, 55 N W. 852; Musgat *v.* Pumpelly, 46 Wis. 660, 1 N. W. 410.

**A feature essential to a chattel mortgage** is an intent to secure, and the existence of this intent is not implied in a provision that a bill of sale shall be void if the grantor shall pay a certain sum of money by a certain day. Smith *v.* Hope, 47 Fla. 295, 35 So. 865.

**76. Sale distinguished from pledge** see *supra*, I, D, 4, c.

77. Smith *v.* 49 & 56 Quartz Min. Co., 14 Cal. 242; Kessler *v.* Manhein, 114 La. 619, 38 So. 473; Marshall *v.* Williams, 3 N. C. 405; Luckett *v.* Townsend, 3 Tex. 119, 49 Am. Dec. 723.

78. *Connecticut.*— Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552.

*Georgia.*—Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962.

*Iowa.*— Bayliss *v.* Davis, 47 Iowa 340; Crooker *v.* Brown, 40 Iowa 144.

*Kansas.*— Renoe *v.* Western Star Milling Co., 53 Kan. 255, 36 Pac. 329.

*Kentucky.*— Kugler *v.* Rouss, 64 S. W. 627, 23 Ky. L. Rep. 979.

*Maine.*— Richardson Mfg. Co. *v.* Brooks, 95 Me. 146, 49 Atl. 672.

*Maryland.*— B. F. Sturtevant Co. *v.* Cumberland, 106 Md. 587, 68 Atl. 351.

*Minnesota.*— Cortland Wagon Co. *v.* Sharvy, 52 Minn. 216, 53 N. W. 1147.

*Missouri.*— Peet *v.* Spencer, 90 Mo. 384, 2 S. W. 434; Thompson *v.* Massey, 76 Mo. App. 197; Ferd Heim Brewing Co. *v.* Linck, 51 Mo. App. 478.

*North Carolina.*— Lance *v.* Butler, 135 N. C. 419, 47 S. E. 488.

*Pennsylvania.*— Bridgeport Organ Co. *v.* Guldin, 3 Pa. Dist. 649.

*Texas.*— Fairbanks *v.* Simpson, (Civ. App. 1894) 28 S. W. 128.

*United States.*— Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; *In re* Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611; John Deere Plow Co. *v.* McDavid, 137 Fed. 802, 70 C. C. A. 422; *In re* Flanders, 134 Fed. 560, 67 C. C. A. 484; *In re* Galt, 120 Fed. 64, 56 C. C. A. 470.

See 43 Cent. Dig. tit. "Sales," § 1335.

goods is eventually to pass to the party receiving them for a price which he agrees to pay the transaction is a contract to sell or a conditional sale.[79]

**D. Requisites and Validity — 1. Form — a. In General.** No particular form of instrument is necessary to create a conditional sale.[80] It may be in the form of a lease [81] or note,[82] on which the stipulation reserving title is indorsed,[83] or the stipulation may be contained in the order for goods signed by the purchaser.[84] It has indeed been held that no express declaration as to the reservation of title is necessary, but that such reservation may be implied,[85] and that it is really the intent of the parties that must govern.[86] It is, however, neces-

79. *Alabama.*— Thornton *v.* Cook, 97 Ala. 630, 12 So. 403.

*Illinois.*— Jordan *v.* Easter, 2 Ill. App. 73.

*Iowa.*— Conable *v.* Lynch, 45 Iowa 84.

*Minnesota.*— H. H. Babcock Co. *v.* Williams, 75 Minn. 147, 77 N. W. 791.

*Missouri.*— A. A. Cooper Wagon, etc., Co. *v.* Wooldridge, 98 Mo. App. 648, 73 S. W. 724.

*Nebraska.*— D. M. Osborne Co. *v.* Plano Mfg. Co., 51 Nebr. 502, 70 N. W. 1124.

*New York.*— People *v.* Gluck, 188 N. Y. 167, 80 N. E. 1022 [*reversing* 117 N. Y. App. Div. 432, 102 N. Y. Suppl. 758]; Smith *v.* Williams, 90 N. Y. App. Div. 507, 85 N. Y. Suppl. 506.

See 43 Cent. Dig. tit. "Sales," § 1335.

80. Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133, 29 S. W. 147; Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448; National Cash Register Co. *v.* Lesko, 77 Conn. 276, 58 Atl. 967.

**An option in the purchaser** to pay or to refuse to pay for the property is not essential to a conditional sale. Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

**A reservation to the grantor, in a deed of real estate,** of the crops to be grown thereon, as security for certain notes given for the purchase-money, is not a conditional sale of such crops. Batchelder *v.* Jenness, 59 Vt. 104, 7 Atl. 279.

**A printed form of contract** for the sale of an electrical plant, providing by certain typewritten matter attached thereto for partial payments of the purchase-price in cash and in notes secured by a chattel mortgage on the property to be sold, but containing in the body thereof a clause that "the title to the plant shall not pass from the company to the purchaser until it is fully paid for as per contract," is one evidencing a conditional sale of the property covered by it. Edison Gen. Electric Co. *v.* Walter, 10 Wash. 14, 38 Pac. 752.

**Payment for labor.**— A contract whereby a party was to do certain work for another, and have in payment therefor certain property, which was to remain the property of the other party until paid for, evidences a conditional sale of the property. Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

**A seed-grain note** is not a conditional sale of the property therein described, so as to vest title thereto in the payee on default of the maker. Scofield *v.* National El. Co., 64 Minn. 527, 67 N. W. 645.

**On a transfer of stock** where the seller took the buyer's note for the price a receipt reciting that the note was given for certain shares of stock then owned by the seller "and to be delivered on payment of the note" amounted to a conditional sale of the stock. Davison *v.* Davis, 125 U. S. 90, 8 S. Ct. 825, 31 L. ed. 635 [*affirming* 20 Fed. 353].

81. See *supra*, X, C, 4.

82. Boynton *v.* Libby, 62 Me. 253; Young *v.* Salley, 83 Miss. 362, 35 So. 571.

**A note is sufficient as a conditional sale contract,** although the amount is stated only in figures in the margin and is omitted in the body of the note which reads "dollars, $50 payable August 9, 1902, and $50 every two months thereafter until note is paid." Kimball *v.* Costa, 76 Vt. 289, 56 Atl. 1009, 104 Am. St. Rep. 937.

83. Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227.

**Must be part of note.**— It is provided by Rev. St. c. 111, § 5, that the reservation of title must be in the note and cannot be made by supplemental agreement. Holt *v.* Knowlton, 86 Me. 456, 29 Atl. 1113. But in Delaware a supplemental agreement attached to the note is sufficient. Townsend *v.* Melvin, 5 Pennew. (Del.) 495, 63 Atl. 330.

**Parol evidence.**— The purchaser of chattels who gives notes for the price, on the backs of which is printed an agreement that the seller is to retain the title until the notes are paid, cannot, after having defaulted in payment, contradict the agreement by parol testimony. Seymour *v.* Farquhar, 93 Ala. 292, 8 So. 466.

84. Piedmont Land, etc., Co. *v.* Thomson-Houston Motor Co., (Ala. 1892) 12 So. 768; National Cash Register Co. *v.* Lesko, 77 Conn. 276, 58 Atl. 967. But see Oliver Chilled Plow Works *v.* Dolan, 139 Mich. 668, 103 N. W. 186, holding that where plaintiff, engaged in the manufacture and sale of plows, used the same blank form to create a sales agency and for sales to the trade, an indorsement on the blank that plaintiff retained title to the goods until paid for was not a part of a contract for the sale of goods to a purchaser, providing for absolute payment at specified dates, which did not qualify the buyer's right to make sales in any manner satisfactory to himself, although it also contained a provision that the buyer recognized as lawful and binding "all conditions and agreements on this sheet."

85. McManus *v.* Walters, 62 Kan. 128, 61 Pac. 686; Whitwell *v.* Vincent, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; Hammett *v.* Linneman, 48 N. Y. 399.

86. Hammett *v.* Linneman, 48 N. Y. 399;

sary that the stipulation reserving the title should be contemporaneous with the contract of sale,[87] but the fact that the note given for the price antedated the contract is not objectionable if it was identified as the one mentioned in the agreement.[88]

**b. Necessity of Writing.** In the absence of statute a writing is not necessary,[89] but in most states statutes have been passed expressly or because of provisions for registration impliedly requiring the contract to be evidenced by a writing.[90] Even in such sales a writing is not necessary as between the parties.[91]

**c. Description of Subject-Matter.** As in ordinary contracts of sale,[92] a contract of conditional sale should properly identify the property; but it is not necessary that the description should be such as to identify the property without the aid of parol evidence.[93]

**2. Execution and Delivery.** In some states it is required that contracts of conditional sale shall be executed by both parties,[94] but even in such case it is sufficient if the contract be executed by one party and the authorized agent of

Walter A. Wood Mowing, etc., Co. *v.* Brooke, 30 Fed. Cas. No. 17,980, 2 Sawy. 576, 9 Nat. Bankr. Reg. 395.

**87.** Caraway *v.* Wallace, 2 Ala. 542; Hyer *v.* Smith, 48 W. Va. 550, 37 S. E. 632.

**88.** Staunton *v.* Smith, (Del. 1906) 65 Atl. 593.

**89.** Sims *v.* Wilson, 47 Ind. 226; Blackwell *v.* Walker, 5 Fed. 419, 2 McCrary 33. But see Helm *v.* Dumars, 3 Cal. 454, holding that where there is no reservation of title in writing and a delivery of the goods the sale will be regarded as absolute.

**In Texas** reservations of title are regarded as chattel mortgages and consequently invalid unless in writing. Hastings *v.* Kellogg, (Civ. App. 1896) 36 S. W. 821; Harrold *v.* Barwise, 10 Tex. Civ. App. 138, 30 S. W. 498.

**90.** *Connecticut.*— Boston Furniture Co. *v.* Thoms, 78 Conn. 273, 61 Atl. 949; National Cash Register Co. *v.* Lesko, 77 Conn. 276, 58 Atl. 967. See also Ryder *v.* Cooley, 58 Conn. 367, 20 Atl. 470, holding that where one has sold the good-will and stock of a retail store, and put the purchaser in possession of the business, giving him an absolute bill of sale, the seller cannot reclaim the goods from an assignee in insolvency under a parol condition that the title should not pass until after payment of time notes given for a small part of the consideration, the rest of which the seller has received and retains.

*Georgia.*— Harp *v.* Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181; Mann *v.* Thompson, 86 Ga. 347, 12 S. E. 746; Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160.

*Maine.*— Boynton *v.* Libby, 62 Me. 253.

*Massachusetts.*— Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556.

*Missouri.*—Mansur-Tebbetts Implement Co. *v.* Price, 81 Mo. App. 243; Eidson *v.* Hedger, 38 Mo. App. 52. See also Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

*Nebraska.*— Johns *v.* Reed, 77 Nebr. 492, 109 N. W. 738.

*Wisconsin.*— Rawson Mfg. Co. *v.* Richards, 69 Wis. 643, 35 N. W. 40.

*United States.*—*In re* Gosch, 121 Fed. 602; New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 868, 1 C. C. A. 133. See also *In re* Atlanta News Pub. Co., 160 Fed. 519.

**A mere oral reservation** of title in the seller without any writing, under the Georgia statute, so fixes the title in the buyer that the rights of third persons obtaining judgments or liens antedating the sale may be enforced against the seller's claim of title. *In re* Atlanta News Pub. Co., 160 Fed. 519.

**Mass. St. (1884) c. 313,** providing that all contracts for conditional sales of "furniture or other household effects" shall be in writing, and that a copy of the contract shall be furnished to the vendee, applies to a sale of a piano. Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556.

**91.** Butts *v.* Screws, 95 N. C. 215. See also *In re* Atlanta News Pub. Co., 160 Fed. 519.

**Guarantor of buyer** is within the rule. Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

**92.** See *supra*, III, B, 1; VI, A, 7, a.

**93.** A. S. Thomas Furniture Co. *v.* T. & C. Furniture Co., 120 Ga. 879, 48 S. E. 333.

**Although a note given for a horse,** stating that title to the horse is to remain in plaintiff till the horse is paid for, does not describe the horse, it is admissible, in replevin for the horse, to show the conditional sale, other evidence being admissible to show the identity of the horse. Young *v.* Salley, 83 Miss. 362, 35 So. 571.

**Property included.**— Where a contract of sale of a livery outfit providing that the title to the property should remain in the seller until fully paid for, also provided that the purchaser should, "on going into possession of said livery, furnish for use thereof four horses, which shall become a part of said livery and a part of this contract," the horses so furnished were not included in the sale. Qualy *v.* Johnson, 80 Minn. 408, 83 N. W. 393.

**94.** Onyx Soda Fountain Co. *v.* L'Engle, 53 Fla. 314, 43 So. 771; S. L. Sheldon Co. *v.*

the other.[95] In some states conditional sale contracts are required to be executed and attested like chattel mortgages,[96] although in others it has been held that the statutes relating to chattel mortgages do not apply.[97] The delivery of the contract must of course be unconditional.[98]

**3. Validity.** The validity of conditional contracts of sale by virtue of which title to the goods sold is reserved in the seller until the price is paid has been recognized in numerous decisions;[99] it being held that contracts of this character

Mayers, 81 Wis. 627, 51 N. W. 1082; W. W. Kimball Co. *v.* Mellon, 80 Wis. 133, 48 N. W. 1100. See also Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

**Execution in duplicate.**— Laws (1888), c. 225, § 7, provides that Laws (1884), c. 315, relating to conditional sales of personal property on credit, shall not apply to engines and boilers, "provided that the contract for the sale of the same be executed in duplicate, and one duplicate shall be delivered to the purchaser." A written order sent to a seller for an engine and boiler, of which order the buyer retained an unsigned copy, was not a duplicate contract, within the meaning of the statute. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 56 N. Y. Suppl. 791 [*affirmed* in 165 N. Y. 636, 59 N. E. 1123].

**95.** Kellogg *v.* Costello, 93 Wis. 232, 67 N. W. 24. And see Tufts *v.* Brace, 103 Wis. 341, 79 N. W. 414. But see Churchill *v.* Demeritt, 71 N. H. 110, 51 Atl. 254, where it was held that under N. H. Pub. St. c. 140, § 23, relating to the reservation of vendor's lien on a conditional sale, requiring the vendor to record a written memorandum, signed by the "purchaser," and containing an affidavit as prescribed by section 24, executed by the "vendor and purchaser," a memorandum signed by the purchaser reciting a sale from M followed by an affidavit in the required form, but signed by C, and sworn to by him as agent for M, was insufficient, though C had made the contract of sale as the authorized agent of M.

**Note executed by third person.**— Where, by agreement between the seller of a chattel and the purchaser and a third person, the note given for the price, and which also embodied the terms of the contract, was executed by the third person, the provision in the note reserving title in the seller was binding on the purchaser. Forbes *v.* Taylor, 139 Ala. 286, 35 So. 855.

**Execution by seller.**— Under Iowa Code (1873), § 1922, declaring that no conditional sale shall be valid against a creditor of the buyer in actual possession thereunder, without notice, unless in writing, executed by the seller, and acknowledged and recorded the same as a chattel mortgage, a bill of sale wherein title to the goods was retained by the seller till full payment, executed by the seller, and acknowledged and recorded, was sufficient to protect the seller's right to such goods against a subsequent creditor of the buyer, although such instruction was not executed by the buyer. National Cash Register Co. *v.* Schwab, 111 Iowa 605, 82 N. W. 1101.

**Acknowledgment.**— An affidavit proving the signature of the president of a corporation to a conditional contract of sale and the affixing of the corporate seal is a sufficient compliance with N. J. Pamphl. Laws 158 (2 Gen. St. 2706), requiring such contracts to be "acknowledged." General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101.

**96.** Merchants, etc., Bank *v.* Cottrell, 96 Ga. 168, 23 S. E. 127; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 868, 1 C. C. A. 133. See also *In re* Atlanta News Pub. Co., 160 Fed. 519.

**Attestation.**— Although a reservation of title embraced in a written contract for the sale of personalty is not, as against third persons, valid unless the contract be attested by a subscribing witness, it is not, as to such persons, essential to the validity of such reservation that the witness be an official, or that the contract be recorded. Hill *v.* Ludden, etc., Southern Music House, 113 Ga. 320, 38 S. E. 752.

**97.** Bennett Bros. Co. *v.* Tam, 24 Mont. 457, 62 Pac. 780. See also Adams *v.* Lee, 64 N. H. 421, 13 Atl. 786.

**98.** Guernsey *v.* Froude, 13 Pa. Super. Ct. 405.

**99.** *California.*— Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448.

*Illinois.*— Emerson Piano Co. *v.* Maund, 85 Ill. App. 453; Gilbert *v.* National Cash Register Co., 67 Ill. App. 606.

*Indiana.*— Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382; Turk *v.* Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85; Tanner *v.* Mishawaka Woolen Mfg. Co., 28 Ind. App. 536, 63 N. E. 313.

*Michigan.*— Marquette Mfg. Co. *v.* Jeffrey, 49 Mich. 283, 13 N. W. 592.

*Mississippi.*— Mount *v.* Harris, 1 Sm. & M. 185, 40 Am. Dec. 89.

*New Hampshire.*— Michelson *v.* Collins, 72 N. H. 554, 58 Atl. 50.

*New York.*— McEntee *v.* Scott, 2 Thomps. & C. 284; Rathbun *v.* Waters, 1 N. Y. City Ct. 36.

*Ohio.*— Davis *v.* Parker, 5 Ohio S. & C. Pl. Dec. 152, 7 Ohio N. P. 382.

*Pennsylvania.*— Turner *v.* Smith, 7 Kulp 139.

*South Carolina.*—Reeves *v.* Harris, 1 Bailey 563.

*Tennessee.*— Price *v.* Jones, 3 Head 84.

*Utah.*— Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103; Lippincott *v.* Rich, 22 Utah 196, 61 Pac. 526.

*Vermont.*— Bradley *v.* Arnold, 16 Vt. 382.

are not unconscionable,[1] and that they do not in any way contravene public policy.[2] Neither is there any objection on such ground because the contract provides that in case of default the whole of the unpaid balance shall become due.[3] It has, however, been held in some states that, where goods are knowingly sold for the purpose of resale, reservations of title are invalid.[4]

**E. Modification and Rescission.**[5] A transaction in effect a conditional

*Wyoming.*— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

*United States.*— Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285; Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879; Wood M., etc., Co. *v.* Brooke, 30 Fed. Cas. No. 17,980, 2 Sawy. 576.

*Canada.*— La Banque d'Hochelaga *v.* Waterous Engine Works Co., 27 Can. Sup. Ct. 406 [*affirming* 5 Quebec Q. B. 125].

See 43 Cent. Dig. tit. "Sales," § 1352.

**Goods not in existence.**— A contract for the sale of goods reserving the title in the seller until payment of the price by the purchaser is valid, although the goods were not in existence so as to be a subject of bargain and sale when the contract was made, if their delivery, when finally made, was under the agreement. Benner *v.* Puffer, 114 Mass. 376.

**Where ranges were sold to a bankrupt** under a conditional contract of sale, the vendor's property therein before payment of the price as against the bankrupt's trustee was not impaired by the fact that use of the ranges on the buyer's property was inconsistent with the idea of a return to the seller, nor because of the claim that the ranges became a part of the real estate, and were therefore incapable of continued ownership in the vendor. *In re* Cohen, 163 Fed. 444.

**Where there is an absolute sale and delivery** of personal property, an agreement by the purchaser to pay the vendor for the future use of the same, or deliver it up on demand, is repugnant to the sale, and void, and the receipt of the property furnishes no valid consideration for such agreement. Domestic Sewing-Mach. Co. *v.* Anderson, 23 Minn. 57.

**Where a contract of conditional sale is void because in violation of a statute** permitting a foreign corporation to do business in the state only on certain conditions, and prescribing penalties, other than the invalidity of contracts, for doing business without compliance with the conditions, it is void in every part, and the property in the possession of the vendee under it for which he has not paid is the property of the vendor. Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

**Even if a contract of conditional sale be void** it does not avail the purchaser, or one claiming under him, in an action by the seller for the chattels, as title remains in the seller. Bennett Bros. Co. *v.* Tam, 24 Mont. 457, 62 Pac. 780.

**Effect of statute exempting property from liens.**— The fact that the land and buildings of a water company are not subject to lien under the mechanics' lien laws of Pennsylvania does not prevent a movable piece of machinery, sold conditionally to such a company, from being subject to a valid contractual lien. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. 879.

**In Louisiana** a so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be the owner of the property until the price is paid, is not possible, and a petition, wherein a vendor under such a contract claims the ownership of the property sold, shows no cause of action. Barber Asphalt Pav. Co. *v.* St. Louis Cypress Co., 121 La. 152, 46 So. 193.

1. Thirlby *v.* Rainbow, 93 Mich. 164, 53 N. W. 159.

2. Dewes Brewing Co. *v.* Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270.

3. Equitable Gen. Providing Co. *v.* Eisentrager, 34 Misc. (N. Y.) 179, 68 N. Y. Suppl. 866; McCormick Harvesting Mach. Co. *v.* Koch, 8 Okla. 374, 58 Pac. 626.

4. Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382; Star Clothing Mfg. Co. *v.* Nordeman, 118 Tenn. 384, 100 S. W. 93; *In re* Gilligan, 152 Fed. 605, 81 C. C. A. 595, applying the law of Indiana. See also McFarlan Carriage Co. *v.* Wells, 99 Mo. App. 641, 74 S. W. 878. But *compare* Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435, holding that an agreement that the purchaser will buy and pay for merchandise, that he may sell it in the regular course of business, but that the proceeds shall be applied as a credit or as collateral to the debt at the option of the vendor, and that the latter will sell and deliver the goods on condition that the title shall remain in him until the notes and accounts of the vendee are paid in cash, is a valid contract of conditional sale.

**A sale of merchandise on credit for resale** in the ordinary course of business with retention of title is contrary to the public policy of Tennessee, and a suit to enforce the title or lien retained cannot be maintained in either the state or federal courts in that state. Coweta Fertilizer Co. *v.* Brown, 163 Fed. 162, 89 C. C. A. 612.

**Before there has been a resale to a third person** a provision in a contract of conditional sale of goods to a dealer giving him the right to resell in the usual course of business does not destroy the title reserved in the seller. *In re* Pierce, 157 Fed. 755, 87 C. C. A. 537.

**Under the law of Arkansas** it is authoritatively settled that a conditional contract of sale is valid, although it provides that the vendee may sell the property in the usual course of business. *In re* Newton, 153 Fed. 841, 83 C. C. A. 23.

5. **Modification or rescission of contract of sale generally** see *supra*, IV.

sale may be modified so as to make the contract one of absolute sale with a mortgage lien reserved; [6] but it would seem that an absolute sale cannot be converted into a conditional sale.[7] Where on a conditional sale the possession of the chattel was retained by the seller, the mere removal thereof to another place would not show a rescission of the contract, such removal of itself not indicating a retaking.[8] An unauthorized rescission of a conditional sale by the president of the corporation vendee may be repudiated by the corporation, which is thereby restored to the rights and burdens it possessed prior to the attempted rescission.[9] The stipulation in the contract of sale that on default in payment the buyer shall return the property does not authorize him to voluntarily return the property in rescission of the contract so as to relieve himself of liability for the price.[10]

**F. What Law Governs.** Generally the law of the place where the contract was made will govern.[11] The place of contract is usually the place where it is actually completed as by delivery; [12] but delivery alone is not sufficient to determine the place of contract, if the actual completion of the contract and its whole beneficial operation and effect take place elsewhere.[13] If the law in question pertains merely to the remedy it will not as a rule be enforced in another state.[14]

6. Griffith *v.* Morrison, 58 Tex. 46.

7. Caraway *v.* Wallace, 2 Ala. 542; Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660, (1900) 59 Pac. 947; Hyer *v.* Smith, 48 W. Va. 550, 37 S. E. 632; Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880. To the same effect see Tomlinson *v.* Roberts, 25 Conn. 477, 68 Am. Dec. 367, where the new contract was regarded as in effect a mortgage to secure the purchase-price. And see Wright *v.* Vaughn, 45 Vt. 369, holding that there must be a change of possession to render the transaction valid against creditors of the buyer. But see Cooper *v.* Payne, 103 N. Y. App. Div. 118, 93 N. Y. Suppl. 69 [*reversed* on other grounds in 186 N. Y. 324, 78 N. E. 1076], where the right to modify the contract so as to give it the effect of a conditional sale is recognized.

8. Cummings *v.* Davis, 17 Ill. App. 245.

9. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755.

10. Robinson's Appeal, 63 Conn. 290, 28 Atl. 40; Finlay *v.* Ludden, etc., Southern Music House, 105 Ga. 264, 31 S. E. 180. See also Ainsworth *v.* Rhines, 34 Misc. (N. Y.) 372, 69 N. Y. Suppl. 876.

11. *Alabama.*— Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729, holding that where the sale took place in Alabama and the property after being removed to Georgia was mortgaged in Alabama, the rights of the parties would be governed by the law of Alabama in an action in that state.

*Maine.*— Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250; Drew *v.* Smith, 59 Me. 393.

*New Jersey.*— Lees *v.* Harding, (1905) 60 Atl. 352.

*Vermont.*— Barrett *v.* Kelley, 66 Vt. 515, 29 Atl. 809, 44 Am. St. Rep. 862; Dixon *v.* Blondin, 58 Vt. 689, 5 Atl. 514.

*Wisconsin.*— Mershon *v.* Moors, 76 Wis. 502, 45 N. W. 95.

*Wyoming.*— Studebaker Bros. Co. *v.* Mau, 14 Wyo. 68, 82 Pac. 2, 13 Wyo. 358, 80 Pac. 151, 110 Am. St. Rep. 1001.

See 43 Cent. Dig. tit. "Sales," § 1323.

**As against resident creditors.**— A conditional sale of property, whereby the property is delivered to the purchaser and title is retained by the seller until the payment of the price, cannot be enforced to the prejudice of resident creditors, who may have demands against the purchaser, although such sale was valid in another state where it was made. Judy *v.* Evans, 109 Ill. App. 154.

**Change of contract.**— Where property conditionally sold in Arkansas is removed to Oklahoma, the vendor consenting to the retention in Oklahoma by the vendee of such property, and the conditional sale notes are changed so as to make them Oklahoma obligations, the property and the rights of the parties are within the jurisdiction of the laws of Oklahoma. National Cash Register Co. *v.* Paulson, 16 Okla. 204, 83 Pac. 793.

**Where no foreign law is proved** which shows that the law of the place where the contract was made differs from the law of the forum the latter will prevail. Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630.

**In an action in the federal court** the validity of a conditional sale contract will be determined by the local law. *In re* Tice, 139 Fed. 52.

**When property conditionally sold is removed** into another state the vendor may follow the property into the jurisdiction where removed, and, without complying with the registration laws of such jurisdiction, enforce his lien against subsequent *bona fide* purchasers or encumbrancers from the mortgagor or vendee. Studebaker Bros. Co. *v.* Mau, 14 Wyo. 68, 82 Pac. 2.

12. Bradley *v.* Kingman Implement Co., 79 Nebr. 144, 112 N. W. 346; Fiske *v.* Peebles, 13 N. Y. St. 743; *In re* Legg, 96 Fed. 326.

**Place of contract of sale** generally see *supra*, II, J, 3.

13. Beggs *v.* Bartels, 73 Conn. 132, 46 Atl. 874, 84 Am. St. Rep. 152.

14. Public Parks Amusement Co. *v.* Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582.

It has, however, been held in some cases that if property conditionally sold in one state is brought into another where registration is necessary as against third persons [15] the law of the latter state will govern.[16] So it has been held that where the conditional sale is made in one state and the property is removed to and sold to a subsequent purchaser in another state, the second sale will be governed by the law of such other state.[17]

**G. Construction and Operation as Between the Parties [18] — 1. Title in General.** Under a conditional sale by the terms of which the seller reserves the title to the goods until payment of the price, no property passes to the buyer, notwithstanding the delivery until performance of the condition as to payment.[19]

**15.** See *infra*, X, J, 4, a.

**16.** Cunningham *v.* Cureton, 96 Ga. 489, 23 S. E. 420; Baldwin *v.* Hill, 4 Kan. App. 168, 46 Pac. 329; Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733. But see Cleveland Mach. Works *v.* Lang, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675.

**17.** Weinstein *v.* Freyer, 93 Ala. 257, 9 So. 285, 12 L. R. A. 700; Public Parks Amusement Co. *v.* Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582; Marvin Safe Co. *v.* Norton, 48 N. J. L. 410, 7 Atl. 418, 57 Am. Rep. 566.

**18.** Of sale generally see *supra*, III.

With respect to third persons see *infra*, X, J.

**19.** *Alabama.*— Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729; Warren *v.* Liddell, 110 Ala. 232, 20 So. 89.

*Arkansas.*— Carroll *v.* Wiggins, 30 Ark. 402.

*California.*— Putnam *v.* Lamphier, 36 Cal. 151.

*Connecticut.*— Colley *v.* Gillan, 54 Conn. 80, 6 Atl. 180.

*Florida.*— Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412, 1 So. 59.

*Georgia.*— Jowers *v.* Blandy, 58 Ga. 379; McBride *v.* Whitehead, Ga. Dec. 165.

*Idaho.*— Kester *v.* Schuldt, 11 Ida. 663, 85 Pac. 974.

*Illinois.*— O'Neil *v.* Rogers, 110 Ill. App. 622; Elliott *v.* Emerson Piano Co., 80 Ill. App. 51.

*Indiana.*—Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403; Thomas *v.* Winters, 12 Ind. 322; Tanner *v.* Mishawaka Woolen Mfg. Co., 28 Ind. App. 536, 63 N. E. 313.

*Iowa.*— Briggs *v.* McEwen, 77 Iowa 303, 42 N. W. 303.

*Maine.*— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Milliken *v.* Warren, 57 Me. 46; Hotchkiss *v.* Hunt, 49 Me. 213.

*Massachusetts.*— Haynes *v.* Temple, 198 Mass. 372, 84 N. E. 467; Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Knox *v.* Perkins, 15 Gray 529; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Hussey *v.* Thornton, 4 Mass. 405, 3 Am. Dec. 224.

*Michigan.*— Couse *v.* Tregent, 11 Mich. 65.

*Mississippi.*— Hunter *v.* Crook, 93 Miss. 812, 47 So. 430; Williams *v.* Williams, (1898) 23 So. 291; Mount *v.* Harris, 1 Sm. & M. 185, 40 Am. Dec. 89.

*Missouri.*— Ridgeway *v.* Kennedy, 52 Mo. 24.

*Nebraska.*— Albright *v.* Brown, 23 Nebr. 136, 36 N. W. 297; Aultman *v.* Mallory, 5 Nebr. 178, 25 Am. Rep. 478.

*New Hampshire.*— Singer Mfg. Co. *v.* Bullard, 62 N. H. 129; Stone *v.* Sleeper, 62 N. H. 3; Weeks *v.* Pike, 60 N. H. 447; Holt *v.* Holt, 58 N. H. 276; Jillson *v.* Wilbur, 41 N. H. 106; Haven *v.* Emery, 33 N. H. 66; Porter *v.* Pettengill, 12 N. H. 299; Luey *v.* Bundy, 9 N. H. 298, 32 Am. Dec. 359.

*New Jersey.*—Falaenau *v.* Reliance Steel Foundry Co., (Ch. 1908) 69 Atl. 1098.

*New York.*— Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7, 20 N. E. 625; Fennikoh *v.* Gunn, 59 N. Y. App. Div. 132, 69 N. Y. Suppl. 12; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Suppl. 448; McEntee *v.* Scott, 2 Thomps. & C. 284; Herring *v.* Hoppock, 3 Duer 20 [*affirmed* in 15 N. Y. 409]; Herring *v.* Willard, 2 Sandf. 418; Van Buskirk *v.* Purinton, 2 Hall 601.

*Ohio.*—Sanders *v.* Keber, 28 Ohio St. 630; Sage *v.* Sleutz, 23 Ohio St. 1; White *v.* Singer Mfg. Co., 4 Ohio Dec. (Reprint) 118, 1 Clev. L. Rep. 40.

*Oregon.*— Rosendorf *v.* Baker, 8 Oreg. 240; Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

*South Carolina.*— Dupree *v.* Harrington, Harp. 391.

*Tennessee.*—Bradshaw *v.* Thomas, 7 Yerg. 497.

*Texas.*— Sacra *v.* Semple, 2 Tex. Unrep. Cas. 644; Arwine *v.* Arwine, 3 Tex. App. Civ. Cas. § 154; Cobb *v.* Tufts, 2 Tex. App. Civ. Cas. § 152; Mosler Safe, etc., Co. *v.* Campbell, 2 Tex. App. Civ. Cas. § 16.

*Vermont.*— Burnell *v.* Marvin, 44 Vt. 277; Davis *v.* Bradley, 24 Vt. 55; Manwell *v.* Briggs, 17 Vt. 176.

*Wisconsin.*— Mississippi River Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193; Hunter *v.* Warner, 1 Wis. 141.

*United States.*— Copland *v.* Bosquet, 6 Fed. Cas. No. 3,212, 4 Wash. 588; *In re* Lyon, 15 Fed. Cas. No. 8,644, 7 Nat. Bankr. Reg. 182. See also *In re* Atlanta News Pub. Co., 160 Fed. 519.

*Canada.*— Fraser *v.* Wallace, 11 Nova Scotia 337 [*affirmed* in 2 Can. Sup. Ct. 522].

See 43 Cent. Dig. tit. "Sales," §§ 1354–1358.

Agreements in the sale of a sloop to "pay the purchase money at the end of the oyster season," and to "make no bills on the boat" without the seller's consent, are not in their

Nevertheless the buyer acquires a defeasible interest in the property which before default he may sell [20] or mortgage,[21] and which may be attached by his creditors.[22] So too he may maintain an action against one who wrongfully invades his posses-

nature conditions precedent to the vesting of the right of possession in the buyer. Hearn *v.* Cullin, 54 Md. 533.

**Delivery to third person.**— A conditional sale of property, accompanied by a delivery of it to a third person, who is to hold it as a common agent of the contracting parties until the terms of sale are complied with, will not vest the title to the property in the purchaser until the condition precedent is fulfilled. Collman *v.* Collins, 2 Hall (N. Y.) 609.

**Property included in condition.**— Where the contract between plaintiff and defendant's assignors provided for the sale of "a certain amount of machinery, and all patterns pertaining to the lock business. . . . Said machinery shall be the property of said" plaintiff until paid for. The word "machinery" included the patterns. Brewer *v.* Ford, 59 Hun (N. Y.) 17, 12 N. Y. Suppl. 619 [*affirmed* in 126 N. Y. 643, 27 N. E. 852].

**The passing of the title** may be made to depend on the giving of a note or other security. Insley *v.* Disharoon, (Md. 1886) 5 Atl. 469; Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7, 20 N. E. 625; Retzsch *v.* Retzsch Printing Co., 19 Ohio Cir. Ct. 631, 10 Ohio Cir. Dec. 537. And see, generally, *supra*, VI, A, 5, d.

**Effect of invalidity of contract.**— One who sells a piano, taking a note which reserves title to the seller until paid, does not lose his title because the note was unauthorized by the signer or forged. Pulsifer *v.* D'Estimauville, 86 Me. 96, 29 Atl. 945.

**Execution of bill of sale by buyer to seller.** — Where appellant put one C in possession of certain machinery, with an agreement that he would turn the machinery over to C on his performance of certain conditions, and at the same time, and as part of the same transaction, C executed a bill of sale of said machinery to appellant, which was duly recorded, as, under the agreement, the title to the machinery did not pass to C, it was reasonable to suppose that the bill of sale was merely for the purpose of giving notice as to who had title, and hence it did not vest the title to the property in C. McCorvey *v.* Potvin, 4 Wash. 698, 30 Pac. 1057, 32 Pac. 295.

**Collateral condition.**— On a sale of goods with a reservation of title until the purchase-price is paid, a condition that the seller might declare the notes due whenever he thought the debt insecure, and might sell the machine, applying the proceeds on the notes, did not divest the seller of the right of property. Call *v.* Seymour, 40 Ohio St. 670.

**Option to purchase.**— A sale of oil tank cars upon condition that if the cars were not paid for within sixty days they should revert to the seller did not pass title to the purchaser, as the transaction would be deemed little more than an option to purchase. Smith *v.* Texas, etc., R. Co., 101 Tex. 405, 108 S. W. 819 [*modifying* (Civ. App. 1907) 105 S. W. 528].

**Injury to property.**— The seller may after default maintain an action against a third person for injury to the property. French *v.* Osmer, 67 Vt. 427, 32 Atl. 254.

**20.** Day *v.* Bassett, 102 Mass. 445; Nutting *v.* Nutting, 63 N. H. 221.

**Fraud as to balance due.**— Where a conditional vendee of property, after part performance of the contract, transfers his interest, the conditional vendor agreeing with the transferee that payment of the balance due shall vest the title in him, and the vendor and vendee, by fraudulently representing that the balance due is greater than it really is, procure that amount to be inserted in the contract between the vendor and transferee, and the vendor, on failure of the transferee to pay the amount specified in the contract, replevies the goods, an answer alleging the fraud and that the balance actually due has been paid sets up a good defense. Sanford *v.* Gates, 18 Mont. 398, 45 Pac. 559.

**Sale to wife.**— The provision that the title should remain in the seller, thus preventing the disposal of the property without his consent, was merely for his protection, so that the rights of innocent third persons should not intervene, and did not render the sale and transfer to the buyer's wife of her husband's interest invalid. Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883.

**On payment by the vendee of the price title** to the goods will vest in his assignee. Currier *v.* Knapp, 117 Mass. 324; Day *v.* Bassett, 102 Mass. 445; Bailey *v.* Colby, 34 N. H. 29, 66 Am. Dec. 752.

**21.** Sunny South Lumber Co. *v.* Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; Chose *v.* Ingalls, 122 Mass. 381; Albright *v.* Meredith, 58 Ohio St. 194, 50 N. E. 719; Carpenter *v.* Scott, 13 R. I. 477. But see Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640; Winchester *v.* King, 46 Mich. 102, 8 N. W. 722.

**22.** Newhall *v.* Kingsbury, 131 Mass. 445; Denny *v.* Eddy, 22 Pick. (Mass.) 535; Hervey *v.* Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673; Hurd *v.* Fleming, 34 Vt. 169. See also Carroll *v.* Beard, 27 Ont. 349, holding that the vendee's interest may be reached in distress for rent. *Contra*, McIver *v.* Williamson-Halsell-Frazier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. N. S. 696, holding that where goods are sold on condition that the title shall not pass until the price is paid, the buyer has no attachable interest therein until payment of the price. See also ATTACHMENT, 4 Cyc. 637 text and note 89.

sion.[23] The seller may sell or mortgage his interest in the goods or in the contract,[24] or it may be attached by his creditors.[25] The provision that title shall remain in the seller is, however, for his benefit and he may elect to treat the sale as absolute and as passing the property in the goods to the buyer.[26] Property held by a bankrupt under a contract of conditional sale, although unrecorded,[27] may, as against the bankrupt buyer, be reclaimed by the seller.[28]

**2. Proceeds, Profits, and Increase of Property.** Since the title to the property remains in the seller he also has title to the increase of such property.[29] He does not, however, take title to goods purchased with the proceeds of the property sold,[30] or received by the buyer on an exchange of property,[31] unless there is an express stipulation to that effect.[32]

**3. Sale or Removal of Property.** The buyer under a contract of conditional sale cannot as a general rule deprive the seller of his property in the goods, by an unauthorized removal thereof[33] or by an unauthorized sale of the goods to a third

23. Harrington *v.* King, 121 Mass. 269; Lord *v.* Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933. *Compare* Smith *v.* Gufford, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37.

**Right of action against tort-feasor** see *infra*, X, M, 1.

24. *Arkansas.*— Little Rock Bank *v.* Collins, 66 Ark. 240, 50 S. W. 694.

*Idaho.*— Barton *v.* Groseclose, 11 Ida. 227, 81 Pac. 623.

*Maine.*— Everett *v.* Hall, 67 Me. 497.

*Minnesota.*— Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106.

*Mississippi.*— Ross-Meehan Brake Shoe Foundry Co. *v.* Pascagoula Ice Co., 72 Miss. 608, 18 So. 364.

*New Hampshire.*— Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.

*Oregon.*— Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

*Utah.*— Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103.

*Vermont.*— Nye *v.* Daniels, 75 Vt. 81, 53 Atl. 150; Burnell *v.* Marvin, 44 Vt. 277.

**After a servant, who bought goods from the master** under a contract stipulating that the ownership of the goods should remain in the master until the servant had sufficient credit to pay for the same, had paid for the goods, the master could not thereafter make advancements to the servant which would constitute a charge against the goods. Black Raven Coal Co. *v.* Edmonson, 108 S. W. 955, 33 Ky. L. Rep. 3.

25. McMillan *v.* Larned, 41 Mich. 521, 2 N. W. 662.

26. Tanner, etc., Engine Co. *v.* Hall, 89 Ala. 628, 7 So. 187; Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Osborne *v.* Walther, 12 Okla. 20, 69 Pac. 953 (holding that the seller may resort to his remedy on the notes given for the price); Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177, 52 Pac. 379.

27. **Necessity and effect of recording** see *infra*, X, J, 4.

28. Monitor Drill Co. *v.* Mercer, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. N. S. 1065; *In re* Atlanta News Pub. Co., 160 Fed. 519.

29. Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026; Elmore *v.* Fitzpatrick, 56 Ala. 400; Bunker *v.* McKenney, 63 Me. 529; Allen *v.* Delano, 55 Me. 113, 92 Am. Dec. 573; Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309; Clark *v.* Hayward, 51 Vt. 14; Buckmaster *v.* Smith, 22 Vt. 203. *Compare* Patterson *v.* Bonner, 19 La. 508. But see Myrick *v.* Boyd, 3 Hayw. (Tenn.) 179.

30. Baker *v.* Tolles, 68 N. H. 73, 36 Atl. 551.

**Goods acquired to keep up stock.**— A stipulation, in an agreement to sell a stock of goods, that the title to same, except such as may be sold in course of trade, shall remain in the vendor until the purchase-price is fully paid, and that the purchaser, by making fresh purchases, shall keep the stock equal to what it was at the time of sale, does not give the vendor title to goods bought by the purchaser to replenish the stock. Harding *v.* Lewenberg, 174 Mass. 394, 54 N. E. 870.

**A stipulation against depleting the stock** while any portion of the purchase-money remained unpaid did not authorize the vendee to purchase new goods on the credit of the vendors. Richardson Drug Co. *v.* Plummer, 56 Nebr. 523, 76 N. W. 1086.

31. Dedman *v.* Earle, 52 Ark. 164, 12 S. W. 330; Smith *v.* Gufford, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37; Hunt *v.* Douglass, 22 Vt. 128. But see Paris *v.* Vail, 18 Vt. 277.

32. Cole *v.* Propst, 119 Ala. 99, 24 So. 884; Churchill *v.* Bailey, 13 Me. 64; McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

33. Warnken *v.* Langdon Mercantile Co., 8 N. D. 243, 77 N. W. 1000. See also Hawkins *v.* Brown, 30 Barb. (N. Y.) 206.

**Consent to the removal** of the property to a designated place does not authorize a second removal to another place. Gibbons *v.* Luke, 37 Hun (N. Y.) 576.

**Waiver.**— Where, after goods were removed by the vendee in a conditional sale, the vendor sent to the vendee, at his new address, an instrument purporting to be a copy of the lease contract, the jury could find a waiver by the vendor of a condition of the lease forbidding removal of the goods by the vendee, so far at least as respected the removal in question. Brown *v.* Goldthwaite Furniture Co., 186 Mass. 51, 71 N. E. 71.

person.[34] The right of sale may, however, be conferred by special stipulation,[35] or inferred from the circumstances, as where the goods are sold for the purpose of being resold at retail,[36] in which case it may be stipulated that the proceeds shall be applied to extinguish the debt for the purchase-money.[37]

**4. Injury to or Destruction of Property.** In some jurisdictions the rule prevails that on a conditional sale, since the title remains in the seller, the goods are at his risk, and in the event of their destruction or injury without the buyer's fault, the seller must bear the loss,[38] following in this regard the rule that prevails

**Sale to two persons.**— Where, after a sale to two persons on condition that the property shall be used by them in their residence, one of such persons gives up his residence and leaves the other in possession of the property, the condition of the sale is not thereby breached. Louis *v.* Hogan, 9 Ohio Dec. (Reprint) 342, 12 Cinc. L. Bul. 198.

**Removal to another state.**— Where personal property, sold under a valid contract of conditional sale, is removed to another state, the failure to comply with the requirements necessary to validate such a contract in such other state does not destroy the vendor's title. Dorntee Casket Co. *v.* Gunnison, 69 N. H. 297, 45 Atl. 318.

34. Wilkinson *v.* H. C. Akeley Lumber Co., 56 Minn. 401, 57 N. W. 941; National Cash Register Co. *v.* Ferguson, 25 Misc. (N. Y.) 363, 55 N. Y. Suppl. 592; Prescott *v.* Prescott, 41 Vt. 131.

**Criminal responsibility.**— Where the sale of a chattel is conditional, the vendor reserving title, it is no defense to a prosecution for its sale by the vendee that the vendor did not record the contract of sale, or take other precaution against loss from any wrongful sale of the property which might be made by the vendee. Chambers *v.* State, 85 Ga. 220, 11 S. E. 653.

**In a prosecution under Ga. Pen. Code (1895), § 673,** for encumbering personal property held under conditional purchase, it is necessary to show that the mortgage was given with intent to defraud the vendor. Miley *v.* State, 118 Ga. 274, 45 S. E. 245.

35. Rewrick *v.* Goldstone, 48 Cal. 554, holding that under a stipulation that the buyer may sell within two years, a sale within the two years prevents the property from vesting in the seller on failure to pay the money. And see Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

**Consent that the property may be mortgaged** to a certain corporation does not authorize the buyer to mortgage it to another corporation. Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646.

36. *Arkansas.*— Rex Buggy Co. *v.* Ross, 80 Ark. 388, 97 S. W. 291.

*Delaware.*— South Bend Iron Works *v.* Reedy, 5 Pennew. 361, 60 Atl. 698.

*Massachusetts.*— Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

*Mississippi.*— Watts *v.* Ainsworth, 89 Miss. 40, 42 So. 672.

*New York.*— Milicie *v.* Pearson, 110 N. Y. App. Div. 770, 97 N. Y. Suppl. 431; Smith *v.* Williams, 90 N. Y. App. Div. 507, 85 N. Y. Suppl. 506; Cook *v.* Gross, 60 N. Y. App. Div. 446, 69 N. Y. Suppl. 924; Albert *v.* R. Lewis Steiner Mfg. Co., 42 Misc. 522, 86 N. Y. Suppl. 162.

*Tennessee.*— Star Clothing Mfg. Co. *v.* Nordeman, 118 Tenn. 384, 100 S. W. 93; Mayer *v.* Catron, (Ch. App. 1898) 48 S. W. 255.

*United States.*— *In re* Gilligan, 152 Fed. 605, 81 C. C. A. 595.

37. Rex Buggy Co. *v.* Ross, 80 Ark. 388, 97 S. W. 291; Smith *v.* Williams, 90 N. Y. App. Div. 507, 85 N. Y. Suppl. 506.

38. *Alabama.*— American Soda Fountain Co. *v.* Blue, (1906) 40 So. 218; Bishop *v* Minderhout, 128 Ala. 162, 29 So. 11, 86 Am. St. Rep. 134, 52 L. R. A. 395.

*Georgia.*— Glisson *v.* Heggie, 105 Ga. 30, 31 S. E. 118; Randle *v.* Stone, 77 Ga. 501. But see Boyer *v.* Ausburn, 64 Ga. 271, where the contract stipulated that the vendee should be liable although the animal sold should die.

*Massachusetts.*— Swallow *v.* Emery, 111 Mass. 355.

*New York.*— Wolf *v.* Di Lorenzo, 21 Misc. 521, 47 N. Y. Suppl. 719.

*Texas.*— Cobb *v.* Tufts, 2 Tex. App. 152.

*United States.*— Arthur *v.* Blackman, 63 Fed. 536.

**Estoppel of buyer.**— It was, however, held in American Soda Fountain Co. *v.* Blue, (Ala. 1906) 40 So. 218, that if the buyer executes a mortgage to the seller on the property to secure the purchase-price he thereby admits that the title to the property was in him at the time of the execution of the mortgage, and cannot contend, after the destruction of the goods, that the original contract of sale was a conditional one, so that title did not pass to him, and thus throw the loss upon the seller. This principle was asserted in Blue *v.* American Soda Fountain Co., 150 Ala. 165, 43 So. 709.

**Election to complete purchase.**— Where defendant held a piano under an agreement for lease or sale, with an option to purchase for a fixed sum, providing that the lessee should be liable for the value of the piano if destroyed or not returned, the election of the lessee to purchase the piano is final, and a subsequent default and offer to return the piano, where it is thereafter destroyed by fire, is not enough to relieve the lessee from paying the price or value thereof. Ainsworth *v.* Rhines, 34 Misc. (N. Y.) 372, 69 N. Y. Suppl. 876.

**Insurance.**— A provision in the contract

as to sales generally.[39] It is to be noted, however, that under a conditional sale the buyer is ordinarily vested with all the incidents of ownership except the title, and by the weight of authority the risk of loss is therefore to be borne by the buyer, and he is liable for the price notwithstanding injury to or destruction of the goods.[40]

**H. Performance by Buyer — 1. In General.** In order that the title shall pass to the buyer under the conditional sale there must be a payment of the proper amount,[41] or a tender of payment.[42] The property will of course vest in the buyer on payment,[43] or a proper tender, although the tender is refused,[44] provided the

that the property should be kept insured by the vendor in its favor at the expense of the vendee did not obligate the vendor to protect the vendee by having the property insured. Arthur *v.* Blackman, 63 Fed. 536.

**39.** See *supra*, VI, A, 9, b.

**40.** *Arkansas.*— Phillips *v.* Hollenberg Music Co., 82 Ark. 9, 99 S. W. 1105.

*Indiana.*— Jessup *v.* Fairbanks, 38 Ind. App. 673, 78 N. E. 1050.

*Iowa.*— Neally *v.* Wilhelm, 4 Greene 240, 61 Am. Dec. 118, where, however, the loss was due to the vendee's negligence.

*Kentucky.*— Prather *v.* Norflet, 1 A. K. Marsh. 178.

*Mississippi.*— Burnley *v.* Tufts, 66 Miss. 48, 5 So. 627, 14 Am. St. Rep. 540.

*Missouri.*— Tufts *v.* Wynne, 45 Mo. App. 42; Jacob Strauss Saddlery Co. *v.* Kingman, 42 Mo. App. 208.

*New Jersey.*— American Soda Fountain Co. *v.* Vaughn, 69 N. J. L. 582, 55 Atl. 54.

*North Carolina.*—Whitlock *v.* Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. N. S. 1214; Tufts *v.* Griffin, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863.

*Tennessee.*— Marion Mfg. Co. *v.* Buchanan, 118 Tenn. 238, 99 S. W. 984, 8 L. R. A. N. S. 590.

*Vermont.*— La Valley *v.* Ravenna, 78 Vt. 152, 62 Atl. 47, 112 Am. St. Rep. 898, 2 L. R. A. N. S. 97; Fuller *v.* Buswell, 34 Vt. 107, assumption of risk by vendee.

*Wisconsin.*— Osborn *v.* South Shore Lumber Co., 91 Wis. 526, 65 N. W. 184; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745, assumption of risk by vendee.

*Canada.*— Sawyer, etc., Co. *v.* Robertson, 1 Ont. L. Rep. 297; Goldie, etc., Co. *v.* Harper, 31 Ont. 284; Hesselbacher *v.* Ballantyne, 28 Ont. 182 [*affirmed* in 25 Ont. App. 36].

See 43 Cent. Dig. tit. "Sales," § 1362.

**Where, at the request of the vendee, the vendor did not deliver** a dry kiln, conditionally sold, but held it subject to the vendee's order, the parties stood toward each other, with regard to their respective rights in the kiln and its destruction by fire, in the same position as if the kiln had been delivered. Whitlock *v.* Auburn Lumber Co., 145 N. C. 120, 58 S. E. 909, 12 L. R. A. N. S. 1214.

**41.** Litterel *v.* St. John, 4 Blackf. (Ind.) 326; and *supra*, X, G, 1.

**If no time is fixed for completing payment,** the buyer is entitled to reasonable time before the seller can demand the return of the goods, and replevy them. Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788.

**Payment by wife** of buyer see *infra*, 712, note 75.

**Performance by creditor.**— Where an attaching creditor took from the possession of a buyer, a piano purchased on condition that the title should remain in the seller until full payment, he could not for his own benefit require the buyer to continue to perform the conditions of the sale by paying instalments of the purchase-price as they fell due, but must himself perform the conditions of the sale. Pearne *v.* Coyne, 79 Conn. 570, 65 Atl. 973.

**Rights as to payment.**— Where the purchaser of a periodical agrees to pay a percentage of the gross receipts quarterly until the payments aggregate three thousand dollars, the title to remain in the seller until full payment, with the right to pay at any time, such purchaser has an absolute right to pay the three thousand dollars at any time, or to pay the gross receipts until they amount to that sum, and claim an absolute title. Allen *v.* D. H. Ranck Pub. Co., 98 Ill. App. 44.

**Sufficiency of evidence** as to payment see Singer Mfg. Co. *v.* Horowitz, 88 N. Y. Suppl. 349.

**Revesting title in seller.**— Where the note is paid by the delivery of chattels which, however, are claimed by creditors of the buyer, and the note is therefore redelivered to the seller, title to the goods covered by the conditional sale is revested in the seller. Bolling *v.* Kirby, 90 Ala. 215, 7 So. 914, 24 Am. St. Rep. 789.

**Question for jury** whether payment has been made see Black Raven Coal Co. *v.* Edmonson, 108 S. W. 955, 33 Ky. L. Rep. 3.

**42.** Ingersoll-Sergeant Drill Co. *v.* Worthington, 110 Ala. 322, 20 So. 61; Cincinnati Safe Co. *v.* Kelly, 54 Ark. 476, 16 S. W. 263; Le Flore *v.* Miller, 64 Miss. 204, 1 So. 99.

**43.** Staunton *v.* Smith, (Del. 1906) 65 Atl. 593; Ideal Cash Register Co. *v.* Zunino, 39 Misc. (N. Y.) 311, 79 N. Y. Suppl. 504.

**Where there was a dispute as to the mode of payment,** a general account between the parties was held to be material only in so far as it might have a bearing on the question as to whether the purchase-price was paid, and in determining what the agreement was. Sparrow-Kroll Lumber Co. *v.* Van Slyck, 130 Mich. 514, 90 N. W. 275.

**44.** Day *v.* Bassett, 102 Mass. 445.

tender is kept good.[45] It is sufficient if the tender is made before possession is actually taken by the seller.[46] While the giving of a note for the price will not in the absence of an agreement to that effect operate as payment so as to pass the title,[47] if the note is accepted as payment the property will pass to the buyer and his title is not defeated by failure to pay the note.[48] A transfer without recourse of the note given for the price, without an assignment of the title to the property, will vest the title in the buyer.[49] Payment of part of the price will not pass the property in a part of the goods unless there is an agreement to that effect.[50] It is, however, held in some jurisdictions that the buyer has an assignable interest in the goods to the extent of his payments which may be reached by his creditors.[51] Where the buyer is allowed a certain period in which to elect

**45.** Summerson *v.* Hicks, 134 Pa. St. 566, 19 Atl. 808.

**46.** Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100; Vaughn *v.* McFadyen, 110 Mich. 234, 68 N. W. 135.

**47.** *Maine.*— Anderson Carriage Co. *v.* Bartley, 102 Me. 492, 67 Atl. 567.

*Montana.*— Heinhockle *v.* Zugbaum, 5 Mont. 325, 5 Pac. 897, 51 Am. Rep. 59.

*New York.*— National Cash Register Co. *v.* Ferguson, 25 Misc. 363, 55 N. Y. Suppl. 592.

*Pennsylvania.*— Levan *v.* Wilten, 135 Pa. St. 61, 19 Atl. 945.

*United States.*— Segrist *v.* Crabtree, 131 U. S. 287, 9 S. Ct. 687, 33 L. ed. 125 [*affirming* 3 N. M. 278, 6 Pac. 202].

**Renewal notes.**— Where a vendor accepted new notes "in renewal and in lieu of the former notes," he did not thereby relinquish the security afforded by the registration of an agreement that the vendor should retain title until the notes were paid. Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90.

**Notes of third person.**—Where a conditional sale of personalty is made, the title to remain in the seller until payment of notes given for the purchase-money, a surrender of such notes and an acceptance of notes of a third person in their stead, with a proviso that the purchaser shall not be released from liability, does not divest the seller of his claim on the property. Hollenburg Music Co. *v.* Morris, (Tex. Civ. App. 1896) 35 S. W. 396.

**48.** Great Western Mfg. Co. *v.* Missouri Nat. Bank, 6 Kan. App. 922, 50 Pac. 941.

**Giving new note.**— Where a sale of personal property was made conditional on the payment of a note, and there was evidence that the note had been paid, partly in cash and partly by a new note, it was error to refuse to charge that, if the first note was paid, the title vested at once in the vendee, unless an agreement was then made that it should remain in the vendor until the payment of the second note. Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133, 29 S. W. 147. But see Staunton *v.* Smith, (Del. 1906) 65 Atl. 593, holding that taking a new note maturing at a later date in renewal of the balance due operated as an extension of the time for the performance of the condition. And see also Lane *v.* Dreger, 95 Minn. 4, 103 N. W. 710, where, on the default of the vendee, a new note was given by the vendee's husband who acted as her agent, the old note being canceled and returned to the vendee, and it was held that this did not divest the vendor of his title to the property.

**A receipt for cash and notes "in full payment"** does not operate to discharge the seller's claim of title unless it clearly appears that the transaction was intended as a full discharge. Bristol *v.* Pearson, 107 N. C. 562, 12 S. E. 451, 22 Am. St. Rep. 900.

**49.** McCullough *v.* Pritchett, 120 Ga. 585, 48 S. E. 148; Bradley *v.* Cassels, 117 Ga. 517, 43 S. E. 857; Burch *v.* Pedigo, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808. *Contra*, Cade *v.* Jenkins, 88 Ga. 791, 15 S. E. 292.

**But an unconditional assignment of a note for the price of personalty,** wherein the seller retains title until the price is paid, does not extinguish the security, but the title retained by the seller becomes vested in the assignee until the price is paid. Laurens Banking Co. *v.* Bales, 4 Ga. App. 142, 60 S. E. 1014 [*following* Townsend *v.* Southern Product Co., 127 Ga. 342, 56 S. E. 436]; Cade *v.* Jenkins, 88 Ga. 791, 15 S. E. 292 [*explained* in Townsend *v.* Southern Product Co., *supra*].

**50.** Brewer *v.* Ford, 59 Hun (N. Y.) 17, 12 N. Y. Suppl. 619 [*affirmed* in 126 N. Y. 643, 27 N. E. 852]. But see Parry Mfg. Co. *v.* Myton, 8 Kan. App. 533, 54 Pac. 291, holding that as between the original parties the seller has only a lien for the unpaid portion of the purchase-price.

**Separate contracts.**— Defendant entered into a written contract with plaintiff for the purchase of a range, under an agreement for possession, and giving plaintiff the right to resume possession on default in payments required to be made, and agreeing that on retaking of possession all payments should be forfeited to the company. By a second agreement defendant acquired certain other personalty under the same conditions as specified in the first contract. Defendant fully paid for the range under the first contract, but made no payments under the second agreement, and the property acquired thereunder was returned to plaintiff before action brought. It was held that the property agreed to be sold under the first agreement was not pledged as security for the payment of the debt created by the second agreement. North Star House Furnishing Co. *v.* Rinkey, 92 Minn. 80, 99 N. W. 429.

**51.** Hervey *v.* Dimond, 67 N. H. 342, 39

to complete the sale, he may make his election at any time within the period,[52] but his election once made is final.[53]

**2. Default and Effect Thereof.** In order that the buyer shall be put in default so as to forfeit his rights under the contract there must have been a demand of payment by the seller.[54] On the failure of the buyer to make payment according to the terms of the contract the seller is entitled to the possession of the property [55] or to a sale thereof in foreclosure of his lien,[56] and is not obliged to accept an offer of payment from a purchaser from the buyer or any person other than the original buyer.[57]

**I. Waiver of Conditions — 1. In General.** The condition as to the retention of title by the seller is for his benefit and may be waived [58] by acts and conduct showing an intent not to rely on such condition,[59] such as laches in exercising his rights,[60] or an election to treat the sale as absolute.[61] Thus if the seller levies an attachment or execution on the property as the property of the buyer, it will be regarded as an election to treat the sale as absolute and an abandonment of his claim to the title.[62] The conditions are not waived, however, by permission to sell at retail,[63] or to mortgage the property to a designated person,[64] except

Atl. 331, 68 Am. St. Rep. 661. And see Albright *v.* Meredith, 58 Ohio St. 194, 50 N. E. 719.

**Attachable interest** see *supra*, X, G, 1.

**52.** Reese *v.* Beck, 24 Ala. 651.

**53.** Ainsworth *v.* Rhines, 34 Misc. (N. Y.) 372, 69 N. Y. Suppl. 876.

**54.** Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100; Cushman *v.* Jewell, 7 Hun (N. Y.) 525; Taylor *v.* Finley, 48 Vt. 78.

**Necessity of demand before suit** see *infra*, X, L, 1, c, (II), (C).

**55.** A'Hern *v.* Lipsett, 154 Mich. 196, 117 N. W. 577. See also *infra*, X, L, 1, c.

**56.** Huyett, etc., Mfg. Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718. See also *infra*, X, L, 1, e.

**57.** Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Lippincott *v.* Rich, 19 Utah 140, 56 Pac. 806. But see Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648, holding that a purchaser from the conditional vendee has a right to complete the purchase, and that the vendors are bound to accept payment from him.

**58.** Tanner, etc., Engine Co. *v.* Hall, 89 Ala. 628, 7 So. 187; Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Osborne *v.* Walther, 12 Okla. 20, 69 Pac. 953; Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177, 52 Pac. 379.

**59.** Frech *v.* Lewis, 32 Pa. Super. Ct. 279.

**Non-reliance on condition.**— Where plaintiff, after furnishing fixtures to a contractor, to enable the latter to place them in defendant's store under a contract, wrote defendant, requesting him to pay the contractor, so that plaintiff could collect of the latter, this was a waiver of any ownership or lien plaintiff had in or on the fixtures. Milicie *v.* Pearson, 110 N. Y. App. Div. 770, 97 N. Y. Suppl. 431.

**The mere mental determination to rest** "satisfied" with the non-performance of a condition precedent to a contract of sale not procured by the vendee or notified to him will not operate as a waiver, so as to vest title in the vendee to the property sold. Manwell *v.* Briggs, 17 Vt. 176.

**60.** Knowles Loom Works *v.* Knowles, (Del. 1906) 65 Atl. 26; Mathews *v.* Smith, 8 Houst. (Del.) 22, 31 Atl. 879; Marston *v.* Baldwin, 17 Mass. 606; Robbins *v.* Phillips, 68 Mo. 100. See also Lord *v.* Buchanan, 69 Vt. 320, 37 Atl. 1048, 60 Am. St. Rep. 933, holding that when the seller had failed to exercise his right to resume possession on default of the buyer but had allowed him to recover from a trespasser, the seller could not maintain an action in his own behalf against such trespasser.

**Default as to interest.**— Where the vendee, in a contract of conditional sale, paid the instalments in full, but did not pay the interest specified, and retained the property for nearly ten years without any demand for interest or claim of title by the vendor, the condition as to payment of interest must be deemed to have been waived, and the title to have become absolute in the vendee. Gorham *v.* Holden, 79 Me. 317, 9 Atl. 894.

**61.** Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014.

**Unconditional delivery.**— Where there has been a conditional sale of personalty, a subsequent delivery, absolute and unconditional, and so intended, waives the condition, and title passes absolutely to the vendee. Albright *v.* Brown, 23 Nebr. 136, 36 N. W. 297.

**Indorsement of notes.**— The vendor of goods delivered under a contract of conditional sale, by indorsing the vendee's purchase-money notes, elects to abide by the contract of sale, and cannot sue to recover the goods. Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

**62.** Thomason *v.* Lewis, 103 Ala. 426, 15 So. 830; Whitney *v.* Abbott, 191 Mass. 59, 77 N. E. 524; Wright *v.* Pierce, 4 Hun (N. Y.) 351, 6 Thomps. & C. 651. But see Reed *v.* Starkey, 69 Vt. 200, 37 Atl. 297.

**63.** Stone *v.* Waite, 88 Ala. 599, 7 So. 117. See also *supra*, X, G, 3. But see Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

**64.** Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646.

as to the particular person so designated.[65] When a return of the goods is declined by the seller, receiving and caring for them on behalf of the buyer is not a waiver of the seller's rights.[66] The fact that possession of the property has been taken by the seller and then restored to the buyer under a new contract does not show an intention to abandon the claim of title.[67] But if the seller takes and retains possession of the property the vendee will be relieved of the obligation to pay.[68] The question whether there has been a waiver by acts and conduct is one depending on the intent of the parties and the circumstances of the case,[69] and is a question of fact for the jury.[70]

**2. Acceptance or Enforcement of Payment.** A waiver of the condition as to the title and an election to regard the sale as absolute cannot be presumed from a demand for payment of the price,[71] or from the fact that the price has been charged against the buyer in his account.[72] It has, however, been held that the presentation, allowance, and approval of a claim for the price against the estate of a deceased purchaser is an election to treat the sale as absolute.[73] And generally the enforcement of the claim for the purchase-price will be regarded as a waiver of the reservation of title by an election to treat the sale as absolute.[74] So too the acceptance of an overdue instalment or a part of the amount due is a waiver of the existing default in the absence of a demand for the balance due.[75] An

65. Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Hyatt *v.* Bell, 83 Ark. 360, 103 S. W. 748. But see Ames Iron Works *v.* Richardson, 55 Ark. 642, 18 S. W. 381, holding that the fact that the seller's agent advised a creditor of the purchaser to take a mortgage thereon is no waiver of the condition where the agent at the time claimed all that was due on the property, and it was not pretended that he had led the creditor to believe that title was in the purchaser, or that the seller's right to its lien was waived.

66. Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531, 56 N. W. 932.

67. Ames Iron Works *v.* Richardson, 55 Ark. 642, 18 S. W. 381; Robinson *v.* Way, 163 Mass. 212, 39 N. E. 1009. See also Cittrell *v.* Carter, 173 Mass. 155, 53 N. E. 375, holding that where one person leases chattels to another, and agrees to execute a bill of sale on receipt of stipulated monthly instalments, his act in taking possession, after the execution of a mortgage by the purchaser, and canceling the lease, and then executing a similar one in favor of a third person, does not affect his right to assert title against the mortgagee.

68. Frederickson *v.* Schmittroth, 77 Nebr 724, 112 N. W. 564.

69. Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805 [*affirming* 2 N. Y. App. Div. 47, 37 N. Y. Suppl. 265]; Albert *v.* R. Lewis Steiner Mfg. Co., 42 Misc. (N. Y.) 522, 86 N. Y. Suppl. 162.

70. *Maine.*— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630.

*Massachusetts.*— Silsby *v.* Boston, etc., R. Co., 176 Mass. 158, 57 N. E. 376; Farlow *v.* Ellis, 15 Gray 229.

*New York.*— Albert *v.* R. Lewis Steiner Mfg. Co., 42 Misc. 522, 86 N. Y. Suppl. 162.

*North Dakota.*— Warnken *v.* Langdon Mercantile Co., 8 N. D. 243, 77 N. W. 1000.

*Pennsylvania.*— Frech *v.* Lewis, 32 Pa. Super. Ct. 279.

*Wisconsin.*— Wing *v.* Thompson, 78 Wis. 256, 47 N. W. 606.

See 43 Cent. Dig. tit. "Sales," § 1417.

71. Equitable General Providing Co. *v.* Stein, 16 Misc. (N. Y.) 582, 38 N. Y. Suppl. 774.

72. Hood *v.* Olin, 68 Mich. 165, 36 N. W. 177; Pecan Lake Mill Co. *v.* American Cooperage Co., (Miss. 1894) 15 So. 580. But *compare* Henrici Laundry Mach. Co. *v.* Fromuth, 8 Pa. Dist. 29, 22 Pa. Co. Ct. 49.

73. Holt Mfg. Co. *v.* Ewing, 109 Cal. 353, 42 Pac. 435 [*distinguishing* Wells *v.* Robinson, 13 Cal. 133].

74. See *infra*, X, L, 1, b.

**A seller suing for the price of goods sold and for the foreclosure of his statutory lien** elects to waive the right secured by the contract of sale stipulating that the title shall remain in him until the price is paid. Elwood State Bank *v.* Mock, 40 Ind. App. 685, 82 N. E. 1003.

75. *Arkansas.*— Carpenter *v.* Crow, 77 Ark. 522, 92 S. W. 779.

*Maryland.*— Cole *v.* Hines, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455.

*Michigan.*— Cable Co. *v.* Wasegizig, 130 Mich. 387, 90 N. W. 24; Deyoe *v.* Jamison, 33 Mich. 94.

*New Hampshire.*— Hervey *v.* Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673.

*New York.*— O'Rourke *v.* Hadcock, 114 N. Y. 541, 22 N. E. 33; Cunningham *v.* Hedge, 12 N. Y. App. Div. 212, 42 N. Y. Suppl. 549. But see Bohde *v.* Farley, 49 N. Y. Super. Ct. 42.

*Rhode Island.*— Mosby *v.* Goff, 21 R. I. 494, 44 Atl. 930.

See 43 Cent. Dig. tit. "Sales," §§ 1414–1416.

**Contra.**— Hegler *v.* Eddy, 53 Cal. 597; Bennett Bros. Co. *v.* Tam, 24 Mont. 457, 62 Pac. 780; Quinn *v.* Parke, etc., Mach. Co., 5 Wash. 276, 31 Pac. 866.

**Payment by third person.**— Where the buyer of goods, sold conditionally, incorpo-

existing default is waived by an extension of time for payment;[76] but such waiver does not extend to a subsequent default.[77]

**3. Taking Other Security.** As a general rule if the seller takes a mortgage or other security for the price, such act will be regarded as a waiver of the condition reserving title and an election to consider the sale as absolute,[78] especially if other security is taken as a general creditor of the buyer.[79] An ineffectual attempt to assert and enforce a mechanic's lien on the property sold is not a waiver of the reservation of title.[80] A mere request for security does not affect the seller's right,[81] and no waiver will be implied where the security was taken by an agent without the seller's knowledge or authority.[82] Nor will it affect his title because he has taken security for a cash payment not made as agreed.[83] Where the property is purchased from the conditional vendee by a third person, the fact that the seller accepts additional security from such third person does not affect his lien.[84]

**J. Operation and Effect as to Third Persons — 1. In General.** A sale of goods on the condition that the property therein shall remain in the seller until the price is paid, in the absence of fraud, is valid against third persons,[85] claiming

rated, and transferred them to the corporation, which, not knowing of the seller's right of recaption, paid several of the purchase-price notes, the action of the seller in accepting payment while knowing of the incorporation did not estop him from retaking the goods, he having a right to suppose the payments were made with knowledge of the contract. Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339.

**76.** Cole *v.* Hines, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; Fairbank *v.* Phelps, 22 Pick. (Mass.) 535; Hutchings *v.* Munger, 41 N. Y. 155 [*affirming* 41 Barb. 396].

**77.** Bunker *v.* McKenney, 63 Me. 529.

**78.** *Alabama.*— American Soda Fountain Co. *v.* Blue, (1906) 40 So. 218. See also Blue *v.* American Soda Fountain Co., 150 Ala. 165, 43 So. 709.

*Georgia.*— Austin *v.* Hamilton, 96 Ga. 759, 22 S. E. 304.

*Kansas.*— McCormick Harvesting Mach. Co. *v.* Lewis, 52 Kan. 358, 35 Pac. 12.

*Minnesota.*— Beer *v.* Aultman-Taylor Co., 32 Minn. 90, 19 N. W. 388.

*Montana.*— Silver Bow Min., etc., Co. *v.* Lowry, 6 Mont. 288, 12 Pac. 652.

*Wisconsin.*— Aultman *v.* Silha, 85 Wis. 359, 55 N. W. 711.

See 43 Cent. Dig. tit. "Sales," § 1413.

**Contra.**— Pettyplace *v.* Groton Bridge, etc., Co., 103 Mich. 155, 61 N. W. 266; Greenwald *v.* Tinsley, (Miss. 1906) 42 So. 89; Richcreek *v.* O'Donnell, 26 Ohio Cir. Ct. 528. But see Valandingham *v.* Bliss, 3 Ohio S. & C. Pl. Dec. 681, 33 Cinc. L. Bul. 27.

**Redelivery under original contract.**— The seller of goods is not estopped as against a creditor of the buyer from claiming title to them, on a conditional sale, by the fact that he accepted a chatted mortgage on them from the buyer in possession, foreclosed it on default, as shown by the records, and again delivered them to the buyer under the original contract, the validity of the conditional sale and the mortgage being unquestioned. Goodkind *v.* Gilliam, 19 Mont. 385, 48 Pac. 548.

**Assignment of rents.**— Where furniture was sold with a reservation of title in the seller, the furniture to be paid for out of rents of the building in which it was used, an assignment of the rents to the seller is not such a taking of security as will waive the condition as to title. Staats *v.* Hodges, Lalor (N. Y.) 211.

**Taking a subsequent contract** from the buyer and another, although it is in effect additional security, will not operate as a waiver of the vendor's rights. Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103.

**Taking personal security** on the purchase-money note is not a waiver of the seller's title. Owenby *v.* Swann, (Tenn. Ch. App. 1900) 59 S. W. 378.

**The taking of notes and collateral security** for the purchase-price of property sold under a contract of conditional sale does not affect such feature of the contract. Monitor Drill Co. *v.* Mercer, 163 Fed. 943, 90 C. C. A. 303, 2 L. R. A. N. S. 1065 [*following* Bierce *v.* Hutchins, 205 U. S. 340, 27 S. Ct. 524, 51 L. ed 828 (*reversing* 16 Hawaii 717)].

**Election of remedies.**— Where one made a conditional sale of goods, his subsequent acceptance of a mortgage on them and other goods does not constitute an election to claim under the mortgage, to the exclusion of his rights under the sale. Corning First Nat. Bank *v.* Reid, 122 Iowa 280, 98 N. W. 107. *Compare* Foster *v.* Briggs Mach., etc., Co., 6 Indian Terr. 342, 98 S. W. 120.

**79.** Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867.

**80.** Warner El. Mfg. Co. *v.* Capitol Inv., etc., Assoc., 127 Mich. 323, 86 N. W. 828, 89 Am. St. Rep. 473. But see Hickman *v.* Richburg, 122 Ala. 638, 26 So. 136.

**81.** Sargent *v.* Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368.

**82.** Jones *v.* Albin, 53 Ga. 585.

**83.** Cherry *v.* Arthur, 5 Wash. 787, 32 Pac. 744.

**84.** Kimball *v.* Costa, 76 Vt. 289, 56 Atl. 1009, 104 Am. St. Rep. 937.

**85.** *California.*— Rodgers *v.* Bachman, 109 Cal. 552, 42 Pac. 448.

under the buyer as subsequent purchasers,[86] mortgagees and pledgees,[87] pur-

*Kentucky.*— Patton *v.* McCane, 15 B. Mon. 555.

*Louisiana.*— McBurney *v.* Flagg, 11 La. 333.

*Michigan.*— Thirlby *v.* Rainbow, 93 Mich. 164, 53 N. W. 159.

*Utah.*— Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103.

*Washington.*— De Saint Germain *v.* Wind, 3 Wash. Terr. 189, 13 Pac. 753.

*United States.*— Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285 [*affirming* 4 Utah 197, 7 Pac. 865]; Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

*England.*— Bateman *v.* Green, Ir. R. 2 C. L. 166.

See 43 Cent. Dig. tit. "Sales," § 1366 *et seq.*; and, generally, FRAUDULENT CONVEYANCES, 20 Cyc. 394.

**Taxes due from purchaser.**—Where it is expressly provided in a contract for the sale of lumber that it "shall belong to the seller until shipped," the title thereto remains in him, and the lumber cannot be seized for taxes due by the purchaser on other property. Hovey *v.* Gow, 81 Mich. 314, 45 N. W. 985.

**If the contract is ambiguous** it will as to third persons be construed as an absolute rather than a conditional sale. W. T. Adams Mach. Co. *v.* Newman, 107 La. 702, 32 So. 38.

**Failure of vendee to redeem.**—Where one person leases chattels to another, and agrees to execute a bill of sale on receipt of stipulated monthly instalments, his rights, as against the purchaser under a mortgage given by the lessee, are not affected by such purchaser's failure to redeem in fifteen days, under Pub. St. c. 192, § 13, after the former had taken possession for failure to pay instalments. Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375.

**The widow of the deceased vendee** under a conditional contract of sale, attempting to collect an award, is not such a third party to the contract as to entitle her to possession of the property as against the vendor. Hallbeck *v.* Stewart, 69 Ill. App. 225.

**Property attached to realty.**—Where a contract for the sale of a mill provided that the vendee should not remove any of the machinery from the premises without the vendor's consent, the fact that the vendee did remove an old engine without the vendor's consent which was replaced by a new gasoline engine purchased from plaintiffs under a conditional contract reserving the title in plaintiffs until paid for did not affect plaintiffs' rights under such conditional contract of sale. Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851 [*reversing* 105 N. Y. App. Div. 636, 93 N. Y. Suppl. 1127].

**Trustee in bankruptcy.**— Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

86. *Arkansas.*— Carroll *v.* Wiggins, 30 Ark. 402.

*California.*—Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

*Indiana.*— Baals *v.* Stewart, 109 Ind. 371, 9 N. E. 403; Sears *v.* Shrout, 24 Ind. App. 313, 56 N. E. 728.

*Kentucky.*— Baldwin *v.* Warren, 39 S. W. 25, 18 Ky. L. Rep. 1102.

*Maine.*— Milliken *v.* Warren, 57 Me. 46; Stevens *v.* Ellis, 48 Me. 501, 77 Am. Dec. 240; Waterston *v.* Getchell, 5 Me. 435, 17 Am. Dec. 251.

*Michigan.*— Couse *v.* Tregent, 11 Mich. 65.

*Mississippi.*—Watts *v.* Ainsworth, 89 Miss. 40, 42 So. 672.

*Missouri.*—Ridgeway *v.* Kennedy, 52 Mo. 24; Barnes *v.* Rawlings, 74 Mo. App. 531.

*New Hampshire.*— Stone *v.* Sleeper, 62 N. H. 3; Kimball *v.* Jackman, 42 N. H. 242.

*New Jersey.*— Cole *v.* Berry, 42 N. J. L. 308, 36 Am. Rep. 511.

*New York.*— Brewster *v.* Baker, 20 Barb. 364; Herring *v.* Willard, 2 Sandf. 418.

*Oregon.*— Rosendorf *v.* Baker, 8 Oreg. 240.

*Tennessee.*— Houston *v.* Dyche, Meigs 76, 33 Am. Dec. 130.

*Vermont.*— Ufford *v.* Winchester, 69 Vt. 542, 38 Atl. 239.

*Virginia.*— McComb *v.* Donald, 82 Va. 903, 5 S. E. 558.

*Wisconsin.*— Garbutt *v.* Prairie du Chien Bank, 22 Wis. 384.

*United States.*—Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285 [*affirming* 4 Utah 197, 7 Pac. 865]; Blackwell *v.* Walker, 5 Fed. 419, 2 McCrary 33; Copland *v.* Bosquet, 6 Fed. Cas. No. 3,212, 4 Wash. 588. See also Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

See 43 Cent. Dig. tit. "Sales," § 1371.

**Property attached to realty.**— Even where the property sold was placed on or attached to the realty of the buyer it has been held that he could pass no title to a subsequent purchaser of the realty. Warren *v.* Liddell, 110 Ala. 232, 20 So. 89; Baldwin *v.* Young, 47 La. Ann. 1466, 17 So. 883. But see Jenks *v.* Colwell, 66 Mich. 420, 33 N. W. 528, 11 Am. St. Rep. 502.

**Conditional sale not evidence of fraud.**— In an action to recover goods to which plaintiff had reserved title on a conditional sale, where there was no evidence authorizing it, it was prejudicial error to charge that every sale, unless accompanied by immediate delivery, and followed by an actual change of possession, was conclusive evidence of fraud, as against the creditors or subsequent purchasers. Goodkind *v.* Gilliam, 19 Mont. 385, 48 Pac. 548.

**Where goods were delivered on trial** to one who was to buy them if they suited, title to remain in the seller, the latter was entitled to possession of them as against a third person not shown to be a *bona fide* purchaser. Ryan *v.* Wollowitz, 25 Misc. (N. Y.) 498, 54 N. Y. Suppl. 988.

87. *Colorado.*— Harbison *v.* Tufts, 1 Colo. App. 140, 27 Pac. 1014.

*Connecticut.*— Cragin *v.* Coe, 29 Conn. 51.

*Georgia.*— Goodwin *v.* May, 23 Ga. 205.

chasers at a judicial sale,[88] or as creditors.[89] The rights of the seller will prevail even against one occupying the position of a *bona fide* purchaser,[90] except in so far as the general rule has been changed by statutory provisions as to the execution of the contract,[91] and those requiring the contract or a memorandum thereof to be filed and recorded.[92] So far as subsequent purchasers are concerned the seller cannot, however, reclaim the goods if the resale was authorized,[93] unless the condition attached to the authorization was that the seller's title should be protected.[94]

**2. Creditors of Buyer[95] — a. General Rule.** Except as the general rule may be modified by statutory provisions requiring contracts of conditional sale to be

*Indiana.*— Sears *v.* Shrout, 24 Ind. App. 313, 56 N. E. 728.

*Michigan.*— Hood *v.* Olin, 68 Mich. 165, 36 N. W. 177.

*New Hampshire.*— Haven *v.* Emery, 33 N. H. 66.

*New York.*— Canton Surgical, etc., Co. *v.* Webb, 16 N. Y. Suppl. 932.

*Utah.*— Shoshonetz *v.* Campbell, 7 Utah 46, 24 Pac. 672.

*United States.*— New York Cent. Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 865, 1 C. C. A. 130.

See 43 Cent. Dig. tit. "Sales," § 1373.

**Property attached to realty.**—Where chattels are sold under an agreement that the title shall not pass until payment, and are delivered to the purchaser after he has made a mortgage covering after-acquired property, of which mortgage the vendor has constructive notice through its record, the vendor's lien on such chattels for their price will prevail, as against the mortgagee, provided such chattels are separate and distinct personalty, and do not become part of the real estate mortgaged; but if, with the consent of the vendor, implied by his knowledge of the mortgage, such chattels become a part of the realty, they are subject to the lien of the mortgage. New York Security, etc., Co. *v.* Capital R. Co., 77 Fed. 529.

**Purchaser at mortgage sale.**— One who leases chattels to another, and agrees to execute a bill of sale on receipt of stipulated monthly instalments, may reclaim the chattels from a purchaser at a sale under a mortgage executed by the latter. Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375. See also Piedmont Land, etc., Co. *v.* Thomson-Houston Motor Co., (Ala. 1892) 12 So. 768.

**An absolute sale cannot be modified** by a subsequent agreement so as to convert it into a conditional sale as against the rights of an intervening mortgagee. Van Winkle *v.* Crowell, 146 U. S. 42, 13 S. Ct. 18, 36 L. ed. 880.

**Goods to be resold.**—Where a person buys personal property under a written contract that he will hold it in trust for the seller until the latter be fully paid, and that, if any sales are made, he will hold the proceeds in trust for the seller, and subsequently the buyer, without the consent of the seller, gives a chattel mortgage on the property to another to secure a prior debt, the seller may recover the property from the mortgagee. Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 544, 33 Pac. 360.

88. Piedmont Land, etc., Co. *v.* Thomson-Houston Motor Co., (Ala. 1892) 12 So. 768; Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Blanchard *v.* Child, 7 Gray (Mass.) 155; Ferguson *v.* Lauterstein, 160 Pa. St. 427, 28 Atl. 852.

89. See *infra*, X, J, 2.

**Attaching creditor** see Attachment, 4 Cyc. 637 text and note 89.

90. See *infra*, X, J, 3.

91. See *supra*, X, D, 2.

92. See *infra*, X, J, 4.

93. Gluckauf *v.* Urton, 19 Cal. 61; Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839; Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

**Resale voidable for fraud.**—Where personal property is sold with power in the conditional vendee to resell, and the resale is voidable at the election of the conditional vendee for fraud, it is also voidable at the election of the conditional vendor. Dunham *v.* Lee, 24 Vt. 432.

**Substitution of vendor.**— Defendants contracted to purchase an electrical machine from M, a dealer in such machines, the contract providing for part payment in a second-hand dynamo. M purchased from plaintiffs the machine with which to fill the contract, title to remain in plaintiffs until payment. Plaintiffs wrote to defendants that at the request of M they would ship the machine; that "this machine is the property of [plaintiffs] until fully paid for; the time of payment being thirty, sixty, and ninety days." Defendants acknowledged receipt of the letter, and agreed to settle in thirty days. Plaintiffs did not know that the second-hand machine was received in part payment. It was held that plaintiffs were not estopped to assert the contract for retention of title, as against defendants. Excelsior Iron Works *v.* Lee, 123 Mich. 499, 82 N. W. 207.

**Under the law of Arkansas** a conditional contract of sale providing that the vendee may sell the property in the usual course of business is valid, although it is not recorded. *In re* Newton, 153 Fed. 841, 83 C. C. A. 23.

94. Bateman *v.* Green, Ir. R. 2 C. L. 166.

95. **Attachable interest of buyer** see *supra*, X, G, 1.

executed in a certain manner [96] and requiring such contracts to be recorded [97] a conditional sale is ordinarily held to be valid as against creditors of the buyer;[98] and

**Priority between attachment and claim under conditional sale** see ATTACHMENT, 4 Cyc. 637.

**Property conveyed by assignment** for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 215.

96. See *supra*, X, D, 2.

97. See *infra*, X, J, 4.

98. *Connecticut.*— Lucas *v.* Birdsey, 41 Conn. 357.

*Georgia.*— Ellis *v.* Holland, 98 Ga. 154, 26 S. E. 735; Hall *v.* Larey, 73 Ga. 697.

*Kentucky.*— Patton *v.* McCane, 15 B. Mon. 555.

*Maine.*— Churchill *v.* Bailey, 13 Me. 64.

*Massachusetts.*— Plymouth Stove Foundry Co. *v.* Fee, 182 Mass. 31, 64 N. E. 419; Nichols *v.* Ashton, 155 Mass. 205, 29 N. E. 519; Hill *v.* Freeman, 3 Cush. 257; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Hussey *v.* Thornton, 4 Mass. 405, 3 Am. Dec. 224.

*Michigan.*— Dewes Brewery Co. *v.* Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; Marquette Mfg. Co. *v.* Jeffrey, 49 Mich. 283, 13 N. W. 592.

*Mississippi.*—W. F. Zimmerman Lumber Co. *v.* Elder, (1901) 29 So. 466. But see Paine *v.* Hall Safe, etc., Co., 64 Miss. 175, 1 So. 56.

*Missouri.*— Ridgeway *v.* Kennedy, 52 Mo. 24.

*Montana.*— Goodkind *v.* Gilliam, 19 Mont. 385, 48 Pac. 548; Silver Bow Min., etc., Co. *v.* Lowry, 6 Mont. 288, 12 Pac. 652; Heinhockle *v.* Zughaum, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59.

*New Hampshire.*— McFarland *v.* Farmer, 42 N. H. 386.

*New Jersey.*— Cole *v.* Berry, 42 N. J. L. 308, 36 Am. Rep. 511.

*New York.*— Fennikoh *v.* Gunn, 59 N. Y. App. Div. 132, 69 N. Y. Suppl. 12; Piser *v.* Stearns, 1 Hilt. 86.

*Tennessee.*— Gambling *v.* Read, Meigs 281.

*Texas.*— Tufts *v.* Cleveland, (1887) 3 S. W. 288; City Nat. Bank *v.* Tufts, 63 Tex. 113; Mechanics' Bank *v.* Gullett Gin Co., (Civ. App. 1898) 48 S. W. 627.

*Utah.*— Russell *v.* Harkness, 4 Utah 197, 7 Pac. 865 [*affirmed* in 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285].

*Vermont.*— Fales *v.* Roberts, 38 Vt. 503 (holding that the creditor must tender the amount due within a specified period in order to hold the goods as against the unpaid seller); Paris *v.* Vail, 18 Vt. 277; Bigelow *v.* Huntley, 8 Vt. 151.

*United States.*— Harkness *v.* Russell, 118 U. S. 663, 7 S. Ct. 51, 30 L. ed. 285 [*affirming* 4 Utah 197, 7 Pac. 865]; The Marina, 19 Fed. 760.

See 43 Cent. Dig. tit. "Sales," §§ 1391, 1394.

**The contrary has been held in some cases.** Murch *v.* Wright, 46 Ill. 487, 95 Am. Dec. 455. Especially when the creditor is an execution creditor. Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22; Herbert *v.* Rhodes-Burford Furniture Co., 106 Ill. App. 583; Emerson Piano Co. *v.* Maund, 85 Ill. App. 453; Boehm *v.* Griebenow, 78 Ill. App. 675. And see W. W. Kimball Co. *v.* Cruikshank, 123 Ill. App. 580; Brunswick, etc., Co. *v.* Hoover, 95 Pa. St. 508, 40 Am. Rep. 674; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121; W. A. E. Henrici Laundry Mach. Co. *v.* Fromuth, 15 Pa. Super. Ct. 339; Ott *v.* Sweatman, 3 Pa. Dist. 573, 15 Pa. Co. Ct. 97 [*affirmed* in 166 Pa. St. 217, 31 Atl. 102]; Lee *v.* Byers, 2 Chest. Co. Rep. (Pa.) 134; Frank *v.* Price, 1 Leg. Rec. 101; Ryle *v.* Knowles Loom Works, 87 Fed. 976, 31 C. C. A. 340, applying the Pennsylvania rule. But see Lehigh Co. *v.* Field, 8 Watts & S. (Pa.) 232; Ladley *v.* U. S. Express Co., 3 Pa. Super. Ct. 149. *Compare* John Matthews Apparatus Co. *v.* Neal, 89 Ill. App. 174; Gould *v.* Howell, 32 Ill. App. 349.

**Under the law of Pennsylvania** a reservation of title in a contract under which goods are delivered to another until the purchase-price shall have been paid is void as against creditors of the person in possession, whatever may be the form of the contract, if it is essentially one of conditional sale, and not of bailment. *In re* Tice, 139 Fed. 52.

**Landlord of vendee.**—Where the seller of a soda-water apparatus on instalments reserves the title thereto until paid for, while any part of the price remains unpaid he has a sufficient interest therein to entitle him to possession, as against the purchaser's landlord in a distress for rent. Tufts *v.* Stone, 70 Miss. 54, 11 So. 792. See also Bingham *v.* Vandegrift, 93 Ala. 283, 9 So. 280, holding that where the instrument of sale of goods to a tenant provides that the vendor shall retain title until the purchase-money is paid, this is a conditional sale, and the landlord can only subject them to his lien by paying the purchase-money due, or keeping good a tender thereof.

**Creditor without notice.**— Delivery under a contract providing that title to the goods shall remain in the vendor until the price and interest thereon is fully paid does not pass title to the vendee, so as to subject it to execution for his debts, although the execution creditors have no notice of the condition. Dodd *v.* Bowles, 3 Wash. Terr. 383, 19 Pac. 156.

**Assignee for benefit of creditors.**—A sale and delivery of chattels on condition that the title shall remain in the vendor until they are paid for passes no title to the vendee, and his assignee has no claim as against a purchaser of the vendor. Schneider *v.* Lee, (Oreg. 1888) 17 Pac. 269.

**The burden of proof** is on the seller to show as against a creditor of the buyer that the sale was a conditional one (Forbes *v.* Martin, 7 Houst. (Del.) 375, 32 Atl. 327), and that

in some cases this rule has been held to apply even though the creditor is a judgment creditor.[99]

**b. After Default and Reclamation.** Especially will the general rule apply after default and a reclamation of the goods by the seller.[1]

**c. Effect of Time of Accrual of Indebtedness.** In some jurisdictions a distinction has been drawn based on the time of accrual of the indebtedness, and the rule has been laid down that while the sale is valid as against a creditor whose claim accrued prior to the sale,[2] it is not valid as against a creditor whose claim accrued subsequently to the sale.[3]

**d. Where Goods Are Sold For Resale.** So too a distinction is observed in some jurisdictions where the goods were sold for the purpose of resale, and it is held that in such case the creditor may hold the goods,[4] although the distinction is not regarded as affecting the question in other jurisdictions.[5]

the condition was not fulfilled (Goodell *v.* Fairbrother, 12 R. I. 233, 34 Am. Rep. 631).

**Buyer trading as corporation.**—When plaintiff sold machinery to A, reserving the title until the same should be paid for, and A and defendant formed a manufacturing company, and advertised under the name of A, with the addition of the words "Manufacturing Co.," the machinery was not liable for the company's debts under Miss. Code (1880), § 1300, which provides that, if any person shall transact business as a trader, or otherwise, with the addition of the words "and Company," "and Co.," or like words, and fail to disclose the name of his principal or partner, all the property used or acquired in such business shall be liable for his debts, as the machinery was not used in such business with the consent of plaintiff. Adams *v.* Berg, 67 Miss. 234, 7 So. 225. *Compare* Paine *v.* Hall Safe, etc., Co., 64 Miss. 175, 1 So. 56, where the property was sold to and used by a firm in the transaction of its business and it was held that in such case the statute applied.

**A hotel-keeper has a lien,** however, on a piano in the possession of a guest under a conditional contract of sale providing that the title thereto shall remain in the vendor until the price has been paid, which is superior to the right of the vendor to retake possession of the piano on a breach by the guest of the conditions contained in such contract of sale. Waters *v.* Gerard, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886 [*affirming* 106 N. Y. App. Div. 431, 94 N. Y. Suppl. 702]. See also INNKEEPERS, 22 Cyc. 1090.

99. Mechanics' Bank *v.* Gullett Gin Co., (Tex. Civ. App. 1898) 48 S. W. 627. *Compare* John Matthews Apparatus Co. *v.* Neal, 89 Ill. App. 174. But see Coors *v.* Reagan, 44 Colo. 126, 96 Pac. 966 [*explaining* Jones *v.* Clark, 20 Colo. 353, 38 Pac. 371; Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260; George *v.* Tufts, 5 Colo. 162; Weber *v.* Diebold Safe, etc., Co., 2 Colo. App. 68, 29 Pac. 747], in case of an attachment creditor.

The receiver or general creditors of an insolvent corporation are not "judgment creditors," within Pamphl. Laws (1898), pp. 699, 700, §§ 71, 72, relating to conditional sales of chattels, and protecting only judgment creditors, subsequent purchasers, and mortgagees, without notice. Smith *v.* Hotel Ritz Co., (N. J. Ch. 1908) 70 Atl. 137.

1. *Georgia.*— Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206.

*Massachusetts.*— Blanchard *v.* Cooke, 144 Mass. 207, 11 N. E. 83.

*New York.*— Powell *v.* Preston, 1 Hun 513, 3 Thomps. & C. 644.

*Pennsylvania.*— Hineman *v.* Matthews, 138 Pa. St. 204, 20 Atl. 843, 10 L. R. A. 233.

*Tennessee.*— Buson *v.* Dougherty, 11 Humphr. 50.

*Vermont.*— Martin *v.* Eames, 26 Vt. 476.

See 43 Cent. Dig. tit. "Sales," § 1400.

**Under Mills Annot. St. Colo. § 2027,** if a conditional sale was rescinded, the seller, to make the transaction available against the buyer's creditors, was bound to immediately take and keep actual and continued possession of the personalty. Coors *v.* Reagan, 44 Colo. 126, 96 Pac. 966.

2. *Iowa.*— Corning First Nat. Bank *v.* Reid, 122 Iowa 280, 98 N. W. 107.

*Massachusetts.*— Marston *v.* Baldwin, 17 Mass. 606.

*New York.*— Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851.

*Pennsylvania.*— Myers *v.* Harvey, 2 Penr. & W. 478, 23 Am. Dec. 60.

*Utah.*— Russell *v.* Harkness, 4 Utah 197, 7 Pac. 865.

See 43 Cent. Dig. tit. "Sales," § 1392.

3. Hussey *v.* Thornton, 4 Mass. 405, 3 Am. Dec. 224; New York Security, etc., Co. *v.* Capital R. Co., 77 Fed. 529.

4. New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300; Wheeler *v.* New Haven Wire Co., (Conn. 1889) 16 Atl. 393; Cleveland Co-operative Stove Co. *v.* Matson, 30 Ill. App. 372; Mayer *v.* Catron, (Tenn. Ch. App. 1898) 48 S. W. 255. But *compare* Mack *v.* Story, 57 Conn. 407, 18 Atl. 707; Lewis *v.* McCabe, 49 Conn. 141, 44 Am. Rep. 217, where the condition was that the seller's title should remain only as to the unsold goods.

5. *Maine.*— Thomas *v.* Parsons, 87 Me. 203, 32 Atl. 876.

*Nebraska.*—Wilson *v.* Lewis, 63 Nebr. 617, 88 N. W. 690.

**3. Bona Fide Purchasers.**[6] The general rule that conditional sales are, in the absence of statute, valid as against subsequent purchasers from the buyer applies, although such purchaser occupies the position of a *bona fide* purchaser.[7] If, however, the goods are sold to a retail dealer, for the purpose of resale, or consent

*New York.*— Frank *v.* Batten, 49 Hun 91, 1 N. Y. Suppl. 705; Cole *v.* Mann, 3 Thomps. & C. 380 [*affirmed* in 62 N. Y. 1]. But see Ludden *v.* Hazen, 31 Barb. 650; Brown *v.* Thurber, 1 N. Y. City Ct. 322.

*Utah.*— Hirsch *v.* Steele, 10 Utah 18, 36 Pac. 49.

*United States.*— South Bend Iron-Works *v.* Cottrell, 31 Fed. 254.

**Sale not completed.**—Where the sale of a stock of goods was conditioned upon the payment at maturity of a note given for the price thereof, and the bill of sale evidencing it, together with the note and its collateral, were deposited with a third party, to be delivered only upon payment by the vendee, which payment was never made, it is no defense to an action of replevin, by one who subsequently purchased from the vendor, against the officer who seized the goods under attachments against the vendee, that the vendor allowed the vendee to participate in making sales from the goods, and to put a sign in his own name upon the store. McDonald *v.* Hallicy, 5 Colo. App. 438, 38 Pac. 993.

**As it does not create a mortgage with a secret lien.**—A stipulation that the purchaser may sell the merchandise in the regular course of business and apply the proceeds as a credit or as collateral security, at the option of the vendor, does not render such contract fraudulent or voidable against creditors. Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

**6. Delay and laches of seller in reclaiming property** see *supra*, X, I, 1.

**7.** *Alabama.*— Goodgame *v.* Sanders, 140 Ala. 247, 37 So. 200; Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104.

*Arkansas.*— Triplett *v.* Mansur, etc., Implement Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; Simpson *v.* Shackelford, 49 Ark. 63, 4 S. W. 165; McRea *v.* Merrifield, 48 Ark. 160, 2 S. W. 780; McIntosh *v.* Hill, 47 Ark. 363, 1 S. W. 680.

*Florida.*— Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

*Georgia.*—Flanders *v.* Maynard, 58 Ga. 56.

*Indiana.*— Payne *v.* June, 92 Ind. 252; Thomas *v.* Winters, 12 Ind. 322.

*Iowa.*— Baker *v.* Hall, 15 Iowa 277; Bailey *v.* Harris, 8 Iowa 331, 74 Am. Dec. 312.

*Kansas.*— Hallowell *v.* Milne, 16 Kan. 65; Sumner *v.* McFarlan, 15 Kan. 600.

*Maine.*— Stevens *v.* Ellis, 48 Me. 501, 77 Am. Dec. 240.

*Massachusetts.*— Carter *v.* Kingman, 103 Mass. 517; Deshon *v.* Bigelow, 8 Gray 159; Sargent *v.* Metcalf, 5 Gray 306, 66 Am. Dec. 368; Gilbert *v.* Thompson, 3 Gray 550 note; Dresser Mfg. Co. *v.* Waterston, 3 Metc. 9. But see Hussey *v.* Thornton, 4 Mass. 405, 3 Am. Dec. 224.

*Michigan.*— Lansing Iron, etc., Works *v.* Wilbur, 111 Mich. 413, 69 N. W. 667; Pettyplace *v.* Groton Bridge, etc., Co., 103 Mich. 155, 61 N. W. 266; Fifield *v.* Elmer, 25 Mich. 48.

*Mississippi.*— Ketchum *v.* Brennan, 53 Miss. 596.

*Missouri.*— Kingsland-Ferguson Mfg. Co. *v.* Culp. 85 Mo. 548; Wangler *v.* Franklin, 70 Mo. 659; Little *v.* Page, 44 Mo. 412; Griffin *v.* Pugh, 44 Mo. 326; Parmlee *v.* Catherwood, 36 Mo. 479.

*Montana.*— Heinbockle *v.* Zugbaum, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59.

*New Mexico.*— Redewill *v.* Gillen, 4 N. M. 78, 12 Pac. 872.

*New York.*— Ballard *v.* Burgett, 40 N. Y. 314 [*affirming* 47 Barb. 646]; Puffer *v.* Reeve, 35 Hun 480, 15 Abb. N. Cas. 388; Walker *v.* Mitchell, 25 Hun 527; Kenny *v.* Planer, 3 Daly 131. But see Wait *v.* Green, 36 N. Y. 556 [*affirming* 35 Barb. 585, 62 Barb. 241]; Fitzgerald *v.* Fuller, 19 Hun 180.

*North Carolina.*— Clayton *v.* Hester, 80 N. C. 275.

*Ohio.*— Sanders *v.* Keber, 28 Ohio St. 630.

*Oklahoma.*— Lockwood *v.* Frisco Lumber Co., (1908) 97 Pac. 562.

*Oregon.*— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

*Texas.*— Leath *v.* Uttley, 66 Tex. 82, 17 S. W. 401; Dunn *v.* Elser, 2 Tex. App. Civ. Cas. § 720.

*Wyoming.*— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23. But see Warner *v.* Roth, 2 Wyo. 63.

*United States.*— Homans *v.* Newton, 4 Fed. 880.

*Canada.*— Forristal *v.* McDonald, 9 Can. Sup. Ct. 12; Walker *v.* Hyman, 1 Ont. App. 345; Tuffts *v.* Mottashed, 29 U. C. C. P. 529.

See 43 Cent. Dig. tit. "Sales, §§ 1377–1380.

**Contra.**—W. W. Kimball Co. *v.* Cruikshank, 123 Ill. App. 580; Herbert *v.* Rhodes-Burford Furniture Co., 106 Ill. App. 583; Simpson Brick Press Co. *v.* Wormley, 61 Ill. App. 460 [but see O'Neil *v.* Rogers, 110 Ill. App. 622, holding that if the seller first reduces the property to possession after the default of his vendee, he may hold the property as against a *bona fide* purchaser from such vendee who has not yet come into possession]; Greer *v.* Church, 13 Bush (Ky.) 430; Vaughn *v.* Hopson, 10 Bush (Ky.) 337; Townsend *v.* Frazee, 54 S. W. 722, 21 Ky. L. Rep. 1183; Hall *v.* Hinks, 21 Md. 406; Stadtfeld *v.* Huntsman, 92 Pa. St. 53, 37 Am. Rep. 661; Lee *v.* Byers, 2 Chest. Co. Rep. (Pa.) 134.

**Title in third person.**—Where, by express agreement between S, the owner of a wagon, and R and H, the owner sells it, receiving in

to resale in the ordinary course of trade is given, a *bona fide* purchaser acquires a good title;[8] but a purchaser of the whole stock of goods does not stand on the footing of a *bona fide* purchaser in this regard;[9] nor does the fact that the buyer is a dealer in such goods give his subpurchaser the rights of a *bona fide* purchaser if the right of resale is expressly restricted.[10] The burden of proof is upon him

payment the note of R, with H as security, and the title to the wagon is to pass to and remain in H until the payment of the note by R, and the wagon is delivered to and used by R, the latter has no title thereto until payment by him of the note; and until that time he cannot, by a sale to even a *bona fide* purchaser, divest H of the title. Hallowell *v.* Milne, 16 Kan. 65.

**Mingled with other goods.**— One who sells lumber to be manufactured into shingles, retaining title and the right to possession until they are paid for, and whose agents permit the manufacturer to mingle the shingles with others, and treat them as his own, has no enforceable lien upon such of them as are sold by the manufacturer to a purchaser for value and without notice. Foster *v.* Warner, 49 Mich. 641, 14 N. W. 673.

**A bona fide transferee of a bill of lading** may hold the goods as against a conditional vendor. Rawls *v.* Deshler, 4 Abb. Dec. (N. Y.) 12, 3 Keyes 572, 3 Transcr. App. 91; Wardwell *v.* Patrick, 1 Bosw. (N. Y.) 406.

**Property taken in exchange.**— In Perry *v.* Young, 105 N. C. 463, 11 S. E. 511, the seller of a mule, sold conditionally, consented that the mule should be traded for a horse, upon the oral agreement that the horse should stand in the place of the mule to secure payment of the note. It was held that the title to the horse vested in the seller, in the absence of any act requiring registration, even as against a *bona fide* purchaser for value.

**Property not included in reservation.**— Where a contract of sale provided that the title to the property should remain in the seller until either the price was paid or a mortgage given on the property, and also that the seller was to furnish, free of cost, a certain other article, a *bona fide* purchaser of such article from the buyer acquired good title thereto as against the seller. Van Allen *v.* Smith, 11 Ind. App. 103, 38 N. E. 542.

**Increase of property.**—Where a mare with foal is conditionally sold the vendor's title extends to the colt subsequently born, as against a *bona fide* purchaser of such colt. Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026.

**Where the law does not require the contract to be recorded,** one claiming under the purchaser in such contract cannot invoke the doctrine of *bona fide* purchaser, but his rights depend on whether his vendor had title. Goodgame *v.* Sanders, 140 Ala. 247, 37 So. 200.

**An attempt to convert an absolute into a conditional sale** is without effect as against a *bona fide* purchaser. Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660, (1900) 59 Pac. 947.

**Waiver and estoppel.**—Where a chattel and a bill of sale thereof have been delivered by the seller to the purchaser, who acknowledged in writing the receipt of the property, and it was permitted to remain in the possession of the purchaser, without demand for compliance with the conditions of the sale, until it was actually sold and delivered to another, the seller waived compliance with the conditions, and is estopped from claiming that title never passed to the subsequent purchaser. Gilroy *v.* Everson-Hickok Co., 118 N. Y. App. Div. 733, 103 N. Y. Suppl. 620 [*affirmed* in 190 N. Y. 551, 83 N. E. 1125]. But see Lockwood *v.* Frisco Lumber Co., (Okla. 1908) 97 Pac. 562, holding that intrusting the possession of chattels to another by the owner under a contract of conditional sale does not estop the owner from setting up title thereto as against an innocent purchaser thereof without notice from the person so intrusted.

8. *Alabama.*— Bent *v.* Jerkins, 112 Ala. 485, 20 So. 655.

*Connecticut.*— Baring *v.* Galpin, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

*Delaware.*— South Bend Iron Works *v.* Reedy, 5 Pennew. 361, 60 Atl. 698.

*Georgia.*— Ezzard *v.* Frick, 76 Ga. 512.

*Illinois.*— Barbour *v.* Perry, 41 Ill. App 613.

*Indiana.*— Winchester Wagon Works, etc., Co. *v.* Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382.

*Kansas.*— Poorman *v.* Witman, 49 Kan. 697, 31 Pac. 370.

*Mississippi.*— Columbus Buggy Co. *v.* Turley, 73 Miss. 529, 19 So. 232, 55 Am. St. Rep. 550, 32 L. R. A. 260.

*Oregon.*— Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

*Tennessee.*— Wilder *v.* Wilson, 16 Lea 548.

*Wisconsin.*— Stubbings *v.* Curtis, 109 Wis. 307, 85 N. W. 325. See also Mississippi River Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193.

See 43 Cent. Dig. tit. "Sales," § 1381. See also *supra*, X, J, 2, d.

**Where there was no evidence** that the purchaser was a dealer in engines, or bought with any intention of reselling, or that plaintiff had any reason to believe that the engine would be resold, the seller was not estopped from asserting title against his buyer and any person claiming under him. Fairbanks Co. *v.* Graves, 90 Miss. 453, 43 So. 675.

9. Burbank *v.* Crooker, 7 Gray (Mass.) 158, 66 Am. Dec. 470.

10. Sargent *v.* Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368.

who asserts that he is a *bona fide* purchaser from the conditional vendee to establish this fact.[11]

**4. Filing and Recording — a. Necessity in General.**[12] It is, however, provided in many states that to give conditional contracts of sale validity as against third persons claiming under the buyer as purchasers or creditors, the contract must be in writing,[13] executed and attested in a particular manner,[14] and recorded.[15] In the absence of such a statute recording is not essential.[16] But even the statute will not protect subsequent purchasers or creditors with actual notice.[17] The

11. Wiltler-Corbin Mach. Co. *v.* Martin, 47 Wash. 123, 91 Pac. 629, holding that in an action by a vendor to recover possession of property conditionally sold, a memorandum of such sale having been filed in the auditor's office, as required by Sess. Laws (1903), p. 6, c. 6, § 1, in the amendment of the act of 1893, the burden is on one claiming to be a *bona fide* purchaser from the conditional vendee or an encumbrancer to establish the same. But see Hogan *v.* Detroit United R. Co., 154 Mich. 478, 118 N. W. 140, holding that where a seller of railroad apparatus reserved title until payment was made, but did not comply with Comp. Laws, § 6336, regulating conditional sales of such material, the seller or his assignee could not recover the unpaid price against a purchaser from the buyer without proof that such purchaser was not a *bona fide* purchaser for value and without notice.

12. **Effect of failure to record** see *infra*, X, J, 4, h.

13. See *supra*, X, D, 1.

14. See *supra*, X, D, 2.

15. See the statutes of the several states. See also the following cases:

*Alabama.*—Worthington *v.* A. G. Rhodes, etc., Co., 145 Ala. 656, 39 So. 614; Bronson *v.* Russell, 142 Ala. 360, 37 So. 672.

*Florida.*— Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791.

*Mississippi.*— Jennings *v.* Wilson, 71 Miss. 42, 14 So. 259; Ketchum *v.* Brennan, 53 Miss. 596.

*Missouri.*— Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

*New Jersey.*— Lauter *v.* O'Toole, (Sup. 1908) 71 Atl. 288.

*South Dakota.*— Pringle *v.* Canfield, 19 S. D. 506, 104 N. W. 223.

*Vermont.*— McPhail *v.* Gerry, 55 Vt. 174.

*United States.*— *In re* Atlanta News Pub. Co., 160 Fed. 519 (construing Georgia code); Mishawaka Woolen Mfg. Co. *v.* Smith, 158 Fed. 885 (construing Wisconsin statute); Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435 (construing Minnesota statute).

See 43 Cent. Dig. tit. "Sales," §§ 1353, 1370; and see Fraudulent Conveyances, 20 Cyc. 394.

**Certain counties may be excepted from the** operation of the statute. Worthington *v.* A. G. Rhodes, etc., Co., 145 Ala. 656, 39 So. 614; Bronson *v.* Russell, 142 Ala. 360, 37 So. 672.

**"Personal property"** in the Wisconsin statute is not limited to property sold to be used and not resold. Mishawaka Woolen Mfg. Co. *v.* Smith, 158 Fed. 885.

**Sales between partners** are within the rule. Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67.

**Effect of repealing act.**— Laws (1893), p. 56, c. 36, § 1, requiring conditional sales to be recorded, was reënacted by Rev. Civ. Code, § 1315, to take effect July 1, 1903. Afterward the act of Feb. 25, 1903, was passed, repealing the statute of 1893, and providing that the repealing act should be in force from and after July 1, 1903. The operation of the act of 1893 was not interrupted by the repealing act. Pringle *v.* Canfield, 19 S. D. 506, 104 N. W. 223.

**Contract obviating** necessity of recording. price to within thirty days see Phelps *v.* Bemis, 51 Vt. 487.

16. Journey *v.* Priestly, 70 Miss. 584, 12 So. 799.

17. *California.*— Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

*Colorado.*— Jones *v.* Clark, 20 Colo. 353, 38 Pac. 371.

*Georgia.*— Hill *v.* Ludden, etc., Southern Music House, 113 Ga. 320, 38 S. E. 752; Morton *v.* Frick Co., 87 Ga. 230, 13 S. E. 463.

*Illinois.*— Thompson *v.* Duff, 19 Ill. App. 75 [*affirmed* in 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335].

*Iowa.*—Moline Plow Co. *v.* Braden, 71 Iowa 141, 23 N. W. 247; Warner *v.* Jameson, 52 Iowa 70, 2 N. W. 951.

*Kansas.*— Larned First Nat. Bank *v.* Tufts, 53 Kan. 710, 37 Pac. 127.

*Michigan.*— Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

*Minnesota.*— Dyer *v.* Thorstad, 35 Minn. 534, 29 N. W. 345.

*Missouri.*— Coover *v.* Johnson, 86 Mo. 533; Oyler *v.* Renfro, 86 Mo. App. 321; Barnes *v.* Rawlings, 74 Mo. App. 531; Peters *v.* Featherstun, 61 Mo. App. 466. But see Collins *v.* Wilhoit, 108 Mo. 451, 18 S. W. 839, where the sale was on oral condition.

*Nebraska.*— D. M. Osborne Co. *v.* Piano Mfg. Co., 51 Nebr. 502, 70 N. W. 1124; Peterson *v.* Tufts, 34 Nebr. 8, 51 N. W. 297; McCormick *v.* Stevenson, 13 Nebr. 70, 12 N. W. 828.

*New Hampshire.*— Batchelder *v.* Sanborn, 66 N. H. 192, 22 Atl. 535.

*New York.*— Duffus *v.* Howard Furnace Co., 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925 [*reversing* 37 N. Y. Suppl. 19].

*Vermont.*— Reed *v.* Starkey, 69 Vt. 200, 37 Atl. 297; Kelsey *v.* Kendall, 48 Vt. 24.

statutes requiring conditional sales to be recorded do not make registration necessary to the validity of the transaction as between the seller and the buyer.[18] The statutes providing for the filing of chattel mortgages and deeds of trust do not as a rule apply to conditional sales[19] unless made to apply by express legislation.[20] Refiling as in the case of chattel mortgages is not necessary,[21] unless expressly required by the statute.[22] The statutes apply only to conditional sales

*Wisconsin.*— Perkins *v.* Best, 94 Wis. 168, 68 N. W. 762.

*Wyoming.*— Crumrine *v.* Reynolds, 13 Wyo. 111, 78 Pac. 402.

**Actual notice** see *infra*, X, J, 4, h, (IV).

**An assignee for benefit of creditors** with notice thereof takes subject to the sale, although the contract is not recorded. Warner *v.* Jameson, 52 Iowa 70, 2 N. W. 951.

**A prior creditor with or without notice** is protected under Mo. Rev. St. (1899) § 3412. Oyler *v.* Renfro, 86 Mo. App. 321. See also *infra*, X, J, 4, h, (III).

**18.** *Arkansas.*— Public Parks Amusement Co. *v.* Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582.

*Missouri.*— Peters *v.* Featherstun, 61 Mo. App. 466; Tufts *v.* Thompson, 22 Mo. App. 564.

*New Hampshire.*— Baker *v.* Tolles, 68 N. H. 73, 36 Atl. 551.

*North Carolina.*— Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2; Kornegay *v.* Kornegay, 109 N. C. 188, 13 S. E. 770; Butts *v.* Screws, 95 N. C. 215.

*Texas.*— Hall *v.* Keating Implement, etc., Co., 33 Tex. Civ. App. 526, 77 S. W. 1054; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

*United States.*— Braddock Brewing Co. *v.* Pfaudler Vacuum Fermentation Co., 106 Fed. 604, 45 C. C. A. 491. See also *In re* Atlanta News Pub. Co., 106 Fed. 519, construing Georgia code.

See 43 Cent. Dig. tit. "Sales," § 1353.

**A guarantor of the performance of the conditions** of a conditional sale on the part of the buyer has been held not to be within the protection of the Mo. Rev. St. (1899) § 3412, relating to the execution, acknowledgment, and record of conditional sales. Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

**Personal representatives of the buyer** are within the rule. *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163.

**Trustee of bankrupt seller** is within the rule. Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

**Receiver of corporation** purchasing property not within the rule see *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163. But under N. J. Pamphl. Laws (1898), p. 670, providing that conditional sales are void as against judgment creditors and subsequent purchasers and mortgagees in good faith, unless the conditions of the sale shall be expressed in a writing which has been recorded, a receiver of an insolvent cannot, as such, in the absence of judgment creditors of the insolvent, attack a conditional sale to the insolvent, although the conditions were not expressed in writing and recorded. Falaenau *v.* Reliance Steel Foundry Co., (N. J. Ch. 1908) 69 Atl. 1098.

**Failure to record within a certain time** may, under the provisions of some statutes, vest title in the buyer. Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791 (two years); Jennings *v.* Wilson, 71 Miss. 42, 13 So. 259 (three years).

**19.** *Florida.*— Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412, 1 So. 59.

*Illinois.*— Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22.

*New Mexico.*— Maxwell *v.* Tufts, 8 N. M. 396, 45 Pac. 979, 33 L. R. A. 854.

*Texas.*— Mansur, etc., Implement Co. *v.* Beeman-St. Clair Co., (Civ. App. 1898) 45 S. W. 729.

*Virginia.*— McComb *v.* Donalds, 82 Va. 903, 5 S. E. 558.

*Wyoming.*— Warner *v.* Roth, 2 Wyo. 63.

*United States.*— The Marina, 19 Fed. 760; Rogers' Locomotive Works *v.* Lewis, 20 Fed. Cas. No. 12,024, 4 Dill. 158.

See 43 Cent. Dig. tit. "Sales," § 1353.

**In Kentucky** a contract for the sale of personal property, whereby it is agreed that the title shall remain in the seller until the price is paid in full, is only a mortgage, and must be recorded as such, to affect an innocent purchaser of the property. Welch *v.* National Cash-Register Co., 44 S. W. 124, 19 Ky. L. Rep. 1664.

**20.** *In re* Wilcox, etc., Co., 70 Conn. 220; 39 Atl. 163; Bond *v.* Brewer, 96 Ga. 443, 23 S. E. 421; Rhode Island Locomotive Works *v.* Empire Lumber Co., 91 Ga. 639, 17 S. E. 1012. See *In re* Atlanta News Pub. Co., 160 Fed. 519. See also *supra*, X, C, 5.

**Absolute sale with lien reserved.**— A writing executed by A, purporting to bargain, sell, and confirm certain personal property to B upon condition that, if B pays a certain sum of money, the conveyance shall remain in full force, but in case of default A may take the goods and dispose of the same as to him may seem proper, and the conveyance shall be from that time null and void, constitutes a sale, and title passes to B, subject to a lien in favor of A for his purchase-money, coupled with a power of sale; and, the instrument not having been recorded as a chattel mortgage, as required by statute, the vendor can assert no lien as against creditors of the vendee. Key *v.* Brown, 67 Tex. 300, 3 S. W. 443.

**21.** National Cash Register Co. *v.* Farmers' Nat. Bank, 1 Ohio S. & C. Pl. Dec. 285, 31 Cinc. L. Bul. 114.

**22.** Crumrine *v.* Reynolds, 13 Wyo. 111, 78 Pac. 402.

made subsequently to their passage.[23] Although the statute of the state where the contract was originally made did not require registration, if the property is removed into a state where registration is required, the contract must be recorded there to be valid as against third persons.[24]

**b. Change of Possession.** The recording statutes presuppose that there is a change of possession of the goods,[25] and some provide that the goods shall be in the actual possession of the vendee.[26] So too where a debtor sells property by

23. Bowen *v.* Frick, 75 Ga. 786; Moseley *v.* Shattuck, 43 Iowa 540; Blunk *v.* Kelley, 9 Nebr. 441, 4 N. W. 57; Perry *v.* Young, 105 N. C. 463, 11 S. E. 511; Harrell *v.* Goodwin, 102 N. C. 330, 8 S. E. 925.

24. Jones *v.* Molster, 11 Ohio Cir. Ct. 432, 1 Ohio Cir. Dec. 251; Sanger *v.* Jesse French Piano, etc., Co., 21 Tex. Civ. App. 523, 52 S. W. 621.

**Removal to and sale in another state.**— Where a contract of conditional sale, made in another state and covering property situated in that state, contains no stipulation that the property shall not be removed out of the state, but does provide that the vendee shall not sell or dispose of the property, except upon the written order of the vendor, the removal of the property by the vendee from the foreign state to this state is not tortious; but its sale in this state without the vendor's consent is wrongful, and conveys to the purchaser no title other than that owned by the vendee. Studebaker Bros. Co. *v.* Man, 14 Wyo. 68, 82 Pac. 2, (1905) 80 Pac. 151.

25. Webster Lumber Co. *v.* Keystone Lumber, etc., Co., 51 W. Va. 545, 42 S. E. 632, 66 L. R. A. 33, holding that where property conditionally sold is a structure on the real estate of the vendor, capable of being made a fixture, and it is agreed between the parties that it shall not be removed until paid for, there is no delivery of possession, to be recorded, although the buyer, as tenant or licensee of the land, had the use of the property.

**Continued possession.**— In the lien law (N. Y. Laws (1897), c. 418, § 112), providing that conditions in a contract of conditional sale, accompanied by immediate delivery and continued possession of the thing to be sold, to the effect that the ownership is to remain in the vendor until paid for, shall be void as to purchasers in good faith, unless the contract is filed, etc., the "continuous possession" required refers to the possession in the vendee. J. L. Mott Iron Works *v.* Reilly, 39 Misc. (N. Y.) 833, 81 N. Y. Suppl. 323.

**Length of possession.**— In some states the statute provides that a purchaser or creditor of the vendee will take a good title if the contract is not recorded and the property has been in the vendee's possession a specified length of time. In Mississippi this time is three years. Jennings *v.* Wilson, 71 Miss. 42, 13 So. 259; Ketchum *v.* Brennan, 53 Miss. 596. In Florida the period is two years. Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791.

26. Warner *v.* Johnson, 65 Iowa 126, 21 N. W. 483, holding that goods in the possession of a carrier in transportation to the vendee are not in the vendee's actual possession so that he can give a good title.

**Property in possession of agent.**— Iowa Code, § 1922, providing that "no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages," does not apply in garnishment proceedings, where the property in dispute is in the possession of a subagent of the vendor; plaintiff in such case being neither a creditor nor a purchaser, within the meaning of the statute, of or from said subagent. South Bend Iron Works *v.* Cottrell, 31 Fed. 254.

**Property loaned to another.**— In replevin of a corn-sheller by the vendor under an oral conditional sale against the sheriff, who had attached it as the property of the vendee, it appeared that the vendee went temporarily to another state; that he gave a third person the privilege of operating the machine in his absence, the operator to receive reasonable pay or a part of the profits; that the machine was used in shelling corn by moving it from farm to farm; and that it was on a neighbor's farm, where such third person had last operated it, when levied on. The machine was in the "actual possession" of the vendee, within the meaning of Iowa Code (1873), § 1922, making such sales void as to creditors of the vendee in "actual possession" without notice. Vorse *v.* Loomis, 86 Iowa 522, 53 N. W. 314.

**That a bank was in possession of property at the time of purchasing it** from a conditional vendee, from whom it had acquired possession, does not deprive it of the protection of Iowa Code, § 2905, providing that no conditional sale shall be valid as against any purchaser of the vendee in actual possession, unless the purchaser had notice thereof. Rock Island Plow Co. *v.* Maynard Sav. Bank, 123 Iowa 640, 99 N. W. 298.

**Possession by bill of lading.**— The Minnesota act of March 10, 1873, making contracts for conditional sales void as against creditors of the vendee and subsequent purchasers and mortgagees in good faith, unless recorded, not requiring that the vendee under such a contract, from whom the purchase is made, shall be in actual possession, posses-

absolute sale to one who on the same day reconveys the same to him by conditional sale, the property remaining at all times in the debtor's possession, the recording of the conditional sale does not give it validity as against attaching creditors of such debtor.[27]

**c. Nature of Contract.** Statutes requiring the recording of contracts of conditional sale do not apply to sales conditioned for the payment of cash on delivery,[28] or to mere "memorandum" sales,[29] or consignments for sale,[30] but is confined strictly to such instruments as evidence a conditional sale with a reservation of title until the price is paid;[31] but if the contract is of that character the

sion symbolized by a bill of lading is sufficient. Morse *v.* Chicago, etc., R. Co., 73 Iowa 226, 34 N. W. 825.

27. Cohen *v.* Schneider, 70 Conn. 505, 40 Atl. 455.

28. Savannah Cotton-Press Assoc. *v.* MacIntyre, 92 Ga. 166, 17 S. E. 1023; Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645 (applying the Georgia statute); Pridmore *v.* Puffer Mfg. Co., 163 Fed. 496, 90 C. C. A. 42 (or when installed by the seller).

29. Eisenberg *v.* Nichols, 22 Wash. 70, 60 Pac. 124, 79 Am. St. Rep. 917.

30. Harris *v.* Coe, 71 Conn. 157, 41 Atl. 552; Richardson Mfg. Co. *v.* Brooks, 95 Me. 146, 49 Atl. 672; Thomas *v.* Parsons, 87 Me. 203, 32 Atl. 876; Peet *v.* Spencer, 90 Mo. 384, 2 S. W. 434.

31. *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163; Campbell *v.* Atherton, 92 Me. 66, 42 Atl. 232; Hopkins *v.* Maxwell, 91 Me. 247, 39 Atl. 573; Plymouth Stove Foundry Co. *v.* Fee, 182 Mass. 31, 64 N. E. 419; *Ex p.* Crawcour, 9 Ch. D. 419, 47 L. J. Bankr. 94, 39 L. T. Rep. N. S. 12, 26 Wkly. Rep. 733.

**An order for goods** reciting, "Please ship to L. Hotel one fireproof safe, with patent inside bolt arrangement, size No. 21, for which I agree to pay $263 payable May 1, 1874," signed by defendant, and stipulating, "The same remaining the property of [plaintiffs] till payment," is not a note for payment for the safe, which was thereupon furnished, within the meaning of Me. Rev. St. c. 111, § 5, requiring such notes to be recorded. Morris *v.* Lynde, 73 Me. 88.

**Exchange of property.**— Minn. Gen. St. (1878) c. 39, § 15, requiring a conditional contract of sale, or, if oral, a memorandum thereof, to be filed, as against creditors and *bona fide* purchasers and mortgagees, applies to an exchange of horses, in which one party reserves the right to return the one delivered to him and retake his own, if the former should prove to have a certain disease. Kinney *v.* Cay, 39 Minn. 210, 39 N. W. 140. But see Hill *v.* Nutter, 82 Me. 199, 19 Atl. 170, holding that an instrument by which S agreed, in consideration of a horse which N was to let him have, to let N have certain personalty, and to pay N a stated sum per month until he should have paid a certain amount, the horse to remain the property of N until paid for, was within the statute and should have been recorded as against third parties.

**Payment from particular fund.**—A statute which, like the Maine statute, requires that agreements whereby chattels sold are to remain the property of the payee until payment of a note given for the price shall be recorded, applies where the promise is to pay out of money to become due, there being nothing importing that, even if the particular money did not become due, the payment would not still be due. Nichols *v.* Ruggles, 76 Me. 25.

**Construction of contract.**—A contract whereby P agrees to deliver to M, at his shingle mill, shingle bolts, the title to the bolts to remain in P till paid for, and M agrees to pay a certain amount per thousand for the shingles manufactured therefrom, payment to be made, for all the shingles manufactured out of a raft of the bolts, as soon as the entire raft is manufactured, is not a contract for the conditional sale of the bolts, within the Washington act of March 10, 1893, providing that a conditional sale of personalty, followed by possession of the purchaser, shall be absolute as to creditors, unless a memorandum be filed, such contract being merely for the sale of the manufactured shingles; so that the bolts, although in the possession of M, cannot be held by his creditors. Peterson *v.* Woolery, 9 Wash. 390, 37 Pac. 416.

**A contract by the United States** with a ship-building company whereby all parts of machinery paid for by the United States under a specified system of partial payments became thereby the sole property of the United States is not a contract of conditional sale, required to be recorded by Va. Code (1904), § 2462, p. 1219. William R. Trigg Co. *v.* Bucyrus Co., 104 Va. 79, 51 S. E. 174.

**A writing addressed to plaintiffs,** requesting them to let W "have one bay horse eight years old, known as the Cunningham horse, for one hundred and fifty dollars — fifty dollars by the 15th of April, 1887, and one hundred dollars by the first of August; that said [plaintiffs] should hold the horse until paid for" is a note with an agreement that the horse shall remain the property of the payee until the note is paid, and is not valid, except as between the original parties to the agreement, unless recorded like chattel mortgages as provided by Me. Rev. St. c. 111, § 5. Cunningham *v.* Trevitt, 82 Me. 145, 19 Atl. 110.

**Sale with chattel mortgage.**— The sale of goods on weekly or monthly payments, on which a chattel mortgage in the usual and

mere fact that it is coupled with a collateral agreement of another character does not affect the necessity of registration.[32]

**d. Place of Contract.** Statutory regulations respecting the recording of contracts of conditional sales apply only to contracts made within the state,[33] or where the goods were in the state at the time of sale.[34] If the goods were within the state the fact that the contract was made out of the state does not affect the requirement of registration.[35]

**e. Subject-Matter of Sale.** In some states the statutes requiring the registration of conditional sale contracts expressly except contracts for the sale of certain articles,[36] such as household goods;[37] and this exception has been construed to include gas fixtures,[38] pianos,[39] and cooking ranges and heaters.[40] The fact that the goods are to be manufactured does not affect the requirement as to registration.[41] Conditional sales of standing timber are not within the statute, as such contracts are sales of an interest in land;[42] and so too the sale of a house to which chattels are attached is not a conditional sale of chattels which must be recorded.[43] The statute will apply, however, to a sale of timber to be severed

ordinary form is given to the seller, does not come within the purview of Ohio Rev. St. 4155–2, known as the "Conditional Sales Act." Goodman *v.* Manning, 9 Ohio S. & C. Pl. Dec. 373, 5 Ohio N. P. 94.

**Executory contracts.**—Where a person sold to defendant personal property that he had surreptitiously taken possession of from plaintiff under a contract of conditional sale that had been executed, but not delivered, plaintiff may recover the same, although the contract was not filed under Wis. Rev. St. § 2317, requiring contracts of conditional sale to be filed to preserve the seller's title against subsequent purchasers, as said section applies to completed contracts only. Owen *v.* Long, 97 Wis. 78, 72 N. W. 364.

**Amount of notes.**—Where personal property was sold, with the agreement that it should remain the seller's until payment of the price, for which three notes containing said agreement were executed, two for more and one for less than thirty dollars, which were not recorded, the contract was invalid against third parties, as to each and all of the notes, under Me. Rev. St. c. 111, § 5, providing that such agreement in a note for an amount exceeding thirty dollars shall be void, except as between the original parties, unless recorded. Field *v.* Gellerson, 80 Me. 270, 14 Atl. 70.

**32.** Camp *v.* Charles Thatcher Co., 75 Conn. 165, 52 Atl. 953.

**33.** Davis *v.* Osgood, 69 N. H. 427, 44 Atl. 432.

**34.** Wooley *v.* Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. 789.

**Property not in the state.**— N. J. Gen. St. p. 891, § 191. requiring conditional sales to be recorded, does not apply to a contract between non-residents concerning personal property situated out of the state; the contract not contemplating the removal of the property into the state. Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

**35.** Knowles Loom Works *v.* Vacher, 57 N. J. L. 490, 31 Atl. 306, 33 L. R. A. 305.

**36.** Jermyn *v.* Schweppenhauser, 33 Misc. (N. Y.) 603, 68 N. Y. Suppl. 153 (boilers and their appurtenances); Lima Mach. Works *v.* Parsons, 10 Utah 105, 37 Pac. 244 (railroad equipment and rolling stock).

**Execution in duplicate.**—Where the statute excepts articles from the operation of the provision relating to registration if the contract of sale is executed in duplicate an unsigned copy of the contract is not a duplicate within such provision. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 56 N. Y. Suppl. 791 [*affirmed* in 165 N. Y. 636, 59 N. E. 1123].

**37.** Boston Furniture Co. *v.* Thoms, 78 Conn. 273, 61 Atl. 949 (holding that linoleum is household furniture within the exception); Sinclair *v.* Wheeler, 69 N. H. 538, 45 Atl. 1085.

**38.** Baldinger *v.* Levine, 83 N. Y. App. Div. 130, 82 N. Y. Suppl. 483; Iden *v.* Sommers, 61 N. Y. Super. Ct. 177, 18 N. Y. Suppl. 779.

**39.** Lamb *v.* King, 73 N. H. 400, 62 Atl. 493. *Compare* Vincingnerra *v.* Fagan, 57 Misc. (N. Y.) 224, 109 N. Y. Suppl. 317, referring to Laws (1897), c. 418, § 115, now repealed.

**40.** Kerby *v.* Clapp, 15 N. Y. App. Div. 37, 44 N. Y. Suppl. 116. But see Duffus *v.* Howard Furnace Co., 15 Misc. (N. Y.) 169, 37 N. Y. Suppl. 19 [*reversed* on other grounds in 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925], holding that a furnace is not excepted.

**41.** McLean *v.* Bloch, 52 Misc. (N. Y.) 545, 102 N. Y. Suppl. 838. But see Graves El. Co. *v.* Callanan, 11 N. Y. App. Div. 301, 42 N. Y. Suppl. 930; Duntz *v.* Granger Brewing Co., 41 Misc. (N. Y.) 177, 83 N. Y. Suppl. 957 [*affirmed* in 96 N. Y. App. Div. 631, 89 N. Y. Suppl. 1103 (*affirmed* in 184 N. Y. 595, 77 N. E. 1186)]; Hirsch *v.* Graves El. Co., 24 Misc. (N. Y.) 472, 53 N. Y. Suppl. 664.

**42.** Mississippi River Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193; Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426.

**43.** Kerby *v.* Clapp, 15 N. Y. App. Div. 37, 44 N. Y. Suppl. 116.

and carried away and manufactured into lumber, where title to the timber and its manufactured product is to remain in the seller until paid for.[44]

**f. Sufficiency of Filing and Record** — (I) *In General.* The statute is satisfied by depositing in the office of the proper official the contract or memorandum thereof [45] or a copy with a statement of the amount of the claim.[46] Recording the instrument in the "miscellaneous record book" is a sufficient record,[47] but recording in the manner required for chattel mortgages is not such a record as will constitute notice.[48]

(II) *Time of Filing.* The conditional sale contract must be filed for record within a reasonable time;[49] and if there is an unreasonable delay, the filing will not operate as constructive notice to one whose rights were acquired between the date of sale and the date of filing.[50] Although not filed until some time after the contract was made it is nevertheless valid as against subsequent purchasers from

44. Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282, 71 N. W. 389.

45. Fairbanks *v.* Davis, 50 Vt. 251; Troy Wagon Co. *v.* Hutton, 53 W. Va. 154, 44 S. E. 135.

**Sufficient memorandum.**—Wash. Sess. Laws (1903), p. 6, c. 6, § 1, in the amendment of the act of 1893, provides that conditional sales of personal property shall be absolute as to purchasers and subsequent creditors in good faith, unless within ten days after possession taken a memorandum is filed in the county auditor's office of the vendee's residence at the date of taking possession. Section 2 provides that the county auditor shall enter the same in a book, etc. It was held that the description of an engine, conditionally sold, in a memorandum filed with the auditor, as "1 30-horse power stationary, side crank, slide valve engine, complete with all fittings, including governor and throttle, band wheels, lubricator, oil cups, and all steam connections," was sufficient to give constructive notice of the vendor's title. Wittler-Corbin Mach. Co. *v.* Martin, 47 Wash. 123, 91 Pac. 629.

**Sale of standing timber.**— The filing of a contract for the conditional sale of standing trees in the office of the lumber inspector of the district does not constitute notice to a subsequent purchaser. Wing *v.* Thompson, 78 Wis. 256, 47 N. W. 606.

**In the absence of a town clerk,** a delivery of a bill of sale to a person in an adjoining office not his deputy, and the clerk's memorandum of receipt as of the hour of such delivery, according to such person's minute thereon, is a sufficient lodgment for record. Fairbanks *v.* Davis, 50 Vt. 251.

46. Remington *v.* Central Press Assoc. Co., 13 Ohio Cir. Ct. 542, 7 Ohio Cir. Dec. 540 [*reversing* 4 Ohio S. & C. Pl. Dec. 347, 3 Ohio N. P. 258].

47. Troy Wagon Co. *v.* Hutton, 53 W. Va. 154, 44 S. E. 135.

48. Gilbert *v.* National Cash Register Co., 176 Ill. 288, 52 N. E. 22.

49. National Cash Register Co. *v.* Lesko, 77 Conn. 276, 58 Atl. 967 (holding that filing the contract the day after the goods were received was within a reasonable time); Camp *v.* Charles Thacher Co., 75 Conn. 165, 52 Atl. 953 (holding that a delay of two months was unreasonable); Pash *v.* Weston, 52 Iowa 675, 3 N. W. 713 (holding that a delay of two months was fatal); Huffard *v.* Akers, 52 W. Va. 21, 43 S. E. 124.

**Under Ga. Code (1895), § 2777,** requiring conditional bills of sale to be recorded within thirty days from their date, where the contract clearly bears date, it must be recorded within thirty days from that time, and not within thirty days from the actual delivery of the property sold. *In re* Gosch, 121 Fed. 602.

**Sale in another state.**—A claimant of attached personalty, who resided in Tennessee, sold the property to defendant in attachment while in claimant's store in that state; but it was not then delivered, because it was not in stock. After defendant's return to Alabama several letters passed between them in reference to the payments, which, being arranged, defendant directed the shipment to him, and executed notes in payment, reserving title in claimant. It was held that this was a sale and delivery in Tennessee, entitling claimant to three months within which to record his contract of sale in Alabama, under Code, § 1017, making contracts of sale in which seller reserves title void against judgment creditors without notice, where the property is brought from another state, unless the contract is recorded within three months in the county in which the property remains, and, he having recorded his contract within the time, the property was not subject to attachment as the property of the buyer. Brandon Printing Co. *v.* Bostick, 126 Ala. 247, 28 So. 705.

**After a statute is passed** requiring conditional sale contracts "now in existence or hereafter executed" to be recorded a reasonable time will be allowed to the holders of such instruments then in existence in which to comply with the law, and an attachment levied within two or three days on property at a distance from the residence of the vendor will not prevail against the vendor's title. Moline Plow Co. *v.* Witham, 52 Kan. 185, 34 Pac. 751.

50. Pash *v.* Weston, 52 Iowa 675, 3 N. W. 713; Huffard *v.* Akers, 52 W. Va. 21, 43 S. E. 124.

the time it was recorded.[51] The time within which the instrument should be recorded should be computed from the day the contract actually became complete by delivery, and not from the day it was executed or approved.[52]

(III) *PLACE OF RECORD.* The statute may require the contract to be recorded in the town or county where the vendee resides,[53] in which case it must be recorded in the county where he resides at the time of making the contract,[54] although he resides elsewhere at the time of the filing;[55] and recording in any other place will not constitute notice.[56] If the contract is recorded in the county where the buyer resides his removal to another county does not necessitate another registration.[57] If the statute of the state where the contract was made and the goods were situated requires the contract to be recorded "where the property is," on a sale to a resident of another state the contract must be recorded where the property is situated, and it is not sufficient that it is recorded in such other state where the buyer resides as required by the laws of that state.[58]

**g. Instruments Entitled to Record.** If the statute provides that the contract of conditional sale must be executed and attested in a particular manner,[59] the instrument to be entitled to record must conform to such provisions.[60] But generally it is sufficient if the instrument evidencing the conditional sale is executed as such instruments are generally executed.[61]

**h. Effect of Failure to File or Record**[62] — (I) *IN GENERAL.* The failure to

51. Holland *v.* Adams, 103 Ga. 610, 30 S. E. 432; Bradley *v.* Benson, 93 Minn. 91, 100 N. W. 670.

**Registration after the purchaser's death** is sufficient to protect the rights of the seller as against the allotment of a year's allowance to the widow of the purchasers. Hinkle *v.* Greene, 125 N. C. 489, 34 S. E. 554.

52. *In re* Gosch, 126 Fed. 627, 61 C. C. A. 363 [*reversing* 121 Fed. 602], construing Ga. Code (1895), § 2777, which requires contracts of conditional sale to be recorded within thirty days from their date.

53. Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160; Creamery Package Mfg. Co. *v.* Tagley, 91 Minn. 79, 97 N. W. 412.

**A corporation** resides in the town in which it has its established place of business, within Me. Rev. St. c. 111, § 5, as amended by Pub. Laws (1895), c. 32, requiring agreements for conditional sales to be filed in the town where the purchaser resides. Emerson Co. *v.* Proctor, 97 Me. 360, 54 Atl. 849.

**Where the evidence is conflicting** as to whether the contract was recorded in the county of the vendee's residence it was error to direct a verdict for the vendor, as against a *bona fide* purchaser of the vendee. Bond *v.* Brewer, 96 Ga. 443, 23 S. E. 421.

54. Creamery Package Mfg. Co. *v.* Tagley, 91 Minn. 79, 97 N. W. 412; *In re* Franklin, 151 Fed. 642, under North Carolina statute.

55. Creamery Package Mfg. Co. *v.* Tagley, 91 Minn. 79, 97 N. W. 412.

56. Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160.

57. Barrington *v.* Skinner, 117 N. C. 47, 23 S. E. 90; *In re* Franklin, 151 Fed. 642.

58. Davis *v.* Osgood, 69 N. H. 427, 44 Atl. 432.

59. See *supra*, X, D, 2.

60. Tufts *v.* Brace, 103 Wis. 341, 79 N. W. 414; Sheldon Co. *v.* Mayers, 81 Wis. 627, 51 N. W. 1082.

**Under the Georgia statute** (Code (1895), §§ 2776, 2777) which requires every contract of conditional sale by which the title to property delivered is reserved in the seller until the purchase-price has been paid to be executed and attested in the same manner as mortgages on personal property and recorded within thirty days, such a contract not so executed and attested is not entitled to record. General Fire Extinguisher Co. *v.* Lamar, 141 Fed. 353, 72 C. C. A. 501. To the same effect see Derrick *v.* Pierce, 94 Ga. 466, 19 S. E. 246.

**Before what officer.**—A conditional bill of sale may be executed before, and attested by, a clerk of a superior court in the county wherein he holds his office, and may thereupon be properly recorded in any other county wherein the vendee resides at the time of its execution. Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026.

61. S. Twitchell Co. *v.* Lawton First Nat. Bank, 18 Okla. 375, 90 Pac. 14; Shafer *v.* National Cash Register Co., 16 Okla. 117, 82 Pac. 646.

**Acknowledgment.**— Notice of reservation of title until property is paid for need not be acknowledged before recording, under Code, c. 74, § 3, providing that a reservation shall be void unless recorded. Hatfield *v.* Haubert, 51 W. Va. 190, 41 S. E. 144. And see Troy Wagon Co. *v.* Hutton, 53 W. Va. 154, 44 S. E. 135.

**Attestation by interested stock-holder.**— The record of a contract of conditional sale, whether purporting to create a lien or to convey title which is attested by a stock-holder in a corporation in whose interest such writing is executed, is invalid, and effects no notice of the existence or contents of the instrument. Betts-Evans Trading Co. *v.* Bass, 2 Ga. App. 718, 59 S. E. 8.

62. **Necessity of recording** see *supra*, X, J, 4, a.

file or record the contract or a memorandum thereof renders the reservation of title invalid as against *bona fide* purchasers,[63] creditors,[64] mortgagees in good faith,[65] pledgees,[66] or any other person than the parties;[67] and the protection has been extended to a mortgagee in good faith of a subsequent purchaser.[68] A failure to record the conditional contract does not, however, affect the rights of the seller as against a prior mortgage purporting to cover after-acquired property;[69] and it has been held in some cases that a mortgagee is not entitled to protection as a purchaser under statutes requiring registration as against creditors and purchasers.[70] So too it has been held that a pledgee is not a purchaser or a mortgagee within the statute extending protection to such persons.[71] A consignee of the buyer who in good faith and without notice makes advances on a consignment of the goods to him will be protected.[72] The failure to record cannot be taken advantage of by one who is a mere trespasser,[73] nor by the widow of the vendee whose allotment of a year's allowance includes the property which was the subject of the conditional sale.[74] Furthermore, under some statutes, upon a failure to record within a certain number of years the title vests absolutely in the buyer.[75]

(II) *BONA FIDE PURCHASERS.* On the failure to file or record the condi-

**63.** See *infra*, X, J, 4, h, (II).

**64.** See *infra*, X, J, 4, h, (III).

**65.** *Georgia.*—Anderson *v.* Adams, 117 Ga. 919, 43 S. E. 982.

*Illinois.*—New England Piano Co. *v.* Maxwell, 67 Ill. App. 593; Gilbert *v.* Gere, 67 Ill. App. 590.

*Iowa.*—Wilton Union Bank *v.* Creamery Package Mfg. Co., 105 Iowa 136, 74 N. W. 921.

*New Hampshire.*—Sinclair *v.* Wheeler, 69 N. H. 538, 45 Atl. 1085.

*New Jersey.*—Knowles Loom Works *v.* Vacher, 57 N. J. L. 490, 31 Atl. 306, 33 L. R. A. 305.

*New York.*—Vincinguerra *v.* Fagan, 57 Misc. 224, 109 N. Y. Suppl. 317.

*Texas.*—Bowen *v.* Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872; Eason *v.* De Long, 38 Tex. Civ. App. 531, 86 S. W. 347.

**Mortgagees are not purchasers** within the meaning of the Nebraska statute. McCormick Harvesting Mach. Co. *v.* Callen, 48 Nebr. 849, 67 N. W. 863; Campbell Printing Press, etc., Co. *v.* Dyer, 46 Nebr. 830, 65 N. W. 904.

**Construction of statute.**—Rev. St. (1899) § 3412, provides that where personal property is sold, to be paid for in instalments or delivered to another on a condition reserving title, etc., such condition shall be void as to all subsequent purchasers in good faith and creditors, unless evidenced by a writing executed and recorded as in cases of mortgages of personal property. The words "good faith," as employed in such section, are confined to the case of a subsequent purchaser, and do not apply to a subsequent chattel mortgagee of the holder of the property mortgaged under an alleged conditional sale, who is not therefore precluded by notice of the claim of the conditional seller. Gilbert Book Co. *v.* Sheridan, 114 Mo. App. 332, 89 S. W. 555.

**If the mortgage is not recorded as provided** by the statutes relating to chattel mortgages, it cannot prevail over the vendor's claim. Cottrell *v.* Merchants', etc., Bank, 89 Ga. 508, 15 S. E. 944.

**A holder of bonds of a corporation,** secured by a trust mortgage executed prior to the corporation's purchase of a boiler under a conditional contract of sale reserving title in the seller until the price was paid, was neither a subsequent purchaser nor mortgagee of the corporation as to such boiler, within a New Jersey statute making conditional contracts of sale not recorded as provided for therein void as to judgment creditors and subsequent purchasers and mortgagees in good faith. Tilford *v.* Atlantic Match Co., 134 Fed. 924.

**66.** Vincinguerra *v.* Fagan, 57 Misc. (N. Y.) 224, 109 N. Y. Suppl. 317.

**67.** Mishawaka Woolen Mfg. Co. *v.* Smith, 158 Fed. 885.

**68.** Behn *v.* New Jersey Nat. Bank, 65 N. J. L. 591, 48 Atl. 527.

**69.** Manhattan Trust Co. *v.* Sioux City Cable R. Co., 76 Fed. 658; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. 868, 1 C. C. A. 133. And see Meyer *v.* Western Car Co., 102 U. S. 1, 26 L. ed. 59.

**70.** Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602, 79 Nebr. 32, 112 N. W. 321; McCormick Harvesting Mach. Co. *v.* Callen, 48 Nebr. 849, 67 N. W. 863; Campbell Printing Press, etc., Co. *v.* Dyer, 46 Nebr. 830, 65 N. W. 904.

**71.** Kauffman *v.* Klang, 16 Misc. (N. Y.) 379, 38 N. Y. Suppl. 56; La Fetra *v.* Glover, 10 Misc. (N. Y.) 70, 31 N. Y. Suppl. 150. But see Pittsburgh Locomotive, etc., Works *v.* Keokuk State Nat. Bank, 19 Fed. Cas. No. 11,198, holding that a pledgee is protected by the Iowa statute.

**72.** Bates *v.* Cunningham, 12 Hun (N. Y.) 21.

**73.** Kimhall *v.* Post, 44 Wis. 471.

**74.** Hinkle *v.* Greene, 125 N. C. 489, 34 S. E. 554.

**75.** Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791; Ketchum *v.* Brennan, 53 Miss. 596. See

tional sale contract or a memorandum thereof, such contract is void as against *bona fide* purchasers from the vendee, without notice;[76] but the right of such a

also Jennings *v.* Wilson, 71 Miss. 42, 14 So. 259.

**76.** *Alabama.*— Dudley *v.* Abner, 52 Ala. 572. See also Worthington *v.* A. G. Rhodes, etc., Co., 145 Ala. 656, 39 So. 614; Bronson *v.* Russell, 142 Ala. 360, 37 So. 672.

*Iowa.*— National Cash Register Co. *v.* Zangs, 127 Iowa 710, 104 N. W. 360; Wright *v.* Barnard, 89 Iowa 166, 56 N. W. 424; Morse *v.* Chicago, etc., R. Co., 73 Iowa 226, 34 N. W. 825; Moline Plow Co. *v.* Braden, 71 Iowa 141, 32 N. W. 247; Pash *v.* Weston, 52 Iowa 675, 3 N. W. 713.

*Kentucky.*— Welch *v.* National Cash Register Co., 103 Ky. 30, 44 S. W. 124, 19 Ky. L. Rep. 1664.

*Maine.*— Emerson Co. *v.* Proctor, 97 Me. 360, 54 Atl. 849; George W. Merrill Furniture Co. *v.* Hill, 87 Me. 17, 32 Atl. 712.

*Michigan.*— See Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

*Mississippi.*— Quin *v.* Mosler Safe Co., (1897) 21 So. 303. *Compare* Ketchum *v.* Brennan, 53 Miss. 596, where it was held that a conditional vendee under an unrecorded contract, who has been in possession less than three years (Code, § 2893) could transfer no title to a *bona fide* purchaser as against the vendor. And see Jennings *v.* Wilson, 71 Miss. 42, 14 So. 259.

*Missouri.*— Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Fairbanks *v.* Baskett, 98 Mo. App. 53, 71 S. W. 1113; Barnes *v.* Rawlings, 83 Mo. App. 185; F. B. Hauck Cloth Co. *v.* Brothers, 61 Mo. App. 381; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550. See also Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

*Nebraska.*— Johns *v.* Reed, 77 Nebr. 492, 109 N. W. 738; Starr *v.* Dow, 77 Nebr. 172, 108 N. W. 1065; Regier *v.* Craver, 54 Nebr. 507, 74 N. W. 830.

*New Jersey.*— Lauter *v.* O'Toole, (1908) 71 Atl. 288.

*New York.*— McLean *v.* Griot, 118 N. Y. App. Div. 100, 103 N. Y. Suppl. 129 [*affirmed* in 193 N. Y. 622, 86 N. E. 1126]; Kirk *v.* Crystal, 118 N. Y. App. Div. 32, 103 N. Y. Suppl. 17; Moyer *v.* McIntyre, 43 Hun 58; Campbell Printing Press, etc., Co. *v.* Oltrogge, 13 Daly 247; Vincinguerra *v.* Fagan, 57 Misc. 224, 109 N. Y. Suppl. 317; Van Leeuwen *v.* Fish, 28 Misc. 443, 59 N. Y. Suppl. 183; Gerber *v.* Mandel, 26 Misc. 825, 56 N. Y. Suppl. 1030. *Compare* Duffus *v.* Howard Furnace Co., 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925 [*reversing* 15 Misc. 169, 37 N. Y. Suppl. 19].

*North Carolina.*— Brem *v.* Lockhart, 93 N. C. 191.

*South Dakota.*— Webber *v.* Conklin, 20 S. D. 52, 104 N. W. 675.

*Texas.*— Knittel *v.* Cushing, 57 Tex. 354, 44 Am. Rep. 598.

*Vermont.*— See McPhail *v.* Gerry, 55 Vt. 174.

*Virginia.*— Arbuckle *v.* Gates, 95 Va. 802, 30 S. E. 496.

*United States.*— See Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435, construing Minnesota statute.

See 43 Cent. Dig. tit. "Sales," § 1384.

**Lease with option to purchase.**—A received personal property from B under a lease conditioned upon the payment of monthly rent, and that A might purchase at any time during the continuance of the lease. The title of the property was expressly reserved to B. A, without having purchased, sold the property to C, who bought in good faith, A representing himself as owner. It was held that C got no title and that it was immaterial that the lease was not proved or acknowledged and recorded. Sumler *v.* Cottey, 71 Mo. 121.

**Lessor as purchaser.**—A lessee purchased scales of defendant, and charged them up to his lessors on account, as provided in the lease. Defendant at the time reserved the title until the scales were paid for, but of this lessors had no notice. Afterward defendant took a mortgage on the scales for their price. It was held that lessors, from the time such scales were charged to them, were complete purchasers, and as against them defendant had no lien of any kind, and that it was immaterial what was the state of the accounts between lessors and lessee. Thatcher *v.* Union Scale Co., 74 Iowa 117, 37 N. W. 102.

**In New Jersey** the Conditional Sales Act of May 9, 1889 (Pamphl. Laws, p. 421; 1 Gen. St. (1895) p. 891), making void, unless recorded, a contract of conditional sale as against a subsequent purchaser in good faith, was not repealed by Pamphl. Laws (1898), p. 711, being an act entitled "An act to repeal sundry acts respecting conveyances," nor affected by Revision of 1898 (Pamphl. Laws (1898), p. 670), entitled "An act respecting conveyances," by section 71 (page 699) of which a conditional sale, although unrecorded, is good as against a subsequent purchaser whose deed shall not have been first recorded. Lauter *v.* O'Toole, (Sup. 1908) 71 Atl. 288.

**One who is not a purchaser or a creditor** of the transferee is not protected under Mo. Rev. St. (1899) § 3412. Vette *v.* J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

**Purchase from bailee with option to purchase.**—Although Minn. Gen. St. (1878) c. 39, §§ 15–17, declare void, as against good faith purchasers, the interest of the vendor in any contract of sale conditioned that the title shall remain in the vendor until the purchase-price is paid, unless such contract, or a memorandum thereof, if oral, is filed of record, a purchaser in good faith of personal property from a bailee, who merely has an option of purchase, acquires no title. Bjork *v.* Bean, 56 Minn. 244, 57 N. W. 657.

purchaser will not be enforced if it accrued after the vendor has taken steps to reclaim the goods;[77] and the statute will not protect one who has joined the vendee in a fraud on the vendor.[78] A mortgagee is not a purchaser under the statute.[79] If the purchaser had notice of the vendor's claim before the purchase, he cannot occupy the position of a *bona fide* purchaser without notice.[80] There is a conflict of authority as to whether a purchaser in consideration of a preëxisting debt is a *bona fide* purchaser.[81] A purchaser from a *bona fide* purchaser may hold the property as against the vendor, although he had notice of the latter's claim.[82] So too it has been held that a *bona fide* purchaser from a purchaser with notice will be protected.[83]

(III) *CREDITORS.*[84] While it is the general rule that the reservation of title in a conditional sale is void as to creditors of the vendee unless the contract or a

**Purchaser from creditor.**—Where plaintiff contracted to sell certain mill attachments, retaining title until payment, and a creditor of the buyer took the property and sold it to defendant, the latter was not an innocent purchaser of such property, since title had never passed to the original transferee. W. F. Zimmerman Lumber Co. *v.* Elder, (Miss. 1901) 29 So. 466.

**A purchaser of personalty at execution sale** is not a creditor, but a purchaser, within the New York Lien Law, § 112, requiring the registration of conditional bills of sale as against purchasers, but not against creditors. Harris *v.* Gunn, 37 Misc. (N. Y.) 796, 77 N. Y. Suppl. 20.

**Under Conn. Pub. Acts (1893), c. 147,** providing that a contract for the sale of personal property which is conditioned that the title shall remain in the vendor after delivery, shall, unless acknowledged and recorded, be held to be an absolute sale, "except against the vendor and his heirs," a *bona fide* purchaser is not protected against the claims of the vendor. Lee Bros. Furniture Co. *v.* Cram, 63 Conn. 433, 28 Atl. 540.

**Construction of statute.**—The Vermont statute of 1872, providing that "no lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or purchasers without notice," should be read as though there were a comma after "purchasers," such comma having been inserted in the original act, although not in the printed copy. McPhail *v.* Gerry, 55 Vt. 174.

**Whether the purchaser is a bona fide purchaser** is a question for the jury, and on this issue the fact that the purchaser required a guaranty for his vendor may be considered. Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

**77.** San Antonio Brewing Assoc. *v.* Arctic Ice-Mach. Mfg. Co., 81 Tex. 99, 16 S. W. 797.

**That a purchaser without notice for several years** uses his good offices to assist the conditional vendor in collecting the unpaid purchase-money does not affect his rights. Onyx Soda Fountain Co. *v.* L'Engle, 53 Fla. 314, 43 So. 771.

**78.** Western Land, etc., Co. *v.* Plumb, 27 Fed. 598.

**79.** McCormick Harvesting Mach. Co. *v.* Callan, 48 Nebr. 849, 67 N. W. 863; Campbell Printing Press, etc., Co. *v.* Dyer, 46 Nebr. 830, 65 N. W. 940.

**80.** Norton *v.* Pilger, 30 Nebr. 860, 57 N. W. 471; Redewill *v.* Gillen, 4 N. M. 78, 12 Pac. 872.

**Actual notice** see *infra*, X, J, 4, h, (IV).

**81.** Hench *v.* Eacock, 21 Ind. App. 444, 52 N. E. 85, holding that a purchaser in consideration of a preëxisting debt is not a *bona fide* purchaser. *Compare* Duffus *v.* Howard Furnace Co., 15 Misc. (N. Y.) 169, 37 N. Y. Suppl. 19 [*reversed* in 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925]. *Contra*, Johnston *v.* Wood, 19 Wash. 441, 53 Pac. 707, holding one who takes property in payment of a preëxisting debt is a purchaser in good faith within the statute.

**In Texas** it has been held that one who has credited the purchase-price on a preëxisting debt is a *bona fide* purchaser. Sanger *v.* Jesse French Piano, etc., Co., (Tex. Civ. App. 1903) 75 S. W. 39 [*overruling* Sanger *v.* Jesse French Piano, etc., Co., 21 Tex. Civ. App. 523, 52 S. W. 621, where it was held that he was a *bona fide* purchaser to the extent of the cash payment only]. *Compare* Hastings *v.* Kellogg, (Tex. Civ. App. 1896) 36 S. W. 821, where it was held that under a former statute making unrecorded conditional sales void as against "purchasers," one who took the property in consideration of a preëxisting debt was a purchaser.

**Effect of extension.**—One who, without notice of an unrecorded conditional sale, extended a preëxisting debt in consideration of receiving from the vendee a chattel mortgage on the property is entitled to it as against the vendor. Union Bank *v.* Creamery Package Mfg. Co., 105 Iowa 136, 74 N. W. 921.

**82.** Ufford *v.* Winchester, 69 Vt. 542, 38 Atl. 239.

**83.** National Cash Register Co. *v.* Maloney, 95 Iowa 573, 64 N. W. 618.

**But if the second subpurchaser had knowledge** of the vendor's rights the fact that he was a purchaser for value would not protect him. Ufford *v.* Winchester, 69 Vt. 542, 38 Atl. 239.

**84. Operation and effect as to creditors generally** see *supra*, X, J, 2.

memorandum thereof is filed or recorded as required by statute,[85] the rule has in some cases been limited to subsequent creditors,[86] and in other cases it has

85. *Colorado.*—Weber *v.* Diebold Safe, etc., Co., 2 Colo. App. 68, 29 Pac. 747.

*Connecticut.*— Unmack *v.* Douglass, 75 Conn. 633, 55 Atl. 12; *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163.

*Florida.*— Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791.

*Georgia.*— Penland *v.* Cathey, 110 Ga. 431, 35 S. E. 659; Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206.

*Illinois.*— New England Piano Co. *v.* Maxwell, 67 Ill. App. 593; Gilbert *v.* Gere, 67 Ill. App. 590.

*Iowa.*— Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415, 88 N. W. 948; National Cash Register Co. *v.* Broeksmit, 103 Iowa 271, 72 N. W. 526.

*Michigan.*— Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

*Minnesota.*— H. H. Babcock Co. *v.* Williams, 75 Minn. 147, 77 N. W. 791.

*Mississippi.*— Jennings *v.* Wilson, 71 Miss. 42, 14 So. 259; Mask *v.* Allen, (1894) 17 So. 82.

*Missouri.*— Mansur-Tebbetts Implement Co. *v.* Price, 81 Mo. App. 243; Loeffler *v.* Damoree, 75 Mo. App. 207. See also Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67; Oyler *v.* Renfro, 86 Mo. App. 321.

*Nebraska.*— Jones *v.* Reed, 77 Nebr. 492, 109 N. W. 738; Starr *v.* Dow, 77 Nebr. 172, 108 N. W. 1065.

*North Carolina.*— Brem *v.* Lockhart, 93 N. C. 191.

*South Dakota.*— Webber *v.* Conklin, 20 S. D. 52, 104 N. W. 675.

*Texas.*— Loving Pub. Co. *v.* Johnson, 68 Tex. 273, 4 S. W. 532; Sinker *v.* Comparet, 62 Tex. 470; Rolerad *v.* Holt, 3 Tex. App. Civ. Cas. § 353.

*Vermont.*— Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309; Whitcomb *v.* Woodworth, 54 Vt. 544.

*Virginia.*— Hash *v.* Lore, 88 Va. 716, 14 S. E. 365.

*West Virginia.*— Baldwin *v.* Van Wagener, 33 W. Va. 293, 10 S. E. 716.

*Wisconsin.*— Rawson Mfg. Co. *v.* Richards, 69 Wis. 643, 35 N. W. 40; Williams *v.* Porter, 41 Wis. 422.

*United States.*— See *In re* Atlanta News Pub. Co., 160 Fed. 519 (construing Georgia statute); Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435 (construing Minnesota statute).

*Canada.*— Eby *v.* McTavish, 32 Ont. 187.

See 43 Cent. Dig. tit. "Sales," § 1397; and the statutes of the several states.

**Contract obviating necessity of recording.**— Where a sale was made on condition that, unless the balance of the price was paid within thirty days, all rights under the contract should end, with the expressed intention of avoiding the necessity of recording a memorandum of a conditional sale under the statute, a creditor of the vendee obtained no rights against the vendor by an attachment levied. Phelps *v.* Bemis, 51 Vt. 487.

**Miss. Code (1892), § 4226,** provides that any conveyance of chattels without consideration, unless recorded, or unless possession remain in the donee, shall be void against creditors. Section 4227 provides that conditional sales of chattels shall be void as to creditors and purchasers of one remaining in possession for three years, unless recorded. Section 4228, providing that these provisions shall not relate to purchasers or creditors subsequent to the fraudulent conveyance, does not affect sales under section 4227. Jennings *v.* Wilson, 71 Miss. 42, 14 So. 259.

**A receiver of the buyer is within the rule.** *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163. But see Falaeneau *v.* Reliance Steel Foundry Co., (N. J. Ch. 1908) 69 Atl. 1098.

**Sale invalid for fraud.**—Where title to goods sold conditionally, by reason of fraud in the sale and rescission thereof, has revested in the vendor, his right to the goods cannot be affected by the fact that the conditional sale was void, as against the creditors of the purchaser, for not being recorded. Brittain Dry-Goods Co. *v.* Buchanan, 79 Mo. App. 528.

**Sale of railway equipment — Burden of proof.**— Under Comp. Laws (1897), § 6336, providing that no contract for the sale of railroad equipment shall be valid, as against subsequent judgment creditors or *bona fide* purchasers for value and without notice, unless filed for record in the office of the secretary of state, where a question arises between a vendor and purchaser, and the purchaser shows payment of a valuable consideration, and that no notice of the true owner's title appears of record, the burden is then on the owner to show notice of his rights brought home to the subsequent purchaser. Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

**Where the execution of a trust deed in favor of creditors** is followed by immediate possession by the trustee, he acquires a lien in favor of the creditors who have accepted under the deed prior to that of an unrecorded conditional sale. Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

86. Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206; Conder *v.* Holleman, 71 Ga. 93; Thompson *v.* Armstrong, 11 N. D. 198, 91 N. W. 39; Sinker *v.* Comparet, 62 Tex. 470; *In re* Atlanta News Pub. Co., 160 Fed. 519. But *compare* Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160.

**In Missouri** it is held that the recording statute applies to both prior and subsequent creditors. Collins *v.* Wilhoit, 108 Mo. 451, 18 S. W. 839 [*affirming* 35 Mo. App. 585]; Peters *v.* Featherstun, 61 Mo. App. 466; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550. But see Tufts *v.* Thompson, 22 Mo. App. 564.

been restricted to lien creditors,[87] that is to say, those claiming under an attachment or judgment.[88] The protection thus extended to creditors does not, however, extend to an assignee for the benefit of creditors.[89] So too under a statute extending protection to a subsequent purchaser no protection will be given to creditors [90] or to an assignee for the benefit of creditors.[91] A landlord claiming under a lien or distress for rent is a creditor within the protection of the statute.[92]

(IV) *NOTICE.* As has been stated above, even under the recording acts, registration of the conditional sale contract is not necessary against creditors or

**A bankrupt,** having purchased a three-deck newspaper press under a written contract providing that the title should remain in the seller until the price was paid, subsequently telegraphed the seller's representative ordering a fourth deck for the press, "according to the original agreement," and on the same day wrote a letter confirming the telegram, containing the words "Your company retaining title to the fourth deck until the notes are paid." It was held that a sale of the fourth deck pursuant to such correspondence constituted a written contract of conditional sale, which, although not executed or recorded as prescribed by Ga. Code (1895), §§ 2776, 2777, was valid as against the bankrupt, its general creditors, and those not having given credit to the bankrupt on the faith of the ownership of the property. *In re* Atlanta News Pub. Co., 160 Fed. 519.

**If the reservation of title is in writing,** although not properly executed and recorded, the reservation is good as between the parties and as against general creditors and creditors with liens antedating the sale, and is only subject to such liens as are obtained or debts arising from credit given in good faith by reason of the buyer's apparent ownership of the property. *In re* Atlanta News Pub. Co., 160 Fed. 519.

**Sales between partners.**— Mo. Rev. St. (1889) §§ 5180, 5181, making conditional sales of property void as to creditors or subsequent purchasers unless the same are in writing and recorded, are applicable to sales between partners. Redenbaugh *v.* Kelton, 130 Mo. 558, 32 S. W. 67.

87. *Georgia.*— Rhode Island Locomotive Works *v.* Empire Lumber Co., 91 Ga. 639, 17 S. E. 1012.

*Missouri.*— Thompson *v.* Massey, 76 Mo. App. 197.

*Nebraska.*— Wilson *v.* Lewis, 63 Nebr. 617, 88 N. W. 690.

*New Jersey.*— Reischman *v.* Masker, 69 N. J. L. 353, 55 Atl. 301.

*Texas.*— Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

**Adjudication in bankruptcy.**—Where the statute provides that an unrecorded conditional sale shall be void as against creditors holding a specific lien, an adjudication in bankruptcy is not such a lien as is contemplated by the statute. York Mfg. Co. *v.* Cassell, 201 U. S. 344, 26 S. Ct. 481, 50 L. ed. 782 [*reversing* 135 Fed. 52, 67 C. C. A. 526]. See also Monitor Drill Co. *v.* Mercer, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. N. S. 1065; *In re* Atlanta News Pub. Co., 160 Fed. 519; Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

88. *Colorado.*— Weber *v.* Diebold Safe, etc., Co., 2 Colo. App. 68, 29 Pac. 747.

*Illinois.*— New England Piano Co. *v.* Maxwell, 67 Ill. App. 593; Gilbert *v.* Gere, 67 Ill. App. 590.

*Iowa.*— National Cash Register Co. *v.* Broeksmit, 103 Iowa 271, 72 N. W. 526.

*Nebraska.*— Starr *v.* Dow, 77 Nebr. 172, 108 N. W. 1065; Peterson *v.* Tufts, 34 Nebr. 8, 51 N. W. 297.

*New Jersey.*— Reischman *v.* Masker, 69 N. J. L. 353, 55 Atl. 301; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101.

*Vermont.*— Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

*Wisconsin.*— Rawson Mfg. Co. *v.* Richards, 69 Wis. 643, 35 N. W. 40; Williams *v.* Porter, 41 Wis. 422.

*Wyoming.*— Crumrine *v.* Reynolds, 13 Wyo. 111, 78 Pac. 402.

*Canada.*— Eby *v.* McTavish, 32 Ont. 187.

*Compare* Dunlop *v.* Mercer, 156 Fed. 545, 86 C. C. A. 435.

89. Rowell *v.* Lewis, 95 Me. 83, 49 Atl. 423; Sinclair *v.* Wheeler, 69 N. H. 538, 45 Atl. 1085; Mansur, etc., Implement Co. *v.* Beeman-St. Clair Co., (Tex. Civ. App. 1898) 45 S. W. 729; Tufts *v.* Blanton, 2 Tex. App. Civ. Cas. § 294. But *compare* Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084.

90. Woolley *v.* Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. 789; Fennikoh *v.* Gunn, 59 N. Y. App. Div. 132, 69 N. Y. Suppl. 12; Thompson *v.* Armstrong, 11 N. D. 198, 91 N. W. 39.

91. Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124.

92. *Florida.*— Hudnall *v.* Paine, 39 Fla. 67, 21 So. 791.

*Georgia.*— Gartrell *v.* Clay, 81 Ga. 327, 7 S. E. 161; Cohen *v.* Candler, 79 Ga. 427, 7 S. E. 160.

*Illinois.*— Elliott *v.* Emerson Piano Co., 80 Ill. App. 51.

*Texas.*— Brady *v.* Nagle, (Civ. App. 1895) 29 S. W. 943.

*West Virginia.*— Huffard *v.* Akers, 52 W. Va. 21, 43 S. E. 124.

See LANDLORD AND TENANT, 24 Cyc. 1260.

**Landlord not a judgment creditor.**—A landlord who has caused a distress warrant to be levied on goods and chattels conditionally sold to his tenant is not a judgment creditor within the meaning of Gen. St. p. 891,

purchasers with notice.[93] Notice to excuse the failure to record must be either actual or constructive;[94] and it is not sufficient that the creditor or purchaser might have ascertained the facts by ordinary diligence,[95] unless there were facts known by the purchaser or creditor sufficient to put him on inquiry.[96] The burden of proof is on the vendor to show that the subsequent purchaser had notice.[97] In the case of creditors the notice must be brought home to the creditor, and notice to the officer executing process is not sufficient.[98] The recording of the contract

so as to render the property subject to his distress, if the contract of conditional aale was not recorded. Reischmann *v.* Masker, 69 N. J. L. 353, 55 Atl. 301.

93. See *supra*, XI, J, 4, a.

Under Mo. Rev. St. (1899) § 3412, providing that conditional sales shall be void as to all subsequent purchasers in good faith and creditors, unless such condition shall be evidenced by writing executed and recorded, such a conditional aale is void against a creditor, prior or subsequent, with or without notice. Oyler *v.* Renfro, 86 Mo. App. 321.

94. Moline Plow Co. *v.* Braden, 71 Iowa 141, 32 N. W. 247.

**Notice to corporation.**— The purchaser in an unrecorded conditional sale resold the property to persons who had notice, and who negotiated a loan from a bank in order to pay for the property. These two persons, with a third, afterward incorporated, the third person acting as general manager. The company purchased the property in controversy some twelve days after its purchase by the corporators, and paid the first two corporators a certain aum in cash, and assumed the payment of their indebtedness to the bank, executing a note therefor signed in the company's name, and possession of the property being delivered to the company. The company's manager had no notice of the conditional sale, and there was nothing to show that the purchase by the corporators was intended as a proposition to the corporation to be accepted when it came into existence. It was held that the company was not charged with notice of the conditional sale. Grand Rapids Furniture Co. *v.* Grand Hotel, etc., Co., 11 Wyo. 128, 70 Pac. 838, 72 Pac. 687. But *compare* Adams *v.* Roscoe Lumber Co., 159 N. Y. 176, 53 N. E. 805 [*affirming* 2 N. Y. App. Div. 47, 37 N. Y. Suppl. 265], when it was held that in an action to recover possession of personal property where defendant corporation claimed as a *bona fide* purchaser, evidence that third persons who were in the employ of the original conditional purchaser at the time of the transaction, and who participated in it, were the officers and managers of a corporation subsequently formed, that claimed to have obtained title to the property by purchase, was admissible, as tending to prove want of good faith, since its officers were all actors in the original purchase before the corporation was formed.

**A subsequent sale subject to the vendor's prior lien** is sufficient notice to the subsequent purchaser to deprive him of the rights of a *bona fide* purchaser without notice. Norton *v.* Pilger, 30 Nebr. 860, 47 N. W. 471.

**A recital in the subcontract** that the seller's title is derived from the contract between the original seller and original buyer is sufficient to put the subcontractor on notice. Van Buren *v.* Stubbings, 149 Mich. 206, 112 N. W. 706.

**Name of vendor on article sold.**— Upon a piano made by a company whose corporate name was "The Mason & Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there were painted the words "Mason & Risch, Toronto." It was held that if the transaction came within the Conditional Sales Act, Ont. Rev. St. (1897) c. 149, this was not a compliance with the provisions of section 1 of that act. Mason *v.* Lindsay, 4 Ont. L. Rep. 365. See also Wettlaufer *v.* Scott, 20 Ont. App. 652, where it was held that the lien of an unpaid vendor of a manufactured article is not invalidated if, without his direction or connivance, the purchaser paints out or obliterates the name and address of the vendor, which were, pursuant to the Conditional Sales Act, 51 Vict. c. 19 (Ont.), properly marked on the article at the time of the conditional sale.

95. Moline Plow Co. *v.* Braden, 71 Iowa 141, 32 N. W. 247.

96. Ingersoll *v.* Barnes, 47 Mich. 104, 10 N. W. 127.

**Custom of trade.**— Plaintiffs, according to the custom of the trade, well known to defendant, sold mineral water in syphons, which were to be returned when empty, and to which they retained title, and plaintiffs' names were stamped on the glass of each syphon. Defendant, who had purchased the syphons from various parties, was not a *bona fide* purchaser. Lighte *v.* Finan, 3 N. Y. Suppl. 148.

97. Wilcox *v.* Williamson Law Book Co., 92 Iowa 215, 60 N. W. 618, holding that a statement by the purchaser plaintiff to the vendor'a attorneys that he had no notice of the contract of sale, made at a time when no such statement was called for by any remarks of the attorneys, is not sufficient to authorize a finding that the purchaser had actual notice of the sale and its conditional character. See also Hogan *v.* Detroit United R. Co., 140 Mich. 101, 103 N. W. 543.

98. Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42.

**Finding a copy of the contract** in executing an attachment on the property is not

of conditional sale is sufficient as constructive notice to all the world,[99] provided it is filed in time.[1] But the filing of such a contract if not made necessary by statute will not operate as constructive notice.[2]

**K. Assignment.**[3] A vendor of personal property sold conditionally may assign his claim to the property,[4] as by an assignment of the debt, which carries with it the vendor's interest in the goods,[5] or by an assignment or indorsement of the note,[6] and the assignee acquires the same rights as the vendor had.[7] A pur-

notice. Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42.

99. *Georgia.*—A. S. Thomas Furniture Co. *v.* T. & C. Furniture Co., 120 Ga. 879, 48 S. E. 333.

*Illinois.*— Gilbert *v.* National Cash Register Co., 67 Ill. App. 606.

*Mississippi.*— Tufts *v.* Stone, 70 Miss. 54, 11 So. 792; John Van Range Co. *v.* Allen, (1890) 7 So. 499.

*New York.*— Nichols *v.* Potts, 35 Misc. 273, 71 N. Y. Suppl. 765.

*Vermont.*— Church *v.* McLeod, 58 Vt. 541, 3 Atl. 490.

*West Virginia.*— Troy Wagon Co. *v.* Hutton, 53 W. Va. 154, 44 S. E. 135.

**Pleading.**—Where the plea in trover by the conditional vendor of goods against an officer attaching them as the property of the vendee alleged that the vendor gave no notice of the amount of his lien, and did not allow ten days in which to pay it, and plaintiff replied, setting up actual notice of the recorded lien to defendant and creditor, and a demurrer was filed thereto, as knowledge of all facts necessary to enable defendant and creditor to pay or tender the amount due, was admitted by the demurrer, and, as suit might be brought by the vendor within the ten days, the plea was bad, as not alleging either payment or tender within that time. Towner *v.* Bliss, 51 Vt. 59.

**Increase of property conditionally sold.**— Where an animal is sold on condition that it sball remain the vendor's property until the payment of the price, its increase accruing before the performance of the condition also belongs to the vendor, and it is not necessary, to protect the title to such increase, as against a *bona fide* purchaser, that it should be named in the memorandum of lien required by St. (1870), Act No. 63. Clark *v.* Hayward, 51 Vt. 14.

**Form of instrument.**—A lien note for a conditional sale of a chattel witnesses the sum due on the lien, as required by Vt. St. 2290, so as to be notice to a subsequent purchaser, where the amount of the note is given in figures in the margin, but is omitted in the body of the note, which reads, "——— dollars, $50 payable August 9, and $50 every two months thereafter till note is paid." Kimball *v.* Costa, 76 Vt. 289, 56 Atl. 1009, 104 Am. St. Rep. 937.

1. Pash *v.* Weston, 52 Iowa 675, 3 N. W. 713.

2. Baldinger *v.* Levine, 83 N. Y. App. Div. 130, 82 N. Y. Suppl. 483. See also Stubbings *v.* Curtis, 109 Wis. 307, 85 N. W. 325.

3. **Purchasers from buyer** see *supra*, X, J, 1, 3.

4. Little Rock Bank *v.* Collins, 66 Ark. 240, 50 S. W. 694; Barton *v.* Groseclose, 11 Ida. 227, 81 Pac. 623; Bean *v.* Edge, 84 N. Y. 510; Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103.

**Registration of the assignment** is not necessary to protect the assignee's rights. English *v.* Hill, 116 Ga. 415, 42 S. E. 717.

5. Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098; Esty *v.* Graham, 46 N. H. 169.

6. Townsend *v.* Southern Product Co., 127 Ga. 342, 56 S. E. 436; Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084. But see Burch *v.* Pedigo, 113 Ga. 1157, 39 S. E. 493, 54 L. R. A. 808 (holding that if the note is indorsed without recourse the title reserved as security is divested); Merchants', etc., Bank *v.* Thomas, 69 Tex. 237, 6 S. W. 565.

**An assignment of notes** taken for the purchase-price of a horse is not a waiver of the condition that the horse should remain the property of the seller till payment of the notes, unless the seller thereby intends to make an election between his remedies for his protection in the sale of the horse, and to rely on the notes for the purchase-price rather than the right to retake. Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227.

**An indorsement in blank** will not of itself vest title to the property in the indorsee. Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 322.

7. *Arkansas.*— Little Rock Bank *v.* Collins, 66 Ark. 240, 50 S. W. 694.

*Idaho.*— Barton *v.* Groseclose, 11 Ida. 227, 81 Pac. 623.

*Mississippi.*— Ross-Meehan Brake Shoe Foundry Co. *v.* Pascagoula Ice Co., 72 Miss. 608, 18 So. 364.

*New Hampshire.*— Esty *v.* Graham, 46 N. H. 169.

*New York.*— Bean *v.* Edge, 84 N. Y. 510.

*Utah.*— Standard Steam Laundry *v.* Dole, 22 Utah 311, 61 Pac. 1103.

**It is not necessary to the validity of the assignee's title** that the vendor, holding a conditional bill of sale which secures a purchase-money note, shall indorse the note or guarantee its payment, when he assigns in writing to such assignee the note and the personal property described therein and all of his rights under the entire paper, which paper covers the note and the security. English *v.* Hill, 116 Ga. 415, 42 S. E. 717.

chase of the rights of both the vendor and the vendee will be valid as against creditors of the vendee in the absence of fraud.[8]

**L. Remedies of Seller — 1. Against Buyer — a. In General.** In the event of a default on the part of the buyer under a contract of conditional sale the seller has several remedies. He may retake the goods,[9] he may sue for the price,[10] or he may foreclose his lien.[11]

**b. Election of Remedies.**[12] The seller cannot resort to more than one remedy,[13] but must elect which he will pursue;[14] and generally an action and recovery of judgment for the price operates as a confirmation of the sale precluding the seller from maintaining an action to recover the goods.[15] So too a retaking of the

**Where the vendor has extended the time of payment** by a supplementary agreement changing the terms of payment, a subsequent assignee of the vendor's rights is bound by such agreement. Bridgman *v.* Robinson, 7 Ont. L. Rep. 591.

**Effect of assignment.**— Since the right to collect notes given for the purchase-money out of personal property sold conditionally, the seller retaining title, is extended by the act of Oct. 22, 1887, to the holder of such notes, and is not confined to the original payee, a transfer of such notes since the passage of said act, even if made without recourse on the payee, will not divest the notes of their character, as a debt for purchase-money. Cade *v.* Jenkins, 88 Ga. 791, 15 S. E. 292.

**Rights of assignee.**—Where a piano, purchased on the instalment plan, conditioned that the title should remain in the seller until full payment, was taken from the buyer under a writ of attachment, the attachment creditor on paying to the seller the portion of the purchase-price remaining unpaid, and receiving from him an assignment of the contract, acquired no greater power to enforce a forfeiture than the seller had, and hence could not enforce such forfeiture for non-payment of an instalment falling due after the assignment, where at the time that the instalment became due he held possession of the piano simply as the seller's assignee, since a material condition to the right of the seller to compel payment of instalments under the contract was that the buyer should have the possession and right to use the piano. Pearne *v.* Coyne, 79 Conn. 570, 65 Atl. 973.

**Reassignment.**—Where a contract providing for the sale of a piano was assigned by the vendor as security for a loan, and was redelivered to him on payment thereof, and the assignment destroyed, title to the contract was restored to the seller, so that he could assign the contract thereafter to another. Ainsworth *v.* Rhines, 34 Misc. (N. Y.) 372, 69 N. Y. Suppl. 876.

**Remedies of buyer.**—A vendee of personalty under a contract of conditional sale, payments to be made in instalments, cannot maintain trover against the purchaser of the vendor's interest to recover to the extent of the payments made, if they be less than the agreed price. Farmers' Bank *v.* McKee, 2 Pa. St. 318.

8. Smith *v.* Foster, 18 Vt. 182.

9. See *infra*, X, L, 1, c.

10. See *infra*, X, L, 1, d.

11. See *infra*, X, L, 1, e.

12. Election of remedies generally see Election of Remedies, 15 Cyc. 251.

13. Davis *v.* Millings, 141 Ala. 378, 37 So. 737; Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; Seanor *v.* McLaughlin, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467; Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588.

14. Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279. See also Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023.

15. *Arkansas.*— Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703.

*California.*— Holt Mfg. Co. *v.* Ewing, 109 Cal. 353, 42 Pac. 435; Parke, etc., Co. *v.* White River Lumber Co., 101 Cal. 37, 35 Pac. 442.

*Connecticut.*— Crompton *v.* Beach, 62 Conn. 25, 25 Atl. 446, 36 Am. St. Rep. 323, 18 L. R. A. 187.

*Indiana.*— Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014.

*Iowa.*— Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569.

*Massachusetts.*— Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; Whitney *v.* Abbott, 191 Mass. 59, 77 N. E. 524; Bailey *v.* Hervey, 135 Mass. 172; Marston *v.* Baldwin, 17 Mass. 606.

*Minnesota.*— Alden *v.* Dyer, 92 Minn. 134, 99 N. W. 784.

*Nebraska.*— Fredrickson *v.* Schmittroth, 77 Nebr. 724, 112 N. W. 564.

*New York.*— Orcutt *v.* Rickenbrodt, 42 N. Y. App. Div. 238, 59 N. Y. Suppl. 1008; Wright *v.* Pierce, 4 Hun 351, 6 Thomps. & C. 651. *Compare* Reedy El. Co. *v.* Berman, 107 N. Y. Suppl. 59.

*North Dakota.*— Dowagiac Mfg. Co. *v.* Mahon, 13 N. D. 516, 101 N. W. 903.

*Oklahoma.*— Osborne *v.* Walther, 12 Okla. 20, 69 Pac. 953.

*Texas.*— Parlin, etc., Co. *v.* Moline Plow Co., (Civ. App. 1894) 27 S. W. 1087.

*Canada.*— Plessisville Foundry *v.* Levesque, 22 Quebec Super. Ct. 306; Purtle *v.* Heney, 33 N. Brunsw. 607.

See 43 Cent. Dig. tit. "Sales," §§ 1414, 1421.

**Contra.**—*Alabama.*—E. E. Forbes Piano Co. *v.* Wilson, 144 Ala. 586, 39 So. 645; Thomason *v.* Lewis, 103 Ala. 426, 15 So.

property and an application of the payments already made as payments for the use of the property is such an election as will bar a suit for the purchase-price.[16] A mere attempt to collect the price will not bar an action to recover the property,[17] nor will it be considered an election if the suit is discontinued,[18] or if the judgment remains unsatisfied.[19] Similarly a suit in equity to enforce the seller's lien constitutes a waiver of his right to declare a forfeiture for non-payment of the purchase-price.[20]

**c. Recovery of Goods** — (i) *In General.* On the default of the buyer the seller has the right of possession of the property and may retake the same.[21] This

830. But see Davis *v.* Millings, 141 Ala. 378, 37 So. 737.

*Georgia.*— Jones *v.* Snider, 99 Ga. 276, 25 S. E. 668.

*Michigan.*— Fuller *v.* Byrne, 102 Mich. 461, 60 N. W. 980. But see Button *v.* Trader, 75 Mich. 295, 42 N. W. 834.

*New Jersey.*— Campbell Printing Press, etc., Co. *v.* Rockaway Pub. Co., 56 N. J. L. 676, 29 Atl. 681, 44 Am. St. Rep. 410.

*Pennsylvania.*— Durr *v.* Replogle, 167 Pa. St. 347, 31 Atl. 645.

**Attachment before maturity.**—Where a sale is made conditional upon the payment of a note, the attachment of the property by the vendor before the maturity of the note does not constitute an election by him to sue for the price of the property. Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133, 29 S. W. 147.

**Action against wrong party.**—Where property was conditionally sold to a partnership, and by it transferred to a corporation of the same name, without the seller's consent, the bringing of a suit against the corporation for the price, in the mistaken belief that the corporation was the vendee, is not such an election by the seller as will defeat his action of replevin for the property against the real vendee. National Cash Register Co. *v.* Ferguson, 25 Misc. (N. Y.) 363, 55 N. Y. Suppl. 592.

**Bringing an action for part of the price** will not operate as a confirmation of the sale as to all the goods. Clark *v.* B. B. Richards Lumber Co., 72 Minn. 397, 75 N. W. 605.

16. *Alabama.*— Davis *v.* Millings, 141 Ala. 378, 37 So. 737.

*Michigan.*— Perkins *v.* Grobben, 116 Mich. 172, 74 N. W. 469, 72 Am. St. Rep. 512, 39 L. R. A. 815. But see Tufts *v.* D'Arcambal, 85 Mich. 185, 48 N. W. 497, 24 Am. St. Rep. 79, 12 L. R. A. 446.

*Minnesota.*— Keystone Mfg. Co. *v.* Casselius, 74 Minn. 115, 76 N. W. 1028; Aultman *v.* Olson, 43 Minn. 409, 45 N. W. 852.

*Missouri.*— Laclede Power Co. *v.* Ennis Stationery Co., 79 Mo. App. 302.

*New York.*— Edmead *v.* Anderson, 118 N. Y. App. Div. 16, 103 N. Y. Suppl. 369; White *v.* Gray, 96 N. Y. App. Div. 154, 89 N. Y. Suppl. 481; Earle *v.* Robinson, 91 Hun 363, 36 N. Y. Suppl. 178 [*affirmed* in 157 N. Y. 683, 51 N. E. 1090].

*Pennsylvania.*— Seanor *v.* McLaughlin, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467; North *v.* Yorke, 13 Montg. Co. Rep. 38.

*United States.*— Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588.

See 43 Cent. Dig. tit. "Sales," § 1431.

**Contra.**— Dederick *v.* Wolfe, 68 Miss. 500, 9 So. 350, 24 Am. St. Rep. 283; McCormick Harvesting Mach. Co. *v.* Koch, 8 Okla. 374, 58 Pac. 626; Travis *v.* Way, 33 Nova Scotia 551, holding that a provision, in a contract for the sale of an organ to be paid for in instalments, that such organ shall remain the property of the vendor until all the instalments have been paid, and that in case of non-payment of any instalment the vendor shall be entitled to the immediate possession of such organ, and all the rights of the purchaser shall cease, and any money paid on account of the price shall be retained as a rental charge for its use, is cumulative only, and does not prevent the maintenance of an action for unpaid instalments.

**Sale under attachment.**—Where property is delivered to the buyer under a contract of conditional sale, and the same is seized under an attachment for the purchase-price without having filed and recorded a bill of sale, the mere fact that before judgment for plaintiff in attachment the property is illegally sold by the levying officer and is purchased by plaintiff does not estop him from prosecuting his suit on the ground that he had elected to rescind the contract. Cooper *v.* Smith, 125 Ga. 167, 53 S. E. 1013.

17. American Box Mach. Co. *v.* Zentgraf, 45 N. Y. App. Div. 522, 61 N. Y. Suppl. 417, 7 N. Y. Annot. Cas. 182.

18. Matthews *v.* Lucia, 55 Vt. 308. But see Orcutt *v.* Rickenbrodt, 42 N. Y. App. Div. 238, 59 N. Y. Suppl. 1008, where the rights of third persons had intervened.

19. E. E. Forbes Piano Co. *v.* Wilson, 144 Ala. 586, 39 So. 645; Thomason *v.* Lewis, 103 Ala. 426, 15 So. 830; Root *v.* Lord, 23 Vt. 568.

20. Gigray *v.* Mumper, (Iowa 1908) 118 N. W. 393.

21. *Alabama.*— Davis *v.* Millings, 141 Ala. 378, 37 So. 737; Jones *v.* Pullen, 66 Ala. 306.

*Arkansas.*— Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703.

*Connecticut.*— Griffin *v.* Ferris, 76 Conn. 221, 56 Atl. 494; Hughes *v.* Kelly, 40 Conn. 148.

*Delaware.*— Staunton *v.* Smith, (1906) 65 Atl. 593; Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192.

right he may exercise without recourse to the courts by retaking possession,

*Georgia.*— Wilmerding *v.* Rhodes-Haverty Furniture Co., 122 Ga. 312, 50 S. E. 100; Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100.

*Illinois.*— O'Neil *v.* Rogers, 110 Ill. App. 622; Walkau *v.* Manitowoc Seating Co., 105 Ill. App. 130; Campion *v.* Smith, 46 Ill. App. 501; Fleury *v.* Tufts, 25 Ill. App. 101.

*Indiana.*— Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Hodson *v.* Warner, 60 Ind. 214.

*Kansas.*— Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989; Hall *v.* Draper, 20 Kan. 137.

*Massachusetts.*— Pels *v.* Millen, 192 Mass 13, 77 N. E. 1152; Blanchard *v.* Cooke, 147 Mass. 215, 17 N. E. 313; Hill *v.* Freeman, 3 Cush. 257.

*Michigan.*— Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370; Baird *v.* Grand Rapids School Furniture Co., 98 Mich. 457, 57 N. W. 729; Wiggins *v.* Snow, 89 Mich. 476, 50 N. W. 991; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788.

*Mississippi.*—Williams *v.* Williams, (1898) 23 So. 291.

*Missouri.*— Ridgeway *v.* Kennedy, 52 Mo. 24.

*Nebraska.*— Edward Thompson Co. *v.* Baldwin, 62 Nebr. 530, 87 N. W. 307; Richardson Drug Co. *v.* Teasdall, 52 Nebr. 698, 72 N. W. 1028.

*New Hampshire.*— Clay *v.* Bohonon, 54 N. H. 474.

*New York.*— Roach *v.* Curtis, 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 [*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411]; Munsell *v.* Flood, 45 N. Y. Super. Ct. 460; Iserman *v.* Conklin, 21 Misc. 194, 47 N. Y. Suppl. 107; Campbell Printing Press, etc., Co. *v.* Walker, 1 N. Y. St. 200.

*North Carolina.*— Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2; Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916.

*Pennsylvania.*— Seanor *v.* McLaughlin, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467; Frech *v.* Lewis, 32 Pa. Super. Ct. 279 [*reversed* on other grounds in 218 Pa. St. 141, 67 Atl. 45, 11 L. R. A. N. S. 948]; Swope *v.* Crawford, 16 Pa. Super. Ct. 474, 18 Lanc. L. Rev. 177.

*South Carolina.*— Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279; Straub *v.* Screven, 19 S. C. 445; McHugh *v.* Dinkins, 2 Brev. 324.

*Texas.*— Henderson *v.* Mahoney, 31 Tex. Civ. App. 539, 72 S. W. 1019; Bensinger Self-Adding Cash Register Co. *v.* Cain, (App. 1892) 18 S. W. 136.

*Utah.*— Lippincott *v.* Rich. 19 Utah 140, 56 Pac. 806.

*West Virginia.*— McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

*Wisconsin.*— Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170; Hunter *v.* Warner, 1 Wis. 141.

*Wyoming.*— Gregory *v.* Morris, 1 Wyo. 213.

*United States.*— Segrist *v.* Crabtree, 131 U. S. 287, 9 S. Ct. 687, 33 L. ed. 125 [*affirming* 3 N. M. 278, 6 Pac. 202]; Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588; The Oriole, 18 Fed. Cas. No. 10,574, 1 Sprague 31.

*Canada.*— Traders Bank *v.* G. & J. Brown Mfg. Co., 18 Ont. 430; Mason *v.* Johnson, 27 U. C. C. P. 208.

See 43 Cent. Dig. tit. "Sales," § 1420.

**Default of the buyer is an essential condition** to the right to retake the property Lambert *v.* McCloud, 63 Cal. 162; Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809; Blanchard *v.* Cooke, 147 Mass. 215, 17 N. E. 313. See also Shields *v.* Bush, 76 Hun (N. Y.) 226, 27 N. Y. Suppl. 754, holding that where the purchase-price is to be paid in property and notes and the notes are paid, but the vendor never calls for the property and it is destroyed, the vendor cannot reclaim the goods sold on the theory that the notes were unpaid to the value of the property. The right cannot be exercised because of a mere apprehension as to the safety of the property. Louis *v.* Hogan, 9 Ohio Dec. (Reprint) 342, 12 Cinc. L. Bul. 198.

**Default in instalment.**— Under a contract of conditional sale which, after providing for a cash payment and a certain amount monthly, the entire amount to be paid at a certain time, gives the seller the right to retake the goods on non-payment of such sums, the seller is entitled to take possession on default of any monthly payment, and is not bound to wait until the expiration of the time provided for the payment of the whole amount. Robinson *v.* Berry, 93 Me. 320, 45 Atl. 34. The seller is entitled to immediate possession in such a case. Berger *v.* Miller, 86 Ark. 58, 109 S. W. 1015.

**Default in interest.**— Under a contract for the sale of bar fixtures, the purchase-price, with interest, was to be paid in weekly instalments, title being reserved in the seller. The buyer paid the principal in instalments to the seller's agents, but failed to pay interest. There was nothing to warrant the inference that the agents had authority to waive the payment of interest or that the seller knew that they were attempting to do so, and there was no consideration for such waiver. It was held that the seller was entitled to take possession of the property for non-payment of the interest. A'Hern *v.* Lipsett, 154 Mich. 196, 117 N. W. 577.

**Mistake in note.**—Where, on conditional sale of a mule, the seller drew up a note for the purchase-price and omitted any provision for interest, while this might have been ground for correcting the contract in a court of equity if there had been an agreement between the parties for interest, the seller could not maintain detinue for the mule until the note matured, and there was default in the payment of the purchase-

provided he can do so peaceably,[22] or he may maintain an action of replevin [23] or

money. Wellden *v.* Witt, 145 Ala. 605, 40 So. 126.

**Payment of part of price in goods.**—Where a contract for the conditional sale of a cash register authorized the buyer to turn in an old register at a specified valuation, and he failed to pay that amount or turn in the old register, the seller was entitled to recover the new register, his remedy not being limited to the recovery of the old register or its value. National Cash Register Co. *v.* Petsas, 43 Wash. 376, 86 Pac. 662.

**Non-performance by seller.**—Where the seller had not delivered the piano purchased but another and cheaper piano to be used by the buyer until the kind purchased could be furnished, a refusal of the buyer to pay an instalment after payment of an amount greatly in excess of the value of the instrument actually furnished does not give the seller the right to retake such instrument. Heine Piano Co. *v.* Crepin, 142 Cal. 609, 76 Pac. 493.

**Goods sold for retail purposes.**—Where a conditional sale was made of a stock of goods, and possession given to the purchaser, the contract providing that he should sell the goods at retail, but should not deplete the stock, and that the title should remain in the seller until payment was made, on a failure to make the payments provided for the seller can retake possession only of so much of the original stock as remains undisposed of, the mingling of other goods therewith by the purchaser to keep up the stock being neither wrongful nor fraudulent, under the contract. Richardson Drug Co. *v.* Teasdall, 52 Nebr. 698, 72 N. W. 1028.

**Question for jury.**—Where the evidence was conflicting as to whether a contract of conditional sale had been rescinded so as to entitle the seller to recover the property, the question was for the jury. Wellden *v.* Witt, 145 Ala. 605, 40 So. 126.

**Retaking from bankrupt** although instrument of sale not recorded see *supra*, X, G, 1.

**22.** Shireman *v.* Jackson, 14 Ind. 459; Swope *v.* Crawford, 16 Pa. Super. Ct. 474, 18 Lanc. L. Rev. 177; Henderson *v.* Mahoney, 31 Tex. Civ. App. 539, 72 S. W. 1019; Traders Bank *v.* G. & J. Brown Mfg. Co., 18 Ont. 430. And see Proctor *v.* Tilton, 65 N. H. 3, 17 Atl. 638.

**Duty of buyer to return goods.**—A stipulation in a contract of conditional sale of personal property to the effect that, if default shall be made in any of the payments therein mentioned, the buyer agrees to return the property, and that the seller or its agent may resume actual possession of the same, places upon the buyer the duty of delivering the property to the seller, when demanded, after a breach of the contract by the former. Finlay *v.* Ludden, etc., Southern Music House, 105 Ga. 264, 31 S. E. 180.

**Right to retake the property** does not confer on the seller the right to enter the buyer's house in his absence, without his consent, and without notice and take away the property. Van Wren *v.* Flynn, 34 La. Ann. 1158. But where the contract provided that the seller might enter into any premises where the property might be and take it away, the fact that he obtained entrance by falsely representing his purpose does not make him a trespasser or the taking unlawful. North *v.* Williams, 120 Pa. St. 109, 13 Atl. 723, 6 Am. St. Rep. 695.

**Question for jury.**— It being agreed that title to a horse should not pass until the price was paid, and a note for the purchase-money and a renewal note for three months not being paid, it is a question for the jury whether the peaceable resumption of possession was a reasonable exercise of the right of rescission. Levan *v.* Wilten, 135 Pa. St. 61, 19 Atl. 945.

**23.** *California.*— Lambert *v.* McCloud, 63 Cal. 162.

*District of Columbia.*— Wall *v.* De Mitkiewicz, 9 App. Cas. 109.

*Florida.*— Scotch Mfg. Co. *v.* Carr, 53 Fla. 480, 43 So. 427.

*Illinois.*— Campion *v.* Smith, 46 Ill. App. 501.

*Indiana.*— Hodson *v.* Warner, 60 Ind. 214; Orner *v.* Sattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644.

*Kansas.*— Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989; Hall *v.* Draper, 20 Kan. 137.

*Massachusetts.*— Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775.

*Michigan.*— Baird *v.* Grand Rapids School Furniture Co., 98 Mich. 457, 57 N. W. 729; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788.

*Missouri.*— Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070.

*Nebraska.*— Richardson Drug Co. *v.* Teasdall, 52 Nebr. 698, 72 N. W. 1028.

*New York.*— Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 106 N. Y. Suppl. 411)].

*North Carolina.*— Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916.

*Wisconsin.*— Mississippi River Logging Co. *v.* Miller, 109 Wis. 77, 85 N. W. 193; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170.

*Wyoming.*— Gregory *v.* Morris, 1 Wyo. 213.

*United States.*— Sugar Beets Product Co. *v.* Lyons Beet Sugar Refining Co., 161 Fed. 215.

*Canada.*— Mason *v.* Johnson, 27 U. C. C. P. 208.

**Replevin** generally see REPLEVIN, 34 Cyc. 1342.

**The buyer takes no title** to the property, and hence after default in the payment of an instalment he has no defense to replevin for the goods. Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div.

trover.[24] If the vendee has sold the property the seller may maintain trover against him as for the conversion.[25] On a retaking of the property by the seller the buyer's rights therein are terminated.[26]

(II) *CONDITIONS PRECEDENT*[27] — (A) *In General.* If the contract provides that on default the seller may declare the contract void and take possession, such a declaration is a condition precedent to a recovery of the property;[28] and where goods are sold to be paid for in work, a stipulation that the seller may retake the goods on payment for the work renders such payment a condition precedent to a recovery of the goods.[29] It may be provided by statute that the seller before taking the property must furnish the buyer with a statement of the amount due;[30] and a stipulation waiving the buyer's rights in this respect is void as against public policy.[31] Where delivery is in instalments the seller may recover for the conversion of the property delivered without tendering delivery of the remaining instalments.[32]

(B) *Return of Consideration.* In some jurisdictions on default of the buyer part payments are regarded as forfeited;[33] and it is not therefore necessary to return the payments received or notes given for the price as a condition precedent to a recovery of the goods.[34] In other jurisdictions, however, the rule has been adopted that a return of the payments made or notes given is a condition precedent to a recovery of the property.[35]

765, 101 N. Y. Suppl. 333 (*affirming* 20 Misc. 122, 100 N. Y. Suppl. 411)].

**Where the seller has repeatedly waived the** condition as to payment the buyer may maintain injunction against a suit in replevin to recover the property because of default in the payment of an instalment and is entitled to a decree declaring the transaction a sale with legal title in the seller as security for the price. Meagher *v.* Hollenberg, 9 Lea (Tenn.) 392.

24. Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100; Jowers *v.* Blandy, 58 Ga. 379; Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; Katz *v.* Diamond, 16 Misc. (N. Y.) 577, 38 N. Y. Suppl. 766; McHugh *v.* Dinkins, 2 Brev. (S. C.) 324.

**The remedy by conversion rests upon the assumption** that as the condition had not been performed the title remained in the seller. Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775.

**Trover** generally see TROVER AND CONVERSION.

25. Rhodes *v.* Dickinson, 79 Ga. 724, 4 S. E. 164; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun (N. Y.) 545, 11 N. Y. Suppl. 448; Watson *v.* Goodno, 66 Vt. 229, 28 Atl. 987.

26. Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Leighton *v.* Stevens, 22 Me. 252.

27. **Giving opportunity to redeem** see *infra*, X, M, 3.

28. Giddey *v.* Altman, 27 Mich. 206.

29. Walker *v.* McNaughton, 16 Vt. 388.

30. See Mass. Rev. Laws, c. 198, § 13.

**Construction of statute.**— Mass. St. (1898) p. 531, c. 545, in substance reënacted in Rev. Laws, c. 198, § 13, which provides that the vendor in a conditional sale shall, at least thirty days before taking possession of the property for default of the vendee, demand of the latter the balance then due, and furnish to the vendee an itemized statement of the account, showing the amount due thereon, when considered in the light of previous legislation (St. (1881) p. 552, c. 222; Pub. St. (1882) c. 192, § 13; St. (1884) p. 343, c. 313, § 2; St. (1892) p. 451, c. 411) applies only where the breach relied on is default in the payment of money, and not where it is a wrongful removal of the article sold. Brown *v.* Goldthwaite Furniture Co., 186 Mass. 51, 71 N. E. 71.

31. Desseau *v.* Holmes, 187 Mass. 486, 73 N. E. 656, 105 Am. St. Rep. 417.

32. Putnam *v.* MacLeod, 23 R. I. 373, 50 Atl. 646.

33. See *infra*, X, L, 1, c, (IX).

34. *Arkansas.*—Kirby *v.* Tompkins, 48 Ark. 273, 3 S. W. 363.

*District of Columbia.*— Wall *v.* De Mitkiewicz, 9 App. Cas. 109.

*Illinois.*— Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79.

*Kansas.*— Fleck *v.* Warner, 25 Kan. 492.

*Mississippi.*— Duke *v.* Shackleford, 56 Miss. 552.

*New York.*— National Cash Register Co. *v.* Ferguson, 25 Misc. 363, 55 N. Y. Suppl. 592.

See 43 Cent. Dig. tit. "Sales," § 1422.

35. *Iowa.*—American Soda Fountain Co. *v.* Dean Drug Co., 136 Iowa 312, 111 N. W. 534.

*Mississippi.*— Ketchum *v.* Brennan, 53 Miss. 596.

*Utah.*— Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559. But see Lippincott *v.* Rich, 22 Utah 196, 61 Pac. 526, holding that it is not necessary to return non-negotiable notes.

*United States.*— Segrist *v.* Crabtree, 131 U. S. 287, 9 S. Ct. 687, 33 L. ed. 125 [*affirming* 3 N. M. 278, 6 Pac. 202]; Latham *v.* Davis, 44 Fed. 862.

*Canada.*— Tufts *v.* Giroux, 12 Quebec Super. Ct. 530. But *compare* Wallace *v.*

(c) *Demand.* It is generally considered necessary that a demand for the goods should be made as a condition precedent to the recovery;[36] and a demand for performance on the part of the buyer is necesssary when a large portion of the purchase-money has been paid,[37] or payments have been accepted after they became due.[38] Demand is a condition precedent to an action of trover for the goods[39] unless there has been an actual conversion.[40]

(III) *DEFENSES.* It is no defense to an action to recover the goods that the buyer had been garnished as a debtor of the seller,[41] or that a mortgage given to secure the purchase-money notes had been foreclosed if the proceeds thereof were insufficient to pay the notes.[42] It is no defense that title is in a third person under a chattel mortgage executed by the vendee.[43] Damages for the non-delivery of a part of the goods may be pleaded.[44] Failure or refusal on the part of the seller to give a title free from liens may constitute a valid defense;[45] and payment in full would of course be sufficient.[46]

(IV) *PARTIES.*[47] Where the property has been mortgaged by the vendee, and the mortgagee has taken possession, there is a joint conversion for which a joint action will lie.[48] If the seller has assigned his rights to a third person, the

Fraser, 2 Can. Sup. Ct. 522 [*affirming* 11 Nova Scotia 377]; Cousineau *v.* Williams Mfg. Co., 11 Quebec Super. Ct. 389.

*Compare* A. G. Rhodes, etc., Furniture Co. *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897.

A return at the time of the trial is in time. Wellden *v.* Witt, 145 Ala. 605, 40 So. 126.

Proof of the loss of the notes pending the trial is sufficient to excuse their non-production. Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143.

36. Hydraulic Press Mfg. Co. *v.* Whetstone, 63 Kan. 704, 66 Pac. 989; New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326; Kimball *v.* Farnum, 61 N. H. 348; Davis *v.* Emery, 11 N. H. 230; Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155. But see Hughes *v.* Kelly, 40 Conn. 148.

A suit for the price which was discontinued was regarded as a sufficient demand in Matthews *v.* Lucia, 55 Vt. 308.

Notice of forfeiture.—Where one making a contract of sale, with provision for forfeiture for non-payment of instalments, promises an extension upon the default of first payment, he is bound to give reasonable notice before attempting to declare a forfeiture. Young *v.* Ward, 115 Ill. 264, 3 N. E. 512.

Under a stipulation that the seller may retake the goods whenever he places previous demand is not necessary. Heath *v.* Randall, 4 Cush. (Mass.) 195.

Repeated demands for payment not completed will give the seller the right to recover the property in replevin without demand therefor. Proctor *v.* Tifton, 65 N. H. 3, 17 Atl. 368 [*distinguishing* Kimball *v.* Farnum, 61 N. H. 348; Davis *v.* Emery, 11 N. H. 230].

37. People's Furniture, etc., Co. *v.* Crosby, 57 Nebr. 282, 77 N. W. 658, 73 Am. St. Rep. 504.

38. People's Furniture, etc., Co. *v.* Crosby, 57 Nebr. 282, 77 N. W. 658, 73 Am. St. Rep. 504; O'Rourke *v.* Hadcock, 114 N. Y. 541, 22 N. E. 33; Hutchings *v.* Munger, 41 N. Y. 155; Mosby *v.* Goff, 21 R. I. 494, 44 Atl. 930.

39. Jowers *v.* Blandy, 58 Ga. 379; Katz *v.* Diamond, 16 Misc. (N. Y.) 577, 38 N. Y. Suppl. 766; Bunting *v.* Dessau, 9 Phila. (Pa.) 31; McHugh *v.* Dinkins, 2 Brev. (S. C.) 324. But see Scarboro *v.* Goeth, 118 Ga. 543, 45 S. E. 413, holding that no demand was necessary, where defendant was in possession claiming title, at the time of the action, his defense being that there was only due a small balance, of which he made tender.

40. Katz *v.* Diamond, 16 Misc. (N. Y.) 577, 38 N. Y. Suppl. 766; Putnam *v.* MacLeod, 23 R. I. 373, 50 Atl. 646.

41. Dufer *v.* Hayden, 12 Colo. 196, 20 Pac. 617; Briggs *v.* McEwen, 77 Iowa 303, 42 N. W. 303.

42. Montgomery Iron Works *v.* Smith, 98 Ala. 644, 13 So. 525.

43. A. D. Puffer, etc., Mfg. Co. *v.* May, 78 Md. 74, 26 Atl. 1020.

44. Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063.

45. Gennelle *v.* Boulais, 48 Wash. 310, 93 Pac. 421, where the buyer defaulted in a payment, but has at all times been ready and willing to pay on the giving of a good title.

46. See Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883. *Compare* Reedy El. Co. *v.* Berman, 107 N. Y. Suppl. 59.

Waiver of tender of price see Kindelberger *v.* Knnow, 122 N. Y. App. Div. 158, 106 N. Y. Suppl. 597 [*affirmed* in 195 N. Y. 517, 88 N. E. 1122], where the evidence was held to authorize a finding that the seller waived a formal tender of the price by refusing to take it unless he was also paid another debt, and by insisting on holding the chattels for both claims, defeating a recovery.

47. Parties generally see PARTIES, 30 Cyc. 1.

48. Ensley Lumber Co. *v.* Lewis, 121 Ala. 94, 25 So. 729. *Compare* Singer Sewing Mach. Co. *v.* Leipzig, 113 N. Y. Suppl. 916.

assignee may sue in his own name to recover the goods;[49] and so too may the seller's trustee in bankruptcy.[50] When the seller has merely indorsed the notes given for the price, he may himself bring an action to recover the goods.[51]

(v) *PLEADING.*[52] Since an action to recover the goods is not based on notes given for the price they need not be made a part of the complaint.[53] An allegation that on a certain day by reason of non-payment of overdue notes the seller was entitled to retake the property is not demurrable on the ground that it is not alleged that the notes were not paid before suit.[54] When the buyer is still in possession failure of the seller's title cannot be shown unless pleaded;[55] and a waiver of performance must also be pleaded to be available.[56]

(vi) *EVIDENCE.*[57] The burden is on the seller to show that the sale was conditional and not absolute.[58] When the issue is whether the sale was absolute or conditional, it is competent for the seller to show that at the time of the delivery the buyer was insolvent and in notoriously bad credit.[59] A seller, bringing replevin for goods conditionally sold, must show that the price has not been paid;[60] but the burden is on the buyer to show performance of the conditions as to payment;[61] and to that end he may show that a part of the price was to be paid in labor.[62] Evidence of partial payments is inadmissible if offered solely for the purpose of showing payment of a sum greater than the agreed price of the portion of the property delivered.[63] Where it appears that the alleged buyer could read and had signed the paper constituting the conditional sale contract, evidence that he thought the property had been given to him and that the paper was a receipt does not warrant submitting to the jury the question of his understanding of the transaction, no fraud being shown.[64]

(vii) *JUDGMENT.*[65] Where it appears that the seller has in fact ratified the sale and the value of part of the property taken has discharged the amount due on the price, a judgment returning the other property to the buyer is proper.[66]

49. Little Rock Bank *v.* Collins, 66 Ark. 240, 50 S. W. 694; Dunbar *v.* Rawles, 28 Ind. 225, 92 Am. Dec. 311. See also Gennelle *v.* Boulais, 48 Wash. 310, 93 Pac. 421.

**The seller is a proper party** in an action by the assignee to enforce the lien. Thus where a corporation sells machinery conditionally, reserving the title as security for the price, and thereafter assigns the note given for the price, it is a proper party to a suit by the assignee to enforce the lien for the price. Ross-Mehan Brake Shoe Foundry Co. *v.* Pascagoula Ice Co., 72 Miss. 608, 18 So. 364. But see Burnell *v.* Marvin, 44 Vt. 277, holding that when the vendor sells and transfers all his title and interest to a third person, an action of trover therefor must be in the name of such third person, and not the conditional vendor. To the same effect see Esty *v.* Graham, 46 N. H. 169.

50. Coats *v.* Farrington, 46 Mich. 422, 9 N. W. 456.

51. McPherson *v.* Acme Lumber Co., 70 Miss. 649, 12 So. 857.

52. **Pleading** generally see PLEADING, 31 Cyc. 1.

53. Payne *v.* June, 92 Ind. 252.

54. Tufts *v.* Johnson, 29 Ill. App. 112.

55. Ross *v.* McDuffie, 91 Ga. 120, 16 S. W. 648.

56. American Soda Fountain Co. *v.* Dean Drug Co., 136 Iowa 312, 111 N. W. 534.

**Breach of warranty in reduction of damages.**—A plea that as a part of the trade plaintiff's agent warranted that the piano sold was rat proof and sound, that the warranty was breached and by reason thereof defendant was damaged in a certain amount, which he pleaded by way of reduction of the amount due on the note given for the balance of the purchase-price, was bad on demurrer. McKimmie *v.* E. E. Forbes Piano Co., 155 Ala. 259, 46 So. 772.

57. **Evidence** generally see EVIDENCE, 16 Cyc. 821.

58. Randolph *v.* Randolph, 3 Munf. (Va.) 99.

59. Buswell Trimmer Co. *v.* Case, 144 Mass. 350, 11 N. E. 549.

60. Brunson *v.* Volunteer Carriage Co., 93 Miss. 793, 47 So. 377.

**Where the sale and reservation of title are not admitted,** in an action to recover goods alleged to have been conditionally sold, the burden of proving continuance of the indebtedness is on plaintiff. Black *v.* Roberson, (Ark. 1908) 112 S. W. 402.

61. Faisst *v.* Waldo, 57 Ark. 270, 21 S. W. 436.

62. Shaffer *v.* Sawyer, 123 Mass. 294.

63. Brandon *v.* Montgomery Iron Works, 96 Ala. 506, 11 So. 540.

64. Thomas *v.* Cooksey, 130 N. C. 148, 41 S. E. 2.

65. **Judgment** generally see JUDGMENTS, 23 Cyc. 623.

66. O'Rourke *v.* Hadcock, 114 N. Y. 541, 22 N. E. 33.

Where the right of the seller to recover is admitted and the only effect of the answer is to protect the buyer from damages and costs, a judgment for the return of the property to him or for its value is improper.[67] If the buyer pleads damages for failure of the seller to deliver all the goods and offers to pay the balance found due, judgment for plaintiff should be that he should have possession if defendant fails in a reasonable time to pay such balance.[68] A judgment against one who is not shown to have ever made any claim to the property or had it in possession is erroneous.[69] If the seller has failed to tender the amount paid by the buyer, as required by statute, the buyer is entitled to have adjudged to him as damages the amount which should have been tendered.[70] In trover the seller electing to take a money verdict is entitled to recover the unpaid balance of the price with interest; [71] but in no event can the amount of recovery exceed the value of the property at the time of conversion, with interest or hire, or the highest proved value between the conversion and the trial.[72]

(VIII) *RESALE.*[73] The right and duty of the seller to resell the property is the subject of statutory regulation in some states; [74] and under these statutes it is usually the duty of the seller to resell the property at public sale,[75] private sale being wrongful; [76] and a failure to comply with the provisions of the statute renders the seller liable to the purchaser for such portion of the purchase-money as has been paid by him.[77] This right of the buyer is not impaired because he failed to accept an offer of the seller to return the goods on payment of the balance

67. Kirby *v.* Thompkins, 48 Ark. 273, 3 S. W. 363.

68. Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063.

69. Rosenthal *v.* Cristal, 45 Misc. (N. Y.) 649, 91 N. Y. Suppl. 15.

70. National Cash Register Co. *v.* Cervone, 76 Ohio St. 12, 80 N. E. 1033, applying Bates Annot. St. § 4155-3, as amended by 95 Ohio Laws, p. 60.

71. Fussell *v.* Heard, 119 Ga. 527, 46 S. E. 621; Guilford *v.* McKinley, 61 Ga. 230.

72. Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143.

73. **Redemption by buyer before sale** see *infra*, X, M, 3.

74. See Cal. Civ. Code, § 3049; N. H. Pub. St. (1901) c. 141, §§ 3-7; N. Y. Laws (1897), p. 541, c. 418, § 116, as amended by Laws (1900), p. 1624, c. 762; Shannon Code Tenn. § 3669; Acts (1889), p. 117, c. 81; Vt. Acts (1884), No. 93, § 5.

**The constitutionality of the statute** has been upheld in Tennessee. Massillon Engine, etc., Co. *v.* Wilkes, (Tenn. 1904) 82 S. W. 316.

**The New York statute** applies when the goods are retaken by replevin as well as when they are surrendered voluntarily. Roach *v.* Curtis, 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 [*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411].

75. Whitelaw Furniture Co. *v.* Boon, 102 Tenn. 719, 52 S. W. 155; Roberts *v.* Hunt, 61 Vt. 612, 17 Atl. 1006.

**Notice of sale** required by statute must be given in order to gain the right to sell. Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411)].

**No estoppel** arises against the seller to assert that the contract was not a conditional sale merely because he advertises the property for sale according to law. Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883.

76. Roberts *v.* Hunt, 61 Vt. 612, 17 Atl. 1006.

**Private sale authorized by contract.**— Even if the provision in a contract of sale permitting defendants at the proper time to dispose of the retaken goods at private sale as well as at auction, as provided by the statute, could be given effect, it was no bar to plaintiff's right to recover the amount paid by her, defendants not having assumed to exercise their power of sale at all during the statutory period, since, if they could sell at private sale, they nevertheless remained bound by all the other provisions of the statute. Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411)]. *Compare* Warner *v.* Zuechel, 19 N. Y. App. Div. 494, 46 N. Y. Suppl. 569.

**The municipal court** of New York city has jurisdiction. Woodman *v.* Needham Piano, etc., Co., 47 Misc. (N. Y.) 683, 94 N. Y. Suppl. 371.

77. Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411)]; Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253; Whitelaw Furniture Co. *v.* Boon, 102 Tenn. 719, 52 S. W. 155; Tschopick *v.* Lippincott, (Tenn. Ch. App. 1898) 48 S. W. 128; Milburn Mfg. Co. *v.* Wayland, (Tenn. Ch. App. 1896) 43 S. W. 129.

**Contract in form of lease.**—Although the contract was in the form of a lease and the payments were denominated "rent," the rule was applied, where the transaction was in

due.[78] The buyer may, however, waive his right to the instalments paid by stipulating that all payments should be regarded as for the use of the property.[79] Pending the action of replevin the seller has not such possession as requires him to proceed to sell the property.[80] The buyer may waive the provisions of the statute as to the method of sale;[81] but a waiver of the right to a public sale prior to default will not bind the buyer, as until that time there is nothing to waive.[82] A failure to comply with the statute is not waived by the buyer's attendance at the sale without objection,[83] by the buyer offering a certain amount to compound the balance of the debt, pending replevin,[84] or by an attempt to open a default in the replevin suit by which the goods were recovered by the seller.[85] But if the buyer requests that the property be left in his possession and that he be given time to raise the money and redeem the property, such conduct will waive the failure to promptly sell the property.[86] Under the statutes the buyer is usually entitled to the surplus proceeds.[87] It is held in some jurisdictions that a conditional vendor stands in the position of a mortgagee and must sell the property,[88] returning to the vendee the surplus after satisfying the claim for purchase-money.[89] Under a resale the title and right of possession passes to the new purchaser,[90] and the proceeds should be applied to the payment of the unpaid purchase-money.[91] The vendor may recover the unpaid balance.[92]

(IX) *REFUNDING PURCHASE-MONEY PAID.*[93] As a general rule the seller need not in an action to recover the goods or the value thereof allow for or refund partial payments, such payments being regarded as forfeited.[94] Some courts,

fact a conditional sale. Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253.

**Expense of replevin proceedings** under which the goods were retaken should, however, be deducted from the amount of recovery. Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253.

**Rental of the machine** during the time the buyer held it was not the subject of set-off by the seller, since it would permit, in effect, the retaking of the machine and also the recovery of the purchase-price. Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253.

78. Roach *v.* Curtis, 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 [*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411].

79. Woodman *v.* Needham Piano, etc., Co., 47 Misc. (N. Y.) 683, 94 N. Y. Suppl. 371.

80. Lieberman *v.* Puckett, 94 Tenn. 273, 29 S. W. 6.

81. Warner *v.* Zuechel, 19 N. Y. App. Div. 494, 46 N. Y. Suppl. 569.

82. Massillon Engine, etc., Co. *v.* Wilkes, (Tenn. 1904) 82 S. W. 316.

83. Massillon Engine, etc., Co. *v.* Wilkes, (Tenn. 1904) 82 S. W. 316.

84. Tschopick *v.* Lippincott, (Tenn. Ch. App. 1898) 48 S. W. 128.

85. Roach *v.* Curtis, 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 [*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411].

86. Milburn Mfg. Co. *v.* Wayland, (Tenn. Ch. App. 1896) 43 S. W. 129.

**Whether there has been a waiver** of the provisions of the statute is a question for the jury. Roach *v.* Curtis, 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 [*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411].

87. Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.

88. White Sewing Mach. Co. *v.* Conner, 111 Ky. 827, 64 S. W. 841, 23 Ky. L. Rep. 1125.

89. White Sewing Mach. Co. *v.* Conner, 111 Ky. 827, 64 S. W. 841, 23 Ky. L. Rep. 1125.

90. Webber *v.* Osgood, 68 N. H. 234, 38 Atl. 730.

91. Little Rock Vehicle, etc., Co. *v.* Robinson, 75 Ark. 548, 87 S. W. 1029; Barton *v.* Groseclose, 11 Ida. 227, 81 Pac. 623; Ascue *v.* Aultman, 2 Tex. App. Civ. Cas. § 497.

92. Matteson *v.* Equitable Min., etc., Co., 143 Cal. 436, 77 Pac. 144; Hall *v.* Tillman, 115 N. C. 500, 20 S. E. 726. But see Arnold *v.* Playter, 22 Ont. 608.

93. **Return of consideration** see *supra*, X, L, 1, c, (II), (B).

94. *Alabama.*— Fields *v.* Williams, 91 Ala. 502, 8 So. 808.

*Connecticut.*—Hughes *v.* Kelly, 40 Conn. 148.

*Illinois.*— Latham *v.* Sumner, 89 Ill. 233, 31 Am. Rep. 79; Fairbanks *v.* Malloy, 16 Ill. App. 277; Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57. But see Singer Mfg. Co. *v.* Ellington, 103 Ill. App. 517, where recovery was allowed less depreciation and value of use.

*Kansas.*— Fleck *v.* Warner, 25 Kan. 492.

*Maine.*— White *v.* Oakes, 88 Me. 367, 34 Atl. 175, 32 L. R. A. 592; Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14.

*Massachusetts.*— Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646; Angier *v.* Taunton Paper Mfg. Co., 1 Gray 621, 61 Am. Dec. 436.

*Michigan.*— Tufts *v.* D'Arcambal, 85 Mich. 185, 48 N. W. 497, 24 Am. St. Rep. 79, 12 L. R. A. 446.

*Mississippi.*— Duke *v.* Shackleford, 56 Miss. 552.

however, refuse to follow the strict rule of forfeiture,[95] and in equity compel the seller to account for the payments received.[96] Of course the right to retain the amounts paid may depend on an express stipulation,[97] as for example, on the stipulation that the payments made shall be regarded as rent for the use of the property;[98] and on the other hand the contract may preclude a forfeiture of payment by stipulating that the vendor may recover the property and reasonable charges.[99] So too it has been held that the seller may retain such amount as will compensate him for any deterioration of the goods in the hands of the buyer.[1] The right of the buyer to a return of the amount paid is in some states secured by statutes.[2]

(x) *Right to Recover Balance of Price.*[3] A retaking or recovery of the property on the default of the buyer is in effect a disaffirmance of the contract, and the seller cannot thereafter maintain an action to recover the balance due on the purchase-price.[4] If, however, the contract stipulates that any payments made shall be considered as payment for use, and that "nothing shall consti-

*New York.*— Humeston *v.* Cherry, 23 Hun 141.

*Vermont.*— Morgan *v.* Kidder, 55 Vt. 367.

**Estoppel to forfeit payments.**—A conditional seller who, after default in payment by the purchaser, while proposing to replevy, intentionally leads the latter to believe that he will repay the money already paid, and retake the chattel, and obtains the purchaser's assent, cannot thereafter stand on his original contract, and replevy the chattel without paying the money. Carpenter *v.* Chase, 64 N. H. 438, 14 Atl. 76.

**95.** Speyer *v.* Baker, 59 Ohio St. 11, 51 N. E. 442; Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559; Tufts *v.* Giroux, 12 Quebec Super. Ct. 530.

**96.** Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170; Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364; Guilford *v.* McKinley, 61 Ga. 230; A. D. Puffer, etc., Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; Simon *v.* Edmundson, 10 Pa. Co. Ct. 315.

**The equities of the buyer** in the payments made cannot be adjusted in an action of replevin for the goods. Ryan *v.* Wayson, 108 Mich. 519, 66 N. W. 370; Thirlby *v.* Rainbow, 93 Mich. 164, 53 N. W. 159. But *compare* New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326.

**97.** Singer Mfg. Co. *v.* Treadway, 4 Ill. App. 57; Haviland *v.* Johnson, 7 Daly (N. Y.) 297.

**98.** Woodman *v.* Needham Piano, etc., Co., 47 Misc. (N. Y.) 683, 94 N. Y. Suppl. 371; Wheeler, etc., Mfg. Co. *v.* Jacobs, 2 Misc. (N. Y.) 236, 21 N. Y. Suppl. 1006; Stearns *v.* Drake, 24 R. I. 272, 52 Atl. 1082; Meagher *v.* Hollenberg, 9 Lea (Tenn.) 392.

**99.** Fairbanks *v.* Malloy, 16 Ill. App. 277.

**1.** Commercial Pub. Co. *v.* Campbell Printing-Press, etc., Co., 111 Ga. 388, 36 S. E. 756; Waterous Engine Works Co. *v.* Cascapedia Pulp, etc., Co., 13 Quebec Super. Ct. 315.

**2.** Mo. Rev. St. (1899) § 3413 [*construed* in Gilbert Book Co. *v.* Sheridan, 114 Mo. App. 332, 89 S. W. 555; De Loach Mill Mfg. Co. *v.* Latham, 99 Mo. App. 231, 72 S. W. 1080. And see Burt *v.* Mears, 41 Mo. App. 231]. To the same effect is the Ohio Rev. St. §§ 4155–1—4155–3 [*construed* in Speyer *v.* Baker, 59 Ohio St. 11, 51 N. E. 442; Richcreek *v.* O'Donnell, 26 Ohio Cir. Ct. 528].

**The Missouri statute** applies to all sales on the instalment plan with a reservation of title. Gentry *v.* Templeton, 47 Mo. App. 55.

**Laws pertaining to the remedy.**— The statute of Missouri requiring one who sells chattels with reservation of title till payment of price to refund part of the money already paid, before retaking the property, pertains only to the remedy, and does not govern a suit in Arkansas to recover chattels so sold in Missouri. Public Parks Amusement Co. *v.* Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582.

**The fact that household goods were sold on instalments** does not bring such sale within Rev. St. § 4155–2, prohibiting a vendor from retaking property conditionally sold without refunding a certain part of the purchase-price, where there is no evidence that the title is to remain in the vendor. Cavanaugh *v.* Bloom, 10 Ohio S. & C. Pl. Dec. 222, 8 Ohio N. P. 6.

**Where the purchaser fails to demand** a return of the statutory allowance of the portion of the purchase-money before consenting to the rescission of the contract, he is without redress on appeal. Laclede Power Co. *v.* Ennis Stationery Co., 79 Mo. App. 302.

**3. Recovery of price** generally see *infra*, X, L, d.

**4.** *Connecticut.*—Loomis *v.* Bragg, 50 Conn. 228, 47 Am. Rep. 638; Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170.

*District of Columbia.*— Campbell Printing Press, etc., Co. *v.* Henkle, 19 D. C. 95.

*Georgia.*— Glisson *v.* Heggie, 105 Ga. 30, 31 S. E. 118.

*Indiana.*— Turk *v.* Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85.

*Minnesota.*— Keystone Mfg. Co. *v.* Casselius, 74 Minn. 115, 76 N. W. 1028; Aultman *v.* Olson, 43 Minn. 409, 45 N. W. 852; Minneapolis Harvester Works *v.* Hally, 27 Minn. 495, 8 N. W. 597.

*New York.*— Edmead *v.* Anderson, 118

tute a defense or offset" to the note at maturity, the seller may on resale for an amount less than the note recover the balance from the buyer.[5] So too if the buyer abandons the property the seller may, to save a total loss, take possession, and on accounting for its reasonable value recover the balance due.[6]

**d. Recovery of Price or Value** — (1) *In General.* The seller under a conditional sale contract may on the default of the buyer elect to affirm the sale and treat it as absolute and sue for the price or value,[7] less such amounts as have

N. Y. App. Div. 16, 103 N. Y. Suppl. 369; Earle *v.* Robinson, 91 Hun 363, 36 N. Y. Suppl. 178 [*affirming* 12 Misc. 536, 33 N. Y. Suppl. 606, and *affirmed* in 157 N. Y. 683, 51 N. E. 1090].

*Wisconsin.*— Tufts *v.* Brace, 103 Wis. 341, 79 N. W. 414.

*Canada.*— Abell *v.* Campbell, 37 Can. L. J. N. S. 316; Arnold *v.* Playter, 22 Ont. 608.

See 43 Cent. Dig. tit. "Sales," § 1431.

**After a resale** and an application of the proceeds to the payment of the unpaid purchase-price, it has been held in some cases that the seller could recover the balance due on the purchase-money. Matteson *v.* Equitable Min., etc., Co., 143 Cal. 436, 77 Pac. 144; Christie *v.* Scott, 77 Kan. 257, 94 Pac. 214; Hall *v.* Tillman, 115 N. C. 500, 20 S. E. 726; Ascue *v.* Aultman, 2 Tex. App. Civ. Cas. § 497. But see Arnold *v.* Playter, 22 Ont. 608. *Compare* Reedy El. Co. *v.* Berman, 107 N. Y. Suppl. 59, holding that where title to an elevator was to remain in the seller until final payment, the seller's action in demanding that the receiver in an action for foreclosure of a mortgage on the building in which the elevator was installed return the elevator did not amount to a rescission of the contract of conditional sale, but was a threat to rescind; the seller not taking possession or assuming control of the elevator.

5. Dederick *v.* Wolfe, 68 Miss. 500, 9 So 350, 24 Am. St. Rep. 283. See also Equitable Gen. Providing Co. *v.* Potter, 22 Misc. (N. Y.) 124, 48 N. Y. Suppl. 647, where the contract was in the form of a lease. *Compare* Christie *v.* Scott, 77 Kan. 257, 94 Pac. 214; Van Den Bosch *v.* Bouwman, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336.

6. Jones *v.* Reynolds, 45 Wash. 371, 88 Pac. 577.

7. *Alabama.*— Davis *v.* Millings, 141 Ala. 378, 37 So. 737.

*Arkansas.*— Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023; Butler *v.* Dodson, 78 Ark. 569, 94 S. W. 703.

*Connecticut.*— Beach's Appeal, 58 Conn. 464, 20 Atl. 475, where there was an absolute promise to pay.

*Illinois.*— Fleury *v.* Tufts, 25 Ill. App. 101.

*Indiana.*— Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Kilmer *v.* Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271.

*Massachusetts.*— Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; Smith *v.* Aldrich, 180 Mass. 367, 62 N. E. 381.

*New Hampshire.*— Clay *v.* Bohonon, 54 N. H. 474.

*New York.*— Gray *v.* Booth, 64 N. Y. App. Div. 231, 71 N. Y. Suppl. 1015; Gormully, etc., Mfg. Co. *v.* Catharine, 25 Misc. 338, 55 N. Y. Suppl. 475; Norton *v.* Abbott, 113 N. Y. Suppl. 669.

*North Carolina.*— Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

*Oregon.*— Herring-Marvin Co. *v.* Smith, 43 Oreg. 315, 72 Pac. 704, 73 Pac. 340.

*Pennsylvania.*— Kelley Springfield Road Roller Co. *v.* Schlimme Constr. Co., 220 Pa. St. 413, 69 Atl. 867, 123 Am. St. Rep. 707; Seanor *v.* McLaughlin, 165 Pa. St. 150, 30 Atl. 717, 32 L. R. A. 467.

*South Carolina.*— Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279; Straub *v.* Screven, 19 S. C. 445.

*Texas.*— Bensinger Self-Adding Cash Register Co. *v.* Cain, (App. 1892) 18 S. W. 136.

*Washington.*— Singer Mfg. Co. *v.* Hatley, 3 Wash. Terr. 198, 21 Pac. 384.

*United States.*— Sugar Beets Product Co. *v.* Lyons Beet Sugar Refining Co., 161 Fed. 215.

See 43 Cent. Dig. tit. "Sales," § 1436.

**The remedy by action for the price** rests upon the theory that after breach, at the election of the seller, the title passed to the buyer, who received and retained the property. Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775.

**The seller looks to the debtor** and not to the property in such a case. Bell *v.* Old, 88 Ark. 99, 113 S. W. 1023.

**Failure to surrender upon default.**—Where a contract for the sale of a business provided that the buyer should surrender the business and premises to the sellers on non-payment of deferred instalments at maturity, a letter sent by the buyer to the sellers by registered mail, informing them that the store had been rented to another from the succeeding May 1, on which date the new tenant would take possession, and calling on the sellers to do something in the matter, and that the buyer expected to hear from them, was not a valid tender of a surrender of the business to the sellers under the contract so as to bar a suit on notes for the price. Norton *v.* Abbott, 113 N. Y. Suppl. 669.

**Surrender by seller of title to receiver.**— Where the title to an elevator was to remain in the seller until final payment, the seller's surrender of title on payment by the receiver in an action for foreclosure of a mortgage on the building in which the elevator was installed of one half the balance due was not a surrender of its claim against the buyers for the remainder of the price. Reedy El. Co. *v.* Berman, 107 N. Y. Suppl. 59.

already been paid.[8] He may sue for each instalment as it becomes due;[9] and if it is so agreed on a default in one instalment may sue for all the instalments.[10] If the buyer converts the property to his own use the seller may sue for the purchase-price,[11] or if the property has been sold by the purchaser, the seller may sue for the proceeds.[12] There can be no recovery on the common counts, but there must be a special count on the special contract.[13] In the enforcement of his right to the purchase-money he may levy on the property.[14]

(II) *Breach of Contract by Refusal to Accept Goods.* If the vendee in a conditional sale refuses to accept the goods on delivery the seller may maintain an action for the price.[15] It has been held that the seller must give notice of his election to treat the contract as an absolute sale,[16] and that if he

**Quitclaim conveyance.**—Where an attachment for purchase-money is levied on property to which plaintiff in attachment has reserved title, the sale is void unless prior thereto a quitclaim conveyance was filed and recorded, as required by Civ. Code, § 5432. Rhoades, etc., Furniture Co. *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897.

**Mode of procedure.**—An instrument which is substantially an acknowledgment by K of the sale to him of furniture by A for a certain sum on account of which he had paid ten dollars, and agreed to pay ten dollars each month thereafter till the price was paid, and an agreement that title to the property should remain in A till the price was paid, and that, if payments were not made as agreed, the interest of K in the property should fail, and A should have the right to take possession, and treat all payments as rent, may be treated by A as a chattel mortgage, and foreclosed for the part of the purchase-money due and unpaid. Loftus *v.* King, 23 Tex. Civ. App. 36, 56 S. W. 109.

8. Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

9. Gray *v.* Booth, 64 N. Y. App. Div. 231, 71 N. Y. Suppl. 1015.

10. Appleton *v.* Norwalk Library Corp., 53 Conn. 4, 22 Atl. 681.

11. Lacy *v.* Johnson, 58 Wis. 414, 17 N. W. 246.

**The measure of damages** for the conversion of diamond rings, sold under a contract whereby title was reserved in the seller until paid for, is the amount due on the price, with interest, unless that amount exceeds the value of the rings at the time of conversion, in which event the damages would be the value of the rings at that time, with interest to the trial. Hall *v.* Nix, 156 Ala. 423, 47 So. 335.

**Evidence of value.**—Although it be assumed that evidence, in an action for the conversion of diamond rings sold under a contract reserving title in the seller until paid for, that the rings were sold "at the value of $225" was evidence from which the jury might infer that the rings were of value at the time of conversion to the extent of one hundred and twenty-four dollars and ninety cents, yet it cannot be affirmed by the court as a matter of law that such should be the effect of the evidence. Hall *v.* Nix, 156 Ala. 423, 47 So. 335.

12. Weston *v.* Brown, 36 N. Y. Suppl. 675 [*affirmed* in 158 N. Y. 360, 53 N. E. 36].

13. Clay *v.* Bohonon, 54 N. H. 474.

**Good complaint.**—A complaint alleging that defendant bought a sewing machine of plaintiff, giving a note therefor, which is due and unpaid, setting out a copy of the note, which stipulates that the machine shall remain the property of plaintiff until the note is paid, and further averring the delivery of the machine in consideration of the execution of the note, and the acceptance and retention thereof, and the refusal of defendant to pay the note, states a good cause of action for the amount of the note. Singer Mfg. Co. *v.* Hatley, 3 Wash. Terr. 198, 21 Pac. 384.

14. Cade *v.* Jenkins, 88 Ga. 791, 15 S. E. 292.

**Collection of part of amount.**— The seller of personalty, who reserved the title, could, after obtaining a judgment against the buyer for the price, and collecting a portion of the same, nevertheless, without canceling the judgment or paying or tendering back what had been received, maintain against the buyer an action of bail trover for the purpose of collecting the balance of the purchase-money, with interest. Jones *v.* Snider, 99 Ga. 276, 25 S. E. 668.

15. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Cambridge Soc. *v.* Elliot, 50 Misc. (N. Y.) 159, 98 N. Y. Suppl. 232; Ideal Cash Register Co. *v.* Zunino, 39 Misc. (N. Y.) 311, 79 N. Y. Suppl. 504; Marvin Safe Co. *v.* Emanuel, 21 Abb. N. Cas. (N. Y.) 181 [*reversing* 12 N. Y. St. 134]; Tufts *v.* Poness, 32 Ont. 51.

**In South Dakota** by the express provisions of Rev. Civ. Code, § 2303, the measure of damages for a breach by a buyer of his agreement to accept and pay for personal property the title to which is not vested in him is the excess of the amount due from the buyer under the contract over the value to the seller, together with the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof if the buyer had accepted it, and, the statutory remedy being ample, the seller has no election to treat the sale as absolute, and sue for the purchase-price. Dowagiac Mfg. Co. *v.* White Rock Lumber, etc., Co., 18 S. D. 105, 99 N. W. 854.

16. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384.

does not give such notice of his election he will be restricted to his action for a breach of the contract.[17]

**e. Enforcement of Lien.** Upon default on the part of the buyer under a contract of conditional sale the seller may foreclose his vendor's lien,[18] instead of bringing an action to recover possession of the goods,[19] or for their price or value.[20]

**2. Against Third Persons[21] — a. Recovery of Goods — (i) *In General.*** A vendor of personal property who reserves title until payment of the purchase-money can recover the goods from a purchaser from,[22] or a creditor of, the vendee,[23] or one claiming under a mortgage by the vendee.[24] If, however, the buyer is not

17. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384. *Compare* Gleason *v.* Knapp, 26 U. C. C. P. 553.

18. Gigray *v.* Mumper, (Iowa 1908) 118 N. W. 393; Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53, 14 S. W. 245; Hollenburg Music Co. *v.* Morris, (Tex. Civ. App. 1896) 35 S. W. 396.

**Enforcement of lien** generally see Liens, 25 Cyc. 681.

**Third person as party.**— In an action by a seller under a conditional bill of sale to enforce his lien on the buyer's default in payments, a third person who assumed control over the property was a proper party defendant. Singer Sewing Mach. Co. *v.* Leipzig, 113 N. Y. Suppl. 916.

**Buyer when liable for deficiency.**— On enforcing the lien of a seller under a conditional bill of sale, on the buyer's default in an action against the buyer and a third person assuming control over the property, the buyer only should be held for a deficiency on a sale to satisfy the lien, where it does not appear that his co-defendant has acquired his interest or assumed the debt. Singer Sewing Mach. Co. *v.* Leipzig, 113 N. Y. Suppl. 916.

19. See *supra*, X, L, 1, c.

20. See *supra*, X, L, 1, d.

21. **Action for injury to goods after buyer's default** see *supra*, 668, note 19.

22. *Alabama.*— Riley *v.* Dillon, 148 Ala. 283, 41 So. 768.

*California.*— Holt Mfg. Co. *v.* Collins, 154 Cal. 265, 97 Pac. 516.

*Colorado.*—Gerow *v.* Castello, 11 Colo. 560, 19 Pac. 505, 7 Am. St. Rep. 260. *Compare* Coors *v.* Reagan, 44 Colo. 126, 96 Pac. 966.

*Illinois.*— O'Neil *v.* Rogers, 110 Ill. App. 622.

*Maine.*— Eaton *v.* Munroe, 52 Me. 63.

*Massachusetts.*— Lorain Steel Co. *v.* Norfolk, etc., St. R. Co., 187 Mass. 500, 73 N. E. 646.

*Mississippi.*— Young *v.* Salley, 83 Miss. 362, 35 So. 571.

*Missouri.*— Ridgeway *v.* Kennedy, 52 Mo. 24.

*New Hampshire.*— Partridge *v.* Philbrick, 60 N. H. 556.

*Tennessee.*— Holmark *v.* Molin, 5 Coldw. 482; Price *v.* Jones, 3 Head 84.

See 43 Cent. Dig. tit. "Sales," § 1440.

**The possession of a sheriff** under execution of an order of sale of a threshing outfit against the buyer to enforce a laborer's lien will not defeat the seller's right to recover possession. Holt Mfg. Co. *v.* Collins, 154 Cal. 265, 97 Pac. 516.

**Assignment of claim against carrier.**— Where complainant sold a soda water fountain to M. & Co. under a conditional sale for the price of two hundred dollars of which five dollars was paid, and, on destruction of the fountain through the negligence of the carrier, it was agreed that M. & Co. should bring suit therefor in their name for the benefit of complainant, to the extent of its claim for the unpaid portion of the price, and, before recovering such judgment, M. & Co. assigned the claim to third persons, a judgment recovered in such action in equity stood in the place of the property, on which complainant had a superior lien, both under the contract and independent thereof. Murphy *v.* American Sode Fountain Co., 86 Miss. 791, 39 So. 100.

**Time to sue.**— Where, by the terms of a conditional sale, the vendee was to keep the property without cost to the vendor, and return it in two years if not paid for, the vendor cannot maintain replevin against a purchaser of the vendee's interest before the expiration of the two years. Nutting *v.* Nutting, 63 N. H. 221.

23. *Maine.*— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630.

*Massachusetts.*— Robinson *v.* Besarick, 156 Mass. 141, 30 N. E. 553.

*Michigan.*— Edwards *v.* Symons, 65 Mich. 348, 32 N. W. 796, holding, however, that the right to reclaim does not extend to after-acquired goods.

*Missouri.*— Ridgeway *v.* Kennedy, 52 Mo. 24.

*United States.*— Gaylor *v.* Dyer, 10 Fed. Cas. No. 5,283, 5 Cranch C. C. 461.

**Form of action.**— The seller of goods on a conditional sale may maintain trespass, the time of payment having passed, against a sheriff who seizes the same under an execution against the buyer. Jordan *v.* Wells, 104 Ala. 383, 16 So. 23. See also Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121.

**Where a conditional sale was rescinded,** under Mills Annot. St. § 2027, the seller, to make the transaction available against the buyer's creditors, was bound to immediately take and keep actual and continued possession of the personalty. Coors *v.* Reagan, 44 Colo. 126, 96 Pac. 966.

24. Benner *v.* Puffer, 114 Mass. 376.

**Fixtures.**— The vendor may reclaim the property from one who as mortgagee of land claims the property as fixtures. Warren *v.* Liddell, 110 Ala. 232, 20 So. 89.

in default the vendor has not the right of possession and cannot recover the goods from a third person claiming under the buyer.[25]

(II) *CONDITIONS PRECEDENT.* Demand is not necessary as a condition precedent to an action against an officer holding the goods under process against the vendee,[26] or one whose possession is tortious.[27] A return or tender of the consideration paid to the original buyer is not necessary when it is sought to recover the goods from a subsequent purchaser.[28]

(III) *DEFENSES.* If the seller brings an action against the buyer for the price of the goods this is an election to affirm the sale and he cannot reclaim the goods from a third person.[29] One holding under the buyer cannot set up as against the vendor title in a third person;[30] but he can show a tender of the purchase-price to the vendor, although it was not kept good, as it constitutes an offer of performance.[31] In replevin against a stranger who is in possession it is no defense that he advanced the money to the buyer to make a partial payment, and afterward tendered the seller the balance of the price.[32] The seller will, however, lose his right to recover the property as against a *bona fide* purchaser if he is guilty of laches in asserting his rights.[33]

(IV) *PLEADING.*[34] An allegation of general ownership is sustained by proof of possession retaken by the vendor under a conditional contract of sale.[35] A purchaser from the vendee in an action by the vendor who claims that the sale to the vendee was conditional may show under a general denial the real contract between the parties.[36] So too under the general issue the purchaser may show that the requirements of the statute relating to registration were not complied with.[37]

(V) *EVIDENCE.*[38] The burden of proof is on the seller to show that there has been a default on the part of the vendee.[39] To show that the price has not been paid, the vendor may prove a judgment on the vendee's note, an execution, and a return of *nulla bona.*[40] On an issue as to the character of the sale as conditional or absolute the seller may prove acts and conduct consistent with the theory that the sale was conditional.[41]

**25.** Savall *v.* Wauful, 16 N. Y. Suppl. 219, 21 N. Y. Civ. Proc. 18. To the same effect see Tulley *v.* Fairly, 51 Ind. 311.

**26.** Forbes *v.* Martin, 7 Houst. (Del.) 375, 32 Atl. 327; Sanders *v.* Wilson, 19 D. C. 555. And see Moses *v.* Rogers, 62 Vt. 84, 19 Atl. 118.

**27.** Tanner *v.* Mishawaka Woolen Mfg. Co., 28 Ind. App. 536, 63 N. E. 313; Whitney *v.* McConnell, 29 Mich. 12, where the goods had been pawned.

**28.** Riley *v.* Dillon, 148 Ala. 283, 41 So. 768; Van Allen *v.* Francis, 123 Cal. 474, 56 Pac. 339; Barnes *v.* Rawlings, 74 Mo. App. 531. But see Ketchum *v.* Brennan, 53 Miss. 596.

**29.** Moline Plow Co. *v.* Rodgers, 53 Kan. 743, 37 Pac. 111, 42 Am. St. Rep. 317.

**30.** A. D. Puffer, etc., Mfg. Co. *v.* May, 78 Md. 74, 26 Atl. 1020.

**31.** Christenson *v.* Nelson, 38 Oreg. 473, 63 Pac. 648.

**32.** Chase *v.* Pike, 125 Mass. 117.

**33.** Knowles Loom Works *v.* Knowles, (Del. 1906) 65 Atl. 26; Townsend *v.* Melvin, 5 Pennew. (Del.) 495, 63 Atl. 330; Mathews *v.* Smith, 8 Houst. (Del.) 22, 31 Atl. 879; Robbins *v.* Phillips, 68 Mo. 100; Owenby *v.* Swann, (Tenn. Ch. App. 1900) 59 S. W. 378.

Illustration.—Where a chattel and a bill of sale thereof have been delivered by the seller to the purchaser, who acknowledged in writing the receipt of the property, and it was permitted to remain in the possession of the purchaser, without demand for compliance with the conditions of the sale, until it was actually sold and delivered to another, the seller waived compliance with the conditions, and is estopped from claiming that title never passed to the subsequent purchaser. Gilroy *v.* Everson-Hickok Co., 118 N. Y. App. Div. 733, 103 N. Y. Suppl. 620 [*affirmed* in 190 N. Y. 551, 83 N. E. 1125].

**34.** Pleading generally see PLEADING, 31 Cyc. 1.

**35.** Wilson *v.* Lewis, 63 Nebr. 617, 88 N. W. 690, when the assignee of the vendor's rights had taken possession.

**36.** Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

**37.** Eidson *v.* Hedger, 38 Mo. App. 52.

**38.** Evidence generally see EVIDENCE, 16 Cyc. 821.

**39.** Leighton *v.* Stevens, 19 Me. 154; Ketchum *v.* Brennan, 53 Miss. 596; Brunswick, etc., Co. *v.* Tacoma Mill Co., 3 Wash. Terr. 164, 13 Pac. 902. But *compare* Powell *v.* Wallace, 44 Kan. 656, 25 Pac. 42.

**40.** Gaither *v.* Teague, 26 N. C. 65.

**41.** Pollard *v.* Bates, 45 Vt. 506, where it appeared that after the purchase many of the vendee's creditors had sued him but that

(VI) *TRIAL*[42] *AND JUDGMENT.*[43] Where plaintiff relies wholly on the reservation of title and disclaims any reliance on the buyer's representations as to solvency, evidence as to such representations should be stricken out and the issue as to reservation of title only submitted to the jury.[44] Instructions which ignore the question whether the vendee had acquired title to the goods are erroneous.[45] It is proper to submit to the jury the question of notice when it appears that the contract was not filed for record as required by the statute.[46] Where the property has been conveyed in trust to secure a debt, equity will not order it to be given up absolutely at the suit of the conditional vendor, but will allow defendant a reasonable time to pay the purchase-money, and retain the property.[47] Where the judgment is in favor of defendant in replevin, it is proper to allow him interest on the value of the property as damages for the detention.[48]

**b. Conversion.**[49] When property conditionally sold is in the possession of a third person claiming under the conditional vendee, who is in default, the seller may bring an action against such person for conversion.[50] Such an action will lie, however, only if the vendee is in default,[51] but a demand is not essential as a condition precedent.[52] It is no defense that the seller has brought suit to recover the balance of the purchase-price.[53] In trover against a creditor it is held that it is no defense that he has tendered the vendor the amount which the vendee agreed to pay.[54] It is held in some jurisdictions that the vendor must tender the amount paid on the contract if it exceeds twenty-five per cent. of the price.[55] The measure of damages is the value of the property at the time of the conversion, without deduction because of partial payments;[56] but in some jurisdictions the

plaintiff, relying on the terms of the contract, had not done so.

**42.** Trial generally see TRIAL.

**43.** Judgment generally see JUDGMENTS, 23 Cyc. 623.

**44.** Pratt *v.* Burhans, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703.

**45.** Jackson *v.* Smith, (Miss. 1888) 4 So. 119.

Sufficiency of instructions on the issue as to the character of the transaction as a conditional sale see Collins *v.* Houston, 138 Pa. St. 481, 21 Atl. 234.

**46.** Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42.

**47.** Gambling *v.* Read, Meigs (Tenn.) 281

**48.** Collins *v.* Houston, 138 Pa. St. 481, 21 Atl. 234.

**49.** Conversion generally see TROVER AND CONVERSION.

**50.** *Georgia.*— Sims *v.* James, 62 Ga. 260.

*Maine.*— Whipple *v.* Gilpatrick, 19 Me. 427.

*Massachusetts.*— Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646; Burbank *v.* Crooker, 7 Gray 158, 66 Am. Dec. 470.

*Michigan.*— See Hogan *v.* Detroit United R. Co., 154 Mich. 478, 118 N. W. 140, holding that where the buyer under a conditional contract of sale sells the property to a purchaser with notice that there is a balance of the price unpaid, the seller or his assignee may recover in trover the unpaid price.

*New York.*— Brewer *v.* Ford, 54 Hun 116, 7 N. Y. Suppl. 244; Schleicher *v.* Wirth, 86 N. Y. Suppl. 265.

*South Carolina.*— Bennett *v.* Sims, Rice 421.

*Canada.*— Joseph Hall Mfg. Co. *v.* Hazlitt, 11 Ont. App. 749.

See 43 Cent. Dig. tit. "Sales," § 1448.

Partial conversion.— In an action on notes given for the price of rails and reserving title to the rails until payment, against the makers and their successors in business, judgment for complainant should be against the makers for the amount of the notes and interest if the makers are solvent, and if they are insolvent against the other defendants only for such part of the rails as it may be shown each converted to his use after the purchase from such makers. Lienkauf Banking Co. *v.* Haney, 93 Miss. 613, 46 So. 626.

Purchaser from seller.—Where the receiver of a bank purchased a seller's claim under a conditional sale against a purchaser from the buyer, alleged to have taken with notice of the unpaid price, and procured a transfer of the claim to plaintiff, a demand on such purchaser having been made by the receiver, and not by plaintiff, evidence that the receiver and not plaintiff was the real owner, and that the purchase was made with the sanction of the court, and the purpose thereof, was admissible. Hogan *v.* Detroit United R. Co., 154 Mich. 478, 118 N. W. 140.

**51.** Newhall *v.* Kingsbury, 131 Mass. 445.

**52.** Worthington *v.* A. G. Rhodes, etc., Co., 145 Ala. 656, 39 So. 614; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118. But see Tompkins *v.* Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933.

**53.** Rawson *v.* Tuel, 47 Me. 506.

**54.** Buckmaster *v.* Smith, 22 Vt. 203.

**55.** National Cash Register Co. *v.* Cervone, 76 Ohio St. 12, 80 N. E. 1033, under statute.

**56.** Herbert *v.* Rhodes-Burford Furniture

measure of plaintiff's recovery has been limited to the amount of the unpaid purchase-money.[57] And it has also been held that where several items of property were sold conditionally, and some of the property was destroyed without the fault of the vendee, and another portion retaken by the vendor, the latter could not maintain trover as for a conversion against a purchaser of the remainder of the property if the amount paid by the vendee exceed the value of such remainder.[58] The vendor may also maintain assumpsit against the subsequent purchaser to recover the balance due on the purchase-money.[59]

**M. Remedies of Buyer — 1. Recovery of Price.** If the seller unlawfully resumes possession of the property the buyer may recover the amount he has paid thereon.[60] A common count for money had and received is a sufficient declaration in an action to recover the price.[61] If the purchaser dies before the default the action may be maintained by his personal representative.[62] Where the statute provides that on a retaking of the property the seller shall refund the instalments paid,[63] the buyer may maintain an independent action for the amount so to be refunded.[64] But in such action the seller may set off the value of the rent of the property while it was in the purchaser's possession.[65] If after payment of part of the price and before the property is put into the buyer's possession it is destroyed, the buyer may recover the amount so paid.[66] So too he may recover freight money paid for the benefit of the seller where for good cause he rejects the goods.[67] The buyer may recover for a tort to the property,[68] espe-

Co., 106 Ill. App. 583; Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14; Brown *v.* Haynes, 52 Me. 578; Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. 646; Angier *v.* Taunton Paper Mfg. Co., 1 Gray (Mass.) 621, 61 Am. Dec. 436; Morgan *v.* Kidder, 55 Vt. 367.

**57.** Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121; Homans *v.* Newton, 4 Fed. 880.

**58.** Swallow *v.* Emery, 111 Mass. 355.

**59.** McCombs *v.* Guild, 9 Lea (Tenn.) 81.

**Vendor as assignee of contract of resale.**— A conditional vendee of goods, while in possession thereof, resold them to one who had no notice of his conditional title — their value to be determined by an invoice to be taken. While the invoice was being taken, the original vendor seized the goods, as owner, and stopped it; and the second vendee recovered them in replevin, having, during the replevin suit, sold all the goods without taking an invoice. Part of the purchase-price was paid by the second vendee to his immediate vendor. It was held that in an action by the original vendor, as assignee of the contract of resale, for the balance of the price due under it, the second vendor was estopped from setting up the defense that no invoice had been taken. Jenkins *v.* Fisher, 15 Ind. App. 58, 42 N. E. 954.

**Right to maintain action.**—Where one to whom a colt was pledged as security made a conditional sale to another with the assent of the pledgor, and the purchaser at the conditional sale sold the colt to another without the knowledge of the owner or the pledgee, the pledgor, the contract being for his benefit, could, after demand, maintain assumpsit against the last purchaser to recover the balance due on the conditional sale. Kimball *v.* Jackman, 42 N. H. 242.

**60.** New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, 38 N. W. 326.

**A seizure and illegal sale and purchase at** such sale of the property by the vendor, who theretofore sold such property under a conditional contract of sale, effects a rescission of the contract, and the purchaser can recover the amount of the purchase-price paid by him less the reasonable value of its use while in his possession. A. G. Rhodes, etc., Furniture Co. *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897.

**61.** Wood *v.* Kaufman, 135 Mich. 5, 97 N. W. 47.

**62.** Wood *v.* Kaufman, 135 Mich. 5, 97 N. W. 47.

**63.** Mo. Rev. St. §§ 3412, 3413.

**64.** McArthur *v.* St. Louis Piano Co., 85 Mo. App. 525. And see Roach *v.* Curtis, 50 Misc. (N. Y.) 122, 100 N. Y. Suppl. 411 [*affirmed* in 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333].

**65.** Wilson *v.* Burks, 71 Ga. 862; A. G. Rhodes, etc., Furniture Co. *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897. *Compare* Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253. See also *supra*, X, L, 1, c, (VIII).

**66.** Weed *v.* Boston, etc., Ice Co., 12 Allen (Mass.) 377.

**67.** Virginia-Carolina Lumber Co. *v.* Eisinger, 29 App. Cas. (D. C.) 531, holding that where a car-load of lumber sold on condition that it proves satisfactory to the purchaser, freight to be paid by the seller, is shipped to the purchaser, and is immediately rejected by him as unsatisfactory, which rejection is accepted by the seller, the lumber remains the property of the seller, subject to the obligation of the seller to pay the purchaser the freight paid by him at the seller's request and for his benefit.

**68.** Emmanuel County *v.* Thompson, 3 Ga. App. 225, 59 S. E. 603.

cially where the whole of the purchase-price has been paid before such action is commenced.[69]

**2. Conversion.**[70] The vendee of property under a conditional sale may maintain trover against a third person who has converted the property,[71] although an action is pending at the suit of the vendor for the same cause.[72] If the buyer is absolutely bound to pay the price he may recover from such third person the full value of the property, although he has paid but a portion of the price.[73] Otherwise the measure of damages is the value of the goods less the unpaid purchase-money.[74] To maintain trover against the seller for an alleged conversion, the buyer must show payment or tender of the purchase-money; [75] and he can recover if the whole price has not been paid no more than the amount paid at the time possession was resumed.[76] Under the Vermont statute,[77] which provides for a sale of the property at auction, the seller on failure to comply therewith is liable as for a conversion; [78] and the vendee is entitled to recover the value of the property at the time of the conversion less the unpaid portion of the price, no deduction being made, however, for the value of the use of the property.[79]

**3. Redemption.** By statute in some states it is provided that if the vendor retakes the goods he shall furnish the buyer with a statement of the amount due thereon, and that the vendee shall have a designated period to redeem.[80] Such a provision is not waived by an express stipulation in the contract permitting the vendor to retake the goods.[81] So too the statute [82] may provide that the seller, upon retaking [83] the goods, shall retain them a certain time before selling them,

69. Emanuel County *v.* Thompson, 3 Ga. App. 225, 59 S. E. 603.

**Payment a question for jury.**—Whether a servant, buying goods from his master under an agreement stipulating that the ownership thereof should remain with the master until the servant had sufficient credit to pay for the same, has paid for the goods, was held, under the facts, to be a question of fact for the jury. Black Raven Coal Co. *v.* Edmonson, 108 S. W. 955, 33 Ky. L. Rep. 3.

70. Trover generally see Trover and Conversion.

71. Aldrich *v.* Hodges, 164 Mass. 570, 42 N. E. 107; Friedman *v.* Phillips, 84 N. Y. App. Div. 179, 82 N. Y. Suppl. 96. But see Tuthill *v.* Wheeler, 6 Barb. (N. Y.) 362.

72. Aldrich *v.* Hodges, 164 Mass. 570, 42 N. E. 107.

73. Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480.

74. Friedman *v.* Phillips, 84 N. Y. App. Div. 179, 82 N. Y. Suppl. 96.

75. Hunt *v.* Winkel, 55 Iowa 623, 8 N. W. 484; Moorhead *v.* Scofield, 111 Pa. St. 584, 5 Atl. 732.

**In Ohio** it has been held that if the buyer has defaulted he cannot maintain trover, although the greater part of the purchase-money has been paid. Walters *v.* Wurlitzer, 8 Ohio Dec. (Reprint) 166, 6 Cinc. L. Bul. 139.

**Where the buyer voluntarily surrenders possession** at the demand of the seller, he has no cause of action under Acts (1877), No. 62, which gives a right of action for removing sewing machines from the premises of purchasers who have not fully paid therefor. Jenks *v.* Howe Sewing Mach. Co., 34 La. Ann. 1241.

**The wife of the buyer** upon payment or tender of payment of the purchase-money may sue the seller in trover for conversion. Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883.

76. Levan *v.* Wilten, 135 Pa. St. 61, 19 Atl. 945. See also Bridgman *v.* Robinson, 7 Ont. L. Rep. 591, 3 Ont. Wkly. Rep. 503, holding that, where the property is wrongfully taken by an assignee of the vendor, the buyer's damages will be measured by the amount he has paid on the contract.

77. Vt. St. § 2293.

78. Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

**Assignment of contract.**—Where a sewing machine was sold under a conditional contract, an assignment of the contract to defendant, without disturbing the buyer's possession or control of the machine, did not render the company guilty of conversion on the ground that, plaintiff having failed to comply with the contract of sale, the company was bound to sell the machine according to the statute. Nye *v.* Daniels, 75 Vt. 81, 53 Atl. 150.

79. Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94.

80. Mass. St. (1884) c. 313.

81. Lee *v.* Gorham, 165 Mass. 130, 42 N. E. 556.

82. See N. Y. Laws (1897), c. 418, § 116 *et seq.*; N. Y. Laws (1900), c. 762; Wadhams N. Y. Consol. Laws, tit. "Personal Property Law," § 65.

83. **Right to retake** see *supra*, X, L, 1, c, (I).

**Taking by a state marshal** is not a taking by plaintiff, the property being merely *in custodia legis*. Sigal *v.* Frank E. Hatch Co., 61 Misc. (N. Y.) 332, 113 N. Y. Suppl. 818.

to permit the buyer to comply with the terms of his contract;[84] but that he must sell at public auction within a certain time unless the goods are redeemed by the buyer.[85]

**4. Penalty For Failure to Enter Satisfaction.** Although a statute provides that conditional sale contracts shall be filed and recorded like chattel mortgages, this does not entitle the buyer on failure of the seller to enter satisfaction of the conditional sale to recover the penalty provided for failure to satisfy a chattel mortgage of record.[86]

**N. Remedies of Third Persons**[87] — **1. Mortgagee of Vendee.** A mortgagee of the vendee or his successor in interest may maintain an action for the surplus proceeds of the property obtained on a resale by the vendor.[88] So too a mortgagee of the conditional vendee may recover from the conditional vendor who has concealed the property to prevent it being taken under the mortgage, the value of the property not exceeding the amount of the mortgage debt.[89]

**2. Subsequent Purchaser From Vendee.**[90] A subsequent purchaser does not overcome the positive testimony that his vendor held the property under a conditional sale by testimony affording a mere inference that the sale was not conditional, or if it was, that the purchase-price had been paid.[91] On the other hand, the fact that the subsequent purchaser who was the father of the conditional vendee left the property in the vendee's hands is not of itself sufficient to show fraud and collusion.[92] When the subsequent purchaser himself purchases under a conditional contract and subsequently learns that his vendor holds under a conditional sale, and that the purchase-price had not been paid, he may refuse to proceed with the contract and may recover his payments and damages.[93] As against the original vendor, a subsequent purchaser, to recover the amount he has paid, must account for the use of the property to the same extent as the original vendee would be charged.[94] The subsequent purchaser on a retaking of the goods by the original vendor has an action of damages against his vendor.[95] In replevin by a subsequent purchaser against the conditional vendor, a referee on finding for defendant is not required to fix the value of the goods.[96]

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**SALESMAN.** A man who sells goods in a shop or store, or by canvassing.[1] (See Commercial Traveler, 8 Cyc. 334; Drummer, 14 Cyc. 1087; Hawkers and Peddlers, 21 Cyc. 378.)

**84.** Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411)]; Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851; Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883; Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253; Sigal *v.* Frank E. Hatch Co., 61 Misc. (N. Y.) 332, 113 N. Y. Suppl. 818.

**The buyer's wife,** upon payment before sale of the balance unpaid and reasonable expenses, was entitled to possession of the property, defendant only being entitled to be made whole. Powers *v.* Burdick, 126 N. Y. App. Div. 179, 110 N. Y. Suppl. 883.

**85.** Hoffman *v.* White Sewing Mach. Co., 123 N. Y. App. Div. 166, 108 N. Y. Suppl. 253. See also Roach *v.* Curtis, 191 N. Y. 387, 84 N. E. 283 [*affirming* 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirming* 50 Misc. 122, 100 N. Y. Suppl. 411)].

**Resale** generally see *supra*, X, L, 1, c, (VIII).

**Modification of contractual provisions** by this statute see Davis *v.* Bliss, 187 N. Y. 77, 79 N. E. 851.

**86.** Curd *v.* Bown, 3 Kan. App. 553, 43 Pac. 846.

**87. Rights of creditors of buyer** see *supra*, X, J, 2; X, J, 4, h, (III).

**88.** Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.

**89.** Anderson *v.* Adams, 117 Ga. 919, 43 S. E. 982.

**Sufficiency of instruction** in a suit by the mortgagee to recover the property from the original vendor see Begole *v.* Stone, 72 Mich. 71, 40 N. W. 171.

**90. Rights of bona fide purchasers from buyer** see *supra*, X, J, 3; X, J, 4, h, (II).

**91.** Goodgame *v.* Sanders, 140 Ala. 247, 37 So. 200.

**92.** Wilcox *v.* Williamson Law Book Co., 92 Iowa 215, 60 N. W. 618.

**93.** Bowen *v.* Dawley, 116 N. Y. App. Div. 568, 101 N. Y. Suppl. 878.

**94.** Snook *v.* Raglan, 89 Ga. 251, 15 S. E. 364.

**95.** Price *v.* Jones, 3 Head (Tenn.) 84.

**96.** Keeney *v.* Swan, 2 N. Y. St. 214, applying and construing Code Civ. Proc. § 1727.

**1.** Standard Dict. [*quoted* in U. S. *v.* Gin Hing, 8 Ariz. 416, 419, 76 Pac. 639].

**SALMON RIVER.** Any river frequented by salmon or young of salmon.[2]

**SALOON.** In its original sense, a large public room or parlor;[3] a hall of reception;[4] a spacious and elegant apartment for the reception of company or for works of art;[5] an apartment for specific public uses.[6] In a more particular sense, a place where intoxicating liquors are sold;[7] a place devoted to the retailing and drinking of intoxicating liquors; a grog shop;[8] a place for retailing spirituous liquors;[9] a building or place where liquors are kept for sale at retail;[10] a public room for specific uses, especially a bar-room or grog shop;[11] a large public room or parlor, a public room for specific uses, especially a bar-room or grog shop;[12] a place of refreshment;[13] a place where persons who call for them are supplied with refreshments.[14] (Saloon: Injunction to Prevent Maintenance, see INJUNCTIONS, 22 Cyc. 898 note 2. Regulation in General, see INTOXICATING LIQUORS, 23 Cyc. 161. See also BAR, 5 Cyc. 615; GROG-SHOP, 20 Cyc. 1367; INNKEEPERS, 22 Cyc. 1094; RESTAURANT, 34 Cyc. 1677.)

**SALT.** The chloride of sodium.[15]

**SALT-CAKE.** A refuse produced in the manufacture of muriatic acid.[16]

**SALT-LICK.** See MINES AND MINERALS, 27 Cyc. 540.

**SALT-MARSH.** A term applied in California to a "certain class of 'swamp and overflowed lands' held by the State under the 'Arkansas Act.'"[17]

**SALT MEADOW.** See MEADOW, 26 Cyc. 1607 note 9.

**"Salesmen making sales"** includes one who sells and delivers the goods at the time of the contract; in other words, he carries the goods with him, makes the sale, and delivers them. Needham *v.* State, 51 Tex. Cr. 248, 251, 103 S. W. 857.

2. Reg. *v.* Grey, L. R. 1 Q. B. 469, 472, 6 B. & S. 65, 12 Jur. N. S. 685, 35 L. J. M. C. 198, 14 L. T. Rep. N. S. 477, 14 Wkly. Rep. 671.

3. McDougall *v.* Giacomini, 13 Nebr. 431, 434, 14 N. W. 150; Webster Dict. [*quoted* in Cardillo *v.* People, 26 Colo. 355, 358, 58 Pac. 678; Clinton *v.* Grusendorf, 80 Iowa 117, 120, 45 N. W. 407].

4. Webster Dict. [*quoted* in Cardillo *v.* People, 26 Colo. 355, 358, 58 Pac. 678; Clinton *v.* Grusendorf, 80 Iowa 117, 120, 45 N. W. 407].

5. Webster Dict. [*quoted* in Cardillo *v.* People, 26 Colo. 355, 358, 58 Pac. 678; State *v.* O'Connell, 26 Ind. 266, 267].

6. Webster Dict. [*quoted* in Clinton *v.* Grusendorf, 80 Iowa 117, 120, 45 N. W. 407]. See also *Ex p.* Livingstone, 20 Nev. 282, 288, 21 Pac. 322.

7. Fourment *v.* State, 155 Ala. 109, 113, 46 So. 266; McDougall *v.* Giacomini, 13 Nebr. 431, 434, 14 N. W. 150.

8. Standard Dict.; Webster Dict. [both *quoted* in Leesburg *v.* Putnam, 103 Ga. 110, 113, 29 S. E. 602, 68 Am. St. Rep. 80].

9. McMurtry *v.* State, 38 Tex. Cr. 521, 524, 43 S. W. 1010, where it is said the word has a varied meaning. See also State *v.* O'Connell, 26 Ind. 266, 267.

**An act fixing the time for opening and closing saloons** and gaming houses refers, by the use of the term, only to places where intoxicating liquors are kept. *Ex p.* Livingstone, 20 Nev. 282, 288, 21 Pac. 322.

10. State *v.* Baker, 50 Oreg. 381, 384, 92 Pac. 1076, 13 L. R. A. N. S. 1040, where it is said it may include more than one room.

**Does not include an inclosed park** in which such liquors are sold. State *v.* Barr, 39 Conn. 40, 44.

11. Webster Dict. [*quoted* in Cardillo *v.* People, 26 Colo. 355, 358, 58 Pac. 678; Leesburg *v.* Putnam, 103 Ga. 110, 113, 29 S. E. 602, 68 Am. St. Rep. 80].

12. Webster Dict. [*quoted* in Malkan *v.* Chicago, 217 Ill. 471, 479, 75 N. E. 548, 2 L. R. A. N. S. 488].

13. Worcester Dict. [*quoted* in Kitson *v.* Ann Arbor, 26 Mich. 325, 326].

**Distinguished from:** "Dispensary" see Leesburg *v.* Putnam, 103 Ga. 110, 113, 29 S. E. 602, 68 Am. St. Rep. 80. "Dram shop" see INTOXICATING LIQUORS, 26 Cyc. 61 note 28.

**"Saloon purposes"** see Craig *v.* Werthmueller, 78 Iowa 598, 606, 43 N. W. 606.

**"The general business of saloon keeper,"** in a certificate stating the nature of the business proposed to be done, is sufficiently descriptive and definite and is quite as intelligible as the words "grocer, innkeeper, storekeeper," and the like. Cahill *v.* Campbell, 105 Mass. 40, 41.

14. Goozen *v.* Phillips, 49 Mich. 7, 8, 12 N. W. 889.

**It is not necessarily a place** for the sale of intoxicating liquors. Brewer, etc., Brewing Co. *v.* Boddie, 181 Ill. 622, 623, 55 N. E. 49; Kitson *v.* Ann Arbor, 26 Mich. 325, 326; State *v.* Mansker, 36 Tex. 364, 365; Springfield *v.* State, (Tex. App. 1890) 13 S. W. 752; Early *v.* State, 23 Tex. App. 364, 365, 5 S. W. 122.

15. Webster Int. Dict.

**"Refuse salt"** is damaged, or impure common salt. Carroll *v.* Walton, etc., Co., 48 Fed. 123, 125, distinguishing "salt-cake."

**"Mineral"** may include salt. See MINES AND MINERALS, 27 Cyc. 533 text and note 42.

16. Carroll *v.* Walton, etc., Co., 48 Fed. 123, 125, distinguishing "refuse salt."

17. Rondell *v.* Fay, 32 Cal. 354, 364.

**SALTPETER.** See DRUG, 14 Cyc. 1077 note 65.

**SALTS.** A term which includes the carbonates of lime, whether produced mechanically or found in a native state.[18]

**SALUS POPULI EST SUPREMA LEX.** A maxim meaning "The health of the people is the first law." [19]

**SALUS REIPUBLICÆ SUPREMA LEX.** A maxim meaning "The safety of the state is the supreme law." [20]

**SALUS UBI MULTI CONSILIA.** A maxim meaning "In many counsellors there is safety." [21]

**SALUTEM CIVUM CIVITATUMQUE INCOLUMNITATEM CONDITÆ LEGES SUNT.** A maxim meaning "Laws were made for the safety of citizens and for the security of states." [22]

18. Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*.

"Chemical salts" may include muriate or hydrochlorate of cocaine. Lehn *v.* U. S., 66 Fed. 748.

19. Peloubet Leg. Max.

Applied in: Beauvior Club *v.* State, 148 Ala. 643, 648, 42 So. 1040, 121 Am. St. Rep. 82; Little Rock *v.* Willis, 27 Ark. 572, 577; Robertson *v.* Porter, 1 Ga. App. 223, 228, 57 S. E. 993; Chicago *v.* Gunning System, 114 Ill. App. 377, 386 (dissenting opinion); Seavey *v.* Preble, 64 Me. 120, 121; State *v.* Noyes, 47 Me. 189, 211; Singer *v.* State, 72 Md. 464, 465, 19 Atl. 1044, 8 L. R. A. 551; Taunton *v.* Taylor, 116 Mass. 254, 260; Com. *v.* Blodgett, 12 Metc. (Mass.) 56, 82; Taylor *v.* Plymouth, 8 Metc. (Mass.) 462, 465; Davock *v.* Moore, 105 Mich. 120, 133, 63 N. W. 424, 28 L. R. A. 783; People *v.* Phippin, 70 Mich. 6, 19, 37 N. W. 888; Verdon *v.* Bowman, 5 Nebr. (Unoff.) 38, 97 N. W. 229; American Print Works *v.* Lawrence, 23 N. J. L. 590, 607, 57 Am. Dec. 420; Den *v.* Shotwell, 23 N. J. L. 465, 474; Sinnickson *v.* Johnson, 17 N. J. L. 129, 147, 34 Am. Dec. 184; Marlatt *v.* Warwick, 19 N. J. Eq. 439, 454; Litchfield *v.* Pond, 186 N. Y. 66, 78 N. E. 719; Rochester *v.* West, 29 N. Y. App. Div. 125, 128, 51 N. Y. Suppl. 482; Campbell *v.* Seaman, 2 Thomps. & C. (N. Y.) 231, 237; Richards *v.* New York, 48 N. Y. Super. Ct. 315, 323; New York *v.* Lord, 17 Wend. (N. Y.) 285, 292; Matter of Jacobs, 2 N. Y. Cr. 539, 545; Turner *v.* Toledo, 8 Ohio Cir. Dec. 196, 200; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 127, 25 Atl. 780; Powell *v.* Com., 114 Pa. St. 265, 294, 7 Atl. 913, 60 Am. Rep. 350; Vodges *v.* Ferree, 5 Wkly. Notes Cas. (Pa.) 99, 101; Aronheimer *v.* Stokley, 2 Wkly. Notes Cas. (Pa.) 723; Block *v.* Schwartz, 27 Utah 387, 403, 76 Pac. 22, 101 Am. St. Rep. 971, 65 L. R. A. 308; Winn *v.* Rutland, 52 Vt. 481, 492; Baker *v.* Wise, 16 Gratt. (Va.) 139, 199; Moyer *v.* Peabody, 148 Fed. 870, 876; Robinson Gold Min. Co. *v.* Alliance Ins. Co., [1902] 2 K. B. 489, 497, 7 Com. Cas. 219, 71 L. J. K. B. 942, 86 L. T. Rep. N. S. 858, 18 T. L. R. 732, 51 Wkly. Rep. 105; Low *v.* Peers, Wilm. 364, 373, 97 Eng. Reprint 138; Bonisteel *v.* Saylor, 17 Ont. App. 505, 518; Reg. *v.* Bunting, 7 Ont. 524, 562.

20. Bouvier L. Dict. [*citing* Broom Leg. Max.].

Applied in: Cochituate Bank *v.* Colt, 1 Gray (Mass.) 382, 386; Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63, 71; Egerton *v.* Brownlow, 4 H. L. Cas. 1, 195, 18 Jur. 71, 23 L. J. Ch. 348, 10 Eng. Reprint 359.

21. Bouvier L. Dict. [*citing* 4 Inst. 1].

22. Peloubet Leg. Max.

# SALVAGE

By Edward C. Ellsbree*

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**CROSS-REFERENCES**

For Matters Relating to:
Insurance, see MARINE INSURANCE, 26 Cyc. 538.
Salvage of Logs, see LOGGING, 25 Cyc. 1577.
Shipping in General, see SHIPPING.

## I. DEFINITIONS.

**A. Salvage.** Salvage is the compensation allowed to persons by whose voluntary assistance a ship or its cargo has been saved, in whole or in part, from

impending danger, or recovered from actual loss,[1] as in cases of shipwreck, derelict, or recapture,[2] or from fire, pirates, or enemies.[3] In the United States the term has been extended to include compensation for saving property or rescuing it from impending peril on a public navigable river or lake,[4] and to vessels undergoing repairs in dry dock.[4a] The term "salvage" is sometimes used to express the service rendered,[5] and also the goods or property saved.[6]

**B. Salvage Loss.** A "salvage loss" is that kind of loss which it is presumed would, but for certain services rendered, have become a total loss;[7] a total loss diminished by salvage.[8]

## II. ELEMENTS OF SALVAGE CLAIM.

**A. In General.** Three elements are necessary to a valid salvage claim: (1) A marine peril. (2) Service voluntarily rendered when not required as an

1. Baker *v.* Hoag, 7 N. Y. 555, 559, 59 Am. Dec. 431; The Blackwell, 10 Wall. (U. S.) 1, 12, 19 L. ed. 870 [*quoted* in The Hesper, 18 Fed. 692]; The Job H. Jackson, 161 Fed. 1015, 1017; The Lyman M. Law, 122 Fed. 816, 822; The Rita, 62 Fed. 761, 763, 10 C. C. A. 629; The Sandringham, 10 Fed. 556, 572, 5 Hughes 316; Browning *v.* Baker, 4 Fed. Cas. No. 2,041, 2 Hughes 30, 41; Davey *v.* The Mary Frost, 7 Fed. Cas. No. 3,591; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; Hennessey *v.* The Versailles, 11 Fed. Cas. No. 6,365, 1 Curt. 353, 355; Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466, 467; The Sailor's Bride, 21 Fed. Cas. No. 12,220, 1 Brown Adm. 68, 69.

**Distinguished from "prize."**—Salvage should be regarded in the light of compensation, and not in the light of prize. The latter is more like a gift of fortune, conferred without regard to the loss or sufferings of the owner, who is a public enemy; while salvage is the reward granted for saving the property of the unfortunate. The Elena G., 61 Fed. 519, 520. See also The Star, 3 Wheat. (U. S.) 78, 4 L. ed. 338; The Victory, 28 Fed. Cas. No. 16,938, 2 Sprague 226.

**Salvage compared with compensation** see COMPENSATION, 8 Cyc. 402 note 72.

2. Black L. Dict.; 3 Kent Comm. 245. And see Baker *v.* Hoag, 7 N. Y. 555, 559, 59 Am. Dec. 431; Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 628, 7 S. Ct. 336, 30 L. ed. 501; The Sabine, 101 U. S. 384, 390, 25 L. ed. 982; The Blackwell, 10 Wall. (U. S.) 1, 11, 19 L. ed. 870 [*quoted* in Spaulding *v.* Alaska Commercial Co., 1 Alaska 497, 501]; Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, 1 Newb. Adm. 421, 428; Norris *v.* The Island City, 18 Fed. Cas. No. 10,306, 1 Cliff. 219, 220; The Gas Float Whitton No. 2, [1896] P. 42, 49, 8 Aspin. 110, 65 L. J. P. D. & Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263 [*affirmed* in [1897] A. C. 337, 8 Aspin. 272, 66 L. J. P. D. & Adm. 99, 76 L. T. Rep. N. S. 663, 13 T. L. R. 422].

3. Muntz *v.* Raft of Timber, 15 Fed. 555, 556, 4 Woods 197; Kennedy *v.* Ricker, 14 Fed. Cas. No. 7,705, Smith (N. H.) 432, 434; Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466, 469; Waite *v.* The Antelope, 28 Fed. Cas. No. 17,045, Bee 233, 234; Weeks *v.* The Catharina Maria, 29 Fed. Cas. No. 17,351, 2 Pet. Adm. 424, 425.

**Other definitions are:** "The relief of property from an impending peril of the sea, by the exertion of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property." U. S. *v.* Morgan, 99 Fed. 570, 572, 39 C. C. A. 653; The Fannie Brown, 30 Fed. 215, 220; The Brandow, 29 Fed. 878, 879; The Alaska, 23 Fed. 597, 607; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, 1 Newb. Adm. 329, 333; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; The M. B. Stetson, 16 Fed. Cas. No. 9,363, 1 Lowell 119, 121; Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376, 378 [*quoted* in Stone *v.* The Jewell, 41 Fed. 103, 104].

"Compensation allowed to persons by whose assistance a vessel or her cargo or the lives of persons belonging to a vessel are saved from danger or loss." Gonzales *v.* U. S., 42 Ct. Cl. 299.

"A compensation given for saving property exposed to marine peril." The Alabamian, 1 Fed. Cas. No. 128.

"An extraordinary compensation for services of a certain highly-favored character." The Cherokee, 30 Fed. 703, 704.

4. Muntz *v.* Raft of Timber, 15 Fed. 555, 556, 4 Woods 197; The Old Natchez, 9 Fed. 478, 480; The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363, 375; Maltby *v.* Steam Derrick Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477, 479; Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss. 297, 301; Sonderburg *v.* Ocean Towboat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146, 149 [*quoted* in Gilchrist Transp. Co. *v.* 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432, 435; The Spokane, 67 Fed. 254, 256].

4a. The Jefferson, 215 U. S. 130, — S. Ct. —, — L. ed. — [*reversing* 158 Fed. 358].

5. The Alaska, 23 Fed. 597; Baker *v.* Hemenway, 2 Fed. Cas. No. 770, 2 Lowell 501; The H. B. Foster, 11 Fed. Cas. No. 6,290, 1 Abb. Adm. 222; The Versailles, 11 Fed. Cas. No. 6,365; Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376.

6. See Black L. Dict.

7. Koons *v.* La Fonciere Compagnie D'Assurances, 71 Fed. 978, 981.

8. Devitt *v.* Providence Washington Ins.

existing duty or from a special contract. (3) Success in whole or in part, or that the service contributed to such success.[9]

**B. The Peril.** It was formerly held that it was an essential element of a salvage service that the property should be in immediate and imminent peril.[10] But the law as to the degree of danger to which saved property is exposed has been modified by recent decisions, and it is now laid down as the rule that it is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute,[11] or such that escape by other means was impossible;[12] but it is sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered,[13] or that the property rescued was exposed to danger greater than is incurred in ordinary navigation.[14] A situation of reasonable apprehension, although not of actual danger, is sufficient.[15] If the danger has passed at the time assistance is offered, and the services of the salvor are no longer required, the latter is not entitled to salvage.[16]

**C. The Service — 1. Nature of Service — a. In General.** A salvage service is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reason-

Co., 61 N. Y. App. Div. 390, 401, 70 N. Y. Suppl. 654 [*affirmed* in 173 N. Y. 17, 65 N. E. 777].

**9.** The Sabine, 101 U. S. 384, 25 L. ed. 982.

**10.** Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; The Schooner Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; Robson *v.* The Huntress, 20 Fed. Cas. No. 11,971, 2 Wall. Jr. 59; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412; The Giacomo, 3 Hagg. Adm. 344. See also Montreal Lighterage Co. *v.* Gordon, 28 Quebec Super. Ct. 198.

**11.** The City of Seattle, 1 Alaska 471; Stone *v.* The Jewell, 41 Fed. 103; The Joseph Laughlin *v.* The Jas. Rumsey, 40 Fed. 909; The Mira A. Pratt, 31 Fed. 572; The Plymouth Rock, 9 Fed. 413; The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss. 297; Winso *v.* The Cornelius Grinnell, 30 Fed. Cas. No. 17,883; Gonzales *v.* U. S., 42 Ct. Cl. 299; The Aztecs, 21 L. T. Rep. N. S. 797; The Charlotte, 6 Notes of Cas. 279, 3 W. Rob. 68.

Compensation in the nature of salvage may be awarded for services rendered to a vessel in distress, although she was in no imminent peril of loss. The Mount Washington, 17 Fed. Cas. No. 9,887.

**12.** Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; The Oregon, 27 Fed. 871; The Dolcoath, 16 Fed. 264; The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350; McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412.

**13.** Fletcher *v.* Barge John I. Brady, 19 App. Cas. (D. C.) 174; Stone *v.* The Jewell, 41 Fed. 103; The Dolcoath, 16 Fed. 264; The Plymouth Rock, 9 Fed. 413; The Courier, 6 Fed. Cas. No. 3,283; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss. 297; Winso *v.* The Cornelius Grinnell, 30 Fed. Cas. No. 17,883; Gonzales *v.* U. S., 42 Ct. Cl. 299; The Charlotte, 6 Notes of Cas. 279, 3 W. Rob. 68.

The danger may arise from the sickness or death of the crew or master as well as from perils of the sea. The Roe, Swab. 84.

Relief from a deadly, contagious disease may be a salvage service. Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376.

A steamship with her thrust shaft broken must be considered as in a position of peril, although the shaft may be temporarily mended on board; and towing her into port is a meritorious service, entitled to a liberal reward. The Hekla, 62 Fed. 941.

**14.** The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363; Hennessey *v.* The Versailles, 11 Fed. Cas. No. 6,365, 1 Curt. 353; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350.

A signal of distress is evidence of an extraordinary sea peril, and a vessel driven on shore in a gale is, while the gale continues, in such peril. The M. B. Stetson, 16 Fed. Cas. No. 9,363, 1 Lowell 119.

**15.** The City of Seattle, 1 Alaska 471; Murray *v.* The John Swan, 50 Fed. 447; The Joseph Laughlin *v.* The Jas. Rumsey, 40 Fed. 909; The Mira A. Pratt, 31 Fed. 572; The Oregon, 27 Fed. 871; Long *v.* The Tampico, 16 Fed. 491; The Plymouth Rock, 9 Fed. 413; Holmes *v.* The Joseph C. Griggs, 12 Fed. Cas. No. 6,640, 1 Ben. 81; The Raikes, 1 Hagg. Adm. 246.

**16.** The Brandow, 29 Fed. 878; The Elswick Park, [1904] P. 76, 9 Aspin. 481, 72 L. J. P. D. & Adm. 79, 89 L. T. Rep. N. S. 217.

The fact that he participated in the efforts to save the vessel does not alter his status, if at the time of his arrival his assistance was not required. The Brandow, 29 Fed. 878.

ably apprehended.[17] It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature.[18] Useful service of any kind rendered to a vessel or her cargo, exposed to impending danger and imminent peril of loss or damage, may entitle those who render them to salvage.[19] The services need not be rendered by actual labor or effort applied by the salvors to the salved vessel. Incidental acts tending to her relief and aid will be treated as of the same effect.[20] It is no objection to a claim for salvage that the interference or assistance of the salvor did not arise from a desire to preserve the property or benefit the owner.[21]

**b. Rescue of Stranded Vessel.** Rescuing a stranded vessel from impending

17. McConnochie *v.* Kerr, 9 Fed. 50, 53 [*quoted* in The Rebecca Shepherd, 148 Fed. 727, 731]; The H. B. Foster, 11 Fed. Cas. No. 6,290, Abb. Adm. 222, 228, 6 N. Y. Leg. Obs. 223.

18. Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376.

In cases of trivial merit compensation in the nature of salvage may be awarded. Butterworth *v.* The Washington, 4 Fed. Cas. No. 2,253.

19. The Blackwell *v.* Sancelito Water, etc., Tug Co., 10 Wall. (U. S.) 1, 19 L. ed. 870; Neel *v.* Iron City Sand Co., 149 Fed. 980, 79 C. C. A. 490; The Apache, 124 Fed. 905; The Sir Robert Fernie, 96 Fed. 348; The Centurion, 5 Fed. Cas. No. 2,554, 1 Ware 490; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207.

**Seizure of vessel in command of negroes.**— The seizure and bringing into port of a vessel in distress in command of African negroes totally ignorant of the science of navigation, who shipped as slaves, had killed the commanding officers, imprisoned their owners, and assumed command, is a salvage service. Gedney *v.* L'Amistad, 10 Fed. Cas. No. 5,294*a*.

20. Boardman *v.* Bethel, 3 Fed. Cas. No. 1,585, holding that giving the benefit of skill and experience and other incidental acts of relief may constitute a salvage service, although there is no actual labor or effort.

**Giving advice or information.**—Advice given as to the proper steps to be taken to get a ship off a shore, the salvors not being able to go on board because of the sea, will be remunerated by salvage award. The Eliza, Lush. 536. So giving information of a vessel in distress, so that relief might be sent her, constitutes a salvage service. The Flottbek, 118 Fed. 954, 55 C. C. A. 448; The Cachemire, 38 Fed. 518; The Crown, 6 Fed. Cas. No. 3,450; The Sarah, 3 P. D. 39, 3 Aspin. 542, 37 L. T. Rep. N. S. 831; The Ocean, 2 W. Rob. 91. But the mere sending of a telegram to the effect that a vessel is in distress to persons who are already aware of the fact and are preparing to send to her assistance does not entitle the sender to salvage remuneration. The Marguerite Molinos, [1903] P. 160, 9 Aspin. 424, 72 L. J. P. D. & Adm. 56, 89 L. T. Rep. N. S. 192. Nor will the mere giving information as to the locality, even to a foreign ship, constitute a salvage service. The Little Joe, 6 Jur. N. S. 783, 2 L. T. Rep. N. S. 473, Lush. 88; The Alma, 5 Nova Scotia 789.

**Supplying an anchor** to a vessel in distress is a salvage service. The Æolus, L. R. 4 A. & E. 29, 1 Aspin. 516, 42 L. J. Adm. 14, 28 L. T. Rep. N. S. 41, 21 Wkly. Rep. 704; The Hector, 3 Hagg. Adm. 90; The Prince of Wales, 6 Notes of Cas. 39.

**Supplying the deficiency** in the crew of a vessel much reduced by death or sickness (The Charles, L. R. 3 A. & E. 536, 1 Aspin. 296, 26 L. T. Rep. N. S. 594, 21 Wkly. Rep. 13; The Bomarsund, Lush. 77; The Roe, Swab. 84), or placing a navigator aboard a vessel whose principal officers were dead or incapacitated by sickness (The F. I. Merryman, 27 Fed. 313; Butterworth *v.* The Washington, 4 Fed. Cas. No. 2,253; The J. L. Bowen, 13 Fed. Cas. No. 7,322, 5 Ben. 296; Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007; Moore *v.* Caribon, 17 Fed. Cas. No. 9,753*a*; The Pennsylvania, 19 Fed. Cas. No. 10,945, 10 Phila. (Pa.) 283; Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376; The Skibladner, 3 P. D. 24, 3 Aspin. 556, 47 L. J. Adm. 84, 38 L. T. Rep. N. S. 150; The Janet Mitchell, Swab. 111), constitutes a salvage service.

**Supplying provisions** to a vessel in distress may be a salvage service. The New Orleans, 23 Fed. 909.

**Transhipping cargo** from a stranded vessel in order to take it to a place of safety is a salvage service. The Westminster, 1 W. Rob. 229.

**Standing by a vessel in a perilous position should be compensated,** because the presence of the salving vessel stimulated those on board the one in danger to exert themselves to preserve the vessel and cargo, and prevented the attention of the crew from becoming distracted from such preservation by fears of their personal safety. The Courier, 6 Fed. Cas. No. 3,283.

21. Le Tigre, 15 Fed. Cas. No. 8,281, 3 Wash. 567.

**Mistake of fact.**— Where a person renders services in the nature of salvage to a vessel which he at the time *bona fide* believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property. The Liffey, 6 Aspin. 255, 58 L. T. Rep. N. S. 351.

peril is a salvage service,[22] although the service was not indispensable, or attended with danger;[23] and such vessel need not be technically wrecked in order to render her rescue a salvage service.[24] Where, however, it is shown that the grounded vessel was in no danger and could be safely left until she could be conveniently floated off, salvage will be denied.[25]

**c. Rescue From Fire.** The rescue of property in danger of destruction by fire is a familiar ground of salvage award, where the essential elements of a salvage service exist. Thus assisting to extinguish a fire on board a vessel,[26] or towing a vessel away from a dock where she is in danger of catching fire,[27] or unloading a ship which is on fire at a wharf, attended with danger of life,[28] is as much a salvage service as rescuing a vessel from a peril of the sea. So a salvage service may be rendered to a vessel by towing away from her another vessel which is on fire;[29] but where a vessel afire, to which salvage services are being rendered,

22. The I. W. Nicholas, 147 Fed. 793; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; French *v.* The Excelsior, 48 Fed. 749; Hall *v.* The Lucy P. Miller, 48 Fed. 121; Congdon *v.* The Eleanor, 42 Fed. 543; The Joseph Laughlin *v.* The Jas. Rumsey, 40 Fed. 909; South Carolina Steamboat Co. *v.* The Nellie Floyd, 39 Fed. 221; The Alamo, 28 Fed. 312; The Hesper, 18 Fed. 696 [*affirmed* in 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175]; Blagg *v.* The E. M. Bicknell, 3 Fed. Cas. No. 1,476, 1 Bond 270; Boardman *v.* Bethel, 3 Fed. Cas. No. 1,585; The M. B. Stetson, 16 Fed. Cas. No. 9,363, 1 Lowell 119; The Himalaya, Swab. 515; The Gleniffer, 3 Can. Exch. 57.

**A steamer stranded upon one of the Florida coral reefs** is always to be considered as in a position of danger, as she is liable to go to pieces on the rocks, upon the rising of the wind. The Alamo, 75 Fed. 602, 21 C. C. A. 451.

**Rescuing a steamer caught in the ice on a** dark, foggy night, with a broken crank, which disabled her for the time being, is a salvage service. Staten Island, etc., Ferry Co. *v.* The Thomas Hunt, 22 Fed. Cas. No. 13,326.

**Lightening.**—Where a steamship is aground on an open and exposed reef, and is relieved from the bottom by taking out some cargo, and throwing overboard by direction of the master, those engaged may be entitled to a salvage compensation, although they carry out no anchor. The Dolcoath, 16 Fed. 264.

**Blasting.**— Where a ship is grounded on a rocky shore with a point of rock protruding through her hull, it has been held that blasting the rock away, and so freeing the ship, is not salvage service. The Costa Rica, 3 Can. Exch. 23.

**Lying alongside vessel after taking her to anchorage.**— When a steam tug is engaged to render assistance to a ship aground in the night-time, and succeeds in getting her off, and takes her to a safe anchorage for the night and lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required. The Philotaxe, 2 Aspin. 141, 29 L. T. Rep. N. S. 515.

23. The Alamo, 28 Fed. 312; The Hesper, 18 Fed. 696 [*affirmed* in 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175]; Blagg *v.* The E. M. Bicknell, 3 Fed. Cas. No. 1,476, 1 Bond 270; Boardman *v.* The Bethel, 3 Fed. Cas. No. 1,585.

24. Boardman *v.* The Bethel, 3 Fed. Cas. No. 1,585.

25. The Upnor, 2 Hagg. Adm. 3.

**Grounding in a tidal harbor or in a river** or some similar place is often one of the ordinary incidents of navigation, and not enough to show danger or distress. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421, holding further that the mere drawing off a boat aground is a common act of river courtesy for which salvage is never claimed.

26. James Clark Co. *v.* The Columbia, 26 App. Cas. (D. C.) 85; The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Blackwell, 10 Wall. (U. S.) 1, 19 L. ed. 870; The J. Emory Owen, 128 Fed. 996; The Vanloo, 39 Fed. 570; The Avoca, 39 Fed. 567; The Lone Star, 34 Fed. 807 [*affirmed* in 35 Fed. 793]; The Cloud, 29 Fed. 272; The Indiana, 22 Fed. 925; The Florida, 22 Fed. 617; The Cyclone, 16 Fed. 486; The Key West, 11 Fed. 911; The Siren, 22 Fed. Cas. No. 12,911, 1 Lowell 280 [*affirmed* in 13 Wall. 389, 20 L. ed. 505].

**Towing a burning vessel from one shore of a river to the other,** without attempting to extinguish the flames, is merely a towage, and not a salvage service. Emerson *v.* The Pandora, 8 Fed. Cas. No. 4,442, 1 Newb. Adm. 438.

27. The Indian, 159 Fed. 20, 86 C. C. A. 210; The Ocean Wave, 53 Fed. 284; Murray *v.* The John Swan, 50 Fed. 447; Baltimore, etc., R. Co. *v.* The Holland, 44 Fed. 362; The Oregon, 27 Fed. 871; The Young America, 20 Fed. 926; Fulmer *v.* Patterson, 9 Fed. Cas. No. 5,152, 14 Phila. (Pa.) 527; The Tees, Lush. 505.

**A reasonable apprehension of immediate danger** is a sufficient basis for an award of salvage compensation for rescuing vessels from fire. Murray *v.* The John Swan, 50 Fed. 447; The Oregon, 27 Fed. 871; Long *v.* The Tampico, 16 Fed. 491.

28. The Circassian, 5 Fed. Cas. No. 2,723, 2 Ben. 171.

29. The Straits of Gibraltar, 32 Fed. 297.

is, in the operation of such services, towed away from a second vessel, in whose vicinity she has been lying, such second vessel is not liable to pay salvage on account of her release from the possible danger of catching fire.[30] Where the services of the salving vessel were not needed,[31] and she was so informed,[32] no salvage can be claimed.

**d. Towage** — (1) *In General.* Towing a vessel may or may not be a salvage service. There is no determinate rule of law absolutely distinguishing towage service from salvage service.[33] Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.[34] If the vessel towed is by this means aided in escaping from a present or prospective danger, the service will be regarded as one of salvage, and the towage as merely an incident.[35] If, on the other hand, the vessel thus assisted is not encompassed by any actual or probable danger,[36] and the employment is simply for the purpose of expediting the voyage,[37] such service is towage and not salvage. Under this rule, whether a particular service is one of salvage or towage is always a question of fact to be ascertained from a consideration of the circumstances under which the court shall find the service was rendered.[38] Thus towage service rendered to a vessel in distress which by reason of its disability requires assistance either to take it to its destination, or to a place of safety, thus relieving it of danger, actual or apprehended, is a salvage service;[39] but the rule does not govern in a

30. The City of Columbia, 56 Fed. 252; The Thomas Hilyard, 55 Fed. 1015.

31. The Avoca, 39 Fed. 567.

32. The Mannie Swan, 145 Fed. 747.

33. The H. B. Foster, 11 Fed. Cas. No. 6,290, 1 Ahb. Adm. 222.

34. The Cachemire, 38 Fed. 518; The Mira A. Pratt, 31 Fed. 572; McConnochie *v.* Kerr, 9 Fed. 50; Blunt *v.* The Frank, 3 Fed. Cas. No. 1,577; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; The Reward, 1 W. Rob. 174.

35. City of Seattle, 1 Alaska 471; American Petroleum Co. *v.* The Veendam, 46 Fed. 489; The Wallace, 41 Fed. 894; The Mira A. Pratt, 31 Fed. 572; The Plymouth Rock, 12 Fed. 927; McConnochie *v.* Kerr, 9 Fed. 50; Mayo *v.* Clark, 1 Fed. 735; The Allegiance, 1 Fed. Cas. No. 207, 6 Sawy. 68; Blunt *v.* The Frank, 3 Fed. Cas. No. 1,577; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391; Canadian Pac. Nav. Co. *v.* The C. F. Sargent, 3 Can. Exch. 332; The Zambesi, 3 Can. Exch. 67; The Herman Ludwig, Young Adm. (Nova Scotia) 211.

36. The Robert S. Besnard, 144 Fed. 992; The J. C. Pfluger, 109 Fed. 93; The Viola, 55 Fed. 829, 5 C. C. A. 283 [*affirming* 52 Fed. 172]; The Wasp, 34 Fed. 222; The Raven, 27 Fed. 470; McConnochie *v.* Kerr, 9 Fed. 50; Boggs *v.* The Loutra, 3 Fed. Cas. No. 1,601; The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185; Turnbull *v.* The Strathnaver, 1 App. Cas. 58, 3 Aspin. 113, 34 L. T. Rep. N. S. 148; The Canova, L. R. 1 A. & E. 54, 12 Jur. N. S. 528; The Lady Egidia, Lush. 513; The Princess Alice, 3 W. Rob. 138, 6 Notes of Cas. 584; Hine *v.* The Thomas J. Scully, 6 Can. Exch. 318.

Towage after danger over.— Services rendered after reaching a port of safety in towing to a part where repairs could be made are towage, not salvage. The W. D. B., 29 Fed. Cas. No. 17,306, 1 Hask. 236; The W. F. Garrison, 29 Fed. Cas. No. 17,475, 1 Lowell 139.

37. The J. C. Pfluger, 109 Fed. 93; The Plymouth Rock, 12 Fed. 927; McConnochie *v.* Kerr, 9 Fed. 50; The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185; Turnbull *v.* The Strathnaver, 1 App. Cas. 58, 3 Aspin. 113, 34 L. T. Rep. N. S. 148; The Princess Alice, 6 Notes of Cas. 584, 3 W. Rob. 138; Canadian Pac. Nav. Co. *v.* The C. F. Sargent, 3 Can. Exch. 332.

38. The J. C. Pfluger, 109 Fed. 93.

39. The Rebecca Shepherd, 148 Fed. 727; The Chief, 147 Fed. 875; The Cottage City, 136 Fed. 496; The Lottie E. Hopkins, 133 Fed. 405; Hume *v.* J. D. Spreckels, etc., Co., 115 Fed. 51, 52 C. C. A. 645; The Santa Ana, 107 Fed. 527; Belgian American Maritime Co. *v.* The Great Northern, 72 Fed. 678; Hein *v.* The Beaconsfield, 67 Fed. 144; The Chinese Prince, 61 Fed. 697; American Petroleum Co. *v.* The Veendam, 46 Fed. 489; New England Terminal Co. *v.* The M. Vandercook, 45 Fed. 262; The Cachemire, 38 Fed. 518; The Erin, 36 Fed. 712; The M. Vandercook, 24 Fed. 472; The Leipsic, 10 Fed. 585, 20 Blatchf. 288; The Plymouth Rock, 9 Fed. 413; McConnochie *v.* Kerr, 9 Fed. 50; Mayo *v.* Clark, 1 Fed. 735; The H. B. Foster, 11 Fed. Cas. No. 6,290, Ahb. Adm. 222; The Millinocket, 17 Fed. Cas. No. 9,609; The Minnie Miller, 17 Fed. Cas. No. 9,638, 6 Ben. 117; Ocean Steam Nav. Co. *v.* The Revenue, 18 Fed. Cas. No. 10,413; The Rebecca Clyde, 20 Fed. Cas. No. 11,621, 5 Ben. 98; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; Sturgis *v.* The Joseph Johnson, 23 Fed. Cas. No. 13,576, 19 How. Pr. (N. Y.) 229; The Agamemnon, 5 Aspin. 92,

case where the towage service which is rendered is not required because of the disability.[40]

(II) *TOWAGE CONVERTED INTO SALVAGE.* A towage service may, if exceptional circumstances arise, develop into a salvage service.[41] Thus if, in the performance of a contract to tow, an unforeseen and extraordinary peril arises to the vessel towed, the steam tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon becomes entitled to salvage reward.[42] But, in order to entitle a steam tug engaged to tow a vessel to successfully claim salvage remuneration for services rendered to such vessel, it must be shown not only that the tow was in danger when the services in respect of which salvage remuneration is claimed were rendered, but that at such time something was done either in the nature of risk run or extra services performed by the tug beyond what was included in the contemplation of the parties to the towage agreement.[43]

(III) *EFFECT OF SIGNAL.* When a dispute arises as to whether a signal hoisted was for a tow or a signal of distress, the fact is to be determined by the state of the vessel itself at the time, and the court will consider the state of the vessel in order to determine whether such a signal was a signal for a tow or for assistance. The true question is: What was the condition of the ship? The character of the signal hoisted is only one part of the evidence bearing on the question.[44]

48 L. T. Rep. N. S. 880; The Charles Adolphe, Swab. 153.

**In the absence of a contract,** the towing of a vessel in peril or disabled is salvage; but, as a convenient word to distinguish an ordinary case of contract from one of salvage, "towage" is often used. Baker *v.* Hemenway, 2 Fed. Cas. No. 770, 2 Lowell 501. See also Charente Steamship Co. *v.* The Dupuy De Lome, 55 Fed. 93.

**Broken propeller shaft.—** Towing into port a steamship with a broken propeller shaft is a salvage service, although the danger was not extreme. The Catalina, 105 Fed. 633, 44 C. C. A. 638; Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292; Davis *v.* Transfer No. 1, 53 Fed. 610; The Jubilee, 4 Aspin. 275, 42 L. T. Rep. N. S. 594.

**Loss of rudder.—** Whether the towing into port of a vessel exposed to the perils of the sea without a rudder can be considered a salvage service will depend upon whether, by the loss of her rudder, she was rendered unnavigable. Hope *v.* The Dido, 12 Fed. Cas. No. 6,679, 2 Paine 243.

**Towing a vessel drifting without motive power** is a salvage service. The Rescue *v.* The George B. Roberts, 64 Fed. 139; Bartley *v.* The William A. Taylor, 47 Fed. 70; The Henry Frank, 11 Fed. 763, 4 Woods 127; Holmes *v.* The Joseph C. Griggs, 12 Fed. Cas. No. 6,640, 1 Ben. 81.

40 The Robert S. Besnard, 144 Fed. 992, holding that if a vessel is in a position which requires towage service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of salvage unless there are some circumstances of peril, immediate, or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel.

41. The Isabella, 3 Hagg. Adm. 427; The Galatea, 4 Jur. N. S. 1064, Swab. 349, 7 Wkly. Rep. 21.

**Towage agreement no bar to salvage.—** An agreement for towage when from unavoidable circumstances salvage service becomes necessary does not preclude the tug rendering such service from claiming as salvor. The William Brand, 2 Notes of Cas. Suppl. 67 [*cited* in The Betsey, 2 Notes of Cas. Suppl. 409, 2 W. Rob. 167, 172]. And see The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596. Nor, it seems, does the existence of such an engagement have any practical effect in diminishing the amount of the award. The Westburn, 8 Aspin. 130, 74 L. T. Rep. N. S. 200. But see Knickerbocker Steam-Towage Co. *v.* The City of Haverhill, 66 Fed. 159.

42. Knickerbocker Steam-Towage Co. *v.* The City of Haverhill, 66 Fed. 159; The Viola, 55 Fed. 829, 5 C. C. A. 283 [*affirming* 52 Fed. 829]; The I. C. Potter, L. R. 3 A. & E. 292, 40 L. J. Adm. 9, 23 L. T. Rep. N. S. 603, 19 Wkly. Rep. 335; The White Star, L. R. 1 A. & E. 68; The Hjemmett, 5 P. D. 227, 4 Aspin. 14, 49 L. J. Adm. 66, 42 L. T. Rep. N. S. 514; The Westburn, 8 Aspin. 130, 74 L. T. Rep. N. S. 200; The Pericles, Brown & L. 80; The Saratoga, Lush. 318; The Julia, Lush. 224, 14 Moore P. C. 210, 15 Eng. Reprint 284.

**When no risk incurred.—** A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service, and endangering the vessel towed, to complete the stipulated service originally contracted for with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not entitled to salvage reward. The Annapolis, 5 L. T. Rep. N. S. 37, Lush. 355.

43. The Liverpool, [1893] P. 154, 7 Aspin. 340, 68 L. T. Rep. N. S. 719, 1 Reports 601.

44. The Mira A. Pratt, 31 Fed. 572.

**e. Pilotage.** A pilot, while acting in the line of his strict duty, cannot be entitled to claim salvage.[45] In this respect he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty.[46] But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor.[47] On the contrary, whenever he renders services to a vessel in distress or in reasonable apprehension thereof,[48] beyond the line of his appropriate duties,[49] he is entitled to salvage as any other person would be. He may be a salvor even after

**45.** Hobart *v.* Drogan, 10 Pet. (U. S.) 108, 9 L. ed. 363; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; Hope *v.* The Dido, 12 Fed. Cas. No. 6,679, 2 Paine 243; Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466; Le Tegre, 15 Fed. Cas. No. 8,281, 3 Wash. 567; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131; The Aquila, 1 C. Rob. 37.

**Reason for rule.**— The rule is well founded in public policy, and strikes at the root of those temptations, which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate. The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363.

**46.** The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363.

**47.** The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; Hope *v.* The Dido, 12 Fed. Cas. No. 6,679, 2 Paine 243.

**No pilot is bound to go on board a vessel in distress** to render pilot service for mere pilotage reward. The Frederick, 1 W. Rob. 16.

**Limitation of doctrine.**— The distinction or exception by which pilots in the usual mode of navigation have been admitted as salvors is not applicable to pilots or engineers of steamboats belonging to the ship's company. Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493.

**Effect of statute requiring pilots to assist vessels in distress.**— A pilot in a proper case will be entitled to salvage, notwithstanding the ordinance from which he derives his commission to act as pilot makes it his duty to go to vessels in distress. The Wisconsin, 32 Fed. 111 [*affirming* 30 Fed. 846]; Lea *v.* Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466. *Contra*, The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131. Under the Oregon Pilot Act of 1882 (Sess. Laws, p. 15), a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk." The C. D. Bryant, 19 Fed. 603; Roff *v.* Wass, 20 Fed. Cas. No. 11,999, 2 Sawy. 389 [*affirmed* in 20 Fed. Cas. No. 12,000, 2 Sawy. 538].

**48.** McDonald *v.* The Resolute, 38 Fed. 923; The C. D. Bryant, 19 Fed. 603; Blunt *v.* The Frank, 3 Fed. Cas. No. 1,577; The Calcutta, 4 Fed. Cas. No. 2,298; Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466; The Aglaia, 13 P. D. 160, 6 Aspin. 337, 57 L. J. Adm. 106, 59 L. T. Rep. N. S. 528, 37 Wkly. Rep. 255; The King Oscar, 6 Notes of Cas. 285.

**Pilotage is confined** to conducting into port a vessel in no state of distress or alarm, or having no apprehension of distress arising from antecedent causes. The Elizabeth, 8 Jur. 365.

**Skill sufficient to entitle one to salvage.**— To entitle to salvage, there need not have been risk of life, expenditure of money, or the application of any extraordinary means, but it may be exclusively a case of skill. Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466.

**Piloting a vessel through dangerous shoals,** where she could not have made her way unaided, is salvage service, if performed in connection with other salvage services. The Maria Pike, 16 Fed. Cas. No. 9,081.

**Pilot assisting to pump.**— Pilots going on board a leaky ship and assisting to pump have been held to be salvors. The Hebe, 2 W. Rob. 246.

**Towage of pilots.**— Pilots who take charge of and tow into port an abandoned ship, at the request of the vessel which has been towing her, render pilotage, towage, and salvage services, and are entitled to a greater compensation than the usual pilotage fees. The Champion, 5 Fed. Cas. No. 2,582*a*.

**Incompetent persons acting as pilots.**— Fishermen who assume to act as salvors to the exclusion of pilots and more competent persons will get no reward if they do no good. The Branken Moor, 3 Hagg. Adm. 373.

**Pilots waiting for fine weather to board.**— Pilots waiting for fair weather to go off to a ship ashore in distress will only be allowed pilotage, and not salvage, for getting her into harbor. The City of Edinburgh, 2 Hagg. Adm. 333.

**49.** The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Grid, 21 Fed. 423; Bean *v.* The Grace Brown, 2 Fed. Cas. No. 1,171, 2 Hughes 112; Dulany *v.* The Peragio, 7 Fed. Cas. No. 4,123, Bee 212; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; The Santiago, 9 Aspin. 147, 70 L. J. P. D. & Adm. 12, 83 L. T. Rep. N. S. 439, 17 T. L. R. 22; The Joseph Harvey, 1 C. Rob. 306; Halsey *v.* Albertusgen, 11 Moore P. C. 313, Swab. 303, 6 Wkly. Rep. 198, 14 Eng. Reprint 714.

**The test** is whether the risk attending the services to the vessel was such that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward. Akerblom *v.* Price, 7 Q. B. D. 129, 4 Aspin. 441, 50 L. J.

the relation of pilot to a particular vessel has been begun;[50] and the service, without regard to the place where it is rendered, will determine whether a pilot is or is not a salvor.[51] He must, however, in all cases, before he can be a salvor, go to the extreme point of his duty.[52] Ordinarily if a pilot acts under an agreement for extra compensation, he is thereby precluded from claiming as for salvage service.[53] Where, however, there has been extraordinary personal merit or effort, or unforeseen exertion and hazard in the performance of the service, he is not absolutely concluded by such agreement, but a court of admiralty may, in its discretion, grant him an extra allowance.[54]

**f. Recapture** — (i) *From Pirates or Enemy.* Salvage is demandable of right for property rescued or recaptured from pirates,[55] or from the enemy.[56] In order, however, to support the demand, the taking must be lawful,[57] and a meritorious service must be rendered.[58] In order to entitle to salvage on recap-

Q. B. 629, 44 L. T. Rep. N. S. 837, 29 Wkly. Rep. 797.

**Trifling services.**— A pilot on a salved ship who rendered trifling assistance as by helping at the wheel and windlass is not entitled to salvage. The Monarch, 12 P. D. 5, 6 Aspin. 90, 56 L. J. Adm. 114, 56 L. T. Rep. N. S. 204, 35 Wkly. Rep. 292; The Cherubim, Ir. R. 2 Eq. 172; The Frederick, 1 W. Rob. 16.

**50.** Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466.

**A pilotage service may be turned by supervening casualties** into a service to be compensated by salvage reward. Akerblom *v.* Price, 7 Q. B. D. 129, 4 Aspin. 441, 50 L. J. Q. B. 629, 44 L. T. Rep. N. S. 837, 29 Wkly. Rep. 797; The Æolus, L. R. 4 A. & E. 29, 1 Aspin. 516, 42 L. J. Adm. 14, 28 L. T. Rep. N. S. 41, 21 Wkly. Rep. 704; The Saratoga, Lush. 318.

**51.** Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466.

**Ship out of pilotage water.**— Assistance given to a ship out of pilotage waters to bring her to a place of safety is salvage, not pilotage. The Eugenie, 3 Notes of Cas. 430; The Rosehaugh, 1 Spinks 267; The Felix, 1 Spinks 23 note; The Hedwig, 1 Spinks 19.

**52.** Lea *v.* The Alexander, 15 Fed. Cas. No. 8,153, 2 Paine 466.

**53.** Hope *v.* The Dido, 12 Fed. Cas. No. 6,679, 2 Paine 243; The Anders Knape, 4 P. D. 213, 4 Aspin. 142, 48 L. J. Adm. 53, 40 L. T. Rep. N. S. 684.

**54.** Hope *v.* The Dido, 12 Fed. Cas. No. 6,679, 2 Paine 243.

**55.** Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Davison *v.* Seal-Skins, 7 Fed. Cas. No. 3,661, 2 Paine 324; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549.

**Expedition to punish pirates.**—A ship, whose master and crew had been captured by pirates, was retaken by salvors and afterward ransomed. Subsequently the salvors organized an expedition for the purpose of punishing the pirates and it was held that the expedition was not a salvage service. The Mary, 2 Notes of Cas. 27, 1 W. Rob. 448.

**56.** Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Kennedy *v.* Ricker, 14 Fed. Cas. No. 7,705, Smith (N. H.) 432; The Beaver, 3 C. Rob. 292.

**Ransomed ship.**— Salvage will be allowed on the recapture of a ransomed ship (The Henry, Edw. Adm. 192), the ransom bill declaring that the sum agreed upon therein should only be payable upon the arrival of the vessel at her port of destination, where she never did arrive (Moodie *v.* The Harriet, 17 Fed. Cas. No. 9,744, Bee 128).

**Capture by a Confederate cruiser in July, 1861,** was capture by a belligerent, so far as the claim of the master and crew for salvage for recapture is concerned, whether the cruiser was, by the laws of the United States, technically a pirate or not. Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549.

**Civil salvage may be awarded in addition to military salvage** where a vessel is rescued not only from the hands of the enemy, but also from a peril of the sea. The Louisa, 1 Dods. 317.

**57.** Peck *v.* Randall, 1 Johns. (N. Y.) 165; Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Davison *v.* Seal-Skins, 7 Fed. Cas. No. 3,661, 2 Paine 324, holding that salvage will not be awarded on property taken without authority from pirates within the territorial jurisdiction of a country at peace with the United States.

**Probable cause** is sufficient to render such recapture lawful. Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15.

**On a recapture, made by a neutral power,** no claim for salvage can arise, since the act of retaking is a hostile act. Peck *v.* Randall, 1 Johns. (N. Y.) 165; Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15. But if captors abandon a prize, a neutral bringing her into port will be entitled to salvage. The Two Cousins, 42 Ct. Cl. 436. And see McDonough *v.* Dannery, 3 Dall. (U. S.) 188, 1 L. ed. 563.

**Recapture after condemnation.**— Where a vessel is captured, condemned, and sold to the subject of an enemy, and afterward recaptured by a private armed ship, the original owner is not entitled to restitution on payment of salvage. The Star, 3 Wheat. (U. S.) 78, 4 L. ed. 338.

**58.** Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Davison *v.* Seal-Skins, 7 Fed. Cas. No. 3,661, 2 Paine 324.

**On the recapture of a neutral from a belligerent,** no salvage is due, since the neutral,

ture or rescue, the property must have been taken from the actual or constructive possession of the enemy.[59] Merely stopping a ship going into an enemy's port is insufficient, since the danger in such case is only contingent.[60] Nor is salvage due a warship for rescuing from the hands of the enemy another vessel engaged in the same expedition.[61]

(II) *From Mutineers.* Salvage is not due to a crew for rescuing the ship from mutineers, since the service does not go beyond the limits of the duty which they are bound to perform.[62] On the same principle salvage has been refused a government ship for rescuing another vessel from a mutinous crew, where the service was performed without danger or great exertion.[63] Salvage has been awarded in such a case, however, where the service rendered was of great merit, and was performed by the crew of one vessel toward another with which they had no particular connection.[64]

**g. Saving Drifting Vessel or Cargo.**[65] Taking up and securing a drifting vessel or cargo may be a salvage service.[66]

**h. Raising Sunken Vessel or Cargo.** Raising a vessel or cargo sunk in waters within the jurisdiction of admiralty is a salvage service,[67] provided the elements of a salvage service exist.[68]

**i. Purchase of Wrecked Cargo.** The sale by auction of the cargo of a wrecked vessel which the master had no means of saving or storing, to another vessel homeward bound, will be regarded as a salvage service, and not a purchase.[69]

**j. Avoidance of Collision.** Successful exertions by the crew of one vessel to avoid an impending collision with another vessel cannot be considered salvage services rendered to the latter.[70]

being in no danger, receives no benefit from recapture. Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Waite *v.* The Antelope, 28 Fed. Cas. No. 17,045, Bee 233; The Huntress, 6 C. Rob. 104; The Eleonora Catharina, 4 C. Rob. 156. If, however, the neutral was in danger of condemnation, the recapturing vessel is entitled to salvage. Thus as the conduct of the French prize courts, during the period of spoliations, rendered a recapture of an American vessel a rescue from actual danger, the recaptors were entitled to salvage. Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; The Amelia, 4 Dall. (U. S.) 34, 1 L. ed. 730; Hooper *v.* U. S., 22 Ct. Cl. 408; The Sansom, 6 C. Rob. 410; The Eleonora Catharina, 4 C. Rob. 156. See also Peck *v.* Randall, 1 Johns. (N. Y.) 165; The Huntress, 6 C. Rob. 104.

59. The Ann Green, 1 Fed. Cas. No. 414, 1 Gall. 274; The Franklin, 4 C. Rob. 147; The Edward and Mary, 3 C. Rob. 305.

60. The Franklin, 4 C. Rob. 147. See also The Ann Green, 1 Fed. Cas. No. 414, 1 Gall. 274.

61. The Belle, Edw. Adm. 66.

62. The Governor Raffles, 2 Dods. 14.

63. The Francis and Eliza, 2 Dods. 115.

64. The Trelawney, 4 C. Rob. 223.

65. Towage see *supra*, II, C, 1, d.

66. Stillwell *v.* The Major Anderson, 23 Fed. Cas. No. 13,452 (vessel floating out to sea in the ice without any one on board and exposed to dangerous hazard of destruction or serious damage); Twenty-three Bales of Cotton, 24 Fed. Cas. No. 14,284, 9 Ben. 48 (picking up of cotton bales floating in New York harbor, at some risk and attended with some damage to the vessels picking up the cotton); Lahey *v.* The Maple Leaf, 6 Can. Exch. 173 (rescue of drifting vessel with no one on board in position of peril).

Under a statute providing for salvage when any vessel or other property shall be lost or wrecked, and in a perishable condition, salvage cannot be claimed for taking up a boat drifting in a river in broad daylight and but a short distance from her moorings. Collard *v.* Eddy, 17 Mo. 354.

67. Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431; The Silver Spray, 22 Fed. Cas. No. 12,857, 1 Brown Adm. 349.

Rescuing the boilers of a vessel by pulling them out of a river has been held salvage service. The Silver Spray, 22 Fed. Cas. No. 12,857, 1 Brown Adm. 349.

68. The Paul L. Bleakley, 146 Fed. 570; Merritt, etc., Derrick, etc., Co. *v.* Moorris, etc., Dredging Co., 137 Fed. 780, 70 C. C. A. 356 [*reversing* 132 Fed. 154], in both of which cases it is held that the raising of a vessel sunk in shallow water, where there is no danger involved, nor any extraordinary means required or employed, is not a salvage service.

Righting a wreck after it has reached a port of safety is not properly a salvage service, and should be paid for on the basis of labor performed and services rendered. The W. D. B., 29 Fed. Cas. No. 17,306, 1 Hask. 236.

69. Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed. 618; Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492.

70. The Acorn, 1 Fed. Cas. No. 30; The John Perkins, 13 Fed. Cas. No. 7,360 [*re-*

**k. Saving of Life.** In the absence of statute, salvage for saving life, unconnected with the saving of property, is not allowed,[71] except for saving the life of a slave,[72] the view being taken that it is a common duty of humanity.[73] This is still the law in the United States, but in England, by statute,[74] the provisions of which were substantially reënacted in the Merchant Shipping Act of 1854, preservation of human life is made a distinct ground of salvage reward,[75] with priority over all other claims for salvage where the property is insufficient.[76] This act was construed to give the admiralty court jurisdiction over salvage of life only when the services were rendered in British waters, at least in the case of a foreign ship.[77] This decision led to the passage of the act of 1861,[78] permitting salvage to be awarded for the saving of life from any British ship or boat wherever the service may have been rendered, or from any foreign ship or boat where the services have been rendered either wholly or in part in British waters; [79] and this extension is practically reproduced in another statute.[80]

**l. Services Rendered Under Contract.** The mere fact that aid in saving a vessel from danger is rendered under a contract does not prevent the service from being a salvage service. The parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted, and such agreements, fairly made, are readily upheld by the courts.[81] Nothing but a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or not in the enterprise, will operate as a bar to a meritorious salvage claim.[82] Anything short of this, although it may

*versing* 18 Fed. Cas. No. 10,252, 3 Ware 87].

**71.** Commercial Towboat Co. *v.* The George W. Clyde, 80 Fed. 157; Baker *v.* The Tros, 2 Fed. Cas. No. 783, 10 Phila. (Pa.) 223; The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68 (in which it was said that, although the court is not authorized to grant a reward directly for saving lives, yet when it has led incidentally to the saving of property, it will not exclude it wholly from its consideration in determining the amount of salvage upon the property); Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007; The Mulhouse, 17 Fed. Cas. No. 9,910; The Johannes, 30 L. J. Adm. 91, 3 L. T. Rep. N. S. 757, Lush. 182; The Zephyrus, 1 Notes of Cas. 338, 1 W. Rob. 329.

**72.** Bass *v.* Five Negroes, 2 Fed. Cas. No. 1,093, Bee 201; The Mulhouse, 17 Fed. Cas. No. 9,910.

**73.** The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68.

**74.** St. 9 & 10 Vict. c. 99.

**75.** The Cairo, L. R. 4 A. & E. 184, 2 Aspin. 257, 43 L. J. Adm. 33, 30 L. T. Rep. N. S. 535, 22 Wkly. Rep. 742; The Thomas Fielden, 32 L. J. Adm. 61; The Eastern Monarch, Lush. 81; Silver Bullion, 2 Spinks 70; The Coromandel, Swab. 205; The Bartley, Swab. 198.

**Passengers.**— In respect to remuneration for life salvage, passengers stand on the same footing as the master and the crew, since they are equally "persons belonging to such ship," as that term is used in the statute. The Fusilier, 11 Jur. N. S. 289, 34 L. J. Adm. 25, 12 L. T. Rep. N. S. 186, 3 Moore P. C. N. S. 51, 13 Wkly. Rep. 592, 16 Eng. Reprint 19.

**When salvor, after towing vessel, abandons her and saves crew.**— When a steamship having taken in tow a vessel in distress, after towing her for some hours, on the weather getting worse and the lives of her crew becoming endangered, takes the crew out of her and finally abandons her in a place where she is afterward picked up by another vessel and taken into port, the owners, master, and crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship and cargo. The Eintracht, 2 Aspin. 198, 29 L. T. Rep. N. S. 851.

**Taking shipwrecked persons off an island** where they were in no particular danger is not life salvage. The Woosung, 3 Aspin. 50, 44 L. J. Adm. 45, 33 L. T. Rep. N. S. 394.

**76.** The Coromandel, Swab. 205.

**77.** The Johannes, 30 L. J. Adm. 91, 3 L. T. Rep. N. S. 757, Lush. 182.

**78.** St. 24 Vict. c. 10.

**79.** The Willem III, L. R. 3 A. & E. 487, 1 Aspin. 129, 25 L. T. Rep. N. S. 386, 20 Wkly. Rep. 216; The Pacific, [1898] P. 170, 8 Aspin. 422, 67 L. J. P. D. & Adm. 65, 79 L. T. Rep. N. S. 125, 46 Wkly. Rep. 686 (holding that where salvors rendered services in saving the lives of the crew of a foreign ship which was in distress outside British waters by taking them off the ship and bringing them to an English port, the service rendered in saving life was so rendered "in part" in British waters, and that plaintiffs were therefore entitled to an award); The Heindall, Young Adm. (Nova Scotia) 132.

**80.** Act (1894), § 544; Jörgensen *v.* Neptune Steam Fishing Co., 4 F. (Ct. Sess.) 992.

**81.** See *infra*, VII, A, 2, b, (II).

**82.** Merritt, etc., Derrick, etc., Co. *v.* Tice, 97 N. Y. App. Div. 457, 89 N. Y. Suppl. 1057; Potomac Steam-Boat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75; The Camanche, 8 Wall. (U. S.)

affect the amount of the compensation, does not change the nature of the service.[83] Indeed, it has been held that even a contract to pay a fixed sum for a salvage service in any event does not change its character, but only furnishes a rule of compensation.[84] To bar a claim for salvage services rendered under contract, there must be a distinct agreement so explicit in terms as to satisfy the court that the salvors assented to something other than a salvage compensation.[85] The jurisdiction of the admiralty courts is not affected by such a contract.[86] All that is meant by the term "bar a claim for salvage" is that the court is prevented from assessing the compensation on the usual liberal scale.[87]

**2. Request For and Acceptance of Services — a. Necessity of Acceptance.** Under nearly all supposable circumstances when the master is in command and control of his own ship he may refuse and reject salvage services, and no volunteer salvor can force on him, and be rewarded for, services which he forbids.[88]

448, 19 L. ed. 397; Elphicke *v.* White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56; Chapman *v.* The Engines of the Greenpoint, 38 Fed. 671; Baker Salvage Co. *v.* The Excelsior, 19 Fed. 436; Adams *v.* The Island City, 1 Fed. Cas. No. 55, 1 Cliff. 210; Bowley *v.* Goddard, 3 Fed. Cas. No. 1,736, 1 Lowell 154; The Centurion, 5 Fed. Cas. No. 2,554, 1 Ware 490; Coffin *v.* The John Shaw, 5 Fed. Cas. No. 2,949, 1 Cliff. 230; The H. B. Foster, 11 Fed. Cas. No. 6,290; The Versailles, 11 Fed. Cas. No. 6,365, 1 Curt. 355; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350; Squire *v.* One Hundred Tons of Iron, 22 Fed. Cas. No. 13,270, 2 Ben. 21; The Susan, 23 Fed. Cas. No. 13,630, 1 Sprague 499; The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282; The Solway Prince, [1896] P. 120, 8 Aspin. 128, 65 L. J. P. D. & Adm. 45, 74 L. T. Rep. N. S. 32; The William Lushington, 7 Notes of Cas. 361.

**An agreement canceled by mutual consent** cannot be set up as a bar to a salvage suit. The Africa, 1 Spinks 299.

83. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350; The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282.

84. Leathem *v.* The Roanoke, 50 Fed. 574; The Silver Spray, 22 Fed. Cas. No. 12,857, 1 Brown Adm. 349.

85. The Huntsville, 12 Fed. Cas. No. 6,916; Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276 (holding that a statement, by the master of a vessel to the commander of a tug asked to tow her out of danger, "that the ship would pay," is not sufficient evidence of a contract for payment at all events to bar a libel for salvage); Gould *v.* U. S., 1 Ct. Cl. 184 (holding that an assurance of the keeper of a lightboat to one of the claimants that he and such other men as could go on board should be well paid, but that he had no authority to make a definite bargain, is not a contract which bars a claim for salvage).

**Mere loose talk** will not do. The Salacia, 2 Hagg. Adm. 262. See also Potomac Steam-Boat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75.

**An agreement to arbitrate** the value of services rendered under a contract is not a bar to a claim for salvage. Potomac Steam-Boat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75; The Kimberley, 40 Fed. 289; Boardman *v.* Bethel, 3 Fed. Cas. No. 1,585; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350; La Prisima Concepcion, 13 Jur. 545.

86. Leathem *v.* The Roanoke, 50 Fed. 574; Frame *v.* The Ella, 48 Fed. 569, 5 Hughes 125; The A. D. Patchin, 1 Fed. Cas. No. 87, 1 Blatchf. 414; The Circassian, 5 Fed. Cas. No. 2,723, 2 Ben. 171; The Louisa Jane, 15 Fed. Cas. No. 8,532, 2 Lowell 295; The Williams, 29 Fed. Cas. No. 17,710, Brown Adm. 208.

87. The Louisa Jane, 15 Fed. Cas. No. 8,532, 2 Lowell 295.

88. The Indian, 159 Fed. 20, 86 C. C. A. 210; The Choteau, 9 Fed. 211, 4 Woods 71; New Harbor Protection Co. *v.* The Charles P. Chouteau, 5 Fed. 463; The Susan, 23 Fed. Cas. No. 13,630; The Yucatan, 30 Fed. Cas. No. 18,194.

**Acceptance of service under mistake of fact.** — The fact that the master of a stranded vessel accepted salvage service from a tug, under the mistaken belief that it was one owned by the company whose boats his owner's agents usually employed, does not lessen the amount of salvage award to which the tug is entitled, where she was guilty of no fraud. The Devonian, 150 Fed. 831.

**No gratuitous, officious, and unnecessary service** thrust upon the master by one seeking to connect himself with a salvage claim will justify an award in his favor. Spaulding *v.* Alaska Commercial Co., 1 Alaska 497. When the owners of a vessel in peril have taken all measures in their judgment necessary to insure her safety, and those measures are adequate and all that prudence requires, other parties have no right to obtrude their services, and anticipate the employment of the means adopted by the owners, and then, if successful, claim a salvage recompense. Such an enterprise savors more of a predatory expedition than a salvage service to be encouraged and rewarded on grounds of public policy. Spreckels *v.* California, 45 Fed. 647. See also The Ragnarok, 158 Fed. 694.

So during the time that assistance is being rendered, the officers of a vessel in distress are certainly at liberty to determine when the assistance rendered should be terminated, and such assistance cannot be forced upon them beyond that point, if the vessel in distress is then in a position where nothing but the property rights of the owners of the vessel are at stake.[89] But the refusal of the master may be so palpably and so grossly wrong as to amount to positive misconduct in reference to the claims of humanity, or the property interests of others, so as legally to justify intervention against his will.[90] And services offered and rendered in a situation of danger, when no other adequate or reasonable means of assistance or protection exist, cannot be repudiated and terminated when the immediate danger has passed, so as to defeat a claim for salvage.[91]

**b. Effect of Request.** A person rendering aid to a ship in distress is a salvor, whether he is a mere volunteer or acts on request.[92] A mere request for aid does not prevent the service rendered from being a salvage service, or reduce the claim merely to one for services rendered under a contract.[93] Persons who assist a vessel in distress, at the request of her master or owner, with no definite arrangement for compensation, must ordinarily be paid as salvors.[94] The master of a vessel in a dangerous situation, after requesting assistance, will not be heard to object to the payment of salvage on the ground that such assistance was unnecessary.[95]

**D. Beneficial Result of Services — 1. In General.** An indispensable ingredient of a salvage claim is that the service rendered has contributed immediately to the rescue or preservation of the property in peril.[96] Exertions therefore, however meritorious, which have not been successful in any degree, cannot receive

**The acceptance of a line by a seaman,** after a refusal by the master, will not bind the ship. The Pohatcong, 77 Fed. 996.

**An express acceptance** of services actually performed is not necessary to entitle to salvage reward; it is sufficient if the circumstances of the case are such that, if an offer of service had been made, any prudent man would have accepted it. The Vandyck, 7 P. D. 42 [*affirmed* in 5 Aspin. 17, 47 L. T. Rep. N. S. 695]; The Annapolis, Lush. 355, 5 L. T. Rep. N. S. 37.

**If the master has requested assistance by a signal of distress, or otherwise,** and salvors have incurred danger, expense, or labor in compliance with such request, and their aid has then been refused, it seems they have a right to some compensation, at least if the vessel ultimately comes to a place of safety. The Susan, 23 Fed. Cas. No. 13,630.

89. The Ragnarok, 158 Fed. 694.

90. The Pohatcong, 77 Fed. 996. And see The Susan, 23 Fed. Cas. No. 13,630; The Yucatan, 30 Fed. Cas. No. 18,194. See also *infra*, IV, J, 2.

91. The Ragnarok, 158 Fed. 694.

92. The Queen of the Pacific, 21 Fed. 459; Spencer *v.* The Charles Avery, 22 Fed. Cas. No. 13,232, 1 Bond 117.

93. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The R. R. Rhodes *v.* Fay, 82 Fed. 751, 27 C. C. A. 258; The Indepeudence, 13 Fed. Cas. No. 7,014, 2 Curt. 350.

94. The S. A. Rudolph, 39 Fed. 331 (implied request); The Sterling, 20 Fed. 751; The Louisa Jane, 15 Fed. Cas. No. 8,532, 2 Lowell 295. See also Creevy *v.* Cummings, 3 La. Ann. 163, 48 Am. Dec. 444.

95. Stone *v.* The Jewell, 41 Fed. 103; Gibson *v.* The Alice Clark, 39 Fed. 621; The Huntsville, 12 Fed. Cas. No. 6,916; The James T. Abbott, 13 Fed. Cas. No. 7,202, 2 Sprague 101; Phillips *v.* The United States, 19 Fed. Cas. No. 11,107; Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*; The Racer, 2 Aspin. 317, 30 L. T. Rep. N. S. 904; The Little Joe, 6 Jur. N. S. 783, 2 L. T. Rep. N. S. 473, Lush. 88; The Otto Hermann, 33 L. J. Adm. 189.

96. The Blackwell, 10 Wall. (U. S.) 1, 19 L. ed. 870; The New Haven, 159 Fed. 798; The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; Alexander *v.* Car Floats Nos. 1, 3, 4, 5, 64 Fed. 887; Atlantic Coast Steamboat Co. *v.* The Golden Gate, 57 Fed. 661; Anderson *v.* The Edam, 13 Fed. 135; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87 (holding that salvage can only be allowed on the goods actually delivered by the salvors); The John Wurts, 13 Fed. Cas. No. 7,434, Olcott 462; The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282; Bryan *v.* U. S., 6 Ct. Cl. 128; The Gleniffer, 3 Can. Exch. 57.

**Complete success unnecessary.**— It is not essential to the right to salvage that the services rendered should have been entirely successful, although the fact that they were not entirely successful may be considered on the question of the amount of compensation which should be allowed. The I. W. Nicholas, 147 Fed. 793.

**Indirect benefit.**— Salvage is not due from the owners of a vessel that only indirectly receives a benefit from salvage services rendered to another vessel driving in her neighborhood. The Annapolis, 5 L. T. Rep. N. S. 37, Lush. 355. See also The Vandyck, 5 Aspin. 17, 47 L. T. Rep. N. S. 694 [*affirming* 7 P. D. 42].

salvage reward.[97] But if an effort be made in good faith with means believed to be adequate, the salvor may recover something in the nature of a *quantum meruit*, although his efforts are unsuccessful.[98] A service is not the less a salvage service because the vessel to which aid was rendered might have escaped from her peril unaided,[99] or because the salvor was compelled by prudence or necessity to discontinue his assistance and leave the final rescue to others.[1]

**2. When Requested.** A salvor in pursuance of a request is entitled to compensation according to the circumstances of the case, although he is unsuccessful, if the property is not lost, or is otherwise saved.[2] But when it is manifest that the property in peril must be wholly saved or lost, his compensation depends upon the contingency of success and should be enhanced accordingly.[3]

**3. When Rendered Under Contract.** There is a broad distinction between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration.[4] But efforts to give assistance under an engagement to a vessel in distress will, although the vessel receives no benefit from them, be rewarded as being in the nature of salvage service, if the vessel is otherwise saved.[5] If a salvor is employed to complete a

97. The Myrtle Tunnel, 146 Fed. 324; Atlantic Coast Steamboat Co. *v.* The Golden Gate, 57 Fed. 661; The Queen of the Pacific, 21 Fed. 459; Clarke *v.* The Dodge Healy, 5 Fed. Cas. No. 2,849, 4 Wash. C. C. 651; Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; The Huntsville, 12 Fed. Cas. No. 6,916; Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; The Sailor's Bride, 21 Fed. Cas. No. 12,220, Brown Adm. 68; The Chetah, L. R. 2 P. C. 205, 38 L. J. Adm. 1, 19 L. T. Rep. N. S. 621, 5 Moore P. C. N. S. 278, 17 Wkly. Rep. 233, 16 Eng. Reprint 520; The Eintracht, 2 Aspin. 198, 29 L. T. Rep. N. S. 851; The Ranger, 9 Jur. 119, 3 Notes of Cas. 589; The Edward Hawkins, 31 L. J. Adm. 46, Lush. 515, 15 Moore P. C. 486, 15 Eng. Reprint 578; The Zephyrus, 1 Notes of Cas. 338, 1 W. Rob. 329; The E. U., 1 Spinks 63; The India, 1 W. Rob. 406.

**When a disabled vessel is left in the same plight as when found,** no salvage can be recovered. The City of Puebla, 153 Fed. 925; Atlantic Coast Steamboat Co. *v.* The Golden Gate, 57 Fed. 661; The Algitha, 17 Fed. 551; The Cheerful, 11 P. D. 3, 55 L. J. Adm. 5, 54 L. T. Rep. N. S. 56, 34 Wkly. Rep. 307; The India, 1 W. Rob. 406.

98. Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; The Sailor's Bride, 21 Fed. Cas. No. 12,220, Brown Adm. 68; The Melphomène, L. R. 4 A. & E. 129, 42 L. J. Adm. 45, 29 L. T. Rep. N. S. 405, 21 Wkly. Rep. 956. See also The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

**Expenses.**— Circumstances may justify the court in directing the expenses of parties attempting to render a service to be paid by the ship which had been in danger. The Ranger, 9 Jur. 119, 3 Notes of Cas. 589; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807.

99. The Mary E. Long, 14 Phila. (Pa.) 598; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, 1 Newb. Adm. 329; Holmes *v.* The Joseph C. Griggs, 12 Fed. Cas. No. 6,640, 1 Ben. 81 (holding that the fact that a derelict vessel might have been saved without the interposition of the salvors may be taken into account in determining the compensation, but cannot deprive the salvors of all claim for salvage); McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130 (holding that the fact that the exertions of the salvor did not save the boat, but she was saved by natural causes, will not affect his right to salvage, where he encountered the danger, and did all he could under the circumstances).

1. The Henry Steers, Jr., 110 Fed. 578.

**Services unavoidably interrupted before completion,** which nevertheless materially contribute to the ultimate safety of the salved property, entitle those performing them to salvage remuneration. The August Korff, [1903] P. 166, 9 Aspin. 428, 72 L. J. P. D. & Adm. 53, 89 L. T. Rep. N. S. 194; The Camellia, 9 P. D. 27, 5 Aspin. 197, 53 L. J. Adm. 12, 50 L. T. Rep. N. S. 126, 32 Wkly. Rep. 495; The Atlas, Lush. 518; The E. U., 1 Spinks 63.

2. The Queen of the Pacific, 21 Fed. 459; The Cambrian, 8 Aspin. 263, 76 L. T. Rep. N. S. 504; The Helvetia Shipping Gazette, Feb. 24, 1894, p. 9. But see The Henry Steers, Jr., 110 Fed. 578, holding that a request for aid by a vessel in distress does not authorize compensation therefor unless the aid rendered was helpful in the final saving of property.

3. The Queen of the Pacific, 21 Fed. 459.

4. See *supra*, II, D, 1.

5. The Sabine, 101 U. S. 384, 25 L. ed. 982; The Nellie, 2 Aspin. 142, 29 L. T. Rep. N. S. 516; The Undaunted, 29 L. J. Adm. 176, 2 L. T. Rep. N. S. 520, Lush. 90; The Aztecs, 21 L. T. Rep. N. S. 797.

**Performance rendered impossible by act of God.**— Attempted services performed under an

salvage service which, through no fault on his part, he fails to do, but still renders beneficial service, he is entitled to a salvage reward.[6] But if a salvor is engaged to do a thing and does not do it, and, while making strenuous exertions, does no good at all, he is not entitled to any award.[7]

## III. PROPERTY SUBJECT TO SALVAGE.

**A. In General.** Salvage, apart from life salvage, is by the maritime law of England confined to ship, apparel, and cargo, or what has formed part of these, and to freight earned by carriage of cargo.[8] A similar rule seems to be laid down in a decision of the supreme court of the United States;[9] but in some American cases a broader view of the property subject to salvage is taken. Thus it has been held that the test as to what is the subject of salvage is no longer whether it is a vessel engaged in commerce or its cargo or furniture, but whether the thing saved is a movable thing, possessing the attributes of property, susceptible of being lost and saved in places within the local jurisdiction of admiralty.[10] There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo they clearly come under the head of wreck, flotsam, jetsam, ligan, or derelict, and salvage may be claimed upon them.[11] But when they have no connection with a ship or vessel, some authorities are against the claim, and others in favor of it. Decisions in favor of the claim in reference to rafts of timber found floating at sea have been made in some cases,[12] and against it in others.[13] Salvage cannot

agreement of salvage are entitled to be rewarded where the performance of them is rendered impossible by the act of God. The Undaunted, 29 L. J. Adm. 176, 2 L. T. Rep. N. S. 520, Lush. 90.

A vessel which contracts to do her best to tow another to safety, and, after honestly attempting so to do, fails through no fault of her own, is entitled to remuneration. The August Korff, [1903] P. 166, 9 Aspin. 428, 72 L. J. P. D. & Adm. 53, 89 L. T. Rep. N. S. 194; The Lepanto, [1892] P. 122, 7 Aspin. 192, 66 L. T. Rep. N. S. 623; The Benlarig, 14 P. D. 3, 6 Aspin. 360, 58 L. J. P. D. & Adm. 24, 60 L. T. Rep. N. S. 238.

6. The Hestia, [1895] P. 193, 7 Aspin. 599, 64 L. J. Adm. 82, 72 L. T. Rep. N. S. 364, 11 Reports 808, 43 Wkly. Rep. 669.

Services refused after engagement.— When a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, and she will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained. The Maude, 3 Aspin. 338, 36 L. T. Rep. N. S. 26.

7. The Dart, 8 Aspin. 481, 80 L. T. Rep. N. S. 23.

8. Wells *v.* The Gas Float Whitton No. 2, [1897] A. C. 337, 8 Aspin. 272, 66 L. J. P. D. & Adm. 99, 76 L. T. Rep. N. S. 663, 13 T. L. R. 422 [*affirming* [1896] P. 42, 8 Aspin. 110, 65 L. J. P. D. & Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263].

The meaning of the word "cargo" may perhaps be extended so as to embrace goods in course of being transported by a vessel, although not inside it. Wells *v.* The Gas Float Whitton No. 2, [1897] A. C. 337, 66 L. J. P. D. & Adm. 99, 76 L. T. Rep. N. S. 663, 13 T. L. R. 422. Thus a caisson lashed to a vessel for transportation to another place may be considered cargo, although not actually on board, and therefore the subject of a salvage claim. Gonzales *v.* U. S., 42 Ct. Cl. 299.

9. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501.

Other statements of the rule.— Salvage relates only to vessels and their cargoes or to those things which have been committed to or lost in the sea and have been found and rescued. Gonzales *v.* U. S., 42 Ct. Cl. 299. The word "salvage" contemplates services rendered in connection with perils of the sea and to vessels or other craft and instrumentalities in use in the navigation of the sea or other waters, although temporarily in a dry dock. The Jefferson, 215 U. S. 130, —— S. Ct. ——, —— L. ed. —— [*reversing* 158 Fed. 358].

10. The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363; Maltby *v.* Steam Derrick Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477.

11. See Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501.

12. Whitmire *v.* Cobb, 88 Fed. 91, 31 C. C. A. 395; Bywater *v.* Raft of Piles, 42 Fed. 917; Muntz *v.* Raft of Timber, 15 Fed. 555, 4 Woods 197; Fifty Thousand Feet of Timber, 9 Fed. Cas. No. 4,783, 2 Lowell 64; Keteltas *v.* Raft of Timber, 14 Fed. Cas. No. 7,741*a*; Raft of Spars, 20 Fed. Cas. No. 11,529, 1 Abb. Adm. 485.

13. Raft of Cypress Logs, 20 Fed. Cas. No. 11,527, 1 Flipp. 543, 14 Alb. L. J. 319;

be allowed for saving from a wreck, the United States mails,[14] or bills of exchange or other papers, the evidence of a debt or of title to property,[15] since such things are not property, the sale of which can be ordered.

**B. Vessels and Ships.** No structure that is not a ship or vessel is a subject of salvage.[16] And the mere fact that the property to which the service is rendered is that of a vessel will not suffice.[17] There must have been a sea peril from which it was rescued, and the vessel itself must have been at the time the subject of a sea peril, in order to support a maritime lien, and afford jurisdiction *in rem* in the admiralty.[18] The terms "ships" and "vessels" are used in a very broad sense to include all navigable structures intended for transportation.[19] They need not have motive power,[20] nor need they be engaged in commerce or navigation,[21] to be subject to salvage. If they were intended for such use, it is sufficient.[22]

**C. Derelict.** To constitute a derelict in the sense of maritime law, it is necessary that the thing be found deserted or abandoned on the seas, whether it arose from accident, or necessity, or voluntary dereliction.[23] In some cases it seems to be held necessary that the abandonment should be voluntary,[24] but this is not the recognized doctrine.[25] *Prima facie* a vessel found at sea, with no one aboard of her, is a derelict;[26] but where the master and crew have left temporarily

Palmer *v.* Rouse, 3 H. & N. 505, 27 L. J. Exch. 437, 6 Wkly. Rep. 674.

14. The Merchant, 17 Fed. Cas. No. 9,435.

15. The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68.

16. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501, holding that a floating dry-dock is not the subject of salvage service.

17. The Jefferson, 158 Fed. 358.

18. The Jefferson, 158 Fed. 358.

19. Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501.

20. The Old Natchez, 9 Fed. 478 [*affirming* 9 Fed. 476].

21. Tebo *v.* New York, 61 Fed. 692; The Old Natchez, 9 Fed. 478 [*affirming* 9 Fed. 476]; Maltby *v.* Steam Derrick Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477.

22. The Old Natchez, 9 Fed. 476 [*affirmed* in 9 Fed. 478]; The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363. But see The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419.

**For example** salvage has been awarded against a steam ferry-boat (The Cheeseman *v.* Two Ferry Boats, 5 Fed. Cas. No. 2,633, 2 Bond 363), a barge (Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss. 297), a derrick-boat (Maltby *v.* Steam Derrick-Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477), a canal-boat (Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431), a hopper-barge used for receiving mud from a dredging-machine, although it had no means of locomotion of its own (The Mac, 7 P. D. 126, 4 Aspin. 555, 51 L. J. Adm. 81, 46 L. T. Rep. N. S. 907), a dismantled steam-boat undergoing alterations and repairs for the purpose of being fitted for use as a wharf-boat (The Old Natchez, 9 Fed. 476 [*affirmed* in 9 Fed. 478]), a sunken vessel (Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431), the common-law "wreck of the sea" (The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77), and a bath-house, built on boats, and designated for navigation and transportation (Tebo *v.* New York, 61 Fed. 692); but not against a floating dry-dock permanently moored (Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501 [*affirming* 10 Fed. 142 and 16 Fed. 924, 4 Woods 265]; Salvor Wrecking Co. *v.* Sectional Dock Co., 21 Fed. Cas. No. 12,273), a vessel while in a dry-dock permanently attached to the shore for repairs (The Jefferson, 158 Fed. 358), a dismantled steamboat fitted up as a hotel (The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419), or a gas float moored in a river to give light to vessels (Wells *v.* The Gas Float Whitton No. 2, [1897] A. C. 337, 8 Aspin. 272, 66 L. J. P. D. & Adm. 99, 76 L. T. Rep. N. S. 663, 13 T. L. R. 422 [*affirming* [1896] P. 42, 8 Aspin. 110, 65 L. J. P. D. & Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263]).

23. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372.

24. The Jonge Johannes, 4 C. Rob. 263.

**Ships forsaken through fear of enemies or loss of life** are not legally derelict, so as to warrant full right by occupancy. Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31.

25. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; The Blenden-Hall, 1 Dod. 414.

**Abandonment of a captured ship by the enemy** constitutes a case of derelict. The Lord Nelson, Edw. Adm. 79. *Contra,* The John and Jane, 4 C. Rob. 216.

26. Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431; The Shawmut, 155 Fed. 476; The Ann L. Lockwood, 37 Fed. 233; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372.

**Boats or vessels forsaken, or found on the seas,** without any person in them are derelicts. 1 Sir Leoline Johnson's Works 89.

for the purpose of obtaining assistance, and with intent to return and resume possession, she is not technically a derelict,[27] although another vessel finding her in such condition and rescuing her may be entitled to salvage compensation as in case of a derelict.[28] To constitute a strict case of technical derelict, the abandonment must be final without hope of recovery or intention to return.[29] There must be not only a hope of recovery, but some reasonable prospect that the hope may be realized to rebut the presumption arising from the condition in which the vessel is found.[30] Where the peril is such as to force an abandonment of the ship, the mere intention to return and recover her, or to send relief, will not prevent her being considered derelict.[31] So where a vessel is not abandoned, but those on board are both physically and mentally incapable of doing anything for their safety, this constitutes a case of quasi derelict.[32]

## IV. PERSONS AND VESSELS ENTITLED TO SALVAGE.[33]

**A. In General.** A salvor is one who, without any particular relation to a vessel in distress, proffers useful service as a voluntary adventurer without any preëxisting covenant connecting him with the duty of preserving the vessel.[34]

**Where a vessel is discovered in the open sea with slaves on board,** and no white person, the crew having been murdered, the vessel will be regarded as derelict. In such case the slaves are considered merely as cargo. Flinn *v.* The Leander, 9 Fed. Cas. No. 4,870, Bee 260.

**A vessel may be derelict on navigable streams and tide-waters,** as well as on sea coasts or on the ocean. The B. C. Terry, 9 Fed. 920.

27. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70; The Shawmut, 155 Fed. 476; The Aquila, 1 C. Rob. 37.

**An abandonment from a sense of imminent danger,** to avoid the consequences of a collision, does not constitute a case of derelict. The Cosmopolitan, 6 Notes of Cas. Suppl. 17; The Fenix, Swab. 13.

**Where the master and crew of the salved ship went on board the salving ship,** which put men on the salved ship to steer her, the court refused to treat the salved ship as a derelict and award salvage on that basis. The Lepanto, [1892] P. 122, 7 Aspin. 192, 66 L. T. Rep. N. S. 623. See also The Margaret, Young Adm. (Nova Scotia) 171.

**An abandonment of a burning vessel by the master to another** for the purpose of salving her does not constitute a case of derelict. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; Union Towboat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412.

28. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70; The Shawmut, 155 Fed. 476.

29. The Launberga, 154 Fed. 959; The Cairnsmore, 20 Fed. 519; The Arendal, 14 Fed. 580; The Hyderabad, 11 Fed. 749, 1 Biss. 112; The Attacapas, 2 Fed. Cas. No. 637, 3 Ware 65; Bean *v.* The Grace Brown, 2 Fed. Cas. No. 1,171, 2 Hughes 112; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328 (holding that where a vessel is abandoned with no intention of returning, a subsequent change of opinion and action under new circumstances are immaterial); The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; Lewis *v.* The Elizabeth and Jane, 15 Fed. Cas. No. 8,321, 1 Ware 33; Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493; The Nathaniel Hooper, 17 Fed. Cas. No. 10,030 (holding that where a vessel aground on a shoal is left by the master and crew with the intention of returning, and is subsequently found by the salvor vessel, and gotten off and navigated to port, she will be considered as derelict, where her master, on his return, gave up pursuit of her in the belief that she had sunk); Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712; The Zeta, L. R. 4 A. & E. 460, 3 Aspin. 73, 44 L. J. Adm. 22, 33 L. T. Rep. N. S. 477, 24 Wkly. Rep. 180.

**Where the abandonment by the owners and the occupation by the salvors are contemporaneous acts,** and the one could not have happened except in a situation where the other was possible, it is not a case of derelict in the strict sense. The Lovett Peacock, 15 Fed. Cas. No. 8,555, 1 Lowell 143.

30. The Georgiana, 10 Fed. Cas. No. 5,355, 1 Lowell 91.

31. The Laura, 14 Wall. (U. S.) 336, 20 L. ed. 813; Grummond *v.* The Burlington, 73 Fed. 258; The Fairfield, 30 Fed. 700; The Georgiana, 10 Fed. Cas. No. 5,355, 1 Lowell 91; The Genessee, 12 Jur. 401; The Gertrude, 30 L. J. Adm. 130; The Coromandel, Swab. 205. See also The B. C. Terry, 9 Fed. 920; The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77.

32. Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449. See also Lewis *v.* A Lot of Whalebone, 51 Fed. 916; The Columbia, 3 Hagg. Adm. 428.

33. **Apportionment among salvors** see *infra*, VII, B, 1, b.

34. The Clarita, 23 Wall. (U. S.) 1, 23 L. ed. 146; The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Nebraska, 75 Fed. 598, 21 C. C. A. 448; The Florida, 22 Fed. 617 (day watchman rendering services at night entitled to salvage); Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, 1 Newb. Adm. 329;

As a general rule, no one can claim salvage who does not personally engage in the service;[35] but this rule does not now apply to the owners of a salvor vessel.[36] Subject to the general qualification that the service must be rendered by persons not bound by their legal duty to render them, there is no limitation to the kind of persons who may be entitled to salvage. Under special circumstances any person may be a salvor. They may be persons in public employment on board men-of-war.[37] They may be semiofficial persons, as pilots.[38] They may be ship,[39] or Lloyd's,[40] agents. They may be persons having some relation to the ship, as passengers,[41] and the crew,[42] in extraordinary circumstances. They may be any sort of persons, as women, apprentices,[43] boys, slaves,[44] masters, mates, sailors, cooks, surgeons, carpenters, and landsmen of every national character.[45] The representatives of deceased salvors may also be entitled to salvage.[46]

**B. Public Servants — 1. In General.**[47] Where salvors act in the performance of a mere duty, as where they are employed by the public authorities to perform the very service, they are not entitled to compensation.[48] But public servants may recover salvage for assistance of great merit, rendered in the line of their regular duty, but in excess of the official requirements thereof.[49] So public servants rendering salvage service beyond the line of their regular employment are entitled to salvage.[50]

**2. National Vessels.** Officers and crews of public vessels are entitled to salvage for their personal services in the same manner as other persons.[51] But

Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131; The Neptune, 1 Hagg. Adm. 227. See also Cohen Adm. 54.

**The test as to whether services are voluntarily rendered** is whether such services are rendered by those who are under no legal obligation to render them. The Dumper No. 8, 129 Fed. 98, 63 C. C. A. 600.

**Insurers** who employ another to rescue a stranded vessel do not act as voluntary adventurers, but in their own interest, because of the insurance contract, and have no right to the proceeds of her sale. Tarr *v.* The Lydia A. Harvey, 84 Fed. 1000.

35. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newh. Adm. 421; The Vine, 2 Hagg. Adm. 1; The Charlotte, 6 Notes of Cas. 279, 3 W. Rob. 68.

36. See *infra*, IV, C, 1.

37. See *infra*, IV, B, 2.

38. See *supra*, II, C, 1, e.

39. The Kate B. Jones, [1892] P. 366, 7 Aspin. 332, 69 L. T. Rep. N. S. 197.

**Extraordinary services.**— Where ship agents render extraordinary services in saving property, the court will, under particular circumstances, allow a claim as agent and a claim as salvor to be united and combined. The Honor, L. R. 1 A. & E. 87, 12 Jur. N. S. 773, 35 L. J. Adm. 113, 15 L. T. Rep. N. S. 677, 15 Wkly. Rep. 10.

**Repayment of advance to salvors.**— Money paid by the ship's agent to salvors, in anticipation of an award, will not be repaid out of the fund in court to those who advance it. The Louisa, 6 Notes of Cas. 531, 3 W. Rob. 99.

**Agent to salve cargo.**— One who is appointed agent by the master to save cargo wrecked may nevertheless claim as salvor in admiralty. The Happy Return, 2 Hagg. Adm. 198.

40. The Purissima Concepcion, 7 Notes of Cas. 150, 3 W. Rob. 181. *Contra*, The Lively, 6 Notes of Cas. 206, 3 W. Rob. 64.

41. See *infra*, IV, H.

42. See *infra*, IV, G.

43. Mason *v.* The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Bell *v.* The Ann, 3 Fed. Cas. No. 1,245, 2 Pet. Adm. 278.

**Master of apprentice salvor.**— The master of an apprentice is not entitled to salvage awarded for the services of the apprentice. The Two Friends, 8 Jur. 1011, 2 W. Rob. 349. Apprentices are entitled to share in salvage, and a contract that their masters should take their shares is *semble* invalid. The Columbine, 2 W. Rob. 186.

44. Small *v.* The Messenger, 22 Fed. Cas. No. 12,961, 2 Pet. Adm. 284.

45. See Browning *v.* Baker, 4 Fed. Cas. No. 2,041, 2 Hughes 30.

46. The Marquis of Huntly, 3 Hagg. Adm. 246.

47. Recapture see *supra*, II, C, 1, f.

48. Firemen's Charitable Assoc. *v.* Ross, 60 Fed. 456, 9 C. C. A. 70; Murphy *v.* The Souliote, 5 Fed. 99, 4 Woods 19; Davey *v.* The Mary Frost, 7 Fed. Cas. No. 3,592, 2 Woods 306 [*affirming* 7 Fed. Cas. No. 3,591], holding that firemen belonging to the fire department of a city who extinguish fire in a ship lying at a wharf are not entitled to salvage, although there is no ordinance especially making it their duty to extinguish fires.

49. The European, 44 Fed. 484; The Huntsville, 12 Fed. Cas. No. 6,916; Silver Bullion, 2 Spinks 70.

50. Le Tigre, 15 Fed. Cas. No. 8,281, 3 Wash. 567; The Ottawa, 18 Fed. Cas. No. 10,617, 1 Lowell 274.

51. The Mulhouse, 17 Fed. Cas. No. 9,910; The Ulysses, 13 P. D. 205, 6 Aspin. 354, 58 L. J. Adm. 11, 60 L. T. Rep. N. S. 111, 37

as they risk no property and their time is paid for by the public, they will be granted a less rate of compensation than other persons for like services.[52] And in such cases something more than the usual peril should be encountered by the officers and crew, and an extraordinary service should be rendered, exceeding the duty imposed upon them by their employment in the public service and the special instructions of the government on the subject.[53]

**C. Owner of Salvor — 1. In General.** It was formerly held that where the owner of a vessel by which salvage service was rendered was not personally present, he could not recover salvage compensation, as such, but was entitled to equitable compensation for the use of his vessel.[54] Modern decisions, however, uphold the right of the owners of ships or vessels, whether propelled by steam or otherwise, to claim compensation for salvage services rendered by their vessels, whether they are present or absent at the time the service is performed.[55] Remuneration for salvage service is awarded to the owners of vessels, not because they are present when the service is rendered, but on account of the danger to which the service exposes their property and the risk which they run of loss in suffering their vessel to engage in such perilous undertakings,[56] and also as an

Wkly. Rep. 270; The Dalhousie, 1 P. D. 271 note; The Woosung, 1 P. D. 260, 3 Aspin. 239, 35 L. T. Rep. N. S. 8, 25 Wkly. Rep. 1; The Bertie, 6 Aspin. 26, 55 L. T. Rep. N. S. 520; The Rapid, 3 Hagg. Adm. 419; The Ewell Grove, 3 Hagg. Adm. 209; The Lustre, 3 Hagg. Adm. 154; The Mary Anne, 1 Hagg. Adm. 158; The Alma, Lush. 378; The Iodine, 3 Notes of Cas. 140; The Mary Pleasants, Swab. 224; The Earl of Eglinton, Swab. 7; The Wilsons, 1 W. Rob. 172.

**The officers and crew of a foreign vessel of war** are entitled to salvage, the same as in the case of other vessels. Robson *v.* The Huntress, 20 Fed. Cas. No. 11,971, 2 Wall. Jr. 59.

**Military salvors** may be entitled to civil salvage. The Franklin, 4 C. Rob. 147; The Louisa, 1 Dods. 317; The Sir Francis Burton, 2 Hagg. Adm. 156.

**A transport ship hired by government,** and performing, by orders of the officer of a queen's ship, salvage services not within the terms of the charter-party, is entitled to a share of the amount awarded as salvage. The Nile, L. R. 4 A. & E. 449, 3 Aspin. 11, 44 L. J. Adm. 38, 33 L. T. Rep. N. S. 66.

**A ship belonging to the Bombay government** with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act (1854), § 484, in the same position as a queen's ship with commissioned officers. The Woosung, 1 P. D. 260, 3 Aspin. 239, 25 Wkly. Rep. 1, 35 L. T. Rep. N. S. 8.

**Whole ship's company entitled.**— The officers and crew of a queen's ship who remain on board are entitled to salvage, as well as those who actually perform the service. The Charlotte Wylie, 2 W. Rob. 495.

**52.** The Mulhouse, 17 Fed. Cas. No. 9,910; The Ewell Grove, 3 Hagg. Adm. 209; The Iodine, 3 Notes Cas. 140; The Earl of Eglinton, Swab. 7.

**53.** The Josephine, 13 Fed. Cas. No. 7,546, 2 Blatchf. 322 [*affirming* 22 Fed. Cas. No. 13,069]; The Walker, Stew. (Nova Scotia) 105. See also The John, Young Adm. (Nova Scotia) 129; The Herman, Young Adm. (Nova Scotia) 111.

**54.** The Arlington, 1 Fed. Cas. No. 534, 2 Ben. 511; The Jack Jewett, 13 Fed. Cas. No. 7,122, 2 Ben. 463; The Charlotte, 6 Notes of Cas. 279, 3 W. Rob. 68.

**55.** The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Birdie, 3 Fed. Cas. No. 1,431, 3 Ben. 273; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The Holder Borden, 12 Fed. Cas. No. 6,600, 1 Sprague 144 (holding that where a vessel was wrecked and the master purchased a brig, and in payment gave a draft on one of the owners of the wrecked vessel, who accepted and paid the draft, and, with the brig purchased, saved the cargo, the drawee of the draft was the sole owner of the brig, and was entitled to recover compensation for the services of his vessel, over and above the expenses and risks); The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; Gonzales *v.* U. S., 42 Ct. Cl. 299; The Roe, Swab. 84; The Norden, 1 Spinks 185.

**The owners of the ship are to be deemed co-salvors** with the navigator. Butterworth *v.* The Washington, 4 Fed. Cas. No. 2,253.

**Vessels are the only exception to the rule** that the supplying of tools or other things does not constitute their owner a salvor. The Ottawa, 18 Fed. Cas. No. 10,617, 1 Lowell 274; The Vine, 2 Hagg. Adm. 1; The Charlotte, 6 Notes of Cas. 279, 3 W. Rob. 68.

**An agreement by the master to victual, man, and navigate the vessel** under the direction of the owner does not make him owner or part-owner during the voyage, so as to entitle him to salvage earned by the vessel. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

**56.** The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; Waterbury *v.* Myrick, 29 Fed. Cas. No. 17,253, Blatchf. & H. 34; The Princess Helena, 30 L. J. Adm. 137, 4 L. T. Rep. N. S. 869, Lush. 190.

encouragement to permit such use.[57] Consequently it has been held that an owner can come in as a co-salvor only where his vessel has been the direct means of rendering the service for which salvage is awarded.[58]

**2. Corporations.** A corporation is not disqualified by the fact of its being a corporation from suing for salvage. On the contrary it is well settled that corporations owning vessels are as much entitled to salvage remuneration as are individual owners. Thus an incorporated company, organized for the purpose of engaging in the meritorious work of saving ships in distress, and devoting themselves assiduously and reputably to that work, may be granted salvage rewards as liberally as natural persons so engaged may be.[59]

**3. When Both Vessels Belong to Same Owner.** The fact that the owners of a salving ship are also owners of the ship salved does not preclude them from recovering salvage compensation from the cargo saved, where the peril which rendered the service necessary did not arise through any breach of the contract of carriage.[60] Nor will the fact that a part-owner in a salving ship also has an interest in the salved property prevent him from sharing in the salvage.[61]

**D. Ship-Owner or Charterer.** In the absence of special provision in the charter-party to the contrary, the owner of a vessel and not the charterer is generally entitled to salvage.[62] But the salvage may under certain circumstances give rise to claims by the charterer against the owner.[63] Thus salvage performed by a ship demised to and wholly in the possession of a charterer inures to the benefit of the charterer.[64] And where a tug whose entire time and services for the day had been hired by a charterer, although not under a charter amounting

57. Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, 1 Newb. Adm. 329; The Ottawa, 18 Fed. Cas. No. 10,617, 1 Lowell 274.

58. Waterbury *v.* Myrick, 29 Fed. Cas. No. 17,253, Blatchf. & H. 34, holding that the owner of a vessel is not entitled to salvage where his shipmaster pledged the owner's funds to procure another vessel with which to render the salvage service.

59. The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Kimberley, 40 Fed. 289; The Egypt, 17 Fed. 359; The Sandringham, 10 Fed. 556, 5 Hughes 316; The Birdie, 3 Fed. Cas. No. 1,432, 7 Blatchf. 238; Browning *v.* Baker, 4 Fed. Cas. No. 2,041, 2 Hughes 30, holding that the whole salvage will be awarded to a wrecking firm where the wages of the crew employed were paid by it, and they make no claim to salvage. *Contra*, The J. F. Farlan, 13 Fed. Cas. No. 7,313, 3 Ben. 206; The Stratton Audley, 23 Fed. Cas. No. 13,529, 3 Ben. 241 [*affirmed* in 23 Fed. Cas. No. 13,530, 8 Blatchf. 264]; Sturgis *v.* The Vickery, 23 Fed. Cas. No. 13,577*a*; Union Towboat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412.

**Necessity of license.**— The law requiring vessels engaged in wrecking on the coast of Florida to have a wrecking license justifies the exclusion of unlicensed vessels from participating in a salvage service, and sharing in the award therefor, only where licensed vessels are present which are capable of rendering the required services, and if the services of unlicensed vessels are accepted, they are entitled to share in the compensation. Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a*.

60. Gilchrist Transp. Co. *v.* 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432; Morse *v.* Pomroy Coal Co., 75 Fed. 428; The R. D. Bibber, 33 Fed. 55; The Miranda, L. R. 3 A. & E. 561, 1 Aspin. 440, 41 L. J. Adm. 82, 27 L. T. Rep. N. S. 389, 21 Wkly. Rep. 84; The Laertes, 12 P. D. 187, 6 Aspin. 174, 56 L. J. Adm. 108, 57 L. T. Rep. N. S. 502, 36 Wkly. Rep. 111; The Caroline, 5 L. T. Rep. N. S. 89, Lush. 334.

61. Lewis *v.* A Lot of Whalebone, 51 Fed. 916.

62. The Alfen, Swab. 189.

**The owners rendering salvage services, being also the charterers of the vessel receiving the services,** are not thereby debarred from claiming salvage reward, unless the effect of the charter-party has been to divest the owners of the possession and control of the salved vessel, and to transfer the same for the time to the charterers. The Collier, L. R. 1 A. & E. 83, 12 Jur. N. S. 789, 16 L. T. Rep. N. S. 155.

**Where a chartered ship renders salvage service to another ship belonging to the charterer,** salvage is payable to the owners of the chartered ship. The Waterloo, 2 Dods. 433. When the charter was substantially for the day service of the vessel and when after her day's work was done she saved property belonging to her employer the salvors were strangers to the owners of the property and may claim as salvors. Gonzales *v.* U. S., 42 Ct. Cl. 299.

63. The New Orleans, 23 Fed. 909; The Alfen, Swab. 189.

64. The Kaiser Wilhelm der Grosse, 106 Fed. 963; The Scout, L. R. 3 A. & E. 512, 1 Aspin. 258, 41 L. J. Adm. 42, 26 L. T. Rep. N. S. 371, 20 Wkly. Rep. 617.

to a demise, leaves her tow to perform a salvage service, the charterer is entitled to a share of the salvage award, to be computed by comparing the value of the work done with the risk involved to the tug.[65] But no salvage can be claimed by a charterer in possession against the chartered ship for services rendered by another ship belonging to the charterer.[66]

**E. Ship-Owner or Owner of Cargo.** The owner of mere inert cargo on a salving vessel is not entitled to share in a salvage award,[67] unless, being on board at the time the property was saved, he consented to the same, and thus discharged the owner of the vessel from the responsibility incurred by deviating to save property.[68] Under other circumstances his only remedy for any loss occasioned by the stoppage and deviation is against the master and owner.[69]

**F. Mortgagor or Mortgagee.** A mortgagor, before condition broken, can bring a libel for salvage, he being in the use, possession, and control of the salving vessel.[70] While it may be that the mortgagee of a salving vessel may claim salvage, where the circumstances put the mortgaged property in peril,[71] proof that there exists against the salving vessel a recorded mortgage does not affect the right of the mortgagor to the compensation due for salvage.[72] Where the owners of a stranded vessel in possession have abandoned all efforts to save her, and at their request the mortgagee, at his own risk and expense, gets her off, and repairs her, his claim is in the nature of salvage.[73]

**G. Master and Crew — 1. Of Salving Vessel — a. In General.** Where salvage services are rendered by a vessel and her machinery, the master and crew of such vessel are entitled to share in the award,[74] although they perform only their ordinary duty for which they are paid by the owners.[75] The fact that the crew engaged to work for pay in the wrecking business does not necessarily deprive them of the right to engage in a salvage service, and to participate in the reward thereof.[76]

65. The Arizonan, 144 Fed. 81, 75 C. C. A. 239 [*reversing* 136 Fed. 1016].

66. The Maria Jane, 14 Jur. 857.

67. National Steamship Co. *v.* The Hekla, 62 Fed. 941; Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292; Velasco Terminal R. Co. *v.* The Brixham, 54 Fed. 539; The Persian Monarch, 23 Fed. 820.

68. The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]. See also The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

**Accepting a bill of lading in which was reserved the right to render aid to vessels in distress** is not such consent to the rendering of such service as will entitle the owner of the cargo to a share of the salvage earned. Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292; Charente Steamship Co. *v.* The Dupuy de Lome, 55 Fed. 93; The Persian Monarch, 23 Fed. 820.

**A charter forbidding a vessel to give assistance to other ships** under any circumstances is a waiver by the charterer of any claim to salvage money earned. Munson *v.* The Vila, 63 Fed. 1017.

69. The Colon, 6 Fed. Cos. No. 3,024, 10 Ben. 60 (holding that a clause in a bill of lading authorizing the vessel to tow and assist other vessels in all situations will not prevent the cargo-owners from recovering damages for a loss to the cargo because of delay in assisting a vessel in distress, on their intervention in salvage proceedings); The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

70. The Cherokee, 30 Fed. 703.

71. The Cherokee, 30 Fed. 703.

72. The Cherokee, 30 Fed. 703.

73. The Barney Eaton, 2 Fed. Cas. No. 1,028, 1 Biss. 242.

74. The New Orleans, 23 Fed. 909; Bowley *v.* Goddard, 3 Fed. Cas. No. 1,736, 1 Lowell 154; The Harvest, 11 Fed. Cas. No. 6,176, 1 Sprague 537.

**Reason for allowance in such case.**— No amount of reward to owners and machinery will so stimulate and encourage efforts to save life and property in peril on the high seas, as will moderate rewards to masters and crews who are on hand to control the ship and machinery, and are the effective agents to set the machinery in motion. The New Orleans, 23 Fed. 909.

**Whole crew of salving ship entitled to share.**— Those of a ship's crew who go on board the ship in distress have not an exclusive claim to salvage. The rest of the crew, being ready to assist, are entitled to share. The Baltimore, 2 Dods. 132. And see The Centurion, 5 Fed. Cas. No. 2,554, 1 Ware 490; The Mountaineer, 2 W. Rob. 7.

**The master has no right to compel the mate to perform a salvage service,** and if he does perform one, by the order of the master, without objection, he is to be considered as a volunteer. Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376.

75. The New Orleans, 23 Fed. 909.

76. The Cetewayo, 9 Fed. 717.

**b. When Both Vessels Belong to Same Owner.** When salvage services are performed by one ship to another, both ships belonging to the same owners, the master and crew of the ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the owners, and which they would be paid for by their ordinary wages.[77]

**2. Of Salved Vessel — a. In General.** Since a claim for salvage service can only be preferred by persons who were not bound by their legal duty to render them, seamen, in the ordinary discharge of their duty, cannot be salvors.[78] Where, however, extraordinary events occur, in which their connection with the ship is dissolved *de facto* or by operation of law, or they exceed their proper duty, they may be permitted to claim as salvors.[79] But compensation for extraordinary exertion by the officers or crew of the wrecked vessel in saving passengers' effects will not be decreed where there is a presumption against the wrecked vessel of fault for the collision by which the vessel was placed in distress.[80]

**b. In Case of Discharge, Wreck, or Abandonment.** Dissolution of their contract of service so as to entitle seamen to salvage reward occurs where they have been discharged,[81] or the voyage is terminated by the wreck of the vessel,[82]

**77.** The Colima, 6 Fed. Cas. No. 2,996, 5 Sawy. 181; The Sappho, L. R. 3 P. C. 690, 40 L. J. Adm. 47, 24 L. T. Rep. N. S. 795, 8 Moore P. C. N. S. 66, 17 Eng. Reprint 238; The Glenfruin, 10 P. D. 103, 5 Aspin. 413, 54 L. J. Adm. 49, 52 L. T. Rep. N. S. 769, 33 Wkly. Rep. 826; The Agamemnon, 5 Aspin. 92, 48 L. T. Rep. N. S. 880; The Caroline, 5 L. T. Rep. N. S. 89, Lush. 334.

**That two vessels were owned by the United States** is not sufficient to deprive the master and crew of one of them of their right to salvage compensation for services rendered in saving personal property belonging to the United States from the wreck of the other. Rees *v.* U. S., 134 Fed. 146.

**78.** The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; Gilbraith *v.* Stewart Transp. Co., 121 Fed. 540, 57 C. C. A. 602, 64 L. R. A. 193; The C. F. Bielman, 108 Fed. 878; The Aguan, 48 Fed. 320; Coffin *v.* The Akbar, 5 Fed. 456; The D. W. Vaughan, 8 Fed. Cas. No. 4,222, 9 Ben. 26; Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493 (holding that the rules of the marine law relative to the exertions required of seamen in cases of shipwreck or of disaster at sea are equally applicable to navigation by steamboats, and for such services they are not entitled to salvage); Miller *v.* Kelly, 17 Fed. Cas. No. 9,577, Abb. Adm. 564; The Olive Branch, 18 Fed. Cas. No. 10,490, 1 Lowell 286; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; The Wave *v.* Hyer, 29 Fed. Cas. No. 17,300, 2 Paine 131; The Le Jonet, L. R. 3 A. & E. 556, 1 Aspin. 438, 41 L. J. Adm. 95, 27 L. T. Rep. N. S. 387, 21 Wkly. Rep. 83; The Neptune, 1 Hagg. Adm. 227; The Warrior, 6 L. T. Rep. N. S. 133, Lush. 476.

**Promise of extra compensation void.**— A master whose vessel has stranded has no authority to promise the seamen additional pay, on behalf of the insurers, for work done for the saving of the ship and cargo, which it was their imperative duty to do without extra compensation; and such a promise cannot operate as a discharge of the men from the service of the ship, or entitle them to recover as for salvage services. The C. F. Bielman, 108 Fed. 878. So where there is no abandonment of a wreck, and the members of the crew are not entitled to compensation as salvors, a promise of reward from the passengers to officers or crew of the distressed vessel, to secure their exertions for saving their property, is not legally binding. Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493.

**Stranger in capacity of master.**— When a steamboat is in imminent peril, and a person in no way connected with the boat takes the charge of her, as master, at the request of her regular master, who is disabled by sickness, and with the concurrence of one of her owners, with an injunction to save her if possible, and without any stipulation as to compensation or the time of service, the fact that he acted in the capacity of master does not exclude him from a claim for salvage. McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130.

**79.** The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Antelope, 1 Fed. Cas. No. 484, 1 Lowell 130; The Mary Hale, 16 Fed. Cas. No. 9,213; The Olive Branch, 18 Fed. Cas. No. 10,490, 1 Lowell 286; The Triumph, 24 Fed. Cas. No. 14,183, 1 Sprague 428; The Le Jonet, L. R. 3 A. & E. 556, 1 Aspin. 438, 41 L. J. Adm. 95, 27 L. T. Rep. N. S. 387, 21 Wkly. Rep. 83.

**80.** Mesner *v.* Suffolk Bank, 17 Fed. Cas. No. 9,493.

**81.** The C. F. Bielman, 108 Fed. 878; The C. P. Minch, 73 Fed. 859, 20 C. C. A. 70.

**If the master improperly discharges the seamen,** the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; and subsequent services rendered by them to ship and cargo are salvage services. The Warrior, 6 L. T. Rep. N. S. 133, Lush. 476.

**82.** The C. F. Bielman, 108 Fed. 878; The

or her absolute abandonment by all, or all except the salvors, without hope or expectation of recovery.[83] Where seamen contract to be paid by a share of the freight or of the proceeds of a voyage, they cannot, in case of wreck, claim compensation for salvage services, or more than day wages for the time actually employed in saving the wreck.[84]

**c. In Case of Recapture of Vessel.** Capture by a public or private armed vessel of a belligerent power or by a pirate terminates or suspends the contract which binds a seaman to his ship, and rescue or recapture by the master and crew entitles them to salvage.[85]

**H. Passengers.** Passengers are not entitled to salvage reward for ordinary labor performed by them in saving their ship because such labor is made the duty of the passenger by the preëxisting contract under which he connected himself with the ship. Passengers on board a vessel, being under an obligation so long as they voluntarily remain on board to do what they can to save the vessel, are not entitled to salvage for service rendered by them within the line of their duty.[86] Circumstances may arise, however, under which a passenger on a ship may render salvage services to that ship when in distress.[87] In order to do this he need not

C. P. Minch, 73 Fed. 859, 20 C. C. A. 70; The Aguan, 48 Fed. 320; The Bowditch, 3 Fed. Cas. No. 1,717, 3 Ware 71; Cartwell *v.* The John Taylor, 5 Fed. Cas. No. 2,482, Newb. Adm. 341; The Two Catherines, 24 Fed. Cas. No. 14,288, 2 Mason 319.

**83.** The C. F. Bielman, 108 Fed. 878; The C. P. Minch, 73 Fed. 859, 20 C. C. A. 70; The Umattilla, 29 Fed. 252; Taylor *v.* The Cato, 23 Fed. Cas. No. 13,786, 1 Pet. Adm. 48; The Le Jonet, L. R. 3 A. & E. 556, 1 Aspin. 438, 41 L. J. Adm. 95, 27 L. T. Rep. N. S. 387, 21 Wkly. Rep. 83; The Florence, 16 Jur. 572; The Two Friends, 8 Jur. 1011, 2 W. Rob. 349; The Vrede, 30 L. J. Adm. 209, Lush 322.

**One man left, either by design or through carelessness, on board of a ship abandoned at sea,** is thereby discharged from his contract of service, and may claim salvage for assisting in saving the vessel. The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; The Triumph, 24 Fed. Cas. No. 14,183, 1 Sprague 428.

**If there is an intention to return** there is no absolute abandonment within the rule. The C. P. Minch, 73 Fed. 859, 20 C. C. A. 70 [*affirming* 61 Fed. 511]; The John Perkins, 13 Fed. Cas. No. 7,360 [*reversing* 18 Fed. Cas. No. 10,252, 3 Ware 87].

**The abandonment of a stranded vessel and her cargo by the owners to the insurers** is not an abandonment, within the meaning of the maritime law, which terminates the voyage, but results merely in a change of owners; and the duty of master and seamen to stand by the vessel and cargo is unaffected by such change, and services thereafter rendered by them in that regard are not salvage services which can be compensated as such by the courts, however meritorious they may have been. The C. F. Bielman, 108 Fed. 878.

**The arrest and detention of a vessel in a civil suit** does not work an abandonment of her, so as to entitle the master to salvage compensation for services rendered, saving her from damage by storm while in the marshal's custody. It is the master's duty to remain with the ship, notwithstanding her arrest, and any services he may render are in the performance of his legal duties. The Nebraska, 75 Fed. 598, 21 C. C. A. 448.

**The transfer of the crew of a vessel in imminent peril to another vessel,** pursuant to an agreement of the respective captains, does not so dissolve the contract as to entitle them to salvage for subsequent labors in saving the distressed vessel according to the agreement. The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

**84.** Reed *v.* Hussey, 20 Fed. Cas. No. 11,646, Blatchf. & H. 525. See also The Holder Borden, 12 Fed. Cas. No. 6,600, 1 Sprague 144.

**85.** Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; Clayton *v.* The Harmony, 5 Fed. Cas. No. 2,871, 1 Pet. Adm. 70; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549. But see Phillips *v.* McCall, 19 Fed. Cas. No. 11,104, 4 Wash. 141, holding that if the master, acting for the benefit of his owner, can regain possession of his ship and cargo by a ransom, or by a purchase after capture and condemnation, he has full authority to do so, and, in the exercise of such authority, he is strictly within the line of his duty and is not entitled to compensation as for a salvage service.

**86.** Kidney *v.* The Ocean Prince, 38 Fed. 259; The Brabo, 33 Fed. 884; The Branston, 2 Hagg. Adm. 2 note; The Vrede, 30 L. J. Adm. 209, Lush. 322.

**Troops carried on a ship under contract with the government are not passengers,** and are entitled to salvage for staying by the vessel, and assisting in saving her from a total wreck, after they might have escaped from the vessel on coming near to the shore. The Merrimac, 17 Fed. Cas. No. 9,473, 1 Ben. 201.

**87.** Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Wash. 80, 3 Pet. Adm. 373 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; The Charles Henry, 5 Fed. Cas. No. 2,617, 1 Ben. 8; Newman *v.* Walters, 3 B. & P. 612, 7 Rev. Rep. 886; The Salacia, 2 Hagg. Adm. 262.

be first personally disconnected from the ship;[88] but his services, in order to constitute him a salvor, must be of an extraordinary character and beyond the line of his duty, and not mere ordinary services such as pumping and aiding in working the ship by usual and well-known means.[89] But the fact that the service rendered was extraordinary will not entitle a passenger to salvage if it appears that such service was unnecessary under the circumstances.[90] The compensation of a passenger for salvage service will be reduced by reason of his subsequent assumption of illegitimate authority over the vessel.[91]

**I. Vessel in Tow of Salvor.** Where a towboat, while towing a ship from one port to another, by a slight deviation, rescues an abandoned vessel and tows it astern to port, the towboat is alone entitled to salvage. A deviation for the purpose of rescuing a vessel may affect the insurance of the tow, and force a breach of the contract of towage; but that does not entitle the tow to compensation in the nature of salvage.[92]

**J. Vessels or Persons Causing or Contributing to Peril — 1. In General.** Salvors are not entitled to reward for saving property which they have by their own wrongful acts contributed to place in jeopardy.[93] Thus a vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision took place by her fault, wholly or in part.[94] But the owners, master, and crew of a vessel which renders assistance to a vessel

88. The Pennsylvania, 19 Fed. Cas. No. 10,945; Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110.

89. The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; Candee *v.* Sixty-Eight Bales Cotton, 48 Fed. 479; The Brabo, 33 Fed. 884; The Pennsylvania, 19 Fed. Cas. No. 10,945; Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110; The Stella Marie, Young Adm. (Nova Scotia) 16.

90. The Anastasia, 1 Fed. Cas. No. 346, 1 Ben. 166.

91. Brady *v.* American Steamship Co., 10 Phila. (Pa.) 283.

92. The Ephraim and Anna, 21 Fed. 346.

93. The Clarita, 23 Wall. (U. S.) 1, 23 L. ed. 146; The Relief, 51 Fed. 252.

**The raising of a sunken vessel** is not a salvage service for which compensation can be collected, where the sole owners of the vessels employed in the raising were also the sole owners of the one through whose fault the sinking occurred. The Pine Forest, 129 Fed. 700 [*affirmed* in 119 Fed. 999].

**A vessel, by breach of her contract with another vessel,** having contributed to put the latter vessel in danger and peril, cannot and ought not to be compensated for services, although otherwise salvage services, rendered in aiding to rescue her. The Krona, 28 Fed. 318.

**Misconduct of tug rendering service necessary.**— A tug under a contract to tow, which by misconduct or negligence or want of reasonable equipments occasions or materially causes danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from danger. Ward *v.* McCorkill, 7 Jur. N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444. And see The Homely, 12 Fed Cas. No. 6,661, 8 Ben. 495; The Robert Dixon, 5 P. & D. 54, 4 Aspin. 246, 42 L. T. Rep. N. S. 334, 28 Wkly. Rep. 716.

**Where both libellant and respondent are at fault** each of the parties will be required to bear one half of the cost of the salvage service. Lynch *v.* Chew, 159 Fed. 182.

94. The Clarita, 23 Wall. (U. S.) 1, 23 L. ed. 146; Moran *v.* The Minnie C. Taylor, 52 Fed. 323; The Chas. E. Soper, 19 Fed. 844; The Samuel H. Crawford, 6 Fed. 906; The Mary Patten, 16 Fed. Cas. No. 9,223, 2 Lowell 196; The Sampson, 21 Fed. Cas. No. 12,279, 4 Blatchf. 28 [*affirming* 13 Fed. Cas. No. 7,057, 11 N. Y. Leg. Obs. 263]; The Glengaber, L. R. 3 A. & E. 534, 1 Aspin. 401, 41 L. J. Adm. 84, 27 L. T. Rep. N. S. 386, 21 Wkly. Rep. 168; The Capella, L. R. 1 A. & E. 356, 16 L. T. Rep. N. S. 800. But see The Zambesi, 3 Can. Exch. 67, holding that where two vessels in collision are both at fault, and one vessel renders salvage services to the other, when the value of such services is determined it shall be divided and the salvaged vessel only be required to pay one half of the amount.

**The statute 25 & 26 Vict. c. 63, § 33,** does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision. The Retriever *v.* The Queen, 17 L. T. Rep. N. S. 329.

**Where a collision originated in the negligence of both a tug and her tow,** and that occurrence requires services of a salvage nature to be rendered by the tug to the tow, the tug cannot claim salvage remuneration. The Duc d'Aumale, [1904] P. 60, 9 Aspin. 502, 73 L. J. P. D. & Adm. 8, 89 L. T. Rep. N. S. 486, 20 T. L. R. 14, 52 Wkly. Rep. 319. Where a tug has caused damage to the tow through the negligence of the master of the tug alone, and the assistance of the tug is required by the tow in order to salve her, the

injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of another vessel by whose misconduct the collision takes place.[95] Nor is a vessel rendering salvage assistance deprived of her right to reward by the fact that she is employed by a vessel whose misconduct has rendered her employment necessary.[96]

2. WRECK OF VESSEL BY MASTER. The wrongful act of a master in wrecking his ship does not bar the claim of a salvor not in collusion with him.[97] But neither the salvor nor any person affected by his acts is entitled to compensation for services rendered to a vessel which has been wrecked, pursuant to an agreement between the salvor and the master of the vessel, for the purpose of salvage and division of the compensation allowed therefor.[98]

**K. Different Sets of Salvors and Successive Salvors**[99] — **1. IN GENERAL.** Although success in the service is one essential to a claim for salvage, yet there may be more than one set of salvors whose labors contribute to the successful result, and in such cases all who shared in the service, and materially contributed to the saving, are entitled to share in the reward.[1] Where several vessels at different times render valuable services to a vessel in a continuous peril, each is entitled to salvage, although the separate services of each alone would not have saved the vessel.[2] Nothing but a voluntary, absolute abandonment of the enterprise and property by the first set of salvors will forfeit the right to share with others who do save finally; such an abandonment as betokens an absence of all further interest in the property and an indifference as to whether it be saved or not.[3] This is the rule where beneficial service has been rendered which has made

other members of the crew are not entitled to salvage. The Duc d'Aumale, *supra*.

95. The Glengaber, L. R. 3 A. & E. 534, 1 Aspin. 401, 41 L. J. Adm. 84, 27 L. T. Rep. N. S. 386, 21 Wkly. Rep. 168.

96. The Glengaber, L. R. 3 A. & E. 534, 1 Aspin. 401, 41 L. J. Adm. 84, 27 L. T. Rep. N. S. 386, 21 Wkly. Rep. 168.

97. Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713; Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

98. Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713; Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

99. Action against co-salvor see *infra*, IX, B, 2.

Apportionment among salvors see *infra*, VII, B, 1, b.

1. The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Island City, 1 Black (U. S.) 121, 17 L. ed. 70; The Strathnevis, 76 Fed. 855; Johnson *v.* The El Dorado, 50 Fed. 951; Gaynor *v.* The Gler, 31 Fed. 425; The Gary *v.* The Sherman, 10 Fed. Cas. No. 5,259, Chase 468; Norris *v.* The Island City, 18 Fed. Cas. No. 10,306, 1 Cliff. 219; The Ottawa, 18 Fed. Cas. No. 10,617, 1 Lowell 274; Ryan *v.* The Cato, 21 Fed. Cas. No. 12,184, Bee 241; The Auguste Legembre, [1902] P. 123, 9 Aspin. 279, 71 L. J. P. D. & Adm. 53, 86 L. T. Rep. N. S. 358, 18 T. L. R. 373, 50 Wkly. Rep. 622.

If salvors, in effecting a salvage service, themselves fall into distress, and are relieved by other salvors, they do not lose their original right to salvage; but the second salvors only partake in the salvage according to their merit. Second salvors cannot lawfully make it a condition of giving assistance that the original salvors shall abandon all claims to salvage. The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

Salvors who save life, but no property, will share with those who save property, according to the merits of the service. The Mulhouse, 17 Fed. Cas. No. 9,910.

A tug which gets a burning vessel afloat, and tows her to a place where other parties put out the fire, renders salvage service, although both sets of salvors deny coöperation. The Huntsville, 12 Fed. Cas. No. 6,916.

Crew of disabled tug.— One of the tugs originally sent out by a tugboat company, after reaching the open sea, which was very rough, became disabled, and was obliged to return, and another tug subsequently took her place in the service. It was held that inasmuch as her owner effected the salvage of the ship, the officers and crew of such tug were entitled to share in the award. The Flottbek, 112 Fed. 682.

2. Muntz *v.* Raft of Timber, 15 Fed. 555, 4 Woods 197; Adams *v.* The Island City, 1 Fed. Cas. No. 55, 1 Cliff. 210; The Jonge Bastiaan, 5 C. Rob. 322; The Atlas, Lush. 518. See also The E. U., 1 Spinks 63.

3. The Strathnevis, 76 Fed. 855; The Angeline Anderson, 34 Fed. 925; The Aberdeen, 27 Fed. 479 (holding that there can be no recovery for services rendered to a vessel however meritorious the services may be, where the vessel is abandoned by the salvors before reaching a place of safety, even though it is subsequently taken up by another vessel and brought safely into port. The succor rendered by the latter vessel cannot be considered as a continuation of that rendered by the libellants, so as to enable the libellants to recover as salvors); The Tolomeo, 7 Fed. 497; The Killeena, 6 P. D. 193, 4 Aspin. 472,

the final saving more certain or easy, but it will not hold good where but futile attempts have been made, no matter how strenuous or well intended they may have been. In that class of cases nothing but constant exertion and continued possession will continue such right.[4] Salvors are not deprived of a remedy because another set of salvors neglect or refuse to join in the suit,[5] nor will such neglect or refusal benefit the libellants by giving them any claim to a larger compensation, as the non-prosecution by one set of salvors inures, not to the libellants prosecuting the claim, but to the owners of the property saved.[6]

**2. Right to Interfere and Participate in Salvage.** Parties taking possession of an abandoned vessel or cargo have a right to retain it until the salvage is completed, and no other person has the right to interfere with them, provided they are able to effect the salvage, and are conducting the business with fidelity and vigor.[7] But if their own means are inadequate they are bound to accept additional assistance, if offered.[8] Those beginning a salvage service, and in the successful prosecution of it, are entitled to be regarded as the meritorious salvors of whatever is preserved, when wrongfully interrupted in the work by others who complete the salvage.[9] Licensed wrecking vessels are entitled to be admitted to assist in the order in which they arrive, if further assistance is needed, and if some are excluded, and a vessel arriving after them is permitted to render assistance which they could have rendered, they will be permitted to share in the salvage; but they are not entitled to an equal share with the others, and they should be awarded only as much as, under all the circumstances, the court may think them equitably entitled to, and so much as will make it to the interest of the wreckers to conform to the rule above stated.[10]

## V. Persons and Property Liable For Salvage.

**A. Persons Liable — 1. In General.** The persons liable for salvage are those who would have borne the loss had the service not been performed, and

51 L. J. Adm. 11, 45 L. T. Rep. N. S. 621, 30 Wkly. Rep. 339; The India, 1 W. Rob. 406.

**Abandonment compelled by weather.**— Where salvors employed by the owner on contingent compensation are compelled to abandon the wreck on account of the severity of the weather, and it drifts to sea and is saved by another, the former have no claim to salvage compensation. The John Wurts, 13 Fed. Cas. No. 7,434, Olcott 462.

4. The Tolomeo, 7 Fed. 497; The John Wurts, 13 Fed. Cas. No. 7,434, Olcott 462.

5. The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870.

6. The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870.

**The fact that the salvors are assisted by others who are not strangers to the property saved** does not accrue to their benefit even though the others make no claim to salvage. They are entitled only to the reasonable *pro rata* share of the remuneration which would be ordinarily awarded to all parties. Gonzales *v.* U. S., 42 Ct. Cl. 299.

7. The Amethyst, 1 Fed. Cas. No. 330, 2 Ware 28, 2 N. Y. Leg. Obs. 312; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77; The Mimi, 17 Fed. Cas. No. 9,627*a*; The Yucatan, 30 Fed. Cas. No. 18,194; The Blenden-Hall, 1 Dods. 414; The Maria Edw. Adm. 175; The Dantzic Packet, 3 Hagg. Adm. 383; The Queen Mab, 3 Hagg. Adm. 242; The Effort, 3 Hagg. Adm. 165; The Charlotta, 2 Hagg. Adm. 361; The Pickwick, 16 Jur. 669; The Glory, 14 Jur. 676; The Fleece, 7 Notes of Cas. 534, 3 W. Rob. 278.

**The claim that property was in possession of prior salvors is not sustained** if it appears that their efforts to save it had not been and would not be successful. The Cheeseman *v.* Two Ferryboats, 5 Fed. Cas. No. 2,633, 2 Bond 363.

8. The Amethyst, 1 Fed. Cas. No. 330, 2 Ware 28, 2 N. Y. Leg. Obs. 312; The Concordia, 6 Fed. Cas. No. 3,092; The Ida L. Howard, 12 Fed. Cas. No. 6,999, 1 Lowell 2; The Dantzic Packet, 3 Hagg. Adm. 383.

**The burden is upon subsequent salvors** to prove that previous salvors in possession were unable to effect the service, or engaged or adopted their assistance. The Blenden-Hall, 1 Dods. 414; The Eugene, 3 Hagg. Adm. 156; The Pickwick, 16 Jur. 669.

9. The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77; A Quantity of Iron, 20 Fed. Cas. No. 11,496, 2 Sprague 51; The Kathleen, L. R. 4 A. & E. 269, 2 Aspin. 367, 43 L. J. Adm. 39, 31 L. T. Rep. N. S. 284, 23 Wkly. Rep. 350; The Blenden-Hall, 1 Dods. 414; The Fleece, 7 Notes of Cas. 534, 3 W. Rob. 278. See also The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807.

10. Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

**A vessel is deemed to have "arrived"** when

who therefore reap the benefit of such service.[11] The liability to pay salvage is not confined to the actual legal owners of the property saved, but extends to those who have an interest in that property, which interest has been saved by the placing of the property itself in a position of security.[12] This rule is expressed by rule 19 of the supreme court in admiralty which provides that suits for salvage *in personam* may be against the party "at whose request, and for whose benefit, the salvage service has been performed."[13] The request may be implied as well as express.[14]

**2. Life Salvage.** Liability to pay life salvage is imposed upon owners of the cargo as well as upon owners of the ship;[15] but such liability is not a general personal liability to be enforced in any circumstances, whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction.[16]

she is in reasonable hailing distance, ready to receive and obey orders; and a subsequent change in the position, by standing off and on, although she might be further from the wreck than another vessel just arriving, will not forfeit her right. Acosta *v.* The Halcyon, 1 Fed. Cas. No. 31.

**11.** Cox *v.* May, 4 M. & S. 152, 16 Rev. Rep. 422.

**12.** The Port Victor, [1901] P. 243, 9 Aspin. 163, 182, 70 L. J. P. & Adm. 52, 48 L. T. Rep. N. S. 677, 17 T. L. R. 538, 49 Wkly. Rep. 578; Five Steel Barges, 15 P. D. 142, 6 Aspin. 580, 59 L. J. Adm. 77, 63 L. T. Rep. N. S. 499, 39 Wkly. Rep. 127.

**Charterers of a ship on a time charter** who receive goods on board the ship for purposes of delivery in consideration of freight, and who are responsible for their safe delivery, have such an interest in the goods as will support a claim for salvage services rendered in respect of them. Port Victor, [1901] P. 243, 9 Aspin. 163, 182, 70 L. J. P. D. & Adm. 52, 84 L. T. Rep. N. S. 677, 17 T. L. R. 538, 49 Wkly. Rep. 578.

**If a shipwrecked vessel is abandoned to the underwriters,** salvage must be borne by them. Cartwell *v.* The John Taylor, 5 Fed. Cas. No. 2,482, Newb. Adm. 341; The Two Catherines, 24 Fed. Cas. No. 14,288, 2 Mason 319.

**13.** Chapman Derrick, etc., Co. *v.* Providence-Washington Ins. Co., 68 Fed. 932; Baxter *v.* Heilner, 38 Fed. 668. See also Fleming *v.* Lay, 109 Fed. 952, 48 C. C. A. 748.

**A railroad company** whose freight, while being transported across a river on barges under contract with another, is saved from loss by a salvage service, is personally liable to the salvor for the salvage compensation. Seamen *v.* Erie R. Co., 21 Fed. Cas. No. 12,582, 2 Ben. 128.

**A bailee of salved property** who has rendered himself liable for the lien of salvors may be proceeded against in admiralty under rule 19. Gates *v.* Johnson, 10 Fed. Cas. No. 5,268, Brunn. Col. Cas. 633. A bailee in possession of a floating bath for repairs who disobeys the owner's directions as to its fastenings for security from storms, and increases its weight and exposure, takes the risk of its going adrift and is bound to indemnify the owner for salvage thereupon. Tebo *v.* New York, 61 Fed. 692.

**The federal government is liable for salvage** upon the duties collected by it upon property afterward saved from loss while in the harbor of New York, and in the possession and control of the customs officers, since, under U. S. Rev. St. § 2984, authorizing the secretary of the treasury to refund duties if the property is destroyed, the government has a pecuniary interest in the property saved. U. S. *v.* Cornell Steamboat Co., 202 U. S. 184, 26 S. Ct. 648, 50 L. ed. 987.

**14.** Tebo *v.* New York, 61 Fed. 692; Baxter *v.* Heilner, 38 Fed. 668.

**15.** The Schiller, 2 P. D. 145, 3 Aspin. 439, 36 L. T. Rep. N. S. 714 [*affirming* 3 Aspin. 226, 46 L. J. Adm. 9]; The Fusilier, 11 Jur. N. S. 289, 34 L. J. Adm. 25, 12 L. T. Rep. N. S. 186, 3 Moore P. C. N. S. 51, 13 Wkly. Rep. 592, 16 Eng. Reprint 19, holding that the owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage.

**Theory of remuneration.**— The remuneration of service in life salvage does not rest upon a consideration of any direct benefit conferred upon those upon whom there falls the liability to pay, but rather upon the interest which the community has in encouraging the efforts of salvors; and upon this ground the owners of cargo on board a salved vessel are liable to a share of the payment of life salvage for the rescue of those on board. The Fusilier, 11 Jur. N. S. 289, 34 L. J. Adm. 25, 12 L. T. Rep. N. S. 186, 3 Moore P. C. N. S. 51, 13 Wkly. Rep. 592, 16 Eng. Reprint 19.

**16.** The Annie, 12 P. D. 50, 6 Aspin. 117, 56 L. J. Adm. 70, 56 L. T. Rep. N. S. 500, 35 Wkly. Rep. 366; The Renpor, 8 P. D. 115, 5 Aspin. 98, 52 L. J. Adm. 49, 48 L. T. Rep. N. S. 887, 31 Wkly. Rep. 640; The Sarpedon, 3 P. D. 28, 3 Aspin. 509, 37 L. T. Rep. N. S. 505, 26 Wkly. Rep. 374.

**Ship wholly lost.**— When lives and cargo have been salved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the

**B. Property Liable — 1. In General.** Where a ship and cargo are saved together by common or continuous labor or service, all the property saved is liable to contribute to the payment of salvage.[17] Cargo is not liable for salvage where the owners of the vessel were responsible for her seaworthiness, and the disaster which made the salvage necessary occurred through her unseaworthiness.[18] On the same principle salvage payable by cargo-owners in consequence of the negligence of the master is recoverable against the vessel;[19] but where the negligence of the master is only the remote cause of the salvage service, the proximate cause being a storm, the vessel is not liable.[20]

**2. Property of United States.** Personal property of the United States on board a vessel is liable to a lien for salvage services rendered in saving the property.[21]

## VI. Negligence or Misconduct of Salvors.

**A. Skill and Care Required.** A salvor does not undertake to succeed in saving the property in peril,[22] but only that he will exercise ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service.[23] In case of necessity, and where there are no others on the spot capable of rendering more efficient assistance, persons without nautical skill, or vessels inefficiently equipped, may undertake a salvage service, and their efforts will be considered with indulgence.[24] But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons present competent to discharge those duties.[25] Salvors are responsible for the reasonable care of the property which they take in charge,[26] and are bound to use every reasonable degree of diligence to prevent plunderage by others.[27] Salvage services require the best of faith in every relation to the saved property, from its commencement to a final parting with it, or sundering of all connection, and it is as much the duty of the salvor to assist in saving wrecked property from unnecessary expense, after its saving, as long as it is in his custody and control, as it is to rescue it from loss.[28] Furthermore it is the duty of a salvor

lives, and the owners of the lost ship are not liable to contribute to such payment. The Sarpedon, 3 P. D. 28, 3 Aspin. 509, 37 L. T. Rep. N. S. 505, 26 Wkly. Rep. 374.

17. Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. 127, 20 Blatchf. 557.

Apportionment see *infra*, VII, B.

Property converted into specie.— An action will lie *in rem* to recover a salvage compensation against the proceeds of salved property converted into specie, provided the same action would lie against the property itself. Waterbury *v.* Myrick, 29 Fed. Cas. No. 17,253, Blatchf. & H. 34.

Personal effects, such as wearing apparel, are not liable for salvage. The Willem III, L. R. 3 A. & E. 487, 1 Aspin. 129, 25 L. T. Rep. N. S. 386, 20 Wkly. Rep. 216.

Landing cargo to lighten vessel.—A vessel in imminent peril should bear an equitable proportion of the salvage awarded for landing the cargo, when the vessel is thereby lightened and enabled to pass to a place of greater safety (The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412); but where in such a case the vessel receives no benefit from the taking off of the cargo, the salvors have no claim for salvage against the ship, but only against the portion of cargo received and saved by them (The Alabamian, 1 Fed. Cas. No. 128).

18. The Delaware, 7 Fed. Cas. No. 3,761, 6 Blatchf. 527.

19. The Princess Royal, L. R. 3 A. & E. 41, 39 L. J. Adm. 43, 22 L. T. Rep. N. S. 39 (under 24 Vict. c. 10).

20. Kenedy *v.* The R. D. Bibber, 50 Fed. 841, 2 C. C. A. 50.

21. The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875 [*affirming* 22 Fed. Cas. No. 12,939, 6 Blatchf. 138, 2 Nat. Bankr. Rep. 3]; Rees *v.* U. S., 134 Fed. 146; U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

22. The Allegiance, 1 Fed. Cas. No. 207, 6 Sawy. 68.

23. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The Henry Steers, Jr., 110 Fed. 578; The Allegiance, 1 Fed. Cas. No. 207, 6 Sawy. 68; The Mulhouse, 17 Fed. Cas. No. 9,910; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807; The Cape Packet, 6 Notes of Cas. 565, 3 W. Rob. 122; The Neptune, 1 W. Rob. 297.

24. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The Henry Steers, Jr., 110 Fed. 578; The Dygden, 1 Notes of Cas. 115.

25. The Dygden, 1 Notes of Cas. 115.

26. The Bremen, 111 Fed. 228; Serviss *v.* Ferguson, 84 Fed. 202, 28 C. C. A. 327; The Albany, 44 Fed. 431; The Sumner, 23 Fed. Cas. No. 13,608, Brown Adm. 52.

27. The Albany, 44 Fed. 431; The Mulhouse, 17 Fed. Cas. Cas. No. 9,910; Nickerson *v.* The John Perkins, 18 Fed. Cas. No. 10,252, 3 Ware 87.

28. The Dolcoath, 16 Fed. 264.

to aid the master in all ways, and he should in no case refuse assistance in the way proposed because they differ in judgment, unless there is unquestionably bad faith in the means suggested.[29]

**B. Forfeiture by Negligence or Misconduct — 1. In General.** Negligence or misconduct on the part of salvors will always reduce their claims to a salvage compensation.[30] The maritime law demands most emphatically from salvors scrupulous good faith and uprightness of conduct, giving them a liberal reward for fidelity and vigilance, and visiting them with severe reprobation and diminished compensation for every negligence;[31] and gross misconduct or wilful negligence may work an entire forfeiture thereof.[32] If, however, success is finally

**29.** The Dolcoath, 16 Fed. 264.

**30.** See *infra*, VII, A, 3, d.

**31.** The Boston, 2 Fed. Cas. No. 1,673, 1 Sumn. 328.

**32.** The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229; The Bremen, 111 Fed. 228; The Henry Steers, Jr., 110 Fed. 578; The Albany, 44 Fed. 431; The Katie Collins, 21 Fed. 409; Anonymous, 1 Fed. Cas. No. 429; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713; The Howard, 12 Fed. Cas. No. 6,752*a*; James *v.* The Sarah A. Boice, 13 Fed. Cas. No. 7,183; The Mulhouse, 17 Fed. Cas. No. 9,910; Nickerson *v.* The John Perkins, 18 Fed. Cas. No. 10,252, 3 Ware 87; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; The Yucatan, 30 Fed. Cas. No. 18,194; The Capella, [1892] P. 70, 7 Aspin. 158, 66 L. T. Rep. N. S. 388; The Yan-Yean, 8 P. D. 147, 5 Aspin. 135, 52 L. J. P. D. & Adm. 67, 49 L. T. Rep. N. S. 186, 31 Wkly. Rep. 950; The Black Boy, 3 Hagg. Adm. 386 note; The Barefoot, 14 Jur. 841; The Lockwoods, 9 Jur. 1017; The Duke of Manchester, 4 Notes of Cas. 575, 2 W. Rob. 470; The Lady Worsley, 2 Spinks 253; The Charles Adolphe, Swab. 153; The Charles Forbes, Young Adm. (Nova Scotia) 172.

**Magnifying services performed.**— Where salvors fraudulently employ an unnecessary number of assistants (The Mt. Washington, 17 Fed. Cas. No. 9,887), or seek otherwise to magnify their services (The Bremen, 111 Fed. 228; The Aurora, 2 Fed. Cas. No. 659; The Byron, 4 Fed. Cas. No. 2,275), so as to obtain a larger salvage than that to which they were justly entitled, their whole salvage will be forfeited.

**A grossly excessive claim** will be dismissed. The C. M. Titus, 7 Fed. 826; The Alma, 5 Nova Scotia 789. And see The Ragnarok, 158 Fed. 694.

**Want of good faith** may destroy all claims to salvage. Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443, 4 West. L. Month. 281; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807.

**An attempt to compel an acceptance of aid** will forfeit all right to compensation for expenses incurred in going to the relief of a burning vessel. New Harbor Protection Co. *v.* The Charles P. Chouteau, 5 Fed. 463.

**Wilful breaking of boxes or packages of cargo** by salvors, except in cases of urgent necessity, will forfeit the salvage. No urgent necessity arises from the fact that the salvor's boats are not large enough to carry the boxes or packages intact, when there are vessels sufficiently large for the purpose at hand. The Isaac Allerton, 13 Fed. Cas. No. 7,088.

**Delay by salvors** in bringing their vessels to the assistance of a wrecked ship, while each strives with the other to be the first to board her in small boats, and their use of insufficient tackle and inadequate means to get her afloat promptly, are evidence of such gross and wilful negligence as merits the forfeiture of all compensation. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

**Failure to inform vessel of danger.**—A salvor forfeits all claims to salvage by neglecting to inform the salved vessel beforehand of an imminent and secret danger known to him, and against which he is able to warn her. American Ins. Co. *v.* Johnson, 1 Fed. Cas. No. 303, Blatchf. & H. 9.

**Boatmen who resist the employment of a steamship** to get the vessel off a sand forfeit all claim to salvage. The Martha, Swab. 489.

**Disobeying master of vessel.**—A licensed wrecker who proceeds in opposition to the master's protests is liable in an extraordinary degree to forfeiture of all compensation for anything short of final success. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914. See also The Cherokee, 31 Fed. 167.

**Misconduct of crew.**— The conduct of the crew of a stranded vessel in refusing to assist in getting her off after wreckers were employed, unless promised extra compensation out of the salvage, is deserving of the severest reprobation, and, although such a promise is given, the court will prohibit the payment of any part of the salvage to them. The York, 30 Fed. Cas. No. 18,140.

**Agreement for rebate.**—An agreement by salvors to pay the master of the salved vessel a share of the salvage award amounts to such misconduct on the part of the salvors as will probably forfeit all rights to salvage whatever. The Kolpino, 73 L. J. P. D. & Adm. 29. But when the offer was made after the services were completed, and without the authority of the libellant, the owner of the salvor, and led to no result, it should have no effect on the right of libellant to recover. South Carolina Steam-Boat Co. *v.* The Nellie Floyd, 39 Fed. 221.

**The evidence to establish misconduct or negligence** must be conclusive. The Cherokee, 31 Fed. 167; The Atlas, 8 Jur. N. S. 753, 31 L. J. Adm. 210, 6 L. T. Rep. N. S. 737, 15 Moore P. C. 329, 10 Wkly. Rep. 850, 15

obtained, no mere mistake or error of judgment in the manner of procuring it, nor conduct short of that which is wilful and may be considered criminal on the part of the salvors, will work an entire forfeiture of the salvage.[33] The thoughts or desires of salvors are immaterial, unless their conduct be influenced thereby.[34]

**2. Embezzlement or Failure to Deliver Property.** If salvors are guilty of embezzlement, whether at sea or in port,[35] or even after the property has been delivered into the custody of the law,[36] their claim for salvage is wholly forfeited.[37] The operation of this rule does not depend on the amount or value of the property embezzled; the law visits any embezzlement, although small, with an entire forfeiture of all claim for salvage.[38] It is the duty of a salvor to promptly bring into port, or forward, all articles received for the purposes of salvage, although of trifling value,[39] and by his failure to do so he forfeits all rights to salvage as against other property saved by him.[40] But where such articles are afterward voluntarily produced, and it appears that the neglect resulted merely from thoughtlessness, compensation is not necessarily forfeited thereby.[41] Where the question of salvage has been settled and liquidated without deduction for embezzlement, the owner of the vessel cannot set up in defense to an action by one of the crew for his share that the latter had embezzled a portion of the goods.[42]

**3. Effect of Forfeiture — a. As to Rights of Co-Salvors.** How far the misconduct of one salvor may be held to prejudice the claims of his co-salvors is not, in all cases, easy to determine. When it is purely an individual act, it will not prejudice co-salvors who are innocent and ignorant of it;[43] but all are guilty who

Eng. Reprint 519; The Charles Adolphe, Swab. 153.

33. The Atlas, 8 Jur. N. S. 753, 31 L. J. Adm. 210, 6 L. T. Rep. N. S. 737, 15 Moore P. C. 329, 10 Wkly. Rep. 850, 15 Eng. Reprint 519.

34. The Cherokee, 31 Fed. 167.

35. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70 [*affirming* 6 Fed. Cas. No. 3,410, 1 Cliff. 221].

36. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70 [*affirming* 6 Fed. Cas. No. 3,410, 1 Cliff. 221]; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

37. The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Anonymous, 1 Fed. Cas. No. 429; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; Cromwell *v.* The Island City, 6 Fed. Cas. No. 3,410, 1 Cliff. 221 [*affirmed* in 1 Black 121, 17 L. ed. 70]; Flinn *v.* The Leander, 9 Fed. Cas. No. 4,870, Bee 260; Lears *v.* One Cask Oil, 15 Fed. Cas. No. 8,161*a*; The Mulhouse, 17 Fed. Cas. No. 9,910; Nickerson *v.* The John Perkins, 18 Fed. Cas. No. 10,252, 3 Ware 87; The Rising Sun, 20 Fed. Cas. No. 11,858, 1 Ware 385; The Louisa, 7 Jur. 182.

**Embezzlement by a master who is part-owner** forfeits his rights to salvage both as master and owner. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

**Consumption of stores.**— The use and consumption by salvors, in the course of their services, and for their necessary subsistence, of stores found on board a derelict, is proper, although they could have brought stores of their own on board without great inconvenience. The Catherine Sudden, 1 Alaska 607; The Ida L. Howard, 12 Fed. Cas. No. 6,999, 1 Lowell 2.

**Robbing wreck — conviction.**— Persons who have been convicted under 9 & 10 Vict. c. 99, for improper interference with a wreck, cannot claim as salvors. The Wear Packet, 2 Spinks 256.

38. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70 [*affirming* 6 Fed. Cas. No. 3,410, 1 Cliff. 221]; Anonymous, 1 Fed. Cas. No. 429.

39. Anonymous, 1 Fed. Cas. No. 429.

**Salvors are not bound to take the salved ship to a foreign port** at the request of her master. Their duty is to take her to a place of safety; the onus is on the objectors to show that it was not a proper place. The Houthandel, 1 Spinks 25.

40. Harley *v.* Gawley, 11 Fed. Cas. No. 6,069, 2 Sawy. 7; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; The Sumner, 23 Fed. Cas. No. 13,608, Brown Adm. 52. See Hartshorn *v.* Twenty-Five Cases of Silk, 11 Fed. Cas. No. 6,168*a*, holding that a vessel which has picked up derelict goods at sea does not forfeit her salvage compensation by refusing to deliver them to the owner's agent at a small port into which she put because of adverse winds, and by carrying them to her port of destination, near by, where there was a better market.

41. Anonymous, 1 Fed. Cas. No. 429. See also The L. T. Knights, 15 Fed. Cas. No. 8,585, 1 Lowell 396, holding that a boy who was an actual salvor, and who had refused to join others of the salvor crew in plundering the salved vessel, but had taken two articles of very trifling value "as keepsakes," which he had offered to return to the claimant, will be awarded a less share than he would otherwise have had.

42. Blake *v.* Patten, 15 Me. 173.

43. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70; The L. T. Knights, 15 Fed. Cas. No. 8,585, 1 Lowell 396; The Missouri, 17 Fed. Cas. No. 9,654, 1 Sprague 260; The Mulhouse, 17 Fed. Cas. No. 9,910; Nicker-

consent to, connive at, or conceal it; who encourage it, or fail to prevent it when they can.[44] A salvor may, however, be entitled to compensation for services performed, although his conduct has been such as to forfeit all claims to a salvage remuneration.[45]

**b. As to Disposition of Forfeited Shares.** When the compensation of certain salvors has been forfeited for misconduct, it rests in the discretion of the court to determine what interest shall be benefited by the forfeiture.[46] Forfeited shares usually accrue to the benefit of the owners of the property, but this is not an inflexible rule.[47]

**C. Liability of Salvor For Negligence or Misconduct.** Gross neglect or wanton injury to the property saved not only works a forfeiture of all claim for salvage, but also renders the salvors liable for damages.[48] But mere negligence, not resulting in injury, does not constitute a ground for the recovery of damages;[49] and when liability is sought to be fastened upon a salving vessel solely because the attempted service was ineffectual, no independent injury having been caused by the salvor, there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or wilful misconduct.[50] The owner of a salvor vessel is not ordinarily liable for loss or damage caused by the unseaworthiness of his vessel, in the absence of any fraudulent misrepresentations or concealment as to its condition.[51] If, however, the salvor vessel is

son *v.* The John Perkins, 18 Fed. Cas. No. 10,252, 3 Ware 87; The Rising Sun, 20 Fed. Cas. No. 11,858, 1 Ware 385; The Neptune, 1 W. Rob. 297.

**Embezzlement by the salvor** crew does not work a forfeiture or diminution of the shares of the owner, where there is no fault on his part (The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328) except in the case of wrecking vessels (The Mulhouse, 17 Fed. Cas. No. 9,910).

44. The Island City, 1 Black (U. S.) 121, 17 L. ed. 70 [*affirming* 6 Fed. Cas. No. 3,410, 1 Cliff. 221]; The Cherubim, Ir. R. 2 Eq. 172.

**All salvors present when one of their number is guilty of wilful wrong** to the property are liable to forfeiture of their compensation if the wrong-doer cannot be discovered. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

**The master of a wrecking vessel by countenancing a wrongful injury** to a wrecked vessel by one of his crew, and by falsely denying knowledge thereof, forfeits all right to salvage. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

45. American Ins. Co. *v.* Johnson, 1 Fed. Cas. No. 303, Blatchf. & H. 9.

**Where guilt cannot be fixed.**— Where a vessel, while lying on a mud bank with wrecking vessels alongside and anchored near, is bored with augers and fills with water, and the guilt cannot be fixed, the court will allow only simple compensation for work and labor performed in saving the cargo and materials, except as to salvors affirmatively proven innocent. The Francis Ashby, 9 Fed. Cas. No. 5,040.

46. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

47. The L. T. Knights, 15 Fed. Cas. No. 8,585, 1 Lowell 396; The Rising Sun, 20 Fed. Cas. No. 11,858, 1 Ware 385; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

**As determined by cause of forfeiture.**— It has been held that compensation for salvage services, which has been forfeited for a neglect of duty which increased the labors and difficulties of other salvors, should be divided between such other salvors and the claimants, while compensation for salvage services which have been forfeited for a wrongful appropriation of the property by salvors to their own use should be paid to the claimants. Anonymous, 1 Fed. Cas. No. 429.

48. The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The Henry Steers, Jr., 110 Fed. 578; Serviss *v.* Ferguson, 84 Fed. 202, 28 C. C. A. 327; The Albany, 44 Fed. 431; The Senator, 21 Fed. Cas. No. 12,664, Brown Adm. 372; The Sumner, 23 Fed. Cas. No. 13,608, Brown Adm. 52; The C. S. Butler, L. R. 4 A. & E. 178, 2 Aspin. 237, 43 L. J. Adm. 17, 30 L. T. Rep. N. S. 475, 22 Wkly Rep. 759; The Kate, Brown & L. 218, 10 Jur. N. S. 444, 33 L. J. Adm. 122, 9 L. T. Rep. N. S. 782.

**Where the salvor has not been guilty of an intentional tort** in making a wrongful sale of salved property, he is liable only to the extent of the salvage received by him. American Ins. Co. *v.* Johnson, 1 Fed. Cas. No. 303, Blatchf. & H. 9.

**One attempting in good faith to save an abandoned vessel,** with reasonable expectation of success, is not a trespasser, or liable for the injury caused by a storm which compelled her abandonment. The Ann L. Lockwood, 37 Fed. 233.

49. The Northwester, 18 Fed. Cas. No. 10,333.

50. The Infanta Maria Theresa, 188 U. S. 283, 23 S. Ct. 412, 47 L. ed. 477; The Laura, 14 Wall. (U. S.) 336, 20 L. ed. 813; The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The Henry Steers, Jr., 110 Fed. 578.

51. The Mulhouse, 17 Fed. Cas. No. 9,910.

one which is regularly engaged in the wrecking business, the owner will be liable for loss or damage so caused.[52]

## VII. THE AWARD.

**A. In General — 1. Principle and Basis of Award — a. Theory and Purpose of Remuneration.** The principle of salvage compensation is not confined to mere compensation for work done and labor performed;[53] but is expanded so as to comprehend a reward for the risk of life and property, labor and danger,[54] as well as a premium sufficiently liberal to afford an inducement to similar exertions to preserve the life and property of others.[55] The claims of simple justice to the

**52.** The Mulhouse, 17 Fed. Cas. No. 9,910; The Pacific, 18 Fed. Cas. No. 10,642.

**53.** The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Jefferson, 158 Fed. 358; The Flora Rodgers, 152 Fed. 286; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; The Queen of the Pacific, 21 Fed. 459; The Katie Collins, 21 Fed. 409; The Egypt, 17 Fed. 359; The Mary E. Dana, 17 Fed. 353, 5 Hughes 362; The Sandringham, 10 Fed. 556, 5 Hughes 316; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31; Aitchison *v.* Lohre, 4 App. Cas. 755, 4 Aspin. 168, 49 L. J. Q. B. 123, 41 L. T. Rep. N. S. 323, 28 Wkly. Rep. 1; The Industry, 3 Hagg. Adm. 203; The Hector, 3 Hagg. Adm. 90; Nicholson *v.* Chapman, 2 H. Bl. 254.

**54.** The City of Seattle, 1 Alaska 471; The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; Fisher *v.* The Sybil, 9 Fed. Cas. No. 4,824, Brunn. Col. Cas. 274, 5 Hughes 61 [*affirmed* in 4 Wheat. 98, 4 L. ed. 522]; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31; The W. F. Garrison, 29 Fed. Cas. No. 17,475, 1 Lowell 139; The Industry, 3 Hagg. Adm. 203; The Hector, 3 Hagg. Adm. 90; The Calypso, 2 Hagg. Adm. 209. See also *infra*, VII, A, 1, b, (I).

**There is no distinction between river salvage and sea salvage,** the danger and meritorious nature of the services in either case being the ground on which the *quantum* of compensation is awarded. The Carrier Dove, Brown & L. 113, 19 L. T. Rep. N. S. 768, 2 Moore P. C. N. S. 243, 15 Eng. Reprint 893.

**55.** The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Jefferson, 158 Fed. 358; The Western Star, 157 Fed. 489; The Lottie E. Hopkins, 133 Fed. 405; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; The Coya, 108 Fed. 413; The Queen of the Pacific, 21 Fed. 459; The Katie Collins, 21 Fed. 409; The Egypt, 17 Fed. 359; The Mary E. Dana, 17 Fed. 353, 5 Hughes 362; Anderson *v.* The Edam, 13 Fed. 135; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. 127, 20 Blatchf. 557; The Sandringham, 10 Fed. 556, 5 Hughes 316; Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; Fisher *v.* The Sybil, 9 Fed. Cas. No. 4,824, Brunn. Col. Cas. 274, 5 Hughes 61 [*affirmed* in 4 Wheat. 98, 4 L. ed. 522]; The Henry Ewbank, 11 Fed. Cas. No. 6,376, Sumn. 400; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; Sonderburg *v.* Ocean Towboat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146; Taylor *v.* Twenty-five Thousand Dollars, 23 Fed. Cas. No. 13,807, Bee 175; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31; The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443; The W. F. Garrison, 29 Fed. Cas. No. 17,475, 1 Lowell 139; Gonzales *v.* U. S., 42 Ct. Cl. 299; The William Beckford, 3 C. Rob. 355; The Sarah, 1 C. Rob. 313 note; The Industry, 3 Hagg. Adm. 203; The Clifton, 3 Hagg. Adm. 117; The Hector, 3 Hagg. Adm. 90.

**The object of the law of salvage** is to promote commerce and trade, and the general interests of the country, by preventing the destruction of property, and to accomplish this by appealing to the personal interest of the individual as a motive of action, with the assurance that he will not depend upon the owner of the property he saves for the measure of his compensation, but to a court of admiralty, governed by principles of equity. Seven Coal Barges, 21 Fed. Cas. No. 12,677, Biss. 297.

**Encouragement of wrecking companies.**— In fixing the amount of salvage compensation it is proper to take into view the policy of encouraging competent persons, on a dangerous coast, to associate together, and keep themselves prepared with boats and other appliances to render prompt assistance to vessels in distress. Merritt *v.* The St. Paul, 82 Fed. 104; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. 127, 20 Blatchf. 557; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; The Susan, 23 Fed. Cas. No. 13,630, 1 Sprague 499; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412; The Glengyle, [1898] P. 97, 8 Aspin. 341, 67 L. J. P. D. & Adm. 48, 78 L. T. Rep. N. S. 139, 14 T. L. R. 231, 46 Wkly. Rep. 308 [*affirmed* in [1898] A. C. 519, 8 Aspin. 436, 67 L. J.

salvor do not ordinarily extend beyond a fair compensation for work and labor. All beyond this is a gratuity given or withheld by the courts upon the grounds of public policy.[56] The courts should be liberal but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril.[57]

**b. Elements to Be Considered**— (I) *In General.* The leading considerations to be observed in determining the amount of an award for salvage services are well defined. In a number of cases they are stated as follows: (1) Enterprise in the salvors and risk incurred; (2) risk of loss to the property salved; (3) the skill and labor shown and incurred by the salvors; (4) the value of the salved property. Where all these circumstances concur a large and liberal reward is given; where none or only in a small degree, it is little more than remuneration for work and labor.[58] In the majority of the cases, however, the following statement of the ingredients of a salvage service is adopted: (1) The time and labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service; (3) the value of the property employed by the salvors in rendering the service, and the danger to which it was exposed; (4) the risk incurred by the salvors; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued.[59] In addition to these six main ingredients the court will consider the degree of success achieved, and the proportions of value lost and saved, and will award a higher proportion even on large values, in cases of salvage with but slight injury, than where only the ship or the cargo, or only portions of it, are saved.[60] The incidental risks or responsibilities incurred by the salvor vessel or her owners, if any, through any

P. D. & Adm. 87, 78 L. T. Rep. N. S. 801, 14 T. L. R. 522].

**Against passenger ships.**— Liberal awards are given against great passenger and mail steamship companies. The London Merchant, 3 Hagg. Adm. 394; The Ardincaple, 3 Hagg. Adm. 151.

56. The Lyman M. Law, 122 Fed. 816; The Katie Collins, 21 Fed. 409; The Crown, 6 Fed. Cas. No. 3,450; Pent *v.* Ocean Belle, 19 Fed. Cas. No. 10,961.

57. The Elena G., 61 Fed. 519; Murphy *v.* The Suliote, 5 Fed. 99, 102, 4 Woods 19, where it is said: "Salvage should be regarded in the light of compensation and reward, not in the light of prize. . . . [It] is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring efforts of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects."

58. The Viola, 55 Fed. 829, 5 C. C. A. 283; Robson *v.* The Huntress, 20 Fed. Cas. No. 11,971, 2 Wall. Jr. 59; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412; The Cleopatra, 3 P. D. 145, 47 L. J. P. 72; The Clifton, 3 Hagg. Adm. 117; The W. G. Putnam, Young Adm. (Nova Scotia) 271.

59. The City of Seattle, 1 Alaska 471; The Blackwall, 10 Wall. (U. S.) 1, 19 L. ed. 870; The Jefferson, 158 Fed. 358; The Western Star, 157 Fed. 489; The Chief, 147 Fed. 875; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; The R. R. Rhodes *v.* Fay, 82 Fed. 751, 27 C. C. A. 258; The Alamo, 75 Fed. 602, 21 C. C. A. 451; The Elmbank, 69 Fed. 104, 16 C. C. A. 164; The Kimberley, 40 Fed. 289; The Indiana, 22 Fed. 925; The Queen of the Pacific, 21 Fed. 459; The Katie Collins, 21 Fed. 409; The Egypt, 17 Fed. 359; The Mary E. Dana, 17 Fed. 353, 5 Hughes 362; The Annie Henderson, 15 Fed. 550; The Sandringham, 10 Fed. 556, 5 Hughes 316; The B. C. Terry, 9 Fed. 920; The Plymouth Rock, 9 Fed. 413; Murphy *v.* The Suliote, 5 Fed. 99, 4 Woods 19; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

**Neither the value of the property imperiled, nor the exact quantum of service performed,** is a controlling consideration in determining the compensation to be made. The peril, hardship, fatigue, anxiety, and responsibility encountered by the salvors in the particular case, the skill and energy exercised by them, the gallantry, promptitude, and zeal displayed, are all to be considered, and the salvors are to be allowed such a generous recompense as will encourage and stimulate similar services by others. The Baker, 25 Fed. 771, 23 Blatchf. 389.

**For other cases discussing the ingredients of salvage service** see Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; The M. B. Stetson, 16 Fed. Cas. No. 9,363, 1 Lowell 119; Taylor *v.* Twenty-Five Thousand Dollars, 23 Fed. Cas. No. 13,807, Bee 175; The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443.

60. The Sandringham, 10 Fed. 556, 5 Hughes 316.

deviation from her voyage in rendering the service, may also be an important element.[61] The circumstances entitled to most consideration in all cases are the value of the property saved, the extent of the labor and services, and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to with uncommon favor.[62] Where there is neither risk of life nor property involved in a salvage service, nor any special knowledge or ingenuity required or used therein, the principal elements in the compensation of the salvor are the value of the labor and care bestowed upon the saved property, and the degree of integrity and responsibility involved in keeping it safely and duly accounting for it, together with the risk of success.[63] The value of a salvage service performed is not to be estimated by the light of subsequent events, but of the facts which seemed to surround it at the time.[64]

(II) *Place of Rendering Services.* As every salvage award consists: (1) Of the compensation due for the labor and material actually expended by the salvor; and (2) of the bounty allowed for enterprise, risk, and success in the service, this latter ingredient should be larger for salvage services on a long and dangerous seaboard than on other coasts,[65] or rivers,[66] or the Great Lakes.[67]

(III) *Character of Vessel or Person Rendering Service* — (A) *In General.* A further element to be considered in determining the amount of a salvage award sometimes exists in the peculiar character of the vessel engaged in the salvage service.[68] So also the peculiar nature of a vessel's employment is to be considered in determining the amount of her award.[69]

(B) *Professional Wreckers.* Salvage services rendered by professional wreckers, who constantly maintain outfits suitable for the purpose, in places, such as the Florida coast, where the interests of commerce require it, are to be more liberally rewarded than like services would be if rendered in other places, and by persons and vessels pursuing other avocations.[70] The amount awarded, however,

61. The Plymouth Rock, 9 Fed. 413.

62. The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207.

63. The Cairnsmore, 20 Fed. 519.

64. The Young America, 20 Fed. 926.

65. The Mary E. Dana, 17 Fed. 353, 5 Hughes 362.

**Salvage services on the South Atlantic coast** demand specially liberal salvage awards, on account of their peculiar difficulties and dangers, and the special necessity for skilled wreckers. The Taylor Dickson, 33 Fed. 886; The Fannie Brown, 30 Fed. 215; The Mary E. Dana, 17 Fed. 353, 5 Hughes 362; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

**Where the coast is thinly settled, and lined with dangerous sand-bars,** and frequently visited by violent storms and hurricanes, this fact may be considered in ascertaining the amount of a salvage award. The Egypt, 17 Fed. 359.

**In harbor cases where tugs are abundant** and on the ground in time to give needed aid, large awards are not only unnecessary, but contrary to principle. The Priscilla, 153 Fed. 476; The O. C. Hanchett, 76 Fed. 1003, 22 C. C. A. 678.

66. McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130; Mattingly *v.* Three Hundred and Fifty-Seven Bales of Cotton, 16 Fed. Cas. No. 9,294, 2 Flipp. 288.

67. Ensign *v.* The Peerless, 8 Fed. Cas. No. 4,494.

68. The City of Seattle, 1 Alaska 471.

**For example,** if the salvor were a large steam vessel, and were compelled to go into a narrow channel to render the service, whereby it was itself endangered, the service is more meritorious than if it were rendered by a powerful tug built for the special purpose (The City of Seattle, 1 Alaska 471); or, if the only vessel available were a small tug or ferryboat, and the property salved were very valuable and difficult to manage by the inadequate power, the services of such small tug or ferryboat are more worthy than if it had been a larger boat with greater power (The City of Seattle, *supra*).

69. Hall *v.* The Bay of Naples, 44 Fed. 90.

70. Peacon *v.* The Amazon, 19 Fed. Cas. No. 10,871; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Virden *v.* The Caroline, 28 Fed. Cas. No. 16,956; Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120; The Glengyle *v.* Neptune Salvage Co., [1898] A. C. 519, 8 Aspin. 436, 67 L. J. P. D. & Adm. 87, 78 L. T. Rep. N. S. 801, 14 T. L. R. 522. *Compare* The J. F. Farlan, 13 Fed. Cas. No. 7,314, 8 Blatchf. 207 [*affirming* 13 Fed. Cas. No. 7,313, 3 Ben. 206] (holding that the fact that the vessels of a corporation maintained for wrecking and salvage purposes at a heavy expense are often unemployed is inadmissible as a basis of fixing salvage compensation in a case where salvage service has been performed by one of such vessels); Sturgis *v.* The Joseph Johnson, 23 Fed. Cas. No. 13,576,

is to be adjusted in conformity rather with the claims of an owner of property put at risk than with those of salvors for personal courage and heroism.[71]

(c) *Steam Vessels.* It is the policy of the law to give a liberal salvage remuneration to powerful and well equipped steamers which render service in saving property that is in peril at sea;[72] but the true character of the individual service must be looked at under the circumstances of each particular case.[73] Thus, owing to its comparative independence of the winds and currents, a steam tug may perform a salvage service with comparative safety to herself, and therefore the matter of risk to herself and crew is to be estimated accordingly, in fixing the value of such service.[74]

(d) *Public Vessels.* As the officers and crews of public vessels risk no property, and their time is paid for by the public, they are paid a less rate of compensation for salvage services than would be allowed to other persons for like services.[75]

(e) *Vessels Associated in Voyage.* Where the salving and salved ships are associated in a voyage in a common interest, a lesser amount of salvage is awarded than where the ships are wholly independent of each other and the salvage accidental.[76]

(iv) *Number of Salvors.* In fixing the total award, the number of salvors necessary to perform the services may be considered,[77] but not the number actu-

19 How. Pr. (N. Y.) 229 (holding that the value of a tug which is constructed and maintained for the purpose of rendering aid to vessels in distress is not a controlling element in determining the amount of a salvage award, where she was not sent for because of her great power or special adaptation for the purpose required, but where, in the usual course of her business, she offered her services to a disabled vessel, which might have been equally well served by other vessels of less power); Sturgis *v.* The Vickery, 23 Fed. Cas. No. 13,577*a* (holding that services rendered by tugs which are maintained for the purpose of aiding vessels in distress as a business and for profit are not to be regarded as entitled to the same high moral merit with those rendered by a vessel which goes out of her course of business on a call of humanity, and on an emergency, to give relief, primarily from motives of benevolence; and the reward is not to be measured on the principle of salvage, but rather on that of a *quantum meruit,* giving a reasonable consideration for the benefits realized, measured by the circumstances of risk and labor attending the transaction.

71. The Birdie, 3 Fed. Cas. No. 1,432, 7 Blatchf. 238.

72. Atlas Steamship Co. *v.* The Colon, 4 Fed. 469, 18 Blatchf. 277; Ehrman *v.* The Swiftsure, 4 Fed. 463, 5 Hughes 228 (where it was held that where service is rendered by a steamer in the course of its regular pursuit in towing and relieving a vessel under circumstances of no unusual danger, and without the exercise of unusual activity, enterprise, or heroism, the allowance should be sufficiently liberal to make everyone concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam vessels sufficiently powerful to make the assistance effective; but it should not be so large and so out of proportion to the services actually rendered as to cause vessels, in situations in which it was expedient that they should quickly accept such assistance, to hesitate or decline to receive it because of its ruinous cost); The Huntsville, 12 Fed. Cas. No. 6,916; The Mary Anne, 11 L. T. Rep. N. S. 85; The London Merchant, 3 Hagg. Adm. 394; The Earl Grey, 3 Hagg. Adm. 363; The Raikes, 1 Hagg. Adm. 246; The General Palmer, 5 Notes of Cas. 159 note; The Medora, 5 Notes of Cas. 156; The Kingalock, 1 Spinks 263, 26 Eng. L. & Eq. 596; The Santipore, 1 Spinks 231; The Martin Luther, Swab. 287; The Spirit of the Age, Swab. 286.

**The capability of steamers to perform services with greater rapidity and certainty** entitles them as salvors to a higher scale of reward. The Otto Hermann, 33 L. J. Adm. 189. See also The Palmyra, 1 Aspin. 182, 25 L. T. Rep. N. S. 884.

**Services rendered by steam vessel to steam vessel.**— The fact that salvage services were rendered by a steam vessel to a steam vessel is a ground for larger compensation than if both had been sailing vessels. The Huntsville, 12 Fed. Cas. No. 6,916.

**Where a steamer is offered salvors free of charge,** they cannot found a claim for increased compensation on its acceptance and use. The Ida L. Howard, 12 Fed. Cas. No. 6,999, 1 Lowell 2.

73. Atlas Steamship Co. *v.* The Colon, 4 Fed. 469, 18 Blatchf. 277.

74. The Allegiance, 1 Fed. Cas. No. 207, 6 Sawy. 68.

75. The Mulhouse, 17 Fed. Cas. No. 9,910.

76. The Trelawney, 4 C. Rob. 223.

**Where vessels sail as consorts,** under an agreement to render each other assistance, salvage will not be given for services rendered by one to the other. The Zephyr, 2 Hagg. Adm. 43. And see The Margaret, 2 Hagg. Adm. 48 note.

77. The Mt. Washington, 17 Fed. Cas. No. 9,887.

ally employed.[78] In no case will the employment of an unnecessary number of salvors by the person to whom the salvage service is intrusted increase the total award.[79]

(v) *Value of Property Saved.* Although salvage compensation is not awarded by any fixed rate of commission on the value of the property saved,[80] yet such value is an element to be taken into account when making up a salvage award.[81] The *quantum* of remuneration must not, however, be raised by a consideration of value to an amount altogether out of proportion to the services actually rendered.[82] In other words, the court will award a smaller proportion where the value of the property is great, and a higher proportion where the value is small;[83] and for this reason, that in property of small value a small proportion would not hold out a sufficient consideration, whereas in cases of considerable value a smaller proportion would afford no inadequate compensation.[84] The value of property lost will also be taken into consideration; a larger proportion will be awarded where all the property is saved, and a smaller one where more or less of it is lost.[85]

(vi) *Value of Salving Vessel.* In all cases the value of the salving vessel is to be regarded;[86] but, since the passage of the Harter Act,[87] the value

78. The Mt. Washington, 17 Fed. Cas. No. 9,887; Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*. But see The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

79. The Albus, 1 Fed. Cas. No. 148; The Ashburton, 2 Fed. Cas. No. 575; The Crown, 6 Fed. Cas. No. 3,450; Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*; The Blenden-Hall, 1 Dods. 414.

80. The Gambetta, 74 Fed. 259, 20 C. C. A. 417; The Rita, 62 Fed. 761, 10 C. C. A. 629; The Neto, 15 Fed. 819; Anderson *v.* The Edam, 13 Fed. 135; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; The Salacia, 2 Hagg. Adm. 262. See The Egypt, 17 Fed. 359, where it is said: "The courts ascertain the value of the property saved, and grant such a sum in reward as they deem proper; and, although the ancient rule as to the value of the property forming the basis of the award has been somewhat relaxed in modern times, they still adhere in general to the rule of measuring the amount of their rewards by some proportion of the aggregate value of the property saved."

81. The Indiana, 22 Fed. 925; The Cairnsmore, 20 Fed. 519; The Neto, 15 Fed. 819; Anderson *v.* The Edam, 13 Fed. 135; Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; The Amerique, L. R. 6 P. C. 468, 2 Aspin. 460, 31 L. T. Rep. N. S. 854, 23 Wkly. Rep. 488; The Werra, 12 P. D. 52, 6 Aspin. 115, 56 L. J. P. D. & Adm. 53, 56 L. T. Rep. N. S. 580, 35 Wkly. Rep. 552; The William Beckford, 3 C. Rob. 356; The Aquila, 1 C. Rob. 37; The Industry, 3 Hagg. Adm. 203; The Hector, 3 Hagg. Adm. 90; Papayanni *v.* Hocquard, 4 Moore P. C. N. S. 104, 16 Eng. Reprint 252.

**Salvage varies according to the description and value of articles saved.**— On plate, jewels, and money it is the least, and on other articles according to circumstances. Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31.

**When the danger is not immediate and the situation of the saved vessel is such that other assistance might probably have been rendered if that of the actual salvors had not been accepted, the value of property saved is not a very important element in awarding salvage.** Bowley *v.* Goddard, 3 Fed. Cas. No. 1,736, 1 Lowell 154.

82. Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276; The Amerique, L. R. 6 P. C. 468, 2 Aspin. 460, 31 L. T. Rep. N. S. 854, 23 Wkly. Rep. 488; The United Kingdom *v.* The Syrian, 14 L. T. Rep. N. S. 833.

**However great the value, the salvage is to be simply an adequate remuneration.** The Philah, 19 Fed. Cas. No. 11,091*a*.

83. Robertson *v.* The Wellington, 52 Fed. 605; Bell *v.* The Ann, 3 Fed. Cas. No. 1,245, 2 Pet. Adm. 278; The Philah, 19 Fed. Cas. No. 11,091*a*; Smith *v.* The Joseph Stewart, 22 Fed. Cas. No. 13,070, Crabbe 218; Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; The Blenden-Hall, 1 Dods. 414; The Salacia, 2 Hagg. Adm. 262; The James Dixon, 2 L. T. Rep. N. S. 696.

**The exact value of property saved, where large, is but a minor element in computing salvage, and, as it increases, the rate per cent given is rapidly reduced.** The Gambetta, 74 Fed. 259, 20 C. C. A. 417; The Rita, 62 Fed. 761, 10 C. C. A. 629; Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292; The Philah, 19 Fed. Cas. No. 11,091*a*.

84. The Neto, 15 Fed. 819; The Blenden-Hall, 1 Dods. 414.

85. The Kimberley, 40 Fed. 289; The Isaac Allerton, 13 Fed. Cas. No. 7,088; The Philah, 19 Fed. Cas. No. 11,091*a*.

86. The Ereza, 124 Fed. 659; Robertson *v.* The Wellington, 52 Fed. 605; The Otto Hermann, 33 L. J. Adm. 189.

87. 27 U. S. St. at L. 445, c. 105 [U. S. Comp. St. (1901) p. 2946]. The third section of this statute provides that if a vessel shall be seaworthy and properly manned,

of the cargo and freight of the salvor is to be excluded from consideration in making up the award.[88]

(VII) *DANGER TO SAVED PROPERTY.* In every case of a claim for salvage, the most important element to be considered in fixing the amount to be allowed is the condition and situation of the property in regard to its exposure to peril or danger of loss or destruction;[89] and, other things being equal, the total award should vary with the extent of this danger.[90] In estimating the degree of danger, the presence or absence of other assistance is an important element to be taken into consideration.[91] Salvage compensation should not be increased because of subsequent storms or other contingent events which might have increased the peril, or even occasioned a total loss; and they can only enter as ingredients in the case, when they were foreseen at the time, for the purpose of showing the promptitude of the assistance, and the activity and sound judgment with which the business was conducted.[92]

(VIII) *EFFICIENCY AND HAZARDOUS CHARACTER OF SERVICES.* In estimating the value of salvage services, circumstances, among others, to be considered by the court are the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering those services.[93] Where the need of salvage service is imminent, and the salvors are prompt and effective in giving their best efforts, a liberal reward should be made.[94] While risk to salvors is not a necessary element in salvage, it is a circumstance to be considered as enhancing their reward.[95] Where such risk or danger has been incurred in saving property from destruction, it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation than would otherwise be accorded to them.[96] In determining the effect on the amount of salvage of risk incurred

equipped, and supplied, at the beginning of the voyage, she shall not be liable to the cargo for losses arising from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

**88.** The Ereza, 124 Fed. 659; The Alaska, 75 Fed. 430; The Florence, 65 Fed. 248 [*affirmed* in 71 Fed. 527, 18 C. C. A. 240]; The Chinese Prince, 61 Fed. 697.

**89.** The J. Emory Owen, 128 Fed. 996; The Kristrel, 14 Fed. Cas. No. 7,935; The Mount Washington, 17 Fed. Cas. No. 9,887; The Chetah, L. R. 2 P. C. 205, 38 L. J. Adm. 1, 19 L. T. Rep. N. S. 621, 5 Moore P. C. N. S. 278, 17 Wkly. Rep. 233, 16 Eng. Reprint 520; The United Kingdom *v.* The Syrian, 14 L. T. Rep. N. S. 833.

**The question whether a grounded vessel could have gotten off without assistance** is important as tending to show the degree of peril she was in, and the proper amount to be awarded as salvage. The Ella Hand, 8 Fed. Cas. No. 4,369.

**90.** The Mount Washington, 17 Fed. Cas. No. 9,887; The Salacia, 2 Hagg. Adm. 262.

**91.** The Boyne, 98 Fed. 444; The Roman Prince, 88 Fed. 336; The Monticello, 81 Fed. 211; The O. C. Hanchett, 76 Fed. 1003, 22 C. C. A. 678; The Bay of Naples, 44 Fed. 90; The Indiana, 22 Fed. 925; The Werra, 12 P. D. 52, 6 Aspin. 115, 56 L. J. P. D. & Adm. 53, 56 L. T. Rep. N. S. 580, 35 Wkly. Rep. 552.

**92.** The Birdie, 3 Fed. Cas. No. 1,432, 7 Blatchf. 238; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The Saragossa, 21 Fed. Cas. No. 12,335, 1 Ben. 553.

**93.** The Chetah, L. R. 2 P. C. 205, 38 L. J. Adm. 1, 19 L. T. Rep. N. S. 621, 5 Moore P. C. N. S. 278, 17 Wkly. Rep. 233, 16 Eng. Reprint 520.

**94.** The J. Emory Owen, 128 Fed. 996; Merritt *v.* The St. Paul, 82 Fed. 104; The Isaac Allerton, 13 Fed. Cas. No. 7,088; The John & Albert, 13 Fed. Cas. No. 7,333; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

**Salvors who adopt a liberal course of conduct toward a vessel in distress,** tendering their services promptly and without stipulations or conditions, and acting gallantly and with alacrity, are entitled to a more liberal reward than those who either wait to be called upon for assistance, or refuse to render it unless the vessel is placed in their charge as security for compensation. The Howard, 12 Fed. Cas. No. 6,752*a*.

**Extraordinary energy** of a salvor should increase the amount awarded. The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

**Want of skill or energy** on the part of salvors will reduce the amount of salvage to be awarded. The Katie Collins, 21 Fed. 409; The Marathon, 16 Fed. Cas. No. 9,058.

**95.** The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Fannie Brown, 30 Fed. 215; The Sandringham, 10 Fed. 556, 5 Hughes 316; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Spencer *v.* The Charles Avery, 22 Fed. Cas. No. 13,232, 1 Bond 117; The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376; The Pericles, Brown & L. 80.

**Risk to life** is entitled to the greatest consideration. The Otto Hermann, 33 L. J. Adm. 189.

**96.** The Thornley, 98 Fed. 735, 39 C. C. A.

the fact that a life-saving crew was in close proximity, and ready to effect a rescue in case of accident, is to be taken into consideration as affecting the degree of merit in facing the danger.[97]

(IX) *Duration of Services.* The duration of the services is not, except in peculiar and extraordinary instances, a prominent element in decreeing salvage compensation.[98] In some cases, however, especially where the salvage service is rendered by a steam vessel,[99] the shortness of the duration of such service is considered an element of meritoriousness.[1] The time occupied in endeavoring to render unsuccessful salvage services will be taken into consideration in awarding compensation for subsequent successful services, if it appears that the original services were rendered at the request of defendants.[2]

(X) *Saving of Life.* When the saving of life is connected with the saving of property, the court may consider it in fixing the amount of salvage.[3]

(XI) *Risk of Inflicting Loss on Others.* When a vessel has gone adrift through negligence, and is drifting toward other vessels, which she is likely to injure, the saving of her owners from liability to pay any such damage as was likely to arise, and which the owners would be called on to pay, should be taken into account in determining the amount of a salvage award.[4]

(XII) *Damages to and Expenses Incurred by Salvor* — (A) *In General.* Where, in rendering salvage services, a vessel has sustained actual damage and loss which is capable of being accurately ascertained, evidence of the amount thereof is admissible on behalf of the salvors,[5] and the court should, where there is a fund sufficient for the purpose without depriving the owner of the benefit of the salvage, award to the salvors the amount of such loss and damage in addition to the salvage reward.[6] Remote and consequential damages, having

248; The John & Albert, 13 Fed. Cas. No. 7,333; Spencer *v.* The Charles Avery, 22 Fed. Cas. No. 13,232, 1 Bond 117; Arnold *v.* Cowie, L. R. 3 P. C. 589, 1 Aspin. 31, 24 L. T. Rep. N. S. 499; Carmichael *v.* Brodie, L. R. 1 P. C. 454, 4 Moore P. C. N. S. 374, 16 Eng. Reprint 358; The Otto Hermann, 33 L. J. Adm. 189.

**Where the amount of personal risk and labor was not great,** it is not sufficient to justify a large allowance of salvage. Blagg *v.* The E. M. Bicknell, 3 Fed. Cas. No. 1,476, 1 Bond 270; McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130; The Otto Hermann, 33 L. J. Adm. 189.

97. The Haxby *v.* Merritt's Wrecking Organization, 83 Fed. 715, 28 C. C. A. 33.

98. The B. C. Terry, 9 Fed. 920; Sonderburg *v.* Ocean Tow-Boat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146.

99. The Otto Hermann, 33 L. J. Adm. 189; The Northumberland *v.* The Andalusia, 12 L. T. Rep. N. S. 584.

1. The United Kingdom *v.* The Syrian, 14 L. T. Rep. N. S. 833.

2. The Avenir, Ir. R. 2 Eq. 111.

3. The Edith L. Allen, 139 Fed. 888; The Plymouth Rock, 9 Fed. 413; The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68; Lamar *v.* Penelope, 14 Fed. Cas. No. 8,007; The Ardincaple, 3 Hagg. Adm. 151; The Aid, 1 Hagg. Adm. 84; The Thomas Fielden, 32 L. J. Adm. 61.

4. Stebbins *v.* Five Mud-Scows, 50 Fed. 227.

5. Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414; The City of Chester, 9 P. D. 182, 5 Aspin. 311, 53 L. J. Adm. 90, 51 L. T. Rep. N. S. 485, 33 Wkly. Rep. 104; The Sunniside, 8 P. D. 137, 5 Aspin. 140, 52 L. J. P. D. & Adm. 76, 49 L. T. Rep. N. S. 401, 31 Wkly. Rep. 859.

6. The Benison, 36 Fed. 793; The Alaska, 23 Fed. 597; Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414; The City of Chester, 9 P. D. 182, 5 Aspin. 311, 53 L. J. Adm. 90, 51 L. T. Rep. N. S. 485, 33 Wkly. Rep. 104; The Sunniside, 8 P. D. 137, 5 Aspin. 140, 52 L. J. P. D. & Adm. 76, 49 L. T. Rep. N. S. 401, 31 Wkly. Rep. 859; The Mud Hopper, 4 Aspin. 403, 40 L. T. Rep. N. S. 462; The Martha, 3 Hagg. Adm. 434; The Otto Hermann, 33 L. J. Adm. 189. See also Stephens *v.* Bales of Cotton, 22 Fed. Cas. No. 13,366, Bee 170. But see Gonzales *v.* U. S., 42 Ct. Cl. 299, holding that no allowance can be made to the claimants for injuries to their vessel, as the loss sustained by them in rescuing the property was one of the risks they ran and for which they seek indemnification for the sacrifices they made.

**If the salving vessel, in trying to save a stranded vessel** by its own motive power, is lost or injured by the movement, it is one of the necessities of the service, and is a risk assumed as such (The Virginia, 28 Fed. Cas. No. 16,957, 3 Biss. 48); but where a steamer stranded employs another and smaller one to assist in getting her off, but herself supplies a part of the necessary motive power, and directs the movements, the smaller one does not run the risks of salvage service, and where she is wrecked in the maneuver, which

no logical or legal connection with the transaction upon which the claim for salvage is founded, cannot be recovered.[7] The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision.[8] In some cases the actual damage or loss may be immaterial, as for instance if it clearly exceeds the recognized limits of salvage award.[9] In other cases it may be difficult, if not impossible, to ascertain exactly the amount of such loss, and in such cases the amount of salvage must be assessed, in a general manner, upon so liberal a scale as to cover the loss, and to afford also an adequate reward for the services rendered.[10]

(B) *Loss of Time and Earnings.* In determining the amount of salvage to which a vessel is entitled, the time and expense incurred in reaching the salved vessel,[11] the time lost during the actual rendition of the services,[12] and also time subsequently lost, which may properly be considered as a proximate result of the services,[13] should all be taken into account. So where a vessel is actually taken off a lucrative employment in order to render a salvage service, such fact forms an essential ingredient in the estimate of the salvage award.[14] Evidence of loss of profits is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages. It is only to be regarded as an element for consideration in estimating the amount of the salvage reward.[15]

(C) *Increased Risk Incurred by Deviation.* In estimating salvage reward to the owners of the salving vessel, the circumstances that the salving vessel deviating from her course might have vitiated the insurance, and the possibility of being answerable to the owners of the cargo for such deviation, are elements to be taken into consideration.[16]

**2. Methods of Compensation — a. In General.** There are three methods of compensation for salvage services. They are: (1) By a share of the salvage in cases where the services are voluntarily rendered, and there is no express contract; (2) by the payment of an agreed compensation in case of success only;

results in saving the stranded steamer, the latter is liable both for her loss and for services rendered (The Virginia, *supra*).

**Presumptions and burden of proof as to damage sustained.**— Where the salvors' vessel is injured or lost while engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the parties alleging that the loss was caused by the default of the salvors. The Baku Standard *v.* The Angele, [1901] A. C. 549, 9 Aspin. 197, 70 L. J. P. C. 98, 84 L. T. Rep. N. S. 788, 17 T. L. R. 584; The Thomas Blyth, Lush. 16.

7. The Ereza, 124 Fed. 659; Winso *v.* The Cornelius Grinnell, 30 Fed. Cas. No. 17,883; The Saragossa, 21 Fed. Cas. No. 12,335, 1 Ben. 553.

8. Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414.

9. Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414.

10. The Baku Standard *v.* The Angele, [1901] A. C. 549, 9 Aspin. 197, 70 L. J. P. C. 98, 84 L. T. Rep. N. S. 788, 17 T. L. R. 584; Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414; The Martha, 3 Hagg. Adm. 434. See also Hattrick *v.* The Spanish Bark, 11 Fed. Cas. No. 6,218*a*; Gonzales *v.* U. S., 42 Ct. Cl. 299.

11. The Pelican, 158 Fed. 183; The Graces, 2 W. Rob. 294.

12. The Pelican, 158 Fed. 183. And see *supra*, VII, A, 1, b, (IX).

13. The Pelican, 158 Fed. 183.

**Time lost by the salvor vessel while undergoing repairs** may be considered in determining the amount of salvage. Gonzales *v.* U. S., 42 Ct. Cl. 299.

14. The Salacia, 2 Hagg. Adm. 262; The Louisa, 6 Notes of Cas. 531, 3 W. Rob. 99. See also The Nicolai Heinrich, 17 Jur. 329.

**Where, however,** she is not so engaged at the time, the award of the court will not be influenced by the consideration of the earnings she might have gained during her detention in the salvage service. The Louisa, 6 Notes of Cas. 531, 3 W. Rob. 99.

15. The Sunniside, 8 P. D. 137, 5 Aspin. 140, 52 L. J. P. D. & Adm. 76, 49 L. T. Rep. N. S. 401, 31 Wkly. Rep. 859.

16. The Pelican, 158 Fed. 183; Markham *v.* Simpson, 22 Fed. 743; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31; Carmichael *v.* Brodie, L. R. 1 P. C. 454, 4 Moore P. C. N. S. 374, 16 Eng. Reprint 358. See Blagg *v.* The E. M. Bicknell, 3 Fed. Cas. No. 1,476, 1 Bond 270, holding that the actual forfeiture of insurance by a deviation for the purpose of rendering a salvage service will be considered in fixing the amount of salvage to be awarded, but the mere possi-

and (3) by the payment at all events of an agreed compensation, or a *quantum meruit*, under a contract to that effect. The third is the common and customary method upon the Great Lakes.[17]

**b. Contracts as to Compensation.** (I) *Authority to Make Contracts.* Salvors are entitled to the judgment of the court as to the amount of their remuneration, and are not under any obligation to negotiate.[18] It is well settled, however, that the master of a vessel in distress may, without special authority,[19] bind the owner by a salvage agreement;[20] but he cannot, without special authority, create a lien on the vessel therefor, where the owner can be consulted, and the necessity for aid is not so pressing as to require immediate action.[21] So also the master of the salving vessel may bind his own interest and that of his employers by an agreement with the master of the vessel saved as to the *quantum* of salvage to be paid;[22] but such an agreement will not be conclusive upon the crew, if made without their sanction and concurrence.[23] There are two circumstances necessary in order to make an agreement binding on an owner: (1) The contract must be made under a necessity; (2) it must be made for his benefit.[24]

(II) *Validity.* The burden of proving the existence of a contract in a salvage action is on those who rely upon it.[25] After such a contract is proved, it is held *prima facie* valid, and the burden is on defendant to show fraud, or compulsion, or other circumstances which would render its enforcement inequitable.[26] Where such contracts are fairly made, no advantage being taken of ignorance or distress, they are readily upheld by the courts.[27] But they will be set aside where

bility that a deviation might have forfeited the insurance will not be considered.

17. The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413; Elphicke *v.* White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56.

18. The Tritonia, 5 Notes of Cas. 110, 2 W. Rob. 522.

19. New York, etc., Mail Steamship Co. *v.* The G. W. Jones, 48 Fed. 925.

20. The Sir William Armstrong, 53 Fed. 145; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, Newb. Adm. 274; The Arthur, 6 L. T. Rep. N. S. 556.

21. The C. M. Titus, 7 Fed. 826.

22. The Britain, 1 W. Rob. 40.

**Agreement as to past services.**— The master of a salving vessel has no authority to make an agreement binding his owners and crew as to the remuneration to be paid for a salvage service already performed, except where such service is merely some slight step in one continuous salvage operation, and would, by itself, give no right to salvage remuneration. The Inchmaree, [1899] P. 111, 8 Aspin. 486, 68 L. J. P. D. & Adm. 30, 80 L. T. Rep. N. S. 201.

**Exception to rule — officers of government vessels.**— The officers and crew of a national vessel, ordered by the government to render salvage assistance, have no right to make any agreement with the master of the distressed vessels as to the amount of their reward. The Woosung, 1 P. D. 260, 3 Aspin. 239, 35 L. T. Rep. N. S. 8, 25 Wkly. Rep. 1.

23. Peacock *v.* Three Million Feet of Lumber, 93 Fed. 983; The Delambre, 9 Fed. 775; The William Lushington, 7 Notes of Cas. 361; The Sarah Jane, 2 W. Rob. 110; The Britain, 1 W. Rob. 40.

24. The Renpor, 8 P. D. 115, 5 Aspin. 98, 52 L. J. P. D. & Adm. 49, 48 L. T. Rep. N. S. 887, 31 Wkly. Rep. 640; International Wrecking, etc., Co. *v.* Lobb, 11 Ont. 408.

**In consequence** a master has no authority to bind his owners by an agreement to save the lives of himself and crew, since his owners have no beneficial interest in the subject-matter of such a contract (The Renpor, 8 P. D. 115, 5 Aspin. 98, 52 L. J. P. D. & Adm. 49, 48 L. T. Rep. N. S. 887, 31 Wkly. Rep. 640), nor can he by express agreement bind the owners to pay salvage beyond the value of the vessel (International Wrecking, etc., Co. *v.* Lobb, 11 Ont. 408).

25. The Resultatet, 17 Jur. 353.

26. The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413; The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, 1 Newb. Adm. 274; The Helen and George, Swab. 368; Connolly *v.* The Dracona, 5 Can. Exch. 146 [*affirmed* in 5 Can. Exch. 207]. *Contra*, The British Empire, 6 Jur. 608; The Arthur, 6 L. T. Rep. N. S. 556.

27. Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed. 618; The Lasca, 133 Fed. 1005; The Thornley, 98 Fed. 735, 39 C. C. A. 248; Davis Coast Wrecking Co. *v.* The Alert, 56 Fed. 721; Merritt Wrecking Organization *v.* The Sir William Armstrong, 53 Fed. 145; Leathem *v.* The Roanoke, 50 Fed. 574; The Agnes I. Grace, 49 Fed. 662; The R. D. Bibber, 33 Fed. 55; The M. Vandercook, 24 Fed. 472; The C. & C. Brooks, 17 Fed. 548; The Delambre, 9 Fed. 775; Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, Newb. Adm. 274; The Ellen Holgate, 8 Fed. Cas. No. 4,375*a*; The H. B. Foster, 11 Fed. Cas. No. 6,290, Abb. Adm. 222; The Independence, 13 Fed. Cas. No. 7,014, 2 Curt. 350; The J. G.

they have been corruptly entered into,[28] or made under fraudulent representations,[29] a clear mistake,[30] or suppression of important facts,[31] or under circumstances amounting to compulsion.[32] Some of the decisions have laid down the general proposition that salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be excessive and unreasonable;[33] but this doctrine has been repudiated in the United States supreme court, where it is held that, in the absence of fraud, compulsion, or mistake of facts, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater

Paint, 13 Fed. Cas. No. 7,318, 1 Ben. 545; The Osteonthe, 18 Fed. Cas. No. 10,608*a*; The Nasmyth, 10 P. D. 41, 5 Aspin. 364, 54 L. J. P. D. & Adm. 63, 52 L. T. Rep. N. S. 392, 33 Wkly. Rep. 736; The Wellfield *v.* Adamson, 5 Aspin. 214, 50 L. T. Rep. N. S. 511; The True Blue, 2 Notes of Cas. 413, 2 W. Rob. 177; International Wrecking, etc., Co. *v.* Lobb, 11 Ont. 408.

**Subsequent services.**— Where several contracts for salvage services were made at various successive times, and a subsequent salvage service was performed under no definite contract, the rule fixed in the prior contracts is not imperative, but is only an auxiliary circumstance in determining what is a fair allowance for such subsequent salvage service. Bearse *v.* Three Hundred and Forty Pigs of Copper, 4 Fed. Cas. No. 1,193, 1 Story 314.

28. Leathem *v.* The Roanoke, 50 Fed. 574; The Crus. V, Lush. 583; The Theodore, Swab. 351.

**An agreement for salvage of the ship apart from the cargo** on board will not be allowed by the court. The Westminster, 1 W. Rob. 229. See also Scott *v.* Four Hundred and Forty-Five Tons of Coal, 39 Fed. 285.

29. Eldridge *v.* Forty-One Bars of Railroad Iron, 8 Fed. Cas. No. 4,334; The Repulse, 4 Notes of Cas. 141, 2 W. Rob. 396; The Helen and George, Swab. 368.

30. Davis Coast Wrecking Co. *v.* The Alert, 56 Fed. 721; The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412.

31. The Clandeboye, 70 Fed. 631, 17 C. C. A. 300; The Kingalock, 1 Spinks 263.

32. Spreckels *v.* The Jessomene, 47 Fed. 903; Spreckels *v.* The Don Carlos, 47 Fed. 746; Sweeting *v.* The Tennasserim, 47 Fed. 119; Brooks *v.* The Adirondack, 2 Fed. 387; The A. D. Patchin, 1 Fed. Cas. No. 87, 1 Blatchf. 414 [*affirming* 9 Fed. Cas. No. 5,170]; Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314; The Bridgewater, 4 Fed. Cas. No. 1,864; Cowell *v.* The Brothers, 6 Fed. Cas. No. 3,294, Bee 136; Crary *v.* The El Dorado, 6 Fed. Cas. No. 3,362; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The Homely, 12 Fed. Cas. No. 6,661, 8 Ben. 495; The Jeremiah, 13 Fed. Cas. No. 7,290, 10 Ben. 338; Schutz *v.* The Nancy, 21 Fed. Cas. No. 12,493, Bee 139; The Senator, 21 Fed. Cas. No. 12,665, Brown Adm. 544; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31; The W D B., 29 Fed. Cas. No. 17,306, 1 Hask. 236; The Wexford, 29 Fed. Cas. No. 17,472, 6 Ben. 119; Williams *v.* The Jenny Lind, 29 Fed. Cas. No. 17,723, Newb. Adm. 443; The Port Caledonia, [1903] P. 184, 9 Aspin. 479, 72 L. J. P. D. & Adm. 60, 89 L. T. Rep. N. S. 216, 52 Wkly. Rep. 223; The Rialto, [1891] P. 175, 7 Aspin. 35, 60 L. J. P. D. & Adm. 71, 64 L. T. Rep. N. S. 540; The Mark Lane, 15 P. D. 135, 6 Aspin. 540, 63 L. T. Rep. N. S. 468, 39 Wkly. Rep. 47; The Silesia, 5 P. D. 177, 4 Aspin. 338, 43 L. T. Rep. N. S. 319, 29 Wkly. Rep. 156; The Medina, 2 P. D. 5, 3 Aspin. 219, 35 L. T. Rep. N. S. 779, 25 Wkly. Rep. 156; The Woosung, 1 P. D. 260, 3 Aspin. 239, 35 L. T. Rep. N. S. 8, 25 Wkly. Rep. 1.

**The courts will not tolerate the doctrine** that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain, nor will they permit the performance of a public duty to be turned into a traffic of profit. Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed. 618; The C. & C. Brooks, 17 Fed. 548.

**What duress must be shown.**— To impugn a salvage contract such duress need not be shown as would require a court of law to set aside an ordinary contract. The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413 [*reversing* 77 Fed. 754, 23 C. C. A. 527]; The Rialto, [1891] P. 175, 7 Aspin. 35, 60 L. J. P. D. & Adm. 71, 64 L. T. Rep. N. S. 540; The Mark Lane, 15 P. D. 135, 6 Aspin. 540, 63 L. T. Rep. N. S. 468, 39 Wkly. Rep. 47.

33. Propeller Towboat Co. *v.* The Agnes I. Grace, 49 Fed. 662 (holding that an agreement to pay salvage, while not binding on the court, when deliberately made, will be regarded as a valuable indication of what should be the true amount of the recovery); New York, etc., Mail Steamship Co. *v.* The G. W. Jones, 48 Fed. 925; Millard *v.* The Schiedam, 48 Fed. 923; Blackburn *v.* The Wellington, 48 Fed. 475; The Sophia Hanson, 16 Fed. 144; The A. D. Patchin, 1 Fed. Cas. No. 87, 1 Blatchf. 414; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The Jacob E. Ridgway, 13 Fed. Cas. No. 7,155, 8 Ben. 179; Sturgis *v.* The Edward, 23 Fed. Cas. No. 13,575; Two Hundred and Two Tons of Coal, 24 Fed. Cas. No. 14,299, 7 Ben. 343; Williams *v.* The Jenny Lind, 29 Fed. Cas. No. 17,723, Newb. Adm. 443.

**Where a salvage contract is made on land,** between parties dealing upon equal terms, with full opportunity for deliberation and equal knowledge of the facts, such contract should be treated like any other voluntary deliberate contract for a specific service. The Alert, 56 Fed. 721.

than the services were actually worth.[34] By the great weight of authority it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside.[35] If, however, the supervening circumstances make the service wholly different from that contemplated by the parties, the court has authority to deal with the question as though no contract had been made.[36]

(III) *Operation and Effect* — (A) *On Rights of Salvors.* A contract to pay for salvage service a fixed price absolutely, without respect to success or failure, does not change the character of the service. It remains a salvage service, but the measure of compensation is gauged by the contract, and not by the danger encountered, or the value of the property salved.[37] While the agreement may be such as to have no binding effect upon the owner of the salved vessel,[38] yet it operates as a limitation of the salvor's demands,[39] and may properly be considered in determining the amount that should be awarded him.[40] Compensation cannot be abated for inefficiency of wrecking material hired at a fixed price by the day, and subject to discharge at the will of the master; but, if the service is retained, the contract compensation must be paid.[41] The full sum fixed by the contract will not be allowed, but only a *quantum meruit*, if it appears that the service did not accomplish the result agreed to be performed.[42]

(B) *On Rights of Persons Assisting Salvors.* Where services are rendered a vessel by one under an agreement with a salvor operating under a contract, with a full knowledge of the terms of such contract, he cannot in any event maintain a suit against the vessel,[43] except by joining with the original contractor and sharing with him the compensation agreed upon;[44] and this he cannot do where by

**34.** The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413 [*reversing* 77 Fed. 754, 23 C. C. A. 527].

**35.** The Elfrida, 172 U. S. 186, 19 S. Ct. 146, 43 L. ed. 413; The Lasca, 133 Fed. 1005; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*; Harley *v.* Four Hundred and Sixty-Seven Bars of Railroad Iron, 11 Fed. Cas. No. 6,068, 1 Sawy. 1; The Silver Spray, 22 Fed. Cas. No. 12,857, Brown Adm. 349; The Strathgarry, [1895] P. 264, 8 Aspin. 19, 72 L. T. Rep. N. S. 900, 11 Reports 783; The Prinz Heinrich, 13 P. D. 31, 6 Aspin. 273, 57 L. J. P. D. & Adm. 17, 58 L. T. Rep. N. S. 593, 36 Wkly. Rep. 511; The Waverly, L. R. 3 A. & E. 369, 1 Aspin. 47, 40 L. J. Adm. 42, 24 L. T. Rep. N. S. 713; The Mulgrave, 2 Hagg. Adm. 77; The Henry, 15 Jur. 183; The Cato, 35 L. J. Adm. 116; Halsey *v.* Albertusgen, 11 Moore P. C. 313, Swab. 303, 6 Wkly. Rep. 198, 14 Eng. Reprint 714; The Firefly, Swab. 240; The Dracona *v.* Connolly, 5 Can. Exch. 207. See also The Betsey, 2 Notes of Cas. 409, 2 W. Rob. 167. *Compare* The Phantom, L. R. 1 A. & E. 58, 12 Jur. N. S. 529, 14 Wkly. Rep. 774.

**36.** The Westbourne, 14 P. D. 132, 6 Aspin. 405, 58 L. J. Adm. 78, 61 L. T. Rep. N. S. 156, 38 Wkly. Rep. 56.

**37.** The Roanoke, 50 Fed. 574. And see *supra*, II, C, 1, l.

**38.** See *supra*, VII, A, 2, b, (II).

**39.** The Schiedam, 48 Fed. 923; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*; The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282.

**An agreement made with one salvor may be binding on all,** although they gave the salvor who made the agreement no formal authority to make a contract in their behalf; the circumstances showing that they were all temporarily associated together for a common purpose with such salvor for their head and spokesman, and that they acquiesced in the agreement as to compensation made by him. Dominy *v.* De Alberti, 7 Fed. Cas. No. 3,977, 1 Ben. 77.

**40.** The Elmbank, 69 Fed. 104, 16 C. C. A. 164.

**For example** the fact that the salvor's services are only to be compensated in case of success is an ingredient of merit, and justly enhances the amount to be awarded. Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276. Conversely the fact that salvage services are rendered under contract by which the salvor is to be compensated whether successful or not should be considered by the court in reduction of the award. The Elmbank, 69 Fed. 104, 16 C. C. A. 164. But where the danger is not great and success is reasonably certain, a contract for payment at all events should have little influence on the amount of the award. Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276.

**41.** Leathem *v.* The Roanoke, 50 Fed. 574.

**42.** The W. D. B., 29 Fed. Cas. No. 17,306, Hask. 236.

**43.** The G. Barber, 29 Fed. 269; Baker *v.* The Tros, 2 Fed. Cas. No. 783; The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364; The Whitaker, 29 Fed. Cas. No. 17,524, 1 Sprague 229.

**44.** The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364; The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282.

the very terms of his agreement he was not so to share.[45] But since a salvor by contract is not an agent of the owners, and cannot create against them, or the property saved, any liability beyond the contract price,[46] one hired by a salvor to assist him, with knowledge that his employer is working under a contract, is limited in his recovery by the contract price.[47]

(c) *On Liability of Owner of Salved Vessel.* An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of and pledging the credit of the ship-owners, so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo.[48]

(iv) *CANCELLATION.* Where a salvage contract is subsequently canceled by mutual consent, the court must consider the service as if no contract has ever existed.[49]

**c. Settlement by Master and Arbitration and Award.** Cases may exist in which the contract of the master of a vessel in relation to the amount of salvage to be paid to salvors, or his agreement to refer the question to arbitrators, will bind the owners.[50] But in all such cases, unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the court, and his contracts will not be regarded as binding upon the parties concerned unless they appear to have been *bona fide*, and such as a discreet owner placed in like circumstances would probably have made.[51] If he settles the amount by agreement, those who claim under it must show that the amount allowed was reasonable and just.[52] If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair, and the referees worthy of the trust.[53] Where the master acts in bad faith, and no necessity for the reference to arbitration exists, the award is void as against the owners.[54] Yet in such a case, unless the salvors have forfeited their right by fraud or other misconduct, they are

45. The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364.

46. The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364; The Whitaker, 29 Fed. Cas. No. 17,524, 1 Sprague 229.

47. The Silver Spray, 22 Fed. Cas. No. 12,857, 1 Brown Adm. 349 (holding further that the fact that he is misinformed as to the terms of the contract is no ground of additional liability on the part of the property or its owners); The Whitaker, 29 Fed. Cas. No. 17,525, 1 Sprague 282.

A vessel, employed for a stipulated sum, by the principal salvors, with the acquiescence of the master of the wrecked ship, cannot, under any circumstances, recover salvage in addition to the sum agreed. The Yucatan, 30 Fed. Cas. No. 18,194.

48. The Prinz Heinrich, 13 P. D. 31, 6 Aspin. 273, 57 L. J. P. D. & Adm. 17, 58 L. T. Rep. N. S. 593, 36 Wkly. Rep. 511; The Cumbrian, 6 Aspin. 151, 57 L. T. Rep. N. S. 205.

49. The Africa, 1 Spinks 299.

50. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

The right is ordinarily limited to cases of extreme necessity, and where, by reason of the distance from the scene of disaster, there is no opportunity of consulting the owner. Peck *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 148; Robinson *v.* Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239; Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713. But when the salvage service has not been important, and the compensation demanded is a small one, the master may settle in order to proceed on his voyage without delay. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

Settlements by the master of a vessel deliberately and fairly made will be upheld, but not if made pursuant to and in furtherance of a contract to defraud underwriters. Leathem *v.* The Roanoke, 50 Fed. 574.

51. Peck *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 148; Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

52. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

53. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

54. Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

entitled to reasonable salvage, which may be allowed to them in a proceeding in admiralty brought by the owners against the proceeds of the vessel and cargo assigned as salvage.[55] A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them.[56]

**3. Amount of Award — a. In General.** The rate of salvage compensation is governed by no determinate rules of law. The principle sought to be enforced is to make a fair division of the salved property between its owners and the salvors.[57] The highest compensation which is ordinarily allowed in the most meritorious cases is one moiety,[58] and that is rarely given, except in cases of derelict.[59] As a rule, regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which is the object of the salvage service to secure to him.[60] While the courts are anxious to encourage salvors by liberality, when possible, yet the business is a speculative one, and their compensation is subject to reduction even below a fair *quantum meruit* when otherwise nothing would be left for the owner.[61]

**b. Within Discretion of Court.** Since it is impracticable to lay down rules to govern the courts in ascertaining the proper rate of compensation, the amount of the reward must be left largely in the discretion of the court, on a just estimate of all the circumstances of the particular case.[62] Some general limit as to this discretion may, however, be assigned in certain cases approaching nearly to the same average merit, such as cases of derelict.[63] But although each case of salvage is

55. Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

56. The Monarch, 12 P. D. 5, 6 Aspin. 90, 56 L. J. P. D. & Adm. 114, 56 L. T. Rep. N. S. 204, 35 Wkly. Rep. 292.

57. The Job H. Jackson, 161 Fed. 1015; The John Wurts, 13 Fed. Cas. No. 7,434, Olcott 462.

In awarding salvage on a foreign vessel, courts in this country will regard the rates of allowance in the courts of the owner's country. The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114.

The amount for which action was entered is not necessarily the limit of the compensation which may be allowed. The Jonge Bastiaan, 5 C. Rob. 323.

58. The Hyderabad, 11 Fed. 749, 1 Biss. 112; Anonymous, 1 Fed. Cas. No. 430; Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314; British Consul *v.* Twenty-Two Pipes & Ten Hogsheads of Wine, 4 Fed. Cas. No. 1,900, Bee 178; Cross *v.* The Bellona, 6 Fed. Cas. No. 3,428, Bee 193; The Elliotta, 2 Dods. 75.

There are some exceptions, as where the property saved is very inconsiderable, and the danger and difficulty of the service have been so great as to require an extraordinary compensation. Brooks *v.* The Adirondack, 2 Fed. 387; Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314. In cases where the owner abandons his property to the salvors, makes no claim, or is unreasonably long in asserting his rights, the court may decree the whole to the libellant. Grummond *v.* The Burlington, 73 Fed. 258; The Lahaina, 19 Fed. 923; Llewellyn *v.* Two Anchors and Chains, 15 Fed. Cas. No. 8,428, 1 Ben. 80; The Zealand, 30 Fed. Cas. No. 18,205, 1 Lowell 1; The William Hamilton, 3 Hagg. Adm. 168. But in no other case will the salvor be entitled to the whole proceeds, even though his actual expenditures exceed the amount of the fund. The L. W. Perry, 71 Fed. 745; Wright *v.* The Felix, 62 Fed. 620; The Carl Schurz, 5 Fed. Cas. No. 2,414, 2 Flipp. 330.

59. See *infra*, VII, A, 3, c, (I).

60. Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414.

61. The Lamington, 86 Fed. 675, 30 C. C. A. 271; The Edwards, 12 Fed. 508; The Amethyst, 1 Fed. Cas. No. 330, 2 Ware 28, 2 N. Y. Leg. Obs. 312; Hattrick *v.* The Spanish Bark, 11 Fed. Cas. No. 6,218*a*; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; Smith *v.* The Joseph Stewart, 22 Fed. Cas. No. 13,070, Crabbe 218; The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114; Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712; Gore *v.* Bethel, 12 Moore P. C. 189, Swab. 370, 14 Eng. Reprint 882.

62. The City of Seattle, 1 Alaska 471; Chauveau *v.* Walden, 10 Mart. (La.) 100; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328; The Job H. Jackson, 161 Fed. 1015; The Fannie Brown, 30 Fed. 215; The Baker, 25 Fed. 771, 23 Blatchf. 389; The Indiana, 22 Fed. 925; The Neto, 15 Fed. 819; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; The John and Albert, 13 Fed. Cas. No. 7,333; McGinnis *v.* The Pontiac, 16 Fed. Cas. No. 8,801, 5 McLean 359, Newb. Adm. 130; Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443.

63. See *infra*, VII, A, 3, c, (I).

disposed of on its own merits, the discretion of the court should be guided by general principles, and in applying them it should, as far as practicable, where circumstances show a similarity of reasoning and common point of agreement as to amount, consider the precedents of adjudicated cases.[64]

**c. As Dependent on Nature of Services**—(i) *DERELICT.* In cases of derelict, it was the ancient rule of the admiralty to give the salvors a moiety of the property saved. This as a binding rule is now obsolete, and the amount is to be determined in the sound discretion of the court, on the same considerations as in other cases,[65] except that the fact of the property being derelict makes out a *prima facie* case of extreme danger of total loss, and thus enhances the reward.[66] The habit of maritime courts, however, still favors the moiety rule in ordinary cases,[67] it being considered a safe and salutary limit upon judicial discretion, and not to be lightly disregarded.[68] It is not, however, an inflexible rule;[69] but it yields to extraordinary circumstances, greatly diminishing or enhancing the merit of the salvage

**64.** The Neto, 15 Fed. 819; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Wash. 80, 2 Pet. Adm. 373; The John and Albert, 13 Fed. Cas. No. 7,333.

**65.** Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed. 618; The Adventure, 8 Cranch (U. S.) 221, 3 L. ed. 542; The Job H. Jackson, 161 Fed. 1015; The Edith L. Allen, 139 Fed. 888; The Eleanor *v.* The Thomas W. Haven, 48 Fed. 842; The Fairfield, 30 Fed. 700; The Annie Henderson, 15 Fed. 550; The B. C. Terry, 9 Fed. 920; The Lovetand, 5 Fed. 105; The Anna, 1 Fed. Cas. No. 398, 6 Ben. 166; The Georgiana, 10 Fed. Cas. No. 5,355, 1 Lowell 91; Hall *v.* The Paquet Bot De Cayenne, 11 Fed. Cas. No. 5,941, 7 Phila. (Pa.) 550; The Ida L. Howard, 12 Fed. Cas. No. 6,999, 1 Lowell 2; Papayanni *v.* Hoequard, L. R. 1 P. C. 250, 4 Moore P. C. N. S. 96, 16 Eng. Reprint 252; Kirby *v.* The Scindia, L. R. 1 P. C. 241, 12 Jur. N. S. 534, 35 L. J. P. C. 53, 4 Moore P. C. N. S. 84, 16 Eng. Reprint 248; The Anna Helena, 5 Aspin. 142, 49 L. T. Rep. N. S. 204; The Aquila, 1 C. Rob. 37; The Florence, 16 Jur. 572, 20 Eng. L. & Eq. 607; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807; The Splendid *v.* The Martin Luther, 12 L. T. Rep. N. S. 585; The Pelican *v.* The Minerva, 9 Wkly. Rep. 81; The Royal Arch, Young Adm. (Nova Scotia) 260; The Canterbury, Young Adm. (Nova Scotia) 57.

Seldom more than one half or less than one third is given. Bell *v.* The Ann, 3 Fed. Cas. No. 1,245, 2 Pet. Adm. 278; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Pet. Adm. 373, 2 Wash. 80 [*affirming* 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361]; British Consul *v.* Twenty-Two Pipes and Ten Hogsheads of Wine, 4 Fed. Cas. No. 1,900, Bee 178; Morehouse *v.* The Jefferson, 17 Fed. Cas. No. 9,793, 1 Pet. Adm. 46; Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114; The Queen Mab, 3 Hagg. Adm. 242; The Effort, 3 Hagg. Adm. 165; The Britannia, 3 Hagg. Adm. 153; The R. M. Mills, 3 L. T. Rep. N. S. 513.

**66.** The Georgina, 10 Fed. Cas. No. 5,355, 1 Lowell 91; Hall *v.* The Paquet Bot De Cayenne, 11 Fed. Cas. No. 5,941, 7 Phila. (Pa.) 550.

**67.** The Gibson, 160 Fed. 230; The Flora Rodgers, 152 Fed. 286; The Myrtle Tunnel, 146 Fed. 324; The Theta, 135 Fed. 129; The Canada, 92 Fed. 196; Ashbahs *v.* The Trusty, 2 Fed. Cas. No. 573*a*; The Cayenne, 5 Fed. Cas. No. 2,532, 2 Abb. 42; The Charles Henry, 6 Fed. Cas. No. 2,617, 1 Ben. 8; Concklin *v.* The Harmony, 6 Fed. Cas. No. 3,089, 1 Pet. Adm. 34 note; Cross *v.* The Bellona, 6 Fed. Cas. No. 3,428, Bee 193; Curtis *v.* Quantity of Wearing Apparel, 6 Fed. Cas. No. 3,504; The Elizabeth and Jane, 8 Fed. Cas. No. 4,356, 1 Ware 27; The Galaxy, 9 Fed. Cas. No. 5,186, Blatchf. & H. 270; Hindry *v.* The Priscilla, 12 Fed. Cas. No. 6,515, Bee 1; Hollingsworth *v.* Seventy Doubloons & Three Small Pieces of Gold, 12 Fed. Cas. No. 6,620; The John E. Clayton, 13 Fed. Cas. No. 7,338, 4 Blatchf. 372, 18 How. Pr. (N. Y.) 319; Johnson *v.* Certain Goods, 13 Fed. Cas. No. 7,377; The John Wurts, 13 Fed. Cas. No. 7,434, Olcott 462; Morehouse *v.* The Jefferson, 17 Fed. Cas. No. 9,793, 1 Pet. Adm. 46; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372; The Saxon, 21 Fed. Cas. No. 12,412, 4 Ben. 18; The W. D. B., 29 Fed. Cas. No. 17,306, 1 Hask. 236; The Andrina, L. R. 3 A. & E. 286, 22 L. T. Rep. N. S. 488; L'Esperance, 1 Dods. 46; The Effort, 3 Hagg. Adm. 165; The Frances Mary, 2 Hagg. Adm. 89; The Watt, 2 W. Rob. 70; The Sylph, 2 Can. L. T. Occ. Notes 607; The Ida Barton, Young Adm. (Nova Scotia) 240; The Architect, Young Adm. (Nova Scotia) 110.

**68.** The Flora Rodgers, 152 Fed. 286; The Myrtle Tunnel, 146 Fed. 324; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

**69.** The Flora Rodgers, 152 Fed. 286; The Myrtle Tunnel, 146 Fed. 324; The Elizabeth and Jane, 8 Fed. Cas. No. 4,356, 1 Ware 27; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; Howland *v.* Two Hundred and Ten Barrels of Oil, 12 Fed. Cas. No. 6,801; Johnson *v.* Certain Goods, 13 Fed. Cas. No. 7,377; The Rising Sun, 20 Fed. Cas. No. 11,858, 1 Ware 385; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372; Sprague *v.* One Hundred and Forty Barrels of Flour, 22 Fed. Cas. No. 13,253, 2 Story 195; Two Hundred and

service.[70] It is the governing policy of the courts, in cases of derelict, to make liberal awards, so as to encourage the rendering of such services.[71] The salvor of a derelict vessel has a right to the usual allowance, without regard to previous unsuccessful attempts of other parties to rescue her.[72]

(II) *TOWAGE.* Towage is not salvage and when considered by itself is never compensated, except on the principle of paying according to its worth for work and labor performed; and the value of the property towed is but slightly, if at all, considered in determining the compensation to be awarded.[73] The value of a salvage service consisting in a towage is to be estimated by the circumstances

Ten Barrels of Oil, 24 Fed. Cas. No. 14,297, 1 Sprague 91.

**70.** The Adventure, 8 Cranch (U. S.) 221, 3 L. ed. 542; The Flora Rodgers, 152 Fed. 286; The Myrtle Tunnel, 146 Fed. 324; The William Smith, 59 Fed. 615; Cargo from Wreck of The Edwards, 12 Fed. 508; The Elizabeth and Jane, 8 Fed. Cas. No. 4,356, 1 Ware 27; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The John E. Clayton, 13 Fed. Cas. No. 7,338, 4 Blatchf. 372, 18 How. Pr. (N. Y.) 319; Sprague *v.* One Hundred and Forty Barrels of Flour, 22 Fed. Cas. No. 13,253, 2 Story 195; The Rasche, L. R. 4 A. & E. 127, 42 L. J. Edm. 71, 22 Wkly. Rep. 240; The Janet Court, [1897] P. 59, 8 Aspin. 223, 66 L. J. P. D. & Adm. 34, 76 L. T. Rep. N. S. 172.

**Awards in particular cases.**— The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266 [*reversing* 16 Fed. Cas. No. 9,230] (two fifths); The Lyman M. Law, 122 Fed. 816 (one third); The Pinmore, 121 Fed. 423 (about one fourth); The Carrie, 88 Fed. 983 (one fourth); Munson *v.* The Vila, 63 Fed. 1017 (three thousand dollars on value of eight thousand one hundred and eight dollars); Lowndes *v.* The Earnest M. Munn, 61 Fed. 694 (one fourth); Chapman Derrick, etc., Co. *v.* The Henry R. Tilton, 53 Fed. 139 (three fourths); Sharply *v.* The Calvin S. Edwards, 46 Fed. 815 (six hundred and seventy-five dollars on value of fifteen hundred dollars); The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328 (two fifths); Flinn *v.* The Leander, 9 Fed. Cas. No. 4,870, Bee 260 (one third); The Georgiana, 10 Fed. Cas. No. 5,355, 1 Lowell 91 (two fifths); Hartshorn *v.* Twenty-Five Cases of Silk, 11 Fed. Cas. No. 6,168*a* (one fourth); Howland *v.* Two Hundred and Ten Barrels of Oil, 12 Fed. Cas. No. 6,801 (five sixths); The Ida L. Howard, 12 Fed. Cas. No. 6,999, 1 Lowell 2 (one sixth); The L. T. Knights, 15 Fed. Cas. No. 8,585 (two thousand five hundred dollars on value of six thousand four hundred dollars); The Mary Ford, 16 Fed. Cas. No. 9,212*a* [*affirmed* in 3 Dall. 188, 1 L. ed. 563] (one third); Two Hundred and Ten Barrels of Oil, 24 Fed. Cas. No. 14,297, 1 Sprague 91 (five sixths); Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712 (three fifths); The Craigs, 5 P. D. 186, 29 Wkly. Rep. 446 (£2,300 on value of £5,100); The Hebe, 4 P. D. 217 (about one half); The Anna Helena, 5 Aspin. 142, 49 L. T. Rep. N. S. 204 (one third); The Jonge Bastiaan, 5 C. Rob. 323 (two thirds); The Blenden-Hall, 1 Dods. 414 (one tenth when value large); The Elephant, 64 L. T. Rep. N. S. 543 (£50 on value of £58); The Mary Anne, 11 L. T. Rep. N. S. 85 (two fifths); The Caroline, 2 W. Rob. 124 (one eighth); The W. G. Putnam, Young Adm. (Nova Scotia) 271 (two thousand five hundred dollars on value of twenty thousand dollars); The R. Robinson, Young Adm. (Nova Scotia) 168 (three tenths); The Tickler, Young Adm. (Nova Scotia) 166 (one third); The Afton, Young Adm. (Nova Scotia) 136 (four hundred and seventy-five dollars on value of two thousand two hundred and fifty dollars); The S. V. Coonan, Young Adm. (Nova Scotia) 109 (four hundred and eleven dollars on value of nine hundred and fifty-four dollars); The Scotswood, Young Adm. (Nova Scotia) 25 (two fifths).

**When whole may be awarded.**— In the case of a derelict where the salvage service is considerable and the value of the property saved inconsiderable, the whole may be awarded to the salvor. The Cairnsmore, 20 Fed. 519; The William Hamilton, 3 Hagg. Adm. 168; Two Bales of Cotton, Young Adm. (Nova Scotia) 135.

**71.** The Theta, 135 Fed. 129; The Agnes Manning, 59 Fed. 481; The Eleanor *v.* The Thomas W. Haven, 48 Fed. 842; The Flower City, 16 Fed. 866; The Anna, 1 Fed. Cas. No. 398, 6 Ben. 166 [*affirmed* in 1 Fed. Cas. No. 401, 10 Blatchf. 456]; The Mary Ford, 16 Fed. Cas. No. 9,212*a* [*affirmed* in 3 Dall. 188, 1 L. ed. 563]; Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449.

**Two reasons are recognized for allowing a liberal reward** in cases of derelict property: (1) That, the property having been abandoned as lost, it is not for its owner to complain of the reward paid to strangers who restore it; (2) the protection of the public against danger from the derelict vessel. The Anna, 1 Fed. Cas. No. 398, 6 Ben. 166 [*affirmed* in 1 Fed. Cas. No. 401, 10 Blatchf. 456].

**72.** The Island City, 1 Black (U. S.) 121, 17 L. ed. 70.

**73.** The Egypt, 17 Fed. 359.

**Allowance of lump sum favored.**— Where a salvage service rendered by a tug was in the nature of a towage, and the danger was not certain and extreme, an allowance of a lump sum as compensation, bearing some relation to the cost of the service if rendered under a contract, is fairer than a percentage of the value of the salved property. The Carroll, 167 Fed. 112, 92 C. C. A. 564.

of the two vessels, and by the conditions of wind and sea prevailing at the time the service is entered upon, and by the casualties which experience teaches practical seamen are liable to happen in the ordinary course of events while the service continues.[74] When the risk is inconsiderable and the service slight the allowance is little more than a mere remuneration *pro opere et labore*.[75] If, however, the

**74.** Belgian American Maritime Co. *v.* The Great Northern, 72 Fed. 678.

**Twenty per cent and over.**— The Lottie E. Hopkins, 133 Fed. 405; The Marie Anne, 48 Fed. 742; The S. A. Rudolph, 39 Fed. 331; Cowell *v.* The Brothers, 6 Fed. Cas. No. 3,294, Bee 136; The Albion, 3 Hagg. Adm. 254.

**Under twenty per cent and over ten per cent.**— The Rita, 88 Fed. 523; Belgian American Maritime Co. *v.* The Great Northern, 72 Fed. 678; National Steamship Co. *v.* The Hekla, 62 Fed. 941; The Albany, 42 Fed. 64; The Pomona, 37 Fed. 444; The Erin, 36 Fed. 712; The Allegiance, 1 Fed. Cas. No. 207, 6 Sawy. 68; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; Holmes *v.* The Joseph C. Griggs, 12 Fed. Cas. No. 6,640, 1 Ben. 81; The John G. Paint, 13 Fed. Cas. No. 7,346, 2 Ben. 174; The Minnie Miller, 17 Fed. Cas. No. 9,638, 6 Ben. 117; The Puritan, 20 Fed. Cas. No. 11,474, 7 Ben. 571; The W. F. Garrison, 29 Fed. Cas. No. 17,475, 1 Lowell 139; The Hebe, 7 Notes of Cas. Suppl. 1; The Paris, 1 Spinks 289; The Martin Luther, Swah. 287; The Marius, Young Adm. (Nova Scotia) 51.

**Under ten per cent and over five per cent.**— The City of Puebla, 153 Fed. 925; The Ira A. Allen, 128 Fed. 172; The Ereza, 124 Fed. 659; National Steamship Co. *v.* La Hesbaye, 71 Fed. 742; Hein *v.* The Beaconsfield, 67 Fed. 144; Charente Steamship Co. *v.* The Dupuy De Lome, 55 Fed. 93; The Chatfield, 52 Fed. 479; Spreckels *v.* The Jessomene, 47 Fed. 903; The Tancarville, 45 Fed. 903; New England Terminal Co. *v.* The M. Vandercook, 45 Fed. 262; The Italia, 42 Fed. 416; The California, 36 Fed. 563; The Taylor Dickson, 33 Fed. 886; The Gallego, 30 Fed. 271; The Fannie Brown, 30 Fed. 215; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391; Ocean Steam Nav. Co. *v.* The Revenue, 18 Fed. Cas. No. 10,413; The Rebecca Clyde, 20 Fed. Cas. No. 11,621, 5 Ben. 98; The Saragossa, 21 Fed. Cas. No. 12,335, 1 Ben. 553; The Edenmoré, [1893] P. 79, 7 Aspin. 334, 69 L. T. Rep. N. S. 230, 1 Reports 574, 41 Wkly. Rep. 654; The Monarch, 12 P. D. 5, 6 Aspin. 90, 56 L. J. P. D. & Adm. 114, 56 L. T. Rep. N. S. 204, 35 Wkly. Rep. 292; The Kenmure Castle, 7 P. D. 47, 5 Aspin. 27, 47 L. T. Rep. N. S. 661, 30 Wkly. Rep. 708; The Traveller, 3 Hagg. Adm. 370; The Augusta Andre, Young Adm. (Nova Scotia) 201.

**Under five per cent.**— The Rebecca Shepherd, 148 Fed. 727; The South Bay, 139 Fed. 273; The Santurce, 136 Fed. 682; The Marcus Hook, 135 Fed. 744, 68 C. C. A. 382; The Alice Blanchard, 106 Fed. 238; The Grace Dollar, 103 Fed. 665; The Winifred, 102 Fed. 988; Puget Sound Tugboat Co. *v.* The City of Puebla, 79 Fed. 982; The Waverly, 78 Fed. 191; Canadian-Australian Steamship Line *v.* The Strathnevis, 76 Fed. 855; Morgan's Louisiana, etc., Steamship Co. *v.* The Alaska, 75 Fed. 430; International Nav. Co. *v.* The Obdam, 72 Fed. 543; Netherlands-American Steam Nav. Co. *v.* The Dania, 70 Fed. 398 [*distinguishing* The Daniel Steinman, 19 Fed. 918]; Royal West India Co. *v.* The City of Para, 69 Fed. 479; Thomas *v.* The Florence, 65 Fed. 248; The Chinese Prince, 61 Fed. 697; Davis *v.* Transfer No. 1, 53 Fed. 610; Upton *v.* The Charles Wetmore, 51 Fed. 449; American Petroleum Co. *v.* The Veendam, 46 Fed. 489; The Benison, 36 Fed. 793; The Wisconsin, 30 Fed. 879; The Swiftsure, 29 Fed. 462; The Alaska, 23 Fed. 597; The Colon, 6 Fed. Cas. No. 3,024, 10 Ben. 60; The Costa Rica, 6 Fed. Cas. No. 3,262, 3 Sawy. 610; Ensign *v.* The Peerless, 8 Fed. Cas. No. 4,494; Pacific Coast Wrecking Co. *v.* The Eastport, 18 Fed. Cas. No. 10,646; Pacific Mail Steamship Co. *v.* Ten Bales Gunny Bags, 18 Fed. Cas. No. 10,648, 3 Sawy. 187; The Vulcan *v.* The Belin, 9 Ct. Sess. Cas. 1057; The Ellora, Lush. 550.

**75.** The Benjamin *v.* Van Brunt, 164 Fed. 775; The Chief, 147 Fed. 875; The William P. Hood, 114 Fed. 983; The New Camelia, 105 Fed. 637, 44 C. C. A. 642; The Catalina, 105 Fed. 633, 44 C. C. A. 638; The Weber Bros., 88 Fed. 92; The Monticello, 81 Fed. 211; The Gambetta, 74 Fed. 259, 20 C. C. A. 417; The Spokane, 67 Fed. 254; Bartley *v.* The William A. Taylor, 47 Fed. 70; Tebo *v.* The Jarlen, 43 Fed. 176; The Rosedale, 20 Fed. 447; Howard *v.* The Manhattan No. 12, 20 Fed. 391; The Levi Davis, 9 Fed. 715; The Leipsic, 5 Fed. 108; The Bolivar *v.* The Chalmette, 3 Fed. Cas. No. 1,611, 1 Woods 397; The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185 [*reversing* 8 Fed. Cas. No. 4,455, 7 Ben. 550]; The Entire, 8 Fed. Cas. No. 4,502; Fulmer *v.* Patterson, 9 Fed. Cas. No. 5,152, 14 Phila. (Pa.) 527; The H. B. Foster, 11 Fed. Cas. No. 6,290, Abb. Adm. 222; Phillips *v.* The United States, 19 Fed. Cas. No. 11,107; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; The Senator, 21 Fed. Cas. No. 12,664, Brown Adm. 372; Sturgis *v.* The Joseph Johnson, 23 Fed. Cas. No. 13,576.

**Towing to safety a drifting barge or scow** is salvage service of a low order of merit, and will be compensated by a small award. Scows Nos. 1 & 10, 141 Fed. 477; The John Fleming, 136 Fed. 486 [*affirmed* in 144 Fed. 1021, 74 C. C. A. 680]; The Hughes Bros. and Bangs No. 49, 135 Fed. 746, 68 C. C. A. 384; U. S. *v.* Morgan, 99 Fed. 570, 39 C. C. A. 653; The Rescue *v.* The George B. Roberts, 64 Fed. 139; Stebbins *v.* Five Mud-Scows, 50 Fed. 227; Bywater *v.* A Raft of Piles, 42 Fed. 917; Howard *v.* The Manhattan No. 12, 20 Fed. 391; The Rialto, 15 Fed. 124; Seaman *v.* Erie R. Co., 21 Fed. Cas. No. 12,582, 2 Ben. 128.

service is attended with unusual danger and difficulty, the reward will be proportionately higher.[76] The extent of the risk assumed in undertaking to tow a disabled vessel is not to be gauged by the results alone; and the fact that the towing line was speedily taken, and that no mishap occurred, is entitled to consideration only so far as it tends to show the state of the wind and sea.[77] The towage of a disabled vessel by a freight or passenger steamer, even if under circumstances scarcely making it a salvage service, should be rewarded by a somewhat greater compensation than a mere towage by tugs.[78]

(III) *PILOTAGE.* The general principle is that double pilotage is payable for piloting a vessel in a crippled state,[79] or a remuneration equivalent to the extra service, including the distance, labor, and hazard of the service.[80] Pilot services when rendered under extraordinary circumstances should be liberally rewarded,[81] and whether the claim for compensation be termed "salvage" or not, it may be determined by the same rules and upon the same principles.[82] The nature of the service only affects the amount of compensation, which should be less than for strictly salvage service.[83] If, however, the circumstances under which the pilot services were rendered should be very extraordinary, and the value of the property great, the court may decree a compensation equal to what would probably be the share of the pilot vessel in saving such an amount of property.[84]

(IV) *RECAPTURE.* By the act of congress of July 9, 1798,[85] recaptured American vessels and cargoes pay salvage, not less than one eighth or more than one half. By the act of March 2, 1799,[86] relating to public armed ships, American or friendly property in the possession of the enemy more than forty-eight and less than ninety-six hours is liable to pay, on recapture, one-third part of the whole value; [87] and if more than ninety-six hours, one half of the value.[88] The salvage act of congress of March 3, 1800,[89] provides that, upon the recapture of any vessel, other than a vessel of war or privateer, or of any goods belonging to any person resident within or under the protection of the United States, the

**Towing a vessel away from a fire** is usually salvage service of a low order of merit, and a small award affords sufficient compensation. Of the ingredients of salvage there are usually to be considered in such cases only the peril of the rescued property, the time occupied, and the value saved. The Priscilla, 153 Fed. 476; The America, 136 Fed. 510; The Barge No. 127, 113 Fed. 529; The John I. Brady, 109 Fed. 912; The Kaiser Wilhelm der Grosse, 106 Fed. 963; The Peru, 99 Fed. 783; The Boyne, 98 Fed. 444; Neal *v.* The Elena G., 61 Fed. 519; The D. L. & W. No. 6 C., 53 Fed. 284; Murray *v.* The John Swan, 50 Fed. 447; Hamilton *v.* The Kaaterskill, 48 Fed. 701; Baltimore, etc., R. Co. *v.* The Holland, 44 Fed. 362; The Marie, 39 Fed. 501; The Carondelet, 36 Fed. 714; The Bessie Whiting, 35 Fed. 79; The New York, 34 Fed. 922; Wilson *v.* Winchester, 30 Fed. 204; The Rialto, 15 Fed. 124; The Arlington, 1 Fed. Cas. No. 534, 2 Ben. 511; Fulmer *v.* Patterson, 9 Fed. Cas. No. 5,152; Stevens *v.* The S. W. Downs, 23 Fed. Cas. No. 13,411, Newb. Adm. 458.

**76.** Luckenbach *v.* Scows 3 and 16, 50 Fed. 570; Easton, etc., R. Co. *v.* The Scow No. 19, 46 Fed. 406; Walsh *v.* Scows 9, 16 and 24, 45 Fed. 901; The Capt. Geo. W. Wright, 5 Fed. Cas. No. 2,393, 8 Ben. 219; The Ontario, 18 Fed. Cas. No. 10,541, 8 Ben. 500.

**77.** The Waverly, 78 Fed. 191.

**78.** The Monticello, 81 Fed. 211.

**79.** The Enterprise, 2 Hagg. Adm. 178 note.

**80.** The Cachemire, 38 Fed. 518.

**81.** The Augusta, 2 Fed. Cas. No. 646; The Calcutta, 4 Fed. Cas. No. 2,298.

**82.** McDonald *v.* The Resolute, 38 Fed. 923 (two hundred and fifty dollars on valuation of twelve thousand dollars); The Wisconsin, 32 Fed. 111 [*affirming* 30 Fed. 846]; The Augusta, 2 Fed. Cas. No. 646 (nine hundred dollars on valuation of twelve thousand dollars); Bean *v.* The Grace Brown, 2 Fed. Cas. No. 1,171, 2 Hughes 112 (two thousand four hundred dollars on valuation of thirty-eight thousand dollars); The Calcutta, 4 Fed. Cas. No. 2,298 (one thousand five hundred dollars on valuation of sixty thousand dollars); Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495 (two thousand five hundred dollars on valuation of one hundred and fifty thousand dollars); The Nicholas Witzen, 3 Hagg. Adm. 369 (£80 on valuation of £3,000).

**83.** Curry *v.* The Lockgoil, 6 Fed. Cas. No. 3,495.

**84.** The Calcutta, 4 Fed. Cas. No. 2,298.

**85.** 1 U. S. St. at L. 579, c. 68, § 6.

**86.** 1 U. S. St. at L. 716.

**87.** Bas *v.* Tingy, 4 Dall. (U. S.) 37, 1 L. ed. 731; Clayton *v.* The Harmony, 5 Fed. Cas. No. 2,871, Pet. Adm. 70, one fourth allowed.

**88.** Jones *v.* Harraden, 9 Mass. 540; Bas *v.* Tingy, 4 Dall. (U. S.) 37, 1 L. ed. 731.

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same, if recaptured by a private vessel of the United States, shall be restored on payment of one-sixth part of the value of the vessel or goods; and if the vessel, so recaptured, shall appear to have been set forth and armed as a vessel of war, before such capture, or afterward, then upon a salvage of one half of the true value of such vessel of war.[90]

(v) *Other Services.* The principles and elements entering into a determination of the amount of compensation to be awarded salvors have been considered in connection with various sorts of salvage services, such as saving a vessel disabled at sea;[91] saving a vessel or her cargo from destruction by fire;[92] picking up a drifting barge or raft;[93] rescuing a stranded vessel;[94] or services

**90.** The Adeline, 9 Cranch (U. S.) 244, 3 L. ed. 719, holding that one-sixth part only is allowed for salvage to a privateer on the recapture of the cargo in an armed vessel, although one half is allowed for the recapture of the vessel.

**91.** See cases cited *infra*, this note.

**Over thirty-three and one-third per cent.**— Hattrick *v.* The Spanish Bark, 11 Fed. Cas. No. 6,218*a*.

**Thirty-three and one-third per cent.**— Attacapas, 2 Fed. Cas. No. 637, 3 Ware 65; Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449; Warder *v.* La Belle Creole, 29 Fed. Cas. No. 17,165, 1 Pet. Adm. 31.

**Twenty-five per cent.**—The Mary N. Hogan, 30 Fed. 381; Booth *v.* L'Esperanza, 3 Fed. Cas. No. 1,647, Bee 92; Fisher *v.* The Sybil, 9 Fed. Cas. No. 4,824, Brunn. Col. Cas. 274, 5 Hughes 61 [*affirmed* in 4 Wheat. 98, 4 L. ed. 522]; The Huntress, 12 Fed. Cas. No. 6,912.

**Twenty per cent.**— The John G. Paint, 13 Fed. Cas. No. 7,346, 2 Ben. 174.

**Fifteen per cent.**— Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1 Curt. 376.

**Under ten per cent.**— The Peter White, 149 Fed. 594; The Marcus Hook, 128 Fed. 813; The Elm Branch, 106 Fed. 952; Kasbek Steamship Co. *v.* The T. F. Oakes, 87 Fed. 229; The Thomas Quigley, 68 Fed. 936; The Courier, 6 Fed. Cas. No. 3,283; The Czarina, 6 Fed. Cas. No. 3,531, 2 Sprague 48; The George Gilchrist, 10 Fed. Cas. No. 5,333, 1 Lowell 234; The J. L. Bowen, 13 Fed. Cas. No. 7,322, 5 Ben. 296; Norris *v.* The Island City, 18 Fed. Cas. No. 10,306, 1 Cliff. 219; Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110 (salvage service rendered by passenger); The Triumph, 24 Fed. Cas. No. 14,183, 1 Sprague 428; The Golondrina, L. R. 1 A. E. 334; The Saint Nicholas, Lush. 29.

**92.** See cases cited *infra*, this note.

**Twenty per cent or over.**— The City of Columbia, 56 Fed. 252; Demarest *v.* The Helen F. Robbins, 55 Fed. 1014; Eastern, etc., R. Co. *v.* The Lydia, 49 Fed. 666; The Isaac May, 46 Fed. 79; The Lone Star, 34 Fed. 807 [*affirmed* in 35 Fed. 793]; The Perseverance, 27 Fed. 478; The Albert Gallatin, 1 Fed. Cas. No. 140; Montgomery *v.* The P. T. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412; The Magnolia, 3 Can. L. T. Occ. Notes 107.

**Five to twenty per cent.**— The Independent, 113 Fed. 702; The Brandywine, 87 Fed. 652, 31 C. C. A. 187; Flannery *v.* The Dayton, 84 Fed. 678; Crocker *v.* The Arkansas, 84 Fed. 361; The H. E. Runnels, 82 Fed. 755, 27 C. C. A. 183; Alexander *v.* Car Floats Nos. 1, 3, 4 and 5, 64 Fed. 887; Seville *v.* The Georgia, 53 Fed. 933; The Avoca, 39 Fed. 567; Wilmington Transp. Co. *v.* The Old Kensington, 39 Fed. 496; Hayden *v.* The C. W. Cochrane, 11 Fed. Cas. No. 6,258, 3 Woods 304; The Tees, Lush. 505.

**Under five per cent.**— James Clark Co. *v.* Steam Ferryboat Columbia, 26 App. Cas. (D. C.) 85; The Car Float No. 19, 138 Fed. 435; The Toledo, 136 Fed. 959; The Joseph Stickney, 127 Fed. 763; Gilchrist Transp. Co. *v.* 110,000 Bushels of No. 1 Northern Wheat, 120 Fed. 432; The Merjulio, 68 Fed. 935; Clarke *v.* The Rita, 62 Fed. 761, 10 C. C. A. 629; Millard *v.* The Barnegat, 55 Fed. 92; Millard *v.* The Lighter No. 14, 53 Fed. 143; The European, 44 Fed. 484; The Alice Clark, 39 Fed. 621; The Vanloo, 39 Fed. 570; The Labrador, 39 Fed. 503; Spreckles *v.* The Brussels, 38 Fed. 524; The Louisiana, 34 Fed. 663; The Straits of Gibraltar, 32 Fed. 297; The Alice M. Minot, 30 Fed. 212; The O. M. Hitchcock, 25 Fed. 777; The Baker, 25 Fed. 771, 23 Blatchf. 389 [*modifying* 23 Fed. 109]; The Rio Grande, 22 Fed. 914; The Rialto, 15 Fed. 124; The City of Newcastle, 7 Aspin. 546, 71 L. T. Rep. N. S. 848.

**The dangerous character of the cargo** whereby the danger of the salvors was largely increased is a sufficient reason for enhancing the reward. The Cyclone, 16 Fed. 486.

**93.** See cases cited *infra*, this note.

**Under ten per cent.**— The Lee, 24 Fed. 47; Keteltas *v.* Raft of Timber, 14 Fed. Cas. No. 7,741*a*; A Raft of Spars, 20 Fed. Cas. No. 11,528, Abb. Adm. 291 [*affirmed* in 20 Fed. Cas. No. 11,529, Abb. Adm. 485]; Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss. 297.

**94.** See cases cited *infra*, this note.

**Fifty per cent and over.**— The Lamington, 86 Fed. 675, 30 C. C. A. 271 [*reversing* 80 Fed. 159]; The Andrew Adams, 36 Fed. 205; The Erato, 13 P. D. 163, 6 Aspin. 334, 57 L. J. P. D. & Adm. 107, 59 L. T. Rep. N. S. 840.

**Thirty-three and one-third per cent.**— The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Euphrasia, 8 Fed. Cas. No. 4,545; The Iconiun, 12 Fed. Cas. No. 6,995; The Kristrel, 14 Fed. Cas. No. 7,935.

**Twenty to twenty-five per cent.**— Sweeting *v.* The Oxford, 66 Fed. 584; Russell *v.* The Tregurno, 50 Fed. 946; The Sandringham, 10

rendered in saving the cargo and materials from a vessel which has been wrecked or which is stranded.[95]

Fed. 556, 5 Hughes 316; The Annie Leland, 1 Fed. Cas. No. 421, 1 Lowell 310.

**Ten to twenty per cent.**— The Lizzie Crawford, 156 Fed. 201, 203 [*affirmed* in 162 Fed. 642, 89 C. C. A. 434]; The Penobscott, 106 Fed. 419, 45 C. C. A. 372 [*modifying* 103 Fed. 205]; The Haxby *v.* Merritt's Wrecking Organization, 83 Fed. 715, 28 C. C. A. 33; Brown *v.* The Ranger, 75 Fed. 688; The Kimberley, 40 Fed. 289 [*affirmed* in 40 Fed. 910]; The Egypt, 17 Fed. 359; The Albus, 1 Fed. Cas. No. 148; The Ashburton, 2 Fed. Cas. No. 575; Brooks *v.* The William Penn, 4 Fed. Cas. No. 1,965, 2 Hughes 144; The Ellen Hood, 8 Fed. Cas. No. 4,377; The J. F. Farlan, 13 Fed. Cas. No. 7,313, 3 Ben. 206 [*affirmed* in 13 Fed. Cas. No. 7,314, 8 Blatchf. 207]; The Rockland, 20 Fed. Cas. No. 11,981; The Sierra Nevada, 22 Fed. Cas. No. 12,846; The Sultan, 23 Fed. Cas. No. 13,601.

**Under ten per cent.**— The Western Star, 157 Fed. 489; The Devonian, 150 Fed. 831; The Apache, 124 Fed. 905; The James Turpie, 113 Fed. 700; The Alexandra, 104 Fed. 904; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; The Niagara, 89 Fed. 1000; Commercial Towboat Co. *v.* The George W. Clyde, 86 Fed. 665, 30 C. C. A. 292; International Nav. Co. *v.* The St. Paul, 86 Fed. 340, 30 C. C. A. 70; Fifield *v.* The Thomas B. Garland, 83 Fed. 1018; The R. R. Rhodes *v.* Fay, 82 Fed. 751, 27 C. C. A. 258; Merritt *v.* The St. Paul, 82 Fed. 104; The Alamo, 75 Fed. 602, 21 C. C. A. 451; Luckenbach *v.* The North Erin, 71 Fed. 430; French *v.* The Excelsior, 48 Fed. 749; Hall *v.* The Lucy P. Miller, 48 Fed. 121; Laverty *v.* The Dennis Valentine, 47 Fed. 664 [*affirmed* in 57 Fed. 398, 6 C. C. A. 409]; The City of Worcester, 42 Fed. 913; Congdon *v.* The Eleanor, 42 Fed. 543; The Joseph Laughlin *v.* The Jas. Rumsey, 40 Fed. 909; South Carolina Steam-Boat Co. *v.* The Nellie Floyd, 39 Fed. 221; The Cassandra Adams, 30 Fed. 379; The Guadalupe, 20 Fed. 443; Baker Salvage Co. *v.* The Excelsior, 19 Fed. 436; The Maggie Ellen, 19 Fed. 221; The Hesper, 18 Fed. 696 [*affirmed* in 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175]; The Hesper, 18 Fed. 692; The Sophia Hanson, 16 Fed. 144; The Mary E. Long, 7 Fed. 364; The Leipsic, 5 Fed. 108; Baker *v.* Hemenway, 2 Fed. Cas. No. 770, 2 Lowell 501; The Birdie, 3 Fed. Cas. No. 1,432, 7 Blatchf. 238 [*modifying* 3 Fed. Cas. No. 1,431, 3 Ben. 273]; The Calcutta, 4 Fed. Cas. No. 2,298; The Diadem, 7 Fed. Cas. No. 3,874; The Marathon, 16 Fed. Cas. No. 9,058; The M. B. Stetson, 16 Fed. Cas. No. 9,363, 1 Lowell 119; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; The Lancaster, 9 P. D. 14, 5 Aspin. 174, 49 L. T. Rep. N. S. 705, 36 Wkly. Rep. 608; The Jan Hendrik, 1 Spinks 181; The Persia, 1 Spinks 166; The Rajasthan, Swab. 171.

**Florida reef cases — Twenty-five to fifty per cent** — Bennett *v.* The Tevere, 3 Fed. Cas. No. 1,325, 5 Adm. Rec. 364; The Howard, 12 Fed. Cas. No. 6,752*a*; The Lexington, 15 Fed. Cas. No. 8,336; The Scotsman, 21 Fed. Cas. No. 12,515; Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120.

**Under twenty-five per cent.**— Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; The York, 30 Fed. Cas. No. 18,140.

**95.** See cases cited *infra*, this note.

**Fifty per cent.**— Shute *v.* Dodge, 7 La. Ann. 479; The Cimbus, 5 Fed. Cas. No. 2,718; The Maria Bishop, 16 Fed. Cas. No. 9,077, Blatchf. Prize Cas. 552.

**Thirty-three and one-third per cent.**— De Leon *v.* Leitch, 65 Fed. 1002; Lewis *v.* Lot of Whalebone, 51 Fed. 916; Small *v.* The Messenger, 22 Fed. Cas. No. 12,961, 2 Pet. Adm. 284; Stephens *v.* Bales of Cotton, 22 Fed. Cas. No. 13,366, Bee 170; Weeks *v.* The Catharina Maria, 29 Fed. Cas. No. 17,351, 2 Pet. Adm. 424.

**Under thirty-three and one-third per cent.**— The Aguan, 48 Fed. 320; The Bickmore, 3 Fed. Cas. No. 1,388; The Crown, 6 Fed. Cas. No. 3,450; Jerby *v.* One Hundred and Ninety-Four Slaves, 13 Fed. Cas. No. 7,288, Bee 226; Spencer *v.* The Charles Avery, 22 Fed. Cas. No. 13,232, 1 Bond 117.

**Florida reef cases — Over fifty per cent.**— The Alabamian, 1 Fed. Cas. No. 128; Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494; The Helen E. Booker, 11 Fed. Cas. No. 6,330; The Isaac Allerton, 13 Fed. Cas. No. 7,088; Peacon *v.* The Amazon, 19 Fed. Cas. No. 10,871; The Robert Morris, 20 Fed. Cas. No. 11,893.

**Thirty to fifty per cent.**— The Athalia, 2 Fed. Cas. No. 598; The Cora Nellie, 6 Fed. Cas. No. 3,217; The Elizabeth Bruce, 8 Fed. Cas. No. 4,358; The F. A. Everett, 8 Fed. Cas. No. 4,603; The Indian Hunter, 13 Fed. Cas. No. 7,024; The Joseph A. Davis, 13 Fed. Cas. No. 7,534; The Mary Hale, 16 Fed. Cas. No. 9,213; The Maryland, 16 Fed. Cas. No. 9,218; The May Howard, 16 Fed. Cas. No. 9,348; The Merchant, 17 Fed. Cas. No. 9,435; The Nathan Hannan, 17 Fed. Cas. No. 10,029; The North America, 18 Fed. Cas. No. 10,313; The Norway, 18 Fed. Cas. No. 10,356; The Pacific, 18 Fed. Cas. No. 10,642; Peacon *v.* The Amazon, 19 Fed. Cas. No. 10,871; The Tellumah, 23 Fed. Cas. No. 13,823.

**Under thirty per cent.**— Johnson *v.* The El Dorado, 50 Fed. 951; The Eliza Mallory, 8 Fed. Cas. No. 4,365.

**Cargo partly damaged and partly undamaged.**— A considerably larger percentage will be allowed salvors on that part of the cargo saved in a damaged condition than on that saved dry and uninjured. Baker *v.* Cargo and Materials of The Slobodna, 35 Fed. 537; The Ajax, 1 Fed. Cas. No. 117; The America, 1 Fed. Cas. No. 279; The Aquila, 1 Fed. Cas. No. 500; Buckley *v.* William M. Jones, 4 Fed. Cas. No. 2,095; The Caroline Nesmith, 5 Fed. Cas. No. 2,423; The Harwood, 11 Fed. Cas. No. 6,186; The John Wesley, 13 Fed.

**d. Reduction.** The amount of salvage compensation to which salvors would be otherwise entitled may be reduced by avarice and hard dealing on their part,[96] by want of good faith,[97] by slight negligence or misconduct,[98] by want of skill or energy,[99] and by errors of judgment.[1] Salvors should not have their compensation for services actually necessary reduced because they performed additional

Cas. No. 7,433; The Mississippi, 17 Fed. Cas. No. 9,651; The Mulhouse, 17 Fed. Cas. No. 9,910; The Nathaniel Kimbal, 17 Fed. Cas. No. 10,033.

**Cargo saved by diving.**— A larger percentage will be awarded on that portion of the cargo saved by diving and working under water than on that saved with comparatively little labor and expense. The America, 1 Fed. Cas. No. 279; The Brewster, 4 Fed. Cas. No. 1,852; Buckley *v.* William M. Jones, 4 Fed. Cas. No. 2,095; The Carolina Nesmith, 5 Fed. Cas. No. 2,423; The John Wesley, 13 Fed. Cas. No. 7,433; The Mulhouse, 17 Fed. Cas. No. 9,910; The Nathaniel Kimbal, 17 Fed. Cas. No. 10,033; The Telamon, 23 Fed. Cas. No. 13,820; The Yucatan, 30 Fed. Cas. No. 18,194.

96. The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

**Exorbitant demands.**— The court, in awarding salvage, may take into consideration the unworthy conduct of salvors in seeking to profit by the fright of the crew of the vessel, and reduce the amount from the exorbitant claim. The Ragnarok, 158 Fed. 694; The Young America, 20 Fed. 926. But an award for salvage services will not be abated because of the exorbitant demands of the salvors made before suit, where their libel demanded no particular sum, and they did not attempt to hold the vessel, but permitted her to go, and agreed to accept a bond to be fixed by the court. The Apache, 124 Fed. 905.

**Unnecessary attachment.**— Where libellant, who had rendered a salvage service to a steamer, seized her cargo on attachment and caused a considerable loss to the owners, although the ship-owner offered to give security for the full amount of any claim against it, a reduction of the salvage award on that account by the trial court will not be disturbed on appeal. The Banes, 147 Fed. 192, 77 C. C. A. 420.

97. The Dolcoath, 16 Fed. 264; The L. T. Knights, 15 Fed. Cas. No. 8,585, 1 Lowell 396; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443.

**Falsehood by salvors** touching the amount of cargo saved by especially meritorious service should diminish their compensation. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

98. The Henry Steers, Jr., 110 Fed. 578; Anonymous, 1 Fed. Cas. No. 429; The Diadem, 7 Fed. Cas. No. 3,874; The Mulhouse, 17 Fed. Cas. No. 9,910; Nickerson *v.* The John Perkins, 18 Fed. Cas. No. 10,252, 3 Ware 87; The C. S. Butler, L. R. 4 A. & E. 178, 2 Aspin. 237, 43 L. J. Adm. 17, 30 L. T. Rep. N. S. 475, 22 Wkly. Rep. 759; The Lisbon, Ir. R. 1 Eq. 144; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807; The Cape Packet, 3 W. Rob. 122, 6 Notes of Cas. 565; The Rowena, Young Adm. (Nova Scotia) 255.

**Slight misconduct not resulting in loss** should not reduce the amount of salvage. The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,393.

**Violent and overbearing conduct** on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the court to diminish the amount of the reward. The Maria, 7 P. D. 203, 5 Aspin. 27, 47 L. T. Rep. N. S. 737.

**Forcibly retaining possession.**— A salvage claim may be dismissed in part because of the misconduct in the salvors in obtruding their services after being formally discharged by the owners of a sunken vessel. The Glasgow Packet, 3 Notes of Cas. 107, 2 W. Rob. 306.

**Not taking necessary assistance.**— Salvage award will be diminished by reason of the salvors not placing the ship in a position of safety, as they might have done, if they had taken further assistance which was offered. The Dosseitei, 10 Jur. 865.

**Usurpation of authority by a passenger** after the performance of a salvage service will reduce the amount of his award. The Pennsylvania, 19 Fed. Cas. No. 10,945.

**When the amount of salvage is necessarily limited to mere compensation for labor,** it should not be reduced by anything short of gross negligence or dishonesty and fraud. Sweeting *v.* The Oxford, 66 Fed. 584.

**The extent of this diminution** is measured, not so much by the amount of loss or injury sustained, as by the moral quality or degree of turpitude of the act complained of. The Mulhouse, 17 Fed. Cas. No. 9,910; The Cape Packet, 6 Notes of Cas. 565, 3 W. Rob. 122.

99. The Katie Collins, 21 Fed. 409; The Dwina, [1892] P. 58, 7 Aspin. 173, 61 L. J. Adm. 71, 66 L. T. Rep. N. S. 862; The Perla, Swab. 230; The Charles Adolphe, Swab. 153; The Clarisse, Swab. 129.

**Where salvors fail to get a stranded vessel afloat at the first high water** at which she might have been floated had they employed the proper means, they must be considered as having failed in point of skill and energy, and must suffer the just and legal consequences of such failure, notwithstanding they may have saved the vessel and cargo. The Katie Collins, 21 Fed. 409.

**Failure to do all that might be done** affords good ground for reducing the amount to be awarded salvors. Canadian-Australian Steamship Line *v.* The Strathnevis, 76 Fed. 855.

1. Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494; The Sultan, 23 Fed. Cas. No. 13,601.

unnecessary labor.[2] Nor is the refusal on the part of salvors to accept a fair offer or to make a proper adjustment of their demand without suit ground for reducing the amount of salvage to which they would otherwise be entitled.[3]

**B. Apportionment**[4] — **1. In General — a. Upon What Property.** Where a ship and cargo are saved together, by common or continuous labor or service, the salvage expenses are properly to be apportioned upon the ship, freight, and cargo, in proportion to their respective values, as in a case of general average;[5] but neither is liable for the salvage due from the other.[6] In this class of cases, no distinction can be made between the proportions of salvage charged against the different kinds of cargo; and specie must bear its share of the common burden.[7] But where the ship is lost and the voyage broken up, each article of the cargo is charged with its own particular expenses of saving. The interests of the parties are sundered by the destruction of the ship, and the maxim, "*Sauve qui peut,*" applies.[8] Articles, however, of the same kind, saved at the same time, and by the same salvors, and in a similar condition, may generally be charged with the same rate of salvage;[9] and notary's fees, costs of the salvage suit, and similar charges for the common benefit should be apportioned.[10] Where by one series of operations the cargo is salved, and by another the ship, it is proper for the salvors to bring separate proceedings against ship and cargo, and for the court to award separate sums, each bearing a different ratio to the amount salved.[11]

**b. Among Salvors** — (i) *In General.* In apportioning an award among salvors, there should be kept in view: (1) Their time of arrival;[12] (2) the value,

2. Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*.

3. The D. W. Vaughan, 8 Fed. Cas. No. 4,222, 9 Ben. 26.

4. Services as subjects of apportionment see Shipping.

5. The Eleanor *v.* The Thomas W. Haven, 48 Fed. 842; Congdon *v.* The Eleanor, 42 Fed. 543; The Queen of the Pacific, 18 Fed. 700, 9 Sawy. 421; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. 127, 20 Blatchf. 557; The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412; The Mulhouse, 17 Fed. Cas. No. 9,910; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549; Briggs *v.* Merchant Traders' Ship Loan, etc., Assoc., 13 Q. B. 167, 13 Jur. 787, 18 L. J. Q. B. 178, 66 E. C. L. 167; The Pyrénnée, Brown & L. 189; The Emma, 3 Notes of Cas. 114, 2 W. Rob. 315.

No distinction can be drawn between vessel and cargo, on the ground that less exertion was necessary to save the latter. The service is considered as a single service, to be compensated by a *quantum* of the proceeds of the whole property saved. Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421. As a general rule the court will not assess a different ratio of salvage upon different parts of the property, according to the labor expended on those parts, although it may do so if justice requires it. The Vesta, 2 Hagg. Adm. 189. See also The Albion Lincoln, 1 Fed. Cas. No. 144, 1 Lowell 71.

Where the character of the cargo is dangerous, and the danger to the salvors is thereby largely increased, it should pay a larger percentage for its rescue in safety. The Cyclone, 16 Fed. 486.

Freight pro rata earned must contribute to the salvage with ship and cargo. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; The Racehorse, 3 C. Rob. 101. In fixing the award for the salvage of a vessel while proceeding on a voyage with cargo, the freight will be treated as divisible, and the amount to be reckoned in the value of the salved property is the proportion thereof which has been actually earned at the time of the salvage service. Perriam *v.* Pacific Coast Co., 133 Fed. 140, 66 C. C. A. 206; The Norma, Lush. 124.

6. Stone *v.* The Jewell, 41 Fed. 103; The Alaska, 23 Fed. 597; The Queen of the Pacific, 18 Fed. 700, 9 Sawy. 421; The Pyrénnée, Brown & L. 189.

7. International Nav. Co. *v.* The St. Paul, 86 Fed. 340, 30 C. C. A. 70; Merritt *v.* The St. Paul, 82 Fed. 104; The Longford, 6 P. D. 60, 4 Aspin. 385, 50 L. J. P. D. & Adm. 28, 44 L. T. Rep. N. S. 254, 29 Wkly. Rep. 491; The Jonge Bastiaan, 5 C. Rob. 322. *Contra*, The Emma, 3 Notes of Cas. 114, 2 W. Rob. 315 (*dictum* by Dr. Lushington).

8. The Mulhouse, 17 Fed. Cas. No. 9,910; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

9. Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

10. Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

11. International Nav. Co. *v.* The St. Paul, 86 Fed. 340, 30 C. C. A. 70; The City of Worcester, 42 Fed. 913.

12. The Kaiser Wilhelm der Grosse, 106 Fed. 963; Demarest *v.* The Helen F. Robbins, 55 Fed. 1014; Millard *v.* The Despatch, 50 Fed. 611; Hall *v.* The Bay of Naples, 44 Fed. 90; The Cachemire, 38 Fed. 518; The Perseverance, 27 Fed. 478.

size, and power of the vessels employed;[13] (3) the effectiveness of their services;[14] (4) their aid in saving life;[15] and (5) their remaining, as requested, after the principal service had been performed.[16] Furthermore in distributing the award some recognition should be made of the special losses or injuries which those engaged in rendering the services may have suffered.[17] A salvor occupying a position subordinate to the principal salvor is entitled to less than the share of an independent salvor.[18] Where charterers are entitled to share in a salvage award, the proper rule is to first allow the charterers their actual outlay in rendering the service, that is, for the hire of the ship, and for the pay-roll and fuel consumed during the delay, and then to divide the balance of the award between the charterers, the owners of the ship, and the crew.[19]

(II) *Between Vessel and Crew.* There is no fixed rule governing the division between the owners and crew of a vessel of the amount received or awarded for salvage services.[20] Each case of salvage must stand on its own merits with regard to the rate of distribution of the sum awarded between owners and crew, but regard should be paid to the value and time of service of each.[21] Under the rule once prevailing in admiralty, the owners of the salving vessel could not receive more than one third of the award,[22] unless there were unusual circumstances of peril to the salving vessel.[23] But that was a rule fixed in reference to sailing vessels, and the policy of courts of admiralty now is to encourage salvage services by steam vessels by giving to their owners a larger proportion.[24] So also

**13.** The Kaiser Wilhelm der Grosse, 106 Fed. 963.

**14.** The Kaiser Wilhelm der Grosse, 106 Fed. 963; Demarest *v.* The Helen F. Robbins, 55 Fed. 1014; Insurance Co. of North America *v.* The Venezuela, 55 Fed. 416, 5 C. C. A. 159 [*affirming* 50 Fed. 607]; Hall *v.* The Bay of Naples, 44 Fed. 90; The Lone Star, 34 Fed. 807 [*affirmed* in 35 Fed. 793].

**15.** The Kaiser Wilhelm der Grosse, 106 Fed. 963; The Eastern Monarch, Lush. 81.

**16.** The Kaiser Wilhelm der Grosse, 106 Fed. 963.

**17.** The Cyclone, 16 Fed. 486; The Marquis of Huntly, 3 Hagg. Adm. 246.

**18.** Insurance Co. of North America *v.* The Venezuela, 55 Fed. 416, 5 C. C. A. 159; Raft of Spars, 20 Fed. Cas. No. 11,529, Abh. Adm. 485.

**19.** The New Orleans, 23 Fed. 909.

**20.** Cape Fear Towing, etc., Co. *v.* Pearsall, 90 Fed. 435, 33 C. C. A. 161.

**21.** The Key West, 11 Fed. 911.

**22.** The Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266; Bond *v.* The Cora, 3 Fed. Cas. No. 1,620, 2 Pet. Adm. 361; The Charles Henry, 5 Fed. Cas. No. 2,617, 1 Ben. 8; Concklin *v.* The Harmony, 6 Fed. Cas. No. 3,089, 1 Pet. Adm. 34 note; Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; The Georgiana, 10 Fed. Cas. No. 5,355, 1 Lowell 91; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The Lovett Peacock, 15 Fed. Cas. No. 8,555, 1 Lowell 143; Sewell *v.* Nine Bales of Cotton, 21 Fed. Cas. No. 12,683, 5 Phila. (Pa.) 508; Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449; Union Tow-Boat Co. *v.* The Delphos, 24 Fed. Cas. No. 14,400, Newb. Adm. 412.

**In the fifth circuit,** the rule for the apportionment of salvage is to give one half to the salving vessel, and the other half to her officers and crew in proportion to their rates of wages, allowing to the vessel any extra expenses incident to the salvage service over and above her ordinary outlays. Sonderburg *v.* Ocean Towboat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146.

**23.** Bell *v.* The Ann, 3 Fed. Cas. No. 1,245, 2 Pet. Adm. 278 (one half); The Cumberland, 6 Fed. Cas. No. 3,470 (one half); The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The John G. Paint, 13 Fed. Cas. No. 7,346, 2 Ben. 174 (one half); Small *v.* The Messenger, 22 Fed. Cas. No. 12,961, 2 Pet. Adm. 284 (one half); Taylor *v.* The Cato, 23 Fed. Cas. Co. 13,786, 1 Pet. Adm. 48 (one half); The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114 (two thirds).

**24.** The Gibson, 160 Fed. 230 (three fourths); The Indian, 159 Fed. 20, 86 C. C. A. 210 (three fifths); The City of Puebla, 153 Fed. 925 (three fourths); The J. Emory Owen, 128 Fed. 996 (two thirds); The S. A. Rudolph, 39 Fed. 331 (two thirds); The Pomona, 37 Fed. 815 (four fifths); The Adirondack, 5 Fed. 213 (three fifths); The Leipsic, 5 Fed. 108 (three fifths); The Lovetand, 5 Fed. 105 (one half); Brooks *v.* The William Penn, 4 Fed. Cas. No. 1,965, 2 Hughes 144; The C. W. Ring, 6 Fed. Cas. No. 3,525, 2 Hughes 99 (three fifths); The Saragossa, 21 Fed. Cas. No. 12,335, 1 Ben. 553 (one half); The Livietta, 8 P. D. 24, 5 Aspin. 132, 48 L. T. Rep. N. S. 799, 31 Wkly. Rep. 643 (two thirds); The Earl Grey, 3 Hagg. Adm. 363; The Raikes, 1 Hagg. Adm 246; The Beulah, 2 Notes of Cas. 61, 1 W. Rob. 477; The Marino, Young Adm. (Nova Scotia) 51.

**Sailing vessel or steamship.**— In apportioning salvage reward among the owners, master, and crew of a sailing vessel which has rendered salvage services, the court will not allot to the owners the same proportion of

where the risk of the salving vessel is extreme,[25] and the vessel and cargo are of large value,[26] or the principal service is performed by the vessel,[27] or the owners direct the service,[28] the owners' share should be proportionately enlarged. On the other hand, where the services are mainly the personal exertions of the master and the crew, the vessel itself rendering little or no assistance, and being exposed to small risk, the master and crew should receive the major portion of the award.[29]

(III) *Among Members of Crew.* In all ordinary cases the respective wages received by the members of the crew of a salving vessel afford a proper basis for the distribution among them of the share of the salvage awarded to them.[30] In making the apportionment the court will, however, regard both the actual services rendered and the risks run by individual members of the crew,[31] and will

the reward as in the case of services rendered by a steamship (usually one half), unless the circumstances show that the vessel itself, as where the services are effected by steam power, was the chief agent in effecting the salvage. The Palmyra, 1 Aspin. 182, 25 L. T. Rep. N. S. 884.

**25.** Charente Steamship Co. *v.* The Dupuy De Lome, 55 Fed. 93 (five sixths).

**The increase of the owners' risk through the deviation** of the vessel, having a large and valuable cargo, in order to effect a salvage service, is an important element in the apportionment. Where that risk is large, and the salvage service of a very low order of merit, the allowance of a larger proportion to the vessel is not unreasonable. Markham *v.* Simpson, 22 Fed. 743; Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; The Farnley Hall, 4 Aspin. 499, 46 L. T. Rep. N. S. 216. *Contra*, The Deveron, 1 W. Rob. 180.

**26.** Robertson *v.* The Wellington, 52 Fed. 605.

**27.** The Rebecca Shepherd, 148 Fed. 727; The J. Emory Owen, 128 Fed. 996; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; Peacock *v.* Three Million Feet of Lumber, 93 Fed. 983; The Sirius, 53 Fed. 611 [*reversed* on other grounds in 57 Fed. 851, 6 C. C. A. 614]; Lewis *v.* Lot of Whalebone, 51 Fed. 916; The Louisiana, 34 Fed. 663; Montgomery *v.* The T. P. Leathers, 17 Fed. Cas. No. 9,736, Newb. Adm. 421; Studley *v.* Baker, 23 Fed. Cas. No. 13,559, 2 Lowell 205; The Kenmure Castle, 7 P. D. 47, 5 Aspin. 27, 47 L. T. Rep. N. S. 661, 30 Wkly. Rep. 708; The Auguste Andre, Young Adm. (Nova Scotia) 201.

**Although the services are rendered by the vessel and her machinery,** the master and crew doing only their ordinary duty, for which they were paid by the owner, still the men must receive a share of the award. The New Orleans, 23 Fed. 909.

**28.** Cape Fear Towing, etc., Co. *v.* Pearsall, 90 Fed. 435, 33 C. C. A. 161.

**29.** The Galaxy, 9 Fed. Cas. No. 5,186, Blatchf. & H. 270 (three fourths); Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a* (three fifths); The Charles, L. R. 3 A. & E. 536, 1 Aspin. 296, 26 L. T. Rep. N. S. 594, 21 Wkly. Rep. 13 (seven eighths); The Palmyra, 1 Aspin. 278, 25 L. T. Rep. N. S. 884 (two thirds). See also Dailey *v.* The Mary Freeland, 62 Fed. 943.

**30.** Scows Nos. 21 and 59, 121 Fed. 430; Cape Fear Towing, etc., Co. *v.* Pearsall, 90 Fed. 435, 33 C. C. A. 161; Cedros Island Min., etc., Co. *v.* The Sirius, 53 Fed. 611 [*reversed* on other grounds in 57 Fed. 851, 6 C. C. A. 614]; Brooks *v.* The William Penn, 4 Fed. Cas. No. 1,965, 2 Hughes 144; Cartwell *v.* The John Taylor, 5 Fed. Cas. No. 2,482, Newb. 341; The Puritan, 20 Fed. Cas. No. 11,474, 7 Ben. 571; The Saragossa, 21 Fed. Cas. No. 12,334, 1 Ben. 551; The Saragossa, 21 Fed. Cas. No. 12,335, 1 Ben. 553; Sewell *v.* Nine Bales of Cotton, 21 Fed. Cas. No. 12,683, 5 Phila. (Pa.) 508; The Cleopatra, 3 P. D. 145, 47 L. J. Adm. 72; The Martha, 3 Hagg. Adm. 434; The Earl Grey, 3 Hagg. Adm. 363; The Auguste Andre, Young Adm. (Nova Scotia) 201; The Marino, Young Adm. (Nova Scotia) 51.

**When no gross sum has been fixed as an award** to the officers and men of a salving vessel, the respective rates of wages are not necessarily a just measure of the awards to be made to certain salvors, who fail to sue until others have recovered their compensation. Wood *v.* The Wellington, 54 Fed. 901.

**31.** The Minneapolis, [1902] P. 30, 9 Aspin. 270, 71 L. J. P. D. & Adm. 28, 86 L. T. Rep. N. S. 263.

**If some of the crew have exposed themselves to much greater risk than the rest,** the court will give them a larger share on equitable principles. The Sirius, 53 Fed. 611 [*reversed* on other grounds in 57 Fed. 851, 6 C. C. A. 614]; The Ontario, 18 Fed. Cas. No. 10,541, 8 Ben. 500; The Puritan, 20 Fed. Cas. No. 11,474, 7 Ben. 571; The Sarah, 3 P. D. 39, 3 Aspin. 542, 37 L. T. Rep. N. S. 831.

**Special reward to master or mate.—** The master or mate of the salving vessel who goes on board the distressed vessel and navigates her to port is entitled to a liberal portion of the award. Coffin *v.* The Akbar, 5 Fed. 456; The Anna, 1 Fed. Cas. No. 398, 6 Ben. 166 [*affirmed* in 1 Fed. Cas. No. 401, 10 Blatchf. 456]; Bell *v.* The Ann, 3 Fed. Cas. No. 1,245, 2 Pet. Adm. 278; The Czarina, 6 Fed. Cas. No. 3,531, 2 Sprague 48; The J. L. Bowen, 13 Fed. Cas. No. 7,322, 5 Ben. 296; Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007; U. S. Mail Steamship Co. *v.* The John Potter, 28 Fed. Cas. No. 16,792*a*; Williamson *v.* The Alphonso, 30 Fed. Cas. No. 17,749, 1

also discriminate between the navigating and the non-navigating part of the crew.[32]

**2. Agreements to Apportion.** While by the ancient law of admiralty courts,[33] and by statute in both the United States[34] and England,[35] any stipulation by which seamen agree to abandon their rights to salvage is invalid, they are not prevented from entering into equitable agreements for the apportionment of salvage, and such agreements will be upheld by the courts.[36] Where, however, the agreement is manifestly inequitable or there is evidence of fraud or concealment, it will be set aside.[37]

## VIII. RIGHT OF POSSESSION AND LIEN.

**A. Right of Possession.** In some cases salvors have a right to retain possession of the property to secure for themselves the compensation which may

Curt. 376; The Golondrina, L. R. 1 A. & E. 334; The Skibladner, 3 P. D. 24, 3 Aspin. 556, 47 L. J. P. D. & Adm. 84, 38 L. T. Rep. N. S. 150. The master is entitled to special reward for his skilful navigation in dangerous circumstances. The Castlewood, 4 Aspin. 278, 42 L. T. Rep. N. S. 702. Where the master undertakes the responsibility of deviating from his course, and so imperiling his insurance, for the purpose of rendering salvage service, he is entitled to considerable reward. The Aletheia, 13 Wkly. Rep. 279. A master who suffers personal injury is entitled to a liberal portion. Demarest *v.* The Helen F. Robbins, 55 Fed. 1014; The John G. Paint, 13 Fed. Cas. No. 7,346, 2 Ben. 174.

**Heroic and self-sacrificing conduct** on the part of the master will entitle him to an increased portion of the award. Hamilton *v.* The Kaaterskill, 48 Fed. 701.

**A mistake on the part of an officer,** which entails considerable expense, will diminish the amount to which such officer would otherwise be entitled. The John G. Paint, 13 Fed. Cas. No. 7,346, 2 Ben. 174.

**An officer who refuses his aid** will receive little or nothing. The Lovett Peacock, 15 Fed. Cas. No. 8,555, Lowell 143.

**32.** The Minneapolis, [1902] P. 30, 9 Aspin. 270, 71 L. J. P. D. & Adm. 28, 86 L. T. Rep. N. S. 263; The Spree, [1893] P. 147, 7 Aspin. 397, 69 L. T. Rep. N. S. 628, 1 Reports 584, half shares to non-navigating part of crew.

**33.** The Pride of Canada, Brown & L. 208, 9 L. T. Rep. N. S. 546.

**Receipt for salvage given in ignorance.**—An ignorant salvor who has signed a receipt in full of all demands for salvage will be relieved in admiralty. Silver Bullion, 2 Spinks 70.

**34.** U. S. Rev. St. (1878) § 4535 [U. S. Comp. St. (1901) p. 3082]. And see Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. 261.

**35.** The Pride of Canada, Brown & L. 208, 9 L. T. Rep. N. S. 546. And see The Ganges, L. R. 2 A. & E. 370, 4 Aspin. 317, 38 L. J. Adm. 61, 22 L. T. Rep. N. S. 72.

**These statutes are not applicable to a master.**—The Wilhelm Tell, [1892] P. 337, 7 Aspin. 329, 61 L. J. P. D. & Adm. 127, 69 L. T. Rep. N. S. 199, 1 Reports 551, 41 Wkly. Rep. 205.

**A steam trawler is not a vessel "to be employed on salvage service"** within section 18 Merchant Shipping Act Amendment Act (1862), § 18, although the agreement between the owners and seamen provides for an apportionment of any salvage earned. The Wilhelm Tell, [1892] P. 337, 7 Aspin. 329, 61 L. J. P. D. & Adm. 127, 69 L. T. Rep. N. S. 199, 1 Reports 551, 41 Wkly. Rep. 205.

**An agreement to waive salvage in consideration of higher wages** is invalid. The Maryanne, 11 L. T. Rep. N. S. 85.

**Agreement between ship-owners and crew as to deductions.**—An agreement between ship-owners and crew that before apportionment of salvage the ship-owners shall be entitled to deduct from the sum awarded for salvage the amount of any damages sustained by the ship or her gear in the performance of the salvage service, and by reason of her loss of fishing, is inoperative. The Saltburn, 7 Aspin. 474, 71 L. T. Rep. N. S. 19, 6 Reports 702.

**36.** Sonderburg *v.* Ocean Tow-Boat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146; The James Armstrong, L. R. 4 A. & E. 380, 3 Aspin. 46, 33 L. T. Rep. N. S. 390; The Ganges, L. R. 2 A. & E. 370, 4 Aspin. 317, 38 L. J. Adm. 61, 22 L. T. Rep. N. S. 72; The Wilhelm Tell, [1892] P. 337, 7 Aspin. 329, 61 L. J. P. D. & Adm. 127, 69 L. T. Rep. N. S. 199, 1 Reports 551, 41 Wkly. Rep. 205; The Afrika, 5 P. D. 192, 4 Aspin. 266, 49 L. J. P. D. & Adm. 63, 42 L. T. Rep. N. S. 403; The Enchantress, Lush. 93, 30 L. J. Adm. 15, 2 L. T. Rep. N. S. 574.

**The burden of proof** is upon those who assert such an agreement to show, not merely its existence, but also its fairness. The Pride of Canada, Brown & L. 208, 9 L. T. Rep. N. S. 546.

**37.** Sonderburg *v.* Ocean Tow-Boat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146 (holding that every agreement between the owners of a salving vessel and its officers and crew as to the distribution of salvage should be made with the fullest explanation of all the facts, or it will be set aside); The Afrika, 5 P. D. 192, 4 Aspin. 266, 49 L. J. P. D. & Adm. 63, 42 L. T. Rep. N. S. 403; The Pensacola, Brown & L. 306; The Enchantress, 30 L. J. Adm. 15, Lush. 93, 2 L. T. Rep. N. S. 574;

be due.[38] Thus the finder of derelict property, who takes possession with the intention of saving the same, gains a right of exclusive possession which he can maintain against the true owner.[39] The owner does not renounce his right of property,[40] but he does abandon temporarily his right of possession, which is transferred to the finder who is not bound to part therewith until his just demands shall be paid, or until the property shall be taken into the custody of the law preparatory to the amount of salvage being legally ascertained.[41] This rule, however, is applicable only to derelicts. When the vessel is not derelict even *bona fide* salvors have no right to the exclusive possession, and are bound to give up charge to the master on his appearing and claiming charge.[42]

**B. Lien — 1. Existence — a. In General.** A salvage service carries with it a maritime lien on the things saved,[43] whether the vessel is foreign or domestic.[44] Such lien is subject to the risk of subsequent depreciation of the value of the property by subsequent accidents or otherwise.[45]

**b. Services Rendered Under Contract.** Salvage services rendered under a previous special agreement fairly made, stipulating for a compensation contingent on the success of the salvor's efforts, will be recognized in admiralty as creating a valid lien.[46] It has been held that a distinct agreement to pay a stipulated sum whether the service be successful or not will prevent the attaching of a lien;[47] but by the weight of authority it seems that even an absolute contract to pay will not have this effect.[48]

The Louisa, 2 Notes of Cas. 149, 2 W. Rob. 22.

**38.** The Glasgow Packet, 3 Notes of Cas. 107, 2 W. Rob. 306.

**In the case of capture and recapture** the property remains with the recaptors until the salvage is paid. Marshall *v.* Delaware Ins. Co., 16 Fed. Cas. No. 9,127, 2 Wash. 54 [*affirmed* in 4 Cranch 202, 2 L. ed. 596].

**39.** Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431; The Amethyst, 1 Fed. Cas. No. 330, 2 Ware 28; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336; Hartshorn *v.* Twenty-Five Cases of Silk, 11 Fed. Cas. No. 6,168*a*; The John Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77; Lewis *v.* The Elizabeth and Jane, 15 Fed. Cas. No. 8,321, 1 Ware 33; The Dantzic Packet, 3 Hagg. Adm. 383.

**40.** The Amethyst, 1 Fed. Cas. No. 330, 2 Ware 28; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336.

**41.** The Hyderabad, 11 Fed. 749, 1 Biss. 112; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336; Hartfort *v.* Jones, 1 Ld. Raym. 393, 91 Eng. Reprint 1161; The Tritonia, 5 Notes of Cas. Suppl. 1.

**42.** The Hyderabad, 11 Fed. 749, 1 Biss. 112; The Cleone, 6 Fed. 517, 7 Sawy. 77; Vincent *v.* The Penelope, 28 Fed. Cas. No. 16,946; The Champion, Brown & L. 69.

**43.** Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431; Central Stockyard, etc., Co. *v.* Mears, 89 N. Y. App. Div. 452, 85 N. Y. Suppl. 795; The Sabine, 101 U. S. 384, 25 L. ed. 982; Leathem *v.* The Roanoke, 50 Fed. 574; Chapman *v.* The Greenpoint, 38 Fed. 671; The Bee, 3 Fed. Cas. No. 1,219, 1 Ware 336; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, Newb. Adm. 274; Lewis *v.* The Elizabeth and Jane, 15 Fed. Cas. No. 8,321, 1 Ware 33; The Blenden-Hall, 1 Dods. 414; Baring *v.* Day, 8 East 57; The Nicolai Heinrich, 17 Jur. 329; Hartford *v.* Jones, 1 Ld. Raym. 393, 91 Eng. Reprint 1161; The Fleece, 7 Notes of Cas. 534, 3 W. Rob. 278; The Conqueror, 5 Can. L. T. Occ. Notes 332; The Flora, Young Adm. (Nova Scotia) 48.

**Lien on governmental property.**—Although a lien for salvage on property belonging to the United States cannot be enforced by the courts by means of a suit against the government, nor by a proceeding *in rem* when possession of the property can only be obtained by taking it out of the actual possession of officers or agents of the government, yet it may exist and may be enforced whenever enforcement does not disturb the possession of the government. The Davis, 10 Wall. (U. S.) 15, 19 L. ed. 875.

**Where there are separate sets of salvors,** they have not separate liens on the several articles saved by each set, but all are entitled to be paid for the salvage services rendered out of all the property saved. The Albion Lincoln, 1 Fed. Cas. No. 144, 1 Lowell 71. See also *supra*, IV, K, 1.

**44.** Chapman *v.* The Greenpoint, 38 Fed. 671.

**45.** The L. W. Perry, 71 Fed. 745; The Carl Schurz, 5 Fed. Cas. No. 2,414, 2 Flip. 330.

**46.** Chapman *v.* The Greenpoint, 38 Fed. 671; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476.

**47.** The Marquette, 16 Fed. Cas. No. 9,101, Brown Adm. 364, 371, where the court said: "Such a contract creates a mere personal obligation, and no lien attaches on account of it." See also *supra*, II, C, 1, l. But see cases cited *infra*, note 48.

**48.** Leathem *v.* The Roanoke, 50 Fed. 574; The Louisa Jane, 15 Fed. Cas. No. 8,532, 2 Lowell 295; The Williams, 29 Fed. Cas. No. 17,710, Brown Adm. 208.

**2. PRIORITIES.** A claim for salvage takes precedence of prior maritime liens.[49] Thus a claim for salvage takes precedence over all previous liens of materialmen and stevedores;[50] mortgage liens;[51] a claim of the holder of a bottomry and *respondentia* bond;[52] a claim *in rem* against a vessel for a collision;[53] a claim for general average arising from the jettison of a portion of the cargo;[54] claims of the government for duties;[55] and claims for wages earned before the salvage services were performed.[56] But a lien for salvage is inferior to the lien of seamen for wages earned on a subsequent voyage.[57]

**3. WAIVER, LOSS, OR DISCHARGE.** It requires the most unequivocal acts on the part of salvors to show that they intend to abandon their lien and resort to the owners for payment.[58] It is not necessary that salvors should retain the vessel saved in order to preserve their lien, and abandonment or waiver of such lien is not to be inferred from the fact of delivery to the owners,[59] although the delivery be made on land.[60]

**4. ASSIGNMENT.**[61] In the absence of statutory restrictions the assignment of a claim for salvage secured by a maritime lien will carry the security with the claim, when the parties so intend,[62] unless it appears that such assignment was obtained by fraud or unfair dealing.[63] Under the English Merchant Shipping Act [64] an assignment by a seaman of his right to salvage reward already acquired is wholly

49. The Dredge No. 1, 137 Fed. 110; The Thomas Morgan, 123 Fed. 781; The Barney Eaton, 2 Fed. Cas. No. 1,028, 1 Biss. 242; Lewis *v.* The Elizabeth and Jane, 15 Fed. Cas. No. 8,321, Ware 33; The Gustaf, Lush 506, 31 L. J. Adm. 207.

50. The M. Vandercook, 24 Fed. 472; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; Emerson *v.* The Pandora, 8 Fed. Cas. No. 4,442, Newb. Adm. 438.

51. The Lillie Laurie, 50 Fed. 219.

52. The Launberga, 154 Fed. 959; Giro *v.* The Alexander Wise, 10 Fed. Cas. No. 5,463.

53. The Jeremiah, 13 Fed. Cas. No. 7,290, 10 Ben. 338.

54. The Spaulding, 22 Fed. Cas. No. 13,215, Brown Adm. 310.

55. Merritt *v.* One Package of Merchandise, 30 Fed. 195 [*affirmed* in 32 Fed. 111], holding that where property is salved on the high seas, and brought by the salvors within the limits of the United States, the salvage claims are entitled to priority over the claims of the government for duties. But for salvage services in rescuing a vessel and cargo the latter cannot be libeled and seized so as to dispossess a customs officer holding the same under the customs laws. The Marion, 99 Fed. 448.

56. The Conveyor, 147 Fed. 586; The Lady Boone, 21 Fed. 731; Collins *v.* The Fort Wayne, 6 Fed. Cas. No. 3,012, 1 Bond 476; The Sabina, 7 Jur. 182.

**Wages earned by seamen after their vessel had been wrecked, but before she was finally abandoned,** do not constitute antecedent wages, in a sense which will postpone them to the claims of salvors, and the proceeds derived from the sale of the outfit of the vessel must first be applied to the payment of the demands of such seamen. The Davidson, 50 Fed. 323; Dalstrom *v.* The E. M. Davidson, 1 Fed. 259.

**Exception.**— It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and save as much as possible from the vessel; and when they have done so the fragments of the vessel and the outfit saved constitute a fund pledged for payment of their wages, superior to the claim of the salvors. The Davidson, 50 Fed. 323.

57. The Lillie Laurie, 50 Fed. 219; Dalstrom *v.* The E. M. Davidson, 1 Fed. 259.

58. Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, Newb. Adm. 274.

**The mere delivery and acceptance of a note** does not necessarily detach a lien for salvage. The burden of proof is on the party asserting that the note was intended to detach the lien. Howard Towing Assoc. *v.* The J. E. Potts, 54 Fed. 539.

59. Byrne *v.* Johnson, 53 Fed. 840, 4 C. C. A. 47; The Sterling, 20 Fed. 751; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; Eads *v.* The H. D. Bacon, 8 Fed. Cas. No. 4,232, Newb. Adm. 274; The Eleanora Charlotta, 1 Hagg. Adm. 156; The Lady Katherine Barham, Lush. 404.

**The mere forbearance of the libellant to distress the claimant,** when nobody has been injured by the delay, is not to be considered as a waiver of the lien. The Sterling, 20 Fed. 751.

60. Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87.

61. Maritime liens in general see 26 Cyc. 801.

62. The M. Vandercook, 24 Fed. 472. See also The Thomas L. James, 115 Fed. 566. *Contra*, Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449, holding that the assignment of a claim for salvage divests the lien originally existing in favor of the salvor, and confers no right upon the assignee to claim reimbursement in a court of admiralty.

63. The Edward Lee, 8 Fed. Cas. No. 4,292, 3 Ben. 114.

64. Act (1854), § 182 (17 & 18 Vict. c. 104).

void and inoperative, although such assignment is for valuable consideration, and in an action for distribution of salvage a defense setting up such an assignment is bad.[65]

## IX. SUITS FOR SALVAGE.[66]

**A. Nature and Form of Remedy.** Suits for salvage may be *in rem* against the property saved, or *in personam* against the party at whose request and for whose benefit the salvage service was performed;[67] but the two modes of proceeding cannot be joined in the same libel.[68] Where a salvor's services were voluntary, he can generally recover only by a suit *in rem* against the property saved,[69] unless the property is destroyed without his fault or taken from his possession by the owner, in which case he may maintain a suit *in personam* against such owner,[70] although the case is not specifically provided for in the nineteenth rule.[71] If the salvor's services were furnished upon request of the master or owner, then the salvor may recover either *in rem* or *in personam*, as upon a contract, express or implied.[72]

**B. Right of Action and Defense — 1. PENDENCY OF OTHER PROCEEDINGS.** The pendency of a suit for salvage is no bar to a subsequent action by other salvors against the same property to recover salvage for other services performed during the same voyage.[73]

**2. ACTION AGAINST CO-SALVORS.** Seamen who authorize the owner of their vessel to make settlement in their behalf of all claims for salvage cannot, after the settlement, collect against the property saved, if dissatisfied with the share of the award allowed them by such owner.[74] In such case their remedy is by libel in admiralty against the owner of their own vessel to recover their share of the award.[75]

65. The Rosaria, 2 P. D. 41, 3 Aspin. 334, 46 L. J. P. D. & Adm. 52, 35 L. T. Rep. N. S. 816.

66. **Pendency of proceedings in personam as a ground for stay of proceedings in rem in admiralty** see ACTIONS, 1 Cyc. 754 note 59.

67. Admiralty rule 19. And see The Sabine, 101 U. S. 384, 25 L. ed. 982; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; The Centurion, 5 Fed. Cas. No. 2,554, 1 Ware 490.

68. The Sabine, 101 U. S. 384, 25 L. ed. 982 [*affirming* 18 Fed. Cas. No. 10,366, 2 Woods 211].

69. Spaulding *v.* Alaska Commercial Co., 1 Alaska 497; The Sabine, 101 U. S. 384, 25 L. ed. 982; The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68.

**Suits of this kind may be enforced against the proceeds of the property** where it appears that the property saved had been previously seized under admiralty process and sold and the proceeds paid into the registry of the court. The Sabine, 101 U. S. 384, 25 L. ed. 982; Waterbury *v.* Myrick, 29 Fed. Cas. No. 17,253, Blatchf. & H. 34.

70. Spaulding *v.* Alaska Commercial Co., 1 Alaska 497; The Sabine, 101 U. S. 384, 25 L. ed. 982; Hudson *v.* Whitmire, 77 Fed. 846; The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware 68; Seaman *v.* Erie R. Co., 21 Fed. Cas. No. 12,582, 2 Ben. 128; The Port Victor, [1901] P. 243, 9 Aspin. 163, 182, 70 L. J. P. D. & Adm. 52, 84 L. T. Rep. N. S. 677, 17 T. L. R. 538, 49 Wkly. Rep. 578; The Elton, [1891] P. 265, 7 Aspin. 66, 60 L. J. P. D. & Adm. 69, 65 L. T. Rep. N. S. 232, 39 Wkly. Rep. 703; Five Steel Barges, 15 P. D. 142, 6 Aspin. 580, 59 L. J. P. D. & Adm. 77, 63 L. T. Rep. N. S. 499, 39 Wkly. Rep. 127; The Meg Merrilies, 3 Hagg. Adm. 346; The Trelawney, 3 C. Rob. 216 note, 4 C. Rob. 223; The Hope, 3 C. Rob. 215; Duncan *v.* Dundee, etc., Shipping Co., 5 Ct. Sess. Cas. 742.

71. Spaulding *v.* Alaska Commercial Co., 1 Alaska 497; The Sabine, 101 U. S. 384, 25 L. ed. 982; Hudson *v.* Whitmire, 77 Fed. 846.

72. Spaulding *v.* Alaska Commercial Co., 1 Alaska 497; Miller *v.* Kelly, 17 Fed. Cas. No. 9,577, Abb. Adm. 564.

73. Forbes *v.* The Merrimac, 9 Fed. Cas. No. 4,927, 1 Ben. 68.

**Pendency of replevin suit.**—A court of admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salved property, brought by the owner against the salvor, and in which the validity of the salvor's lien upon the property may be determined. Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*; Raft of Spars, 20 Fed. Cas. No. 11,528, Abb. Adm. 291.

74. The Managua, 126 Fed. 208; The Olive Mount, 50 Fed. 563.

**Receipt for benefit of all salvors.**— The receipt by the owner and captain of a vessel of the whole compensation awarded as salvage would necessarily import its receipt for the benefit of all other co-salvors interested in the same service, and so exonerate the owners of the vessel, to which the service was rendered, from any liability to others of the saving crew. McConnochin *v.* Kerr, 15 Fed. 545 [*reversing* on other grounds 9 Fed. 50].

75. McMullin *v.* Blackburn, 59 Fed. 177;

3. COUNTER-CLAIM AND CROSS SUIT. Independent claims cannot be set up by way of counter-claim in a salvage suit,[76] but a claim arising out of the same cause of action for which the original libel was filed may be set up by a cross libel.[77]

**C. Time to Sue and Laches.** One who undertakes a salvage service has no right to compensation until the service is completed, and a libel filed before that time is premature.[78] On the other hand promptness is required in presenting a salvage claim.[79] Furthermore all the parties should come forward promptly, that the court may consider and determine at one time the merit of the claim of each salvor, and the value of the whole service.[80]

**D. Injunction.** A party who alleges that he has a lien on a fund for salvage services, and that the fund is in danger of being lost, on account of the irresponsibility of the parties having possession of it, and also seeks an equitable distribution of it among the parties, all performing, to a greater or less extent, salvage services, is entitled to an injunction to restrain any interference therewith by other parties claiming a lien and possession thereof, and that the fund be brought into court to abide the final order thereof, on the settlement of the equities of the respective claimants.[81]

**E. Consolidation of Causes.** It is the recognized practice of courts of admiralty to encourage and enforce consolidation of salvage causes.[82] This practice is not limited to cases where the rights of the various claimants depend upon the same facts, or arise out of services of the same description.[83] Formerly the court would not insist upon consolidation when it was objected to by one or the other of the parties; [84] but by the modern practice, such suits will be consolidated wherever it appears to be convenient to do so, without regard to the consent of the parties.[85] It has been held, however, that a salvor who saves life in addi-

The Olive Mount, 50 Fed. 563; The Centurion, 5 Fed. Cas. No. 2,554, 1 Ware 490; Roff *v.* Wass, 20 Fed. Cas. No. 12,000, 2 Sawy. 538 [*affirming* 20 Fed. Cas. No. 11,999, 2 Sawy. 389]; Studley *v.* Baker, 23 Fed. Cas. No. 13,559, 2 Lowell 205; Waterbury *v.* Myrick, 29 Fed. Cas. No. 17,253, Blatchf. & H. 34. But see Sheldrake *v.* The Chatfield, 52 Fed. 495.

**76.** The Sybil, 4 Wheat. (U. S.) 98, 4 L. ed. 522.

**77.** Admiralty rule 53. And see Southwestern Transp. Co. *v.* Pittsburg Coal Co., 42 Fed. 920, holding, however, that in a suit for salvage by the crew and owners of a tug for saving a fleet of coal barges, a counter-claim for wrongfully mooring the tug to the outer barge, whereby the accident occurred, is not the subject of a cross libel.

A cross libel for injuries received during the salvage service will be dismissed, it appearing that they were the result of unavoidable accident in the confusion of the moment, and the service being at the request and to the benefit of the cross libellants. Stevens *v.* The S. W. Downs, 23 Fed. Cas. No. 13,411, Newb. Adm. 458.

**78.** Boyd *v.* The Towner, 3 Fed. Cas. No. 1,748*a*.

**79.** McMullin *v.* Blackburn, 59 Fed. 177.

**80.** McMullin *v.* Blackburn, 59 Fed. 177; Wood *v.* The Wellington, 54 Fed. 901.

Where a claim of salvage has been settled and the moneys distributed among the owners, captain, and crew, and a release under seal executed by the seamen for their various shares, a libel filed four years afterward by some of the crew to obtain a larger sum will not be sustained, in the absence of any actual or constructive fraud, or any grossly wrong or unfair distribution. Markham *v.* Simpson, 22 Fed. 743. But when the crew of a salving vessel, who have sued her owners for their share of the salvage, did not know the amount of salvage that had been received by the owners until just before the bringing of their suit, delay in bringing the suit could not be set up as a defense. Sonderburg *v.* Ocean Tow-Boat Co., 22 Fed. Cas. No. 13,175, 3 Woods 146. Furthermore a libel *in personam* brought by salvors to recover their share of salvage against another salvor who, two years before, had received and still held the money belonging to libellants, could not be defended against on the ground that the claim was stale. Sonderburg *v.* Ocean Tow-Boat Co., *supra*.

**81.** Lewis *v.* Dodge, 17 How. Pr. (N. Y.) 229.

**82.** The Charles Henry, 5 Fed. Cas. No. 2,617, 1 Ben. 8; The Mississippi, 17 Fed. Cas. No. 9,651; The Melpomene, L. R. 4 A. & E. 129, 1 Aspin. 575, 42 L. J. Adm. 45, 29 L. T. Rep. N. S. 405, 21 Wkly. Rep. 956.

**83.** The Strathgarry, [1895] P. 264, 7 Aspin. 573, 64 L. J. P. D. & Adm. 59, 72 L. T. Rep. N. S. 202, 11 Reports 732; The William Hutt, Lush. 25.

**84.** The Jacob Landstrom, 4 P. D. 191, 4 Aspin. 58, 40 L. T. Rep. N. S. 38.

**85.** The Strathgarry, [1895] P. 264, 7 Aspin. 573, 64 L. J. P. D. & Adm. 59, 72 L. T. Rep. N. S. 202, 11 Reports 732. *Compare* Anthanissen *v.* Dart, 94 Ga. 543, 20 S. E. 124, holding that where three persons render salvage services without request, the three

tion to rendering other salvage services is not bound to consolidate against his will.[88]

**F. Jurisdiction**[87] — **1. In General.** While a few cases exist in the books of suits for salvage in courts of common law,[88] it is well recognized that common-law courts do not have jurisdiction of salvage cases, but that they belong by long custom to courts of admiralty, which, from their extraordinary processes, are the only proper tribunals.[89] Nor do the common-law courts have jurisdiction of a contract for salvage;[90] but a valid contract for compensation for work, labor, and services may be enforced *in personam* in a common-law court, although, in the absence of a contract, the claim might be one of salvage.[91]

**2. Property in Custody of State Court.** If property upon which a claim for salvage is attempted to be enforced is either actually or constructively in the custody of a state court, a federal court has no jurisdiction of the libel;[92] but if the custody of the state court is only a fiction, it will not be allowed to prevent the exercise of the jurisdiction of the federal court.[93]

**3. As Dependent on Value of Property or Amount Claimed.** The statutes of Victoria,[94] being read together, enact, that all disputes as to the amount of salvage, where either the sum claimed does not exceed £200, or the value of the property saved does not exceed £1,000, shall be referred to the arbitration of two justices or a county court judge, and thereby in those cases exclude the jurisdiction of the court of admiralty,[95] except where the services are rendered within the bound-

are not bound to sue jointly merely because they coöperated in rendering the services, and had an understanding among themselves as to a division of the compensation, but each is entitled to stand on his right, as against defendant, to recover for himself the value of his own services, unless some other reason for implying a joint rather than a several contract appears.

**Separate counsel permitted.**— When the interests of one of the parties in a consolidated salvage suit are adverse to the interests of the others, separate counsel on his behalf may be heard at the hearing of the consolidated cause. The Scout, L. R. 3 A. & E. 512, 1 Aspin. 258, 41 L. J. Adm. 42, 26 L. T. Rep. N. S. 371, 20 Wkly. Rep. 617.

86. The Morocco, 1 Aspin. 46, 24 L. T. Rep. N. S. 598.

87. As dependent on locality where service performed see Admiralty, 1 Cyc. 815 *et seq.*

Jurisdiction of admiralty in general see Admiralty, 1 Cyc. 809 *et seq.*

Jurisdiction of admiralty over claims for services in the nature of salvage see Admiralty, 1 Cyc. 841 note 16.

Property subject to salvage see *supra*, III.

Salvage suits between citizens and foreigners see Admiralty, 1 Cyc. 822 note 6.

Salvage suits involving foreign parties see Admiralty, 1 Cyc. 819 note 87.

88. Peck *v.* Randall, 1 Johns. (N. Y.) 165; Newman *v.* Walters, 3 B. & P. 612, 7 Rev. Rep. 886. See also Lipson *v.* Harrison, 2 Wkly. Rep. 10.

89. Sturgis *v.* Law, 3 Sandf. (N. Y.) 451; Boyd *v.* The Falcon, 1 Handy (Ohio) 362, 12 Ohio Dec. (Reprint) 185; Houseman *v.* The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Neel *v.* Iron City Sand Co., 149 Fed. 980, 79 C. C. A. 490; Standard Mar. Ins. Co. *v.* Nome Beach Lighterage, etc., Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. N. S. 1095; Brevoor *v.* The Fair American, 4 Fed. Cas. No. 1,847, 1 Pet. Adm. 87; Gates *v.* Johnson, 10 Fed. Cas. No. 5,268, Brunn. Col. Cas. 633. See also Admiralty, 1 Cyc. 841.

**Jurisdiction of territorial courts.**—Although jurisdiction in salvage cases can be exercised in the states in the federal courts only, the same limitation does not extend to the territories, and the territorial legislature has the right to create a court with jurisdiction of such cases. American Ins. Co. *v.* Three Hundred and Fifty-Six Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242.

90. Merritt, etc., Derrick, etc., Co. *v.* Tice, 77 N. Y. App. Div. 326, 79 N. Y. Suppl. 120.

91. Merritt, etc., Derrick, etc., Co. *v.* Tice, 77 N. Y. App. Div. 326, 79 N. Y. Suppl. 120.

92. Scott *v.* Seventy-Five Tons of Pig Iron, 23 Fed. 197.

**Possession of claimants.**—The fact that the property was in claimants' possession would not prevent its being in the custody of the law, and if it was in their hands awaiting the decision of the state court, and in readiness, upon its judgment of return, to be delivered to defendants in the replevin suit, it would have been incumbent upon the libellant to wait until such an order had been made and the litigation was at an end. Scott *v.* Seventy-Five Tons of Pig-Iron, 23 Fed. 197.

93. Scott *v.* Seventy-Five Tons of Pig-Iron, 23 Fed. 197.

94. St. 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63, § 49.

95. Beadnell *v.* Beeson, L. R. 3 Q. B. 439, 9 B. & S. 315, 37 L. J. Q. B. 171, 18 L. T. Rep. N. S. 401, 16 Wkly. Rep. 1008; The Kate, Brown & L. 218, 10 Jur. N. S. 444, 33 L. J. Adm. 122, 9 L. T. Rep. N. S. 782; The Louisa, Brown & L. 59, 9 Jur. N. S. 676, 11 Wkly. Rep. 614; The William and John, Brown & L. 49, 9 Jur. N. S. 284, 32 L. J. Adm. 102, 8 L. T. Rep. N. S. 56, 11 Wkly.

aries of the Cinque Ports, in which case the court of admiralty retains its concurrent jurisdiction with the court of admiralty of the Cinque Ports, unaffected by the above sections.[96] Jurisdiction in such cases is, however, restored to the court of admiralty by statute,[97] and under this statute, a county court, having admiralty jurisdiction, has jurisdiction to entertain a suit of distribution of salvage where the amount which the court is asked to apportion does not exceed £300, notwithstanding the value of the property saved exceeds £1,000.[98]

**G. Parties.** No one can be a party claimant to a proceeding *in rem* for salvage unless he has an interest in the property itself in a legal and technical sense; it is not sufficient that he may have an interest in the controversy.[99] In cases of salvage, the proper course is to make all the co-salvors parties to the original libel; otherwise the court cannot do full justice to all concerned.[1] Nevertheless the non-joinder of the crew of the salvor vessel in a suit by the owner is no impediment to the maintenance of such suit.[2] According to the prevailing practice in admiralty, the owners of a vessel may maintain a suit for salvage services rendered

Rep. 535; The Leda, 2 Jur. N. S. 119, Swab. 40, 4 Wkly. Rep. 322.

**By "the sum claimed"** is meant the sum claimed by the salvors before the dispute is referred. The William and John, Brown & L. 49, 9 Jur. N. S. 284, 32 L. J. Adm. 102, 8 L. T. Rep. N. S. 56, 11 Wkly. Rep. 535.

**The words "disputes as to the amount of salvage"** extend to cases where an agreement stipulating for a fixed amount has been made. Beadnell *v.* Beeson, L. R. 3 Q. B. 439, 9 B. & S. 315, 37 L. J. Q. B. 171, 18 L. T. Rep. N. S. 401, 16 Wkly. Rep. 1008; The William and John, Brown & L. 49, 9 Jur. N. S. 284, 32 L. J. Adm. 102, 8 L. T. Rep. N. S. 56, 11 Wkly. Rep. 535.

**Time of determining value.**— The words in 25 & 26 Vict. c. 63, § 49, determining the jurisdiction of the court of admiralty by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any subsequent period. The Stella, L. R. 1 A. & E. 340, 36 L. J. Adm. 13, 16 L. T. Rep. N. S. 335, 15 Wkly. Rep. 936.

**96.** The Jeune Paul, L. R. 1 A. & E. 336, 36 L. J. Adm. 11, 16 L. T. Rep. N. S. 125, 15 Wkly. Rep. 776.

**97.** 31 & 32 Vict. c. 71; The Empress, L. R. 3 A. & E. 502, 1 Aspin. 183, 41 L. J. Adm. 32, 25 L. T. Rep. N. S. 885, 20 Wkly. Rep. 553; The Herman Wedel, 39 L. J. Adm. 30, 23 L. T. Rep. N. S. 876.

**98.** The Glannibanta, 2 P. D. 45, 46 L. J. P. D. & Adm. 75, 36 L. T. Rep. N. S. 27, 25 Wkly. Rep. 513, holding further that the admiralty jurisdiction of the county courts extends to the distribution of salvage, although there has been no original claim in the county court for salvage.

**99.** The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328, holding that in a libel *in rem* against a vessel or cargo for salvage, the underwriters, not having accepted an abandonment, are not proper parties.

**1.** Lewis *v.* Lot of Whalebone, 51 Fed. 916; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; Hessian *v.* The Edward Howard, 12 Fed. Cas. No. 6,436, Newb. Adm. 522; The Maréchal Suchet, [1896] P. 233, 8 Aspin. 108, 65 L. J. P. D. & Adm. 94, 74 L. T. Rep. N. S. 789, 45 Wkly. Rep. 141.

**Men employed by libellant to render salvage** services should join in the suit, or make claim to the proceeds, if any, in the registry of the court. The R. D. Bibber, 33 Fed. 55.

**Salvors working under joint agreement.**— Where a number of salvors are engaged in saving wrecked articles, and make a joint agreement for a specified sum per article, all must join in an action therefor. Boyd *v.* The Calcon, 1 Handy (Ohio) 363, 12 Ohio Dec. (Reprint) 185.

**Necessity of notice to crew.**— Where the crew have not received the usual notice by publication to come in and make claim upon the vessel attached, or upon the fund in court, it is incumbent upon the libellant, when not acting in the interest of such crew, to bring them in, or have them duly notified to come in, for the purpose of making the apportionment. The Leipsic, 5 Fed. 108; Brooks *v.* The Adirondack, 2 Fed. 872.

**Effect of concealment of names of co-salvors.**— Where a few of the salvors present themselves in court, concealing from the court the names of others who equally participated in the salvage services, the court will feel bound to dismiss their libel. Hessian *v.* The Edward Howard, 12 Fed. Cas. No. 6,436, Newb. Adm. 522.

**Waiver of objection.**—An objection that other persons should join in a suit for salvage is in the nature of a plea in abatement, and, if good at all, is waived unless taken by answer or exception in the court of original jurisdiction. The Camanche, 8 Wall. (U. S.) 448, 476, 19 L. ed. 397; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; Staten Island, etc., Ferry Co. *v.* The Thomas Hunt, 22 Fed. Cas. No. 13,326.

**Intervention by omitted parties.**— If any parties are omitted, and the property is in the custody of the court, under process, they can bring forward their claims by suitable allegations, and make themselves parties, without filing new libels. The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

**2.** The A. D. Patchin, 1 Fed. Cas. No. 87, 1 Blatchf. 414 [*affirming* 9 Fed. Cas. No. 5,170].

on their own behalf and on behalf of the master, officers, and crew, and it is not essential that the names of the officers and crew should be stated in the libel, but they may be identified by evidence at any time before the award made is distributed.[3] All persons who have an interest in the property, although liable only in proportion to their respective interests, may be properly joined as defendants.[4]

**H. Pleading — 1. The Libel.** Libels for salvage should state the subject-matter in articles, with certainty and precision, and with averments admitting of distinct answers.[5] It is proper, although perhaps not indispensable, to allege a distinct claim for salvage.[6] The character of the claim set forth in the libel must be determined by the general scope of the several allegations of which it is composed.[7] But there are no technical rules of variance or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for in the libel, because the entire case is not distinctly stated in the libel. Thus it is common practice in suits brought to specifically recover on salvage contracts, and where the facts are all brought out, for the court, on setting aside the contract for cause, to at once proceed, without amendments to the pleading, to award proper compensation for services actually rendered.[8] Conversely, it is competent for the court, on finding the contract to be valid, to treat the suit as one based thereon, and to decree compensation to the libellants in accordance with its terms.[9]

**2. The Answer.** The answer should meet each material allegation of the libel with an admission, a denial, or a defense.[10] If the respondent wishes to avail himself of any particular matter of defense, he should present it with proper averments in his answer or plea, and should set out clearly and explicitly the facts relied on.[11] If he desires to raise a new issue, in addition to those raised by

3. The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

4. Cloon *v.* City Ins. Co., 1 Handy (Ohio) 32, 12 Ohio Dec. (Reprint) 12.

5. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

**Ownership of salvor vessel.**— In a suit for salvage, the libellant must allege specifically, and in a distinct article, who are the owners of the vessel alleged to have rendered the service in question. Ownership is, in a suit of this character, a material fact, and may become of essential importance to the respondent. The Cherokee, 30 Fed. 640.

**Specific expenses.**—When in a salvage cause the petition states expenses to have been incurred in rendering the services without stating their amount and the answer admits all the allegations of the petition, the court of admiralty will not allow evidence to be called by plaintiff to show the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give defendant the opportunity of admitting or denying them. The Eintracht, 2 Aspin. 198, 29 L. T. Rep. N. S. 851.

**England — Rules of supreme court, 1883.**— Where a statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C to the Rules of the Supreme Court, 1883, on motion by the defendants under Ord. XIX, r. 7, for a further and better statement of claim or particulars, it was held that plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C No. 6 should generally be followed. The Isis, 8 P. D. 227, 5 Aspin. 155, 53 L. J. P. D. & Adm. 14, 49 L. T. Rep. N. S. 444, 32 Wkly. Rep. 171.

6. The Adeline, 9 Cranch (U. S.) 244, 3 L. ed. 719.

7. Adams *v.* The Island City, 1 Fed. Cas. No. 55, 1 Cliff. 210.

8. See The Tornado, 109 U. S. 110, 3 S. Ct. 78, 27 L. ed. 874; The Elfrida, 77 Fed. 754, 23 C. C. A. 527; The Young America, 20 Fed. 926; Brooks *v.* The Adirondack, 2 Fed. 387.

9. The Thornley, 98 Fed. 735, 39 C. C. A. 248.

10. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

**A plea of tender** without payment into court is bad. Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; The Nasmyth, 10 P. D. 41, 5 Aspin. 364, 54 L. J. P. D. & Adm. 63, 52 L. T. Rep. N. S. 392, 33 Wkly. Rep. 736.

**Amount awarded other salvors in another court.**— For the purpose of informing the court of the value of the property against which it would have to make its award, defendant may be allowed to plead the amount of an award made to other salvors in another court. The Antilope, L. R. 4 A. & E. 33, 1 Aspin. 511, 42 L. J. Adm. 42, 28 L. T. Rep. N. S. 74, 21 Wkly. Rep. 464. See also The Due Checchi, L. R. 4 A. & E. 35 note, 1 Aspin. 294, 26 L. T. Rep. N. S. 593, 20 Wkly. Rep. 686.

11. The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Alexander, 104 Fed. 904.

**Negligence,** although not specifically pleaded in the answer, may be proved to negative a claim to salvage upon a simple traverse of salvage services (Ward *v.* McCorkill, 7 Jur.

the answer as filed, it should be done either by amendment to the answer or by a proper plea.[12] Amendments irrelevant to the issues will not be permitted.[13]

**3. Supplementary Libel and Answer.** A supplementary libel alleging new matter, and an answer thereto, may be filed after appeal at the discretion of the court.[14]

**I. Evidence — 1. Presumptions and Burden of Proof.** The burden of establishing an agreement changing the rights of salvors is upon him who alleges it.[15] Service rendered on request is presumably beneficial.[16]

**2. Admissibility.** No evidence is admissible in a salvage suit except it be appropriate to some of the allegations in the libel or answer.[17] In case of appeal new matter may be introduced in evidence.[18]

**3. Weight and Sufficiency.** The libellant in a salvage suit, in order to succeed, must prove his case by a preponderance of the evidence.[19] When the evidence is directly contradictory, the court considers only on whom the onus of proof lies, and whether that party has discharged it.[20]

N. S. 1257, 30 L. J. Adm. 211, 4 L. T. Rep. N. S. 810, Lush. 335, 15 Moore P. C. 133, 9 Wkly. Rep. 925, 15 Eng. Reprint 444); but where the respondent relies upon a defense of misconduct on the part of libellants which forfeited their right to recover salvage, he must specially allege the facts constituting such misconduct, with due certainty of time, place, and circumstances (The Alexander, 104 Fed. 904; Ward *v.* McCorkill, *supra*. See also The Kathleen, L. R. 4 A. & E. 269, 2 Aspin. 367, 43 L. J. Adm. 39, 31 L. T. Rep. N. S. 204, 23 Wkly. Rep. 350).

12. The Alexander, 104 Fed. 904.

13. The Fielden, 11 Wkly. Rep. 156.

14. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

15. Elphicke *v.* White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56; Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a*.

**Where a vessel is injured or lost in rendering salvage services,** the presumption is that the injury or loss was caused by the necessity of the service, and not by the default of the salvors, and the burden of proof is upon the party who alleges that the loss was caused by the salvors' own acts. The Baku Standard *v.* The Angele, [1901] A. C. 549, 9 Aspin. 197, 70 L. J. P. C. 98, 84 L. T. Rep. N. S. 788, 17 T. L. R. 584; The Thomas Blyth, Lush. 16.

16. The Thomas Quigley, 68 Fed. 936.

17. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

**Instrument of abandonment.**— In a suit for salvage against a boat and cargo, a written instrument of abandonment, signed by the officers of the boat, is admissible in evidence to prove the perilous situation of the vessel. Blagg *v.* The E. M. Bicknell, 3 Fed. Cas. No. 1,476, 1 Bond 270.

**The protest** should always be brought in. The Emma, 3 Notes of Cas. 114, 2 W. Rob. 315.

**Evidence of continuing and future conditions** is admissible to illustrate with greater certainty the danger present and existing at the time the salvage service was performed. The City of Seattle, 1 Alaska 471; The R. R. Rhodes *v.* Fay, 82 Fed. 751, 27 C. C. A. 258.

**Amount paid in other instances.**— On a hearing to determine the amount of salvage to be awarded for pulling a steamer off a bar, evidence as to the sums paid in particular instances for drawing off other vessels which had gone aground is inadmissible. French *v.* The Excelsior, 48 Fed. 749. In a salvage suit evidence of the amount in which another suit has been instituted in another court for services rendered at the same time is not admissible. The Antilope, 1 Aspin. 477, 27 L. T. Rep. N. S. 663.

**Deposition before receivers of wreck.**—A receiver of wreck, in taking depositions under the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), § 448, should put down the facts deposed to as given by the deponent, and should not correct any statement made by the deponent which, within the personal knowledge of the receiver, is erroneous. The Lancashire, L. R. 4 A. & E. 198, 2 Aspin. 202, 29 L. T. Rep. N. S. 927. The examination of the crew of a salved vessel taken by the receiver of wreck under the Merchant Shipping Act of 1854, section 448, is not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the examination. The Little Lizzie, L. R. 3 A. & E. 56, 23 L. T. Rep. N. S. 84, 18 Wkly. Rep. 960.

18. The Annette, L. R. 4 A. & E. 9, 1 Aspin. 577, 42 L. J. Adm. 13, 28 L. T. Rep. N. S. 372, 21 Wkly. Rep. 552; The Thomas Wood, 1 W. Rob. 18.

19. Love *v.* Dumper Scow No. 11, 48 Fed. 740.

**Evidence held sufficient to show contract.**— Merritt, etc., Derrick, etc., Co. *v.* Tice, 118 N. Y. App. Div. 123, 103 N. Y. Suppl. 333.

**Evidence held insufficient to show contract.** — Lewis *v.* Clyde Steamship Co., 132 N. C. 904, 44 S. E. 666, 131 N. C. 652, 42 S. E. 969.

**Evidence held insufficient to show modification of contract.**— The City of Alexandria, 40 Fed. 697.

**Evidence held insufficient to show custom of vessels to help each other free of charge.**— Staten Island, etc., Ferry Co. *v.* The Thomas Hunt, 22 Fed. Cas. No. 13,326.

20. The Nymphe, 5 L. T. Rep. N. S. 365.

**J. Witnesses — 1. Competency.** The case of salvage is an exception to the rule as to the incompetency of witnesses on account of interest. Salvors are from necessity competent witnesses as to the facts occurring at the time of the salvage service;[21] but not as to other facts capable of distinct and independent proof.[22] Such evidence, being of interested persons, will weigh little unless corroborated by other circumstances.[23]

**2. Cross-Examination.** In a suit by rival salvors, the witnesses called on behalf of one set of salvors are liable to cross-examination, first on behalf of the rival salvors,[24] and then on behalf of the owners.[25]

**K. Trial or Hearing — 1. In General.** In a suit by a salvor against a ship and cargo to recover for salvage services the court cannot determine issues which may incidentally or collaterally arise between the parties libeled.[26] In some instances facts may be considered, although not introduced by either party, and brought to the court's notice by accident.[27]

**2. Computation of Value of Property — a. Time and Place of Computation.** Salvors are entitled to compensation upon a value calculated at the place where their services terminated.[28] So also the value of the property saved is usually estimated at the time of salvage;[29] but where the salvors refuse to deliver the property to the owners, and neglect to bring their libels until after the goods have fallen in market value, the price is to be ascertained as of the time when the libels are filed and the warrants to deliver executed.[30]

**b. Basis of Computation** — (i) *In General.* In an ordinary case of salvage, value means "market value."[31] There are no decisions as to what is meant by "market value" in cases of salvage, but it is well settled that it does not mean the proceeds of a forced sale,[32] or of a private sale made without advertisement.[33] This test can be adopted only where there is a market for vessels of the kind sufficiently extensive to give a fair approximation to the vessel's real value. Where there is no market value the court must resort to other means of ascertaining value, and consider all the surrounding circumstances, aided by the opinions of persons conversant with shipping and having special means of knowledge, and having regard to the original cost, age, depreciation, present condition of rates of freight, and other circumstances of a similar nature.[34]

21. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; The Elizabeth and Jane, 8 Fed. Cas. No. 4,356, 1 Ware 27; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The Huntress, 12 Fed. Cas. No. 6,912, 1 Phila. (Pa.) 122; Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492; The Sara Barnardina, 2 Hagg. Adm. 151; The Pitt, 2 Hagg. Adm. 149.

22. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400.

23. The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328.

24. The Morocco, 1 Aspin. 46, 24 L. T. Rep. N. S. 598; The Philadelphia, Brown & L. 28.

25. The Philadelphia, Brown & L. 28.

26. The James Turpie, 113 Fed. 700, holding that the ship cannot be required in such suit to answer to a claim of the cargo-owners of negligent navigation as affecting the question of liability between the ship and cargo, having been brought into court for a different purpose, and service of process on her proctor on behalf of the cargo is ineffective to raise such an issue.

27. Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

28. The Albion Lincoln, 1 Fed. Cas. No. 144, 1 Lowell 71; The Norma, 3 L. T. Rep. N. S. 340, Lush. 124; The George Dean, Swab. 290; Vermont Steamship Co. *v.* The Abby Palmer, 8 Can. Exch. 446.

29. The Albion Lincoln, 1 Fed. Cas. No. 144, 1 Lowell 71; The Stella, L. R. 1 A. & E. 340, 36 L. J. Adm. 13, 16 L. T. Rep. N. S. 335, 15 Wkly. Rep. 936.

30. The Albion Lincoln, 1 Fed. Cas. No. 141, 1 Lowell 71.

31. Hayden *v.* The C. W. Cochrane, 11 Fed. Cas. No. 6,258, 3 Woods 304; Vermont Steamship Co. *v.* The Abby Palmer, 8 Can. Exch. 446.

In case of recapture by a public vessel of war, the salvage can only be ascertained by sale of the recaptured property, unless both parties consent to an appraisement. Cross *v.* The Dolphin, 6 Fed. Cas. No. 3,432, Bee 152.

32. Vermont Steamship Co. *v.* The Abby Palmer, 8 Can. Exch. 446.

33. The Thomas L. James, 115 Fed. 566.

34. Vermont Steamship Co. *v.* The Abby Palmer, 8 Can. Exch. 446, holding that where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors, the *res* should be valued not on the basis of a forced sale, but as a "going

(II) *Stipulation or Appraisement.* In ascertaining the value of the property in salvage causes, an appraisement is very rarely resorted to. The libellants should state in their libel what the property consists of and their estimate of its value, and the claimants in like manner should respond under oath; and unless there is a very great disparity between the values as stated by the respective parties an appraisement should not be granted.[35] Nor ought it to be granted when the value is known and admitted to be very large, and the services are inconsiderable.[36] Nor when, the quantity and quality being known, the value may be ascertained by calculation.[37] Nor, in short, in any case where it is unnecessary to a just and legal decision of the cause.[38] Where the parties agree upon, and stipulate for, a certain value, they are estopped from afterward disputing this amount.[39] So, in the absence of error or mistake, an appraisement by order of court is conclusive of the value of the salved property, notwithstanding the sum actually realized by sale is less than the appraised value.[40] But when satisfied that an error has been made in the appraisement, the court may allow the decree to be opened for a rehearing upon the value, and receive further evidence upon that point.[41]

**3. Reference.** By agreement of the parties, the issues may be referred to a referee to hear and determine.[42] The court has discretionary power over awards

concern," in the hands of a solvent owner using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it. See also Murphy *v.* The Mary S. Hontvet, 4 Fed. 920.

**The freight to be considered** is only such proportion as the distance at which the salvage service was rendered from the port of departure bears to the whole voyage. The Sandringham, 10 Fed. 556, 5 Hughes 316; The Norma, 3 L. T. Rep. N. S. 340, Lush. 124. The presumption is that prepaid freight can be recovered back as not earned in case of the loss of the cargo, and therefore should be considered as part of the property saved to the owners of the ship. The Lovetand, 5 Fed. 105. Wages earned after the salved ship has been brought into port are not to be deducted from the freight upon which salvage is earned. The Edina, 4 Wkly. Rep. 91.

**Amount of insurance.**— While the amount for which a vessel may have been insured may be considered as a circumstance in arriving at its value, it is not direct testimony to that effect, nor can it be considered as conclusive as against a positive valuation. Compagnie Commerciale de Transport a Vapeur Francaise *v.* Charente Steamship Co., 60 Fed. 921, 9 C. C. A. 292 [*reversing* 55 Fed. 93].

**Cost of repairs.**— The value of the vessel to the owners for purposes of repair will be adopted as the value of the vessel in fixing the salvor's reward. Such value is determined by deducting from the value of the vessel just before the accident the cost of repair. The Lamington, 86 Fed. 675, 30 C. C. A. 271; The Ellen Holgate, 8 Fed. Cas. No. 4,375*a*. But this rule does not apply where the damage necessitating repairs was caused by the act of the master and crew of the salved vessel. The Germania, [1904] P. 131, 9 Aspin. 538, 73 L. J. P. D. & Adm. 52, 90 L. T. Rep. N. S. 296.

**Custom-house charges.**— In estimating the value of a cargo in port, custom-house charges and charges or liens for handling the cargo should be first deducted. Cornell Steamboat Co. *v.* 1,883 Bags of Sugar, 108 Fed. 277; Davis Coast Wrecking Co. *v.* The Alert, 56 Fed. 721.

**Charges and expenses incident to the custody of the property** should be deducted in estimating the value of salved property. Johnson *v.* The El Dorado, 50 Fed. 951 [*reversed* on other grounds in 53 Fed. 840, 4 C. C. A. 47]; The Le Jonet, L. R. 3 A. & E. 556, 1 Aspin. 438, 41 L. J. Adm. 95, 27 L. T. Rep. N. S. 387, 21 Wkly. Rep. 83.

35. The Philah, 19 Fed. Cas. No. 11,091*a*; The Persian, 1 Notes of Cas. 304, 1 W. Rob. 328.

36. The Philah, 19 Fed. Cas. No. 11,091*a*.

37. The Philah, 19 Fed. Cas. No. 11,091*a*.

38. The Philah, 19 Fed. Cas. No. 11,091*a*.

39. Johnson *v.* The El Dorado, 50 Fed. 951 [*reversed* on other grounds in 53 Fed. 840, 4 C. C. A. 47]; The Hanna, 3 Aspin. 503, 37 L. T. Rep. N. S. 364. But see The Hope, 14 Wkly. Rep. 467.

40. The Venus, L. R. 1 A. & E. 50, 12 Jur. N. S. 379, 14 Wkly. Rep. 460; The Georg, [1894] P. 330, 7 Aspin. 476, 71 L. T. Rep. N. S. 22; The Oscar, 2 Hagg. Adm. 257; The Sir Francis Burton, 2 Hagg. Adm. 156; The R. M. Mills, 3 L. T. Rep. N. S. 513; The S. B. Hume, Young Adm. (Nova Scotia) 228.

41. Johnson *v.* The El Dorado, 50 Fed. 951 [*reversed* on other grounds in 53 Fed. 840, 4 C. C. A. 47]; The Royal Arch, Young Adm. (Nova Scotia) 260; The S. B. Hume, Young Adm. (Nova Scotia) 228.

42. The Col. Adams, 19 Fed. 795 (holding that in such a case an apportionment of the amount awarded is a part of the issues referred; and, the commissioner's report having been filed without apportionment, it will be sent back on exceptions that such apportionment may be made on the evidence of the

of referees, either to set them aside, or to recommit them, but will interfere with an award with great reluctance.[43] The principal grounds for so doing are fraud, collusion, or mistake.[44] An award stating the amount due, and that libellants are entitled to costs, is sufficiently certain, without stating the amount of the costs.[45]

**4. Assistance of Nautical Experts.** The English court of admiralty is in the habit of calling in seafaring men to assist its judgment in salvage causes involving questions of nautical difficulty;[46] but this mode of procedure has never been sanctioned in this country.[47]

**L. Tender.**[48] A tender in a salvage suit is an admission that salvage services were rendered.[49] Where there are separate suits instituted, and defendant is unable to estimate the respective value of each service, he will be allowed to make a single tender in respect of the whole service rendered.[50] On appeal against the award the appellants are entitled to make a tender by act in court, notwithstanding no tender had been made prior to the institution of the appeal.[51]

**M. Bail.** Where a vessel has been seized under a libel *in rem*, the claimant may effect a release of the property by giving bail.[52] But owners who have given bail are still personally liable for any amount which the judgment of the court may find to be due to plaintiffs in excess of the amount for which bail has been given, and execution may be issued against them for such balance and costs.[53] After release of salved property upon proper security, salvors have no right to detain the property, or to arrest it.[54]

**N. Judgment or Decree.** In an action on a claim for services in the nature of salvage, judgment will be rendered against each defendant only in proportion to his interest in the vessel.[55]

**O. Sale of Property.** Admiralty courts have jurisdiction to order a survey, and decree a condemnation and sale of vessels to which salvage services have been rendered;[56] but, before doing so, the judge should be satisfied that the application is made in perfect good faith towards all parties interested, and that the vessel is so damaged that no prudent man would think of repairing her.[57] A sale of the damaged vessel will not be ordered, although the repairs will nearly equal her present value, where the court does not think it to the interest of her owners and insurers and the owners of the cargo.[58] So a sale of the cargo may be ordered

respective values of the vessel and cargo); The Arendal, 14 Fed. 580.

43. The Liverpool Packet, 15 Fed. Cas. No. 8,407, 2 Sprague 37.

44. The Liverpool Packet, 15 Fed. Cas. No. 8,407, 2 Sprague 37, holding that an award of a referee will not be recommitted because the counsel for the libellants omitted to call the attention of the referee to one of the grounds for increasing the amount of salvage.

45. The Liverpool Packet, 15 Fed. Cas. No. 8,407, 2 Sprague 37.

46. The James Dixon, 2 L. T. Rep. N. S. 696; The Princess Alice, 6 Notes of Cas. 584, 3 W. Rob. 138; Vermont Steamship Co. *v.* The Abby Palmer, 10 Brit. Col. 380, 8 Can. Exch. 469.

Where the court has the assistance of Trinity Masters, it will not be guided by the opinions of witnesses skilled in nautical matters. The Nimrod, 14 Jur. 942; The Magdalen, 31 L. J. Adm. 22, 5 L. T. Rep. N. S. 807.

47. The Waterloo, 29 Fed. Cas. No. 17,257, Blatchf. & H. 114.

48. Effect upon costs see *infra*, IX, R, 7.

49. The Portia, 9 Jur. 167.

50. The Jacob Landstrom, 4 P. D. 191, 4 Aspin. 58, 40 L. T. Rep. N. S. 38.

51. The Annette, L. R. 4 A. & E. 9, 1 Aspin. 577, 42 L. J. Adm. 13, 28 L. T. Rep. N. S. 372, 21 Wkly. Rep. 552.

52. Admiralty rules 10, 11.

Demand of excessive bail disapproved by court. The Earl Grey, 1 Spinks 180. See also The Agamemnon, 5 Aspin. 92, 48 L. T. Rep. N. S. 880; The Nimrod, 14 Jur. 942.

53. The Dictator, [1892] P. 304, 7 Aspin. 251, 61 L. J. P. D. & Adm. 73, 67 L. T. Rep. N. S. 563.

54. The Lady Katherine Barham, 5 L. T. Rep. N. S. 693, Lush. 404.

55. Cloon *v.* City Ins. Co., 1 Handy (Ohio) 32, 12 Ohio Dec. (Reprint) 12.

56. Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120.

57. Bennett *v.* The Tevere, 3 Fed. Cas. No. 1,325; Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed. Cas. No. 4,299*a*; The Isahel, 13 Fed. Cas. No. 7,098; The Kristrel, 14 Fed. Cas. No. 7,935; Walter *v.* Montgomery, 29 Fed. Cas. No. 17,120.

58. The Lexington, 15 Fed. Cas. No. 8,336.

to prevent deterioration.[59] It is the duty of a marshal taking possession of salved property, and in selling the same, to preserve the marks thereon, and, where they are obliterated, to take an inventory thereof, to keep accounts of the goods saved by different salvors, to arrange the goods for sale, and to employ assistance, if necessary, and charge for the same as a disbursement in the cause.[60]

**P. Restoration of Property and Disposition of Surplus — 1. In General.** Property libeled for salvage service is in the possession of the court, and can only be restored by its order.[61] Neither dismissal of the libel nor satisfaction of the libellant's demand will *per se* operate to reinvest the claimant with its possession.[62] In ordinary cases, when the libel is dismissed, or the libellant's claim is satisfied, a decree of restitution to the claimant is given as a matter of course,[63] without much inquiry into the claimant's right or title.[64] But the propriety of restoring to the claimant the possession may, under certain circumstances, become a subject for consideration by the court.[65] Surplus proceeds of cargo remaining after the payment of the salvage awards will not necessarily be paid at once to the master, although he is the only claimant, but a reasonable time may be allowed to permit the owners of the cargo themselves, or the underwriters, if they have paid, as in case of total loss, to appear and file claims in their own behalf.[66]

**2. Derelict Property.** Surplus proceeds of derelict property found at sea, remaining in the registry of the court for many years, after awarding to the salvors a proper compensation, will not, in the absence of statute, be awarded also to the salvors, nor will it be ordered to be paid into the treasury of the state, into which the property was brought, but the superior right is in the government of the United States, and the money will be ordered to be paid into the treasury thereof.[67]

**3. Captured Property.** In awarding surplus proceeds after deduction of salvage in the case of a vessel captured at sea and subsequently abandoned by the captors, the courts of a neutral nation will regard the fact of capture and possession by the captors as decisive in their favor, and hence cannot regard the subsequent abandonment as restoring the rights of the original owner.[68]

**Q. Appeal — 1. In General.** Courts of admiralty will not encourage appeals in salvage cases upon slight or frivolous grounds, or, indeed, in any case, except upon some plain, clear, and determinate mistake of law or fact in the court below, which is manifestly not justified by the circumstances, and the *onus probandi* of such mistake is upon the appellant.[69] A finding of fact in a salvage cause upon conflicting evidence will not be reversed or modified by an appellate court unless there is a clear preponderance of evidence against it.[70]

59. The Kathleen, L. R. 4 A. & E. 269, 2 Aspin. 367, 43 L. J. Adm. 39, 31 L. T. Rep. N. S. 204, 23 Wkly. Rep. 350; The Anna Helena, 5 Aspin. 61, 48 L. T. Rep. N. S. 681.

60. The Isaac Allerton, 13 Fed. Cas. No. 7,088.

61. The Byron, 4 Fed. Cas. No. 2,275.

62. The Byron, 4 Fed. Cas. No. 2,275.

63. British Consul *v.* Twenty-Two Pipes and Ten Hogsheads of Wine, 4 Fed. Cas. No. 1,900, Bee 178; The Byron, 4 Fed. Cas. No. 2,275; The Cerro Gordo, 5 Fed. Cas. No. 2,557; The Montserat, 17 Fed. Cas. No. 9,740; The North America, 18 Fed. Cas. No. 10,313; The Osteonthe, 18 Fed. Cas. No. 10,608*a*.

64. The Byron, 4 Fed. Cas. No. 2,275.

65. See cases cited *infra*, this note.

For example where a master claims as bailee of the owners, the court may refuse to restore the vessel to him, if satisfied from his past misconduct or present condition that he is an improper person to trust with the same, and that the interest of the owners will be jeopardized. The Byron, 4 Fed. Cas. No. 2,275; The Montserat, 17 Fed. Cas. No. 9,740; The North American, 18 Fed. Cas. No. 10,313.

The test as to restoration is, what, in the opinion of the court, would the owners themselves do, if on the spot, in possession of all the facts? The Byron, 4 Fed. Cas. No. 2,275.

66. The Osteonthe, 18 Fed. Cas. No. 10,608*a*.

67. Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19 Fed. Cas. No. 10,869.

68. McDonough *v.* Dannery, 3 Dall. (U. S.) 188, 1 L. ed. 563 [*affirming* 16 Fed. Cas. No. 9,212*a*]; Booth *v.* The L'Esperanza, 3 Fed. Cas. No. 1,647, Bee 92; The Two Cousins, 42 Ct. Cl. 436.

69. Bearse *v.* Three Hundred and Forty Pigs of Copper, 2 Fed. Cas. No. 1,193, 1 Story 314.

70. Elphicke *v.* White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56; Ins. Co. *v.* The Venezuela, 55 Fed. 416, 5 C. C. A. 159.

**2. As to Amount of Award.** Since the amount of the award in a salvage case rests largely in the discretion of the trial court,[71] it will not be interfered with on appeal where there has been no mistake of fact or application of incorrect principles,[72] and the amount is not clearly exorbitant,[73] although it may be greater or less than the appellate court would have allowed.[74] But the court of appeal will, where the award given is manifestly wrong, increase or diminish it as the justice of the case may require.[75]

71. See *supra*, VII, A, 3, h.

72. The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Dos Hermanos, 10 Wheat. (U. S.) 306, 6 L. ed. 328; The Sybil, 4 Wheat. (U. S.) 98, 4 L. ed. 522; Perriam *v.* Pacific Coast Co., 133 Fed. 140, 66 C. C. A. 206; The Edith L. Allen, 129 Fed. 209, 63 C. C. A. 367; Hume *v.* J. D. Spreckels, etc., Co., 115 Fed. 51, 52 C. C. A. 645; Simpson *v.* Dollar, 109 Fed. 814, 48 C. C. A. 663; The New Camelia, 105 Fed. 637, 44 C. C. A. 642; The Thornley, 98 Fed. 735, 39 C. C. A. 248; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; Thomas *v.* The Florence, 71 Fed. 527, 18 C. C. A. 240; The Emulous, 8 Fed. Cas. No. 4,480, 1 Sumn. 207; Tyson *v.* Prior, 24 Fed. Cas. No. 14,319, 1 Gall. 133; The James Armstrong, L. R. 4 A. & E. 380, 3 Aspin. 46, 33 L. T. Rep. N. S. 390; The Lancaster, 9 P. D. 14, 5 Aspin. 174, 49 L. T. Rep. N. S. 705, 36 Wkly. Rep. 608; The Vesta, 2 Hagg. Adm. 189; Green *v.* Bailey, 12 Moore P. C. 346, 14 Eng. Reprint 943; Gann *v.* Brun, 12 Moore P. C. 340, Swab. 129, 14 Eng. Reprint 940.

**The discretion of the inferior court as to the *quantum* of salvage will not be disturbed unless manifestly erroneous.** Chauveau *v.* Walden, 10 Mart. (La.) 100; The Eliza Strong, 130 Fed. 99, 64 C. C. A. 433; Whitmire *v.* Cobb, 88 Fed. 91, 31 C. C. A. 395; The Delaware, 7 Fed. Cas. No. 3,761, 6 Blatchf. 527.

**Error in valuation of vessel.**— Where the court valued the vessel salved at two million dollars, while its actual value was one million eight hundred and eighty-eight thousand five hundred dollars, the error is not material, as, where the total amount salved is so large, the difference between the two sums is too small to affect the amount of award. International Nav. Co. *v.* The St. Paul, 86 Fed. 340, 30 C. C. A. 70.

73. Creevy *v.* Cummings, 3 La. Ann. 163, 48 Am. Dec. 444; Potomac Steamboat Co. *v.* Baker Salvage Co., 123 U. S. 40, 8 S. Ct. 33, 31 L. ed. 75; The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Camanche, 8 Wall. (U. S.) 448, 19 L. ed. 397; The Hope, 10 Pet. (U. S.) 108, 9 L. ed. 363; The Carroll, 167 Fed. 112, 92 C. C. A. 564; Hume *v.* Spreckels, 115 Fed. 51, 52 C. C. A. 645; Simpson *v.* Dollar, 109 Fed. 814, 48 C. C. A. 663; The Laura, 83 Fed. 311, 27 C. C. A. 540; The R. R. Rhodes *v.* Fay, 82 Fed. 751, 27 C. C. A. 258; Morse *v.* Pomroy Coal Co., 75 Fed. 428; The Amity, 69 Fed. 110, 16 C. C. A. 170; The Akaba, 54 Fed. 197, 4 C. C. A. 281; The Agnes I. Grace, 51 Fed. 958, 2 C. C. A. 581; The Albany, 48 Fed. 565; Scott *v.* The City of Worcester, 45 Fed. 119; The Glengyle *v.* Neptune Salvage Co., [1898] A. C. 519, 8 Aspin. 436, 67 L. J. P. D. & Adm. 87, 78 L. T. Rep. N. S. 801, 14 T. L. R. 522; The Lancaster, 9 P. D. 14, 5 Aspin. 174, 49 L. T. Rep. N. S. 705, 36 Wkly. Rep. 608; Jorgensen *v.* Neptune Steam Fishing Co., 4 F. (Ct. Sess.) 992; The Fusilier, 11 Jur. N. S. 289, 34 L. J. Adm. 25, 12 L. T. Rep. N. S. 186, 3 Moore P. C. N. S. 51, 13 Wkly. Rep. 592, 16 Eng. Reprint 19; The Cuba, 6 Jur. N. S. 152, Lush. 14; The Woburn Abbey, 21 L. T. Rep. N. S. 707.

**Amount of excess necessary to warrant interference.**— An appellate court will not interfere with an award in a salvage case except where the difference between what has been and what ought to have been awarded is very considerable. Arnold *v.* Cowie, L. R. 3 P. C. 589, 1 Aspin. 31, 24 L. T. Rep. N. S. 499; Prendeville *v.* The England, L. R. 2 P. C. 253, 38 L. J. Adm. 9, 20 L. T. Rep. N. S. 46, 5 Moore P. C. N. S. 344, 16 Eng. Reprint 545; Green *v.* Bailey, 12 Moore P. C. 346, 14 Eng. Reprint 943; Gann *v.* Brun, 12 Moore P. C. 340, Swab. 129, 14 Eng. Reprint 940.

**Under § 11, Act of March 3, 1891,** creating the circuit courts of appeals, such courts are governed, in reviewing decrees in admiralty, by the provisions of law then in force and applicable to such review by the supreme court; and under the act of Feb. 16, 1875 (18 St. c. 77), restricting such review to matters of law, a decree for salvage services cannot be altered, for the reason that the amount awarded is excessive, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. Irvine *v.* The Hesper, 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175; The Connemara, 108 U. S. 352, 2 S. Ct. 754, 27 L. ed. 751; The Trefusis, 98 Fed. 314, 39 C. C. A. 96.

74. The Thornley, 98 Fed. 735, 39 C. C. A. 248; The Baker, 25 Fed. 771, 23 Blatchf. 389; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328; The Baku Standard *v.* The Angele, [1901] A. C. 549, 9 Aspin. 197, 70 L. J. P. C. 98, 84 L. T. Rep. N. S. 788, 17 T. L. R. 584; The Glengyle *v.* Neptune Salvage Co., [1898] A. C. 519, 8 Aspin. 436, 67 L. J. P. D. & Adm. 87, 78 L. T. Rep. N. S. 801, 14 T. L. R. 522; The Jeune Louise, 37 L. J. Adm. 32; The Woburn Abbey, 21 L. T. Rep. N. S. 707.

75. Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; The Accomac, [1891] P. 349, 7 Aspin. 153, 66 L. T. Rep. N. S. 335; The

**3. As to Costs.** Although the question of costs is perhaps not *per se* the proper subject of an appeal,[76] yet it is reviewable when a case is properly in the appellate court.[77]

**R. Costs**[78] **— 1. In General.** Costs in salvage cases are given or refused according to the sound discretion of the court, which is to be exercised in accordance with settled practice, for the furtherance of justice and with reference to the facts of the case.[79] The general rule is that costs and charges are to be paid out of the property saved, to be apportioned among the respective claimants thereof.[80] The only exceptions are where the costs and charges have been occasioned by the gross neglect, or laches, or improper conduct of the claimant, in which case they are to be borne by him alone,[81] or where the right has been forfeited by the misconduct of the salvors, in which case the court will refuse any allowance to them and compel the guilty parties to bear their own costs.[82] Although the libel is dismissed, if it appears that the efforts of the libellant were made with the intent and hope of rendering assistance, the libellant may be given his costs,[83] or they may be divided.[84]

**2. Effect of Filing Separate Libels.** Where different libels are filed by co-salvors unnecessarily, it is at the peril of paying costs.[85] Where separate

Star of Persia, 6 Aspin. 220, 57 L. T. Rep. N. S. 839.

**Amount increased on appeal.**— Neel *v.* Iron City Sand Co., 149 Fed. 980, 79 C. C. A. 490; Rowe *v.* The Brig, 20 Fed. Cas. No. 12,093, 1 Mason 372; Kirby *v.* The Scindia, L. R. 1 P. C. 241, 12 Jur. N. S. 534, 35 L. J. P. C. 53, 4 Moore P. C. N. S. 84, 16 Eng. Reprint 248; The City of Berlin, 2 P. D. 187, 3 Aspin. 491, 47 L. J. P. D. & Adm. 2, 37 L. T. Rep. N. S. 307, 25 Wkly. Rep. 793; The Star of Persia, 6 Aspin. 220, 57 L. T. Rep. N. S. 839; The Farnley Hall, 4 Aspin. 499, 46 L. T. Rep. N. S. 216; The Harriett, Swab. 218; The Messenger, Swab. 191.

**Amount reduced on appeal.**— The Edith L. Allen, 129 Fed. 209, 63 C. C. A. 367 [*reversing* 122 Fed. 729]; The Flottbek, 118 Fed. 954, 55 C. C. A. 448; The Penobscott, 106 Fed. 419, 45 C. C. A. 372; The New Camelia, 105 Fed. 637, 44 C. C. A. 642; Ulster Steamship Co. *v.* Cape Fear Towing, etc., Co., 94 Fed. 214, 36 C. C. A. 201; The Elmbank, 69 Fed. 104, 16 C. C. A. 164 [*reversing* 62 Fed. 306]; The Oxford, 66 Fed. 590, 13 C. C. A. 647; The Phœnix, 62 Fed. 487, 10 C. C. A. 506; Hall *v.* The Bay of Naples, 48 Fed. 737, 1 C. C. A. 81 [*reversing* 44 Fed. 90]; The Hesper, 18 Fed. 696 [*affirmed* in 122 U. S. 256, 7 S. Ct. 1177, 30 L. ed. 1175]; Mattingly *v.* Three Hundred and Fifty-Seven Bales of Cotton, 16 Fed. Cas. No. 9,294, 2 Flipp. 288; The Underwriter, 24 Fed. Cas. No. 14,341, 4 Blatchf. 94; The Thomas Allen, 12 App. Cas. 118, 6 Aspin. 99, 56 L. T. Rep. N. S. 285; Bird *v.* Gibb, 8 App. Cas. 559, 5 Aspin. 156, 52 L. J. P. C. 57, 49 L. T. Rep. N. S. 414; The Amerique, L. R. 6 P. C. 468, 2 Aspin. 460, 31 L. T. Rep. N. S. 854, 23 Wkly. Rep. 488; The Chetah, L. R. 2 P. C. 205, 38 L. J. Adm. 1, 19 L. T. Rep. N. S. 621, 5 Moore P. C. N. S. 278, 17 Wkly. Rep. 233, 16 Eng. Reprint 520; The General Palmer, 2 Hagg. Adm. 323.

**76.** U. S. *v.* The Malek Adhel, 2 How. (U. S.) 210, 11 L. ed. 239; The Indian, 159 Fed. 20, 86 C. C. A. 210; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586.

**77.** Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586.

**78.** Costs in actions generally see Costs, 11 Cyc. 1.

**79.** Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586.

**80.** The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; The Gleniffer, 3 Can. Exch. 57.

**Costs should be apportioned between the owners of ship, freight, and cargo,** although the latter were not before the court when the decree was made. The Elton, [1891] P. 265, 7 Aspin. 66, 60 L. J. P. D. & Adm. 69, 65 L. T. Rep. N. S. 232, 39 Wkly. Rep. 703; The Peace, Swab. 115.

**Costs of parties against whom no claim made out.**— When parties have been summoned to appear against whom no claim to contribution is made out, the parties so summoned are entitled to their costs. The Sarpedon, 3 P. D. 28, 3 Aspin. 509, 37 L. T. Rep. N. S. 505, 26 Wkly. Rep. 374.

**Trivial claim.**— Where the nature of the claim is so trivial that it ought not to have been brought into court, costs will not be awarded. The Red Rover, 3 W. Rob. 150.

**81.** The Byron, 4 Fed. Cas. No. 2,275; The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; The Cadiz, 3 Aspin. 332, 35 L. T. Rep. N. S. 602.

**82.** Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed. Cas. No. 4,299*a*; The Minnie Miller, 17 Fed. Cas. No. 9,638, 6 Ben. 117; The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; The Cadiz and The Boyne, 3 Aspin. 332, 35 L. T. Rep. N. S. 602; The Kauss, 20 T. L. R. 326.

**Fraudulent claim.**— A fraudulent salvage case will be dismissed with costs. The Susannah, 3 Hagg. Adm. 345 note.

**83.** The Rosalind, 12 L. T. Rep. N. S. 553.

**84.** The Brandow, 29 Fed. 878.

**85.** The Henry Ewbank, 11 Fed. Cas. No. 6,376, 1 Sumn. 400; The Maryland, 16 Fed.

salvage claims are not consolidated, full costs in the later suit will not be granted unless under exceptional circumstances.[86]

**3. Effect of Want of Demand or Notice.**[87] Where a libel for salvage is filed without demand or notice to the owners of the salved vessel, the libellants will not be allowed costs,[88] unless under the peculiar circumstances of the case a demand was immaterial.[89] So also where claims for special damage incurred in rendering a salvage service are not advanced until trial, even though full opportunity is thereafter given to meet such claims, costs will not be allowed to libellants.[90]

**4. Effect of Exorbitant Claim.** Where salvors make an exorbitant claim, and the claimants offer a reasonable compensation, the former are not entitled to costs; [91] but costs will be awarded salvors, although their claim was inequitable in amount, where claimants made no offer of compensation whatever for the services rendered.[92]

**5. Effect of Requiring Excessive Bond.** On a libel for salvage the requirement of an excessive bond from claimant should not be permitted to relieve him from costs where the amount appeared to have been agreed on, and the claimant had had an opportunity to apply to the judge for a reduction.[93]

**6. Effect of Want of Tender.** Where the claimants make no tender they will be charged with costs.[94] The fact that libellant made no offer to arbitrate does not entitle claimant to costs, where there was no tender in claimant's answer either of arbitration or of payment for libellant's services.[95]

**7. Effect of Tender.**[96] Where a tender is made and refused, and is subsequently pronounced sufficient, the libellant is chargeable with his own costs accruing subsequent to the tender,[97] and generally with the owner's costs

Cas. No. 9,218; The Jacob Landstrom, 4 P. D. 191, 4 Aspin. 58, 40 L. T. Rep. N. S. 38.

**86.** The Belle of Lagos, 20 L. T. Rep. N. S. 1019, 17 Wkly. Rep. 899; The Nicolina, 2 W. Rob. 175. See also The Bartley, Swab. 198.

**Apportionment among plaintiffs.**—In a case where defendants, in two actions of salvage instituted against the same property, are ordered to pay only one set of costs, to be apportioned between plaintiffs in the two actions, the apportionment should be made according to the amount of plaintiffs' bills of costs. The Pasithea, 5 P. D. 5. But see The Sarah, 3 P. D. 39, 3 Aspin. 542, 37 L. T. Rep. N. S. 831.

**87.** In actions generally see Costs, 11 Cyc. 482.

**88.** The D. L. & W. No. 6 C., 53 Fed. 284; Jones *v.* Car Float No. 5, 50 Fed. 573; The Vanloo, 39 Fed. 570; The Rosedale, 20 Fed. 447; The Maggie Ellen, 19 Fed. 221; The Jack Jewett, 13 Fed. Cas. No. 7,122, 2 Ben. 463. *Compare* Holmes *v.* The Joseph C. Griggs, 12 Fed. Cas. No. 6,640, 1 Ben. 81.

**89.** The Alaska, 23 Fed. 597, where it was necessary for the libellant to file its libel at once to enforce its claim against the cargo before it was delivered.

**90.** The Benison, 36 Fed. 793.

**91.** Murray *v.* The John Swan, 50 Fed. 447; The O. M. Hitchcock, 25 Fed. 777; The Agamemnon, 5 Aspin. 92, 48 L. T. Rep. N. S. 880; The Towan, 3 Notes of Cas. 25, 2 W. Rob. 259; The Alma, 5 Nova Scotia 789.

**92.** The Straits of Gibraltar, 32 Fed. 297; The Indiana, 22 Fed. 925; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391; The Wexford, 29 Fed. Cas. No. 17,742, 6 Ben. 119.

**93.** The Barge No. 127, 113 Fed. 529.

**94.** James Clark Co. *v.* Steam Ferryboat Columbia, 26 App. Cas. (D. C.) 85; The New Orleans, 23 Fed. 909; The Daniel Steinman, 19 Fed. 918; The Rialto, 15 Fed. 124; The Leipsic, 5 Fed. 108.

**95.** Charente Steamship Co. *v.* The Dupuy De Lome, 55 Fed. 93 [*reversed* on other grounds in 60 Fed. 921, 9 C. C. A. 292].

**96.** In actions generally see Costs, 11 Cyc. 71.

**97.** Howard *v.* The Rose, 34 Fed. 928; The Rose, 31 Fed. 176; The Arlington, 1 Fed. Cas. No. 534, 2 Ben. 511; Hessian *v.* The Edward Howard, 12 Fed. Cas. No. 6,436, Newb. Adm. 522; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; The Waverley, L. R. 3 A. & E. 369, 1 Aspin. 47, 40 L. J. Adm. 42, 24 L. T. Rep. N. S. 713; The Lotus, 7 P. D. 199, 4 Aspin. 595, 47 L. T. Rep. N. S. 447, 30 Wkly. Rep. 892; The Lee, 6 Aspin. 395, 60 L. T. Rep. N. S. 939; The Vrouw Margaretha, 4 C. Rob. 103; The John and Thomas, 1 Hagg. Adm. 157 note; The Batavier, 1 Spinks 169; The Emu, 1 W. Rob. 15.

**Sufficiency of tender.**— In order to escape paying salvors' costs, a tender in a salvage suit should be in regular form, as early as possible, by act of court. Evans *v.* The Charles, 8 Fed. Cas. No. 4,556, Newb. Adm. 329; The Vrouw Margaretha, 4 C. Rob. 103. No tender out of court, although adequate in amount, will bar the salvors of subsequent costs, unless made in cash or bank-notes. The Sovereign, 6 Jur. N. S. 832, 29 L. J. Adm. 113, 2 L. T. Rep. N. S. 669, Lush. 85. It is not necessary that a tender should be accompanied with an offer to pay plaintiff's costs up to the date of tender. The William

also;[98] but this practice is not an invariable one, and where the court is of opinion that the tender, while sufficient, was not a liberal one, it has a discretion in the matter of costs.[99] The libellant is, however, entitled to his costs up to the time of the tender,[1] unless the circumstances of the case render it just and expedient to order otherwise.[2]

**8. On Appeal.** There is no hard-and-fast rule as to the costs of a successful appeal in a salvage action.[3] The successful party is usually awarded costs.[4] Where the award is reduced the salvors are not entitled to their costs of appeal.[5]

**9. Costs of Appraisement.** Salvors are entitled to the costs of appraisement when it appears that there is a substantial difference between the appraised value and that alleged by defendants;[6] but if salvors take out a commission of appraisement without cause, they will have to pay the costs.[7]

**10. Security For Costs.**[8] Libellants seeking salvage compensation who have filed a single libel, treating the salved property belonging to numerous persons as an entirety, and have given a stipulation to secure costs, conformably to standing rule 44, will not be required to furnish increased security under rule 55, where it does not appear that the sum stipulated is insufficient to cover the costs of contesting libellant's demand in the manner in which the suit is instituted.[9] Nor are they answerable to the claimants for sums deposited on bonding the attached property, as rule 68 changes the former practice by securing the return of costs to successful claimants.[10]

**S. Interest.** Interest upon a salvage award, when allowable, runs from the date of the entry of judgment.[11] But where a libellant made greatly exaggerated and unwarranted claims for salvage services he will not be allowed interest on the amount awarded.[12]

Symington, 10 P. D. 1, 5 Aspin. 293, 54 L. J. P. D. & Adm. 4, 51 L. T. Rep. N. S. 461, 33 Wkly. Rep. 371. And see The Sovereign, *supra*. *Contra*, The Hickman, L. R. 3 A. & E. 15, 39 L. J. Adm. 7, 21 L. T. Rep. N. S. 472, 18 Wkly. Rep. 151.

**98.** The Arlington, 1 Fed. Cas. No. 534, 2 Ben. 511; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; The Vrouw Margaretha, 4 C. Rob. 103.

**99.** The Marie, 39 Fed. 501; Lubker *v.* The A. H. Quinby, 15 Fed. Cas. No. 8,586; The Lotus, 7 P. D. 199, 4 Aspin. 595, 47 L. T. Rep. N. S. 447, 30 Wkly. Rep. 892; The William, 5 Notes of Cas. 108, 2 W. Rob. 521; The Queen, 1 Spinks 175 note; The Emu, 1 W. Rob. 15.

**1.** The Rose, 31 Fed. 176; The William Symington, 10 P. D. 1, 5 Aspin. 293, 54 L. J. P. D. & Adm. 4, 51 L. T. Rep. N. S. 461, 33 Wkly. Rep. 371; The Lee, 6 Aspin. 395, 60 L. T. Rep. N. S. 939.

**2.** The William Symington, 10 P. D. 1, 5 Aspin. 293, 54 L. J. P. D. & Adm. 4, 51 L. T. Rep. N. S. 461, 33 Wkly. Rep. 371.

Since the passing of the English Judicature Acts these costs are in the discretion of the court. The William Symington, 10 P. D. 1, 5 Aspin. 293, 54 L. J. P. D. & Adm. 4, 51 L. T. Rep. N. S. 461, 33 Wkly. Rep. 371.

**3.** The Prince Llewellyn, [1904] P. 83, 9 Aspin. 505, 73 L. J. P. D. & Adm. 22, 89 L. T. Rep. N. S. 489; The Gipsy Queen, [1895] P. 176, 7 Aspin. 586, 64 L. J. P. D. & Adm. 86, 72 L. T. Rep. N. S. 454, 11 Reports 766, 43 Wkly. Rep. 359.

**4.** The Emily B. Souder, 8 Fed. Cas. No. 4,458, 15 Blatchf. 185; The Prince Llewellyn, [1904] P. 83, 9 Aspin. 505, 73 L. J. P. D. & Adm. 22, 89 L. T. Rep. N. S. 489. But see The Gipsy Queen, [1895] P. 176, 7 Aspin. 586, 64 L. J. P. D. & Adm. 86, 72 L. T. Rep. N. S. 454, 11 Reports 766, 43 Wkly. Rep. 359, unless the award is considerably reduced.

Appeals under English Judicature Act.—Although in appeals as to the amount of salvage the privy council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. The City of Berlin, 2 P. D. 187, 3 Aspin. 491, 47 L. J. P. D. & Adm. 2, 37 L. T. Rep. N. S. 307, 25 Wkly. Rep. 793.

**5.** The Henry of Philadelphia, 1 Hagg. Adm. 264.

**6.** The Paul, L. R. 1 A. & E. 57, 35 L. J. Adm. 16, 14 L. T. Rep. N. S. 192; The Magdalen, 5 L. T. Rep. N. S. 692.

**7.** The Margaret Jane, L. R. 2 A. & E. 345, 38 L. J. Adm. 38, 20 L. T. Rep. N. S. 1017, 17 Wkly. Rep. 1064; The Wilhelmina, 1 Notes of Cas. 376; The Commodore, 1 Spinks 175 note.

**8.** In actions generally see Costs, 11 Cyc. 170.

**9.** Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed. Cas. No. 4,299*a*.

**10.** Edwards *v.* Thirty-Five Boxes of Gold Dust, 8 Fed. Cas. No. 4,299*a*.

**11.** The Haxby, 83 Fed. 720, 28 C. C. A. 38; The Jones Brothers, 3 Aspin. 478, 46 L. J. P. D. & Adm. 75, 37 L. T. Rep. N. S. 164.

**12.** Merritt, etc., Derrick, etc., Co. *v.* Chubb, 113 Fed. 173, 51 C. C. A. 119.

**SALVATION ARMY.** An organization formed upon a quasi-military pattern, for the revival of religion among the masses.[1] (Salvation Army: Disturbing Meeting of, see DISTURBANCE OF PUBLIC ASSEMBLAGE, 14 Cyc. 539, 540 note 8. Use of Street For Religious Meeting, see MUNICIPAL CORPORATIONS, 28 Cyc. 909.)

**SALVOR.** See SALVAGE, *ante*, p. 716.

**SAME.** Not different or other; identical;[2] of the kind or species, though not the specific thing;[3] similar;[4] of like kind, species, sort, dimensions, or the like; not differing in character, or in the quality or quantities compared; corresponding; not discordant; similar; like;[5] synonymous with LIKE,[6] *q. v.* (See also AFORESAID, 2 Cyc. 50; IDENTICAL, 21 Cyc. 1723; SAID, 34 Cyc. 1825.)

1. Century Dict.

2. U. S. *v.* East Tennessee, etc., R. Co., 13 Fed. 642, 644; Thomas *v.* U. S., 38 Ct. Cl. 113, 129.

3. Crapo *v.* Brown, 40 Iowa 487, 493, where it is said that this word does not always mean identical, or not different, or other, and is often used as a substitute for that which was used before, and is employed in the sense of a pronoun, in which sense it is very frequently employed in legal documents and pleadings.

4. *In re* Dougherty, 27 Vt. 325, 327.

5. Webster Dict. [*quoted* in Cobb *v.* Lincoln, 15 Nebr. 86, 88, 17 N. W. 365].

6. Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 260, 38 L. J. Exch. 177, 22 L. T. Rep. N. S. 43, 18 Wkly. Rep. 92.

**Used in a demurrer,** "Come now the defendants and demur severally to each paragraph of the complaint as amended, because the same does not state," refers to each paragraph and not to the entire complaint. Terre Haute, etc., R. Co. *v.* Sherwood, 132 Ind. 129, 130, 31 N. W. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339.

**The words "the same"** as used in a contract, statute, etc., are relative and imply a known antecedent. They assume that the instrument referred to has been in some manner already identified. Smith *v.* Boyd, 101 N. Y. 472, 476, 5 N. E. 319.

**Refers to** antecedent other than last (Mott *v.* Mott, 68 N. Y. 246, 255; *In re* Kimball, 14 Fed. Cas. No. 7,767, 2 Ben. 38, 43); last or next to antecedent (Hancock *v.* Hancock, 14 Pick. (Mass.) 70, 75; Seneca Nation of Indians *v.* Knight, 23 N. Y. 498, 500; Sampson *v.* Com., 5 Watts & S. (Pa.) 385, 388; Phillips' Estate, 20 Phila. (Pa.) 140, 142; Brown *v.* State, 28 Tex. App. 379, 380, 13 S. W. 150); more than one antecedent (Court *v.* Buckland, 1 Ch. D. 605, 610, 45 L. J. Ch. 214); subject of sentence in which it appears (Ammons *v.* Brunswick-Balke-Collender Co., 141 Fed. 570, 573, 72 C. C. A. 614).

**Used in connection with other words.**— "Same as" see Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633, 644; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 277, 317, 28 So. 956, 60 L. R. A. 33; Mississippi Mills *v.* Cook, 56 Miss. 40, 52. "Same cause" see Titus *v.* Poole, 145 N. Y. 414, 423, 40 N. E. 228. "Same character of work" see Long *v.* Chicago, etc., R. Co., 94 Tex. 53, 57, 57 S. W. 802. "Same class of subjects" see People *v.* Henderson, 12 Colo. 369, 375, 21 Pac. 144. "Same compensation" see Bates *v.* St. Louis, 153 Mo. 18, 21, 54 S. W. 439, 77 Am. St. Rep. 701. "Same condition" see Knight *v.* Schell, 24 How. (U. S.) 526, 530, 16 L. ed. 760; U. S. *v.* Dunbar, 67 Fed. 783, 785, 14 C. C. A. 639. "Same conditions and terms" see Pendleton *v.* Larrabee, 62 Conn. 393, 396, 26 Atl. 482. "Same direction" see Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 437, 59 Am. Rep. 250. "Same extent" see People *v.* Feitner, 56 N. Y. App. Div. 280, 285, 67 N. Y. Suppl. 893. "Same fees" see Cobb *v.* Lincoln, 15 Nebr. 86, 88, 17 N. W. 365. "Same" fund see Clement's Appeal, 49 Conn. 519, 533. "Same general business" see Webb *v.* Denver, etc., R. Co., 7 Utah 363, 367, 26 Pac. 981. "Same grade of employment" see Missouri, etc., R. Co. *v.* Whitaker, 11 Tex. Civ. App. 668, 669, 33 S. W. 716. "Same grantor" see Farmer *v.* Fisher, 197 Pa. St. 114, 118, 46 Atl. 892. "Same invention" see Topliff *v.* Topliff, 145 U. S. 156, 166, 12 S. Ct. 825, 36 L. ed. 658; Carpenter Straw-Sewing Mach. Co. *v.* Searle, 52 Fed. 809, 812. "Same manner" see Hawkins *v.* Duncan, 103 Ala. 398, 399, 15 So. 828; Phillips *v.* Middlesex County Com'rs, 122 Mass. 258, 260; State *v.* State First Nat. Bank, 4 Nev. 491, 493; Perkins *v.* Perkins, 24 N. J. L. 409, 411; Suydam *v.* Voorhees, 58 N. J. Eq. 157, 162, 43 Atl. 4; McDonald *v.* Dunbar, (Pa. 1888) 12 Atl. 553, 557; State *v.* Cook, 78 Tex. 406, 414, 14 S. W. 996. "Same offense" see People *v.* Stephens, 79 Cal. 428, 430, 21 Pac. 856, 4 L. R. A. 845; State *v.* Gapen, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25, 26; State *v.* Williams, 45 La. Ann. 936, 938, 12 So. 932; Com. *v.* Roby, 12 Pick. (Mass.) 496, 502; State *v.* Gustin, 152 Mo. 108, 112, 53 S. W. 421; Hirshfield *v.* State, 11 Tex. App. 207, 214; *In re* Dougherty, 27 Vt. 325, 327; Moundsville *v.* Fountain, 27 W. Va. 182, 195, 197; U. S. *v.* Cashiel, 25 Fed. Cas. No. 14,744, 1 Hughes 552, 558. "Same parties" see Briggs *v.* Briggs, 80 Cal. 253, 254, 22 Pac. 334; Wilson *v.* Exchange Bank, 122 Ga. 495, 498, 50 S. E. 357, 69 L. R. A. 97; Dishong *v.* Finkbiner, 46 Fed. 12, 17. "Same piece of work" see Long *v.* Chicago, etc., R. Co., 94 Tex. 53, 60, 57 S. W. 802. "Same punishment" see Anderson *v.* State, 63 Ga. 675, 678. "Same rate of interest" see Vaughan *v.* Kennan, 38 Ark. 114, 116. "Same right" see Greer *v.* Arlington Mills Mfg. Co., 1 Pennew. (Del.) 581, 591, 43 Atl. 609; Wingate *v.* Parsons, 4 Del. Ch. 117, 122; Griffin *v.* Overman Wheel Co., 61 Fed. 568, 573, 9 C. C. A. 542. "Same street" see Com. *v.* McDonald, 160 Mass. 528,

**SAME CAUSE OF ACTION.** Where the same evidence will support both the actions, although they happen to be grounded on different writs.[7] (See CAUSE OF ACTION, 6 Cyc. 705; and, generally, ACTIONS, 1 Cyc. 634.)

**SAME OFFENSE.** See CRIMINAL LAW, 12 Cyc. 280.

**SAME PARTIES.** See JUDGMENTS, 23 Cyc. 1237.

**SAME TIME.** Words used in the sense of same period; same occasion.[8]

**SAMPLE.** Both in its legal and popular acceptation, that which is taken out of a large quantity as a fair representation of the whole; a part shown as a specimen.[9] (See, generally, SALES, *ante*, p. 223, 405.)

**SAMPLE MERCHANT.** One who sells or offers to sell any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or who acts as agent for the sale or collection of orders by sample or description list.[10] (See COMMERCIAL TRAVELER, 8 Cyc. 334; DRUMMER, 14 Cyc. 1087.)

**SAMPLE-ROOM.** A room where samples are kept and shown; a place where liquor is sold by the glass; a bar-room; grog-shop.[11] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 61.)

**SANATORIUM.** See HOSPITALS, 21 Cyc. 1105.

**SANCTION.** Weight.[12] As applied to law, means of enforcement.[13]

**SANCTIONING RIGHT.** The right of a servant who is wrongfully discharged to recover damages from the master for a breach of contract.[14] (See MASTER AND SERVANT, 26 Cyc. 1001.)

**SANCTION OF AN OATH.** A belief that the Supreme Being will punish falsehood.[15] (See PERJURY, 30 Cyc. 1395.)

**SAND.** Water worn detritus, finer than that to which the name gravel would ordinarily be applied.[16] (See GRAVEL, 20 Cyc. 1364.)

**SAND-BAR.** See NAVIGABLE WATERS, 29 Cyc. 354.

**SAND-BLAST.** A blast prepared by partially filling an opening or crevice in the rock with powder, laying a fuse, and filling in with sand and slate rubbish.[17]

530, 36 N. E. 483; Com. *v.* Jenkins, 137 Mass. 572, 573. "Same voyage" see Wright *v.* Norwich, etc., Transp. Co., 30 Fed. Cas. No. 18,087, 8 Blatchf. 14, 23.

7. Albuquerque First Nat. Bank *v.* Lewinson, 12 N. M. 147, 152, 76 Pac. 288; Rice *v.* King, 7 Johns. (N. Y.) 20, 21; Jackson *v.* Thomson, 215 Pa. St. 209, 218, 64 Atl. 421; Piro *v.* Shipley, 33 Pa. Super. Ct. 278, 283.

**In Rule 53 in Admiralty,** the same transaction, dispute, or subject-matter which had been the cause of the action being brought, and they include those cases of cross libels where the question in dispute is identical in both the defenses in one suit being the ground of the claim in the other. Vianello *v.* The Credit Lyonnais, 15 Fed. 637, 638.

8. Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 444, 59 Am. Rep. 250.

9. Webber *v.* Com., 33 Gratt. (Va.) 898, 904.

**Import of the exhibition of a sample** is that the article proposed to be sold is like that which is shown as a parcel of the article. Bradford *v.* Manly, 13 Mass. 138, 143, 7 Am. Dec. 122.

10. White *v.* Com., 78 Va. 484, 485; Webber *v.* Com., 33 Gratt. (Va.) 898, 904.

11. Standard Dict.

**As used in an indictment** charging a person with breaking and entering a sample room in a hotel, sample room cannot be affirmed from its mere designation to be a shop, store, warehouse, or other building, structure or inclosure in which goods, merchandise, or valuable things are kept for use, sale, or deposit. Thomas *v.* State, 97 Ala. 3, 5, 12 So. 409.

12. People *v.* Kraft, 148 N. Y. 631, 634, 43 N. E. 80, where it is said the word "sanction" conveys the idea of sacredness or of authority.

13. Nolan County Com'rs Ct. *v.* Beall, 98 Tex. 104, 108, 81 S. W. 526 [*citing* Bouvier L. Dict.], where it is said that sanctions are of two kinds, those which redress civil injuries, called civil sanctions, and those which punish crimes called penal sanctions.

**Held to mean** "consent" see O'Sullivan *v.* Roberts, 42 N. Y. Super. Ct. 282, 287.

14. Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157, 164, 43 N. E. 279.

15. Blocker *v.* Burness, 2 Ala. 354, 355, where it is said that whether punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is an avenger of falsehood.

16. Century Dict.

**Equivalent to land** see Spinney *v.* Marr, 41 Me. 352, 355.

**Meaning of "sand and gravel"** in a deed is to be determined by evidence to prove the meaning of the words as generally understood in such locality. Brown *v.* Brown, 8 Metc. (Mass.) 573, 576.

17. Stephens *v.* Martins, 1 Mona. (Pa.) 376, 380, 17 Atl. 242.

**SAN DOMINGO MAHOGANY.** A trade term meaning a good figured mahogany equal in density to that known as San Domingo mahogany.[18]

**SAND PACKING.** A fraudulent packing of cotton by intermixing or putting sand within the bale.[19]

**SANE.** Whole, sound, in a healthful state.[20] (See CRIMINAL LAW, 12 Cyc. 164; HOMICIDE, 21 Cyc. 663; INSANE PERSONS, 22 Cyc. 1004; WILLS.)

**SANE MIND AND MEMORY.** See SANE; and, generally, INSANE PERSONS, 22 Cyc. 1004; WILLS.

**SANITARY.** Pertaining to health or hygiene, or the preservation of health;[21] pertaining to or designed to secure sanity or health.[22] (Sanitary: District, see HEALTH, 21 Cyc. 384 text and note 5. Officers, see HEALTH, 21 Cyc. 385; MUNICIPAL CORPORATIONS, 28 Cyc. 537. Regulations, see CONSTITUTIONAL LAW, 8 Cyc. 1052; HEALTH, 21 Cyc. 387; MUNICIPAL CORPORATIONS, 28 Cyc. 709.)

**SANITATION.** See HEALTH, 21 Cyc. 383; MUNICIPAL CORPORATIONS, 28 Cyc. 709.

**SANITY.** A word generally used to express soundness of mind;[23] a condition precedent to all intelligent action, as well benevolent as nefarious;[24] a normal condition;[25] health;[26] the ability of a person to distinguish between right and wrong in reference to an act itself, that is, the act done by him, and his power to choose whether he will do it or not;[27] the natural and usual condition of the mind;[28] the normal and usual condition of mankind;[29] the normal state of the human mind;[30] the presence of reason, thought, and comprehension.[31] (See CRIMINAL LAW, 12 Cyc. 386; INSANE PERSONS, 22 Cyc. 1104; WILLS.)

**SAPIENS INCIPIT A FINE; ET QUOD PRIMUM EST IN INTENTIONE ULTIMUM EST IN EXECUTIONE.** A maxim meaning "A wise man begins at the end; and that which is first in intention is last in execution."[32]

**SAPIENS OMNIA AGIT CUM CONSILIO.** A maxim meaning "A wise man does everything advisedly."[33]

**SAPIENTIA LEGIS NUMMARIO PRETIO NON EST ÆSTIMANDA.** A maxim meaning "The wisdom of the law cannot be valued by money."[34]

18. Snoqualmi Realty Co. *v.* Moynihan, 179 Mo. 629, 644, 78 S. W. 1014, where it is said that when used in St. Louis specifications it does not mean mahogany that was grown on the island of San Domingo.

19. Daniel *v.* State, 61 Ala. 4, 8.

20. Den *v.* Vancleve, 5 N. J. L. 589, 661, where it is said to be equally applicable to the mind and to the body.

**Synonymous with "sound mind and memory"** see Waugh *v.* Moan, 200 Ill. 298, 304, 65 N. E. 713.

21. Century Dict. [*quoted* in *In re* Theresa Drainage Dist., 90 Wis. 301, 305, 63 N. W. 288].

22. Webster Dict. [*quoted* in *In re* Theresa Drainage Dist., 90 Wis. 301, 305, 63 N. W. 288].

**The word "sanitary,"** in a city charter providing for the construction of sewers, embraces everything pertaining to the health of the inhabitants. Eyerman *v.* Blaksley, 78 Mo. 145, 151.

23. Piper *v.* Stinson, 3 McCord (S. C.) 251, 254, where it is said that the word is nothing more or less than "*sanitas*," a Roman word, which means health, soundness of body, mind, wit, and memory, with an English termination.

24. State *v.* Quigley, 26 R. I. 263, 271, 58 Atl. 905, 67 L. R. A. 322, where it is said to be a preëxisting fact, which may be taken for granted as implied by law and general experience.

25. State *v.* Lyons, 113 La. 959, 982, 37 So. 890, where it is said that it is not a disease to be diagnosed by an expert, but a condition so commonplace that its existence in one attracts no attention from another member of the human race.

26. Robinson *v.* Adams, 62 Me. 369, 398, 16 Am. Rep. 473.

27. State *v.* Reidell, 9 Houst. (Del.) 470, 477, 14 Atl. 550, where it is said that the true test is not, as sometimes laid down, the capacity merely to distinguish between the rightfulness and wrongfulness of the act committed, but there must also be sufficient will power to choose whether he shall do or refrain from doing it. It is a state of mind in which the criminal is capable of the perception of consciousness of right and wrong as applied to the act he is about to commit, and the ability through that consciousness to choose by an effort of the will whether he will do the deed which he knows to be wrong.

28. Wood *v.* Sawyer, 61 N. C. 251, 277.

29. Brotherton *v.* People, 75 N. Y. 159, 162; Walker *v.* People, 1 N. Y. Cr. 7, 17.

30. State *v.* Klinger, 43 Mo. 127, 132.

31. Somers *v.* Pumphrey, 24 Ind. 231, 245.

**Equivalent to "sound mind and memory"** see Waugh *v.* Moan, 200 Ill. 298, 304, 65 N. E. 713.

32. Morgan Leg. Max.

33. Black L. Dict. [*citing* 4 Coke Inst. 4].

34. Peloubet Leg. Max.

**SAPIENTIS JUDICIS EST COGITARE TANTUM SIBI ESSE PERMISSUM QUANTUM COMMISSUM ET CREDITUM.** A maxim meaning "It is the part of a wise judge to think that a thing is permitted to him only in so far as it is committed and intrusted to him." [35]

**SARANJAM.** Assignment of lands or their revenue by the state for the support of troops.[36]

**SARDINES.** Small fish of the family *clupeidæ*, prepared and canned in oil.[37]

**SARSAPARILLA AND IRON.** Sarsaparilla root or its extract combined with a solution of the metal iron.[38]

**SATIS DOLATA SI BENE MORATA.** A maxim meaning "A woman is well enough dowered for a wife if possessed of good morals." [39]

**SATIS EST PRODESSE ETIAM MALIS PROPTER BONOS QUAM BONIS DEESSE PROPTER MALOS.** A maxim meaning "It is better to retreat than to press forward in the wrong path." [40]

**SATISFACTION.** Equivalent or compensation;[41] that which satisfies, compensation; indemnification; reward; remuneration; requital; amends; atonement; recompense.[42] In law, release and discharge of the obligation in reference to which it is given;[43] payment of a legal debt or demand; the discharging or canceling of a judgment or a mortgage, by paying the amount of it.[44] In equity, the donation of a thing, with the intention, express or implied, that it is to be an extinguishment of some existing right or claim of the donee.[45] (Satisfaction: In General, see ACCORD AND SATISFACTION, 1 Cyc. 305; NOVATION, 29 Cyc. 1129; PAYMENT, 30 Cyc. 1173; RELEASE, 34 Cyc. 1039; TENDER. Absolute Deed Given in Satisfaction of Debt as Constituting Mortgage, see MORTGAGES, 27 Cyc. 1010. Application of Deposit in Lieu of Bail in Civil Action in Satisfaction of Plaintiff's Claim, see BAIL, 5 Cyc. 28. As Defense or Ground For Opposition to Revival of Judg-

35. Morgan Leg. Max. [*citing* 4 Coke Inst. 163].

36. Wilson Gloss. [*quoted* in Shekh Sultan Sani *v.* Shekh Ajmodin, L. R. 20 Indian App. 50, 56].

37. *In re* Wieland, 98 Fed. 99, 101 [*affirmed* in 104 Fed. 541, 44 C. C. A. 23], where it is said: "Sprats and sardines belong to the same family. . . . The smaller fish of this family are prepared and canned in oil, and are placed upon the market under the general name of 'sardines.' The sardine is a more expensive fish than the sprat, and sprats sold as sardines are sold as sardines of inferior quality, but 'sardines' appears to be the general term covering clupeidæ, both sardines proper and the commoner varieties, when put up in oil in tins."

38. Schmidt *v.* Breig, 100 Cal. 672, 678, 35 Pac. 623, 22 L. R. A. 790.

39. Morgan Leg. Max. [*citing* Grigg Max.].

40. Morgan Leg. Max. [*citing* Riley Max. 409].

41. The Enquirer *v.* Johnson, 72 Fed. 443, 447, 18 C. C. A. 628, where it is said to be so used in a charge to the jury as to damages in an action for libel.

42. Webster Dict. [*quoted* in Rivers *v.* Blom, 163 Mo. 442, 446, 63 S. W. 812].

43. Jersey Island Dredging Co. *v.* Whitney, 149 Cal. 269, 277, 86 Pac. 509, 691.

44. Webster Dict. [*quoted* in Rivers *v.* Blom, 163 Mo. 442, 446, 63 S. W. 812].

**There are two kinds of satisfaction of a debt,** actual and legal; actual where payment in money or its equivalent is made of the debt, and legal where from some act done by the party, or from lapse of time, the law presumes payment. Mazyck *v.* Coil, 3 Rich. (S. C.) 235, 236.

**Construed as legal satisfaction** see Pollock *v.* Pennsylvania Iron Works Co., 13 Misc. (N. Y.) 194, 197, 34 N. Y. Suppl. 129.

**Distinguished from "ademption"** see Burnham *v.* Comfort, 37 Hun (N. Y.) 216, 220.

**Distinguished from "release of cause of action"** see Miller *v.* Beck, 108 Iowa 575, 578, 79 N. W. 344.

**A tender of satisfaction** is not the same as satisfaction. Prest *v.* Cole, 183 Mass. 283, 285, 67 N. E. 246.

45. Story Eq. Jur. § 1099 [*quoted* in Green *v.* Green, 49 Ind. 417, 423].

**Used in connection with other words.**— "Give satisfaction" see Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, 104, 35 N. W. 841. "In satisfaction" of plaintiff's claim see Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 108, 17 Atl. 356. "Satisfaction of the court or judge" see Coughran *v.* Markley, 15 S. D. 37, 42, 87 N. W. 2; Davis *v.* Cook, 9 S. D. 319, 324, 69 N. W. 18. "To the satisfaction of the court" see Kinsley *v.* Monongalia County Ct., 31 W. Va. 464, 466, 7 S. E. 445. "To their 'satisfaction'" see Harris *v.* Miller, 11 Fed. 118, 122, 6 Sawy. 391.

**As used in a contract** providing that a building shall be completed to the acceptance of the architect and the satisfaction of the owner it has no reference to the quality of the workmanship or materials. Tetz *v.* Butterfield, 54 Wis. 242, 246, 11 N. W. 531, 41 Am. Rep. 29.

**"Full satisfaction" of the guilt** of the defendant in a criminal case is not the equivalent of "belief beyond a reasonable doubt."

ment, see JUDGMENTS, 23 Cyc. 1443. As Defense to False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 339. As Ground of Equitable Relief Against Judgment, see JUDGMENTS, 23 Cyc. 1001. Asserting Satisfaction on Appeal, see APPEAL AND ERROR, 2 Cyc. 665. Discharge of Principal Without Payment or Satisfaction as Affecting Discharge of Surety, see PRINCIPAL AND SURETY, 32 Cyc. 151. Entry of, Effect as to Priority of Assignment of Mortgage, see MORTGAGES, 27 Cyc. 1303. Foreclosure of Mortgage as Satisfaction of Debt or Lien, see MORTGAGES, 27 Cyc. 1443. Giving and Acceptance in, see ACCORD AND SATISFACTION, 1 Cyc. 312. Issue Joined on Plea of, see JURIES, 24 Cyc. 124. Levy as, see FINES, 19 Cyc. 550 note 32. Of Bond, Effect of After Assignment, see BONDS, 5 Cyc. 787. Of Condition to Pay Costs, see APPEAL AND ERROR, 2 Cyc. 955. Of Debt — After Commencement of Action Affecting Right to Costs, see COSTS, 11 Cyc. 83; Authority of Agents Under Powers of Attorney, see PRINCIPAL AND AGENT, 31 Cyc. 1349; Evidence as to, in Determining Whether Absolute Debt Constitutes Mortgage, see MORTGAGES, 27 Cyc. 1001. Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 405. Of Domestic Judgment by Levy, Effect as to Right of Action Thereon, see JUDGMENTS, 23 Cyc. 1488. Of Execution — Generally, see EXECUTIONS, 17 Cyc. 1387; Issued by Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 631. Of Fine by Payment, see FINES, 19 Cyc. 548. Of Ground of Action For Death, see DEATH, 13 Cyc. 325. Of Judgment — Generally, see JUDGMENTS, 23 Cyc. 1404, 1463; Assigned, see JUDGMENTS, 23 Cyc. 1419; By One Jointly Liable, see JUDGMENTS, 23 Cyc. 1214; By Plaintiff, see BAIL, 5 Cyc. 28; In Action By or Against Infant, see INFANTS, 22 Cyc. 704; In Infant's Favor, see INFANTS, 22 Cyc. 704; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 612; In Replevin, see REPLEVIN, 34 Cyc. 1550; Mandamus to Vacate, see MANDAMUS, 26 Cyc. 212; Obtaining in Equity, see JUDGMENTS, 23 Cyc. 1432; Pleading, see JUDGMENTS, 23 Cyc. 1513, 1561; Postponement of Lien by Erroneous Entry of Satisfaction, see JUDGMENTS, 23 Cyc. 1388; Proving, see JUDGMENTS, 23 Cyc. 1467; Release of Lien by, see JUDGMENTS, 23 Cyc. 1495; What May Be Received in, see JUDGMENTS, 23 Cyc. 1465. Of Landlord's Lien, see LANDLORD AND TENANT, 24 Cyc. 1289. Of Legacy, see WILLS. Of Liability on Appeal-Bond, see APPEAL AND ERROR, 2 Cyc. 960. Of Lien, see LIENS, 25 Cyc. 677. Of Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 261, 294. Of Mortgage — Generally, see CHATTEL MORTGAGES, 7 Cyc. 71; MORTGAGES, 27 Cyc. 1414; Assigned, see MORTGAGES, 27 Cyc. 1303; By Decree of Foreclosure, see MORTGAGES, 27 Cyc. 1788; Effect as to Priority, see MORTGAGES, 27 Cyc. 1224; Effect of Entry of, Upon Junior Lienor, see MORTGAGES, 27 Cyc. 1224; Right to, see MORTGAGES, 27 Cyc. 1414; To Deprive Mortgagee of Possession, see MORTGAGES, 27 Cyc. 1239; Who May Make, see MORTGAGES, 27 Cyc. 1386. Of Mortgage or Lien Debt on Railroad, see RAILROADS, 33 Cyc. 552. Of Official Bond, see OFFICERS, 29 Cyc. 1462. Of Part of Joint Demand, as Severance, see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 614. Of Penalty, Application of Property in, see BAIL, 5 Cyc. 153. What Constitutes, of a Claim For Wages, see MASTER AND SERVANT, 26 Cyc. 1052.)

**SATISFACTION PIECE.** In law or equity, an instrument which purports to discharge land from the lien of a mortgage, and which is equivalent to a release of the mortgaged premises.[46] (See JUDGMENTS, 23 Cyc. 1496.)

**SATISFACTORY.** Giving or producing satisfaction; yielding content; especially relieving the mind from doubt or uncertainty, and enabling it to rest with confidence.[47] (See SATISFACTION, *ante*, p. 793; and, generally, CONTRACTS, 9 Cyc. 620.)

Williams *v.* State, 73 Miss. 820, 823, 19 So. 826.

46. Bacon *v.* Van Schoonhoven, 87 N. Y. 446, 450.

47. Webster Dict. [*quoted* in Pittman *v.* Pittman, 72 Ill. App. 500, 503].

**Construed as "reasonably satisfactory"** see Pennington *v.* Howland, 21 R. I. 65, 67, 41 Atl. 891, 79 Am. St. Rep. 774.

**Used in connection with other words.**— "Good and satisfactory title" see Moot *v.* Business Men's Inv. Assoc., 157 N. Y. 201,

**SATISFACTORY INDORSER.** Words of recognized commercial signification, said to mean an indorsement satisfactory to the payee, and not to the maker.[48] (See COMMERCIAL PAPER, 7 Cyc. 791.)

**SATISFIED.** Convinced;[49] extinguished;[50] PAID,[51] *q. v.*; reasonably certain;[52] relieved of all doubt or uncertainty;[53] settled certainly, or fixed permanently what was before uncertain, doubtful, or disputed.[54] (See SATISFACTION, *ante*, p. 793; SATISFY; and, generally, EXECUTIONS, 17 Cyc. 401.)

**SATISFY.** To free from doubt and uncertainty; set at rest;[55] to free the mind from doubt; to set at rest;[56] to free from doubt, perplexity or suspense; to set the mind at rest; to convince;[57] to free from doubt, suspense, or uncertainty; to give assurance to; to set at rest the mind of; to convince;[58] to relieve from all uncertainty or doubt;[59] to remove all reasonable doubt;[60] synonymous with BELIEVE,[61] *q. v.*; to fill up the measure of a want (of a person or thing);[62] to comply with the rightful demands of; to give what is due to; to answer or discharge, as a claim, debt, legal demand, or the like; to pay off; to requite.[63] (See SATISFACTION, *ante*, p. 793; SATISFIED.)

**SAUCE.** A mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish.[64] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1122.)

211, 52 N. E. 1, 45 L. R. A. 666. "Satisfactory note" see Hanna *v.* Mills, 21 Wend. (N. Y.) 90, 93, 34 Am. Dec. 216. "Satisfactory price" see Rhodes *v.* Holladay-Klotz Land, etc., Co., 105 Mo. App. 279, 312, 79 S. W. 1145. "Satisfactory proof" see Bronson *v.* Gutches, 17 N. Y. App. Div. 204, 205, 45 N. Y. Suppl. 487; Van Steenbergh *v.* Kortz, 10 Johns. (N. Y.) 167, 169. "Satisfactory proof of death" see Buffalo Loan, etc., Co. *v.* Knights Templar, etc., Assoc., 126 N. Y. 450, 453, 27 N. E. 942, 22 Am. St. Rep. 839. "Satisfactory rate of progress" see Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280, 302, 65 S. W. 784. "Warranted satisfactory in every respect" see Singerly *v.* Thayer, 108 Pa. St. 291, 297, 2 Atl. 230, 56 Am. Rep. 207.

48. Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470, 475.

49. Bryan *v.* Moore, 81 Ind. 9, 12.

50. Kronebusch *v.* Raumin, 6 Dak. 243, 42 N. W. 656, 657.

51. Reynolds *v.* Bird, 1 Root (Conn.) 503, 506 (where it is so used as applied to a note); State *v.* Towner, 26 Mont. 339, 346, 67 Pac. 1004; *In re* European Assur. Soc., 1 Ch. D. 307, 324, 45 L. J. Ch. 321, 33 L. T. Rep. N. S. 766.

52. Kenyon *v.* Mondovi, 98 Wis. 50, 54, 73 N. W. 314, where the word is so defined when used with reference to a jury.

53. Torrey *v.* Burney, 113 Ala. 496, 504, 21 So. 348. *Compare* Callan *v.* Hanson, 86 Iowa 420, 423, 53 N. W. 282.

54. Cox *v.* Royal Tribe, 42 Oreg. 365, 376, 71 Pac. 73, 95 Am. St. Rep. 752, 60 L. R. A. 620, where it is said: "To be 'satisfied' by a preponderance of the evidence and to be 'satisfied' in the general sense are entirely different conditions of the mind."

**Construed as demanding the mental concurrence of the jury** and as having no wider meaning than "preponderance of evidence" see Stewart *v.* Outhwaite, 141 Mo. 562, 571, 44 S. W. 326.

**Construed as "honestly satisfied"** see Harward *v.* Hackney Union, 14 T. L. R. 306, 307.

**Ordinarily signifies** something more than a belief founded on the preponderance of the evidence, and its use in an instruction that the jury should be satisfied without qualification or explanation is misleading. Rosenbaum *v.* Levitt, 109 Iowa 292, 296, 80 N. W. 393.

55. Ball *v.* Marquis, (Iowa 1902) 92 N. W. 691, 692.

56. Kelch *v.* State, 55 Ohio St. 146, 152, 45 N. E. 6, 8, 60 Am. St. Rep. 680, 39 L. R. A. 737.

57. Worcester Dict. [*quoted* in Rolfe *v.* Rich, 149 Ill. 436, 438, 35 N. E. 352].

58. Webster Dict. [*quoted* in Foley *v.* State, 11 Wyo. 464, 483, 72 Pac. 627].

59. Baltimore, etc., R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730, 735.

60. Foley *v.* State, 11 Wyo. 464, 483, 72 Pac. 627.

61. Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 135, 54 Pac. 642; Baltimore, etc., R. Co. *v.* Walker, 41 Ind. App. 588, 84 N. E. 730, 735.

62. Webster Dict. [*quoted* in Foley *v.* State, 11 Wyo. 464, 483, 72 Pac. 627].

63. Webster Dict. [*quoted* in Kronebusch *v.* Raumin, 6 Dak. 243, 42 N. W. 656, 657].

64. Webster Dict. [*quoted* in Bogle *v.* Magone, 152 U. S. 623, 626, 14 S. Ct. 718, 38 L. ed. 574].

**In a later edition** [of Webster's Dictionary] there is given, by way of additional definition, "Stewed or preserved fruit, eaten with other food as a relish; as apple sauce, cranberry sauce, etc." Bogle *v.* Magone, 152 U. S. 623, 626, 14 S. Ct. 718, 38 L. ed. 574.

**The word "sauce," as commonly used,** designates a condiment, generally but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable; and is not applied to anything which is eaten, alone or with a bit of bread, either for its own sake only, or to stimulate the appetite for other food to be eaten afterward. Bogle *v.* Magone, 152 U. S. 623, 625, 14 S. Ct. 718, 38 L. ed. 574.

**SAUVE QUI PEUT.** A maxim meaning "Save who can." [65]

**SAVANNA.** A term used to indicate a natural open meadow.[66] (See BOUNDARIES, 5 Cyc. 869 note 5.)

**SAVED.** In the law of salvage, a word used in the sense of salved, that is, saved by salvors.[67] (See, generally, SALVAGE, *ante*, p. 716.)

**SAVING.** With the exception of; [68] synonymous with "exempting." [69] (See DEEDS, 13 Cyc. 672; STATUTES. See also RESERVATION, 34 Cyc. 1638.)

**SAVING CLAUSE.** An exception of a special thing out of general things mentioned in a statute; [70] something smaller than the thing itself and yet not nullifying it.[71] (See COSTS, 11 Cyc. 26; and, generally, STATUTES.)

**SAVINGS-BANK.** See BANKS AND BANKING, 5 Cyc. 604.

**SAVINGS-BANK BOOK.** A book issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt.[72] (See, generally, BANKS AND BANKING, 5 Cyc. 608.)

**SAVINGS-FUND SOCIETY.** See BANKS AND BANKING, 5 Cyc. 604; BUILDING AND LOAN SOCIETIES, 6 Cyc. 120.

**SAW.** A tool for cutting.[73]

**SAWLOG.** A log cut into lengths suitable for being sawed into lumber; [74] a log suitable to be cut in a sawmill.[75] (See, generally, LOGGING, 25 Cyc. 1541.)

**SAWMILL.** A manufacturing establishment; [76] a mill which deals with sawlogs; [77] an establishment for sawing logs into lumber by power.[78] (See, generally, LOGGING, 25 Cyc. 1547; MECHANICS' LIENS, 27 Cyc. 31, 39; MILLS, 27 Cyc. 509.)

**Anchovy paste and bloater paste** included within the term "pickles and sauces" under the tariff act see Bogle *v.* Magone, 40 Fed. 226, 228 [*affirmed* in 152 U. S. 623, 14 S. Ct. 718, 38 L. ed. 574].

65. The Mulhouse, 17 Fed. Cas. No. 9,910. Applied in Danson *v.* Cawley, 1 Newfoundl. 377, 379.

66. Stapleford *v.* Brinson, 24 N. C. 311, 312.

67. The Schiller, 2 P. D. 145, 150, 3 Aspin. 439, 36 L. T. Rep. N. S. 714.

68. Langdon *v.* New York, 6 Abb. N. Cas. (N. Y.) 314, 323.

69. Langdon *v.* New York, 6 Abb. N. Cas. (N. Y.) 314, 323.

**Distinguished from "reserving"** see Keeler *v.* Wood, 30 Vt. 242, 246.

**Saving the benefit of a plea to the hearing** see EQUITY, 16 Cyc. 295.

70. Potter's Dwarris St. 117 [*quoted* in Clark Thread Co. *v.* Kearney Tp., 55 N. J. L. 50, 54, 25 Atl. 327].

71. Ansonia Brass, etc., Co. *v.* New Lamp Chimney Co., 53 N. Y. 123, 126, 13 Am. Rep. 476 [*citing* Potter's Dwarris St. 513; 4 Kent Comm. 468].

72. Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 432, where it is said: "It is not a mere pass-book, or the statement of an account."

73. March Dict. [*quoted* in Alexander *v.* Beekman Lumber Co., 78 Ark. 169, 172, 95 S. W. 449].

74. State *v.* Addington, 121 N. C. 538, 540, 27 S. E. 988, where it is said: "A tree standing in the woods can no more be called a saw-log because it is capable of being cut into a saw-log, than it can properly be called a plank or a shingle from its capability of being sawed into those articles."

75. *In re* Gosch, 121 Fed. 604, 605.

**"Manufacturing saw-logs into lumber"** means the grosser operation of converting logs into timbers, planks, and boards. Dexter *v.* Sparkman, 2 Wash. 165, 169, 25 Pac. 1070.

76. Graham *v.* Magann Fawke Lumber Co., 118 Ky. 192, 195, 80 S. W. 799, 26 Ky. L. Rep. 70; Bogard *v.* Tyler, 55 S. W. 709, 710, 21 Ky. L. Rep. 1452, in both of which cases it was so held, under a statute giving laborers in a manufacturing establishment a lien for wages prior to that of mortgages.

77. *In re* Gosch, 121 Fed. 604, 605, where it is said that as defined by the law of Georgia a sawmill is not a planing mill, or a sash and door factory.

78. Standard Dict. [*quoted* in *In re* Gosch, 121 Fed. 604, 605].

**Construed to include a circular sawmill,** which is in and constitutes a part of the sawmill building see Newhall *v.* Kinney, 56 Vt. 591, 593.

**A policy of insurance on a "steam sawmill"** covers not only the building itself, but all the machinery and fixtures necessary to make it a steam sawmill in all its parts. Bigler *v.* New York Cent. Ins. Co., 20 Barb. (N. Y.) 635, 636.

**Purposes which a sawmill may be used for** under an insurance policy see Frost's Detroit Lumber, etc., Works *v.* Miller's Mut. Ins. Co., 37 Minn. 300, 305, 34 N. W. 35, 5 Am. St. Rep. 846.

**Sawmill as not including the shed that covers the sawmill** see Alexander *v.* Beekman Lumber Co., 78 Ark. 169, 172, 95 S. W. 449.

**"Saw-mill plant"** in a lease of a sawmill does not include a stock of goods contained in a commissary store attached to the mill, though such store is embraced in the lease. Liberty County Land, etc., Co. *v.* Barnes, 77 Ga. 748, 752, 1 S. E. 378.

**SAWMILL SAW.** An essential part of sawmill machinery.[79] (See SAWMILL.)

**SAW TIMBER.** Pine timber suitable for the manufacture of lumber.[80] (See SAWLOG, *ante*, p. 796.)

**SAY.** A word intended as a sort of warranty;[81] a word pointing and giving an explanation of what went before.[82]

**SAYING.** Speaking.[83]

**SCAB.** A contagious disease with which sheep are affected;[84] a mean, paltry, or shabby fellow; a term of contempt; specifically, in recent use, a workman who is not or refuses to become a member of a labor union, who refuses to join a strike, or who takes the place of a striker;[85] a person who does not give honest or fair compensation for labor.[86] (See, generally, LABOR UNIONS, 24 Cyc. 815.)

**SCAFFOLD or SCAFFOLDING.** Anything serving the purpose of raising from the ground workmen engaged on a work of construction or repair;[87] a temporary structure upon which workmen stood in erecting the walls of a building;[88] a support for workmen.[89] (See MASTER AND SERVANT, 26 Cyc. 1115.)

**SCALAWAGS.** A name applied to hogs, fed upon mast, such as beechnuts and acorns.[90]

**SCALE.** A technical term, used in the logging business, the measuring of logs afloat in waters.[91] (See LOGGING, 25 Cyc. 1560; WEIGHTS AND MEASURES.)

**SCALE BILLS.** A logging term meaning certificates of the measurement of logs, measured while floating in waters.[92] (See LOGGING, 25 Cyc. 1563.)

**SCALES.** See MUNICIPAL CORPORATIONS, 28 Cyc. 725; WEIGHTS AND MEASURES.

**SCALE WEIGHT.** A term used by dealers and manufacturers of structural

79. State *v.* Avery, 44 Vt. 629, 630.

80. Kelly *v.* Robb, 58 Tex. 377, 380.

81. Gwillim *v.* Daniell, 2 C. M. & R. 61, 71, 1 Gale 143, 4 L. J. Exch. 174, 5 Tyrw. 644.

82. Leeming *v.* Snaith, 16 Q. B. 275, 277, 15 Jur. 988, 20 L. J. Q. B. 164, 71 E. C. L. 275, where it is said to be equivalent to "that is to say."

**Equivalent to "more or less," "about," "by estimation"** see Brawley *v.* U. S., 11 Ct. Cl. 522, 532.

**"Say about 2,800 tons,"** a provision in a charter party is fulfilled by providing a cargo of twenty-eight hundred and forty tons where twenty-eight hundred and eighty tons is the reasonable carrying capacity of the vessel see Miller *v.* Borner, [1900] 1 Q. B. 691, 9 Aspin. 31, 5 Com. Cas. 107, 69 L. J. Q. B. 429, 82 L. T. Rep. N. S. 258, 48 Wkly. Rep. 588.

**"I say the beads"** is an expression sometimes applied to the devotional exercises which are performed on rosaries. Benziger *v.* Robertson, 122 U. S. 211, 212, 7 S. Ct. 1169, 30 L. ed. 1149.

83. Stutts *v.* State, 52 Fla. 110, 112, 42 So. 51.

84. Mount *v.* Hunter, 58 Ill. 246, 249.

85. Prince *v.* Socialistic Co-operative Pub. Assoc., 31 Misc. (N. Y.) 234, 235, 64 N. Y. Suppl. 285 [*citing* Cent. Dict.], where it is said to be an opprobrious term used by the workmen and others who dislike his action, and where it is further said that the word is one of ancient origin in its application to persons of disrepute.

86. People *v.* Radt, 71 N. Y. Suppl. 846, 848, where this is said to be the meaning given to it by the New York court of appeals.

87. Veazey *v.* Chattle, [1902] 1 K. B. 494, 496, 66 J. P. 389, 71 L. J. K. B. 252, 85 L. T. Rep. N. S. 574, 18 T. L. R. 99, 50 Wkly. Rep. 263.

88. Century Dict. [*quoted* in Welk *v.* Jackson Architectual Iron Works, 98 N. Y. App. Div. 247, 248, 90 N. Y. Suppl. 541].

89. Walker Dict. [*quoted* in Hoddinott *v.* Newton, [1901] A. C. 49, 70, 70 L. J. Q. B. 150, 84 L. T. Rep. N. S. 1, 17 T. L. R. 134, 49 Wkly. Rep. 380].

**Ladder** as scaffolding see O'Brien *v.* Dobbie, [1905] 1 K. B. 346, 348, 74 L. J. K. B. 268, 92 L. T. Rep. N. S. 721, 21 T. L. R. 218, 53 Wkly. Rep. 374; Crowther *v.* West Riding Window-Cleaning Co., [1904] 1 K. B. 232, 68 J. P. 122, 73 L. J. K. B. 71, 52 Wkly. Rep. 374; Marshall *v.* Rudeforth, [1902] 2 K. B. 175, 66 J. P. 627, 71 L. J. K. B. 781, 86 L. T. Rep. N. S. 752, 18 T. L. R. 649, 50 Wkly. Rep. 596.

**May consist of:** An arrangement of planks and ladders see Dredge *v.* Conway, [1901] 2 K. B. 42, 47, 70 L. J. K. B. 494, 84 L. T. Rep. N. S. 345, 17 T. L. R. 355, 49 Wkly. Rep. 518. Ordinary pair of painter's steps see Elvin *v.* Woodward, [1903] 1 K. B. 838, 842, 67 J. P. 413, 72 L. J. K. B. 468, 88 L. T. Rep. N. S. 671, 19 T. L. R. 410, 51 Wkly. Rep. 518. The arrangement of movable trestles with boards laid across the top within a building see Maude *v.* Brook, [1900] 1 Q. B. 575, 578, 64 J. P. 181, 69 L. J. Q. B. 322, 82 L. T. Rep. N. S. 39, 16 T. L. R. 164, 48 Wkly. Rep. 290.

90. Bartlett *v.* Hoppock, 34 N. Y. 118, 119, 88 Am. Dec. 428.

91. State *v.* Lumbermen's Bd. of Exch., 33 Minn. 471, 473, 23 N. W. 838.

92. State *v.* Lumbermen's Bd. of Exch., 33 Minn. 471, 473, 23 N. W. 838.

steel and iron said to mean the determination of the weight by what the material actually weighs in pounds.[93] (See WEIGHTS AND MEASURES.)

**SCALING LAWS.** A term used to signify statutes establishing the process of adjusting the difference in value between depreciated paper money and specie.[94] (Scaling Laws: Impairment of Obligation of Contract by Enactment of, see CONSTITUTIONAL LAW, 8 Cyc. 1007. Operation and Effect of Scaling Laws as to Payment of Debt, see PAYMENT, 30 Cyc. 1217. Presumption That Contract Is Subject to, see PAYMENT, 30 Cyc. 126 note 58.)

**SCALING LOGS.** See LOGGING, 25 Cyc. 1560.

**SCALP.** A brokerage term said to mean a trade for the day, and sold out that evening or the next day; a short trade or deal; a quick sale and a settlement on differences.[95] (See GAMING, 20 Cyc. 886.)

**SCALPED TICKET.** One bought from a ticket broker.[96] (See CARRIERS, 6 Cyc. 573.)

**SCALPER.** A dealer in tickets originally purchased by others;[97] a ticket broker;[98] one who is in the habit of buying one or more carloads of coal, principally in the summer and fall when coal is at a low figure, and then selling it to consumers directly off the car.[99] (Scalper: Constitutionality of Statute Regulating Sale of Railroad Tickets, see CONSTITUTIONAL LAW, 8 Cyc. 1064. Selling Railroad Tickets Without Authority, see CARRIERS, 6 Cyc. 573 note 18.)

**SCALPER'S BUSINESS.** The buying and selling of railroad tickets that have been partially used.[1] (Scalper's Business: As Offense, see CARRIERS, 6 Cyc. 573 note 18. Prohibition of by State, see COMMERCE, 7 Cyc. 447 note 80.)

**SCANDAL.** In legal parlance, a term which has the same meaning as "slander."[2] In a pleading, consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear.[3] (Scandal: Ground For Withholding Costs, see COSTS, 11 Cyc. 36. In Brief, see APPEAL AND ERROR, 2 Cyc. 1018 note 86. In Equity, see EQUITY, 16 Cyc. 257, 309. In Pleading, see PLEADING, 31 Cyc. 68, 636. Method of Objecting to, see EQUITY, 16 Cyc. 317. Suppression of Affidavit Containing, see AFFIDAVITS, 2 Cyc. 230.)

**SCANDALUM MAGNATUM.** An offense at common law which consisted of scandalizing the sovereign, his ministers, members of parliament, the court and the judges, and certain other persons of high rank;[4] words spoken in derogation of a peer, a judge, or other great officer of the realm.[5] (See, generally, LIBEL AND SLANDER, 25 Cyc. 249.)

**SCARECROW.** Any frightful thing set up to frighten crows or other fowls from corn fields; hence, anything terrifying without danger; a vain terror.[6]

**SCAR TISSUE.** The scar that has formed over the bone as a result of a fracture.[7]

93. Hale *v.* Milliken, 5 Cal. App. 344, 353, 90 Pac. 365.

94. Bouvier L. Dict., where such statutes were said to be rendered necessary by the depreciation of paper money necessarily following the establishment of American independence, and more recently to discharge those debts which were made payable in Confederate money.

95. McCormick *v.* Nichols, 19 Ill. App. 334, 336.

96. Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 54, 47 N. W. 312.

97. Comer *v.* Foley, 98 Ga. 678, 682, 25 S. E. 671.

98. Hoffman *v.* Northern Pac. R. Co., 45 Minn. 53, 54, 47 N. W. 312.

99. Sanford *v.* People, 121 Ill. App. 619, 631, where he is said to be a person who does not have an office, scales, or place for storing coal nor does he engage regularly in the coal business.

1. Ford *v.* East Louisiana R. Co., 110 La. 414, 415, 34 So. 585.

2. Sharff *v.* Com., 2 Binn. (Pa.) 514, 519.

3. McNulty *v.* Wiesen, 130 Fed. 1012, 1013; Kelley *v.* Boettcher, 85 Fed. 55, 58, 29 C. C. A. 14.

"Scandalous" as applied to pleading cannot be applied to any matter which is not also impertinent. McIntyre *v.* Union College, 6 Paige (N. Y.) 239, 248.

Immaterial facts are impertinent, if reproachful, they are scandalous. See Hutchinson *v.* Van Voorhis, 54 N. J. Eq. 439, 446, 35 Atl. 371; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103, 106.

4. State *v.* Shepherd, 177 Mo. 205, 219, 76 S. W. 79, 99 Am. St. Rep. 624.

5. Sharff *v.* Com., 2 Binn. (Pa.) 514, 520.

6. Webster Dict. [*quoted* in Atchison, etc., R. Co. *v.* Loree, 4 Nebr. 446, 448].

7. Evers *v.* Wiggins Ferry Co., 127 Mo. App. 236, 245, 105 S. W. 306, where it is said

**SCELUS INTRA SE TACITUM QUI COGITAT ULLUM FACTI CRIMEN HABET.** A maxim meaning "He who secretly meditates a crime is guilty of the deed." [8]

**SCENERY.** Applied to a theater, a term which has been held not to include paint on the walls.[9]

**SCHEDULE.** A word synonymous with INVENTORY,[10] *q. v.* (Schedule: Annexed to — Answer in Equity, see EQUITY, 16 Cyc. 302; Constitution, see CONSTITUTIONAL LAW, 8 Cyc. 724. For Partial Transcript, see APPEAL AND ERROR, 3 Cyc. 94. Of Assessment For Drain, see DRAINS, 14 Cyc. 1063. Of Assets and Liabilities — Accompanying Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 159; Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 197. Of Attached Property, see ATTACHMENT, 4 Cyc. 600. Of Bankrupt's Property — Generally, see BANKRUPTCY, 5 Cyc. 299, 318; Concealing or Omitting From, see BANKRUPTCY, 5 Cyc. 395, 404; Examination by Referee of, see BANKRUPTCY, 5 Cyc. 277; False Swearing by Bankrupt in, see BANKRUPTCY, 5 Cyc. 394 note 26; Filing of, by Involuntary Bankrupt, see BANKRUPTCY, 5 Cyc. 318, 414; On Composition With Creditors, see BANKRUPTCY, 5 Cyc. 356; Petition in Voluntary Bankruptcy, Accompanied by, see BANKRUPTCY, 5 Cyc. 299; Placing False Debts in, see BANKRUPTCY, 5 Cyc. 394 note 26. Of Bill of Sale, Registering, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 211 note 55. Of Exempt Property, see EXEMPTIONS, 18 Cyc. 1471. Of Insolvent as Acknowledgment, see LIMITATIONS OF ACTIONS, 25 Cyc. 1344. Of Insolvent Proceedings as Proper Evidence, see HUSBAND AND WIFE, 21 Cyc. 1699 note 81. Of Insolvent's Property — Generally, see INSOLVENCY, 22 Cyc. 1268; Defects or Omissions in, see INSOLVENCY, 22 Cyc. 1338, 1344; Failure to File, see INSOLVENCY, 22 Cyc. 1338. Of Property in — Antenuptial Settlement, see HUSBAND AND WIFE, 21 Cyc. 1245 text and note 21; Proceedings For Discharge From Imprisonment For Debt, see EXECUTIONS, 17 Cyc. 1528. Of Property, Necessity of Recording, see CHATTEL MORTGAGES, 6 Cyc. 1081 note 58. Of Ward's Estate, see GUARDIAN AND WARD, 21 Cyc. 42. Of Wife's Separate Estate, see HUSBAND AND WIFE, 21 Cyc. 1367. Sufficiency of Description With, see CHATTEL MORTGAGES, 6 Cyc. 1028 note 43.)

**SCHEME.** A design or plan formed to accomplish some purpose;[11] a combination of things connected and adjusted by design; a system.[12]

**SCHISM.** In a general sense, division or separation; but appropriately, a division or separation in a church or denomination of christians, occasioned by diversity of opinions; breach of unity among people of the same religious faith;[13] a division or separation in a church or denomination of christians occasioned by

that the flesh will never form over the bone at that place.

**8.** Morgan Leg. Max. [*citing* Tayler L. Gloss. 397].

**9.** Forbes *v.* Howard, 4 R. I. 364, 367.

**10.** Standard Dict. [*quoted* in Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 169, 75 N. E. 368].

**Term implies** something written, and when used with reference to a train implies that its operation is governed by a rule rather than a particular direction or agreement. Draper *v.* Evansville, etc., R. Co., 165 Ind. 117, 119, 74 N. E. 889.

**Schedule of property for taxation** is a list of assessable articles without attempting to describe the same in detail. Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 169, 75 N. E. 368.

**11.** U. S. *v.* Dextes, 154 Fed. 890, 896.

**12.** Webster Dict. [*quoted* in *In re* Mason's Orphanage, [1896] 1 Ch. 54, 56, 65 L. J. Ch. 32, 73 L. T. Rep. N. S. 465, 44 Wkly. Rep. 61].

**The intention to make false and fraudulent misrepresentations** by means of circulars and letters transmitted through the mails, and then obtain money from the credulous, constitutes a scheme. Harris *v.* Rosenberger, 145 Fed. 449, 456, 76 C. C. A. 225, 13 L. R. A. N. S. 762; U. S. *v.* Watson, 35 Fed. 358, 359.

**The regulations** of a charitable trust embodied in a deed form a scheme. *In re* Mason's Orphanage, [1896] 1 Ch. 54, 56, 65 L. J. Ch. 32, 73 L. T. Rep. N. S. 465, 44 Wkly. Rep. 61.

**May include a plan** or device for the legitimate accomplishment of an object. Horman *v.* U. S., 116 Fed. 350, 352, 53 C. C. A. 570.

**"Scheme" and "artifice"** are words descriptive of the thing to be planned or devised. Horman *v.* U. S., 116 Fed. 350, 352, 53 C. C. A. 570. Distinguished from "artifice" where it is said to have a broader meaning, not necessarily involving trickery or cunning see Horman *v.* U. S., 116 Fed. 350, 352, 53 C. C. A. 570.

**13.** Webster Dict. [*quoted* in McKinney *v.* Griggs, 5 Bush (Ky.) 401, 414, 96 Am. Dec. 360].

diversity of opinions;[14] breach of unity among people of the same religious faith.[15] (See, generally, RELIGIOUS SOCIETIES, 34 Cyc. 1112.)

**SCHMASCHEN GLOVES.** A trade term often applied to gloves of lamb origin but not to the exclusion of gloves of kid origin.[16]

**SCHNAPPS.** A word of German derivation used in Germany and Holland to signify a dram or drink of some alcoholic beverage;[17] holland gin.[18] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 63.)

**SCHOLAR.** Those whose names are upon the register, and who are recognized as members of the schools, though they may occasionally be absent from school.[19] (See, generally, SCHOOLS AND SCHOOL-DISTRICTS, *post*, p. 801.)

**SCHOLARSHIP.** Maintenance for a scholar or student, the foundation for the support of a student.[20] (See, generally, COLLEGES AND UNIVERSITIES, 7 Cyc. 289.)

**SCHOOL LANDS.** See PUBLIC LANDS, 32 Cyc. 867.

14. Nelson *v.* Benson, 69 Ill. 27, 30; McKinney *v.* Griggs, 5 Bush (Ky.) 401, 407, 96 Am. Dec. 360.

15. McKinney *v.* Griggs, 5 Bush (Ky.) 401, 407, 96 Am. Dec. 360.

16. *In re* Holzmaister, 61 Fed. 645, 647.

17. Wolfe *v.* Burke, 7 Lans. (N. Y.) 151, 155. See also Burke *v.* Cassin, 45 Cal. 467, 479, 13 Am. Rep. 204, where it is said that the primary signification of the word was probably "dram" or "drink," but it has long been used to designate a gin manufactured in Schiedam.

18. Webster Dict. [*quoted* in Wolfe *v.* Burke, 7 Lans. (N. Y.) 151, 155].

19. Needham *v.* Wellesley, 139 Mass. 372, 374, 31 N. E. 732.

20. Webster Dict. [*quoted* in Butts *v.* McMurry, 74 Mo. App. 526, 530].

# SCHOOLS AND SCHOOL-DISTRICTS

By Alexander Stronach* and Henry H. Skyles†

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* Author of "Employers' Liability Insurance," 15 Cyc. 1035. Joint author of "Forcible Entry and Detainer," 19 Cyc. 1108; "Gaming," 20 Cyc. 873.

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**CROSS-REFERENCES**

For Matters Relating to:

Burning of School-House, see ARSON, 3 Cyc. 989.

Charitable Gift For Maintenance of Schools, see CHARITIES, 6 Cyc. 910.

College or University, see COLLEGES AND UNIVERSITIES, 7 Cyc. 283.

Contract:

For Construction of State School Building, see STATES.

Of Infant For Education, see INFANTS, 22 Cyc. 594 text and note 58.

Education of Indian Child, see INDIANS, 22 Cyc. 115.

Exemption of Property For Educational Purposes From Taxation, see MUNICIPAL CORPORATIONS, 28 Cyc. 1690; TAXATION.

Parental Rights and Duties as to Education of Child, see PARENT AND CHILD, 29 Cyc. 1605, 1668, 1671.

Prohibition of Sale of Liquor:

Near School-House, see INTOXICATING LIQUORS, 23 Cyc. 123, 199.

To Student, see INTOXICATING LIQUORS, 23 Cyc. 197.

Public Lands Reserved For School Purposes, see PUBLIC LANDS, 32 Cyc. 867, 952, 992, 1124.

Right to Trial by Jury in Proceedings to Commit to Industrial School, see JURIES, 24 Cyc. 147.

Taxation:

For Public Education in General, see TAXATION.

Of School Land, see TAXATION.

## I. DEFINITIONS.*

**A. School in General.** "School" is a generic term and denotes an institution for instruction or education.[1] The term "school" also denotes a collective body of pupils in any place of instruction and under the direction and discipline of one or more instructors.[2]

**B. Public or Common School.** The term "public" or "common," when applied to schools, has no reference to the kind of studies to be taught, but in this connection the word means open to all, belonging to the public.[3] Public schools

1. American Asylum for Education, etc. *v.* Phœnix Bank, 4 Conn. 172, 175, 10 Am. Dec. 112. See also State Bd. of Pharmacy *v.* White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678; Omaha Medical College *v.* Rush, 22 Nebr. 449, 35 N. W. 222; Com. *v.* Banks, 198 Pa. St. 397, 48 Atl. 277.

**Other definitions** are: "A place for learned intercourse and instruction, an institution for learning; an educational establishment; a place for acquiring knowledge and mental training." Omaha Medical College *v.* Rush, 22 Nebr. 449, 453, 35 N. W. 222 [*quoting* Webster Dict.].

"An assemblage of peoples and teachers." State *v.* Spray, 113 N. C. 686, 688, 18 S. E. 700.

"Any place or means of discipline, improvement, instruction, or training." *In re* Sanders, 53 Kan. 191, 197, 36 Pac. 348, 23 L. R. A. 603.

**A singing school** kept and taught for culture and improvement in sacred church music is a school within a statute against disturbing any public, private, or select school. State *v.* Gager, 28 Conn. 232. But a meeting of persons assembled for the purpose of singing together for their common improvement in singing, without a teacher, is not a school within such a statute. State *v.* Gager, *supra*.

**A private school giving instruction in writing** is a school within a statute against disturbing schools. State *v.* Leighton, 35 Me. 195.

**An orphan asylum** whose inmates receive instruction as incidental to their care, but in which no religious instruction is given during school hours, is not a school or institution of learning within the meaning of N. Y. Const. art. 9, § 4, prohibiting the use of public money for any school or institution of learning wholly or in part under the control of any religious denomination. Sargent *v.* Rochester Bd. of Education, 35 Misc. (N. Y.) 321, 71 N. Y. Suppl. 954 [*affirmed* in 76 N. Y. App. Div. 588, 79 N. Y. Suppl. 127].

**School and college** are generally speaking convertible terms. State Bd. of Pharmacy *v.* White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678.

2. State *v.* Gager, 28 Conn. 232; *In re* Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

3. Roach *v.* St. Louis Public Schools, 77 Mo. 484 [*reversing* on other grounds 7 Mo. App. 567]; Le Couteulx *v.* Buffalo, 33 N. Y.

* I-III, D by Alexander Stronach.

are the schools which municipalities or districts are required to maintain, or authorized to maintain, although not required to do so as a part of the system of common education, and which are open and free to all the children and youth of the municipalities or districts in which they are situated, who are of proper age or qualifications to attend them,[4] and which derive their support entirely or in part from money raised by a general state, county, or district tax.[5]

**C. Private School.** A private school is one managed and supported by individuals.[6]

**D. Elementary School.** An elementary school is a school or department of a school at which elementary education is the principal part of the education there given.[7]

**E. High School.** A high school may be defined as a school where the higher branches of a common school education are taught.[8]

333; People *v.* Brooklyn Bd. of Education, 13 Barb. (N. Y.) 400. *Compare* Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123, holding that a common school is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies or universities devoted exclusively to teaching advanced pupils in the classics and all the higher branches of study usually included in the curriculum of a college.

**In Kansas** the term "common schools," as used in Const. art. 6, § 2, providing for their establishment, means "free common schools." Lawrence Bd. of Education *v.* Dick, 70 Kan. 434, 78 Pac. 812.

4. Jenkins *v.* Andover, 103 Mass. 94, holding that the term cannot be limited to schools supported exclusively by municipal taxation or by the public.

**Normal schools** for the training of teachers are not common schools. Normal School-Dist. No. 3 *v.* Painter, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493 (holding that a municipal school for the education and training of school teachers is not included within the words "public school" in a deed of gift as such words are used in a general and popular sense and mean a school which would be open to all the inhabitants of the municipality); Gordon *v.* Cornes, 47 N. Y. 608, 616 (where it is said: "Normal schools differ materially from the common schools. . . . They are not intended for the education of the children of the inhabitants of the districts where they are to be located, but for the training of teachers for all the public schools. They are not open to all, but only to such as may be selected at times and in a manner to be prescribed by the superintendent of public instruction"). See also Collins *v.* Henderson, 11 Bush (Ky.) 74; People *v.* Crissey, 45 Hun (N. Y.) 19. But see People *v.* Wicks, 1 N. Y. St. 604.

**An orphan asylum** is not a common school within the meaning of the constitution of New York, and for that reason no part of the money devoted to the support of common schools by such constitution can be lawfully appropriated for the support of such asylums. People *v.* Brooklyn Bd. of Education, 13 Barb. (N. Y.) 400; St. Patrick's Orphan Asylum *v.* Rochester Bd. of Education, 34 How. Pr. (N. Y.) 227. An orphan house controlled by a city open only to poor orphan children is not a "free public school" of the state, and as such entitled to participate in the state school fund. *In re* Malone, 21 S. C. 435.

**Incorporated academies and colleges distinguished from common schools.**— "These [incorporated academies and colleges] in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the 'public or common schools' is, that the latter are supported by general taxation, that they are open to all free of expense, and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city." Merrick *v.* Amherst, 12 Allen (Mass.) 500, 509.

**The phrase "teacher of common schools"** means a teacher in the free common schools of the state. Milford *v.* Simpson, 11 Ind. 520.

5. Cooke *v.* Logan County School-Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719. See also Richter *v.* Cordes, 100 Mich. 278, 58 N. W. 1110.

**A manual training and polytechnic school,** founded on private donation, accepted under Ohio Rev. St. §§ 4095, 4104, relating to trust funds for such purposes, is not a public school in the sense that common schools established and supported by the general common school system are public schools. State *v.* Schauss, 23 Ohio Cir. Ct. 283.

6. Jenkins *v.* Andover, 103 Mass. 94; Quigley *v.* State, 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310, holding that if a certain number of persons meet together and agree that they will have a teacher and pay him for his services in that school, and no persons attend that school but their own children, it is a private school. See also Twiggs County Bd. of Education *v.* McRee, 88 Ga. 214, 14 S. E. 200.

7. Reg. *v.* Cockerton, (1901) 1 K. B. 726, 65 J. P. 435, 78 L. J. K. B. 441, 84 L. T. Rep. N. S. 488, 17 T. L. R. 402, 49 Wkly. Rep. 433.

8. Atty.-Gen. *v.* Butler, 123 Mass. 304;

**F. Academy.** An academy is commonly understood to mean a school or seminary of learning, holding a rank between a university or college and a common school, in which the arts and sciences in general are taught.[9]

**G. School-District.** A school-district is a political or civil subdivision of the state formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children.[10]

**H. School Officer.** The term "officer of schools" as used in a constitutional provision has been held to mean a person whose office pertains solely to the management of schools.[11]

**I. School Laws.** Laws which provide a system of education and create and designate the officers by and through whom the system is to be administered are known as school laws.[12]

**J. School-House.** A school-house is a house appropriated for the use of schools or for instruction, but usually applies to a building for a subordinate school, and not for a college.[13]

## II. PRIVATE SCHOOLS.[14]

**A. Incorporation and Organization.** The legislature has full power to incorporate a private school,[15] with power to receive and hold, and of course sue for and collect, money bequeathed it.[16] And unless it is otherwise provided by its charter or by general statute such an incorporated school may be the grantee of real property.[17] A religious society which has founded an educational institu-

Whitlock *v.* State, 30 Nebr. 815, 47 N. W. 284.

**Preparatory school for university.**— A high school is a school which "is designed for scholars who have passed through the primary grades and are supposed to be able to read, write, and spell correctly, and to be familiar with other branches which need not be noticed. Many, if not most of the high schools of this state, are in fact preparatory schools for the university, and the course of study determined with a regard to that object." State *v.* Dixon County School Dist. No. 1, 31 Nebr. 552, 556, 48 N. W. 393.

9. Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496.

**Special grades of instruction.**— The word "academy" is applied to institutions which are confined to some special grades of instruction. Com. *v.* Banks, 198 Pa. St. 397, 48 Atl. 277.

10. Landis *v.* Ashworth, 57 N. J. L. 509, 31 Atl. 1017; Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110; Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482. See also Farmer *v.* Myles, 106 La. 333, 30 So. 858; Westwood Bd. of Education *v.* Sinton, 41 Ohio St. 504; State *v.* Powers, 38 Ohio St. 54.

**A school-district is a corporation** organized for educational purposes. Hamilton *v.* San Diego County, 108 Cal. 273, 306, 41 Pac. 305.

**In Nebraska** a school-district is defined by statute as the territory under the jurisdiction of a single school-board. See Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955.

11. State *v.* Gorton, 33 Minn. 345, 23 N. W. 529, construing Const. art. 7, § 8.

12. Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

13. Chegaray *v.* Jenkins, 5 N. Y. 376. See also Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496.

**The real estate of a colored orphan asylum** is not included under a statute exempting school-houses from taxation. Colored Orphans Ben. Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279.

14. **Contract not to teach** as being a contract in restraint of trade see INJUNCTIONS, 22 Cyc. 868.

15. Frederick Female Seminary *v.* State, 9 Gill (Md.) 379 (holding that the legislature may incorporate a private school with two boards, one of trustees and one of commissioners existing at the same time, and a member of one may at the same time be a member of the other); Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15 (no particular form of words is necessary); Nashville *v.* Ward, 16 Lea (Tenn.) 27 (holding that a private school cannot be chartered without mentioning or providing for any person or persons to perform the duties and exercise the rights conferred); Atty.-Gen. *v.* Albion Academy, etc., 52 Wis. 469, 9 N. W. 391 (holding that such a corporation is a private stock corporation and not an eleemosynary or public corporation).

**Charters of particular institutions** see Frederick Female Seminary *v.* State, 9 Gill (Md.) 379; Waller *v.* Everett, 52 Mo. 57; Brown *v.* Chesterville Academy Soc., 3 Rich. Eq. (S. C.) 362; Orleans County Grammar School *v.* Parker, 25 Vt. 696.

16. White Schoolhouse *v.* Post, 31 Conn. 240; Auburn Theological Seminary *v.* Cole, 18 Barb. (N. Y.) 360; Kelly *v.* Love, 20 Gratt. (Va.) 124.

17. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; Kelly *v.* Love, 20 Gratt. (Va.) 124.

tion is divested of all title in the property, and of the power of management, by the incorporation of a board of trustees under a charter which confers on them the power to hold the property and to manage the school in all of its affairs.[18] A minority of the persons in whom a trust of a school-house and school is vested by deed cannot by associating and procuring a charter acquire a right to manage the property against the will of the majority of the persons interested.[19]

**B. Public Aid and Taxation.** Where there are inhibitory constitutional provisions,[20] private educational institutions cannot become the beneficiaries of public funds or property;[21] but in the absence of such provisions a grant of state lands to such an institution is valid.[22] The legislature cannot authorize the levy of taxes for the benefit of private schools.[23] Under the constitutional provisions in force in some jurisdictions, property held and used for purposes purely educational may be exempted from taxation by the legislature, although held and used by private persons.[24]

**C. Visitation,[25] Supervision, and Control.** A court of chancery has no power of visitation over an incorporated academy, but it has power to cause unauthorized contracts by its trustees to be canceled.[26] And the trustees of a private academy which has made an agreement with a village board of education as to the salary of the principal and the admission of pupils may be restrained from violating their contract.[27] The attorney-general cannot bring an action to determine who are entitled to vote at corporate meetings of an incorporated private school;[28] but the legislature may authorize the attorney-general to institute proceedings against the commissioners of an educational institution to inquire whether its charter and franchise should be annulled by reason of abuse thereof.[29] A private incorporated school receiving state aid is within the purview of a statute prohibiting officers and members of boards of institutions receiving state aid from selling supplies to such institutions.[30]

**D. Contracts, Conveyances, Property, and Liabilities — 1. In General.** An educational institution chartered as a corporation, with power to sue and be

18. Union Baptist Assoc. *v.* Hunn, 7 Tex. Civ. App. 249, 26 S. W. 755.

19. Com. *v.* Jarret, 7 Serg. & R. (Pa.) 460.

20. See the constitutions of the several states.

21. Brooke Academy *v.* George, 14 W. Va. 411, 35 Am. Rep. 760. *Compare* Sargent *v.* Rochester Bd. of Education, 35 Misc. (N. Y.) 321, 71 N. Y. Suppl. 954 [*affirmed* in 76 N. Y. App. Div. 588, 79 N. Y. Suppl. 127].

22. Kiefer *v.* German American Seminary, 46 Mich. 636, 10 N. W. 50, holding that the proceeds of land granted exclusively for the erection of buildings may be appropriated to its general needs, when all the buildings needed have been otherwise secured. See also Ipswich Grammar School *v.* Andrews, 8 Metc. (Mass.) 584; Orleans County Grammar School *v.* Parker, 25 Vt. 696.

23. People *v.* McAdams, 82 Ill. 356; Jenkins *v.* Andover, 103 Mass. 94 (holding that a legislative enactment authorizing a town tax for the support of a free school founded by private benevolence, but under the control of trustees, some of whom are not elected by the people, is repugnant to the constitution, providing that all money raised by taxation or appropriated for the support of common schools shall be applied to no other schools than those conducted under the superintendence of the authorities of the town or city in which the money is to be expended); Curtis *v.* Whipple, 24 Wis. 350, 1 Am. Rep. 187 (holding that incidental benefits resulting to the people of a town from the location of a private institution are no grounds for the exercise of the taxing power in aid thereof).

**Test of public use.**— In the case of a tax for building a school-house to be leased to an academy corporation for school purposes, the test of the public use is not a right of enjoying the property wholly at the public expense, but a common and equal right, free from unreasonable discrimination. Holt *v.* Antrim, 64 N. H. 284, 9 Atl. 389.

24. See the constitutions of the several states. And see Nashville *v.* Ward, 16 Lea (Tenn.) 27; Taxation.

25. Visitation of certain Massachusetts institutions see Smyth *v.* Phillips Academy, 154 Mass. 551, 28 N. E. 683; Murdock *v.* Phillips Academy, 12 Pick. 244; *In re* Murdock, 7 Pick. 303.

26. Auburn Academy *v.* Strong, Hopk. (N. Y.) 278.

27. Washington Academy *v.* Cruikshank, 43 Misc. (N. Y.) 197, 88 N. Y. Suppl. 330.

28. Atty.-Gen. *v.* Albion Academy, etc., 52 Wis. 469, 9 N. W. 391.

29. Frederick Female Seminary *v.* State, 9 Gill (Md.) 379.

30. East Stroudsburg State Normal School *v.* Yetter, 33 Pa. Super. Ct. 557.

sued, is liable for its breach of contract in the same manner as an individual.[31] A taxpayer in a school-district cannot maintain a bill for an injunction against the violation, by an academy, of a contract with such district in a matter not affecting his interest.[32] A contract, entered into by a municipality with a private school, for the instruction of certain pupils for a certain period, which provides for the appointment of one pupil annually by each member of the municipal council and requires certain municipal officials to inspect the condition and manner in which the school is fulfilling its contract and if satisfactory to pay it a certain sum does not impair the right of the school to refuse to admit colored pupils.[33] Although the majority of the trustees of a school are among those whom the trustees permit to erect a boarding-house on the school property, with an agreement that the house shall remain the property of the builders, there is no abuse of trust, rendering void the agreement as to its remaining the builders' property, such house being essential to the successful conduct of the school, and being built for that reason, and not to enable them to make a profit out of their trust.[34] The trustees of an incorporated school may transfer the school lands to another body corporate, on condition that the body to whom it is transferred perform the trusts without the intervention of a court.[35] And the trustees of a school in whom is vested the title to its property may convey the same after it has ceased to be used for school purposes, although they have tendered their resignation to take effect upon the happening of a certain event which did not occur.[36] But the trustees of an educational institution cannot sell or dispose of its property in such a way or to such persons as to conflict with the terms of the trust under which they derive their power.[37] Where the trustees or directors, or a majority thereof, are authorized to sell lands belonging to a seminary, a power of attorney executed by the president, authorizing one to execute deeds is insufficient to show the authority of the attorney in fact to convey the lands.[38] Where lands which were conveyed to an educational corporation, to be held by it so long as they should be used for educational purposes, are sold by the corporation, and other lands are purchased with the funds and conveyed to the corporation absolutely, the latter lands are not subject to the restriction.[39] A legislative act authorizing the building of an academy on a lot, belonging not to the state but to a county and subject to the paramount trust of the county for public buildings, is only a mere license or contract for quiet enjoyment during the pleasure of the county; and the tenancy of the academy under it is only a tenancy at will.[40]

31. Hall-Moody Inst. *v.* Copass, 108 Tenn. 582, 69 S. W. 327. See also Moss *v.* Harpeth Academy, 7 Heisk. (Tenn.) 283. *Compare* Clayton *v.* Newton Academy, 95 N. C. 298.

32. Page *v.* Haverhill Academy, 63 N. H. 216.

33. State *v.* Maryland Inst., etc., 87 Md. 643, 41 Atl. 126.

34. Decell *v.* McKee, 83 Miss. 423, 35 So. 940.

35. *Ex p.* Greenville Academies, 7 Rich. Eq. (S. C.) 471.

36. Union Baptist Assoc. *v.* Hunn, 7 Tex. Civ. App. 249, 26 S. W. 755.

37. Busby *v.* Mitchell, 23 S. C. 472 (holding that where land is conveyed in trust for the erection of a church and academy for the benefit of a certain religious denomination, the church council cannot convey any portion of it to others than persons of the same denomination for an academy); Stevens *v.* Willard, 43 Vt. 692 (holding that the trustees of an educational institution located at a certain place have no authority to sell the property of such institution conveyed to it for the use and benefit of said institution established by law at such place as aforesaid, "and in promotion of the objects of its establishment" and transfer the same or the proceeds to a similar institution located elsewhere). *Compare* Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387, holding that the trustees of an academy incorporated to promote religion, and for the instruction of youth in the learned languages may take notes to constitute a fund to found an institution for the education of indigent young men, with a sole view to the ministry, to be incorporated with the academy; and such trustees may make a valid transfer of such notes to a college incorporated distinct from the academy, but which, by its charter, is authorized to receive, and required to apply, such fund according to the will of the donors.

38. New Glasgow Planing Mill Co. *v.* Shaw, 99 S. W. 661, 30 Ky. L. Rep. 807.

39. Moss *v.* Harpeth Academy, 7 Heisk. (Tenn.) 283.

40. Kittaning Academy *v.* Brown, 41 Pa. St. 269.

**2. Contracts For Instruction.** One who undertakes to furnish school-room accommodations impliedly contracts that those furnished will be reasonably suitable.[41] And one who is employed to render services as a teacher undertakes, in the absence of a special contract, to exercise reasonable skill and judgment, and ordinary care and diligence in rendering such services;[42] but one who contracts to give instruction in specified studies does not warrant that he will pursue the best methods of study.[43] The measure of damages for breach of a contract by which one was to be given a reduced rate of tuition in a school is the difference between the contract charge and the regular tuition.[44]

**E. Tuition and Other School Charges.**[45] No action lies on an agreement promising to pay for tuition for a specified time, if during the whole of that time the promisor was prevented by illness from attending and receiving the tuition.[46] And of course tuition or board cannot be recovered where the instruction or board contracted for has not been furnished,[47] unless the failure to furnish has been caused by the act of the pupil.[48] But it seems that a school principal has the right to punish a pupil for unbecoming conduct by suspension or expulsion, if necessary, and in such case is entitled to the agreed school charges.[49] School rules and provisions contained in a school catalogue, advertisement, or application blank become part of the contract for tuition and other school charges, where notice thereof has been given to parents or guardians, or their attention called thereto.[50] A contract for a complete course of instruction or for a specified period of time is entire, and the school proprietor is entitled to recover the whole sum agreed upon or nothing.[51] A school furnishing instruction under contract with the parents of the pupils can recover tuition from the parents and not from the children;[52] and where instruction is furnished under an agreement that the school shall look to a school-district for compensation, the school cannot maintain an action against the parents, and at common law neither the school nor the parents can maintain an action against the school-district for the tuition.[53] In an action for tuition and board, where the failure to furnish proper instruction and board is set up, evidence cannot be introduced as to the mode of conducting the school generally or as to the schoolmaster's conduct with respect to other particular boys;[54] and it has been decided that in such an action evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given in evidence in order to reduce the amount claimed, such a breach being the subject of a cross

41. Barngrover *v.* Maack, 46 Mo. App. 407.
42. Barngrover *v.* Maack, 46 Mo. App. 407.
43. Barngrover *v.* Maack, 46 Mo. App. 407.
44. Neale *v.* Smith, 61 Ark. 564, 33 S. W. 1058.
45. **Liability when pupil removed without notice** see Collins *v.* Price, 5 Bing. 132, 6 L. J. C. P. O. S. 244, 2 M. & P. 233, 30 Rev. Rep. 542, 15 E. C. L. 507; Eardley *v.* Price, 2 B. & P. N. R. 333, 9 Rev. Rep. 654; Simeon *v.* Watson, 46 L. J. C. P. 679.
**Liability of town for tuition under New Hampshire statute** see New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538; Sanborn Seminary *v.* Newton, 73 N. H. 109, 59 Atl. 614; Union School Dist. *v.* District No. 20, 71 N. H. 269, 52 Atl. 850.
46. Stewart *v.* Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747.
47. Kabus *v.* Seftner, 34 Misc. (N. Y.) 538, 69 N. Y. Suppl. 983.
48. Kabus *v.* Seftner, 34 Misc. (N. Y.) 538, 69 N. Y. Suppl. 983.
49. Kabus *v.* Seftner, 34 Misc. (N. Y.) 538, 69 N. Y. Suppl. 983. *Compare* Starr *v.* Liftchild, 40 Barb. (N. Y.) 541.
50. Hartridge School *v.* Riordan, 112 N. Y. Suppl. 1089; Horner School *v.* Wescott, 124 N. C. 518, 32 S. E. 885 (holding that where, according to a school catalogue, which was seen by the parent, tuition and board were payable in instalments in advance, and no money thus paid was to be returned in event of dismissal for bad conduct, and by special indulgence, payment in advance was not insisted upon from a pupil, who was dismissed for bad behavior, the school was entitled to recover the instalment which ought to have been paid in advance); Horner *v.* Baker, 74 N. C. 65; Bingham *v.* Richardson, 60 N. C. 215; Price *v.* Wilkins, 58 L. T. Rep. N. S. 680.
51. Starr *v.* Liftchild, 40 Barb. (N. Y.) 541; Kabus *v.* Seftner, 34 Misc. (N. Y.) 538, 69 N. Y. Suppl. 983.
52. New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538 [*citing* Sanborn Seminary *v.* Newton, 73 N. H. 109, 59 Atl. 614].
53. New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538.
54. Clements *v.* May, 7 C. & P. 678, 32 E. C. L. 818.

action and not of set-off.[55] A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar.[56]

**F. Teachers and Other Instructors.**[57] Trustees empowered by statute to appoint and remove teachers at pleasure have no power to make a contract with a teacher limiting their right to remove him at pleasure.[58] A requirement by the head of a business school, attended by minors, that teachers therein shall not frequent places where intoxicating liquors are sold in the vicinity of the school is, as a matter of law, a reasonable regulation.[59] A female teacher in a private academy cannot rightfully be discharged for failure to obey regulations of the board of trustees as to the evenings on which and the hours at which she shall receive men callers, so long as her actions in that respect are chaste and ladylike, and not incompatible with her duties as a teacher;[60] but she may be dismissed if she goes with young men to such questionable places as to cause her reputation as a lady to be called into question.[61]

**G. Discipline.** The conduct of a pupil at a boarding-school, in continually playing truant, and in finally leaving for his home, is ground for expulsion, where the pupil's parent has refused to permit the teacher to whip him for misconduct and has taken no steps himself to correct him.[62] Where a child is sent to school, under an agreement to be bound by the conditions of the school catalogue, which provides that scholars shall not be absent from school except at regular recesses, the proprietor of the school is not bound to allow the child to remain in the school, unless with the understanding that he shall not be absent during term-time without the consent of the officers thereof.[63]

## III. PUBLIC SCHOOLS.

**A. Establishment and Regulation — 1. In General.** The power of the states to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control, and regulate such schools when established is one of the powers not delegated to the United States by the constitution, nor prohibited by it to the states, and is reserved to the states respectively or to the people.[64] Providing for public education and establishing and regulating public schools are matters which rest primarily with the legislative department,[65]

**55.** Hennequin *v.* O'Dowd, 21 L. T. Rep. N. S. 802.

**56.** Clements *v.* Williams, 8 C. & P. 58, 34 E. C. L. 608.

**57. Selection and appointment of teacher under contract between school-district and academy** see Page *v.* Haverhill Academy, 63 N. H. 216.

**Liability for salary of teacher employed by private school and high school** see Dickey *v.* Putnam Free School, 197 Mass. 468, 84 N. E. 140.

**Right of trustees to increase salary of teacher** see Hildreth *v.* Pinkerton Academy, 29 N. H. 227.

**Removal of professors in certain Massachusetts institutions** see Smyth *v.* Phillips Academy, 154 Mass. 551, 28 N. E. 683; Murdock *v.* Phillips Academy, 12 Pick. 244 (holding that a professor removable for neglect of duty or other sufficient cause cannot be removed upon grounds of mere expediency or convenience, nor unless he has forfeited his office for one of the causes mentioned in the charter of the institution); *In re* Murdock, 7 Pick. 303 (holding that a professor at a seminary cannot be tried and removed by the visitors for misconduct without having the offense with which he is charged "fully and plainly, substantially and formally described to him" and that in proceedings for the removal of a professor the court has no authority on appeal from the sentence of removal to examine the evidence, by way of a rehearing, but must determine the question upon the record of the visitors).

**58.** Auburn Academy *v.* Strong, Hopk. (N. Y.) 278.

**59.** Koons *v.* Langum, 93 Minn. 332, 101 N. W. 490.

**60.** Hall-Moody Inst. *v.* Copass, 108 Tenn. 582, 69 S. W. 327.

**61.** Hall-Moody Inst. *v.* Copass, 108 Tenn. 582, 69 S. W. 327.

**62.** Fessman *v.* Seeley, (Tex. Civ. App. 1895) 30 S. W. 268.

**63.** Curry *v.* Lasell Seminary Co., 168 Mass. 7, 46 N. E. 110.

**64.** Marshall *v.* Donovan, 10 Bush (Ky.) 681.

**65.** Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147; Rutgers College *v.* Morgan, 70 N. J. L. 460, 57 Atl. 250. See also Fuller *v.* Heath, 89 Ill. 296; Speight

subject only to constitutional restrictions.[66] A state legislature may enact special laws for the establishment and regulation of municipal public schools,[67] and may

*v.* People, 87 Ill. 595; Willis *v.* Owen, 43 Tex. 41; Lowrance *v.* Schwab, 46 Tex. Civ. App. 67, 101 S. W. 840.

**General laws passed by the legislature** in regard to the common schools, and prescribing the duties of boards of education in counties and cities, are paramount, and control conflicting provisions of city charters; but such charters may contain additional provisions or provide for matters not enumerated in the general law, so long as such provisions are not in conflict with the general law. McKenzie *v.* San Francisco Bd. of Education, 1 Cal. App. 406, 82 Pac. 392.

**Special legislation** which does not come in aid of the general system, or on relief of hardships growing out of its provisions, or of the default of the officers by whom it is administered, and especially such as interferes with these officers in the discharge of their duties, or takes from them the right to control the funds set apart to the counties or districts for which they are acting, is calculated to destroy the system of common schools which the constitution declares shall be maintained. Halbert *v.* Sparks, 9 Bush (Ky.) 259.

**Statutory provisions concerning school establishment and regulation** see the statutes of the several states. And see Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Barber *v.* Alexander, 120 Ga. 30, 47 S. E. 580; State *v.* Black, 166 Ind. 138, 76 N. E. 882; Weir *v.* State, 161 Ind. 435, 68 N. E. 1023; State *v.* Elk County, 61 Kan. 90, 58 Pac. 959 (holding that a statute arbitrarily establishing a high school and requiring its maintenance by the people of a county is not unconstitutional as interfering with the right of local self-government); Thomas *v.* Frederick County School, 7 Gill & J. (Md.) 369; Com. *v.* Dedham, 16 Mass. 141; Bartlett *v.* State, 73 Ohio St. 54, 75 N. E. 939; Cincinnati School Dist. *v.* Oakley Special School Dist. No. 11, 27 Ohio Cir. Ct. 824; Oklahoma Bd. of Education *v.* Territory, 12 Okla. 286, 70 Pac. 792.

66. Rutgers College *v.* Morgan, 70 N. J. L. 460, 57 Atl. 250.

**Constitutional provisions concerning school establishment and regulation** see the constitutions of the different states. And see San Francisco Bd. of Education *v.* Hyatt, 152 Cal. 515, 93 Pac. 117 (holding that under Const. art. 9, § 6, an evening high school may be conducted as a part of the public school system); Quick *v.* Springfield Tp., 7 Ind. 636; Clayton County High School *v.* Clayton County, 9 Iowa 175; Dubuque Dist. Tp. *v.* Duhuque, 7 Iowa 262; Newman *v.* Thompson, 4 S. W. 341, 9 Ky. L. Rep. 199; Fiske *v.* Huntington, 179 Mass. 571, 61 N. E. 260; Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450; Com. *v.* Hartman, 17 Pa. St. 118; Willis *v.* Owen, 43 Tex. 41 (holding that the basis of the school system contemplated in the constitution of Texas is the school-district, and the local board of directors and the superintendent of public instruction are intended to be the leading and essential factors of such system); Merrill *v.* Spencer, 14 Utah 273, 46 Pac. 1096; Bedford County *v.* Bedford High School, 92 Va. 292, 23 S. E. 299.

**Requirement of uniformity** see Barber *v.* Alexander, 120 Ga. 30, 47 S. E. 580; Lawrence Bd. of Education *v.* Dick, 70 Kan. 434, 78 Pac. 812; Koester *v.* Atchison County, 44 Kan. 141, 24 Pac. 65 (holding that an act providing for county high schools is constitutional); Smith *v.* Simmons, 129 Ky. 93, 110 S. W. 336, 33 Ky. L. Rep. 503; State Female Normal School *v.* Auditors, 79 Va. 233; Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash, 696, 43 Pac. 944.

67. See the following cases:

*California.*— Chico High School Bd. *v.* Butte County, 118 Cal. 115, 50 Pac. 275; Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805.

*Illinois.*— Brenan *v.* People, 176 Ill. 620, 52 N. E. 353.

*Kansas.*— Lawrence Bd. of Education *v.* Dick, 70 Kan. 434, 78 Pac. 812, holding that the high school grade of a city system of schools is a part of the common school system.

*Kentucky.*— Hickman College *v.* Colored Common School Dist. A, 111 Ky. 944, 65 S. W. 20, 23 Ky. L. Rep. 1271 (holding that special acts concerning school-districts in towns and cities were repealed by the general law relating to common schools, to the extent that they were inconsistent with the general law); Chambers *v.* Adair, 110 Ky. 942, 62 S. W. 1128, 23 Ky. L. Rep. 373; Hawesville Bd. of Education *v.* Louisville, etc., R. Co., 110 Ky. 932, 62 S. W. 1125, 23 Ky. L. Rep. 76; Louisville School Bd. *v.* Louisville, 103 Ky. 421, 45 S. W. 1047, 20 Ky. L. Rep. 142; Roberts *v.* Clay City, 102 Ky. 88, 42 S. W. 909, 79 Ky. L. Rep. 1046; Taylor *v.* Russell, 78 S. W. 411, 25 Ky. L. Rep. 1652; Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public School, 64 S. W. 974, 23 Ky. L. Rep. 1169.

*New Mexico.*— Albuquerque Water Supply Co. *v.* Albuquerque, 9 N. M. 441, 54 Pac. 969.

*New York.*— Matter of Harris, 58 Misc. 297, 109 N. Y. Suppl. 983.

*North Carolina.*— Lowery *v.* Graded School Trustees, 140 N. C. 33, 52 S. E. 267.

*Ohio.*— State *v.* Toledo Bd. of Elections, 16 Ohio Cir. Ct. 1, 8 Ohio Cir. Dec. 215.

*South Dakota.*— State *v.* Power, 5 S. D. 627, 59 N. W. 1090.

*Tennessee.*— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.

*Texas.*— El Paso *v.* Ruckman, 92 Tex. 86, 46 S. W. 25; State *v.* Callaghan, 91 Tex. 313, 43 S. W. 12; School Trustees *v.* Sherman,

provide for normal schools,[68] and power to establish public schools may be delegated by the legislature to boards of education or such like bodies.[69] A town having provided on the mainland sufficient school facilities for all children entitled to attend the public schools is not bound to build a school-house on an island off the coast, to accommodate a few children there, especially where it does not appear that the town would have a right to build such a school-house without authority from the commonwealth.[70]

**2. Regulation and Management by School-Boards, Etc.** It is customary to vest boards of education and other such bodies with large powers in all matters as to school management. What rules and regulations may best promote the interest of the schools, and what branches shall be taught, other than those expressly prescribed by statute, are left usually to their determination.[71] With the discretionary powers of such officers, the courts will not interfere,[72] unless there has been such an abuse of discretion as works palpable injustice or injury.[73]

**3. Separate White and Colored Schools.** The legislature may expressly authorize the establishment of separate schools for white and colored children.[74]

91 Tex. 188, 42 S. W. 546, 44 S. W. 615; Conklin *v.* El Paso, (Civ. App. 1897) 44 S. W. 879.

*Utah.*— Merrill *v.* Spencer, 14 Utah 273, 46 Pac. 1096.

*Washington.*— Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

*Wisconsin.*— State *v.* Enos, 97 Wis. 164, 72 N. W. 222.

See 43 Cent. Dig. tit. "Schools and School Districts," § 14.

**68.** See the following cases:

*Florida.*— State *v.* Bryan, 50 Fla. 293, 39 So. 929, the state constitution expressly provides for normal schools.

*Kentucky.*— Marsel *v.* Hager, 101 S. W. 882, 31 Ky. L. Rep. 79, holding that an appropriation for a normal school is valid, although not submitted to a vote of the people.

*New York.*— Gordon *v.* Comes, 47 N. Y. 608.

*Virginia.*— State Female Normal School *v.* Auditors, 79 Va. 233.

*United States.*— Briggs *v.* Johnson, 4 Fed. Cas. No. 1,872, 4 Dill. 148.

See 43 Cent. Dig. tit. "Schools and School Districts," § 13.

**69.** Clayton County High School *v.* Clayton County, 9 Iowa 175; District Tp. *v.* Dubuque, 7 Iowa 262; Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654, holding that such boards may establish and maintain various grades or departments in city public schools, including a high school grade.

**70.** Newcomb *v.* Rockport, 183 Mass. 74, 66 N. E. 587. See also Davis *v.* Chilmark, 199 Mass. 112, 85 N. E. 107.

**71.** Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654. See also Pinsler *v.* Protestant School Com'rs, 23 Quebec Super. Ct. 365.

Prohibiting foot-ball see *infra*, III, I, 3, d, (III.)

**72.** *Indiana.*— State *v.* Gray, 93 Ind. 303, holding that the power given to school officers to establish separate schools for colored children, and over the admission of pupils and the competency of teachers, cannot be controlled by the courts.

*Kansas.*— Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654.

*Maryland.*— Wiley *v.* Allegany County School Com'rs, 51 Md. 401.

*Ohio.*— Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 13 Am. Rep. 233, holding that where the legislative power of the state has placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the judicial power of the courts will not be called into exercise for the purpose of directing what instruction shall be given in such schools or what books shall be read therein.

*Pennsylvania.*— Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371; Nicklas' Petition, 146 Pa. St. 212, 23 Atl. 316; Heard *v.* Woodcock Tp. School Directors, 45 Pa. St. 93 (holding that the temporary consolidation of schools in a district is a matter of discretion of the board of directors, and when reasonably exercised will not be interfered with by the courts); *In re* Washington Tp. School Directors, 15 Pa. Co. Ct. 509 (holding that courts cannot interfere with the discretion of school-districts as to the establishment or non-establishment of graded schools); *In re* Dublin Tp. School Bd., 14 Pa. Co. Ct. 464 (holding that the court cannot review the exercise of the discretion of school directors in closing a school). *Compare In re* Bloomsburg School Bd., 4 Pa. Co. Ct. 411, holding that the court cannot ordinarily interfere with the exercise of the discretion of school directors, but may do so where the school-board is evenly divided on a question, and cannot proceed.

*Texas.*— McCallum *v.* Adams, (Civ. App. 1908) 110 S. W. 526.

*Vermont.*— Samson *v.* Grand Isle, 78 Vt. 383, 63 Atl. 180.

See 43 Cent. Dig. tit. "Schools and School Districts," § 38.

**73.** Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654; Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371; Com. *v.* Williamson, 30 Leg. Int. (Pa.) 406.

**74.** *California.*— Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 425.

And it has been held that in the absence of special legislation on the subject, school-boards or trustees may make provisions for the instruction of colored children in schools established exclusively for them, and prohibit their attendance in other schools,[75] but this has been denied.[76] And of course such separate schools cannot be established by boards of trustees when such action is prohibited by law.[77]

**4. Separate Denominational Schools.** Under the British North American act provincial legislatures may legislate in regard to separate denominational schools, provided the legislation is not such as prejudicially affects the rights and privileges theretofore possessed by such schools.[78] And it has been decided that a statute abolishing the denominational system of public education, but not compelling the attendance of any child at a public school, and leaving each denomination free to establish and conduct its own schools, is valid.[79]

**B. School Lands and School Funds — 1. School Lands — a. Acquisition.** A municipal council or other governing body,[80] or a school-board,[81] may acquire and hold land for public school purposes.

*Indiana.*— Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

*Kansas.*— Richardson *v.* Kansas City Bd. of Education, 72 Kan. 629, 84 Pac. 538.

*Mississippi.*— Chrisman *v.* Brookhaven, 70 Miss. 477, 12 So. 458, holding that the constitutional provision requiring the legislature to establish and maintain a uniform system of free public schools does not prevent its providing for the establishment outside of that system of a school exclusively for whites and the issue of bonds by the town in which it is located to pay therefor.

*New York.*— People *v.* Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; People *v.* Queens School Bd., 44 N. Y. App. Div. 469, 61 N. Y. Suppl. 330 [*affirmed* in 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113].

*Ohio.*— State *v.* McCann, 21 Ohio St. 198, decided under a statute subsequently repealed.

*United States.*— U. S. *v.* Buntin, 10 Fed. 730.

See 43 Cent. Dig. tit. "Schools and School Districts," § 15. See also *infra*, III, I, 1, c, (II).

**Requirements for colored schools.**— Such special colored schools must be reasonably accessible and must afford substantially equal educational advantages with those provided for white children. U. S. *v.* Buntin, 10 Fed. 730. See also Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738; People *v.* Queens School Bd., 44 N. Y. App. Div. 469, 61 N. Y. Suppl. 330 [*affirmed* in 161 N. Y. 598, 56 N. E. 8, 48 L. R. A. 113].

**Two school-houses necessary.**—The law contemplates but one school-house and school to each district only, wherein it provides that separate schools shall be provided for whites and blacks, but in case there should be both white and colored children in the same district would require separate schools. Union County Ct. *v.* Robinson, 27 Ark. 116.

**Mandamus** will not be granted to compel a township trustee to organize a school for colored children where the complaint does not show that there are a sufficient number of children to render such organization practicable. State *v.* Grubb, 85 Ind. 213.

**In Canada** where a separate school has been established for colored children, they cannot attend the general common schools. Hill *v.* Camden, etc., School Trustees, 11 U. C. Q. B. 573. But where no separate school has been established, or having been established has been afterward discontinued, colored children may attend the general common schools. *In re* Hutchinson, 31 U. C. Q. B. 274; *In re* Stewart, 31 U. C. Q. B. 634.

**75.** Roberts *v.* Boston, 5 Cush. (Mass.) 198.

**76.** Rowles *v.* Wichita Bd. of Education, 76 Kan. 361, 91 Pac. 88; Oxford Bd. of Education *v.* State, 45 Ohio St. 555, 16 N. E. 373 [*affirming* 2 Ohio Cir. Ct. 557, 1 Ohio Cir. Dec. 640]. See also Clark *v.* Muscatine Bd. of Directors, 24 Iowa 66.

**77.** People *v.* Quincy Bd. of Education, 101 Ill. 308, 40 Am. Rep. 196; Pierce *v.* Dist. School Trustees, 46 N. J. L. 76. See also People *v.* Alton, 179 Ill. 383, 54 N. E. 421, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; People *v.* Upper Alton School-Dist. Bd. of Education, 127 Ill. 613, 21 N. E. 187; People *v.* McFall, 26 Ill. App. 319. (Chase *v.* Stephenson, 71 Ill. 383).

**78.** Belleville Roman Catholic Separate Schools *v.* Grainger, 25 Grant Ch. (U. C.) 570.

**79.** Winnipeg *v.* Barrett, (1892) A. C. 445, 61 L. J. P. C. 58, 67 L. T. Rep. N. S. 429 [*reversing* 19 Can. Sup. Ct. 374 (*reversing* 7 Manitoba 273 [*followed* in Logan *v.* Winnipeg, 8 Manitoba 3])]. See also *Ex p.* Renaud, 14 N. Brunsw. 273.

**80.** Le Couteulx *v.* Buffalo, 33 N. Y. 333; Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522.

**81.** Smith *v.* Belleville School Trustees, 16 Grant Ch. (U. C.) 130, holding that a school-board is liable for the purchase-money due upon a piece of land bought by a school trustee, at the desire of the board, for a school site, although he signed the contract with his name only, where such board has unanimously recognized the purchase as its own and has paid several instalments of the purchase-money, and has applied to the town council for money to pay for such land.

**b. Disposition.** The right to sell, lease, or otherwise dispose of public school lands depends generally upon express constitutional or statutory provisions.[82] And the sufficiency and validity of a deed or other conveyance of such land is usually to be determined with reference to the statutory provisions on the subject.[83] If it is subsequently found that public school lands were in fact worth more at the time of sale than they were sold for, this fact will not avoid the sale, if fairly made.[84]

**c. Actions Affecting School Lands or Proceeds.** The right to bring an action as to school lands or the proceeds thereof and the name in which it should be brought depends usually upon the provisions of the statutes as to such lands.[85] Under an act by which the school commissioners of each township are constituted bodies corporate, which may sue and be sued, they are properly designated in a writ as school commissioners of a township, describing it by number and range, and it is not necessary that they should be described as commissioners of a particular section of such township.[86]

**2. School Funds — a. Creation and Sources.** Funds for the establishment and maintenance of public schools are commonly provided for by state constitutions or by legislative enactment.[87] Among the funds which have been devoted to this purpose are those arising from intoxicating liquor licenses,[88]

**82.** See the constitutions and statutes of the several states.

Sale of school lands see People *v.* Roche, 124 Ill. 9, 14 N. E. 701; Heaston *v.* Randolph County Com'rs, 20 Ind. 398; Lumbard *v.* Trask, 9 Metc. (Mass.) 557; Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670.

Lease of school lands see San Francisco Bd. of Education *v.* Grant, 118 Cal. 39, 50 Pac. 5; Anderson *v.* Prairie School Tp., 1 Ind. App. 34, 27 N. E. 439; Forsdick *v.* Tallahatchie County, 76 Miss. 622, 24 So. 962; Bolivar County *v.* Coleman, 71 Miss. 832, 15 So. 107; Phillips *v.* Burrus, 13 Sm. & M. (Miss.) 31; Cole *v.* Harmon, 8 Sm. & M. (Miss.) 562; McInnes *v.* Wallace, (Tex. Civ. App. 1896) 38 S. W. 816; White *v.* Fuller, 38 Vt. 193.

Mortgage for purchase-price see People *v.* Roche, 124 Ill. 9, 14 N. E. 701.

Platting and subdividing school land see Seeger *v.* Mueller, 133 Ill. 86, 24 N. E. 513; Barger *v.* Jones, 4 Ill. 613; Eberle *v.* St. Louis Public Schools, 11 Mo. 247; Miller *v.* School Com'rs, 12 Lea (Tenn.) 75; Martin *v.* State, 10 Humphr. (Tenn.) 157.

**83.** See the statutes of the several states. And see Harmon *v.* Steinman, 9 Iowa 112 (holding that the school fund commissioner's certificate of purchase does not convey a legal title to the purchaser); Abbott *v.* Chase, 75 Me. 183 (holding that a deed made and received in good faith, and duly executed by the acting treasurer of the ministerial and school fund of a town, in pursuance of an order of the acting trustees, will pass a good title, although all that is necessary to make the treasurer and trustees officers *de jure* as well as *de facto* is not shown by the record); Warren *v.* Stetson, 30 Me. 231; Forsdick *v.* Tallahatchie County, 76 Miss. 622, 24 So. 962; Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670.

**84.** Taber *v.* Dallas County, 101 Tex. 241, 106 S. W. 332.

**85.** See the statutes of the several states. And see School Com'rs *v.* Aiken, 5 Port. (Ala.) 169; Cloud *v.* Danley, 16 Ark. 699; Porter *v.* Blakely, 1 Root (Conn.) 440 (holding that where lands are given or granted to towns for the use of schools, the selectmen or committees of the societies cannot sue for the recovery of such lands in their own name, but the action must be brought in the name of the town); Barber *v.* School Trustees, 51 Ill. 396; Moore *v.* School Trustees, 19 Ill. 83 (holding that where the state holds lands of a township in trust for common school purposes, the trustees of the schools of the township may sue in equity in matters affecting such lands); Chamberlain *v.* Lawrence County, 71 Miss. 949, 15 So. 40; Rabb *v.* Washington County, 62 Miss. 589; Simmons *v.* Holmes, 49 Miss. 134; Connell *v.* Woodward, 5 How. (Miss.) 665, 37 Am. Dec. 173 (holding that the trustees of schools and school lands are corporate bodies, and, as such, may maintain an action against a member of their own bodies); State *v.* Crumb, 157 Mo. 545, 57 S. W. 1030; State *v.* Luce, 62 Fed. 417. See 43 Cent. Dig. tit. "Schools and School Districts," § 22.

**86.** School Com'rs *v.* Dean, 2 Stew. & P. (Ala.) 190.

**87.** See the constitutions and statutes of the several states. And see Alleghany County School Trustees *v.* Maffit, 22 Md. 121; Halifax County *v.* Dartmouth, 38 Nova Scotia 1 [*affirmed* in 37 Can. Sup. Ct. 514], liability of incorporated towns to contribute.

**88.** *Georgia.*— Carroll *v.* Wright, 131 Ga. 728, 63 S. E. 260.

*Idaho.*— Cassia County School Dist. No. 27 *v.* Twin Falls, 13 Ida. 471, 90 Pac. 735.

*Indiana.*— State *v.* Forkner, 70 Ind. 241.

*Nebraska.*— State *v.* Sams, 71 Nebr. 669, 99 N. W. 544; State *v.* Wilcox, 17 Nebr. 219, 22 N. W. 458; Hastings *v.* Thorne, 8 Nebr. 160; State *v.* McConnell, 8 Nebr. 28.

estrays,[89] escheats,[90] unclaimed money and valuables found on dead bodies,[91] general[92] or special[93] taxation, dog taxes,[94] public lands or property,[95] the sale of county seminaries,[96] fines, penalties, and forfeitures,[97] surplus railroad interest and sinking funds,[98] surplus drainage funds,[99] and money paid as an equivalent for militia duty.[1] Public school funds are also sometimes derived from bequests made by individuals.[2]

**b. Apportionment and Disposition** — (i) *IN GENERAL.* The apportionment and disposition of the public school funds is to be made in accordance with constitutional and statutory requirements on the subject,[3] it being frequently provided

*New Mexico.*— East La Vegas Bd. of Education *v.* Tafaya, 6 N. M. 292, 27 Pac. 616.

See 43 Cent. Dig. tit. "Schools and School Districts," § 24. See also INTOXICATING LIQUORS, 23 Cyc. 152 note 40.

89. Tippecanoe County *v.* State, 92 Ind. 353.

90. Hinkle *v.* Shadden, 2 Swan (Tenn.) 46.

91. State *v.* Marion County, 85 Ind. 489.

92. Auditor-Gen. *v.* State Treasurer, 45 Mich. 161, 7 N. W. 716; State *v.* Thompson, 41 Mo. 13; School Dist. No. 1 *v.* Ormsby County Com'rs, 1 Nev. 334.

93. Collins *v.* Henderson, 11 Bush (Ky.) 74; Opinion of Justices, 68 Me. 582.

94. *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

95. *California.*— McCord *v.* Slavin, 143 Cal. 325, 76 Pac. 1104.

*Georgia.*— See Glynn County Bd. of Education *v.* Brunswick, 72 Ga. 353.

*Indiana.*— State *v.* Springfield Tp., 6 Ind. 83. See also Grant County *v.* Grant County, 7 Ind. 315.

*Michigan.*— People *v.* Auditor-Gen., 12 Mich. 171.

*Mississippi.*— State *v.* Vicksburg, etc., R. Co., 51 Miss. 361.

*Oregon.*— State *v.* Chadwick, 10 Oreg. 423.

*Texas.*— Taber *v.* Dallas County, 101 Tex. 241, 106 S. W. 332.

*United States.*— Springfield Tp. *v.* Quick, 22 How. 56, 16 L. ed. 256.

*Canada.*— Quebec *v.* Ontario, 31 Can. Sup. Ct. 516.

96. Heaston *v.* Randolph County, 20 Ind. 398.

97. Cassia County School Dist. No. 27 *v.* Twin Falls, 13 Ida. 471; Fuqua *v.* Hager, 119 Ky. 407, 84 S. W. 325, 27 Ky. L. Rep. 46; State *v.* Sams, 71 Nebr. 669, 99 N. W. 544. And see FINES, 19 Cyc. 560; INTOXICATING LIQUORS, 23 Cyc. 171; PENALTIES, 30 Cyc. 1342.

Municipal fines and licenses.—A school-district is not entitled to any of the proceeds of the fines and license money collected under the ordinances of a city, unless some part of its territory is included within the territorial limits of such city. Hall County School Dist. No. 30 *v.* Grand Island School Dist., 63 Nebr. 44, 88 N. W. 120.

Forfeited cash bail.— A sheriff cannot be compelled, after a prisoner has failed to appear, to pay bail money to the school fund, in the absence of statute allowing sheriffs to release prisoners on the receipt of money instead of a bond. State *v.* Farrell, 83 Iowa 661, 49 N. W. 1038.

98. State *v.* Storey County Com'rs, 17 Nev. 96, 28 Pac. 122.

99. School Dist. *v.* Edwards, 46 Wis. 150, 49 N. W. 968.

1. Mitchell *v.* State, 3 Blackf. (Ind.) 391.

2. North Troy Graded School Dist. *v.* Troy, 80 Vt. 16, 66 Atl. 1033. And see Atty.-Gen. *v.* Soule, 28 Mich. 153, holding that a will which provided that a certain sum should be set apart for the "establishment of a school at Montrose aforesaid, for the education of children, to be expended according to the directions of my said executors," means the establishment of a school, either public or private, according to the discretion of the executors named, and does not necessarily mean the establishment of a public charitable school, and, if it does, would leave the plans and details entirely to the discretion of the executors.

3. See the constitutions and statutes of the several states. And see the following cases:

*California.*— San Francisco Bd. of Education *v.* Hyatt, 152 Cal. 515, 93 Pac. 117 (holding that there being no statute providing a minimum duration of daily sessions of high schools, the fact that the sessions of an evening high school are only two hours per day does not prevent it from participating in the benefits conferred on regularly established high schools); Los Angeles County *v.* Kirk, 148 Cal. 385, 83 Pac. 250; Sunol School Dist. *v.* Chipman, 138 Cal. 251, 71 Pac. 340.

*Colorado.*— Cooke *v.* Logan County School Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719, holding that the making of the estimate as to the distribution of the school fund is not of itself sufficient to vest in the several school-districts the ownership of their respective shares.

*Connecticut.*— State *v.* Staub, 61 Conn. 553, 23 Atl. 924.

*Delaware.*— Wilmington Bd. of Public Education *v.* Griffin, 9 Houst. 334, 32 Atl. 775.

*Florida.*— State *v.* Barnes, 22 Fla. 8.

*Georgia.*— Clark *v.* Cline, 123 Ga. 856, 51 S. E. 617.

*Indiana.*— Pfau *v.* State, 148 Ind. 539, 47 N. E. 927; State *v.* McClelland, 138 Ind. 395, 37 N. E. 799; State *v.* Springfield Tp., 6 Ind. 83.

*Kentucky.*— Collins *v.* Henderson, 11 Bush

that the distribution shall be in proportion to the number of children or youths

74; Posey *v.* Corydon Public School, 38 S. W. 1063, 19 Ky. L. Rep. 466.

*Maine.*— Gorham School Dist. No. 1 *v.* Deering, 91 Me. 516, 40 Atl. 541.

*Massachusetts.*— Newcomb *v.* Rockport, 183 Mass. 74, 66 N. E. 587, holding that under a statute providing that a town may appropriate money for conveying pupils to and from the public schools, to be expended by the school committee in its discretion, a town and its school committee cannot be compelled to furnish transportation to scholars living on an island off the coast, especially where access from the island to the mainland is always inconvenient and at certain seasons impossible.

*Michigan.*— Deckerville High School *v.* Marion Tp., etc., School Dist. No. 3, 131 Mich. 272, 90 N. W. 1064; Moiles *v.* Watson, 60 Mich. 415, 27 N. W. 553.

*Mississippi.*— Murray *v.* Smith, 28 Miss. 31.

*Missouri.*— Veal *v.* Chariton County Court, 15 Mo. 412.

*Nebraska.*— State *v.* McBride, 5 Nebr. 102.

*Nevada.*— State *v.* Westerfield, 23 Nev. 468, 49 Pac. 119, holding that no part of the general school fund can be appropriated to pay teachers at the state orphans' home.

*New Hampshire.*— Walpole School Dist. No. 1 *v.* Prentiss, 66 N. H. 145, 19 Atl. 1090.

*New Jersey.*— Frelinghuysen Tp. Bd. of Education *v.* Atwood, 73 N. J. L. 315, 62 Atl. 1130; Rutgers College *v.* Morgan, 70 N. J. L. 460, 57 Atl. 250.

*New Mexico.*— Romero *v.* Las Vegas Bd. of Education, 10 N. M. 67, 61 Pac. 109.

*New York.*— Brooklyn School Bd. *v.* New York Bd. of Education, 157 N. Y. 566, 52 N. E. 583 [*affirming* 34 N. Y. App. Div. 9, 53 N. Y. Suppl. 1000, 54 N. Y. Suppl. 185 (*affirming* 25 Misc. 40, 53 N. Y. Suppl. 1000)]; People *v.* Allen, 19 Misc. 464, 44 N. Y. Suppl. 566; Bennett *v.* Burch, 1 Den. 141.

*North Carolina.*— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524; Lowery *v.* Kernersville Graded School Trustees, 140 N. C. 33, 52 S. E. 267; Duplin County Bd. of Education *v.* State Bd. of Education, 114 N. C. 313, 19 S. E. 277, holding that Const. art. 9, § 10, giving the board of education power to make regulations as to the public schools and state educational funds, subject to amendment or repeal by the general assembly, does not empower the board to apportion money raised by taxation in the different counties for school purposes, and retained in their several treasuries in accordance with an act of the general assembly.

*Oklahoma.*— Oklahoma County School Dist. No. 5 *v.* Hopkins, 7 Okla. 154, 54 Pac. 437.

*Pennsylvania.*— Alter *v.* McBride, 7 Pa. St. 147.

*South Carolina.*— Murph *v.* Landrum, 76 S. C. 21, 56 S. E. 850; State *v.* Derham, 54 S. C. 349, 32 S. E. 418.

*South Dakota.*— Heston *v.* Mayhew, 9 S. D. 501, 70 N. W. 635.

*Texas.*— Webb County *v.* Laredo School Trustees, 95 Tex. 131, 65 S. W. 878 [*reversing* (Civ. App. 1901) 64 S. W. 486]; Jernigan *v.* Finley, 90 Tex. 205, 38 S. W. 24; Wester *v.* Oge, 29 Tex. Civ. App. 615, 68 S. W. 1005; Oge *v.* Froboese, (Civ. App. 1902) 66 S. W. 688.

*Vermont.*— Brattleboro Town School Dist. *v.* Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697.

*Washington.*—State *v.* Cheetham, 23 Wash. 666, 63 Pac. 552 (holding that where the superintendent of public instruction properly apportions to a county its share of the public school funds, the state auditor cannot retain from such amount a sum claimed to be due from the county school funds to the state on account of moneys levied and collected for school purposes by such county); Sheldon *v.* Purdy, 17 Wash. 135, 49 Pac. 228; Pierce County School Dist. No. 43 *v.* Fairchild, 10 Wash. 198, 38 Pac. 1029.

See 43 Cent. Dig. tit. "Schools and School Districts," § 34.

**One school-board may recover from another** funds illegally paid the latter by the state authorities which should have been paid the former, and if the funds are not in defendant's possession, but can be traced to property in which they have been invested by it, the property can be recovered. East Carroll Parish School Bd. *v.* Union Parish School Bd., 36 La. Ann. 806.

**Where a particular school-district has received less than its share of the fund,** it is entitled to be made good by deductions in the next apportionment of the amount of the deficit from the amounts which would otherwise be apportioned to those districts which have received an excess. Andrus *v.* St. Landry Parish, 108 La. 386, 32 So. 420. See also Louisville School Bd. *v.* McChesney, 58 S. W. 427, 22 Ky. L. Rep. 506.

**Revision of apportionment.**— Where the state treasurer has erroneously announced to the superintendent of education the amount to be apportioned among the educable children of the state, but before the apportionment could be canceled the school directors of a parish had received their quota thereunder, the superintendent may take the improper payment into consideration in making the revised apportionment after the true sum is announced. State *v.* Fay, 36 La. Ann. 241.

**A teacher cannot compel** the state controller to apportion the school fund as required by law. Yost *v.* Gaines, 10 Lea (Tenn.) 576.

**In Texas** the commissioners' courts have no authority to apportion the county school fund. Wester *v.* Oge, 29 Tex. Civ. App. 615, 68 S. W. 1005.

**Right to question ministerial act as to apportionment.**— Where the act of the county superintendent of schools in drawing an order

between certain ages in the various school-districts.[4] Where lands are granted in trust for the benefit of certain public schools, the rents and profits arising therefrom must be distributed in accordance with the terms of the grant.[5]

(11) *ILLEGAL DISPOSITION.* Where a public school fund is created and protected by a constitutional provision,[6] a statute which attempts to authorize the use of such fund or a part thereof for any other purpose than the establishment and maintenance of public schools is unconstitutional.[7] And a statute appropriating public school funds to a sectarian school is of course invalid where there is a constitutional provision against such a use of such funds.[8] A school fund is not diverted from the purpose for which it was intended by law by being

apportioning school funds is ministerial only, the county treasurer is not precluded from questioning the right of such county superintendent to issue the order. Multnomah County School Dist. No. 2 *v.* Lambert, 28 Oreg. 209, 42 Pac. 221.

**Compelling apportionment by mandamus** see Merritt *v.* Merritt School-Dist., 54 Ark. 468, 16 S. W. 287; People *v.* Hempstead, 126 N. Y. 528, 27 N. E. 968 [*affirming* 12 N. Y. Suppl. 165]; State *v.* Bryan, 26 Oreg. 502, 38 Pac. 618; Pontotoc Independent School Corp. *v.* Johnson, (Tex. Civ. App. 1900) 59 S. W. 53. See also MANDAMUS, 26 Cyc. 285 *et seq.*

**Apportionment in proportion to attendance** see Stockton School Dist. *v.* Wright, 134 Cal. 64, 66 Pac. 34; Brattleboro Town School Dist. *v.* Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697.

**Apportionment between white and colored schools** see Reid *v.* Eatonton, 80 Ga. 755, 6 S. E. 602 (holding that a statute which provides that when bonds are sold for the purpose of building school-houses for both the white and colored schools, the trustees for the schools shall enter into an agreement in writing as to what part of the fund shall be used for each school, and that the amount received by the colored school shall not exceed in proportion the *pro rata* part of the taxes paid by the colored people is not unconstitutional); Hickman College *v.* Colored Common Schools Dist A., 111 Ky. 944, 65 S. W. 20, 23 Ky. L. Rep. 1271; Elizabethtown Dist. Public Schools *v.* Morris, 71 S. W. 654, 24 Ky. L. Rep. 1420.

**Apportionment to separate denominational schools** see Belleville Roman Catholic School *v.* Belleville School Trustees, 10 U. C. Q. B. 469.

4. See the constitutions and statutes of the several states. And see the following cases:

*Florida.*— State *v.* Barnes, 22 Fla. 8.

*Georgia.*— Clark *v.* Cline, 123 Ga. 856, 51 S. E. 617, holding that children of school age, resident in the county, attending the public schools of a town or city, are to be counted in the school population of such town or city in apportioning school funds.

*Indiana.*— State *v.* Mathews, 150 Ind. 597, 50 N. E. 572.

*Iowa.*— Dubuque Dist. Tp. *v.* Dubuque County Judge, 13 Iowa 250.

*Kentucky.*— Louisville School Bd. *v.* McChesney, 109 Ky. 9, 58 S. W. 427, 22 Ky. L. Rep 506; Louisville School Bd. *v.* Public Instruction Superintendent, 102 Ky. 394, 43 S. W. 718, 19 Ky. L. Rep. 1350.

*Louisiana.*— Andrus *v.* St. Landry Parish, 108 La. 386, 32 So. 420.

*Montana.*— Gallatin County School Dist. No. 7 *v.* Patterson, 10 Mont. 17, 24 Pac. 698.

*Nevada.*— State *v.* Dovey, 19 Nev. 396, 12 Pac. 910, holding that the inmates of an orphans' home are not to be counted as part of the school population, as they have no right to attend the public schools and their education is provided for in the home.

*New Jersey.*— Rutgers College *v.* Morgan, 70 N. J. L. 460, 57 Atl. 250; Central Union School Dist. No. 7 *v.* Sherman, 59 N. J. L. 375, 35 Atl. 1060.

*New Mexico.*— Romero *v.* Las Vegas Bd. of Education, 10 N. M. 67, 61 Pac. 109.

*Tennessee.*— State *v.* Knoxville, 115 Tenn. 175, 90 S. W. 289.

See 43 Cent. Dig. tit. "Schools and School Districts," § 34.

5. Atty.-Gen. *v.* Axford, 13 Can. Sup. Ct. 294 [*reversing* 17 Nova Scotia 107 (*reversing* Russ. Eq. Dec. (Nova Scotia) 429)].

6. See the constitutions of the several states.

7. *Colorado.*— *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274.

*Kentucky.*—Public Instruction Superintendent *v.* Auditor of Public Accounts, 97 Ky. 180, 30 S. W. 404, 17 Ky. L. Rep. 46 (holding that a statute providing that the expenses of the department of education of whatever character shall be paid out of the common school fund is constitutional); Underwood *v.* Wood, 93 Ky. 177, 19 S. W. 405, 14 Ky. L. Rep. 129, 15 L. R. A. 825 (holding that equity may enjoin the superintendent of schools from paying any part of the school fund to the teachers of a private school); Collins *v.* Henderson, 11 Bush 74 (holding that an act authorizing the purchase of certain historical works with part of the school fund is unconstitutional); Halbert *v.* Sparks, 9 Bush 259.

*New York.*— People *v.* Allen, 42 N. Y. 404; People *v.* Brooklyn Bd. of Education, 13 Barb. 400.

*South Carolina.*— *In re* Malone, 21 S. C. 435.

*Virginia.*— Hall's Free School Trustees *v.* Horne, 80 Va. 470.

See 43 Cent. Dig. tit. "Schools and School Districts," § 37.

8. Hackett *v.* Brooksville Graded School Dist., 120 Ky. 608, 87 S. W. 792, 27 Ky. L.

subjected to the payment of a judgment recovered for services rendered as a teacher of common schools, under the employment of trustees.[9] It has been decided that the payment of a special assessment against school property for street improvements from public school funds is not an unlawful diversion,[10] and that statutes making the salary of a superintendent of public instruction [11] and the insurance on public school property [12] payable out of the public school funds are valid. It has also been decided that a part of a fund provided by statute for the building of an annex to a state normal school may be used to procure and pay for the ground on which such annex is to be erected.[13] The fact that the term for which the teachers of a public school have agreed to teach is not yet ended will not prevent them from maintaining a suit to prevent the superintendent of schools from misapplying the school fund from which they are paid.[14]

(III) *EFFECT OF ALTERATION OF SCHOOL-DISTRICTS.*[15] It has been decided that where a new school-district is created out of a part of an existing one the new district is entitled to a *pro rata* share of the school fund belonging to the old district.[16] But where an attempted change in the boundaries of school-districts is absolutely void the proper officers must apportion school funds precisely as if no such change of boundaries had been attempted.[17] Where a portion of a school-district is incorporated as a city or town, the fact that the trustees of the district continue to maintain, as before, for the benefit of the children of their district a school within the territory included in the city or town does not entitle such district to a portion of the school fund of the county, in the absence of any school in the portion of the district not included in such newly incorporated city or town.[18]

**c. Administration, Preservation, and Investment** — (I) *IN GENERAL.* Although school funds cannot be diverted from the purpose for which they were created the administrators of such funds and the mode of their administration may be changed.[19] Under a constitutional requirement that the expense of investing

Rep. 1021, 117 Am. St. Rep. 599, 69 L. R. A. 592 (holding that a prayer offered at the opening of a public school, imploring the aid and presence of the Heavenly Father during the day's work, asking for wisdom, patience, mutual love, and respect, looking forward to a heavenly reunion after death, and concluding in Christ's name, is not sectarian, and does not make the school a "sectarian school," within Const. § 189, prohibiting the appropriation of educational funds in aid of sectarian schools); Otken *v.* Lamkin, 56 Miss. 758; Nance *v.* Johnson, 84 Tex. 401, 19 S. W. 559.

9. Milford *v.* Simpson, 11 Ind. 520.

10. Chicago *v.* Chicago, 207 Ill. 37, 69 N. E. 580.

11. State *v.* Westerfield, 24 Nev. 29, 49 Pac. 554.

12. Bryan *v.* Perry Bd. of Education, 7 Okla. 160, 54 Pac. 409; Oklahoma County School Dist. No. 5 *v.* Hopkins, 7 Okla. 154, 54 Pac. 437.

13. Kepley *v.* Prather, 52 Kan. 9, 33 Pac. 958.

14. Underwood *v.* Wood, 93 Ky. 177, 19 S. W. 405, 14 Ky. L. Rep. 129, 15 L. R. A. 825.

15. See *infra*, III, C, 2, a.

16. Towle *v.* Brown, 110 Ind. 599, 10 N. E. 628; Lower Allen Tp. School Dist. *v.* Shiremanstown School Dist., 91 Pa. St. 182; Porter *v.* State, 78 Tex. 591, 14 S. W. 794; Cassville *v.* Morris, 14 Wis. 440. *Compare* Merritt *v.* Arkansas County School-Dist. No. 9, 54 Ark. 468, 16 S. W. 287; People *v.* School Trustees, 86 Ill. 613.

**Apportionment made before new district created.**—Where a new district has been created, taking a certain number of children from an old one, the state superintendent having already apportioned the public fund among the counties on the previous year's enumeration, the new district cannot, by mandamus, compel the old one to draw a warrant in its favor on the county treasurer for a share of the fund proportioned to the number of children taken. State *v.* Vernon County School-Dist. No. 15, 90 Mo. 395, 2 S. W. 420.

In **Wisconsin** a newly formed school-district whose report does not show it to have maintained a school is not entitled to share in the town school fund, the apportionment of which, under Rev. St. § 558, can be made only to such districts as have maintained a school for at least six months during the year past. Harmony, etc., Joint School Dist. No. 8 *v.* Harmony School Dist. No. 5, 92 Wis. 608, 66 N. W. 794.

17. State *v.* Grimshaw, (Mo. 1886) 1 S. W. 363.

18. Bay View School Dist. *v.* Linscott, 99 Cal. 25, 33 Pac. 781.

19. Mobile School Com'rs *v.* Putnam, 44 Ala. 506. See also Harrodsburg *v.* Harrodsburg Educational Dist., 7 S. W. 312, 9 Ky. L. Rep. 605.

managing, and collecting the school fund shall be borne by the counties, counties are liable for money paid out of the fund for collecting and disbursing money belonging to the fund.[20] An act providing for keeping a proportionate share of the school fund in each county does not violate a constitutional provision that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law."[21] A school-district may maintain a suit for the school fund and it is not necessary that the children of the district be before the court;[22] but it cannot sue the superintendent of schools of the county on the ground that he turned over an unexpended balance to the credit of the school-district to the unappropriated school fund of the county, as a school-district has no proprietary right to the money to its credit in the treasury.[23] Persons appointed trustees of a school fund acquire no right or title to such fund as against the districts appointing them, but they are the agents of the districts appointing them and for whose benefit they hold the fund.[24] Constitutional requirements as to the preservation and inviolability of the public school funds[25] must be observed by state legislatures or their enactments will be invalid.[26] The inhabitants of a school-district for the time being cannot dispose of or in any way impair the district school fund. They are the passive recipients of its increase for the use of schools as long as they are inhabitants of the district, but those who are to come after them have as much right to it as they have, and it is the policy of the law to preserve it for them.[27] In making loans and investments of public school funds constitutional and statutory provisions[28] must be complied with. They

20. Rush County *v.* State, 103 Ind. 497, 3 N. E. 165.

21. Smith *v.* Speed, 50 Ala. 276.

22. Anderson County *v.* Hays, 99 Tenn. 542, 42 S. W. 266.

23. Gridley School Dist. *v.* Stout, 134 Cal. 592, 66 Pac. 785.

24. Goulding *v.* Peabody, 170 Mass. 483, 49 N. E. 752.

25. See the constitutions of the several states. And see Hamilton County *v.* State, 122 Ind. 333, 24 N. E. 347.

26. *Colorado.*— *In re* Loan of School Fund, 18 Colo. 195, 32 Pac. 273, holding that an act providing for a loan of a part of the public school fund to the general revenue funds for certain years, without providing any more definite time, means, or security, for the repayment thereof, than that payment shall be made out of the "excess revenue for the years 1892 and subsequent years and not otherwise appropriated" is unconstitutional.

*Idaho.*— State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112.

*Indiana.*— Howard County *v.* State, 120 Ind. 282, 22 N. E. 255, holding that an act providing that the county auditor's report of the amount of school funds held in trust, when approved by the superintendent of public instruction, shall be taken as conclusive evidence of the facts therein contained, is unconstitutional, as such action may preclude the securing of all the money belonging to such fund, or the requiring the counties to discharge the duties imposed upon them in relation thereto.

*Kentucky.*— See Morganfield Public School *v.* Thomas, 15 S. W. 670, 12 Ky. L. Rep. 832.

*Louisiana.*— Sun Mut. Ins. Co. *v.* Board of Liquidation, 31 La. Ann. 175 (holding that an act abolishing the free school fund is unconstitutional, and any sale of bonds of said fund thereunder is utterly void, even as to a *bona fide* assignee for value before maturity); State *v.* Board of Liquidators, 29 La. Ann. 77.

*Montana.*— State *v.* Rice, 33 Mont. 365, 83 Pac. 874.

*Nebraska.*— State *v.* Bartley, 41 Nebr. 277, 59 N. W. 907, holding that an act authorizing the state treasurer to pay warrants drawn against other funds out of the permanent school fund, and to hold them as an investment of the permanent school fund, is void, as authorizing a transfer of that fund to other funds within the prohibition of Const. art. 8, § 9.

*New York.*— People *v.* Allen, 1 Alb. L. J. 123, holding that the right to determine what shall be adequate security for the investment of the public school fund rests with the legislature.

*Tennessee.*—Governor *v.* McEwen, 5 Humphr. 241, holding that a statute appointing commissioners to settle and compromise suits against the superintendent of public instruction, who has misappropriated school funds "upon principles of right and justice towards the securities and to the best interest of the school fund," and directing that their report shall be the judgment of the courts in the pending suits, is not in violation of Const. art. 11, § 10, prohibiting the passage of any law diverting the school fund, or any part thereof, to any use other than the support of common schools.

See 43 Cent. Dig. tit. "Schools and School Districts," § 25.

27. Veal *v.* Chariton County Ct., 15 Mo 412.

28. See the constitutions and statutes of the several states.

must be made by the persons or bodies empowered to do so,[29] and must not exceed the sum allowed by law.[30] Loans must be secured as required,[31] and the securities invested in must be those which are authorized.[32]

**29.** *Indiana.*—Ware *v.* State, 74 Ind. 181 (holding that the county auditor is not a trustee of the congressional township school fund, and a loan made by him therefrom to himself is void, although he has complied with all the formalities required by the statute in such cases); Shoemaker *v.* Smith, 37 Ind. 122 (holding that where a state constitution provides that the general assembly shall invest the school fund not intrusted to the several counties, and shall provide for the distribution of the interest to such counties, the word "invest" covers loans made by the counties, and the fund may be intrusted to the counties for such purposes).

*Mississippi.*— Murray *v.* Smith, 28 Miss. 31, holding that the school fund not appropriated by the school commissioners is to be loaned out by the county treasurer.

*Missouri.*— Montgomery County *v.* Auchley, 103 Mo. 492, 15 S. W. 626, holding that under an act authorizing the county court to invest and manage school funds, and loan them on specified security, such court cannot delegate the power to make loans, or to compromise those already made, without requiring the final approval by the court of the security.

*Nebraska.*— State *v.* Bartley, 40 Nebr. 298, 58 N. W. 966, holding that a statute which attempts to authorize the state treasurer alone to invest moneys in his hands belonging to the permanent educational funds of the state is void, because in conflict with Const. art. 8, § 1, which declares that the governor, secretary of state, treasurer, attorney-general, and commissioner of public lands and buildings shall constitute a board of commissioners for the general management of all funds set apart for educational purposes.

*Oregon.*— Kubli *v.* Martin, 5 Oreg. 436, holding that an act which provides that the county treasurers of the several counties are hereby required to loan the school fund in their respective counties, provided nothing herein shall be construed so as to deprive the state of the right to control the common school fund created by the sale of school lands, is not in violation of Const. art. 8, which provides that the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school lands and for the investment of the funds derived therefrom.

*Texas.*— Boydston *v.* Rockwell County, 86 Tex. 234, 24 S. W. 272, (Civ. App. 1893) 23 S. W. 541.

See 43 Cent. Dig. tit. "Schools and School Districts," § 28.

**30.** State *v.* State Bank, 5 Ind. 353.

**31.** *Alabama.*— Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368.

*Illinois.*— School Trustees *v.* Southard, 31 Ill. App. 359, holding that where a statute requires two or more sureties on a loan of school funds, and there are several signers to a note given for such loan, it will be presumed that such note was executed in conformity with the law, and that at least two of such signers are sureties.

*Mississippi.*— Littlewort *v.* Davis, 50 Miss. 403 (holding that a loan of school fund upon mortgage or other security than that named in the statute is a misapplication of the fund for which the trustees are personally liable, but that the statute does not make the mortgage or other security void); Lindsey *v.* Marshall, 12 Sm. & M. 587 (holding that the trustees of school lands are authorized to loan money only upon personal security, and a loan by them secured by a deed of trust, and lost, although without fault on their part, will be a misapplication of the funds, for which they will be liable.

*Missouri.*— Montgomery County *v.* Auchley, 92 Mo. 126, 4 S. W. 425, 103 Mo. 492, 15 S. W. 626 (holding that under the Missouri statute a bond to secure a loan of the school fund by a county court must contain an agreement for such additional security as may from time to time be ordered by the court, and that where a bond is signed by a surety, as such additional security it relates back to the date of the original execution of the bond, and no new consideration is required); Sharp *v.* Collins, 74 Mo. 266 (holding that under a statute requiring loans of school moneys to be secured by unencumbered real estate, the security is not invalid because of an encumbrance upon the land).

*Texas.*— Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317.

See 43 Cent. Dig. tit. "Schools and School Districts," § 28.

An unsecured promissory note given for a loan of school funds is not rendered void because of a statute requiring such loans to be secured by a mortgage or deed of trust. Edwards *v.* Township 20 School Trustees, 30 Ill. App. 528; Bremer County *v.* Barrick, 18 Iowa 390; Gaines *v.* Faris, 39 Miss. 403.

**32.** *Mississippi.*— State *v.* Vicksburg, etc., R. Co., 51 Miss. 361, holding that where under the act creating a school fund it is to be invested in government or other safe stocks, it is exclusively within the province of the legislature to determine what stocks are safe, and the court cannot interfere.

*Missouri.*— State *v.* State Bank, 45 Mo. 528, holding that investment in the stock, bonds, or other obligations of any state, city, town, or county corporation, is prohibited.

*Nebraska.*— State *v.* Stuefer, 66 Nebr. 381, 92 N. W. 646 (holding that a provision that school funds shall be invested only in United States or state securities does not prevent investment in bonds of other states, running not less than thirty nor more than forty years, with three per cent interest); State *v.* Bartley, 39 Nebr. 353, 58 N. W. 172, 23 L. R. A. 67 (holding that an act requiring the deposit of school funds in banks which

(II) *MORTGAGES TO SECURE LOANS*[33] — (A) *In General.* A school fund mortgage is not void because the loan secured by it was made to a person or upon property not authorized by law,[34] but such mortgage is voidable at the instance of those having supervisory control of the school fund.[35] A mortgage executed to the commissioner of the school fund after the abolition of his office, but to secure a loan from that fund, is valid, the mortgagor being estopped from denying the official character of the grantee.[36] It has been held that a mortgage to a county to secure a loan of school funds is not rendered invalid by reciting that it is for the use of a specified section of school land, instead of for the use of the township to which the fund belonged.[37]

(B) *Sales Under Mortgages.* Sales under school fund mortgages are to be made in accordance with statutory provisions relating thereto;[38] and the statute

are to pay interest is void, when the constitution requires such funds to be invested in United States or state securities); *In re* State Warrants, 25 Nebr. 659, 41 N. W. 636 (holding that state warrants secured by a levy of taxes for their payment are state securities); *In re* School Fund, 15 Nebr. 684, 50 N. W. 272.

*Nevada.*— Klein *v.* Kinkead, 16 Nev. 194, holding that an investment in state bonds issued for the construction of an insane asylum is valid, where school funds can be invested only in United States or state bonds.

*Texas.*— Boydston *v.* Rockwell County, 86 Tex. 234, 24 S. W. 272.

*Washington.*— State *v.* Young, 21 Wash. 391, 58 Pac. 220, holding that state warrants are not state bonds.

See 43 Cent. Dig. tit. "Schools and School Districts," § 28.

**Bonds of a city indebted** to its constitutional limit, issued for the payment of a waterworks plant, payable out of a special fund composed of a fixed per cent of the gross receipts of the plant and such further sum as the city may from time to time by ordinance transfer from the receipts of the plant or from its general revenue, without pledging the credit of the city, are not municipal bonds, within a constitutional provision, permitting the investment of the school fund in "national, state, county, municipal, or school district bonds." State *v.* Clausen, 40 Wash. 95, 82 Pac. 187.

**33. In Indiana** the statute provides that mortgages taken for school fund loans shall be considered to be of record from the date thereof, and shall have priority over all mortgages and conveyances not previously recorded. See Mann *v.* State, 116 Ind. 383, 19 N. E. 181; Stockwell *v.* State, 101 Ind. 1; West *v.* Wright, 98 Ind. 335; Deming *v.* State, 23 Ind. 416.

**In Iowa** it has been held that the statute which provides that "the several boards of supervisors shall hold and manage the securities given to the school fund" is not inconsistent with the statute which requires the mortgages belonging to the fund to be filed in the office of the auditor and he is the lawful custodian. Madison County *v.* Tullis, 69 Iowa 720, 27 N. W. 487.

**In Missouri** under a statute providing that where school funds belonging to a county are loaned, they shall be secured by a bond and a mortgage on land in the county, it has been held that the principal in the bond may substitute another mortgage for the one first given, and that in such a case if the sureties are uninformed of the substitution they are released only to the extent of any injury they may sustain. Lafayette County *v.* Hixon, 69 Mo. 581. And under a statute prescribing the kind of mortgage to be taken for a school fund loan and giving in substance all of its provision, it has been held that while a mortgage, if taken under the statute, must comply with all its provisions, a mortgage not taken thereunder but good at common law is valid. Mann *v.* Best, 62 Mo. 491.

**In Oregon** the state land board, which is authorized to loan the irreducible school fund, may assign a mortgage given to secure such a loan, although such power of assignment is not expressly conferred by statute. Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

**34.** Stockwell *v.* State, 101 Ind. 1 (loan made by county auditor to himself); Deming *v.* State, 23 Ind. 416 [*overruling* State *v.* State Bank, 5 Ind. 353]; Sharp *v.* Collins, 74 Mo. 266 (land previously encumbered).

**35.** State *v.* Levi, 99 Ind. 77 [*limiting* Ware *v.* State, 74 Ind. 181].

**36.** Floyd County *v.* Morrison, 40 Iowa 188.

**37.** Grant *v.* Huston, 105 Mo. 97, 16 S. W. 680.

**38.** See the statutes of the several states. And see School Trustees *v.* Arnold, 58 Ill. App. 103 (as to right of school trustees to buy in the mortgaged premises); Hamilton County *v.* State, 122 Ind. 333, 24 N. E. 347 (as to bidding off premises by auditor); Haynes *v.* Cox, 118 Ind. 184, 20 N. E. 758 (as to sale of portion of mortgaged premises); McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634 (sale at public auction is required); Clark *v.* State, 109 Ind. 388, 10 N. E. 125; Shannon *v.* Hay, 106 Ind. 589, 7 N. E. 376 (as to sale of part of mortgaged premises); Johnson *v.* State, 74 Ind. 588; Bonnell *v.* Ray, 71 Ind. 141 (as to sale of part of mortgaged premises); Cole *v.* Miller, 60 Ind. 463 (as to sale to highest bidder); Arnold *v.* Gaff, 58 Ind. 543; Key *v.* Ostrander, 29 Ind. 1; Williamson *v.* Doe, 7 Blackf.

in force at the time of a sale governs such sale.[39] It has been decided that a person claiming title to lands sold under such a mortgage has the burden of showing that the sale conformed strictly to the statutory requirements as otherwise it is wholly void;[40] but that where the mortgagor seeks to recover lands so sold he has the burden of proving that the statutory requirements were not complied with in making such sale.[41] In Indiana, under the statute specifically authorizing the auditor to sell land, mortgaged to secure a school fund loan, and to execute a deed to the purchaser, the purchaser takes a full title and there is no right of redemption by junior mortgagees.[42]

(III) *INTEREST ON LOANS.*[43] The rate of interest on school fund loans depends upon the statutory provisions on the subject.[44] A school fund loan secured by mortgage draws interest after as well as before maturity.[45] A county court, having loaned district school funds at a certain rate, cannot, upon the application of the inhabitants of the district, reduce the rate.[46]

(IV) *PAYMENT OF LOANS AND RELEASE OR DISCHARGE OF SECURITY.* Where the borrower of school funds has repaid them to one officer he cannot be held liable therefor, on the ground that he should have paid them to another officer, where the officer who received the money paid it to the proper officer.[47] But payment of a school fund loan secured by mortgage to an officer who is not authorized to receive payment and who does not pay the money to the proper officer will not release the mortgage.[48] Payment of a school fund loan to an officer who has been removed will not avail a debtor who was aware of such removal at the time of payment.[49] The penalty imposed by the Illinois school law for failing to make prompt payment of a school fund loan is imposed only on the borrower and not upon a subsequent purchaser of the premises mortgaged to secure the loan.[50] School fund mortgages can be released or discharged only by the officers and in the way prescribed by statute.[51] The rule that a surety will be discharged whenever the creditor commits acts which operate to his injury or disadvantage does not apply where the creditor is the state or its agents, and

(Ind.) 12; Carter *v.* Sherman, 63 Iowa 689, 16 N. W. 707; Krebs *v.* Dodge, 9 Wis. 1 (as to bidding off premises by commissioners).

**Notice of sale** see Bonnell *v.* Ray, 71 Ind. 141; Jones *v.* Hopkins, 26 Ind. 450; Webb *v.* Moore, 25 Ind. 4.

**Necessity for stating compliance in deed.**— A school commissioner's deed on the sale of land mortgaged to secure a loan of school funds is not evidence that he has taken the steps pointed out by the statute in the event of such a sale, where the deed does not state specifically that he has taken such steps. Williamson *v.* Doe, 7 Blackf. (Ind.) 12.

In Missouri the statute prescribes the requisites of school mortgages, requires them to authorize the sheriff to sell in case of default, and prescribes what notice shall be given, when the sale shall be made, etc. See Benton County *v.* Morgan, 163 Mo. 661, 64 S. W. 119 (holding that the failure of the sheriff to notify a school fund mortgagor, he being a non-resident of the county, of the intended sale of the property after default, is a mere irregularity not vitiating the sale); Snyder *v.* Chicago, etc., R. Co., 131 Mo. 568, 33 S. W. 67; Grant *v.* Huston, 105 Mo. 97, 16 S. W. 680 [*distinguishing* Wilcoxon *v.* Osborn, 77 Mo. 621; McClurg *v.* Dollarhide, 51 Mo. 347] (holding that while sales under these statutory mortgages must be made during sessions of court, yet where a school fund mortgage contains other provisions prescribing the notice, time, place, manner, and terms of sale, and declaring that the sheriff's deed shall be as effectual as if made under judgment of a court, it is valid as a common-law mortgage, and a sale thereunder when the court is not in session confers a valid title); Hurt *v.* Kelly, 43 Mo. 238.

**39.** McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

**40.** Benefiel *v.* Aughe, 93 Ind. 401.

**41.** Bonnell *v.* Ray, 71 Ind. 141.

**42.** Schnantz *v.* Schellhaus, 37 Ind. 85.

**43.** See, generally, INTEREST, 22 Cyc. 1459.

**44.** See the statutes of the several states. And see Ware *v.* Kelley, 22 Ark. 441; Township 27 School Trustees *v.* Bibb, 14 Ill. 371; Fulwiler *v.* Zern, 38 Ind. 208; State *v.* Hendershott, 21 Iowa 437.

**45.** Stockwell *v.* State, 101 Ind. 1.

**46.** Veal *v.* Chariton County Ct., 15 Mo. 412.

**47.** Poweshiek County *v.* Allen, 90 Iowa 195, 57 N. W. 706.

**48.** Knox County *v.* Goggin, 105 Mo. 182, 16 S. W. 684.

**49.** Jameson *v.* Conway, 10 Ill. 227.

**50.** Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564.

**51.** See the statutes of the several states. And see Snodgrass *v.* Morris, 123 Ind. 425, 24 N. E. 151; Madison County *v.* Kridler, 56 Iowa 32, 8 N. W. 682; Knox County *v.*

the state is not affected by the laches of its agents in the management and care of school funds, and so a surety for a loan thereof can claim no relief on account of such laches.[52]

(v) *Enforcement of Obligations.* The state,[53] the county,[54] or some public officer [55] may be the party in whose name a suit or action to collect a school loan or to enforce a bond or note given therefor should be brought. A declaration on a note given for a loan of school money under a statute authorizing loans of school money on interest and providing a penalty in case loans are not paid must, in order to authorize a recovery of the penalty, allege that the note was given for school money and specially claim the penalty.[56] Suits brought to foreclose mortgages given to secure school fund loans [57] are subject to the same defenses as like suits upon other mortgages.[58] Where a note payable to a common school commissioner or his successor is sued on by his successor, it is no defense that the note was given for money to be used by the commissioner himself, upon his promise to indemnify the makers, which he failed to do.[59]

(vi) *Powers, Duties, and Liabilities of School Officials.*[60] Under the authority of the board of school directors of a district the treasurer of the board may make a valid sale of the warrants of the state which represent that portion of the interest on the free school fund due said district.[61] A state board of land commissioners has power to make legal contracts in loaning the school fund, but cannot bind the state beyond the authority given them by law.[62] Whether a railroad company applying for a loan out of the school fund is such that its application can be entertained is a jurisdictional fact upon which the power of the school commissioners in the premises depends, and upon which therefore their determination is not final.[63] The treasurer of a board of school trustees who lends the money of a school-district, and receives promissory notes from the borrowers, cannot compel his successor in office to receive such notes as money, although the loans were made upon the advice of the board of school trustees.[64] Officials intrusted with school funds may be required to give a bond therefor.[65] A loan of school funds upon other security than that required by law is a misapplication of such funds for which the officials making the loan are personally liable.[66] Where an official charged with loaning school funds is required to take security in real estate of treble the value of the amount of school funds loaned, the duty is performed if he has availed himself of the best means of forming a correct opinion of the value of the property, and believes it adequate.[67] But if such an official relying entirely upon the judgment of the board of school directors, and against his own judgment, loans school funds upon insufficient security, and a loss occurs,

Goggin, 105 Mo. 182, 16 S. W. 684; American Dock, etc., Co. *v.* Public Schools, 35 N. J. Eq. 181.

**52.** Ray County *v.* Bentley, 49 Mo. 236.

**53.** Williams *v.* State, 37 Ark. 463; Lopp *v.* Woodward, 1 Ind. App. 105, 27 N. E. 575.

**54.** Lafayette County *v.* Hixon, 69 Mo. 581.

**55.** Scotten *v.* State, 51 Ind. 52; Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54.

**56.** Sexton *v.* Gallatin County School Com'rs, 19 Ill. 51; Township 27 School Trustees *v.* Bibb, 14 Ill. 371; Bradley *v.* Snyder, 14 Ill. 263, 58 Am. Dec. 564; Hamilton *v.* Wright, 2 Ill. 582.

**57.** See Board of Trustees *v.* Davison, 65 Ill. 124; Ferris *v.* Cravens, 65 Ind. 262.

**58.** American Dock, etc., Co. *v.* Public Schools, 35 N. J. Eq. 181. *Compare* Emmet County *v.* Skinner, 48 Iowa 244, holding that in an action by a county to foreclose a school fund mortgage, defendant, who was the grantee of the mortgagor, could not defeat the action by showing that he had made application for a loan from the school fund, and that the application was wrongfully refused.

**59.** Ware *v.* Kelly, 22 Ark. 441.

**60.** See *supra*, III, B, 2, c, (I).

**61.** Concordia Parish School Directors *v.* Hernandez, 31 La. Ann. 158.

**62.** State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112.

**63.** Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317.

**64.** Hiatt *v.* State, 110 Ind. 472, 11 N. E. 359.

**65.** See the statutes of the several states. And see Kempner *v.* Galveston County, 73 Tex. 216, 11 S. W. 188.

**66.** Littlewort *v.* Davis, 50 Miss. 403; Lindsey *v.* Marshall, 12 Sm. & M. (Miss.) 587.

**67.** Greene County *v.* Bledsoe, 12 Ill. 267.

his official bond is liable therefor.[68] A collector of money due the common school fund is responsible for a negligent failure to collect money which he might have collected by ordinary diligence.[69] But if in collecting such money he receives funds current at the time and place of reception, but which soon after, through unforeseen events, became greatly depreciated, the loss does not fall on him or his subordinate agents.[70] A public official charged with the distribution of the public school income fund is not liable for a delay in making such distribution where it does not appear that any loss has been sustained by the schools thereby;[71] nor is he liable for a failure to distribute among the counties entitled thereto, within the time required by law, certain funds, which are afterward lost through the defalcation of the state treasurer.[72] But he is liable for a failure to make, at the time required by law, an estimate of the permanent school fund, and to notify the county auditors thereof, thereby causing the funds to remain uninvested, and a consequent loss of interest; and if the loss of interest was not caused by the failure to make such estimate, he is liable for at least nominal damages.[73] Where an official whose duty it is to rent school lands fails to report and pay over the rents, he is chargeable with interest.[74] Although a school official may have paid the money of a school-district to a person not authorized to receive it, still, if he be ready to pay the draft of the school trustees when presented, his duty on the subject will be discharged.[75] Where it is provided by a state constitution that certain state officers shall constitute a board for the sale of school lands and the investment of the proceeds, in an action by such officers for damages sustained by reason of a false certificate as to the title of land offered as security for a loan, their legal capacity to sue need not be alleged;[76] and in such action a complaint which alleges that such officers retained one to examine and report on the condition of the title to the property offered as security; that he accepted the retainer; that he neglected his duty, and represented that the security offered was good; that such officers, induced by his representations, advanced money on the security offered; and that the security was bad, by means of which such officers sustained damage, states a good cause of action.[77]

**C. Creation, Alteration, Existence, and Dissolution of School-Districts — 1. Incorporation, Organization, Creation, Formation,[78] and Alteration — a. Nature and Status as Corporations.** It is well settled that school-districts[79]

**68.** St. Clair County *v.* Baker, 34 Ill. App. 620.

**69.** Governor *v.* McEwen, 5 Humphr. (Tenn.) 241.

**70.** Governor *v.* McEwen, 5 Humphr. (Tenn.) 241.

**71.** State *v.* Ruth, 9 S. D. 84, 68 N. W. 189.

**72.** State *v.* Ruth, 9 S. D. 84, 68 N. W. 189.

**73.** State *v.* Ruth, 9 S. D. 84, 68 N. W. 189.

**74.** Bullock *v.* Governor, 2 Port. (Ala.) 484.

**75.** State *v.* Wright, 8 Blackf. (Ind.) 65.

**76.** Pennoyer *v.* Willis, (Oreg. 1893) 32 Pac. 57.

**77.** Pennoyer *v.* Willis, (Oreg. 1893) 32 Pac. 57.

**78.** The words "establish," "create," "form," and "organize," when used in reference to school-districts, are practically synonymous. State *v.* Blue Earth County School Dist. No. 152, 54 Minn. 213, 55 N. W. 1122.

"Organization" means formation and includes everything necessary to the creation of a school-district, or bringing it into being. State *v.* Blue Earth County School Dist. No. 152, 54 Minn. 213, 55 N. W. 1122.

"Organized" means the same as incorporated. State *v.* Power, 5 S. D. 627, 59 N. W. 1090. "Organized," as applied to a school-district, in a statute providing for the expenditure of school money by town officers rather than district officers, implies a district originally and specially created by legislative act, with special powers made a part of or at least coeval with the organization. Gorham School Dist. No. 1 *v.* Deering, 91 Me. 516, 40 Atl. 541.

**79.** *California.*— Denman *v.* Webster, 139 Cal. 452, 73 Pac. 139.

*Dakota.*— School Dist. No. 61 *v.* Alderson, 6 Dak. 145, 41 N. W. 466.

*Illinois.*— Bush *v.* Shipman, 5 Ill. 186.

*Indiana.*— See Teeple *v.* State, 171 Ind. 268, 86 N. E. 49.

*Kansas.*— State *v.* Downs, 60 Kan. 788, 57 Pac. 962; Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235; Knowles *v.* Topeka Bd. of Education, 33 Kan. 692, 7 Pac. 561; Beach *v.* Leahy, 11 Kan. 23.

*Maine.*— Dresden School Dist. No. 6 *v.*

and boards of school trustees [80] are quasi-corporations, and that they are public as distinguished from private corporations.[81] But as to whether or not they are municipal corporations there is considerable conflict of authority; some of the cases holding them to be so, at least for certain purposes,[82] and some of them holding otherwise.[83] A school-district is a distinct corporation from a city,[84] or town-

Ætna Ins. Co., 54 Me. 505. See also Whitmore *v.* Hogan, 22 Me. 564.

*Minnesota.*— Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439.

*New Hampshire.*— Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58. *Compare* Foster *v.* Lane, 30 N. H. 305.

*New York.*— Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. 175.

*Ohio.*— State *v.* Powers, 38 Ohio St. 54.

*Pennsylvania.*— Pittsburg *v.* Sterrett Subdist. School, 204 Pa. St. 635, 54 Atl. 463, 61 L. R. A. 183. *Compare* Com. *v.* Beamish, 81 Pa. St. 389, holding that a school officer who mutilates its books is not liable under a statute punishing the officer of a corporate body for mutilating the books thereof.

*Rhode Island.*— Cranston, Petitioner, 18 R. I. 417, 28 Atl. 608; Bull *v.* Woonsocket School Committee, 11 R. I. 244.

*Vermont.*— See North Troy Graded School Dist. *v.* Troy, 80 Vt. 16, 66 Atl. 1033.

*Washington.*— See Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110.

*Wisconsin.*— Stroud *v.* Stevens Point, 37 Wis. 367; Janesville School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

*United States.*— Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; National Waterworks Co. *v.* Kansas City School-Dist. No. 7, 48 Fed. 523.

See 43 Cent. Dig. tit. "Schools and School Districts," § 39.

80. People *v.* Dupuyt, 71 Ill. 651; Clinton County School Trustees *v.* Tatman, 13 Ill. 27; Littlewort *v.* Davis, 50 Miss. 403; Landis *v.* Ashworth, 57 N. J. L. 509, 31 Atl. 1017. But *compare* Bassett *v.* Fish, 75 N. Y. 303, holding a board of education to be a complete and not merely a quasi-corporation.

81. Hughes *v.* Ewing, 93 Cal. 414, 28 Pac. 1067; Bush *v.* Shipman, 5 Ill. 186; Monticello School Town *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139; Brown *v.* Newport Bd. of Education, 108 Ky. 783, 57 S. W. 612, 22 Ky. L. Rep. 483.

82. *California.*— Los Angeles City School Dist. *v.* Longden, 148 Cal. 380, 83 Pac. 246; Hughes *v.* Ewing, 93 Cal. 414, 28 Pac. 1067, both holding a school-district to be a corporation of a quasi-municipal character.

*Indiana.*— Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

*Kansas.*— State *v.* Wilson, 65 Kan. 237, 69 Pac. 172, holding that a school-district is a municipality within the meaning of the eight-hour law.

*Maine.*— Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

*Massachusetts.*— Whitney *v.* Stow, 111 Mass. 368; Gaskill *v.* Dudley, 6 Metc. 546, 39 Am. Dec. 750.

*Michigan.*— People *v.* Port Huron Bd. of Education, 39 Mich. 635.

*Minnesota.*— Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

*Mississippi.*— Connell *v.* Woodard, 5 How. 665, 37 Am. Dec. 173.

*New Jersey.*— Trenton Public Instruction Com'rs *v.* Fell, 52 N. J. Eq. 689, 29 Atl. 816, holding that a school-district is a municipal corporation within the statutes as to public improvements.

*New York.*— Brownville Union Free School Dist. No. 1 *v.* Glen Park, 109 N. Y. App. Div. 414, 96 N. Y. Suppl. 428, holding that a union free school district, although a municipal corporation entitled to sue, can only maintain actions relating to its functions and hence cannot obtain an injunction to restrain a village within its limits from separating from the district.

*North Carolina.*— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524, holding that a school-district is a municipal corporation within the constitutional provision that no tax shall be levied unless by a vote of the qualified voters.

*Vermont.*— Tileston *v.* Newman, 23 Vt. 421.

*Washington.*—State *v.* Grimes, 7 Wash. 270, 34 Pac. 836 (holding that a school-district is a municipal corporation within the constitutional provision that the school fund "may be invested in national, state, county or municipal bond"); Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110 (holding that a statute requiring municipal corporations to require bonds from contractors applies to school-districts).

See 43 Cent. Dig. tit "Schools and School Districts," § 39.

83. *Illinois.*— People *v.* School Trustees, 78 Ill. 136.

*Iowa.*— Sheridan Dist. Tp. *v.* Frahm, 102 Iowa 5, 70 N. W. 721.

*Kansas.*— Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235, holding that the term "municipal corporations," properly speaking, only includes cities, towns, and villages, and does not embrace school-districts; but these latter belong to the same class as counties and townships.

*Kentucky.*— Brown *v.* Newport Bd. of Education, 108 Ky. 783, 57 S. W. 612, 22 Ky. L. Rep. 483.

*Missouri.*— Heller *v.* Stremmel, 52 Mo. 309.

*Pennsylvania.*—Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358.

*United States.*— Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566.

See 43 Cent. Dig. tit. "Schools and School Districts," § 39.

84. *California.*— Los Angeles City School Dist. *v.* Longden, 148 Cal. 380, 83 Pac. 246;

ship,[85] although their territorial limits may be the same.[86] School-districts are corporations created for a special purpose, and have only the powers expressly granted to them and those that are necessary to accomplish the objects for which they are created. In the discharge of their duties and the exercise of the powers granted they are governed and restrained by the provisions of the law creating them.[87]

**b. Power to Organize, Etc., or Alter** — (i) *IN GENERAL.* The power to organize, establish, or lay off new school-districts, or to divide, change the boundaries, or otherwise alter existing districts is vested primarily in the legislature,[88] which may act without the assent of the inhabitants of the affected territory.[89]

San Diego *v.* Dauer, 97 Cal. 442, 32 Pac. 561.

*Michigan.*— People *v.* Port Huron Bd. of Education, 39 Mich. 635 (holding that the board of education of a city is a municipal corporation whose members are not city officers removable by the common council); Board of Education *v.* Detroit, 30 Mich. 505 (holding that a board of education is a distinct corporation from a city).

*Missouri.*— Buchanan County School Dist. No. 7 *v.* St. Joseph School Dist., 184 Mo. 140, 82 S. W. 1082; State *v.* Henderson, 145 Mo. 329, 46 S. W. 1076.

*New Jersey.*— Industrial School Dist. *v.* Whitehead, 13 N. J. Eq. 290.

*Ohio.*— Board of Education *v.* Board of Education, 41 Ohio St. 680, holding that where a high school was established according to the then existing statutes, and was thereby vested in the township board, on the forming of that territory into an incorporated village, the property and management of the school did not pass to the board of education of the incorporated village.

*Wisconsin.*— State *v.* Wolfrom, 25 Wis. 468, holding that where a village incorporated by the legislature includes only a part of the territory of a school-district, in the absence of a declared intention to the contrary, the organization of the district is not destroyed, but it becomes a joint district, the school taxes to be collected by the authorities of each portion for common use.

*United States.*— National Waterworks Co. *v.* Kansas City School-Dist. No. 7, 48 Fed. 523.

See 43 Cent. Dig. tit. "Schools and School Districts," § 40.

**85.** Teeple *v.* State, 171 Ind. 268, 86 N. E. 49; Hornby *v.* State, 69 Ind. 102; McLaughlin *v.* Shelby Tp., 52 Ind. 114; Heizer *v.* Yohn, 37 Ind. 415; North Troy Graded School Dist. *v.* Troy, 80 Vt. 16, 66 Atl. 1033.

**86.** Los Angeles City School Dist. *v.* Longden, 148 Cal. 380, 83 Pac. 246; Hornby *v.* State, 69 Ind. 102; McLaughlin *v.* Shelby Tp., 52 Ind. 114; Heizer *v.* Yohn, 37 Ind. 415.

**87.** *California.*— Denman *v.* Webster, 139 Cal. 452, 73 Pac. 139.

*Dakota.*— Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767; School Dist. No. 61 *v.* Alderson, 6 Dak. 145, 41 N. W. 466.

*Indiana.*— See Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

*Kansas.*— State *v.* Downs, 60 Kan. 788, 57 Pac. 962.

*Minnesota.*— Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

*New Hampshire.*— Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58.

*New York.*— Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. 175.

*Oklahoma.*— Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482.

*United States.*— Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669.

See 43 Cent. Dig. tit. "Schools and School Districts," § 39.

**88.** *Illinois.*— Schofield *v.* Watkins, 22 Ill. 66. See also Greenleaf *v.* Township No. 41 Trustees, 22 Ill. 236.

*Iowa.*— Fairview Independent School Dist. *v.* Burlington Independent School Dist., 139 Iowa 249, 117 N. W. 668; Fairview Independent Dist. *v.* Durland, 45 Iowa 53, holding that school-districts, whether they are independent school-districts or township school-districts, are creatures of statute and may be altered in such manner as the legislature may deem advisable.

*Michigan.*—Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289; Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391; Oshtemo Tp. School Dist. No. 13 *v.* Dean, 17 Mich. 223. See also Keweenaw Assoc. *v.* Hancock Tp. School-Dist. No. 1, 98 Mich. 437, 57 N. W. 404.

*Minnesota.*— Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439.

*North Carolina.*— McLeod *v.* Carthage, 148 N. C. 77, 61 S. E. 605; Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

*Oklahoma.*— Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482.

*Pennsylvania.*— Wolf's Appeal, 58 Pa. St. 471.

*Texas.*— State *v.* Norwood, 24 Tex. Civ. App. 24, 57 S. W. 875.

*Vermont.*— Barre *v.* Barre School Dist. No. 13, 67 Vt. 108, 30 Atl. 807, holding that a change of territorial limits amounts simply to a change of trustees.

*West Virginia.*— Kuhn *v.* Wellsburg Bd. of Education, 4 W. Va. 499.

See 43 Cent. Dig. tit. "Schools and School Districts," § 53. See also CONSTITUTIONAL LAW, 8 Cyc. 903 note 5.

**89.** Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289; Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482; Kuhn *v.* Wellsburg Bd. of Education, 4

And indeed this power on the part of the legislature has been very frequently exercised in many instances.[90]

(II) *DELEGATION OF POWER* — (A) *In General.* The power to establish new school-districts, or to alter existing ones, may be delegated by the legislature to subordinate agencies or officers;[91] and in most jurisdictions this has been done.[92] When the power to exercise the authority is made to depend upon the performance of certain conditions, such as the signing of a petition by a certain

W. Va. 499. See also State *v.* Norwood, 24 Tex. Civ. App. 24, 57 S. W. 875.

**90.** See the statutes of the several states. And see the following cases:

*Georgia.*— Edalgo *v.* Southern R. Co., 129 Ga. 258, 58 S. E. 846.

*Maine.*— Tucker *v.* Wentworth, 35 Me. 393.

*Michigan.*— Johnston *v.* Cathro, 51 Mich. 80, 16 N. W. 241.

*Minnesota.*— School Dist. No. 1 *v.* Eckert, 84 Minn. 417, 87 N. W. 1019.

*Missouri.*— State *v.* Fry, 186 Mo. 198, 85 S. W. 328; Buchanan County School Dist. No. 7 *v.* St. Joseph School Dist., 184 Mo. 140, 82 S. W. 1082; McManning *v.* Farrar, 46 Mo. 376.

*New Hampshire.*—Pickering *v.* Coleman, 53 N. H. 424.

*New Jersey.*— Conover *v.* Parker, 57 N. J. L. 631, 31 Atl. 769.

*Ohio.*— Fulks *v.* Wright, 72 Ohio St. 547, 75 N. E. 55; Scott *v.* McCullough, 72 Ohio St. 538, 75 N. E. 52 (both cases construing statutes providing for the formation of special school-districts); Anders *v.* Spargur, 19 Ohio St. 577; Bryant *v.* Goodwin, 9 Ohio St. 471.

*Pennsylvania.*— Colvin *v.* Beaver, 94 Pa. St. 388; Claysville Burrough School Dist. *v.* Worrell, 37 Pa. Super. Ct. 10.

*Texas.*— State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723; Swenson *v.* McLaren, 2 Tex. Civ. App. 331, 21 S. W. 300.

See 43 Cent. Dig. tit. "Schools and School Districts," § 41.

**91.** Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482.

**92.** See the statutes of the several jurisdictions. And see Mooney *v.* Tulare County, 2 Cal. App. 65, 83 Pac. 165; Scoville *v.* Mattoon, 55 Conn. 144, 10 Atl. 511; School Dist. No. 61 *v.* Alderson, 6 Dak. 145, 41 N. W. 466; Bloomfield School Tp. *v.* Castalia Independent School Dist., 134 Iowa 349, 112 N. W. 5; Steele *v.* Glen Park, 119 N. Y. App. Div. 918, 105 N. Y. Suppl. 1144 [*affirmed* in 193 N. Y. 341, 86 N. E. 26]; Moss *v.* Huntsburg Special School Dist. No. 1, 58 Ohio St. 354, 50 N. E. 921; *In re* Wilson, 21 Ont. App. 585, 24 Can. Sup. Ct. 706; McFee *v.* Dundar, 10 U. C. C. P. 94; *In re* Chamberlain, 45 U. C. Q. B. 26; *In re* Tyrell, 35 U. C. Q. B. 247, holding that under 34 Vict. c. 33, the county council has implied power to change the limits of a high school-district from time to time, and not merely once, or when an additional school is established.

See 43 Cent. Dig. tit. "Schools and School Districts," § 59½.

**Power of towns or townships** see Groton First School Dist. *v.* Eighth School Dist., 78 Conn. 71, 61 Atl. 234; Sixteenth School Dist. *v.* Eighteenth School Dist., 54 Conn. 50, 5 Atl. 609; Tucker *v.* Wentworth, 35 Me. 393; Adams *v.* Crooks, 7 Gray (Mass.) 411; Fry *v.* Athol First School Dist., 4 Cush. (Mass.) 250; Waldron *v.* Lee, 5 Pick. (Mass.) 323; Alton School Dist. No. 2 *v.* Gilman, 3 N. H. 168; State *v.* Norwood, 24 Tex. Civ. App. 24, 57 S. W. 875, holding that a town may change the boundaries of a district without the consent of the majority of the legal voters of the district.

**Power of school trustees, directors, inspectors, commissioners, committeemen, etc.,** see Bourland *v.* Snyder, 224 Ill. 478, 79 N. E. 568 (holding that a statute conferring power on school trustees to divide or consolidate districts gives them power to create a new district by dividing an existing one); School Trustees *v.* People, 76 Ill. 621; Glencoe Bd. of Education *v.* School Trustees, 74 Ill. App. 401 [*affirmed* in 174 Ill. 510, 51 N. E. 656] (holding that the records of trustees must show the jurisdictional facts upon the existence of which their power to act depends); Schaefer *v.* People, 20 Ill. App. 605; Potter *v.* School Trustees, 10 Ill. App. 343; Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933; State *v.* Wilson, 149 Ind. 253, 48 N. E. 1030; Mum *v.* Soap Creek School Tp., 110 Iowa 652, 82 N. W. 323; Center Dist. Tp. *v.* Lansing Independent Dist., 82 Iowa 10, 47 N. W. 1033; Morgan *v.* Wilfley, 70 Iowa 338, 30 N. W. 606; Mt. Vernon Independent Dist. *v.* Harris Grove Independent Dist., 65 Iowa 590, 22 N. W. 689; Smelzer *v.* Big Prairie Tp. School Inspectors, 125 Mich. 666, 85 N. W. 94; Coulter *v.* School Inspectors, 59 Mich. 391, 26 N. W. 649; Clement *v.* Everest, 29 Mich. 19 (holding that the fact that school inspectors are interested parties, as taxpayers and residents of the district, does not affect the validity of their action in changing the boundaries of such district); Oshtemo Tp. School Dist. No. 13 *v.* Dean, 17 Mich. 223; People *v.* Davidson, 2 Dougl. (Mich.) 121; State *v.* Riley, 85 Mo. 156 (holding that a county school commissioner cannot change the boundaries of a school-district otherwise than as proposed in the election held to submit the question of such change); State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537; State *v.* Browning, 28 N. J. L. 556; State *v.* Reeves, 28 N. J. L. 520; Langto *v.* Raymond, 90 N. Y. App. Div. 614, 86 N. Y. Suppl. 182; Canton Union School *v.* Meyer, 9 Ohio St. 580; Wayne Tp. Bd. of Education *v.* Clark, 6 Ohio Cir. Ct.

number of voters or the like, the agent or officer cannot act until such conditions have been complied with,[93] and cannot refuse to act when they have been.[94]

(B) *Appeal and Review* — (1) IN GENERAL. Where authority to establish or alter school-districts is delegated to subordinate agencies or officers, provision is made by statute in many jurisdictions for appeals from their action.[95] But in the absence of statute authorizing it the courts will not interfere with the action of school trustees and like officials in forming or altering school-districts, unless

599, 3 Ohio Cir. Dec. 604; State *v.* Raine, 4 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 426; Bd. of Education *v.* Bowen, 8 Ohio Dec. (Re-Print) 548, 8 Cinc. L. Bul. 312; Conley *v.* West Deer Tp. School Directors, 32 Pa. St. 194 (holding that school directors cannot bind themselves and their successors by a contract that a certain school-district shall not be changed); Bull *v.* Woonsocket School Committee, 11 R. I. 244; Rodemer *v.* Mitchell, 90 Tenn. 65, 15 S. W. 1067.

See 43 Cent. Dig. tit. "Schools and School Districts," § 59½.

**Power of county superintendent** see People *v.* Vanhorn, 20 Colo. App. 215, 77 Pac. 978; Newlon *v.* Montrose Independent Dist., 109 Iowa 169, 80 N. W. 316; Union Independent Dist. *v.* Cedar Rapids Independent Dist., 62 Iowa 616, 17 N. W. 895; Stewart *v.* Adams, 50 Kan. 560, 32 Pac. 122; Cloud County School Dist. No. 50 *v.* Roach, 41 Kan. 531, 21 Pac. 597; Howard *v.* Forester, 109 Ky. 336, 59 S. W. 10, 22 Ky. L. Rep. 843; Mouser *v.* Spaulding, 96 S. W. 882, 29 Ky. L. Rep. 1071 (holding that in the matter of establishing or refusing to establish a new school-district, the duties of the county superintendent of schools are statutory and purely administrative, and he cannot be made to observe the interests of any individual); Farley *v.* Gilbert, 72 S. W. 1098, 24 Ky. L. Rep. 2109 (holding that it will be presumed that the action of the county superintendent in changing the boundaries of school-districts was based on a proper reason); Anderson *v.* Green, 55 S. W. 420, 21 Ky. L. Rep. 1439; Sherman County School Dist. No. 67 *v.* Sherman County School Dist. No. 24, 55 Nebr. 716, 76 N. W. 420; Bay State Live-Stock Co. *v.* Bing, 51 Nebr. 570, 71 N. W. 311 (holding that under the statute providing that the county superintendent shall divide organized counties into school-districts, his power so to do is not affected by the desire or other expression of the will of the resident voters to be organized into such a district, nor is any notice of his proposed action necessary); Hendreschke *v.* Harvard High School Dist., 35 Nebr. 400, 53 N. W. 204; School-Dist. *v.* Wheeler, 25 Nebr. 199, 41 N. W. 143; Cowles *v.* School Dist. No. 6, 23 Nebr. 655, 37 N. W. 493 (holding that no cause of action accrues to a district as a corporation against the superintendent for the manner in which he may exercise this power); Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110; Caddo County School Dist. No. 44 *v.* Turner, 13 Okla. 71, 73 Pac. 952; Pond Creek Bd. of Education *v.* Boyer, 5 Okla. 225, 47 Pac. 1090; Garfield County School Dist. No. 17 *v.* Zediker, 4 Okla. 599, 47 Pac. 482; Redfield School Dist. No. 12 *v.* Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180.

See 43 Cent. Dig. tit. "Schools and School Districts," § 59½.

**Power of county courts or courts of county commissioners** see Bailey *v.* Figely, 106 Ky. 725, 51 S. W. 424, 21 Ky. L. Rep. 341; Bd. of Education *v.* Stuck, 39 Ohio St. 259; Rodemer *v.* Mitchell, 90 Tenn. 65, 15 S. W. 1067; Porter *v.* State, 78 Tex. 591, 14 S. W. 794; Reynolds Land, etc., Co. *v.* McCabe, 72 Tex. 57, 12 S. W. 165; State *v.* Watson, (Tenn. Ch. App. 1896) 39 S. W. 536; Lytle School Dist. *v.* Haas, 24 Tex. Civ. App. 433, 59 S. W. 830; Whitmire *v.* State, (Tex. Civ. App. 1898) 47 S. W. 293; Rhomberg *v.* McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571.

**Power of county commissioners** see Caldwell *v.* Robeson County Com'rs, 90 N. C. 453; McCormac *v.* Robeson County Com'rs, 90 N. C. 441; School Dist. No. 74 *v.* Lincoln County, 9 S. D. 291, 68 N. W. 746; Sixteenth School Dist. *v.* Davis County, 16 Utah 323, 52 Pac. 279.

**Formal requirements.**—Where power to form school-districts is delegated to private persons, the method prescribed by the legislature should be substantially followed. Form is the substance, and a blunder in form means invalidity. Arthur Tp. Roman Catholic Separate School Trustees *v.* Arthur, 21 Ont. 60.

**Seal and signature.**—A by-law of a township corporation for the purpose of dividing a school section is invalid, unless under the corporate seal, and signed by the head and by the clerk of the corporation. Holt *v.* Medonte Tp., 22 Ont. 302.

**93.** People *v.* Van Horn, 20 Colo. App. 215, 77 Pac. 978; Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 930; Langto *v.* Raymond, 90 N. Y. App. Div. 614, 86 N. Y. Suppl. 182; Caddo County School Dist. No. 44 *v.* Turner, 13 Okla. 71, 73 Pac. 952.

**94.** School Trustees *v.* People, 76 Ill. 621 (mandamus will lie); Potter *v.* School Trustees, 10 Ill. App. 343; Munn *v.* Soap Creek School Tp., 110 Iowa 652, 82 N. W. 323.

**95.** See the statutes of the several jurisdictions. And see Groton First School Dist. *v.* Eighth School Dist., 78 Conn. 71, 61 Atl. 234 (appeal to superior court is authorized); Mason *v.* People, 185 Ill. 302, 56 N. E. 1069; Sedgwick County School Dist. No. 116 *v.* Wolf, 78 Kan. 805, 98 Pac. 237; Jeffreys *v.* School Dist. No. 54, 3 Kan. App. 154, 42 Pac. 830 (appeal to board of county com-

fraud, corruption, oppression, or gross injustice is clearly shown;[96] and where by statute an appeal is provided for from one official or set of officials to another the same rule applies as to reviewing the actions of the latter.[97] In Minnesota it has been decided that a board of county commissioners, to whom is intrusted the matter of forming school-districts, may appeal from an order of the district court reversing their action in establishing a new school-district.[98] Where an appeal lies from the action of an official with reference to forming or altering school-districts, the remedy by appeal is exclusive and mandamus will not be granted to control such official's action.[99]

missioners); Bloomquist *v.* Washington County, 101 Minn. 163, 112 N. W. 253 (appeal to county district court); State *v.* Job, 205 Mo. 1, 103 S. W. 493 (holding that upon an appeal to arbitrators in a proceeding to consolidate school-districts, it is not necessary that they or the witnesses testifying before them be sworn); Tilley *v.* Greer County, 15 Okla. 219, 79 Pac. 756 (right of board of county commissioners to which an appeal is taken from the county superintendent to reconsider its action); Hus *v.* Ste. Victoria Parish School Com'rs, 19 Can. Sup. Ct. 477 (holding that a petition in appeal must be approved by three qualified school visitors); *In re* Almonte Bd. of Education, 12 Ont. L. Rep. 486; *In re* Proper, 34 U. C. Q. B. 266; Tremblay *v.* Valentin, 12 Can. Sup. Ct. 546.

See 43 Cent. Dig. tit. "Schools and School Districts," § 68.

**Appeals to state and county superintendents of public instruction** see Greene County *v.* Dist. No. 2 School Directors, 190 Ill. 390, 60 N. E. 531; Hamilton *v.* Frette, 189 Ill. 190, 59 N. E. 588; Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933; State *v.* Alexander, 129 Iowa 538, 105 N. W. 1021 (holding that the remedy for testing the incorporation of a school-district by appeal to the county superintendent is not exclusive); Munn *v.* Soap Creek School Tp., 110 Iowa 652, 82 N. W. 323; Morgan *v.* Wilfley, 70 Iowa 338, 30 N. W. 606; Gividen *v.* School Dist. No. 54, 126 Ky. 194, 102 S. W. 1191, 31 Ky. L. Rep. 633; People *v.* Skinner, 74 N. Y. App. Div. 58, 77 N. Y. Suppl. 36; State *v.* Whitford, 54 Wis. 150, 11 N. W. 424; Joint School Dist. No. 7 *v.* Wolfe, 12 Wis. 685 (holding that the assistant state superintendent of public instruction may not examine and determine appeals from the decision of the town superintendents in forming and altering, or refusing so to do, school-districts; as this is a quasi-judicial function, which should be exercised by the state superintendent in person).

**On appeal to the board of county commissioners** from the decision of the county superintendent as to the formation or alteration of school-districts, the board has no original jurisdiction. Its only function is to determine whether the decision of the county superintendent shall be sustained. State *v.* Secrest, 60 Kan. 641, 57 Pac. 500.

**In Pennsylvania** the statute (act May 20, 1857) provides that when an independent district has been created in violation of the principles therein declared, the court of quarter sessions may open the decree and reëxamine the case on the merits. See *In re* Sewickley Tp. Independent School Dist. No. 8, 33 Pa. St. 297; Brown *v.* Independent School Dist., (1888) 16 Atl. 32; *In re* Greenwood Tp. Independent School Dist., 19 Pa. Co. Ct. 452; *In re* Harrisville Borough Independent School Dist., 6 Pa. Co. Ct. 469.

**In Ontario** when the alteration of a school-district is proposed an appeal lies from the township council to the county council, by which arbitrators are appointed to determine the matter. See *In re* Southwold School Sections, 3 Ont. L. Rep. 81; *In re* Wooliver, 31 Ont. 606; *In re* Amaranth School Trustees, 30 Ont. 43; *In re* Powers, 29 Ont. 571 [*affirmed* in 26 Ont. App. 483]; *In re* Hamilton Tp. School Section No. 16, 29 Ont. 390 (holding that no appeal lies from the refusal of a township council to divide a school-district); *Re* Martin, 25 Ont. 411 (holding that notice of appeal must he given within the time required by statute).

96. School Directors *v.* School Trustees, 66 Ill. 247; Thompson *v.* Beaver, 63 Ill. 353; Metz *v.* Anderson, 23 Ill. 463, 76 Am. Dec. 704; Grove *v.* Peoria, 20 Ill. 532; Garfield County School Dist. No. 17 *v.* Zedicker, 4 Okla. 599, 47 Pac. 482. See also Stephens *v.* Buie, 23 Tex. Civ. App. 491, 57 S. W. 312.

97. *Illinois.*— Greene County *v.* Dist. No. 2 School Directors, 190 Ill. 390, 60 N. E. 531; Hamilton *v.* Frette, 189 Ill. 190, 59 N. E. 588.

*Indiana.*— Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933.

*Iowa.*— Munn *v.* Soap Creek School Tp., 110 Iowa 652, 82 N. W. 323.

*Kentucky.*— Gividen *v.* School Dist. 54, 126 Ky. 194, 102 S. W. 1191, 31 Ky. L. Rep. 633.

*Missouri.*— State *v.* Job, 205 Mo. 1, 103 S. W. 493.

**In Washington** under the statute providing that the action of the county superintendent in organizing a new school-district may be reviewed on appeal to the county commissioners, whose decision shall be final, the court has no jurisdiction to review the action of the board on such an appeal unless there is a want of jurisdiction or some action in excess of jurisdiction. Wilsey *v.* Cornwall, 40 Wash. 250, 82 Pac. 303.

98. Moede *v.* Stearns County, 43 Minn. 312, 45 N. W. 435.

99. State *v.* Clary, 25 Nebr. 403, 41 N. W. 256.

(2) CERTIORARI.[1] The common-law writ of certiorari may issue to boards of school directors, trustees, inspectors, and the like where in forming or altering school-districts they exceed their jurisdiction, or proceed illegally, or where there is no appeal or other mode of directly reviewing their proceedings.[2] Irregularities in the proceedings of such tribunals, which do not affect their jurisdiction or property rights cannot, however, be reviewed on certiorari.[3] And the principle that the issuance of a writ of certiorari is largely discretionary, and that it will not be permitted to accomplish a palpable injustice, has been applied with reference to the proceedings of such tribunals.[4] Proceedings whereby a school-district is created out of existing districts cannot be reviewed by certiorari after the district has assumed the functions of a corporation, the proper remedy being by quo warranto.[5]

**c. Proceedings For Organization or Alteration** — (1) *IN GENERAL.* Action in accordance with the statutory provisions relative thereto must be taken in order to effect the organization or establishment of school-districts.[6] Thus where the voters of a newly formed district are required to meet and organize within a certain time, this must be done.[7] And the establishment of school-districts by officers or boards is not effected until it is so entered upon the public records, so as to notify the public that it has been done.[8] It has been held, however, that if the inhabitants of a school-district defined by a county school superintendent assent to such organization, and

1. Certiorari generally see CERTIORARI, 6 Cyc. 730.

2. Potter *v.* School Trustees, 10 Ill. App. 343. See also School Dist. No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580. *Compare* Doxey *v.* Martin School Inspectors, 67 Mich. 601, 35 N. W. 170. But see Moede *v.* Stearns County, 43 Minn. 312, 45 N. W. 435; Lemont *v.* Dodge County, 39 Minn. 385, 40 N. W. 359, both holding that, although in other jurisdictions any proceedings, whether legislative, judicial, or executive, of any inferior court, tribunal, board, or officer, may be reviewed on certiorari, if there is no appeal or other direct way of reviewing their proceedings, in Minnesota the office of the writ is confined to reviewing acts judicial or quasi-judicial, and therefore the action of a board of county commissioners in forming a new school-district, being legislative and not judicial in its nature, cannot be reviewed on certiorari.

Notice.—A statutory requirement that notice must be given before school-boards and the like shall proceed is jurisdictional, and where such notice has not been given certiorari will issue to review their proceedings. Gentle *v.* School Inspectors, 73 Mich. 40, 40 N. W. 928; Fractional School Dist. No. 3 *v.* Martin School Inspectors, 63 Mich. 611, 30 N. W. 198; State *v.* Clifton, 113 Wis. 107, 88 N. W. 1019.

3. Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782. See also Molyneaux *v.* Molyneaux, 130 Iowa 100, 106 N. W. 370.

4. Silver *v.* Hamilton Tp., 146 Mich. 393, 109 N. W. 664, holding that certiorari will not issue to vacate proceedings of a township board, setting aside the organization of a school-district, where it appears that the district has been formed by detaching territory from two other districts, and that by reason of a reduced assessed valuation none of the districts will be able to maintain their schools without imposing an unjust burden upon the residents thereof.

5. Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391.

6. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879. See also Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 32 So. 87.

Two essential steps must be taken in order to effect the organization of a school-district — one of them is the approval of the plat defining the boundaries, the other is the election of directors. Agency School Dist. *v.* Wallace, 75 Mo. App. 317. *Compare* Burr Oak Tp. Independent School Dist. No. 8 *v.* Burr Oak Independent School Dist., 48 Iowa 157.

Entering the funds apportioned to a new school-district, to the credit of such district, as required by statute, is not essential to the organization of the district. Dist. No. 5 School Directors *v.* Dist. No. 10 School Directors, 73 Ill. 249.

Levying school tax.—Under a statute which provides that an incorporated town of so many inhabitants may constitute a separate school-district if the town authorities so elect, the levy of a tax to carry on the school beyond the constitutional period of four months in each year is not an act precedent to the organization of such district, but a duty which may be enforced when deemed necessary. State *v.* Hamilton, 69 Miss. 116, 10 So. 57.

7. Agency School Dist. *v.* Wallace, 75 Mo. App. 317. *Compare* Munn *v.* Soap Creek School Tp., 110 Iowa 652, 82 N. W. 323; State *v.* Burford, 82 Mo. App. 343.

8. Mouser *v.* Spaulding, 96 S. W. 882, 29 Ky. L. Rep. 1071. See also Ringo *v.* Stewart, 4 B. Mon. (Ky.) 206. *Compare* State *v.* Denny, 94 Mo. App. 559, 72 S. W. 467.

Manner of making record.— The findings and orders of a superintendent of public in-

assume the functions of a school-district, the corporate entity is complete;[9] that where a county court appoints a committee to report as to the consolidation of subdivisions of a school-district, which are treated as independent districts, and adopts the report of the committee in favor thereof, no further order creating the new district is necessary;[10] and that the failure of school trustees, after granting a petition for the formation of a new school-district to sell a school-house standing on territory detached from another district, to file a map of the new district, and to order an election of school directors in the new district, will not invalidate the formation of the new district.[11] Proceedings for the extension of the limits of a school-district pursuant to the provisions of an act authorizing such extension, taken before such act has gone into effect, are void.[12]

(II) *NOTICE.* It is frequently provided by statute that when the formation of a new district or the division or other alteration of an existing district is contemplated, notice, or warning, as it is sometimes called, shall be given to the inhabitants of the territory which will be affected, or to certain officials;[13] and such notice is a jurisdictional requirement and a failure to give it will invalidate

struction in forming a new school-district from territory embraced in other districts need not be entered with all the formality of a judgment at law; but it is sufficient if the record shows a substantial compliance with the statute. Biart *v.* Myers, (Nebr. 1902) 91 N. W. 573.

**9.** Landis *v.* Ashworth, 57 N. J. L. 509, 31 Atl. 1017.

**10.** State *v.* Watson, (Tenn. Ch. App. 1896) 39 S. W. 536.

**11.** Union School Dist. School Directors *v.* New Union School-Dist. School Directors, 135 Ill. 464, 28 N. E. 49.

**12.** Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18.

**13.** See the statutes of the several states. And see the following cases:

*Connecticut.*— Gravel Hill School Dist. *v.* Old Farm School-Dist., 55 Conn. 244, 10 Atl. 689; Stratford First School Dist. *v.* Ufford, 52 Conn. 44.

*Iowa.*— State *v.* Leverton, 53 Iowa 483, 5 N. W. 613; Trotter *v.* Paunley, 39 Iowa 203.

*Kentucky.*— Gividien *v.* Common School Dist. No. 54, 102 S. W. 1191, 31 Ky. L. Rep. 633; Howard *v.* Forester, 59 S. W. 10, 22 Ky. L. Rep. 843; Anderson *v.* Green, 55 S. W. 420, 21 Ky. L. Rep. 1439.

*Maine.*— Butterfield *v.* School Dist. No. 6, 61 Me. 583.

*Massachusetts.*— Alden *v.* Rounseville, 7 Metc. 218.

*Michigan.*— Huyser *v.* Zeeland Tp., etc., School Inspectors, 131 Mich. 568, 91 N. W. 1020; Smelser *v.* Big Prairie Tp. School Inspectors, 125 Mich. 666, 85 N. W. 94; Fractional School Dist. No. 1 *v.* Metcalf, 93 Mich. 497, 53 N. W. 627; Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782.

*Missouri.*— State *v.* Job, 205 Mo. 1, 103 S. W. 493; Mason *v.* Kennedy, 89 Mo. 23, 14 S. W. 514; State *v.* Eden, 54 Mo. App. 31.

*Nebraska.*— Polk County School Dist. No. 10 *v.* Coleman, 39 Nebr. 391, 58 N. W. 146.

*New Hampshire.*— Child *v.* Colburn, 54 N. H. 71; Converse *v.* Porter, 45 N. H. 385.

*New York.*— People *v.* Hooper, 13 Hun 639.

*Pennsylvania.*— *In re* Wilkins Tp. School Dist., 70 Pa. St. 108; *In re* Sewickley Tp. Independent School Dist. No. 8, 33 Pa. St. 297.

*South Dakota.*— Lincoln County School Dist. No. 56 *v.* School Dist. No. 27, 9 S. D. 336, 69 N. W. 17.

*Vermont.*— Hall *v.* Calais School Dist. No. 3, 46 Vt. 19; Weeks *v.* Batchelder, 41 Vt. 317; Ovitt *v.* Chase, 37 Vt. 196; Moore *v.* Beattie, 33 Vt. 219; Sherwin *v.* Bugbee, 16 Vt. 439, holding that a school meeting warned, without naming in the warrant the hour of the meeting, is irregular, and its proceedings are void.

*Wisconsin.*— State *v.* Cary, 132 Wis. 501, 112 N. W. 48 (holding that records of a town board of supervisors which forms a new district out of several existing ones, in order to confer jurisdiction, should show at least written proof or admission of service of the notice upon the school-district clerks); State *v.* Steele, 106 Wis. 475, 82 N. W. 295; State *v.* Graham, 60 Wis. 395, 19 N. W. 359.

*Canada.*— Griffiths *v.* Grantham Tp., 6 U. C. C. P. 274; *In re* Patterson, 30 U. C. Q. B. 484; *In re* Taylor, 30 U. C. Q. B. 337; *In re* Shaw, 19 U. C. Q. B. 288; *In re* Isaac, 17 U. C. Q. B. 205; *In re* Ley, 13 U. C. Q. B. 433; *In re* Ness, 13 U. C. Q. B. 408; *In re* Morrison, 13 U. C. Q. B. 279.

See 43 Cent. Dig. tit. "Schools and School Districts," § 64.

**Informalities in issuing notice.**—Where there has been actual notice of proposed proceedings by joint boards for the formation of a new school-district out of several old ones, mere informalities in the issue of such notice are not jurisdictional defects, nor is the fact that it covers territory not actually taken such a defect. Parman *v.* School Inspectors, 49 Mich. 63, 12 N. W. 910.

**A return of service of notice** is insufficient which does not definitely state the time, place, or manner of service, and does not purport to be made by the person who served the notice. State *v.* Cary, 132 Wis. 501, 112 N. W. 428.

**Naming contiguous districts.**—Where the

the proceedings.[14] But when the persons entitled to notice of a meeting to be held for the purpose of altering a district appear, and make no objection at the time to the sufficiency of the notice, such appearance is a waiver of all right to notice and of all exception to the regularity of issuing the same.[15]

(III) *SUBMISSION TO POPULAR VOTE.* The question of the formation of a new district or the alteration of an existing one must, under the provisions of many statutes, be submitted to a vote of the persons living in the territory which would be affected by the change;[16] and where there is such a requirement, an attempted alteration of a school-district, not based upon the assenting vote of

notice of the proceedings for the alteration of the boundaries of a school-district shows on its face how the alteration will affect the contiguous districts, and copies of the notice are posted in such districts, the omission to specifically name these districts in the notice is not fatal to the proceedings. Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782.

**Necessity of giving boundaries.**—A notice of the proposed formation of a new district need not give its boundaries, but it is sufficient to refer to the petition therefor in which they are given, and to describe the territory to be taken from the district in which the notice is posted. Mason *v.* Kennedy, 89 Mo. 23, 14 S. W. 514.

14. Huyser *v.* Zeeland Tp., etc., School Inspectors, 131 Mich. 568, 91 N. W. 1020; Graves *v.* Benton Tp., etc., Joint School Inspectors, 102 Mich. 634, 61 N. W. 60; Gentle *v.* Colfax Tp. School Inspectors, 73 Mich. 40, 40 N. W. 928; Coulter *v.* Grant Tp., etc., School Inspectors, 59 Mich. 391, 26 N. W. 649; Perryman *v.* Bethune, 89 Mo. 158, 1 S. W. 231. See also Nohle *v.* White, 77 S. W. 678, 25 Ky. L. Rep. 1282.

15. Andover School Dist. No. 6 *v.* Carr, 55 N. H. 452.

16. See the statutes of the several states. And see the following cases:

*Arizona.*— Sharp *v.* George, 5 Ariz. 65, 46 Pac. 212, holding that a majority of those voting and not a majority of the qualified voters is required.

*Arkansas.*— Beavers *v.* State, 60 Ark. 124, 29 S. W. 144.

*Illinois.*— People *v.* Keechler, 194 Ill. 235, 62 N. E. 525.

*Iowa.*— Molyneaux *v.* Molyneaux, 130 Iowa 100, 106 N. W. 370; Lincoln Dist. Tp. *v.* Germania Independent Dist., 112 Iowa 321, 83 N. W. 1068 (holding that a failure to keep the polls open during the hours required by statute will not invalidate the election, if all the persons entitled to vote and desiring to do so, voted); Hesper Dist. Tp. *v.* Burr Oak Independent Dist., 34 Iowa 306.

*Kansas.*—Deng *v.* Scott County, 77 Kan. 863, 95 Pac. 592; Gardner *v.* State, 77 Kan. 742, 95 Pac. 588.

*Kentucky.*— Bailey *v.* Figely, 106 Ky. 725, 52 S. W. 800, 51 S. W. 424, 21 Ky. L. Rep. 341; Chiles *v.* Todd, 4 B. Mon. 126; Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81; Hundley *v.* Singleton, 66 S. W. 279, 23 Ky. L. Rep 2006; Mullins *v.* Andrews, 45 S. W. 231, 20 Ky. L. Rep. 20.

*Maine.*— Grindle *v.* Brooksville School Dist. No. 1, 64 Me. 44; Tucker *v.* Wentworth, 35 Me. 393.

*Massachusetts.*— Judd *v.* Thompson, 125 Mass. 553; Andrews *v.* Boylston, 110 Mass. 214; Perkins *v.* Crocker, 109 Mass. 128; Sutton Mfg. Co. *v.* Sutton, 108 Mass. 106; Blankinship *v.* Hadley, 11 Gray 431.

*Michigan.*— Briggs *v.* Borden, 71 Mich. 87, 38 N. W. 712.

*Missouri.*— Buchanan County School Dist. No. 7 *v.* St. Joseph School Dist., 184 Mo. 140, 82 S. W. 1082; State *v.* Stone, 152 Mo. 202, 53 S. W. 1069; School Dist. No. 1 *v.* School Dist. No. 4, 94 Mo. 612, 7 S. W. 285; Shattuck *v.* Phillips, 78 Mo. 80; State *v.* Appleton Bd. of Education, 64 Mo. 53; State *v.* Heiser, 60 Mo. 540; State *v.* Grimshaw, (1886) 1 S. W. 363; Meyers *v.* School Dist. No. 2, 96 Mo. App. 48, 75 S. W. 1120; State *v.* Burford, 82 Mo. App. 343; State *v.* Gibson, 78 Mo. App. 170.

*Nebraska.*— State *v.* Cass County, 69 Nebr. 100, 95 N. W. 6.

*New Hampshire.*— Child *v.* Colburn, 54 N. H. 71.

*New Jersey.*— State *v.* Deshler, 25 N. J. L. 177.

*Oklahoma.*— Territory *v.* Logan County High School, 13 Okla. 605, 76 Pac. 165.

*Rhode Island.*— Comstock *v.* Lincoln School Committee, 17 R. I. 827, 24 Atl. 145.

*South Dakota.*— Redfield School Dist. No. 12 *v.* Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180.

*Texas.*— Junction City School Incorporation *v.* School Dist. No. 6, 81 Tex. 148, 16 S. W. 742; Porter *v.* State, 78 Tex. 591, 14 S. W. 794 (holding that where no method is prescribed for determining the will of the majority, it is left to the discretion of the county commissioners' court, and where a pleading alleges that a district was divided with the consent of a majority, it will be presumed that a reasonable and just method was adopted); Brewer *v.* Hall, (Civ. App. 1908) 111 S. W. 788; State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723. *Compare* Parks *v.* West, (Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in (1908) in 111 S. W. 726, 113 S. W. 529].

*Virginia.*— Literary Fund *v.* Dalby, 4 Gratt. 528.

See 43 Cent. Dig. tit. "Schools and School Districts," § 66.

**Union or consolidation of districts.**— Under the statutes of some of the states when the question to be determined is the union or consolidation of several existing districts,

a majority of the electors of the district, is absolutely void.[17] In some jurisdictions the calling of an election to determine the question of organizing or altering school-districts, upon petition therefor, is provided for by statute.[18]

(IV) *PETITION OR CONSENT.* Instead of providing for the submission of the question of forming a new district or the alteration of an existing one to a popular vote, provision is frequently made for taking such action upon the presentation of a petition, signed as required, to certain officials.[19] And in a few

each of the districts affected must return a majority in favor of the proposition. See Deng *v.* Scott County, 77 Kan. 863, 95 Pac. 592; Gardiner *v.* State, 77 Kan. 742, 95 Pac. 588; Barrett *v.* Coleman, 12 Tex. Civ. App. 663, 35 S. W. 418. But in Arizona it has been held that an election for the purpose and in favor of forming a union high school-district out of several adjoining districts is not void because no election was held in one of such districts, where it appears that if an election had been held in such district and all the qualified voters of said district had cast their votes against the proposition of a large majority would remain in favor of it. Sharp *v.* George, 5 Ariz. 65, 46 Pac. 212. In Missouri provision is made by statute (Rev. St. (1899) § 9742) for reference of the question to the county commissioner who is required to appoint a board of arbitrators, when the districts affected disagree in their vote. See State *v.* Job, 205 Mo. 1, 103 S. W. 493; State *v.* McClain, 187 Mo. 409, 86 S. W. 135 (arbitrators need not be sworn); State *v.* Cummins, 114 Mo. App. 93, 89 S. W. 74; School Dist. No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580; State *v.* Wilson, 99 Mo. App. 675, 74 S. W. 404; State *v.* Denny, 94 Mo. App. 559, 72 S. W. 467 (holding that where it does not appear from the proceedings of a board of arbitrators, appointed to consider the necessity for a change of boundary between two school-districts, that they ever met and considered the matter submitted, or found that the proposed change was necessary, the proceedings are void on their face); Newton County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215; Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654.

Effect of disqualification of judge of election.—Where one of the judges of an election for the incorporation of an independent school-district is disqualified by reason of his candidacy for the office of trustee of the district such disqualification is an irregularity which only affects the legality of his individual election as trustee of the created district and does not render the incorporation election invalid. State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723.

Holding second election see Ewing *v.* Jefferson Bd. of Education, 72 Mo. 436; State *v.* Cass County, 69 Nebr. 100, 95 N. W. 6.

Notice of election see Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120; State *v.* Gill, 190 Mo. 79, 88 S. W. 628 (holding that where a board of directors has ordered an election and given notice, a majority of the board cannot thereafter order the withdrawal of the notice of election, the duty of the board in ordering an election and giving notice thereof being mandatory and ministerial); Butler County School Dist. No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580 (holding that when notices are not properly posted the election is void); Newton County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215; School Dist. No. 552 *v.* Neal, 74 Mo. App. 553; Peth *v.* Martin, 31 Wash. 1, 71 Pac. 549.

**17.** State *v.* Grimshaw, (Mo. 1886) 1 S. W. 363. See also Ft. Dodge School Dist. *v.* Wahkansa Dist. Tp., 17 Iowa 85.

**18.** See the statutes of the several states. And see People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660; People *v.* Keechler, 194 Ill. 235, 62 N. E. 525; State *v.* Grefe, 139 Iowa 18, 117 N. W. 13; Molyneaux *v.* Molyneaux, 130 Iowa 100, 106 N. W. 370; Mullins *v.* Andrews, 45 S. W. 231, 20 Ky. L. Rep. 20; State *v.* Gibson, 78 Mo. App. 170; Perth *v.* Martin, 31 Wash. 1, 71 Pac. 549. *Compare* Parks *v.* West, (Tex. Civ. App. 1908) 108 S. W. 466 [*reversed* in (1908) 111 S. W. 726, 113 S. W. 529].

Where no petition is presented, as required by statute, the election is void. School Dist. No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580.

**19.** See the statutes of the several jurisdictions. And see the following cases:

*Arkansas.*— Hudspeth *v.* Waller, 54 Ark. 134, 15 S. W. 184.

*California.*— Mooney *v.* Tulare County, 2 Cal. App. 65, 83 Pac. 165, holding that the findings of the board of supervisors upon a petition presented to them is conclusive.

*Dakota.*— Dartmouth Sav. Bank *v.* School-Dists. Nos. 6 and 31, 6 Dak. 332, 43 N. W. 822.

*Illinois.*— Nolting *v.* Batterton, 231 Ill. 394, 83 N. E. 179; Bourland *v.* Snyder, 224 Ill. 478, 79 N. E. 568; People *v.* Keechler, 194 Ill. 235, 62 N. E. 525; Hamilton *v.* Frette, 189 Ill. 190, 59 N. E. 588; People *v.* Simpson, 168 Ill. 127, 48 N. E. 302; People *v.* Allen, 155 Ill. 402, 40 N. E. 350; Parr *v.* Miller, 146 Ill. 596, 35 N. E. 230 [*affirming* 49 Ill. App. 48]; People *v.* Ricker, 142 Ill. 650, 32 N. E. 671; Carrico *v.* People, 123 Ill. 198, 14 N. E. 66; School Trustees *v.* People, 121 Ill. 552, 13 N. E. 526; School Trustees Tp. *v.* People, 71 Ill. 559; People *v.* Rhodes, 109 Ill. App. 110; Boone *v.* People, 4 Ill. App. 231.

*Indiana.*— State *v.* Wilson, 149 Ind. 253, 48 N. E. 1030; Trager *v.* State, 21 Ind. 317.

*Iowa.*— Hightower *v.* Overhaulser, 65 Iowa 347, 21 N. W. 671.

*Kansas.*— Sedgwick County School Dist. No. 116 *v.* Wolf, 78 Kan. 805, 98 Pac. 237, holding that, although the statute contem-

states the statutes require the consent of the trustees of the districts to be affected, before territory can be attached to or detached from a district, or the district

plates the filing of a petition with the county superintendent for a change of boundaries of a school-district before notice setting a time for the hearing as to the change, yet where a verbal request is made and notice given and the interested parties appear, and an appeal is taken from the order of the county superintendent to the county commissioners, and the order is affirmed, the proceedings are not void, but only irregular.

*Kentucky.*— Waring *v.* Bertram, 75 S. W. 222, 5 Ky. L. Rep. 307; Hundley *v.* Singleton, 66 S. W. 279, 23 Ky. L. Rep. 2006.

*Massachusetts.*— Adams *v.* Crooks, 7 Gray 411.

*Michigan.*— Howell *v.* Shannon, 130 Mich. 556, 89 N. W. 410; Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391.

*Missouri.*— State *v.* Job, 205 Mo. 1, 103 S. W. 493; Sayre *v.* Tompkins, 23 Mo. 443.

*Nebraska.*—Biart *v.* Myers, (1902) 91 N. W. 573; State *v.* Compton, 28 Nebr. 485, 44 N. W. 660, holding that a petition in writing is necessary and that an oral request is not sufficient.

*Ohio.*— State *v.* Tallmadge Tp. Treasurer, 17 Ohio 32; Eckstein *v.* Board of Education, 10 Ohio Cir. Ct. 480, 4 Ohio Cir. Dec. 149; State *v.* Clark, 6 Ohio Dec. (Reprint) 831, 8 Am. L. Rec. 363.

*Oregon.*— School Dist. No. 110 *v.* Palmer, 41 Oreg. 485, 69 Pac. 453.

*Pennsylvania.*— *In re* South Abington Tp. Independent School Dist., 1 Pa. Dist. 696, 11 Pa. Co. Ct. 602.

*South Dakota.*— Redfield School Dist. No. 12 *v.* Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180; School Dist. No. 74 *v.* Lincoln County, 9 S. D. 291, 68 N. W. 746; Coler *v.* Rhoda School Tp., 6 S. D. 640, 63 N. W. 158.

*Texas.*— Pinson *v.* Vesey, 23 Tex. Civ. App. 91, 56 S. W. 593 (when petition must be accompanied by map); Whitmire *v.* State, (Civ. App. 1898) 47 S. W. 293.

*Canada.*— Curren *v.* McEachen, 5 Northwest. Terr. 333; Union School Section *v.* Lockhart, 26 Ont. 662, 27 Ont. 345; *In re* Morrison, 13 U. C. Q. B. 279.

See 43 Cent. Dig. tit. "Schools and School Districts," § 63.

**Presumption and burden of proof.**— It will be presumed, in the absence of proof to the contrary, that the officials who altered a school-district acted only after having ascertained that the petition was signed by a majority of the electors in the affected territory, as required by law. Pond Creek Bd. of Education *v.* Boyer, 5 Okla. 225, 47 Pac. 1090. See also Redfield School Dist. No. 12 *v.* Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180. Under a statute permitting the erection of independent school-districts to protect and promote the educational welfare of localities, where from natural or other adequate obstacles the locality could not be properly provided for under the organization of township districts, the burden of showing the obstacles rests on the applicant for a new district. *In re* Franklin Independent School Dist., 1 C. Pl. (Pa.) 128.

**"Citizen" means "elector"** in a statute providing who may sign a petition for a change of school-district boundaries. School Dist. No. 11 *v.* School Dist. No. 20, 63 Ark. 543, 39 S. W. 850.

**Approval by trustees.**—Where a statute requires the petition to be approved by a majority of the trustees of the common-school district, an order entered on a petition, approved by certain persons as trustees who are not such in fact, is void. Mullins *v.* Andrews, 45 S. W. 231, 20 Ky. L. Rep. 20.

**Consequent change in adjoining district.**— If the boundary of a school-district be changed conformably to a legal petition, the consequent change of the boundary of the adjoining district is valid without petition. Nutter *v.* School Dist. No. 4, 4 Blackf. (Ind.) 351.

**Increase in number of freeholders after petition presented.**—Where jurisdiction has been conferred on the county commissioners to establish a new school-district, they do not exceed their authority in establishing it after hearing, although a majority of the freeholders do not concur therein, where such freeholders have moved into the district after the petition for such district has been presented to the commissioners. Gerber *v.* Wright County, 89 Minn. 351, 94 N. W. 886.

**Right to change boundaries described in petition.**—Where a county superintendent is petitioned to organize a school-district, he is not restricted to the organization of a district with the boundaries described in the petition, but may in a proper case modify such boundaries. Wilsey *v.* Cornwall, 40 Wash. 250, 82 Pac. 303.

**As to form and contents of petition** see Scott *v.* School Trustees, 71 Ill. App. 95 (substantial compliance with statutory requirements sufficient); Webb *v.* People, 11 Ill. App. 358 (holding that an allegation that petitioners are not properly accommodated with schools is necessary); Potter *v.* School Trustees, 10 Ill. App. 343 (holding that it must be alleged that petitioners constitute "two-thirds of the legal voters of the territory"); Newton School Tp. *v.* Newton Independent School Dist., 110 Iowa 30, 81 N. W. 184 (holding that the existence of natural obstacles interfering with school facilities must be alleged); School-Dist. No. 1 *v.* School-Dist. No. 4, 94 Mo. 612, 7 S. W. 285 (holding that a petition must specify the exact changes proposed in the boundary lines); Perkins *v.* Langmaid, 34 N. H. 315 (holding that the particular interest of the petitioners need not be set forth); Territory *v.* Logan County High School, 13 Okla. 605, 76 Pac. 165 (holding that a substantial compliance with the statute is sufficient); Heidler's Petition, 122 Pa. St. 653, 16

be otherwise altered.[20] A signer of a petition to change school boundaries should be permitted, while the petition is pending, to remove his name from the petition, upon his showing that he signed it under a mistake of fact, produced by misrepresentations.[21]

(v) *MEETINGS.* A statute providing for the formation of school-districts out of the territory lying in several townships, which requires the concurrent action of the officials of such townships, does not authorize the formation of such districts by the joint action of such officials at a joint meeting.[22] And on the other hand where the joint action of officials at a joint meeting is required, a valid change of the boundaries of a district cannot be made unless such officials meet and act together,[23] and hence a meeting of one set of officials and the written indorsement of their action by the other set of officials is insufficient.[24] Where more than one proposition to form or alter districts is presented at a meeting, there must be a separate vote upon each proposition;[25] but several alterations may be ordered at the same meeting and under the same notice, where each proposition is voted upon separately, and those present have ample opportunity to be heard upon each.[26] Officials while engaged in proceedings to alter a district may adjourn as to time and place, for any sufficient reason.[27]

(vi) *RECOMMENDATIONS, REPORTS, MAPS, ORDERS, AND RECORDS.*[28] Where the written recommendation of certain officials accompanied by a statement of facts is required by statute,[29] an alteration in a school-district made

Atl. 97; In re Hatfield Tp. School Dist., 2 Walk. (Pa.) 169 (holding that the obstacles by reason of which a new district is desired must be set forth); *In re* Franklin Independent School Dist., 22 Pa. Co. Ct. 43; *In re* Mt. Pleasant Tp. Independent School Dist., 10 Pa. Co. Ct. 588 (holding that facts made indispensable by statute must be set forth); *In re* Wolfe, 8 Kulp (Pa.) 181. See 43 Cent. Dig. tit. "Schools and School Districts," § 63.

**Notice of presentation of petition** see Scott *v.* School Trustees, 71 Ill. App. 95; Dooley *v.* Meese, 31 Nebr. 424, 48 N. W. 143; State *v.* Compton, 28 Nebr. 485, 44 N. W. 660.

**Mandamus** is the proper remedy to compel the formation of a new school-district, when the petition required by law has been presented. School Trustees *v.* People, 121 Ill. 552, 13 N. E. 526. See also MANDAMUS, 26 Cyc. 282.

20. See the statutes of the several states. And see Burnett *v.* Chickaming School Inspectors, 97 Mich. 103, 56 N. W. 234; Williams *v.* Larkin, 3 Den. (N. Y.) 114.

21 School Dist. No. 11 *v.* School Dist. No. 20, 63 Ark. 540, 39 S. W. 850; *In re* Independent School Dist., 2 Chest. Co. Rep. (Pa.) 132.

22. Rayfield *v.* People, 144 Ill. 332, 33 N. E. 188.

23. State *v.* Rice, 35 Wis. 178; Ripon *v.* Ripon, etc., Joint School Dist. No. 11, 17 Wis. 83. See also Van Buren Tp. Bd. of Education *v.* Greenville Tp. Bd. of Education, 67 Ohio St. 326, 65 N. E. 1018, holding that under a statute relating to the establishment of joint school subdistricts, a joint meeting of the members of different township boards of education to consider a petition for the establishment of a joint subdistrict is, an agreement failing, an independent body in which a majority of all the members of the interested boards constitutes a quorum, and the favoring vote of a majority of the quorum is sufficient for the provisional establishment of such district.

24. Smith *v.* Township 39 Bd. of Education, 58 Mo. 297; State *v.* Rice, 35 Wis. 178.

25. State *v.* Duerr, 11 Ohio Cir. Ct. 303, 5 Ohio Cir. Dec. 400.

26. Doxey *v.* Martin School Inspectors, 67 Mich. 601, 35 N. W. 170.

27. Donough *v.* Dewey, 82 Mich. 309, 46 N. W. 782, holding that unless it is made to appear that such adjournment was an abuse of their corporate functions, and operated to the detriment of those affected by the proceedings, such action is not subject to review on certiorari. See also Converse *v.* Porter, 45 N. H. 385; Bryant *v.* Goodwin, 9 Ohio St. 471, holding that where a statute prohibits any change or alteration of school-districts except at a regular meeting, but authorizes adjournments, it is competent for a board of education to make such change or alteration at a meeting held in pursuance of an adjournment from a regular meeting.

28. **The Wisconsin statute** providing for the formation of new districts does not require the order of apportionment to be filed by the superintendent of schools, either in his own office, or with the town clerk. State *v.* Eaton, 11 Wis. 29.

29. See the statutes of the several states. And see Webber *v.* Stover, 62 Me. 512 (holding that a statement of facts is a mere recital of the principal material facts upon which the recommendation is based); Neal *v.* Lewis, 46 N. H. 276.

**Specifying alterations.**— The recommendation must show specifically what alteration is to be made. Neal *v.* Lewis, 46 N. H. 276. *Contra*, Grindle *v.* Brooksville School Dist. No. 1, 64 Me. 44.

without such recommendation and statement is invalid.[30] A report of the proceedings of the officials or persons laying off or altering a school-district is sometimes made necessary by statute.[31] And where proceedings for the establishment of a district are based upon a petition, it is sometimes required that a copy of such petition and the findings thereon should be filed.[32] It has been held, however, that a failure to file maps,[33] or the names, number, and limits,[34] or a list of the taxpayers,[35] of school-districts which have been newly formed or altered, even when required by statute, will not affect the validity of their formation or alteration. Unless it is so prescribed by statute, the evidence upon which officials predicate their action to the formation or alteration of a district need not be preserved in their records.[36]

(VII) *CURATIVE STATUTES.* It is competent for the legislature to pass statutes validating defective proceedings for the formation or alteration of school-districts,[37] and such statutes are to be liberally construed in furtherance of their object.[38] An act of the legislature curing an informality in an election at which the question of forming an independent district was submitted does not have the effect of changing or modifying the boundaries of such district.[39]

**d. Territorial Extent and Boundaries.** The maximum or minimum amount of territory which may be included in a school-district is sometimes fixed by statute;[40] and in some states it is required that school-districts shall coincide as to boundaries with the townships in which they are situated.[41] Under some statutes a school-district can be formed of connected and contiguous territory only;[42]

**30.** Parker *v.* Titcomb, 82 Me. 180, 19 Atl. 162; Allen *v.* Archer, 49 Me. 346; Jackson School Dist. No. 1 *v.* Stearns, 48 Me. 568.

**31.** See the statutes of the several states. And see *In re* Sewickley Independent School Dist. No. 8, 33 Pa. St. 297 (holding that a confirmation of a commissioner's report must be made at the term after that to which the report is made); *In re* Elk Tp. School Dist., 146 Pa. St. 1, 23 Atl. 400.

**Filing and recording report** see Ringo *v.* Stewart, 4 B. Mon. (Ky.) 206; Howard *v.* Stevens, 3 Allen (Mass.) 409; Alden *v.* Rounseville, 7 Metc. (Mass.) 218.

**32.** See the statutes of the several states. And see Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391.

**33.** Union School Dist. School Directors *v* New Union School Dist. School Directors, 135 Ill. 464, 28 N. E. 49; Dist. No. 5 School Directors *v.* Dist. No. 10 School Directors, 73 Ill. 249; Munson *v.* Minor, 22 Ill. 594. But *compare* Potter *v.* School Trustees, 10 Ill. App. 343. *Contra, In re* Wilkins Tp. School Dist., 70 Pa. St. 108; *In re* Sewickley Independent School Dist. No. 8, 33 Pa. St. 297.

**34.** Stratford First School Dist. *v.* Ufford, 52 Conn. 44.

**35.** People *v.* Newberry, 87 Ill. 41.

**36.** Parr *v.* Miller, 146 Ill. 596, 35 N. E. 230.

**37.** Allen *v.* Archer, 49 Me. 346. See also Parker *v.* Titcomb, 82 Me. 180, 19 Atl. 162; Smyth *v.* Titcomb, 31 Me. 272; *In re* Minister of Education, 28 U. C. C. P. 325; Boyd *v.* Bobcaygeon Public School Bd., 43 U. C. Q. B. 35.

**38.** Stratford First School Dist. *v.* Ufford, 52 Conn. 14.

**39.** Burr Oak Tp. Independent School Dist. No. 8 *v.* Burr Oak Independent School Dist., 48 Iowa 157.

**40.** See the statutes of the several states. And see Roeser *v.* Gartland, 75 Mich. 143, 42 N. W. 687; Simpkins *v.* Ward, 45 Mich. 559, 8 N. W. 507; State *v.* Buckner, 54 Mo. App. 452; State *v.* Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733; Brewer *v.* State, (Tex. Civ. App. 1908) 111 S. W. 788; State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723; Pinson *v.* Vesey, 23 Tex. Civ. App. 91, 56 S. W. 593; State *v.* Allegree, 3 Tex. Civ. App. 437, 22 S. W. 289; Wilsey *v.* Cornwall, 40 Wash. 250, 82 Pac. 303; Keystone Lumber Co. *v.* Bayfield, 94 Wis. 491, 69 N. W. 162. *Compare* Ft. Dodge *v.* Waukansa, 15 Iowa 434; State *v.* Shap, 27 Minn. 38, 6 N. W. 408; Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

**41.** See the statutes of the several states. And see Russell *v.* Cleveland Dist. Tp., 97 Iowa 573, 66 N. W. 771; Large *v.* Washington Dist. Tp., 53 Iowa 663, 6 N. W. 1; Union Dist. Tp. *v.* Greene County, 41 Iowa 30 (holding that no such restriction exists upon the formation of independent districts); Bryant *v.* Goodwin, 9 Ohio St. 471; *In re* Wilkins Tp. School Dist., 70 Pa. St. 108.

**An exception** is made where by reason of streams or other natural obstacles any portion of the inhabitants of any school-district cannot with reasonable facility enjoy the advantages of any school in their township. See Newlon *v.* Montrose Independent Dist., 109 Iowa 169, 80 N. W. 316; Russell *v.* Cleveland Dist. Tp., 97 Iowa 573, 66 N. W. 771; Troy Dist. Tp. *v.* Doyle Dist. Tp., 53 Iowa 667, 6 N. W. 34; Union Dist. Tp. *v.* Greene Independent Dist., 41 Iowa 30.

**42.** See the statutes of the several states. And see Heidler's Petition, 122 Pa. St. 653,

but other statutes contain no such provision.[43] In Kentucky a common school-district cannot be composed of territory lying in different counties, except by the concurrent official action of the common school commissioners of both counties.[44] School-districts must be established by geographical limits; a designation of the inhabitants is not sufficient;[45] and the territory included in such districts must be properly described and its boundaries definitely designated.[46] The limits of a school-district may be extended by prescription so as to embrace other territory than that included in it by its original incorporation, but the limits as thus extended must be definite, if it is sought to levy a tax upon the added territory.[47] The franchises of a school corporation, which is also an incorporated town, cannot be made appurtenant to real estate and school buildings lying outside of the corporate limits of the town, and within the territorial limits of a township also a school corporation, created such at the same time, and clothed with the same franchises, under the same law, as said town school corporation.[48] Residents of a school-district who do not show that their own children are incommoded or that their taxes are increased by the manner in which the boundaries of a school-district have been fixed are without right to resist a tax levied in the district on the ground that the boundaries have not been so fixed as to accommodate the school children.[49] In Missouri it is expressly provided by statute that in changing the boundary lines between two established school-districts, one district shall not encroach on another simply for the acquisition of territory.[50] In Canada it has been held that the board of school trustees of a municipality and not the applicants for separate denominational schools is to prescribe the territory of such schools and that an application should be for one or more separate schools, leaving such board to define the boundaries;[51] and also that the boundaries of a protestant separate school cannot be

16 Atl. 97; Keystone Lumber Co. *v.* Barfield, 94 Wis. 491, 69 N. W. 162.

**43.** See the statutes of the several states. And see Weeks *v.* Batchelder, 41 Vt. 317.

**44.** Common School Dist. No. 50 *v.* Young, 105 Ky. 299, 49 S. W. 28, 20 Ky. L. Rep. 1191.

**45.** Nye *v.* Marion, 7 Gray (Mass.) 244; Fry *v.* Athol First School Dist. 4 Cush. (Mass.) 250; Perry *v.* Dover, 12 Pick. (Mass.) 206; Withington *v.* Eveleth, 7 Pick. (Mass.) 106; Lisbon School Dist. No. 3 *v.* Aldrich, 13 N. H. 139; Pierce *v.* Carpenter, 10 Vt. 480; Gray *v.* Sheldon, 8 Vt. 402. *Compare* Ireland *v.* State, 165 Ind. 377, 75 N. E. 872.

Setting off certain inhabitants together with their estates is sufficient. Parker *v.* Titcomb, 82 Me. 180, 19 Atl. 162; Deane *v.* Washburn, 17 Me. 100; Alden *v.* Rounseville, 7 Metc. (Mass.) 218.

**46.** *Illinois.*— Dist. No. 5 School Directors *v.* Dist. No. 10 School Directors, 73 Ill. 249.

*Kansas.*— School Dist. No. 76 *v.* Ryker, 64 Kan. 612, 68 Pac. 34, holding that a description is sufficiently certain which can be made certain.

*Kentucky.*— Ringo *v.* Stewart, 4 B. Mon. 206 (holding that the boundaries should be designated with such certainty as to show who is entitled to vote in each district for the adoption therein of the common school system); Hundley *v.* Singleton, 66 S. W. 279, 23 Ky. L. Rep. 2006. See also McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289.

*Louisiana.*— See Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 32 So. 87.

*Maine.*—Allen *v.* Archer, 49 Me. 346.

*Massachusetts.*— See Adams *v.* Crooks, 7 Gray 411.

*Michigan.*— Baird *v.* Shea, 88 Mich. 385, 50 N. W. 318. See also People *v.* Hatch, 60 Mich. 229, 26 N. W. 860.

*New Hampshire.*—Wilson *v.* Chester School Dist. No. 4, 32 N. H. 118, holding that the boundaries of a district are well established by a reference to its boundaries on a former division of the town into districts, although there might be defects in the records of the former town meeting.

*Pennsylvania.*— Com. *v.* Gardner, 23 Pa. St. 417; Williams *v.* Crook, 17 Pa. St. 199, holding that if a new district is without fixed boundaries, and without the means of ascertaining them, its existence as a district is necessarily suspended until its boundaries are designated by law.

*Vermont.*— See Sawyer *v.* Williams, 25 Vt. 311.

*Canada.*— *In re* Simmons, 21 U. C. Q. B. 75; Haacke *v.* Markham Tp., 17 U. C. Q. B. 562.

See 43 Cent. Dig. tit. "Schools and School Districts," § 50.

**47.** Half-Way River School Dist. *v.* Bradley, 54 Conn. 74, 5 Atl. 861.

**48.** State *v.* Shields, 56 Ind. 521.

**49.** Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 32 So. 87.

**50.** See State *v.* Denny, 94 Mo. App. 559, 72 S. W. 467.

**51.** *In re* Hayes, 3 U. C. C. P. 478.

extended into or over an adjoining public school section, where the teacher in the latter is not a Roman Catholic.[52] A map showing the division of a township into school-districts is admissible in evidence for the purpose of showing the boundaries of such districts.[53]

**e. Number of Inhabitants or School Children.** Under the statutes in force in some states,[54] a school-district must contain a certain number of inhabitants,[55] families,[56] or children of school age.[57]

**f. Evidence of Existence and Organization.** Where a school-district has been in continued existence for years, acting as such, and recognized as such, it will be presumed that it was legally and regularly organized;[58] and in some states it is expressly provided by statute that school-districts which have exercised the franchises and powers incident to such districts for a prescribed period of time shall be presumed to have been legally organized.[59] Proof that school trustees are acting in discharge of the duties required by statute is *prima facie* evidence of the organization of the district.[60] The best evidence of the corporate existence of a school-district formed by an official under delegated legislative power is the records of such official, together with the records of the district;[61] and it has been held doubtful whether the existence of a school-district as a body corporate, capable of taking and holding property, can be proved by parol evidence.[62] It has been held, however, that the existence and organization of a school-district may be proved by reputation, where there is no record.[63] The certificate of the registration of a school-district bond, indorsed on such bond, signed and sealed by the county clerk, and dated at a time shortly subsequent to the time when such district is alleged to have been legally organized,

52. Banks *v.* Andendon Tp., 20 Ont. 296.

53. Shorey *v.* Thrasher, 30 U. C. Q. B. 504.

54. See the statutes of the several states.

55. Allen *v.* Bertram Dist. Tp., 70 Iowa 434, 30 N. W. 684; Brewer *v.* Hall, (Tex. Civ. App. 1908) 111 S. W. 788.

56. Chesshire *v.* People, 116 Ill. 493, 6 N. E. 486.

57. Gividen *v.* Common School Dist. No. 54, 102 S. W. 1191, 31 Ky. L. Rep. 633 (holding that as the domicile of children is *prima facie* the domicile of their parents, children of a resident of a district, who are themselves out of the district, must be counted); Farley *v.* Gilbert, 72 S. W. 1098, 24 Ky. L. Rep. 2109; State *v.* Hill, 152 Mo. 234, 53 S. W. 1062 (holding that a school-district cannot cut off from itself a territory containing less than the required number of children); State *v.* Patton, 79 Mo. App. 164; Calvert *v.* Bates, 44 Mo. App. 626; Rosell *v.* Avon by the Sea, 70 N. J. L. 336, 57 Atl. 1132; Rosell *v.* Neptune City Bd. of Education, 68 N. J. L. 498, 53 Atl. 398.

58. *Massachusetts.*— Bassett *v.* Porter, 4 Cush. 487.

*Missouri.*— Rice *v.* McClelland, 58 Mo. 116.

*Nevada.*— State *v.* Sweeney, 24 Nev. 350, 55 Pac. 88.

*New Hampshire.*— See Rumney, etc., Union School Dist. No. 5 *v.* Smart, 18 N. H. 268.

*New York.*— Rohie *v.* Sedgwick, 4 Abb. Dec. 73, 5 Transcr. App. 151 [*affirming* 35 Barb. 319].

*Vermont.*— Jones *v.* Camp, 34 Vt. 384 (holding that, after a long period of acquiescence, it may be fairly presumed that the act of a town making an alteration in a school-district had its origin in the express assent of the district); Bowen *v.* King, 34 Vt. 156; Sherwin *v.* Bugbee, 16 Vt. 439.

See 43 Cent. Dig. tit. "Schools and School Districts," § 49.

59. See the statutes of the several states. And see People *v.* Van Horn, 20 Colo. App. 215, 77 Pac. 978 (holding that a school-district which allows another school-district to exercise, undisputed, the prerogatives and enjoy the privileges of a legally formed district, for a year, over part of its territory, loses such territory); Collins *v.* Liberty School Dist. No. 7, 52 Me. 522; Call *v.* Chadbourne, 46 Me. 206 (holding that this presumption is not conclusive as against proof of fraud and corruption, but only as against irregularities and informalities which are technical in their character and which do not go to the merits of the case); Pine River Tp. School-Dist. No. 1 *v.* Pine River Tp. Union School-Dist. No. 1, 81 Mich. 339, 45 N. W. 993; State *v.* Cooley, 65 Minn. 406, 68 N. W. 66; State *v.* Blue Earth County School Dist. No. 152, 54 Minn. 213, 55 N. W. 1122 (holding that such a statute establishes a conclusive presumption of law in the nature of a statute of limitations, and does not merely shift the burden of proof to the person impeaching the incorporation); State *v.* Sioux County School Dist. No. 19, 42 Nebr. 499, 60 N. W. 912.

60. Swails *v.* State, 4 Ind. 516. See also Trautmann *v.* McLeod, 74 Minn. 110, 76 N. W. 964.

61. State *v.* Sherman County School Dist. No. 7, 21 Nebr. 725, 33 N. W. 266.

62. Whitmore *v.* Hogan, 22 Me. 564.

63. Barnes *v.* Barnes, 6 Vt. 388.

introduced and received in evidence without objection, is evidence of the corporate existence of the school-district by which such bond purports to have been issued.[64] A rough sketch or map designated as "school section map township of B," but without signature, seal, or date, having the appearance of being very old and being produced from the proper custody, is admissible as evidence of the formation of the school-districts in such township.[65] Papers and proceedings connected with the supposed organization of a school-district whose existence is in issue are properly excluded, when, taken together, they do not show that the district was ever legally organized.[66]

**g. Attacking Legality of Organization or Alteration.** The legality of the organization or formation of a school-district cannot be attacked collaterally,[67] especially where such district has for a number of years exercised all the powers, and enjoyed all the privileges of such a corporation.[68] So also proceedings resulting in a change of the boundaries of a school-district cannot be collaterally attacked.[69] A school-district may be estopped, by long acquiescence in an alteration thereof, from contesting the validity of such alteration.[70] Where, after its organization, a school-district has borrowed money from the state for the erection of a school building, and has issued its bonds to the state, and has voted a tax for current expenses, the state is estopped to attack its corporate capacity.[71] That a school-house site has been selected, contracts for work and material made, bonds issued and sold, and a teacher engaged does not operate as an estoppel against a proceeding by information in the nature of a quo warranto against school directors to test the legality of the organization of a school-district, where it does not appear that the bonds were sold or the money expended before the filing of the information, and the hiring of the teacher was after that time.[72] If the

**64.** State *v.* Sherman County School Dist. No. 7, 21 Nebr. 725, 33 N. W. 266.

**65.** Burford School Trustees *v.* Burford Tp., 18 Ont. 546.

**66.** Montgomery County School Dist. No. 101 *v.* Oaks, 20 Kan. 112.

**67.** *Illinois.*— Union School-Dist. No. 4 School Directors *v.* New Union School-Dist. No. 2 School Directors, 135 Ill. 464, 28 N. E. 49; Alderman *v.* District No. 5 School Directors, 91 Ill. 179; Trumbo *v.* People, 75 Ill. 561.

*Kansas.*— Sedgwick County School Dist. No. 116 *v.* Wolf, 78 Kan. 805, 98 Pac. 237; Jefferson County School-Dist. No. 8 *v.* Gibbs, 52 Kan. 564, 35 Pac. 222; Cheyenne County School-Dist. No. 2 *v.* Cheyenne County School-Dist. No. 1, 45 Kan. 543, 26 Pac. 43; Atchison, etc., R. Co. *v.* Wilson, 33 Kan. 223, 6 Pac. 281.

*Kentucky.*— McDonald *v.* Parker, 130 Ky. 501, 110 S. W. 810, 33 Ky. L. Rep. 805.

*Michigan.*— Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900.

*Missouri.*— Black *v.* Early, 208 Mo. 281, 106 S. W. 1014; Burnham *v.* Rogers, 167 Mo. 17, 66 S. W. 970; State *v.* Miller, 113 Mo. App. 665, 88 S. W. 637. *Compare* Orrick School-Dist. *v.* Dorton, 125 Mo. 439, 28 S. W. 765.

*Nebraska.*— State *v.* Palmer, 18 Nebr. 644, 26 N. W. 469.

*New Jersey.*— State *v.* Donahay, 30 N. J. L. 404.

*New York.*— Rawson *v.* Van Riper, 1 Thomps. & C. 370; Reynolds *v.* Moore, 9 Wend. 35, 24 Am. Dec. 116.

*North Dakota.*— State *v.* Gang, 10 N. D. 331, 87 N. W. 5.

*Ohio.*— Blanchard *v.* Bissell, 11 Ohio St. 96.

*Texas.*— See Parks *v.* West, (1908) 111 S. W. 726, 113 S. W. 529 [*reversing* (1908 Civ. App.) 108 S. W. 466].

*Canada.*— See St. Ignace School Com'rs *v.* French, 16 Quebec Super. Ct. 70. *Compare* Askew *v.* Manning, 38 U. C. Q. B. 345.

See 43 Cent. Dig. tit. "Schools and School Districts," § 48.

But *compare* Dartmouth Sav. Bank *v.* Minnehaha County School-Dist. No. 6, 6 Dak. 332, 43 N. W. 822.

**68.** Voss *v.* Crawford County Union School Dist. No. 11, 18 Kan. 467; Keweenaw Assoc. *v.* Hancock Tp. School-Dist. No. 1, 98 Mich. 437, 57 N. W. 404; Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69; State *v.* Central Pac. R. Co., 21 Nev. 75, 25 Pac. 296; Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154. See also Scoville *v.* Mattoon, 55 Conn. 144, 10 Atl. 511; Burnham *v.* Rogers, 167 Mo. 17, 66 S. W. 970.

**69.** Sedgwick County School Dist. No. 116 *v.* Wolf, 78 Kan. 805, 98 Pac. 237; Clement *v.* Everest, 29 Mich. 19.

**70.** Pine River Tp. School-Dist. No. 1 *v.* Pine River Tp. Union School-Dist. No. 1, 81 Mich. 339, 45 N. W. 993.

**71.** State *v.* Dakota County School Dist. No. 108, 85 Minn. 230, 83 N. W. 751, where the terms "waiver" and "estoppel in pais" are compared and distinguished.

**72.** Mason *v.* People, 185 Ill. 302, 56 N. E. 1069.

reorganization of a school-district is irregular and void as to any part of the inhabitants of the district, it is so as to all, and a person is not prevented from contesting the proceedings under such reorganization, or the authority of the officers, because he was moderator of a meeting under such new organization.[73] Where the owner of property transferred from one school-district to another acquiesces in the transfer, recognizes it as valid, pays taxes assessed in the district, and votes there, he is estopped to question the validity of the transfer.[74] Under a statute which declares school-districts to be bodies corporate possessing the usual powers of public corporations and requires a newly formed district to organize by electing a board of school directors within fifteen days after the formation of the district an information in the nature of a quo warranto, commenced sixty days after the formation of a district, is the appropriate remedy to test the legality of the formation thereof.[75]

**h. De Facto Districts.** The continued exercise, under an act or proceeding for the formation of a school-district, of the powers of such corporation, may constitute the territory exercising such powers a *de facto* school-district.[76]

**i. Time Limit For Alteration.** Under the statutes in force in some jurisdictions when the alteration of a district has been made or refused, no further change can be made for a prescribed period.[77]

**j. Operation and Effect of Alteration** — (i) *In General.* A school-district is not dissolved by being divided, but retains all its rights as a corporation of that nature;[78] nor does a school-district become dissolved or lose any of its rights, or become discharged of any of its obligations, by a change of name.[79] The annexation of a subdistrict to adjacent subdistricts does not vacate the offices of local school directors in the latter districts.[80] A vote of a town to annex one school-district to another has the effect of abolishing the former and enlarging the latter, leaving the latter in continued existence as fully as before the transaction, without the necessity of new organization or action on the part of either.[81] Where by statute a town may, by vote, annex a portion of its inhabitants to a district in an adjoining town, which shall consent to receive them, although the effect of this is so to extend the corporate jurisdiction of such district as to embrace the persons thus annexed, together with the property subject to taxa-

**73.** Thomas *v.* Gibson, 11 Vt. 607.

**74.** Newlon *v.* Montrose Independent Dist., 109 Iowa 169, 80 N. W. 316.

**75.** Butler County School Dist. No. 2 *v.* Pace, 113 Mo. App. 134, 87 S. W. 580.

**76.** *California.*— Hamilton *v.* San Diego County, 108 Cal. 273, 41 Pac. 305.

*Kansas.*— Stafford County School-Dist. No. 25 *v.* State, 29 Kan. 57.

*Missouri.*— Sayre *v.* Tompkins, 23 Mo. 443, as to whether a district *de facto* may not levy a tax *quære.*

*New York.*— Stevens *v.* Newcomb, 4 Den. 437.

*Vermont.*— See Thomas *v.* Gibson, 11 Vt. 607.

*United States.*— Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154, holding that the exercise of powers for many years confers a *de facto* existence.

*Canada.*— Nichol School Trustees *v.* Maitland, 26 Ont. App. 506.

See 43 Cent. Dig. tit. "Schools and School Districts," § 46.

*Compare* Tucker *v.* Wentworth, 35 Me. 393.

Actual user.— In the absence of a *de jure* organization of a school-district, a *de facto* existence can only be shown by actual user. Agency School Dist. *v.* Wallace, 75 Mo. App. 317. See also Green Mountain Stock Ranching Co. *v.* Savage, 15 Mont. 189, 38 Pac. 940.

Sufficient to support trespass.— Proof of the existence of a *de facto* school-district is sufficient, as against a plea of *nul tiel* corporation, to enable school directors to maintain an action of trespass for breaking into a school-house in such district under their charge. Alderman *v.* District No. 5 School Directors, 91 Ill. 179.

**77.** See the statutes of the several jurisdictions. And see Gustin *v.* Danvers School Dist. No. 5, 10 Gray (Mass.) 85 (holding that a subdivision of a school-district cannot be altered oftener than once in ten years); *In re* Amaranth School Trustees, 30 Ont. 43 (holding that the decision of officials as to a change of boundaries is final for five years); *In re* East Wawanoch, etc., Union School Section, 26 Ont. 463 (holding that an award of arbitrators is conclusive for five years, although the award is that no change be made in the boundaries).

**78.** Janesville School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

**79.** Janesville School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

**80.** State *v.* Gibbs, 25 Ohio St. 256.

**81.** Greenbanks *v.* Boutwell, 43 Vt. 207.

tion belonging to them in the particular territory inhabited by them, yet the territory is not itself annexed to the district, as it is where a district is formed from territory belonging to two towns, by a concurrent vote of both towns.[82] The rule which obtains in Pennsylvania that the erection of a borough creates two districts, one retaining the old name and the other assuming that of the borough, will be applied, although the part of the old district remaining is very small and has a scant population.[83]

(II) *TIME FOR TAKING EFFECT.* When territory is detached from one school-district for the purpose of annexing it to another, such annexation becomes effective at once, when no time therefor is specified.[84] In Indiana it has been decided that the right of an incorporated town to the school property therein and to the control of the schools vests when the incorporation becomes complete.[85] In Pennsylvania the division of a borough into two does not take effect on the school-district therein until the beginning of the next school year.[86] In Canada it is provided that a by-law altering a school section shall not be passed later than the first of May and shall not take effect until the twenty-fifth of December next thereafter.[87]

**K. Municipal School-Districts.** Statutes have frequently been enacted providing especially for the formation and alteration of school-districts in cities, towns, and villages,[88] and the organization of school-districts composed partly of territory within incorporated municipalities and partly of territory adjacent thereto has been the subject of legislation in many states.[89]

82. Hewett *v.* Miller, 21 Vt. 402, holding that the arrangement between a town and a district in an adjoining town, by which the town, by a vote, annexes some of its inhabitants to such district, and the district consents to receive them, is not to be regarded as a compact, absolutely and perpetually binding, but as a mere license and temporary consent on both sides, and therefore subject to be revoked or canceled by either party.

83. *In re* Old Forge Tp. School Dist., 8 Lack. Leg. N. (Pa.) 264.

84. Ovitt *v.* Chase, 37 Vt. 196. See also Center Dist. Tp. *v.* Lansing Independent Dist., 82 Iowa 10, 47 N. W. 1033.

85. Hornbeck *v.* State, 33 Ind. App. 609, 71 N. E. 916.

86. Hunlock *v.* Jones, 9 Kulp (Pa.) 278.

87. See *In re* Asphodel Tp. School Trustees, 24 Ont. 682; *In re* McIntyre, 27 U. C. C. P. 58; Free *v.* McHugh, 24 U. C. C. P. 13; Cotter *v.* Darlington Tp., 11 U. C. C. P. 265; *In re* Patterson, 31 U. C. Q. B. 360.

88. See the statutes of the several states. And see Kramm *v.* Bogné, 127 Cal. 122, 59 Pac. 394; Bay View School Dist. *v.* Linscott, 99 Cal. 25, 33 Pac. 781 (holding that under Pol. Code, § 1576, providing that each city or incorporated town, unless subdivided by the legislative authority thereof, shall form a school-district, by the incorporation of a portion of a school-district as a city or town, all that portion of the district within the exterior boundaries of the city or town is withdrawn from the district); Saginaw Tp. *v.* School Dist. No. 1, 9 Mich. 541; State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; Gault *v.* Gill, 190 Mo. 79, 88 S. W. 628 (holding that any village incorporated or unincorporated, the plot of which has been filed in the recorder's office, may be organized into a school-district); Agency School Dist. *v.* Wallace, 75 Mo. App. 317 (holding that only an organized, and not an unorganized, common school district can be organized into a village school district); Cist *v.* State, 21 Ohio St. 339; State *v.* Wofford, 90 Tex. 514, 39 S. W. 921; Parks *v.* West, (1908) 111 S. W. 726, 113 S. W. 529 [*reversing* (Tex. Civ. App. 1908) 108 S. W. 466].

89. See the statutes of the several states. And see the following cases:

*Arkansas.*— Beavers *v.* State, 60 Ark. 124, 29 S. W. 144, construing Sandels & H. Dig. § 7088, holding that an incorporated town which, with territory beyond its corporate limits, previously formed a common school district, may organize itself into a single school-district exclusive of such territory, and that the phrase, "including the territory annexed thereto for school purposes," means such territory as thereafter may be annexed to such single district under the act.

*Illinois.*— Cravener *v.* Chicago Bd. of Education, 133 Ill. 145, 24 N. E. 532; McGurn *v.* Chicago Bd. of Education, 133 Ill. 122, 24 N. E. 529.

*Iowa.*— State *v.* Sunnyside Independent School Dist. No. 6, 46 Iowa 425 (holding that extending the territorial limits of a municipality does not operate to enlarge the school-district previously existing within it); Ft. Dodge City School Dist. *v.* Wahkansa, 15 Iowa 434 (holding that the extent of the territory which may be added to a town or city district for school purposes is not limited by law).

*Minnesota.*— Winona *v.* School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

*Missouri.*— Macon School Dist. *v.* Goodding, 120 Mo. 67, 24 S. W. 1034; Henry *v.*

**l. High School or Graded School Districts.** Special provision is made in many jurisdictions for the creation of high school or graded school districts;[90] and it is usually provided that the question of the creation of such districts shall be submitted to the voters in the territory which will be affected.[91]

**m. Independent School Districts.** In addition to the regular school-districts, provision is often made for independent districts, composed usually of territory lying partly within two or more townships or partly within two or more counties or partly within and partly without the territorial limits of a municipality.[92]

Duele, 74 Mo. 443; State *v.* Mayview Bd. of Education, 65 Mo. 587 (holding that under Wagner St. p. 1262, § 1, declaring that any city, town, or village, "together with the territory attached or which shall hereafter be attached" thereto, may be organized into a single school-district, outlying territory adjacent to a town may be organized with the town into a single school-district, without having been previously annexed to the town for school purposes); State *v.* Miller, 65 Mo. 50 (holding that the statute (Act (1868), p. 164, § 1) providing for the extension of the limits of territory attached to a city, town, or village for school purposes, beyond the corporate limits, authorizes the board of education of a town which has been organized into a special school-district to annex additional territory, although previous to such an annexation the district did not extend beyond the limits of the town); State *v.* Appleton City Bd. of Education, 64 Mo. 53; State *v.* Heiser, 60 Mo. 540; State *v.* Heath, 56 Mo. 231; State *v.* Appleton City Bd. of Education, 53 Mo. 127; State *v.* Searl, 50 Mo. 268; McManning *v.* Farrar, 46 Mo. 376 (holding that an unincorporated town cannot avail itself of the statute (Wagner St. p. 1262, § 1), providing that any incorporated city or town, with the territory attached or hereafter attached thereto for school purposes, may be organized as a single school-district); State *v.* Marshall, 48 Mo. App. 560.

*Oklahoma.*—Kingfisher County School Dist. No. 74 *v.* Long, 2 Okla. 460, 37 Pac. 601, holding that under the statute (Laws (1893), c. 73, art. 7, § 2) providing that territory outside of the limits of the city, but adjoining thereto, may be attached to such city for school purposes, it is not necessary that the lands attached, as described by the survey, should lie next to or contiguous to the city limits, but lands which join, and are a part of, the entire body of lands which are attached to such city for school purposes may be attached.

*Texas.*— State *v.* Brownson, 94 Tex. 436, 61 S. W. 114; State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723; Pinson *v.* Vesey, 23 Tex. Civ. App. 91, 56 S. W. 593.

*Washington.*— McGovern *v.* Fairchild, 2 Wash. 479, 27 Pac. 173.

See 43 Cent. Dig. tit. "Schools and School Districts," § 84.

**90.** See the statutes of the several states. And see Mooney *v.* Tulare County, 2 Cal. App. 65, 83 Pac. 165; Gale *v.* Knopf, 193 Ill. 245, 62 N. E. 229; People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; Webb *v.* Smith, 99 Ky. 11, 34 S. W. 704, 17 Ky. L. Rep. 1308; Simpkins *v.* Ward, 45 Mich. 559, 8 N. W. 507; Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462; Lowery *v.* Kernsville Bd. of Graded School Trustees, 140 N. C. 33, 52 S. E. 267; Wilson *v.* Elgin County, 21 Ont. App. 585, 24 Can. Sup. Ct. 706 (holding that a county council has power to detach a township from a high school district without the consent of that township or of the other townships included in the high school district); *In re* Morrisburgh Bd. of Education, 8 Ont. App. 169; *In re* Wolverton, 3 Ont. 293. See 43 Cent. Dig. tit. "Schools and School Districts," § 85.

**91.** See the statutes of the several jurisdictions. And see People *v.* Hanford Union High School Dist., 148 Cal. 705, 84 Pac. 193; People *v.* Union High School Dist., 101 Cal. 655, 36 Pac. 119; Gale *v.* Knopf, 193 Ill. 245, 62 N. E. 229; Township No. 9 School Trustees *v.* People, 161 Ill. 146, 43 N. E. 696 [*affirming* 61 Ill. App. 131]; People *v.* Cowden, 160 Ill. 557, 43 N. E. 788; Richards *v.* Raymond, 92 Ill. 612, 34 Am. Rep. 151; State *v.* Echols, 41 Kan. 1, 20 Pac. 523 (holding that where an election is legally called and held to determine whether a county high school shall be established, and at which a majority of the votes cast upon the proposition are in favor of the same, the proposition will be adopted, although it may not have received a majority of all the votes cast upon other questions submitted at the same election); McDonald *v.* Parker, 130 Ky. 501, 110 S. W. 810, 33 Ky. L. Rep. 805; Bailey *v.* Figely, 106 Ky. 725, 51 S. W. 424, 21 Ky. L. Rep. 341, (Ky. 1899) 52 S. W. 800 (registration of qualified voters necessary); Webb *v.* Smith, 99 Ky. 11, 34 S. W. 704, 17 Ky. L. Rep. 1308; Williamston Graded Free School Dist *v.* Webb, 89 Ky. 264, 12 S. W. 298, 11 Ky. L. Rep. 456 (holding that under a statute providing that trustees shall take the sense of the voters as to whether a proposed graded school shall be established a submission of the question as to whether a tax shall be levied for the establishment and support of such a school is a substantial compliance); Kattawa Commen School Dist. No. 29 *v.* Eddyville Graded School Dist. No. 8, 99 S. W. 905, 30 Ky. L. Rep. 839; Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462.

See 43 Cent. Dig. tit. "Schools and School Districts," § 85. And see *supra*, III, C, 1, c, (III).

**92.** See the statutes of the several states. And see Fairview Independent School Dist. *v.*

And the alteration of such independent school-districts is also sometimes particularly provided for.[93]

**n. Consolidation and Union School Districts.** The formation of new districts by the consolidation or union of already existing districts is authorized in many jurisdictions.[94]

**2. Adjustment of Preëxisting Rights and Liabilities — a. In General.** In the absence of some statutory provision to the contrary, the general rule is that when a part of the territory of a school-district is separated from it by annexation to another district, or by the creation of a new district, the old district retaining its organization, such old district retains all its property, powers, rights, and privileges,[95] and continues to be responsible for all its debts and liabilities.[96] In

Burlington Independent School Dist., 139 Iowa 249, 117 N. W. 668; Lynnville Independent Dist. *v.* Lynn Grove Dist. Tp., 82 Iowa 169, 47 N. W. 1030; State *v.* Newport Independent School-Dist., 42 Minn. 357, 44 N. W. 120; *In re* Newry School Dist., 11 Pa. Super. Ct. 592; *In re* Foxburg Independent School Dist., 25 Pa. Co. Ct. 226; Engle *v.* Reichard, 4 Pa. Co. Ct. 48; Parks *v.* West, (Tex. 1908) 111 S. W. 726, 113 S. W. 529 [*reversing* (Civ. App. 1908) 108 S. W. 466]; Brewer *v.* Hall, (Tex. Civ. App. 1908) 111 S. W. 788; Cummins *v.* Gaston, (Tex. Civ. App. 1908) 109 S. W. 476; State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723.

In Pennsylvania under the statute permitting the formation of independent districts where natural or other obstacles prevent proper provision for educational facilities, it has been held that such districts can only be formed where they are necessary and not where they are merely expedient (*In re* Hatfield Tp. School Dist., 2 Walk. 169), that such a district cannot be created to enable inhabitants to maintain better schools to the prejudice of the rights and interests of the remaining portion of the district (*In re* Lehman Borough, 4 Pa. Co. Ct. 37), and that such a district will not be erected, where the effect will be to separate the wealthier and the poorer portions of the district to the detriment of the latter, except in case of extreme necessity (*In re* Mt. Pleasant Tp. Independent School Dist., 10 Pa. Co. Ct. 588).

**93.** See the statutes of the several states. And see Rural Independent School Dist. No. 10 *v.* New Independent School Dist., 120 Iowa 119, 94 N. W. 284; Independent School Dist. No. 2 *v.* Clay County Dist. No. 37, 20 S. D. 349, 106 N. W. 302.

**94.** See the statutes of the several states. And see People *v.* Keechler, 194 Ill. 235, 62 N. E. 525; State *v.* Grefe, 139 Iowa 18, 117 N. W. 13; Call *v.* Chadbourne, 46 Me. 206; Smyth *v.* Titcomb, 31 Me. 272; Frisby *v.* Hill, 152 Mo. 234, 53 S. W. 1062; Converse *v.* Porter, 45 N. H. 385 (holding that under the power to alter the limits of school-districts a town may unite two existing districts); Foster *v.* Lane, 30 N. H. 305; McCarter *v.* Bradley Beach Bd. of Education, 73 N. J. L. 301, 63 Atl. 93; Howe *v.* Landiss Tp. Bd. of Education, 72 N. J. L. 158, 60 Atl. 518; State *v.* Gibbs, 25 Ohio St. 256; Bill *v.* Dow, 56 Vt. 562; Bowen *v.* King, 34 Vt. 156; Pierce *v.* Whitman, 23 Vt. 626.

In Canada the formation of union districts out of districts in different townships is not authorized. Halpin *v.* Calder, 26 U. C. C. P. 501. And municipalities have no authority to form or alter union districts. *In re* Hart, 16 U. C. Q. B. 32; *In re* Ley, 13 U. C. Q. B. 433.

**95.** *Illinois.*— People *v.* School Trustees, 86 Ill. 613.

*Kansas.*— Kansas City Bd. of Education *v.* School Dist. No. 7, 45 Kan. 560, 26 Pac. 13 [*distinguishing* Curtis *v.* Bd. of Education, 43 Kan. 138, 23 Pac. 98].

*Michigan.*— Saginaw Tp. *v.* Saginaw School Dist. No. 1, 9 Mich. 541.

*Minnesota.*— Winona *v.* Winona County School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

*Ohio.*— Corwin Special School Dist. Bd. of Education *v.* Wayne Tp. Bd. of Education, 6 Ohio Cir. Ct. 597, 3 Ohio Cir. Dec. 603, money belonging to original district.

*West Virginia.*— Baker Dist. Bd. of Education *v.* Valley Dist. Bd. of Education, 30 W. Va. 424, 4 S. E. 640.

*Wisconsin.*— Joint School Dist. No. 8 *v.* Harmony School Dist. No. 5, 92 Wis. 608, 66 N. W. 794.

See 43 Cent. Dig. tit. "Schools and School Districts," §§ 71, 72.

But see Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626 (holding that as to money, choses in action, and other kindred property the claims of the old and the new district are to be adjusted upon equitable principles); Potter *v.* Chapin, 6 Paige (N. Y.) 639.

**Funds.**— In the absence of statutory provision to the contrary all funds belong to the old district. Cooke *v.* Logan County School-Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719; Hughes *v.* Carson, 90 Mo. 399, 2 S. W. 441; State *v.* Northfield Tp. Bd. of Education, 22 Ohio Cir. Ct. 224, 12 Ohio Cir. Dec. 423; Morrow County *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806. And see Rice *v.* McClelland, 58 Mo. 116. In Indiana, however, the rule seems to be otherwise. Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626; Johnson *v.* Smith, 64 Ind. 275. *Compare* Zartman *v.* State, 109 Ind. 360, 10 N. E. 94.

**96.** *Indiana.*— Maumee School Tp. *v.* Shirley City School Town, 159 Ind. 423, 65 N. E. 285.

*Michigan.*— Wayne County Sav. Bank *v.* Mikado School Dist. No. 5, 152 Mich. 440, 116 N. W. 378; People *v.* Ryan, 19 Mich. 203.

applying this general rule some cases have gone to the extent of holding that school-houses and other like property, even though beyond the limits of the old district, after its alteration, are still the property of such district;[97] but this has been denied in a number of cases and the prevailing doctrine seems to be otherwise.[98] When an old school-district is entirely abolished, or two old districts consolidated, and a new district or districts is formed from the territory of such old district or districts, the new district or districts become entitled to all the property of such old district or districts and liable for all the existing legal debts and liabilities thereof.[99] And where two new districts are created, each of them will take

*Minnesota.*— Winona *v.* Winona County School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

*New Jersey.*—McCully *v.* Ridgefield Tp. Bd. of Education, 63 N. J. L. 18, 42 Atl. 776.

*South Dakota.*— Livingstone *v.* Brookings County School Dist. No. 7, 9 S. D. 102, 68 N. W. 167, holding that where, after a school-district has issued bonds for the erection of a school-house, part of its territory is made into new districts, under a general law which does not expressly provide that the new districts shall be liable for a proportionate share of the debts of the old district, neither the old district nor a creditor thereof can enforce against the new districts a liability on such bonds, especially where the school-house remains in the old district.

*West Virginia.*— Baker Dist. Bd. of Education *v.* Valley Dist. Bd. of Education, 30 W. Va. 424, 4 S. E. 640.

*Wisconsin.*— Briggs *v.* Erin Prairie School Dist. No. 1, 21 Wis. 348.

*England.*— See *In re* Wallsend Borough Council, [1906] 2 Ch. 506, 70 J. P. 434, 75 L. J. Ch. 813, 4 Loc. Gov. 1141, 95 L. T. Rep. N. S. 259, 22 T. L. R. 773.

*Canada.*—Canada Permanent Loan, etc., Co. *v.* Donore, 11 Manitoba 120.

See 43 Cent. Dig. tit. "Schools and School Districts," § 73.

**In Nebraska** it has been held that where a district which is in debt is subdivided and sufficient territory detached therefrom to impair the obligation by not leaving sufficient property liable for the payment thereof, the detached territory is liable for its share of such indebtedness. Manahan *v.* Adams County, 77 Neb. 829, 110 N. W. 860, 77 Nebr. 832, 111 N. W. 800; Clother *v.* Maher, 15 Nebr. 1, 16 N. W. 902.

**Failure of new district to contribute as required.**—Where a territory is taken from a school-district, and organized into an independent district, and provision is made that the new district shall contribute to the original district its proportion of the indebtedness of the old district, and receive its proportionate share of unexpended funds, a failure of the new organization to furnish its portion of money to pay such indebtedness will not relieve the old district organization from liability to the creditor. Turnbull *v.* Alpena School-Dist., 45 Mich. 496, 8 N. W. 65.

97. Whittier *v.* Sanborn, 38 Me. 32; Stoneham School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62 [*questioned* in Danvers School Dist. No. 6 *v.* Tapley, 1 Allen (Mass.) 49]; Winona *v.* Winona County School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46 [*distinguishing* Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439]. See also Kansas City Bd. of Education *v.* Wyandotte County School-Dist. No. 7, 45 Kan. 560, 26 Pac. 13 [*distinguishing* Curtis *v.* Topeka Bd. of Education, 43 Kan. 138, 23 Pac. 98].

98. Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626; Allen School Tp. *v.* Macy School Town, 109 Ind. 559, 10 N. E. 578; Leesburgh School Town *v.* Plain School Tp., 86 Ind. 582 [*distinguishing*, and in effect *overruling* Reckert *v.* Peru, 60 Ind. 473; Heizer *v.* Yohn, 37 Ind. 415]; Carson *v.* State, 27 Ind. 465; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109; Wilkins School Dist. *v.* Turtle Creek Borough Dist., 31 Pittsb. Leg. J. N. S. (Pa.) 189; Barker Dist. Bd. of Education *v.* Valley Dist. Bd. of Education, 30 W. Va. 424, 4 S. E. 640. See also Indianapolis School Com'rs *v.* Center Tp., 143 Ind. 391, 42 N. E. 808; Hornbeek *v.* State, 33 Ind. App. 609, 71 N. E. 916; Danvers School Dist. No. 6 *v.* Tapley, 1 Allen (Mass.) 49. *Compare* Monroe Tp. Bd. of Education *v.* Dell Roy Village Dist. Bd. of Education, 46 Ohio St. 595, 22 N. E. 641.

99. *Connecticut.*— Winsted Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81.

*Indiana.*— Maumee School Tp. *v.* Shirley, City School Town, 159 Ind. 423, 65 N. E. 285.

*Iowa.*— McDonald *v.* Nevada Tp. School Dist. No. 1, 10 Iowa 469.

*Kansas.*— Hoffield *v.* Newton Bd. of Education, 33 Kan. 644, 7 Pac. 216.

*Kentucky.*— Latonia Graded School Dist. *v.* Latonia Bd. of Education, 93 S. W. 590, 29 Ky. L. Rep. 391.

*Massachusetts.*— Goulding *v.* Peabody, 170 Mass. 483, 49 N. E. 752; Bacon *v.* Barnstable Thirteenth School Dist., 97 Mass. 421.

*Michigan.*— Brewer *v.* Palmer, 13 Mich. 104.

*Minnesota.*— Winona *v.* Winona County School-Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46; Robbins *v.* Anoka County School Dist. No. 1, 10 Minn. 340.

*Missouri.*— Thompson *v.* Abbott, 61 Mo. 176, holding that a new district is liable for the salary of a teacher employed by the abolished district.

*New Hampshire.*— See Greenfield School-

the property which happens to fall within its limit.[1] Where a *de facto* school-district issues bonds, money deposited by it to pay such bonds should be applied for that purpose, and should not be paid to a school-district legally organized in the place of the *de facto* district.[2]

**b. Adjustment Under Statutory Provisions** — (i) *IN GENERAL.* As school property is held in trust for school purposes by the persons or corporations authorized for the time being by statute to control the same, it is in the power of the legislature, at any time, to change the trustee.[3] And the legislature may provide for such an apportionment of the common property and common burdens as to it may seem just and equitable, where a school-district is divided or otherwise altered,[4] and this has frequently been done.[5]

Dist. No. 3 *v.* Greenfield, 64 N. H. 84, 6 Atl. 484.

*New Jersey.*— McCully *v.* Ridgefield Tp. Bd. of Education, 63 N. J. L. 18, 42 Atl. 776, holding that the new district is liable for bonds of the consolidated districts. *Compare* State *v.* Froehlich, (Sup. 1897) 37 Atl. 1024.

*North Dakota.*— Coler *v.* Coppin, 10 N. D. 86, 85 N. W. 988; Coler *v.* Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649, holding that the new district is entitled to the school-house and furniture.

*Vermont.*— Barre Town School Dist. *v.* Cook, 68 Vt. 88, 34 Atl. 33; Chester School Dist. No. 20 *v.* Pierce, 67 Vt. 317, 31 Atl. 783; Barre *v.* Barre School Dist. No. 13, 67 Vt. 108, 30 Atl. 807, the last two cases both holding that the new district is entitled to money and wood which the old district had on hand.

*West Virginia.*— Barker Dist. Bd of Education *v.* Valley Dist. Bd. of Education, 30 W. Va. 424, 4 S. E. 640.

*Wisconsin.*— Stroud *v.* Stevens Point, 37 Wis. 367.

See 43 Cent. Dig. tit. "Schools and School Districts," §§ 72, 73.

**Liable severally.**—Where more than one new district is created each is liable severally for its proportionate share of the debts of the old district. Halbert *v.* Watertown Tp. School Dists., 36 Mich. 421; Barker Dist. Bd. of Education *v.* Valley Dist Bd. of Education, 30 W. Va. 424, 4 S. E. 640. But see Hughes *v.* Schuyler County School Dist. No. 29, 72 Mo. 643.

**A just debt barred by the statute of limitations** may be lawfully paid by an abolished district in adjusting its accounts. Hartford School Dist. *v.* Hartford School Dist. No. 13, 69 Vt. 147, 37 Atl. 252.

**Suit in equity.**—Where an existing district is abolished and new districts formed from its territory, a suit against such new districts brought in a federal court must be in equity, for the reason that there is no privity of contract between plaintiff and defendants which will support an action at law, and for a further reason, where it is shown as a defense, that the indebtedness sued on, if enforced against any one of the defendants alone, will subject it to a liability far in excess of its constitutional limit of indebtedness; it being the duty of the court in such case, in the exercise of its equitable powers, to prevent such a result by apportioning the liability in the first instance by its decree. Fairfield *v.* Allison Rural Independent School Dist., 111 Fed. 108 [*reversed* on other grounds in 116 Fed. 838, 54 C. C. A. 342].

**In Illinois** when the trustees of schools redistrict a township, and form the territory of a district into other districts, so that the old one ceases, if they fail to apportion its indebtedness, and lay it upon the new organizations, the old district will be continued in existence for the purpose of enforcing its liabilities. Rogers *v.* People, 68 Ill. 154; Randolph County School Directors *v.* Miller, 49 Ill. 494; Moll *v.* District No. 2 School Directors, 23 Ill. App. 508.

1. Whitmore *v.* Hogan, 22 Me. 564; Danvers School Dist. No. 6 *v.* Tapley, 1 Allen (Mass.) 49 (school-houses); Stoneham School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62 (school-houses); Winona *v.* Winona County School-Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46; Robbins *v.* Anoka County School Dist. No. 1, 10 Minn. 340; North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

2. Hamilton *v.* San Diego County, 108 Cal. 273, 41 Pac. 305.

3. Leesburgh School Town *v.* Plain School Tp., 86 Ind. 582; Carson *v.* State, 27 Ind. 465. See also Latonia Graded School Dist. *v.* Latonia Bd. of Education, 93 S. W. 590, 29 Ky. L. Rep. 391.

4. Willimantic School Soc. *v.* Windham First School Soc., 14 Conn. 457; Barker Dist. Bd. of Education *v.* Valley Dist. Bd of Education, 30 W. Va. 424, 4 S. E. 640. See also Perrizo *v.* Kesler, 93 Mich. 280, 53 N. W. 391; Mt. Pleasant *v.* Beckwith, 100 U. S. 514, 25 L. ed. 699.

**Action not reviewable.**—The legislature has power to abolish and consolidate the districts, and to apportion their property, and the manner of apportionment is a legislative question, which the courts cannot review. Lowe *v.* Hardy, 7 Utah 368, 26 Pac. 982.

**A legislative change of the directory or board of education,** without altering the territorial limits of the school-district, does not affect the obligation of a legally created debt thereof. Shankland *v.* Phillips, 3 Tenn. Ch. 556.

5. See the statutes of the several states. And see the following cases:

(II) *Proceedings For Apportionment* — (A) *In General.* The apportionment must be made by the persons or bodies designated by statute,[6] and in the manner and in accordance with the requirements prescribed thereby.[7]

*Arkansas.*— School Dist. No. 15 *v.* Waldron School Dist., 63 Ark. 433, 39 S. W. 264.

*Illinois.*— People *v.* Keechler, 194 Ill. 235, 62 N. E. 525; Township No. 9 School Trustees *v.* District No. 2 School Directors, 190 Ill. 390, 60 N. E. 531; Cravener *v.* Chicago Bd. of Education, 133 Ill. 145, 24 N. E. 532; McGurn *v.* Chicago Bd. of Education, 133 Ill. 122, 24 N. E. 529; Randolph County School Directors *v.* Miller, 49 Ill. 494.

*Iowa.*— State *v.* Grefe, 139 Iowa 18, 117 N. W. 13; Williams Dist. Tp. *v.* Jackson Dist. Tp., 36 Iowa 216, holding that schoolhouses and real estate used for school purposes, situated within the divided districts, are to be estimated in the apportionment.

*Massachusetts.*—Needham *v.* Wellesley, 139 Mass. 372, 31 N. E. 732.

*Michigan.*— Deckerville High School Dist. *v.* Marion, etc., Tp. School Dist. No. 3, 131 Mich. 272, 90 N. W. 1064.

*Minnesota.*— Gregg *v.* French, 67 Minn. 402, 69 N. W. 1102, holding that an award is not sufficiently definite where it provides that all outstanding indebtedness, if any, of the old district shall be taken into consideration, and that the division of the funds shall be based upon the assessed valuation of the land constituting the new district, but does not provide who shall determine the amount of the outstanding indebtedness, or how the assessed valuation of the land shall be ascertained.

*Nebraska.*— Douglas County School Dist. No. 46 *v.* Douglas County School Dist. No. 53, 49 Nebr. 33, 68 N. W. 366; Clother *v.* Maher, 15 Nebr. 1, 16 N. W. 902.

*Oregon.*— Polk County School Dist. No. 61 *v.* Polk County School Dist. No. 32, (1908) 98 Pac. 523.

*Pennsylvania.*— Munhall Borough School Dist. *v.* Mifflin Tp. School Dist., 207 Pa. St. 638, 56 Atl. 1125 [*affirming* 34 Pittsb. Leg. J. N. S. 65] (holding that the statute does not authorize a decree for a balance to the new district for an undue proportion of the real estate and movable property remaining in the old district); Aleppo School Dist.'s Appeal, 96 Pa. St. 76; *In re* Darby, etc., School Dists., 5 Pa. Dist. 725, 19 Pa. Co. Ct. 314; *In re* Everson Borough, 31 Pa. Super. Ct. 170; Parker Tp. School Dist. *v.* Bruin Borough School Dist., 13 Pa. Dist. 769; Rouseville Borough School Dist. *v.* Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214 (holding that the statute does not prevent the districts from endeavoring, by agreement, to arrange a mutually satisfactory division between themselves); *In re* Old Forge School Dist.'s Indebtedness, 22 Pa. Super. Ct. 239 (holding that the residue of the old district remains a district, however small its population may be, and as such is entitled to a portion of the school property); *In re* Wilkins Tp. School Dist., 18 Pa. Super. Ct. 293; Springfield Tp. School Dist. *v.* Morton School Dist., 7 Del. Co. 583 (as to interest on balance due one district by another); *In re* Cheswick School Dist., 35 Pittsb. Leg. J. N. S. 91 (holding that where the proceeds of a bond issue went almost entirely toward building a school-house in a central location in the old district just before the division, the new district will not be saddled with any of the debt).

*Rhode Island.*— *In re* Abolishing School Dists., 27 R. I. 598, 65 Atl. 302.

*Texas.*— Cummins *v.* Gaston, (Civ. App. 1908) 109 S. W. 476.

*Wisconsin.*— Lake School Dist. No. 9 *v.* Lake School Dist. No. 5, 118 Wis. 233, 95 N. W. 148, holding that a tax voted before but collected after the formation of a new school-district from another, all going into the treasury of the old district, is a credit of such old district which must be apportioned between such districts.

*United States.*— Gamble *v.* Allison Rural Independent School District, 132 Fed. 514 [*reversed* in 146 Fed. 113, 76 C. C. A. 539]; Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

See 43 Cent. Dig. tit. "Schools and School Districts," § 71.

6. *Illinois.*— District No. 5 School Directors *v.* District No. 10 School Directors, 73 Ill. 249, board of trustees.

*Iowa.*—Viola Dist. Tp. *v.* Audubon Dist. Tp., 45 Iowa 104, boards of school directors or arbitrators.

*Oregon.*— Multnomah County School Dist. No. 2 *v.* Lembert, 28 Oreg. 209, 42 Pac. 221 boards of school directors.

*Pennsylvania.*— *In re* South Covington School-Dist. Indebtedness, 3 C. Pl. 170, court of county in which divided district lies.

*Wisconsin.*— State *v.* Amherst, etc., Joint School Dist. No. 1, 109 Wis. 313, 85 N. W. 349 (supervisors of divided district); State *v.* Rice, 35 Wis. 178 (supervisors).

See 43 Cent. Dig. tit. "Schools and School Districts," § 74.

7. *Iowa.*—Albin *v.* West Branch Independent Dist., 58 Iowa 77, 12 N. W. 134.

*Minnesota.*— Gregg *v.* French, 67 Minn. 402, 69 N. W. 1102, holding that a division and award of funds and credits of a school-district, made by the county commissioners, is governed by the rules applicable to awards made by statutory or common-law arbitrators.

*Missouri.*— Rice *v.* McClelland, 58 Mo. 116.

*New Hampshire.*—Andover School Dist. No. 6 *v.* Carr, 55 N. H. 452.

*Pennsylvania.*— *In re* Abington School Dist., 84 Pa. St. 179; Manchester *v.* Reserve Tp., 4 Pa. St. 35; Darby *v.* Sharon Hill, 2 Pa. Dist. 485 (holding that where two school-districts are created out of one the property should be divided on the ratios of taxable property in the respective districts); Butler

(B) *Arbitration.* It is sometimes provided that the apportionment shall be made by arbitrators,[8] or that if the school-district officials, whose duty it is to make the apportionment in the first instance, cannot agree, the matter shall be submitted to arbitrators.[9]

(III) *TIME FOR APPORTIONMENT.* A delay of nearly two years, by a school-district formed out of another school-district having property, in seeking to enforce the right to an apportionment of such property, does not estop the new district from thereafter asserting that right.[10] And the fact that an apportionment is made to a new district before its organization is complete,[11] or that an apportionment is not made until a considerable time after the formation of the new district,[12] will not invalidate such apportionment.

(IV) *EFFECT OF DETERMINATION AND REVIEW.* It has been held that an apportionment of assets and liabilities made by the proper official is final and conclusive until set aside by proper proceedings and cannot be attacked collaterally,[13] and that an official in making an apportionment acts in a judicial or quasi-judicial capacity, and hence, after an award has been made by him, and the amount thereof paid, his power is exhausted, and he cannot thereafter increase the amount of the original award.[14] Mandamus will not be granted to disturb an apportionment made by the proper board, between school-districts, acquiesced in for several years and which, if the court could change, it has no proof that it should do so.[15] Under the statutes in force in some jurisdictions an appeal will lie from the award of the officials making the apportionment;[16] but in Pennsylvania, since no right to appeal is provided for, nothing but the jurisdiction and the regularity of the proceedings on such adjustment can be reviewed by certiorari.[17]

Tp. School Dist. *v.* Gordon School Dist., 10 Pa. Co. Ct. 663 (holding that in the division of school property on the formation of a new district, the taxable property, the number of taxpayers, and the number of pupils may be taken into consideration; but in the apportionment of debts, and of money arising from unseated lands, only taxable valuations can be considered); Williams Tp. *v.* Williamstown, 9 Pa. Co. Ct. 65; *In re* School Bd., 1 Leg. Rec. 11; *In re* Jenkintown School Dist., 6 Wkly. Notes Cas. 65.

*Wisconsin.*— Ashland School Directors *v.* Ashland, 87 Wis. 533, 58 N. W. 377; Eagle River School Directors *v.* Merrill School Dist. No. 1, 81 Wis. 543, 51 N. W. 874 (holding that under a statute making "the last prior assessment . . . the basis in determining" what ratio is to be employed in the apportionment of the assets of a school-district on a division of the territory thereof, it is of no importance that the portion detached contains no school-house or inhabitants); Pelican School Directors *v.* Rock Falls School Directors, 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049; State *v.* Kidd, 63 Wis. 337, 23 N. W. 703; State *v.* Rice, 35 Wis. 178.

See 43 Cent. Dig. tit. "Schools and School Districts," § 74.

8. See the statutes of the several states. And see State *v.* Grand Forks County School Dist. No. 21, 6 N. D. 488, 71 N. W. 772.

9. See the statutes of the several states. And see Franklin Dist. Tp. *v.* Wiggins, 110 Iowa 702, 80 N. W. 432; Corwith Independent Dist. *v.* Lu Verne Dist. Tp., 107 Iowa 73, 77 N. W. 525; Little Sioux Dist. Tp. *v.* Little Sioux Independent Dist., 60 Iowa 141, 14 N. W. 201; Algona Dist. Tp. *v.* Pott's Creek Dist. Tp., 54 Iowa 286, 6 N. W. 295; Lowell Independent School Dist. *v.* Duser Independent School Dist., 45 Iowa 391.

10. Douglas County School Dist. No. 46 *v.* Douglas County School Dist. No. 53, 49 Nebr. 33, 68 N. W. 366.

11. Evins *v.* Batchelor, 61 Ark. 521, 33 S. W. 1055.

12. Pawnee County School Dist. No. 49 *v.* Pawnee County School Dist. No. 21, 32 Kan. 123, 4 Pac. 189 (delay of three years); School Dist. No. 13 *v.* State, 15 Kan. 43 (delay of seven months).

13. Lowell Independent School Dist. *v.* Duser Independent School Dist., 45 Iowa 391; Oakville Independent School Dist. *v.* Asbury Independent School Dist., 43 Iowa 444.

14. Robinet *v.* School Dist. No. 83, 63 Kan. 1, 64 Pac. 970.

15. School Dist. No. 3 *v.* Riverside Tp., 67 Mich. 404, 34 N. W. 886. See generally MANDAMUS, 26 Cyc. 285.

16. See the statutes of the several states. And see Lowell Independent School Dist. *v.* Duser Independent School Dist., 45 Iowa 391 (appeal from district directors to county superintendent); Pine School Dist. *v.* Wilcox, 48 Mich. 404, 12 N. W. 510; Prairie Du Sac School Dist. No. 2 *v.* Prairie Du Sac School Dist. No. 1, 3 Wis. 333 (appeal to state superintendent from town superintendent).

17. *In re* Aliquippa School Directors, 172 Pa. St. 81, 33 Atl. 236; Sharon Hill School Dist.'s Appeal, 160 Pa. St. 79, 28 Atl. 636.

(v) *APPRAISAL OF SCHOOL PROPERTY AND ASSESSMENT AND REMISSION OF TAX.* Where school-districts are abolished, consolidated, or otherwise altered, provision is sometimes made by statute for the appraisal of the school property, for the levy of a tax equal to the amount of such appraisal, and for the remission of such tax to certain taxpayers.[18]

**c. Actions to Determine or Enforce Rights Between Districts.** School-districts are liable to suits or actions at the hands of other school-districts to determine and enforce their respective rights as to school property and funds.[19] Where

**18.** See the statutes of the several states. And see Rawson *v.* Spencer, 113 Mass. 40; Halleck *v.* Boylston, 117 Mass. 169; Everett Tp. School Dist. No. 3 *v.* Wilcox Tp. School Dist. No. 1, 63 Mich. 51, 29 N. W. 489; School Dist. No. 1 *v.* School Dist. No. 4, 94 Mo. 612, 7 S. W. 285; Perry *v.* Fitzwilliam, 64 N. H. 289, 16 Atl. 899; School Dist. No. 16 *v.* Concord, 64 N. H. 235, 9 Atl. 630; Elizabethtown Water Co. *v.* Wade, 59 N. J. L. 78, 35 Atl. 4; *In re* Cranston, 18 R. I. 417, 28 Atl. 608, holding that the amounts remitted are remitted to the individual taxpayers, and are not paid to the treasurer of the district. See 43 Cent. Dig. tit. "Schools and School Districts," § 78.

**19.** Wesley Dist. *v.* Algona Dist. Tp., 52 Iowa 153, 2 N. W. 1048; Hamilton County School Dist. No. 9 *v.* Hamilton County School Dist. No. 6, 9 Nebr. 331, 2 N. W. 712; Barre *v.* School Dist. No. 5, 69 Vt. 374, 37 Atl. 1111; Cassville *v.* Morris, 14 Wis. 440. See also Willimantic School Soc. *v.* Windham School Soc., 14 Conn. 457. *Compare* Henry County Dist. No. 6 *v.* Henry County Dist. No. 5, 18 Mo. App. 266; Kearne County School Dist. Nos. 17 and 24 *v.* Kearne County School Dist. Nos. 2 and 18, 17 Nebr. 177, 22 N. W. 360, holding that until the amount justly due to a district has been determined by the proper official, an action cannot be maintained.

**When action for money had and received the proper remedy** see Township 24 School Trustees *v.* Township 25 School Trustees, 81 Ill. 470; Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551; Lake School Dist. No. 9 *v.* Lake School Dist. No. 5, 118 Wis. 233, 95 N. W. 148.

**Bill in equity.**—Where an appraisal and distribution of school funds is made upon the formation of a new district, and the old districts refuse to pay over the funds to the treasurer, and the board of trustees neglect to compel such payment, the proper remedy of the new district is by a bill in equity to compel the collection of the fund and the application thereof to its legitimate use, and to prevent its perversion or loss. School Directors of Dist. No. 5 *v.* Winnebago County School Directors, 73 Ill. 249. See also Ford County School Directors Dist. No. 2 *v.* Ford County School Directors Dist. No. 4, 16 Ill. App. 651. Where a new school-district was organized according to law, and one of the old districts refused to account to the new district for a part of the taxes which the latter was entitled to share according to the act under which it was formed, a bill by the new district against the inspectors and such old district for an accounting will lie. Oshtemo Tp. School Dist. No. 13 *v.* Dean, 17 Mich. 223. Where the subdistricts of a district township were organized into independent districts, and the directors made a distribution of assets and liabilities, and instituted an action at law against the debtor districts for the amount due from them, pending which the term of office of the directors expired, it was held that the creditor districts could, in equity, compel an accounting and payment of the amount due them. Georgia Independent School Dist. *v.* Victory Independent School Dist., 41 Iowa 321.

**Mandamus.**—An action for money had and received is the only proceeding by which to liquidate a demand by one school-district against another for money belonging to plaintiff and wrongfully in the possession of defendant, and mandamus will not lie to compel its payment. Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551. But to enforce the obligation of a district to raise by taxation its share of the amount necessary for the support of a joint high school, the remedy is not by action to recover such share as a claim against the district, but by mandamus to compel the levy and collection of the tax. Joint Free High School Dist. *v.* Green Grove, 77 Wis. 532, 46 N. W. 895. Upon the division of a school district, the old district has no authority to use property or funds to which the new one is entitled; but mandamus will not lie against the treasurer of the old district, if such funds are placed beyond his control by the action of its officers. People *v.* Hodge, 4 Nebr. 265. See, generally, MANDAMUS, 26 Cyc. 285.

**Sufficiency of petition.**— In an action by a school-district to recover an amount adjudged by the county superintendent to be due it from the district out of which it was created for property retained by the original district, a petition setting up the facts of the case, and alleging that the amount was due, and that defendant had refused, upon proper demand, to pay the same, is good against a general demurrer; and it is not necessary either to allege or to prove that defendant district had notice of the action of the county superintendent in ordering it to pay for such property. School Dist. No. 49 *v.* School Dist. No. 70, 20 Kan. 76.

**Counter-claim based on incomplete agreement.**— In an action against a school-district to recover money raised by taxation for school purposes, a counter-claim based on an

an action is brought by an old school-district against a new one created therefrom to determine how much the latter should pay it for its proportionate share of the real estate and school-house, another school-district subsequently created out of the old one cannot intervene in said suit and claim its proportionate share, but must wait the settlement between the old and the first new district, and then make its claim against the old district.[20]

**d. Actions By or Against Districts as to Preëxisting Rights or Liabilities.** A board of education which by reason of the reorganization of a school-district has become the legal successor of a previous board is authorized to bring an action for school property which but for such reorganization would have vested in the previous board.[21] And it has been held that a school-district loses none of its rights by being divided and changing its name, but the various districts into which it has been divided may unite in a suit in the name which they had before division to maintain any right which accrued to the district before such division.[22] The assignee of school-district orders, due from one district to another, cannot enforce their collection by mandamus, but must proceed through his assignor.[23] In Iowa in an action on an order of a school-district which has been subsequently reorganized into independent districts, the court has jurisdiction to render judgment thereon against the several independent districts, and to issue a mandamus to compel the school directors to assemble and apportion the amount of the judgment among the several judgment creditors.[24] In Kansas a school-board that issued bonds is none the less the proper party to be sued thereon because in the meantime the city which constitutes the school-district by simple increase of population has become a city of the first class, in which class the school-boards have no separate corporate existence.[25] In Vermont, under a statute which provides that no union of school-districts shall merge them until their debts are paid and affairs settled, where an action for a debt contracted by an old district is brought against a district with which it is united it will fail.[26]

**3. Annexation of Territory For School Purposes.** It has been decided that a statute, providing that for school purposes the land of persons resident in one township or borough may be annexed to another township or borough, is intended for the relief of particular cases and not to allow a large body of land in one township to be annexed to another, even though they are contiguous;[27] that such stat-

agreement between the districts is properly rejected where it appears that conferences were had between the boards, and the agreement discussed and provisionally settled, but not consummated. Lake School Dist. No. 9 *v.* Lake School Dist. No. 5, 123 Wis. 289, 101 N. W. 681.

**Action to equalize apportionment.**— School-districts forming part of a township, which received smaller appropriations than the other districts in the township, cannot maintain an action against the latter for such a sum as would make all the districts equal as to revenues, when there is no statute requiring an equal expenditure of the money among the districts. Canadian County School Dist. Nos. 5 and 8 *v.* Canadian County School Dist. Nos. 6 and 7, 11 Okla. 72, 65 Pac. 939.

**Where there has been an attempt to divide a district** and erect a new one, but this has not been accomplished, an action cannot be maintained against the attempted new district to compel it to pay its proportion of an indebtedness incurred by the old district, as such new district has no corporate existence against which a judgment can be rendered. Fordham School Tp. *v.* Darlington School Tp., 6 S. D. 489, 61 N. W. 1128.

20. Aleppo School Dist.'s Appeal, 96 Pa. St. 76.

21. Sigel School Directors *v.* Coe, 40 Wis. 103. See also Crofton *v.* Cincinnati Bd. of Education, 26 Ohio St. 571 [*affirming* 5 Ohio Dec. (Reprint) 348, 4 Am. L. Rec. 768].

22. Janesville School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

23. People *v.* Wilson Tp. Bd. of Education, 41 Mich. 547, 49 N. W. 920.

24. Asbury Independent School Dist. *v.* Dubuque County Dist. Ct., 48 Iowa 182; Knoxville Nat. Bank *v.* Washington Independent Dist., 40 Iowa 612. See also White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 52 Iowa 73, 2 N. W. 965.

25. Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573. See also Knowles *v.* Topeka Bd. of Education, 33 Kan. 692, 7 Pac. 561.

26. Needham *v.* School Dist. No. 6, 62 Vt. 176, 20 Atl. 198.

27. *In re* Wolfe, 8 Kulp (Pa.) 181, construing Pa. Pamphl. Laws (1876), 38, (1867), 82.

ute does not authorize the annexation of land to a non-adjacent township;[28] and that the authority given by such statute should not be exercised when an equal inconvenience will be caused to the district from which the territory is taken.[29]

**4. Restoration of Territory.** Provision may be made by statute for restoring territory, which has been attached for school purposes to a district in an adjoining township or to an independent district, to the district to which it geographically belongs.[30] A statute providing that when a school-house, erected and used by a district composed of territory in two or more civil townships, has been removed, or said territory is uninhabited, it shall form a part of the district township to which it geographically belongs, does not apply to the removal of an old school-house in such district to make place for a new one, as such removal does not disorganize the district and restore the territory to the different civil townships; but the statute applies when a school-house is no longer maintained at the place where it was established by law and required to be kept.[31]

**5. Enumeration of Children For School Purposes.** Where school trustees are required by law to make an enumeration of the children of school age within their districts at stated intervals and file it with or transmit it to a superior school official,[32] the making of such enumeration is a judicial and not a ministerial act and the trustees are not civilly responsible for error or fraud therein.[33]

**6. Dissolution or Abolition.** The legislature may itself dissolve or abolish school-districts,[34] or it may, if it see fit, delegate this power to certain officials,[35] or

**28.** *In re* Heidler, 122 Pa. 653, 16 Atl. 97.

**29.** *In re* Watson, 1 Chest. Co. Rep. (Pa.) 496.

**30.** See Williams *v.* Core, 124 Iowa 213, 99 N. W. 732 (holding that the statute applies only to the restoration of territory attached to an independent district after its organization, and not to territory taken in part to make up an independent district on its organization); Odendahl *v.* Russell, 86 Iowa 669, 53 N. W. 336 (holding that the requirement of concurrence of the directors of the respective districts is peremptory); Magnolia Dist. Tp. *v.* Boyer Independent Dist., 80 Iowa 495, 45 N. W. 907; Hancock *v.* Perry Dist. Tp., 78 Iowa 550, 43 N. W. 527; Barnett *v.* Earlham Independent Dist., 73 Iowa 134, 34 N. W. 780; Albin *v.* West Branch Bd. of Directors, 58 Iowa 77, 12 N. W. 134; Fairview Independent Dist. *v.* Durland, 45 Iowa 53.

**Mandamus.**—Where no action is taken upon an application for restoration mandamus rather than appeal to the county superintendent is the proper remedy. Odendahl *v.* Russell, 86 Iowa 669, 53 N. W. 336. But where the application has been refused the remedy is by appeal to the county superintendent and not by mandamus. Barnett *v.* Earlham Independent Dist., 73 Iowa 134, 34 N. W. 780.

**Necessity for erecting school-house in territory to be restored** see Odendahl *v.* Russell, 86 Iowa 669, 53 N. W. 336.

**31.** State *v.* McCormick, 37 Iowa 142.

**32.** See the statutes of the several states. And see Young *v.* State, 138 Ind. 206, 37 N. E. 984, holding that an enumeration made by a school trustee of children of school age in his township, when properly and regularly reported, is binding and conclusive on the county superintendent and he must make it the basis of his report to the state superintendent.

**33.** Morris Tp. *v.* Carey, 27 N. J. L. 377.

**34.** Rawson *v.* Spencer, 113 Mass. 40; *In re* North Smithfield School Committee, 26 R. I. 164, 58 Atl. 628, holding that a statute abolishing school-districts and vesting the property thereof in towns is not repugnant to R. I. Const. art. 1, § 2, which declares that the burdens of the state ought to be fairly distributed among its citizens. See also Constitutional Law, 8 Cyc. 783 note 60.

**Statutes abolishing school-districts construed** see Young *v.* Bethany, 73 Conn. 166, 46 Atl. 822; State *v.* Ogan, 159 Ind. 119, 63 N. E. 227; Russell *v.* Cleveland Dist. Tp., (Iowa 1894) 62 N. W. 661; State *v.* Vaughan, 99 Mo. 332, 12 S. W. 507; Sargent *v.* Union School Dist., 63 N. H. 528, 2 Atl. 641; Briggs *v.* Outwater, 30 Barb. (N. Y.) 501; Conley *v.* West Deer School Tp. Directors, 32 Pa. St. 194; *In re* Britton Run Independent School Dist., 31 Pa. Super. Ct. 211; *In re* White Independent School Dist., 31 Pa. Super. Ct. 205; *In re* Greenwood Tp. Independent School Dist., 19 Pa. Co. Ct. 452; *In re* Abolishing of School Dists., 27 R. I. 598, 65 Atl. 302; Dodge *v.* South Royalton Graded School Dist., 67 Vt. 334, 31 Atl. 784. See 43 Cent. Dig. tit. "Schools and School Districts," § 88.

**35.** *Illinois.*— Badger *v.* Knapp, 7 Ill. App. 222, school trustees.

*Indiana.*— Ireland *v.* State, 165 Ind. 377, 75 N. E. 872, township trustees.

*New Jersey.*— State *v.* Barrett, 31 N. J. L. 31, town superintendent and district trustees.

*New York.*— Smith *v.* Coman, 47 N. Y. App. Div. 116, 62 N. Y. Suppl. 106, holding that, under a statute providing that the power to review an order of the school commissioner dissolving a school-district on ap-

courts,[36] or to the towns or townships in which the school-districts lie.[37] And it has been held that school-districts formed of parts of two or more towns may be dissolved by mutual consent,[38] but that one of these parts cannot by its own action or that of its town dissolve such a district.[39] Where the legislature has provided the manner in which,[40] or the conditions upon which,[41] dissolution may be effected, such requirements must be complied with. It has been held that the election of the school trustees and clerk by *viva voce* instead of by ballot, as required by statute, and the failure of the clerk to give bond, will not disorganize a school-district;[42] and that a joint high school district will not be dissolved by reason of the refusal of a town in such district to levy and collect taxes for the school.[43] The extinction of a municipal corporation by absorption into another city does not extinguish the school-district of such corporation.[44] If parts of two towns are by an act of the legislature incorporated into a school-district, one of those towns cannot, in the exercise of its general powers of regulating the boundaries of school-districts within its limits, dismember such district.[45] An injunction will lie at the suit of a resident taxpayer to restrain the board of school inspectors from selling school property under color of a void attempt to dissolve the district to which such property belongs.[46]

**D. Government, Officers, and District Meetings — 1. Administration of School Affairs Generally.** Unless there are constitutional restrictions,[47] the legislature may provide that school-committees, boards of directors, and the like may be composed of any persons and chosen in any manner that it may prescribe;[48] and it may prescribe the powers and duties of school-boards or

peal by a person aggrieved is vested in the superintendent of public instruction in the first instance, in the absence of such appeal the validity of such order cannot be collaterally attacked in an action against the district for school supplies.

*Canada.*— *In re* Churchill, 11 Ont. L. Rep. 284 (arbitrators); *In re* Chesterville Public School Bd., 29 Ont. 321 (arbitrators); *In re* Sydenham School Section, 6 Ont. 417 [*affirmed* in 7 Ont. App. 49 (arbitrators).

See 43 Cent. Dig. tit. "Schools and School Districts," § 90.

**36.** *In re* Lagrange Independent School Dist., 7 Pa. Dist. 719 (holding that the courts have no power to discontinue or abolish a part of an independent school-district); *In re* Braintrim Independent School Dist., 22 Pa. Co. Ct. 190 (holding that the court will not abolish an independent school-district, created by act of the assembly, when the best interests of the public and scholars will be served by its retention); *In re* Centreville Independent Dist., 33 Leg. Int. (Pa.) 281.

**37.** *Connecticut.*— Winstead Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81; Young *v.* Bethany, 73 Conn. 166, 46 Atl. 822.

*Massachusetts.*—Mendell *v.* Marion, 16 Gray 353. See also Sutton Mfg. Co. *v.* Sutton, 108 Mass. 106.

*New Hampshire.*— Child *v.* Colburn, 54 N. H. 71.

*Vermont.*— Lathrop *v.* Sunderland, 64 Vt. 35, 23 Atl. 619.

*Canada.*— *In re* Minister of Education, 29 U. C. C. P. 122.

**38.** Jones *v.* Camp, 34 Vt. 384.

**39.** Bowen *v.* King, 34 Vt. 156.

**40.** Young *v.* Bethany, 73 Conn. 166, 46 Atl. 822 (holding that the notice required when a district is altered need not be given when a district is dissolved); State *v.* Hulin, 2 Oreg. 306; Bowen *v.* King, 34 Vt. 156 (holding that a district can be dissolved only by application to the county court); *In re* McAlpine, 45 U. C. Q. B. 199.

**41.** Hornbeck *v.* State, 33 Ind. App. 609, 71 N. E. 916, holding that liability to schoolteachers for damages sustained by a breach of a contract of employment is an indebtedness within a statute providing that an incorporated town may abandon the control of its schools when the corporation "has no school indebtedness."

The assent of a majority of the legal voters (Young *v.* Bethany, 73 Conn. 166, 46 Atl. 822; Ireland *v.* State, 165 Ind. 377, 75 N. E. 872; State *v.* Cooley, 65 Minn. 406, 68 N. W. 66; State *v.* Barrett, 31 N. J. L. 31), or resident taxpayers (Briggs *v.* Borden, 71 Mich. 87, 38 N. W. 712; State *v.* Browning, 27 N. J. L. 527, 28 N. J. L. 556; State *v.* Jacobus, 26 N. J. L. 135; *In re* Lagrange Independent School Dist., 7 Pa. Dist. 719), is sometimes required.

**42.** Burgess *v.* Pue, 2 Gill (Md.) 254.

**43.** State *v.* Lamont, 86 Wis. 563, 57 N. W. 369.

**44.** State *v.* Henderson, (Mo. 1898) 46 S. W. 1076.

**45.** Rumney, etc., Union School Dist. No. 5 *v.* Smart, 18 N. H. 268.

**46.** Briggs *v.* Borden, 71 Mich. 87, 38 N. W. 712. See generally Injunctions, 22 Cyc. 883.

**47.** Ellis *v.* Greaves, 82 Miss. 36, 34 So. 81; State *v.* Lindermann, 132 Wis. 47, 111 N. W. 214.

**48.** *California.*— Nevada School-Dist. *v.* Shoecraft, 88 Cal. 372, 26 Pac. 211.

officials appointed by it or under its authority.[49] As to school officials whose offices are created by the legislature and which it may abolish at will, the legislature may require such qualifications and prescribe such conditions of eligibility as the nature of the particular office may reasonably require.[50] The legislature may also provide for the removal of school officials appointed by it or under authority conferred by it.[51] Where a school-district is legally laid out and an election of trustees is held therein, as provided by statute, the fact that that portion of the statute which relates to local taxation by districts for school purposes is unconstitutional does not oust such trustees from office.[52] Officers of the board of school trustees of a school city, who are statutory trustees, intrusted with the management of the prudential affairs of their respective political districts, are not officers and employees of the government of a civil city, within the meaning of a statute providing that the common council of every city may supervise and investigate all officers and employees of the government of such city.[53]

**2. State School-Boards and Officers — a. Appointment or Election, Tenure, Removal, Etc.** As is the case with public officers generally,[54] matters pertaining to the appointment or election of state school-boards or officers,[55] their tenure of office,[56]

*Connecticut.*— State *v.* Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83.

*Illinois.*— See People *v.* Welsh, 225 Ill. 364, 80 N. E. 313; Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75.

*Michigan.*— Pingree *v.* Detroit Bd. of Education, 99 Mich. 404, 58 N. W. 333.

*New York.*— People *v.* Bennett, 54 Barb. 480.

See 43 Cent. Dig. tit. "Schools and School Districts," § 92.

49. *Alabama.*— Gibson *v.* Mabry, 145 Ala. 112, 40 So. 297.

*Georgia.*— Americus Bd. of Public Education *v.* Barlow, 49 Ga. 232, holding that the legislature may appoint a board of education and may authorize it to superintend and control schools and to use and appropriate the school funds raised by taxation, in connection with what may be derived from the general fund provided by the state.

*Kentucky.*— Churchill *v.* Highland Park Graded School, 89 S. W. 122, 28 Ky. L. Rep. 162, holding that a statute relative to the powers and duties of school trustees and the levy and collection of taxes for school purposes, should be liberally construed with a view to effectuate its purposes.

*Massachusetts.*— Morse *v.* Ashley, 193 Mass. 294, 79 N. E. 481, holding that under a statute, providing that the school-committee shall have general charge and superintendence of all public schools in a town, such committee has power to determine that the number of pupils attending a school is so small that its maintenance is inadvisable and unnecessary and to direct that such pupils attend another school, and it will be presumed in the absence of evidence to the contrary that such committee acted in good faith and that its judgment was correct.

*Michigan.*— Pingree *v.* Detroit Bd. of Education, 99 Mich. 404, 58 N. W. 333, holding that the act of May 23, 1893, makes the mayor of Detroit a member *ex officio* of the board of education thereof and gives him certain veto power thereover.

*Mississippi.*— See Ellis *v.* Greaves, 82 Miss. 36, 34 So. 81.

*Oklahoma.*— Oklahoma County School Dist. No. 71 *v.* Overholser, 17 Okla. 147, 87 Pac. 665.

See 43 Cent. Dig. tit. "Schools and School Districts," § 92.

50. Fordyce *v.* State, 115 Wis. 608, 92 N. W. 430. See also Tucker *v.* State, 89 Miss. 363, 42 So. 798.

51. See the statutes of the several states. And see *In re* Smith, 84 Ark. 533, 106 S. W. 679, as to when state superintendent of public instruction may revoke license of county examiner.

52. Griffin *v.* Brooks, 129 Ga. 698, 59 S. E. 902.

53. Agar *v.* Pagin, 39 Ind. App. 567, 79 N. E. 379.

54. See Officers, 29 Cyc. 1368.

55. See People *v.* Osborne, 7 Colo. 605, 4 Pac. 1074 (holding that a statute providing for the original appointment of the board of control of a state industrial school, their terms of office, etc., does not contravene a constitutional provision vesting in the governor the appointment of all officers whose appointment or election is not otherwise provided for); Ash *v.* McVey, 85 Md. 119, 36 Atl. 440; State *v.* Sheldon, 8 S. D. 525, 67 N. W. 613 (holding that vacancies in the regents of education are to be filled by appointment by the governor); State *v.* Finnerud, 7 S. D. 237, 64 N. W. 121 (holding that when the governor fills a vacancy in the regents of education no confirmation of the appointment by the senate is necessary).

56. See Ash *v.* McVey, 85 Md. 119, 36 Atl. 440 (holding that a school commissioner appointed, under Act (1892), c. 341, to fill an unexpired term, holds not only until the end of the unexpired term but until another has been appointed by the governor with the advice and consent of the senate); State *v.* Thompson, 38 Mo. 192 (holding that the superintendent of public instruction continues in office until his successor is duly

and their eligibility [57] are governed by constitutional and statutory provisions.[58] Under a statute authorizing the removal of state school officials upon certain contingencies, the fact of removal is presumptive evidence that it was made for a proper cause.[59]

**b. Compensation.** The compensation of state school officials depends upon the constitutional and statutory provisions upon the subject.[60]

**c. Powers** — (i) *IN GENERAL.* Although no express authority is given by statute to a state school official to establish regulations as to the management of public schools, yet he has the implied power to make such regulations as are reasonable and in accord with the general public policy of the state.[61] A state superintendent, who is authorized to institute suits for the recovery of moneys due the state, may employ an attorney to collect a desperate claim due the state;[62] but under a statute requiring him to appear by the attorney-general or proper district attorney, a suit instituted by him officially by private counsel will be dismissed.[63] A state board of education may appoint agents for the prosecution of its business.[64] A statute providing that the state board of education may decide all controversies and disputes that may arise among those intrusted with the management of the public schools confers a visitorial power which is summary and exclusive.[65] A statute providing that it shall be the duty of the joint board of normal school trustees "to sit as a board of arbitration in matters concerning the management of each state normal school that may need adjustment" does not give to the joint board jurisdiction to arbitrate the question of an individual student's rights to be admitted to a normal school, and does not affect the jurisdiction of the courts in such a matter.[66] Where a uniform series of text-books for public schools is adopted, a state school-board, charged with the duty of enforcing the use of such books, may use such means as they think necessary to have such uniform series of books reach the children of the state with the least possible expense and inconvenience.[67] Under a statute providing for the taking of a school-book publisher's bond by the "*ex officio*" members of the state

appointed and qualified); Com. *v.* Waller, 145 Pa. St. 235, 23 Atl. 382 [*reversing* 10 Pa. Co. Ct. 111]; Pettigrew *v.* Bell, 34 S. C. 104, 12 S. E. 1023; Williams *v.* Clayton, 6 Utah 86, 61 Pac. 398 (holding that under the statute authorizing the legislature to provide for the election of "all township, district and county officers, not herein otherwise provided for," and providing for the appointment of all other officers by the governor, with the advice and consent of the legislative council, the territorial superintendent of schools is required to be appointed by the governor, and not elected).

**Term of office of deputy.**—Where a statute empowers the superintendent of public instruction to appoint a deputy, who shall perform such duties pertaining to the office as the superintendent may direct, such deputy has no fixed term of office, but holds at the pleasure of the appointing power. Somers *v.* State, 5 S. D. 321, 58 N. W. 804.

57. People *v.* Ingles, 161 Ill. 256, 43 N. E. 1103.

58. See the constitutions and statutes of the several states.

59. State *v.* Graham, 25 La. Ann. 73.

60. See the constitutions and statutes of the several states. And see State *v.* Barnes, 25 Fla. 75, 5 So. 698; State *v.* La Grave, 23 Nev. 88, 42 Pac. 797 (holding that hotel bills incurred by a superintendent of public instruction while staying at a place for the purpose of visiting schools are not part of the "actual traveling expenses" which are to be allowed and paid to that officer); State *v.* Cunningham, 82 Wis. 39, 51 N. W. 1133.

61. O'Connor *v.* Hendrick, 184 N. Y. 421, 77 N. E. 621, 7 L. R. A. N. S. 402 [*affirming* 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161.] See also Duncan *v.* State Bd. of Education, 74 S. C. 560, 54 S. E. 760.

**Prohibition as to teacher wearing religious garb** see *infra*, III, H, 2, c.

62. State *v.* Sims, 76 Ind. 328.

63. Fay *v.* Jumel, 35 La. Ann. 368.

64. State Bd. of Education *v.* Greenbaum, 39 Ill. 609.

65. Wiley *v.* Alleghany County School Com'rs, 51 Md. 401.

66. Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029.

67. Duncan *v.* State Bd. of Education, 74 S. C. 560, 54 S. E. 760, holding that a statute requiring publishers, in the discretion of the state board of education, to establish in each county one or more depositaries of their books, does not prevent such board from providing by contract with publishers of school text-books that they shall maintain at the state capital a central wholesale depositary from which its agencies and county depositaries may be supplied.

**Powers as to text-books** generally see *infra*, III, I, 2, e.

board of education, two out of three members of the state board, although not acting as a board, have power to approve and accept such bond.[68] A statute giving the state superintendent general supervision of all departments of instruction applies to a union free school district, created by special act of the legislature; and where by such statute the superintendent is given power to remove school officers for neglect of duty, he may remove members of the board of education of said school-district for neglect of duty, although the act creating such district gives the school-board thereof entire management of all common schools therein.[69] One dealing with a state board of school commissioners, the power of which is merely statutory, is bound to know the laws governing the powers of the board, and no estoppel can be created by the acts of such board in excess of its statutory powers.[70]

(II) *HEARING APPEALS.* When it is so provided by statute[71] a state superintendent or commissioner of education may hear appeals from the acts and decisions of subordinate school officials.[72] Such an official has, however, no power to review the decision of subordinate officials as to matters intrusted by law to their discretion, but is confined to the redress of grievances occasioned by violations of right.[73] A statute authorizing the superintendent of public instruction to supervise all trusts for the benefit of schools does not confer upon him power to hear and determine an appeal from an apportionment by the board of town auditors under a statute providing for the administration of the fund accruing to a town from the sale of common lands for the benefit of public schools, as the latter statute does not create a trust for school purposes within the meaning of the former.[74]

(III) *DECISIONS.* Where a state superintendent of schools is given authority

68. Reid *v.* Com., 123 Ky. 240, 94 S. W 641, 29 Ky. L. Rep. 672.

Publishers' bonds generally see *infra*, III, 1, 2, e, (v).

69. Matter of Light, 21 Misc. (N. Y.) 737, 49 N. Y. Suppl. 345 [*reversed* on other grounds in 30 N. Y. App. Div. 50, 51 N. Y. Suppl. 743].

70. Silver *v.* Indiana State Bd. of Education, (Ind. App. 1904) 71 N. E. 667, 35 Ind. App. 438, 72 N. E. 829.

71. See the statutes of the several states.

72. Matter of Harris, 58 Misc. (N. Y.) 297, 109 N. Y. Suppl. 983 (holding that under a statute conferring on the commissioner of education authority to hear appeals of any person considering himself aggrieved in consequence of any decision of a board of education with reference to the common schools of the state, it is the duty of the appellant to establish before the commissioner that he is in fact a party aggrieved by the decision appealed from); Matter of Light, 21 Misc. (N. Y.) 737, 49 N. Y. Suppl. 345 [*reversed* on other grounds in 30 N. Y. App. Div. 50, 51 N. Y. Suppl. 743] (holding that where members of a school-board proceeded with a board meeting after they knew that it had been regularly adjourned, their acts are "official acts" within a statute providing that any one aggrieved by decisions of school authorities, "or by any other official act," may appeal to the state superintendent); Hutchinson *v.* Skinner, 21 Misc. (N. Y.) 729, 49 N. Y. Suppl. 360 (holding that the refusal of a board of education to pass a resolution offered for the election of teachers is an "official act," within the meaning of a statute providing for an appeal to the superintendent of public instruction from any official act or decision of the school authorities); Watkins *v.* Huff, (Tex. Civ. App. 1901) 63 S. W. 922, (1901) 64 S. W. 682 (holding that, under a statute providing that the state superintendent shall hear and determine all appeals from the rulings and decisions of subordinate school officers, a teacher is entitled to appeal to the state superintendent from a decision of a county superintendent refusing to approve the teacher's contract to teach in the county); State *v.* Whitford, 54 Wis. 150, 11 N. W. 424. But *compare* Dexter *v.* Gardner, 5 How. Pr. (N. Y.) 417; Douglas County School Dist. No. 116 *v.* Irwin, 34 Oreg. 431, 56 Pac. 413 (holding that a statute providing that the superintendent of public instruction "shall decide, without cost to the parties appealing, all questions and disputes that may arise under the school laws" does not authorize an appeal to him from a decision of a county superintendent); James' Appeal, 5 R. I. 602 (holding that where a tax collector and the treasurer of a school-district disagreed as to whether the former had paid over to the latter certain tax money collected by him, and the district voted that the former should pay it over, the school commissioner had no jurisdiction of an appeal from such vote).

73. Gardiner's Appeal, 4 R. I. 602.

74. People *v.* Town Auditors, 126 N. Y. 528, 27 N. E. 968 [*affirming* 12 N. Y. Suppl. 165].

to hear and determine certain matters, his determination thereupon has the conclusive quality of a judgment pronounced in a legally created court of limited jurisdiction, acting within the bounds of its authority.[75] By force of statutory enactment in some states [76] the decisions of state school officials and boards upon questions presented to them upon appeal are final [77] and not reviewable.[78] It has been decided that a superintendent of public instruction in the discharge of his judicial duties has the power to correct mistakes made in rendering a judgment in a case before him, and that if, through mistake, he should announce a decision differing from a decision actually rendered, he has the power to recall such announcement, and publish the decision correctly; or that if, mistakenly, he should render a decision, he can, before rights have been acquired under it, and within a proper time, upon discovering his mistake, recall it, and decide rightly.[79]

(IV) *APPEALS FROM DECISIONS.* One who does not exercise due diligence in perfecting the appeal, provided for by statute, from a state school superintendent to the state board of education, loses his right to appeal.[80] In Rhode Island the decision of a judge of the supreme court upon an appeal from the state school commissioners is, by statute, final.[81]

**3. COUNTY BOARDS AND OFFICERS — a. Appointment or Election.** Where a county school official is to be elected by a board of trustees or like body, it is essential that a quorum of such body be present at the time of the election; [82] but if a quorum is present, whoever has a majority of the votes cast is elected, although a majority of the entire body altogether abstain from voting.[83] And it has been decided that unless it is otherwise provided by statute,[84] only a plurality of the votes cast by such body is necessary for an election.[85] An election by a county school-board, two of the three members of which are rightfully in office, is valid,

**75.** Thompson *v.* Elmer Bd. of Education, 57 N. J. L. 628, 31 Atl. 168.

**76.** See the statutes of the several states.

**77.** People *v.* Van Horn, 20 Colo. App. 215, 77 Pac. 978 (holding that the decisions of the state board of education, which the statute conferring on it power to decide questions of law and fact provides shall be final, are not final in the sense that they are not reviewable by the courts; otherwise the statute would violate Const. art. 6, § 1, vesting the judicial power in the courts there enumerated); Underwood *v.* Prince George's County School Com'rs, 103 Md. 181, 63 Atl. 221 (holding that a statute providing that such decisions shall be final is constitutional).

**78.** Wood *v.* Farmer, 69 Iowa 533, 29 N. W. 440; Park *v.* Pleasant Grove Tp. Independent School-Dist. No. 1, 65 Iowa 209, 21 N. W. 567 (holding that under a statute providing for an appeal by a teacher from an order by the district board of directors discharging him to the county superintendent, and thence to the superintendent of public instruction, whose decision shall be final, a decision, affirmed by the state superintendent, that a teacher was wrongfully discharged, is conclusive in an action for damages therefor, brought against the school-district by the teacher); People *v.* Eckler, 19 Hun (N. Y.) 609; People *v.* Collins, 34 How. Pr. (N. Y.) 336. *Compare In re* Light, 30 N. Y. App. Div. 50, 51 N. Y. Suppl. 743 [*reversing* 21 Misc. 737, 49 N. Y. Suppl. 345], holding that the statute relating to appeals to the superintendent of public instruction by any person conceiving himself aggrieved by any official act or any decision, and making his decision final and conclusive, and not subject to review in any court, does not apply to an order made by the superintendent removing a member of a board of education, and that such an order is one that is reviewable.

Where certiorari runs to the superintendent of public instruction, who has only quasi-judicial power to act in proceedings of a summary character, out of the course of the common law, the record will be reviewed to ascertain, not only whether he acted within his jurisdiction, but whether he acted strictly according to law; but his decision upon the merits, or upon mere questions of fact, as to which there was evidence to support it, will not be reviewed. State *v.* Whitford, 54 Wis. 150, 11 N. W. 424.

**79.** Desmond *v.* Glenwood Independent School Dist., 71 Iowa 23, 32 N. W. 6.

**80.** Watkins *v.* Huff, (Tex. Civ. App. 1901) 63 S. W. 922, (1901) 64 S. W. 682.

**81.** Smith's Appeal, 4 R. I. 590, holding that only matters of law arising upon the appeal are to be decided by the judge.

**82.** State *v.* Porter, 113 Ind. 79, 14 N. E. 883. See also State *v.* Edwards, 114 Ind. 581, 16 N. E. 627.

**83.** State *v.* Dillon, 125 Ind. 65, 25 N. E. 136 [*distinguishing* State *v.* Edwards, 114 Ind. 581, 16 N. E. 627; State *v.* Porter, 113 Ind. 79, 14 N. E. 883].

**84.** Com. *v.* Wickersham, 66 Pa. St. 134.

**85.** People *v.* Stone, 78 Mich. 635, 44 N. W. 333.

where all three members vote for the same person, although it is uncertain which two are the rightful members of such board.[86] The election of a superintendent of county schools by a joint school-committee may be rescinded at a subsequent meeting.[87] In the absence of any statutory provisions to the contrary, county school officials may be elected, by the bodies having this power, either *viva voce* or by ballot.[88] An election for a school officer cannot be held at a time not fixed by law for such election.[89] It has been held, however, that a statute which designates the time for the appointment of a county examiner is directory, and not mandatory,[90] and that where the power of school trustees to elect a county superintendent is not limited to the day named by statute for such election, such trustees are not deprived of the power or relieved of the duty of electing such superintendent on a later day, by a failure to make a valid election on the day specified.[91] The record of an election of a county superintendent, made by the county auditor as required by law, is *prima facie* correct, and will stand until overthrown by evidence that it is not true;[92] and since a statute requiring the county auditor to keep a record of such election in a book kept for that purpose is merely directory, the fact of election may be shown by a record entered in another book or, in the absence of any record, by parol.[93] A township trustee cannot legally vote for himself for the office of county superintendent.[94] Where the power to determine a contest over a county school office is not given by statute to the chairman of a county court, he cannot determine such contest.[95] A constitutional provision making it the duty of the legislature to establish "a uniform system of free public schools" does not require uniformity in the manner in which county superintendents of education are to be chosen in the several counties.[96] School officers who have acted under appointment are estopped from repudiating the authority and title under which they acted and from setting up independent and paramount titles to their offices by reason of their election at a prior time.[97] In New York there is no way in which county school commissioners can be elected except by assembly districts, and when the legislature changes such districts, the school commissioner districts are, of necessity, similarly changed.[98]

**b. Eligibility and Qualifications** — (1) *IN GENERAL.* Under the statutes in force in some jurisdictions,[99] only graduates of certain institutions of learning [1] or the holders of teachers' certificates or licenses [2] are eligible to certain county

86. Ledford *v.* Greene, 125 N. C. 254, 34 S. E. 434.

87. Reed *v.* Deerfield School Committee, 176 Mass. 473, 57 N. E. 961.

88. State *v.* Kilroy, 86 Ind. 118; Johnson *v.* De Hart, 9 Bush (Ky.) 640.

89. State *v.* Collins, 2 Nev. 351.

90. Neal *v.* Burrows, 34 Ark. 491.

91. State *v.* Scott, 171 Ind. 349, 86 N. E. 409. See also State *v.* Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832.

92. State *v.* Sutton, 99 Ind. 300.

93. State *v.* Scott, 171 Ind. 349, 86 N. E. 409.

94. Hornung *v.* State, 116 Ind. 458, 19 N. E. 151, 2 L. R. A. 510.

95. Leonard *v.* Haynes, 14 Lea (Tenn.) 447.

96. Wynn *v.* State, 67 Miss. 312, 7 So. 353.

97. Jones *v.* Keating, 55 Md. 145.

98. Queens County Democratic Committee *v.* Queens County Republican Committee, 74 Hun (N. Y.) 76, 26 N. Y. Suppl. 290.

99. See the statutes of the several states.

1. State *v.* Huegle, 135 Iowa 100, 112 N. W. 234; People *v.* Howlett, 94 Mich. 165, 53 N. W. 1100; Territory *v.* Stubblefield, 5 Okla. 310, 48 Pac. 112.

2. *Arkansas.*— *In re* Smith, 84 Ark. 533, 106 S. W. 679.

*Indiana.*— Benham *v.* Bradt, (1908) 84 N. E. 1084.

*Iowa.*— State *v.* Huegle, 135 Iowa 100, 112 N. W. 234.

*Michigan.*— People *v.* Howlett, 94 Mich. 165, 53 N. W. 1100, holding that a certificate issued to one after his election to the office of county school commissioner, although dated prior thereto, is insufficient.

*Missouri.*— State *v.* Meek, 129 Mo 431, 31 S. W. 913.

*Oklahoma.*— Territory *v.* Stubblefield, 5 Okla. 310, 48 Pac. 112, holding that one elected to the office of county superintendent should not be placed in possession thereof, although he holds a first grade certificate, where the examination papers upon which it was issued clearly show that he is not entitled to it.

See 43 Cent. Dig. tit. "Schools and School-Districts," § 101.

But see Wynn *v* State, 67 Miss. 312, 7 So. 353 [*overruling* Burnham *v.* Sumner, 50 Miss

school offices. Under some statutes a person who has once been elected to and held a county school office is always eligible thereto.[3] A successful contestant for the office of county school superintendent does not become disqualified therefor because, pending the contest, he resides temporarily in another county for the purpose of teaching.[4] The fact that the board of education of a city has exempted such city from the jurisdiction of the county superintendent of schools for the district in which it is situated for one year does not render a resident and elector of such city ineligible to the office of county superintendent of schools for such district, at an election held for that office during the same year.[5]

(II) *ELIGIBILITY OF WOMEN.* Where there is no express constitutional disqualification of females, no affirmative statement of qualifications which excludes them, and nothing in the language of the statute creating the office, or in the duties imposed by law upon the officer, which implies the necessary or intended exclusion of either sex, a woman is eligible to the office of county superintendent of schools or of public instruction.[6]

(III) *BONDS.* County school officials are sometimes required by statute to give bonds for the faithful performance of their duties before entering thereon.[7]

**c. Term of Office** — (I) *IN GENERAL.* The general rules governing the right of public officers to hold over after the expiration of their terms which have been discussed elsewhere,[8] are applicable to county school officials.[9] Of course, however, when there are express constitutional or statutory provisions on the subject, these control.[10] Where the office of county school superintendent is a constitutional office with a term fixed by the constitution, the legislature cannot fix a different term;[11] but the term of school officers who do not hold constitutional offices may be fixed by the legislature.[12]

517] (holding that a statute making a first grade certificate a condition of eligibility is unconstitutional); State *v.* Acton, 31 Mont. 37, 77 Pac. 299.

**3.** See the statutes of the several states. And see Atty.-Gen. *v.* Lewis, 151 Mich. 81, 114 N. W. 927. But *compare* People *v.* Howlett, 94 Mich. 165, 52 N. W. 1100 (holding that the fact that one has been secretary to the board of school commissioners of another county does not qualify him to act as school commissioner); Com. *v.* Wickersham, 90 Pa. St. 311 (holding that under a statute providing that service as county, city, or borough superintendent of public schools shall be deemed a sufficient test of qualification, where the same person is reëlected, this is not an absolute test, and if objections are made to one reëlected, who upon examination is found unfit, he is not entitled to the office).

**4.** People *v.* Wilson, 6 Cal. App. 122, 91 Pac. 661.

**5.** State *v.* Goldthwaite, 16 Wis. 146.

**6.** Huff *v.* Cook, 44 Iowa 639; Wright *v.* Noell, 16 Kan. 601; State *v.* Gorton, 33 Minn. 345, 23 N. W. 529; Russell *v.* Guptill, 13 Wash. 360, 43 Pac. 340. But *compare* State *v.* Stevens, 29 Oreg. 464, 44 Pac. 898.

**7.** See the statutes of the several states And see Justices Lee County Inferior Ct. *v.* Smith, 13 Ga. 502; Knox County *v.* Johnson, 124 Ind. 145, 24 N. E. 148, 19 Am. St. Rep. 88, 7 L. R. A. 684, holding that a county superintendent did not lose his office where it was declared vacant for a failure to give a bond without his having been given a hearing, and the time within which the bond should be filed not having been made quite clear by the statute itself.

**Acceptance of bond.**— In an action by the state on a school fund commissioner's bond in its possession, the facts that the bond was made and signed by the officer and his sureties, as a part of his qualification for office, and that the officer took the necessary oath, had the same indorsed on the bond, and both filed in the office of the proper clerk, and thereupon entered upon the duties of the office, are *prima facie* evidence that the bond was accepted. State *v.* Fredericks, 8 Iowa 553.

**8.** See OFFICERS, 29 Cyc. 1399 *et seq.*

**9.** See Howard *v.* Cornett, 1 S. W. 1, 8 Ky. L. Rep. 52.

**It is only elective officers who hold until** their successors are elected and qualified, and a school examiner appointed to fill a vacancy can only serve out the unexpired term. People *v.* Stone, 78 Mich. 635, 44 N. W. 333.

**10.** See the constitutions and statutes of the several states.

**Provisions empowering school officers to hold over** see Walton *v.* Garrett, (Ala. 1905) 38 So. 1039; State *v.* Holcombe, (Ala. 1905) 38 So. 1038; Miller *v.* State, (Ala. 1905) 38 So. 1036; State *v.* Thompson, 142 Ala. 98, 38 So. 679; State *v.* Acton, 31 Mont. 37, 77 Pac 299; State *v.* Fabrick, 16 N. D. 94, 112 N. W. 74; State *v.* Tallman, 24 Wash. 426, 64 Pac. 759.

**Provisions preventing school officers from holding over** see Tuley *v.* State, Smith (Ind.) 299; Burnham *v.* Sumner, 50 Miss. 517.

**11.** Pendleton *v.* Miller, 82 Va. 390.

**12.** State *v.* Elk County, 61 Kan. 90, 58 Pac. 959.

(II) *RESIGNATION OR REMOVAL.* A county superintendent of education who has resigned cannot withdraw his resignation after the election of his successor.[13] And where the resignation of a county superintendent, tendered to the county court, has been received by it and filed under its order, this is a virtual acceptance thereof which cannot be revoked by such superintendent, where it is not necessary to enter an order upon the records formally accepting such resignation.[14] Where the incumbent of the office of county superintendent whose reëlection is contested surrenders the official records to his opponent who has been recognized by the superintendent of public instruction as the rightful officer, as is provided for by statute, and the courts decide that such opponent was elected, the former is excluded from the office and cannot sue to remove the latter therefrom, although he be ineligible.[15] County school officials can be removed only in accordance with the constitutional or statutory provisions on the subject.[16] Under some statutory provisions county school officials may be removed without any cause being assigned, any charges preferred, or any notice given to the incumbent;[17] and when this is the case the action of the officer or board making such removal is not reviewable.[18] Express provision is, however, sometimes made for an appeal from such action.[19] The legislature may of course abolish a county school office which is not constitutional,[20] and a statute empowering the county commissioner's court to abolish the office of county superintendent of public instruction when advisable is not unconstitutional as constituting a delegation of legislative functions.[21]

13. McGee *v.* State, 103 Ind. 444, 3 N. E. 139.

14. Pace *v.* People, 50 Ill. 432.

15. Wilson *v.* Tye, 126 Ky. 34, 102 S. W. 856, 31 Ky. L. Rep. 491.

16. Hufford *v.* Conover, 139 Ind. 151, 38 N. E. 328 [*distinguishing* Vincennes *v.* Windman, 72 Ind. 218] (holding that under a statute providing for the dismissal of a county superintendent for immorality by the county commissioners after "ten days' notice before the first day of the term of the court of commissioners on which the cause is to be heard," such commissioners may dismiss such superintendent at a special meeting of the board, as it will not be presumed that the legislature intended that an immoral superintendent should remain in power until a regular meeting); Worcester County School Com'rs *v.* Goldsborough, 90 Md. 193, 44 Atl. 1055 (holding that members of a school-board are not civil officers, within Const. art. 2, § 15, authorizing the governor to remove civil officers appointed by him for incompetency or misconduct, and hence that the governor has no power to remove them for alleged incompetency or misconduct); State *v.* Hays, 105 Minn. 399, 117 N. W. 615 (holding that under a statute authorizing the board of county commissioners to fill any vacancy occurring in the office of county superintendent and providing for the removal of such officers by the governor, such board has only power to fill such office after it has been vacated by proper proceedings or by the act of the incumbent and has no power to remove such superintendent); Bon Homme County *v.* McLouth, 19 S. D. 555, 104 N. W. 256 (holding that under a statute, providing that all elective county, township, and precinct officers may be charged, tried, and removed from office for habitual or wilful neglect of duty, one month's absence from the state is not of itself a neglect of duty on the part of a county superintendent of schools).

17. See the statutes of the several states. And see State *v.* Shaver, 54 Ala. 193 (holding that the superintendent of public instruction is authorized to remove any county superintendent, whenever in his opinion the interests of public education demand such removal); People *v.* Mays, 117 Ill. 257, 7 N. E. 660 [*affirming* 17 Ill. App. 361] (holding that the county board is empowered to remove the county superintendent "for any palpable violation of law or omission of duty"); Johnson *v.* Ginn, 105 Ky. 654, 49 S. W. 470, 20 Ky. L. Rep. 1475. But see Field *v.* Com., 32 Pa. St. 478.

18. State *v.* Shaver, 54 Ala. 193; People *v.* Mays, 117 Ill. 257, 7 N. E. 660 [*affirming* 17 Ill. App. 361].

19. See the statutes of the several states. And see Stephens *v.* Marrs, 44 S. W. 102, 19 Ky. L. Rep. 1623, holding that a reversal by the superintendent of public instruction of an order of the county superintendent removing a trustee from office renders the action of the county superintendent void *ab initio*, and restores the trustee to all his rights.

20. State *v.* St. Louis County Ct., 41 Mo. 52; State *v.* Tilford, 1 Nev. 240 (holding that where a board of education, which is not designated in the constitution, is abolished by the legislature, the presidency of such a board ceases with the existence of the board; and, where the president is *ex officio* superintendent of public schools, his office of superintendent expires also with the presidency); Dalby *v.* Hancock, 125 N. C. 325, 34 S. E. 516; Greene *v.* Owen, 125 N. C. 212, 34 S. E. 424.

21. Stanfield *v.* State, 83 Tex. 317, 18 S. W. 577; State *v.* Crumbaugh, 26 Tex. Civ.

**d. Compensation.** Whether or not a county school official is entitled to compensation for services rendered by him and the amount of such compensation depends upon the constitutional and statutory provisions on the subject.[22] The amount of the salary of a county school superintendent is in some states to be determined from the number of schools,[23] or children of school age,[24] or inhabitants[25] within his district. Since the law recognizes no fraction of a day, a county school superintendent is entitled to a *per diem* allowance for every day in which he necessarily renders any substantial official service, without regard to the time occupied in its performance.[26] Overpayments of salary of a county superintendent, made under a mistake of fact and induced by such superintendent's false statements, may be recovered back by the county.[27] A county superintendent lawfully holding over after the expiration of his term of office and continuing to perform the duties thereof is entitled to the compensation provided by law for such offices.[28] Where a county school superintendent makes out and verifies his bill for compensation and mileage according to law, a *prima facie*

App. 521, 63 S. W. 925, holding that under a statute (Rev. St. art. 3930) empowering the county commissioners' court to abolish the office of county superintendent of public instruction when advisable, and stipulating that, whenever such office is abolished, the county superintendent shall serve out the term for which he was elected, a county superintendent of public instruction, appointed by the county commissioners' court to fill a vacancy, is not entitled to serve out the term of his office on the abolition thereof by the county commissioners' court.

**22.** See the constitutions and statutes of the several states. And see the following cases:

*California.*— Wilson *v.* Fisher, 140 Cal. 188, 73 Pac. 850 (holding that a person who was duly elected superintendent of schools, and who received a certificate of his election, and thereafter qualified and performed the duties of such office, is entitled to the salary attaching thereto pending a contest); Peachy *v.* Calaveras County, 59 Cal. 548.

*Colorado.*—El Paso County Com'rs *v.* Finch, 8 Colo. App. 401, 46 Pac. 629 (holding that a statute providing a salary for county superintendents of schools, as compensation for their services, and making no allowance for fees, assistance, or incidental expenses, repeals any statutory provisions authorizing such a superintendent to hire a deputy at the expense of the county); Stevens *v.* Sedgwick County, 5 Colo. App. 115, 37 Pac. 948.

*Illinois.*— Jimison *v.* Adams County, 130 Ill. 558, 22 N. E. 829; Murray *v.* Clay County, 81 Ill. 597; Jefferson County *v.* Johnson, 64 Ill. 149.

*Indiana.*— Yeager *v.* Gibson County, 95 Ind. 427; Wright *v.* McGinnis, 37 Ind. 421.

*Iowa.*— Farrell *v.* Webster County, 49 Iowa 245; Jones *v.* Benton, 4 Greene 40.

*Kentucky.*— Piercy *v.* Smith, 80 S. W. 201, 25 Ky. L. Rep. 2158; Pickett *v.* Adams, 15 S. W. 865, 16 S. W. 132, 12 Ky. L. Rep. 957 [*distinguishing* Pickett *v.* Harrod, 86 Ky. 485, 5 S. W. 473, 9 Ky. L. Rep. 687].

*Nebraska.*—Chase County *v.* Kelly, 69 Nebr. 426, 95 N. W. 865.

*South Carolina.*— Houser *v.* Orangeburg County, 59 S. C. 265, 37 S. E. 831, allowance for traveling expenses, under Rev. St. § 1057, which was not repealed by 22 St. at L. 759, or 23 St. at L. 107.

*Tennessee.*— Haile *v.* Young, 6 Lea 501.

*Texas.*— Stephens *v.* Campbell, 26 Tex. Civ. App. 213, 63 S. W. 161; Stanfield *v.* Bexar County, (Civ. App. 1894) 28 S. W. 114.

*Washington.*—Cox *v.* Holmes, 14 Wash. 255, 44 Pac. 262, holding that a statute allowing a superintendent three dollars a day for each school visited and mileage is unconstitutional.

*Wisconsin.*— Clarke *v.* Milwaukee County, 53 Wis. 65, 9 N. W. 782.

See 43 Cent. Dig. tit. "Schools and School Districts," § 106.

**23.** State *v.* Heinrich, 11 N. D. 31, 88 N. W. 734 (holding that under a statute providing that, in counties having sixty schools, the board of county commissioners shall appropriate one hundred dollars for clerical assistance in the county superintendent's office, and five dollars for each additional school, to be paid monthly, the appropriation required to be made is not for the personal benefit of the superintendent, but is to create a fund to pay the county's obligation to such clerks as shall be lawfully employed in that office); Wiles *v.* McIntosh County, 10 N. D. 594, 88 N. W. 710; Dickey County *v.* Hicks, 14 N. D. 73, 103 N. W. 423 (holding that schools in special districts and not under the supervision of a county superintendent are not to be considered in computing the salary of such superintendent).

**24.** Jefferson County Com'rs *v.* McCleary, 13 Kan. 149; Piercy *v.* Smith, 80 S. W. 201, 25 Ky. L. Rep. 2158.

**25.** Geraghty *v.* Ashland County, 81 Wis. 36, 50 N. W. 892; O'Herrin *v.* Milwaukee County, 67 Wis. 142, 30 N. W. 239; Clarke *v.* Milwaukee County, 53 Wis. 65, 9 N. W. 782.

**26.** Smith *v.* Jefferson County, 10 Colo. 17, 13 Pac. 917; Garfield County *v.* White, 16 Colo. App. 516, 66 Pac. 682.

**27.** Wiles *v.* McIntosh County, 10 N. D. 594, 88 N. W. 710.

**28.** State *v.* Fabrick, 16 N. D. 94, 112 N. W. 74.

case is established and the burden of proof is on the county attacking the correctness thereof.[29] In an action by a former school superintendent for fees for examining teachers, evidence that his successor in office spent a certain number of days in performing the same duty is not admissible upon the question whether plaintiff occupied only a reasonable time in so doing.[30]

**e. Powers and Liabilities** — (I) *In General.* A county superintendent of schools is a public officer,[31] whose powers and duties are derived entirely from statutory provisions, and he can exercise only such powers as are specially granted, or are incidentally necessary to carry the same into effect.[32] A statute investing a county board of education with discretionary powers as to the establishment and discontinuance of high schools is not unconstitutional.[33] A board of education may order their clerk to amend the record of a previous meeting to show the facts, although the *personnel* of the board has changed, as the authority for such amendment does not rest upon the personal recollection of the members of the board, but upon the knowledge of the clerk, or such files, minutes, or memoranda as put him in possession of knowledge of what transpired at such meeting.[34] In South Carolina the power of a board of trustees of a school-district to employ teachers and fix their salaries must be exercised subject to the supervision of the county board of education.[35] A county school superintendent who erroneously turns over an unexpended balance standing to the credit of a school-district to the unappropriated school funds of the county is not liable to the school-district in an action for tort.[36] Nor is a county superintendent liable for the acts of his deputy out of the line of his official duty and beyond the power conferred upon him by virtue of his appointment as deputy.[37]

(II) *Hearing Appeals.* Statutes providing for an appeal to the county superintendent from the action of subordinate school officials,[38] or for taking his

**29.** Garfield County *v.* White, 16 Colo. App. 516, 66 Pac. 682.

**30.** Farrell *v.* Webster County, 49 Iowa 245.

**31.** State *v.* Thens, 114 La. 1097, 38 So. 870.

**32.** *California.*— McKenzie *v.* San Francisco Bd. of Education, 1 Cal. App. 406, 82 Pac. 392, holding that additional duties cannot be imposed upon a county superintendent by a city charter.

*Colorado.*— Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328, holding that a county superintendent has implied authority to maintain a suit to restrain a board of directors from employing a teacher who is not qualified according to law.

*Florida.*— Nassau County Bd. of Public Instruction *v.* Billings, 15 Fla. 686, holding that a county superintendent has no authority to purchase and pay for lands for school purposes without being directed to do so by the county board of instruction.

*Indiana.*— State *v.* Jackson, 168 Ind. 384, 81 N. E. 62. See also Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933, holding that the acts of township trustees and county superintendents will not be reversed on appeal to the supreme court, where they are in substantial compliance with the statute.

*Minnesota.*— See State *v.* School Dist. No. 6 Bd. of Education, 73 Minn. 375, 76 N. W. 43.

*Nebraska.*— Ratcliff *v.* Faris, 6 Nebr. 539. See also Chase County *v.* Kelley, 69 Nebr. 426, 95 N. W. 865.

See 43 Cent. Dig. tit. "Schools and School Districts," § 107.

**33.** Blodgett *v.* Richmond County Bd. of Education, 105 Ga. 463, 30 S. E. 561; Richmond County Bd. of Education *v.* Cummings, 103 Ga. 641, 29 S. E. 488, both holding that it was no abuse of such discretion for the board to discontinue a high school for the colored race, although it left in operation a similar school for white females, and contributed to the support of a school for white boys and girls, which, however, it had not established, where the lower grade schools for colored children needed the money appropriated for the colored high school.

**34.** Glencoe Bd. of Education *v.* Township 42, 174 Ill. 510, 51 N. E. 656 [*affirming* 74 Ill. App. 401].

**35.** See State *v.* Daniel, 52 S. C. 201, 29 S. E. 633.

**Employment of teachers** generally see *infra*, III, H, 3.

**36.** Gridley School Dist. *v.* Stout, 134 Cal. 592, 66 Pac. 785.

**37.** Fresno Nat. Bank *v.* Hawkins, 93 Cal. 551, 29 Pac. 233, 27 Am. St. Rep. 221.

**38.** See the statutes of the several states. And see Sioux City School Dist. Tp. *v.* Pratt, 17 Iowa 16; People *v.* Eckler, 19 Hun (N. Y.) 609, holding that on an appeal by a claimant for teacher's wages, the county superintendent may direct the school-district trustee, if he has not sufficient money on hand to pay the claim, to issue a tax list and warrant for an amount sufficient to pay such claim for wages.

opinion and advice in controversies arising under the school law,[39] do not clothe him with judicial authority.[40] A statute providing that the action of a county school-board confirming or rejecting the action of district school trustees shall be final means only that such decision is final so far as such trustees are concerned, and does not in any manner interfere with the powers vested in the state school-board of education by statute to direct the county board as to the true intent and meaning of the school law.[41]

(III) *Liabilities on Official Bonds* — (A) *In General.* The general rules governing the liability of officers and their sureties upon official bonds have been fully discussed elsewhere in this work,[42] and are applicable to the bonds of county school officers. If such an officer fails to perform any duty rightfully imposed upon him by law his bond becomes liable.[43] Payment of the school funds, upon the order of an officer not authorized to make it,[44] or without authority of law to a person or officer not entitled thereto, by reason of which a loss occurs,[45] will subject him to liability upon his bond. If he loans such funds either in bad faith or without due caution and circumspection he is liable upon his bond for their loss.[46] But it has been held that if he deposits such funds in a bank of long established good standing and reputation he is not guilty of negligence or want of proper business prudence and caution, and that his bond is not liable for a loss occasioned by the failure of such bank.[47] As in the case of other public officers,[48] the sureties of a county school officer are only responsible for his performance of the duties assigned him by law; and if such officer engages, or those who by law have the control of his official conduct employ him in matters foreign to his office, his sureties will not be bound for his acts in the course of such employment.[49] The sureties upon the official bond of a county school officer are not liable for his acts done after the expiration of his term, while holding over without authority;[50] but it is otherwise where such officer holds over rightfully.[51] Where a county school officer continues in office under a new appointment the sureties on a bond given prior to such new appointment are not liable for his subsequent defalcations.[52] Where, however, there is no reappointment, but a continuing term of office for a number of years, the sureties on the bond of a county school officer, given for one of such years, an annual bond being required by statute,

**39.** See the statutes of the several states. And see Fitch *v.* Smith, 57 N. J. L. 526, 34 Atl. 1058; Buren *v.* Albertson, 54 N. J. L. 72, 22 Atl. 1083; McFarland *v.* Gloucester City Bd. of Education, 45 N. J. L. 100; Mershon *v.* Baldridge, 7 Watts (Pa.) 500.

**40.** Sioux City School Dist. *v.* Pratt, 17 Iowa 16; Fitch *v.* Smith, 57 N. J. L. 526, 34 Atl. 1058 (holding that the opinion of a county superintendent of public schools that a certain person is entitled to an office under the school law will not confer on such person any right to the office against an actual incumbent); Buren *v.* Albertson, 54 N. J. L. 72, 22 Atl. 1803 (holding that a county superintendent cannot decide the controversy so as to bind the parties, but can merely express an opinion and give advice, it being for the state superintendent to try the matters in dispute, and judicially decide them).

**41.** Underwood *v.* Prince George County, 103 Md. 181, 63 Atl. 221.

**42.** See Officers, 29 Cyc. 1451 *et seq.*

**43.** Chance *v.* Temple, 1 Iowa 179; Pryse *v.* Titus, 12 S. W. 584, 11 Ky. L. Rep. 564; Williams *v.* Lindsay, 44 N. C. 323. *Compare* Pace *v.* People, 47 Ill. 321.

**Failure to account for school funds and to pay them over to his successor constitutes a breach of a school officer's bond.** Lee County Justices of Inferior Court *v.* Smith, 13 Ga. 502; Allen *v.* State, 6 Blackf. (Ind.) 252. See also Pryse *v.* Hewitt, (Ky. 1886) 1 S. W. 469, 8 Ky. L. Rep. 262; Cooper *v.* Cherry, 53 N. C. 323.

**44.** Boydstun *v.* Rockwall County, (Tex. Civ. App. 1893) 23 S. W. 541.

**45.** Mahaska County *v.* Searle, 44 Iowa 492.

**46.** People *v.* Haines, 10 Ill. 528.

**47.** State *v.* Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844, 54 Am. St. Rep. 840.

**48.** See Officers, 29 Cyc. 1455 *et seq.*

**49.** Collier *v.* Henderson, 86 Ala. 279, 5 So. 488; Miller County Bd. of Education *v.* Fudge, 4 Ga. App. 637, 62 S. E. 154; State *v.* Moeller, 48 Mo. 331; Nolley *v.* Callaway County Ct., 11 Mo. 447. *Compare* State *v.* May, 22 Ark. 445.

**50.** Inley *v.* State, 1 Ind. 500.

**51.** Snugge *v.* Stone, 52 N. C. 382; Gulley *v.* Daniel, 51 N. C. 444.

**52.** Mullikin *v.* State, 7 Blackf. (Ind.) 77.

are liable for the money in his hands during that year, although part of it was received in previous years, and although at the commencement of each fiscal year he debited himself in his books of account with the amount on hand at the close of the preceding year.[53] Sureties on the general bond of a county officer are not liable for his default in respect to school funds which are covered by a special bond.[54] A state legislature is not precluded from passing an act releasing a county treasurer from liability for school funds stolen without fault on his part, by a constitutional provision that no school tax shall be appropriated to any other purpose than that for which it was levied.[55] A failure to file a copy of the county superintendent's bond with the state superintendent of education, as required by statute, is no defense to him or his sureties in an action for a default.[56] A bond given by a county school commissioner is not void because made payable to the state for the use of the township schools in said county, and not for the use of the congressional township, as required by statute.[57] And sureties on the separate bond required of a county treasurer as custodian of the school funds are liable for any school funds which he receives and does not account for, although they are not specified therein, when the condition of the bond is precisely such as the statute requires.[58] Although a bond is not required of a county school officer, yet, if he gives one, he and the sureties thereon are bound as upon a common-law bond.[59]

(B) *Actions on Bonds.*[60] Where the state,[61] a county,[62] or a particular public official [63] is made the trustee of school funds, an action upon the bond of a school official with respect to such funds should be brought in the name of such trustee. The petition or declaration in an action on the bond of a school official must contain allegations of matters which if proved will constitute a breach of such bond.[64] The record of sales of school lands required to be kept by the school commissioner is admissible in evidence in an action on such commissioner's bond, and where it does not show whether the sales were made for cash or credit, if the declaration does not aver that the sales were made for cash, it is competent to prove in some other way than by the record that the sales were so made.[65] An action on a county treasurer's bond for conversion of school money should not be dismissed for want of evidence that a school-district, which is plaintiff, has not received

**53.** Miller *v.* Macoupin County, 7 Ill. 50.

**54.** Glade Dist. Bd. of Education *v.* Rader, 42 W. Va. 178, 24 S. E. 680.

**55.** Pearson *v.* State, 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91.

**56.** Reed *v.* Summers, 79 Ala. 522.

**57.** Ellis *v.* State, 2 Ind. 262.

**58.** State *v.* Cook, 72 Mo. 496.

**59.** Elliott *v.* Perkins, 32 N. C. 333. See also State *v.* Fredericks, 8 Iowa 553.

**60.** See, generally, OFFICERS, 29 Cyc. 1462 *et seq.*

**61.** State *v.* Bonner, 5 Mo. App. 13.

**62.** Madison County *v.* Tullis, 69 Iowa 720, 27 N. W. 487.

**63.** Bedwell *v.* Jones, 9 Lea (Tenn.) 168; Rogers *v.* Sparkman, 8 Baxt. (Tenn.) 405.

**In Indiana a** suit on the bond of a school commissioner who has gone out of office should be brought by the state on the relation of his successor. State *v.* Wright, 8 Blackf. 65; State *v.* Grant, 7 Blackf. 71; Wright *v.* State, 7 Blackf. 63. And a suit on a county auditor's official bond may be instituted in the name of the state on the relation of the board of commissioners, for the recovery of congressional school funds, such commissioners being bound by law to protect and preserve the fund. Groner *v.* State, 9 Ind. 200. In a suit by the state on a school commissioner's bond, the writ must show the relator's name, either on its face or by an indorsement. State *v.* Anderson, 7 Blackf. 223.

**64.** Greene County *v.* Smith, 4 Ill. 227 (holding that, in an action on the bond of a commissioner of school lands, it must appear from the allegations assigning a breach of the bond that the township for whose use the action was brought has sustained an injury); Kintner *v.* State, 3 Ind. 86 (holding that a general demurrer to the whole declaration will not be sustained if one of several breaches assigned is sufficient); State *v.* Newby, 7 Blackf. (Ind.) 330; Wright *v.* State, 7 Blackf. (Ind.) 63; Hammond *v.* Crawford, 9 Bush (Ky.) 75; Rogers *v.* Sparkman, 8 Baxt. (Tenn.) 405 (holding that a declaration alleging that the county superintendent of schools failed and refused to pay over and account for the free school moneys received by him for the use of the county sufficiently assigns a breach of his bond).

**Amending declaration** see Ellis *v.* State, 2 Ind. 262.

**65.** Frazier *v.* Laughlin, 6 Ill. 347.

all to which it is entitled, where there is proof that an item credited on the treasurer's books as paid to said district was not thus paid, and where the treasurer's balance sheet also shows that he has received more than he has disbursed.[66] In an action against the bond of a school commissioner the record of the board of commissioners and a report of such school commissioner showing a statement of his accounts, which has been filed and recorded, is not admissible in evidence, where there is no proof of the items contained therein.[67] In some states the statutes provide a summary remedy by notice and motion for the enforcement of liabilities upon the bonds of public school officials.[68]

**4. Town or Township School Officers.** A town or city school committee cannot change the time prescribed by statute for electing a school superintendent by a custom of holding such election at any time during the year at its discretion.[1] A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and if he does so he becomes liable therefor.[2] A town treasurer who receives school money contrary to the vote of a school-district, but who disposes of it in accordance with the vote of such district, does not subject himself to an action in behalf of such district for such money.[3] In Illinois the statute empowering school trustees to remove the township treasurer requires no formal charge, no notice to the incumbent, no form of procedure or trial, and their action is not subject to review.[4] In Canada it has been decided that moneys appropriated for educational purposes are not protected by a township treasurer's bond;[5] that a township superintendent cannot sue the collector of the township for moneys received by him not in the nature of penalties;[6] that the trustees of towns, but not of townships, have unlimited discretion as to the number of schools to be kept up;[7] and that after a township public school board has existed for five years at least the by-law establishing such board may be attacked with a view to its repeal again and again, so long as the agitation against it exists.[8]

**5. District Meetings Generally — a. When and Where Held.** A statute fixing the time for holding district meetings is mandatory.[9] An annual district meeting ordinarily must be held at the time and place fixed by the next preceding annual meeting when provision is made by statute for thus naming them;[10] but it has been held that the designation of the time for an annual meeting by the next preceding annual meeting is not indispensable, even though such designation is required by statute.[11] School officials for a school-district in one state cannot be elected at a meeting held in another state,[12] and school-district officials cannot be elected at a meeting held outside of the boundaries of the district.[13] It is no

66. High Lake Dist. Tp. *v.* Espeset, 75 Iowa 500, 39 N. W. 809.

67. Kintner *v.* State, 3 Ind. 86.

68. See the statutes of the several states. And see Reed *v.* Summers, 79 Ala. 522; Naylor *v.* Literary Fund, 5 Leigh (Va.) 71 (holding that the summary remedy by motion against the treasurer of the board of school commissioners does not lie for the penalty of a bond, to be discharged by damages arising from a breach, but only for specific sums of money which the treasurer of the board of school commissioners has received and has failed to pay over); Licking Dist. Bd. of Education *v.* Parsons, 22 W. Va. 580 (holding that a notice of a motion for judgment against an ex-sheriff and his sureties for money due a school-board must show that the board had ordered him to pay over the money to his successor). *Compare* Underwood *v.* School Tp. 16, 34 Ala. 29.

1. *In re* Pawtucket School Committee, 27 R. I. 596, 65 Atl. 301.

2. People *v.* Wright, 34 Mich. 371.

3. Sanford School Dist. No. 2 *v.* Tebbetts, 67 Me. 239.

4. See Hertel *v.* Boismenue, 229 Ill. 474, 82 N. E. 298 [*affirming* 128 Ill. App. 322].

5. Oakland Tp. *v.* Proper, 1 Ont. 330.

6. Shirley *v.* Hope, 4 U. C. Q. B. 240.

7. Brockville School Trustees *v.* Brockville, 9 U. C. Q. B. 302.

8. *Re* Tuckersmith Tp. Public School Bd., 16 Ont. 604.

9. Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907. See also State *v.* Cones, 15 Nebr. 444, 19 N. W. 682. But see Sackett *v.* State, 74 Ind. 486 [*distinguishing* State *v.* Harrison, 67 Ind. 71].

10. Marchant *v.* Langworthy, 3 Den. (N. Y.) 526 [*affirming* 6 Hill 646].

11. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

12. School Directors *v.* National School Furnishing Co., 53 Ill. App. 254.

13. School Directors *v.* National School

objection, however, to the validity of a tax imposed by the inhabitants of a school-district that it was voted at a meeting held within the district, but adjourned from a previous meeting held without the district, if such meeting was regularly held in other particulars.[14] The fact that a school-district meeting, instead of being held in the school-house which was customarily used for that purpose and named in the notice, was for good reasons held elsewhere in the district, will not invalidate the action taken thereat, where all persons going to the customary meeting-place were notified of the change and the average number of inhabitants participated in the meeting.[15]

**b. Call, Warrant, and Notice** — (I) *IN GENERAL.* A school meeting must be called and notice thereof given[16] in the form and manner prescribed by law,[17] or any action taken thereat will be illegal.[18] A defective or insufficient notice, by virtue of which a school-district meeting is convened for the election of officers, cannot be taken advantage of to charge the persons elected as such officers as trespassers for any of their official acts.[19] And a notice of a meeting, purporting to have been drawn, signed, and dated in a certain city and state cannot be collaterally attacked on the ground that it was prepared and signed in another state; nor can the return thereto of the officer issuing such notice be collaterally attacked.[20] Where an act is passed to validate a district meeting which was invalid because of a failure to give proper notice thereof, all subsequent meetings affected by the illegality of such meeting are made valid.[21]

(II) *DURATION OF NOTICE.* Where the period for which notice of a school-district meeting shall be given is prescribed by statute,[22] if such notice is given

Furnishing Co., 53 Ill. App. 254. *Contra*, Myer *v.* Crispell, 28 Barb. (N. Y.) 54.

**14.** Myer *v.* Crispell, 28 Barb. (N. Y.) 54.

**Submission to voters of questions of taxation** generally see *infra*, III, F, 4, c, (IV).

**15.** Wakefield *v.* Patterson, 25 Kan. 709.

**16.** State *v.* St. Louis, etc., R. Co., 75 Mo. 526; Apgar *v.* Van Syckel, 46 N. J. L. 492; Rideout *v.* Dunstable School Dist. No. 5, 1 Allen (Mass.) 232; Central School Supply House *v.* Montague Tp. School Dist. No. 3, 99 Mich. 402, 58 N. W. 324. But *compare* Township Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58 [*reversing* 81 Ill. App. 459 (holding that notice to a member of a board of education is not necessary where the meeting is a stated one provided for by regular order); Com. *v.* Reynolds, 8 Pa. Co. Ct. 568, 5 Kulp 547 (holding that the absence of proclamation will not invalidate an election for school directors, if the election was generally known and a reasonable number of votes was cast).

**Time and place fixed by previous meeting.** — The annual meeting of a school-district is valid, although the clerk gives no notice as required by statute, if the time and place was fixed at the next preceding annual meeting in accordance with law, unless the omission to give such notice was wilful and fraudulent. Marchant *v.* Langworthy, 3 Den. (N. Y.) 526 [*affirming* 6 Hill 646].

**In Rhode Island** it is provided by statute that the record of the district clerk that a meeting has been duly and legally notified shall be *prima facie* evidence that it has been notified as the law requires. See Howland *v.* Little Compton School Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337.

**17.** Rideout *v.* Dunstable School Dist. No. 5, 1 Allen (Mass.) 232; Hayward *v.* North Bridgewater School Dist. No. 13, 2 Cush. (Mass.) 419.

**Sufficiency of notice.**—Notices which comply substantially in form with statutory requirements are sufficient. Township Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58 [*reversing* 81 Ill. App. 459]; Calahan *v.* Handsaker, 133 Iowa 622, 111 N. W. 22. Where a notice is addressed to "the inhabitants of school-district No. 1 of Newington, qualified to vote in district affairs," and there is but one district in N, the notice is sufficiently accurate. Pickering *v.* De Rochemont, 66 N. H. 377, 23 Atl. 88.

**Where a town has directed the mode** of calling the meetings of school-districts, it is necessary, in proving their transactions, to show that such directions have been pursued; and merely showing that a meeting was held *de facto* by all the inhabitants who were qualified to attend is not sufficient. Moor *v.* Newfield, 4 Me. 44.

**18.** Rideout *v.* Dunstable School Dist. No. 5, 1 Allen (Mass.) 232; State *v.* St. Louis, etc., R. Co., 75 Mo. 526.

**19.** Ring *v.* Grout, 7 Wend. (N. Y.) 341.

**20.** Woods *v.* Bristol, 84 Me. 358, 24 Atl. 865.

**21.** Stratford First School Dist. *v.* Ufford, 52 Conn. 44.

**22.** See the statutes of the several states. And see Kinney *v.* Howard, 133 Iowa 94, 110 N. W. 282; Fletcher *v.* Lincolnville, 20 Me. 439; Chapin *v.* Walpole School Dist. No. 2, 30 N. H. 25; Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58.

**In computing the length of time** during which notice of a meeting of a school-district was given, the same rule will be applied as

for a greater [23] or less period,[24] any action taken at a meeting held thereunder is invalid.

(III) *Time and Place of Meeting.* Usually the notice of a school-district meeting should name the time [25] and place [26] for such meeting. Where, however, the time for holding annual meetings is fixed by statute, it is sufficient to give notice of the place alone.[27] An annual meeting called on due notice is valid where the time for the same is not fixed at the preceding annual meeting as required by law.[28]

(IV) *Purpose of Meeting or Business to Be Transacted.* A statute requiring that the notice of a school-district meeting shall state the purpose of such meeting or the business to be transacted [29] is mandatory,[30] and any action taken at a meeting pursuant to a notice which is defective in this respect is invalid.[31] All that is requisite, however, is that the inhabitants of the district

in the case of service of process — either the day on which the notice was posted, or the day on which the meeting was held, will be counted. Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487. See also Hunt *v.* Norwich School Dist. No. 14, 14 Vt. 300, 39 Am. Dec. 225.

**Dating notice.**— A statute which prescribes no way of showing that a notice has been posted for the statutory period does not require such notice to be dated. Braley *v.* Dickinson, 48 Vt. 599.

**23.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**24.** Canda Mfg. Co. *v.* Woodbridge Tp., 58 N. J. L. 134, 32 Atl. 66; Davis *v.* Rapp, 43 N. J. L. 594; Gilbert *v.* Van Winkle, 25 N. J. L. 73.

**25.** Howland *v.* Little Compton School Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337; Sherwin *v.* Bugbee, 16 Vt. 439, holding that a school meeting warned without naming the hour of the meeting in the warrant is irregular. *Compare* Regan *v.* Snohomish County School Dist. No. 25, 44 Wash. 523, 87 Pac. 828, holding that the notice of a meeting called to consider purchasing a school-house site need not state the hours during which the polls will be kept open.

**26.** Howland *v.* Little Compton School Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337; State *v.* Green, 131 Wis. 324, 111 N. W. 519, holding that a notice of a meeting, stating merely that it will be held in the school-house in the district, is insufficient, where there are two school-houses in the district.

**27.** Hodgkins *v.* Fry, 33 Ark. 716.

**28.** Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

**29.** See the statutes of the several states. And see the following cases:

*Connecticut.*— Bartlett *v.* Kinsley, 15 Conn. 327.

*Idaho.*— Bramwell *v.* Guheen, 3 Ida. 147, 29 Pac. 110.

*Illinois.*— Merritt *v.* Farris, 22 Ill. 303.

*Iowa.*— Calahan *v.* Handsaker, 133 Iowa 622, 111 N. W. 22; McNees *v.* East River School Tp., 133 Iowa 120, 110 N. W. 325.

*Massachusetts.*— George *v.* Mendon Second School Dist., 6 Metc. 497.

*Michigan.*— Peters *v.* Warren Tp., 98 Mich. 54, 56 N. W. 1051.

*New Hampshire.*— Davis *v.* Haverhill School Dist., 43 N. H. 381.

*New York.*— Lawson *v.* Lincoln, 178 N. Y. 636, 71 N. E. 1133 [*affirming* 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667]; People *v.* Deer Park Bd. of Education, 1 N. Y. Suppl. 593.

*Rhode Island.*— Seabury *v.* Howland, 15 R. I. 446, 8 Atl. 341.

*Texas.*— Reynolds Land, etc., Co. *v.* McCabe, 72 Tex. 57, 12 S. W. 165.

*Vermont.*— Scott *v.* Williamstown School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

*Wisconsin.*— State *v.* Green, 131 Wis. 324, 111 N. W. 519.

*Canada.*— Lecavalier *v.* Les Commissaires d'Ecole, etc., 27 Quebec Super. Ct. 521.

See 43 Cent. Dig. tit. "Schools and School Districts," § 114.

**30.** Goerdt *v.* Trumm, 118 Iowa 207, 91 N. W. 1067.

**31.** *Connecticut.*— Wright *v.* North School Dist., 53 Conn. 576, 5 Atl. 708; Wilson *v.* Waltersville School Dist., 44 Conn. 157, holding that a certified copy of a vote of a school-district on a matter of business not referred to in the notice of the meeting is inadmissible, since such vote is of no legal effect.

*Massachusetts.*— Little *v.* Merrill, 10 Pick. 543. See also Rideout *v.* Dunstable School Dist. No. 5, 1 Allen 232.

*Michigan.*— Andress *v.* Williamstown Tp. School Inspectors, 19 Mich. 332; Passage *v.* Williamstown Tp. School Inspectors, 19 Mich. 330.

*New Hampshire.*— Holbrook *v.* Faulkner, 55 N. H. 311; Weare *v.* School Dist., 44 N. H. 189.

*New Jersey.*— Stackhouse *v.* Clark, 52 N. J. L. 291, 19 Atl. 462, holding that a resolution to sell an old school-house passed at the same meeting at which it was resolved to raise money to build a new house is illegal, unless notice was given that the former would be a subject for consideration at the meeting.

*New York.*— Gibson *v.* Roach, 2 N. Y. App. Div. 86, 37 N. Y. Suppl. 567 (holding that an expenditure cannot be authorized which was not contained in the notice of estimates of expenses prepared by the school trustees and posted before the meeting); People *v.*

may fairly understand from the notice the purpose for which they are convened.[32]

(v) *Service and Record.* Provision is usually made by statute for posting a certain number of copies of notice of a district meeting at certain public places in the district.[33] And sometimes it is required that notice of such meeting shall be given by newspaper advertisement for a designated length of time.[34] Where by statute the certificate of a person required to give notice of a school meeting is made evidence of that fact in a collateral proceeding it is conclusive, like the return of an officer;[35] and the return of an officer on a warrant for calling an annual meeting that he has warned all the legal voters in the district is sufficient evidence that the meeting was legally warned, although the return does not state in what manner he warned them.[36] The official certificate of the director of a school-district that notice of a certain special school meeting was given by posting up notices, which certificate was received in evidence under a stipulation in which it was recited that such stipulation was for the purpose of using the same as testimony, to save taking depositions, is evidence of the due publication of the notice of such meeting.[37] Where the clerk of a school-board is required to give notice of district meetings and to keep a record of such meetings, the posting of notices by him is in pursuance of his official duty and an entry by him in the record of

Deer Park Bd. of Education, 1 N. Y. Suppl. 593.

*Rhode Island.*— Holt's Appeal, 5 R. I. 603.

*Vermont.*— St. Johnsbury School Dist. No. 13 *v.* Smith, 67 Vt. 566, 32 Atl. 484 (holding that where the notice of a meeting does not state that there will be an election of a district officer, the election will be illegal); Bethel School Dist. No. 4 *v.* Stockbridge School Dist. No. 2, 64 Vt. 527, 25 Atl. 433; Hunt *v.* Norwich School Dist. No. 20, 14 Vt. 300, 39 Am. Dec. 225.

See 43 Cent. Dig. tit. "Schools and School Districts," § 114.

**32.** *Connecticut.*— South School Dist. *v.* Blakeslee, 13 Conn. 227. See also Bartlett *v.* Kinsley, 15 Conn. 327.

*Illinois.*— Merritt *v.* Farris, 22 Ill. 303, holding that where the notice of an election for a school-district specifies several purposes in such a way that no doubt is left as to its meaning, it is sufficient, although there may be an omission in it of a copulative conjunction.

*Michigan.*— See Peters *v.* Warren Tp., 98 Mich. 54, 56 N. W. 1051.

*New Hampshire.*— Brooks *v.* Franconia School Dist., 73 N. H. 263, 61 Atl. 127.

*New York.*— See Lawson *v.* Lincoln, 178 N. Y. 636, 71 N. E. 1133 [*affirming* 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667]; People *v.* Deer Park Bd. of Education, 1 N. Y. Suppl. 593; Williams *v.* Larkin, 3 Den. 114.

*Rhode Island.*— Seabury *v.* Howland, 15 R. I. 446, 8 Atl. 341, holding that a notice of a special district meeting stating the object of the meeting to be the "taking action in regard to the collection of the tax already assessed" is sufficiently explicit to warrant the election of a tax collector at such meeting.

*Texas.*— See Reynolds Land, etc., Co. *v.* McCabe, 72 Tex. 57, 12 S. W. 165.

*Vermont.*— Chandler *v.* Bradish, 23 Vt. 416; Dix *v.* Wilmington School Dist. No. 2, 22 Vt. 309.

See 43 Cent. Dig. tit. "Schools and School Districts," § 114.

*Compare* Bramwell *v.* Guheen, 3 Ida. 347, 29 Pac. 110.

**33.** See the statutes of the several states. And see Bartlett *v.* Kinsley, 15 Conn. 327 (holding that it is sufficient to post the number of notices required by statute, although at a previous meeting of the district additional notices have been required); Kinney *v.* Howard, 133 Iowa 94, 110 N. W. 282; Soper *v.* School Dist. No. 9, 28 Me. 193; Fletcher *v.* Lincolnville, 20 Me. 439 (holding that a grist mill is a public place); State *v.* Lockett, 54 Mo. App. 202; Chapin *v.* Walpole School Dist. No. 2, 30 N. H. 25; Seabury *v.* Howland, 15 R. I. 446, 2 Atl. 341 (holding that notices, posted one on the school-house, another on a building formerly used as a granary, and a third on a wall facing a public road, are posted in public places). See 43 Cent. Dig. tit. "Schools and School Districts," § 116.

**34.** See the statutes of the several states. And see State *v.* Yellow Jacket Min. Co., 5 Nev. 415, holding that under a statute requiring that notice of an election to impose an additional school tax be given by advertisement in a newspaper once a week for three successive weeks, it was not necessary for the notice to be published twenty-one days before the day of election, but publication by three insertions in three successive weeks, at any time in any of such weeks, was sufficient.

**35.** Starbird *v.* Falmouth School Dist. No. 7, 51 Me. 101. See also Saxton *v.* Nimms, 14 Mass. 315.

**36.** Houghton *v.* Davenport, 23 Pick. (Mass.) 235 [*overruling* Perry *v.* Dover, 12 Pick. (Mass.) 206]. See also Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

**37.** State *v.* Sherman County School Dist. No. 7, 21 Nebr. 725, 33 N. W. 266.

the time and place of posting such notices is sufficient proof of the posting thereof.[38] Proof that notices were left with the teachers at some of the school-houses in a district with directions to post the same is sufficient to raise a presumption that they were posted, in the absence of evidence to the contrary, and this in connection with a showing that they were actually posted on the remainder of the school-houses is sufficient proof of posting in conformity with a statute requiring notices of school-district meetings to be posted at the door of each school-house in the district.[39] A statute requiring all warnings for school-district meetings to be recorded before they are posted is directory only, and a failure to record the warning of such a meeting will not render it illegal.[40]

(VI) *By Whom Meeting Called and Notice Given.* A school-district meeting must be called and notice thereof given by the officers or persons authorized by law to do so;[41] and the proceedings of a meeting called or warned by unauthorized officers or persons are invalid.[42] A *de facto* officer may, however, call a valid meeting.[43] Special provision is sometimes made for calling meetings, where there is a vacancy in the office, the incumbent of which is authorized to issue the call or where the officer named by statute neglects or refuses to issue it.[44] Under statutes which provide for calling meetings upon the presentation of a written application or petition to certain designated officials,[45] it has been held that a meeting called by such an official of his own motion, without such application or petition, is illegal.[46]

**38.** Amort *v.* School Dist. No. 80, 48 Oreg. 522, 87 Pac. 761.

**39.** Calahan *v.* Handsaker, 133 Iowa 622, 111 N. W. 22.

**40.** Adams *v.* Sleeper, 64 Vt. 544, 24 Atl. 990; Sherwin *v.* Bugbee, 17 Vt. 337.

**41.** See the statutes of the several states. And see the following cases:

*Arkansas.*— Davies *v.* Holland, 43 Ark. 425 (notice given by school directors); Holland *v.* Davies, 36 Ark. 446 (holding that notice may be given by two of the three directors).

*Massachusetts.*— Stone *v.* Hamilton School Dist. No. 4, 8 Cush. 592 (holding that a clerk who is only authorized to give notice of meetings cannot call them); Stoughton Third School Dist. *v.* Atherton, 12 Metc. 105 (holding that a clerk who is authorized to call annual meetings is not thereby authorized to call any other meetings); Kingsbury *v.* Quincy Centre School Dist., 12 Metc. 99 (as to sufficiency of notice and warning given by clerk). See Little *v.* Merrill, 10 Pick. 543, under the act of Feb. 28, 1860, concerning common schools in the city of St. Anthony.

*Minnesota.*— Sturm *v.* Brown County School Dist. No. 70, 45 Minn. 88, 47 N. W. 462 (holding that under a statute requiring a certain number of the signers of a notice to be freeholders the mere fact that the notice fails to recite that they are so does not invalidate it); State *v.* St. Anthony, 10 Minn. 433.

*Missouri.*— State *v.* Lockett, 54 Mo. App. 202, holding that under a statute which provides that "the board of directors thereof shall order a special meeting . . . by posting notices in five public places within the district," the posting of such notices by one member of the board with the consent of the others is not a sufficient call for such meeting, since it is not the corporate action of the board.

*New Hampshire.*— Giles *v.* Sanbornton School Dist. No. 14, 31 N. H. 304.

*New Jersey.*— Apgar *v.* Van Syckel, 46 N. J. L. 492; Bogert *v.* Bergen County School Dist. No. 30, 43 N. J. L. 358.

*Canada.*— Wilson *v.* Thompson, 9 U. C. C. P. 364.

See 43 Cent. Dig. tit. "Schools and School Districts," § 114.

**42.** Giles *v.* Sanbornton School Dist. No. 14, 31 N. H. 304; Apgar *v.* Van Syckel, 46 N. J. L. 492.

**43.** Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Woodcock *v.* Bolster, 35 Vt. 632.

**44.** See the statutes of the several states. And see Starbird *v.* Falmouth School Dist. No. 7, 51 Me. 101; Pickering *v.* De Rochemont, 66 N. H. 377, 23 Atl. 88 (holding that where a substitute officer calls a meeting, his warrant need not recite the neglect of the regular officer); Deuniston *v.* Goffstown School Dist. No. 11, 17 N. H. 492.

**45.** See the statutes of the several states. And see Soper *v.* Livermore School Dist. No. 9, 28 Me. 193 (holding that it is not necessary to the validity of a warrant from the selectmen to call a meeting that the application therefor should be recorded or produced or that the fact that a proper application had been made should be recited in the warrant); Fletcher *v.* Lincolnville, 20 Me. 439; Central School Supply House *v.* Montague Tp. School Dist. No. 3, 99 Mich. 402, 58 N. W. 324; State *v.* Lockett, 54 Mo. App. 202; Chandler *v.* Bradish, 23 Vt. 416 (holding that it is not essential to the validity of the proceedings of a school-district annual meeting that there should have been any request to the clerk to warn the meeting); Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487.

**46.** Sanford School Dist. No. 5 *v.* Lord, 44

**c. Qualifications of Voters** — (I) *IN GENERAL.* It has been decided that the power given the legislature by a state constitution to provide for the establishment of a uniform system of common schools carries with it the power to prescribe the qualifications of voters at school-district meetings and elections for district officers.[47] In some states the right to vote at such meetings and elections depends upon the ownership of property[48] or the payment of taxes or other prescribed charges.[49] One having all the necessary qualifications to vote at a school election cannot be denied that right solely on the ground that he is a negro.[50] Under a statute providing for the transfer of children from one school corporation to another, but not authorizing the transfer of their parents, guardians, or custodians, the parent, guardian, or custodian of a transferred child is not a legal voter in the district to which the child has been transferred.[51] A district school meeting for the election of officers is within a statute providing a punishment for a person who shall vote at "any legally authorized election," knowing himself not entitled to vote.[52]

(II) *RIGHT OF WOMEN TO VOTE.* In some states the right to vote at such meetings and elections has been conferred upon women.[53]

**d. Conduct of Business** — (I) *IN GENERAL.* School-district meetings should be presided over by the person named by or elected in accordance with the statute on the subject,[54] and the person designated by statute should act as secretary.[55] As a general rule a majority of the qualified voters present at a district meeting

Me. 374. See also Central School Supply House *v.* Montague Tp. School Dist. No. 3, 99 Mich. 402, 58 N. W. 324. *Contra*, Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487, holding that the statutory provision which makes it the duty of the clerk to warn a meeting upon a written application to him for that purpose was intended to act compulsorily upon the clerk, and not to withhold from him the power of calling meetings without such application.

**47.** State *v.* Hingley, 32 Oreg. 440, 52 Pac. 89; Harris *v.* Burr, 32 Oreg. 348, 52 Pac. 17, 39 L. R. A. 768.

**48.** See the statutes of the several states. And see McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85 (holding that the wife of a person owning a homestead on which the family resides is not by reason of her homestead interest in said land an owner of real estate within a statute giving female real property owners the right to vote); State *v.* Hingley, 32 Oreg. 440, 52 Pac. 89. *Compare* Com. *v.* Bonsall, 3 Whart. (Pa.) 559.

**49.** See the statutes of the several states. And see Ward *v.* Sasscer, 98 Md. 281, 57 Atl. 208; Crawford *v.* Wilson, 4 Barb. (N. Y.) 504; Weybridge School Dist. No. 1 *v.* Bridport, 63 Vt. 383, 22 Atl. 570, holding that where property of a widow is listed to the estate of her deceased husband, she is not entitled to vote in a school-district meeting.

**50.** Bernier *v.* Russell, 89 Ill. 60.

**51.** Teeple *v.* State, 171 Ind. 268, 86 N. E. 49; Ireland *v.* State, 165 Ind. 377, 75 N. E. 872.

**52.** State *v.* Hingley, 32 Oreg. 440, 52 Pac. 89.

**53.** See the statutes of the several states. And see Mudge *v.* Jones, 59 Mich. 165, 26 N. W. 325 (holding that the right conferred upon women of voting at district meetings does not give them the right to vote at a municipal election for school trustees); McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85; Harris *v.* Burr, 32 Oreg. 348, 52 Pac. 17, 39 L. R. A. 768; Weybridge School Dist. No. 1 *v.* Bridport, 63 Vt. 383, 22 Atl. 570; Brown *v.* Phillips, 71 Wis. 239, 36 N. W. 242. See 43 Cent. Dig. tit. "Schools and School Districts," § 120.

**In New Jersey** it has been held that a statute which confers upon females the right to vote at any school meeting, although unconstitutional in so far as it assumes to confer the right to vote for school trustees, is valid in respect to all other privileges granted, including the right to vote to raise money and to issue bonds. Chamberlain *v.* Cranbury Tp. Bd. of Education, 57 N. J. L. 605, 31 Atl. 1033. See also Elkin *v.* Deshler, 25 N. J. L. 177.

**54.** See the statutes of the several states. And see State *v.* Waterhouse, 71 N. H. 488, 53 Atl. 304 (holding that a moderator who refuses to perform his duties is liable to the penalty provided for a wilful neglect of duty by a public officer); Mitchell *v.* Brown, 18 N. H. 315 (holding that the moderator of a school-district meeting need not be elected by ballot nor be sworn); State *v.* McKee, 20 Oreg. 120, 25 Pac. 222 (holding that a statute providing that "the oldest in office of the directors present shall act as chairman" means the director who has served the longest term as such under an election); Stevens *v.* Kent, 26 Vt. 503 (holding that a moderator elected at an annual meeting need not be present at every meeting during the year, but that his place can be supplied).

**55.** State *v.* McKee, 20 Oreg. 120, 25 Pac. 222, holding that where the clerk of a school-district refuses to act as secretary of a school meeting, as he is required to do by statute, the meeting has power to appoint a secretary *pro tem.*

may act, and a majority of all the qualified voters in the district is not necessary.[56] An annual meeting may be adjourned till the next day in order that its business may be completed.[57] Proceedings of a district meeting which are not strictly legal may be ratified at a subsequent legal meeting.[58] District meetings should be opened at a reasonable time after the hour specified in the notice;[59] and they should not be adjourned hurriedly, but all who are entitled to participate and desire to do so should be afforded a reasonable opportunity to be present and express their wishes.[60] Technicalities should not be resorted to, but fair play, frankness, and liberality should characterize such meetings.[61]

(II) *Method of Voting.* Persons participating in a school-district meeting may express their views upon pending questions in any recognized manner,[62] unless it is specifically required that they shall vote by ballot.[63]

(III) *Reconsideration or Rescission of Action.* The action of a school-district may be reconsidered or rescinded at a subsequent legal meeting [64] if such action has not been already carried into effect.[65] Where the action taken at a district meeting is invalid, a vote at a subsequent meeting not to rescind such action does not render it valid.[66] Where the action taken at a district meeting has become inoperative on account of the neglect of school officials it is not necessary to rescind such action before taking action again upon the same matter.[67]

**e. Minutes and Records.** There may be two partial records as to the same meeting and each of equal validity, where they are not contradictory.[68] The records of a school-district are proper and legitimate evidence of its action, for

56. Richardson *v.* McReynolds, 114 Mo 641, 21 S. W. 901; McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85; Sanford *v.* Prentice, 28 Wis. 358.

**In New Jersey** under the act of 1888 a majority vote of the taxable voters of those present at a meeting is sufficient to carry any proposition except a proposition for the condemnation of land. Stackhouse *v.* Clark, 52 N. J. L. 291, 19 Atl. 462. Before the passage of this act a majority vote of all the taxable voters of the district was necessary at an annual meeting to authorize the buying of land for school purposes or the building of a new school-house (Quaid *v.* Middlesex County School Dist. No. 37, 49 N. J. L. 607, 10 Atl. 191; Point Pleasant Land Co. *v.* Ocean County School Dist. No. 16, 47 N. J. L. 225), but at a special meeting a majority of the taxable voters present could authorize these acts (Schomp *v.* Cole, 51 N. J. L. 277, 18 Atl. 52; Crandall *v.* Gloucester County School Dist. No. 38, 51 N. J. L. 138, 16 Atl. 194).

57. Maher *v.* State, 32 Nebr. 354, 49 N. W. 436.

58. Jordan *v.* Lisbon, etc., School Dist. No. 3, 38 Me. 164.

59. South School Dist. *v.* Blakeslee, 13 Conn. 227, holding that what is a reasonable time depends in some measure upon the circumstances of each particular case.

60. See State *v.* Woolem, 39 Iowa 380. *Compare* Regan *v.* Snohomish County School Dist. No. 25, 44 Wash. 523, 87 Pac. 828.

61. See State *v.* Woolem, 39 Iowa 380.

62. Seaman *v.* Baughman, 82 Iowa 216, 47 N. W. 1091, 11 L. R. A. 354.

63. Kinney *v.* Howard, 133 Iowa 94, 110 N. W. 282; Chamberlain *v.* Cranbury Tp. Bd. of Education, 57 N. J. L. 605, 31 Atl. 1033.

64. Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131; Mitchell *v.* Brown, 18 N. H. 315; Wilson *v.* Thompson, 9 U. C. C. P. 364, holding that a resolution passed at a general annual meeting may be rescinded at a special meeting. See also George *v.* Mendon Second School Dist., 6 Metc. (Mass.) 497.

**Vote necessary to rescind.**—An act of the electors of a school-district which can be taken only by a two-thirds vote cannot be rescinded by a bare majority. Stockdale *v.* Wayland School Dist., 47 Mich. 226, 10 N. W. 349.

**Authorizing action previously denied.**—A special meeting of a school-district, duly called, may vote to raise money for school purposes, although a similar proposition has been rejected at the annual district meeting (Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377) or at a previous special meeting held in the same year (Stackhouse *v.* Clark, 52 N. J. L. 291, 19 Atl. 462).

**Effect of double repeal.**—Where a resolution of the inhabitants of a school-district to levy a tax is repealed at a subsequent meeting, and the repealing resolution is thereafter repealed, the original resolution is thereby revived. Gale *v.* Mead, 4 Hill (N. Y.) 109 [*affirmed* in 2 Den. 232].

65. Benjamin *v.* Malaka Dist. Tp., 50 Iowa 648; Mitchell *v.* Brown, 18 N. H. 315; Smith *v.* Dillingham, 4 Barb. (N. Y.) 25, all holding that after a tax authorized at a district meeting has been assessed and collected the action of such meeting cannot be rescinded.

66. Wright *v.* North School Dist., 53 Conn. 756, 5 Atl. 708.

67. Randall *v.* Smith, 1 Den. (N. Y.) 214.

68. Williams *v.* Lunenburg School Dist No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

such district, in a suit to which it is a party.[69] Although school-district records show a majority in favor of a proposition, such records are not controlling, but evidence *aliunde* is admissible to show what the actual facts are as to the result of the vote upon the proposition.[70] While it is the better practice for the clerk of a school-district to enter upon the records thereof an exact copy of the record of a meeting kept by the secretary thereof, including the signature of the chairman of the meeting, his failure to do so will not, in the absence of evidence attacking the regularity of the proceedings of the meeting, render his record inadmissible in evidence.[71] The rule that parol evidence in a collateral proceeding cannot be received to contradict the records of a public corporation, required by law to be kept in writing, or to show a mistake, applies to school-district records.[72] Records and returns relating to school-district meetings may be amended; [73] but a clerk of such district cannot amend the records thereof after his term of office has expired and another has been chosen and has qualified.[74] A statute requiring the secretary of a school-district to record all the proceedings of the district school-board and of the district meetings in separate books to be kept for that purpose is merely directory.[75] Since the act of the clerk of a school-district in making the records of a meeting thereof is an official act, they must be finally entered or approved by him when under oath, but he may take the minutes of the meeting upon which such records are based before he has been sworn.[76]

**f. Presumption as to Validity.** From the allegation in a complaint that a regular meeting of a school-district was held, at which a certain vote was had, it will be presumed that the meeting was valid and was properly composed, including the requisite number of voters.[77] Where it appears from the records of a school-district that a meeting was held on the day appointed, the presumption of law is that it was held at a suitable time of day and in pursuance of the notice given; and if one claims it to have been held otherwise the burden rests on him.[78]

**6. District Boards,[79] Members Thereof, and Other District and Local Officers — a. Nature, Election, and Appointment** — (i) *In General.* In a majority of the states statutes provide for the creation of district school-boards, variously called school-committees, school-boards, or boards of education, vested with power to regulate the schools in the city, township, or county of their organization.[80] These statutes generally contain provisions of some kind pre-

**69.** South School Dist. *v.* Blakeslee, 13 Conn. 227.

**70.** State *v.* Hutchins, 33 Nebr. 335, 50 N. W. 165.

**71.** State *v.* Eden, 54 Mo. App. 31.

**72.** Everts *v.* Rose Grove Dist. Tp., 77 Iowa 37, 41 N. W. 78, 14 Am. St. Rep. 264.

**73.** Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58; Vaughn *v.* School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393; Hadley *v.* Chamberlain, 11 Vt. 618, holding that an amendment of the records of a school-district should not be made, on the trial of a cause, for the purpose of meeting a particular ruling of the court.

**A court of equity may** correct the record of a school meeting to make it show the action really taken thereat, such correction not being in contradiction of the record, but in harmony with and necessary to make intelligible what appears therein. Locker *v.* Keiler, 110 Iowa 707, 80 N. W. 433.

**74.** Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105. See also Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

**75.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**76.** Bartlett *v.* Kinsley, 15 Conn. 327.

**77.** Soule *v.* Thelander, 31 Minn. 227, 17 N. W. 373.

**78.** South School Dist. *v.* Blakeslee, 13 Conn. 227.

**79. State boards and officers** see *supra*, III, D, 2.

**80.** See the statutes of the several states. And see State *v.* Ryland, 7 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 633; Com. *v.* Reynolds, 137 Pa. St. 389, 20 Atl. 1011; Com. *v.* Connell, 10 Pa. Co. Ct. 93, holding that the Pennsylvania act of Feb. 12, 1889, providing for the election of a full board of school directors by all the electors of a ward at the next election after the creation of a new ward abrogates, upon the division of a ward, the borough and township system of electing directors existing in Philadelphia, in original undivided wards, under the acts of Feb. 2, 1854, and of March 21, 1866, so that each new ward is entitled to a complement of twelve directors.

**The Mercer school-district,** formed under the act of May 13, 1856 (Pamphl. Laws 574), out of the borough of Mercer and the parts of three adjoining townships, is in fact

scribing the number of members of the board,[81] calculated in most instances according to the size of the population of the territory within the jurisdiction of the board,[82] and regulating the manner of their appointment,[83] and the manner of appointment of other district officers, such as district collector,[84] and the time,[85]

an independent school-district within the meaning of the act of May 8, 1855 (Pamphl. Laws 509), and is governed in its election of school directors by the act of April 11, 1862 (Pamphl. Laws 471). *In re* Nelson, 34 Pa. Super. Ct. 591.

**A union of the boards of trustees of a grammar and common school** is illegal in Canada under U. C. Consol. St. c. 63, § 25, subs. 7, and c. 64, § 79, subs. 9. Trenton School Trustees *v.* Trenton, 26 U. C. Q. B. 353.

81. See Smith *v.* People, 154 Ill. 58, 39 N. E. 319, holding that where a city as organized was divided into four wards, and its charter provided that its board of education should consist of the mayor and one member from each ward, and, by amendment to the charter, it was afterward provided that the members of the board should hold office for two years, and that two of them should be elected each year, the charter as so amended did not, by implication, limit the number of members to four in case of an increase in the number of wards.

82. State *v.* Vreeland, 79 Iowa 466, 44 N. W. 709; State *v.* Simpkins, 77 Iowa 676, 42 N. W. 516.

**In Kansas** outlying and adjacent territory attached to a city of the second class for school purposes is not entitled to elect members of the board of education of the city to represent said territory, unless such territory contains a population equal to that of any one ward of the city, or its taxable property equals that of any one ward of the city. Jay *v.* Emporia Bd. of Education, 46 Kan. 525, 26 Pac. 1025.

83. McTeer *v.* Caldwell, 77 Va. 596, holding that the duty of appointing and removing district school trustees was taken from the state board by the act of Jan. 11, 1877, and the power vested in a school trustee electoral board.

**Where the legislature in creating a school-district appoints the first trustees, without having the power of appointment,** the appointment does not make the act invalid, since, if the legislature had not the power to appoint them, the district should have filled the offices under the general law. Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289.

**Canada.**— Under its act of incorporation [47 Vict. c. 57 (Ont.)], the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns. A board of trustees of a high school may be appointed by resolution of the municipal council having jurisdiction; and a by-law is not necessary. Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522 [*disapproving* Dawson *v.* Sault Ste. Marie, 18 Ont. 556, and *following* Pembroke Tp. *v.* Canada Cent. R. Co., 3 Ont. 503]. Under 50 Vict. c. 60 (Ont.) § 1, incorporating the town of Sault Ste. Marie, appointment of the high school board must be by by-law of the town. Dawson *v.* Sault Ste. Marie, *supra*.

84. Hamlin *v.* Dingman, 41 How. Pr. (N. Y.) 132 [*reversed* on other grounds in 5 Lans. 61], holding that an appointment of a school-district collector under N. Y. Laws (1864), c. 555, art. 3, tit. 7, § 32, made by parol, by the trustees of the school-district, does not vest the title of office in the appointee; but the appointment should be made in writing as required by the statute.

**Preferential appointment of veteran.**— A school under the control of a school-district is not a public department of the state, county, city, or village where situated, within N. Y. Laws (1884), c. 312, as amended by N. Y. Laws (1896), c. 821, providing for preferential employment of veterans in every public department of the state, counties, cities, and villages. People *v.* Hayward, 19 N. Y. App. Div. 46, 46 N. Y. Suppl. 1083.

85. State *v.* St. Louis School Bd., 131 Mo. 505, 33 S. W. 3 (holding that Laws (1887), p. 272, fixing the terms of members of the St. Louis school-board, modified Laws (1833), p. 37, vesting the board with power to prescribe the time and manner of conducting elections, to the extent of requiring elections to be held at some reasonable time near the close of the terms of office which the former act defined); State *v.* Hansen, 20 Nev. 401, 22 Pac. 753 (holding that St. (1887) p. 139, § 2, which provides that at the general election of the several counties in this state in the year 1888 there shall be elected by the qualified electors of each district one school trustee for two years, and one trustee for four years; and that, in all cases where there are two or more school-districts in the same election precinct, there shall be held in each of said districts an election for school trustees on the second Saturday of May of each year, does not authorize separate May elections in a precinct which only comprises portions of several school-districts).

**In Illinois** under the general revision of 1889 of the school law, election of school directors for a newly organized district must be on a Saturday. Peterson *v.* People, 129 Ill. App. 55. This revision, repealing as it did "all general school laws of the state," repealed the act of March 25, 1887, which provided that, in all cases where the time for electing members of boards of education was fixed by virtue of any special charter, such election might be held at the time provided for the election of school directors under the general school law. Smith *v.* People, 154 Ill. 58, 39 N. E. 319. Hurd Rev. St. (1899) art. 6, § 2, c. 122, relates to the

and manner,[86] usually by a majority of the legal ballots cast at an election held for the purpose.[87] And these statutes also usually contain provisions as to

election of additional members to be elected by reason of the increased population, and does not require that the election in a newly organized district shall only be held on the third Saturday. People *v.* Keechler, 194 Ill. 235, 62 N. E. 525.

**Effect of act not specifying time of election** —S. D. Acts (1891), c. 9, § 7, making it the duty of municipal corporations to hold an election, at which a new board of education shall be chosen without specifying a time for holding it, except that it shall not be on the same day as a municipal election, leaves the time for holding it to be determined by the municipality; and the manner of calling, holding, and conducting such election is the same as in the case of other municipal elections, except so far as the act provides otherwise. *In re* School Law, 2 S. D. 71, 48 N. W. 812.

**Under Tex. Acts (1900), c. 7, § 10,** providing that any town or village which may desire to incorporate for school purposes can apply to the county judge for the organization of an independent school-district, as provided by general statutes, and for the election of a board of trustees, the election of trustees for the first time is required to be held at the same time that the question of incorporation of the school-district is voted on. Hillebrandt *v.* Devine, 31 Tex. Civ. App. 402, 72 S. W. 266.

**86.** Butler *v.* Pelham, 19 N. H. 553 (decided under the act of Dec. 19, 1848, making the provisions of the Somersworth Act applicable to all school-districts adopting the act at a legal meeting); Com. *v.* Taylor, 159 Pa. St. 451, 28 Atl. 348 (holding that the Pennsylvania act of May 14, 1874, which directed "the election of an equal number of councilmen and school directors in each of the wards of boroughs," was impliedly repealed by the act of May 10, 1878, which constituted the wards separate districts for the election of councilmen, but expressly excepted school directors, and required them to be elected by a "concurrent" vote of the wards, and that so much of the act of May 10, 1878, as requires the election of school directors by a concurrent vote of the wards, is impliedly repealed, and the act of May 14, 1874, section 4, is reënacted and extended, by the act of Feb. 16, 1883, which recites the act of May 14, 1874, section 4, as originally enacted, reënacts its terms, and provides that "each ward shall elect not less than one nor more than three school directors").

**School trustees held properly elected under** Ky. St. (1903) § 4471, providing that the trustees of graded common school districts shall be divided into three classes, to hold office for one, two, and three years, respectively, "or until their successors are elected and qualified," and on the first Saturday in May following the first election, and each year thereafter, two trustees shall be elected to succeed two trustees retiring from office. See Lee *v.* Shepardsville Graded Common School Dist. No. 4, 88 S. W. 1071, 28 Ky. L. Rep. 55.

**Where certain irregularities take place in the conduct of an election of school trustees** at one of the several polling places of a township, which are not shown to have changed the result in that polling place, and the result in the township will be the same whether the vote of that polling place is counted or rejected, the election will not be invalidated thereby. Simons *v.* People, 119 Ill. 617, 9 N. E. 220.

**Statute requiring the use of the Australian ballot system** see People *v.* Brown, 189 Ill. 619, 60 N. E. 46.

**Necessity of new election upon alteration in section.**—An alteration of the boundaries of a section under 13 & 14 Vict. c. 48, § 18, subs. 4, does not make it necessary to call a school section meeting and appoint new trustees. *In re* Moore Tp. School Trustees *v.* McRae, 12 U. C. Q. B. 525.

**The Canadian Municipal Amendment Act of 1898,** which abolishes ward representation in municipal councils of towns under five thousand inhabitants, does not affect the procedure for election of school trustees in which the system of election by ballot prevails under the provisions of Ont. Rev. St. c. 292, § 58, and public school trustees are to be elected, as heretofore by wards, and not by "a general vote." The powers and duties of a returning officer are purely ministerial and in no sense judicial. Ont. Rev. St. c. 23, § 128, subs. 2, does not restrict the returning officer to one hour for receiving nomination papers, but provides for at least one hour being allowed therefor. *In re* Public Schools Act, 35 Can. L. J. N. S. 426 [*approving* Reg. *v.* Jull, 5 Ont. Pr. 41].

**87.** State *v.* Fagan, 42 Conn. 32 (holding that under Gen. St. (1875) tit. 11, c. 5, § 16, providing that the committees of school-districts shall be elected by ballot, and a general statute providing that all questions in meetings of communities shall be decided by a majority vote, a majority of the ballots cast for a committeeman in a school-district was necessary to his election); Roeser *v.* Gartland, 75 Mich. 143, 42 N. W. 687 (holding that the statutory provision concerning the election of school-district officers by ballot is mandatory, but where such officers have been unanimously elected by *viva voce* vote at a regular meeting, no other persons claim to have been elected, and they have qualified and are acting, they will not be ousted on quo warranto); National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637 (holding that under Vt. Comp. Laws (1887), § 1808, relating to schools allowing adoption of its provisions at any time by

the place[88] of the election of the members of the board and the notice to be given thereof.[89] The general election laws are held to have no application to the election of school trustees;[90] but where there is no provision in the charter of a city authorizing the election of school directors on any other day than that appointed for the election of city and ward officers, the election of the latter

organized cities, and also by towns or villages not organized, and making provision for an immediate election of school officers in such unorganized territory, but not in an organized city, such officers may be chosen, in an organized city adopting the act, at a special election called pursuant to the city charter).

**Effect of casting of unqualified votes.**— The election of trustees for an independent school-district pursuant to Acts 26th Leg. p. 18, c. 7, is not rendered void by the fact that persons residing outside of the district, but within a territory supposed to have been added to the district by a previous election, which was void, were permitted to participate therein, and two of the trustees elected resided in such ontside territory. Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18. Similarly the fact that a few taxpayers and voters were improperly included in the boundaries of a district in establishing the same did not affect the election, where it appears that they did not vote, and that, if they had, the result would have been the same. Williams *v.* Lovelace, 90 S. W. 983, 28 Ky. L. Rep. 957.

**Returns of election.**— Under 2 Sayles Annot. Civ. St. Tex. art. 3953*a*, providing that the returns of elections for school trustees shall be made to the county superintendent, such returns are properly made to a county judge who is *ex officio* such superintendent. Deaver *v.* State, 27 Tex. Civ. App. 453, 66 S. W. 256. The fact that such officers are not sworn does not render the election void. Deaver *v.* State, *supra*.

**In Canada** persons rated only for statute labor, and not householders, are not "taxable inhabitants" within 13 & 14 Vict. c. 48, § 22, and cannot therefore vote at the election of school trustees. Reg. *v.* Christie, 9 U. C. Q. B. 682.

**Manner of counting votes.**— Where, at a school-board election, the number of votes at the disposal of a single voter being regulated by the number of candidates, a voter chooses to mark his ballot paper with crosses instead of figures, each cross is to be counted as a single vote; and there is no presumption that by placing a single cross against the name of one candidate only the voter intended to bestow all his votes on, and thus to exhaust his whole voting power in favor of, such candidate. Morris *v.* Beves, (1897) 1 Q. B. 449, 61 J. P. 263, 66 L. J. Q. B. 299, 76 L. T. Rep. N. S. 120, 45 Wkly. Rep. 430.

**Personation of voters.**— The Elementary Education Acts (33 & 34 Vict. c. 75, § 90, and 36 & 37 Vict. c. 86, second sched.), which imposes a penalty for the offense of personating any one entitled to vote at the election of a school-board, do not include the offense of personating at the voting for a resolution for application for a school-board; and an order in council purporting to be made under the acts, and imposing a penalty upon any one guilty of such offense is invalid. Reg. *v.* Sankey, 3 Q. B. D. 379, 47 L. J. M. C. 96.

88. Simons *v.* People, 119 Ill. 617, 9 N. E. 220.

**A change of location of the polling place** of an election for school trustee, for a short distance, in plain sight, not alleged or shown to have misled any voter or changed the result, will not invalidate the election in that district. Simons *v.* People, 119 Ill. 617, 9 N. E. 220.

89. Ackerman *v.* Haenck, 147 Ill. 514, 35 N. E. 381 (holding that under Rev. St. (1891) c. 122, art. 5, § 8, which declares that notices of school elections in organized districts shall be given by the directors, which notice shall specify, among other things, "the time of opening and closing of the polls," and article 6, section 8, of the same statute, which declares that elections of boards of education shall be governed by the provisions of the act relating to elections of boards of directors, a board of education may, in their discretion, fix the time for opening the polls at one in the afternoon, and of closing at seven in the evening. Peterson *v.* People, 129 Ill. App. 55 (decided under the Revised School Law of 1889, providing for notice by the township treasurer of an election in a newly organized school-district); Blaisdell *v.* Westmore School Dist. No. 2, 72 Vt. 63, 47 Atl. 173 (holding that where, on an issue as to whether the prudential committee of a school-district was legally elected, it appeared that the warning for the election was dated March 23, and called the meeting for the last Tuesday of March, which was the 30th, and the record of the votes and proceedings of the meeting under date of March 29, stated that the voters met agreeably to the warning, the election was legal, since the record showed that the meeting was warned the requisite time).

**Effect of order for election of excessive number of trustees.**— The fact that an order for an election of trustees of a graded school-district, under Acts (1894), p. 22, c. 15, ordered the election of six trustees, when only five could be legally elected, did not invalidate the election, the five having the highest votes being elected. Williams *v.* Lovelace, 90 S. W. 983, 28 Ky. L. Rep. 957.

90. Simons *v.* People, 119 Ill. 617, 9 N. E. 220 (holding that 2 Starr & C. Annot. St. c. 122, pars. 25–30, does not contemplate that there shall be more than one polling place in each school-district; and the fact that, under the general law on elections, two polling districts and places are established

having been fixed by statute to take place on a certain day, the election of school directors must take place on that day;[91] and a general act of assembly relating to the method of electing school directors in boroughs will apply with full force to the elections in a borough where no special act sets forth another method.[92] Where a school-district at its annual meeting decides to elect for the ensuing year, and elects but one trustee, who accepts his appointment, it cannot at a subsequent adjourned meeting rescind the vote and appoint two other trustees, the trusteeship having been duly filled by an election and no vacancy having occurred in the manner prescribed by statute;[93] and where a school-district, at an annual meeting, has appointed one person to act as prudential committee, it is not competent for the district, during the year, to supersede him by appointing another person in his place, or by adding more to the number of the committee;[94] but a school-district, after having chosen one person as prudential committee at its annual meeting, and adjourned, may choose additional members of such committee at the adjourned meeting.[95]

(II) *ELIGIBILITY*. The statutes providing for their election or appointment[96] usually regulate also the eligibility of officers of school-districts, as by providing that no one shall be eligible who has not paid a school tax[97] or a state

in one school-district will not change this rule, nor invalidate a school election held at one polling place in the school-district fixed by the school trustees); Bernier *v.* Russell, 89 Ill. 60.

**The Missouri election act of 1895** (Laws (1895 Sp. Sess.) p. 5) did not deprive the St. Louis school-board of the power to conduct elections of members of said board; and it was not excused, by reason of the registration provisions of said law, from holding the November, 1895, election to fill the places of those members whose terms, as fixed by Laws (1887), p. 272, expired at that time, it appearing that the board could obtain the registry lists as they existed and were in effect in August, 1895. State *v.* St. Louis School Bd., 131 Mo. 505, 33 S. W. 3.

**Okla. St. c. 79,** providing for the election of members of the school-board in cities of the first class, is not in conflict with chapter 33, providing for elections generally. Beatty *v.* Walker, 1 Okla. 178, 32 Pac. 53, holding that an election of members of the school-board in a city of the first class, held in pursuance of chapter 15, providing for the election of city officers generally, is invalid, as the election of a school-board must be held in pursuance of chapter 79, providing for such election, and that the election of members of the school-board in cities of the first class will be governed by the provisions of St. c. 79, relating specifically to school matters, and not by chapter 15, relating to the election of city officers generally; the insertion of "members of the school board" in article 1, section 8, of the latter chapter (the clause providing for the election of all city officers) being ascribed to inadvertence on the part of the legislature.

**91.** Bouton *v.* Royce, 2 Luz. Leg. Reg. (Pa.) 241, so decided as to the city of Scranton.

**92.** Gutwald's Petition, 1 Pa. Cas. 191, 2 Atl. 61.

**93.** Richardson's Appeal, 5 R. I. 606.

**Where two persons are duly elected assessor and moderator,** and tender their acceptances and bonds to the proper officer, but are prevented from qualifying by a conspiracy between him and the officers whose places they are elected to, they become thereby lawful officers; and one appointed by them as school director to fill a vacancy, who qualifies, becomes director, and is entitled to the papers belonging to that office. Culver *v.* Armstrong, 77 Mich. 194, 43 N. W. 776.

**94.** Chandler *v.* Bradish, 23 Vt. 416; George *v.* West Fairlee, etc., School Dist. No. 8, 20 Vt. 495; Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487.

**95.** Kingsbury *v.* Quincy Centre School Dist., 12 Metc. (Mass.) 99.

**96.** See *supra*, III, D, 6, a, (I).

**97.** State *v.* Macklin, 41 Mo. App. 335, holding that Mo. Laws (1887), p. 27, 3, § 5, which provides that no person shall be eligible for office as a director "who shall not have paid a school tax within said city for two consecutive years immediately preceding his election," means a tax assessed on property in which the school director has an interest subject to taxation at the date of assessment or date of payment, paid at any time within two consecutive calendar years next preceding the year of the director's election.

**Payment insufficient.**—The payment of delinquent taxes on land by a stranger for the purpose of qualifying for the office of school director, or the payment of taxes for the current year instead of those for the two years immediately preceding the election, or the payment of a merchant's license which does not appear to be for the benefit of schools, are not payments of taxes, within the purview of the Missouri act of March 30, 1887, section 5. State *v.* Macklin, 41 Mo. App. 335.

**Payment sufficient.**—A payment by a copartnership of a tax in part for school purposes against its personal property by one who is a member of the copartner-

and county tax [98] for or within a specified time prior to his election, or who is not at the time of his election a resident of the district or ward for which he is chosen,[99] and a qualified voter therein,[1] or who holds another public office; [2] and some statutes prohibit a member of a school-board from contracting or performing any work, and from furnishing any materials used in such work, which is under the supervision, direction, or control of such officer, and the court will refuse the remedy of quo warranto to invest such a one with the office.[3] In the absence of

ship at the time; the payment of taxes on land by one having a tenancy by the curtesy initiate therein, out of his own means; and the payment of delinquent taxes on land purchased by the payer, although the payment was made for the express purpose of qualifying for the office, constitutes a payment of taxes which will satisfy the requirements of an act which provides that no person shall be eligible for the office of school-board director who shall not have paid a school tax for two consecutive years immediately preceding his election. State *v.* Macklin, 41 Mo. App. 335, under the Mo. act of March 30, 1887, section 5.

**A fraudulent payment of taxes** does not render the candidate eligible to the office. State *v.* Rebenack, 135 Mo. 340, 36 S. W. 893.

98. State *v.* Fasse, 189 Mo. 532, 88 S. W. 1. See also Queen *v.* Dinnin, 2 Ont. App. 283.

**Taxes paid in county other than where director is elected.**— Under Mo. Rev. St. (1899) §§ 9759, 9760, declaring that a school director must be a resident taxpayer and a qualified voter of the district, and must have paid a state and county tax within one year next preceding his election, it is not required that a director be a resident taxpayer of the district in which he is elected; but if he has paid state and county taxes in another county, from which he removed to the county in which he is elected, within a year preceding his election, he is eligible. State *v.* Fasse, 189 Mo. 532, 88 S. W. 1.

99. People *v.* New York Bd. of Education, 1 Den. (N. Y.) 647; Reg. *v.* Evans, 31 Ont. 448.

1. State *v.* Fasse, 189 Mo. 532, 88 S. W. 1 (under Rev. St. (1899) §§ 9759, 9760); State *v.* McSpaden, 137 Mo. 628, 39 S. W. 81, holding that the qualifications required by Rev. St. (1889) § 8086, providing for the election of school directors "who are . . voters" are mandatory, and therefore the election of a woman as school director is void.

2. State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616 (holding, however, that a deputy sheriff of the city of St. Louis does not "hold office under the city," within Acts (1845), p. 182, § 1, providing that no such office-holder shall be a member of the board of school directors of said city and that the two offices are not incompatible); Doyle *v.* Bayonne Bd. of Education, 54 N. J. L. 313, 23 Atl. 670 (holding that under the act of 1885 (Suppl. Rev. p. 507), providing that no member of any board of aldermen, township committee, or other municipal board or body, shall, during the term for which he shall have been elected such member, be eligible for election or appointment to any office to be filled by such board, the words "other municipal boards" included all bodies or boards having municipal governmental functions, whether legislative or administrative, and so included the board of education of Bayonne).

**Under the Pennsylvania act of Feb. 17, 1859,** providing that in Schuylkill county no person shall hold more than one school-district office at one time, no person can hold at the same time the office of school treasurer and school director in such county. Com. *v.* Haeseler, 161 Pa. St. 92, 28 Atl. 1014. And a school director cannot hold the office of district treasurer or collector of the school taxes. *Ex p.* Meehan, 1 Leg. Chron. 307.

**Acceptance of one office as resignation of another.**— Under Ohio Rev. St. § 4047, providing that the treasurer of a school-board shall not pay out any money except on an order signed by the president, the treasurer of a school-board, by accepting the office of president, will be deemed to have resigned the office of treasurer, and will be ousted therefrom, since one person cannot hold both offices. State *v.* Heddleston, 8 Ohio Dec. (Reprint) 77, 5 Cinc. L. Bul. 502.

**The office of school trustee is a "lucrative office,"** within the meaning of a constitutional prohibition declaring that no person shall hold more than one lucrative office at the same time. Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613, decided under Const. art. 2, § 9, and so holding upon an information to oust a person from the office of school trustee on the ground that he had accepted the office of trustee of the institute for the education of the deaf and dumb.

**The term "member of council,"** as used in Ohio Rev. St. § 1717, which forbids members of the council from holding other offices, cannot be construed to mean "trustees of hamlet"; and such trustees are not precluded from acting as members of the board of education. State *v.* Wagar, 19 Ohio Cir. Ct. 149, 10 Ohio Cir. Dec. 160. Nor does this section prohibit a member of the city council from acting as a member of a school-board in a special district of which such city forms a part. State *v.* Kinney, 20 Ohio Cir. Ct. 325, 11 Ohio Cir. Dec. 261.

**But the same person may be appointed district clerk and collector of the district** at the same time, there being nothing incompatible in the two offices. Howland *v.* Luce, 16 Johns. (N. Y.) 135.

3. Weston *v.* Lane, 40 Kan. 479, 20 Pac. 260, 10 Am. St. Rep. 224, where the applicant

statutory or constitutional prohibition, there is nothing to prevent a woman otherwise eligible from being a member of a school-committee.[4]

(III) *QUALIFICATION.* The statutes generally prescribe also the manner in which such officers shall qualify,[5] as by taking and subscribing an oath of office [6] before the proper officer [7] and filing it with the clerk,[8] giving a bond,[9] or filing with the proper officer a written acceptance of the office within a specified time.[10]

contracted with the school-district in which he resided to erect a school-house and when the contract was only partially performed was elected a member of the district board and upon bringing quo warranto the court refused to aid him, under the provision of Comp. Laws (1885), c. 31, § 334. See also *infra*, III, E, 4, c.

**4.** Opinion of Justices, 115 Mass. 602.

**In Missouri** only qualified voters being eligible as school directors under Rev. St. (1889) § 8086, women are held ineligible. State *v.* McSpaden, 137 Mo. 628, 39 S. W. 81.

**5.** See the statutes of the several states. And see cases cited *infra*, this and the following notes.

**School directors of Philadelphia have no authority to pass on qualifications** of a fellow school director to the office for which he was regularly elected. Com. *v.* Mann, 5 Pa. Dist. 439.

**6.** School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S. W. 132, holding that the provision of Mansfield Dig. § 6206, as amended by the act of April 4, 1887, requiring school directors, in order to qualify, to subscribe the oath of office, and file it with the clerk, is mandatory, and that a verbal oath is not sufficient.

**Indorsement on certificate of appointment.** — It is immaterial that the official oath of a school trustee is attached to, instead of being indorsed on, the certificate of appointment, or that it is indorsed on the face instead of the back of the certificate of election. State *v.* Horton, 19 Nev. 199, 8 Pac. 171.

**The office of school trustees is vacated by their failure to take and subscribe the oath of** office within the time prescribed by law, and thereupon the state board of education may appoint new trustees to succeed them upon the city council's failure to do so within the prescribed time. Owens *v.* O'Brien, 78 Va. 116; Childrey *v.* Rady, 77 Va. 518.

**Oath of clerk of school-district.**—A clerk of a school-district, who is once duly sworn into office, and is afterward chosen clerk, but is not again sworn, is qualified to act as clerk, by virtue of Mass. Rev. St. c. 23, § 27, which provides that he "shall hold his office until another shall be chosen and sworn in his stead." Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105. And where the clerk of a school-district removes into an adjoining district, but within the same town, and another is chosen in his stead, but not sworn, the first continues competent to act as clerk. Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243. The oath of office taken by the clerk of a school-district will be presumed, when found extended on the records of the district, to have been placed there by the proper officer, in the absence of other proof. Tozier *v.* Vienna School Dist. No. 2, 39 Me. 556.

**Tax collectors of school-districts are not** regarded in Vermont as officers "in authority under this state," within the meaning of the constitution, which requires all such officers to be sworn, and, in the absence of any statutory regulation, it is not necessary that school-district officers be sworn. Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598. But in a prior case it was held that a district collector who had never taken the official oath prescribed by Vt. Const. pt. 2, § 29, could not maintain an action against a constable for money not paid over. Houston *v.* Russell, 52 Vt. 110.

**A moderator of a school-district** is not required to take an oath of office in Nebraska. Frans *v.* Young, 30 Nebr. 360, 46 N. W. 528, 27 Am. St. Rep. 412.

**7.** State *v.* Horton, 19 Nev. 199, 8 Pac. 171, holding that a judge of an election cannot administer the oath of office to a school director, as St. (1885) p. 113, § 9, only authorizes him to administer the oath to a voter when challenged.

**8.** School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S. W. 134.

**Effect of failure to file duplicate oath.**— Under Sandels & H. Dig. § 7036, requiring a duplicate of the oath of office signed by a school director to be filed in the county clerk's office, the fact that no duplicate oath is there on file is insufficient to deprive the school director of his right to the office, where the oath was duly signed and mailed, and there is no evidence, other than its absence from the files, that it was not received. Click *v.* Sample, 73 Ark. 194, 83 S. W. 932.

**9.** Marshal *v.* Hamilton, 41 Miss. 229, holding that the bond given by school trustees is good, although not approved formally by the board of police according to the direction of the statute.

**10.** State *v.* Weatherby, 17 Nebr. 553, 23 N. W. 512, holding that where, under Comp. St. c. 79, § 3, subd. 3, which required school trustees, within ten days after their election, to file with the director a written acceptance of the office, the old trustees held over beyond that time, and the new trustees, through a mistaken idea of the law, filed their acceptance with a director newly selected by themselves, instead of with the old one, who still continued in office, they did not thus forfeit the offices, but that their present custodian would be directed to deliver them to the proper one.

A failure to qualify before the proper officer within the time specified vacates the office,[11] and the prior incumbent holds over;[12] and it has been held that where there is no record in the county superintendent's office of the qualification of one who is acting as trustee under an appointment to fill a vacancy, he is merely a *de facto* officer, and the county superintendent has the power to declare the office vacant and to appoint another in his stead;[13] but where a school trustee has in fact taken the oath of office, the failure to indorse such oath on the certificate of his election, as required by statute, does not affect his qualification, such requirement being merely directory;[14] and it has been held in the case of the clerk of a school-district that, although he does not take the oath of office within the prescribed time after his appointment, it is sufficient if he qualifies before any official act is done by him.[15]

(IV) *EVIDENCE OF ELECTION OR APPOINTMENT; PRESUMPTIONS.* Persons acting publicly as officers of a school-district are presumed to be rightfully in office.[16] Thus a person acting as prudential committee in a school-district will be presumed to have been completely authorized, until the contrary is proved;[17] and general reputation that trustees and collectors of school-districts are such officers, with proof of their acting as such, is *prima facie* evidence of their election, especially where there is evidence of their acting under color of an election;[18] and certificates or returns of election presented to school directors at their first meeting for the purposes of organization, showing who the directors-elect are, are *prima facie* evidence entitling the holders to seats in the board.[19] The failure of the board of county commissioners to canvass the votes, and issue a certificate of election to a school trustee, as provided by statute, is fatal to his right to hold the office;[20] but it is held that, although a statute providing for the election of school directors contemplates that a record of the meeting shall be made, in the absence of a provision in the statute that the record shall be the

**A person elected to the office of clerk of a common school-district** is required, under Ky. Gen. St. (1894) § 3680, to file written acceptance of the office within ten days after his election and notice thereof, but he need not take and file his oath of office within said ten-day period. Mattingly *v.* Vancleave, 61 S. W. 257, 22 Ky. L. Rep. 1761. It is sufficient if he takes and files such oath within a reasonable time after his election, where no action has been taken looking toward filling the office by the appointment or election of another person. State *v.* Stratte, 83 Minn. 194, 86 N. W. 20.

**Effect of failure of moderator to file acceptance.**—When a person elected to the office of moderator of a school-district fails to file with the director of the district his written acceptance of the office, as provided by Nebr. Comp. Laws, c. 79, subd. 3, § 3, but, immediately after his election, enters upon the discharge of all the official duties required by law of such officer, without objection from any one, he does not forfeit his title to the office by such failure. Frans *v.* Young, 30 Nebr. 360, 46 N. W. 528, 27 Am. St. Rep. 412.

**11.** Minnick *v.* State, 154 Ind. 379, 56 N. E. 851; Carpenter *v.* Titus, 33 Kan. 7, 5 Pac. 412 (holding that under Comp. Laws (1879), c. 92, art. 4, § 3, providing that any person elected school-district treasurer "who shall refuse or neglect, without sufficient cause, to qualify within twenty days after his election . . . shall thereby forfeit his right to the office," a person so elected may qualify after twenty days on showing sufficient cause); Smith *v.* Ritchie, 98 S. W. 330, 30 Ky. L. Rep. 339; State *v.* Jaquis, 11 Ohio Cir. Dec. 91, where, however, the qualification was held to be timely. *Compare* cases cited *supra*, note 10.

**A collector failing to give a bond for nine months** may be superseded. Chiles *v.* Todd, 4 B. Mon. (Ky.) 126.

**But delay in giving a bond does not amount to a refusal to accept office.**— State *v.* Cave, 26 Ohio Cir. Ct. 301.

**12.** State *v.* Cahill, 131 Iowa 155, 105 N. W. 691; Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105, so holding as to the clerk of a school-district.

**13.** Meadors *v.* Patrick, 56 S. W. 652, 22 Ky. L. Rep. 95.

**14.** State *v.* Van Patten, 26 Nev. 273, 66 Pac. 822, under Comp. Laws, § 1804.

**15.** Howland *v.* Luce, 16 Johns. (N. Y.) 135.

**16.** Burgess *v.* Pue, 2 Gill (Md.) 254.

**17.** State *v.* Williams, 27 Vt. 755.

**18.** Ring *v.* Grout, 7 Wend. (N. Y.) 341, holding also that evidence that a majority of the inhabitants of a school-district say that certain persons claiming to be trustees of the school-district are not trustees is inadmissible.

**19.** Bouton *v.* Royce, 2 Luz. Leg. Reg. (Pa.) 241.

**20.** State *v.* Meder, 22 Nev. 264, 38 Pac. 668, decided under Gen. St. § 1304.

sole and conclusive evidence of the election, if the record is not kept, or if it fails to contain evidence of the election, parol evidence is admissible to prove the election and its result.[21]

(v) *Contesting Election and Trial of Title to Office.* The authority of officers of school-districts cannot be inquired into collaterally,[22] and unless a statute otherwise provides,[23] the proper method of contesting the election and of trying the title to the office is by quo warranto,[24] and an injunction

21. State *v.* Cahill, 131 Iowa 155, 105 N. W. 691.

22. Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44.

23. **Under N. J. Acts (1902), p. 72, § 10,** the state superintendent of schools has power to decide all controversies under the school laws as to the election of members of the board of education of certain municipalities, subject to appeal to the state board of education. Du Four *v.* State Superintendent Public Instruction, 72 N. J. L. 371, 61 Atl. 258.

**In Kentucky** when the statute regulating elections of trustees of school-districts has been literally complied with, and the candidate receiving a majority of the votes as cast and recorded has received a certificate of election in due form and qualified and entered on his duties, the county superintendent cannot determine his right to the office as against the opposition candidate, this being exclusively within the jurisdiction of the county board of contest. Hopkins *v.* Swift, 100 Ky. 14, 37 S. W. 155, 18 Ky. L. Rep. 526. A county school superintendent has no power on his own motion to declare an election of trustees to be void. Shelbourne *v.* Blatterman, 49 S. W. 952, 20 Ky. L. Rep. 1730.

**In England** by the Elementary Education Act of 1870, § 33, questions as to the right of any person to act as a member of a school-board may be inquired into by the education department; and a petition against his election cannot be sustained under the Corrupt Practices (Municipal) Act of 1872. *In re* West Bromwich School Bd., 5 C. P. D. 191, 44 J. P. 426, 49 L. J. C. P. 641, 28 Wkly. Rep. 766.

24. *Connecticut.*— Hinckley *v.* Breen, 55 Conn. 119, 9 Atl. 31, holding that where the school-district is not a party the title to the office can be had only by quo warranto.

*Illinois.*— Gale *v.* Knopf, 193 Ill. 245, 62 N. E. 229.

*Ohio.*— State *v.* Goodale, 6 Ohio Dec. (Reprint) 854, 8 Am. L. Rec. 432.

*Pennsylvania.*— Com. *v.* Parsons, 217 Pa. St. 435, 66 Atl. 657 (holding that where there was no ward in a city which a person claiming to be a school controller could represent, and there was no election district in which votes could be cast for him for the office, a judgment of ouster against him was properly rendered); Gilroy's Appeal, 100 Pa. St. 5; Hagner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220.

*Wisconsin.*— State *v.* Vanhuse, 120 Wis. 15, 97 N. W. 503.

*Canada.*— Chaplin *v.* Woodstock Public School Bd., 16 Ont. 728; Reg. *v.* Standish, 6 Ont. 408.

See 43 Cent. Dig. tit. "Schools and School Districts," § 134.

**For matters relating to quo warranto** generally see Quo Warranto, 32 Cyc. 1410.

**The granting of an order for a quo warranto is in the discretion of the court,** and where the term of defendant's office will expire before the issue can be tried, the motion will be dismissed without costs. Reg. *v.* Evans, 31 Ont. 448.

**The relator must depend on the strength of his own title** in such a proceeding. State *v.* Goodale, 6 Ohio Dec. (Reprint) 854, 8 Am. L. Rec. 432.

**In Pennsylvania** the continuing members of a school-board are not the judges of the legality of the election of new directors, as the statute of May 8, 1854 (Purdon Dig. p. 239, pl. 21), requires the court of quarter sessions to examine into the election whenever contested by not less than ten citizens. Bouton *v.* Royce, 10 Phila. 559 [*affirmed* in 1 Walk. 215]. But the court of quarter sessions has jurisdiction to inquire into the legality of the election of school directors only at the instance of contestants, but not at the instance of supporters; of those who deny, but not of those who affirm, the election. Collins' Case, 2 Grant 214.

**Recovery of office papers.—A** school director's remedy to recover papers belonging to the office from one who is appointed director by the old assessor and moderator, who claim to hold over by reason of their successors' not qualifying, is under Howell Annot. St. Mich. c. 295, entitled "Proceedings to compel the delivery of books and papers by public officers to their successors," which provides by section 8547, that the successor can take the proceedings as well against any person having possession of such books and papers as against his predecessor. Culver *v.* Armstrong, 77 Mich. 194, 43 N. W. 776.

**But the school-district itself may file a bill** to prevent rival parties, each claiming to represent it, from making contracts in its name. Hinckley *v.* Breen, 55 Conn. 119, 9 Atl. 31.

**The position of city superintendent of public schools is an office,** and the lawful incumbent thereof may sue to recover either the office itself or its emoluments, in case he is unlawfully deprived of the same. Kimbrough *v.* Barnett, 93 Tex. 301, 55 S. W. 120, holding that where there is a contest over the office of superintendent of public schools of a city between two claimants, appointed by different boards of school trustees, each

will not be granted to restrain an individual from discharging the duties of a school director claiming to hold that office.[25] Thus the validity of the appointment of school directors duly appointed and confirmed, and acting as officers *de facto*, cannot be collaterally questioned in a suit for an injunction to restrain the collection of taxes levied by such directors;[26] nor where school trustees are declared elected, and they assume to act as such, can the regularity of their election be questioned in a collateral proceeding to restrain the levy of a tax voted by the district at an election, the call for which was participated in by such trustees;[27] nor can the question as to who is a legal school director be determined in an action to restrain one who assumes to act as such from interfering with the school;[28] and in an action of forcible detainer defendant cannot question the manner and legality of the election of the school directors who are plaintiffs;[29] and, similarly, where the trustees of a school-district are empowered by statute to call a special meeting of the district to fill any vacancy in their number, and they call such a meeting and elect certain trustees, the authority of such trustees to act cannot be inquired into in an action against them for acts done by them as trustees.[30] but the officers *de facto* of a school-district who, as a majority of the school-board, have employed a teacher, may restrain persons claiming to be the officers *de jure* from interfering with the management of the school pending quo warranto proceedings to try title to the offices of clerk and treasurer.[31]

**b. De Facto Officers.** As to who are *de facto* officers[32] is determined by the rules relating to public offices generally.[33] As a general rule the acts of *de facto* officers of school-districts are valid as regards third persons and the public.[34]

acting under alleged authority of law, it is not necessary that a claimant present his claim to the state superintendent of public instruction before bringing suit for the office.

**A quo warranto will not lie for the office of clerk to a school-board,** where he holds his office during the pleasure of the board. Bradley *v.* Sylvester, 25 L. T. Rep. N. S. 459.

25. Gilroy's Appeal, 100 Pa. St. 5; Hagner *v.* Heyberger, 7 Watts & S. (Pa.) 104, 42 Am. Dec. 220.

26. Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75.

**The validity of the appointment of the collector of a school tax** will not be inquired into by the court, he having given bond, with sureties, approved as required by law. Locust Mountain Coal, etc., Co. *v.* Curran, 10 Phila. (Pa.) 543.

27. Boesch *v.* Byrom, 37 Tex. Civ App. 35, 83 S. W. 18

28. Soldier Dist. Tp. *v.* Barrett, 47 Iowa 110.

29. McDaniel *v.* Stephenson County Dist. No. Sixteen School Directors, 125 Ill App. 332.

30. Colton *v.* Beardsley, 38 Barb. (N Y.) 29.

31. Brady *v.* Sweetland, 13 Kan. 41.

32. McCoy *v.* Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113, holding that evidence that certain individuals are generally reputed to be, and have acted as, trustees and collectors of a common school district, is *prima facie* sufficient to establish their official character

**Where, pursuant to an opinion of the state superintendent** of public instruction, one of two contestants for the office of school director assumes the duties of the office and acts as such officer, he is, while so acting, a *de facto* officer of that district. Bishop *v.* Fuller, 78 Nebr. 259, 110 N. W. 715.

33. See OFFICERS, 29 Cyc. 1389.

34. Rhodes *v.* McDonald, 24 Miss. 418 (holding that when a trustee of school lands is such only by color of title, his acts, like those of any officer, are valid as regards the interest of third persons and the public, particularly, where he is fully in office, except as to giving bond and taking the oath); Scott *v.* Great Clifton, etc., School Bd., 14 Q. B. D. 500, Cab. & E. 435, 52 L. T. Rep. N. S. 105, 33 Wkly. Rep. 368; Gill *v.* Jackson, 14 U. C. Q. B. 119.

**But where there are two boards of school trustees, each claiming that the other is unlawful,** and each proceeding as if the other did not exist, the board whose members have no legal right to the offices cannot become a *de facto* board, so as to validate its acts (State *v.* Blossom, 19 Nev. 312, 10 Pac. 430), and contracts entered into with a number of persons acting as a board of school directors are not binding upon the school-district, where there is in existence at the same time another acting board of school directors, who are so *de jure*, and who have notified the persons contracting with the first-named board not to carry out their contracts (Genesee Tp. Independent School Dist. *v.* McDonald, 98 Pa. St. 444). However, the status of a *de facto* board of education, composed of persons actually elected as school trustees, is not affected by the appointment of other trustees, on the supposition that the election was illegal. Kimball *v.* Hendee, 57 N. J. L. 307, 30 Atl. 894.

**A school trustee cannot contest the validity of a contract made by his predecessor** on the ground that his predecessor, being an alien,

Thus a board of directors of a school-district having been elected, and they and their successors having acted in that capacity for a number of years, none but the state can question their right to act on account of irregularities in the organization of the district;[35] and where a person appointed school director is allowed to act in that capacity for two years without objection from the district, the district is bound by his acts as those of a *de facto* officer, regardless of the legality of his appointment.[36] A teacher employed by a *de facto* school trustee[37] or *de facto* school agent[38] may recover for his services, and bonds issued by a *de facto* board of education, within the powers granted to a board legally organized, are binding in the hands of *bona fide* purchasers;[39] and when a warrant is drawn by those who are *de facto* directors of the public school of a particular district the treasurer upon whom it is drawn cannot set up as a defense that the directors were not elected and had not qualified as directors.[40] The board of education

was disqualified from holding the office. Morrison *v.* Sayre, 40 Hun (N. Y.) 465.

**Duty of courts to aid.**—Where a school-board who are in possession of their office under an appointment by the circuit court judges, under the Maryland act of 1872, refuse to surrender to a new board appointed by the governor, as provided for by the act of 1892, chapter 341, it is the duty of the court to aid the public board in obtaining money set apart for the public schools, as long as it is in actual possession of the office, so that there shall be no stoppage of the public business. Washington County New School Com'rs *v.* Washington County Old School Com'rs, 77 Md. 283, 26 Atl. 115.

**Liability of de facto clerk.**—A clerk *de facto* of a school-district is not liable for certifying to the assessor that at a legal and duly organized meeting it was voted to raise a certain sum of money, on the ground of illegality in the meeting at which he was elected clerk, or of informalities and irregularities in calling and conducting the second meeting. Allen *v.* Metcalf, 17 Pick. (Mass.) 208.

**In an action against a school-district to recover back a tax** which had been paid to a collector *de facto* of the town, it was not open to plaintiff to object that the officer had not been duly elected and sworn. Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

**De facto moderator.**—Where there was a contest between two persons as to which one was elected moderator of a school-district, and judgment was, by the default of one, rendered in the other's favor, and the successful party did not apply to the school-board for recognition, and never assumed the duties of the office, and the assessor and director of the district, assuming that there was a vacancy, appointed a third person moderator, who entered upon the duties of the office, the latter was at least *de facto* moderator, and his official acts were valid. Tallmadge Tp. School-Dist. No. 8 *v.* Root, 61 Mich. 373, 28 N. W. 132.

**A parol appointment of a collector by the sole trustee** of a school-district, the execution of the bond by the collector, the approval thereof by the trustee, together with the delivery of a tax warrant to him, constitute him an officer *de facto*, and his acts as such officer are binding upon the public and third parties, and the title to his office cannot be inquired into collaterally. Hamlin *v.* Dingman, 41 How. Pr. (N. Y.) 132 [*reversed* on other grounds in 5 Lans. 61].

35. Franklin Ave. German Sav. Inst. *v.* Roscoe Bd. of Education, 75 Mo. 408.

36. Hall County School Dist. No. 25 *v.* Cowee, 9 Nebr. 53, 2 N. W. 235.

**A person elected by a school-district as its prudential committee,** who claims the rights, and discharges the duties of that position, is at least committee *de facto*; and his proceedings in assessing taxes and making out and delivering a rate bill to the tax collector of the district will justify that officer in serving the warrant. Goodwin *v.* Perkins, 39 Vt. 598.

37. Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303 (holding that where school trustees, with the acquiescence of the school town, continue to act as such after the expiration of their term, and before their successors are appointed, they are officers *de facto*, and a contract with a teacher entered into by them is binding on the town); De Wolf *v.* Watterson, 35 Hun (N.Y.) 111; O'Neill *v.* Battie, 15 N. Y. Suppl. 818; Barrett *v.* Sayer, 12 N. Y. Suppl. 170 (holding that where the trustee of a school-district, disputing the legality of an adjourned school meeting at which his successor was elected, continued to claim and hold the office and all the property of the district, and to act as sole trustee, and in that capacity employed plaintiff as teacher, and, in payment of his wages, made a draft on the supervisor of the town, such acts were valid as those of an officer *de facto*, and plaintiff could recover on the draft). But see White *v.* Archbald Borough School Dist., 5 Pa. Cas. 323, 8 Atl. 443, holding that one who contracts with and renders services for a *de facto* school-board, which is not such *de jure*, cannot recover from the school-district the value of such services.

38. Woodbury *v.* Knox, 74 Me. 462.

39. National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637 [certiorari *denied* in 159 U. S. 262, 15 S. Ct. 1041, 40 L. ed. 147].

40. Miahle *v.* Fournet, 13 La. Ann. 607, parish treasurer.

can legalize and confirm the acts of *de facto* school officers under a law which is declared invalid;[41] but the acts of one who is not even a *de facto* officer are absolutely void.[42]

**c. Term of Office; Holding Over.** The term of office of officers of district boards and the district officers is generally prescribed by the statutes providing for their appointment or election,[43] and begins as soon as they have qualified according to statute,[44] and continues until the end of the term of election or

41. Dubuque Female College *v.* Dubuque Dist. Tp., 13 Iowa 55.

42. Bennett *v.* Colfax Dist. Tp., 53 Iowa 687, 6 N. W. 36 (holding that under Code (1873), § 1752, a subdirector of a school-district, to qualify, need only appear before some officer and take the required oath within the time provided, and his failure to appear at the school meeting, or file written notice of his qualification, will not render the office vacant; and that a person subsequently appointed by the board to fill the office, under the belief that the person elected had not duly qualified, is not even a *de facto* officer, and his acts are void); Woods *v.* Bristol, 84 Me. 358, 24 Atl. 865 (holding that the selection of an agent of a school-district is void, and does not constitute him a *de facto* officer, where another agent has already been chosen whose term of office has not expired; and that a teacher employed by such subsequently selected agent cannot recover for his services from the district).

**Facts held not to constitute one a de facto trustee** see Hand *v.* Deady, 79 Hun (N. Y.) 75, 29 N. Y. Suppl. 633.

43. See the statutes of the several states. And see State *v.* Cahill, 131 Iowa 155, 105 N. W. 691 (holding that under Code, §§ 2751, 2757, and 2758, a director's term of office begins and ends on the third Monday in March, when the regular meeting of the directors is held, and not on the first Monday in March, when the annual meeting and election of the subdistrict is held); Briggs *v.* Outwater, 30 Barb. (N. Y.) 501; State *v.* Perkins, 13 Wis. 411 (holding that where the act of incorporation of a school-district provided for an annual election of directors, and an amendatory act contained the same provision, and provided that the district should be subject to the general laws relating to school-districts, and that any alterations in the law subsequently made should apply to this district, except as otherwise provided in the act of incorporation and the amendment thereto, and a subsequent general law changed the directors' term of office from one to three years, it did not apply to the district in question).

**Louisiana Act No. 6, of 1870,** regulating public education, creates a board of school directors, with power to appoint a board of district school directors for each ward school district in their respective parishes, and repeals the former law in conflict with it, and therefore the school directors appointed prior to its passage are *functi officiis*. Frazier *v.* Sandlin, 22 La. Ann. 537.

**N. H. Gen. Laws, c. 87, § 18,** directing how the term of office of the members of boards of education is to be determined, is directory merely. Pickering *v.* De Rochemont, 66 N. H. 377, 23 Atl. 88.

**An act fixing a longer term than that permitted by the constitution** of a state is unconstitutional and void. State *v.* Harris, 19 Nev. 222, 8 Pac. 462 (so holding as to St. (1885) p. 111, § 2, which provides that school trustees shall be elected in May of each year; that the number shall be three, except when the number of census children for the preceding year exceeds four hundred, in which case it shall be five; that the trustees shall hold office for one, two, and three years, respectively; and that, except as provided above, one trustee shall be elected annually to hold office for three years where there are three trustees, and for five years where there are five trustees, the provision for holding office for five years being in conflict with the constitutional prohibition declaring that "the legislature shall not create any office the term of which shall be longer than four years," except as otherwise provided by the constitution, and the whole act is thereby made void); Rowan *v.* King, (Tex. 1900) 55 S. W. 123; Kimbrough *v.* Barnett, 93 Tex. 301, 55 S. W. 120 (both holding that the Texas act of March 30, 1899, providing a uniform method of electing school trustees, and giving a four-year term to the trustees is void, as a whole, under Const. art. 16, § 30, providing that the duration of officers not fixed by the constitution shall never exceed two years).

**An agreement between the trustees elect** is a proper method of deciding the question where two school trustees are elected at the same time to fill a two and a three year term, and the statute indicates no method of determining which trustee is elected for the longer term, and the fact that one of the trustees receives a larger number of votes does not entitle him to the longer term. Gilbert *v.* Lucas, 107 S. W. 751, 32 Ky. L. Rep. 979.

**In Massachusetts** the employment of a superintendent of schools is deemed to be for one year, unless otherwise agreed upon. Freeman *v.* Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510.

44. School Dist. *v.* Bennett, 52 Ark. 511, 13 S. W. 132.

**Where the term of office of the clerk of the board of education commences immediately on his selection,** whether he qualifies by giving bond and taking the office then or not, his right to the office and the emoluments thereof at once arises, unless he forfeits his right by refusing to accept, or neglects or refuses to qualify, or is properly removed

appointment,[45] and until the appointment or election and qualification of their successors,[46] and until such time they cannot be compelled to turn over school funds lawfully in their possession.[47] But upon a valid election the former incumbent ceases to hold over;[48] and, although the statute provides that one shall hold office

therefrom in the manner prescribed by law for the removal of officers from public offices, and hence the school code does not affect his right to the office or divest him thereof. State *v.* Cave, 26 Ohio Cir. Ct. 301.

**Officers elected to take office at the expiration of the terms of the incumbent** are not proper officers of the district until the expiration thereof. State *v.* Weatherby, 17 Nebr. 553, 23 N. W. 512; Bouton *v.* Royce, 2 Luz. Leg. Reg. (Pa.) 241, holding that, although school directors are elected nearly three months prior to the beginning of the current school year, they cannot exercise any of the powers pertaining to their office until the full term of their predecessors has expired, but when this has taken place their official functions attach, and on presentation of their certificates of election they are entitled to meet with the continuing members of the board, and to participate in both the temporary and permanent organization.

**45.** Fountain County *v.* Marr, 22 Ind. App. 539, 54 N. E. 402.

**46.** *Arkansas.*— Click *v.* Sample, 73 Ark. 194, 83 S. W. 932.

*California.*— People *v.* Harvey, 58 Cal. 337.

*Indiana.*— Milford School Town *v.* Powner, 126 Ind. 528, 26 N. E. 484 (holding that duly elected and qualified school trustees continue to be officers *de jure*, as well as *de facto*, after the expiration of their term of office, if no successors to them are elected); Sackett *v.* State, 74 Ind. 486 (holding that where a school trustee has been appointed to fill a vacancy under the act of March 12, 1875, he is entitled, under Const. art. 15, § 3, to hold office until the election and qualification of his successor); Stewart *v.* State, 4 Ind. 396.

*Michigan.*— Cleveland *v.* Amy, 88 Mich. 374, 50 N. W. 293, holding that the term "all other school officers," used in Howell Annot. St. § 5132, as amended by the act of 1885, which requires a majority vote to elect the "trustees, and all other school officers," means the moderator, director, and assessor, who comprise the board of the primary school district; and where no person receives a majority of the votes cast for these offices at the annual school meeting the old officers hold over.

*Ohio.*— State *v.* Cave, 26 Ohio Cir. Ct. 301, so holding as to the clerk of the board of education chosen according to Rev. St. § 3980.

*South Dakota.*— *In re* School Law, 2 S. D. 71, 48 N. W. 812, holding that since under Comp. Laws, § 1814, the members of the board of education elected under its provisions were to continue in office until their successors should be elected and qualified, Act March 12, 1891, c. 9, § 7, providing for the election of a new board, does not oust from office the members of the old board until after the new board is elected and qualified.

*Vermont.*— Walker *v.* Miner, 32 Vt. 769; Chandler *v.* Bradish, 23 Vt. 416, holding that school-district officers, elected at an annual meeting of the district, will hold their offices until others are elected, at another annual meeting, to supersede them; and it makes no difference whether the second meeting is a few days more or a few days less than one year from the time the first meeting was held.

*Wisconsin.*— State *v.* Nobles, 109 Wis. 202, 85 N. W. 367.

See 43 Cent. Dig. tit. "Schools and School Districts," § 132.

But see People *v.* Board of Education, 1 N. Y. Suppl. 743 (holding that the term of office of attendance agents of a board of education having expired, they have no legal status as such agents, and cannot claim recognition as such by the board on account of any irregularity in the election of their successors); Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666 (holding that the Pennsylvania act of April 11, 1862 [Pamphl. Laws 471], providing that school directors shall retain power over a detached portion of a divided school-district, does not continue in office a tax collector elected under the act of June 25, 1885 [Pamphl. Laws 187]).

**Failure to elect a prudential committee at an annual meeting** does not create a vacancy but leaves the district legally officered in that respect by the prudential committee of the previous year. Rowell *v.* Tunbridge School Dist. No. 19, 59 Vt. 658, 10 Atl. 754. But see Atty.-Gen. *v.* Burnham, 61 N. H. 594, holding that while the officers of a school-district hold their offices until others are elected or appointed and qualified, if the district fails to hold its annual meeting before April 20, the offices are so far vacant that the selectmen may appoint.

**Where a city charter is adopted by a borough,** the school directors of the borough do not lose their offices, if there is no provision to that effect in the law. Knerr *v.* Krause, 3 Pa. Co. Ct. 563.

**47.** St. Johnsbury School Dist. No. 13 *v.* Smith, 67 Vt. 566, 32 Atl. 484, holding that under a statute providing that the duties of a treasurer of a school-district shall be like those of a town treasurer, against whom the town is given a right of action for money had and received on his failure, on going out of office, to pay to his successor any balance due the town, no right of action accrues to the school-district on the failure of its treasurer to pay a balance due the district to one who is not legally elected to succeed him, since by statute his term continues till his successor is legally chosen.

**48.** State *v.* Fagan, 42 Conn. 32.

till his successor is elected or appointed and qualified, the appointment of his successor, after his term has expired, suspends his powers, so that he cannot exercise the functions of the office till his successor qualifies the next day;[49] and where a school trustee resigns, to take effect at a certain date, the proper board may before that date elect a successor for the unexpired term.[50] One who is appointed to fill a vacancy in the office of school trustee holds until the expiration of the term for which his predecessor was elected, and not merely until the next election.[51]

**d. Resignation, Removal, Vacancies, and the Filling Thereof** — (I) *RESIGNATION.* Officers of school-boards may resign, in like manner as other public officers,[52] but in so doing they must observe the methods set out in the statutes,[53] such as that the resignation must be in writing.[54] To authorize his place to be filled by appointment, the resignation of a school director should be absolute and unqualified, and duly entered on the minutes of the board. Mere verbal statements on his part of an intention to resign, and absence from some of the meetings, are not sufficient, and an appointment made by the board to fill a vacancy claimed to have been thus created is void;[55] and as a general rule a school trustee's office is not vacated by an unaccepted resignation.[56] Conversely, where a district officer tenders his written resignation, to take effect on a specified future date, which resignation is accepted according to its terms, such trustee has no power to withdraw the resignation before the date fixed for it to take effect.[57]

(II) *REMOVAL* — (A) *Grounds.* The statutes also very generally provide for the removal from office of members of school-district boards,[58] for just

**49.** Shepherd *v.* Gambill, 75 S. W. 223, 25 Ky. L. Rep. 333.

**50.** Leech *v.* State, 78 Ind. 570.

**51.** Swango *v.* Rose, 105 Ky. 294, 49 S. W. 40, 20 Ky. L. Rep. 1243; Meadors *v.* Patrick, 56 S. W. 652, 22 Ky. L. Rep. 95; Flaugher *v.* Yates, 56 S. W. 411, 57 S. W. 244, 22 Ky. L. Rep. 77.

**52.** Vaughn *v.* School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393.

**53.** Vaughn *v.* School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393 (holding that the resignation of a director of a school-district, made to and accepted by the voters of the district, is of no effect, but it must be made to a member of the board, who, under Hill Code, § 2604, may call an election to fill the vacancy); State *v.* Nobles, 109 Wis. 202, 85 N. W. 367 (holding that under Rev. St. (1898) § 961, providing that the resignation of a school-district officer shall be made to the district board, tender of resignation to the electors of the district at the annual meeting is ineffectual). But see Pariseau *v.* Board of Education, 96 Mich. 302, 55 N. W. 799, holding that a failure to follow the exact steps prescribed by statute for a resignation will not justify one who has resigned in withdrawing his resignation to the prejudice of one who was elected to fill the vacancy at a meeting which he attended.

**54.** Davis *v.* Connor, 52 S. W. 945, 21 Ky. L. Rep. 658.

**Effect of parol resignation under such a statute.**— Under Ky. St. § 1530, the resignation of a school trustee must be in writing, and therefore the appointment of a successor to a trustee who has tendered only a verbal resignation is void (Davis *v.* Connor, 52 S. W. 945, 21 Ky. L. Rep. 658), and a verbal resignation of school trustees being not effective, the selection of a site for a school-house and the levy of taxes by persons appointed as their successors are void (Davis *v.* Humphrey, 52 S. W. 946, 21 Ky. L. Rep. 660); and neither a parol resignation by a school trustee nor a written resignation to which his name was signed by another is valid (Graham *v.* Jackson, 66 S. W. 1009, 23 Ky. L. Rep. 2235).

**55.** Hunlock *v.* Jones, 9 Kulp (Pa.) 278.

**A resignation will not be inferred** from a mere failure to perform the duties of the office. Giles *v.* Sanborton School Dist. No. 14, 31 N. W. 304.

**56.** Townsend *v.* Essex County School Dist. No. 12, 41 N. J. L. 312.

**57.** Saunders *v.* O'Bannon, 87 S. W. 1105, 27 Ky. L. Rep. 1166, holding also that where a school-district trustee's resignation has been accepted to take effect on a future date, his appointment as a member of the board before such date at a meeting at which there is no quorum is ineffectual.

**58.** See the statutes of the several states. And see Crawford *v.* Scio Tp. Bd., 24 Mich. 248, holding that the statute which provides for the removal of school-district officers from office by the township board is applicable only to such school-districts as are situated within a single township, and thus where a district is organized from two or more adjoining townships, no power is conferred upon the several township boards to act as a joint board in the removal of the school-district officers.

**In Tennessee** it seems that a bill to remove

cause,[59] such as wilful refusal or neglect to perform the duties of the office,[60] wilful disobedience of orders or decisions of the superintendent of public instruc-

school directors who are public officers can only be filed by the attorney-general as representing the state. State *v.* Leonard, 3 Tenn. Ch. 177.

**Disqualification to remove by reason of kinship.**— In proceedings before the township board to remove a school director, for refusing to recognize the validity of a teacher's contract, the fact that one of the members of the board is related to a third person, who has a contract subject to the same objections, does not disqualify him from acting. Hamtramck *v.* Holihan, 46 Mich. 127, 8 N. W. 720.

**59.** State *v.* Burchfield, 12 Lea (Tenn.) 30, holding that a school director will not forfeit his office by employing his minor daughter as a teacher.

**60.** Geddes *v.* Town Bd., 46 Mich. 316, 9 N. W. 431, holding that where a school director wilfully refuses to sign or accept and file a contract made with a teacher, or draw orders for the teacher's pay, and obstinately neglects to furnish necessary schoolhouse supplies, such refusal and neglect is ground for his removal, under Comp. Laws, § 3695, as amended.

**Neglect of duty arising from mistake of judgment.**—Although the facts might justify the removal of school directors for noncompliance with the requirements of the Pennsylvania acts of June 6, 1893 (Pamphl. Laws 339), and June 24, 1895 (Pamphl. Laws 254), as to the mode of construction and the cleansing of water-closets, this penalty will not be imposed where the court is satisfied that the neglect of duty arose from a mistake of judgment. *In re* Salford Tp. School Directors, 19 Pa. Co. Ct. 264, 12 Montg. Co. Rep. 65. And see People *v.* Skinner, 37 N. Y. App. Div. 44, 55 N. Y. Suppl. 337 [*affirmed* in 159 N. Y. 162, 53 N. E. 806], holding that where the president and one member of a school-board adjourned a meeting at a few minutes after the hour set for the meeting, although they knew that the other members were at the entrance of the building prepared to attend, and as they passed out they notified the others of the adjournment, but the latter announced that the members were present and that a meeting would be held, and they proceeded to the hall and held the meeting, and it was customary to assemble the meeting fifteen to thirty minutes after the time set, there being no evidence of a wrongful purpose, it did not justify the removal from office of the directors holding the meeting, conceding that under Laws (1894), c. 556, the state superintendent could remove them for a wilful violation or neglect of duty.

**Failure to provide buildings or teachers as ground for removal.**— Under the Pennsylvania act of May 8, 1854, authorizing the court, on petition, to remove school directors if they neglect or refuse to perform duties enjoined by law, the court cannot remove directors because, in the exercise of their discretion, they refuse to erect a new school building. Cline *v.* School Directors, 2 Lanc. L. Rev. (Pa.) 321; *In re* Derry Tp. Dist., 1 Leg. Gaz. (Pa.) 59. And a board of school directors, having taken official action as to the number of school-houses necessary for a district, cannot be removed, although they have failed to provide a sufficient number of buildings, as the court cannot interfere with matters left to the discretion of the board. Snavely *v.* School Directors, 1 Lanc. L. Rev. (Pa.) 9. Thus where school directors in a sparsley populated district locate the school-houses so that the longest distance required to be traveled by any scholar to reach any school is two miles and two hundred and seventy-one rods, the directors having exercised their discretion, there is no authority for the court to remove them except on evidence showing want of good faith in their acts. Price *v.* Barrett Tp. School Directors, 9 Pa. Co. Ct. 395. Nor will the court interfere to remove school directors for failure to provide suitable school-houses, where the houses provided are cheap, unsightly, unfit for permanent use, and hard to keep in repair, but not uncomfortable or unsafe. *In re* Ohio Tp. School Directors, 9 Pa. Co. Ct. 392. Nor can the court review the exercise of the discretion of school directors in refusing to establish schools in certain localities, where it is not alleged that a sufficient number of schools has not been established. *In re* School Directors, 2 Pa. Co. Ct. 497. But where, on a petition to remove school directors, defendants do not deny the averment that they have not appointed the usual and necessary number of teachers, and it appears that the omission is because the directors cannot agree as to the salary, they may be properly removed. *In re* Bloomsburg School Bd., 4 Pa. Co. Ct. 411 [*affirmed* in 121 Pa. St. 293, 15 Atl. 548]. And it has been held that section 23 of the act, providing that the school-board "shall establish a sufficient number of common schools for the education of every individual above the age of six and under twenty-one years, in their respective districts, who may apply for admission and instruction, either in person or by parent, guardian, or next friend," is mandatory; and a refusal to consider a request by two citizens, made by themselves and on behalf of their neighbors, for enlarged school accommodation, in a case where the same is clearly required, is cause for removal of the board. *In re* Connoquenessing School Directors, 9 Pa. Co. Ct. 425. Similarly where a village contained thirty-eight school children, while the nearest schoolhouses were a mile and a half distant, and the seating capacity of these were insufficient, and the school director refused to provide better accommodations and reduced the tax rate to one-third the average in the state, there was an abuse of discretion by the school

tion,[61] or board of education,[62] illegal disposal of public money,[63] incompetency, or official misconduct, or the like,[64] or general inability or unfitness to perform the duties of the office;[65] but one, having been duly elected and having qualified as school-district trustee, cannot be deprived of the office through any failure of the superintendent to perform ministerial or clerical duties respecting the recording of the election and qualification.[66]

directors, calling for their removal under the act of June 6, 1893 (Pamphl. Laws 330), authorizing proceedings for the removal of school directors who wilfully neglect or refuse to provide suitable school-houses, etc. (*In re* Colerain Tp. School Directors, 11 York Leg. Rec. (Pa.) 113), and under this act school directors cannot justify their refusal to furnish adequate accommodations on the ground that other localities are equally inconvenienced, and that, if a school was established as requested, they might be called on to establish schools in other localities (Fretz's Case, 9 Pa. Dist. 758, 24 Pa. Co. Ct. 172).

**If a school-board does not organize** because no one can obtain a majority of the votes for president, it is such a "neglect of duty," as will justify the court in declaring their seats vacant and appointing others in their place. Royce's Appeal, 1 Walk. (Pa.) 215; *In re* Kline Tp. School Bd., 3 Pa. Co. Ct. 546; Bouton *v.* Royce, 10 Phila. (Pa.) 559. And see Volrath *v.* Drunn, 7 Luz. Leg. Reg. (Pa.) 223.

**The Pennsylvania court of quarter sessions has no power to remove school directors** for misfeasance in office, its power being limited to cases of neglect or refusal to perform duty. Heard *v.* Woodcock Tp. School Directors, 45 Pa. St. 93; *In re* Union Tp. School Directors, 12 Pa. Co. Ct. 547. Thus it cannot remove school directors for illegally electing teachers. *In re* Union Tp. School Directors, 3 Pa. Dist. 132. But where persons elected as members of a school-board divide into two equal factions, and each faction attempts an organization in the absence of the other, with a view of usurping all the power, and excluding the other from any share of control, no organization of the board is effected, within the meaning of the act of April 22, 1863, which requires that an organization of the board shall be had within a specified time, and the failure to so organize is neglect or refusal to perform duties, justifying the court in declaring the offices vacant and filling the vacancies. Butler Tp. School Dist.'s Case, 158 Pa. St. 159, 27 Atl. 849.

**Where the acts complained of are done by them as individuals,** and not officially, and where the official acts are in strict conformity with their duty, a bill to remove school directors cannot be sustained. State *v.* Leonard, 3 Tenn. Ch. 177, holding that school directors cannot be removed for electing a teacher in place of one to whom permission to absent himself has been given by them individually, and not as a board formally convened.

61. O'Connor *v.* Hendrick, 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161 (holding that disobedience of the order of the superintendent of public instruction directing that a teacher wearing the garb peculiar to a religious order shall not be employed by a trustee of a school-district, or, if employed, shall be dismissed unless she discontinues wearing the garb, renders the trustee liable to removal); People *v.* Draper, 63 Hun (N. Y.) 389, 18 N. Y. Suppl. 282 (holding that where the return of a trustee of a school-district to an order made by the state superintendent of public instruction, requiring him to show cause why he should not be removed from his office, admitted that he had neglected and refused to comply with and had violated certain orders of the superintendent, he was properly removed from his office, under Laws (1864), c. 555, § 18, authorizing such removal in case of the wilful disobedience of any decision or order of the superintendent on the part of the trustee).

62. State *v.* Lynch, 8 Ohio St. 347.

63. Hazen *v.* Town Bd., 48 Mich. 188, 12 N. W. 43, holding, however, that Acts (1881), No. 164, c. 13, § 8, providing that the township board may remove any district officer who has illegally disposed of public moneys intrusted to him, does not authorize the removal of the moderator for hiring her husband to teach the district school, and agreeing to pay him more than is necessary to secure a better teacher.

64. Hendricks *v.* State, 20 Tex. Civ. App. 178, 49 S. W. 705, holding that, school-districts being subdivisions of a county, the trustee of a school-district is a county officer, and may be removed from office, under Rev. St. (1895) art. 3531, providing that all district attorneys, county judges, etc., and "all other county officers," may be removed from office by the judge of the district court for incompetency, official misconduct, etc.

65. Freeman *v.* Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510, holding that in the employment of a superintendent of schools there is an implied condition authorizing his dismissal when not able or fit to perform his duties.

**The pendency of an indictment for adultery** and proceedings thereupon, against a superintendent of schools, is sufficient cause for his discharge by the authority employing him. Freeman *v.* Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510.

66. Graham *v.* Jackson, 112 Ky. 883, 66 S. W. 1009, 23 Ky. L. Rep. 2235 (holding that where a school trustee took the oath of office before the county superintendent, the failure of the record of the superintendent to show that fact does not deprive the trustee of his right to the office); Gilbert *v.* Lucas, 107 S. W. 751, 32 Ky. L. Rep. 979

(B) *Manner.* Removal must be in the manner provided by law,[67] and by the properly constituted authority,[68] after notice and an opportunity to defend,[69] at a hearing conducted by unbiased judges;[70] and where a person elected has entered upon the discharge of his duties, as a school-district officer, he cannot, without notice and a hearing before some competent officer or tribunal, be deprived of his office on the ground that he has neglected or refused to perform any duty required of him, and, until a forfeiture of his right to the office has been declared another person cannot be appointed in his stead;[71] but where the officer admits the charges set up against him and expressly desires the board to act on them, he cannot afterward complain that they in fact did so.[72] Where there is evidence before a township board upon which they remove a school director, their decision on matters of fact will not be reviewed.[73]

(III) *VACANCIES AND FORFEITURES.* The statutes usually provide also how the office may become vacant,[74] as by absence from the district for more than

(holding that where a school trustee was elected to a three-year term as trustee, and his election was certified to the county superintendent, it was not invalidated by the latter's failure to record his election as being for the three-year term); McGlone *v.* Zornes, 107 S. W. 329, 32 Ky. L. Rep. 965.

**67.** Geddes *v.* Town Bd., 46 Mich. 316, 9 N. W. 431 (holding that in Michigan proceedings by a township board to remove a school director cannot properly be taken until the action of the proper authorities has been invoked by complaint of some definite violation of duty); *In re* Hazle Tp., 9 Kulp (Pa.) 365 (holding that the Pennsylvania act of June, 6, 1893, section 2, which confers upon the court of quarter sessions the power to remove from office school directors who fail to comply with the requirements of that act, is in conflict with section 4, article 6, of the constitution, and is therefore unconstitutional and void; such officers are removable by the governor of the state upon address of two thirds of the senate).

**Removal by appointment of successor.**— The appointment of a treasurer by school trustees is a removal of the prior officer. Holbrook *v.* La Salle County Tp. 33, 22 Ill. 539.

**Under N. J. Pamphl. Laws (1897), p. 120, relating to the appointment of a secretary to the commission of public instruction,** a clerk appointed for a term previously fixed by the commission cannot be removed by the commission at will before his term ends. Brown *v.* Cline, 62 N. J. L. 489, 41 Atl. 690.

**68.** Matthews *v.* Rogers, 53 S. W. 413, 21 Ky. L. Rep. 905, holding that under St. § 4417, providing that the county superintendent may, for certain causes, remove from office "any trustee or teacher of any school under his supervision," does not apply to trustees of graded school districts, the whole management of graded schools being left with their trustees.

**Under Greater New York Charter** [Laws (1901), p. 483, § 1101], providing that all school officers or other employees appointed by the board of education before the act took effect should continue to hold their respective positions, etc., subject to change of title, etc., and subject to the right of the board of education to abolish unnecessary positions, the board has power, if a position becomes unnecessary, either to abolish it or to transfer the incumbent to some other position in the department; and hence the board has power, after creating the position of additional auditor, to remove an appointee thereto and transfer him to another department at a reduced salary, as fixed by the board of estimate and apportionment. People *v.* New York Bd. of Education, 187 N. Y. 535, 80 N. E. 1116 [*affirming* 114 N. Y. App. Div. 1, 99 N. Y. Suppl. 737].

**69.** Willard's Appeal, 4 R. I. 595 (holding that the school-committee of a town cannot remove the clerk of the board, unless for cause, and after due notice, and opportunity given him to defend himself); Richardson *v.* Methley School Bd., [1893] 3 Ch. 510, 62 L. J. Ch. 943, 69 L. T. Rep. N. S. 308, 3 Reports 701, 42 Wkly. Rep. 27 (holding that a school-board cannot declare a member to be in default on the ground of six months' absence, unless an opportunity is given to the member to explain, and that in such a case the court has jurisdiction under the Judicature Act (1873), § 25, subs. 8, to restrain by injunction a school-board from declaring the member in default and proceeding to the election of a new member, notwithstanding there might be a legal remedy by quo warranto).

**70.** State *v.* Seattle Bd. of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317, holding that, in a proceeding to remove the superintendent of public schools from office, he is entitled to have a member of the board of directors of the school-district which constitutes the tribunal to hear and determine the charges against him, and from whose decision there is no appeal, who is biased, and has personal enmity toward defendant, prohibited from sitting as a member of such tribunal.

**71.** Jacques *v.* Litle, 51 Kan. 300, 33 Pac. 106, 20 L. R. A. 304.

**72.** Geddes *v.* Town Bd., 46 Mich. 316, 9 N. W. 431.

**73.** Hamtramck *v.* Holihan, 46 Mich. 127, 8 N. W. 720.

**74.** Stevens *v.* Kent, 26 Vt. 503, holding that the prudential committee of a school-

a stated length of time,[75] or removal from the district or county,[76] or by the officer's assuming inconsistent and proscribed employment,[77] or entering into a contract in which he has a pecuniary interest with the school corporation of which he is a member,[78] or not attending meetings,[79] or, under some statutes, being incarcerated for

district refusing to do a particular act, even one required by his duty, does not create a vacancy in the office; but if a new district is created, and the prudential committee is included within its limits, it does vacate the office.

**Effect of tie vote.**— Under Pa. Act (1862), p. 471, § 2, which provides that, when candidates for school director shall have the same number of votes, the candidates shall appear at the next regular meeting of the board of directors, which board shall, in a certain manner, determine their rights to seats therein, where there is a tie vote as to two candidates for school director, and one of them appears before the next meeting of the board of school directors, and offers to have his right determined as prescribed by the act, but the other refuses to have his right so determined, and the board adjourns without taking action, no vacancy is created in the office, as it is the duty of the reorganized board, at its first meeting, on an application of one of the candidates, to determine his rights in the manner prescribed by the act. Com. *v.* Meanor, 167 Pa. St. 292, 31 Atl. 552.

**Failure to take oath.**—Where city school trustees are required to take the oath of office before entering upon the discharge of their official duties, their failure to take it in the prescribed time makes the offices vacant, and if the city council neglects to appoint others within sixty days, as required by law, the duty of appointment devolves upon the state board of education, whose appointees, when duly qualified, become the lawful board of school trustees. Owens *v.* O'Brien, 78 Va. 116; Childrey *v.* Rady, 77 Va. 518.

**Failure to qualify as vacating office** see *supra*, III, D, 6, a, (III).

**Effect of alteration or creation of new district** see *supra*, III, C, 1, j.

**75.** Gilbert *v.* Patterson, 32 N. J. L. 177, where the statute provided that when a school trustee left his district for more than six months his office should be declared vacant.

**76.** Giles *v.* Sanbornton School Dist., 31 N. H. 304 (holding that a district prudential committee vacates his office by removal from the town); Gildersleeve *v.* New York Bd. of Education, 17 Abb. Pr. (N. Y.) 201.

**Effect of division of ward.**— Under a statute requiring school directors to reside in the wards for which they are elected, and declaring that a removal from the ward shall cause a vacancy, if a ward is divided the office of school director in the old ward, held by those who live in the new ward, becomes vacant. *In re* Nineteenth Ward School Directors, 11 Phila. (Pa.) 300.

**Temporarily moving his residence** onto or near the district line does not forfeit a school-district trustee's office. McGlone *v.* Zornes, 107 S. W. 329, 32 Ky. L. Rep. 965. Nor does temporary absence *animo revertendi* vacate the office. State *v.* Van Patten, 26 Nev. 273, 66 Pac. 822.

**As far as concerns a third party** a school director will be considered a *de facto* officer, although the removal of a school director from the district operates as a vacation of his office, if he has assumed and continued to act in the capacity of director. Graham *v.* School Dist. No. 69, 33 Oreg. 263, 54 Pac. 185.

**77.** Ferguson *v.* True, 3 Bush (Ky.) 255, holding that the duties of a school trustee are incompatible with those of teacher, and one trustee, employed as teacher by the two others, vacates his office as trustee. See Gatchell *v.* Day, 21 Misc. (N. Y.) 98, 47 N. Y. Suppl. 52.

**78.** Lee *v.* Toronto Public School Bd., 32 U. C. C. P. 78, holding, however, that the fact of the public school board of the city of Toronto entering into an agreement with and purchasing school stationery and other supplies from a publishing company, and having obtained gas from a gas company, and insured the school property in certain insurance companies, of which said companies plaintiff was a shareholder, did not disqualify him from acting as a trustee of the school-board, or render his seat vacant, under 44 Vict. c. 30, § 10 (Ont.).

**Where a school trustee, who was a medical practitioner,** acted in his professional capacity under engagement by the board in examining pupils attending the school as to the prevalence of an infectious disease, and made a charge therefor, which the board ordered to be paid, but which he afterward declined to accept payment for, he was disqualified as trustee, and his seat rendered vacant, under 44 Vict. c. 30, § 13 (Ont.). Reg. *v.* Standish, 6 Ont. 408.

**79.** Zulich *v.* Bowman, 42 Pa. St. 83.

**The meetings must be regular ones to justify the declaring of an office of school director vacant** for failure to attend a specified number of successive meetings, under a statute providing therefor. Genesee Tp. Independent School Dist. *v.* McDonald, 98 Pa. St. 444; Zulich *v.* Bowman, 42 Pa. St. 83. For a meeting held to be "regular" within the meaning of the statute see Keating *v.* Jordan, 181 Pa. St. 168, 37 Atl. 199, holding that where a school-board has no standing regulations as to the time for holding meetings, "every meeting held in succession from the said first meeting for organization by adjournment to a time and place certain" is a regular meeting (Act April 11, 1862, Pamphl. Laws 471); and the absence of a director from two of such meetings in succession, unless sick or out of the district, will authorize the board to declare his seat va-

crime.[80] The statutes also usually specify who may declare the office vacant,[81] and the manner of filling vacancies,[82] and an appointment to fill a vacancy, not made

cant, and appoint another in his stead (Act May 8, 1854, Pamphl. Laws 618). The meetings referred to in the Pennsylvania act of Feb. 16, 1865 (Pamphl. Laws 151), providing that, "if any person, having taken upon him the duties of his office as director, shall neglect to attend any three regular meetings of the board in succession," he may be removed, are any three meetings in succession during the term of such member. Com. *v.* Campbell, 8 Pa. Dist. 645, 23 Pa. Co. Ct. 313. The act does not require that notice shall be sent to a defaulting director, already qualified, of the intention of members present at a regular meeting to declare his seat vacant. Com. *v.* Campbell, *supra*. But under the act of May 8, 1854 (Pamphl. Laws 618, § 8), providing, that if a school director shall neglect to attend two regular meetings of the board in succession, he shall be removed, unless detained by sickness or by absence from the district, he cannot be removed at the second of such meetings, and can only be removed on notice to him, and opportunity to show sickness or absence from the district as an excuse. Com. *v.* Gibbons, 196 Pa. St. 97, 46 Atl. 313.

**80.** Conybeare *v.* London School Bd., [1891] 1 Q. B. 118, 17 Cox C. C. 191, 55 J. P. 151, 60 L. J. Q. B. 44, 63 L. T. Rep. N. S. 651, 39 Wkly. Rep. 288, holding that where under rule 14 of schedule 2, part 1, of the Elementary Education Act of 1870, providing that "if a member of the school board . . . is punished with imprisonment for any crime . . . his office shall thereupon become vacant," plaintiff, a member of a school-board, suffered imprisonment in Ireland on the charge of taking part in a criminal conspiracy heard before a court of summary jurisdiction under the provisions of the criminal law and procedure, plaintiff's office as member of such school-board had become vacant under the rule.

**81.** Felton *v.* Com., 8 Watts & S. (Pa.) 267, holding that under an act expressly vesting power of declaring vacant the seats of the school directors in the remaining directors of its election districts, no director of any other township or election district is empowered to participate in declaring such vacancy in said township.

**82.** *New York.*— People *v.* New York Bd. of Education, 1 Den. 647, holding that under Acts (1844), p. 503, § 48, providing for filling vacancies in the office of ward commissioners of schools when occasioned by death, resignation, or refusal to qualify or give the prescribed security, a removal by such commissioner from the ward for which he was chosen creates a vacancy in his office, authorizing the appointment of another in his stead.

*Ohio.*— Cist *v.* State, 21 Ohio St. 339 (construing the act of March 14, 1853 (Swan & C. St. p. 1347, § 3), which authorizes the clerk of the township board of education to fill vacancies in the boards); Gates *v.* Beckwith, 2 Ohio Dec. (Reprint) 394, 2 West. L. Month. 589 (holding that under the statute providing that the village recorder shall be clerk of the board of education, and shall perform the duties required by the clerk of the township board, and under the statute making it the duty of the township clerk to fill vacancies that occur in the office of school directors, the recorder of a village, as clerk of the board of education, has power to fill vacancies that occur in the office of school directors).

*Pennsylvania.*— Hatz *v.* Gilbert, 19 Pa. Co. Ct. 413, holding that since the act of May 8, 1854, section 7, provides that the board of directors shall fill any vacancy in the board until the next annual election, when the vacancy shall be filled by election, one appointed to fill a vacancy holds until the first Monday in June after the next annual election, at which time the person elected at the preceding annual February election takes office for the balance of the unexpired term.

*Rhode Island.*— State *v.* Lane, 16 R. I. 620, 18 Atl. 1035, under Pub. St. c. 50, § 4, providing that the town council shall fill vacancies in the school committee.

*Texas.*— Stewart *v.* Purvis, 20 Tex. Civ. App. 647, 50 S. W. 204.

See 43 Cent. Dig. tit. "Schools and School Districts," § 135.

**Pennsylvania** act of 1854, section 7 (Purdon Dig. p. 239, pl. 22), provides that each board of school directors may fill any vacancy occurring by resignation until the next annual election for directors, when such vacancy shall be filled by electing a person from the district in which the vacancy occurs. Under this section it has been held that the board cannot fill the vacancy for any longer than until the next annual election. Com. *v.* Thomas, 10 Phila. 600. The provision in the act, section 17 (Purdon Dig. p. 241, pl. 33), authorizing less than a majority of the school directors to fill vacancies "as hereinbefore directed," applies only where the number has been reduced below a majority from causes mentioned in sections 7 and 8 of the act (Purdon Dig. pp. 240, 241, pl. 22, 23). Bouton *v.* Royce, 2 Luz. Leg. Reg. 241. Where a vacancy occurs in the board of school controllers in the city of Scranton, which is a city of the third class, divided into more than twelve wards, such vacancy is to be filled by the qualified voters of the proper ward at the next municipal election. Com. *v.* Evans, 102 Pa. St. 394. A vacancy in the office of school director in the city of Pittsburg, under Act Feb. 12, 1869, § 43 (Pamphl. Laws 159), can only be filled by the directors "until the next annual organization of the board," which, under Act March 24, 1877 (Pamphl. Laws 44), takes place in June; General School Law of May 8, 1854, § 7 (Pamphl. Laws 618), providing for the filling of such vacancies until the next annual election of school directors, being superseded

as prescribed, is invalid.[83] But it has been held that, even where there is such neglect as furnishes a ground to vacate the office, it does not become vacant until new appointments have been duly made according to statute;[84] and even if the failure of one duly elected a school trustee to qualify creates a vacancy in the office, the former trustee is not entitled to the office without the consent of the superintendent;[85] and the appointment of one to be a school trustee is a nullity, where no vacancy exists in the office,[86] as is the appointment under similar circumstances of a treasurer of a school-district.[87] So also as a county superintendent, by declaring a vacancy in the office of school trustee when none in fact exists, does not create a vacancy, an appointment to fill the supposed vacancy is void;[88] and under a statute authorizing a county superintendent to declare the place of trustee to be vacant, and fill it by appointment, in the event the trustee elected shall fail to qualify on or before a certain date, the power of the superintendent is not arbitrary, and must be exercised by him before receiving the certificate of qualification.[89]

**e. Compensation and Reimbursement** — (I) *Of Members of District Boards.* Unless the office is a non-salaried one,[90] as where a statute provides that they shall serve without pay,[91] members of district boards are, upon ful-

by the act of 1869. Com. *v.* Pedder, 208 Pa. St. 28, 57 Atl. 54.

**Presumption of vacancy of office.**—Where a statute provides for appointment by a county court to fill a vacancy an appointment of school directors by the court will be presumed to be upon a vacancy in the office contemplated by statute, although the record of appointment does not show a vacancy, and warrants drawn for teachers' services by such directors are valid. Pierce *v.* Edington, 38 Ark. 150. And where a resolution of a special meeting, appointing a trustee in the place of one who had been chosen a few days before, stated that the one first chosen "had refused to serve," it was held in trespass against the trustee for causing a district tax to be collected that such statement was sufficient evidence that a vacancy had occurred to render the second appointment valid. Randall *v.* Smith, 1 Den. (N. Y.) 214.

**The word "may,"** in the New Jersey act of March 17, 1854, which provides that in case of any vacancy in the board of trustees of any school-district the same may be filled by taxable inhabitants of the district, was not designated to exclude other modes of filling a vacancy which existed when the statute was passed. State *v.* Patterson, 32 N. J. L. 177.

**Cal. St. (1863) p. 605, § 14,** authorizing the board of education, in case of a vacancy in the office of superintendent, to appoint a person to fill the vacancy until the regular election then next following, when the office shall be filled by the election of the people, means the next "general" election, and not the next election at which superintendents are to be elected. People *v.* Babcock, 123 Cal. 307, 55 Pac. 1017.

**83.** Shephard *v.* Whiteley County, 76 S. W. 1084, 25 Ky. L. Rep. 1072, holding that under Ky. St. (1899) § 4436, requiring a vacancy in the office of school trustee to be filled by the county superintendent by appointment in writing, an appointment not in writing is invalid.

**84.** Woodcock *v.* Bolster, 35 Vt. 632, holding that the offices of a school-district do not become vacant merely by the failure of the district to maintain a school as required by Vt. Acts (1859), No. 32, and Acts (1860), No. 4 (Gen. St. c. 22, § 40); but such neglect merely affords a reason for vacating the offices and they do not become vacant until the selectmen have duly made new appointments.

**85.** Dotson *v.* Stratton, 37 S. W. 147, 18 Ky. L. Rep. 534.

**86.** McGlone *v.* Zornes, 107 S. W. 329, 32 Ky. L. Rep. 965; Shepherd *v.* Gambill, 75 S. W. 223, 25 Ky. L. Rep. 333 (holding that an appointment to fill a vacancy in the office of a school trustee which will arise because of a failure to hold a prior election, being made before the vacancy arises, is void); Reg. *v.* Nagle, 26 Ont. 249.

**87.** Horneman *v.* Harlan, 47 Kan. 413, 28 Pac. 177.

**88.** Smythe *v.* Lapsley, 64 S. W. 733, 23 Ky. L. Rep. 1065 (holding that the action of the county superintendent of schools in removing a trustee for misfeasance in office, and in appointing another in his stead, was void, where the notice of the proceeding failed to state the acts relied on as constituting misfeasance; and, the state superintendent having properly so decided on appeal, the acts of the appointee to fill the supposed vacancy done pending the appeal to the state superintendent were void, and the subsequent acts of the trustee sought to be removed were valid); Mattingly *v.* Vancleave, 61 S. W. 257, 22 Ky. L. Rep. 1761 (holding also that, although such an appointee may have been a *de facto* officer by reason of his recognition by the county superintendent, yet he ceased to be so when notified by the county superintendent that he was no longer considered trustee; and his acts thereafter, although on the same day he received such notice, were void).

**89.** Shelbourne *v.* Blatterman, 49 S. W. 952, 20 Ky. L. Rep. 1730.

**90.** Hinman *v.* Battle Creek School Dist. No. 1, 4 Mich. 168.

**91.** See Houston Independent School Dist.

filling their duties, entitled to the compensation provided by statute,[92] and in the absence of a fixed or agreed sum are entitled to receive a reasonable compensation for their services,[93] each member of the board being entitled to a *pro rata* proportion of the board's salary, without reference to the amount of his services, in the absence of a different apportionment by the school-district.[94] But a member of a district board who without authority usurps powers of the board is not entitled to extra compensation for the labor he expends; [95] nor is a member of the board entitled without prior contract to compensation for extra services rendered to the school-district outside of his regular duties.[96] In addition to compensation for services members are entitled to reimbursement for money properly expended in the interest of the district,[97] and thus the trustee of a school township, after having, within the scope of his authority, employed the necessary teachers, may, upon finding a lack of funds for paying the same, advance the necessary sum, and look to the corporation for reimbursement; [98] and a prudential committee being authorized by statute to provide fuel may supply a deficiency thereof and charge the price to the district.[99] Expenditures by members of a school-board must be recovered in the manner provided by statute, and if this

*v.* Dow, (Tex. Civ. App. (1901) 63 S. W. 1027, holding that under the Texas act of Feb. 21, 1900, providing for the election of trustees to constitute the school-board of an independent school-district, all of whom shall serve without compensation, and directing that they shall choose necessary officers and committees, such board cannot allow compensation to their secretary and treasurer elected from their own number, although the act of June 23, 1897, as amended by the act of June 6, 1899, allows the use of local school funds for paying employees, and other purposes necessary in the conduct of the public schools, to be determined by the trustees.

92. See cases cited *infra*, this and following notes.

Pa. Act, May 8, 1854, §§ 12, 14, allowing the secretary of the board of school directors to receive such compensation as the board may direct, is not affected by the act of June 11, 1885, such act being repealed by the act of June 16, 1891, relating to school-districts composed of cities of the third class. Com. *v.* Mackin, 8 Kulp 176. Nor are these sections of the act repealed by the act of March 31, 1860, section 66, making it unlawful for the director in any corporation municipality to be secretary or other officer subordinate to the president and directors receiving a salary. Com. *v.* Mackin, *supra*.

93. Manchester *v.* Potter, 30 N. H. 409.

94. Stone *v.* Towne, 67 N. H. 113, 29 Atl. 637.

95. Moore *v.* Toledo City Independent Dist., 55 Iowa 654, 8 N. W. 631, holding that where a school-house duly authorized, being erected for an independent school-district, is abandoned by the contractor before completion, the board of directors have power, and it is their duty to go on and complete the building, but a member of such board, who by its direction employed men and superintended such completion, is not entitled to extra compensation therefor from the district.

96. Black *v.* Allegheny Tp. School Dist., 16 Montg. Co. Rep. (Pa.) 179.

97. Manchester *v.* Potter, 30 N. H. 409.

**Where the statute requires the school director to defend** suits against the district unless otherwise specially directed by vote, he can recover from the district the expenses thereof. Fobes *v.* School Dist., 10 Wis. 117.

**Effect of rescission of vote authorizing expenditure.**—Where a school committee appointed in consequence of a resolution of the inhabitants of the district to purchase a site for a school-house do so, giving a note therefor, and are compelled to pay for it out of their own personal funds, they may recover the amount from the district, notwithstanding a subsequent rescission of the votes authorizing the purchase, and although the note was paid subsequent to the descinding vote. Kingman *v.* North Bridgewater School Dist. No. 13, 2 Cush. (Mass.) 426.

**Expenses incurred without authority.**—Where in an action by a school city against one who has been president of its board of school trustees for a conversion of money collected by him, it appears that he made the collection without authority, the expense of collection is not ground for recoupment. Knowlton *v.* Logansport, 75 Ind. 103.

**School director prohibited by statute from contracting with district.**—Where a statute prohibits a director from being interested in any contract made by the board of which he is a member, it cannot be evaded by appropriation or payments for labor performed or materials furnished for the benefit of the district on the pretext that they were performed or furnished without any interest, but being enjoyed by the district should be paid for as a matter of justice. School Directors *v.* Parks, 85 Ill. 338, holding that a school director who performs labor in repairing a school-house, and furnishes the school with wood, is not entitled to compensation therefor, and, when paid for such services and wood by his co-directors, the money may be recovered back.

98. Kiefer *v.* Troy School Tp., 102 Ind. 279, 1 N. E. 560.

99. Norton *v.* Tinmouth School Dist. No. 7, 37 Vt. 521.

is to be from school money assigned to the district it must be recovered in an action against the district itself.[1]

(II) *OF OTHER DISTRICT AND LOCAL OFFICERS.* In like manner as the compensation of members of district boards is fixed by statute,[2] so also is the compensation of other district officers;[3] and, like officers of district boards,[4] they cannot claim extra compensation not provided for in the statute,[5] or not included in an estimate of school expenses required by statute to be posted;[6] and where the statute makes no provision for the payment of services, it is held that a promise on the part of the town to pay for them is not implied from the fact of the election of the officers and the rendition of services.[7] A treasurer of a board of education who has voluntarily paid to his successor all moneys in his hands, including the commission he was entitled to by law, cannot, on being again elected treasurer, hold out of the money then coming into his hands the amount of commissions

1. Giles *v.* Sanbornton School Dist. No. 14, 31 N. H. 304.

2. See *supra*, III, D, 6, e, (I).

3. See the statutes of the several states. And see cases cited *infra*, this and the following notes.

**Fixing compensation of treasurer after expiration of term.**— The board of directors of a school-district, empowered to fix the compensation of the treasurer of the board at any sum not exceeding two per cent on the amount of school taxes collected, cannot, after expiration of the treasurer's term, fix his compensation at less than the maximum two per cent. Allen Sub-school Dist. *v.* Vogel, 16 Pa. Co. Ct. 661.

**Under Pa. Act, May 23, 1874 (Pamphl. Laws 252),** which provides that the city controller shall "have supervision and control of the fiscal concerns of all departments, bureaus, and officers of the city and school district," where a school-district does not accept this act, but continues to act under a special law, under which it has power to appoint an auditor to the school accounts, and the city controller audits the school accounts, the school-board having passed a resolution that it was his duty as city controller to do so, not having been appointed auditor by the school-district he cannot recover compensation for such services. Rothrock *v.* Easton School Dist., 133 Pa. St. 487, 19 Atl. 483.

4. See *supra*, III, D, 6, e, (I).

5. Lovingston *v.* Board of Trustees, 99 Ill. 564, holding that a school treasurer is not entitled to any compensation above that fixed by the board of trustees before his appointment for the performance of any duty imposed on him by law, and it being his duty to collect from the city money received as license-fees, he has no right to accept, instead of money, city warrants, or to procure the issue of city bonds for the same and sell them at a discount, and, having done so, he cannot claim extra compensation therefor. And see Montezuma Independent School Dist. *v.* McDonald, 39 Iowa 564, holding that where the treasurer of a school-district, who used in his own business funds intrusted to him, claimed no compensation for his services, and the board of directors did not award it, in an action upon his official bond, nothing should be allowed for his services.

**The treasurer of an independent district** cannot recover for his services a greater amount than the sum fixed by the board of directors under the statute, even though the compensation was not fixed until after the expiration of his term. Wilson *v.* Osceola Independent Dist., 39 Iowa 471.

**Money paid to a teacher by a school agent** cannot be considered as money paid for the town, so as to entitle him to maintain an action against it for money paid, as the school money collected by the selectmen, if paid to the town treasurer, must be considered in his hands as treasurer of the selectmen, and not of the town. Tolman *v.* Marlborough, 3 N. H. 57.

**Compensation in two offices.**— Under the act of May 23, 1874, section 42, which provides that the city treasurer shall be *ex officio* school treasurer, and shall qualify as school treasurer, the office of school treasurer is not merged in that of city treasurer, and the incumbent is entitled to compensation for both offices. McCauley *v.* Easton School Dist., 133 Pa. St. 493, 19 Atl. 410; Scranton School-Dist. *v.* Simpson, 133 Pa. St. 202, 19 Atl. 359. But a city treasurer who is also *ex officio* treasurer of the school-district is not entitled to compensation for services rendered in the latter capacity subsequent to the expiration of his term as city treasurer, where his successor as city treasurer fails to qualify as school treasurer, since the law denies to him compensation for services rendered as school treasurer while city treasurer, and he is not entitled to the office subsequent to the qualification of his successor as city treasurer. Knorr *v.* Board of Education, 8 Ohio Dec. (Reprint) 672, 9 Cinc. L. Bul. 182.

6. Gibson *v.* Roach, 2 N. Y. App. Div. 86, 37 N. Y. Suppl. 567.

7. Talbot *v.* East Machias, 76 Me. 415.

**Under Kirby Dig. Ark. §§ 7630, 7631,** providing that one of the directors of a school-district shall act as clerk, and prescribing the duties he shall perform, but containing no provision for his compensation, a board of school directors has no authority to vote a salary to a director appointed to act as clerk, since in the absence of legislation he took the position with its burdens, and without pay. Clarke *v.* Clark County School Dist. No. 16,

so paid over to him.[8] The salaries of the secretary and the treasurer of the board of directors of the district are part of the necessary expenses to which the contingent fund is appropriated.[9]

**f. Powers and Functions**[10] — (i) *In General.* Officers of school-districts are public officers,[11] and, like other public officers,[12] their authority and powers are generally determined by statute and they can rightfully perform all those acts which the law expressly or impliedly authorizes,[13] such as disbursing school

84 Ark. 516, 106 S. W. 677. And funds in the hands of a county treasurer belonging to the school-district, illegally paid by the county treasurer for the salary of such clerk of a board of school directors, may be recovered back by such treasurer on discovery of his mistake. Clarke *v.* Clark County School Dist. No. 16, *supra*.

**8.** Bunn *v.* People, 32 Ill. App. 410.

**9.** Yaggy *v.* Monroe Dist. Tp., 80 Iowa 121, 45 N. W. 553.

**10. Authority:** To change districts see *supra*, III, C, 1, b. To change school-house site see *infra*, III, E, 2, c. To contract in general see *infra*, III, E, 4. To contract with teachers see *infra*, III, H, 3. To control school buildings see *infra*, III, E, 2, f. To execute bills or notes see *infra*, III, F, 3. To fix school terms, vacations, and holidays see *infra*, III, I, 2. To grant certificates or licenses to teachers see *infra*, III, H, 1, c. To hire property for school purposes see *infra*, III, E, 1, c; III, E, 2, d. To incur expenses for highways for access to school-house see *infra*, III, E, 5, c. To issue orders or certificates of indebtedness see *infra*, III, F, 2, d. To locate school-house site see *infra*, III, E, 2, b. To make rules and regulations for admission of pupils see *infra*, III, I, 1. To mortgage district property see *infra*, III, E, 1, e. To prescribe and furnish text-books see *infra*, III, E, 2, e. To provide school-house see *infra*, III, E, 2, a. To repair school building see *infra*, III, E, 2, g. To sue for injuries to school property see *infra*, III, E, 2, g, (III).

**Control by courts over district boards** see *supra*, III, A. 2.

**11.** Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; Morse *v.* Ashley, 193 Mass. 294, 79 N. E. 481 (holding that under Mass. Rev. Laws, c. 42, § 27, providing that the school-committee of a town shall have "the general charge and superintendence of all the public schools," the school-committee act, not as agents of the town, but as public officers, intrusted with powers and charged with duties concerning the maintenance of the school); Kimbrough *v.* Barnett, 93 Tex. 301, 55 S. W. 120 (holding that under Tex. Const. art. 16, § 30, providing that the duration of offices not fixed by the constitution shall not exceed two years, trustees of independent school-districts, authorized to exercise exclusive control over the management of free schools within their districts, and to hold title to the school property, are public officers, although they receive no salary or compensation); Buchanan *v.* Graham, 36 Tex. Civ. App. 468, 81 S. W. 1237 (holding that school trustees are public officers within Const. art. 16, § 1, providing that all officers shall take a prescribed oath before entering on the duties of their office); Hendricks *v.* State, 20 Tex. Civ. App. 178, 49 S. W. 705 (holding that under Tex. Rev. St. (1895) arts. 3953–3955, providing for trustees for school-districts, and prescribing the manner of their election, their duties, oath, and term of office, the trustee of a school-district is a public officer, being intrusted with the exercise of a part of the sovereign function of the state).

**A treasurer of a school-district is a public officer** within the meaning of Mo. Rev. St. (1899) § 4274, providing the period within which civil actions shall be commenced, after the cause of action has accrued. State *v.* Harter, 188 Mo. 516, 87 S. W. 941.

**But the duties of the clerk of a school-board are purely ministerial,** and he is obliged to record its proceedings whenever it directs him to do so, and he is not liable for costs when such record is quashed. Champaign County Tp. 19 *v.* Shepherd, 139 Ill. 114, 28 N. E. 1073. But see State *v.* Coon, 26 Ohio Cir. Ct. 241, holding that under Rev. St. § 3899–3 the clerk of the board of education is a public officer.

**School-boards are not agents** of the districts, but their trustees. Wheeler *v.* Alton School Dist., 66 N. H. 540, 23 Atl. 89.

**12.** See OFFICERS, 29 Cyc. 1431 *et seq.*

**13.** Tufts *v.* State, 119 Ind. 232, 21 N. E. 892; Com. *v.* Campbell, 8 Pa. Dist. 645, 23 Pa. Co. Ct. 313, holding that where, under the law, a school-board is a quasi-corporation, dating from its creation by statute, with the incident of succession, it has power to act upon the default of a member arising in a previous year.

**Discontinuing school.**—A school trustee may for good cause discontinue a school in his township, and where it appears that there are other schools being taught therein which the pupils can conveniently attend, and that the average daily attendance at the school in question, during the last term, was but four pupils, the number not being reduced by sickness or other providential cause, no abuse of the trustee's discretion is shown. Tufts *v.* State, 119 Ind. 232, 21 N. E. 892. See also *infra*, III, E, 2, a, (IV).

**Appointment of salary commission.**— The Pennsylvania act of Feb. 12, 1869 (Pamphl. Laws 150), creating the central board of education of Pittsburg, gives no power to such board to appoint a salary commission and delegate to it the power to examine teachers and fix their salaries. Houston *v.* Pittsburg Central Bd. of Education, 220 Pa. St. 33, 68 Atl. 1036.

funds,[14] prescribing courses to be given, such as music,[15] employing necessary teachers,[16] and all other things necessary for the government of schools and the control and management of teachers employed therein,[17] subject only to the general educational laws of the state.[18] But a board of school directors can

**Right to divest board of statutory powers.** — A school-district cannot, by vote, deprive the prudential committee of the power given by statute to provide board for teachers. Danbury School Dist. No. 7 *v.* Currier, 45 N. H. 573. And school directors cannot, by contract, divest themselves of the powers conferred on them for public purposes. Conley *v.* West Deer Tp. School Directors, 32 Pa. St. 194.

**Reconsideration of refusal to act.**— If a board of education refuses to do an act required by a statute to be done at a particular time, and the act is such that the board could be compelled by mandamus to perform it, the board may afterward, on its own motion, do the act. Corrothers *v.* Clinton Dist. Bd. of Education, 16 W. Va. 527.

**The powers and duties of the board of education of the city of Camden** under its act of incorporation (N. J. Pamphl. Laws (1854), p. 88) and amendment (Pamphl. Laws (1874), p. 246), and those of its officers, were not abrogated or diminished by the general act of March 10, 1892, changing the method of selection of the commissioners of public instruction now forming such board, and granting additional powers (3 Gen. St. p. 3096). Rose *v.* Hufty, 63 N. J. L. 195, 42 Atl. 836.

**Duty to provide free transportation of pupils.**— Under a statute providing that it shall be cause for transfer if the nearest school to any child entitled to school privileges shall be more than one mile from his residence, and there is a school in an adjoining corporation within one-half mile, "unless free transportation . . . is provided." The trustee of a consolidated school-district was under no duty to provide free transportation for pupils to and from the school, and the legal duty of the school trustee was not affected by the fact that his predecessor, with the concurrence of the advisory board, levied a tax to provide such transportation. State *v.* Jackson, 168 Ind. 384, 81 N. E. 62. A trustee of a school-district whose school had been abandoned could not be compelled to furnish a conveyance for pupils to another district school. Nelson *v.* State, 168 Ind. 491, 81 N. E. 486. See also *infra*, III, E, 5, h.

**City treasurer ex officio school treasurer.**— Under Pa. Act May 23, 1874, § 42 (Pamphl. Laws 256), accepted by the school-district of the city of Harrisburg by authority of section 41, proviso 4, the city treasurer of the city of Harrisburg is *ex officio* school treasurer of the school-district of that city. Com. *v.* Middleton, 210 Pa. St. 582, 60 Atl. 297.

**Authority to deposit in bank.**— Under Iowa Code (1873), § 1747, which provides that a school treasurer shall hold all moneys belonging to the district, and shall pay out the same on the order of the president, countersigned by the secretary, the word "hold" as so used does not require that the treasurer should keep the moneys of the district in his physical possession at all times, and does not prohibit the treasurer from making a general deposit of the district's funds in a solvent bank to his credit as treasurer. Hunt *v.* Hopley, 120 Iowa 695, 95 N. W. 205. See also *infra*, III, F, 2, a, (III).

14. People *v.* Lathrop, 19 How. Pr. (N. Y.) 358, holding that it is the duty of the board of education of the city of Rochester, and it has the requisite power, in its discretion, to disburse all moneys raised and received according to law, in purchasing sites, building and repairing school-houses, and supporting teachers, and discharge all the contingent and incidental expenses connected therewith.

15. W. P. Myers Pub. Co. *v.* White River School Tp., 28 Ind. App. 91, 62 N. E. 66.

16. Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686.

17. People *v.* New York Bd. of Education, 4 N. Y. St. 747 (so holding under N. Y. Laws (1882), c. 410, §§ 1022, 1026, as to the board of education of the city of New York); New Antioch Bd. of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58 (holding that in Ohio the management of public schools is by express statutory provisions under the exclusive control of boards of education; and that each board is required to "make such rules and regulations" for the government of the schools under its control as "it may deem expedient and necessary"); Weatherby *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 136 (holding that an ordinance establishing a school-board under Shannon Code, § 1467, authorizing the board of mayor and aldermen of a city establishing public schools to appoint such a board, which shall have full power to manage and control such schools, elect or employ teachers, and prescribe all needful rules and regulations, by implication authorizes the school-board to pass rules and regulations for the government of schools, the employment of teachers, etc., where such power is not exercised by the board of mayor and aldermen.

**Excluding members of secret societies from school-games.**—A board of education has power to adopt a rule excluding all pupils who are members of secret societies from participating in athletic contests, etc., and such a rule is reasonable. Wilson *v.* Chicago Bd. of Education, 137 Ill. App. 187 [*affirmed* in 233 Ill. 464, 84 N. E. 697, 15 L. R. A. N. S. 1136].

18. People *v.* New York Bd. of Education, 4 N. Y. St. 747 [*reversed* on other grounds in 143 N. Y. 62, 37 N. E. 63].

exercise no other powers than those expressly granted, or which are necessarily implied from those granted,[19] and can exercise no greater power than the legislature can confer upon them;[20] and thus, unless expressly authorized by statute,[21] it cannot prosecute actions,[22] except upon the official bonds of its officers or to recover school moneys from them,[23] or to recover school taxes;[24] and it cannot expend district funds in defending an action against its members individually for their own wrong;[25] and school-district officers, not having power to levy taxes, have no power to incur indebtedness for the purpose of keeping the schools open beyond the time for which funds are provided.[26] The discretion of a school-board in the exercise of its administrative functions cannot ordinarily be controlled by mandamus.[27]

(II) *MODE OF ACTION; MEETINGS AND THE ORGANIZATION THEREOF* — (A) *General Rules.* District boards must exercise their power in the manner prescribed by the constitutional act, charter, or general educational law.[28] As a

**19.** Cumberland County Dist. No. 3 School Directors *v.* Fogleman, 76 Ill. 189; Peers *v.* Madison County School Dist. No. 3 Bd. of Education, 72 Ill. 508; Harris *v.* Kill, 108 Ill. App. 305, holding that the board of education of Chicago, like all municipal bodies, has only such powers as are expressly given to it, or as result by fair implication from the powers granted.

**Members of a village council,** who are also made a board of education, can only exercise the powers conferred expressly or by implication. They may do such things as may be necessary to effectuate the purposes of the creation of the body of which they are officers; but they have not an unlimited discretion, and must look to the law creating the office for their warrant in all they do officially. Sherlock *v.* Winnetka, 68 Ill. 530.

**20.** Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

**21.** See the statutes of the several states. And see Caledon Tp. School Trustees *v.* Caledon Tp., 12 U. C. C. P. 301.

**A demand or order from a majority of the school trustees of a school section is necessary** to sustain an action against a municipal corporation for money collected under a by-law, passed under the authority of U. C. Consol. St. c. 64, § 34. Caledon Tp. School Trustees *v.* Caledon Tp., 12 U. C. C. P. 301.

**22.** Burgess *v.* Uxbridge School Dist., 100 Mass. 132, holding that authority to prosecute actions is not incidental to the official power of the committee of a school-district, and the vote of a district to stop an action does not render the district liable for expenses previously incurred by the committee in prosecuting it without special authorization.

**"To look into the rights of the district."**— A vote of a school-district for its prudential committee "to look into the rights of the district" does not imply authority to prosecute an action. Burgess *v.* Uxbridge School Dist., 100 Mass. 132.

**23.** Stephen Tp. School Trustees *v.* Mitchell, 29 U. C. Q. B. 382, holding that a board of school trustees may maintain an action for money had and received against their secretary-treasurer, to recover a balance of money in his hands not expended or accounted for. And see *infra*, III, D, 6, g, (III).

**Recovery of seal and papers.**—A court of equity has jurisdiction to order persons wrongfully claiming to be school trustees to deliver up the corporate seal and papers to the legal trustees. Belleville Roman Catholic Separate Schools *v.* Grainger, 25 Grant Ch. (U. C.) 570.

**24.** Healy *v.* Carey, 13 Can. L. J. N. S. 91.

**25.** Hotchkiss *v.* Plunkett, 60 Conn. 230, 22 Atl. 535, holding that the board of education of a school-district cannot expend the funds of the district to defend a lawsuit against its members individually, who, it is claimed, have injured the business of others by refusing to entertain their bid to furnish stationery, and as a reason therefor stated to various persons that the bidders had carried on their business dishonestly, and had cheated the district.

**26.** Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

**27.** State *v.* Tate Tp. Bd. of Education, 15 Ohio Cir. Ct. 10, 8 Ohio Cir. Ct. 166, holding that the determination of whether a bridge shall be built for the accommodation of school children, and its location, are administrative functions of a school-board.

**28.** Schofield *v.* Watkins, 22 Ill. 66; Herrington *v.* Liston Dist. Tp., 47 Iowa 11; State *v.* Saline County School Dist. No. 49, 22 Nebr. 48, 33 N. W. 480 (holding that the duties devolved upon the members of the school-district board, or upon the moderator and director, by Nebr. Comp. St. c. 79, § 8, subd. 4, can only be performed by these two officers acting in conjunction); Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308. See Darter *v.* State, 50 Ind. 510, under Ind. Act of March 8, 1873.

**A board of education has the authority to reconsider a vote** during the same session at which the original vote was taken. State *v.* Womack, 4 Wash. 19, 29 Pac. 939.

**In Pennsylvania,** where the continuing and newly appointed members of a school-board meet to organize, their first business is to effect a temporary organization for the purpose of ascertaining who the directors are, as shown by the certificates or returns of election, which are *prima facie* evidence of their right to seats in the board, and then a

general rule they may [29] and must act as a majority, for it is essential to a performance of a valid act that the board exercises its powers as a unit,[30] officially,[31] when duly assembled at a meeting of the board,[32] and trustees of a school-district

permanent organization should follow, by the appointment of a president, secretary, and treasurer, as required by the statute of May 8, 1854 (Purdon Dig. p. 240, pl. 28), and this is the only organization known to the law. Bouton *v.* Royce, 10 Phila. 559 [*affirmed* in 1 Walk. 215]. The functions of the newly elected school directors attach as soon as the terms of their predecessors expire, and they are entitled to participate in the organization of the new board. Bouton *v.* Royce, *supra*. But where three newly elected school directors of a borough met two out of the three continuing directors to organize, but the latter did not participate in the manner required by law, looking to an organization of a school-board, the organization was defective, and there was no legally constituted board of school directors for the borough in question. Volrath *v.* Drum, 7 Luz. Leg. Reg. 223.

**A provision in a city charter authorizing the board of education to enact rules** for the conduct of its proceedings does not empower it to change a rule in the charter that a majority of its members shall constitute a quorum, and that a majority of those present at a meeting may transact business. Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948.

**Under a statute providing that a school-board "may" make rules** and regulations for the performance thereof, the making of such rules is discretionary. Reynolds *v.* Little Falls Union Free School Dist. Bd. of Education, 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75.

**A statute which conflicts with by-laws** of a board of education repeals them. People *v.* Van Sicklen, 43 Hun (N. Y.) 537.

**29.** Kingsbury *v.* Quincy Centre School Dist., 12 Metc. (Mass.) 99 (holding that a majority of a prudential committee of a school-district may lawfully do official acts, especially after a refusal of the minority to meet with them); Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308.

**A by-law of a board of education requiring a two-thirds vote** of all the members in favor of an appropriation of money is void as an unauthorized limitation of the power of the board. Short Conrad Co. *v.* Eau Claire School Dist., 94 Wis. 535, 69 N. W. 337.

**30.** Forcum *v.* Montezuma Independent Dist., 99 Iowa 435, 68 N. W. 802 (holding that the fact that some of the members of a school-board, with knowledge that the architect employed by the board to superintend the construction of a school building had directed changes in the building contract, permitted them to be made without objection, does not estop the district from claiming damages on account of such changes, as the district could only act through its directors as a board); Herrington *v.* Liston Dist. Tp., 47 Iowa 11; Blodgett *v.* Seals, 78 Miss. 522, 29 So. 852; Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308. But see Hanover School Tp. *v.* Gant, 125 Ind. 557, 25 N. E. 872, holding that under Ind. Rev. St. § 4446, providing that "the school trustees of two or more distinct municipal corporations for school purposes shall have power to establish joint graded schools, or such modifications of them as may be practicable, and provide for admitting into the higher departments of their graded schools, from the primary schools of their corporations, such pupils as are sufficiently advanced," etc., and that "said trustees shall have the care and management of such graded schools, and they shall select the teachers therefor," the trustees of two or more of such corporations act, in establishing and managing a graded school, as individual trustees, not as representing their respective corporations, and the majority of the whole number of trustees has power to transact all business relating to such graded schools.

**Permission for a teacher to absent himself** from his position can only be given by the directors as a board, not by them individually. State *v.* Leonard, 3 Tenn. Ch. 177.

**Under 2 Starr & C. Annot. St. Ill. p. 2222, § 44,** authorizing school directors to determine and certify to the township treasurer the amount that must be raised by special tax, a certificate of special tax, signed by a minority of the directors, and not in any way adopted by the board at any meeting, is not sufficient to support a levy of a special tax. People *v.* Smith, 149 Ill. 549, 36 N. E. 971.

**Census of children.**— Under Ky. St. (1903) § 4449, which provides that the trustees of each school-district shall annually take a census of children, a census certified to by only the chairman of the board of trustees is not the act of the district, and the county superintendent has no power to make it a part of his records. Short *v.* Langston, 125 Ky. 816, 102 S. W. 236, 31 Ky. L. Rep. 388.

**In the organization of a school-board** (the law simply prescribing that the members shall meet at a certain time, and organize by election of president, secretary, and treasurer), the members holding over, with the newly elected members whose election is not disputed, should temporarily organize, and then pass on the *prima facie* qualification of the remaining members; and this cannot be done by less than a quorum of those entitled to participate therein. Com. *v.* Fletcher, 180 Pa. St. 456, 36 Atl. 917.

**31.** Mitchell *v.* Williams, (Tenn. Ch. App. 1897) 46 S. W. 325, holding that to make a binding agreement to employ a teacher, a board of school-district directors must meet officially, and agree to the employment.

**32.** Herrington *v.* Liston Dist. Tp., 47 Iowa 11; Cowley *v.* Harrisville Tp. School

can bind the district only by a corporate meeting held as provided by law;[33] and any attempt on their part to perform their duties alone and not in conjunction or jointly is ineffectual and void,[34] mere discussion, without any motion or united action, not being sufficient to authorize its secretary to act.[35] As a general rule the board cannot delegate their duties,[36] or parcel out among themselves the control of the district schools.[37]

(B) *Notice of Meetings.* The meetings of the board must be upon notice,[38] to

Dist. No. 3, 130 Mich. 634, 90 N. W. 680 (holding that under Comp. Laws, § 4671; with reference to school-districts, and providing that no act authorized to be done by the district board shall be valid unless voted at a meeting of the board, a board cannot take valid action as to the employment of a teacher except by vote or resolution at a board meeting); Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308.

**What constitutes an adjournment.**— That school directors, having trouble at a meeting, leave the place without arranging to return or to hold another meeting, does not constitute an adjournment, and their reassembling on the same day continues the meeting. State *v.* Powell, 101 Iowa 382, 70 N. W. 592.

**The appointment of the district clerk** by directors of a school-district should be made at a regular or special meeting of the board. State *v.* Cartwright, 122 Mo. App. 257, 99 S. W. 48.

**33.** Cooke *v.* Barren County White Common School Dist. No. 7, 111 S. W. 686, 33 Ky. L. Rep. 926.

**34.** *Arkansas.*— Faulkner County School Dist. *v.* Adams, 69 Ark. 159, 61 S. W. 793.

*Nebraska.*— State *v.* Saline County School Dist. No. 49, 22 Nebr. 48, 33 N. E. 480.

*New York.*— Beck *v.* Kerr, 75 N. Y. App. Div. 173, 77 N. Y. Suppl. 370.

*Ohio.*— State *v.* Liberty Tp., 22 Ohio St. 144, holding that a board of education is made by the statute a body corporate, and that the contracting of a debt by the board, and directing the issuance of an order to pay it, are corporate acts, which cannot be performed by the individual members of the board acting separately.

*Pennsylvania.*— Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308.

*Tennessee.*—Fine *v.* Stuart, (Ch. App. 1898) 48 S. W. 371, holding that school directors can act for their district only as a board, and not individually.

See 43 Cent. Dig. tit. "Schools and School Districts," §§ 139, 140.

**Under a statute providing that authority confided to three or more officers may be exercised by a majority** upon a meeting of all of them, two trustees of a school-district cannot act in the performance of their duties, except when all three are present, whether the third one refuses to act or not, and therefore an assessment of a tax by two in the absence of the third is void as is also the warrant issued thereupon (Lamoreaux *v.* O'Rourk, 3 Abb. Dec. (N. Y.) 15, 2 Keyes 499; Harding *v.* Head, 35 Barb. (N. Y.) 35; Keeler *v.* Frost, 22 Barb. (N. Y.) 400; Whitford *v.* Scott, 14 How. Pr. (N. Y.) 302; Lee *v.* Parry, 4 Den. (N. Y.) 125), but the presence of the requisite number will be presumed until the contrary be shown (Folsom *v.* Streeter, 24 Wend. (N. Y.) 266, holding that an apportionment of the school tax may be made by two of the trustees in the absence of the third, unless it appears that the third was not notified and did not attend; McCoy *v.* Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113, holding that two trustees of a common school-district may issue a warrant for the collection of a tax, and the presence of the third trustee at the issuing thereof will be presumed). One of the three trustees cannot delegate his authority to the other two to make the assessment of such school tax, neither can he, after they have made it, ratify and adopt the assessment or apportionment by indorsing his approval in the absence of the others. Keeler *v.* Frost, 22 Barb. (N. Y.) 400.

**In Canada** two of the trustees of a section are not competent to act in all cases without consulting the third. Orr *v.* Ranney, 12 U. C. Q. B. 377. Thus a warrant signed by only two trustees when three should have been but were not elected is inoperative. McGregor *v.* Pratt, 6 U. C. C. P. 173.

**35.** Butler *v.* Leighton School Dist., 149 Pa. St. 351, 24 Atl. 308.

**36.** Webster *v.* San Francisco Bd. of Education, 140 Cal. 331, 73 Pac. 1070 (holding that as the duties of the board of education of the city and county of San Francisco are legislative and quasi-judicial, and cannot be delegated, the superintendent of schools of the city and county, if *ex officio* a member of the board, cannot appoint a deputy to act for him in that capacity, although he has power to appoint deputies to assist in the discharge of his duties as superintendent); Kinney *v.* Howard, 133 Iowa 94, 110 N. W. 282 (holding that under the statute making it the duty of the board of a school township to select the site, adopt the plans for the school-house, and award the contract for the building thereof, the board cannot delegate such powers to a committee appointed by it). But see Eddy *v.* Omaha, 72 Nebr. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692, holding that the board of education of the school-district of Omaha may authorize its president to sign a petition for repaving a street in the name of the board, and such signature will bind the school-district.

**37.** Mitchell *v.* Williams, (Tenn. Ch. App. 1897) 46 S. W. 325, holding also that an agreement between school-district directors delegating to each authority to engage a teacher for a particular school is void.

**38.** Faulkner County School Dist. No. 49

all the members of the board,[39] must be in writing,[40] and must be signed by such of the members of the board as are prescribed by law;[41] and the call must be signed by an officer or by officers duly authorized,[42] and must be given the specified number of days before the meeting,[43] and must convey information of the time,[44]

*v.* Adams, 69 Ark. 159, 61 S. W. 793; Burns *v.* Thompson, 64 Ark. 489, 43 S. W. 499 (holding that where proper notice of a meeting of school directors is not given, a contract executed at such meeting is invalid as against the corporation); People *v.* Frost, 32 Ill. App. 242; Porter *v.* Robinson, 30 Hun (N. Y.) 209.

**A request** to the chairman of the board of trustees of a graded common school, signed by three of the members of the board, and requesting him to call a meeting of the board to meet at a specified time and place, is not a notice to him of a meeting of the board at such time and place. Saunders *v.* O'Bannon, 87 S. W. 1105, 27 Ky. L. Rep. 1166.

**Sufficient evidence of notice.**— Testimony of the clerk of a school-board who kept the records of the board, that all the directors of the board were present at a meeting except a certain member, and that he had been "notified by mail three days previous," is sufficient to support a finding that all the directors were notified, in an action to enjoin the board from acting on a resolution passed at the meeting. Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438.

**In West Virginia** a board of education can perform official acts only when a quorum is assembled, as a board, by due notice to all the members, under W. Va. Code (1899), c. 45, § 6, except that the president and secretary may sign orders on the sheriff for any sum of money which may have been already ordered to be paid. Cunningham *v.* Dry Fork Dist. Bd. of Education, 53 W. Va. 318, 44 S. E. 129.

**39.** Schafer *v.* Baraga School Dist. No. 1, 116 Mich. 206, 74 N. W. 465 (holding that a resolution authorizing the hiring of plaintiff as school-teacher, entered into at a special meeting of the board of education, called on two days' notice, where four of the five members had been served with notice, and were present, the other member being out of town for two days, is unauthorized); Beck *v.* Kerr, 75 N. Y. App. Div. 173, 77 N. Y. Suppl. 370 (holding that where two school trustees made out a tax list, executed a tax warrant, and renewed it, without the knowledge of the third, no notice having been given him, the actions of the two trustees were individual acts, and void for noncompliance with N. Y. Consol. School Law (Laws (1894), c. 556), requiring notice of meetings of school trustees to be given to each member); Cunningham *v.* Dry Fork Dist. Bd. of Education, 53 W. Va. 318, 44 S. E. 129 (holding that a meeting of two members of a board of education, at a time and place of which no notice was given to the other member of the board, and at which he was not present, is not a legal meeting, and any official act thereat is void).

**Where an honest and reasonable effort has been made to notify an absent director** of a meeting of the board, although unavailing, the other two directors may legally act. School Directors *v.* Sprague, 78 Ill. App. 390.

**On a bill in equity to restrain school directors from carrying out a contract** for the purchase of school-books, a preliminary injunction will be continued where it is not pretended that two of the directors had any notice of the meeting at which the contract of purchase was entered into, or that they were even consulted with reference to the terms of the contract, or that it was ever authorized or ratified by the board acting as such, or that any record of the action of the three or four directors who made the contract was even entered upon the minutes. Mitchell *v.* Kearns, 16 Pa. Super. Ct. 357.

**40.** Burns *v.* Thompson, 64 Ark. 489, 43 S. W. 499.

**41.** Riggs *v.* Polk County, 51 Oreg. 509, 95 Pac. 5, holding that a special meeting called under Ballinger & C. Comp. St. § 3380, signed by the next oldest member of the board, was not signed by "the chairman of the board," as required thereby, and bonds issued at such a meeting were invalid.

**Where district is abandoned.**— N. Y. Consol. School Law (Laws (1894), c. 556, tit. 7, § 9), providing that the commissioner may order an inhabitant to give notice of a meeting to transact the business of an annual meeting after the time for the annual meeting has expired, does not apply to districts in fact abandoned. Mooers School Dist. No. 23 *v.* Raymond, 86 N. Y. Suppl. 182.

**Under the New York Consolidated School Law** (Laws (1894), c. 556, §§ 1, 2), providing that, on the formation of a school-district, the commissioner shall prepare a notice appointing a time and place for the first district meeting, and deliver the same to a taxable inhabitant, who shall notify every other inhabitant at least six days before the meeting, the notice required to be given is a six-days notice in writing, to be prepared by the commissioner himself, and delivered to the voter who is to serve the same. Mooers School Dist. No. 23 *v.* Raymond, 86 N. Y. Suppl. 182.

**42.** People *v.* Frost, 32 Ill. App. 242.

**43.** Schafer *v.* Baraga School Dist. No. 1, 116 Mich. 206, 74 N. W. 465.

**44.** Burns *v.* Thompson, 64 Ark. 489, 43 S. W. 499; Shepherd *v.* Gambill, 75 S. W. 223, 25 Ky. L. Rep. 333, holding that notice of a meeting of school trustees to hire a teacher is not sufficient, not being given till the morning of the meeting of some of the trustees, and stating that the meeting would

place,[45] and purpose of the meeting.[46] If the statute does not prescribe what notice shall be given, reasonable notice only is required,[47] in the absence of statute the common-law rules regulating notice, majorities, and similar matters applying.[48] But where there is an agreement by all of the directors of a school to meet, no formal notice of a directors' meeting is necessary,[49] and such an agreement is presumed in the absence of evidence to the contrary;[50] and in general the fact that the directors of a school-district had no notice of a meeting is immaterial if they were all present at the meeting and participated therein,[51] for in such case the presumption is that proper notice has been given.[52] Thus it is held that a statute which provides that no official business shall be transacted by a board of school directors, except at a regular or special meeting, does not invalidate official actions taken by such board at a meeting at which all the directors are present, although such meeting is neither a regular one, nor one specially called in the statutory manner;[53] and the fact that they proceed informally and make no record of their meeting does not affect the validity of the hiring of a teacher,[54] for it will be presumed generally, in the absence of contrary proof, that a school meeting was regularly held.[55] Where a meeting was a regular and stated meeting of a board of education, previously provided for by regular order, no notice to the members thereof is necessary to legalize the calling of an election to authorize the building of a high school and issuance of bonds therefor.[56]

be at six o'clock in the morning, without stating the day. See Waters *v.* Boone County School Dist. No. 4, 59 Mo. App. 580.

**45.** Burns *v.* Thompson, 64 Ark. 489, 43 S. W. 499. See Waters *v.* Boone County School Dist. No. 4, 59 Mo. App. 580.

**46.** Burns *v.* Thompson, 64 Ark. 489, 43 S. W. 499. See Waters *v.* Boone County School Dist. No. 4, 59 Mo. App. 580.

**47.** People *v.* Frost, 32 Ill. App. 242.

**48.** Porter *v.* Robinson, 30 Hun (N. Y.) 209.

Trustees of a union school district duly organized under N. Y. Laws (1864), c. 555, tit. 9, are a body corporate, and, as to the validity of their meetings, either the common-law or statutory rules regulating notice, majorities, etc., apply. Porter *v.* Robinson, 30 Hun (N. Y.) 209.

**49.** Olney School Dist. *v.* Christy, 81 Ill. App. 304; Hanna *v.* Wright, 116 Iowa 275, 89 N. W. 1108, holding that the fact that a contract by a school township was made at a special meeting, of which no notice was given, is immaterial, all the members of the board being present. See Schafer *v.* Baraga School Dist. No. 1, 116 Mich. 206, 74 N. W. 465.

**50.** Hanna *v.* Wright, 116 Iowa 275, 89 N. W. 1108.

**51.** Clay County School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172; Decker *v.* Douglas County School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390, holding that where all the members of a school-board meet at some place in the district, whether in obedience to notice or by accident, they may, if they choose, hold a board meeting and transact any ordinary business pertaining to the district; and this notwithstanding Rev. St. (1899) § 9761, requires each member to have notice of the meeting.

**52.** People *v.* Frost, 32 Ill. App. 242.

**Conclusiveness of record or minutes reciting due notice.**— The recital of the record book of common school district trustees, expressly required to be kept by Ky. St. (1903) § 4458, that a meeting be kept after due notice, may be attacked for fraud or mistake only. Creech *v.* Harlan County Common School Dist. No. 15, 102 S. W. 804, 31 Ky. L. Rep. 379. And where the minutes of a board of education showed affirmatively that meetings were held pursuant to a rule fixing the time and places of meeting, providing for the calling of special meetings, and defining a quorum in the absence of evidence to the contrary, the presumption was conclusive that such meetings were so called and held. American Foundry, etc., Co. *v.* Berlin Bd. of Education, 131 Wis. 220, 110 N. W. 403.

**53.** Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197, under Act (1889), p. 296, art. 5, § 19.

**54.** Pollard *v.* Moultrie County School Dist. No. 9, 65 Ill. App. 104.

**55.** Waters *v.* Boone County School Dist. No. 4, 59 Mo. App. 580, holding this to be true under Mo. Rev. St. (1889) § 7990, empowering the president of a school-district board to call special meetings and requiring only that each of the board shall have notice of the time, place, and purpose of the meeting.

**Effect of participation of de facto but not de jure trustee.**—Where a judge of an independent school-district election was disqualified by reason of his candidacy for the office of trustee of the district when created, the fact that he thereafter, on being elected, participated in the trustees' proceedings did not invalidate the same, his election being irregular only, and he being a *de facto*, if not a *de jure*, trustee. State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723.

**56.** Lake County Tp. 43 Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58. And

(c) *Minutes and Records.* It is very generally required that district boards should keep written records of their votes, orders, and proceedings,[57] in such a manner as to show what was done by the board, and that they acted in pursuance of and within the requirements of the law;[58] but a failure on the part of a school-board to make and preserve minutes of their proceedings, as required by statute, will not affect the rights of a party with whom they have made a valid settlement at such meeting;[59] and although the best evidence of the official action of the directors of a school-district is the official record of the governing body, yet if for any reason the action taken is not spread upon the minutes or records it may be shown by the testimony of witnesses cognizant of the facts.[60] Moreover the requirement that the board shall keep a record does not mean that all rules for the good conduct of schools shall be matter of record, or every act as to the management be confirmed by formal vote;[61] and the omission of the trustee to enter of record his

see Splaine *v.* Spokane County School Dist. No. 122, 20 Wash. 74, 54 Pac. 766, holding that one denying the validity of the acts of certain school directors at a certain meeting on the ground that an absent member was not notified of the meeting must prove that such meeting was not a regular one.

57. Broussard *v.* Verret, 43 La. Ann. 929, 9 So. 905; Blodgett *v.* Seals, 78 Miss. 522, 29 So. 852.

**In Pennsylvania** the law did not formerly require the school directors to keep a record of their proceedings, although it was held advisable that they should do so. Gearhart *v.* Dixon, 1 Pa. St. 224. But the act of April 11, 1862, section 4, requires a written record and that the names of members voting in the affirmative and negative be entered in the minutes. Mathewson *v.* Factoryville School Directors, 23 Pa. Co. Ct. 121. See Mitchell *v.* Kearns, 16 Pa. Super. Ct. 357. Where, at a regular meeting of a board of school directors, the names of those present were entered on the minutes, and it was noted that a resolution for the purchase of a school lot was passed unanimously, but the names of those voting were not entered, this was held a sufficient compliance with the act (Denison Tp. School Dist. *v.* Shortz, 2 Pennyp. (Pa.) 231), and where the minutes of a school-board showed that, at a meeting at which a quorum was present, a resolution employing a teacher was passed unanimously, this also was held to be a substantial compliance (Genesee Tp. Independent School Dist. *v.* McDonald, 98 Pa. St. 444), and the same was held where the minutes of a school-board stated that all the members were present, and that a vote to levy a tax was unanimous, but the names of the members voting in the affirmative and negative were not entered (Tobin *v.* Morgan, 70 Pa. St. 229).

**Correction of minutes.—** The clerk of a school-board, after a reorganization of the board which deprived him of his office, cannot correct the minutes of a meeting of the board as a public officer, and cannot correct his official entries in public records after the expiration of his term of office. Beck *v.* Rock River Village School Dist., 29 Ohio Cir. Ct. 717 [*affirmed* in 76 Ohio St. 587, 81 N. E. 1180].

**Necessity of entering names where vote is unanimous.—** Under Ohio Rev. St. § 3982, which requires that, upon a motion to adopt a resolution by a board of education to employ a school superintendent, the clerk of the board shall call publicly the roll of all the members composing the board, and enter on the record required to be kept the names of those voting "Aye" and the names of those voting "No," where the minutes of a meeting of a board of education at which a resolution was offered to employ a superintendent of schools for the following year showed that the resolution was passed "all voting 'Ayes,'" but did not recite the names of those voting "Ayes," it was held that the minutes of the meeting did not show that the resolution was lawfully adopted. Beck *v.* Rock River Village School Dist., 29 Ohio Cir. Ct. 717 [*affirmed* in 76 Ohio St. 587, 81 N. E. 1180]. The rule has been held to be otherwise in Pennsylvania. See cases cited *supra*, this note.

**Record held to sufficiently show that the board adopted the proposition which was submitted to the electors** see Kinney *v.* Howard, 133 Iowa 94, 110 N. W. 282.

58. Mathewson *v.* Factoryville School Directors, 23 Pa. Co. Ct. 121.

59. Decker *v.* Douglas County School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390, under Mo. Rev. St. (1899) § 9761.

60. Jackson County School Directors *v.* Kimmel, 31 Ill. App. 537; Dixon *v.* Liberty Tp. Sub-Dist. No. 5, 3 Ohio Cir. Ct. 517, 2 Ohio Cir. Dec. 298; Roland *v.* Reading School Dist., 161 Pa. St. 102, 28 Atl. 995; Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856; German Ins. Co. *v.* Milford Independent School Dist., 80 Fed. 366, 25 C. C. A. 492. But see Kane *v.* Calhoun School Dist., 48 Mo. App. 408, holding that if a statute creating a school corporation and providing for its proceedings, requires such proceedings to be preserved in a record kept for that purpose, then such record is the only proper evidence of such proceedings.

61. Russell *v.* Lynnfield, 116 Mass. 365, holding that under Gen. St. c. 38, §§ 16, 22, requiring the school-committee to have general charge of the schools, and keep a record of their votes, orders, and proceedings, it was

order discontinuing a school at the time of making it will not affect its validity, where notice of the making of the order was given to the persons interested;[62] nor is it necessary that a clerk of a school society be a witness of the proceedings of a meeting under his official oath, but it is sufficient if he records them, or sanctions the record of them, after he is sworn.[63] The records and proceedings of school-district meetings are not to be given a technical construction, but should be so construed as to give effect to the manifest intention of the voter if shown by the record.[64] As between a school-district and a stranger, the possession of the records by the clerk is the possessior of the district.[65]

(D) *Orders and Decisions and Appeals Therefrom.* The statutes generally provide for appeals from orders and decisions of district boards, usually to superintendents of education for the county or state;[66] and under statutes conferring on school-boards discretion to adopt and promulgate rules for the proper government of schools, a rule so adopted or a decision rendered thereon will not be interfered with by the courts, unless it is so far unreasonable as to amount to a

not unlawful for a teacher to enforce a rule made by one member of a school-committee, and assented to by the others, that any scholar twice tardy should be suspended, although such rule was not recorded.

62. Tufts *v.* State, 119 Ind. 232, 21 N. E. 892.

63. Bartlett *v.* Kinsley, 15 Conn. 327.

64. Quisenberry *v.* Hall County School Dist. No. 6, 75 Nebr. 47, 105 N. W. 982; Burke *v.* Wilkes-Barre Tp. School Dist., 28 Pa. Super. Ct. 16, holding that where the minutes of a school-board show that "all members answered the roll call," and that a contract for the employment of a teacher was authorized, "all members voting in the affirmative," the validity of the contract cannot be attacked on the ground that the names of the members voting were not recorded in the minutes, as in such a case the minutes substantially comply with the spirit of the act of April 11, 1862 (Pamphl. Laws 471).

65. Sanford School Dist. No. 5 *v.* Lord, 44 Me. 374.

66. See the statutes of the several states. And see People *v.* Eckler, 19 Hun (N. Y.) 609.

**What is a decision within such statutes.**— Where a board of school directors, by fraud and abuse of power, have declared the adoption of a vote levying a tax for building a new school-house, such action is not a decision of the board, within Iowa Code (1896), § 1829, providing that any person aggrieved by a decision or order of the district board of directors in matters of law or fact may appeal therefrom to the county superintendent. Hinkle *v.* Saddler, 97 Iowa 526, 66 N. W. 765. But where one who was engaged to teach twenty weeks, but who was discharged before the end of the term, sued the district trustee in the county court, and was nonsuited, and afterward he appealed from the trustee's refusal to pay him his wages to the superintendent of public instruction, who reversed the trustee's decision and directed him to pay the claim, the trustee's refusal to pay was a "decision," within N. Y. Laws (1864), c. 555, whence lay an appeal to the superintendent. People *v.* Eckler, 19 Hun (N. Y.) 609.

**Thus in Iowa** the remedy for a review of the proceedings of a school-board, either as to law or fact, with reference to a subject within the board's jurisdiction and as to which it is vested with a discretion, is by appeal to the county superintendent of schools, provided for by the code, section 2818. Doud's Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554 (holding that the action of school directors of a district in fixing a new school site as authorized by the code, section 2773, is subject to review by the county superintendent, as authorized by section 2818); Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496 (so holding where a board of high school directors had power to adopt and promulgate a rule prohibiting the playing of football by pupils of the high school, and the board found that petitioner had violated the rule and that his apology tendered was insufficient to purge his offense, but holding, however, that the question whether the board had power to make such a rule was reviewable by the courts). But in prosecuting appeals from the refusal of the directors of a township to certify to the board of supervisors the amount of a tax voted by a subdistrict for school purposes, and from the decision of the county superintendent of schools affirming the decision of the directors, a plaintiff is not entitled to any damages for expenses incurred and time lost, where there is nothing to show that the directors and superintendent did not act in good faith. Wood *v.* Farmer, 69 Iowa 533, 29 N. W. 440.

**New York Consolidated School Law** (Wadhams N. Y. Consol. Laws p. 681, § 360) gives any person conceiving himself aggrieved by any decision of any school-district meeting the right to appeal to the superintendent of public instruction, and authorizes him to examine and decide the controversy, and a school-district meeting having allowed members of one of its committees expenses incurred by them in the defense of a libel suit growing out of reports made by them as members of such committee, it was held that the superintendent of public instruction

gross or fraudulent abuse of discretion,[67] and the courts cannot interfere to prevent the superintendent from hearing an appeal and from proceeding in the matter;[68] but whether a rule adopted by a school-board or a decision rendered was reasonably within the jurisdiction of the board conferred by statute is a question which is reviewable by the courts and as to which the party aggrieved is not limited to the county superintendent.[69]

**g. Liability of Members of District Boards and of Other District Officers** — (i) *IN GENERAL.* The duties of members of district boards are derived exclusively from statute, and are generally specifically defined, and, if they exercise powers and functions not conferred upon them, they are responsible for all losses that may ensue,[70] and they are of course liable for tort in like manner as other

had jurisdiction of an appeal by plaintiff in such libel suit from the decision allowing such expenses. People *v.* Skinner, 74 N. Y. App. Div. 58. 77 N. Y. Suppl. 36.

**Order of board fixing janitors' salaries construed** see People *v.* New York Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300.

67. Wilson *v.* Chicago Bd. of Education, 137 Ill. App. 187 [*affirmed* in 233 Ill. 464, 84 N. E. 697, 15 L. R. A. N. S. 1136 (holding that, with respect to a rule adopted in the interest of discipline, courts will not interpose their judgment against that of a board of education, unless it is clearly shown that fraud or corruption controlled such board in making, or that oppression or gross injustice naturally follows from the enforcement of such rule); Carbondale Bd. of Education *v.* Stotlar, 95 Ill. App. 250 (holding that the fact as to whether a board of education has acted wisely in dismissing a teacher is a matter into which the appellate court cannot inquire); Kinzar *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496; New Antioch Board of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58 (holding that a resolution of a board of education prohibiting the reading of the Bible and prayer or other religious instructions in the school, under Ohio Rev. St. § 4017, authorizing it to make such rules as it may deem expedient, is final, and cannot be reviewed by the court); Fritchey *v.* Mayton, 19 Pa. Co. Ct. 388 (holding that the members of a school-board are the judges of the sufficiency of a contractor's bond, and their action will not be reviewed by the court); Richards *v.* Joyce, 8 Kulp (Pa.) 572 (holding that the courts cannot interfere with school directors because they exercise their unquestionable powers unwisely).

**A decision of school directors that certain children are not residents of the district and entitled to attend school therein** cannot be reviewed by a court and jury. Com. *v.* Wenner, 211 Pa. St. 637, 61 Atl. 247.

**Appeal from settlement of account.—The** Pennsylvania court of common pleas has no power to allow an appeal *nunc pro tunc* from a settlement of a school-district treasurer's accounts by borough auditors four months after the auditor's settlement has become absolute, in the absence of any allegation of proof that the settlement had been procured by fraud. Dunmore Borough School Dist. *v.* Wahlers, 28 Pa. Super. Ct. 39.

68. Garfield County School Dist. No. 13 *v.* Garfield County Superintendent, 36 Colo. 393, 85 Pac. 696, holding that the county superintendent being authorized by Mills Annot. St. § 4049, to entertain an appeal from the action of the school-board in closing a school, and clothed with jurisdiction to hear and determine the matter, and an appeal from the decision of the county superintendent to the state board of education, the decision of the board to be final being provided by section 4055 the court cannot prevent the superintendent from proceeding in the matter.

69. Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496 (where the question was whether the rule adopted by the board prohibiting the playing of football, for violation of which a pupil was expelled, was within the jurisdiction of the board conferred by Iowa Code, §§ 2772, 2782, authorizing rules for the government of schools and expulsion of students for violation thereof); Rodgers *v.* Colfax Independent School Dist., 100 Iowa 317, 69 N. W. 544 (holding that McClain Code, § 2985, declaring that any person aggrieved by any decision of the district board of school directors may appeal to the county superintendent, does not preclude the right to an appeal to the courts upon questions involving the authority of the board of directors).

**New York Consolidated School Laws, tit. 14, § 1 (Laws (1894), c. 556),** allowing any person aggrieved by any decision or act of local school officers to appeal to the state superintendent of public instruction, whose decision on such appeal shall be final, relates only to appeals from decisions of local officers in the administration of laws relating to the common schools, and does not apply to an order made by him in the first instance removing school officers from office, which no local officer has any power to do, and such proceedings therefore are subject to review by the courts. People *v.* Skinner, 159 N. Y. 162, 53 N. E. 806 [*affirming* 37 N. Y. App. Div. 44, 55 N. Y. Suppl. 337].

70. Adams *v.* State, 82 Ill. 132.

**Notice of action; limitations.—A** school trustee sued for any act done in his corporate capacity is entitled to a notice of the action, which must be brought within six months, and a school trustee, acting in the

persons; [71] and furthermore statutes exist in some of the states penalizing the performance of prescribed acts, such as becoming interested in the furnishing of school supplies,[72] or loaning the public money,[73] and penalizing also the non-performance of prescribed duties, such as the duty to provide adequate school facilities and accommodation,[74] or the duty to prevent the loss of school money

discharge of his duty as such, is entitled to the protection of, and comes within 16 Vict. c. 180, notwithstanding he has signed a warrant individually instead of in his corporate capacity. Spry *v.* Mumby, 11 U. C. C. P. 285.

**Refusal to exercise corporate powers.**— In Canada formerly any difference between trustees and a teacher in regard to his salary or any other matter must have been submitted to arbitration, as provided by the statutes (see U. C. Consol. St. c. 64, §§ 84–87), and by 23 Vict. c. 49, § 9, trustees wilfully neglecting or refusing to give effect to the award, were held personally responsible for the amount awarded, which might be enforced against them by warrant of the arbitrators. But these provisions were repealed by 34 Vict. c. 33, § 27 (Ont.), which directed all such differences to be decided in the division court. This enactment is contained in Ont. Rev. St. (1877) c. 204, Ont. Rev. St. (1897) c. 292, § 104, which provides that any trustee or trustees of any public school wilfully neglecting or refusing to exercise all the corporate powers vested in them by this act for the fulfilment of any contract or agreement made by them shall be held to be personally responsible for the fulfilment of such contract or agreement. For decisions under the arbitration clause as between the trustees and a teacher see Birmingham *v.* Hungerford, 19 U. C. C. P. 411; Weaver *v.* Bull, 10 U. C. C. P. 369; Kennedy *v.* Hall, 7 U. C. C. P. 218; Hughes *v.* Pake, 25 U. C. Q. B. 95; Kennedy *v.* Burness, 15 U. C. Q. B. 473 [*affirmed* in 7 U. C. C. P. 227]. Trustees can be held liable only where they wilfully neglect to do their duty, not where they decline in good faith to exercise their corporate powers on account of any doubt or legal difficulty which they suppose to exist. Vanburen *v.* Bull, 19 U. C. Q. B. 633. And where school trustees become personally responsible under 13 & 14 Vict. c. 48, § 2, subs. 16, for refusing to exercise their corporate powers, before such liability can be enforced by the warrant of arbitrators under 15 Vict. c. 185, § 15, it is necessary to show that there has been some adjudication of the fact of wilful refusal to justify such warrant. Ranney *v.* Maclem, 9 U. C. C. P. 192. Furthermore, school trustees cannot be held liable under 23 Vict. c. 49, § 9, for wilfully neglecting or refusing to comply with an award, without being first afforded an opportunity of explaining or justifying such non-compliance. Where therefore defendant in replevin justified seizing plaintiff's goods under a warrant of the arbitrators issued against plaintiff and the other trustees for non-compliance with an award, but did not show that plaintiff was notified or called upon to show cause before such warrant issued, the plea was bad. Graham *v.* Hungerford, 29 U. C. Q. B. 239.

**Liability for seizure under warrant.**—Where it appeared that a horse was seized by K, under a warrant signed by two trustees, commencing, "We, the undersigned, trustees of school section," etc., and sealed with the corporate seal, it was held that the trustees were liable personally, not in their corporate capacity only. Vance *v.* King, 21 U. C. Q. B. 187. But see Ryland *v.* King, 12 U. C. C. P. 198.

71. Haycraft *v.* Grigsby, 88 Mo. App. 354, holding that in an action against a teacher and directors of a school for severely punishing plaintiff, an instruction that, although the teacher did inflict unreasonable punishment on plaintiff, the directors were not liable, unless they maliciously advised the teacher to do so, or aided and assisted her, is erroneous, since, if such directors advised or encouraged an immoderate whipping, they were liable, whether or not their motive was malicious. See also *infra*, III, I, 3, e, (II), (B).

**Personal liability of treasurer for failure to pay teacher.**— If the treasurer of a school-district has money belonging to the district, and devoted to the payment of teachers' wages, and refuses to pay it over on a proper order and demand, he becomes personally liable to the teacher. Edson *v.* Hayden, 18 Wis. 627.

72. State *v.* Wick, 130 Iowa 31, 106 N. W. 268, under Iowa Code, § 2834, which declares it unlawful for any school director to act as agent for any school text-books or supplies during his term of office, and provides that any director violating the provisions of the act shall be deemed guilty of misdemeanor.

**A corrupt or dishonest intent or unfairness in the price charged for the supplies and materials is not an essential element** of the offense, so that an allegation in an indictment that the defendant was "corruptly" interested in the contract is surplusage. Com. *v.* Miller, 31 Pa. Super. Ct. 309.

73. See Hunt *v.* Hopley, 120 Iowa 695, 95 N. W. 205, holding that a general deposit of the funds of a school-district in a bank, to the credit of the school-district treasurer in his representative capacity, is not a loan of the district's funds to the bank, within Code, § 4840, declaring that if any school officer loans without authority any portion of the public moneys intrusted to him for safe-keeping, etc., he shall be guilty of embezzlement, nor was such deposit illegal, so as to preclude him from recovering on a guaranty given by the bank to secure him against loss by reason of the bank's failure to repay the deposit.

74. Frelinghuysen Tp. Bd. of Education *v.*

apportioned to the district.[75] But where he acts within the scope of his authority a school officer is not personally liable for a mistake of judgment in the government of a school;[76] and generally a school officer, acting within the scope of his authority, is not responsible in case of an injury, unless it results from a corrupt motive.[77]

(II) *ON CONTRACTS.* The general rule is that the officers of a school-district cannot be held personally liable on a contract made on their part as such officers, and solely for the benefit of the district,[78] unless guilty of fraud or misrepresentation,[79] or unless they expressly contract to assume personal liability.[80] Thus where an officer of a school-district contracts by a writing showing on its face that he acts in his official character, although he does not add his official designation to his signature, he is not bound personally;[81] and *a fortiori* he is not individually liable where he adds his official designation to an instrument which shows

Atwood, 74 N. J. L. 638, 65 Atl. 999 [*affirming* 73 N. J. L. 315, 62 Atl. 1130], holding, however, that failure of a board of education to provide for the transportation of children living remote from the school-house, under N. J. Pamphl. Laws (1902), p. 108, § 111, is not a failure to provide suitable school facilities and accommodations within section 120 of the same act, because, the act being highly penal in its consequences, it must be construed with reasonable strictness.

**A statute imposing a penalty on a school-district officer for failure to furnish a certified copy of the records** under his charge to an applicant, by implication, imposes a duty to furnish such copies. Musback *v.* Schaefer, 115 Wis. 357, 91 N. W. 966, decided under Wis. Rev. St. (1898) § 414, and holding also that the fact that the same statute declares such copy admissible as evidence does not excuse the officer from furnishing it for other purposes.

**75.** Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592, holding that under Shannon's Code, § 1426, providing that, should the share of school money apportioned to a district be lost to the same by the neglect of the directors, they shall forfeit to the district the full amount so lost, with interest, for the payment of which they shall be jointly and severally liable, where school directors permitted a contractor for the erection of a school building, who was insolvent, to receive the contract price before the building was completed, and after the building had been destroyed before delivery to receive the insurance thereon, by reason of which the part of the school fund so paid was lost to the district, the directors were personally liable therefor.

**Where a well is a necessity at a school-house,** the action in good faith of two of a board of three directors in constructing such a well, and paying for it out of the school fund, at a reasonable cost, without causing their action in the matter to be entered upon the records of the proceedings of the board, or notifying the other director, does not in fact cause the funds of the district to sustain any such loss as will render the directors so acting liable for the amount so expended, under Starr & C. Annot. St. (1896) c. 122, § 285, providing that all losses sustained by the school fund by reason of the failure of an officer to perform the duties required of him may be recovered in a civil action against such officer brought at the suit of the state. Rea *v.* People, 84 Ill. App. 504 [*affirmed* in 185 Ill. 633, 57 N. E. 778].

**76.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**77.** Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463; Miller *v.* Harvey, 215 Pa. St. 103, 64 Atl. 330, holding that where plaintiff, a public school teacher, sued the president of the board of school directors to recover for the loss of plaintiff's position because of an alleged unlawful conspiracy between defendant and others, and her testimony showed that the charges against her were made by teachers in the school to defendant as president of the board; and that after investigation he, with other members of the board, made further investigation and acting together the directors requested the resignation of plaintiff, plaintiff cannot recover. And see Wetmore *v.* Burns, 1 N. J. L. J. 48, holding that a complaint in an action for damages against the members of a school-board for excluding complainant from his seat on such board, charging that defendants, "contriving and fraudulently and maliciously intending to damnify plaintiff, refused to admit him to his seat," is insufficient, for it does not show that defendant's act was unlawful, or charge that the act itself was maliciously done.

**78.** Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100; Anderson *v.* Vansittart, 5 U. C. Q. B. 335, holding that where plaintiff, a teacher, sued upon a special agreement, stated to have been made by defendants as trustees, to furnish him with fuel when required, under 9 Vict. c. 20, and defendants demurred, because defendants, having made the agreement in their corporate capacity, were charged as individuals, the declaration was bad. And see Sheriff *v.* Patterson, 5 U. C. Q. B. 620.

**79.** See Sanborn *v.* Neal, 4 Minn. 126, 77 Am Dec. 502.

**80.** See Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

**81.** Mackenzie *v.* Edinburg Bd. of School Trustees, 72 Ind. 189 (holding that a contract executed by school trustees of an incorporated town, and signed by them indi-

clearly an intention to bind the district and not the officer,[82] or expressly contracts against personal liability;[83] and it is held in some of the cases that generally where an officer of a school-district executes a contract or note adding his official designation, the presumption is that he acts as a public agent and binds the district and not himself personally in the absence of clear evidence to the contrary,[84] although other cases hold that the official designation following the signature is, in the absence of a clear intention expressed on the face of the contract or note to bind the district and not themselves, a mere *descriptio personæ*, and that the officers are themselves personally liable;[85] and where school directors execute a promissory note in their individual names for a purpose connected with schools, but not authorized by vote of the people as required by statute, the remedy of the holders of the note is by an action at law against the directors as individuals.[86] But school committeemen who, acting in the line of their duty, employ a teacher, are not personally liable for his pay,[87] nor are the trustees of a school-district personally liable on a note executed by their predecessors in office in their own

vidually, without any designation of their official character in connection with their signatures, if they are designated as trustees of public schools in the body of the instrument, is the contract of the corporation, and binding thereon, and not the personal contract of the trustees); Lyon *v.* Anderson, 7 Iowa 509.

**82.** Robinson *v.* Howard, 84 N. C. 151; Greenville Second Nat. Bank *v.* Wilcox, 2 Ohio Cir. Ct. 325, 1 Ohio Cir. Dec. 511 (holding that a personal liability cannot be asserted against the makers of a note, who have signed it as "president" and "clerk," where the note indicates an intention to charge the township board of education of which they were such officers); Toronto *v.* McBride, 29 U. C. Q. B. 13.

**83.** Goodin *v.* Common School Dist. No. 94, 23 S. W. 964, 15 Ky. L. Rep. 481.

**84.** State *v.* Helms, 136 Ind. 122, 35 N. E. 893 (holding that where a school township trustee signs a note, and adds to his signature, "Trustee of Sugar Creek Township," the note binds the township, and not the trustee individually); Mason City Independent Dist. *v.* Reichard, 50 Iowa 98 (holding that an agreement signed by all the directors of a school-district in an official capacity, and attested by their secretary, binds the district, and does not bind the directors as individuals); Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502 (holding that where defendants, being trustees of a school-district, made a note for the debt of the district, in which they promised as trustees, but signed it as individuals, and stated to the payee that they did not intend to become individually liable, counsel having stated that they would not become so liable on the note, they were not individually liable); Hodges *v.* Runyan, 30 Mo. 491 (holding that where the president of a board of school trustees promises in their behalf, by a note, to pay a debt contracted in the erection of a school-house, he acts as a public agent, and therefore will not be personally liable on the note).

**85.** Sharp *v.* Smith, 32 Ill. App. 336 (holding that where a contract for building a school-house contained the names of the school directors, and their description as such, as contracting parties, and was signed by them as directors, but did not expressly show that they were acting on behalf of the district, or intending to make the instrument the contract of the district, the directors were individually liable); Wing *v.* Glick, 56 Iowa 473, 9 N. W. 384, 41 Am. Rep. 118 (holding that a contract for the purchase of school supplies, phrased, "We agree to pay," and signed by two persons, with the respective additions of "president school board," and "secretary school board," but containing no reference to any school-district, is a personal obligation, the principal being undisclosed, although the contract was headed, "State of Iowa, county of Jones, township of Hale," and the township of Hale was in fact the school-district for which the supplies were purchased); Western Pub. House *v.* Murdick, 4 S. D. 207, 56 N. W. 120, 21 L. R. A. 671; Western Pub. House *v.* Bachman, 2 S. D. 512, 51 N. W. 214.

**86.** School Directors *v.* Miller, 54 Ill. 338, holding that upon such an instrument a bill in equity will not lie against the state.

**Effect of mutual mistake of law.**—Where school apparatus was purchased for a school-district by the clerk and director thereof, who gave the seller an order on the district treasurer for the amount of the purchase, and it subsequently appeared that such order was drawn without authority; all parties, however, having equal knowledge of the facts, but misinterpreting the law, the clerk and director were not personally liable for the amount. Watson *v.* Rickard, 25 Kan. 662. Similarly in a case in which the sole director of a school-district, in his official capacity, made a contract under a mistake of law, and the other party to the contract was equally mistaken as to the law, each having the same opportunities of knowing the law, it was held that the officer was not personally liable, although the district was not incorporated. Humphrey *v.* Jones, 71 Mo. 62.

**87.** Robinson *v.* Howard, 84 N. C. 151, holding that the only remedy in favor of the teacher is by mandamus to compel them to give on order on the county treasurer.

names to a teacher for services.[88] If, however, the treasurer of a school-district has money belonging to it, appropriated to the payment of teacher's wages, and refuses to pay it over on a proper order and demand, he becomes personally liable to the teacher;[89] and it has been held that school trustees failing to raise and collect the school funds as required by law are personally liable to a teacher for a failure to pay as agreed.[90]

(III) *For School Funds* — (A) *In General.* A district school may be sued for money received and not accounted for;[91] and as is held by the weight of authority to be the rule in regard to other public officers,[92] the liability of officers of school-districts, such as the treasurer, is absolute for all funds which come into his hands in his official capacity;[93] and, in case of loss, cannot be varied or diminished by the cause or manner of the loss;[94] nor can the directors of a school-district release the treasurer of the district from liability for money of the district coming into his hands, and which is stolen from him without his fault;[95] but the electors of a school-district may at a regular meeting, in case of default by an assessor, authorize a settlement of the matter, by providing that the assessor may pay a part in cash, and that the balance may be paid in township orders, guaranteed by a responsible party.[96] Under the provision of a statute that trustees of a school-district shall have a remedy on the official bond of the collector, of any action and any remedy given by law, they may resort to any remedy against him for a default, independently of his bond;[97] and where, after expiration of his office, a district officer refuses on demand, to pay over to his successor money received by him, an action upon the officer's bond is not the exclusive remedy, the bond being required as additional security, and not superseding the officer's individual responsibility, and an action for money had and received will lie in favor of the school-district for the money wrongfully retained,[98] which action the officer cannot defend by questioning the regularity of the proceedings whereby the funds came into his possession;[99] nor can he, in an action against him for money in his hands unexpended, object that it does not appear that he was sworn in.[1]

88. Rogers *v.* Carver, 21 Mo. 517.

Acts of predecessor as not binding public officers generally see Officers, 29 Cyc. 144.

89. Edson *v.* Hayden, 18 Wis. 627.

90. Ferguson *v.* True, 3 Bush (Ky.) 255.

91. Board of Education *v.* Milligan, 51 Ohio St. 115, 42 N. E. 255, holding that a board of education may sue its treasurer.

Where the statute requires a report in writing to be made by the treasurer of a school-district at the end of each year, showing the moneys received and the moneys disbursed, with the vouchers therefor, which report is to be recorded by the clerk of the district, and where the statute provides for no other record or account of the treasurer's proceedings, in an action brought by the district against the treasurer, at the expiration of his term of office, to recover a balance of the moneys in his hands not paid over to his successor, in which there is no testimony tending to show that such report was not duly made and recorded, it is not error to rule out from the testimony the private account kept by the treasurer of moneys received and paid out as such treasurer, nor to refuse to permit a witness to testify as to the result of an examination of the treasurer's books and papers, made by him at the request of such treasurer. Hinton *v.* Nemah County, etc., School Dist. No. 2, 12 Kan. 573.

Right of school agent to retain balance.— In an action under Me. Rev. St. c. 11, § 54, to recover money received by defendant as school agent of the district, the agent could not retain on account of services a balance which by statute was to be appropriated to certain specified purposes, as the statute provides that "moneys not so appropriated by him during his term of office" should belong to the district, and could be recovered of him. Searsport School Dist. No. 9 *v.* Deshon, 51 Me. 454.

92. See Officers, 29 Cyc. 1438 text and note 62.

93. Bluff Creek Dist. Tp. *v.* Hardinbrook, 40 Iowa 130. And see *infra*, III, D, 6, e, (IV), (A).

94. Bluff Creek Dist. Tp. *v.* Hardinbrook, 40 Iowa 130.

95. Taylor Dist. Tp. *v.* Morton, 37 Iowa 550.

96. Buckeye Tp. School Dist. No. 2 *v.* Clark, 90 Mich. 435, 51 N. W. 529.

97. O'Hanlon *v.* Scott, 89 Hun (N. Y.) 44, 35 N. Y. Suppl. 31.

98. Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228.

99. Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228, so holding as to the assessor of a district.

1. Searsport School Dist. No. 9 *v.* Deshon,

(B) *Accounts and Accounting.* The statutes generally provide for the audit and settlement of the accounts of school directors and other district officers,[2] before specified auditors,[3] upon whose refusal to audit the settlement may be carried to the board of directors or other ruling body.[4] An audit and settlement by the proper authority is conclusive upon the officers unless appealed from,[5] and, if free from fraud or mistake, upon the district;[6] but to bind the district it must be a party to the settlement,[7] and the district is not bound if charges are allowed in the settlement in violation of law;[8] but where a school-board has examined and approved the accounts and vouchers of its treasurer, and granted a discharge, the discharge is conclusive unless procured by fraud,[9] and in an action by the successor of such board to rescind the settlement and discharge, the burden

51 Me. 454, so holding as to a school agent, in an action under Rev. St. c. 11, § 54.

2. See the statutes of the several states. And see cases cited *infra*, this and the following notes.

**Under Pennsylvania act of May 1, 1876,** requiring school directors to submit a statement at the close of the school year to the proper auditors, and making a failure to comply therewith a misdemeanor punishable by a fine, the directors will not be required, in mandamus proceedings, to furnish a statement of the accounts of their predecessors, where they have delivered up the books containing such accounts. Baer *v.* School Directors, 4 Pa. Co. Ct. 43.

**Arbitration.**— A public corporation, such as a school-district, may submit to arbitration differences arising upon settlement with its treasurer. Walnut Dist. Tp. *v.* Rankin, 70 Iowa 65, 29 N. W. 806.

3. Baer *v.* School Directors, 4 Pa. Co. Ct. 43, where it was held to be the duty of borough auditors under the Pennsylvania act of May 4, 1891.

**Where a school treasurer's account had not been examined and settled for a number of years** by the borough auditors, but had been annually settled by a committee of the school-board, the borough auditors elected for a certain year could not be compelled to resettle accounts for former years, although such former settlements may have been informal. Com. *v.* Stofer, 2 Pearson (Pa.) 224.

4. Stephens *v.* Dimock, 11 Leg. Int. (Pa.) 94, holding, however, that where the treasurer of a school fund, being at a meeting of the auditors on other business, casually mentioned that he was ready to settle his accounts, and was answered that the books showed no charges against him, and the same thing occurred twice during his term of service of eight years, there was no refusal of the auditors to settle his accounts, justifying him to carry the settlement past them to the board of directors.

5. Porter *v.* Luzerne Dist. School Directors, 18 Pa. St. 144, holding that a certified settlement by the township auditors of the account of the treasurer of a school-district is conclusive, if not appealed from. But see Van Wert *v.* Adams Tp. School Dist. No. 8, 100 Mich. 332, 58 N. W. 1119, holding that Howell Annot. St. § 5073, subd. 7, providing that a school director shall keep account of his expenses incurred, to be audited by the moderator and assessor, and on their written order to be paid out of any money provided therefor, does not make such audit conclusive on the director, or forbid him, when his account is disputed, to sue the district thereon in assumpsit; since school-districts are suable under section 5039, and, the claim being unliquidated, mandamus to the officers could not issue.

**If the school treasurer has a set-off** against the district's demand for money in his hands, the auditors who are authorized to settle his accounts are the proper tribunal to pass upon it, and, if dissatisfied with their decision, the right of appeal is open to him; and if he does not avail himself of this right, he cannot, in an action of debt on his bond, go behind the finding of the auditors. Shartzer *v.* Washington School Dist., 90 Pa. St. 192, holding that under the Pennsylvania act of May 21, 1857, section 1, which authorizes borough auditors to settle the accounts of a school treasurer, with the right of appeal therefrom to either party, unless appealed from, such settlement is conclusive.

**Where a school treasurer appears before auditors de facto,** and submits his accounts to them for adjudication, and takes no appeal therefrom, he cannot be permitted to show that they were not duly elected. Shartzer *v.* Washington School Dist., 90 Pa. St. 192.

6. Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271.

7. Shippen Tp. School Dist. *v.* Cameron County, 3 Pa. Co. Ct. 15.

**Settlements of a treasurer's accounts by the county auditors,** allowing a special or other commission out of moneys collected for a school-district, are not binding on the district, it not being a party to the settlement. Shippen Tp. School Dist. *v.* Cameron County, 3 Pa. Co. Ct. 15.

8. Union Parish School Bd. *v.* Trimble, 33 La. Ann. 1073.

9. East Feliciana Parish School-Bd. *v.* Packwood, 42 La. Ann. 468, 7 So. 537, holding also that the fact that the books of the treasurer of a school-board, whose accounts have been settled, and who has received a discharge, appear to have been kept in a confused and irregular manner, and differ from

is on plaintiff to show fraud.[10] A settlement in which no accounts are produced and which is never entered on the books of the township is no settlement in point of law, and not conclusive on either party.[11]

(IV) *ON OFFICIAL BONDS* — (A) *General Rules.* Officers of school-districts are often required by statute to give bonds for the faithful performance of their duties and the securing of funds in their hands,[12] sometimes ascertained by double the estimated amount of money which will come into their hands.[13] The general rules governing official bonds and liability thereon [14] apply to bonds given by school-district officers,[15] and the signers of such a bond are liable thereon for defaults by their principal within the purposes of the bond,[16] immediately upon a

his settlement with the board, does not create any liability on his bond, where it is not shown that he received any money for which he failed to account.

10. East Feliciana Parish School-Bd. *v.* Packwood, 42 La. Ann. 468, 7 So. 537.

11. Stephens *v.* Dimock, 11 Leg. Int. (Pa.) 94.

12. See the statutes of the several states. And see cases cited *infra*, this and the following notes.

**An officer holding two offices must give two bonds.**— German *v.* Highland Park Graded Common School Dist. No. 46, 117 Ky. 907, 79 S. W. 1189, 25 Ky. L. Rep. 2094.

13. See State *v.* Teal, 72 Minn. 37, 74 N. W. 1024, holding that Minn. Gen St. (1894) § 3700, requiring the treasurer's bond to be in double the amount of money, as near as can be ascertained, which will come into his hands during his term, refers to the aggregate amount that will come into his hands during his term, and not merely to the probable amount that will be in his hands at any one date.

14. See OFFICERS, 29 Cyc. 14 *et seq.*

15. See cases cited *infra*, this note.

**The approval of the bond of a treasurer of a school-district** is evidenced by the official indorsement of the members of the board. Holbrook *v.* Township 33, 22 Ill. 539. But an express written approval is not essential, and where the board of education of a school-district elected a treasurer, required him to give bond, which he did, with security, and it was received by the board and acted upon by the parties, it was held to be a sufficient approval, without any such indorsement on the bond, or any entry thereof on their records, and the fact that the board did not fix the penalty of the bond is not material. Bartlett *v.* Freeport School Dist. Bd. of Education, 59 Ill. 364.

**Consideration for additional bond.**— Where the first bond of the treasurer of the board of education after it was given became insufficient, and the board of education ordered that the treasurer should give another and an additional bond, which he did, there was sufficient consideration for the giving of such additional bond. Gilbert *v.* Newton Bd. of Education, 45 Kan. 31, 25 Pac. 226, 23 Am. St. Rep. 700.

16. Bartlett *v.* Freeport Bd. of Education, 59 Ill. 364.

**If a school treasurer releases a mortgage** given to secure a debt due the school fund of his township, without an order of the board of trustees, or a majority of them, entered upon their journal, and subscribed by their president and clerk, he will be liable upon his official bond for any loss sustained in consequence thereof. Union County Township 13 *v.* Misenheimer, 78 Ill. 22.

**If a township treasurer fails to present a note,** payable to the school fund, against the estate of the principal maker, within the time limited by law, the sureties will be released, and if the amount is thereby lost to the school fund the treasurer will be liable therefor on his official bond. House *v.* Township 35, 83 Ill. 368.

**Failure of a school-district treasurer to turn funds over to his successor** is a breach for which his bondsmen may be held. Reed *v.* Stark County Bd. of Education, 39 Ohio St. 635. But where one is appointed treasurer of a school-district to fill a vacancy, and upon such appointment gives a bond with sureties, as provided by law, and at the annual election thereafter is elected his own successor, and continues in office, but without giving any new bond, the sureties on the bond given upon his appointment are not liable for any default occurring after the commencement of the term to which he is elected. Riddel *v.* Cherokee County School Dist. No. 72, 15 Kan. 168.

**Payment of money by a school-board treasurer without an order** drawn and countersigned as required by statutes renders the treasurer and his bondsmen liable for the amount so paid. Campbell School Dist. No. 4 *v.* Baier, 98 Wis. 22, 73 N. W. 448.

**Money raised for the building of a schoolhouse is raised for "school purposes,"** within N. Y. Laws (1864), c. 565, § 7, and the treasurer of the board of education is the proper keeper thereof, and his sureties are liable for such money in his hands. Fairport Union Free School *v.* Fonda, 77 N. Y. 350.

**Liability of sureties of prior bond under additional bonds**—Where the treasurer of a board of education deposits school moneys in the name of and along with the funds of a private corporation of which he is manager, with the knowledge of the bank officials; and such deposit is subject to his check for both school and private purposes, and as manager of the private corporation, he draws out so much of the deposit as to leave a deficit in the amount due by him to the board of education, and shortly afterward, he is required to give an additional bond as such

breach,[17] although the bond is not under seal,[18] and they may be held for all moneys not properly accounted for or turned over to their successors,[19] and the bondsmen of an officer of a school-district who borrows money without complying with the terms of a statute prescribing the steps preliminary to the borrowing are liable to the lender for a conversion of the money borrowed.[20] Furthermore liability on the bond for school funds not used according to law is absolute and cannot be defended upon the ground that school funds were without the officer's fault stolen from him,[21] or lost through the insolvency of a bank in which the treasurer deposited them, although he was not guilty of any want of care in failing to ascertain its financial condition;[22] nor is it a defense to an action on the official bond

treasurer, and funds of the private corporation in sufficient amount to make up this deficit are afterward deposited in the same way by the manager, this is a payment of such deficit, and hence the sureties on the second bond are liable for a deficit existing at the expiration of his term as treasurer. Gilbert *v.* Newton Bd. of Education, 45 Kan. 31, 25 Pac. 226, 23 Am. St. Rep. 700.

**Application of payments between surety and deceased principal's estate.**— Where a school treasurer was reappointed without giving a new bond, and on his decease, five months afterward, was found to be in default, but for a part of the defalcation his sureties were not liable, and judgment was recovered against his estate for the whole, it was held that it was not a case for the appropriation of payments, the judgment evidencing but a single indebtedness. School Trustees *v.* Smith, 88 Ill. 181.

17. Joint School Dist. No. 1 *v.* Lyford, 27 Wis. 506.

**Where the surety impliedly authorizes the principal to fill in the penalty** in a blank left for that purpose, he is liable on the bond in like manner as if he had filled it in himself. Bartlett *v.* Freeport School Dist. Bd. of Education, 59 Ill. 364, holding that the fact that the sureties of a treasurer of a board of education after knowledge of the treasurer's default took mortgages and other securities from him was evidence from which the jury might infer that authority had been given the treasurer to fill up the blank, or that they had ratified the act of the treasurer in so filling it.

18. Fairport Union Free School *v.* Fonda, 77 N. Y. 350, holding that where a board of education, attempting to comply with N. Y. Laws (1864), c. 565, § 7, took from one elected as its treasurer a writing in the form of a bond, but not under seal, and they thereupon entered upon the discharge of the office, the writing was enforceable against the sureties as a bond.

19. Lindsey *v.* Marshall, 12 Sm. & M. (Miss.) 587; Creswell *v.* Nesbitt, 16 Ohio St. 35. But see Overacre *v.* Garrett, 5 Lans. (N. Y.) 156, holding that where a school-district collector refused to pay over, upon order of the district trustees, moneys received during a term of office which expired at the time the order was made, he being his own successor in office, the sureties on the official bond which was given with respect to the expired term were not liable.

**Interest.**— The rule that interest is not allowable on an unliquidated account for goods or services is not applicable in an action on the bond of a school-district treasurer to recover a defalcation. Sturgeon Bay School Dist. No. 1 *v.* Dreutzer, 51 Wis. 153, 6 N. W. 610.

20. State *v.* Helms, 136 Ind. 122, 35 N. E. 893, holding also that where a trustee of a school township having contracted an unauthorized debt while Acts (1883), p. 114, § 2, which makes the trustee's bond liable therefor in such case, was in force, Act (1889), p. 278, repealing it, did not affect the right of the person who lent him the money to enforce the obligation of the bond, as Rev. St. § 248, provides that the repeal of any statute shall not release any liability unless the repealing act shall so expressly provide.

**Pleading; supplying omitted averment.**— In an action on the bond of a school township trustee to recover money due on a note executed by him without authority, the note, although exhibited with the complaint, cannot be looked to to supply an omitted averment. State *v.* Helms, 136 Ind. 122, 35 N. E. 893.

21. Taylor Dist. Tp. *v.* Morton, 37 Iowa 550; Pine Island Bd. of Education *v.* Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586, holding that under Minn. Gen. St. (1878) c. 36, § 107, requiring the treasurer of a school-district to execute a bond with sureties conditioned "for the faithful discharge of his duties as treasurer," and further requiring him to "pay to his successor in office upon demand . . . all money in his hands belonging to said district," the fact that such treasurer has lost the funds by burglary, although without his own fault, constitutes no defense to an action on his official bond for the failure to pay over to his successor the money received and not disbursed by him. And see *supra*, III, D, 6, e, (III), (A).

**Release by district and school-board ineffectual.**— A vote of the school-district, and of the board of education without consideration, to discharge the legal obligation of a treasurer who has lost the school fund by burglary, without fault, is ineffectual. Pine Island Bd. of Education *v.* Jewell, 44 Minn. 427, 46 N. W. 914, 20 Am. St. Rep. 586.

22. State *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512; Ward *v.* Colfax County School Dist. No. 15, 10 Nebr. 293, 4 N. W. 1001, 35 Am. Rep. 477.

of a township treasurer for his failure to take such security for the loan of school funds as is prescribed by statute that the board of education authorized his action, where they have no power to determine the sufficiency of such security, that power being by statute vested solely in the treasurer,[23] and the liability of the sureties of the treasurer of a board of education for money raised for school purposes is not affected by the fact that the authority to raise the money was given by a private law.[24] But the sureties are not liable on the bond for funds which never actually came into the treasurer's hands,[25] or which he collected while performing duties legally devolving upon another officer,[26] or during an appointment made subsequent to the appointment for which the bond was given;[27] and school officers of a district who, being misled by false representations of one presenting a claim against the corporation, issue an order for its payment are not individually liable to make the order good to an assignee thereof on the failure of the latter to recover from the district on the ground that the were guilty of legal fraud in issuing it without authority,[28] and in the absence of fraud, or consequent damages or loss, the fact that school directors knowingly draw a warrant on a fund to the credit of which there is no money wherewith to meet such warrant at the date thereof is not such an illegal exercise of authority as will render the directors personally liable for the amount of said warrant.[29]

(B) *Actions; Procedure.* The rules governing actions on official bonds generally[30] apply to actions upon the bonds of officers of school-districts.[31] Some statutes regulate the form of action and by whom it may be brought,[32] but unless

**23.** Bd. of Trustees *v.* Baker, 24 Ill. App. 231.

**24.** Fairport Union Free School *v.* Fonda, 77 N. Y. 350.

**25.** Prairie School Tp. *v.* Haseleu, 3 N. D. 328, 55 N. W. 938.

**26.** State *v.* Cottle, 29 Ohio Cir. Ct. 32 [*affirmed* in 74 Ohio St. 80, 77 N. E. 686], holding that the sureties on the bond of a clerk of a board of education are not liable for his appropriation of moneys that have come to him while such clerk, but the collection of which legally devolved upon the treasurer of the board.

**27.** Waterford School Trustees *v.* Clarkson, 23 Ont. App. 213.

**28.** Boardman *v.* Hayne, 29 Iowa 339.

**29.** Jacquemin *v.* Andrews, 40 Mo. App. 507, where drafts for any school year on any fund were limited to the amount to be derived from all sources during that year. And see School Dist. No. 3 *v.* Smalley, 58 Mo. App. 658; generally *infra*, III, F, 2, d.

**30.** See OFFICERS, 29 Cyc. 1462 *et seq.*

**31.** See *infra*, this note.

**Where the principal in a note to the trustees of a school dies** and the treasurer neglects to present the note for allowance against his estate, in an action on the treasurer's bond, if it does not appear that the sureties are insolvent, or that the debt is lost, no more than nominal damages can be recovered. McHaney *v.* School Trustees, 68 Ill. 140.

**Payment over of special school fund for common school fund.**— Where, in an action on the bond of a school trustee for a shortage in the funds, it appears that he paid moneys out of the special school fund, on account of the common school fund, he should be given credit for the amount thus paid, and not be charged with the entire shortage in the special fund. Finney *v.* State, 126 Ind. 577, 26 N. E. 150. And defendant should not be denied this credit because his answer alleges that the overpayments were made for the benefit of the special school fund, while the proof shows that they were made for the benefit of the common school fund. Finney *v.* State, *supra*.

**Parties.**— The treasurer of the municipality is not a proper party to a bill by a rural school section corporation to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corporation. Hamilton Tp. School Trustees *v.* Neil, 28 Grant Ch. (U. C.) 408.

**32.** See the statutes of the several states. And see School Trustees *v.* Stokes, 3 Ill. App. 267 (holding that an action by the school trustees on the bond of the township treasurer, under Ill. Rev. St. c. 122, §§ 40, 55, for neglecting to pay over moneys to his successor, lies, whether the apportionment required by section 34 has been made among the several districts or not; and that if this has been made, they need not sue for the use of the districts); Nichols *v.* State, 65 Ind. 512 (holding that an action on a bond of a township trustee may, by statute, be brought in the name of the state, by the county school superintendent; but his right to do so is only concurrent with that possessed by such trustee's successor).

**Statutory mode of assessing damages.**— Ind. Proc. Act, § 338 (2 Rev. St. (1876) p. 173), provides that in actions for the recovery of money the jury must assess the amount of the recovery; but Common School Law, § 7 (1 Rev. St. (1876) p. 781), which is a later act, provides that, in a suit on the official bond of a township trustee for failure to discharge any of his duties relative to schools and school revenues, the court

a statute otherwise provides,[33] it is generally held that the action is properly brought in the name of the state,[34] of the board,[35] or of the district,[36] and a demand is not necessarily a condition precedent to the bringing of the action.[37] An official bond of a treasurer of a school-district is joint and several, and a suit may be maintained thereon against any or all of the obligors;[38] and where an additional bond is executed all the sureties on both bonds may be joined in an action for a default subsequent to the second bond;[39] and in an action on the school treasurer's bond, the sureties cannot object to evidence of a breach of the conditions of the bond by the principal because he has not been served with process or is not within the jurisdiction of the court, or because his defalcation has not been established

shall assess on the amount of the recovery ten per cent damages, to be included in the judgment. Under this later act it is held that it is the duty of the court to assess ten per cent damages on the amount of the verdict in an action on such bond, and to include such damages in the judgment. Goldsberry *v.* State, 69 Ind. 430.

**33.** Fuller *v.* Fullerton, 14 Barb. (N. Y.) 59, holding that under 1 Rev. St. 536, the official bond of a town superintendent of common schools can be sued on only in the name of the supervisor named therein, or of a successor in his office.

**Wis. St. (1898) § 442,** requiring the director of a school-district to prosecute an action on the treasurer's bond for a breach of a condition thereof, and § 430, subd. 17, authorizing a school-district meeting to make necessary provisions for the prosecution of any action in which the district may be a party, require a director to sue on the treasurer's bond and prosecute it until the electors of the district take control thereof. Madison School Dist. No. 11 *v.* Clifcorn, 133 Wis. 465, 112 N. W. 1099.

**Under Kan. Gen. St. (1901) § 6174,** on the breach of any condition in the bond of a school-district treasurer, if the director neglects or refuses to prosecute an action, any householder may cause such prosecution to be instituted in the name of and for the benefit of the school-district, and prosecute such suit to final judgment. Kingman County School Dist. No. 9 *v.* Brand, 71 Kan. 728, 81 Pac. 473.

**34.** Nichols *v.* State, 65 Ind. 512.

**An action on the bond of the treasurer of a school town** is properly brought on the relation of the treasurer, where the breach is the failure of the retiring treasurer to turn over money in his hands at the expiration of his term, nor need it be shown that the county board directed the bringing of the action. Hiatt *v.* State, 110 Ind. 472, 11 N. E. 359.

**Under Swan St. Ohio, p. 843, § 27,** making it the duty of the township clerk to prosecute an action on the bond of a township treasurer, given to secure the due disbursement of the school funds, an action on the bond of a township treasurer, given for the disbursement of school funds, cannot be prosecuted in the name of the board of education; such action must be prosecuted in the name of the state, to whom the bond is payable. Athens Tp. Bd. of Education *v.* Kersinger, 2 Ohio Dec. (Reprint) 344, 2 West. L. Month. 474.

**35.** Gilbert *v.* Newton Bd. of Education, 45 Kan. 31, 25 Pac. 226, 23 Am. St. Rep. 700 (holding that since in a city of the second class the board of education is the general representative of the school organization as a corporation, it, and not the successor in office of the treasurer of the board of education, is the proper party to commence an action on the official bond of such treasurer for a failure to pay over to his successor the balance due the board); Madison Parish School Directors *v.* Brown, 33 La. Ann. 383 (holding that where the treasurer of a school-board gave a bond conditioned for the performance of his duties as treasurer, payable to the governor of the state, the board, being the beneficiary and having the right to sue, was properly party plaintiff in a suit on the bond).

**In Ohio** the action cannot be brought in the name of the board. Athens Tp. Bd. of Education *v.* Kersinger, 2 Ohio Dec. (Reprint) 344, 2 West. L. Month. 474.

**36.** Armstrong *v.* Durland, 11 Kan. 15; Coffman *v.* Parker, 11 Kan. 9, both holding that an action on the bond of the treasurer of a school-district to recover a balance not paid over to his successor in office must be in the name of the school-district; and, if such action is brought and prosecuted in the name of the successor of such office, it is error for which the judgment will be reversed.

**37.** Jenks *v.* Coffey County School Dist. No. 38, 18 Kan. 356 (holding that no demand is necessary before bringing suit on the official bond of the treasurer of a school-district for moneys of the school fund which he neglects to pay over, where he has resigned the office, and removed, and conceals his residence); Prescott, etc., Joint School Dist. No. 1 *v.* Lyford, 27 Wis. 506 (holding that where a school-district treasurer was removed from office, and delivered his books to his successor, but failed to pay over the public money in his hands, there was a breach of his bond, without demand being made for such balance, and that a demand for the public money remaining in his hands was not a condition precedent to an action on his bond).

**38.** Jenks *v.* Coffey County School Dist. No. 38, 18 Kan. 356.

**39.** Holeran *v.* Adams County School-Dist. No. 17, 10 Nebr. 406, 6 N. W. 472.

by a judgment, the obligation of a surety on such bond not being a collateral but a direct one.[40] Official account-books or reports made and signed by the principal are admissible in evidence against the sureties or the principal,[41] and are in general conclusive upon them.[42] To hold the sureties, the default must be properly pleaded and proved;[43] but upon proof of failure of the officer to respond for school funds, the burden is on the sureties to show that he lawfully disbursed the entire amount received,[44] and the presumption that as an officer he did his duty cannot avail.[45] But proof that a school treasurer, after his reappointment, received money on a school note in his possession, without proof when the note came to his hands, whether before or after his appointment, is not sufficient to charge his sureties on his bond given at his first appointment.[46]

**7. Criminal Responsibility and Penalties — a. In General.** Under statutes prohibiting members of a school-board from contracting with such board and providing that the violation of a statute to which no penalty is expressly attached shall be a misdemeanor, a member of such board, who accepts a contract to set out trees around a school-house, erect a school-house fence, and furnish school furniture is guilty of a misdemeanor.[47] Common school commissioners are indictable for employing a teacher who has no examiner's certificate of his competency, as required by statute.[48] To make trustees of schools liable for the wrongful act of their treasurer, such act must be required by an order of the board entered on their journal, and signed by the president and clerk, as required by

**40.** Cassady *v.* Will County Tp. 35, 105 Ill. 560.

**41.** Longan *v.* Taylor, 130 Ill. 412, 22 N. E. 745 [*affirming* 31 Ill. App. 263]; Cassady *v.* Will County Tp. 35, 105 Ill. 560 (holding that entries made by a school treasurer in his official books, showing distribution of school money, although made prior to the execution of his bond, on which an action is brought, are admissible against his sureties as well as himself); Bartlett *v.* Freeport School Dist. Bd. of Education, 59 Ill. 364; Prescott, etc., Joint School Dist. No. 1 *v.* Lyford, 27 Wis. 506 (holding that where a treasurer of a school-district sent to the director the book which he was required to keep by Wis. Gen. Laws (1863), c. 154, § 38, accompanied by a letter identifying it as such official record, it is competent evidence to show a balance due from him, in an action against his surety).

**42.** Longan *v.* Taylor, 31 Ill. App. 263 [*affirmed* in 130 Ill. 412, 22 N. E. 745], holding that the final report made by a school township treasurer, and the entries in his books made by him in such capacity, are conclusive evidence against him and his sureties as to the amount due, in an action on his bond. But see School Trustees *v.* Smith, 88 Ill. 181, holding that an entry on the minutes of the board of trustees at the time a school treasurer was reappointed that he had made a report as treasurer, which was "carefully examined," is not evidence that his defalcation had not then occurred.

**43.** State *v.* Corey, 16 Ohio St. 17, holding that where, in an action against a surety on a township treasurer's school bond, conditioned for the faithful disbursement of moneys received by him for "school purposes," the pleading and evidence show that he had not accounted for "township funds," without proving that any of such funds were received by him for school purposes, a judgment in defendant's favor in the court below will not be reversed.

**44.** School Trustees *v.* Smith, 88 Ill. 181 (holding also that where at the time of the appointment of a township school treasurer the permanent school fund was loaned out, and he received notes therefor, and on his death his administrator failed to find a part of such notes, this was *prima facie* sufficient to show a default on his part as to the notes not found, without proof of his having collected them, and that his sureties were liable); Sturgeon Bay School-Dist. No. 1 *v.* Dreutzer, 51 Wis. 153, 6 N. W. 610.

**45.** School Trustees *v.* Smith, 88 Ill. 181, holding that where a township school treasurer was reappointed about five months before his death, but gave no new bond, and after his death it was found he was a defaulter, in the absence of proof that he had in his hands all the money intrusted to him during his first term, it could not be presumed that he had paid over all the money to himself as his own successor, so as to exonerate the sureties on a bond given by him during the first term.

**46.** School Trustees *v.* Smith, 88 Ill. 181. **The sureties on a school treasurer's bond for his second term** may show in a suit for his defalcation that this occurred prior to the settlement made with the school directors at the end of the first term, if on the settlement the treasurer merely produced a draft on a bank for the amount with which he was charged, and the directors failed to inquire whether there were funds sufficient to meet the draft. Milford Dist. Tp. *v.* Morris, 91 Iowa 198, 59 N. W. 274, 51 Am. St. Rep. 338.

**47.** State *v.* Keeton, 9 Baxt. (Tenn.) 559.

**48.** Robinson *v.* State, 2 Coldw. (Tenn.) 181.

law.[49] One who has been legally elected clerk of a school-district, and is still in possession of the office, claiming the rightful possession thereof, and also claiming to be legally entitled to hold the same, cannot be convicted for neglecting or refusing to deliver the records, books, and papers belonging to the office to one not in possession of the office, but claiming the same under a subsequent election.[50] School directors who neglect to keep public schools open for such a portion of the year as is prescribed by law may be removed, but they are not indictable.[51] But where it is duly ordered that a school be kept open for a specified time and funds are provided therefor, trustees who neglect without excuse to provide the school for the specified time are liable to the penalty imposed by law upon officers who refuse or neglect to perform their official duties.[52] The selectmen of a town are not liable to indictment for neglecting to remove a school-house to a new site, designated by report of a committee, if it appears that the new site was not the property of the school-district, and no allegation is made that proper steps had been taken to have it laid out as a school lot.[53] A penalty imposed by law upon school officials for neglect to perform their duties does not extend to a defective performance or omission of a particular act, but only to a general non-performance of official duties.[54] A statute providing a penalty for the refusal of a school officer to pay over fines, forfeitures, and other moneys collected by him does not apply to a retiring treasurer of a school-district who fails to pay over a general balance of moneys in his hands.[55]

**b. Indictments, Complaints, Evidence, Etc.** The rules relative to indictments generally,[56] that it is necessary to the validity of an indictment that it should be good in form as well as in substance;[57] that if an exception to a statutory offense is created by a subsequent statute, it is a matter of defense to be shown by the accused and need not be negatived in an indictment for such offense;[58] and that where an offense is defined by statute it is not necessary, in an indictment, to employ the exact words of the statute, but it is sufficient if equivalent terms or language conveying the same meaning are used,[59] have been applied to indictments against school officials. An indictment against the directors of a school-district for misconduct in the issuance of school orders should state that the claims for which the orders were alleged to be drawn had not been audited and allowed, when by statute it is necessary that they should be audited and allowed before orders can be issued.[60] An indictment against a school commissioner for failing to make a report of the moneys received and disbursed by him should contain an express averment that he had received money which he was bound to report.[61] An indictment against the clerk of a school-district, for neglect of duty in not recording the warrant for a school meeting, must allege that a legal

**49.** Lovingston *v.* St. Clair County Town 2, 99 Ill. 564.

**50.** State *v.* Dean, 49 Kan. 558, 31 Pac. 145.

**51.** McElhiney *v.* Com., 22 Pa. St. 365.

**52.** Soule *v.* Thelander, 31 Minn. 227, 17 N. W. 373.

**53.** State *v.* Bailey, 21 N. H. 185.

**54.** Spafford *v.* Hood, 6 Cow. (N. Y.) 478. See also *supra*, III. D, 6, g, (I).

**Under Ky. St. (1899) § 4409,** a county superintendent of schools who wilfully fails to settle his accounts before the first day of August, is guilty of a misdemeanor. Tracy *v.* Com., 76 S. W. 184, 25 Ky. L. Rep. 669.

**55.** People *v.* Dolan, 5 Wyo. 245, 39 Pac. 752.

**56.** See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

**Evidence held admissible** on a prosecution of a county superintendent of schools for wilfully failing to settle his accounts as required by statute. See Tracy *v.* Com., 76 S. W. 184, 25 Ky. L. Rep. 669.

**57.** Lathrop *v.* State, 6 Blackf. (Ind.) 502, holding that an indictment against a school commissioner for a breach of duty must show the condition of his bond to have been broken and that the breach ought to be so particularly assigned that the assignment would, were it in a declaration in a suit on the bond, be beyond the reach of a special demurrer.

**58.** Com. *v.* Sheffield, 11 Cush. (Mass.) 178.

**59.** Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655.

**60.** State *v.* Stiles, 40 Iowa 148.

**Presentation and allowance of claims** see *infra*, III, G, 1.

**61.** Lathrop *v.* State, 6 Blackf. (Ind.) 502.

warrant was issued and given to him, or that the meeting was legally called;[62] and an indictment charging a school-district committee with wilfully neglecting to give a district clerk the warrant for the annual meeting, with the affidavit of posting indorsed thereon, as required by statute, is bad if it does not allege that the warrant was duly issued and a copy or copies seasonably posted.[63] An indictment for issuing a certificate of indebtedness against a school-district, in violation of statute, need not, however, state what the consideration for the debt was;[64] nor need an indictment against a member of a school-board for accepting a contract from such board allege that he received pay for what he undertook to do or furnish, as the making of a contract implies a consideration.[65] In an action against a school trustee for the penalty imposed by law for neglecting the duties of his office, a declaration in very general terms is sufficient and, if the accused is dissatisfied with it, he must demur specially.[66] Although a complaint in an action for a penalty against school officials for a failure to maintain a school contains no express averment of the existence of a school-district, yet, if the facts stated could not be true unless there was such a district, and no contrary inference could be drawn from them, the complaint is sufficient in that respect.[67] The certificate of indebtedness issued by the accused is competent to prove the offense of issuing such certificate in violation of statute.[68] And the testimony of a teacher that supplies for which a certificate of indebtedness was issued were necessary is competent, as sustaining the charge that a debt was incurred.[69] Under a statute imposing a penalty upon an officer of a school-district for neglect of duty to be collected by an action prosecuted by the director of said district or by any freeholder in said district, such an action may be brought by a director or freeholder in his own name, although the cause of action is in the district.[70]

**E. District Property, Contracts, and Liabilities***[71] — **1. Acquisition, Use, and Disposition of Property in General — a. Capacity to Acquire and Hold Property.** A school-district, through its proper boards or officers, has such power to acquire and hold property for school purposes as is expressly conferred upon it by statute, and such as is reasonably necessary to enable it to carry out such purposes.[72] It has been held under the various statutes that a school-district has no authority to acquire real property and hold it for any other purpose than as a school-site;[73] that it may, when necessary for the purposes of an extension which has been duly voted, acquire additional lands adjoining a schoolhouse lot;[74] that the boards of trustees of common schools are corporations to the extent of holding property transferred to them for school purposes;[75] that the trustees must hold a fee simple title to land on which they are authorized to

62. State *v.* Demerritt, 64 N. H. 313, 9 Atl. 99.

63. State *v.* Corbett, 64 N. H. 311, 9 Atl. 629.

64. Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655.

65. State *v.* Keeton, 9 Baxt. (Tenn.) 559.

66. Fitch *v.* Miller, 13 Wend. (N. Y.) 66.

67. Soule *v.* Thelander, 31 Minn. 227, 17 N. W. 373.

68. Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655.

69. Duty *v.* State, 9 Ind. App. 595, 36 N. E. 655.

70. Soule *v.* Thelander, 31 Minn. 227, 17 N. W. 373.

71. Apportionment of property and liabilities on alteration of boundaries or creation of new districts see *supra*, III, B, 2, b, (III); III, C, 2.

Assessment of school property for public improvements see MUNICIPAL CORPORATIONS, 28 Cyc. 1117.

72. Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554 (holding that Code, § 2743, only confers power on school-districts to purchase and hold property for the purposes specified by statute); Niles *v.* West New York Bd. of Education, 70 N. J. L. 1. 56 Atl. 312.

73. Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554.

74. Cousens *v.* Lyman School Dist. No. 4, 67 Me. 280.

75. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317, holding this rule to apply to boards of trustees for common schools in the respective wards in the city of New York. In this case personal property was transferred by bequest to and acquired by the board of education of the city and county of New York.

* III, E — III, J, by Henry H. Skyles.

expend money collected by taxation; [76] that conveyances of land for school buildings of brick or stone must be in fee simple or for ninety-nine years; [77] and that where the real property rights so acquired are vested in trustees, the board of school directors has no power to take the property,[78] except by conveyance from the trustees.[79] Where the property is acquired by means of a levy and collection of taxes, it is acquired by the district as an agency of the sovereign power and does not belong to it independently of the state or territory.[80] A municipal corporation may appropriate its corporate funds for the purchase of an interest in a building for public school purposes,[81] notwithstanding the superintendence of the school is in the hands of trustees not elected by the municipality, and they have contracted to keep a school in the building.[82]

**b. Conveyance, Dedication, or Reservation of Land For School Purposes.** The trustees or other board or officers having authority to acquire or hold property for school purposes may ordinarily receive the same by deed,[83] devise or bequest,[84] condemnation,[85] grant,[86] or dedication;[87] and, in surveying and laying out land

**76.** Dawson *v.* Common School Dist. No. 40, 115 Ky. 151, 72 S. W. 806, 24 Ky. L. Rep. 2027.

**77.** Delhi School Dist. No. 5 *v.* Everett, 52 Mich. 314, 17 N. W. 926, holding that a lease of land to a school-district "during the time it is used for school purposes" creates a base fee within such a requirement of Mich. Comp. Laws, § 3629. See also State *v.* Benton, 29 Nebr. 460, 45 N. W. 794.

**78** *In re* Old Eagle School Property, 36 Wkly. Notes Cas. (Pa.) 348.

**79.** *In re* Old Eagle School Property, 36 Wkly. Notes Cas. (Pa.) 348.

**80.** Kingfisher Bd. of Education *v.* Kingfisher County, 14 Okla. 322, 78 Pac. 455.

**81.** Danielly *v.* Cabaniss, 52 Ga. 211. And see MUNICIPAL CORPORATIONS, 28 Cyc. 616, 1534.

**82.** Danielly *v.* Cabaniss, 52 Ga. 211.

**83.** See Township No. 17 *v.* Petefish, 181 Ill. 255, 54 N. E. 920.

**Power to accept deed with restrictions.**— Where a proposal to sell certain land to a school-district contains certain restrictions, and the purchase of the land is voted without anything being done as to the restrictions, the committee or officers making the purchase have power to accept a deed containing restrictions not exactly similar to those in the proposal but more favorable to the district. Dix *v.* Wilmington School Dist. No. 2, 22 Vt. 309.

**84.** Cass County Tp. No. 17 *v.* Petefish, 181 Ill. 255, 54 N. E. 920; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317.

**85.** See, generally, EMINENT DOMAIN, 15 Cyc. 602.

**Compulsory purchase of land for school purposes** under the English Elementary Education Act of 1870, and the Lands Clauses Consolidation Act of 1845, § 68, see Kirby *v.* Harrogates School Bd., [1896] 1 Ch. 437, 60 J. P. 182, 65 L. J. Ch. 376, 74 L. T. Rep. N. S. 6; Rolls *v.* London School Bd., 27 Ch. D. 639, 51 L. T. Rep. N. S. 567, 33 Wkly. Rep. 129.

**Assent by voters.**— Under Mo. Rev. St. (1899) § 9772 (Annot. St. (1906) p. 4483), providing that when "a majority of the qualified voters and taxpayers of any school district, at any annual or special meeting called for that purpose," shall deem it necessary to have additional grounds for school purposes, the board of directors may proceed to condemn, etc., the assent of a majority of the qualified voters and taxpayers of the district is required and not a mere majority of those present at the meeting and voting, before the board may proceed to condemn. St. Louis County School Dist. No. 3 *v.* Oellien, 209 Mo. 464, 108 S. W. 529.

**Compensation.**—In England in assessing the compensation to be paid the owner of land compulsorily purchased for the erection of a board school, the noise made by children outside of such a school may be taken into consideration as injuriously affecting his adjoining land. Reg. *v.* Pearce, 67 L. J. Q. B. 842, 78 L. T. Rep. N. S. 681, 14 T. L. R. 465. And under the Elementary Education Act of 1870, a school-board need not give notice to treat to the owners of easements over the land taken, although compensation in respect to such easements is to be given as for land injuriously affected. Clark *v.* London School Bd., L. R. 9 Ch. 120, 43 L. J. Ch. 421, 29 L. T. Rep. N. S. 903, 22 Wkly. Rep. 354.

**86. Grant of public land for school purposes** generally see PUBLIC LANDS, 32 Cyc. 867 *et seq.*

**A grant for the purpose of a high school,** college, or other institution of learning and for no other purpose whatever does not include within its purposes the primary department of a public school. Whitlock *v.* State, 30 Nebr. 815, 47 N. W. 284.

**87.** See, generally, DEDICATION, 13 Cyc. 448.

**That the donor does not execute a deed until after bonds are voted** for the erection of a new building on the site donated is immaterial; the title passes to the school-district upon the acceptance of his offer, the delivery by him, and the taking possession by the district, of possession and using the site for the purposes for which it was donated. Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

**In default of the appointment of trustees** by the donor to manage land dedicated to school purposes, the management will devolve upon the school directors under the common

for a town, village, or city, sites may be selected and reserved for school purposes.[88] The construction of a conveyance of land for public school purposes is governed by the rules applicable to the construction of deeds or conveyances generally,[89] such as the rules relating to the construction of conditions and restrictions contained in the conveyance.[90] Where real estate is leased or conveyed to individuals as trustees and to their successors legally elected to hold for school purposes, it will be presumed that it is for the use of public schools established and maintained at the public expense;[91] and even if there were no such presumption, if the public school directors are in possession claiming under such a lease or conveyance, they will be presumed to hold rightfully until an adverse claimant appears with a better title and rebuts the presumption.[92]

**e. Contracts For Purchase or Lease.** The power of a school-district through its boards and officers to enter into a contract for the purchase or lease of school property is governed by statute.[93] Ordinarily a school-district can only act in its corporate capacity and can only bind itself by a contract to purchase or lease property, when authorized by legal votes passed at a district meeting regularly

school law independently of the acts of the assembly conferring it upon them. Pott *v.* Pottsville School Directors, 42 Pa. St. 132.

**A donation by a member of the school-board** of a site for a school building will not be avoided by reason of any interest such member may have in adjoining premises, where no fraud or undue influence is shown and the site selected is suitable for the purpose. Territory *v.* Logan County High School, 13 Okla. 605, 76 Pac. 165.

**88.** See San Francisco Bd. of Education *v.* Donahue, 53 Cal. 190 (holding that a map by commissioners wherein lots designated for school purposes were colored brown, and their accompanying certificate and report, sufficiently identified certain lots as reserved for school purposes); Wyoming *v.* Bell, 24 Grant Ch. (U. C.) 564.

**89.** See, generally, DEEDS, 13 Cyc. 600 *et seq.*

**Construction of a conveyance to a town exercising both municipal and parochial functions** see Medford First Parish *v.* Medford, 21 Pick. (Mass.) 199.

**Successor.**— In North Carolina the functions of the school-committees of districts under the old system having been transferred to the school-committees of the townships, a township committee is the successor of the district committee within the meaning of a deed conveying land to the thirty-eighth district of common schools "and their successor in office." Providence Tp. School Committee *v.* Kesler, 67 N. C. 443.

**A deed naming no grantee** but giving land "for the use of a school-house," etc., cannot operate by way of a grant or estoppel, there not being the necessary parties; but it creates a trust which a court of equity will protect and, if necessary, it will appoint a trustee and compel a conveyance to him of the legal title by the grantor or his heirs. Bailey *v.* Kilburn, 10 Metc. (Mass.) 176, 43 Am. Dec. 423.

**90.** See, generally, DEEDS, 13 Cyc. 683 *et seq.*

**Limitation of use.**— Where a deed of a certain lot situated within a certain school-district conveys the lot in fee and forever to the members of the school-board, and to "their successors in office for the erection of a school-house thereon, and for no other purposes," it does not create an estate merely upon condition either precedent or subsequent, but the words "for the erection of a school-house thereon, and for no other purposes" constitute only a limitation upon the manner in which the land should be used, and where afterward that portion of the school-district within which the lot was situated is severed from the remainder of the school-district and placed within the corporate limits of a city, the school officers of such city become and are the "successors in office" of the officers of the school-district within the meaning of such deed. Curtis *v.* Topeka Bd. of Education, 43 Kan. 138, 23 Pac. 98. So a covenant "that said land and buildings shall be used for the purposes of said school, and for no other purpose" does not create a base or qualified fee but restricts the use of the land to the particular purpose which will be binding upon all those taking title to the property with notice thereof, and was held properly disapproved by the county court to which it had been submitted under Va. Code, § 824. Bedford County *v.* Bedford County High School, 92 Va. 292, 23 S. E. 299. So it has been held that a condition in a deed to a school-committee "so long as the system of common schools shall be continued" is contrary to public policy, repugnant, and inconsistent with the nature of the grant and void. Providence Tp. School Committee *v.* Kesler, 67 N. C. 443.

**91.** McDonald *v.* Starkey, 42 Ill. 442.

**92.** McDonald *v.* Starkey, 42 Ill. 442.

**93.** See Schenectady Union College *v.* Coughlin, 89 Hun (N. Y.) 171, 35 N. Y. Suppl. 25 [*affirmed* in 159 N. Y. 540, 53 N. E. 1133]. And see the statutes of the several states.

**Under a statute permitting district officers to hold their office until their successors are elected and qualified,** a school-board may bind the school corporation by a contract of lease entered into after their successors have

called,[94] and the authority given at such a meeting must be given either expressly or by clear implication.[95] Where a contract for the lease of property is voted by a school-district at a meeting not regularly called, the district by reason of the illegality of the meeting is not bound by its vote,[96] and the agreement for want of mutuality is not binding upon the lessor,[97] nor is he estopped to deny the legality of the meeting by reason of the fact that he was a member and attended the meeting.[98] A contract for the purchase of a school-house site entered into by one school-district may, under some statutes, be completed by another district within which the property included in the agreement is embraced by subsequent legislation.[99] The condition of a bond for a deed that the school trustees as grantees shall be incorporated by a legislative enactment and thereby be authorized to hold the land for school purposes "exclusive of any restriction of school law" is not void as being contrary to public policy.[1]

**d. Use and Disposition in General.**[2] As a general rule such use or disposition only can be made of property acquired for public school purposes as is authorized by the deed of conveyance,[3] or by statute;[4] and as a general rule any other use of the property than for public school purposes is a perversion of the property from its intended use.[5] Thus if a conveyance of real estate expressly provides that it is conveyed for school purposes the land itself must be so used,[6] and it cannot be sold and the proceeds applied to school purposes,[7] although it has been said that it might be rented and the rent applied to such purposes.[8] But where the conveyance provides that the grantee shall keep the buildings in repair, the town or district may reconvey to the owner whenever it is unable to maintain the school buildings.[9] Under some statutes the proper school authorities may in their discretion sell school property and apply the proceeds to school purposes;[10] and under others they may sell school property whenever it is no longer required for such purposes,[11] and whether it is any longer so required is a question within their

been elected, but before they have qualified. Dubuque Female College *v.* Dubuque Dist. Tp., 13 Iowa 555.

94. Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

95. Marsh *v.* Dedham, 137 Mass. 235.

96. Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

97. Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

98. Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

99. Connor *v.* St. Anthony Bd. of Education, 10 Minn. 439. And see the statutes of the several states.

1. Chapman *v.* Multnomah County School Dist. No. 1, 5 Fed. Cas. No. 2,608, Deady 139.

2. Adverse possession of school lands see ADVERSE POSSESSION, 1 Cyc. 1118.

Use and disposition of school-house see *infra*, III, E, 2, f, (II); III, E, 2, h.

3. Calvert *v.* Pewee Valley, 25 S. W. 5, 15 Ky. L. Rep. 644, holding that where land is deeded to a town and individuals "for school purposes, and such other purposes consistent" therewith as a majority in interest of the owners may determine, its use for a school not to be abandoned but by written consent of the owners of ten thirteenths, and the town owning two thirteenths and representing most of the owners and also being a common school district, begins the erection of a school-house thereon, an owner of seven thirteenths holds subject to the use for school purposes, and has no right to possession of the land and cannot interfere with the building.

4. See McCullough *v.* Pittsburgh Fourth Ward School Directors, 11 Pa. St. 476.

5. Sherlock *v.* Winnetka, 68 Ill. 530, holding that where a charter empowers a village council as a board of directors to purchase grounds to erect buildings, borrow money to establish a school of high grade, and levy taxes for the erection and support of the same, a conveyance or lease of the buildings when completed without pay or rent to an individual or private corporation for the purpose of having a school taught therein for pay is a perversion of the property and not a use for a free school as contemplated by the charter.

**Burying-ground.**—A school-district has no power to withdraw a portion of the school property from school purposes and devote it to a burying-ground. Rapelyea *v.* Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175.

6. Morgan County *v.* Braner, 71 Ill. 546.

7. Morgan County *v.* Braner, 71 Ill. 546.

8. Morgan County *v.* Braner, 71 Ill. 546.

9. McGehee *v.* Woodville, 59 Miss. 648.

10. See Lowery *v.* Kernersville Bd. of Graded School Trustees, 140 N. C. 33, 52 S. E. 267.

11. McCullough *v.* Pittsburgh Fourth Ward School Directors, 11 Pa. St. 476.

Under Kan. Gen. St. (1901) §§ 6127, 6181, authorizing a sale of property belonging to a school-district when the same shall be no

discretion.[12] Such sale must be made in compliance with the terms of the statute authorizing it.[13] A material departure in such a sale from the terms of the advertisement thereof invalidates the sale.[14]

**e. Power to Mortgage.** The authorities of a school-district have only such power to mortgage the school property as is conferred by statute, either expressly or by necessary implication,[15] such as they may have as a necessary incident to the power of purchasing.[16] Where the title to lands of a school-district is in the district, the school trustees cannot execute a valid mortgage thereon except under authority from the district.[17]

**f. Reversion to Original Owner.** Under some statutes if school land is not used for school purposes for a specified time, the title reverts to the original owner,[18] upon his repaying the purchase-price and the value of improvements.[19] Such a reversion may also take place by virtue of a provision to that effect in the grant

longer needful for its use, the orders of a district meeting to the board of directors who were proceeding to build a school-house, to suspend their work and dispose of the material furnished are binding on the board, and they may be required by a court in a proper action therefor to obey the same. State *v.* Umbarger, 69 Kan. 66, 76 Pac. 429.

12. McCullough *v.* Pittsburgh Fourth Ward School Directors, 11 Pa. St. 476.

13. Strathern *v.* Gilmore, 184 Pa. St. 265, 39 Atl. 83 (holding that the requirement of the act of April 11, 1862, that the names of the members of the board of directors voting in the negative and affirmative shall be so entered on the minutes of the board, must be substantially complied with); Reed *v.* Jefferson Tp. Public School Dist., 32 Pittsb. Leg. J. N. S. (Pa.) 387.

**Under a Texas statute,** Sayles Annot. Civ. St. art. 3990, the trustees of any school-district may sell property of the district only upon an order of the commissioners' court. Crouch *v.* Posey, (Tex. Civ. App. 1902) 69 S. W. 1001.

**Sale at auction** see Edgar *v.* North British, etc., Ins. Co., 27 Quebec Super. Ct. 299.

14. Strathern *v.* Gilmore, 184 Pa. St. 265, 39 Atl. 83, holding that material departures in a sale of land, from the terms of the advertisement, as to the amount of land sold and the terms of payment, invalidate the sale.

15. See the statutes of the several states; and cases cited *infra*, this note.

**Arkansas act** of 1905 authorizing the special school-district of Little Rock to borrow money and mortgage the real property of the district therefor, empowers the district to mortgage for this purpose all or part of the real property in the district as the school-board may deem advisable. Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438.

**Under Pennsylvania act** of May 22, 1901, the trustees of a state normal school have no power to mortgage school property where authority has not been given by special statute, except for the purpose of refunding an existing bonded indebtedness at a lower rate of interest. School Bonds, 11 Pa. Dist. 134, 26 Pa. Co. Ct. 222.

**A description of land in a school fund mortgage** as the northeast part of a specified tract, containing a specified number of acres, is insufficient. Buck *v.* Axt, 85 Ind. 512.

16. Matter of Morrisville Borough School Dist., 3 Phila. (Pa.) 181, holding that under the general school law of 1854 school directors have such power.

17. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

18. Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554 (holding that where the action of school directors in purchasing a school site is reversed by the county superintendent, such action prevents title from vesting in the school-district, and the situation is the same as if no deed had been given or the property had been abandoned under Code, § 2816, providing for a reversion in case of non-user for school purposes for two years continuously); Oak Dale Independent Dist. *v.* Fagan, 94 Iowa 676, 63 N. W. 456.

**Me. Rev. St.** § 33, providing that a school-house lot shall revert to the original owner when a school-house has ceased to be thereon for two years, is not applicable to a case where no school-house has been built on the lot within two years from the time the lot was designated for location by the municipal officers. Jordan *v.* Haskell, 63 Me. 189.

**Under Pennsylvania act** of April 9, 1867, a school-board acquires an easement only and not a fee in the land designated for school purposes, and when the land is abandoned for school purposes it reverts to the owner of the fee. Lazarus *v.* Morris, 29 Pa. Co. Ct. 505.

19. Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554 (without interest); Oak Dale Independent Dist. *v.* Fagan, 94 Iowa 676, 63 N. W. 456 (holding, however, that where one has neither paid nor tendered the purchase-price, nor the value of the improvements, he is not entitled to the land).

**Tender of reconveyance.**— Where title to real estate purchased by school directors never vested in the district because of the reversal of their action by the county superintendent, the district is not bound to tender a reconveyance before it can maintain a suit to recover the price from the seller. Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554.

to the school authorities.[20] But in the absence of such a provision in the statute or grant, a school-district does not lose its title to land, as to an adverse claimant, by non-user thereof for a time less than that sufficient to establish a prescriptive right in another, usually twenty years.[21]

**2. School Buildings — a. Authority and Duty to Provide — (i) *In General.*** The powers and duties of school-districts relative to the constructing or providing of buildings for school purposes are governed by the terms of the statute relating thereto, and are such only as are expressly or impliedly conferred or imposed by such statutes;[22] and all statutes granting and defining such powers should be construed not only as a grant of power to such boards or officers, but also as a limitation thereon.[23] Thus under some statutes the school authorities cannot proceed to erect a school building until the question has been submitted to the electors of the district and they have authorized it by a legal vote.[24] The power of determining the necessity for and the kind of school-house may be confided to the school-districts or to certain local boards or officers therein;[25] and in such case the exercise of such power is within the discretion of the board of officers, within the limits

**20.** Courtney *v.* Keller, 4 Pennyp. (Pa.) 38, holding that where a grant of land in fee to a school-board provided "that in case the school law now in existence should be abolished, and the public school cease to exist" the land should revert, the word "and" in the clause quoted should be read "or," and that when there was an abandonment of the use for the purpose of a school-house the right of the school-board ceased. See also Waits *v.* Bailey, 192 Pa. St. 562, 44 Atl. 262.

**21.** Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319 [*affirmed* in 4 Abb. Dec. 73, 5 Transcr. App. 151].

**22.** See Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

**Power to build a school-house out of funds provided for that purpose** by a district confers no power to build a school-house and then make its cost a charge against the district. Nevil *v.* Clifford, 63 Wis. 435, 24 N. W. 65.

**Under the Oklahoma act** of March 4, 1893, relating to the public schools and the session laws amendatory thereto, a country school-district, not embracing a city of the first class, and uniform graded schools or separate schools for colored pupils, has no authority to construct more than one school-house in the district or to maintain more than one school at the public expense. Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110.

**House for teachers.**— School trustees have no authority to expend money to erect a house for teachers. Grattan *v.* Ottawa Separate School Trustees, 8 Ont. L. Rep. 135 [*affirmed* in 9 Ont. L. Rep. 433].

**23.** State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**24.** State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**New York Consolidated School Law** (Laws (1894), c. 556), providing that the board of education in districts, where districts correspond with those of the city, have the power to call special meetings of the inhabitants of their respective districts for the purpose of authorizing the erection of school buildings, and the raising of the money to pay therefor, does not require that a special meeting of the inhabitants shall give any specific direction relative to the construction of the school building; but such matters shall be left to the discretion of the board of education. Lawson *v.* Lincoln, 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667 [*affirmed* in 178 N. Y. 636, 71 N. E. 1133].

**25.** Sheldon *v.* Centre School Dist., 25 Conn. 224; Lawson *v.* Lincoln, 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667 [*affirmed* in 178 N. Y. 636, 71 N. E. 1133].

**Separate schools.**— In Oklahoma school-districts which include cities of the first class may, without special authority, erect in the district such buildings as may be deemed advisable for the separate use of white and colored children, regardless of the question whether or not they have the legal right to prohibit colored children from attending a white school. Kingfisher Bd. of Education *v.* Kingfisher County, 14 Okla. 322, 78 Pac. 455. See also *infra*, III, I, 1, c, (II).

**In Ohio** under the act of April 16, 1900 (1 Rev. St. § 3927 *et seq.*), no imperative duty rests upon a township board of education to purchase a site and erect a school building until after a determination by the board of a necessity therefor, and such determination may be reconsidered by the board or its successor, subject only to existing contract rights. State *v.* Chester Tp. Bd. of Education, 25 Ohio Cir. Ct. 424.

**Under Nebr. Comp. St.** c. 79, subd. 2, § 10, subject to certain restrictions, imposed by the legislature, the qualified electors of school-districts are intrusted with the power to determine what sort of a school-house shall be erected within the school-district and the extent of the expenditure to be made therefor; and when so determined the school-board has no authority to change the same and thus bind the district for an increased expenditure. Sherman County School Dist. No. 35 *v.* Randolph, 57 Nebr. 546, 77 N. W. 1073; Gehling *v.* School Dist. No. 56, 10 Nebr. 239, 4 N. W. 1023.

defined by the statute, and cannot be interfered with by the courts,[26] except in cases where it has been manifestly abused.[27] Thus under the various statutes it has been held competent to adopt a school-house, by whatever means it may have come into existence,[28] to purchase a site having already a school-house thereon,[29] to build another school-house if necessary,[30] or to provide for the erection of a new school-house in a more central locality;[31] and that it is the duty of the proper authorities to provide building accommodations for all the school children in the district,[32] and to rebuild a school-house which has been destroyed by fire.[33] In the building of a school-house to serve present needs it is proper for the school authorities to go beyond the immediate necessity and make reasonable provision for what the district seems likely soon to need for the service and accommodation of the increasing population and scholars.[34]

(II) *HALLS OR ROOMS IN CONNECTION WITH SCHOOL BUILDING.* Under some statutes the school authorities are also authorized to provide such rooms or halls in connection with the school building as in the exercise of an honest discretion they shall judge the interests of the district require for the purposes of its schools, reference being had to its conditions and circumstances,[35] such as a

**26.** Sheldon *v.* Centre School Dist., 25 Conn. 224; Jamison *v.* Houston, (Miss. 1894) 15 So. 114; *In re* Brown's Mill School Dist., 27 Pa. Co. Ct. 410 (holding that where directors, with an honest purpose to serve the public interest, are attentive and faithful in the performance of their duties, their conclusions with respect to providing additional school facilities are questions of policy and expediency which will not be revised by the courts); State *v.* Watson, (Tenn. Ch. App. 1896) 39 S. W. 536.

**27.** Sheldon *v.* Centre School Dist., 25 Conn. 224.

**Under Pennsylvania Act of June 6, 1893** (Pub. Laws 330), §§ 1, 2, where school directors wilfully neglect or refuse to provide suitable school buildings, the citizens may petition the court of common pleas for the appointment of an inspector upon whose report the court may grant a rule on the directors who have failed without justifiable excuse to perform their duties, to show cause why they should not be removed, and under such statute the court may also ascertain the facts and determine whether the directors have exercised a sound discretion. On the report by an inspector appointed under such act, the court may draw inferences from the facts different from those drawn by the inspector; and a decree of the common pleas reviewing the discretion of school directors as to providing school buildings, if reviewable, will be disturbed only for a manifest abuse of discretion. *In re* Walker, 179 Pa. St. 24, 36 Atl. 148. Under such statute a lawyer may be appointed as a competent inspector; and it is not necessary that the petitioners give notice to the school directors of the time and place of the hearing of the petition for the appointment of an inspector, but it is enough that the inspector give the prescribed notice of the investigation. *In re* Kittanning Tp. School Directors, 179 Pa. St. 60, 36 Atl. 151.

**28.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**29.** People *v.* Sisson, 98 Ill. 335, holding that power to borrow money for building school-houses and purchasing sites embraces the power to purchase a site having a school-house thereon.

**30.** Wood *v.* Farmer, 69 Iowa 533, 29 N. W. 440, holding that Code (1873), § 1727, providing that each subdistrict may have more than one school, implies the authority to build another school-house, if it is necessary in order to maintain more than one school.

**The erection of a new school-house will not be enjoined** unless an abuse of discretion be shown. Mason *v.* Mulligan, 12 Kulp (Pa.) 120.

**31.** Seaman *v.* Baughman, 82 Iowa 216, 47 N. W. 1091, 11 L. R. A. 354, holding that a tax voted for the construction of a new school-house will not be declared illegal and its collection enjoined on the ground that the building is not necessary, where it appears that the old school-house is some distance from the center of the subdistrict and that some of the scholars cannot attend by reason of its distance from their homes, that it cannot be removed to a new site without considerable damage and expense, and that if moved it would be available for use for but a few years because of its age and weakness. See also Green School Dist. No. 1 *v.* Bailey, 12 Me. 254.

**32.** York Tp. School Dist.'s Petition, 10 Pa. Dist. 687, 15 York Leg. Rec. 74; Rex *v.* West Riding of Yorkshire County Council, [1906] 2 K. B. 676, 75 L. J. K. B. 933, 95 L. T. Rep. N. S. 248. See also *infra*, III, I, 1, a.

**Mandamus** will lie to compel a board of school trustees to provide sufficient accommodations for the children of the school-district. *Ex p.* Gallagher, 31 N. Brunsw. 472. And see, generally, MANDAMUS, 26 Cyc. 281.

**33.** Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

**34.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**35.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**Statement of rule.**— Under a statute authorizing a school-district to raise money for the purpose of erecting, hiring, or purchasing a building to be used as a school-house, it is within the province of the school-district to

school-house with a hall on an upper floor.[36] But it cannot use the occasion of building a school-house as a pretext for making a public hall for purposes not connected with the schools of the district,[37] or for making rooms for the purpose of realizing profit by renting for pay.[38]

(III) *AUTHORITY OF TOWNS AND TOWN OFFICERS.* A municipality may, as a necessary incident to the administration of municipal affairs and where no law forbids, erect and maintain school buildings,[39] and especially may it do so where authority is conferred upon it to aid in the building up of such schools as it may think proper.[40] Under some statutes municipal officers may proceed to erect a school-house within the municipality where the school-district authorities unreasonably neglect or refuse to do so;[41] but in such a case such officers ordinarily can legally expend therefor so much money only as the district has voted for that purpose.[42] A civil township as distinguished from a school township has no authority to make a contract for the erection of a school-house;[43] but it is the duty of the school township trustees to provide buildings for the schools,[44] and they may levy a tax to build school-houses, and their contracts for building such houses are binding on the school township,[45] although such a school-house may be used for township purposes.[46] Under some statutes the township trustees of adjoining

build a hall in connection with a school-house, designed to accommodate the schools and inhabitants of the district for the purpose of examinations and exhibitions, and such other things as are proper and customary in connection with district schools. Greenbanks *v.* Boutwell, 43 Vt. 207.

**36.** Sheldon *v.* Centre School Dist., 25 Conn. 224.

**Where a school-district erects a school-house with a hall on the second floor** and votes to levy a tax to defray the expense thereof, aside from any question as to the propriety of erecting such hall, the proceedings of the district are not illegal as an unwarrantable abuse of power, or as involving an extravagant and improper outlay of money. Sheldon *v.* Centre School Dist., 25 Conn. 224.

**Hall as builder's property.**—Where a school-district accepts the proposal of a builder to erect a school-house for a certain sum with liberty to build a public hall over the same as the builder's property, he allowing the district to have the use of the hall free of charge for meetings of the district and for examination of the schools, etc., and the house is so built, the district has not exceeded its authority and a tax is legally assessed to pay for the house. George *v.* Mendon Second School Dist., 6 Metc. (Mass.) 497.

**37.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**38.** Greenbanks *v.* Boutwell, 43 Vt. 207.

**39.** Cartersville *v.* Baker, 73 Ga. 686. And see MUNICIPAL CORPORATIONS, 26 Cyc. 616.

**40.** Cartersville *v.* Baker, 73 Ga. 686.

**41.** Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**In New Hampshire** power is given in the first instance to each school-district by vote to raise money to build or repair school-houses for the use of the district and to erect the same, but on their unreasonable neglect or refusal the jurisdiction devolves on the selectmen of the town who are bound to assess a sufficient tax on the district for this purpose. Blake *v.* Sturtevant, 12 N. H. 567. And where the selectmen take such action, it will be presumed, in the absence of proof to the contrary, that they acted in good faith in determining the amount to be assessed, and that such amount was necessary. Converse *v.* Porter, 45 N. H. 385. A petition to the selectmen of a town, representing that a certain school-district is destitute of a suitable school-house and that the district refuses to provide one, and praying that the selectmen will build a suitable house according to the statute, is sufficient to authorize the assessment of a tax therefor, although not expressly prayed for. Converse *v.* Porter, *supra*. See also *infra*, III, F, 5.

**Evidence of neglect.**— Where a tax is raised by a district to build a school-house, and a committee is appointed for this purpose, but owing to some difficulty as to the land for the location of the house the committee does not proceed, and a second meeting is called to take the whole matter into consideration, and the district is unable to elect a committee but requests the selectmen to proceed and build the house, it is sufficient evidence of neglect and refusal on the part of the district to give the selectmen jurisdiction to assess the tax and locate and build the house. Blake *v.* Sturtevant, 12 N. H. 567.

**42.** Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**43.** Hornby *v.* State, 69 Ind. 102 (holding that a complaint against a trustee of a civil township to compel him as such to erect a school-house within its territorial limits is bad on demurrer, as such proceeding if brought at all must be against the trustee of the school township); McLaughlin *v.* Jefferson County Shelly Tp., 52 Ind. 114; Carmichael *v.* Lawrence, 47 Ind. 554.

**44.** Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

**45.** Heal *v.* Grant County Jefferson Tp., 15 Ind. 431; Harmony Tp. *v.* Osborne, 9 Ind. 458; Adamson *v.* Warren County, 9 Ind. 174.

**46.** Harmony Tp. *v.* Osborne, 9 Ind. 458.

townships have discretionary power to establish joint or union school-districts and build joint school-houses when petitioned for.[47]

(IV) *ABANDONMENT OR CLOSE OF SCHOOL.* Under some statutes the school authorities cannot abandon a school-house having a daily average attendance of more than a specified number of pupils,[48] except with the written consent of a majority of the legal voters of the school-district,[49] and subject to the overruling judgment of the county superintendent on appeal.[50] But where under such statute the attendance at the school is less than such number the closing of the school by a trustee is within his discretion and not subject to revision by the courts;[51] and where the trustee acts in good faith in closing the school he cannot be compelled to reopen the same.[52]

**b. Location and Acquisition of Site**[53] — (I) *IN GENERAL.* Questions concerning the location and acquisition of a site for a school-house are governed by the local statutes relating thereto,[54] under which it is sometimes provided that the

47. Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18; Henricks *v.* State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933. See also State *v.* Sweeney, 24 Nev. 350, 55 Pac. 88.

**The signatures of a majority of the school patrons** of each former district to a petition is not required under such statute, but only the majority of the patrons of the two districts together. Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18.

**Determination of the necessity for a joint school-house** under Ind. Acts (1903), c. 229, § 1, and Burns Annot. St. (1901) § 8085*f*, see Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18.

48. Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

**A township advisory board** has no power by refusing to appropriate money for the erection of a school-house to abolish a school-district. Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

49. Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

50. Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700.

51. State *v.* Seeley, 163 Ind. 244, 70 N. E. 805; Davis *v.* Mendenhall, 150 Ind. 205, 49 N. E. 1048, holding that such discretion is not abused by discontinuing a school for an indefinite time because the pupils attending can be accommodated as well or better at other schools, and notifying patrons and offering them the privileges of other convenient schools. See also *infra*, III, I, 1, c, (VI), (B).

52. State *v.* Seeley, 163 Ind. 244, 70 N. E. 805.

53. **As affecting the validity of a school-house tax** see *infra*, III, F, 5.

54. See the statutes of the several states; and cases cited *infra*, this note.

**Amount and measurement of site.**— Under Iowa Code, § 1825, providing that not exceeding an acre shall be taken under condemnation proceedings for the location of a school-house, and section 1826, requiring the site to be on a public highway, the acre may be so measured as to be exclusive of the road. Salisbury *v.* Highland Tp. School Dist., 101 Iowa 556, 70 N. W. 706.

**Statute fixing site.**—The fact that a statute creating a school-district fixes the site of the school building does not render the act invalid, since if the legislature has not the power to fix the site beyond revocation, it can be held to have made a provision which is directory merely. Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289.

**House beyond city limits.**— It has been held that the school authorities have power to maintain a school in a house beyond the city limits for the instruction of children living in the city limits. Grove *v.* Peoria Bd. of School Inspectors, 20 Ill. 532.

**A hotel site may be purchased** to be used for the construction of a school-house, under 3 Ballinger Annot. Codes & St. Wash. § 2367. Nichols *v.* Pierce County School Dist. No. 10, 39 Wash. 137, 81 Pac. 325.

**In Canada,** under Ont. Pub. School Law, §§ 31, 34, the trustees of every rural school section have power to select a site for a new school-house or to agree upon a change of site for an existing school-house, and shall call a special meeting of the rate-payers of the section to consider the site selected; and in case a majority of the rate-payers at a special meeting differ from the trustees as to the suitability of the site selected by the trustees, an arbitrator must be appointed by each party to whom the difference must be submitted. *Re* Cartwright Public School Trustees, 5 Ont. L. Rep. 699 [*affirming* 4 Ont. L. Rep. 272]. Such arbitrators can only determine whether or not the site selected by the trustees is a suitable one and have no power to select another site. *In re* Sombra Public School, 40 Can. L. J. N. S. 32, 6 Ont. L. Rep. 585. Where, however, a majority of the rate-payers at a special meeting vote in favor of a change of a school site, without any selection of site having been first made by the trustees, there is no foundation for an arbitration under such statute. *Re* Cartwright Public School Trustees, 5 Ont. L. Rep. 699 [*affirming* 4 Ont. L. Rep. 272]. Similar provisions are made under the Canada Public School Acts of 1891, §§ 64, 65. See Coupland *v.* Nottawasaga School Trustees, 15 Grant Ch. (U. C.) 339, holding that a dissent by school trustees from a decision of the rate-payers as to a

site selected must be on a public road or highway,[55] in a central locality,[56] and, except in cities, must not be within a certain distance of the residence of an objecting owner,[57] or must not be within a certain distance of another school already established in the district.[58]

(II) *POWER TO SELECT AND ACQUIRE SITE.* The power to select and acquire a school-house site is, under some statutes, vested in the voters or people of the school-district,[59] or subdistrict;[60] and while, under such statutes, it is probable that in an emergency a school-board might make a temporary arrangement for the accommodation of a school,[61] it cannot wilfully disregard the right of the people to say what shall be done with reference to the permanent location of a

site for the school should be intimated promptly and, if not announced until after the expiration of the current year, it is too late. An award is insufficient under such statute, where the description of the lot is not fully inserted, but a blank is left therefor which is afterward filled in and the word "lot" altered to "gore." Ryland *v.* King, 12 U. C. C. P. 198; Vance *v.* King, 21 U. C. Q. B. 187. A special meeting of the freeholders and householders at which it is agreed to procure a certain site is null and void under such statutes, where before such meeting another meeting had been convened according to law and upon a difference of opinion existing, arbitrators were appointed to decide upon a certain site, which decision remains in force. Ryland *v.* King, *supra.* See also Vance *v.* King, 21 U. C. Q. B. 187.

55. Mendenhall *v.* Leighton Independent School Dist., 137 Iowa 554, 115 N. W. 11; Salisbury *v.* Highland Tp. School Dist., 101 Iowa 556, 70 N. W. 706.

56. Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110, holding that under St. (1893) § 5773, a country school district is prohibited from selecting a building site for a school-house more than one-half mile from the center of the district.

**Where the boundaries of a school-district** are changed by detaching territory therefrom, it does not necessarily require the selection of a new school-house site, in case the site previously selected is more than one-half mile from the center of the district remaining after such territory is detached, and such fact does not require that, before any school-house can be erected upon the previously selected site, the question of the designation of the site shall be resubmitted to the people of the district. Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

**The centralization of township schools** is a duty imposed upon the township board of education under the Ohio Act of April 16, 1900 (1 Rev. St. 3927 *et seq.*), although the mode and manner of performing it is discretionary. State *v.* Chester Tp. Bd. of Education, 25 Ohio Cir. Ct. 424.

57. Mendenhall *v.* Leighton Independent School Dist., 137 Iowa 554, 115 N. W. 11.

**The term "owner,"** as used in Iowa Code, § 2814, as amended by Laws (1907), c. 153, authorizing school corporations to own land for school-house sites which must be at least thirty rods from the residence of any owner who objects to a site being placed nearer, refers to the owner of a residence within thirty rods of a school-house site, and not to the owner of a site; and such prohibition applies to school-house sites whether acquired by purchase, devise, gift, or condemnation. Mendenhall *v.* Leighton Independent School Dist., 137 Iowa 554, 115 N. W. 11.

58. Pickler *v.* Davie County Bd. of Education, 149 N. C. 221, 62 S. E. 902, holding, however, that such a provision does not prohibit the repairing or building of a new school-house on a site where a school has long been established.

59. Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767; Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

**Under Me. Rev. St. c. 11, § 24,** the power "to determine where their school houses shall be located" is given directly to the several school-districts in the first instance. Norton *v.* Perry, 65 Me. 183.

**Vote authorizing building of new school-house.**—Where the majority of ballots cast at a school election of which sufficient notice has been given are for a proposed school-house site and for borrowing money and issuing a bond, the proposition submitted being to change the school-house site and borrow money to build a new school-house, such ballots sufficiently indicate an intention to vote for the building of a new school-house and authorize its building. Shires *v.* Irwin, 87 Ill. App. 111.

**Sufficiency of ballot.**—Where an election notice specifies that the question for determination is whether a new school-house shall be built, and if so whether its location shall be changed, ballots reading, "For the proposed school-house site the N. W. Cor. of the S. W. qr. of section 29, house to be 20 rods south of the half section line," sufficiently indicate that the voters favor the proposition to build a new school-house. Shires *v.* Irwin, 87 Ill. App. 111.

60. Seibert *v.* Botts, 57 Mo. 430, holding that under Wagner St. § 12, the selection of a site for a school-house must be made at a meeting of the voters of a subdistrict.

61. State *v.* Lyons, 37 Mont. 354, 96 Pac. 922, 925, in which it was said by Brantly, C. J., that "in cases of fire or pestilence, or in case of danger of an action in ejectment or damages after lawful notice to vacate premises belonging to other persons, it might well be said that they have implied power to make any temporary arrangement to accommodate the school."

school,[62] and therefore cannot locate and acquire a school-house site except upon the authority of the electors of the school-district or township at a regularly called meeting or election,[63] as upon the authority of a two-thirds [64] or majority vote of the voters of the school-district.[65] But under such statutes the question of the selecting of a site need not be submitted to the vote of the people in order to authorize the erection of a new school building on an old site.[66] Under some of these statutes the voters of the district are required only to select a school site by a general designation; [67] and it is then the duty of the school-board to locate the site on the land selected, by fixing its boundaries, and it is vested with discretion as to the precise limits of the site selected, as well as to the amount to be taken, within the statutory limits.[68] Under some statutes, however, the board of directors or other proper officers, if in their judgment the public interests require it, may take steps to select a school-house site, if no one locality receives a majority of the votes cast at such an election,[69] or if a certain number of the minority object to the place adopted by the majority.[70] And under other statutes, upon the petition of a certain number of the voters of the

**62.** State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**63.** *Dakota.*— Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 60 Dak. 255, 42 N. W. 767.

*Illinois.*— A board of education has no power to locate and purchase a school-house site without first submitting the question to a vote of the electors of the township. Shires *v.* Irwin, 87 Ill. App. 111; Carolan *v.* Township Bd. of Education, 81 Ill. App. 359 [*reversed* on other grounds in 182 Ill. 119, 55 N. E. 58]; Ziesing *v.* Matthiessen, 79 Ill. App. 560.

*Massachusetts.*— Marsh *v.* Dedham, 137 Mass. 235.

*Michigan.*— Detroit Bd. of Education *v.* Moross, 151 Mich. 625, 114 N. W. 75, holding that under Comp. Laws, § 4665, subd. 4, and §§ 4728 and 4729, proceedings by a board of education of a city to condemn a school site without prior action by the voters of the district are unsustainable.

*Missouri.*— Seibert *v.* Botts, 57 Mo. 430.

*Nebraska.*— Ladd *v.* School Dist. No. 6, 70 Nebr. 438, 97 N. W. 594.

*Oklahoma.*— Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

*Canada.*— Concurrence of freeholders under 14 & 15 Vict. c. 48, and 16 Vict. c. 185, see Orr *v.* Ranney, 12 U. C. Q. B. 377.

See 43 Cent. Dig. tit. "Schools and School Districts," § 170.

**An affirmative vote** of the electors, selecting a site for a township high school, invests the board of education with power to acquire the site by purchase or condemnation. Thompson *v.* Rio Tp., 218 Ill. 540, 75 N. E. 1048.

**A subsequent election** authorizing the school-board to erect a school-house on the site purges the illegality of a location and purchase without first submitting the question to popular vote. Township Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58 [*reversing* 81 Ill. App. 359].

**That a particular site to which a school-house is to be moved has been designated** by the electors of a district is not an implied direction to the school-board to purchase or lease such site. Ladd *v.* School Dist. No. 6, 70 Nebr. 438, 97 N. W. 594.

**64.** Colt *v.* Roberts, 28 Conn. 330, holding that Act (1856), § 17, authorizing the committees of school-districts to provide suitable school-rooms, was not intended to qualify the law which required a vote of two thirds to establish the site of the school-house.

Conn. Gen. St. (1902) § 2209, making a two-thirds vote necessary where a school-district undertakes to fix or change a school-house site and section 2212, prescribing that each town assuming the control of its school shall constitute one school-district, etc., when construed in the light of Pub. Acts (1841), c. 40; Pub. Acts (1856), c. 51; Pub. Acts (1865), c. 112; Pub. Acts (1868), c. 102; Pub. Acts (1878), c. 124, and in view of the difference between subordinate school-districts and towns, do not apply to consolidated town school systems. Benham *v.* Potter, 77 Conn. 186, 58 Atl. 735.

**65.** Thompson *v.* Rio Tp., 218 Ill. 540, 75 N. E. 1048; School Directors *v.* Wright, 43 Ill. App. 270 (holding also that an injunction will lie to prevent the board of directors from expending money to build a school-house upon an unauthorized site); Bean *v.* Glovers School Dist. No. 11, 38 Vt. 177.

**66.** Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

**67.** Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756.

**Sufficiency.**—A selection by voters describing the site "for locating a new school-house on the hill at the south end of Sixth street, in Peterson's field," has been held sufficiently definite on which to base a definite location of the site by the school-board. Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756.

**68.** Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756.

**69.** School Directors *v.* Wright, 43 Ill. App. 270.

**70.** Bean *v.* Glovers School Dist. No. 11, 38 Vt. 177.

**Under Me. Rev. St.** c. 11, § 32, if more

district who are aggrieved by the location as made, a committee may be appointed to examine and report thereon.[71] Under still other statutes it is provided that the power of locating and acquiring a school-house site is vested in the township trustees,[72] township board of education,[73] board of school directors,[74] school-district trustees,[75] or other local boards or officers;[76] and their action in selecting and acquiring the site will not be controlled by the courts,[77] except for a manifest abuse of their discretion.[78]

(III) *PROCEEDINGS FOR PURCHASING OR TAKING LAND IN GENERAL.* The power to locate and acquire a school-house site being derived from statute, there must be a strict compliance with all the statutory steps or proceedings to be taken by the board or officers vested with such power.[79] There must be at least a substantial compliance with the various provisions that the officers making the location shall file with the clerk of the district within a prescribed time[80] a

than one third of the voters present and voting object to the location selected, the municipal officers of the town on written application of any three or more of said voters or any committee of the district may call a district meeting, and after a hearing thereat may decide where the school-house shall be placed; but until more than one third of the voters present and voting have objected, the municipal officers have no authority to decide. Jordan *v.* Cape Elizabeth School Dist. No. 8, 60 Me. 540; Goodwin *v.* Nye, 60 Me. 402. And where there does not appear to have been such a disagreement on the part of the district, a vote of the school-district requesting the municipal officers to fix the location of their school-house makes the action of the municipal officers under it merely recommendatory and not compulsory on the members of the district. Tozier *v.* Vienna School Dist. No. 2, 39 Me. 556.

**A written objection** by those objecting is not necessary under such statute, the fact of their voting against the acceptance of the report as to the location is sufficient. Norton *v.* Perry, 65 Me. 183.

**71.** See the statutes of the several states; and cases cited *infra*, this note.

**A selectman cannot properly act in the appointment of a committee** to locate a school-house where his brother is a party. True *v.* Melvin, 43 N. H. 503.

**Objections to the persons appointed to locate a school-house** must be taken before the hearing, if known. True *v.* Melvin, 43 N. H. 503.

**The power of a committee appointed** to select a school-house site is not affected by a subsequent petition for, and the calling of, a meeting to reconsider the vote appointing them. Ayers *v.* Cornish School Dist., 67 N. H. 169, 29 Atl. 416.

**72.** Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18; Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170; Crist *v.* Brownville Tp., 10 Ind. 461, majority of the township trustees.

**The decision of such trustees cannot be attacked** in a proceeding by a trustee to condemn lands for such location. Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170.

**73.** Hughes *v.* Madison Tp. Bd. of Education, 13 Ohio St. 336.

**74.** Doubet *v.* Clearfield Independent Dist., 135 Iowa 95, 111 N. W. 326 (holding that under Code, § 2773, power to locate a school site is vested exclusively in the school-board); Carpenter *v.* Columbia Tp. Independent Dist. No. 5, 95 Iowa 300, 63 N. W. 708 (holding that under Code (1873), § 1724, providing that the board of school directors shall fix the site of each school-house, taking into consideration the geographical position and the convenience of the people of each portion of the subdistrict, the controlling consideration is not the wishes of a majority of the legal voters but the geographical position, and the welfare of the people not voters, or who are at an inconvenient distance from the proposed site, are not to be ignored); Roth *v.* Marshall, 158 Pa. St. 272, 27 Atl. 945; Hibbert *v.* Nether Providence School Dist., 8 Del. Co. (Pa.) 285; Mercur *v.* Nether Providence Tp. School Dist., 8 Del. Co. (Pa.) 269; Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. (Pa.) 14.

**75.** Davis *v.* Humphrey, 52 S. W. 946, 21 Ky. L. Rep. 660; Zabriskie *v.* Bergen County School Dist. No. 10, 52 N. J. L. 104, 18 Atl. 683; Meisner *v.* Meisner, 32 Nova Scotia 320, holding that under Acts (1895), c. 1, § 24, the choice of a site for a school building is vested in the trustees subject to the sanction of the inspector.

**76.** Witherop *v.* Titusville School Bd., 7 Pa. Co. Ct. 451, school controllers.

**77.** Roth *v.* Marshall, 158 Pa. St. 272, 27 Atl. 945; Witherop *v.* Titusville School Bd., 7 Pa. Co. Ct. 451.

**78.** Tarbell *v.* Montrose Borough School-Dist., 129 Pa. St. 146, 18 Atl. 758.

**79.** Norton *v.* Perry, 65 Me. 183; Coal, etc., Co. *v.* Dunphy, 11 Pa. Dist. 218, holding that a resolution of the board of directors with reference to acquiring a site for a school-house must be adopted after due deliberation by a majority of the whole number.

**80.** Norton *v.* Perry, 65 Me. 183, holding that under Rev. St. c. 11, § 32, municipal officers must file their certificates within ten days.

**The fact that the officers had previously certified that they were unable to agree**, but such certificate was not recorded and is withdrawn, does not prevent them from making

certificate of their determination as to the location;[81] that the school trustees shall designate to a meeting of the voters called to vote and appropriate money for the purchase or acquirement of lands, the place where the lands proposed to be acquired or purchased lie,[82] and that the voters must vote on the purchase or acquisition of the lands so designated;[83] and that the town or school-district meeting shall designate a suitable place for the school-house before the school authorities can select and locate a school-house lot.[84] A location or report when filed should contain a definite description of the property selected,[85] and a location is void if it makes an insufficient or defective description of the premises to be taken,[86] and in such case new proceedings must be had to make a valid location.[87]

(IV) *BY CONDEMNATION.* Under some statutes, after the prescribed steps relative to the location of the land have been taken, the proper school authorities may then take steps to condemn the land selected,[88] if the owner thereof refuses to sell[89] or demands an unreasonable price,[90] and to procure the appointment of persons to decide upon the value of the land;[91] and upon the tender or payment of the sum so fixed to the owner of the land title thereto vests in the school-district.[92] Under statutory authority to take land for a school-house site, it has been held that land may be appropriated for such purpose, although the school

a certificate of their determination if it is filed within the time allowed. Norton *v.* Perry, 65 Me. 183.

**81.** Norton *v.* Perry, 65 Me. 183.

**82.** Zabriskie *v.* Bergen County School Dist. No. 10, 52 N. J. L. 104, 18 Atl. 683.

**83.** Zabriskie *v.* Bergen County School Dist. No. 10, 52 N. J. L. 104, 18 Atl. 683.

**A resolution to purchase lands not so designated** is not within the powers of such meeting. Zabriskie *v.* Bergen County School Dist. No. 10, 52 N. J. L. 104, 18 Atl. 683.

**84.** Spalding *v.* Chelmsford, 117 Mass. 393.

**Designation held insufficient** to authorize the selectmen to take land for a school-house lot under Mass. Gen. St. c. 38, §§ 37, 38, see Spalding *v.* Chelmsford, 117 Mass. 393; Crosby *v.* Dracut, 109 Mass. 206; Harris *v.* Marblehead, 10 Gray (Mass.) 40.

**85.** Leighton *v.* Ossipee School Dist., 66 N. H. 548, 31 Atl. 899.

**86.** Norton *v.* Perry, 65 Me. 183.

**Where a location is defective by reason of a vague description** of the premises to be taken, such defect will not revive or render valid a proceeding for a different location, which was invalid, by reason of the fact that it did not receive a sufficient statutory majority and to which more than one third present and voting objected and applied to the municipal officers in the town in which the district was situated to make a new location. Norton *v.* Perry, 65 Me. 183.

**87.** Norton *v.* Perry, 65 Me. 183.

**88.** Thompson *v.* Rio Tp., 218 Ill. 540, 75 N. E. 1048; Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170; Howland *v.* Little Compton School-Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337.

**Eminent domain** generally see EMINENT DOMAIN, 15 Cyc. 543.

**Owner's remedy.**—Where school directors have marked off and proceeded to occupy land for a site for a school-house under the Pennsylvania act of April 9, 1867, the court cannot in a summary manner annul their action, but the owner must resort to his remedy by ejectment. *In re* Braintrim Dist. Schoolhouse, 4 Leg. Gaz. (Pa.) 410.

**Estoppel.**— The receipt by the owner of damages awarded him estops him to object to irregularities in the proceedings in taking his land. Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

**89.** Harris *v.* Marblehead, 10 Gray (Mass.) 40; Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414; True *v.* Melvin, 43 N. H. 503, holding that an unqualified refusal to sell land selected by a committee as the location of a school-house, without calling for the authority of the party applying, is a sufficient refusal to justify the selectmen in setting off the land.

**90.** Harris *v.* Marblehead, 10 Gray (Mass.) 40; Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414.

**91.** Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170; Howland *v.* Little Compton School-Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337, holding that under Pub. St. c. 53, § 5, no authority to make the appointment of persons to fix the value of the land is given until after the vote to build the school-house, and any appointment before the vote, or any tender of the value fixed is ineffectual to pass the title to the district.

**Signing report.**— The report of viewers appointed to assess damages under such a statute need not be signed by all the viewers, where the action of a majority is sufficient. *In re* Jackson Tp., 11 York Leg. Rec. (Pa.) 15.

**92.** Howland *v.* Little Compton School-Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337. And see, generally, EMINENT DOMAIN, 15 Cyc. 783.

**Tender to agent.**— If the owner lives out of the commonwealth, such tender may be made to the person left by him in possession of the land and who for some purposes is his agent. Gibbons *v.* East Granville Southwest School Dist., 4 Allen (Mass.) 508.

authorities already hold it under a lease and have a school-house on the land.[93] Under such authority improved town lots may be taken,[94] or land may be taken for the necessary enlargement of school grounds.[95] An owner of land taken for a school-house site has no right to remove trees and fences therefrom.[96]

(v) *NOTICE.* A notice or warrant to voters to meet for the purpose of acting upon the purchase or taking of certain land for a school-house site should indicate correctly the authority invoked and proceedings intended,[97] and should be in strict compliance with the particular section of the statute under which the proceedings are to be had,[98] and should be in the statutory form.[99] The subject-matter to be acted upon at the meeting should be contained in the notice or warrant,[1] although a general description thereof will ordinarily be sufficient.[2] A committee to locate a school-house may be appointed without notice to other parties,[3] but there must be proper notice of a hearing before such committee.[4] It is also required under some statutes that notice in writing be given to the owner of the land before proceedings can be had to lay out his land and assess damages.[5]

(vi) *RECORD.* As a general rule a record should be kept of all the meetings and proceedings to purchase or condemn a school-house site, showing a compliance with all the requirements of the statute,[6] although immaterial defects

**93.** *In re* Braintrim Dist. Schoolhouse, 4 Leg. Gaz. (Pa.) 410.

**94.** Ferree *v.* Allegheny Sixth Ward School Dist., 76 Pa. St. 376.

**95.** Thompson *v.* East Marlborough School Dist., 1 Chest. Co. Rep. (Pa.) 493; *In re* Jackson Tp. School Dist., 11 York Leg. Rec. (Pa.) 15.

**96.** Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414, holding that an owner of land taken for a school-house lot under St. (1848) c. 237, "in the same way and manner as is provided for laying out town ways" has no such right to remove trees or fences as the owner of land taken for a town-way has by St. (1848) c. 98.

**97.** Leavitt *v.* Eastman, 77 Me. 117.

**98.** Leavitt *v.* Eastman, 77 Me. 117, holding that where, by reason of the inability of a school-district to agree with the land-owner, municipal officers have been appealed to under Rev. St. c. 11, § 57, to determine the size and shape of the lot on which a location has been made by the school-district, etc., the notice required by section 57 must be given, and a notice in conformity with section 56 of such statute is insufficient.

**Objection.**—Where notice of a hearing by county commissioners as to the location of a district school-house under the final authority given them in the matter by N. H. Gen. Laws, c. 88, § 6, should be in accordance with section 7, the district alone in its corporate capacity can take objection that it was given otherwise. Newell *v.* Hancock, 67 N. H. 244, 35 Atl. 253.

**99.** Lake County Tp. 43 Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58 [*reversing* 81 Ill. App. 459], as to signing.

**1.** Shires *v.* Irwin, 87 Ill. App. 111; Reed *v.* Acton, 117 Mass. 384. See also *In re* Tabor, 20 U. C. Q. B. 549.

**Amount to be expended need not be specified** in the notice see Thompson *v.* Rio Tp., 218 Ill. 540, 75 N. E. 1048.

**2.** Reed *v.* Acton, 117 Mass. 384 (holding that a warrant for a town meeting to see if the town will instruct the selectmen to purchase or take land in South or West Acton for the location of school-houses is sufficient under Gen. St. c. 18, § 22, which authorizes the town to designate a lot in West Acton for a school-house); Newell *v.* Hancock, 67 N. H. 244, 35 Atl. 253 (holding that a warrant for the annual meeting of a school-district stating that the meeting is to "see if the district will vote to build a new school-house at or near the village" sufficiently states the location of the proposed school-house).

**Under Ill. School Law, art. 5, § 31, and art. 9, § 4,** the notice for an election to vote on building a township high school need not specify the site to be chosen, and the voters may express their choice of a site whether it is the one specified in the notice or not. Thompson *v.* Rio Tp., 218 Ill. 540, 75 N. E. 1048.

**3.** True *v.* Melvin, 43 N. H. 503.

**4.** True *v.* Melvin, 43 N. H. 503, holding that the proper notice to be given of such a hearing to individuals and the district is that limited by the service of process on persons and corporations.

**5.** Norton Eighth School Dist. *v.* Copeland, 2 Gray (Mass.) 414, holding that where selectmen, on the failure of a school-district to agree where to place a school-house, have determined the location thereof, they cannot proceed to lay out the land and assess damages to the owner without seven days' notice to him in writing. And see, generally, EMINENT DOMAIN, 15 Cyc. 841.

**Sufficiency of notice.**—Notice that the selectmen in accordance with a vote of the town will, on a certain day, lay out and assess damages for the taking of a lot of land, but not stating that it is for a school-house, is insufficient. Harris *v.* Marblehead, 10 Gray (Mass.) 40.

**6.** Coal, etc., Co. *v.* Dunphy, 11 Pa. Dist. 218; Mercur *v.* Nether Providence Tp. School Dist., 8 Del. Co. (Pa.) 269.

therein will not operate to make the proceedings or location illegal.[7] Where it appears that there has been a proper vote the location will not be invalid because the clerk of the election has made irregularities or omissions in describing the site selected.[8] A location is usually made and completed when the report thereon is filed with the clerk of the town district;[9] and if the board or officers making the location fail to make a return thereof at the proper time, the record may be subsequently amended by filing the written location.[10]

(VII) *OPERATION AND EFFECT OF DETERMINATION IN GENERAL.* The operation and effect of a location legally made is usually controlled by the statute relating thereto.[11] In accordance with the general rule that public officials are presumed to have performed their duty and that their acts are legal and authorized,[12] where the officers of a school-district purchase a site for a school-house and the district continues to use and occupy the same for educational and school purposes, and all the records of the district relating to the selection and designation of such site by the voters have become lost, it will be presumed that the site was selected and designated in compliance with the statute,[13] and that the officers in purchasing the same and in erecting a school-house thereon acted within the scope of their authority.[14] Where it has been duly decided by the proper board that a school building shall be erected at a particular site, the board or officers having charge of the erection of the building cannot, without a reversal of such decision, lawfully erect another building at another site.[15] Thus, although school directors may have authority to fix the location of a proposed school-house, where they have once located a site and the electors and taxpayers have voted bonds to erect a school-house at the designated place, the school directors cannot afterward use the bonds to build on another site, especially where it does not appear that the site designated is impracticable;[16] nor can they under a power to decide when

**Record of vote.**— Under a statute requiring the clerk to make a record of the fact that a certain number of voters at a district meeting objected to the location it is sufficient if he makes a record of the state of the votes, and it is not required that he should record the names of the voters objecting. Norton *v.* Perry, 65 Me. 183.

7. Howland *v.* Little Compton School-Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337, holding that proceedings to condemn land for a school-house are not shown to be illegal, because the record merely recites generally that the meeting was duly notified by the posting of the notices in the district, without showing that they were posted in such public places as the law requires, since Pub. St. c. 58, § 11, makes the record that a meeting has been duly notified *prima facie* evidence that it has been so notified; nor because the record does not expressly state at what time the meeting was held, where it describes it as a meeting which was notified, and the notice appointed the hour.

8. Merritt *v.* Farris, 22 Ill. 303, as where he describes it merely by general reference, and not by metes and bounds.

9. Ayers *v.* Cornish School Dist., 67 N. H. 169, 29 Atl. 416; Converse *v.* Porter, 45 N. H. 385.

**Neglect of the town clerk to make a proper record** will not affect the validity of a location where the doings of the selectmen in locating the school-house are reduced to writing and returned to the town clerk for recordation. Converse *v.* Porter, 45 N. H. 385.

10. Leighton *v.* Ossipee School Dist., 66 N. H. 548, 31 Atl. 899.

11. See the statutes of the several states. And see cases cited *infra*, this note.

**Under N. H. Gen. Laws, c. 43, § 6,** the location of a school-house by a committee is conclusive for five years unless appealed from. Ayers *v.* Cornish School Dist., 67 N. H. 169, 29 Atl. 416; Stickney *v.* Orford, 64 N. H. 299, 10 Atl. 117. *Compare* True *v.* Melvin, 43 N. H. 503.

**Under Me. Rev. St. c. 11, § 32,** the certificate of the municipal officers of a town of their determination where a school-house is to be placed is, after the application, notice to all parties interested, and a hearing, conclusive upon the school-district. Norton *v.* Perry, 65 Me. 183.

12. See, generally, EVIDENCE, 16 Cyc. 1076 *et seq.*; OFFICERS, 29 Cyc. 1431.

13. Webb *v.* Lac Qui Parle County School Dist. No. 3, 83 Minn. 111, 85 N. W. 932.

14. Webb *v.* Lac Qui Parle County School Dist. No. 3, 83 Minn. 111, 85 N. W. 932.

15. Sligh *v.* Bowers, 62 S. C. 409, 40 S. E. 885, holding that under Acts (1896), §§ 28, 29, 32, 37, 39, after a county board of education has decided that a school building shall be maintained at a particular site in the district, a board of trustees cannot use public funds for erecting another building at another site, without a reversal of the action of the county board.

16. Rodgers *v.* Colfax Independent School Dist., 100 Iowa 317, 69 N. W. 544.

a school-house site or school building has become unnecessary, unsuitable, or inconvenient, in the absence of a change in conditions, annul the action of the voters in selecting a site.[17] Where a location is established before the opening of a meeting called to reconsider a vote empowering the board or officers to locate a site, such location is not affected by the subsequent vote of the district at such meeting.[18] The fact that the location of a school-house lot inadvertently overlaps a public way does not render the location invalid.[19]

(VIII) *REVIEW.* Provision is made in some statutes for an appeal from the decision of the school trustees, directors, or other officers as to the location of a school-house site,[20] as to the state superintendent of public instruction, whose decision is generally final,[21] and where on such appeal the location is confirmed, the board of trustees or directors cannot thereafter make a relocation,[22] unless the circumstances become materially changed.[23] Under some statutes an appeal lies to the county superintendent,[24] whose decision is final and binding upon the trustees or directors,[25] from the time it is given, although it is not entered upon the superintendent's record until afterward,[26] and it is immaterial whether the selection has been made by a trustee on his own motion, or by proceedings instituted by the voters;[27] although it has been held under such a statute that such decision is binding only for the time being,[28] and that in case the superintendent reverses the trustee's location it will not prevent, if the interests of the district should afterward require it, a future location at the place selected by the trustee,[29] or at a different place near where he first located it.[30] Under such statutes, if such an appeal is not taken, an injunction will not lie to restrain the school directors from making improvements on the site located.[31] Under other statutes an appeal may be taken by petition to the county commissioners, whose decision shall be conclusive for a prescribed time.[32]

17. Kiehna *v.* Mansker, 178 Ill. 15, 52 N. E. 1047 [*reversing* 77 Ill. App. 508].

18. Ayers *v.* Cornish School Dist., 67 N. H. 169, 29 Atl. 416.

19. Jordan *v.* Haskell, 63 Me. 189.

20. See the statutes of the several states.

**In Rhode Island** an appeal lies to the commissioner of public schools from the location of a school-house by a school-committee, and the commissioner may confirm or reverse the same, or make a new location; and until his decision is confirmed by a judge of the supreme court such commissioner may rehear the case. But after its confirmation by the supreme court, it is final in that case, and another location can only be made on entirely new proceedings. Cottrell's Appeal, 10 R. I. 615.

21. State *v.* Custer, 11 Ind. 210; Carpenter *v.* Columbia Tp. Independent Dist. No. 5, 95 Iowa 300, 63 N. W. 708.

**Extent of jurisdiction.**— On appeal to the county and state superintendent under Iowa Laws, §§ 2818, 2820, their jurisdiction is limited to a review of the action of the school-board, and they have no authority to establish a new site, nor may they impose conditions which were not presented to and acted upon by the board. Doubet *v.* Clearfield Independent Dist., 135 Iowa 95, 111 N. W. 326.

22. Carpenter *v.* Columbia Tp. Independent Dist. No. 5, 95 Iowa 300, 63 N. W. 708.

23. Carpenter *v.* Columbia Tp. Independent Dist. No. 5, 95 Iowa 300, 63 N. W. 708, holding also that a change of conditions pending appeal must be urged before the state superintendent.

24. Knight *v.* Woods, 129 Ind. 101, 28 N. E. 306; Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170; James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723.

**A taxpayer's remedy** against an illegal or injudicious location of a school-house is by an appeal to the county superintendent. Center Independent Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174.

**Under Ky. St. § 4439,** providing that the trustees of a school-district shall select a site for a school-house and that a majority of the school directors may prosecute an appeal to the county superintendent whose decision shall be final, the only power the superintendent has upon appeal is to either approve or condemn the site selected; and in the event of disapproval the trustees must select another, and so continue until a satisfactory site is selected. Davis *v.* Humphrey, 52 S. W. 946, 21 Ky. L. Rep. 660.

25. Knight *v.* Woods, 129 Ind. 101, 28 N. E. 306; Davis *v.* Humphrey, 52 S. W. 946, 21 Ky. L. Rep. 660.

26. Knight *v.* Woods, 129 Ind. 101, 28 N. E. 306.

27. Knight *v.* Woods, 129 Ind. 101, 28 N. E. 306.

28. State *v.* Mewhinney, 67 Ind. 397.

29. State *v.* Mewhinney, 67 Ind. 397.

30. State *v.* Mewhinney, 67 Ind. 397.

31. Center Independent Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174.

32. Stickney *v.* Orford, 64 N. H. 299, 10

**c. Change of Site or Location of School** — (i) *In General.* After a school-house site or location has been once established it can be changed to a different site or location only by virtue of statutory authority, and in making such a change the provisions of the statute must be at least substantially complied with.[33] Under some statutes the power of making such a change is in the discretion of the school-board,[34] and its decision will not be interfered with by the courts, unless there is

Atl. 117, five years under Gen. Laws, c. 88, §§ 6, 7.

**Jurisdiction.**— Under N. H. Gen. Laws, c. 88, § 6, the jurisdiction of commissioners upon such an appeal extends to towns in which the district system has been abolished. Adams *v.* Slate, 65 N. H. 188, 18 Atl. 321.

**Estoppel.**—Where parties on an appeal to the county commissioners have waived objection to the location made by the district committee, because a written location was not filed, they will be estopped from raising such objection at a subsequent proceeding to enjoin the building of a school-house upon the location. Leighton *v.* Ossipee School Dist., 66 N. H. 548, 31 Atl. 899.

**A void location by county commissioners** may be validated by a vote of the district "to build a school-house on said location made by said county commissioners." Leighton *v.* Ossipee School Dist., 66 N. H. 548, 31 Atl. 899.

33. Colton *v.* Beardsley, 38 Barb. (N. Y.) 29 (holding that under Laws (1856), c. 179, § 26, providing that "the site of such school house shall not be changed . . . unless by the consent in writing of the supervisor," it makes no difference whether such consent or the vote of the district to change the site has the precedence in time); Westchester Union Free School Bd. of Education *v.* Mapes, 14 N. Y. St. 593; Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

**In Indiana** prior to the act of Feb. 7, 1893 (Burns Rev. St. (1894) §§ 5920*a* to 5920*c*), the trustee of a school township if acting in good faith had an unlimited discretion in regard to the removal of schools subject only to the appeal to the county superintendent. See Carnahan *v.* State, 155 Ind. 156, 57 N. E. 717; Knight *v.* Woods, 129 Ind. 101, 28 N. E. 306; Braden *v.* McNutt, 114 Ind. 214, 16 N. E. 170; Koontz *v.* State, 44 Ind. 323. But since the adoption of the above act the change of a school-house site may be effected only by the concurrent desires and actions of three parties: (1) A majority of the patrons of the school; (2) the trustee of the school township; and (3) the county superintendent of schools. The wishes of the first two parties are to be expressed by signing and presenting a petition to the county superintendent, and the other by an order for or against the change. The trustee is required to post notices of the time when the petition will be presented to the superintendent, and before the superintendent expresses his opinion on the propriety of the change, satisfactory proof must be made to him that a majority of the patrons are petitioners for the change. Brandt *v.* State, 171 Ind. 288, 86 N. E. 337; Carnahan *v.* State, 155 Ind. 156, 57 N. E. 717; Kessler *v.* State, 146 Ind. 221, 45 N. E. 102. The jurisdiction of the county superintendent in such cases is original, and not appellate, and he has no jurisdiction to order a change of site until a proper petition is filed with him and the requisite notice has been given. Brandt *v.* State, *supra*. His determination as to whether a majority of the school patrons have signed the petition is an administrative and not a judicial act, and so is open to review by the courts. Carnahan *v.* State, *supra*. These statutory provisions are applicable alike to cases where it is desired to build a new school-house on a new location, as it is to the mere removal of a school-house to a new location. Kessler *v.* State, *supra*.

**In New Hampshire,** upon the petition of ten legal voters that they are aggrieved by the location as made, the county commissioners may effect a change of location. Holbrook *v.* Faulkner, 55 N. H. 311, holding that where a school-district in possession of a school-house votes to repair it, and to buy land enough to straighten the line west of the school-house, it is a sufficient location to give the county commissioner jurisdiction of such a petition.

34. Venable *v.* Pilot Mountain School Committee, 149 N. C. 120, 62 S. E. 902.

**In Iowa,** under Code, § 2773, giving the board of directors of a school township power to fix the site of each school-house, such board has power to change the site of an existing school-house, where there has been a material change in conditions subsequent to the location of the school site. Doubet *v.* Clearfield Independent Dist., 135 Iowa 95, 111 N. W. 326; James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723. And they are not required to give notice of the removal of a school-house. James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723. Their decision, however, is subject, under Code, §§ 2818, 2820, to an appeal to the county superintendent, and from him to the state superintendent. Doubet *v.* Clearfield Independent Dist., 135 Iowa 95, 111 N. W. 326. And where the action of the school directors in purchasing a new school-house site is reversed by the county superintendent, the district has no longer any authority to hold or use the site so purchased. Douds Independent School Dist. *v.* McClure, (Iowa 1907) 113 N. W. 554. Code, § 2749, providing that the voters in a township assembled at an annual meeting shall have power to direct a sale or other disposition of a school-house or other property belonging to the corporation, does not apply to the removal of a school-house from one site to another, so as to require the sanction of the

a violation of law, or fraud or misconduct on its part.[35] Where the authority to change a site or location is vested in a particular board or officer the fact that the former site is in the center of the district and that two thirds of the patrons favor its retention there is not controlling on the question of the expediency of ordering its removal;[36] nor does the fact that the school-house is moved in the night, taken alone, establish fraud or stamp the removal as wrongful.[37]

(II) *SUBMISSION TO VOTE.* Under some statutes, where a school-house site has been once selected and a school-house built thereon, it can be changed, and the school-house removed from that location, only by authority of the people of the district expressed in the manner provided by the statutes,[38] as at an annual

voters to authorize such a step. James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723.

**Under Can. Pub. School Act (1891), § 8,** a board of education, formed by the union of high school and public school trustees, has power to change the site for a school, and purchase another without a by-law or resolution of the county council, or the approval of the lieutenant-governor. Moffatt *v.* Carleton Place Bd. of Education, 5 Ont. App. 197 [*affirming* 26 Grant Ch. (U. C.) 590].

**35.** Venable *v.* Pilot Mountain School Committee, 149 N. C. 120, 62 S. E. 902.

**Fraud.**—Where the property on which a school building is located has been dedicated to school purposes, the participation by two of the school trustees in the removal of the building to another tract constitutes a legal fraud, a perversion of their trust, and a practical confiscation of the school-house. Sanders *v.* Cauley, (Tex. Civ. App. 1908) 113 S. W. 560.

**That a member of the board contributes to the purchase** of a new school site, in consideration of a conveyance of the old site and the payment of a specified sum by the citizens, does not invalidate the transaction, where the old site is conveyed for its full value, and the new site is purchased at its fair value. Venable *v.* Pilot Mountain School Committee, 149 N. C. 120, 62 S. E. 902.

**That the brothers of two of the board contribute to the purchase** of a new school site does not *per se* invalidate the action of the board in changing the site, in the absence of evidence that they influenced any member thereof. Venable *v.* Pilot Mountain School Committee, 149 N. C. 120, 62 S. E. 902.

**36.** James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723.

**37.** James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723.

**38.** Shires *v.* Irwin, 87 Ill. App. 111; State *v.* Marshall, 13 Mont. 136, 32 Pac. 648; Stayton *v.* Butchee, 16 Okla. 232, 82 Pac. 726.

**In Missouri** the sanction of the voters of the district is an indispensable prerequisite to the authority of the district director to change a school-house site, or to build a new school-house on a new site. Livesay *v.* Whitney, 107 Mo. App. 475, 81 S. W. 640 (holding also that a vote to "move the school-house onto the southeast corner" of W's place is in effect a vote to change the school-house site); Buchanan *v.* Hannibal School Dist., 25 Mo. App. 85.

**Under Mont. Comp. St. (1885)** the school-board of trustees has no authority to remove a school from the established school-house of their district, or to remove a school-house to another part of such district without direction to do so by a vote of the district. State *v.* Marshall, 13 Mont. 136, 32 Pac. 648. See also State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**Annulment of election.**—School directors cannot annul an election changing a school-house site, and repudiate the site chosen, and call an election to vote on the question of building a new school-house on an old site, merely because the new site is not located upon a public highway. School Directors *v.* People, 90 Ill. App. 670.

**Record of meeting.**—Although under Mo. Rev. St. (1899) § 9750, the record of the proceedings of an annual school meeting upon the question of moving a school-house should show how the vote was taken and the number of votes cast for and against removal, the fact that the record is not complete will not defeat the action taken, as it is proper to show by parol what actually took place at such meeting. Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867.

**Proceedings under Can. Pub. School Act (1891), § 64,** relative to the calling of a special meeting of the rate-payers of the section, and relative to the consent of a majority of them to a site selected for the erection of a new school-house or for changing the site of a school-house see Wallace *v.* Lobo Tp. School Trustees, 11 Ont. 648; Malcolm *v.* Malcolm, 15 Grant Ch. (U. C.) 13; Williams *v.* Plympton School Trustees, 7 U. C. C. P. 559. Under such section, the questions to be voted on, whether the trustees shall secure a site, and there shall be a change of site, and if so whether the proposed site is acceptable, should be so laid before the meeting that a fair vote thereon can be given, unequivocally indicating the mind of the majority on the particular point. McGugan *v.* Southwold School Bd., 17 Ont. 428. As to the appointment of arbitrators in case a majority of the rate-payers present at such special meeting differ as to the suitability of the site selected by the school trustees see Toronto Tp. *v.* McBride, 29 U. C. Q. B. 13. Where the rate-payers at such special meeting reject the site adopted by the school trustees, but no arbitrators are named by either party, they may be appointed by the rate-payers at a subsequent

meeting [39] by a two-thirds [40] or majority vote of the electors of the district,[41] and upon a specific designation or description by such vote of the new site.[42] But a designation of a school-house site is not void by reason of the fact that the motion making such a designation also provides that if such site cannot be procured other locations may be accepted.[43] Where a statute providing for such a vote makes no express provision as to the method of proceeding, the provisions relating to the periodical meetings for the election of trustees or other officers or for calling special elections to obtain authority to issue bonds, etc., should be followed.[44] It is also provided under some statutes that appraisers shall be appointed to appraise the school-house and property prior to taking a vote on the removal of the same to a new site; [45] and that a school-house site cannot be removed from one site to another when there is no money in the fund applicable thereto,[46] except where promises are made by taxpayers to defray the expenses and the board of trustees are willing to incur the risk on such promises.[47] Authority to change a school-house at a district meeting cannot be delegated.[48]

meeting. Malcolm *v.* Malcolm, 15 Grant Cb. (U. C.) 13. But see Williams *v.* Plympton School Trustees, 7 U. C. C. P. 559.

**39.** Moore *v.* State, 9 Kan. App. 489, 58 Pac. 1004; Zimmerman *v.* State, 60 Nebr. 633, 83 N. W. 919; Wilber *v.* Woolley, 44 Nebr. 739, 62 N. W. 1095 (holding that under Comp. St. c. 71, § 8, subd. 2, a school-house site when once established can be changed only at an annual school-district meeting, and not at a special meeting); Custer County School Dist. No. 34 *v.* Stairs, 1 Nebr. (Unoff.) 85, 95 N. W. 492.

**Under Nebr. St.** (Cobbey Annot. St. (1903) §§ 11036, 11038), a school-district may authorize the removal of a school-house to a new site prior to the acquisition of title to the latter, and thereafter at a special meeting authorize the acquisition of title to said new site, but it cannot remove the school-house to the new site until title has been acquired. McMahon *v.* Antelope County School Dist. No. 66, 80 Nebr. 156, 113 N. W. 1046.

**40.** Colt *v.* Roberts, 28 Conn. 330 (holding that Act (1856), § 17, authorizing the committees of school-districts to provide suitable schools, was not intended to qualify the law which requires the vote of two-thirds to change a school-house site); Stadtler *v.* Houston County School Dist. No. 40, 61 Minn. 259, 63 N. W. 638 (holding that a school-house site cannot be changed unless at least a majority of the legal voters in the district vote on the question, and two-thirds of the voters are present and vote in favor of such change); Zimmerman *v.* State, 60 Nebr. 633, 83 N. W. 919.

**41.** Moore *v.* State, 9 Kan. App. 489, 58 Pac. 1004 (holding that under Gen. St. (1897) c. 63, § 18, a new site may be designated and the school-house ordered to be removed thereto by a majority vote of those present and voting at the annual school meeting); Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867 (holding that a majority vote of the voters who are resident taxpayers within the meaning of Rev. St. (1899) §§ 9, 750, subd. 11, means a majority of the taxpayers of the district present and voting at the election).

**42.** Livesay *v.* Whitney, 107 Mo. App. 475, 81 S. W. 640 (holding that a vote to move a school-house to the southeast corner of W's place sufficiently designates the site to enable the board of school directors to locate the same and is therefore sufficiently specific); Zimmerman *v.* State, 60 Nebr. 633, 83 N. W. 919 (holding that a vote "to move the school-house" is void for uncertainty); Custer County School Dist. No. 34 *v.* Stairs, 1 Nebr. (Unoff.) 85, 95 N. W. 492 (holding that it is not a designation of a site to appoint a committee to locate the school-house as near as practicable to the center of the district).

**Designation held sufficient** to vest the officers of the school-district with power to sell the old school-house and build a new one on the designated site see Quisenberry *v.* Hall County School Dist. No. 6, 75 Nebr. 47, 105 N. W. 982. The designation of a school site as the southeast corner of the northeast quarter of section 22 is not fatally defective for a failure to state the township and range in which the section is located, where there is but one section 22 within the school-district. McMahon *v.* Antelope County School Dist. No. 66, 80 Nebr. 156, 113 N. W. 1046.

**43.** Moore *v.* State, 9 Kan. App. 489, 58 Pac. 1004.

**44.** State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**45.** Moore *v.* State, 9 Kan. App. 489, 58 Pac. 1004 (holding that under Gen. St. (1897) § 69, c. 63, making such provision, the appraisers may be legally elected at the annual school-district meeting by a majority of those present and voting); Day *v.* Hulpieu, 8 Kan. App. 742, 54 Pac. 926.

**A wife** living with her husband upon land owned by him and occupied by them as their homestead is a freeholder qualified to act as such an appraiser. Moore *v.* State, 9 Kan. App. 489, 58 Pac. 1004.

**46.** Livesay *v.* Whitney, 107 Mo. App. 475, 81 S. W. 640.

**47.** Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867.

**48.** Custer County School Dist. No. 34 *v.* Stairs, 1 Nebr. (Unoff.) 85, 95 N. W. 492.

(III) *RESTRAINING OR ENFORCING CHANGE OF SITE.*[49] An injunction will lie to restrain a threatened illegal removal of a school building,[50] and to restrain boards or officers, who have discretionary power to change the site or location of a school-house, but who are in the particular instance abusing such discretion.[51] Thus an injunction will lie to restrain the directors of a school-district from changing a school-house site or erecting a new school-house on a new site without the sanction of the voters signified at an election;[52] or to restrain a proposed removal which, if unauthorized, will involve a waste and an unwarranted expenditure of public funds.[53] But the mere fact that proceedings to enjoin the removal of a school-house are pending does not prevent the school trustees from accepting a deed donating the proposed new site, for even if the vote to remove is not binding, legal action may be subsequently taken to locate the school-house on such site.[54] Mandamus will lie to enforce the removal of a school-house which has been legally ordered.[55]

**d. Lease of Buildings or Rooms.** Where it becomes necessary for the board or officers having the duty of providing school accommodations to procure a suitable building or room in which to conduct a public school,[56] as where there is no suitable school-house in the district,[57] and the school-district has voted down a proposition to issue bonds for a new school-house,[58] or where the school-house which has been used is taken from the school trustees by an order of court,[59] or where otherwise the best interests of the school would be subserved thereby,[60] such board or officers are authorized to lease a suitable building or room for that purpose,[61] such as a building or room which has been used for the purposes of a church,[62]

**49. Right of taxpayers to enjoin change of location or removal of school-house** see *infra*, III, F, 8, b, (II).

**50.** Lodomillo Dist. Tp. *v.* Cass Dist. Tp., 54 Iowa 115, 6 N. W. 163, holding that an injunction will lie in favor of one district township to restrain another from unlawfully removing a school-house from its territory, and from assuming control over a portion of such territory.

**Notice of application.**—An injunction to restrain the removal of a school-house of a district township is not an injunction to stop the general and ordinary business of a municipal corporation within the meaning of Iowa Code (1876), § 7391, and therefore such an injunction may be granted without notice of the application. Lodomillo Dist. Tp. *v.* Cass Dist. Tp., 54 Iowa 115, 6 N. W. 163.

**51.** Venable *v.* Pilot Mountain School Committee, 149 N. C. 120, 62 S. E. 902; Watkins *v.* Hall, 13 Ohio Cir. Ct. 255, 7 Ohio Cir. Dec. 434; Peiffer *v.* Reno, 29 Pa. Co. Ct. 145.

**52.** Buchanan *v.* Hannibal School Dist., 25 Mo. App. 85.

**53.** McLain *v.* Maricle, 60 Nebr. 353, 83 N. W. 85, holding that resident taxpayers may maintain such a suit.

**54.** Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867.

**55.** Zimmerman *v.* State, 60 Nebr. 633, 83 N. W. 919, holding that, where the electors of a school-district have, in a lawful manner, ordered the removal of their school-house and the funds in the treasury together with the taxes levied for current expenses are sufficient to meet all district obligations, the order is valid and its execution will be enforced by mandamus. And see, generally, MANDAMUS, 26 Cyc. 282.

**56.** Millard *v.* Bd. of Education, 121 Ill. 297, 10 N. E. 669 [*affirming* 19 Ill. App. 48].

**57.** Allen *v.* Westport School Dist. No. 2, 15 Pick. (Mass.) 35. See also Clark *v.* Great Barrington, 11 Pick. (Mass.) 260; State *v.* Lyons, 37 Mont. 354, 96 Pac. 922.

**58.** Millard *v.* Bd. of Education, 121 Ill. 297, 10 N. E. 669.

**59.** Cumberland Bank *v.* Simpson, 77 S. W. 695, 25 Ky. L. Rep. 1227, holding that where possession of a school-house is taken from the trustees by an order of court appointing a receiver therefor, the trustees have the right, and it is their duty to rent a suitable place for conducting the school.

**60.** Scripture *v.* Burns, 59 Iowa 70, 12 N. W. 760, holding that in a proper case school directors may, in the exercise of their discretion, cause a school to be taught in a rented building instead of the public school-house.

**61.** Millard *v.* Bd. of Education, 121 Ill. 297, 10 N. E. 669; Allen *v.* Westport School Dist. No. 2, 15 Pick. (Mass.) 35; Dorner *v.* Luxemburg School Dist. No. 5, 137 Wis. 147, 118 N. W. 353, 19 L. R. A. N. S. 171, holding that where a school-house owned by a district is inadequate, the district may rent a part of a parochial school building.

**62.** Millard *v.* Bd. of Education, 121 Ill. 297, 10 N. E. 669; Swadley *v.* Haynes, (Tenn. Ch. App. 1897) 41 S. W. 1066.

**Statement of rule.**—Whilst it is contrary to law and to public policy to allow the public school money to be invested in property in which any religious denomination or society or any other person has any interests or rights, as constant contention and friction

or a portion of a dwelling-house;[63] and it is no defense to an action for the rent of such a building or room that the school was continued by private contributions, and so was continued longer than it otherwise would have been,[64] that the instructors were not legally employed or duly qualified,[65] or that the school funds have not been legally appropriated or distributed.[66] Under some statutes, however, the school-board has no power to rent rooms separate from the district school-house, and to employ teachers for a supplemental school therein, without authority from the voters of the school-district.[67] As to what particular board or officers may enter into a lease of property for public school purposes is governed by the local statutes.[68] Where such a lease has been made, any disturbance of the lessee's possession by the lessor or his representative, as by an entry before the end of the term, entitles the lessee, as in the case of other lessees, to recover for damages sustained.[69] Under some statutes a school-district, which has built a school-house on leased premises, has a reasonable time after the termination of the lease to remove such building.[70]

**e. Construction of Building.**[71] The power, duty, and manner of proceeding in the construction of a public school building is governed by the statutes relative thereto,[72] and in constructing a building under such statutes all of the requirements

is sure to arise while the building is being so used, and when it is desired to sell it the respective rights of the parties would inevitably draw them into litigation, this does not prevent or inhibit school directors, when necessary, from using a building of this character by permission of the trustees, nor from making any suitable arrangement, when necessary, for the rent and occupation of the building for the use of the public schools. Swadley *v.* Haynes, (Tenn. Ch. App. 1897) 41 S. W. 1066.

**Paying rent to a church organization for a** school-room is not an appropriation or aid to a church within the prohibition of a constitution. Millard *v.* Bd. of Education, 19 Ill. App. 48 [*affirmed* in 121 Ill. 297, 10 N. E. 669].

**63.** Gould *v.* Eagle Creek School Dist. Sub-Dist. No. 3, 7 Minn. 203, holding that the trustees of a school-district have power to employ a portion of a dwelling-house for school purposes if in their judgment it is necessary and proper.

**64.** Allen *v.* Westport School Dist. No. 2, 15 Pick. (Mass.) 35.

**65.** Allen *v.* Westport School Dist. No. 2, 15 Pick. (Mass.) 35.

**66.** Allen *v.* Westport School Dist. No. 2, 15 Pick. (Mass.) 35.

**67.** Black *v.* Cornell, 30 Mo. App. 641.

**A notice calling a district meeting** to fix the place where school shall be held is sufficiently comprehensive to justify the electors, assembled in pursuance of the call, in adopting a resolution directing the district board to rent a designated building to be used as a school-house. Krull *v.* State, 59 Nebr. 97, 80 N. W. 272.

**68.** See the statutes of the several states.

**Under the L. I. City Charter,** N. Y. Laws (1871), c. 461, the board of education composed of school commissioners of the different school wards is the responsible body for all expenses for public instruction within the city, and the school trustees cannot contract for a lease of a school building at a rent of over two thousand dollars a year; but where such lease is made with the consent of the board of education, it is the contract of such board, which alone can be sued thereon. Union College *v.* Coughlin, 89 Hun (N. Y.) 171, 35 N. Y. Suppl. 25 [*affirmed* in 159 N. Y. 540, 53 N. E. 1133].

**69.** See, generally, LANDLORD AND TENANT, 24 Cyc. 1055 *et seq.*

**Trespass.**—A trustee of the owners of a building leased to school directors is liable in trespass for an entry before the expiration of the term, although the public school has no funds, and the teacher has not been examined for that year, if such teacher has a certificate and has been examined on a previous occasion. Kingsley *v.* Plum Tp. School Directors, 2 Pa. St. 28.

**70.** Hayward *v.* Hope Tp. School Dist. No. 9, 139 Mich. 539, 102 N. W. 999, holding that Comp. Laws (1897), § 4673, which provides that no district shall build a frame school-house on any site for which they have not a title in fee or a lease for fifty years, without securing the privilege of removing the school-house, does not entitle an owner of premises leased for fifty years for school purposes, to the school-house after the termination of the lease, merely because of the absence of an express reservation of title in the school-district. And see, generally, LANDLORD AND TENANT, 24 Cyc. 1113.

**71. Contracts for construction** see *infra*, III, E, 4.

**Mechanics' liens on school-houses** see MECHANIC'S LIENS, 27 Cyc. 26 text and note 68.

**72.** Brandt *v.* State, 171 Ind. 288, 86 N. E. 337, holding that the proper procedure for the erection of a new school building on an existing site is by petition to the township trustee, and an appeal from him to the county superintendent.

**Proceedings to erect a graded school building** for the use, and at the expense of one school township are not governed by statutory provisions concerning the erection of joint school buildings, or joint graded school

thereof must be at least substantially complied with.[73] It is provided under some statutes that the qualified voters, or inhabitants, of the school-district have the power of directing the building of a school-house,[74] and that, although they may designate the school-board of such district to act as the agent of the district in superintending the construction of the school building,[75] and although, if no one else is designated by the voters, such board has authority to make contracts and superintend the construction,[76] the voters are not obliged to select the members of the school-board as such agents, but may select such person or persons as in their judgment will best subserve the interests of the school-district.[77] It is also sometimes provided that the erection of a school-house can be undertaken only where funds are provided or are available to pay for it when completed,[78] and hence under such a provision the erection of a school-house cannot be undertaken where such funds cannot be provided, because of the fact that the district indebtedness is already beyond the constitutional limit.[79]

**f. Control, Possession, and Use** — (i) *In General.* What boards or officers shall have the control and possession of school premises, and the extent of such control and possession, are governed by the local statutes.[80] As a general rule

buildings by more than one school corporation, or a graded high school building by a single township. State *v.* John, 170 Ind. 233, 84 N. E. 1.

**73.** See Martin *v.* Yolo County, 103 Cal. 668, 37 Pac. 758; Montclair Bd. of Education *v.* Montclair Town Council, 76 N. J. L. 59, 68 Atl. 795.

**Injunction.**— Equity will not enjoin the construction of a school building upon merely technical grounds, where it appears that there has been a substantial compliance with the law, and the public needs require the construction of the new building and no bad faith is shown, although all the technical legal formalities have not been strictly complied with. Lawson *v.* Lincoln, 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667 [*affirmed* in 178 N. Y. 636, 71 N. E. 1133].

**74.** Mizera *v.* Auten, 45 Nebr. 239, 63 N. W. 399.

**Under Ark. St.** (Sandels & H. Dig. §§ 7–29) giving the electors of a school-district power to determine at their annual meeting whether they will have a school for the ensuing year they have implied power to vote the revenues for such year, for the building of a school-house. Hale *v.* Brown, 70 Ark. 471, 69 S. W. 260.

**Under the New York Consolidated School Law** (Laws (1894), c. 556), it is not necessary that a special meeting of the inhabitants of a school-district, called to authorize the erection of a school building, should give any specific directions regarding the erection of the building, but such matters may be left to the discretion of the board of education. Lawson *v.* Lincoln, 86 N. Y. App. Div. 217, 83 N. Y. Suppl. 667 [*affirmed* in 178 N. Y. 636, 71 N. E. 1133].

**75.** Mizera *v.* Auten, 45 Nebr. 239, 63 N. W. 399.

**76.** Mizera *v.* Auten, 45 Nebr. 239, 63 N. W. 399.

**77.** Mizera *v.* Auten, 45 Nebr. 239, 63 N. W. 399. *Compare* Maher *v.* State, 32 Nebr. 354, 49 N. W. 436, 441.

**78.** Scott *v.* Goshen, 162 Ind. 204, 70 N. E. 79, holding that under Burns Rev. St. (1901) §§ 5914, 5920, 5975, 5978, a civil city cannot consent to the erection of a school-house by the school trustees unless it provides for the indebtedness so incurred, or unless the school city has funds available therefor.

**Under N. J. School Law (1903), § 76,** requiring a town council to appropriate funds for the erection of a school-house when the amount necessary has been fixed and determined by the board of school estimate, a resolution fixing and determining the amount of money necessary for the erection of a school-house at a specified sum, on condition that a school building containing twenty units shall be erected, is not such a determination of the amount necessary for the purpose of building, and hence the town council cannot be compelled to act. Montclair Bd. of Education *v.* Montclair Town Council, 76 N. J. L. 59, 60 Atl. 795.

**79.** Scott *v.* Goshen, 162 Ind. 204, 70 N. E 79, holding that under Burns Rev. St. (1901) §§ 5914, 5920, 5975, 5978, where a civil city is already indebted beyond the constitutional limit of two per cent on its assessed valuation and the school city will not have sufficient funds to pay for the school-house in ten or fifteen years, the erection of such building cannot be authorized by the civil city or legally undertaken by the school city.

**80.** See Culver *v.* Smart, 1 Ind. 65 (holding that under Rev. St. (1843) the trustees in each school-district have the charge and possession of the district school-house in their district); Baggerly *v.* Lee, 37 Ind. App. 139, 73 N. E. 921 (holding that under Burns' Annot. St. (1901) § 8068, subd. 5, a township trustee has control of, and supervision over, the school property in his township); Rhodes *v.* Maret, (Tex. Civ. App. 1908) 112 S. W. 433; Chaplin *v.* Hill, 24 Vt. 528 (holding that by implication the prudential committee of a school-district must have the right to occupy the school-house when the school is in operation, but that neither the statute, nor

the directors or other proper school authorities have a qualified title to and possession of the school property;[81] but this does not confer upon them that absolute dominion which a private individual may exercise over the premises of which he is the exclusive and fee simple owner.[82] The public, including all citizens within the district intended to be benefited by the purposes to which the premises are devoted, have some rights in the school-house property, and among them the right of entry at proper times and for proper purposes.[83] The school authorities of course have the right to protect themselves and their schools from disturbances and annoyances that interfere with the successful prosecution of the purposes for which they are established,[84] and have the right to exclude from their grounds and buildings any person entering thereon for the purpose of disturbing the peace or interfering with the legitimate exercises of the school;[85] but they cannot impose individual restrictions making discriminations excluding some from public exhibitions or exercises to which all the public are invited.[86] Where a private academy receives funds from a school-district for erecting a school building, the fact that certain rooms are used by the district and the remainder by the academy, which is presumably for the accommodation of pupils, is not an absolute division of the building, nor does it curtail the rights of the district scholars in the entire building.[87]

(II) *PURPOSES FOR WHICH SCHOOL PROPERTY MAY BE USED* — (A) *In General.* As a general rule the school authorities having control and possession of school property may authorize its use only for school purposes, or for such inci-

implication growing out of the general powers and duties of the prudential committee, give him exclusive control of the school-house in his district, as that power must be in the district).

**The public schools of a city, within a school township,** have no rights in a school building belonging to the school township, although they have been permitted to use it for school purposes. Yazoo City Public Schools *v.* Yazoo City Library Assoc., (Miss. 1892) 12 So. 30.

**Building aided by private contributions.**— Where under a statute authorizing the mayor and council of a city to levy and collect taxes for the purpose of establishing and maintaining schools, and granting them full power and authority to employ teachers and make rules for the government of such schools, a school-house is built by subscription from citizens and from the mayor and council, but no tax is levied therefor, a teacher whom the subscribing citizens wish to retain but whom the mayor and council have discharged may be restrained from taking possession of the building, whether or not it belongs to the subscribers jointly, or has been dedicated to the public. Patterson *v.* Butler, 83 Ga. 606, 11 S. E. 399.

**Trust property.**—A general statutory power, in a school-board, to take charge of, manage, and control the school property of the district, does not vest such board with the control of property which has been dedicated by individuals to the uses and purposes of certain well-defined trusts, including the use thereof as school property, where the trustees appointed by the owners are properly carrying out the trust; and the mere advancement of a small sum from the school fund, which is to be returned, to be used together with the donor's money for the purpose of erecting a building on the land conveyed in trust, in part for school purposes, and in time to be used as a public school-house, does not give the board the right to take charge of and control the property. Swadley *v.* Haynes, (Tenn. Ch. App. 1897) 41 S. W. 1066.

**Under Alaska Civ. Code,** § 202, a school-board elected under the provisions of such statute has exclusive supervision, management, and control of a public school and school property within the district, including the power and duty of expending the funds paid in by the clerk of the district court. Chambers *v.* Solner, 1 Alaska 271. And that part of the school fund which is paid in by the clerk of the district court from license receipts pursuant to another section of the statute is a part of the school property within the corporation, over which such board has exclusive supervision. Brace *v.* Solner, 1 Alaska 361; Chambers *v.* Solner, *supra.*

81. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

82. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

83. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

84. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

**The power of preserving order outside of a school-house** while the school is in session is in ordinary cases in the teacher, but in extraordinary cases the school superintendent or other proper board or officer may furnish the teacher with such assistance as is necessary and reasonable to preserve order. Huse *v.* Lowell, 10 Allen (Mass.) 149.

85. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

86. Hughes *v.* Goodell, 3 Pittsb. (Pa.) 264.

87. Brooks *v.* Franconia School Dist., 73 N. H. 263, 61 Atl. 127.

dental uses as are not inconsistent with its use for school purposes,[88] or, under some statutes, for any purpose which will not interfere with the seating or other furniture.[89] But they cannot authorize its use for any private purposes,[90] or for any purposes foreign to public instruction,[91] unless they are authorized to do so by the voters of the district,[92] and if the school officers exceed their authority in this respect an injunction will lie to prevent the illegal use.[93] It has been held that a school-house may be used for township purposes,[94] or that the proper school authorities may permit the school building to be used temporarily for the purposes of a private school,[95] as during the interval between the usual summer and winter schools;[96] or that they may lawfully permit the school-house to be used out of school hours for the purpose of private instruction in vocal music of the district scholars and of others residing in the district;[97] and that it is no objection to such use that the teacher of such music is compensated by private subscription or otherwise.[98] But on the other hand it has been held that the school authorities cannot permit a public school building to be used for political meetings,[99] or for the purposes of theatrical performances as a business,[1] for public or private dances,[2] or other social gatherings,[3] although a majority of the electors and taxpayers of the district assent to such use,[4] and although an adequate rent is paid therefor.[5]

(B) *Religious Purposes.* In most jurisdictions it is generally held or provided

**88.** Sugar *v.* Monroe, 108 La. 677, 32 So. 961, 59 L. R. A. 723; Greenbanks *v.* Boutwell, 43 Vt. 207.

**89.** Lewis *v.* Bateman, 26 Utah 434, 73 Pac. 509.

**90.** Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

**91.** Weir *v.* Day, 35 Ohio St. 143; Bender *v.* Streabich, 182 Pa. St. 251, 37 Atl. 853 [*affirming* 17 Pa. Co. Ct. 609]; School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

**92.** Hurd *v.* Walters, 48 Ind. 148. But see Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268, holding that the use of a public school-house for any private purpose may be restrained at the instance of any party injured thereby, although a majority of the electors and taxpayers of the district assent to such use.

**93.** Scofield *v.* Eighth School Dist., 27 Conn. 499; Hurd *v.* Walters, 48 Ind. 148 (holding that an injunction will lie at the suit of a resident voter or taxpayer of a school-district, to restrain the use of a school-house for other than school purposes, although upon permission of the trustees of the district); Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

**94.** Harmony Tp. *v.* Osborne, 9 Ind. 458.

**95.** Chaplin *v.* Hill, 24 Vt. 528, holding, however, that the district cannot thereby confer any exclusive right to the possession of the school-house for any definite time. But see Weir *v.* Day, 35 Ohio St. 143, holding that a lease of a public school-house for a private school for a term of weeks is in violation of the trust imposed on the board of education, and that such use may be restrained at the suit of a resident taxpayer of the district.

**Where by permission of the school-district persons occupy a school-house** for the purpose of a private school not inconsistent with the rights of the district, and the prudential committee wrongfully prevents the further occupation of the house by closing it, such committee is liable therefor in an action on the case, and not in trespass. Chaplin *v.* Hill, 24 Vt. 528.

**96.** Russell *v.* Dodds, 37 Vt. 497.

**97.** Barnes' Appeal, 6 R. I. 591.

**98.** Barnes' Appeal, 6 R. I. 591.

**99.** Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

**1.** Sugar *v.* Monroe, 108 La. 677, 32 So. 961, 59 L. R. A. 723; Bender *v.* Streabich, 182 Pa. St. 251, 37 Atl. 853 [*affirming* 17 Pa. Co. Ct. 609].

**2.** Lewis *v.* Bateman, 26 Utah 434, 73 Pac. 509.

**Under Utah Rev. St. (1898) § 1822,** providing that the school trustees may permit a school-house when not occupied for school purposes to be used for any purpose which will not interfere with the seating or other furniture, the trustees of a district have no right to permit the school-house to be used for public or private dances, which use necessitates the removal of the desks from the rooms, as such a use would be a misappropriation of the trust property, and opposed to the principle that sovereignty cannot tax for private purposes. Lewis *v.* Bateman, 26 Utah 434, 73 Pac. 509.

**3.** Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

**4.** Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

**5.** Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

by statute that the school authorities cannot authorize or may prohibit a public school building to be used by outside parties for sectarian or religious purposes.[6] Under some statutes, however, it is held that the temporary use of school-houses for religious purposes may be permitted;[7] and that the permission of such use is not in violation of a constitutional provision that the legislature shall not make any appropriation from any public fund in aid of any church or sectarian purpose,[8] or make any law respecting the establishment of religion,[9] or to the effect that no one shall be compelled to support a place of worship,[10] or of a constitutional provision that all property granted for school purposes shall be applied to the object of the grant.[11]

**g. Care, Maintenance, and Repair** [12] — (i) *IN GENERAL.* A school-district is a quasi-corporation for the purpose of repairing its school-house.[13] The power and duty of caring for, maintaining, and repairing public school buildings and premises is usually vested by statute in certain local school boards or officers, such as the board of directors,[14] a school director,[15] or the school trustees.[16] The officers or boards designated to preserve and care for a school-house have the implied power to preserve the building in the condition in which it is placed in

6. *Arkansas.*— Under Sandels & H. Dig. §§ 7-42, giving the directors the custody of school-houses, grounds, books, etc., belonging to the district and requiring them to preserve the same, they are authorized to prohibit religious worship in the school where it is shown that books, seats, etc., are damaged thereby, notwithstanding the school, with the consent of the trustees, is erected on land conveyed to the latter for the purpose of religious worship, and the building is erected partly by subscriptions, with the understanding that it is to be so used under the charge of the directors. Boyd *v.* Mitchell, 69 Ark. 202, 62 S. W. 61.

*Connecticut.*— Scofield *v.* Eighth School Dist., 27 Conn. 499, holding that the inhabitants of a school-district have no right to use a school-house of the district for religious meetings and Sunday schools, against the objection of any taxpayer of the district, even though the district may have voted to allow such use, and that an injunction will be granted against such use on the application of such taxpayer, although the injury to him may be very slight.

*Indiana.*— Baggerly *v.* Lee, (App. 1905) 73 N. E. 921, holding that Burns Annot. St. (1901) §§ 5920*a*, 5981, relating to the duration of school terms in school townships, and section 5999, granting the right to use a public school building for other than school purposes "when unoccupied for common school purposes," has reference only to the time intervening between terms of school, and does not authorize a religious organization to use a school-house on Sundays and evenings during the school term, when the school is not actually in session.

*Kansas.*— Spencer *v.* Nemaha County, etc., Joint School Dist. No. 6, 15 Kan. 259, 22 Am. Rep. 268.

*Michigan.*— Eckhardt *v.* Darby, 118 Mich. 199, 76 N. W. 761, holding that the voters of a school-district at a meeting properly called and held may prohibit certain persons the use of the school-house for the purpose of holding religious meetings.

*Missouri.*— Dorton *v.* Hearn, 67 Mo. 301, holding that the school law confers no authority on school directors to allow the school building to be used for a Sunday school.

*Pennsylvania.*— Bender *v.* Streabich, 182 Pa. St. 251, 37 Atl. 853 [*affirming* 17 Pa. Co. Ct. 609]; Spring *v.* Harmon Tp. School Directors, 31 Pittsb. Leg. J. N. S. 194.

*Tennessee.*— See Swadley *v.* Haynes, (Ch. App. 1897) 41 S. W. 1066.

*Canada.*— See Rabian *v.* Thurlow School Trustees, 12 Grant Ch. (U. C.) 115.

See 43 Cent. Dig. tit. "Schools and School Districts," § 178.

7. Nichols *v.* School Directors, 93 Ill. 61, 32 Am. Rep. 160; Townsend *v.* Hagan, 35 Iowa 194, holding that the electors of a school-district may legally permit a district school building to be used for religious purposes.

8. Nichols *v.* School Directors, 93 Ill. 61, 32 Am. Rep. 160.

9. Davis *v.* Boget, 50 Iowa 11.

10. Nichols *v.* School Directors, 93 Ill. 61, 32 Am. Rep. 160; Davis *v.* Boget, 50 Iowa 11.

11. Nichols *v.* School Directors, 93 Ill. 61, 32 Am. Rep. 160.

12. **Personal injuries occasioned by negligence** see *infra*, III, E, 6.

**Reimbursement of officers for expenses incurred** see *supra*, III, D, 6, e.

13. Andrews *v.* Estes, 11 Me. 267, 26 Am. Dec. 521.

14. Williams *v.* Peinny, 25 Iowa 436 (holding that contracts for repairs of a school-house are entirely under the control of the board of directors of the district township, as they are made payable out of the contingent fund, which fund may be levied without vote, and that no vote of the electors of a subdistrict is necessary); School Dist. No. 8 *v.* Arnold, 21 Wis. 657.

15. Hamtramck Tp. *v.* Holihan, 46 Mich. 127, 8 N. W. 720.

16. Rapelye *v.* Van Syckler, 1 Edm. Sel. Cas. (N. Y.) 175.

their custody,[17] and to make good the waste and injury to which such a building is subject, or in other words to keep it in repair,[18] and this implies power to do all things that may come fairly and strictly within the term "repair";[19] but it does not imply the right to remodel or improve.[20] Under some statutes a school-district is bound by a contract of its board for the repair of its school-house, although the sum voted at the annual meeting for such repair has already been expended thereon.[21] Under other statutes, however, such board or officers cannot expend in the repair of a school building any more than has been designated for that purpose.[22] Where the statute provides that the expenses of such an officer shall be subsequently audited and paid, the money therefor need not be placed in his hands preliminary to his action.[23]

(II) *CONDEMNATION OF DILAPIDATED BUILDINGS.* In some jurisdictions provision is made by statute for the condemnation of school buildings, when they become in a dilapidated condition.[24]

(III) *TRESPASS AND ACTIONS THEREFOR.* Where a school building is unlawfully broken into and entered, or the school premises are otherwise unlawfully used or injured, the party doing the same, although an inhabitant of the school-district, is guilty of a trespass;[25] and an action therefor may be maintained by the school-board or officers having the care and management of the premises, such as the school trustees,[26] or school directors,[27] or by the board of officers having the actual occupancy thereof, although the legal title thereto is vested in others.[28] Under some statutes the district alone can bring *quare clausum fregit.*[29]

**h. Sale or Other Disposition**[30] — (I) *IN GENERAL.* A school-district pos-

**17.** Conklin *v.* School Dist. No. 37, 22 Kan. 521.

**18.** Conklin *v.* School Dist. No. 37, 22 Kan. 521.

**19.** Conklin *v.* School Dist. No. 37, 22 Kan. 521. *Compare* Davis *v.* Bradford School Dist. No. 2, 24 Me. 349.

**20.** Conklin *v.* School Dist. No. 37, 22 Kan. 521.

Civil townships are not liable for expenses incurred in improving their school buildings. Wingate *v.* Harrison School Tp., 59 Ind. 520.

**21.** Conklin *v.* School Dist. No. 37, 22 Kan. 521, holding that under Laws (1876), c. 122, §§ 11, 22, 25, authorizing a school-district to vote taxes for the purchase and repairs of a school-house, and requiring the board to preserve and care for the school-house, a school-district is bound by the contract of its board for repairs, although the sum voted at the annual meeting for certain repairs has already been expended thereon.

**22.** Davis *v.* Bradford School Dist. No. 2, 24 Me. 349.

**23.** Hamtramck Tp. *v.* Holihan, 46 Mich. 127, 8 N. W. 720.

**24.** See New York Consolidated School Law, tit. V, § 13, subd. 4; and the statutes of the several states.

Under Ky. Gen. St. § 7, arts. 6, 8, providing that it shall be the duty of the county superintendent to condemn dilapidated school buildings, and of the trustees, when notified by the superintendent of the condemnation, to repair the old building or erect a new one, the superintendent and the trustees are the judges of the necessity for a new building, and their action cannot be questioned by the taxpayers of the district. School Dist. No. 1 *v.* Jameson, 15 S. W. 1, 779, 12 Ky. L. Rep. 719, holding also that where under such statute the trustees are notified by the superintendent that a better house is required, and that the old one has been condemned, it is not necessary that the trustees see the order of condemnation before taking action.

**25.** Rapelye *v.* Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175, holding that where an inhabitant of a school-district at his own pleasure and against the remonstrance of the school trustees removes a fence erected by the district on its school land, he will be liable to the trustees in trespass. See also Pictou County School Trustees *v.* Cameron, 2 Can. Sup. Ct. 690.

**26.** Rapelje *v.* Van Sickler, 11 Edm. Sel. Cas. (N. Y.) 175. See also Pictou County School Trustees *v.* Cameron, 2 Can. Sup. Ct. 690; Monaghan *v.* Ferguson, 3 U. C. Q. B. 484.

**27.** School Dist. No. 8. *v.* Arnold, 21 Wis. 657, holding that under Laws (1863), c. 155, § 48, the board of school directors must be deemed to have authority to bring a suit for an injury to the school-house, without any direction from the electors.

**28.** Alderman *v.* School Directors of Dist. No. 5, 91 Ill. 179, holding that school directors in the actual occupancy of a school-house for school purposes may maintain trespass for breaking and entering the same, although the legal title is vested in the trustees of schools.

**29.** Chaplin *v.* Hill, 24 Vt. 528, holding also that such an action cannot be maintained by an inhabitant of the school-district, as such inhabitants have no estates in any form in the property belonging to the district.

**30.** Use and disposition of school property in general see *supra*, III, E, 1, d.

sesses only such power as is conferred upon it by statute, in respect to selling or otherwise disposing of its public school buildings,[31] and investing the proceeds;[32] and as a general rule it cannot sell a school-house for mere purposes of gain,[33] or for any other purpose than to carry into effect the powers granted to it by statute.[34] It is sometimes provided by statute, however, that a school-district may sell and dispose of a school-house if necessary,[35] of which necessity the school-district is the exclusive and final judge.[36] And it has been held that where a school-house becomes old and unfit for the use of the district, the district may dispose of it even independently of statutory authority.[37] Authority to an agent of a school-district to sell a school-house as a general rule authorizes a sale for cash only,[38] and a sale thereof on credit is unenforceable,[39] unless it is thereafter ratified by the district.[40]

(II) *RATIFICATION OR RESCISSION OF SALE.* An unauthorized or invalid sale of a school-house by an agent of a school-district may be ratified by the district by a recorded vote, or by some act or acquiescence upon its part as a corporation equivalent thereto.[41] In order that a school-district may rescind a sale of a school-house on the ground of fraud, it must at least offer to restore to the purchaser what has been paid therefor.[42]

**3. SCHOOL FURNITURE, APPARATUS, AND OTHER APPLIANCES[43] — a. Authority and Duty to Provide in General.** The authority and duty of providing furniture, books, apparatus, and other appliances for public school purposes are usually vested by statute in a designated board or officer.[44] The extent of the powers of such board or officer is controlled by the terms of the statute, and is such only as

**Disposition of school lands** see *supra*, III, B, 1, b.

31. See Samuels *v.* Poplar Plains, 4 Bush (Ky.) 252.

**Disposition of school buildings under the Oklahoma act** of March 8, 1901, known as the Separate School Act, see Oklahoma County School Dist. No. 71 *v.* Overholser, 17 Okla. 147, 87 Pac. 665; Kingfisher Bd. of Education *v.* Kingfisher County, 14 Okla. 322, 78 Pac. 455.

32. Samuels *v.* Poplar Plains, 4 Bush (Ky.) 252, holding that the act of Feb. 28, 1860, authorizing town trustees to sell a lot and school-house thereon belonging to the town, and to invest the proceeds in the purchase of other grounds and the erection of other school-house buildings, did not require a re-investment within the corporation, and that the trustees could not be held responsible as for a misapplication of the fund, for proceeding in accordance with a popular vote, and investing the proceeds as so much stock in a seminary lot and building just outside the town limits.

33. Whitmore *v.* Hogan, 22 Me. 564.

34. Sherlock *v.* Winnetka, 68 Ill. 530 (holding that a board of education cannot convey or lease a school building without pay or rent to an individual or private corporation for the purpose of having a school taught therein for pay); Whitmore *v.* Hogan, 22 Me. 564.

35. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 54 Me. 505.

36. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 54 Me. 505.

37. Whitmore *v.* Hogan, 22 Me. 564.

**A resolution to sell an old school-house** passed at the same meeting at which it is resolved to raise money to build a new school-house is illegal where no notice is given that the matter of sale will be a subject of consideration at the meeting. Stackhouse *v.* Clark, 52 N. J. L. 291, 19 Atl. 462.

38. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330.

39. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330.

40. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330.

41. See Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 62 Me. 330, holding, however, that where a committee making an unauthorized sale keeps the proceeds of the sale in its own hands and makes no report in any form to the district, and the district at its first meeting after such sale passes a vote condemning the action of the meeting, no ratification of the acts of the committee can be inferred from the fact that the meeting was not held until several months after the sale was known to individuals in the district, although during such time the school-house was removed by the vendees.

42. Dresden School Dist. No. 6 *v.* Ætna Ins. Co., 54 Me. 505.

43. **Text-books** see *infra*, III, I, 2, e.

44. Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700 (holding that it is the duty of the township trustee to provide furniture and appliances for schools); Pennsylvania First School Dist. Bd. of Public Education *v.* Ransley, 209 Pa. St. 51, 58 Atl. 122 (holding that the power of the board of education of Philadelphia to purchase supplies for school purposes is not affected by the act of April 4, 1903, providing for a department of supplies for the city); McGee *v.* Franklin Pub. Co., 15 Tex. Civ. App. 216, 39 S. W. 335 (school trustees).

is expressly given or necessarily implied;[45] or if the power is conferred by a vote of the electors of the district, it is controlled by the terms of the resolution conferring it,[46] and under some statutes a purchase by such board or officer must be authorized or approved by the district.[47] A general authority to provide all necessary apparatus and equipment and make other necessary provisions, etc., means the ordinary general apparatus or furnishing, such as seats, heating apparatus, blackboards, desks, etc., necessary in all school-houses to completely equip them and make them suitable and comfortable for general use for school purposes;[48] and in exercising such power the board or officers must act with discretion and economy, and have no power to charge the school-district or township with anything but needful and appropriate articles.[49] But it has been held that where the purchases are authorized the fact that the articles purchased are unnecessary,[50] or the contract fraudulent,[51] does not relieve the district or township from liability, without a rescission of the contract by returning or offering to return the articles purchased.[52] Under some statutes such appliances or apparatus may be purchased on the credit of the school-district or town.[53] Under other statutes,

**Under Iowa Code (1873), tit. 12, c. 9,** the entire control of the district schools is put into the hands of the board of township directors, and a subdirector in a school-district has no right to forbid the use in the schools of a subdistrict of apparatus purchased by the board, on the ground that such apparatus is worthless and that its purpose is illegal. Union Dist. Tp. *v.* Meyers, 83 Iowa 688, 49 N. W. 1042.

**45.** Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515 (holding that a township trustee has authority to bind the township by a contract for the purchase of school furniture); Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564.

**Under Ind. Rev. St. (1881) §§ 4444, 4499, 4537,** a school trustee has no lawful authority to provide furniture for a room for school purposes, unless such room is owned or leased by the school township; and even if the county superintendent on appeal directs him to provide furniture for a room not so owned or leased, he may properly disobey the order, and a mandate will not lie to compel him to obey it. State *v.* Sherman, 90 Ind. 123.

**46.** McLaren *v.* Akron Town Bd., 48 Mich. 189, 12 N. W. 43 (holding that a township school director has authority, in the exercise of a sound discretion, to buy new seats for a school-house under a resolution "that the school board fix the school-house ready for the winter term"); Chamberlain *v.* Cranbury Tp. Bd. of Education, 57 N. J. L. 605, 31 Atl. 1033.

**47.** Monticello Bank *v.* Coffin's Grove Dist. Tp., 51 Iowa 350, 1 N. W. 592; Taylor *v.* Otter Creek Dist. Tp., 26 Iowa 281 (holding that the board of directors of a district township has no power to make a purchase of maps, charts, globes, and other school apparatus without a previous vote of the electors); Western Pub. House *v.* Locke Tp. School-Dist. No. 1, 94 Mich. 262, 53 N. W. 1103 (holding that Howell Annot. St. § 5073, subd. 6, and § 5052, subds. 7, 12, does not allow of any purchase of apparatus or appendages by a director, whether acting singly or with the other directors, unless upon the authority of the district; and that this is not changed by act No. 165, Laws 1887); Kane *v.* School Dist. No. 3, 52 Wis. 502, 9 N. W. 459 (holding that the power of the district board to contract for appendages to a school-house, fuel, etc., is conditioned upon the contract being approved by the district, by allowing the account of the board therefor, or otherwise ratifying such contract, except in cases where the district has already provided a fund, and directed the board to purchase and pay for such appendages or fuel out of such fund).

**48.** State *v.* Freed, 10 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 550, holding that Rev. St. § 3987, refers only to such furnishing and equipment, and not to philosophical apparatus for the demonstration of branches of education which is expressly provided for by section 3995.

**Under N. J. Pub. School Act,** Oct. 19, 1903, a board of education may build a central heating plant, from which heat is to be distributed through pipes to a group of school-houses in the vicinity of, but not adjoining, such plant. Scala *v.* Montclair Bd. of Education, (N. J. Sup. 1908) 71 Atl. 299.

**49.** Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100.

**50.** Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515.

**51.** Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515.

**52.** Johnson School Tp. *v.* Citizens' Bank, 81 Ind. 515.

**53.** Hartwell *v.* Littleton, 13 Pick. (Mass.) 229, holding that under the clause in St. (1826) c. 143, that the school-committee of each town shall procure class-books at the expense of the town to be paid for out of the town treasury, the school-committee may procure books on the credit of the town, or their own credit, and thereby make themselves creditors of the town.

**Under Iowa Code (1897), § 2783,** a board of school directors may contract an indebtedness for school supplies, payable out of the contingent fund, although no funds are on

however, debts against the district cannot be contracted for such purposes.[54] Some statutes limit the amount which may be expended in any one year for such apparatus.[55]

**b. What Apparatus or Appliances May Be Provided.** As to what apparatus or appliances may or should be provided under such statutes depends upon the terms of the particular statute.[56] It has been held that a statutory provision authorizing or requiring "apparatus," "appliances," or "appendages" to be provided for school purposes, authorizes a purchase of suitable maps and charts,[57] a mathematical chart,[58] music charts,[59] mathematical blocks,[60] a globe representing the movements of the earth, moon, and sun,[61] and a fence inclosing a school-house site and separating it from adjacent lands;[62] and that it does not authorize the purchase of a stereoscope and stereoscopic views,[63] or a "reading circle library and

hand at the time from which the indebtedness may be paid (Johnson *v.* Cedar School Corp., 117 Iowa 319, 90 N. W. 713; Hanna *v.* Wright, 116 Iowa 275, 89 N. W. 1108); but it was otherwise under the code of 1873, section 1729 (see Yaggy *v.* Monroe Dist. Tp., 80 Iowa 121, 45 N. W. 553; Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564).

**54.** Clark *v.* Iroquois County Dist. No. 1, 78 Ill. 474.

**55.** Hanna *v.* Wright, 116 Iowa 275, 89 N. W. 1108; Greenville Tp. Bd. of Education *v.* Andrews, 51 Ohio St. 199, 37 N. E. 260; State *v.* Freed, 10 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 550; Kane *v.* School Dist. No. 3, 52 Wis. 502, 9 N. W. 459.

**56.** See Yaggy *v.* Monroe Dist. Tp., 80 Iowa 121, 45 N. W. 553; Affholder *v.* State, 51 Nebr. 91, 70 N. W. 544; Plymouth First Nat. Bank *v.* Harrison Tp. Bd. of Education, 15 Ohio Cir. Ct. 561, 8 Ohio Cir. Dec. 283; State *v.* Freed, 10 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 550; McGee *v.* Franklin Pub. Co., 15 Tex. Civ. App. 216, 39 S. W. 335, holding that authority to buy furniture for school-houses does not authorize the purchase of a "Normal Series Grammar Chart."

**A cabinet containing a number of geographical maps, so that they may be conveniently displayed, and the whole series when not in use, inclosed and protected are, under Ohio Rev. St. § 3987, in reference to furnishings for a school-room, and do not fall within the limitation of section 3995, as philosophical and other apparatus for the demonstration of branches of education, and therefore may be furnished to a school by the board of education. Plymouth First Nat. Bank *v.* Harrison Tp. Bd. of Education, 15 Ohio Cir. Ct. 561, 8 Ohio Cir. Dec. 283.**

**Whether a well is a necessary appendage** to a school-house, within a statute providing that "the district board shall provide the necessary appendages for the school-house during the time a school is taught therein" is a question for the jury to decide. Hemme *v.* Osage County School Dist. No. 4, 30 Kan. 377, 1 Pac. 104.

**57.** Gibson *v.* Vevay Tp. School Dist. No. 5, 36 Mich. 404 (holding, however, that national business multiplication charts, being charts or cards containing the multiplication table, practical forms of business contracts, and also brief mention of prominent historical events, are not necessary appendages to the school-house, within Comp. Laws (1871), § 3618); State *v.* German Tp., 2 Ohio Cir. Ct. 363, 1 Ohio Cir. Dec. 532 (holding that under Rev. St. § 3987, empowering the board of education to build, enlarge, repair, and furnish the necessary school-houses, the board has authority to furnish school and reading charts); Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 54 Am. St. Rep 847, 32 L. R. A. 413 (holding that under the head of "appliances," a board of education may provide maps and charts, but it must be made to appear that they are not mere school-books in some other form or under some other name, but something of which a few will answer the needs of all, suitable to the school, and reasonably necessary to enable the teacher to impart instruction to the pupils more efficiently in such branches as are required to be taught).

**58.** Chase County School-Dist. No. 17 *v.* Swayze, 29 Kan. 211.

**59.** W. P. Myers Pub. Co. *v.* White River School Tp., 28 Ind. App. 91, 62 N. E. 66, holding that music charts, not being general text-books for the use of the individual pupils, but a few sufficing for the school, can be purchased by the school trustees for the use of the schools.

**60.** State *v.* Freed, 10 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 550, holding, however, that a contract to purchase such blocks beyond the amount limited by Rev. St. § 3995, is void.

**61.** Greenville Tp. Bd. of Education *v.* Andrews, 51 Ohio St. 199, 37 N. E. 260, holding that "Andrews' Tellurian Globes," consisting of a globe representing the earth, and a smaller one representing the moon, and other parts, so constructed as, when operated, to represent the relative motions of the earth and moon with respect to each other and the sun, and to explain the various natural phenomena caused by the motions of the earth, moon, and sun, is an apparatus within Rev. St. § 3995, limiting the amount which a board of education may expend for such purposes in any one year.

**62.** Creager *v.* Wright Tp. School-Dist. No. 9, 62 Mich. 101, 28 N. W. 794.

**63.** Bourbon County School Dist. No. 29 *v.* Perkins, 21 Kan. 536, 30 Am. Rep. 447, holding such articles not to be "necessary

cases"; [64] but that an affirmative vote of the qualified voters at a lawfully assembled meeting is necessary to a purchase of such articles.[65] Authority to provide for the teaching of music implies the power to purchase a musical instrument, such as an organ.[66] A piano may be purchased for the purposes of a high or graded school.[67]

**c. School Libraries.** Provision is made under some statutes for the establishment, maintenance, and regulation of school-district libraries.[68] It has been held under such a statute that the legislature has power to specify the duties of the librarians of such libraries; [69] that the inhabitants of the school-district may also make such regulations as they think proper for the government of the librarian; [70] that the school trustees may direct him in all matters relating to the preservation of the books; [71] and that in the absence of regulations or directions touching the rights of the inhabitants and the duties of the librarian, an action cannot be maintained against him for refusing to allow a taxable inhabitant or his children to take books from the library.[72]

**4. CONTRACTS** [73] **— a. Capacity of District to Contract in General.** A school-district or township can contract only in its corporate capacity,[74] and has the power of entering into such contracts and such only as are expressly or impliedly authorized by statute,[75] and as are authorized by legal votes passed at a regularly called district meeting.[76]

**b. Powers of District Boards, Committees, or Other Officers** [77] **— (I)** *IN GENERAL.* The authority of school-district boards, committees, or other officers to bind the district by contracts relative to school matters are also controlled by statute, and are such only as are conferred, either expressly or by necessary implication, by such statute,[78] or as are authorized by a vote of the electors of the school-

appendages for the school-house" within the meaning of Gen. St. c. 92, art. 4, § 46.

**64.** Elkhart First Nat. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. E. 256; Marion First Nat. Bank *v.* Adams School Tp., 17 Ind. App. 375, 46 N. E. 832.

**65.** Bourbon County School Dist. No. 29 *v.* Perkins, 21 Kan. 536, 30 Am. Rep. 447.

**66.** Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564.

**67.** Knabe *v.* West Bay City Bd. of Education, 67 Mich. 262, 34 N. W. 568, holding that the board of trustees of a graded school have such authority.

**68.** See New York Consolidated School Law, tit. 13; and the statutes of the several states.

**Under Ind. Act (1903), c. 102** (Burns Annot. St. Suppl. (1905) §§ 4983*h*–4983*s*), providing for the maintenance and management of public libraries in certain cities, a school city exercising its authority over the public library of a city by virtue of law, has no right to complain that the management of the library has been taken over by a board of trustees appointed by a majority vote of the members of the common council. Marion *v.* Forrest, 168 Ind. 94, 78 N. E. 187.

**69.** Kennedy *v.* Ray, 22 Barb. (N. Y.) 511.

**70.** Kennedy *v.* Ray, 22 Barb. (N. Y.) 511.

**71.** Kennedy *v.* Ray, 22 Barb. (N. Y.) 511.

**72.** Kennedy *v.* Ray, 22 Barb. (N. Y.) 511.

**73. Contracts with teachers** see *infra*, III, H, 3.

**Power of school commissioner to contract for interest on sale of school land** see PUBLIC LANDS, 32 Cyc. 882, 887.

**74.** Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

**75.** Snoddy *v.* Wabash School Tp., 17 Ind. App. 284, 46 N. E. 588, holding a school township not liable on an attorney-fee clause in its note.

**Build and repair division fences.**—A school-district may contract to build and keep in repair a division fence, as part of the consideration for a conveyance of land, to be used as a public school site, although such contract is made before any tax to build or repair the fence has been voted. Albright *v.* Riker, 22 Hun (N. Y.) 367.

**A school city cannot contract for the construction of a street** in front of its property, nor can it assume payment therefor after the work is completed. Sutton *v.* Montpelier School City, 28 Ind. App. 315, 62 N. E. 710.

**A civil township** can make no valid contract concerning the property of a school township. Jarvis *v.* Jefferson County Shelby Tp., 62 Ind. 257; Jackson Tp. *v.* Barnes, 55 Ind. 136.

**76.** Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

**77. Authority to contract:** For **furniture**, apparatus, and other appliances see *supra*, III, E, 3. For the purchase or lease of school property see *supra*, III, E, 1, c. **To incur indebtedness** see *infra*, III, F, 1.

**Contracts with teachers extending beyond officer's term** see *infra*, III, H, 3, a, (IV).

**78.** Easton School Dist. No. 4 *v.* Snell, 24 Mich. 350 (holding that the district board has authority under the Primary School Law, §§ 4, 5, 9, 38, to purchase a set of books suitable for district records without

district;[79] and a school-district or township cannot be held liable on contracts of its board or officers which they had no legal authority to make.[80] Thus it has been held under the various statutes that such board, committee, or officers have power to compromise a claim against the district,[81] to contract for repairs,[82] and to insure the school property.[83] But on the other hand it has been held that a school-board has no power in the absence of express legislative authority to make a contract for school supplies which stipulates for the payment of attorney's fees by the school-district,[84] or which fixes the place of payment at any other place than at the school treasury.[85] Under some statutory provisions such board or officers cannot make a valid contract on behalf of the school-district except to the extent that funds have been appropriated and are available therefor,[86] as under a provision that

the vote of the district); Gould *v.* Union Free School Dist. No. 9, 34 Hun (N. Y.) 16; Washington Academy *v.* Cruikshank, 43 Misc. (N. Y.) 197, 88 N. Y. Suppl. 330 (holding that a contract between a village board of education and the trustees of a private academy for the instruction therein of public school pupils is not *ultra vires*). See also Perkins *v.* Newark Bd. of Education, 161 Fed. 767.

**Burial of dead from smallpox.**— Under the Pennsylvania act of April 11, 1899, empowering school-boards to act with a view to abating any contagious disease prevalent in their district, a school-board has power through a committee of the board to enter into a contract with an undertaker, binding upon the school-district, to bury a poor person who has died of smallpox. Marlatt *v.* Aleppo Tp. School Dist., 34 Pa. Super. Ct. 323.

**In Canada** a joint board of grammar and common school trustees are a corporate body, capable of contracting and being sued, although the separate corporate existence of each continues; and they are therefore liable for work done under a contract made by them for an addition to a school-house. Oliver *v.* Union School Trustees, 29 U. C. Q. B. 409.

**79.** American Ins. Co. *v.* Willow Dist. Tp., 55 Iowa 606, 8 N. W. 472; Union Free School Dist. No. 4 *v.* Grear, 57 Misc. (N. Y.) 472, 109 N. Y. Suppl. 931, holding that under a vote to enlarge a school building at a cost not to exceed a certain sum to be raised by tax, the board of education cannot contract for alterations, at a cost of more than one third of the entire sum, which are so extensive as to constitute a remodeling of the entire interior of the existing building.

**80.** State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519; Mest *v.* Earle Tp. School Dist., 2 Woodw. (Pa.) 257.

**A trustee of a civil township** has no authority to execute a contract for the benefit of the property of the school township. Jackson Tp. *v.* Columbus Home Ins. Co., 54 Ind. 154.

**Temporary aid to poor children.**— Ind. Act (1899), § 6, providing that if the parent or custodian of any child is too poor to furnish it with the necessary clothing and books with which to attend school, "then the school trustees shall furnish temporary aid for such purpose," which shall be repaid on the certificate of said officers by the county commissioners, does not authorize a school corporation to contract a debt on behalf of the county with third persons for furnishing such supplies. Miami County Com'rs *v.* Falk, 29 Ind. App. 683, 65 N. E. 10.

**81.** Norton *v.* Tinmouth School Dist. No. 7, 37 Vt. 521.

**82.** Leonard *v.* State, 67 Nebr. 635, 93 N. W. 988, holding that under Comp. St. c. 79, subd. 4, § 13, the director of a school-district with the consent of the moderator may contract for repairs on a school-house of a district during vacation, and that it is not necessary that such contract be entered into at a regular meeting of the school-board.

**83.** Clark School Tp. *v.* Home Ins., etc., Co., 20 Ind. App. 543, 51 N. E. 107, holding that under Rev. St. (1897) § 4444 (Burns Rev. St. (1894) § 5920) a school township trustee has implied power to expend a reasonable sum in insuring the school property against fire. *Compare* American Ins. Co. *v.* Willow Dist. Tp., 55 Iowa 606, 8 N. W. 472.

**84.** Weir Furnace Co. *v.* Seymour Independent School Dist., 99 Iowa 115, 68 N. W. 584.

**85.** Weir Furnace Co. *v.* Seymour Independent School Dist., 99 Iowa 115, 68 N. W. 584.

**86.** People *v.* Lathrop, 19 How. Pr. (N. Y.) 358; Davis *v.* Ft. Spring Dist., 38 W. Va. 382, 18 S. E. 588, holding that under Code, c. 45, § 45, making it unlawful to contract for more than the funds available for the fiscal year, the value of a school-house and site yet unsold, although intended to be sold, cannot be considered in estimating the amount of money available in the fiscal year for contracts and expenditures.

**The failure of the board of education of the city of New York to make an appropriation** as authorized by the provisions of the Consolidation Act to pay a contractor for work done on a public school building, under a contract approved and ratified by the board does not invalidate such contract and preclude a recovery by the contractor where he performs the work in good faith without knowledge that the appropriation had not been made, and where he has no means under the statute of protecting himself against the board's exhausting appropriations available and sufficient at the time the

they shall not contract debts in excess of the amount voted by the school-district,[87] or that they shall not create a debt not included in the annual estimate, without special authority therefor.[88] Where, however, the power to contract is fully executed, and something unauthorized is added, which is clearly distinguishable from the rightful execution, the execution of the power so far as authorized is good, and void as to the excess.[89] A *de facto* school officer may bind a school-district by a contract otherwise within his powers.[90]

(II) *NOTICE OF LIMITATIONS ON POWER.* All persons dealing with district boards, committees, or officers are bound to ascertain the limits of their authority as fixed by statutory or organic law, and are therefore chargeable with notice of any limitations thereon,[91] as in respect to the amount they are authorized to expend.[92]

(III) *POWERS IN RESPECT TO PARTICULAR CONTRACTS* — (A) *Construction of Buildings.* The power of a district board, committee, or other officers to enter into a contract for the construction of a school building is controlled by statutes,[93] under which it is usually provided that a school-board may enter into a contract for the erection of a school-house only upon the petition or authority of the voters of the district,[94] at an annual meeting on a designated day,[95] and then only within the limits of the power so conferred;[96] that such contract can

contract was made to pay for the work. Van Dolsen *v.* New York Bd. of Education, 162 N. Y. 446, 56 N. E. 990 [*reversing* 29 N. Y. App. Div. 501, 51 N. Y. Suppl. 720].

**87.** Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922, holding that Rev. St. § 3936, does not authorize a district board to contract debts in excess of the appropriation made for that purpose by the annual district meeting.

**88.** Union Nat. Bank *v.* Franklin School Tp., 31 Ind. App. 699, 68 N. E. 328; Lincoln School Tp. *v.* American School Furniture Co., 31 Ind. App. 405, 68 N. E. 301.

**89.** State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519.

**90.** Smith *v.* Coman, 47 N. Y. App. Div. 116, 62 N. Y. Suppl. 106, holding that where a trustee of a school-district is appointed by the school commissioner, the fact that he holds *de facto* title to the office is sufficient to enable third parties to recover against the district for school supplies ordered by him. See also *supra*, III, D, 6, b.

**91.** *Connecticut.*—Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

*Indiana.*— Silver *v.* Indiana State Bd. of Education, 35 Ind. App. 438, 72 N. E. 829, (App. 1904) 71 N. E. 667.

*Iowa.*— Douds Independent School Dist. *v.* McClure, 136 Iowa 122, 113 N. W. 554.

*Kansas.*— School Dist. No. 80 *v.* Brown, 2 Kan. App. 309, 43 Pac. 102.

*Ohio.*— State *v.* Freed, 10 Ohio Cir. Ct. 294, 6 Ohio Cir. Dec. 550.

*Pennsylvania.*— Roland *v.* Reading School Dist., 161 Pa. St. 102, 28 Atl. 995 (holding that a person contracting with a school-district is bound to know what contract the board has authorized its president to make); Rutledge *v.* McCue, 10 Kulp 57.

*West Virginia.*— Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413.

See 43 Cent. Dig. tit. "Schools and School Districts," § 188.

But *compare* Baker *v.* Barton School Dist. No. 2, 46 Vt. 189.

**Persons contracting with a school trustee** are bound to take notice of his official character, and that he can only bind his township by contracts authorized by law, and it is incumbent upon those who deal with him to ascertain whether he is acting within his authority. Bloomington School Tp. *v.* National School Furnishing Co., 107 Ind. 43, 7 N. E. 760; Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

**92.** Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

**93.** People *v.* Banfield, 6 How. Pr. (N. Y.) 437 (holding that the inhabitants of a school-district cannot empower a building committee to advertise or make a contract for building a school-house, or to do any other act binding upon the trustees without their assent, as the statute merely empowers the inhabitants to provide the means, and then empowers the trustees to build); Perkins *v.* Newark Bd. of Education, 161 Fed. 767.

**A school-district may contract for the protection of third persons** furnishing material to contractors, to be used in the construction of a school building, under a power to erect school buildings and to provide for payment therefor. Connor Co. *v.* Ætna Indemnity Co., 136 Wis. 13, 115 N. W. 811.

**94.** District 1 Bd. of Education *v.* Roehr, 23 Ill. App. 629; School Dist. No. 80 *v.* Brown, 2 Kan. App. 309, 43 Pac. 102; St. Paul Capital Bank *v.* Baines County School-Dist. No. 53, 1 N. D. 479, 48 N. W. 363.

**95.** Fluty *v.* School-Dist. No. 11, 49 Ark. 94, 4 S. W. 278, holding that where the law fixes a certain time and place for transacting the business of a school-district, and a meeting is held on a different day and authority is voted to the school directors to make a contract for building a school-house, the contract in pursuance of such vote is void.

**96.** School Dist. No. 80 *v.* Brown, 2 Kan. App. 309, 43 Pac. 102; Baker *v.* Barton School Dist. No. 2, 46 Vt. 189.

be entered into only to the extent of funds provided and available for that purpose; [97] or that no contract can be made relative to the erection of a school building, the cost of which will exceed the amount appropriated therefor [98] or which will exceed a given amount.[99] But it has been held that a school-board has power to contract for general drawings and preliminary specifications for a school building, although for want of funds it may at that time have no power to erect the building, since such plans are no part of the construction.[1]

(B) *Employment of Counsel.* A school-district ordinarily has statutory power, through its proper boards or officers, to employ counsel to represent it in suits brought by or against it or any of its officers involving the interests of the district,[2]

**Build new school-house or enlarge old one.** — Where a vote is cast at a school meeting to build a new school-house or enlarge the old one, and a building committee is chosen with instructions to proceed forthwith to complete the work which is in its hands, the committee has power at its election to either build a new school-house or enlarge the old one. Morse *v.* Newbury School Dist. No. 7, 3 Allen (Mass.) 307.

**97.** *New York.*— Van Dolsen *v.* New York Bd. of Education, 162 N. Y. 446, 56 N. E. 990 [*reversing* 29 N. Y. App. Div. 501, 51 N. Y. Suppl. 720].

*North Dakota.*— St. Paul Capital Bank *v.* Barnes County School-Dist. No. 53, 1 N. D. 479, 48 N. W. 363.

*West Virginia.*— Davis *v.* Ft. Spring Dist. Bd. of Education, 38 W. Va. 382, 18 S. E. 588, holding, however, that a contract for the building of a school-house is not void under Code, c. 45, § 45, restricting contracts for that purpose to the amount of funds available for the fiscal year, although the contract price is greater than the available funds, if it provides that no liability shall be imposed upon the board for anything more than the sum lawfully available.

*Wisconsin.*— McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100.

*United States.*— St. Paul Capital Bank *v.* Barnes County School Dist. No. 26, 63 Fed. 938, 11 C. C. A. 514.

*Canada.*— See Smith *v.* Ft. William School Bd., 24 Ont. 366.

**98.** Gahling *v.* Richardson County School Dist. No. 56, 10 Nebr. 239, 4 N. W. 1023; Wilson *v.* Chester School Dist. No. 4, 32 N. H. 118; Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58; Perkins *v.* Newark Bd. of Education, 161 Fed. 767.

**99.** Turney *v.* Bridgeport, 55 Conn. 412, 12 Atl. 520.

**1.** Fiske *v.* Lincoln School Dist., 59 Nebr. 51, 80 N. W. 265, 58 Nebr. 163, 78 N. W. 392. But see Perkins *v.* Newark Bd. of Education, 161 Fed. 767.

**2.** Scott *v.* Hardin Independent School Dist., 91 Iowa 156, 59 N. W. 15; Templin *v.* Fremont Dist. Tp., 36 Iowa 411, holding, however, that the president of a school-district township has no authority to employ counsel at request of the district unless in a case brought by or against the district.

**A board of education of a union free school district created under N. Y. Laws (1864),** c. 555, had authority to employ counsel to defend an action brought against it. Gould *v.* Livonia Bd. of Education, 34 Hun (N. Y.) 16.

**Under Tenn. Act. (1897), c. 36, § 6,** the state superintendent has the power on a report that any portion of the school fund has been misappropriated, illegally disposed of, lost, or uncollected, to employ a local attorney to collect the funds, and to authorize the attorney to retain for his compensation a certain per cent of the money actually collected. State *v.* True, 116 Tenn. 294, 95 S. W. 1028, holding also that under such statute the chairman of the county court has no authority to employ an attorney to institute such a suit, and to contract to pay him a specified fee out of the school funds of the county.

**An appeal to a county or state superintendent** from a decision of the board of school directors is not a suit by or against the school-board or its officers, in which counsel may be employed by the president of a school-district township. Templin *v.* Fremont Dist. Tp., 36 Iowa 411.

**Power to consult counsel.**—A vote by a school-district for its prudential committee "to look into the rights of the district" implies authority to consult counsel as to such rights, but not to prosecute an action. Burgess *v.* Uxbridge School Dist., 100 Mass. 132.

**Necessity for vote of district.**— In Vermont the prudential committee of a school-district has no authority, without a vote of the district to that effect, to employ counsel in the name of the district to defend a suit against an officer of the district, in which the district may be interested. Harrington *v.* Alburgh Sixth School Dist. No. 6, 30 Vt. 155.

**Attorney member of committee.**—Where an attorney is employed by the director of a school-district to defend a suit in a justice's court, and the suit is discontinued and another suit brought on the same cause of action in a higher court, and after the commencement of proceedings in the latter court the electors of the district meet and appoint a committee, of which the attorney is a member, to defend the suit, and a proposition to rescind the acts of the meeting is voted down at a subsequent meeting, it is a valid contract of employment of such attorney, and the fact that the committee of which he is a member stands in the relation of public officers to the district does not affect his right to com-

and this power may be implied from the power to sue.[3] But such power does not authorize school officers to employ counsel at the public expense to defend a fraud perpetrated by such officers upon the district;[4] nor has the president of a school-board power to bind the board by employing an attorney and authorizing him to enter judgment in behalf of the district on a bond held by the district.[5] Where the school-district has a right to require the services of the city or district attorney, it has no authority to incur expense in the employment of other counsel.[6]

(c) *Employment of Janitor and Engineer.* A school-district board or other proper officers are usually authorized to employ a janitor for a school-house,[7] or an engineer to take charge of the steam-heating apparatus of a school;[8] and such contract must be made by the board or officer authorized thereto by statute,[9] and in the manner and under the conditions required by the terms of the statute,[10] as that it must be in writing.[11]

(iv) *ESTOPPEL TO DENY AUTHORITY.* As a general rule the doctrine that principals are estopped from denying the authority of agents acting within the scope of their apparent powers[12] is not applicable to public officers, and if a contract is made by a school-board or officers in excess of their authority, the school-district cannot be held liable on the ground of estoppel.[13] But where a contract is made by a board or officers within the limit of their general powers, and performance thereunder is of so notable a character that it may be deemed to be done with the consent of the district, an obligation will arise on the part of the district to pay for the work done or services performed, although the particular board or officers had in fact no such authority;[14] and the plea or defense of *ultra vires* is

pensation. McCaffrey *v.* Montello School Dist. No. 1, 74 Wis. 100, 42 N. W. 103.

3. State *v.* Aven, 70 Ark. 291, 67 S. W. 752; Kingsbury *v.* Quincy Centre School Dist., 12 Metc. (Mass.) 99.

4. Scott *v.* Hardin Independent Dist., 91 Iowa 156, 59 N. W. 15.

5. Com. *v.* Kerr, 25 Pa. Co. Ct. 645.

6. Denman *v.* Webster, 139 Cal. 452, 73 Pac. 139, (1902) 70 Pac. 1063.

7. Oberdorfer *v.* Louisville School Bd., 120 Ky. 112, 85 S. W. 696, 27 Ky. L. Rep. 508 (holding that under St. (1903) §§ 2954, 2956, the school-board of a city may employ a janitor for a school building, and that having done so it is its duty to pay his salary from the fund for educational purposes); Taylor *v.* School Dist. No. 3, 60 Mo. App. 372; Weidman *v.* Lyons Bd. of Education, 4 Silv. Sup. (N. Y.) 240, 7 N. Y. Suppl. 309. See also People *v.* New York Bd. of Education, 104 N. Y. App. Div. 162, 93 N. Y. Suppl. 300.

**Removal of janitor.**— Under N. Y. Laws (1856), c. 129, the board of education had power to remove the janitor at its pleasure, which power became a term of the contract by which such janitor was employed. Weidman *v.* Lyons Bd. of Education, 4 Silv. Sup. (N. Y.) 240, 7 N. Y. Suppl. 309.

**Compensation of janitor** under N. Y. Labor Law (Laws (1897), c. 415, § 3, as amended by Laws (1899), c. 567), and Laws (1900), c. 298, in connection with the Greater New York Charter (Laws (1897), c. 378), see Farrell *v.* New York City Bd. of Education, 113 N. Y. App. Div. 405, 98 N. Y. Suppl. 1046, also construing the present Greater New York Charter (Laws (1901), c. 466, §§ 10, 56), in respect to a janitor's salary.

8. People *v.* Long Island City Bd. of Education, 84 Hun (N. Y.) 417, 32 N. Y. Suppl. 377, holding that the Long Island City Charter (Laws 1871), c. 461, subc. 2, tit. 9, § 2, subd. 2), providing that the board of education of that city shall have power to employ necessary workmen, authorizes such board to appoint an engineer to take charge of the steam-heating apparatus of a school.

9. Taylor *v.* School Dist. No. 3, 60 Mo. App. 372, holding that under Rev. St. § 3157, the board of directors only is the proper party to make a valid contract with another to sweep the district school-house and keep fires therein during the school term, and that such a contract made by a teacher is not binding upon the district, although the board refuses to make it and such services are absolutely necessary.

10. See Taylor *v.* School Dist. No. 3, 60 Mo. App. 372.

11. Taylor *v.* School Dist. No. 3, 60 Mo. App. 372.

12. See, generally, PRINCIPAL AND AGENT, 31 Cyc. 1332 *et seq.*

13. Silver *v.* Indiana St. Bd. of Education, 35 Ind. App. 438, 72 N. E. 829, (App. 1904) 71 N. E. 667; Miller *v.* New York, 3 Hun (N. Y.) 35, 5 Thomps. & C. 219, holding that where bills are incurred by the trustees of a school-district for work and materials in excess of that authorized, the school-district cannot be held liable on the ground of estoppel.

14. Kreatz *v.* St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533.

not available to the school-district while it is in receipt of and enjoying the benefits of the contract.[15]

**c. Individual Interest of Officers.** As a general rule it is unlawful for a member of a school-board or a school officer to enter into any contract on behalf of the school-district in which he has an individual interest.[16] In some jurisdictions it is held that a contract so entered into is void;[17] but in other jurisdictions such contracts are merely voidable,[18] and are binding when properly ratified.[19] But it has been held that a majority of a building committee appointed by a school-district to superintend the erection of a school-house may employ one of their number to do the work, and unless there is fraudulent dealing such person may in his own name recover of the district the amount of his claims.[20] It has also been held that a school-committee may contract with one of their own number to board a teacher.[21]

**d. Letting of Contracts** — (I) *PROPOSALS AND BIDS IN GENERAL.* The statutes usually provide that a school-board, committee, or officer in letting contracts on behalf of the school-district, such as for the construction or improve-

**15.** Washington Academy *v.* Cruikshank, 43 Misc. (N. Y.) 197, 88 N. Y. Suppl. 330.

**16.** Escondido Lumber, etc., Co. *v.* Baldwin, 1 Cal. App. 606, 84 Pac. 284; Com. *v.* Miller, 31 Pa. Super. Ct. 309; Elwood Lumber Co. *v.* Frey, 19 Pa. Co. Ct. 56; Miller *v.* Sullivan, 32 Wash. 115, 72 Pac. 1022; Lamont *v.* Aldboro School Trustees, 5 Can. L. J. 93, holding that a school trustee cannot, even by the consent of his co-trustees, be a contractor for the building of a school-house.

**Liability for penalty** of a member of a school-board, under the Elementary Education Act (1870), § 34, for being concerned in a contract see Barnacle *v.* Clark, [1900] 1 Q. B. 279, 64 J. P. 87, 69 L. J. Q. B. 15, 81 L. T. Rep. N. S. 484, 48 Wkly. Rep. 336; Cantin *v.* Lachance, 19 Quebec Super. Ct. 144. See also *supra*, III, D, 7, a.

**Contract before statute.**—A statute prohibiting a member of a school-board from being employed by said board does not prevent a recovery for services performed by a member of the board after the passage of the act, under a contract entered into before its passage. Harrison *v.* School Dist., 2 C. Pl. (Pa.) 243.

**17.** Independent School Dist. No. 5 *v.* Collins, 15 Ida. 535, 98 Pac. 857; Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811; Wingate *v.* Harrison School Tp., 59 Ind. 520 (holding that a note executed by a school trustee in pursuance of a contract whereby he is to share in the profits of a certain improvement of the school property is void); Weitz *v.* Des Moines Independent Dist., 78 Iowa 37, 42 N. W. 577 (holding that an agreement by a board of directors of an independent school-district to employ one of the directors as local superintendent of the construction of a school building, and to pay him for such services, is void); Poling *v.* Philippi Dist. Bd. of Education, 56 W. Va. 251, 49 S. E. 148.

**Return of compensation received.**— A decree declaring void an agreement by the board of directors of a school-district to employ one of their number as superintendent of construction of a school building should provide that the money received by such director as compensation for his services should be returned to the district. Weitz *v.* Des Moines Independent Dist., 87 Iowa 81, 54 N. W. 70.

**Evidence.**— The record of the proceedings of a school-board signed by the secretary thereof reciting a resolution to accept the bid of one of its own members to furnish supplies is sufficient evidence of such an unlawful contract. Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811.

**Contract with wife of member.**— Under Ida. Sess. Laws (1899), invalidating any contract made by a board of school trustees in which any trustee is pecuniarily interested, a contract made with the wife of a member of the board, employing her to teach in the school over which such board has supervision, is void, as her husband is pecuniarily interested. Nuckols *v.* Lyle, 8 Ida. 589, 70 Pac. 401.

**18.** Currie *v.* Murray County School Dist. No. 26, 35 Minn. 163, 27 N. W. 922, holding that a contract between a director or trustee of a school-district and the other trustees for the erection by him of a school-house in the district is against public policy, and is voidable by the trustees irrespective of its fairness or unfairness.

**A contract by a school-board for the purchase of land for a school site owned by one** of its members, the resolution to purchase which was carried by the vote of such member, all the members of the board, however, acting in good faith, is not void but voidable merely. Trainer *v.* Wolfe, 140 Pa. St. 279, 21 Atl. 391. See also Witmer's Appeal, (Pa. 1888) 15 Atl. 428.

**19.** Trainer *v.* Wolfe, 140 Pa. St. 279, 21 Atl. 391, holding that a contract by a school-board for the purchase for a school site of land owned by one of its members is binding, when ratified by a resolution of a new and entirely disinterested board acting with full knowledge of all the facts.

**20.** Junkins *v.* Doughty Falls Union School Dist., 39 Me. 220.

**21.** Brown *v.* School Dist., 55 Vt. 43.

ment of a school building,[22] or for furnishing school supplies,[23] shall give due notice by advertisement of the intention to receive bids,[24] and shall determine the specifications for such bids.[25] It is also usually provided that such contract shall be let to the lowest responsible bidder,[26] upon his giving bond for the faithful performance of his contract,[27] and provided his bid is in the proper form [28] and is received within the proper time.[29] Under some statutes, where the terms and conditions are left to the discretion of the school-board, it may change the specifications after bids have been received so as to reduce the cost of the school building, if it does not change the general plans of the building.[30] But on the other hand it has been held that a contractor cannot be allowed to amend and increase his bid after it has been opened on account of an alleged mistake which does not appear on the face of the original bid.[31] It is sometimes provided that the bidder

**22.** Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177; Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. 696; Stock Tp. Bd. of Education *v.* Mills, 38 Ohio St. 383 (holding that the duty imposed by the school law upon township boards of education to advertise and let to the lowest responsible bidder any contract for the building or improving of a school-house involving more than five hundred dollars cannot be delegated to the subdistrict in which the work is to be done); Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

**23.** See State *v.* York County, 13 Nebr. 57, 12 N. W. 816.

**24.** Scola *v.* Montclair Bd. of Education, (N. J. Sup. 1908) 71 Atl. 299; State *v.* Columbus Bd. of Education, 10 Ohio Dec. (Reprint) 314, 20 Cinc. L. Bul. 156; Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984; and cases cited *supra*, notes 22 and 23.

**25.** Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984.

**26.** Jacobson *v.* Elizabeth Bd. of Education, (N. J. Sup. 1906) 64 Atl. 609 (holding that under Pub. Laws (1904), Special Sess. § 53, requiring a municipal board of education to award contracts for school supplies to the lowest responsible bidder it must make the award to such bidder); Board of Education *v.* Mills, 38 Ohio St. 383; State *v.* Columbus Bd. of Education, 10 Ohio Dec. (Reprint) 314, 20 Cinc. L. Bul. 156; Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

**Under an Indiana statute** (Burns Annot St. § 8085*i*), it is the duty of the township trustee to sign a contract with one whose bid is approved by the advisory board of the township. Lincoln School Tp. *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272.

**Where notice of acceptance to the bidder is** required before the bid becomes binding, a telegram to such bidder stating, "You are low bidder. Come on morning train," is insufficient to constitute an acceptance; and where such a telegram is sent after a meeting of the board at which the bids were opened, and a motion made and carried that the contract be awarded to the lowest bidder and that the secretary be instructed to telegraph him to that effect, the action of the board does not make a complete contract. Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177.

**27.** Weitz *v.* Des Moines Independent Dist., 79 Iowa 423, 44 N. W. 696, holding that Code (1873), § 1723, conferred upon the school directors no authority to contract with one who is not the lowest bidder and does not furnish the bond required, and that hence the acceptance of his bid does not constitute a contract. And see *infra*, III, E, 4, f.

**28.** State *v.* York County, 13 Nebr. 57, 12 N. W. 816 (holding that a bidder must state the price at which he will furnish the articles desired, and that a bid to furnish a certain portion of school supplies "at just what it costs to lay them down" and "at what it costs to deliver the same to the county" is too indefinite to justify the making of an award thereon); Scola *v.* Montclair Bd. of Education, (N. J. Sup. 1908) 71 Atl. 299 (must conform to specifications); State *v.* Board of Education, 6 Ohio S. & C. Pl. Dec. 235, 4 Ohio N. P. 44.

**The omission of two articles of insignificant** value from a bid does not invalidate it if it is otherwise in proper form. State *v.* York County, 13 Nebr. 57, 12 N. W. 816, holding that a bid for a large amount of school supplies which includes all the articles advertised for, except one knife eraser and a bottle of ink, is not thereby rendered unacceptable.

**29.** State *v.* York County, 13 Nebr. 57, 12 N. W. 816 (holding that Laws (1879), § 150, which requires that all bids for school supplies "shall be filed with said clerk on or before the 1st day of January" is mandatory and a bid filed after that date cannot be considered); State *v.* Cincinnati Bd. of Education, 27 Ohio Cir. Ct. 832.

**30.** Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984.

**But the school-board cannot modify the specifications,** after the reception of bids, and award a contract to a former bidder, although the lowest, to execute the work according to the revised specifications, at a price less than the original bid. Scola *v.* Montclair Bd. of Education, (N. J. Sup. 1908) 71 Atl. 199.

**31.** McGreevy *v.* Toledo Bd. of Education, 20 Ohio Cir. Ct. 114, 10 Ohio Cir. Dec. 724.

shall accompany his bid with a deposit, which he shall forfeit if he refuses to contract, upon his bid being accepted;[32] but the fact that such a bidder, after being notified that he is the lowest bidder, informs the school-board that he has made a mistake, and requests a change in the specifications, does not amount to such a refusal;[33] nor can the school-board, upon such a refusal, reject all bids, enter into a contract with a non-bidding party, and recover of such bidder the difference between his bid and the price at which the contract is let.[34]

(II) *DISCRETION OF BOARD.* Under some statutes the school-board or officers may in their discretion reject any and all bids,[35] and, where the bids contain separate items, may accept any part of the bid which is lower than the same part of any other bid.[36] And it is usually within the power of the school-board or officers to exercise their discretion in determining the lowest responsible bidder, and in the exercise of such discretion they may accept a bid notwithstanding it is not the lowest bid made,[37] particularly where they have reserved the right to reject any and all bids,[38] although they will not be permitted to exercise such discretion to accomplish fraud and favoritism.[39] Where the bids called for are as to different systems of a certain improvement, the school-board may also exercise its discretion in accepting a particular system, although lower bids are

holding that a contract based on such an amended bid is void under Rev. St. § 3988, although the bid as amended is still the lowest bid received.

**32.** See Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177.

**33.** Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177.

**34.** Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177.

**35.** Cedar Rapids Lumber Co. *v.* Fisher, 129 Iowa 332, 105 N. W. 595, 4 L. R. A. N. S. 177; Gilbert *v.* Board of Education, 21 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 552.

**36.** Gilbert *v.* Board of Education, 21 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 552; State *v.* Board of Education, 6 Ohio S. & C. Pl. Dec. 235, 4 Ohio N. P. 44, holding that a bid for school-house furnishings under Rev. St. § 3988, separately stating the items of labor and material in the bid with the price of each, but containing the provision "the above proposal includes labor and material, and is given with the understanding that it is to be accepted only as a whole" is not in compliance with the statute, as the board of education is thereby precluded from accepting part and rejecting part.

**37.** Wells *v.* Chester School Dist., 7 Del. Co. (Pa.) 578, holding that a board of school directors acting in good faith and without fraud or corruption may award a contract to one who is not the lowest bidder, if considerations of skill, promptness, or efficiency on the part of the bidder prompt them to do so.

**A promise by a school-board to let to the lowest bidder** does not mean that the board shall accept the lowest bid made, but they may exercise discretionary powers in determining whom they consider the best bidder under all the circumstances, that is, whose bid is the best for the benefit of the public. Bowers *v.* Harrisburg School Bd., 2 Pearson (Pa.) 227.

**Notice to bidder and opportunity to be heard.**— Under N. J. Pub. Laws (1904), Special Sess. § 53, a municipal board of education cannot determine upon the responsibility of a bidder without giving him notice and an opportunity to be heard, and is bound to show a reason for passing over one whose bid is lower than the bid accepted. Jacobson *v.* Elizabeth Bd. of Education, (N. J. Sup. 1906) 64 Atl. 609.

**Unauthorized bids.**— The discretion to reject all bids refers to such bids as are received in pursuance of the advertisement and cannot relate to an independent and unauthorized bid received after the date fixed in the advertisement. State *v.* Cincinnati Bd. of Education, 27 Ohio Cir. Ct. 832.

**38.** Chandler *v.* Detroit Bd. of Education, 104 Mich. 292, 62 N. W. 370 (holding that an injunction will not lie to restrain a school-board from awarding a contract to one who is not the lowest bidder, where the board reserved the right to reject any and all bids, and there is no evidence of fraud on the part of the board and no statute requiring the contract to be awarded to the lowest bidder); Anderson *v.* Public School, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707 (holding that where an advertisement for bids for the erection of a public school reserves such right, one making the lowest bid has no right of action against the board where his bid is rejected and the contract given to another, although it is a rule of the board that contracts should be let to the lowest bidder). See also Kemp *v.* Sedalia School Dist., 84 Mo. App. 680.

**39.** State *v.* Cincinnati Bd. of Education, 27 Ohio Cir. Ct. 832, holding that where a board refuses to receive a bid and proceeds to award the contract on a bid based on conditions not contained in the original specifications, and received at a time subsequent to that designated in the advertisement, the con-

offered for other systems.[40] In the absence of statute requiring the school-board or officers to advertise for bids, they may let a contract in any manner they may deem proper provided they do not abuse such discretionary power;[41] and if they do advertise when they are not required to do so, they may, after receiving proposals, act independently of them in awarding the contract, if in doing so they act in good faith and with reasonable discretion.[42]

**e. Making, Requisites, and Validity**[43] — (i) *In General.* Except in so far as governed by special statutes, the making, requisites, and validity of contracts by school-districts are governed by the rules applicable to contracts generally.[44] Ordinarily, however, the making of such contracts are governed by special statutes, in which case there must be a compliance with the statutory provisions relative to the method and manner in which such contracts must be entered into,[45] and relative to the board, officer, or agent by or with whom the contract must be made.[46] Thus under some statutes such contracts must be in writing,[47] which writing must show all the elements of a valid contract;[48] and it has been held that under such a statute a recovery cannot be had against a district on a *quantum meruit*.[49]

tract awarded thereon is unauthorized and void. See also Bowers *v.* Harrisburg School Bd., 2 Pearson (Pa.) 227.

**40.** Polhamus *v.* Cleveland Bd. of Education, 21 Ohio Cir. Ct. 257, 11 Ohio Cir. Dec. 366 (holding that where bids are received in response to an advertisement for bids for three systems for the fireproofing of a school building, it is not unlawful for the school-board to select a certain system, although the bid for that system is not the lowest bid received); State *v.* Columbus Bd. of Education, 10 Ohio Dec. (Reprint) 314, 20 Cinc. L. Bul. 156 (holding that under Rev. St. § 3988, giving the board of education discretionary power to determine the system of heating and ventilating public schools, but requiring that the contract shall be awarded to the lowest responsible bidder, the board may advertise merely for plans and specifications for heating and ventilating certain schools and then award the contract to the lowest responsible bidder of a certain system, although there are lower bids offered for other systems).

**41.** Baltimore *v.* Weatherby, 52 Md. 442, contract for supplying public school building with heating apparatus.

**In Pennsylvania** it has been held that a school-board is not required to take bids before letting a contract for heating a school-house (Zies *v.* Latimer, 28 Pittsb. Leg. J. N. S. 366); and that, although it is proper that the school directors should advertise for bids before entering into a contract for the erection of a school-house, the law does not compel them to do so (Taylor *v.* Winton Borough School Tp., 4 Lack. Leg. N. (Pa.) 431; Hughes *v.* School Directors, 8 Luz. Reg. Reg. (Pa.) 284).

**42.** Kraft *v.* Weehawken Tp. Bd. of Education, 67 N. J. L. 512, 51 Atl. 483; Coward *v.* Bayonne, 67 N. J. L. 470, 51 Atl. 490, holding that where a board of education is not required to advertise for proposals, if it does advertise reserving the right to reject any bids, it may enter into any contract it deems best for the interests of the city without reference to the advertisement.

**43. Contracts for text-books** see *infra*, III, I, 2, e, (IV).

**44.** See, generally, CONTRACTS, 9 Cyc. 213.

**Where a written contract entered into by a school-board is free from ambiguity,** evidence *aliunde* is not admissible to explain its meaning or enlarge its scope. Ivison *v.* Indianapolis School Com'rs, 39 Fed. 735.

**45.** Cascade School Dist. *v.* Lewis School Dist., 43 Pa. St. 318; Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413; Pennsylvania Lightning Rod Co. *v.* Cass Tp. Bd. of Education, 20 W. Va. 360.

**46.** Collins *v.* Liberty School Dist. No. 7, 52 Me. 522; Rauscher *v.* Cronk, 3 N. Y. Suppl. 470.

**47.** Perkins *v.* Ridgeway Independent School Dist., 99 Mo. App. 483, 74 S. W. 122.

**Under Mo. Act (1874), p. 44** (Rev. Sts. (1889) § 3157), requiring that a contract by school directors must arise on a consideration to be rendered subsequent to its making, and must be in writing and duly executed, neither a school-board nor its successor can be held liable for services rendered to it on a parol contract by the president of the board. Terry *v.* St. Louis Bd. of Education, 84 Mo. App. 21 [*distinguishing* Page *v.* Township Bd. of Education, 59 Mo. 264].

**Written acceptance.**— That a person performs services cannot be construed as an acceptance of a board's employment of him, where a written acceptance is necessary by statute. Perkins *v.* Ridgeway Independent School Dist., 99 Mo. App. 483, 74 S. W. 122.

**Contract required to be under seal** see Start *v.* West Mersea School Bd., 63 J. P. 440, 15 T. L. R. 442; Marshall *v.* Kitley Tp. School Trustees, 4 U. C. C. P. 373.

**48.** Perkins *v.* Ridgeway Independent School Dist., 99 Mo. App. 483, 74 S. W. 122, holding that certain writings did not constitute a contract under Rev. St. (1899) § 759, since they showed that the minds of the parties had not met.

**49.** Perkins *v.* Ridgeway Independent School Dist., 99 Mo. App. 483, 74 S. W. 122.

(II) *By School-Boards or Committees.* The power of a school-board or committee to enter into contracts on behalf of the school-district must be exercised by them as boards and not as individuals;[50] and hence it is necessary, in order that such a contract may be binding, that it be authorized or executed at a board meeting regularly adjourned to or regularly called,[51] at which all the members of the board are present or have had notice to be present,[52] except that notice is not required of regular meetings held at stated times fixed by the board;[53] and under some statutes unless the members of the board so proceed they are pecuniarily responsible for any loss sustained by the district.[54] In accordance with these rules a contract is not binding on the district if it is executed by members of the board acting separately and individually and not as a body convened for the transaction of business,[55] although it is actually executed by a majority of the board,[56] especially where the signatures of some of the members are obtained by fraud,[57] unless such contract is ratified by the district;[58] nor will the ratification of such a contract by the individual members make the contract valid and binding.[59] Where the requirements and conditions as to meetings and notice are fully complied with, it is not necessary that all the members of the board shall concur in executing the contract but they may usually act by a majority,[60]

**50.** State *v.* Liberty Tp., 22 Ohio St. 144; Roland *v.* Reading School Dist., 161 Pa. St. 102, 28 Atl. 995; McLain *v.* Snyder Tp. School Dist., 12 Pa. St. 204; Pennsylvania Lightning Rod Co. *v.* Cass Tp. Bd. of Education, 20 W. Va 360.

**Mode of action of school-board** generally see *supra*, III, D, 6, f, (II).

**51.** People *v.* Rea, 185 Ill. 633, 57 N. E. 778 [*affirming* 84 Ill. App. 504]; Mills *v.* Collins, 67 Iowa 164, 25 N. W. 109; Andrews *v.* Otter Tail County School Dist. No. 4, 37 Minn. 96, 33 N. W. 217; Currie *v.* Murray County School-Dist. No. 26, 35 Minn. 163, 27 N. W. 922. See also *supra*, III, D, 6, f, (II).

**A contract by the president and secretary of a school-district** does not bind the district unless expressly authorized by the board of directors in session or ratified thereby. Weir Furnace Co *v.* Seymour Independent School Dist., 99 Iowa 115, 68 N. W. 584.

**52.** Springfield Furniture Co. *v.* Faulkner County School Dist. No. 4, 67 Ark. 236, 54 S. W. 217 (holding that a contract made by only two directors of a school-district and not at a regular meeting, or at a special meeting on notice to the third director, is void); School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S. W. 132 (holding that a contract made by two of three directors at a meeting held at a time different from the time fixed for regular meetings and of which the third director had no notice is not binding on the district); Wilson *v.* Waltersville School Dist., 46 Conn. 400; People *v.* Peters, 4 Nebr. 254. See also *supra*, III, D, 6, f, (II), (B).

**53.** School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S W. 132; Lake County Tp. 43 Bd. of Education *v.* Carolan, 182 Ill 119, 55 N. E. 58 [*reversing* 81 Ill. App. 459].

**54.** People *v.* Rea, 185 Ill. 633, 57 N. E. 778 [*affirming* 84 Ill. App. 504], holding, however, that, although school directors contract in violation of the School Law, § 139, no loss is sustained by the school funds so as to make the directors liable under section 285, where the contract is one which they are authorized to make at a meeting, and the matter contracted for is necessary and the cost reasonable.

**55.** Richards *v.* Jackson School Tp., 132 Iowa 612, 109 N. W. 1093; Mills *v.* Collins, 67 Iowa 164, 25 N. W. 109; Kane *v.* Osborne County School Dist. No. 112, 5 Kan. App. 260, 47 Pac. 561; State *v.* Liberty Tp., 22 Ohio St. 144; Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413; Pennsylvania Lightning Rod Co. *v.* Cass Tp. Bd. of Education, 20 W. Va. 360.

**56.** Richards *v.* Jackson School Tp., 132 Iowa 612, 109 N. W. 1093; State *v.* Liberty Tp., 22 Ohio St. 144.

**57.** Mills *v.* Collins, 67 Iowa 164, 25 N. W. 109.

**58.** Richards *v.* Jackson School Tp., 132 Iowa 612, 109 N. W. 1093. And see *infra*, III, E, 4, g.

**59.** Pennsylvania Lightning-Rod Co. *v.* Cass Tp. Bd. of Education, 20 W. Va. 360.

**60.** *Arkansas.*— School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S. W. 132.

*Connecticut.*—Wilson *v.* Waltersville School Dist., 46 Conn. 400, holding that a contract made by two of three members of a committee is valid where the third member either authorized them beforehand to make it or consented to it afterward.

*Nebraska.*— People *v.* Peters, 4 Nebr. 254.

*New Hampshire.*— Keyser *v.* Sunapee Dist. No. 8, 35 N. H. 477, holding that a committee appointed by a school-district, according to the statute, to purchase and repair a schoolhouse are public officers and a majority of them have authority to act for the whole.

*Ohio.*— Neubauer *v.* Union Tp. Bd. of Education, 8 Ohio S. & C. Pl. Dec. 349, 6 Ohio N. P. 530.

*Pennsylvania.*— See Thalman *v.* Mt. Albion

or they may act through another as their agent,[61] or may appoint a committee to act for them, which committee must act as a committee and not as individuals.[62] Such a board in seeking proposals for a contract may delegate to a committee the duty of preparing and submitting specifications and of conducting negotiations for a contract, provided the result of the negotiations are considered by the board before the contract is awarded.[63] As a general rule a school-board should keep a record of their proceedings at each session and their acts relative to the execution of a contract should appear therein.[64] Their unrecorded acts, however, are not void;[65] and since this duty is for the protection of their constituents, contractors cannot repudiate their contracts on the ground that the board's acts in respect thereto are not recorded.[66]

(III) *PRESUMPTIONS AS TO VALIDITY.* The acts or contracts of school-boards or officers within the scope of their authority and in the performance of their statutory duties are presumed to be valid and binding on the district.[67] But when their acts are not expressly authorized by statute, no such presumption arises, and the burden is on the party relying upon the fact that they were duly authorized to affirmatively establish such fact.[68]

**f. Contractors' Bonds**[69] — (I) *IN GENERAL.* It is sometimes required by statute that a party contracting with a school-district through its boards of officers, as for the erection of a school building, shall give a bond conditioned for

Sub School Dist., 34 Pittsb. Leg. J. N. S. 261.

See 43 Cent. Dig. tit. "Schools and School Districts," § 193.

**Confirmation and approval.**— Where a majority of the school-board of a township contract for certain school supplies, and at the next meeting of the board a motion not to accept the supplies is defeated, it is a confirmation and approval of the order. Johnson *v.* Cedar School Corp., 117 Iowa 319, 90 N. W. 713.

**The fact that one trustee is not a legally qualified trustee** does not affect the validity of a contract made by all three of the trustees, where two of them are legally elected. Shelbourne *v.* Blatterman, 49 S. W. 952, 20 Ky. L. Rep. 1730.

**Where one of a majority of two is incompetent** to act by reason of his being personally interested in the contract, the contract is void for want of the sanction of a competent majority. Honaker *v.* Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413.

61. Neubauer *v.* Union Tp. Bd. of Education, 8 Ohio S. & C. Pl. Dec. 349, 6 Ohio N. P. 530, holding that a contract made by a local school director duly authorized by a resolution of the board of education of a township is valid and binding on such board.

62. McLain *v.* Snyder Tp. School Dist., 12 Pa. St. 204, holding that where two persons are authorized by a board of school directors to make a contract on their behalf, a contract signed and sealed by one only is not admissible in evidence in an action of covenant brought against the school-district.

63. Kraft *v.* Weehawken Tp. Bd. of Education, 67 N. J. L. 512, 51 Atl. 483.

64 See Sugar Creek School Directors *v.* McBride, 22 Pa. St. 215.

**Minutes and records of school-boards** generally see *supra*, III, D, 6, f, (II), (C).

65. Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564 (holding that a purchase by the directors of an independent school-district of a musical instrument for the use of the school is not rendered invalid by the fact that no record of the action of the board is made); Sugar Creek School Directors *v.* McBride, 22 Pa. St. 215.

66. Sugar Creek School Directors *v.* McBride, 22 Pa. St. 215, holding that the unrecorded acts of school directors are so far valid that persons who contract with them cannot for that reason alone repudiate their contracts.

67. Martin *v.* Meeker County Common School Dist. No. 61, 93 Minn. 409, 101 N. W. 952; Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280; Burkhardt *v.* Georgia School Tp., 9 S. D. 315, 69 N. W. 16; Baker *v.* Barton School Dist. No. 2, 46 Vt. 189.

68. Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280.

**Illustrations.**— Thus it has been held that the fact that a school-district board bought supplies for a school-house raises no presumption that the district had previously voted a tax therefor as required by statute so as to confer authority on the board to bind the district by such contract, and the burden is on the seller to establish the validity of such vote. Bourbon County School Dist. No. 29 *v.* Perkins, 21 Kan. 536, 30 Am. Rep. 447. But on the other hand it has been held that where a school-board having power to change the location of school-houses only when authorized to do so by the voters of the district contracts for the removal of a school-house, it will be presumed in the absence of anything to the contrary that the board was so authorized. Burkhardt *v.* Georgia School Tp., 9 S. D. 315, 69 N. W. 16.

69. **Text-book publisher's bond** see *infra*, III, I, 2, e, (V).

the faithful performance of the contract,[70] in an amount fixed in the discretion of the proper school-board or officer,[71] and with proper sureties.[72] Under some statutes the bond must be conditioned, in addition to the faithful performance of the contract, that the contractor guarantee that he will pay for all materials used and labor employed by him in the prosecution of the work.[73] Under such a statutory provision an action on the bond may be maintained by any person who has a claim against the contractor for material furnished or labor performed,[74] upon his filing the statutory notice; [75] or such action may be maintained by the school-

**70.** Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562; Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83.

**Suit on bond by new board.**— The fact that after the work is done under the contract, but before it is finally declared inadequate, the school-board is reorganized under a new law, does not prevent the new board from suing on the contractor's bond to enforce the penalty, where the only difference between the two boards is in their names and the names of the officers, who discharge the several duties. St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70.

**71.** See Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

**72.** See Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

**73.** *California.*— Union Sheet Metal Works *v.* Dodge, 129 Cal. 390, 62 Pac. 41, holding that under Code Civ. Proc. §§ 1183, 1203, a school-district in contracting for the erection of a school-house, although not expressly authorized to require such a bond under such sections, could nevertheless do so, as it was not prohibited.

*Indiana.*— National Surety Co. *v.* Foster Lumber Co., 42 Ind. App. 671, 85 N. E. 489 (holding that the board of trustees of the Indiana State Normal School, established by Burns Annot. St. (1901) § 6034, has authority to require a contractor constructing a building for the school to contract to pay the laborers and materialmen and to give a bond conditioned on his making such payment); Williams *v.* Markland, 15 Ind. App. 669, 44 N. E. 562.

*Michigan.*— Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

*Missouri.*— St. Louis Public Schools *v.* Woods, 77 Mo. 197, holding that under Laws (1872), §§ 1, 4, the board of public schools for the city of St. Louis may take a bond from a contractor to secure the dues of materialmen and laborers.

*Nebraska.*— Maryland Fidelity, etc., Co. *v.* Parkinson, 68 Nebr. 319, 94 N. W. 120.

*Washington.*— Puget Sound Brick, etc., Co. *v.* King County School Dist. No. 73, 12 Wash. 118, 40 Pac. 608 (bond held insufficient under Gen. St. § 2415); Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110. Under Laws (1887–1888), c. 12 (1 Hill Code, § 2415), requiring municipal corporations to take such a bond, it has been held that a school-district is a municipal corporation within the meaning of such statute. Pacific Mfg. Co. *v.* King County School Dist. No. 7, 6 Wash. 121, 33 Pac. 68; Maxon *v.* Spokane County School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110. It has also been held that such statute is not in conflict with Const. art. 9, § 2, which provides for a general and uniform system of public schools, and the application of the revenue derived from the common school fund. Pacific Mfg. Co. *v.* King County School Dist. No. 7, *supra*. The fact that a bond given by a school-house contractor under such statute is payable to the school-district instead of to the state, and in other respects fails to follow the form required by the statute, does not render it void. Wadsworth *v.* Whatcom County School Dist. No. 1, 7 Wash. 485, 35 Pac. 371.

*Wisconsin.*— R. Connor Co. *v.* Ætna Indemnity Co., 136 Wis. 13, 115 N. W. 811.

See 43 Cent. Dig. tit. "Schools and School Districts," § 195.

A subcontractor furnishing work and material in the construction of a school building would seem not to be within the terms of such a statute, although he has paid the mechanics and laborers doing such work, and therefore is not entitled to the protection of the bond given under the statute. Maryland Fidelity, etc., Co. *v.* Parkinson, 68 Nebr. 319, 94 N. W. 120.

**74.** Baker *v.* Bryan, 64 Iowa 561, 21 N. W. 83; Detroit Bd. of Education *v.* Grant, 107 Mich. 151, 64 N. W. 1050 (holding that persons to whom an indebtedness has accrued for labor performed on a school building may recover on a bond executed as required by such a statute, except that it is payable to a board of education instead of to the state, and although there is an additional condition to save such board harmless from all claims for such labor); R. Connor Co. *v.* Ætna Indemnity Co., 136 Wis. 13, 115 N. W. 811.

**75.** Crane Co. *v.* Ætna Indemnity Co., 43 Wash. 516, 86 Pac. 849, holding that where a person furnishing material to a school contractor fails to file a notice thereof with the school-board as required by statute he is not entitled to maintain an action on the contractor's bond given to secure payment of claims incurred in the execution of the contract.

**Excuse.**— The fact that a contractor's bond is not filed with the county auditor does not relieve a person furnishing materials to the contractor from the obligation of giving notice to the school-district where he has actual knowledge that the bond is in existence. Crane Co. *v.* Ætna Indemnity Co., 43 Wash. 516, 86 Pac. 849.

district upon the contractor's failure to pay the materialmen or laborers the amounts due to them.[76]

(II) *FAILURE TO REQUIRE BOND.* Under some statutes, if the school-board or officers fail to take a proper bond conditioned for the payment of material and labor, a laborer or materialman injured thereby may maintain an action for damages against such board or officers;[77] and neither notice nor demand is necessary to such a cause of action;[78] nor is it necessary in order to subject the school-district to liability for a failure to take such bond that it should be made a party to a suit against the contractor for materials furnished or labor performed.[79] This liability of a school-board or officers is in the nature of a suretyship rather than a tort where they have acted in good faith, and they are not required to wait until suit is brought against them before making payment to the materialman or laborer.[80] Where through ignorance of the law such bond is not required in the first instance and the contractor subsequently refuses to give it when requested and makes a default in the performance of his contract, the school-board or officers may set over against his claim for a balance due under his contract any amounts due for materials or labor they may be required or liable to pay by reason of their failure to require the bond in the first instance.[81]

**76.** St. Louis Public Schools *v.* Woods, 77 Mo. 197.

**77.** Wells *v.* West Bay City Bd. of Education, 78 Mich. 260, 44 N. W. 267; Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649 (holding that, although Sess. Laws (1883), Act No. 94, providing for such bond, requires that before accepting the bond the school trustees shall first fix the amount in which it shall be given and pass upon the sufficiency of the sureties, if they absolutely fail to take such bond they are liable in damages at the suit of a materialman injured thereby); Wilcox Lumber Co. *v.* Otter Tail County School Dist. No. 268, 106 Minn. 208, 118 N. W. 794.

**The duty to exact such bond is a duty to the individual** laborer or materialman, and a failure to perform such duty is an individual wrong for which an individual action will lie. Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

**Time of filing.**— It is not necessary that such bond be filed prior to the furnishing of materials to the contractor in order to relieve the school-district from liability, and the fact that the bond is not filed until after plaintiff has furnished materials is not prejudicial to him if it is filed and plaintiff has knowledge thereof before bringing suit. Wadsworth *v.* Whatcom County School Dist. No. 1, 7 Wash. 485, 35 Pac. 371.

**Estoppel.**— A materialman who is also a surety on the bond of a contractor and who furnishes material, not upon the assumption that the trustees have taken the bond required by statute for his protection, but with knowledge to the contrary and relying upon the credit of the contractor, is estopped to proceed against the trustees upon the insolvency of the contractor, for their failure to exact the bond. Owen *v.* Hill, 67 Mich. 43, 34 N. W. 649.

**The fact that the sureties on such bond do not justify as to their financial responsibility** as required by law is a mere irregularity which will be presumed not to be injurious, and is not available in an action to recover from the school-district for material furnished on the ground of defects in the bond, in the absence of proof that the sureties are not financially able to justify. Wadsworth *v.* Whatcom County School Dist. No. 1, 7 Wash. 485, 35 Pac. 371.

**Accrual of action — limitation.**— A materialman's right of action against the members of a school-board for failing to require a contractor to give a statutory bond for the payment of laborers and materialmen accrues as to any instalment, immediately upon default in payment by the contractor in accordance with the terms of his contract with him, and limitations run against each instalment from the time it becomes due, and not from the date of the last item furnished. Staffon *v.* Lyon, 110 Mich. 260, 68 N. W. 151.

**In Missouri** where the directors of a school-district fail to take the bond provided for by statute to indemnify persons furnishing labor and material to public contractors, the negligence is that of the district in its corporate capacity and not that of the officers, and since the act of 1895 expressly exempts a public corporation from liability in such a case, no action lies for damages occasioned by such neglect. Hydraulic Press Brick Co. *v.* Kirkwood School Dist., 79 Mo. App. 665.

**78.** Staffon *v.* Lyon, 110 Mich. 260, 68 N. W. 151.

**79.** Pacific Mfg. Co. *v.* School Dist. No. 7, 6 Wash. 121, 33 Pac. 68.

**80.** Wells *v.* West Bay City Bd. of Education, 78 Mich. 260, 44 N. W. 267.

**81.** Wells *v.* West Bay City Bd. of Education, 78 Mich. 260, 44 N. W. 267, holding that in such a case the school-board may deduct the amount paid for materials furnished and labor performed for the contractor, and also the amount due from him for material and labor and for the payment of which demands have been made upon such board or officers.

(III) *DISCHARGE OF SURETY.*[82] As a general rule a school-district in whose favor a contractor's bond has been executed has no power directly to release the sureties thereon.[83] But it has authority to change its contract, the legal effect of which will be the release of the sureties.[84] Ordinarily any material change in the original contract without the sureties' consent affecting the subject-matter of the contract will exonerate him.[85] But an unwarranted attempt to cancel the bond does not release the sureties; [86] nor are they relieved by the fact that the bond is payable to the members of the school-board instead of the district, if it is payable to them in their representative capacity.[87]

**g. Ratification** — (I) *IN GENERAL.* An act or contract with a school-district through its board or officers, which is illegal and void in its inception, as from a want of power to execute it, cannot be ratified.[88] But where the contract is invalid merely because it is executed in excess of authority or in an informal manner, it may be ratified by the school-district at a proper meeting, or through its proper board or officers,[89] who have power to make such contract.[90] Thus a school-district may, through its officers, ratify a contract made by *de facto* officers, if the officers ratifying have authority to bind the corporation,[91] and contracts made in the name of a school corporation before it had a legal existence may be adopted by it after it is incorporated.[92] In order that there may be such ratification, however, the contract must, by its terms, purport to be the contract of and binding on the school-district,[93] although in case it does not so purport the district may become bound by adopting or assuming the obligation of the contract.[94]

(II) *SUFFICIENCY OF RATIFICATION.* A subsequent ratification of an invalid school-district contract is governed by the rules applicable to the ratifica-

**82.** Discharge or release of surety generally see PRINCIPAL AND SURETY, 32 Cyc. 149 *et seq.*

**83.** Mason City Independent Dist. *v.* Reichard, 50 Iowa 98.

**84.** Mason City Independent Dist. *v.* Reichard, 50 Iowa 98.

**85.** Mason City Independent Dist. *v.* Reichard, 50 Iowa 98.

**86.** Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

**87.** Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

**88.** Cumberland County Dist. No. 3 *v.* Fogleman, 76 Ill. 189; Glidden *v.* Hopkins, 47 Ill. 525 (holding that a subsequent board of directors cannot ratify an illegal act of their predecessors); Brown *v.* Orford School Dist. No. 6, 64 N. H. 303, 10 Atl. 119 (holding that where the vote of a school-district to raise money for the purpose of building a school-house is absolutely void for want of corporate power, the cost of building the house in accordance with that vote is no legal claim against the district and cannot be made one by subsequent ratification and acceptance).

**89.** *Arkansas.*—Springfield Furniture Co. *v.* Faulkner County School Dist. No. 4, 67 Ark. 236, 54 S. W. 217, holding that a ratification by a school-district of an unauthorized purchase of school desks by two of its directors is not *ultra vires.*

*Iowa.*— Richards *v.* Jackson School Tp, 132 Iowa 612, 109 N. W. 1093, holding that a contract for school supplies, although invalid because of its being executed by the members of the board acting independently, may be ratified.

*Kansas.*—Sullivan *v.* Brown County School-Dist. No. 39, 39 Kan. 347, 18 Pac. 287.

*Minnesota.*—Sanborn *v.* Rice County School-Dist. No. 10, 12 Minn. 17, holding that the unauthorized act of school trustees in expending more funds on a school building than the limit voted may be ratified by the district at a district meeting.

*New Hampshire.*—Davis *v.* Haverhill School Dist., 44 N. H. 398.

See 43 Cent. Dig. tit. "Schools and School Districts," § 198.

**90.** Stevenson *v.* Summit Dist. Tp., 35 Iowa 462 (holding that the board of directors of a district township having a power to make contracts for the erection of school-houses in a special district may ratify a contract of this character informally entered into); Sullivan *v.* Brown County School-Dist. No. 39, 39 Kan. 347, 18 Pac. 287 (holding that a contract for building a school-house invalid because made by only one member of the school-board may afterward be ratified and made binding on the school-district by the full school-board); Johnson *v.* School Dist., 67 Mo. 319.

**91.** Dubuque Female College *v.* Dubuque Dist. Tp., 13 Iowa 555.

**92.** Dubuque Female College *v.* Dubuque Dist. Tp., 13 Iowa 555.

**93.** Western Pub. House *v.* Rock Dist. Tp., 84 Iowa 101, 50 N. W. 551 (holding that where the contract is of certain school directors personally and not of the district, the latter cannot ratify it); Hayward *v.* North Bridgewater School Dist. No. 13, 2 Cush. (Mass.) 419.

**94.** Western Pub. House *v.* Rock Dist. Tp., 84 Iowa 101, 50 N. W. 551.

tion of the acts of agents generally.[95] Such ratification may be either express or implied.[96] A school-district may ratify a contract entered into on its behalf without proper authority or in an informal manner, by accepting and retaining the benefits of the contract with a full knowledge of all the facts.[97] But as a

95. See, generally, PRINCIPAL AND AGENT, 31 Cyc. 1245 *et seq.*

**Ratification in toto.**— Where a district committee makes a contract not binding on the district, and the district votes to accept and to pay a certain sum, this vote binds them to pay on a *quantum meruit* not limited to the sum voted. Kimball *v.* Roxbury School Dist. No. 8, 28 Vt. 8.

96. Everts *v.* Rose Grove Dist. Tp., 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264 (holding that the contract of a board of directors made in excess of its powers is ratified by a vote of the electors authorizing the board to settle a disputed claim growing out of such contract); McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100 (holding that a contract by a school-board to build a school-house in violation of a statute limiting its power in building a school-house to "funds provided for that purpose" is ratified by the school-district if it afterward authorizes the board to borrow money therefor).

**Illustrations.**— Thus a contract for building a school-house, voidable because made by only one member of the school-board, may be ratified and made binding by the action of the school directors in completing the building, furnishing the same with seats, desks, and other necessary school-house furniture, occupying the same for school purposes, and insuring the same. Brown County School Dist. No. 39 *v.* Sullivan, 48 Kan. 624, 29 Pac. 1141. So a legal vote of a district to raise money to pay the premium will amount to a ratification of a trustee's unauthorized act in insuring the school-house and furniture. Holt's Appeal, 5 R. I. 603. But the vote of a district to stop an action does not render the district liable for expenses previously incurred by its committee in prosecuting it without special authority. Burgess *v.* Uxbridge School Dist., 100 Mass. 132. Nor does the mere knowledge of the pendency of a suit against a school-district and of the employment of counsel to defend it, by the officers and voters of the district, show acquiescence by the district in the unauthorized employment of such counsel. Harrington *v.* Alburgh School Dist. No. 6, 30 Vt. 155.

**An invalid purchase of a school-house site** is impliedly ratified by a vote of the district authorizing the building of a school-house thereon and the issuance of bonds therefor. Township Bd. of Education *v.* Carolan, 182 Ill. 119, 55 N. E. 58 [*reversing* 81 Ill. App. 459]; Nichols *v.* Pierce County School Dist. No. 10, 39 Wash. 137, 81 Pac. 325.

97. Clark School Tp. *v.* Home Ins., etc., Co., 20 Ind. App. 543, 51 N. E. 107; Richards *v.* Jackson School Tp., 132 Iowa 612, 109 N. W. 1093 (holding that an invalid contract by a school-board for supplies is ratified where at a subsequent meeting of the board they voted to refuse to accept the supplies, instructed the treasurer not to pay the order issued in payment, and at a still later meeting rescinded such action and voted to accept and pay for the supplies); Johnson *v.* Cedar School Corp., 117 Iowa 319, 90 N. W. 713; Bellows *v.* West Fork Dist. Tp., 70 Iowa 320, 30 N. W. 582; Haney School Furniture Co. *v.* Crystal Lake Tp. School Dist. No. 1, 133 Mich. 241, 94 N. W. 726; Jones *v.* Iosco School Dist. No. 3, 110 Mich. 363, 68 N. W. 222; Keyser *v.* Sunapee Dist. No. 8, 35 N. H. 477; Chapin *v.* Walpole School Dist. No. 2, 30 N. H. 25.

**Illustrations.**— Thus a valid contract for supplies or apparatus is ratified by a school-district or township in accepting and using the supplies with full knowledge of all the facts for a considerable length of time without offering to return them. Springfield Furniture Co. *v.* Faulkner County School Dist. No. 4, 67 Ark. 236, 54 S. W. 217; Richards *v.* Jackson School Tp., 132 Iowa 612, 109 N. W. 1093; Akron Sav. Bank *v.* Westfield School Tp., (Iowa 1905) 103 N. W. 968; Union School Furniture Co. *v.* School Dist. No. 60, 50 Kan. 727, 32 Pac. 368, 20 L. R. A. 136. So where supplies are purchased by directors without authority from a board of which they are members, and are received and used for the benefit of the district under such circumstances and for such length of time as to raise the presumption that it is with the common consent of the district, it will be bound to pay for them. Andrews *v.* Otter Tail County School-Dist. No. 4, 37 Minn. 96, 33 N. W. 217. But where the supplies are bought by two directors without any authority and used for about three weeks and afterward some of the articles are used by order of the clerk of the district and others from time to time, by whose direction it does not appear, and the voters of the district in the meantime have repudiated the action of such directors, a presumption of ratification is not necessarily raised. Andrews *v.* Otter Tail County School-Dist. No. 4, 37 Minn. 96, 33 N. W. 217. Where pursuant to a vote to purchase a school-house and raise funds for that purpose, certain persons acting as a committee of the district make a contract on behalf of the district for the purchase of the building at an agreed price, and the district takes possession of the building and occupies and retains it as a school, it thereby ratifies the action of the committee, binding the district by such ratification. Keyser *v.* Sunapee Dist. No. 8, 35 N. H. 477.

**An informal execution of a power to build a school-house** by two of a committee appointed for that purpose, the third refusing to act, is ratified where all the schools of

general rule, in order to constitute a valid ratification, there must be some affirmative corporate action, showing an intention to ratify, on the part of the district [98] or school-board,[99] and it will not be implied from mere silence;[1] nor, in the absence of circumstances indicating an intention to ratify, will it be implied from a temporary or necessary use of the property acquired under the contract,[2] particularly where the district has no knowledge of the unauthorized acts.[3]

**h. Implied Contracts.** A school-district, in like manner as a private corporation or an individual, may become bound by contracts implied from its acts or the acts of its agents.[4] Thus it may become bound by an implied contract where it receives and retains money or property under such circumstances that the law, independently of an express contract, imposes an obligation upon it to do justice in respect to the same,[5] as where a school-board

the district are afterward kept in such house and all the meetings of the inhabitants of the district held there, and on which notice of such meetings by vote of the district are posted. Fisher *v.* Attleborough School Dist., 4 Cush. (Mass.) 494.

**That a building is used by the children of the school-district** does not, taken alone, authorize a finding of a ratification of a contract under which buildings appurtenant to the school-house are built, although it is evidence to be considered with other matters tending to show such ratification. Bellows *v.* West Fork Dist. Tp., 70 Iowa 320, 30 N. W. 582.

**98.** Taylor *v.* Wayne Dist. Tp., 25 Iowa 447 (holding that where a district board unauthorizedly purchases maps and other school apparatus, the subsequent use of the articles in the school with the knowledge of the directors and electors, and the fact that at a meeting of the electors subsequent to the purchase no steps are taken to repudiate the contract does not amount to a ratification of it); Caxton Co. *v.* Spooner School Dist. No. 5, 120 Wis. 374, 98 N. W. 231 (holding that nothing short of some affirmative corporate action by the district will constitute a ratification).

**99.** Currie *v.* Murray County School-Dist. No. 26, 35 Minn. 163, 27 N. W. 922 (holding that in order to bind the district unauthorized contracts must be ratified by at least a majority of a school-board after notice and opportunity to all the members to participate in the transaction); Johnson *v.* School Dist., 67 Mo. 319 (holding that the ratification or approval of purchased articles for a school by one or more of the directors without authority can only be made by the officers who were authorized in the first instance to make such contract at a meeting of the board); Kane *v.* Calhoun School Dist., 48 Mo. App. 408; Morristown First Nat. Bank *v.* Felknor, (Tenn. Ch. App. 1898) 48 S. W. 392.

**1.** Caxton Co. *v.* Spooner School Dist. No. 5, 120 Wis. 374, 98 N. W. 231.

**2.** *Connecticut.*— Turney *v.* Bridgeport, 55 Conn. 412, 5 Atl. 520, holding that the taking possession and use by a town of a school-house erected on its land is not such a ratification of unauthorized expenditures in its erection as to make the town liable therefor.

*Maine.*— Davis *v.* Bradford School Dist. No. 2, 24 Me. 349, holding that a school-district cannot be considered as promising to pay for unauthorized repairs upon a school-house by using it afterward.

*Michigan.*—Gibson *v.* Vevay Tp. School Dist. No. 5, 36 Mich. 404, holding that the fact that a school director who has without authority purchased school charts for the use of the school causes them to be occasionally used in the school cannot operate as a ratification.

*Minnesota.*—Young *v.* Dassel Bd. of Education, 54 Minn. 385, 55 N. W. 1112, 40 Am. St. Rep. 340 (holding that where the officers of a district, without authority, borrow and expend money to complete a school-house, no liability attaches to the district therefor, notwithstanding the benefit received, since it has not had an opportunity to reject it); Currie *v.* Murray County School-Dist. No. 26, 35 Minn. 163, 27 N. W. 922.

*Missouri.*— Johnson *v.* School Dist., 67 Mo. 319; Kane *v.* Calhoun School Dist., 48 Mo App. 408.

*Tennessee.*—Morristown First Nat. Bank *v.* Felknor, (Ch. App. 1898) 48 S. W. 392.

*Wisconsin.*— Caxton Co. *v.* Spooner School Dist. No. 5, 120 Wis. 374, 98 N. W. 231.

See 43 Cent. Dig. tit. "Schools and School Districts," § 198.

**3.** Wilson *v.* Chester School Dist. No. 4, 32 N. H. 118 (holding that a ratification of the acts of a committee in building a more expensive school-house cannot be inferred from the mere fact that the district school is kept in it for a few weeks immediately after it is finished, where there is no evidence that the district had any knowledge of the amount expended or had taken any action on the subject); Kane *v.* School Dist. No. 3, 52 Wis. 502, 9 N. W. 459 (holding that the mere fact that seats purchased by a school-board have continued to be used in the school-house is no proof that the district has ratified the purchase, where it does not appear that the board ever presented any account for such seats to the district for allowance).

**4.** State Bd. of Education *v.* Greenbaum, 39 Ill. 609; Driscoll *v.* Council Bluffs Independent School Dist., 61 Iowa 426, 16 N. W. 291; Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182.

**5.** Davis *v.* Niles School-Dist. No. 1, 81

having authority to procure building material does so in a wrongful manner, and such material is used in the construction of a school building.[6] But it has been held that there cannot be an implied contract so as to legalize a contract which is *ultra vires* and void,[7] and that no implied contract to pay for supplies and apparatus unlawfully purchased on credit arises from their receipt and use by the district.[8] A committee chosen at an illegal district meeting does not by superintending the erection of a school-house render the district liable to the builder.[9]

**i. Construction and Operation of Contracts.** Contracts of a school-district are ordinarily subject to the same rules of construction and operation as apply to contracts of private corporations and individuals,[10] and should be construed in accordance with the plain import of the language used, in the light of the apparent understanding of the parties at the time the contract was made.[11] Where school-district officers or agents make a contract in their official capacity for the benefit of the district it is usually construed to be the contract of the district or board of which they are members,[12] although it is made in their individual names.[13] But a school-district cannot be held liable upon the personal undertaking of a school officer, although it is for services or material furnished to the district.[14]

**j. Modification or Rescission.** The modification or rescission of a school-district contract must ordinarily be made in the manner in which the execution of the contract must have been made,[15] and notice of such modification or rescission must

Mich. 214, 45 N. W. 989; Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984.

**Illustrations.**—Where an incorporated board of education appoints a building committee to contract for the erection of a school building, which they do, and after its completion it is accepted by the board, a contract to pay for the same will be implied, although the appointment of the committee was not under seal. State Bd. of Education *v.* Greenbaum, 39 Ill. 609. So where a committee *de facto*, not legally elected, but acting in good faith as such, furnishes labor, materials, and board for a teacher, and the district stands by in silence and avails itself of the benefits, there is an implied promise on the part of the district to pay therefor. Rowell *v.* Tunbridge School-Dist., 59 Vt. 658, 10 Atl. 754.

6. McClure *v.* Tipton School Dist., 79 Mo. App. 80.

7. District No. 3 *v.* Fogleman, 76 Ill. 189; Jordan *v.* Lisbon, etc., School Dist. No. 3, 38 Me. 164 (holding that where there is no legal contract on the part of a school-district to build a school-house, or any acceptance of the house, the building of such a house within the limits of the district imposes no legal obligation on the members to pay for it); Taylor *v.* Bates County School Dist. No. 3, 60 Mo. App. 372 (holding that a school-district cannot be made liable on an implied contract for the value of the services of a janitor in sweeping the district school-house and keeping fires therein, where the statute requires that such a contract shall be in writing).

8. Clark *v.* Iroquois County Dist. No. 1, 78 Ill. 474; Honey Creek School Tp. *v.* Barnes, 119 Ind. 213, 1 N. E. 747.

9. Jordan *v.* Lisbon, etc., School Dist. No. 3, 38 Me. 164.

10. See, generally, CONTRACTS, 9 Cyc. 577 *et seq.*

11. *Arkansas.*—Du Val *v.* Ft. Smith School Dist., 67 Ark. 67, 53 S. W. 562.

*Indiana.*— Jackson Tp. *v.* Home Ins. Co., 54 Ind. 184, holding that where a contract executed by the trustee of a civil township describes him as acting for the township, it will be taken to mean the civil township.

*Michigan.*— Dean *v.* Detroit Bd. of Education, 73 Mich. 165, 41 N. W. 218.

*Missouri.*— National Water Works Co. *v.* Kansas City School Dist., 23 Mo. App. 227.

*Nebraska.*— Omaha School Dist. *v.* McDonald, 68 Nebr. 610, 94 N. W. 829, 97 N. W. 584.

12. Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824; Johnson *v.* Cedar School Corp, 117 Iowa 319, 90 N. W. 713; Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379; Livingstone *v.* Boularderie School Trustees, 13 Nova Scotia 535.

**Liability of district officers on contracts** generally see *supra*, III, D, 6, g, (II).

13. Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379, holding that where the president of a board of education as such contracts for a school site, the contract is that of the board, although made in the president's own name.

14. Moore *v.* Leonard Independent School Dist., (Tex. Civ. App. 1903) 74 S. W. 324, holding that where a school-district contracted for the erection of a school-house and the president of the board of trustees verbally promised the person employed by the contractor to do the plastering, that he would pay him, the school-district did not thereby become liable to the subcontractor.

15. Broussard *v.* Verret, 43 La. Ann. 929, 9 So. 905, holding that since the proceedings of a school-board are required to be in writing, a verbal extension by the president of the board of a contract made by it is of no effect.

be given to the other party to the contract.[16] When there is proper authority therefor, a school-district contract may be modified or rescinded by the school-board or officers acting within the limits of such authority;[17] but a member of a school-board cannot change a contract made by the board so as to bind it unless he has been so authorized by the board, or unless his action is approved by such board.[18]

**k. Performance or Breach.** Where a party contracts to build a school-house in a particular manner, a substantial compliance is not sufficient, but it must be completed according to contract.[19] Where by the terms of the contract the performance thereof is to be passed upon by an architect, engineer, or committee, his decision is final and binding on the parties,[20] unless impeached on the ground of fraud, mistake, undue influence, or some other good cause.[21] A school-district, however, may waive a breach of contractual conditions;[22] and, although it is not liable on a contract by reason of a breach on the part of the contractor, it may be liable on a *quantum meruit* or *quantum valebant*, if it accepts the result of the contract.[23] But where a contractor to build a school-house fails to build it according to contract, and it is not expressly or impliedly accepted, and the district derives no benefit from the building, the contractor is not entitled to the value of the materials used in the building.[24] The fact that there has been a waiver of defects in the early stages of the work in erecting a school-house does not entitle the contractor to recover, unless the subsequent parts of the work have been performed conformably to contract or have been accepted.[25] A contractor may be compelled to remove a building which is not built according to contract.[26] After a school-district contract has been fully performed by both parties, money

16. Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856, holding that to show a rescission by a school-district of a written contract in pursuance of a contemporaneous parol contract, a resolution of the school-board, on which notice of rescission was given, is admissible, and it is no objection thereto that the other party to the contract was not present at the time of the passing of the resolution.

**The president of a school-board does not need a special authorization** to notify the other party of a rescission of his contract, where the school-board has passed a resolution for such rescission. Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856.

17. Schofield *v.* McGregor, 1 Thomps. & C. (N. Y.) 404; Edinburg American Land, etc., Co. *v.* Mitchell, 1 S. D. 593, 48 N. W. 131.

18. State *v.* Tiedemann, 69 Mo. 515.

19. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316. See also Kreatz *v.* St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533, 82 Minn. 516, 85 N. W. 518.

20. Paola Bd. of Education *v.* Shaw, 15 Kan. 33; Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70, holding that where a contract for heating a school building guaranteed adequate heat from the apparatus installed, and made the architect of the school-board the sole judge of the sufficiency of the plant, the fact that after the apparatus was put in and before it was finally declared inadequate the school-board was reorganized under a new law did not prevent the commissioner of school buildings of the new board from passing on the question whether the guarantee had been made good, where his office corresponded to that of the architect under the old board.

21. Paola Bd. of Education *v.* Shaw, 15 Kan. 33.

22. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316; Decker *v.* Douglas County School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390, holding that a settlement between the directors of a school-district and a contractor, who has failed to fully perform his contract to build a school-house, fixing the amount due the contractor, for the labor and material actually furnished by him is binding on the parties, unless set aside for fraud or mistake.

**The right to recoup damages** sustained by a school-district by reason of a contractor's failure to perform his contract may be waived by the district. Decker *v.* Douglas County School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390.

23. Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984, holding that where a contractor for the erection of a school building made many material changes and additions in the work without authority of the school-board, and against the protests of the architect, but notwithstanding this the contract was not fraudulent or *ultra vires*, and the district accepted and used the building after it was completed, it was bound to pay the reasonable value of the building, although not liable on the contract.

24. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

25. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

26. Hill *v.* Millburn School Dist. No. 2, 17 Me. 316.

paid or advanced under such contract cannot be recovered back in the absence of fraud or corruption.[27]

**l. Rights and Remedies of Parties**[28] — (I) *SCHOOL-DISTRICT.* A school-district may, through its proper board or officers, maintain an action for money had and received, to recover money wrongfully paid out by one of its officers or agents,[29] such as money paid out on an illegal contract.[30] It may also maintain an action for damages for a breach of a district contract,[31] but it cannot in such an action recover on the theory that the contract is void.[32]

(II) *CONTRACTORS.* Contractors with a school-district may maintain assumpsit against the proper school-board or officers on lawful contracts of such officers or their predecessors,[33] or an action on such contract may be maintained by an assignee thereof,[34] or an action for damages for a breach of the contract may be maintained against the proper school-board.[35] A contractor may also in a proper case maintain a mandatory injunction [36] or mandamus,[37] to compel a performance of its contract, such as to compel the school authorities to use a text-book adopted by the state board of education, and which plaintiff is under contract to furnish.[38] Where goods are sold to a school-district under a contract not conforming to statute, although such goods are necessary and suitable to the purposes intended, and they are retained and used by the district or township, no recovery can be had upon a *quantum meruit,* where the goods are tangible and can be recovered;[39] but the only remedy of the seller of such articles is to claim the property itself.[40]

**27.** Kagy *v.* West Des Moines Independent Dist., 117 Iowa 694, 89 N. W. 972.

**28. Individual liability of officers in general** see *supra,* III, D, 6, g.

**29.** Nassau County Bd. of Public Instruction *v.* Billings, 15 Fla. 686.

**30.** Latah County Independent School Dist. No. 5 *v.* Collins, 15 Ida. 535, 98 Pac. 857, holding that the fact that the statute makes a contract by a trustee in which he is interested void and provides as a penalty only that an action shall not be maintained thereon does not prevent a recovery by the district of money paid on such contract.

**31.** Fluty *v.* School-Dist. No. 11, 49 Ark. 94, 4 S. W. 278.

**32.** Fluty *v.* School-Dist. No. 11, 49 Ark. 94, 4 S. W. 278.

**33.** Williams *v.* Keech, 4 Hill (N. Y.) 168. See also Coghlan *v.* East Tilbury Tp., 35 U. C. Q. B. 575.

**34.** Smith *v.* Coman, 47 N. Y. App. Div. 116, 62 N. Y. Suppl. 106, holding that where a trustee of a school-district orders charts for use in such district by a written order signed by himself as trustee, and such charts are delivered to and used by the district, an assignee of the order is entitled to recover therefor against a trustee subsequently elected.

**The acceptance of a void warrant** by the assignee does not supersede the original contract, so as to deprive him of his right to sue thereon. Johnson *v.* Cedar School Corp., 117 Iowa 319, 90 N. W. 713.

**35.** Morgan *v.* San Francisco Bd. of Education, 136 Cal. 245, 68 Pac. 703, holding also that, in an action against a school-board for a breach of contract, the fact of a second contract by the board with a third party for the same work is of no consequence.

**Whether or not the judgment can be collected** is immaterial in an action against a board of education for a breach of contract. Morgan *v.* San Francisco Bd. of Education, 136 Cal. 245, 68 Pac. 703.

**36.** Silver *v.* Indiana State Bd. of Education, (Ind. App. 1904) 71 N. E. 667; Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1103; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103. And see, generally, INJUNCTIONS, 22 Cyc. 844 *et seq.*

**37.** Ginn *v.* School Book Bd., 62 W. Va. 428, 59 S. E. 177, holding, however, that a publisher of school-books having a contract with the school-board for furnishing books cannot compel the board to continue or renew its contract for five years after its expiration, on the ground that the board changed books without a sufficient vote. And see, generally, MANDAMUS, 26 Cyc. 125.

**Mandamus is not the proper remedy** of a contractor having a valid contract for an impairment of his contract rights by reason of a change made in good faith in the centralization of the township schools, but his remedy is by an action at law. State *v.* Chester Tp. Bd. of Education, 25 Ohio Cir. Ct. 424.

**38.** Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1093; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103; Westland Pub. Co. *v.* Royal, 36 Wash 399, 78 Pac. 1096, holding, however, that where it appears that plaintiff is only nominally damaged he is not entitled to such an injunction. See also *infra,* III, I, 2, e, (III), (B).

**39.** Union Nat. Bank *v.* Franklin School Tp., 31 Ind. App. 699, 68 N. E. 328; Lincoln School Tp. *v.* American School Furniture Co., 31 Ind. App. 405, 68 N. E. 301; Andrews *v.* Curtis, 2 Tex. Civ. App. 678, 22 S. W. 72.

**40.** Clark *v.* Iroquois County Dist. No. 1, 78 Ill. 474 (holding that the only remedy of a seller of articles purchased by school directors having no authority to purchase the

But equity will not permit a contractor to remove a school-house to pay a balance of only a small fraction of the contract price.[41] Where a school officer having no power to borrow money on behalf of the district does so and the money is applied to a lawful indebtedness of the district, the lender of such money may be subrogated to the rights of the creditor and by such means recover the amount loaned.[42] It is no defense to an action against a district, on a contract, for labor and materials furnished in repairing a school-house, that the building has been unlawfully removed from the lot belonging to the district,[43] or that the tax to raise funds for such repairs has been illegally assessed or collected;[44] or, on a contract for erecting a school-house, that the committee authorized to enter into such contract, expended a larger sum than that voted therefor,[45] that the school-house is worth no more than the sum so voted,[46] or that the district does not own the land on which the school-house is built;[47] nor is it a defense to an action for damages against a school-board, for a breach of contract, that public funds cannot be used to pay damages.[48]

(III) *SUBCONTRACTORS AND MATERIALMEN.*[49] In the absence of a statutory provision or contract to that effect, a school corporation is not personally liable for work or materials furnished to the principal contractor.[50] A school-district may, however, become personally liable to subcontractors or materialmen for the amount of their claims by express contract,[51] as by accepting an order on the principal contractor for the amount of the claim.[52] But ordinarily the rights and remedies of subcontractors and materialmen are governed by statute,[53] under which it is

same on credit is to claim the property itself); Andrews *v.* Curtis, 2 Tex. Civ. App. 678, 22 S. W. 72.

**41.** Grady *v.* Landram, 63 S. W. 284, 23 Ky. L. Rep. 506.

**42.** White River School Tp. *v.* Dorrell, 26 Ind. App. 538, 59 N. E. 867.

**Interest** on such loan from the time of the loan cannot be recovered, where plaintiff recovers a judgment against a school township for money loaned without its authority to a school trustee, to be paid to a contractor erecting the school-house, and it is so used and there is no finding as to when it was so paid. White River School Tp. *v.* Dorrell, 26 Ind. App. 538, 59 N. E. 867.

**43.** Knowles *v.* Chesterville School Dist. No. 10, 63 Me. 261.

**44.** Knowles *v.* Chesterville School Dist. No. 10, 63 Me. 261.

**45.** Jenkins *v.* Doughty Falls Union School Dist., 39 Me. 220.

**46.** Junkins *v.* Doughty Falls Union School Dist., 39 Me. 220.

**47.** Norris *v.* Windsor School Dist. No. 1, 12 Me. 293, 28 Am. Dec. 182.

**48.** Morgan *v.* San Francisco Bd. of Education, 136 Cal. 245, 68 Pac. 703.

**49. Officers' liability for neglect to exact contractor's bonds** see *supra*, III, E, 4, f, (II).

**50.** Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84, holding that where a contract for the construction of a school-house provides that if the contractor abandons the work the school-district shall be entitled to take possession thereof inclusive of all "materials, tools, and appliances thereon" and finish the work, the fact that certain unworked materials furnished to the contractor are on the ground when the district takes possession of the uncompleted work does not impose on the district a personal liability therefor, on their being used in the completion of the work.

**Right of attaching creditor.**— The fact that the officers of a township or district know that certain material which is used in the construction of a school-house has been attached but which is so used after the attachment is released, although wrongfully, will not give the attaching creditor a lien on the school-house, or render the district liable for the value of the material, since the officers of the district are not presumed to know that the attaching officer was guilty of a wrongful act in releasing the attachment and permitting the material to be used. Charnock *v.* Colfax Dist. Tp., 51 Iowa 70, 50 N. W. 286, 33 Am. Rep. 116.

**51.** Mundorff *v.* Kilbuck Tp., 4 Pennyp. (Pa.) 103 (holding, however, that where the agreement provides that the school-board shall pay all bills for material and labor when so ordered by the contractor, it is not liable for bills which such contractor has never ordered the board to pay); Lafebre *v.* Superior Bd. of Education, 81 Wis. 660, 51 N. W. 952.

**52.** Hamblett *v.* White, (Miss. 1892) 11 So. 185.

**53.** See the statutes of the several states; and cases cited *infra*, this note.

**An Indiana statute** (Elliott Suppl. § 1696), making an owner personally liable to a subcontractor who serves him with notice of the amount of his claim as therein provided, creates a personal liability in favor of those only to whom a lien is given; and as there can be no lien upon a school-house, school corporations are not liable under such statute to such subcontractors. Jeffries *v.* Meyers, 9 Ind. App. 563, 37 N. E. 301.

**Under Wis. Rev. St. § 3328,** any subcon-

sometimes provided that subcontractors have a claim against the school corporation for the value of materials or services furnished, not in excess of the contract price,[54] and not in excess of the amount due from the district to the principal contractor at the time the subcontractor's action therefor is commenced or tried;[55] and if the subcontractor does not file his claim against the district until all that is due has been paid to the principal contractor the subcontractor cannot recover;[56] but the school corporation is not required to pay such claim in any different manner from that provided in the principal contract.[57] Where in an action by materialmen and subcontractors, the contractor answers and proof is given sufficient to support a judgment against him, although not as against the district, recovery may be had against the contractor.[58]

**5. District Expenses and Charges, and Statutory Liability[59] — a. In General.** As a general rule a school-district is liable for such expenses and charges and such only as are expressly or impliedly authorized by law,[60] and such as are necessarily and properly incident to the performance of a statutory authority or duty,[61]

tractor who furnishes materials to a principal contractor for the construction of any building for a school-district may sue such principal contractor and the school-district jointly; but no judgment can be entered against any defendant therein other than the principal contractor for any amount greater than the amount due from the district to such principal contractor at the time of the commencement of such action. Iron River Bank *v.* Iron River School Directors, 91 Wis. 596, 65 N. W. 368.

**54.** Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**Lien.**— Iowa Code, § 3102, authorizing subcontractors for public buildings not belonging to the state to file claims for materials, etc., which shall be paid by the public corporation constructing the building to the extent of the contract price, etc., does not authorize a lien upon the building so erected, or on the funds due the contractor. Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**55.** Allentown School Dist. *v.* McConn, 2 Walk. (Pa.) 85; Iron River Bank *v.* Iron River School Directors, 91 Wis. 596, 65 N. W. 368; Raduenz *v.* Ahnapee School Dist. No. 1, 42 Wis. 397.

**Proof of amount due.**—Where a contract to construct a school building provides that if the contractor fails to finish the work the district may complete it and deduct the cost from any money due the contractor on the contract, and that expenditures and damages incurred through such default shall be certified by the architect, the architect's certificate as to the amount expended in completing the building is conclusive proof of such amount as against subcontractors, in the absence of fraud. Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**56.** Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**57.** Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**58.** Green Bay Lumber Co. *v.* Odebolt Independent School Dist., 125 Iowa 227, 101 N. W. 84.

**59. Allowance of claims** see *infra*, III, G, 1, a.

**Compensation and reimbursement of expenses of officers** see *supra*, III, D, 6, e.

**Indebtedness and expenditures in general** see *infra*, III, F.

**Tuition of pupils** see *infra*, III, I, 1, e.

**60.** Estes *v.* Bethel, etc., School Dist. No 19, 33 Me. 170; Hartman *v.* Mt. Joy School Dist., 68 Pa. St. 441.

**Printing.**— Under Mass. Gen. St. c. 40, § 6, directing school-committees annually to make a report of the condition of the schools, and to cause it to be printed for the use of the inhabitants, it is held that a city school-committee may charge to the city the expense of printing an address by them to the people thereof relating to a case of corporal punishment in one of the public schools, the address being referred to in their subsequently printed report as a part thereof. Wilson *v.* Cambridge, 101 Mass. 142. But it has been held that a school-district is not liable for the cost of printing a list of delinquent taxpayers not ordered by it. Hoover *v.* Lower Merion Tp. School Dist., 20 Montg. Co. Rep. (Pa.) 53.

**Under Okla. Laws (1890), c. 79, art. 13,** providing for the establishment of separate schools and requiring an annual tax to be levied by the board of county commissioners in addition to the general county tax sufficient to maintain such separate schools, where a township erects a school-house, pays teachers' wages, and purchases fuel for the support and maintenance of such separate schools, the debts incurred for such purposes are not township liabilities. School Dist. No. 76 *v.* Capitol Nat. Bank, 7 Okla. 45, 54 Pac. 309.

**The board of a pupil** is not a proper district expense. Pfeiffer *v.* Reno, 29 Pac. Co. Ct. 145.

**61.** Wright *v.* Rosenbloom, 52 N. Y. App. Div. 579, 66 N. Y. Suppl. 165; Union Free School Dist. No. 1 *v.* Mapes, 14 N. Y. St. 593.

including a broker's commission in the purchase of a school-house site,[62] repairs on a school-house,[63] and the expenses of suits growing out of the performance of official duties.[64] But where certain school agents are empowered to provide certain articles from money assigned to them for that purpose, the school-district has no authority to raise other money therefor or to make itself liable for such articles.[65] It has been held that, upon the principle that in the absence of specific directions on the subject, the beneficiary should pay the legitimate expenses incurred, a school-district is liable for the fees allowed under a general law for holding a school election, although not expressly required to pay them.[66]

**b. Transportation of Pupils.** It has been provided that a school-board may incur a district expense by arranging for the transportation of children to school,[67] as where there will be a saving of expense and the children will thereby secure increased advantages.[68] The arrangement for such transportation is ordinarily within the discretion of the school-board having authority to make it,[69] and mandamus will not lie at the instance of one aggrieved by the board's action,[70] unless there has been an abuse of such discretion;[71] but the proper remedy in such a case under some statutes is by appeal to the county superintendent.[72]

**c. Highway For Access to School-House.** It is also provided under some statutes that the school-board, when properly authorized by the electors of the district or township,[73] may lawfully incur expenses to secure the location of a

**62.** Union Free School Dist. No. 1 *v.* Mapes, 14 N. Y. St. 593.

**63.** Blaisdell *v.* Westmore School Dist. No. 2, 72 Vt. 63, 47 Atl. 173, holding that the act of 1892, providing that debts for repairs on school-houses shall be paid by the town, does not relieve a school-district of liability for repairs on a school-house, since the statute was intended merely to fix the liability for such debts as between the town and district.

**64.** People *v.* Skinner, 74 N. Y. App. Div. 58, 77 N. Y. Suppl. 36, holding that the members of a school-district meeting, constituting a committee to investigate the financial affairs of the district, are not school-district officers within the meaning of Consolidated School Laws, section 264, allowing such officers their expenses in suits against them growing out of the performance of their official duties, and although sued for libel growing out of their report they cannot recover from the district the expenses of the suit.

**65.** Estes *v.* Bethel, etc., School Dist. No. 19, 33 Me. 170.

**66.** Ft. Smith School Dist. *v.* Williams, 61 Ark. 71, 31 S. W. 980.

**67.** Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51. *Compare* Nelson *v.* State, 168 Ind. 491, 81 N. E. 486; State *v.* Jackson, 168 Ind. 384, 81 N. E. 62.

**A majority of the board** must act in entering into such a contract, and there can be no recovery from the district for the conveyance of scholars in the absence of proof that the contract was entered into by such majority. Boyles *v.* Summit Tp. School Dist., 28 Pa. Co. Ct. 351.

**Public funds not diverted.**— Kan. Laws (1899), c. 177, § 12, imposing a liability on a school-district to a parent of pupils residing more than three miles from a school-house, for their carriage thereto and return, is not invalid as allowing public funds to be diverted to private uses. Atchison County School Dist. No. 3 *v.* Atzenweiler, 67 Kan. 609, 73 Pac. 927.

**Pa. Act June 2, 1897,** authorizing school-boards to furnish transportation facilities for school children, applies only to children from schools that have been closed by reason of small attendance. Pfeiffer *v.* Reno, 29 Pa. Co. Ct. 145.

**68.** Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51.

**69.** Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51; *In re* West Fallowfield School Dist., 29 Pa. Co. Ct. 600 (holding that where a neglect of such duty has not been wilful but rather a dispute over the price to be paid for transportation, the board will be given a further opportunity to rectify the error); Carey *v.* Thompson, 66 Vt. 665, 30 Atl. 5. See also Frelinghuysen Tp. Bd. of Education *v.* Atwood, 74 N. J. L. 638, 65 Atl. 999 [*affirming* 73 N. J. L. 315, 62 Atl. 1130].

**70.** Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51; Carey *v.* Thompson, 66 Vt. 665, 30 Atl. 5.

**71.** Carey *v.* Thompson, 66 Vt. 665, 30 Atl. 5.

**72.** Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51.

**73.** Brockway *v.* Louisa County, 133 Iowa 293, 110 N. W. 844 (holding that it is within the power of a school-district by its electors voting at an annual meeting and of its officers, to procure the opening of a road to render a school accessible, and to levy a tax for that purpose, and that the district is not required to proceed by condemnation, unless such proceeding becomes necessary by inability to obtain a conveyance); Bogaard *v.* Plain View Independent Dist., 93 Iowa 269, 61 N. W. 859 (holding that the board of directors of an independent school-district

public highway by which scholars may reach the school building without trespassing upon private property.[74]

**6. Torts.** The management of public schools is a branch of the state government, and school-districts[75] and school-boards,[76] considered as corporations or quasi-corporations, ordinarily are not liable in tort,[77] as for the negligence of their officers, agents, employees,[78] and contractors,[79] unless such liability is expressly or impliedly imposed by statute,[80] and except where the property rights of another have been wilfully or negligently appropriated by the agents of the district or board.[81] Thus, in the absence of statute, a school-district or school-board is not liable for

is authorized on the vote of the electors to appropriate funds for highways for better access to school-houses, and that a tax may be properly levied therefor); McShane *v.* Pleasant Grove Independent Dist., 76 Iowa 333, 41 N. W. 33.

**74.** Flint River Independent Dist. *v.* Kelley, 55 Iowa 568, 8 N. W. 426, holding that where the board of directors of an independent school-district has authorized, audited, and paid such expenses to secure the location of a public highway, the district cannot afterward maintain an action against the individual members of the board to recover the money so paid.

**Limitation of power.**— The power given to the board of directors of district townships by Iowa Act, 19th Gen. Assembly, c. 51, § 1, to obtain such a highway as they deem necessary, is not limited to cases where the school-houses are not situated on any highway. Bogaard *v.* Plain View Independent Dist., 93 Iowa 269, 61 N. W. 859.

**Taxation.**— The fact that the school-board is guilty of fraud or collusion in establishing a road for proper access to the school, and thereby increases the expense, does not render invalid the tax levied to pay therefor. Brockway *v.* Louisa County, 133 Iowa 293, 110 N. W. 844.

**75.** Charles Bank *v.* Brainard School Dist., 49 Minn. 106, 51 N. W. 814; McClure *v.* Tipton School Dist., 79 Mo. App. 80; Ford *v.* Kendall Borough School Dist., 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607.

**76.** State *v.* Frederick County, 94 Md. 334, 51 Atl. 289.

**A board of education** is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating such liability. Finch *v.* Toledo Bd. of Education, 30 Ohio St. 37, 27 Am. Rep. 414.

**77.** See, generally, Municipal Corporations, 28 Cyc. 1256 *et seq.*

**78.** Freel *v.* Crawfordsville School City, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; McKenna *v.* Kimball, 145 Mass. 555, 14 N. E. 789; Ford *v.* Kendall Borough School Dist., 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607.

**79.** Wood *v.* Mitchell Independent School Dist., 44 Iowa 27.

**80.** See Bank *v.* Brainerd School Dist., 49 Minn. 106, 51 N. W. 814, holding, however, that a right of action against a school-district for negligence is not given by Gen. St. (1878) c. 36, § 117, which authorizes actions to be brought against trustees in their official capacity for an injury to the rights of others arising from some act or omission of the officers of the district.

**Under the Washington statute** (Ballinger Annot. Codes & St. §§ 5673, 5674), providing that an action may be maintained against a school-district for an injury arising from its act or omission, a school-district is liable for the scalding of a child rightfully in attendance at school through the overturning of a bucket of boiling water which was negligently kept upon a register in the middle of the school-room wholly unguarded and unprotected. Redfield *v.* Kittitas County School Dist. No. 3, 48 Wash. 85, 92 Pac. 770. And it is held that such statute applies to governmental duties as well as other duties, since it was designed to remove the limitations of the common-law rule and make the district responsible generally for an omission of duty. Redfield *v.* Kittitas County School Dist. No. 3, *supra*.

**In New York** the board of education of the city of New York, created a corporate body by Laws (1864), c. 555, is liable for neglect to perform a duty imposed on such board. Donovan *v.* New York Bd. of Education, 85 N. Y. 117 [*affirming* 46 N. Y. Super. Ct. 565] [but see former decision in 44 N. Y. Super. Ct. 53, 55 How. Pr. 176]; Bassett *v.* Fish, 75 N. Y. 303 [*reversing* 12 Hun 209]. But the board of education cannot be held liable for an injury caused by negligence in keeping school premises in proper condition, since the special care and safe-keeping of school buildings is committed by statute to a board of trustees who are independent public officers, and for whose negligence the board of education is not liable. Donovan *v.* New York Bd. of Education, *supra*. Contributory negligence in an action by a teacher against the board of education for injuries caused by a defect in the school building see Bassett *v.* Fish, *supra*.

**81.** Volk *v.* Cincinnati Bd. of Education, 10 Ohio S. & C. Pl. Dec. 35, 7 Ohio N. P. 164, holding that a board of education is liable for damages where by its acts there has been an invasion of the property rights of a private party, as where such board causes excavations, which cause the foundation of the house of an adjoining owner to be damaged. See also Gould *v.* Eagle Creek School Dist., 7 Minn. 203.

injuries caused by its negligence or the negligence of its officers or agents in the construction of a school-house or in failing to keep a school building or premises in proper repair and condition,[82] or in furnishing unsafe and unsuitable means of conveyance in transporting pupils to and from schools;[83] nor is it liable for a trespass committed by its officers.[84] Where a school-board or officer having authority to procure building material or other property for a school-district does so in a wrongful manner as by a wrongful appropriation or conversion, the school-district may be held liable on an implied assumpsit for the value of the material or property used;[85] but it is not liable in tort for the wrongful act of the board or officers in converting the property.[86] But where a school-district in the exercise of its corporate powers creates or permits a nuisance by misfeasance or nonfeasance, it is liable in damages to any person suffering special injury therefrom.[87] The members of a school-board or school officers are not personally liable for an injury resulting solely from the negligence of a person necessarily employed by them, as in such case the doctrine of *respondeat superior* has no application,[88] but they are liable for their personal negligence or other wrongs,[89] as where they have knowledge of the negligence of an employee and fail to use due care to provide against its consequences.[90] A municipal corporation cannot be held liable for the negligent acts of a school-board which is not an agent of the city government or under its control.[91]

**F. District Debts, Securities, and Taxation**[92] — **1. Power to Incur Indebtedness and Expenditures — a. In General.** A school-district or township,

82. *Iowa.*— Lane *v.* Woodbury Dist. Tp., 58 Iowa 462, 12 N. W. 478, holding that a school-district is not liable for injuries to a pupil resulting from a defective condition of the school-house.

*Maryland.*— State *v.* Frederick County, 94 Md. 334, 51 Atl. 289.

*Massachusetts.*— Sullivan *v.* Boston, 126 Mass. 540; Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Bigelow *v.* Randolph, 14 Gray 541.

*Minnesota.*—Bank *v.* Brainerd School Dist., 49 Minn. 106, 51 N. W. 814.

*Pennsylvania.*— Erie School Dist. *v.* Fuess, 98 Pa. St. 600, 42 Am. Rep. 627.

*Rhode Island.*— Wixon *v.* Newport, 13 R. I. 454, 43 Am. Rep. 35.

See 43 Cent. Dig. tit. "Schools and School Districts," § 208.

**School-districts and independent school-districts,** being corporations with limited powers organized solely for public purposes, and the duties of the trustees or boards of education intrusted with the management and care of the property of such districts being public and administrative only, they are not liable for injuries to individuals caused by negligence in failing to make repairs. Bank *v.* Brainerd School Dist., 49 Minn. 106, 51 N. W. 814.

83. Harris *v.* Salem School Dist., 72 N. H. 424, 57 Atl. 332.

84. School Dist. No. 11 *v.* Williams, 38 Ark. 454.

85. McClure *v.* Tipton School Dist., 79 Mo. App. 80. And see *supra*, III, E, 4, h.

86. McClure *v.* Tipton School Dist., 79 Mo. App. 80.

87. See Wood *v.* Mitchell Independent School Dist., 44 Iowa 27, holding, however, that the machinery for controlling a well, left unlocked and unguarded on the school-house grounds by a contractor employed by the district to drill a well, is not a nuisance rendering the district liable for injuries received by a school child while playing with it.

88. Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649 [*affirming* 46 N. Y. Super. Ct. 111]. See also Crisp *v.* Thomas, 55 J. P. 261, 63 L. T. Rep. N. S. 756.

89. School Dist. No. 11 *v.* Williams, 38 Ark. 454; Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649 [*affirming* 46 N. Y. Super. Ct. 111].

**Where a member of a school-board is charged by the board as its agent,** distinguished from his corporate relation, with the duty of keeping a school-house in repair, he is individually liable for an injury occasioned by his neglect thereof; and it is erroneous in such a case to render a judgment against all the members of the school-board jointly for a personal injury caused by his neglect. Bassett *v.* Fish, 75 N. Y. 303.

90. See Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649 [*affirming* 46 N. Y. Super. Ct. 111].

91. Treadwell *v.* New York, 1 Daly (N. Y.) 123. See, generally, Municipal Corporations, 28 Cyc. 1271 *et seq.*

**Where a board of education** or other board of a city has charge of the school buildings, and in such capacity is not a servant of the city government or under its control, the city cannot be held liable for injuries caused by the acts of negligence of such board in caring for the school building. Ham *v.* New York, 70 N. Y. 459 [*affirming* 37 N. Y. Super. Ct. 458]; Terry *v.* New York, 8 Bosw. (N. Y.) 504; Diehm *v.* Cincinnati, 25 Ohio St. 305 [*affirming* 5 Ohio Dec. (Reprint) 215, 3 Am. L. Rec. 542].

92. **District expenses and charges:** In general see *supra*, III, E, 5, a. For school fur-

through its proper board or officers, has such power, and such only, of incurring indebtedness [93] or making expenditures [94] as is either expressly, or by necessary implication, conferred upon it by statute; and where such power is expressly limited by the terms of the statute, the board or officers are authorized to act only within such limits,[95] as within a provision that they cannot incur a certain indebtedness or make certain expenditures until certain revenues are apportioned thereto,[96] or before a tax for the purpose of the debt has been voted,[97] or beyond the amount of certain funds,[98] and within such limits it is their duty to act when properly called upon.[99] The validity and effect of such statutes are to be determined by the application of the general rules relating to the construction of statutes.[1] The legislature may, by statute, repeal a former statute regulating a school-district's indebtedness or expenditures;[2] but it cannot thereby impair the obligation of a contract made under the repealed statute previous to its repeal.[3]

**b. Ratification.** Where a school-district might originally have authorized the incurring of a debt, it may ratify such a debt when incurred by a district board or officer without previous authority,[4] as by voting, at a district meeting, a tax to apply upon an indebtedness so contracted.[5]

**c. Limitation of Amount of Indebtedness** [6] — (i) *In General.* The amount of indebtedness which a school-district may contract in conducting and managing its schools is ordinarily expressly limited by the state constitution,[7] or by

niture and appliances see *supra*, III, E, 3. For obtaining transportation of pupils see *supra*, III, E, 5, b. For obtaining highways for access to school-houses see *supra*, III, E, 5, c.

**93.** Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194; Robbins *v.* Anoka County School Dist. No. 1, 10 Minn. 340; Eddy Bd. of Education *v.* Bitting, 9 N. M. 588, 58 Pac. 395.

**The power of a school corporation is much more limited** than ordinary public corporations, for it has no general power to incur debts or execute evidences of indebtedness. Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

**94.** Hotchkiss *v.* Plunkett, 60 Conn. 230, 22 Atl. 535, holding that a board of education cannot expend money except for purposes expressly authorized by statute.

**95.** Middleton *v.* Greeson, 106 Ind. 18, 5 N. E. 755, holding that Rev. St. (1881) §§ 6006, 6007, limiting the authority of "township trustees" in the matter of contracting debts on behalf of their townships, applies to them in their capacity as trustees of the school township as well as of the civil township.

**96.** Harney *v.* Wooden, 30 Ind. 178.

**97** Manning *v.* Van Buren Dist. Tp., 28 Iowa 332.

**98.** See *infra*, III, F, 1, c.

**99.** Zimmerman *v.* State, 60 Nebr. 633, 83 N. W 919.

1. See Murphey *v.* Burke County Educational Bd. 71 Ga. 856, holding that the act of March 3, 1874, providing for the payment of school officers and school-teachers for services rendered in the year 1871, is not unconstitutional because of a provision that it shall not apply or operate in any county after any grand jury thereof sball otherwise recommend.

2. See Lincoln School Tp. *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272; Chalfant *v.* Edwards, 176 Pa. St. 67, 34 Atl. 922 [*overruling* Hutchinson's Appeal, 47 Pa. St. 84, and holding that the act of April 20, 1874, section 2, repealed by necessary implication the act of Feb. 12, 1869, section 66].

**In Indiana** the act of 1875, chapter 114, providing for an order from the board of county commissioners as a condition precedent to the incurring of certain indebtedness by a trustee of a school township, was repealed by Acts (1889), c. 5, § 6, creating a township advisory board. Lincoln School Tp. *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272. For decisions prior to this repealing statute see Roseboom *v.* Jefferson School Tp., 122 Ind. 377, 23 N. E. 796; Jefferson School Tp. *v.* Litton, 116 Ind. 467, 19 N. E. 323.

3. Dennington *v.* Roberta, 130 Ga. 494, 61 S. E. 20.

4. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

5. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155. See also Nichols *v.* Pierce County School Dist. No. 10, 39 Wash. 137, 81 Pac. 325.

6. **Limitation of bonded debt** see *infra*, III, F, 3, c.

7. *California.*— People *v.* Hanford Union High School Dist., 148 Cal. 705, 84 Pac. 193.

*Illinois.*— Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824.

*Iowa.*—Edmundson *v.* Jackson Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224; Winspear *v.* Holman Dist. Tp., 37 Iowa 542, holding that a school-district township is a "political or municipal corporation" within Const. art. 2, § 3, inhibiting such corporations from incurring

statute,[8] or in the case of a territory by an act of congress.[9] Under such constitutional or statutory provisions, a school-district cannot appropriate money, if by such action the district indebtedness is increased beyond the prescribed limitation;[10] although the fact that the limitation of indebtedness has been reached does not prevent the district from contracting a debt payable expressly out of a special fund,[11] as out of the annual revenues of the district.[12] The limitation upon the amount of a tax that may be levied by a school-district for a particular purpose in any one year does not limit the amount that may be expended for such purpose, but limits only the amount that may be expended in that year.[13] A limitation upon the bonded indebtedness of a school-district does not affect its power to create a general indebtedness, to be liquidated by concurrent taxation.[14] As a general rule a contract of indebtedness in excess of the constitutional or statutory limitation is void,[15] and the fact that the district has had the benefit of the performance of the contract does not render it liable on a *quantum meruit*.[16] It is usually void, however, only as to the excess, and where the contract is partly within and partly beyond the limitation, it is valid and enforceable up to the amount of the limitation;[17] and the fact that the duty to be performed by a contractor is not severable in its nature does not defeat his right to enforce the contract up to the prescribed amount.[18]

(II) *How Limitation Fixed.* It is usually provided in such constitutions or statutes that the amount of indebtedness shall not exceed in any one year the income and revenue provided for that year,[19] or a given per cent of the assessed value of the taxable property in the district,[20] except upon the assent of the elect-

indebtedness exceeding a certain per cent on the taxable property of the corporation.

*Kentucky.*— Howard *v.* Harlan County School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399.

*Pennsylvania.*— Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129; Hutchinson's Appeal, 4 Pennyp. 84.

*Washington.*— Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

*Wisconsin.*— McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100.

8. Hutchinson's Appeal, 4 Pennyp. (Pa.) 84.

**Repeal of statute** see Hampton *v.* Hickey, 88 Ark. 324, 114 S. W. 707.

9. Eddy Bd. of Education *v.* Bitting, 9 N. M. 588, 58 Pac. 395; Territory *v.* Logan County High School, 13 Okla. 605, 76 Pac. 165. See also Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

**A town board of education,** being a distinct municipal corporation for school purposes, is one of the corporations enumerated in the act of congress of July 30, 1886, section 4, known as the "Federal Limitation Act," and providing that no municipal corporation in the territory shall become indebted beyond four per cent of the value of the taxable property within such corporation. Eddy Bd. of Education *v.* Bitting, 9 N. M. 588, 58 Pac. 395.

10. Scheetz *v.* Norristown School Dist., 7 Lack. Leg. N. (Pa.) 334, 17 Montg. Co. Rep. 209.

11. Scheetz *v.* Norristown School Dist., 7 Lack. Leg. N. (Pa.) 334, 17 Montg. Co. Rep. 209.

12. Scheetz *v.* Norristown School Dist., 7 Lack. Leg. N. (Pa.) 334, 17 Montg. Co. Rep. 209.

13. Farmers, etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767; Robbins *v.* Anoka County School Dist. No. 1, 10 Minn. 340.

14. Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539.

15. Howard *v.* Harlan County School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399; Luburg's Appeal, (Pa. 1889) 17 Atl. 245.

16. McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100.

17. People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824; Denisou Tp. School Dist. *v.* Shortz, 2 Pennyp. (Pa.) 231; McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100.

18. McGillivray *v.* Joint School Dist. No. 1, 112 Wis. 354, 88 N. W. 310, 88 Am. St. Rep. 969, 58 L. R. A. 100.

19. People *v.* Hanford Union High School Dist., 148 Cal. 705, 84 Pac. 193; Howard *v.* Harlan County School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399; Carlisle County School Dist. No. 32 *v.* Kane, 87 S. W. 321, 27 Ky. L. Rep. 983; Andrus *v.* St. Landry Parish, 108 La. 386, 32 So. 420.

20. *Dakota.*— Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767.

*Illinois.*— People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Russell *v.* Morgan High School Bd. of Education, 212 Ill. 327, 72 N. E. 441; Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824.

ors of the district, given in the prescribed manner.[21] But in the absence of a constitutional or statutory provision prohibiting a school-district from contracting a debt in excess of the revenue or taxes for the current year, it has authority to incur a reasonable debt for any legitimate and necessary purpose.[22]

(III) *COMPUTATION OF LIMIT OR AMOUNT.* In determining whether the limit of the indebtedness of a school-district has or has not been reached, only its own debts are to be considered,[23] and where the school-district is within a city, and is separate and distinct therefrom, its debts are not to be aggregated with those of the city.[24] A distinct indebtedness, however, is not increased by a conditional acceptance of a bid,[25] or by the obtaining of a judgment against the district;[26] and all assets on hand available for paying the debt when contracted should be taken into consideration,[27] including the value of property which the

*Indiana.*— Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920.

*Iowa.*— Winspear *v.* Holman Dist. Tp., 37 Iowa 542.

*Missouri.*— Thornburg *v.* Chariton County School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

*New Mexico.*— Eddy Bd. of Education *v.* Bitting, 9 N. M. 588, 58 Pac. 395.

*Oklahoma.*— Territory *v.* Logan County High School, 13 Okla. 605, 76 Pac. 165.

*Pennsylvania.*— Luburg's Appeal, (1889) 17 Atl. 245; Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 6 Lack. Leg. N. 129.

*South Dakota.*— Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952.

*Washington.*— Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

**The assessment to be resorted to** in determining the taxable value of property in such a case is the last preceding assessment which has been completed by final action thereon, by the proper state board, and, when an indebtedness is contracted by a school-district before such action in any year, resort must be had to the assessment-roll of the preceding year to determine whether the debt is within the constitutional limit. Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824.

21. Howard *v.* Harlan County School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399; Carlisle County School Dist. No. 32 *v.* Kane, 87 S. W. 321, 27 Ky. L. Rep. 983; Luburg's Appeal, (Pa.) 1889) 17 Atl. 245.

**The refunding of a bonded indebtedness** of a school-district is not the creation of a debt within a provision that no debt in excess of the taxes of the current year shall be created by any municipality unless the proposition shall have been submitted to and approved by a vote of the people thereof. Miller *v.* Carbon County School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879.

**Assumed debt.**— Any assumption by a school-district, not included in a high school-district, of a *pro rata* bonded indebtedness originally created by such high school-district, is as to such district the incurring of an indebtedness or liability within the meaning of a constitutional provision that no school-district shall incur a debt for any purpose, exceeding in any year the income provided for such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose. People *v.* Hanford Union High School Dist., 148 Cal. 705, 84 Pac. 193.

**The election** at which such assent is given must be regular; and the absence of a valid notice of election, and the failure to file a statement showing the indebtedness, as required by statute, are fatal to the validity of an increase of indebtedness under such a vote. Witherop *v.* Titusville School Bd., 7 Pa. Co. Ct. 451.

**The ballots** at such an election need not be numbered or recorded. Rebman *v.* Crafton School Dist., 25 Pa. Co. Ct. 132.

**Wash. Const. art. 8, § 6,** requiring that no school-district shall become indebted to an amount exceeding one and one-half per cent of its taxable property, "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose," does not require the express assent of the legislature to the holding of such an election, but is self-executing, so far as to allow the question of extending the debt limit to be voted on at an election called by the officers of the school-district, in accordance with existing general enactments regulating the holding of annual and special school-district elections. Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

22. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

23. Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920.

24. Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920; Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952.

25. Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262.

26. Edmundson *v.* Jackson Independent School Dist., 98 Iowa 639, 67 N. W. 671, 60 Am. St Rep. 224.

27. Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824; Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

**Necessity for appropriation.**—The fact that a school-district has money in its treasury at the time of contracting a debt does not entitle it to contract a debt to an amount beyond the prescribed limit, unless the money on hand to the amount of such excess is definitely appropriated to the payment of such contract. Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824.

school-board has power to sell,[28] and money due the school-district from another school-district upon an adjustment of the assets and liabilities between them,[29] but not the right of a new school-board to levy a tax.[30]

**d. Borrowing Money.** A school-district ordinarily has no power to borrow money for school purposes,[31] unless expressly authorized to do so by statute,[32] or unless such power is necessarily implied from some other power granted or duty imposed.[33] Where such authority is given by statute, it must be exercised in the manner prescribed thereby,[34] as by a vote of the legal voters of the district at a regularly called meeting;[35] otherwise there is no liability on the district to repay the same.[36] But even where there is no authority to borrow, or the authority is irregularly exercised, if money is borrowed for a legitimate purpose and is used and applied for that purpose, the district or township may be held liable on an implied assumpsit for money had and received.[37]

**e. Aid to Corporations.** In the absence of a constitutional or statutory authority, a school-district has no power to assess and collect taxes, subscribe to stock, or issue bonds in aid of a public or quasi-public corporation, such as a railroad company,[38] and in some jurisdictions it is unconstitutional for the legislature to confer such power upon a school township or district.[39]

**28.** Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155. *Compare* Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129, holding that the value of certain lots of the school-district, estimated at the amount of allowance which a contractor offers to make for them, if the school-district will let them go at that price, is too problematic an asset to be considered as such.

**29.** Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129.

**30.** Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129.

**31.** Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194 (holding that where a school trustee has funds of the corporation in his hands he cannot borrow money to pay its expenses); Wallis *v.* Johnson School Tp., 75 Ind. 368; Richardson *v.* McReynolds, 114 Mo. 641, 21 S. W. 901 (holding that since Rev. St. (1889) § 1771, requires money for the purchase of a school-house to be raised by taxation, the district has no authority to borrow money and issue its bonds in payment); Reg. *v.* Reed, 5 Q. B. D. 483, 44 J. P. 633, 49 L. J. Q. B. 600, 42 L. T. Rep. N. S. 835, 28 Wkly. Rep. 787.

**Power to make all arrangements** necessary to the efficient operation of the schools does not authorize a school-board to borrow money. Miller County Bd. of Education *v.* Fudge, 4 Ga. App. 637, 62 S. E. 154.

**32.** Adams *v.* State, 82 Ill. 132; Weare *v.* Weare School Dist. No. 16, 44 N. H. 189; Holmes *v.* Goderich, 5 Ont. L. Rep. 33.

**Repeal of statute** see Hampton *v.* Hickey, 88 Ark. 324, 114 S. W. 707.

**33.** Gray *v.* Peoria School Inspectors, 135 Ill. App. 494 [*affirmed* in 231 Ill. 63, 83 N. E. 95]; Austin *v.* Colony Dist. Tp., 51 Iowa 102, 49 N. W. 1051; Clarke *v.* School Dist. No. 7, 3 R. I. 199 (holding that the incidental power of a school-district as a corporation to borrow money to pay debts legally incurred is not taken away by the power given to raise money by taxation); McNeil *v.* Victoria Dist. School Trustees, 34 Nova Scotia 546.

**Temporary loan.**— Money borrowed by a school officer without authority for a school-district, on the credit of the district, for paying the expenses of a school, may be treated as valid, as being borrowed of himself, when it is merely to supply a temporary need in respect to an expense for which a tax might legally be assessed under a vote of the district. Brock *v.* Bruce, 59 Vt. 313, 10 Atl. 93.

**34.** Adams *v.* State, 82 Ill. 132; Lander *v.* Smithfield School Dist., 33 Me. 239; *In re* Tabor, 20 U. C. Q. B. 549. See also Bower *v.* Fulton Tp. Bd. of Education, 28 Ohio Cir. Ct. 624.

**35.** Lander *v.* Smithfield School Dist., 33 Me. 239, holding that a vote to borrow money passed by a school-district at a meeting of which no previous notice had been given creates no liability upon the district to repay money borrowed in pursuance of the vote; and that a vote subsequently passed, although at a meeting legally called "to pay debts due from the district." is no admission of such indebtedness.

**36.** Lander *v.* Smithfield School Dist., 33 Me. 239.

**37.** Union School Tp. *v.* Crawfordsville First Nat. Bank, 102 Ind. 464, 2 N. E. 194; Wallis *v.* Johnson School Tp., 75 Ind. 368; Crawfordsville First Nat. Bank *v.* Union School Tp., 75 Ind. 361; Bicknell *v.* Widner School Tp., 73 Ind. 501.

**38.** Macoupin County Tp. No. 7 *v.* People, 63 Ill. 299.

**39.** People *v.* School Trustees, 78 Ill. 136, holding that power cannot constitutionally be conferred upon a school township or district to levy a tax to aid in the construction of a railroad, or to pay interest on bonds issued in aid of such road.

**Ill. Const. (1848) art 9, § 5,** authorizing school-districts to assess and collect taxes "for corporate purposes," limits the power of school-districts in that regard to corporate

**2. Administration of Finances, Appropriations, Warrants, and Payment — a. Collection, Custody, and Disbursement of Funds** [40] — (I) *In General.* The manner in which school-district funds shall be collected, and the board or officers who shall receive and have the custody and disbursement of such funds, depend upon the terms of the statute relating thereto.[41] It is the duty of an officer who collects or otherwise receives such funds to deposit them with the officer entitled to their custody,[42] and upon his failure to do so after a proper demand the officer entitled to their custody may sue him for their recovery,[43] or mandamus will lie to compel him to turn over the funds.[44] Where a school officer having such funds turns them over to one not entitled to receive them, he does so at his own risk,[45]

purposes, and therefore a statute authorizing the trustees of a school-district to hold an election, subscribe stock, and issue bonds in aid of a railroad is unconstitutional. People *v.* Dupuyt, 71 Ill. 651; Macoupin County Tp. No. 7 *v.* People, 63 Ill. 299.

**40. Accounting by district officers** see *supra*, III, D, 6, g, (III), (B).

**Disposition of taxes and other revenue** see *infra*, III, F. 7.

**Investment and administration of school funds** see *supra*, III, B, 2, c.

**41.** *California.*—Kennedy *v.* Miller, 97 Cal. 429, 32 Pac. 558, holding that all moneys apportioned from the school fund are to remain in the county treasury until withdrawn under requisition of the county superintendent.

*Georgia.*— Under the act of 1872 (Code, § 1263), the county commissioner of education, and not the county treasurer, is the custodian of the school fund, from whatever source derived and the county treasurer has no power to receive and disburse the same, and is entitled to no commissions thereon. Wood *v.* Greene County, 60 Ga. 558. But under the constitution of 1868 and the act of Oct. 30, 1870, the county treasurer was the proper person to hold and disburse the school fund. Clarke *v.* Levy, 45 Ga. 498.

*Illinois.*— The township treasurer is the only proper custodian of school funds (Adams *v.* State, 82 Ill. 132), and he is the proper person to make a demand for school-district moneys which ought to be deposited in the township treasury, as well as for moneys which are distinctly township funds (Cook County Dist. No. 13 *v.* People, 79 Ill. 511). But the school commissioner may properly refuse to pay school money to a township treasurer who has not filed his bond as required by the school act. Pace *v.* People, 47 Ill. 321.

*Louisiana.*—Hendricks *v.* Bobo, 12 La. Ann. 620.

*Maine.*— Sanford School Dist. No. 3 *v.* Brooks, 23 Me. 543, holding that a school-district has no right to the custody of school money assigned by a town for the support of schools in the district, as it is under no obligation to support schools and has no power to raise money for that object; but such duty is upon the town.

*Massachusetts.*— Belchertown School Dist. No. 6 *v.* Randall, 7 Cush. 478, holding that school moneys belong to the town, and not to the school-district.

*Michigan.*— Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551 (holding that under Comp. Laws, § 3647, providing that money due a new district shall be paid over to its assessor, a town treasurer can pay school moneys only to the school-district assessor); People *v.* Mahoney, 30 Mich. 100 (holding that under Comp. Laws, §§ 3639, 3643, the treasurer of a board of school inspectors and not the town treasurer is the proper custodian of the township library money).

*New Jersey.*— Rose *v.* Hufty, 63 N. J. L. 195, 42 Atl. 836; Prosser *v.* Behrens, 58 N. J. L. 276, 33 Atl. 282 (town treasurer); Meinger *v.* Disbrow, 42 N. J. L. 141.

*Vermont.*— Harrison *v.* Davis, 81 Vt. 309, 70 Atl. 567.

See 43 Cent. Dig. tit. "Schools and School Districts," § 214.

**42.** Adams *v.* State, 82 Ill. 132; Port Huron Bd. of Education *v.* Runnels, 57 Mich. 46, 23 N. W. 481, holding that the treasurer of a municipal board of education cannot go back of the board's records which on their face show valid action, for the purpose of avoiding the performance of his duty to deposit the funds paid to him with the custodian who appears by the records to be entitled to them.

**43.** Hendricks *v.* Bobo, 12 La. Ann. 620; People *v.* Mahoney, 30 Mich. 100.

**Right of successor.**—An assessor of a school-district cannot withhold its funds when demanded by his successor, on the ground that he is entitled to be notified officially of the election of the successor. Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228.

**In Louisiana** a parish board of school directors is entitled to demand of and to receive from a municipality funds which have been actually levied, collected, and deposited in the treasury for school purposes; and where a municipality has annually collected a school tax, and appropriated the same to school purposes for many years, it cannot, after it has actually collected such a tax, decline to make disbursements therefrom for such purposes on the ground that it had no power to levy such tax. Caddo Parish *v.* Shreveport, 47 La. Ann. 21, 16 So. 563.

**44.** People *v.* Mahoney, 30 Mich. 100. And see, generally, Mandamus, 26 Cyc. 285 *et seq.*

**45.** Adams *v.* State, 82 Ill. 132, holding that where school directors place borrowed

and is personally liable for any misapplication or misappropriation of such funds,[46] as for a conversion;[47] but a school officer is not liable for a misapplication of funds, by a co-officer, in which he takes no part.[48] Where an officer having custody of school funds makes payment to an officer entitled to receive the same, the fact that he makes such payment in an irregular manner does not render him liable for a deficit in the latter officer's accounts unless such irregularity is the proximate cause of the deficit.[49]

(II) *DISBURSEMENTS.* The disbursing officer of a school-district may pay out the district funds only for the purposes and in the manner authorized by statute;[50] and he cannot be compelled by judicial proceedings to make a different disposition of the funds intrusted to his care, than that provided by law.[51] It is generally provided that disbursements from a school fund may be made only upon a warrant or order drawn and countersigned by particular officers.[52] Where an officer receiving money assigned to a district for the support of schools neglects to appropriate it to that use, the district may recover the money of him in an action for money had and received.[53]

(III) *DEPOSIT IN BANKS.* Some statutes require that the school fund shall

money in the hands of any one else than their treasurer, it is at their own risk.

**46.** Dickinson Tp. *v.* Linn, 36 Pa. St. 431, holding that where school directors vote for a misapplication of public funds they are personally liable to the township for the amount so misappropriated.

**That the treasurer of a school fund acts under the warrant of the board of directors** of which board he is also a member cannot shield him from liability in voting in favor of the misapplication of school funds. Dickinson Tp. *v.* Linn, 36 Pa. St. 431.

**In Alabama** any legal voters of a township may maintain an action, by motion under the statute, against a school commissioner who draws school funds from a bank and fails to pay them over as directed by law; and where such school commissioners refuse to appropriate money in their hands for the tuition of the children of the township attending other schools, the tuition money may be recovered from them or any one of them by any legal voter, for the purpose of defraying such tuition; and the judgment may be recovered in the name of plaintiff, for the aggregate sum, ascertaining the several sums due each child or parent, to be satisfied by the payment of these several amounts to the persons respectively entitled thereto; but one school commissioner, as such, cannot recover from another school commissioner money belonging to the school fund in his hands. Burns *v.* Minter, 12 Ala. 316.

**47.** Knowlton *v.* Logansport School City, 75 Ind. 103.

**It is no defense** to an officer who is sued for money collected by him that he had paid it over to one who had been treasurer of the school-board at the same time with himself, but that both had been legislated out of office, and that such person is a responsible resident and ready to settle therefor. Knowlton *v.* Logansport School City, 75 Ind. 103.

**Ratification.**— An action by a school-district against one of its officers for the conversion of money collected by him thereby ratifies the collection, but not his act in turning it over to a person not entitled to receive it; such a ratification extends only to the act of collection, and does not embrace the time employed or expense incurred before or after the collection. Knowlton *v.* Logansport School City, 75 Ind. 103.

**48.** State *v.* Julian, 93 Ind. 292, holding that school trustees are not liable for the improper disbursement of money by one of their number acting as treasurer in which they had no part.

**49.** Grove Dist. Tp. *v.* Bowman, 55 Iowa 129, 7 N. W. 492.

**50.** Grove Dist. Tp. *v.* Bowman, 55 Iowa 129, 7 N. W. 492; Meinzer *v.* Disbrow, 42 N. J. L. 141; People *v.* Neilson, 48 How. Pr. (N. Y.) 454; State *v.* Cincinnati, 19 Ohio 178.

**Vote of district.**— Although a school-district may have voted a tax for the purpose of erecting a school-house, the fund when collected is beyond the control of its officers until its expenditure is authorized by a vote of the district. Dixon County Dist. No. 2 *v.* Stough, 4 Nebr. 357.

**51.** Offut *v.* Acheverra, 24 La. Ann. 93.

**52.** Grove Dist. Tp. *v.* Bowman, 55 Iowa 129, 7 N. W. 492; Andrus *v.* St. Landry Parish, 108 La. 386, 32 So. 420 (holding that disbursements by the treasurer of a school fund of a parish otherwise than on warrants drawn by the president and countersigned by the secretary of the parish board of school directors are positively prohibited by law); Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551; People *v.* Bender, 36 Mich. 195.

**53.** Auburn School Dist. No. 7 *v.* Sherburne, 48 N. H. 52 (holding that under Rev. St. c. 70, § 1, and c. 73, § 10, a school-district may maintain an action for money had and received against a prudential committee after his term of office has expired for neglecting to appropriate for the support of schools money received by him, which had been assigned to the district for such purpose); Moultonborough School Dist. *v.* Tuttle,

be deposited in a bank on interest.[54] But where a school officer without authority places school funds in a bank of which he is manager, and the bank knowing of the trust character of the funds wrongfully uses them in the business of the bank and afterward becomes insolvent, such funds become a charge upon the entire assets of the bank with which they were mingled, and the school-board or officers having control of such funds have a preferred right to the assets of the bank over general creditors to the extent of the funds converted;[55] and the fact that collateral security is taken from the officer so wrongfully using the funds does not prevent the school-board or officers having control of the funds from insisting upon their equitable lien against the assets of the bank.[56]

**b. Appropriations.** A school-district can appropriate its funds only for lawful corporate purposes,[57] as for the erection and furnishing of school-houses,[58] or for the payment of a contractor who has erected a school-house for the district under a valid contract;[59] and it cannot appropriate such fund for any purpose not expressly, or by necessary implication, authorized by law.[60] The mere fact that some other corporation or individual derives an incidental benefit from an appropriation does not render it unlawful.[61] Such appropriations must be made in the manner prescribed,[62] and must not exceed the statutory limit.[63] Where an appropriation for a particular purpose is to be made out of a particular fund, other moneys in the school-district treasury cannot be appropriated for that purpose.[64] An appropriation of a specified sum, under a statute authorizing surplus money from a certain tax to be appropriated to certain purposes, does not operate as a general appropriation of such sum, but only of that sum from the surplus of the fund specified.[65]

**c. Payment of Indebtedness in General.**[66] Different funds are sometimes

26 N. H. 470. But *compare* School Dist. *v.* Esty, 16 N. H. 146; Tolman *v.* Marlborough, 3 N. H. 57.

**54.** Gilliford *v.* Allegheny City School Dist., 165 Pa. St. 631, 30 Atl. 1051, holding that under the act of April 16, 1870, providing that the board of controllers of the Allegheny school-district shall deposit the school funds in such bank as they shall annually elect, for the highest rate of interest they can obtain on current balances, such board when offered a certain per cent on balances by a responsible bank cannot deposit the funds in a bank offering no interest, but agreeing to loan the district money if it should need to borrow it, to a certain amount, without interest.

**55.** Meyers *v.* Clay Center Bd. of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263. And see, generally, TRUSTS.

**56.** Meyers *v.* Clay Center Bd. of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

**57.** State *v.* Albright, 20 N. J. L. 644; Scheetz *v.* Norristown School Dist., 7 Lack. Leg. N. (Pa.) 344, 17 Montg. Co. Rep. 209.

**58.** Pierce, etc., Mfg. Co. *v.* Bleckwenn, 62 Hun (N. Y.) 265, 16 N. Y. Suppl. 768 [*affirmed* in 131 N. Y. 570, 30 N. E. 67], holding that Laws (1887), c. 519, as amended by Laws (1890), c. 300, authorizing Long Island City to issue bonds for the erection of school-houses, etc., does not limit the power of the board of education or common council, under the provisions of the city charter (Laws (1871), c. 461, tit. 9) authorizing them to appropriate moneys for the erection and furnishing of school-houses, to make an appropriation for such purpose, where the proceeds of such bonds are insufficient.

**59.** Maher *v.* State, 32 Nebr. 354, 49 N. W. 436, 441.

**60.** State *v.* Albright, 20 N. J. L. 644.

**61.** Brooks *v.* Franconia School Dist., 73 N. H. 263, 61 Atl. 127, holding that where, under Pub. St. (1891) c. 89, § 3, authorizing school-districts to raise money to purchase, rent, and repair school-houses, a private academy receives funds of the district for the erection of a school building for the benefit of the town district, a vote of the district appropriating money for furnishing light in the building is not illegal, although the academy incidentally receives a benefit therefrom.

**62.** Short-Conrad Co. *v.* Eau Claire School Dist., 94 Wis. 535, 69 N. W. 337.

A contract for placing apparatus in a school building at a specified price subject to satisfactory tests is not an appropriation of money, within a provision requiring for all appropriations by the board of education a two-thirds vote of all the members. Short-Conrad Co. *v.* Eau Claire School Dist., 94 Wis. 535, 69 N. W. 337.

**63.** Pierce, etc., Mfg. Co. *v.* Bleckwenn, 62 Hun (N. Y.) 265, 16 N. Y. Suppl. 768 [*affirmed* in 131 N. Y. 570, 30 N. E. 67].

**64.** State *v.* Albright, 20 N. J. L. 644.

**65.** Banhagel *v.* Bronson, etc., Tp. School Dist. No. 1, 134 Mich. 455, 96 N. W. 506.

**66. Application of taxes and other revenue to payment of debts and expenses** see *infra*, III, F, 7, c.

provided for out of which different classes of claims are payable,[67] and a particular indebtedness of a school-district can as a rule be paid only out of the fund raised or appropriated for that purpose;[68] and the fact that a claim so payable is reduced to judgment does not change its character so as to require that it shall be satisfied out of another fund.[69] A debt contracted by a school officer which is payable out of the funds coming into his hands constitutes a charge upon such funds,[70] and payment by him of the claim out of such funds, although made after his term of office has expired, but before the school-district or his successor demands the funds, extinguishes the claim against the district.[71] But where the law has provided for the settlement of certain outstanding claims against a school fund, the school-board cannot be compelled to make payment thereof out of funds in their hands.[72] In the absence of any showing to the contrary, it will be presumed that payments of public money by school-district officers are authorized by the district.[73]

**d. Warrants, Orders, and Certificates of Indebtedness** — (I) *In General.* A school-district warrant, order, or certificate of indebtedness is merely a mode of reaching money in the treasury of the school-district, to be disbursed under authority of law;[74] and is ordinarily issued for the payment of general school debts and expenses,[75] and under some statutes may be issued for money borrowed to meet such expenses.[76] Such a warrant, order, or certificate is neither a bill, note, check, nor contract,[77] nor a liquidated and settled account,[78] nor a satisfaction of the indebtedness for which it is given,[79] and, standing alone, it creates no liability against the school district or township.[80]

(II) *Power and Duty to Issue in General.* The power and duty of ordering, drawing, signing, or paying school warrants or orders is usually vested by statute in certain specified boards or officers;[81] under which statutes it is held to be the imperative duty of the proper officer to draw or sign warrants when

**Payment of teachers' wages** see *infra*, III, H, 5, e.

**Burden of expenses shared by contributory district** see Reg. *v.* Vane, 47 J. P. 69, 51 L. J. M. C. 114, 47 L. T. Rep. N. S. 21.

**67.** See State *v.* District School Bd., 97 Mo. App. 613, 71 S. W. 701; and the statutes of the several states.

**68.** State *v.* Smith, 8 S. C. 127, holding also that the act of March 3, 1874, was not repealed by the act of March 17, 1874.

**69.** State *v.* District School Bd., 97 Mo. App. 613, 71 S. W. 701.

**70.** Barrett *v.* Bow School Dist. No. 2, 37 N. H. 445.

**71.** Barrett *v.* Bow School Dist. No. 2, 37 N. H. 445.

**72.** Offut *v.* Acheverra, 24 La. Ann. 93, holding that where the law provides for the settlement of outstanding claims against a school fund, bearing date prior to the appointment of a school-board, a suit cannot be maintained against the board to compel payment out of the funds in their hands, the disposition of which has been regulated by law.

**73.** Brock *v.* Bruce, 59 Vt. 313, 10 Atl. 93, holding that payments for the repairs of a school-house are presumed to be authorized by the district.

**74.** Northumberland First Nat. Bank *v.* Rush School Dist., *81 Pa. St. 307; Livingston *v.* South Middleton Tp. School Bd., 15 Pa. Super. Ct. 358; Central School Supply House *v.* South Middleton Tp. School Bd., 9 Pa. Super. Ct. 110; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**75.** See Gray *v.* Peoria Bd. of School Inspectors, 231 Ill. 63, 83 N. E. 95.

**76.** Gray *v.* Peoria Bd. of School Inspectors, 231 Ill. 63, 83 N. E. 95.

**77.** Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**78.** Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**79.** Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**80.** Martin County Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520; Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922, holding that the issuance of a warrant by a school-district in payment for property purchased is not the incurring of a debt, but the debt is incurred at the date of the purchase.

**81.** *Illinois.*— Gray *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95, holding that under Hurd Rev. St. (1905) c. 146*a*, § 2, the board of school inspectors is authorized to issue warrants in anticipation of taxes for ordinary and necessary expenses.

*Mississippi.*— Tunica County Suprs. *v.* Rhodes, 85 Miss. 500, 37 So. 1005.

*New Jersey.*— Rose *v.* Hufty, 63 N. J. L. 195, 42 Atl. 836.

*Rhode Island.*— Randall *v.* Wetherell, 2 R. I. 120, holding that the commissioner of public schools has no authority to draw an order on the town treasurer, but must certify

properly requested or presented;[82] and if he improperly refuses to do so a writ of mandamus will lie at the instance of one showing himself entitled to such warrant or order, to compel its issuance.[83] Warrants drawn by *de facto* officers charged with that duty are valid.[84] Where the power to draw such warrants or orders is vested in a particular board, it is a personal trust which cannot be delegated by such board to one of their number, but must be executed in person by each and all.[85] Under some statutes a school warrant cannot be issued for a claim, until the claim has been audited and allowed by the proper authorities.[86] When properly authorized and in proper form, such warrants are under some statutes receivable in payment of school taxes.[87] Where an order for a school warrant has become lost, in order to maintain a warrant drawn pursuant to such order it must be shown not only that the order had existed, but also what its contents were.[88]

(III) *NECESSITY FOR EXISTENCE OF FUNDS.* Under some statutes, school warrants can be drawn only when sufficient money to pay them is in the appropriate fund, or is provided for;[89] and they have been held invalid if made payable out of funds which necessarily cannot be applicable thereto until after

his decision to the town committee requesting them to draw the order.

*Tennessee.*— State *v.* Hart, 106 Tenn. 269, 61 S. W. 780. holding that where the election of school directors in a school-district is prematnre and illegal, as being held in May instead of August, a warrant drawn in July by the old directors whose term of office does not expire until September 1 is valid.

See 43 Cent. Dig. tit. "Schools and School Districts," § 218.

**82.** Faulk *v.* McCartney, 42 Kan. 695, 22 Pac. 712.

**83.** People *v.* Bender, 36 Mich. 195 (to compel countersigning); State *v.* Cincinnati. 19 Ohio 178; Randall *v.* Wetherell, 2 R. I. 120; *Ex p.* Florence School, 43 S. C. 11, 20 S. E. 794. And see, generally, MANDAMUS, 26 Cyc. 286, 318.

**Mandamus should not issue** to compel a school commissioner to draw his warrant for school funds, where the law does not require him but the board of school commissioners to draw such a warrant, especially where it is doubtful whether he is required even to countersign such warrant. *Ex p.* Florence School, 43 S. C. 11, 20 S. E. 794.

**84.** Pierce *v.* Edington, 38 Ark. 150; Miahle *v.* Fournet, 13 La. Ann. 607.

**85.** Glidden *v.* Hopkins, 47 Ill. 525.

**A warrant executed by the president and secretary** of a school-board without the authority of the rest of such board in payment for school supplies contracted for by a majority of the board is void. Johnson *v.* Cedar School Corp., 117 Iowa 319, 90 N. W. 713.

**86.** Martin County Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520; Tunica County *v.* Rhodes, 85 Miss. 500, 37 So. 1005. See also Doyle *v.* Gill, 59 Wis. 518, 18 N. W. 517; and *infra*, III, G, 1.

Record.— Under Wyo. Rev. St. (1899) § 546, authorizing the trustees of a school-district to allow all just claims against the district, and draw orders for all demands thus audited upon the district treasurer, a warrant regularly drawn, in pursuance of a vote to issue warrants to pay a valid indebtedness is not rendered invalid by reason of the fact that the minutes of the board contains no record of the presentation of the claim, its audit and allowance, or of an order for the issuance of the warrant. Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922.

**87.** Coler *v.* Sterling, 15 S. D. 415, 89 N. W. 1022, holding, however, that an instrument directed to the treasurer of a school-district, directing the payment of money at a future time, not being in conformity with Laws (1879), c. 14, § 4492, is not a school warrant and is not receivable for school taxes under Laws (1891), c. 14, § 80, providing that such warrants shall be so received.

**88.** Tunica County *v.* Rhodes, 85 Miss. 500, 37 So. 1005.

**89.** Kane *v.* Calhoun School Dist., 48 Mo. App. 408; Dixon County School Dist. No. 2 *v.* Stough, 4 Nebr. 357 (holding that the district board has no authority to draw orders on a fund which has been proposed but not raised by taxation); Kane *v.* School Dist. No. 3, 52 Wis. 502, 9 N. W. 459. See also School Dist. No. 76 *v.* Capitol Nat. Bank, 7 Okla. 45, 54 Pac. 309.

**A school warrant drawn in one scholastic year** and made payable in another scholastic year is void, under a statute prohibiting any state officer from drawing a warrant for any public debt except upon money then actually to his credit on that account in the hands of some bank or public officer. Loan, etc., Bank *v.* Shealey, 62 S. C. 337, 40 S. E. 674.

**Where taxes levied constitute a general fund,** warrants may be drawn against it within the amount of the levy, although the money has not been collected into the fund with which to pay the same. Lincoln School Dist. *v.* Fiske, 61 Nebr. 3, 84 N. W. 401; Zimmerman *v.* State, 60 Nebr. 633, 83 N. W. 919.

the next tax levy.[90] Under other statutes, however, they may be drawn in anticipation of a specified fund, provided they are made payable solely out of such fund when raised and set apart therefor.[91]

(IV) *ISSUANCE, REQUISITES, AND VALIDITY.* To be valid, a school warrant, order, or certificate of indebtedness must be properly authorized,[92] and must be issued in payment of a valid authorized indebtedness,[93] or for a proper consideration,[94] and without fraud on the part of the board or officers issuing it.[95] There must also be a compliance with all the requirements of the statute under which the warrant or order is issued,[96] as that it must be for an amount within the constitutional or statutory limitation of indebtedness,[97] or within the amount authorized to be expended for the purpose for which it is drawn,[98] and must be drawn in the form prescribed by statute,[99] upon or to the proper board or officer,[1] signed and

90. Scott *v.* Armstrong Bd. of School Directors, 103 Wis. 280, 79 N. W. 239.

91. Grey *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95, construing Hurd Rev. St. (1905) c. 146*a*, § 2, and holding that under such statute the board of school inspectors is only authorized to issue warrants in anticipation of taxes levied to establish and support schools, and not in anticipation of taxes for building purposes.

92. Mincer *v.* Reno County School Dist. No. 31, 27 Kan. 253 (holding that a school-district order signed by a director and clerk, the former of whom had forfeited his position for failing to qualify in time, and which was never authorized or allowed by the board, is invalid); Doyle *v.* Gill, 59 Wis. 518, 18 N. W. 517 (holding that where authority to provide fuel for school-houses is conferred on the district board, an order signed by the clerk and district director without any action being taken by the board need not be paid by the treasurer).

93. Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767 (holding that the district may plead *ultra vires* to an action on warrants issued for the purchase of a school site by the district board without authority); Elkhart First Nat. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. E. 256 (holding that a warrant stating that it is given for certain articles, the purchase of which is unauthorized, is void on its face); Monticello Bank *v.* Coffin's Grove Dist. Tp., 51 Iowa 350, 1 N. W. 592; Dixon County School Dist. No. 2 *v.* Stough, 4 Nebr. 357.

94. Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

A settlement of a claim between a school-district and a claimant is a good consideration for an order of the district to pay a sum of money, agreed in the settlement to be paid in satisfaction of the claim. Everts *v.* Rose Grove Dist. Tp., 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264.

95. Shakespear *v.* Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327 (holding that an order for the payment of school funds drawn with the concurrence of two only of the three trustees of the school-district, one of whom is interested in it, is void); Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

**[III, F, 2, d, (III)]**

Adverse interest.— School commissioners cannot draw a warrant payable to one of their number for the aggregate sum of a number of claims examined and allowed by them, and receive the money thereon from the treasurer with which to pay such claims. Harrison *v.* Davis, 81 Vt. 309, 70 Atl. 567.

96. Miller *v.* White River School Tp., 101 Ind. 503 (holding, however, that the certificate of a school township trustee for necessary supplies binds the corporation and is not rendered invalid by the trustee's failure to comply with Rev. St. (1881) §§ 6006, 6007, which do not apply to such an indebtedness); Amort *v.* School Dist. No. 80, 48 Oreg. 522, 87 Pac. 761.

Board meeting.— A school warrant issued in violation of a statute which declares that no contract binding on the school-district shall be made in any case except by the school-board or board of education, acting as such at a regular meeting or regularly called special meeting, excepting contracts for the employment of teachers, is void. Rochford *v.* Lyman County School Dist. No. 6, 19 S. D. 435, 103 N. W. 763.

Under Mo. Rev. St. (1899) § 9761, in order to issue a binding warrant for the purchase of books, the school directors must meet as a board, with a clerk to record the proceedings, and as a body make the purchase and order the warrant drawn in conformity to statute. State *v.* Lawrence, 178 Mo. 350, 77 S. W. 497.

97. Farmers', etc., Nat. Bank *v.* School Dist. No. 53, 6 Dak. 255, 42 N. W. 767; Farmers' Sav. Bank *v.* Farmington Independent School Dist., 122 Iowa 99, 97 N. W. 988; Austin *v.* Colony Dist. Tp., 51 Iowa 102, 49 N. W. 1051; Amort *v.* School Dist. No. 80, 48 Oreg. 522, 87 Pac. 761, holding, however, that the failure of the records of a school meeting, incurring an indebtedness for the erection of a school building, and issuing warrants therefor, to show that the indebtedness incurred does not exceed fifty per cent of the taxable property of the district, is not fatal to the proceedings, as that is a matter to be determined from the assessment.

98. Edinburgh American Land, etc., Co. *v.* Mitchell, 1 S. D. 593, 48 N. W. 131.

99. Clark *v.* District No. 1, 78 Ill. 474.

1. Macomb Fractional School Dist. No. 4 *v.* Mallary, 23 Mich. 111 (holding that under

countersigned as required,[2] and be specific in naming the school-district or school corporation for which the indebtedness was incurred.[3] It must also express on its face the purpose for which it is drawn;[4] but it is not essential that it should specify from what particular fund it is payable,[5] unless the statute so requires.[6] But mere irregularities and informalities in the manner in which a school warrant is issued do not affect its validity,[7] or justify a court of equity in enjoining its payment,[8] and such irregularities and informalities may be cured by ratification.[9] Where a warrant regular in form has been issued, it is unnecessary and irregular to issue another warrant for the same indebtedness.[10]

(v) *CONSTRUCTION AND OPERATION* — (A) *In General.* A school warrant drawn for unauthorized expenses, not necessary to the operation of the schools, is *prima facie* invalid;[11] but as a general rule a school warrant, order, or certificate of indebtedness, regular on its face, is *prima facie* legal and valid, and constitutes a good cause of action against the district for the claim for which it was issued,[12] and in the absence of evidence to the contrary, it will be presumed that it was lawfully issued,[13] as that it is within the amount that might be lawfully

Comp. Laws, §§ 2272–2275, 2296, an order made payable to any one but the district assessor is void on its face); Kane *v.* Calhoun School Dist., 48 Mo. App. 408; State *v.* Bloom, 19 Nebr. 562, 27 N. W. 638.

**In New Hampshire** school money collected by the selectmen of a town under the school law does not become the property of the town but must be considered the property of the selectmen, and the town therefore is not liable on the selectmen's order for such money, drawn in favor of a school agent. Tolman *v.* Marlborough, 3 N. H. 57.

2. *Missouri.*— Johnson *v.* School Dist., 67 Mo. 319.

*Montana.*— State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698.

*Nebraska.*— State *v.* Bloom, 19 Nebr. 562, 27 N. W. 638.

*North Carolina.*—Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

*South Carolina.*— State *v.* Morton, 51 S. C. 323, 28 S. E. 945, holding that where such a warrant is to be signed by a school-board, a signing by a majority is sufficient.

See 43 Cent. Dig. tit. "Schools and School Districts," § 218.

**Where the subdistricts of a township have been converted into special districts,** thereby destroying the organization of the board of education of the township, it is not necessary that orders by the township clerk on the treasurer for the portion of the school fund allotted by the board of education to one of the special districts should be countersigned by the president. State *v.* Clark, 6 Ohio Dec. (Reprint) 831, 8 Am. L. Rec. 363.

**Necessity for seal** to the signature of an officer see Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874; State *v.* Morton, 51 S. C. 323, 28 S. E. 945.

3. Kane *v.* Calhoun School Dist., 48 Mo. App. 408, holding that a school warrant purporting to be for furniture furnished district No. 7, township 43, range ——, is not the obligation of and does not bind a town district.

4. Newell *v.* District No. 1, 68 Ill. 514; Glidden *v.* Hopkins, 47 Ill. 525 (holding that if a warrant is not so drawn, it is void and cannot be rendered valid by the action of any succeeding board in paying interest, etc.); Tunica County *v.* Rhodes, 85 Miss. 500, 37 So. 1005; Zimmerman *v.* Mathe, 49 N. J. L. 45, 7 Atl. 674.

5. Zimmerman *v.* Mathe, 49 N. J. L. 45, 7 Atl. 674.

6. Newell *v.* District No. 1, 68 Ill. 514; Tunica County *v.* Rhodes, 85 Miss. 500, 37 So. 1005; Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922.

7. Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919 (holding that where it is apparent that the date of audit is a clerical error, the fact that such date precedes the incurring of the liability is of no avail to defendant); Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922 (holding that where a school-district warrant is properly signed and sealed, and issued for a valid indebtedness, it is not rendered invalid by the failure of the district clerk to number it as other warrants are numbered, and to note its issuance in his warrant stub-book).

8. Gray *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95. *Compare* Stephens *v.* Wyoming School Dist., 10 Pa. Dist. 135.

9. St. Paul Capital Bank *v.* School Dist. No. 85, 6 Dak. 248, 42 N. W. 774; Gray *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95.

10. Central School Supply House *v.* South Middleton Tp., 9 Pa. Super. Ct. 110.

11. Wolf *v.* Pleasant Valley Independent School Dist., 51 Iowa 432, 1 N. W. 695.

12. Miller *v.* White River School Tp., 101 Ind. 503; Jackson School Tp. *v.* Hadley, 59 Ind. 534; Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874; Edinburg American Land, etc., Co. *v.* Mitchell, 1 S. D. 593, 48 N. W. 131; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

13. Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68; Edinburg American Land, etc., Co. *v.* Mitchell, 1 S. D. 593, 48 N. W. 131.

ordered,[14] and that presentation and allowance of the claim if necessary have been regularly made.[15] Such presumptions, however, are not conclusive, but may be impeached by the school-district, as by showing a want or failure of consideration for the warrant or order,[16] or that the officers issuing it were not properly authorized to do so;[17] and the fact that the officers acted in good faith in issuing such warrant does not prevent the district from setting up its invalidity,[18] or intervening taxpayers from insisting upon such defense, if the school officers refuse to interpose it.[19] Although a school warrant may be void as such, it is still competent evidence of the indebtedness which it was issued to pay.[20] The issuance of a school warrant does not merge an oral contract, under which property for which the warrant is issued was bought, into the written warrant.[21]

(B) *Individual Liability.* A school warrant or order properly drawn and signed is the obligation of the school-district, and imposes no individual liability upon the officers signing it,[22] except in so far as they expressly agree to be individually liable,[23] as by individually guaranteeing the payment of the warrant;[24] and in the absence of fraud or misrepresentation, an unauthorized indorsement does not render such officer personally liable for a warrant otherwise invalid.[25]

(VI) *INTEREST.* In the absence of an agreement or statutory provision therefor, a school warrant or order in the usual form does not as a general rule draw interest,[26] until after a proper demand and refusal of payment;[27] and under some statutes it is expressly provided that school warrants or orders cannot be made to draw interest.[28] Under other statutes, however, such warrants may be made to draw interest,[29] but not at a greater than the legal rate.[30] Where by agreement school warrants payable on demand draw interest at a rate less than the legal rate, they draw interest at such rate until there is a default in payment,[31] and thereafter, in the absence of another agreement, at the legal rate.[32]

**14.** Farmers', etc., State Bank *v.* Rock Creek School Tp., 118 Iowa 540, 92 N. W. 676.

**15.** Rochford *v.* Lyman County School Dist. No. 11, 17 S. D. 542, 97 N. W. 747; Edinburg American Land, etc., Co. *v.* Mitchell, 1 S. D. 593, 48 N. W. 131.

**16.** Axt *v.* Jackson School Tp., 90 Ind. 101, holding that a school township cannot, by the acts, promises, or conduct of its trustee, be estopped from pleading want of consideration as a defense to a suit on a certificate of indebtedness issued by the trustee in the name of such township.

**17.** Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605; Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68; Edinburg American Land, etc., Co *v.* Mitchell, 1 S. D. 593, 48 N. W. 131.

**18.** Farmers' Sav. Bank *v.* Farmington Independent School Dist., 122 Iowa 99, 97 N. W. 988.

**19.** Farmers' Sav. Bank *v.* Farmington Independent School Dist., 122 Iowa 99, 97 N. W. 988.

**20.** Board of Education *v.* Foley, 88 Ill. App. 470, 90 Ill. App. 494.

**21.** Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520.

**22.** Germania Bank *v.* Trapnell, 118 Ga. 578, 45 S. E. 446; Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100; Bailey *v.* Tompkins, 127 Mich. 74, 86 N. W. 400.

**23.** See Germania Bank *v.* Trapnell, 118 Ga. 578, 25 S. E. 446.

**24.** Germania Bank *v.* Trapnell, 118 Ga. 578, 25 S. E. 446. *Compare* Bailey *v.* Tompkins, 127 Mich. 74, 86 N. W. 400.

**25.** Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

**26.** Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**27.** Martin *v.* Tripp, 51 Mich. 184, 16 N. W. 330, holding that interest from the time of demand may be allowed in granting a mandamus for the payment of a school order, when it is such a settled demand as will sustain a recovery of interest at law.

**28.** Clark *v.* Iroquois County Dist. No. 1, 78 Ill. 474; Pomerene *v.* Butler County School Dist. No. 56, 56 Nebr. 126, 76 N. W. 414.

**A contract providing for payment in interest-bearing warrants** is tainted with the same vice as the warrants themselves, and no recovery can be had thereon. Pomerene *v.* Butler County School Dist. No. 56, 56 Nebr. 126, 76 N. W. 414.

**29.** Phelps *v.* Summit Dist. Tp., 90 Iowa 53, 57 N. W. 642.

**30.** Phelps *v.* Summit Dist. Tp., 90 Iowa 53, 57 N. W. 642 (holding that where the legal rate is six per cent school orders cannot be made to draw ten per cent); Anstin *v.* Colony Dist. Tp., 51 Iowa 102, 49 N. W. 1051 (holding that the rate of interest recoverable on a school order is six per cent, although the order calls for a greater rate).

**31.** Winsted Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81.

**32.** Winsted Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81.

(VII) *NEGOTIABILITY AND TRANSFER.* It may be stated as a general rule that while school-district warrants, orders, and certificates of indebtedness, when negotiable in form, are transferable by delivery or assignment and may be sued upon by the transferee,[33] they are not negotiable in the sense of the law-merchant; but on the other hand purchasers or assignees of such warrants or orders take them subject to all defects and irregularities in their issuance, such as fraud,[34] or want of consideration,[35] and the school-district may set up against them any defenses or set-offs that may have been made against them in the hands of the original holder.[36] But an assignee for value of a school warrant is entitled to payment thereof as against a claim for material and labor, notice of which is not given to the school-district until after the assignment and presentation of the warrant.[37]

(VIII) *PAYMENT* — (A) *In General.* As a general rule a school warrant or order which specifies no time of payment is due and payable immediately,[38] and under some statutes it cannot be made payable at a future date.[39] But it has

**33.** Germania Bank *v.* Trapnell, 118 Ga. 578, 45 S. E. 446; Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874. *Compare* Fox *v.* Shipman, 19 Mich. 218.

**34.** Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1; Fine *v.* Stuart, (Tenn. Ch. App. 1898) 48 S. W. 371.

**35.** Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

**36.** *California.*— Shakespear *v.* Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327, holding that a third person can acquire no greater rights under such an order than the original holder thereof.

*Georgia.*— Germania Bank *v.* Trapnell, 118 Ga. 578, 45 S. E. 446.

*Illinois.*— Newell *v.* District No. 1, 68 Ill. 514; Gray *v.* Peoria School Inspectors, 135 Ill. App. 494 [*affirmed* in 231 Ill. 63, 83 N. E. 95].

*Indiana.*— Boyd *v.* Mill Creek School Tp., 114 Ind. 210, 16 N. E. 511, holding that where a trustee orders supplies giving the township certificate of indebtedness therefor, and the township refuses to receive them because not needing them, of which refusal the seller is duty notified, an assignee of the certificate cannot recover thereon in an action against the township, although both he and the seller act in good faith without knowledge that the supplies are not needed.

*Iowa.*— Boardman *v.* Hayne, 29 Iowa 339.

*Michigan.*— Bailey *v.* Tompkins, 127 Mich. 74, 86 N. W. 400.

*Nebraska.*— Dixon County School Dist. No. 2 *v.* Stough, 4 Nebr. 357, holding that school-district orders are subject to the same defenses against an indorsee as against the payee.

*North Carolina.*— Wright *v.* Kinney, 123 N. C. 618, 31 S. E. 874.

*North Dakota.*— St. Paul Capital Bank *v.* Barnes County School-Dist. No. 53, 1 N. D. 479, 48 N. W. 363; Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

*Oklahoma.*— Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110.

*Pennsylvania.*— Northumberland First Nat. Bank *v.* Rush School Dist., *81 Pa. St. 307 (holding that they do not authorize a subsequent holder to maintain suit thereon in his own name as upon a promissory note, bill, or order); Livingston *v.* South Middleton Tp., 15 Pa. Super. Ct. 358; Central School Supply House *v.* South Middleton Tp., 9 Pa. Super. Ct. 110; Stephens *v.* Wyoming School Dist., 10 Pa. Dist. 135.

*Tennessee.*— Gallatin Bank *v.* Baber, 6 Lea 273.

*Wyoming.*— Carbon County School Dist. No. 3 *v.* Western Tube Co., 5 Wyo. 185, 38 Pac. 922.

*United States.*— Newton School Dist. Tp. *v.* Lombard, 21 Fed. Cas. No. 12,478, 2 Dill. 493.

See 43 Cent. Dig. tit. "Schools and School Districts," § 220.

**Notice to purchaser or assignee.**— A purchaser of such an order is charged with notice that it has been executed on account of the public schools, that it is open to defenses against an assignee, that a school-district officer has no powers except those specially conferred by statute or necessarily implied, and that the powers can be exercised only in accordance with the statute. Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100. An assignee of a school order is bound at his peril to ascertain the authority of the officers of the district in issuing it, and if issued without authority he cannot recover thereon. Boardman *v.* Hayne, 29 Iowa 339. Thus where a school warrant drawn in one year is void under the statute because payable in the next year, an assignee thereof cannot be protected as a *bona fide* purchaser, its invalidity being apparent on its face. Loan, etc., Bank *v.* Shealey, 62 S. C. 337, 40 S. E. 674.

**An assignee of a school order issued in excess of the constitutional limitation** of indebtedness occupies no better position than the assignor. Mt. Pleasant Nat. State Bank *v.* Marshall Independent Dist., 39 Iowa 490.

**37.** Long Beach School Dist. *v.* Lutge, 129 Cal. 409, 62 Pac. 36.

**38.** Winsted Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81.

**39.** Clark *v.* District No. 1, 78 Ill. 474; Newell *v.* District No. 1, 68 Ill. 514; Pom-

been held that the parties may agree that the indebtedness evidenced by such warrant shall remain a continuing one until the contractual relation is terminated by payment by the debtor, or by demand or suit by the creditor.[40] In the absence of statute otherwise a school warrant must ordinarily be paid upon a proper demand therefor, regardless of how long it may have been issued and outstanding,[41] although all rights under it may be lost by a failure to present it for payment until the debt which it was issued to pay is barred.[42] It is the imperative duty of the treasurer or other proper officer to pay such warrant or order when drawn in the proper form and signed by the proper officer,[43] unless he is in doubt as to the legality of the warrant,[44] and mandamus may lie to compel him to make such payment.[45] A disbursing officer, however, may claim no credit for the payment of a warrant illegally issued, if he aided in its issue.[46] Where a warrant is for all moneys raised for certain purposes, without specifying any amount, the proper officer must pay thereon all of such moneys in his hands.[47]

(B) *Order of Payment.* As a general rule such warrants or orders are payable in the order in which they are presented for payment,[48] or if registered in the order in which they are regularly reached in the order of their registration.[49]

(C) *From What Funds Payable.* As a general rule school warrants are payable only out of the particular fund applicable thereto,[50] and payment thereof cannot be recovered if such fund becomes exhausted.[51] Under some statutes school warrants are primarily payable only out of school funds specifically raised for the current year,[52] and warrants for past years cannot be paid out of such funds,[53] unless there is a surplus above the amount necessary for the current year.[54] It has been held that school officers will not be required to appropriate and set apart the entire revenue of the district to the payment of registered warrants if the effect will be to close the schools; but that they may be required to set apart so much of the revenue as is necessary to maintain the schools for the shortest time provided by law, and at the least possible expense, and to use the balance in payment of such warrants in their proper order.[55]

(IX) *REFUNDING.* The power of a school-district to refund an outstanding warrant indebtedness into bonds and the mode of doing so depends entirely upon the terms of the particular statute.[56] The acceptance and retention of bonds

erene *v.* Butler County School Dist. No. 56, 56 Nebr. 126, 76 N. W. 414; Andrews *v.* McCook School Dist., 49 Nebr. 420, 68 N. W. 631; Coler *v.* Sterling, 15 S. D. 415, 89 N. W. 1022; Kane *v.* School Dist. No. 3, 52 Wis. 502, 9 N. W. 459.

**40.** Winsted Sav. Bank *v.* New Hartford, 78 Conn. 319, 62 Atl. 81.

**41.** School Dist. No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. 106. See also Douglas *v.* Downing, (Miss. 1891) 9 So. 297.

**42.** Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273. And see *infra*, III, G, 2, b.

**43.** Faulk *v.* McCartney, 42 Kan. 695, 22 Pac. 712; Leonard *v.* State, 67 Nebr. 635, 93 N. W. 988.

**44.** Collier *v.* Peacock, 93 Tex. 255, 54 S. W. 1025.

**45.** See *infra*, III, F, 2, d, (X).

**46.** Dickinson Tp. *v.* Linn, 36 Pa. St. 431.

**47.** Bryant *v.* Moore, 50 Mich. 225, 15 N. W. 94.

**48.** State *v.* Gardner, 79 Nebr. 101, 112 N. W. 373; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**49.** State *v.* Gardner, 79 Nebr. 101, 112 N. W. 373.

**50.** State *v.* Cook, 72 Mo. 496, holding that in case of a warrant drawn upon the funds of one school township in excess of the funds in the hands of the treasurer for such township he cannot pay the same and be allowed a credit for the excess out of the funds belonging to another township.

**51.** Saunders *v.* State, 2 Ohio Cir. Ct. 475, 1 Ohio Cir. Dec. 596 (before presentation); State *v.* Slavin, 11 Wis. 153. *Compare* Com. *v.* Virtue, 12 Luz. Leg. Reg. (Pa.) 191.

**52.** Foote *v.* Brown, 60 Miss. 155.

**53.** Foote *v.* Brown, 60 Miss. 155.

**54.** Foote *v.* Brown, 60 Miss. 155. See also Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

**55.** State *v.* Gardner, 79 Nebr. 101, 112 N. W. 373.

**56.** Caddo County School Dist. No. 44 *v.* Baxter, 14 Okla. 374, 78 Pac. 386, holding that Laws (1895), c. 7, art. 1, as amended by Laws (1897), c. 5, providing a manner in which municipalities may refund an outstanding legal warrant indebtedness into bonds of the municipality, and providing that such bonds may be issued in sums of any denomination from one hundred to one thousand dollars, in a series running from ten to twenty years, and from twenty to

which were issued for the amount of a warrant to the payee thereof constitutes a payment of such warrant.[57]

(x) *RIGHTS AND REMEDIES OF HOLDERS.*[58] Where the disbursing officer of a school-district refuses to pay a properly drawn and presented school warrant, the holder thereof may maintain an action at law thereon against the school-district corporation,[59] or school-board,[60] or mandamus will lie against the proper fiscal officer to compel payment.[61] But where the holder of a warrant does nothing to compel payment during the time funds applicable thereto are in the district treasury, he cannot after such funds have been paid on other obligations compel the fiscal officer by mandamus to appropriate other funds to the payment of his claim.[62]

**3. BONDS AND OTHER SECURITIES — a. Bills and Notes.** As a general rule a school-district has no power to make and issue, or indorse, commercial paper,[63] unless authority to do so is expressly or impliedly granted by statute; [64] and if

thirty years, do not provide a manner in which a warrant indebtedness of a school-district amounting to eight hundred dollars may be funded into bonds of eighty dollars each.

**57.** Green *v.* Hughitt School Tp., 5 S. D. 452, 59 N. W. 224, holding that where school township officers issue a warrant in payment for furniture, and before any transfer of the warrant issue bonds to the amount thereof to the payee named, who accepts and retains the same, the acceptance of such bonds constitutes a payment of such warrants.

**58. Costs** see *infra*, III, G, 2, j.

**Limitations** see *infra*, III, G, 2, b.

**Pleading and evidence** see *infra*, III, G, 2, f, g, h.

**59.** See cases cited *infra*, this note.

**Under a statute providing that school-districts are corporations** and may make contracts and sue and be sued, the holder of a school warrant which the disbursing officer upon presentation refuses to pay may maintain an action thereon against the school-district that issued such warrant. School Dist. No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. 106. See also Heal *v.* Jefferson Tp., 15 Ind. 431.

**60.** See cases cited *infra*, this note.

**In Louisiana** school certificates of indebtedness, issued by the board of directors of the public schools of New Orleans, are not debts of the city, and actions for the purpose of having them recognized as valid claims can be maintained only against the school-board. Fisher *v.* New Orleans City Schools, 44 La. Ann. 184, 10 So. 494; Labatt *v.* New Orleans, 38 La. Ann. 283.

**Under Wis. Rev. St. § 519,** providing that a town board of school directors is a body corporate and shall possess the usual powers of a corporation for public purposes, and that it may sue and be sued, a suit cannot be maintained against a town for non-payment of a school order signed by the proper officers of the district, and drawn on the town treasurer, and specifying that it is to be paid out of the school fund. Miller *v.* Jacobs, 70 Wis. 122, 35 N. W. 324.

**61.** Bryant *v.* Moore, 50 Mich. 225, 15 N. W. 94; Leonard *v.* State, 67 Nebr. 635, 93 N. W. 988. See also Canby *v.* Sleepy Creek Dist. Bd. of Education, 19 W. Va. 93; and, generally, MANDAMUS, 26 Cyc. 285 *et seq.*

**Applications.**— Thus mandamus will issue to compel a school-district assessor to pay a school order, where the court is satisfied that there is no valid defense. Martin *v.* Tripp, 51 Mich. 184, 16 N. W. 330. But the owner of a school warrant on a county treasury cannot, by suit in the name of the county trustee, compel the controller of the state to pay the amount of the warrant. Yost *v.* Gaines, 10 Lea (Tenn.) 576.

**Pleading.**— A petition for a writ of mandamus to compel the treasurer of a city school-board to pay certain alleged warrants, issued by the president and secretary of the board to teachers in the public schools, should allege that such warrants were drawn on funds in the hands of the treasurer, and that he has or has had in his possession funds out of which he could legally pay said warrants, and which were duly set apart and apportioned by the school-board to pay the same. Nocona Bank *v.* March, (Tex. Civ. App. 1899) 51 S. W. 266.

**62.** Stephenson *v.* Union Seating Co., 26 Tex. Civ. App. 16, 62 S. W. 128.

**63.** Peers *v.* Madison County Bd. of Education, 72 Ill. 508 (holding that a board of school directors has no power to make acceptances of orders or bills of exchange so as to bind the school-district, and create a right of action thereon against the board); Stanton *v.* Shipley, 27 Fed. 498.

**64.** School Directors *v.* Miller, 54 Ill. 338; Stanton *v.* Shipley, 27 Fed. 498. See also Common School Dist. No. 10 *v.* Miller, 105 S. W. 457, 32 Ky. L. Rep. 367; Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280; Brewster *v.* Colwell, 13 Wend. (N. Y.) 28.

**A power to borrow on the vote of the people and issue bonds** therefor cannot be enlarged so as to authorize the execution of promissory notes binding on the district School Directors *v.* Sippy, 54 Ill. 287. See also School Directors *v.* Miller, 54 Ill. 338.

**In order that a note by school officers may be valid** as a note of the district, it must appear that it was given for an indebtedness which such officers were authorized to con-

the district officers or agents issue such paper without authority, it will at most have the force of a simple obligation,[65] or be admissible in evidence as tending to show the amount of the indebtedness for which it was given.[66] In some jurisdictions it is held that a school-district or township may bind itself by a negotiable promissory note or bill of exchange, for any debt contracted by it in the course of its legitimate business, for any expenses incurred in any authorized matter, or in any matter which is not foreign to the purposes of its creation;[67] and that where such paper is executed on behalf of a district or township, the words "trustee of the district or township" added to the trustee's signature are not mere *descriptio personæ*, but the paper binds the district or township and not the trustee individually.[68] But where the body of such paper does not contain apt words to bind the school-district, the mere addition of the words "school trustees," or the like, to the signature of the officers signing such paper, are mere *descriptio personæ* and do not make the paper that of the school corporation.[69]

**b. Authority to Issue Bonds in General.** A school-district has such power, and such only, as is conferred upon it by an act of the legislature, either expressly or by necessary implication to issue bonds for school purposes,[70] as for the

tract. Wright County Shcool Dist. No. 7 *v.* Thompson, 5 Minn. 280.

**65.** Stanton *v.* Shipley, 27 Fed. 498.

**Promissory notes made by trustees of** school-districts as evidences of indebtedness are valid between the parties, as a contract for forbearance and promise to pay the amount specified upon which a suit may be brought against the district; but a judgment upon them can be enforced only against the fund raised for the payment of the particular indebtedness. Robbins *v.* Anoka County School Dist. No. 1, 10 Minn. 340.

**66.** School Directors *v.* Sippy, 54 Ill. 287.

**67.** State *v.* Helms, 136 Ind. 122, 35 N. E. 893; Fatout *v.* Indianapolis School Com'rs, 102 Ind. 223, 1 N. E. 389; Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139; Clarke *v.* School Dist. No. 7, 3 R. I. 199, holding that a school-district may give and is bound by a promissory note for money borrowed to pay debts legally incurred.

**Such a note is not governed by the law merchant,** and an assignee thereof takes it subject to all defenses. Sheffield School Tp. *v.* Andress, 56 Ind. 157.

**68.** State *v.* Helms, 136 Ind. 122, 35 N. E. 893. See also *supra*, III, D, 6, g. (II).

**Illustration.**— A promissory note executed upon a consideration moving only to the use and benefit of the school corporation of an incorporated town, and signed by the school trustees thereof with their individual names followed by their official designation, is not the note of the persons whose names are signed thereto, but the note of such corporation and binding thereon. Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139.

**69.** Cahokia *v.* Rautenberg, 88 Ill. 219; American Ins. Co. *v.* Stratton, 59 Iowa 696, 13 N. W. 763, holding also that the acts of 1882, chapter 111, legalizing all contracts made by school officers for the insurance of school buildings, does not make a note which binds the officers individually an obligation of the district.

**70.** *Arkansas.*— Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438, holding that under Acts (1895), c. 55, authorizing the special school-district of Little Rock to borrow money to erect a high school building, to issue evidences of debt therefor, and to mortgage the real property of the district as security, the district is authorized to issue negotiable bonds with interest coupons attached.

*Iowa.*— Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 17 N. W. 191, holding that a school-district is a "municipal corporation" within the acts of the 14th Gen. Assembly, c. 87, authorizing a municipal corporation to issue bonds.

*Kansas.*— Atchison Bd. of Education *v.* State, 26 Kan. 44, holding that under Laws (1879), c. 71, the board of education is without power to issue bonds to purchase a school site and erect school buildings.

*North Carolina.*— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

*Oklahoma.*— Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110, holding that the officers of a school-district have no power under St. (1893) c. 73, art. 6, as amended by Laws (1895), c. 7, art. 2, to issue bonds, except in the manner provided thereby, and that they cannot circumvent the statute by issuing warrants and selling them and investing the proceeds.

*South Dakota.*— Kunz *v.* Hutchinson County School Dist. No. 28, 11 S. D. 578, 79 N. W. 844.

*United States.*— Ashuelot Nat. Bank *v.* Valley County School Dist. No. 7, 56 Fed. 197, 5 C. C. A. 468 [*affirming* 41 Fed. 514]; Erwin *v.* St. Joseph Bd. of Public Schools, 12 Fed. 680, 2 McCrary 608.

See 43 Cent. Dig. tit. "Schools and School Districts," § 224.

**District in city.**— While a city may, when authorized by its charter, issue municipal bonds for school purposes, yet unless its power to do so is exclusive, a school-district embracing the city and territory attached thereto for school purposes may, independently of the city, issue district school bonds in the manner prescribed by statute. Los

purpose of borrowing money,[71] or for the purpose of raising money to build or provide school-houses or sites and furnish the same; [72] and bonds issued without such authority or for an unauthorized purpose are void even in the hands of innocent persons;[73] and such bonds are not rendered valid by a vote of the people of the district authorizing them to be issued, where the law does not authorize such a vote.[74] The statutes conferring such authority, however, must not be in violation of constitutional provisions.[75] Under some statutes a school-district may also issue renewal refunding bonds.[76]

**c. Limitation of Amount of Bonds.** It is sometimes provided by statute that a school-district cannot issue bonds in excess of a specified amount,[77] or for an amount which will increase the bonded indebtedness of the district beyond a certain limit,[78] or which will increase the indebtedness of the district beyond the limitation prescribed by statute or the constitution.[79] But a constitutional or statu-

Angeles City High School Dist. *v.* Longden, (Cal. 1905) 83 Pac. 248; Los Angeles City School Dist. *v.* Longden, (Cal. 1905) 83 Pac. 246.

**71.** People *v.* Sisson, 98 Ill. 335; Folsom *v.* McLean County Dist. No. 5 School Directors, 91 Ill. 402, holding that Rev. St. (1874) § 47, conferring upon school directors the power to give bonds for money borrowed, enlarges the power they would otherwise have in connection with the power to borrow money. And see cases cited *supra*, note 70.

**72.** Sherlock *v.* Winnetka, 68 Ill. 530 (holding that under an authority to issue bonds to erect school buildings the school authorities cannot issue and sell bonds for the purpose of building a dormitory and boarding-house); Revell *v.* Annapolis, 81 Md. 1, 31 Atl. 695; St. Joseph Bd. of Public Schools *v.* Gaylord, 86 Mo. 401; Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

**Power to borrow money to pay for the sites of school-houses** and to erect buildings thereon carries with it the power to issue and sell bonds to raise money for those purposes. Orchard *v.* School Dist. No. 70, 14 Nebr. 378, 15 N. W. 730; State *v.* Adams County School Dist. No. 4, 13 Nebr. 82, 12 N. W. 812; State *v.* Adams County School Dist. No. 24, 13 Nebr. 78, 12 N. W. 927. But a school-district cannot, under such power, issue bonds to be bargained away and delivered to a contractor for the erection and furnishing of a school-house for such district. State *v.* School Dist. No. 4, 16 Nebr. 182, 20 N. W. 209.

**Under N. Y. Laws (1895), c. 273, § 10,** providing for the issuance of bonds by a union free school district for the purchase of school sites or structures, such a district may issue bonds for a school site and a school-house already erected thereon, although a very small part of the price represents property not properly school property. Oswego City Sav. Bank *v.* Union Free School Dist. No. 2 Bd. of Education, 35 Misc. (N. Y.) 540, 72 N. Y. Suppl. 15 [*affirmed* in 70 N. Y. App. Div. 538, 75 N. Y. Suppl. 417 (*affirmed* in 174 N. Y. 515, 66 N. E. 1113)].

**73.** Hewitt *v.* Normal School Dist. Bd. of Education, 94 Ill. 528; State *v.* Sherman County, 31 Nebr. 465, 48 N. W. 146; Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439; Ashuelot Nat. Bank *v.* Valley County School Dist. No. 7, 56 Fed. 197, 5 C. C. A. 468 [*affirming* 41 Fed. 514].

**74.** Ashuelot Nat. Bank *v.* Valley County School Dist. No. 7, 56 Fed. 197, 5 C. C. A. 468 [*affirming* 41 Fed. 514].

**75.** State *v.* L'Engle, 40 Fla. 392, 24 So. 539; Hollowell *v.* Borden, 148 N. C. 255, 61 S. E. 638.

**76.** Woods *v.* Covington Bd. of Education, 53 S. W. 517, 21 Ky. L. Rep. 941 (construing St. § 3228); State *v.* Walker, 193 Mo. 693, 92 S. W. 69; St. Joseph Bd. of Public Schools *v.* Gaylord, 86 Mo. 401; State *v.* Moore, 45 Nebr. 12, 63 N. W. 130.

**77.** Rogers *v.* Carlisle Graded School, 13 S. W. 587, 11 Ky. L. Rep. 934; State *v.* Cascade County School Dist. No. 1, 15 Mont. 133, 38 Pac. 462.

**An issue for less than the amount limited** is valid under such a statute. Rogers *v.* Carlisle Graded School, 13 S. W. 587, 11 Ky. L. Rep. 934.

**Repeal of statute** see Hall *v.* Madison, 128 Wis. 132, 107 N. W. 31.

**78.** Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539. See also Snyder *v.* Baird Independent School Dist., (Tex. 1908) 111 S. W. 723, 113 S. W. 521.

**Dak. Comp. Laws (1887), §§ 1149, 1150,** providing that the limit of bonded indebtedness that may be incurred by a city or other municipal corporation shall be based on its assessed valuation for the year preceding the incurring of the indebtedness, do not apply to boards of education created under Laws (1887), c. 47, which restricts the power of boards of education to issue bonds to an amount not exceeding three per cent on the assessed valuation of the district, although it is silent as to what assessment shall be used in the computation; and under this latter section the computation must be based upon the last completed assessment before the bonds were issued. Huron Bd. of Education *v.* National L. Ins. Co., 94 Fed. 324, 36 C. C. A. 278.

**79.** *Indiana.*— Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920; Winamac *v.* Huddleston, 132 Ind. 217, 31 N. E. 561, holding

tory limitation upon the amount of bonded indebtedness which a school-district may incur does not apply to bonded indebtedness incurred before the enactment of such limitation.[80] Where an issue of bonds is partly within and partly beyond the limit it may be sustained up to the legal limit.[81] Bonds which are issued to fund a valid indebtedness merely change the form of an existing indebtedness and do not create any debt or increase the debt of the district, and where at the time of their issuance the district is already indebted beyond the prescribed limit, such bonds may be enforced to the extent that they are used in paying off a valid prior indebtedness, but not beyond such amount.[82] But where, although the bonds are issued for the purpose of taking up outstanding bonds or funding an outstanding indebtedness, they are not used for that purpose, they do create a debt and are void to the extent that they increase the district indebtedness beyond the prescribed limit.[83]

**d. Submission to Popular Vote.** Where constitutional or statutory provisions require that the question of the issuance of school-district bonds shall be submitted to the voters or inhabitants of the district, a compliance with all the requirements of such provisions is essential to the validity of the bonds.[84] Under such provisions an issuance of school-district bonds as a general rule is valid only where it has been properly submitted to and approved by the voters or people of the district,[85] by the required number of qualified voters giving their assent,[86]

that under Const. art. 13, § 1, a town cannot issue bonds to procure funds with which to rebuild a school-house, where the bonds if issued will create an indebtedness in excess of two per cent of the taxable value of property within the town limits.

*Iowa.*— Wilkinson *v.* Van Orman, 70 Iowa 230, 30 N. W. 495, holding that where an issue of district bonds will increase the district indebtedness beyond the constitutional limit according to the tax lists of the previous year, an injunction will be granted to prevent the issue until the next tax list is made, as it cannot until then be determined whether the debt will exceed the constitutional limit for the current year.

*Oregon.*— Vaughn *v.* Gillamook County School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393.

*South Dakota.*— Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952, holding that under Laws (1887), c. 47, the amount for which boards of education are entitled to issue bonds must be determined on a basis of the last completed assessment of the property of the district, although taxes have not been levied thereon.

*United States.*— Huron Bd. of Education *v.* National L. Ins. Co., 94 Fed. 324, 36 C. C. A. 278, construing Dak. Laws (1887), c. 47.

See 43 Cent. Dig. tit. "Schools and School Districts," § 225.

**Limitation of amount of indebtedness** generally see *supra*, III, F, 1, c.

**80.** Miller *v.* School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879.

**81.** Stockdale *v.* Wayland School Dist. No. 2, 47 Mich. 226, 10 N. W. 349; Vaughn *v.* School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393, holding that under Hill Code, § 2602, subd. 3, a vote to issue bonds in excess of two thirds of the cost of a proposed school-house is sufficient authority for an issue of bonds up to two thirds of such cost, the legal limit.

**82.** Miller *v.* Carbon County School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879; Doon Dist. Tp. *v.* Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044 [*reversing* 42 Fed. 644]; Everett *v.* Rock Rapids Independent School Dist., 109 Fed. 697; Jamison *v.* Rock Rapids Independent School Dist., 90 Fed. 387.

**83.** Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89; Doon Dist. Tp. *v.* Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044 [*reversing* 42 Fed. 644].

**The burden of showing that the proceeds of such bonds were in fact applied to a legal** debt is on the district, in an action to enjoin the payment of and cancel such bonds. Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89.

**84.** See Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654.

**85.** Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654; Rogers *v.* Carlisle Graded School Trustees, 13 S. W. 587, 11 Ky. L. Rep. 934; *In re* McCormick, 46 U. C. Q. B. 65.

**86.** Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654 (majority); Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412; State *v.* Benton, 29 Nebr. 460, 35 N. W. 794 (majority); Luzader *v.* Sargeant, 4 Wash. 299, 30 Pac. 142 (holding that under Acts (1890), § 2, it will be presumed that a majority vote is sufficient, and that ten illegal votes will not invalidate an election where there is a majority without them).

**Where the required number give their assent** to an issuance of bonds for the erection of a school-house, neither the selection of an ineligible site, nor the fact that a former election had resulted against the issuance of the bonds, invalidates the election. Taylor *v.* Brownfield, 41 Iowa 264.

**A vote of the majority of those present at** an adjournment of an annual school meeting, in favor of refunding the bonded indebtedness

to the proposition submitted in the required form,[87] at a proper meeting or election,[88] called upon a proper order,[89] and by notice served in the prescribed form and manner,[90] and conducted according to the requirements of the stat-

of a school-district is valid, although the voters in favor of the bonds are not a majority of the voters of the entire district, or of those who were present at the regular annual meeting. Miller *v.* School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879.

**A vote in favor of bonds by the majority of those voting** is sufficient under N. Y. Laws (1864), c. 555, although such majority is less than one half of the voters actually present at the meeting. Smith *v.* Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403 [*affirming* 53 Hun 143, 6 N. Y. Suppl. 212].

**Persons entitled to vote** where contiguous portions of a town have been attached to a city for school purposes see Hall *v.* Madison, 128 Wis. 132, 107 N. W. 31.

**Canvass of returns** see McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289.

**87.** State *v.* Benton, 29 Nebr. 460, 45 N. W. 794.

**Ballot.**— It is the general rule that in submitting the question of issuing school bonds, the ballot must fairly and intelligently present the question to be voted upon, but where all the preliminary steps are regular, an omission from the proposition submitted, of the limit of indebtedness to be incurred, as provided in the resolution of the board and notice of the election, will not invalidate the election. Calahan *v.* Handsaker, 133 Iowa 622, 111 N. W. 22.

**The question of buying a lot and building a school-house** may be submitted jointly with the question of an issuance of bonds for such purpose. People *v.* Caruthers School Dist., 102 Cal. 184, 36 Pac. 396. See also People *v.* Sisson, 98 Ill. 335.

**88.** State *v.* Benton, 29 Nebr. 460, 45 N. W. 794, holding that under the act of March 31, 1887, section 28, the proposition of issuing bonds for the purpose of borrowing money thereon may be submitted at a regular municipal election. See also Forbes *v.* Grimsby Public School Bd., 7 Ont. L. Rep. 137.

**89.** McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289 (holding that where an order for an election for an issuance of school bonds provides for an issue within the prescribed limit, the order is not objectionable because it fails to set out the number of bonds to be issued, their character, term, and rate of interest, where the term is limited by statute to thirty years and the rate of interest to six per cent); Parks *v.* West, (Tex. Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in 111 S. W. 726, 113 S. W. 529] (holding that the use of the word "bond" instead of "coupon bond," in an order for an election to determine whether bonds shall be issued for school purposes, does not invalidate the election, as an issuance of bonds providing for the payment of interest on their face is in substantial compliance with a statute, providing that the trustees shall have power to issue "coupon bonds").

**90.** *California.*— People *v.* Caruthers School Dist., 102 Cal. 184, 36 Pac. 396.

*Iowa.*— Calahan *v.* Handsaker, 133 Iowa 622, 111 N. W. 22.

*Kentucky.*— Arbuckle *v.* McKinney, 97 S. W. 408, 30 Ky. L. Rep. 55.

*Missouri.*— Richardson *v.* McReynolds, 114 Mo. 641, 21 S. W. 901.

*Nebraska.*— State *v.* Nuckolls County School Dist. No. 9, 10 Nebr. 544, 7 N. W. 315.

*Washington.*— Luzader *v.* Sargeant, 4 Wash. 299, 30 Pac. 142.

*Canada.*— Forbes *v.* Grimsby Public School Bd., 7 Ont. L. Rep. 137.

See 43 Cent. Dig. tit. "Schools and School Districts," § 226.

**Where the statute merely requires that the notice shall specify the "question or questions to be voted,"** a notice of an election to issue bonds to raise money to build a school-house or purchase a school-house site, need not mention any particular site, or state the amount to be borrowed for the purpose, or submit but a single question, and a notice "for the purpose of voting for a school-house site for a school-house for district" and "also for the purpose of voting for or against issuing bonds to erect or purchase a school-house for said district" is neither indefinite nor uncertain as to the site to be voted for or the amount of bonds to be issued, nor bad for embracing two questions instead of one; and although the amount of bonds is not named either in the notice or vote, the necessary amount may be issued within the statutory limit. People *v.* Sisson, 98 Ill. 335.

**Interest and time of payment.**— Under Mont. Comp. St. § 1950, as amended by the act of Feb. 14, 1893, a notice of election which does not state the rate of interest or the time when the bonds are to become payable and redeemable is insufficient. State *v.* Cascade County School Dist. No. 1, 15 Mont. 133, 38 Pac. 462. Under Wash. Code Pub. Instr. § 117, declaring that school-district bonds shall bear a rate of interest not exceeding ten per cent, and section 118 prescribing that notice of the election shall state "the amount of bonds proposed to be issued, the time they are to run and the purpose for which the money is to be used," a notice stating that the bonds will draw interest at the rate of four per cent is not void. Parkinson *v.* Seattle School Dist. No. 1, 28 Wash. 335, 68 Pac. 875.

**Time and place.**— Under Mont. Pol. Code, § 1940, a notice not specifying the place of holding the election is insufficient, if attacked before the bonds are issued; and where such notice is insufficient for failure to designate the polling places under such statute, such insufficiency is not remedied by the fact that the notice of registration specifies the polling places, since Pol. Code, § 1784, requiring no-

ute,[91] and under some statutes upon the record thereof showing that all the statutory requirements have been complied with.[92] Under some statutes such an election can be called only upon the petition of a certain number of the voters of the district;[93] and where such an election has been held the court may, in an action to restrain an issuance of bonds, review the qualifications of the petitioners requesting such election.[94] But where authority to issue bonds is fixed by the record of the proceedings of the election, and the bonds have been issued, mere irregularities in their issue will not affect an innocent holder,[95] and the court will not thereafter inquire into the qualifications of the voters at the election [96] or into the qualifications of the persons signing a petition or request therefor.[97] Nor will an election authorizing such an issuance be held invalid, because the district officers repeatedly called elections until the consent of the electors was obtained.[98] A statutory provision that upon a prescribed vote the school-board shall forthwith issue the bonds is mandatory,[99] and a vote in the affirmative amounts to an

tice of registration, does not require such notice to designate the polling places. Hauswirth *v.* Mueller, 25 Mont. 156, 64 Pac. 324.

**Want of due notice.**— Under Nebr. Gen. St. § 22, which provides that "no district meeting shall be deemed illegal for want of due notice, unless it shall appear that the omission to give such notice was willful and fraudulent," a want of due notice does not render illegal a school-district meeting, or render invalid bonds issued in pursuance thereof, where it appears that every voter of the district was present at such meeting. State *v.* Shcool Dist. No. 13, 13 Nebr. 466, 14 N. W. 382.

**Posting notice.**— Proof that notices were left with the teachers at some of the schoolhouses of a district with directions to post the same is sufficient to raise a presumption that they were posted, in the absence of evidence to the contrary, and this in connection with a showing that they were actually posted on the remainder of the school-houses is sufficient proof of posting in conformity with the statute. Calahan *v.* Hansaker, 133 Iowa 622, 111 N. W. 22.

**91.** People *v.* Caruthers School Dist., 102 Cal. 184, 36 Pac. 396; Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654; Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412; Luzader *v.* Sargeant, 4 Wash. 299, 30 Pac. 142, holding that under Acts (1890), p. 246, elections for the issuance of school bonds are to be held in the manner prescribed for the holding of special school elections.

**A special statute** prescribing the method of conducting a special election for the validation of an illegal indebtedness does not apply to an election to authorize an issuance of bonds for the purpose of erecting a high school building. Nichols *v.* Pierce County School Dist. No. 10 Bd. of Directors, 39 Wash. 137, 81 Pac. 325.

**Contest of election.**— The term "municipal corporation," as used in Kan. Laws (1871), c. 79, does not embrace school-districts, and a school-district election to vote bonds cannot be contested at the instance of an aggrieved elector by any of the proceedings provided for in that statute. Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235.

**92.** Thornburg *v.* School Dist. No. 3, 175 Mo. 12, 75 S. W. 81 (record held not to show authority in school-board to issue bonds); Heard *v.* Calhoun School Dist., 45 Mo. App. 660; Nichols *v.* Pierce County School Dist. No. 10, 39 Wash. 137, 81 Pac. 325.

**That the record does not show that the vote authorizing the issuance of the bonds was by ballot** will not invalidate the bonds, where it appears that an election was had and the proposition was unanimously carried, since it must be assumed that the election was a legal one. Bauer *v.* School Dist. No. 127, 78 Mo. App. 442.

**93.** Fullerton *v.* Lincoln School Dist., 41 Nebr. 593, 59 N. W. 896.

**Petition not necessary** under Mo. Rev. St. (1889) §§ 7981, 8008, see Richardson *v.* McReynolds, 114 Mo. 641, 21 S. W. 901.

**94.** Fullerton *v.* Lincoln School Dist., 41 Nebr. 593, 59 N. W. 896.

**Objections.**— In a suit to enjoin an issuance of bonds on the ground that the meeting of the district board authorizing the issue was not legally convened, even if plaintiff had knowledge of the meeting and participated therein and was thereby estopped to question the validity of the proceedings in equity, such facts would be a matter of defense by way of estoppel. Riggs *v.* Polk County, 51 Oreg. 509, 95 Pac. 5.

**95.** Heard *v.* Calhoun School Dist., 45 Mo. App. 660.

**That certain persons are wrongfully excluded as electors** will not vitiate an election, where the result will be the same if all of such persons vote against the issue. Arbuckle *v.* McKinney, 97 S. W. 408, 30 Ky. L. Rep. 55.

**96.** State *v.* School Dist. No. 4, 13 Nebr. 82, 12 N. W. 812.

**97.** Orchard *v.* School Dist. No. 70, 14 Nebr. 378, 15 N. W. 730; State *v.* School Dist. No. 4, 13 Nebr. 82, 12 N. W. 812.

**98.** Luzader *v.* Sargeant, 4 Wash. 299, 30 Pac. 142, holding also that it cannot be objected that the directors finally intimidated the electors by threatening to continue to call elections until the issuance of the bonds was authorized, where such threats are only alleged inferentially.

**99.** Schonweiler *v.* Allen, (N. D. 1908) 117 N. W. 866.

instruction to the board and its duties thereafter consist in obeying implicitly the directions of the voters so given.[1]

**e. Sale and Other Disposition of Bonds.** Authority to issue bonds for the purpose of building a school-house, or to purchase a school site, implies the power to sell such bonds[2] or to give them in exchange for a site with a school-house already erected thereon.[3] The manner and terms of selling or disposing of school bonds are ordinarily regulated by statute,[4] under which it is usually provided that they shall be sold or disposed of for not less than a specified price,[5] as for not less than their par value,[6] and for cash.[7] General statutory authority to issue bonds and negotiate them to the best advantage does not limit the manner in which they are to be applied.[8] Where it is provided that the bonds shall be sold after advertisement to the highest and best bidder,[9] although a notice has been published inviting bids for such bonds, the contract is incomplete until the bid is accepted,[10] and the district is not liable for damages for refusing to accept a bid, even though it be the highest one made,[11] particularly where the notice reserves the right to reject any and all bids.[12] Under some statutes the district school-board or officers are authorized to cancel unsold bonds regularly issued, and substitute therefor bonds specifying a different place of payment, where the reissued bonds are identical in amount with those canceled.[13]

**f. Form, Execution, and Issuance of Bonds.** In order that school-district bonds may be valid it is essential that there should be at least a substantial compliance with all the statutory requirements as to the proceedings to be had and the manner in which such bonds may be issued,[14] as that they must be issued by

1. Schonweiler *v.* Allen, (N. D. 1908) 117 N. W. 866.

2. Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412.

3. People *v.* Sisson, 98 Ill. 335.

4. Lanford *v.* Drummond, 81 S. C. 174, 62 S. E. 10.

5. Franklin Ave. German Sav. Inst. *v.* Roscoe Bd. of Education, 75 Mo. 408, holding that where a statute prohibits certain school bonds from being sold for less than ninety cents on the dollar, it is not violated where the bonds are sold for that price, but the purchaser deducts one per cent therefrom as commission on the sale.

6. Oswego Sav. Bank *v.* Manheim, etc., Union Free School Dist. No. 2 Bd. of Education, 35 Misc. (N. Y.) 540, 72 N. Y. Suppl. 15 [*affirmed* in 70 N. Y. App. Div. 538, 75 N. Y. Suppl. 417 (*affirmed* in 174 N. Y. 515, 66 N. E. 1113)]; State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519.

7. Oswego City Sav. Bank *v.* Union Free School Dist. No 2 Bd. of Education, 35 Misc. (N. Y.) 540, 72 N. Y. Suppl. 15 [*affirmed* in 70 N. Y. App. Div. 538, 75 N. Y. Suppl. 417 (*affirmed* in 174 N. Y. 515, 66 N. E. 1113)].

8. Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412.

9. See Parkinson *v.* Seattle School Dist. No. 1, 28 Wash. 335, 68 Pac. 875, holding that under Code Pub. Instr. § 119, a notice to bidders, which of itself names the rate of interest which the bonds are to draw, is not void, although it does not ask the bidders to name the rate at which they will accept the bonds

**Construction of bids.**—A bid for bonds in response to a printed circular from the school-board, stating that it will, on a certain date, receive sealed proposals for coupon bonds to be dated a certain other date, and that no bid for less than par and accrued interest to the date of delivery will be entertained, which offers "accrued interest to date," is to be construed as meaning interest to the date of the delivery of the bonds. Hayes *v.* Cleveland City Dist. Bd. of Education, 22 Ohio Cir. Ct. 32, 12 Ohio Cir. Dec. 219.

10. Coquard *v.* Joplin School Dist., 46 Mo. App. 6.

11. Coquard *v.* Joplin School Dist., 46 Mo. App. 6.

12. Coquard *v.* Joplin School Dist., 46 Mo. App. 6.

13. Kunz *v.* Hutchinson County School Dist. No. 28, 11 S. D. 578, 79 N. W. 844.

14. Bowman *v.* Middlesboro, 91 S. W. 726, 28 Ky. L. Rep. 1290; State *v.* Brock, 66 S. C. 357, 44 S. E. 931 (as to designation of district); Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439 (as to levying tax to pay the bonds and interest).

**That the bonds are to be issued only for the purposes for which the statute authorizes** their issuance must clearly appear on the face of the proceedings. Chamberlain *v.* Cranbury Tp. Bd. of Education, 58 N. J. L. 347, 33 Atl. 923.

**Statement of indebtedness** under the Pennsylvania act of April 24, 1874, see Mason *v.* Wilkes-Barre Tp. School Dist., 10 Kulp (Pa.) 563.

**Certification.**—A statute requiring the attorney-general to examine and certify the bonds of a county, city, or town, issued by the commissioners' court, city council, or board of aldermen does not require that the attorney-general shall examine and certify

the particular officers authorized.[15] The bonds must comply with all the statutory requirements in regard to form,[16] as that they must specify the purpose for which they are issued,[17] be signed by the proper officers,[18] of an authorized denomination,[19] and be registered, where the statute so prescribes.[20] Mere irregularities or informalities, however, in the issuance of school-district bonds will not invalidate them if they are otherwise valid.[21] It has been held under the various statutes that school-district bonds properly issued are not invalidated by the mere failure of the school-district to fill a vacancy in the school-board issuing them,[22] by a necessary delay, due to financial stringency, in issuing the bonds after they are authorized,[23] by the fact that they are issued for a less amount than that authorized,[24] by a failure to provide a sinking fund for the payment of the bonds,[25] or by the fact that a tax for interest is levied in excess of the amount required for the interest on such bonds.[26] Bonds issued by a *de facto* board or district within the powers given to a legal board or district are valid and binding in the hands of *bona fide* purchasers.[27] Where a statute requires that an issue of

bonds issued by the trustees of a school-district, embracing territory within a town and outside thereof, constituted by a special legislative act which does not authorize submission of its bonds to him. Brownson *v.* Smith, 93 Tex. 614, 57 S. W. 570.

**15.** Prairie School Tp. *v.* Haseleu, 3 N. D. 328, 55 N. W. 938.

**16.** Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438, holding that recitals in bonds, pledging the revenues of the district for their payment, are not repugnant to the act of 1905, page 154.

**Attaching coupons.**— Express authority granted to school-boards to issue bonds bearing interest carries with it power to issue interest coupons attached to the bonds. Atchison Bd. of Education *v.* De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. ed. 573.

**17.** State *v.* Chautauqua County School-Dist. No. 3, 34 Kan. 237, 8 Pac. 208 (holding that a recital in school-district bonds that they are issued under a certain act which permits the issuance of bonds for only one purpose is a sufficient compliance with such a requirement); Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35 (holding that under the Nebraska act of Feb. 26, 1879, as amended by the act of March 31, 1887, which authorizes school-districts to issue bonds "to purchase a site for, or erect a school house, or houses, or for furnishing the necessary furniture or apparatus for the same, or for all of these purposes," bonds may be issued for either one or all of the purposes stated, and such bonds are not invalid because they recite that they are issued "for the purpose of building a schoolhouse" only).

**18.** Pawnee County School-Dist. No. 42 *v.* Xenia First Nat Bank, 19 Nebr. 89, 26 N. W. 912, holding also that there is a presumption of law that the officer signing them did so after he had qualified. See also *In re* McIntyre, 27 U. C. C. P. 58.

**19.** Livingston *v.* Brookings County School Dist. No. 7, 9 S. D. 345, 69 N. W. 15, holding that a school-district bond for more than five hundred dollars, reciting that it is issued pursuant to the special act of Feb. 21, 1879, is void even in the hands of an innocent purchaser, since such act authorizes that they shall be issued in "denominations of not more than $500.00, nor less than $50.00."

**20.** See Pawnee County School-Dist. No. 42 *v.* Xenia First Nat. Bank, 19 Nebr. 89, 26 N. W. 912.

**21.** Brand *v.* Lawrenceville, 104 Ga. 486, 30 S. E. 954 (holding that the validity of school bonds is not affected by the fact that the system of schools contemplated by the act has not been formally established before the bonds are issued and sold); Lancaster City School Dist. *v.* Lamprecht Bros. Co., 198 Pa. St. 504, 48 Atl. 434 (holding that an issue of bonds is not invalid because in issuing them the district has provided that the proceeds of part of them shall be used in paying bonds of a prior invalid issue, where the first issue was for a valid indebtedness, for the discharge of which the district could, at the time of such issue or subsequently, have issued valid bonds).

**That the trustees issuing such bonds cast lots to determine their respective terms** does not affect their proceedings. McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289.

**22.** Bauer *v.* School Dist. No. 127, 78 Mo. App. 442, holding that renewal bonds issued during such vacancy are not thereby vitiated.

**23.** Miller *v.* Carbon County School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879, holding that a delay of seventeen months between a vote in favor of an issuance of such bonds, due to such stringency, will not invalidate the bonds on the ground of the remoteness of the time of their issuance from the time of the vote authorizing them.

**24.** Bauer *v.* School Dist. No. 127, 78 Mo. App. 442.

**25.** Bauer *v.* School Dist. No. 127, 78 Mo. App. 442.

**26.** Bauer *v.* School Dist. No. 127, 78 Mo. App. 442.

**27.** Coler *v.* Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; National L. Ins. Co. *v.* Huron Bd. of Education, 62 Fed. 778, 10 C. C. A. 637.

school bonds shall bear interest at a rate not exceeding a specified per cent, and an agreement is entered into by which money is borrowed at an aggregate rate of interest exceeding such per cent, under which agreement bonds are issued for the amount borrowed at the authorized rate and the excess of interest is to be paid by school orders or warrants, such agreement as to the excess of interest is void;[28] but where the void part of the agreement is never executed in whole or in part it will not avoid a recovery on the bonds issued.[29] Where bonds issued in an unmarketable written form are afterward mutilated and replaced by a printed bonds of the same tenor, the latter bonds are validly executed.[30]

**g. Estoppel or Ratification.** Where the statutes leave it to the school officers issuing bonds to determine whether the facts exist which constitute the statutory or constitutional conditions precedent to an issuance of bonds, the recital of such facts in the bonds estops the school-district from denying their validity in the hands of *bona fide* holders;[31] and where, as required by statute, the proper officer files a statement showing that all the statutory requirements have been complied with, the school-district is estopped from setting up that the bonds were not issued in accordance with the statute.[32] But where the determination of such facts is not left to the board or officers issuing the bonds, but is required to be made a matter of public record, recitals in the bonds do not estop the district;[33] nor is the district estopped by recitals which show on their face that the bonds were issued without authority or for an unauthorized purpose.[34] So where school bonds are void for want of authority to issue them, a school-district is not estopped from denying their validity, by reason of the fact that it has paid interest thereon, without full knowledge on the part of the officers and people of the district of the facts connected with the issuance and sale of the bonds.[35] Where an officer of a school-district has, apparently with the authority of the district, paid money on one of its bonds, the district must disprove his authority in order to avoid the presumption arising against it from such payment.[36] Where a school-district officer participates in the negotiation and sale of certain bonds issued by the district and purporting to be signed by him, the district is estopped from denying his signature.[37] As a general rule the payment of school bonds by a proper board

**Officers irregularly elected.**— The validity of school-district bonds cannot be attacked on the ground of irregularities in the election of the district officers who issued them, where no objection is made thereto until after a statutory presumption has arisen in favor of the district organization. State *v.* Webster County School-Dist. No. 13, 13 Nebr. 466, 14 N. W. 382.

**28.** State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519.

**The fact of an agreement for unlawful interest does not charge a purchaser** of such bonds with notice of prior fraudulent practices of the school-board in incurring the debt, for the payment of which the money was borrowed, which had no connection with the sale of the bonds and of which the purchaser had no knowledge. State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519.

**29.** State *v.* Perrysburg Tp. Bd. of Education, 35 Ohio St. 519.

**30.** Oswego City Sav. Bank *v.* Union Free School Dist. No. 2 Bd. of Education, 35 Misc. (N. Y.) 540, 72 N. Y. Suppl. 15 [*affirmed* in 70 N. Y. App. Div. 538, 75 N. Y. Suppl. 417 (*affirmed* in 174 N. Y. 515, 66 N. E. 1113)].

**31.** Bolton *v.* District No. 3 Bd. of Education, 1 Ill. App. 193 [*affirmed* in 104 Ill. 220] (holding that recitals in a school bond in the hands of a *bona fide* holder that it was issued according to law and by vote, etc., estop the district to deny the vote, etc.); Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952; Anderson *v.* Angus Independent School Dist., 78 Fed. 750.

**32.** Parker Tp. School Dist. *v.* Bruin Borough School Dist., 13 Pa. Dist. 769.

**33.** Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438; Thornburg *v.* Chariton County School Dist. No. 3, 175 Mo. 12, 75 S. W. 81, holding that a school-district at the suit of a purchaser of school bonds for value without notice, before maturity, is not estopped by recitals in the bond to deny that the requirements of the law were complied with in their issuance.

**34.** State *v.* Sherman County School-Dist. No. 4, 16 Nebr. 182, 20 N. W. 209. See also Elkhart First Nat. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. E. 256.

**35.** Ashuelot Nat. Bank *v.* Valley County School Dist. No. 7, 41 Fed. 514 [*affirmed* in 56 Fed. 197, 5 C. C. A. 468].

**36.** York County School-Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721.

**37.** Pawnee County School-Dist. No. 42 *v.* Xenia First Nat. Bank, 19 Nebr. 89, 26 N. W. 912.

extinguishes them and they cannot be reissued; and where such board is not negligent in not seeing that one of its members follows its instructions as to canceling the bonds, it is not estopped from denying the validity of the reissuance by him before maturity of bonds which have been left with him for cancellation.[38] An invalid issue of school bonds may be subsequently ratified and rendered valid by an act of the legislature, within constitutional limits.[39]

**h. Negotiability and Transfer.**[40] Unless authorized by its charter or governing statute, a school-district has no power to issue bonds and place them in the market as commercial paper;[41] and any person dealing in such bonds is bound to see whether authority to issue them exists,[42] and is bound to take notice of any constitutional or statutory limitation upon such authority.[43] Such a person is also bound to take notice of recitals on the face of the bond[44] and of all facts in respect to such bonds which are a matter of record.[45] But ordinarily where a bond is regular on its face, the purchaser thereof need look no further than the face of the bond if the facts therein recited show a compliance with the statute under which it is issued;[46] and if such bond is allowed to go into circulation through the negligence or carelessness of the district or its officers, the district is liable thereon to an innocent holder for value, although it goes into circulation without its knowledge or authority, and without its receiving any value therefor.[47] A purchaser of school-district bonds is also charged with knowledge of the financial condition of the district, so far as it affects the validity of the bonds.[48]

**i. Payment or Redemption.** The power of providing for and making payment or redemption of school-district bonds, and the time and manner of doing so, depend upon the terms of the particular constitution or statute.[49]

**38.** Westwood Bd. of Education *v.* Sinton, 41 Ohio St. 504 [*reversing* 6 Ohio Dec. (Reprint) 878, 8 Am. L. Rec. 567 (*affirming* 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 992)].

**39.** Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920, holding that, although Rev. St. (1881) § 4457, providing for the election of school commissioners in cities and defining their duties is unconstitutional, and the issuance of bonds thereunder invalid, Acts (1899), p. 434, creating school commissioners and requiring them to "assume, pay and be liable for all the indebtedness" of the previous boards, was a sufficient ratification of the issue of the bonds to validate them. See also Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

**40. Sufficiency of delivery of bonds** by a school-district to a bank for a purchaser to entitle the latter to recover the bonds from the district to which they have been redelivered on the failure of the bank see McCurdy *v.* West Branch Tp. School Dist. No. 1, 127 Mich. 210, 86 N. W. 803.

**41.** Hewitt *v.* Normal School Dist. Bd. of Education, 94 Ill. 528. And see, generally. MUNICIPAL CORPORATIONS, 28 Cyc. 1611 *et seq.*

**42.** Hewitt *v.* Normal School Dist. Bd. of Education, 94 Ill. 528.

**43.** Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89.

**44.** Gibbs *v.* Colfax Tp. School Dist. No. 10, 88 Mich. 334, 50 N. W. 294, 26 Am. St. Rep. 295.

**General words** in a bond following a particular recital are qualified and limited by such recital. Pierre Bd. of Education *v.* McLean, 106 Fed. 817, 45 C. C. A. 658.

**45.** Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89.

**If facts necessary to the validity of school bonds are required by law to be made matters of record,** a purchaser of such bonds, for value, without notice, before maturity, cannot claim to have been misled to his disadvantage by trusting to false recitals in the bonds, if he has neglected to examine the public records of the board which would have shown that those recitals were untrue. Thornburg *v.* Chariton County School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

**46.** Gibbs *v.* Colfax Tp. School Dist. No. 10, 88 Mich. 334, 50 N. W. 294, 26 Am. St. Rep. 295; State *v.* Perrysburg Tp., 27 Ohio St. 96.

**47.** Robinson *v.* St. John School Trustees, 34 N. Brunsw. 503.

**48.** Nesbit *v.* Riverside Independent School-Dist., 25 Fed. 635.

**49.** McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289 (holding that under St. (1903) § 4482, school-districts are authorized to provide for the redemption of bonds at the rate of two each year out of the sinking fund); Bowman *v.* Middlesboro, 91 S. W. 726, 28 Ky. L. Rep. 1290; Jacobson *v.* Cary, 51 Nebr. 762, 71 N. W. 723; Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952 (holding that under Const. art. 13, § 5, requiring school-districts at or before incurring indebtedness, to provide for the collection of a tax sufficient to pay the same when due, the failure of a board of education to comply with such condition does not relieve it from

**j. Nature of School Bonds.** Bonds issued by school-districts are not mortgages, notwithstanding the statutes make the bonds a lien on the property of the inhabitants of the district, but are merely evidences of the legal debts of the district issuing them.[50]

**k. Rights and Remedies of Holders.** The right of a holder of a school-district bond to recover thereon cannot be defeated because of a misapplication of the proceeds of the sale of such bond.[51] Notwithstanding the bonds on which a loan to a school-district is made are void, if the money is advanced in good faith and is used by the school-district for school purposes, it is under a liability to refund the money so advanced.[52] The usual remedy of a holder of a school-district bond or coupon which is not paid when due is an action at law thereon [53] against the proper school officers in their corporate capacity.[54] Under some statutes however, a special remedy is given to a holder of such a bond on a failure to pay the interest or principal, whereby sufficient taxes may be added to the tax list to pay the amount due;[55] but such special remedy does not deprive the holder of his usual remedy for the collection of the bond;[56] nor will a remedy given by statute impair a right of action on a bond existing at the time of the passage of the statute.[57] In actions upon school-district bonds the rules applicable in civil actions generally govern questions of pleading,[58] parties,[59] and proof.[60] The

the obligation to thereafter provide for the payment of bonds issued in violation thereof).

**50.** McCully *v.* Ridgefield Tp., 63 N. J. L. 18, 42 Atl. 776.

**51.** Cummins *v.* Doon Dist. Tp., 42 Fed. 644 [*reversed* on other grounds in 142 U. S. 366, 12 S. Ct. 220, 35 L. ed. 1044].

**Estoppel.**—A board of education authorized to issue bonds is estopped to allege as a defense to an action thereon that the money realized from their sale was misapplied. Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952.

**52.** State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698; Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539.

**53.** School Directors *v.* Taylor, 54 Ill. 289; Bonham *v.* Harrisonville Bd. of Education. 3 Fed. Cas. No. 1,629, 4 Dill. 156.

**54.** See School Directors *v.* Taylor, 54 Ill. 289.

**55.** Bonham *v.* Harrisonville Bd. of Education, 3 Fed. Cas. No. 1,629, 4 Dill. 156.

**56.** Bonham *v.* Harrisonville Bd. of Education, 3 Fed. Cas. No. 1,629, 4 Dill. 156.

**57.** Gamble *v.* Allison Rural Independent School Dist., 146 Fed. 113 [*reversing* 132 Fed. 541].

**58.** School Directors *v.* Taylor, 54 Ill. 289, holding that a party seeking to charge school directors in their corporate capacity, on a bond executed by them, must aver in his declaration that the bond was given under the authority of a vote of the people, for one of the purposes named in the statute authorizing them to issue such bonds on such vote.

**Pleading** generally see PLEADING, 31 Cyc. 1.

**Sufficiency of petition.**—Where a petition in an action against a school-district upon its bonds alleges that the school-district made and issued the bonds by its proper officers, for value received, and copies of the bonds are given and made a part of the petition, which show that the bonds were issued in pursuance of an act of the legislature authorizing such bonds, and the bonds appear to be valid upon their face, the petition states a good cause of action against the school-district (State *v.* Chautauqua County School Dist. No. 3, 34 Kan. 237, 8 Pac. 208); and where copies of the bonds or coupons sued on are attached to and made a part of the petition, such copies must be considered as part of the petition in construing the allegations thereof (State *v.* Chautauqua County School Dist. No. 3, *supra*). In a petition on such bond, it is not necessary to state the amount of the consideration for which the bonds were issued or the prices fixed by the qualified electors of the district for the sale of the bonds. State *v.* Chautauqua County School Dist. No. 3, *supra*.

**Answer.**— If anything was done or omitted in the issuance of the bonds which would render them invalid, it devolves upon defendant to set the same up in his answer as a defense. State *v.* Chautauqua County School Dist. No. 3, 34 Kan. 237, 8 Pac. 208.

**Where a school-district pleads part payment** on one of its bonds issued to erect a school-house therein, but denies that such money was paid with its knowledge or consent, it is not a denial of the authority of the agent. York County School-Dist. No. 27 *v.* Holmes, 16 Nebr. 486, 20 N. W. 721.

**59.** Southold Sav. Bank *v.* Union Free School Dist. No. 22 Bd. of Education, 44 Misc. (N. Y.) 74, 89 N. Y. Suppl. 714, holding that in an action against a school-district on bonds issued by it, the fact that after the issue of the bonds a portion of the district is cut off and annexed to the city of New York, and no adjustment of the bonded indebtedness is made between the district and such city, does not compel the bond-holder to make the city a party in order that the controversy between it and the school-district may be determined.

**Parties** generally see PARTIES, 30 Cyc. 1.

**60.** York County School Dist. No. 27 *v.*

rendition of a judgment in favor of a bondholder on school-district bonds establishes the validity thereof and precludes the district from subsequently setting up such invalidity as a defense to such bonds, or to other bonds for which they are exchanged.[61]

**4. School Taxes[62] — a. Power and Duty to Tax — (i)** *In General.* Under some statutes school-districts are regarded as political organizations possessing the power of taxation;[63] but as a general rule a school-district has no inherent power to levy taxes for school purposes, although such power or duty may be, and usually is, conferred upon it either expressly or by necessary implication, by constitutional, charter, or statutory provisions,[64] the nature and extent of such power or duty depending upon the terms of the particular provisions relative thereto;[65] and such provisions will be strictly construed, and if there is a fair doubt as to the existence of the power of taxation it will be denied.[66] It has been held that a school-district not formed or organized in the prescribed manner has no power to authorize an assessment of taxes for any purpose.[67] As a general rule a school tax law must secure the equality and impartiality of the

Holmes, 16 Nebr. 486, 20 N. W. 721 (holding that where the evidence shows that the bond was issued under the authority of the district, that it sold the same and received the money therefor, and that the treasurer of the district had paid one instalment of interest on it, it is sufficient to sustain a judgment for plaintiff); Connellsville Second Nat. Bank *v.* Connellsville School Dist., 23 Pa. Co. Ct. 636 (holding that in a suit upon coupons payable to bearer, plaintiff may offer the coupons and rest; he is not obliged to show the validity of the school-district bonds to which they were attached, since the invalidity of the bonds is a matter of defense).

**Recitals of a school-district bond are neither prima facie nor conclusive evidence of** the authority to issue the same; and in an action thereon all the steps necessary to confer the authority to issue them must be proved, whether the bonds recite that these steps were taken or not. Heard *v.* Calhoun School Dist., 45 Mo. App. 660.

**61.** Taylor *v.* Garfield School Dist., 97 Fed. 753.

**62. Effect of change of boundaries or creation of new district** see *infra*, III, F, 4, f.

**Power and duty of municipality to levy school taxes** see Municipal Corporations, 28 Cyc. 1670.

**Taxation in aid of private schools and academies** see *supra*, II, B.

**Right of Roman Catholic separate schools to levy school rates by their own authority** see Nottawasaga Public School Trustees *v.* Nottawasaga, 15 Ont. App. 310.

**63.** Landis *v.* Ashworth, 57 N. J. L. 509, 31 Atl. 1017.

**64.** Marion, etc., R. Co. *v.* Alexander, 63 Kan. 72, 64 Pac. 978; Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109; Hogg *v.* Rogers, 15 U. C. C. P. 417.

**Repeal of statutes** see Horton *v.* Mobile School Com'rs, 43 Ala. 598; Gray *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95 (holding that Hurd Rev. St. (1905) c. 122, § 202, providing for the levy of school taxes in general did not repeal Private Laws (1869), p. 168, creating a special charter for Peoria and providing for the levy of school taxes for such city); Kirk *v.* Roberson, 76 S. W. 183, 25 Ky. L. Rep. 633; Phillips *v.* Barnhart, 27 Pa. Super. Ct. 26. As in other cases a repeal of a school tax law by implication is not favored. People *v.* San Francisco, etc., R. Co., 28 Cal. 254; Montgomery *v.* Richmond County Bd. of Education, 74 Ga. 41; Kinney *v.* Zimpleman, 36 Tex. 554.

**A statute which contains no provision for carrying its provisions as to taxation into execution** is inoperative and void. Hilburn *v.* St. Paul, etc., R. Co., 23 Mont. 229, 58 Pac. 551, 811.

**65.** Davis *v.* Ponder, 131 Ga. 713, 63 S. E. 220; Cairo Banking Co. *v.* Ponder, 131 Ga. 708, 63 S. E. 218; Lane *v.* Stanly, 65 N. C. 153; Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109; Bull *v.* Read, 13 Gratt. (Va.) 78.

**Annual tax.**—Authority to levy a tax for school purposes authorizes the levy of such tax annually, although there is no express provision to that effect. Peay *v.* Talbot, 39 Tex. 335.

**The word "may,"** as used in a statute providing that certain officers may levy certain taxes for the support of common schools, is not mandatory but permissive, and such a levy cannot be enforced by mandamus. State *v.* Police Jury, 40 La. Ann. 755, 5 So. 23.

**A second tax for the same purpose cannot,** under some statutes, be levied during the same year after an annual tax for school purposes has already been levied. Verona Borough School Dist.'s Appeal, 1 Mona. (Pa.) 697; Oliver *v.* Carsner, 39 Tex. 396.

**66.** Marion, etc., R. Co. *v.* Alexander, 63 Kan. 72, 64 Pac. 978.

**67.** Tucker *v.* Wentworth, 35 Me. 393, holding that where a school-district not formed by a vote of the town votes to raise money to build a school-house and the assessors of the town assess a tax in pursuance thereof, the assessment is illegal and void. *Compare* Atchison, etc., R. Co. *v.* Neosho County School Dist. No. 99, 75 Kan. 843, 89 Pac. 1018, holding that where, in a proceed-

tax which it authorizes,[68] provide for an adjustment and equalization of assessments[69] or guaranties for the economical, faithful, and impartial administration of the law,[70] and provide for an appropriation of the tax to the purposes for which it is levied.[71]

(II) *CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS IN GENERAL.*[72] The power of a state legislature to impose or authorize taxation for school purposes is ordinarily limited and restricted by various constitutional provisions,[73] as by provisions that the rate of assessment and taxation shall be uniform and equal[74] and shall not be in excess of a prescribed rate or limit,[75] that the question of levying a tax, at least for certain purposes, shall be submitted to the voters of the district,[76] and that a special or local tax cannot be authorized or imposed for general school purposes.[77] A constitutional provision that the legislature shall provide a thorough, efficient, and uniform system of free schools whereby all children in the state may receive a good common school education, or in words of like purport, is intended as a limitation upon the power of the legislature to

ing to recover certain taxes from a school-district, there is no claim that the property taxed was not within the district where it was taxed on the day that the levy was made, or that the property was taxed in any other district or subject to double taxation, there is nothing equitable in a claim for relief on the ground that the school-district was not organized at the time when the tax was levied.

**68.** Lane *v.* Stanly, 65 N. C. 153; Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

**69.** Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831. And see *infra*, III, F, 4, c, (VIII).

**70.** Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

**71.** Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

**72.** As to equalizing tax on change of organization of district see *supra*, III, C, 2, b, (V).

**73.** See the constitutions of the several states. See also People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660 (holding that Pol. Code, § 1670, subds. 14, 15, is not unconstitutional as fixing no maximum rate and providing no rule of computation); McCabe *v.* Carpenter, 102 Cal. 469, 36 Pac. 836 (holding that under Const. art. 11, § 12, the legislature cannot prescribe a procedure for levying taxes for high school purposes, which will allow the taxes to be levied without leaving any discretion in regard to them to the local authorities); Crosby *v.* Lyon, 37 Cal. 242.

**Application.**—A constitutional provision requiring the legislature to provide means for sustaining a free school in each district for a certain period during each year, with no negation of the right to provide means for maintaining such schools for a longer period, is not a limitation on its power of taxation, and does not prohibit a provision for a longer period of time. State *v.* Miller, 65 Mo. 50.

**A person receiving his full share of the benefits** and advantages of a school system will not be heard to complain that the legislative power as exercised in the levying of taxes and the expenditure of the school fund is unwarranted. Marshall *v.* Donovan, 10 Bush (Ky.) 681.

**74.** *Georgia.*— Edalgo *v.* Southern R. Co., 129 Ga. 258, 58 S. E. 846, holding that a statute is not in violation of the uniformity rule for the reason that the scheme of taxation as to the amount and method of collection is different when taxes are levied and collected for district schools, from what it is when collected for county schools.

*Indiana.*— Kent *v.* Kentland, 62 Ind. 291, 30 Am. Rep. 182, holding that the act of March 8, 1873, which authorizes cities to collect a school tax from persons who reside and have their property outside of the city limits, if their children are sent to school within the city, is not in conflict with the uniformity rule, since throughout the state it operates alike on all persons in the same circumstances.

*Mississippi.*— Bordeaux *v.* Meridian Land, etc., Co., 67 Miss. 304, 7 So. 286.

*North Carolina.*— Perry *v.* Franklin County Com'rs, 148 N. C. 521, 62 S. E. 608; Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

*Ohio.*— Root *v.* Board of Education, 52 Ohio St. 589, 41 N. E. 135.

*Canada.*— *In re* Scott, 13 U. C. Q. B. 346.

See 43 Cent. Dig. tit. "Schools and School Districts," § 234.

**Division of school-district.**—A statute which provides that persons and property in part of a certain school-district shall be taxed for the erection and maintenance of school-houses in that part only, and likewise that persons and property in the district shall be liable for taxation for such purposes in their part only, is not unconstitutional as authorizing a different tax in one part from that in the other, or as authorizing an unequal taxation because the scholars of one part might use the school-houses in the other under the direction of the board of education. Allen *v.* Bidwell, 68 N. H. 245, 44 Atl. 295.

**75.** See *infra*, III, F, 4, a, (V).

**76.** See *infra*, III, F, 4, c, (IV).

**77.** *Alabama.*—Southern R. Co. *v.* St. Clair County, 124 Ala. 491, 27 So. 23.

provide for the maintenance of free schools by local taxation;[78] and means that it shall by a general law provide for conducting schools and securing revenues from taxation for their support, through the instrumentalities of the government;[79] but such a provision does not mean that the legislature must directly and by statute levy all taxes for each locality,[80] or that it must prescribe rules for every school-district in the state,[81] and does not prevent the legislature from permitting taxation in each district for its own schools.[82]

(III) *POWER OF LEGISLATURE TO DELEGATE AUTHORITY.* Under some constitutions the legislature has no authority to delegate the power of taxation to the school-district authorities.[83] Under others the legislature cannot impose a tax upon the property or inhabitants of a school-district, but must vest the power in the local authorities.[84] In most jurisdictions, however, subject to constitutional limitations and restrictions,[85] the legislature may delegate the power of levying school taxes to school-districts;[86] to certain district authorities;[87] or to certain county,[88] township,[89] or municipal authorities.[90] Where provision is

*Indiana.*— Greencastle Tp. *v.* Black, 5 Ind. 557.

*Kentucky.*— Bellepoint *v.* Pence, 17 S. W. 197, 13 Ky. L. Rep. 371.

*Louisiana.*— Bassett *v.* Barbin, 11 La. Ann. 672.

*Utah.*— Bromley *v.* Reynolds, 2 Utah 525.

See 43 Cent. Dig. tit. "Schools and School Districts," § 234.

**78.** Richards *v.* Raymond, 92 Ill. 612, 34 Am. Rep. 151.

**79.** Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698.

**80.** Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698.

**81.** Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698.

**82.** See Bordeaux *v.* Meridian Land, etc., Co., 67 Miss. 304, 7 So. 286.

**83.** Schultes *v.* Eberly, 82 Ala. 242, 2 So. 345; Kecsee *v.* Civil Dist. Bd. of Education, 6 Coldw. (Tenn.) 127.

**84.** McCabe *v.* Carpenter, 102 Cal. 469, 36 Pac. 836.

**85.** People *v.* McAdams, 82 Ill. 356 (holding that under Const. (1848) art. 8, § 5, the legislature had no power to constitute a private school-house a school-district, and invest the trustees to be elected therein with the power of taxation for the support of the school); Dwyer *v.* Hackworth, 57 Tex. 245; Ft. Worth *v.* Davis, 57 Tex. 225. And see *supra*, III, F, 4, a, (II).

**86.** Steward *v.* Jefferson, 3 Harr. (Del.) 335 (to school voters in a district); People *v.* McAdams, 82 Ill. 356 (to the public school-districts under the general school laws of the state); Burgess *v.* Pue, 2 Gill (Md.) 11, 254 (to the taxable inhabitants).

**87.** *Kentucky.*—Macklin *v.* Common School Dist. No. 9, 88 Ky. 592, 11 S. W. 657, 11 Ky. L. Rep. 75, school trustees.

*Missouri.*— Benton *v.* Scott, 168 Mo. 378, 68 S. W. 78.

*North Carolina.*— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

*Texas.*— State *v.* Bremond, 38 Tex. 116, school directors. Under Const. art. 9, § 3, there is no constitutional warrant for the authority granted by the act of April 24, 1871, to the board of education to levy and collect a school tax. Willis *v.* Owen, 43 Tex. 41 [*disapproving* Kinney *v.* Zimpleman, 36 Tex. 554].

*Virginia.*— Bull *v.* Read, 13 Gratt. 78.

See 43 Cent. Dig. tit. "Schools and School Districts," § 234.

**88.** Henslee *v.* McLarty, 131 Ga. 244, 62 S. E. 66; Georgia R., etc., Co. *v.* Hutchinson, 125 Ga. 762, 54 S. E. 725 (holding that the act of Aug. 23, 1905, providing for the creation of local tax-district schools, and for the levying and collection of local taxes by counties for educational purposes, is not intended to be retrospective in its operation); Smith *v.* Bohler, 72 Ga. 546; Americus Bd. of Public Education *v.* Barlow, 49 Ga. 232; Root *v.* Board of Education, 52 Ohio St. 589, 41 N. E. 135; Washington County *v.* Saltville Land Co., 99 Va. 640, 39 S. E. 704.

Under Wis. Rev. St. (1878) § 1074, a county board has no power to levy on a town a school tax for the use of the county, as such fund in the hands of the county treasurer belongs to the town school-district. State *v.* Nelson, 105 Wis. 111, 80 N. W. 1105.

**89.** Rose *v.* Bath Tp., 10 Ind. 18.

**90.** *California.*— Visalia Sav. Bank *v.* Visalia, 153 Cal. 206, 94 Pac. 888 (holding that the power expressly given by Pol. Code, §§ 1576, 1670, to city trustees to levy a school tax on lands beyond the city limits but within the school-district, is constitutional); Woodland Bd. of Education *v.* Woodland Trustees, 129 Cal. 599, 62 Pac. 173.

*Georgia.*— Henslee *v.* McLarty, 131 Ga. 244, 62 S. E. 66; Smith *v.* Bohler, 72 Ga. 546.

*Illinois.*— People *v.* Mottinger, 215 Ill. 256, 74 N. E. 150, holding that Priv. Laws (1857), p. 129, c. 11, giving the city council of Joliet power to levy taxes for school purposes was not repealed by Hurd Rev. St. (1903) p. 1714, c. 122.

*Indiana.*— Shepardson *v.* Gillette, 133 Ind. 125, 31 N. E. 788; Kent *v.* Kentland, 62 Ind. 291, 30 Am. Rep. 182.

*Maine.*— See Powers *v.* Sanford, 39 Me. 183.

made for the levying of school taxes by county authorities, and also by certain municipal authorities for schools within municipal limits, the county's power of taxation will ordinarily be restricted to property without the limits of such municipality.[91]

(IV) *PURPOSE AND GROUNDS IN GENERAL.*[92] As a general rule the power of raising taxes for school purposes may be exercised for such purposes only as are expressly or impliedly authorized by the provisions of the constitution, charter, or statute granting such power,[93] such as for educational[94] and building purposes,[95] and for such purposes as are incidental to those expressly authorized,[96] and a levy of school taxes for purposes different from those authorized is void.[97] Among other purposes for which a school tax may be properly levied are the payment of interest and principal on school bonds as they become due,[98] the payment of the expenses of incidental or necessary litigation; [99] the payment of school-teachers'

*Tennessee.*— Under Const. art. 2, § 29, the legislature may authorize counties and municipalities to tax for free school purposes (Ballentine *v.* Pulaski, 15 Lea 633), but it cannot delegate such power to school-districts (Lipscomb *v.* Dean, 1 Lea 546; Waterhouse *v.* Cleveland Public Schools, 9 Baxt. 398; Keesee *v.* Civil Dist. Bd. of Education, 6 Coldw. 127).

*Texas.*— Dwyer *v.* Hackworth, 57 Tex. 245; Ft. Worth *v.* Davis, 57 Tex. 225.

See 43 Cent. Dig. tit. "Schools and School Districts," § 234. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 1670.

**Authority of a municipal corporation to provide by ordinance for the maintenance of public schools** authorizes the municipal council to provide by ordinance for the maintenance of the public schools by taxation. Chambers *v.* Solner, 1 Alaska 271.

**91.** Bordeaux *v.* Meridian Land, etc., Co., 67 Miss. 304, 7 So. 286, holding that the word "county" as used in the act of March 18, 1886, requiring the board of supervisors of each county to levy a certain tax for school purposes, when construed in connection with Code (1880), § 731, authorizing certain municipal officers to levy a school tax in certain towns, is restricted to property outside of said towns.

**92. Assessments and special taxes for particular purposes** see *infra*, III, F, 5.

**93.** Marion School City *v.* Forrest, (Ind. 1906) 78 N. E. 187.

**Traveling expenses.**— School trustees cannot impose a rate to reimburse themselves for traveling expenses incurred, in order to consult with the school superintendent. Stark *v.* Montague, 14 U. C. Q. B. 473.

**Library.**— Under authority to levy a tax for the purpose of purchasing or keeping up a library, school officers cannot levy a tax for the purpose of restoring money to the school fund which they have used in paying for a library already purchased. Lueder *v.* Caffrey, 9 Kulp (Pa.) 144. See also Marion School City *v.* Forrest, (Ind. 1906) 78 N. E. 187.

**94.** St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664, Chicago, etc., R. Co. *v.* People, 205 Ill. 625, 69 N. E. 72.

**The words "educational purposes"** within the meaning of a statute authorizing a school tax to be levied for such purposes are general and apply to all matters for which a board of school directors may levy taxes. O'Day *v.* People, 171 Ill. 293, 49 N. E. 504. A tax for heating apparatus, and reconstructing part of a basement of a school building and sidewalk around it is not for "building purposes" within the meaning of the Illinois statute, but is for ordinary repairs and within the term "educational purposes." People *v.* Toledo, etc., R. Co., 231 Ill. 514, 83 N. E. 193; Wabash R. Co. *v.* People, 187 Ill. 289, 58 N. E. 254; Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 45 N. E. 122. So the cost of a small coal shed, expenses for painting and papering a schoolhouse, for building a porch, for lumber and flooring, for stoves and stove repairs, and for janitor services and fuel cannot be included in a tax levy for "building purposes," but must be included in a levy for "educational purposes." O'Day *v.* People, 171 Ill. 293, 49 N. E. 504.

**95.** St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664; People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Chicago, etc., R. Co. *v.* People, 205 Ill. 625, 69 N. E. 72; Eikenbary *v.* Porter, 60 Nebr. 75, 82 N. W. 108. And see *infra*, III, F, 5, a.

**Repeal of statute** see Mellor *v.* Pittsburg, 201 Pa. St. 397, 50 Atl. 1011.

**96.** Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254.

**97.** Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254; Burhans *v.* Union Free School Dist. No. 1, 24 N. Y. App. Div. 429, 48 N. Y. Suppl. 702 [*affirmed* in 165 N. Y. 661, 59 N. E. 1119]; Goldsboro Graded School *v.* Broadhurst, 109 N. C. 228, 13 S. E. 781; Fitting *v.* Glassbrunner, 1 Pearson (Pa.) 544.

**98.** See *infra*, III, F, 5, c.

**99.** Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254; *In re* Johnson, 30 U. C. Q. B. 264; *In re* Tiernan, 15 U. C. Q. B. 87. But see Stark *v.* Montague, 14 U. C. Q. B. 473.

**Suit against tax-collector.**— A school-district has a right to assess taxes to pay for defending a suit against a tax collector for collecting taxes, although there is a doubt as to whether the district is liable to the collector for his damages in such suit. Johnson *v.* Colburn, 36 Vt. 693.

salaries and expenses;[1] and to refund money unlawfully collected.[2] Where the power of raising money by taxation for the support of schools is of a general character, a further provision requiring that a certain number or kinds of schools shall be supported is not a definition or limitation of the public schools which may be provided for by taxation,[3] and taxes may also be levied under such power for other public schools for instruction in branches which are not required by such provision.[4]

(v) *AMOUNT OR RATE OF TAX*[5] — (A) *In General.* In the absence of a constitutional or statutory provision to that effect, there is no express limit upon the rate or amount of taxes that may be levied for school purposes.[6] But in most jurisdictions, constitutional, charter, or statutory provisions limit to a certain rate or amount the taxes that may be levied for school purposes in any one year,[7] as that the amount raised by taxation by a school-district shall not be more than a given excess over the amount received for school purposes from the state,[8] or

1. Dennington *v.* Roberta, 130 Ga. 494, 61 S. E. 20; Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119; Munson *v.* Collingwood, 9 U. C. C. P. 497.

**Unqualified teacher.**— No taxes can legally be imposed for the salary of an unqualified teacher. Stark *v.* Montague, 14 U. C. Q. B. 473.

2. Churchill *v.* Highland Park Graded School, 89 S. W. 122, 28 Ky. L. Rep. 162, holding that where a board of trustees unlawfully levies and collects a tax on property outside of the school-district, it may, and should, levy a further tax to refund the money unlawfully collected.

3. Cushing *v.* Newburyport, 10 Metc. (Mass.) 508.

4. Cushing *v.* Newburyport, 10 Metc. (Mass.) 508.

5. **Estimates, reports, certificates, or statements as to amount** see *infra*, III, F, 4, c, (v).

6. See Murphy *v.* Harbison, 29 Ark. 340; Hasbrouck *v.* Kingston Bd. of Education, 2 Abb. Dec. (N. Y.) 340, 3 Keyes 480, 3 Transcr App. 106, 5 Abb. Pr. N. S. 399.

7. *Arkansas.*—Worthen *v.* Badgett, 32 Ark. 496; Vaughan *v.* Bowie, 30 Ark. 278. See also Murphy *v.* Harbison, 29 Ark. 340.

*California.*— People *v.* Sargent, 44 Cal. 430.

*Florida.*— State *v.* L'Engle, 40 Fla. 392, 24 So. 539, not more than five mills on the dollar of all taxable property.

*Illinois.*— People *v.* Read, 233 Ill. 351, 84 N. E. 214; People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; O'Day *v.* People, 171 Ill. 293, 49 N. E. 504; Gage *v.* Bailey, 102 Ill. 11. But see Merritt *v.* Farris, 22 Ill. 303.

*Indiana.*— Wayne Tp. *v.* Alexander, 10 Ind. 221.

*Iowa.*— Richards *v.* Lyon County, 69 Iowa 612, 29 N. W. 630.

*Kentucky.*— Macklin *v.* Common School Dist. No. 9, 88 Ky. 592, 11 S. W. 657, 11 Ky. L. Rep. 75.

*Minnesota.*— State *v.* Babcock, 87 Minn. 234, 91 N. W. 842, holding that Gen. St. (1894) § 1558, as amended by Laws (1899), c. 117, limiting the tax levy for school purposes, does not apply to independent school-districts.

*Mississippi.*— Cowart *v.* Foxworth, 67 Miss. 322, 7 So. 350; Bordeaux *v.* Meridian Land, etc., Co., 67 Miss. 304, 7 So. 286.

*Missouri.*— Chicago, etc., R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. 200; State *v.* Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. 862.

*Nebraska.*— Chicago, etc., R. Co. *v.* Kearney County School Dist. No. 10, 60 Nebr. 164, 82 N. W. 373 (holding that under Comp. St. (1895) c. 79, subd. 4, § 1, unless a school-district includes within its limits an incorporated city having more than fifteen hundred inhabitants it is not subject to such subdivision limiting the lawful taxation therein); Sarpy County School Dist. No. 1 *v.* McCormick, 4 Nebr. (Unoff.) 242, 93 N. W. 956.

*New Jersey.*— See *In re* Newark School Bd. (Sup. 1907) 70 Atl. 881.

*Tennessee.*— Nashville, etc., R. Co. *v.* Franklin County, 5 Lea 707.

*Texas.*— State *v.* Bremond, 38 Tex. 116; Brewer *v.* Hall, (Civ. App. 1908) 111 S. W. 738; Cummins *v.* Gaston, (Civ. App. 1908) 109 S. W. 476; Snyder *v.* Baird Independent School Dist., (Civ. App. 1908) 109 S. W. 472 [questions certified to the supreme court *answered* in (1908) 111 S. W. 723, 113 S. W. 521]; Parks *v.* West, (Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in (1908) 111 S. W. 726, 113 S. W. 529].

*Vermont.*— State *v.* Jericho, 12 Vt. 127.

*United States.*— U. S. *v.* Monona Independent School Dist., 20 Fed. 294.

See 43 Cent. Dig. tit. "Schools and School Districts," § 236.

**As determined by assessment.**— The assessment referred to in a statute which limits the taxes to a certain per cent of the taxable property, "the valuation to be ascertained by the last assessment for state and county taxes," is the assessment for the current year, although such assessment is still incomplete when the first steps toward levying the school tax must be taken. Wabash R. Co. *v.* People, 147 Ill. 196, 35 N. E. 157.

8. Robeson *v.* Mellick, 25 N. J. L. 563 (must not exceed double the amount appor-

more than a given excess over the county tax therefor,[9] or not in excess of the county and state taxes authorized by law for county and state purposes.[10] Such limitations are sometimes imposed upon special taxes levied for special purposes, as for the building and furnishing of school-houses.[11] Under some constitutional provisions, a limit is fixed which, however, may be increased by a vote of the people.[12] The fact that the constitution or statute fixes a maximum limit does not mean that taxes may always be demanded to that amount, but only to the amount that is reasonably necessary for the current year.[13]

(B) *Taxes Included Within Limitation.* Under some constitutions or statutes a general limitation on taxes for school purposes does not control or limit school taxes under special charters or statutes not inconsistent therewith;[14] and as a general rule the power to exceed the general limit by a tax for a special purpose is implied from the power to levy the special tax.[15] Under some provisions it is held that the limit placed upon ordinary taxes may be exceeded in levying taxes to pay the interest and principal of a bonded indebtedness,[16] or to discharge a debt incurred prior to the adoption of the statute fixing the limit of taxation.[17] It has been held that a limitation as to taxes for a general und for primary and grammar schools has no application to a special tax for high schools;[18] but on the other hand it has been held that where a high school district and common school district are coterminous, the taxes for both the high school and common schools must not in the aggregate exceed the prescribed rate or amount.[19] The statutory duty of levying a tax sufficient to keep a school open a certain number of months has been held to justify the levy of a special tax in excess of the prescribed limit.[20]

tioned from the state school fund); Van Vorst *v.* Kingsland, 23 N. J. L. 85.

9. Wilson *v.* Lewistown, 1 Watts & S. (Pa.) 428.

10. Locust Mountain Coal, etc., Co. *v.* Curran, 10 Phila. (Pa.) 543.

11. See U. S. *v.* Monona Independent School Dist., 20 Fed. 294. And see *infra*, III, F, 5.

**Repeal of statute** see Mellor *v.* Pittsburg, 201 Pa. St. 397, 50 Atl. 1011.

**Dependent upon regular tax.**—Where the extent of a special tax in any year is limited to an amount not exceeding the regular annual tax for such year, if no regular annual tax is levied, the attempt to levy a special tax must fail, as such tax in any event will be in excess of the regular levy. Walker *v.* Edmonds, 197 Pa. St. 645, 47 Atl. 867.

12. Benton *v.* Scott, 168 Mo. 378, 68 S. W. 78; Chicago, etc., R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. 200; State *v.* St. Louis, etc., R. Co., 75 Mo. 526; State *v.* St. Louis, etc., R. Co., 74 Mo. 163; Wilson *v.* Lewistown, 1 Watts & S. (Pa.) 428.

13. Newport Bd. of Education *v.* Nelson, 109 Ky. 203, 58 S. W. 700, 22 Ky. L. Rep. 680, 59 S. W. 505, 22 Ky. L. Rep. 1377.

**The amount of back taxes on hand** is to be considered in determining the sufficiency of a levy for school purposes. Lexington *v.* Lexington Bd. of Education, 65 S. W. 827, 23 Ky. L. Rep. 1663.

14. People *v.* Bloomington, 130 Ill. 406, 22 N. E. 833.

**A general school law fixing a certain limit of taxation** does not abrogate or interfere with the taxing power of a school-district, under a special charter not inconsistent with the general school law. Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728; People *v.* Bloomington, 130 Ill. 406, 22 N. E. 833.

15. Sarpy County School Dist. No. 1 *v.* McCormick, 4 Nebr. (Unoff.) 242, 93 N. W. 956 (holding that Comp. St. c. 79, subd. 2, § 11, does not apply to a tax certified to the county authorities by the county supervisors of schools on the creation of a new district); Winifrede Coal Co. *v.* Cabin Creek Dist. Bd. of Education, 47 W. Va. 132, 34 S. E. 776 (holding that under Code, c. 45, § 58, and Acts (1897), c. 52, § 15, it is not necessary that there shall be a lawful existing indebtedness, before the board of education may levy special taxes in excess of the amount limited by such code provision).

16. Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262; Wabash R. Co. *v.* People, 187 Ill. 289, 58 N. E. 254; Richards *v.* Lyon County, 69 Iowa 612, 29 N. W. 630; U. S. *v.* Monona Independent School-Dist., 20 Fed. 294; Foster *v.* Hintonburg, 28 Ont. 221. But *compare* Central City School Dist. *v.* Chicago, etc., R. Co., 60 Nebr. 454, 83 N. W. 667; Union Pac. R. Co. *v.* Dawson County, 12 Nebr. 254, 11 N. W. 307.

17. Wayne Tp. *v.* Alexander, 10 Ind. 221.

18. Brown *v.* Visalia, 141 Cal. 372, 74 Pac. 1042.

19. People *v.* Read, 233 Ill. 351, 84 N. E. 214; Marion, etc., R. Co. *v.* Alexander, 63 Kan. 72, 64 Pac. 978.

20. Collie *v.* Franklin County Com'rs, 145 N. C. 170, 59 S. E. 44 [*overruling* Barksdale *v.* Sampson County Com'rs, 93 N. C. 472]. But see Bladen County Bd. of Education *v.* Bladen County, 111 N. C. 578, 16 S. E. 621, 18 L. R. A. 850.

(c) *Effect of Excessive Taxation.* A levy of taxes in excess of the rate or amount prescribed by law is not totally void, but is illegal and void only as to the excess,[21] and a statute authorizing a levy in excess of the limit prescribed by the constitution is void.[22] But the validity of a tax is not affected by the fact that part of the indebtedness for which it is levied is in excess of the limit prescribed for such indebtedness.[23]

**b. Persons and Property Liable, and Place of Taxation** [24] — (I) *In General.* The persons and property which are taxable for school purposes ordinarily depend upon the terms of the particular constitutional or statutory provision relative thereto.[25] Under some provisions taxes for school purposes are to be levied and assessed on the same general principles, and upon the same species of property as are taxes for town, county, and state purposes.[26] Taxes have been held to be leviable for school purposes under the various statutes on debts due by solvent debtors,[27] money payable under articles of agreement and bearing interest,[28] auction sales,[29] licenses for retailing spirituous liquors,[30] and merchants' licenses or statements.[31]

(II) *Place of Taxation in General.* Ordinarily a taxpayer is assessable in the district in which he resides, or is a taxable inhabitant, on the annual date fixed by statute,[32] notwithstanding he subsequently moves therefrom [33] temporarily,[34] and is not assessable in a district in which he is not a taxable inhabitant.[35]

**21.** Wabash R. Co. *v.* People, 187 Ill. 289, 58 N. E. 254; Chicago, etc., R. Co. *v.* People, 155 Ill. 276, 40 N. E. 602 (holding that under Rev. St. (1893) c. 122, § 202, which empowers the levying of taxes not exceeding two per cent for educational purposes and three per cent for building purposes, a tax for educational purposes for more than two per cent is void as to the excess, although the taxes levied jointly for educational and building purposes do not together exceed five per cent); Kirchner *v.* Wapsinonoc School Tp., (Iowa 1908) 118 N. W. 51.

**22.** Snyder *v.* Baird Independent School Dist., (Tex. 1908) 111 S. W. 723, 113 S. W. 521 [*answering* questions certified from the court of civil appeals in (Civ. App. 1908) 109 S. W. 472].

**23.** People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Wabash R. Co. *v.* People, 202 Ill. 9, 66 N. E. 824; Lyon County White School Dist. No. 15 *v.* Cummins, 111 S. W. 286, 33 Ky. L. Rep. 739.

**Limitation of amount of indebtedness generally** see *supra*, III, F, 1, c.

**24.** See, generally, TAXATION.

**Effect of change of boundaries or creation of new district** see *infra*, III, F, 4, f.

**25.** Keweenaw Assoc. *v.* Hancock Tp. School-Dist. No. 1, 98 Mich. 437, 57 N. W. 404; Brown *v.* Hoadley, 12 Vt. 472 (taxes on scholars); Craig *v.* Rankin, 10 U. C. C. P. 186 (taxation of parents of pupils).

**A person who acquires land after the imposition of a school assessment** upon it is not personally liable for the payment thereof within the meaning of a statute providing that such taxes shall be payable by the owner, occupant, or possessor of such property, although such assessment constitutes a special charge upon the property. Roxton School Com'rs *v.* De Lorimier, 24 Quebec Super. Ct. 48.

**26.** Savary *v.* Georgetown Fourth School Dist., 12 Metc. (Mass.) 178; State *v.* Kinney, 48 Mo. 373; Chadwick *v.* Crapsey, 35 N. Y. 196; Stephens *v.* Multnomah County School Dist. No. 21, 6 Oreg. 353. See also *In re* De la Haye, 3 U. C. C. P. 23.

**27.** Blickensderfer *v.* Erie West Ward, 20 Pa. St. 38.

**28.** Vœgtly *v.* Alleghany Third Ward, 1 Pa. St. 330.

**29.** Brooks *v.* Mobile School Com'rs, 31 Ala. 227.

**30.** Holt *v.* Mobile School Com'rs, 29 Ala. 451. And see *supra*, III, B, 2, a.

**31.** State *v.* Tracy, 94 Mo. 217, 6 S. W. 709; State *v.* Kinney, 48 Mo. 373.

**32.** Savary *v.* Georgetown Fourth School Dist., 12 Metc. (Mass.) 178; Ryder *v.* Cudderback, 12 Johns. (N. Y.) 412; Walker *v.* Miner, 32 Vt. 769.

**33.** Walker *v.* Miner, 32 Vt. 769, holding that under Comp. St. p. 457, §§ 35, 36, and the acts of 1851 and 1854, a person residing in a school-district on April 1 and properly listed there remains subject to taxation therein on such list, notwithstanding he subsequently moves from the state. But *compare* Savary *v.* Georgetown Fourth School Dist., 12 Metc. (Mass.) 178, holding that under the Massachusetts statutes an inhabitant of a school-district who moves therefrom before the district votes to raise money for school purposes is not liable to be taxed for that purpose, although he was a member of the district on the first day of May next before the vote was passed.

**34.** Bump *v.* Smith, 11 N. H. 48.

**35.** Suydam *v.* Keys, 13 Johns. (N. Y.) 444.

**Estoppel.**— The fact that a person had at one time served as trustee of a certain school-district, sent his children to the school, and enrolled his property therein does not

As a general rule all property real or personal within the limits of a school-district is subject to assessment for school taxes therein;[36] and, in the absence of express legislative authority, real property not within the limits of a school-district cannot be taxed therein for school purposes.[37] A party claiming that his property is not taxable in a certain district must prove such fact.[38]

(III) *PROPERTY OF NON-RESIDENT.* Non-residents of a school-district are liable to pay taxes therein, in common with the residents of the district for all purposes for which school-districts are empowered to lay taxes, on all taxable property which they have within such district,[39] including personal property which is permanently located or used in doing business in the district;[40] but a

estop him from denying that he is a resident of the district in order to defeat a school tax charged against him, there being no connection between the levying of the tax and the conduct of such person. Abney *v.* Bell, 7 Ky. L. Rep. 444.

**36.** Hughes *v.* Ewing, 93 Cal. 414, 28 Pac. 1067; Churchill *v.* Highland Park Graded School, 89 S. W. 122, 28 Ky. L. Rep. 162 (holding that under St. (1903) § 4482, the power of a board of trustees of a graded common school district to levy and collect a tax is restricted to property within the boundary of the district); Keweenaw Assoc. *v.* Hancock Tp. School-Dist. No. 1, 98 Mich. 437, 57 N. W. 404; Ovitt *v.* Chase, 37 Vt. 196. See also *In re* De la Haye, 3 U. C. C. P. 23.

**Land considered part of district.**—Where the records of the organization and limits of a school-district have been lost, and certain land has been considered as a part of the district for thirty years, and taxes have been assessed thereon for the benefit of such district, and the district has furnished school facilities during such time, the land will be considered as a part of the district for the purpose of taxation. Ottumwa Independent Dist. *v.* Taylor, 100 Iowa 617, 69 N. W. 1009.

**37.** Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955.

**38.** Mills *v.* Thornton, 26 Ill. 300, 79 Am. Dec. 377; Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955, holding that Comp. St. c. 79, subd. 3, § 8, providing that every school-district shall be presumed to have been legally organized when it has exercised franchises of the district for a year, does not require the court to presume that the property taxed is within or without the limits of such district.

**39.** *Connecticut.*—Allen *v.* Gleason, 4 Day 376.

*Iowa.*— Grout *v.* Illingworth, 131 Iowa 281, 108 N. W. 528.

*Kentucky.*— Paintsville School Dist. *v.* Davis, 64 S. W. 438, 23 Ky. L. Rep. 838.

*New Jersey.*— Gilbert *v.* Van Winkle, 25 N. J. L. 73.

*Canada.*— Dunwich Tp. School Trustees *v.* McBeath, 4 U. C. C. P. 228; De la Haye *v.* Gore Tp., 2 U. C. C. P. 317.

See 43 Cent. Dig. tit. "Schools and School Districts," § 237.

**Estoppel.**— The fact that one of the directors of a school-district, and the secretary of the school-district board, and an elector who is not an officer of the district, while acting as judges at a school-district election, refuse to allow the electors residing on certain land to vote on the ground that they live outside the district, will not estop the district from thereafter claiming that such land is within its limits for purposes of taxation. Ottumwa Independent Dist. *v.* Taylor, 100 Iowa 617, 69 N. W. 1009.

**"Taxable inhabitant."**—Where, under a statute providing that every person owning or holding real estate in any school-district who shall improve and occupy the same by his agent or servant shall be considered a "taxable inhabitant" of such district in respect to the liability of such property to taxation in the same manner as if he resided therein, a person resides in one school-district, and his homestead farm lies in that district, and he owns, improves, and occupies another tract in another district, which is not part of his farm nor attached to or adjoining it, the latter tract is properly taxed for school purposes in the district in which it is located. Myer *v.* Crispell, 28 Barb. (N. Y.) 54. But an owner of land, not occupied by him, his agent or servant, but in the actual occupation of a tenant is not a "taxable inhabitant" within the meaning of such a statute; but the tenant and his subtenant are the persons upon whom the tax should be imposed where the owner is a nonresident. Dubois *v.* Thorne, 8 Wend. (N. Y.) 518.

**Property held for the use of minors** residing in another state is taxable for school purposes in the county where the guardian resides, and where he holds it for the minors' use, under a statute authorizing the taxation of property held in trust or for the use of others; but where a minor resides with his father in one school-district and his guardian resides in another district in the same county, the property held by the guardian is taxable for the benefit of the district wherein the minor lives. West Chester School Dist. *v.* Darlington, 38 Pa. St. 157.

**40.** Mills *v.* Thornton, 26 Ill. 300, 79 Am. Dec. 377.

**Stock in trade** must be assessed for school purposes in the school-district in which it is situated. Ament *v.* Humphrey, 3 Greene (Iowa) 255; Bates *v.* Weymouth Eighth School Dist., 9 Gray (Mass.) 433. See also St. Johnsbury School Dist. No. 1 *v.* Kittridge, 27 Vt. 650; Fairbanks *v.* Kittredge,

resident of one district cannot be taxed therein for personal property which is permanently located or used in business in another district.[41]

(iv) *Property Partly Within and Partly Without District.* In the absence of statute otherwise, where real estate lies partly within and partly without a school-district, such district cannot tax that part which lies outside of its boundaries.[42] Under some statutes, however, land lying in one body and occupied by the same person, although situated partly in two or more districts, is taxable for school purposes in the district in which the occupant resides,[43] or in which that part of the tract which is occupied by the mansion house is located.[44]

(v) *Corporate Property.* A corporation whose place of business is located within a school-district, and which owns property therein, is under some statutes taxable for school purposes upon all such property, in the same manner as for town, county, and state purposes,[45] unless exempted by statute.[46] Thus under some statutes railroad property within the limits of a school-district is subject to taxation therein for local school purposes.[47] Shares of stock in a

24 Vt 9; Graham *v.* Monaghan, 17 Nova Scotia 186.

**41.** Lemp *v.* Hastings, 4 Greene (Iowa) 448 (holding that a resident in a school-district cannot be assessed in that district for the personal property in his store which is situated in another district); Bates *v.* Weymouth Eighth School Dist., 9 Gray (Mass.) 433.

**Bank stock.—** Under Mass. Gen. St. c. 39, providing that every inhabitant shall be taxed in the district in which he lives for all his personal estate, and St. (1873) c. 315, providing that all stock in national banks shall be assessed to the owners thereof in the cities or towns where such banks are located, the stock of a national bank belonging to an inhabitant of a school-district in a town other than that in which the bank is situated cannot be taxed therein for the purpose of defraying the expenses of building a school-house in that district. Little *v.* Little, 131 Mass. 367.

**42.** Shaw *v.* Lockett, 14 Colo. App. 413, 60 Pac. 363; Arthur *v.* Polk Borough School Dist., 164 Pa. St. 410, 30 Atl. 299.

**43.** Budd *v.* Allen, 69 Hun (N. Y.) 535, 24 N. Y. Suppl. 5; Hallowell Tp. School Trustees *v.* Storm, 14 U. C. Q. B. 541, holding that such a provision applies only to the case of undivided property extending into more than one section of the same municipality, and not where the land lies in different municipalities.

**44.** Arthur *v.* Polk Borough School Dist., 164 Pa. St. 410, 30 Atl. 299.

**Ky St. § 4458,** providing that when lines dividing districts divide the lands of any person the tax shall be levied and paid to the district where the homestead is situated, applies only to common school districts, and not to free graded school districts. Jackson *v.* Brewer, 112 Ky. 554, 66 S. W. 396, 23 Ky. L. Rep. 1871; Paintsville School Dist. *v.* Davis, 64 S. W. 438, 23 Ky. L. Rep. 838. Thus land included within a graded school district at the time bonds are issued to provide money for the erection of a school-house, and which is still so included, is liable for its proportion of the bonded debt, although after the bonds are issued the land is purchased by one who resides in another district, and included in a large boundary on which his residence is located. Paintsville School Dist. *v.* Davis, *supra.*

**Land in district including parts of two counties** see Roberts *v.* Ross, 58 S. W. 708, 18 Ky. L. Rep. 873.

**45.** Pineville Public Graded Schools *v.* Belle County Coke, etc., Co., 96 Ky. 68, 27 S. W. 862, 16 Ky. L. Rep. 283 (holding that the act of April 22, 1890, taxing the property of white persons for the maintenance of a school for white pupils, applies to corporations, unless their stock-holders are black people); Chadwick *v.* Crapsey, 35 N. Y. 196

**Banks** are subject to local taxation for school purposes. Fremd *v.* Eminence Deposit Bank, 42 S. W. 102, 19 Ky. L. Rep. 825.

**46.** See *infra,* III, F, 4, b, (vi).

**47.** Georgia R., etc., Co. *v.* Hutchinson, 125 Ga. 762, 54 S. E. 725; Chicago, etc., R. Co. *v.* Lamkin, 97 Mo. 496, 10 S. W. 200; Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516; King *v.* Utah Cent. R. Co., 6 Utah 281, 22 Pac. 158; Moore *v.* Holliday, 17 Fed. Cas. No. 9,765, 4 Dill. 52. But see Louisville, etc., R. Co. *v.* Johnson, 11 S. W. 666, 11 Ky. L. Rep. 118.

**Extent of authority.—** Authority to levy on property of a railroad company for "school purposes" does not authorize a levy on such property for school buildings and for the payment of an indebtedness. State *v.* Wabash, etc., R. Co., 90 Mo. 166, 2 S. W. 275; State *v.* Wabash, etc., R. Co., 83 Mo. 395.

**Under Mo. Act (1871), § 13,** a railroad company is not taxable for school purposes in any other districts than those through which it passes, or in which it holds property. Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516.

**In Virginia** a levy on railroad property as a whole within a county for district school purposes without reference to what part is located in the several districts, or without showing the amount levied for each district,

national bank are subject to taxation for public school purposes in some jurisdictions.[48]

(VI) *EXEMPTIONS.*[49] In some jurisdictions, certain persons and property are exempted, by constitutional or statutory provisions, from taxation for public school purposes,[50] and under some statutes the exercise of the power of exempting certain persons and property from such taxation is left largely within the discretion of the local authorities.[51] Public property as such is generally exempt from such a tax, independently of statute.[52] But property is not exempt from taxation for school purposes under a statute exempting it from taxation for general city or town[53] or state purposes.[54] Under some statutes railroad property is exempted from school taxation; [55] but an exemption of a railroad company from state and county taxes does not exempt it from local taxation for school purposes.[56]

**c. Levy and Assessment** — (I) *POWER AND DUTY TO LEVY IN GENERAL.*[57] The power and duty of making a levy for school taxes is as a general rule in a certain designated board or officers only,[58] and they cannot delegate this power

is in violation of Const. art. 8, § 8. New York, etc., R. Co. *v.* Northampton County, 92 Va. 661, 24 S. E. 221, holding further that under Code, § 833, subds. 2, 3, a levy upon railroad property for district school purposes is unauthorized.

**48.** Daniels *v.* Strader, 39 Ind. 63; Root *v.* Erdelmyer, Wils. (Ind.) 99; Little *v.* Little, 131 Mass. 367.

**49.** See, generally, TAXATION.

**50.** Elizabethtown Dist. Public School *v.* Louisville, etc., R. Co., 30 S. W. 620, 17 Ky. L. Rep. 160; Louisiana, etc., R. Co. *v.* State Bd. of Appraisers, 120 La. 471, 45 So. 394. See also Coleman *v.* Emanuel County Bd. of Education, 131 Ga. 643, 63 S. E. 41.

**Where a county has the constitutional power of taxation** for school purposes, a statute attempting to take away such power by exempting a certain town within the county's jurisdiction from such taxation is unconstitutional and void. Washington County *v.* Saltville Land Co., 99 Va. 640, 39 S. E. 704.

**Estates of officers or soldiers.**—A statutory provision opening "all the public schools in the state to the children of officers and soldiers," etc., "without any cost or expense for taxes, or other charges imposed for purposes of public education," does not exempt the estate of such an officer or soldier from taxation levied for school purposes. Carpenter *v.* Hopkinton School Trustees, 12 R. I. 574.

**Exemption of supporters of separate Roman Catholic schools** from payment of taxes for public schools see McCarthy *v.* Regina, 5 Northwest. Terr. 71; *In re* Roman Catholic Separate Schools, 18 Ont. 606. Such supporters are not exempt from taxation for charges incurred before the establishment of the separate Roman Catholic school. *In re* Tiernan, 15 U. C. Q. B. 87.

**Exemption of protestant** sending children to a protestant separate school or subscribing thereto from common school rates see Harling *v.* Mayville, 21 U. C. C. P. 499.

**Exemption under Nova Scotia Rev. St. c. 32, § 52,** of the city of Halifax, but not of the town of Dartmouth, from county school rates see Dartmouth *v.* Reg., 9 Can. Sup. Ct. 509 [*affirming* 13 Nova Scotia 402], 14 Can. Sup. Ct. 45 [*affirming* 17 Nova Scotia 311].

**51.** Enos *v.* Hulett, 13 Barb. (N. Y.) 111.

**Where indigent persons are exempted** by school trustees from the payment of teachers' wages, the amount thereof must be assessed on other persons subject to be taxed for the quarter or term in which the exemption is allowable. Enos *v.* Hulett, 13 Barb. (N. Y.) 111.

**52.** Schuylkill County *v.* North Manheim Tp., 42 Pa. St. 21.

**A county poor-house** is not taxable for school purposes by the school directors of the township in which it is situated. Schuylkill County *v.* North Manheim Tp., 42 Pa. St. 21.

**53.** South Bend *v.* Notre Dame Du Lac University, 69 Ind. 344.

**54.** Conyngham School Dist.'s Appeal, 77 Pa. St. 265. But see Locust Mountain Coal, etc., Co. *v.* Curran, 10 Phila. (Pa.) 543.

**55.** See Canadian Pac. R. Co. *v.* Winnipeg, 30 Can. Sup. Ct. 558 [*reversing* 12 Manitoba 581]; Balgonie Protestant Public School Dist. *v.* Canadian Pac. R. Co., 5 Northwest. Terr. 123.

**A railroad company cannot claim exemption** from taxation under a statute exempting the property of negro residents, on the ground that it is not subject to identification by color, or on the ground that it may thereafter be made liable for a similar tax for colored schools. Elizabethtown Dist. Public School *v.* Louisville, etc., R. Co., 30 S. W. 620, 17 Ky. L. Rep. 160, 64 S. W. 974, 23 Ky. L. Rep. 1169.

**56.** Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516; Moore *v.* Holliday, 17 Fed. Cas. No. 9,765, 4 Dill. 52.

**57. Effect of change of boundaries or creation of new district** see *infra*, III, F, 4, f.

**58.** Wood *v.* Tipton School Corp., 132 Ind. 206, 31 N. E. 799 (holding that, under Rev. St. (1881) §§ 4467, 4468, the trustees of cities having the power to levy a special tax for school purposes within certain limita-

to others,[59] nor can a levy be made by officers not legally authorized;[60] and if made by unauthorized officers, it cannot be ratified by the board or officers having authority to make the levy in the first instance.[61] Under some constitutions or statutes the power and duty of levying school taxes, or of doing certain acts relative thereto, is in the county court,[62] or in certain county officers to be levied with county taxes,[63] or in certain municipal authorities to be levied with municipal taxes.[64]

(II) *MAKING, REQUISITES, AND VALIDITY IN GENERAL.* Taxes for school purposes are to be levied in the same manner as those for municipal, county, or state purposes,[65] except in so far as specially regulated by constitutional, statutory, or charter provisions;[66] and although it has been held that, in order that there may be a valid levy of special taxes, there must be a strict compliance with the provisions relative thereto,[67] ordinarily there need be only a substantial compliance with the statute in levying school taxes.[68] Mere irregularities or informalities

tions have the exclusive right to determine the amount of and make such levy within the prescribed limits, without any action of the board of commissioners of the county); Cole *v.* State, 131 Ind. 591, 31 N. E. 458 (holding that under Rev. St. §§ 4467, 5995, it is unnecessary that the county commissioners concur in a levy of a special school tax by a township trustee); Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109.

**59.** Shepardson *v.* Gillete, 133 Ind. 125, 31 N. E. 788.

**60.** Shepardson *v.* Gillete, 133 Ind. 125, 31 N. E. 788; Burlington, etc., R. Co. *v.* Saunders County Com'rs, 9 Nebr. 507, 4 N. W. 240; Sharp *v.* Froehlich, (N. J. Sup. 1897) 37 Atl. 1024.

**61.** Shepardson *v.* Gillete, 133 Ind. 125, 31 N. E. 788.

**62.** Worthen *v.* Badgett, 32 Ark. 496; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Murphy *v.* Harbison, 29 Ark. 340.

**Recommendation by the school trustee** is a prerequisite to a levy of school taxes by the county court under the Arkansas statute. Murphy *v.* Harbison, 29 Ark. 340.

**63.** State *v.* Hunter, 119 Wis. 450, 96 N. W. 921.

**In Florida,** under art. 12 of the constitution, county taxes for public schools must be specifically levied for that purpose, differentiated from a levy for other county purposes. State *v.* L'Engle, 40 Fla. 392, 24 So. 539.

**In Minnesota,** while school taxes for independent school-districts are to be extended and collected by the same county officers as county taxes, the county commissioners have nothing to do with determining the amount to be raised, or approving the action of the district in that regard. State *v.* Lakeside Land Co., 71 Minn. 283, 73 N. W. 970.

**In South Carolina,** under Const. art. 11, § 6, and 23 St. at L. § 13, the county commissioners have only administrative power as to a school tax, and have no power to do anything other than to see that such tax is entered for collection, and an entry of such tax without any action by such commissioners does not affect its validity. Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

**64.** Wood *v.* Tipton School Corp., 132 Ind. 206, 31 N. E. 799; Reno County School Dist. No. 76 *v.* Ryker, 64 Kan. 612, 68 Pac. 34.

**Approval of amount.**— Under R. I. St. c. 51, § 4, empowering a school-district to raise money by taxation, "provided that the amount of the tax shall be approved by the school committee of the town," the committee's approval need not precede the voting of the tax. Seabury *v.* Howland, 15 R. I. 446, 8 Atl. 341 [*distinguishing* Holt's Appeal, 5 R. I. 603]. So the duty of a city council under Okla. St. (1893) c. 73, art. 7, § 15, to approve the levy of a school tax by a school-board is mandatory; and the council has no discretion to determine from any cause that the tax is too high, or to reduce the levy. Kingfisher Bd. of Education *v.* Kingfisher, 5 Okla. 82, 48 Pac. 103.

**65.** Glass *v.* Billings, 59 Kan. 776, 53 Pac. 125; Chadwick *v.* Crapsey, 35 N. Y. 196. And see, generally, COUNTIES, 11 Cyc. 580 *et seq.*; MUNICIPAL CORPORATIONS, 28 Cyc. 1690 *et seq.*; TAXATION.

**66.** See the constitutions and statutes of the several states.

**In Iowa** where two independent districts embrace common territory, such territory should be included within the district whose organization was first commenced, and a school tax thereon should be levied in its favor; and whether or not such territory is contiguous to the district will not be considered by the courts when it does not appear that the aid of the school officers has been invoked. Sheldon Independent Dist. *v.* Sioux County, 51 Iowa 658, 2 N. W. 590.

**67.** Bramwell *v.* Guheen, 3 Ida. 347, 29 Pac. 110 (holding that where the statute provides for the levying of a special tax by a school-district, and prescribes the manner in which such levy must be made, a literal compliance with the requirements of the statute is necessary to the validity of the tax); Northern Coal, etc., Co. *v.* Dunphy, 11 Pa. Dist. 218, 8 Del. Co. 433, 10 Kulp 491 (holding that school directors must comply strictly with the provisions of the act of April 11, 1862, in levying a school building tax, and the minutes must show that the tax was levied after due deliberation by a majority of the whole number of directors).

**68.** Holland *v.* Davies, 36 Ark. 446; Black-

in making a levy should be overlooked and disregarded;[69] and the acts of the officers making the levy, whether they act *de jure* or *de facto*, will not be inquired into by a court of equity for mere irregularities;[70] but on the other hand will be held binding until vacated by certiorari or some other direct proceedings.[71] General statutory provisions relative to the levying of school taxes do not affect the levying of a tax under a special statute which prescribes the procedure for the levy of such a tax.[72] A levy of a school tax must be made for a purpose which the statute permits,[73] and must specify with certainty the purpose for which it is levied;[74] and in extending such tax items improperly included may be stricken out.[75] It has been held that taxes for purposes which are distinct and separate, such as school purposes proper and school building purposes, cannot be united in one levy.[76] A void levy does not prevent the proper authorities from subsequently making a valid levy.[77]

(III) *TIME FOR LEVY.* The time for making a levy of taxes for school purposes is usually fixed by a statutory or charter provision,[78] which time under

stone *v.* Taft, 4 Gray (Mass.) 250; Walker *v.* Edmonds, 197 Pa. St. 645, 47 Atl. 867.

**Where a levy is assailed,** to sustain its validity it must affirmatively appear from the proceedings that the district kept within the limits of the statute, that what was done was done in accordance therewith, and that the levy was for a purpose and use which the statute permits. Shaw *v.* Lockett, 14 Colo. App. 413, 60 Pac. 363.

**Record.**— Under a statute which requires the official acts of each school-board to be recorded by its clerk, a tax levy which has been duly signed and filed is not invalidated by the failure to record the action of the officers in making the levy, where the officers charged with carrying the levy forward act upon the certificate of levy and not upon the record of the board. Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197. So where the legislature delegates to the taxable inhabitants of a district the power to raise a school tax the tax will not be held invalid because the records of their proceedings do not show that every provision of the law is complied with, if the contrary is not shown. Burgess *v.* Pue, 2 Gill (Md.) 11, 254.

**A voluntary subscription** by the freeholders and householders of a school section among themselves for the expenses of a school cannot be used as a substitute for the provisions made by law; and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to an avowry for a rate levied by them in the usual way. McMillan *v.* Rankin, 19 U. C. Q. B. 356.

**69.** Holland *v.* Davies, 36 Ark. 446; State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

**70.** Schofield *v.* Watkins, 22 Ill. 66.

**71.** Schofield *v.* Watkins, 22 Ill. 66.

**72.** Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728; Commercial Bank *v.* Sanford, 103 Fed. 98.

**73.** Shaw *v.* Lockett, 14 Colo. App. 413, 60 Pac. 363. And see *supra*, III, F, 4, a, (IV).

**74.** Koelling *v.* People, 196 Ill. 353, 63 N. E. 735 (holding that an ordinance levying a tax for school purposes which specifies one amount as required for building purposes and another amount for educational purposes is sufficiently definite, and that it is unnecessary to separate the amounts for buildings and for sites, and to specify the items embraced under educational purposes); Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389; U. S. Fidelity, etc., Co. *v.* Somerset Public Graded Schools Bd. of Education, 118 Ky. 355, 80 S. W. 1191, 26 Ky. L. Rep. 246.

**A misdescription** of a school tax, by mistake in treating it as levied as a county school tax, does not affect the nature of the tax, where the county board which makes such levy has no authority to levy school taxes for the use of the county, but only for the use of the taxing district. State *v.* Hunter, 119 Wis. 450, 96 N. W. 921.

**Items for educational purposes** which are improperly included in a levy for building purposes cannot be held valid even though the tax levied for educational purposes does not equal the amount authorized by law, since the funds for the two purposes cannot be commingled, and taxes levied for one purpose cannot be applied to the other. Knopf *v.* People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17.

**Parol evidence.**—Where the minutes of a school-board fail to show an annual tax for ordinary school purposes, the fact that there was such a tax may be shown by parol evidence, in order to support the legality of a special levy. Parker Tp. School Dist. *v.* Bruin Borough School Dist., 13 Pa. Dist. 769.

**75.** Knopf *v.* People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17.

**76.** State *v.* Wabash, etc., R. Co., 90 Mo. 166, 2 S. W. 275. But see Koelling *v.* People, 196 Ill. 353, 63 N. E. 735.

**77.** Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389.

**78.** Standard Coal Co. *v.* Angus Independent Dist., 73 Iowa 304, 34 N. W. 870; Atchison, etc., R. Co. *v.* Neosho County School Dist. No. 99, 75 Kan. 843, 89 Pac. 1018, holding that where a tax levy is made within the proper time by a school-district duly organized, and upon property which is within

some statutes is held to be mandatory,[79] while under others it is held to be merely directory, and a levy held valid, although it is not made until a later time.[80] It has been held that where an old school-house is condemned the school-district officers may immediately levy a tax to be applied in building a new school-house, without waiting until an appeal is taken from the condemnation.[81]

(IV) *SUBMISSION TO VOTERS* — (A) *In General.* In the absence of statute, or in cases in which the statute does not apply, a levy of a school tax may be made by the school-district authorities without the question being first submitted to a vote of the people;[82] but in most jurisdictions there are constitutional, statutory, or charter provisions which require as a prerequisite to the levying of a school tax that the question of the tax shall be submitted to and approved by the voters or inhabitants of the school-district,[83] at least when it is levied for a special purpose,[84]

the district when the levy is made, and none of the property pays school taxes for that year in any other district, the tax is valid and legal.

79. Standard Coal Co. *v.* Angus Independent Dist., 73 Iowa 304, 34 N. W. 870, holding that Code (1873), § 1738, providing that "no tax shall be levied by the board [of directors] after the third Monday in May" is mandatory, and a tax levied after that time is void.

80. Perrin *v.* Benson, 49 Iowa 325; Walker *v.* Edmonds, 197 Pa. St. 645, 47 Atl. 867; Gearhart *v.* Dixon, 1 Pa. St. 224.

81. Fremd *v.* Eminence Deposit Bank, 42 S. W. 102, 19 Ky. L. Rep. 825.

82. Lippincott *v.* Jacksonville School Dist. Bd. of Education, 186 Ill. 205, 57 N. E. 772; Macklin *v.* Common School Dist. No. 9, 88 Ky. 592, 11 S. W. 657, 11 Ky. L. Rep. 75, holding that in case of the condemnation of an old school-house, no vote is required to be taken to authorize the levy of a tax for the purpose of building a new school-house, but that the school trustees cannot order the tax, unless a necessity for the house exists, or they have been notified that the old house has been condemned.

83. *Arkansas.*—Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Murphy *v.* Harbison, 29 Ark. 340.

*Delaware.*— Steward *v.* Jefferson, 3 Harr. 335.

*Kentucky.*— Bowman *v.* Middlesboro, 91 S. W. 726, 20 Ky. L. Rep. 1290.

*Michigan.*— Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

*Montana.*— See Hilburn *v.* St. Paul, etc., R. Co., 23 Mont. 229, 58 Pac. 551, 811, statute held inoperative and void.

*New Hampshire.*— See Davis *v.* Haverhill School Dist., 43 N. H. 381.

*New York.*— Haley *v.* Whitney, 53 Hun 119, 6 N. Y. Suppl. 342 (holding that, under the Laws of 1864, a school trustee has no power to include in his levy a tax to supply a deficiency in a former year without a vote of the taxpayers); Enos *v.* Hulett, 13 Barb. 111; Robinson *v.* Dodge, 18 Johns. 351.

*North Carolina.*— Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524, holding that Priv. Acts (1905), c. 204, authorizing the trustees of a graded school district to levy a tax and issue bonds when the act is approved by the majority of the qualified voters is a valid exercise of legislative authority.

*Texas.*—Dwyer *v.* Hackworth, 57 Tex. 245; Ft. Worth *v.* Davis, 57 Tex. 225.

*Vermont.*— Adams *v.* Crowell, 40 Vt. 31 (holding that a vote to sustain a school for a definite period is not equivalent to a vote to defray the expenses of that school, so as to authorize the assessment of a tax for that purpose on the grand list of the district); Bowen *v.* King, 34 Vt. 156.

See 43 Cent. Dig. tit. "Schools and School Districts," § 241.

**School-districts as public quasi-corporations,** are included in the term "municipal corporations" as used in N. C. Const. art. 7, § 7, and come within the express provisions that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc.; nor shall any tax be levied, unless by a vote of the . . . qualified voters." Smith *v.* Robersonville Graded School, 141 N. C. 143, 53 S. E. 524.

**An election under a statute which is declared unconstitutional** does not warrant an assessment under a subsequent amendatory statute. Dolvin *v.* Lewis, 131 Ga. 29, 61 S. E. 913.

**A special meeting** of the voters of a school-district may be legally held, to order the raising of a tax which had been refused at a previous annual meeting. Stanton *v.* Neptune City Bd. of Education, 68 N. J. L. 496, 53 Atl. 236 [*affirmed* in 70 N. J. L. 336, 57 Atl. 1133].

84. *California.*— People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660.

*Colorado.*— Prowers County *v.* Pueblo, etc., R. Co., 3 Colo. App. 398, 33 Pac. 682.

*Florida.*— Pickett *v.* Russell, 42 Fla. 116, 28 So. 764.

*Georgia.*— Chipley *v.* Layfield, 120 Ga. 33, 47 S. E. 539, holding that the act of Aug. 1, 1903, authorizing the levy of an annual special tax for the improvement of school property without submitting the question to the qualified voters is void under Const. art. 8, § 4, pt. 1.

*Illinois.*— Greenwood *v.* Gmelich, 175 Ill. 526, 51 N. E. 565, holding that a levy of taxes by the board of education to build a high school without calling an election is invalid.

or for increasing the rate of the general school taxes,[85] or supplementing the funds received from the state public school fund;[86] and under some statutes the power of fixing and levying a tax for school purposes, or to a certain limit, is vested in the school board or officers without a vote of the school-district, and for other purposes, or beyond such limit, the levy must be authorized by a vote of the people.[87] But general statutory provisions requiring such a vote ordinarily do not apply to cities or other school-districts acting under special charter or statutory provisions concerning public schools, and if such special provisions do not so require, a school tax may be levied in such city or district without submitting the question to the voters.[88] A failure to submit such question when required by statute or constitution is a jurisdictional defect which will render an attempted levy by the school-board void.[89]

(B) *Requisites of Vote.* Every essential requirement in regard to the steps to be taken, and the manner thereof, must be substantially complied with in submitting and voting upon the question of levying a tax for school purposes,[90] as that, when

*Louisiana.*— Gruner *v.* Claiborne Parish Police Jury, 119 La. 551, 44 So. 295.

*Montana.*— State *v.* Cave, 20 Mont. 468, 52 Pac. 200, for additional "school facilities."

*North Carolina.*— Goldsboro Graded School *v.* Broadhurst, 109 N. C. 228, 13 S. E. 781.

See 43 Cent. Dig. tit. "Schools and School Districts," § 241.

**A statute requiring that the question of building a school-house shall be submitted** to the electors does not require that the cost of such building shall be passed upon and a levy made therefor. People *v.* Chicago, etc., R. Co., 186 Ill. 139, 57 N. E. 838; Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367.

**85.** Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000; State *v.* Phipps, 148 Mo. 31, 49 S. W. 865.

**86.** Davis *v.* Ponder, 131 Ga. 713, 63 S. E. 220; Cairo Banking Co. *v.* Ponder, 131 Ga. 708, 63 S. E. 218.

**87.** Munson *v.* Minor, 22 Ill. 594 [*distinguishing* Beverly *v.* Sabin, 20 Ill. 357], holding that under the act of 1853, school directors have power to levy a tax for the purpose of supporting a school for six months in each year without submitting the question to the vote of the district, but that they cannot erect a school-house costing more than one thousand dollars, or change a site without such a vote); Merritt *v.* Farris, 22 Ill. 303; Schofield *v.* Watkins, 22 Ill. 66; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153 (holding that the board of directors alone has authority to vote or fix the rates to be levied for teachers' funds or contingent funds, and that such a tax voted by the electors and not by the directors is illegal); Snyder *v.* Wampton, 12 Iowa 409; State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

**Mo. Rev. St. (1889) §§ 9757, 9758,** authorizing boards of education to make estimates for the levying of sinking and interest fund taxes, to be levied in the same manner as other taxes for school purposes, does not require that the levy of such taxes be sanctioned by a vote of the taxpayers. Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000.

**88.** Lippincott *v.* Jacksonville School Dist. Bd. of Education, 186 Ill. 205, 57 N. E. 772; Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728.

**89.** Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000.

**Under Mich. Pub. Acts (1891), No. 176, § 9,** providing that in case the electors at any annual township meeting shall neglect or refuse to determine the amount to be raised for school purposes, the board of education shall determine the same, unless a proposition to determine the amount so to be raised is submitted to the electors at an annual meeting, they cannot be said to have neglected or refused to vote the same and a resolution of the board of education to raise a certain sum by taxation for such purpose is void. Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

**90.** *Arkansas.*— Holland *v.* Davies, 36 Ark. 446.

*Kentucky.*— Bowman *v.* Middlesboro, 91 S. W. 726, 28 Ky. L. Rep. 1290.

*Louisiana.*— Regard *v.* Avoyelles Police Jury, 117 La. 952, 42 So. 438; Bennett *v.* Staples, 110 La. 847, 34 So. 801.

*Maine.*— Knowles *v.* Chesterville School Dist. No. 10, 63 Me. 261.

*Missouri.*— Benton *v.* Scott, 168 Mo. 378, 68 S. W. 78.

See 43 Cent. Dig. tit. "Schools and School Districts," § 241.

**Repeal of statute.**— La. Acts (1904), No. 145, directly repeals Act (1898), No. 131, relating to the manner in which special elections in school-districts shall be held. Baucum *v.* Claiborne Parish Police Jury, 119 La. 532, 44 So. 289.

**A provision as to the time for opening and closing the polls** is directory merely, and an election should not be set aside and its object defeated for want of a strict compliance with the statute in such respect, where no obstruction or impediment to the will of the people is shown. Holland *v.* Davies, 36 Ark. 446.

**Voting viva voce** in a special school-district for a school tax is not in violation of a constitutional provision requiring all elections to be by ballot, since such a provision does not apply to the mere ascertainment of the will of the taxpayers authorized to deter-

required, there must be a proper petition of the taxpayers for the vote,[91] an order for the election,[92] and a proper notice or warning thereof;[93] that the question must be submitted in the manner prescribed;[94] and that the vote must be upon the particular question submitted,[95] as set forth in the notice or warning of the election,[96] and must be passed by voters of the required qualification,[97] and number

mine the amount of tax to be levied. Martin *v.* Laurens School Dist., 57 S. C. 125, 35 S. E. 517.

**Second election.**—A statutory provision that where a proposition to levy a school-district tax shall be defeated, no election for that purpose shall be ordered until after the expiration of one year, is complied with where a year has elapsed before the holding of the second election, notwithstanding the order for the election is made before the expiration of the year. Parks *v.* West, (Tex. Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in (1908) 111 S. W. 726, 113 S. W. 529].

**A statute relative to elections in connection with quasi-public improvements** or railway enterprises have no application to special tax elections in aid of public schools. Flores *v.* De Soto Parish Police Jury, 116 La. 428, 40 So. 785.

**91.** Coleman *v.* Emanuel County Bd. of Education, 131 Ga. 643, 63 S. E. 41; Rhomberg *v.* McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571, holding further that it is not necessary that the names of the petitioners appear on the last assessment-roll of the county, although the statute declares this to be one of the qualifications of the voters at the election.

**In Louisiana,** under Const. art. 232, and the act of 1898, the petition of taxpayers for an election for the purpose of voting a school tax must state the amount to be realized each year from the tax and it will not suffice that the petition merely specifies the rate of the proposed tax. Bennett *v.* Rapides Parish Police Jury, 113 La. 68, 36 So. 891. But under the act of 1904 which provides for the ratification of the petition of all taxpayers for the levy of special taxes, the fact that such petition does not set out the amount of the tax does not render the election thereunder invalid. Baucum *v.* Claiborne Parish Police Jury, 119 La. 532, 44 So. 289.

**Qualification of petitioners.**—Under Ky. St. § 4464, the petitioners themselves must be taxpayers and it is not sufficient that their wives pay taxes. Tate *v.* Erlanger School Dist. No. 32, 49 S. W. 337, 20 Ky. L. Rep. 1370.

**92.** Fordsville Graded School Dist. No. 96 *v.* McCarty, 68 S. W. 147, 24 Ky. L. Rep. 164 (order shall be at next term); Tate *v.* Erlanger School Dist. No. 32, 49 S. W. 337, 20 Ky. L. Rep. 1370 (holding that the requirement that the order for an election to vote a tax on a school-district shall be made at the term succeeding that at which the petition is presented is mandatory, and an order made at the same term is void); Parks *v.* West, (Tex. Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in (1908) 111 S. W. 726, 113 S. W. 529] (holding that under Rev. St. (1895) art. 3996, the order must state the exact rate of the tax proposed to be levied, and that an election held under an order that the tax should not exceed twenty-five cents on the one hundred dollars' valuation is void); Lowrance *v.* Schwab, 46 Tex. Civ. App. 67, 101 S. W. 840 (holding that an order for an election which takes from the voters the discretion as to the amount to be voted renders an election thereunder void).

**Where the election is to determine whether bonds shall be issued and a tax levied,** the amount of the tax and the amount of the bonds must both be stated in the order. Parks *v.* West, (Tex. Civ. App. 1908) 108 S. W. 466 [*reversed* on other grounds in (1908) 111 S. W. 726, 113 S. W. 529].

**93.** Sherwin *v.* Bugbee, 17 Vt. 337, holding that it is necessary that the warning for a meeting of a school-district should be recorded by the district clerk, and that if it does not appear from such record that the hour of day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence that in the original warning the hour for the meeting was named. See also Meisner *v.* Meisner, 32 Nova Scotia 320.

**94.** Rogers *v.* Kerr, 42 Ark. 100 (holding that where, under an act providing that the votes for school taxes shall contain the words "for tax" or "against tax," with the sum placed thereafter which each voter prefers, the votes contain no sums, a levy of any tax is illegal); Ft. Worth *v.* Davis, 57 Tex. 225.

**95.** See Ft. Worth *v.* Davis, 57 Tex. 225.

**96.** State *v.* Browning, 28 N. J. L. 556; Vaughn *v.* Tillamook County School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393.

**"School purposes,"** as used in such a notice or warning, means the ordinary and current expenses in sustaining the existing schools, and does not include the proposition of raising money for the purpose of erecting a high school building. Allen *v.* Burlington, 45 Vt. 202.

**97.** Pickett *v.* Russell, 42 Fla. 116, 28 So. 764 (holding that Laws (1895), c. 4336, authorizing an election to determine the rate to be assessed in school-districts, and limiting the right to vote thereat to qualified and registered voters who are taxpayers, is not inoperative because neither it nor any other statute provides a method, by registration or otherwise, of ascertaining who are the qualified electors of a school-district and therefore entitled to vote at elections authorized by it); Gruner *v.* Claiborne Parish Police Jury, 119 La. 551, 44 So. 295 (property taxpayers entitled to vote under the election laws of the state); Regard *v.* Avoyelles Police Jury, 117 La. 952, 42 So. 438 (holding that under Const. art. 232, the right to vote as relates to property depends upon the property owned by the voter, and that when he votes he

or majority.[98] The vote or resolution passed at such an election should usually state with certainty the amount or rate,[99] and the purpose of the tax, as being for authorized school purposes.[1] It has been held that it is not essential to the validity of the vote that the particular object for which the tax is laid should be specified;[2]

should indorse what property he votes, and not leave it to the election supervisors or commissioners to determine after the election); Flores *v.* De Soto Parish Police Jury, 116 La. 428, 40 So. 785; Hillsman *v.* Faison, 23 Tex. Civ. App. 398, 57 S. W. 920. See also McGregor *v.* Patterson, 5 Nova Scotia 211; Pino *v.* Shaw, 1 Nova Scotia Dec. 362.

**Registration of voters** qualified to vote at a school-district election see Pickett *v.* Russell, 42 Fla. 116, 28 So. 764.

**Property qualification** see Hillsman *v.* Faison, 23 Tex. Civ. App. 398, 57 S. W. 920.

**A taxpayer has no constitutional right to participate** in the proceedings of a school-district for the voting of a tax for the construction of a school-house, and a non-resident taxpayer cannot be relieved from the payment of taxes on his property within the district by reason of the fact that he has no voice in the election authorizing the tax. Grout *v.* Illingworth, 131 Iowa 281, 108 N. W. 528.

**Poll tax.**— Under La. Const. art. 232, in order that a voter may be entitled to vote at a special election for the purpose of passing upon a tax to be levied for school purposes, he must have paid his poll tax for the two years preceding. Gruner *v.* Claiborne Parish Police Jury, 119 La. 551, 44 So. 295.

**Where a person must be qualified to vote in general elections and also be a taxpayer within the district,** in order to be qualified to vote at a special school tax election a petition alleging that at such an election no one was allowed to vote except qualified voters and those who, in addition to such qualification, were property taxpayers, is insufficient, as it does not allege that they were taxpayers within the district. Miller *v.* Crawford Independent School Dist., 26 Tex. Civ. App. 495, 63 S. W. 894.

**Any spinster or widow** residing in a district who is a taxpayer, or who has children within school age, is a qualified voter at an election concerning district taxation, under Ky. St. (1903) § 4458. Arbuckle *v.* McKinney, 97 S. W. 408, 30 Ky. L. Rep. 55.

98. Pickett *v.* Russell, 42 Fla. 116, 28 So. 764; Goldsboro Graded School *v.* Broadhurst, 109 N. C. 228, 13 S. E. 781; Hillsman *v.* Faison, 23 Tex. Civ. App. 398, 57 S. W. 920.

**Under a statute authorizing a levy if "the clearly ascertained will of the people shall be in favor of it,"** and providing that if a majority of those voting shall vote in favor of the tax, the sheriff shall collect it, a majority of those voting at an election held pursuant to the statute constitutes the clearly ascertained will of the people. McNees *v.* McGill, 4 Ky. L. Rep. 632.

**A provision authorizing a tax when two thirds** of the taxpayers shall vote for such tax means two thirds of all taxpayers who are qualified voters, and not two thirds of those voting. Dwyer *v.* Hackworth, 57 Tex. 245; Ft. Worth *v.* Davis, 57 Tex. 225.

**Returns of elections and canvassing the same** see Pickett *v.* Russell, 42 Fla. 116, 28 So. 764; McGinnis *v.* Bardstown Graded School Dist., 108 S. W. 289, 32 Ky. L. Rep. 1289; Arbuckle *v.* McKinney, 97 S. W. 408, 30 Ky. L. Rep. 55; Fordsville Graded School Dist. No. 96 *v.* McCarty, 68 S. W. 147, 24 Ky. L. Rep. 164.

**That ballots are improperly rejected at** such an election will not avoid the election, unless they are rejected fraudulently, or the rejected ballots would change the result of the election. Pickett *v.* Russell, 42 Fla. 116, 28 So. 764.

99. Myer *v.* Crispell, 28 Barb. (N. Y.) 54; Ackerman *v.* Vail, 4 Den. (N. Y.) 297; Trumbull *v.* White, 5 Hill (N. Y.) 46 (holding that the resolutions of a school-district meeting must specify some definite amount, and not leave it to be determined by the trustees at their discretion); Robinson *v.* Dodge, 18 Johns. (N. Y.) 351; Adams *v.* Sleeper, 64 Vt. 544, 24 Atl. 990 (holding that a vote "to have 24 weeks of school" and "to raise money to support the school and pay the indebtedness of the district" clearly warrants the assessment of a tax, it not being necessary that the vote shall show the rate per cent thereof); Brown *v.* Hoadley, 12 Vt. 472. But see Adams *v.* Hyde, 27 Vt. 221.

**A resolution to raise a single sum for building and furnishing** a school-house is not bad for uncertainty, because the amount to be used for building and the amount for furnishing are not separately stated. State *v.* Clark, 52 N. J. L. 291, 19 Atl. 462.

1. Canton West School Dist. *v.* Merrills, 12 Conn. 437. See also Meisner *v.* Meisner, 32 Nova Scotia 320.

**A statement that the purposes of the tax are to meet current expenses and running expenses** is sufficiently definite. Stanton *v.* Neptune City Bd. of Education, 68 N. J. L. 496, 53 Atl. 236 [*affirmed* in 70 N. J. L. 336, 57 Atl. 1133].

**A vote to appropriate money for school purposes** includes the power to raise the same by a special assessment, upon the property of the school-district. Chamberlain *v.* Cranbury Tp. Bd. of Education, 57 N. J. L. 605, 31 Atl. 1033.

**A vote to raise "all the law allows" for schools** is deficient in precision, but it may be made certain, and will not therefore render an assessment thereunder void. Hance *v.* Sickels, 24 N. J. L. 125; State *v.* Middletown, 24 N. J. L. 124.

**A vote which fails to show the purpose** for which the tax is voted does not authorize the district trustees to make a certificate to the assessor. Kaighn *v.* Browning, 28 N. J. L. 556.

2. Canton West School Dist. *v.* Merrills,

but on the other hand it has been held that the vote should designate particularly the purposes for which the tax is imposed,[3] and that it is not sufficient to state that it is "for incidentals," [4] or for school purposes generally.[5] A levy of a tax, valid without a vote, is not vitiated by an illegal vote authorizing it.[6] It has been held that where a levy is made for several taxes, one of which is illegal because not authorized by a vote of the district, the whole levy is void;[7] and that the result of an election may be contested in the courts only where jurisdiction of such question is conferred by statute.[8]

(c) *Effect of Irregularities in Vote.* The statutes providing for such an election should be interpreted with liberality, in view of the great public purposes which they accomplish, and mere irregularities or informalities in an election which do not affect the fairness of the election or the result should be overlooked and disregarded, and should not be held to render invalid a levy otherwise valid.[9] Thus it has been held that a levy of school taxes will not be rendered invalid by reason of an omission of the vote authorizing it to fix a time for its payment,[10] since a tax legally imposed is payable on demand or within a reasonable time;[11] nor will a levy be affected by mere irregularities or informalities in the return made by the judges of such an election,[12] although a failure to make any return of the election may render illegal any levy thereunder.[13]

(d) *Rescinding Vote.* A vote to levy a school tax may be rescinded at a regular or special election, provided the tax has not in the meantime been certified or levied by the school-board,[14] and it has been held that this may be done

12 Conn. 437; State *v.* Wolfrom, 25 Wis. 468, holding that the designation that such tax when voted is "for incidental purposes" is sufficiently specific.

**3.** State *v.* Cole, 51 N. J. L. 277, 18 Atl. 52; Banghart *v.* Sullivan, 36 N. J. L. 89; State *v.* Greenleaf, 34 N. J. L. 441; State *v.* Garrabrant, 32 N. J. L. 444; Kaighn *v.* Browning, 28 N. J. L. 556, holding that resolutions adopted at a school-district meeting lawfully convened should show on their face for which of the objects named in the notice of election the taxes are voted.

**4.** State *v.* Cole, 51 N. J. L. 277, 18 Atl. 52.

**5.** State *v.* Garrabrant, 32 N. J. L. 444.

**6.** Winters *v.* State, 9 Ind. 172, holding that the exercise of a power to levy a tax for building school-houses by township trustees, valid without the vote of the town, will not be vitiated by a vote of the town in pursuance of an unconstitutional statute authorizing such vote.

**7.** Haley *v.* Whitney, 53 Hun (N. Y.) 119, 6 N. Y. Suppl. 342.

**8.** Patterson *v.* Knapp, 125 Ky. 474, 101 S. W. 379, 31 Ky. L. Rep. 108, holding that where there is no provision in the statute for contesting the result of an election to determine whether a tax should be imposed in aid of a graded school, the courts have no jurisdiction of the subject-matter of an action brought to question the result of such an election.

**Setting aside election** see Regard *v.* Avoyelles Police Jury, 117 La. 952, 42 So. 438.

**9.** *Arkansas.*— Holland *v.* Davies, 36 Ark. 446.

*Georgia.*— Coleman *v.* Emanuel County Bd. of Education, 131 Ga. 643, 63 S. E. 41.

*Kentucky.*— Common School Dist. No. 88 *v.* Garvey, 80 Ky. 159; Fordsville Graded School Dist. No. 96 *v.* McCarty, 68 S. W. 147, 24 Ky. L. Rep. 164; Eakins *v.* Eakins, 20 S. W. 285, 14 Ky. L. Rep. 562; McNees *v.* McGill, 4 Ky. L. Rep. 632.

*Louisiana.*—Flores *v.* De Soto Parish Police Jury, 116 La. 428, 40 So. 785.

*Massachusetts.*—Blackstone *v.* Taft, 4 Gray 250.

*Texas.*— Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18, holding that an election is not rendered invalid by the fact that school trustees whose election as such was irregular because residing in territory not then legally attached to the district participated in calling the election.

See 43 Cent. Dig. tit. "Schools and School Districts," § 241.

**Correction of record.**—A court of equity may hear proof that the electors of a school-district, as empowered by statute, at a meeting authorized the levy of a tax, and correct the record of the meeting to show this, where such correction is not in contradiction of the record, but in harmony with, and necessary to make intelligible, what appears therein. Locker *v.* Keiler, 110 Iowa 707, 80 N. W. 433.

**The failure of the officers and clerks who hold the election to take the oath** prescribed by statute does not affect the validity of a school tax, as they are *de facto* officers whose acts cannot be questioned collaterally. Brasch *v.* Western Tie, etc., Co., 80 Ark. 425, 97 S. W. 445.

**10.** Bartlett *v.* Kinsley, 15 Conn. 327.

**11.** Bartlett *v.* Kinsley, 15 Conn. 327.

**12.** Holland *v.* Davies, 36 Ark. 446.

**13.** Hodgkin *v.* Fry, 33 Ark. 716.

**14.** Kirchner *v.* Wapsinonoc School Tp., (Iowa 1908) 118 N. W. 51 (holding, how-

although one of the electors has commenced an action to compel the board to certify and levy such tax.[15]

(v) *Certificates, Estimates, Reports, and Statements* — (a) *In General.* In most jurisdictions it is provided that before a levy for school taxes can be made, a certificate, estimate, report, or statement of the amount or rate required or voted for the current year, or for the particular purpose, shall be made by certain school officers to the board, officers, or meeting authorized to make the levy, and in order that a levy may be valid, it is essential that there should be a compliance with such provision in every substantial particular,[16] except where the provision is held to be merely directory.[17] In some jurisdictions such a certificate, report, or estimate is held to be in a sense jurisdictional, and a levy without it, or upon an invalid certificate or estimate is unauthorized and void,[18] and cannot be extended in any subsequent year as back taxes.[19] Moreover if such a report, certificate, etc., is not properly furnished, the levying board cannot be charged with neglect of duty in failing to levy the school tax.[20] Ordinarily such certificate constitutes a levy for school purposes, and is the only authority which

ever, that a school-board is not bound to call a special election to vote on such a proposition, on a petition of the electors); Hibbs *v.* Adams Dist. Tp., 110 Iowa 306, 81 N. W. 584, 48 L. R. A. 535.

**15.** Hibbs *v.* Adams Dist. Tp., 110 Iowa 306, 81 N. W. 584, 48 L. R. A. 535.

**16.** *Arkansas.*—Worthen *v.* Badgett, 32 Ark. 496 (holding that the county court has authority to cause to be placed on the tax books and collect only such rates as are reported from the school-districts); Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Union County Ct. *v.* Robinson, 27 Ark. 116.

*Colorado.*— People *v.* Lake County Com'rs, 12 Colo. 89, 19 Pac. 892, holding that where under Gen. St. c. 97, § 67, a resolution of a school meeting is regularly adopted, instructing the president or secretary of the school-board to certify to the county commissioners that it is necessary to levy a certain tax on the property of the district for a special fund, and this action is duly certified, there is a sufficient compliance with the requirements of the statute.

*Illinois.*— People *v.* Welsh, 225 Ill. 364, 80 N. E. 313; Chicago, etc., R. Co. *v.* People, 171 Ill. 544, 49 N. E. 489; Weber *v.* Ohio, etc., R. Co., 108 Ill. 451; People *v.* Wiltshire, 92 Ill. 260.

*Iowa.*— Kirchner *v.* Wapsinonoc School Tp., (1908) 118 N. W. 51 (holding that where the electors of a school township have voted to build a school-house, it is the duty of the secretary of the board of directors to certify the same to the board of supervisors, unless the vote is subsequently rescinded); Standard Coal Co. *v.* Angus Independent Dist., 73 Iowa 304, 34 N. W. 870; Cooper *v.* Nelson, 38 Iowa 440; Rose *v.* Hindman, 36 Iowa 160.

*Massachusetts.*— Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

*New Jersey.*— State *v.* Clark, 52 N. J. L. 291, 19 Atl. 462, holding that where a resolution to raise a sum of money to build a school-house is followed by a resolution that several bonds payable in successive years shall be issued, it is erroneous to issue a certificate to levy the whole amount in one year.

*Ohio.*— State *v.* Brewster, 39 Ohio St. 653.

*South Carolina.*— Dent *v.* Bryce, 16 S. C. 1.

*Washington.*— State *v.* Byrne, 32 Wash. 264, 73 Pac. 394.

*Wisconsin.*— Arnold *v.* Juneau County, 43 Wis. 627. See also State *v.* Hunter, 119 Wis. 450, 96 N. W. 921.

*Canada.*— London Bd. of Education *v.* London, 1 Ont. L. Rep. 284; Coleman *v.* Kerr, 27 U. C. Q. B. 5; Brockville School Trustees *v.* Brockville, 9 U. C. Q. B. 302. See also *In re* Port Rowan High School Trustees, 23 U. C. C. P. 11.

See 43 Cent. Dig. tit. "Schools and School Districts," § 242.

**17.** Woodland Bd. of Education *v.* Woodland Trustees, 129 Cal. 599, 62 Pac. 173; Smyth *v.* Titcomb, 31 Me. 272, holding that where a school-district votes to raise money authorized by law, and the assessors ascertained the fact and assess the same, the assessment is valid, although the district clerk does not certify to them the vote of the district.

**18.** *Illinois.*— St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364; Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 45 N. E. 122; Weber *v.* Ohio, etc., R. Co., 108 Ill. 451.

*Iowa.*— Standard Coal Co. *v.* Angus Independent Dist., 73 Iowa 304, 34 N. W. 870.

*Missouri.*— Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000; State *v.* Hannibal, etc., R. Co., 110 Mo. 265, 19 S. W. 816.

*Pennsylvania.*— Irvin *v.* Gill, 155 Pa. St. 8, 25 Atl. 649.

*Wisconsin.*— Powell *v.* St. Croix County, 46 Wis. 210, 50 N. W. 1013, holding that the want of such a statement as required by statute is a good defense to a foreclosure suit on a tax deed based on such a tax.

See 43 Cent. Dig. tit. "Schools and School Districts," § 242.

**19.** Weber *v.* Ohio, etc., R. Co., 108 Ill. 451.

**20.** Beard *v.* Lee County, 51 Miss. 542.

the assessing officer has for extending the tax;[21] and the validity of the tax is dependent upon the certificate, and not upon the records of the board meeting.[22] Under some statutes such an estimate, certificate, or report must be made to the county board or officers, to be levied with the county taxes,[23] or to the municipal authorities, to be levied with the municipal taxes.[24] An estimate furnished may be withdrawn before it is acted upon, and another substituted in its stead,[25] in which case defects in the former will not affect a levy based on the later estimate.[26]

(B) *Sufficiency of Certificate or Report.* Such a certificate, report, estimate, or statement must substantially comply with all the essential requirements of the constitution or statute relative to the time within which it must be made and delivered,[27] and as to its form and contents,[28] as that it shall state all facts neces-

**21.** St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364.

**22.** St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364. See also Weber *v.* Ohio, etc., R. Co., 108 Ill. 451.

**23.** *Colorado.*— People *v.* County Com'rs, 12 Colo. 89, 19 Pac. 892.

*Florida.*— Tomasello *v.* Santa Rosa County Bd. of Public Instructions, 55 Fla. 341, 45 So. 886; State *v.* Volusia County, 28 Fla. 793, 10 So. 14; Jones *v.* State, 17 Fla. 411, holding that under the acts of 1874, and 1879, an assessor cannot be compelled to levy a county school tax merely on receiving the statement from the board of instruction of the amount necessary to be raised, or upon their order, but only on the order of the board of county commissioners.

*Illinois.*— Chicago, etc., R. Co. *v.* People, 205 Ill. 625, 69 N. E. 72.

*Minnesota.*— State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

*Missouri.*— Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000; State *v* Phipps, 148 Mo. 31, 49 S. W. 865.

*Nebraska.*— Burlington, etc., R. Co. *v.* Saunders County, 9 Nebr. 507, 4 N. W. 240.

*Washington.*— State *v.* Byrne, 32 Wash. 264, 76 Pac. 394, holding that under Sess. Laws (1897), c. 118, § 97, which repealed Sess. Laws (1889-1890), c. 2, § 5, a county commissioner's duty in making a levy is ministerial only, and that the statute is therefore not objectionable as vesting one municipal corporation with taxing functions belonging to another.

See 43 Cent. Dig. tit. "Schools and School Districts," § 242.

**An "itemized estimate"** of moneys required to be raised by county tax for school purposes, furnished by the board of public instruction to the board of county commissioners under the Florida statute, should contain not only a statement of the estimate of the expenditures for the school year, but should also give the estimated income from the state school tax, state school fund, and other probable sources, and should not contain items for the salary of the county superintendent, or for the compensation of the treasurer of the board of public instruction, but may contain an item for outstanding warrants which were issued by the board of public instruction, for the payment of the indebtedness of the board and which are still unpaid. State *v.* Board of County Com'rs, 17 Fla. 418.

**24.** Woodland Bd. of Education *v.* Woodland Bd. of Trustees, 129 Cal. 599, 62 Pac. 173 (holding that the provision of the act of March 13, 1883, § 798, subd. 8, which requires the board of trustees of a city, after an estimate has been made by the board of education of the amount of money required for school purposes, to add such amounts to the amount required to be assessed and collected for city purposes, is directory only and does not deprive the board of trustees of the power to determine the amount of money to be raised by taxation for school purposes in any one year); People *v.* Welsh, 225 Ill. 364, 80 N. E. 313; State *v.* New Orleans, 121 La. 762, 46 So. 798.

**25.** State *v.* Thorp, 148 Mo. 31, 49 S. W. 865.

**26.** State *v.* Thorp, 148 Mo. 31, 49 S. W. 865.

**27.** Mitchell *v.* McCormick, 9 Kulp (Pa.) 286, holding that where estimates for the purchase of school-houses and the opening of schools have not been made at the beginning of the year, before the levy of the school tax, a levy based on estimates subsequently made is void.

**A failure to certify a school tax by the day named** in the statute does not invalidate the tax; and if certified after such day it is a mere irregularity which may be cured by statute. Moore *v.* Fessenbeck, 88 Ill. 422; Buck *v.* People, 78 Ill. 560. But see Cowgill *v.* Long, 15 Ill. 202.

**28.** Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805; People *v.* Chicago, etc., R. Co., 223 Ill. 448, 79 N. E. 151; Black *v.* Early, 208 Mo. 281, 106 S. W. 1014; Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31; Bryant *v.* Goodwin, 9 Ohio St. 471. See also *In re* Port Rowan High School Trustees, 23 U. C. C. P. 11; Port Hope School Trustees *v.* Port Hope, 4 U. C. C. P. 418; *In re* Mount Forest School Trustees, 29 U. C. Q. B. 422; *In re* Sandwich School Trustees, 23 U. C. Q. B. 639.

**The form** of certificate prescribed by statute as the basis of a school levy is mandatory. St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364; Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 45 N. E. 122.

**The absence of a date** has been held to be

sary to show that the prerequisites of a lawful tax have been complied with,[29] and shall specify with certainty the purpose or purposes for which the tax is required;[30] and, when required for several purposes, shall state specifically the amount required for each purpose.[31] Where such certificate or estimate is to be made by a school-board, it should be made and signed at or under the authority of a meeting of such board,[32] although the court may, in proceedings before it relating to such tax, and upon a proper showing, permit the certificate to be afterward signed.[33] Mere irregularities or informalities, however, in such a certificate

a fatal defect. *In re* South Fredericksburgh School Trustees, 37 U. C. Q. B. 534.

**Attestation.**— The oath of the clerk or other officer attached to such certificate should verify all the material facts therein stated. State *v.* Padden, 44 N. J. L. 151. But Minn. Gen. St. (1894) § 3802, providing that the clerk of the board of education shall furnish to the county auditor an attested copy of his record, stating the amount of money voted to be raised by the district for school purposes, or by the board of education, is not mandatory so that if the copy of the resolution of the board sent to the auditor is not attested, it does not vitiate the tax. State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

**Fixing rate.**— Under Mo. Rev. St. § 8005, which provides that whenever it shall become necessary in the judgment of the boards of directors of any school-district to increase the annual rate for school purposes, they shall determine the rate and submit to the voters whether the tax shall be increased as proposed by them, where the estimates returned by the several school-districts show that the boards fixed the rates, and that a majority of the voters voted in favor of an increase of the levy to those rates, the estimates sufficiently fix the rate from which to deduce the average rate of the districts for taxation for school purposes. State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

29. Kaighn *v.* Browning, 28 N. J. L. 556.

**Call of meeting.**—Where a meeting of the inhabitants of a school-district is held, and money voted to be raised by taxation at a special meeting, the previous action of the trustees in calling the meeting pursuant to statute should appear in the certificate of the clerk to the assessor. Lamb *v.* Hurff, 38 N. J. L. 310.

**Notice of district meeting.**—A trustee's certificate, required as evidence of the fact that a tax for a free school has been authorized by the inhabitants of a district, which states that the notice was given in accordance with the act, is insufficient; it should state what notice, when and where put up, and all facts necessary to show compliance with the law, and also that the meeting was to determine whether a tax should be authorized for a free school. Quaid *v.* Middlesex County School Dist. No. 37, 49 N. J. L. 607, 10 Atl. 191; Hardcastle *v.* Hodge, 27 N J. L. 551 [*affirming* 26 N. J. L. 143]. But the certificate need not state fully the places at which the notices of the meeting were posted, if it states that they were posted in "at least three public places in said district." State *v.* Donahay, 30 N. J. L. 404.

30. Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 45 N. E. 122 (holding that a certificate that a certain amount is needed for school purposes and a certain other amount for "heating and repairing purposes" is insufficient to authorize a tax for building purposes); Locker *v.* Keiler, 110 Iowa 707, 80 N. W. 433; State *v.* Garrabrant, 32 N. J. L. 444. See also *In re* Port Rowan High School Trustees, 23 U. C. C. P. 11; *In re* South Fredericksburgh Tp. School Trustees, 37 U. C. Q. B. 534.

**Stipulation waiving objection** to a certificate, in that it did not properly state the purpose for which the tax was to be levied see St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303.

31. St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364, holding also that a certificate of levy for school purposes generally does not imply authority to extend a tax for building purposes.

**In New Jersey** a certificate of the proceedings of a meeting for directing special school taxes to be raised and applied to different purposes should show apportionment by the meeting of a specified amount for each purpose. State *v.* Padden, 44 N. J. L. 151; Corrigan *v.* Duryea, 40 N. J. L. 266; Banghart *v.* Sullivan, 36 N. J. L. 89.

32. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367 (holding that a tax levied upon a certificate which is not made until after the meeting of the board at which the tax is voted, and which is signed by the directors at different times and places, is void); People *v.* Chicago, etc., R. Co., 183 Ill. 311, 55 N. E. 682.

**That the levy is authorized by an order of the board** need not be recited in the estimate. Kansas City, etc., R. Co. *v.* Chapin, 162 Mo. 409, 62 S. W. 1000.

**Signing.**—A certificate of levy of a school tax signed by the members of a school-board of education as "directors" is a fatal error. Chicago, etc., R. Co. *v.* People, 171 Ill. 544, 49 N. E. 489. *Compare* Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623.

33. Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293, holding that where such a certificate is signed by the president and clerk only, under the belief that it is sufficient — the other members acquiescing in the certificate, and being ready to sign it if necessary, it is proper on the trial of proceedings to enforce the tax to permit the amendment of the certificate by attaching the names of the other members.

or estimate will not ordinarily invalidate the tax,[34] and they may be corrected by amendment,[35] although a void certificate cannot be so amended.[36]

(c) *Power and Duty to Levy After Certificate or Estimate Furnished.* Under some statutes where the provisions relating to certificates, estimates, etc., have been complied with, the authorities whose duty it is to levy the taxes are bound to levy the amount or rate so reported, within the prescribed limits, and have no revisory powers over such amount or rate,[37] and mandamus will lie to compel them to levy the tax.[38] Under other statutes, however, the provisions relating to such reports, estimates, etc., are held to be merely directory, and the levying board or officers are held not bound to levy the amount or rate so reported, but may exercise their discretion within specified limits.[39] And under still other statutes the school authorities must report or certify the amount to be raised for school purposes, leaving to the levying officers the ascertainment of the rate at which the tax shall be extended.[40]

**Where a tax levy has been voted and assented to at a meeting of a school-board,** but the certificate of levy is signed only by a part of the board, under the belief that such signing is proper, the court at a hearing of objections to the rendition of a judgment for taxes levied under the certificate has power to permit the certificate to be signed by the other members of the board. Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293; Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367; Chicago, etc., R. Co. *v.* People, 183 Ill. 247, 55 N. E. 680; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874 [*distinguishing* People *v.* Smith, 149 Ill. 549, 36 N. E. 971].

34. Chicago, etc., R. Co. *v.* People, 205 Ill. 625, 69 N. E. 72; Chicago, etc., R. Co. *v.* People, 155 Ill. 276, 40 N. E. 602; Moore *v.* Fessenbeck, 88 Ill. 422; Buck *v.* People, 78 Ill. 560; Kirchner *v.* Wapsinonoc School Tp., (Iowa 1908) 118 N. W. 51; Cooper *v.* Nelson, 38 Iowa 440; Rose *v.* Hindman, 36 Iowa 160; St. Louis, etc., R. Co. *v.* Gracy, 126 Mo. 472, 29 S. W. 579, (1894) 22 S. W. 736.

35. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367; St. Louis, etc., R. Co. *v.* People, 177 Ill. 78, 52 N. E. 364; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874; State *v.* Paddock, 36 Nebr. 263, 54 N. W. 515.

**Changing date.**—A certificate of levy executed the day after the date of the board meeting by the president and clerk may be amended on the trial of proceedings to enforce the taxes by changing the date to conform to that of the board meeting. Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293.

**A clerical error in the omission of a dollar mark** in a certificate of levy on which a special school tax was extended, in designating the amount to be levied, may be corrected, by amendment in an action to enforce the tax. Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691.

36. Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367; People *v.* Chicago, etc., R. Co., 183 Ill. 311, 55 N. E. 682; Chicago, etc., R. Co. *v.* People, 171 Ill. 544, 49 N. E. 489; People *v.* Smith, 149 Ill. 549, 36 N. E. 971.

37. *Florida.*— Tomasello *v.* Santa Rosa County Bd. of Public Instructions, 55 Fla. 341, 45 So. 886, holding that under Laws (1907), cc. 5596, 5606, the county commissioners have no power to revise the decision of the county board of public instruction, as to the millage required for the maintenance of the necessary county schools, when it is within the constitutional limits, and the estimates include no illegal items. *Compare* State *v.* Volusia County, 28 Fla. 793, 10 So. 14.

*Michigan.*— Rogers Tp. Union School-Dist. *v.* Farris, 97 Mich. 593, 56 N. W. 924, holding that a town supervisor has no discretion, but is bound to spread upon the tax roll of his township the amount of a school tax which is certified to him, and directed by the board to be spread. See also Detroit Bd. of Education *v.* Detroit, 80 Mich. 548, 45 N. W. 585.

*Missouri.*— *In re* Powers, 52 Mo. 218.

*Ohio.*— State *v.* Capeller, 39 Ohio St. 455.

*Pennsylvania.*— Com. *v.* Shaw, 96 Pa. St. 268.

*Texas.*— Crockett *v.* Crockett Independent School Dist., 44 Tex. Civ. App. 428, 98 S. W. 889, holding that where city schools are under the control of a board of trustees, and such board determines in its discretion the amount of taxes, within the authorized limit, which shall be levied for the ensuing year, the city council has no discretion but to levy the amount certified.

See 43 Cent. Dig. tit. "Schools and School Districts," § 242.

38. People *v.* Lake County Com'rs, 12 Colo. 89, 19 Pac. 892. And see, generally, MANDAMUS, 26 Cyc. 287.

**Burden of proof.**—A taxpayer who seeks by mandamus brought some months after a board of education has certified a school tax to a county auditor, who places it on the tax list in a reduced form, to compel the auditor to place the original estimate on the list, has the burden of showing that the board of education did not consent to the reduction. State *v.* Capeller, 39 Ohio St. 455.

39. Woodland Bd. of Education *v.* Woodland, 129 Cal. 599, 62 Pac. 173; Sacramento Bd. of Education *v.* Sacramento, 96 Cal. 42, 30 Pac. 838; State *v.* New Orleans, 121 La. 762, 46 So. 798; State *v.* Omaha, 39 Nebr. 745, 58 N. W. 442.

40. Chicago, etc., R. Co. *v.* People, 205 Ill. 625, 69 N. E. 72.

(VI) *ASSESSMENT AND EXTENSION OF TAX*[41] — (A) *Power to Assess in General.* A tax for school purposes must be based upon a valid assessment,[42] made by properly qualified and authorized assessors;[43] and if a school tax has been properly levied, filed, and ordered, it is the duty of the assessing officers to make the assessment in accordance therewith,[44] and an action will lie to compel them to do so,[45] as by mandamus.[46] Moneys voted to be raised by a school-district may be assessed by assessors chosen after such vote.[47] An illegal assessment may be revoked by the assessors making it, and a new assessment made without a second certificate or estimate from the district officers;[48] or if they neglect, or have no time, to make another assessment before their term of office expires, a second certificate or estimate may be made to their successors, who may make the new assessment.[49] Where property situated in one school-district is by mistake assessed for school taxes, which are paid, in another district, the school authorities of the former district have no remedy in equity to compel the amount thereof to be extended as omitted taxes.[50] Unless required by statute, an assessing officer need not give a bond,[51] and unless so required the failure to take a bond from him will not invalidate the assessment.[52]

(B) *Time For Assessment.* While as a general rule an assessment of school taxes should be made at or within the time prescribed by statute therefor,[53] it is ordinarily held that unless negative words are used in the statute, making the assessment illegal if such provision is disregarded, the time prescribed is merely directory, and that a tax will be valid, although not assessed until after such

41. **Effect of change of boundaries or creation of new district** see *infra*, III, F, 4, f.

42. People *v.* Stockton, etc., R. Co., 49 Cal. 414.

43. People *v.* Stockton, etc., R. Co., 49 Cal. 414; Benson *v.* Bloomfield Tp., 58 N. J. L. 491, 33 Atl. 855.

**Under Mo. Rev. St. § 7125,** as amended by Laws (1885), providing that on receipt of the estimates of the various districts the county clerk shall proceed to assess the amount so returned on all taxable property, the county clerk has no authority to assess property for school or other purposes, but his duty is merely to extend and apportion the amounts of revenue for school purposes upon the property assessed for each school-district. Laclede County School Dist. No. 1 *v.* Wickersham, 34 Mo. App. 337. See also State *v.* Byers, 67 Mo. 706.

**In Vermont** the prudential committee of the district is alone authorized by law to assess and certify a school tax to pay the expenses of removing a school-house. Johnson *v.* Sanderson, 34 Vt. 94. But if one is elected as the prudential committee, who is ineligible for that office, his assessment of a tax voted by the district is invalid. Woodcock *v.* Bolster, 35 Vt. 632.

**Where assessors are to be appointed by a school commissioner** to assess a tax, the school-district concerned is a necessary party and must have notice. Peckham *v.* Bicknell, 11 R. I. 596.

**De facto officer.**—An assessor who has been regularly appointed and recognized as such by the school-board is a *de facto* officer. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

44. Wood *v.* Tipton School Corp., 132 Ind. 206, 31 N. E. 799, holding that where the trustees of a school corporation make a levy of a special school tax within the limits prescribed by law, the county auditor has no authority to reduce the levy and make the assessment at a lower rate under the directions of the board of commissioners of the county.

**An assessor need not go behind the records** to see that a school-district meeting at which a tax was voted was legally called. Saxton *v.* Nimms, 14 Mass. 315.

**It is no grounds for a refusal to make an assessment** in accordance with the levy that it appears to the assessing officer that the levy is unnecessary (Cole *v.* State, 131 Ind. 591, 31 N. E. 458); nor can his failure to make the assessment be excused by any custom in the auditor's office (Cole *v.* State, *supra*).

45. Wood *v.* Tipton School Corp., 132 Ind. 206, 31 N. E. 799.

46. Smith *v.* Swain, 71 N. H. 277, 52 Atl. 857. And see, generally, MANDAMUS, 26 Cyc. 287.

47. Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

48. Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

49. Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

50. Jackson County Dist. No. 153 *v.* Jackson County Dist. No. 154, 232 Ill. 322, 83 N. E. 849.

51. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

52. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

53. Wilcox *v.* Eagle Tp., 81 Mich. 271, 45 N. W. 987.

time;[54] and under some statutes if the assessment is not made at the proper time the tax shall be assessed in a succeeding year.[55] It has also been held that the time named in the vote of a district, for the payment of the money raised, does not prevent the assessors from making the assessment after the expiration of such time.[56] A provision requiring a school-district clerk to certify the vote of the district to the assessing officers within a certain time is merely directory in respect to time, and, where the tax has been voted, it is the duty of the assessing officers to seasonably assess the tax after such vote has been certified to them, although the vote has not been certified until after the time specified.[57] In some cases the rule is that the tax shall not be assessed until the money voted by the district is required;[58] but this does not mean that it shall not be assessed until the very day that it is required, but the assessing officers have a right to anticipate the wants of the district, and may legally assess it at a reasonable time before it is actually required.[59]

(c) *Mode of Assessment in General.* Where no other or different method is provided for making assessments in school-districts, the provisions of the general laws governing assessments must be followed.[60] In some jurisdictions, however, the mode of making assessments of school taxes and the procedure connected therewith is regulated by constitutional, statutory, or charter provisions,[61] and in making such an assessment there must be at least a substantial compliance with such provisions,[62] as with provisions requiring notice of the proceedings to be given,[63] and relative to the property upon which the assessment shall be made.[64] A failure to at

**54.** Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131 (holding that a statute requiring that a school-district tax shall be assessed within thirty days after the clerk of the district has certified to the assessors the amount of the tax to be raised is directory only and does not prohibit an assessment after that period); Johnson *v.* Dole, 3 N. H. 328; Thomas *v.* Clapp, 20 Barb. (N. Y.) 165 [*affirmed* in 20 Barb. 168 note]; Gale *v.* Mead, 2 Den. (N. Y.) 160; Water *v.* Daines, 4 Vt. 601.

**55.** Wilcox *v.* Eagle Tp., 81 Mich. 271, 45 N. W. 987, holding that under Howell St. § 5090, so providing, an assessment may be made in the succeeding year, where it failed in the proper year on account of the failure of the school-board to certify it to the township clerk in time for the supervisor to spread it on his roll.

**56.** Pond *v.* Negus, 3 Mass. 230, 3 Am. Dec. 131.

**57.** Smith *v.* Swain, 71 N. H. 277, 52 Atl. 857.

**58.** Brock *v.* Bruce, 59 Vt. 313, 10 Atl. 93

**59.** Brock *v.* Bruce, 59 Vt. 313, 10 Atl. 93.

**60** Chadwick *v.* Crapsey, 35 N. Y. 196; Stephens *v.* Multnomah County School Dist. No. 21, 6 Oreg. 353. And see, generally, TAXATION.

**Record of proceedings.**—Where school trustees are vested with a discretion as to the rate of taxation to be imposed for school purposes, there should be some order or equivalent entry in the books of the district evidencing their proceedings fixing such rate; but a mere tax book with the names of the taxpayers inserted therein, and the amount of their property, and the school tax assessed against each taxpayer opposite his name, sufficiently evidences the rate fixed. Eakins *v.* Eakins, 20 S. W. 285, 14 Ky. L. Rep. 562.

**61.** See Perkins *v.* Langmaid, 34 N. H. 315.

**Under Vt. Gen. St. c. 84, § 67,** providing that the grand list to be completed May 15 shall be the list on which all school-district taxes voted on the 1st day of March, or any time within one year thereafter, shall be assessed, a tax voted on the 29th day of March cannot be levied on the grand list of the preceding year, although expressly made so, but must be on the list completed in the May following the vote. Capron *v.* Raistrick, 44 Vt. 515. *Compare* Waters *v.* Daines, 4 Vt. 601.

**62.** Smith *v.* Bohler, 72 Ga. 546. See *In re* De la Haye, 3 U. C. C. P. 23.

**The requirements of appraisal, and remittance** to taxpayers of their proportionate share of the appraised value of school property under R. I. Pub. Laws (1903), c. 1101, are mandatory, and an assessment against taxpayers in a district, made without any precedent appraisal of the property in the district, or any remission to taxpayers of their proportionate share of the appraised school property, is illegal and void. Tefft *v.* Lewis, 27 R. I. 9, 60 Atl. 243.

**63.** Peckham *v.* Bicknell, 11 R. I. 596, holding that assessors appointed under Rev. St. c. 64, § 4, by the school-commissioners to assess a special school tax, and acting under the commissioner's warrant, must give proper notice and thereafter make the assessment upon their own judgment.

**64.** Smith *v.* Bohler, 72 Ga. 546 (holding that an assessment made by taking the returns of the county tax receiver, and assessing upon the property therein returned the

least substantially comply with such provisions renders an assessment invalid,[65] except that an assessment will not be invalid by reason of a failure to comply with a provision which is merely directory.[66] Mere irregularities or informalities, however, in an assessment will not vitiate a tax founded thereon,[67] unless such irregularities result from fraud;[68] but they may be corrected from the district records.[69] Thus an assessment will not be vitiated by an omission through misinformation, mistake of fact or error of judgment to tax some property in the district,[70] or to tax some persons liable to assessment.[71] School authorities in making an assessment acquire jurisdiction of the persons to be taxed and of the subject-matter, and the fact that an excessive assessment is made does not invalidate the whole assessment, but is merely an irregularity which may be corrected,[72] and is invalid only as to the excess,[73] unless it is an unreasonable one;[74] and it has been held that in making an assessment the assessing officers have no right to anticipate that taxpayers who are solvent will not pay their taxes and assess enough more to cover that contingency.[75] The fact that the rate at which property is assessed is too low cannot be urged by a taxpayer as an objection to the tax.[76]

(D) *Listing Persons and Property.* There must be a substantial compliance with the statutory requirements relative to the preparation of lists or invoices of taxable persons and property of the district.[77] If the tax listers make a wrongful designation of taxpayers or property taxable, and refuse or neglect to correct it when properly requested, they are liable to the school-district for damages resulting from its being thereby deprived of the benefit of a list upon such property.[78] In some jurisdictions the taxpayers are required to deliver to the assessor written lists of their property, for purposes of taxation;[79] and if a taxpayer in making out his list, either through negligence or fraud, wrongfully lists his prop-

percentage named by the board of education, is a legitimate method of imposing an educational tax); State *v.* Burford, 82 Mo. App. 343; Moss *v.* Hinds, 29 Vt. 188 (holding that, in assessing a school-district tax, it is the duty of the committee to assess upon all lands mentioned in the grand list in the district in which they actually lie, whether such district is rightfully mentioned in the grand list or not, and to exclude from such assessment such lands as are not in the district, although they are incorrectly designated as being there, but that they cannot assess upon lands wholly omitted from the list, although they know them to be in the district).

65. Loud *v.* Darling, 7 Allen (Mass.) 205; Taft *v.* Wood, 14 Pick. (Mass.) 362.

66. Thomson *v.* Harris, 88 Hun (N. Y.) 478, 34 N. Y. Suppl. 885; Gates *v.* Beckwith, 2 Ohio Dec. (Reprint) 394, 2 West. L. Month. 589 (as to time of notice of tax voted); Meisner *v.* Meisner, 32 Nova Scotia 320.

67. State *v.* Bremond, 38 Tex. 116.

68. State *v.* Bremond, 38 Tex. 116.

69. Ovitt *v.* Chase, 37 Vt. 196, holding that an error of listers in setting lands in the wrong school-district is not conclusive upon the owner or the district for purposes of taxation, if the town records furnish the necessary means of correcting it.

70. Vittum *v.* People, 183 Ill. 154, 55 N. E. 689 (holding that the omission of property included in a school-district when computing the assessed valuation of property to ascertain the rate per cent for school purposes does not vitiate the entire school levy, but only such a portion thereof as is excessive); Merritt *v.* Farris, 22 Ill. 303; Schofield *v.* Watkins, 22 Ill. 66; George *v.* Mendon Second School Dist., 6 Metc. (Mass.) 497; Meisner *v.* Meisner, 32 Nova Scotia 320. See also Moss *v.* Hinds, 29 Vt. 188. But *compare* Auditor-Gen. *v.* McArthur, 87 Mich. 457, 49 N. W. 592, holding that, where the statute requires that all taxes shall be levied upon all the taxable property of the district, a tax on only a part of a school-district is void.

71. Schofield *v.* Watkins, 22 Ill. 66.

72. Norris *v.* Jones, 7 Misc. (N. Y.) 198, 27 N. Y. Suppl. 209 [*affirmed* in 81 Hun 304, 27 N. Y. Suppl. 209, 30 N. Y. Suppl. 1134]; Rowell *v.* Horton, 57 Vt. 31.

73. State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532. And see *supra*, III, F, 4, a, (V), (C).

74. Rowell *v.* Horton, 57 Vt. 31.

75. Rowell *v.* Horton, 57 Vt. 31. *Compare* Chandler *v.* Bradish, 23 Vt. 416.

76. State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

77. Creech *v.* Common School Dist. No. 15, 102 S. W. 804, 31 Ky. L. Rep. 379; Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81; Roger *v.* Bowen, 42 N. H. 102.

78. St. Johnsbury School Dist. No. 1 *v.* Kittridge, 27 Vt. 650.

**A school-district may sustain an action against the tax listers** if they designate any part of the property which belongs to and is taxable in their district as belonging to and taxable within another district. St. Johnsbury School Dist. No. 1 *v.* Kittridge, 27 Vt. 650.

79. Sanford *v.* Dick, 15 Conn. 447.

erty so that a wrongful assessment is made thereon, he cannot complain thereof.[80] The record of a taxpayer's invoice of his property is *prima facie* evidence of a proper invoice, until the contrary is shown.[81]

(E) *Description.* The assessment should contain an accurate description of the land and other property assessed,[82] although it has been held that the description is sufficient if it can be made certain by extrinsic evidence;[83] and under some statutes such description may be based upon the description contained in a municipal or county valuation,[84] and may be assessed either to the owner of the property or to the person in possession thereof.[85] An assessment on one lot or portion of land, part of which does not lie within the district, is void as to the whole of that lot or parcel;[86] but this does not affect the validity of the assessment on other lands within the district to the same owner, by separate descriptions.[87]

(F) *Valuation.* The property which is taxable should be taxed at its true value, to be determined by the assessing officers in the manner prescribed;[88] and an assessment will be void if in making such valuation the assessors fail properly to proceed in regard to a matter which is jurisdictional,[89] as where they omit to give notice to a property-owner of their intention to ascertain the value of his property;[90] and such failure renders them liable to an owner so assessed whose property is levied on and taken pursuant to a warrant issued on such illegal assessment.[91] Under some statutes the valuation of property for school taxes may be based upon the state, town, municipal, or county valuation.[92] Power in certain officers to assess a tax on property in a certain district implies power to make a valuation of the property for the purpose of levying the assessment.[93]

(VII) *ASSESSMENT ROLLS, RATE BILLS, AND TAX LISTS.* It is usually required that an assessment of school taxes shall be spread or extended on a particular assessment roll or tax list,[94] which must comply with all the statutory or

**80.** Sanford *v.* Dick, 15 Conn. 447.

**81.** Blake *v.* Sturtevant, 12 N. H. 567.

**82.** See Blackstone *v.* Taft, 4 Gray (Mass.) 250.

**83.** Blackstone *v.* Taft, 4 Gray (Mass.) 250.

**84.** Blackstone *v.* Taft, 4 Gray (Mass.) 250, holding that a school-district valuation which is expressly based on the town valuation for the same year need not contain any description of real estate and machinery taxed, if it appears by the correspondence between the figures opposite the names of each person in the two valuations, and by the description in the town valuation, that the property is situated within the school-district.

**85.** Blackstone *v.* Taft, 4 Gray (Mass.) 250.

**86.** Blackstone *v.* Taft, 4 Gray (Mass.) 250.

**87.** Blackstone *v.* Taft, 4 Gray (Mass.) 250

**88.** Baley *v.* Wortsman, 2 N. Y. St. 246; Harling *v.* Mayville, 21 U. C. C. P. 499.

**Separate valuations** see Adams *v.* Hyde, 27 Vt. 221.

**89.** See Baley *v.* Wortsman, 2 N. Y. St. 246.

**90.** Baley *v* Wortsman, 2 N. Y. St. 246.

**91.** Jewell *v.* Van Steenburgh, 58 N. Y. 85 [*overruling* Randall *v.* Smith, 1 Den. (N. Y.) 214] (holding that an omission to give the notice required is a jurisdictional defect which invalidates the tax, and renders the trustees liable as trespassers for levying on the property); Baley *v.* Wortsman, 2 N. Y. St. 246.

**92.** *Georgia.*— Georgia R., etc., Co. *v.* Hutchinson, 125 Ga. 762, 54 S. E. 725.

*Massachusetts.*—Blackstone *v.* Taft, 4 Gray 250; Waldron *v.* Lee, 5 Pick. 323, holding that a school-district tax may be assessed on the valuation of property taken in reference to a town tax for the same year.

*Missouri.*—Laclede County School Dist. No. 1 *v.* Wickersham, 34 Mo. App. 337.

*New York.*— Baley *v.* Wortsman, 2 N. Y. St. 246.

*Canada.*— Meisner *v.* Meisner, 32 Nova Scotia 320.

See 43 Cent. Dig. tit. "Schools and School-Districts," § 243.

**If the school trustees cannot ascertain the valuation** of the property from the town assessment roll, they may assess property not upon such roll or change any of the assessments thereon, provided they give notice to the persons interested of the completion of their roll, specifying a day when they will meet to review their assessment. Jewell *v.* Van Steenburgh, 58 N. Y. 85; Baley *v.* Wortsman, 2 N. Y. St. 246, holding that under Laws (1864), c. 555, tit. 7, § 6768, the school trustees in such a case shall proceed in the same manner as town assessors are required to proceed in the valuation of taxable property.

**93.** Richardson *v.* Sheldon, 1 Pinn. (Wis.) 624.

**94.** Folkerts *v.* Powers, 42 Mich. 283, 3

charter requirements as to matters of form [95] and procedure.[96] If such tax appears only on a roll to which it does not belong, and is omitted from the roll to which the law authorizing it expressly assigns it, it is invalid,[97] except that, although placed on the wrong roll, if a marginal note therein shows that the tax belongs to a particular school-district, the tax will not be invalid.[98] The duty of making a tax roll must be performed by the particular officer designated, in his official capacity, and he alone is responsible for the manner in which it is performed; [99] but it has been held that the extension of the tax on the assessment roll is not a part of the assessment and levy, and that the fact that it is not spread on the roll by the proper officer does not prevent the enforcement of a statutory lien for the tax.[1] The unauthorized entry of a school tax against property at a less rate than that levied by the district does not render the tax void or relieve the property from any liability for any school tax whatever.[2] An assessment roll or book in due form is *prima facie* proof of the assessment,[3] and of the amount of unpaid taxes,[4] and of the fact that all the required steps in relation to the levy and assessment have been complied with, and therefore is *prima facie* proof of the validity [5] and correctness of the tax,[6] unless it is overcome by other evidence.[7] A tax rate bill, as provided for by some statutes, should be made only for an

N. W. 857; Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109.

**95.** See cases cited *infra*, this note. See also *supra*, III, F, 4, c, (VI), (D), (E), (F).

**Heading.**—A statutory provision that the trustees of a school-district in making an assessment shall "prefix to their tax list a heading showing for what purpose the different items of the tax is levied" requires such heading to be prefixed whether the tax is voted by the district, or whether it is such a tax as the trustee is by law authorized to levy without any vote of the district; but such a provision is merely directory, and the absence of such heading does not vitiate the assessment. Thomson *v.* Harris, 88 Hun (N. Y.) 478, 34 N. Y. Suppl. 885.

**In Pennsylvania** a school tax and a building tax are to be placed in the same duplicate, but are to be kept separate. Mathewson *v.* Factoryville School Directors, 23 Pa. Co. Ct. 121.

**96.** State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532, holding that under Rev. St. (1889) § 7717 *et seq.* the clerk of the county court has no power, without an order of the court, to extend a school tax on a tax-book against railroad property.

**New list.**—Where the law requires that the tax list shall be made after the tax has been voted, and after such list has been made out the previously voted tax is repealed and a tax again levied, a new list should be made out after the latter vote. Mead *v.* Gale, 2 Den. (N. Y.) 232.

**97.** Folkerts *v.* Power, 42 Mich. 283, 3 N. W. 857.

**98.** Rhomberg *v.* McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571, holding also that equity will not on that ground alone enjoin the collection of the tax.

**99.** Brown *v.* Harris, 52 Mo. 306 (holding that under the School Act of 1867, making it the duty of the county clerk to extend the amount of the school taxes on the assessment books, the auditor had no jurisdiction in the matter, and his mandate would not protect the collector in proceeding to collect such taxes); Laclede County School Dist. No. 1 *v.* Wickersham, 34 Mo. App. 337 (holding that it is the duty of the county clerk merely to extend and apportion the amounts of revenue for school purposes upon the property assessed for each school-district); Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109.

**Mistake as to duty.**—Where the duty of assessing a school tax is by law in the officers of the school-district, and a certain town officer, under an erroneous opinion as to his duty and without any improper motive, assesses a tax against the taxable property of such district and carries it out on the general tax roll of the town to be collected by the town treasurer, a taxpayer against whose land a tax is so assessed and which has been returned as delinquent, cannot maintain an action for such act against the town officer on his official bond given to secure the faithful performance of his duty. Alvord *v.* Barrett, 16 Wis. 175.

**1.** State *v.* Harper, 83 Mo. 670 [*reversing* 11 Mo. App. 301].

**2.** Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423.

**3.** San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

**4.** San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

**5.** San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

**6.** People *v.* Lansing, 55 Cal. 393.

**7.** San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470; People *v.* Lansing, 55 Cal. 393, holding that in an action to recover a district school tax, it is error to exclude evidence that the assessment roll had been copied from the county roll, and that no assessment had in fact been made.

authorized tax,[8] and should show with reasonable certainty on what list of ratable property the tax is laid;[9] but it will not be invalid because it is made for a small sum over that authorized.[10] A certificate attached to a rate bill showing for what purpose the tax is assessed is not conclusive, but may be contradicted;[11] and such a certificate is not invalid because of a mere clerical error therein.[12]

(VIII) *EQUALIZATION, CORRECTION, OR SETTING ASIDE OF ASSESSMENT* — (A) *In General.* The record of an assessment may be amended so as to make it correspond with the facts,[13] but not by an amendment which is contradictory to the facts.[14] In some jurisdictions taxpayers aggrieved by an assessment have a right of appeal,[15] and if they fail to take such an appeal they will be deemed to have waived all objections.[16] An illegal assessment may also be reviewed and set aside on certiorari brought by a person aggrieved;[17] but on such certiorari the court will not inquire into the legal existence of the district, or of the school officers, as a political corporation.[18] Where an assessment is null and void the courts cannot validate it by confirming it.[19]

(B) *Statutory or Charter Provisions.* In some jurisdictions a statutory board of relief is provided for, to review the work of the assessors and to correct errors or inequalities in the assessment by making additions to or deductions from the tax list or any part thereof.[20] The procedure of such board must be in compliance with the statutory or charter provisions,[21] as that notice of the time and place of the meeting at which they act must be duly given,[22] and that the meeting must be at the time and place fixed in such notice.[23] If such board makes no change

8. Chandler *v.* Bradish, 23 Vt. 416.

9. Sanford *v.* Dick, 15 Conn. 447. See also *In re* De la Haye, 3 U. C. C. P. 23.

**Where an inhabitant of a school-district has no list** in the district, his name need not appear in the rate bill of a tax laid by such district. Bull *v.* Griffith, 30 Vt. 273.

10. Chandler *v.* Bradish, 23 Vt. 416.

11. Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598.

12. Goodwin *v.* Perkins, 39 Vt. 598.

13. Perkins *v.* Langmaid, 36 N. H. 501.

14. Perkins *v.* Langmaid, 36 N. H. 501.

15. Carlisle School Dist. *v.* Hepburn, 79 Pa. St. 159 (to the auditor-general); Mitchell *v.* McCormick, 9 Kulp (Pa.) 286. See also *In re* Assessment School Rate, 3 Nova Scotia Dec. 122.

**In West Virginia** a void tax levy will be wholly superseded by the circuit court, provided the taxpayers' petition for that purpose is filed within forty days from the time of making the illegal levy. Wells *v.* Lincoln Dist. Bd. of Education, 20 W. Va. 157.

16. Carlisle School Dist. *v.* Hepburn, 79 Pa. St. 159.

**In Rhode Island,** under Pub. St. c. 58, § 5, an objection that a school-district tax is invalid because it does not appear that it was raised to carry out powers granted to the district is not available in an action to recover the tax brought by the collector, if no appeal be taken from the vote ordering the tax or from proceedings in its assessment. Seabury *v.* Howland, 15 R. I. 446, 8 Atl. 341.

17. Schofield *v.* Watkins, 22 Ill. 66; Howe *v.* Landis Tp. School Dist. Bd. of Education, 72 N. J. L. 158, 60 Atl. 518; Stanton *v.* Neptune City Bd. of Education, 68 N. J. L. 496, 53 Atl. 236 [*affirmed* in 70 N. J. L. 336, 57 Atl. 1133]; Kaighn *v.* Browning, 28 N. J. L. 556 [*affirming* 27 N. J. L. 527], holding that school taxes assessed on property lying in a district illegally annexed to the district that votes the tax will be set aside by certiorari brought by the persons aggrieved, but that if ample relief can be afforded the prosecutors by setting aside so much as aggrieves them, the whole tax will not be set aside.

**An objection not pointed out by any of the reasons filed** will not prevail on certiorari. Stanton *v.* Neptune City Bd. of Education, 68 N. J. L. 496, 53 Atl. 236 [*affirmed* in 70 N. J. L. 336, 57 Atl. 1133].

18. Howe *v.* Landis Tp. Bd. of Education, 72 N. J. L. 158, 60 Atl. 518; Gilbert *v.* Van Winkle, 25 N. J. L. 73.

19. Tefft *v.* Lewis, 27 R. I. 9, 60 Atl. 243.

20. Sanford *v.* Dick, 15 Conn. 447; U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863; Goudreau *v.* St. Ignace, 97 Mich. 413, 56 N. W. 772 [*overruling* so far as it intimates a contrary view Aplin *v.* Roberts, 83 Mich. 471, 47 N. W. 442]; Chamberlain *v.* St. Ignace, 92 Mich. 332, 52 N. W. 634.

**Utah Laws (1892),** c. 68, § 4, providing that the county court shall equalize the assessment roll of the whole county, including the assessment for general taxes of cities of the first and second classes, empowers the court to equalize an assessment roll relating to school taxes levied in cities of either the first or second class. Ogden Bd. of Education *v.* Brown, 12 Utah 251, 42 Pac. 1109.

21. See Sanford *v.* Dick, 15 Conn. 447.

22. Sanford *v.* Dick, 15 Conn. 447.

**Waiver.**— Such notice being for the benefit of a taxpayer may be waived by him. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

23. Sanford *v.* Dick, 15 Conn. 447.

in the assessment, it will be presumed that it is satisfied with the assessment as made by the assessor.[24]

(c) *Curative Statutes.* It is competent for the legislature to legalize irregularities or defects in the levy and assessment of school taxes by a curative statute,[25] and even to render valid taxes which were invalid.[26]

(d) *Liability For and Lien Of Taxes.* The liability of a taxpayer to pay a school tax attaches when the tax is levied in accordance with the law.[27] Under some statutes school-district taxes constitute a lien upon the property on which they are assessed;[28] but such a statute is not retrospective, and hence does not create a lien for taxes assessed prior to the enactment of the statute.[29]

**d. Payment and Refunding of Taxes** — (i) *PAYMENT.* As a general rule the payment of school taxes is receivable only in the medium which the law authorizes the collecting officer to receive,[30] and if he receives anything else, and receipts for the taxes, he must make good the amount;[31] and where the statute requires such taxes to be paid in lawful money of the United States, they are payable only in that medium of payment,[32] and not in state tax-receivable coupons.[33] Where such taxes are strictly local and assessed only on the property of the district for which they are levied, they are payable in the orders of the school trustees of such district,[34] but not in county warrants.[35]

(ii) *REFUNDING OR RECOVERY OF TAXES PAID.* As a general rule taxes

**24.** U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

**25.** Munson *v.* Minor, 22 Ill. 594 (holding that a provision which requires a map of the school-district to be furnished to the county clerk, to aid in the extension of the tax, is directory, and the defect may be cured by the Revenue Act of 1853); Schofield *v.* Watkins, 22 Ill. 66; Spencer *v.* Wheaton, 14 Iowa 38 (holding, however, that an act passed by the board of education on Dec. 15, 1861, legalizing any taxes levied under "An Act for the Public Instruction . . . approved March 12, 1858," did not legalize an assessment attempted to be made under the act, but voted at a meeting which was called contrary to its express provisions); Fitzpatriok *v.* Mt. Sterling Public Graded Schools, 87 Ky. 132, 7 S. W. 896, 10 Ky. L. Rep. 9.

**Jurisdictional defect.**—Where a board of education attempts to levy taxes for school purposes before the question has been submitted to the electors, and they have refused or neglected to raise the tax, the defect is jurisdictional and is not cured by the curative clause in Mich. Pub. Acts (1893), No. 206, § 99. Auditor General *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

**26.** Woolley *v.* Hendrickson, 73 N. J. L. 14, 62 Atl. 278. But see Nevil *v.* Clifford, 63 Wis. 435, 24 N. W. 65.

**New Jersey Act** of Oct. 19, 1903, entitled an act to invalidate taxes heretofore levied for school purposes, is constitutional, and had the effect of validating all appropriations, taxes, and assessments theretofore made, levied, and imposed, and all other acts theretofore passed or taken for public school purposes under the provisions of the Gen. School Laws of 1900 and 1902, which laws respectively were declared unconstitutional; but such act in connection with the Gen. School Act of Oct. 19, 1903, did not have the effect of disturbing pending proceedings for the assessment and collection of taxes already ordered to be raised to meet school bonds maturing during the school year, even in cases where by statute the boundaries of school-districts were changed, and notwithstanding the statutory provisions respecting the transfer to new school-districts of the obligations to pay outstanding debts of the former school-districts. Woolley *v.* Hendrickson, 73 N. J. L. 14, 62 Atl. 278.

**27.** Toothaker *v.* Moore, 9 Iowa 468, holding that liability to pay a school tax attaches upon the levy of the tax by the vote of the district.

**28.** Claysville Borough School Dist. *v.* Worrell, 37 Pa. Super. Ct. 10; Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron, etc., Co., 18 W. Va. 441, for delinquent taxes.

**In Quebec** the school rates constitute privileged claims upon immovables, and are exempt from the formality of registration. Westmount School Com'rs *v.* Pitts, 24 Quebec Super. Ct. 7. And the hypothec for school taxes covers all the costs, even those incurred in a personal action against the debtor of the taxes, and the school corporation may claim by an hypothecary action, from a third person owning the immovable charged with the payment of these taxes, the amount of such costs at the same time as that of the taxes. St. Henry School Trustees *v.* Solomon, 12 Quebec Super. Ct. 179.

**29.** Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron, etc., Co., 18 W. Va. 441.

**30.** People *v.* Wright, 34 Mich. 371.

**31.** People *v.* Wright, 34 Mich. 371.

**32.** Greenhow *v.* Vashon, 81 Va. 336; McGahey *v.* State, 135 U. S. 662, 10 S. Ct. 972, 34 L. ed. 304.

**33.** Greenhow *v.* Vashon, 81 Va. 336.

**34.** Wallis *v.* Smith, 29 Ark. 354.

**35.** Wallis *v.* Smith, 29 Ark. 354.

which have been voluntarily paid without coercion cannot be recovered.[36] But where the school-district officers wrongfully collect school taxes there is an implied obligation to return the money so collected to the taxpayer;[37] and where illegal school taxes are paid involuntarily they may be recovered back[38] in an action generally against the school-district for whose use the tax is collected and to whose order it is subject,[39] although it is collected and deposited with a town treasurer;[40] and such action cannot be maintained against the town or county whose officers assess and collect the tax for the use of the school-district,[41] unless they act illegally, or without authority, in making the assessment and the money is not received and appropriated for the use of the district.[42]

**e. Collection and Enforcement**[43] — (i) *POWER AND DUTY TO COLLECT IN GENERAL.* The particular officer or officers who are authorized to collect or enforce the collection of taxes for school purposes, and their powers and duties in regard thereto, are generally governed by statutory or charter provisions,[44]

**36.** Withington *v.* Harvard, 8 Cush. (Mass.) 66; Wall *v.* Eastman, 1 Mich. 268.

**Voluntary payment to wrong district.**— Taxpayers in one school-district who voluntarily pay a tax levied by mistake upon their lands to another district cannot recover back the same, where the books were kept open and means of knowledge of all the facts existed, although they supposed they were paying the tax to the district in which their lands lay. Walser *v.* School Dist. No. 1 Bd. of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329 [*affirming* 57 Ill. App. 288].

**37.** Churchill *v.* Highland Park Graded School, 89 S. W. 122, 28 Ky. L. Rep. 162.

**38.** Elberg *v.* San Luis Obispo County, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572; Pacific Mut. L. Ins. Co. *v.* San Diego County, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571; Starbird *v.* Falmouth School Dist. No. 7, 51 Me. 101; Matteson *v.* Rosendale, 37 Wis. 254.

**Defenses.**— It is no defense to an action against a school-district to recover the amount of an illegal tax, that the town treasurer advanced to the district the whole amount of the assessed tax, before the collection from plaintiff of his proportion. Bacon *v.* Barnstable Thirteenth School Dist., 97 Mass. 421. So it is no ground for retaining a tax illegally assessed by a school-district, against an inhabitant who has paid the same, that the sum so received of him was only his due proportion of the amount necessary to discharge the debts of the district, and for payment of which the district might have legally raised a sufficient sum. Joyner *v.* Egremont School Dist. No. 3, 3 Cush. (Mass.) 567.

**Evidence.**— That there is already a sufficient school-house in the district is inadmissible as evidence in an action against a school-district to recover back the amount of a tax paid for building a school-house, as such evidence will not show the tax to be illegal. Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

**39.** Starbird *v.* Falmouth School Dist. No. 7, 51 Me. 101; Haines *v.* Readfield School Dist. No. 6, 41 Me. 246; Bacon *v.* Barnstable Thirteenth School Dist., 97 Mass. 421.

**But where a school-district votes to raise money for purposes not within its authority,** such vote is a nullity, and whoever presumes to carry it into effect does so at his peril, and the district is not liable since the vote is altogether aside from its corporate powers. Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254.

**40.** Starbird *v.* Falmouth School Dist. No. 7, 51 Me. 101; Ellis *v.* Seekonk Eighth School Dist., 11 Gray (Mass.) 487; Joyner *v.* Egremont School Dist. No. 3, 3 Cush. (Mass.) 567.

**41.** Trim *v.* Charleston, 41 Me. 504; Trafton *v.* Alfred, 15 Me. 258.

**Cal. Pol. Code,** § 3819, as amended by the statute of 1893, providing for actions against counties to recover illegal taxes paid under protest, does not authorize an action to be brought against a county for taxes collected by it for the use of and to be disbursed by a local school-district within the county, and for the enforced payment of which by the county it can have no recourse against such school-district. Elberg *v.* San Luis Obispo County, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572; Pacific Mut. L. Ins. Co. *v.* San Diego County, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571.

**42.** Powers *v.* Sanford, 39 Me. 183, holding that the mere refusal by the inhabitants of a school-district to vote any particular sum of money for a given purpose will not confer jurisdiction upon the town as for a disagreement under St. (1850) c. 193, § 12, and if the town assess a tax where no such disagreement appears, the tax is unauthorized and void, and one whose property is taken in satisfaction of such tax may recover it back in an action against the town, but not against the district, unless it appear that the money was received and appropriated to its use.

**A statutory provision exempting the assessors of a town who are required to levy a tax in a school-district from personal liability, when they act with faithfulness, and providing that any further liability shall rest solely on the district, does not make a district liable for the errors of a town.** Powers *v.* Sanford, 39 Me. 183.

**43. Effect of change of boundaries or creation of districts** see *infra*, III, F, 4, f.

**44.** See Chiles *v.* Todd, 4 B. Mon. (Ky.)

and under the various provisions such authority is vested in the collector of county taxes [45] or in the municipal or township treasurer or collector.[46] Under some statutes a collector of school moneys is required to give a bond, and has no power to collect such moneys until he has done so.[47] A collection by a *de facto* collector is valid as to the public and third persons.[48] When it becomes the duty of a collector to collect school taxes he should proceed in the prescribed manner, and take all the steps prescribed by statute,[49] and if he neglects or refuses to do so he may be compelled to proceed by mandamus,[50] unless there exists some legal excuse for his default or failure.[51]

(II) *WARRANT FOR COLLECTION* — (A) *In General.* As a general rule a collector's authority to collect school-district taxes is his tax warrant or order issued to him by the proper officers,[52] and which ordinarily is governed by the rules relating to tax warrants generally,[53] and if he interferes with a taxpayer's property without a proper tax warrant he is a trespasser.[54] The authority conferred by such a warrant is not only to the person in office at the time of its issue, but also to his successor.[55] If the warrant is valid on its face, it affords complete protection to the collector in enforcing the collection,[56] although it is issued

126, holding that the collectors of a common school tax have the same power as sheriffs.

**45.** Louisa County *v.* Davison, 8 Iowa 517; Cameron County *v.* Shippen Tp. School-Dist., 117 Pa. St. 149, 11 Atl. 534.

**46.** Smyth *v.* Titcomb, 31 Me. 272, holding that the collector of taxes of a town has the same powers, and is equally bound to collect school-district taxes as town taxes.

**In Pennsylvania** a tax collector for a township is the proper person to collect the taxes of an independent school-district, within the limits of the township, under the act of June 25, 1885. Com. *v.* Bitting, 2 Pa. Co. Ct. 298; Mellinger *v.* Directors, 3 Lanc. L. Rev. 385. And under the act of June 20, 1901, section 8, a city treasurer of a city of the third class is not the collector of school taxes, where it appears that the school-board has accepted only sections 42 and 43 of the act of May 23, 1874, and has not accepted section 41 of the same act. Copelin *v.* Harrisburg, 215 Pa. St. 359, 64 Atl. 542.

**Under Vt. Rev. Laws,** § 510, a collector of town taxes is eligible to collect school-district taxes, although he is not an inhabitant of the school-district. Alexander *v.* School Dist. No. 6, 62 Vt. 273, 19 Atl. 995.

**47.** Woodhull *v.* Bohenblost, 4 Hun (N. Y.) 399. See also *supra*, III, D, 6, a, (III).

**Default.**—Under N. Y. Laws (1864), c. 555, § 83, a collector is not in default for failing to give a bond, until the school trustees limit the time within which the bond must be given, and determine its amount. Woodhull *v.* Bohenblost, 4 Hun (N. Y.) 399.

**The bond of a tax collector is not void** as to his sureties by reason of the fact that it is not signed by him, where the trustees of the district are allowed to pursue him by any remedy, and the rights of the sureties against him are therefore the same as though he had signed. O'Hanlon *v.* Scott, 89 Hun (N. Y.) 44, 35 N. Y. Suppl. 31.

**48.** Hamlin *v.* Dingman, 5 Lans. (N. Y.) 61, holding that where a school trustee authorized to appoint a collector of a school tax in writing, makes such appointment by parol, although the appointment is irregular the appointee thereby becomes an officer *de facto*, and his acts as such are valid as to the public and third persons, and the trustee is not liable for his acts in enforcing a warrant. *Compare* Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

**49.** See Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377.

**50.** Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377; Somerville *v.* Gallaher, 13 Pa. Co. Ct. 666; U. S. *v.* Monona Independent School Dist., 20 Fed. 294.

**51.** Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377, holding that a judgment remitting a tax, although erroneous, will protect the collector, and restrain him from proceeding to collect such remitted taxes, but will not protect him for his neglect or refusal to collect taxes which have not been remitted.

**Where a collector has made no return of delinquent taxpayers, and no warrants have** been issued to him during the year, if he be reëlected mandamus will not issue to compel him to proceed to collect the taxes of such delinquents, because he has no statutory authority to do so. Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377.

**52.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305; Eakins *v.* Eakins, 20 S. W. 285, 14 Ky. L. Rep. 562; Hilbish *v.* Hower, 58 Pa. St. 93.

**Where an order levying a school tax is void,** it gives no authority to the collector to collect the tax, or to retain the money when collected. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

**53.** See, generally, TAXATION.

**54.** Hilbish *v.* Hower, 58 Pa. St. 93.

**55.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**56.** Colton *v.* Beardsley, 38 Barb. (N. Y.) 29; Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312; Thomas *v.* Clapp, 20 Barb. (N. Y.) 165 [*affirmed* in 20 Barb. 168 note]; Finch *v.*

on a void order,[57] or although the collector has knowledge of facts rendering it invalid;[58] and such warrant will also protect those who aid him in taking the property.[59] But where the warrant is void or irregular on its face it will afford no protection to the collector.[60]

(B) *Requisites of Warrant.* A warrant for the collection of school taxes must be issued under authority of, and in conformity with, the law,[61] as that it must be issued by the proper board or officer,[62] as by the board of school trustees.[63] The insertion of an improper item in such a warrant does not vitiate the warrant if it is otherwise valid,[64] but it is void only as to the excess,[65] and renders the officer issuing it personally liable in an action to recover back any part of the excess paid or collected.[66] Under some statutes a tax warrant which has expired may be renewed so as to be equivalent to the issuing of a new warrant of the same force and effect in all respects as the original warrant,[67] and it has been held that under the

Cleveland, 10 Barb. (N. Y.) 290; Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89.

**57.** Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312.

**58.** Thomas *v.* Clapp, 20 Barb. (N. Y.) 165 [*affirmed* in 20 Barb. 168 note].

**59.** Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312.

**60.** Stroud *v.* Butler, 18 Barb. (N. Y.) 327; Clarke *v.* Hallock, 16 Wend. (N. Y.) 607, holding that a collector proceeding under a school-district warrant which is void is a trespasser, althongh in the execution of the warrant he proceeds in all respects in the same manner as if the warrant had been issned conformably to the requirements of the statute.

**61.** Chiles *v.* Todd, 4 B. Mon. (Ky.) 126; Folsom *v.* Streeter, 24 Wend. (N. Y.) 266 (holding that a warrant for the collection of a school tax is valid in form which directs the collection, in case of non-payment by distress and the sale of goods, as in the collection of other taxes); Hilbish *v.* Hower, 58 Pa. St. 93; Gillies *v.* Wood, 13 U. C. Q. B. 357.

**A party assessed cannot object** to the validity of a warrant under which his goods are sold that, after the delivery of the warrant to the collector, the same is reduced by one of the trustees. Folsom *v.* Streeter, 24 Wend. (N. Y.) 266.

**A warrant is not rendered void** by a direction to the collector to collect the amount of the tax, together with five per cent for his fees, although the statutes give him only one per cent. Thomas *v.* Clapp, 20 Barb. (N. Y.) 165. But see Stroud *v.* Butler, 18 Barb. (N Y.) 327.

**Time of issuing.**—A statutory provision requiring the warrant to be made out within a specified time is merely directory, and does not prevent its being made out after the time specified in the statute has elapsed. Thomas *v.* Clapp, 20 Barb. (N. Y.) 165 [*affirmed* in 20 Barb. 168 note].

**A neglect to specify in the warrant a limit of time,** as required by statute, within which the tax is to be collected is not a defect of which a person taxed can take advantage, and although it may render the warrant informal and defective as between the school-district and a collector, it does not invalidate the action taken by the latter to collect the tax. Walker *v.* Miner, 32 Vt. 769.

**62.** Hilbish *v.* Hower, 58 Pa. St. 93 (holding that where a school-board levies a tax, it is to be collected by some suitable person appointed by the school-board, and under a warrant issued by the president and countersigned by the secretary); McCracken *v.* Elder, 34 Pa. St. 239.

**A justice of the peace** has no authority to issne and sign a warrant for the collection of school taxes. Hilbish *v.* Hower. 58 Pa. St. 93; Johnson *v.* Sanderson, 34 Vt. 94.

**63.** See cases cited *infra*, this note.

**The tax list itself need not be signed** by the school trustees who are authorized to issue such warrant, but the mere signing of the warrant to which the list is annexed is sufficient. Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312.

**The signing of the warrant is merely a ministerial duty,** and if the tax is levied and assessed by all the trustees acting together and concurring, it is unimportant whether all are present or not when the warrant is signed (Thomas *v.* Clapp, 20 Barb. (N. Y.) 165 [*affirmed* in 20 Barb. 168 note]); and it is sufficient if it is signed hy two of the trustees (Doolittle *v.* Doolittle, 31 Barb. (N. Y.) 312; Thomas *v.* Clapp, *supra*; Folsom *v.* Streeter, 24 Wend. (N. Y.) 266; Gillies *v.* Wood, 13 U. C. Q. B. 357), and the presence of a third trustee at the meeting will be presumed unless the contrary appears (Doolittle *v.* Doolittle, *supra*).

**64.** Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

**65.** Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

**66.** Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

**67.** Frederick *v.* Dorn, 66 N. Y. App. Div. 97, 72 N. Y. Suppl. 673 (holding, however, that where a trustee in renewing a school-district warrant for the collector changes the tax list by reducing certain assessments, which changes are apparent on the face of the warrant, it is void as Laws (1894), c. 556, permitting any error in the school tax list to be amended with the approval of the snperintendent of public instruction provides the only way in which changes may be made); Colton *v.* Beardsley, 38 Barb. (N. Y.)

power to renew such a warrant a new warrant may be issued.[68] If the warrant is lost it may be supplied by a new one,[69] and although a second warrant is not issued, the collector may proceed to collect the tax without the warrant and protect himself by proving the issuance of the warrant, its contents, and loss.[70]

(III) *TIME FOR COLLECTION.* As a general rule such taxes should be collected if possible during the year in which they are levied; [71] but if there is a failure to so collect the tax, the authority conferred by the tax warrant does not expire, especially where the tax is levied upon personal property, but continues after the expiration of the year.[72] Where, however, the warrant limits the time within which the collector must act, his powers cease with the expiration of the time limited,[73] unless the warrant is renewed; [74] and if without such a renewal he sells property after the expiration of the time limited in enforcing collection, he acts without authority and becomes a trespasser.[75] Under some statutes a collector after receiving his warrant acts for a specified time as the mere receiver of such taxes as may be voluntarily paid to him,[76] and acts as collector, to enforce the collection, only in case default is made in payment during such time.[77]

(IV) *COMPENSATION AND REIMBURSEMENT.* As a general rule a tax collector is entitled to reimbursement for necessary expenses incurred in collecting a school tax, to be paid out of the funds collected,[78] and also is ordinarily entitled to retain out of such fund compensation for his services in collecting the same.[79]

29; Thomas *v.* Clapp, 20 Barb. (N. Y.) 165; Parker *v.* Brown, 17 Barb. (N. Y.) 145.

**Where the renewal is signed by two only of the trustees** of the school-district, the third refusing to sign it, the latter is not liable for any act done under the warrant. Thomas *v.* Clapp, 20 Barb. (N. Y.) 165; Folsom *v.* Streeter, 24 Wend. (N. Y.) 266.

**Where the statute simply gives the power to renew,** a provision in the renewal limiting the time for which it is to be renewed may be rejected as surplusage. Baker *v.* Lee, 41 Hun (N. Y.) 591.

**A warrant may be renewed as often as the** circumstances require. Folsom *v.* Streeter, 21 Wend. (N. Y.) 266. See also Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

**Where a tax has been levied and the trustees have been sued in trespass** and the matter referred back, they cannot renew the warrant and direct a relevy of the same tax or any part thereof. Benjamin *v.* Hull, 17 Wend. (N. Y.) 437.

**68.** Seaman *v.* Benson, 4 Barb. (N. Y.) 444.

**69.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**70.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**71.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**72.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**73.** Stroud *v.* Butler, 18 Barb. (N. Y.) 327.

**74.** Stroud *v.* Butler, 18 Barb. (N. Y.) 327.

**75.** Stroud *v.* Butler, 18 Barb. (N. Y.) 327.

**76.** Parker *v.* Brown, 17 Barb. (N. Y.) 145.

**Under N. Y. Laws (1899), c. 440, changing** the time in which voluntary payments might be received on school-district tax warrants, from two weeks to thirty days, a warrant authorizing the collector to receive voluntary payments for two successive weeks after the delivery of the warrant is void; and as the statute does not specify the time in which such warrant shall be returnable, if it is made returnable within thirty days it is unreasonable and void since it gives the collector no time in which to enforce payment after the expiration of the time limited for receiving voluntary payments. Frederick *v.* Dorn, 66 N. Y. App. Div. 97, 72 N. Y. Suppl. 673.

**77.** Parker *v.* Brown, 17 Barb. (N. Y.) 145, holding that if the collector assumes to act as such by levying upon the property within that time he becomes a trespasser.

**78.** Waycross *v.* Board of Education, 87 Ga. 22, 13 S. E. 133; Wood *v.* Warwick School Dist. No. 5, 28 R. I. 299, 67 Atl. 65, holding, however, that a tax collector incurring expenses for printing is not entitled to reimbursement from the district in the absence of a vote authorizing the expense. But see Anne Arundel County School Com'rs *v.* Gantt, 73 Md. 521, 21 Atl. 548.

**Where a collector is not required to give a bond** with a surety company as surety, nor authorized directly or indirectly to incur expenses for such a bond, he cannot recover from the district the amount paid for premiums on such a bond. Wood *v.* Warwick School Dist. No. 5, 28 R. I. 299, 67 Atl. 65.

**Compensation and reimbursement of district officers** generally see *supra*, III, D, 6, e.

**79.** Waycross *v.* Board of Education, 87 Ga. 22, 13 S. E. 133; Cameron County *v.* Shippen Tp. School Dist., 117 Pa. St. 149, 11 Atl. 534 [*reversing* 3 Pa. Co. Ct. 15].

**A sheriff** is entitled to commissions for collecting a school tax under N. C. Code, §§ 723, 2563, and Acts (1903), c. 251, § 92. Iredell County Bd. of Education *v.* Iredell County, 137 N. C. 63, 49 S. E. 47.

**Change of compensation.**— A tax collector who receives a certain compensation for one year for collecting taxes is not entitled to the same compensation on his holding over

Under some statutes, however, tax collectors are not entitled to any compensation whatever for collecting school taxes or revenue raised for the maintenance and support of public schools.[80]

(v) *DELINQUENT TAXES.* Where school-district taxes are assessed and collected by county or municipal authorities the school-district for whose use they are collected is entitled to have the amount collected turned over to it,[81] less the commissions of the collector;[82] and the county or municipal authorities authorized to collect school-district taxes may be compelled to pay over the amount of delinquent taxes due to a school-district, although they have not been collected.[83] If delinquent taxes so turned over to a school-district are in fact legal, they cannot be recovered back by the county or municipal authorities,[84] although they may be recovered if they are invalid, and the officer turning them over to the district acted without knowledge of the facts rendering them so.[85] Interest accruing on delinquent school taxes which belong to a school-district is merely an incident of the principal, and also belongs to the district, and a municipality or county charged with the collection of such taxes cannot withhold interest collected by it, although the principal may have been paid over and received by the district.[86]

(vi) *DELINQUENT COLLECTORS AND LIABILITY ON OFFICIAL BONDS.*[87] It is the duty of a tax collector to pay over or account for school taxes collected by him, or which he should have collected, to the proper custodian thereof,[88] and if he neglects or refuses to do so he is liable for a breach of his official duty,[89] and

for another year because of the failure of his successor to qualify, where in the meantime the rate of compensation is changed by the school-district. Wood *v.* Warwick School Dist. No. 5, 28 R. I. 299.

**Compensation for loss of fees** see Rex *v.* London County Council, [1906] 1 K. B. 346, 70 J. P. 169, 75 L. J. K. B. 241, 4 Loc. Gov. 305, 94 L. T. Rep. N. S. 218, 22 T. L. R. 235, 54 Wkly. Rep. 439.

80. Gorman *v.* Boise County, 1 Ida. 647.

81. Shippen Tp. School Dist. *v.* Cameron County, 3 Pa. Co. Ct. 15 [*reversed* on other grounds in 117 Pa. St. 149, 11 Atl. 534].

**Informality in the certificate of return** of taxes made by the school directors to the commissioners of a county cannot avail the county as a defense to the claim of the school-district for such taxes, after they have been collected by the county. Shippen Tp. School Dist. *v.* Cameron County, 3 Pa. Co. Ct. 15 [*reversed* on other grounds in 117 Pa. St. 149, 11 Atl. 534].

82. Cameron County *v.* Shippen Tp. School Dist., 117 Pa. St. 149, 11 Atl. 534 [*reversing* 3 Pa. Co. Ct. 15]. But see Conyngham School Dist. *v.* Columbia County, 6 Leg. Gaz. (Pa.) 26.

83. Wallendorf *v.* Cole County Ct. Justices, 45 Mo. 228.

**Under N. Y. Laws (1847), c. 480, §§ 89, 90, as amended by Laws (1864), c. 555, tit. 7, §§ 75–78, and Laws (1883), c. 250,** a county treasurer must pay all school taxes on real estate returned as unpaid, although the collector has failed in his duty to make diligent effort to collect them. People *v.* Hegeman, 4 N. Y. Suppl. 351 [*affirmed* in 123 N. Y. 645, 25 N. E. 954].

**A tax for a new site** for a school-house is not illegal because it is afterward found that good title cannot be conveyed, and the county treasurer cannot for that reason refuse to pay a delinquent tax. People *v.* Hegeman, 4 N. Y. Suppl. 351 [*affirmed* in 123 N. Y. 645, 25 N. E. 954].

84. Ripon *v.* Ripon, etc., Joint School Dist. No. 11, 17 Wis. 83.

85. Ripon *v.* Ripon, etc., Joint School Dist. No. 11, 17 Wis. 83.

86. New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15 [*modified* and *affirmed* in 189 U. S. 185, 21 S. Ct. 347, 45 L. ed. 485].

87. See, generally, TAXATION.

**Liabilities on official bonds of custodians of school funds** see *supra*, III, D, 6, g, (IV).

88. Pettigrew *v.* Washington County, 43 Ark. 33; U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863; Hoover *v.* Reap, 10 Kulp (Pa.) 59; Berks County *v.* Reed, 2 Woodw. (Pa.) 4; Bull *v.* Griffith, 30 Vt. 273, holding that under the act of 1854 it is proper that the warrant for the collection of a school-district tax should require the money collected to be paid to the treasurer, if one has been elected, and not to the prudential committee.

**Settlement in subsequent year.**—Where the accounts of a township school tax collector are not settled until the following year, they may be adjusted by the auditors of a subsequent year, and where there has not been a settlement for a number of years, such auditors may settle the accounts of any one year without touching the others. Swatara Tp. School Dist. *v.* Geesey, 7 Pa. Dist. 173.

89. State *v.* Lewis, 35 N. J. L. 377. See also U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

**Necessity for order for money.**—Under N. Y. Laws (1864), c. 555, § 88, requiring a collector to keep in his own possession the school moneys collected and received by

may be compelled by mandamus to pay over or account,[90] or assumpsit may be maintained against him for the recovery of the money collected,[91] or an action may be maintained against him and his sureties on his official bond;[92] and if a statutory penalty is imposed for a breach of such duty, it may be recovered in an action of debt on such bond.[93] If the collector pays the money collected to any

him by virtue of his office, and to be paid out by him on the order of the trustees, the trustees are not entitled to receive the money from the collector, and he is not in default, until the trustees draw an order for the money and present the same to him. Woodhull *v.* Bohenblost, 4 Hun (N. Y.) 399.

**90.** Allhands *v.* People, 82 Ill. 234. And see, generally, MANDAMUS, 26 Cyc. 285.

**It is no defense** to such an action against a county collector, to compel him to pay over to a school-district treasurer, taxes levied by the directors on railroad property and collected by him, that he was required to pay into the treasury of the state any taxes collected by him in that town for any purpose whatever by the assessment of railroads, and that the town had issued bonds to the railroad company for the amount of its subscription which remained unpaid, where it does not appear that the town and school-district are territorially the same. Allhands *v.* People, 82 Ill. 234.

**91.** O'Neal *v.* Washington County School Com'rs, 27 Md. 227; Houston *v.* Russell, 52 Vt. 110.

**That the collector is responsible on his official bond,** and might be sued thereon in the name of the state, is no bar to an action of assumpsit against him to recover taxes collected. O'Neal *v.* Washington County School Com'rs, 27 Md. 227.

**That the taxes were unlawfully levied is no defense** to a collector who admits their collection. O'Neal *v.* Washington County School Com'rs, 27 Md. 227.

**Evidence.**— In an action by a board of school commissioners against a tax collector to recover money collected by him for the school fund, the treasurer of the board is competent to testify that he had collected the money, notwithstanding the fact that the witness as treasurer had given his receipt to defendant for the money sued for; and it is also competent for him to show that the receipt given by him was erroneous in that the money had not been paid at all by defendant, and upon objection being made to the admissibility of such evidence on account of interest, plaintiff may execute a release, the effect of which is to remove the objection. O'Neal *v.* Washington County School Com'rs, 27 Md. 227

**92.** *Arkansas.*— Pettigrew *v.* Washington County, 43 Ark. 33.

*Illinois.*— People *v.* Yeazel, 84 Ill. 539.

*Maryland.*— O'Neal *v.* Washington County School Com'rs, 27 Md. 227.

*New Hampshire.*—Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538.

*North Carolina.*— Lindsay *v.* Dozier, 44 N. C 275.

*Pennsylvania.*— Burlington School Dist. *v.* Alexander, 6 Pa. Co. Ct. 413; Stoneboro School Dist. *v.* Jenkins, 2 Pa. Co. Ct. 300.

*Canada.*—Nottawasaga Public School Trustees *v.* Nottawasaga, 15 Ont. App. 310; Brown *v.* Styles, 2 U. C. C. P. 346.

See 43 Cent. Dig. tit. "Schools and School Districts," § 250.

**An action on a school collector's bond lies:** (1) When he fails to execute the warrant for the collection of a school tax issued by the school trustees; (2) when by his laches any tax is lost to the district; or (3) when he has neglected to pay over any balance in his hands to his successor. Woodhull *v.* Bohenblost, 4 Hun (N. Y.) 399.

**Where an order fixing a tax levy is void,** the collector has no authority to collect taxes, nor has the board of education the right to accept a collector's bond for that year, and no recovery can be had thereon for a failure of the collector to account to the board for the taxes of that year. U. S. Fidelity, etc., Co. *v.* Somerset Public Graded Schools Bd. of Education, 118 Ky. 355, 80 S. W. 1191, 26 Ky. L. Rep. 246.

**Presentation of county clerk's certificate** of the school tax of each district, as a prerequisite to a right of action on a collector's bond see Tappan *v.* People, 67 Ill. 339.

**Opening judgment for fraud on sureties** see Burlington School Dist. *v.* Alexander, 6 Pa. Co. Ct. 413.

**Extent of surety's liability** see Spencer Dist. Bd. of Education *v.* Cain, 28 W. Va. 758. And see, generally, PRINCIPAL AND SURETY, 32 Cyc. 109 *et seq.* Under Ky. Acts (1887–1888), c. 1273, § 14, a tax collector's surety is liable not only for the taxes collected, but also for those which should have been collected. U. S. Fidelity, etc., Co. *v.* Somerset Public Graded Schools Bd. of Education, 118 Ky. 355, 80 S. W. 1191, 26 Ky. L. Rep. 246.

**Apportionment of liability.**— Where two bonds are executed during a collector's term of office, with penalties of different amounts, the amount of the default should be settled *pro rata* between the solvent sureties on such bonds, in proportion to the penalties of the respective bonds. Maddox *v.* Shacklett, (Tenn. Ch. App. 1895) 36 S. W. 731.

**A surety on an assessor's bond as collector** cannot collaterally raise the objection that he had not given bond as assessor as a defense as to taxes actually collected. U. S. Fidelity, etc., Co. *v.* Somerset Bd. of Education, 86 S. W. 1120, 27 Ky. L. Rep. 863.

**That the levy of taxes was made subsequent to the date of the bond** does not affect the liability of the sureties on the bond, in case of default in paying over money collected as school taxes. State *v.* Kelley, 43 Tex. 667.

**93.** Tappan *v.* People, 67 Ill. 339.

person other than the one authorized to receive it, he is guilty of a breach of his bond;[94] and if the person receiving the money, upon discovery of the mistake, pays over the same to the proper school-district officers so that the district in fact loses nothing, the collector is liable for nominal damages.[95] The capacity to sue for and recover school moneys from a collector is generally in the officers who have authority to receive and disburse such moneys;[96] and in some cases an action on the collector's bond may be brought in the name of the state for the use of the school-district authorities.[97]

(VII) *SUMMARY PROCEEDINGS AND ACTIONS AGAINST TAXPAYERS* — (A) *In General.* The method or procedure which a tax collector may employ to collect or enforce the payment of delinquent school taxes is generally regulated by statutory or charter provisions,[98] and if a specific method for the collection is prescribed, no other means can be resorted to to enforce the payment.[99] Ordinarily the authorized modes of making such collection are distraint,[1] an action to recover a personal judgment for the taxes,[2] an action to recover judgment against the property of the delinquent,[3] or by a summary levy upon and sale of the land

94. People *v.* Yeazel, 84 Ill. 539.

**Payment to successor.**— A collector of school taxes may not pay over a fund in his hands to a successor in office, without the direction of the proper board or officers, and if he does so the sureties on his official bond are liable. Spencer Dist. Bd. of Education *v.* Cain, 28 W. Va. 758.

95. People *v.* Yeazel, 84 Ill. 539.

96. O'Neal *v.* Washington County School Com'rs, 27 Md. 227; Sunapee School Dist. No. 8 *v.* Perkins, 49 N. H. 538; Stokes County Bd. of Education *v.* Wall, 117 N. C. 382, 23 S. E. 358, holding that under Code, § 2563, as amended by Acts (1889), c. 199, § 28, an action on a sheriff's bond may be brought on the relation of the county board of education, and the complaint therein need not allege that the county commissioners refused to bring the action.

**A collector who has never taken his official oath** cannot maintain an action against a constable for money not paid over, and an objection that he has not taken such oath may be taken at the trial of such an action, under a plea of the general issue, with notice that plaintiff is not a legal collector Houston *v.* Russell, 52 Vt. 110.

97. Tappan *v.* People, 67 Ill. 339; O'Neal *v.* Washington County School Com'rs, 27 Md. 227; State *v.* Kelley, 43 Tex. 667.

**Testimony of a director** of a school-district, giving his conclusions that the district has received its share of the taxes in full, is inadmissible in an action in the name of the people for the use of school trustees, upon a township collector's bond, as the director has no interest in such suit, and has no right to speak. People *v.* Yeazel, 84 Ill. 539.

98. Georgia R., etc., Co. *v.* Hutchinson, 125 Ga. 762, 54 S. E. 725 (holding that a tax collector of a county may enforce the collection of a tax for educational purposes by execution issued by him); State *v.* First Nat. Bank, 4 Nev. 491 (in the same manner as delinquent state or county taxes). And see, generally, TAXATION.

**Arrest.**— Under some statutes an arrest may be had of the taxpayer's person for the non-payment of a school tax. Allen *v.* Gleason, 4 Day (Conn.) 376; Fulton *v.* Jenks, 9 Pa. Co. Ct. 126.

99. Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron, etc., Co., 18 W. Va. 441, holding further that no suit will lie against a delinquent taxpayer to collect township school taxes.

1. See *infra*, III, F, 4, e, (VII), (D).

2. Elizabethtown Dist. Public School *v.* Louisville, etc., R. Co., (Ky. 1895) 30 S. W. 620; State *v.* First Nat. Bank, 4 Nev. 491; Beck *v.* Kerr, 87 N. Y. App. Div. 1, 83 N. Y. Suppl. 1057 [*affirmed* in 177 N. Y. 558, 69 N. E. 1120]; Chrigstrom *v.* McGregor, 74 Hun (N. Y.) 343, 26 N. Y. Suppl. 517 (holding that under Laws (1864), c. 555, § 86, authorizing a school trustee to recover in his own name a school tax where the delinquent taxpayer does not reside within the district at the time of making out the tax list or at the expiration of the warrant, no action can be maintained, where the taxpayer resides within the district and has sufficient personal property therein to satisfy the tax); McGregor *v.* White, 1 U. C. Q. B. 15.

**Assumpsit.**— In the absence of a statute authorizing school trustees to sue for a school tax, they have the common-law right of action in assumpsit for its recovery, as the legal obligation to pay the tax implies a promise to pay it by the one assessed. Torrey *v.* Willard, 55 Hun (N. Y.) 78, 8 N. Y. Suppl. 392; McCracken *v.* Elder, 34 Pa. St. 239.

**A judgment for costs** in favor of defendant in an action by school trustees for the collection of a tax, instituted without the authority of the district, is not a claim against the district, but against the trustees personally and against their successors adopting the cause of action. Beck *v.* Kerr, 87 N. Y. App. Div. 1, 83 N. Y. Suppl. 1057 [*affirmed* in 177 N. Y. 558, 69 N. E. 1120].

3. Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262; Chicago, etc., R. Co. *v.* People, 155 Ill. 276, 40 N. E. 602.

**In Texas,** under Sayles Civ. St. art. 425*a*, an action to establish a lien upon real estate for unpaid school taxes cannot be maintained by a city unless it is averred and

on which the taxes are a lien.[4] Where the levy is upon land within the district which constitutes only a part of a tract, the rest of which lies outside of the district, all of the tract cannot be sold;[5] and so where the levy is on personalty, there cannot be a sale of the land on which it is situated;[6] and where the tax collection is to be made only by a certain officer, a levy and sale by him is not affected by the fact that the tax was previously paid to another officer not authorized to receive it.[7] Under some statutes the state may be made a party plaintiff to a suit for the recovery of delinquent school taxes.[8]

(B) *Defenses.* A taxpayer cannot resist the collection of a school tax on the ground that the title to the land purchased for a school building is defective so long as the possession remains undisturbed.[9] Nor can a taxpayer set off against such taxes a claim against the district authorities for unliquidated damages arising out of a breach of contract.[10] Where the taxes are levied for a special purpose, not including the payment of a preëxisting indebtedness, it is no defense to a district treasurer, against whom taxes are assessed, that he had during a previous year paid out on vouchers a certain sum in excess of that which he had received, and that such sum was more than the claim against him for taxes.[11]

(C) *Pleading*[12] *and Evidence.*[13] Where the holding of an election on the question of levying a school tax is a jurisdictional fact, it must be clearly averred in the complaint or petition for the collection of such taxes.[14] Under some statutes the answer to a complaint or petition for the collection of a tax may allege that the tax was paid,[15] or that the property was exempt from taxation,[16] or deny any interest in the property at the date of the assessment,[17] or allege fraud in the assessment.[18] Where the answer denies that any election to authorize the tax was ever held, and there is no attempt to prove such an election, a nonsuit should be granted.[19] As a general rule the burden of proving the invalidity of a school tax is upon defendant.[20]

(D) *Distraint.* In some jurisdictions the collection of delinquent school taxes may be enforced by a levy upon and, if necessary, a sale of the property of the delinquent taxpayer.[21] But in order that such remedy may be enforced,

proved that such city has been duly organized as a separate and independent school-district. McCombs *v.* Rockport, 14 Tex. Civ. App. 560, 37 S. W. 988.

**4.** Brasch *v.* Western Tie, etc., Co., 80 Ark. 425, 97 S. W. 445; Tweed *v.* Metcalf, 4 Mich. 578.

**Notice of the sale** must be given in the manner prescribed by the statute. Bedell *v.* Barnes, 17 Hun (N. Y.) 353.

**Sale to city.**— Under Utah Sess. Laws (1892), § 129, providing that school taxes shall be collected by the collector as other city taxes are collected, the collector has authority to sell property for a delinquent school tax, and if no bids are obtained therefor to strike it off to the city. Ogden City *v.* Hamer, 12 Utah 337, 42 Pac. 1113.

**Redemption from sale.**— Under Cal. Pol. Code, § 3817, as amended by the act of March, 1895, real estate sold to the state for delinquent school taxes may be redeemed by payment of the amount of taxes due thereon at the time of the sale, with penalties based thereon. Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931.

**5.** Shaw *v.* Lockett, 14 Colo. App. 413, 60 Pac. 363.

**6.** Shaw *v.* Lockett, 14 Colo. App. 413, 60 Pac. 363.

**7.** Young *v.* King, 3 R. I. 196.

**8.** Hawesville Bd. of Education *v.* Louisville, etc., R. Co., 110 Ky. 932, 62 S. W. 1125, 23 Ky. L. Rep. 376 (in the name of the state and of the local board of education); State *v.* First Nat. Bank, 4 Nev. 491 (holding that the "state of Nevada" is a proper party plaintiff in an action to recover a delinquent school tax under the act of March 20, 1865).

**9.** People *v.* Sisson, 98 Ill. 335.

**10.** McCracken *v.* Elder, 34 Pa. St. 239.

**11.** Massie *v.* Palo Pinto Independent School Dist., 47 Tex. Civ. App. 349, 105 S. W. 821.

**12.** See, generally, PLEADING, 31 Cyc. 1; TAXATION.

**13.** See, generally, EVIDENCE, 16 Cyc. 821.

**14.** People *v.* Castro, 39 Cal. 65; Com. *v.* Louisville, etc., R. Co., 33 S. W. 204, 17 Ky. L. Rep. 991.

**15.** People *v.* Nelson, 36 Cal. 375.

**16.** People *v.* Nelson, 36 Cal. 375.

**17.** People *v.* Nelson, 36 Cal. 375.

**18.** People *v.* Nelson, 36 Cal. 375.

**19.** People *v.* Castro, 39 Cal. 65.

**20.** Common School Dist. No. 88 *v.* Garvey, 80 Ky. 159.

**21.** McKay *v.* Batchellor, 2 Colo. 591; Atkison *v.* Amick, 25 Mo. 404; Folsom *v.* Streeter, 24 Wend. (N. Y.) 266; Harling *v.* Mayville, 21 U. C. C. P. 499; Chapman *v.* Thrasher, 20 U. C. C. P. 259; Applegarth

all the prescribed conditions precedent must be complied with,[22] as that there must first be a demand upon the delinquent for the tax, and a refusal by him to pay it.[23] Under some statutes the collector cannot levy upon a taxpayer's property until after the expiration of the prescribed time within which he may voluntarily pay the tax.[24] But as a general rule where the collector of a school-district properly calls for a tax, and the taxpayer refuses to pay, the collector is not required to give any further time, or to specify a time and place to receive it, but may levy at once;[25] and this rule is not affected by the fact that the taxpayer promises that he will pay the tax within a given time if the collector will leave the property.[26] Authority to distrain for school taxes extends to all taxes that may be levied and assessed by the school-district,[27] including back taxes for previous years.[28] A levy for school taxes may be made on any goods and chattels lawfully in possession of the person liable to pay the tax, although he is not the owner thereof.[29] A school-district collector by levying under his warrant on property for the non-payment of a tax acquires a special property in the goods levied on, and may maintain an action against any person who removes them, although he leaves them temporarily with the original owner.[30]

**f. Effect of Change of Boundaries or Creation of New District**[31] — (i) *IN GENERAL.* The levy, assessment, collection, and disposition of school taxes upon the change of the boundaries of a school-district or the creation of new districts,[32]

*v.* Graham, 7 U. C. C. P. 171; Spry *v.* McKenzie, 18 U. C. Q. B. 161; Newberry *v.* Stephens, 16 U. C. Q. B. 65.

**Indorsement of warrant.**— The omission of the officer who seizes property for school taxes under a warrant to enter upon the warrant the true day and year when he receives the same does not invalidate his proceeding. Goodwin *v.* Perkins, 39 Vt. 598.

**Place of sale.**—A collector distraining property to satisfy a school tax need not sell the property in his district; but it is sufficient if it is sold in the town. Sherwin *v.* Bugbee, 16 Vt. 439.

**Where no penalty is sought to be collected,** and the distraint for taxes is not made until more than four months after the levy, it is no defense that the school trustees failed to fix the time within which the tax should be paid, as required by statute. Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81.

**If persons assessed do not pay or tender the school taxes** before enjoining their collection, it is immaterial that the levying officer fails to tender tax receipts to them before levying on their property. Collins *v.* Masden, 74 S. W. 720, 25 Ky. L. Rep. 81.

**Replevin for property seized** under a warrant of distress for the non-payment of school taxes see McGregor *v.* Patterson, 5 Nova Scotia 211; Haacke *v.* Marr, 8 U. C. C. P. 441.

**Agreement with third party.**— An agreement between a school-district collector, who has left in the hands of the owner goods levied on under his warrant, and a third person, for the delivery of the goods or the payment of the tax, is binding on the parties, and is a sufficient consideration for a promise by such person, after the goods have been removed out of the reach of the collector, to pay a certain sum upon the warrant on the relinquishment of the levy by the collector. Hilliard *v.* Austin, 17 Barb. (N. Y.) 141.

22. See Atkison *v.* Amick, 25 Mo. 404.

**All the legal requisites** to the organization of the district, to the appointment of the collector, and the authority to collect, must be shown to have been complied with in order to justify a taking of property as collector of a school-district; and an assistant is not justified unless the collector is. Bates *v.* Hazeltine, 1 Vt. 81.

23. Atkison *v.* Amick, 25 Mo. 404; Gearhart *v.* Dixon, 1 Pa. St. 224.

24. Parker *v.* Brown, 17 Barb. (N. Y.) 145, holding also that if the collector levies upon the property within that time he is a trespasser.

25. Wheelock *v.* Archer, 26 Vt. 380.

26. Wheelock *v.* Archer, 26 Vt. 380.

27. Keeler *v.* Chicester, 13 Wend. (N. Y.) 629.

28. Coleman *v.* Kerr, 27 U. C. Q. B. 5; McLean *v.* Farrell, 21 U. C. Q. B. 441.

29. Keeler *v.* Chicester, 13 Wend. (N. Y.) 629.

30. Hilliard *v.* Austin, 17 Barb. (N. Y.) 141.

31. **Appraisal of school property and assessment of equalizing tax on change of organization** see *supra*, III, C, 2, b, (v).

**Validity of proceedings for the alteration and creation of districts** see *supra*, III, C, 1, c.

32. See the statutes of the several states; and the following cases:

*Missouri.*— State *v.* Schnecko, 11 Mo. App. 165.

*Nebraska.*— Burlington, etc., R. Co. *v.* Lancaster County Com'rs, 12 Nebr. 324, 11 N. W. 332, holding that under Gen. St. § 8, county commissioners may levy a school-district tax on a district formed from another, for its proportion of the tax on the original district, on a certificate of the county superintendent of schools to the county clerk showing such proportion.

or upon the transfer of a person for school purposes from one district to another,[33] are generally regulated by statutory or charter provisions, or by the agreement under which the change or division is made.[34] As a general rule the power to levy and assess a tax upon all the property of a school-district extends to the property within the boundaries of the district corporation at the time of the levy,[35] including property which is annexed to it from another district before the levy is made;[36] and if after a tax has been levied the boundaries of the district are changed so as to transfer part of its territory to another district such transferred territory is still subject to such levy;[37] but if such change is made before the tax is levied

*New Hampshire.*— Perkins *v.* Longmaid, 34 N. H. 315.

*New Jersey.*— Woolley *v.* Hendrickson, 73 N. J. L. 14, 62 Atl. 278, holding that Gen. School Law (1903), § 33, postpones the operation of the act, with respect to all fiscal adjustments between the new school-districts and the former school-districts, until the end of the then current school year.

*Utah.*— Lowe *v.* Hardy, 7 Utah 368, 26 Pac. 982.

*Vermont.*— Barre *v.* Barre School Dist. No. 13, 67 Vt. 108, 30 Atl. 807.

*Washington.*— Seattle School Dist. No. 1 *v.* King County Com'rs, 3 Wash. 154, 28 Pac. 376.

*Wyoming.*— Baldwin *v.* Nickerson, 3 Wyo. 208, 19 Pac. 439.

See 43 Cent. Dig. tit. "Schools and School Districts," § 252.

**Necessity for new certificate.**—Under Mass. Gen. St. c. 39, § 25, a town voting to unite two of its school-districts is so "districted anew" that the estate of a non-resident previously taxed in one of the old districts cannot be taxed in the new one without a new certificate of the assessors. Bacon *v.* Barnstable Thirteenth School Dist., 97 Mass. 421.

**A tax upon illegally united districts is void.** Kaighn *v.* Reeves, 28 N. J. L. 520, holding that where the town superintendent and the trustees undertake to join to their own district another unincorporated district, which they have no power to do, and the tax is assessed upon the inhabitants of both districts as though they had been legally united, the tax is entirely void.

**The want of assent of a school-district to** a vote of a town uniting it with another school-district is no objection to the validity of a school-district tax assessed by the united district. Blackstone *v.* Taft, 4 Gray (Mass.) 250.

**Effect on vote.**— A division of a school-district after the enactment of a statute authorizing an election therein for the purpose of voting a special tax does not render a subsequent election in one of such divisions, and a tax on the property therein, void where no one in the other division is permitted to vote or is taxed. Eakins *v.* Eakins, 20 S. W. 285, 14 Ky. L. Rep. 562.

33. Johns *v.* State, 130 Ind. 522, 30 N. E. 640.

**Under Ind. Rev. St. (1881) § 4468,** where a person is transferred from one township, town, or city to another for school purposes, he must pay on all his property situated in the township, town, or city to which he is transferred, as well as that in the township, town, or city in which he resides, the same rate of school and poll taxes as is paid by the people of the township to which he is transferred. Johns *v.* State, 130 Ind. 522, 30 N. E. 640.

34. Jasper Dist. Tp. *v.* Wheatland Dist. Tp., 62 Iowa 62, 17 N. W. 205.

35. See *supra*, III, F, 4, b, (II).

36. *California.*— Visalia Sav. Bank *v.* Visalia, 153 Cal. 206, 94 Pac. 888, holding that, under Pol. Code, § 1576, where land adjoining a city is included in the city school-district, it will be liable to a levy of a city school tax.

*Illinois.*— Phelps *v.* Peoria School Inspectors, 214 Ill. 30, 73 N. E. 412.

*Iowa.*— Grout *v.* Illingworth, 131 Iowa 281, 108 N. W. 528, holding that where property is brought into a district by an extension of its boundaries prior to a levy of taxes for school purposes, it is liable to such tax, although it was not a part of the district at the time that the tax was voted, and although the taxpayer had no opportunity to participate in the election of the members of the board certifying the tax.

*New Hampshire.*—Fifield *v.* Swett, 56 N. H. 432; Pickering *v.* Coleman, 53 N. H. 424, holding that persons and property annexed to a school-district in an adjoining town are subject to school-house taxes in the district to which they are annexed, and not elsewhere, although previous to such annexation the town within whose limits they were constituted but one school-district; and if the town or city containing the district to which they are annexed is subsequently consolidated into one district, they will be likewise subject to school-house taxes therein.

*Ohio.*— Eckstein *v.* Chicago Junction Bd. of Education, 4 Ohio Cir. Dec. 149 [*affirmed* in 55 Ohio St. 643, 48 N. E. 1112].

*Utah.*— King *v.* Utah Cent. R. Co., 6 Utah 281, 22 Pac. 158.

*Vermont.*— Hassam *v.* Edwards, 49 Vt. 7.

*Washington.*— Seattle School Dist. No. 1 *v.* King County Com'rs, 3 Wash. 154, 28 Pac. 376.

See 43 Cent. Dig. tit. "Schools and School Districts," § 252.

**Where territory is detached from a village or special school-district and attached to a township subdistrict, such territory is taxable for school purposes after such change in the township subdistrict, and not in the village or special district.** State *v.* Holliday, 9 Ohio S. & C. Pl. Dec. 738, 7 Ohio N. P. 47.

37. Hughes *v.* Ewing, 93 Cal. 414, 28 Pac.

the transferred territory is not liable to such tax,[38] although the legislature may, in making such a change, impose a tax upon the detached territory for a certain time for the benefit of the district from which it is detached, in consideration of benefits conferred upon such territory.[39] As to personal property, however, it has been held that there can be no distress thereon for school taxes if it is without the district,[40] although it is without the district by reason of a division of the district after the levy is made, but before the property is seized.[41]

(II) *TAXATION FOR BONDED INDEBTEDNESS.* Where the taxation is for a bonded school indebtedness the right to tax extends to real estate which was taxable as such at the time the indebtedness was contracted, although it is subsequently transferred to another district by division,[42] and does not extend to real estate that was not taxable at that time.[43]

(III) *DISPOSITION.* Where taxes which are assessed before the formation of a new district from an old district remain uncollected until after such formation, the new district is entitled to participate in the fund when collected;[44] and where an old district wrongfully levies and collects taxes on a portion thereof which has been transferred to a new district, an action will lie in favor of the latter to recover the amount so collected;[45] and when such amount is recovered it is divisible among the new district and such other districts as may have been formed out of it in the same proportions in which it was levied.[46] Where a school-district from which an illegal tax is collected and expended is afterward subdivided, upon a refunding of such tax it should be apportioned from the funds of the different districts occupying the territory from which it was collected;[47] and if it is refunded wholly from the funds of one of such districts, such district after a demand upon the districts occupying the remaining territory may maintain an action against them for contribution.[48]

**g. Remedies For Erroneous Taxation**[49] — (I) *IN GENERAL.* It has been held that the proper remedy of a person assessed by a school-district in which he is not taxable is by an application for an abatement.[50] Where a person is aggrieved by the failure of the school-district authorities to insert in the tax list the names of all the taxable inhabitants, his remedy in some jurisdictions is by an appeal to the county superintendent of schools,[51] or by suing out a common-law cer-

1067; Union Independent Dist. *v.* Cedar Rapids Independent Dist., 62 Iowa 616, 17 N. W. 895; Waldron *v.* Lee, 5 Pick. (Mass.) 323; Dyer *v.* Rutland School Dist. No. 1, 61 Vt. 96, 17 Atl. 788; Ovitt *v.* Chase, 37 Vt. 196.

A curative statute validating a previously invalid change of boundaries cannot operate to deprive a school-district from which territory is detached by such change of taxes levied and collectable before the act is passed. Union Independent Dist. *v.* Cedar Rapids Independent Dist., 62 Iowa 616, 17 N. W. 895.

**38.** Hughes *v.* Ewing, 93 Cal. 414, 28 Pac. 1067; Jackman *v.* Salisbury Second School Dist., 5 Gray (Mass.) 413 (holding that a school-district tax cannot be assessed on an inhabitant who is set off by a vote of the town to another district before the assessment is complete, although after the tax is voted and expenses are incurred in favor of the school-district in the execution of its project); Richards *v.* Dagget, 4 Mass. 534; State *v.* Burford, 82 Mo. App. 343; Pierce *v.* Whitman, 23 Vt. 626.

**39.** Fitzpatrick *v.* Mt. Sterling Graded Public School, 87 Ky. 132, 7 S. W. 896, 10 Ky. L. Rep. 9.

**40.** McKay *v.* Batchellor, 2 Colo. 591.

**41.** McKay *v.* Batchellor, 2 Colo. 591.

**42.** Callaway *v.* Denver, etc., R. Co., 6 Colo. App. 284, 40 Pac. 573; Chambers *v.* Adair, 110 Ky. 942, 62 S. W. 1128, 23 Ky. L. Rep. 373; Hawesville Bd. of Education *v.* Louisville, etc., R. Co., 110 Ky. 932, 62 S. W. 1125, 23 Ky. L. Rep. 376.

**43.** Callaway *v.* Denver, etc., R. Co., 6 Colo. App. 284, 40 Pac. 573.

**44.** Manchester *v.* Reserve Tp., 4 Pa. St. 35.

**45.** Hamilton County School Dist. No. 6 *v.* Hamilton County School Dist. No. 9, 13 Nebr. 166, 12 N. W. 921.

**46.** Hamilton County School Dist. No. 6 *v.* Hamilton County School Dist. No. 9, 13 Nebr. 166, 12 N. W. 921.

**47.** Spencer Dist. Tp. *v.* Riverton Dist. Tp., 56 Iowa 85, 8 N. W. 784.

**48.** Spencer Dist. Tp. *v.* Riverton Dist. Tp., 56 Iowa 85, 8 N. W. 784.

**49.** Correction or setting aside of assessment see *supra*, III, F, 4, c, (VIII).

**50.** Orford School Dist. No. 6 *v.* Orford, 63 N. H. 277. See also Locke *v.* Pittsfield, 63 N. H. 122.

**51.** Easton *v.* Calendar, 11 Wend. (N. Y.) 90.

tiorari.[52] A levy to pay an unconstitutional debt may be defeated by an objection in a proceeding for a judgment for delinquent taxes.[53]

(II) *RIGHTS OF DISTRICTS.* One school-district may recover from another district taxes which have been levied by the former and unlawfully collected by the latter;[54] but a school-district does not become a trustee for one taxpayer of an excessive amount collected from another taxpayer,[55] and one school-district cannot recover from another district taxes which, through a mistake as to location, have been levied by and voluntarily paid to the latter, upon land within the former district,[56] although the tax rate as extended in the former district is thereby made greater than it otherwise would have been.[57] But the fact that one school-district unlawfully levies and collects taxes on land in another school-district does not prevent the latter from levying and collecting taxes on the same land.[58]

(III) *INJUNCTIONS*[59] — (A) *In General.* The power of taxation for the support of public schools may in a proper case be controlled by injunction,[60] which ordinarily is governed by the general rules relating to injunctions,[61] and will not be granted except where it is clear that it is necessary to protect plaintiff's rights;[62]

**52.** Easton *v.* Calendar, 11 Wend. (N. Y.) 90.

**Upon a certiorari** by a taxpayer against a tax collector, the question whether bonds authorized to be issued by a board of education were issued at the time of the computation of ratables for assessment, should not be decided, where no notice of the pendency of such proceeding has been given to any one representing the public interests sought to be attacked. Tippett *v.* McGrath, 70 N. J. L. 110, 56 Atl. 134 [*affirmed* in 71 N. J. L. 338, 59 Atl. 1118].

**53.** Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262.

**54.** State *v.* Beale, 90 Mo. App. 341.

**55.** Walser *v.* School Dist. No. 1 Bd. of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329 [*affirming* 57 Ill. App. 288].

**56.** *Illinois.*—Jackson County Dist. No. 153 *v.* Jackson County Dist. No. 154, 232 Ill. 322, 83 N. E. 849; Walser *v.* School Dist. No. 1 Bd. of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329 [*affirming* 57 Ill. App. 288].

*Iowa.*— Rapids Dist. Tp. *v.* Clinton Dist. Tp., 27 Iowa 323.

*Missouri.*— State *v.* Beale, 90 Mo. App. 341.

*Ohio.*— Lyme Tp. Bd. of Education *v.* Special School Dist. No. 1, Bd. of Education, 44 Ohio St. 278, 7 N. E. 12, where the taxes so received are not produced by any levy made by the former district.

*Pennsylvania.*— Arthur *v.* Polk Borough School Dist., 164 Pa. St. 410, 30 Atl. 299.

**57.** Walser *v.* School Dist. No. 1 Bd. of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329 [*affirming* 57 Ill. App. 288].

**58.** Arthur *v.* Polk Borough School Dist., 164 Pa. St. 410, 30 Atl. 299.

**59. Attacking legal existence of district** see *supra*, III, C, 1, g.

**60.** Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

**61.** See, generally, INJUNCTIONS, 22 Cyc. 724; TAXATION.

**Equity will take jurisdiction** of a bill brought to restrain the collection of a school-district tax illegally assessed, on the ground of the inherent jurisdiction of equity to prevent a multiplicity of suits, although each taxpayer may have a remedy at law. Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**Matters considered.**— On a bill to restrain the collection of school taxes, the court will not inquire into the validity of the appointment of the collector, where he has given a bond with securities approved as required by law (Locust Mountain Coal, etc., Co. *v.* Curran, 10 Phila. (Pa.) 543); nor, where the action is brought by taxpayers who have voted in favor of the tax, will it consider the number of persons in favor of or opposed to the tax at the time the suit was commenced, or how much the school-district may gain or lose by enjoining the collection of the tax (Vaughn *v.* Tillamook County School Dist. No. 31, 27 Oreg. 57, 39 Pac. 393); but upon proper allegations equity will inquire into the validity of an election, voting a tax, although as a general rule it will not deal with contests of elections (Coleman *v.* Emanuel County Bd. of Education, 131 Ga. 643, 63 S. E. 41).

**Evidence.**— In proceedings to enjoin the collection of a school tax, certificates of levy by the school directors which are required by law to be filed with the county court are inadmissible in the absence of proof of proper filing, and entries made by the county clerk of the legal effect of the certificates on no principle are admissible as evidence of such levies. Weber *v.* Ohio, etc., R. Co., 108 Ill. 451.

**62.** Davis *v.* Ponder, 131 Ga. 713, 63 S. E. 220; Cairo Banking Co. *v.* Ponder, 131 Ga. 708, 63 S. E. 218; T. B. Scott Lumber Co. *v.* Oneida County, 72 Wis. 158, 39 N. W. 343, holding that an injunction against a sale of lands for taxes levied under the school system will not be granted where it appears that the system was duly adopted by the legal voters, and that the law authorizing the system violates no constitutional principle of local self-government or uniformity.

**Changing location of school.**— In the absence of a showing that school trustees did

nor in any case will it be granted where there is an adequate remedy at law [63] or by proceedings before a reviewing board or officer.[64] Subject to these rules an injunction will lie to restrain the assessment and collection of school taxes which are illegal,[65] as where the levy or assessment is invalid by reason of its having been made without authority of the law,[66] as by an unauthorized board or officer,[67] or by reason of its being levied upon property not taxable within the district,[68] as where it is levied upon the property of one school-district for the benefit of another,[69] or by reason of its being levied fraudulently.[70] An injunction will also lie to restrain the collection of a school tax which is in excess of the constitutional or statutory limit,[71] or which is greatly in excess of the amount which is required for the purpose for which it is levied,[72] although it has been held that where the tax does not exceed the prescribed limit the courts will not, in the absence of fraud, enjoin its collection merely because more has been levied than might be found neces-

not act for the best interests of the district, their act of changing the location of a school building is no ground for restraining a levy of taxes ordered by the district. Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18.

**63.** Shriver *v.* McGregor, 224 Ill. 397, 79 N. E. 706; Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75; Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197; State *v.* McLaughlin, 15 Kan. 228, 22 Am. Rep. 264; Barrow *v.* Davis, 46 Mo. 394; Sayre *v.* Tompkins, 23 Mo. 443.

**That the certificate of levy is not under seal,** as required by statute, is a defect which might be remedied upon a proper application, when a judgment and order of sale for nonpayment is asked for, and hence is not available on a suit for an injunction to restrain the collection of taxes. Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75.

**Misappropriation.**— Where there is an adequate remedy at law against school directors for a misappropriation of school funds by them, a court of equity will not enjoin the collection of a school tax merely on the ground of such misappropriation. Moore *v.* Fessenbeck, 88 Ill. 422.

**64.** Bogaard *v.* Plain View Independent Dist., 93 Iowa 269, 61 N. W. 859.

**65.** *Arkansas.*— Cole *v.* Blackwell, 38 Ark. 271.

*Florida.*— Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

*Kansas.*— See Atchison, etc., R. Co. *v.* Wilhelm, 33 Kan. 206, 6 Pac. 273.

*Kentucky.*— Howard *v.* School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399.

*Michigan.*— Folkerts *v.* Powers, 42 Mich. 283, 3 N. W. 857.

*Ohio.*— Moss *v.* Special School Dist. No. 1 Bd. of Education, 58 Ohio St. 354, 50 N. E. 921; Warring *v.* Hazlewood, 3 Ohio Dec. (Reprint) 315.

*Pennsylvania.*— Coal, etc., Co. *v.* Dunphy, 11 Pa. Dist. 218, 10 Kulp 491.

*Rhode Island.*— Tefft *v.* Lewis, 27 R. I. 9, 60 Atl. 243, holding that where, under Pub. Laws (1903), c. 1101, a tax is void because of the absence of the required appraisers, the taxpayers of the district, the property of which was not appraised, are entitled to have the collection permanently enjoined.

See 43 Cent. Dig. tit. "Schools and School Districts," § 255.

But see Barrow *v.* Davis, 46 Mo. 394; Sayre *v.* Tompkins, 23 Mo. 443.

**66.** *Iowa.*— Williams *v.* Peinny, 25 Iowa 436.

*Kentucky.*— Dawson *v.* School Dist. No. 40, 72 S. W. 806, 24 Ky. L. Rep. 2027.

*Maine.*— Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

*Nebraska.*— Earl *v.* Duras, 13 Nebr. 234, 13 N. W. 206.

*Ohio.*— Baker *v.* Black, 6 Ohio 53.

*Pennsylvania.*— Conner's Appeal, 103 Pa. St. 356.

See 43 Cent. Dig. tit. "Schools and School Districts," § 255.

**Purpose of tax.**—Where, on the hearing of a motion to restrain the collection of an alleged building tax for school purposes, the purpose of the tax is not clearly shown, a preliminary injunction may be continued on account of the necessity of knowing what the records of the school-district show in relation to the purpose, whether for building or merely for the purpose of repairs. Gilbert *v.* Tierney, 14 Pa. Co. Ct. 472.

**67.** Cole *v.* Blackwell, 38 Ark. 271; Munson *v.* Minor, 22 Ill. 594; Watts *v.* McCleave, 16 Ill. App. 272.

**68.** Green Mountain Stock Ranching Co. *v.* Savage, 15 Mont. 189, 38 Pac. 940.

**69.** Earl *v.* Duras, 13 Nebr. 234, 13 N. W. 206.

**70.** Schofield *v.* Watkins, 22 Ill. 66; Hinkle *v.* Saddler, 97 Iowa 526, 66 N. W. 765.

**71.** Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262; Marion, etc., R. Co. *v.* Alexander, 63 Kan. 72, 64 Pac. 978. See also Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832.

**72.** Conner's Appeal, 103 Pa. St. 356; Davis *v.* Bradford School Dist., 4 Pa. Co. Ct. 656; Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

**Preliminary injunction.**— On a bill to restrain the collection of a building tax, a preliminary injunction will be continued where it appears from defendant's own testimony that only a small portion of the tax is to be used for building purposes, that the alleged purpose is to use the larger part of the tax in paying debts, although there are no debts shown which can be legally paid out of such a fund, and that the school-district has large assets in the shape of sums due from former

sary.[73] But an injunction will not be granted to restrain the collection of a school tax merely because of irregularities in the proceedings of the taxing officers;[74] nor in the absence of fraud or misconduct will it be granted so as to interfere with matters which are within the discretion of the taxing officers;[75] nor will such an injunction be granted because the collector's bond is too small to include a tax authorized after his entry into office,[76] or because it is proposed to divert the money when raised, since a court of equity may prevent a misappropriation of the fund after the tax is collected,[77] or because the course of study adopted for the school which the tax is to maintain is different from that contemplated by the law;[78] nor will an injunction lie to try the corporate existence of the board levying the tax.[79] Payment or tender of payment of so much of the tax as is admitted to be legal has been held to be a condition precedent to an action to enjoin the collection of an illegal tax;[80] and acquiescence in the proceedings by which the tax is authorized may bar a right to an injunction to restrain the collection of the tax on the ground of the invalidity of the proceedings.[81] A school-district cannot maintain an injunction to restrain the collection of taxes on property in which it has no interest, as on lands detached from its territory and included in a newly formed district;[82] nor can it maintain an injunction to control the actions of public officers in the discharge of official duties in relation to school taxes.[83]

(B) *Parties and Pleading.* A bill to enjoin the collection of an illegal school tax may be brought by all or any number of the taxpayers of the district, suing on behalf of themselves and all others similarly situated.[84] The school-district

collectors and treasurers. Mitchell *v.* Kearns, 16 Pa. Super. Ct. 354.

**73.** Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832; Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197.

**74.** Smith *v.* Bohler, 72 Ga. 546; Gray *v.* Peoria Bd. of School Inspectors, 231 Ill. 63, 83 N. E. 95; Schmohl *v.* Williams, 215 Ill. 63, 74 N. E. 75; Munson *v.* Minor, 22 Ill. 594; Merritt *v.* Farris, 22 Ill. 303; Burnham *v.* Rogers, 167 Mo. 17, 66 S. W. 970; Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358.

**Irregularities in the certificate of levy** which might be corrected by amendment or otherwise are not sufficient for the issuing of an injunction to restrain the collection of a school tax. Shriver *v.* McGregor, 224 Ill. 397, 79 N. E. 706; Creech *v.* Harlan County Common School Dist. No. 15, 102 S. W. 804, 31 Ky. L. Rep. 379.

**75.** Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197; Jamison *v.* Houston, (Miss. 1894) 15 So. 114; Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358; Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

**76.** Smith *v.* Bohler, 72 Ga. 546.

**77.** People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832; Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197.

**78.** Richards *v.* Raymond, 92 Ill. 612, 34 Am. Rep. 151.

**The teaching of Latin and Greek in a** common school does not justify an injunction against the collection of a tax levied in aid of such school. Newman *v.* Thompson, 4 S. W. 341, 9 Ky. L. Rep. 199.

**79.** Ewing *v.* Jefferson Bd. of Education, 72 Mo. 436.

**80.** Black *v.* Early, 208 Mo. 281, 106 S. W. 1014; Burnham *v.* Rogers, 167 Mo. 17, 66 S. W. 970.

**81.** Loesche *v.* Goerdt, 123 Iowa 55, 98 N. W. 571; Clarke *v.* Starr Tp. Bd. of Education, 44 Ohio St. 595, 9 N. E. 790; Martin *v.* Laurens School Dist., 57 S. C. 125, 35 S. E. 517.

**After a school-house has been erected and the school therein put in operation,** it is too late to object to the validity of the tax voted to pay therefor, by proceedings to restrain the collection of the tax. Loesche *v.* Goerdt, 123 Iowa 55, 98 N. W. 571; Casey *v.* Nutt Independent Dist., 64 Iowa 659, 21 N. W. 122. An interlocutory injunction restraining a school tax authorized by the local law, and levied for supporting the school system, will not be granted where a majority of the complainants, suing for their own separate benefit and protection, voted in favor of the approval of such local law, and all of them acquiesced in the result of the election, until after the school-house was established and put in operation. Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120.

**Where the acts of school officers in levying a tax are void** taxpayers are not estopped, by the fact that they had notice thereof and paid the tax without complaint for two years. Howard *v.* School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399.

**82.** Jefferson County School Dist. No. 8 *v.* Gibbs, 52 Kan. 564, 35 Pac. 222.

**83.** Jefferson County School Dist. No. 8 *v.* Gibbs, 52 Kan. 564, 35 Pac. 222.

**84.** Williams *v.* Penny, 25 Iowa 436; Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**Plaintiff must aver that he sues not only**

is a necessary party defendant to such a bill,[85] as are also all the officers of the school-district who are directly interested in the collection of the taxes.[86] Where the tax has been extended on the tax books and placed in the hands of the collector the injunction should be against him.[87] In an action to enjoin the collection of taxes for the purpose of paying the principal and interest on school-bonds the bondholders are necessary parties.[88] The allegations of such bill must be definite and certain in stating facts sufficient to constitute the cause of action,[89] as also must be the allegations in an answer, as to matters of defense.[90]

(IV) *ACTIONS FOR DAMAGES.* A taxpayer who is aggrieved by the assessment and collection of an illegal school tax is not limited to an action to recover the amount of taxes collected from him;[91] but may maintain an action of trespass against the assessing or collecting officers for the unlawful seizure of his property to recover the value of the property taken,[92] as where such officers collect a tax which is illegal because of a non-compliance with the statutory provisions relative to the forming of the school-district,[93] because of the adopting an erroneous basis for fixing the amount of the tax to be paid,[94] or because of its being levied and assessed on non-taxable property.[95] If a taxpayer has regained

on his own behalf, but also on behalf of all others similarly situated, such averment being essential to a complete determination of all the rights affected by the suit. McClung *v.* Livesay, 7 W. Va. 329.

85. Folkerts *v.* Power, 42 Mich. 283, 3 N. W. 857.

**Where the tax is found to be illegal, it is** sufficient to add the district as a party before entering the final decree. Folkerts *v.* Power, 42 Mich. 283, 3 N. W. 857.

86. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

**A final injunction will not be granted until** the officers of the school-district directly interested in the collection of the taxes are made parties defendant. Atchison, etc., R. Co. *v.* Wilhelm, 33 Kan. 206, 6 Pac. 273.

**A temporary injunction,** however, will not be dissolved, because of a failure to make such officers parties to the bill. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.

87. Ewing *v.* Jefferson City Bd. of Education, 72 Mo. 436.

88. Brockway *v.* Louisa County, 133 Iowa 293, 110 N. W. 844; Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18.

89. Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197; Shea *v.* Burke, 3 Luz. Leg. Reg. (Pa.) 242.

**A general allegation** of irreparable injury in such a bill is not sufficient to entitle plaintiff to relief, unless some equitable circumstances are shown, such as insolvency, impediment to a judgment at law or to adequate legal relief, or a threatened destruction of property, or the like. McClung *v.* Livesay, 7 W. Va. 329.

**A petition to restrain the collection of a tax levied for erecting a new school-house** on the ground that the erection of a new school-house is an unauthorized attempt to maintain two school-houses in the district at the same time must specifically allege the fact that there is already a school-house fit for use, and that it is designed to maintain two at the same time. Casey *v.* Nutt Independent Dist., 64 Iowa 659, 21 N. W. 122.

**Striking out allegation.**—An allegation in such a bill which is a mere conclusion of law, and not specific enough to raise an issue of fact should be stricken out. Fitzpatrick *v.* Mt. Sterling Public Graded Schools, 87 Ky. 132, 7 S. W. 896, 10 Ky. L. Rep. 9.

90. See Visalia Sav. Bank *v.* Visalia, 153 Cal. 206, 94 Pac. 888.

91. Haley *v.* Whitney, 53 Hun (N. Y.) 119, 6 N. Y. Suppl. 342.

92. *Maine.*— Tucker *v.* Wentworth, 35 Me. 393.

*Massachusetts.*—Withington *v.* Eveleth, 7 Pick. 106.

*New Hampshire.*— Rogers *v.* Bowen, 42 N. H. 102; Johnson *v.* Dole, 4 N. H. 478.

*New York.*— Jewell *v.* Van Steenburgh, 58 N. Y. 85 [*overruling* Randall *v.* Smith, 1 Den. 214]; Haley *v.* Whitney, 53 Hun 119, 6 N. Y. Suppl. 342 [*disapproving* Colten *v.* Beardsley, 38 Barb. 29]. But see Seaman *v.* Benson, 4 Barb. 444.

*Vermont.*— Moss *v.* Hindes, 28 Vt. 279.

See 43 Cent. Dig. tit. "Schools and School Districts," § 256.

**In Maine and Massachusetts it has been** held that a statutory provision imposing certain liabilities upon towns and other corporations, and exempting assessors from such liability except in cases of want of integrity on their part, does not apply to school-districts. Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254; Taft *v.* Wood, 14 Pick. 362; Withington *v.* Eveleth, 7 Pick. 106.

**For sufficiency of replication** in such an action see Moss *v.* Hindes, 28 Vt. 279.

**An objection not raised at the trial in such** an action is waived. See Williams *v.* Larkin, 3 Den. (N. Y.) 114.

93. Tucker *v.* Wentworth, 35 Me. 393; Withington *v.* Eveleth, 7 Pick. (Mass.) 106.

94. Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89.

95. Suydam *v.* Keys, 13 Johns. (N. Y.) 444.

**Estoppel.**—Where land is assessed in a school-district in which it is not legally taxable, but the owner thereof has requested the

his property he may maintain such an action to recover the amount paid by him to regain it.[96] An action of trespass for damages may also be maintained by one who has been imprisoned for the non-payment of an illegal tax.[97] But where an officer's act in making the levy, assessment, or collection is merely a *bona fide* error of judgment, the tax is voidable only, and the officer is not liable in trespass for causing it to be collected.[98] A school-district will not be liable in trespass for voting a school tax for unauthorized purposes where the vote is altogether aside from its corporate powers.[99] The burden of showing the legality of a school tax in an action of trespass is generally on defendant,[1] and this defendant must show by the records of the district;[2] or if they are shown to be lost by secondary evidence,[3] such as by a copy of the records, or if they cannot be produced by parol evidence.[4]

**5. Assessments and Special Taxes For Particular Purposes[5] — a. School Buildings and Sites.** The powers and duties of school-districts through their proper authorities to levy and assess taxes for the purpose of acquiring school-house sites and erecting and maintaining school-houses are generally regulated by constitutional, statutory, or charter provisions, and such authorities have only such powers in this regard as are conferred either expressly or by necessary implication by such provisions;[6] and in exercising such powers the proper authorities must proceed in substantial compliance with all essential requirements of such provisions,[7] such as those relative to the submission of the question to the

assessors to place such land to his account as taxable property, and informed them that he was to be taxed for it, the assessors cannot be held liable in an action of trespass for making such assessment. Pease *v.* Whitney, 8 Mass. 93.

**96.** Bedell *v.* Barnes, 17 Hun (N. Y.) 353; Baker *v.* Freeman, 9 Wend. (N. Y.) 36, 24 Am. Dec. 117.

**97.** Bassett *v.* Porter, 10 Cush. (Mass.) 418; Taft *v.* Wood, 14 Pick. (Mass.) 362.

**98.** Easton *v.* Calender, 11 Wend. (N. Y.) 90.

**99.** Greene School Dist. No. 1 *v.* Bailey, 12 Me. 254.

**1.** Bassett *v.* Porter, 10 Cush. (Mass.) 418; Rogers *v.* Bowen, 42 N. H. 102.

**2.** Bartlett *v.* Kinsley, 15 Conn. 327; Rogers *v.* Bowen, 42 N. H. 102.

**3.** Rogers *v.* Bowen, 42 N. H. 102.

**4.** Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

**5. Authority of town officers to provide school-houses and levy taxes therefor** see *supra*, III, E, 2, a (III).

**Certificates or estimates as to amount of tax** see *supra*, III, F, 4, c, (V).

**Taxes for expense of obtaining highways for access to school-house** see *supra*, III, E, 5, c.

**6.** See the constitutions and statutes of the several states; and the following cases:

*Connecticut.*—Sheldon *v.* Center School Dist., 25 Conn. 224.

*Iowa.*—Wood *v.* Farmer, 69 Iowa 533, 29 N. W. 440.

*Kentucky.*—Creech *v.* Common School Dist. No. 15, 102 S. W. 804, 31 Ky. L. Rep. 379.

*Missouri.*— St. Louis, etc., R. Co. *v.* Gracy, 126 Mo. 472, 29 S. W. 579, (1894) 28 S. W. 736.

*New Jersey.*—Van Riper *v.* Ryerson, 30 N. J. L. 268.

*New York.*—Colton *v.* Beardsley, 38 Barb. 29.

*Ohio.*— Bryant *v.* Goodwin, 9 Ohio St. 471.

*South Carolina.*— State *v.* Bacon, 31 S. C. 120, 9 S. E. 765.

*Wisconsin.*— Nevil *v.* Clifford, 63 Wis. 435, 24 N. W. 65.

*Canada.*— *Re* Napanee Bd. of Education, 29 Grant Ch. (U. C.) 395; Kelly *v.* Hedges, 12 U. C. Q. B. 531.

See 43 Cent. Dig. tit. "Schools and School Districts," § 257.

**The power to establish free schools in a district,** and to levy taxes sufficient to defer the expenses thereof, embraces the power to levy a tax for necessary school-houses therein. Bull *v.* Read, 13 Gratt. (Va.) 78.

**The words "for building purposes"** within the meaning of a statute authorizing a tax to be levied for such purposes are special, and apply solely to the building of school-houses and matters incident thereto. O'Day *v.* People, 171 Ill. 293, 49 N. E. 504.

**Taxes levied for building purposes,** to make up the difference between the cost of a school building and the amount realized from a sale of bonds therefor are valid, where the election at which the erection of the building was authorized did not limit the cost to the amount of the bonds voted, or specify the purpose for which the bonds were to be used. People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734.

**Repeal of statute** see Rose *v.* Hindman, 36 Iowa 160.

**7.** People *v.* Toledo, etc., R. Co., 231 Ill. 514, 83 N. E. 193; Hunter *v.* Louisville, etc., R. Co., 30 S. W. 645, 17 Ky. L. Rep. 158; Louisville, etc., R. Co. *v.* School Dist. No. 108, 29 S. W. 340, 16 Ky. L. Rep. 554; State *v.* St. Anthony, 10 Minn. 433.

voters of the district [8] and the computation of the amount of the tax.[9] The fact that a school-district is already indebted to the constitutional limit does not preclude it from levying a special tax within prescribed limits, for the purpose of building or completing a school-house, since this does not create an indebtedness against the district.[10] It is sometimes provided that the school-district board or officers may vote and levy a tax within prescribed limits for the purpose of purchasing a site and erecting a school-house,[11] and ascertain and apportion the amount thereof if the electors of the district neglect or refuse to vote it after it has been properly certified to them.[12] It has been held under the various statutes relative to taxation for school-house purposes that a special tax may be levied to pay the rent on a building to be used for school purposes,[13] or to pay or reimburse the expense of repairing a school-house;[14] that the validity of a tax for removing and repairing a school-house is not affected by the fact that it is removed from within another district, and by the repairs altered in shape and size;[15] that a tax for building purposes cannot be provided until the erection of the building has been agreed upon,[16] or has been authorized by a vote of the dis-

**An assessment by unauthorized officers is** invalid. Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**A tax for the purchase of a school-house site is** properly included in a tax for building purposes. St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303.

8. See, generally, *supra*, III, F, 4, c, (IV).

**The meeting of legal voters must determine** upon the number of houses to be erected and the number of sites to be purchased, and must specify a definite and certain sum of money for such purpose, and this action must precede the levying of the tax. State *v.* St. Anthony, 10 Minn. 433.

**Where the intention of the voters to levy such a tax appears from the records** of the district, it is no objection thereto that such intention is informally expressed. Soper *v.* School Dist. No. 9, 28 Me. 193.

**Second vote.**—The fact that a vote at a district meeting for the erection of a school-house has become inoperative by lapse of time, and is not reconsidered or rescinded, does not prevent a subsequent vote for such purpose from being legal and valid. Randall *v.* Smith, 1 Den. (N. Y.) 214.

9. St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303, holding that where the rate of a tax levied to purchase a school-house site is lower than the maximum rate allowed by law, the amount of the tax should be computed and extended upon the valuation as fixed by the county board of review of the general property and the corporate property as assessed by the state board of equalization.

10. People *v.* Chicago, etc., R. Co., 223 Ill. 448, 79 N. E. 151; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 387, 69 N. E. 39. See also Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 26.

**Where a school-district has exhausted its power to borrow money** for the building of a school-house, and the building is still incomplete, the district may levy up to the statutory limit for building purposes and continue to do so from year to year, until a sufficient amount is raised to complete the building. People *v.* Chicago, etc., R. Co., 223 Ill. 448, 79 N. E. 151.

11. Benjamin *v.* Malaka Dist. Tp., 50 Iowa 648; Blair *v.* Boggs Tp. School Dist., 31 Pa. St. 274.

**Under the New Jersey School Law,** § 76, where a board of school estimate has determined the amount necessary for the purchase of land and erection of a school-house, it is mandatory on the body having the power to make appropriations of money raised by tax to cause the amount to be raised by tax, or to borrow the same and secure its repayment by an issue of bonds. Montclair *v.* Baxter, 76 N. J. L. 68, 68 Atl. 794.

12. Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153, holding that under Laws (1862), c. 172, §§ 16, 17, a school-house tax voted by the board of directors, and not by electors of the district will be deemed valid, as it will be presumed that it has been voted by the directors in pursuance of their duty, on neglect of the electors to do so.

**The duty of determining in the first instance what is a just and valuable apportionment** of taxes rests upon the board of school directors under the Iowa School Law (1872), § 12. Cooper *v.* Nelson, 38 Iowa 440.

13. Hackett *v.* Emporium Borough School-Dist., 150 Pa. St. 220, 24 Atl. 627.

14. Louisville, etc., R. Co. *v.* School Dist. No. 108, 29 S. W. 340, 16 Ky. L. Rep. 554; Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

**Postponement of collection.**—A school-district meeting may postpone the collection of a tax for the repair of a school-house until the repairs are finished. Folsom *v.* Streeter, 24 Wend. (N. Y.) 266.

**That the repairs are paid at the time out of private funds** cannot be availed of by property-owners to avoid a tax imposed for repairs on a school-house. Louisville, etc., R. Co. *v.* School Dist. No. 108, 29 S. W. 340, 16 Ky. L. Rep. 554.

15. Tozier *v.* Vienna School Dist. No. 2, 39 Me. 556.

16. Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832.

trict;[17] that authority to tax for erecting and repairing school-houses authorizes a tax to remove and repair a school-house;[18] but that authority to tax for making repairs does not authorize a tax for building.[19] A tax to build a school-house may be levied and collected before the site for the building is decided upon or procured,[20] but where a particular site has been designated for a school-house a tax cannot be raised to build it upon another site;[21] nor can a tax be levied to build a school-house upon land which is not public property.[22]

**b. High Schools and Academies.**[23] Although it has been held that authority to raise money for a high school is fairly included within a statute providing for the raising of money for purchasing or taking and condemning lands for school-houses,[24] it is within the power of the legislature to provide for the support of high schools and academies by special methods different from those adopted for other schools, and the provisions of high school acts are not generally to be controlled by the provisions relating to common schools.[25] The power and duty of levying and assessing taxes for the support of high schools and academies depend upon the terms of the particular statute relative thereto,[26] and such taxation must be in substantial compliance with the requirements of the statute.[27] Under some statutes a school-district may by taxation provide for the free instruction

17. St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664.

18. Bump *v.* Smith, 11 N. H. 48.

19. Carlton *v.* Newman, 77 Me. 408, 1 Atl. 194.

20. Seaman *v.* Baughman, 82 Iowa 216, 47 N. W. 1091, 11 L. R. A. 354; Colton *v.* Beardsley, 38 Barb. (N. Y.) 29; Williams *v.* Larkin, 3 Den. (N. Y.) 114.

**That the title to the property has not been acquired** is not a good objection to a tax to pay for a school-house, although the school trustees should not pay out the money until they obtain a conveyance. Williams *v.* Larkin, 3 Den. (N. Y.) 114.

21. Marble *v.* McKenney, 60 Me. 332. *Compare* Stevens *v.* Kent, 26 Vt. 503.

22. Loverin *v.* School Dist. No. 3, 64 N. H. 616, 14 Atl. 810. See also Baucum *v.* Claiborne Parish Police Jury, 119 La. 532, 44 So. 289.

**Under Ky. St. (1899)** § 4437, providing that in acquiring land for school sites the trustees shall take a fee simple title, and that titles to lands now used for school sites shall be perfected as soon as possible, school trustees can be restrained from collecting a tax for the repair or improvement of a school-house located on land owned by them jointly with others, and with a reversionary interest in the grantor. Dawson *v.* Common School Dist. No. 40, 115 Ky. 151, 72 S. W. 806, 24 Ky. L. Rep. 2027.

23. **Contribution between municipalities** in regard to the erection and maintenance of high schools see Port Arthur High School Bd. *v.* Ft. William, 25 Ont. App. 522; *In re* Niagara High School Bd., 1 Ont. App. 288.

24. Carling *v.* Jersey City, 71 N. J. L. 154, 58 Atl. 395.

25. Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805.

26. See the statutes of the several states; and the following cases:

*California.*— Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805, holding that under Pol. Code, § 1670, no vote of the people of a high school district is necessary to authorize a board of supervisors to levy a tax for a high school building in a union high school district, on a proper estimate being made and presented, as provided by such statute.

*Illinois.*— Fisher *v.* People, 84 Ill. 491, holding that the school law authorizes the trustees of high schools to levy taxes for the support of such schools.

*Massachusetts.*— Cushing *v.* Newburyport, 10 Metc. 508.

*Missouri.*— State *v.* Vaughan, 99 Mo. 332, 12 S. W. 507.

*Wisconsin.*— State *v.* Lamont, 86 Wis. 563, 57 N. W. 369, holding that the board of a joint free high school district may institute mandamus against the clerk of a town in the district, to compel the levy and collection of a tax for the support of its high school.

*Canada.*— See *In re* Oakwood High School Bd., 16 Ont. App. 87; *In re* Morrisburgh Bd. of Education, 8 Ont. App. 169; *In re* Perth Bd. of Education, 39 U. C. Q. B. 34.

See 43 Cent. Dig. tit. "Schools and School Districts," § 258.

**Apportionment of tax.**— The fact that the apportionment to a town of a tax for the support of a joint free high school is made on the erroneous basis that a certain other town is in the school-district, and the fact that the school-district board in apportioning the tax does not have before it the certificate of the clerk of the town stating the equalized valuation of the taxable property therein does not affect the validity of the apportionment. State *v.* Lamont, 86 Wis. 563, 57 N. W. 369.

**Second levy.**—Where a tax levy made for the construction of a high school building is found to be inadequate, a second levy may be made to raise the amount necessary. Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805.

27. Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805.

of children in high schools in other languages than English,[28] and such taxation has been upheld on the ground that such a school is a public corporation.[29] It is not necessary that the purchase of a lot for a high school building should be authorized or made before a tax is levied for the erection of such building.[30]

**c. Payment of Indebtedness.** Under some statutes the school-district authorities may levy a special tax to pay the principal and interest on school bonds as they become due,[31] and to create a sinking fund for their redemption[32] or to pay other lawful indebtedness of the school-district,[33] the nature and extent of such power or duty being governed by the provisions of the particular statute; and in a proper case the school-district authorities may be compelled to make a levy of such a tax;[34] but such a tax cannot be levied for an illegal indebtedness.[35] Authority to issue school bonds implies the power to levy and collect taxes for their payment.[36]

**6. Poll Taxes.** Provision is sometimes made by statute, charter, or the

**28.** Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69 (holding that the school authorities in union school districts have the right to levy taxes upon the general public for the support of high schools, and by such taxation to make free the instruction of children in other languages than English); State *v.* Vaughan, 99 Mo. 332, 12 S. W. 507.

**29.** State *v.* Vaughan, 99 Mo. 332, 12 S. W. 507.

**30.** Bancroft *v.* Randall, 4 Cal. App. 306, 87 Pac. 805.

**31.** People *v.* St. Louis, etc., R. Co., 230 Ill. 61, 82 N. E. 305; St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303; People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832; Brockway *v.* Louisa County, 133 Iowa 293, 110 N. W. 844; State *v.* Byrne, 32 Wash. 264, 73 N. E. 394; U. S. *v.* Monona Independent School-Dist., 20 Fed. 294.

**Authority to assess and collect taxes for corporate purposes** authorizes the levy of a tax to pay a bonded indebtedness contracted for the erection of a school-house. State *v.* Bacon, 31 S. C. 120, 9 S. E. 765. But *compare* Goldsboro Graded School *v.* Broadhurst, 109 N. C. 228, 13 S. E. 781, holding that Acts (1881), c. 189, and Acts (1887), c. 382, authorizing a levy of taxes for the purpose of establishing, and for the annual support of graded schools, do not either in terms or by implication authorize a levy of taxes to pay the interest or principal of any debt created for that purpose.

**A tax for building purposes** within the legal limit may be levied to pay bonds and interest, the proceeds of which have been used for erecting school-houses. Cleveland, etc., R. Co. *v.* People, 208 Ill. 9, 69 N. E. 832.

**A school tax levied to an amount in excess of the outstanding bonds** is not invalid as to the excess, in the absence of evidence that such bonds are the only outstanding debt. People *v.* St. Louis, etc., R. Co., 230 Ill. 61, 82 N. E. 305.

**32.** St. Louis, etc., R. Co. *v.* People, 225 Ill. 418, 80 N. E. 303; People *v.* Peoria, etc., R. Co., 216 Ill. 221, 74 N. E. 734; Benton *v.* Scott, 168 Mo. 378, 68 S. W. 78.

**33.** *Louisiana.*— Bordelon *v.* Lewis, 8 La. Ann. 472.

*Maryland.*— Burgess *v.* Pue, 2 Gill 254.

*Mississippi.*— Cowart *v.* Foxworth, 67 Miss. 322, 7 So. 350.

*Texas.*— Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119.

*Canada.*— Scott *v.* Burgess, etc., School Trustees, 41 U. C. C. P. 398; *In re* Doherty, 25 U. C. Q. B. 409.

See 43 Cent. Dig. tit. "Schools and School Districts," § 259.

**Advancement of funds for repairs.**—Where the school trustees advance funds from their own individual means to make necessary repairs upon a school-house, the sums advanced become a debt of the school-district for the payment of which the school trustees may levy a tax upon the district. Louisville, etc., R. Co. *v.* School Dist. No. 108, 29 S. W. 340, 16 Ky. L. Rep. 554.

**34.** Dennington *v.* Roberta, 130 Ga. 494, 61 S. E. 20.

**Under the Iowa laws** it is the duty of the board of supervisors of the county to levy such a tax certified by the board of directors of an independent school-district, and a writ of mandamus to compel them to do so may be issued. U. S. *v.* Monona Independent School Dist., 20 Fed. 294.

**Where the amount of the bonds and rate of interest are fixed,** a demand on the auditor to compute the amount necessary to be paid by each taxpayer for the purpose of paying the annual interest is sufficient to authorize mandamus to compel him to perform his duty without any formal assessment of the amount by the board. State *v.* Bacon, 31 S. C. 120, 9 S. E. 765.

**35.** People *v.* Toledo, etc., R. Co., 229 Ill. 327, 82 N. E. 420; Baltimore, etc., R. Co. *v.* People, 195 Ill. 423, 63 N. E. 262; Howard *v.* School Dist. No. 27, 102 S. W. 318, 31 Ky. L. Rep. 399.

**36.** St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664; State *v.* Bacon, 31 S. C. 120, 9 S. E. 765.

**Authority to erect a school building and issue bonds** to pay for the same authorizes a levy of taxes for "building purposes" to supplement the bonds and pay for the installation of a heating plant in the building.

state constitution for the imposition of a capitation or poll tax upon certain individuals, to be applied in the aid of the public schools,[37] the terms of the particular statute or constitution governing the extent of such a tax,[38] and the manner of levying, assessing, and collecting,[39] and distributing the same;[40] and where the provision imposing such a tax is mandatory, it is the duty of the tax collector to receive and receipt for such tax when it is tendered to him.[41] Under some provisions such tax must be collected and applied in aid of the public school fund in the county in which it is paid,[42] and in addition thereto a poll tax may be levied by the municipal or school-district authorities, to be applied exclusively to public schools of such municipality or district.[43]

**7. Disposition of Proceeds of Taxes and Other Revenue**[44] **— a. In General.** The mode of disposing of taxes and other revenue raised and collected for school purposes is generally regulated by constitutional or statutory provisions,[45] such as those relative to the board of officers by whom the funds may be apportioned or distributed,[46] and as to the purposes to which they may be applied.[47] Where

St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664.

37. See Burkhart *v.* Vine Grove Common School Dist., 118 Ky. 365, 80 S. W. 1128, 26 Ky. L. Rep. 262.

**Under Ind. Rev. St. (1881) § 4460,** giving a school-board power "to levy all taxes for the support of the schools," but making it unlawful "to levy or assess taxes, for any one year, exceeding, in the aggregate, twenty cents on the one hundred dollars of property," a school-board has no authority to levy a poll tax. Indianapolis School Com'rs *v.* Magner, 84 Ind. 67.

**Repeal of statutes** see Francis *v.* Peevey, 132 Ala. 58, 31 So. 372.

38. Taft *v.* Wood, 14 Pick. (Mass.) 362; Perry *v.* Franklin County, 148 N. C. 521, 62 S. E. 608.

39. Francis *v.* Peevey, 132 Ala. 58, 31 So. 372 (holding that where the provisions are mandatory, such tax cannot be levied, assessed, collected, or applied in any other manner than that prescribed); Bull *v.* Read, 13 Gratt. (Va.) 78; McKenzie *v.* Jackson, 31 Nova Scotia 70.

**List of poll taxpayers.**— Under the Arkansas act of March 5, 1875, and the act of Dec. 7, 1875, it is the duty of the assessor to enter annually upon his books the names of persons in his county subject to the poll tax provided for by those acts. Saunders *v.* Erwin, 49 Ark. 376, 5 S. W. 703.

**Commission for collecting poll tax** see San Luis Obispo County *v.* Felts, 104 Cal. 60, 37 Pac. 780; Butt *v.* Montgomery County, 62 Miss. 213.

**Voluntary payment.**—The fact that a statute makes a default in payment of poll taxes a misdemeanor does not prevent a tax collector from accepting voluntary payment of delinquent poll taxes with penalties. State *v.* Folk, 45 S. C. 491, 23 S. E. 628.

40. Territory *v.* Luna, 3 N. M. 218, 3 Pac. 241; State *v.* Folk, 45 S. C. 491, 23 S. E. 628 (holding that delinquent poll taxes with penalties paid to the county treasurer before prosecution has begun, under a statute making a default in payment of poll taxes a misdemeanor, belong to the school fund of the district where the payee resides); State *v.* Smith, 8 S. C. 127; State *v.* Cobb, 8 S. C. 123.

41. Francis *v.* Peevey, 132 Ala. 58, 31 So. 372.

42. Francis *v.* Peevey, 132 Ala. 58, 31 So. 372.

43. Francis *v.* Peevey, 132 Ala. 58, 31 So. 372. *Compare* Albertville *v.* Rains, 107 Ala. 691, 18 So. 255.

44. **Collection, custody, and disbursement of funds** see *supra*, III, F, 2, a.

**Constitutional requirements as to disposition of taxes** see *supra*, III, F, 4, a, (II).

45. See the constitutions and statutes of the several states. See also Smith *v.* Speed, 50 Ala. 276; Anne Arundel County *v.* Gantt, 73 Md. 521, 21 Atl. 548; State *v.* Jericho, 12 Vt. 127.

**Repeal of statute** see Smith *v.* Speed, 50 Ala. 276.

46. Nome School Dist. *v.* Nome Common Council, 2 Alaska 351; Ogle County Dist. No. 5 *v.* Ogle County Dist. No. 1, 36 Ill. 140.

**Under Alaska Civ. Code, § 203,** as amended by the act of March 3, 1901, chapter 859, the common council of a town has no control for municipal purposes over the school fund, or any portion thereof, until such portion is segregated and set apart for municipal use by an order of the district court (Brace *v.* Solner, 1 Alaska 361; Chambers *v.* Solner, 1 Alaska 271); and such common council has no other direction over the school fund paid into the school treasury by the clerk of the district court from licenses than to consider the amounts in determining the budget to be raised by taxation, or otherwise, under their duty to provide for the maintenance of the public schools (Chambers *v.* Solner, *supra*); and under section 202 a school-board has exclusive power as to the duty of expending the fund paid in by the clerk of the district court (Brace *v.* Solner, *supra*; Chambers *v.* Solner, *supra*).

47. Pennington *v.* Coe, 57 Ill. 118; State *v.* Dickerman, 16 Mont. 278, 40 Pac. 698.

**In England** it is not within the powers of the London school-board to expend money out of the rates for the purpose of providing separate schools for the education of pupil teachers, commonly called "pupil teachers'

such funds are raised by county or municipal authorities the general rule is, that the gross amount levied for the schools shall be paid over to the school-board,[48] and that the amount levied cannot be diminished by the municipal or county authorities by applying any part of it to any other purpose,[49] or by withholding a part of it to pay discounts for the prompt payment of county or municipal taxes;[50] nor can the payment of such funds be refused on the ground that they have gone into a certain county or municipal fund;[51] and although such taxes are illegal, if they are voluntarily paid they constitute a public fund which may be distributed to the proper districts.[52]

**b. Distribution or Apportionment.**[53] School taxes or revenue are to be apportioned and distributed between the different funds to which they are applicable, in the manner and proportions provided for by the constitutional or statutory provisions relating thereto[54] which are in force when the distribution is made,[55] including those provisions which relate to distribution of the amount derived from the state school fund,[56] or from liquor licenses,[57] dog taxes,[58] or railroad

centers," in which the education is in reality higher education and not the elementary education contemplated by the Elementary Education Act of 1870. Rex *v.* Cockerton, 70 L. J. K. B. 441, [1901] 1 K. B. 726, 65 J. P. 435, 84 L. T. Rep. N. S. 488, 17 T. L. R. 402, 49 Wkly. Rep. 433; Dyer *v.* London School Bd., [1902] 2 Ch. 768, 72 L. J. Ch. 10, 87 L. T. Rep. N. S. 225, 18 T. L. R. 804, 51 Wkly. Rep. 34.

**If levied for a special purpose** they must be used in good faith for that purpose. Mitchell *v.* Kearns, 16 Pa. Super. Ct. 354; Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

**Money raised for the expense of maintaining a road** for a school-district may be so applied, although pending an injunction suit to prevent such use electors of the district raise money by their individual note for such expense, at the desire of the district, and with the understanding that the money from the tax will be applied to payment of the note, if the injunction is dissolved. Locker *v.* Keiler, 110 Iowa 707, 80 N. W. 433.

**Use for sectarian purposes.**— Under some constitutions or statutes no portion of any fund or tax raised or levied for educational purposes can be appropriated to or used by or in aid of any church, sectarian, or denominational school. McDonald *v.* Parker, 110 S. W. 810, 33 Ky. L. Rep. 805. See also *supra*, III, B, 2, b, (II).

**Counsel fees.**— Under Tenn. Acts (1897), c. 36, § 6, a payment of the fee of an attorney employed by a chairman of the county court to institute a suit for the recovery of school money out of school funds of the county amounts to a misappropriation thereof. State *v.* True, 116 Tenn. 294, 95 S. W. 1028.

**48.** Anne Arundel County *v.* Gantt, 73 Md. 521, 21 Atl. 548.

**49.** Louisville *v.* Louisville School Bd., 32 S. W. 406, 17 Ky. L. Rep. 697; Anne Arundel County *v.* Gantt, 73 Md. 521, 21 Atl. 548.

**50.** Anne Arundel County *v.* Gantt, 73 Md. 521, 21 Atl. 548.

**51.** Louisville *v.* Louisville School Bd., 32 S. W. 406, 17 Ky. L. Rep. 697, holding that under Const. § 184, providing that the fund for common schools produced by taxation shall be appropriated only to the maintenance of a school system, a city cannot relieve itself from paying over to the school-board the whole amount collected, on the ground that it went into the sinking fund.

**52.** Cuming County School Dist. No. 30 *v.* Cuming County, 81 Nebr. 606, 116 N. W. 522.

**A county has no vested right in a public fund** created by the levy of taxes under an unconstitutional act for the benefit of high school districts, and voluntarily paid by the taxpayers. Cuming County School Dist. No. 30 *v.* Cuming County, 81 Nebr. 606, 116 N. W. 522.

**53. Apportionment and disposition of school funds** in general see *supra*, III, B, 2, b.

**54.** Walpole School Dist. No. 1 *v.* Prentiss, 66 N. H. 145, 19 Atl. 1090; Brown Tp. Bd. of Education *v.* Cheney, 5 Ohio St. 67; Com. *v.* Public Schools Controllers, 7 Serg. & R. (Pa.) 454; *In re* Storms, 39 U. C. Q. B. 353.

**55.** School Dist. No. 1 *v.* Weber, 75 Mo. 558, holding that school taxes should be distributed among school-districts in the manner provided by the law in force when the distribution is made, rather than according to the law in force when the taxes should have been levied and collected. But *compare* State *v.* Cappeller, 6 Ohio Dec. (Reprint) 857, 8 Am. L. Rec. 482.

**56.** Newport Bd. of Education *v.* Nelson, 109 Ky. 203, 58 S. W. 700, 59 S. W. 505, 22 Ky. L. Rep. 680, 1377, holding that the amount derived from the state school fund for the benefit of the city schools should be apportioned between the city fiscal years.

**57.** Herman *v.* Crete, 9 Nebr. 350, 2 N. W. 722.

**Where portions of several school-districts are within the limits of an incorporation,** the moneys received by the incorporation authorities for liquor licenses should be equally divided between such districts. State *v.* White, 29 Nebr. 288, 45 N. W. 631; State *v.* Brodboll, 28 Nebr. 254, 44 N. W. 186.

**58.** South Bend School City *v.* Jaquith, 90 Ind. 495; Maloy *v.* Madget, 47 Ind. 241.

**Under Ind. Act March 6, 1891, § 236,** the surplus dog fund in the hands of a township trustee should be distributed among the

taxes;[59] and where the constitution or statute expressly provides the proportions in which the taxes or revenue are to be distributed, they cannot be distributed in any other manner or proportions.[60] Where the taxes or revenue received by a county or municipality are distinguishable as school moneys, they may be distributed to the proper school-district depositary, without an apportionment being made for that purpose,[61] unless the statute expressly requires an apportionment;[62] and such taxes or revenue must be apportioned or distributed to the districts for which they are raised,[63] each school-district being entitled to its just proportion of the school money,[64] although no school is kept therein.[65] A statute expressly providing for the apportionment of taxes from particular property, or of particular revenue, has no application to other taxes or revenue.[66] As a general rule school funds cannot be apportioned between blacks and whites on the basis of population,[67] and the courts may interfere by mandamus to prevent such an apportionment.[68]

**e. Application to Payment of Debts and Expenses.**[69] School taxes and other revenue must be applied in the prescribed manner and to the particular debts and expenses prescribed by the constitution or statute.[70] As a general rule

towns and cities in the township, in proportion to the school population in each corporation at the time when such surplus should be distributed. Taggart *v.* State, 142 Ind. 668, 40 N. E. 260, 42 N. E. 352.

**59.** Somerset Public School Bd. of Education *v.* Colored School Dist. No. 1, 35 S. W. 549, 18 Ky. L. Rep. 103; *In re* Railroad School Tax, 78 Mo. 596.

**Under Mo. Laws (1875), § 1, and Laws** (1877), § 1, railroad taxes go exclusively to the school-districts only when their townships have made valid subscriptions to the railroads; otherwise the taxes are distributed ratably among all the districts of the county, except that those coming from land and buildings belonging to the railroads go to the districts where such property is situated. School Dist. No. 1 *v.* Rhoads, 81 Mo. 473.

**60.** Somerset Public School Bd. of Education *v.* Colored School Dist. No. 1, 35 S. W. 549, 18 Ky. L. Rep. 103; Swanzey School Dist. No. 9 *v.* Twitchell, 63 N. H. 11; Brown Tp. Bd. of Education *v.* Cheney, 5 Ohio St. 67.

**Where the method of distribution is prescribed by the state constitution,** the legislature has no power to divert the fund by prescribing a different method. Greensboro *v.* Hodgin, 106 N. C. 182, 11 S. E. 586.

**61.** Port Huron Bd. of Education *v.* Runnels, 57 Mich. 46, 23 N. W. 481.

**62.** Donnelly *v.* Duras, 11 Nebr. 283, 9 N. W. 45.

**63.** Honey Creek Dist. Tp. *v.* Floete, 59 Iowa 109, 12 N. W. 809; Walpole School Dist. No. 1 *v.* Prentiss, 66 N. H. 145, 19 Atl. 1090.

**Liability of county.**—A county is not liable to an independent school-district for the acts of the county school superintendent in distributing to other school-districts the portion of school funds derived from the income of trust funds from a sale of county school land, in disregard of the right of such independent district to participate in the distribution, since when such income is paid to the county treasurer, the trust of the county is discharged, and the county superintendent, in thereafter apportioning, acts as the agent of the state and not of the county. Webb County *v.* Laredo School Trustees, 95 Tex. 131, 65 S. W. 878 [*reversing* (Civ. App. 1901), 64 S. W. 486].

**64.** Sarpy County School Dist. No. 1 *v.* McCormick, 4 Nebr. (Unoff.) 242, 93 N. W. 956; Swanzey School Dist. No. 9 *v.* Twitchell, 63 N. H. 11; School Dist. *v.* Morrill, 59 N. H. 367; Danville School Dist. No. 1 *v.* Sanborn, 25 N. H. 34.

**65.** School Dist. *v.* Morrill, 59 N. H. 367.

**66.** Somerset Public School Bd. of Education *v.* Colored School Dist. No. 1, 35 S. W. 549, 18 Ky. L. Rep. 103, holding that a statutory provision that the railroad tax shall be apportioned between the white and colored schools in the same district has no application to the tax of any other corporation.

**67.** Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540; Harrodsburg Educational Dist. No. 28 *v.* Colored School Dist. No. 1, 105 Ky. 675, 49 S. W. 538, 20 Ky. L. Rep. 1487, holding that under St. § 4101, the white school-districts have the exclusive right to tax a railroad company for school purposes, but that when this right is exercised by a white district, there must be a *pro rata* distribution of the tax with the colored district. And see, generally, CIVIL RIGHTS, 7 Cyc. 168.

**In North Carolina** the special tax directed by Acts (1905), c. 11, § 6, is not to be apportioned between the races *per capita*. Lowery *v.* Kernersville Bd. of Graded School Trustees, 140 N. C. 33, 52 S. E. 267.

**68.** Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540. *Compare* Somerset Public School Bd. of Education *v.* Colored School Dist. No. 1, 35 S. W. 549, 18 Ky. L. Rep. 103.

**69. Payment of indebtedness in general** see *supra*, III, F, 2, c.

**70.** Parker *v.* State, (Miss. 1892) 10 So. 571.

**Payment of teachers' salaries** under Minn. Sp. Laws (1891), c. 36, see Putnam *v.* St. Paul, 75 Minn. 514, 78 N. W. 90.

funds obtained for the support of schools cannot be applied to the payment of claims for other expenses against a school-district,[71] as for erecting a schoolhouse,[72] except that under some statutes an excess of such funds may be diverted to the payment of other claims.[73] It has been held under the various statutes that a tax raised to furnish additional school facilities may be used to pay salaries of teachers, where the regular fund therefor is exhausted,[74] and that a school fund of one year cannot be used to pay off a debt of a previous year.[75] Where a special tax is levied for a special purpose, and orders are issued thereon, the holders of such orders have an equitable lien on the fund obtained by such tax; [76] and where, in anticipation of the collection of a certain revenue, particular debts are incurred, such revenue is deemed to be impliedly pledged for the payment of such debts,[77] and mandamus will not lie to compel it to be distributed to another fund which would have been entitled to it had it not been so pledged; [78] nor will an injunction lie to prevent it from being applied to the particular debt.[79]

**d. Wrongful Apportionment or Application, and Remedies Therefor.** Where money raised for school purposes is wrongfully appropriated, or applied to other purposes than those authorized, the board or officer making such misappropriation or misapplication is guilty of a breach of duty and liable therefor in damages,[80] although the misappropriation or misapplication is made through a mistake; [81] or the diverted funds may be recovered from the board or corporation which has received them or their benefit; [82] but assumpsit for money had and received will not lie against a board or corporation where the money has not been received by it or to its use.[83] Where school funds belonging to one school-district are wrongfully paid to and received by another school-district, the former may maintain an action for money had and received against the latter to recover such funds; [84] and the liability of the latter is not affected by any illegality in the

After an award against a school-district has been made by arbitrators, the taxpayers cannot vote to pay a sum in addition to the amount awarded. Burhans *v.* Canton Union Free School Dist. No. 1, 24 N. Y. App. Div. 429, 48 N. Y. Suppl. 702 [*affirmed* in 165 N. Y. 661, 59 N. E. 1119].

71. State *v.* Walsh, 31 Nebr. 469, 48 N. W. 263.

72. Pennington *v.* Coe, 57 Ill. 118; Lee *v.* Atlantic County School Dist. No. 1, 36 N. J. Eq. 581.

73. German Tp. School Dist. *v.* Sangston, 74 Pa. St. 454.

74. State *v.* Cave, 20 Mont. 468, 52 Pac. 200.

75. Collier *v.* Peacock, 93 Tex. 255, 54 S. W. 1025 [*overruling* Culberson *v.* Gilmer Bank, 20 Tex. Civ. App. 565, 50 S. W. 195]; Collier *v.* Peacock, (Tex. Civ. App. 1900) 55 S. W. 756; Nocona Bank *v.* March, (Tex. Civ. App. 1899) 51 S. W. 266.

76. Pennington *v.* Coe, 57 Ill. 118.

77. Zartman *v.* State, 109 Ind. 360, 10 N. E. 94.

78. Zartman *v.* State, 109 Ind. 360, 10 N. E. 94.

79. State *v.* Van Buren Tp. Bd. of Education, 11 Ohio Cir. Ct. 41, 5 Ohio Cir. Dec. 447. But see Maloy *v.* Madget, 47 Ind. 241, holding that an injunction will lie to prevent a township trustee from expending, in advance of the general apportionment of the tuition fund for the year, the fund arising from the dog tax in the support of a single school, when no other schools are being taught in the township.

80. Knox County *v.* Hunolt, 110 Mo. 67, 19 S. W. 628. See also Shelly School Bd. *v.* Shelley, 22 Wkly. Rep. 154.

The proper party to sue for a breach of duty of a county court in using county school funds for purposes other than maintaining public schools is the county, where the county school funds, although set apart by law for special purposes, belong to the county. Knox County *v.* Hunolt, 110 Mo. 67, 19 S. W. 628.

Variance in a petition in a suit by a county for a breach of duty of the county court in using county school funds for purposes other than maintaining schools see Knox County *v.* Hunolt, 110 Mo. 67, 19 S. W. 628.

81. Knox County *v.* Hunolt, 110 Mo. 67, 19 S. W. 628.

82. Hermann *v.* Crete, 9 Nebr. 350, 2 N. W. 722.

83. Morris Tp. *v.* Carey, 27 N. J. L. 377; Weybridge School Dist. No. 1 *v.* Bridport, 63 Vt. 383, 22 Atl. 570, holding that assumpsit will not lie by a school-district against a town for money which the district should have received, but which was not allotted to it by the proper officers, and which was paid over to other districts upon the order of such officers.

84. Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807. See also Burford Tp. School Trustees *v.* Burford Tp., 18 Ont. 546.

**Proof.**— One school-district that has wrongfully received money that belongs to another cannot, in an action by the latter to recover it, require strict proof of the regularity of the proceedings authorizing it to be collected.

imposition or irregularity in the assessment of the taxes.[85] It has been held that the proper remedy of the officers of a school-district for funds to which they are entitled, and which are wrongfully paid to another district, is against the collector or other officer making the wrongful payment, and not against the officers receiving them.[86] Where the money of a school-district is wrongfully used by its treasurer in the business of a bank, upon the bank's becoming insolvent the school-board or officers entitled to the control of such fund are entitled to an equitable lien against the bank's assets,[87] and the fact that they have taken collateral security from such treasurer for the payment of the money does not prevent them from enforcing such lien.[88] An action will lie to restrain a diversion of school funds to an illegal use;[89] but where taxes have been paid for school purposes without objection or protest, their use for the purposes for which they were levied will not be prevented for any mere technical objections as to the manner in which the levy was made.[90]

**8. Rights and Remedies of Taxpayers**[91] **— a. In General.** As a general rule a taxpayer cannot as relator maintain an action in the name of the school-district for the recovery of a personal judgment against the school-board or officers,[92] without at least first making a demand on the proper officers of the district to bring such an action.[93] But where his pecuniary interests as taxpayer are affected a taxpayer may sue by mandamus to compel the performance of a duty affecting his interests,[94] or he may sue for affirmative relief from the wrongful acts of the school officers.[95] Where the proper district authorities improperly refuse or neglect to do so, a taxpayer may intervene in a pending proceeding to set up a defense for the protection of the rights of the district.[96] It has also been held that the inhabitants of a school-district may file a bill to contest the constitutionality of a law constituting the district, and the legality of the proceedings of the district officers under it.[97]

Midland School Dist. No. 9 *v.* Midland School Dist. No. 5, 40 Mich. 551.

**Joint and several judgment.**—Where money raised for school purposes for a certain district has by mistake been paid to another district, the former is entitled to a joint and several judgment against all the independent districts into which the latter may be divided. White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 52 Iowa 73, 2 N. W. 965.

**85.** Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807.

**86.** Ogle County Dist. No. 5 *v.* Ogle County Dist. No. 1, 36 Ill. 140; School Directors *v.* School Trustees, 61 Ill. App. 89.

**87.** Myers *v.* Clay Center Bd. of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

**88.** Myers *v.* Clay Center Bd. of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

**89.** Black *v.* Cornell, 30 Mo. App. 641; Fremont County School Dist. No. 21 *v.* Fremont County, 15 Wyo. 73, 86 Pac. 24, holding, however, that under Rev. St. (1899) § 1822, a board of county commissioners has not such an interest in taxes voted by a school-district as will authorize it to maintain a suit to enjoin payment thereof by the county treasurer to the school-district, although the organization of the district is illegal.

**90.** School Trustees *v.* Peoria School Inspectors, 150 Ill. App. 479 [*affirmed* in 214 Ill. 30, 73 N. E. 412].

**91. Recovery of taxes paid** see *supra*, III, F, 4, d, (II).

**Remedies for erroneous taxation** see *supra*, III, F, 4, g.

**92.** Center Independent Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174.

**93.** Center Independent Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174.

**94.** Case *v.* Blood, 71 Iowa 632, 33 N. W. 144, holding that a non-resident has such an interest in a school-district in which he pays taxes as will give him a right of action to compel the proper administration of the school funds. And see, generally, MANDAMUS, 26 Cyc. 285.

**95.** Union School-Dist. *v.* New Union School Dist. No. 2, 135 Ill. 464, 28 N. E. 49; Dorner *v.* Luxemburg School Dist. No. 5, 137 Wis. 147, 118 N. W. 353, 19 L. R. A. N. S. 171; Malcolm *v.* Malcolm, 15 Grant Ch. (U. C.) 13.

**Formation of new district.**— Where school directors retain possession of a school-house standing on land which has been detached in order to form a new district, and continue to levy taxes on the detached territory, and the school trustees refuse to sell such school-house, a court of equity will grant relief from such acts, at the suit of the directors of the new district and taxpayers residing in such district. Union School-Dist. *v.* New Union School Dist. No. 2, 135 Ill. 464, 28 N. E. 49.

**96.** Richards *v.* Lyon County, 69 Iowa 612, 29 N. W. 630.

**97.** Bull *v.* Read, 13 Gratt. (Va.) 78.

**b. Restraining Action by District or Officers** [98] — (i) *In General.* In the absence of fraud or abuse the courts will not interfere, at the instance of a taxpayer, with the exercise of the discretionary powers of school-district officers in respect to taxation; [99] but a court of equity will, in a proper case, on the suit of an interested taxpayer, enjoin illegal or unauthorized acts on the part of the school-district or its officers which are prejudicial to the interests of the district,[1] such as to restrain the performance of an illegal contract made by the school-district authorities,[2] or to have the contract rescinded,[3] or for the purpose of restraining an illegal creation or increase of the district indebtedness,[4] or unlawful payments or applications of the school fund,[5] or an unlawful issuance of bonds,[6] or for the purpose of restraining a levy and collection of an illegal tax.[7] But it has been held that a taxpayer who has not paid his taxes cannot sue to restrain the school-district authorities from making an illegal or unauthorized appropriation or use of district funds; [8] nor will an injunction lie at the instance of a taxpayer to restrain the acts of school-district officers, where such acts affect merely the interests of the public in general, and do not affect the rights of the taxpayer or threaten him with special injury,[9] or where there is an adequate remedy at law.[10]

98. **Restraining employment of teacher** see *infra*, III, H, 2, c.
**Restraining religious instruction in schools** see *infra*, III, I, 2, d.

99. Eikenbary *v.* Porter, 60 Nebr. 75, 82 N. W. 108; Eddy *v.* Wilson, 43 Vt. 362.
**Where a school-district keeps within its corporate powers,** its proceedings in raising and expending money cannot be collaterally impeached and held void because, in the opinion of a court and jury, a less sum would have answered the immediate necessities of the corporation, or the money might have been more judiciously and economically expended. Eddy *v.* Wilson, 43 Vt. 362.

1. Witmer's Appeal, (Pa. 1888) 15 Atl. 428.

2. Lindblad *v.* Normal School Dist. Bd. of Education, 221 Ill. 261, 77 N. E. 450 [*reversing* 122 Ill. App. 617]; Ries *v.* Hemmer, 127 Iowa 408, 103 N. W. 346; Weitz *v.* Des Moines Independent Dist., 87 Iowa 81, 54 N. W. 70; Grant *v.* Brouse, 1 Ohio N. P. 145, 2 Ohio S. & C. Pl. Dec. 24, holding that a suit to enjoin a board of education and its treasurer from making any payment on a contract for the sale of goods to the board by a mercantile firm, one member of which is also a member of the board, may be maintained by any resident taxpayer of the district.

3. Shinn *v.* Jackson County Bd. of Education, 39 W. Va. 497, 20 S. E. 604 (holding that a court of equity has jurisdiction of a suit by taxpayers of a school-district to set aside a contract made by the board of education creating a debt to be paid out of the school money of subsequent years); Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369.
**Necessity for demand.**— In a suit by a taxpayer against a vendor to rescind a purchase, and to recover the purchase-price of land unlawfully purchased by a school-board, the fact that all the board are participants in the wrong complained of, and made co-defendants, renders it unnecessary to demand that they proceed for the relief sought. Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369.

4. Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110; Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129. See also Mercur *v.* Nether Providence Tp. School Dist., 8 Del. Co. (Pa.) 269.

5. *California.*— Barry *v.* Goad, 89 Cal. 215, 26 Pac. 785.
*Georgia.*— Clark *v.* Cline, 123 Ga. 856, 51 S. E. 617.
*Illinois.*— Martin *v.* Jamison, 39 Ill. App 248.
*Oklahoma.*— Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110, holding that a resident taxpayer, although he shows no special interest, may invoke the interposition of equity to prevent an illegal disposition of the moneys of a school-district.
*Pennsylvania.*— Dolan *v.* Lackawanna Tp. School Dist., 10 Pa. Dist. 694, 7 Lack. Leg. N. 129; Stephens *v.* Wyoming School Dist., 10 Pa. Dist. 135.

6. Schmutz *v.* Little Rock Special School Dist., 78 Ark. 118, 95 S. W. 438 (holding, however, that, although the directors of the special school-district of Little Rock in the issuance of bonds under the act of 1905 exceed their authority in proposing to insert recitals pledging the revenues for their payment, it will not be ground for enjoining the issuance of the bonds at the suit of a taxpayer); Schouweiler *v.* Allen, (N. D. 1908) 117 N. W. 866.

7. Holmes *v.* Baker, 16 Gray (Mass.) 259; Eikenbary *v.* Porter, 60 Nebr. 75, 82 N. W. 108; Mitchell *v.* Kearns, 16 Pa. Super. Ct. 354; Lueder *v.* Caffrey, 9 Kulp (Pa.) 144; Tefft *v.* Lewis, 27 R. I. 9, 60 Atl. 243. See also *supra*, III, F, 4, g, (III).

8. Davis *v.* Bradford School Dist., 4 Pa. Co. Ct. 656.

9. Nixon *v.* McPherson County School Dist. No. 92, 32 Kan. 510, 4 Pac. 1017; Fugate *v.* McManama, 50 Mo. App. 39; Morse *v.* Jacky, 34 Mont. 165, 85 Pac. 882.

10. Morse *v.* Jacky, 34 Mont. 165, 85 Pac. 882.

(II) *Location, Erection, or Removal of School Building.* An injunction will lie at the suit of a taxpayer who sues on behalf of himself and other taxpayers, and shows that the action of the district officers is substantially injurious to them,[11] or at the suit of a taxpayer who will suffer special injury,[12] to restrain the school-district authorities from illegally expending public money to build or improve a school-house upon an unauthorized, illegal, or injudicious location,[13] or to restrain them from unauthorizedly removing a school-house,[14] collusively or negligently paying for an inferior building at an excessive price,[15] illegally selling the school-house and site and furniture, etc.,[16] or from unauthorizedly renting a building for school purposes;[17] and it has been held that an injunction will lie at the suit of school directors to restrain one director from removing a school-house from one site to another.[18] But where the school-district has not been incorporated, an action cannot be maintained in its name, on the relation of taxpayers, to enjoin the district officers from proceeding to erect a school-house with district funds.[19] Nor can a private person suing merely on his own behalf as a citizen and taxpayer, without showing any special injury, maintain an action to restrain school-district officers from erecting[20] or removing a school-house,[21] or from unauthorizedly renting a building for school purposes.[22]

c. Actions. In an action by a taxpayer against school-district officers, there must be proper service of process on or appearance by the necessary parties,[23] and the taxpayer's complaint or bill must allege all the facts necessary to authorize the relief demanded.[24] A taxpayer cannot join in his suit separate causes of

11. Fugate *v.* McManama, 50 Mo. App. 39.

12. Parody *v.* Cuming County School Dist. No. 11, 15 Nebr. 514, 19 N. W. 633.

**Sufficiency of interest.**—A resident and taxpayer of a school subdistrict, who lives only one half of a mile from a legally located school-house in said subdistrict, and who has children of school age to send to school, and whose taxes will be materially increased by a removal of the school-house two and one-half miles further from his residence, has such an individual interest in the subject-matter, not met with by other residents and taxpayers, as gives him the right to sue to restrain the illegal removal of the school-house. Graves *v.* Jasper School Tp., 2 S. D. 414, 50 N. W. 904.

13. School Directors *v.* Wright, 43 Ill. App. 270; Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110. See also Mercur *v.* Nether Providence Tp. School Dist., 8 Del. Co. (Pa.) 269.

**In Iowa** a taxpayer's remedy against an illegal or injudicious location of a school-house is by appeal to the county superintendent; and in the absence of such an appeal an injunction will not issue to restrain the directors from making an improvement on the site so located. Center Independent Dist. *v.* Gookin, 72 Iowa 387, 34 N. W. 174; Vance *v.* Wilton Dist. Tp., 23 Iowa 408.

**Pleading and proof.**— In an action to enjoin a school-district from changing the site of a school-house, and appropriating money for the erection of a school-house on another site, an allegation that plaintiff is a resident taxpayer and qualified voter of the district is a material allegation, and where such petition is met by a general denial, a failure to establish such allegation by proof is fatal. Hess *v.* Dodge, 82 Nebr. 35, 116 N. W. 863.

14. Tucker *v.* McKay, 131 Mo. App. 728, 111 S. W. 867; Parody *v.* Cuming County School-Dist. No. 11, 15 Nebr. 514, 19 N. W. 633; Graves *v.* Jasper School Tp., 2 S. D. 414, 50 N. W. 904, holding that a removal which is not authorized by a vote of the majority of the electors of the subdistrict in which the school-house is situated may be enjoined.

15. Carthan *v.* Lang, 69 Iowa 384, 28 N. W. 650.

16. Briggs *v.* Borden, 71 Mich. 87, 38 N. W. 712.

17. Fugate *v.* McManama, 50 Mo. App. 39.

18. Ruble *v.* School Dist. No. 5, 42 Ill. App. 483, holding this to be true where the supervision and control of a school-house is vested in the school directors of the district.

19. State *v.* Arnold, 38 Ind. 41.

20. Nixon *v.* McPherson County School-Dist. No. 92, 32 Kan. 510, 4 Pac. 1017.

21. Parody *v.* Cuming County School-Dist. No. 11, 15 Nebr. 514, 19 N. W. 633.

22. Fugate *v.* McManama, 50 Mo. App. 39.

23. Downs *v.* Jefferson County School Dist. No. 1, 4 Wash. 309, 30 Pac. 147, holding that under Code Civ. Proc. § 173, in order to obtain jurisdiction of a school-district, service of process must be had on the clerk of the school-district, and that service on an individual member of the board of school directors is not sufficient.

24. Witmer's Appeal, (Pa. 1888) 15 Atl. 428, holding that a bill alleging that a board of school directors fraudulently and unlawfully conspired to collect a building tax for the purpose of purchasing a certain building in which some of them were interested sufficiently avers that some of the members of the board have an interest in the building about to be bought and are unlawfully acting together to sell it to the district.

action.[25] In a suit to restrain the removal of a school-house, the officers who have the supervision and control of such building are the proper parties complainant,[26] and in such suit a resident taxpayer is a proper but not a necessary party complainant,[27] and the bill is sufficient if it is sworn to by him alone.[28] But a taxpayer cannot intervene in a suit in which he has no interest.[29] It has been held that a suit to restrain the performance of a fraudulent contract and to set aside the contract may be brought in the name of the state for the use of the school-district.[30] In a suit to restrain an issuance of bonds by a school-district, resident taxpayers have such a direct legal interest in the question as to make them proper parties plaintiff;[31] and in a suit by taxpayers to enjoin the payment of and to cancel district bonds on the ground that they are void the school-district is not an indispensable party.[32] The holder of an illegal school-district warrant is not a necessary party to a suit by a taxpayer to enjoin its payment.[33] Irregularities in the exercise of the power to create a school-district can be complained of only at the suit of the state in quo warranto proceedings,[34] and cannot be questioned in a suit by taxpayers to enjoin an issuance of bonds.[35] In the absence of statute an attorney's fee cannot be allowed as part of the costs in a taxpayer's action to restrain an unlawful disposition of school funds.[36]

**G. Claims Against District and Actions**[37] **— 1. Presentation and Allowance of Claims.**[38] The requirements as to the presentation and allowance of claims against a school-district are generally regulated by statute,[39] under which

25. Newcomb *v.* Horton, 18 Wis. 566, holding that one taxpayer of a school-district cannot sue in behalf of himself and of the other taxpayers to restrain the sale of their real estate for the purpose of collecting a delinquent tax assessed to pay certain judgments against the district, and to have the judgments declared void on the ground that they were obtained on illegal and void school orders, since each taxpayer desiring the relief sought must bring his several action.

**Joinder of causes of action.**—A suit by a taxpayer against a vendor to rescind a conveyance and to recover the price paid for a parcel of land bought by the board of a school-district contrary to the directions of the district meeting is not improperly joined with a suit against the school-board to enjoin them from proceeding in the construction of a school building on such site, since the substance of the entire action is to prevent the acquisition of the unlawful site, the erection of a school-house thereon, and the depletion of the fund provided for a site and building elsewhere. Egaard *v.* Dahlke, 109 Wis. 366, 85 N. W. 369.

26. Ruble *v.* School Dist. No. 5, 42 Ill. App. 483, holding that under Rev. St. c. 122, § 39, the directors and not the trustees are made the parties complainant in a suit to restrain the removal of a school-house from one site to another.

27. Ruble *v.* School Dist. No. 5, 42 Ill. App. 483.

28. Ruble *v.* School Dist. No. 5, 42 Ill. App. 483.

29. Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

30. State *v.* Earhart, 27 Ind. 119.

31. Wilkinson *v.* Van Orman, 70 Iowa 230, 30 N. W. 495.

32. Holliday *v.* Hilderbrandt, 97 Iowa 177, 66 N. W. 89.

33. Kellogg *v.* Comanche County School Dist. No. 10, 13 Okla. 285, 74 Pac. 110.

34. Snyder *v.* Baird Independent School Dist., (Tex. Civ. App. 1908) 109 S. W. 472 [certified questions *answered* in (Tex. 1908) 111 S. W. 723, 113 S. W. 521].

35. Snyder *v.* Baird Independent School Dist., (Tex. Civ. App. 1908) 109 S. W. 472.

36. Criswell *v.* Everett School Dist. No. 24, 34 Wash. 420, 75 Pac. 984.

37. **Actions:** Affecting school lands see *supra*, III, B, 1, c. By taxpayers see *supra*, III, F, 8. By teacher see *infra*, III, H, 4, h, (III); III, H, 5, g. For damages for expulsion or punishment of pupil see *infra*, III, I, 3, e, (III), (F). On liabilities accruing before division of district see *supra*, III, C, 2, d. On official bonds see *supra*, III, D, 6, g, (IV), (B). On school bonds see *supra*, III, F, 3, k. To enforce apportionment of assets and liabilities on division of district see *supra*, III, C, 2, c. To enforce school fund mortgages or other securities see *supra*, III, B, 2, c, (V). To enjoin tax proceedings see *supra*, III, F, 4, g, (III).

**Remedies on contracts** see *supra*, III, E, 4, l.

38. **Mandamus to compel allowance and payment of claims** see MANDAMUS, 26 Cyc. 286.

39. See the statutes of the several states.

**A statutory provision relating to claims against a municipality** and requiring notice of such claims to be filed with certain municipal officers does not apply to claims against a school-board within such municipality, where such board is an entity separate and distinct from the municipality.

it is usually provided that an unliquidated claim or demand against a school-district must be presented to the proper district board or officer for audit and allowance or rejection,[40] or a demand of payment be made,[41] within the time prescribed by statute,[42] unless such presentation or demand is waived or rendered unnecessary;[43] and that without such presentation, demand, or waiver payment of the claim cannot be enforced.[44] Under some statutes, however, the requirements relating to the auditing of claims apply only as between the school-district and the auditing officers, and do not lay upon the claimant the duty of presenting his claim to such officers for allowance before suit thereon.[45] The allowance or rejection of a claim which is properly presented is largely within the discretion of the board or officers in whom the auditing power is vested,[46] and in the absence of fraud or mistake their determination is conclusive of all questions passed on, until set aside by direct proceedings.[47] A school-district in its annual meeting

Ferris *v.* Detroit Bd. of Education, 122 Mich. 315, 81 N. W. 98.

**In New York,** under Consolidated Laws (1909), c. 16, §§ 508–511, and under similar provisions in former statutes, the costs and expenses of a school-district trustee or other district officer incurred in bringing or defending a suit in certain cases constitute a district charge which shall be levied by tax, and, upon the claim being presented to the proper board or officer, it may be ordered to be paid without any action on the part of the taxable inhabitants of the district (People *v.* Green, 10 How. Pr. 468; People *v.* Busti School Dist. No. 13, 6 How. Pr. 332, 8 How. Pr. 125. *Compare* People *v.* Snyder, 10 How. Pr. 143); but if such a suit is brought or defended by such a trustee or officer without a resolution of the district meeting ordering him to do so, his claim for costs and expenses must be presented in the prescribed manner to a regular district meeting (see New York Consolidated Laws (1909), § 509), and if the amount claimed be disputed by the district meeting, and such meeting refuses to levy a tax therefor, the claim may be adjusted by appeal to a county judge (*In re* Merrill, 8 N. Y. Suppl. 737). The fact that a school trustee was not a trustee at the time of the district meeting which passed on his claim for such costs and expenses is immaterial (Matter of Purdy, 56 N. Y. App. Div. 544, 67 N. Y. Suppl. 642), and if the term of his office expires while a suit is pending and his successors do not voluntarily appear, the suit should proceed against him, and if a recovery is had he is entitled to be allowed the amount in his official accounts (Colegrove *v.* Breed, 2 Den. 125).

**40.** Grant Tp. School Dist. *v.* Carroll Independent School Dist., (Iowa 1903) 97 N. W. 76; Pierson *v.* Hawarden Independent School Dist., 106 Iowa 695, 77 N. W. 494; Stackpole *v.* School Dist. No. 5, 9 Oreg. 508; Whitaker *v.* Roberts, 155 Fed. 882.

**Where a school-district director is required by law to appear in behalf of his district in all suits by or against it, he can recover of the district the amount of necessary expenses which he may have been put to or incurred in the prosecution or defense of such suit, but before he can maintain a suit for such expenses he must present his account to some district meeting and give the voters an opportunity of voting upon it and making provision for its payment.** Fobes *v.* School Dist., 10 Wis. 117.

**41.** Horton Dist. Tp. *v.* Ocheyedan Dist. Tp., 49 Iowa 231.

**42.** Parker *v.* Buckner, 67 Tex. 20, 2 S. W. 746.

**Constitutionality of the Texas act of April 2, 1883, section 4, enacting that all claims, such as are mentioned in sections 1 and 2 of this act, shall be barred if not presented within six months after the act goes into effect see Parker *v.* Buckner, 67 Tex. 20, 2 S. W. 746.**

**43.** Horton Dist. Tp. *v.* Ocheyedan Dist. Tp., 49 Iowa 231, holding that under the code of 1873, section 1793, allowing children of one district to attend school in another, where the directors of the district in which the children reside, upon being notified of their attendance in another district, decide not to pay their tuition and give notice to that effect, no further demand upon them by such other district is necessary, and the account may then be filed with the auditor.

**44.** Grant Tp. School Dist. *v.* Carroll Independent School Dist., (Iowa 1903) 97 N. W. 76 (holding that an action cannot be maintained to recover money from an independent school-district alleged to belong to another district, where no claim has been presented to the board of defendant district for payment and refused); Horton Dist. Tp. *v.* Ocheyedan Dist. Tp., 49 Iowa 231; Stackpole *v.* School Dist. No. 5, 9 Oreg. 508; Fobes *v.* School Dist., 10 Wis. 117; Whitaker *v.* Roberts, 155 Fed. 882.

**45.** Andrews *v.* McCook School Dist., 49 Nebr. 420, 68 N. W. 631.

**46.** See Whitaker *v.* Roberts, 155 Fed. 882.

**Sufficiency of audit.—Where, in an action against a school township on a warrant, proof is made of the persons composing the board of auditors, and the stamp on the warrant bears the name of one of them as president and one as secretary, it will be presumed that the board performed its duty of indorsement by the proper members.** Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919.

**47.** Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919. *Compare* Timmons

may lawfully recognize and pay equitable claims, although they are not strictly legal demands against it.[48] Where the ascertainment of a claim against a school-district is not made until after the levy and certification of the tax for a certain year, payment thereof cannot be demanded from the taxes for that year.[49]

**2. Actions By or Against District — a. Capacity to Sue or Be Sued.** A school-district or school-district board which has not been organized as a corporate body, or constituted such a body by statute, has no capacity to sue or be sued as such,[50] although a suit which has been brought prior to organization may be ratified after organization while the suit is still pending;[51] and it has been held that for purposes of a suit a school-district will be presumed to be legally organized and existing, since its existence can be inquired into only in direct proceedings.[52] But in most jurisdictions a school-district is expressly constituted a body corporate by statute or is regarded as such, with the power of suing and being sued,[53] and such power may be inferred from the powers and privileges conferred upon the district by statute;[54] and under a statutory power to sue and be sued a school-district may appoint and instruct agents to prosecute and defend suits on its behalf,[55] and may instruct them to withdraw defenses and confess judgment.[56] But a school-district can only maintain an action relating to its corporate rights or functions.[57] In some jurisdictions the power of suing and being sued as legal or corporate bodies in regard to school matters is in various school-boards,[58]

*v.* Pine School Tp., 22 Ind. App. 93, 53 N. E. 242, holding that the approval of the report of a school trustee of claims paid by him while an adjudication of payment is not an adjudication of the validity of the claims, binding on the school township.

48. Stockdale *v.* Wayland School Dist. No. Two, 47 Mich. 226, 10 N. W. 349.

49. Denver School Dist. No. 1 *v.* Adams County School Dist. No. 98, 33 Colo. 52, 78 Pac. 693; Denver School Dist. No. 1 *v.* Arapahoe County School Dist. No. 7, 33 Colo. 43, 78 Pac. 690.

50. Runyan *v.* School Dist. No. 3, 12 Iowa 184; Drake *v.* Oskaloosa Normal School Trustees, 11 Iowa 54; McDonald *v.* Nevada Tp. School Dist. No. 1, 10 Iowa 469.

51. Stoneham School Dist. No. 1 *v.* Richardson, 23 Pick. (Mass.) 62, holding that where an action is brought in the name of a school-district not duly organized, and while pending the district organizes itself legally, and ratifies the prosecution of the action, the ratification is valid and effectual.

52. Fremont County School Dist. No. 21 *v.* Fremont County, 15 Wyo. 73, 86 Pac. 24, holding that for the purposes of a suit to enjoin payment of a special school tax to a school-district, the district must be presumed to be legally organized and existing.

53. *Arkansas.*— Clarke *v.* Clark County School Dist. No. 16, 84 Ark. 516, 106 S. W. 677; Morris *v.* School Dist. No. 86, 63 Ark. 149, 37 S. W. 569 (holding that a school-district may sue for trespass on land dedicated for school purposes); School Dist. No. 3 *v.* Bodenhamer, 43 Ark. 140.

*Indiana.*— Utica Tp. *v.* Miller, 62 Ind. 230.

*Michigan.*— Everett Tp. School-Dist. No. 3 *v.* Wilcox Tp. School Dist. No. 1, 63 Mich. 51, 29 N. W. 489.

*Nebraska.*— Donnelly *v.* Duras, 11 Nebr. 283, 9 N. W. 45.

*New Hampshire.*— Denniston *v.* Goffstown School Dist. No. 11, 17 N. H. 492.

*New York.*— Union Free School Dist. No. 1 *v.* Glen Park, 109 N. Y. App. Div. 414, 96 N. Y. Suppl. 428 (holding that under the express provisions of Const. art. 8, § 3, and Laws (1892), c. 687, § 3, a school-district may sue in its corporate capacity); Chrigstrom *v.* McGregor, 74 Hun 343, 26 N. Y. Suppl. 517.

*Oklahoma.*—Kingfisher County School Dist. No. 74 *v.* Long, 2 Okla. 460, 37 Pac. 601.

*Pennsylvania.*— Barnet *v.* Young Tp. School Directors, 6 Watts & S. 46.

*Wisconsin.*— School Dist. No. 3 *v.* Macloon, 4 Wis. 79.

See 43 Cent. Dig. tit. "Schools and School Districts," § 271.

54. McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

55. Denniston *v.* Goffstown School Dist. No. 11, 17 N. H. 492.

56. Denniston *v.* Goffstown School Dist. No. 11, 17 N. H. 492.

57. Union Free School Dist. No. 1 *v.* Glen Park, 109 N. Y. App. Div. 414, 96 N. Y. Suppl. 428; Union Free School Dist. No. 6 Bd. of Education *v.* Union Free School Dist. No. 7, 76 N. Y. App. Div. 355, 78 N. Y. Suppl. 522 [*affirmed* in 179 N. Y. 556, 71 N. E. 1128].

58. White School-House *v.* Post, 31 Conn. 240 (holding that, independently of chancery powers, a state legislature has power to authorize the proprietors of a school building to sue as a body corporate for funds bequeathed to them for school purposes); Oberdorfer *v.* Louisville School Bd., 120 Ky. 112, 85 S. W. 696, 27 Ky. L. Rep. 508; Rush School Dist. No. 4 *v.* Wing, 30 Mich. 351; Stewart *v.* Thornton, 75 Va. 215.

Implied power.—A power to receive, hold, and manage a certain fund given by the legislature to the proprietors of a school-house

such as a board of education,[59] school commissioners,[60] school trustees,[61] or board of directors.[62] But one school-board cannot be sued upon a contract made by a separate and independent board,[63] although it may be sued upon an authorized contract of its predecessor in office.[64] Under some statutes a certain officer or officers may appear in behalf of the school-district in all suits by or against it;[65] but power to so appear does not authorize such an officer to institute a suit on his own motion in the name of the district.[66]

**b. Time to Sue and Limitations.**[67] A school-district, when clothed with the capacity to sue or be sued, is subject to the plea of the statute of limitations,[68] and likewise the statute runs in favor of a school-district in the same manner as it does for individuals,[69] except that the statute cannot be pleaded so as to bar a public right or trust.[70] But a claim against a school-district may be kept alive

implies a power to sue for it. White School-House *v.* Post, 31 Conn. 240.

**59.** Hancock *v.* Santa Barbara Bd. of Education, 140 Cal. 554, 74 Pac. 44 (holding that Pol. Code, § 1575, providing that the trustees of every school-district may sue and be sued applies to city boards of education as well as to boards of country school districts); San Francisco Bd. of Education *v.* Donohue, 53 Cal. 190 (holding that the board of education of San Francisco may, under the statutes defining its rights and powers, maintain ejectment for a school lot); San Francisco Bd. of Education *v.* Fowler, 19 Cal. 11.

**The board of education of the city of New York** may sue and be sued. Gildersleeve *v.* New York Bd. of Education, 17 Abb. Pr. (N. Y.) 201; Donovan *v.* New York Bd. of Education, 55 How. Pr. (N. Y.) 176. The fact that the board of education is made a member of one of the administrative departments of the city of New York by statute does not devolve upon the city itself the functions formerly imposed on the board as a separate corporation, nor does the fact that the Laws (1897), c. 378, § 1055, authorize the board to sue as to school property exclude the idea that it may also defend actions. Gunnison *v.* New York Bd. of Education, 176 N. Y. 11, 68 N. E. 106 [*affirming* 80 N. Y. App. Div. 480, 81 N. Y. Suppl. 181].

**60.** Sixteenth Tp. School Com'rs *v.* Dean, 2 Stew. & P. (Ala.) 190.

**61.** Hill *v.* Houk, 155 Ala. 448, 46 So. 562; Crawford *v.* Dean, 6 Blackf. (Ind.) 181; Minga *v.* Colored Common School Dist. No. A, 113 Ky. 475, 68 S. W. 483, 24 Ky. L. Rep. 288; Johnson *v.* Common School Dist. No. 13, 38 S. W. 861, 18 Ky. L. Rep. 887.

**62.** Fisher *v.* New Orleans School Directors, 44 La. Ann. 184, 10 So. 494, holding that the board of directors of the public schools for New Orleans having the control of the school funds collected by the city placed in their charge for the maintenance of the schools, has authority to stand in judgment, to institute or defend suits.

**63.** Georgia Military Inst. *v.* Simpson, 31 Ga. 273.

**64.** Williams *v.* Keech, 4 Hill (N. Y.) 168, holding that assumpsit lies against the trustees of a school-district on a contract with their predecessors for building a school-house whether funds are in defendant's hands or not.

**65.** Cedar Tp. Independent School Dist. No. 6 *v.* Wirtner, 85 Iowa 387, 52 N. W. 243; Bowen *v.* School Dist. No. 3, 10 Nebr. 265, 4 N. W. 981.

**66.** Cedar Tp. Independent School Dist. No. 6 *v.* Wirtner, 85 Iowa 387, 52 N. W. 243.

**67.** For statutes of limitations generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963.

**68.** Clarke *v.* School Dist. No. 16, 84 Ark. 516, 106 S. W. 677; May *v.* School Dist. No. 22, 22 Nebr. 205, 34 N. W. 377, 3 Am. St. Rep. 266; Porter *v.* Luzerne Dist. School Directors, 18 Pa. St. 144.

**69.** Butt *v.* Jennings School Tp., 81 Ind. 69 (holding that the statute of limitations runs against the right of a school township trustee to recover money advanced by him for the school township in his annual settlement from the date of such settlement); May *v.* School Dist. No. 22, 22 Nebr. 205, 34 N. W. 377, 3 Am. St. Rep. 266; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273 (holding that the statute of limitations may be relied on as a defense to an action on a claim against a school-district both by the board of school commissioners and their disbursing officer).

**Applications.**—A right of action on an order of school commissioners on the disbursing officer in favor of a school creditor ordinarily accrues on the presentation of the order for payment and the receipt of sufficient funds to pay it, and the statute of limitations then begins to run and the remedy of the creditor is barred if he allows the statutory time to elapse thereafter. Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273. Where a school-district issues and sells bonds which are void for want of power to issue them, but the district continues to recognize their validity by levying taxes to pay the interest thereon and by promising to pay the same for some years afterward, the limitation does not begin to run against an action by a bond-holder to recover the consideration paid until the district takes some action indicating its intention to repudiate the bonds. Geer *v.* Ouray County School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539.

**Where the auditing of a claim is required,** the statute does not begin to run until the claim is audited and allowed in the manner prescribed by statute. Matter of Purdy, 56 N. Y. App. Div. 544, 67 N. Y. Suppl. 642.

**70.** School Trustees *v.* Arnold, 58 Ill. App.

as in other cases by a new promise or acknowledgment,[71] unless it embraces a qualification which rebuts the inference of an unconditional promise to pay.[72] A school-district may, at a district meeting, make a promise that will take a debt of the district out of the operation of the statute of limitations;[73] but in the absence of express authority school trustees or other school officers cannot make a promise or acknowledgment which will have that effect.[74] Where school warrants or certificates are payable only out of particular funds, the statute begins to run against them only when such funds are collected and applicable thereto;[75] and where it appears that at no time since the debt was created has there been money applicable to the payment of the orders or warrants, the school-district is estopped from interposing the defense that the action is barred by limitations.[76]

**c. Use of Name of District or of Officers.** As a general rule actions by or against a school-district should be in the corporate name of the district,[77] or for its benefit as a legal entity,[78] and not in the individual names of the members of a district board or of other officers,[79] although under some statutes certain district boards or officers may sue or be sued in their official names.[80] A school-district may sue in a name which it has acquired by reputation.[81] Where a loss to a school fund of a particular district is occasioned by the misfeasance or malfeasance of its officers, in order to recover and preserve such fund a suit may be brought in equity against such officers by and in the names of the residents of the school-district and patrons of its schools interested in the fund.[82] An action may be brought in the name of the state for the protection of public interests in regard

103 (holding that school trustees in an action against a township treasurer for recovery of school funds are not barred by the statute of limitations); Harrodsburg *v.* Harrodsburg Education Dist., 7 S. W. 312, 9 Ky. L. Rep. 605. And see, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 1149 *et seq.*

**Implied trust.**— But the statute does run against an implied trust and where a school township is paid taxes apportioned to a school town, converts them, and, on demand, refuses to pay their equivalent, it becomes the trustee of an implied trust for the school town, and the statute of limitations begins to run in favor of the township at the time of the demand. Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 386, 32 N. E. 807.

71. Meyer *v.* School Dist. No. 31, 4 S. D. 420, 57 N. W. 68; Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273.

72. School Dist. *v.* Cromer, 52 Ark. 454, 12 S. W. 878, 6 L. R. A. 510, holding that where a school warrant has been destroyed and the school-board issues a duplicate as of the date of the original with the word "duplicate" written across the face, the statute begins to run from the date of the original and not from the date of the issue of the duplicate.

73. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

**Application of rule.**—Where, at a meeting, a school-district by vote requests a creditor of the district to state on what terms he will settle, and at the next meeting his proposition is submitted and acted on and recorded in the official registry, and a further direction is made in open meeting to the school trustees to pay to the creditor the money in the county treasury, it is a sufficient promise to take the debt out of statute of limitations, and the district cannot revoke the promise. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

74. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

75. Gasquet *v.* City Schools Directors, 45 La. Ann. 342, 12 So. 506.

76. Seward County School Dist. No. 5 *v.* Wabash First Nat. Bank, 63 Kan. 668, 66 Pac. 630.

77. Donnelly *v.* Duras, 11 Nebr. 283, 9 N. W. 45; Sproul *v.* Smith, 40 N. J. L. 314; Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

78. Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

79. Donnelly *v.* Duras, 11 Nebr. 283, 9 N. W. 45; Sproul *v.* Smith, 40 N. J. L. 314, holding that a suit to recover for services as a teacher must be brought against the district by its corporate name, and not against individual names of the trustees.

**A school-board cannot maintain trespass** in its own name for the taking and carrying away of district chattels, unless it has an actual or constructive possession thereof at the time of the taking, and a general or qualified property therein. Perkins *v.* Weston, 3 Cush. (Mass.) 549.

80. Johnson *v.* Common School Dist. No. 13, 38 S. W. 861, 18 Ky. L. Rep. 887; Chrigstrom *v.* McGregor, 74 Hun (N. Y.) 343, 26 N. Y. Suppl. 517. See also Perkins *v.* Weston, 3 Cush. (Mass.) 549.

81. School Dist. *v.* Pillsbury, 58 N. H. 423.

82. Finney *v.* Garner, 110 Tenn. 67, 71 S. W. 592.

**Necessity for demand.**—A taxpayer cannot prosecute an action on behalf of a school-district to recover money due unless he has

to school matters,[83] but this does not prevent a suit in the name of the district to redress private wrongs.[84]

**d. Parties.** Except in so far as modified by statute, the rules governing in civil actions generally apply in actions by or against school-districts in regard to the proper plaintiffs [85] or defendants,[86] and in regard to the propriety or necessity of joining certain persons as plaintiffs [87] or defendants; [88] and this is also true of the right to intervene in such an action.[89] Where a school-board is unincorporated an action by or against it should be in the individual names of its members, and not in the name of the board; [90] but if such board is incorporated, or is regarded as a corporate body, the suit should be in its corporate name.[91] The majority of a school-board may sue in the name of the board; [92] but the minority of a school-

first demanded that the district board proceed to bring such action and his demand is refused. Grant Tp. School Dist. *v.* Carroll Independent School Dist., (Iowa 1903) 97 N. W. 76.

**83.** Franklin School Tp. *v.* Wiggins, 122 Iowa 602, 98 N. W. 490.

**84.** Franklin School Tp. *v.* Wiggins, 122 Iowa 602, 98 N. W. 490.

**85.** *Connecticut.*—White School House *v.* Post, 31 Conn. 240.

*Illinois.*— McDaniel *v.* District No. Sixteen School Directors, 125 Ill. App. 332, holding that, in an action of forcible detainer to recover possession of school property, the school directors are the proper plaintiffs, but that where title to land is involved, the school trustees are the proper plaintiffs.

*Indiana.*—Newpoint Lodge No. 255 *v.* Newpoint School Town, 138 Ind. 141, 37 N. E. 650; Crawford *v.* Dean, 6 Blackf. 181; McGreggor *v.* State, 31 Ind. App. 483, 68 N. E. 315.

*Maine.*— Junkins *v.* Doughty Falls Union School Dist., 39 Me. 220.

*Nebraska.*— Bowen *v.* Phelps County School Dist. No. 3, 10 Nebr. 265, 4 N. W. 981.

*New York.*— Mooers School Dist. No. 23 *v.* Raymond, 86 N. Y. Suppl. 182.

*Texas.*— Lytle School Dist. *v.* Haas, 24 Tex. Civ. App. 433, 59 S. W. 830.

See 43 Cent. Dig. tit. "Schools and School Districts," § 275; and, generally, PARTIES, 30 Cyc. 21 *et seq.*

**Successors.**—A suit may be maintained in the name of the successor of a school officer upon a contract made by such officer. Manlove *v.* McHatton, 5 Ill. 95.

**86.** See, generally, PARTIES, 30 Cyc. 98 *et seq.*

**An action against a school-district, the name of which is changed** after the cause of action accrues, but before its commencement, should be against it in its new name. Gould *v.* Eagle Creek School Dist., 7 Minn. 203.

**Where two school-districts are united into** one, the name of which is the same as that of one of the old, and suit is brought against the district by that name, but with the additional description of defendant as being that school-district which is "running a school," it is clearly shown that the new district is the one intended to be sued. Needham *v.* Shrewsbury School Dist. No. 6, 62 Vt. 176, 20 Atl. 198.

**87.** Clarke *v.* Clark County School Dist. No. 16, 84 Ark. 516, 106 S. W. 677; Harris *v.* Canaan School Dist. No. 10, 28 N. H. 58, holding that where the members of a building committee of a school-district render services and furnish material, severally, under the directions of the committee, their claims against the district are not joint, but several. And see, generally, PARTIES, 30 Cyc. 105 *et seq.*

**88.** Starr *v.* State, 149 Ind. 592, 49 N. E. 591 (holding that where, by reason of the acts of a school city and its treasurer, the liability incurred is by law expressly confined to the treasurer, there is no defect of parties in not making the members of the school-board parties defendant in an action against the treasurer to enforce the liability); Cunningham *v.* Orange, 74 Vt. 115, 52 Atl. 269; Whitaker *v.* Roberts, 155 Fed. 882. And see, generally, PARTIES, 30 Cyc. 120 *et seq.*

**89.** Lane *v.* Weymouth Fourth School Dist., 10 Metc. (Mass.) 462 (holding that the individual members of a school-district have no right to appear and be heard in defense of an action against the district); Rush School Dist. No. 4 *v.* Wing, 30 Mich. 351.

**90.** See Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189. See also *Ex p.* Collins, 49 Ala. 69.

**91.** *Illinois.*— Shoudy *v.* School Directors, 32 Ill. 290.

*Indiana.*— Mackenzie *v.* Edinburg School Trustees, 72 Ind. 189.

*Kentucky.*— Anderson *v.* Green, 55 S. W. 420, 21 Ky. L. Rep. 1439, holding that where the names of the trustees of a school-district appear as plaintiffs in the caption of a petition, followed by words describing them as such trustees, and it is alleged in the petition that plaintiffs are the trustees of the district, and as such constitute a body politic and corporate, it sufficiently appears that they sue in their corporate capacity as trustees.

*Maryland.*— Jones *v.* Keating, 55 Md. 145.

*Pennsylvania.*— Kingsley *v.* Plum Tp., 2 Pa. St. 28; Barnet *v.* School Directors, 6 Watts & S. 46.

*Virginia.*— Stewart *v.* Thornton, 75 Va. 215.

See 43 Cent. Dig. tit. "Schools and School Districts," § 275.

**92.** Paillette *v.* Carr, 3 Mart. (La.) 489.

board have no power to commence an action in its name, and if they do so they will be individually responsible for the costs;[93] nor can one member of an incorporated board bring suit in his own name on behalf of himself and the other members.[94] Where a civil town or township and a school town or township are distinct corporations they must sue and be sued each in its own corporate name;[95] and in order to constitute a suit one against a school township, its character as a school corporation must be designated either in the title of the action or in the complaint by an allegation of that fact;[96] and a suit against a township in its ordinary corporate name is a suit against the civil township and not against the school township.[97] A complaint or petition may be amended by inserting the proper name of a party, provided it does not amount to the substitution of a new party.[98]

**e. Process and Appearance.** Except in so far as modified by statute, the rules relating to the contents, service, and return of process in actions by or against school-districts are the same as those regulating process in civil actions generally,[99] as in regard to the officer or agent to be served or to receive service,[1] or in regard to the officer or agent who may appear for or on behalf of the school-district.[2] Where a member of a school-board, with the consent of the other members, enters an appearance in a suit, the board cannot, after a verdict, object to the regularity of the proceeding.[3]

**f. Pleading.** Except where otherwise provided by statute, the pleading in an action by a school-district is governed by the rules relating to pleadings in

93. Johnston *v.* Mitchell, 120 Mich. 589, 79 N. W. 812.

94. Jones *v.* Keating, 55 Md. 145.

95. Utica Tp. *v.* Miller, 62 Ind. 230; Wright *v.* Stockman, 59 Ind. 65; Carmichael *v.* Lawrence, 47 Ind. 554, holding that a complaint against a township for money alleged to be due for building a school-house should be against the school township, and not against the civil township.

96. Jarvis *v.* Robertson, 126 Ind. 281, 26 N. E. 182 (holding that a complaint stating a good cause of action against a school township but designating defendant as "township trustee" must be dismissed for its failure to make the school corporation a party to the action); Utica Tp. *v.* Miller, 62 Ind. 230; Noblesville *v.* McFarland, 57 Ind. 335.

97. Utica Tp. *v.* Miller, 62 Ind. 230.

A suit against the "trustees of the township" is conclusively presumed to be against the trustees of the civil township, and not of the school township. Teeple *v.* State, 171 Ind. 268, 86 N. E. 49.

98. Shoudy *v.* School Directors, 32 Ill. 290 (holding that an action commenced by school directors constituting a school corporation, in their individual names, but as school directors, may be amended by striking out the proper names of such directors as surplusage and substituting in their place their corporate name); Agency School Dist. *v.* Wallace, 75 Mo. App. 317.

99. See, generally, PROCESS, 32 Cyc. 412.

Manner of service.— It has been held that the service of a writ on a school-district by attaching certain personal property of the district, and leaving a true and attested copy of the writ, with the officer's return thereon, at the house of the then usual abode of the clerk of the said district in the hands of his wife is a good service. Dow *v.* Walden School Dist. No. 12, 46 Vt. 108. But on the other hand it has been held that a summons on a school-district must be served personally on its officer, and cannot be served on him by leaving a copy at his house with an adult member of his family. Flood *v.* Marcy School Dist., 9 Kulp (Pa.) 385.

Place of service.— Service of summons on the clerk of a school-district located in two counties may be made in either of such counties. Altman *v.* School Dist. No. 6, 35 Oreg. 85, 56 Pac. 291, 76 Am. St. Rep. 468.

1. Rogers *v.* Brewer, 68 Ill. 154; Kennedy *v.* Derby Grange Independent School Dist., 48 Iowa 189 (treasurer of school-district); Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

The president as head officer of the board of directors of a school-district has implied authority to receive service of process in a suit against the district, in the absence of statute otherwise. Carr *v.* Belton School Dist., 42 Mo. App. 154.

Changing district.—Where the school trustees redistrict a township and form the territory into other districts so that an old district ceases, service of process in an action to recover the indebtedness of the old district, upon those who were directors of such district at the time of the change is good, as such persons constitute a body corporate for the purpose of enabling creditors to enforce the payment of debts of the district which have not been apportioned among the new district. Rogers *v.* Brewer, 68 Ill. 154.

2. Davis *v.* Haverhill School Dist., 43 N. H. 381. And see, generally, APPEARANCES, 3 Cyc. 503.

3. Thompson *v.* Township 29 School Dist No. 4, 71 Mo. 495.

civil actions in general.[4] Thus a complaint or petition in an action against a school-district should clearly and definitely allege all the essential facts constituting plaintiff's cause of action,[5] as that in an action for a debt facts must be alleged which show that the supposed indebtedness is such a one as the district could lawfully incur;[6] and in an action on a contract made with district agents the complaint or the petition should allege facts showing the agents' power to execute the contract;[7] and it is proper in an action against a school-district to negative the legal existence of the district by a direct allegation that there is no such district;[8] but the complaint or petition need not allege immaterial facts[9] or anticipate or allege matters of defense.[10] In some jurisdictions a complaint on

4. See Franklin School Tp. *v.* Wiggins, 122 Iowa 602, 98 N. W. 490; and, generally, PLEADING, 31 Cyc. 1.

**Supplemental petition.**—Where an action is commenced on school-district warrants, and before trial the legislature passes an act legalizing the warrants sued on, the fact of the passage of the act, being material to the proper determination of the case, may be set up in a supplemental petition. Shaffer *v.* Greeley County School Dist. No. 1, 8 Kan. App. 751, 61 Pac. 759.

**Answer sufficiently alleging fraud** in an action upon a school order by an assignee thereof see Kittenger *v.* Monroe School Tp., 3 Ind. App. 411, 29 N. E. 931.

**Plea.**— In an action to recover the price of goods sold to a board of education by a member thereof in violation of statute, a plea setting up its illegality need not aver that the purchaser was prejudiced. Poling *v.* Phillippi Dist. Bd. of Education, 56 W. Va. 251, 49 S. E. 148.

5. *Colorado.*— Phillips County School Dist. No. 15 *v.* Flanigan, 28 Colo. 431, 65 Pac. 24.

*Idaho.*— Independent School Dist. No. 5 *v.* Collins, 15 Ida. 535, 98 Pac. 857.

*Indiana.*— Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100; Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520; Lebanon Nat. Bank *v.* Clinton School Tp., 24 Ind. App. 359, 56 N. E. 857, holding that a claim against a school township for money loaned can only be enforced by showing in the complaint the existence of the necessity for the borrowing.

*Iowa.*— James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723, holding that, in a suit to enjoin the removal of a school-house, an allegation that the action of the township board in ordering its removal was surreptitiously taken cannot be considered in the absence of allegations of fact on which it is based

*New York.*— Shuler *v.* Meyers, 5 Lans. 170.

*South Dakota.*— Livingston *v.* Brookings County School Dist. No. 7, 11 S. D. 150, 76 N. W. 301.

See 43 Cent. Dig. tit. "Schools and School-Districts," § 277.

**Complaint or petition held sufficient:** In an action against a school township for the value of charts. See Myers Pub. Co. *v.* White River School Tp., 28 Ind App. 91, 62 N. E. 66. In a suit by a school township against persons unlawfully acting as officers of an independent school-district within the township, to restrain further interference with the rights of the township on the part of defendants, and for an accounting. See Franklin School Tp. *v.* Wiggins, 122 Iowa 602, 98 N. W. 490.

**In order to sustain an action upon a school-district warrant,** the complaint must show by proper averment what it was given for, and if for goods of any character, if they were suitable, useful, and necessary for the district or township and that such district or township received and used them. Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520. But it has been held that a complaint in an action on a school-district warrant is sufficient, as against an objection raised for the first time at the trial, that it does not state a cause of action, although it fails to allege the consideration for which the order was drawn, or that there were funds in the district treasury applicable to its payment. Brown *v.* Fitcher, 91 Minn. 41, 97 N. W. 416.

**Demand of payment.**—Where a complaint in an action on a school-district order sets out the order and alleges that payment has been refused, the complaint is not demurrable on the ground that it fails to allege a demand. Rochford *v.* Lyman County School Dist. No. 11, 17 S. D. 542, 97 N. W. 747.

**Order to make more definite and certain** see Timmons *v.* Pine School Tp., 22 Ind. App. 93, 53 N. E. 242.

**Matters stated in a petition as an introduction or inducement** to the facts on which plaintiff bases his claim are not wholly impertinent, and it is not error to refuse to strike out such matter on motion. Bellows *v.* West Fork Dist. Tp., 70 Iowa 320, 30 N. W. 582.

6. School Dist. No. 16 *v.* School Dist. No. 9, 12 Nebr. 241, 11 N. W. 311.

7. Illinois Bd. of Education *v.* Greenebaum, 39 Ill. 609; Honey Creek School Tp. *v.* Barnes, 119 Ind. 213, 21 N. E. 747; Lincoln School Tp. *v.* Union Trust Co., 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272; King *v.* Mason County Common School Dist. No. 23, 32 S. W. 752, 17 Ky. L. Rep. 803; Shuler *v.* Meyers, 5 Lans. (N. Y.) 170.

8. Franklin School Tp. *v.* Wiggins, 122 Iowa 602, 98 N. W. 490.

9. Craig School Tp. *v.* Scott, 124 Ind. 72, 24 N. E. 585.

10. Jefferson School Tp. *v.* Litton, 116 Ind. 467, 19 N. E. 323; Noble School Furniture

a contract for school supplies and furnishings must allege that they were suitable and necessary for the schools,[11] and that they have been delivered to and accepted by the school corporation.[12] In an action upon school orders payable out of a general fund the complaint need not allege that there are moneys in such fund out of which the orders may be paid;[13] but where such orders are payable out of a special fund, the complaint must aver that there are moneys in such fund sufficient to meet the orders.[14] Where the claim must be presented to the district for allowance before bringing suit, such presentation must be alleged in the complaint.[15] A complaint or petition by a school-district need not set out the manner of the formation of the district;[16] and where the general school law makes all school-districts corporations, the fact of the incorporation need not be pleaded.[17]

**g. Issues, Proof, and Variance.** The rules governing in civil actions generally also apply to the issues,[18] proof, and variance[19] in actions by or against school-districts. Thus the propriety of a purchase of land and the necessity thereof for a school cannot be inquired into in an action on a note for the price of the land.[20] In an action upon a school order or note given for supplies furnished to defendant school-district, defendant may show the value of the supplies received and have the recovery limited thereto.[21]

Co. *v.* Washington School Tp., 4 Ind. App. 270, 29 N. E. 935; Buffalo School Furniture Co. *v.* School Dists. Nos. 4, 30, 40, 7 Kan. App. 796, 54 Pac. 115 (holding that in an action on a school warrant given in payment for school supplies, plaintiff need not allege that the furniture and goods were such as the school-board were authorized to purchase, such fact being matter of defense); Carlisle County Common School Dist. No. 32 *v.* Kane, 87 S. W. 321, 27 Ky. L. Rep. 983.

**11.** Oppenheimer *v.* Greencastle School Tp., 164 Ind. 99, 72 N. E. 1100; Bloomington School Tp. *v.* National Furniture Co., 107 Ind. 43, 7 N. E. 760; Reeve School Tp. *v.* Dodson, 98 Ind. 497; Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520. But see Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919.

**12.** Bloomington School Tp. *v.* National School Furniture Co., 107 Ind. 43, 7 N. E. 760; Reeve School Tp. *v.* Dodson, 98 Ind. 497; Mitchelltree School Tp. *v.* Carnahan, 42 Ind. App. 473, 84 N. E. 520.

**13.** Brown *v.* Jacobs School Directors, 77 Wis. 27, 45 N. W. 678. See also Brown *v.* Fitcher, 91 Minn. 41, 97 N. W. 416.

**14.** Brown *v.* Jacobs School Directors, 77 Wis. 27, 45 N. W. 678.

**15.** Pierson *v.* Harwarden Independent School Dist., 106 Iowa 695, 77 N. W. 494; Weir Furnace Co. *v.* Seymour Independent School Dist., 99 Iowa 115, 68 N. W. 584 (holding that in an action against a school-district on a contract for supplies, the petition is demurrable if it discloses that the claim was not presented to the board of directors before suit was brought); Fobes *v.* School Dist., 10 Wis. 117 (holding that the presentation of a claim against a school-district is so far a necessary substantial fact that even a complaint before a justice must allege it, or it cannot be proved).

**16.** Ft. Dodge City School Dist. *v.* Wahkansa Dist. Tp., 15 Iowa 494.

**17.** School Dist. No. 4 *v.* Holmes, 53 Mo. App. 487.

**18.** Stratford First School Dist. *v.* Ufford, 52 Conn. 44 (holding that where, in an action by a school-district, defendant denies plaintiff's corporate existence, the question whether a certain boundary of the district has been legally established is not in issue); James *v.* Gettinger, 123 Iowa 199, 98 N. W. 723 (holding that where there is nothing before the court except an application for a mandatory injunction and a demurrer to the same, the court cannot pass on the necessity or expediency of the action of a school-board in ordering the removal of a school-house); Junkins *v.* Doughty Union School Dist., 39 Me. 220 (holding that plaintiff in an action against a school-district for labor done under a contract with a committee of the district cannot recover the amount paid by him to a third person for services rendered the district). And see, generally, PLEADING, 31 Cyc. 670 *et seq.*

**Defense not raised.**— In assumpsit by a builder against a school-district to recover pay for building a school-house and finding materials therefor, defendants cannot object to the absence of proof of a legal meeting to determine upon the building and the raising of money therefor, unless they have raised such objection by their specifications of defense. Collins *v.* Liberty School Dist. No. 7, 52 Me. 522.

**19.** Globe Furniture Co. *v.* Gentry County, 51 Mo. App. 549.

**Proof.**—Where defendant district alleges that the indebtedness in suit was incurred by a fraudulent agreement between plaintiff and its own agents, plaintiff may show that there was a valid consideration for the debt. Wormley *v.* Carroll Dist. Tp., 45 Iowa 666.

**20.** Craig School Tp. *v.* Scott, 124 Ind. 72, 24 N. E. 585.

**21.** Litten *v.* Wright School Tp., 127 Ind. 81, 26 N. E. 567; Kittenger *v.* Monroe School Tp., 3 Ind. App. 411, 29 N. E. 931.

**h. Evidence.**[22] The rules of evidence in civil actions generally apply in actions by or against school-districts in regard to the admissibility [23] and weight and sufficiency [24] of the evidence, and also in regard to the presumptions [25] and burden of proof [26] in such actions.

**i. Trial and Judgment** — (i) *IN GENERAL.* In the absence of statutory provisions otherwise, trials in actions by or against school-districts are governed by the rules regulating trials in civil actions generally,[27] and judgments therein are

**22. Evidence of corporate existence of district** see *supra*, III, C, 1, f.

**23.** See Wormley *v.* Carroll Dist. Tp., 45 Iowa 666; Williams *v.* Keech, 4 Hill (N. Y.) 168 (holding that where in an action for building a school-house defendants proved that plaintiff's work was improperly performed, it is not competent for him to show that it would have been worth more than the contract price to build the house in a workmanlike manner); Currier *v.* Brighton School Dist., 76 Vt. 261, 56 Atl. 1016; Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155. And see, generally, EVIDENCE, 16 Cyc. 821.

**Evidence as to the name by which a district has been known and called is admissible** in an action by it, where there is no statutory requirement that a name shall be designated by which it shall be called. South School Dist. *v.* Blakeslee, 13 Conn. 227.

**Evidence of the usefulness and necessity of school supplies** to the district to which they are furnished is material in an action for the price thereof. Litten *v.* Wright School Tp., 1 Ind. App. 92, 27 N. E. 329.

**The official character of school trustees** may be proved by their acts and conduct, and proof of their affidavits and official bonds is competent evidence to prove such official character. Eads *v.* Wooldridge, 27 Mo. 251.

**24.** See, generally, EVIDENCE, 17 Cyc. 753 *et seq.*

**Evidence held sufficient** in an action against a school-district to recover a loss alleged to have been suffered by reason of the failure of the district officers to require of a contractor the statutory bond to support a verdict for defendant see Wilcox Lumber Co. *v.* Otter Tail County School Dist. No. 268, 106 Minn. 208, 118 N. W. 794.

**Evidence held insufficient** in an action to recover money alleged to have been loaned to a school township, for the erection of a school-house, on the theory of a quasi-contract, to establish the receipt of the money by the township see White River School Tp. *v.* Caxton County, 34 Ind. App. 8, 72 N. E. 185.

**25.** Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919 (holding that where, in an action against a school township, the complaint alleges the date on which the warrant sued on was audited and executed, it is to be presumed that it was audited by the board of county commissioners before delivery, as required by statute); Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564 (holding that in an action for the price of supplies purchased by the directors of an independent district for use in the schools, to be paid for out of any unappropriated funds of the district, the court will presume, in the absence of proof to the contrary, that there were unappropriated funds of the district on hand at the time the purchase was made; and that this presumption will not be rebutted by the fact that a future time of payment was fixed in the contract). And see, generally, EVIDENCE, 16 Cyc. 1050 *et seq.*

**Presumptions as to validity of contracts** see *supra*, III, E, 4, e, (III).

**Presumption of assignment.**—Where the payee of a school warrant receives from the person who discounts it all that is due under the original contract on which the warrant is based, the person who makes the discount in suing the district on the original contract need show no former assignment of the warrant since that is presumed to have been made. Central School Supply House *v.* South Middleton Tp. School Bd., 9 Pa. Super. Ct. 110.

**26.** White River School Tp. *v.* Caxton County, 34 Ind. App. 8, 72 N. E. 185 (holding that where plaintiff loans money to a school trustee for the district, intending that it should be used for the erection of a school-house, and thereafter brings suit against the school township to recover the same on the theory that defendant has received and retained the benefit of the money advanced, and therefore in equity should pay it, the burden is on plaintiff to prove the receipt of the money by the township); Brown *v.* Cowley County School Dist. No. 41, 1 Kan. App. 530, 40 Pac. 826 (holding that where, in an action against a school-district on a written instrument, the petition does not allege authority on the part of those signing the instrument for the district, and the answer denies the authority of such persons, and nowhere admits that the signers were officers of the district, the burden is on plaintiff to establish the execution of the instrument and the authority of those executing the same); Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155. And see, generally, EVIDENCE, 16 Cyc. 926 *et seq.*

**Defense of ultra vires.**—Where a board of education seeks to avoid a contract on the ground of *ultra vires*, the burden is on it to allege and prove such defense. Morgan *v.* San Francisco Bd. of Education, 136 Cal. 245, 68 Pac. 703.

**27.** See, generally, TRIALS.

**Construction of findings in an action** against a moderator and assessor of a school-district on an order for school furniture

ordinarily subject to the same rules as are judgments in general.[28] For example, a judgment against a school-district cannot be collaterally impeached by an inhabitant whose property has been taken to satisfy it.[29] A general judgment may be rendered against a school-district in an action on a warrant drawn against a fund which is a continuous fund and capable of being replenished when temporarily exhausted by a transfer from another regular fund, or by taxation.[30] The title of a member of a school-board to his office cannot be collaterally attacked in an action in which he is acting in his official capacity.[31]

(II) *VACATING JUDGMENT.* A judgment or decree against a school-district may, upon a proper application therefor, be set aside and a continuation of the cause be had on the merits, where such judgment or decree has been obtained by fraud or breach of duty,[32] as where it is suffered by default in the private interests of an officer whose duty it is to resist it,[33] or is entered through the fraud and collusion of such officer with parties having no legal or equitable claims against the district.[34] Where a judgment is set aside or vacated it is entirely destroyed, and the rights of the parties are left as if no judgment had ever been entered.[35]

(III) *EXECUTION AND ENFORCEMENT OF JUDGMENT.* The manner of enforcing a judgment against a school-district is generally regulated by statute.[36] Under some statutes, where a judgment is rendered against a school-district, it is the duty of the proper board or officers to apply to the payment thereof the proper funds, not otherwise appropriated,[37] and to issue an order upon the treasury

signed by them see Kane *v.* Stowe, 50 Mich. 317, 15 N. W. 490.

**Question for jury.**—Where a school-district buys maps and gives a warrant in payment, and the agent of the seller obtains a discount of the warrant, and remits the seller's share of the money, and an action is brought on the contract of sale in the name of the seller, for the use of the person who discounted the warrant, the assignee is entitled to have the jury say whether the seller and the agent received all that was due them, notwithstanding there is a duplicate warrant unpaid, and outstanding on which action by the seller is pending. Central School Supply House *v.* South Middleton Tp. School Bd., 9 Pa. Super. Ct. 110.

**Directing verdict.**—Where under a statute requiring that claims against a school-district must be first presented to the board of directors before suit can be maintained thereon, a petition founded on such claim does not allege presentation, and plaintiff's evidence affirmatively shows that it was only proposed to the president of the board of directors to arbitrate the claim, a verdict for the district should be directed. Pierson *v.* Harwarden Independent School Dist., 106 Iowa 695, 77 N. W. 494.

28. See, generally, JUDGMENTS, 23 Cyc. 623.

29. McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689.

30. Carbon County School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304, 80 Pac. 155.

31. Cynthiana *v.* Cynthiana Bd. of Education, 52 S. W. 969, 21 Ky. L. Rep. 731, holding that, in an action by a city board of education to compel the city to pay to it taxes collected for city purposes, the title of the members of the board cannot be questioned.

32. Noble *v.* Jersey County School Directors, 117 Ill. 30, 7 N. E. 350, 57 Am. Rep. 852.

33. Noble *v.* Jersey County School Directors, 117 Ill. 30, 7 N. E. 350, 57 Am. Rep. 852.

**That outstanding obligations are largely in excess of the constitutional limit** at the time a judgment by default is rendered against a school-district does not show that the judgment was obtained by fraud and collusion. Thompson *v.* Allison, etc., Independent School Dists., 102 Iowa 94, 70 N. W. 1093.

34. Sturm *v.* Brown County School Dist. No. 70, 45 Minn. 88, 47 N. W. 462; Nevil *v.* Clifford, 55 Wis. 161, 12 N. W. 419; Newcomb *v.* Horton, 18 Wis. 566.

35. See King *v.* Mason County Common School Dist. No. 23, 32 S. W. 752, 17 Ky. L. Rep. 803; and, generally, JUDGMENTS, 23 Cyc. 973.

36. See Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154 (construing Howell Annot. St. Mich. §§ 5109–5113); and the statutes of the several states.

**Under N. Y. Code Civ. Proc. §§ 1927, 1929, 1931,** providing that the trustees of school-districts shall be individually liable for judgments recovered against them on contracts made by them in their official capacity, a judgment so recovered may be collected by execution from their individual property, and a writ of mandamus will not be granted to enforce the payment of such a judgment out of funds belonging to a school-district in the hands of its trustees. People *v.* Abbott, 107 N. Y. 225, 13 N. E. 779.

37. Chase *v.* Morrison, 40 Iowa 620; Le Sueur County School Dist. No. 31 *v.* Roach, 43 Minn. 495, 45 N. W. 1097, holding that under Gen. St. (1878) c. 36, § 119, which authorizes the treasurer of a school-district to pay a judgment against the trustees of

for the amount of the judgment,[38] and if there are not sufficient funds applicable to the payment of the judgment, the proper board or officer, within prescribed limits, should cause a tax to be levied for that purpose;[39] and in case such board or officer neglects or refuses to resort to taxation to create a fund where there are no funds applicable to the payment of the judgment resort may be had to mandamus to compel it to do so.[40] But as a general rule a judgment against a school-district cannot be enforced by execution against the school property.[41] In some jurisdictions the private property of the inhabitants of a school-district may be taken on execution to satisfy a judgment against such district;[42] and where the members of a school-district are liable for its debts, an execution on a judgment against it must be levied on the goods and chattels or the body of a member before legal resort can be had to his real estate.[43] It has been held that where a member of a school-district having no corporate funds has obtained judgment against it, the appropriate remedy for its enforcement, in the absence of statutory provisions, is in equity, and that its enforcement against the property of another individual member will be restrained.[44] Where a judgment is obtained by fraud, a court of equity will restrain its collection;[45] but where the debt on which the judgment is based is valid, and plaintiff acts in good faith and obtains proper service on defendant, a court of equity will not interfere with its collection.[46]

**j. Costs.**[47] As a general rule a school-district is not liable for costs in an action or proceeding by or against it unless it is made so by constitutional or statutory provision;[48] and under some statutes it is expressly provided that a

the district only out of money not otherwise appropriated, he has no authority to do so out of moneys of the district applicable only to other specific purposes.

**38.** Chase *v.* Morrison, 40 Iowa 620.

**Orders on the treasurer of a school-district,** directing him to pay certain judgments, are not evidences of debt independent of the judgments on which they are based, and payment of them cannot be enforced without reference to the ownership of the judgments. Richards *v.* Rock Rapids Independent School Dist., 46 Fed. 460. See also Cross *v.* Dayton Dist. Tp., 14 Iowa 28.

**39.** State *v.* Yellowstone County, 12 Mont. 503, 31 Pac. 78.

**Extent of authority.**—A board of supervisors cannot levy a tax for paying a judgment against a school-house fund, after their authority to tax for that fund has been exercised to the full amount allowed for that year. Sterling School Furniture Co. *v.* Harvey, 45 Iowa 466.

**40.** *Iowa.*— Chase *v.* Morrison, 40 Iowa 620 (holding that one who has obtained a judgment against a district township upon an order on the school-house fund, and to whom the directors have issued an order upon the treasurer for payment, may compel by mandamus the levy of a special tax if the district has not levied the maximum allowed by law); Cross *v.* Dayton Dist. Tp., 14 Iowa 28.

*Montana.*— State *v.* Yellowstone County, 12 Mont. 503, 31 Pac. 78.

*North Dakota.*— Coler *v.* Coppin, 7 N. D. 418, 75 N. W. 795.

*Pennsylvania.*— Cavanaugh *v.* Cass School Dist., 6 Pa. Co. Ct. 35.

*United States.*— Presque Isle County *v.* Thompson, 61 Fed. 914, 10 C. C. A. 154.

See 43 Cent. Dig. tit. "Schools and School Districts," § 281; and, generally, MANDAMUS, 26 Cyc. 307 *et seq.*

**41.** Allen *v.* Pike County School Dist. No. 1, 23 Mo. 418, holding that the trustees of a school-district are not a corporation so as to be liable to an action subjecting the school property to execution. And see, generally, EXECUTIONS, 17 Cyc. 978. But see Chase *v.* Morrison, 40 Iowa 620, holding that a judgment creditor may collect his debt by execution against the property of the district if any can be found not exempt.

**42.** McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689. And see EXECUTIONS, 17 Cyc. 980.

**43.** Kenyon *v.* Clarke, 2 R. I. 67.

**44.** Kenyon *v.* Clarke, 2 R. I. 67.

**45.** School Directors *v.* National School Furnishing Co., 53 Ill. App. 254.

**46.** School Directors *v.* National School Furnishing Co., 53 Ill. App. 254.

**47.** For costs generally see COSTS, 11 Cyc. 1.

**48.** See Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89; Hoover *v.* Union Tp. School Dist., 4 Pa. Co. Ct. 520.

**Where in a bill by one school-district against another school-district** and school inspectors for an accounting, it appears that the proceedings and action of defendants are with the approval of the state superintendent of public instruction, neither party should recover costs against the other. Oshtemo Tp. School Dist. No. 13 *v.* Dean, 17 Mich. 223.

**A judgment for costs against a school-district on the dismissal of an appeal** taken in the name of the district by the director thereof without the authority or assent of the assessor, who by statute is authorized to appear for and in behalf of the district, on the ground that the district had not appealed,

school-district or school officers will not be liable for costs in certain cases.[49] A school-district is not liable for the costs of a suit by reason of a district officer refusing to perform a duty which might be compelled by proper proceedings against him.[50]

**k. Review.** Except where there are special statutory provisions otherwise, appeals in actions by or against school-districts are regulated by the rules applicable to appeals from judgments and orders in civil actions generally.[51]

**H. Teachers** [52] **— 1. Eligibility — a. In General.** It is usually required by the statutes and rules and regulations relating to public schools that in order that a person may be eligible to teach in the public schools he shall possess certain qualifications,[53] such as that he be of a good moral character [54] and undergo a prescribed examination as to his learning and ability; [55] that he have a license or certificate of qualification, as prescribed by statute; [56] and for some positions,

is erroneous. Rush School Dist. No. 4 *v.* Wing, 30 Mich. 351.

49. See the statutes of the several states.

**Under Ill. School Law, art. 16, § 1,** no justice, clerk of court, sheriff, or constable shall charge any fees where any school officer or school corporation sues for the recovery of a school fund or for any interest in the school fund. Illinois Cent. R. Co. *v.* Jackson County, 212 Ill. 406, 72 N. E. 39 [*reversing* 112 Ill. App. 488]. But this statute does not apply to an action brought by trustees of schools to recover damages for injuries to school property. Illinois Cent. R. Co. *v.* Jackson County, *supra*. Where the trustees of schools prosecute or defend in their official capacity and fail to recover they are not liable for costs. Cassady *v.* School Trustees, 94 Ill. 589; Township 2 School Trustees *v.* Hihler, 85 Ill. 409 (holding that it is error to decree costs against school trustees on the dismissal of a bill filed by them to set aside a fraudulent conveyance and to subject the property to the payment of a debt due a school fund); People *v.* Yeazel, 84 Ill. 539 (holding that where plaintiffs fail in an action in the name of the people for the use of school trustees on the official bond of a township collector, judgment for costs is error); School Trustees *v.* Stokes, 3 Ill. App. 267. But see Boone *v.* People, 4 Ill. App. 231.

**In New York,** under Code Civ. Proc. § 3244, costs cannot be awarded in an action against a school officer, or a supervisor, on account of an act performed by him by virtue of or under color of his office, or on account of a refusal or omission to perform a duty enjoined upon him by law, where his act, refusal, or omission might have been the subject of an appeal to the state superintendent of public instruction, and where it is certified that it appeared, upon the trial, that defendant acted in good faith. Barrett *v.* Sayer, 12 N. Y Suppl. 170 (holding, however, that where the payment of a draft by a school trustee on the supervisor of a town is refused by the latter upon a doubt as to the competency of the former to make it, and it appears that the drawer is at least such trustee *de facto*, the supervisor has no authority to question the drawer's title as trustee, and is not entitled in an action on the draft to the certificate that he has acted in good faith so as to relieve him from the costs of the action); Whitbeck *v.* Billings, 1 Hun 494, 3 Thomps. & C. 364; Willey *v.* Shaver, 1 Thomps. & C. 324 (holding also that such a certificate exempts school officers from costs in all stages of the action). See also Dexter *v.* Gardner, 5 How. Pr. 417.

**In Tennessee** Shannon Annot. Code, § 1427, authorizing the payment of costs of a suit commenced in good faith by a school director out of the money belonging to the school-district in case of his defeat, does not authorize the payment of costs by the district incurred in a suit brought to determine the right of plaintiff to the office of school director, in which he is defeated. State *v.* Banks, 106 Tenn. 394, 61 S. W. 778.

50. Phillips *v.* New Buffalo Tp. School Dist. No. 3, 79 Mich. 170, 44 N. W. 429, holding that where a school-district votes a certain sum to the moderator for money expended by him in behalf of the district, and an order is drawn therefor by a director and countersigned by the moderator, the district should not be put to the costs of a suit by reason of the refusal of the assessor to pay it as mandamus will lie against him for the non-performance of his duty.

51. See, generally, APPEAL AND ERROR, 2 Cyc. 474.

**Authority to execute an appeal-bond** may be given to several agents, and the fact that by the provisions of a school law the president of a school-district shall appear in behalf of his district, in suits by or against it, does not imply an exclusive power in the president, so that an appeal-bond cannot be executed by another agent if duly authorized. Jefferson County School Dist. No. 8 *v.* Erskin, 1 Colo. 367.

52. **Instructors of colleges and universities** see COLLEGES AND UNIVERSITIES, 7 Cyc. 296.

**Libel or slander of teachers** see LIBEL AND SLANDER, 25 Cyc. 236, 388.

**Teachers of private schools** see *supra*, II, F.

53. See Galesburg Bd. of Education *v.* Arnold, 112 Ill. 11, 1 N. E. 163; and the statutes of the several states.

54. Galesburg Bd. of Education *v.* Arnold, 112 Ill. 11, 1 N. E. 163.

55. See *infra*, III, H, 1, c, (II).

56. See *infra*, III, H, 1, c, (IV).

such as for the office of principal or supervising principal, that he have a certain experience as teacher in the common schools.[57] The law, however, does not usually require that a teacher shall be possessed of the highest qualification, or of a talent for his profession equal to the most eminent and successful teachers; but it only requires that he have an average qualification and ability.[58] A school officer, such as a trustee, whose duties are incompatible with those of a teacher, cannot be both officer and teacher at the same time,[59] and under some statutes such an officer cannot voluntarily employ a near relative as a teacher,[60] although it has been held otherwise.[61] The power of prescribing the qualifications of teachers is, under some statutes, in a certain board, such as the board of education,[62] which board may also classify or grade the teachers, in accordance with the prescribed qualifications, in such manner and by such tests as the board in its discretion may deem best for the interests of the public school system;[63] and in determining the qualifications of teachers for different kinds of schools, the board may take into consideration the question of sex,[64] and may prescribe that male teachers only shall be principals of certain classes of schools.[65]

**b. Teachers' Institutes.** In some jurisdictions statutory provision is made for the holding of teachers' institutes,[66] the raising of funds for the support of the same,[67] as by the collection of annual fees from applicants for teachers' certificates.[68] Under some statutes provision is also made for the payment of teachers attending such institutes,[69] under which provision compensation is

**57.** Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371 (holding that a rule requiring five years of approved experience as teacher, to render a person eligible to the office of supervising principal in a mixed grammar and primary school in the city of Philadelphia, is reasonable); Sherry *v.* Sheppard, 12 Pa. Co. Ct. 168.

**58.** Neville *v.* District No. 1 School Directors, 36 Ill. 71.

**59.** Ferguson *v.* True, 3 Bush (Ky.) 255, holding that a school trustee vacates his office by being employed as a teacher, the duties of teacher and trustee being inconsistent. See also *supra*, III, D, 6, d, (III).

In Vermont, under Rev. Laws (1880), § 515, a person acting as a prudential committee of a school-district cannot employ himself as a teacher. Scott *v.* Williamstown School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

**60.** Holt *v.* Watson, 71 Ark. 87, 71 S. W. 262.

Under Ark. Acts (1901), § 1, prohibiting school directors from employing a teacher related to either of them by consanguinity or affinity within the fourth degree unless petitioned to do so, a second cousin of one of the directors cannot be employed without petition; nor can a second cousin of the wife of one of the directors be so employed. Holt *v.* Watson, 71 Ark. 87, 71 S. W. 262.

Wife.— A statutory provision that no trustee shall be pecuniarily interested in any contract made by the board of which he is a member, and that any contract so made is void, renders void a contract made with the wife of a member of a board of school trustees, employing her to teach in a school over which such board has supervision. Nuckols *v.* Lyle, 8 Ida. 589, 70 Pac. 401.

**61.** State *v.* Burchfield, 12 Lea (Tenn.) 30, holding that a school director will not forfeit his office by employing his daughter as a teacher.

**62.** Keller *v.* Hewitt, 109 Cal. 146, 41 Pac. 871; Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498.

**63.** Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498.

**64.** Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498.

**65.** Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498.

**66.** See Randol *v.* Sloan, 79 Mo. App. 238; and the statutes of the several states.

**67.** Hall *v.* Somersworth, 39 N. H. 511, holding that the duty of towns to appropriate and pay for the support of teachers' institutes a sum equal to two per cent of the amount required to be raised for the maintenance of schools is imperative.

**68.** Hammond *v.* Muskegon School Bd., 109 Mich. 676, 67 N. W. 973.

**69.** Beverstock *v.* Bowling Green School Dist. Bd. of Education, 75 Ohio St. 144, 78 N. E. 1007 [*affirming* 28 Ohio Cir. Ct. 187]; *In re* Teachers' Institutes, 6 Pa. Co. Ct. 24.

Pennsylvania act of April 13, 1887, requiring school-boards to pay the teachers employed in the public schools for attendance on the sessions of the annual county institutes, includes teachers who have been employed prior to the statute, and whose schools are open subsequent thereto; and under such statute teachers attending such institutes are entitled to be paid therefor at their *per diem* rates for actual teaching, not exceeding the maximum fixed by law. *In re* Teachers' Institutes, 6 Pa. Co. Ct. 24.

usually given to them in addition to their regular monthly salaries for their services as teachers in the schools.[70]

**c. Certificate or License** — (i) *In General.* The license or certificate of qualification [71] which under some statutes a teacher must possess before he is eligible to teach in the public schools [72] has none of the elements of a contract, and does not confer upon the holder thereof an absolute right, but only gives him a personal privilege to be exercised under existing restrictions, and under such as may thereafter be reasonably imposed.[73] Such license or certificate is regulated by the statutory provisions relative thereto,[74] such as those relative to the time it shall run,[75] unless revoked for cause,[76] and those relative to the grades or classes that may be taught by the holder of a particular certificate,[77] and there must be at least a substantial compliance with such provisions as to the contents and form of such certificate.[78] A teacher's certificate is *prima facie* evidence of the teacher's quali-

70. Beverstock *v.* Bowling Green School Dist. Bd. of Education, 75 Ohio St. 144, 78 N. E. 1007 [*affirming* 28 Ohio Cir. Ct. 187]; *In re* Teachers' Institutes, 6 Pa. Co. Ct. 24.

71. There is no legal distinction between the granting of a license to teach and the act of issuing a certificate of that fact; the terms are convertible, and the "licensing" implies the issuing to an applicant of a written permission to teach in the public schools. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

72. See *infra*, III, H, 1, c, (IV).

73. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147.

74. Jackson *v.* Hampden, 20 Me. 37 (holding that the certificate required is of the existing committee, and that one granted by a committee of a former year, although composed of the same individuals, is unavailing); People *v.* New York Bd. of Education, 106 N. Y. App. Div. 101, 94 N. Y. Suppl. 61 [*affirmed* in 192 N. Y. 572, 85 N. E. 1114]; People *v.* Maxwell, 50 N. Y. App. Div. 538, 64 N. Y. Suppl. 96 [*affirmed* in 163 N. Y. 599, 57 N. E. 1120] (holding that C grade certificatea issued by the city auperintendent of achools in Brooklyn prior to 1882, under authority of Laws (1850), c. 143, expired by their own limitation, and were not revived by Laws (1899), c. 644); Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 [*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734, and *affirmed* in 165 N. Y. 431, 59 N. E. 300].

**Duty of making lists of licensees** under the Revised Charter of New York City, § 1089 (Laws (1901), c. 718) see Schlivinski *v.* Maxwell, 80 N. Y. App. Div. 313, 80 N. Y. Suppl. 726.

75. *Maryland.*—Washington County School Com'rs *v.* Wagaman, 84 Md. 151, 35 Atl. 85.

*Michigan.*— Lee *v.* Alcona Tp. School-Dist. No. 2, 71 Mich. 361, 38 N. W. 867.

*Mississippi.*— Hill *v.* Swinney, 72 Miss. 248, 16 So. 497.

*Nebraska.*— State *v.* Grosvenor, 19 Nebr. 494, 27 N. W. 728.

*Vermont.*— Holman *v.* Halifax School Dist. No. 4, 34 Vt. 270.

See 43 Cent. Dig. tit. "Schools and School-Districts," § 285.

**Temporary and permanent license.**— Under the Revised Charter of New York City, § 1089 (Laws (1901), c. 718), declaring that at the close of the third year of continuous successful service of a teacher, the city superintendent may make a temporary license permanent, it is not mandatory on such superintendent to make a license permanent under such circumstances, and the issuance of a special license to a teacher who has aerved three years under a temporary license is not a determination by the superintendent that the teacher is entitled to a permanent license. People *v.* New York Bd. of Education, 106 N. Y. App. Div. 101, 94 N. Y. Suppl. 61 [*affirmed* in 192 N. Y. 572, 84 N. E. 1114]. The Greater New York Charter, § 1117, making positions of teachers permanent, subject to certain limitations, does not apply to a teacher whose license expires within the current year, except for the period limited by the expiration of the license. Wood *v.* New York Bd. of Education, 59 Misc. (N. Y.) 605, 112 N. Y. Suppl. 578.

76. Washington County School Com'rs *v.* Wagaman, 84 Md. 151, 35 Atl. 85. And see *infra*, III, H, 1, c, (V).

77. Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594.

**Kindergarten.**— Under Cal. Pol. Code, § 1771, a certificate entitling one to teach "any kindergarten class of the public achools" issued by a county board of education qualifies the holder to teach kindergarten classes in a city of the county which has adopted a kindergarten as a special branch of its primary school system. Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594.

78. See Donaldson *v.* York County School Supt., 8 Pa. Dist. 185; Crosby *v.* Readsboro School Dist. No. 9, 35 Vt. 623, holding, however, that a certificate of qualification need not contain any statement as to the teacher's good moral character.

**No particular form** is usually prescribed or required for a teacher's certificate of qualifications to teach school, and if the superintendent, or other proper officer, certifies that the party was examined and approved by him on a given day it is ordinarily sufficient. Wells *v.* Granby School Dist. No. 2, 41 Vt. 353.

fications,[79] and of the fact that the board or committee issuing such certificate have properly performed their duty as to the manner and requisites of their issuing it,[80] and in the absence of fraud cannot be collaterally impeached [81] as in a suit by a teacher to recover his wages after being dismissed, by proof that he was not properly examined; [82] but on the other hand it devolves upon the school officers who have dismissed him for incompetency or neglect of duty to prove such facts.[83] Under some statutes a teacher's certificate may be renewed or extended, provided it is done in the manner prescribed.[84]

**Date.**—A teacher's certificate should be dated as of the time it is issued, the date being a material matter, in that it shows the beginning of the period in which the teacher is entitled to teach thereunder. Van Dorn *v.* Anderson, 219 Ill. 32, 76 N. E. 53 [*affirming* 117 Ill. App. 618].

**Signing.**—A certificate signed by the chairman of the committee authorized to issue it under their authority is sufficient. Libby *v.* Douglas, 175 Mass. 128, 55 N. E. 808.

**Approval of certificate.**—Where the statute declares that the certificate which a school commissioner is required to grant after examination shall not be valid for more than one year without the approval of the commissioner indorsed thereon, although the approval of the commissioner is not indorsed in writing on the certificate yet if he signifies his approval in words, and declares the teacher competent and gives his sanction to the previous arrangement of the school in the presence of school trustees, the spirit of the law is complied with and the trustees cannot be held liable for the amount paid the teacher, from the time of the expiration of the certificate. Barnhart *v.* Bodenhammer, 31 Mo. 319.

The certificate of a majority of a school-committee is a valid certificate, although that majority does not act together in the examination (Stevens *v.* Fassett, 27 Me. 266), except where all the members of such committee have not received notice of the examination as to qualifications, in which case the certificate is void (Jackson *v.* Hampden, 20 Me. 37).

A provision that a teacher's certificate "may be in" a certain form is merely directory, and if it states that the person is qualified to teach the branches enumerated, it need not state that an examination was had. Kane County Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595.

A mere letter from a county school superintendent stating that an applicant's papers are sufficient to entitle him to a temporary certificate, and that such certificate will be granted on application as provided by statute, is not the equivalent of a temporary certificate. Kester *v.* Walla Walla County School Dist. No. 34, 48 Wash. 486, 93 Pac. 907.

**Forgery.**—A school-teacher's certificate is within the prohibition of a statute against forging any certificate, order, or allowance by a competent court or officer or any license or authority authorized by any statute. State *v.* Grant, 74 Mo. 33.

**79.** District No. 5 School Directors *v.* Reddick, 77 Ill. 628; Neville *v.* District No. 1 School Directors, 36 Ill. 71; Doyle *v.* School Directors, 36 Ill. App. 653.

**80.** Jackson *v.* Hampden, 20 Me. 37; Kimball *v.* Spokane County School Dist. No. 122, 23 Wash. 520, 63 Pac. 213; Fitzgerald *v.* Spokane County School Dist. No. 20, 5 Wash. 112, 31 Pac. 427, holding that there is a *prima facie* presumption that a document in the form of a regular first grade certificate produced by a school-teacher, who states that it was delivered to him by the superintendent of schools, is regular, although he makes no offer to prove the signatures affixed.

**81.** Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595; Doyle *v.* School Directors, 36 Ill. App. 653; Com. *v.* Dedham, 16 Mass. 141; State *v.* Grosvenor, 19 Nebr. 494, 27 N. W. 728; Kimball *v.* Spokane County School Dist. No. 122, 23 Wash. 520, 63 Pac. 213.

A county superintendent is estopped to deny the recitals of a teacher's certificate issued by him, and he cannot, in an action of mandamus to compel him to date the certificate correctly, collaterally attack the certificate by attempting to show that it was issued without due examination. Van Dorn *v.* Anderson, 219 Ill. 32, 76 N. E. 53 [*affirming* 117 Ill. App. 618].

**82.** Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595; Doyle *v.* School Directors, 36 Ill. App. 653; Wells *v.* Granby School Dist. No. 2, 41 Vt. 353.

Evidence.—Where, on an issue whether a school certificate is genuine, it appears that the holder has not been examined regarding his qualification, it is competent for the school commissioner to state whether he has issued any certificates without such examination. Morrow *v.* Ostrander, 13 Hun (N. Y.) 219.

**83.** Neville *v.* District No. 1 School Directors, 36 Ill. 71.

**84.** Van Doren *v.* Anderson, 219 Ill. 32, 76 N. E. 53 [*affirming* 117 Ill. App. 618], holding that under the School Law, art. 7, § 3, providing that the county superintendent may, at his option, renew teachers' certificates at their expiration by indorsement thereon, a teacher's certificate can only be renewed by the indorsement of the county superintendent, and that the issuance of a new certificate cannot be regarded as a renewal); Bryan *v.* Shelby Tp., etc., Fractional School Dist. No. 1, 111 Mich. 67, 69 N. W. 74 (holding, however, that a teacher's certificate issued for three years cannot be legally extended by being changed to read four years,

(II) *EXAMINATION OF APPLICANTS.* The statutes usually provide that a teacher's license or certificate shall be issued to an applicant therefor only upon his being found duly qualified after a prescribed examination or test as to his moral character, learning, and ability,[85] by an authorized board or officer;[88] and in determining the qualifications of a proposed teacher, the board or committee having control of such matters are not confined to his moral character and literary qualifications and his capacity to govern, but may consider his fitness in other respects for teaching.[87] It is sometimes provided, however, that an applicant may be exempt from examination in certain contingencies.[88] Thus it is sometimes provided that a certificate may be issued, without examination, to the holder of

by the secretary of the board of examiners who issued it, after he has gone out of office).

**There need be no second examination of a teacher,** upon the granting of a renewal certificate, where the original certificate issued to him upon examination has expired by statutory limitation. Doyle *v.* School Directors, 36 Ill. App. 653.

**Under N. Y. Consol. Act** (Laws (1882), c. 410), § 1040, the city superintendent cannot renew a provisional license which he has granted for six months at the expiration of that period but must refuse a further license, or on a proper examination grant a permanent license. Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 [*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734, and *affirmed* in 165 N. Y. 431, 59 N. E. 300].

**85.** *California.*— Keller *v.* Hewitt, 109 Cal. 146, 41 Pac. 871.

*Illinois.*— Union School Dist. No. 6 *v.* Sterricker, 86 Ill. 595.

*Kentucky.*— Northington *v.* Sublette, 114 Ky. 72, 69 S. W. 1076, 24 Ky. L. Rep. 835.

*Maryland.*— Washington County School Com'rs *v.* Wagaman, 84 Md. 151, 35 Atl. 85.

*Michigan.*— People *v.* Howlett, 94 Mich. 165, 53 N. W. 1100.

*Pennsylvania.*— Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498; Stroup *v.* Beer, 10 Pa. Dist. 301, 25 Pa. Co. Ct. 1 (holding that the county superintendent of schools has no power to refuse to examine a teacher on the ground that he held examinations at a particular period of the year, and that the teacher did not appear at such examination); Dillon *v.* Myers, Brightly 426.

*England.*—Rex *v.* York, 6 T. R. 490, 101 Eng. Reprint 664.

*Canada.*— Grattan *v.* Ottawa Separate School Trustees, 9 Ont. L. Rep. 433 [*affirming* 8 Ont. L. Rep. 135].

See 43 Cent. Dig. tit. "Schools and School-Districts," § 285.

**Offenses for selling, giving away, or using examination questions** see *infra*, III, J.

**Time for examination** see Cohn *v.* Townsend, 48 Misc. (N. Y.) 47, 94 N. Y. Suppl. 817, holding that an examination may be continued beyond noon of Saturday.

**That a third person acts with a majority of the board of examiners in conducting an** examination does not invalidate the proceedings, and a person who fails to pass cannot complain, where it does not appear that such third person had anything to do with his failure to get his certificate. Lee *v.* Alcona Tp. School-Dist. No. 2, 71 Mich. 361, 38 N. W. 867.

**Institute examination** under Mo. Act (1891), § 2, see Randol *v.* Sloan, 79 Mo. App. 238.

**Certificate obtained in good faith.**—Where the teacher of a district school, without the use of any fraudulent or improper means on his part, obtains a certificate of his qualifications in due form, it is no defense to an action brought by the teacher against a district to recover his wages that the certificate was granted without any examination having been in fact made. Blanchard *v.* Warren School Dist. No. 11, 29 Vt. 433; George *v.* West Fairlee, etc., School Dist. No. 8, 20 Vt. 495.

**86.** Galesburg Bd. of Education *v.* Arnold, 112 Ill. 11, 1 N. E. 163, holding that the power of exclusive management and control, or that of appointing teachers, does not necessarily give the right to examine and pass upon qualifications of teachers.

**87.** Uxbridge School Dist. No. 10 *v.* Mowry, 9 Allen (Mass.) 94. But see Dillon *v.* Myers, Brightly (Pa.) 426, holding that it is the imperative duty of school directors to examine every applicant wishing to be employed as a teacher, and that their inquiries are to be confined to the "moral character" and "learning and ability" of the applicant.

**88.** See the statutes of the several states.

**The Revised Greater New York Charter,** § 1089, which provides for the making of a list of eligibles for appointments to the positions of principals of public schools in the city of New York, from those to whom licenses have been granted, including those exempted from examination, and those duly licensed in the several boroughs prior to the date of the act, relates to those teaching in the city at the time the charter took effect, so as to exempt them from reëxamination, but does not entitle one who, although he was licensed some years before, but was not teaching in the city at the time the charter took effect, to have his name placed upon such list. Walker *v.* Maxwell, 120 N. Y. App. Div. 571, 105 N. Y. Suppl. 533 [*affirmed* in 190 N. Y. 566, 83 N. E. 1133]; People *v.* Maxwell, 87 N. Y. App. Div. 391, 84 N. Y. Suppl. 947; Brooklyn Teachers' Ass'n *v.* New York Bd. of Education, 85 N. Y. App.

a diploma or certificate from a certain school [89] or from another county; [90] that a certificate from a state normal school shall serve as a certificate of legal qualification to teach when properly filed; [91] that a certificate from another county may, by indorsement by the proper officer, be rendered valid in the county where indorsed; [92] or that the holder of a certificate shall, after a given experience as teacher, be exempted from further examination.[93] Under some statutes a special certificate may be granted without an examination to an applicant, to continue in force until the next regular examination; [94] but this does not authorize the granting of another special certificate to one who has been teaching under such a certificate but who has failed to pass the examination.[95] Where a teacher is examined and graded, and a license issued to him according to his grade, to teach for a given length of time, his papers cannot afterward be regraded so as to reduce his license to teach for a less time,[96] and the fact that he consents to a reëxamination and regrading does not affect his rights under the first license.[97]

(III) *REFUSAL TO ISSUE CERTIFICATES.*[98] Officers or boards authorized to issue teachers' licenses or certificates are usually vested with a discretion in regard thereto,[99] and their decisions are usually conclusive,[1] subject, however, under some statutes, to an appeal to the county or state superintendent.[2] If such officers or boards act in good faith, they are not liable in damages for a mere mistake or error in judgment in granting or withholding a teacher's license,[3] although they are so liable if they act maliciously in withholding a license from an applicant lawfully entitled to receive it;[4] but where, after a proper examination, or com-

Div. 47, 83 N. Y. Suppl. 1 [*affirmed* in 176 N. Y. 564, 68 N. E. 1114].

89. Kemble *v.* McPhaill, 128 Cal. 144, 60 Pac. 1092.

**A graduate from a state normal school is** entitled, under Cal. Pol. Code, § 1403, as amended in 1893, to a grammar grade school certificate from any city, city and county, or county board of education in the state; and a rule adopted by a county board of education, requiring one year's experience in teaching, before such certificate will be issued, is invalid, as being inconsistent with the act of the legislature. Mitchell *v.* Winnek, 117 Cal. 520, 49 Pac. 579.

90. Kester *v.* Walla Walla County School Dist. No. 34, 48 Wash. 486, 93 Pac. 907.

91. Smith *v.* Pleasant Plains School-Dist. No. 2, 69 Mich. 589, 37 N. W. 567.

92. State *v.* Grosvenor, 19 Nebr. 494, 27 N. W. 728; Jordan *v.* Davis, 10 Okla. 329, 61 Pac. 1063, holding that such a statute imposes an imperative duty on the county superintendent to indorse proper certificates to teachers when presented to him for indorsement, and gives him no arbitrary discretion in such cases.

93. Doss *v.* Wiley, 72 Miss. 179, 16 So. 902, holding that Code (1892), § 4026, exempting a teacher who has taught five years under a first grade license from further examinations, applies only to teachers who have taught five years under such licenses which have been issued after successful examinations.

94. Lee *v.* Alcona Tp. School Dist. No. 2, 71 Mich. 361, 38 N. W. 867.

95. Lee *v.* Alcona Tp. School Dist. No. 2, 71 Mich. 361, 38 N. W. 867.

96. Hill *v.* Swinney, 72 Miss. 248, 16 So. 497.

97. Hill *v.* Swinney, 72 Miss. 248, 16 So. 497.

98. **Mandamus to compel examination and issuance of certificates** see MANDAMUS, 26 Cyc. 283.

99. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343; Sherry *v.* Sheppard, 12 Pa. Co. Ct. 168. See also Dillon *v.* Myers, Brightly (Pa.) 426.

1. Uxbridge School Dist. No. 10 *v.* Mowry, 9 Allen (Mass.) 94.

**The action of the majority of a school-board** in refusing a certificate cannot be questioned by the rejected applicant in a suit to recover wages he would have earned under his contract but for such adverse action. Lee *v.* Alcona Tp. School Dist. No. 2, 71 Mich. 361, 38 N. W. 867.

2. Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 [*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734, and *affirmed* in 165 N. Y. 431, 59 N. E. 300]; People *v.* Masters, 21 Barb. (N. Y.) 252. But *compare* Cruse *v.* McQueen, (Tex. Civ. App. 1894) 25 S. W. 711, holding that the refusal of a county judge to issue a certificate of competency to teach, being a ministerial act, is not a "ruling or decision" within the meaning of a statute, which provides that the state superintendent shall hear and determine all appeals from the "rulings and decisions" of subordinate school officers.

3. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

4. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

**Evidence.**— In an action against an officer for maliciously withholding a license, oral proof of admissions by him that he had granted a license to the applicant is inad-

pliance with other statutory conditions, it is determined that an applicant is competent to teach, the officer or board has no discretion to refuse the issuance of a certificate to him,[5] and if it does so refuse, it may be compelled to issue the certificate by mandamus.[6]

(IV) *AS A REQUISITE TO APPOINTMENT OR EMPLOYMENT* — (A) *In General.* Under some statutes, no matter what an applicant's qualifications for employment as a teacher may be, it is a necessary prerequisite to his appointment or employment as a teacher that he have in his possession or file with the proper board or officer, a license or certificate of his qualifications, as prescribed by law,[7] otherwise his contract of employment is void, and he can recover neither wages from the district for services performed by him in teaching thereunder,[8] nor damages

missible, unless it is first shown that he kept no such record as is required by statute, or that such record is incorrect; and where he is called as a witness for plaintiff and is examined as to a part of the examination papers, the other parts having been lost, it is not error to exclude such fragmentary part of such papers from evidence. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

5. Keller *v.* Hewitt, 109 Cal. 146, 41 Pac. 871; Northington *v.* Sublette, 114 Ky. 72, 69 S. W. 1076, 24 Ky. L. Rep. 835, holding that where two of the three members of the board of examiners decide that a teacher has passed an examination, entitling him to a county certificate of the first class, the county superintendent has no discretion to refuse to issue a certificate of that grade to him.

6. Mitchell *v.* Winnek, 117 Cal. 520, 49 Pac. 579; Keller *v.* Hewitt, 109 Cal. 146, 41 Pac. 871. And see, generally, MANDAMUS, 26 Cyc. 283.

7. *Colorado.*— Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328.

*Illinois.*— Galesburg Bd. of Education *v.* Arnold, 112 Ill. 11, 1 N. E. 163; Wells *v.* People, 71 Ill. 532.

*Indiana.*— Butler *v.* Haines, 79 Ind. 575; Putnam *v.* Irvington, 69 Ind. 80.

*Maine.*— Rolfe *v.* Cooper, 20 Me. 154.

*Massachusetts.*— Com. *v.* Dedham, 16 Mass. 141.

*Minnesota.*— Jenness *v.* Washington County School Dist. No. 31, 12 Minn. 448.

*Montana.*— Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

*New York.*— O'Connor *v.* Francis, 42 N. Y. App. Div. 375, 59 N. Y. Suppl. 28; Blandon *v.* Moses, 29 Hun 606; Wood *v.* New York Bd. of Education, 59 Misc. 605, 112 N. Y. Suppl. 578, holding that one who does not at the time hold a first assistant teacher's license may not be appointed assistant principal.

*Pennsylvania.*— Com. *v.* Bd. of Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498.

*Tennessee.*— Robinson *v.* State, 2 Coldw. 181.

*England.*— Rex *v.* York, 6 T. R. 490, 101 Eng. Reprint 664.

*Canada.*— Grattan *v.* Ottawa Separate School Trustees, 9 Ont. L. Rep. 433 [*affirming* 8 Ont. L. Rep. 135].

See 43 Cent. Dig. tit. "Schools and School Districts," § 287.

**Command of law.**— The requirement that public teachers shall obtain a license is not a condition of the contract, but is a command of the law. Jackson School Tp. *v.* Farlow, 75 Ind. 118.

**Recital cannot nullify requirement.**—A statutory provision requiring a public school teacher to be licensed cannot be nullified by inserting in the introductory clause of a contract employing the teacher a provision by way of recital that he is a licensed teacher. Jackson School Tp. *v.* Farlow, 75 Ind. 118.

**A teacher of a school conducted under a special act** is not subject to such a requirement by a general school law. Kuenster *v.* Monroe County Bd. of Education, 134 Ill. 165, 24 N. E. 609 [*affirming* 31 Ill. App. 386].

8. *Illinois.*— Kuenster *v.* Monroe County Bd. of Education, 134 Ill. 165, 24 N. E. 609 [*affirming* 31 Ill. App. 386]; Galesburg Bd. of Education *v.* Arnold, 112 Ill. 11, 1 N. E. 163; Botkin *v.* Osborne, 39 Ill. 101; Casey *v.* Baldridge, 15 Ill. 65.

*Indiana.*— Jackson School Tp. *v.* Farlow, 75 Ind. 118; Harrison Tp. *v.* Conrad, 26 Ind. 337.

*Maine.*— Jose *v.* Moulton, 37 Me. 367; Dore *v.* Billings, 26 Me. 56; Jackson *v.* Hampden, 20 Me. 37.

*Maryland.*— Washington County School Comr's *v.* Wagaman, 84 Md. 351, 35 Atl. 85.

*Michigan.*— Bryan *v.* Shelby Tp., etc., Fractional School Dist. No. 1, 111 Mich. 67, 69 N. W. 74; Devoe *v.* Spaulding Tp. School Dist. No. 3, 77 Mich. 610, 43 N. W. 1062.

*Missouri.*— Barnhart *v.* Bodenhammer, 31 Mo. 319.

*New Hampshire.*— Barr *v.* Deniston, 19 N. H. 170.

*North Dakota.*— Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

*Pennsylvania.*— Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371; Dillon *v.* Myers, Brightly 426; Sherry *v.* Sheppard, 12 Pa. Co. Ct. 168; Chestnut *v.* Philadelphia, 17 Phila. 32.

*Vermont.*— Baker *v.* Bakersfield School Dist. No. 1, 12 Vt. 192.

*Washington.*— Kester *v.* Walla Walla County School Dist. No. 34, 48 Wash. 486, 93 Pac. 907.

*Canada.*— Wright *v.* Stephen Tp. School Trustees, 32 U. C. Q. B. 541.

for a breach of such contract.[9] Such a statutory requirement cannot be waived or dispensed with,[10] nor can the employment of a person without such a certificate be made by indirection, as by employing a person with a certificate, with the understanding that he will employ as assistant a person without a valid certificate.[11] The failure to have such a certificate is not excused by the fact that no board authorized to give the required certificate is chosen for that year,[12] that there is ill-feeling between the officer authorized to issue the certificate and the teacher,[13] that the superintendent was sick and unable to examine him,[14] or that the examining board neglects or wantonly refuses to examine him.[15] Nor can a teacher without a proper certificate recover his wages from the agent who employed him,[16] unless the money has been paid to such agent to be paid by him to the teacher;[17] nor can an agent who has paid out his own money to such a teacher recover it from the district.[18] In some jurisdictions an officer who employs a teacher without such a certificate may be indicted.[19]

(B) *Applications.* The provisions of the statutes and the decisions thereunder in regard to such requirement, however, are not uniform. Thus it has been held under some statutes that a teacher must possess a license, or certificate of qualification, at the time his contract of employment is entered into,[20] although he need not possess it at the time he makes his application for a position as teacher,[21] and that a contract of employment entered into by a teacher without such certificate, at the time, cannot be subsequently ratified,[22] as by the subsequent granting of

See 43 Cent. Dig. tit. "Schools and School Districts," § 287.

**A warrant issued to a teacher who does not hold a legal certificate** of qualification is void, and the fact that the school-district receives the benefit of the teacher's services does not subject the district to liability on the warrant or on a *quantum meruit*. Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

9. School Directors *v.* Newman, 47 Ill. App. 364; Jackson School Tp. *v.* Farlow, 75 Ind. 118; Blandon *v.* Moses, 29 Hun (N. Y.) 606; Hosmer *v.* Sheldon School Dist. No. 2, 4 N. D. 197, 59 N. W. 1035, 50 Am. St. Rep. 639, 25 L. R. A. 383.

10. Barr *v.* Deniston, 19 N. H. 170; Goodrich *v.* Fairfax School Dist. No. 1, 26 Vt. 115.

11. Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328.

12. Jose *v.* Moulton, 37 Me. 367.

13. Welch *v.* Brown, 30 Vt. 586.

14. Goodrich *v.* Fairfax School Dist. No. 1, 26 Vt. 115.

15. Jackson *v.* Hampden, 20 Me. 37; Dillon *v.* Myers, Brightly (Pa.) 426.

16. Jose *v.* Moulton, 37 Me. 367, holding that a person teaching a school without the required certificate cannot recover of the agent who hired him, although such agent is not duly constituted to bind the district.

17. Dore *v.* Billings, 26 Me. 56.

18. Tolman *v.* Marlborough, 3 N. H. 57.

19. Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250; Robinson *v.* State, 2 Coldw. (Tenn.) 181. See also *supra*, III, D, 7, a.

20. Wells *v.* People, 71 Ill. 532; School Directors *v.* Newman, 47 Ill. App. 364 (holding that a contract to teach made before a teacher has such certificate is illegal, although he does not begin to teach until after he receives the certificate); School Directors *v.* Jennings, 10 Ill. App. 643; McCloskey *v.* Wheatland Tp. School Dist. No. 5, 134 Mich. 235, 96 N. W. 18 (holding that a contract of employment made with one not having at the time a qualifying certificate is not binding, although the person employed obtains a certificate before the time stipulated for the teaching to commence); Bryan *v.* Shelby Tp., etc., Fractional School Dist. No. 1, 111 Mich. 67, 69 N. W. 74; McKinney *v.* Dakota County School-Dist. No. 45, 20 Minn. 72; Jenness *v.* Washington County School Dist. No. 31, 12 Minn. 448; O'Connor *v.* Francis, 42 N. Y. App. Div. 375, 59 N. Y. Suppl. 28. But see District No. 2 School Directors *v.* Orr, 88 Ill. App. 648; Pollard *v.* School Dist. No. 9, 65 Ill. App. 104, holding that, under Rev. St. c. 122, § 5, art. 7, as amended by the act of July 1, 1893, it is immaterial that a teacher has not a certificate of qualification at the time he is employed, provided he has such certificate "at the time he enters upon his duties."

**Estoppel of district.**—Although a statute declares that a certificate from the state normal school shall serve as a certificate of legal qualification to teach, when filed in the county, city, township, or district, a failure to file it until after making a contract to teach is no defense to an action for salary earned after it is filed. Smith *v.* Pleasant Plains School Dist. No. 2, 69 Mich. 589, 37 N. W. 567.

**The repeal of a statute** under which a certificate, good until revoked, is issued after a proper examination, does not affect the validity of a contract based on such certificate. Snell *v.* Glasgow, 90 Minn. 111, 95 N. W. 881.

21. School Dist. No. 4 *v.* Stilley, 36 Ill. App. 133.

22. Wells *v.* People, 71 Ill. 532.

a license or certificate to him.[23] Under other statutes, however, it has been held to be sufficient if the teacher possesses a certificate before entering upon the term of his employment,[24] and during his term of employment;[25] and some cases go so far as to hold that if the teacher be without a certificate at the time of entering upon his employment, the subsequent procurement of the required certificate will establish his competency from the date on which it is received, and the law will infer a new contract from that date.[26] It has been held under the various statutes that if a teacher's certificate expires while he is teaching, and a new one is not secured, he cannot recover pay for teaching thereafter,[27] or damages for a breach of the contract of employment;[28] but, on the other hand, it has been held that where the teacher has a certificate at the commencement of his employment, but it expires during the employment, he is entitled to recover for services performed both before and after the expiration of the certificate;[29] but that if he begins his employment without a certificate, but subsequently procures one, payments made on salary before he has a certificate cannot be set off against those that accrue after he receives one.[30] It has also been held that where, without a legal certificate, a teacher earns his money, and he is in fact entitled to a certificate, which through inadvertence merely has not been received by him, he is entitled to the wages earned.[31] So it has been held that the possession of such a certificate from another county, which may be validated in the new county by the indorsement by the proper officer, is sufficient authority to permit a teacher to enter upon his employment, and to recover wages therefor, after a promise by that officer to execute the necessary papers.[32]

(v) *REVOCATION* — (A) *In General.* A statute authorizing the issuance of a license or certificate of qualification may also provide for the revocation thereof,

**23.** Butler *v.* Haines, 79 Ind. 575; Putnam *v.* Irvington, 69 Ind. 80; Hosmer *v.* Sheldon School Dist. No. 2, 4 N. D. 197, 59 N. W. 1035, 50 Am. St. Rep. 639, 25 L. R. A. 383.

**24.** Oxford Tp. School Dist. No. 2 *v.* Dilman, 22 Ohio St. 194 (holding that the term "employed," as used in a statute requiring one to have a certificate of competency before being employed as a teacher, means not only the being hired but the being engaged in the discharge of a teacher's duties, and does not render invalid a contract of employment made before the teacher obtains the requisite certificate, provided he obtains it before entering upon the term of his employment); Youmans *v.* Pataskala Special School Dist. Bd. of Education, 13 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 269; Welch *v.* Brown, 30 Vt. 586; Paul *v.* Hartland School Dist. No. 2, 28 Vt. 575 (holding that the statute is satisfied if the certificate be obtained on the evening of the first day, especially where the delay has been at the request of the superintendent and with his assurance that all will be well).

**25.** Crabb *v.* Bates County School Dist. No. 1, 93 Mo. App. 254, holding that the statutes do not require the teacher to have a certificate of qualification at the time of making the contract to teach in the future, but that such certificate must exist during the employment of teaching.

**Certificate need not reach to end of term.**— Mo. Rev. St. (1889) §§ 7995, 8021, which render it necessary for a teacher to have a certificate before a valid contract for teaching can be made, and which provide that "the certificate must be enforced for the full time for which the contract is made," do not require that the teacher shall, at the time of employment, have a certificate which reaches to the end of the term of such employment, but it is sufficient if he renews his certificate at its expiration during the term. Audrian County School Dist. No. 1 *v.* Edmonston, 50 Mo. App. 65.

**26.** Hotz *v.* School Dist. No. 9, 1 Colo. App. 40, 27 Pac. 15; Libby *v.* Douglas, 175 Mass. 128, 55 N. E. 808; Scott *v.* Fairfax School Dist. No. 2, 46 Vt. 452.

**27.** Devoe *v.* Saginaw County School Dist. No. 3, 77 Mich. 610, 43 N. W. 1062 (new certificate refused on examination); People *v.* New York Bd. of Education, 56 N. Y. App. Div. 368, 67 N. Y. Suppl. 836 [*affirmed* in 167 N. Y. 626, 60 N. E. 1118].

**28.** O'Leary *v.* Bridgeport Tp. School Dist. No. 4, 118 Mich. 469, 76 N. W. 1038.

**29.** Holman *v.* Halifax School Dist. No. 4, 34 Vt. 270. See also Com. *v.* Lyndall, 2 Brewst. (Pa.) 425, 7 Phila. 29.

**30.** School Dist. No. 8 *v.* Estes, 13 Nebr. 52, 13 N. W. 16.

**31.** Clarendon School Dist. No. 9 *v.* Brown, 55 Vt. 61.

**A certificate made out at the proper time** by the proper officer upon satisfactory evidence of the teacher's qualifications is valid, and takes effect from its date, although by some accident or neglect the certificate is not put into the teacher's hands. Blanchard *v.* Warren School Dist. No. 11, 29 Vt. 433.

**32.** San Juan County School Dist. No. 1 *v.* Ross, 4 Colo. App. 493, 36 Pac. 560.

by a certain board or officer, under certain contingencies,[33] as for incompetency, immorality, cruelty, or general neglect;[34] or for a failure to attend township, district, or county institutes;[35] or for other adequate or sufficient causes rendering him unworthy to be a teacher;[36] and the licensee, by accepting and acting under the license, assents to the statutory provisions for revocation.[37] Where the statute enumerates the causes for which a teacher's certificate may be revoked, such enumeration excludes all other grounds.[38] A void order revoking a teacher's certificate does not deprive him of any right, and he may proceed to teach his school regardless of it.[39]

(B) *Manner of Revocation.* The board or officers authorized to revoke a teacher's license must at least substantially comply with the provisions of the statute relative to the steps to be taken in revoking a license,[40] as that written specific charges must be made against the teacher,[41] and the prescribed notice of such charges must be given to him.[42] If the charges made are not sufficiently specific, the teacher's remedy is by a motion in the original cause, to have them

33. People *v.* New York Bd. of Education, 17 Barb. (N. Y.) 299.

**A provision for the suspension or removal of a teacher** for certain causes does not authorize the revocation of his certificate. Daviess County Common Schools *v.* Taylor, 105 Ky. 387, 49 S. W. 38, 20 Ky. L. Rep. 1241. So it has been held that the statutory grounds on which a teacher may be suspended or removed do not authorize a refusal to employ a duly licensed teacher who has been selected by the trustees of a school. Brown *v.* Owens, 75 Miss. 319, 23 So. 35, 942.

34. Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846; Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147; Bowman *v.* Ray, 118 Ky. 110, 80 S. W. 516, 25 Ky. L. Rep. 2131; Daviess County Common Schools *v.* Taylor, 105 Ky. 387, 49 S. W. 38, 20 Ky. L. Rep. 1241; State *v.* Lorain County School Examiners, 2 Ohio S. & C. Pl. Dec. 24, 1 Ohio N. P. 151.

**Where an investigation of the moral character** of an applicant for a teacher's certificate is required before an issuance of such certificate, such a requirement does not authorize a revocation for immorality prior to the date of the certificate, and not so close thereto in point of time as to affect the teacher's moral standing at that time. Bowman *v.* Ray, 118 Ky. 110, 80 S. W. 516, 25 Ky. L. Rep. 2131.

35. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147.

36. Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846.

**"Sufficient cause,"** within the meaning of a statute authorizing the revocation of a teacher's certificate therefor, must be such as affects the holder's profession as a teacher. Browne *v.* Gear, 21 Wash. 147, 57 Pac. 359.

**That a teacher has on a single occasion assisted an applicant** for a certificate in his examination does not authorize the revocation of his certificate. Daviess County Common Schools *v.* Taylor, 105 Ky. 387, 49 S. W 38, 20 Ky. L. Rep. 1241.

37. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147.

38. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147; Brown *v.* Owen, 75 Miss. 319, 23 So. 35, 942.

**A court of equity may restrain a revocation** sought to be founded upon a cause not among those enumerated. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147.

39. Wilson *v.* Hite, 54 S. W. 726, 21 Ky. L. Rep. 1199.

40. See Brown *v.* Owen, 75 Miss. 319, 23 So. 35, 942.

**Evidence of revocation.**—Where the statute makes it the duty of the county superintendent to keep a record of revocations of licenses to teach, such record is the best and the proper evidence of a revocation. Washington County School Dist. No. 10 *v.* Thelander, 32 Minn. 476, 21 N. W. 554.

**Concurrence of trustee.**—Where the concurrence of the local trustees in a revocation is required, the county superintendent's annulment of a teacher's certificate without such concurrence does not deprive the teacher of compensation if he still teaches to the end of the term. Jamison *v.* Senter, 56 Miss. 194.

41. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147; Brown *v.* Owen, 75 Miss. 319, 23 So. 35, 942.

**Date of acts.**—Where the charges of immorality preferred against a school-teacher fail to specify the date of the specific acts alleged they are insufficient. Bowman *v.* Ray, 118 Ky. 110, 80 S. W. 516, 25 Ky. L. Rep. 2131.

42. Bowman *v.* Ray, 118 Ky. 110, 80 S. W. 516, 25 Ky. L. Rep. 2131; Wilson *v.* Hite, 54 S. W. 726, 21 Ky. L. Rep. 1199; Brown *v.* Owen, 75 Miss. 319, 23 So. 35, 942; Finch *v.* Cleveland, 10 Barb. (N. Y.) 290, ten days' notice in writing to the teacher holding the certificate and to the trustees of the district in which he is employed.

**Sufficiency of notice.**—Under a statute requiring at least ten days' previous notice of the charges, to the teacher holding the certificate, the teacher is entitled to ten full days including the day on which the notice is given. Scheibner *v.* Baer, 174 Pa. St. 482, 34 Atl. 193 [*affirming* 4 Pa. Dist. 633].

amended or stricken out,[43] and if he fails to take such steps he is not entitled to relief by an injunction.[44] Under some statutes a revocation by such board or officer is final;[45] but under other statutes, where the officers or board proceed on charges within the statute, the aggrieved teacher's proper remedy is to proceed in the manner prescribed by the statute,[46] as by an appeal to the state superintendent;[47] and if such officers or board proceed in the prescribed manner, and in good faith, they are not liable for damages, although their decision is erroneous;[48] but they are liable for damages for revoking a teacher's certificate or license if they act wilfully or maliciously in doing so,[49] or if they proceed in a manner other than that prescribed, as without notice to the teacher, although they act in good faith and without malice;[50] and if they proceed in an unauthorized manner the teacher may apply to a court of equity to intervene to prevent the threatened revocation.[51]

**2. Selection and Appointment — a. In General.** The power and duty of selecting and appointing school-teachers[52] or a school superintendent[53] are usually regulated by statute, and in order that the selection or appointment may be valid there must be a compliance with all the substantial requirements of the

**Waiver of notice.**— The fact that a school-teacher, after the revocation of his license, appears and requests that the order of revocation be set aside is not a waiver of notice. Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846.

43. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147.

44. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147. And see, generally, Injunctions, 22 Cyc. 772.

45. State *v.* Lorain County School Examiners, 2 Ohio S. & C. Pl. Dec. 24, 1 Ohio N. P. 151, holding that a revocation by the board of county school examiners of a teacher's certificate, for intemperance and immorality is final, under Rev. St. § 4073, and that mandamus will not lie to compel the examiners to sign a bill of exceptions setting forth the evidence and rulings on the trial of the revocation proceedings.

46. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147, holding that the utmost that the holder of a teacher's license may ask, as to proceedings to revoke a license, is that they shall conform to the laws authorizing revocation.

47. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147; Bowman *v.* Ray, 118 Ky. 110, 80 S. W. 516, 25 Ky. L. Rep. 2131.

48. Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846.

49. Love *v.* Moore, 45 Ill. 12.

**It is not necessary to show personal hatred** or ill-will in order to show malice in such a case, but if the officer or board acts wrongfully, wickedly, or wantonly in revoking a certificate the jury may infer malice. Love *v.* Moore, 45 Ill. 12.

50. Lee *v.* Huff, 61 Ark. 494, 33 S. W. 846, holding that the action of an examiner in revoking a license without notice to the teacher, and without giving him a chance to be heard, is without jurisdiction and renders the examiner liable to such person for damages, although he acts in good faith and without malice.

51. Stone *v.* Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. N. S. 1147, holding, however, that where a county superintendent has jurisdiction of a proceeding to revoke a teacher's license, his bias and want of judicial capacity are not grounds for interference by the court.

52. Brown *v.* Sanders, 144 Ala. 500, 42 So. 39; Washington Tp. Advisory Bd. *v.* State, 164 Ind. 295, 73 N. E. 700, holding that it is the duty of the school township trustee to provide teachers for the schools of his township.

**Resignation — new appointment.**— A letter to a school-board by a school-teacher informing it that she will be married on a certain date, but that she will continue to teach until the end of the scholastic year, together with a subsequent letter before any action is taken by the board, that if it is satisfactory to it she will teach another scholastic year, does not amount to a resignation so as to create a vacancy which the board is authorized to fill as provided by Md. Code Pub. Gen. Laws (1904), art. 77, § 53. Underwood *v.* Prince George's County School Com'rs, 103 Md. 181, 63 Atl. 221.

53. State *v.* MacKinnon, 5 Ohio S. & C. Pl. Dec. 558, 7 Ohio N. P. 531, holding that it is the duty of county commissioners to elect a superintendent for the public schools, where the school-board fails to make a selection.

**Term of appointee.**— Where a superintendent is elected for a specified term, and before the expiration thereof a new rule is adopted making the term of office of the superintendent a longer period, if such superintendent is immediately elected for a term specified by such rule, his term is for the latter period, and not for the balance of the term under his former election. People *v.* Rochester Bd. of Education, 55 N. Y. App. Div. 295, 66 N. Y. Suppl. 963.

**Reconsideration of vote.**— Where a school-board has elected a superintendent it may, at the same meeting, reconsider its vote before it has been communicated to the person so elected, and at an adjourned meeting elect another person. Wood *v.* Cutter, 138 Mass. 149.

statute relative to the mode of making such selection or appointment,[54] and if the provision is mandatory, it must be strictly pursued.[55] Under some statutes the taxpayers of the school-district may decide who shall be the teacher of their children;[56] and the school-board or officer has no power to employ a teacher whom those entitled to vote at a regular school meeting decide they do not wish to be employed,[57] although if the taxpayers or patrons do not choose a teacher, the school-board may appoint one.[58] But even in the absence of statute the patrons of a school may remonstrate against the appointment of a particular person as teacher;[59] but they cannot make this right the means for gratifying malice and animosity, and if by reason of a malicious and groundless remonstrance a proposed teacher is rejected, he may maintain an action against the objecting patrons for the actual damages sustained by him,[60] although he had no certificate

54. See New Concord School Dist. Bd. of Education *v.* Best, 52 Ohio St. 138, 39 N. E. 694, 27 L. R. A. 77; Dennison Tp. School Dist. *v.* Padden, 89 Pa. St. 395; State *v.* Leonard, 3 Tenn. Ch. 177.

A designation to act temporarily as teacher in a given position is not an appointment to that position. Hazen *v.* New York Bd. of Education, 127 N. Y. App. Div. 235, 111 N. Y. Suppl. 337.

In Ohio, under Rev. St. § 4017, as amended by the act of March 11, 1898, the board of directors of a subdistrict have the right to elect teachers in their subdistrict, subject to confirmation by a majority of the township board of education, and unless such election is confirmed by the township board it has no legal effect (State *v.* Wilson Tp. Bd. of Education, 19 Ohio Cir. Ct. 574, 10 Ohio Cir. Dec. 678; State *v.* Wilson Tp. Bd. of Education, 8 Ohio S. & C. Pl. Dec. 196, 5 Ohio N. P. 546; Richland Tp. Bd. of Education *v.* McFadden, 8 Ohio S. & C. Pl. Dec. 57, 6 Ohio N. P. 226), and if the township board fails or refuses to confirm an election made by the local board, and such local board does not elect another teacher before the third Monday in August, the township board of education may then employ a teacher for such subdistrict (State *v.* Wilson Tp. Bd. of Education, 19 Ohio Cir. Ct. 574, 10 Ohio Cir. Dec. 678; State *v.* Wilson Tp. Bd. of Education, 8 Ohio S. & C. Pl. Dec. 196, 5 Ohio N. P. 546); but where for any reason it becomes necessary after the third Monday of August in any year to elect a teacher in a township subdistrict, it is the right of the board of directors to elect such teacher and certify such election to the township clerk (Richland Tp. Bd. of Education *v.* McFadden, *supra*), and if in such case the township board of education proceeds to elect the teacher without giving the board of directors a reasonable time to call a meeting and make another election its action is illegal (Richland Tp. Bd. of Education *v.* McFadden, *supra*). Where, under such section, and also under section 3915, which provides that in case of a tie the clerk of the board of education shall have the right to cast the deciding vote, the board of education consists of a clerk and five members, four of whom are present and two vote to confirm the election, and the clerk casts the deciding vote, such confirmation is illegal because not obtained by a majority vote. Rush *v.* Clinton Tp. Bd. of Education, 20 Ohio Cir. Ct. 361, 11 Ohio Cir. Dec. 181.

55. See Pierce *v.* West Loveland Special School Dist. No. 7 Bd. of Education, 8 Ohio S. & C. Pl. Dec. 648, 1 Ohio N. P. 286.

**Illustration.**— A provision that "upon a motion . . . to employ a . . . teacher the clerk of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept, the names of those voting aye, and the names of those voting no, is a mandatory provision and must be strictly pursued," and where the record of the proceedings of the board does not show that on a motion to employ a teacher the roll of the members was called and the names of those voting "aye" and "no" recorded, the election is invalid. New Concord Village School Dist. Bd. of Education *v.* Best, 52 Ohio St. 138, 39 N. E. 694, 27 L. R. A. 77; Pierce *v.* West Loveland Special School Dist. No. 7 Bd. of Education, 8 Ohio S. & C. Pl. Dec. 648, 1 Ohio N. P. 286. But where the minutes of the board meeting show the aye and nay vote, and how each member voted, although it does not expressly state that the roll was called, it is a substantial compliance with such a statute. Youmans *v.* Pataskala Special School Dist. Bd. of Education, 13 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 269.

56. O'Brien *v.* Moss, 131 Ind. 99, 30 N. E. 894 (holding that such a statute must be literally construed so as to advance the right); Kingsley *v.* Plum Tp. School Directors, 2 Pa. St. 28.

Ind. Rev. St. (1876) § 28, relating to the power of the majority of the voters of a school-district over the employment of teachers, does not apply to cities and incorporated towns. Putnam *v.* Irvington School Town, 69 Ind. 80; Crawfordsville *v.* Hays, 42 Ind. 200.

A school-district vote instructing the school-board to hire a female teacher is advisory only. Waterbury School Dist. No. 13 *v.* Harvey, 56 Vt. 556.

57. O'Brien *v.* Moss, 131 Ind. 99, 30 N. E. 894; Rumble *v.* Barker, 27 Ind. App. 69, 60 N. E. 956.

58. Kingsley *v.* Plum Tp. School Directors, 2 Pa. St. 28.

59. Vanarsdale *v.* Laverty, 69 Pa. St. 103.

60. Vanarsdale *v.* Laverty, 69 Pa. St. 103.

of qualification at the time.[61] A teacher deprived of employment by the discontinuance of his school must, under some statutes, be preferred in appointments to be made thereafter.[62] A school-board may make a rule that applications for positions as teachers shall be in writing;[63] but it may waive compliance with such rule, as by unanimously electing one as teacher.[64]

**b. Discretion of Board or Officer.** Although an applicant so far as the statutory qualifications are concerned may be eligible to teach in public schools generally, the board or officer authorized to select and appoint or confirm the appointment of teachers has a discretionary power in passing upon the fitness of an applicant for the position of teacher in a particular school or grade,[65] and in determining such fitness they may consider the sex of the applicant;[66] and unless there is manifest abuse, the exercise of this discretionary power will not be reviewed by the courts,[67] as by mandamus.[68] Although a woman may be eligible to the position of supervising principal of a particular school, the school-board may, in its discretion, determine whether she or some other applicant shall be chosen for such position.[69]

**c. Restraining Employment.** An injunction will issue at the instance of the taxpayers or patrons of a school to restrain the illegal appointment or employment of a teacher,[70] such as to restrain the employment of one who has no legal certificate or license,[71] or of one whom the voters of the district have regularly decided they do not desire;[72] but it has been held that such an injunction will not issue at the instance of the county superintendent.[73] Taxpayers, however, cannot maintain

61. Vanarsdale *v.* Laverty, 69 Pa. St. 103.

62. Cusack *v.* New York Bd. of Education, 89 N. Y. App. Div. 355, 85 N. Y. Suppl. 991.

63. Weatherly *v.* Chattanooga, (Tenn. Ch App. 1898) 48 S. W. 136.

64. Weatherly *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 136.

**An application is sufficient,** where the applicant speaks to one or more of the school-board, stating the salary desired, and his name is reported by the board as among the applicants, and the salary stated. Weatherly *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 136.

65. State *v.* Smith, 49 Nebr. 755, 69 N. W. 114; State *v.* Wilson Tp. Bd. of Education, 19 Ohio Cir. Ct. 574, 10 Ohio Cir. Dec. 678; Youmans *v.* Pataskala School Dist. Bd. of Education, 13 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 269; Com. *v.* Philadelphia Bd. of Public Education, 187 Pa. St. 70, 40 Atl. 806, 41 L. R. A. 498; Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371 [*affirming* 1 Pa. Dist. 481, 12 Pa. Co. Ct. 168]; Com. *v.* Gratz, 5 Pa. Dist. 341.

**Where the statute has not prescribed any religious belief as a qualification** of a teacher in the public schools, the school authorities may select a teacher who belongs to any church or to no church, as they may think best. Millard *v.* Board of Education, 121 Ill. 297, 10 N. E. 669.

**The employment of nuns,** in the absence of proof of religious sectarian teaching or exercises, is purely an exercise of the discretion of the school-board, and is lawful. Hysong *v.* Gallitzin Borough School Dist., 164 Pa. St. 621, 30 Atl. 482, 44 Am. St. Rep. 632, 26 L. R. A. 203.

66. Com. *v.* Gratz, 5 Pa. Dist. 341. And see *supra*, III, H, 1, a.

67. Youmans *v.* Pataskala Special School Dist. Bd. of Education, 13 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 269; Hysong *v.* Gallitzin Borough School Dist., 164 Pa. St. 621, 30 Atl. 482, 44 Am. St. Rep. 632, 26 L. R. A. 203.

68. See, generally, MANDAMUS, 26 Cyc. 283.

69. Com. *v.* Jenks, 154 Pa. St. 368, 26 Atl. 371 [*affirming* 1 Pa. Dist. 481, 12 Pa. Co. Ct. 168].

70. Lindblad *v.* Normal School Dist. Bd. of Education, 221 Ill. 261, 77 N. E. 450 [*reversing* 122 Ill. App. 617], holding that a taxpayer is entitled to enjoin a contract of the public school-board and the state board of education, providing for the illegal employment of critic teachers to be paid in part by the school-district.

**A teacher appointed by fraudulent practices** of the school directors, in place of a lawfully appointed teacher fraudulently removed, may be enjoined. McCue *v.* Holleran, 7 Del. Co. (Pa.) 458, 9 Kulp 433.

71. Martin *v.* Jamison, 39 Ill. App. 248; Perkins *v.* Wolf, 17 Iowa 228.

72. O'Brien *v.* Moss, 131 Ind. 99, 30 N. E. 894.

**The decision of the county school superintendent** on appeal from a trustee that a certain person shall not be employed over the protest of the patrons of a school-district is final and binding upon such trustee, and obedience thereto may be compelled by injunction. O'Brien *v.* Moss, 131 Ind. 99, 30 N. E. 894.

73. Perkins *v.* Wolf, 17 Iowa 228, holding that a county superintendent of common schools cannot maintain a bill restraining a person from teaching a school, the treasurer of the town from paying him, and the district director from permitting the use of the

an injunction to restrain the school authorities from breaking a contract with a teacher where they are deprived of no right to instruction for their children.[74] Nor can the question as to who is legally employed to teach a school be properly determined in an action to restrain one who assumes to act as director, or a teacher employed by him, from interfering with the school, since there is an adequate remedy at law.[75]

**3. Contracts of Employment — a. Authority to Contract — (i)** *In General.* As to what board or officer may enter into contracts of employment with school-teachers,[76] the nature and extent of such power,[77] and the manner of exercising the same,[78] ordinarily depends upon the terms of the statutes relative thereto, and subject to such rules and restrictions, not inconsistent with the law, as may be prescribed by the school-board,[79] such as a regulation prohibiting the wearing of a religious garb by teachers.[80] It has been provided that a contract of

school-house, on the ground that such party has no certificate to teach. But see Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328.

**74.** Schwier *v.* Zitike, 136 Ind. 210, 36 N. E. 30, holding that taxpayers having children of school age cannot enjoin the town from breaking a contract with a teacher, and giving possession of his school-room to another, where the contract with the latter is valid, and plaintiffs are not deprived of their right to instruction for their children.

**75.** Soldier Dist. Tp. *v.* Barrett, 47 Iowa 110.

**76.** See the statutes of the several states. And see the following cases:

*Alabama.*— Gibson *v.* Mabry, 145 Ala. 112, 20 So. 297 (holding that under Gen. Acts (1903), § 10, the power to employ teachers rests solely with the district trustees); Brown *v.* Sanders, 144 Ala. 500, 42 So. 39.

*California.*— Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948.

*Connecticut.*— Gilman *v.* Bassett, 33 Conn. 298, holding that the power to employ school-teachers is primarily in the school-district, and that if it acts the school-committee is bound thereby, but that if the district neglects or refuses to act, the committee may employ teachers at the expense of the district.

*Indiana.*— Harrison Tp. *v.* McGregor, 67 Ind. 380; Greensboro Tp. *v.* Cook, 58 Ind. 139, holding that the trustee of a school township as such has no authority to employ a teacher for the common school of his township.

*Iowa.*— Gambrell *v.* Lenox Dist. Tp., 54 Iowa 417, 6 N. W. 693, holding that the employment of a teacher by a township district board is invalid. The board of directors of an independent district is the only official power to employ, and to enter into a contract of employment with teachers. Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524; Athearn *v.* Millersburg Independent Dist., 33 Iowa 105.

*Louisiana.*—New Orleans Third Ward School Dist. *v.* City School Directors, 23 La. Ann. 152.

*Maine.*— Woodbury *v.* Knox, 74 Me. 462; Moor *v.* Newfield, 4 Me. 44.

*Massachusetts.*— Uxbridge School Dist. No. 10 *v.* Mowry, 9 Allen 94.

*Michigan.*— Tappan *v.* Carrollton School Dist. No. 1, 44 Mich. 500, 7 N. W. 73, trustees of graded school district.

*North Carolina.*— Skinner *v.* Bateman, 96 N. C. 5, 1 S. E. 538.

*Vermont.*— Cobb *v.* Pomfret School Dist. No. 1, 63 Vt. 647, 21 Atl. 957, holding that under Rev. Laws, § 515, a prudential committee may bind its school-district for the expenses of teaching a term of school, which the district has not voted to maintain.

See 43 Cent. Dig. tit. "Schools and School Districts," § 292.

**77.** Lindblad *v.* Normal School Dist. Bd. of Education, 221 Ill. 261, 77 N. W. 450 [*reversing* 122 Ill. App. 617]; State *v.* Sherman, 90 Ind. 123; Galentine *v.* Carroll County Dist. Tp., (Iowa 1900) 82 N. W. 993.

**Board and lodging.**—A school-board has no power to make an agreement for providing a teacher with board and lodging. Wheeler *v.* Alton School Dist., 66 N. H. 540, 23 Atl. 89; Quin *v.* Seymour Tp. School Trustees, 7 U. C. Q. B. 130.

**78.** See Pugh *v.* School Dist. No. 5, 114 Mo. App. 688, 91 S. W. 471; Graham *v.* School Dist. No. 69, 33 Oreg. 263, 54 Pac. 185; McNolty *v.* Morse Bd. of School Directors, 102 Wis. 261, 78 N. W. 439.

**79.** Potter *v.* Fredericksburg Dist. Tp., 40 Iowa 369 (holding that while a subdirector is authorized to make contracts for the employment of teachers, his authority is subject to the rules and restrictions, not inconsistent with the law, which may be prescribed by the board of directors); Thompson *v.* Linn, 35 Iowa 361.

**80.** O'Connor *v.* Hendrick, 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. N. S. 402 [*affirming* 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161], holding that a contract for the employment of a teacher in a public school bound by her vows to wear the garb of a catholic religious order to which she belongs, entered into in disobedience to the orders of the state superintendent, is invalid and unenforceable.

**Regulation as to use of religious dress by teachers.**— A regulation established by a school superintendent, prohibiting teachers in public schools from wearing a distinctly religious garb while engaged in the work of teaching therein, is a reasonable and valid exercise of his discretionary powers, not because the wearers of such apparel should be

employment of a teacher shall not be entered into before a specified time,[81] and that a teacher cannot be employed on the credit of the district itself, but only on the credit of the school fund of the district.[82] A teacher may be employed by a *de facto* board or officer;[83] but a contract of employment entered into by one purporting to be a school officer, at a time when there is no person in existence legally authorized to make the contract, is unenforceable and void.[84]

(II) *EMPLOYMENT OF SUPERINTENDENT.* A school-board has the power to employ a superintendent of schools where such power is expressly conferred upon it by statute[85] or by necessary implication from the duties imposed upon it.[86] But a power to employ "teachers" does not authorize the employment of "inspecting teachers" whose duties in no respect pertain to instruction, but are simply those which pertain to a superintendent or director of the school;[87] and where the duties of a superintendent do not require teaching, unless the statute so requires, it is not necessary that he should be a teacher or have a teacher's certificate.[88] Where a superintendent is appointed under a statute which manifestly contemplates an appointment for the school year, he is entitled to recover for services rendered during the year for which he is elected, although they are rendered after the repeal of an ordinance authorizing his appointment.[89] Power to remove a superintendent for due cause authorizes his removal only for a legal cause.[90]

excluded from teaching in a public school on account of their religious convictions or membership in religious orders, since, if otherwise qualified and by their acts as teachers they do not promote any denominational doctrine or tenet, there is no reason, morally or legally, why they should be disqualified, but because the influence of such apparel is distinctly sectarian, even if the wearing of it does not amount to the teaching of denominational doctrine, and the prohibition is in accord with a constitutional provision forbidding the use of the property of the state in aid of sectarian influences. O'Connor *v.* Hendrick, 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. N. S. 402 [*affirming* 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161].

**81.** Jones *v.* School Dist. No. 144, 7 Kan. App. 372, 51 Pac. 927 (holding that a district school-board cannot make a binding contract for the employment of a teacher prior to the annual school-district meeting, for a term commencing after such meeting); Treadway *v.* Daniels, 92 S. W. 981, 29 Ky. L. Rep. 331 (holding that under St. (1903) § 4445, providing that the contract between a school-teacher and a school trustee shall not be entered into before the first of July of the calendar year in which the school is to begin, a contract made prior to that date is void).

**82.** Wheeler *v.* Alton School Dist., 66 N. H. 540, 23 Atl. 89.

**83.** Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303; Lacy *v.* Swango, 57 S. W. 473, 22 Ky. L. Rep. 390; Whitman *v.* Owen, 76 Miss. 783, 25 So. 669 (holding that the election of a school trustee, although made after the day set therefor by statute, gives him color of right to the office, and a teacher's contract made by the board of which he thus becomes a *de facto* member is valid); De Wolf *v.* Watterson, 35 Hun (N. Y.) 111.

Power of de facto officers generally see *supra*, III, D, 6, b.

Where a school agent acts for a year as such under color of his election, he is an agent *de facto*, and his contract with the teacher is sufficient to bind the town, although the meeting at which he was elected was not duly notified, and he was never sworn as agent. Woodbury *v.* Knox, 74 Me. 462.

**84.** Beeks *v.* Fooshee, 25 Miss. 55.

**85.** Gates *v.* School Dist., 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; Kimball *v.* Salem, 111 Mass. 87; Delanos Land Co.'s Appeal, 103 Pa. St. 347.

Superintendent of music.— Under the Pennsylvania act of March 3, 1818, the board of public education of the city of Philadelphia had no power to employ a superintendent of music. Perot *v.* Philadelphia, 11 Phila. (Pa.) 181, 2 Wkly. Notes Cas. 351.

**86.** Spring *v.* Wright, 63 Ill. 90 (holding that where a statute makes it the duty of the board of directors of public schools in a city to establish and keep up a system of graded schools therein, and ten teachers are employed, and there are over eight hundred pupils, the board by necessary implication has authority to appoint a superintendent over the schools); Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69 (holding that the power to make the appointment of a superintendent of schools in a union school district is one that is incident to the full control which by law the district board has over the schools of the district).

**87.** Barry *v.* Goad, 89 Cal. 215, 26 Pac. 785, (1890) 24 Pac. 823.

**88.** Davis *v.* Niles School Dist. No. 1, 81 Mich. 214, 45 N. W. 989.

**89.** Kimball *v.* Salem, 111 Mass. 87.

**90.** State *v.* Watertown, 9 Wis. 254, holding that such power does not authorize the school-board to remove him at its discretion.

(III) *TERM OF EMPLOYMENT.*[91] Although in the absence of any restrictions it is customary to employ the same teacher for the school year,[92] under some statutes, or rules of school-boards, a contract of employment of a teacher can be made only for a prescribed period of time,[93] as for the current school year,[94] or until a specified date,[95] or for such period as the district or school-board may establish.[96] Where a contract of employment is for a specified period less than the school year, with the option of teaching the whole year, a new contract is not necessary upon the completion of such period to bind the district for the entire school year.[97]

(IV) *AUTHORITY TO MAKE CONTRACTS EXTENDING BEYOND OFFICER'S TERM.* In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school-teacher may be made to a period within the contracting school-board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office,[98] or for the term of school succeeding their term of office,[99] provided such contract

**91. Authority to make contract extending beyond officer's term** see *infra*, III, H, 3, a, (IV).

**92.** Twenty-Third Dist. School Directors *v.* Leak, (Tenn. Ch. App. 1898) 48 S. W. 692.

**93.** Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250 (three months); Murray *v.* Wilkes-Barre Tp. School Dist., 33 Pa. Super. Ct. 373; Burke *v.* Wilkes-Barre Tp. School Dist., 28 Pa. Super. Ct. 16, 21.

**Estoppel.**—Where a school-board authorizes its president to employ a person as a teacher for the "winter term," without making any provision as to what constitutes such term, and the president employs such person for nine months, a subsequent attempt of the board to correct the report by stating that the president was authorized to close contracts for six months only,—the winter term,"—does not affect the person so employed. Benson *v.* Silver Lake Dist. Tp., 100 Iowa 328, 69 N. W. 419.

**94.** *California.*—Barthel *v.* San Jose Bd. of Education, 153 Cal. 376, 95 Pac. 892.

*Iowa.*—Burkhead *v.* Independence School Dist., 107 Iowa 29, 77 N. W. 491, holding that contracts with superintendents and teachers should be limited in duration to the school year as determined by the board of directors.

*Louisiana.*—Golden *v.* New Orleans Public School Directors, 34 La. Ann. 354.

*Pennsylvania.*—Dennison Tp. School Dist. *v.* Padden, 89 Pa. St. 395.

*Canada.*—Grattan *v.* Ottawa Separate School Trustees, 8 Ont. L. Rep. 135 [*affirmed* in 9 Ont. L. Rep. 433].

**95.** Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408, (1902) 70 Pac. 1058.

**96.** Norton *v.* Wilkes, 93 Minn. 411, 101 N. W. 619.

**97.** Wallace *v.* Saline County School Dist. No. 27, 50 Nebr. 171, 69 N. W. 772.

**98.** *Connecticut.*—Wilson *v.* East Bridgeport School Dist., 36 Conn. 280.

*Indiana.*—Sparta School Tp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604; Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303, holding that the board of school trustees may bind the school town by a contract with a teacher, although the contract is not to be performed before the election of a new board.

*Massachusetts.*—Natick School Dist. No. 6 *v.* Morse, 8 Cush. 191.

*New York.*—Wait *v.* Ray, 67 N. Y. 36 [*affirming* 5 Hun 649]; Gillis *v.* Space, 63 Barb. 177; Williams *v.* Keech, 4 Hill 168; Silver *v.* Cummings, 7 Wend. 181.

*Vermont.*—Chittenden *v.* Waterbury School Dist. No. 1, 56 Vt. 551.

*Wisconsin.*—Webster *v.* School Dist. No. 4, 16 Wis. 316.

*United States.*—Caldwell *v.* Lake County School Dist. No. 7, 55 Fed. 372.

See 43 Cent. Dig. tit. "Schools and School Districts," § 294.

**Election of new member.**—A board of school trustees, being a continuing body, may bind the school corporation by a contract employing a superintendent of schools, although the election of a new member may intervene before the performance of the contract. Reubelt *v.* Noblesville School Town, 106 Ind. 478, 7 N. E. 206.

**Where no appeal is taken** from the decision of the state superintendent that a teacher's contract with a school-board is valid, a subsequent board is bound thereby. Pearsall *v.* Wools, (Tex. Civ. App. 1899) 50 S. W. 959.

**99.** *Arkansas.*—Gates *v.* School Dist., 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186, holding that a school-board may contract for a superintendent for a term beginning after some members of the board go out of office.

*Michigan.*—Farrell *v.* Rubicon Tp. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053; Cleveland *v.* Amy, 88 Mich. 374, 50 N. W. 293.

*Texas.*—Pearsall *v.* Wools, (Civ. App. 1899) 50 S. W. 959.

*Washington.*—Splaine *v.* Spokane County School Dist. No. 122, 20 Wash. 74, 54 Pac. 766 (holding that school directors may hire a teacher for an ensuing year, although there will be a change in the membership of the

is made in good faith, without fraud or collusion, and for a reasonable period of time;[1] and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects,[2] or abrogate it without a valid reason therefor.[3] Under some statutes, however, it is held that a school-board has no authority to divest a future board of the power of selecting the teachers they shall desire for the term to be commenced within their term of office, by employing a teacher under a contract to be performed in the succeeding school year,[4] or extending into such year,[5] unless such period extends only a reasonable time beyond the current school year, and the contract is made in good faith.[6] An old school-board cannot employ a teacher for the coming year, after their successors have been elected and qualified, although the contract is made before the commencement of the next school year.[7]

(v) *AUTHORITY TO FIX SALARIES AND RESTRICTIONS IMPOSED BY APPROPRIATIONS.* A school-board or officers authorized to contract with teachers have the power to fix the salaries to be paid them,[8] except in so far as they may be restricted or limited by statute [9] or by a rule or regulation of the school-board.[10] It has been held under the various statutes that a teacher may be employed at a salary specified to be for the whole term;[11] and that the school-board may employ teachers to carry on schools within the year for which a levy has been made, to be paid out of such funds when collected;[12] but that it may

board before the term begins); Taylor *v.* Clallam County School Dist. No. 7, 16 Wash. 365, 47 Pac. 758.

*Wisconsin.*— Hemingway *v.* Oak Grove Joint School Dist. No. 1, 118 Wis. 294, 95 N. W. 116, holding that a district board has power to contract with a teacher for the next school year, subject to the power of the district at its next meeting or of the new board to terminate the contract by an inconsistent determination.

See 43 Cent. Dig. tit. "Schools and School Districts," § 294.

**1.** Wait *v.* Ray, 67 N. Y. 36 [*affirming* 5 Hun 649]; Chittenden *v.* Waterbury School Dist. No. 1, 56 Vt. 551.

**2.** Sparta School Tp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604.

**3.** Farrell *v.* Rubicon Tp. School-Dist. No. 2, 98 Mich. 43, 56 N. W. 1053; Splaine *v.* Spokane County School Dist. No. 122, 20 Wash. 74, 54 Pac. 766.

**Fraud.**— A contract with a teacher by school trustees after the expiration of their term, and before their successors qualify, cannot be assailed by subsequently elected trustees, on the ground that it was fraudulently made by the former board in order to forestall them, where it does not appear that the teacher was a party to the fraud. Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303.

**4.** Smith *v.* Sussex County School Dist. No. 57, 1 Pennew. (Del.) 401, 42 Atl. 368; Davis *v.* School Directors, 92 Ill. 293; Stevenson *v.* District No. 1 School Directors, 87 Ill. 255; District No. 6 School Directors *v.* Hart, 4 Ill. App. 224; Fitch *v.* Smith, 57 N. J L. 526, 34 Atl. 1058, holding that an outgoing board cannot appoint to an office that will not begin during the term of their own official life.

**5.** Cross *v.* School Directors, 24 Ill. App. 191 (holding that a board of school directors has no power five days before the expiration of the current school year, to hire a teacher for a term extending three months into the new school year, where the election of a new board of directors is to take place during the ensuing month); Taylor *v.* Northampton County School Committee No. 17, 50 N. C. 98 (holding that a school-committee has no authority to employ a teacher for a period extending beyond the time when their office expires); Canton *v.* Walker, 71 Ohio St. 169, 72 N. E. 898 (holding that a board of education cannot lawfully employ a teacher for a term which will expire after the term of office of every member of the board employing him has expired); Murray *v.* Wilkes-Barre Tp. School Dist., 33 Pa. Super. Ct. 373.

**6.** Stevenson *v.* District No. 1 School Directors, 87 Ill. 255.

**7.** Loomis *v.* Coleman, 51 Mo. 21.

**8.** Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948; Batchelder *v.* Salem, 4 Cush. (Mass.) 599; State *v.* Wilcox, 11 Ohio St. 326; Philadelphia *v.* Johnson, 47 Pa. St. 382.

**Implied power.**— Power of a school trustee to contract with school-teachers for the schools of a city includes the power to determine their salaries, and the city council has no control over the school-committee in this respect, except by voting to close a school after it has been kept the length of time required by law. Charlestown *v.* Gardner, 98 Mass. 587.

**9.** See People *v.* Coffey, 62 Hun (N. Y.) 86, 16 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 569, 30 N. E. 64].

**10.** Conner *v.* Ludlow Dist. Tp., 35 Iowa 375.

**11.** Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408, (1902) 70 Pac. 1058; Darby *v.* Earl, 3 U. C. Q. B. 6.

**12.** Harney *v.* Wooden, 30 Ind. 178.

not employ teachers at salaries which in the aggregate exceed the funds appropriated for that purpose,[13] although this does not prevent the board, so long as it keeps within the restriction, from contracting at a rate which will exceed the appropriation before the end of the school year, and thereby shorten the school year.[14]

**b. Making, Requisites, and Validity** [15] — (i) *IN GENERAL.* Except in so far as controlled by statute, the making, requisites, and validity of a contract of employment of a teacher in the public schools is governed by the rules relating to contracts generally.[16] Thus the contract must be mutual,[17] certain, and definite in its terms,[18] and free from fraud [19] and illegality.[20] It is also essential to the validity of such a contract that it at least substantially comply with all the formal requisites prescribed by statute,[21] as that it be entered into and signed by the

**13.** Philadelphia *v.* Johnson, 47 Pa. St. 382; Collier *v.* Peacock, 93 Tex. 255, 54 S. W. 1025, holding that a contract to pay a salary in excess of the funds of a school-district for the particular year in which the services are rendered is invalid. But see Charleston *v.* Gardner, 98 Mass. 587.

**14.** People *v.* Coffey, 62 Hun (N. Y.) 86, 16 N. Y. Suppl. 501 [*affirmed* in 131 N. Y. 569, 30 N. E. 64].

**15.** Necessity of certificate or license see *supra*, III, H, 1, c, (IV).

**16.** See, generally, CONTRACTS, 9 Cyc. 213.

**Proof of contract.**— A contract of a school-board employing a person as teacher for the ensuing year at a stated salary is proved by the minutes of the board showing that he was elected teacher for the ensuing year, a letter from one of the members to him informing him of his election, a letter from him accepting the employment, and proof that for several years previously he had been employed by the board at the same salary, and that in pursuance of the employment for the year in question, he entered on his duties and taught for several months receiving the due proportion of the salary at that rate. Polk *v.* Santa Barbara Bd. of Education, (Cal. 1903) 74 Pac. 47.

**A nugatory condition** in such a contract does not affect its validity. Crabb *v.* Township 15 School Dist. No. 1, 93 Mo. App. 254, holding that a contract with a teacher requiring that he take a special examination before the district superintendent is nugatory, where there is no such officer as district superintendent.

**17.** Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948.

**18.** Fairplay School Tp. *v.* O'Neal, 27 Ind. App 95, 26 N. E. 686 (holding that a contract to pay "good wages" is too indefinite to found an action upon); Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159; Scott *v.* Joint School Dist. No. 16, 51 Wis. 554, 8 N. W. 398; Caldwell *v.* Lake County School Dist. No. 7, 55 Fed. 372.

**19.** Guilford School Tp. *v.* Roberts, 28 Ind. App. 355, 62 N. E. 711; Dolan *v.* Joint School-Dist. No. 13, 80 Wis. 155, 49 N. W. 960

**That the teacher is a near relative** of two or three of the officers composing the school-board, and that other qualified teachers can be employed at about two thirds of the salary agreed to be paid to him, is not such fraud in the inception of the contract as will justify a court in declaring it invalid. Dolan *v.* Joint School-Dist. No. 13, 80 Wis. 155, 49 N. W. 960.

**Misrepresentations as to marriage.**— The rule that fraud cannot be predicated upon acts which a party has a legal right to do, or upon the non-performance of acts which by law he is not bound to do, has no application to a case where a contract to teach school is procured upon the representation that the teacher is unmarried, and a pledge that she will not marry during the school term, when in fact she is married at the time she signs the contract. Guilford School Tp. *v.* Roberts, 28 Ind. App. 355, 62 N. E. 711.

**20.** State *v.* McQuade, 36 Wash. 579, 79 Pac. 207, holding, however, that a contract whereby a school-teacher is employed to superintend two schools, a part of his duty being to teach in both, for which he is to receive a stipulated salary from each, is not illegal.

**21.** See Langston *v.* Springwells Tp. School Dist. No. 3, 121 Mich. 654, 80 N. W. 642; Birmingham *v.* Hungerford, 19 U. C. C. P. 411.

**Branches to be taught.**— A contract of employment as teacher and superintendent of a school, by a board of education employing several teachers, is not invalid under the provisions of a statute requiring teachers to have certificates, because it requires branches to be taught in the school, not covered by the certificate held by the employee. State *v.* Moser, 12 Ohio Cir. Ct. 247, 4 Ohio Cir. Dec. 557.

**Duplicate contract.**— A requirement that contracts made by the school-board with teachers shall be executed in duplicate is directory merely, and a failure to comply with the requirement does not invalidate the contract. McShane *v.* Township 32 School Dist. No. 5, 70 Mo. App. 624. But see Globe Furniture Co. *v.* Darlington Tp. School Dist. 7, 51 Mo. App. 549.

**Filing.**— A requirement of a statute as to the filing of the contract with the district clerk, and its attestation by him, is not as to matters within the control of the teacher, and therefore its omission cannot prejudice him. McShane *v.* Township 32 School Dist. No. 5, 70 Mo. App. 624.

proper board or officers,[22] that it be signed by both parties,[23] and that it specify the time for which the teacher is employed,[24] the wages to be paid,[25] and any other agreements entered into by the parties thereto.[26] The mere vote of a school-board in favor of employing a certain person as teacher does not constitute a contract of employment of such person,[27] but amounts only to an offer of employment which the board may revoke or cancel at any time before acceptance;[28] but where an application for a position as teacher is accepted, and he is duly elected, the contract is complete.[29] Where such a contract is regularly entered into by competent authority, it is *prima facie* valid and the burden of showing it to be invalid is on the school-district;[30] and mere inaccuracies or irregularities in the contract will not affect its validity;[31] and if through a mutual mistake the contract fails to correctly state the terms agreed upon, it may be reformed in equity.[32]

(II) *NECESSITY FOR WRITING.* Under most statutes it is expressly required that a contract with a school-teacher shall be in writing,[33] and under such a stat-

22. Ewin *v.* Shoshone County Independent School Dist. No. 8, 10 Ida. 102, 77 Pac. 222; Dearborn County Sparta School Dist. *v.* Mendell, 138 Ind. 188, 37 N. E. 604 (holding that the trustee of a civil township being *ex officio* trustee of a school township, but having no power to employ a teacher except in the latter capacity, his written contract signed as "township trustee" is not enforceable as it stands, since it is *prima facie* the contract of the civil township); Dennison *v.* Vinalhaven, 100 Me. 136, 60 Atl. 708; Ryan *v.* Dakota County School-Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

**Sufficiency of signature.**—Where a contract for employing a teacher is signed by the director of a school-district and by the teacher, and the moderator writes upon it "approved," and subscribes it as moderator, such approval and signature will be treated as in legal effect a signature of the contract by such moderator. Everett *v.* Cannon Tp. Fractional School Dist. No. 2, 30 Mich. 249.

23. Lee *v.* York School Tp., 163 Ind. 339, 71 N. E. 956; Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159 (holding that such a requirement is mandatory); Wetmore *v.* St. Louis Bd. of Education, 86 Mo. App. 362.

**That the teacher's name is signed by a third person,** having authority to do so, does not make the contract invalid. Turner *v.* Hampton, 97 S. W. 761, 30 Ky. L. Rep. 179.

24. School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172.

**Where the rules and regulations of the district,** which are made a part of the contract, specify the time for which the school is to be taught, a failure of the contract to state such time does not invalidate it. Burkhead *v.* Independence Independent School Dist., 107 Iowa 29, 77 N. W. 491.

25. School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172; Mingo *v.* Garrard County Colored School Dist. No. A, 113 Ky. 475, 68 S. W. 483, 24 Ky. L. Rep. 288 (holding that a contract which does not fix the compensation, but leaves it for future agreement, is not enforceable); Langston *v.* Springwells Tp. School Dist. No. 3, 121 Mich. 654, 80 N. W. 642.

26. School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172.

27. Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948; Roberts *v.* Clay City, 102 Ky. 88, 42 S. W. 909, 19 Ky. L. Rep. 1046.

28. Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948.

**Refusal to declare election.**— Where a school-board after voting in favor of the employment of a teacher refuses to declare the teacher elected, it in effect revokes and cancels the offer and leaves nothing thereafter for the teacher to accept. Malloy *v.* San Jose Bd. of Education, 102 Cal. 642, 36 Pac. 948.

29. Wetherly *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 136, holding also that it is not necessary to complete the contract that the school-board notify him of his election, and that he notify it of his acceptance.

30. Webster *v.* School Dist. No. 4, 16 Wis. 316.

31. Audrian County School Dist. No. 1 *v.* Edmonston, 50 Mo. App. 65 (holding that where a teacher has been regularly employed by a school-board, a refusal of the president to sign the contract as required by statute does not affect the validity of the contract); Scott *v.* Joint School Dist. No. 16, 51 Wis. 554, 8 N. W. 398.

**Identity of party.**— Where a person's identity as the party referred to in a contract for the employment of school-teachers is the subject of averment and proof, it is immaterial that he is referred to therein only by his surname, and that no christian name is given. Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159.

32. Sparta School Tp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604.

33. *Arkansas.*— Griggs *v.* Randolph County School Dist. No. 70, 87 Ark. 93, 112 S. W. 215; Clay County School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172.

*Indiana.*— Lee *v.* York School Tp., 163 Ind. 339, 71 N. E. 956; Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159.

*Kansas.*— Faulk *v.* McCartney, 42 Kan. 695, 22 Pac. 712.

ute, if an oral contract is made, it is unenforceable;[34] and if services are rendered thereunder, the teacher cannot recover on a *quantum meruit*, notwithstanding the services were necessary, acceptable, and beneficial to the school corporation.[35] But in the absence of such a statutory requirement, an oral contract is sufficient.[36]

(III) *CONTRACT BY SCHOOL-BOARD.* Where the power of making a contract of employment with a school-teacher is vested in a school-board, the individual members of the board acting separately cannot enter into a valid contract with a teacher;[37] but it is essential that the contract be agreed upon at a properly convened meeting of the board, of which all the members have had notice and an opportunity to be present,[38] and at which at least a majority of the members of the board are present and agree upon the contract.[39] If the meeting is a called

*Kentucky.*— Lewis *v.* Hayden, 38 S. W. 1054, 18 Ky. L. Rep. 980.

*Michigan.*— Hutchins *v.* Colfax Tp. School Dist. No. 1, 128 Mich. 177, 87 N. W. 80; Langston *v.* Springwells Tp. School Dist. No. 3, 121 Mich. 654, 80 N. W. 642.

*Minnesota.*— Leland *v.* St. Louis County School Dist. No. 28, 77 Minn. 469, 80 N. W. 354; McGuiness *v.* Le Sueur County School Dist. No. 10, 39 Minn. 499, 41 N. W. 103.

*Missouri.*— Wetmore *v.* St. Louis Bd. of Education, 86 Mo. App. 362.

*Oregon.*— Graham *v.* Umatilla County School Dist. No. 69, 33 Oreg. 263, 54 Pac. 185.

*Canada.*— See Quin *v.* Seymour Tp. School Trustees, 7 U. C. Q. B. 130, as to necessity for corporate seal.

See 43 Cent. Dig. tit. "Schools and School Districts," § 296.

**That the contract consists of more than one instrument** is not conclusive against its validity under a statute requiring it to be in writing. Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159.

**The contract need not be reduced to writing during a session of the district board,** but it is enough if it is entered into at such session, and is reduced to writing and signed after the board has adjourned. Faulk *v.* McCartney, 42 Kan. 695, 22 Pac. 712.

**34.** Lewis *v.* Hayden, 38 S. W. 1054, 18 Ky. L. Rep. 980; Hutchins *v.* Colfax Tp. School Dist. No. 1, 128 Mich. 177, 87 N. W. 80; Leland *v.* St. Louis County School Dist. No. 28, 77 Minn. 469, 80 N. W. 354.

**35.** Lee *v.* York School Tp., 163 Ind. 339, 71 N. E. 956.

**36.** Jackson School Tp. *v.* Shera, 8 Ind. App. 330, 35 N. E. 842; Roberts *v.* Clay City, 102 Ky. 88, 42 S. W. 909, 19 Ky. L. Rep. 1046; Wilson *v.* Lee's Summit Bd. of Education, 63 Mo. 137.

**37.** *Iowa.*— Harrington *v.* Liston Dist. Tp., 47 Iowa 11.

*Kansas.*— Aikman *v.* Butler County School Dist. No. 16, 27 Kan. 129, holding that a contract signed by two of the board without a meeting, and without consultation, is not binding on the district.

*Michigan.*— Davis *v.* Niles School Dist. No. 1, 81 Mich. 214, 45 N. W. 989.

*Missouri.*— Pugh *v.* De Kalb County School Dist. No. 5, 114 Mo. App. 688, 91 S W. 471.

*Wisconsin.*— Manthey *v.* Commonwealth School Dist. No. 6, 106 Wis. 340, 82 N. W. 132; McNolty *v.* Morse Bd. of School Directors, 102 Wis. 261, 78 N. W. 439.

*Canada.*— Sparling *v.* Spring Coulee School Dist., 4 Northwest. Terr. 366; Lambiere *v.* South Cayuga School Trustees, 7 Ont. App. 506.

See 43 Cent. Dig. tit. "Schools and School Districts," § 296.

**Repudiation of contract.**— Where school trustees in their individual capacity agree with one to employ him as a teacher, and afterward in regular session as a board repudiate or disregard the agreement, such person is without redress, since the agreement is void as against public policy. McGinn *v.* Willey, 6 Cal. App. 111, 91 Pac. 423.

**38.** *Arkansas.*— School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172; Clay County School Dist. No. 42 *v.* Bennett, 52 Ark. 511, 13 S. W. 132.

*Delaware.*— Smith *v.* School Dist. No. 57, 1 Pennew. 401, 42 Atl. 368.

*Illinois.*— School Directors *v.* Jennings, 10 Ill. App. 643.

*Indiana.*— Milford School Town *v.* Powner, 126 Ind. 528, 26 N. E. 484.

*Michigan.*— Hazen *v.* Lerche, 47 Mich. 626, 11 N. W. 413.

*Missouri.*— Pugh *v.* De Kalb County School Dist. No. 5, 114 Mo. App. 688, 91 S. W. 471.

*New Jersey.*— Townsend *v.* Essex County School Dist. No. 12, 41 N. J. L. 312.

*Pennsylvania.*— Dennison Tp. School Dist. *v.* Padden, 89 Pa. St. 395.

*West Virginia.*— Casto *v.* Ripley Dist. Bd. of Education, 38 W. Va. 707, 18 S. E. 923.

*Wisconsin.*— Dolan *v.* Joint School Dist. No. 13, 80 Wis. 155, 49 N. W. 960.

*Canada.*— Lambiere *v.* South Cayuga School Trustees, 7 Ont. App. 506.

See 43 Cent. Dig. tit. "Schools and School Districts," § 296.

But see Jefferson County School Dist. No. 25 *v.* Stone, 14 Colo. App. 211, 59 Pac. 885, holding that under a statute authorizing school-boards "to employ or discharge teachers," it is not necessary that the members thereof should meet and act as a board in order to make a valid contract for the employment of a teacher, where they all assent to the employment.

**39.** *Arkansas.*— Clay County School Dist. *v.* Bennett, 52 Ark. 511, 13 S. W. 132.

*Delaware.*— Hitchens *v.* Sussex County

one, notice thereof to all the members is indispensable, unless it is waived by the presence of the members and their participation in the meeting;[40] and if the meeting is not properly called, by reason of the fact that all the members of the board are not notified thereof, a contract made at such meeting is void;[41] but where the meeting is a regular one for the transaction of business, the time and place for which is fixed by law, notice thereof must be taken by all, and a majority acting in such meeting will bind the district.[42] Where, however, the power of employing a teacher is vested in a particular member of the board, with the consent of his colleagues, or one of them, or under their direction, it is not necessary to the validity of the contract that there shall be a formal meeting of the board, or that all the members of the board shall be consulted in relation thereto, or be notified of the employment.[43] Where the terms of a contract with a teacher are properly agreed upon at a regularly convened meeting of the school-board, it is unnecessary that the contract be executed at such meeting, but it may be subsequently signed and executed by the parties thereto,[44] and it is immaterial that the officers of the board sign the contract at different times.[45] Where the contract is signed by the officers of the board and appears regular on its face, the presumption is that it has been regularly entered into in accordance with the requirements stated above,[46] and the fact that the officers are not together when they signed the contract does not rebut this presumption.[47] The fact that one member of the school-board has not taken the oath of office at the time he signs the contract does not affect its validity.[48]

(IV) *APPROVAL OF CONTRACT.* Under some statutes a contract of employment of a school-teacher is valid and binding only when it is approved by a specified officer or board,[49] as by the president of the board making it,[50] or by the county

School Dist. No. 180, 5 Pennew. 325, 62 Atl. 897; Smith *v.* Sussex County School Dist. No. 57, 1 Pennew. 401, 42 Atl. 368.

*Iowa.*— Herrington *v.* Liston Dist. Tp., 47 Iowa 11.

*Kansas.*— Brown *v.* Cowley County School Dist. No. 41, 1 Kan. App. 530, 40 Pac. 826, holding that a contract for the hire of a teacher made by two of the members of the board with the consent of the other is binding on the district, although the latter member is not present when the contract is executed.

*Michigan.*— Farrell *v.* Rubicon Tp. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053.

*Texas.*— Pearsall *v.* Woolls, (Civ. App. 1899) 50 S. W. 959, holding that the employment of a teacher by a majority of a school-board is valid, although the minority oppose it.

*Wisconsin.*— McNolty *v.* Morse Bd. of School Directors, 102 Wis. 261, 78 N. W. 439.

See 43 Cent. Dig. tit. "Schools and School Districts," § 296.

**40.** Faulkner County School Dist. No. 49 *v.* Adams, 69 Ark. 159, 61 S W. 793.

**That a member had previously expressed himself in opposition** to employing the person contracted with does not render a notice to him of the board meeting unnecessary. Scott *v.* Pendley, 114 Ky. 606, 71 S. W. 647, 24 Ky. L. Rep. 1431.

**41.** Scott *v.* Pendley, 114 Ky. 606, 71 S. W. 647, 24 Ky. L. Rep. 1431; Casto *v.* Ripley Dist. Bd. of Education, 38 W. Va. 707, 18 S E. 923.

**42.** Faulkner County School Dist. No. 49 *v.* Adams, 69 Ark. 159, 61 S. W. 793; Clay County School Dist. *v.* Bennett, 52 Ark. 511, 13 S. W. 132.

**43.** Hull *v.* Aplington Independent School Dist., 82 Iowa 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 1073; Montgomery *v.* State, 35 Nebr. 655, 53 N. W. 568; Russell *v.* State, 13 Nebr. 68, 12 N. W. 829.

**44.** School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172.

**45.** Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303; Holloway *v.* Ogden School Dist. No. 9, 62 Mich. 153, 28 N. W. 764; Armstrong *v.* School Dist. No. 3, 28 Mo. App. 169; Dolan *v.* Joint School Dist. No. 13, 80 Wis. 155, 49 N. W. 960.

**46.** Crane *v.* Bennington School Dist. No. 6, 61 Mich. 299, 28 N. W. 105; Dolan *v.* Joint School Dist. No. 13, 80 Wis. 155, 49 N. W. 960; Scott *v.* Joint School Dist. No. 16, 51 Wis. 554, 8 N. W. 398; McPherson *v.* Usborne School Trustees, 1 Ont. L. Rep. 261.

**47.** Dolan *v.* Joint School Dist. No. 13, 80 Wis. 155, 49 N. W. 960.

**48.** Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

**49.** Gibson *v.* Mabry, 145 Ala. 112, 40 So. 297.

**Power of county judge** to approve contracts between teachers and school trustees see Caviel *v.* Coleman, 72 Tex. 550, 10 S. W. 679; Bell *v.* Kuykendall, 3 Tex. Civ. App. 209, 22 S. W. 112.

**50.** Place *v.* Colfax Dist. Tp., 56 Iowa 573, 9 N. W. 917; Gambrell *v.* Lenox Dist. Tp., 54 Iowa 417, 6 N. W. 693; Thompson *v.* Linn, 35 Iowa 361; Athearn *v.* Millersburg Independent Dist., 33 Iowa 105.

board of education,[51] or county superintendent,[52] unless a formal approval is waived and the contract is ratified by the district.[53] Such a board, in determining whether the employment of a teacher shall or shall not be approved, acts as a deliberative body and its reasons for approving or disapproving cannot be inquired into;[54] and as a general rule the power or duty of approving or disapproving the contract of a teacher cannot be controlled by mandamus,[55] except where the approving officer has no discretionary power, but only has authority to inquire whether the contract conforms to the provisions of the law.[56] A contract made with an outgoing school-board, and not signed by the teacher until the new board comes into office, must be approved by the new board.[57]

(v) *RATIFICATION AND ESTOPPEL.* An unauthorized contract with a teacher may be ratified by those having authority to do so, either expressly or by acts recognizing the employment,[58] as by partly performing the contract, making payments for services, accepting its benefits, and the like.[59] A contract of employment entered into by a school-board, which is invalid by reason of some defect in the execution thereof, may be ratified by the board,[60] as by recognizing the person acting under such contract as teacher, and paying him his salary.[61] But where the payments or other like acts by the board are accompanied by acts indicating that it intends to repudiate the contract, there is no ratification.[62]

**A contract made and signed by a director who is at the time president** of the school-board is not invalid by his failure to approve it as president. Benson *v.* Silver Lake Dist. Tp., 100 Iowa 328, 69 N. W. 419.

**51.** Gibson *v.* Mabry, 145 Ala. 112, 40 So. 297.

**52.** Watkins *v.* Huff, (Tex. Civ. App. 1901) 63 S. W. 922, 64 S. W. 682, holding also that a contention that the contract cannot be approved because it will render the funds of the district deficient cannot be sustained where it is admitted that there is some money applicable to the contract and the agreement itself provides against a deficiency. See also Campbell *v.* Elliott, 3 U. C. Q. B. 241.

**53.** Place *v.* Colfax Dist. Tp., 56 Iowa 573, 9 N. W. 917.

**54.** Gibson *v.* Mabry, 145 Ala. 112, 40 So. 297.

**55.** Thompson *v.* Linn, 35 Iowa 361. See also MANDAMUS, 26 Cyc. 283 text and note 29.

**56.** Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524, holding that after a teacher has been employed by a board of directors of an independent district, and a contract has been signed by himself and the secretary, the president of the board cannot refuse to approve and file the contract because of the teacher's moral character and personal fitness to teach, since these are matters for the board to determine. See also MANDAMUS, 26 Cyc. 283 text and note 30.

**Joinder of plaintiffs.**— Where a statute provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, an independent school-district and a teacher employed by the school-board may join as plaintiffs in an action to compel the president of the board to approve and file the contract of employment, since both are interested in the subject of the action — the contract — and in the relief demanded — its approval and filing. Eden Independent Dist. No. 2 *v.* Rhodes, 88 Iowa 570, 55 N. W. 524.

**57.** Crawley *v.* Leonard, 10 Lea (Tenn.) 344.

**58.** Place *v.* Colfax Dist. Tp., 56 Iowa 573, 9 N. W. 917 (holding that the mere fact that a teacher proceeds under an unapproved contract and completes the performance thereof is not of itself sufficient to constitute a ratification); Dennison *v.* Vinalhaven, 100 Me. 136, 60 Atl. 798; Woodbury *v.* Knox, 74 Me. 462; Pugh *v.* School Dist. No. 5, 114 Mo. App. 688, 91 S. W. 471 (holding, however, that the fact that an alleged contract for employment as teacher, not made by the directors as a board as required by statute, is recorded by the clerk, does not constitute a ratification thereof).

**59.** Cook *v.* North McGregor Independent School Dist., 40 Iowa 444; Athearn *v.* Millersburg Independent Dist., 33 Iowa 105.

**60.** School Dist. No. 47 *v.* Goodwin, 81 Ark. 143, 98 S. W. 696 (holding that a contract which is invalid for want of a written notice of the directors' meeting at which the contract is made is subject to ratification by the district); Milford School Town *v.* Powner, 126 Ind. 528, 26 N. E. 484.

**61.** *Arkansas.*— School Dist. No. 47 *v.* Goodwin, 81 Ark. 143, 98 S. W. 696.

*Colorado.*— Jefferson County School Dist. No. 25 *v.* Stone, 14 Colo. App. 211, 59 Pac. 885.

*Kansas.*— Jones *v.* Elk County School Dist. No. 144, 7 Kan. App. 372, 51 Pac 927.

*Michigan.*— Crane *v.* Bennington School Dist. No. 6, 61 Mich. 299, 28 N. W. 105.

*Oregon.*— Graham *v.* School Dist. No. 69, 33 Oreg. 263, 54 Pac. 185.

See 43 Cent. Dig. tit. "Schools and School Districts," § 297.

**62.** Herrington *v.* Liston Dist. Tp., 47 Iowa 11, holding that where after a teacher em-

**c. Construction and Operation in General.** The rules regulating the construction and operation of contracts generally [63] apply to the construction and operation of contracts of employment of teachers, as in regard to the beginning of a teacher's services,[64] the duration of his employment,[65] and the legality and binding force of the contract.[66] Thus in the absence of anything to the contrary, incidental stipulations necessary to carry into effect such a contract, or to make it reasonable, or conformable to usage, are implied therefrom,[67] and if the contract is indefinite in its terms, it is to be interpreted by the understanding of the parties as indicated by their acts and the attending circumstances; [68] and where a contract intended to supersede a previous contract of a like character is inoperative by reason of its invalidity, the first contract remains in force and governs the relations between the parties.[69] A stipulation in a contract between a teacher and several subscribers that each subscriber shall pay severally for each scholar subscribed by him binds the subscriber whether or not he sends a scholar to the school; [70] and a further stipulation in such a contract that either party may discontinue the school at the end of any quarter means that the teacher or a majority of the subscribers may terminate the school, and one subscriber is not exonerated or his responsibility reduced by discontinuing to send scholars.[71]

**4. Removal, Dismissal, and Resignation — a. Power to Remove or Dismiss in General.**[72] The power of removing or dismissing a public school teacher, and the nature and extent of such power, is generally regulated by the school law,[73]

ployed without authority has taught for a few days, the board votes to discontinue the school, and pays him a certain amount for his services, there is no ratification of the contract binding the board to pay for services rendered after the school is discontinued.

**63.** See, generally, CONTRACTS, 9 Cyc. 577 *et seq.* And see Dodge County School Dist. No. 8 *v.* Estes, 13 Nebr. 52, 13 N. W. 16.

**64.** Township 13 *v.* Criswell, 6 Ala. 565; Crabb *v.* Bates County School Dist. No. 1, 93 Mo. App. 254, holding that where a teacher's contract employs her for a given time at a given price but fails to state when her services shall begin, the law implies that the services are to be rendered within the school year and shall begin when the school-board fixes the opening of the term.

**65.** Township 13 *v.* Criswell, 6 Ala. 565; Dennison *v.* Vinalhaven, 100 Me. 136, 60 Atl. 798 (holding that where a person is engaged as a school-teacher at the beginning of the second term of a school year, at the rate of the annual salary, it will be presumed that the contract is to end with the year); Butcher *v.* Charles, 95 Tenn. 532, 32 S. W. 631 (holding that where a contract employing a teacher does not specify the duration of the contract, but makes provision for the closing of the school under certain circumstances, the contract continues for the school year subject to the contingencies specified in the contract).

**Where the contract is for a "year"** it will be construed, in the absence of anything to the contrary, to be for a "school year" as prescribed by law. Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408, (1902) 70 Pac. 1058.

**Where the contract is changed** by a member of the school-board so as to cause it to call for a longer term than that previously specified, it will be presumed, in the absence of evidence otherwise, that he had authority to do so. School Dist. No. 27 *v.* Wheat, (Ark. 1904) 78 S. W. 755.

**66.** Pugh *v.* School Dist. No. 5, 114 Mo. App. 688, 91 S. W. 471, holding that the fact that a contract of employment is regular on its face, in that it is duly signed and attested, does not render it conclusive as to its legality and binding force.

**67.** Morrow *v.* Chamberlain Bd. of Education, 7 S. D. 553, 64 N. W. 1126, holding that a contract whereby a teacher agrees to devote to the school, under the direction of the principal thereof and the board of education, six hours of each school-day, implies an agreement to assist in the school during school hours, by teaching such branches and by conducting such recitations as might be reasonably assigned to the teacher by the principal.

**68.** Dennison *v.* Vinalhaven, 100 Me. 136, 60 Atl. 798.

**69.** McPherson *v.* Usborne School Trustees, 1 Ont. L. Rep. 261.

**70.** Bird *v.* Thornburgh, 1 B. Mon. (Ky.) 4.

**71.** Bird *v.* Thornburgh, 1 B. Mon. (Ky.) 4.

**72. Effect of removal or dismissal on right to compensation** see *infra*, III, H, 5, c.

**"Removal" and "dismissal."**— As used in a school law the word "removal" implies some dereliction of duty, and the word "dismissal" means termination from whatever cause. Board of Education *v.* Stotlar, 95 Ill. App. 250.

**73.** See the statutes of the several states

**"Power to employ legally qualified teachers"** imports no authority to dismiss unqualified ones. Arnold *v.* School Dist., 78 Mo. 226 [*distinguishing* McCutcheon *v.* Windsor, 55 Mo. 149].

**The removal of a principal** of a school is

and by the rules and regulations of the local school-boards not inconsistent with such law.[74] Such power is generally vested in the school-board or authorities who have the power of employing teachers and of controlling and managing the school,[75] except where the law, or rules and regulations, provide that the power of removing or dismissing a school-teacher shall be in a particular other board or officer [76] or in the voters of the district.[77] But a school-board cannot dismiss a teacher who has been employed by a contract with subscribers.[78]

**b. Right to Remove or Dismiss in General.** Under some statutory provisions and rules and regulations a school-teacher, or at least certain teachers, may be removed or dismissed at any time at the pleasure of the school-board, notwithstanding his term of service has not expired,[79] and particularly where he

authorized by a provision, that "any teacher" may be removed by the board of education. People *v.* New York Bd. of Education, 69 Hun (N. Y.) 212, 23 N. Y. Suppl. 473 [*affirmed* in 142 N. Y. 627, 37 N. E. 565].

**A provision that no election of a teacher shall be construed as a contract,** either as to the duration of time or amount of wages, does not give a teacher security from removal, but on the other hand protects the district against a claim that a teacher is entitled to serve for any particular time. Stockton *v.* San Jose Bd. of Education, 145 Cal. 246, 78 Pac. 730.

74. See McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362; People *v.* Maxwell, 177 N. Y. 494, 69 N. E. 1092 [*reversing* 87 N. Y. App. Div. 131, 83 N. Y. Suppl. 1098].

**The dismissal of a teacher is not a municipal affair,** which may by a freeholder's charter be regulated in a manner in conflict with that provided by the general law. Barthel *v.* San Jose Bd. of Education, 153 Cal. 376, 95 Pac. 892.

75. Bays *v.* State, 6 Nebr. 167; Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487; Conner *v.* Wiggins, 10 N. Brunsw. 185.

**Under Colo. Gen. St. § 3046,** giving school-boards the power to employ and dismiss teachers, a taxpayer cannot sue to enjoin the dismissal of a teacher. Pitkin County School Dist. No. 1 *v.* Carson, 9 Colo. App. 6, 46 Pac. 846.

76. Carver *v.* Battle Creek Tp. School Dist. No. 6, 113 Mich. 524, 71 N. W. 859 (board of school commissioners); Armstrong *v.* School Dist., 19 Mo. App. 462 (county commissioner); People *v.* Board of Education, 2 Abb. Pr. N. S. (N. Y.) 177, 32 How. Pr. 167 (holding that the power of removing principals or vice-principals is vested exclusively in the board of education of the city of New York by the act of 1864, section 12); Dillon *v.* Meyers, 3 Pa. L. J. 168, 552 (holding that school directors are made the legal visitors of the schools and may suspend or dismiss teachers).

77. Putnam *v.* Irvington School Town, 69 Ind. 80; Crawfordsville *v.* Hays, 42 Ind. 200, holding, however, that the latter part of Rev. St. (1865) § 28, which relates to the power of a majority of the voters of the school-district to effect the dismissal of teachers, does not apply to cities and incorporated towns.

**Reinstatement.**— Where by statute the power to dismiss teachers is primarily in the school-district, except that if it neglects or refuses to act the district committee is authorized to do so, and a teacher is dismissed by the committee and the district votes to reinstate him, it is the duty of the committee to conform to such action. Gilman *v.* Bassett, 33 Conn. 298.

78. Henderson *v.* Hammond, 19 Ala. 340.

79. *California.*— Barthel *v.* San Jose Bd. of Education, 153 Cal. 376, 95 Pac. 892 (holding that the school-board may remove at pleasure a teacher who does not hold a certificate); Stockton *v.* San Jose Bd. of Education, 145 Cal. 246, 78 Pac. 730 (holding that the board of education has a right to remove any teacher, including those elected to permanent positions, at will, except such teachers holding permanent positions as have been favorably reported upon by the committee of classification); Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 12 Pac. 1042; Bradley *v.* San Francisco Bd. of Education, 1 Cal. App. 212, 81 Pac. 1036 (holding that the clause of Pol. Code, § 1793, protecting holders of teachers' certificates from removal without cause, applies only to holders of "general city certificates," and that a holder of a special city certificate, authorizing him to teach mechanical drawing only, is removable at the pleasure of the board).

*Missouri.*— McLellan *v.* St. Louis Public School, 15 Mo. App. 362.

*Nebraska.*— Jones *v.* Nebraska City, 1 Nebr. 176.

*New York.*— People *v.* New York Bd. of Education, 69 Hun 212, 23 N. Y. Suppl. 473 [*affirmed* in 142 N. Y. 627, 37 N. E. 565]; Kelderhouse *v.* Brown, 17 Abb. N. Cas. 401 [*distinguishing* Finch *v.* Cleveland, 10 Barb. 290], holding that a sole trustee of a school-district may dismiss a teacher at any time, although his contract for services has not expired, and although he is properly qualified and performs his services in a proper manner.

*Tennessee.*— Weatherly *v.* Chattanooga, (Ch. App. 1898) 48 S. W. 136.

*Wisconsin.*— Gillan *v.* Normal Schools, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336.

See 43 Cent. Dig. tit. "Schools and School Districts," § 302.

**Statute and rules part of contract.**— A statute, or rules passed and adopted by a

has no fixed term of employment.[80] Under most statutes, however, a teacher who has been employed for a definite term may be dismissed only at the end of his term of employment,[81] or if before the expiration of such time, only for a just and sufficient cause.[82] Where the statute specifically enumerates the causes for which a teacher may be removed or dismissed, he ordinarily cannot be removed or dismissed for any other cause,[83] unless the contract of employment reserves the right to dismiss for other causes.[84] It has been held that the power of a particular board to revoke a teacher's license or certificate for certain causes does not exclude the school-board's authority to remove a teacher for a good cause.[85] A statutory provision forbidding the removal of a teacher except for cause is retrospective in its operation so as to protect a teacher, elected before its enact-

school-board, providing for the dismissal of teachers at the pleasure of the school-board, enters into and forms a part of the contract made by the board with a teacher for his services, and authorizes his dismissal by the board whenever in its judgment public necessity or convenience requires it. Jones *v.* Nebraska City, 1 Nebr. 176; Weatherly *v.* Chattanooga, (Tenn. Ch. App. 1898) 48 S. W. 136. But see School Dist. No. 3 *v.* Hale, 15 Colo. 367, 25 Pac. 308, holding that a rule in a teacher's hand-book to the effect that the tenure of office of all teachers, regardless of contract, shall be at the pleasure of the board, is of no value as a defense to an action on a contract for a specified term.

**80.** Marion *v.* Oakland Bd. of Education, 97 Cal. 606, 32 Pac. 643, 20 L. R. A. 197.

**81.** Marion *v.* Oakland Bd. of Education, 97 Cal. 606, 32 Pac. 643, 20 L. R. A. 197 [*distinguishing* Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042].

**82.** *California.*— Stockton *v.* San Jose Bd. of Education, 145 Cal. 246, 78 Pac. 730; Bradley *v.* San Francisco Bd. of Education, 1 Cal. App. 212, 81 Pac. 1036.

*Colorado.*— School Dist. No. 26 *v.* McComb, 18 Colo. 240, 32 Pac. 424.

*Indiana.*— Crawfordsville *v.* Hays, 42 Ind. 200; Milford School Town *v.* Zeigler, 1 Ind. App. 138, 27 N. E. 303, holding that a contract with a teacher cannot be annulled by abolishing the department in which he is engaged to teach.

*Kansas.*— Ottawa Bd. of Education *v.* Cook, 3 Kan. App. 269, 45 Pac. 119.

*Maryland.*— Underwood *v.* Prince George County School Com'rs, 103 Md. 181, 63 Atl. 221.

*Nebraska.*— Wallace *v.* School Dist. No. 27, 50 Nebr. 171, 69 N. W. 772; Bays *v.* State, 6 Nebr. 167.

*New York.*— People *v.* New York Bd. of Education, 174 N. Y. 169, 66 N. E. 674 [*affirming* 78 N. Y. App. Div. 501, 79 N. Y Suppl. 624]; Steinson *v.* New York Bd. of Education, 165 N. Y. 431, 59 N. E. 300 [*affirming* 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 (*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734)]; Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105]; Bogert *v.* New York Bd. of Education, 106 N. Y. App. Div. 56, 94 N. Y. Suppl. 180 [*affirming* 44 Misc. 10, 89 N. Y. Suppl. 737]; Finch *v.* Cleveland, 10 Barh. 290.

*Oklahoma.*—Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

*Tennessee.*— Twenty-third Dist. School Directors *v.* Leak, (Ch. App. 1898) 48 S. W. 692.

*Vermont.*— Holden *v.* Shrewsbury School Dist. No. 10, 38 Vt. 529.

*Wisconsin.*— Scott *v.* Joint School Dist. No. 16, 51 Wis. 554, 8 N. W. 398.

*Canada.*— Raymond *v.* Cardinal School Trustees, 14 Ont. App. 562.

See 43 Cent. Dig. tit. "Schools and School Districts," § 302.

**83.** Barthel *v.* San Jose Bd. of Education, 153 Cal. 376, 95 Pac. 892; Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042; Searsmont *v.* Farswell, 3 Me. 450; Thompson *v.* Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548; Butcher *v.* Charles, 95 Tenn. 532, 32 S. W. 631. But *compare* Board of Education *v.* Stotlar, 95 Ill. App. 250.

**Marriage of female teacher.**— The provisions of the Greater New York Charter that teachers in public schools shall hold their positions subject only to the limitations of the act, and to reassignment or removal for cause after trial on charges of gross misconduct, insubordination, neglect of duty, or general inefficiency, are exclusive and a by-law of a board of education providing that if a female teacher marry her place shall become vacant, is void as in conflict with the charter. People *v.* Maxwell, 177 N. Y. 494, 69 N. E. 1092 [*reversing* 87 N. Y. App. Div. 131, 83 N. Y. Suppl. 1098].

**84.** School Directors *v.* Ewington, 26 Ill. App. 379; Wallace *v.* School Dist. No. 27, 50 Nebr. 171, 69 N. W. 772. And see *infra*, III, H, 4, d. *Contra*, Thompson *v.* Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548, holding that such a reservation is not authorized by law and is void.

**85.** School Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669; Raymond *v.* Cardinal School Trustees, 14 Ont. App. 562. *Compare* Arnold *v.* School Dist., 78 Mo. 226; Oakes *v.* School Dist. No. 3, 98 Mo. App. 163, 71 S. W. 1060, holding that under Rev. St. (1899) § 9767, a board of school directors cannot dismiss a regularly qualified teacher who is employed under contract for a specified number of months, but that, should a teacher's certifi-

ment, in his right to continue in his position,[86] and such a provision may be violated by a transfer of a teacher, involving a loss of pay and rank, as by a removal from a higher to a lower grade,[87] or even by a transfer to a higher grade or department, unless the work is in the same general line as that of the first employment, and the offer of the new position is such that its acceptance will not amount to a modification of the original contract.[88]

**c. Causes For Removal or Dismissal.** As a general rule a school-teacher may be removed or dismissed before the expiration of his term of service, for any cause that renders him unfit to be a teacher in the public school, so that the best interests of the school require that he should be removed or dismissed,[89] such as for a violation of the rules and regulations of the school-board,[90] or for incompetency,[91] failing to manage and control the school,[92] improper con-

cate be revoked, the contract is thereby annulled.

86. Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042.

87. Fairchild *v.* San Francisco Bd. of Education, 107 Cal. 92, 40 Pac. 26; Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042; People *v.* New York Bd. of Education, 174 N. Y. 169, 66 N. E. 674 [*affirming* 78 N. Y. App. Div. 501, 79 N. Y. Suppl. 624]; *In re* Gleese, 50 N. Y. Super. Ct. 473, 67 How. Pr. 372.

88. Jackson *v.* Steamboat Rock Independent School Dist., 110 Iowa 313, 81 N. W. 596.

89. Ft. Smith School Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669; Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042; Robinson *v.* District No. 4 School Directors, 96 Ill. App. 604; Board of Education *v.* Stotlar, 95 Ill. App. 250; Moulton Tp. Sub-School Dist. No. 7 *v.* Burton, 26 Ohio St. 421.

**There may be causes for the removal of a teacher affecting the discipline of the school** over which he presides, entirely outside of any question of his learning, ability, power of enforcing discipline, or moral qualities, and outside of his own acts. McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362.

**That scholars and parents are dissatisfied** with a school-teacher is not a sufficient cause for dismissing him, before the expiration of his term; but only unfaithfulness or incompetency will justify his dismissal. Paul *v.* Hartland School Dist. No. 2, 28 Vt. 575.

**Removal of school superintendent** for cause see Freeman *v.* Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 310.

90. Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042.

**As to religious exercises.**— Where a teacher after due notice refuses to obey a rule prohibiting the reading of the Bible in school, and other religious exercises, and continues such exercises, such act of insubordination is a violation of his contract for which he may be dismissed. New Antioch Bd. of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58.

**Vaccination.**— The refusal of a teacher to comply with a regulation requiring teachers to be vaccinated is a sufficient cause for his removal. Lyndall *v.* Philadelphia High School, 19 Pa. Super. Ct. 232 [*affirming* 10 Pa. Dist. 665, 25 Pa. Co. Ct. 647].

91. *Arkansas.*— Ft. Smith School Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669.

*California.*— Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042.

*Iowa.*— Hull *v.* Aplington Independent Dist., 82 Iowa 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273; Smith *v.* Knox Dist. Tp., 42 Iowa 522.

*Michigan.*— Carver *v.* Battle Creek Tp. School Dist. No. 6, 113 Mich. 524, 71 N. W. 859.

*Nebraska.*— Bays *v.* State, 6 Nebr. 167.

*New York.*— People *v.* New York Bd. of Education, 3 Hun 177, 5 Thomps. & C. 334.

*Tennessee.*— Morley *v.* Power, 10 Lea 219.

*Vermont.*— Holden *v.* Shrewsbury School Dist. No. 10, 38 Vt. 529.

See 43 Cent. Dig. tit. "Schools and School Districts," § 302.

**Statement of rule.**— Where a teacher in a public school, although he has been employed for a definite length of time, proves to be incompetent and unable to teach the branches of instruction he is employed to teach, either from a lack of learning or from an utter lack of capacity to impart learning to others, he may be dismissed from such employment. Crawfordsville *v.* Hays, 42 Ind. 200.

**Cruel treatment and profane and abusive language** toward pupils constitutes "incompetency or immorality," within the meaning of a provision authorizing a dismissal for such causes. Arnold *v.* School Dist., 78 Mo. 226.

**Failing to have the requisite qualifications of temper and discretion** of a good teacher justifies a teacher's dismissal. Robinson *v.* District No. 4 School Directors, 96 Ill. App. 604.

**Mistakes in occasional instances,** one, two, three, or even more, will not necessarily show a teacher incompetent to teach that subject or branch of instruction in which the mistakes were made. Holden *v.* Shrewsbury School Dist. No. 10, 38 Vt. 529.

**A teacher cannot be dismissed before rendering any services,** for incompetency, where he has a proper certificate and has been employed by the board with knowledge of his qualifications. Farrell *v.* Rubicon Tp. School-Dist. No. 2, 98 Mich. 43, 56 N. W. 1053.

92. Eastman *v.* Rapids Dist. Tp., 21 Iowa 590, holding that a teacher may be dismissed

duct,[93] immorality,[94] negligence, or inattention to duty,[95] or for failing in any other respect to perform his obligations as teacher, which arise from the express terms of his contract or by necessary implication.[96] It has also been held that a teacher may be dismissed where by a change in the conduct of the schools his services are no longer needed,[97] or where the funds for maintaining the school have become exhausted.[98]

**d. Contracts Reserving Right.** Notwithstanding the statutory provisions

for a failure to control the school, even though he is not unfaithful in the discharge of his duties.

93. Morley *v.* Power, 10 Lea (Tenn.) 219.

**Refusing to receive back a pupil** whom he has suspended, after his action has been overruled by the school directors, justifies the dismissal of a school-teacher. Parker *v.* Jefferson County School Dist. No. 38, 5 Lea (Tenn.) 525.

94. School-Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669; McLellan *v.* St. Louis Public Schools, 15 Mo. App. 362 (holding that a school-teacher may be removed, upon his being charged in a divorce suit, with having committed various acts of adultery); Edinboro Normal School *v.* Cooper, 150 Pa. St. 78, 24 Atl. 348; Custer *v.* Prospect Park School Dist., 12 Pa. Super. Ct. 102.

**That a teacher is on bail for attempted rape,** and is reported to be the father of illegitimate children, is sufficient cause for rescinding his contract. Tingley *v.* Vaughn, 17 Ill. App. 347.

95. Smith *v.* Knox Dist. Tp., 42 Iowa 522; Morley *v.* Power, 10 Lea (Tenn.) 219; Doe *v.* Cole, 6 C. & P. 359, 25 E. C. L. 474.

**Where a school-teacher leaves his place** in the school, placing a substitute therein to teach, and fails to resume his place when requested by the principal having charge of the school, and when asked for an explanation by the directors gives none, except that he has furnished a competent substitute to teach in his place and will resume as soon as vacation is over, it is a good cause for his dismissal. School Directors *v.* Hudson, 88 Ill. 563.

**Tardiness.**— Where one teaching school in the fall and winter season is tardy from fifteen to thirty minutes two or three days of each week, and has the key to the schoolhouse so that the school children cannot enter until he arrives, and the directors repeatedly expostulate with him for his tardiness, but without effect, they have a legal right to dismiss him for that reason. School Directors *v.* Birch, 93 Ill. App. 499.

**Unavoidable delay in opening school.**— Where nothing is said either in the contract of employment or in the minutes of the school-board that the contract shall be void if the teacher does not begin to teach on a specified date, although after the contract is signed one of the board suggests that if the teacher does not begin at the specified date the contract shall be void, the fact that the teacher is unable to begin on the date specified, but arrives two days later and on the day following presents himself at the schoolhouse to teach, is no cause for the termination of his contract. Turner *v.* Hampton, 97 S. W. 761, 30 Ky. L. Rep. 179.

96. Crawfordsville *v.* Hays, 42 Ind. 200.

**Expiration of license.**— A recital in the contract of employment of a teacher that he holds a license of a certain grade is not a warranty that he will continue to hold such license, and the fact that after the contract is executed and before the school begins, such teacher takes an examination, as his license has nearly expired, wherein he receives a license of a lower grade, does not justify a rescission of his contract in the absence of any provision in the contract stipulating that it shall terminate in such an event. School Dist. No. 23 *v.* Ozmer, 81 Ark. 194, 98 S. W. 974. See also Steinson *v.* New York City Bd. of Education, 165 N. Y. 431, 59 N. E. 300 [*affirming* 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128].

**Marriage.**— A contract to teach, procured upon the condition that the teacher will remain unmarried during the school-term, may be rescinded upon the failure to perform such condition. Guilford School Tp. *v.* Roberts, 28 Ind. App. 355, 62 N. E. 711.

**Where the contract requires a teacher to keep a correct list of pupils,** and authorizes his dismissal for a breach of contract or a failure to observe the rules of the district board, a teacher keeping such list cannot be dismissed for failure to keep a grade register as required by a rule of the superintendent of public instruction. Carver *v.* Battle Creek Tp. School Dist. No. 6, 113 Mich. 524, 71 N. W. 859.

97. Cusack *v.* New York Bd. of Education, 174 N. Y. 136, 66 N. E. 677 [*reversing* 78 N. Y. App. Div. 470, 79 N. Y. Suppl. 803]; People *v.* New York Bd. of Education, 114 N. Y. App. Div. 1, 99 N. Y. Suppl. 737 [*affirmed* in 187 N. Y. 535, 80 N. E. 1116]. See also O'Leary *v.* New York Bd. of Education, 174 N. Y. 511, 66 N. E. 1113 [*reversing* 78 N. Y. App. Div. 475, 79 N. Y. Suppl. 806].

**A resolution of a school-board requesting a teacher to resign** is not equivalent to a removal, on the ground that his services are no longer necessary. Kennedy *v.* Snohomish County School Dist. No. 1, 20 Wash. 399, 55 Pac. 567.

98. New Castle County School Dist. No. 7 *v.* Walker, 2 Houst. (Del.) 21; Morley *v.* Power, 10 Lea (Tenn.) 219. But see Harmony School Tp. *v.* Moore, 80 Ind. 276.

**That there are not sufficient funds in the treasury** or collectable to pay the compensation agreed upon does not justify a school-board in violating a contract of employment

relating to the dismissal of teachers,[99] a contract of employment of a teacher may reserve to the school-board the right to dismiss the teacher at any time [1] if he fails to give satisfaction,[2] by giving him a prescribed notice.[3] Under such reserved power the school-board has a right to determine without any formal trial what is required to give satisfaction, and whether it is in fact being given by a teacher, and if not, to dismiss him;[4] but such right must be exercised in good faith, and without passion, prejudice, or caprice, and upon grounds affecting the teacher's efficiency and usefulness.[5]

**e. Waiver of Right.** A school-board may by its conduct waive a compliance, on the part of a teacher, with regulations intended for his guidance;[6] but it cannot waive compliance with undertakings or requirements which are for the benefit of the school, its pupils and patrons, and therefore cannot waive its right to dismiss a teacher whose misconduct and inefficiency impairs his services or prejudices the welfare of the school.[7] A dismissal which has been irregularly made may be waived.[8]

**f. Mode of Removal or Dismissal** — (i) *IN GENERAL.* A school-board having authority to remove or dismiss a teacher cannot arbitrarily exercise such power, but must act with discretion and judgment, and take all necessary steps to inform itself before proceeding to remove or dismiss the teacher.[9] Where the statute

of a teacher. Rudy *v.* Poplar Bluff School Dist., 30 Mo. App. 113.

**99.** School Directors *v.* Ewington, 26 Ill. App. 379; Armstrong *v.* Union School Dist., 28 Kan. 345; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954, holding that a school-board may contract with a teacher giving the board authority to remove the teacher for the statutory or other causes.

1. Olney School Dist. *v.* Christy, 81 Ill. App. 304, holding that under a contract to teach a school containing the clause "the continuance of an engagement with teachers is at the option of the directors," the directors may dismiss a teacher at any time, and that such an option is exercised by a request for the teacher's resignation.

2. School Directors *v.* Ewington, 26 Ill. App. 379; Wyandotte County School Dist. No. 5 *v.* Colvin, 10 Kan. 283; Brown *v.* Cowley County School Dist. No. 41, 1 Kan. App. 530, 40 Pac. 826; Richardson *v.* Westminster School Dist. No. 10, 38 Vt. 602, holding that the dissatisfaction must be with the teacher's work, and not his personal unpopularity in the district. But see Gillan *v.* Normal Schools Bd. of Regents, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336; Tripp *v.* Utica School-Dist. No. 3, 50 Wis. 651, 7 N. W. 840, holding that such a reservation in a contract of employment is unauthorized under the Wisconsin law and is inoperative.

3. Armstrong *v.* Union School Dist. No. 1, 28 Kan. 345; Voss *v.* Feurmann, (Tex. Civ. App. 1893) 23 S. W. 936; Greenlees *v.* Picton Public School Bd., 2 Ont. L. Rep. 387. See also Pottle *v.* Sharp, 65 L. J. Ch. 908, 75 L. T. Rep. N. S. 265; Ryan *v.* Jenkinson, 25 L. J. Q. B. 11.

**A provision authorizing a teacher's dismissal at any time on thirty days' notice** is not beyond the power devolving upon a school-district, and a notice to terminate is effectual, although given before the commencement of the services. Dees *v.* Detroit Bd. of Education, 146 Mich. 64, 109 N. W. 39.

4. School Directors *v.* Ewington, 26 Ill. App. 379; Armstrong *v.* Union School Dist. No. 1, 28 Kan. 341; Kingston *v.* Decatur Tp. School Dist. No. 5, 140 Mich. 603, 104 N. W. 28, holding that such a reserved power authorizes a school-board to dispense with a teacher's services for the spring term, on its being dissatisfied with his work during the winter term, and by so notifying him before the commencement of the spring term.

5. School Directors *v.* Ewington, 26 Ill. App. 379; Henry School Tp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393 (holding that a stipulation that the contract "is to be good as long . . . as the trustees see fit" does not authorize a trustee to terminate the contract arbitrarily and without cause); Lafayette School City *v.* Bloom, 17 Ind. App. 461, 46 N. E. 1016; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

6. School-Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669.

7. School-Dist. *v.* Maury, 53 Ark. 471, 14 S. W. 669.

**The statutory power of removing a schoolteacher** becomes part of his contract of employment, and a school-board can make no by-law or contract by which such contract is bargained away, limited, or restricted. Gillan *v.* Normal Schools Bd. of Regents, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336.

8. Finch *v.* Cleveland, 10 Barb. (N. Y.) 290.

9. Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

**A school-board acting in conjunction with a county superintendent** in dismissing a teacher need not act with the formality of a court, but may adopt such a mode of procedure as such board and the county superintendent may for the time being consider the best and most likely to do justice and pro-

expressly provides that the removal or dismissal shall be made in a prescribed manner, all the essential steps to be taken must be at least substantially complied with, and a dismissal by any other method than that prescribed is illegal.[10] It has been held under the various statutes that a teacher may be dismissed only upon a petition of the voters of the district requesting his dismissal,[11] that due notice of the dismissal must be given,[12] and that the dismissal must be in writing under the hand of the dismissing officer,[13] and must specifically assign the cause for dismissal.[14] A removal or dismissal by a school-board or committee should be made by at least a majority of the members of the board at a meeting at which all the members are present, or of which they all had notice and an opportunity to attend,[15] and must be in compliance with any special statutory requirements relative thereto.[16] A school-board may reconsider its action in dismissing a teacher.[17]

(II) *NECESSITY FOR NOTICE AND HEARING.* Under some statutory provisions the removal or dismissal of a school-teacher may be made summarily, without asserting or showing any cause therefor or giving the teacher an opportunity to be heard,[18] subject, however, under some statutes, to the approval of

mote the best interests of the public. Bourbon County School Dist. No. 23 *v.* McCoy, 30 Kan. 268, 1 Pac. 97, 46 Am. Rep. 92.

10. Barthel *v.* San Jose Bd. of Education, 153 Cal. 376, 95 Pac. 892 (holding that under the San Jose Charter, art. 9, §§ 5, 13, a teacher duly elected for a year cannot be legally removed except upon an adverse report of the classification committee); Hull *v.* Aplington Independent School-Dist., 82 Iowa 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273; Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105]; Bogert *v.* New York Bd. of Education, 106 N. Y. App. Div. 56, 94 N. Y. Suppl. 180 [*affirming* 44 Misc. 10, 89 N. Y. Suppl. 737].

11. Rumble *v.* Barker, 27 Ind. App. 69, 60 N. E. 956.

Appeal by patrons of a school from the decision of a trustee to a county superintendent relative to the dismissal of a teacher see Rumble *v.* Barker, 27 Ind. App. 69, 60 N. E. 956.

12. See Lariviere *v.* St. Fulgence School Trustees, 11 Quebec Super. Ct. 528.

13. Searsmont *v.* Farwell, 3 Me. 450.

14. Searsmont *v.* Farwell, 3 Me. 450.

Letters notifying a teacher that the trustees believe it for the best interests of the school that his services be dispensed with do not disclose a reason for his dismissal and are insufficient. Underwood *v.* Prince George County School Com'rs, 103 Md. 181, 63 Atl. 221.

15. Jackson *v.* Hampden, 16 Me. 184; Wilkinson *v.* Malin, 2 Cromp. & J. 636, 1 L. J. Exch. 234, 2 Tyrw. 544; Robertson *v.* Durham School Dist. No. 2, 34 N. Brunsw. 103; Greenlees *v.* Picton Public School Bd., 2 Ont. L. Rep. 387.

Adopting report of committee.— In acting on the removal of a teacher, the board of education is not confined to a direct vote upon that question, but may effect the removal by adopting by a vote of the requisite majority, a report of one of its committees, accompanied by a resolution for such removal, where it appears that it was the intent and purpose of the board to include the passing of the resolution in the adoption of the report. People *v.* New York Bd. of Education, 69 Hun (N. Y.) 212, 23 N. Y. Suppl. 473 [*affirmed* in 142 N. Y. 627, 37 N. E. 565].

16. Heisey *v.* Risser, 3 Pa. Super. Ct. 196 [*affirming* 18 Pa. Co. Ct. 325].

Balloting.— A provision requiring that the names of directors voting for a certain teacher be entered on the minutes of the board by the secretary is mandatory, and a dismissal by secret ballot is invalid. Dyberry School Dist. *v.* Mercer, 115 Pa. St. 559, 9 Atl. 64; Heisey *v.* Risser, 3 Pa. Super. Ct. 196 [*affirming* 18 Pa. Co. Ct. 325]. And under such provision a minute of the action of the board showing merely that "the motion was carried" is insufficient. Keating *v.* Neary, 9 Kulp (Pa.) 421.

17. Kellison *v.* Cascade County School Dist. No. 1, 20 Mont. 153, 50 Pac. 421.

18. *District of Columbia.*— U. S. *v.* Hoover, 31 App. Cas. 311, holding that the board of education of this district may inquire into the qualifications of a teacher of the public schools and dismiss him, without giving him the hearing required under Act Cong. June 20, 1906, c. 3446, § 10, which provides for the protection of teachers against all charges that are not confined to the professional qualifications of a teacher.

*Idaho.*— Ewin *v.* Shoshone County Independent School Dist. No. 8, 10 Ida. 102, 77 Pac. 222.

*New York.*— People *v.* Hubbell, 38 N. Y. App. Div. 194, 56 N. Y. Suppl. 642; Dunavon *v.* Hornellsville Bd. of Education, 47 Hun 13; People *v.* Board of Education, 32 Misc. 63, 66 N. Y. Suppl. 149; Ridenour *v.* Brooklyn Bd. of Education, 15 Misc. 418, 37 N. Y. Suppl. 109. The board of education of the city of New York has the power and right to remove any teacher upon the recommendation of the city superintendent of schools, without a hearing or assigning any cause (People *v.* New York Bd of Education, 69 Hun

a particular board or officer.[19] But under most provisions unless a teacher waives his right to a hearing [20] he cannot be removed or dismissed before the end of his term, even for statutory causes of removal, until after a conviction upon a fair hearing of charges duly preferred,[21] and after a proper notice thereof to him and an opportunity to be heard,[22] and under some statutes such conviction can

212, 23 N. Y. Suppl. 473 [*affirmed* in 142 N. Y. 627, 37 N. E. 565]; People *v.* New York Bd. of Education, 52 N. Y. Super. Ct. 520), and without passing a resolution formally abolishing the position (People *v.* New York Bd. of Education, 114 N. Y. App. Div. 1, 99 N. Y. Suppl. 737 [*affirmed* in 187 N. Y. 535, 80 N. E. 1116].

*England.*— Hayman *v.* Rugby School Governors, L. R. 18 Eq. 28, 43 L. J. Ch. 834, 30 L. T. Rep. N. S. 217, 22 Wkly. Rep. 587; Reg. *v.* Darlington Free Grammar School, 6 Q. B. 682, 9 Jur. 21, 14 L. J. Q. B. 67, 51 E. C. L. 681; Doe *v.* Cole, 6 C. & P. 359, 25 E. C. L. 474; Doe *v.* Willis, 5 Exch. 894, 20 L. J. Exch. 85.

*Canada.*— Dunn *v.* Toronto Bd. of Education, 7 Ont. L. Rep. 451.

See 43 Cent. Dig. tit. "Schools and School Districts," § 301.

**19.** People *v.* Hyde, 89 N. Y. 11 (holding that the superintendent of public instruction cannot remove the principal of a normal school without the concurrence of the local board, in whom the power to employ is vested subject to his approval); People *v.* Hubbell, 38 N. Y. App. Div. 194, 56 N. Y. Suppl. 642; People *v.* New York Bd. of Education, 3 Hun (N. Y.) 177, 5 Thomps. & C. 334; People *v.* New York Bd. of Education, 32 Misc. (N. Y.) 63, 66 N. Y. Suppl. 149.

**The written approval of a majority of the district inspectors,** and on appeal of the board of education, is required in order to remove a teacher of a public school in New York city by the school trustees of a ward. People *v.* New York Bd. of Education, 3 Hun (N. Y.) 177, 5 Thomps. & C. 234; Matter of Gleese, 50 N. Y. Super. Ct. 473, 67 How. Pr. 372.

**20.** Kellison *v.* Cascade County School Dist. No. 1, 20 Mont. 153, 50 Pac. 421, holding that the action of school trustees in dismissing a teacher without a hearing is waived by his appearing and asking for and being granted a hearing on the charge made against him, resulting in his being found guilty.

**21.** *California.*— McKenzie *v.* San Francisco Bd. of Education, 1 Cal. App. 406, 410, 82 Pac. 392, 394.

*District of Columbia.*— U. S. *v.* Hoover, 31 App. Cas. 311.

*Iowa.*— Curtright *v.* Center Junction Independent School Dist., 111 Iowa 20, 82 N. W. 444.

*New York.*— Bogert *v.* New York Bd. of Education, 106 N. Y. App. Div. 56, 94 N. Y. Suppl. 180 [*affirming* 44 Misc. 10, 89 N. Y. Suppl. 737]; People *v.* Board of Education, 32 Misc. 63, 66 N. Y. Suppl. 149.

*Pennsylvania.*— Edinboro Normal School *v.* Cooper, 150 Pa. St. 78, 24 Atl. 348.

*Tennessee.*— Butcher *v.* Charles, 95 Tenn. 532, 32 S. W. 631; Morley *v.* Power, 10 Lea 219; Morley *v.* Power, 5 Lea 691.

See 43 Cent. Dig. tit. "Schools and School Districts," § 301.

**School-board as accuser and judge.**—Where a school-board constitutes the only tribunal authorized to try charges against a teacher, it is no ground of objection to a trial before them that they were accusers rather than judges, and because of their prejudice. White *v.* Wohlenberg, 113 Iowa 236, 84 N. W. 1026.

**The duties of a school-board** in investigating the facts on which it may dismiss a teacher are judicial. Smith *v.* Knox Dist. Tp., 42 Iowa 522.

**Hearing without notice — second trial.**— Where the decision of a school-board in dismissing a teacher is reversed by a county superintendent because the teacher was not given notice of the hearing, the teacher is not entitled to an injunction restraining a second trial on new charges, since the first hearing was a nullity and could not operate as an acquittal, and the fact that the school-board does not permit the teacher to resume his school after the reversal does not entitle him to such an injunction; and where by reason of such an unwarranted injunction the hearing of such charges against the teacher are delayed, on dissolution of the injunction, the hearing will relate back to the time originally set for the investigation. White *v.* Wohlenberg, 113 Iowa 236, 84 N. W. 1026.

**Right to be attended by counsel** see U. S. *v.* Hoover, 31 App. Cas. (D. C.) 311.

**22.** *Colorado.*— Huerfano County School Dist. No. 26 *v.* McComb, 18 Colo. 240, 32 Pac. 424.

*Idaho.*— Ewin *v.* Shoshone County Independent School Dist. No. 8, 10 Ida. 102, 77 Pac. 222.

*Indiana.*— Rumble *v.* Barker, 27 Ind. App. 69, 60 N. E. 956.

*Iowa.*— White *v.* Wohlenberg, 113 Iowa 236, 84 N. W. 1026; Benson *v.* Silver Lake Dist. Tp., 100 Iowa 328, 69 N. W. 419.

*Montana.*— Kellison *v.* Cascade County School Dist. No. 1, 20 Mont. 153, 50 Pac. 421.

*New York.*— People *v.* New York Bd. of Education, 174 N. Y. 169, 66 N. E. 674 [*affirming* 78 N. Y. App. Div. 501, 79 N. Y. Suppl. 624].

*Tennessee.*— Butcher *v.* Charles, 95 Tenn. 532, 32 S. W. 631; Morley *v.* Power, 5 Lea 691.

See 43 Cent. Dig. tit. "Schools and School Districts," § 301.

**A notice that the directors would inquire into the teacher's fitness** is insufficient. Morley *v.* Power, 10 Lea (Tenn.) 219.

be had only after the specific charges against him are established by the testimony of sworn witnesses.[23]

**g. Resignation and Abandonment.** A teacher's contract of employment may also be terminated by his resigning and abandoning his contract.[24] His resignation should be tendered to the board or officer that has the power of removing or dismissing him,[25] which tender, however, is a mere offer and is not binding on either party until it is accepted,[26] as by the appointment of another person in the teacher's place,[27] and may be withdrawn at any time before it is acted upon by the school-board.[28] The resignation of a teacher should not be induced by fraud or duress, and if it is so induced, reinstatement may be compelled by the teacher.[29] The failure of a teacher, employed for a specified number of months, to finish his term because of an attempted unauthorized dismissal amounts to a voluntary abandonment.[30]

**h. Rights and Remedies of Aggrieved Teacher**[31] — (I) *IN GENERAL.* One appointed as a school-teacher cannot maintain a bill in equity in the name of the state to have another teacher removed in his favor, since he has an adequate remedy at law.[32] Where a teacher wrongfully dismissed continues in possession of the school property, a court of equity will not aid the school-board in dispossessing him.[33] It has been held that mandamus will lie at the instance of a teacher to enforce his rights under a contract to teach.[34] But the courts will not enforce an invalid contract of employment of a school-teacher merely because its failure to do so will result in the closing down of the public schools of the district.[35]

23. Morley *v.* Power, 10 Lea (Tenn.) 219.

24. Curtright *v.* Center Junction Independent School Dist., 111 Iowa 20, 82 N. W. 444.

25. People *v.* Board of Education, 2 Abb. Pr. N. S. (N. Y.) 177, 32 How. Pr. 167.

26. Curtright *v.* Center Junction Independent School Dist., 111 Iowa 20, 82 N. W. 444 (holding that the fact that a tender of a resignation by a teacher is handed to the president of the district board and retained by him does not constitute an acceptance thereof, where it remains for the board to act on the tender); People *v.* Board of Education, 2 Abb. Pr. N. S. (N. Y.) 177, 32 How. Pr. 167. See also Underwood *v.* Prince George's County School Com'rs, 103 Md. 181, 63 Atl. 221.

27. People *v.* Board of Education, 2 Abb. Pr. N. S. (N. Y.) 177, 32 How. Pr. 167.

28. Curtright *v.* Center Junction Independent School Dist., 111 Iowa 20, 82 N. W. 444.

**Sufficiency of abandonment.**—The fact that a teacher tenders his resignation at the close of a term, draws the pay due him, and delivers up the key of the school-house on demand of the district board is insufficient to show an abandonment of his contract where he afterward, and before the commencement of the next term, withdraws his resignation prior to its acceptance. Curtright *v.* Center Junction Independent School Dist., 111 Iowa 20, 82 N. W. 444.

29. Matter of Grendon, 114 N. Y. App. Div. 759, 100 N. Y. Suppl. 253.

**Laches.**— A delay of nearly a year in applying for a reinstatement constitutes such laches as will justify the denial of a teacher's application for mandamus against the school-board. Matter of Grendon, 114 N. Y. App. Div. 759, 100 N. Y. Suppl. 253.

30. Oakes *v.* Cedar County School Dist. No. 3, 98 Mo. App. 163, 71 S. W. 1060.

31. **Arbitration.**— The wrongful dismissal of a teacher is a "matter connected with his duty" within the meaning of the Manitoba School Act, § 93, and therefore is not the subject of an action, but of arbitration only. Pearson *v.* St. Jean Baptiste Centre Catholic School Dist., 2 Manitoba 161.

32. State *v.* Leonard, 3 Tenn. Ch. 177.

33. Thompson *v.* Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548.

34. Whitman *v.* Owen, 76 Miss. 783, 25 So. 669.

**Mandamus to compel reinstatement** see MANDAMUS, 26 Cyc. 283.

**Where the state superintendent of public instruction decides that a teacher's contract is valid,** and that its repudiation by a subsequent school-board is void, the teacher may maintain mandamus to compel the recognition of his contract, and in such an action the defense that the former board made other contracts which if enforced would create a deficiency in the school fund cannot be raised, since it is presumed that such question was disposed of by the superintendent. Pearsall *v.* Woolls, (Tex. Civ. App. 1899) 50 S. W. 959.

**Mandamus will not lie to oust a public school-teacher** from his position after he has entered upon his duties, because a school-board at a meeting previous to the one at which he was elected, elected the relator who has not notified the board of an acceptance of his election or entered into any contract with it. Boyle *v.* Lansford School Dist., 8 Pa. Dist. 436, 22 Pa. Co. Ct. 26.

35. Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

(II) *RIGHT TO REVIEW OF DECISION OF DISMISSAL.* Where a school-board dismisses a teacher in accordance with the statutory provisions, such act of dismissal is generally conclusive, in the absence of fraud, corruption, or oppression, and is not subject to review by the courts;[36] although it has been held that such action is not final, but may be inquired into in an action by the teacher to recover for the residue of his term.[37] But under some statutes a teacher who is aggrieved by the action of the board in removing or dismissing him has a right of appeal to a higher board or officer, such as the county or state superintendent,[38] whose decision is generally final and conclusive and not subject to review;[39] and if such an appeal is not taken with reasonable promptness, the teacher's dismissal becomes final.[40]

(III) *ACTIONS FOR DAMAGES* — (A) *In General.* Where a school-teacher is wrongfully removed or dismissed before the expiration of the term of his employment, he is entitled to recover from the school-district, or the school-board, the damages he has sustained by reason of the breach of his contract,[41] as where he

**36.** *Idaho.*— Ewin *v.* Shoshone County Independent School Dist. No. 8, 10 Ida. 102, 77 Pac. 222.

*Illinois.*— Board of Education *v.* Stotlar, 95 Ill. App. 250.

*Kansas.*— Kearny County School Dist. No. 18 *v.* Davies, 69 Kan. 162, 76 Pac. 409.

*New York.*— People *v.* Hubbell, 38 N. Y. App. Div. 194, 56 N. Y. Suppl. 642.

*Ohio.*— Moulton Tp. Subschool Dist. No. 7 *v.* Burton, 26 Ohio St. 421.

*Pennsylvania.*— McCrea *v.* Pine Tp. School-Dist., 145 Pa. St. 550, 22 Atl. 1040. But *compare* Ouster *v.* Prospect Park School Dist., 12 Pa. Super. Ct. 102.

*Wisconsin.*— Gillan *v.* Normal Schools Bd. of Regents, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336.

*England.*— Hayman *v.* Rugby School Governors, L. R. 18 Eq. 28, 43 L. J. Ch. 834, 30 L. T. Rep. N. S. 217, 22 Wkly. Rep. 587.

See 43 Cent. Dig. tit. "Schools and School Districts," § 304.

**37.** Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

**38.** White *v.* Wohlenberg, 113 Iowa 236, 84 N. W. 1026; People *v.* Hubbell, 38 N. Y. App. Div. 194, 56 N. Y. Suppl. 642; Ridenour *v.* Brooklyn Bd. of Education, 15 Misc. (N. Y.) 418, 37 N. Y. Suppl. 109; Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120; Moreland *v.* Wynne, (Tex. Civ. App. 1901) 62 S. W. 1093; Van Dyke *v.* Lewis County School Dist. No. 77, 43 Wash. 235, 86 Pac. 402. See also People *v.* New York Bd. of Education, 18 Abb. Pr. (N. Y.) 165, 27 How. Pr. 462.

**Under Iowa Code, § 2792,** the remedy of a teacher who has had an opportunity to be heard, and who is aggrieved by the action of a school-board, is by an appeal to the county superintendent; but an appeal cannot be taken to the county superintendent from the refusal of the board of school directors to allow a school-teacher to render services, because of the alleged illegality of the contract of employment. Burkhead *v.* Independence School Dist., 107 Iowa 29, 77 N. W. 491.

**The manner of investigating an appeal** is usually left to the sound discretion of the appellate board, and may be had without judicial trial on the sworn testimony of witnesses. People *v.* New York Bd. of Education, 3 Hun (N. Y.) 177, 5 Thomps. & C. 334.

**39.** Jackson *v.* Steamboat Rock Independent School Dist., 110 Iowa 313, 81 N. W. 596; Draper *v.* Camden Public Instruction, 66 N. J. L. 54, 48 Atl. 556; Van Dyke *v.* School Dist. No. 77, 43 Wash. 235, 86 Pac. 402.

**40.** Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120.

**An injunction** will not lie by a teacher who has been dismissed to enjoin another teacher from teaching his school, where the former teacher fails to appeal from his dismissal to the county superintendent of schools as authorized by statute. Morland *v.* Wynne, (Tex. Civ. App. 1901) 62 S. W. 1093.

**41.** *Illinois.*— Ewing *v.* District No. 3 School Directors, 2 Ill. App. 458.

*Indiana.*— Jackson School Tp. *v.* Shera, 8 Ind. App. 330, 35 N. E. 842.

*Kentucky.*—Mingo *v.* Garrard Colored Common School Dist. No. A, 113 Ky. 475, 68 S. W. 483, 24 Ky. L. Rep. 288.

*Missouri.*— Puterbaugh *v.* Township No. 1 Bd. of Education, 53 Mo. 472.

*New York.*— Shaul *v.* New York Bd. of Education, 108 N. Y. App. Div. 19, 95 N. Y. Suppl. 479.

*Wisconsin.*— Scott *v.* Joint School-Dist. No. 16, 51 Wis. 554, 8 N. W. 398.

*Canada.*—Conner *v.* Wiggins, 10 N. Brunsw. 185.

See 43 Cent. Dig. tit. "Schools and School Districts," § 305.

**Presentment of claim.**—Where one who has contracted to teach a district school is not permitted to do so, he may maintain an action for a breach of his contract without first presenting his claim to the board of audit. Oil School Tp. *v.* Marting, 27 Ind. App. 525, 61 N. E. 740.

**A school community** created for a year under a Texas statute (Sayles Annot. Civ. St. art. 3765) is not a corporation, and cannot sue or be sued, nor can its funds be disbursed to pay damages for the school trustees' breach of a contract with a teacher.

is dismissed without a sufficient cause,[42] or without the cause of his dismissal being ascertained and shown in the manner prescribed by statute,[43] as without a hearing.[44] A teacher may recover damages in such a case, although he is offered another school in the district, unless the conditions of such offer are as advantageous and beneficial to him as those under the first contract,[45] particularly where another competent teacher has been previously contracted with for the offered school.[46] But a teacher cannot recover for the breach of an executory contract unless it is so definite as to be capable of specific performance;[47] nor can he recover damages unless, under some statutes, he has first appealed in the manner prescribed by statute from the decision of the school-board dismissing him,[48] or where he has not properly performed his part of the contract,[49] as where he voluntarily abandoned his employment before the end of his term.[50] Where the violation of a contract is by the school officers in their official capacity they are not personally and individually liable therefor,[51] unless they act maliciously.[52] But where a school-board acts beyond the scope of its authority and forcibly prevents a school-teacher from complying with his contract, the members of the board and not the district are liable to the teacher therefor.[53]

(B) *Pleading and Evidence.* In the absence of special statutory provisions, the rules applying in civil actions generally govern questions of pleading [54] and

Fuller *v.* Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

**42.** Doyle *v.* School Directors, 36 Ill. App. 653; Hornbeck *v.* State, 33 Ind. App. 609, 71 N. E. 916 (holding that the abandoning of the control of schools by the board of trustees is such a breach); Wallace *v.* Saline County School Dist. No. 27, 50 Nebr. 171, 69 N. W. 772.

**43.** School Dist. No. 26 *v.* McComb, 18 Colo. 240, 32 Pac. 424.

**44.** Burkhead *v.* Independence School Dist., 107 Iowa 29, 77 N. W. 491; Ridenour *v.* Brooklyn Bd. of Education, 15 Misc. (N. Y.) 418, 37 N. Y. Suppl. 109.

**45.** Sparta School Tp. *v.* Mendell, 138 Ind 188, 37 N. E. 604, holding that it is no defense to an action for a breach of contract of employment that the teacher was offered another school in the same township, unless it appears that the conditions at the latter were such that it would certainly not be discontinued before the other.

**46.** Sparta School Tp. *v.* Mendell, 138 Ind. 188, 37 N. E. 604.

**47.** Fairplay School Tp. *v.* O'Neal, 127 Ind. 95, 26 N. E. 686; Taylor *v.* Petersburg School Town, 33 Ind. App. 675, 72 N. E. 159.

**48.** Kirkpatrick *v.* Liberty Independent School Dist., 53 Iowa 585, 5 N. W. 750; Harkness *v.* Hutcherson, 90 Tex. 383, 38 S. W. 1120; Van Dyke *v.* Lewis County School Dist. No. 77, 43 Wash. 235, 86 Pac. 402; Fitzgerald *v.* Spokane County School Dist. No. 20, 5 Wash. 112, 31 Pac. 427.

**Waiver of defense.**—A teacher's failure to appeal from an order of a school-board dismissing him cannot be urged as a defense on an appeal from an action by the teacher for a breach of his contract. Fitzgerald *v.* School Dist. No. 20, 5 Wash. 112, 31 Pac. 427.

**49.** Scott *v.* Joint School-Dist. No. 16, 51 Wis. 554, 8 N. W. 398.

**50.** Oakes *v.* School Dist. No. 3, 98 Mo. App. 163, 71 S. W. 1060.

**51.** Morrison *v.* McFarland, 51 Ind. 206; Gregory *v.* Small, 39 Ohio St. 346, holding that where the local directors of a subordinate school-district act in good faith in dismissing a teacher on the ground that he has not been employed, they are not personally liable for damages caused by such dismissal.

**52.** Adams *v.* Thomas, 12 S. W. 940, 11 Ky. L. Rep. 701; Burton *v.* Fulton, 49 Pa. St. 151.

**Mere negative evidence of want of probable cause for a removal,** by showing general good conduct and capacity as a teacher, is not sufficient proof of malice in relation to a removal. Burton *v.* Fulton, 49 Pa. St. 151.

**53.** White *v.* Kellogg, 119 Ind. 320, 21 N. E. 901; McCutchen *v.* Windsor, 55 Mo. 149; Oakes *v.* School Dist. No. 3, 98 Mo. App. 163, 71 S. W. 1060; Swartwood *v.* Walbridge, 57 Hun (N. Y.) 33, 10 N. Y. Suppl. 862, holding, however, that a school trustee is not liable as for an assault and battery in using sufficient force to prevent a teacher from entering a school-house and continuing teaching after she has received notice that she was dismissed.

**54.** See Jefferson County School Dist. No. 25 *v.* Stone, 14 Colo. App. 211, 59 Pac. 885; Doyan *v.* Montgomery School Dist. No. 3, 35 Vt. 520, holding that in an action by a school-teacher against a school-district for a breach of his contract of employment, it need not be averred in the declaration that plaintiff had procured from the town superintendent a certificate of qualification as required by statute. And see, generally, PLEADING, 31 Cyc. 1.

**Answer.**— Where a school-teacher who has been dismissed after teaching two months brings suit for a breach of a written contract employing him for eight months, an answer denying that any such contract was ever made, and alleging that the only con-

evidence [55] in an action by a school-teacher to recover damages for a breach of his contract of employment. Thus where there is an admitted written contract of employment, it is not competent to prove that there was a different oral contract embracing the same services.[56] The burden of proving, in such an action, that the teacher did or might have obtained other employment in the same line, and thereby reduced his damages, is on the district.[57]

(c) *Trial.* In accordance with the rules governing trials in civil actions generally,[58] as to whether the rules, for a violation of which a teacher was dismissed, are reasonable or not, is ordinarily a question for the jury,[59] as is also the question of the teacher's incompetency [60] or the existence of other causes for his removal or dismissal.[61]

(d) *Damages Recoverable.* The measure of damages in favor of a teacher, in case of a breach of his contract of employment, is governed by the rules applicable to ordinary contracts of employment,[62] and *prima facie* is the wages agreed to be paid,[63] less what the teacher might by the exercise of reasonable diligence have earned or actually did earn in the same line of employment.[64] If the contract is broken by the district it is the duty of the teacher to use all reasonable diligence to secure other similar employment, so as to mitigate the damages; [65] but he is not required to seek or accept employment in a school or grade lower than that for which he was employed under the first contract,[66] or in a different locality.[67] If he obtains other employment, and earns wages amounting to as much as he could have recovered under his first contract, nominal damages may be recovered.[68]

**5. Compensation [69] — a. Right and Liability in General.** As a general rule a

tract was a written contract for two months, and that defendants have fully complied with the terms of such contract, shows a complete defense. Mann *v.* Le Grand Independent School Dist., 52 Iowa 130, 2 N. W. 1005.

**55.** See School Dist. No. 68 *v.* Allen, 83 Ark. 491, 104 S. W. 172 (evidence held sufficient to sustain verdict for plaintiff); School Dist. No. 27 *v.* Wheat, (Ark. 1904) 78 S. W. 755; Hull *v.* Aplington Independent School-Dist., 82 Iowa 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273 (holding that in an action for a wrongful discharge, evidence that there were good grounds for the discharge is irrelevant as that question is not involved). And see, generally, Evidence, 16 Cyc. 821.

**Admissibility.**— Evidence of general dissatisfaction with a teacher is inadmissible to determine whether he was properly removed, where only unfaithfulness or incompetency will justify such removal. Paul *v.* Hartland School Dist. No. 2, 28 Vt. 575.

**Exhibits.**— Where in an action by a school-teacher to recover for a wrongful dismissal, the complaint alleges that plaintiff appealed to the county superintendent and the superintendent of public instruction and that their decisions were in his favor, and the answer alleges that an alleged breach of the contract by plaintiff was not passed on in either of the appeals, it is not necessary that copies of the decisions on the appeals be attached to the answer. Jackson *v.* Steamboat Rock Independent School Dist., 110 Iowa 313, 81 N. W. 596.

**56.** Mann *v.* Le Grand Independent School-dist., 52 Iowa 130, 2 N. W. 1005.

**57.** School Directors *v.* Kimmel, 31 Ill. App. 537; Carver *v.* Battle Creek Tp. School Dist. No. 6, 113 Mich. 524, 71 N. W. 859.

**58.** See, generally, Trial.

**Harmless error.**— Where the allegations of the complaint as to a teacher's employment are admitted by the answer, proof as to the manner of employment is unnecessary, and errors committed by the court in admitting evidence to prove such employment are immaterial. Fitzgerald *v.* Spokane County School Dist. No. 20, 5 Wash. 112, 31 Pac. 427.

**59.** Roberson *v.* Troutt, 17 Ill. App. 386.

**60.** McCutchen *v.* Windsor, 55 Mo. 149.

**61.** McCutchen *v.* Windsor, 55 Mo. 149.

**62.** Byrne *v.* Struble Independent School Dist., 139 Iowa 618, 117 N. W. 983. See, generally, Damages, 13 Cyc. 1.

**63.** Jackson County School Directors *v* Kimmel, 31 Ill. App. 537.

**64.** Jackson County School Directors *v.* Kimmel, 31 Ill. App. 537.

**65.** Byrne *v.* Struble Independent School Dist., 139 Iowa 618, 117 N. W. 983.

**Breach during vacation.**—Where a teacher's contract is annulled by the school-board during a vacation, and before the time for the commencement of his services, the teacher need not immediately seek other employment, but may insist on the contract and tender his services at the stipulated time. Farrell *v.* Rubicon Tp. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053.

**66.** Byrne *v.* Struble Independent School Dist., 139 Iowa 618, 117 N. W. 983; Farrell *v.* Rubicon Tp. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053.

**67.** Byrne *v.* Struble Independent School Dist., 139 Iowa 618, 117 N. W. 983.

**68.** Doyle *v.* School Directors, 36 Ill. App. 653.

**69. Compensation for attending teachers' institutes** see *supra*, III, H, 1, b.

school-teacher is entitled to the compensation agreed to be paid to him when, and only when, he has been regularly appointed, and has performed his services in at least substantial compliance with the terms of his contract of employment,[70] and with the requirements of the law,[71] and the rules and regulations of the school-board, which either expressly or impliedly are made a part of the contract; [72] and where a district obtains the services of a teacher under a claim of authority to do so, it is estopped to deny its liability therefor.[73] If the contract is an entire one, the teacher must perform services for the entire term,[74] and it has been held that a contract to teach a given number of months at a given rate per month is an entire contract within the meaning of this rule.[75] But if the contract is severable, the teacher may recover for any portion thereof that he has completed.[76] In the absence of waiver, a teacher's contract is, as a general rule, for his personal services, and cannot be fulfilled by a substitute, however competent.[77] A teacher is also entitled to the agreed compensation where, although he does not teach, he, at the instance of the school-board, holds himself

**Effect of closing of school because of contagious disease or destruction of building** see *infra*, III, H, 5, b.

**Exemption of school-teachers' salary** see EXEMPTIONS, 18 Cyc. 1436.

**Garnishment against salaries of teachers and superintendents** see GARNISHMENT, 20 Cyc. 1031.

**Rights under contracts with de facto officers** see *supra*, III, D, 6, h.

**70.** Section Sixteen *v.* Criswell, 6 Ala. 565; Adkins *v.* Mitchell, 67 Ill. 511; Barry *v.* Alsbury, Litt. Sel. Cas. (Ky.) 149.

**A stipulation that the teacher shall teach at a designated place** is a condition, the performance of which, or offer to perform which, the teacher must show before he can recover the compensation agreed on in the contract of employment. Bird *v.* Thornburgh, 1 B. Mon. (Ky.) 4.

**A teacher in a colored school** is entitled to pay for the whole term, where he teaches a full term of other primary schools in the district, although the board of education unlawfully limits the term to a shorter period than that in the other schools. Williams *v.* Fairfax Dist. Bd. of Education, 45 W. Va. 199, 31 S. E. 985.

**The wrongful exclusion of a pupil** from the benefits of a school, by the teacher under the direction of the local directors does not defeat the right of such teacher to his wages, duly certified by such directors. State *v.* Blain, 36 Ohio St. 429.

**As between two teachers** claiming a school fund, one who is employed by a *de facto* officer, and teaches the full term is entitled thereto, as against a teacher who has notice of the first teacher's rights when he accepts employment as a teacher. Lacey *v.* Swango, 57 S. W. 473, 22 Ky. L. Rep. 390. But where the one teacher who has taught does not have a valid contract, and the other who is elected has not taught, neither one is entitled to the fund. Shepard *v.* Gambill, 75 S. W. 223, 25 Ky. L. Rep. 333.

**71.** Noble *v.* White, 77 S. W. 678, 25 Ky. L. Rep. 1282.

**Necessity of certificate or license** see *supra*, III, H, 1, c, (IV).

**That a teacher admits as scholars those not entitled by law** is a good defense to an action by him to recover the amount of a subscription in aid of the common school fund. Chalmers *v.* Stewart, 11 Ohio 386.

**72.** Jacksonville *v.* Akers, 11 Ill. App. 393; O'Connor *v.* Hendrick, 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. N. S. 402 [*affirming* 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161].

**A refusal to comply with a regulation as to the wearing of a religious garb,** after notification thereof, forfeits a teacher's right to further compensation under his contract of employment. O'Connor *v.* Hendrick, 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. N. S. 402 [*affirming* 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161].

**Notice of regulation.**— A teacher's wages cannot be withheld for non-compliance with a regulation of a school-board, made during his employment, where he has not been properly notified of such regulation. Perkins *v.* Green County School Dist. No. 2, 61 Mo. App. 512.

**73.** Hull *v.* Pleasant Valley Dist. Tp., 41 Iowa 494.

**74.** Turner *v.* Baker, 30 Ark. 186; Hill *v.* Balkcom, 79 Ga. 444, 5 S. E. 200 (holding that, in an action on a contract to teach nine months, plaintiff cannot recover if he teaches only eight and one-half months); Clark *v.* Pawlet School Dist. No. 7, 29 Vt. 217 (holding that where a teacher contracts to keep a school for a certain term, and leaves without sufficient cause before the term is out, he can recover nothing for his services up to the time of leaving); Kimball *v.* Spokane County School Dist. No. 122, 23 Wash. 520, 63 Pac. 213.

**75.** Turner *v.* Baker, 30 Ark. 186.

**76.** Hill *v.* Balkcom, 79 Ga. 444, 5 S. E. 200.

**77.** School Directors *v.* Hudson, 88 Ill. 563.

**That a teacher permits some of the older pupils to hear classes** does not justify the school-board in withholding his wages, where it is not against the rules of the school-board, and is necessary owing to the crowded condi-

in readiness to perform his duties,[78] and where actual performance is prevented by some wrongful act or omission on the part of the school authorities.[79] A teacher's right to compensation in accordance with the terms of his contract is not affected by the neglect or refusal of parents to send their children to his school,[80] by the fact that he knew that the title of the officers who employed him was in dispute,[81] or by the fact that he is employed by the officers of a district which is afterward consolidated with another district.[82] But a teacher is not entitled to compensation under an illegal contract,[83] as under a contract which he induced by fraudulent representations; [84] nor is he entitled to be paid from public funds for teaching a private school.[85] The liability for a teacher's compensation is generally upon the board, officers, or corporation which is charged with the duty of supporting the schools.[86]

**b. Effect of Closing School Because of Contagious Disease, or Destruction of School Building.** While a school-district may be relieved from liability for compensation to a teacher during the time the school-house is closed by an act of God or of the public enemy, which renders performance of the contract impossible,[87] as a general rule it is held that a contagious disease or the destruction of a school building is not such an act within the meaning of the school law, and that where a teacher is ready and offers to continue his duties under his contract of employment, no deduction can be made from his salary for the time that the school is closed by reason of a contagious disease,[88] or by reason of the destruction of the school building,[89] or by its becoming in a condition unfit for school

tion of the school. Perkins *v.* Green County School Dist. No. 2, 61 Mo. App. 512.

**78.** Singleton *v.* Austin, 27 Tex. Civ. App. 88, 65 S. W. 686 (holding that where an assistant teacher duly employed reports for duty under his contract, but is told that the daily attendance is under the statutory number permitting an assistant, but to hold himself in readiness, which he does, he is entitled to payment, although he has never taught in the school); Randolph *v.* Sanders, 22 Tex. Civ. App. 331, 54 S. W. 621.

**79.** Charlestown School Tp. *v.* Hay, 74 Ind. 127. And see *infra*, III, H, 5, c.

**80.** Doyle *v.* School Directors, 36 Ill. App. 653.

**81.** Davis *v.* Connor, 52 S. W. 945, 21 Ky. L. Rep. 658, holding that the fact that a teacher employed by the lawful trustees of a school-district knew that the title of such trustee was in dispute does not estop him to assert a claim for his services.

**82.** Sproul *v.* Smith, 40 N. J. L. 314, holding that since the new district has become entitled to all the property, rights, and assets of the old districts, it is also liable to all just claims against such districts.

**83.** Galentine *v.* Washington Dist. Tp., (Iowa 1900) 82 N. W. 993; Skinner *v.* Bateman, 96 N. C. 5, 1 S. E. 538.

**84.** Connor *v.* Lasseter, 98 Ga. 708, 25 S. E. 830.

**85.** Ussery *v.* Laredo, 65 Tex. 406, holding that unless a school is made a public school by the common law, its teachers are not entitled to be paid from the public funds.

**86.** Norton *v.* Soule, 75 Me. 385 (holding that except perhaps in the case of school-districts maintaining graded schools towns alone are responsible for the support of schools and liable for the payment of teachers); Clark *v.* Great Barrington, 11 Pick. (Mass.) 260 (town); Stebbins *v.* Columbia School Dist., 16 N. H. 510; Tolman *v.* Marlborough, 3 N. H. 57.

**87.** See Carthage School Town *v.* Gray, 10 Ind. App. 428, 37 N. E. 1059; Dewey *v.* Alpena School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206; Sherman County School Dist. No. 16 *v.* Howard, 5 Nebr. (Unoff.) 340, 98 N. W. 666; McKay *v.* Barnett, 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371.

**88.** Carthage School Town *v.* Gray, 10 Ind. App. 428, 37 N. E. 1059; Libby *v.* Douglas, 175 Mass. 128, 55 N. E. 808; Randolph *v.* Sanders, 22 Tex. Civ. App. 331, 55 S. W. 621 (holding that where city schools are suspended during an epidemic, and a teacher complies with a notice to keep himself ready for work when they resume, which might occur at any time, his services are rendered within the meaning of his contract to teach during the scholastic year, and within the meaning of an ordinance requiring their rendition before warrants may issue to pay therefor); McKay *v.* Barnett, 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371 (holding that the temporary closing of the schools by a board of education during an epidemic of smallpox, although it may be a wise precaution, does not release the school-board under the contract, or change its obligation).

**An act of God that** will excuse the performance of a contract must be one which renders performance impossible, so that where schools are suspended because of smallpox. the teacher, remaining ready to perform his contract, is not by reason of such suspension precluded from his right to compensation during the period of suspension. Dewey *v.* Alpena School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206.

**89.** School Directors *v.* Crews, 23 Ill. App. 367; Charlestown School Tp. *v.* Hay, 74 Ind.

purposes,[90] unless there is a stipulation in the contract of employment covering such a possible occurrence,[91] or unless it is closed by authority of the law.[92]

**c. Effect of Removal or Dismissal.** Where a teacher is lawfully and regularly removed or dismissed, he is entitled to no compensation for services rendered in teaching thereafter in defiance of such removal or dismissal,[93] nor to the price agreed to be paid, for the balance of the unexpired term;[94] nor can a teacher recover compensation on his contract of employment if he voluntarily abandons his position.[95] But where a teacher is wrongfully removed or dismissed, and he holds himself in readiness to teach at all times before his contract expires, and is unable to obtain other employment, he is entitled to recover the agreed compensation for the remainder of the term contracted for,[96] notwithstanding another

127; Smith *v.* Pleasant Plains School-Dist. No. 2, 69 Mich. 589, 37 N. W. 567; Cashen *v.* Berlin School Dist. No. 12, 50 Vt. 30. But see Hall *v.* School Dist. No. 10, 24 Mo. App. 213, holding that where a teacher is employed to teach in a school for a certain term, upon the burning of the school building by an inevitable accident, before the expiration of the term, the district's liability under the contract ceases, since the parties must have contemplated the continued existence of the school-house during the stipulated period as the basis of the teaching during such time.

**Neither party** to a contract between a school-board and teacher, whereby the latter is employed to teach a certain school upon a named salary, is discharged from observing the conditions thereof by reason of the destruction of the school-house, in the absence of any provision touching such a possible occurrence. Corn *v.* Mt. Vernon Bd. of Education, 39 Ill. App. 446.

**The inability of the school-board to procure another building** for school purposes will not absolve it from liability for salary to a teacher who is ready and offers to continue his duties under the contract. Corn *v.* Mt. Vernon Bd. of Education, 39 Ill. App. 446.

90. Bromley *v.* Tinmouth School Dist. No. 5, 47 Vt. 381.

91. Goodyear *v.* Jackson County School Dist. No. 5, 17 Oreg. 517, 21 Pac. 664, holding that where, under a contract between a teacher and a school-district, there is a clause to teach a definite period, unless the school is discontinued by order of the directors, who in consequence of the prevalence of diphtheria stop the schools, but reopen them when the danger is passed, and before the expiration of the contract, such discontinuance is authorized under the contract, and relieves the district from liability during such period, but not from liability for the unexpired term of such contract after the schools are reopened.

**A stipulation to pay a teacher certain wages, "for the time actually occupied in school," merely** prohibits the teacher from drawing his salary during vacation, or during the time when he might be excusably absent, or temporarily unable to discharge his duties, and does not apply to such time as the district might arbitrarily prevent plaintiff from performing his duties without discharging him under the contract. McKay *v.* Barnett, 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371.

92. Sherman County School Dist. No. 16 *v.* Howard, 5 Nebr. (Unoff.) 340, 98 N. W. 666. See also Roberts *v.* Falmouth Sanitary Authority, 52 J. P. 741.

93. *Delaware.*— New Castle County School Dist. No. 7 *v.* Walker, 2 Houst. 21.

*Georgia.*— Pierce *v.* Beck, 61 Ga. 413, holding that where a teacher who is dismissed for cause takes forcible possession of a school-house and continues to teach, he is not entitled to any compensation from the time of his dismissal.

*Illinois.*— Stewart *v.* School Directors, 24 Ill. App. 229, holding that where school directors make a written contract to employ a teacher for four months promising at the same time to give him another month if he gives satisfaction, there is no definite contract for the additional month, and the fact that after being notified that he is not wanted for the fifth month he continues to teach without the consent of the directors, gives him no right of recovery.

*Maine.*— Woodbury *v.* Knox, 74 Me. 462, holding that a teacher cannot recover for his services as a teacher rendered after being notified of his dismissal.

*Massachusetts.*— Wood *v.* Medfield, 123 Mass. 545; Knowles *v.* Boston, 12 Gray 339.

See 43 Cent. Dig. tit. "Schools and School Districts," § 310.

**Personal liability of officer.**— Where a subschool director enters into a written contract of employment with a teacher, who has no certificate and the contract is not approved by the president of the board and he is notified to stop teaching, such subschool director is not individually liable for his services. Slone *v.* Berlin, 88 Iowa 205, 55 N. W. 341.

94. Bourbon County School Dist. No. 23 *v.* McCoy, 30 Kan. 268, 1 Pac. 97, 46 Am. Rep. 92; McCrea *v.* Pine Tp. School-Dist., 145 Pa. St. 550, 22 Atl. 1040 (holding that where a school-board in good faith dismisses a teacher for incompetency, he cannot recover his salary for the entire term on the ground that the dismissal was without cause); Morley *v.* Power, 10 Lea (Tenn.) 219.

95. Frazier *v.* Saline County School Dist. No. 1, 24 Mo. App. 250.

96. *Colorado.*— School Dist. No. 3 *v.* Hale, 15 Colo. 367, 25 Pac. 308, holding also that

teacher is employed in his place.[97] Where, however, a teacher is reinstated before the expiration of his term of employment he is entitled to recover for the period subsequent to his reinstatement only upon his performing or offering to perform his contract during that time.[98] Where a teacher who has been irregularly dismissed continues in the school with the assent of a majority of a school-board, it is a waiver of such dismissal and a satisfaction of the original employment.[99]

**d. Amount or Rate** [1] — (i) *IN GENERAL.* The amount or rate of compensation which a teacher or school superintendent is entitled to receive for his services generally depends upon the terms of the contract under which he is employed,[2] and upon the provisions of the statute governing his employment.[3] Where the contract is for a gross sum for the entire session, and without any fault on the teacher's part some act is done which entitles him to consider the contract as rescinded, he is entitled to recover the whole stipulated sum.[4] But where a teacher renders services under a contract which is not in writing, as required by statute,[5] where there is no stipulation as to compensation,[6] or where there is no express contract but the district receives the benefit of his services,[7] he is entitled to recover only the reasonable value of his services; and it has also been held that a teacher employed for a definite time who voluntarily breaks his engagement after teaching part of the time may recover on a *quantum meruit* for services rendered.[8]

the teacher need not show an appeal to the county superintendent, as a condition precedent to his right of action.

*Iowa.*— Park *v.* Des Moines County Independent School Dist. No. 1, 65 Iowa 209, 21 N. W. 567.

*Maryland.*— Underwood *v.* Prince George County School Com'rs, 103 Md. 181, 63 Atl. 221.

*New York.*— Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 [*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734, and *affirmed* in 165 N. Y. 431, 59 N. E. 300].

*Canada.*— McPherson *v.* Usborne School Section No. 7, 1 Ont. L. Rep. 261.

See 43 Cent. Dig. tit. "Schools and School Districts," § 310.

**Necessity for reinstatement.**— A teacher in the employment of the board of education of the city of New York does not hold a public office, requiring him to be reinstated to the position from which he has been removed to recover his compensation, since if his employer refuses to permit him to work he need only offer his services from time to time and then sue for his salary. Steinson *v.* New York Bd. of Education, 49 N. Y. App. Div. 143, 63 N. Y. Suppl. 128 [*reversing* 27 Misc. 687, 58 N. Y. Suppl. 734, and *affirmed* in 165 N. Y. 431, 59 N. E. 300].

**97.** Underwood *v.* Prince George County School Com'rs, 103 Md. 181, 63 Atl. 221.

**98.** Park *v.* Des Moines County Independent School Dist. No. 1, 65 Iowa 209, 21 N. W. 567; Kellison *v.* Cascade County School Dist. No. 1, 20 Mont. 153, 50 Pac. 421, holding that a school-teacher who has been employed by a board of school trustees for a definite period, and who has been dismissed for improper conduct, which sentence of dismissal is subsequently reversed, is entitled to recover the amount due him under his contract from the date of the reversal until the date fixed for the termination of his contract, but not for the time between the date of his dismissal and the date of the reconsideration thereof.

**99.** Finch *v.* Cleveland, 10 Barb. (N. Y.) 290.

**1. Authority to fix compensation** see *supra*, III, H, 3, a, (v).

**2.** Case *v.* Missoula County School Dist. No. 3, 14 Mont. 138, 35 Pac. 906 (holding that where a person is engaged as "supply teacher" at seventy dollars per month, the contract cannot be construed as a contract by which he is to receive a salary of seventy dollars per month for the entire term without regard to whether he actually renders any services or not, but rather that he is to be paid for the time he teaches at the rate of seventy dollars per month); Wichita School Dist. *v.* Hickey, 3 Tex. App. Civ. Cas. § 280.

**3.** Dickey County *v.* Denning, 14 N. D. 77, 103 N. W. 422 (holding that under Rev. Codes (1899), § 652, providing a graduated salary for county superintendents of schools, corresponding to the number of schools or departments of graded schools under their official supervision, schools in special districts are not to be included in computing their salary); Geddes *v.* Bombauch, 14 Haz. Reg. (Pa.) 347.

**4.** Sprague *v.* Morgan, 7 Ala. 952.

**5.** Jones *v.* Neosho County School Dist. No. 47, 8 Kan. 362.

**6.** Morris *v.* New York Bd. of Education, 54 Misc. (N. Y.) 605, 104 N. Y. Suppl. 979 [*affirmed* in 124 N. Y. App. Div. 921, 108 N. Y. Suppl. 1141].

**7.** Offut *v.* Bourgeois, 16 La. Ann. 163; Scott *v.* Williamstown School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

**8.** Riggs *v.* Horde, 25 Tex. Suppl. 456, 78 Am. Dec. 584.

**The measure of damages** in such a case is the actual value of the teacher's services for the time, not to exceed the contract price. Riggs *v.* Horde, 25 Tex. Suppl. 456, 78 Am. Dec. 584.

The fact that a teacher fails to teach for a short time, for a sufficient reason and to the satisfaction of the school-board, does not defeat his right to recover for the time he actually serves, but he is entitled to recover for such time at the rate agreed upon for the entire time.[9] Under some statutes it is provided that the salary of a teacher shall not be either increased or diminished during the term for which he is appointed;[10] and that a teacher of a certain grade or position shall not receive less than a given salary;[11] but in order that a teacher may be entitled to the salary of a certain grade or position his appointment thereto must be permanent, and a designation to act temporarily in such a position is not sufficient;[12] and on the other hand a teacher's statutory right to a salary of a certain grade is not affected by his temporarily teaching in another grade,[13] and is not waived by his merely accepting and receipting for salary at a lower rate;[14] but it is waived by his demanding and drawing pay, and receipting in full after reassignment to another position in which he receives higher pay.[15] The charter of the city of Greater New York makes full provision in regard to the salaries of teachers in public schools in that city.[16]

(II) *HOLIDAYS AND VACATIONS.* As a general rule a teacher's contract for a stated period is subject to the observance of recognized holidays and vacations, and there should be no deduction for such occasions from the teacher's wages,[17]

9. Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487.

10. Pierce *v.* West Loveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 648, 1 Ohio N. P. 286.

11. Hazen *v.* New York Bd. of Education, 127 N. Y. App. Div. 235, 111 N. Y. Suppl. 337.

12. Hazen *v.* New York Bd. of Education, 127 N. Y. App. Div. 235, 111 N. Y. Suppl. 337; Hoefling *v.* New York Bd. of Education, 120 N. Y. App. Div. 545, 104 N. Y. Suppl. 941 (holding that where a teacher acts as principal but is not appointed to the position in compliance with the statute, he is not entitled to the salary of a principal); Wood *v.* New York Bd. of Education, 59 Misc. (N. Y.) 605, 112 N. Y. Suppl. 578.

13. Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105].

14. Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105].

15. Sheehan *v.* New York Bd. of Education, 120 N. Y. App. Div. 557, 104 N. Y. Suppl. 1002 [*affirmed* in 193 N. Y. 627, 86 N. E. 1133].

16. See Greater New York Charter, § 1091. See also McCabe *v.* Cook, 29 Misc. (N. Y.) 679, 61 N. Y. Suppl. 588; and New York cases cited in preceding notes 6–15.

**The Greater New York Charter, § 1091,** empowers the city board of education to adopt by-laws fixing a uniform schedule of salaries for all teachers in the common schools in their respective grades, without reducing existing salaries, and was intended to bring about a uniformity of salaries immediately, or so soon as it could be accomplished without reducing salaries, and hence where a board adopts a schedule fixing the minimum and maximum salaries of a certain grade and providing for a certain annual increase until the maximum is reached, a teacher of that grade whose salary exceeds the minimum is not entitled to the prescribed annual increase until other salaries in the same grade by such increase equals his, after which he is entitled to the increase with the others. McHench *v.* New York Bd. of Education, 127 N. Y. App. Div. 294, 111 N. Y. Suppl. 303. It has also been held under such statute that the salaries existing at the time of the passage of the act, when above the minimum required by the appropriate schedule, shall so continue until the end of the school year, at which time a teacher is entitled to be increased in accordance with the schedule applicable to the class of teachers to which he belongs (Loewy *v.* New York Bd. of Education, 59 Misc. (N. Y.) 70, 112 N. Y. Suppl. 4); and that, although such statute provides that no salary shall be reduced by the operation of the act, it does not preclude the city board of education from reducing the salary of a teacher to the minimum prescribed (Buckbee *v.* New York Bd. of Education, 115 N. Y. App. Div. 366, 100 N. Y. Suppl. 943 [*reversing* 51 Misc. 295, 100 N. Y. Suppl. 1063, and *affirmed* in 187 N. Y. 544, 80 N. E. 1106]).

**A teacher in an evening school** is not within the meaning of the statute fixing the minimum salary of a day school teacher, but is employed to perform services for such compensation as is fixed in his contract, and in the absence of any agreement as to compensation can only recover what his services are reasonably worth; and where he has been employed at a stated salary, the board of education may, by a unanimous vote, reduce his salary, and if both parties enter into the contract with knowledge of the powers of the board, the teacher cannot complain of such a reduction. Morris *v.* New York Bd. of Education, 54 Misc. (N. Y.) 605, 104 N. Y. Suppl. 979 [*affirmed* in 108 N. Y. Suppl. 1141].

17. Holloway *v.* Ogden School Dist. No. 9,

and the same rule applies in regard to special vacations ordered by the school-board.[18]

e. **Payment and Vouchers or Orders.**[19] Where a teacher has properly earned his right to compensation, and his claim therefor has been properly presented and audited, it is the duty of the proper officer of the district to draw an order or warrant therefor,[20] and of the disbursing officer of the district to pay such claim, if there are funds in the district treasury applicable thereto.[21] But as a general rule the district cannot be compelled to pay a school order or warrant for a teacher's compensation, if the funds applicable thereto have become exhausted before the presentation of the order,[22] although it has been held that in such a case the surplus of funds apportioned to other teachers may be used in paying teachers whose apportionment has become exhausted.[23] The manner of paying a teacher's compensation ordinarily depends upon the terms of the statute relative thereto,[24] as in regard to the issuing of vouchers, orders, or warrants therefor,[25] and the approval thereof,[26] and in regard to the fund out of which

62 Mich. 153, 28 N. W. 764; Marathon Tp. School Dist. No. 4 *v.* Gage, 39 Mich. 484, 33 Am. Rep. 421.

18. Emporia Bd. of Education *v.* State, 7 Kan. App. 620, 52 Pac. 466 (holding that unless it clearly appears that a board of education of a city abuses its discretion in giving a two days' vacation at Thanksgiving, no deduction from the teacher's salary should be made therefor, and that an injunction will not lie to compel them to make such a deduction); Pittsburg Cent. Bd. of Education *v.* Stephenson, 16 Wkly. Notes Cas. (Pa.) 124.

19. Interest on orders see *supra*, III, F, 2, d, (VI).

20. State *v.* Blain, 36 Ohio St. 429 (holding that a township clerk to whom application is duly made by a teacher for an order on the township treasury for the amount of his wages, duly certified by the local directors, cannot refuse to draw such order on the ground that the contract of employment between the teacher and the local directors wrongfully stipulated for the exclusion from the school of certain youths of school age residing in the school-district); Morley *v.* Power, 10 Lea (Tenn.) 219.

21. State *v.* Zeeb, 9 Ohio Cir. Ct. 13, 6 Ohio Cir. Dec. 70 (holding that a township treasurer may be compelled by mandamus to pay an order for salary out of common school moneys coming into his hands and apportionable to the subdistrict where the relator taught); Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607. See also Munson *v.* Collingwood, 9 U. C. C. P. 497.

**Rights of assignee.**— A recovery may be had on a school claim by a person to whom a teacher has assigned it, as well as by the teacher himself. Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

**The fact that a teacher exacts extra compensation from the parents of children** does not justify the school officers in refusing payment of a warrant drawn in favor of such teacher, although it may be ground for complaint to the directors as against such teacher. Miahle *v.* Fournet, 13 La. Ann. 607.

22. Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250; Saunders *v.* State, 2 Ohio Cir. Ct. 475, 1 Ohio Cir. Dec. 596, holding also that the amount of funds apportioned to any subdistrict for school purposes in any one year cannot be increased or diminished by reason of any default or surplus in the funds previously appropriated to that district or to any other subdistrict. But *compare* Harrison School Tp. *v.* McGregor, 96 Ind. 185.

23. Bell *v.* Kuykendall, 3 Tex. Civ. App. 209, 22 S. W. 112.

24. See Knox *v.* Woods, 8 Cal. 545; King *v.* Barker, 28 Ga. 293; Johnson *v.* Governor, 17 Ga. 179; Bailey *v.* Philadelphia, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. Rep. 691; Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

**Time of payment.**— Directions in a school law in relation to the distribution of the school fund among the teachers on certain specified dates are mandatory. Thomas *v.* Township Thirteen, 16 Ill. 163.

25. Williams *v.* Bagnelle, 138 Cal. 699, 72 Pac. 408, (1902) 70 Pac. 1058.

**Directory provision.**—A requirement that a warrant for the salary of any teacher shall be accompanied by a statement of the number of pupils taught is directory merely, and such statement is not a necessary adjunct of the warrant. Miahle *v.* Fournet, 13 La. Ann. 607.

**Order as payment.**— An order drawn in favor of a teacher by the proper school-board on the treasurer thereof and delivered to the teacher is a payment of the salary for the month for which it is drawn. Seymour *v.* Over-River School Dist., 53 Conn. 502, 3 Atl. 552.

26. Carviel *v.* Coleman, 72 Tex. 550, 10 S. W. 679; Bell *v.* Kuykendall, 3 Tex. Civ. App. 209, 22 S. W. 112.

**The fact that a teacher had been previously paid for a month during which he did not teach** does not justify a refusal by the county superintendent to approve a check or warrant legally drawn and approved by the school trustees, for a month during which he actually taught, but for which he was not paid.

such compensation must be paid,[27] and upon which the warrant or order must be drawn.[28] The payment of money by a school-district to its agent to be turned over to a teacher does not discharge the district's liability to the teacher, if such agent appropriates such money to his own use;[29] but where, there being no funds in the district treasury, the general official agent of the district in good faith pays a teacher his compensation out of his own private funds, although without the direction or knowledge of the district, the district may rely upon such payment as against the teacher.[30]

**f. Necessity of Returning Schedules, Reports, or School Registers.** It is required under some statutes that a school-teacher must keep and file in a prescribed manner and form and with certain school authorities a schedule, report, or register showing the attendance of pupils at his school, etc., before he is entitled to be paid his compensation,[31] or a certain portion thereof;[32] and even where a teacher is entitled to a certain per cent of his wages without such schedule or report he may by his contract of employment make the filing of such schedule or report a condition precedent to his recovering anything.[33] The duty of making such a schedule or report is one which from its nature cannot be performed except by one who is actually engaged in teaching,[34] and a school-board cannot waive the performance of this duty,[35] and if it pays out money of the district to a teacher who has not filed a report or schedule, the school-district may maintain an action against the board to recover back such money.[36] But a teacher is entitled to his

Devine *v.* McBride, (Tex. Civ. App. 1896) 35 S. W. 317.

**27.** See Morley *v.* Power, 10 Lea (Tenn.) 219.

**Repeal of statute** see Arrington *v.* Cotton, 1 Baxt. (Tenn.) 316.

**28.** State *v.* Thompson, 64 Mo. 26, holding that warrants for the payment of teachers of both white and colored schools of a certain district were properly drawn upon the teachers' fund of such district.

**29.** Clark *v.* Great Barrington, 11 Pick. (Mass.) 260; Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607, holding that the fact that a county has collected and placed in the hands of its treasurer a sum sufficient to pay the claims of teachers does not operate as a payment of them, or relieve the county from the obligation to raise more money to pay them, if that placed with the treasurer for that purpose is by him appropriated to some other purpose.

**Liability of surety.**— The fact that a county treasurer who has defaulted turns over special school funds to one of the sureties on his general bond is not sufficient of itself to fix liability on that surety, and to defeat a suit against the county by that surety and others not sureties as assignees of school claims. Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

**30.** Edson *v.* Sprout, 33 Vt. 77.

**31.** See the statutes of the several states; and the following cases:

*Illinois.*— Adkins *v.* Mitchell, 67 Ill. 511; Cotton *v.* Reed, 20 Ill. 607; Robinson *v.* District No. 4 School Directors, 96 Ill. App. 604; District No. 6 School Directors *v.* Greenville First Nat. Bank, 3 Ill. App. 349.

*Maine.*— Brown *v.* Chesterville, 63 Me. 241.

*Maryland.*—Allegany County School Com'rs *v.* Adams, 43 Md. 349, holding that the duty of making reports to the board of county school commissioners of the attendance of pupils, of the text-books used, and branches taught, is imposed upon all teachers, and from which the principal of a public school is not exempt.

*Massachusetts.*— Jewell *v.* Abington, 2 Allen 592.

*Montana.*— Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

*New Hampshire.*— Moultonborough School Dist. *v.* Tuttle, 26 N. H. 470.

*Vermont.*— Scott *v.* Williamstown School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588; Scott *v.* Fairfax School Dist. No. 2, 46 Vt. 452; Wells *v.* Granby School Dist. No. 2, 41 Vt. 353. But see Crosby *v.* Readsboro School Dist. No. 9, 35 Vt. 623.

See 43 Cent. Dig. tit. "Schools and School Districts," § 314.

**Sufficiency of report.**— A teacher whose report is not signed, and is otherwise defective and not such as the law requires, is not entitled to compensation. Moultonborough School Dist. *v.* Tuttle, 26 N. H. 470.

**Evidence.**— Where it appears that a proper report has not been made, a certificate of a superintending committee that a teacher has made a report is not competent evidence to show that he has done so. Moultonborough School Dist. *v.* Tuttle, 26 N. H. 470.

**32.** Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220.

**33.** Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220, holding also that the burden of showing compliance with such condition is upon the teacher.

**34.** Allegany County School Com'rs *v.* Adams, 43 Md. 349.

**35.** Jewell *v.* Abington, 2 Allen (Mass.) 592.

**36.** Moultonborough School Dist. *v.* Tuttle, 26 N. H. 470.

compensation notwithstanding he fails to deliver his schedule or report, where he offers to do so but the district clerk refuses to receive it,[37] or where compliance with the statute is rendered impossible by reason of some wrongful act on the part of the district board in breaking up the school or otherwise terminating the contract of employment.[38] Where a teacher properly keeps and returns his register he is entitled to his compensation, notwithstanding the district clerk refuses to give him a receipt for it.[39]

**g. Actions For Compensation** [40] — (i) *In General.* As a general rule, where a teacher properly presents and demands payment of a claim, order, or warrant for his compensation, which is refused, he may maintain an action of assumpsit against the district upon such order or warrant,[41] or for the balance due him,[42] although he also has a remedy by mandamus against the officer who refuses payment, to compel him to pay the order;[43] but it has been held that where the officer refusing such payment has money in his hands applicable to the payment of the order the proper remedy is by mandamus.[44] But a teacher cannot sue legally elected school officers on a contract made by him with officers illegally elected.[45] Before a teacher may maintain an action for his compensation all prescribed conditions precedent must have been complied with.[46] Where a teacher's schedule or report does not comply with the statute, by reason of some neglect of duty on the part of the school authorities, he cannot maintain a bill in equity to recover his compensation;[47] but his remedy, if any, is by mandamus to compel such authorities to perform their duties.[48]

(ii) *Parties.*[49] An action by a school-teacher for his compensation should be against either the district[50] or against the school-board, in its corporate capacity, which has the control and management of school affairs and is liable to him for his compensation.[51]

**37.** School Directors *v.* Mae Sprague, 78 Ill. App. 390.

**38.** School Directors *v.* Crews, 23 Ill. App. 367 (holding that where a school is broken up because of the failure of the school-board to furnish another room, upon the destruction of the school-house by fire, the teacher may recover under his contract, although he has not kept and cannot furnish a schedule); Rudy *v.* Poplar Bluff School Dist., 30 Mo. App. 113; Scott *v.* Fairfax School Dist. No. 2, 46 Vt. 452 (holding that where a school-teacher after teaching a couple of weeks leaves the school in consequence of the unjustifiable conduct of the school-committee, being prevented, without any fault on his part, from teaching to the close of the term, the fact that he has not made entries in the school register as required by law at the close of the school does not prevent a recovery of his wages).

**39.** Cobb *v.* Pomfret School Dist. No. 1, 63 Vt. 647, 21 Atl. 957.

**40. Mandamus as remedy to compel payment** see MANDAMUS, 26 Cyc. 286.

**Arbitration** as a remedy to a teach to recover his compensation see Birmingham *v.* Hungerford, 19 U. C. C. P. 411; Milne *v.* Sylvester, 18 U. C. Q. B. 538; Tierman *v.* Nepean School Trustees, 14 U. C. Q. B. 15.

**41.** McCasky *v.* Centre Tp. School Dist. No. 1, 2 Greene (Iowa) 482; Martin *v.* Elwood, 35 Minn. 309, 29 N. W. 135.

**Where an order is accepted without authority** by the treasurer of the district, an action will not lie against the district upon such order. Smith *v.* Collingwood, 19 U. C. Q. B. 259.

**42.** Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105], holding that a school-teacher after retirement, without having been removed or reduced in rank, may maintain an action at law to recover the balance due him on his salary.

**43.** Martin *v.* Elwood, 35 Minn. 309, 29 N. W. 135.

**44.** Howard *v.* Bamford, 3 Oreg. 565. And see, generally, MANDAMUS, 26 Cyc. 286.

**45.** Meadows *v.* Nesbit, 12 Lea (Tenn.) 486.

**46.** Philadelphia *v.* Johnson, 47 Pa. St. 382, holding that a suit brought against the city of Philadelphia, under the act of March 4, 1861, by a teacher for his salary before a schedule of salaries has been adopted by the controllers of public schools, is prematurely brought and cannot be sustained.

**47.** Cotton *v.* Reed, 20 Ill. 607.

**48.** Cotton *v.* Reed, 20 Ill. 607. And see, generally, MANDAMUS, 26 Cyc. 286.

**49. Parties** generally see PARTIES, 30 Cyc. 1.

**50.** Ross *v.* Allen, 10 N. H. 96.

**51.** See Ross *v.* Allen, 10 N. H. 96.

**In New York city,** under the Greater New York Charter, an action to recover a teacher's salary must be brought against the board of education and not against the city, and a further provision in such charter that all suits against the city of New York, or against any corporations united therewith.

(III) *PLEADING.* The rules applicable to civil actions generally apply in actions by school-teachers for the recovery of their compensation in regard to matters of pleading.[52] Thus a teacher, in his complaint, petition, or declaration, should clearly and definitely allege all facts showing the existence of a valid contract of employment,[53] the performance of his duties under the contract, or that he was prevented by the school officers from performing them, without cause,[54] as that he properly kept and returned a schedule or report as required by statute,[55] and that defendant neglected and refused to pay him.[56] Plaintiff, however, need not aver specifically that he has performed each act and duty required to be done and performed in the discharge of his duties as teacher,[57] but any failure on his part so to do should be set up in the answer as a defense;[58] nor need plaintiff otherwise anticipate or allege matters of defense.[59] Where the statute requires that a teacher shall possess a certificate of qualification at the time of his employment as a condition precedent to his right to recover compensation for his services,[60] the facts necessary to constitute a compliance with the statute in this respect must be distinctly and affirmatively alleged and proved by the teacher, in an action by him to recover compensation for his services,[61] and the petition or complaint cannot be aided in this regard by a copy of the contract of employment in

shall be brought in the corporate name, does not preclude a suit for a teacher's salary against the city board of education. Gunnison *v.* New York Bd. of Education, 176 N. Y. 11, 68 N. E. 106 [*affirming* 80 N. Y. App. Div. 480, 81 N. Y. Suppl. 181].

In Ohio a teacher who has been employed by the directors of a subdistrict of a township may sue the township board of education for an unpaid balance of his salary. Symmes Tp. Bd. of Education *v.* O'Hara, 7 Ohio Dec. (Reprint) 312, 2 Cinc. L. Bul. 96.

52. See, generally, PLEADING, 31 Cyc. 1.

In an action by a teacher to enforce personal responsibility against the treasurer of a school-district for money in his hands belonging to the district and appropriated to the payment of teacher's wages, the complaint should allege that such treasurer had money in his hands at the time the order was presented sufficient to pay it and applicable to the purpose; and an amendment may be made by inserting such an allegation. Edson *v.* Hayden, 18 Wis. 627.

53. See Crawfordsville *v.* Hays, 42 Ind. 200; Quin *v.* Seymour School Trustees, 7 U. C. Q. B. 130.

An allegation that plaintiff and defendant "entered into an agreement in writing" implies that the statutory directions as to the way and manner in which it was to be entered into on the part of the district have been complied with. Ryan *v.* Dakota County School-Dist. No. 13, 27 Minn. 433, 8 N. W. 146.

54. Henry School Tp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393.

55. Owen School Tp. *v.* Hay, 107 Ind. 351, 8 N. E. 220, complaint held sufficient as against a motion to arrest judgment.

56. Ellis *v.* Sharp, 42 Hun (N. Y.) 179, holding that an allegation that defendant had "neglected and refused to pay" the wages is equivalent to an averment of a refusal to give an order for public money, or of a refusal or neglect to collect any balance by tax, and hence is sufficient on demurrer, although such averments are not specifically made.

57. Ellis *v.* Sharp, 42 Hun (N. Y.) 179.

58. Ellis *v.* Sharp, 42 Hun (N. Y.) 179.

59. Section Sixteen Com'rs *v.* Criswell, 6 Ala. 565.

As to sufficiency of funds.— A complaint by a teacher to recover money due under a contract need not allege that defendant had the money in his hands with which to pay plaintiff, for if by reason of any deficiency there is not money enough to pay him, such fact would be defensive matter to be pleaded. Gay *v.* Bankston, 100 Ala. 280, 13 So. 939; Harmony School Tp. *v.* Moore, 80 Ind. 276.

60. See *supra*, III, H, 1, c, (IV).

61. Stevenson *v.* District No. 1 School Directors, 87 Ill. 255; Botkin *v.* Osborne, 39 Ill. 101; Smith *v.* Curry, 16 Ill. 147; Casey *v.* Baldridge, 15 Ill. 65; Stanhope *v.* School Directors, 42 Ill. App. 570; Hamrick *v.* Wellington Bd. of Education, 28 Kan. 385; Ryan *v.* Dakota County School-Dist. No. 13, 27 Minn. 433, 8 N. W. 146; Jenness *v.* Washington County School Dist. No. 31, 12 Minn. 448.

A general allegation that a teacher is legally or lawfully qualified is not sufficient. Casey *v.* Baldridge, 15 Ill. 65; Stanhope *v.* School Directors, 42 Ill. App. 570; Jackson School Tp. *v.* Farlow, 75 Ind. 118. But see Goetz *v.* Stearns County School-Dist. No. 59, 31 Minn. 164, 17 N. W. 276 [*distinguishing* Ryan *v.* Dakota County School-Dist. No. 13, 27 Minn. 433, 8 N. W. 146], holding that an allegation that plaintiff is "a duly qualified teacher of and in the public schools of said state" includes the fact that he has received the certificate required by statute to entitle him to teach in such school.

A failure to state the date of the certificate in the complaint or petition is immaterial, where it appears that it was issued before the date of the contract declared on. Hamrick *v.* Wellington Bd. of Education, 28 Kan. 385.

which plaintiff is described as a "licensed teacher," [62] nor will a failure to make such an averment be cured by verdict.[63] An answer in such an action should clearly and definitely allege all matters of defense,[64] as in regard to the teacher's disqualification,[65] removal, or dismissal.[66]

(IV) *EVIDENCE.* The rules applicable in civil cases generally govern the presumptions and burden of proof [67] and the admissibility [68] and the weight and

62. Jackson School Tp. *v.* Farlow, 75 Ind. 118.

63. Botkin *v.* Osborne, 39 Ill. 101; Smith *v.* Curry, 16 Ill. 147.

64. Harmony School Tp. *v.* Moore, 80 Ind. 276, holding that an affirmative answer, in an action by a teacher to recover for services rendered, that a former trustee who had employed plaintiff had caused the schools to be taught in the district for two months longer during two years than in other districts, and that the trustee had continued the schools in such district after he knew that there was no fund with which to pay the expenses, is insufficient upon demurrer.

65. Ellis *v.* Sharp, 42 Hun (N. Y.) 179.

**Striking out allegations in an answer as to plaintiff's qualifications** see Jefferson County School Dist. No. 25 *v.* Stone, 14 Colo. App. 211, 59 Pac. 885.

**Legal conclusions.**— An averment that a person did not possess a certificate to teach in force during any of the times mentioned in the complaint is not a statement of a legal conclusion. Catlin *v.* Christie, 15 Colo. App. 291, 63 Pac. 328.

66. See Crawfordsville *v.* Hays, 42 Ind. 200.

67. See, generally, EVIDENCE, 16 Cyc. 926, 1050. See also Bourbon County School Dist. No. 23 *v.* McCoy, 30 Kan. 268, 1 Pac. 97, 46 Am. Rep. 92; Steinson *v.* Hudson County School Dist. No. 8, 55 N. J. L. 567, 27 Atl. 923; Edson *v.* Hayden, 18 Wis. 627, holding that if the complaint fails to allege that defendant officer had in his hands, at the time the order was presented to him for payment, moneys of the district sufficient to pay it and properly applicable to its payment, it will not be presumed that he had such moneys, from the mere fact that before such presentment the time had passed when by law it was defendant's duty to apply for and receive from the town treasurer the school moneys belonging to his district.

**Applications.**— Thus where, in an action by a school-master against a town to recover for his services, there is proof that he was employed by the school agent and that the services were rendered as agreed, it *prima facie* entitles plaintiff to recover, and if defendant will avail itself of the want of a certificate, as required by statute, it must show such fact, as the agent has not the right to engage such services without a certificate, and he will be presumed to have done his duty. Rolfe *v.* Cooper, 20 Me. 154. So where under a statute which provides that no official business shall be transacted except at a regular or special meeting, and that the school directors shall not pay any public funds to a teacher, unless he has furnished them a schedule, the directors have paid the teacher for the time he actually taught, it will be presumed that such payment was made at a regular or special meeting. Robinson *v.* District No. 4 School Directors, 96 Ill. App. 604.

68. See, generally, EVIDENCE, 16 Cyc. 1110 *et seq.* See also Gay *v.* Bankston, 100 Ala. 280, 13 So. 939; Custer *v.* Prospect Park School Dist., 12 Pa. Super. Ct. 102.

**Evidence held admissible.**— In an action against a county superintendent of education to recover money due under a contract to teach school in a designated township, the contract mentioned in the complaint and plaintiff's quarterly report made to defendant as required by law are admissible. Gay *v.* Bankston, 100 Ala. 280, 13 So. 939. So where in an action of assumpsit for services as teacher, defendant pleads the general issue with notice of a tender and other special matters in defense, and the notice sets up the fact of incompetency, evidence is admissible of certain particular instances of mismanagement in the government of the school by plaintiff while he was teaching. Holden *v.* Shrewsbury School Dist. No. 10, 38 Vt. 529.

**Evidence held inadmissible** see Swafford *v.* Petaluma Bd. of Education, 127 Cal. 484, 59 Pac. 900 (holding that where plaintiff sues on an express contract made in one year for a designated sum per month, evidence of a contract made with a different party in another year is irrelevant); Jackson Tp. *v.* Grimes, 24 Ind. App. 331, 56 N. E. 724 (holding that evidence of compensation for a previous year cannot be received as evidence of what plaintiff was to receive under an alleged contract). So in an action for compensation, evidence that a majority of the voters in the district were dissatisfied with plaintiff, and that plaintiff and the board which employed him knew this at the time of the employment is inadmissible. Mason *v.* Brookfield School Dist. No. 14, 20 Vt. 487. So evidence going to show that plaintiff had miscalculated the amount due him is not admissible as bearing upon the question of competency. Doyle *v.* School Directors, 36 Ill. App. 653.

**Profert.**— In a suit by a school-teacher against a school-district on a contract of employment, plaintiff is not bound to make profert of his certificate of qualification, but may be allowed to give parol proof that he has one. Manistee School-Dist. No. 1 *v.* Cook, 47 Mich. 112, 10 N. W. 131.

**The minutes of a school-board** are the best evidence of a teacher's contract of employment, and evidence of the declarations of members of the board are irrelevant and incompetent. Dyberry School-Dist. *v.* Mercer,

sufficiency [69] of the evidence in actions by school-teachers for the recovery of their compensation.

(v) *TRIAL AND JUDGMENT.* The rules governing in civil actions generally also apply in actions by school-teachers for the recovery of their compensation in regard to questions relating to the trial,[70] as in regard to questions for the court and the jury,[71] and as to the findings [72] and judgment.[73]

**6. PENSIONS.** Provision is sometimes made, or authorized by statute, for the establishment of a pension or retirement fund out of which a pension or annuity is to be paid to teachers in public schools upon certain conditions,[74] as upon their being retired for mental or physical incapacity after they have been in continuous service for a specified length of time.[75] Under some statutes a school-board may

115 Pa. St. 551, 9 Atl. 64. Such minutes are also the best evidence of a teacher's dismissal, and therefore oral evidence as to his acts of cruelty are inadmissible. Whitehead *v.* North Huntington School-Dist., 145 Pa. St. 418, 22 Atl. 991.

**69.** See, generally, EVIDENCE, 17 Cyc. 753. See also School Dist. No. 47 *v.* Goodwin, 81 Ark. 143, 98 S. W. 696 (evidence held sufficient to prove ratification of a contract of employment by the district); Marquissee *v.* Hitchcock County School Dist. No. 64, 5 Nebr. (Unoff.) 85, 97 N. W. 324.

**70.** See, generally, TRIAL. See also Doyle *v.* School Directors, 36 Ill. App. 653, holding that in an action by a discharged school-teacher to recover a balance claimed to be due as salary, it is improper as a test of competency to require him upon cross-examination to answer questions propounded, or to show that after his employment a remonstrance was circulated in his district, and signed by divers persons.

**An objection that plaintiff had no certificate** as required by statute comes too late if made in the first instance after the evidence is closed. Sproul *v.* Smith, 40 N. J. L. 314.

**Costs.—** A school-teacher is neither a laborer, clerk, servant, nurse, nor other person, within the meaning of a statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any of the persons above enumerated for compensation claimed to be due for personal services performed, plaintiff if successful shall be entitled to recover as part of his costs a judgment against defendant for an attorney's fee. Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954.

**71.** Southern Industrial Inst. *v.* Hellier, 142 Ala. 686, 39 So. 163 (holding that where a teacher was sick, and his wife taught for him without being employed by the school authorities, it is open to the jury to find that the school authorities accepted the wife's services in place of those of her husband and that he was to receive compensation therefor as though he had rendered the services himself); Shaw *v.* Wallace, 2 Stew. & P. (Ala.) 193; Dore *v.* Billings, 26 Me. 56; McGuiness *v.* Le Sueur County School Dist. No. 10, 39 Minn. 499, 41 N. W. 103; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 73 Pac. 954 (holding that the action of a school-board, when authorized, in discharging a teacher is not conclusive, and that in a suit by the teacher to recover for the residue of his term the question as to whether there were sufficient grounds for his dismissal is for the court or jury).

**Incompetency is a question of fact,** to be found by the jury from all the evidence in the case. Ewing *v.* School Directors Dist. No. 3, 2 Ill. App. 458.

**72.** See Roussin *v.* Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

**73.** See, generally, JUDGMENTS, 23 Cyc. 623; TRIAL. See also Milford *v.* Simpson, 11 Ind. 520, holding that an order that a judgment "for services as a teacher of common schools" shall, after a return of *nulla bona*, be paid out of the school funds of the delinquent township in the county treasury does not divert those funds from their proper purpose.

**Restraining judgment.—** A judgment for compensation against a school-district in favor of a teacher who has not produced the certificate required by law, although entered by consent of the district, will be restrained by injunction at the suit of any taxpayer within the district suing in behalf of himself and others. Barr *v.* Deniston, 19 N. H. 170.

**74.** See Child *v.* Teachers' Annuity, etc., Assoc., 21 Pa. Super. Ct. 480. And see the statutes of the several states.

**Under N. Y. Laws (1895), c. 767,** which provide that on petition of twenty-five taxpayers, requesting submission of the question of making provision for pensioning teachers who have been employed in the common schools not less than twenty-five years, the town board shall cause such question to be submitted to the taxpayers at the next town meeting, on due notice published in a town newspaper or by posting, a vote taken without such notice will not authorize the pensioning of a teacher coming within the act; nor will a vote, although regularly taken, authorize the giving of a pension to a teacher who has not served twenty-five years at the time the vote is taken. People *v.* Haughran, 55 N. Y. App. Div. 118, 67 N. Y. Suppl. 49 [*affirming* 29 Misc. 440, 61 N. Y. Suppl. 932].

**75.** See Moore *v.* New York Bd. of Education, 121 N. Y. App. Div. 862, 106 N. Y. Suppl. 983 [*affirmed* in 195 N. Y. 601, 88 N. E. 645, 195 N. Y. 614, 89 N. E. 1105]; Venable *v.* Schafer, 28 Ohio Cir. Ct. 202,

adopt a rule or regulation that a certain sum or per cent shall be deducted from the salary of each teacher for each day of absence,[76] or from the salary of each teacher coming into the scheme,[77] to be applied to such fund; but in the absence of statutory authority a rule or regulation requiring teachers contracting for employment to consent to such a deduction is unauthorized and void.[78] It has been held that a statute requiring the deduction of a certain per cent from the salary of a teacher for such fund is unconstitutional, as interfering with the teacher's constitutional right to use his property for his own benefit;[79] and that a teacher is not estopped from attacking the constitutionality of such a statute by the mere fact that he accepts a position as teacher under a notification that his appointment is subject to the provisions of the law and the rules of the board relating to the appointment and compensation of teachers, since he accepts the position subject only to valid and constitutional laws;[80] nor is he so estopped by the fact that he has been elected a member of the pension board, where he has constantly opposed its enforcement from the time of its enactment;[81] and it has also been held that if a teacher has paid his assessments under such a statute he may recover the same with interest.[82]

**7. Duties and Liabilities.**[83] As a general rule a person in accepting employment as a teacher in the public schools agrees to perform his labors and duties under the control and direction of the school-board and in conformity to such lawful rules and regulations as the board may adopt, or as may be imposed by statute, and if a teacher is negligent in the performance of his duties he is liable to the district for any loss caused thereby.[84] Under some statutes a teacher is punishable by a fine if he neglects to perform his statutory duties;[85] but in the absence of a statute, rule, or regulation to that effect a school-board has no power to impose a fine upon a teacher for a disobedience of instructions, or for any misconduct or dereliction.[86] Where a teacher, after he is properly dismissed, persists

holding that one whose name has been on the teachers' roll of a city school-district for twelve years, but who has not been actually engaged in teaching therein during all of such period, a substitute having taken his place at one time, will not be entitled to a pension under the act of 1909.

The word "teacher," as used in such provision, if not specifically restricted in its meaning, will comprehend within its purview such instructors as have spent a part of the time required in teaching in schools not supported in whole or in part by public taxation. Venable *v.* Schafer, 28 Ohio Cir. Ct. 202.

Under N. Y. Const. art. 3, § 28, a statute directing the placing upon the pension list of teachers who had retired before the pension system was established is unconstitutional. Mahon *v.* New York Bd. of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810 [*affirming* 68 N. Y. App. Div. 154, 74 N. Y. Suppl. 172].

76. Murphy *v.* New York Bd. of Education, 87 N. Y. App. Div. 277, 84 N. Y. Suppl. 380 [*affirming* 38 Misc. 706, 78 N. Y. Suppl. 248].

77. Phillips *v.* London School Bd., [1898] 2 Q. B. 447, 67 L. J. Q. B. 874, 79 L. T. Rep. N. S. 50, 14 T. L. R. 501, 46 Wkly. Rep. 658 [*affirming* [1898] 1 Q. B. 4, 61 J. P. 758, 66 L. J. Q. B. 878, 77 L. T. Rep. N. S. 397, 14 T. L. R. 4, 46 Wkly. Rep. 155].

78. State *v.* Rogers, 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663.

79. State *v.* Hubbard, 22 Ohio Cir. Ct. 252, 12 Ohio Cir. Dec. 87 [*affirmed* in 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654].

80. State *v.* Hubbard, 22 Ohio Cir. Ct. 252, 12 Ohio Cir. Dec. 87 [*affirmed* in 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654].

81. State *v.* Hubbard, 22 Ohio Cir. Ct. 252, 12 Ohio Cir. Dec. 87 [*affirmed* in 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654].

82. Venable *v.* Schafer, 28 Ohio Cir. Ct. 202. But *compare* Phillips *v.* London School Bd., [1898] 2 Q. B. 447, 67 L. J. Q. B. 874, 79 L. T. Rep. N. S. 50, 14 T. L. R. 501, 46 Wkly. Rep. 658 [*affirming* [1898] 1 Q. B. 4, 61 J. P. 758, 66 L. J. Q. B. 878, 77 L. T. Rep. N. S. 397, 14 T. L. R. 4, 46 Wkly. Rep. 155].

83. **Criminal responsibility for defilement of pupil** see Seduction, *post*.

**Duty to return reports or school registers** see *supra*, III, H, 5, f.

**Liability for punishment of pupils** see *infra*, III, I, 3, e, (II), (B).

84. New Antioch Bd. of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58; Crosby *v.* Readsboro School Dist. No. 9, 35 Vt. 623, holding that a teacher is liable to make good to the district the amount of public money which his neglect has caused it to lose.

85. State *v.* Quigley, 11 Ohio Dec. (Reprint) 340, 26 Cinc. L. Bul. 129 [*affirmed* in 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310]. *Compare* Crosby *v.* Readsboro School Dist. No. 9, 35 Vt. 623.

86. People *v.* New York Bd. of Education,

in using the school-house in defiance of the school-board's rights and authority, he is a trespasser and liable therefor in damages.[87]

**I. Pupils, and Conduct and Discipline of Schools**[88] — **1. Admission and Attendance of Pupils — a. Nature of Right to Admission or Instruction in General.** The right to attend a public school and receive instruction therein is not a private right held by an individual separately from the community at large, but is a political right held in common;[89] nor is it a privilege appertaining to a citizen of the United States as such, and therefore cannot be demanded on the mere status of citizenship.[90] But, subject to reasonable rules and regulations, it is a right or privilege which belongs to every child or person who is within the rules of eligibility as prescribed by statute or by the rules and regulations of the school-board;[91] and reasonable and convenient accommodations, and opportunity for instruction, should be provided by the board or officers having charge of such matters for all children legally entitled to attend school and who desire to do so.[92]

**b. Rules and Regulations of Admission in General.**[93] The right or privilege to attend and be educated in the public schools is derived entirely from the legislature, and is subject to such regulations, in respect to the admission and classification of pupils, as the legislature may from time to time see fit to make.[94] Except in so far as expressly regulated by statute,[95] the board or officers having

143 N. Y. 62, 37 N. E. 637 [*reversing* 4 N. Y. St. 747], holding that the Consolidation Act of 1882 does not empower the board of education of the city of New York to fine a teacher so many days' pay for disobeying the instructions of the city superintendent.

**87.** Kelderhouse *v.* Brown, 17 Abb. N. Cas. (N. Y.) 401.

**88. Highways for access to school-houses** see *supra*, III, E, 5, c.

**Transportation of pupils** see *supra*, III, E, 5, b.

**89.** Learock *v.* Putnam, 111 Mass. 499.

**Education** is not so much a technical right possessed by a child or his parents as a privilege or advantage granted by the state to be used or enjoyed upon such reasonable terms and conditions as the law-making power, within constitutional limits, may see fit to impose. Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251.

**90.** Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

**The provision of the fourteenth amendment of the federal constitution** that no state shall deprive any person of life, liberty, or property without due process of law has no reference to the privilege accorded by the law of a state of attending public schools maintained at the expense of the state, and no person can be said to have been deprived of either life, liberty, or property because denied the right to attend as a pupil at a school, however insufficient and untenable the ground upon which the exclusion is put. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

**91.** See *infra*, III, I, 1, b *et seq.*

**92.** Rulison *v.* Post, 79 Ill. 567; Chase *v.* Stephenson, 71 Ill. 383; *In re* Zanesville Bd. of Education, 5 Ohio S. & C. Pl. Dec. 578, 7 Ohio N. P. 564; *In re* York Tp. School Dist., 10 Pa. Dist 687, 15 York Leg. Rec. 74.

**Sufficiency of accommodation.**— This rule, however, does not mean that all the school children who may be in attendance or desire to attend must be comfortably seated in one particular school in their immediate neighborhood, but only that there shall be provided reasonable and convenient accommodations at some convenient and proper school-house or houses, reasonably accessible to the children desiring to attend. *In re* York Tp. School Dist., 10 Pa. Dist. 687, 15 York Leg. Rec. 74.

**A child cannot compel readmission** into a department from which he has graduated and in which there is no room to seat him. People *v.* Board of Education, 4 N. Y. Suppl. 102.

**93. Health regulations** see *infra*, III, I, 1, d.

**94.** Dallas *v.* Fosdick, 40 How. Pr. (N. Y.) 249.

**95.** See the statutes of the several states.

**Order of admission.**— Where the statute provides that pupils must be admitted in the order in which they are registered, and makes it the duty of the board of education to keep a register, open to the inspection of the public, of all children applying for admission, and entitled to be admitted into the public schools, a teacher must receive pupils registered by the board in the order in which they are registered, and not in the order of the applications to the teacher. Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394.

**Estoppel to deny right to admission.**— Where, as required by statute, a board of education has enumerated a child in its list of children entitled to school privileges, and has received from the proper treasury the distributive portion of the public funds to which such enumeration entitles it, and has also received, upon the basis of such enumeration, taxes directly levied for the support of schools in the district, the board is estopped to deny to such child the right to school privileges. El Reno Bd. of Education *v.* Hobbs, 8 Okla. 293, 56 Pac. 1052.

control and supervision of the admission of pupils as a general rule have a discretionary power to establish reasonable rules and regulations for their admission,[96] such as rules and regulations making a classification of pupils according to sex,[97] or by which the assignment of children between schools affording equal advantages shall be determined,[98] or requiring pupils to apply to such board or officers for orders for admission;[99] and the exercise of such discretionary power will not be interfered with by the courts, except in cases of manifest abuse.[1] Such rules and regulations, however, must be reasonable, otherwise they cannot be enforced.[2] Thus a rule or regulation has been held unreasonable which excludes a pupil from admission for the purpose of taking other studies because of his failure to pass a satisfactory examination in one study,[3] or which prohibits children who have just arrived at school age from entering the schools at any time except during the first month of the fall or spring terms.[4] But on the other hand a rule or regulation has been held proper which excludes children temporarily from a school for want of room,[5] notwithstanding there is a statutory provision making attendance at school for a certain number of weeks in the year compulsory.[6]

c. **Eligibility** — (I) *IN GENERAL.* In order that a child may be eligible to the privilege of attending a public school he must be within the rules and regulations prescribed by statute, or the school-board,[7] as in regard to his race or color,[8] age,[9] residence,[10] health,[11] and tuition.[12] A child may be refused admission to a public school because of a licentious or immoral character,[13] although such character is not manifested by any acts of licentiousness or immorality within the school;[14] or he may be refused admission to a public graded school because of lack of sufficient education to enter the lowest grade of such school.[15]

(II) *RACE OR COLOR.* As a general rule a child cannot be excluded from a public school because of race or color alone; and in the absence of statute to that effect children of colored parents cannot be compelled to attend separate schools from those of white children, although such schools have been established. It is within the power of a state legislature, however, to provide for separate schools for white and colored children, and to require each to attend their respective schools, provided the advantages and facilities furnished for both are equal.[16]

(III) *AGE.* The age at which a child is eligible to attend a public school is

**96.** Grove *v.* Peoria School Inspectors, 20 Ill. 532; Alvord *v.* Chester, 180 Mass. 20, 61 N. E. 263; People *v.* Easton, 13 Abb. Pr. N. S. (N. Y.) 159.

**97.** State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

**98.** People *v.* Easton, 13 Abb. Pr. N. S. (N. Y.) 159.

**99.** State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713.

1. Grove *v.* Peoria School Inspectors, 20 Ill. 532; Com. *v.* Meiss, 10 Kulp (Pa.) 277.

2. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

3. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55, holding that where it appears that a pupil passed a satisfactory examination in all the studies except that of grammar, which his father did not desire him to study, a rule or regulation excluding him from admission as to the other studies on that account is unreasonable and cannot be enforced.

4. Moline Bd. of Education *v.* Bolton, 85 Ill. App. 92. *Compare* Alvord *v.* Chester, 180 Mass. 20, 61 N. E. 263, holding that a regulation that children under the age of seven years shall not attend school unless they enter at the beginning of the fall term, or within four weeks thereafter, or unless they are qualified to enter classes existing at the time of their entry, is a reasonable regulation.

5. People *v.* McFall, 26 Ill. App. 319.

6. People *v.* McFall, 26 Ill. App. 319.

7. See Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

8. See *infra*, III, I, 1, c, (II).

9. See *infra*, III, I, 1, c, (III).

10. See *infra*, III, I, 1, c, (IV).

11. See *infra*, III, I, 1, d.

12. See *infra*, III, I, 1, e.

13. Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

14. Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

15. Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; Jones *v.* McProud, 62 Kan. 870, 64 Pac. 602, holding that where the lowest grade of a high school is No. 10, and applicants for admission have only completed grade 8, they are not entitled to admission to the high school.

16. See CIVIL RIGHTS, 7 Cyc. 167, 168. And see *supra*, III, A, 3.

generally fixed by statute [17] or a constitutional provision,[18] although it is sometimes left to the discretion of the school-board or officers.[19] But where the school authorities have uniformly, for a considerable time, admitted certain persons regardless of age, and have admitted a student to a particular school knowing that he will be over the school age before his first year is finished, they are estopped to afterward deny his right to attend such school on the ground that he is over school age.[20]

(IV) *RESIDENCE.* As a general rule the free school privileges of a district, town, or city are open only to children, otherwise eligible, who are *bona fide* residents of that district, town, or city;[21] and in determining whether a person is or is not a resident in a school-district within the meaning of such a rule, the usual and ordinary *indicia* of residence or the absence thereof should be the proper guide, and not the secret mental resolves or concealed intentions of persons living, or having lived, in the district.[22] Such rule, however, does not usually require that there shall be a legal domicile, but it is sufficient if the child and his parent, or the person in control of him, are actually resident in the district, with apparently

17. Wysinger *v.* Crookshank, 82 Cal. 588, 23 Pac. 54 (between six and twenty-one years); Tape *v.* Hurley, 66 Cal. 473, 6 Pac. 129; Yale *v.* West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161 (all children over four years); *In re* Newark School Bd., (N. J. Sup. 1907) 70 Atl. 881 (holding that a constitutional provision requiring the legislature to provide for the instruction of children between the ages of five and eighteen years does not limit the power of the legislature so as to preclude it from providing for the education of children between the ages of five and twenty years).

18. Roach *v.* St. Louis Bd. of Public Schools, 77 Mo. 484 (between the ages of six and twenty-one); Rogers *v.* McCraw, 61 Mo. App. 407.

19. State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713, holding that the school trustees, under their power of general supervision, may make any classification based on age as may seem best.

**Preventing entrance immediately after school age.**— Under Ill. School Law, art. 6, § 10, par. 4, the board of education has the right to adopt reasonable rules in regard to the admission of children over six years of age which may operate to prevent such children from entering school immediately after arriving at that age. Moline Bd. of Education *v.* Bolton, 85 Ill. App. 92.

20. Brown *v.* Cleveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

21. *California.*— Wysinger *v.* Crookshank, 82 Cal. 588, 23 Pac. 54.

*Connecticut.*— Yale *v.* West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161.

*Kentucky.*— Winchester Bd. of Education *v.* Foster, 116 Ky. 484, 76 S. W. 354, 25 Ky. L. Rep. 723.

*Missouri.*— Binde *v.* Klinge, 30 Mo. App. 285.

*Nebraska.*— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Mizner *v.* School Dist. No. 11, 2 Nebr. (Unoff.) 238, 242, 96 N. W. 128, 1006.

*Oklahoma.*— El Reno Bd. of Education *v.* Hobbs, 8 Okla. 293, 56 Pac. 1052.

*Canada.*— *Ex p.* Miller, 34 N. Brunsw. 318; Washington *v.* Charlotteville School Trustees, 11 U. C. Q. B. 569.

See 43 Cent. Dig. tit. "Schools and School Districts," § 324.

**That a child's father and mother have separated** and destroyed the common home, and that one of the parents provides for the child in that place which had been their home while they were a united family, does not destroy the child's residence for school purposes. El Reno Bd. of Education *v.* Hobbs, 8 Okla. 293, 56 Pac. 1052.

**Residents on lands purchased or ceded to the United States** for navy yards, forts, and arsenals, and where there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, are not entitled to the benefits of the common schools for their children in the districts in which the lands are situated. Opinion of Justices, 1 Metc. (Mass.) 580.

**Whether a person has been enumerated** in a census taken by a school-board should be established by the production of the proper record disclosing such facts. State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

**Estoppel.**—A resident of a school-district who is entitled to school privileges for his children is not estopped to assert his right by the fact that he fails or refuses to attend a meeting of the school-board and make an affidavit prepared for him respecting his residence. State *v.* Penter, 96 Mo. App. 416, 70 S. W. 375.

22. State *v.* Smith, 64 Mo. App. 313.

**Where a person with his family moves away** from the school-district in which he lives, leaving the house formerly occupied by him vacant, but with the intention of returning in a few months, his children are not residents of such district within the meaning of a statute providing for the enumeration of children for school purposes. State *v.* Smith, 64 Mo. App. 313.

no present purpose of removal;[23] but this rule does not include the children of a person who comes temporarily into a district to reside during the scholastic year for the purpose only of sending his children to the school of that district;[24] nor can a person residing without a state send his minor children into the state and acquire a domicile for them, so as to entitle them to a free common school education therein.[25] But under some statutes children living without a school-district or town may, with the consent of the proper school authorities, attend school therein,[26] upon such terms and conditions as the school authorities may deem right,[27] as upon the payment of a tuition,[28] where it will not interfere with the accommodation or instruction of the scholars residing therein.[29]

(v) *Inmates of Charitable Institutions.* It has been held that the children of paupers supported at a county poor farm are entitled to attend the public schools in the district in which such farm is located.[30] But on the other hand it has been held that non-residents of a school-district do not acquire a residence therein for common school purposes by becoming inmates of a charitable institution established for their care, support, and education,[31] particularly where

**23.** *Connecticut.*— Yale *v.* West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161.

*Illinois.*— Board of Education *v.* Lease, 64 Ill. App. 60.

*Nebraska.*— State *v.* Selleck, 76 Nebr. 747, 107 N. W. 1022, holding that if a family or persons having the control of children of school age live in a school-district other than the district of their legal residence, not for the purpose of obtaining school privileges but from other motives, their children are entitled to free school privileges while so living in the district.

*New York.*— People *v.* Hendrickson, 125 N. Y. App. Div. 256, 109 N. Y. Suppl. 403 [*affirming* 54 Misc. 337, 104 N. Y. Suppl. 122].

*Wisconsin.*— State *v.* Thayer, 74 Wis. 48, 41 N. W. 1014.

See 43 Cent. Dig. tit. "Schools and School Districts," § 324.

**State officers living in a district during** their term of office may send their children to the public schools of the district, without paying tuition, although they retain their legal residence elsewhere. State *v.* Selleck, 76 Nebr. 747, 107 N. W. 1022.

**A child whose parents are non-resident,** and who lives, with his parents' consent, with others who care for him and with whom he and his parents expect him to live permanently, has a right to attend the schools in the district in which he thus resides. Yale *v.* West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161.

**An orphan child** placed in the family of a resident of a school-district for care by the Children's Aid Society, which pays for his board and clothing, and who is treated in all respects as a member of the family, is a resident of such district and entitled to free school privileges, although there is no arrangement as to the term of his abode in the district. People *v.* Hendrickson, 125 N. Y. App. Div. 256, 109 N. Y. Suppl. 403 [*affirming* 54 Misc. 337, 104 N. Y. Suppl. 122]. But *compare* Hall *v.* Stisted School Trustees, 24 Ont. App. 476 [*affirming* 28 Ont. 127].

**24.** Barnard School Dist. *v.* Matherly, 84 Mo. App. 140, 90 Mo. App. 403; State *v.* Selleck, 76 Nebr. 747, 107 N. W. 1022; State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

**Where a father binds out his minor children in another district** in which he does not reside, to serve as apprentices, for the sole purpose of sending his children to school there, and they go to school there without the consent of the district, they are trespassers and liable to an action by the district. Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

**25.** Wheeler *v.* Burrow, 18 Ind. 14; Winchester Bd. of Education *v.* Foster, 116 Ky. 484, 76 S. W. 354, 25 Ky. L. Rep. 723; Haverhill *v.* Gale, 103 Mass. 104.

**26.** Wrentham *v.* Fales, 185 Mass. 539, 70 N. E. 936 (holding that under such a statute the committee whose consent is to be obtained is that of the town in which the school is located, and not that of the town in which the parents reside); Board of Education *v.* Board of Education, 10 Ohio Cir. Ct. 617, 5 Ohio Cir. Dec. 96 (holding that the permission provided for is to be given by the receiving board, and that the board of the district where the children reside has no concern in the matter beyond paying for the tuition). See also Sheldon Poor House Assoc. *v.* Sheldon, 72 Vt. 126, 47 Atl. 542.

**27.** Rogers *v.* Carlisle Graded School, 13 S. W. 587, 11 Ky. L. Rep. 934. See also People *v.* Hendrickson, 125 N. Y. App. Div. 256, 109 N. Y. Suppl. 403 [*affirming* 54 Misc. 337, 104 N. Y. Suppl. 122].

**28.** See *infra*, III, 1, 1, e.

**29.** Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120 (holding that non-residents cannot be received to the exclusion of resident children who would otherwise attend); People *v.* Board of Education, 26 Ill. App. 476; State *v.* Joint School Dist. No. 1, 65 Wis. 631, 27 N. W. 829, 56 Am. Rep. 653.

**30.** Brentwood School Dist. No. 2 *v.* Pollard, 55 N. H. 503.

**31.** State *v.* School Dist. No. 14, 10 Ohio St. 448; Com. *v.* Brookville School Dist., 164

such institution is provided by the state with funds sufficient for the education of its inmates.[32] Under a statute authorizing the school authorities of a district to receive into its schools pupils residing in other districts, a district belonging to an association organized for the maintenance of a poorhouse, and within which district the poorhouse is situated, may admit to its schools paupers of school age of other districts residing in the poorhouse of the association, although it is not obliged to do so without a charge to the district of which he is a resident.[33]

(VI) *ASSIGNMENT OR ADMISSION TO PARTICULAR SCHOOLS* — (A) *In General.* Under some statutes it is within the power of the proper school-board to divide a school-district into subdistricts and establish therein schools of different grades [34] and to assign the pupils to the several schools; [35] and where in the exercise of such powers the rules and orders made are reasonable, necessary, and such as will best afford all eligible children an opportunity to receive the benefits of proper instruction, such rules and orders will be sustained by the courts,[36] except in cases of clear abuse.[37] It has been held that in the exercise of such power a school-board may refuse to admit children, provided with a proper school, to enter another school whose rooms are already crowded beyond their capacity.[38]

(B) *Discontinuance of Particular School.* Where there are other schools in the district which pupils may conveniently attend, the school-board may for a sufficient cause discontinue a particular school, and provide for the attendance of pupils thereof at such other schools,[39] as where the average daily attendance of the particular school is very small, and the number is not reduced by sickness or other providential cause,[40] and such discontinuance may be for a part of the year only, as during the winter months; [41] but where such discontinued school is reopened, pupils who had formerly attended there and had been assigned to other schools should be returned thereto.[42]

Pa. St. 607, 30 Atl. 509, 26 L. R. A. 584; Com. *v.* Upper Swatara Tp. School Dist., 164 Pa. St. 603, 30 Atl. 507, 26 L. R. A. 581.

**32.** Com. *v.* Brookville School Dist., 164 Pa. St. 607, 30 Atl. 509, 26 L. R. A. 584.

**Pennsylvania act of April 18, 1893,** giving children of Union soldiers who shall be temporarily or otherwise in any school-district the same right to instruction in the schools of such district as the resident children, does not apply to soldiers' children who are inmates of an institution, amply provided by the state with funds for their education. Com. *v.* Brookville School Dist., 164 Pa. St. 607, 30 Atl. 509, 26 L. R. A. 584.

**Misconduct of managers.**— The fact that the managers of such an institution neglect or fail to provide adequate educational advantages does not entitle the inmates to free admission to the schools of the district in which such institution is located. Com. *v.* Brookville School Dist., 164 Pa. St. 607, 30 Atl. 509, 26 L. R. A. 584.

**33.** Sheldon Poor House Assoc. *v.* Sheldon, 72 Vt. 126, 47 Atl. 542, holding that since a pauper of school age supported by a town in a poorhouse situated in another town is a resident of the town supporting him, the town in which the poorhouse is located is not obliged to allow him to attend its public schools without charge to the town of which he is a resident. And see, generally, *infra*, III, I, 1, e, (II).

**34.** People *v.* Board of Education, 26 Ill. App. 476.

**35.** People *v.* Board of Education, 26 Ill. App. 476; Com. *v.* School Directors, 4 Pa. Dist. 314; *In re* Lower Salford Tp., 19 Pa. Co. Ct. 264, 13 Montg. Co. Rep. 65, holding that the school directors are vested with authority to decide as to the number of pupils to be assigned to a particular school, and also which school the pupils are to attend.

**36.** People *v.* Board of Education, 26 Ill. App. 476.

**37.** *In re* Lower Salford Tp., 19 Pa. Co. Ct. 264, 13 Montg. Co. Rep. 65.

**38.** People *v.* Board of Education, 26 Ill. App. 476.

**39.** Davis *v.* Mendenhall, 150 Ind. 205, 49 N. E. 1048; Tufts *v.* State, 119 Ind. 232, 21 N. E. 892; Morse *v.* Ashley, 193 Mass. 294, 79 N. E. 481. See also *supra*, III, E, 2, a, (IV).

**40.** State *v.* Seeley, 163 Ind. 244, 70 N. E. 805; Tufts *v.* State, 119 Ind. 232, 21 N. E. 892. See also *In re* Dublin Tp. School Bd., 14 Pa. Co. Ct. 464.

**41.** Potter *v.* Fredericksburg Dist. Tp., 40 Iowa 369, holding that where a subdistrict contains but five pupils, the school-board may direct that no school shall be taught during the winter in such district, and provide for the attendance of the pupils elsewhere.

**42.** Morse *v.* Ashley, 193 Mass. 294, 79 N. E. 481, holding that where a town votes to reopen a school which had been closed because the number of pupils formerly attending it was so small as to render its maintenance inadvisable and unnecessary, such vote will be construed as an order that pupils

(c) *Joint Schools.* Under some statutes the school authorities of adjoining school-districts may establish a joint school, where the number of pupils in each is not large enough to warrant the expense of establishing and maintaining separate schools.[43]

(VII) *TRANSFER TO ANOTHER DISTRICT FOR EDUCATIONAL PURPOSES.* It is sometimes provided that pupils may be transferred for educational purposes to the schools of an adjoining school-district or corporation at which they may be more conveniently and better accommodated;[44] and that unless an appeal is taken from the decision making such a transfer, in the time and manner prescribed, it becomes final.[45] Thus under some statutes, where by reason of the great distance from the school-houses in their own district, pupils can be more conveniently accommodated in the schools of an adjoining district, they may be transferred to such adjoining district;[46] but such power should be carefully exercised;[47] and there should be a great distance and great difficulty of access to the schools of the resident district before there is any right to ask to be sent to a more convenient school in an adjoining district,[48] and an arrangement for such a transfer should not be made where the number desiring admission to such other school is so great that the latter school cannot accommodate them without enlarging its school facilities.[49] It has been held under such a provision that where a person is so transferred it is only for the next school year, and that, if he wishes to continue in the school to which he is transferred, he must again request and procure a transfer the next year at the time the enumeration of pupils is made.[50] Under

who formerly attended the school should be taken from the schools to which they had been reassigned, and returned to the old school.

43. Com. *v.* Williamson, 10 Phila. (Pa.) 490. See also *supra*, III, E, 2, a, (III).

44. Teeple *v.* State, 171 Ind. 268, 86 N. E. 49 (holding that under Burns Annot. St. (1908) §§ 6449–6453, providing for the transfer of children from one school corporation to another, a child of school age and not the parent, guardian, or custodian of such child is transferred for educational purposes); Edwards *v.* State, 143 Ind. 84, 42 N. E. 525 (holding that under Rev. St. (1894) §§ 5958–5960, transfers may be made from any school corporation to another in the same or adjoining counties, subject to the condition that no transfer can be made to a township unless it adjoins the school corporation from which the transfer is made, but that such condition does not attach where the transfer is to a town or city, and also holding that it is immaterial that the school corporation to which pupils are transferred under such statute receives from the corporation from which the transfer is made less money than the expense *per capita* for such pupils); Wallingford *v.* Clarendon, 81 Vt. 245, 69 Atl. 734.

45. Edwards *v.* State, 143 Ind. 84, 42 N. E. 525. See also Fogle *v.* Gregg, 26 Ind. 345.

46. Freeman *v.* Franklin Tp., 37 Pa. St. 385; *In re* Watson, 1 Chest. Co. Rep. (Pa.) 496; *In re* Grove, 11 York Leg. Rec. (Pa.) 156.

In Ohio, under Rev. St. § 4022*a*, children living more than one and one-half miles from their assigned school may attend a nearer school in the same district or in another district, but this does not require the board of education of a school-district to admit children to a school outside of a district in which they reside, unless the school in their own district is more than one and one-half miles from their residence, and more remote than the school to which admission is sought. Boyce *v.* Mt. Carmel Special School Dist. Bd. of Education, 76 Ohio St. 365, 81 N. E. 437; Board of Education *v.* Board of Education, 10 Ohio Cir. Ct. 617, 1 Ohio Cir. Dec. 96.

Measurement of distance.— To ascertain whether a child is entitled to the benefit of a statute which entitles a child to attend a nearer school if its residence is more than a given distance from the school-house of its district, the distance will be measured from the school by the most direct public highway to the nearest part of the curtilage of its residence. Butler Tp. Bd. of Education *v.* Eldorado Bd. of Education, 58 Ohio St. 390, 50 N. E. 812.

47. Freeman *v.* Franklin Tp. School Directors, 37 Pa. St. 385.

The abuse of the discretionary power of school directors in sending children to the schools in an adjoining district is official misconduct, but the courts will be liberal in reviewing their exercise of such power, and unless such abuse be clearly shown will not interfere. Freeman *v.* Franklin Tp. School Directors, 37 Pa. St. 385; *In re* East Hopewell Tp. School Dist., 7 Pa. Dist. 177; Com. *v.* Meiss, 10 Kulp (Pa.) 277; *In re* Grove, 11 York Leg. Rec. (Pa.) 156.

48. Freeman *v.* Franklin Tp. School Directors, 37 Pa. St. 385; Com. *v.* Williamson, 10 Phila. (Pa.) 490.

49. *In re* Watson, 1 Chest. Co. Rep. (Pa.) 496. See also People *v.* Board of Education, 26 Ill. App. 476.

50. Edwards *v.* State, 143 Ind. 84, 42 N. E. 525.

some statutes the county court may compel a school-district to receive pupils transferred from an adjoining district,[51] but an order so made is not effective after a child ordered to be transferred ceases to reside in the adjoining district.[52]

(VIII) *REMEDIES TO COMPEL ADMISSION.*[53] It has been held that a mandatory injunction may issue to restrain the school authorities from refusing a child who is duly qualified from attending a public school;[54] but as a general rule mandamus is the proper remedy to compel the admission of such a child, or to compel his reinstatement if he has been wrongfully excluded,[55] such as to compel the admission or reinstatement of a pupil who has been excluded on the ground of race or color.[56] In an action to compel the admission or reinstatement of a pupil, the petition or complaint, as in civil actions generally, must state facts sufficient to constitute the cause of action.[57]

**d. Health Regulations** — (I) *IN GENERAL.* Under some statutes the local school authorities of a district, town, or city have power to adopt, reasonable health regulations for the benefit and safety of the pupils and the general public.[58]

**Estoppel.**—Where a school corporation enumerates a child as transferred, receives the distribution of the state school tax, collects a part or all of the school tax levied on the parent of such child, and admits the child to its school, it cannot question the validity of the transfer during the year for which the enumeration is made. Edwards *v.* State, 143 Ind. 84, 42 N. E. 525.

**51.** Gacking *v.* Ft. Smith School Dist., 65 Ark. 427, 46 S. W. 943.

**52.** Gacking *v.* Ft. Smith School Dist., 65 Ark. 427, 46 S. W. 943.

**53.** Actions for damages see *infra*, III, I, 3, e, (III), (F).

**54.** Cross *v.* Walton Graded Common School Dist., 121 Ky. 469, 89 S. W. 506, 28 Ky. L. Rep. 440; Mizner *v.* Sherman County School Dist. No. 11, 2 Nebr. (Unoff.) 238, 242, 96 N. W. 128, 1006, holding that where a child of school age is wrongfully denied admission to a public school of the district, an injunction may properly issue to restrain the directors from interfering with his attendance. But see McCaskill *v.* Bower, 126 Ga. 341, 54 S. E. 942; Americus Public Education *v.* Felder, 116 Ga. 788, 43 S. E. 56.

**Sufficiency of complaint** in a suit for a mandatory injunction to restrain a board of trustees of a graded school-district from refusing to permit a pupil to attend see Cross *v.* Walton Graded Common School Dist., 121 Ky. 469, 89 S. W. 506, 28 Ky. L. Rep. 440.

**Who may** sue.—The father of a child of school age, or one standing *in loco parentis*, may maintain an action to compel the directors of a school-district to allow the child to attend a school of the district of which such child is a *bona fide* resident. Mizner *v.* School Dist. No. 11, 2 Nebr. (Unoff.) 238, 242, 96 N. W. 128, 1006.

**55.** See MANDAMUS, 26 Cyc. 284. See also *infra*, III, I, 3, e, (III), (D).

**A foster parent** is entitled to mandamus to compel a board of education to admit his child to attendance without payment of tuition, although the child may not have been legally adopted. McNish *v.* State, 74 Nebr. 261, 104 N. W. 186.

**In New York,** before mandamus will lie to compel the admission of a relator's child to a ward school in New York city, whose exclusion has been caused, as alleged, by a violation of a rule of the board of education by the principal, the relator must appeal from the principal's decision to the board of trustees of the ward, and thence to the board of education. People *v.* New York Bd. of Education, 4 N. Y. Suppl. 102.

**56.** See CIVIL RIGHTS, 7 Cyc. 175.

**57.** See Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394.

**Sufficiency of complaint.**—A complaint in an action by a resident of the part of a school-district which has been annexed to a city for school purposes, against the board of education of the city to establish the right of his son to attend the public schools of the city, which alleges that he is a resident of the city school-district, and which also avers that he is and was residing in the former school-district by its name, and which it is further alleged became and is a part of the city school-district, is sufficient as against a general demurrer. Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394.

**Matters of defense.**—Where such complaint alleges that the father is a resident of the city school district, the child is *prima facie* entitled to the privileges of the school, and any reason which will justify the school-board in refusing such privileges is a matter of defense which need not be negatived in the complaint. Kramm *v.* Bogue, 127 Cal. 122, 59 Pac. 394.

**58.** Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697 (holding that the act of April 11, 1899, giving school-boards certain power over matters relating to the public health and to contagious and infectious diseases is not repealed by the act of March 30, 1903, authorizing cities of the third class to establish hospitals for contagious diseases outside the limits of the city); Duffield *v.* Williamsport School Dist., 162 Pa. St. 476, 29 Atl. 742, 25 L. R. A. 152; Wayne Tp. School Directors *v.* Rosencrans, 30 Pa. Co. Ct. 9 (holding that school directors have authority to maintain an action for a penalty for the violation of rules adopted to control an infectious disease).

(II) *VACCINATION.* It is often required that a child shall be vaccinated as a condition to his being admitted to or attending public schools,[59] it being required under some statutes that such a condition must be complied with, although smallpox is not prevalent or apprehended in the vicinity,[60] although under other statutes the rule is held to apply only where there is a reasonably well founded belief that smallpox is prevalent in the community or is approaching thereto;[61] and it has been held that in such a case an unvaccinated pupil may be excluded from the school, although he is not a fit subject for vaccination.[62] It is sometimes provided that before a pupil may attend the public schools he must present a certificate of a reputable physician that he has been successfully vaccinated,[63] or has had smallpox,[64] or must present a physician's certificate excusing him from vaccination,[65] such as a certificate to the effect that by repeated trials he has been shown to be immune from vaccination.[66] Legislative enactments requiring or authorizing a school-board to require the vaccination of pupils as a condition to their being admitted to or attending the public schools have been held to be a valid exercise of the police power of the legislature,[67] and have also been held

59. See, generally, HEALTH, 21 Cyc. 393.

**Vaccination not compulsory.**—Where a statute requiring vaccination does not impose any penalty for a neglect to comply therewith, a parent cannot be compelled to have his child vaccinated; nor does a compulsory education law which does not require vaccination have this effect. Com. *v.* Smith, 9 Pa. Dist. 625, 24 Pa. Co. Ct. 129; Com. *v.* Bauman, 33 Pittsb. Leg. J. N. S. (Pa.) 109.

**The determination of the reasonableness of a rule or regulation requiring vaccination** is to be determined in the first instance by the school-board, and the courts will not interfere unless it be clearly shown that there has been an abuse of this discretion. State *v.* Barberton Bd. of Education, 76 Ohio St. 297, 81 N. E. 568 [*affirming* 29 Ohio Cir. Ct. 375]; Duffield *v.* Williamsport School Dist., 162 Pa. St. 476, 29 Atl. 742, 25 L. R. A. 152.

**Pennsylvania act of June 18, 1895,** relating to the vaccination of children in the public schools, applies to township school-districts, and is not limited to cities and boroughs. Sprague *v.* Baldwin, 18 Pa. Co. Ct. 568.

60. See HEALTH, 21 Cyc. 393.

61. See HEALTH, 21 Cyc. 394.

**The duty of enforcing a rule requiring the vaccination** of school children in such cases is upon the board of officers charged with the duty of managing the public schools. State *v.* Beil, 157 Ind. 25, 60 N. E. 672.

62. Hammond *v.* Hyde Park, 195 Mass. 29, 80 N. E. 650 (holding that a town is not liable for excluding a pupil who is not vaccinated when there is particular reason to apprehend danger from an epidemic of smallpox, although the pupil presents a certificate that he is not a fit subject for vaccination); Hutchins *v.* Durham School Committee, 137 N. C. 68, 49 S. E. 46.

63. Auten *v.* Little Rock School Bd., 83 Ark. 431, 104 S. W. 130; Com. *v.* Rowe, 218 Pa. St. 168, 67 Atl. 56; Field *v.* Robinson, 198 Pa. St. 638, 48 Atl. 873; Gerhard *v.* Packer Tp. School Dist., 9 Pa. Dist. 720, 24 Pa. Co. Ct. 339; Cousins *v.* Warren Borough School Dist., 28 Pa. Co. Ct. 381. But *compare* State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 60 Am. St. Rep. 123, 37 L. R. A. 157.

**Certificate as evidence.**—A certificate of a reputable physician showing that the pupil has been successfully vaccinated is conclusive evidence in favor of the pupil that he has complied with the rule. Auten *v.* Little Rock School Bd., 83 Ark. 431, 104 S. W. 130.

**The duty of excluding children who do not produce the required certificate** is upon the superintendent, principals, and teachers in immediate charge of the schools, and not upon the school directors. Com. *v.* Rowe, 218 Pa. St. 168, 67 Atl. 56; Com. *v.* Smith, 9 Pa. Dist. 625, 24 Pa. Co. Ct. 129.

64. Com. *v.* Rowe, 218 Pa. St. 168, 67 Atl. 56; Field *v.* Robinson, 198 Pa. St. 638, 48 Atl. 873.

**The determination of the fact as to whether or not a child has had smallpox or has been** successfully vaccinated is to be determined by the physician, and not by the school authorities. Cousins *v.* Warren Borough School Dist., 28 Pa. Co. Ct. 381.

65. State *v.* Barberton Bd. of Education, 76 Ohio St. 297, 81 N. E. 568 [*affirming* 29 Ohio Cir. Ct. 375].

66. Auten *v.* Little Rock School Bd., 83 Ark. 431, 104 S. W. 130. *Compare* Stull *v.* Reber, 215 Pa. St. 156, 64 Atl. 419.

67. *California.*— French *v.* Davidson, 143 Cal. 658, 77 Pac. 663; Abeel *v.* Clark, 84 Cal. 226, 24 Pac. 383.

*New York.*— Viemeister *v.* White, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796 [*affirming* 88 N. Y. App. Div. 44, 84 N. Y. Suppl. 712]; Matter of Walters, 84 Hun 457, 32 N. Y. Suppl. 322.

*Ohio.*— State *v.* Barberton Bd. of Education, 76 Ohio St. 297, 81 N. E. 568 [*affirming* 29 Ohio Cir. Ct. 375].

*Pennsylvania.*— Stull *v.* Reber, 215 Pa. St. 156, 64 Atl. 419 (holding that a statute providing for the exclusion of unvaccinated children from the public schools does not involve in its application a trespass on the reserved rights of the individual beyond the reach of the police power, from the fact that

not to be in contravention of the provision of the federal constitution that no state shall deprive any person of any rights without due process of law,[68] or of a provision of a state constitution relating to the maintenance of public schools wherein all children of eligible age may receive an education.[69]

**e. Tuition** — (I) *IN GENERAL.* It is usually provided either by statute [70] or by the state constitution [71] that instruction in the public schools of a district shall be free to all children of school age resident therein. Such a provision, however, usually applies only in regard to the regular prescribed course of study for public schools,[72] and does not prevent the school authorities from permitting a teacher to instruct in other branches and to charge the pupils fees there-

vaccination is the infliction of a disease on the subject); Nissley *v.* Hummelstown School Directors, 5 Pa. Dist. 732, 18 Pa. Co. Ct. 481; Sprague *v.* Baldwin, 18 Pa. Co. Ct. 568.

*Utah.*— State *v.* Salt Lake City Bd. of Education, 21 Utah 401, 60 Pac. 1013.

See 43 Cent. Dig. tit. "Schools and School Districts," § 329.

*Compare* People *v.* Chicago Bd. of Education, 234 Ill. 422, 84 N. E. 1046, 17 L. R. A. N. S. 709 (holding that the general police powers of a city authorizing the passing of ordinances and the making of regulations for the promotion of health or the suppression of disease do not include the passage of an ordinance making vaccination a condition precedent to the right of education); State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 60 Am. St. Rep. 123, 37 L. R. A. 157 (holding that in the absence of a statute making vaccination compulsory or a condition precedent to the right of children to attend the public schools, a rule by the state board of health that no child shall be allowed to attend a public or private school within the state without presenting a certificate of vaccination cannot be sustained as an exercise of police power).

68. Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; State *v.* Barberton Bd. of Education, 76 Ohio St. 697, 81 N. E. 568 [*affirming* 29 Ohio Cir. Ct. 375].

69. Viemeister *v.* White, 88 N. Y. App. Div. 44, 84 N. Y. Suppl. 712 [*affirmed* in 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796]; Stull *v.* Reber, 215 Pa. St. 156, 64 Atl. 419.

70. Major *v.* Cayce, 98 Ky. 357, 33 S. W. 93, 17 Ky. L. Rep. 967, 30 L. R. A. 697; State *v.* Independent School Dist. No. 40 Bd. of Education, 91 Minn. 268, 97 N. W. 885; Young *v.* Fountain Inn Graded School, 64 S. C. 131, 41 S. E. 824. See also *supra*, III, I, 1, c, (IV). *Compare* London School Bd. *v.* Wright, 12 Q. B. D. 578, 48 J. P. 484, 53 L. J. Q. B. 266, 50 L. T. Rep. N. S. 606, 32 Wkly Rep. 577; Saunders *v.* Richardson, 7 Q. B. D. 388, 45 J. P. 782, 50 L. J. M. C. 137, 45 L. T. Rep. N. S. 319, 29 Wkly. Rep. 800.

**Authority** to manage and control the school property of a district does not include authority to charge pupils incidental fees. Young *v.* Fountain Inn Graded School, 64 S. C. 131, 41 S. E. 824.

**Question of fact.**—Whether a person is an actual resident of a particular school-district, so as to entitle him to the privileges of the school without the payment of tuition fees charged non-residents, is a question of fact dependent upon the facts of each particular case. State *v.* Independent School Dist. No. 40 Bd. of Education, 91 Minn. 268, 97 N. W. 885.

**A foster parent** of a child of school age may compel the school-board to admit such child to attendance without the payment of tuition in the public schools of the city or district in which such foster parent resides. McNish *v.* State, 74 Nebr. 261, 104 N. W. 186.

71. Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120; Roach *v.* St. Louis Public Schools, 77 Mo. 484; Barnard School Dist. *v.* Matherly, 90 Mo. App. 403; Lowery *v.* Kernersville Graded School Trustees, 140 N. C. 33, 52 S. E. 267; State *v.* Eau Claire Bd. of Education, 96 Wis. 95, 71 N. W. 123; State *v.* Joint School Dist. No. 1, 65 Wis. 631, 27 N. W. 829, 56 Am. Rep. 683. See also *supra*, III, I, 1, c, (IV).

**Constitutionality of statute.**—Where such provision is made by the state constitution, a statute which exacts incidental fees of resident scholars as well as of non-resident scholars is unconstitutional so far as it relates to resident scholars, but the fact that such part of the statute is unconstitutional does not vitiate the whole statute. Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120.

**Special act.**—Where the constitution provides for the establishment of a uniform system of free public schools throughout the state, but such system has never been established, a special act for a particular district is not unconstitutional because of the fact that it provides for supplementary tuition fees to be paid by pupils to meet the expenses of the school attended by them. Holler *v.* Rock Hill School Dist., 60 S. C. 41, 38 S. E. 220.

**Note for tuition.**—Where there is a contention between a district and a resident therein relating to his liability for the tuition of his children, and he gives his note for such tuition, in an action on the note it is proper to submit to the jury the question whether there was a compromise of a doubtful claim, as a consideration for the note, and if so to return a verdict accordingly. Barnard School Dist. *v.* Matherly, 90 Mo. App. 403.

72. Major *v.* Cayce, 98 Ky. 357, 33 S. W. 93, 17 Ky. L. Rep. 967, 30 L. R. A. 697.

for,[73] if the efficiency of the instruction in the prescribed common school branches is not thereby impaired.[74]

(II) *NON-RESIDENT PUPILS IN GENERAL.* Under most if not all school laws, a pupil who is not a *bona fide* resident of a school-district is entitled to attend a public school therein only upon the payment of a tuition,[75] to be paid by the county [76] or district or school corporation from which he is received or transferred,[77] provided it has granted permission to the pupil to attend in such other district or corporation,[78] or by the parent, guardian, or custodian of such pupil,[79] particularly where he contracts to pay such tuition.[80] The payment of such tuition must be at such rate as the statute may fix or authorize,[81] or as may be fixed by the school authorities of the town or district in which the pupil attends school,[82] or upon such terms as may be agreed upon by the two districts,[83] in the

**73.** Major *v.* Cayce, 98 Ky. 357, 33 S. W. 93, 17 Ky. L. Rep. 967, 30 L. R. A. 697.

**74.** Major *v.* Cayce, 98 Ky. 357, 33 S. W. 93, 17 Ky. L. Rep. 967, 30 L. R. A. 697.

**75.** Winchester Bd. of Education *v.* Foster, 116 Ky. 484, 76 S. W. 354, 25 Ky. L. Rep. 723; Rogers *v.* Carlisle Graded School Trustees, 13 S. W. 587, 11 Ky. L. Rep. 934; Binde *v.* Klinge, 30 Mo. App. 285 (holding that a minor who is neither an orphan nor an apprentice, and whose parents reside without the school-district, is not entitled to attend school therein, without the payment of tuition fees, although he has a home more or less permanent within the district); State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Board of Education *v.* Board of Education, 10 Ohio Cir. Ct. 617, 1 Ohio Cir. Dec. 96.

**Where a child's primary purpose in coming into a school-district is to attend the public school therein,** he must pay tuition, although there is some incidental purpose to be subserved while he attends the school. State *v.* Eau Claire Bd. of Education, 96 Wis. 95, 71 N. W. 123.

**76.** State *v.* Hamilton, 69 Miss. 116, 10 So. 57.

**77.** Kerr *v.* Perry School Tp., 162 Ind. 310, 70 N. E. 246; Westfield Borough School Dist. *v.* Dillman, 22 Pa. Co. Ct. 567.

**78.** Board of Education *v.* Board of Education, 50 Ohio St. 439, 38 N. E. 23; Board of Education *v.* Board of Education, 3 Ohio S. & C. Pl. Dec. 70, 2 Ohio N. P. 256 (holding that such permission must be affirmatively granted, and that mere acquiescence is not sufficient); Wallingford *v.* Clarendon, 81 Vt. 245, 69 Atl. 734; Hardwick Town School Dist. *v.* Wolcott Town Dist., 78 Vt. 23, 61 Atl. 471.

**79.** Fractional School Dist. No. 1 *v.* Yerrington, 108 Mich. 414, 66 N. W. 324.

**80.** Westfield Borough School Dist. *v.* Dillman, 22 Pa. Co. Ct. 567.

**Where a non-resident parent promises to pay** for the tuition of his children attending school in another district be is liable for such tuition under his contract (Wrentham *v.* Fales, 185 Mass. 539, 70 N. E. 936), although in the absence of such promise the school-district in which he resides will be liable therefor (Westfield Borough School Dist. *v.* Dillman, 22 Pa. Co. Ct. 567).

**81.** Kerr *v.* Perry School Tp., 162 Ind. 310, 7 N. E. 246; State *v.* Hamilton, 69 Miss. 116, 10 So. 57, holding that "the actual *pro rata* cost of tuition for all such pupils" as used in such a statute means such proportionate part of the entire tuition in such school as the number of outside pupils bears to the whole number attending the school.

**The tuition payable is to be determined by the length of the term** of the pupil's enrolment in the creditor district, and is not limited to the term of school held in the residence district. Kerr *v.* Perry School Tp., 162 Ind. 310, 70 N. E. 246.

**82.** Fractional School Dist. No. 1 *v.* Yerrington, 108 Mich. 414, 66 N. W. 324; Binde *v.* Klinge, 30 Mo. App. 285; State *v.* Superior School Dist., 55 Nebr. 317, 77 N. W. 855.

**Extent of power.**—A provision that the local board may admit pupils not residents in the town on such terms as the board may prescribe does not allow the board to prescribe terms which will cast upon the town or its inhabitants any part of the expense of educating non-resident pupils, and such pupils cannot be received at a less rate per scholar than the inhabitants of the town pay by taxation for their children. Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120.

**83.** Weldon Independent School Dist. *v.* Shelby Independent School Dist., 113 Iowa 549, 85 N. W. 794; Board of Education *v.* Board of Education, 50 Ohio St. 439, 38 N. E. 23.

**Evidence.**—An agreement by one school-district with another to pay for the tuition of children of the former attending school in the latter, which is made after such attendance has ceased, is admissible in an action by the latter to recover the price of the tuition from the former. Waldon Independent School Dist. *v.* Shelby Independent School Dist., 113 Iowa 549, 85 N. W. 794.

**Appeal.**—Vt. Acts (1900), No. 23, providing that on the failure of the school directors to agree as to the tuition for children attending school, either board may appeal to the examiner of teachers whose decision shall be final, has no application to a case where the question is one of a town's liability or non-liability, based on an implied contract for tuition for its children attending schools of another town. Hardwick Town School Dist. *v.* Wolcott Town Dist., 78 Vt. 23, 61 Atl. 471.

manner prescribed by statute.[84] Where the school authorities have no right to receive non-resident children into their school they cannot maintain an action for the tuition of children received in violation of law, although there is an express contract to pay.[85]

(III) *ATTENDANCE AT HIGH SCHOOLS.* It is sometimes provided that where a school-district or school corporation does not maintain a high school of its own it shall pay the tuition of pupils residing therein who may attend a high school in the same or another district[86] or who may attend a county high school;[87] and if such school-district or school corporation neglects or refuses to pay such tuition, it shall be liable to the parent of the child paying the same,[88] or to the town or district furnishing the tuition.[89] Such a provision, however, does not require that a town shall pay the tuition of a child attending a high school in a neighboring town where a school of a grade corresponding to a high school is maintained in the town of the pupil's residence, although it is not maintained by the town and is not approved by the state board of education,[90] and if in such a case the parent pays the tuition of his child attending in a neighboring town he cannot recover

**84.** Cascade School Dist. *v.* Lewis School Dist., 43 Pa. St. 318; Bethel School Dist. No. 4 *v.* Stockbridge School Dist. No. 2, 64 Vt. 527, 25 Atl. 433.

**85.** Haverhill *v.* Gale, 103 Mass. 104.

**86.** Goodwin *v.* Charleston, 100 Me. 549, 62 Atl. 606; Columbus *v.* Fountain Prairie, 134 Wis. 593, 115 N. W. 111.

**In Massachusetts,** under St. (1898) c. 496, § 3, requiring that any town of less than five hundred inhabitants in which no high school is maintained shall pay for the tuition of any child who, with the approval of the school-committee, attends a school in another town, and that no school-committee shall refuse such attendance if the child has completed the instruction provided by the former town, a town is liable where children are fully prepared for high school and attend one in a neighboring town, although approval is not granted by the school-committee. Fiske *v.* Huntington, 179 Mass. 571, 61 N. E. 260. *Compare* Millard *v.* Egremont, 164 Mass. 430, 41 N. E. 669, under St. (1891) c. 263; (1894) c. 436.

**In New Hampshire** school-districts being organizations distinct from each other and from the towns in which they are located, are "towns" within the meaning of Laws (1901), c. 96, making "towns" which do not maintain high schools of their own liable for the tuition of children residing therein with their parents or guardians, and attending high schools therein or in any other town or city in the state; but "towns" as such not being authorized to maintain a high school and having no boards of education are not subject to the liability imposed by such statute. Union School Dist. *v.* School Dist. No. 20, 71 N. H. 269, 52 Atl. 850.

**In Ohio** the act of April 14, 1900, amending Rev. St. § 4029–1 *et seq.*, and providing for the payment by a board of education of a township of the tuition of pupils of that township attending a high school in the same or adjoining county is directory merely, and a school-board is not bound to pay for the tuition of one of its pupils in a high school of an adjoining school-district, although such pupil has the qualifications necessary under the law for such attendance. Ashland Tp. Bd. of Education *v.* Montgomery Tp. Bd. of Education, 10 Ohio S. & C. Pl. Dec. 459, 8 Ohio N. P. 21; State *v.* Columbia Tp. Bd. of Education, 21 Ohio Cir. Ct. 383, 12 Ohio Cir. Dec. 337.

**Such tuition is payable to the high school district in which the instruction is afforded,** and not to the city within which such district may be located, and hence an action to recover the same must be brought by the district and not by the city or the city board of education. Columbus *v.* Fountain Prairie, 134 Wis. 593, 115 N. W. 111. See also Ricker Classical Inst. *v.* Mapleton, 101 Me. 553, 64 Atl. 948, holding that schools receiving pupils under the provision of such a statute may maintain in its own name an action against the town in which such pupils reside to recover the tuition of such pupils.

**87.** Boggs *v.* Cass School Tp., 128 Iowa 15, 102 N. W. 796.

**88.** Fiske *v.* Huntington, 179 Mass. 571, 61 N. E. 260 (holding that the failure of a school-committee of a town in which a child resides to grant a formal request to approve its attendance at the high school of another town is a sufficient refusal to render the town liable for its tuition); New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538; Burbank *v.* Pembroke School Dist., 73 N. H. 540, 64 Atl. 17.

**Minor cannot sue.**—A minor residing with his father who has never contracted on his own behalf as to his tuition at a high school attended by him and who has incurred no legal indebtedness cannot sue to recover an amount voluntarily paid as tuition for him to such high school by his father. Goodwin *v.* Charleston, 100 Me. 549, 62 Atl. 606.

**89.** New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538.

**90.** Hurlburt *v.* Boxford, 171 Mass. 501, 50 N. E. 1043. See also New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538.

the amount paid from the town in which he resides;[91] nor is a town or district liable for the tuition of a pupil at a high school who has already taken and graduated from a high school course.[92]

**f. Compulsory Attendance** — (i) *In General.* Under some statutes it is provided that parents or persons having the custody or control of children between certain ages shall compel them to attend school for a certain number of weeks during each school year,[93] including under some statutes private or parochial schools,[94] unless there is a reasonable excuse for non-attendance;[95] and that if such a parent or person having an eligible child under his control neglects or refuses without a sufficient excuse to cause the child to attend school for the prescribed period of time he shall forfeit a certain penalty,[96] or be found guilty of a misdemeanor punishable by a fine.[97] In some jurisdictions special provisions are made for children employed in labor, and are usually to the effect that children

**91.** Hurlburt *v.* Boxford, 171 Mass. 501, 50 N. E. 1043.

**92.** New Hampton Inst. *v.* Northwood School Dist., 74 N. H. 412, 68 Atl. 538, holding that under a statute authorizing the maintenance of high schools, a district maintaining a high school with one course of instruction is not liable for the tuition of children who, having taken that course, attend an approved school in another district, and that a district not maintaining a high school is not liable for the tuition of children attending an approved school after having graduated from an approved school.

**93.** See the statutes of the several states; and the following cases:

*Connecticut.*— Yale *v.* West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161.

*Massachusetts.*— Com. *v.* Roberts, 159 Mass. 372, 34 N. E. 402.

*Michigan.*— Jackson *v.* Mason, 145 Mich. 338, 108 N. W. 697.

*New Hampshire.*— State *v.* Hall, 74 N. H. 61, 64 Atl. 1102 (at a public school); State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

*New York.*— People *v.* Hendrickson, 125 N. Y. App. Div. 256, 109 N. Y. Suppl. 403 [*affirming* 54 Misc. 337, 104 N. Y. Suppl. 122], holding that the compulsory education law requires regular school attendance by every child between eight and sixteen years of age, of proper physical and mental condition.

*Pennsylvania.*— *In re* Compulsory Attendance Law, 10 Pa. Dist. 576, 25 Pa. Co. Ct. 503.

*Vermont.*— State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234, at a public school.

*Washington.*— State *v.* MacDonald, 25 Wash. 122, 69 Pac. 912.

*England.*— Winyard *v.* Toogood, 10 Q. B. D. 218, 47 J. P. 325, 52 L. J. M. C. 25, 48 L. T. Rep. N. S. 229, 31 Wkly. Rep. 271.

**Truancy** is an offense unknown to the common law, and the elements of the offense must be found in some ordinance, by-law, or statute. Cushing *v.* Friendship, 89 Me. 525, 36 Atl. 1001.

**94.** Quigley *v.* State, 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310, holding that a provision that the law compelling attendance at schools shall apply to "private schools" includes, by the use of those terms, parochial schools.

**95.** See *infra*, III, I, 1, f, (II).

**96.** Com. *v.* Roberts, 159 Mass. 372, 34 N. E. 402; State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739; State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234, holding that where the statute provides that such attendance shall begin with the school year, the offense is committed whenever a child is not in attendance in such a manner as will make the prescribed period of time from the beginning of the first term, although the parent or guardian intends to send the child to an academy for a period, which with the time he had attended the district school will make the prescribed period.

**Liability for habitual neglect** to send child to school see *Ex p.* London School Bd., 2 Q. B. D. 397, 46 L. J. M. C. 193, 36 L. T. Rep. N. S. 698, 25 Wkly. Rep. 536; Morgan *v.* Heycock, 44 J. P. 199.

**A mother** who has the care and custody of a child may be convicted for neglecting to cause him to attend school. London School Bd. *v.* Jackson, 7 Q. B. D. 502, 45 J. P. 750, 50 L. J. M. C. 134, 30 Wkly. Rep. 47; Hance *v.* Burnett, 45 J. P. 54. But an attendance order made on a father of a child cannot on the death of the father be enforced against the mother. Hance *v.* Fairhurst, 47 J. P. 53, 51 L. J. M. C. 139.

**Non-payment of school fees** as a failure to cause a child to attend a school within the meaning of the school laws see London School Bd. *v.* Wood, 15 Q. B. D. 415, 50 J. P. 54, 54 L. J. M. C. 154, 54 L. T. Rep. N. S. 88; Saunders *v.* Richardson, 7 Q. B. D. 388, 45 J. P. 782, 50 L. J. M. C. 137, 45 L. T. Rep. N. S. 319, 29 Wkly. Rep. 800 [*overruling* Richardson *v.* Saunders, 6 Q. B. D. 313, 45 J. P. 344, 50 L. J. M. C. 65, 44 L. T. Rep. N. S. 474, 29 Wkly. Rep. 631].

**Amount of penalty and costs** see Cook *v.* Plaskett, 47 J. P. 265, 46 L. T. Rep. N. S. 383.

**Distress** against goods of a parent for a fine imposed for non-attendance of children see Reg. *v.* German, 56 J. P. 358, 61 L. J. M. C. 43, 66 L. T. Rep. N. S. 264.

**97.** Com. *v.* Hammer, 9 Pa. Dist. 251; State *v.* MacDonald, 25 Wash. 122, 64 Pac.

between certain ages when so employed shall attend school a certain number of hours each week, except where they have attained a certain age and a prescribed standard of proficiency in certain branches of study.[98] A compulsory education law is not unconstitutional as an invasion of the natural right of a parent to govern and control his own children, as it is competent for the legislature to compel parents to perform the natural duty of education owed to their children.[99]

(II) *SUFFICIENCY OF COMPLIANCE AND EXCUSES.* It has been held under the various statutes that the compulsory education law is sufficiently complied with, and a child excused from attending a public school, if it is caused to attend for the prescribed length of time a private school approved by the public school authorities,[1] or is otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools,[2] or has already acquired instruction in the required branches.[3] It has also been held that a child is excused from attending a public school where he lives at such a distance from the school-house as makes it unreasonable for him to walk, unless a means of conveyance is provided by the school authorities,[4] where he is not of a sufficient physical or mental condition to attend school,[5] or where there is some other reasonable excuse for his non-attendance.[6] In the enforcement of such a law allowances should be

912, holding also that, upon parents being summoned and ordered to place their child in school, there is no authority to hold them as for contempt and punish them by fine.

**98.** See N. Y. Consol. Laws, c. 16, § 531. See also Winyard *v.* Toogood, 10 Q. B. D. 218, 47 J. P. 325, 52 L. J. M. C. 25, 48 L. T. Rep. N. S. 229, 31 Wkly. Rep. 271 [*overruling* Saunders *v.* Crawford, 9 Q. B. D. 612, 46 J. P. 344, 51 L. J. Q. B. 460, 46 L. T. Rep. N. S. 420]; Mellor *v.* Denham, 4 Q. B. D. 241, 48 L. J. M. C. 113, 40 L. T. Rep. N. S. 395, 27 Wkly. Rep. 496; Bury *v.* Cherrybohn, 1 Ex. D. 457, 35 L. T. Rep. N. S. 403.

**99.** State *v.* Bailey, 157 Ind. 324, 61 N. E. 730; State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

**Whether a compulsory education law is "wholesome and reasonable"** within the meaning of a constitutional provision giving the legislature power to make wholesome and reasonable laws, which they may judge to be for the benefit and welfare of the state, cannot be questioned by the court in an action against a parent for not complying with the statute, as it can only inquire whether it violates some other constitutional provision. State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

**1.** Com. *v.* Connecticut Valley St. R. Co., 196 Mass. 309, 82 N. E. 19; Com. *v.* Roberts, 159 Mass. 372, 34 N. E. 402; State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

**2.** Com. *v.* Roberts, 159 Mass. 372, 34 N. E. 402; State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234; Belper School Bd. *v.* Bailey, 9 Q. B. D. 259, 46 J. P. 438, 51 L. J. M. C. 91.

**Where a parent in good faith employs a teacher** formerly employed in the public schools to teach his child, under an arrangement that the child shall be taught all the branches taught in the public schools at the regular public school hours, and the child attends the teacher's home regularly every school-day and receives instruction equal to that which it could have received at the public schools, it is a sufficient compliance with the statute, although the teacher does not advertise himself as keeping a public school, and has no regular tuition fixed, or any school equipments, and makes no arrangement to take other pupils. State *v.* Peterman, 32 Ind. App. 665, 70 N. E. 550.

**3.** Com. *v.* Roberts, 159 Mass. 372, 34 N. E. 402; State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234.

**4.** State *v.* Hall, 74 N. H. 61, 64 Atl. 1102 (holding that under the school law a person having the custody and control of a child is required to send it to school whenever a conveyance is provided, but that he is not required, where he lives at such a distance from the school as makes it unreasonable for a child to walk, to convey the child to school either at his own expense or for a sum thought reasonable by the school-board); Belper School Bd. *v.* Bailey, 9 Q. B. D. 259, 46 J. P. 438, 51 L. J. M. C. 91; Hewett *v.* Thompson, 53 J. P. 103, 58 L. J. M. C. 60, 60 L. T. Rep. N. S. 268.

**5.** State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739; People *v.* Hendrickson, 125 N. Y. App. Div. 256, 109 N. Y. Suppl. 403 [*affirming* 54 Misc. 337, 104 N. Y. Suppl. 122]; State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234; Belper School Bd. *v.* Bailey, 9 Q. B. D. 259, 46 J. P. 438, 51 L. J. M. C. 91; Hewett *v.* Thompson, 53 J. P. 103, 58 L. J. M. C. 60, 60 L. T. Rep. N. S. 268.

**A parent who withdraws his child from school on account of the latter's ill-health** and in obedience to an apparently reasonable necessity, without first obtaining the permission of the school-board, is not thereby made subject to the statutory penalty. State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

**6.** Belper School Bd. *v.* Bailey, 9 Q. B. D. 259, 46 J. P. 438, 51 L. J. M. C. 91; Mather *v.* Lawrence, [1899] 1 Q. B. 1000, 19 Cox C. C. 300, 63 J. P. 455, 68 L. J. Q. B. 714, 80 L. T. Rep. N. S. 600, 15 T. L. R. 347, 47 Wkly. Rep. 559; London School Bd. *v.* Dug-

made for delinquencies that may happen by reason of lack of knowledge on the part of those affected by its provisions,[7] and under some statutes the law is not operative where there are not sufficient seating accommodations to seat children compelled to attend,[8] or where the absences are merely occasional and temporary.[9] Since such a statute is a penal one, it must be strictly construed without reading into it the provisions of a statute which denies a child the privilege of attending school unless vaccinated;[10] and where the vaccination law does not make vaccination compulsory, if the parent sends his child to school in good faith, but he is refused admission on the ground that he is not vaccinated, the parent is not amenable to the penalty of the compulsory education law.[11]

(III) *TRIAL OF OFFENSES.*[12] The trial of an offense against a compulsory education law should be had within the bounds of the school-district where the offense occurred,[13] before a proper court or officer having jurisdiction of the offense,[14] and on a proper complaint.[15] Defendant will not be permitted to present his excuses for keeping a child out of school to the jury as a defense where by statute the school-board is the judge of the truth and sufficiency of such excuses, and defendant has been repeatedly notified to appear and present the same to the school-board, but neglects to do so.[16]

**g. Truants and Truant Officers and Schools.** Provision is sometimes made for the establishment of truant schools at which school children guilty of habitual truancy may be placed,[17] and for the appointment of officers known as truant officers to look after non-attending children and compel their attendance or inquire into their excuses for non-attendance.[18]

gan, 13 Q. B. D. 176, 48 J. P. 742, 53 L. J. M. C. 104, 32 Wkly. Rep. 768. See also Jones *v.* Rowland, 19 Cox C. C 315, 63 J. P. 454, 80 L. T. Rep. N. S. 630; Hewett *v.* Thompson, 53 J. P. 103, 58 L. J. M. C. 60, 60 L. T. Rep. N. S. 268.

**That the child had played truant** against the parent's wish is not a reasonable excuse for failing to comply with an attendance order. Hewett *v.* Thompson, 53 J. P. 103, 58 L. J. M. C. 60, 60 L. T. Rep. N. S. 268.

7. *In re* Compulsory Attendance Law, 10 Pa. Dist. 576, 25 Pa. Co. Ct. 503.

8. Quigley *v.* State, 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310, holding also that in a prosecution against the principal of a private school for failing to enforce attendance, the burden is on him to show the want of accommodation in the district wherein the school is located.

9. State *v.* Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

10. Com. *v.* Smitb, 9 Pa. Dist. 625, 24 Pa. Co. Ct. 129.

11. Com. *v.* Smith, 9 Pa. Dist. 625, 24 Pa Co. Ct. 129; Com. *v.* Bauman, 33 Pittsb. Leg. J. N. S. (Pa.) 109.

12. **Proof of conviction for non-compliance with attendance order** see London School Bd. *v.* Harvey, 4 Q. B. D. 451, 48 L. J. M. C. 130, 27 Wkly. Rep. 786.

13. Grahn *v.* State, 9 Ohio S. & C. Pl. Dec. 816, 6 Ohio N. P. 182.

14. Quigley *v.* State, 5 Ohio Cir. Ct. 638, 3 Ohio Cir. Dec. 310 [*affirming* 11 Ohio Dec. (Reprint) 340, 26 Cinc. L. Bul. 129]; Com. *v.* Hammer, 9 Pa. Dist. 251.

**Jurisdiction of justices** under the English Elementary Education Act of 1876 see Reg. *v.* Eaton, 8 Q. B. D. 158, 46 J. P. 231, 51 L. J. M. C. 31, 46 L. T. Rep. N. S. 663, 30 Wkly. Rep. 335; Thompson *v.* Rose, 56 J. P. 438, 61 L. J. M. C. 26, 65 L. T. Rep. N. S. 851, 40 Wkly. Rep. 155.

15. See State *v.* McCaffrey, 69 Vt. 85, 37 Atl. 234.

16. Com. *v.* Hammer, 9 Pa. Dist. 251.

17. Lynn *v.* Essex County Com'rs, 148 Mass. 148, 19 N. E. 171; Fay *v.* Barber, 72 Vt. 55, 47 Atl. 180.

**Provision mandatory.**— The provision of Mass. Pub. St. c. 48, § 14, that if three or more towns so require the county commissioners shall establish truant schools is mandatory, and on a proper requirement the commissioners should establish the school without reference to their views as to the expediency of doing so. Lynn *v.* Essex County Com'rs, 148 Mass. 148, 19 N. E. 171, 153 Mass. 40, 26 N. E. 409, holding also that the word "town" as used in such provision includes cities.

**Liability of state for costs.**— Under Vt. St. § 2016, declaring that the costs of a prosecution for a breach of a penal law or other offense shall be paid out of the treasury to which the penalty by law belongs, and section 718, making habitual truancy punishable by confinement in the industrial school, the costs of a prosecution for habitual truancy in which defendant is sentenced to the industrial school should be paid by the state, since it receives the penalty in the form of any service defendant might perform. Fay *v.* Barber, 72 Vt. 55, 47 Atl. 180.

18. Featherngill *v.* State, 33 Ind. App. 683, 72 N. E. 181, holding that under Burns Annot. St. (1901) § 6633b, providing for the appointment of truant officers on the first Monday of May of each year, is directory only so far as it relates to the time of ap-

**2. School Terms, Classification of Pupils, and Instruction — a. School Terms, Vacations, and Holidays.** While under some school laws the length of time a school shall be kept open during each year is left to the discretion of the school-board having the general charge and superintendence of public schools or to the electors of the district,[19] ordinarily it is provided by the state constitution or by statute that a school shall be taught in each district for a term of at least a given number of weeks,[20] and it is then left to the electors or people of the district,[21] or to the proper school-board or officer,[22] to provide for a longer term if they so desire, and to fix holidays and vacations.[23] Under some statutes the school authorities may provide for a shorter term than that limited in the statute if there are good reasons for doing so.[24] Where separate schools are maintained for different races, the school term for each race must be of the same length during the year.[25]

**b. Grades or Classes and Departments.** Under the various constitutional or statutory provisions relating to the grades or classes and departments that may be established and maintained as a part of a public school system,[26] it has been provided or held that where the number of school children in city or town districts require more than one teacher, the schools shall be graded,[27] and that there may be established and maintained a high school grade or department[28] or a

pointment, and does not preclude a subsequent appointment.

**Qualifications.**—A truant officer is a public officer, and is therefore bound to qualify before entering on the duties of his office by taking the oath prescribed by statute. Featherngill *v.* State, 33 Ind. App. 683, 72 N. E. 181.

**Term of office.**—Under Mass. Gen. St. c. 42, § 5, a truant officer does not hold over until another is appointed, but his office expires at the end of the municipal year. Huse *v.* Lowell, 10 Allen (Mass.) 149. But under Burns Annot. St. Ind. (1901) § 6633*b*, a truant officer duly appointed is entitled to hold his office until his successor has qualified by taking the prescribed oath. Featherngill *v.* State, 33 Ind. App. 682, 72 N. E. 181.

**The rule of respondeat superior** does not apply to the relation existing between a board of education of a union free school and an "attendance officer" appointed by the former in compliance with N. Y. Consol. School Law (Laws (1894), cc. 556, 671), and the board of education is not liable for the act of such "attendance officer" in wrongfully arresting a scholar by reason of which, in his efforts to escape along the line of a railroad, the scholar is killed. Reynolds *v.* Little Falls Union Free School Dist. Bd. of Education, 33 N. Y. App. Div. 88, 53 N. Y. Suppl. 75.

**A city** is not liable for a negligent injury inflicted on a truant school-boy by an attendance officer while in the performance of his duties, where by statute such an officer is a state officer and not a servant of the city. Rhall *v.* New York Bd. of Education, 40 N. Y. App. Div. 412, 57 N. Y. Suppl. 977.

19. Morley *v.* Power, 10 Lea (Tenn.) 219.

**Suspension of school.**—Under a statute giving the electors of a school-district power to determine at their annual meeting whether they will have a school for the ensuing year, they have implied power to suspend the school for the purpose of building a schoolhouse. Hale *v.* Brown, 70 Ark. 471, 69 S. W. 260.

20. See Herrington *v.* Liston Dist. Tp., 47 Iowa 11; Matney *v.* Boydston, 27 Mo. App. 36.

21. Matney *v.* Boydston, 27 Mo. App. 36, holding, however, that such power in the electors of the district at an annual meeting is limited to the current year and that such meeting cannot provide for the school term in another year.

22. Wood *v.* Farmer, 69 Iowa 533, 29 N. W. 440, holding, however, that an order of the superintendent of public instruction that a school shall be held in a certain subdistrict for three months during the summer months cannot be enforced after such term has passed.

23. Weymouth Ninth School Dist. *v.* Loud, 12 Gray (Mass.) 61.

24. Herrington *v.* Liston Dist. Tp., 47 Iowa 11, holding that under Code, § 1727, requiring a school to be taught in each subdistrict "for at least twenty-four weeks in a year, unless the county superintendent shall be satisfied that there is good reason for a failure to do so," a resolution by the directors of a school for less weeks in the year is valid, although the superintendent's consent is obtained afterward.

25. Lowery *v.* Kernersville Graded School, 140 N. C. 33, 52 S. E. 267; Williams *v.* Fairfax Dist. Bd. of Education, 45 W. Va. 199, 31 S. E. 985.

26. See the constitutions and statutes of the several states.

27. Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096, holding further that a finding that a school-district is of the class employing more than one teacher is supported by the evidence of three teachers of the district who testify without objection by either party.

28. Russell *v.* Cook County Dist. No. 131, 212 Ill. 327, 72 N. E. 441 (holding that under

kindergarten department.[29] Under a power to prescribe necessary rules and regulations for the management and government of the schools, a school-board may require a classification of the pupils with respect to the branches of study they are respectively pursuing and with respect to the proficiency or degree of advancement in the same branches.[30] Where under the state school system it is common and convenient to do so, the various grades may be taught in one building.[31]

**c. Curriculum and Courses of Study.** It is usually required that certain specified branches shall be taught in the several grades of the public schools;[32] but in the absence of such a requirement, or in addition to the branches thus specified, it is within the discretion of the electors of the district, or of the local school-board, except in so far as they may be restricted by a constitutional or statutory provision, to provide for the teaching of such other branches in particular grades or departments as they may deem best,[33] including music,[34] draw-

the school law and Const. art. 8, § 1, any school-district may establish and maintain a high school department); Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654 (holding that boards of education of cities of the first class have power to establish and maintain various grades or departments in city public schools, including a high school grade or department).

29. Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (holding that the board of education of a city may adopt the kindergarten as a special branch of the primary school system); *In re* Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469 (holding that the legislature has power to establish a kindergarten department in the public school system).

30. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

Such rules or regulations are for the benefit of all and presumptively are promotive of the interests of all, and no parent has the right to demand that the interests of the children of others shall be sacrificed for the interests of his child, and consequently cannot insist that his child shall be placed or kept in particular classes when by so doing others will be retarded in their studies. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

31. Hathaway *v.* New Baltimore, 48 Mich. 251, 12 N. W. 186.

32. Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654.

The state board of education has, under some statutes, exclusive power to adopt a uniform course of study for use in the public schools of a state and in such a case it is the duty of a local school-board to substantially enforce the same (Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1093; Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096), and it has no authority to adopt a course of study in conflict with that so prescribed (Wagner *v.* Royal, *supra*; Westland Pub. Co. *v.* Royal, *supra*), and where a general course of study is prepared and published by the state board of education, and such course is treated by a school-board as the state course of study, it is not entitled, in a suit to enforce the same, to claim that the board of education has not adopted a course of study (Wagner *v.* Royal, *supra*).

33. *California.*— Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594.

*Illinois.*— Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123; Rulison *v.* Post, 79 Ill. 567.

*Indiana.*— Indianapolis School Com'rs *v.* State, 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147.

*Kansas.*— Topeka Bd. of Education *v.* Welch, 51 Kan. 792, 33 Pac. 654, holding also that the courts will not interfere with the board's decision in this respect unless there has been such an abuse of its discretion as works palpable injustice or injury.

*Michigan.*— Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69.

*Missouri.*— Roach *v.* St. Louis Public Schools, 77 Mo. 484, holding that the term "common schools" as used in the Missouri legislature does not indicate the grade of the schools or what may or may not be taught therein, and that hence a school-board may in its discretion provide that more than the rudiments of an education be furnished.

See 43 Cent. Dig. tit. "Schools and School Districts," § 336.

Compositions.— The public school authorities may make it a part of the school course to write compositions, and enter into debates and prescribe that all pupils shall participate therein; and whether a particular subject given by such authorities for composition or debate is suited to the age and advancement of a pupil is a question for the determination of such authorities and not for the courts. Samuel Benedict Memorial School *v.* Bradford, 111 Ga. 801, 36 S. E. 920.

Science and art schools and classes see Reg. *v.* Cockerton, [1901] 1 Q. B. 726, 65 J. P. 435, 70 L. J. K. B. 441, 84 L. T. Rep. N. S. 488, 17 T. L. R. 402, 49 Wkly. Rep. 433.

34. Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123 (vocal music); State *v.* Webber, 108 Ind. 31, 8 N. E. 708, 58 Am. St. Rep. 30; Bellmeyer *v.* Marshalltown Independent Dist., 44 Iowa 564.

ing,[35] and the modern languages,[36] such as German.[37] A rule or regulation prescribing a course of study for a particular school, such as a high school, does not require that any particular branch of study is compulsory upon those who attend the school;[38] nor does such a rule or regulation deny a parent all control of the education of his child, but merely withdraws from him the right to select the branches to be studied by his child to the extent that the exercise of such right will interfere with the system of instruction provided for the school and its efficiency in imparting instruction to all entitled to share in its benefits;[39] and hence a parent cannot insist that his child shall be taught studies not in the prescribed course of the school,[40] or that he shall be allowed to use a text-book different from that adopted,[41] or to adopt methods of study that interfere with others in their studies.[42]

**d. Religious Instruction and Reading of Scriptures.**[43] In many jurisdictions provision is made by the constitutions against the use of public funds in support of religious or sectarian institutions, or against the giving of religious or sectarian instruction in the public schools;[44] and it has been held that public funds cannot be used for such a purpose, even in the absence of an express constitutional prohibition to that effect.[45] The authorities, however, are not uniform as to what constitutes religious or sectarian instruction within the meaning of such a prohibition;[46] but in most jurisdictions it is held that the reading of the Bible or parts thereof without comment or remark, the repeating of a prayer, and the singing of religious songs in the public schools, which exercises need not be attended or participated in by pupils whose parents or guardians object thereto, is not in violation of a constitutional provision against the giving of religious or sectarian instruction,[47] or of a provision that no person shall be compelled to attend or

35. Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123.

36. Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69.

**The teaching of Latin and Greek** in the common schools established under the common school law of Kentucky is not in violation of that law. Newman *v.* Thompson, 4 S. W. 341, 9 Ky. L. Rep. 199.

**While the medium of communication must be the English language,** the teaching of a modern language is not thereby prohibited. Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123.

37. Powell *v.* Board of Education, 97 Ill. 375, 37 Am. Rep. 123.

**Upon demand of parents or guardians** see Indianapolis School Com'rs *v.* State, 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147.

**Lack of funds no excuse.**— It is not a sufficient reason for refusing to introduce the study of German in a school that there are no funds therefor in the school treasury, where it appears that studies not required by statute are pursued in such school at an expense greater than that of teaching German. Indianapolis School Com'rs *v.* State, 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147.

38. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55; Rulison *v.* Post, 79 Ill. 567.

39. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

**A parent may make a reasonable selection from the prescribed studies** for his child to pursue. State *v.* Dixon County School-Dist. No. 1, 31 Nebr. 552, 48 N. W. 393.

40. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

41. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

42. School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

43. **Mandamus prohibiting sectarian instruction** see MANDAMUS, 26 Cyc. 285.

44. O'Connor *v.* Hendrick, 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161 [*affirmed* in 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. N. S. 402]; Stevenson *v.* Hanyon, 4 Pa. Dist. 395, 16 Pa. Co. Ct. 186; Church *v.* Bullock, (Tex. 1908) 109 S. W. 115 [*affirming* (Civ. App. 1907) 100 S. W. 1025]. See also Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 13 Am. Rep. 223.

45. Millard *v.* Board of Education, 121 Ill. 297, 10 N. E. 669. See also State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

46. **The wearing of the garb and insignia of a sisterhood of nuns while teaching in the** public schools cannot be termed "sectarian teaching," and is not unlawful, although the garb and insignia impart at once knowledge to the pupil of the religious belief and society membership of the wearer. Hysong *v.* Gallitzin School Dist., 164 Pa. St. 629, 30 Atl. 482, 44 Am. St. Rep. 632, 26 L. R. A. 203. But see O'Connor *v.* Hendrick, 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161 [*affirmed* in 184 N. Y. 421, 77 N. E. 612].

47. Billard *v.* Topeka Bd. of Education, 69 Kan. 53, 76 Pac. 422, 105 Am. St. Rep. 148, 66 L. R. A. 166; State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927. But see State *v.* Edgerton School-Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

contribute to the support of any place of worship or minister of religion,[48] or of a provision against using public funds in aid or support of any sectarian school,[49] or in violation of a constitutional provision guaranteeing religious liberty.[50] Where, however, such use of the Bible is abused, so as to amount to sectarian instruction, the courts may intervene to enjoin it.[51] A resolution of a school-board prohibiting the reading of the Bible and prayer and other religious instructions in the school is final and cannot be reviewed by the courts.[52]

**In Massachusetts** it has been held that a school-committee may lawfully pass a rule requiring a school to be opened by reading from the Bible and prayer, and that each child shall bow the head during such prayer, and that any scholar shall be excused from bowing the head if his parents request it; and that when any scholar refuses to obey the rule, and his parents refuse to request that he shall be excused, the committee may exclude such scholar from the school. Spiller *v.* Woburn, 12 Allen (Mass.) 127.

**The Bible is not a sectarian book,** and the reading thereof without comment in the public schools does not constitute sectarian instruction, within the meaning of a provision that no books of a sectarian character shall be used in any common school, or that no sectarian doctrine shall be taught therein. Hackett *v.* Brooksville Graded School Dist., 120 Ky. 608, 87 S. W. 792, 27 Ky. L. Rep. 1021, 117 Am. St. Rep. 599, 69 L. R. A. 592.

**Whether it is prudent or politic to permit Bible reading** in the public schools is a question for the school authorities to determine, but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence. State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

**Objection of parent.**— It is immaterial whether the objection of a parent to his children participating in a religious service conducted by a teacher in a school-room during school hours is reasonable or unreasonable. State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

**48.** *Iowa.*— Moore *v.* Monroe, 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444.

*Kentucky.*— Hackett *v.* Brooksville Graded School Dist., 120 Ky. 608, 87 S. W. 792, 27 Ky. L. Rep. 1021, 117 Am. St. Rep. 599, 69 L. R. A. 592, holding that a public school opened with prayer and the reading without comment of passages from King James' translation of the Bible, during which pupils are not required to attend, is not a "place of worship," nor are its teachers "ministers of religion" within the meaning of such a constitutional provision.

*Michigan.*— Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536.

*Ohio.*— Nessle *v.* Hum, 2 Ohio S. & C. Pl. Dec. 34, 1 Ohio N. P. 140.

*Pennsylvania.*— Hart *v.* Sharpsville School Dist., 2 Lanc. L. Rev. 346.

*Texas.*— Church *v.* Bullock, (1908) 109 S. W. 115 [*affirming* (Civ. App. 1907) 100 S. W. 1025].

See 43 Cent. Dig. tit. "Schools and School Districts," § 337.

But see State *v.* Edgerton School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330, holding that Const. art. 1, § 18, clause 2, declaring that "no man shall be compelled to . . . erect, or support any place of worship" entitles an individual taxpayer to prevent the reading of the Bible in the public schools, since such reading is an act of worship within the intendment of such article, and the reading of it makes the public schools places of worship.

**An injunction** will not be granted to restrain the reading or repeating of the Bible, or parts thereof, or the singing of religious songs, in a school at the instance of a taxpayer whose children are not required to be present during such exercises. Moore *v.* Monroe, 64 Iowa 367, 20 N. W. 475, 52 Am. St. Rep. 444.

**49.** Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536; O'Connor *v.* Hendrick, 109 N. Y. App. Div. 361, 96 N. Y. Suppl. 161 [*affirmed* in 184 N. Y. 421, 77 N. E. 612, 17 L. R. A. N. S. 402]; Stevenson *v.* Hanyon, 7 Pa. Dist. 585, 9 Kulp 256; Church *v.* Bullock, (Tex. 1908) 109 S. W. 115 [*affirming* (Civ. App. 1907) 100 S. W. 1025], holding that one or more individuals do not have the right under such a provision to have the courts deny the people the privilege of having children instructed in the public schools in the moral truths of the Bible, because such objectors do not desire that their own children shall be participants therein. But see State *v.* Edgerton School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

**50.** Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256, holding that a regulation requiring that the protestant version of the Bible be read in the public schools by the scholars who are able to read on pain of expulsion is not in conflict with such a constitutional provision. See also CONSTITUTIONAL LAW, 8 Cyc. 884.

**51.** State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927, holding that the point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse, where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. See also Millard *v.* Board of Education, 121 Ill. 297, 10 N. E. 669.

**52.** New Antioch Bd. of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58.

**e. Text-Books** [53] — (I) *SELECTION AND ADOPTION.* In the absence of a constituted authority to determine the text-books to be used in a public school, or upon the failure of the proper authorities to act, the teacher is naturally the most available agent for that purpose because of his familiarity with the contents and relative merits of the different books; [54] or it has been held that where the legislature has failed to establish a uniform series of books, and has not conferred special authority on any officer or board so to do, the school-board which has charge of the government of a school may designate the text-books to be used therein.[55] But under some constitutions it is within the power of the legislature to provide for a uniform series of text-books throughout the state; [56] and provision is sometimes made for the establishing of a uniform series of text-books to be selected and adopted through a state book commission, or the state board of education, and for the obtaining of such books at cheaper prices, to be used in the public schools of the state.[57] But under some provisions, authority to select and adopt such books is vested in the local authorities of the county [58] or of the school-district or city.[59] Such selection and adoption must be made in the mode

**53. Authority to contract for books and other appliances** see *supra*, III, E, 3.

**54.** State *v.* Millsap, 130 Mo. App. 683, 108 S. W. 1133, holding also that a majority of the patrons of a school-district have no authority to prescribe the books to be used.

**55.** Campana *v.* Calderhead, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277.

**56.** State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

**57.** See the constitutions and statutes of the several states; and the following cases:

*Alabama.*— Dickinson *v.* Cunningham, 140 527, 37 So. 345.

*Kansas.*— State *v.* Topeka Bd. of Education, 59 Kan. 501, 53 Pac. 478.

*Maryland.*— Baltimore School Com'rs *v.* State Bd. of Education, 26 Md. 505.

*Minnesota.*— Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450.

*Missouri.*— State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125, holding that a statutory provision for the appointment of a school-book commission to select text-books, and to make contracts for supplying the same, is not in violation of the Const. art. 11, § 4, providing that "the supervision of instruction in the public schools" shall be vested in the state board of education.

*Montana.*— Campana *v.* Calderhead, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277, holding, however, that a constitutional provision imposing on the legislature the duty of establishing and maintaining "a general, uniform and thorough system of public, free common schools," does not necessarily require that body to establish a uniform series of text-books throughout the state.

*Nevada.*— State *v.* State Bd. of Education, 18 Nev. 173, 1 Pac. 844.

*Tennessee.*— Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

*Washington.*— Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096, holding that under Laws (1897), p. 356, the state board of education has the exclusive power to adopt a uniform series of text-books for the public schools.

*United States.*— Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 8 Reporter 39, 5 Sawy. 502.

See 43 Cent. Dig. tit. "Schools and School Districts," § 338.

**Evidence of adoption.**— The fact that the state board of education has adopted a uniform series of text-books for the public schools is sufficiently evidenced, where it appears that the same is published throughout the state apparently by its authority, and is generally recognized as valid and acted upon. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103.

**Under the Alabama act** of March 4, 1903, it is an indispensable prerequisite to the authorization of text-books to be used in the public free schools of the state that the printing with reference to the price, etc., as required by the statute, shall appear on and in the books. Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

**58.** People *v.* Oakland Bd. of Education, 55 Cal. 331.

**Jurisdiction of county court to canvass** vote on county uniformity of text-books see Firestone *v.* White, 71 Ark. 109, 71 S. W. 250.

**59.** *California.*— People *v.* Oakland Bd. of Education, 55 Cal. 331.

*Iowa.*— McNees *v.* East River School Tp., 133 Iowa 120, 110 N. W. 325; Ries *v.* Hammer, 127 Iowa 408, 103 N. W. 346.

*Maine.*— Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256, holding that a school-committee's selection of books cannot be inquired into by the court, although their selection may be injudicious and unwise.

*Michigan.*— Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746; Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

*Ohio.*— State *v.* Columbus Bd. of Education, 35 Ohio St. 368.

*Pennsylvania.*— Butler *v.* Shirley Tp. School Dist., 15 Pa. Co. Ct. 291; Francis *v.* Allegheny School Dist., 24 Pittsb. Leg. J. N. S. 19, holding that a board of directors cannot adopt in the schools of its district

prescribed by statute;[60] but a provision that all text-books used in any school-district shall be uniform on any one subject requires uniformity in the same grade only, and does not require that all text-books used in the different grades on the same subject shall be of the same series.[61]

(II) *CHANGE OF TEXT-BOOK.* Provision is also sometimes made by statute in regard to the changing of text-books that have been adopted,[62] provided the change is made in the manner prescribed, as by publishing notice thereof in a newspaper for a prescribed length of time.[63] Under some statutes text-books which have been regularly adopted must be continued in use for not less than a given length of time, and cannot be legally changed within that time,[64] except

more than one series of text-books covering the same studies.

*Utah.*— Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

See 43 Cent. Dig. tit. "Schools and School Districts," § 338.

**The adoption of a report of a committee on books,** recommending the adoption of certain new books, is a sufficient adoption of such books by the school-board. Heckman *v.* Allegheny Bd. of Controllers, 34 Pittsb. Leg. J. N. S. (Pa.) 81.

**A resolution adopting a certain text-book** is not affected by a rule of the school-board fixing a time for the subsequent reconsideration of such a resolution. Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

60. McNees *v.* East River School Tp., 133 Iowa 120, 110 N. W. 325 (holding that a selection of text-books made without advertising for bids as required by statute is void); Johnson *v.* Ginn, 105 Ky. 654, 49 S. W. 470, 20 Ky. L. Rep. 1475 (requirement that the books shall be set out in the bond filed by the publisher); Butler *v.* Shirley Tp. School Dist., 15 Pa. Co. Ct. 291 (holding that where the school law requires that the school-board when desiring to adopt a series of books to be used in the school-district for the ensuing year shall notify the teachers for such year to be present at the meeting, for the purpose of advice and consultation, an adoption of text-books at a meeting called prior to the election of teachers is invalid); Shannon *v.* School Directors, 10 Kulp (Pa.) 544 (holding that text-books may not be adopted by a school-board except on the affirmative vote of a majority of the whole number of the board); Glynn *v.* Fell Tp. School Dist., 5 Lack. Leg. N. (Pa.) 313.

61. Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746.

62. See People *v.* Oakland Bd. of Education, 54 Cal. 375 (holding that the action of a school-board in adopting a series of text-books in lieu of a series previously in use cannot be reviewed on certiorari); State *v.* Cleveland Bd. of Education, 2 Ohio Cir. Ct. 510, 1 Ohio Cir. Dec. 614.

63. Greene *v.* San Francisco Bd. of Education, 131 Cal. 165, 63 Pac. 161 (holding that a resolution changing text-books without giving such notice is void); People *v.* State Bd. of Education, 49 Cal. 684.

64. *California.*— Greene *v.* San Francisco Bd. of Education, 31 Cal. 165, 63 Pac. 161, four years. See also People *v.* Oakland Bd. of Education, 55 Cal. 331.

*Illinois.*— People *v.* Aurora School Dist. No. 5 Bd. of Education, 175 Ill. 9, 51 N. E. 633, holding that the School Law, art. 5, § 26, providing that the board of directors of each district "shall not permit text-books to be changed oftener than once in four years" applies to boards of education in school-districts having more than one thousand, and less than one hundred thousand inhabitants.

*Kentucky.*— American Book Co. *v.* McElroy, 76 S. W. 850, 25 Ky. L. Rep. 960, five years.

*Michigan.*— Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746, five years.

*Ohio.*— State *v.* Columbus Bd. of Education, 35 Ohio St. 368, three years.

*Pennsylvania.*— Shannon *v.* School Directors, 10 Kulp 544 (three years); Glynn *v.* Fell Tp. School Dist., 5 Lack. Leg. N. 313.

*Utah.*— Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

*Washington.*— Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096, five years.

See 43 Cent. Dig. tit. "Schools and School Districts," § 338.

But *compare* Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 8 Reporter 39, 5 Sawy. 502, holding that an act of the state of Oregon authorizing the adoption of text-books for the use of the common schools of the state for a prescribed period does not constitute a contract with the publishers of the adopted books, by which the state is bound to use the same in its schools for such period, or authorize the board of education to make any contract with such publisher on behalf of the state concerning the furnishing and use of such books; but that such act is a mere regulation imposed by the state upon itself, and that therefore the legislature may modify or abrogate it at pleasure.

**Sufficiency of adoption.**—Where a board of education passes a resolution for the purchase and use of a certain text-book in the schools and purchases a certain number of such books, such resolution constitutes a sufficient adoption of such book to preclude the board from thereafter changing the same within the statutory period. Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746.

**Beginning of limitation.**—Where a school-board passes a resolution for the purchase

upon certain conditions,[65] such as upon the consent of a majority of the voters of the district [66] or of a certain proportion of the members of the school-board.[67] It has been held under the various statutes that after a certain text-book has been adopted and copies of it are received and sold to the patrons of the school, a school-board has no right to reconsider the resolution adopting such book; [68] but on the other hand it has been held that a state board of education may reconsider its action in prescribing a certain text-book, and change any book it has prescribed, before it has been adopted by the school-districts; [69] and that in the absence of a statutory provision to that effect a school-board is entitled to rescind its previous action adopting certain text-books, and to adopt others at its discretion.[70]

(III) *Power and Duty to Furnish Text-Books* [71] — (A) *In General.* Under its power over schools, the state legislature may provide the method or mode in which the text-books adopted shall be obtained and distributed, and it is the duty of the school authorities to comply with such a provision in obtaining and distributing text-books,[72] and a purchase of text-books other than for the purpose of adopting them for general use in the schools is illegal and void.[73] It is sometimes provided that the school-board may furnish free school-books to pupils whose parents are too poor to supply them therewith,[74] or that it may purchase school-books and rent them,[75] or sell them to the pupils at cost; [76] but in the absence of statute a school-board's power of general management of its school does not authorize it to distribute school-books for the free use of all pupils regardless of whether their parents are financially able at their own cost to supply them with necessary books.[77]

of certain books to be used in the schools, the statutory period within which the board is prohibited from changing such books begins to run from the date of the resolution, and not from the time the books are completely installed in all the schools. Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746.

**Graded writing or copy books** with printed forms and texts scientifically arranged, with printed instructions to the pupils in each book, and with a manual of instruction for the teachers, are text-books within the meaning of a statutory provision that text-books shall not be changed oftener than once in a given length of time. People *v.* Aurora School Dist. No. 5 Bd. of Education, 175 Ill. 9, 51 N. E. 633.

**65.** See Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

**66.** Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309.

**67.** State *v.* Columbus Bd. of Education, 35 Ohio St. 368; Ivison *v.* Indianapolis School Com'rs, 39 Fed. 735.

**68.** Jones *v.* Detroit Bd. of Education, 88 Mich. 371, 50 N. W. 309; State *v.* Columbus Bd. of Education, 35 Ohio St. 368.

**69.** State *v.* State Bd. of Education, 18 Nev. 173, 1 Pac. 844.

**70.** State *v.* Wilson, 121 Wis. 523, 99 N. W. 336.

**71. Mandamus to compel purchase and use of text-books** see MANDAMUS, 26 Cyc. 284.

**72.** State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.

**Notice.**—A statutory requirement that the school-board shall give notice of the place where class books procured by the board may be obtained is sufficiently complied with by depositing the books with the teachers and giving notice thereof to the schools. Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

**73.** Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 557, 93 N. W. 546.

**74.** Shelby County Council *v.* State, 155 Ind. 216, 57 N. E. 712; Parker *v.* Cleveland Bd. of Education, 9 Ohio Dec. (Reprint) 335, 12 Cinc. L. Bul. 186; *In re* School Directors, 12 Wkly. Notes Cas. (Pa.) 125, indigent blind children. See also Wickersham's Appeal, 1 Chest. Co. Rep. (Pa.) 509.

**75.** Mathis *v.* Gordy, 119 Ga. 817, 47 S. E. 171, holding, however, that such a provision does not authorize a school-board to compel pupils to rent such books, and to make the payment of the rental charge a condition precedent to admission to the school, without regard to whether the pupils already have such books.

**76.** Ries *v.* Hemmer, 127 Iowa 408, 103 N. W. 346, holding, however, that authority in a school-board to contract for and buy and sell text-books at cost, and to select persons to keep the same for sale, does not authorize the school-board to contract with a book-seller to sell books to scholars at cost, in consideration of payments to be made to him out of the contingent fund of the district.

**77.** Harris *v.* Kill, 108 Ill. App. 305; Detroit Bd. of Education *v.* Detroit Common Council, 80 Mich. 548, 45 N. W. 585; Parker *v.* Cleveland Bd. of Education, 9 Ohio Dec. (Reprint) 335, 12 Cinc. L. Bul. 186, holding, however, that a school-board will not be enjoined from paying for supplies purchased by it for free distribution to other

(B) *Duty to Enforce Use of Text-Book Adopted by State.* Where a certain text-book is adopted by the state board of education, or state book commission, to be used in a specified grade, it is the duty of the school-district board to enforce such use of the book so adopted; [78] and where the use of such book is not so enforced it may be assumed that the publisher of such book is deprived of a portion of the benefit which he is entitled to receive from his contract to supply it; [79] and if the publisher is materially damaged thereby, an injunction may issue to require the school-board to cause the text-book to be used in the grade for which it was prescribed.[80] It is no excuse to a school-board for failing to enforce the use of books which have been so adopted that the publisher's bond to the state has not been duly approved [81] or that the use of the books adopted is inadvisable,[82] and hence a school-district cannot excuse itself on such grounds from enforcing the course of study prescribed by the state and using the books contracted for,[83] or on the ground that changes have been made in the text-book, where the contract with the state provided for such changes.[84] Under some statutes it is a misdemeanor for any person or teacher to violate the provisions of such a statute by using unauthorized text-books or text-books which have not been purchased from the publishers or from some of their established agencies.[85]

(IV) *CONTRACTS TO SUPPLY.* A contract for the purchase or revision of

than indigent pupils, in the absence of proof that the persons from whom it purchased knew that the supplies were intended for such free distribution, although such improper distribution will be enjoined.

**Authority to purchase furniture, apparatus, and other educational appliances** does not authorize a school-board to purchase text-books for the use of pupils individually. Honey Creek School Tp. *v.* Barnes, 119 Ind. 213, 21 N. E. 747.

78. State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; State *v.* Topeka Bd. of Education, 59 Kan. 501, 53 Pac. 478 (holding that a city may be compelled to comply with such an adoption, although its board is under a written contract with certain publishers to use the books of said publishers for a stated period, since such a contract is beyond the power of the board to make); Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1093; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096 (holding that a course of study prescribed by a school-board, requiring the prescribed text-books to be supplemented by the use of others on the same subject, is inconsistent with the laws of the state).

**Use of text-book.**—Where a state board of education in adopting a course of study prescribes the use of a particular text-book during a particular year in a student's course, a school-board has no authority to omit the use thereof for that year. Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103.

**An injunction,** however, will not be granted at the instance of a citizen to restrain the use of a certain text-book in the public schools, illegally introduced in the place of another text-hook, where it does not appear that the latter has been legally adopted. Reno County School Dist. No. 1 *v.* Shadduck, 25 Kan. 467.

79. Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1093.

**Sufficiency of compliance.**—A publisher of a text-book prescribed for use in the public schools by the state board of education is not damaged by the fact that the book is not used during the entire year in the prescribed grades, if all the pupils in such grades are required to purchase the book and use the same until they have become proficient therein. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

80. Eaton *v.* Royal, 36 Wash. 435, 78 Pac. 1093; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103; Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096 (holding, however, that an injunction will not be granted unless the publisher is materially damaged, and that it will not be granted because one teacher testifies that more of plaintiff's books would have been used if they had not been supplemented by other books, where it does not appear that many more would have been used, and where they were used in one more than all the grades prescribed); Rand *v.* Hartranft, 32 Wash. 378, 73 Pac. 401.

**Intervention.**—A taxpayer in a school-district whose children attend the school has no such interest in the matter in litigation as entitles him to intervene in such an action. Westland Pub. Co. *v.* Royal, 36 Wash. 399, 78 Pac. 1096.

81. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103. *Compare* Maynard *v.* Olson, 48 Kan. 565, 30 Pac. 16.

82. Rand *v.* Hartranft, 32 Wash. 378, 73 Pac. 401.

83. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094; Rand *v.* Royal, 36 Wash. 420, 78 Pac. 103.

84. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094.

85. Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

text-books to be used in public schools must be in compliance with the statutory conditions and requirements.[88] Under some statutes a contract for text-books can be lawfully made only by advertising for bids and awarding the contract in the manner prescribed, to the lowest responsible bidder offering suitable books.[87] The publishers of books that have been adopted under such a statute, and who have entered into a contract with the state to furnish the same, have the exclusive privilege of supplying the books so adopted to the pupils and patrons of the schools,[88] and books purchased from others than such publishers or through channels established by them cannot be used by the pupils in the schools.[89]

(v) *PUBLISHER'S BOND.* It is sometimes provided that the publisher to whom is awarded the contract of furnishing the text-books adopted for use in the public schools is required to furnish a bond in the form and manner prescribed by statute,[90] accepted and approved in the prescribed manner by the prescribed authori-

**86.** Rand *v.* Royal, 36 Wash. 420, 38 Pac. 1103, holding that where the state board of education prior to making contracts for school-books with publishers agreed that such contracts should be signed by the president and secretary of the board, the contracts so signed are not invalid on the ground that they are not executed as required by law.

**Contract for revision** under Burns Annot. St. Ind. (1909) §§ 5890, 5891, 5895, see Silver *v.* Indiana Bd. of Education, 35 Ind. App. 438, 72 N. E. 829, (App. 1904) 71 N. E. 667.

**87.** Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345; McNees *v.* East River School Tp., 133 Iowa 120, 110 N. W. 325 (holding that a contract without such advertisement is illegal); Tanner *v.* Wilson, 25 Utah 226, 70 Pac. 984.

**Sufficiency of compliance.**—Where bids for furnishing school-books, submitted to a convention called by the state superintendent of instruction as required by statute, are voluminous and contain large catalogues, price lists, etc., and on the first day of the session the bids are publicly opened and the introductory portions of each bid, and the communications accompanying them are read, when the proposals are referred to committees on tabulations and are open to inspection to all persons interested therein, there is a substantial compliance with a provision requiring the convention to meet and publicly open and read the proposals. Tanner *v.* Wilson, 25 Utah 226, 70 Pac. 984.

**Definiteness of contract.**—A stipulation in a contract that the publisher has never furnished, and is not now furnishing, the same books to any state, county, or school-district at a less price, where like conditions prevail as in this state, and under this contract, is not too indefinite for enforcement. Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167.

**A school-district cannot question the validity of a contract by the state board of education with a publisher,** where the state has raised no objection thereto, since the district is not a party to the contract. Rand *v.* Royal, 36 Wash. 420, 78 Pac. 1103.

**88.** Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

**Constitutionality.**—A grant of the exclusive right to supply the state common schools with text-books of a specified character and price does not violate a constitutional provision against special privileges or monopolies. Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167; Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

**A school-district cannot question the validity** of such contract when the state has raised no objection thereto. Wagner *v.* Royal, 36 Wash. 428, 78 Pac. 1094.

**Time of running of contract.**—A proposal to the school-board of a city that, if certain text-books shall be adopted by the latter, complainants will furnish them at certain terms, and a resolution of acceptance by the board, neither of which stipulates for any length of time for which the books shall be used, creates a contract free from ambiguity, and evidence *aliunde* is not admissible to show that a certain time was intended, nor is such intention shown by a statutory regulation that no text-books adopted by the county board shall be changed within six years from its adoption, where such requirement does not apply to cities, and where the statute also provides that such changes may be made by the unanimous consent of the board. Ivison *v.* Indianapolis School Com'rs, 39 Fed. 735. See also Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 93 N. W. 746.

**89.** Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345.

**90.** See Johnson *v.* Ginn, 105 Ky. 654, 49 S. W. 470, 20 Ky. L. Rep. 1475. And see the statutes of the several states.

**A stipulation,** in an action on a school-book publisher's bond that the copy of the bond filed and attached to plaintiff's petition is a true, perfect, and complete copy of the bond executed by defendants before the *ex officio* board of education, and filed in the office of the superintendent of public instruction, and that the copy shall be considered as evidence, is an agreement that the bond constitutes a substantial compliance with the statutory provision regulating the issuance and delivery of school-book publishers'

ties,[91] conditioned upon the faithful performance of his contract,[92] and providing a penalty for its violation [93] in such sum as the proper school authorities may determine.[94] A condition in such a bond to sell the books to patrons and pupils of the common schools in any county in the state in which they may be adopted, at as low a price as the publisher sells them anywhere in the country, is broken where the publisher contracts with another state to sell the same books at a lower price,[95] or sells the books in any other state or section of the country, either at wholesale or retail, at a lower price; [96] and in an action on the bond for a breach of such condition, it is not necessary for plaintiff to show that the books offered for sale in the other state were the same in paper, binding, typography, and in every other respect as the samples filed with the bond; [97] and it is no defense to such an action that there was no consideration for the execution of the bond,[98] or

bonds. Rand *v.* Turner, 94 S. W. 643, 29 Ky. L. Rep. 696.

91. Maynard *v.* Olson, 48 Kan. 565, 30 Pac. 16; Com. *v.* Ginn, 120 Ky. 83, 85 S. W. 688, 27 Ky. L. Rep. 486 (holding that the duty of approving such a bond, imposed on the secretary of state as an *ex officio* member of the board of education, is properly performed by his assistant); Com. *v.* Ginn, 111 Ky. 110, 63 S. W. 467, 23 Ky. L. Rep. 521 (holding that a bond required to be approved by the members of the state board of education, three in number, is valid when approved by two of them).

92. Rand *v.* Com., 106 S. W. 238, 32 Ky. L. Rep. 441, 108 S. W. 892, 32 Ky. L. Rep. 1168; Maynard *v.* Chowning, 105 S. W. 114, 31 Ky. L. Rep. 1340.

**Evidence of breach.**— In an action for a breach of a publisher's bond to furnish books equal to sample copies filed, it is proper to exhibit books which have been used in the county in different families, and to permit persons who have used them or are familiar with them, with the date of their purchase, or the extent of their use, to state how they have been used, and to permit others who have bought and used the books to testify as to the character and quality of the binding, although the books are not exhibited to the jury; and where the publisher's representative testifies that the books sold conform in all respects to the contract, although he has no personal knowledge of the quality of work done upon each book bound and sold by his company, it is proper to show through him that book binderies, including his company, occasionally send out imperfectly bound books. Rand *v.* Com., 106 S. W. 238, 32 Ky. L. Rep. 441, 108 S. W. 892, 32 Ky. L. Rep. 1168. But in such an action plaintiff cannot introduce in evidence various school-books furnished, for the purpose of showing that the binding is poor, without proof of the usage the books have been subjected to between the time they were purchased and the date of the trial. Rand *v.* Turner, 94 S. W. 643, 29 Ky. L. Rep. 696.

**Liability of surety.**— Under a statute which prohibits the adoption of books, the publisher of which has not given the bond required by statute, the surety on such bond is not liable for his principal's violation of his agreement, as to books adopted prior to the execution of the bond. Graziani *v.* Com., 123 Ky. 799, 97 S. W. 409, 30 Ky. L. Rep. 119.

**Under Ky. St. (1903) §§ 4423, 4424,** requiring a seller of text-books to give a bond that the text-books sold shall not exceed the lowest price at which the same books are sold by the seller elsewhere, and requiring the county superintendent to bring suit for a forfeiture of such bond, etc., the county superintendent may sue for a forfeiture of the bond, collect the same, and pay the proceeds into the county school fund; but he cannot accept in satisfaction of the judgment less than the whole amount thereof, and his act in accepting a note for a less sum and entering satisfaction of the judgment is void, and does not estop the state from suing to set aside such satisfaction of the judgment. Heath *v.* Com., 129 Ky. 835, 113 S. W. 69. And under such sections in connection with section 130, the county attorney may compel the payment of a judgment of forfeiture of such a bond, and the county superintendent cannot dismiss an action to set aside a satisfaction of such judgment against the objection of the county attorney. Heath *v.* Com., *supra*.

93. Rand *v.* Com., 106 S. W. 238, 32 Ky. L. Rep. 441, 108 S. W. 892, 32 Ky. L. Rep. 1168; Rand *v.* Turner, 74 S. W. 643, 29 Ky. L. Rep. 696.

**The amount named in a bond as liquidated damages** for its breach will be treated as such if the damages resulting are very uncertain, and evidence of their amount difficult to obtain, and the fair import of the agreement is that the amount fixed is agreed upon to avoid the expense and difficulty of proving actual damages, and the amount is not out of proportion to the actual cash damages. Com. *v.* Ginn, 111 Ky. 110, 63 S. W. 467, 23 Ky. L. Rep. 521.

94. Maynard *v.* Olson, 48 Kan. 565, 30 Pac. 16; Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

95. Graziani *v.* Burton, 97 S. W. 800, 30 Ky. L. Rep. 180, holding this to be true, although the proof fails to show any sales in the other state.

96. Com. *v.* Ginn, 111 Ky. 110, 63 S. W 467, 23 Ky. L. Rep. 521.

97. Graziani *v.* Burton, 97 S. W. 800, 30 Ky. L. Rep. 180.

98. Graziani *v.* Burton, 97 S. W. 800, 30 Ky. L. Rep. 180.

that similar conditions do not prevail in the different states.[99] But it is not a breach of such condition that the books are sold at a less price in another state by dealers and school-boards if it does not appear that the publishers themselves sell such books for a price below that made to the state in which the bond is given.[1] As a general rule only one recovery may be had on such a bond,[2] but an action for a breach in one county as to one kind of book is not barred by the pendency of a prior action in another county for a breach there as to another kind of book.[3]

**3. Control of Pupils and Discipline — a. In General.** As a general rule a school-teacher, to a limited extent at least, stands *in loco parentis* to pupils under his charge, and may exercise such powers of control, restraint, and correction over them as may be reasonably necessary to enable him to properly perform his duties as teacher and accomplish the purposes of education;[4] and if nothing unreasonable is demanded, he has the right to direct how and when each pupil shall attend to his appropriate duties,[5] and the manner in which a pupil shall demean himself,[6] and consequently may adopt any reasonable rule or regulation concerning matters not provided for by the rules prescribed by the school-board, and not inconsistent with some statute or other prescribed rule.[7]

**b. Rules and Regulations of School-Board in General.**[8] As a general rule the school-board which by statute has the general charge and superintendence of the public schools has power to adopt appropriate and reasonable rules and regulations for the discipline and management of such schools,[9] such as a rule requiring that

99. Johnson Pub. Co. *v.* Com., 97 S. W. 749, 30 Ky. L. Rep. 148.

1. Mills *v.* Myers, 70 S. W. 412, 24 Ky. L. Rep. 971.

2. Com. *v.* Ginn, 111 Ky. 110, 63 S. W. 467, 23 Ky. L. Rep. 521 (holding that under St. (1903) § 4423, but one action can be had on such bond, and the whole sum named in the bond as "agreed liquidated damages" will inure to the benefit of the county whose superintendent first institutes the action for its recovery); Burton *v.* Maynard, 105 S. W. 115, 31 Ky. L. Rep. 1342; Maynard *v.* Chowning, 105 S. W. 114, 41 Ky. L. Rep. 1340.

3. Maynard *v.* Chowning, 105 S. W. 114, 41 Ky. L. Rep. 1340.

4. *Alabama.*— Boyd *v.* State, 88 Ala. 169, 57 So. 268, 16 Am. St. Rep. 31.

*Maine.*— Stevens *v.* Fassett, 27 Me. 266.

*Missouri.*— State *v.* Randall, 79 Mo. App. 226.

*Pennsylvania.*— Com. *v.* Ebert, 11 Pa. Dist. 199; Com. *v.* Seed, 5 Pa. L. J. Rep. 78.

*Texas.*— Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

*Wisconsin.*— State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706.

*England.*— Fitzgerald *v.* Northcote, 4 F. & F. 656.

**The requests of a teacher are practically commands** when made during school hours. State *v.* Scheve, 65 Nebr. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

**That a teacher's title to his office is defective** does not affect his power to govern the school, as against scholars who attend the school or parents who send their children to it. Kidder *v.* Chellis, 59 N. H. 473.

**Pupils over twenty-one years of age** who voluntarily attend a public school, and are received as scholars therein, are under the same restrictions and liabilities as if they were within such age. Stevens *v.* Fassett, 27 Me. 266.

5. Stevens *v.* Fassett, 27 Me. 266; Thomason *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1013.

6. Stevens *v.* Fassett, 27 Me. 266.

7. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709; Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387.

**A teacher has the right and duty** not only to enforce discipline, to preserve order, and to teach, but also to look after the morals, the health, and the safety of his pupils; and to do, and to require his pupils to do, whatever is reasonably necessary to preserve and conserve all these interests, when not in conflict with the primary purposes of the school or opposed to law or a rule of the school-board. State *v.* Randall, 79 Mo. App. 226.

**Authority of superintendent.**—A rule requiring the superintendent of city schools to visit weekly all the schools under his charge, and to see that the best methods of instruction are adopted, confers upon him authority to order and promulgate such additional rules as the best interests of the school may require. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

8. **Health regulations** see *supra*, III, I, 1, d.

9. See the statutes of the several states; and the following cases:

*Indiana.*— Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

*Massachusetts.*— Hodgkins *v.* Rockport, 105 Mass. 475.

*Missouri.*— Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343.

*Nebraska.*— Bourne *v.* State, 35 Nebr. 1, 52 N. W. 710, high school board.

there shall be prompt attendance, diligence in study, and proper deportment;[10] and the decision of such board, if exercised in good faith, on matters affecting the good order and discipline of the school is final so far as it relates to the rights of pupils to enjoy school privileges, and the courts will not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised.[11]

**c. Reasonableness and Validity of Rules.** A rule or regulation in regard to the discipline and management of a public school, whether adopted by the teacher or by the school-board, must be reasonable in itself,[12] in accordance with which it has been held that a rule is reasonable and valid which requires tardy pupils to remain either in the hall or in the principal's office until the opening exercises of the school are concluded;[13] which requires scholars in grammar to write English composition;[14] or which requires a parent or guardian to sign and return to the teacher the report of the teacher in regard to a pupil's standing, attendance, and deportment.[15] But on the other hand it has been held that a rule is not reasonable which will deprive a child of school privileges except as a punishment for a breach of discipline or an offense against good morals,[16] such as a rule which requires pupils to pay for school property which they wantonly or carelessly break or destroy, under penalty of suspension,[17] or which requires that each pupil when returning to school after recess shall bring into the school-room a stick of wood for the fire.[18] The enforcement of a school rule or regulation must also be reasonable under all the circumstances;[19] and in such enforcement due regard must be had to the health, comfort, age, and mental and physical condition of the pupil and to the circumstances attending each particular emergency; and the

*Ohio.*— Sewell *v.* Defiance Union School Bd. of Education, 29 Ohio St. 89.

See 43 Cent. Dig. tit. "Schools and School Districts," §§ 342, 343.

**Home lessons** see Hunter *v.* Johnson, 13 Q. B. D. 225, 48 J. P. 663, 15 Cox C. C. 600, 53 L. J. M. C. 182, 51 L. T. Rep. N. S. 791, 32 Wkly. Rep. 857.

**10.** School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55; State *v.* Dixon County School Dist. No. 1, 31 Nebr. 552, 48 N. W. 393.

**11.** Favorite *v.* Chicago Bd. of Education, 235 Ill. 314, 85 N. E. 402; Wilson *v.* Chicago Bd. of Education, 233 Ill. 464, 84 N. E. 697, 15 L. R. A. N. S. 1136 [*affirming* 137 Ill. App. 187]; Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496; Watson *v.* Cambridge, 157 Mass. 561, 32 N. E. 864; Hodgkins *v.* Rockport, 105 Mass. 475; State *v.* School Dist. No. 1 Dist. Bd., 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730.

**But the courts will interfere** to prevent the enforcement of a rule which manifestly reaches beyond the school-board's sphere of action, and relates to subjects in no wise connected with the management or successful operation of the school, or which is plainly calculated to subvert or retard the leading object of legislation on the subject. King *v.* Jefferson City School Bd., 71 Mo. 628, 36 Am. Rep. 499.

**12.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**A presumption** exists in favor of the reasonableness and propriety of a rule adopted under statutory authority, by a school-board for the government of pupils. Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496.

**That abuses may be practised** in the pretended enforcement of a rule adopted for the government of a school affords no argument against the reasonableness of the rule, having reference to the legitimate purposes for which it was adopted. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**Whether a rule or regulation of the school authorities is reasonable** or valid is a question of law for the court. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**13.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**14.** Guernsey *v.* Pitkin, 32 Vt. 224, 76 Am. Dec. 171.

**15.** Bourne *v.* State, 35 Nebr. 1, 52 N. W. 710.

**16.** Perkins *v.* West Des Moines Independent School Dist. Bd. of Directors, 56 Iowa 476, 9 N. W. 356.

**17.** State *v.* Vanderbilt, 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820; Perkins *v.* West Des Moines Independent School Dist., 56 Iowa 476, 9 N. W. 356. See also Holman *v.* Avon Tp. School Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

**18.** State *v.* Fond du Lac Bd. of Education, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282, holding that such a regulation is not needful for the government, good order, and efficiency of the schools, and that a pupil cannot be suspended for a refusal to comply with such a regulation.

**19.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

condition of the weather, the infirmity of the pupil, and the like may require relaxation in a strict enforcement.[20]

**d. Control of Pupils Outside of School** — (I) *IN GENERAL.* Although a school-teacher or a school-board ordinarily has no right of control over a child after he has returned to his home or his parents' control and cannot punish him for ordinary acts of misbehavior thereafter,[21] and hence cannot adopt a rule that during the school term no pupil shall attend a social party,[22] the supervision and control of a teacher over a pupil, and of a school-board to make needful rules for the conduct of the pupils, is not confined to the school-room and school premises, but extends over the pupil from the time he leaves home to go to school until he returns home from school,[23] and as to acts which pertain to duties within the school-room, even after he has returned to his home and is under his parents' control;[24] and where the effect of acts done out of a school-room while the pupils are coming to or going from school reach within the school-room, and are detrimental to good order and the best interests of the school, such acts may be forbidden and the teacher may punish an offending pupil when he comes to school.[25] The school authorities may also punish, as by suspension, for acts committed outside of school hours, even after a pupil has returned to his home, where such acts have a direct and immediate tendency to influence the conduct of other pupils while in the school-room, to set at naught proper discipline, to impair the authority of the teachers, and to bring them into ridicule and contempt.[26]

(II) *SECRET SOCIETIES.* A school-board under its authority to adopt rules

**20.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**The habit of locking the doors of** a school-room during the opening exercises is not an unreasonable enforcement, under ordinary circumstances, of a rule requiring pupils to remain in the hall during that time; but if the weather is unusually severe and proper steps are not taken for the comfort of children thus excluded, such method of enforcement is unreasonable and improper. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**21.** Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

**22.** Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343 (holding that such a rule is an invasion of the rights of the parents); State *v.* Osborn, 32 Mo. App. 536, 24 Mo. App. 309.

**23.** Jones *v.* Cody, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160; Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387 (holding that a teacher may forbid scholars from quarreling and swearing on the way home, and punish them for the infraction of such rule); State *v.* Randall, 79 Mo. App. 226; Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776 (holding that reasonable chastisement by a teacher of a pupil for a violation of a rule, even though the violation did not occur at the school-house or during school hours, does not constitute an assault); Lander *v.* Seaver, 32 Vt. 114, 176 Am. Dec 156.

**A rule that the pupils shall go directly home when dismissed from school,** adopted by a school-board, is a reasonable one, and a teacher who enforces such a rule is not liable for damages sustained by a merchant arising from a loss of trade due to such enforcement. Jones *v.* Cody, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160.

**24.** Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

**Requiring a pupil to work examples in arithmetic out of school** is not unreasonable, and a refusal of the pupil to comply therewith justifies a reasonable punishment. Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579.

**25.** Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387; Lander *v.* Seaver, 32 Vt. 114, 176 Am. Dec. 156; Cleary *v.* Booth, [1893] 1 Q. B. 465, 17 Cox C. C. 611, 57 J. P. 375, 62 L. J. M. C. 87, 68 L. T. Rep. N. S. 349, 5 Reports 263, 41 Wkly. Rep. 391.

**The misbehavior,** however, for which punishment in such a case may be inflicted must not have merely a remote or indirect tendency to injure the school, but the acts done must be direct and immediate in their bearing upon the welfare of the school or the authority of the teacher and respect due to him. Lander *v.* Seaver, 32 Vt. 114, 176 Am. Dec. 156.

**26.** State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730. But see Murphy *v.* Marengo Independent Dist. Directors, 30 Iowa 429, holding that the board of directors have no power to dismiss or suspend a pupil for acts done out of school, which, although having a tendency to incite ridicule of the directors and insubordination in the school, are not immoral or prohibited by any rule or regulation.

**Publication in newspaper.**— The suspension of pupils until they shall apologize for causing the publication in a local newspaper of a satirical poem reflecting on the regulations of the school is not an abuse of the discretion conferred upon school authorities in the discipline and government of pupils. State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730.

and regulations for the well-being of the school may deny to pupils belonging to a secret fraternity, contrary to the rules of the school, the right of participating in athletic, military, literary, and similar school organizations, although the meetings of the fraternity are held outside of the school-house, after school hours, and with parental consent, where it is shown that such societies have a tendency to destroy good order, discipline, and scholarship.[27]

(III) *ATHLETIC CONTESTS.* It has been held that a rule of a school-board forbidding pupils to play foot-ball under the auspices of the school is not unreasonable or in excess of the authority of the board, although applied to conduct on holidays and away from the school-grounds.[28]

**e. Violation of Rules, Offenses, and Punishment** — (I) *IN GENERAL.* As a general rule a teacher is authorized to inflict such humane and reasonable punishment as he may deem most conducive to the enforcement of the rules and regulations of the school-board and the good discipline and order of the school,[29] and even for misconduct in regard to which no formal rules have been prescribed,[30] although the punishment must be for some specific offense which the pupil has committed, and which he knows he is being punished for.[31] A school-teacher is not personally liable for a mere mistake of judgment in punishing a pupil;[32] but to create a liability against him it must be shown that he acted in the matter complained of wantonly, wilfully, or maliciously.[33]

(II) *CORPORAL PUNISHMENT* — (A) *In General.* As a general rule a school-teacher, in so far as it may be reasonably necessary to the maintenance of the discipline and efficiency of the school, and to compel a compliance with reasonable rules and regulations, may inflict reasonable corporal punishment upon a pupil for insubordination, disobedience, or other misconduct;[34] but a teacher cannot

**27.** Wayland *v.* Hughes, 43 Wash. 441, 86 Pac. 642, 7 L. R. A. N. S. 352. *Compare* State *v.* White, 82 Ind. 278, 42 Am. Rep. 496.

**A rule is neither unlawful nor unreasonable** which requires teachers to refuse to give public recognition to such societies, allow meetings to be held in the school buildings, permit the name of the school to be used by such society, or to allow members thereof to represent the school in any literary or athletic contest, or in any public capacity. Favorite *v.* Chicago Bd. of Education, 235 Ill. 314, 85 N. E. 402; Wilson *v.* Chicago Bd. of Education, 233 Ill. 464, 84 N. E. 697, 15 L. R. A. N. S. 1136 [*affirming* 137 Ill. App. 187].

**Publications of a Greek letter fraternity** showing a spirit of insubordination to the authorities of a high school are sufficient to support a finding to the effect that the fraternity is detrimental to good order in the schools. Wayland *v.* Hughes, 43 Wash. 441, 86 Pac. 642, 7 L. R. A. 352.

**28.** Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496.

**29.** Samuel Benedict Memorial School *v.* Bradford, 111 Ga. 801, 36 S. E. 920 (holding that a teacher may punish a pupil for a failure to prepare a paper in compliance with instructions); State *v.* Randall, 79 Mo. App. 226.

**Extent of authority.**— The fact that a school had not been well managed prior to the teacher's employment therein, and that he is specially requested to be more strict in compelling obedience to the rules, does not give him more authority than he would otherwise have had. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

**30.** State *v.* Williams, 27 Vt. 755; State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730.

**Removal from room.**—Where a scholar refuses to leave a school-room when requested to do so by the teacher, for insubordination and misconduct, a third person will, upon the request of the teacher, be justified as the servant of the teacher in using the necessary force for removing him. State *v.* Williams, 27 Vt. 755.

**31.** State *v.* Mizner, 50 Iowa 145, 32 Am. Rep. 128.

**32.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709. And see *infra*, III, I, 3, e, (II), (B).

**33.** Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**34.** *Connecticut.*— Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

*Indiana.*—Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645 (holding that a school-teacher may in a kind and reasonable spirit inflict corporal punishment upon a pupil for disobedience); Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709; Danenhoffer *v.* State, 69 Ind. 295, 35 Am. Rep. 216; Marlsbary *v.* State, 10 Ind. App. 21, 37 N. E. 558.

*Kansas.*— State *v.* Ward, 1 Kan. L. J. 370.

*Maine.*— Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; Stevens *v.* Fassett, 27 Me. 266.

*Missouri.*— Deskins *v.* Gose, 85 Mo. 485,

inflict corporal punishment to enforce an unreasonable rule,[35] to compel a pupil to pursue a study forbidden by his parent,[36] or to compel him to do something which his parent has requested that he be excused from doing,[37] although the teacher may be justified in refusing to permit the attendance of a pupil whose parent will not consent that he shall obey the rules of the school.[38] The infliction of corporal punishment by a teacher is largely within his discretion;[39] but he must exercise sound discretion and judgment in determining the necessity for corporal punishment and the reasonableness thereof, under the varying circumstances of each particular case, and must adapt the punishment to the nature of the offense, and to the age and mental condition and personal attributes of the offending pupil,[40] and, considering the circumstances and conditions of the particular

55 Am. Rep. 387; Haycraft *v.* Grisgsby, 88 Mo. App. 354; State *v.* Boyer, 70 Mo. App. 156.

*New Hampshire.*— Heritage *v.* Dodge, 64 N. H. 297, 9 Atl. 722.

*North Carolina.*— State *v.* Stafford, 113 N. C. 635, 18 S. E. 256; State *v.* Pendergrass, 19 N. C. 365, 31 Am. Dec. 416.

*Ohio.*— Quinn *v.* Nolan, 7 Ohio Dec. (Reprint) 585, 4 Cinc. L. Bul. 81.

*Pennsylvania.*— Com. *v.* Ebert, 11 Pa. Dist. 199; Com. *v.* Fell, 11 Haz. Reg. 179; Com. *v.* Sneed, 5 Pa. L. J. Rep. 78.

*Tennessee.*— Anderson *v.* State, 3 Head 455, 75 Am. Dec. 774.

*Texas.*— Thomason *v.* State, (Cr. App. 1898) 43 S. W. 1013; Atterberry *v.* State, 33 Tex. Cr. 88, 25 S. W. 125; Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122, 59 Am. Rep. 776; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579; Dowlen *v.* State, 14 Tex. App. 61.

*England.*— Cleary *v.* Booth, [1893] 1 Q. B. 465, 17 Cox C. C. 611, 57 J. P. 375, 62 L. J. M. C. 87, 68 L. T. Rep. N. S. 349, 5 Reports 263, 41 Wkly. Rep. 391; Gardner *v.* Bygrave, 53 J. P. 743.

*Canada.*— Brisson *v.* Lafontaine, 8 L. C. Jnr. 173.

See 43 Cent. Dig. tit. "Schools and School Districts," § 345. See also ASSAULT AND BATTERY, 3 Cyc. 1051, 1078.

**A pupil over school age** is liable to corporal punishment. State *v.* Mizner, 45 Iowa 248, 24 Am. Rep. 769. See also Stevens *v.* Fassett, 27 Me. 266.

**A member of a school-board** may use sufficient force to remove from the school-room a pupil, who is using profane and insulting language to him, in the presence of other pupils. Peck *v.* Smith, 41 Conn. 442.

**The detention of a pupil for a short time after school** hours as a penalty for some misconduct or omission is one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools, and although the detention be mistaken it has none of the elements of false imprisonment, unless imposed from wanton, wilful, or malicious motives. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**Taking away pistol.**—A school-teacher has the right to take away from a pupil a pistol which such pupil is carrying at school, and to use such force as may be necessary for that purpose. Metcalf *v.* State, 21 Tex. App. 174, 17 S. W. 142.

**Removal from room.**—A school-teacher, although employed without a certificate as required by statute, may use reasonable force to expel from the school-room a scholar who refuses to comply with reasonable regulations as to the conduct of the school. Kidder *v.* Chellis, 59 N. H. 473. So a teacher may lawfully remove from the room a scholar who places himself in the desk of the teacher, and refuses to leave it upon request, and for that purpose may use such force and call to his assistance such aid from any other person as is necessary to accomplish the removal. Stevens *v.* Fassett, 27 Me. 266.

35. State *v.* Vanderbilt, 116 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820.

36. Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471.

37. State *v.* Mizner, 50 Iowa 145, 32 Am. Rep. 128.

38. State *v.* Mizner, 50 Iowa 145, 32 Am. Rep. 128.

39. Heritage *v.* Dodge, 64 N. H. 297, 9 Atl. 722; State *v.* Pendergrass, 19 N. C. 365, 31 Am. Dec. 416.

**Within the sphere of his authority,** a school-teacher is the judge as to when the correction of a pupil is required, and of the degree of correction necessary. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

40. *Alabama.*— Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31.

*Connecticut.*— Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841.

*Indiana.*—Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

*Kansas.*— State *v.* Ward, 1 Kan. L. J. 370, holding that the teacher should be governed by the nature of the offense committed, the previous good or bad conduct of the pupil and the age, size, sex, and apparent power of endurance of the pupil.

*Missouri.*— State *v.* Boyer, 70 Mo. App. 156.

*Texas.*— Whitley *v.* State, 33 Tex. Cr. 172, 25 S. W. 1072.

*Canada.*— Brisson *v.* Lafontaine, 8 L. C. Jur. 173.

See 43 Cent. Dig. tit. "Schools and School Districts," § 345.

**The cause must be sufficient, the instrument suitable** to the purpose, and the punishment must be administered in moderation. Cooper *v.* McJunkin, 4 Ind. 290.

offense and pupil, the punishment must not be inflicted with such force or in such a manner as to cause it to be cruel or excessive,[41] or wanton or malicious.[42]

(B) *Liability For Punishment.* If a teacher inflicts reasonable corporal punishment and there is nothing to indicate any intentional or undue severity or improper motive on his part, he cannot be convicted of an assault and battery,[43] and in the absence of evidence to the contrary, it will be presumed that the punishment was properly and rightly inflicted;[44] but he will be liable criminally as for an assault and battery if he inflicts cruel and excessive punishment,[45] or if the punishment is prompted by malice or other improper motives.[46] Likewise if a teacher acts in good faith and without malice, he is not civilly liable in damages as for an assault and battery, for an error of judgment as to when and to what extent punishment is necessary;[47] but he is so liable if the punishment is clearly excessive and unneces-

**Whether a rawhide is a proper instrument** of punishment of a pupil is a question of fact under all the circumstances. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

**A teacher cannot whip** a pupil as long as he appears unsubdued. Whitley *v.* State, 33 Tex. Cr. 172, 25 S. W. 1072.

41. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. Rep. 709.

**The legitimate object of chastisement** is to inflict punishment by the pain which it causes as well as by the degradation which it implies, and it does not follow that a chastisement is cruel and excessive because pain is produced or abrasions of the skin result from the instrument used by a teacher. Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

**The fact that a scholar misspells a word** and refuses to try again does not justify a teacher in beating him with a whip, and striking and kicking him in the face. Gardner *v.* State, 4 Ind. 632.

42. Haycraft *v.* Grigsby, 88 Mo. App. 354; State *v.* Boyer, 70 Mo. App. 156; Com. *v.* Ebert, 11 Pa. Dist. 199.

43. See, generally, ASSAULT AND BATTERY, 3 Cyc. 1051.

**The intent** necessary to support a charge of assault and battery may be inferred from the unreasonableness of the method adopted or the excess of force employed, the burden of proving which rests upon the state. Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

44. Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State *v.* Mizner, 50 Iowa 145, 32 Am. Rep. 128; State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

45. See, generally, ASSAULT AND BATTERY, 3 Cyc. 1051 *et seq.*

**Giving as punishment sixty-six blows with his hands,** although the pupil remains insubordinate until he has received sixty-three blows, is sufficient to justify the conviction of a school teacher of assault. Whitley *v.* State, 33 Tex. Cr. 172, 25 S. W. 1072.

**Detaining a pupil after school hours** for not doing lessons which the teacher is not authorized to compel him to do renders a teacher liable to conviction for an assault. Hunter *v.* Johnson, 13 Q. B. D. 225, 15 Cox C. C. 600, 48 J. P. 663, 53 L. J. M. C. 182, 51 L. T. Rep. N. S. 791, 32 Wkly. Rep. 857.

**Proof of a teacher's good character in a** prosecution against him for whipping a pupil must be confined to his general character. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

**On a prosecution for an aggravated assault,** a teacher may not prove by himself that the punishment inflicted was not more than was necessary under the circumstances. Howerton *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1018.

**Malicious prosecution.**—Where a teacher inflicts corporal punishment upon a child for the purpose of compelling him to pursue a study forbidden by his father, and the father causes the teacher to be prosecuted as for an assault or battery, he is not liable to the teacher as for a malicious prosecution. Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471.

46. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602; State *v.* Pendergass, 19 N. C. 365, 31 Am. Dec. 416. See also ASSAULT AND BATTERY, 3 Cyc. 1051, 1052.

**A school-teacher who, prompted by revenge,** inflicts corporal punishment is as guilty criminally as if he had acted with malice. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

**Malice may be inferred from excessive punishment,** but where the punishment administered is not in itself immoderate, its legality or illegality must depend entirely on the *quo animo* with which it is administered. State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

47. *Illinois.*— Fox *v.* People, 84 Ill. App. 270.

*Maine.*— Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818.

*New Hampshire.*— Heritage *v.* Dodge, 64 N. H. 297, 9 Atl. 722.

*North Carolina.*— Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890.

*Ohio.*— Quinn *v.* Nolan, 7 Ohio Dec. (Reprint) 585, 4 Cinc. L. Bul. 81, holding that a teacher is not liable in damages for causing injury, in inflicting reasonable punishment, by reason of an unknown constitutional weakness in the pupil.

See 43 Cent. Dig. tit. "Schools and School Districts," § 345.

**If the punishment is not clearly excessive** in the general judgment of reasonable men, the school-teacher is not civilly liable for inflicting the same. Patterson *v.*

sary, or is prompted by malice or wantonness,[48] or is such that a person of ordinary prudence could have reasonably foreseen that a permanent injury of some kind would naturally or probably result from the act.[49]

(III) *EXPULSION OR SUSPENSION* — (A) *In General.* As a general rule the power of expelling or suspending a pupil is in the school-board which has the power of controlling and governing the school;[50] and a teacher also has the inherent power, where the interests of the school require it, to suspend a pupil in a proper case, and make a report thereof to the school-board, unless he has been deprived of such power by the affirmative action of the board,[51] although he cannot permanently exclude a pupil unless he acts under an order of the school-board.[52] The suspension of a pupil does not extend beyond the current school year, if that long;[53] and under some statutes a teacher can suspend a pupil only for a given length of time, as for such time as may be necessary to convene the school-board to act upon the suspension.[54]

(B) *Grounds For Expulsion or Suspension.*[55] A pupil may be properly expelled or suspended for an infraction of or for a refusal to comply with a reasonable rule or regulation of the school-board or of the teacher,[56] as for continued absences

Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818.

48. See, generally, ASSAULT AND BATTERY, 3 Cyc. 1078. See also Haycraft *v.* Grigsby, 88 Mo. App. 354; Brisson *v.* Lafontaine, 8 L. C. Jur. 173.

**If there is any reasonable doubt as to** whether the punishment was excessive, the teacher should have the benefit of it. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

**Aider and abetter.—** If excessive punishment is inflicted, the teacher and all who encouraged, aided, or abetted him are answerable, regardless of whether the motive which prompted them or him was malicious or not. Haycraft *v.* Grigsby, 88 Mo. App. 354.

**That in a former trial of the same case no claim of excessive punishment was made is** competent evidence against a charge in an action of trespass that the punishment was excessive. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

**That the same instrument of punishment** as that resorted to by the teacher in the particular case is used in other schools in the vicinity may be shown by the teacher upon the question as to whether he acted maliciously in the punishment of a scholar. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

**Evidence that the ordinary management of a teacher as such is mild and moderate is** not admissible upon the question as to whether the punishment inflicted by him in a particular case was excessive or not, but it is admissible in regard to whether the punishment was wanton and malicious. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

49. Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890.

**It is not necessary that the injury in the precise form** in which it in fact resulted should have been foreseen, but it is sufficient if by the exercise of reasonable care the teacher may have foreseen that some injury might result from his act. Drum *v.* Miller, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, 65 L. R. A. 890.

50. See the statutes of the several states; and the following cases:

*Georgia.*— Cartersville Bd. of Education *v.* Purse, 101 Ga. 422, 28 S. E. 896, 65 Am. St. Rep. 312, 41 L. R. A. 593.

*Illinois.*— Rulison *v.* Post, 79 Ill. 567.

*Maine.*— Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256.

*Massachusetts.*— Hodgkins *v.* Rockport, 105 Mass. 475.

*Michigan.*— Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736.

*Missouri.*— State *v.* Hamilton, 42 Mo. App. 24.

*Tennessee.*— Parker *v.* Jefferson County School Dist. No. 38, 5 Lea 525.

*Wisconsin.*— State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730.

See 43 Cent. Dig. tit. "Schools and School Districts," § 346.

**Power of individual member.—** The forcible ejection from a school-room of a pupil who has been misbehaving, by an individual member of the school-board who has no power to expel a pupil, does not amount to an expulsion from the school so as to deprive the pupil of the liberty of returning to the school, and so as to charge such member with the loss of the pupil's school privileges if he does not return. Peck *v.* Smith, 41 Conn. 442.

51. Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736; Sewell *v.* Defiance Union School Bd. of Education, 29 Ohio St. 89; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706.

52. Davis *v.* Boston, 133 Mass. 103; Parker *v.* Jefferson County School Dist. No. 38, 5 Lea (Tenn.) 525.

53. Board of Education *v.* Helston, 32 Ill. App. 300.

54. Brown *v.* Cleveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

55. **Expulsion or suspension for conduct out of school** see *supra*, III, I, 3, d.

56. *Georgia.*— Samuel Benedict Memorial School *v.* Bradford, 111 Ga. 801, 36 So. 920, refusal to write composition.

without satisfactory excuses;[57] or he may be expelled or suspended for persistent disobedience, insubordination, or other misconduct for which no formal rule is prescribed, but which has an injurious effect upon the discipline and government of the school.[58] But a pupil cannot be arbitrarily expelled or suspended;[59] nor

*Illinois.*— McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

*Indiana.*— State *v.* Webber, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30.

*Iowa.*— Kinzer *v.* Marion Independent School Dist., 129 Iowa 441, 105 N. W. 686, 3 L. R. A. N. S. 496; Murphy *v.* Marengo Independent Dist. Bd. of Education, 30 Iowa 429, persistent violation of regulations.

*Maine.*— Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256, refusal to read from a book prescribed by the superintending school-committee.

*Massachusetts.*— Russell *v.* Lynnfield, 116 Mass. 365; Spieler *v.* Woburn, 12 Allen 127.

*Michigan.*— Holman *v.* Avon Tp. School-Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

*New Hampshire.*— Kidder *v.* Chellis, 59 N. H. 473.

*Ohio.*— Sewell *v.* Defiance Union School Bd. of Education, 29 Ohio St. 89, failure to come prepared with a required exercise or with a reasonable excuse.

*Vermont.*— Guernsey *v.* Pitkin, 32 Vt. 224, 76 Am. Dec. 171, refusal to write English composition, without a request from his parents that he be excused therefrom.

*Wisconsin.*— State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730; Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471.

See 43 Cent. Dig. tit. "Schools and School Districts," § 346.

**The wrongful exaction of tuition** from a resident pupil, as for a non-resident pupil, and paid under protest by the guardian of such pupil does not amount to an expulsion. State *v.* Eau Claire Bd. of Education, 96 Wis. 95, 71 N. W. 123.

57. Churchill *v.* Fewkes, 13 Ill. App. 520 (without a written excuse from his parents); Burdick *v.* Babcock, 31 Iowa 562; King *v.* Jefferson City School Bd., 71 Mo. 628, 36 Am. Rep. 499; Ferriter *v.* Tyler, 48 Vt. 444, 21 Am. Rep. 133.

58. *Illinois.*— Rulison *v.* Post, 79 Ill. 567, holding, however, that the school laws do not authorize the school directors to expel a pupil except for incorrigible disobedience or bad conduct.

*Iowa.*— Murphy *v.* Marengo Independent Dist. Bd. of Education, 30 Iowa 429, gross immorality.

*Kentucky.*— Cross *v.* Walton Graded Common School, 129 Ky. 35, 110 S. W. 346, 33 Ky. L. Rep. 472, refusing to take part in a dialogue in the annual commencement exercises, as directed by the principal.

*Massachusetts.*—Hodgkins *v.* Rockport, 105 Mass. 475.

*Missouri.*— State *v.* Randall, 79 Mo. App. 226; State *v.* Hamilton, 42 Mo. App. 24.

*Nebraska.*— Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736, for gross misdemeanor or persistent disobedience.

*Vermont.*— Scott *v.* Fairfax School Dist. No. 2, 46 Vt. 452.

*Wisconsin.*— State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. 730.

*England.*— Fitzgerald *v.* Northcote, 4 F. & F. 656.

See 43 Cent. Dig. tit. "Schools and School Districts," § 346.

**Low standing** in some class or recitation, or inadaptability for teaching, in the opinion of the school authorities, do not constitute reasonable grounds for expulsion. Brown *v.* Cleveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

**A refusal to give the name of a pupil** who has been guilty of a breach of the rules, by a pupil who acknowledges that he has been told the name of such guilty pupil, justifies his suspension. Board of Education *v.* Helston, 32 Ill. App. 300.

**The term "misdemeanor,"** as used in a statute authorizing the suspension or expulsion from school of any pupil guilty of gross misdemeanor or persistent disobedience, means gross misbehavior or misconduct. Holman *v.* Avon Tp. School Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

**Misconduct of parent justifying expulsion of pupil** see Cartersville Bd. of Education *v.* Purse, 101 Ga. 422, 28 S. E. 896, 65 Am. St. Rep. 312, 41 L. R. A. 593.

59. Cross *v.* Walton Graded Common School Dist., 121 Ky. 469, 89 S. W. 506, 28 Ky. L. Rep. 440, holding that the trustees of a graded school-district have no right to arbitrarily expel a pupil from a school which he attends, or to arbitrarily refuse him the privilege of attending the school in the future in the district in which he resides.

**Normal schools.**— The teachers of a normal school cannot deprive a qualified student of the privileges of the school under a resolution of the local board, on the assumption that they can by their own arbitrary will decide him to be "disqualified to become a teacher," and dismiss him from the school, although he has passed in all branches except practice teaching, and has never failed in his examination on that subject, and has not completed the time given to it, as it is not within their power to anticipate the result of the final examination and exclude a student from the privileges of the school at their election at any time, simply because in their judgment he will never make a successful teacher. Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029. So the board of education of a normal school, which is a part of the state public school system, cannot expel a student on the ground that he gives no promise of becoming fit to teach. Brown *v.* Cleve-

can he be suspended or expelled for a refusal to comply with a rule or regulation that is not needful for the government, good order, or efficiency of the school; [60] for refusing, by direction of his parents, to pursue a particular branch of study; [61] for insubordination at a former term of the school; [62] or for a careless act, no matter how negligent, which is not wilful or malicious.[63]

(c) *Mode of Expulsion or Suspension.* Where express provision is made by statute therefor, the expulsion or suspension of a pupil must be made in the manner prescribed; otherwise it is illegal; [64] and although ordinarily a school-board may adopt any mode of procedure in obtaining information or evidence of the conduct of a pupil which it deems best,[65] and although in some cases, as for gross misdemeanor or persistent disobedience, a pupil may be expelled or suspended without notice to him or his parents and without any formal trial,[66] as a general rule the pupil, if his parent or guardian desires it, must be granted a hearing before the school-board on the charges against him before he can be permanently expelled.[67] The decision of a school-board in expelling or suspending a pupil is final so far as it relates to the rights of the pupil to enjoy the privileges of the school, and is not subject to judicial interference,[68] unless it acts arbitrarily or maliciously.[69]

(d) *Readmission or Reinstatement.* A school-board has no power to require the payment of a sum of money as a condition to the reinstatement of a pupil under suspension; [70] and a suspended pupil may forfeit his right, if any, to reinstatement by his misconduct when called before the school-board at a hearing to decide on his right to reinstatement.[71] Where a pupil is illegally expelled or suspended, he may compel his readmission or reinstatement by mandamus [72]

land Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

**60.** State *v.* Fond du Lac Bd. of Education, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 282, refusal to carry in wood.

**61.** School Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55; Rulison *v.* Post, 79 Ill. 567; State *v.* School-Dist. No. 1, 31 Nebr. 552, 48 N. W. 393. But see State *v.* Webber, 108 Ind. 31, 8 N. E. 708, 58 Am. Rep. 30; State *v.* Mizner, 50 Iowa 145, 32 Am. Rep. 128.

**62.** State *v.* School Dist. No. 1, 31 Nebr. 552, 48 N. W. 393.

**63.** Holman *v.* Avon Tp. School-Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

**64.** See Brown *v.* Cleveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

**Mandatory provision.**—A statutory provision that no pupil shall be expelled until his parent or guardian has been notified of the proposed expulsion and permitted to be heard against the same is mandatory. Brown *v.* Cleveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 378, 6 Ohio N. P. 411.

**65.** Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736.

**66.** Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736.

**67.** Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91; Bishop *v.* Rowley, 165 Mass. 460, 43 N. E. 191.

**Power of school-board to compel witnesses to attend** or to testify see Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

**68.** Cross *v.* Walton Graded Common School, 129 Ky. 35, 110 S. W. 346, 33 Ky. L. Rep. 472 (holding that the action of the trustees of a common school in approving the suspension of a pupil for disobedience is conclusive and not subject to judicial interference); Covington Bd. of Education *v.* Booth, 110 Ky. 807, 62 S. W. 872, 23 Ky. L. Rep. 288, 53 L. R. A. 787; Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91 (holding that mere errors in the admission or exclusion of evidence do not render the final decision invalid); Watson *v.* Cambridge, 157 Mass. 561, 32 N. E. 864; *Re* McCallum, 17 Ont. 451.

**69.** Cross *v.* Walton Graded Common School, 129 Ky. 35, 110 S. W. 346, 33 Ky. L. Rep. 472; Covington Bd. of Education *v.* Booth, 110 Ky. 807, 62 S. W. 872, 23 Ky. L. Rep. 288, 53 L. R. A. 787.

**70.** State *v.* School Dist. No. 1, 135 Wis. 619, 116 N. W. 232, 16 L. R. A. N. S. 730.

**71.** District No. 1 Bd. of Education *v.* Helston, 32 Ill. App. 300, holding that where a suspended pupil uses gross profanity and vulgarity to the school-board on being called before it, he forfeits his right to a reinstatement.

**72.** See, generally, MANDAMUS, 26 Cyc. 284.

**A pupil of a normal school** should not be refused reinstatement merely because the court cannot compel the faculty to grant him a diploma. Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029.

**Evidence.**—The misconduct of a pupil can be shown only by witnesses of the facts, in an action of mandamus against the members of a school-board to procure his reinstatement. Vermillion *v.* State, 78 Nebr. 107, 110 N. W. 736.

**Necessity for appeal** to a joint board of trustees as a condition to an expelled sudent's right to resort to mandamus to com-

and in some cases such readmission or reinstatement may be compelled by a mandatory injunction.[73]

(E) *Liability For Expulsion or Suspension.* As a general rule a teacher and the members of a school-board in exercising the power of expelling or suspending a pupil must exercise judgment and discretion, and are not liable in damages for errors of judgment in that regard if they act without malice, wantonness, or intention to wrong the pupil.[74] But where a pupil is illegally expelled, both the teacher who expels him and the members of the school-board who wrongfully order or advise it are liable to such pupil for damages;[75] although under some statutes liability for a wrongful expulsion or suspension is upon the city or district in which the school is located.[76]

(F) *Actions For Damages.* As a general rule the proper remedy of a pupil for damages sustained by reason of a wrongful expulsion or suspension is by an action of trespass on the case against the teacher and the school-board wrongfully expelling or suspending him,[77] and assumpsit cannot be maintained against the teacher who actually does the act of expulsion.[78] A parent, since ordinarily he can only sue for such injuries to his child as occasion loss of services,[79] cannot maintain an action for damages for the wrongful expulsion or suspension of his child from school, but such action must be brought in the name of the child by his guardian or next of kin, for the child's benefit.[80] Under some statutes such suit should be against the city or school-district,[81] provided an appeal is first taken

pel his readmission see Miller *v.* Dailey, 136 Cal. 212, 68 Pac. 1029.

**73.** See Cross *v.* Walton Graded Common School, 129 Ky. 35, 110 S. W. 346, 33 Ky. L. Rep. 472; Covington Bd. of Education *v.* Booth, 110 Ky. 807, 62 S. W. 872, 23 Ky. L. Rep. 288, 53 L. R. A. 787.

**74.** McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Churchill *v.* Fewkes, 13 Ill. App. 520; Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256; Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Sewell *v.* Defiance Union School Bd. of Education, 29 Ohio St. 89.

**75.** Peck *v.* Smith, 41 Conn. 442; Rulison *v.* Post, 79 Ill. 567. See also McIntyre *v.* Blanchard School Trustees, 11 Ont. 439.

**76.** Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91; Hodgkins *v.* Rockport, 105 Mass. 475, holding, however, that the expulsion of a pupil for cause from a school by only a part of the committee, after it is unanimously ratified by the town committee, is not an irregularity giving the pupil a right of action against the town.

**Mass. Rev. Laws, c. 44, § 7,** authorizing a recovery of damages against a city for the unlawful expulsion of a pupil from its schools, does not authorize the recovery of damages for the expulsion of a pupil by the school-committee after a hearing, although the committee refuses to require other pupils to testify as to the difficulty for which the pupil is expelled, where such refusal is not made in bad faith on the part of the committee. Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

**Damages.**— A pupil cannot recover the cost of board and tuition paid by him in attending another school after his expulsion as an element of damages, unless it is paid out of his own property or funds; but he may recover for injury to his feelings or his standing in the community because of such expulsion. Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

**77.** Stuckey *v.* Churchman, 2 Ill. App. 584.

**Pleading.**— In an action against a school-board for damages for the suspension of a pupil, no recovery may be had without an allegation and proof that their action was wanton or malicious. McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

**Justification.**— In such an action defendants cannot justify as teacher and school-board under a plea of the general issue, although plaintiff's own evidence shows defendant's official positions. Mack *v.* Kelsey, 61 Vt. 399, 17 Atl. 780.

**78.** Stuckey *v.* Churchman, 2 Ill. App. 584, holding that since there is no implied contract between a teacher and a pupil in the public schools that the former shall teach the latter, an action of assumpsit cannot be maintained by a pupil against his teacher, on the ground that the teacher in compliance with an order of the school directors refused to hear the pupil recite any lessons in any study unless he procured a copy book and took lessons in a certain system of penmanship.

**79.** See, generally, PARENT AND CHILD, 29 Cyc. 1637.

**80.** Boyd *v.* Blaisdell, 15 Ind. 73; Donahoe *v.* Richards, 38 Me. 376; Stephenson *v.* Hall, 14 Barb. (N. Y.) 222. But see Roe *v.* Deming, 21 Ohio St. 666, holding that the father of a child entitled to the benefits of the public school of the subdistrict of his residence may maintain an action against the teacher of the school and the local directors of the subdistrict, for damages for wrongfully expelling the child.

**81.** Learock *v.* Putnam, 111 Mass. 499. And see *supra*, III, I, 3, e, (III), (E), text and note 76.

from the act of the teacher in expelling or suspending the pupil to the school-board or committee.[82]

**J. Offenses For Selling, Giving Away, or Using Examination Questions.** Under some statutes it is a penal offense for any person to sell, or to offer to sell or give away, before the date of the examination, questions or answers to the same prepared by the proper authorities for the examination of teachers of public schools,[83] or for any applicant for a teacher's certificate to procure or fraudulently use such questions prior to examination.[84]

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**SCIENCE.** A term said to imply special and peculiar knowledge;[1] knowledge coördinated, arranged and systemized;[2] the knowledge of many, orderly and methodically arranged, so as to become attainable by one;[3] the knowledge of many methodically digested and arranged so as to be attainable by one; a body of principles and deductions to explain the nature of some matter;[4] the laws or truths ascertained by the investigation of men devoted to a particular department of inquiry.[5] (Science: Duties on Imports For Promotion of, see CUSTOMS DUTIES, 12 Cyc. 1131. Matter Involving Scientific Knowledge as Subject of Expert Testimony, see EVIDENCE, 17 Cyc. 67. Reading Books of to Jury, see CRIMINAL LAW, 12 Cyc. 573.)

**SCIENTER.** Knowingly; with knowledge; purposely.[6] A term used in pleading to signify an allegation setting out defendant's previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of.[7] (Scienter: Allegation of in — Indictment or Information in General, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 327; Pre-

**Where the fault for which a child is suspended is a disputed fact,** and the school-committee refusing the father's application for a hearing expels the child until he acknowledges his fault, a finding in an action for the unlawful expulsion that the child was in fault will not defeat the action. Bishop *v.* Rowley, 165 Mass. 460, 43 N. E. 191.

**Evidence** in an action against a city for the wrongful expulsion of a pupil see Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

**Evidence held to justify submission to the jury** of the issue as to whether the school-committee had acted in good faith in excluding certain evidence at the hearing of charges against plaintiff and had given plaintiff a fair opportunity to be heard see Morrison *v.* Lawrence, 186 Mass. 456, 72 N. E. 91.

82. Bishop *v.* Rowley, 165 Mass. 460, 43 N. E. 191; Davis *v.* Boston, 133 Mass. 103. See also Spear *v.* Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 63.

83. Bryant *v.* State, 92 Miss. 822, 46 So. 247, holding, however, that a conviction under Code (1906), §§ 4539, 4546, for offering to sell examination questions, cannot be sustained where the proof does not show that the questions offered for sale were prepared by the state superintendent of education and sealed and sent to the county superintendent of education as provided by such statutes.

84. Fulsom *v.* State, 50 Tex. Cr. 470, 98 S. W. 853; Felder *v.* State, 50 Tex. Cr. 388, 97 S. W. 701.

**Instructions.**— An instruction authorizing a conviction of defendant if he unlawfully procured and used the questions prepared by the superintendent of public instruction for teachers' examinations is erroneous for failing to charge that the questions must have been fraudulently used. Felder *v.* State, 50 Tex. Cr. 388, 97 S. W. 701.

**Evidence held insufficient** to sustain a conviction in a prosecution for fraudulently using questions prepared by the state superintendent of public instruction for the examination of teachers for certificates see Fulsom *v.* State, 50 Tex. Cr. 470, 98 S. W. 853; Felder *v.* State, 50 Tex. Cr. 388, 97 S. W. 701.

1. Dole *v.* Johnson, 50 N. H. 452, 454.

2. *In re* Massachusetts Gen. Hospital, 95 Fed. 973, 976.

3. Jackson *v.* Waldron, 13 Wend. (N. Y.) 178, 205.

4. Vredenburg *v.* Behan, 33 La. Ann. 627. 637.

5. Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7, 13.

**Distinguished from:** "Art" see Vredenberg *v.* Behan, 33 La. Ann. 627, 637. "Philosophy" see U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 937, 41 C. C. A. 114; *In re* Massachusetts Gen. Hospital, 95 Fed. 976, 983.

**Does not include** "rifle shooting" see Vredenberg *v.* Behan, 33 La. Ann. 627, 637.

**Surgery described** as "a branch of medical science" see U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 938, 41 C. C. A. 114.

6. Grattan L. Gloss.

7. Black L. Dict.

**As applied to the keeper of a vicious dog** it is said to mean no more than a reasonable cause to apprehend that he might commit the injury complained of. Duval *v.* Barnaby, 75 N. Y. App. Div. 154, 156, 77 N. Y. Suppl. 337.

liminary Complaint or Affidavit, see CRIMINAL LAW, 12 Cyc. 293. As Element of Crime, see CRIMINAL LAW, 12 Cyc. 408, 446; and particularly BURGLARY, 6 Cyc. 233 note 70; COUNTERFEITING, 11 Cyc. 309; DISORDERLY HOUSES, 14 Cyc. 488; DUELING, 14 Cyc. 1116; EXTORTION, 19 Cyc. 42, 47; FALSE PRETENSES, 19 Cyc. 416; FOOD, 19 Cyc. 1092; FORGERY, 19 Cyc. 1419; GAMING, 20 Cyc. 896; HOMICIDE, 21 Cyc. 850; INCEST, 22 Cyc. 47; INTERNAL REVENUE, 22 Cyc. 1677; INTOXICATING LIQUORS, 23 Cyc. 184; LARCENY, 25 Cyc. 47, 49; PERJURY, 30 Cyc. 1402; RECEIVING STOLEN GOODS, 34 Cyc. 515; ROBBERY, 34 Cyc. 1797; STREETS AND HIGHWAYS; TREASON. Evidence of Knowledge, see CRIMINAL LAW, 12 Cyc. 408; EVIDENCE, 16 Cyc. 850. Extent of, to Fix Liability of Owner of Diseased Animal, see ANIMALS, 2 Cyc. 333, 336. Instruction as to in Action For — Fraud, see FRAUD, 20 Cyc. 128; Injury by Animal, see ANIMALS, 2 Cyc. 391. Knowledge of Defects and Dangers as Affecting Liability For Negligence — In General, see NEGLIGENCE, 29 Cyc. 637; In Appliances and Machinery, see MASTER AND SERVANT, 26 Cyc. 1142; In Bridge, as Contributory Negligence, see BRIDGES, 5 Cyc. 1108; In Highways, see STREETS AND HIGHWAYS. Knowledge of Falsity of Representations as Affecting Liability For Fraud or Deceit, see FRAUD, 20 Cyc. 24, 32, 99, 115, 125. Knowledge of Forgery of Negotiable Instruments Affecting Liability of Parties on Indorsement, see COMMERCIAL PAPER, 7 Cyc. 1034. Knowledge of Fraud as Affecting — Creditor's Right to Attack Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 277; Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 461. Knowledge of Injunction as Affecting Liability For Violation, see INJUNCTIONS, 22 Cyc. 1013. Knowledge of Pendency of Action, see LIS PENDENS, 25 Cyc. 1476. Knowledge of Vicious Propensities of Animal, see ANIMALS, 2 Cyc. 377. Necessity For Allegation of — In Action For Fraud, see FRAUD, 20 Cyc. 99; In Complaint For Injury by Animal, see ANIMALS, 2 Cyc. 383; In Transaction For Sale of Intoxicating Liquors to Minors or Drunken Persons, see INTOXICATING LIQUORS, 23 Cyc. 234. Of Person Passing Counterfeit Money, see COUNTERFEITING, 11 Cyc. 309. Sufficiency of Evidence to Establish, as to Vicious Propensities of Animal, see ANIMALS, 2 Cyc. 389. Want of, as Defense in Action For Injury by Animal, see ANIMALS, 2 Cyc. 382. When Imputed to Principal From Agent's Knowledge, see FRAUD, 20 Cyc. 115.)

**SCIENTIA SCIOLORUM EST MIXTA IGNORANTIA.** A maxim meaning "The knowledge of smatterers is diluted ignorance." [8]

**SCIENTIA UTRIMQUE PAR PARES CONTRAHENTES FACIT.** A maxim meaning "Equal knowledge on both sides makes contracting parties equal." [9]

**SCIENTI ET VOLUNTI NON FIT INJURIA.** A maxim meaning "An injury is not done to one who knows and wills it." [10]

**SCIENTIFIC.** Of or pertaining to science.[11] (See SCIENCE, *ante*, p. 1144.)

8. Morgan Leg. Max. [*citing* Blackmore's Case, 8 Coke 156*a*, 159*a*, 77 Eng. Reprint 710].

9. Burrill L. Dict. [*citing* Lord Mansfield, C. J., in Carter *v.* Boehm, 3 Burr. 1905, 1910, 97 Eng. Reprint 1162].

10. Black L. Dict. [*citing* Bracton 20].

11. Webster Int. Dict.

**Scientific books** see EVIDENCE, 17 Cyc. 421.

**Scientific facts** see EVIDENCE, 16 Cyc. 876.

**"Scientific institution"** is an institution devoted either to the sciences generally, or to some department of science as a principal object, and not merely as an unimportant incident to its objects (New England Theosophical Corp. *v.* Board of Assessors, 172 Mass. 60, 63, 51 N. E. 456, 42 L. R. A. 281); an institution for the advancement or promotion of knowledge (Detroit Home, etc., School *v.* Detroit, 76 Mich. 521, 523, 43 N. W. 593, 6 L. R. A. 97); and it does not include a medical college (People *v.* Gunn, 96 N. Y. 317, 323).

**"Scientific instrument"** is a term which includes any instrument which, in ordinary definition, or the acceptation of experts would fall within that category (U. S. *v.* Presbyterian Hospital, 71 Fed. 866, 868, 18 C. C. A. 338); such as are specially designed for use and principally employed in any branch of science (*In re* Massachusetts Gen. Hospital, 95 Fed. 973, 976).

**"Scientific" society** embraces individuals associated together for the purpose of mutual coöperation in scientific investigations and pursuits. People *v.* Cothran, 27 Hun (N. Y.) 344, 345, where such societies are said not to include medical or other colleges, or any institution whatever which is primarily exclusively educational, and especially one in which a compensation is demanded for the instruction furnished.

**SCIENTI NON FIT INJURIA.** A maxim meaning "An injury is not done to one who knows." [12] (See VOLENTI NON FIT INJURIA.)

**SCI. FA.** An abbreviation of scire facias.[13] (See SCIRE FACIAS, *post*, p. 1147.)

**SCILICET.** A word used in pleadings or other instruments to particularize that which has before been stated generally, and explain that which is indifferent, doubtful, or obscure.[14] (See INDICTMENTS AND INFORMATIONS, 22 Cyc. 299.)

**SCINTILLA.** A spark; a glimmer; the smallest trace; the least particle; the faintest ray.[15]

**SCIRE DEBES CUM QUO CONTRAHIS.** A maxim meaning "You ought to know with whom you deal." [16]

**SCIRE ET SCIRE DEBERE ÆQUIPARANTUR IN JURE.** A maxim meaning "To know a thing, and to be bound to know it, are regarded in law as equivalent." [17]

12. See cases cited *infra*, this note.

**A maxim sometimes erroneously cited for** *volenti non fit injuria.* See Choctaw, etc., R. Co. *v.* Jones, 77 Ark. 367, 375, 92 S. W. 244, 4 L. R. A. 837; Siegel *v.* Treka, 115 Ill. App. 56, 60; Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 159, 29 N. E. 464, 31 Am. St. Rep. 537; Pressly *v.* Dover Yarn Mills, 138 N. C. 410, 423, 51 S. E. 69, 73; Lake *v.* Drury, 32 N. Brunsw. 82, 83; Madden *v.* Hamilton Iron Forging Co., 18 Ont. 55, 61.

13. Grattan L. Gloss.

14. Tullis *v.* Shaw, 169 Ind. 662, 668, 83 N. E. 376. See also Phelan *v.* Phelan, 1 U. C. C. P. 275, 279; Grattan L. Gloss.

15. Grattan L. Gloss.

**Scintilla juris,** in real property law, means "a spark of right or interest." Black L. Dict.

**"'Scintilla' of evidence"** is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror (Crosby *v.* Seaboard Air Line R. Co., 81 S. C. 24, 31, 61 S. E. 1064. See also Territory *v.* Mackey, 8 Mont. 168, 173, 19 Pac. 395), a spark of evidence (Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 211, 7 Pac. 795; Jenkins, etc., Co. *v.* Alpena Portland Cement Co., 147 Fed. 641, 643, 77 C. C. A. 625). "Evidence tending to prove" means more than a mere "scintilla of evidence." Offutt *v.* World's Columbian Exposition, 175 Ill. 472, 475, 51 N. E. 651.

16. Black L. Dict.

17. Bouvier L. Dict. [*citing* Trayner Max. 5511.

# SCIRE FACIAS

By Edward C. Ellsbree*

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* Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626; "Post-Office," 31 Cyc. 970. Joint author of "Religious Societies," 34 Cyc. 1112.

## I. DEFINITION.

A scire facias is a (judicial) writ founded on some matter of record,[1] such as a judgment, recognizance, letters patent, etc., and requiring the person against whom it is brought to show cause why the person bringing it should not have advantage of such record, or, as in case of a scire facias to repeal letters patent, why the record should not be annulled or vacated;[2] also the name of a writ, and of the whole proceeding, founded on some public record.[3]

## II. NATURE OF WRIT.

Scire facias is a generic term, and includes proceedings of two distinct classes. One class is where the writ is the commencement of an original action, as to repeal letters patent, charters, as a charter of pardon, and the like.[4] In the other class it is a judicial writ to carry on a suit in which some other person has acquired an interest, to revive a judgment, remedy defects, or for like purpose.[5] But in all

1. *Alabama.*— Lloyd *v.* State, Minor 34.
*Florida.*— State *v.* Canfield, 40 Fla. 36, 49, 23 So. 591, 42 L. R. A. 72; Brown *v.* Harley, 2 Fla. 159, 165.
*Illinois.*— Challenor *v.* Niles, 78 Ill. 78, 79; Chestnut *v.* Chestnut, 77 Ill. 346, 349.
*Massachusetts.*— Com. *v.* Stebbins, 4 Gray 25, 26; Sigourney *v.* Stockwell, 4 Metc. 518, 521.
*New Jersey.*— Jersey City Police Com'rs *v.* Pritchard, 36 N. J. L. 101, 107; Condit *v.* Gregory, 21 N. J. L. 429.
*Tennessee.*— State *v.* Scott, 2 Swan 332, 335.
*Vermont.*— Walsh *v.* Haswell, 11 Vt. 85, 88; Dimond *v.* Allen, 1 Tyler 10, 11.
*United States.*— Winder *v.* Caldwell, 14 How. 434, 442, 14 L. ed. 487; Egan *v.* Chicago Great Western R. Co., 163 Fed. 344, 350; Bentley *v.* Sevier, 30 Fed. Cas. No. 18,233, Hempst. 249.
*England.*— Reg. *v.* Hughes, L. R. 1 P. C. 81, 87, 12 Jur. N. S. 195, 35 L. J. P. C. 23, 14 L. T. Rep. N. S. 808, 14 Wkly. Rep. 441.

2. Anderson L. Dict.; Black L. Dict.; Burrill L. Dict.; Grattan L. Gloss.; Rapalje & L. L. Dict.
See also the following cases:
*Illinois.*— Strauss *v.* Merchants' Loan, etc., Co., 119 Ill. App. 588, 594.
*Iowa.*— Vredenburgh *v.* Snyder, 6 Iowa 39, 42.
*Maine.*— Pillsbury *v.* Smyth, 25 Me. 427, 432.
*Maryland.*— Bowie *v.* Neal, 41 Md. 124, 135.
*New Jersey.*—Boylan *v.* Anderson, 3 N. J. L. 529, 530.
*Tennessee.*— Gregory *v.* Chadwell, 3 Coldw. 390, 392.
*United States.*— Winder *v.* Caldwell, 14 How. 434, 443, 14 L. ed. 487; Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790, 792; Kenosha, etc., R. Co. *v.* Sperry, 14 Fed. Cas. No. 7,712, 3 Biss. 309, 311.
*Canada.*— Gwatkin *v.* Harrison, 36 U. C. Q. B. 478, 483.

3. Bouvier L. Dict.

4. *Georgia.*— Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773.
*Maine.*— Potter *v.* Titcomb, 13 Me. 36.
*Maryland.*— Bish *v.* Williar, 59 Md. 382.
*New Jersey.*— Greenway *v.* Dare, 6 N. J. L. 305.
*North Carolina.*— McDowell *v.* Ashury, 66 N. C. 444.
*Ohio.*— Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462.
*Tennessee.*— State *v.* Scott, 2 Swan 332.
*Vermont.*— State Treasurer *v.* Foster, 7 Vt. 52.
See 44 Cent. Dig. tit. "Scire Facias," § 1 *et seq.*

5. *Florida.*— Brown *v.* Harley, 2 Fla. 159.
*Georgia.*— Heath *v.* Bates, 70 Ga. 633.
*Maine.*— Todd *v.* Darling, 11 Me. 34.
*Mississippi.*— Breckenridge *v.* Mellon, 1 How. 273.
*Missouri.*— State *v.* Hoeffner, 124 Mo. 488, 28 S. W. 1; Coomes *v.* Moore, 57 Mo. 338; Humphreys *v.* Lundy, 37 Mo. 320 [*quoted* and *approved* in Sutton *v.* Cole, 155 Me. 206, 55 S. W. 1052].
*North Carolina.*— McDowell *v.* Ashury, 66 N. C. 444; Binford *v.* Alston, 15 N. C. 351.
*Ohio.*— Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462.
*Tennessee.*— State *v.* Scott, 2 Swan 332.
*Vermont.*— Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489; Gibson *v.* Davis, 22 Vt. 374; State Treasurer *v.* Foster, 7 Vt. 52.
*United States.*— Lafayette County *v.* Wonderly, 92 Fed. 313, 34 C. C. A. 360.
*England.*— Agassiz *v.* Palmer, 1 D. & L. 18, 7 Jur. 972, 12 L. J. C. P. 245, 5 M. & G. 697, 6 Scott N. R. 603, 44 E. C. L. 365; Morrice *v.* Hankey, 3 P. Wms. 148, 24 Eng. Reprint 1006; Wright *v.* Nutt, 1 T. R. 388, 99 Eng. Reprint 1154. But see Farrell *v.* Gleeson, 11 Cl. & F. 702, 8 Eng. Reprint 1269, holding that a scire facias on a judgment is not a mere continuance of a former suit, but creates a new right.
See 44 Cent. Dig. tit. "Scire Facias," § 1 *et seq.*
It is said to be a statutory substitute for the common-law action on the judgment, which was formerly necessary to be brought, if execution was not issued within a year and a day. Kratz *v.* Preston, 52 Mo. App.

cases it is considered as an action because defendant may plead to it.[6] The codes of some states have abolished and superseded the writ of scire facias.[7]

## III. PURPOSES OF WRIT.

Either at common law or by statute scire facias may be a proper remedy to con-

251 [*quoted* and *approved* in Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052].

**Scire facias against one who had been charged as trustee in a process of foreign attachment** is not a new suit, but is an incident to, or a part and continuation of, the original process. Adams *v.* Rowe, 11 Me. 89, 25 Am. Dec. 266.

**The action of scire facias against a garnishee** is not an original action, but a proceeding auxiliary to, and instituted for, the enforcement and collection of the judgment in the original suit on which it is founded. Sherwood *v.* Stevenson, 25 Conn. 431.

**Similar to foreclosure.**— It is held that the remedy by scire facias accomplishes precisely the same thing as foreclosure. They both seek the same end, namely, the conversion of the mortgaged premises into money and the extinguishment of the equity of redemption. The latter is called "equitable foreclosure," and the former may be called "legal foreclosure," because they are in effect the same. Van Vrankin *v.* Roberts, 7 Del. Ch. 16, 29 Atl. 1044.

6. *Arkansas.*— Hubbard *v.* Bolls, 7 Ark. 442.

*Georgia.*— Heath *v.* Bates, 70 Ga. 633.

*Illinois.*— Gibbons *v.* Goodrich, 3 Ill. App. 590.

*Maryland.*— Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806; Bowie *v.* Neale, 41 Md. 124; Kirkland *v.* Krebs, 34 Md. 93.

*Massachusetts.*— Com. *v.* Stebbins, 4 Gray 25.

*Missouri.*— Walsh *v.* Bosse, 16 Mo. App. 231; Simpson *v.* Watson, 15 Mo. App. 425.

*New Hampshire.*— State *v.* Kinne, 39 N. H. 129.

*New Jersey.*— Castner *v.* Styer, 23 N. J. L. 236.

*New York.*— Cameron *v.* Young, 6 How. Pr. 372; Thompson *v.* Hammond, 1 Edw. 497.

*Pennsylvania.*— Walter *v.* Conyngham Tp., 1 C. Pl. 27.

*Vermont.*— State *v.* Dwyer, 70 Vt. 96, 39 Atl. 629.

*United States.*— Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487; Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491; Bentley *v.* Sevier, 30 Fed. Cas. No. 18,233, Hempst. 249.

*England.*— Winter *v.* Kretchman, 2 T. R. 46, 100 Eng. Reprint 25; Fenner *v.* Evans, 1 T. R. 267, 99 Eng. Reprint 1087; Grey *v.* Jones, 2 Wils. C. P. 251, 95 Eng. Reprint 794.

*Canada.*— Gwatkin *v.* Harrison, 36 U. C. Q. B. 478.

See 44 Cent. Dig. tit. "Scire Facias," § 1 *et seq.*

**As an action or suit.**— A scire facias is an action. It also is a suit. Milsap *v.* Wildman, 5 Mo. 425. See also White *v.* Washington School Dist., 45 Conn. 59; Chestnut *v.* Chestnut, 77 Ill. 346.

**A scire facias in attachment is an action at law** within the statute of 1848, prescribing the form of general issues in such action. Smyth *v.* Ripley, 33 Conn. 306.

**Not action for all purposes.**— A scire facias to revive a judgment is not an action, within the meaning of the statute giving either party a change of venue in any civil cause before a justice of the peace. Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052. A scire facias to revive a judgment is not a suit, within the meaning of the statute prohibiting a plaintiff from suing a defendant out of the county where the latter resides and may be found. Challenor *v.* Niles, 78 Ill. 78; Crisman *v.* People, 8 Ill. 351. A writ of scire facias is not a civil action within the meaning of Mass. St. (1866) c. 217, 279, authorizing the removal of such actions from the municipal court of Boston to the superior court. Grey *v.* Thrasher, 104 Mass. 373.

7. Humiston *v.* Smith, 21 Cal. 129; U. S. *v.* Ensign, 2 Mont. 396; Cameron *v.* Young, 6 How. Pr. (N. Y.) 372; The Catskill Bank *v.* Sanford, 4 How. Pr. (N. Y.) 100, 2 Code Rep. 58.

**Under the New York code,** proceedings in the nature of scire facias are to be had by action. Thurston *v.* King, 1 Abb. Pr. 126; Alden *v.* Clark, 11 How. Pr. 209; Cameron *v.* Young, 6 How. Pr. 372. The saving clause in Code Civ. Proc. § 428, abolishing writs of scire facias, providing that "any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition," relates only to proceedings by scire facias commenced before the code took effect, whether judgment had been rendered therein or not. The Catskill Bank *v.* Sanford, 4 How. Pr. 100, 2 Code Rep. 58.

**North Carolina.**— Writs of scire facias, before the adoption of the code, consisted of two classes, the object of the first class being to remedy defects in or to continue an action; that of the second class to commence some proceeding. Proceedings in the nature of a scire facias in the first class are almost indispensable in the administration of justice, and the object of the code was merely to abolish the name and form of this class, and simplify the process into a notice of summons to show cause why further proceeding should not be had, and to furnish further relief in matters where the parties had had a day in court, and not to affect the substance of the remedy. McDowell *v.* Asbury, 66 N. C. 444.

tinue or revive actions on death of party;[8] to enforce,[9] or revive,[10] judgments; to enforce payment of alimony;[11] to enforce mechanics' liens;[12] to enforce the liability of an indorser of a writ for costs;[13] to enforce forfeited bail-bonds and recognizances;[14] to enforce award in replevin;[15] to enforce order for support in bastardy proceedings;[16] to enforce liability of stock-holders on judgment against corporation;[17] to bring in necessary parties;[18] to give relief against a fraudulent conveyance;[19] to foreclose mortgages;[20] to hear errors;[21] to obtain new execution;[22] to secure sheriff's performance of official duty;[23] to repeal letters patent;[24] to revoke or annul grants of land improperly made or forfeited by the grantee thereof;[25] and to vacate or forfeit corporate charters and franchises.[26]

## IV. DEFENSES.[27]

Matters which might have been pleaded in defense to the original proceedings which gave rise to the obligation of record cannot be pleaded to the scire facias thereon.[28] The only available pleas to a scire facias, relying on matter in bar,

**Virginia.**—The act of March 29, 1831, in relation to proceedings upon scire facias, did not repeal the act of 1819 upon the same subject. Williamson *v.* Crawford, 7 Gratt. 202.

**8.** See ABATEMENT AND REVIVAL, 1 Cyc. 101.

**9.** See JUDGMENTS, 23 Cyc. 1434 *et seq.*

**Conditional judgment against garnishee** see GARNISHMENT, 20 Cyc. 1113 *et seq.*

**Judgment against garnishee** see GARNISHMENT, 20 Cyc. 1120.

**Judgment against trustee** see TRUSTS.

**Judgments in actions on bonds** see BONDS, 5 Cyc. 858 note 84.

**Judgments of justices of the peace** see JUSTICES OF THE PEACE, 24 Cyc. 611 note 78.

**Personal judgment against executors and administrators** see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1071, 1072.

**10.** See JUDGMENTS, 23 Cyc. 1448.

**Judgments against decedent** see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1064 notes 46, 47.

**Judgments against personal representatives** see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1065 notes 55, 56.

**Judgments of justices of the peace** see JUSTICES OF THE PEACE, 24 Cyc. 611 note 83.

**11.** Chestnut *v.* Chestnut, 77 Ill. 346 (holding, however, that scire facias will not lie on the record of an order for the payment of alimony pending a suit for divorce, when a resort to evidence *dehors* the record would be necessary to ascertain the amount due); Knapp *v.* Knapp, 134 Mass. 353; Morton *v.* Morton, 4 Cush. (Mass.) 518.

**12.** See MECHANICS' LIENS, 27 Cyc. 366.

**13.** See COSTS, 11 Cyc. 198 notes 82, 83.

**14.** See BAIL, 5 Cyc. 137 note 11.

**Bond for support of bastard child** see BASTARDS, 5 Cyc. 673 note 18.

**Recognizance in general** see RECOGNIZANCES, 34 Cyc. 536.

**Replevin bond** see REPLEVIN, 34 Cyc. 1588 note 13.

**15.** Calloway *v.* Eubank, 4 J. J. Marsh. (Ky.) 280.

**16. Bastardy proceedings** see BASTARDS, 5 Cyc. 670 note 99.

**17.** Shaver *v.* Cotton, 27 Ont. 131; Gwatkin *v.* Harrison, 36 U. C. Q. B. 478.

**18.** Smith *v.* Harris, 12 Ill. 462.

**19.** See FRAUDULENT CONVEYANCES, 20 Cyc. 655 note 81.

**20.** See MORTGAGES, 27 Cyc. 1514.

**21.** See APPEAL AND ERROR, 2 Cyc. 859.

**22.** See JUDGMENTS, 23 Cyc. 1434 note 56.

**23.** See SHERIFFS AND CONSTABLES.

**24.** Reg. *v.* Eastern Archipelago Co., 1 E. & B. 310, 17 Jur. 491, 22 L. J. Q. B. 196, 72 E. C. L. 310, 18 Eng. L. & Eq. 167.

**The fiat of the attorney-general** is necessary to the maintenance of scire facias to set aside a patent at the instance of a private relator. Reg. *v.* Pattee, 5 Ont. Pr. 292. See also PATENTS, 30 Cyc. 911.

**25.** Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773; Walker *v.* Wells, 17 Ga. 547, 63 Am. Dec. 252; People *v.* Miner, 2 Lans. (N. Y.) 396.

**26.** *Alabama.*—State *v.* Moore, 19 Ala. 514.

*Maryland.*—Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

*New Jersey.*—Winsor *v.* Brown, 31 N. J. L. 355.

*Tennessee.*—State *v.* Columbia, etc., Turnpike Co., 2 Sneed 254; State *v.* Scott, 2 Swan 332.

*England.*—Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. 282, 30 Rev. Rep. 504, 13 E. C. L. 316; Eastern Archipelago Co. *v* Reg., 2 C. L. R. 145, 2 E. & B. 856, 18 Jur. 481, 23 L. J. Q. B. 82, 2 Wkly. Rep. 77, 75 E. C. L. 856.

See 43 Cent. Dig. tit. "Scire Facias," § 4.

**Legislative sanction necessary.**—While proceedings by scire facias against a corporation for the forfeiture of its charter cannot be maintained except by the sanction of the legislature, a special act is not required, but a general law authorizing suits for this purpose may be passed. State *v.* Consolidation Coal Co., 46 Md. 1.

**27. Defenses to writs of scire facias for particular purposes** see the titles referred to *supra*, notes 8–26.

**28.** *Connecticut.*—Robbins *v.* Bacon, 1 Root 548; Hubbard *v.* Manning, Kirby 256.

are such as are subsequent to the original proceeding, as discharge, payment, or the like.[29] Errors or irregularities which might be sufficient to reverse the judgment on writ of error cannot be made to avail as defense to a scire facias on such judgment.[30] Nor is it a good plea, either in abatement or in bar to a declaration in scire facias, that a writ of error has been sued out before the return of the scire facias and is still depending.[31] Where one has a good defense to a scire facias, which without any fault or laches on his part he has no opportunity to make, and is without a full and adequate remedy at law, he is entitled to an injunction.[32]

## V. PROCEEDINGS.

**A. Jurisdiction and Authority to Issue.** Since the writ of scire facias is one which pertains to all courts of record, all courts of record, unless prohibited, have the power to issue it.[33] But a scire facias can only issue from the court having possession of the record on which it is founded;[34] the jurisdiction is deter-

*Florida.*— Gilchrist *v.* Meacham, 3 Fla. 219.

*Maine.*— Smith *v.* Eaton, 36 Me. 298, 58 Am. Dec. 746.

*Maryland.*— Moore *v.* Garrettson, 6 Md. 444.

*Massachusetts.*— Hall *v.* Young, 3 Pick. 80, 15 Am. Dec. 180.

*Mississippi.*— Roberts *v.* Weiler, 55 Miss. 249; Person *v.* Valentine, 13 Sm. & M. 551; Mathews *v.* Mosby, 13 Sm. & M. 422.

*Missouri.*— Jeffries *v.* Wright, 51 Mo. 215; Watkins *v.* State, 7 Mo. 334.

*New Hampshire.*— State *v.* Kinne, 39 N. H. 129.

*New York.*— McFarland *v.* Irwin, 8 Johns. 78.

*United States.*— Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491.

*England.*— Philipson *v.* Egremont, 6 Q. B. 587, 14 L. J. Q. B. 25, 51 E. C. L. 587; Baylis *v.* Hayward, 4 A. & E. 256, 1 Harr. & W. 609, 5 L. J. K. B. 52, 5 N. & M. 613, 31 E. C. L. 127; Cook *v.* Jones, Cowp. 727, 728, 98 Eng. Reprint 1330; Bradley *v.* Urquhart, 2 Dowl. P. C. N. S. 1042, 12 L. J. Exch. 459, 11 M. & W. 456; Bradley *v.* Eyre, 12 L. J. Exch. 450, 11 M. & W. 432.

See 43 Cent. Dig. tit. "Scire Facias," § 11.

**29.** Vredenburgh *v.* Snyder, 6 Iowa 39; Blackburn *v.* Beall, 21 Md. 208; Langston *v.* Abney, 43 Miss. 161; Lawder *v.* Peyton, Ir. R. 11 C. L. 41.

**Accord and satisfaction** is a proper plea to a scire facias. McCullough *v.* Franklin Coal Co., 21 Md. 256; Booth *v.* Campbell, 15 Md. 569.

**A final discharge under the insolvent laws** is a good and valid defense (Starr *v.* Heckart, 32 Md. 267), unless such discharge was granted prior to the rendition of the original judgment (Moore *v.* Garrettson, 6 Md. 444; Roberts *v.* Weiler, 55 Miss. 249).

**At common law a plea of payment** to a scire facias was not good, because payment was matter *in pais* and not of record, but by statute 4 Anne, c. 16, § 12, a plea of payment was permitted in such case. McCullough *v.* Franklin Coal Co., 21 Md. 256.

**30.** Langston *v.* Abney, 43 Miss. 161.

**If the original judgment was obtained collusively or fraudulently,** such fraud and collusion may be pleaded in bar to a scire facias, or a motion may be made to set aside the proceedings as fraudulent. Philipson *v.* Egremont, 6 Q. B. 587, 14 L. J. Q. B. 25, 51 E. C. L. 58; Dodgson *v.* Scott, 6 D. & L. 27, 2 Exch. 457, 17 L. J. Exch. 321.

**To a scire facias on bond to the crown for excise duties,** a plea of payment after the day, but before writ issued, and acceptance of the crown in satisfaction, was held insufficient. Rex *v.* Ellis, 1 Price 23.

**31.** Snook *v.* Mattock, 5 A. & E. 239, 2 Harr. & W. 188, 5 L. J. K. B. 206, 6 N. & M. 783, 31 E. C. L. 597.

**32.** Starr *v.* Heckart, 32 Md. 267.

**33.** See cases cited *infra*, this note.

**The supreme court** has power to issue writs of scire facias. Shumway *v.* Sargeant, 27 Vt. 440.

**U. S. Rev. St. (1878) § 716 [U. S. Comp. St. (1901) p. 580] vests in the federal courts** power to issue writs of scire facias. Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790.

**Justice of the peace.**— It seems that a scire facias cannot be issued by a justice of the peace. Smith *v.* Harker, 3 N. J. L. 431.

**34.** *Connecticut.*— Jarvis *v.* Rathburn, Kirby 220.

*Georgia.*— Walker *v.* Wells, 17 Ga. 547, 63 Am. Dec. 252.

*Maine.*— State *v.* Brown, 41 Me. 535; State *v.* Smith, 2 Me. 62.

*Massachusetts.*— Gray *v.* Thrasher, 104 Mass. 373; Osgood *v.* Thurston, 23 Pick. 110; Com. *v.* Downey, 9 Mass. 520.

*New Hampshire.*— State *v.* Kinne, 39 N. H. 129.

*New Jersey.*— Boylan *v.* Anderson, 3 N. J. L. 529.

*North Carolina.*— Turner *v.* White, 49 N. C. 116.

*Ohio.*— Cowden *v.* Stevenson, Wright 116.

*South Carolina.*— Grimke *v.* Mayrant, 2 Brev. 202.

*Vermont.*— Gibson *v.* Davis, 22 Vt. 374; Walsh *v.* Haswell, 11 Vt. 85; Gilson *v.* Gay, 10 Vt. 326; Carlton *v.* Young, 1 Aik. 332;

mined by the record without regard to the residence of the parties, or the sum in dispute.[35] Unless leave of court is required by statute, a writ of scire facias in a proper case may issue as of course out of the clerk's office, without leave of court first obtained.[36] Being a judicial writ it must be signed by a judge or the clerk of the court from which it issues.[37] The writ may issue to any county where defendant resides, and need not recite his residence therein.[38]

**B. Pleadings — 1. Declaration or Complaint — a. Writ as Constituting Pleading and Process.** A scire facias occupies the place of both process and declaration or petition.[39] Therefore no declaration or petition,[40] or rule to plead,[41] is necessary.

**b. Form and Requisites of Writ** — (i) *In General.* Since a writ of scire facias supplies the place of both summons and declaration,[42] it must contain every material allegation essential to show a right of recovery.[43] If it fails to do this,

Windham County *v.* Erwin, Brayt. 218; Phelps *v.* Mott, Brayt. 191.

*United States.*— Pullman's Palace-Car Co. *v.* Washburn, 66 Fed. 790, holding that scire facias can lie only out of the court where the recognizance is entered of record, or the court to which the same has been removed.

See 43 Cent. Dig. tit. "Scire Facias," § 13.

**The statute of Vermont** has made an innovation on this principle, so far as to provide that a writ may issue from another justice, or from the county court in some cases, notwithstanding the record is not before them. Freeman *v.* Batchelder, 36 Vt. 292; Gilson *v.* Gay, 10 Vt. 326.

**If issued by any other court,** it will be a mere nullity, and an appearance and answer by defendant will not give jurisdiction. Gray *v.* Thrasher, 104 Mass. 373.

35. Walsh *v.* Haswell, 11 Vt. 85.

36. Goddard *v.* Delaney, 181 Mo. 564, 80 S. W. 886. *Contra,* Frierson *v.* Harris, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220, holding that a clerk has no power or authority to issue a scire facias. Its issuance is a judicial act based on a suggestion of record, and it must be awarded by the court.

37. Walsh *v.* Haswell, 11 Vt. 85; Sherwood *v.* Pearl, 1 Tyler (Vt.) 319.

**Scire facias being issued as matter of** right it may be signed by the clerk of the court. State Treasurer *v.* Moore, 1 Tyler (Vt.) 329.

38. Dyches *v.* State, 24 Tex. 266.

39. *Arkansas.*—Calhoun *v.* Adams, 43 Ark. 238; Hanly *v.* Adams, 15 Ark. 232; Gray *v.* State, 5 Ark. 265.

*Illinois.*— Compton *v.* People, 86 Ill. 176; Rietzell *v.* People, 72 Ill. 416; Farris *v.* People, 58 Ill. 26; Campbell *v.* People, 22 Ill. 234; Conner *v.* People, 20 Ill. 381; Shadley *v.* People, 17 Ill. 252.

*Mississippi.*— Tucker *v.* State, 55 Miss. 452.

*Missouri.*— State *v.* Baughman, (App.) 74 S. W. 433.

*Ohio.*— McAlpin *v.* Graham, 1 Ohio Dec. (Reprint) 56, 1 West. L. J. 394.

*Pennsylvania.*— Rynd *v.* Bakewell, 87 Pa. St. 460; McKinney *v.* Mehaffey, 7 Watts & S. 276; Association *v.* Gardiner, 2 Wkly. Notes Cas. 95.

*Virginia.*— Gedney *v.* Com., 14 Gratt. 318.

*United States.*— Hollister *v.* U. S., 145 Fed. 773, 76 C. C. A. 337.

See 43 Cent. Dig. tit. "Scire Facias," § 17.

**The record** upon which the scire facias is based constitutes the petition. State *v.* Lighton, 4 Greene (Iowa) 278.

40. *Alabama.*—Toulmin *v.* Bennett, 3 Stew. & P. 220.

*Florida.*— Brown *v.* Harley, 2 Fla. 159.

*Illinois.*— Wood *v.* People, 16 Ill. 171.

*Iowa.*— State *v.* Foster, 2 Iowa 559.

*Missouri.*— Garner *v.* Hays, 3 Mo. 436.

*New York.*— Jackson *v.* Tanner, 18 Wend. 526.

*Pennsylvania.*— Kean *v.* Franklin, 5 Serg. & R. 147; Ridgway *v.* Hess, 1 Browne 347.

*Texas.*— Branch *v.* State, 25 Tex. 423; State *v.* Cox, 25 Tex. 404.

**If the whole cause of action be shown in the writ** of scire facias, no declaration need be filed. Lasselle *v.* Godfroy, 1 Blackf. (Ind.) 297.

**In Montana** the common-law forms of procedure, including scire facias, are done away, and a complaint is necessary in all civil actions. U. S. *v.* Ensign, 2 Mont. 396.

41. Brown *v.* Harley, 2 Fla. 159; Garner *v.* Hays, 3 Mo. 436; McVeigh *v.* Old Dominion Bank, 76 Va. 267; Williamson *v.* Crawford, 7 Gratt. (Va.) 202.

42. See *supra,* V, B, 1, a.

43. *Alabama.*— Toulmin *v.* Bennett, 3 Stew. & P. 220.

*Arkansas.*— Gray *v.* State, 5 Ark. 265; Hicks *v.* State, 3 Ark. 313.

*District of Columbia.*— Lyon *v.* Ford, 20 D. C. 530.

*Illinois.*—Farris *v.* People, 58 Ill. 26; Conner *v.* People, 20 Ill. 381.

*Maryland.*— Wright *v.* Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Bowie *v.* Neal, 41 Md. 124.

*Ohio.*— Wolf *v.* Pounsford, 4 Ohio 397; McVickar *v.* Ludlow, 2 Ohio 246; Bowen *v.* Pyne, Wright 602.

See 43 Cent. Dig. tit. "Scire Facias," § 16.

**In proceedings for forfeiture of a charter,** the scire facias should allege that defendant procured the act of incorporation, or that the company accepted it or acted under it. State *v.* Moore, 19 Ala. 514. A scire facias setting forth the obligation of defendant under the act of incorporation, and expressly charg-

it will sustain no judgment against defendant, not even one by default,[44] although mere formal errors will not vitiate it if the substance is sufficiently and intelligently set forth.[45] At common law, being founded on some obligation of record, the writ must recite such record,[46] or at least so much thereof as will show the liability of defendant;[47] and as long as the scire facias is in conformity with the record, it cannot be pronounced insufficient.[48] Nothing that is not of record need be recited.[49] By statute, however, the writ of scire facias is sometimes extended to cases where it is necessary to insert something more than what appears from the record.[50]

(II) *AMENDMENT.* A scire facias may be amended in the same manner as declarations in other cases,[51] so as to conform to the record on which it is based,[52] or to the instructions given to the clerk,[53] even after a plea of *nul tiel record*,[54] and even after appeal if justice requires it.[55] But an amendment which would change

ing a violation thereof, and the mode and manner in which it was violated, and, in the language of the act, seeking to ascertain whether the charter and corporate powers and franchises of defendant ought not, by reason of nonuser and abuser, to be declared vacated and annulled, fully discloses plaintiff's cause of complaint, and sets out a substantial cause of action. Washington, etc., Turnpike Road *v.* State, 19 Md. 239.

**44.** Gray *v.* State, 5 Ark. 265; Davidson *v.* State, 20 Tex. 649.

**45.** Andrews *v.* Buckbee, 77 Mo. 428; Davidson *v.* State, 20 Tex. 649; Richardson *v.* Prince George Justices, 11 Gratt. (Va.) 190.

**46.** Gray *v.* State, 5 Ark. 265; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Gregory *v.* Chadwell, 3 Coldw. (Tenn.) 390; Martin *v.* Gorden, 3 Hayw. (Tenn.) 173; Davidson *v.* State, 20 Tex. 649.

**In Texas** the common-law practice never having been adopted, a scire facias not conforming to common-law precedents, but substantially notifying defendant of the obligation of record sought to be enforced, and to show cause, etc., is all that can be required. Horn *v.* State, 3 Tex. 190.

**If founded on a recognizance** the writ must pursue the recognizance either literally or substantially, and show in what court or before what officer it was acknowledged. Gray *v.* State, 5 Ark. 265.

**47.** Gregory *v.* Chadwell, 3 Coldw. (Tenn.) 390; Martin *v.* Gorden, 3 Hayw. (Tenn.) 173.

**48.** Boyle *v.* Robinson, 7 Harr. & J. (Md.) 200.

**49.** Nicholson *v.* Patterson, 2 Humphr. (Tenn.) 448; Carson *v.* Richardson, 3 Hayw. (Tenn.) 231 (holding that a scire facias need not state the sum paid, or the balance yet due on the obligation of record, as the judgment thereon can only be that plaintiff have execution, and the record shows for how much it ought to issue; and defendants, in a plea, may state what sum has been paid, if they think proper); Dimond *v.* Allen, 1 Tyler (Vt.) 10.

**50.** See Walsh *v.* Haswell, 11 Vt. 85.

**51.** *Alabama.*— Lowry *v.* Newsom, 51 Ala. 570.

*Illinois.*— Peacock *v.* People, 83 Ill. 331.

*Indiana.*— Berry *v.* McDonald, 7 Blackf. 371.

*New York.*— Jackson *v.* Tanner, 18 Wend. 526.

*West Virginia.*— State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

See 43 Cent. Dig. tit. "Scire Facias," § 18.

**52.** Constantine *v.* Major, 6 J. J. Marsh. (Ky.) 621; Thompson *v.* Dougherty, 3 J. J. Marsh. (Ky.) 564; Patrick *v.* Woods, 3 Bibb (Ky.) 232; Pounds *v.* State, 60 Miss. 925; Maus *v.* Maus, 5 Watts (Pa.) 315; Burrows *v.* Heysham, 1 Dall. (Pa.) 133, 1 L. ed. 69; Smith *v.* Brisbane, 2 Bay (S. C.) 557.

**Formal defects.**—Gedney *v.* Com., 14 Gratt. (Va.) 318.

**Clerical errors.**—Anthony *v.* Humphries, 9 Ark. 176, 11 Ark. 663; Johnson *v.* Goddard, 19 Ga. 597; McFadden *v.* Fortier, 20 Ill. 509; State Bank *v.* Buckmaster, 1 Ill. 176; Rainey *v.* Com., 10 Watts (Pa.) 343; Potter *v.* Grambo, 1 Wkly. Notes Cas. (Pa.) 484; Smith *v.* Brisbane, 2 Bay (S. C.) 557; Tayloe *v.* Wharfield, 23 Fed. Cas. No. 13,772, 2 Cranch C. C. 248.

**53.** Patrick *v.* Woods, 3 Bibb (Ky.) 232; Byrne *v.* McPherson, 12 Gill & J. (Md.) 157; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261.

**54.** *Maryland.*— Hazeldine *v.* Walker, 1 Harr. & J. 487.

*New Jersey.*—Condit *v.* Gregory, 21 N. J. L. 429.

*North Carolina.*— Williams *v.* Lee, 4 N. C. 578.

*Pennsylvania.*— Willard *v.* Norris, 2 Rawle 56.

*South Carolina.*— Smith *v.* Brisbane, 1 Brev. 455.

See 43 Cent. Dig. tit. "Scire Facias," § 18.

**Contra.**— Constantine *v.* Major, 6 J. J. Marsh. (Ky.) 611.

**55.** Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49 (holding, however, that where the objection is purely technical, an amendment should not be allowed to rectify it, to the overthrow of substantial justice); State *v.* Cherry, 13 N. C. 550 (holding that where the record of a scire facias brought in a county court on an obligation of record taken therein and the record of the obligation differed, the county court may amend the entry after appeal to the superior court).

the cause of action as well as the form is not allowable.[56] Nor can plaintiff add new parties, the necessity for whose joinder existed previous to the issuing of the writ, or where the statute of limitations has attached.[57]

**2. Plea, Answer, and Demurrer.** A scire facias is an action to which defendant may plead any legal matter of defense.[58] If the obligation of record was not entered into by the party sued on it so as to be obligatory on him, the objection should be made by plea.[59] If the facts set up in the writ are not sufficient to constitute a cause of action, the objection is properly raised by demurrer.[60] Irregularities apparent on the face of a scire facias may be taken advantage of by motion to quash,[61] or by demurrer;[62] but whenever objections to the writ involve questions of fact only, or depend partly on matters of record and partly on matters *in pais*, such objections should be presented by plea,[63] and not by motion to quash.[64] Non-joinder or misjoinder of defendants, when apparent on the face of the writ, should be taken advantage of by demurrer;[65] when not so apparent, the defect must be brought to the notice of the court by plea in abatement.[66]

56. Eckert *v.* Phillips, 4 Pa. Co. Ct. 514; Howard *v.* McKowen, 2 Browne (Pa.) 150.

57. Willink *v.* Renwick, 22 Wend. (N. Y.) 608.

58. Camp *v.* Small, 44 Ill. 37; Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491.

**Estoppel by failure to plead.**—As scire facias is in the nature of an original action, defendant may plead defenses, and, if he fails to do so, he and his privies are estopped from raising them afterward. Hadaway *v.* Hynson, 89 Md. 305, 43 Atl. 806.

59. Ross *v.* State, 6 Blackf. (Ind.) 315.

**Nul tiel record.**—If defendant wishes to deny the existence of the record as alleged, the proper plea is *nul tiel record*. Wilson *v.* State, 6 Blackf. (Ind.) 212; Bowie *v.* Neale, 41 Md. 124. A void record is no record, and a plea of *nul tiel record* is therefore properly sustained. Donley *v.* Brownlee, 7 Pa. St. 109. If the writ misdescribes the record, the proper plea is *nul tiel record*. Slaten *v.* People, 21 Ill. 28; Moore *v.* Garrettson, 6 Md. 444; Davis *v.* Norris, 8 Pa. St. 122.

**Non est factum** is not a proper plea to a scire facias on an obligation of record. Camp *v.* Small, 44 Ill. 37; Johnston *v.* People, 31 Ill. 469.

**Usury** is not a good plea to scire facias on a record. Camp *v.* Small, 44 Ill. 37; Carpenter *v.* Mooers, 26 Ill. 162.

**Scire facias sur mortgage or mechanic's lien.**—Under the Pennsylvania practice the plea of *nul tiel record* to a scire facias sur mortgage is a nullity, the scire facias being founded upon the mortgage and not upon the registry of it. Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541; Frear *v.* Drinker, 8 Pa. St. 520. The proper plea in denial of the instrument is *non est factum*. Lancaster *v.* Smith, 67 Pa. St. 427. For the same reason *nul tiel record* is not a good plea to scire facias on a mechanic's lien. Davis *v.* Church, 1 Watts & S. (Pa.) 240. While the plea of *nil debet* is technically better (Early *v.* Albertson, 2 Wkly. Notes Cas. (Pa.) 541), *non assumpsit* is a proper plea to a scire facias on a mechanic's lien (Early *v.* Albertson, *supra*).

60. *Arkansas.*—Trapnall *v.* Terry, 27 Ark. 70.

*Maryland.*—Bowie *v.* Neal, 41 Md. 124.

*Montana.*—U. S. *v.* Ensign, 2 Mont. 396.

*Virginia.*—Garland *v.* Ellis, 2 Leigh 555.

*United States.*—Dickson *v.* Wilkinson, 3 How. 57, 11 L. ed. 491.

**Demurrer brings up whole record.**—A demurrer to a scire facias only raises a question as to the sufficiency of matters appearing on the record, or necessarily implied by law. Norfolk *v.* People, 43 Ill. 9; State *v.* Heed, 62 Mo. 559; State *v.* Potts, 60 Mo. 368; State *v.* Randolph, 22 Mo. 474. In scire facias to enforce a judgment of forfeiture of a recognizance, the recognizance is not properly a part of the record, and defects therein cannot be taken advantage of by demurrer, but only by *nul tiel record*. State *v.* Rhonimus, 47 Miss. 314; Fields *v.* State, 39 Miss. 509; Ditto *v.* State, 30 Miss. 126.

**On demurrer to a plea** in a proceeding by scire facias the court may look back and examine into the validity of the writ. Hicks *v.* State, 3 Ark. 313.

**Errors in matter of form** will not be noticed on general demurrer. McLellan *v.* Codman, 22 Me. 308. Thus a general demurrer to a scire facias cannot reach a defect in the prayer. Barton *v.* Vanzant, 1 Mo. 192.

61. McFadden *v.* Fortier, 20 Ill. 509; Campbell *v.* Booth, 8 Md. 107.

62. McFadden *v.* Fortier, 20 Ill. 509; Ross *v.* State, 6 Blackf. (Ind.) 315.

63. Campbell *v.* Booth, 8 Md. 107; Stevens *v.* Ewer, 2 Metc. (Mass.) 74.

64. Hoover *v.* Davenport, 5 Blackf. (Ind.) 230; Clark *v.* Digges, 5 Gill (Md.) 109.

65. Bowie *v.* Neale, 41 Md. 124; Parrish *v.* State, 14 Md. 238; Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; Rex *v.* Chapman, Anstr. 811; Rex *v.* Young, Anstr. 448. *Compare* Wilson *v.* State, 6 Blackf. (Ind.) 212.

66. Nesbit *v.* Manro, 11 Gill & J. (Md.) 261; McElderry *v.* Smith, 2 Harr. & J. (Md.) 72; Cumming *v.* Eden, 1 Cow. (N. Y.) 70.

**3. Plaintiff's Response.** If plaintiff deems the facts pleaded by defendant insufficient in law to constitute a valid defense, he should demur;[67] by replying and joining issue on the truth of the plea, he admits its sufficiency in law.[68] Where the plea of *nul tiel record* is entered, plaintiff should, in his replication, reassert the record on which he relies.[69]

**C. Parties.** It has been held that where an obligation by two or more is several and not joint, a joint scire facias against the obligors cannot be sustained.[70] But the better rule seems to be that it is no valid objection to a scire facias that the obligation on which it is based is several, and the action joint, provided the scire facias recites the obligation truly, and seeks to have execution according to its effect.[71] If, however, the obligation be joint, the scire facias should also be joint.[72]

**D. Service and Return of Writ — 1. Service — a. In General.** At common law where the sheriff returns *nihil*, plaintiff must sue out an alias scire facias.[73] If he returns *nihil* to the second writ, judgment may be entered. In other words, two returns of *nihil* are equivalent to service.[74] But in modern practice the writ of scire facias contains an ordinary clause of summons, and is deemed to be sufficiently executed when served by the sheriff as a writ of summons.[75] And in some states writs of scire facias are by statute required to be served as writs of summons.[76] Statutory provisions regarding service must be

**67.** Blackburn *v.* Beall, 21 Md. 208.

**A motion for judgment notwithstanding a** plea filed to a scire facias waives all defects in the form of the plea, and is equivalent to a general demurrer to the sufficiency of the facts alleged therein. Roller *v.* Caruthers, 5 App. Cas. (D. C.) 368.

**68.** Blackburn *v.* Beall, 21 Md. 208; Maus *v.* Maus, 6 Watts (Pa.) 275.

**69.** Payton *v.* Stuart, Peck (Tenn.) 156.

**70.** *Indiana.*—Lockwood *v.* State, 7 Blackf. 417; Chandler *v.* State, 5 Blackf. 471; Wellman *v.* State; 5 Blackf. 343; Hildreth *v.* State, 5 Blackf. 80; Thompson *v.* State, 4 Blackf. 188.

*Maryland.*— Parrish *v.* State, 14 Md. 238.

*Ohio.*— State *v.* Gardner, Tapp. 252.

*Texas.*— Davidson *v.* State, 20 Tex. 649.

*England.*— Rex *v.* Chapman, Anstr. 811. *Contra*, Rex *v.* Young, Anstr. 448.

See 43 Cent. Dig. tit. "Scire Facias," § 15.

**Where three persons became severally** bound for each of three defendants they cannot be joined in one scire facias. Garland *v.* Ellis, 2 Leigh (Va.) 555.

**71.** *Alabama.*— Howie *v.* State, 1 Ala. 113.

*Illinois.*— Farris *v.* People, 58 Ill. 26; Chumasero *v.* People, 18 Ill. 405; Crisman *v.* People, 8 Ill. 351; Sans *v.* People, 8 Ill. 327.

*Kentucky.*— Madison *v.* Com., 2 A. K. Marsh. 131.

*Massachusetts.*— Com. *v.* McNeill, 19 Pick. 127.

*New Jersey.*— State *v.* Stout, 11 N. J. L. 124.

*New York.*— People *v.* Corbett, 8 Wend. 520, by statute.

*Tennessee.*— State *v.* Frankgos, 114 Tenn. 76, 85 S. W. 79.

*Virginia.*— Caldwell *v.* Com., 14 Gratt. 698; Gedney *v.* Com., 14 Gratt. 318.

*West Virginia.*— State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

See 43 Cent. Dig. tit. "Scire Facias," § 15.

**Against heirs and personal representatives.** — A joint scire facias may be maintained against the heirs and personal representatives of a deceased coöbligor. Calloway *v.* Ewbank, 4 J. J. Marsh. (Ky.) 280.

**72.** Carson *v.* Moore, 23 Tex. 450.

**73.** Grimke *v.* Mayrant, 2 Brev. (S. C.) 202; 4 Inst. 472.

**74.** *Illinois.*— Choate *v.* People, 19 Ill. 63.

*North Carolina.*— Woodfork *v.* Bromfield, 5 N. C. 187.

*Ohio.*— Cowden *v.* Stevenson, Wright 116.

*Pennsylvania.*— Taylor *v.* Young, 71 Pa. St. 81; Stevens *v.* North Pennsylvania Coal Co., 35 Pa. St. 265; Magaw *v.* Stevenson, 1 Grant 402; Compher *v.* Anawalt, 2 Watts 490; Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101; Warner *v.* Moore, 3 Luz. Leg. Reg. 108.

*England.*— Ratcliffe's Case, Dyer 172*a*, 73 Eng. Reprint 377; Barret *v.* Cleydon, Dyer 168*a*, 73 Eng. Reprint 368; Bromley *v.* Littleton, Yelv. 113, 80 Eng. Reprint 76.

See 43 Cent. Dig. tit. "Principal and Surety," § 19.

**The legal fiction making two returns of nihil equivalent to personal service** is applicable only to the jurisdiction of the forum. Weaver *v.* Boggs, 38 Md. 255; Kirk *v.* U. S., 137 Fed. 753, 70 C. C. A. 187.

**Two returns of "not found"** to a scire facias, like two returns of "*nihil*," are equivalent to service. Kearns *v.* State, 3 Blackf. (Ind.) 334; Saffold *v.* State, 60 Miss. 928; State *v.* Culp, 39 Mo. 530.

**Scire facias against heirs, devisees, and terre-tenants.**— The rule that two *nihils* are equal to the return of a scire feci applies to a proceeding against heirs, devisees, and terre-tenants, provided they are named in the writ, but otherwise it is not sufficient to return *nihil*. Cumming *v.* Eden, 1 Cow. (N. Y.) 70.

**75.** Andrews *v.* Buckbee, 77 Mo. 428.

**76.** *Arkansas.*— Hanly *v.* Adams, 15 Ark. 232.

*Florida.*— McCallum *v.* Culpepper, 41 Fla. 107, 26 So. 187.

strictly construed.[77] A writ fatally defective in its service is a nullity, and no valid judgment can be entered thereon.[78]

**b. Who May Serve.** The writ may be directed to and may be served by any sheriff in the state, but ought to be sent to the sheriff of the district where defendant resides, unless he may be found in another district.[79] But where a scire facias addressed to a sheriff of one county is served by the sheriff of another county, the service is a nullity.[80] Service of a scire facias may, it has been held, be made by special deputy who has not taken an official oath.[81]

**c. Waiver of Defects in Service.** By appearing and pleading to the writ, defendant waives defects in the service thereof.[82] So written acknowledgment that the scire facias was properly served, and by the proper officer, is a waiver of a defect in the authority of the person serving it.[83]

**2. RETURN — a. Time and Place.** A writ of scire facias must be returned to the court where the original proceedings are of record.[84] The time when the writ shall be returnable is usually fixed by statutory provision, and if, on its face, a writ is not returnable within such period so fixed by the statute, it is void.[85] The writ cannot be made returnable *instanter*;[86] ordinarily it should be made returnable on the return-day of the next regular term of court,[87] provided a

*Georgia.*— Atwood *v.* Hirsch, 123 Ga. 734, 51 S. E. 742.

*New York.*— Feeter *v.* McCombs, 1 Wend. 19.

*Pennsylvania.*— Buchannan *v.* Specht, 1 Phila. 252.

*United States.*— Bentley *v.* Sevier, 30 Fed. Cas. No. 18,233, Hempst. 249.

**If there is personal service** it must be in the same manner as a summons. Philadelphia *v.* Cooper, 212 Pa. St. 306, 61 Atl. 926.

**If personal service is not made** it must be by posting and publication. Philadelphia *v.* Cooper, 212 Pa. St. 306, 61 Atl. 926.

**In Pennsylvania,** notwithstanding the act of June 13, 1836, providing that "a scire facias shall be served and returned in the same manner as a summons," if service cannot be made of a scire facias it may be returned "*nihil*," and after two *nihils* judgment may be taken according to the practice prevailing before the passage of the act. Chambers *v.* Carson, 2 Whart. 9.

**In South Carolina** the service must be personal if the defendant be within the state, but, if otherwise, it must be by posting a rule at the door of the courthouse pursuant to the act of 1792. Grimke *v.* Mayrant, 2 Brev. 202.

**Service on attorneys.**— A scire facias against a non-resident may properly be served on parties who are his attorneys in fact, although not the attorneys of record in the original suit. Fisher *v.* Battaile, 31 Miss. 471.

**Remedies by scire facias unknown to common law.**— Where the statute has provided remedies by writ of scire facias, or summons in the nature of a scire facias, which were unknown to the common law, and which are of a personal character merely, the same must be executed, like any other ordinary process, by personal service on the parties. McCourtie *v.* Davis, 7 Ill. 298.

**Effect of service on persons not named in writ.**— Where the sheriff serves a scire facias on defendant, and also on persons not named in the writ as defendants, it does not impair the writ or the return. Anthony *v.* Humphries, 9 Ark. 176.

**Witnesses unnecessary.**— Under a statute providing "that the return of a sheriff that he has executed a scire facias shall be sufficient, though it do not appear that witnesses were present," the service of a scire facias is good, although that fact does not appear. Farley *v.* Nelson, 4 Ala. 183.

77. Carswell *v.* Patzowski, 3 Pennew. (Del.) 593, 53 Atl. 54; McCallum *v.* Culpepper, 41 Fla. 107, 26 So. 187; Garner *v.* Hays, 3 Mo. 436; Castner *v.* Styer, 23 N. J. L. 236.

78. Philadelphia *v.* Cooper, 212 Pa. St. 306, 61 Atl. 926; Philadelphia *v.* Merz, 28 Pa. Super. Ct. 227.

79. Grimke *v.* Mayrant, 2 Brev. (S. C.) 202.

**Service by a constable** is proper where there is no sheriff or coroner in the county. Gay *v.* State, 20 Tex. 504.

80. Kennedy *v.* People, 15 Ill. 418.

81. Courson *v.* Hixon, 78 Ill. 339, holding that it is no objection to the service of a scire facias that it was made by a special deputy who had not taken an official oath, where the statute only requires that a return by such a deputy shall be verified by his affidavit.

82. Andrews *v.* Buckbee, 77 Mo. 428.

**A motion by an attorney to quash the return** on a scire facias issued against defendant is equivalent to an appearance by him. Fisher *v.* Battaile, 31 Miss. 471.

83. Aycock *v.* Leitner, 29 Ga. 197.

84. Grimke *v.* Mayrant, 2 Brev. (S. C.) 202.

85. Lavell *v.* McCurdy, 77 Va. 763.

86. Jebo *v.* Ewing, 5 Blackf. (Ind.) 563; Young *v.* Colby, Wright (Ohio) 85.

87. Jebo *v.* Ewing, 5 Blackf. (Ind.) 563; Hackett *v.* Ford, 4 T. B. Mon. (Ky.) 88; Bridges *v.* Adams, 32 Md. 577.

sufficient period would intervene between the date of issuance and the date of return.[88]

**b. Requisites and Sufficiency.** The return must show service of the writ within the time and in the manner prescribed.[89] Where the words in which a return should be made are prescribed by statute, they should be literally followed.[90] Nevertheless a return will be deemed sufficient if the language used will permit such a construction.[91] If the return is required to be verified, an unverified return is insufficient.[92] Falsity of the sheriff's return is no ground for setting aside the service of the writ; defendant's remedy is against the sheriff for a false return.[93] The remedy for a defective return is not a plea in abatement or a motion to quash the writ, but a motion to quash the return.[94]

**c. Amendment.** After issue joined in scire facias, it is within the discretion of the court to allow the officer serving the writ to amend his return.[95]

**E. Dismissal and Nonsuit.** In scire facias plaintiff may in a proper case be nonsuited.[96] When the death of one of two defendants to a scire facias is suggested, it is equivalent to a dismissal of the suit as to him.[97]

**F. Discontinuance and Quashing of Writ.** Delay may work a discontinuance of a scire facias.[98] So where service has not been effected on all defendants, by taking judgment against the others, the cause is, in fact and in law,

88. See cases cited *infra*, this note.

**In Kentucky** a scire facias may, by the statute, be executed any time before the return-day. Patrick *v.* Newel, 1 Bibb 323.

**In New York** it was once held that there must be in all cases fifteen days between the teste of the first and return of the second scire facias. Little *v.* Woodman, Col. Cas. 60, Col. & C. Cas. 35.

**In Ohio** it is held that there must be fifteen days between service and return. Lyon *v.* Randall, 1 Ohio Dec. (Reprint) 57. Under the Justices' Act of 1824, a scire facias cannot be returnable in less than three days. Young *v.* Colby, Wright 85.

**In Virginia** two days' interval is required between service and return. Green *v.* Thompson, 1 Patt. & H. 427.

89. Thomas *v.* State, 62 Miss. 184 (holding that under a statute requiring service of a writ by delivery of a copy, a return on a writ of scire facias that it has been "executed" by "reading" shows an illegal service); Simmons *v.* Wood, 6 Yerg. (Tenn.) 518; Middleton *v.* State, 11 Tex. 255.

**Miss. Rev. Code, p. 490, art. 73,** requires that a scire facias shall be executed and returned in the same manner as a summons, which has to be served personally on defendant, if to be found, and a true copy delivered to him. In view of this requirement, a return, "Executed by personal service," is insufficient. Davis *v.* Patty, 42 Miss. 509.

**A palpable error** in the date of service renders the return bad and insufficient to support judgment. Philadelphia *v.* Newkumet, 11 Pa. Co. Ct. 504.

90. Matthews *v.* Gordy, 2 Houst. (Del.) 573 (holding that a return to a writ of scire facias issued on a judgment "served by copy left at the house of the defendant in the presence of his wife" is insufficient as Del. Rev. Code, c. 99, § 3, expressly prescribes that, when it cannot be personally served on defendant, return shall be made that it was left at his "usual place of abode," etc.); Winans *v.* State, 25 Tex. Suppl. 175, holding that under Paschal Dig. art. 1433, a sheriff's return of a scire facias is defective if it merely recites that he "served" it. It must show that he delivered defendant a copy, etc.

91. Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415; Polnac *v.* State, 46 Tex. Cr. 70, 80 S. W. 381.

92. Dennison *v.* Willson, 16 N. H. 496; Henry *v.* Henry, 1 How. Pr. (N. Y.) 167.

93. Smith *v.* Hooton, 3 Pa. Dist. 250.

94. Mandeville *v.* McDonald, 16 Fed. Cas. No. 9,013, 3 Cranch C. C. 631.

95. Dennison *v.* Willson, 16 N. H. 496; Mandeville *v.* McDonald, 16 Fed. Cas. No. 9,013, 3 Cranch C. C. 631.

**Amendment after error brought.**— Leave to amend a return of scire facias after error brought and joinder should be granted on condition of payment of the costs of the writ of error if it be *non prose'd* because of the amendment. Dennison *v.* Willson, 16 N. H. 496.

**If two writs of scire facias be successively issued,** the returns on both of which are defective, and defendant, after pleading specially, obtain leave to withdraw his plea, as having been improvidently pleaded, the court ought not thereupon to permit the sheriff to amend both his returns, but only that on the first writ, quashing the second writ, and remanding the cause to the rules for further proceedings. Lee *v.* Chilton, 5 Munf. (Va.) 407.

96. O'Mealey *v.* Wilson, 1 Campb. 482, 10 Rev. Rep. 732.

**Dismissal or nonsuit** generally see DISMISSAL AND NONSUIT, 14 Cyc. 387.

97. Davidson *v.* Alvord, 3 Ind. 1.

98. West *v.* Nixon, 3 Grant (Pa.) 236.

**Under the Pennsylvania** practice the lapse of two years from return of a scire facias, without any pleading on it, does not work a discontinuance. Davis *v.* Jones, 12 Serg. & R. 60.

discontinued as to those not served.[99] Where a writ of scire facias is a nullity, defendant should ask the court to strike it off.[1]

**G. Trial — 1. In General.** It is irregular to try one process in proceedings on another, and it cannot be done.[2] On a plea of *nul tiel record*, the issue thus raised must be tried by the court, and not by the jury.[3] Where a scire facias issues to make one a party to a judgment, the trial as to him should be conducted as if no judgment has been rendered against his co-defendant, and such defendant has a right to make every defense which he might have made had he been served with summons and a hearing had as to him at the same time that the cause was heard as to his co-defendant.[4]

**2. Issues and Proof.** A trial on a scire facias without an issue is erroneous.[5] Under the plea of *nil debet*, any matter showing that nothing is due at the time of pleading, as a release or discharge, is admissible.[6] Where *nul tiel record* is pleaded the record only on which the writ is based can be examined.[7]

**3. Variance.** A substantial variance between the obligation of record as recited in the writ and that offered in evidence,[8] or between a pleading and the evidence offered in support thereof,[9] is fatal. But a variance resulting from a mere clerical error is immaterial.[10] After judgment by default on scire facias advantage cannot be taken of a variance between the scire facias and the obligation of record on which the writ is based.[11]

**4. Evidence — a. Burden of Proof.** Plaintiff is bound to show that he is entitled to maintain the writ.[12] Where defendant sets up a defense, the burden is on him to prove it.[13]

**b. Admissibility.** Strictly speaking, no evidence can be heard on scire facias other than the record declared on.[14] Defendant cannot show, in order to reduce the damages, that the adjudication of the court in the original action was erroneous.[15]

**5. Profert and Oyer.** Profert of a record must be made in a scire facias. Profert of books in a clerk's office is not sufficient.[16] Oyer of the record on which the writ is founded is not demandable.[17]

**H. Judgment**[18] **— 1. In General — a. Nature.** On a scire facias the court will give judgment according to law, and not according to the prayer of plain-

99. State *v.* Hinson, 4 Ala. 671, holding further that it is unnecessary to enter a formal discontinuance as to those on whom service has not been effected.

1. West *v.* Nixon, 3 Grant (Pa.) 236.

**Writs held properly quashed.**— A writ of scire facias which summoned defendants "before the . . . of our said circuit court" (Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933), or which was returnable at rules "on the first day of the next term, June term, 1889," the first day of which, according to the notice of the writ, was "the second Monday" of June, whereas there were no rules until the third Monday (Raub *v.* Otterback, *supra*), is properly quashed.

2. West *v.* Nixon, 3 Grant (Pa.) 236, holding that it is irregular to try the sufficiency of a scire facias in proceedings on an alias scire facias issued without the interval of a term, and when there is an appearance to it, and it cannot be done.

3. Merkle *v.* Bolles, 6 Blackf. (Ind.) 288; White *v.* Elkin, 6 Blackf. (Ind.) 123; Dimmick *v.* Leath, 5 Kulp (Pa.) 255; Jeremy *v.* Edwards, 2 Kulp (Pa.) 435; Oliver *v.* Foster, 3 Pa. L. J. Rep. 388.

4. Ryder *v.* Glover, 4 Ill. 547; Lasman *v.* Harts, 112 Ill. App. 82.

5. Shiel *v.* Ferriter, 7 Blackf. (Ind.) 574.

6. Becker *v.* People, 164 Ill. 267, 45 N. E. 500.

7. Bergen *v.* Williams, 3 Fed. Cas. No. 1,340, 4 McLean 125.

8. Bolinger *v.* Fowler, 14 Ark. 27 (as to date); Farris *v.* People, 58 Ill. 26; Smith *v.* State, 76 Miss. 728, 25 So. 491 (as to date); Bailey *v.* State, (Tex. Cr. App. 1893) 22 S. W. 40 (as to date).

**Variance held not fatal.**— Hersch *v.* Groff, 2 Watts & S. (Pa.) 449.

9. Earle *v.* Earle, 20 N. J. L. 347, holding that a plea of payment is not supported by evidence of a bargain and sale of lands unless it has been consummated.

10. Hollister *v.* U. S., 145 Fed. 773, 76 C. C. A. 337.

11. Saffold *v.* State, 60 Miss. 928.

12. Lasman *v.* Harts, 112 Ill. App. 82; Barry *v.* Hoffman, 6 Md. 78.

13. Smith *v.* Burnet, 17 N. J. Eq. 40.

14. Chestnut *v.* Chestnut, 77 Ill. 346; Hollister *v.* U. S., 145 Fed. 773, 76 C. C. A. 337; Kenosha, etc., R. Co. *v.* Sperry, 14 Fed. Cas. No. 7,712.

15. Woods *v.* Cooke, 61 Me. 215.

16. Cowden *v.* Starr, Wright (Ohio) 115, as the profert may or may not be of a record.

17. Slaten *v.* People, 21 Ill. 28.

18. For form of judgment on scire facias

tiff.[19] No new judgment should be entered;[20] the judgment should be that plaintiff have execution,[21] and it is error to render judgment for debt and damages.[22]

**b. Joint or Several.** By the weight of authority a joint scire facias may be maintained on a several obligation of record, but judgment should be rendered to have execution according to the effect thereof.[23] If a recognizance is joint and several, and a scire facias thereon is served on one or more, and returned *nihil* as to the others, judgment may be rendered against those served, and execution may issue thereon.[24] But judgment is not warranted until there is service, or two *nihils*, as to those against whom judgment is rendered.[25] And if the scire facias is against two defendants, and service is only had on one, judgment against both is held to be irregular.[26]

**c. Time of Rendering Judgment.** It has been held that a statute which directs that no judgment shall be rendered at the appearance term in any suit for the purpose of collecting money does not apply to suits commenced by scire facias.[27] If there be no plea filed, judgment may be rendered at the first term.[28]

**d. Effect of Judgment.** A judgment on scire facias is of the same force as any other, and a defendant cannot avail himself of his own neglect or omission as a ground on which afterward to ask relief in equity.[29] If he seeks relief from a judgment against him, he must swear to the merits.[30]

**2. DEFAULT JUDGMENT.** If, after two returns of *nihil*, defendant does not appear within the period fixed by statute, judgment by default may be taken.[31]

see Brown *v.* Chesapeake, etc., Canal Co., 4 Fed. 770, 4 Hughes 584.

**19.** Snowden *v.* State, 8 Mo. 483.

**20.** Denegre *v.* Haun, 13 Iowa 240; Ingraham *v.* Champion, 84 Wis. 235, 54 N. W. 398.

**21.** *Illinois.*— Waterbury Nat. Bank *v.* Reed, 231 Ill. 246, 83 N. E. 188.

*Iowa.*— Denegre *v.* Haun, 13 Iowa 240; Von Puhl *v.* Rucker, 6 Iowa 187.

*Kentucky.*— Fowler *v.* Com., 4 T. B. Mon. 128; Davis *v.* Com., 4 T. B. Mon. 113.

*Missouri.*— Humphreys *v.* Lundy, 37 Mo. 320 [*quoted* and *approved* in Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052]; Trimble *v.* Elkin, 88 Mo. App. 229.

*New Jersey.*— Boylan *v.* Anderson, 3 N. J. L. 529.

*Tennessee.*— Payton *v.* Stuart, Peck 156.

*Texas.*— Bullock *v.* Ballew, 9 Tex. 498; Camp *v.* Gainer, 8 Tex. 372.

*Vermont.*— Betts *v.* Johnson, 68 Vt. 549, 35 Atl. 489.

*Virginia.*— Lavell *v.* McCurdy, 77 Va. 763.

*Wisconsin.*— Ingraham *v.* Champion, 84 Wis. 235, 54 N. W. 398.

See 43 Cent. Dig. tit. "Scire Facias," § 24.

A judgment that plaintiff recover instead of have execution is informal, but not erroneous. Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

**22.** Payton *v.* Stuart, Peck (Tenn.) 156; Camp *v.* Gainer, 8 Tex. 372; Lavell *v.* McCurdy, 77 Va. 763.

**23.** Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131; Dean *v.* State, 2 Sm. & M. (Miss.) 200. But see *supra*, V, C, and cases there cited.

**24.** *Colorado.*— People *v.* Mellor, 2 Colo. 705; Chase *v.* People, 2 Colo. 528.

*Illinois.*— Stokes *v.* People, 63 Ill. 489; Wheeler *v.* People, 39 Ill. 430; Musselman *v.* People, 15 Ill. 51; McFarlan *v.* People, 13 Ill. 9; Passfield *v.* People, 8 Ill. 406; Sans *v.* People, 8 Ill. 327; Alley *v.* People, 6 Ill. 109, holding that no judgment can be entered until there has been service on all the defendants or two *nihils* overruled.

*Indiana.*— Adair *v.* State, 1 Blackf. 200.

*Kentucky.*— Fowler *v.* Com., 4 T. B. Mon. 128.

*Mississippi.*— Saffold *v.* State, 60 Miss. 928.

*Missouri.*— State *v.* Woerner, 33 Mo. 216.

See 43 Cent. Dig. tit. "Scire Facias," § 24.

**25.** Stokes *v.* People, 63 Ill. 489.

**26.** Breckenridge *v.* Mellon, 1 How. (Miss.) 273. *Contra*, Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16, holding that judgment should be entered against all, under the provisions of the statute, although the process has not been served on all.

**27.** Walker *v.* Massey, 10 Ala. 30, holding that such an act is intended to affect suits only in which previously a judgment final by default might be taken unless a defense is interposed, and therefore suits commenced by scire facias are not controlled by it.

**28.** Unterrein *v.* McLane, 10 Mo. 343.

**29.** Thompson *v.* Hammond, 1 Edw. (N. Y.) 497.

**30.** Hammond *v.* Harris, 2 How. Pr. (N. Y.) 115.

**31.** Smith *v.* State, 76 Miss. 728, 25 So. 491 (holding, however, that a judgment final on a scire facias is erroneous, where the scire facias was not served, or two writs returned "Not found," as required by Code (1892), § 1396); Forest *v.* Price, 37 N. J. L. 177; Spencer *v.* Webb, Col. Cas. (N. Y.) 194, Col. & C. Cas. 114; Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101.

If defendant neither pleads nor demurs, judgment by default may be taken against him. Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491.

But in such a case, the record of judgment must show that all the steps prescribed by the statute to give the court jurisdiction of his person were had before the default was entered, or the proceedings will be set aside.[32] This rule does not prevent the exercise by the court of its equitable powers to open the judgment where justice requires it,[33] and prompt application is made.[34] A default admits the truth of the averments in a scire facias.[35]

**I. Appeal and Error — 1. In General.** The judgment upon a scire facias awarding execution is a final judgment from which an appeal lies.[36] Scire facias cases are governed by the same rules on appeal as civil cases.[37] The decision of the lower court can be reviewed only by means of a bill of exceptions, setting forth the record offered, and the ruling thereon, to which exception is taken.[38] On appeal from an order overruling a demurrer to a scire facias, the inquiry is limited to the causes of demurrer specially assigned.[39] Since the office of a scire facias is both that of declaration and process, the record should show, not by

**Time of entering judgment.**— Miss. Rev. Code, p. 503, art. 150, provides that defendant shall have leave to plead from the first to the third day of the term, and, if there is no plea in by the fourth day, judgment by default may be taken; and hence it is error to take judgment by default on the return of a scire facias on the first day of the term. Davis *v.* Patty, 42 Miss. 509. In the absence of a statute or rule of court governing the question, judgment by default may be entered at the return-term of the writ. Knight *v.* Bunker, 7 Ohio St. 77; Hill *v.* Kling, 4 Ohio 135; Williamson *v.* Crawford, 7 Gratt. (Va.) 202.

**Default sufficient foundation for award of execution.**— Williamson *v.* Crawford, 7 Gratt. (Va.) 202.

32. Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16; Middleton *v.* State, 11 Tex. 255, holding that to authorize a judgment by default, it must appear that service of the writ was legally made upon defendant.

33. Compher *v.* Anawalt, 2 Watts (Pa.) 490; Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101.

**If tender is alleged as a ground for opening the judgment,** the evidence to establish it must be clear and satisfactory, and it must be shown to have been kept good. Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101.

**If it is clear that defendant has no defense,** and if the judgment, when finally entered for plaintiff, must be in its present form, in consequence of what has transpired since the suit was commenced, such motion will be denied. Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16.

34. Freemansburg Bldg., etc., Assoc. *v.* Billig, 30 Pa. Super. Ct. 101.

**If laches in moving to correct the error exist,** a motion to set aside the default will be denied. Corning *v.* Shepard, 3 How. Pr. (N. Y.) 16.

35. Rietzell *v.* People, 72 Ill. 416; Garrison *v.* People, 21 Ill. 535.

36. State *v.* Woerner, 33 Mo. 216.

**Judgment rendered by justice of the peace.** —An appeal may be had from a judgment rendered by a justice of the peace on a writ of scire facias. Gilson *v.* Gay, 10 Vt. 326.

**Scire facias is a "suit at law,"** within the meaning of the charter of the city of Hartford, which provides for an appeal in such suits from the city court to the superior court. White *v.* Washington School Dist., 45 Conn. 59.

**The issue on the plea of nul tiel record** includes two questions: One of fact, as to the existence of the record, from the decision of which in the court below there is no appeal; and the other of law as to its legal effect, deducible from such fact, from the decision of which there is an appeal. Simpson *v.* Simpson, 63 N. C. 534; Trice *v.* Turrentine, 35 N. C. 212.

**In a writ of error coram nobis** to correct a judgment of fiat, the error assigned was that the scire facias recited a record which had no existence. The court sustained a demurrer to this assignment, and gave judgment for defendant in error. It was held that, whether this be an error of law or of fact, the ruling must be sustained, for, if it be error of law, the writ coram nobis did not apply, and if of fact, there was nothing to correct, as the scire facias set out a record justifying the judgment. Bridendolph *v.* Zeller, 3 Md. 325.

37. Wolf *v.* State, (Tex. Cr. App. 1905) 85 S. W. 17; Bringhurst *v.* State, (Tex. Cr. App. 1896) 37 S. W. 757, as to filing briefs.

38. Hannah *v.* Carrington, 8 Ark. 117 (holding that where the record only shows the finding for defendant on the plea of *nul tiel record*, and a judgment in accordance therewith, nothing appears by which to question the decision of the court below, and it must be affirmed); Otterback *v.* Patch, 5 App. Cas. (D. C.) 69; McKnew *v.* Duvall, 45 Md. 501.

**Where the court rejects the record offered in evidence by plaintiff,** the supreme court will presume in favor of the correctness of the decision until plaintiff in error shows to it the particular wherein the court below erred. Bolinger *v.* Fowler, 14 Ark. 27. That court cannot know what record may have remained in the court below, except so far as the bill of exceptions may make it a part of the record sent to such court. Bolinger *v.* Fowler, *supra*.

39. Lowry *v.* Newsom, 51 Ala. 570.

recital, but by giving a copy of it, that the writ was actually issued, or the judgment on it will be reversed.[40] Defects of an insufficient scire facias cannot be reached in error where the record shows a judgment on plea withdrawn.[41] Where the whole case is not brought up on appeal, so that further proceedings are necessary in the lower court, it is proper to award a procedendo.[42]

**2. In Criminal Cases.** Where a scire facias proceeding is a criminal case, the state has no right of appeal from an adverse judgment therein.[43]

**J. Costs.** By the common law, no costs were given in actions of scire facias; the courts have no power to order their payment unless authorized by statute.[44] Unless specially provided for by some local statute, which is usually the case,[45] costs in all actions of scire facias are regulated by the statute 8 & 9 Wm. III.[46] An issue to determine the question of costs alone will not be allowed.[47]

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**SCIRE LEGES NON HOC EST VERBA EARUM TENERE, SED VIM AC POTESTATEM.** A maxim meaning "To know the laws is not to observe their mere words, but their force and power; [that is, the essential meaning in which their efficacy resides]." [1]

**SCIRE PROPRIE EST REM RATIONE ET PER CAUSAM COGNOSCERE.** A maxim meaning "To know a thing properly is to understand its reason and cause." [2]

**SCOLD.** See Common Scold, 8 Cyc. 392.

**SCOPE.** Design, aim, or purpose, intention.[3]

40. Campbell *v.* People, 22 Ill. 234.

41. Clements *v.* Johnson, 3 Stew. & P. (Ala.) 269, holding that in such case the court will presume the existence of a plea competent to reach the defects of the writ, although the form of the plea be not shown in the record.

42. Overton *v.* Abbott, 61 N. C. 293.

43. State *v.* French, (Tex. Cr. App. 1904) 80 S. W. 1007.

44. See Costs, 11 Cyc. 24, 25. See McCoy *v.* Loughery, 2 Wkly. Notes Cas. (Pa.) 521.

45. See cases cited *infra*, this note.

**In Alabama** the general law regulating costs applies to suits by scire facias. Hanson *v.* Jacks, 22 Ala. 549.

**Under N. J. Pr. Act, § 276,** providing that, in suits on any writ of scire facias, plaintiff obtaining judgment or award of execution after plea pleaded or demurrer joined therein shall recover his costs, where judgment has been obtained for the penalty of a bond for non-performance of covenants or agreements, and execution is awarded on scire facias setting up further breaches, costs will be taxed, although there was no plea pleaded nor demurrer joined. State *v.* Franke, 51 N. J. L. 410, 17 Atl. 1078.

**Under 2 N. Y. Rev. St. p. 613, § 3,** where a scire facias is prosecuted in good faith in a proper case, costs follow the judgment, be the amount of recovery ever so small. Hoyt *v.* Blain, 12 Wend. 188. A *nolle prosequi* is equivalent to a discontinuance as far as the payment of costs is concerned. Morton *v.* Croghan's Terre-Tenants, 20 Johns. 106.

**Costs on amendment.**— If a writ has been amended by striking out the name of one of plaintiffs, on terms which have been complied with, defendant at the termination of the case is not entitled to tax costs against plaintiff whose name was thus stricken out. Richardson *v.* Wolcott, 10 Allen (Mass.) 439.

**Attorney's fees.**— Under the Alabama statute of 1812, in regard to fees in general, an attorney may claim a fee of six dollars for the successful prosecution of a proceeding by scire facias, such fee to be taxed in the bill of costs. Smith *v.* State, 7 Port. (Ala.) 492.

46. See cases cited *infra*, this note.

**Under 8 & 9 William III, c. 11,** plaintiff may recover his costs, but only after "plea pleaded or demurrer joined." McCoy *v.* Loughery, 2 Wkly. Notes Cas. (Pa.) 521. The section expressly embraces "all suits upon any writ or writs of scire facias" but refers merely to civil suits. Rex *v.* Corum, Anstr. 50; Rex *v.* Bingham, 1 Cromp. & J. 379, 1 Dowl. P. C. 280, 1 Tyrw. 262 (holding that in scire facias against the conusor of a recognizance to the crown, no costs are recoverable by the defendant, although he succeeds on demurrer and in error); Rex *v.* Miles, 7 T. R. 367, 101 Eng. Reprint 1024 (holding that such statute did not extend to a scire facias to repeal a patent prosecuted in the name of the king).

**In Pennsylvania** there is no other statute on the subject and costs are taxable on every proceeding by scire facias as if it were an original action. Haskins *v.* Low, 17 Pa. St. 64.

47. McCoy *v.* Loughery, 2 Wkly. Notes Cas. (Pa.) 521, holding that where, before plea pleaded or demurrer joined, the debt is paid with interest, it would be useless to permit the case to go to the jury on the question of costs.

1. Black L. Dict. [*citing* Dig. 1, 3, 17; 1 Kent Comm. 462].

**Applied in:** Livesey *v.* Omaha Hotel Co., 5 Nebr. 50, 73; Barnes *v.* Buck, 1 Lans. (N. Y.) 268, 270.

2. Morgan Leg. Max. [*citing* Coke Litt. 183].

3. Linblom *v.* Ramsay, 75 Ill. 246, 251.

**SCOT.** A term commonly applied to sewer's rates on marsh lands.[4]

**SCOT AND LOT.** A customary contribution laid on all subjects according to their ability;[5] certain duties which must be paid by those who claim to exercise the elective franchise within cities and boroughs before they are entitled to vote.[6]

**SCOUTS.** Persons who in time of war are sent out to gain information and bring in tidings of the movements and conditions of the enemy.[7]

**SCOW.** A certain kind of vessel.[8] (See ADMIRALTY, 1 Cyc. 823 note 16; MARITIME LIENS, 26 Cyc. 754.)

**SCRAMBLING POSSESSION.** A possession without any savor of the legitimate enjoyment of property rights, and neither sought nor secured on any such account, but which is only scrambled for by one party or by both because of some supposed advantage it may command in a pending struggle;[9] a struggle for possession on the land itself, not such a contest as is waged in the courts.[10] (Scrambling Possession: Sufficiency to Sustain Action For Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1132.)

**SCRAMMING CONTRACT.** One that confers the right to mine and gather such ore as may be left within the limits of a mine or pit that has been opened and mined before.[11]

**SCRAPE.** A term used to designate crude turpentine which is formed on the body of a tree.[12]

**SCRAP IRON.** All waste or refuse iron which has been in actual use and is only fit for remanufacture.[13]

**SCRAP TOBACCO.** The part that falls when stripping the tobacco to prepare the leaf to go into the cigar.[14]

**SCRAWL.** See SCROLL, *post*, p. 1163.

**SCREENED COAL.** Coal which has been passed through screens no matter what its size.[15] (See also COAL, 7 Cyc. 266.)

"**Scope of agency**" see Whaley *v.* Duncan, 47 S. C. 139, 148, 25 S. E. 54; Matheson *v.* Rice, 116 Wis. 328, 333, 92 N. W. 1109.

"**Scope of authority**" see Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 402, 95 Am. Dec. 400; Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 475, 62 N. W. 899.

"**Scope**" **of business** refers to what is reasonably necessary for the successful conduct of the business, measured by the nature of the business and the usages of those engaged in the same occupation in the same locality. Sparks *v.* Flannery, 104 Ga. 323, 326, 30 S. E. 823. Used with relation to the power of partners includes what is reasonably necessary to the successful conduct of the business in which they are actually engaged. See Brooks-Waterfield Co. *v.* Jackson, 53 S. W. 41, 42, 21 Ky. L. Rep. 854.

"**Scope**" **of employment** of railroad servants is the extent, or so to speak, the sweep, of their authority. Southern R. Co. *v.* Wildman, 119 Ala. 565, 571, 24 So. 764. Acting within general scope of employment means while on duty. See Palmer *v.* Winston-Salem R., etc., Co., 131 N. C. 250, 253, 42 S. E. 604. See also MASTER AND SERVANT, 26 Cyc. 1283, 1525; RAILROADS, 33 Cyc. 635.

4. Waller *v.* Andrews, 1 H. & H. 87, 89, 7 L. J. Exch. 67, 3 M. & W. 312.

5. Frieszlehen *v.* Shallcross, 9 Houst. (Del.) 1, 61, 19 Atl. 576, 8 L. R. A. 337; Waller *v.* Andrews, 1 H. & H. 87, 89, 7 L. J. Exch. 67, 3 M. & W. 312.

6. McCafferty *v.* Guyer, 59 Pa. St. 109, 116.

7. Vaughn *v.* State, 3 Coldw. (Tenn.) 102, 107.

8. Adams *v.* Farmer, 1 E. D. Smith (N. Y.) 588, 589; Endner *v.* Greco, 3 Fed. 411, 413; The Hezekiah Baldwin, 12 Fed. Cas. No. 6,449, 8 Ben. 556, 557.

9. Dyer *v.* Reitz, 14 Mo. App. 45, 46.

10. Spiers *v.* Duane, 54 Cal. 176, 177.

**Possession obtained by a landlord** by seizing the tenant and throwing him to the ground and holding him there while his father enters the property and locks and bolts the doors, is what books characterize as "scrambling possession" and confers no rights whatever on the landlord, and particularly no right to defend the possession thus gained by further acts of violence and force. Lobdell *v.* Keene, 85 Minn. 90, 97, 88 N. W. 426.

11. Davie *v.* Lumbermans' Min. Co., 93 Mich. 491, 493, 53 N. W. 625, 24 L. R. A. 357.

12. Lewis *v.* McNatt, 65 N. C. 63, 65, where it is said to be personal property, and belongs to the person who has lawfully produced it by cultivation.

13. Schlesinger *v.* Beard, 120 U. S. 264, 267, 7 S. Ct. 546, 30 L. ed. 656.

**It does not include** iron rails that have never been in use, although they are old and rusty and are in fact intended by the importer to be manufactured. Dwight *v.* Merritt, 140 U. S. 213, 214, 11 S. Ct. 768, 35 L. ed. 450.

14. U. S. *v.* Schroeder, 93 Fed. 448, 449, 35 C. C. A. 376.

15. Mercer Min., etc., Co. *v.* McKee, 77

**SCREWED.** Fastened with screws, pressed with screws, forced.[16]

**SCRIBERE EST AGERE.** A maxim meaning "To write is to act." [17]

**SCRIP.** Warrants or other like orders drawn on the city treasurer.[18] (Scrip: As Subject to Replevin, see REPLEVIN, 34 Cyc. 1359. Evidencing Debt of State, see STATES. For Public Lands, see PUBLIC LANDS, 32 Cyc. 886 note 53, 822 note 14. Issuing to Circulate as Money, see CORPORATIONS, 10 Cyc. 1117. Lands Subject to Entry and Purchase by, see MINES AND MINERALS, 27 Cyc. 550. Rights to Indian Lands of Persons Holding Under Indian Scrip, see INDIANS, 22 Cyc. 139.)

**SCRIP DIVIDEND.** A dividend of certificates giving the holder certain rights which are specified in the certificate itself.[19]

**SCRIPTÆ OBLIGATIONES SCRIPTIS TOLLUNTUR, ET NUDI CONSENSUS OBLIGATIO, CONTRARIO CONSENSU DISSOLVITUR.** A maxim meaning "Written obligations are dissolved by writing, and the obligations of a naked agreement by a naked agreement to the contrary." [20]

**SCRIVENER.** A term said to mean a party who performs the co-joint duties of a banker, a broker, and an attorney.[21]

**SCROLL.** The flourish of a pen at the end of or under the name.[22] (Scroll: In General, see SEALS, *post*, p. 1165. Affixing to Process in Civil Cases in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 520. Necessity and Sufficiency of, see BONDS, 5 Cyc. 737. Reformation of Instrument by Addition of, see REFORMATION OF INSTRUMENTS, 34 Cyc. 933.)

**SCRUB.** Something small and mean; close; low growth of bushes; low underwood; mean; dirty; contemptible; scrubby.[23]

**SCULPTOR.** One whose occupation is to carve wood, stone, or other materials into images or statues.[24]

**SCYTHE.** A simple tool, used by mankind from remote ages to the present, for the cutting of grass, grain, and weeds.[25]

**SE.** An abbreviation which may stand for "section." [26]

**S. E.** An abbreviation of southeast.[27]

Pa. St. 170, 172, where the term was so used in an agreement by which plaintiff was to pay a certain sum for each ton of screened coal mined and removed from certain land and in which it was further held that evidence was inadmissible to show that "screened coal" is understood to mean among coal merchants and mines to include only lump coal.

16. Webster Dict. [*quoted* in Miles *v.* Vanhorn, 17 Ind. 245, 247, 79 Am. Dec. 477].

Meaning of term as used in certain localities see LIBEL AND SLANDER, 25 Cyc. 322 note 38.

17. Black L. Dict. [*citing* 2 Rolle 89; 4 Blackstone Comm. 80; Broom Max. 312, 967].

18. Alma *v.* Guaranty Sav. Bank, 60 Fed. 203, 207, 8 C. C. A. 564.

Where lands have been appropriated or granted for the purpose of aiding in the drainage of swamp lands, whenever the contractor doing the work has so performed any portion of it as to obtain its acceptance by the proper officer, and that officer has reported to the land-office to credit the contractor on the books of the office with the number of acres of swamp land to which such performance entitles him under the contract, this credit is termed "scrip." Wait *v.* State Land-Office Com'r, 87 Mich. 353, 356, 49 N. W. 600. See also U. S. *v.* Booth, 148 Fed. 112, 114.

19. *In re* Robinson, 218 Pa. St. 481, 485, 67 Atl. 775.

20. Bouvier L. Dict.

21. River Clyde Trustees *v.* Duncan, 25 Eng. L. & Eq. 19, 23, where it is said to be a business not known now, or at least not ordinarily existing.

A scrivener's business was to receive other men's money and lay it out at interest and then receive it back again and keep it in his hands and then lay out again at interest. Wilkinson *v.* Candlish, 5 Exch. 91, 97, 19 L. J. Exch. 166.

22. Corlies *v.* Vannote, 16 N. J. L. 324, 328. But see Grimsley *v.* Riley, 5 Mo. 280, 282, 32 Am. Dec. 319, where it was held that a mere flourish at the end of a signature not made by way of seal is not a "scrawl by way of seal" within a statute providing that the signer of a sealed instrument must fix a "scrawl by way of seal" to his name to constitute it a sealed instrument.

With word "seal" written in it a scroll is a seal. Muckleroy *v.* Bethany, 23 Tex. 163, 164.

23. Webster Dict. [*quoted* in O'Hanlon *v.* Denvir, 81 Cal. 60, 62, 22 Pac. 407, 15 Am. St. Rep. 19].

24. Viti *v.* Tutton, 14 Fed. 241, 246, 15 Phila. (Pa.) 507, 508.

25. Post *v.* Chicago, etc., R. Co., 121 Mo. App. 562, 564, 97 S. W. 233.

26. Chambers *v.* Watson, 60 Iowa 339, 342, 14 N. W. 336, 46 Am. Rep. 70.

27. See Bandow *v.* Wolven, 20 S. D. 445, 452, 107 N. W. 204.

**SEA.** A word variously applied by sailors to a single wave, to the agitation produced by a multiplicity of waves in a tempest, or to their particular progress or direction;[28] that vast tract of water encompassing the whole earth, more properly called "ocean";[29] waters within the ebb and flow of the tides;[30] a more or less distinctly limited or landlocked part of the ocean, having considerable dimensions;[31] a wave, a billow; the swell of the ocean in a tempest; motion and agitation of the water's surface.[32] (See HIGH SEAS, 21 Cyc. 436; OCEAN, 29 Cyc. 1349; and, generally, ADMIRALTY, 1 Cyc. 815; NAVIGABLE WATERS, 29 Cyc. 285; WATERS.)

**SEA BEACH.** The territory lying between the lines of high water and low water over which the tide ebbs and flows.[33] (See SEASHORE, *post*, p. ——.)

**SEABOARD.** The country bordering on the sea.[34]

**SEA-GOING.** Going upon the sea, especially sailing upon the deep sea.[35] (See, generally, COLLISION, 7 Cyc. 331 note 86; SHIPPING.)

**SEA GROUND.** Either the ground bordering on the sea or covered with the sea.[36]

**SEALED.** Secured with any substance without the destruction of which the cork, plug, or stopper cannot be withdrawn.[37]

**SEA-LETTER.** A certificate of ownership granted unregistered vessels belonging to citizens of the United States.[38] (See EVIDENCE, 17 Cyc. 686; PASSPORT, 801 note 29; SHIPPING.)

**SEAL-FISHERIES.** See FISH and GAME, 19 Cyc. 1006.

**SEALING CEREMONY.** A term used among the Mormons to designate the marriage ceremony.[39] (See MARRIAGE, 26 Cyc. 821.)

**28.** Snowdon *v.* Guion, 50 N. Y. Super. Ct. 137, 142.

**29.** Snowdon *v.* Guion, 50 N. Y. Super. Ct. 137, 142. See OCEAN, 20 Cyc. 1349.

**30.** Baker *v.* Hoag, 3 Barb. (N. Y.) 203, 206; *In re* Gwin, Tuck. Surr. (N. Y.) 44, 45.

**31.** Century Dict. [*quoted* in American Fisheries Co. *v.* Lennen, 118 Fed. 869, 873].

**32.** Webster Dict. [*quoted* in Snowdon *v.* Guion, 50 N. Y. Super. Ct. 137, 142].

**Ebbing and flowing of the tide-water** or immediate connection with the ocean are essential to the legal character of a sea. Cole *v.* White, 26 Wend. (N. Y.) 511, 517.

**As defined by the admiralty courts,** it means not only the "high sea," but on to the sea, flowing from it into ports and havens and as high up rivers as the tide ebbs and flows. Waring *v.* Clarke, 5 How. (U. S.) 441, 462, 12 L. ed. 226.

**It is either that which lies without the body of a county or within.**— That arm or branch of the sea which lies within the *fauces terræ* is, or at least may be, within the body of a county; and that part which lies not within the body of the county is called the main sea or ocean. U. S. *v.* Rodgers, 150 U. S. 249, 253, 37 L. ed. 1071, 14 S. Ct. 109; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398; U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290.

**It has been held that in crimes the seas,** the high seas, or the ocean means the same. U. S. *v.* New Bedford Bridge, 27 Fed. Cas. No. 15,867, 1 Woodb. & M. 401.

**33.** Doane *v.* Willcutt, 5 Gray (Mass.) 328, 335, 66 Am. Dec. 369.

**34.** American Fisheries Co. *v.* Lennen, 118 Fed. 869, 873.

**35.** Webster Int. Dict.

**Applied to vessels,** it does not include receiving ship in the navy lying at anchor. Frary *v.* U. S., 24 Ct. Cl. 114, 117.

**Carrying a mast and flag** does not show a vessel to be sea-going. See Hodges *v.* Williams, 95 N. C. 331, 336, 59 Am. Rep. 242.

**36.** Scratton *v.* Brown, 4 B. & C. 485, 502, 6 D. & R. 536, 28 Rev. Rep. 344, 10 E. C. L. 670, where it was said that in a deed "the word 'ground' itself is sufficient to pass the soil, and the word 'sea' annexed to it only shows where it is situate."

**37.** Mitchell *v.* Crawshaw, [1903] 1 K. B. 701, 705, 20 Cox C. C. 395, 67 J. P. 179, 72 L. J. K. B. 389, 88 L. T. Rep. N. S. 463, 19 T. L. R. 352, where the term is so used in referring to sealed bottles.

**38.** Sleght *v.* Hartshorne, 2 Johns. (N. Y.) 531, 544, where it is distinguished from "passport."

**39.** Hilton *v.* Roylance, 25 Utah 129, 149, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

# SEALS

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## I. DEFINITIONS.

At common law a seal is an impression upon wax or wafer, or some other tenacious substance capable of being impressed.[1] By statute a seal is a particular

1. State *v.* Thompson, 49 Mo. 188, 189 [*quoting* 4 Kent Comm. 252]; Pease *v.* Lawson, 33 Mo. 35, 39 [*quoted* in Alt *v.* Stoker, 127 Mo. 466, 471, 30 S. W. 132]; Allen *v.* Sullivan R. Co., 32 N. H. 446, 449; Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349, 366; Osborn *v.* Kistler, 35 Ohio St. 99, 102. To same effect see Floyd *v.* Ricks, 14 Ark. 286, 295, 58 Am. Dec. 374 (where the same definition is given to the word "sealing"); Jackson *v.* Security Mut. L. Ins. Co., 135 Ill. App. 86, 91 [*affirmed* in 233 Ill. 161, 84 N. E. 198]; Bradford *v.* Randall, 5 Pick. (Mass.) 496, 497; Tasker *v.* Bartlett, 5 Cush. (Mass.) 359, 364; Warren *v.* Lynch, 5 Johns. (N. Y.) 239, 245; Coit *v.* Millikin, 1 Den. (N. Y.) 376, 377; Providence Telegram Pub. Co. *v.* Crahan Engraving Co., 24 R. I. 175, 176, 52 Atl. 804; Beardsley *v.* Knight, 4 Vt. 471, 479; *In re* Nebe, 17 Fed. Cas. No. 10,073, 11 Nat. Bankr. Reg. 289.

**Lord Coke's definition** is: 'Wax with an impression." 3 Inst. 169 [*quoted* in Lowe *v.* Morris, 13 Ga. 147, 152; Woodman *v.* York, etc., R. Co., 50 Me. 549, 551; Swink *v.* Thompson, 31 Mo. 336, 339; Curtis *v.* Leavitt, 15 N. Y. 9, 90; Corlies *v.* Vannote, 16 N. J. L. 324; Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52, 55; Cromwell *v.* Tate, 7 Leigh (Va.) 301, 304, 30 Am. Dec. 506; Jones *v.* Logwood, 1 Wash. (Va.) 42, 43].

**Webster** defines a seal to be wax affixed to a letter, or instrument, and impressed with a seal; also wax, wafer, or other adhesive

sign, made to attest in the most formal manner the execution of an instrument.[2] A public seal has been defined as an impression made of some device, by means of a piece of metal or other hard substance, kept and used by public authority.[3]

## II. NECESSITY, USE, AND EFFECT.[4]

Seals are of great antiquity, their use beginning at a time when writing was not common but when every individual possessed a coat-of-arms or other distinctive device, and in early times much importance attached to their employment as a means of distinguishing the person.[5] The effect of a seal being affixed to a private written instrument is to convert it into a specialty, importing a consideration, and rendering unnecessary the recital of a consideration.[6] However, with the growth of education, the signature to an instrument has now become more important than the seal,[7] and in some jurisdictions seals have been entirely abolished by statute,[8] while in others the decided tendency of modern decisions

substance which closes a letter, or other paper; that which confirms or secures confirmation, authentication, attestation. Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349, 366.

**Other definitions** are: "A scroll with the word seal written in it." Muckleroy *v.* Bethany, 23 Tex. 163, 164.

"A scrawl, or a mark made with a pen in the form of a seal." Miller *v.* Binder, 28 Pa. St. 489, 490.

"A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression." Corrigan *v.* Trenton Delaware Falls Co., 5 N. J. Eq. 52, 56.

**In its ordinary acceptation** the word "seal" denotes an outward imprint. Jenkins *v.* Atlantic Coast Line R. Co., (S. C. 1909) 65 S. E. 636.

**"Great seal" defined** see GREAT SEAL, 20 Cyc. 1365.

2. Cal. Code Civ. Proc. (1903) § 1930; Oreg. Annot. Codes & St. (1901) § 763; Utah Rev. St. (1898) § 3397.

3. Kirksey *v.* Bates, 7 Port. (Ala.) 529, 534, 31 Am. Dec. 722.

**Statutory definition** see Cal. Code Civ. Proc. (1903) § 1931; Oreg. Annot. Codes & St. (1901) § 764; Utah Rev. St. (1898) § 3398.

**A statute requiring the jury to "seal"** their respective assessments and valuations in proceedings under an occupying claimant law means that the assessments and valuations should be placed in an envelope, or other inclosure, and the inclosure sealed, and does not mean either the public or private seal of the jury, or of any of the members thereof. Bradley *v.* Rogers, 33 Kan. 120, 5 Pac. 374.

4. **By particular persons, bodies, and officers,** and on particular instruments see the Cross-References, *supra*, p. 1165.

5. Lowe *v.* Morris, 13 Ga. 147; Cooper *v.* Rankin, 5 Binn. (Pa.) 613; Cromwell *v.* Tate, 7 Leigh (Va.) 301, 30 Am. Dec. 506; Jones *v.* Logwood, 1 Wash. (Va.) 42; U. S. *v.* Stephenson, 27 Fed. Cas. No. 16,386, 1 McLean 462.

6. Rendleman *v.* Rendleman, 156 Ill. 568, 41 N. E. 223; Chamberlain *v.* Fernbach, 118 Ill. App. 145; Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115; Douglass *v.* Howland, 24 Wend. (N. Y.) 35. See also CONTRACTS, 9 Cyc. 310; and Cross-References, *supra*, p. 1165.

**The recognition of an unsealed instrument** by a sealed instrument does not confer upon the former the character of an instrument under seal. Crouse *v.* McKee, 14 N. Y. St. 158.

**Where false representations** as to the consideration are employed to procure the signature to an instrument under seal, the nature of the instrument being fully understood by the party signing, the effect of such instrument can only be avoided by a separate proceeding in equity. Papke *v.* G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910; Quincy Horse R., etc., Co. *v.* Orner, 109 Ill. App. 238.

7. Lowe *v.* Morris, 13 Ga. 147.

**In Louisiana** a seal adds no obligatory force to an instrument when its execution is admitted or proven; its sole effect is to confirm the signature. Bell *v.* Keefe, 13 La. Ann. 524.

8. Daniel *v.* Garner, 71 Ark. 484, 76 S. W. 1063; Dyer *v.* Gill, 32 Ark. 410; Jacobs *v.* McClintock, 53 Tex. 72; Clayton *v.* Mooring, 42 Tex. 182; Courand *v.* Vollmer, 31 Tex. 397; Russell *v.* McCampbell, 29 Tex. 31; Foster *v.* Champlin, 29 Tex. 22. See also the statutes of the several states.

**Seals not recognized in Mexican jurisprudence.**— Posten *v.* Rassette, 5 Cal. 467.

**Alabama** statute abolishing seals as to deeds has no retroactive effect (Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13), and under the statute providing that instruments which import on their face to be under seal shall be deemed to be sealed instruments, an instrument is not sufficient as one under seal, even though a scroll or other device is affixed thereto, unless it imports on its face that it was intended to be under seal (Blackwell *v.* Hamilton, 47 Ala. 470; Lindsay *v.* State, 15 Ala. 43; Waddel *v.* Glassel, 11 Ala. 568; Carter *v.* Penn, 4 Ala. 140).

**Minnesota** has abolished seals as to con-

is to minimize if not to entirely do away with the old distinctions between sealed and unsealed instruments.[9]

## III. WHAT LAW GOVERNS.

As the validity of a seal directly affects the obligation of a contract, it is to be tested by the *lex loci contractus*;[10] but the sufficiency of the seal of an instrument executed in one state but contemplating performance in another state is to be tested and governed by the laws of the latter state;[11] and where the remedy upon a written instrument depends upon the question whether it is sealed or unsealed, it is well settled that the sufficiency of the seal is to be tested by the *lex fori* and not the *lex loci contractus*.[12]

## IV. REQUISITES.

**A. In General.** It was the early rule at common-law that there must be an actual sealing, consisting of the impression of an individual mark or device upon wax or other adhesive substance;[13] but the common-law rule has been consider-

tracts. J. B. Streeter, Jr., Co. *v.* Janu, 90 Minn. 393, 96 N. W. 1128.

9. Rockwell *v.* Capital Traction Co., 25 App. Cas. (D. C.) 98; Kulp *v.* March, 13 Montg. Co. Rep. (Pa.) 17 (holding that a seal is only evidence of consideration when the instrument is delivered); Paddleford *v.* Thacher, 48 Vt. 574.

**However, under the Oregon statute,** providing that there is no difference between sealed and unsealed writings, except as to the time of commencing actions thereon and except that a seal is primary evidence of consideration, a seal is still considered a matter of substance and not of surplusage. Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833.

**While the agreement is executory,** the fact that the instrument is under seal does not preclude an inquiry, at least in equity, into the actual consideration; the seal imports a consideration, but the presumption is rebuttable. Williams *v.* Whitall, 69 N. Y. App. Div. 340, 74 N. Y. Suppl. 820; Baird *v.* Baird, 81 Hun (N. Y.) 300, 30 N. Y. Suppl. 785 [*affirmed* in 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375]; Anthony *v.* Harrison, 14 Hun (N. Y.) 198 [*affirmed* in 74 N.Y. 613]; Green *v.* Elwell, 13 N. Y. Wkly. Dig. 236; Way *v.* Union Cent. L. Ins. Co., 61 S. C. 501, 39 S. E. 742. And see Storch *v.* Duhnke, 76 Minn. 521, 79 N. W. 533 (decided before seals were abolished as to contracts in Minnesota); Koster *v.* Welch, 57 S. C. 95, 35 S. E. 435 (holding that a person who has signed an instrument under seal may show failure, but not want, of consideration). See also MORTGAGES, 27 Cyc. 1050.

**Equity will give relief** upon an instrument defective in law for want of a seal. Montville *v.* Haughton, 7 Conn. 543; Underwood *v.* Campbell, 14 N. H. 393; Wadsworth *v.* Wendell, 5 Johns. Ch. (N. Y.) 224 [*reversed* on other grounds in 20 Johns. 659]. See also MORTGAGES, 27 Cyc. 986.

10. Curtis *v.* Leavitt, 15 N. Y. 9.

**When common law governs.**— In the absence of evidence of the law of the state where the instrument was executed, the sufficiency of the seal will be tested by the principles of the common law. Waln *v.* Waln, 53 N. J. L. 429, 22 Atl. 203.

11. Warren *v.* Lynch, 5 Johns. (N. Y.) 239.

12. *Kentucky.*— Steele *v.* Curle, 4 Dana 381.

*Maryland.*— Trasher *v.* Everhart, 3 Gill & J. 234.

*Missouri.*— Dorsey *v.* Hardesty, 9 Mo. 157; Broadhead *v.* Noyes, 9 Mo. 56.

*New Hampshire.*— Douglas *v.* Oldham, 6 N. H. 150.

*New York.*— Andrews *v.* Herriot, 4 Cow. 508 [*overruling* Meredith *v.* Hinsdale, 2 Cai. 362].

*United States.*— Le Roy *v.* Beard, 8 How. 451, 12 L. ed. 1151; U. S. Bank *v.* Donnally, 8 Pet. 361, 8 L. ed. 974.

*England.*— See Adam *v.* Kers, 1 B. & P. 360.

See 43 Cent. Dig. tit. "Seals," § 3.

13. *Maine.*— McLaughlin *v.* Randall, 66 Me. 226; Woodman *v.* York, etc., R. Co., 50 Me. 549.

*Massachusetts.*— Bates *v.* Boston, etc., R. Co., 10 Allen 251.

*Missouri.*— Swink *v.* Thompson, 31 Mo. 336.

*New Hampshire.*— Allen *v.* Sullivan R. Co., 32 N. H. 446.

*New Jersey.*— Force *v.* Craig, 7 N. J. L. 272.

*Pennsylvania.*— Duncan *v.* Duncan, 1 Watts 322.

*South Dakota.*— Philip *v.* Stearns, 20 S. D. 220, 105 N. W. 467.

*Vermont.*— Beardsley *v.* Knight, 4 Vt. 471.

*United States.*— U. S. *v.* Stephenson, 27 Fed. Cas. No. 16,386, 1 McLean 462.

See 43 Cent. Dig. tit. "Seals," § 4.

**"Formerly wax was the most convenient,** and the only material used to receive and retain the impression of a seal. Hence it was said: '*Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.*'" Pillow *v.* Roberts, 13 How. (U. S.) 472, 473, 14 L. ed. 228 [*reversing* 20 Fed. Cas. No. 11,909, Hempst. 624].

**A scrawl** does not, at common law, con-

ably modified by both decision and statute, and sealing has become constructive rather than actual,[14] being considered largely a matter of intention.[15] At the present time, although the use of the common-law seal is permissible,[16] the use of wax or other adhesive substance is not required;[17] both written and printed seals are valid;[18] the seal need not be of any particular form or figure;[19] and some

stitute a seal. Fish *v.* Brown, 17 Conn. 341; Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173.

**A seal by wafer,** or other tenacious substance, upon which an impression is or may be made, is sufficient under the common-law rule. Tasker *v.* Bartlett, 5 Cush. (Mass.) 359; Turner *v.* Field, 44 Mo. 382; Pease *v.* Lawson, 33 Mo. 35; Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349.

**In New York** the common-law rule was for a long time substantially adhered to, except as to corporate and official seals, in regard to which the rule has been modified by statute. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168; Coit *v.* Milliken, 1 Den. 376; Farmers', etc., Bank *v.* Haight, 3 Hill 493; Rochester Bank *v.* Gray, 2 Hill 227; Warren *v.* Lynch, 5 Johns. 239. The cases of Curtis *v.* Leavitt, 15 N. Y. 9, and Rose *v.* Bedell, 5 Duer 462, decided before the enactment of this statute and holding that where the paper is of sufficient tenacity to receive and retain the impression, an actual seal stamped thereon is a seal within the strict definition of the common law, have been distinguished in later cases on the ground that they relate only to corporate and notarial seals. But for the present statute see 2 Wadhams N. Y. Consol. Laws (1909), p. 1372, §§ 43, 44.

**14.** *Maine.*— Woodman *v.* York, etc., R. Co., 50 Me. 549.

*Missouri.*— Pease *v.* Lawson, 33 Mo. 35; Swink *v.* Thompson, 31 Mo. 336.

*New Jersey.*— Force *v.* Craig, 7 N. J. L. 272.

*Ohio.*— Osborn *v.* Kistler, 35 Ohio St. 99.

*Pennsylvania.*— Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242; McDill *v.* McDill, 1 Dall. 63, 1 L. ed. 38.

*Rhode Island.*— Providence Telegram Pub. Co. *v.* Crahan Engraving Co., 24 R. I. 175, 52 Atl. 804.

*South Dakota.*— Philip *v.* Stearns, 20 S. D. 220, 105 N. W. 467.

*Tennessee.*— Whitley *v.* Davis, 1 Swan 333.

*Canada.*— Hamilton *v.* Dennis, 12 Grant Ch. (U. C.) 325.

See 43 Cent. Dig. tit. "Seals," §§ 4, 5.

**Place of seal.**— The fact that the seal is not on a line with the signature does not affect its validity. Harrell *v.* Butler, 92 N. C. 20.

**15.** Lindsay *v.* State, 15 Ala. 43; McKain *v.* Miller, 1 McMull. (S. C.) 313; Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515.

**16.** Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Alt *v.* Norman, 128 Mo. 330, 30 S. W. 1031; Alt *v.* Stoker, 127 Mo. 466, 30 S. W. 132; Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833.

**17.** *Alabama.*— Bradley *v.* Northern Bank, 60 Ala. 252.

*Indiana.*— Vanblaricum *v.* Yeo, 2 Blackf. 322.

*Missouri.*— Meyers *v.* Russell, 52 Mo. 26. *Contra*, when a public record is authenticated by the private seal of an officer. Gates *v.* State, 13 Mo. 11.

*New Hampshire.*— Allen *v.* Sullivan R. Co., 32 N. H. 446; Carter *v.* Burley, 9 N. H. 558.

*Pennsylvania.*— Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242.

*United States.*— Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254; *In re* Nebe, 17 Fed. Cas. No. 10,073, 10 Nat. Bankr. Reg. 289; U. S. *v.* Coffin, 25 Fed. Cas. No. 14,823, Bee 140.

*England.*— Reg. *v.* St. Paul, 7 Q. B. 232, 53 E. C. L. 232.

See 43 Cent. Dig. tit. "Seals," § 4.

**The stamping** of the seal on paper, by a machine which does not require any soft or adhesive substance to receive and retain its impression, is now sufficient. Hendee *v.* Pinkerton, 14 Allen (Mass.) 381 [*followed* in Royal Bank *v.* Grand Junction R., etc., Co., 100 Mass. 444, 97 Am. Dec. 115]; Pillow *v.* Roberts, 13 How. (U. S.) 472, 14 L. ed. 228 [*reversing* 20 Fed. Cas. No. 11,909, Hempst. 624]. However, in New York, statutes authorizing stamping in certain specified instances have been somewhat strictly construed, and have been held not to permit of an imprint of ink on the surface of the paper (Richard *v.* Boller, 51 How. Pr. (N. Y.) 371), nor to do away with the common-law rule in regard to classes of persons not named in the statutes (Farmers', etc., Bank *v.* Haight, 3 Hill (N. Y.) 493) or in territory over which the statutes do not extend (Rochester Bank *v.* Gray, 2 Hill (N. Y.) 227). But see 2 Wadhams N. Y. Consol. Laws (1909), p. 1372, §§ 43, 44.

**Any forcible indentation** on the parchment is sufficient, where there is an intention to seal the instrument. Follett *v.* Rose, 9 Fed. Cas. No. 4,900, 3 McLean 332.

**18.** Hastings *v.* Vaughn, 5 Cal. 315; Green *v.* Lake, 2 Mackey (D. C.) 162; Whittington *v.* Clarke, 8 Sm. & M. (Miss.) 480; Wanzer *v.* Barker, 4 How. (Miss.) 363. *Compare* Buckingham *v.* Orr, 6 Colo. 587, holding insufficient a printed seal in a case where no intention to adopt the seal appeared.

**19.** Jacksonville, etc., R., etc., Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515. See also *infra*, IV, B.

**The usual mode** is to make a circular, oval, or square mark opposite the name of the signer. Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502.

**Internal revenue stamps,** when used as

courts have gone to the extent of holding that any mark, blot, or flourish is sufficient, provided it is intended as a seal.[20]

**B. Different Forms Considered.**[21] By the weight of authority, there is a sufficient sealing when there is affixed to the signature a scroll,[22] the word "Seal," [23] the letters "L. S.," [24] a scroll containing either the word "Seal" [25] or the letters "L. S.," [26] but in some jurisdictions, it is necessary, when these devices are used

seals, have been held sufficient. Van Bokkelen *v.* Taylor, 62 N. Y. 105.

A square piece of paper attached to the instrument with a wafer is sufficient, when intended as a seal. Hughes *v.* Debnam, 53 N. C. 127.

Requisites of notarial seal see NOTARIES, 29 Cyc. 1098.

20. Bobe *v.* Moon Bldg. Assoc., 8 Ohio Dec. (Reprint) 164, 6 Cinc. L. Bul. 124; Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242; Long *v.* Ramsay, 1 Serg. & R. (Pa.) 72. And see Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502.

A short dash made with a pen, following the signature, has been held to be a sufficient seal, although similar marks for punctuation were used in the instrument. Hacker's Appeal, 121 Pa. St. 192, 15 Atl. 500, 1 L. R. A. 861.

A slit in a parchment in which a ribbon is inserted has been held not to be a seal. Duncan *v.* Duncan, 1 Watts (Pa.) 322. *Contra*, Hamilton *v.* Dennis, 12 Grant Ch. (U. C.) 325.

The mere touching of the paper with the end of a poker, which makes no impression on the paper, is not sufficient. Clement *v.* Donaldson, 9 U. C. Q. B. 299.

21. What devices sufficient as corporate seals see CORPORATIONS, 10 Cyc. 1011.

22. *Arkansas.*—Anderson *v.* Wilburn, 8 Ark. 155, holding that the scrawl need not be accompanied by the letters "L. S."

*Georgia.*— Harden *v.* Webster, 29 Ga. 427; Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173.

*Illinois.*— Eames *v.* Preston, 20 Ill. 389.

*Indiana.*— Kilgore *v.* Powers, 5 Blackf. 22, holding that no word or letter is essential to the validity of a scrawl as a seal.

*Ohio.*— Michenor *v.* Kinney, Wright 460.

*South Carolina.*— Parks *v.* Duke, 2 McCord 380.

*Virginia.*— Jones *v.* Logwood, 1 Wash. 42.

*United States.*— U. S. *v.* Stephenson, 27 Fed. Cas. No. 16,386, 1 McLean 462.

See 43 Cent. Dig. tit. "Seals," § 5.

Contra.— McLaughlin *v.* Randall, 66 Me. 266; Hendee *v.* Pinkerton, 14 Allen (Mass.) 381.

In New Jersey it was formerly held that a scroll was sufficient where the instrument was for the payment of money (Force *v.* Craig, 7 N. J. L. 272), but that in regard to other instruments, wax, wafer, or something susceptible of receiving and retaining an impression, was necessary (Perrine *v.* Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388; Hopewell Tp. *v.* Amwell Tp., 6 N. J. L. 169). However, the New Jersey statute has been broadened so as to render sealed all instruments executed with a scroll, or other device by way of seal. Waln *v.* Waln, 53 N. J. L. 429, 22 Atl. 203.

23. *Illinois.*— Jackson *v.* Security Mut. Life Ins. Co., 233 Ill. 161, 84 N. E. 198.

*Minnesota.*— Cochran *v.* Stewart, 57 Minn. 499, 59 N. W. 543.

*Pennsylvania.*— Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242.

*South Dakota.*— Philip *v.* Stearns, 20 S. D. 220, 105 N. W. 467.

*Tennessee.*— Whitley *v.* Davis, 1 Swan 333.

*Virginia.*— Lewis *v.* Overby, 28 Gratt. 627.

See 43 Cent. Dig. tit. "Seals," § 5.

Contra.— Beardsley *v.* Knight, 4 Vt. 471.

24. Stansell *v.* Corley, 81 Ga. 453, 8 S. E. 868; McKain *v.* Miller, 1 McMull. (S. C.) 313.

The letters originally meant *locus sigilli*, but have now acquired the popular force of an arbitrary sign for a seal. Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242 [*disapproving* Bennet *v.* Allen, 20 Phila. (Pa.) 423].

25. *Arkansas.*— Bertrand *v.* Byrd, 4 Ark. 195.

*California.*— Hastings *v.* Vaughn, 5 Cal. 315.

*Florida.*— Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Comerford *v.* Cobb, 2 Fla. 418.

*Georgia.*— Williams *v.* Greer, 12 Ga. 459.

*Illinois.*—Ankeny *v.* McMahon, 4 Ill. 11.

*Mississippi.*— Pierce *v.* Lacy, 23 Miss. 193; Whittington *v.* Clarke, 8 Sm. & M. Ch. 480.

*Missouri.*— Groner *v.* Smith, 49 Mo. 318; Underwood *v.* Dollins, 47 Mo. 259.

*Ohio.*— Osborn *v.* Kistler, 35 Ohio St. 99.

*Oregon.*—Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833.

*Texas.*— Muckleroy *v.* Bethany, 23 Tex. 163; Conner *v.* Autrey, 18 Tex. 427; English *v.* Helms, 4 Tex. 228.

*Virginia.*— Buckner *v.* Mackay, 2 Leigh 488.

*United States.*— Jacksonville, etc., Nav. Co. *v.* Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. ed. 515.

See 43 Cent. Dig. tit. "Seals," § 5.

Contra.— Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114; Bishop *v.* Globe Co., 135 Mass. 132; Providence Tel. Pub. Co. *v.* Crahan Engraving Co., 24 R. I. 175, 52 Atl. 804.

26. *California.*— Hastings *v.* Vaughn, 5 Cal. 315.

*Colorado.*— Morgenson *v.* Middlesex Min., etc., Co., 11 Colo. 176, 17 Pac. 513.

*Florida.*— Langley *v.* Owens, 52 Fla. 302, 42 So. 457, holding that it is immaterial whether the scrawl, within which the letters are inserted, consists of brackets or parentheses.

instead of actual sealing, that the instrument contain evidence of an intention to seal,[27] while in other jurisdictions this is not necessary.[28]

**C. Time of Sealing.** Although it is immaterial that a scrawl seal is printed on the instrument before it is executed, as the party, by signing his name in front of it, adopts such printed device as his seal,[29] yet where the instrument is not sealed at the time of execution, a subsequent sealing will not cure the defect.[30]

**D. Recital in Instrument.** Except in cases where a scroll or other substi-

*Georgia.*— New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 60 S. E. 828.

*Indiana.*— Bradfield *v.* McCormick, 3 Blackf. 161.

*Oregon.*— Wilson *v.* McEwan, 7 Oreg. 87.

*Pennsylvania.*— Hazelton Nat. Bank *v.* Kintz, 24 Pa. Super. Ct. 456.

*Wisconsin.*—Williams *v.* Starr, 5 Wis. 534.

*United States.*— Burton *v.* Le Roy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510.

See 43 Cent. Dig. tit. "Seals," § 5.

**In New York** a scroll containing the letters "L. S." was formerly not sufficient (Warren *v.* Lynch, 5 Johns. 239), but where there is an intention to seal, equity will afford the requisite relief (Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430; Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168). See 2 Wadhams N. Y. Consol. Laws (1909), p. 1372, § 44.

27. *California.*— McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220.

*Missouri.*— Glasscock *v.* Glasscock, 8 Mo. 577; Walker *v.* Keile, 8 Mo. 301; Grimsley *v.* Riley, 5 Mo. 280, 32 Am. Dec. 319; Boynton *v.* Reynolds, 3 Mo. 79; Dickens *v.* Miller, 12 Mo. App. 408.

*New Jersey.*— Force *v.* Craig, 7 N. J. L. 272.

*Texas.*— Clopton *v.* Pridgen, 8 Tex. 308; Flemming *v.* Powell, 2 Tex. 225.

*Virginia.*— Clegg *v.* Lemessurier, 15 Gratt. 108; Cromwell *v.* Tate, 7 Leigh 301, 30 Am. Dec. 506; Peasley *v.* Boatwright, 2 Leigh 195; Anderson *v.* Bullock, 4 Munf. 442; Austin *v.* Whitlock, 1 Munf. 487, 4 Am. Dec. 550; Baird *v.* Glaigrove, 1 Wash. 170. And see Lewis *v.* Overby, 28 Gratt. 627; Jenkins *v.* Hurt's Com'rs, 2 Rand. 446.

See 43 Cent. Dig. tit. "Seals," § 5.

**Restriction of rule to contracts.**— It has been held, in some of the jurisdictions wherein this rule prevails, that the rule is confined in its application to contracts, and that it does not apply to instruments to which the act of sealing gives no new or different character, such as deeds or other instruments which are recorded (Ashwell *v.* Ayers, 4 Gratt. (Va.) 283; Parker *v.* Hewlett, 9 Leigh (Va.) 511; Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739; Smith *v.* Henning, 10 W. Va. 596), or testamentary papers (Pollock *v.* Glassell, 2 Gratt. (Va.) 439).

In Alabama this rule prevailed prior to the act of Feb. 2, 1839, which dispenses with the necessity of a seal or scroll where the instrument imports on its face to be under seal. Moore *v.* Leseur, 18 Ala. 606; Carter *v.* Penn, 4 Ala. 140; Lee *v.* Adkins, Minor 187.

**Under the Minnesota and Mississippi statutes,** it is essential that there exist an intention to use the scroll as a seal, but that intention may be manifested in either the body of the instrument or in the scroll itself. Brown *v.* Jordhal, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; Hudson *v.* Poindexter, 42 Miss. 304; Commercial Bank *v.* Ullman, 10 Sm. & M. Ch. 411; McRaven *v.* McGuire, 9 Sm. & M. Ch. 34; Whittington *v.* Clarke, 8 Sm. & M. Ch. 480. But see Bohannon *v.* Hough, Walk. 461.

28. *Arkansas.*— Jeffery *v.* Underwood, 1 Ark. 108.

*Florida.*— Langley *v.* Owens, 52 Fla. 302, 42 So. 457.

*Illinois.*— Jackson *v.* Security Mut. L. Ins. Co., 135 Ill. App. 86 [*affirmed* in 233 Ill. 161, 84 N. E. 198].

*Maryland.*— Trasher *v.* Evahart, 3 Gill & J. 234.

*Ohio.*— Howe *v.* Dawson, Tapp. 201 [*followed* in Michenor *v.* Kinney, Wright 460].

*Oregon.*—Osborne *v.* Hubbard, 20 Oreg. 318, 25 Pac. 1021, 11 L. R. A. 833.

*South Carolina.*— McLaughlin *v.* Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681; Relph *v.* Gist, 4 McCord 267.

*Tennessee.*— Scruggs *v.* Brackin, 4 Yerg. 528.

*United States.*— Burton *v.* Le Roy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510.

See 43 Cent. Dig. tit. "Seals," § 5.

29. *Colorado.*—Carlile *v.* People, (1899) 59 Pac. 48. But see Buckingham *v.* Orr, 6 Colo. 537.

*Illinois.*— Jackson *v.* Security Mut. L. Ins. Co., 135 Ill. App. 86 [*affirmed* in 233 Ill. 161, 84 N. E. 198].

*Ohio.*— Osborn *v.* Kistler, 35 Ohio St. 99; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

*Pennsylvania.*— Lorah *v.* Nissley, 156 Pa. St. 329, 27 Atl. 242 [*disapproving* Bennet *v.* Allen, 20 Phila. 423].

*South Carolina.*— McLaughlin *v.* Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681.

*Wisconsin.*— Williams *v.* Starr, 5 Wis. 534.

See 43 Cent. Dig. tit. "Seals," § 6.

But see Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114; Bates *v.* Boston, etc., R. Co., 10 Allen (Mass.) 251.

30. Smalley *v.* Vanorden, 5 N. J. L. 811; Merritt *v.* Horne, 5 Ohio St. 307, 67 Am. Dec. 298. *Compare* People *v.* Rensselaer, 11 Wend. (N. Y.) 174 (holding that the court may permit the seals to be subsequently affixed); Green *v.* Elwell, 13 N. Y. Wkly. Dig. 236.

tute is used instead of the common-law seal,[31] a recital in the body of the instrument or in the attestation clause that the instrument is sealed is not material in determining that fact. The presence of such recital does not change the character of an instrument, to which no seal is affixed,[32] nor its absence, the character of an instrument actually sealed.[33]

## V. ADOPTION OF SEALS.

Where there are not as many seals as signatures to a written instrument, the seals will be presumed to be those of the parties to whose names they are affixed, and will be held to be the seals of all on proof that they were attached on the authority of all,[34] as, on account of the law permitting one person to adopt the seal of another, it is not necessary that the number of seals equal the number of signatures.[35] Proof that the parties who have not attached seals have adopted

**Addition or detachment of seal as constituting alteration of instrument** see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 207.

31. See *supra*, IV, B.

32. *Delaware.*—Armstrong *v.* Pearce, 5 Harr. 351.

*Georgia.*— Willhelms *v.* Partoine, 72 Ga. 898 [*following* Brooks *v.* Kiser, 69 Ga. 762].

*Illinois.*— Chilton *v.* People, 66 Ill. 501; Nance *v.* Funk, 3 Ill. 263.

*Indiana.*— Deming *v.* Bullitt, 1 Blackf. 241.

*Maine.*— Boothbay *v.* Giles, 68 Me. 160.

*Maryland.*— State *v.* Humbird, 54 Md. 327; Stabler *v.* Cowman, 7 Gill & J. 284.

*Mississippi.*— McPherson *v.* Reese, 58 Miss. 749 [*distinguishing* McCarley *v.* Tippah County, 58 Miss. 483, 38 Am. Rep. 338].

*New York.*— Davis *v.* Bingham, 39 Misc. 299, 79 N. Y. Suppl. 469.

*South Carolina.*— Mitchell *v.* Parham, Harp. 3.

*Wisconsin.*— Davis *v.* Judd, 6 Wis. 85.

*England.*— Moore *v.* Jones, 2 Ld. Raym. 1536, 92 Eng. Reprint 496.

See 43 Cent. Dig. tit. "Seals," § 8.

**Equitable estoppel.**— However, where the instrument recites that it is under seal and the failure to affix a seal is due to mere inadvertence, a court of equity will not allow the party executing the instrument to claim and obtain any benefit arising from such failure. McCarley *v.* Tippah County, 58 Miss. 483, 38 Am. Rep. 338; Rutland *v.* Paige, 24 Vt. 181.

33. *Illinois.*— Chamberlain *v.* Fernbach, 118 Ill. App. 145.

*Kentucky.*— Hubbard *v.* Beckwith, 1 Bibb 492.

*Maine.*— Wing *v.* Chase, 35 Me. 260.

*South Carolina.*— Cunningham *v.* Smith, Harp. Eq. 90.

*England.*— Drapper *v.* Capper, Dyer 19*a*, 73 Eng. Reprint 39.

See 43 Cent. Dig. tit. "Seals," § 8.

But see Cartmill *v.* Hopkins, 2 Mo. 220; Dickens *v.* Miller, 12 Mo. App. 408.

**Contra.**— Humphries *v.* Nix, 77 Ga. 98; Brooks *v.* Kiser, 69 Ga. 762; Bradley Salt Co. *v.* Norfolk Importing, etc., Co., 95 Va. 461, 28 S. E. 567.

**Recital as to official seal:** In acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 580; in jurat of affidavit see AFFIDAVITS, 1 Cyc. 34.

34. *Arkansas.*— Hanger *v.* Dodge, 24 Ark. 205.

*District of Columbia.*— Rockwell *v.* Capital Traction Co., 25 App. Cas. 98.

*Illinois.*— Eames *v.* Preston, 20 Ill. 389.

*Maryland.*— State *v.* Humbird, 54 Md. 327; Stabler *v.* Cowman, 7 Gill & J. 284.

*Massachusetts.*— Bradford *v.* Randall, 5 Pick. 496.

*North Carolina.*— Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 521; Yarborough *v.* Monday, 13 N. C. 493, 14 N. C. 420.

*South Carolina.*— McLaughlin *v.* Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681; O'Cain *v.* O'Cain, 1 Strobh. 402.

*England.*— Ball *v.* Dunsterville, 4 T. R. 313, 100 Eng. Reprint 1038, where authority was inferred from the fact that one party affixed his seal for himself and another party in the presence of the other.

See 43 Cent. Dig. tit. "Seals," § 7.

**On demurrer** the court is not authorized to assume that the seals attached are not the seals of all the parties. Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Bohannons *v.* Lewis, 3 T. B. Mon. (Ky.) 376; Van Alstyne *v.* Van Slyck, 10 Barb. (N. Y.) 383; Norvell *v.* Walker, 9 W. Va. 447.

35. *Alabama.*— Carter *v.* Doe, 21 Ala. 72.

*Arkansas.*— McKiel *v.* Porter, 4 Ark. 534; State Bank *v.* Bailey, 4 Ark. 453.

*Florida.*— Baars *v.* Sordon, 21 Fla. 25; Cotten *v.* Williams, 1 Fla. 42.

*Maine.*— Cumberland Bank *v.* Bugbee, 19 Me. 27.

*Maryland.*— State *v.* Humbird, 54 Md. 327.

*Massachusetts.*— Tasker *v.* Bartlett, 5 Cush. 359; Mill Dam Foundery *v.* Hovey, 21 Pick. 417.

*Mississippi.*— New Orleans, etc., R. Co. *v.* Burke, 53 Miss. 200, 24 Am. Rep. 689.

*Missouri.*— Burnett *v.* McCluey, 78 Mo. 676. But see Kennerly *v.* Weed, 1 Mo. 672.

*New Hampshire.*— Northumberland *v.* Cobleigh, 59 N. H. 250; Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

*New York.*— Rusling *v.* Union Pipe, etc., Co., 5 N. Y. App. Div. 448, 39 N. Y. Suppl. 216 [*affirmed* in 158 N. Y. 737, 53 N. E. 1131]; Van Alstyne *v.* Van Slyck, 10 Barb.

the seals which are attached is sufficient, where the parties recite in the instrument that it is executed under their seals,[36] or where there is any contemporaneous writing showing an adoption.[37]

## VI. EVIDENCE AND QUESTIONS FOR JURY.[38]

A presumption of due sealing attaches where the instrument itself purports to be under seal,[39] or where the instrument cannot be produced, and a copy thereof recites that it is under seal and contains appropriate words or letters indicating a seal;[40] and where such presumption attaches, the burden is upon the party objecting to the sufficiency of the instrument to show that it was not sealed at the time of signature;[41] but where the adoption of the seal of one signer by another signer is sought to be shown, the burden of proof is on the party seeking to enforce the instrument as a specialty.[42] In case of the loss of the instrument or of the

383; Mackay *v.* Bloodgood, 9 Johns. 285; Loodlow *v.* Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291.

*Ohio.*— Citizens' Bldg. Assoc. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841.

*Pennsylvania.*— Bowman *v.* Robb, 6 Pa. St. 302.

*South Carolina.*— Twitty *v.* Houser, 7 S. C. 153, holding that several may adopt the seal of one without so expressing on the face of the papers.

*Tennessee.*— Lambden *v.* Sharp, 9 Humphr. 224; Hollis *v.* Pond, 7 Humphr. 222.

*Texas.*— Muckleroy *v.* Bethany, 23 Tex. 163.

*Wisconsin.*— Rollins *v.* Humphrey, 98 Wis. 66, 73 N. W. 331; Yale *v.* Flanders, 4 Wis. 96.

*England.*— Lovelace's Case, W. Jones 268, 82 Eng. Reprint 140.

See 43 Cent. Dig. tit. "Seals," § 7.

**Contra.**— Tingey *v.* Carroll, 23 Fed. Cas. No. 14,056, 3 Cranch C. C. 693, holding that there cannot, at common law, be a seal of a firm, or a joint seal for any number of persons not incorporated.

**The rule is applicable** to instruments in which only part of the signers are named as obligors in the body of the instrument. Pequawkett *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737; Citizens' Bldg. Assoc. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841.

**36.** *Alabama.*— Carter *v.* Doe, 21 Ala. 72; Hatch *v.* Crawford, 2 Port. 54; Martin *v.* Dortch, 1 Stew. 479.

*District of Columbia.*— Rockwell *v.* Capital Traction Co., 25 App. Cas. 98.

*Florida.*— Cotten *v.* Williams, 1 Fla. 37.

*Illinois.*— Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213; Davis *v.* Burton, 4 Ill. 41, 36 Am. Dec. 511 [*followed* in McLean *v.* Wilson, 4 Ill. 50]; Troydon *v.* Cleveland Stone Co., 53 Ill. App. 206.

*Indiana.*— Flood *v.* Yandes, 1 Blackf. 102.

*Maine.*— Cumberland Bank *v.* Bugbee, 19 Me. 27.

*Missouri.*— Lunsford *v.* La Motte Lead Co., 54 Mo. 426.

*New Hampshire.*— Northumberland *v.* Cobleigh, 59 N. H. 250; Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737.

*New York.*— Rusling *v.* Union Pipe, etc., Co., 5 N. Y. App. Div. 448, 39 N. Y. Suppl. 216 [*affirmed* in 158 N. Y. 737, 53 N. E. 1131].

*Pennsylvania.*— Bowman *v.* Robb, 6 Pa. St. 302, where both the parties in question had placed their signatures opposite one seal.

*West Virginia.*— Norvell *v.* Walker, 9 W. Va. 447.

*Wisconsin.*— Yale *v.* Flanders, 4 Wis. 96.

See 43 Cent. Dig. tit. "Seals," § 7.

**Contra.**— Stabler *v.* Cowman, 7 Gill & J. (Md.) 284 [*followed* in State *v.* Humbird, 54 Md. 327].

**Where no such recital is contained in the instrument,** and the instrument purports to be that of one individual only, extraneous proof is necessary to show an adoption. Hess' Estate, 150 Pa. St. 346, 24 Atl. 676.

**37.** Ingoldsby *v.* Juan, 12 Cal. 564.

**38. Evidentiary matters connected with corporate seals** see CORPORATIONS, 10 Cyc. 1016.

**39.** Doe *v.* Pendleton, 15 Ohio 735, holding that a slight impression upon process, after the lapse of many years, will be presumed to be the seal.

**The possession of the instrument** by the obligee or grantee, with the seal attached, and proof of the handwriting of the obligor, has been held *prima facie* evidence of sealing. Merritt *v.* Cornell, 1 E. D. Smith (N. Y.) 335. *Contra,* Keedy *v.* Moats, 72 Md. 325, 19 Atl. 965.

**40.** Deininger *v.* McConnel, 41 Ill. 227; Flowery Min. Co. *v.* North Bonanza Min. Co., 16 Nev. 302. See also DEEDS, 13 Cyc. 727. *Contra,* Dickens *v.* Miller, 12 Mo. App. 408.

**The registration of a conveyance,** with a certificate that it conferred a complete title, has been held to justify the presumption that it was duly sealed. Sneed *v.* Ward, 5 Dana (Ky.) 187.

**The absence of the seal** may be accounted for by parol evidence only where there is other evidence from which the genuineness of the document can be inferred. Adams *v.* Wilder, 91 Ga. 562, 18 S. E. 530.

**Presumption as to due affixing of official seal** see APPEAL AND ERROR, 3 Cyc. 97, 102 note 68, 157 note 28, 274 note 7.

**41.** Growning *v.* Behn, 10 B. Mon. (Ky.) 383; Pool *v.* Dial, 10 S. C. 440. And see MORTGAGES, 27 Cyc. 1106 text and note 47.

**42.** Pickens *v.* Rymer, 90 N. C. 282, 47

seal from the instrument, and in the absence of direct evidence, circumstantial evidence of a due sealing is admissible.[43] Whether or not a certain device constitutes a seal is a question of law for the court, but it is for the jury to determine whether the seal was affixed to the instrument, or, having been attached, has since been detached.[44]

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**SEA-MOSS.** See Moss, 27 Cyc. 1868 note 9.

Am. Rep. 521; Citizens' Bldg. Assoc. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841; Hollis *v.* Pond, 7 Humphr. (Tenn.) 222.

**The burden of proof is not sustained** by merely showing that the surety, to whose signature there is no seal attached, has accepted indemnity. State *v.* Humbird, 54 Md. 327.

**43.** Livingston County *v.* White, 30 Barb. (N. Y.) 72; Follett *v.* Rose, 9 Fed. Cas. No. 4,900, 3 McLean 332, holding that the officer who took the acknowledgment may testify as to his practice in taking only instruments to which seals are attached.

**44.** *Florida.*— Langley *v.* Owens, 52 Fla. 302, 42 So. 457.

*Illinois.*— Schwarz *v.* Herrenkind, 26 Ill. 208, holding that the question whether the seal was attached at the time of the execution of the instrument or afterward is one for the jury.

*New Jersey.*— Corlies *v.* Vannote, 16 N. J. L. 324.

*North Carolina.*— Baird *v.* Reynolds, 99 N. C. 469, 6 S. E. 377.

*Pennsylvania.*— Miller *v.* Binder, 28 Pa. St. 489.

*Vermont.*— Beardsley *v.* Knight, 4 Vt. 471.

*United States.*— Follett *v.* Rose, 9 Fed. Cas. No. 4,900, 3 McLean 332.

See 43 Cent. Dig. tit. "Seals," § 10.

**Ownership of seal.**— Whether or not the seal is that of the party to be charged is a question for the jury. Crossman *v.* Hilltown Turnpike Co., 3 Grant (Pa.) 225.

**The intent** with which a party affixed the letters "L. S." to the signature is a question of fact for the jury (McKain *v.* Miller, 1 McMull. (S. C.) 313), as well as is the intention of one signer to adopt the seal of another signer (Pickens *v.* Rymer, 90 N. C. 282, 47 Am. Rep. 521; Yarborough *v.* Monday, 14 N. C. 420; Citizens' Bldg. Assoc. *v.* Cummings, 45 Ohio St. 664, 16 N. E. 841; Lambden *v.* Sharp, 9 Humphr. (Tenn.) 224; Vermont University *v.* Joslyn, 21 Vt. 52).

# SEAMEN

EDITED BY ALEXANDER KARST


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## I. DEFINITIONS.

**A. Seamen.** A seaman is defined to be one whose occupation is to assist in the management of ships at sea; a mariner; a sailor.[1] The term is exceed-

1. Webster Dict. [*quoted* in Doughten *v.* Vandever, 5 Del. Ch. 51, 73].
Other definitions are: "A sailor, a mariner; one whose business is navigation." Bouvier L. Dict.
"A man whose occupation it is to coöperate

ingly broad in its signification and is held to include carpenters,[2] clerks,[3] cooks,[4] coopers,[5] deck hands,[6] divers,[7] engineers,[8] firemen,[9] fishermen,[10] mates,[11]

in the navigation of a ship at sea; a mariner; a sailor; applied to both officers and common sailors, but technically restricted to men below the rank of officer." Century Dict.

"Every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" a vessel. U. S. Rev. St. (1878) § 4612 [U. S. Comp. St. (1901) p. 3120] [*quoted* in Saylor *v.* Taylor, 77 Fed. 476, 477, 23 C. C. A. 343].

**As used in 23 U. S. St. at L. 55, c. 121,** § 10, as amended by 24 U. S. St. at L. 80, c. 421, § 3, amended by 30 U. S. St. at L. 763, c. 28, § 24 [U. S. Comp. St. (1901) p. 3078], making it unlawful to pay any seaman wages in advance, the term means those Americans who practise or are employed in navigation or whose avocation is that of mariner. U. S. *v.* Nelson, 100 Fed. 125.

**As used in 17 U. S. St. at L. 273,** providing for the punishment of any seaman who has been lawfully engaged and who has committed certain enumerated offenses, the term applies to seamen engaged on foreign vessels in American waters and not only to those employed on American vessels. U. S. *v.* McArdle, 26 Fed. Cas. No. 15,653, 2 Sawy. 367.

**As used in U. S. Rev. St. (1878) § 4601,** making it a punishable offense to harbor any seaman belonging to any vessel, the word "seaman" is not unlimited, but must be taken in connection with U. S. Rev. St. (1878) § 4612 [U. S. Comp. St. (1901) p. 3120], providing that the word "seaman" shall be taken to be one employed on a vessel belonging to any citizen of the United States. U. S. *v.* Minges, 16 Fed. 657, 5 Hughes 494.

**For various code definitions** see Cal. Civ. Code (1903), § 2049; N. D. Rev. Codes (1899), § 4151; S. D. Civ. Code (1903), § 1504.

**As used in the Merchant Shipping Act (1854), § 2, 17 & 18 Vict.,** the term includes "every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." The Arina, 12 P. D. 118, 123, 6 Aspin. 141, 56 L. J. P. D. & Adm. 57, 57 L. T. Rep. N. S. 121, 35 Wkly. Rep. 654; Connor *v.* The Flora, 6 Can. Exch. 131, 132. In the English Employers' and Workmen's Act of 1875, the term is used in the same sense. Corbett *v.* Pearce, [1904] 2 K. B. 422, 68 J. P. 387, 73 L. J. K. B. 885, 90 L. T. Rep. N. S. 781, 20 T. L. R. 473.

**A merchant seaman** is a seaman in a private vessel as distinguished from a seaman in the navy or on a public vessel. U. S. *v.* Sullivan, 43 Fed. 602, 604. The term includes seamen or mariners on boats or vessels employed in navigable fresh waters within the admiralty jurisdiction of the United States, and therefore they are entitled to all the rights and subject to all duties as such, as much as seamen on the ocean. The Ben Flint, 3 Fed. Cas. No. 1,299, 1 Biss. 562.

**Mariner defined** see MARINER, 26 Cyc. 741.

2. Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

3. Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310; Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 81, 36 Am. Rep. 579; The Sultana, 23 Fed. Cas. No. 13,602, Brown Adm. 13. But see The Globe *v.* Herbert, 13 Mo. 577 (where it is held that the claim on the clerk of a steamboat for wages is not a lien upon the boat, by the statute of Missouri); Zollinger *v.* The Emma, 30 Fed. Cas. No. 18,218 (where it is held that the chief clerk of a vessel, for the reason that he is required to account to the owner and not to the master, is not entitled to a seaman's lien for his wages).

4. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579; *Ex p.* Thompson, 4 Bradf. Surr. (N. Y.) 154; Allen *v.* Hallet, 1 Fed. Cas. No. 223, Abb. Adm. 573; Black *v.* The Louisiana, 3 Fed. Cas. No. 1,461, 2 Pet. Adm. 268; The Charles F. Perry, 5 Fed. Cas. No. 2,616, 1 Lowell 475; The Helen M. Pierce, 11 Fed. Cas. No. 6,332, 2 Hask. 205; Bean *v.* Stupart, Dougl. (3d ed.) 11, 99 Eng. Reprint 9.

**Women who are cooks** are seamen. Lawson *v.* The James H. Shrigley, 50 Fed. 287; Sageman *v.* The Brandywine, 21 Fed. Cas. No. 12,216, Newb. Adm. 5; Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932.

5. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168.

6. Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

7. The Murphy Tugs, 28 Fed. 429; The Highlander, 12 Fed. Cas. No. 6,476, 1 Sprague 510.

8. Holt *v.* Cummings, 102 Pa. St. 212, 48 Am. Rep. 199; Allen *v.* The Destroyer, 56 Fed. 310; The May Queen, 16 Fed. Cas. No. 9,360, 1 Sprague 588; Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

**An engineer in charge of a steam dredge** who was the highest officer on the dredge, and directed the foreman and any other hands aboard, but who had not authority to engage or dismiss hands or purchase supplies, and whose wages were paid at the office of the charterer, and who received pay only for each day that the dredge was at work, was held not to be the "master" of the dredge within the rule denying to masters a maritime lien for wages. The Atlantic, 53 Fed. 607.

9. The North America, 18 Fed. Cas. No. 10,314, 5 Ben. 486; Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

10. Com. *v.* Douglas, 17 Mass. 49; Telles *v.* Lynde, 47 Fed. 912; The Minna, 11 Fed. 759; Knight *v.* Parsons, 14 Fed. Cas. No. 7,886, 1 Sprague 279.

11. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244; The Helen M. Pierce, 11 Fed. Cas. No. 6,332, 2 Hask. 205; The May Queen, 16 Fed. Cas. No. 9,360, 1 Sprague 588. But see Ely *v.* Peck, 7 Conn. 239, where, in deciding a question as to the juris-

pilots,[12] porters,[13] pursers,[14] salesmen,[15] sealers,[16] slaves hired as seamen,[17] stewards,[18] and wreckers.[19] It does not include, however, lightermen plying within a harbor on a vessel under twenty tons burden,[20] nor does it include masters,[21] musicians,[22] performers in a show on board a vessel,[23] physicians,[24] raftsmen,[25] or the servants of the master.[26]

**B. Crew.** The crew of a vessel in a general sense comprises all persons who, in pursuance of some contract or arrangement with the owner or master, are on board the same, aiding in the navigation thereof.[27] The term includes the cook,[28] the mate,[29] and the engineer;[30] but excludes the bookkeeper of a steamboat who performs such service wholly on shore and renders no service on board the boat,[31]

diction of a state court, although unnecessary to the decision in the case, the court held that the mate was not a seaman.

**If a mate upon death of the master succeeds to command** of the vessel, he does not lose his character as a seaman, and may sue in admiralty to recover his wages. The George, 10 Fed. Cas. No. 5,329, 1 Sumn. 151 [*affirming* 14 Fed. Cas. No. 8,035, 1 Sumn. 591]; The Leonidas, 15 Fed. Cas. No. 8,262, Olcott 12, holding, however, that he may not sue *in rem* to recover extra compensation for services performed as master.

12. The Mary Elizabeth, 24 Fed. 397; Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

13. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579.

14. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579 [*reversing* 14 Hun 100]; *In re* Hayes, 2 Curt. Eccl. 338.

15. Connor *v.* The Flora, 6 Can. Exch. 131.

16. The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105.

17. Slacum *v.* Smith, 22 Fed. Cas. No. 12,936, 2 Cranch C. C. 149.

18. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579; Black *v.* The Louisiana, 3 Fed. Cas. No. 1,461, 2 Pet. Adm. 268.

19. The Highlander, 12 Fed. Cas. No. 6,476, 1 Sprague 510.

20. Pratt *v.* Hall, 4 Mass. 239.

21. The John A. Morgan, 28 Fed. 895; The Arina, 12 P. D. 118, 6 Aspin. 141, 56 L. J. P. D. & Adm. 57, 57 L. T. Rep. N. S. 121, 35 Wkly. Rep. 654. See Peterson *v.* The Nellie and Annie, 37 Fed. 217.

**A person calling himself master,** who neither contracts directly with the owners, nor has charge of freights and moneys, is an ordinary seaman and may proceed *in rem* against the vessel as such. The Imogene M. Terry, 19 Fed. 463.

**But the master of a vessel is a "mariner"** within the meaning of the term as used by statutes making special provisions for the nuncupative wills of mariners (Hubbard *v.* Hubbard, 8 N. Y. 196; *In re* Gwin, Tuck. Surr. (N. Y.) 44), and within the meaning of the term as used by statutes exempting mariners from militia duty (Bayley *v.* Merritt, 2 Pick. (Mass.) 597. But see Brush *v.* Bogardus, 8 Johns. (N. Y.) 157, where it was held that the master of a sloop sailing in the Hudson river only was not a mariner within the meaning of these statutes).

22. Trainer *v.* The Superior, 24 Fed. Cas. No. 14,136, Gilp. 514; McElhaney *v.* The Flora, 6 Can. Exch. 129.

23. Lawrence *v.* The W. F. Brown, 46 Fed. 290.

24. Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223. But see The Wharton, 3 Hagg. Adm. 148 note; Mills *v.* Long, Say. 136, 96 Eng. Reprint 829.

25. *In re* Raft of Cypress Logs, 20 Fed. Cas. No. 11,527, 1 Flipp. 543.

26. Sunday *v.* Gordon, 23 Fed. Cas. No. 13,616, Blatchf. & H. 569.

27. The Marie, 49 Fed. 286, holding that it matters not whether the contract is verbal or in writing, or for a long or short voyage or period.

**Another definition is:** "The company of seamen who man a ship, vessel, or boat; the seamen belonging to a vessel; specifically, the common sailors of a ship's company. In a broad (but not properly nautical) sense the word comprises all the officers and men on board a ship enrolled on the books. It has received this interpretation in law." Century Dict.

**The term is used in different senses:** Sometimes as comprehending all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers, and which sense it is used in in any particular instance must be determined from the context. Generally it may be stated that wherever in a statute the words "master" and "crew" occur in connection with each other, the word "crew" embraces all the officers as well as the common seamen. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209, containing a full discussion of the various shades of meaning of the term.

**One who secretes himself on board a vessel before sailing** and discovers himself after the vessel is at sea is not one of the crew, although the master requires him to work, as a condition for his having food, and he does work. U. S. *v.* Small, 27 Fed. Cas. No. 16,314, 2 Curt. 241.

28. The Marie, 49 Fed. 286.

29. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209.

30. The D. C. Fogel, 41 Fed. 154.

31. Dalzell *v.* The Daniel Kaine, 31 Fed. 746, holding also that such bookkeeper is not a clerk within the meaning of the Pennsylvania act of April 20, 1858, relating to boats

and is generally held to exclude the master, who is held to be rather in the nature of an agent of the owner than a seaman.[32]

## II. WHAT SERVICES ARE MARITIME.

**A. In General.** The question as to whether a service is a maritime service is one of considerable importance, in that upon its decision depends the jurisdiction of the courts of admiralty in suits arising out of the contracts for the wages of seamen.[33] No positive rule that will govern all cases may be laid down to determine the question; but the facts in each case must be considered with reference to the vessel on which the services are performed, its locality, and the nature of the service.[34] The service must be performed on a vessel,[35] by persons employed by the vessel,[36] and it must be connected with the main purpose of the voyage,[37] or the navigation of the vessel,[38] or with its preservation,[39] or with the preservation of those employed in her navigation.[40] It was formerly the rule that unless the services were performed on a vessel engaged on the sea or in the tide waters they were not maritime;[41] but the decisions upon which this rule was founded were expressly overruled,[42] and the rule that if the services were performed on

navigating the Allegheny, Monongahela, or Ohio rivers.

**32.** The Marie, 49 Fed. 286 (holding that the word "crew" includes the officers and common seamen on a vessel except the master); U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209. See Millaudon *v.* Martin, 6 Rob. (La.) 534; U. S. *v.* Huff, 13 Fed. 630.

**33.** Thackarey *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524; Trainer *v.* The Superior, 24 Fed. Cas. No. 14,136, Gilp. 514.

**Jurisdiction of admiralty over contracts of seamen** see ADMIRALTY, 1 Cyc. 832 text and note 62.

**34.** Thackarey *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524.

**The manner in which persons are paid** does not affect the nature of the service. The Carrier Dove, 97 Fed. 111, 38 C. C. A. 73.

**35.** Saylor *v.* Taylor, 77 Fed. 476, 23 C. C. A. 343 (holding that a steam dredge with motive power engaged in deepening navigable waters, and capable of being towed from place to place, was a vessel, and that persons employed on her were seamen and within the maritime jurisdiction); Coffin *v.* The Progresso, 46 Fed. 292 (holding that services performed by a person who was the mate of a vessel sunk in the harbor of New York and abandoned by her owners, but which was raised and sold, performed while the vessel was without name, register, or documents as a vessel, were maritime in their nature, although the person by whom they were performed was discharged before the vessel was documented); The Alabama, 19 Fed. 544 [*affirmed* in 22 Fed. 449].

**The manner in which the vessel is propelled,** however, need not be considered. The D. C. Salisbury, 7 Fed. Cas. No. 3,694, Olcott 71. See Thackarey *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524.

**Vessel defined** see ADMIRALTY, 1 Cyc. 822.

**36.** The Sarah E. Kennedy, 29 Fed. 264, holding that a libel against a vessel for seamen's wages could not be maintained by laborers employed by a person who had contracted to load a vessel, and not by the vessel itself, and whose contract was solely with the former, and to whom the vessel was a stranger, and whose only material connection with it was that they were transported in her as passengers to the port of destination for the purpose of excavating cargo.

**37.** The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437, holding that services performed by persons employed to load, navigate, and unload a vessel plying between two adjoining ports, principally for the transportation of stone, are maritime in their nature, and criticizing Packard *v.* The Louisa, 18 Fed. Cas. No. 10,652, 2 Woodb. & M. 48, where it was held in effect that services performed on a vessel of less than fifty tons burden employed in transporting stone and laying it in Massachusetts bay, in loading and unloading the vessel, and in laying the stone and in navigating the vessel, were not maritime in their nature.

**Services performed by persons on a fishing tug,** in catching and preserving fish, although part of the services are performed on shore, are maritime in their nature, and persons performing them are entitled to a lien for their wages. The Minna, 11 Fed. 759.

**Services performed by sealers on a sealing voyage** are maritime in their nature. The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105.

**38.** Lawrence *v.* The W. F. Brown, 46 Fed. 290, holding that services performed by performers in a show given on a float at a point on the Mississippi river are not maritime.

**39.** The D. C. Salisbury, 7 Fed. Cas. No. 3,694, Alcott 71; The Harriet, 11 Fed. Cas. No. 6,097, Olcott 229.

**40.** Trainer *v.* The Superior, 24 Fed. Cas. No. 14,136, Gilp. 514.

**41.** The Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. ed. 358; The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437; The D. C. Salisbury, 7 Fed. Cas. No. 3,694, Olcott 71; Hart *v.* The Enterprise, 11 Fed. Cas. No. 6,151; Norton *v.* Acker, 16 Fed. Cas. No. 9,155, Blatchf. & H. 279; Smith *v.* The Pekin, 22 Fed. Cas. No. 13,090, Gilp. 203.

**42.** The Hine *v.* Trevor, 4 Wall. (U. S.)

the sea or on navigable water they should be considered maritime established,[43] and, although it was formerly held that the vessel must be engaged in trade or commerce,[44] this now seems unnecessary.[45]

**B. In Port or at Anchor — 1. General Rule.** As a general rule services rendered a vessel in port or at anchor are not considered to be maritime in their nature,[46] unless the services performed while the vessel is in port are merely subsidiary to the service on the voyage.[47]

**2. Application to Particular Services — a. Ship-Keeper or Watchman.** Services rendered on a vessel in her home port by a person whose sole duty it is to remain on board the vessel, or to visit her from time to time to see to her safety, are not considered maritime,[48] unless it is a part of his duty to assist in getting the vessel under way and in navigating her from place to place as circumstances from time to time demand.[49] Services performed by a watchman or ship-keeper, if rendered on a foreign vessel, however, are held to be maritime in their nature.[50]

**b. Stevedores.** Formerly the services performed by stevedores in stowing and discharging the cargo were considered to be not maritime in their nature,[51] but the authorities in support of that view have been overruled and it is now held that such services are maritime.[52] However, even after they were decided to be mari-

555, 18 L. ed. 451; The Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058.

**43.** Murray *v.* The F. B. Nimick, 2 Fed. 86; The Sarah Jane, 21 Fed. Cas. No. 12,349, 1 Lowell 203. See Lawrence *v.* The W. F. Brown, 46 Fed. 290, holding that services performed on a tugboat on the Mississippi were maritime, the question as to the locality of the vessel not being discussed, however. And see, generally, Admiralty, 1 Cyc. 816.

**44.** Thackarey *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524, holding that the vessel must be engaged in trade and commerce in a literal sense of the term. See, however, Hart *v.* The Enterprise, 11 Fed. Cas. No. 6,151, where it is held that services performed by persons employed as laborers upon a vessel sailing between Philadelphia and ports on the Chesapeake bay to obtain oysters for the purpose of transplanting were maritime.

**45.** The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437 [*criticizing* Thackarey *v.* The Farmer of Salem, 23 Fed. Cas. No. 13,852, Gilp. 524], holding services performed for a vessel operating in the tidewater are maritime, whether or not the vessel is engaged in trade or commerce.

Services on a tugboat used on a river in propelling a float, on which theatrical performances were given, rendered by an engineer, are maritime in their character, since the tugboat is engaged in commerce and navigation. Lawrence *v.* The W. F. Brown, 46 Fed. 290.

**46.** Graham *v.* Hoskins, 10 Fed. Cas. No. 5,669, Olcott 224 (holding that services rendered by a fireman on board a vessel at dock are not maritime); The M. M. Caleb, 17 Fed. Cas. No. 9,682, 9 Ben. 159 (holding that admiralty has no jurisdiction of a claim for wages of a seaman for the time he was engaged in repairing the vessel, which had been sunk in port, and raised again); Walter *v.* The Kamchatker, 29 Fed. Cas. No. 17,119 (holding that services performed on a contract, a certain rate per day, in putting machinery in a vessel are not maritime).

**47.** The Minna, 11 Fed. 759 (holding that the fact that fishermen slept on shore at night to repair the nets did not prevent their services from being considered maritime); The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437; The Mary, 16 Fed. Cas. No. 9,190, 1 Sprague 204.

**48.** Williams *v.* The Sirius, 65 Fed. 226; The America, 56 Fed. 1021; The E. A. Barnard, 2 Fed. 712; The Champion, 5 Fed. Cas. No. 2,584; Gurney *v.* Crockett, 11 Fed. Cas. No. 5,874, Abb. Adm. 490; The Harriett, 11 Fed. Cas. No. 6,097, Olcott 229; Henderson *v.* The Hannah M. Buell, 11 Fed. Cas. No. 6,352, 1 Wkly. Notes Cas. (Pa.) 302; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 275; Levering *v.* Columbia Bank, 15 Fed. Cas. No. 8,237, 1 Cranch C. C. 207; Phillips *v.* The Thomas Scattergood, 19 Fed. Cas. No. 11,106, Gilp. 1; Russell *v.* Barkman, 21 Fed. Cas. No. 12,151.

**49.** Pond *v.* The Hattie Thomas, 59 Fed. 297; Wishart *v.* The Jos. Nixon, 43 Fed. 926; The Maggie P., 32 Fed. 300; Gurney *v.* Crockett, 11 Fed. Cas. No. 5,874, Abb. Adm. 490; The May Queen, 16 Fed. Cas. No. 9,360, 1 Sprague 588.

**50.** The Erinagh, 7 Fed. 231.

**51.** Zung *v.* Howland, 5 Daly (N. Y.) 136; Danace *v.* The Magnolia, 37 Fed. 367; The Amstel, 1 Fed. Cas. No. 339, Blatchf. & H. 215; The A. R. Dunlap, 1 Fed. Cas. No. 513, 1 Lowell 350; The Circassian, 5 Fed. Cas. No. 2,722, 1 Ben. 209; Cox *v.* Murray, 6 Fed. Cas. No. 3,304, Abb. Adm. 340; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120; McDermott *v.* S. C. Owens, 16 Fed. Cas. No. 8,748, 1 Wall. Jr. 370; The Ilex, 19 Fed. Cas. No. 10,842, 2 Woods 229.

**52.** The Maine, 51 Fed. 954, 2 C. C. A. 569; The Mattie May, 47 Fed. 69; The Gilbert Knapp, 37 Fed. 209; The Wyoming, 36 Fed. 493; The Scotia, 35 Fed. 916; The Velox *v.* Wilkins, 21 Fed. 479; The Senator, 21 Fed. 191; The Hattie M. Bain, 20 Fed. 389;

time in their nature a maritime lien to enforce their payment was denied when the services were rendered in the vessel's home port,[53] being allowed when they were rendered to a foreign vessel.[54] They are now, however, considered maritime in their nature to such extent that the maritime lien is granted without reference to the port in which the services are rendered.[55]

## III. EMPLOYMENT AND DISCHARGE.

**A. Contract of Employment — 1. NATURE AND CONSTRUCTION.** The service of seamen on shipboard is regulated by contract, express or implied, and the relation between them and the master of the ship is largely, if not altogether, a contractual one.[56] As seamen are generally ignorant and improvident, courts are accustomed to consider them as peculiarly entitled to their protection, and, while contracts for their services will not be construed with the strictness which obtains at common law,[57] the courts will scrutinize these contracts closely to ascertain whether any imposition is made on the seamen; and any obscurity, uncertainty, or ambiguity therein will be resolved in favor of the seamen and against the master.[58] However, it is only when a given stipulation of their general contract of shipment signifies such improvidence or ignorance on the part of the seamen as to make its enforcement unreasonable, or is such as contravenes a settled policy of the law maritime, that it will be considered void and without obligatory force.[59] The validity and construction of the contract is to be determined with reference to the laws of the country where it is executed,[60] even though the ship is that of a foreign nation;[61] but in the absence of evidence of the law of the place where the contract is made, the law maritime will be presumed to control the contract.[62]

**2. SHIPPING ARTICLES — a. Necessity.** The execution of shipping articles is required by statute in the United States where the vessel is bound on a foreign voyage or from a port in one state to a port in any other than an adjoining state,[63]

The Canada, 7 Fed. 119, 7 Sawy. 173; Roberts *v.* The Windermere, 2 Fed. 722; The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477. And see The Trimountain, 24 Fed. Cas. No. 14,175, 5 Ben. 246.

**53.** The Gilbert Knapp, 37 Fed. 209; The E. A. Barnard, 2 Fed. 712.

**54.** George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477.

**55.** The Seguranca, 58 Fed. 908; The Norwegian Steamship Co. *v.* Washington, 57 Fed. 224, 6 C. C. A. 313. But see The Wyoming, 36 Fed. 493, where it is held that unless proof is furnished that stevedores' services are rendered upon the credit of the vessel, a maritime lien for the services will not be allowed.

**Services of landsmen,** however, who procure cargoes for a vessel and assist in loading them, are not maritime. The Ole Oleson, 20 Fed. 384.

**Coopers.**— The services of coopers in preparing the cargoes of vessels for delivery are maritime services. The Onore, 18 Fed. Cas. No. 10,538, 6 Ben. 564. And see The Trimountain, 24 Fed. Cas. No. 14,175, 5 Ben. 246.

**56.** The Joseph B. Thomas, 148 Fed. 762 [*affirming* 136 Fed. 693].

**57.** Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500; Bains *v.* The James and Catherine, 2 Fed. Cas. No. 756, Baldw. 544; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; The Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas. No. 2,280, Blatchf. & H. 139]; Ellison *v.* The Bellona, 8 Fed. Cas. No. 4,406, Bee 106; The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253; The Ringleader, 20 Fed. Cas. No. 11,850, 6 Ben. 400.

**When the contract is oral** the court will, as between several versions, adopt the one that is most consistent with common sense and with the preponderance of testimony. The A. H. Jennie, 29 Fed. 150.

**58.** The Alice Blanchard, 92 Fed. 519; The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; The Disco, 7 Fed. Cas. No. 3,922, 2 Sawy. 474; Wope *v.* Hemenway, 30 Fed. Cas. No. 18,042, 1 Sprague 300 [*affirmed* in 22 Fed. Cas. No. 13,149, 2 Curt. 301].

**59.** The Joseph B. Thomas, 148 Fed. 762 [*affirming* 136 Fed. 693]. And see Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500.

**Specific performance required.**— It has been held that a seaman who signs a contract to perform a voyage is bound to a specific performance, and may not elect to pay damages for non-performance of it, as in ordinary personal covenants. *Ex p.* Pool, 2 Va. Cas. 276.

**60.** The Ucayali, 164 Fed. 897.

**61.** The Troop, 117 Fed. 557 [*affirmed* in 125 Fed. 672, 60 C. C. A. 362].

**62.** The Countess of Dufferin, 6 Fed. Cas. No. 3,280, 10 Ben. 155.

**63.** U. S. Rev. St. (1878) §§ 4511, 4520 [U. S. Comp. St. (1901) pp. 3068, 3073].

the effect of a seaman being shipped without a written contract, where the burden of the vessel and the nature of the voyage are such as to bring the case within the statutes, being to confer on the seaman a right to leave the vessel at any time,[64] and to entitle him to recover the highest rate of wages obtaining at the port from which he was shipped.[65]

**b. Execution and Mutuality.** It is essential to the validity of the shipping articles that they be signed by the seaman,[66] and by the master before any seaman signs,[67] and the contract must be executed before the vessel proceeds on its voyage;[68] but the statutory provisions requiring the articles to be signed in the

**The object of requiring shipping articles** is primarily to prevent imposition upon seamen, and disputes between them and the master. The Theodore Perry, 23 Fed. Cas. No. 13,880.

**These statutes have been held to apply to** a vessel bound on a coasting voyage to ports in several states (The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448. See also The Elvine, 19 Fed. 528), to lake navigation (The Theodore Perry, 23 Fed. Cas. No. 13,880), to vessels navigating rivers of the interior states (The Pacific, 23 Fed. 154), to vessels bound from one state to a territory (*In re* Bryant, 4 Fed. Cas. No. 2,067, Deady 118), and to steam ferry boats plying from one state to another (Hitchcock *v.* The St. Louis, 48 Fed. 312). On the other hand, neither these statutes nor the statutes regulating the agreements of fishermen require a written contract in the case of a tug towing vessels from one lake to another (The John Martin, 13 Fed. Cas. No. 7,357), nor in the case of a fishing or whaling voyage where the crew are to receive a part of the catch as compensation and the voyage is not from port to port (Burdett *v.* Williams, 27 Fed. 113; The Cornelia M. Kingsland, 25 Fed. 856). It has been held that, although there is no statutory provision requiring contracts in writing with sailors going on a voyage to the West India Islands, the general maritime law, independent of statute, requires the contract to be written. Smith *v.* Chase, 22 Fed. Cas. No. 13,023, 2 Hask. 106. And see U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514.

**The English statutes** contain similar provisions and are equally obligatory (Elsworth *v.* Woolmore, 5 Esp. 84), but their application is confined to voyages of British ships (Dickman *v.* Benson, 3 Campb. 290).

64. The Occidental, 101 Fed. 997; The Lizzie M. Dun, 30 Fed. 927; The Pacific, 23 Fed. 154; The City of Fremont, 5 Fed. Cas. No. 2,746, 2 Biss. 415; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448, limiting the application of the rule, however, to cases where the leaving is not productive of special injury to the master. *Compare* Jansen *v.* The Theodor Heinrich, 13 Fed. Cas. No. 7,215, Crabbe 226, holding that the seaman may leave at the termination of any particular voyage but not during such a voyage, as by transferring to another ship in mid-ocean.

**Application of penalties to coasting voyages.**— The master of a vessel bound on a coasting voyage does not, on failure to enter into a written agreement with his crew, incur the penalty imposed on masters of vessels bound on foreign voyages who fail to execute shipping articles. U. S. *v.* The Thomas M. Haven, 3 Fed. 347. But see The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; The Theodore Perry, 23 Fed. Cas. No. 13,880 [*following* Wolverton *v.* Lacey, 30 Fed. Cas. No. 17,932], where the penalty was imposed on the master of a lake vessel.

65. See *infra*, VI, B.

66. Johnson *v.* The Karoo, 49 Fed. 651 (holding that the signing of the names of the crew by the shipping or boarding-house master without their consent is insufficient); Dooley *v.* The Neptune's Car, 7 Fed. Cas. No. 3,997. See also The Elvine, 19 Fed. 528.

**The Russian code** expressly requires that contracts with seamen shall be signed by them in the presence of witnesses. Jansen *v.* The Theodor Heinrich, 13 Fed. Cas. No. 7,215, Crabbe 226.

**A signing by an agent of the master,** for the seamen, renders the articles invalid. *In re* Bryant, 4 Fed. Cas. No. 2,067, Deady 118.

**The signature is not required when shipment is made at a foreign port.**— Gladding *v.* Constant, 10 Fed. Cas. No. 5,468, 1 Sprague 73.

67. U. S. Rev. St. (1878) § 4511 [U. S. Comp. St. (1901) p. 3068].

**Under earlier statutes** the signature of the captain or master was not required (Botker *v.* Towner, 3 E. D. Smith (N. Y.) 132), and it was held in an early case to be competent for a seaman to sign before the appointment of the master and hence before a signature by him (Mayo *v.* Harding, 6 Mass. 300).

**Countersigning in case of numerous owners.** — Under U. S. Rev. St. (1878) § 4391 [U. S. Comp. St. (1901) p. 2998], providing that an agreement for a cod or mackerel fishing voyage shall be indorsed or countersigned by the owner of the vessel, it is not necessary, where there are many owners, that all of them should indorse or countersign the articles in order to give efficacy to them. Wait *v.* Gibbs, 4 Pick. (Mass.) 298.

68. The Theodore Perry, 23 Fed. Cas. No. 13,880, where it is said that to authorize a master to withhold the signing of the articles until the vessel has put to sea would enable him to impose upon the seaman as great a duress as if his signature were coerced by actual physical violence.

**The seaman becomes a member of the crew,** and his obligation begins, when the service is to be on board a merchant vessel, with the signing of the shipping articles (Tucker *v.* Alexandorff, 183 U. S. 424, 22 S. Ct. 195, 46

presence of a shipping commissioner have been construed, on account of the express exceptions contained therein, not to apply to coastwise voyages or voyages from a port in the United States to the West Indies.[69] A seaman is not bound by any new or unusual stipulation introduced into the articles, which is in derogation of his general rights, without full knowledge thereof and adequate compensation therefor,[70] particularly where he cannot read, and the stipulation is not read or explained to him; [71] but where the contract appears to be just and reasonable, it will be enforced by a court of admiralty, even though its meaning may not have been clearly understood by the parties.[72]

**c. Alterations and Erasures.** The articles, after they have been signed by the seaman, must be regarded as the final contract entered into between the parties,[73] and cannot be varied by a verbal agreement made by the master and the seaman.[74]

L. ed. 264; The Ida G. Farren, 127 Fed. 766); but not before the seamen are received on board (U. S. *v.* The Thomas W. Haven, 3 Fed. 347).

**69.** U. S. *v.* Smith, 95 U. S. 536, 24 L. ed. 517; U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514 [*affirming* 10 Fed. Cas. No. 5,653].

**Signature before owner, master, or consignee.**— It seems that, when the voyage comes within the statutory exceptions and a signing in the presence of a commissioner is not required, the owner, consignee, or master may perform the duties of a shipping commissioner (U. S. *v.* Smith, 95 U. S. 536, 24 L. ed. 517; U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514 [*affirming* 10 Fed. Cas. No. 5,653]; The William H. Clifford, 165 Fed. 59), but it has been held that a signing before such persons is not necessary (U. S. *v.* Bain, 5 Fed. 192).

**70.** The Almatia, 1 Fed. Cas. No. 254, Deady 473; The Australia, 2 Fed. Cas. No. 667, 3 Ware 240; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; Heard *v.* Rogers, 11 Fed. Cas. No. 6,298, 1 Sprague 556; Matern *v.* Gibbs, 16 Fed. Cas. No. 9,273, 1 Sprague 158; Mayshew *v.* Terry, 16 Fed. Cas. No. 9,361, 1 Sprague 584; The Quintero, 20 Fed. Cas. No. 11,517, 1 Lowell 38; The Sarah Jane, 21 Fed. Cas. No. 12,348, Blatchf. & H. 401.

**Presumption when signed before consul.**— A seaman cannot absolve himself from the performance of the duties undertaken by him, on the ground that he did not understand the terms of the agreement, where the articles were signed by him in the presence of a consul in a foreign country, as it will be presumed, in the absence of proof to the contrary, that the consul explained to him the nature, purport, and effect of the agreement. The Exile, 20 Fed. 878.

**Sufficiency of evidence to show fraud in executing articles.**— Evidence held insufficient see Ramirez *v.* Mexican Steamship Co., 107 Fed. 530. Evidence held sufficient see Sweeney *v.* Cloutman, 23 Fed. Cas. No. 13,685, 2 Cliff. 85.

**71.** Johnson *v.* The Frank S. Hall, 38 Fed. 258; The Samuel Ober, 15 Fed. 621.

**72.** The L. B. Snow, 15 Fed. 282.

**73.** The Exile, 20 Fed. 878; The Elvine, 19 Fed. 528.

**In England** the articles are conclusive as to the amount of wages and the voyage, but not as to other stipulations, and the latter will be upheld by the courts only when reasonable and consistent with justice. The Prince Frederick, 2 Hagg. Adm. 394; The Minerva, 1 Hagg. Adm. 347. And see The Isabella, 2 C. Rob. 241.

**74.** Johnson *v.* Dalton, 1 Cow. (N. Y.) 543; Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260; The Ucayali, 164 Fed. 897; Northwestern Steamship Co. *v.* Turtle, 162 Fed. 256, 89 C. C. A. 236 [*affirming* 154 Fed. 146]; The Lakme, 93 Fed. 230; The Alice Blanchard, 92 Fed. 519; The Quintero, 20 Fed. Cas. No. 11,517, 1 Lowell 38; Rich *v.* The Cherub, 20 Fed. Cas. No. 11,756; Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971; The Triton, 24 Fed. Cas. No. 14,181, Blatchf. & H. 282; Veacock *v.* McCall, 28 Fed. Cas. No. 16,904, Gilp. 329; White *v.* Wilson, 2 B. & P. 116; Elsworth *v.* Woolmore, 5 Esp. 84, holding that an additional agreement as to the rate of wages is invalid. But see The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83 (holding that the court may inquire into the true terms of the contract, notwithstanding the written agreement); Parker *v.* Calliope, 18 Fed. Cas. No. 10,729, 2 Pet. Adm. 272 (holding that parol evidence of supplementary grants of additional benefits is admissible).

**New or subsequent agreement.**— As the policy of the law is that the shipping articles executed before the beginning of the voyage shall constitute the contract between the parties, and as contracts executed during the voyage are liable to be attended with fraud and duress, contracts, either verbal or written, executed subsequent to the original contract, regardless of whether the latter is oral or written, are generally held invalid (Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260; The Lola, 15 Fed. Cas. No. 8,468, 6 Ben. 142; Stratton *v.* Babbage, 23 Fed. Cas. No. 13,527; Sweeney *v.* Cloutman, 23 Fed. Cas. No. 13,685, 2 Cliff. 85; Waling *v.* The Christina, 28 Fed. Cas. No. 17,059, Deady 49, 1 Oreg. 430; Frazer *v.* Hatton, 2 C. B. N. S. 512, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 5 Wkly. Rep. 632, 89 E. C. L. 512, grounding the decision upon the lack of consideration for the new articles and the lack of authority in the master to make such an agreement), but there are instances of such contracts being sustained (Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24; Rand *v.* The Hercules, 20 Fed. Cas. No. 11,548, where the original voyage had been broken up before the new contract was entered into).

However this rule does not preclude the admissibility of parol evidence where the articles are void on account of non-compliance with statutory provisions,[75] or where fraud and duress entered into their execution.[76] Statutes providing that all interlineations and erasures in the articles or duplicates thereof shall be deemed fraudulent, working no change in the papers, unless satisfactorily explained, do not apply to immaterial erasures;[77] but the principle of the statute will be followed even as to articles not made under statute.[78]

**d. Stipulations** — (I) *In General.* The provisions required by statute to be inserted in the shipping articles are essential to their validity,[79] and the statutes are mandatory;[80] but they do not prevent other reasonable provisions not contrary to law inserted in the articles from being valid and binding.[81] Stipulations in shipping articles in regard to the nature and duration of the voyage will be given a reasonable construction,[82] and where the language used has a popular sense in local usage or in its application to the subject-matter of the contract, more or less comprehensive than the words naturally import, such popular sense will be adopted;[83] but all cases of ambiguity will be resolved in favor of the seaman.[84]

(II) *Particular Stipulations* — (A) *As to Voyage and Term of Employment.* To comply with the law, and to be valid and binding, the shipping articles must specify clearly, definitely, and precisely the nature of the intended voyage;[85] the port or country at which it is to terminate;[86] and the duration of the voyage,

75. Page *v.* Sheffield, 18 Fed. Cas. No. 10,667, 2 Curt. 377 [*affirming* 21 Fed. Cas. No. 12,743, 1 Sprague 285].

76. The Elvine, 19 Fed. 528; The Samuel Ober, 15 Fed. 621; The Lola, 15 Fed. Cas. No. 8,468, 6 Ben. 142; The Quintero, 20 Fed. Cas. No. 11,517, 1 Lowell 38.

Fraud must be clearly established in order to justify the changing of the written contract by parol evidence. The Ucayali, 164 Fed. 897.

An omission by mistake has been held to authorize the admission of parol evidence to show the contract as to the part omitted. Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452.

77. The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232.

After signature the filling up of blanks is unauthorized.— Bark Shetland *v.* Johnson, 21 App. Cas. (D. C.) 416.

78. The Richard Vaux, 20 Fed. 654.

79. The Lilian, 131 Fed. 375.

80. Bark Shetland *v.* Johnson, 21 App. Cas. (D. C.) 416; The Occidental, 101 Fed. 997.

The master cannot take advantage of his own neglect by asserting that the shipping articles do not conform to the statutory requirements. The Governor Ames, 55 Fed. 327.

81. The Lilian, 131 Fed. 375.

Particular stipulations upheld.— A stipulation that the crew may be transferred to another vessel during the voyage is not invalid (Frazer *v.* Hatton, 2 C. B. N. S. 512, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 5 Wkly. Rep. 632, 89 E. C. L. 512), nor is one providing that the owners of a whaling vessel may ship the catchings home (Frates *v.* Howland, 9 Fed. Cas. No. 5,066, 2 Lowell 36), nor one prohibiting the wearing of sheath knives (The George Burnham, 10 Fed. Cas. No. 5,331, 1 Hask. 381).

82. The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526; Magee *v.* Moss, 16 Fed. Cas. No. 8,944, Gilp. 219.

The words "and elsewhere" have been rejected as void for uncertainty (Ely *v.* Peck, 7 Conn. 239); but, in other instances, have been construed as subordinate to the voyage specified, and as only authorizing such a course as may be necessary to accomplish the principal voyage (Anonymous, 1 Fed. Cas. No. 449, 5 Hughes 32; Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477. See also The Minerva, 1 Hagg. Adm. 347).

Effect of usage.— If the usage of a particular port or a particular trade authorizes an interpolation of the port of departure as the port of termination, where the shipping articles are silent in this respect, this must be qualified by another implied term, that the return of the vessel to her home port shall be within a reasonable time. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45.

83. The Ada, 1 Fed. Cas. No. 38, 2 Ware 408.

84. The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Jansen *v.* The Theodor Heinrich, 13 Fed. Cas. No. 7,215, Crabbe 226.

85. The Occidental, 101 Fed. 997; The Gem, 10 Fed. Cas. No. 5,304, 1 Lowell 180; The Westmoreland, 1 W. Rob. 216.

The object of the statute is to prevent the entrapping of seamen into a voyage of greater length or of more peril or labor than that which they have assented to and for which they ought to receive increased wages. The Grace Dollar, 160 Fed. 906, 88 C. C. A. 88 [*affirming* 149 Fed. 793], holding that the essential requisites are that the seamen shall know the duration of the voyage and the port of his final discharge.

86. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; The Horace E. Bell, 12 Fed. Cas. No. 6,702, 3 Ware 236; Magee *v.* The Moss, 16 Fed. Cas. No. 8,944, Gilp. 219,

or the time at which it is to terminate.[87] Articles indefinite, in that they leave to the option of the master whether the voyage will be a long one to one or more foreign ports, or a short one to near-by domestic ports, are void.[88] However, where the duration of the voyage is properly limited, and the port of discharge is indicated, a slight indefiniteness in the statement of the nature of the voyage does not invalidate the articles.[89] The effect of such stipulations is to deprive the master of the right to deviate from the voyage therein specified,[90] or to prolong

holding also that the articles must specify the port at which the voyage is to commence.

**The term "voyage"** always imports a definite commencement and end. Anonymous, 1 Fed. Cas. No. 449, 5 Hughes 32; Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477. The same meaning attaches to the word "cruise." The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526.

**Not all intermediate ports need be named,** for it was not the intention of congress in enacting the statute to require owners of sailing vessels engaged in the coastwise trade to specify at the inception of each voyage all the ports at which the vessel might touch, or to deprive the master of the power to exercise a reasonable discretion in touching at other convenient ports, and availing himself of the opportunities afforded by the exigencies of trade. The Mermaid, 115 Fed. 13, 52 C. C. A. 607 [*reversing* 104 Fed. 301]. See The Grace Dollar, 160 Fed. 906, 88 C. C. A. 88 [*affirming* 149 Fed. 793].

**The Merchant Shipping Act of Great Britain,** as amended by 36 & 37 Vict. c. 85, provides that the agreement may, instead of stating the nature and duration of the intended voyage, state the maximum period of the voyage or engagement, and the places or parts of the world, if any, to which the voyage or engagement is not to extend. Riley *v.* Henderson, 134 Mass. 171; The Grace Dollar, 160 Fed. 906, 88 C. C. A. 88 [*affirming* 149 Fed. 793]; The Hermine, 12 Fed. Cas. No. 6,409, 3 Sawy. 80; The Red Jacket, 8 Quebec 205. For the requirements of earlier English statutes see Roberts *v.* Knights, 7 Allen (Mass.) 449; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194; The Westmoreland, 1 W. Rob. 216.

**A master has authority,** when in a foreign port, to contract for such a voyage as will enable the seamen to return to the country of their residence. McKenzie *v.* Oglethorpe, 16 Fed. Cas. No. 8,857.

87. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; The Horace A. Bell, 12 Fed. Cas. No. 6,702, 3 Ware 236.

**Where the nature of the voyage precludes an exact statement of duration,** an approximation of the time of the voyage is sufficient (The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194), and where, on such a voyage, its duration is not stated at all, but the wages are stipulated as so much per month, the contract will be construed to be for at least a month (Kasit *v.* The Pilot Boat No. 5, 54 Fed. 537).

**Time of beginning of voyage.**— The time for the seaman to go on board and begin work must be specified in articles required by statute, but need not be in articles for a voyage to the West Indies, as such articles are not required by statute. Smith *v.* Chase, 22 Fed. Cas. No. 13,023, 2 Hask. 106.

88. The Occidental, 101 Fed. 997. *Compare* Frazer *v.* Hatton, 2 C. B. N. S. 512, 3 Jur. N. S. 694, 26 L. J. C. P. 226, 5 Wkly. Rep. 632, 89 E. C. L. 512.

**Sufficiency of articles.**— Articles have been held sufficient which name a voyage to a specified port and elsewhere for a market (U. S. *v.* Staly, 27 Fed. Cas. No. 16,374, 1 Woodb. & M. 338); a voyage to a specified port, thence to one or more ports east, if required, and back to a western port of discharge (U. S. *v.* Bain, 5 Fed. 192); a voyage from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States (Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971); and, generally, articles which indicate with reasonable clearness the nature of several voyages to be made within the specified time (The Occidental, 87 Fed. 485 [*distinguishing* Snow *v.* Wope, 22 Fed. Cas. No. 13,149, 2 Curt. 301, on the ground that it was decided under an earlier statute]. And see The Roy Somers, 107 Fed. 750). But articles have been held insufficient for indefiniteness which include almost every port and sea on the globe within the contemplated voyage. Roberts *v.* Knights, 7 Allen (Mass.) 449.

89. The Mermaid, 115 Fed. 13, 52 C. C. A. 607 [*reversing* 104 Fed. 301]; The Hermine, 12 Fed. Cas. No. 6,409, 3 Sawy. 80. And see The C. F. Sargent, 95 Fed. 179. *Compare* Marsland *v.* The Yosemite, 18 Fed. 331, where the time of service was limited, but no definite voyage was provided for, and it was held that while the vessel was remaining in the home port, either party was at liberty to terminate the service at the end of any month, on reasonable notice.

**Cases decided under English statutes not in force at the present time** see Roberts *v.* Knights, 7 Allen (Mass.) 449; The Westmoreland, 1 W. Rob. 216.

**Where the voyage is so clearly defined** as to convey to the seaman a knowledge of its duration, a failure to specify the length of the contemplated voyage is not fatal. The Red Jacket, 8 Quebec 205.

90. The J. M. Griffith, 71 Fed. 317; The Disco, 7 Fed. Cas. No. 3,922, 2 Sawy. 474; The Gem, 10 Fed. Cas. No. 5,304, 1 Lowell 180; Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24.

**The vessel must visit the ports in the order** in which they are named in the shipping articles. Turtle *v.* Northwestern Steamship Co.,

the voyage after its termination by the expiration of the time limited,[91] or by completion according to the terms of the articles.[92] In some instances, where there was no proof to the contrary and the extent of the employment was not agreed upon, the courts have held that there was an implied contract that the seamen would serve for the trip or voyage,[93] and the services of seamen after the termination of their contract has been held to be under the same terms as the original contract.[94]

(B) *As to Wages.* It is provided by statute that the articles shall state the amount of wages which each seaman is to receive;[95] and even before the enactment of the statute the courts enforced against masters of vessels the obligation to stipulate the rate of pay as an essential part of the written contract.[96] However, the stipulations named in the statute are not exclusive, and other stipulations in the articles as to wages which are reasonable and not contrary to law are binding;[97] but articles are void in so far as they provide for a forfeiture of wages in excess of that provided by statute,[98] or restrict the time within which seamen shall sue for their wages,[99] or contain other stipulations as to the period for which wages shall be paid, which are clearly beyond the authority of the master to make.[1]

162 Fed. 256 [*affirming* 154 Fed. 146]; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

**Revisiting intermediate port.**— Where an intermediate port named in the articles has been once visited, a return thereto on the same voyage is unauthorized, in the absence of specific authority contained in the shipping articles. Rury *v.* McCay, 84 Fed. 360; Heinrici *v.* The Laura Madsen, 84 Fed. 362.

**Option exercisable only once.**— Where the articles allow some discretion as to the port to be visited, or at which the voyage is to be terminated, the master may, in the first instance, select the port within the boundaries named, but having once exercised his option, he will not be permitted to select another port. The Falls of Keltie, 114 Fed. 357; Douglass *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147; Reynolds *v.* The Simoon, 20 Fed. Cas. No. 11,733.

**To justify a deviation** from the direct voyage specified in the shipping articles, the same must be unpremeditated, and caused by a *vis major.* U. S. *v.* White, 28 Fed. Cas. No. 16,683.

**91.** The Belvedere, 100 Fed. 498 [*affirmed* in 108 Fed. 299, 47 C. C. A. 338].

**Necessary delay.**— Shipping articles providing for a stay of a few days at a port until the cargo is landed are not violated by making a cruise while waiting the arrival of the consignee of the goods. Ellison *v.* The Bellona, 8 Fed. Cas. No. 4,406, Bee 106. Likewise a putting into port for necessary repairs is not such a deviation as will discharge seamen from their articles. Botker *v.* Towner, 3 E. D. Smith (N. Y.) 132; The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289.

**Rule when detention caused by act of God.** — The detention of seamen after the expiration of the time limited by the imprisonment of the vessel in ice must be attributed to the act of God and is excusable. The Belvedere, 100 Fed. 498 [*affirmed* in 108 Fed. 299, 47 C. C. A. 338]; Burdett *v.* Williams, 27 Fed. 113.

**92.** Dary *v.* The Caroline Miller, 36 Fed. 507; The Edwin, 23 Fed. 255.

**When voyage completed.**— The voyage does not terminate at the arrival of the vessel at the first port in the home country, nor until an arrival at the port of discharge. U. S. *v.* Smith, 27 Fed. Cas. No. 16,337, 1 Mason 147.

**Deviation for purpose of selling cargo.**— A whaling voyage does not include or permit of a trading voyage to dispose of the cargo after it is obtained. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45.

**93.** Longstreet *v.* The R. R. Springer, 4 Fed. 671; Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384; Jansen *v.* The Theodor Heinrich, 13 Fed. Cas. No. 7,215, Crabbe 226.

**94.** Thompson *v.* Faussat, 23 Fed. Cas. No. 13,954, Pet. C. C. 182.

**95.** U. S. Rev. St. (1878) § 4511 [U. S. Comp. St. (1901) p. 3068].

**96.** The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452.

**97.** The Lillian, 131 Fed. 375 [*followed* in The Joseph B. Thomas, 148 Fed. 762 (*affirming* 136 Fed. 693)], holding valid a stipulation that the crew shall make no claim for wages while the vessel is detained by ice prior to departure); Hogan *v.* The J. D. Peters, 78 Fed. 368 (holding that, on coasting voyages, a stipulation in regard to an allotment of wages is valid).

**Valid stipulation as to time and place of payment.**— A stipulation in the articles that no seaman shall demand or be entitled to his wages until the arrival of the vessel at the port of discharge and the delivery of her cargo is valid and obligatory. Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384. However, such a stipulation is to be regarded merely as one concerning the time and place of payment, and does not cause a forfeiture of wages where the arrival of the ship at the port of discharge is prevented by capture by a foreign nation. Johnson *v.* Sims, 13 Fed. Cas. No. 7,413, 1 Pet. Adm. 215.

**98.** The San Marcos, 27 Fed. 567.

**99.** The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83.

**1.** Canizares *v.* The Santissima Trinidad, 5 Fed. Cas. No. 2,383, Bee 353.

**3. Breach of Contract and Damages.** The contract of employment may be dissolved by cruel and unwarrantable treatment on the part of the master,[2] and by an abandonment of the ship by the seamen with the consent of the master,[3] but not by the death, disability, removal, or resignation of the master and the substitution of another in his stead,[4] nor by inability to obtain freight,[5] or the disturbed condition of the country to which the vessel is bound, where such condition is the same as at the time of sailing.[6] In addition to the wages recoverable by the seaman on a breach of the contract by the master,[7] and the expenses of his return to the port of shipment,[8] general damages for breach of contract may be recovered.[9]

**B. Discharge — 1. By Master or Owner — a. Grounds.** Claims for wages are highly favored in admiralty courts, and discharges are not justified for trivial causes,[10] nor for a single offense,[11] unless of a highly aggravated character.[12] Generally speaking, the causes which justify a discharge before termination of the voyage are such as amount to a disqualification and show the seaman to be unfit for the service, or to be trusted in the vessel.[13] Such causes are continued disobedience or insubordination;[14] mutinous and rebellious conduct persevered in;[15]

**A stipulation for a low rate of wages** for part of the voyage and intended as a cover of an evasion of the statute prohibiting advances and prepayment of wages is unlawful and void. The Kestor, 110 Fed. 432.

2. Weiberg *v.* The St. Oloff, 29 Fed. Cas. No. 17,357, 2 Pet. Adm. 428.

3. The Philadelphia, 19 Fed. Cas. No. 11,084, Olcott 216.

4. U. S. *v.* Cassedy, 25 Fed. Cas. No. 14,745, 2 Sumn. 582; U. S. *v.* Haines, 26 Fed. Cas. No. 15,275, 5 Mason 272; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,291, 1 Mason 443.

5. Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971.

6. Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,371 [*affirming* 4 Fed. Cas. No. 2,372, McAllister 77].

**Great danger.**— The seaman may treat as a breach of contract the master's employment of him on a voyage which would expose him to greater danger than he had reason to anticipate. Burton *v.* Pinkerton, L. R. 2 Exch. 340, 36 L. J. Exch. 137, 16 L. T. Rep. N. S. 419, 15 Wkly. Rep. 1139.

7. See *infra*, VI, F, 1.

8. See *infra*, V, D, 2.

9. The Sirius, 47 Fed. 825; Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,371 [*affirming* 4 Fed. Cas. No. 2,372, McAllister 771]; Dougherty *v.* American Steamship Co., 7 Fed. Cas. No. 4,023; Farrell *v.* French, 8 Fed. Cas. No. 4,683, Blatchf. & H. 275; McKenzie *v.* Oglethorpe, 16 Fed. Cas. No. 8,857; Nevitt *v.* Clarke, 18 Fed. Cas. No. 10,138, Olcott 316; Sunday *v.* Gordon, 23 Fed. Cas. No. 13,616, Blatchf. & H. 569; The Justitia, 12 P. D. 145, 6 Aspin. 198, 56 L. J. P. D. & Adm. 111, 57 L. T. Rep. N. S. 816. But see The Superior, 22 Fed. 927.

10. The Idlehour, 63 Fed. 1018; The Garnet, 10 Fed. Cas. No. 5,244, 3 Sawy. 350; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58.

11. The Villa Y Herman, 101 Fed. 132; Marsland *v.* The Yosemite, 18 Fed. 331.

**Seamen shipping on a pleasure yacht and signing shipping articles** can only be discharged in conformity with the ordinary maritime law, which does not justify a discharge for single acts of negligent disobedience. Marsland *v.* The Yosemite, 18 Fed. 331.

12. The Villa Y Herman, 101 Fed. 132; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; The Garnet, 10 Fed. Cas. No. 5,244, 3 Sawy. 350; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58.

13. The Villa Y Herman, 101 Fed. 132; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

**Failure to provide suitable clothing or bedding** justifies the master in discharging seamen at the inception of the voyage. The George Burnham, 10 Fed. Cas. No. 5,331, 1 Hask. 381.

14. Tios *v.* Radovich, 10 La. Ann. 101, 63 Am. Dec. 592; The T. F. Oakes, 36 Fed. 442, 13 Sawy. 498; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168. And see The Enterprise, 127 Fed. 765; Russell *v.* The Twilight, 43 Fed. 320.

**Seamen who refuse to work on Sunday** because not allowed double pay, under a custom of the port near which they are at anchor, may be discharged. The Richard Matt, 20 Fed. Cas. No. 11,766, 1 Biss. 440. But see The Cyane, 13 Fed. Cas. No. 7,381.

**Failure to report for duty in time.**— A seaman who has signed articles, and does not report for duty at the stipulated time, or, if no time is stipulated, within what is under the circumstances a reasonable time, may be discharged. Smith *v.* Chase, 22 Fed. Cas. No. 13,023, 2 Hask. 106.

**Refusal of a fireman to accept orders from any one except the engineer in chief** will justify his discharge. Walter *v.* Kamchatker, 29 Fed. Cas. No. 17,119.

15. The T. F. Oakes, 36 Fed. 442, 13 Sawy. 498; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm.

gross dishonesty, or embezzlement, or theft;[16] habitual drunkenness;[17] or where the seaman is habitually a stirrer-up of quarrels,[18] or by his own fault renders himself incapable of performing his duty.[19] As a general rule the maritime law requires the master to receive back a seaman when he has thus discharged him, if he repents and seasonably offers to return to his duty and make satisfaction,[20] unless the offense for which he was discharged was of an aggravated or disqualifying character.[21]

**b. What Constitutes.** A discharge need not be proved by direct evidence, but may be inferred from circumstances,[22] such as payment, or permission to leave the vessel,[23] or deferring beyond a reasonable time to unload the vessel.[24] The discharge of the crew by sale of the vessel on execution is of the same effect as to their rights as the breaking up of the voyage or discharge of the crew by act of the master.[25]

**c. In Foreign Port.** Discharges in a foreign port, without the express approval of the American consul, when one is present, or without the consent of the seaman, are not favored in the acts of congress or by the courts of the United States;[26] and in all such cases the burden of proof is upon the master to prove to the satisfaction of the court that they were clearly just and reasonable,[27] and necessary,[28] and that he could not retain them on board with safety.[29]

186; Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

**An assault by a mariner on the captain** justifies the latter in discharging him unless the mariner makes an apology. Buck *v.* Lane, 12 Serg. & R. (Pa.) 266.

16. Black *v.* The Louisiana, 3 Fed. Cas. No. 1,461, 2 Pet. Adm. 268; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

17. The Bertha, 111 Fed. 550; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

A single offense of drunkenness is not ordinarily sufficient to warrant the discharge of a common seaman without some added reason. Lyons *v.* The Grace Littleton, 50 Fed. 285. But the station of the party and the nature of his duty are always to be kept in view. The Garnet, 10 Fed. Cas. No. 5,244, 3 Sawy. 350. Thus the dismission of a cook or steward, when found incapable from drunkenness, may be ratified with more latitude than that of mariners. Black *v.* The Louisiana, 3 Fed. Cas. No. 1,461, 2 Pet. Adm. 268; The Garnet, *supra*. And a first mate may be discharged for one such offense. The Garnet, *supra*. And see The El Dorado, 8 Fed. Cas. No. 4,327, 1 Lowell 289.

**Evidence held insufficient to justify discharge for drunkenness.**— Caffyn *v.* Peabody, 149 Fed. 294.

18. The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; The George Burnham, 10 Fed. Cas. No. 5,331, 1 Hask. 381; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

19. Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58.

20. Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Nieto *v.* Clark, 18 Fed. Cas. No. 10,262, 1 Cliff. 145. And see *supra*, note 12.

21. Black *v.* The Louisiana, 3 Fed. Cas. No. 1,461, 2 Pet. Adm. 268.

22. The Frank C. Barker, 19 Fed. 332; The David Faust, 7 Fed. Cas. No. 3,595, 1 Ben. 183; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454.

**Words spoken by the master in anger** do not amount to a discharge, although such as might imply a discharge if spoken under different circumstances. Natchez, etc., Nav. Co. *v.* Price, 74 Fed. 845, 21 C. C. A. 145; The Jefferson Borden, 6 Fed. 301; Babbell *v.* Gardiner, 2 Fed. Cas. No. 692, Bee 87.

23. Dixon *v.* The Cyrus, 7 Fed. Cas. No. 3,930, 2 Pet. Adm. 407; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454.

24. The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232.

25. The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396.

26. Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Nieto *v.* Clark, 18 Fed. Cas. No. 10,262, 1 Cliff. 145; The Elizabeth, 2 Dods. 403.

27. Nieto *v.* Clark, 18 Fed. Cas. No. 10,262, 1 Cliff. 145.

28. Jones *v.* Sears, 13 Fed. Cas. No. 7,494, 2 Sprague 43.

29. Jones *v.* Sears, 13 Fed. Cas. No. 7,494, 2 Sprague 43; The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1; The Marina, 50 L. J. P. D. & Adm. 33, 29 Wkly. Rep. 508.

**Particular circumstances as justifying discharge.**— Incompetency on the part of a seaman will not justify the master in discharging him in a distant port, before the expiration of his term of service (Capillo *v.* Bristol Packing Co., 112 Fed. 439), nor will refusal to do duty (Johnson *v.* The Cyane, 13 Fed. Cas. No. 7,381, 1 Sawy. 150), nor a defect in shipping articles, in not specifying the terms of the voyage (Burke *v.* Buttman, 4 Fed. Cas. No. 2,160, 1 Lowell 191); but an attempt to rape a female passenger in a foreign port, and

**2. By Consul.** By statute,[30] a consul is authorized to discharge a seaman on the application of the master, or that of the seaman,[31] and a master cannot lawfully discharge a seaman in a foreign port without the intervention of a consul,[32] who must require of the master payment of the wages then due,[33] and must, after granting the discharge, attach a certificate thereof to the crew list and shipping articles,[34] showing clearly his jurisdiction and the grounds of his action,[35] and, fraud excepted, his action is binding on all parties in those cases in which the law gives him a discretion.[36] The causes for which he may discharge on the application of the seaman are specified, but not in the case of the application by the master.[37]

**3. Right of Seamen to Demand Discharge.** Seamen may demand their discharge if they ship under a misapprehension as to the voyage, although it does not appear that there was any intention to practise a fraud upon them,[38] or where there is unnecessary deviation from [39] or breaking up and abandonment of the original voyage,[40] failure to provide an adequate supply of provisions,[41] persistent ill-treatment by the officers,[42] or a change of the flag, that is to say, of the

her refusal to remain on board unless he is discharged, justify his immediate dismissal (Nieto *v.* Clark, 18 Fed. Cas. No. 10,262, 1 Cliff. 145 [*affirming* 18 Fed. Cas. No. 10,261]).

30. U. S. Rev. St. (1878) § 4580, as amended by 23 U. S. St. at L. 54 [U. S. Comp. St. (1901) p. 3106].

**Under Acts Feb. 28, 1803, and July 20, 1840,** the discharge of a seaman in a foreign port can be ordered by the consul only on the consent of the seaman given or proved before him, and the party relying on such discharge in defense to an action for subsequent wages must show the fact that such consent was given. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; Tingle *v.* Tucker, 23 Fed. Cas. No. 14,057, Abb. Adm. 519.

31. The T. F. Oakes, 36 Fed. 442.

**If any deceit or collusion is practised by the master** in obtaining the discharge he can claim no benefit or immunity under it. Tingle *v.* Tucker, 23 Fed. Cas. No. 14,057, Abb. Adm. 519.

32. The T. F. Oakes, 36 Fed. 442.

33. The T. F. Oakes, 36 Fed. 442.

**The money settlement need not be made before the consul,** and he is not entitled to charge a commission on the amount paid for merely witnessing the payment. Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56.

34. The T. F. Oakes, 36 Fed. 442.

35. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81.

36. Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81.

**Where a hearing has been had on the merits,** on the demand of the master, or the seaman, and a proper record preserved of the consul's decision and judgment, discharging the seaman, it is ordinarily entitled to full credence; but, where there has been no hearing, no judgment, and no record, a forced discharge abroad is illegal, and it is no defense that it was abetted by irregular action of the consular office. The Sachem, 59 Fed. 790.

37. The T. F. Oakes, 36 Fed. 442, holding that the causes for which a seaman may be discharged on the master's application, not being specified in the statute, must be such as are sanctioned by the principles or usages of maritime law, as recognized in the United States, and that a premeditated and persistent shirking and slighting of duty, as well as a deliberate and continued attitude of insolence and defiance to his superiors, on the part of a seaman, is such a case.

**Disobedience and disability.**— Mere disobedience is not a sufficient ground for discharge by a consul (Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81), nor disability arising from wounds contracted in the service of the ship (Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1).

**The propriety of the consul's interference** is to be determined upon the facts which were before him, and not by the case which may be afterward shown upon a trial. Tingle *v.* Tucker, 23 Fed. Cas. No. 14,057, Abb. Adm. 519.

38. The Kambira, 100 Fed. 118.

39. Moran *v.* Baudin, 17 Fed. Cas. No. 9,785, 2 Pet. Adm. 415.

**Deviation from the voyage agreed upon from accident or overruling necessity** does not entitle the mariner to his discharge; but a deviation of importance, without necessity, does. Moran *v.* Baudin, 17 Fed. Cas. No. 9,785, 2 Pet. Adm. 415; The George Holme, 1 Hagg. Adm. 370; The Minerva, 1 Hagg. Adm. 347; The Countess of Harcourt, 1 Hagg. Adm. 248; The Eliza, 1 Hagg. Adm. 182.

**Deviation may be justified by the shipping articles.**— *In re* Chung Fat, 96 Fed. 202.

40. Thorson *v.* Peterson, 14 Fed. 742, 11 Biss. 497; Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,371 [*affirming* 4 Fed. Cas. No. 2,372, McAllister 77].

**Abandonment by delay or detention.**— Where the seaman claims his discharge on the ground that the voyage has been abandoned, and the only evidence of the abandonment is that a delay or detention has occurred in the course of it, the delay or detention to produce such a result should appear to be unreasonable. Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,371.

41. The Amalia, 3 Fed. 652.

42. Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2

nationality of the vessel,[43] and, by disrating an officer and placing him before the mast, the master rescinds his contract; and, if the rescission is accepted by the officer, he is entitled to his discharge.[44]

4. DAMAGES FOR WRONGFUL DISCHARGE.[45] If, during a voyage for which a seaman has shipped, he is wrongfully discharged by the master, the owners are liable for the damage,[46] measured by the equities of the particular case,[47] and allowed in some cases up to the successful termination of the voyage,[48] in others, up to the return of the seaman to the country where he originally shipped, without reference to the termination of the voyage;[49] and in either case including, in

Lowell 81, holding that if they leave the vessel for this reason they are not deserters.

It must be a clear case to entitle a seaman to discharge.—Aertsen *v.* The Aurora, 1 Fed. Cas. No. 95, Bee 161; Turner's Case, 21 Fed. Cas. No. 14,248, 1 Ware 77.

43. Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10.

44. The Mary C. Conery, 9 Fed. 222; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194.

45. Extra wages on wrongful discharge see *infra*, VI, F, 1.

46. The Dolphin, 7 Fed. Cas. No. 3,972, 6 Ben. 402; Hunt *v.* Colburn, 12 Fed. Cas. No. 6,886, 1 Sprague 215.

The mate is entitled to command in the absence of the master, and, if a seaman be wrongfully dismissed by him, the owners are liable therefor, as the act of their agent. Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541.

47. Croucher *v.* Oakman, 3 Allen (Mass.) 185; The America, 1 Fed. Cas. No. 286, Blatchf. & H. 185; Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Emerson *v.* Howland, 8 Fed. Cas. No. 4,441, 1 Mason 45; Farrell *v.* French, 8 Fed. Cas. No. 4,683, Blatchf. & H. 275; Foye *v.* Dabney, 9 Fed. Cas. No. 5,022, 1 Sprague 212; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; Pierce *v.* The Victory, 19 Fed. Cas. No. 11,149*a*; The Great Eastern, L. R. 1 A. & E. 384, 36 L. J. Adm. 15, 17 L. T. Rep. N. S. 228; The Frederick, 1 Hagg. Adm. 211.

In ordinary cases a full indemnity for his loss, deducting his wages earned in other employment during the period of his engagement, should be held sufficient. The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315.

Rule of settlement in case of death or sickness.— Under shipping articles which provide that, when a man is separated from the vessel during the voyage by death or sickness, he shall be paid at a certain rate, but which do not provide for payment in any other case of separation, the court ordinarily adopts the same rate in case of a man being discharged during the voyage for some other cause than sickness, and without his own fault. But if there are circumstances showing that this rule of settlement would not be just and reasonable, the rule will not be adopted; the object of the court being to ascertain and carry out the intention of the parties, which they have not expressed. Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56.

Value of clothing detained by master may, in an action by a seaman for his wrongful discharge in a foreign port, be recovered as a part of the damages. Hunt *v.* Colburn, 12 Fed. Cas. No. 6,886, 1 Sprague 215; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58.

Waiver of damages.— Where a seaman has been wrongfully discharged, and on the same day the master offers to take him back on the return voyage, and thereby save him any loss which he may sustain from the discharge, a refusal to accept such offer is a waiver of damages for the wrongful discharge. Dary *v.* The Caroline Miller, 36 Fed. 507.

48. Grant *v.* The Maria Denning, 28 Mo. 280; The Topgallant, 84 Fed. 356; Fee *v.* Orient Guano Mfg. Co., 44 Fed. 430 [*affirming* 36 Fed. 509]; The Heroe, 21 Fed. 525; The America, 1 Fed. Cas. No. 286, Blatchf. & H. 185; The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315; Farrell *v.* French, 8 Fed. Cas. No. 4,683, Blatchf. & H. 275; Hart *v.* The Littlejohn, 11 Fed. Cas. No. 6,153, 1 Pet. Adm. 115; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; The Mary Belle Roberts, 16 Fed. Cas. No. 9,200, 3 Sawy. 485; The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1; Veacock *v.* McCall, 28 Fed. Cas. No. 16,904, Gilp. 329; The Elizabeth, 6 Jur. 156.

If the voyage is extended beyond the usual period by an accident, a seaman can only recover full wages for a successful trip of the ordinary length, and not for the actual length of the trip. Cunningham *v.* The Low Water, 28 Mo. 338.

This rule is not applicable to voyages upon inland waters. The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315.

Consent of a seaman to his discharge is no defense to his action for his wages for the rest of the trip, where the consent is conditioned on his receiving a full month's wages, which were not paid. Boston *v.* Ocean Steamship Co., 197 Mass. 561, 83 N. E. 1116.

49. Croucher *v.* Oakman, 3 Allen (Mass.) 185; Sullivan *v.* Morgan, 11 Johns. (N. Y.) 66; Hoyt *v.* Wildfire, 3 Johns. (N. Y.) 518; Thompson *v.* The Sam Brown, 45 Fed. 508; The Hudson, 8 Fed. 167; Worth *v.* The Lioness No. 2, 3 Fed. 922, 2 McCrary 208; Burke *v.* Buttman, 4 Fed. Cas. No. 2,160, 1 Lowell 191; Foye *v.* Dabney, 9 Fed. Cas. No. 5,022, 1 Sprague 212; Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285 [*affirmed* in 18 Fed. Cas. No. 10,667, 2 Curt. 377]; The Beaver, 3 C. Rob. 92; Robinett *v.* The Exeter, 2 C. Rob. 261.

addition to his wages, the necessary expenses of his return,[50] deducting his intermediate earnings.[51]

## IV. PERFORMANCE OF SERVICES.

**A. In General.** During the voyage, it is the right and duty of seamen to remain by the ship,[52] and to act in accordance with the orders of the master,[53] performing with reasonable skill the duties of the positions for which they are hired,[54] and any other work necessary and within their experience and ability,[55] and, when necessary, work on Sunday [56] and holidays,[57] as well as work outside the usual working hours, may be required;[58] and loading and unloading cargo in a foreign port are implied conditions of their employment;[59] but they are not obligated to assist in unloading the cargo at the port of final discharge,[60] unless

**50.** Boston *v.* Ocean Steamship Co., 197 Mass. 561, 83 N. E. 1116; The Topgallant, 84 Fed. 356; Worth *v.* The Lioness No. 2, 3 Fed. 922, 2 McCrary 208; Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433; Farrell *v.* French, 8 Fed. Cas. No. 4,683, Blatchf. & H. 275; Foye *v.* Dabney, 9 Fed. Cas. No. 5,022, 1 Sprague 212; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; The Mary Belle Roberts, 16 Fed. Cas. No. 9,200, 3 Sawy. 485.

**51.** Grant *v.* The Maria Denning, 28 Mo. 280; Hoyt *v.* Wildfire, 3 Johns. (N. Y.) 518; Fee *v.* Orient Guano Mfg. Co., 44 Fed. 430 [*affirming* 36 Fed. 509]; Burke *v.* Buttman, 4 Fed. Cas. No. 2,160, 1 Lowell 191; Farrell *v.* French, 8 Fed. Cas. No. 4,683, Blatchf. & H. 275; Foye *v.* Dabney, 9 Fed. Cas. No. 5,022, 1 Sprague 212; Hart *v.* The Littlejohn, 11 Fed. Cas. No. 6,153, 1 Pet. Adm. 115; Jehner *v.* Philadelphia, etc., R. Co., 13 Fed. Cas. No. 7,255; The Mary Belle Roberts, 16 Fed. Cas. No. 9,200, 3 Sawy. 485.

**The intermediate earnings of the seaman should be deducted from the expenses of his return,** and not from the wages due. Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433; Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; The Mary Belle Roberts, 16 Fed. Cas. No. 9,200, 3 Sawy. 485.

**Where a mate returns home in another vessel before the mast,** and it appears that there was no opportunity for him to return home on a vessel as mate, he will be allowed wages to the home port, without any deduction for wages earned before the mast. Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285 [*affirmed* in 18 Fed. Cas. No. 10,667, 2 Curt. 377]. And see The Cornelia Amsden, 6 Fed. Cas. No. 3,234, 5 Ben. 315.

**Duty to seek employment.**— It is the duty of seamen wrongfully discharged to use reasonable diligence to obtain similar employment elsewhere, and, where they could have obtained such employment, they can only recover, in a suit for breach of the contract, the difference between what they could thereby have earned and what they would have received under the contract. The Abbie M. Deering, 105 Fed. 400.

**52.** Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443, holding that after the ship has been captured they should remain by the ship so long as there is any hope of recovering the property.

**53.** The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289; The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1 (holding that they are not authorized to make a jettison of any part of the cargo without the order of the master); Caroe *v.* Bayliss, 72 J. P. 525.

**Refusal to perform service** while at a port is not punishable by imprisonment under the present United States statutes. The South Portland, 111 Fed. 767.

**54.** The Buena Vista, 4 Fed. Cas. No. 2,105, 3 Blatchf. 510; Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283; Caroe *v.* Bayliss, 72 J. P. 525. And see The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289.

**A person secreted on board** and who is discovered after the vessel leaves port can be required to perform any service within his ability, but cannot be required to perform all the duties of an able seaman. Allen *v.* Hallet, 1 Fed. Cas. No. 223, Abb. Adm. 573.

**Where it is the duty of the crew to handle cargo,** they are not exempt from handling a cargo consisting of ice, unless such exemption is expressly mentioned in the shipping articles or clearly established by custom. O'Brien *v.* The Cramp, 84 Fed. 696.

**55.** Russell *v.* The Twilight, 43 Fed. 320; Allen *v.* Hallet, 1 Fed. Cas. No. 223, Abb. Adm. 573.

**The rule is otherwise as to a ship-keeper.**— The Harvest, 11 Fed. Cas. No. 6,175, Olcott 271.

**56.** The Lakme, 93 Fed. 230; Smith *v.* The J. C. King, 3 Fed. 302; The Richard Matt, 20 Fed. Cas. No. 11,766, 1 Biss. 440; Ulary *v.* The Washington, 24 Fed. Cas. No. 14,323, Crabbe 24. And see Johnson *v.* The Cyane, 13 Fed. Cas. No. 7,381, 1 Sawy. 150, holding that a seaman has no right to refuse to work in a foreign port on a day which is Sunday by our calendar, but which is not observed as a holiday in such port owing to a difference in the calendar.

**57.** The Lakme, 93 Fed. 230.

**58.** The Lakme, 93 Fed. 230.

**59.** Cuban Steamship Co. *v.* Fitzpatrick, 66 Fed. 63; Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm. 253.

**60.** The Annie M. Smull, 1 Fed. Cas. No. 423, 2 Sawy. 226; Francis *v.* Bassett, 9 Fed. Cas. No. 5,037, 1 Sprague 16; The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151; Ryan *v.* Green, 21 Fed. Cas. No. 12,186*a*; Slacum *v.* Smith, 22 Fed. Cas. No. 12,936, 2 Cranch C. C. 149; Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm.

the shipping articles contain a stipulation to that effect,[61] or the established custom of the port requires it.[62]

**B. Disrating and Reinstatement.** Where a seaman is dismissed at a port, the master cannot require him to do work not included in the contract;[63] but when the vessel is at sea the necessities of the case require the application of a different rule, and not only may a seaman be displaced for incompetency, but he may also be disrated and compelled to perform the duties of an inferior position.[64] Although the master is necessarily the judge, in the first instance, of the competency of the seaman, his judgment will be upheld by the courts only when sufficient cause existed for the disrating,[65] and it has been held that reinstatement should be made where the seaman offers to perform his proper duty.[66]

**C. Payment and Release**[67] — **1. PAYMENT.** A seaman's contract generally terminates on the completion of the voyage, and it has been held that he may properly demand payment at that time,[68] unless he is sooner discharged,[69] in

253. And see Dixon *v.* The Cyrus, 7 Fed. Cas. No. 3,930, 2 Pet. Adm. 407. *Compare* The Hudson, 6 Fed. 830 (in which case the men in question had nothing to do with the navigation of the vessel, and handling of the cargo was part of their employment); Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; The Baltic Merchant, Edw. Adm. 86.

61. Webb *v.* Duckingfield, 13 Johns. (N. Y.) 390, 7 Am. Dec. 388; The Annie M. Smull, 1 Fed. Cas. No. 423, 2 Sawy. 226; Knagg *v.* Goldsmith, 14 Fed. Cas. No. 7,872, Gilp. 207.

**A stipulation not to sue for wages until** the vessel is unloaded does not require the seaman to remain on board until the unloading is completed. Granon *v.* Hartshorne, 10 Fed. Cas. No 5,689, Blatchf. & H. 454.

62. The Annie M. Smull, 1 Fed. Cas. No. 423, 2 Sawy. 226; The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465.

**A custom is not sufficient** to render such labor obligatory unless the men are requested to remain for the purpose of unloading. The Olive Branch, 18 Fed. Cas. No. 10,490, 1 Lowell 286.

63. Wood *v.* North, 30 Fed. Cas. No. 17,960.

64. The Australia, 2 Fed. Cas. No. 667, 3 Ware 240; Burton *v.* Salter, 4 Fed. Cas. No. 2,218, Brunn. Col. Cas. 623; The Exchange, 8 Fed. Cas. No. 4,594, Blatchf. & H. 366; Smith *v.* Jordan, 22 Fed. Cas. No. 13,068, Brunn. Col Cas. 627; U. S. *v.* Savage, 27 Fed. Cas. No. 16,225, 5 Mason 460.

**The effect of the disrating is to rescind the contract.**— The Mary C. Conery, 9 Fed. 222.

**The power is remedial and not penal,** and does not authorize a degradation to the lowest place, if there is an intermediate office which the man is competent to fill. Smith *v.* Jordan, 22 Fed. Cas. No. 13,068, Brunn. Col. Cas. 627. And see Thompson *v.* Busch, 23 Fed. Cas. No. 13,944, 4 Wash. 338, holding that a mate improperly dismissed is not bound to perform the duties of a common seaman.

65. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244; The Mentor, 17 Fed. Cas No. 9,427, 4 Mason 84; The Penang, 19 Fed. Cas. No. 10,915, 4 Sawy. 100; Sherwood *v.* McIntosh, 21 Fed. Cas. No. 12,778, 1 Ware 104 (holding that a single act of intemperance is not sufficient ground for disrating).

**The mate leaving a watch may be disrated.** —Setzer *v.* The Sylvia de Grasse, 21 Fed. Cas. No. 12,676.

**In ordinary cases,** where no injustice or manifest error appears, the decision of the master will be considered as final. Kelly *v.* The Topsy, 44 Fed. 631; The Elizabeth Frith, 8 Fed. Cas. No. 4,361, Blatchf. & H. 195 [*modified* in 8 Fed. Cas. No. 4,353].

66. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244.

67. **Loss of claim or lien by assignment** see *infra*, VI, L, 4, b.

68. Boston *v.* Ocean Steamship Co., 197 Mass. 561, 83 N. E. 1116; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

**An exception** exists where the voyage is not from port to port, and, in such case, a return to the port of shipment is not a condition precedent to payment. Olsen *v.* The Edwin Post, 6 Fed. 314.

**The mere offer of the master to pay** a seaman's wages will be construed only to mean that he would rather pay the sum demanded than litigate the question and will not be construed as an admission of legal liability. The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151.

**The authority of one of several owners** to pay the seaman's wages, with his consent, to a creditor who has attached the same, may be inferred from proof of a general agency to settle with the seaman, without proof of special authority. Munroe *v.* Holmes, 5 (Mass.) 201.

**Formerly,** the service of the seaman was considered not to terminate until the discharge of the cargo, and consequently he was held not to be entitled to payment of his wages until then. Edwards *v.* The Susan, 8 Fed. Cas. No. 4,299, 1 Pet. Adm. 165; Thompson *v.* The Philadelphia, 23 Fed. Cas. No. 13,973, 1 Pet. Adm. 210. And see Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm. 253, holding that the wages are not payable until the expiration of the period allowed for collecting the freight.

69. Boston *v.* Oceanic Steamship Co., 197

United States currency, when the voyage terminates at a port of the United States.[70] A payment of wages in violation of the English [71] or United States [72] statutes providing that on foreign voyages the seamen shall receive their wages in the presence of a duly authorized shipping commissioner is of no effect,[73] and likewise a payment of the wages to a consul discharges the obligation of the master only when such payment is authorized by statute.[74]

**2. Release.** A receipt in full is only *prima facie* and not conclusive evidence of full payment and discharge of all claims for wages by the seaman,[75] and is not binding when its execution is attended with fraud, duress, or coercion,[76] or when it is not completely executed,[77] but the release is conclusive against him when

Mass. 561, 83 N. E. 1116; Walsh *v.* The Louisiana, 4 Fed. 751. And see The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83.

**70.** Trecartin *v.* The Rochambeau, 24 Fed. Cas. No. 14,163, 2 Cliff. 465 [*modifying* 20 Fed. Cas. No. 11,973, 3 Ware 304].

**Where the contract of service is terminated in a foreign port,** without fault on the part of the seaman, and he is paid in foreign coin, such coin is to be valued at its rate in the home port, under the laws of the United States; but if the payment is a voluntary advance on the part of the master, made with the assent of the seaman, the foreign coin is to be estimated at its value at the place of payment. The Cabot, 4 Fed. Cas. No. 2,277, Abb. Adm. 150.

**A payment in anything else than money** will be most rigidly scrutinized by the court, and must clearly be shown to be proper and equivalent to the payment of money. Rosenthal *v.* The Die Gartenlaube, 5 Fed. 827.

**Application of payments.**— In the absence of an agreement to the contrary, payments made to a seaman will be appropriated to the oldest service performed (The Louie Dole, 14 Fed. 862, 11 Biss. 479), and payments made by a new master are properly applied to wages earned under the former master (Smith *v.* Oakes, 141 Mass. 451, 5 N. E. 824, 55 Am. Rep. 487).

**Allowance for depreciation of currency.**— Where the seaman was shipped abroad in a foreign vessel, and his wages are payable in a foreign currency, the value of such currency must be calculated in coined money of the United States, and the amount paid to him in currency, without any allowance for premium on the coin or depreciation of the currency. The Blohm, 3 Fed. Cas. No. 1,556, 1 Ben. 228.

**71.** St. 13 & 14 Vict. c. 93, § 96.

**72.** U. S. Rev. St. (1878) § 3088 [U. S. Comp. St. (1901) p. 3088].

**The statutes do not apply** to voyages between the United States and the West Indies (U. S. *v.* French, 14 Phila. (Pa.) 497; The Brothers, 4 Fed. Cas. No. 1,968, 10 Ben. 400), nor after a decree for the wages has been made by a court of admiralty (The Araminta, 2 Jur. N. S. 310, Swab. 81, 4 Wkly. Rep. 396).

**73.** The Alexander M. Lawrence, 101 Fed. 135. And see Keslake *v.* Board of Trade, [1903] K. B. 453, 9 Aspin. 491, 67 J. P. 356, 72 L. J. K. B. 829, 89 L. T. Rep. N. S. 534, 52 Wkly. Rep. 127, 19 T. L. R. 583.

**74.** Hindsgaul *v.* The Lyman D. Foster, 85 Fed. 987; Heynsohn *v.* Merriman, 1 Fed. 728; Jones *v.* Sears, 13 Fed. Cas. No. 7,494, 2 Sprague 43.

**After the master has properly left the wages with a consul,** the ship is not liable for any misapplication by the consul (The Lyman D. Foster, 85 Fed. 987); but an appropriation of all the earnings of the vessel by the master to the payment of his own wages, to the exclusion of the seamen, is improper (The Benjamin English, 3 Fed. Cas. No. 1,306, 2 Lowell 218).

**75.** Caffyn *v.* Peabody, 149 Fed. 294; Martial *v.* The Eclipse, 53 Fed. 273 [*affirmed* in 60 Fed. 105, 8 C. C. A. 505]; The Commerce, 6 Fed. Cas. No. 3,054, 1 Sprague 34 (holding that a receipt in full of all claims, exacted as a condition of the payment of wages, does not operate as a release of any claim except the one for wages); The David Pratt, 7 Fed. Cas. No. 3,597, 1 Ware 509; Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; Jackson *v.* White, 13 Fed. Cas. No. 7,151, 1 Pet. Adm. 179; The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45 (holding that a receipt in full will not bar a claim for which the seaman has not received compensation); Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24; The Rajah, 20 Fed. Cas. No. 11,538, 1 Sprague 199; Thomas *v.* Lane, 23 Fed. Cas. No. 13,902, 2 Sumn. 1. And see Domenico *v.* Alaska Packers' Assoc., 112 Fed. 554 [*reversed* on other grounds in 117 Fed. 99, 54 C. C. A. 485]; The Lillie, 42 Fed. 237, holding that the seaman is not estopped from claiming the full amount due him by the fact that suit is brought for him by another person, where he has never admitted that the amount for which suit was brought is the full amount.

**The acceptance of wages up to date of discharge** does not bar the seaman from claiming the balance of wages which is due him. The City of New Orleans, 33 Fed. 683.

**76.** Caffyn *v.* Peabody, 149 Fed. 294; The Fred E. Sander, 95 Fed. 829; The Galloway C. Morris, 9 Fed. Cas. No. 5,204, 2 Abb. 164; The Ringleader, 20 Fed. Cas. No. 11,850, 6 Ben. 400; Savin *v.* The Juno, 21 Fed. Cas. No. 12,390, 1 Woods 300; Somerville *v.* The Francisco, 22 Fed. Cas. No. 13,171, 1 Sawy. 390 (holding the agreement in question to be inequitable and unjust); Whiteman *v.* The Neptune, 29 Fed. Cas. No. 17,569, 1 Pet. Adm. 180.

**77.** Boston *v.* Ocean Steamship Co., 197

entered into voluntarily and with a full knowledge of his rights.[78] The United States statute [79] requiring the signing of a mutual release before a shipping commissioner does not apply to voyages to the West Indies,[80] and where it does apply the validity of the release is not affected by the fact that it is not signed in the presence of the commissioner by both parties at the same time,[81] or that the seal of the commissioner is not attached.[82]

## V. DUTY OF OWNER TO SEAMEN.

**A. Seaworthiness of Vessel.** A ship-owner, among other obligations to the seamen, is bound to provide a seaworthy ship, furnished with all necessary and customary requisites for navigation, including proper equipment and a competent crew,[83] and, although it was formerly held in England that there was no

Mass. 561, 83 N. E. 1116; Hogan *v.* The J. D. Peters, 78 Fed. 368.

78. Rosenberg *v.* Doe, 146 Mass. 191, 15 N. E. 510; The George B. Ferguson, 140 Fed. 955; Pettersson *v.* The Empire Transp. Co., 111 Fed. 931, 50 C. C. A. 63; The Charles D. Lane, 106 Fed. 746; The Belvedere, 100 Fed. 498; The Pennsylvania, 98 Fed. 744 (holding that the fact that the seamen greatly needed the money paid them does not amount to legal duress or coercion); Kelly *v.* The Topsy, 44 Fed. 631; The Samuel E. Spring, 27 Fed. 764; The Hermon, 12 Fed. Cas. No. 6,411, 1 Lowell 515 (where the settlement was deliberately made by the seaman with the advice of his proctor).

**Rule where seaman's rights are doubtful.**— It has been held that a receipt for less than the amount due will not be set aside where the legal rights of the party were doubtful, and honestly contested, and opportunity was given him to satisfy himself in relation thereto. Thompson *v.* Faussatt, 23 Fed. Cas. No. 13,954, Pet. C. C. 182.

79. U. S. Rev. St. (1878) § 4552 [U. S. Comp. St. (1901) p. 3089].

**The English statute,** Merchant Shipping Act (1894) (57 & 58 Vict.), § 136, contains similar provisions for the execution of a release before a superintendent, but a conditional release is not a "release" within the meaning of the statute. Collins *v.* Simpson Steamship Co., 23 T. L. R. 241 [*reversed* in part in 24 T. L. R. 178].

80. Burton *v.* Frye, 139 Mass. 131, 29 N. E. 476.

81. Pettersson *v.* Empire Transp. Co., 111 Fed. 931, 50 C. C. A. 63; The Pennsylvania, 98 Fed. 744.

82. Rosenberg *v.* Doe, 146 Mass. 191, 15 N. E. 510.

83. The Troop, 128 Fed. 856, 63 C. C. A. 584; The Lizzie Burrill, 115 Fed. 1015; Olson *v.* Oregon Coal, etc., Co., 104 Fed. 574, 44 C. C. A. 51; Gabrielson *v.* Waydell, 67 Fed. 342; The Julia Fowler, 49 Fed. 277; Clowes *v.* The Frank and Willie, 45 Fed. 494; The A. Heaton, 43 Fed. 592; The Queen, 40 Fed. 694; Olson *v.* Flavel, 34 Fed. 477; Dixon *v.* Cyrus, 7 Fed. Cas. No. 3,930, 2 Pet. Adm. 407; The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110; Halverson *v.* Nisen, 11 Fed. Cas. No. 5,970, 3 Sawy. 562; The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289; The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490; Rice *v.* The Polly and Kitty, 20 Fed. Cas. No. 11,754, 2 Pet. Adm. 420.

**The standard of seaworthiness** varies with the character of the voyage and the nature of the cargo. Under some circumstances, such as a short voyage with a cargo of lumber, a leaky vessel may be seaworthy. Farrell *v.* Mayers, 8 Fed. Cas. No. 4,685.

**Extent of owner's duty.**— While seaworthiness includes a competent crew, yet the owner does not warrant to each seaman the competency of the others, all alike being engaged in the common employment of navigating the ship. The E. B. Ward, Jr., 20 Fed. 702; Dixon *v.* The Cyrus, 7 Fed. Cas. No. 3,930, 2 Pet. Adm. 407. Nor is the owner an insurer or warrantor of the seamen against latent and undiscoverable defects in the ship. The Lizzie Frank, 31 Fed. 477. And see Riley *v.* State Line Steamship Co., 29 La. Ann. 791, 29 Am. Rep. 249. The owners having performed all that can reasonably be done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established. The City of Alexander, 17 Fed. 390. If a vessel is constructed and equipped in the mode usual and customary with other vessels of like character, and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence or fault on the part of the owner. The Lizzie Frank, *supra*; The Harold, 21 Fed. 428; The Rheola, 19 Fed. 926, 22 Blatchf. 124. And see Sunney *v.* Holt, 15 Fed. 880.

**It is a misdemeanor** under the United States statute to knowingly send an unseaworthy ship to sea. 30 U. S. St. at L. 758, c. 28, § 11 [U. S. Comp. St. (1901) p. 3095]. In England a similar law is in force. See Hedley *v.* Pinkney, [1892] 1 Q. B. 58, 7 Aspin. 135, 56 J. P. 308, 61 L. J. Q. B. 179, 66 L. T. Rep. N. S. 71, 40 Wkly. Rep. 113.

**Evidence held sufficient to show negligence in not providing proper appliances.**— Eldridge *v.* Atlas Steamship Co., 58 Hun (N. Y.) 96,

implied warranty of seaworthiness in the contracts between an owner of a ship and a seaman,[84] the rule has been there changed by statute to conform to the American doctrine.[85] If seamen have reason to believe, and do believe, that a vessel is unseaworthy, before the commencement of the voyage, they may lawfully refuse to go to sea in her;[86] or if, after commencing the voyage, they become apprehensive of danger from unseaworthiness, it is not mutinous in them, in a body, to apply respectfully to the officers and urge that the ship be put back to port,[87] or they may demand a survey,[88] and if in consequence of the survey the vessel is declared unseaworthy, the consul is empowered either to discharge the

11 N. Y. Suppl. 468 [*affirmed* in 134 N. Y. 187, 32 N. E. 66]; Minor *v.* Clark, 55 Hun (N. Y.) 603, 8 N. Y. Suppl. 616; The Shenandoah, 134 Fed. 304.

**Presumption of seaworthiness.**— When a ship undertakes a voyage, she is presumed to be seaworthy; but it is a presumption which may be overcome, not only by direct proof, but by circumstances. La Fernier *v.* Soo River Lighter, etc., Co., 129 Mich. 596, 89 N. W. 353.

84. Couch *v.* Steel, 2 C. L. R. 940, 3 E. & B. 402, 18 Jur. 515, 23 L. J. Q. B. 121, 2 Wkly. Rep. 170, 77 E. C. L. 402, 24 Eng. L. & Eq. 77.

85. See Hedley *v.* Pinkney, etc., Steamship Co., [1892] 1 Q. B. 58, 7 Aspin. 135, 56 J. P. 308, 61 L. J. Q. B. 179, 66 L. T. Rep. N. S. 71, 40 Wkly. Rep. 113.

When a seaman signs articles at a foreign port there is an implied warranty of seaworthiness, and if the ship is unseaworthy there is consideration for a new contract for extra reward to induce him to sail in her. Turner *v.* Owen, 3 F. & F. 176.

86. McKenna *v.* The Shawnee, 45 Fed. 769 (where, however, the vessel was held not to be so unseaworthy as to absolve seamen from service); The Hibernia, 12 Fed. Cas. No. 6,455, 1 Sprague 78; U. S. *v.* Ashton, 24 Fed. Cas. No. 14,470, 2 Sumn. 13; U. S. *v.* Givings, 25 Fed. Cas. No. 15,212, 1 Sprague 75; U. S. *v.* Nye, 27 Fed. Cas. No. 15,906, 2 Curt. 225; Hartley *v.* Ponsonby, 7 E. & B. 872, 3 Jur. N. S. 746, 26 L. J. Q. B. 322, 5 Wkly. Rep. 659, 90 E. C. L. 872 (holding that if the ship is not seaworthy by reason of some of the crew having deserted, the rest of the crew are not bound to go to sea in her, and their contract is at an end). And see Keating *v.* Pacific Steam-Whaling Co., 21 Wash. 415, 58 Pac. 224, holding that, although a sailor has signed shipping articles before going aboard, he may, on examining the vessel and finding its appliances for towing unsafe for one working about the main sail, stipulate, as a condition to his going on the voyage, that the main sail shall not be used.

87. The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289; U. S. *v.* Staly, 27 Fed. Cas. No. 16,374, 1 Woodb. & M. 338.

**Where a ship earns freight to one port of delivery** but becomes unfit to proceed on her voyage by reason of unseaworthiness, a seaman who refuses to proceed on the voyage in a vessel provided for the further transportation of the cargo will be allowed wages to the first port, but is not entitled to wages to the end of the voyage. Hindman *v.* Shaw, 12 Fed. Cas. No. 6,514, 2 Pet. Adm. 264.

**Seamen who desert from a ship which is in a perilous position** and are confined at the master's instance are entitled to discharge on its being shown that the vessel is totally destroyed and the voyage broken up (Sims *v.* Mariners, 22 Fed. Cas. No. 12,893, 2 Pet. Adm. 393), and a seaman does not forfeit his wages by leaving a dangerously unseaworthy vessel which the master has unreasonably neglected to repair (Savary *v.* Clements, 8 Gray (Mass.) 155); but while on the happening of any disaster to a vessel by which the prosecution of the voyage is rendered impossible, the seamen are discharged from the principal obligation of performing the voyage, they are not released from the incidental obligation of rendering their best services for saving as much as practicable of the ship and cargo (The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126), and alleged unseaworthiness of a vessel, unless clearly established, will not, in an action for wages, justify a seaman's desertion of his vessel before the completion of the voyage for which he shipped (Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384, holding that the same rule applies to the case of insufficient supplies of wholesome provisions).

**Overloading** a vessel against the protest of seamen constitutes such a breach of their agreement as justifies them in leaving the ship in a foreign port without forfeiting their wages. Papping *v.* Sirius, 47 Fed. 825.

**Upon the dismasting of a vessel in a collision** on her arrival at a port of safety, seamen's contracts to ship are terminable at the will of the parties. Thorson *v.* Peterson, 9 Fed. 517, 10 Biss. 530.

88. Hoffman *v.* Yarrington, 12 Fed. Cas. No. 6,580, 1 Lowell 168; U. S. *v.* Ashton, 24 Fed. Cas. No. 14,470, 2 Sumn. 13; U. S. *v.* Staly, 27 Fed. Cas. No. 16,374, 1 Woodb. & M. 338.

**The owners cannot charge the expense to the seamen** where the crew insist on a survey of the vessel, alleging that she is unseaworthy, if there be reasonable cause for a survey. The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware 373.

**Conclusiveness of report by marine surveyors.**—A report that a ship is seaworthy made by marine surveyors upon occasion of the crew demanding to leave her for unseaworthiness is not conclusive against the crew in a subsequent action for wages after leaving. Bucker *v.* Klorkgeter, 4 Fed. Cas. No. 2,083, Abb. Adm. 402.

seamen or order them to stay by the vessel after it is put in condition.[89] Statutory provisions relating to the discharge of seamen and the holding of surveys on vessels alleged to be unseaworthy are not exclusive of remedies other than those therein contained.[90]

**B. Food and Provisions — 1. In General.** Proper subsistence is a part of the contract between ship-owners and the seamen in their employ, and the latter must be furnished with a sufficient supply of proper food,[91] every master being bound to see before he sets sail that his vessel is properly provisioned, including a surplus to meet all reasonable contingencies of the seas, and if, in consequence of an omission to do so, there is a short allowance, the withholding of suitable food is not justifiable,[92] and if, during a voyage, a master meets with difficulty at sea, it is his duty, before changing his voyage for a much longer one, to exercise exactly the same care as when first setting sail, to see that he is properly provisioned for the change of course, and to provision his vessel by any practicable methods the circumstances reasonably admit.[93] Seamen may maintain an action for the recovery of damages sustained by them for the wilful or negligent conduct of the master or owners in respect to a sufficient supply of good provisions,[94] and if subsistence be not furnished them by the master, they may recover the amount which they have properly paid therefor,[95] and have a lien against the vessel for

Seamen cannot desert the ship without asking for a survey.— The C. F. Sargent, 95 Fed. 179.

89. U. S. Rev. St. (1878) § 4561 [U. S. Comp. St. (1901) p. 3095].

90. The Heroe, 21 Fed. 525.

91. Foster *v.* Sampson, 9 Fed. Cas. No. 4,982, 1 Sprague 182; The John L. Dimmick, 13 Fed. Cas. No. 7,335, 3 Ware 196 (holding that it is a well understood term of the contract that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, although this obligation is not expressed in the written or printed contract); The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45.

A seaman engaged in a foreign port on the homeward voyage has the same rights as to food allowance as one shipping at the point of original departure. Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223.

Where a seaman ships "by the run" or "by the voyage," the vessel, although detained at an intermediate port by stress of weather, is bound to maintain him while he remains attached to her, whether his services are useful to her or not. Miller *v.* Kelly, 17 Fed. Cas. No. 9,577, Abb. Adm. 564.

Flour is not a proper substitute for bread (Foster *v.* Sampson, 9 Fed. Cas. No. 4,982, 1 Sprague 182), unless it is cooked by the ship's cook into good and wholesome bread (The Hermon, 12 Fed. Cas. No. 6,411, 1 Lowell 515), and a bread or pastry composed of one-third flour and two-thirds copra (dried cocoanut) is not a proper and equivalent substitute for ship bread (Petersen *v.* J. F. Cunningham Co., 77 Fed. 211), and five pounds of bread a week to each seaman is a short allowance, within U. S. St. at L. p. 135, c. 30, § 9 (The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45, holding also that under 1 U. S. St. at L. 135, which requires a vessel to have a certain amount of water, meat, and bread on board the vessel at the time she sails, there is a violation of the statute where there was not the required amount of bread on board, although there was more meat than the statute required, as an overabundance of meat cannot be substituted for the bread required).

92. U. S. *v.* Reed, 86 Fed. 308, holding also that where there is evidence that everyone of a crew was afflicted with scurvy, of which several died, and that the ordinary cause of that disease is lack of suitable food, the jury are justified, unless some other cause is shown, in finding that there was such lack of suitable food.

93. U. S. *v.* Reed, 86 Fed. 308.

94. Collins *v.* Wheeler, 6 Fed. Cas. No. 3,018, 1 Sprague 188. And see U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,792, 3 Wash. 95.

Evidence held insufficient to establish claims for damages for short allowance, and alleged consequent scurvy, on a voyage from Shanghai and Manila to New York see The H. E. Thompson *v.* Martin, 16 App. Cas. (D. C.) 222 (holding that proof of a substantial failure by the master to observe the requirements of the law, with such reasonable particularity as to the number of days on which the scale was not observed as will enable the court to assess the compensation with reasonable certainty, is sufficient, without showing a failure from day to day to observe the scale, especially where it appears that during the voyage the master and owner knew, while the seamen were ignorant of, the new scale, for the violation of which the latter subsequently libel the vessel); The Pactolas, 88 Fed. 299.

95. The Gazelle, 10 Fed. Cas. No. 5,289, 1 Sprague 378; Hayes *v.* The J. L. Wickwire, 11 Fed. Cas. No. 6,262, 7 Phila. (Pa.) 594, holding that where a seaman on a foreign

the amount,[96] and are entitled to board money out of the proceeds of the ship;[97] and seamen who, during the time they served on a voyage, were supplied with insufficient food, are justified in leaving the ship before the completion of the voyage for which they signed, and entitled to recover full wages for the time served;[98] but an alleged insufficient supply of wholesome provisions for the support of the crew, unless clearly established, will not, in an action for wages, justify a seaman's desertion of his vessel before the completion of the voyage for which he shipped;[99] and when a seaman justifies his leaving the ship in a foreign port on the ground that bad provisions were supplied, they must be really bad, and unfit for the men's support.[1] What is proper subsistence, such as the owners are bound to furnish the seamen, depends upon what is usual in similar voyages,[2] it being formerly the rule that when there was a controversy whether an allowance be short or not, the navy ration was assumed as the standard of a proper allowance;[3] but the matter is now regulated by statute.[4] Whether the master's failure to properly provision his ship is from negligence or inadvertence is immaterial, failure to furnish the crew with the scheduled allowance is actionable unless provisions, the allowance of which has been reduced, could not be procured in sufficient quantities, or were unavoidably lost or injured, and proper or equivalent substitutes were supplied in lieu thereof, in a reasonable time;[5] and it is no defense to such an action against the owners that the injuries were caused by the master's default; the owners are responsible for the direct consequences of any wrongdoing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master.[6] Where the articles of provision specified in the statute can be procured, no equivalents can be admitted as substitutes;[7] but, where the specific articles of provision cannot be obtained, other

vessel, having gone ashore in an American port, was arrested by the local authorities for a breach of the peace, and was locked up four days, and the master entered him on his log-book as a deserter, and, on his reporting to the vessel, declined to receive him on board, pay his wages, or give him his clothing, he was entitled to the expenses of boarding for twenty days.

**Seaman wrongfully leaving ship.**—Where a seaman leaves a vessel because of an assault and battery committed by the mate, the vessel is not liable to such seaman for board and railroad fare, after invitation by the master, in good faith, to return to the vessel, and an offer to stand between him and harm. McKinnon *v.* The Reed Case, 39 Fed. 624. Similarly where the assistant engineer of a steamer, knowing that she was on the eve of departure, being sent ashore upon an errand, absented himself for an unreasonable period, and the master, after searching to find him, departed, leaving him behind, the master was justified in his departure, and was not liable for the subsequent expenses of the seaman for board. Brink *v.* Lyons, 18 Fed. 605.

96. Brown *v.* The Alexander McNeil, 4 Fed. Cas. No. 1,988.

97. The San Jose Primeiro, 3 L. T. Rep. N. S. 513.

98. The Forteviot, 98 Fed. 440; The Amalia, 3 Fed. 652; Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm. 253, holding that the crew are justified in leaving the ship, and may recover full wages, where they are fed on unwholesome or spoiled provisions.

99. Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384.

1. The Balize, 2 Fed. Cas. No. 809, Brown Adm. 424 (holding, however, that the fact that meat used on board was for a short time slightly tainted is no excuse for desertion); Ulary *v.* The Washington, 24 Fed. Cas. No. 14,323, Crabbe 204.

2. Foster *v.* Sampson, 9 Fed. Cas. No. 4,982, 1 Sprague 182.

3. Gardiner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223; The John L. Dimmick, 13 Fed. Cas. No. 7,355, 3 Ware 196; The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465; The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45.

4. 30 U. S. St. at L. 762, c. 28, § 23.

5. Robinson *v.* The T. F. Oakes, 82 Fed. 750; Petersen *v.* J. F. Cunningham, 77 Fed. 211 (holding that prolongation of the trip by reason of bad weather or accident does not justify the master in shortening the schedule allowance of provisions of the crew); Johnson *v.* The Karoo, 49 Fed. 651 (holding that where the evidence showing that certain sailors, lawfully shipped, were ill-treated on board the vessel, and were deprived of proper food and lime juice or other antiscorbutics, it was a breach of the ship's contract to furnish suitable provisions, entitling the men to leave the vessel, although the negligence might not have been that of the master of the ship, but of the ship chandler who supplied her).

6. Baxter *v.* Doe, 142 Mass. 558, 8 N. E. 415.

7. Mariners *v.* The Washington, 16 Fed. Cas. No. 9,086, 1 Pet. Adm. 219.

good and wholesome provisions may be substituted and supplied in place of those damaged without the fault of the master or owner, or consumed.[8]

**2. Antiscorbutics.** Masters and owners are required by statute,[9] under penalty, to provide seamen with antiscorbutics, such as lime or lemon juice,[10] and when they are not served, and the crew are attacked with scurvy, the ship is liable for the damage the seamen sustain on account of the disease, in the absence of any proof that they had contracted scurvy before the voyage began;[11] but the penalty imposed upon the master for failing to serve his crew with antiscorbutics does not inure to the benefit of the crew.[12]

**3. Criminal Liability For Withholding.** In the United States it is made by statute[13] a crime for a master or other officer of a vessel to withhold, through malice, hatred, or revenge, suitable food and nourishment from the crew.[14]

**C. Medical Treatment — 1. General Rules.** Under the maritime law it is the duty of a vessel to care for a seaman taken sick on the voyage, and to bear the expenses of his medical treatment,[15] and a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as cure is possible, at the expense of the ship;[16] and this is true even though the cause of the injury can be attributed to the fault of no

8. Mariners *v.* The Washington, 16 Fed. Cas. No. 9,086, 1 Pet. Adm. 219; The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465.

9. U. S. Rev. St. (1878) § 4569 [U. S. Comp. St. (1901) p. 3100].

10. Petersen *v.* J. F. Cunningham Co., 77 Fed. 211 (holding that the fact that there is a supply of limes on board a vessel, from which the crew are at liberty to help themselves, is not a compliance with U. S. Rev. St. § 4569, requiring the master to serve the crew with a regular daily allowance of antiscorbutics); Anderson *v.* The Rence, 46 Fed. 805 (holding that it is no excuse for not serving out lime juice to the crew daily, as required by the statute, that the seamen preferred to receive coffee instead of lime juice).

11. Anderson *v.* The Rence, 46 Fed. 805.

12. Petersen *v.* J. F. Cunningham, 77 Fed. 211.

13. U. S. Rev. St. (1878) § 5347 [U. S. Comp. St. (1901) p. 3631].

14. U. S. *v.* Reed, 86 Fed. 308, holding that in order to justify a conviction under U. S. Rev. St. (1878) § 5347 [U. S. Comp. St. 1901) p. 3631], imposing a penalty upon the master or other officer of a vessel who withholds suitable food and nourishment from the crew, each of the statutory elements of lack of a suitable food supply, absence of justifiable cause, and the presence of malice, hatred, or revenge, must be found beyond a reasonable doubt.

15. Moseley *v.* Scott, 3 Ohio Dec. (Reprint) 449, 5 Am. L. Reg. 599; Gabrielson *v.* Waydell, 67 Fed. 342; The Forest, 9 Fed. Cas. No. 4,936, 1 Ware 429; Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1 [*citing* Laws of Oleron, art. 7; Laws of the Hanse Towns, art. 45; Laws of Wisbuy, art. 19]; Richardson *v.* Juillette, 20 Fed. Cas. No. 11,784; Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm. 253. See also The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. ed. 760.

Fishermen paid in proportion to their individual catches are entitled to be cured at the vessel's expense. Knight *v.* Parsons, 14 Fed. Cas. No. 7,886, 1 Sprague 279.

The courts of admiralty have jurisdiction to enforce by libel the payment of these expenses. The Ben Flint, 3 Fed. Cas. No. 1,299, 1 Abb. 126, 1 Biss. 562.

16. Danvir *v.* Morse, 139 Mass. 323, 1 N. E. 123; Scarff *v.* Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807 [*affirming* 36 Hun 202]; Petersen *v.* Swan, 50 N. Y. Super. Ct. 46; Holt *v.* Cummings, 102 Pa. St. 212, 48 Am. Rep. 199; Sanders *v.* Stimson Mill Co., 32 Wash. 627, 73 Pac. 688, 34 Wash. 357, 75 Pac. 974; The Mars, 145 Fed. 446 [*affirmed* in 149 Fed. 729, 79 C. C. A. 435]; The Matterhorn, 128 Fed. 863, 63 C. C. A. 331; The Troop, 128 Fed. 856, 63 C. C. A. 584 [*affirming* 118 Fed. 769]; The Troy, 121 Fed. 901; Whitney *v.* Olsen, 108 Fed. 292, 47 C. C. A. 331; Gabrielson *v.* Waydell, 67 Fed. 342; The A. Heaton, 43 Fed. 592; The Scotland, 42 Fed. 925; The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52; The Lizzie Frank, 31 Fed. 477; The Vigilant, 30 Fed. 288 (holding that it is the duty of a master to procure any medical attendance that may be available, at ports where the vessel touches, for the benefit of seamen injured, where there is reasonable evidence of a necessity for it); The W. L. White, 25 Fed. 503; The City of Alexandria, 17 Fed. 390; The Centennial, 10 Fed. 397, 4 Woods 50; Longstreet *v.* The R. R. Springer, 4 Fed. 671; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 554; The Ben Flint, 3 Fed. Cas. No. 1,299, 1 Abb. 126, 1 Biss. 562; Brown *v.* Overton, 4 Fed. Cas. No. 2,024, 1 Sprague 462; Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1; Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; Harris *v.* Capen, 11 Fed. Cas. No. 6,118; Holmes *v.* Hutchinson, 11 Fed. Cas. No. 6,639, Gilp. 447; Hedley *v.* Pinkney, etc., Steamship Co., [1894] A. C. 222.

Application of rule.— This rule applies to

one.[17] And the fact that the injury is caused by the negligence of the seaman himself, unless such negligence is gross, will not relieve the ship of its duty to care for the seaman and to bear the expense of his treatment.[18] But a seaman is not entitled to be treated at the expense of the ship while disabled by disease brought on by his own vices,[19] gross negligence,[20] or disobedience,[21] nor when being in a diseased state he ships as an able seaman.[22] A vessel is not relieved of this duty where a sick seaman is sent ashore to be cared for, but is liable for the expenses incident to his treatment, including medicine, medical advice, nursing, diet, and lodging,[23] and the duty endures until a cure, as far as a cure may be accomplished by medical

a mariner whose compensation is a share in the earnings of the vessel (The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451), to a fireman employed on board a steamer (The North America, 18 Fed. Cas. No. 10,314, 5 Ben. 486), to seamen employed on the lakes and navigable rivers within the United States (The Ben Flint, 3 Fed. Cas. No. 1,299, 1 Abb. 126, 1 Biss. 562), to seamen engaged on a steamboat on the western rivers (Moseley *v.* Scott, 3 Ohio Dec. (Reprint) 449, 6 Am. L. Reg. N. S. 599), and to seamen employed on vessels engaged in short coastwise trips (The Mars, 149 Fed. 729, 79 C. C. A. 435 [*affirming* 138 Fed. 941, 145 Fed. 446]).

**The phrase "service of the ship"** is not confined in meaning to acts done for the benefit of the ship, or in the actual performance of the seaman's duty. A sailor must, in judgment of law, be deemed in the service of the ship while under the power and authority of its officers; and he is entitled to be cured at the expense of the ship of any injury received by him in executing an improper order, or inflicted upon him directly by the wrongful violence of an officer of the ship in the exercise of his authority as officer to punish him. Ringgold *v.* Crocker, 20 Fed. Cas. No. 11,843, Abb. Adm. 344. Thus where a second mate was called on by the mate to help in suppressing a serious riot on board a ship lying at the wharf in a foreign port, and took a loaded pistol which the mate warned him not to use, and in the scuffle the pistol was accidentally discharged and wounded the second mate himself, it was held he was wounded in the service of the ship. Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1.

**Error of judgment.**—A captain does not fail in his duty to give proper surgical treatment to a sailor by erring in judgment—by permitting splints, for instance, to remain longer than they should, although the effect of the error is injurious to the sailor. Petersen *v.* Swan, 53 N. Y. Super. Ct. 151.

**Evidence held insufficient to show negligence in providing medical treatment.**—Johnson *v.* Holmes, 188 Mass. 170, 74 N. E. 364; The Sarnia, 147 Fed. 106, 77 C. C. A. 332 [*reversing* 137 Fed. 952]; The Kenilworth, 137 Fed. 1003; Campbell *v.* The Frank Gilmore, 43 Fed. 318; The Harry Buschman, 33 Fed. 558.

17. Brown *v.* The Bradish Johnson, 4 Fed. Cas. No. 1,992, 1 Woods 301; Jackson *v.* The Fleta, 13 Fed. Cas. No. 7,135.

18. The Mars, 149 Fed. 729, 79 C. C. A. 435 [*affirming* 138 Fed. 941, 145 Fed. 446]; The Chico, 140 Fed. 568; Davidson *v.* The City of St. Louis, 56 Fed. 720; Paulson *v.* The Governor Ames, 55 Fed. 327; The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52; The Wanderer, 20 Fed. 140; The City of Alexandria, 17 Fed. 390; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 544; The Ben Flint, 3 Fed. Cas. No. 1,299, 1 Abb. 126, 1 Biss. 562; Reed *v.* Canfield, 20 Fed. Cas. No. 11,641, 1 Sumn. 195 [*affirming* 5 Fed. Cas. No. 2,381].

**A seaman is not entitled to expenses if he disregards advice** of his physician and uses a wounded foot. Richardson *v.* The Juillette, 20 Fed. Cas. No. 11,784, 2 N. J. Leg. Obs. 23.

19. Chandler *v.* The Annie Buckman, 5 Fed. Cas. No. 2,591*a*; Pierce *v.* Patton, 19 Fed. Cas. No. 11,145, 1 Gilp. 435.

20. Johnson *v.* Huckins, 13 Fed. Cas. No. 7,390, 1 Sprague 67.

21. Pierce *v.* Patton, 19 Fed. Cas. No. 11,145, Gilp. 435.

22. Chandler *v.* The Annie Buckman, 5 Fed. Cas. No. 2,591*a*.

23. Johnson *v.* Doubty, 1 Ashm. (Pa.) 165; The Wensleydale, 41 Fed. 829 (holding, where a seaman, ill with fever, was sent to a hospital, and remained there one hundred and thirty-four days, and where it appeared that, so far as the fever was concerned, he might have left the hospital at the end of two months, but that, owing to having had some of his toes amputated, he was unable at that time to stand on his feet or take care of himself, that the ship was liable to the New York quarantine commissioners for the seaman's expenses during the entire period of his stay at the hospital); Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; Lamson *v.* Westcott, 14 Fed. Cas. No. 8,035, 1 Sumn. 591 [*affirmed* in 10 Fed. Cas. No. 5,329, 1 Sumn. 151]; Tomlinson *v.* Hewett, 24 Fed. Cas. No. 14,087, 2 Sawy. 278 (where it was held that the fact that his disease is malignant and infectious will afford no justification or excuse to the master for setting him ashore, without any provision for his care, his subsistence, or his proper medication). See also Babcock *v.* Terry, 2 Fed. Cas. No. 702, 1 Lowell 66.

**Under the English law,** where an injured seaman is left behind in a foreign port, his wages stop, but the ship is liable for his cure and care. The Magna Charta, 16 Fed. Cas. No. 8,953, 2 Lowell 136.

means, is effected;[24] the obligation, however, being limited to actual necessary charges and disbursements of the seaman;[25] and the seaman is entitled to recover only for treatment so far as ordinary medical means extend, not for extraordinary treatment or for attention which he himself could give;[26] and a vessel is under no obligation to pay expenses of a seaman taken sick after his rightful discharge in a foreign port.[27] The fact that the United States by statute[28] has provided for the collection, from vessels, of a certain sum per month for each seaman, as a fund for the relief of sick or disabled seamen, and has established a marine hospital service, does not affect the right of a seaman to receive medical attendance at the cost of the vessel when he is injured in its service;[29] but after a seaman has been placed in a marine hospital by a vessel, the vessel is not liable for expenses incurred by a seaman at a private hospital.[30]

**2. Duty to Put Into Port.** It may become the duty of the master to put into an intermediate port where medical and surgical attendance can be obtained, and failure to do so may render the owners liable in damages;[31] but the master of a vessel is not required in every instance where a seaman is injured at sea to put into port to obtain relief for him. Whether it is his duty in a particular case must be decided upon the circumstances of each case.[32] Although the vessel is

24. Croucher *v.* Oakman, 3 Allen (Mass.) 185; The Mars, 149 Fed. 729, 79 C. C. A. 435 [*affirming* 138 Fed. 941, 145 Fed. 446]; The Henry B. Fiske, 141 Fed. 188; The Kenilworth, 137 Fed. 1003; The Svealand, 136 Fed. 109, 69 C. C. A. 97 [*affirming* 132 Fed. 932]; McCarron *v.* Dominion Atlantic R. Co., 134 Fed. 762; The Lizzie Frank, 31 Fed. 477 [*criticizing* The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451]; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 544; The Lizzie Hopkins, 17 Fed. Cas. No. 9,993, 1 Woods 170; Reed *v.* Canfield, 20 Fed. Cas. No. 11,641, 1 Sumn. 195. But see Lambos *v.* The Tammerlane, 47 Fed. 822; The J. F. Card, 43 Fed. 92 (holding that the obligation of a vessel on the lakes where seamen are shipped for short voyages to care for an injured seaman terminates with the seaman's contract); The City of Alexandria, 17 Fed. 390.

25. The Kenilworth, 144 Fed. 376, 75 C. C. A. 314 (holding that a vessel is not liable for expenditures made by others on behalf of an injured seaman, which he is under no obligation to reimburse, and which were made when the cure had been completed, at least so far as the ordinary medical means extended); Davis *v.* The Erie, 7 Fed. Cas. No. 3,632*a* (holding that a seaman cannot recover against a vessel for gratuitous hospital treatment for an injury received on board a vessel).

26. *In re* Mars, 145 Fed. 446.

27. Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432.

**By an abandonment of the ship's service without necessity,** a sick seaman relinquishes his right to be cured at the ship's expense. The Cambridge, 4 Fed. Cas. No. 2,335, 4 Sawy. 252.

28. U. S. Rev. St. (1878) §§ 4585, 4803 [U. S. Comp. St. (1901) p. 3322].

29. Holt *v.* Cummings, 102 Pa. St. 212, 48 Am. Rep. 199; Peterson *v.* The Chandos, 4 Fed. 645, 6 Sawy. 544; Brunent *v.* Taber, 4 Fed. Cas. No. 2,054, 1 Sprague 243; Reed *v.* Canfield, 20 Fed. Cas. No. 11,641, 1 Sumn. 195.

30. Raymond *v.* The Ella S. Thayer, 40 Fed. 902, 12 Sawy. 409.

31. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. ed. 955 [*affirming* 118 Fed. 1003, 55 C. C. A. 497]; Whitney *v.* Olsen, 108 Fed. 292, 47 C. C. A. 331; Brown *v.* Overton, 4 Fed. Cas. No. 2,024, 1 Sprague 462.

32. Danvir *v.* Morse, 139 Mass. 323, 1 N. E. 123; The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. ed. 955 [*affirming* 118 Fed. 1003, 55 C. C. A. 497] (where it is said that while a master is not bound in every instance where a seaman is seriously injured to disregard every other consideration, and put into the nearest port where medical assistance can be obtained, his duty to do so is manifest, if the accident happens within a reasonable distance of such a port); The Cuzco, 154 Fed. 177, 83 C. C. A. 181 (holding that, in order to require a master to put into port to obtain relief for an injured seaman, the state of circumstances must be such as to leave the master no alternative, as a reasonable and prudent man, exercising a sound judgment, and acting for the best interests of all concerned, but to depart from or delay the usual course of the voyage); The Kenilworth, 144 Fed. 376, 75 C. C. A. 314; The Shenandoah, 134 Fed. 304; The Erskine M. Phelps, 131 Fed. 1, 65 C. C. A. 239; Whitney *v.* Olsen, 108 Fed. 292, 47 C. C. A. 331.

**Criteria for determining whether ship should put into port.**— The seriousness of the injury, the care that can be given the seaman on shipboard, the proximity of an intermediate port, the consequences of delay to the interest of the ship-owner, the direction of the wind, and the probability of its continuing in the same direction, and the fact whether a surgeon of competent skill is likely to be found must all be considered; all that is demanded of the master being the exercise of a reasonable judgment and the ordinary acquaintance of a seaman with the

held not at fault in this respect, still it may be liable for failure to procure prompt and efficient treatment and care at the end of the voyage.[33]

**3. Medicine Chest.** By statute in the United States,[34] it is required that vessels of certain classes be provided with medicine chests containing directions for using the medicine, which chests must be examined and supplied at certain periods, and if a vessel fails to supply the chest and have it examined it shall be liable for all expenses incident to the seamen's sickness.[35] This act operates to exempt those vessels complying with its provisions from liability for the expense of attending sick seamen,[36] but not from their duty to pay the expenses of a sick seaman's board and lodging,[37] nor from liability for expenses of the cure of seamen where there is no one on board by whom the medicine can be safely administered, the disease being of such a character as to require a high degree of medical skill;[38] nor does the statute apply where the seaman is unable, through no fault of his own, to gain access to the chest.[39] To obtain the benefit of the exemption of this act, moreover, the burden of proof is upon those claiming the exemption to prove by clear and satisfactory proof that they had complied with its provisions.[40]

**4. Actions For Expense of Cure of Seamen.** The expenses of the cure of a seaman may be recovered in a manner similar to that employed for the recovery of wages,[41] as by a proceeding *in rem* in admiralty,[42] or in a libel for damages for the injury,[43] and in a suit brought for the recovery of wages, the court may allow

geography and resources of the country. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. ed. 955; The Svealand, 132 Fed. 932 [*affirmed* in 136 Fed. 109, 69 C. C. A. 97]. The master is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. The Iroquois, *supra*.

**Circumstances held not to render master liable for failure to put into port** see The Drumelton, 158 Fed. 454; The Cuzco, 154 Fed. 177, 83 C. C. A. 181 [*reversing* 148 Fed. 914]; The Kenilworth, 144 Fed. 376, 75 C. C. A. 314; The Margharita, 140 Fed. 820, 72 C. C. A. 232; The Svealand, 136 Fed. 109, 69 C. C. A. 97 [*affirming* 132 Fed. 932].

**Circumstances held to render master liable for failure to put into port** see Danvir *v.* Morse, 139 Mass. 323, 1 N. E. 123; The Iroquois, 118 Fed. 1003, 55 C. C. A. 497 [*affirmed* in 194 U. S. 240, 24 S. Ct. 640, 48 L. ed. 955]; The Troop, 118 Fed. 769 [*affirmed* in 128 Fed. 856, 63 C. C. A. 584]; Whitney *v.* Olsen, 108 Fed. 292, 47 C. C. A. 331; Brown *v.* Overton, 4 Fed. Cas. No. 2,024, 1 Sprague 462.

33. The Svealand, 132 Fed. 932 [*affirmed* in 136 Fed. 109, 69 C. C. A. 97].

34. 1 U. S. St. at L. 134, c. 29, § 8.

35. Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541, where it was held that a stipulation that the seamen should pay for medical advice and medicines without any condition that there should be a medicine chest on board was void, as contrary to the policy of that act.

36. Pray *v.* Stinson, 21 Me. 402; Holmes *v.* Hutchinson, 12 Fed. Cas. No. 6,639, Gilp. 447; Pierce *v.* Patton, 19 Fed. Cas. No. 11,145, Gilp. 435, holding that where a seaman is taken on shore, in a foreign port, at his own solicitation, from a vessel properly provided with a chest of medicines, and there receives medical attendance and advice, the expenses thereof are to be deducted from his wages.

37. Moseley *v.* Scott, 3 Ohio Dec. (Reprint) 449, 5 Am. L. Reg. N. S. 599; Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; Walton *v.* The Neptune, 29 Fed. Cas. No. 17,135, 1 Pet. Adm. 142.

38. The Forest, 9 Fed. Cas. No. 4,936, 1 Ware 429, holding that where the master, mate, and four of the men were sick with the yellow fever at the same time, the owners were bound to pay the expenses of the attendance and advice of a physician, although a suitable medicine chest had been provided.

39. The Forest, 9 Fed. Cas. No. 4,936, 1 Ware 429.

40. Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372, holding that an answer averring in general terms that a vessel was supplied with a medicine chest according to the law was not of itself sufficient evidence to discharge a master from his liability for a physician's bill for attendance on a sick seaman.

**Sufficiency of chest.**— The *onus probandi* in respect to the sufficiency of the medicine chest is upon the owners of the vessel (Harden *v.* Gordon, 11 Fed. Cas. No. 6,047, 2 Mason 541; The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1; The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware (U. S.) 373), and the proof required to establish its sufficiency is the testimony of a reputable physician (The William Harris, *supra*, holding that the master was not a competent witness to the sufficiency of the chest).

41. See *infra*, VI, M.

42. Brown *v.* The D. S. Cage, 4 Fed. Cas. No. 2,002, 1 Woods 401.

43. The Lizzie Frank, 31 Fed. 477, holding that where a libel was filed by a seaman for

an amendment, so that a seaman may recover expenses of the cure of an injury that were paid by him.[44] The remedy is not, however, confined to the courts of admiralty, but may be administered by the state courts.[45]

**D. Return of Crew — 1. Necessity.** In the United States by statute masters of vessels engaged on foreign or whaling voyages must, under penalty, return the seamen to the United States,[46] and by the act of congress of February 28, 1803,[47] American consuls are empowered to send home destitute American seamen, in American vessels,[48] the master being compelled under penalty to take them,[49] the men being, however, bound to work.[50] In England also certain of the officers of the English government are empowered by statute [51] to send home, on British vessels, distressed British seamen.[52]

**2. Expenses.** A seaman is entitled to expenses of returning to the port from which he shipped, if the vessel does not return,[53] unless the port where the voyage

damages, and also praying other relief, admiralty was competent to administer a suitable remedy, and that, although the court found that no damages were due, it had power to make a decree for such expenses in healing the libellant as had been already incurred, but that it could not decree for prospective expenses.

44. The W. L. White, 25 Fed. 503.

45. Moseley *v.* Scott, 3 Ohio Dec. (Reprint) 449, 5 Am. L. Reg. N. S. 599; Sanders *v.* Stimson Mill Co., 32 Wash. 627, 73 Pac. 688, 34 Wash. 357, 75 Pac. 974, holding, however, on rehearing, that an action in tort for injuries to a seaman cannot be joined with an action on contract to furnish the seaman medical care, nursing, and attendance at the expense of the ship on which he was injured.

46. U. S. Rev. St. (1878) § 4576 [U. S. Comp. St. (1901) p. 3104].

Under the former statute regulating the matter masters engaged on foreign voyages were required to enter into a bond to deliver to the boarding officer, who came on board their ships at the first home port they reached, a certified copy of the list of the crew, and to produce the persons named therein to such boarding officer. 2 U. S. St. at L. 203. The master was not liable on the bond if the vessel was sold in a foreign port (Montell *v.* U. S., 17 Fed. Cas. No. 9,723, Taney 24), or if the seamen absconded, died, or were forcibly impressed into other service, or if by reason of sickness the master was relieved from his command in a foreign port and was superseded by another (U. S. *v.* Page, 27 Fed. Cas. No. 15,986*a*), or if the seamen were discharged in a foreign port with the consent of the American consul (U. S. *v.* Hatch, 26 Fed. Cas. No. 15,325, 1 Paine 336; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,002, 1 Lowell 107); nor were they required to return to the United States foreign seamen shipping at their home for a particular voyage, ending where it began (U. S. *v.* Parsons, *supra*). The bond given under this statute was valid, although it was not expressed to be taken in pursuance of it. U. S. *v.* Hatch, *supra*. A master on a whaling voyage was not required to enter into a bond. Taber *v.* U. S., 23 Fed. Cas. No. 13,722, 1 Story 1.

47. U. S. Rev. St. (1878) § 4577 [U. S. Comp. St. (1901) p. 3105].

48. Matthews *v.* Offley, 16 Fed. Cas. No. 9,290, 3 Sumn. 115, holding that foreigners while employed as seamen in the merchant ships of the United States are within the meaning of the statute and thus entitled to protection.

49. Burke *v.* Buttman, 4 Fed. Cas. No. 2,160, 1 Lowell 191, holding that a seaman wrongfully discharged abroad cannot be compelled to ship as a seaman for a return in another vessel of the same owners.

The fact of desertion from an American ship, whether she be in port or not at the time when the seaman becomes destitute, does not supersede the authority of the consul to require another American ship to bring the seaman to the United States. Matthews *v.* Offley, 16 Fed. Cas. No. 9,290, 3 Sumn. 115, holding also that a consul is the proper judge as to the ship which shall bring destitute seamen to the United States.

50. U. S. *v.* Salisbury, 27 Fed. Cas. No. 16,214, 2 N. Y. Leg. Obs. 53.

51. Merchants' Shipping Act (1894), §§ 191, 192, 193, as amended by Merchants' Shipping Act (1898).

52. Board of Trade *v.* The Glenpark, [1904] 1 K. B. 682, 9 Aspin. 550, 9 Com. Cas. 192, 73 L. J. K. B. 315, 90 L. T. Rep. N. S. 360, 20 T. L. R. 321, 52 Wkly. Rep. 646, holding that it is a question of fact in each case whether a seaman who has been shipwrecked and in distress abroad is a "distressed seaman" within the meaning of the Merchant Shipping Acts of 1894 and 1898, and that a seaman may, however, be a "distressed seaman" within the meaning of those acts, and as such entitled to relief under the acts notwithstanding he has been paid arrears of wages sufficient to cover his passage home and maintain him in the meantime.

53. Schermacher *v.* Yates, 57 Fed. 668; Thompson *v.* The Sam Brown, 45 Fed. 508; Swift *v.* The Frank and Willie, 45 Fed. 488; The City of New Orleans, 33 Fed. 683; The Belle of Oregon, 19 Fed. 924; Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500; The Hudson, 8 Fed. 167; The Zack Chandler, 7 Fed. 684, 10 Biss. 372; Worth *v.* The Lioness No. 2, 3 Fed. 922, 2 McCrary 208; The Blohme, 3

terminates is the home of the seaman.[54] So too he is entitled to his expenses to the home port if he is wrongfully discharged in a foreign port;[55] or becomes disabled,[56] or through no fault of his he is separated from the vessel;[57] but not when he is separated from the vessel by his own fault.[58] In some instances the amount of wages that a seaman who had been left in a foreign port earns or can earn in returning home are deducted from the amount of expenses due him from the vessel by which he has been left.[59]

## VI. WAGES.[60]

**A. In General.** The claims of seamen for wages are highly favored by the courts;[61] but the seaman, in order to prove himself entitled to wages, must show a valid contract of employment,[62] and a performance thereof by serving until

Fed. Cas. No. 1,556, 1 Ben. 228; The Gazelle, 10 Fed. Cas. No. 5,289, 1 Sprague 378.

**When a vessel was condemned and sold as being unseaworthy,** the seamen were formerly allowed their expenses to their home port. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126. But it has been decided that under 11 U. S. St. at L. 62, c. 127, § 26, where an American vessel is condemned the crew cannot recover the expenses of their return to the United States. Kelly *v.* Otis, 23 Fed. 903; Hoffman *v.* Yarrington, 12 Fed. Cas. No. 6,580, 1 Lowell 168.

**In England** the question of the expense of the return of seamen is regulated by statute (Merchants' Shipping Act (1894), § 186, 57 & 58 Vict. c. 60, § 186); where it is provided that when the service of any seaman belonging to a British ship terminates in any port out of British possessions, the master shall either provide him with employment on board some other British ship bound to the port in British possessions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or that he shall furnish the seaman the means of sending him back to some such port, or shall provide him with a passage home. MacPherson *v.* Blytheswood, 16 Fed. Cas. No. 8,920, 1 Phila. (Pa.) 546; Edwards *v.* Steel, [1897] 2 Q. B. 327, 8 Aspin. 323, 2 Com. Cas. 272, 66 L. J. Q. B. 690, 77 L. T. Rep. N. S. 297, 13 T. L. R. 528, 45 Wkly. Rep. 689. The "port agreed to by seamen" as used in this statute means a particular defined port and not several ports which the master may select. Atty.-Gen. *v.* Fargrove Steam Nav. Co., 23 T. L. R. 230. "Home" as used in this statute means the port at which the seaman was originally shipped, or such other port in the United Kingdom as he agreed to go to. Edwards *v.* Steel, *supra*; Purves *v.* Straits of Dover Steamship Co., [1899] 2 Q. B. 217, 8 Aspin. 566, 4 Com. Cas. 274, 68 L. J. Q. B. 925, 81 L. T. Rep. N. S. 35, 15 T. L. R. 450, 47 Wkly. Rep. 630 [*affirming* [1899] 1 Q. B. 38, 8 Aspin. 446, 4 Com. Cas. 1, 68 L. J. Q. B. 38, 79 L. T. Rep. N. S. 444, 15 T. L. R. 15].

54. Thompson *v.* The Sam Brown, 45 Fed. 508.

55. The Superior, 22 Fed. 927. And see *infra*, IX, G.

56. Harvey *v.* Smith, 35 Fed. 367 (holding that under the provisions of the British Merchants' Shipping Act, a vessel has no right to abandon a disabled seaman without payment of his wages up to the time of his being left on shore, together with provision for his return home); The Centennial, 10 Fed. 397, 4 Woods 50; Brunent *v.* Taber, 4 Fed. Cas. No. 2,054, 1 Sprague 243; Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1.

57. Antone *v.* Hicks, 1 Fed. Cas. No. 493, 2 Lowell 383; The Mary Belle Roberts, 16 Fed. Cas. No. 9,200, 3 Sawy. 485.

58. McKinnon *v.* The Reed Case, 39 Fed. 624; Brink *v.* Lyons, 18 Fed. 605.

59. Papping *v.* The Sirius, 47 Fed. 825 (holding that where seamen left an English vessel in the port of San Francisco, being justified in so doing by breach of the shipping articles, and acting on the advice of the British consul, where it appeared that all the seamen found employment on other vessels, no allowance would be made for their passage home); Hutchinson *v.* Coombs, 12 Fed. Cas. No. 6,955, 1 Ware 58; The William Martin, 29 Fed. Cas. No. 17,698, 1 Sprague 564. But see Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285 [*affirmed* in 18 Fed. Cas. No. 10,667, 2 Curt. 317], holding that where a mate is wrongfully discharged in a foreign port, and he returns home in another vessel before the mast, and it appears that there was no opportunity for him to return home on a vessel as mate, he will be allowed expenses to the home port, without any deduction for wages earned before the mast.

60. **Compensation of pilots** see PILOTS, 30 Cyc. 1617.

**Garnishment** of seamen's wages see EXEMPTIONS, 18 Cyc. 1430 text and note 12; GARNISHMENT, 20 Cyc. 1007 text and note 41.

61. The Idlehour, 63 Fed. 1018.

62. Neilson *v.* The Laura, 17 Fed. Cas. No. 10,092, 2 Sawy. 242 (holding the agreement void for lack of consideration); The Robert Noble, 20 Fed. Cas. No. 11,894, 1 Lowell 57; Wilcocks *v.* Palmer, 29 Fed. Cas. No. 17,638, 3 Wash. 248. See also Carter *v.* Hall, 2 Stark. 361, 3 E. C. L. 445, holding that a purser's steward on board a king's ship cannot recover wages from the purser upon an implied contract. *Compare* The Trial, 24 Fed. Cas. No. 14,170, Blatchf. & H. 94, hold-

the voyage is ended or the term of service has expired,[63] or a legal and sufficient excuse for non-performance.[64] The fact that the seaman was engaged at a foreign port during the voyage and not at the commencement thereof does not deprive him of the right to wages.[65]

**B. As Dependent on Freight Earnings.** In accordance with the ancient

ing that the foundation of a suit for wages is the hiring and service, and not the written contract.

**A subsequent agreement fraudulently obtained** does not affect the right of the seamen to recover wages under the original agreement. Baker *v.* Corey, 19 Pick. (Mass.) 496.

**Minors** may disaffirm their contract of shipment and recover the reasonable value of their services (Belyea *v.* Cook, 162 Fed. 180; The Topsy, 44 Fed. 631), and their fraudulent representation to the shipping commissioner as to their ages does not operate as an estoppel (Burdett *v.* Williams, 30 Fed. 697). However, a parol agreement between minors and one owner who was their father does not, after his death, confer any right to wages as against the surviving owner. The Modoc, 20 Fed. 398.

**When voyage illegal.**— Seamen who serve on an illegal voyage have no valid claim for wages (The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122; The Elexea, 53 Fed. 359; The Vanguard, 6 C. Rob. 207), unless they are ignorant of the character of the voyage, and innocent of any participation in the wrong (The City of Mexico, 28 Fed. 207; The Mary, 16 Fed. Cas. No. 9,190, 1 Sprague 204, holding that it is not incumbent upon the seaman to examine the ship's papers to see if the voyage is legal; The Mary Ann, 16 Fed. Cas. No. 9,194, Abb. Adm. 270; The Malta, 2 Hagg. Adm. 158 note).

**What law governs.**— The right of seamen to wages is dependent upon the law of the flag under which the vessel sails and not upon the nationality of the seamen. The Magna Charta, 16 Fed. Cas. No. 8,953, 2 Lowell 136; The Johann Friederich, 1 W. Rob. 35. And see Moran *v.* Baudin, 17 Fed. Cas. No. 9,785, 2 Pet. Adm. 415.

**Seamen on a vessel sailing under letters of marque** are entitled to the remedies of seamen in the merchant service, and may sue for wages in a neutral port. Ellison *v.* The Bellona, 8 Fed. Cas. No. 4,407, Bee 112.

**63.** Wilcocks *v.* Palmer, 29 Fed. Cas. No. 17,638, 3 Wash. 248.

**Seamen must be entitled to a discharge** before they can possess a right to all their wages. However, when they file a libel for their wages, they elect to treat their engagement as at an end, and cannot recover wages for subsequent services. The Chas. L. Baylis, 25 Fed. 862; The Carolina, 34 L. T. Rep. N. S. 399, 3 Aspin. 141.

**Where the voyage is not from port to port** but is for a specified length of time, the return of the vessel to the port of shipment is not a condition precedent to the payment of the full wages due. Olsen *v.* The Edwin Post, 6 Fed. 314.

**The voyage terminates** and the right to wages accrues when the vessel reaches her destined place of mooring at her port of final discharge (Taber *v.* Nye, 12 Pick. (Mass.) 105; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454), but it has been held that where the agreement is for monthly wages so long as the voyage continues to be a freighting one, the freighting voyage terminates when all the cargo is delivered with the exception of a small portion which it is impossible to deliver without great risk of life (Burdett *v.* Williams, 27 Fed. 113). The voyage is not terminated within the meaning of articles providing for its termination at a port of discharge in the United States, by the arrival of the vessel at a port which is not a port of discharge and the seamen are entitled to wages up to the time the vessel arrives at such a port (Stratton *v.* Babbage, 23 Fed. Cas. No. 13,527), but their right does not accrue till then (Fairchild *v.* The Aurelius, 8 Fed. Cas. No. 4,609).

**64.** The Leiderhorn, 99 Fed. 1001; Singstrom *v.* The Hazard, 22 Fed. Cas. No. 12,905, 2 Pet. Adm. 384; Wilcocks *v.* Palmer, 29 Fed. Cas. No. 17,638, 3 Wash. 248; O'Neil *v.* Armstrong, (1895) 2 Q. B. 70, 64 L. J. Q. B. 552, 72 L. T. Rep. N. S. 776, 43 Wkly. Rep. 554 [*affirmed* in [1895] 2 Q. B. 418, 8 Aspin. 63, 65 L. J. Q. B. 7, 73 L. T. Rep. N. S. 178, 14 Reports 703]; Lloyd *v.* Sheen, 10 Aspin. 75, 93 L. T. Rep. N. S. 174.

**A refusal by the master to allow performance** does not bar the seamen of their right to wages where they manifest their readiness and willingness to perform by presenting themselves at the wharf where the boat lays. The Acorn, 32 Fed. 638.

**Right as affected by prior and continuing disability of seaman.**— There is an implied warranty on the part of the seaman that he is able-bodied and he cannot recover any wages where he was unable to perform his duties during the voyage because of a long standing and incurable disease existing at the time of employment. Mitchell *v.* The Mary Sanford, 58 Fed. 926; Chandler *v.* The Annie Buckman, 5 Fed. Cas. No. 2,591*a*; Mowatt *v.* Brown, 17 Fed. Cas. No. 9,899*a*; Writer *v.* The Richmond, 30 Fed. Cas. No. 18,104, 2 Pet. Adm. 263, where the mariner died of a severe pulmonic disease during the voyage, and the claim of his administrator for wages was disallowed.

**Where the seaman was discharged from a hospital** prior to the time of shipment and suffered an acute attack of a different disease during the voyage, he is entitled to his wages. Highland *v.* The Harriet C. Kerlin, 41 Fed. 222.

**65.** Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223.

maxim that "freight is the mother of wages" it was formerly the rule that no wages were due where no freight had been earned or could not have been earned, and its loss was not due to the fault or fraud of the master or owner;[66] but it is now expressly provided by statute in England[67] and the United States[68] that no right to wages shall be dependent on the earning of freight by the vessel.[69]

**C. Destruction or Abandonment of Vessel or Voyage — 1. General Rules.** Generally where the voyage is broken up by the act or fault of the master or owner, the seamen are entitled to wages for the full voyage.[70] Where the voyage is abandoned from other causes not attributable to the act or fault of the master or owner, such as necessity or perils of the sea, the courts have awarded the seamen wages up to the time of the abandonment,[71] or up to the

66. Leddo *v.* Hughes, 15 Ill. 41; Patten *v.* Park, Anth, N. P. (N. Y.) 46; Van Beuren *v.* Wilson, 9 Cow. (N. Y.) 158, 18 Am. Dec. 491; Icard *v.* Goold, 11 Johns. (N. Y.) 279; Dunnett *v.* Tomhagen, 3 Johns. (N. Y.) 154; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; Davis *v.* Faucon, 7 Fed. Cas. No. 3,632*a*; Henop *v.* Tucker, 11 Fed. Cas. No. 6,368, 2 Paine 151; The Niphon's Crew, 18 Fed. Cas. No. 10,277, Brunn. Col. Cas. 577; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,185, 3 Sumn. 50; Wallace *v.* Mumford, 29 Fed. Cas. No. 17,102; Dunkley *v.* Bulwer, 6 Esp. 86; Eaken *v.* Thom, 5 Esp. 6, 8 Rev. Rep. 824; Thomas *v.* Tobin, 3 Hagg. Adm. 197 note; The Lady Durham, 3 Hagg. Adm. 196; Anonymous, 2 Show. 283, 89 Eng. Reprint 941; Anonymous, 1 Sid. 236, 82 Eng. Reprint 1079. *Compare* The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126, where it is stated that, although freight is the natural fund for the payment of wages as it is in part the product of the labor of the seamen, the doctrine that it is the only fund out of which wages can be claimed was never received in the United States but with material qualifications.

The rule did not apply to a fishing or sealing voyage (The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105), nor to a voyage commenced and intended to be made in ballast (Waling *v.* The Christina, 28 Fed. Cas. No. 17,059, Deady 49), nor where there was a special agreement for wages (Campion *v.* Nicholas, Str. 405, 93 Eng. Reprint 597).

67. Merchant Shipping Act (1894) (57 & 58 Vict. c. 60), § 157.

68. U. S. Rev. St. (1878) § 4525 [U. S. Comp. St. (1901) p. 3076].

69. The City of Mexico, 28 Fed. 207; The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105.

70. City of New Orleans, 33 Fed. 683; Hainey *v.* The Tristram Shandy, 11 Fed. Cas. No. 5,906, Bee 414 (holding the mariner entitled to share in all prizes taken during the term of the cruise); The Maria, 16 Fed. Cas. No. 9,074 Blatchf. & H. 331 (holding further that any sum which the seaman earns in the meantime should be deducted); The Mary, 16 Fed. Cas. No. 9,186, 1 Paine 180; The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105. And see Sullivan *v.* Morgan, 11 Johns. (N. Y.) 66, where wages were allowed up to the time of the abandonment and for a reasonable time to be allowed for their return home.

Where the voyage is shortened beyond that agreed upon, wages for the specified voyage may be recovered. Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971.

71. Boulton *v.* Moore, 14 Fed. 922, 11 Biss. 500 [*distinguishing* The Hudson, 8 Fed. 167; The Lioness, No. 2, 3 Fed. 922], in which case the voyage was not absolutely broken up, but the contract of hiring was regarded by the parties as terminated); Hindman *v.* Shaw, 12 Fed. Cas. No. 6,514, 2 Pet. Adm. 264 (where wages were allowed to the first port of delivery and during half of the time of the stay there).

Where the seamen are to be paid a lump sum for the entire voyage, and the voyage is broken up by perils of the sea or dangers of navigation, they are not entitled to any wages (Stark *v.* Mueller, 22 Fed. 447); but where, in such case, they serve at the request of the master from the time of the abandonment of the voyage until the arrival of the ship at a port of delivery, they become entitled to *per diem* compensation for such service (Thorson *v.* Peterson, 14 Fed. 742, 11 Biss. 497 [*affirming* 9 Fed. 517, 10 Biss. 530]).

Wages for services performed in port while preparing for the voyage are recoverable where the voyage is not prosecuted. Levering *v.* Columbia Bank, 15 Fed. Cas. No. 8,286, 1 Cranch C. C. 152. And see Bray *v.* Atlanta, 4 Fed. Cas. No. 1,819, Bee 48.

Destruction or abandonment of vessel.— The present statutes of both England and the United States provide that, on the termination of the service of the seaman by the loss or wreck of the vessel, he shall be entitled to wages for the time of service prior to such termination, but not for any further period. U. S. Rev. St. (1878) § 4526 [U. S. Comp. St. (1901) p. 3076]; Merchant Shipping Act (1894) (57 & 58 Vict. c. 60), § 158. See Livewright *v.* Allen, [1906] 2 K. B. 81, 11 Com. Cas. 167, 70 J. P. 290, 75 L. J. K. B. 476, 94 L. T. Rep. N. S. 778, 22 T. L. R. 482, 54 Wkly. Rep. 604. After the vessel has been wrecked, a survey and condemnation are not necessary to bring the case within the statutory provisions (Flanagan *v.* U. S., etc., Steamship Co., 30 Fed. 202), as the statutes apply to all cases of loss or wreck of the vessel (Flanagan *v.* U. S., etc., Steamship

time of their arrival home,[72] according to the peculiar circumstances of the particular case.

**2. Capture or Seizure of Vessel.** Where the vessel is seized under process for the debts of the owner or for violating the revenue laws of a foreign country, the seamen are entitled to wages up to the time of seizure.[73] In some cases, where the vessel was captured by a foreign nation and condemned, the courts have allowed seamen wages up to the time of condemnation;[74] but the rule adhered to in a majority of the cases is that the seamen are entitled to wages for services performed up to the last port of delivery and during half the time of their stay there.[75] However, wages for the whole voyage are recoverable, where the cap-

Co., *supra*, stranding of the vessel caused by the intoxication of the master; Livewright *v.* Allen, *supra*, destruction of vessel after capture; Collins *v.* Simpson Steamship Co., 24 T. L. R. 178, loss caused by explosion while carrying contraband of war), and invest the master with discretion to fix the day of the actual termination of the seaman's services (Flanagan *v.* U. S., etc., Steamship Co., *supra*). For decisions prior to the enactment of the present statutes discussing the right of seamen to wages when the vessel was destroyed or abandoned as a total loss see Blanchard *v.* Bucknam, 3 Me. 1; Swift *v.* Clark, 15 Mass. 173; Daniels *v.* Atlantic Mut. Ins. Co., 24 N. Y. 447 [*affirming* 8 Bosw. 266]; Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210; Dunnett *v.* Tomhagen, 3 Johns. (N. Y.) 154; Adams *v.* The Sophia, 1 Fed. Cas. No. 65, Gilp. 77; Bronde *v.* Haven, 4 Fed. Cas. No. 1,924, Gilp. 592; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; Davis *v.* Faucon, 7 Fed. Cas. No. 3,632b; Davis *v.* Leslie, 7 Fed. Cas. No. 3,639, Ahb. Adm. 123; The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126; Farrell *v.* Mayers, 8 Fed. Cas. No. 4,685; The General Chamberlain, 10 Fed. Cas. No. 5,310, 1 Hask. 432; Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Adm. 203; Henop *v.* Tucker, 11 Fed. Cas. No. 6,368, 2 Paine 151; Hill *v.* Murray, 12 Fed. Cas. No. 6,495, 6 Ben. 141; The Massasoit, 16 Fed. Cas. No. 9,260, 1 Sprague 97; The Niphon's Crew, 18 Fed. Cas. No. 10,277, Brunn. Col. Cas. 577; Thompson *v.* Faussat, 23 Fed. Cas. No. 13,954, Pet. C. C. 182; The Two Catherines, 24 Fed. Cas. No. 14,288, 2 Mason 319; White *v.* Adams, 29 Fed. Cas. No. 17,534, 5 Ben. 355; Anonymous, 2 Campb. 320 note; Appleby *v.* Dods, 8 East 300, 9 Rev. Rep. 450; Dunkley *v.* Bulwer, 6 Esp. 86; The Lady Durham, 3 Hagg. Adm. 196; The Neptune, 1 Hagg. Adm. 227; Harris *v.* Ive, 1 Harr. & W. 238; The Stephen Wright, 12 Jur. 732; Bernier *v.* Langlois, 5 L. T. Rep. 425; The Warrior, 6 L. T. Rep. N. S. 133, Lush. 476; Anonymous, 2 Show. 283, 89 Eng. Reprint 941; Hicks *v.* Walker, 4 Wkly. Rep. 511.

While there is still hope of saving the ship after stranding, the master may compel the seamen to stand by her and they may recover wages for services so performed. Tarlton *v.* Mallory, 23 Fed. Cas. No. 13,753, 10 Ben. 46.

The English statute does not include cases where the service terminates because of the wilful action of the captain and owner and not because of any peril or injury affecting the ship itself or preventing the continuance of the voyage. Austin Friars Steamship Co. *v.* Strack, [1905] 2 K. B. 315, 10 Aspin. 70, 74 L. J. K. B. 683, 93 L. T. Rep. N. S. 169, 21 T. L. R. 556, 53 Wkly. Rep. 661.

A notice of abandonment given to the underwriters cannot be considered in determining whether or not there was a wreck of the vessel which terminated the seamen's wages. Lloyd *v.* Sheen, 10 Aspin. 75, 93 L. T. Rep. N. S. 174.

**72.** The Frank and Willie, 45 Fed. 488.

**73.** Oxnard *v.* Dean, 10 Mass. 143; The Augustine Kobbe, 37 Fed. 696.

Some circumstances have been held to entitle them to additional pay.— Van Beuren *v.* Wilson, 9 Cow. (N. Y.) 158, 18 Am. Dec. 491 (wages for return voyage); The Gazelle, 10 Fed. Cas. No. 5,289, 1 Sprague 378 (wages up to time they might return to port of shipment); Woolf *v.* The Order, 30 Fed. Cas. No. 18,027, 2 Pet. Adm. 261 (one month's additional pay).

**74.** Ardrey *v.* Karthaus, 1 Fed. Cas. No. 511, Taney 379; Bordman *v.* Elizabeth, 3 Fed. Cas. No. 1,657, 1 Pet. Adm. 128; Vandeveer *v.* Tilghman, 28 Fed. Cas. No. 16,846, Crabbe 66; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161. And see Bouysson *v.* Miller, 3 Fed. Cas. No. 1,710, Bee 190.

Where the vessel is owned by enemies at war with the United States, the courts of this country will not decree any wages to the seamen. The Velasco, 28 Fed. Cas. No. 16,910*a*, Blatchf. Prize Cas. 54.

Where all freight is lost by reason of the capture of the vessel, it has been held that the seamen are not entitled to any wages. McQuirk *v.* Penelope, 16 Fed. Cas. No. 8,925, 2 Pet. Adm. 276.

**75.** *Massachusetts.*— Hooper *v.* Perley, 11 Mass. 545.

*New York.*— Murray *v.* Kellog, 9 Johns. 227 (holding the seamen entitled to wages up to the time of departure from the last port of delivery); Brown *v.* Caon, 1 City Hall Rec. 179; Butler *v.* Adams, 1 City Hall Rec. 119.

*Pennsylvania.*— Galloway *v.* Morris, 3 Yeates 445. And see Marshall *v.* Montgomery, 2 Dall. 170, 1 L. ed. 335.

*United States.*— Cranmer *v.* Gernon, 6 Fed. Cas. No. 3,359, 2 Pet. Adm. 390; Giles *v.* The Cynthia, 10 Fed. Cas. No. 5,424, 1 Pet. Adm. 203; Johnson *v.* Sims, 13 Fed. Cas. No. 7,413,

ture was due to the fault of the owner in altering the character of the voyage and carrying contraband cargo,[76] or where the vessel is recaptured,[77] or either it or its value is restored.[78]

**D. For Extra Services.** A seaman is entitled to wages for extra services that he is not bound by his contract to perform;[79] but where he is bound to perform them he is not entitled to increased wages, although they are promised him.[80] When sailors are under articles it is only in extreme cases that new agree-

1 Pet. Adm. 215; Jones *v.* Smith, 13 Fed. Cas. No. 7,497, Brunn. Col. Cas. 255, 5 Hughes 40; Lindsey *v.* The South Carolina, 15 Fed. Cas. No. 8,368, Bee 173; Rand *v.* Hercules, 20 Fed. Cas. No. 11,548. *Compare* Powell *v.* The Betsy, 19 Fed. Cas. No. 11,355, 2 Browne (Pa.) 335.

*England.*— Edwards *v.* Child, 2 Vern. Ch. 727, 23 Eng. Reprint 1077.

See 43 Cent. Dig. tit. "Seamen," § 62.

**Where the vessel is captured on the outward voyage** and before arrival at a port of delivery, no wages are recoverable even though the seamen remain on the ship until condemnation. Lemon *v.* Walker, 9 Mass. 404.

**Right of seamen on letter of marque.**— It has been held that a seaman who was engaged to serve on board a letter of marque for wages and a share of all prizes is not entitled to any part of the wages if the ship is taken before she completes her voyage, although he shall have been sent from the ship before the capture, as prize-master on board a prize taken. Abernathy *v.* Landale, Dougl. (3d ed.) 539, 99 Eng. Reprint 342. But see Cheeny *v.* Livingston, 2 City Hall Rec. (N. Y.) 59.

**Where an embargo** and not a hostile capture is the cause of the detention of the ship and seamen, and the vessel and its cargo are afterward restored and the seamen liberated, the seamen are entitled to wages during the time of their detention. Beale *v.* Thompson, 3 B. & P. 405, 1 Dow. 299, 4 East 546, 1 Smith K. B. 153, 14 Rev. Rep. 73, 3 Eng. Reprint 707.

**76.** Austin Friars Steamship Co. *v.* Strack, [1905] 2 K. B. 315, 10 Aspin. 70, 74 L. J. K. B. 683, 93 L. T. Rep. N. S. 169, 21 T. L. R. 556, 53 Wkly. Rep. 661.

**77.** Ardrey *v.* Karthaus, 1 Fed. Cas. No. 511, Taney 379; Hart *v.* The Littlejohn, 11 Fed. Cas. No. 6,153, 1 Pet. Adm. 115; Howland *v.* The Lavinia, 12 Fed. Cas. No. 6,797, 1 Pet. Adm. 123; Bergstrom *v.* Mills, 3 Esp. 36, 6 Rev. Rep. 810. But see The Friends, 4 C. Rob. 143, holding otherwise where the seaman was a prisoner and unable to rejoin the vessel.

**78.** Bordman *v.* Elizabeth, 3 Fed. Cas. No. 1,657, 1 Pet. Adm. 128; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; Girard *v.* Ware, 10 Fed. Cas. No. 5,460, Pet. C. C. 142; Hitchen *v.* Wilson, 12 Fed. Cas. No. 6,541, Brunn. Col. Cas. 253; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,186, 3 Sumn. 286; The Saratoga, 21 Fed. Cas. No. 12,355, 2 Gall. 164; Watson *v.* The Rose, 29 Fed. Cas. No. 17,288, 1 Pet. Adm. 132; Wesley *v.* Biays, 29 Fed. Cas. No. 17,419, Brunn. Col. Cas. 254; Willard *v.* Dorr, 29 Fed. Cas. No. 17,679, 3 Mason 91, holding that the right to wages is not complete until restitution of the vessel. See also Powell *v.* The Betsy, 19 Fed. Cas. No. 11,355, 2 Browne (Pa.) 335. But see Rand *v.* The Hercules, 20 Fed. Cas. No. 11,548; Wiggins *v.* Ingleton, 2 Ld. Raym. 1211, 92 Eng. Reprint 300.

**The seaman must rejoin the ship** after its restoration in order to entitle him to wages (Watson *v.* The Rose, 29 Fed. Cas. No. 17,288, 1 Pet. Adm. 132) unless he is unable, without any fault on his part, to do so (Brooks *v.* Dorr, 2 Mass. 39; Wetmore *v.* Henshaw, 12 Johns. (N. Y.) 324; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; The Fair American, 9 Fed. Cas. No. 4,846, Bee 134; Williams *v.* The Juno, 29 Fed. Cas. No. 17,724).

**79.** Johnson *v.* The Frank S. Hall, 38 Fed. 258; The Exchange, 8 Fed. Cas. No. 4,594, Blatchf & H. 366; Clutterbuck *v.* Coffin, C. & M. 273, 41 E. C. L. 153, 1 Dowl. P. C. N. S. 479, 6 Jur. 131, 11 L. J. C. P. 65, 3 M. & G. 842, 42 E. C. L. 438, 4 Scott N. R. 509; Hicks *v.* Walker, 4 Wkly. Rep. 511.

**Sleeping on board a vessel at night in port,** unless specially stipulated, does not impart a right to extra compensation therefor to a ship-keeper. The Harvest, 11 Fed. Cas. No. 6,175, Olcott 271.

**If seamen remain on board after their term of shipment has expired,** they will be entitled to pay for their additional services upon the basis of *quantum meruit*; and a reasonable mode of determining that sum is to ascertain the wages mutually agreed upon between the parties during the continuance of their contract, and to adopt that rate for the additional services. Olsen *v.* The Edwin Post, 6 Fed. 314.

**If required to work on Sundays or legal holidays,** in handling cargo when the vessel is in port, merely to save expenses, or to increase the profits of the voyage, the sailors are justly entitled to share in the benefits of their own labor, by being paid extra wages for such extra work. The Carrier Dove, 98 Fed. 313; The Lakme, 93 Fed. 230.

**A seaman is entitled to interest** on his wages from the time they are due. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

**80.** The Potomac, 72 Fed. 535, 19 C. C. A. 151 [*reversing* 66 Fed. 348]; Harris *v.* Watson, 1 Peake N. P. 72, 3 Rev. Rep. 654.

**In case of impending peril or disaster,** seamen are bound, without extra compensation, to render extra labor and services to save the vessel and cargo, and a contract for extra pay made when the ship is in distress is

ments can be considered valid;[81] and in general a seaman who seeks to insist on a fresh contract is bound to show a state of circumstances in which he would be justified in breaking his articles.[82] Where fraud is practised upon seamen to induce them to embark on a certain voyage, they are not bound to work at the compensation fixed by the shipping articles, and if the master agrees to pay them extra compensation the agreement is binding.[83]

**E. Amount and Rate.** Although shipping articles may be attacked by the seamen, and shown by parol to be incorrect, fraudulent, or void;[84] yet, in case of dispute as to the amount of wages agreed on, the shipping articles will control,[85]

wholly void. The Potomac, 72 Fed. 535, 19 C. C. A. 151; Miller *v.* Kelly, 17 Fed. Cas. No. 9,577, Abb. Adm. 564. But in cases of shipwreck, it has been held that the seamen are entitled to claim, according to the merit of their services, an extra reward, beyond their wages, against the property saved. Anonymous, 1 Fed. Cas. No. 430; The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126. This ought not generally to be less than the expenses of their return home. The Dawn, *supra*. Being of the nature of a salvage reward, it may be allowed, as well against the savings of the cargo, as against the fragments of the ship. The Dawn, *supra*.

**In case of the discharge or desertion of a portion of the crew** a seaman cannot recover for extra labor thereby imposed upon him, when the voyage has not been changed or the original articles materially departed from, because there is no valid consideration for the claim, and it is opposed to commercial policy. Stilk *v.* Myrick, 2 Campb. 317, 11 Rev. Rep. 717; Harris *v.* Carter, 2 C. L. R. 1582, 3 E. & B. 559, 18 Jur. 1014, 23 L. J. Q. B. 295, 2 Wkly. Rep. 409, 77 E. C. L. 559. The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. But if the captain capriciously discharges a portion of the crew, the others may not be compelled to take the whole duty upon themselves, and their agreeing to do so may be a sufficient consideration for the promise of an advance of wages. Stilk *v.* Myrick, *supra*.

81. Hartley *v.* Ponsonby, 7 E. & B. 872, 3 Jur. N. S. 746, 26 L. J. Q. B. 322, 5 Wkly. Rep. 659, 90 E. C. L. 872, holding that the objection to their validity is founded both on the ground of want of consideration for the additional pay and on public policy, both these grounds being on the supposition that the crew are bound to proceed.

82. Hopkins *v.* McBride, 18 T. L. R. 53, 50 Wkly. Rep. 255.

**For example,** after an accident which does not render the vessel unseaworthy, the crew have no right to break their articles, and an agreement to pay them additional compensation to work the vessel home cannot be enforced. Hopkins *v.* McBride, 18 T. L. R. 53, 50 Wkly. Rep. 255. But where, in such case, to proceed with the voyage would involve risk of life, the crew are not bound to do so, and a promise to pay them extra wages is binding. Hartley *v.* Ponsonby, 7 E. & B. 872, 3 Jur. N. S. 746, 26 L. J. Q. B. 322, 5 Wkly. Rep. 659, 90 E. C. L. 872.

83. The Brookline, 4 Fed. Cas. No. 1,937, 1 Sprague 104.

84. The Elvine, 19 Fed. 528; The Brookline, 4 Fed. Cas. No. 1,937, 1 Sprague 104; The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83; Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285 [*affirmed* in 18 Fed. Cas. No. 10,667, 2 Curt. 377]; The Nonpareil, 33 L. J. Adm. 201; The Annie Sherwood, 12 L. T. Rep. N. S. 582, 13 Wkly. Rep. 641, 965.

**Contracts entered into with seamen should be construed most favorably for them,** and against the person contracting with them. The Nonpareil, 33 L. J. Adm. 201.

85. Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564; Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260; The Elvine, 19 Fed. 528; Smith *v.* The Joshua Levines, 4 Fed. 846; The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; The Warrington, 29 Fed. Cas. No. 17,208, Blatchf. & H. 335; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161; The Isabella, 2 C. Rob. 241; The Prince Frederick, 2 Hagg. Adm. 394; Elsworth *v.* Woolmore, 5 Esp. 84.

**Where no rate of wages is stipulated in shipping articles,** the seamen may either prove a parol contract (The Warrington, 29 Fed. Cas. No. 17,208, Blatchf. & H. 336; Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452; The Harvey, 2 Hagg. Adm. 79; The Prince George, 3 Hagg. Adm. 376; The Porcupine, 1 Hagg. Adm. 378), or claim the highest rate payable at the port of shipment within the three months next preceding the date of the articles (The Elihu Thompson, 139 Fed. 89; Rollins *v.* The E. O. Stanard, 4 Fed. 750; Mahoon *v.* The Glocester, 16 Fed. Cas. No. 8,970, 2 Pet. Adm. 403, Bee 395; The Warrington, *supra*), or he may recover on a *quantum meruit* (Kelly *v.* The Topsy, 44 Fed. 631).

**On disrating.**— For various causes the master may disrate a seaman, and make a reasonable deduction in his wages. The Alonzo, 1 Fed. Cas. No. 258, 3 Ware 318 [*affirmed* in 4 Fed. Cas. No. 2,223, 2 Cliff. 548]; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194; Mitchell *v.* The Orozimbo, 17 Fed. Cas. No. 9,667, 1 Pet. Adm. 250; Sherwood *v.* McIntosh, 21 Fed. Cas. No. 12,778, 1 Ware 104. Thus where a seaman is promoted but is afterward justifiably disrated, he is entitled only

the seaman being competent to bind himself thereby,[88] unless the articles are shown to be invalid by a reasonable and satisfactory preponderance of evidence.[87] In the case of a seaman taken and carried out without a contract in writing being first made and signed by the seaman, it is declared by act of congress [88] that the master shall pay to such seaman the highest price of wages, which shall have been given at the port or place where such seaman shall have been shipped, for a similar voyage, within three months next before the time of such shipping.[89] While it seems that a seaman can be held to a less rate by reason of a verbal contract,[90] such contract must be clearly established.[91] But if a seaman who ships under a verbal agreement draws the wages promised, he cannot recover a larger amount under the statute.[92]

**F. Extra Wages** [93] — **1. On Improper Discharge.** The payment of extra wages under statutes requiring their payment on the discharge of a seaman before the commencement of the voyage, or before one month's wages are earned, or on his discharge in a foreign port, does not constitute a satisfaction of any other claims which the seaman may have against the vessel.[94] To entitle the seaman to such additional wages, he must be an American seaman,[95] and there must be

to the wages originally contracted for (Wood *v.* The Nimrod, 30 Fed. Cas. No. 17,959, Gilp. 83), and where one shipped as second mate, but was afterward justifiably disrated, he was entitled only to the same wages as the other able seamen for the remainder of the voyage (The Edwin, 23 Fed. 255). But the disrating is not retroactive, and the seaman is entitled to the wages of his original grade from the time he shipped until the time he was disrated. Fratter *v.* Andrews, 17 Can. L. T. Occ. Notes 19.

**A seaman or mate who is promoted** is entitled to the wages of the position to which he is promoted (The Blohm, 3 Fed. Cas. No. 1,556, 1 Ben. 228; Knee *v.* American Steamship Co., 14 Fed. Cas. No. 7,877; Hanson *v.* Royden, L. R. 3 C. P. 47, 37 L. J. C. P. 66, 17 L. T. Rep. N. S. 214, 16 Wkly. Rep. 205), and an alteration in the ship's articles is not necessary to support his title (Hanson *v.* Royden, *supra*; The Providence, 1 Hagg. Adm. 391). Thus a mate succeeding to the position of master upon the latter's death is entitled to the wages of such position. Smith *v.* Curtis, 5 Allen (Mass.) 367. And see Hanson *v.* Royden, *supra*. *Contra*, The Fanny Gardner, 8 Fed. Cas. No. 4,642, 5 Biss. 209. And the same rule extends to a seaman who succeeds a mate. The Providence, *supra*.

**During second season.**— Where a seaman has served one season in a certain capacity, and he ships again for a second season, without any agreement as to wages, his last year's wages will be received as a measure of wages for his subsequent work. Milligan *v.* The B. F. Bruce, 17 Fed. Cas. No. 9,602, Newb. Adm. 539.

**Wages of kidnapped seamen.**— Where sailors are inveigled aboard a ship, and compelled to serve against their will, the master cannot fix the rate of their wages, but the court will fix it anywhere within reasonable limits. Johnson *v.* The Karoo, 49 Fed. 651.

**86.** The Elvine, 19 Fed. 528; The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451.

**Seamen temporarily absent from a vessel** who rejoin her are entitled to the same rate originally contracted for, in the absence of a new contract. The Magna Charta, 16 Fed. Cas. No. 8,953, 2 Lowell 136; Shakerly *v.* Pedrick, 21 Fed. Cas. No. 12,699, Crabbe 63; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140.

**87.** The Elvine, 19 Fed. 528.

**88.** 1 U. S. St. at L. 131, c. 29, § 1, and 5 U. S. St. at L. 395, c. 48, § 10.

**To what vessels and voyages statute applicable.**— The act of 1790, allowing to seamen, shipped without contract in writing, the highest wages, notwithstanding any parol contract, is confined to cases of vessels bound on a foreign voyage, or to a domestic port other than that of an adjoining state. It does not extend to the trade between ports of the same state, nor with them of an adjoining state, nor can it be made to reach an ordinary fishing voyage, without doing violence to the language or interpolating words which the legislature have not seen fit to use. The Ianthe, 12 Fed. Cas. No. 6,992, 3 Ware 126. Nor does it apply to seamen upon a tugboat. Milligan *v.* The B. F. Bruce, 17 Fed. Cas. No. 9,602, Newb. Adm. 539.

**89.** The Lud Keefer, 49 Fed. 650; The Australia, 2 Fed. Cas. No. 667, 3 Ware 240; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Graham *v.* The Exporter, 10 Fed. Cas. No. 5,667; Jameson *v.* The Regulus, 13 Fed. Cas. No. 7,198, 1 Pet. Adm. 212; Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452. And see The Acorn, 15 Fed. 751.

**90.** See Jameson *v.* Regulus, 13 Fed. Cas. No. 7,198, 1 Pet. Adm. 212. *Compare* The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448.

**91.** The Acorn, 15 Fed. 751.

**92.** The City of Fremont, 5 Fed. Cas. No. 2,746, 2 Biss. 415, 9 Fed. Cas. No. 5,093.

**93. Compensation for extra services** see *supra*, VI, D.

**Lien for extra wages** see *infra*, VI, L, 1.

**94.** Erwin *v.* Butler, 5 La. 330; The W. L. White, 25 Fed. 503.

**95.** Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10; The Hermon, 12 Fed. Cas. No. 6,411, 1 Lowell 515; Orne *v.* Townsend,

a voluntary [96] discharge [97] at a foreign port,[98] or facts entitling the seaman to a discharge,[99] together with an absence of facts showing a waiver of the right.[1] Under former statutes, the United States was entitled to one third of the extra wages payable on the discharge of a seaman in a foreign port.[2]

**2. On Termination of Voyage by Loss or Unseaworthiness of Vessel.** Several changes and amendments have at different times been made in the statutes relating to the payment of extra wages on the breaking up of the voyage because of the sale or unseaworthy condition of the vessel, but the uniform construction has been that the extra wages named in the statutes are recoverable where the vessel is voluntarily sold or either becomes wrecked, stranded, or otherwise unseaworthy, or is condemned as such, and such condition is due to the wilful negligence and fault of the owner; and that such wages are not recoverable where the sale or loss of the vessel is due to extraordinary perils of the sea.[3] A payment of the extra

18 Fed. Cas. No. 10,583, 4 Mason 541, holding that the omission of the name of the seaman as an American citizen from the list of the crew certified from the collector's office is not fatal, provided he is named as an American citizen on the master's list of the crew.

96. Pool *v.* Welsh, 19 Fed. Cas. No. 11,269, Gilp. 193.

**Effect of interdiction of commerce.**—Where, at the time of the discharge, the vessel is in condition to return home or perform any lawful voyage, the fact that it was previously captured and recaptured does not take away the voluntary character of the discharge. The Saratoga, 21 Fed. Cas. No. 12,355, 2 Gall. 164.

97. Waitshoair *v.* The Craigend, 42 Fed. 175 (holding that extra wages are not allowable where the contract is terminated by mutual consent); The Caroline E. Kelly, 5 Fed. Cas. No. 2,422, 2 Abb. 160, 7 Phila. (Pa.) 570 (holding that the leaving of a seaman on shore amounts to a discharge); Rogers *v.* Lewis, 20 Fed. Cas. No. 12,014, 1 Lowell 297. And see Caffyn *v.* Peabody, 149 Fed. 294, where the case was not within the statute, but the discharge was wrongful and the court allowed extra wages in analogy to the statutory relief.

**Discharge by the mate, in absence of the master, is sufficient.**—Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541.

**Coercing seamen** into remaining on board a vessel sold to a foreign government is equivalent to a discharge, entitling them to extra wages. Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10.

**Where the vessel is compelled to return** in a state of wreck shortly after the commencement of the voyage, and its unseaworthy condition was known by the owner, the seaman is entitled to the extra wages provided by statute. The Staghound, 97 Fed. 973.

**A delay in discharging the men,** caused by the master waiting for definite instructions from the owners on the libel of the vessel, does not deprive the seamen of their right to extra wages. The Adolph, 7 Fed. 501.

**Under a former statute** extra wages were recoverable when the seaman was discharged in a foreign port with his consent (Gove *v.* Judson, 19 Fed. 523); and the statute was held to apply to all discharges of seamen in a foreign port, regardless of whether the contract of employment had expired or not (Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10); but no action therefor could be maintained against the owner (Ogden *v.* Orr, 12 Johns. (N. Y.) 143).

98. Brown *v.* Hartley, 4 Fed. Cas. No. 2,009*a*.

99. Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,371 [*affirming* 4 Fed. Cas. No. 2,372, McAllister 77]; The Hermon, 12 Fed. Cas. No. 6,411, 1 Lowell 515.

1. The John R. Bergen, 122 Fed. 98.

**Settlements made under duress,** or by a proctor without authority, which do not include the extra wages due the seaman, do not bar him of his right. Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433.

**A claim for extra wages is not satisfied** by the payment of extra monthly wages, where the seaman was hired for the share of the takings of an entire whaling voyage, and he does not concur in this method of apportionment. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451.

**A discharge by the consul without extra** wages is of no efficacy and does not bar the right to extra wages unless the consul makes an official entry thereof upon the list of the crew and the shipping articles. Miner *v.* Harbeck, 17 Fed. Cas. No. 9,629, Abb. Adm. 546.

2. Pray *v.* U. S., 10 Ct. Cl. 453; Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81; Pool *v.* Welsh, 19 Fed. Cas. No. 11,269, Gilp. 193. And see Griffith *v.* U. S., 24 Ct. Cl. 160.

3. Brown *v.* Chandler, 4 Fed. Cas. No. 1,998; The Dawn, 7 Fed. Cas. No. 3,665, 1 Ware 499; Gallagher *v.* Murray, 9 Fed. Cas. No. 5,193, 10 Ben. 290 (holding that a recommendation by surveyors for a condemnation of the vessel because of injuries received by perils of the sea brings the case within the rule); Henop *v.* Tucker, 11 Fed. Cas. No. 6,368, 2 Paine 151; Hoffman *v.* Yarrington, 12 Fed. Cas. No. 6,580, 1 Lowell 168; The Rupee, 21 Fed. Cas. No. 12,140; Wells *v.* Meldrun, 29 Fed. Cas. No. 17,402, Blatchf. & H. 342.

**Vessel unseaworthy at inception of voyage.**—Where the vessel was unseaworthy at the beginning of the voyage, extra wages may be recovered. The Wenonah, 29 Fed. Cas. No. 17,412, 1 Hask. 606.

**If the vessel can be repaired at a reason-**

wages to the consul at the port where the voyage terminates has been held to relieve the master from liability.[4]

**3. For Reduction of Provisions.** Under statutes providing for extra wages or compensation where the allowance of provisions required by law to be furnished the seamen is reduced, extra wages are recoverable, in proportion to the shortage,[5] whether there is a general reduction in all kinds of food,[6] or a shortage in some kinds,[7] in which case an excess of other kinds of food does not excuse,[8] unless they are proper substitutes for the food, of which the allowance is reduced, and of which a proper supply could not be obtained, and thus come within the statutory provisions allowing such circumstances to reduce or modify the compensation.[9] Seamen are not estopped from suing for the extra compensation by their agreeing on shipboard to acquiesce in the short allowance,[10] but they cannot recover where the deficiency was accidental or unintentional.[11]

**4. For Delaying Payment.** It is provided by statute that every master who refuses or neglects to make payment of wages in the manner required by law without sufficient cause shall pay to the seaman a sum equal to one day's pay for each day's delay;[12] but it has been held that delay is excused where the master

able expense and in a reasonable time, but the repairs are not made, the owners are liable for extra wages. The Dawn, 7 Fed. Cas. No. 3,666, 2 Ware 126, 7 Fed. Cas. No. 3,665, 1 Ware 499.

**Restriction of liability to proceeds of vessel.** — Where the loss is without the privity or knowledge of the owner, his liability for extra pay is restricted to the proceeds of the vessel after payment of wages to the termination of the voyage. Brown *v.* Chandler, 4 Fed. Cas. No. 1,998; The Wenonah, 29 Fed. Cas. No. 17,412, 1 Hask. 606.

4. Drew *v.* Pope, 7 Fed. Cas. No. 4,080, 2 Sawy. 72.

5. Petersen *v.* J. F. Cunningham Co., 77 Fed. 211; Collins *v.* Wheeler, 6 Fed. Cas. No. 3,018, 1 Sprague 188 [*following* The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45; The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465, and *disapproving* Coleman *v.* Harriet, 6 Fed. Cas. No. 2,982, Bee 80]; The Hermon, 12 Fed. Cas. No. 6,411, 1 Lowell 515.

**Where complaint is made of the bad quality** of the food, the compensation of the seaman is limited by U. S. Comp. St. § 4568, to a sum not exceeding one dollar a day during the time of the continuance of the supply of such food. The Rence, 46 Fed. 805.

**Length of time for which extra wages payable.** — The crew are entitled to extra wages for every day that the short allowance is continued. The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465.

6. The Amalia, 3 Fed. 652; Collins *v.* Wheeler, 6 Fed. Cas. No. 3,018, 1 Sprague 188; The Josephine, 2 Jur. N. S. 1148, Swab. 152.

**A seaman furnishing his own provisions,** in case of a shortage, is entitled to their value, as wages, but for supplies furnished by him to other members of the crew his claim is that of a materialman. The Rodney, 20 Fed. Cas. No. 11,993, Blatchf. & H. 226.

7. The Mary Paulina, 16 Fed. Cas. No. 9,224, 1 Sprague 45.

**Failure to serve lime juice,** or other antiscorbutics, as required by U. S. Rev. St. (1878) § 4569 [U. S. Comp. St. (1901) p. 3100], does not confer on the crew any right in the penalty in the nature of additional wages. Such right is confined to cases of failure to furnish such provisions as are required by U. S. Rev. St. (1878) § 4562 [U. S. Comp. St. (1901) p. 3096]. Petersen *v.* J. F. Cunningham Co., 77 Fed. 211.

**A deficiency of other than the statutory articles of food** may give rise to a right to extra wages, as the owner is bound to furnish the seamen suitable subsistence, but the court will not decree any wages on that account where the statutory penalty is sufficient compensation. Collins *v.* Wheeler, 6 Fed. Cas. No. 3,018, 1 Sprague 188; Foster *v.* Sampson, 9 Fed. Cas. No. 4,982, 1 Sprague 182.

8. Broux *v.* Ivy, 62 Fed. 600.

9. The Belvedere, 90 Fed. 106, holding that no extra wages are recoverable where no suffering or sickness was caused by the short allowance.

**Under 1 U. S. St. at L. 135,** before extra wages could be recovered it was necessary to show not only that the crew were put on short allowance during the voyage, and before the arrival of the vessel at the port of destination, but that the vessel left her last port with an amount of provisions less than that required by law. The Childe Harold, 5 Fed. Cas. No. 2,676, Olcott 275; The Elizabeth *v.* Rickers, 8 Fed. Cas. No. 4,353, 2 Paine 291 [*modifying* 8 Fed. Cas. No. 4,361, Blatchf. & H. 195]; Ferrara *v.* The Talent, 8 Fed. Cas. No. 4,745, Crabbe 216; The John L. Dimmick, 13 Fed. Cas. No. 7,355, 3 Ware 196.

10. Broux *v.* The Ivy, 62 Fed. 600.

11. The Elizabeth *v.* Rickers, 8 Fed. Cas. No. 4,353, 2 Paine 291 [*modifying* 8 Fed. Cas. No. 4,361, Blatchf. & H. 195].

**Sharing with another crew in distress** and thereby creating a scarcity of food confers no right to extra wages. Burdett *v.* Williams, 27 Fed. 113.

12. U. S. Rev. St. (1878) § 4529 [U. S. Comp. St. (1901) p. 3077].

**The English statute contains similar provisions.** Covert *v.* The Wexford, 3 Fed. 577.

or owner has reasonable cause for contesting his liability for wages,[13] or where, on account of heavy losses, the owner is unable to command sufficient money to pay off the crew.[14]

**5. For Cruel Treatment.** Seamen who are entitled to be discharged on account of cruel and unusual treatment are entitled to three months' extra pay.[15]

**G. Assignment of Wages in Advance.** In the United States by statute,[16] an assignment of a seaman's wages in advance is forbidden;[17] and a similar statute[18] was passed in England at an early date.[19]

**H. On Discharge.** In the absence of some usage or custom to the contrary,[20] seamen employed without an agreement as to the duration of the service may be discharged without previous notice, and can recover only for the time actually served;[21] and where a seaman's contract of service is terminated at his own request after part performance he is not entitled to wages for the entire voyage,[22] but only for the time of actual service;[23] nor will the court decree payment of extra wages or damages as in case of a wrongful discharge, nor forfeiture of the wages earned by services rendered pursuant to the contract, as in case of desertion.[24] A contract made by a seaman upon his discharge, concerning wages already earned, will be binding on him, if he acts freely, and is fairly dealt with;[25] but will be set aside or disregarded if inequitable.[26]

13. The St. Paul, 133 Fed. 1002; The George W. Wells, 118 Fed. 761, holding that delay is excused even though the contention of the master is insufficient in law. *Compare* Gallagher *v.* Murray, 9 Fed. Cas. No. 5,193, 10 Ben. 290.

14. The Gen. McPherson, 100 Fed. 860; The Wenonah, 29 Fed. Cas. No. 17,412, 1 Hask. 606.

15. Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81, holding that it is immaterial whether the seamen are or are not deserters.

Where the treatment was caused by the seaman's insolence, the rule is otherwise. Brown *v.* The Independence, 4 Fed. Cas. No. 2,014, Crabbe 54.

16. U. S. Rev. St. (1878) § 4536 [U. S. Comp. St. (1901) p. 3082].

17. The George M. Wells, 118 Fed. 761; White *v.* The M. M. Morrill, 78 Fed. 509. But see The Staghound, 97 Fed. 973, holding that the owners of a fund derived from the sale of a vessel cannot urge as against the assignee of an advance note to seamen for a month's wages, the wages having been thereafter earned and not paid, the rule made for the benefit of seamen that the assignee of such a note cannot sue thereon.

Necessity of this statute was pointed out before its passage by Judge Story in Cushman *v.* Ryan, 6 Fed. Cas. No. 3,515, 1 Story 91, 98.

18. 1 Geo. II, c. 14, § 7.

19. Bellamy *v.* Lunn, 8 Aspin. 348, 77 L. T. Rep. N. S. 396. But see McKnne *v.* Joynson, 5 C. B. N. S. 218, 4 Jur. N. S. 760, 28 L. J. C. P. 133, 6 Wkly. Rep. 658, 94 E. C. L. 218; Cronch *v.* Martin, 2 Vern. Ch. 595, 23 Eng. Reprint 987.

Assignment by seaman of his prize money to the surgeon set aside see Taylor *v.* Rochfort, 2 Ves. 281, 28 Eng. Reprint 182; Baldwin *v.* Rochford, 1 Wils. C. P. 229, 95 Eng. Reprint 589.

20. See Moore *v.* Neafie, 3 Fed. 650, holding that an established usage of a certain port by which employees in the steam-tug service are authorized to leave at any time, and their employers are permitted to discharge them at any time, their wages to be paid up to the time of their leaving, is not unreasonable, nor invalid as being contrary to a positive rule of law or as against public policy.

21. The Rescue, 116 Fed. 380; The Pacific, 18 Fed. 703; Marsland *v.* The Yosemite, 18 Fed. 331.

A hiring at monthly wages imports that the engagement is by the month, terminable with each month at the option of either party. If the party hired is discharged before the termination of a month, he may recover for the entire month. The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396.

22. Thompson *v.* The Stacey Clarke, 54 Fed. 533; Raymond *v.* The Ella S. Thayer, 40 Fed. 902, 12 Sawy. 409; Brown *v.* Hartley, 4 Fed. Cas. No. 2,009*a*; The William Cummings, 29 Fed. Cas. No. 17,690, holding that where seamen obtain their discharge by the consul at a foreign port through concerted misrepresentations, but ultimately return to the home port in the vessel, they will not be allowed wages during the time of detention at the foreign port.

23. The Topgallant, 84 Fed. 356; Waitshoair *v.* The Craigend, 42 Fed. 175.

24. Waitshoair *v.* The Craigend, 42 Fed. 175.

25. Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433; Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56.

A provision in the shipping articles that any seaman who terminates his contract before the end of the voyage shall only receive one dollar per month as wages is reasonable. Kelly *v.* The Topsy, 44 Fed. 631.

26. The Hermine, 12 Fed. Cas. No. 6,409, 3 Sawy. 80.

Duress.— Where a seaman is induced to assent to his discharge, upon payment of a nominal sum, from just apprehension of future ill-treatment, arising from the miscon-

**I. Deductions and Offsets — 1. General Rules.** Cross demands against the claim of a seaman for wages are not regarded with favor,[27] ordinarily the only set-offs allowed being those which are part of the contract on which suit is brought, as partial payments of wages and advances,[28] or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence;[29] or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services.[30] Debts or liabilities of seamen to the master or owner of a vessel for other causes than these cannot be set up against their demand of wages.[31] Moreover, in order to be avail-

duct of the master, such assent is given under a species of duress, and is no bar to a recovery of the amount actually due to him at the time of his discharge. Bates *v.* Seabury, 2 Fed. Cas. No. 1,104, 1 Sprague 433.

27. The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84; The Uncle Tom, 24 Fed. Cas. No. 14,335, 10 Ben. 234, holding that such ground for withholding wages is in effect inconsistent with those provisions of our law which are designed to secure to the seamen their absolute right to their wages.

**Wages earned by a minor, as seaman,** are only subject, in admiralty, even in a suit by the father, to such deductions and offsets as are authorized by or enforceable against the minor himself. Charges authorized by the father, only, will not be allowed as offsets. The Lucy Anne, 15 Fed. Cas. No. 8,596, 3 Ware 253.

**Articles sold to seamen** by the master during the voyage are allowed as an offset to wages, at a rate not above ten per cent over the cost to the master.

**A charge in excess of that is unreasonable and oppressive.**— The Rob Roy, 30 Fed. 696 (holding that where a settlement was made with one of the crew, and excessive charges were made for whisky and tobacco furnished at the bar of the boat, a court of admiralty would not sanction the settlement or the charges, but would reduce the set-off to a reasonable allowance of these articles); The Edwin, 23 Fed. 255.

28. Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. 649; Bains *v.* The James and Catherine, 2 Fed. Cas. No. 756, Baldw. 544; The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161. And see Worth *v.* Mumford, 1 Hilt. (N. Y.) 1.

**Where the nature of the claims is entirely different** they are not the proper subject of set-off. The Uncle Tom, 24 Fed. Cas. No. 14,335, 10 Ben. 234.

**Where a contract of service is made in violation of statute** a seaman may recover full wages for the time served, without deduction on account of advance. The Troop, 117 Fed. 557 [*affirmed* in 125 Fed. 672, 60 C. C. A. 362].

**Allotment of wages to creditor.**— Since the act of Feb. 18, 1895, providing that a shipping agreement made before a shipping commissioner for a coastwise voyage shall not include the clause relating to an allotment of wages, where such an allotment is made it is invalid, and money paid under it cannot be deducted from the seaman's wages. Grossett *v.* Townsend, 86 Fed. 908, 30 C. C. A. 457. But this rule cannot be urged to defeat recovery by the assignee of an advance note to a seaman for a month's wages, the wages having thereafter been earned, and not paid. The Staghound, 97 Fed. 973.

29. Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. 649; The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161.

**A seaman proved to be utterly incompetent and unskilful** cannot recover his stipulated wages where the master had no opportunity to discharge him and employ another person in his place after discovering his incompetency. Buena Vista, 4 Fed. Cas. No. 2,105, 3 Blatchf. 510. Nor is he entitled to the wages of that class of seamen to which he properly belongs but only to what his services are actually worth to the owners. Wheatley *v.* Hotchkiss, 29 Fed. Cas. No. 17,483, 1 Sprague 225. But where opportunity for discharge exists, and no action to that end is taken by the master, a reduction in wages for alleged incompetency or neglect of duty will not be allowed. The Sadie C. Sumner, 142 Fed. 611. Habitual drunkenness, if it goes to establish general incapacity to perform duty, is a ground of forfeiture of wages; otherwise it goes only to diminish compensation for the voyage. Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541.

**Necessity of entry of offense in ship's log.**— To authorize the offset of a fine for misconduct or neglect of duty an entry of the offense is required to be made on the ship's log. U. S. Rev. St. (1878) § 4597, as amended by 30 U. S. St. at L. 761, c. 28, § 20 [U. S. Comp. St. (1901) p. 3115]. And see Healey *v.* The Maracaibo, 79 Fed. 809. But although no entry of the occurrence is made in the log as required, a deduction from the wages of a seaman by reason thereof may be made, the court being given a discretion to receive other evidence in such case. The Marjory Brown, 134 Fed. 999.

30. The Juneau, 113 Fed. 514; Gillingham *v.* Charleston Tow-boat, etc., Co., 40 Fed. 649; The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161.

31. The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396; The Lady Campbell, 2 Hagg. Adm. 14 note.

**The master cannot set off the libellant's personal debt to him** against the debt of the ship to the libellant. The Journeyman, 60

able, the set-off must be specially pleaded,[32] and the facts stated must constitute a cause of action against the seaman singly.[33]

**2. Sick or Disabled Seamen.** Where a seaman is unable to perform duty during a part of the voyage by reason of sickness, he is entitled to full wages for the whole voyage,[34] notwithstanding the sickness may have begun before he signed the articles, if he had entered on the service,[35] or that the sickness may have had its origin in some previous injury or infection, not occasioned by his own fault, provided he had acted in good faith, and without fraudulent misrepresentation or concealment;[36] but in case of illness by his own fault a seaman is not entitled to his wages during the time he does not do duty.[37] So, in case of an injury received in the service of the ship, a seaman is entitled to wages to the end of the voyage,[38] or to the time of his return, not exceeding the length of the voyage;[39]

Fed. 295. But where the master is authorized to pay a debt contracted by a seaman, it has been held that he is entitled to deduct the amount so paid from his wages. The Cold Stream, 6 Fed. Cas. No. 2,972, 4 Sawy. 172.

**An indebtedness for a house** cannot be pleaded in admiralty as a set-off to a claim for unpaid wages as pilot and carpenter of a vessel, in the absence of an allegation that it was agreed that the work performed as pilot and carpenter should be taken in payment for such house. The Two Brothers, 4 Fed. 158.

32. White *v.* The Ranier, 45 Fed. 773.

33. White *v.* The Ranier, 45 Fed. 773.

34. Highland *v.* The Harriet C. Kerlin, 41 Fed. 222; Neilson *v.* The Laura, 17 Fed. Cas. No. 10,092, 2 Sawy. 242; Chandler *v.* Grieves, 2 H. Bl. 606 note, 6 T. R. 325 note, 3 Rev. Rep. 525, 101 Eng. Reprint 576.

Indebitatus assumpsit lies to recover the wages for the whole voyage of a seaman, who had signed shipping articles, was taken sick in the service of defendant, and was left in another port, unable to rejoin the ship, provided he received no wages in returning in another ship. Sykes *v.* Summerel, 2 Browne (Pa.) 225.

Full wages mean the aggregate amounts of all the monthly sums, which would have accrued, upon the completion of the voyage. Sims *v.* Jackson, 22 Fed. Cas. No. 12,890, 1 Pet. Adm. 157, 1 Wash. 414; Chandler *v.* Grieves, 2 H. Bl. 606 note, 6 T. R. 325 note, 3 Rev. Rep. 525, 101 Eng. Reprint 576.

35. Neilson *v.* The Laura, 17 Fed. Cas. No. 10,092, 2 Sawy. 242.

36. Chandler *v.* The Annie Buckman, 5 Fed. Cas. No. 2,591*a* (holding that when a seaman, being in a diseased state unknown to the master and owners, ships as an able man, he is not entitled to recover wages during the time of his disability); Neilson *v.* The Laura, 17 Fed. Cas. No. 10,092, 2 Sawy. 242.

37. Chandler *v.* The Annie Buckman, 5 Fed. Cas. No. 2,591*a*; Johnson *v.* Huckins, 13 Fed. Cas. No. 7,390, 1 Sprague 67; Walton *v.* The Neptune, 29 Fed. Cas. No. 17,135, 1 Pet. Adm. 142.

**Wages paid a substitute,** during a part of the time the libellant was off duty, cannot be charged to him, his wages for the same period being already deducted, nor can the claim for delay, by reason of the loss of his services, during the remainder of that time. Johnson *v.* Huckins, 13 Fed. Cas. No. 7,390, 1 Sprague 67.

38. Olsen *v.* Whitney, 109 Fed. 80; The Robert C. McQuillen, 91 Fed. 688; The City of Alexandria, 17 Fed. 390; Longstreet *v.* The R. R. Springer, 4 Fed. 671; The Cortes, 6 Fed. Cas. No. 3,258, 6 Ben. 288; Jackson *v.* The Fleta, 13 Fed. Cas. No. 7,135; The North America, 18 Fed. Cas. No. 10,314, 5 Ben. 486; Chandler *v.* Grieves, 2 H. Bl. 606 note, 6 T. R. 325 note, 3 Rev. Rep. 525, 101 Eng. Reprint 576.

**Illness caused by bad food** is an injury in the service of the ship within 17 & 18 Vict. c. 104, § 228, subs. 1. Board of Trade *v.* Sundbolm, 4 Aspin. 196, 41 L. T. Rep. N. S. 469.

**The fact that a seaman at the time of his employment was an escaped convict,** and subject to recapture, did not deprive him of the rights which ordinarily arise from such employment; and where he was injured in the service, and in consequence left the vessel before the expiration of his term of service, and was subsequently captured and reimprisoned before the expiration of such term, he is entitled to wages to the time of his recapture. McCarron *v.* Dominion Atlantic R. Co., 134 Fed. 762.

**Contributory negligence** on the part of the seaman injured does not debar him from recovering his full wages (The Robert C. McQuillen, 91 Fed. 688; Davidson *v.* City of St. Louis, 56 Fed. 720; Paulson *v.* The Governor Ames, 55 Fed. 327; The Truro, 31 Fed. 158; The City of Alexandria, 17 Fed. 390), unless it is wilful, gross, or inexcusable, in which case the expense of his cure may be charged against his wages (The Truro, *supra*; City of Alexandria, *supra*).

**In case of injury by the fault or neglect of the officers,** it has been held that a seaman is entitled to full wages until restored without reference to the length of the voyage. The Centennial, 10 Fed. 397, 4 Woods 50; Myers *v.* The Lizzie Hopkins, 17 Fed. Cas. No. 9,993, 1 Woods 170. But see Paulson *v.* The Governor Ames, 55 Fed. 327; The City of Alexandria, 17 Fed. 390, in both of which cases it is held that a seaman injured through the negligence of the ship's officers is entitled to recover wages only to the end of the voyage.

39. Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1.

or for the term of his shipment, where that extends beyond the termination of the voyage.[40] Where a sick or disabled seaman is left by the master in a foreign port, he is entitled to his wages up to the end of the voyage,[41] or until his return home,[42] deducting wages actually earned on the return voyage.[43]

**3. Necessity of Furnishing Account of Wages and Deductions.** By statute, both in the United States,[44] and in England,[45] the master is required to furnish to seamen or to the shipping commissioner an account of wages and deductions to be made therefrom within a specified time before paying off or discharging the former.[46]

**J. Forfeiture and Fines — 1. Grounds — a. In General.** While forfeitures of wages previously earned are imposed upon seamen for acts of misconduct, they are not looked upon with favor by the courts,[47] nor imposed for trivial offenses,[48] nor upon mere suspicion, but only upon positive evidence,[49] for forfeitures are primarily imposed not merely as compensation to the owner for loss, but as a punishment to the seamen.[50] But although seamen who have not signed shipping articles are not liable to forfeitures provided for by the statutes of the United States, they are liable to forfeitures prescribed by the maritime law.[51]

**b. Loss or Injury to Vessel or Cargo.** Seamen are generally held to be liable out of their wages for damages or loss to the vessel caused by their negligence[52]

40. McCarron *v.* Dominion Atlantic R. Co., 134 Fed. 762; Longstreet *v.* The R. R. Springer, 4 Fed. 671.

41. Heynsohn *v.* Merriman, 1 Fed. 728; Nevitt *v.* Clarke, 18 Fed. Cas. No. 10,138, Olcott 316.

**Refusal to rejoin ship.**— A seaman, left sick in a foreign port, who refused to rejoin the ship when able to do so, will not be allowed wages beyond the time of such refusal. Williams *v.* The Hope, 29 Fed. Cas. No. 17,721, 1 Pet. Adm. 138.

**Under the British** law, where an injured seaman is left behind in a foreign port, his wages stop. The Magna Charta, 16 Fed. Cas. No. 8,953, 2 Lowell 136.

42. Heynsohn *v.* Merriman, 1 Fed. 728; Harris *v.* Capen, 11 Fed. Cas. No. 6,118.

43. Harris *v.* Capen, 11 Fed. Cas. No. 6,118.

44. U. S. Rev. St. (1878) § 4550 [U. S. Comp. St. (1901) p. 3089].

45. Merchant Shipping Act (1854), § 171.

46. Stevenson *v.* Hare, 23 Fed. Cas. No. 13,416, 2 Sawy. 583 (holding that the "deductions" referred to are deductions to be made from wages to be paid, such as advances, money furnished during the voyage, supplies from the slop chest, and that the expenses occasioned by a desertion are not treated by the act as "deductions" to be allowed the master; they are charges, to the payment of which the wages forfeited are "in the first instance to be applied," and the "balance" only is to be paid to the commissioner); The Highland Chief, [1892] P. 76, 7 Aspin. 176, 61 L. J. P. D. & Adm. 51, 66 L. T. Rep. N. S. 468, 40 Wkly. Rep. 416 (holding that where a seaman's wages are reduced for alleged drunkenness and incapacity, such alteration of wages is not a deduction therefrom within the meaning of the statute).

47. The A. M. Baxter, 93 Fed. 479 (where in a suit for seamen's wages, although the seamen had been guilty of misconduct that would ordinarily have rendered them liable to a forfeiture of wages, the court refused to decree the forfeiture because the answer failed to demand it); The Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229; Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; The Lilian M. Vigus, 15 Fed. Cas. No. 8,346, 10 Ben. 385; The Rovena, 20 Fed. Cas. No. 12,090, 1 Ware 313.

48. The Alps, 19 Fed. 139, holding also that under the law of England fines may be imposed on seamen only when the shipping articles contain stipulations permitting their imposition.

49. Krueger *v.* The John and Winthrop, 84 Fed. 503, holding that the mere fact that the master suspended seamen from duty, and imprisoned them, in good faith, on suspicion of an intent to burn the vessel, is not ground for forfeiting their wages, if they in fact were not guilty.

**Effect of examination by consul.**— The fact that the charge of misconduct has been examined by a consul with a view to send the seaman home for trial will not preclude a seaman for claiming wages. The Paul Revere, 10 Fed. 156.

50. The Florence, 9 Fed. Cas. No. 4,881.

51. Jameson *v.* The Regulus, 13 Fed. Cas. No. 7,198, 1 Pet. Adm. 212.

52. Fogerty *v.* Pratt, 9 Fed. Cas. No. 4,896 (holding that where the mates and crew of a vessel discharge ballast into a lighter or barge so carelessly as to overload her on one side, and cause her to sink, they are liable to the owner for the loss); Mariners *v.* The Washington, 16 Fed. Cas. No. 9,086, 1 Pet. Adm. 219 (holding, however, that the vessel owner cannot retain wages of the crew as a contribution for injuries from a collision alleged to have been caused by their negligence, until after the legal liability is established).

**Obedience to orders as excuse for negligence.**— Mariners are not required to obey all

or misconduct,[53] and for the value of articles belonging to the vessel stolen or embezzled by them,[54] or lost through their inattention or carelessness;[55] and when the fault is not clearly fixed on any particular person or persons connected with the ship all must contribute, the master included, in the ratio of their wages,[56] except those that prove their innocence.[57]

**c. Misconduct and Disobedience.** Misconduct on the part of a seaman sufficient to work a forfeiture of wages must be misconduct of such gravity as to render the seaman's discharge imperatively necessary to the safety of the ship, and the due preservation of discipline;[58] a forfeiture will not be decreed because of trivial acts of misconduct, such as a single act of disobedience,[59] threatening to

orders unconditionally; but it is their right and duty, when they believe that work is being done in an improper or dangerous manner, to call their officers' attention thereto, and remonstrate with them. If they fail to do so, they are liable with the officers for a resulting loss. Fogerty *v.* Pratt, 9 Fed. Cas. No. 4,896.

**Set-off.**— The loss caused by a seaman's negligence or misconduct may be set off in an action by the seaman for wages. The Hudson, 12 Fed. Cas. No. 6,831, Olcott 396; The New Phœnix, 2 Hagg. Adm. 420. See Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168.

**Liability to master.**— The master may reimburse himself out of the seamen's wages for loss by their fault. Anonymous, 1 Ld. Raym. 650, 91 Eng. Reprint 1334.

53. Brown *v.* The Neptune, 4 Fed. Cas. No. 2,022, Gilp. 89 (where a vessel was detained in port by the wrongful absence of a seaman, a deduction from his wages was allowed for the amount of loss actually sustained); Macomber *v.* Thompson, 16 Fed. Cas. No. 8,919, 1 Sumn. 384.

54. Alexander *v.* Galloway, 1 Fed. Cas. No. 167, Abb. Adm. 261; The Florence, 9 Fed. Cas. No. 4,881; Williams *v.* Waterman, 29 Fed. Cas. No. 17,745. But see Anderson *v.* The Solon, 1 Fed. Cas. No. 363, Crabbe 17 (holding, however, where a mariner, by direction of the mate, during the permanent absence of the captain, sold a part of the cargo to procure necessary provisions for the vessel, he did not commit such embezzlement as would amount to a forfeiture of his wages); The Beaver, 3 C. Rob. 92 (where wages were decreed a seaman, although he had stolen from the ship, and because he had been wrongfully discharged and had been put on shore in violation of a statute).

**Trivial depredations on the ship's property** such as taking three bottles of beer does not of itself forfeit seamen's wages. Olsen *v.* The Edwin Post, 6 Fed. 314.

55. Brown *v.* The Neptune, 4 Fed. Cas. No. 2,022, Gilp. 89; Conner *v.* Levering, 6 Fed. Cas. No. 3,114, 2 Cranch C. C. 163; Edwards *v.* Sherman, 8 Fed. Cas. No. 4,298, Gilp. 461; Mariners *v.* Kensington, 16 Fed. Cas. No. 9,085, 1 Pet. Adm. 239; Matthew *v.* Chase, 16 Fed. Cas. No. 9,283*a* (where it is held, however, that, although it might be implied from his office that a mate was in charge of a vessel and intrusted with receiving or unloading a cargo, yet he cannot be charged with a deficiency in the cargo in the absence of evidence that he was put to that duty or proof that cargo was lost); Scharlock *v.* The Globe, 21 Fed. Cas. No. 12,439, Crabbe 278; The Tusker, 24 Fed. Cas. No. 14,274, 1 Sprague 71; The Duchess of Kent, 1 W. Rob. 283.

56. Fogerty *v.* Pratt, 9 Fed. Cas. No. 4,896; Mariners *v.* Kensington, 16 Fed. Cas. No. 9,085, 1 Pet. Adm. 239; Spurr *v.* Pearson, 22 Fed. Cas. No. 13,268, 1 Mason 104; Sullivan *v.* Ingraham, 23 Fed. Cas. No. 13,595, Bee 182; Wilson *v.* The Belvidere, 30 Fed. Cas. No. 17,790, 1 Pet. Adm. 258. But see Thompson *v.* Collins, 1 B. & P. N. R. 347.

57. Lewis *v.* Davis, 3 Johns. (N. Y.) 17 (holding that when the loss is attributable to particular persons they alone are liable and that the crew are not liable to contribute out of their wages to make good the loss); Edwards *v.* Sherman, 8 Fed. Cas. No. 4,298, Gilp. 461; Knap *v.* The Eliza and Sarah, 14 Fed. Cas. No. 7,873, 1 Pet. Adm. 200; Sullivan *v.* Ingraham, 23 Fed. Cas. No. 13,595, Bee 182. But see Crammer *v.* The Fair American, 6 Fed. Cas. No. 3,347, 1 Pet. Adm. 242, where it is held that a seaman absent during the time of an embezzlement on board a ship is not excused from contribution.

58. The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331 (where it is held that misconduct in a seaman will not be punished by an absolute forfeiture of his wages and of his effects on board, unless it be continued or repeated, or, if occurring but once, be of a highly aggravated character); The Blake, 1 W. Rob. 73.

**The mate may forfeit his wages** by fraudulent, unfaithful, and illegal practice; by gross and repeated negligence, or flagrant, wilful, and unjustifiable disobedience; by incapacity, brought on by his own fault, to perform his duty; or by palpable want of skill in his profession. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244.

**Misconduct sufficient to justify discharge** see *supra*, III, B, 1, a.

59. Russell *v.* The Twilight, 43 Fed. 320; Olsen *v.* The Edwin Post, 6 Fed. 314; The Almatia, 1 Fed. Cas. No. 254; Drysdale *v.* The Ranger, 7 Fed. Cas. No. 4,097, Bee 148; Martin *v.* The William, 16 Fed. Cas. No. 9,171; Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541; The Pioneer, 19 Fed. Cas. No. 11,177, Deady 72; The Beaver, 3 C. Rob. 92.

desert,[60] drunkenness, unless of such character as continuously interferes with the performance of services,[61] or using insulting language to the master.[62] But forfeiture will be imposed for mutinous conduct,[63] attempt to create a revolt,[64] smuggling,[65] altering or deranging the machinery,[66] or other flagrant acts of disobedience or persistent refusal to perform duty,[67] such as assault upon the master.[68]

**d. Desertion** — (i) *UNDER MARITIME LAW.* Desertion by a seaman works a forfeiture of wages previously earned,[69] the extent of the forfeiture imposed,

**Particularly where disobedience is justified.** — Rebetto *v.* How, 44 Mo. 52; Dixon *v.* The Cyrus, 7 Fed. Cas. No. 3,930, 2 Pet. Adm. 407; The Moslem, 18 Fed. Cas. No. 9,875, Olcott 289; The Tarquin, 23 Fed. Cas. No. 13,755, 2 Lowell 358; Sibery *v.* Connelly, 10 Aspin. 330, 96 L. T. Rep. N. S. 140, 23 T. L. R. 257 (where a seaman who refused to perform services on the ground that the vessel was carrying contraband of war to a port of one of two nations that were at war was held not to have forfeited his wages); Train *v.* Bennett, 3 C. & P. 3, 14 E. C. L. 420, M. & M. 82.

**60.** Hart *v.* Otis, 11 Fed. Cas. No. 6,154, Crabbe 52.

**61.** The Jasper, 13 Fed. Cas. No. 7,228, 3 Ware 296; The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331; Matthew *v.* Chase, 16 Fed. Cas. No. 9,283*a*; The Ealing Grove, 2 Hagg. Adm. 15; The Lady Campbell, 2 Hagg. Adm. 5; The New Phœnix, 1 Hagg. Adm. 198; Robinett *v.* The Exeter, 2 C. Rob. 261.

**62.** The Superior, 22 Fed. 927.

**63.** McKenna *v.* The Shawnee, 45 Fed. 769; The Mary Ann, 16 Fed. Cas. No. 9,194, Abb. Adm. 270; The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289; Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186; The Susan, 2 Hagg. Adm. 229 note.

**Mutiny as a crime** see *infra*, XI, A.

**64.** The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84. But see Airey *v.* The Ann C. Pratt, 1 Fed. Cas. No. 113*a* [*affirmed* in 1 Fed. Cas. No. 114, 1 Curt. 395].

**Attempt to make a revolt as a crime** see *infra*, XI, A.

**65.** Scott *v.* Russell, 21 Fed. Cas. No. 12,546, Abb. Adm. 258. But see The Horace E. Bell, 12 Fed. Cas. No. 6,702, 3 Ware 236 (where it is held that, although smuggling on the part of seamen is a grave offense, it is not imperative on the part of the court to forfeit their whole wages, and the law may be satisfied with a fine); The Prince Frederick, 2 Hagg. Adm. 394 (where the fact that contraband goods were found in the forecastle, and this by a clause in the shipping articles had been made a cause of forfeiture of wage, was held not to cause a forefeiture of a seaman's wages, where he was not proved to have been guilty of the offense).

**66.** The John Martin, 13 Fed. Cas. No. 7,358, Brown Adm. 149; The Magnet, 16 Fed. Cas. No. 8,955, Brown Adm. 547.

**Or drawing fires of the engine.**—Marsland *v.* The Yosemite, 18 Fed. 331.

**67.** The St. Paul, 133 Fed. 1002; The Galina, 6 Fed. 927; Gladding *v.* Constant, 10 Fed. Cas. No. 5,468, 1 Sprague 73 (holding, however, that there is no inflexible rule requiring a forfeiture for every wrongful refusal to do duty, the court must look into the circumstances of each case and exercise its discretion); Swift *v.* The Happy Return, 23 Fed. Cas. No. 13,697, 1 Pet. Adm. 253 (holding that wages may be declared forfeited for a refusal to unload and reload cargo on the voyage, but not for such refusal at the last port of delivery); The Tarquin, 23 Fed. Cas. No. 13,755, 2 Lowell 358. See also The Alps, 19 Fed. 139; The Palledo, 18 Fed. Cas. No. 10,677, 3 Ware 321.

**68.** Buck *v.* Lane, 12 Serg. & R. (Pa.) 266; The Olive Chamberlain, 18 Fed. Cas. No. 10,491, 1 Sprague 9; Sprague *v.* Kain, 22 Fed. Cas. No. 13,250, Bee 184, where only half a seaman's wages were decreed forfeited for the offense of striking the master because the latter had inflicted other punishment for the offense which prevented the court from decreeing a forfeiture of the whole. But see Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168, holding that broils, assaults on, or resistance to masters do not ordinarily without more serious fault, operate to forfeit wages.

**69.** *Louisiana.*—Baldwin *v.* Bennett, 6 Rob. 311.

*Maine.*— Noble *v.* Steele, 42 Me. 518; Spencer *v.* Eustis, 21 Me. 519, 38 Am. Dec. 277.

*Virginia.*— Cavan *v.* Morton, 3 Call 228.

*United States.*— Steindl *v.* The Lady Furness, 84 Fed. 679; Disbrow *v.* The Walsh Brothers, 36 Fed. 607; The Alvena, 22 Fed. 861; Welcome *v.* The Yosemite, 18 Fed. 383; The Galina, 6 Fed. 927; Bordman *v.* The Elizabeth, 3 Fed. Cas. No. 1,657, 1 Pet. Adm. 128; Burton *v.* Salter, 4 Fed. Cas. No. 2,218, Brunn. Col. Cas. 623; The Cadmus *v.* Matthews, 5 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas. No. 2,280, Blatchf. & H. 139]; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; The Ericson, 8 Fed. Cas. No. 4,510, 3 Sawy. 559; Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; The Magnet, 16 Fed. Cas. No. 8,955, Brown Adm. 547; The Merrimac, 17 Fed. Cas. No. 9,474, 1 Pen. 490; The Philadelphia, 19 Fed. Cas. No. 11,084, Olcott 216; The Rovena, 20 Fed. Cas. No. 12,090, 1 Ware 313; Smith *v.* The Utica, 22 Fed. Cas. No. 13,123; The Swallow, 23 Fed. Cas. No. 13,664, Olcott 4, holding this to be true of seamen employed by the month. See also Herron *v.* The Peggy, 12 Fed. Cas. No. 6,427, Bee 57.

*England.*— The Jupiter, 2 Hagg. Adm. 221; The Bulmer, 1 Hagg. Adm. 163; Anonymous, 1 Ld. Raym. 639, 91 Eng. Reprint 1328, 12 Mod. 442, 88 Eng. Reprint 1438.

See 43 Cent. Dig. tit. "Seamen," § 104.

however, being discretionary with the court,[70] the desertion, to justify a forfeiture, being a quitting of the ship and her service not only without leave and against the duty of the party, but with an intent not to return again to ship's duty.[71] The desertion must be during the voyage,[72] and it must appear that the seaman was bindingly engaged on the vessel for a valid engagement.[73] Where absence is caused without fault of the seaman, it is not desertion,[74] nor where a seaman

70. The Balize, 2 Fed. Cas. No. 809, Brown Adm. 424; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; Hanson *v.* Rowell, 11 Fed. Cas. No. 6,043, 1 Sprague 117; Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355; Swain *v.* Howland, 23 Fed. Cas. No. 13,661, 1 Sprague 424. See also Coffin *v.* Shaw, 5 Fed. Cas. No. 2,951 [*affirming* 5 Fed. Cas. No. 2,952, 3 Ware 82].

**Minors.**— Where a minor, with the consent of his father, shipped as a seaman, but deserted during the voyage after he had become of age, such desertion does not forfeit his father's right to wages earned during minority. Coffin *v.* Shaw, 5 Fed. Cas. No. 2,951 [*affirming* 5 Fed. Cas. No. 2,952, 3 Ware 82].

**Extent of forfeiture** see *infra*, VI, J, 2.

71. The Lizzie M. Dun, 30 Fed. 927; Brink *v.* Lyons, 18 Fed. 605; Welcome *v.* The Yosemite, 18 Fed. 383; The Galina, 6 Fed. 927; Antone *v.* Hicks, 1 Fed. Cas. No. 493, 2 Lowell 383 (holding, where a seaman became separated from his vessel through no fault of his own, that he was not guilty of desertion); The Baloze, 2 Fed. Cas. No. 809, Brown Adm. 424; Borden *v.* Hiern, 3 Fed. Cas. No. 1,655, Blatchf. & H. 293 (holding that a temporary and open absence by a seaman without objection from the master, in an intermediate port, while the vessel is discharging and taking her cargo, is not desertion); The Catawanteak, 5 Fed. Cas. No. 2,510, 2 Ben. 189; Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; The John Martin, 13 Fed. Cas. No. 7,357; Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24; The Rovena, 20 Fed. Cas. No. 12,090, 1 Ware 313; Ruddy *v.* The Golden State, 20 Fed. Cas. No. 12,111; The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334; The Union *v.* Jansen, 24 Fed. Cas. No. 14,348, 2 Paine 277 [*reversing* 24 Fed. Cas. No. 14,347, Blatchf. & H. 545]; The Pearl, 5 C. Rob. 224; The Jupiter, 2 Hagg. Adm. 221; The Bulmer, 1 Hagg. Adm. 163.

**Imprisoned seamen.**— In order to charge a seaman, imprisoned by the master, for a refusal to return to duty, the master is required to ascertain before leaving port whether the seaman is willing to return to duty. The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331.

**Sufficiency of evidence.**— Evidence sufficient to show desertion see Welcome *v.* The Yosemite, 18 Fed. 383; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; The Ericson, 8 Fed. Cas. No. 4,510, 3 Sawy. 559, holding that where a seaman, against the orders of the master, and knowing that the ship was about to sail, went ashore and failed to return to the ship, and subsequently when approached by the master broke away from his custody, and where it appeared that further delay would have imperiled the ship, this conduct amounts to desertion. Evidence held insufficient see Brink *v.* Lyons, 18 Fed. 605 (holding that, where an assistant engineer of a steamer, knowing that she was on the eve of departure, being sent ashore on an errand, absented himself for an unreasonable period, and the master, after spending a couple of hours in searching for him, departed leaving him, a case of desertion had not been made out); Johnson *v.* Blanchard, 7 Fed. 597; The Catawanteak, 5 Fed. Cas. No. 2,510, 2 Ben. 189.

**Drunkenness.**— Where a seaman during a voyage went on board another vessel and became intoxicated, and refused to return it was held that he was guilty of desertion. The Mermaid, 115 Fed. 13, 52 C. C. A. 607.

72. Disbrow *v.* The Walsh Brothers, 36 Fed. 607; Thorson *v.* Peterson, 14 Fed. 742, 11 Biss 497 (holding, where seamen shipped for a round trip, and by reason of a collision with another vessel the voyage was broken up, but they were induced to proceed with the vessel to the port of delivery and on arriving there they refused to aid in discharging the vessel, that they were not guilty of desertion); Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373. See The Ida G. Farren, 127 Fed. 766, holding that where a seaman signed articles, and then went ashore by permission and did not return, he was guilty of desertion. *Compare* Cotel *v.* Hilliard, 4 Mass. 664, holding that a seaman who renders himself on board his vessel pursuant to his agreement, but who quits the ship before the voyage is commenced, is not liable to the forfeiture provided for desertion by the statute in the United States.

**In England** it is held that the voyage is not complete until the vessel is safely docked, and that hence where seamen quit before that time they are guilty of desertion. The Pearl, 5 C. Rob. 224.

73. Roberts *v.* Knights, 7 Allen (Mass.) 449; The Occidental, 101 Fed. 997; The Pacific, 23 Fed. 154; *In re* Bryant, 4 Fed. Cas. No. 2,067, Deady 118; The George, 1 Hagg. Adm. 168 note. But see The C. F. Sargent, 95 Fed. 179; The Occidental, 87 Fed. 485.

**The rule extends to employment by the month.**— Baldwin *v.* Bennett, 6 Rob. (La.) 311; Kasit *v.* Pilot Boat No. 5, 54 Fed. 537.

74. Lizzie M. Dun, 30 Fed. 927; Costello *v.* American Steamship Co., 6 Fed. Cas. No. 3,263; Hayes *v.* The J. L. Wickwire, 11 Fed. Cas. No. 6,262, 7 Phila. (Pa.) 594.

leaves the ship with consent of the commanding officer,[75] such consent purging the act of its otherwise wrongful nature.

(II) *UNDER STATUTE.* By statute in the United States which is held not to extend or repeal the maritime law concerning desertion,[76] it is provided that forty-eight hours' absence from the ship without leave, if a proper entry thereof is made at the time in the log-book, shall be deemed a desertion, and a forfeiture of all the wages due the seaman and all his effects that are on board the vessel;[77] but it is necessary to show that there was an entry in the log-book on the day the seaman left, containing the name of the seaman and stating that he left,[78] and if this entry is defective there can be no forfeiture, as where the entry is not made on the day the seaman left,[79] or does not contain his name,[80] or does not

**75.** The Caroline E. Kelley, 5 Fed. Cas. No. 2,422, 7 Phila. (Pa.) 570.

**76.** Welcome *v.* The Yosemite, 18 Fed. 383; Burton *v.* Salter, 4 Fed. Cas. No. 2,218, Brunn. Col. Cas. 623; Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Jameson *v.* The Regulus, 13 Fed. Cas. No. 7,198, 1 Pet. Adm. 212; The John Martin, 13 Fed. Cas. No. 7,357, 2 Abb. 172; The Rovena, 20 Fed. Cas. No. 12,090, 1 Ware 311; The Union *v.* Jansen, 24 Fed. Cas. No. 14,348, 2 Paine 277 [*reversing* 24 Fed. Cas. No. 14,347, Blatchf. & H. 545]. See Herron *v.* The Peggy, 12 Fed. Cas. No. 6,427, Bee 57; The Merrimac, 17 Fed. Cas. No. 9,474, 1 Ben. 490. *Compare* The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140; Wood *v.* The Nimrod, 30 Fed. Cas. No. 17,959, Gilp. 83, in which cases, while the courts do not decide that the statute repealed or superseded the maritime law, they decide a question that is inconsistent with any other conclusion.

**By statute in England also** desertion works a forfeiture of wages (The Lilian M. Vigus, 15 Fed. Cas. No. 8,346, 10 Ben. 385; The Baltic Merchant, Edw. Adm. 86), and the forfeiture imposed thereby is a liability of a criminal nature and cannot be compromised by private agreements between masters or owners and seamen (Keslake *v.* Board of Trade, [1903] 2 K. B. 453, 9 Aspin. 491, 67 J. P. 356, 72 L. J. K. B. 829, 89 L. T. Rep. N. S. 534, 19 T. L. R. 583, 52 Wkly. Rep. 127); but a seaman is exonerated from the penalty attendant on desertion if he quits the service of a vessel in order to join a ship of the king and does so join such a ship within twenty-four hours (The Amphitrite, 2 Hagg. Adm. 403, holding, however, when a seaman quits a vessel in defiance of the master with opprobrious language, and without any declaration of an intention of joining the king's ship, that the entry on board the king's vessel will not exonerate him of the penalty for desertion).

**77.** The Grace Dollar, 160 Fed. 906, 88 C. C. A. 88 [*affirming* 149 Fed. 793]; The Ida G. Farren, 127 Fed. 766; The Moonlight, 125 Fed. 429; The C. F. Sargent, 95 Fed. 179; The Occidental, 87 Fed. 485; Kasit *v.* Pilot Boat No. 5, 54 Fed. 537; Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; Knagg *v.* Goldsmith, 14 Fed. Cas. No. 7,872, Gilp. 207; The Phœbe *v.* Dignum, 19 Fed. Cas. No. 11,110, 1 Wash. 48; The Union *v.* Jansen, 24 Fed. Cas. No. 14,348, 2 Paine 277 [*reversing* 24 Fed. Cas. No. 14,347, Blatchf. & H. 545]. See also The H. C. Wahlberg, 87 Fed. 361, 31 C. C. A. 6.

**This statute also provides that if a seaman** fails to join his vessel at the time he stipulates in his shipping articles to join her he should forfeit his wages. Cotel *v.* Hilliard, 4 Mass. 664 (holding, however, where a seaman rendered himself on board his vessel pursuant to the terms of the contract, but quitted the vessel before she began, that he did not incur the forfeiture provided by the statute); Ida G. Farran, 127 Fed. 766; Smith *v.* The Utica, 22 Fed. Cas. No. 13,123 (holding, where a seaman attempts to join his vessel, but not until she was in the act of casting off, he thereby forfeits his wages).

**78.** Spencer *v.* Eustis, 21 Me. 519, 38 Am. Dec. 277; The Amazon, 144 Fed. 153; The Betsy *v.* Duncan, 3 Fed. Cas. No. 1,367, 2 Wash. 272; The Catawanteak, 5 Fed. Cas. No. 2,510, 2 Ben. 189; Hart *v.* The Otis, 11 Fed. Cas. No. 6,154, Crabbe 52; Knagg *v.* Goldsmith, 14 Fed. Cas. No. 7,872, Gilp. 207; The Magee *v.* Moss, 16 Fed. Cas. No. 8,944, Gilp. 219.

**Coastwise trade.**— The court may refuse to receive evidence of a desertion from a vessel engaged in the coastwise trade if the evidence has not been entered in the official log of the vessel. The Amazon, 144 Fed. 153. But see Herron *v.* The Peggy, 12 Fed. Cas. No. 6,427, Bee 57, holding that, although the entry in log-books is defective, a desertion might be proved by the general maritime law.

**79.** Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294; The Cadmus *v.* Mathews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas. No. 2,280, Blatchf. & H. 139]; The Phœbe *v.* Dignum, 19 Fed. Cas. No. 11,110, 1 Wash. 48; The Rovena, 20 Fed. Cas. No. 12,090, 1 Ware 313, holding that an entry made on a day subsequent to the day that seamen left cannot be invoked in aid of an entry made on the day that the seamen left.

**80.** Bray *v.* The Atlanta, 4 Fed. Cas. No. 1,819, Bee 48 (holding that an entry that the mate and all hands went aboard was not sufficient); The Rovena, 20 Fed. Cas. No.

state that he left without leave,[81] or that he was absent from the ship forty-eight hours.[82] In order to punish for the offense of desertion under the maritime law, however, there was no necessity that an entry be made in the log-book.[83]

**e. Absence Without Leave** — (i) *In General.* Seamen are not entitled to wages during unauthorized absences,[84] and even though they are received on board the vessel after an absence, deductions may be made to cover the expense caused by their absence,[85] the expense of persons necessarily employed in their places [86] and the expense of apprehending them.[87] When the absence was not caused by their fault, however, a forfeiture will not be imposed,[88] nor will a forfeiture be imposed if the absence is justified.[89] Absence without leave, although permanent, unless it amounts to a desertion will not cause a forfeiture of wages previously earned.[90]

(ii) *Justifiable Departure or Absence as Not Working Forfeiture.* A seaman is justified in leaving his vessel and does not incur a forfeiture when there is a deviation [91] from the voyage named in the shipping articles,[92]

12,090, 1 Ware 313 (where it was held that an entry that "the crew declined doing more duty and went ashore" did not meet the requirements of the statute, and that neither did an entry "all the crew went ashore"); Wood *v.* The Nimrod, 30 Fed. Cas. No. 17,959, Gilp. 83.

81. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1 (holding that an entry that the men abandoned the ship was not sufficient); The Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas. No. 2,280, Blatchf. & H. 139]; Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140 (holding that an entry that the seamen were "off duty" was insufficient). But see Ulray *v.* Washington, 24 Fed. Cas. No. 14,323, Crabbe 204, where the entry on the day that the seamen left was that they "ran away," and on the day following that they left without leave, and it was held sufficient.

Under the British Merchant Shipping Act, the omission of the date of the day when the entry of the desertion is made is fatal to the value of the entry as proof of desertion. Lilian M. Vigus, 15 Fed. Cas. No. 8,346, 10 Ben. 385.

82. The Hercules, 12 Fed. Cas. No. 6,401, 1 Sprague 534.

83. Welcome *v.* Yosemite, 18 Fed. 383.

84. Johnson *v.* Blanchard, 7 Fed. 597; Lang *v.* Holbrook, 14 Fed. Cas. No. 8,057, Crabbe 179; Whiteman *v.* The Neptune, 29 Fed. Cas. No. 17,569, 1 Pet. Adm. 180. But see *In re* Hartel, 11 Fed. Cas. No. 6,157, 7 Nat. Bankr. Reg. 559, where it was held that no abatement of wages would be made for occasional absences on a ship by a ship-keeper in port, if no objection was made thereto until the whole period had expired.

When a seaman by special permission did not go on board his vessel at the time appointed in the articles no deduction from his wages was made. Thompson *v.* The Philadelphia, 23 Fed. Cas. No. 13,973, 1 Pet. Adm. 210.

So too is absence a ground of forfeiture of wages by statute in England see The Ada, 1 Fed. Cas. No. 38, 2 Ware 408; Frontine *v.* Frost, 3 B. & P. 302.

85. Ingraham *v.* Albee, 13 Fed. Cas. No. 7,044, Blatchf. & H. 289; Brown *v.* The Neptune, 4 Fed. Cas. No. 2,022, Gilp. 89; Lang *v.* Holbrook, 14 Fed. Cas. No. 8,057, Crabbe 179; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140.

86. Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140; Whiteman *v.* The Neptune, 29 Fed. Cas. No. 17,569, 1 Pet. Adm. 180.

87. Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294.

88. The Lizzie M. Dun, 30 Fed. 927 (holding that, where a seaman was detained on shore by civil authorities as a witness, he would be entitled to wages up to the time of his detention); Antone *v.* Hicks, 1 Fed. Cas. No. 493, 2 Lowell 383; Hayes *v.* The J. L. Wickwire, 11 Fed. Cas. No. 6,262 (holding that when a seaman was arrested by local authorities for some trivial offense and was locked up for four days, and on his reporting to the vessel the master refused to receive him on board and also refused to pay him his wages or to give him his clothing, the seaman was entitled to wages up to the time of the decree).

89. Babbell *v.* Gardner, 2 Fed. Cas. No. 692, Bee 87, holding that under the English statute a seaman has a right to go on shore to apply to a court for his wages, and that when he does so he will not incur a forfeiture provided he does apply for them within forty-eight hours.

90. Brink *v.* Lyons, 18 Fed. 605; The Ericson, 8 Fed. Cas. No. 4,510, 3 Sawy. 559; Ruddy *v.* The Golden State, 20 Fed. Cas. No. 12,111.

91. Deviation defined see 14 Cyc. 282.

92. Potter *v.* Allen, 2 Root (Conn.) 63; Bradley *v.* The J. M. Griffith, 71 Fed. 317; Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477; Douglas *v.* Eyne, 7 Fed. Cas. No. 4,032, Gilp. 147 (holding, however, that no deviation had been shown); The Gem, 10 Fed. Cas. No. 5,304, 1 Lowell 180; Ingraham *v.* Albee, 13 Fed. Cas. No. 7,044, Blatchf. & H. 289; The Cambridge, 2 Hagg. Adm. 243; The Eliza, 1 Hagg. Adm. 182; Hayward *v.* Maine, 3 N. Brunsw. 292.

Deviation held to justify a seaman in quitting see Potter *v.* Allen, 2 Root (Conn.) 63;

when the vessel is unseaworthy,[93] or when there has been such cruelty on the part of the master[94] or mate[95] as to make it dangerous to the seaman's personal safety to remain, and the same rule obtains where there is a failure to observe the statutes passed for seamen's protection and comfort;[96] and as it is a seaman's right to lay before the consul a complaint of the mistreatment and seek his advice, he does not incur a forfeiture of wages for doing so,[97] or for leaving the vessel upon the advice of the consul,[98] and when wages are due seamen and

Bradley *v.* The J. M. Griffith, 71 Fed. 317; Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477; The Cambridge, 2 Hagg. Adm. 243; Hayward *v.* Maine, 3 N. Brunsw. 292.

**Deviation held not to justify a seaman in quitting** see The Grace Dollar, 160 Fed. 906, 88 C. C. A. 88 [*affirming* 149 Fed. 793]; The J. B. Williams, 126 Fed. 590; The Mermaid, 115 Fed. 13, 52 C. C. A. 607; Douglas *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147; The Gem, 10 Fed. Cas. No. 5,304, 1 Lowell 180; Magee *v.* Moss, 16 Fed. Cas. No. 8,944, Gilp. 219; Wood *v.* The Nimrod, 30 Fed. Cas. No. 17,959, Gilp. 83.

93. Hartley *v.* Ponsonby, 7 E. & B. 872, 3 Jur. N. S. 746, 26 L. J. Q. B. 322, 7 Wkly. Rep. 659, 90 E. C. L. 872, a well-considered case.

94. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81; Ward *v.* Ames, 9 Johns. (N. Y.) 138; The City of Mobile, 116 Fed. 212; The Alvena, 22 Fed. 861; The Alonzo, 1 Fed. Cas. No. 258, 3 Ware 318 [*affirmed* in 4 Fed. Cas. No. 2,223, 2 Cliff. 548]; Coffin *v.* Weld, 5 Fed. Cas. No. 2,953, 2 Lowell 81; Knowlton *v.* Boss, 14 Fed. Cas. No. 7,901, 1 Sprague 163; Magee *v.* The Moss, 16 Fed. Cas. No. 8,944, Gilp. 219; Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186; Rice *v.* The Polly and Kitty, 20 Fed. Cas. No. 11,754, 2 Pet. Adm. 420; Sherwood *v.* McIntosh, 21 Fed. Cas. No. 12,778, 1 Ware 104; Steele *v.* Thacher, 22 Fed. Cas. No. 13,348, 1 Ware 85; Edward *v.* Trevellick, 2 C. L. R. 1605, 4 E. & B. 59, 1 Jur. N. S. 110, 24 L. J. Q. B. 9, 2 Wkly. Rep. 586, 82 E. C. L. 59; Limland *v.* Stephens, 3 Esp. 269; Tupper *v.* McFadden, 7 Montreal Leg. N. 369. See U. S. *v.* Cassedy, 25 Fed. Cas. No. 14,745, 2 Sumn. 582.

**Facts held sufficient to justify seamen in quitting because of cruelty** see Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81 (the master presented a pistol at plaintiff's head and threatened to shoot him, and four days afterward another seaman was shot by the captain); Ward *v.* Ames, 9 Johns. (N. Y.) 138 (seaman cruelly beaten); The Alonzo, 1 Fed. Cas. No. 258, 3 Ware 318 [*affirmed* in 4 Fed. Cas. No. 2,223, 2 Cliff. 548]; Knowlton *v.* Boss, 14 Fed. Cas. No. 7,901, 1 Sprague 163 (seaman was brutally treated by the mate, and refused permission to see the American consul, and severely punished for refusal to return to duty under the mate); Rice *v.* The Polly and Kitty, 20 Fed. Cas. No. 11,754, 2 Pet. Adm. 420; Sherwood *v.* The McIntosh, 21 Fed. Cas. No. 12,778, 1 Ware 104 (seaman was beaten with a rope); Limland *v.* Stephens, 3 Esp. 269.

**Facts held insufficient to justify seamen in quitting** see The City of Mobile, 116 Fed. 212 (holding that as a master may inflict moderate chastisement on a member of the crew for disobedience of orders, a single act of such kind, which does not exceed the bounds of moderation, will not justify a seaman in quitting before the expiration of his term of service, in the absence of threats of great bodily harm or some other reason to apprehend extreme danger if he remains); The Alvena, 22 Fed. 861 (the master ordered a mate to his room and to consider himself under arrest for mutinous conduct); Magee *v.* The Moss, 16 Fed. Cas. No. 8,944, Gilp. 219; Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186; Steele *v.* Thacher, 22 Fed. Cas. No. 13,348, 1 Ware 85 (holding that a single assault and battery would not justify a seaman in deserting).

95. McKinnon *v.* The Reed Case, 39 Fed. 624; The America, 1 Fed. Cas. No. 286, Blatchf. & H. 185; Knowlton *v.* Boss, 14 Fed. Cas. No. 7,901, 1 Sprague 163.

96. The Ida McKay, 99 Fed. 1002, holding that the failure of the master to provide a warm room for the use of seamen in cold weather as required by statute in the United States justified the seamen in leaving.

**Substantial compliance with terms of the statute is sufficient.**— The Moonlight, 125 Fed. 429.

**Duty to complain to master.**— Seamen are not justified in leaving their ship before the expiration of their term of service on account of a failure to make their quarters comfortable as required by statute, where they made no complaint on that ground to the master. The C. F. Sargent, 95 Fed. 179; The A. M. Baxter, 93 Fed. 479.

**Overloading.**— Seamen are directly interested in maintaining the load line at the mark as entered in the shipping articles, and to load the vessel a foot and a half deeper against their protest constitutes a breach of the shipping articles and will justify them in leaving the vessel in a foreign port. The Sirius, 47 Fed. 825.

97. The Edwin Kreplin, 8 Fed. Cas. No. 4,427, 4 Ben. 413; Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372; Hart *v.* The Otis, 11 Fed. Cas. No. 6,154, Crabbe 52; The Westmoreland, 1 W. Rob. 216.

98. Papping *v.* The Sirius, 47 Fed. 825; The City of Mexico, 28 Fed. 207; Cross *v.* Hyne, 16 Wkly. Rep. 967, holding that it is not desertion for a mate to obey orders from the consul to go to England and give evidence against the master, although the charge against the master was afterward proved to have been groundless.

are refused them, they are justified in leaving the vessel to obtain it.[99] The custom in a harbor that when seamen are dissatisfied with masters they may leave the service will justify a seaman in quitting and will prevent a forfeiture of wages;[1] but the mere fact that a vessel is captured will not justify a seaman in leaving a vessel,[2] nor will the mere fact that he is required to perform extra watches;[3] and where a seaman has left the ship the fact that he was drunk when he refused to return will not excuse him.[4]

**2. Extent of Forfeiture — a. General Rules.** Misconduct of a seaman which works a forfeiture of his wages will not extend to a forfeiture of wages earned on a subsequent voyage,[5] nor will desertion on one voyage react to cause a forfeiture of wages earned on a prior voyage;[6] and seamen otherwise sufficiently punished for misconduct will not be subjected to the forfeiture of wages.[7] Thus a seaman is not liable to double punishment for offenses where he has been punished by imprisonment, and will not incur a forfeiture of wages for the same offense.[8] Forfeiture may be total or partial,[9] and even though the desertion is not justified, where extenuating circumstances exist a partial forfeiture may be imposed,[10]

99. Olsen *v.* The Edwin Post, 6 Fed. 314. By the law of England a seaman may come on shore to demand his wages, without incurring a forfeiture. Babbell *v.* Gardner, 2 Fed. Cas. No. 692, Bee 87.

1. The Belle of the Coast, 56 Fed. 251. But see Dishrow *v.* The Walsh Bros., 36 Fed. 607; Marsland *v.* The Yosemite, 18 Fed. 331, holding that an alleged custom for the rest of the men in the engineer's department on a pleasure yacht to leave if the engineer is discharged is illegal and contrary to public policy.

2. Cavan *v.* Morton, 3 Call (Va.) 228. See Sims *v.* Mariners, 22 Fed. Cas. No. 12,893, 2 Pet. Adm. 393.

3. Steindl *v.* The Lady Furness, 84 Fed. 679.

4. The Mermaid, 115 Fed. 13, 52 C. C. A. 607. That an engineer's assistant is a drunkard does not justify the engineer in deserting the vessel. The Magnet, 16 Fed. Cas. No. 8,955, Brown Adm. 547, holding also that the engineer had the right to discharge his assistant even against the wishes of the master.

5. The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84 (holding also that where seamen forfeited their wages by misconduct in the voyage and afterward earned wages, the advance wages stipulated for in the shipping articles should be a charge on the forfeited funds; and that money advanced on the voyage for clothes, etc., and stipulated for, should be a charge on the unforfeited wages and that hospital money should be apportioned *pro rata* on the wage of the whole voyage); The Pioneer, 19 Fed. Cas. No. 11,177, Deady 72.

6. Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 2.

7. Bray *v.* The Atlanta, 4 Fed. Cas. No. 1,819, Bee 48.

8. Thompson *v.* The Stacy Clark, 54 Fed. 583; The Paul Revere, 10 Fed. 156; Bray *v.* The Atlanta, 4 Fed. Cas. No. 1,819, Bee 48 (desertion); Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294; The Elizabeth *v.* Rickers, 8 Fed. Cas. No. 4,353, 2 Paine 291 [*modifying* 8 Fed. Cas. No. 4,361, Blatchf. & H. 195]; The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84; The Olive Chamberlain, 18 Fed. Cas. No. 10,491, 1 Sprague 9; The Thomas *v.* Gray, 23 Fed. Cas. No. 13,898, Blatchf. & H. 493; Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168; The William Cummings, 29 Fed. Cas. No. 17,690 (mutiny). But see Hill *v.* The Triumph, 12 Fed. Cas. No. 6,500, holding that seamen would be allowed to recover wages and claims for short allowance, although guilty of mutinous and disobedient conduct, where they are criminally punished for the offense, but that no wages would be allowed a seaman who had been criminally punished for mutiny but who was guilty also of misbehavior and desertion); Sprague *v.* Kain, 22 Fed. Cas. No. 13,250, Bee 184 (where half of a seaman's wages was declared forfeited for the offense of striking the master, because the master had inflicted other punishment for the offense).

9. The Alps, 19 Fed. 139 (where a fine or a partial forfeiture of wages was imposed on a seaman for refusing to listen to the reading of an entry in the log-book); The Antioch, 11 Fed. 165, 6 Sawy. 328 (where a cook who was put off duty in consequence of negligence, disobedience, and insolence was not allowed wages for the period during which he performed no duty); The Jefferson Borden, 6 Fed. 301 (where seamen were not allowed wages for days that they had wrongfully refused to work or obey orders); The Almatia, 1 Fed. Cas. No. 254, Deady 473; Gladding *v.* Constant, 10 Fed. Cas. No. 5,468, 1 Sprague 73; Martin *v.* William, 16 Fed. Cas. No. 9,171; The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140 (holding that, where a vessel is detained by the refusal of the seamen to work, they are to be charged with the demurrage, and the proportion of each seaman who refused is to be deducted from his wages).

10. Gifford *v.* Kollock, 10 Fed. Cas. No. 5,409, 3 Ware 45; Hanson *v.* Rowell, 11 Fed. Cas. No. 6,043, 1 Sprague 117, allowing a

or none at all, according to the circumstances of the particular case.[11] By statute in the United States, a partial forfeiture is provided for seamen who absent themselves without leave,[12] and stipulations in the shipping articles for a forfeiture in excess of this statutory forfeiture are void.[13]

**b. Effect of Imprisonment.** When he is imprisoned by the master the seaman is entitled to wages during the imprisonment,[14] but when he is imprisoned by the local authorities in his home port, he will not be entitled to wages during the term of imprisonment.[15] He is, however, liable for the expense incident to the imprisonment whether such imprisonment be caused by the master,[16] or by the authorities for the violation of the law of the country where the seaman is,[17] unless such imprisonment is not caused by the fault of the seaman;[18] and when

seaman, who in peril of a collision jumped aboard the colliding vessel, and who afterward without success endeavored to rejoin his own vessel, wages, up till the time of the collision.

**11.** Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355 (where the seaman was a minor and had served fourteen months, and the court refused to decree a forfeiture); Swain *v.* The Howland, 23 Fed. Cas. No. 13,661, 1 Sprague 424 (where it appeared that the seaman was a minor and had served three years and four months before desertion, and where it further appeared that the master made no effort to procure his return, and it was not shown that the desertion caused any loss or damage to the owners, and the court declined to decree a forfeiture). See also The Two Fannys, 25 Fed. 285 (where a seaman left because he was told by the mate that the master claimed that he was not to receive wages, but was serving for his board only, and it was held that he would not forfeit his wages previously earned); Borden *v.* The Elizabeth, 3 Fed. Cas. No. 1,657, 1 Pet. Adm. 128 (where seamen failed to remain on a captured vessel because they were prevented from so doing by the captor and because there were no provisions or accommodations for them, and the court refused to decree a forfeiture); The Lilian M. Vigus, 15 Fed. Cas. No. 8,346, 10 Ben. 385.

**12.** Brown *v.* The Neptune, 4 Fed. Cas. No. 2,022, Gilp. 89; The Ericson, 8 Fed. Cas. No. 4,510, 3 Sawy. 559; Brink *v.* Lyons, 18 Fed. Cas. No. 605; Scott *v.* Rose, 21 Fed. Cas. No. 12,545, 2 Lowell 381; The Union *v.* Jansen, 24 Fed. Cas. No. 14,348, 2 Paine 277.

**13.** The San Marcos, 27 Fed. 567. But see Dunn *v.* Comstock, 2 E. D. Smith (N. Y.) 142; Webb *v.* Duckingfield, 13 Johns. (N. Y.) 390, 7 Am. Dec. 388, where it appeared that a seaman who signed shipping articles by which he engaged not to go out of the vessel until the voyage was completed and the cargo discharged, without leave, left the vessel without leave after she was moored in her last port of discharge, and refused to assist in discharging the cargo, it was held that he forfeited his wages by such desertion.

**14.** The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331 (holding that, where a seaman was rightfully imprisoned at the instance of the master, but wrongfully left behind by him, he would be entitled to wages); Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168.

**15.** The Thomas *v.* Gray, 23 Fed. Cas. No. 13,898, Blatchf. & H. 493.

**Imprisonment in foreign port.**— The arrest and imprisonment of a seaman in a foreign port and sending him home by the public authorities as a prisoner charged with an indictable offense does not necessarily constitute a bar to the claim for wages for the voyage, and such proceedings do not preclude the court from inquiring into the merits of the case and making such decree as the justice of the case requires. Smith *v.* Treat, 22 Fed. Cas. No. 13,117, 2 Ware 270.

**16.** Graves *v.* The W. F. Babcock, 85 Fed. 978, 29 C. C. A. 514 [*reversing* 79 Fed. 92]; Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294. But see The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1.

**Imprisonment by order of a consul.**— Where seamen are imprisoned in a foreign jail by order of the American consul, and there is no evidence of bad faith, the seamen must bear the charges of the imprisonment, but will not be required to pay the charges of the consul as judge, although the shipping articles contain that provision. Chester *v.* Benner, 5 Fed. Cas. No. 2,660, 2 Lowell 76. And thus, where seamen leave a ship without cause, and are arrested and taken before a consul, and decline to return to duty, and make threats of violence, and are at the request of the captain delivered in custody of the marshal, the proper charges for their arrest and detention, the wages of their substitutes, and the amount which was necessarily paid by the ship to the authorities as penalty for the malicious destruction of personal property by the seamen on their way to the ship should be taken from their wages. Graves *v.* The W. F. Babcock, 85 Fed. 978, 29 C. C. A. 514.

**17.** Magee *v.* The Moss, 16 Fed. Cas. No. 8,944, Gilp. 219; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140.

**Waiver.**—Where by reason of a vessel being short-handed the seamen refused to proceed on the voyage, their subsequent consent to do so is a sufficient consideration for the release by the master of deductions from their wages of fines imposed on them at a port for breaches of the peace, and paid by him. The Ada, 1 Fed. Cas. No. 38, 2 Ware 408.

**18.** Anonymous, 1 Fed. Cas. No. 473; The

a person is necessarily hired to perform his services while he is imprisoned, the expense of such hire is to be deducted from his wages,[19] unless his imprisonment is unjustified.[20]

c. Loss of Clothing or Effects. Misconduct in a seaman will not be punished by an absolute forfeiture of his clothing and effects on board, unless his offense be continued or repeated, or if occurring but once be of a highly aggravated character,[21] and a master who without necessity detains or causes the seaman to lose his effects is liable therefor,[22] and if he detain him in custody until his effects on board are lost or stolen, he is answerable for their value.[23] But a seaman cannot recover either from the vessel or owner where reasonable care has been exercised in an attempt to return his effects to him;[24] and if the master wrongfully detains clothing of a seaman the owner is not liable unless he has ratified the act or upon demand has refused to deliver them,[25] nor will he be liable where there is no evidence to show that the goods were detained on board.[26]

3. Waiver of Forfeiture. Forfeiture of wages may be remitted and a pardon will reinstate a seaman in his rights;[27] and when seamen who have deserted return to their vessel within a reasonable time, offering to return to duty, the master is bound to receive them back, unless their previous misconduct has been such as will justify the master in discharging them,[28] and when they are thus received

Cynosure, 6 Fed. Cas. No. 3,529, 1 Sprague 88; Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31.

19. Graves *v.* The W. F. Babcock, 85 Fed. 978, 29 C. C. A. 514 [*reversing* 79 Fed. 92]; Brower *v.* The Maiden, 4 Fed. Cas. No. 1,970, Gilp. 294; Pierce *v.* Patton, 19 Fed. Cas. No. 11,145, Gilp. 435. But see The Nimrod, 18 Fed. Cas. No. 10,267, 1 Ware 1, holding that where a seaman has been imprisoned for misbehavior he is not subject to forfeiture, and is not liable for the expense of one hired in his place.

20. Anonymous, 1 Fed. Cas. No. 473; Johnson *v.* The Coriolanus, 13 Fed. Cas. No. 7,380, Crabbe 239; The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31.

21. The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331. And see Jordan *v.* Williams, 13 Fed. Cas. No. 7,528, 1 Curt. 69; Smith *v.* The Utica, 22 Fed. Cas. No. 13,123.

22. The Eldorado, 8 Fed. Cas. No. 4,327, 1 Lowell 289; Hayes *v.* The J. L. Wickwire, 11 Fed. Cas. No. 6,262.

A criminal information will not lie for the violation of 28 U. S. St. at L. 667, c. 97, which exempts the clothing of a seaman from attachment, and provides that any person who shall detain such clothing when demanded by the owners shall be liable to a penalty, as a penalty imposed by an act of congress is a debt, to be recovered by a civil action, and for which, in a state where imprisonment for debt has been abolished, imprisonment by a federal court is prohibited by U. S. Rev. St. (1878) § 990 [U. S. Comp. St. (1901) p. 709]. U. S. *v.* Younger, 92 Fed. 672.

23. Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262.

24. Highland *v.* Harriet C. Kerlin, 41 Fed. 222; The Lizzie M. Dunn, 30 Fed. 927. But see Callon *v.* Williams, 4 Fed. Cas. No. 2,324, 2 Lowell 1.

25. The Hibernia, 12 Fed. Cas. No. 6,455, 1 Sprague 78.

Where the seaman is arrested in a foreign port without instigation of the master, the owner is not, in the absence of negligenee, liable for the loss of the effects of the seaman. Johnson *v.* Blanchard, 7 Fed. 597; Richards *v.* Pacific Mail Steamship Co., 20 Fed. Cas. No. 11,793, 5 Sawy. 252.

26. Nevitt *v.* Clarke, 18 Fed. Cas. No. 10,138, Olcott 316.

Where a seaman was separated from his ship by no fault of his, and the master sold his effects at auction and there was no evidence of negligence or bad faith, the owner was held liable only for the amount realized by the sale. Antone *v.* Hicks, 1 Fed. Cas. No. 493, 2 Lowell 383.

27. The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84, violation of stipulation in articles prohibiting traffic by the seaman waived.

Consideration.— When, owing to the fact that a vessel is short-handed, the seamen refuse to proceed on the voyage, their subsequent consent to do so is a sufficient consideration for the release by the master of claims for deductions from their wages, of fines imposed on them at a port for breaches of the peace, paid by him. The Ada, 1 Fed. Cas. No. 38, 2 Ware 408.

Evidence.— The act of a master in allowing the mate at the end of the voyage his full claim for wages and giving a draft therefor proves that, if there was a cause of complaint against the mate for intoxication, it was overlooked or forgiven. Matthews *v.* Chase, 16 Fed. Cas. No. 9,283*a*.

Discharge.— Where a seaman charged with disobedience of orders was voluntarily discharged from the ship by his captain, who expressed regret for the difficulties which had occurred, and promised to pay such seaman his wages, such promise operated as a waiver of any forfeiture of wages by the seaman for disobedience of orders during the voyage. Austin *v.* Dewey, 1 Hall (N. Y.) 267.

28. The Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas.

back the forfeiture for their desertion is deemed to have been waived,[29] and generally if seamen, being repentant, tender their services and are put to work after misconduct, the forfeiture is deemed to have been waived,[30] notwithstanding a clause in the shipping articles providing that it shall not operate as a waiver.[31]

**K. Persons Liable — 1. General Rules.** Seamen have a threefold remedy for the recovery of their wages; they may proceed *in rem* against the vessel,[32] or

No. 2,280]; Dougherty *v.* American Steamship Co., 7 Fed. Cas. No. 4,023; Hayes *v.* Wickwire, 11 Fed. Cas. No. 6,262; Ulary *v.* The Washington, 24 Fed. Cas. No. 14,323, Crabbe 204 (holding, however, that when seamen attempt to return by night not saying who they are or what they want, it is not such a return as will restore them to rightful wages); Sigard *v.* Roberts, 3 Esp. 71. But see Malone *v.* Bell, 16 Fed. Cas. No. 8,994, 1 Pet. Adm. 139.

**Imprisoned seamen.**— Where a seaman has been imprisoned by the master for a refusal to return to duty, before he can be charged as a deserter the master must before leaving port ascertain whether the seaman is willing to return. The Maria, 16 Fed. Cas. No. 9,074, Blatchf. & H. 331.

**What is a reasonable time.**— Where an engineer of a tug-boat engaged in towing vessels had deserted, an offer to return made by him five or six weeks after such desertion was held not to be a reasonable time. The John Martin, 13 Fed. Cas. No. 7,357, 2 Abb. 172. And where a seaman failed by his own fault to rejoin the ship at an intermediate port at which she touched in the course of the voyage, the master was not bound to reinstate him upon the return to such port in the course of her voyage. Scully *v.* Great Republic, 21 Fed. Cas. No. 12,571, 1 Sawy. 31.

29. The Betsy *v.* Duncan, 3 Fed. Cas. No. 1,367, 2 Wash. 272 (where a seaman deserted but afterward performed services by order of the mate and the master after promise that his wages would be paid, and it was held that the seaman was entitled to recover his wages); Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*reversing* 4 Fed. Cas. No. 2,280]; Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372 (holding when a seaman was forcibly brought and set to work that the forfeiture was remitted even though the shipping articles contained a clause that a return should not remit a forfeiture); Hart *v.* The Otis, 11 Fed. Cas. No. 6,154, Crabbe 52; Ingraham *v.* Albee, 13 Fed. Cas. No. 7,044, Blatchf. & H. 289; The Philadelphia, 19 Fed. Cas. No. 11,084, Olcott 216 (holding, however, that when a seaman returned clandestinely to a vessel after someone had been employed in his place, and they compelled him to work for his passage, the forfeiture had not been waived); Whiteman *v.* The Neptune, 29 Fed. Cas. No. 17,569, 1 Pet. Adm. 180; Whitton *v.* The Commerce, 29 Fed. Cas. No. 17,604, 1 Pet. Adm 160; Miller *v.* Brant, 2 Campb. 590, 11 Rev. Rep. 806.

30. The Elizabeth *v.* The Rickers, 8 Fed. Cas. No. 4,353, 2 Paine 291 [*modifying* 8 Fed. Cas. No. 4,361, Blatchf. & H. 195]; Johnson *v.* The Eliza, 13 Fed. Cas. No. 7,383 (attempt to create a revolt); The Mentor, 17 Fed. Cas. No. 9,427, 4 Mason 84 (attempt to create mutiny); Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186 (mutiny); Whiteman *v.* The Neptune, 29 Fed. Cas. No. 17,569, 1 Pet. Adm. 180; Train *v.* Bennett, 3 C. & P. 3, 4 E. C. L. 420, M. & M. 82 (holding, however, that if seamen, having incurred a forfeiture of wages, in time of distress where the ship is aground, the captain calls on those seamen to assist in getting her off, this is no waiver of the forfeiture, but if the captain continues them in their work after the peril is passed it is a waiver).

**Mere delay in exercising authority** is not a condonation of the offense. The Olive Chamberlain, 18 Fed. Cas. No. 10,491, 1 Sprague 9, where, after personal violence on the master, the first mate was permitted to continue in his office for a few days until the master could reach a place more convenient for his dismissal.

31. Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372; Lang *v.* Holbrook, 14 Fed. Cas. No. 8,057, Crabbe 179.

32. Sheppard *v.* Taylor, 5 Pet. (U. S.) 675, 8 L. ed. 269; The Acorn, 32 Fed. 638; The Frank C. Barker, 19 Fed. 332 (holding that the remedy afforded seamen by U. S. Rev. St. (1878) §§ 4546, 4547 [U. S. Comp. St. (1901) p. 3087], providing that, if the wages of any seaman are not paid, the district judge may summon the master of the vessel to appear and show cause why process should not issue against the vessel, is not exclusive and that the usual process *in rem* is still open to him); The Fanny Gardner, 8 Fed. Cas. No. 4,642, 5 Biss. 209 (holding that a mariner is not bound to follow the estate of a deceased owner into the probate court in order to recover his wages, but that he may proceed *in rem* in admiralty); Smith *v.* The Pekin, 22 Fed. Cas. No. 13,090, Gilp. 203; Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

**A warrant of arrest** in a proceeding *in rem* for seaman's wages, issued by the clerk in the absence of the judge, contrary to the provisions of a rule of court, is void. Deas *v.* The Berkeley, 58 Fed. 920.

**Seamen may sue jointly** for their wages in admiralty (Oliver *v.* Alexander, 6 Pet. (U. S.) 143, 8 L. ed. 349), and all the crew may unite in a suit for double wages because of a short allowance of bread (The Childe Harold, 5 Fed. Cas. No. 2,676, Olcott 275); but a decree against one does not affect the claims of the rest (Oliver *v.* Alexander, *supra*), and other seamen may not be com-

*in personam* against the owner,[33] or master,[34] and where the master during a voyage is relieved of his office his successor is liable,[35] and these cumulative remedies will not be abridged except in cases of a clear and common understanding to that effect.[36] Seamen are prohibited, however, by rule 13 of the admiralty rules of the supreme court of the United States from blending a proceeding *in rem* with one *in personam* against the owner.[37]

pelled to come in and join as complainants in a libel for wages by one (Nelson *v.* The Hercules, 17 Fed. Cas. No. 10,108), and all seamen suing *in personam* for wages earned on the same voyage are not compelled to unite in one action (Collins *v.* Hathaway, 6 Fed. Cas. No. 3,014, Olcott 176). A seaman who claims to recover both for wages and for moneys advanced to the ship's use may join in a libel *in rem* with a co-libellant claiming wages only (The Merchant, 17 Fed. Cas. No. 9,434, Abb. Adm. 1), but this is not true when the action is *in personam* (The Merchant, *supra*), and in a libel by holders of a bottomry bond, seamen suing for wages, may not be made co-libellants (Jaurekhe *v.* The S. G. Troop, 13 Fed. Cas. No. 7,231).

33. Sheppard *v.* Taylor, 5 Pet. (U. S.) 675, 8 L. ed. 269; The Edwin Post, 6 Fed. 206 (holding that U. S. Rev. St. (1878) §§ 4546, 4547 [U. S. Comp. St. (1901) p. 3087], providing that if the wages of any seaman are not paid, a district judge may summon the master of the vessel to appear and show cause why process should not issue against the vessel, did not prevent the seamen from proceeding *in personam* to recover their wages); Martin *v.* Acker, 16 Fed. Cas. No. 9,155, Blatchf. & H. 279.

34. Temple *v.* Turner, 123 Mass. 125 (holding that in an action by a seaman against a master of a vessel for his wages, evidence that he shipped at a fixed rate of wages per month on the vessel of which defendant was at the time master, and served until discharged by him, is sufficient to warrant a recovery, although there is no other evidence of a contract made by the master with the seaman); Farrel *v.* McClea, 1 Dall. (Pa.) 392, 1 L. ed. 191 (holding that the master is liable for the wages of mariners if he admits them to serve on board the vessel, although they were originally shipped by the owner); Martin *v.* Acker, 16 Fed. Cas. No. 9,155, Blatchf. & H. 279; Wells *v.* Meldrun, 29 Fed. Cas. No. 17,402, Blatchf. & H. 342; Buck *v.* Rawlinson, 1 Bro. P. C. 137, 1 Eng. Reprint 470. But see Bishop *v.* Shepherd, 23 Pick. (Mass.) 492; Harris *v.* Nugent, 11 Fed. Cas. No. 6,126, 3 Cranch C. C. 649.

**The master of a shipping vessel hiring her on shares,** manning and victualing her, is *pro hac vice* her owner, and liable as such to the seamen for their wages. Holden *v.* French, 68 Me. 241.

**Extra wages.**—A seaman discharged with his own consent in a foreign port, prevented by the conduct of the master from making application to the American consul at the place of discharge, may maintain an action at common law against the master for two months' wages as his part of the three months' extra pay which the master is required by U. S. Rev. St. (1878) §§ 4582, 4584, to pay to the consul on account of discharge of such seaman. Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10.

**Proceeding against master and owner prohibited.**—A seaman cannot maintain an action for his wages against both the master and the owner of the vessel. His remedy is against either, not both. Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81.

35. Smith *v.* Oaks, 141 Mass. 451, 5 N. E. 824, 55 Am. Rep. 487 (holding that if the master of a ship falls sick on a voyage and another is appointed in his place, the latter is liable for seamen's wages thereafter earned); Fitzsimmons *v.* Baxter, 3 Daly (N. Y.) 81 (holding that the substituted master, by assuming command of the vessel, acquires all the power of the former master over the seamen under their contract, and must necessarily take with it all the obligations imposed by the maritime law as a consequence of the contract). But see Anonymous, 1 Fed. Cas. No. 467*a*, 1 Pet. Adm. 247.

**But where on the outward passage the vessel was captured** and carried into the port of the captors, where the master left her, she being afterward released, and instead of prosecuting the original voyage, returned home with the same crew under the command of A, who had been subsequently appointed by the owner to take charge of the vessel, this was a new and distinct voyage and A was liable only for the wages arising while he was master and not for the wages which had accrued when the vessel was under the former commander. Wysham *v.* Rossen, 11 Johns. (N. Y.) 72.

36. Russell *v.* Rackett, 46 Fed. 200.

37. The Ethel, 66 Fed. 340, 13 C. C. A. 504 (holding that where an attempt is made to join the remedies the libel should be dismissed); The Merchant, 17 Fed. Cas. No. 9,434, Abb. Adm. 1.

**Joinder of actions.**— The course of proceeding in the admiralty bears a much closer analogy to that of a court of equity than to that of the common law, and the objections to admitting multifarious and unconnected matters into a suit apply with nearly the same force in the admiralty as in equity in regard to suits for seamen's wages. Pratt *v.* Thomas, 19 Fed. Cas. No. 11,377, 1 Ware 437. It appears, however, to be the established practice in the high court of admiralty in England, that a cause of damage, as a suit for a personal tort is technically called, cannot be united with an action for wages. The Jack Park, 4 C. Rob. 308. But a seaman may in the same libel sue for wages and the

**2. Owners.** The owner of a vessel is liable to the seamen for wages,[38] although his name is not stated in the shipping articles,[39] and although the master may have had a complement of men without the seaman;[40] but the owner is not liable for wages of a seaman hired by the master on his exclusive credit,[41] although an agreement between the owner and the master that the latter was to pay all wages will not relieve the owner in the absence of notice to and assent of the seaman.[42] If a person chartering a vessel has the entire control of it, so that the captain and seamen are primarily in his employ, and he runs it at his own expense, then he is regarded as the owner for the time being, and the general owner is relieved from liability for seamen's wages;[43] but if, notwithstanding the charter-party, the general owner retains possession of the vessel so far as to run it by his own captain and seamen, the latter will be in his employ and he will be liable.[44] The sale of the vessel subsequent to the making of the articles does not discharge the owner's liability, even though the voyage was not terminated, or the wages were not demanded, previous to the sale,[45] unless the sale is recorded in the office

statute allowance made to a mariner who is discharged from a vessel in a foreign country with his own consent (Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541), and it is a common practice to proceed in the same libel for wages earned in a particular voyage, and for damages for a tortious discharge in the same voyage (Emerson *v.* Howland, 8 Fed. Cas. No. 4,441, 1 Mason 45; Mahoon *v.* The Glocester, 16 Fed. Cas. No. 8,970, Bee 395, 2 Pet. Adm. 403; The Beaver, 3 C. Rob. 92; Robinett *v.* The Exeter, 2 C. Rob. 261).

**A claim for salvage** may not be joined with a claim for wages. The Sarah E. Kennedy, 29 Fed. 264.

**38.** Brooks *v.* Dorr, 2 Mass. 39; Carey *v.* The Kitty, 5 Fed. Cas. No. 2,401, Bee 254.

**Part-owners** in absence of proof to the contrary will be considered commercial partners liable for wages *in solido*. Shaum *v.* Strong, 14 La. 491. Thus, where one quarter of a vessel was owned by defendant, and the other three quarters by another person, and the master, notwithstanding defendant had forbidden both him and the other part-owner from employing the vessel at all, had hired a seaman upon the credit of both the owners, defendant was liable for the wages of the seaman so hired, he not having at the time any knowledge of the prohibition. Hardy *v.* Sproule, 29 Me. 258. And see Alleson *v.* Marsh, 2 Vent. 181, 86 Eng. Reprint 380. And where a master, who is part-owner and general agent, contracts in his own name with a seaman to employ him, all the owners will be liable for his wages, the general rules of agency being applicable. Baker *v.* Corey, 19 Pick. (Mass.) 496. But one part-owner of a boat cannot sue the others for services as clerk on the boat, under the employment of the captain, another part-owner. Hinton *v.* Law, 10 Mo. 701.

**Extra wages.**— Seamen may maintain an action against the vessel owner to recover as wages their portion of the three months' wages required by Act Feb. 28, 1803 (2 U. S. St. at L. 203) to be paid on a discharge in a foreign port. Dustin *v.* Murray, 8 Fed. Cas. No. 4,201, 5 Ben. 10.

**One who is owner at the institution of the action,** although not at the time the debt was incurred, is liable for wages. *Ex p.* Warner, 5 L. C. J. 120, 11 L. C. Rep. 115.

**39.** Bronde *v.* Haven, 4 Fed. Cas. No. 1,924, Gilp. 592.

**But an owner on register is not liable for wages, if not owner in fact.**— Ratchford *v.* Meadows, 3 Esp. 69.

**40.** Luscom *v.* Osgood, 15 Fed. Cas. No. 8,608, 1 Sprague 82.

**41.** Scott *v.* Failes, 21 Fed. Cas. No. 12,530, 5 Ben. 82.

**42.** Russell *v.* Rackett, 46 Fed. 200.

**43.** Giles *v.* Vigoreux, 35 Me. 300, 58 Am. Dec. 704; Goodridge *v.* Lord, 10 Mass. 483; Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

**But where the vessel is let to the master for a portion of her earnings,** and he is to have entire control, and to victual, man, and furnish her, the owners are still liable for wages, unless the contract is known to the seamen at the time of shipping. The money received by the owners is freight, and they are liable for wages as having an interest in the freight and to the whole extent of the freight received, and not *pro rata*. Skofield *v.* Potter, 22 Fed. Cas. No. 12,925, 2 Ware 394. And see Sargent *v.* Wording, 46 Me. 464, holding that where defendants, the owners of a vessel, and a former master, had an agreement under which the vessel was sailed by the latter on shares, and the master made an arrangement with another master to take his place, but the assent of defendants thereto was not proved, a seaman hired by the second master was in the absence of such proof entitled to recover his wages of the owners of the vessel.

**44.** Sheriffs *v.* Pugh, 22 Wis. 273, 94 Am. Dec. 600.

**45.** Bonnah *v.* McMorran, 64 Mich. 145, 31 N. W. 37; Bronde *v.* Haven, 4 Fed. Cas. No. 1,924, Gilp. 592. But see Aspinwall *v.* Bartlet, 8 Mass. 483, holding that where there was a sale and delivery of a ship in a foreign port by the master, and a contract that the purchasers should victual and man her, upon these facts being made part of a case,

of the collector of customs, where the vessel is registered or enrolled, as required by statute.[46]

**3. MORTGAGEES.** A mortgagee in possession of a vessel is liable for seamen's wages,[47] but not a mortgagee not in possession.[48]

**L. Lien — 1. IN GENERAL.** Seamen have a lien on the vessel for their wages,[49] unless it is shown that they rely for their wages, not upon the vessel but upon their contract with the owner,[50] and they have the same lien on a vessel that is chartered,[51] or that is sailed by the master on shares as they do on others,[52] unless a waiver of the lien is proved.[53] This lien is not dependent upon the seaman's contract but is fixed by law as an incident to his employment,[54] and is not affected by a condition in the contract by which the seaman agrees to perform services on shore while in port.[55] It is dependent, however, upon the seaman's being employed in the interest of the owners of the vessel,[56] and having been engaged by a per-

the former owners were not liable for seamen's wages after this transaction, but only for such as were earned before.

46. Hance *v.* Antone, 1 Tex. App. Civ. Cas. § 800, under U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837].

47. The Bramen, 4 Fed. Cas. No. 1,805, Brown Adm. 161. But see Dickey *v.* Faribault, 11 L. C. Rep. 150.

**A person to whom an absolute bill of sale of a vessel is given** to secure an indebtedness, under an agreement for a reconveyance when the indebtedness is paid, where the master of the vessel is to account to him for her earnings, will be considered a mortgagee in possession, and as such liable for seamen's wages (The Bramen, 4 Fed. Cas. No. 1,805, Brown Adm. 161) and is bound by his admission of liability and express promise to pay wages earned during the time he held such title, made after he had taken possession, and while she was under arrest for such wages (Kenneway *v.* The Wickford, 14 Fed. Cas. No. 7,709).

48. Annett *v.* Carstairs, 3 Campb. 354.

49. Kirkpatrick *v.* Augusta Bank, 30 Ga. 465; The John McDermott, 109 Fed. 90; The John T. Williams, 107 Fed. 750; Allen *v.* The Destroyer, 56 Fed. 310; McNamara *v.* The Atlantic, 53 Fed. 607; The Bolivar, 3 Fed. Cas. No. 1,610, Olcott 480.

**A minor** employed by the master-at-all-work has a lien for his wages, even though the owner is authorized by the sharesmen to retain from their shares his wages. The Helen M. Pierce, 11 Fed. Cas. No. 6,332, 2 Hask. 205.

**A seaman, although a part-owner** of a vessel on which he serves, has a lien for his wages. Foster *v.* The Pilot No. 2, 9 Fed. Cas. No. 4,980, Newb. Adm. 215. See The Blohm, 3 Fed. Cas. No. 1,556, 1 Ben. 228, holding that the taking by a mate of an agreement from the master to share the profits in place of interest on money loaned by the mate to the vessel will not prevent a lien for wages. *Compare* Logan *v.* The Æolian, 15 Fed. Cas. No. 8,465, 1 Bond 267, holding that the clerk of a steamboat who has an interest of one half in the boat has no lien for wages.

**A crew shipped by a consul** on a vessel seized by him in a foreign port are entitled to a lien for their wages. Maria Theresa, 16 Fed. Cas. No. 9,082.

**Master's lien for wages** see SHIPPING.

**Lien of pilot** see PILOTS, 16 Cyc. 1620, 1621, text and notes 83, 84, 85.

**When seamen are employed for a certain length of time** and are wrongfully discharged before the expiration of the term of their contract, the lien for their wages is for the entire term of their employment. The Wanderer, 20 Fed. 655, 4 Woods 25.

**When seamen are employed on two or more vessels** they have liens on each vessel upon which they have rendered service, to the amount of the services rendered that vessel. McRae *v.* Bowers Dredging Co., 86 Fed. 344; The Murphy Tugs, 28 Fed. 429. But see The Ida Meyer, 31 Fed. 89.

50. White *v.* The Emma, 37 Fed. 703.

51. The Gen. J. A. Dumont, 158 Fed. 312; The L. L. Lamb, 31 Fed. 29; The International, 30 Fed. 375; The Samuel Ober, 15 Fed. 621; The Adelphi, 1 Fed. Cas. No. 80; The Artisan, 2 Fed. Cas. No. 568, 9 Ben. 106.

52. The Carrier Dove, 93 Fed. 978; The Montauk, 17 Fed. Cas. No. 9,717, 10 Ben. 455; Skofield *v.* Potter, 22 Fed. Cas. No. 12,925, 2 Ware 394. But see The Hattie Low, 14 Fed. 880; Devoe *v.* The Fashion, 7 Fed. Cas. No. 3,844.

53. McNamara *v.* The Atlantic, 53 Fed. 607; The L. L. Lamb, 31 Fed. 29; The International, 30 Fed. 375; The Artisan, 2 Fed. Cas. No. 568, 9 Ben. 106; The Bambard, 2 Fed. Cas. No. 831, 8 Ben. 493; Bickner *v.* The William D., 3 Fed. Cas. No. 1,390; The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437; The Fashion, 7 Fed. Cas. No. 3,844; The Montauk, 17 Fed. Cas. No. 9,717, 10 Ben. 455.

**What amounts to waiver** see *infra*, VI, L, 4, a.

54. The International, 30 Fed. 375.

55. The Artisan, 2 Fed. Cas. No. 568, 9 Ben. 106.

56. The Gen. McPherson, 100 Fed. 860.

**Vessel operated by receiver.**— A seaman may acquire a lien for wages for services rendered a receiver in charge of the vessel and employing it in navigation under order of court. The William M. Hoag, 168 U. S. 443, 18 S. Ct. 114, 42 L. ed. 537 [*affirming* 69 Fed. 742].

son authorized to engage him,[57] and upon a voyage that is not illegal.[58] But when they have been validly engaged, and are ready and willing to perform their duties, seamen are entitled to the lien, although they do not perform the service.[59] This lien extends to extra wages or pay given by statute, to be recovered as wages,[60] but not to compensation promised them for overtime;[61] and the courts of the United States will enforce the lien, although it arises in a country where there are no courts of admiralty.[62]

**2. Property Subject to.**[63] Under the maritime law the vessel, if subject to the jurisdiction of admiralty,[64] is subjected to the lien for seamen's wages.[65] Where a vessel is sold by order of court, the lien for seamen's wages attaches to

**57.** The Gen. McPherson, 100 Fed. 860; Gilligan *v.* The Winged Racer, 10 Fed. Cas. No. 5,439.

**58.** The Langdon Cheves, 14 Fed. Cas. No. 8,063, 2 Mason 58.

**59.** The Alanson Sumner, 28 Fed. 670; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375.

**But where shipping articles have not been signed,** there is no lien as for wages unless services have in fact been rendered, although the seaman has been engaged for a voyage. The Glenesslin, 96 Fed. 768.

**60.** Covert *v.* The Wexford, 3 Fed. 577; The Blohm, 3 Fed. Cas. No. 1,556, 1 Ben. 228.

**When extra wages are allowed** see *supra*, VI, F.

**61.** The Northern Light, 106 Fed. 748.

**Wages for extra services** generally see *supra*, VI, D.

**62.** The Champion, 5 Fed. Cas. No. 2,584.

**63. Property subject to maritime liens** generally see MARITIME LIENS, 26 Cyc. 753 *et seq.*

**64. Jurisdiction of admiralty** see ADMIRALTY, 1 Cyc. 815 *et seq.*

**65.** Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542; The Bolivar, 3 Fed. Cas. No. 1,610, Olcott 480; Wilson *v.* The Ohio, 30 Fed. Cas. No. 17,825, Gilp. 505.

**Particular vessels subject to lien.**— Barges are subject to the lien for seamen's wages (Disbrow *v.* The Walsh Brothers, 36 Fed. 607), as are also steam dredges (McRae *v.* Bowers Dredging Co., 86 Fed. 344), and wrecking tugs (The Murphy Tugs, 28 Fed. 429), and in some of the jurisdictions statutes give seamen a lien on steamboats (see the statutes of the several states); but these statutes are confined to vessels that are within the state, and do not apply to vessel without the state coming within (Strother *v.* Lovejoy, 8 B. Mon. (Ky.) 135).

**Canal-boats.**— In the United States under U. S. Rev. St. (1878) § 4251 [U. S. Comp. St. (1901) p. 2929], canal-boats without masts or steam power are exempt from the lien. The George Urban, Jr., 70 Fed. 91, holding that a canal-boat is not rendered subject to the lien by the fact that it is towed through the canal by a steam yacht. The statute is not abrogated by 18 U. S. St. at L. 31, c. 110 [U. S. Comp. St. (1901) p. 2995], which provides that the enrolment act of 1793 (1 U. S. St. at L. 305) shall not be so construed as to extend the provisions of the latter act to such canal-boats. The J. S. Woodward, 6 Fed. 636. A canal-boat is defined to be a vessel engaged in navigating canals, within the meaning of the statute, without reference to its form, and a boat not engaged in navigating canals is not a canal-boat, within the meaning of the statute, whatever may be its form. The William L. Norman, 49 Fed. 285.

**A porgy fishing vessel** is not subject to this lien. The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278.

**When a vessel is wrecked** those seamen who have assisted in saving portions of her have a lien upon the proceeds of the sale of the portions saved (Daniels *v.* Atlantic Mut. Ins. Co., 8 Bosw. (N. Y.) 266 [*affirmed* in 24 N. Y. 447]; Hart *v.* Proceeds of the Oakland, 32 Fed. 234; Adams *v.* The Sophia, 1 Fed. Cas. No. 65, Gilp. 77; The Bowditch, 3 Fed. Cas. No. 1,717, 3 Ware 71; Brackett *v.* The Hercules, 3 Fed. Cas. No. 1,762, Gilp. 184 (holding, however, that a creditor of seamen cannot recover his claim in an action by the seamen to recover their wages out of the proceeds of articles saved from a wreck); Flaherty *v.* Doane, 9 Fed. Cas. No. 4,849, 1 Lowell 148; Weeks *v.* The Catharine Maria, 29 Fed. Cas. No. 17,351, 2 Pet. Adm. 424), and when a vessel is abandoned, seamen have a lien upon her in the hands of the salvors (Smith *v.* The Joseph Stewart, 22 Fed. Cas. No. 13,070, Crabbe 218. But see Lewis *v.* The Elizabeth and Jane, 15 Fed. Cas. No. 8,321, 1 Ware 33, holding that if the seamen abandon the ship they lose their lien).

**The lien is governed by the law of the flag** of the vessel to which the seamen belong. The Velox *v.* Woske, 21 Fed. 479 (holding that where seamen shipped at Japan on a Dutch vessel for a voyage to New York and back, and the voyage was broken up by a sale of the vessel in New York, the liens of the seamen were regulated by the code of the Netherlands); The Adolph, 7 Fed. 501; The Enterprise, 8 Fed. Cas. No. 4,498, 1 Lowell 455. But in the absence of evidence as to what that law is, the general maritime law will govern. The Countess of Dufferin, 6 Fed. Cas. No. 3,280, 10 Ben. 155. Where the master commits an act of barratry by carrying off the vessel after the owner's death to a port of a state other than that of the owner's residence, the right of one claiming a lien for wages is to be determined on the same principles as if the libel were filed in a court of the owner's domicile. Williams *v.* The Sylph, 29 Fed. Cas. No. 17,740.

the proceeds of the sale,[66] and where sums are awarded the owners on account of the capture of the vessel, the seamen's lien attaches to the sums so awarded;[67] and while ordinarily in case of war between countries seamen on a captured vessel have no right to wages out of the proceeds of the prize property even though the voyage commenced before war was declared, in case of civil war, if the voyage be commenced before war declared, seamen not hostile to the capturing side will be allowed their wages or equivalent compensation out of the proceeds of the seized property.[68] Seamen may proceed against the insurance money paid to the owners, when a vessel has been sunk,[69] or abandoned as a total loss;[70] but they may not do so when the insurance money is paid on account of the capture of a vessel.[71] The lien extends to freight earned;[72] but not to the cargo,[73] unless the owners of the cargo are the owners of the vessel,[74] or are its charterers;[75] and when that is the case the seamen are allowed a lien on the cargo, to the amount that its transportation is reasonably worth.[76]

**3. Priority.**[77] The lien for seamen's wages is superior to all claims against the vessel arising out of contract,[78] and to the claim of the United States for

66. Douglass *v.* Roan, 4 Call (Va.) 353; *In re* Low, 15 Fed. Cas. No. 8,558, 2 Lowell 264, holding that where the ship-owner of a vessel engaged in fishing becomes bankrupt the lien of seamen follows the proceeds of the fish into the hands of his assignees. But see The Augustine Kobbe, 37 Fed. 696 (holding that a mate who remains on a vessel after her seizure, and assists the marshal in handling her, acquires thereby no maritime claim, to be enforced against the proceeds of the vessel); The Henry Warner, 29 Fed. 601; The Searle W. Jacobs, 21 Fed. Cas. No. 12,588, Olcott 502 (holding that where a claim for wages was set up after the vessel has been sold upon due proceedings instituted upon a claim for supplies furnished her, and was sought to be recovered out of the proceeds of the vessel in court, the claim would be disallowed unless supported by more than *prima facie* evidence, especially when the rate of wages claimed was unusually high).

67. Sheppard *v.* Taylor, 8 Pet. (U. S.) 676, 8 L. ed. 269; Brown *v.* Lull, 4 Fed. Cas. No. 2,018, 2 Sumn. 443; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,185, 3 Sumn. 50; Vandeveer *v.* Tilghman, 28 Fed. Cas. No. 16,846, 1 Crabbe 66. But see Mansen *v.* Gardiner, 5 Me. 108.

68. The Parkhill, 18 Fed. Cas. No. 10,756.

69. The Conveyor, 147 Fed. 586.

70. *In re* Ripley, 9 Daly (N. Y.) 252.

71. McQuirk *v.* Penelope, 16 Fed. Cas. No. 8,925, 2 Pet. Adm. 276.

72. Tibbol *v.* The Marion, 79 Fed. 104; *In re* Nova Scotia Bank, 4 Fed. 667; The Clayton, 5 Fed. Cas. No. 2,870, 5 Biss. 162; The Monadnock, 17 Fed. Cas. No. 9,704, 5 Ben. 357; Poland *v.* The Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130; Skofield *v.* Potter, 22 Fed. Cas. No. 12,925, 2 Ware 394.

**Freight earned prior to a wreck** of the vessel and put on shore in the course of the voyage is, to the last nail or cable, hypothecated to the wages. Relf *v.* The Maria, 20 Fed. Cas. No. 11,692, 1 Pet. Adm. 186.

**This lien was not destroyed by the act of congress of July 20, 1790** (1 U. S. St. at L. 131), for the government of merchant seamen, which authorized process against the vessel. Poland *v.* The Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130.

**Where seamen proceed against both the freight and the vessel** for their wages, and either fund is sufficient to pay them in full, the court can direct as to the mode of satisfying their decrees. The equity in the freight created by an advance upon the credit of the freight is no greater than the equity in the ship created by a mortgage of the ship. As between two such creditors, the equitable method is to charge the wages upon both funds *pro rata*. *In re* Nova Scotia Bank, 4 Fed. 667.

**Freight money paid to the master before notice** of the claim is not subject to the lien. Conley *v.* The G. C. Barras, 6 Fed. Cas. No. 3,103, 6 Ben. 12. Nor is freight not sought to be charged in the libel. Conley *v.* The G. C. Barras, *supra*.

**Delivery of the cargo without the payment of the freight** does not divest the lien, which follows the cargo. Whitney *v.* Tibbol, 93 Fed. 686, 35 C. C. A. 544.

73. Holmes *v.* Bigelow, 3 Desauss. Eq. (S. C.) 497.

74. The Marion, 88 Fed. 96; Tibbol *v.* The Marion, 79 Fed. 104; The Antelope, 1 Fed. Cas. No. 484, 1 Lowell 130 (holding that seamen in the whaling service have a lien on the oil for their wages); *In re* Low, 15 Fed. Cas. No. 8,558, 2 Lowell 264; Skolfield *v.* Potter, 22 Fed. Cas. No. 12,925, 2 Ware 394.

75. Whitney *v.* Tibbol, 93 Fed. 686, 35 C. C. A. 544; The Clayton, 5 Fed. Cas. No. 2,870, 5 Biss. 162; Poland *v.* The Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130.

76. Whitney *v.* Tibbol, 93 Fed. 686, 35 C. C. A. 544; The Marion, 88 Fed. 96; The Clayton, 5 Fed. Cas. No. 2,870, 5 Biss. 162.

77. **Inferiority of wage lien to lien for damage for collision** see Collisions, 7 Cyc. 375 text and note 88.

**Priority of salvage lien over wage lien** see Salvage.

78. Mooney *v.* The Hondurino, 11 La. Ann. 538; Abbott *v.* Baltimore, etc., Steam Packet

penalties incurred by the vessel for failure to comply with the provision of a statute, when the statute imposes no duty upon the seamen,[79] and when the seamen have no knowledge that a voyage is illegal the lien for their wages is superior to the claim for forfeiture by the government.[80] But seamen on board a prize captured and condemned as enemy's property have no lien for wages, as against the title of the United States and the rights of the captors;[81] and when a creditor other than the seamen procures the sale of the vessel, the cost of the proceeding to procure the sale, and the expenses incident to the sale are to be taken from the proceeds before the claims of the seamen are to be satisfied.[82]

**4. Loss of Lien —a. In General.** Although the lien for seamen's wages may be lost in various ways, an act of the owner, in which the seamen do not participate, such as entering an agreement, by which the vessel is chartered,[83] or pledging the freight,[84] or by going into bankruptcy, will not operate to cause such loss,[85] nor will the delivery of a vessel on bail,[86] or the sale of the vessel by an order of court;[87] and the forfeiture of a vessel for the violation of a statute will not operate to divest the seamen's lien as against the government,[88] but will so operate as against a purchaser of the forfeited vessel.[89] A seaman may lose his lien for wages by waiver,[90] but the fact that the seamen attempt to collect their wages

Co., 1 Md. Ch. 542; *In re* Ripley, 9 Daly (N. Y.) 252; The Mystic, 30 Fed. 73 (towage services); The Velox *v.* Woske, 21 Fed. 479; The J. A. Brown, 13 Fed. Cas. No. 7,118, 2 Lowell 464; The May Queen, 16 Fed. Cas. No. 9,360, 1 Sprague 588; The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*. And see, generally, Maritime Liens, 26 Cyc. 806.

**Materialman's lien.**— The lien for seamen's wages is superior to that of materialmen. The Nellie Bloomfield, 27 Fed. 524 (holding, however, that a seaman who delayed too long in enforcing his lien could not have priority of a claim for supplies); The G. F. Brown, 24 Fed. 399.

**Mortgage.**— The seamen's lien for wages is superior to a mortgage on the vessel. The H. N. Emilie, 70 Fed. 511; The Live Oak, 30 Fed. 78; The Guiding Star, 9 Fed. 521; The Uncle Tom, 24 Fed. Cas. No. 14,335, 10 Ben. 234.

**Priority of seaman's wage lien over bottomry bond** see Shipping.

**Lender on security of freight.**— The lien for seamen's wages is superior to the claim of a lender on the security of the freight to be earned by the vessel. *In re* Nova Scotia Bank, 4 Fed. 667.

**Assignment for benefit of creditors.**— The lien for seamen's wages is superior to the claim of an assignee of the vessel by the owners for the benefit of creditors. Poland *v.* The Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130.

79. The Jennie Hays, 37 Fed. 373, penalty for failure to post certificate.

80. St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122.

81. U. S. *v.* The Sally Magee, 27 Fed. Cas. No. 16,216.

82. The G. F. Brown, 24 Fed. 399; The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326.

83. Hart *v.* The Enterprise, 11 Fed. Cas. No. 6,151.

**Lien for wages of seamen on chartered vessels** see *supra*, VI, L, 1.

84. The Monadnock, 17 Fed. Cas. No. 9,704, 5 Ben. 357.

85. The Louie Dole, 14 Fed. 862, 11 Biss. 479.

86. The Langdon Cheves, 14 Fed. Cas. No. 8,063, 2 Mason 58.

87. Crosby *v.* The Lillie, 40 Fed. 367 [*affirmed* in 42 Fed. 237]; McGinnis *v.* The Grand Turk, 16 Fed. Cas. No. 8,800; Poland *v.* The Spartan, 19 Fed. Cas. No. 11,246, 1 Ware 130. But see Gallatin *v.* The Pilot, 9 Fed. Cas. No. 5,199, 2 Wall. Jr. 592 [*reversing* 9 Fed. Cas. No. 4,980, Newb. 215], holding that the lien for wages of a seaman, a part-owner of the vessel, is discharged by a sheriff's sale of her on execution against her owners, although as a general principle a sheriff's sale does not have this effect.

**Lien on proceeds of sale** see *supra*, VI, L, 2.

**Even though the seamen stand by and see the vessel sold,** without asserting their claims the rule applies. The Lillie, 42 Fed. 237 [*affirming* 40 Fed. 367]. If, however, the vessel is sold at a private sale, seamen who have knowledge of the sale and refrain from asserting their claim may not afterward proceed against the vessel. The Bolivar, 3 Fed. Cas. No. 1,609, Olcott 474. And see Crosby *v.* The Lillie, 40 Fed. 367 [*affirmed* in 42 Fed. 237].

**Where part of a ship's crew had libeled her** in the admiralty for their wages, and she was sold upon a decree in their favor, it was held that the remainder of the crew who had notice of the proceeding had no lien upon the ship, after such sale, for their wages. Trump *v.* The Thomas, 24 Fed. Cas. No. 14,206, Bee 86.

88. St. Jago de Cuba, 9 Wheat. (U. S.) 409, 6 L. ed. 122; Anderson *v.* The Solon, 1 Fed. Cas. No. 363, Crabbe 17; U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

89. Hastings *v.* The Elexena, 53 Fed. 359.

90. The Bambard, 2 Fed. Cas. No. 831, 8

in a non-maritime court will not operate as a waiver of their lien and prevent them from enforcing it in a court of admiralty.[91]

**b. By Assignment.** The assignee of a seaman's claim for wages has no lien,[92] and may not maintain a suit *in rem* against the vessel for the recovery of the wages assigned,[93] nor may seamen after they have assigned their claim for wages maintain a libel for their recovery.[94]

**M. Actions and Proceedings**[95] — **1. In General.** Admiralty has not exclusive jurisdiction of seamen's claims for wages; they may proceed in the state courts,[96] but not for causes that arise outside of their territorial jurisdic-

Ben. 493; Bickner *v.* The William D., 3 Fed. Cas. No. 1,390; The Countess of Dufferin, 6 Fed. Cas. No. 3,280, 10 Ben. 155; The Gate City, 10 Fed. Cas. No. 5,267, 5 Biss. 200.

**To establish a waiver, there must be shown** an express contract on the part of the seaman not to rely on the credit of the vessel for his wages (The L. L. Lamb, 31 Fed. 29; The International, 30 Fed. 375; The Artisan, 2 Fed. Cas. No. 568, 9 Ben. 106), fully understood by the seaman (The Highlander, 12 Fed. Cas. No. 6,476, 1 Sprague 510; The Sarah Jane, 21 Fed. Cas. No. 12,348, Blatchf. & H. 401), and supported by a consideration (The Highlander, *supra*; The Sarah Jane, *supra*); or there must be a state of facts from which an intention not to rely on the credit of the vessel must necessarily appear (The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437; The Montauk, 17 Fed. Cas. No. 9,717, 10 Ben. 455). The taking of a promissory note in settlement of his wages (The Betsy and Rhoda, 3 Fed. Cas. No. 1,366, 2 Ware 117; The Gate City, 10 Fed. Cas. No. 5,267, 5 Biss. 200; The Harriet, 11 Fed. Cas. No. 6,098, 1 Sprague 33; The Helen M. Pierce, 11 Fed. Cas. No. 6,332, 2 Hask. 205), or of an order on the owners for the balance due him will not operate as such a waiver (The Eastern Star, 8 Fed. Cas. No. 4,254, 1 Ware 184), nor will knowledge on the part of the seamen that the vessel is chartered (McNamara *v.* The Atlantic, 53 Fed. 607; The L. L. Lamb, *supra*; The International, *supra*; The Artisan, *supra*); or is sailed by the master on shares (The Canton, *supra*; The Montauk, *supra*. But see Devoe *v.* The Fashion, 7 Fed. Cas. No. 3,844).

**Where the charterers are insolvent,** if the master and owner know that fact and do not disclose it to the seamen at the time of engaging them for the charterers, the concealment is a fraud upon them, and any agreement to release the lien on the ship will be disregarded by the court. The L. L. Lamb, 31 Fed. 29.

**Becoming master of the vessel.**—Although it is sometimes held that the master of a vessel has no lien for his wages (see SHIPPING); the fact that a seaman succeeds to the command of the master during the voyage will not cause the loss of his lien for his wages as a seaman. The Fanny Gardner, 8 Fed. Cas. No. 4,642, 5 Biss. 209, holding, however, that a mate who takes command of a vessel on the death of the master is not entitled to maintain a libel for wages as master for that part of the voyage in which he acted in that capacity.

**91.** The Cerro Gordo, 54 Fed. 391; The Pioneer, 21 Fed. 426; The Highlander, 12 Fed. Cas. No. 6,476, 1 Sprague 510, holding that a seaman's lien for wages is not defeated by a previous attachment of the vessel, at common law, in a state court, abandoned before the filing of the libel. And see The Gate City, 10 Fed. Cas. No. 5,267, 5 Biss. 200.

**The presentment of the claim by a seaman to a bankrupt court** will not be considered a waiver of his lien for wages. The Louie Dole, 14 Fed. 862, 11 Biss. 479.

**92.** The Clara A. McIntyre, 94 Fed. 552; Howard *v.* The Georgia, 46 Fed. 669; The Henry Warner, 29 Fed. 601; The Langdon Cheves, 14 Fed. Cas. No. 8,063, 2 Mason 58; Logan *v.* The Æolian, 15 Fed. Cas. No. 8,465, 1 Bond 267; Patchin *v.* The A. D. Patchin, 18 Fed. Cas. No. 10,794; Rusk *v.* The Freestone, 21 Fed. Cas. No. 12,143, 2 Bond 234; Seaver *v.* The Thales, 21 Fed. Cas. No. 12,594. *Contra*, The Wm. M. Hoag, 69 Fed. 742 [*affirmed* in 168 U. S. 437, 18 S. Ct. 112, 42 L. ed. 533] (holding that a lien for seaman's wages will be enforced in the hands of an assignee when there is no reason to question the fairness of the assignment); The New Idea, 60 Fed. 294 (holding that a claim for maritime wages is assignable, and the lien also passes by the assignment, so that the assignee is entitled to enforce such lien in his own name).

**93.** Logan *v.* The Æolian, 15 Fed. Cas. No. 8,465, 1 Bond 267; Patchin *v.* The A. D. Patchin, 18 Fed. Cas. No. 10,794.

**94.** Bibbins *v.* The Citizen, 3 Fed. Cas. No. 1,384*a*; Logan *v.* The Æolian, 15 Fed. Cas. No. 8,465, 1 Bond 267.

**95. Jurisdiction of admiralty:** To enforce lien for seamen's wages see ADMIRALTY, 1 Cyc. 832. Over foreign seamen see ADMIRALTY, 1 Cyc. 819 *et seq.*

**96.** Calvin *v.* Huntley, 178 Mass. 29, 59 N. E. 435, holding that the state courts have jurisdiction over an action to recover additional wages provided for by U. S. Rev. St. (1878) § 4527 [U. S. Comp. St. (1901) p. 3077], for wrongful discharge. See also Munroe *v.* Holmes, 5 Allen (Mass.) 201; Luther *v.* Fowler, 1 Grant (Pa.) 176.

**The district or justice's court of New York city** has not jurisdiction of the claims of seamen for wages. Roche *v.* McCaldin, 1 Misc. (N. Y.) 174, 20 N. Y. Suppl. 688 (holding that a trip of a steam tug, while

tion.[97] In some of the jurisdictions proceedings against the vessel in the nature of proceedings *in rem* in admiralty are authorized by statute.[98] The statutes in the United States[99] providing that, where seamen's wages are not paid when due, district judges of the district where the vessel is may summon the master to appear before them to show cause why process should not issue against the vessel affords a summary remedy merely cumulative and not exclusive of the remedies which before the enactment of the statute they may have had;[1] nor is this remedy conclusive, for the owner is permitted even after the warrant has been issued to intervene by answer and show that the libellant has no right to sue;[2] and this statute has been held to apply only to the classes of vessels enumerated in the first section of the act.[3] That the wages are due must appear on the face of the complaint,[4] and the certificate to the clerk must show on its face that it was issued in accordance with the statute.[5]

**2. Time to Sue.** Seamen's wages are due when the services are complete,[6] and they may not maintain suits to recover them until that time,[7] unless the per-

towing a ship from port to sea, is a "voyage," within the meaning of the statute prohibiting the district court of New York city from taking cognizance of an action brought by any seaman against the owner of a ship or vessel for breach of contract for services on board ship during any "voyage performed, or in part performed, by such ship or vessel"); Collins *v.* Underwood, 1 E. D. Smith (N. Y.) 318.

**Effect of treaty.**—An action for seamen's wages earned on board of a Swedish vessel is, under the treaty with Sweden and Norway, only cognizable before the consul of Sweden; and the state court has no jurisdiction. Norberg *v.* Hillgreu, 5 N. Y. Leg. Obs. 177.

97. Connelly *v.* The Bee, 40 Mo. 263.

98. See the statutes of the several states. And see Cape Fear Steamboat Co. *v.* Torrent, 46 Ga. 585; Butts *v.* Cuthbertson, 6 Ga. 166; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248; Robinson *v.* The Lotus, 1 Ga. 317; Byrne *v.* The St. Mary, 27 Mo. 296; Williams *v.* The Morrisett, 21 Mo. 144; Jones *v.* The Morrisett, 21 Mo. 142; Luft *v.* Envoy, 19 Mo. 476; Russell *v.* The Elk, 6 Mo. 552; Lewis *v.* The Cleveland, 12 Ohio 341.

**The Michigan statute** was declared unconstitutional as in violation of the constitution of that state. Parsons *v.* Russel, 11 Mich. 113, 83 Am. Dec. 728.

99. U. S. Rev. St. (1878) §§ 4546, 4547 [U. S. Comp. St. (1901) p. 3087]; 1 U. S. St. at L. 133, c. 29, § 6; 5 U. S. St. at L. 517, c. 188, § 1; 30 U. S. St. at L. 756, c. 28, § 6.

1. The Shelbourne, 30 Fed. 510 (holding that an action at common law is still open to a seaman); The Frank C. Barker, 19 Fed. 332 (holding that the usual process *in rem* against the vessel is still open to seamen); The Edwin Post, 6 Fed. 206; Murray *v.* The Ferry-Boat Nimick, 2 Fed. 86; The M. W. Wright, 17 Fed. Cas. No. 9,983, Brown Adm. 290; The Waverly, 29 Fed. Cas. No. 17,301, 7 Biss. 465; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

2. The Warrington, 29 Fed. Cas. No. 17,208, Blatchf. & H. 335.

3. The M. W. Wright, 17 Fed. Cas. No. 9,983, Brown Adm. 290.

**Fishing vessels.**— The provisions of this statute apply only to merchant ships and their masters and crews, and not to vessels engaged in fisheries. The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278.

4. The Rockie E. Yates, 20 Fed. Cas. No. 11,980*a*, 2 Hask. 430, holding also that the vessel must be within the judicial district at the time of the hearing, and that the master has a right to appear by attorney.

5. Kief *v.* The London, 14 Fed. Cas. No. 7,759, 6 McLean 184, Newb. Adm. 6, holding also that, where the certificate shows on its face that it was issued according to law, the court will not go behind it as conferring authority on the clerk to issue process.

6. The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83; The Mary, 16 Fed. Cas. No. 9,191, 1 Ware 465.

**The services are complete when the vessel is moored** at her final port of destination, and wages are then due. The Annie M. Smull, 1 Fed. Cas. No. 423, 2 Sawy. 226.

7. Jelly *v.* Tiddeman, 13 Fed. Cas. No. 7,256*a*; The Swallow, 23 Fed. Cas. No. 13,664, Olcott 4.

**Seamen employed for specified time** cannot sue for wages until the expiration of the time, unless there be proof of actual or constructive release. The Warrington, 29 Fed. Cas. No. 17,208, Blatchf. & H. 335.

**Effect of premature commencement.**— While in many instances libels that are prematurely brought are dismissed (Smith *v.* The Columbus, 43 Fed. 686; The David Faust, 7 Fed. Cas. No. 3,595, 1 Ben. 183; Jelly *v.* Tiddeman, 12 Fed. Cas. No. 7,256*a*; The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151; The Warrington, 29 Fed. Cas. No. 17,208, Blatchf. & H. 335), this is not a necessary result if substantial justice can be done (The L. B. Snow, 15 Fed. 282).

**Right of exception to the premature commencement is waived by appearance and answer.**— The Edward, 8 Fed. Cas. No. 4,289, Blatchf. & H. 286; The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454.

formance of the services is released, as by discharge of the seamen;[8] and when seamen stipulate in their shipping articles not to sue for their wages until a certain time has elapsed after their connection with the vessel is severed, if the stipulations are fairly made they are bound by them.[9] In the United States by statute[10] proceedings *in rem* against the vessel by seamen for wages may not be commenced until the expiration of ten days from the discharge of the cargo,[11] and seamen are required to wait a reasonable time for the discharge to be made,[12] but may proceed at once if a dispute as to their wages arise,[13] or they be discharged,[14] or if the vessel departs from the port of her discharge,[15] or be about to proceed to sea.[16] This statute, however, prevents only the issuing of process against the vessel, not the filing of a libel,[17] or the beginning of a suit against the freight,[18] or *in personam*.[19]

**3. Laches.** While there is no definite rule stating within what time steps to enforce the seamen's lien must be taken to prevent it from becoming stale,[20] and the lien is enforced often, although seamen have delayed in asserting it,[21] it will not be enforced against an innocent purchaser of the vessel, if the seamen have delayed enforcing it so long as to justify a presumption that it has been waived.[22]

8. Dary *v.* The Caroline Miller, 36 Fed. 507; The Cadmus, 4 Fed. Cas. No. 2,280, Blatchf. & H. 139 [*affirmed* in 4 Fed. Cas. No. 2,282, 2 Paine 229].

9. Smith *v.* The Columbus, 43 Fed. 686; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454.

10. U. S. Rev. St. (1878) §§ 4546, 4547 [U. S. Comp. St. (1901) p. 3087].

11. The David Faust, 7 Fed. Cas. No. 3,595, 1 Ben. 183; The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232; Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372; The Rockie E. Yates, 20 Fed. Cas. No. 11,980*a*, 2 Hask. 430, holding that the complaint should show that this time had elapsed.

12. The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232 (holding, however, that a delay beyond a reasonable time to unlade the vessel may be regarded as equivalent to a discharge of a seaman, so as to enable him to sue for wages before the unlading of the cargo); Edwards *v.* The Susan, 8 Fed. Cas. No. 4,299, 1 Pet. Adm. 165; The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151 (holding that fifteen days will be taken to be a reasonable time in ordinary cases); Thompson *v.* Philadelphia, 23 Fed. Cas. No. 13,973, 1 Pet. Adm. 210.

13. The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

A demand of wages and a refusal by the owner to pay, till after ten days, does not constitute a dispute, within 1 U. S. St. at L. 133, so as to authorize process *in rem* before the expiration of the ten days. The Commerce, 6 Fed. Cas. No. 3,054, 1 Sprague 34.

14. The Cabot, 4 Fed. Cas. No. 2,277, Abb. Adm. 150; Collins *v.* Nickerson, 6 Fed. Cas. No. 3,016, 1 Sprague 126; The Columbia, 6 Fed. Cas. No. 3,034, 6 Ben. 398; The David Faust, 7 Fed. Cas. No. 3,595, 1 Ben. 183; The Susan, 23 Fed. Cas. No. 13,631, 3 Ware 222. And see The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83.

15. The Edward, 8 Fed. Cas. No. 4,289, Blatchf. & H. 286; Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372.

16. The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83; The Trial, 24 Fed. Cas. No. 14,170, Blatchf. & H. 94; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

17. Francis *v.* Bassett, 9 Fed. Cas. No. 5,637, 1 Sprague 16.

18. The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

19. The Edwin Post, 6 Fed. 206; The Commerce, 6 Fed. Cas. No. 3,054, 1 Sprague 34; Freeman *v.* Baker, 9 Fed. Cas. No. 5,084, Blatchf. & H. 372; The Susan, 23 Fed. Cas. No. 13,631, 3 Ware 222; The William Jarvis, 29 Fed. Cas. No. 17,697, 1 Sprague 485.

20. The Mary, 16 Fed. Cas. No. 9,186, 1 Paine 180.

21. Redmeyer *v.* The H. N. Emilie, 70 Fed. 511; The Lillie, 42 Fed. 237; The Canton, 5 Fed. Cas. No. 2,388, 1 Sprague 437; The Mary, 16 Fed. Cas. No. 9,186, 1 Paine 180.

Delay of twenty months.—A claim of a seaman does not, as a matter of law, become stale in twenty months, as against the holders of a trust deed of the vessel (The Norfolk, 18 Fed. Cas. No. 10,297, 2 Hughes 123), and where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien on it for wages due, until after twenty-one months' continuous service, does not render his claim stale (The Galloway C. Morris, 9 Fed. Cas. No. 5,204, 2 Abb. 164).

Delay of a year.—Where a seaman, having removed to a different port, liheled the vessel on her first appearance there, it was held that, although a year had elapsed, he had not lost his lien, where the delay caused no change for the worse to claimants. The Lillie, 42 Fed. 237.

The fact that a vessel has made several voyages since the contract was terminated will not discharge the lien of a seaman for wages, where it appears that the seaman exerted himself to follow the vessel, and commenced suit at the earliest moment. The Freeman *v.* The Jane, 9 Fed. Cas. No. 5,086, Crabbe 178.

22. The Seminole, 42 Fed. 924; The Boli-

**4. Procedure — a. Pleading.** The general rule that courts of admiralty are not restrained by the strict technical rules of pleading which prevail at common law [23] applies in actions by seamen for wages.[24] The libel must, however, set forth in plain allegations the ground on which the judgment of the court is asked,[25] and the facts should be set forth in distinct articles.[26] Similarly strict and technical formality is not required of the answer. It should, however, distinctly admit or deny the facts stated in the different articles of the libel;[27] and should not contain impertinent allegations,[28] and where the defense relies on new matter by way of defense, this matter must be set up in distinct articles, by special allegations of the facts with due certainty of time, place, and other circumstances.[29]

**b. Evidence.** The general rules of evidence in admiralty [30] apply in suits for

var, 3 Fed. Cas. No. 1,609, Olcott 474; Herbert *v.* The Amanda F. Myrick, 12 Fed. Cas. No. 6,395; Packard *v.* The Louisa, 18 Fed. Cas. No. 10,652, 2 Woodb. & M. 48; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,186, 6 Sumn. 286.

**But if a purchaser of a vessel has notice** before or at the time of his purchase information sufficient to put him on inquiry, as to liens which might exist against the vessel, the fact that proceedings by libellant to enforce his lien for services were not instituted against the vessel till after the purchase would not operate as a waiver of the lien which originally existed. The Seminole, 42 Fed. 924.

23. See Admiralty, 1 Cyc. 853.

24. Pratt *v.* Thomas, 19 Fed. Cas. No. 11,377, 1 Ware 437, holding that a libel for wages is sufficient if it state the contract and service performed, without the annexation of an account stating the rate of wages, and the precise balance due.

25. Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541 (holding that the allegation of hiring, voyage, etc., should be stated with accuracy and reasonable certainty); The William Harris, 29 Fed. Cas. No. 17,695.

**There must be a substantial agreement between the pleading and proof** (White *v.* The Ranier, 45 Fed. 773; Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541; The William Harris, 29 Fed. Cas. No. 17,695), and parties cannot introduce evidence in support of matter not put in issue by the pleadings (The Kendal, 56 Fed. 239; White *v.* The Ranier, *supra*. But see Piehl *v.* Balchen, 19 Fed. 11,137, Olcott 24, holding that a general form of pleading is sufficient to admit evidence of a right to compensation for short allowance of provisions which is recovered as wages where no exception is taken before trial).

**The seaman is bound by the allegation in his libel.**— The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450.

26. Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541.

27. Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541, holding that no facts of misbehavior, or other cause of forfeiture of wages, are admissible at the hearing, unless the answer distinctly propounds them, and puts them in issue.

**Where desertion is set up as a defense** to a libel for seamen's wages, the libellants may show legal cause for such desertion, without alleging the same in the libel. Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384.

**Where a libel claims extra wages for short allowance** of provisions, under 1 U. S. St. at L. 135, the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute, or an exception will lie for insufficiency. The Elizabeth Frith, 8 Fed. Cas. No. 4,361, Blatchf. & H. 195 [*modified* in 8 Fed. Cas. No. 4,353, 2 Paine 291].

**Where the answer fails to deny an allegation** in the libel, and the respondent does not interpose a dilatory plea in the nature of a plea in abatement, the allegation will be taken to be admitted. The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware 373.

**The oath of calumny** anciently required of the libellant in the admiralty is not now in use. Pratt *v.* Thomas, 19 Fed. Cas. No. 11,377, 1 Ware 437.

28. The Pioneer, 19 Fed. Cas. No. 11,176, Deady 58.

29. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541.

**An allegation of misconduct** as a cause of forfeiture of wages must state the particular acts of misconduct relied on, with the circumstances of time and place. Macomber *v.* Thompson, 16 Fed. Cas. No. 8,919, 1 Sumn. 384 (holding also that failure to so state must be taken advantage of by exception); The Pioneer, 19 Fed. Cas. No. 11,176, 1 Deady 58.

**Where a new clause in the shipping articles** derogatory of the general rights of a seaman is relied upon to repel a claim for wages, it must be specially pleaded. Heard *v.* Rogers, 11 Fed. Cas. No. 6,298, 1 Sprague 556.

**Counter-claim.**— Where it appears in a libel for seamen's wages that the wages have been earned a defense in the nature of a counter-claim cannot be sustained if not specially pleaded. White *v.* The Ranier, 45 Fed. 773.

**Where an English statute is relied upon** to defeat a summary action for seamen's wages, the authority of a foreign statute is sufficiently pleaded by a general reference to the law of Great Britain, where the opposite party has not been misled by such pleading. The Alps, 19 Fed. 139.

30. See Admiralty, 1 Cyc. 992.

wages;[31] and the question of the weight to be given to a particular kind of evidence, and to the evidence of particular persons, must be determined by the facts of each case, with regard to the general rules of evidence.[32] The burden of

31. Henry *v.* Curry, 11 Fed. Cas. No. 6,381, Abb. Adm. 433.

It will be presumed that the ordinary routine of a ship has been pursued until the contrary is proved (Setzer *v.* The Silvia de Grasse, 21 Fed. Cas. No. 12,676), that statutory duties have been fulfilled (Bark Shetland *v.* Johnson, 21 App. Cas. (D. C.) 416), that where evidence is in possession of the party who fails to introduce it it is unfavorable to him (Davis *v.* The Faucon, 7 Fed. Cas. No. 3,632*b*), that the rate of wages at a port of destination is the rate of the port of departure (The Elihu Thompson, 139 Fed. 89); but payment will not be presumed from the taking of a note by a seaman (The Betsey and Rhoda, 3 Fed. Cas. No. 1,366, 2 Ware 117); nor will the presumption of misconduct on board a vessel be raised by improprieties outside of the ship (Matthews *v.* Chase, 16 Fed. Cas. No. 9,283*a*); and mere failure to sue for nine months does not raise a presumption of payment either in admiralty or any other court (Holmes *v.* Lodemia, 12 Fed. Cas. No. 6,642, Crabbe 434).

32. Spicer *v.* Yamoiden, 49 Fed. 591 (holding that where the disrating of seamen by the master was sustained by his testimony and the mate's but contradicted by the testimony of each seaman disrated, as regarded himself but not as regarded the other seamen, and the appearance of the seamen did not impress the court favorably, disrating would be accepted in computing the wages due); Alexander *v.* Galloway, 1 Fed. Cas. No. 167, Abb. Adm. 261 (holding that the fact of a seaman's acquittal on a criminal trial for larceny for part of the cargo is not conclusive to rebut the charge when set up as a defense in a suit for wages); Bibbins *v.* Brookfield, 3 Fed. Cas. No. 1,384 (holding that three weeks' time, consumed mostly in discharging cargo and taking another on at a port during the progress of the voyage, will not show such an abandonment of the voyage as will justify desertion and a suit for wages at such intermediate port); Bucker *v.* Klorkgeter, 4 Fed. Cas. No. 2,083, Abb. Adm. 402 (holding that a maritime surveyor's report as to seaworthiness of the vessel is not conclusive against the crew in a subsequent action for wages); The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448 (holding that, in a suit by a mate for wages, allegations in the answer of partnership between the master and mate is not sustained by proof that the mate shipped for a share of the profits, unattended by other circumstances and without proof of what that share was to be); The Infanta, 13 Fed. Cas. No. 7,030, Abb. Adm. 263 (holding that the testimony of a master of a foreign vessel that he had discharged a seaman in his port will not be allowed, in a suit by the seaman against the vessel for wages, to countervail his official report to the consul of his nation that the seaman deserted the ship); Jones *v.* Crowell, 13 Fed. Cas. No. 7,459 (holding that a tender by respondents on libel for services as stewardess of a ship is an admission of ownership of the vessel); Minors *v.* The Mary, 17 Fed. Cas. No. 9,644, Bee 119 (holding that the captain's certificate that seamen's wages were due, although the vessel was in port not earning freight, is sufficient evidence thereof, although the articles are not produced); The Trial, 24 Fed. Cas. No. 14,170, Blatchf. & H. 94 (holding that where the master was sworn his testimony is, in the absence of shipping articles, sufficient of itself to establish the time of each seaman's services and the amount of wages due).

The evidence of a seaman uncorroborated, and contradicted by a number of witnesses, is as a general rule insufficient to establish the seaman's contention. The Rothemay, 34 Fed. 80; The Honora Carr, 31 Fed. 842; The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232. But see Armstrong *v.* Ryesdale, 1 Fed. Cas. No. 547.

Shipping articles are the proper and usual documents of the ship for the voyage, and are in the admiralty always admitted as evidence of the terms of hire. Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161. And see The Brucklay Castle, 30 Fed. 923, 13 Sawy. 521. So too are they *prima facie* evidence that the seamen were on board the vessel. Malone *v.* Bell, 16 Fed. Cas. No. 8,994, 1 Pet. Adm. 139. Where the wages of a seaman appear by the shipping articles, evidence of a further compensation by way of customary privilege cannot be received. Bogert *v.* Cauman, Anth. N. P. (N. Y.) 97.

Statutory evidence is necessary to convict a seaman of desertion which carries with it a forfeiture of wages, when the desertion was not shown to be wilful and it was not shown that their intention not to return existed. The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450. Evidence held insufficient to establish a claim of desertion see The Alnwick, 132 Fed. 117.

Evidence held sufficient to establish that the seaman has been rightfully discharged (see the August Belmont, 153 Fed. 639); that the vessel was so unseaworthy as to justify the seamen in leaving and to entitle them to wages (see The Heroe, 21 Fed. 525); the seamen's claim for wages (see The Sentinel, 152 Fed. 564); the contention of seamen as to the time that they were to appear on board (see Bark Shetland *v.* Johnson, 21 App. Cas. (D. C.) 416); the extent of the voyage (see Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24); and a claim of the seamen that they were not to pay for their own board, when the vessel was without a cook (see Sacqueland *v.* The Meteor, 46 Fed. 566 [*reversed* on other grounds in 39 Fed. 512]).

proof is upon seamen to establish the facts alleged in the libel;[33] but the burden of proof is upon the defense to establish affirmative defenses, such as payment of wages,[34] misconduct of the seamen,[35] or discharge.[36] As a general rule any evidence that tends to prove or disprove a material fact, and which is not rendered inadmissible by the general rules of evidence,[37] is admissible.[38] Irrelevant evidence

**Evidence held insufficient** to support the seamen's claims for extra wages for short allowance (see The Elizabeth *v.* Rickars, 8 Fed. Cas. No. 4,353, 2 Paine 291); a deceased part-owner's minor sons' claim for wages earned during the lifetime of their father and when the vessel was run by him (see The Modoc, 20 Fed. 398); a seaman's claim for wages as mate (see Sacqueland *v.* The Meteor, 39 Fed. 512 [*reversing* 36 Fed. 566]).

**An entry in the log-book** is *prima facie* evidence of its truth in every particular and to be overcome must be disproved by satisfactory evidence (Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; Douglass *v.* Eyre, 7 Fed. Cas. No. 4,032, Gilp. 147; Malone *v.* Bell, 16 Fed. Cas. No. 8,994, 1 Pet. Adm. 139; Thompson *v.* The Philadelphia, 23 Fed. Cas. No. 13,973, 1 Pet. Adm. 210); and an entry in a log-book is competent evidence to prove a desertion as defined by the act of congress of July 20, 1790, but is not *per se* competent to prove a general desertion (Worth *v.* Mumford, *supra*); but written entries by the captain in a memorandum book, made a month after an occurrence from alleged contemporaneous entries in pencil, erased, are not entitled to consideration as evidence to the weight of a log-book properly kept, or of written contemporaneous entries (Brink *v.* Lyons, 18 Fed. 605).

**The fact that a steamboat was used within a state** is *prima facie* evidence that the boat was "used in navigating the waters of this State," within the meaning of Mo. Rev. Code (1835), p. 102, providing for the collection of demands against such vessels. Russell *v.* The Elk, 6 Mo. 552.

**Consular certificates of discharge** are but *prima facie*, not conclusive, evidence of the facts therein stated (The T. F. Oakes, 36 Fed. 442, 13 Sawy. 498 (holding that a discharge may be shown to have been illegal, although the consular certificate states that it was legal); Campbell *v.* The Uncle Sam, 4 Fed. Cas. No. 2,372, McAllister 77; Johnson *v.* The Coriolanus, 13 Fed. Cas. No. 7,380, Crabbe 239; The Lilian M. Vigus, 15 Fed. Cas. No. 8,346, 10 Ben. 385; Tingle *v.* Tucker, 23 Fed. Cas. No. 14,057, Abb. Adm. 519. But see The Paul Revere, 10 Fed. 156; Lamb *v.* Briard, 14 Fed. Cas. No. 8,010, Abb. Adm. 367), and a certificate of discharge which is in itself defective is not evidence of a discharge (The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451).

**Proof that plaintiff worked on board a sloop,** and that defendant was the owner thereof, is *prima facie* sufficient to sustain a recovery. Dougherty *v.* Gallagher, 3 E. D. Smith (N. Y.) 570.

33. The Independence, 1 Alaska 591; The Eagle, 8 Fed. Cas. No. 4,233, Olcott 232; Granon *v.* Hartshorne, 10 Fed. Cas. No. 5,689, Blatchf. & H. 454.

**In suits for compensation for short allowance of provisions,** the burden of proof is upon the seamen to show that they were put on short allowance (The Childe Harold, 5 Fed. Cas. No. 2,676, Olcott 275; The Elizabeth Frith, 8 Fed. Cas. No. 4,361, Blatchf. & H. 195 [*modified* in 8 Fed. Cas. No. 4,353, 2 Paine 291]; Piehl *v.* Balchen, 19 Fed. Cas. No. 11,137, Olcott 24); but after that has been established the defense must show that the vessel had placed on board her all the provisions required by law (The Elizabeth Frith, *supra*. *Compare* The Childe Harold, *supra*); unless the seaman unduly delays bringing his action, when the court will require him to give evidence importing that the vessel went to sea unprovided with a proper supply of provisions, then the burden is placed upon the ship to show clearly that the vessel went to sea with all the provisions required by law (Piehl *v.* Balchen, *supra*).

34. Hogan *v.* The J. D. Peters, 78 Fed. 368; Holmes *v.* Dodge, 12 Fed. Cas. No. 6,637, Abb. Adm. 60 (holding that respondent, on a libel for wages, has the burden of showing that the shipping agent to whom an alleged payment in advance was made was authorized by libellant to receive it); The Napoleon, 17 Fed. Cas. No. 10,015, Olcott 208.

**Where testimony is evenly balanced** on a question of payment, the case will be decided in favor of the seamen, against the party on whom rests the burden of proof. The Fritheoff, 14 Fed. 302, 7 Sawy. 58.

**Where an unusual clause in the shipping articles is relied on** in defense of a suit for seamen's wages, the burden of proof is on the defense to show that the seamen had been informed of the clause and that they understood it and agreed to it. The Ringleader, 20 Fed. Cas. No. 11,850, 6 Ben. 400.

35. Benton *v.* Whitney, 3 Fed. Cas. No. 1,335, Crabbe 417.

36. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451.

37. See, generally, EVIDENCE, 16 Cyc. 821.

**Evidence admissible in admiralty** generally see ADMIRALTY, 1 Cyc. 883 *et seq.*

38. The Heroe, 21 Fed. 525 (holding that the discharge of seamen and unseaworthiness of vessels may be proved in the same manner as other facts are proved before a court or jury); Ketland *v.* Lebering, 14 Fed. Cas. No. 7,744, 2 Wash. 201 (holding that the *role d'equipage* is good evidence of the shipment and wage contract); The Parkhill, 18 Fed. Cas. No. 10,756; The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware 373.

**Seamen are competent witnesses for each other** in suits for wages earned. The Cypress, 6 Fed. Cas. No. 3,530, Blatchf. & H. 83.

is inadmissible in actions for seamen's wages in like manner as in other actions.[39]

**c. Trial.** The general rules governing trials in admiralty[40] apply to the trial of suits for seamen's wages,[41] and rules of trial are practically the same both in courts of law and in admiralty in reference to foreign seamen.[42]

**d. Costs.**[43] In suits for seamen's wages, admiralty has a general discretionary power over costs,[44] and when a seaman has a just cause of complaint it will allow

**Desertion.**— 1 U. S. St. at L. 131, makes desertion, carrying with it a forfeiture of wages, a statutory offense, and defines the evidence by which it is to be established. The Martha, 16 Fed. Cas. No. 9,144, Blatchf. & H. 151.

**Answer in another suit between same parties.**— In a suit by seamen against the master, plaintiff may read in evidence an answer by defendant in a prior suit between the parties for wages. Rambler *v.* Choat, 20 Fed. Cas. No. 11,542, 1 Cranch C. C. 167.

**Secondary evidence.**— In an action on shipping articles, parol evidence of their contents may be given on proving a reasonable excuse for not producing them (The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450, where, however, notice to produce was held insufficient; Patten *v.* Park, Anth. N. P. (N. Y.) 46. See also Bogert *v.* Cauman, Anth. N. P. (N. Y.) 97); and under the same circumstances a certified copy of them may be introduced (Henry *v.* Curry, 11 Fed. Cas. No. 6,381, Abb. Adm. 433), or evidence as to their contents may be contradicted (The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450; The Tarquin, 23 Fed. Cas. No. 13,755, 2 Lowell 358), and it is competent to supply an omission in them (Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452). So may parol evidence be introduced to contradict an entry in the log-book (Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; The Hercules, 12 Fed. Cas. No. 6,401, 1 Sprague 534; Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541), and under certain circumstances, although a statute has provided by what evidence a certain fact may be established, the fact may be established by other evidence); Davis *v.* Leslie, 7 Fed. Cas. No. 3,639, Abb. Adm. 123 (holding that on a libel for wages under 7 & 8 Vict. c. 112, § 17, notwithstanding the loss of the vessel, the fidelity of the seaman may be shown by other evidence than the certificate of the chief surviving officer, provided by such act); The T. F. Whiton, 23 Fed. Cas. No. 13,849, 10 Ben. 369).

**The declarations of the master** concerning the contract of seamen are admissible in a suit against the owners, although not strictly a part of the *res gestæ* (The Enterprise, 8 Fed. Cas. No. 4,497, 2 Curt. 317); but a foreign master, who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language without clear proof that he well understood the meaning of what was addressed to him and used by him in reply (The Lotty, 15 Fed. Cas. No. 8,524, Olcott 329).

**Entry in agent's book.**— In an action against the owners of a whaling vessel to recover the amount of a seaman's wages, which plaintiff had attached on trustee process, and which their general agent had thereupon, with the seaman's consent, retained and promised to pay to plaintiff, an entry by the agent upon the book in which he kept the accounts of the owners, and which was at all times accessible to them, is competent evidence to show the amount so retained. Munroe *v.* Holmes, 5 Allen (Mass.) 201.

39. Ward *v.* Willson, 3 Mich. 1.

40. See ADMIRALTY, 1 Cyc. 887 *et seq.*

41. Eva D. Rose, 151 Fed. 704 [*modified* in 153 Fed. 112] (holding that where seamen intervene a claim for wages in a suit *in rem* against a vessel, the court will adjudge their rights thereon regardless of the merits or disposition of the original libel); Airey *v.* The Ann C. Pratt, 1 Fed. Cas. No. 114, 1 Curt. 395 [*affirming* 1 Fed. Cas. No. 113*a*, 10 N. Y. Leg. Obs. 199] (holding that in a suit *in rem* by a mate for wages under shipping articles, the court will not consider allegations of misconduct as master while in temporary command, while the master was absent, with a view of inflicting a forfeiture for wages as mate); The Cadmus *v.* Matthews, 4 Fed. Cas. No. 2,282, 2 Paine 229 [*affirming* 4 Fed. Cas. No. 2,280, Blatchf. & H. 139] (holding that whether there was a deviation is a question not of law but of fact).

42. Petersen *v.* Brockelmann, 1 N. Y. City Ct. 193.

**An agreement not to sue in a foreign port,** in shipping articles, does not deprive a seaman of that right when the voyage, as respects him, is ended, and that by the act of the master, as a deviation or cruel treatment. Shulenburg *v.* Wessells, 2 E. D. Smith (N. Y.) 70; Vibus *v.* Wirting, 2 Yeates (Pa.) 350.

**Question of fact.**— On variant evidence it was held to be a question of fact whether a seaman, illiterate, without money, and away from home, after being unlawfully denied further recognition as a member of the crew, agreed to accept a week's wages in full satisfaction of his claim for wages for the rest of the voyage. Boston *v.* Ocean Steamship Co., 197 Mass. 561, 83 N. E. 1116.

43. Costs in admiralty generally see ADMIRALTY, 1 Cyc. 908.

44. The Susan, 23 Fed. Cas. No. 13,631, 3 Ware 222.

**Security for costs.**— Seamen are privileged suitors in admiralty, and are not required to give security for costs (The Shelbourne, 30 Fed. 510; The Arctic, 1 Fed. Cas. No. 509*a*, Brown Adm. 347; Chambers *v.* The Henry Kneeland, 5 Fed. Cas. No. 2,581*a*; Collins *v.*

him costs,[45] but will not do so when the suit is unnecessary or inequitable.[46] It is the course of admiralty courts not to impose costs upon libellants when they establish probable cause for instituting suits for redress;[47] but they will do so when it appears that there is not probable cause.[48]

## VII. SHARE IN EARNINGS.

**A. Nature of Right.** In the earliest periods of maritime commerce, a common method of compensating the seaman was to allow him a share in the profits of the voyage, and this method has been continued as to whaling and fishing voyages;[49] and the validity of contracts providing for such a mode of compensation has been upheld by the courts.[50] This lay[51] or share given to the seaman does not create any partnership in the profits of the voyage, nor does it constitute him a part-owner, but is in the nature of wages and is governed by the same rules,[52] entitles the seaman to the usual maritime lien upon the vessel for

Hathaway, 6 Fed. Cas. No. 3,014, Olcott 176; Polydore *v.* Prince, 19 Fed. Cas. No. 11,257, 1 Ware 411; Wick *v.* Ellis, 29 Fed. Cas. No. 17,614, Abb. Adm. 444, holding that nonage of a seaman will not change the rule and that security will not be required of his guardian or next friend); unless their ability to give the security is proved (The Niveto, 18 Fed. Cas. No. 10,279, 7 Ben. 69, holding that where the seaman has been paid off by a United States shipping commissioner, there is a presumption that his just demands have been discharged, and, if he files a libel thereafter, security may be required; Wheatley *v.* Hotchkiss, 29 Fed. Cas. No. 17,483, 1 Sprague 225). This rule is confined to suits to recover wages, and if a seaman libels the vessel to enforce an agreement extraneous to contracts for wages, his position is that of an ordinary suitor of whom security will be required. Walsh *v.* Louisiana, 4 Fed. 751. A suit by seamen for breaking up a voyage is not a suit for wages, within a rule excusing libellant in such suit from giving security for costs. The Carolina and Cornelia, 5 Fed. Cas. No. 2,420, 2 Ben. 105.

45. The Grapeshot, 22 Fed. 123; Walsh *v.* Louisiana, 4 Fed. 751; The Cortes, 6 Fed. Cas. No. 3,258, 6 Ben. 288; Hoffman *v.* Yarrington, 12 Fed. Cas. No. 6,580, 1 Lowell 168. But see The Lakme, 93 Fed. 230.

46. Johnson *v.* Blanchard, 7 Fed. 597; The Brothers, 4 Fed. Cas. No. 1,968, 10 Ben. 400; The Cabot, 4 Fed. Cas. No. 2,277, Abb. Adm. 150; The Moslem, 17 Fed. Cas. No. 9,876, Olcott 374; Reed *v.* Hussey, 20 Fed. Cas. No. 11,646, Blatchf. & H. 525; The Susan, 23 Fed. Cas. No. 13,631, 3 Ware 222.

47. Howland *v.* Conway, 12 Fed. Cas. No. 6,793, Abb. Adm. 281.

48. The L. B. Snow, 15 Fed. 282; The Childe Harold, 5 Fed. Cas. No. 2,676, Olcott 275; The Infanta, 13 Fed. Cas. No. 7,030, Abb. Adm. 263; The Mary Ann, 16 Fed. Cas. No. 9,194, Abb. Adm. 270.

49. Lewis *v.* Chadbourne, 54 Me. 484, 92 Am. Dec. 558; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448, 1437; The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 265; Reed *v.* Hussey, 20 Fed. Cas. No. 11,646, Blatchf. & H. 525. And see Allen *v.* Hitch, 1 Fed. Cas. No. 224, 2 Curt. 147.

50. The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451.

**When hiring on shares compulsory.**— It has been held that, because of the requirement of the law of June 19, 1813, the master of every fishing vessel of more than twenty tons shall make an agreement in writing, for shares, with every fisherman employed therein, a master of a fishing vessel has no authority to hire men for wages (Whalen *v.* The Silver Spring, 29 Fed. Cas. No. 17,477); but that this statute does not prevent the owner of such a vessel from making a valid contract with the fishermen for wages (Baker *v.* Corey, 19 Pick. (Mass.) 496).

51. **"Lay" defined** see 25 Cyc. 168.

52. Lewis *v.* Chadbourne, 54 Me. 484, 92 Am. Dec. 558; Baxter *v.* Rodman, 3 Pick. (Mass.) 435 [*followed* in Grozier *v.* Atwood, 4 Pick. (Mass.) 234]; Rice *v.* Austin, 17 Mass. 197; The Barbara Hernster, 146 Fed. 732, 734 note; The Carrier Dove, 97 Fed. 111, 38 C. C. A. 73 [*affirming* 93 Fed. 978]; The Antelope, 1 Fed. Cas. No. 484, 1 Lowell 130 (holding that the lays of the crew are only a mode of arriving at their wages); Bourne *v.* Smith, 3 Fed. Cas. No. 1,701, 1 Lowell 547; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108; Crowell *v.* Knight, 6 Fed. Cas. No. 3,445, 2 Lowell 307; The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Hazard *v.* Howland, 11 Fed. Cas. No. 6,280, 2 Sprague 68; Hussey *v.* Fields, 12 Fed. Cas. No. 6,947, 1 Sprague 394; Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303; Knight *v.* Parsons, 14 Fed. Cas. No. 7,886, 1 Sprague 279; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 265; Reed *v.* Canfield, 20 Fed. Cas. No. 11,641, 1 Sumn. 195; Reed *v.* Hussey, 20 Fed. Cas. No. 11,646, Blatchf. & H. 525; Taber *v.* Jenny, 23 Fed. Cas. No. 13,720, 1 Sprague 315; The Frederick, 5 C. Rob. 8; Wilkinson *v.* Frasier, 4 Esp. 182. But see The Riby Grove, 2 W. Rob. 52, where the seamen were considered partners.

**No right until separation and delivery.**— The right of the seaman is to have the cargo sold and to recover his stipulated share of the proceeds; but even when he is allowed

wages,[53] and brings him within the statute [54] prohibiting an assignment of wages prior to the accrual thereof.[55] In some instances, by usage, the lay is subject to a lien for supplies furnished the seamen during the voyage by the master.[56]

**B. Contract Not Fully Performed.** In whaling voyages, the shipping articles usually provide that if any seaman shall be prevented by sickness or death from performing the entire voyage, he shall be entitled to such part of the whole amount of his stipulated share as the time of his services on board shall be of the whole term of the voyage,[57] and by analogy this rule has been adopted by courts of admiralty in other cases of separation from the vessel, in the absence of a fair settlement on the separation or circumstances showing that this mode of settlement would not be just and reasonable.[58] Seamen are entitled to their full share when wrongfully discharged,[59] or unjustifiably left behind and deserted by the ship; [60] but in regard to their rights on desertion, there seems to be no

to have his share in the cargo specifically, he has no property in it until separation and delivery. Bishop *v.* Shepherd, 23 Pick. (Mass.) 492.

**Contract for shares bar to claim for wages.** — The making of a contract for compensation by shares limits the rights of the seamen and bars them from recovering wages as such (Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262), even though, on account of the wrongful acts of the master, no profits are earned (Williams *v.* The Sylph, 29 Fed. Cas. No. 17,740).

**53.** The Carrier Dove, 93 Fed. 978 [*affirmed* in 97 Fed. 111, 38 C. C. A. 73] (holding that proof of a custom that the master should sell the catch and collect the price, and that, in his absence, the crew should appoint one or more of their number to take his place, does not deprive the seamen of their lien); Crowell *v.* Knight, 6 Fed. Cas. No. 3,445, 2 Lowell 307 (holding that the lien is that of a creditor, and not that of a partner); The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278 (holding that the existence of a lien depends upon the nature of the services and the locality in which they are rendered, and not upon the method of ascertaining the amount of compensation to which the party may be entitled).

**Time lien attaches.**— A specific lien on the vessel has been held not to attach until the earnings of the vessel are ascertained and liquidated. Williams *v.* The Sylph, 29 Fed. Cas. No. 17,740.

**Lien on cargo.**— It has been held that the crew have a lien on the cargo until it is sold by the owners under authority given by the articles. The Antelope, 1 Fed. Cas. No. 484, 1 Lowell 130; Hussey *v.* Fields, 12 Fed. Cas. No 6,947, 1 Sprague 394; *In re* Low, 15 Fed. Cas. No. 8,558, 2 Lowell 264.

**Cod and mackerel fishing voyages.**— It is provided by U. S. Rev. St. (1878) § 4393 [U. S. Comp. St. (1901) p. 2999], that whenever an agreement is made for a cod or mackerel fishing voyage, and the fish caught are sold by the owner or agent after having been delivered to him for cure, the vessel shall, for the term of six months after such sale, be liable for the fishermen's share of such fish, but this statute has been held not to apply to fishermen who have shipped without a written agreement (The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278; The Ianthe, 12 Fed. Cas. No. 6,992, 3 Ware 126), nor to porgy fishermen or whalemen (The Grace Darling, *supra*), nor to confer a lien on the fish or their proceeds after they have been delivered to the owner (Story *v.* Russell, 157 Mass. 152, 31 N. E. 753).

**54.** See *supra*, VI, G.

**55.** The M. M. Morrill, 78 Fed. 509.

**Prior to the enactment of the statute, it** was held that a valid equitable assignment of the lay or share could be made before the commencement of the voyage (Osborne *v.* Jordan, 3 Gray (Mass.) 277; Tripp *v.* Brownell, 12 Cush. (Mass.) 376; Parkhurst *v.* Dickerson, 21 Pick. (Mass.) 307; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168. And see Bagley *v.* Francis, 14 Mass. 453), but that the shares of seamen in prizes captured were not assignable before condemnation (Usher *v.* De Wolfe, 13 Mass. 290).

**56.** Barney *v.* Coffin, 3 Pick. (Mass.) 115.

**57.** The Atlantic, 2 Fed. Cas. No. 620, Abb. Adm. 451; Brunent *v.* Taber, 4 Fed. Cas. No. 2,054, 1 Sprague 243; Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56; Jenks *v.* Cox, 13 Fed. Cas. No. 7,277, Holmes 92.

**When disabled before the voyage begins,** the seaman is not entitled to share in prizes taken during the cruise. *Ex p.* Giddings, 10 Fed. Cas. No. 5,404, 2 Gall. 55.

**58.** Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56; Jenks *v.* Cox, 13 Fed. Cas. No. 7,277, Holmes 92.

**59.** The Hibernia, 12 Fed. Cas. No. 6,455, 1 Sprague 78.

**Refusal to allow performance of contract.**— The crew are not deprived of their rights to share in the proceeds of the voyage, by a failure to complete the contract, where they were ready and willing to perform, but the master and owners refused to allow them to perform. Goodrich *v.* The Domingo, 10 Fed. Cas. No. 5,543, 1 Sawy. 182.

**60.** Keane *v.* The Gloucester, 2 Dall. (U. S.) 36, 1 L. ed. 278; Flynn *v.* The Nereid, 67 Fed. 602; Mahoon *v.* The Glocester, 16 Fed. Cas. No. 8,970, Bee 395, 2 Pet. Adm. 403.

**Where the voyage is abandoned** and the enterprise virtually defeated because of the failure of the master to provide the necessary supplies, the men are entitled to recover the

fixed rule applicable to all cases. It has been held that, as a right to share in the proceeds is in the nature of wages,[61] it is wholly forfeited by a desertion.[62] But, on the other hand, it has been held that a mere desertion does not necessarily work a forfeiture, as the matter rests within the discretion of the court,[63] and a seaman who leaves or is discharged by consent is entitled to share in the proceeds of the cargo already taken, but not for the whole voyage,[64] or, as is sometimes held, he is entitled to share to the extent his time of actual service bears to the whole voyage.[65] It is competent, on the separation of the seaman from the vessel during the voyage, for the parties to agree on the share to be paid, but such settlement will be upheld by the courts only so far as it was entered into freely and not under duress.[66]

**C. Amount.** In general the share or lay recoverable is determined and limited by the terms of the contract or shipping articles,[67] except where extra work is done under compulsion,[68] or where no contract exists and a custom or usage is shown.[69] The seamen are entitled to have such part of the catch or cargo as will satisfy their demands sold for cash at the port of delivery as soon as possible after its arrival,[70] except where there is no market for the commodity

profits they would have made had the enterprise been prosecuted up to the time it might reasonably have been brought to a conclusion. The Page, 18 Fed. Cas. No. 10,660, 5 Sawy. 299.

61. See *supra*, VII, A.

62. Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108. And see Shaw *v.* Mitchell, 2 Metc. (Mass.) 65.

63. Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355.

**Forfeiture by violation of shipping articles.** — Where a seaman is guilty of mutiny or other conduct prohibited by the shipping articles, the court will not inflict an absolute forfeiture of wages, but will adjudge such a forfeiture as the case equitably requires (Hazard *v.* Howland, 11 Fed. Cas. No. 6,280, 2 Sprague 68; Macomber *v.* Thompson, 16 Fed. Cas. No. 8,919, 1 Sumn. 384), and no forfeiture will be declared where the seaman has been punished by sentence of a court martial (Luscomb *v.* Prince, 12 Mass. 576).

64. The Hunter, 47 Fed. 744; Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56.

**Inability to return because of intoxication.** — Seamen who wilfully prolong their stay on shore, and, at the time of the signal to return, are too intoxicated to do so, may recover only such share of the proceeds as remain after deducting the damages which directly and necessarily result from their failure to perform their duty. Flynn *v.* The Nereid, 67 Fed. 602.

**Prices at home port control.** — In the absence of a fair and express agreement to the contrary, the seaman is entitled to have his share reckoned at the prices obtaining at the home port, and not the port of discharge. Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56; Jenks *v.* Cox, 13 Fed. Cas. No. 7,277, Holmes 92.

65. Jenks *v.* Cox, 13 Fed. Cas. No. 7,277, Holmes 92.

**Desertion by minor.** — Where the seaman was a minor during part of the voyage and deserted after he became of age, such desertion does not defeat the right of the father to recover his son's lay accruing during his minority (Coffin *v.* Shaw, 5 Fed. Cas. No. 2,951), and it has been held that, even where the seaman deserts during his minority, if his desertion occasions no loss or inconvenience to the owner of the ship, his father may recover such proportion of the lay as the time of service bears to the whole time of the voyage (Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355).

66. Shaw *v.* Mitchell, 2 Metc. (Mass.) 65; Green *v.* Swift, 14 Fed. 877; Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56; Jenks *v.* Cox, 13 Fed. Cas. No. 7,277, Holmes 92; Mayshew *v.* Terry, 16 Fed. Cas. No. 9,361, 1 Sprague 584.

67. The Hunter, 47 Fed. 744; Donahay *v.* Howland, 7 Fed. Cas. No. 3,978; The Sarah Jane, 21 Fed. Cas. No. 12,348, Blatchf. & H. 401; Tompkins *v.* Howard, 24 Fed. Cas. No. 14,089, 1 Sprague 167; Jesse *v.* Roy, 1 C. M. & R. 316, 3 L. J. Exch. 268, 4 Tyrw. 626. And see The Brutus, 4 Fed. Cas. No. 2,060, 2 Gall. 526.

**Where a seaman has different lays during the same voyage,** he is entitled to such proportion of each lay as the time he served thereunder is of the time of the whole voyage. The William Martin, 29 Fed. Cas. No. 17,698, 1 Sprague 564.

68. Lopes *v.* Luce, 84 Fed. 465.

69. The S. L. Goodal, 6 Fed. 539.

70. Bourne *v.* Smith, 3 Fed. Cas. No. 1,701, 1 Lowell 547; Crowell *v.* Knight, 6 Fed. Cas. No. 3,445, 2 Lowell 307; Hazard *v.* Howland, 11 Fed. Cas. No. 6,280, 2 Sprague 68, holding that if a sale is made on credit for a larger price, the owner is only responsible for the price of a cash sale.

**Where the vessel does not return** and the voyage is necessarily broken up, although it is stipulated in the shipping articles that the right to the lay does not accrue until the return of the vessel to the home port, it is proper for the master to pay the seamen their respective shares at the foreign port by delivering to them portions of the cargo taken (Hussey *v.* Fields, 12 Fed. Cas. No. 6,947, 1 Sprague 394), or if some of the proceeds reach the home port, the owners are liable to

in that place, in which case the price in the place where there is a market, less the cost of transportation, controls,[71] and to have their accounts settled upon the basis of the actual catch of the vessel, provided it is all brought to port.[72] Supplies furnished the seamen, and certain other expenses of the voyage, specified in the articles or settled by usage, may be deducted from the gross proceeds,[73] and in all cases a fair and just settlement will be upheld by the courts.[74]

**D. Actions.** Where the amount out of which the share is to be paid is liquidated, an action at law may be brought for its recovery,[75] and admiralty also has jurisdiction, provided no general accounting of the proceeds of the voyage is asked for.[76] The action should be brought within a reasonable time,[77] upon the agreement,[78] against the owners of the vessel,[79] and in such action the usual rules relating to the burden of proof,[80] measure of damages,[81] and the admissibility of parol evidence apply.[82]

## VIII. PERSONAL INJURIES.[83]

**A. Liability in General.** The liability of a vessel or her owner to a crew does not ordinarily include any compensation or allowance for the resulting effects

account to the seamen for their respective shares (Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303), and the seamen are entitled to compensation for their time and expenses in returning home, less the amount they earn or have an opportunity to earn while so returning (The William Martin, 29 Fed. Cas. No. 17,698, 1 Sprague 564). However, where the owners ship the catchings home, and in good faith keep them unsold, hoping for a rise in the market, they are not bound to account for them to the seamen at their value when they arrived. Frates *v.* Howland, 9 Fed. Cas. No. 5,066, 2 Lowell 36.

**Interest is allowable after default.**— Jay *v.* Allen, 13 Fed. Cas. No. 7,235, 1 Sprague 130.

71. The Barbara Hernster, 146 Fed. 732, 77 C. C. A. 158; The Cape Horn Pigeon, 49 Fed. 164; The Hunter, 47 Fed. 744.

72. The Hunter, 47 Fed. 744.

**Where part of cargo is lost.**— The seamen are entitled to shares only in so much cargo as is brought safely to the home port, and are not entitled to anything for cargo lost on the voyage (Reed *v.* Hussey, 20 Fed. Cas. No. 11,646, Blatchf. & H. 525), or wrongfully sold by the master in a foreign port (Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303), nor are they entitled to any part of insurance paid to the owners for loss of cargo, in the absence of an express contract giving them that right (Roberts *v.* Swift, 13 Fed. 915).

73. Goodrich *v.* Domingo, 10 Fed. Cas. No. 5,543, 1 Sawy. 182.

**Charges for articles furnished must be correct before any deduction may be made.** The Hibernia, 12 Fed. Cas. No. 6,455, 1 Sprague 78.

**Items not chargeable against seamen.**— It has been held that the owners have no right to deduct charges for their personal services in selling the cargo (Hazard *v.* Howland, 11 Fed. Cas. No. 6,280, 2 Sprague 68), the value of casks (Hazard *v.* Howland, *supra*), losses sustained on sales made on credit (Crowell *v.* Knight, 6 Fed. Cas. No. 3,445, 2 Lowell 307), nor for freight on cargo shipped home, after the vessel has been condemned abroad as unseaworthy (Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303).

74. Lopes *v.* Luce, 84 Fed. 465; Da Crouz *v.* The Cape Horn Pigeon, 49 Fed. 164.

**Release by seaman while intoxicated.**— A seaman is not bound by a release of his claim to a part of the proceeds of the voyage, executed by him while in an intoxicated condition. The Barbara Hernster, 146 Fed. 732, 77 C. C. A. 158.

**Payment to assignee of share discharges owner.**— Crowell *v.* Knight, 6 Fed. Cas. No. 3,445, 2 Lowell 307.

75. The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Duryee *v.* Elkins, 8 Fed. Cas. No. 4,197, Abb. Adm. 529; Wilkinson *v.* Frasier, 4 Esp. 182.

76. The Crusader, 6 Fed. Cas. No. 3,456, 1 Ware 448; Duryee *v.* Elkins, 8 Fed. Cas. No. 4,197, Abb. Adm. 529. But see The Sydney Cove, 2 Dods. 11; The Riby Grove, 2 W. Rob. 52.

**Claims of seamen to shares of prizes are within the jurisdiction of courts of admiralty.** Keane *v.* The Gloucester, 2 Dall. (U. S.) 36, 1 L. ed. 278; Mahoon *v.* The Glocester, 16 Fed. Cas. No. 8,970, Bee 395, 2 Pet. Adm. 403.

77. Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303 [*affirming* 13 Fed. Cas. No. 7,235, 1 Sprague 130].

**After liquidation, demand is not a condition precedent.**— Wait *v.* Gibbs, 7 Pick. (Mass.) 146.

78. Evans *v.* Bennett, 1 Campb. 300.

79. Bishop *v.* Shepherd, 23 Pick. (Mass.) 492.

80. The Hunter, 47 Fed. 744.

81. Lovrein *v.* Thompson, 15 Fed. Cas. No. 8,557, 1 Sprague 355.

82. Bradford *v.* Drew, 5 Metc. (Mass.) 188 (holding evidence of usage receivable); Shaw *v.* Mitchell, 2 Metc. (Mass.) 65 (holding that parol evidence is admissible to show the terms of a parol agreement made at the time of the discharge of the seamen); Wait *v.* Gibbs, 4 Pick. (Mass.) 297 (holding that ownership may be proved by evidence other than the documents of the vessel).

83. **Liability of owner for injury to seaman by fellow seaman or officer** see MASTER AND SERVANT, 26 Cyc. 1358 *et seq.*

of an injury received while in her service, no fault tending to produce the injury being shown in the vessel, her appliances, equipment, or officers;[84] but is limited to the expenses of the care, attendance, and cure of the seaman.[85] The vessel and her owner are, however, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.[86] But liability in such case is incurred only when those who represented the vessel failed to exercise reasonable care to make the fitting or appliances safe, and where the breaking was due to a defect which might with reasonable care have been discovered and remedied.[87] The risk to a seaman of injury from perils of navigation from defects in tackle or other appliances, which are not obvious or discoverable by the exercise of reasonable care, is incidental to the employment, and is assumed by him.[88]

**B. Effect of Contributory Negligence.**[89] Although it has been held in some cases that a seaman cannot recover for an injury caused by his own negligence, which contributed to the result, even though the vessel was also at fault,[90] in cases of marine tort courts of admiralty are not bound by the common and civil law rules governing cases of contributory negligence, but will, in the exercise of a sound discretion, give or withhold damages according to principles of equity and justice, considering all the circumstances of the case.[91] But a party who is

84. Danvir *v.* Morse, 139 Mass. 323, 1 N. E. 123; The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. ed. 760; Campbell *v.* Trinidad Shipping, etc., Co., 165 Fed. 270; The Mars, 138 Fed. 941; The Rutherford, 128 Fed. 189; Toll *v.* Prince Line, 124 Fed. 110; The Eva B. Hall, 114 Fed. 755; The Robert C. McQuillen, 91 Fed. 685; The Ida B. Cothell, 62 Fed. 765, 10 C. C. A. 634; Lambos *v.* The Tammerlane, 47 Fed. 822; The Lizzie Frank, 31 Fed. 477.

**Injury received while obeying orders.**— A seaman cannot recover damages from the ship for an injury received while obeying an order which is shown to have been a proper and usual one under the circumstances, and when the service required did not involve unusual risk. The Pegasus, 96 Fed. 623. But where a young and inexperienced seaman is directed to perform work not within the scope of his employment, he does not assume the risk therefrom, and the vessel is liable for his injury. Smith *v.* Cook, 164 Fed. 628.

**Duty to provide seaworthy vessel** see *supra*, V, A.

85. See *supra*, V, C.

86. The Norway *v.* Jensen, 52 Ill. 373; Scarff *v.* Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807; The Osceola, 189 U. S. 158, 175, 23 S. Ct. 483, 47 L. ed. 760; The Drumelton, 158 Fed. 454; The Lowlands, 142 Fed. 888; The Svaeland, 132 Fed. 932 [*affirmed* in 136 Fed. 109, 69 C. C. A. 97]; Lafourche Packet Co. *v.* Henderson, 94 Fed. 871, 36 C. C. A. 519; The Cyprus, 55 Fed. 332; McFarland *v.* The J. C. Tuthill, 37 Fed. 714; The Truro, 31 Fed. 158; The Noddleburn, 28 Fed. 855; The Edith Godden, 23 Fed. 43.

**In England responsibility for injuries received through the unseaworthiness of the ship** is imposed upon the owner by the Merchants' Shipping Act of 1876 (39 & 40 Vict. c. 80, § 5), where, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. Hedley *v.* Pinkney, etc., Steamship Co., [1894] App. Cas. 222, 7 Aspin. 483, 63 L. J. Q. B. 419, 70 L. T. Rep. N. S. 630, 6 Reports 106, 42 Wkly. Rep. 497.

**Explosion of boiler.**— Injury to a seaman from explosion of a steam-tug boiler, due to negligence of the owner of the vessel, is actionable in admiralty. Grimsley *v.* Hankins, 46 Fed. 400.

87. The Lyndhurst, 149 Fed. 900; The Henry B. Fiske, 141 Fed. 188; The France, 59 Fed. 479, 8 C. C. A. 185; Couch *v.* Steel, 2 C. L. R. 940, 3 E. & B. 402, 18 Jur. 515, 23 L. J. Q. B. 121, 2 Wkly. Rep. 170, 77 E. C. L. 402. And see *supra*, V. A.

88. The Robert C. McQuillen, 91 Fed. 685.

89. **Effect of seamen's negligence on right to medical treatment** see *supra*, V, C, 1.

90. Watts *v.* Boston Towboat Co., 161 Mass. 378, 37 N. E. 197; Brown *v.* Wood, (Pa. 1888) 16 Atl. 42; The E. B. Ward, 20 Fed. 702; The Montauk, 17 Fed. 96; Peterson *v.* The Chandos, 4 Fed. 645.

91. The Frank and Willie, 45 Fed. 494; The Wanderer, 20 Fed. 140; The Explorer, 20 Fed. 135.

**Cases holding seamen guilty of contributory negligence precluding a recovery** see The Lyndhurst, 149 Fed. 900; The Mars, 149 Fed. 729, 79 C. C. A. 435; The Cuzco, 148 Fed. 914 [*reversed* on other grounds in 154 Fed. 177, 83 C. C. A. 181]; The Robert C. McQuillen, 91 Fed. 685; Davidson *v.* The City of St. Louis, 56 Fed. 720; Willis *v.* The Aspotogan, 49 Fed. 163.

**Division of damages.**— In cases of marine tort the admiralty courts, where both parties are in fault, will divide the damages as the circumstances surrounding the tort in question may require. The Max Morris *v.* Curry,

*in delicto* ought to make a very strong case in order to entitle himself to general relief.[92]

**C. Remedies.** A libel in admiralty may be maintained against the ship for any personal injury, for which the owners are liable, under the general law and independently of any local statute;[93] and a statute giving an action *in personam* in such case does not take away or exclude this right.[94] The suit to enforce such a lien may include a cause of suit against the master arising out of the same facts;[95] and where a libel is filed by a seaman for damages, and also praying other relief, admiralty is competent to administer a suitable remedy; and, although the court finds no damages due, it may make a decree for such expenses in healing the libellant as have been already incurred, but cannot decree for prospective expenses;[96] and where, in an action for injuries to a seaman, the complaint states a cause of action in tort only for the negligence and wrongful acts of defendant, and contains no statement of a cause of action on a maritime contract, express or implied, plaintiff cannot recover in that action for medical care, nursing, and attendance, under an implied contract.[97] Summary remedies against steamboats and other water craft for injuries done to seamen by such craft are given in certain cases by statute.[98]

**D. Damages and Costs.** Without proof of some substantial harm, some incapacity for their ordinary work, or some expense incurred, no damages for alleged personal injuries should be awarded to seamen.[99] Where damages are properly allowed, the amount thereof should be such as will fairly compensate the seaman for his actual loss by reason of the injury,[1] or the delay in providing proper treatment;[2] and where a libel by a seaman for injuries sustained by the negligence of the crew is prosecuted in good faith, libellant is entitled to

137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586; The Watson, 128 Fed. 201; Wm. Johnson *v.* Johansen, 86 Fed. 886, 30 C. C. A. 675; Keiley *v.* The Cyprus, 55 Fed. 332; Olson *v.* Flavel, 34 Fed. 477, 13 Sawy. 232; The Eddystone, 33 Fed. 925. Thus where the contributory negligence of libellant was not wilful, gross, or inexcusable, and libellee was guilty of negligence in not providing a safe ladder, he is entitled to recover a portion of his damages, and will be allowed nothing for his pain and suffering, but will be allowed the wages he would have earned but for the accident. The Truro, 31 Fed. 158. And see The Wanderer, 20 Fed. 140. A state court cannot divide the damages where plaintiff has been guilty of contributory negligence. Kalleck *v.* Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421.

**Obedience of a seaman to the orders of the mate or master** is not negligence, although he knows the danger. Keating *v.* Pacific Steam-Whaling Co., 21 Wash. 415, 58 Pac. 224.

92. The Explorer, 20 Fed. 135.

93. The Matterhorn, 128 Fed. 863, 63 C. C. A. 331; The Troop, 128 Fed. 856, 63 C. C. A. 584 [*affirming* 118 Fed. 769]; The A. Heaton, 43 Fed. 592; The Scotland, 42 Fed. 925; City of Carlisle, 39 Fed. 807, 5 L. R. A. 52; City of Alexandria, 17 Fed. 390; Brown *v.* The D. S. Cage, 4 Fed. Cas. No. 2,002, 1 Woods 401.

**But by the British law,** an action *in rem* cannot be maintained for such injuries (Peterson *v.* The Lamington, 87 Fed. 752), although libellant is a naturalized American citizen (The Egyptian Monarch, 36 Fed. 773).

94. The Clatsop Chief, 8 Fed. 767, 7 Sawy. 279; Brown *v.* The D. S. Cage, 4 Fed. Cas. No. 2,002, 1 Woods 401.

**The sixteenth rule in admiralty,** which directs that "in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only," does not affect libels for negligence. The A. Heaton, 43 Fed. 592.

95. City of Carlisle, 39 Fed. 807, 5 L. R. A. 52.

96. The Lizzie Frank, 31 Fed. 477.

97. Sanders *v.* Stimson Mill Co., 34 Wash. 357, 75 Pac. 974.

**An action in tort for injuries to a seaman cannot be joined with an action on contract** to furnish the seaman medical care, nursing, and attendance at the expense of the ship on which he was injured. Sanders *v.* Stimson Mill Co., 34 Wash. 357, 75 Pac. 974.

98. The Norway *v.* Jensen, 52 Ill. 373, holding that St. (1857) giving a summary remedy in certain cases against steamboats and other water craft is not confined in its operation to that class of vessels navigating the rivers within or bordering upon that state but embraces as well all those that are employed upon any navigable waters whether lake or river.

99. The Queen, 40 Fed. 694, holding that allowances under this head will not be made for damages from being thrown into the water or for alleged fright.

1. The A. Heaton, 43 Fed. 592; The Edith Godden, 23 Fed. 43.

2. The Scotland, 42 Fed. 925; The Vigilant, 30 Fed. 288.

costs, although he is not entitled to recover on the ground of his contributory negligence.[3]

## IX. DISCIPLINE AND PUNISHMENT.

**A. Right to Punish and Manner of Enforcing Discipline.** It is the right and duty of the master to maintain proper discipline on the ship, and to protect members of the crew from abuse at the hands of his subordinate officers;[4] and he has the sole and exclusive command on board the vessel, and the inferior officers, as well as the common sailors, are bound to obey his lawful commands,[5] and the master may inflict proper correction on his seamen,[6] for past as well as present

3. The Wanderer, 20 Fed. 140.

4. The Marion Chilcott, 95 Fed. 688; Anderson *v.* Ross, 1 Fed. Cas. No. 361, 2 Sawy. 91; Jordan *v.* Williams, 13 Fed. Cas. No. 7,528, 1 Curt. 69; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407.

**When the crime of a sailor is too great for the master's authority** to punish, the master must not take the law into his own hands, but must seize the criminal, put him in irons, and bring him to justice on the return home. Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168.

5. Buddington *v.* Smith, 13 Conn. 334, 33 Am. Dec. 407; Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305; U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525.

**Submission is among the first duties of the seamen** (U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505; U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525), and in proportion as the urgency of the occasion and the necessities of the sea service require instant compliance with such commands the duty of the seamen to obey becomes more pressing and obligatory (Thompson *v.* Hermann, 47 Wis. 602, 3 N. W. 579, 32 Am. Rep. 784; U. S. *v.* Freeman, *supra*).

**The necessities of the service require a promptness of action** in emergencies that excludes the possibility of acting under the deliberative direction of several minds, and the law therefore, finding it necessary to invest the captain with a dictatorship to meet emergencies, to preserve uniformity of government, very properly gives him the entire authority or command, in all cases; but it enjoins on him the moderate and prudent use of his authority, and holds him strictly responsible for the abuse of his high powers. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220.

**When the master is absent** the mate executes the power of the master, and is entitled to the same obedience from the seamen. Sheridan *v.* Furhur, 21 Fed. Cas. No. 12,761, 1 Blatchf. & H. 423. And even when the master is on board and at hand, the mate may punish seamen if the punishment is necessary as a means to suppress mutinous, illegal, or flagrant disobedience, on the part of the seamen, to orders, or other duties, which require prompt and instantaneous action, and admit of no delay, but when he relies upon this right as a defense the burden of proof is upon him to show that such a real or supposed necessity existed. U. S. *v.* Harriman, 26 Fed. Cas. No. 15,311, 1 Hughes 525; U. S. *v.* Hunt, 26 Fed. Cas. No. 15,423, 2 Story 120; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584.

**A ship's carpenter ranks with an ordinary seaman,** and cannot disobey the orders of the second mate, and general orders from one officer will not excuse his disobedience of specific orders of another officer. Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, Blatchf. & H. 423.

6. *Connecticut.*— Buddington *v.* Smith, 13 Conn. 333, 33 Am. Dec. 407.

*Massachusetts.*— Sampson *v.* Smith, 15 Mass. 365.

*New York.*— Brown *v.* Howard, 14 Johns. 119.

*South Carolina.*— Flemming *v.* Ball, 1 Bay 3.

*United States.*— The Stacey Clarke, 54 Fed. 533; Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 219; U. S. *v.* Alden, 24 Fed. Cas. No. 14,427, 1 Sprague 95; U. S. *v.* Harriman, 26 Fed. Cas. No. 15,311, 1 Hughes 525; U. S. *v.* Hunt, 26 Fed. Cas. No. 15,423, 2 Story 120; U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525; Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31.

See 43 Cent. Dig. tit. "Seamen," § 196.

**The object of granting this authority to the master** is to enable him to maintain his command and to preserve discipline and subordination on board his vessel; and to do this, he must have the power to enforce habits of obedience and a respectful demeanor of the crew toward himself. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 219.

**Subordinate officers** have no authority to punish a seaman when the master is on board unless such punishment is absolutely required at the very moment, by the necessity of the ship's service, to compel the performance of duty. Murray *v.* White, 9 Fed. 562; Elwell *v.* Martin, 8 Fed. Cas. No. 4,425, 1 Ware 45; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584. Nor have they the right to punish a seaman for an offense which the master has condoned. Murray *v.* White, *supra*.

**A second mate, rightfully displaced from his position,** is bound to perform other duty, and, upon his refusal to do so, may be punished for disobedience. Morris *v.* Cornell, 17 Fed. Cas. No. 9,829, 1 Sprague 62.

offenses,[7] and may take measures to enforce the discipline of his ship. He may confine a refractory sailor,[8] or stop his provisions; [9] and, if the seaman be incorrigibly disobedient and mutinous, he may discharge him without payment of his wages; [10] and since prompt obedience by the crew of a ship to the commands of the officer on deck is essential to the safety of the vessel, it may be enforced by the officer, even by blows, when necessary, and a court will not hold him liable in damages therefor where he uses no weapons, and there is no evidence of malice, or excessive punishment.[11] But punishment inflicted by a master on a seaman must be moderate in degree,[12] proportioned both to the nature of the offense and

**A minor placed aboard ship by his father to improve his health,** and to learn navigation, is subject to the discipline and punishment of an ordinary seaman, although a person of refinement and gentle breeding. Gould *v.* Christianson, 10 Fed. Cas. No. 5,636, Blatchf. & H. 507.

**Foreign seamen on board American ships** are as much subject to punishment for such disobedience or violence as Americans, and are alike to be protected and redressed on their return home. U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

**In case of mutinous conduct,** the master may suppress in the best mode he can, and may therefore use a greater degree of evidence on such occasions than when there is misbehavior only. U. S. *v.* Wickham, 28 Fed. Cas. No. 16,689, 1 Wash. 316.

7. U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505; Lamb *v.* Burnett, 1 Cromp. & J. 291, 1 Tyrw. 265. See also Bronghton *v.* Jackson, 18 Q. B. 378, 16 Jur. 886, 21 L. J. Q. B. 265, 83 E. C. L. 378.

**But investigation of some kind should first be made.**— Schelter *v.* York, 21 Fed. Cas. No. 12,446, Crabbe 449; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407; Murray *v.* Moutrie, 6 C. & P. 471, 25 E. C. L. 530.

8. Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31. And see *infra*, note 12.

**When one of the crew of a vessel resists a person in authority over him,** while in the discharge of his duty, the latter may lawfully use sufficient force to overcome such resistance. Pendergrast *v.* Lampman, 19 Fed. Cas. No. 10,919, Deady 54.

9. Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31.

**Wrongful withholding of provisions** see *supra*, V, B, 3.

10. Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31. And see *supra*, VI, J, c.

11. Stout *v.* Weedin, 95 Fed. 1001; Healy *v.* Cox, 45 Fed. 119.

12. Brown *v.* Howard, 14 Johns. (N. Y.) 123; Cushman *v.* Ryan, 6 Fed. Cas. No. 3,515, 1 Story 91; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1; Turner's Case, 24 Fed. Cas. No. 14,248, 1 Ware 77; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505; U. S. *v.* Wickham, 28 Fed. Cas. No. 16,689, 1 Wash. 316; The Lowther Castle, 1 Hagg. Adm. 384.

**Imprisonment.**— One of the most common methods of punishing refractory and incorrigible seamen is by confinement on shipboard. Buddington *v.* Smith, 13 Conn. 333, 33 Am. Dec. 407; Lane *v.* Powell, 1 Edm. Sel. Cas. (N. Y.) 256; The Cora *v.* Cressy, 131 Fed. 144; Thompson *v.* The Stacey Clarke, 54 Fed. 533; Healey *v.* Martin, 11 Fed. Cas. No. 6,295. But a single act of insubordination (Gardner *v.* Bibbins, 9 Fed. Cas. No. 5,222, Blatchf. & H. 356), or refusal to obey an unlawful order (Foye *v.* Leckie, 9 Fed. Cas. No. 5,023, 1 Sprague 210; U. S. *v.* Winn, 28 Fed. Cas. No. 16,739*a*, Brunn. Col. Cas. 519), cannot be considered as justifying imprisonment. Nor is a master justified in imprisoning a seaman merely on suspicion that he is a dangerous man, or on the request of the crew, unless some facts are shown rendering the truth of the charge probable. Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262. So where a seaman is entitled to his discharge, imprisonment by the master for refusal to remain and do duty is illegal. Snow *v.* Wope, 22 Fed. Cas. No. 13,149, 2 Curt. 301 [*affirming* 30 Fed. Cas. No. 18,042, 1 Sprague 300]. It is not within the ordinary powers of a master to imprison a seaman on shore in a foreign port; nothing but an extreme case of extraordinary violence, where the safety of the vessel or those on board requires it, will justify such practice (Buddington *v.* Smith, 13 Conn. 334, 33 Am. Dec. 407; Thompson *v.* The Stacey Clarke, 54 Fed. 533; Anonymous, 1 Fed. Cas. No. 473; Chester *v.* Benner, 5 Fed. Cas. No. 2,660, 2 Lowell 76; The Elwin Kreplin, 8 Fed. Cas. No. 4,427, 4 Ben. 413; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262; Johnson *v.* The Coriolanus, 13 Fed. Cas. No. 7,380, Crabbe 239; Magee *v.* The Moss, 16 Fed. Cas. No. 8,944, Gilp. 219; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407, holding that where the master of a vessel causes any of his crew to be confined in a foreign jail, he ought to see that their condition and treatment there is such as humanity requires; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,205, 5 Mason 192; Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31; Wope *v.* Hemenway, 30 Fed. Cas. No. 18,042, 1 Sprague 300 [*affirmed* in 22 Fed. Cas. No. 13,149, 2 Curt. 301]), and moreover the right should be exercised as one of safety, rather than discipline, and never applied as punishment for past misconduct (Buddington *v.* Smith, *supra*; The Elwin Kreplin, *supra*; Wilson *v.* The Mary, *supra*). But since the passage of the act of congress of July 20, 1840, when the master of a vessel in a foreign port lays a complaint against any of his crew fully and

the exigency of the occasion,[13] and administered in a proper manner,[14] for there

fairly before the consul, and the complaint is such that a competent master may fairly believe it to be within the consul's jurisdiction, and the consul, upon examination, finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a tort; the consul being answerable to the injured party for any malversation or abuse of power (Chester *v.* Benner, 5 Fed. Cas. No. 2,660, 2 Lowell 76; Jordan *v.* Williams, 13 Fed. Cas. No. 7,528, 1 Curt. 69; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407), although prior to this statute a master who procured his men to be imprisoned without good cause could not be exempted from his liability to them for damages by showing that the imprisonment was ordered by the consul (Anonymous, 1 Fed. Cas. No. 473; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262; The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware 373; Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31).

**Desertion.**— A master may retake a deserting seaman and confine him on board the vessel. Turner's Case, 24 Fed. Cas. No. 14,248, 1 Ware 77, holding further that the authority given by St. (1790) c. 56, to arrest deserters by a warrant from a magistrate, does not supersede the authority which he has under the general maritime law. 1 U. S. St. at L. 134, c. 29, § 7, empowers a master to confine a seaman, and applies to a seaman who deserts the ship after it reaches port, but before discharge of cargo and ballast. *Ex p.* Sprout, 22 Fed. Cas. No. 13,267, 1 Cranch C. C. 424.

13. Johns *v.* Brinker, 30 La. Ann. 241; Spencer *v.* Kelley, 32 Fed. 838; Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220; Cushman *v.* Ryan, 6 Fed. Cas. No. 3,515, 1 Story 91; Gardner *v.* Bibbins, 9 Fed. Cas. No. 5,222, Blatchf. & H. 356; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505.

**Elements determining degree of punishment.**— The urgency of the occasion, the temper and conduct of the culpable party, the dispositions, state of discipline, and habits of obedience of the crew, all are elements of the case, and may go to justify a greater or less degree of severity in the punishment. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220. The law which governs the deportment of men to each other on shore cannot be applied to their habits and intercourse on board of a ship. Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283.

**No punishment can be inflicted unless for reasonable provocation or cause.**— Morris *v.* Cornell, 17 Fed. Cas. No. 9,829, 1 Sprague 62; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505. Furthermore the power to punish is given only for the purposes of the voyage, as a means of accomplishing its object, by preventing the recurrence of those offenses which interfere with, or may defeat the successful prosecution of the enterprise. Payne *v.* Allen, 19 Fed. Cas. No. 10,855, 1 Sprague 304.

**Use of weapons.**— As a master often has not physical power to enforce obedience, he may, if necessary, resort to weapons, and the law will protect him; but he must resort to proper weapons (Carleton *v.* Davis, 5 Fed. Cas. No. 2,408, 2 Ware 225; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1; The Palledo, 18 Fed. Cas. No. 10,677, 3 Ware 321; Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168), such as are the ordinary instruments for such occasions (Healy *v.* Cox, 45 Fed. 1119; Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283, as a rope); but nothing short of some personal danger to himself or his officers (Carleton *v.* Davis, *supra*; Fuller *v.* Colby, *supra*; Saunders *v.* Buckup, 21 Fed. Cas. No. 12,373, 1 Blatchf. & H. 264), or an emergency requiring instant obedience (Padmore *v.* Piltz, 44 Fed. 104), will justify the master in so assaulting a seaman. In subduing an insurrection or mutiny, however, force requisite may be used, and any weapon which the occasion may require (Sampson *v.* Smith, 15 Mass. 365; Fuller *v.* Colby, *supra*; Jarvis *v.* The Claiborne, 13 Fed. Cas. No. 7,225, Bee 248; Roberts *v.* Dallas, 20 Fed. Cas. No. 11,898, Bee 239; U. S. *v.* Lunt, 26 Fed. Cas. No. 15,643, 1 Sprague 311; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305), and the use of weapons, and especially deadly ones, is held to be limited to the prevention of mutiny or its suppression, and the courts do not countenance it for merely punishing past offenses (Fuller *v.* Colby, *supra*; Jarvis *v.* The Claiborne, *supra*).

**A sword is an improper weapon** for a master to use in punishing an unresisting seaman, when there is no appearance of mutiny. Schelter *v.* York, 21 Fed. Cas. No. 12,446, Crabbe 449.

14. Cushman *v.* Ryan, 6 Fed. Cas. No. 3,515, 1 Story 91; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1.

**The law does not permit the master to gratify a brutal and low revenge,** or to inflict cruel and unnecessary punishments. Whitten *v.* Chester, 2 N. Y. City Ct. 4; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505.

**Double punishment** is not to be imposed except in cases where the seaman is incorrigibly disobedient, and his confinement necessary to the safety of the ship. The Paul Revere, 10 Fed. 156.

**Corporal punishment.**— The master of a vessel had a right, by the maritime law, to correct a negligent, disobedient, or mutinous seaman by moderate personal chastisement (U. S. *v.* Beyer, 31 Fed. 35; Bangs *v.* Little, 2 Fed. Cas. No. 839, 1 Ware 520; Bennett *v.* Sherman, 3 Fed. Cas. No. 1,324; Carleton *v.* Davis, 5 Fed. Cas. No. 2,408, 2 Ware 225; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1; Michaelson *v.* Denison, 17 Fed. Cas. No. 9,523, 3 Day 294, Brunn. Col.

is a limit to the authority of the master, and if he issues an unlawful order the seamen and under officers may refuse obedience thereto,[15] or even arrest and confine the master if he attempts to perpetrate a piracy or felony;[16] but it does not necessarily follow, because a wrong is attempted upon a seaman, that he may use every kind and degree of resistance; if the wrong be such as will admit of complete indemnity, such resistance cannot be resorted to,[17] and where it is apparent that the punishment of a seaman is merited, the court will not under-

Cas. 63; Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, Blatchf. & H. 423; Thompson *v.* Busch, 23 Fed. Cas. No. 13,944, 4 Wash. 338; Turner's Case, 24 Fed. Cas. No. 14,248, 1 Ware 77; Wilson *v.* The Mary, 30 Fed. Cas. No. 17,823, Gilp. 31. But see The Josephine, 13 Fed. Cas. No. 7,544, holding that a master, although acting under the honest belief that the seaman had conspired to poison him, has no right to flog the seaman; Gordon *v.* Gordon, 1 Nova Scotia Dec. 80), even for a past offense (Sampson *v.* Smith, 15 Mass. 365; Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, Blatchf. & H. 423); but the punishment must be reasonable, and not inflicted with unlawful instruments (Carleton *v.* Davis, *supra*. And see *infra*, XI, F). But his authority in this respect is not coextensive with that of a parent over his children, or a schoolmaster over his scholars. It extends only to the correction of such negligence or misconduct as relate to their duties as members of the ship's crew, or tend directly to the subversion of the discipline and police of the ship. Bangs *v.* Little, 2 Fed. Cas. No. 839, 1 Ware 520. He has no authority to inflict corporal punishment for any moral delinquency, which does not endanger the ship or cargo, and does not tend directly to the subversion of the discipline or good order of the crew. Bangs *v.* Little, *supra*. By Act (1850), c. 80, § 1 (9 U. S. St. at L. 515), corporal punishment is now illegal and cannot be justified. The General Rucker, 35 Fed. 152; Riley *v.* Allen, 23 Fed. 46; Payne *v.* Allen, 19 Fed. Cas. No. 10,855, 1 Sprague 304; Roberts *v.* Skolfield, 20 Fed. Cas. No. 11,917, 3 Ware 184.

**Knocking a man down with a belaying-pin** is an illegal mode of punishment. Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407.

**Use of irons.**— It is not a cruel or excessive punishment to keep two waiters ironed together for ten hours for fighting in the cabin of a vessel. Lindrop *v.* Dall, 15 Fed. Cas. No. 8,365.

**15.** Frost *v.* Hammatt, 11 Pick. (Mass.) 70; The Mary Ann, 16 Fed. Cas. No. 9,194, Abb. Adm. 270; U. S. *v.* Winn, 28 Fed. Cas. No. 16,739*a*, Brunn. Col. Cas. 519.

**An officer has the right to protect himself and his rank.**— Foye *v.* Leckie, 9 Fed. Cas. No. 5,023, 1 Sprague 210.

**Incompetency to perform the duties of the station** for which an officer or seaman has shipped is no justification for the infliction of punishment. Payne *v.* Allen, 19 Fed. Cas. No. 10,855, 1 Sprague 304. But see Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283, holding that a person who, shipping as cook, is unwilling or unable to do his duty, and keeps the galley in a filthy condition, may be punished.

**Mere immorality as a man** is not sufficient ground for punishing a seaman who conducts himself properly as such. Bangs *v.* Little, 2 Fed. Cas. No. 839, 1 Ware 520; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1.

**A seaman may be justified in his use of a deadly weapon if he acts in self-defense.** U. S. *v.* Beyer, 31 Fed. 35.

**16.** The Mary Ann, 16 Fed. Cas. No. 9,194, Abb. Adm. 270; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168.

**17.** Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407.

**His remedy is at law after his return,** and not a resort to violence, unless in danger of the actual loss of life, and then at his peril, as the result may turn out. U. S. *v.* Staly, 27 Fed. Cas. No. 16,374, 1 Woodb. & M. 338.

**Where the master assaults a seaman,** the seaman may endeavor to escape, and if pursued by the master and the assault is repeated, the seaman may resist in such manner as to protect himself from injury, and if the assault is made with a deadly weapon, or otherwise dangerously, the seaman is authorized to use equivalent and necessary force in his own protection. U. S. *v.* Beyer, 31 Fed. 35; U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168. The same rule applies if the assault is made by an officer without a deadly weapon, if the assault is of a character which would subject the seaman to serious bodily harm. U. S. *v.* Beyer, *supra*. And if the master, without any disobedience of orders or resistance, is about to attack any of the crew, he may be disarmed, if done to repel great violence, which is threatened and impending without any justifiable cause; but if the crew are disobedient, and resort to personal violence and seditiously resist the master in enforcing his lawful orders, he can then rightfully arm himself; and, if only intending to use his weapons, so far as is necessary to produce obedience and put down mutiny, he cannot be properly opposed or disarmed by his crew. U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305. A seaman can interpose resistance only to protect himself against undeserved and great bodily injury, and not resistance to a moderate chastisement, to which he was legally liable for some offense. Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1.

take to adjust very exactly, according to its own ideas of fitness and propriety, the balance between the gravity of the offense and the quantity of punishment,[18] and will not award damages unless the punishment is manifestly excessive.[19]

**B. Liability For Wrongful Punishment or Assault — 1. Vessel or Owner.** The master of a ship while on board is the agent of the owners in respect to all matters which come within the scope of his duty, and the owners and ship are liable in damages to a seaman, not only for the unwarranted ill-treatment of such seaman by the master himself,[20] but for his failure to perform his duty to protect the seaman from assaults and ill-treatment by other officers;[21] but it must be shown that the master was acting within the scope of his duty, and in the exercise of his control over plaintiff.[22]

**2. Master or Officer.** A seaman is in general entitled to recover damages for an assault and battery from the master of a ship where personal violence is inflicted, not excessively, but wantonly and without provocation or cause,[23] where there was provocation or cause, but the punishment was cruel or excessive,[24] or when the punishment is inflicted with a dangerous or deadly weapon[25] The master is likewise liable for an unjustifiable assault by one of his officers upon a seaman, when done by his connivance, consent, or authority;[26] but not for injuries

18. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1; Gardner *v.* Bibbins, 9 Fed. Cas. No. 5,222, Blatchf. & H. 356.

19. Olzen *v.* Schierenberg, 3 Daly (N. Y.) 100; Fuller *v.* Colby, 9 Fed. Cas. No. 5,149, 3 Woodb. & M. 1; U. S. *v.* Freeman, 25 Fed. Cas. No. 15,162, 4 Mason 505.

20. Belyea *v.* Cook, 162 Fed. 180; The Lizzie Burrill, 115 Fed. 1015; The General Rucker, 35 Fed. 152; Sherwood *v.* Hall, 21 Fed. Cas. No. 12,777, 3 Sumn. 127.

21. The Lizzie Burrill, 115 Fed. 1015; The Marion Chilcott, 95 Fed. 688. But see The Astral, 134 Fed. 1017.

The rule that a ship is not liable for injuries resulting from negligence of the officers is not applicable when such negligence amounts to a breach of duty; as where the master fails to protect the seamen from continued violence and brutal treatment at the hands of a subordinate officer. The Marion Chilcott, 95 Fed. 688.

22. Spencer *v.* Kelley, 32 Fed. 838.

Wilful assault.— The owners of a vessel are not liable, even under the maritime law, for a wilful and malicious assault by the captain of the vessel on a seaman who refuses to obey a command on the plea of sickness, since, in committing the assault, he exceeds his authority. His command does not extend over the persons of the seamen beyond the infliction of usual and necessary punishment in case of disobedience or infraction of rules. Gabrielson *v.* Waydell, 135 N. Y. 1, 31 N. E. 969, 31 Am. St. Rep. 793, 17 L. R. A. 228. A master is not within the line of his duty in assaulting a seaman for an act of disobedience, after the emergency has passed, and the act been done, and the owner of the vessel is not liable to the seaman for any injury he may have received. Spencer *v.* Kelley, 32 Fed. 838. A steamboat is not liable to seizure under the water craft law (Act Feb. 20, 1840) for a wilful assault and battery committed by the mate of the boat on a hand while the boat was lying at the landing, since such act was in no way connected with the business of the boat; such statute being remedial only, and not imposing any new liabilities. The Messenger *v.* Pressler, 13 Ohio St. 255.

23. Wedman *v.* Kendall, 14 Wkly. Notes Cas. (Pa.) 157; Belyea *v.* Cook, 162 Fed. 180; Dorrell *v.* Schwerman, 111 Fed. 209; Cushman *v.* Ryan, 6 Fed. Cas. No. 3,515, 1 Story 91; Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283; Lindrop *v.* Dall, 15 Fed. Cas. No. 8,365.

Advice of consul.— The master is civilly responsible for his ill-treatment of the crew on board his ship, notwithstanding the advice and direction of the consul. Peters *v.* Martens, 19 Fed. Cas. No. 11,031; Shorey *v.* Rennell, 22 Fed. Cas. No. 12,806, 1 Sprague 407.

Punishment without investigation.— The master is liable in damages for flogging a seaman without a hearing, for disobeying orders, where the seaman acted in good faith. Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, Blatchf. & H. 423.

24. Sampson *v.* Smith, 15 Mass. 365; Whitten *v.* Chester, 2 N. Y. City Ct. 4; Brown *v.* Howard, 14 Johns. (N. Y.) 119; Flemming *v.* Ball, 1 Bay (S. C.) 3; Elwell *v.* Martin, 8 Fed. Cas. No. 4,425, 1 Ware 45; Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283.

25. Flemming *v.* Ball, 1 Bay (S. C.) 3; Forbes *v.* Parsons, 9 Fed. Cas. No. 4,929, Crabbe 283. And see *supra*, IX, A.

A mutineer, although severely injured by a deadly weapon, necessarily used by a master in the suppression of a mutiny, can maintain no action against the master for damages. Roberts *v.* Eldridge, 20 Fed. Cas. No. 11,901, 1 Sprague 54.

26. Murray *v.* White, 9 Fed. 562 (holding that the master is liable if he allows punishment to be inflicted on a seaman in his presence by a subordinate officer for an offense which the master has condoned); Anderson *v.* Ross, 1 Fed. Cas. No. 361, 2 Sawy. 91;

inflicted before he could interfere.[27] The under officers of a vessel are also liable in damages for assaults upon seamen,[28] and for injuries caused by punishment unnecessarily severe,[29] except where they act in obedience to the orders of the master, in which case they will not be held liable as joint trespassers,[30] unless the punishment is obviously and grossly excessive.[31]

**C. Actions — 1. Jurisdiction.**[32] The laws of the United States follow seamen engaged on vessels of the United States, until the voyage is completed, whether in a foreign or domestic port or here, and hence actions for tortious assaults on a seaman by the ship's officers are cognizable in the United States courts.[33] Where the action is *in personam* and no remedy is sought against the vessel, state courts have concurrent jurisdiction with the federal courts; but even such cases are more properly brought in the admiralty court, where the judge is familiar with the subject-matter, and can, moreover, call in the aid of nautical experts as assessors.[34] In the absence of treaty stipulation giving consuls exclusive jurisdiction of differences between master and crew,[35] it is discretionary with the courts

Hanson *v.* Fowle, 11 Fed. Cas. No. 6,042, 1 Sawy. 539 (holding that such consent and authority will be presumed when it appears that he knew of the trespass, or had reason to know it, and did not interfere to prevent it); Knowlton *v.* Boss, 14 Fed. Cas. No. 7,901, 1 Sprague 163; Roberts *v.* Skolfield, 20 Fed. Cas. No. 11,917, 3 Ware 184; Thomas *v.* Lane, 23 Fed. Cas. No. 13,902, 2 Sumn. 1.

27. Johnston *v.* Mowatt, 115 Fed. 844; Mellor *v.* Cox, 45 Fed. 115.

28. Backstack *v.* Banks, 2 Fed. Cas. No. 711, 7 Ben. 355.

29. Riley *v.* Allen, 23 Fed. 46; Elwell *v.* Martin, 8 Fed. Cas. No. 4,425, 1 Ware 45.

30. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220; Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, Blatchf. & H. 423.

31. Brown *v.* Howard, 14 Johns. (N. Y.) 119 (holding that it is no defense to an assault committed on plaintiff by the mates of a vessel that they acted under the orders of the master); Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220.

**Manslaughter.**— That a mate acted under the orders of the master is not a defense to an indictment for manslaughter. State *v.* Sutton, 10 R. I. 159.

32. See, generally, Admiralty, 1 Cyc. 809 *et seq.*

33. Roberts *v.* Skolfield, 20 Fed. Cas. No. 11,917, 3 Ware 184.

**Time for bringing suit.**—An action for damages for maltreatment of a seaman by the master is based on breach of the duty of good treatment, and a statute limiting the time for bringing actions for assault and battery does not apply. Gabrielson *v.* Waydell, 67 Fed. 342.

**Settlement of suit.**— Settlements made between seamen and masters or owners are always narrowly watched by courts of admiralty, seamen being considered as under a disadvantage in such transactions, and they are not strictly held to the letter or form of their acts, if there seem to have been any undue means used to bring about an unequal settlement. Yet settlements made by seamen are allowed. They are not incapacitated from settling their claims, either before or after suit brought, and settlements will be upheld, if made fairly and understandingly, for adequate consideration. Brooks *v.* Snell, 4 Fed. Cas. No. 1,961, 1 Sprague 48, holding that, if it seems to be an unequal and disadvantageous one to the seaman, there will be ground for relieving him from it, unless the other side show circumstances sufficient to satisfy the court that the seaman was under no disadvantage, either from ignorance of his rights, mistake of facts, fear, or strong moral duress.

34. Flynn *v.* Corning, 2 Wkly. Notes Cas. (Pa.) 223.

35. Meyer *v.* Basson, 10 Phila. (Pa.) 414; Williams *v.* The Welhaven, 55 Fed. 80.

**Where a criminal assault upon a seaman** is not named as a matter of exclusive consular jurisdiction, the federal courts may take jurisdiction for the purpose of protecting the seaman and redressing his wrongs, although a treaty between the United States and Italy provides that "consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge . . . and shall alone take cognizance of questions, of whatever kind, that may arise, both at sea and in port, between the captain, officers, and seamen." The Salomoni, 29 Fed. 534; Weiberg *v.* The St. Oloff, 29 Fed. Cas. No. 17,357, 2 Pet. Adm. 428.

**Right of seamen to lay complaint before consul.**— The right given to seamen by 5 U. S. St. at L. 396, c. 48, § 16, to lay their complaints before the American consul in foreign ports is one of great importance, which a court of admiralty will carefully guard. Morris *v.* Cornell, 17 Fed. Cas. No. 9,829, 1 Sprague 62. The master is required to allow them the fullest liberty to do so (Jordan *v.* Williams, 13 Fed. Cas. No. 7,528, 1 Curt. 69; Knowlton *v.* Boss, 14 Fed. Cas. No. 7,901, 1 Sprague 163), but this liberty is to be exercised under the fair and reasonable discretion of the master as to the time and mode of landing, and a refusal of duty on the part of the crew because such permission is not given is justifiable only when such refusal is necessary to prevent the loss of the right (Jordan *v.* Williams, *supra*). The phrase, "to lay their complaints before the consul," applies to such causes of com-

of this country whether or not they will exercise jurisdiction to redress wrongs arising between foreign seamen and the masters of foreign vessels, especially when the act complained of occurred upon the high seas,[36] and more especially where the seaman by his contract has elected and fixed upon the tribunal to which he is to resort for the redress of his wrongs,[37] and the great inconvenience which would arise from it has induced them to decline interference in ordinary cases, and leave the parties to seek redress in the courts of their own country.[38] But where a seaman is legally discharged from the vessel in this country, he may maintain an action in our courts for a tort committed by the master on the high seas, while the relation of master and seaman existed.[39]

**2. Procedure.** While the practice of the admiralty does not insist on all that technical exactness in pleading which is required by courts proceeding according to the course of the common law, libellant is required to state in clear, distinct, and intelligible allegations the whole gravamen of his complaint,[40] and the proofs in the case must be confined to the matters that are put in issue by the libel and answer,[41] the burden being on the seaman to make out his case by clear and consistent proof.[42] In trespass against a captain and mate of a vessel for assault, it is a mixed question of law and fact whether the mate, in inflicting punishment on a mariner under orders from the master, used any unnecessary violence, and whether a mate is bound to obey the order of the master when commanded to punish a mariner;[43] but whether such flagrant offenses existed on board a vessel as will justify the master in imprisoning a mariner on shore in a foreign port is a question of fact for the jury in an action brought by the mariner against the master for such imprisonment.[44]

**3. Damages.** In an action by a seaman against the master for assault or excessive punishment, a reasonable compensation for the injuries suffered and the loss occasioned constitutes the true measure of damages.[45] Vindictive damages

plaint as are specified in the act, namely, that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, etc., and not to affrays or quarrels between the officers and crew. Jordan *v.* Williams, *supra*. But see Knowlton *v.* Boss, *supra*.

**36.** Olzen *v.* Schierenberg, 3 Daly (N. Y.) 100; Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

**37.** Olzen *v.* Schierenberg, 3 Daly (N. Y.) 100.

**38.** Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

**39.** Olzen *v.* Schierenberg, 3 Daly (N. Y.) 100; Johnson *v.* Dalton, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

**40.** Pettingill *v.* Dinsmore, 19 Fed. Cas. No. 11,045, 2 Ware 212, holding that if libellant intends to claim damages for separate and independent assaults, they should be separately set forth; otherwise the respondent will not know what he has to answer, and that if he intends to rely on general ill-treatment and oppression on the part of the master, in aggravation of damages, it must be propounded in a distinct allegation, to enable the master to take issue upon it in his answer.

**41.** Bennett *v.* Howard, 3 Day (Conn.) 219; Pettingill *v.* Dinsmore, 19 Fed. Cas. No. 11,045, 2 Ware 212.

**The master may be permitted, in justification or in mitigation of damages,** to show that the seaman was habitually careless, disobedient, or negligent in his conduct. Pettingill *v.* Dinsmore, 19 Fed. Cas. No. 11,045, 2 Ware 212; The Lowther Castle, 1 Hagg. Adm. 385. But in order to be admitted to this defense, he must set forth such habitual misconduct in a defensive allegation in his answer, in order that the libellant may be entitled to meet the charge by counter evidence. Pettingill *v.* Dinsmore, *supra*.

**Under a replication de injuria to a justification of a beating,** as master of a ship, plaintiff may show that the punishment was excessive and it is not necessary to reply such matter specially. Hannen *v.* Edes, 15 Mass. 347.

**42.** Pacific Packing, etc., Co. *v.* Fielding, 136 Fed. 577, 69 C. C. A. 325 (holding, however, that where the answer alleges a special defense, the burden of proving such defense rests on respondent); Benton *v.* Whitney, 3 Fed. Cas. No. 1,335, Crabbe 417.

**If it is shown that he has been guilty of a fault** which would justify some punishment, to entitle himself to damages, he must show that the punishment was excessive in degree or unlawful in its kind. Carleton *v.* Davis, 5 Fed. Cas. No. 2,408, 2 Ware 225.

**43.** Frost *v.* Hammatt, 11 Pick. (Mass.) 70.

**44.** Buddington *v.* Smith, 13 Conn. 334, 33 Am. Dec. 407.

**45.** Padmore *v.* Piltz, 44 Fed. 104; Backstack *v.* Banks, 2 Fed. Cas. No. 711, 7 Ben. 355; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262, holding that in an action against a master for the imprisonment of a

may sometimes be awarded against a master, but not unless his motives appear to have been bad;[46] and since such damages are given, not by way of compensation to the sufferer, but by way of punishment of the offender, the owner of a vessel cannot be subjected to punitive damages because of the unlawful, oppressive, and malicious action of the master, unless such action was authorized or ratified by the owner.[47] No costs can be had until damages have been decreed against respondent,[48] and even a recovery in such a suit does not necessarily carry costs as an incident, in admiralty.[49]

## X. WAGES AND EFFECTS OF DECEASED SEAMEN.

Under the act creating his office, the United States shipping commissioner[50] has a right to take possession of such effects of a deceased seaman as are on board ship;[51] but he cannot intermeddle with the estate or effects on shore, and is not

seaman, and his detention until his effects on board were lost or sold, compensation for the time of imprisonment, the value of his articles lost or sold, interest on the amount, and passage home constitute the true measure of damages.

**Personal indignities.**— Courts of admiralty do not ordinarily allow extravagant damages for personal injuries that are not permanent or serious, on any consideration of personal indignity. The General Rucker, 35 Fed. 152. But an exception to this rule exists in the case of a minor who is placed aboard a ship by his father to improve his health and to learn navigation, and where an action is brought against the master for the excessive punishment of such minor, the damages will be estimated with regard to the character and position of the minor, and will not be necessarily limited exclusively to a remuneration for the bodily injury. Gould *v.* Christianson, 10 Fed. Cas. No. 5,636, Blatchf. & H. 507.

**Circumstances weighed in determining damages.**— The court will consider the situation of the parties (Schelter *v.* York, 21 Fed. Cas. No. 12,446, Crabbe 449; Whitney *v.* Eager, 29 Fed. Cas. No. 17,584, Crabbe 422), the conduct of libellant (The Palledo, 18 Fed. Cas. No. 10,677, 3 Ware 321; Saunders *v.* Buckup, 21 Fed. Cas. No. 12,373, Blatchf. & H. 264), his motives in instituting the suit (Saunders *v.* Buckup, *supra*, holding that where, in a libel for an assault and battery by a master, the mate, who was a witness of the transaction, but was in no way connected with it, was joined as a party to the suit with the master, the court will presume that this was done to render the mate an incompetent witness, and will consider that fact in estimating damages; Sheridan *v.* Furbur, 21 Fed. Cas. No. 12,761, 1 Blatchf. & H. 423), and the various aggravating or mitigating circumstances of the case (Schelter *v.* York, *supra*).

The weapon used by an officer for punishing a seaman is always a subject of consideration and weight with the court. Benton *v.* Whitney, 3 Fed. Cas. No. 1,335, Crabbe 417. And see Padmore *v.* Piltz, 44 Fed. 104.

**In case of an inexcusable delay in bringing the action,** only nominal damages will as a rule be allowed. Saunders *v.* Buckup, 21 Fed. Cas. No. 12,373, Blatchf. & H. 264.

**Insubordination by a steward, an educated man,** is a greater offense than by an ordinary mariner, and therefore the damages awarded him because of excessive punishment will be less than those awarded an ordinary mariner. Peters *v.* Martens, 19 Fed. Cas. No. 11,031.

**Effect of failure to plead mitigating circumstances.**— In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery, with a view to reduce the verdict below the amount of the damages actually sustained, if those circumstances could have been pleaded. Watson *v.* Christie, 2 B. & P. 224.

46. Gould *v.* Christianson, 10 Fed. Cas. No. 5,636, Blatchf. & H. 507 (holding that vindictive damages will not be awarded, unless the punishment was wantonly inflicted by the master with a view to the disgrace and mortification of the libellant, and not for the enforcement of discipline); Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262.

47. Pacific Packing, etc., Co. *v.* Fielding, 136 Fed. 577, 69 C. C. A. 325.

48. Peterson *v.* Watson, 19 Fed. Cas. No. 11,037, Blatchf. & H. 487.

**Effect of settlement before hearing.**— The mere institution of a suit for damages by a seaman against the master for assault and battery does not carry with it a lien upon or equitable claim to the costs created in bringing the action, nor can libellant's proctor hold defendant responsible for his costs in the suit where the cause of action was settled by libellant and respondent before the hearing; and a notice by the proctor to respondent that in case of a compromise he will be held liable for the costs is ineffectual. Peterson *v.* Watson, 19 Fed. Cas. No. 11,037, Blatchf. & H. 487; Purcell *v.* Lincoln, 20 Fed. Cas. No. 11,471, 1 Sprague 230.

49. Peterson *v.* Watson, 19 Fed. Cas. No. 11,037, Blatchf. & H. 487.

50. **Rights, powers, and duties of shipping commissioners** generally see *infra*, XII.

51. *In re* Bedford, Myr. Prob. (Cal.) 60.

*ex officio* entitled to letters of administration.[52] Where the master of the vessel sells at the mast the effects of a deceased seaman, the proceeds must be paid to the shipping commissioner or accounted for, as provided by the statute, and no deductions from such proceeds can be made on account of any claim due the vessel by the deceased.[53] Where a seaman dies during a voyage, his representatives are, according to some decisions, entitled to his wages for the whole voyage,[54] although monthly wages are stipulated;[55] but other cases hold that where a seaman dies before the voyage is completed his representatives are entitled to his wages only up to the time of his death,[56] where the engagement was by the month.[57] If a seaman ships under an agreement for a certain sum, provided he continues his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed, either on the contract or on a *quantum meruit*.[58]

## XI. CRIMES AND OFFENSES.

**A. Mutiny.** In the United States mutiny or revolt is made a crime by a statute,[59] by which it is declared to consist of the crew's attempting to usurp the command of the vessel from the master, or attempting to deprive him of it for any purpose by violence, or in its resisting him in the lawful exercise of his authority.[60] As seamen have a right to refuse to go to sea in a vessel that is not seaworthy,[61] they are not liable for making a revolt when they refuse to serve because they believe that the vessel is unseaworthy;[62] and when seamen, because of the intemperance of the master and the danger to the vessel resulting from it, rise up against

**52.** *In re* Bedford, Myr. Prob. (Cal.) 60.

**53.** U. S. *v.* Tobey, 12 Fed. 347.

**54.** Johnson *v.* The Coriolanus, 13 Fed. Cas. No. 7,380, Crabbe 239. And see Scott *v.* The Greenwich, 21 Fed. Cas. No. 12,531, 1 Pet. Adm. 155.

**55.** Sims *v.* Jackson, 22 Fed. Cas. No. 12,890, 1 Pet. Adm. 157, 1 Wash. 414 (holding that the stipulation does not break the entirety of the contract for the voyage, but only furnishes a rule to adjust the *quantum* for the voyage); Walton *v.* The Neptune, 29 Fed. Cas. No. 17,135, 1 Pet. Adm. 142.

**56.** Carey *v.* The Kitty, 5 Fed. Cas. No. 2,402, Bee 255; Beale *v.* Thompson, 4 East 546, holding that where a seaman dies on the voyage his representatives are entitled to his wages up to his death or last time for payment, according as the wages are payable.

**57.** Natterstrom *v.* The Hazard, 17 Fed. Cas. No. 10,055, Bee 441.

**58.** Cutter *v.* Powell, 3 Rev. Rep. 185, 6 T. R. 320, 101 Eng. Reprint 573.

**59.** U. S. Rev. St. (1878) § 5360 [U. S. Comp. St. (1901) p. 3640].

**60.** Thompson *v.* The Stacey Clarke, 54 Fed. 533; U. S. *v.* Huff, 13 Fed. 630 (holding that the statute does not include every case of simple passive disobedience of a master's orders, not participated in by other members of the crew, but does embrace every case of resistance to the lawful exercise of the master's authority, when accompanied by force, fraud, intimidation, violence, a conspiracy among the crew or concerted action in such resistance or disobedience by one of the crew); U. S. *v.* Borden, 24 Fed. Cas. No. 14,625, 1 Sprague 374; U. S. *v.* Forbes, 25 Fed. Cas. No. 15,129, Crabbe 558 (holding that a mere disobedience of an order by one or two seamen without combining with others was not a revolt); U. S. *v.* Kelly, 26 Fed. Cas. No. 15,516, 4 Wash. 528 (holding that mere insolent conduct to the master, disobedience of orders, or violence committed on the person of the master, unaccompanied by other acts showing an intention to subvert his command, did not constitute the offense); U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

The act of April 30, 1790 (1 U. S. St. at L. 114), by which the making of a revolt in a ship was first made a crime, declared that if a seaman should make a revolt in a ship he would be adjudged a pirate and felon and upon conviction should suffer death, without enumerating the acts that would constitute the making of a revolt. U. S. *v.* Kelly, 26 Fed. Cas. No. 15,516, 4 Wash. 528. The courts, however, declared that the crime was committed, when the crew, or any part of them, threw off all obedience to the commander and forcibly took possession of the vessel, by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who had usurped the command (U. S. *v.* Haskell, 26 Fed. Cas. No. 15,321, 4 Wash. 402, 2 Wheel. Cr. (N. Y.) 101); and it was held that seamen put on board a vessel by a consul were within the provisions of this act (U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118).

**61.** See *supra*, V, A.

**62.** U. S. *v.* Givings, 25 Fed. Cas. No. 15,212, 1 Sprague 75 (where it is said in effect that where seamen for justifiable cause resist the demands of the master, they are not liable for the acts of any one seaman who goes further than is necessary in the course of the resistance, but that such seaman is liable alone for his offense); U. S. *v.*

the master and displace him, they may not be convicted of the crime of making a revolt.[63]

**B. Inciting Revolt.** The crime of inciting revolt, while not specifically defined by statute, has been held to be the endeavor of the crew of a vessel or any one or more of them to overthrow the legitimate authority of her commander, with intent to remove him from his command or against his will to take possession of the vessel by assuming the government and navigation of her or by transferring their obedience from the lawful commander to some other person;[64] but this definition is held simply to declare that those acts enumerated by it do amount to the offense and not to declare that other acts do not,[65] and thus it has been held to be an endeavor to make a revolt for the crew to form a conspiracy to usurp command of the vessel or to resist the commanding officer,[66] to confine the master, whether depriving him of the use of his limbs,[67] or by intimidation preventing him from the free use of every part of the vessel,[68] to wilfully disobey lawful orders,[69] or to form a combination to refuse to do duty until the master complies

Staly, 27 Fed. Cas. No. 16,374, 1 Woodb. & M. 338. See also The Moslem, 17 Fed. Cas. No. 9,875, Olcott 289.

**63.** The Ulysses, 24 Fed. Cas. No. 14,330, Brunn. Col. Cas. 529, holding that the offense of seamen who revolt against the master on the ground of his intemperance and danger to the vessel, and place him in confinement, continuing the voyage under the mate, is not a felony.

An indictment under this statute must set forth the particular acts of the accused that are relied upon to constitute the offense. U. S. *v.* Almeida, 24 Fed. Cas. No. 14,433, holding upon a motion in arrest of judgment that an indictment against several defendants, which charged that on a certain day they, being seamen of an American vessel named, "with force and arms, did then and there feloniously make a revolt on board the said ship" was insufficient to charge the offense of making a revolt.

**64.** U. S. *v.* Kelly, 11 Wheat. (U. S.) 417, 6 L. ed. 508 [*affirming* 26 Fed. Cas. No. 15,516, 4 Wash. 528].

**65.** U. S. *v.* Haines, 26 Fed. Cas. No. 15,275, 5 Mason 272.

**66** U. S. *v.* Hemmer, 26 Fed. Cas. No. 15,345, 4 Mason 105.

**67.** U. S. *v.* Bladen, 24 Fed. Cas. No. 14,606, Pet. C. C. 213 (holding that a seaman is guilty of the offense if he seizes the person of the master, although the restraint be but momentary); U. S. *v.* Savage, 27 Fed. Cas No. 16,225, 5 Mason 460 (holding that a seaman is guilty of the offense if he seizes the master for the purpose of inflicting personal chastisement upon the master); U. S. *v.* Smith, 27 Fed. Cas. No. 16,344, 3 Wash. 78; U. S. *v.* Smith, 27 Fed. Cas. No. 16,345, 3 Wash. 525 (holding that the seaman is guilty, although he seizes the master because the master strikes him); U. S. *v.* Stevens, 27 Fed. Cas. No. 16,394, 4 Wash. 547 (holding that a seaman is guilty of the offense where it appears that he forcibly detained the master by seizing him by the collar, and by presenting a pistol, which the seaman declared to be loaded, and placing it against the breast of the captain, and thereby preventing the latter from going on deck).

Assault and battery by a seaman upon the master of a vessel does not amount to a confinement of the commander. U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,575, 1 Cranch C. C. 94.

**68.** U. S. *v.* Huff, 13 Fed. 630; U. S. *v.* Hemmer, 26 Fed. Cas. No. 15,345, 4 Mason 105; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118.

Mutinous conduct of the crew such as would reasonably intimidate a firm man is confining the master if he is restrained thereby from the performance of the duties of his station. U. S. *v.* Bladen, 24 Fed. Cas. No. 14,606, Pet. C. C. 213. In order to constitute the crime the confinement must be done unlawfully (U. S. *v.* Henry, 3 Fed. Cas. No. 1,351, 4 Wash. 428, holding that the confinement must be done feloniously to constitute the offense), if done in self-defense it is no crime (U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118, where it is said that a master of a vessel may so conduct himself as to justify the officers and crew in placing restraints upon him to prevent his committing acts which might endanger the lives of all the persons on board; but that an excuse of this kind must be listened to with great caution, and that such measures should cease the moment the occasion for them ceases; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168, where it is said that it is not an offense for the seamen to confine the master for a justifiable cause, or in justifiable self-defense). And where a defendant is convicted of this crime a new trial will not be granted, as upon the ground of newly discovered evidence, in order that defendant may avail himself of the testimony of others jointly indicted with him, who were acquitted. Lander *v.* U. S., 14 Fed. Cas. No. 8,039.

**69.** U. S. *v.* Brown, 24 Fed. Cas. No. 14,672, 3 Sawy. 602. A prosecution, under this act, cannot be maintained, however, unless an entry of the disobedience is made by the master in the official log-book of the vessel as soon as possible after the occurrence, and is read over to the seamen or a copy

with some improper request on their part; [70] and it seems that actual disobedience of orders is not necessary when the crew combine together not to do duty, and then endeavor to make a revolt, although no orders are actually given afterward.[71] To constitute the crime it is necessary that there be some act by one of the crew to stir up others to disobedience to the master; [72] but neither a previous combination nor preconcerted plan is necessary,[73] and the offense can be committed on any kind of a vessel,[74] and the jurisdiction of the court is not dependent upon the offense being committed on the high seas.[75] In order to convict for this crime

furnished him, and his reply thereto entered in the same manner.

**Before the enactment of this statute** it was held that a consul has no authority to order a seaman to be imprisoned in a foreign port for disobedience of orders. U. S. *v.* McArdle, 16 Fed. Cas. No. 15,653, 2 Sawy. 367; The William Harris, 29 Fed. Cas. No. 17,695, 1 Ware 373.

70. U. S. *v.* Gardner, 25 Fed. Cas. No. 15,188, 5 Mason 402.

71. U. S. *v.* Barker, 24 Fed. Cas. No. 14,516, 5 Mason 404.

72. U. S. *v.* Barker, 24 Fed. Cas. No. 14,516, 5 Mason 404 (holding that a simple refusal by one or more of the crew to do duty does not amount to the offense); U. S. *v.* Hemmer, 26 Fed. Cas. No. 15,345, 4 Mason 105; U. S. *v.* Kelly, 26 Fed. Cas. No. 15,516, 4 Wash. 528 (holding that a mere conspiracy of the crew to displace the master, unaccompanied by overt acts, did not constitute the offense); U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,575, 1 Cranch C. C. 94 (holding that an assault and battery by a seaman upon the master of a vessel is not an attempt to incite a revolt); U. S. *v.* Savage, 27 Fed. Cas. No. 16,225, 5 Mason 460; U. S. *v.* Smith, 27 Fed. Cas. No. 16,337, 1 Mason 147; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168.

73. U. S. *v.* Morrison, 26 Fed. Cas. No. 15,818, 1 Sumn. 418; U. S. *v.* Smith, 27 Fed. Cas. No. 16,337, 1 Mason 147.

74. U. S. *v.* Kelly, 26 Fed. Cas. No. 15,516, 4 Wash. 528.

75. U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,291, 1 Mason 443; U. S. *v.* Keefe, 26 Fed. Cas. No. 15,509, 3 Mason 475 (holding that an endeavor to commit a revolt is an offense even if committed in a foreign port); U. S. *v.* Smith, 27 Fed. Cas. No. 16,344, 3 Wash. 78 (holding that seamen may be punished for confining the master, although the vessel is not on the high seas at the time the offense is committed).

**The indictment** for endeavoring to make a revolt is sufficient if it follow the language of the statute and does not set forth the particulars relied upon by the prosecution to constitute the crime. U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,254, 4 Blatchf. 420.

**An indictment under the act of 1790** was not required to allege that the master was at the time the crime was committed in the peace of the United States or a citizen of the United States (U. S. *v.* Thompson, 28 Fed. Cas. No. 16,492, 1 Sumn. 168); or that the offense had been committed on the high seas (U. S. *v.* Keefe, 26 Fed. Cas. No. 15,509, 3 Mason 475, holding that when, in an indictment for an endeavor to commit a revolt, it is averred to be on the high seas, the allegation is not material to be proved; and if the offense is proved to have been committed in a foreign port it is sufficient).

**Defenses.**— Seamen who lawfully refuse to go to sea having reason to believe that the vessel is unseaworthy are not guilty of an endeavor to make a revolt (U. S. *v.* Nye, 27 Fed. Cas. No. 15,906, 2 Curt. 225, holding that seamen may refuse to go to sea in an unseaworthy vessel after the voyage is begun), nor is it a crime for them to combine to force the master to return to port when they in good faith believe that the vessel is unseaworthy, and have reasonable grounds for so believing (U. S. *v.* Ashton, 24 Fed. Cas. No. 14,470, 2 Sumn. 13), the burden of proving the ship unseaworthy, or that they had reasonable grounds for believing that it was unseaworthy, being upon the seamen (U. S. *v.* Nye, *supra*). So too is it their right to take measures to protect one of their number, when they justifiably believe that a great wrong is about to be inflicted upon him by the captain. U. S. *v.* Borden, 24 Fed. Cas. No. 14,625, 1 Sprague 374. But see U. S. *v.* Morrison, 26 Fed. Cas. No. 15,818, 1 Sumn. 448, holding that interposition of a crew, by violence and intimidation, whereby the master was compelled to desist from punishing a seaman for gross misbehavior, was an endeavor to commit a revolt. And they may lawfully refuse to obey orders when the master has deviated from the voyage as defined in the shipping articles. U. S. *v.* Lynch, 26 Fed. Cas. No. 15,648 (holding, however, that seamen, defending against a prosecution for endeavoring to commit a revolt, on the ground that they were ordered to go on a voyage for which they were not bound by the shipping articles, must show that they made the objection at the time of disobedience); U. S. *v.* Matthews, 26 Fed. Cas. No. 15,742, 2 Sumn. 470; U. S. *v.* White, 28 Fed. Cas. No. 16,683. But the fact that there is a change of masters could not justify them in refusing to obey the new master. U. S. *v.* Haines, 26 Fed. Cas. No. 15,275, 5 Mason 272.

**Venue.**— The courts for the district into which seamen, brought into this country charged with an endeavor to make a revolt, are first brought have jurisdiction to try them. U. S. *v.* Crawford, 25 Fed. Cas. No. 14,890, holding, however, that the objection that the district in which seamen indicted for endeavoring to make a mutiny and revolt were tried was not the district in which

it must be shown that the accused was a member of the crew [78] of an American vessel,[77] and that on the high seas or other waters within the admiralty jurisdiction of the United States he combined, conspired, or confederated with some other person on board to make revolt or mutiny; [78] or that he solicited, incited, or stirred up some one of the crew to disobey or resist the lawful orders of the master or other officer of such vessel; [79] or with other members of the crew assembled in a tumultuous and mutinous manner.[80]

**C. Desertion.**[81] By statute in the United States [82] it is an offense punishable by imprisonment for a seaman to desert. The statute applies only to seamen shipped in the United States,[83] and does not apply to coastwise service.[84] The

they were first brought and apprehended cannot be taken for the first time on motion in arrest of judgment.

**78.** U. S. *v.* Huff, 13 Fed. 630 (holding, however, that the mate and other officers inferior to the master are members of the crew, within the meaning of the act, and that a mate displaced by the captain is not released from the operation of the statute while he remains on board the vessel); U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305 (holding, however, that foreign seamen on board American vessels are as much subject to punishment for acts of revolt, or attempts to commit revolts, as Americans).

**Shipping articles are not admissible in evidence** upon the trial of an endeavor to commit a revolt, for the purpose of proving that a seaman was a member of the crew, unless the handwriting of the prisoner is proved. U. S. *v.* Doughty, 25 Fed. Cas. No. 14,987.

**On an indictment under the act of 1790,** the statute by which an endeavor to make a revolt was first made a crime, seamen of the United States put on board a vessel of the United States by a consul were held to be seamen within the meaning of the act. U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118.

**77.** U. S. *v.* Jenkins, 26 Fed. Cas. No. 15,473*a* (holding that a vessel not enrolled and not licensed is not an American vessel within the meaning of the term as used in the statute, and that therefore a crew on board her cannot be convicted of an endeavor to make a revolt); U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118 (indictment for confining the master). See U. S. *v.* Rogers, 27 Fed. Cas. No. 16,189, 3 Sumn. 342.

**Evidence of nationality.**— To maintain an indictment for a revolt on board of an American vessel in a foreign port, it is not necessary to give documentary proof establishing the national character of the vessel, but it is sufficient to prove orally that she is owned by American citizens. U. S. *v.* Crawford, 25 Fed. Cas. No. 14,890; U. S. *v.* Seagrist, 27 Fed. Cas. No. 16,245, 4 Blatchf. 420. The ownership of the vessel determines her national character, and the ownership may be proved in the same manner as that of any other chattel, and it is not necessary for the public prosecutor to produce any documentary evidence. U. S. *v.* Jenkins, 26 Fed. Cas. No. 15,473*a*. To render a vessel American, so as to punish offenses on board of her, it is enough to show that she sailed to an American port, and was apparently owned and controlled by citizens of the United States. U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

**78.** U. S. *v.* Cassedy, 25 Fed. Cas. No. 14,745, 2 Sumn. 582; U. S. *v.* Nye, 27 Fed. Cas. No. 15,906, 2 Curt. 225 (holding that a combination by the crew to prevent a vessel from going to sea pursuant to the order of the master was an attempt to make a revolt); U. S. *v.* Roberts, 27 Fed. Cas. No. 16,173 (holding that a seaman who came on deck to ascertain the cause of a disturbance and refused to go below when ordered by the master may be punished for an endeavor to make a revolt).

**79.** U. S. *v.* Lynch, 26 Fed. Cas. No. 15,648, holding that where a vessel has cleared at the custom-house and is ready for sea with crew on board, the pilot, in the absence of the master and mate, is an officer of the vessel, and that a seaman was guilty of an endeavor to make a revolt where he solicited any of the crew to disobey or resist him.

**80.** U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

**81.** "Desertion" defined see 14 Cyc. 227.

**82.** U. S. Rev. St. (1878) § 4596 [U. S. Comp. St. (1901) p. 3113].

**Jurisdiction of United States commissioners.**— The act of congress of 1842 (5 U. S. St. at L. 516) conferring upon United States commissioners the power conferred upon justices of the peace in an act of congress of Sept. 24, 1789 (1 U. S. St. at L. 9), did not confer upon them the power to try deserting seamen. *Ex p.* Crandall, 2 Cal. 144, holding that under the acts of congress justices of the peace have and commissioners of the United States have not the power to arrest, try, and convict deserting seamen, but that the latter officers can only arrest and commit for trial.

**83.** Com. *v.* Holloway, 1 Serg. & R. (Pa.) 392.

**Formerly** the act of congress (1 U. S. St. at L. 131) which regulated seamen in the merchant service did not apply to foreign seamen on board foreign ships, and hence there was no authority under which deserting seamen could be committed by officers of the United States. *Ex p.* D'Olivera, 7 Fed. Cas. No. 3,967, 1 Gall. 474. But see Com. *v.* Holloway, 1 Serg. & R. (Pa.) 392.

**84.** U. S. *v.* Mason, 34 Fed. 129, 13 Sawy.

return of foreign seamen deserting in ports of the United States is regulated by statute,[85] and treaties with the different countries.[86]

**D. Harboring Deserting Seamen.** Formerly by the act of July 20, 1790,[87] a penalty was imposed upon every person who harbored or secreted a seaman who belonged to any vessel, knowing that he belonged to the vessel, recoverable one half to the person prosecuting for it and one half to the United States. The statute has since been repealed, however, by act of December 21, 1896.[88] Harboring deserting seamen is also made an offense by statute in some of the states.[89]

**E. Advances.** In the United States by statute,[90] it is a misdemeanor to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, unless the seaman has stipulated in his shipping agreement for an allotment of any portion of his wages, not exceeding one month's, to be paid an original creditor for board or clothing.[91] The statute is applicable to seamen shipping on foreign vessels,[92] provided treaties in force between the United States and foreign nations do not conflict;[93] but the general purposes of the act, as well as some of its specific provisions and its necessary results, are held to indicate an intention to exclude from its operation shipments of seamen in foreign ports,[94] and the act does not apply to steamboats engaged in trade and navigating the inland waters of the United States.[95] The advance payment of wages to a seaman does not render the contract for service made by the shipping articles void, where it is not shown that the unlawful payment entered into the contract as one of the things agreed on by the parties.[96] An authorized advance may be offset in an action for wages,[97]

218; U. S. *v.* Buckley, 31 Fed. 804, 12 Sawy. 108; U. S. *v.* Bain, 5 Fed. 192.

**Enticement of a member of the crew to desert** the vessel wrongfully is in some of the jurisdictions made a statutory offense. See the statutes of the several states. And see Com. *v.* Bartlett, 190 Mass. 148, 76 N. E. 607.

**85.** U. S. Rev. St. (1878) § 5280 [U. S. Comp. St. (1901) p. 3598].

**86.** Power to return them rests in officers of the United States not in state officers (Matter of Leon, 1 Edm. Sel. Cas. (N. Y.) 311), and they are to be returned to the consul of the country to which the seamen belong (U. S. *v.* Kelly, 108 Fed. 538), who must apply in writing, stating that the seamen deserted while in a port of the United States (*In re* Bruni, 1 Barb. (N. Y.) 193), and must prove by the register of the vessel or other official document that the alleged deserter belonged at the time of the desertion to the crew of the vessel (Tucker *v.* Alexandroff, 183 U. S. 424, 22 S. Ct. 195, 46 L. ed. 264 [*reversing* 107 Fed. 437, 48 C. C. A. 97]).

**87.** U. S. Rev. St. (1878) § 4601.

**Decisions under this statute** see U. S. *v.* Grant, 55 Fed. 414 [*reversed* in 58 Fed. 694, 7 C. C. A. 436]; U. S. *v.* Minges, 16 Fed. 657, 5 Hughes 494.

**88.** 30 U. S. St. at L. 764 [U. S. Comp. St. (1901) p. 3081].

**89.** See the statutes of the several states. And see Burns *v.* State, 73 Ga. 747 (holding that an indictment following the language of the statute is sufficient); *Ex p.* Young, 36 Oreg. 247, 59 Pac. 707, 48 L. R. A. 153 (holding that it is within the power of the state to enact such statute); State *v.* Cordes, Rice (S. C.) 152, Dudley 225.

**90.** 23 U. S. St. at L. 55, c. 121, § 10, amended by 24 U. S. St. at L. 80, c. 421, § 3, and 30 U. S. St. at L. 763, c. 28, § 24 [U. S. Comp. St. (1901) p. 3079].

**This is a valid exercise of the power of congress to regulate commerce.**— Patterson *v.* The Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. ed. 1002.

**Cases discussing advances to seamen prior to the passage of the statute** see Fogg *v.* Sinclair, 5 Cush. (Mass.) 478; James *v.* Hogan, 1 Daly (N. Y.) 517; Backman *v.* Hanson, 2 E. D. Smith (N. Y.) 391; Woodside *v.* Pender, 2 E. D. Smith (N. Y.) 390; Martin *v.* Schouboe, Riley (S. C.) 240; Duncan *v.* Shaw, 19 Fed. 521; Greefe *v.* Cortis, 13 Fed. 299; Church *v.* The H. L. Scanton, 5 Fed. Cas. No. 2,710*a*; Smith *v.* Pendergast, 22 Fed. Cas. No. 13,090*a*.

**91.** U. S. *v.* Nelson, 100 Fed. 125.

**Writing held not to be an assignment for wages within the meaning of the act** see The George W. Wells, 118 Fed. 761.

**Allotments are not allowed in coastwise shipments.**— Grossett *v.* Townsend, 86 Fed. 908, 30 C. C. A. 457. *Compare* Martial *v.* The Eclipse, 53 Fed. 273 [*affirmed* in 60 Fed. 105, 8 C. C. A. 505].

**92.** Patterson *v.* The Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. ed. 1002; U. S. *v.* Nelson, 100 Fed. 125. But see Levinshon *v.* Edwards, 79 Ala. 293.

**93.** U. S. *v.* Nelson, 100 Fed. 125.

**94.** The State of Maine, 22 Fed. 734.

**95.** U. S. *v.* King, 23 Fed. 138.

**96.** The Bound Brook, 146 Fed. 160.

**97.** The State of Maine, 22 Fed. 734.

but an unlawful advance cannot be availed of indirectly by way of offset or deduction.[98]

**F. Maltreatment of Crew.**[99] By the act of congress of March 3, 1835,[1] it was made a crime for a master or other officer [2] of an American vessel on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States, actuated by malice,[3] hatred, or revenge,[4] and without justifiable cause,[5] to beat, wound, or imprison any one of the crew,[6] or withhold from them food and nourishment or inflict upon them any cruel or unusual punishment.[7] The act of congress of September 28, 1850,[8] by which the punishment of flogging [9]

98. The Samuel E. Spring, 27 Fed. 764, holding that where, at the time of shipping, a seaman signs a written contract at a rate lower than that verbally agreed upon, and receives the difference as an advance, he is entitled, on completion of the voyage, to recover the amount verbally agreed to, without deduction of the sum advanced. And see Martial *v.* The Eclipse, 53 Fed. 273.

A custom of a particular port that a seaman's advance wages, due under shipping articles, shall be paid to the shipping agent, to be paid by him to the boarding-house keeper bringing the seamen, for his benefit, is unreasonable, and does not bind the seaman, although known to him at the time of signing the articles, and, if valid, would not be sustained by evidence that the shipping agent paid the wages to the boarding-house keeper, and charged them in account with the owner of the vessel. Metcalf *v.* Weld, 14 Gray (Mass.) 210.

99. Civil liability for punishment of seaman see *supra*, IX, B.

1. U. S. Rev. St. (1878) § 5347.

Amendment of the act of March 3, 1835.— The words "from malice, hatred, or revenge" as used in this act have been stricken out. 29 U. S. St. at L. 691 [U. S. Comp. St. (1901) p. 3631].

2. Officer.— One who, by authority, exercises control over the actions of the crew, or any part of them, by giving directions to their work is an "officer" within the meaning of this statute. And so where the roustabouts belonging to the crew of a steamboat were divided into watches, and one of their number was set over them as "captain of the watch" with power to direct their work and demand obedience to his orders, he was held to be an officer. U. S. *v.* Trice, 30 Fed. 490.

3. "Malice" as used in this statute means a wrongful act done intentionally, without just cause or excuse. U. S. *v.* Harriman, 26 Fed. Cas. No. 15,311, 1 Hughes 525; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584. Where a master is indicted for beating one of the crew under this statute and it appears that the master knew that the punishment inflicted by him was illegal and prohibited by law, and that he inflicted the punishment intending to take the consequences, the master will be regarded as having acted maliciously. U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501, holding that it was incumbent upon the government to prove that the act was malicious and that it was a wilful departure from a known duty.

4. Question for jury.— In a prosecution of a captain for imprisoning a seaman "from malice, hatred and revenge," where the mode of punishment is unjustifiable, the question whether it was from malice, hatred, or revenge is a question of fact, to be determined by the jury. U. S. *v.* Alden, 24 Fed. Cas. No. 14,427, 1 Sprague 95.

5. Justifiable cause.— It is incumbent upon the government in a prosecution under this statute to show that the act was without justifiable cause. U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584. Where a certain method of punishment is prohibited by law, if it is inflicted, it is inflicted without justifiable cause, and so when on the trial of an indictment under this statute for beating one of the crew it was contended by the prosecution that the punishment inflicted was flogging, and it appeared that flogging had been abolished by the act of Sept. 28, 1850 (9 U. S. St. at L. 515) it was said that the only question for the jury to decide was whether the punishment was flogging. U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501.

6. Crew.— The word "crew" is intended to include the officers, as well as the common seamen, and a master is liable under the statute for the imprisonment of the first mate of his ship. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209. However, one who secretes himself on board a vessel before sailing and discovers himself after the vessel is at sea is not one of the crew, although the master requires him to work, as a condition for his having food, and he does work. U. S. *v.* Small, 27 Fed. Cas. No. 16,314, 2 Curt. 241.

7. Cruel and unusual punishment.— Flogging, although prohibited by statute, is not a cruel and unusual punishment within the meaning of this statute. U. S. *v.* Collins, 25 Fed. Cas. No. 14,836, 2 Curt. 194.

8. U. S. Rev. St. (1878) § 4611 [U. S. Comp. St. (1901) p. 3120].

9. Flogging.— Flogging as practised in the navy and merchant marine acquired a certain recognized meaning, viz., punishment by a cat o' nine tails or other instrument capable of inflicting the same kind of punishment. *In re* Charge to Grand Jury, 20 Fed. Cas. No. 18,249, 1 Curt. 509. Any punishment which in substance and effect amounts to corporal punishment by stripes inflicted with a cat is within the provision of the statute, irrespective of the degree of the punishment

in the navy and on board vessels of commerce [10] was abolished, was not a penal law, and no indictment could be framed under it.[11]

**G. Forcing or Leaving Seamen on Shore.** By the act of congress of March 3, 1825,[12] punishment is provided for every master or commander of any vessel belonging in whole or in part to a citizen of the United States, who, during his absence abroad, maliciously,[13] and without justifiable cause,[14] forces [15] any officer or mariner [16] of such vessel on shore, in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return when he is ready to proceed on his homeward voyage.[17] Included in this act are three distinct and independent offenses: (1) The maliciously and without justifiable cause, forcing any officer or mariner on shore in any foreign port; (2) the maliciously and without justifiable cause leaving such officer or mariner behind in any foreign port; and (3) the maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return and willing to return on the homeward voyage.[18]

## XII. SHIPPING COMMISSIONERS.

Shipping commissioners are officers, originally appointed by the circuit courts,[19] but now appointed by the secretary of the treasury, for each port of entry which is also a port of ocean navigation and which in his judgment may require the same,[20] vested with certain powers and charged with the performance of certain duties in exercising a general supervisory authority over the contracts and welfare of seamen,[21] and the act of congress providing for their appointment forbids

inflicted. U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501.

**10. Vessels of commerce.**— Whaling ships are "vessels of commerce," within the meaning of this act abolishing the punishment of flogging. U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,249, 1 Curt. 509.

**11.** U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,249, 1 Curt. 509.

**12.** U. S. Rev. St. (1878) § 5363 [U. S. Comp. St. (1901) p. 3641].

**13. "Maliciously"** as used in this statute is said to mean with a wilful disregard of right and duty, or doing an act against a man's own conviction of duty. U. S. *v.* Lunt, 26 Fed. Cas. No. 15,642; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,205, 5 Mason 192.

**Malice an element of the offense.**— The master is not guilty under this statute, if he acts under an honest mistake of judgment and not from malice. U. S. *v.* Lunt, 26 Fed. Cas. No. 15,642.

**14. "Justifiable cause,"** as used in this statute, does not mean such a cause as, in the mere maritime law, might authorize a seaman's discharge, but a case of moral necessity for the safety of the ship and crew and the due performance of the voyage. U. S. *v.* Coffin, 25 Fed. Cas. No. 14,824, 1 Sumn. 394; U. S. *v.* Netcher, 27 Fed. Cas. No. 15,866, 1 Story 307; U. S. *v.* Ruggles, 27 Fed. Cas. No. 16,205, 5 Mason 192.

**A master may act on his own responsibility** in leaving men in foreign ports on account of misconduct. While it is proper for a master to take the advice of the consul as of any other judicious person, the opinion of the consul is only advice and not justification. U. S. *v.* Lunt, 26 Fed. Cas. No. 15,642.

**15. "Forces."**— To support an indictment against the master of a ship for maliciously forcing the mate on shore at a foreign port and leaving him there, it is not necessary to show the use of physical force against the mate if he left the ship under a well founded fear of danger to his life. U. S. *v.* Riddle, 27 Fed. Cas. No. 16,162, 4 Wash. 644.

**16. Foreign seamen.**— This act implies to all seamen constituting a part of the crew of an American ship whether foreigners or Americans. U. S. *v.* Coffin, 25 Fed. Cas. No. 14,824, 1 Sumn. 394.

**17. "Condition to return and willing to return."**— To complete the offense of maliciously and without justifiable cause forcing an officer or mariner on shore, or leaving him behind in a foreign port, it is not necessary that he should be in a condition to return, and willing to return. U. S. *v.* Netcher, 27 Fed. Cas. No. 15,866, 1 Story 307.

**18.** U. S. *v.* Netcher, 26 Fed. Cas. No. 15,866, 1 Story 307.

**19.** Young *v.* American Steamship Co., 105 U. S. 41, 26 L. ed. 966. See *In re* Shipping Com'rs, 20 Fed. 211.

**20.** U. S. Rev. St. (1878) § 4501, as amended by 23 U. S. St. at L. 59, c. 121, § 27 [U. S. Comp. St. (1901) p. 3062].

**The statute also authorizes him to remove from office** any such commissioner whom he may have reason to believe does not properly perform his duty, although originally the duty of removing shipping commissioners devolved upon the circuit courts. See *In re* Shipping Com'rs, 20 Fed. 211.

**21.** American Steamship Co. *v.* Young, 105

other persons, in certain cases, from performing the duties with which such commissioners are charged by the provisions of that act,[22] violation of the statute subjecting the offender to a penalty.[23] The manner of determining the fees and compensation of shipping commissioners is regulated by statutes.[24]

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**SEARCH.** The act of seeking or looking for something.[1] (Search: In General, see SEARCHES AND SEIZURES, *post*, p. 1263. Of Record, Fees For, see CLERKS OF COURTS, 7 Cyc. 211. Of Title, see ABSTRACTS OF TITLE, 1 Cyc. 212.)

U. S. 41, 26 L. ed. 906 [*affirming* 89 Pa. St. 186, 33 Am. Rep. 748]; U. S. *v.* Smith, 95 U. S. 536, 24 L. ed. 517; U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514.

An award by a shipping commissioner is not binding upon the parties unless made by authority of a submission in writing. The W. F. Babcock, 85 Fed. 978, 29 C. C. A. 514 [*reversing* 79 Fed. 92].

22. U. S. *v.* Smith, 95 U. S. 536, 24 L. ed. 517; U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514.

The cases in which shipping commissioners must act, or in which the agreement of the seaman is required to be signed in the presence of such a commissioner, are where the ship is bound from a port in the United States to a foreign port, not including the ports of the British provinces or the ports of the West Indies or the republic of Mexico, or lake-going vessels touching at foreign ports, and in the case of ships of seventy-five tons burden or upward bound from a port on the Atlantic to a port on the Pacific, or *vice versa*. U. S. *v.* The Grace Lothrop, 95 U. S. 527, 24 L. ed. 514. The act conferring power to appoint shipping commissioners does not apply to the shipping of seamen upon vessels engaged only in and for voyages coastwise between Atlantic ports of the United States (U. S. *v.* Smith, 95 U. S. 536, 24 L. ed. 517), to the West Indies (Burton *v.* Frye, 139 Mass. 131, 29 N. E. 476; U. S. *v.* The Grace Lothrop, *supra*), or to foreign vessels (The Montapedia, 14 Fed. 427).

The English Merchant Shipping Act of 1894 contains similar provisions. Reg. *v.* Stewart, [1899] 1 Q. B. 964, 8 Aspin. 534, 63 J. P. 547, 68 L. J. Q. B. 582, 80 L. T. Rep. N. S. 660, 15 T. L. R. 308, 47 Wkly. Rep. 445.

A shipping commissioner may appoint clerks to assist him in the transaction of the business of his office subject to the approval of the secretary of the treasury. *In re* New York Shipping Com'rs, 21 Fed. Cas. No. 12,793, 16 Blatchf. 92.

U. S. Rev. St. (1878) § 4609, providing a penalty for receiving any greater remuneration than authorized by law for procuring employment for seamen, is not applicable to seamen for whom employment is procured on a foreign vessel. U. S. *v.* Kellum, 7 Fed. 843, 19 Blatchf. 372, holding also that the statute is designed to permit a civil action for the penalties, with quasi-criminal procedure in enforcing the judgment, and an action is properly brought thereon in the name of the United States as plaintiff.

23. Young *v.* American Steamship Co., 105 U. S. 41, 26 L. ed. 966 [*affirming* 89 Pa. St. 186, 33 Am. Rep. 748]; U. S. *v.* Rose, 12 Fed. 576; U. S. *v.* Idell, 26 Fed. Cas. No. 15,436.

24. 23 U. S. St. at L. 59, c. 121, § 27 [U. S. Comp. St. (1901) p. 3061]. And see U. S. *v.* Reed, 167 U. S. 664, 17 S. Ct. 919, 42 L. ed. 317 [*affirming* 69 Fed. 841, 13 C. C. A. 682]; U. S. *v.* Gunnison, 155 U. S. 389, 15 S. Ct. 152, 39 L. ed. 195; Young *v.* American Steamship Co., 105 U. S. 41, 26 L. ed. 966 [*affirming* 89 Pa. St. 186, 33 Am. Rep. 748]; *In re* Accounts of Shipping Com'rs, 85 Fed. 683; *In re* New York Shipping Com'r, 21 Fed. Cas. No. 12,793, 16 Blatchf. 92.

Coastwise trade.— A vessel engaged in the carrying trade on a navigable river is held to be "engaged in the coastwise trade" within the meaning of 24 U. S. St. at L. 80, c. 421, § 2 [U. S. Comp. St. (1901) p. 3064], and the shipping commissioner is entitled to fees for shipping seamen on such vessel. Ravesies *v.* U. S., 37 Fed. 447 [*reversing* 35 Fed. 917].

1. Webster Dict. [*quoted* in Edwards *v.* Law, 46 Fla. 203, 204, 36 So. 569].

# SEARCHES AND SEIZURES

By George G. Calmes

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Exemplary Damages For Unlawful Search or Seizure, see DAMAGES, 13 Cyc. 111.
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Taking Property From One Arrested For Crime, see ARREST, 3 Cyc. 896.

## I. DEFINITIONS.

The term "search," as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged;[1] and a "seizure" is the act of taking possession of such property.[2]

1. Black L. Dict.
2. Black L. Dict.; Bouvier L. Dict.

## II. NATURE AND PURPOSE OF REMEDY.

Proceedings for the search and seizure of property stolen or illegally withheld vary according to the statutes of the several states. They are in most instances of a criminal nature and are usually ancillary to the prosecution of some particular offense, but may or may not be accompanied by a criminal prosecution depending upon the nature of the facts disclosed, if any.[3]

## III. SEARCH WARRANT.

**A. Definition.** A search warrant is generally defined to be an order in writing in the name of the state, signed by a magistrate and directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.[4]

**B. Constitutional and Statutory Provisions.** The danger of the use of a search warrant has been so clearly apprehended that constitutional barriers have been very generally erected against its abuse.[5] The statutes of all the states provide for the issuance, form, and execution of search warrants.[6]

**C. Necessity For.**[7] Nothing will justify searching a dwelling for stolen property without a warrant for that purpose,[8] unless made with the consent or by invitation of the owner.[9] Nor have officers the right to forcibly enter without a warrant a private club on suspicion that a misdemeanor is being committed or may be committed therein.[10] In some jurisdictions it has been held that while an officer may, by statute, without a warrant, make an arrest for a criminal offense committed in his presence, he has no authority on mere information or suspicion that a person is carrying a concealed weapon to arrest such person and search him without a warrant;[11] but where the statute requires that persons suspected

3. Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404; Cole *v.* Curtis, 16 Minn. 182.

4. Cal. Pen. Code (1903), § 1523; Ida. Pen. Code (1901), § 5783; Nev. Comp. Laws (1900), § 4595; N. Y. Code Cr. Proc. § 791; Okla. Rev. St. (1903) § 5670; S. D. Code Cr. Proc. (1903) § 594; Utah Rev. St. (1898) § 5081. See also *post*, p. 1277.

**In Texas,** a search warrant is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for personal property, to seize the same, and to bring it to such magistrate; or it is a like written order commanding a peace officer to search a suspected place, where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense. Tex. Code Cr. Proc. (1895) art. 343.

**By the common law** search warrants were never recognized as processes available in the course of civil proceedings or for the purpose of maintaining mere private rights, but their use was confined to cases of public prosecutions instituted and pursued for the suppression of crime and the detection and punishment of criminals, and while their legality was formally questioned, they gradually became engrafted into the law, and their legality has long since been established on the ground of public necessity. Robinson *v.* Richardson, 13 Gray (Mass.) 454 [*citing* Com. *v.* Dana, 2 Metc. (Mass.) 329]; Entick *v.* Carrington, 19 How. St. Tr. 1030, 2 Wils. C. P. 275, 95 Eng. Reprint 807. Such a warrant "is a sharp and heavy police weapon to be used most carefully lest it wound the security or liberty of the citizen. It was unknown to the early common law and came into use almost unnoticed in the troublous times of English history. Lord Coke denied its legality, but finally the courts and parliament, recognizing its great efficiency, contented themselves with carefully restricting and controlling its use (Entick *v.* Carrington, 19 How. St. Tr. 1030, 2 Wils. C. P. 275, 95 Eng. Reprint 807"). State *v.* Guthrie, 90 Me. 448, 450, 38 Atl. 368 [*quoted* in Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70].

5. Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70 [*quoting* State *v.* Guthrie, 90 Me. 448, 38 Atl. 368]. See U. S. Const. Amendm. art. 4; and the constitutional provisions of the several states.

6. See the statutes of the several states; and *infra*, III, D–F.

7. **To search for liquor** see INTOXICATING LIQUORS, 23 Cyc. 295.

**To seize forfeited property** see *infra*, IV.

8. McClung *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

9. Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. N. S. 1056. See also McClung *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

10. Fairmont Athletic Club *v.* Bingham, 61 Misc. (N. Y.) 419, 113 N. Y. Suppl. 905.

11. Picket *v.* State, 99 Ga. 12, 25 S. E. 608, 59 Am. St. Rep. 226; Stewart *v.* State, 2 Ga. App. 98, 58 S. E. 395; Hughes *v.* State,

of carrying concealed weapons be searched, the proper officer receiving information that a person is carrying a concealed weapon, contrary to the statute, is justified in searching him without a warrant.[12]

**D. Issuance — 1. In General.** Search warrants can only be issued upon probable cause supported by oath or affirmation;[13] and upon the grounds and in the manner prescribed by statute.[14]

**2. Who May Issue.** A justice of the peace or magistrate is the proper officer at common law to issue a search warrant.[15]

**E. Sufficiency — 1. In General.** The warrant must describe with particularity the place sought to be searched,[16] and the persons or things sought to be

2 Ga. App. 29, 58 S. E. 390; Hughes *v.* Com., 41 S. W. 294, 19 Ky. L. Rep. 497.

12. Keady *v.* People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353.

13. *Illinois.*—White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592]; Lippman *v.* People, 175 Ill. 101, 51 N. E. 872.

*Massachusetts.*— Com. *v.* Dana, 2 Metc. 329.

*Minnesota.*— Cole *v.* Curtis, 16 Minn. 182.

*Rhode Island.*— Humes *v.* Taber, 1 R. I. 464.

*South Carolina.*— State *v.* Wimbush, 9 Rich. 309.

*United States.*— *In re* Jackson, 96 U. S. 727, 24 L. ed. 877.

*Canada.*— See Mayer *v.* Vaughan, 11 Quebec Q. B. 340.

See 43 Cent. Dig. tit. "Searches and Seizures," § 2.

**Substantial conformance to the statute** is sufficient. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52, holding that where a statute requires that an affidavit shall be inserted in a complaint, before a warrant to search a dwelling-house shall issue, an oath, in the alternative, that the criminal act was done by defendant or by his consent is sufficient.

**A mere misrecital, which is an obvious** clerical error in the complaint or affidavit, is not fatal. Com. *v.* Certain Intoxicating Liquors, 13 Allen (Mass.) 52.

**An affidavit that affiant "believes"** that certain forged instruments are concealed on the premises, because his agent so reported to him, is not sufficient, within Ill. Cr. Code, c. 38, div. 8, § 2, requiring the court to be "satisfied that there is reasonable cause," because it fails to state facts on which his belief is founded. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592].

**A complaint made on oath or affirmation** was defective, because the words "has cause to suspect and does suspect" were used, since they were not equivalent to the word "believes," used in the statute, and because the place was not sufficiently described therein as required by the statute. Humes *v.* Taber, 1 R. I. 464.

14. See cases cited *supra*, note 13.

**Sufficiency of warrant** see *infra*, III, E.

15. People *v.* Holcomb, 3 Park. Cr. (N. Y.) 656, 2 Hale P. Cr. 149.

**Where the power has been expressly conferred by statute** upon a justice and a police judge is vested with all the powers and authority of such justice except in civil cases, a police judge is thereby authorized to issue search warrants, and jurisdiction extends throughout the county where the law directs the process to be executed by the sheriff or any constable of the county. O'Meara *v.* Merritt, 128 Mich. 249, 87 N. W. 197.

16. *Alabama.*— Thrash *v.* Bennett, 57 Ala. 156.

*Connecticut.*— Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Frisbie *v.* Butler, Kirby 213.

*Indiana.*— Tuell *v.* Wrink, 6 Blackf. 249.

*Kentucky.*— Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

*Louisiana.*— Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

*Maine.*— State *v.* Duane, 100 Me. 447, 62 Atl. 80.

*Massachusetts.*— Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151.

*New Hampshire.*— Metcalf *v.* Weed, 66 N. H. 176, 19 Atl. 1091.

*New York.*— People *v.* Holcomb, 3 Park. Cr. 656.

*North Dakota.*— State *v.* McNulty, 7 N. D. 169, 73 N. W. 87.

*Rhode Island.*— *In re* Horgan, 16 R. I. 542, 18 Atl. 279; Humes *v.* Taber, 1 R. I. 464.

*Wisconsin.*— Ashley *v.* Peterson, 25 Wis. 621.

*Canada.*— McLeod *v.* Campbell, 26 Nova Scotia 458.

See 43 Cent. Dig. tit. "Searches and Seizures," § 2.

**A warrant authorizing the search of any suspected places** was held to be too general. People *v.* Holcomb, 3 Park. Cr. (N. Y.) 656.

**A warrant to search the dwelling-house of** a person only authorizes a search of the house in which such person lives, and not a house hired and occupied by another, although owned by such person. Humes *v.* Taber, 1 R. I. 464.

**Where, in separate rooms of the same** building, two different lines of business are transacted, one lawful and the other unlawful, and the warrant directs the seizure of property on the "premises" where the unlawful business is carried on, it must be confined to the rooms used in that business. State *v.* McNulty, 7 N. D. 169, 73 N. W. 87.

**Warrants held sufficient** see State *v.* Moore, 125 Iowa 749, 101 N. W. 732; Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6; Dwinnels *v.* Boynton, 3 Allen (Mass.) 310; Com. *v.*

seized.[17] Where a search warrant directs the search of certain premises for the discovery of property, a further provision commanding search of the person of the one against whom it is directed may be regarded as surplusage.[18] At common law it seems to have been necessary to the sufficiency of a search warrant to command that the goods together with the person in whose possession they were found when taken should be brought before the magistrate and after an examination of the facts be disposed of according to law.[19]

**2. Conformity to Constitutional and Statutory Provisions.** The warrant must conform strictly to the requirements of the constitutional provision or statute under which it is issued, otherwise it is void;[20] and it is likewise void if it does not command such officer to bring such goods or other personal property before the judge or justice issuing the warrant or some other judge, justice, or court designated in the statute having cognizance of the case.[21]

**F. Execution of — 1. Who May Execute.** At common law a justice may direct his warrant to or depute any private person to execute it, and it has been held by the courts of this country that such right extends to search warrants, unless expressly restrained or taken away by statute,[22] in which event it should be

Dana, 2 Metc. (Mass.) 329; State *v.* Markuson, 7 N. D. 155, 73 N. W. 82; Meek *v.* Pierce, 19 Wis. 300.

**The warrant may refer to an annexed complaint** for a description of the premises. Dwinnels *v.* Boynton, 3 Allen (Mass.) 310; Com. *v.* Dana, 2 Metc. (Mass.) 329.

**More than one place** see State *v.* Duane, 100 Me. 447, 62 Atl. 80, holding that a single search warrant cannot be lawfully issued to search more than one place, under Const. art. 1, § 5.

**That it is a question of fact** whether the premises to be searched are described with reasonable certainty see Metcalf *v.* Weed, 66 N. H. 176, 19 Atl. 1091.

17. *Alabama.*— Thrash *v.* Bennett, 57 Ala. 156.

*Connecticut.*—Frisbie *v.* Butler, Kirby 213.

*Kentucky.*— Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

*Massachusetts.*— Stone *v.* Dana, 5 Metc. 98; Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151.

*New York.*— Bell *v.* Clapp, 10 Johns. 263, 6 Am. Dec. 339.

*North Dakota.*—State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

*Ohio.*— Dougherty *v.* Gilbert, Tapp. 38.

*Pennsylvania.*— Moore *v.* Coxe, 10 Wkly. Notes Cas. 135.

*Vermont.*— State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

*United States.*— *In re* Jackson, 96 U. S. 727, 24 L. ed. 877.

See 43 Cent. Dig. tit. "Searches and Seizures," § 2.

**Although not naming the person against whom it is issued** the warrant is valid if he is sufficiently described and it is stated that his name is unknown. Dougherty *v.* Gilbert, Tapp. (Ohio) 38.

**"Goods, wares, and merchandise"** is sufficient as describing the goods to be searched for. Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151.

**If a description is as particular as the circumstances of the case will ordinarily permit, it is sufficient to satisfy the constitutional requirement.** State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

**The warrant may refer to the annexed complaint** for the description of the property to be seized, where the complaint contains a sufficient description. Dwinnels *v.* Boynton, 3 Allen (Mass.) 310. See *supra*, note 16.

**The warrant need not state who is the owner of the goods sought, and it may contain a direction to arrest the person in whose possession the goods are found.** Bell *v.* Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

18. State *v.* Moore, 125 Iowa 749, 101 N. W. 732.

19. Robinson *v.* Richardson, 13 Gray (Mass.) 454; People *v.* Holcomb, 3 Park. Cr. (N. Y.) 656 [*citing* 2 Hale Pl. Cr. 149; Bouvier L. Dict.].

20. Early *v.* People, 117 Ill. App. 608, holding that a search warrant that fails to require the officer to whom it is directed to bring before the justice issuing it the person in possession of the goods seized is illegal and void, even though such person puts in an appearance.

21. *Illinois.*—White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60; Early *v.* People, 117 Ill. App. 608.

*Louisiana.*— Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

*Maine.*— State *v.* Whalen, 85 Me. 469, 27 Atl. 348; State *v.* Leach, 38 Me. 432.

*New Hampshire.*— State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398; Hussey *v.* Davis, 58 N. H. 317.

*West Virginia.*—Byrnside *v.* Burdett, 15 W. Va. 702.

See 43 Cent. Dig. tit. "Searches and Seizures," §§ 2, 3.

**A warrant which fails to require the officer to make return of his proceedings thereon** with an inventory is insufficient, and a return showing an inventory embraced therein is not justified. Hussey *v.* Davis, 58 N. H. 317.

22. Miller *v.* Hogeboom, 56 Nebr. 434, 76

directed to the officer designated in such statute,[23] and if any other person undertake to execute it the warrant will afford him no protection.[24]

**2. Mode of Execution.** The officer, for the purpose of executing such warrant, may enter in the daytime the house described therein,[25] and should it become necessary, as where he is refused admittance, he may break and enter the premises and seize the property.[26] It has been held that where the statute provides that the warrant shall not be used to search a dwelling in the night-time, an arrest under such warrant is not illegal if made in the night-time, provided the house of the party arrested had not been entered.[27]

**G. Service and Return.** A search warrant must be executed within a reasonable time, the length of such time being a question of law for the court to determine in each case according to the circumstances.[28] There can be no proper return of the warrant, except to the justice by whom it is issued, unless the warrant expressly permits a return before some other justice.[29] It has been held that the state cannot contradict the return of its officer.[30]

**H. Disposition of Property Stolen.** It has been held that a magistrate issuing a search warrant on the ground that the property was stolen has jurisdiction to dispose of the property seized thereunder, although there is no criminal prosecution for the larceny.[31] By statute the person in whose possession such stolen goods are found may retain them until the trial before the justice, upon giving security to produce them at that time.[32]

**I. Certiorari to Review Proceedings.** It has been held that in search warrant proceedings the action of the magistrate cannot, in the absence of a statute, be stayed or reviewed by a writ of certiorari;[33] but the contrary has also been held in Illinois.[34]

## IV. Seizure Proceedings Against Property Forfeited.

Where the use of certain articles, although treated as property and employed for lawful purposes, are considered harmful to the welfare of the community, they may be forfeited and destroyed under proper statutory provisions, and where an attempt is made to secretly or clandestinely divert them to unlawful purposes so that ordinary diligence cannot discover such attempt, in order that the law may declare the forfeiture, statutes authorizing searches and seizures have been held proper, and proceedings *in rem* may be enforced against such articles seized,

N. W. 888 [*citing* Rex *v.* Kendal, 1 Ld. Raym. 65, 91 Eng. Reprint 939]; Meek *v.* Pierce, 19 Wis. 300.

**23.** Halsted *v.* Brice, 13 Mo. 171; People *v.* Holcomb, 3 Park. Cr. (N. Y.) 656; Meek *v.* Pierce, 19 Wis. 300; Jones *v.* Ross, 3 U. C. Q. B. 328.

**24.** Halsted *v.* Brice, 13 Mo. 171, where the justice deputized one not a public officer.

**25.** Beaty *v.* Perkins, 6 Wend. (N. Y.) 382; Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

**26.** Banks *v.* Farwell, 21 Pick. (Mass.) 156.

**By N. Y. Code Cr. Proc. § 799, an officer** may not break into a place under a search warrant, unless, after due notice of his authority and purpose, he is refused admittance. Phelps *v.* McAdoo, 47 Misc. 524, 94 N. Y. Suppl. 265. *Compare* Wells *v.* Hubbard, 29 Fed. Cas. No. 17,397, 2 Cranch C. C. 292, holding that a constable in the District of Columbia becomes a trespasser who breaks into a dwelling-house under a warrant from a justice of the peace to search for goods clandestinely removed by a tenant to deprive his landlord of his remedy by distress for rent.

**27.** Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344.

**28.** State *v.* Guthrie, 90 Me. 448, 38 Atl. 368.

**29.** Com. *v.* Certain Intoxicating Liquors, 130 Mass. 29.

**Under Massachusetts statute** see Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

**30.** State *v.* Kenniston, 67 Me. 558.

**31.** Haworth *v.* Newell, 102 Iowa 541, 71 N. W. 404.

**32.** Com. *v.* Thompson, 9 Pa. Dist. 559, 24 Pa. Co. Ct. 179, construing Pennsylvania act of March 31, 1860, section 5.

**Restitution of stolen property** see Larceny, 25 Cyc. 54.

**33.** Farrow *v.* Springer, 57 N. J. L. 353, 31 Atl. 215.

**34.** White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592], holding that the common-law certiorari will lie where the justice has exceeded his jurisdiction or has proceeded illegally, and there can be no appeal or writ of error.

even without the knowledge or consent of the true owner;[35] and laws that provide for the search and seizure of articles or other things which it is unlawful for a person to have in his possession, for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, forged instruments, gambling devices, etc., have been upheld by the courts.[36] Moreover, reasonable ordinances may be passed by municipal corporations for such searches and seizures.[37] Statutes of this kind authorizing unreasonable searches and seizures repugnant to the declaration of rights or constitution are void.[38] The process of search, seizure, and forfeiture is subject to strict construction, and to enforce forfeitures in forfeiture proceedings the most rigid compliance with the law is required.[39]

## V. UNREASONABLE SEARCHES AND SEIZURES.

**A. In General.** The protection of the people against unreasonable searches and seizures of both persons and property are guaranteed, as has been seen, by the constitution of the United States and the bill of rights of most of the states.[40]

**B. Constitutional Limitation Upon Federal Powers — 1. In General.** The fourth amendment to the constitution of the United States declaring that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated" is not a limitation upon the powers of the states, but operates solely on the federal government.[41] This amendment and the following or fifth constitutional amendment, which protects persons against being compelled to be witnesses against themselves in criminal cases, may be invoked in behalf of aliens residing in the United States,[42]

35. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173; Gray *v.* Kimball, 42 Me. 299; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381.

36. Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Com. *v.* Dana, 2 Metc. (Mass.) 329; Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746. See also FORFEITURES, 19 Cyc. 1359.

Ill. Rev. St. (1893) c. 38, div. 8, authorizing the issuance of search warrants for the recovery of stolen property, counterfeit coin, obscene literature, etc., and which provides that such property, if found, and the person in whose possession it is found, shall be brought before the judge or justice who issued the warrant, is not unconstitutional. Glennon *v.* Britton, 155 Ill. 232, 40 N. E. 594.

The constitutional right to be secure against unreasonableness searches and seizures is not violated by the seizure of a warrant of requisition based upon a forged certificate. Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

37. State *v.* Newman, 96 Wis. 258, 71 N. W. 438, holding that an ordinance providing that, on complaint upon oath that gambling is carried on in any building, a warrant shall be issued commanding the officer to enter such building, arrest all persons therein, and take possession of all gambling implements found therein, and that such implements shall be destroyed if, on a trial of whether they are gambling implements, they be found to be so, does not violate Const. art. 1, § 11. See also MUNICIPAL CORPORATIONS, 28 Cyc. 761.

38. Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381, holding that St. (1852) c. 322, § 14, concerning the sale of spirituous liquors, is in conflict with article 14 of the Declaration of Rights.

39. State *v.* Therrien, 86 Me. 425, 29 Atl. 1117; State *v.* Whalen, 85 Me. 469, 27 Atl. 348; Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398.

Under N. H. Bill of Rights, art. 19, prohibiting unreasonable searches and seizures, a warrant to search for and seize certain spirituous liquor for the purpose of forfeiting it was invalid where the complaint on which it was founded contained no allegation that such liquor was kept for sale in violation of law. State *v.* Spirituous Liquors, 68 N. H. 47, 40 Atl. 398.

40. See *supra*, III, B.

Licenses as unreasonable searches and seizures see LICENSES, 25 Cyc. 604.

41. *Arkansas.*— Hammond Packing Co. *v.* State, 81 Ark. 519, 100 S. W. 407, 126 Am. St. Rep. 1047.

*Illinois.*— Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085.

*Indiana.*—Coöperative Building, etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146.

*South Carolina.*— State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

*South Dakota.*— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

*United States.*— U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

See 43 Cent. Dig. tit. "Searches and Seizures," § 5.

42. U. S. *v.* Wong Quong Wong, 94 Fed. 832.

and they also protect persons, not only from the unreasonable seizure of their private papers, but from the use of such papers, when unlawfully seized, as evidence against them in cases involving a forfeiture of their property or personal rights.[43]

**2. Sealed Mail Matter Protected Against Inspection.** The constitutional guaranty extends to letters, and sealed packages subject to letter postage, in the mail wherever they may be.[44]

**3. Military Order Authorizing Arrest.** A military order authorizing the arrest of persons discouraging enlistments, without complaint or warrant, is also in contravention of such fourth amendment;[45] but an officer does not violate such provision in seizing property of a person for the sole purpose of effecting his arrest while seeking to evade a draft made under a military order authorized by the constitution of the United States.[46]

**4. Production and Examination of Books and Papers.** The Revenue Act[47] authorizing an order in revenue cases requiring defendant or claimant to produce his private books, invoices, and papers, or else the allegations of the government attorney will be taken as confessed, has been held to violate the fourth amendment of the federal constitution.[48] On the other hand it has been held that the Revenue Act,[49] giving a supervisor of internal revenue the right to examine such books and papers belonging to banks and banking associations relating to their operations with the public, and connected with the internal revenue of the United States,[50] and authorizing such supervisor to summon persons chargeable with a tax to come before him and testify under oath and produce their books and papers[51] is not unconstitutional, as it does not violate either of these amendments.

43. U. S. *v.* Wong Quong Wong, 94 Fed. 832 [*citing* People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746].

**Seizure of infringing copies.**—Constitutional rights of a corporate defendant in an action for the forfeiture of infringing copies of a painting protected by copyright are not violated by the admission in evidence of the replevin proceedings under which such infringing copies were seized, over the objection that, by such proceedings, rights under the 4th and 5th amendments to the federal constitution were invaded. American Tobacco Co. *v.* Werckmeister, 207 U. S. 284, 52 L. ed. 208 [*affirming* 146 Fed. 375, 76 C. C. A. 647, and *following* Hale *v.* Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652 (*affirming* 139 Fed. 496); Adams *v.* New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575 (*affirming* 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 17 N. Y. Cr. 443, 83 N. Y. Suppl. 481)].

**Question determined upon motion before trial.**—The right of a defendant in a criminal case to a return of property held by the district attorney and alleged to have been obtained as the result of an unconstitutional search and seizure, and which includes papers intended to be used as evidence on the trial in alleged violation of defendant's rights under the fifth constitutional amendment, may, it has been held, be determined by the court in advance of the trial on a motion made on his behalf for the purpose. U. S. *v.* Wilson, 163 Fed. 338.

44. *In re* Jackson, 96 U. S. 727, 24 L. ed. 877.

**Such mail matter can only be opened and examined** under a warrant issued upon oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. *In re* Jackson, 96 U. S. 727, 24 L. ed. 877.

**Refusal by a postmaster to deliver mail matter** addressed to a private person, who is a citizen of the United States, and the return of such mail to the sender, or to the dead letter office, without regard to whether it is non-mailable, although done in pursuance of an executive order of the postmaster-general, on a determination by him that the person to whom such mail is addressed is using the mails for unlawful purposes, is a violation of the fourth amendment to the constitution. Hoover *v.* McChesney, 81 Fed. 472.

45. *Ex p.* Field, 9 Fed. Cas. No. 4,761, 5 Blatchf. 63.

46. Allen *v.* Colby, 47 N. H. 544.

**Searching private house for deserter** see Arrest, 3 Cyc. 893.

47. 18 U. S. St. at L. p. 186, c. 391 [U. S. Comp. St. (1901) p. 2018].

48. Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746 [*overruling* U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483], the purpose of requiring such production of books, papers, etc., being either to establish a criminal charge against defendant or have his property forfeited.

49. 15 U. S. St. at L. p. 144, c. 186, § 49.

50. Stanwood *v.* Green, 22 Fed. Cas. No. 13,301, 2 Abb. 184.

51. *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317.

Likewise the examination of the books of a person by an assessor of internal revenue [52] is not an infringement of the fourth amendment.[53]

**5. Examination of Witness Before Senate.** It has also been held to be no invasion of such protection to require a member of a stock brokerage firm to state before a committee of the United States senate appointed to investigate charges as to alleged dealings of senators in stocks, whether or not any of them had bought or sold such stocks through his firm.[54]

**6. Production of Books, Etc., of Corporation Before Grand Jury.** But this protection cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpœna *duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the Anti-Trust Act [55] by such corporation.[56] Such corporation, however, is entitled to immunity where the requirement is unreasonable, as in the case of a mass of documentary matter to be produced when its materiality or the necessity for its production is not shown.[57]

**7. Production of Documents Before Interstate Commerce Commission.** The compulsory production of documentary evidence in a proceeding before the Interstate Commerce Commission on a complaint alleging violations by railroad companies of the Interstate Commerce Act [58] does not infringe the provision against such unreasonable searches and seizures.[59]

**8. Confidential Conversations Between Husband and Wife.** It has been held that to compel the wife of a bankrupt to disclose confidential communications made to her by her husband in regard to his property or his income would violate the fourth amendment to the federal constitution.[60]

**C. Constitutional Limitation Upon State Powers — 1. Procuring Evidence of Criminality.** It is well settled that a person legally arrested and in the custody of the law on a criminal charge may be subjected to a personal search and examination, even though against his will, for evidence of his criminality, and, if found, it may be seized without violating his constitutional rights.[61] And

52. 14 U. S. St. at L. p. 101, c. 184, § 9.

53. *In re* Strouse, 23 Fed. Cas. No. 13,548, 1 Sawy. 605 [*citing In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317].

54. *In re* Chapman, 166 U. S. 661, 17 S. Ct. 677, 41 L. ed. 1154.

55. 26 U. S. St. at L. p. 209, c. 647 [U. S. Comp. St. (1901) p. 3200].

**A subpœna duces tecum, directed to an officer of a railroad corporation,** requiring him to appear before a federal grand jury and produce certain records of the railroad company relating to freight claims, is not an unreasonable requirement. Santa Fe Pac. R. Co. *v.* Davidson, 149 Fed. 603.

56. Hale *v.* Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652 [*affirming* 139 Fed. 496].

**Violation of state penal law** has been held to bring a corporation within the same rule. Consolidated Rendering Co. *v.* State, 207 U. S. 541, 52 L. ed. 327 [*affirming* 80 Vt. 55, 66 Atl. 790], holding that an unreasonable search and seizure of the private books and documents of a corporation doing business in the state is not made by the proceedings under the Vermont act of Oct. 9, 1906, to compel the production before a grand jury of material books and papers called for by a notice limited to such books or papers as relate to or concern any dealings or business between Jan. 1, 1904, and the date of the notice, Oct. 10, 1906, with the parties named therein, who were cattle commissioners of the state, to be used relative to the matter of a complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with having unlawfully sold diseased meat for food purposes at Burlington, Vermont, the notice also giving in detail the dates and amounts of checks and vouchers which the company was required to produce.

57. Hale *v.* Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. ed. 652 [*affirming* 139 Fed. 496].

58. 24 U. S. St. at L. p. 379, c. 104 [U. S. Comp. St. (1901) p. 3154].

59. Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 24 S. Ct. 563, 48 L. ed. 860 [*reversing* 123 Fed. 969].

60. *In re* Jefferson, 96 Fed. 826.

61. *Connecticut.*— State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

*Louisiana.*— State *v.* Renaud, 50 La. Ann. 662, 23 So. 894, holding that where a letter written by a prisoner, open and unsealed, is intrusted to a fellow prisoner to seal and mail to a witness for the writer, and the person to whom the letter is intrusted, instead of mailing it, reads it, and turns it over to the jailer, who keeps it until the trial, where it is used as evidence against the writer, the proceeding is not an unreasonable search and seizure.

*Massachusetts.*— Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. N. S. 1056.

if any person, even by an illegal search or seizure, procure possession of any article, instrument, or document, the state may, notwithstanding such illegal seizure, use it if necessary as legitimate evidence against the person from whom it was so obtained to convict him of a crime,[62] or upon an investigation against such person before a grand jury,[63] it being an established rule that the court can take no notice of how such evidence was obtained, whether originating from a legal or an illegal source.[64]

**2. Production and Examination of Books and Papers.** One cannot be compelled to produce his own books, or the books of another which are under his control, where their production would tend to criminate him, nor can his clerk be required to produce them;[65] but when, as the agent of a corporation, he makes entries on its books, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a subpœna *duces tecum*, and such compulsion does not amount to an unjustifiable or unreasonable search and seizure.[66] A party to a suit may be required to produce books, records, papers,

*Michigan.*— Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530, 61 Am. St. Rep. 346, 31 L. R. A. 163.

*Montana.*— State *v.* Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. N. S. 762, holding that in a prosecution for murder, the admission of evidence that shoes taken from defendant without his consent corresponded with tracks found near the scene of the killing, did not deprive defendant of the rights guaranteed to him by Const. art. 3, § 7, which prohibits unreasonable searches and seizures.

*Nebraska.*— Russell *v.* State, 66 Nebr. 497, 92 N. W. 751, holding that a pair of old shoes worn by defendant when arrested, and taken from the jail without his consent, to be used in evidence against him, does not show a violation of his constitutional right to be secure against unreasonable searches and seizures.

*New York.*— Smith *v.* Jerome, 47 Misc. 22, 93 N. Y. Suppl. 202.

*West Virginia.*— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

See 43 Cent. Dig. tit. "Searches and Seizures," § 5. See also Arrest, 3 Cyc. 896.

*Compare* U. S. *v.* Wilson, 163 Fed. 338.

62. *Alabama.*— Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

*California.*— Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

*Colorado.*— Imboden *v.* People, 40 Colo. 142, 90 Pac. 608, holding that in a prosecution of certain bank officers for conspiracy to defraud the bank, private letters and telegrams between certain of the conspirators, which their servants surrendered to the deputy district attorney after obtaining them from defendants' private files, were not objectionable as evidence against him.

*Georgia.*— Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814.

*Louisiana.*— State *v.* Renaud, 50 La. Ann. 662, 23 So. 894.

*Massachusetts.*—Com. *v.* Dana, 2 Metc. 329.

*New York.*— People *v.* Coombs, 158 N. Y. 532, 53 N. E. 527 [*affirming* 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276].

*West Virginia.*— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

*United States.*— Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37.

See 43 Cent. Dig. tit. "Searches and Seizures," § 5.

*Compare* State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711, holding that a paper taken under an illegal search warrant by an officer from the person of defendant will not be received in evidence against him, if he invokes his constitutional right.

**The constitutional protection against unreasonable seizures has been held to be violated,** where a boiler and engine on the premises of the owner, alleged to have been wrecked by the criminal negligence of the engineer, was ordered by the court ten days after the accident into the custody of the police, but not to be removed from the premises, to be used as evidence on the trial of the engineer for manslaughter. Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530, 61 Am. St. Rep. 346, 31 L. R. A. 163.

63. Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; Adams *v.* New York, 192 U. S. 585, 24 S. Ct. 372, 48 L. ed. 575 [*affirming* 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 17 N. Y. Cr. 443, 83 N. Y. Suppl. 481].

**In a criminal prosecution against a private banker** for receiving deposits when the bank was insolvent, where the bank had made an assignment in bankruptcy, and his books had been turned over to the trustee, such trustee with the books might be examined before the grand jury on an investigation of the affairs of the bank, without violating Const. art. 1, § 10. State *v.* Strait, 94 Minn. 384, 102 N. W. 913.

64. Imboden *v.* People, 40 Colo. 142, 90 Pac. 608; Com. *v.* Dana, 2 Metc. (Mass.) 329; State *v.* Strait, 94 Minn. 384, 102 N. W. 913.

65. See Criminal Law, 12 Cyc. 400. See also Witnesses.

66. *In re* Moser, 138 Mich. 302, 101 N. W. 588 [*quoting* Boyd *v.* U. S., 116 U. S. 616,

and correspondence in his possession which may contain evidence relating to the matter at issue in the case.[67] A committee appointed by the general assembly of a state to examine the books of a state officer, in acting under such authority, do not contravene the provisions of the federal and state constitutions against unreasonable searches and seizures.[68]

**3. Legislative Enactments and Ordinances.** When not prohibited by the federal or state constitutions, the legislature may enact laws authorizing searches and seizures on the conditions, and subject to the restrictions, prescribed by it;[69]

6 S. Ct. 524, 29 L. ed. 746], holding that the protection afforded a witness by Const. art. 6, § 32, providing that no witness can be compelled to give testimony which might tend to criminate him or expose him to criminal prosecution, is personal to the witness and cannot be used by him for the protection of others, and that this provision is the same as that contained in U. S. Const. Amendm. 5.

**Mo. Const. art. 2, § 11 [Annot. St. (1906) p. 133], and U. S. Const. Amendm. 4,** prohibiting searches and seizures, do not restrict the power of courts to compel the production of documentary evidence by subpœna *duces tecum*. State *v.* Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

67. Anti-Kalsomine Co. *v.* Kent Cir. Judge, 120 Mich. 250, 79 N. W. 186.

**An order directing a foreign corporation** sued for violating the Arkansas anti-trust act (Ark. Acts (1905), p. 1) to produce as witnesses before a commission certain named officers, agents, directors, and employees, and to produce any books, papers, etc., in their possession or under their control relating to the merits of the cause or to any defense, does not amount to an unreasonable search and seizure. Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 29 S. Ct. 370, 53 L. ed. 530 [*affirming* 81 Ark. 519, 100 S. W. 407, 1199]. See also Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 28 S. Ct. 178, 52 L. ed. 327.

68. State *v.* Farnum, 73 S. C. 165, 53 S. E. 83.

69. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173; Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571.

**Statutes** held to be not in violation of constitutional provisions against unreasonable searches and seizures see Levy *v.* San Francisco Super. Ct., 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811 (holding that Cal. Code Civ. Proc. §§ 1459, 1460, providing that upon complaint of an administrator that any person is suspected of having concealed, embezzled, etc., any moneys or goods of decedent, or has in his possession any writings tending to disclose the right of the latter to property, etc., he may be required to appear before the court and submit to an examination touching such matters and if it appears that he has concealed, embezzled, etc., any moneys or goods, or has any such writings, the court may order him to disclose his knowledge, and may commit him to the county jail until the order is complied with, or he is discharged is remedial, and not criminal and not in conflict with Const. art. 1, §§ 3, 19); Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173 (holding that under Pen. Code, §§ 1523–1542, a warrant to search certain persons for lottery tickets, a seizure of tickets, not from the person, but from the room where the search is made, to be used in evidence against him, is justified); Washington Nat. Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53 (holding that Acts (1901), p. 109, c. 71, authorizing an order for the inspection by the county assessor of a person's books to determine whether another has returned all his property for taxation, is not in conflict with the constitutional guaranty against unreasonable search); Co-operative Bldg., etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146 (holding that the constitutional prohibition against unreasonable searches is not violated by Burns Rev. St. (1894) § 8444, giving county assessors the right to examine books and papers of taxpayers for the purpose of properly listing and assessing property for taxation); Gray *v.* Kimball, 42 Me. 299 (holding that St. (1853) c. 48, for the suppression of drinking houses, etc., which authorizes a search for and seizure of liquors in certain cases, does not violate the constitutional provisions); Com. *v.* Dana, 2 Metc. (Mass.) 329 (holding that Rev. St. c. 142, authorizing magistrates to issue warrants to search for and seize lottery tickets or materials for a lottery, unlawfully made, provided, or procured, for the purpose of drawing a lottery, is constitutional); Robison *v.* Haug, 71 Mich. 38, 38 N. W. 668 (holding that Acts (1887), No. 313, § 31, requiring that at times when places where liquor is sold must be kept closed, curtains, screens, etc., obstructing the view from the street, etc., shall be removed, does not conflict with Const. art. 6, § 26); Weimer *v.* Bunbury, 30 Mich. 201 (holding that Comp. Laws (1871), § 1029, authorizing summary process against delinquent tax collectors and their sureties, does not violate Const. art. 6, § 26, prohibiting unreasonable searches and seizures); Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197 (holding that the Ohio law authorizing the commitment of minors upon complaint and due proof that they are homeless, or without proper or suitable homes, does not contravene Const. § 14); State *v.* Armeno, 29 R. I. 431, 72 Atl. 216 (holding that R. I. Pub. Laws (1903), p. 28, c. 1100, § 4, authorizing the board of examiners to enter barber shops during business hours and make reasonable examination for the purpose of ascertaining the sanitary condition thereof, is not unconstitutional as authorizing unreasonable searches or seizures,

and a municipal corporation under the power delegated to it by the legislature may pass such reasonable ordinances authorizing searches and seizures in aid of the detection and prevention of crime as are not in contravention of constitutional provisions;[70] but if such an ordinance is unreasonable it is an invasion of the sanctity of private business and therefore void.[71]

**D. Right Under Canada Law to Search Mail Carriers.** It has been held in Canada that a detective who is a peace officer has the right to search a letter carrier, where he consents to such search, and there is reasonable and probable cause for issuing the search warrant.[72]

**E. Unauthorized Acts of Individuals.** The federal and state constitutional prohibitions against unreasonable searches and seizures are limitations upon the power of the state to make such searches and seizures for its own benefit, and have no reference to the unauthorized acts of individuals.[73]

## VI. CIVIL LIABILITY FOR WRONGFUL SEARCHES AND SEIZURES.

**A. Who Liable and When — 1. JUSTICE ISSUING WARRANT.** A justice issuing a search warrant without having jurisdiction to do so, as where he fails to observe the necessary requisites of a valid warrant under the statute, is liable for damages to the person injured in the execution thereof.[74]

**2. PERSON SUING OUT WARRANT OR INSTIGATING SEARCH.** In some jurisdictions if the property sought to be discovered and seized under a search warrant

in violation of Const. art. 1, § 6, since the act does not authorize either a search or a seizure); State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. 767 (holding that Pub. Laws, c. 590, § 87, providing for the seizure and forfeiture of liquors unlawfully kept for sale, is not repugnant to Const. art. 1, §§ 6, 14); Parks *v.* Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234 (holding that 21 S. C. St. at L., p. 793, providing that books of cotton buyers shall be open to public inspection, is not unconstitutional); State *v.* Byrd, 72 S. C. 104, 51 S. E. 542 (holding that S. C. Cr. Code (1902), §§ 26, 590, authorizing a magistrate to arrest one committing a misdemeanor in his presence without a warrant, is not a violation of Const. art. 1, § 16, protecting a citizen from unreasonable seizure of his person and property); *In re* Powers, 25 Vt. 261 (holding that the provisions of St. (1852) § 22, to prevent traffic in intoxicating liquors, authorizing the arrest, without warrant, of a person found intoxicated, are not in conflict with article 11 of the bill of rights); *In re* Consolidated Rendering Co., 207 U. S. 541, 28 S. Ct. 178, 52 L. ed. 327 [*affirming* 80 Vt. 55, 66 Atl. 790] (holding that an order issued under Vt. Laws (1906), p. 79, No. 75, directing a corporation to produce before a court, grand jury, tribunal, or commission certain books and papers is not for an unreasonable search or seizure in violation of constitutional article 11, and that an order and proceeding thereunder for a violation of such is not an infringement of such constitutional provision). *Compare* Robinson *v.* Richardson, 13 Gray (Mass.) 454, holding that St. (1856) c. 284, § 36, providing for the issuance of warrants by judges of insolvency on the complaint of an assignee, to search for property of the debtor, is unconstitutional.

70. Guillotte *v.* New Orleans, 12 La. Ann. 432 (holding that the authority given by the ordinance of New Orleans to seize bread unstamped or deficient in weight, and to conduct the offender before the recorder, to be by him dealt with, is not in violation of the state constitution or U. S. Const. Amendm. 6, relative to unlawful searches and seizures); People *v.* Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345 (holding that a city ordinance requiring automobiles to be registered, and to have attached to the rear a number corresponding to the registration number, was not a violation of Const. art. 6, § 26, forbidding unreasonable searches); St. Joseph *v.* Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577 (holding that a city ordinance requiring every pawnbroker to keep a book in which shall be entered a description of property left with him in pawn, and the name and description of the person pawning it, is not in conflict with Const. art. 2, § 11); *Ex p.* Conrades, 112 Mo. App. 21, 85 S. W. 150 (holding that an order of a municipal assembly, made under a city ordinance, requiring the production before it of books of a corporation in aid of investigations as to evasions of license taxes by corporations, is not a violation of the constitutional guaranty against searches and seizures); *In re* Dunn, 9 Mo. App. 255.

71. Clinton *v.* Phillips, 58 Ill. 102, 11 Am. Rep. 52. See MUNICIPAL CORPORATIONS, 28 Cyc. 692 *et seq.*

72. Mayer *v.* Vaughan, 11 Quebec Q. B. 340.

73. Imboden *v.* People, 40 Colo. 142, 90 Pac. 608; Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085; Bacon *v.* U. S., 97 Fed. 35, 38 C. C. A. 37.

74. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200.

is found, the person suing it out is justified, but if not he is a trespasser and is liable in an action of trespass for damages whether the warrant is in legal form or not,[75] while in other jurisdictions trespass will not lie against one suing out a search warrant where the officer peaceably enters by an open door the house to be searched, without doing unnecessary damage, although the goods are not found.[76] Where, under color of a warrant to search for stolen goods, the person upon whose affidavit it is procured accompanies the officer in searching the premises of another not described in such warrant, he is jointly liable with the officer for any damages sustained;[77] but, although a search warrant issued on an insufficient affidavit affords no protection to the persons executing, yet where the property taken belonged to the persons seizing it, and was being unlawfully carried away by the person against whom the warrant issued, he has no cause of action against the owners.[78] When a search warrant is sued out without probable cause at the instigation of another, in order to make such person liable for damages it must be shown that he acted affirmatively in inducing, by advice or otherwise, the action of the person suing out such warrant.[79] Where, however, the arrest and search of a person is made by an officer without a warrant at the instigation of another, the latter is likewise answerable in damages for advising, aiding, or abetting.[80]

**3. Officer[81] — a. Acting Under Warrant.** The constitutional guaranty that "the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures" is a restraint upon officers executing a search warrant, as well as upon magistrates issuing it.[82] The officer executing a search warrant is liable, where it is illegal upon its face,[83] and if under a warrant to search for stolen property he searches any place or premises not described with particularity in the warrant, he is answerable in damages to the owner or occupant thereof;[84] or if, in the execution of a legal search warrant, he voluntarily abuses and perverts it to other purposes, he becomes a trespasser *ab initio* and is liable for all that he has done under the process.[85] If he takes property into his custody under a valid warrant, the fact that he has another process with him at the time which he might have used, whether valid or not, will not affect his liability for such action.[86]

**b. Acting Without Warrant.** If no legal authority is conferred upon the officer to act, as where he arrests and searches a person before a complaint is sworn out or a search warrant is issued, his acts are illegal and he is responsible in dam-

75. Reed *v.* Legg, 2 Harr. (Del.) 173; Dougherty *v.* Gilbert, Tapp. (Ohio) 6.

76. Beaty *v.* Perkins, 6 Wend. (N. Y.) 382; Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

77. Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

78. Reed *v.* Lucas, 42 Tex. 529.

79. Mark *v.* Merz, 53 Ill. App. 458.

80. Regan *v.* Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164.

81. **Further as to liability of officer** for wrongful search and seizure see SHERIFFS AND CONSTABLES, *post*.

82. Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70.

**Person assisting officer.**— One who acts in good faith upon the command of the officer to aid in the execution of a search warrant is not liable in damages, although such warrant is not valid. Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

83. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

84. Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

85. Lawton *v.* Cardell, 22 Vt. 524.

**For example** where officers to ascertain whether pipes to carry liquor are concealed within the walls of a dwelling, use an ax, a pickax, and crowbar, and tear out the paper, plaster, and laths around the walls of every room on the first floor for a width of from two to four feet, leaving the *débris* on the floors, they exceed their authority and are liable to the owner thereof. Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70.

**Should do as little damage as possible.**— While officers in executing a search warrant to search a dwelling occupied by a family should search thoroughly in every part of the house where there is reason to believe the object searched for may be found, they should consider the comfort and convenience of the occupants, and be careful to do no more injury to property than reasonably necessary. Buckley *v.* Beaulieu, 104 Me. 56, 71 Atl. 70.

86. Houghton *v.* Bachman, 47 Barb. (N. Y.) 388.

ages.[87] He is also liable if he enters the dwelling-house of another against the will of the occupant for the purpose of searching for stolen property without a warrant therefor;[88] or without such warrant to invade or search a house on suspicion that misdemeanors are committed therein, even though the officer is directed by statute to inspect certain enumerated houses and places and restrain unlawful conduct therein;[89] or if, after seizing the goods and arresting a person under legal process, he again enters the house without a search warrant merely to procure evidence.[90]

**B. Nature and Form of Action.** An action of trespass will lie where there is a search or seizure of a person or his property without lawful authority.[91] Where the pleadings allege malice in suing out a search warrant to search plaintiff's house and person, the classification of the cause of action is immaterial, and it makes no difference whether the title is libel, slander, false imprisonment, or malicious prosecution.[92]

**C. Pleading.** The general rules of pleading apply in actions for wrongful searches and seizures.[93] In pleading justification for suing out the warrant, it is unnecessary to allege the ground of suspicion on which defendant acted, or that the complaint was signed or a minute made of the date when exhibited, or that a recognizance for costs was given, or that the warrant was returned.[94]

**D. Evidence — 1. In General.** The general rules of evidence governing trials in civil actions in general control,[95] when applicable.[96]

**2. Character.**[97] In an action for wrongfully suing out a search warrant, where the evidence as to plaintiff's guilt is purely circumstantial, his good character may be shown to disprove reasonable cause on defendant's part for suing out the writ.[98]

87. Regan *v.* Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164.

**Willingness to be searched.**— Such a person is not precluded from a recovery by the fact that when so arrested he expressed a willingness to be searched in order to convince his accusers of his innocence. Regan *v.* Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164.

88. McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 325, 65 L. R. A. 519; Gardner *v.* Neil, 4 N. C. 104; Lawton *v.* Cardell, 22 Vt. 524.

**Consent of person in charge of premises.**— It is not a trespass to search a dwelling for stolen property without a warrant, where, in the absence of the owner, the consent of his wife is given, who is in charge of the house, he having the right to enter in a peaceable manner and search for his property. Grim *v.* Robinson, 31 Nebr. 540, 48 N. W. 388.

89. Devlin *v.* McAdoo, 49 Misc. (N. Y.) 57, 96 N. Y. Suppl. 425; People *v.* Glennon, 37 Misc. (N. Y.) 1, 74 N. Y. Suppl. 794.

90. Lawton *v.* Cardell, 22 Vt. 524.

91. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Reed *v.* Legg, 2 Harr. (Del.) 173; Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

Trespass generally see TRESPASS.

92. Doane *v.* Anderson, 15 N. Y. Suppl. 459.

False imprisonment generally see FALSE IMPRISONMENT, 19 Cyc. 316.

Libel and slander generally see LIBEL AND SLANDER, 25 Cyc. 225.

Malicious prosecution generally see MALICIOUS PROSECUTION, 26 Cyc. 1.

**An action for malicious prosecution will lie** for maliciously and without probable cause instituting and carrying forward proceedings under a search warrant, and causing plaintiff's house to be searched. Whitson *v.* May, 71 Ind. 269; Beaty *v.* Perkins, 6 Wend. (N. Y.) 382, holding that where a party has no ground for his proceedings and is actuated by malicious motives, either case or malicious prosecution will lie. See also McNellis *v.* Gartshore, 2 U. C. C. P. 464; Lucy *v.* Smith, 8 U. C. Q. B. 518. *Compare* Tuell *v.* Wrink, 6 Blackf. (Ind.) 249, holding that an action on the case will lie against one for causing the arrest of another and having his premises searched under a search warrant on suspicion of his having committed a felony, if the former acted maliciously and without probable cause.

93. See CASE, ACTION ON, 6 Cyc. 695; PLEADING, 32 Cyc. 1; TRESPASS.

94. Chipman *v.* Bates, 15 Vt. 51, 40 Am. Dec. 663.

95. See EVIDENCE, 16 Cyc. 821 *et seq.*

Evidence in mitigation of damages see *infra*, note VI, D, 3.

96. Josh *v.* Marshall, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419.

**Seizing nets by fish protector.**— It has been held that, in an action against a fish protector for seizing nets used without a license obtained under prescribed rules and regulations, evidence of the seizure establishes a *prima facie* case, or which plaintiff may recover damages; and, to justify the seizure, defendant must show that such rules and regulations had been duly made and published; but the record of plaintiff's conviction for using such nets without a license is not competent testimony. Josh *v.* Marshall, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419.

97. Injury to feelings see *infra*, VI, E, 1.

98. Mark *v.* Merz, 53 Ill. App. 458.

**3. Malice.** On the question of malice, evidence is admissible to show circumstances leading immediately to the search and tending to disclose something of the motive actuating such search.[99]

**E. Damages — 1. In General.**[1] Damages for unlawfully entering and searching the premises of another include injuries to property, to plaintiff's feelings, and disturbance of his family;[2] but in an action of trespass for unlawfully entering and searching plaintiff's house for stolen property, evidence of injury to character is admissible without being alleged.[3]

**2. Exemplary Damages.**[4] Exemplary damages may be recovered in an action of trespass where it is shown that defendant in making an illegal or unlawful search of plaintiff's house for stolen goods acted with malice.[5]

**3. Mitigation of Damages.** In an action for trespass for searching plaintiff's house without a warrant, circumstances of reasonable suspicion that implements of evidence of crime are there concealed may be introduced in evidence in mitigation of damages.[6]

**F. Questions For Jury.** Where a search was made of plaintiff's residence for stolen goods, without a warrant therefor, the question whether plaintiff consented to the search is one for the jury;[7] and where the evidence tends to show that the house in which the goods were seized was in the possession of plaintiff, the sufficiency of such evidence to prove his exclusive possession of such premises is a question for the jury, even though a former occupant's goods still remained there at the time of such search.[8]

## VII. Criminal Liability For Wrongful Searches and Seizures.

The wrongful search or seizure of person or property is not an indictable offense at common law, unless force accompanies the act.[9]

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**Search Warrant.** An order in writing in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.[1] (Search Warrant: As Remedy to Discover Liquor, see Commerce, 7 Cyc. 439 note 31. Description of Property in, see Lotteries, 25 Cyc. 1653 note 51. For Seizure of Gaming Implements, see Gaming, 20 Cyc. 919. In Internal Revenue Case, see Internal Revenue, 22 Cyc. 1662. Necessity of Under Liquor Laws, see Intoxicating Liquors, 23 Cyc. 295. See also Searches and Seizures, *ante*, p. 1265.)

99. McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519, holding that evidence as to the conduct of dogs in leading a searching party to plaintiff's house is admissible on the question of malice, but that photographs of the dogs are not competent evidence.

1. See Damages, 13 Cyc. 1 *et seq.*; Trespass.

2. Larthet *v.* Forgay, 2 La. Ann. 524, 46 Am. Dec. 554.

3. Anonymous, Minor (Ala.) 52, 12 Am. Dec. 31.

4. See Damages, 13 Cyc. 111; Trespass.

5. McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

A verdict for two thousand five hundred dollars is not excessive for maliciously causing a wrongful search of a woman's premises and person, where the officer in searching her person subjected her to personal indignities and humiliation. Doane *v.* Anderson, 15 N. Y. Suppl. 459.

6. Simpson *v.* McCaffrey, 13 Ohio 508.

7. McClurg *v.* Brenton, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

8. Lawton *v.* Cardell, 22 Vt. 524.

9. State *v.* Leathers, 31 Ark. 44. See, generally, Trespass.

If one enters a private dwelling, without force, for the purpose of making such search or seizure without a warrant, an indictment will not lie in the absence of a statute. State *v.* Leathers, 31 Ark. 44.

1. People *v.* Noelke, 1 N. Y. Cr. 252, 268 [*citing* Code Cr. Proc. § 792].

It has also been defined as "an examination or inspection by authority of law of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged." Newberry *v.* Carpenter, 107 Mich. 567, 574, 65 N. W. 530, 61 Am. St. Rep. 346, 31 L. R. A. 163.

**SEA SERVICE.** In reference to the officers of the United States navy, service performed at sea; under the orders of a department; and in vessels employed by authority of law.[2]

**SEASHELLS.** The hard, organized substances forming the exterior covering and protection of certain marine animals.[3]

**SEA-SHORE.** At common law, all the ground between the ordinary high water mark and low water mark;[4] the land between high and low water mark;[5] the space between ordinary high and low water mark;[6] the space of land between high and low water mark;[7] that space of land on the borders of the sea which is alternately covered and left dry by the rising and falling of the tide, or in other words, that space between high and low water mark;[8] that ground that is between ordinary high water and low water mark.[9] In the law of Louisiana, that space of land over which the waters of the sea spread, in the highest water, during the winter season.[10] In Mexican law, that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs, and the rivers, although they may not be navigable, their beds, mouths, and the salt marshes.[11] (See BOUNDARIES, 5 Cyc. 892; NAVIGABLE WATERS, 29 Cyc. 285.)

**SEASON.** A particular period of time.[12] (Season: Judicial Notice as to Course of, see EVIDENCE, 16 Cyc. 855.)

**Must be issued under seal** see People *v.* Holcomb, 3 Park. Cr. (N. Y.) 656, 665.

2. U. S. *v.* Barnette, 165 U. S. 174, 178, 17 S. Ct. 286, 41 L. ed. 675; U. S. *v.* Symonds, 120 U. S. 46, 48, 7 S. Ct. 411, 30 L. ed. 557; McRitchie *v.* U. S., 23 Ct. Cl. 23, 25.

**The term includes service performed under** the orders of the navy department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas. U. S. *v.* Symonds, 120 U. S. 46, 50, 7 S. Ct. 411, 30 L. ed. 557. See also U. S. *v.* Strong, 125 U. S. 656, 657, 8 S. Ct. 1021, 31 L. ed. 823 (holding that the term includes services on a receiving ship at anchor in a harbor); McRitchie *v.* U. S., 23 Ct. Cl. 23, 26

3. Schoenemann *v.* U. S., 119 Fed. 584, 587, 56 C. C. A. 104, where it is said: "And these hard bony coverings are not changed from their natural state, by having these animals and the adventitious and foreign matter clinging to them removed."

4. Lapish *v.* Bangor Bank, 8 Me. 85, 90; Storer *v.* Freeman, 6 Mass. 435, 439, 4 Am. Dec. 155, where it is said: "It cannot be considered as including any ground always covered by the sea; for then it would have no definite limit on the sea-board. Neither can it include any part of the upland, for the same reason."

5. Blundell *v.* Catterall, 5 B. & Ald. 268, 289, 24 Rev. Rep. 353, 7 E. C. L. 152. See also Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 217, 2 Eq. Rep. 1195, 18 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159, 43 Eng. Reprint 486, 27 Eng. L. & Eq. 242.

6. Young *v.* McIsaac, 18 Can. L. T. Occ. Notes 42, 43.

7. Wharton L. Lex. [*quoted* in Mellor *v.* Walmesley, [1905] L. R. 2 Ch. 164, 177, 74 L. J. Ch. 475, 93 L. T. Rep. N. S. 574, 21 L. T. R. 591, 53 Wkly. Rep. 581].

8. Bouvier L. Dict. [*quoted* in Church *v.* Meeker, 34 Conn. 421, 424].

9. Hale de Jure Maris [*quoted* in Mellor *v.* Walmesley, [1905] L. R. 2 Ch. 164, 177, 74 L. J. Ch. 475, 93 L. T. Rep. N. S. 574, 21 L. T. R. 591, 53 Wkly. Rep. 581].

**For all the ordinary purposes of a boundary,** where the ocean or a bay, or other body of water affected by the flux or reflux of the tide is made a limit, the words "sea-shore" and "sea," in the absence of any showing to the contrary, appear to be practically synonymous. Coburn *v.* San Mateo County, 75 Fed. 520, 528.

**"Sea-shore" extends as far toward the** land as the tide flows. Com. *v.* Alger, 7 Cush. (Mass.) 53, 90.

**Does not include** land overflowed by extraordinary tides. Littlefield *v.* Maxwell, 31 Me. 134, 139, 50 Am. Dec. 653.

10. Minor *v.* New Orleans, 115 La. 301, 311, 38 So. 999; Morgan *v.* Nagodish, 40 La. Ann. 246, 252, 3 So. 636.

11. United Land Assoc. *v.* Knight, 85 Cal. 448, 482, 23 Pac. 267, 24 Pac. 818 [*citing* Hall Mexican Laws 448–503; Civ. Code Mexico, art. 802].

12. Century Dict.

**The word is not limited to one day,** but contemplates a longer time. Purdom Naval Stores Co. *v.* Knight, 129 Ga. 590, 592, 59 S. E. 433.

**The meaning of the term may be** a question of fact for the jury (McIntosh *v.* Miner, 53 N. Y. App. Div. 240, 244, 65 N. Y. Suppl. 735); and may depend upon the customs of the locality (Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748; Myers *v.* Walker, 24 Ill. 133, 134).

**During the coming "season"** see Myers *v.* Walker, 24 Ill. 133, 136.

**"During the season of the year 1883"** see Sarles *v.* Sharlow, 5 Dak. 100, 37 N. W. 748, 750.

**SEASON TICKET.** In English railroad law, a contract by which the company engages to carry the holder, free of any further charge, for a specified period between certain specified stations.[13] (See EXCURSION TICKET, 17 Cyc. 873.)

**SEA STORES.** The supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers;[14] the provisions taken on board for the use of the passengers and crew, and not such articles as the anchors, cables, spars, and cordage of the ship.[15]

**SEAT.** As applied to machinery, the part on which another thing rests, as a valve seat.[16] In reference to a stock exchange, a personal privilege of being and remaining a member of a voluntary association with the assent of the associates.[17] (Seat: County-Seat, see COUNTIES, 11 Cyc. 366. In Board of Trade or Stock Exchange — Asset of Bankrupt, see BANKRUPTCY, 5 Cyc. 352; Assignability of, see EXCHANGES, 17 Cyc. 864; Liability to Levy of Executions, see EXECUTIONS, 17 Cyc. 945; Property in, see EXCHANGES, 17 Cyc. 863.)

**SEATED LAND.** Land that is occupied, cultivated, improved, reclaimed, farmed, or used as a place of residence.[18]

**SEAT OF JUSTICE.** The place where the court-house and the jail and the county offices are located; the place where the chancery and circuit and county courts are held, and where the county records are kept;[19] the county seat; the place where the court-house and county offices are located, the place where the chancery, circuit and county courts are held and where the county records are kept.[20] (See COUNTIES, 11 Cyc. 366.)

**SEAWORTHINESS.** In maritime law, reasonable fitness for the voyage;[21] the sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit, for the trade or service in which it is employed.[22] (Seaworthiness: As Affecting Amount of Damages in Suit For Collision, see COLLISION, 7 Cyc. 392. Of Insured Vessel — Breach of Warranty of, see MARINE INSURANCE, 26 Cyc. 636; Disclosure of Particulars in Regard to Vessel, see MARINE INSURANCE, 26 Cyc. 621; Implied Warranty of, see MARINE INSURANCE, 26 Cyc. 644; Presumption of in Action For Loss, see MARINE INSURANCE, 26 Cyc. 723. Of Vessel, as Affecting Rights and Liabilities of — Owner or Charterer, see SHIPPING; Seaman, see SEAMEN, *ante*.)

**SEC.** The abbreviation for "section."[23]

**SECESSION.** See INSURRECTION, 22 Cyc. 1451; RELIGIOUS SOCIETIES, 34 Cyc. 1167.

**SECLUSION.** A voluntary confinement or retreat from social life.[24]

13. Saunders *v.* South Eastern R. Co., 5 Q. B. D. 456, 466, 44 J. P. 781, 49 L. J. Q. B. 761, 43 L. T. Rep. N. S. 281, 29 Wkly. Rep. 281.

14. U. S. *v.* Hawley, 160 Fed. 734, 739. See also U. S. *v.* Twenty-Four Coils of Cordage, 28 Fed. Cas. No. 16,566, Baldw. 502.

15. U. S. *v.* Twenty-Three Coils of Cordage, 28 Fed. Cas. No. 16,573, Gilp. 299.

16. Knight Mechanical Dict. [*quoted* in Safety Oiler Co. *v.* Scovill Mfg. Co., 110 Fed. 203, 204].

17. San Francisco *v.* Anderson, 103 Cal. 69, 70, 36 Pac. 1034, 42 Am. St. Rep. 98; Lowenberg *v.* Greenebaum, 99 Cal. 162, 165, 33 Pac. 794, 37 Am. St. Rep. 42, 21 L. R. A. 399.

18. Black L. Dict.

Residence without cultivation, or cultivation without residence, or both, constitute that species of property which may properly be denominated seated (Kennedy *v.* Daily, 6 Watts (Pa.) 269, 272); but the building of a cabin on land as a shelter for miners, which is afterward abandoned and altogether disappears, and an occasional digging of coal by a trespasser, even under color of title, is not sufficient to seat a tract of land (Stoetzel *v.* Jackson, 105 Pa. St. 562, 567. See also Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90, 98).

19. Ellis *v.* State, 92 Tenn. 85, 93, 20 S. W. 500. See also Babcock *v.* Hahn, 175 Mo. 136, 140, 75 S. W. 93.

20. Bouvier L. Dict. [*quoted* in Babcock *v.* Hahn, 175 Mo. 136, 139, 75 S. W. 93].

Synonym of "county-seat" see Babcock *v.* Hahn, 175 Mo. 136, 139, 75 S. W. 93. But it has been held that the term, as used in the territorial acts of Michigan, does not necessarily mean the same thing as county-seat. Whallon *v.* Gridley, 51 Mich. 503, 511, 16 N. W. 876.

21. The Millie R. Bohannon, 64 Fed. 883, 884.

22. Bouvier L. Dict. [*quoted* in The Southwark, 191 U. S. 1, 8, 24 S. Ct. 1, 48 L. ed. 65].

23. Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204.

24. Jurgens *v.* Ittman, 41 La. Ann. 367, 373, 16 So. 952.

**SECOND.** A term which, when added to the name of a person, distinguishes him from an older person of the same name.[25] (See JUNIOR, 24 Cyc. 79.)

**SECONDARY.** Not primary; subordinate.[26] (See PRIMARY, 31 Cyc. 1172.)

**SECOND COUSINS.** Persons having the same great grandfathers and great grandmothers;[27] a term said to include those only who have either the same great grandfather or the same great grandmother.[28] (See COUSINS, 11 Cyc. 1020; COUSINS GERMAN, 11 Cyc. 1021; FIRST COUSIN, 19 Cyc. 984.)

**SECOND-HAND GOODS.** A term said to be broad enough to include "second-hand furniture."[29]

**SECOND-HAND MACHINERY.** Such machinery as has been previously used by another person.[30]

**SECOND-HAND STORE.** A term which, if not qualified or limited, would include any store in which any kind of second-hand goods are dealt in.[31] (Second-Hand Store: As Subject of License or Special Tax, see LICENSES, 25 Cyc. 614. Pawnshops, see PAWNBROKERS, 30 Cyc. 1163.)

**SECOND MORTGAGE.** A mortgage without intervening liens between it and the first.[32] (See, generally, CHATTEL MORTGAGES, 6 Cyc. 980; MORTGAGES, 27 Cyc. 916.)

**SECOND TRIAL.** See NEW TRIAL, 29 Cyc. 707.

**SECRECY.** As used to describe the circumstances of the execution of a conveyance to one in a position of trust or confidence, a term usually applied to active efforts by the beneficiary to exclude persons whose presence would have been natural, not a mere absence of such proclamation as is not usual with those freely making conveyances.[33] (Secrecy: As Badge of Fraud, see FRAUDULENT CONVEYANCES, 20 Cyc. 447. As Element of Offense of Kidnapping, see KIDNAPPING, 24 Cyc. 789 note 22. As Evidence of Fraud in Conveyances, see FRAUDULENT CONVEYANCES, 20 Cyc. 593. Of Ballot, see ELECTIONS, 15 Cyc. 423. Whether Showing Fraud, Determination of Question, see FRAUDULENT CONVEYANCES, 20 Cyc. 807.)

**SECRET.** As an adjective, hidden; concealed. As a noun, something studi-

**Distinguished from "reclusion"** see Phelps *v.* Reinach, 38 La. Ann. 547, 551.

25. Cobb *v.* Lucas, 15 Pick. (Mass.) 7, 9, comparing the term "junior."

26. Webster Int. Dict.

**"Secondary battery"** is a battery which has no original power of developing a current of electricity, and is active only when rendered so by sending a current, elsewhere generated, through it. Brush Electric Co. *v.* Milford, etc., St. R. Co., 58 Fed. 387, 388, where the term is distingnished from "primary battery." Electrical Accumulator Co. *v.* Brush Electric Co., 52 Fed. 130, 131, 2 C. C. A. 682.

**"Secondary easement"** see EASEMENTS, 14 Cyc. 1203.

**"Secondary evidence"** see EVIDENCE, 17 Cyc. 465.

**"Secondary franchise"** see CORPORATIONS, 10 Cyc. 1327.

**"Secondary invention"** is an invention which performs a function previously performed, but in a substantially different way. Western Electric Co. *v.* Robertson, 142 Fed. 471, 477, 73 C. C. A. 587.

27. *In re* Parker, 15 Ch. D. 528, 538, 49 L. J. Ch. 587, 43 L. T. Rep. N. S. 115, 28 Wkly. Rep. 823, where it is said that the term has a well-known definite meaning. See also *In re* Parker, 17 Ch. D. 262, 264, 50 L. J. Ch. 639, 44 L. T. Rep. N. S. 885, 29 Wkly. Rep. 855.

28. Bridgnorth *v.* Collins, 15 Sim. 538, 541, 38 Eng. Ch. 536, 60 Eng. Reprint 727.

**"The child of a first cousin** is a first cousin once removed to his father's (or mother's) cousin. So the child of a second cousin is a second cousin once removed to his father's (or mother's cousin). But the child of a first cousin is sometimes loosely called a second cousin to his father's (or mother's) cousin." People *v.* Clark, 62 Hun (N. Y.) 84, 85, 16 N. Y. Suppl. 473, 695.

**It is said to be very common** for persons to call the children of their first cousins their second cousins. Slade *v.* Fooks, 2 Jur. 961, 8 L. J. Ch. 41, 9 Sim. 386, 16 Eng. Ch. 386, 59 Eng. Reprint 406.

29. State *v.* Segel, 60 Minn. 507, 508, 62 N. W. 1134.

**"Dealers in second-hand goods,"** wares, or merchandise as not including a person engaged in buying and selling old books see Eastman *v.* Chicago, 79 Ill. 178, 179.

30. Maxwell *v.* Bastrop Mfg. Co., 77 Tex. 233, 237, 14 S. W. 35.

31. Duluth *v.* Bloom, 55 Minn. 97, 100, 56 N. W. 580, 21 L. R. A. 689, where it is said: "Every junk shop is a secondhand store, but not every secondhand store is a junk shop." See also Chicago *v.* Reinschreiber, 121 Ill. App. 114, 119.

32. Green's Appeal, 97 Pa. St. 342, 347.

33. Vance *v.* Davis, 118 Wis. 548, 553, 95 N. W. 939.

ously concealed; a thing kept from general knowledge; what is not revealed, or not to be revealed.[34] (Secret: Assault, see HOMICIDE, 21 Cyc. 779 note 45. Partner, see PARTNERSHIP, 30 Cyc. 397. Society — Privileged Communications Between Members in Furtherance of Common Interest, see LIBEL AND SLANDER, 25 Cyc. 398; Privileged Communications For Discipline by, see LIBEL AND SLANDER, 25 Cyc. 411; Records as Evidence, see EVIDENCE, 17 Cyc. 405; Right of College Student to Join, see COLLEGES AND UNIVERSITIES, 7 Cyc. 289 note 30. Trust, see FRAUDULENT CONVEYANCES, 20 Cyc. 562.)

**SECRETARY.** A person employed to write orders, letters, despatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer;[35] an official scribe, amanuensis, or writer; a person employed to write orders, records, and the like;[36] one of the general managing agents of a corporation.[37]

**SECRETARY OF THE INTERIOR.** See UNITED STATES.

**SECRETARY OF THE NAVY.** See UNITED STATES.

**SECRETARY OF THE TREASURY.** See UNITED STATES.

**SECRETARY OF WAR.** See UNITED STATES.

**SECRET ASSAULT.** See HOMICIDE, 21 Cyc. 779 note 45.

**SECRETE.** To hide; to conceal; to remove from the observation or knowledge of others.[38]

**SECRET PARTNER.** See PARTNERSHIP, 30 Cyc. 397.

**SECRET TRUST.** See FRAUDULENT CONVEYANCES, 20 Cyc. 562.

**SECT.** A body of Christians cut off or separated from the rest, who live apart, and by themselves, having a form of church government, discipline and worship different from others, and especially from those from whom they separated, and who thus form a distinct sect, section or society, acquire a name or denomination;[39] a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system; specifically, the adherents collectively of a particular creed or confession; a denomination; communion.[40] (See, generally, RELIGIOUS SOCIETIES, 34 Cyc. 1112.)

**SECTA EST PUGNA CIVILIS, SICUT ACTORES ARMANTUR ACTIONIBUS, ET QUASI ACCINGUNTUR GLADIIS, ITA REI (E CONTRA) MUNIUNTUR EXCEPTIONIBUS, ET DEFENDUNTUR QUASI CLYPEIS.** A maxim meaning "A suit is a civil battle, as the plaintiffs are armed with actions and as it were girt with swords, so on the other hand the defendants are fortified with pleas, and defended as it were by shields."[41]

**SECTA QUÆ SCRIPTO NITITUR A SCRIPTO VARIARI NON DEBET.** A maxim meaning "A suit which relies upon a writing ought not to vary from the writing."[42]

**SECTARIAN.** Pertaining to a sect or sects; peculiar to a sect; bigotedly

34. Webster Dict. [*quoted* in Ritchie *v.* Richards, 14 Utah 345, 373, 47 Pac. 670].

35. Webster Dict. [*quoted* in State *v.* Currie, 3 N. D. 310, 315, 55 N. W. 858].

36. Webster Dict. [*quoted* in Griffin *v.* Corydon, 44 S. W. 629, 19 Ky. L. Rep. 1872].

As applied to subordinate ministerial functionaries, the term is by popular usage synonymous with "clerk." State *v.* Currie, 3 N. D. 310, 315, 55 N. W. 858. See also Griffin *v.* Corydon, 44 S. W. 629, 19 Ky. L. Rep. 1872.

"Secretary of internal affairs" see Goodyear *v.* Brown, 155 Pa. St. 514, 519, 26 Atl. 665, 35 Am. St. Rep. 903, 20 L. R. A. 838.

37. Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 479, 34 N. E. 289; Hanover Nat. Bank *v.* American Dock, etc., Co., 75 Hun (N. Y.) 55, 60, 26 N. Y. Suppl. 1055.

38. Webster Dict. [*quoted* in Pearre *v.* Hawkins, 62 Tex. 434, 435].

Synonym of "conceal" see Dale County *v.* Gunter, 46 Ala. 118, 142.

Under a statute making the "secreting" of public records an offense, the mere inaction on defendant's part, when it is his duty as secretary of the senate to transmit the bill secreted to the other branch of the assembly, where he purposely withholds it, whether by putting it in his desk or otherwise withholding, and purposely refrains from transmitting it as required, constitutes a secretion of the bill. State *v.* Bloor, 20 Mont. 574, 580, 52 Pac. 611.

39. Muzzy *v.* Wilkins, Smith (N. H.) 1, 20.

40. Standard Dict. [*quoted* in Stevenson *v.* Hanyon, 7 Pa. Dist. 585, 590].

The term embraces a company of persons denominated "shakers." Lawrence *v.* Fletcher, 8 Metc. (Mass.) 153, 162.

41. Bouvier L. Dict. [*citing* Bracton 339*b*].

Applied in Roll *v.* Oshorn, Hob. 20, 21, 80 Eng. Reprint 171.

42. Peloubet Leg. Max. [*citing* Jenkins Cent. 65].

attached to the tenets and interests of a denomination; one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state.[43] (See SCHOOLS AND SCHOOL-DISTRICTS, *ante*.)

**SECTARIANISM.** A term which is held to include adherence to a distinct political party as much as to a separate religious sect.[44] (See SECT, *ante*, p. 1281.)

**SECTION.** In books and writings, a distinct part or portion; the subdivision of a chapter; the division of a law or other writing or instrument;[45] a part separated from the rest; a division; a portion; a distinct part or portion of a book or writing; the subdivision of a chapter, the division of law or other writing; a paragraph; an article.[46]

**SECTION HAND.** See MASTER AND SERVANT, 26 Cyc. 1373.

**SECULAR.** Temporal, pertaining to temporal things, things of this world worldly; also, opposed to spiritual, holy.[47]

**SECUNDUM ALLEGATA ET PROBATA.** Literally "According to what is alleged and proved; according to the allegations and proofs." [48] A fundamental rule in the administration of justice.[49]

**SECUNDUM FORMAM CHARTÆ.** Literally "According to the form of the charter, (deed.)" [50]

**SECUNDUM NATURAM EST COMMODA CUJUSQUE REI EUM SEQUI, QUEM SEQUNTUR INCOMMODA.** A maxim meaning "It is according to nature that the advantages of anything should attach to him to whom the disadvantages attach." [51]

**SECUNDUM SUBJECTAM MATERIAM.** Literally "According to the subject-matter." [52]

43. Webster Dict. [*quoted* in State *v.* Hallock, 16 Nebr. 373, 385].

The term is applicable to the doctrine of a particular religious sect, which is not common to all others. State *v.* Dist. Bd. of School-Dist. No. 8, 76 Wis. 177, 193, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

The term does not include any form of prayer not authorized by a particular church. Hackett *v.* Brooksville Graded School Dist., 120 Ky. 608, 615, 87 S. W. 792, 117 Am. St. Rep. 599, 69 L. R. A. 592.

"Sectarian instruction" see State *v.* Dist. Bd. of School Dist. No. 8, 76 Wis. 177, 193, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

44. State *v.* St. Louis Pub. Schools, 134 Mo. 296, 310, 35 S. W. 617, 56 Am. St. Rep. 503.

45. Webster Dict. [*quoted* in Alfrey *v.* Colbert, 7 Indian Terr. 338, 104 S. W. 638, 646].

In laws a section is sometimes called a paragraph or article. Webster Dict. [*quoted* in Alfrey *v.* Colbert, 7 Indian Terr. 338, 104 S. W. 638, 646].

46. Webster Dict. [*quoted* in State *v.* Babcock, 23 Nebr. 128, 133, 36 N. W. 348].

The character § is often used to denote such a division. Webster Dict. [*quoted* in State *v.* Babcock, 23 Nebr. 128, 133, 36 N. W. 348].

Construed to mean "provision" see U. S. *v.* Healey, 160 U. S. 136, 144, 16 S. Ct. 247, 40 L. ed. 369.

Meaning "subdivision or subsection" see *In re* Dassler, 35 Kan. 678, 683, 12 Pac. 130.

"Section of a street" proposed to be improved cannot mean any arbitrary and uniform length of street, like a block or half mile, but must refer to a portion of a street proposed to be improved. Matter of Widening Washington Street, 14 N. Y. Suppl. 470, 471.

47. Richardson English Dict. [*quoted* in Allen *v.* Deming, 14 N. H. 133, 139, 40 Am. Dec. 179].

48. Black L. Dict.

49. Gordon *v.* Ellenville, etc., R. Co., 119 N. Y. App. Div. 797, 801, 104 N. Y. Suppl. 702.

The rule adapts itself to every jurisdiction and to every civil action. Young *v.* Miller, 10 Ohio 85, 88. See also Nashville, etc., R. Co. *v.* Woods, 155 Ala. 263, 265, 46 So. 561; Furst *v.* Zucker, 125 N. Y. App. Div. 591, 110 N. Y. Suppl. 63; Willey *v.* Greenfield, 64 N. Y. App. Div. 220, 223, 71 N. Y. Suppl. 1046; Fox *v.* Davidson, 36 N. Y. App. Div. 159, 163, 55 N. Y. Suppl. 524; Matter of Fleming, 5 N. Y. App. Div. 190, 193, 39 N. Y. Suppl. 156; Beecher *v.* Shuback, 1 N. Y. App. Div. 359, 363, 37 N. Y. Suppl. 325; Ballou *v.* Parsons, 11 Hun (N. Y.) 602, 606; Hackley *v.* Draper, 4 Thomps. & C. (N. Y.) 614, 627; Lawton *v.* Goodrich, 4 Silv. Sup. (N. Y.) 24, 27, 7 N. Y. Suppl. 76; Rust *v.* Hauselt, 46 N. Y. Super. Ct. 38, 45; Howe *v.* Woolsey, 7 Misc. (N. Y.) 33, 35, 27 N. Y. Suppl. 377; Hecht *v.* Brandus, 4 Misc. (N. Y.) 58, 60, 23 N. Y. Suppl. 1004; Dille *v.* Woods, 14 Ohio 122, 126; McArthur *v.* Phoebus, 2 Ohio 415, 424; Lage *v.* Mackenson, 40 U. C. Q. B. 388, 396; Gardner *v.* Stoddard, Draper (U. C.) 94, 105.

50. Black L. Dict. See also Nolan *v.* Fox, 15 U. C. C. P. 565, 575.

51. Black L. Dict. [*citing* Dig. 50, 17, 10].

52. Black L. Dict. See also Gannon *v.* Mc-

**SECURE.** To make safe; to protect from danger; to make certain; to insure; to enclose effectually;[53] to protect; insure; save, ascertain, etc.;[54] to procure;[55] to get possession of; to make one's self secure of; to acquire certainly;[56] to make certain; to put beyond hazard.[57]

**SECURITAS LEGATORUM UTILITATI PŒNÆ PREPONDERAT.** A maxim meaning "The safety of ambassadors outweighs the expediency of punishment."[58]

**SECURITIES.** Written assurances for the return or payment of money; evidences of indebtedness.[59] (Securities: As Separate Property of Married Woman,

Guire, 22 N. Y. App. Div. 43, 51, 47 N. Y. Suppl. 870.

**53.** Com. *v.* Delamater, 13 Pa. Co. Ct. 152, 155.

**May be used** in the sense of "paying" see Partlow *v.* Swigart, 90 Mich. 61, 65, 51 N. W. 270.

**54.** Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 660, 8 L. ed. 1055.

**One of the ordinary meanings of the word** is "guard" or "protect." State Bd. of Health *v.* Diamond Mills Paper Co., 63 N. J. Eq. 111, 113, 51 Atl. 1019.

**55.** Anderson L. Dict. [*quoted* in State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, 132].

**May be used in the sense of** "purchase" see Tukey *v.* Omaha, 54 Nebr. 370, 375, 74 N. W. 613, 69 Am. St. Rep. 711.

**The term "secures,"** when used in its popular signification, is not equivalent to payment in money, but implies something given and received by means of which payment may at some future time be procured or compelled. Foot *v.* Webb, 59 Barb. (N. Y.) 38, 52.

**56.** Webster Dict. [*quoted* in Venable *v.* Riley-Grant Co., 117 Ga. 127, 130, 43 S. E. 428].

**Synonymous** with: "Obtain" and "give" see Century Dict. [*quoted* in State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, 132]. "Get," "obtain," and "attain" see Standard Dict. [*quoted* in State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, 132].

**57.** Worcester Dict. [*quoted* in Huck *v.* Gaylord, 50 Tex. 578, 582]. See also Jennings *v.* Davis, 31 Conn. 134, 140.

**In an agreement providing for a certain** rate of commission upon goods from which a certain per cent profit is secured, the word "secured" means that which is presently reduced to possession or that of which payment is made sure. Allen *v.* Armstrong, 58 N. Y. App. Div. 427, 429, 68 N. Y. Suppl. 1079.

**In the by-laws of a home for aged persons** providing for the payment of interest on moneys "secured" to the home by persons entering, the term "secured" does not mean "assigned" or "conveyed" or "transferred," and does not literally mean anything more than obtaining the interest of the property during the time of membership. *In re* Maull, 186 Pa. St. 477, 484, 40 Atl. 1010.

**In the federal constitution** giving congress power to promote the progress of science, etc., by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries, the term "securing" has reference to future rights and not to rights already in existence. Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 660, 8 L. ed. 1055.

**In the Greater New York Charter,** reserving rights and privileges secured under the provisions of the act, "secured" implies not rights and privileges created and conferred by the charter but secured, that is, confirmed; made fast and safe — by it to those entitled thereto. In other words it implies rights and privileges conferred by some other act and secured to the beneficiaries by this one. Hurst *v.* New York, 55 N. Y. App. Div. 68, 72, 67 N. Y. Suppl. 84.

**"'Secured' is not a word of description;** it implies an act. A creditor who takes a note for his debt is never understood to be a secured creditor. A bond, which carries nothing more than a promise to pay, is no more a security than a promissory note." Stickel *v.* Atwood, 25 R. I. 456, 461, 56 Atl. 687.

**Implies the actual giving** of security see Pennel *v.* Rhodes, 9 Q. B. 114, 130, 58 E. C. L. 114.

**58.** Morgan Leg. Max. [*citing* Tayler L. Gloss.].

**59.** Bouvier L. Dict. [*quoted* in Whitely *v.* Arbogast, 17 Ohio S. & C. Pl. Dec. 569, 574].

**The word is widely used as a synonym** of "investments." *In re* Gent, [1905] 1 Ch. 386, 389, 74 L. J. Ch. 333, 92 L. T. Rep. N. S. 356, 53 Wkly. Rep. 330; *In re* Rayner, [1904] 1 Ch. 176, 189, 73 L. J. Ch. 111, 89 L. T. Rep. N. S. 681, 52 Wkly. Rep. 273.

**In common commercial parlance** the term is understood to refer to live and negotiable commercial obligations, or such negotiable obligations as state, county, government, and municipal bonds, and other obligations considered generally as safe or secure, and would not generally be understood to refer to or include judgments. Mace *v.* Buchanan, (Tenn. Ch. App. 1899) 52 S. W. 505, 507.

**It includes** bills of exchange, bonds for the payment of money, and promissory notes. Jennings *v.* Davis, 31 Conn. 134, 139. See also Bank of Commerce *v.* Hart, 37 Nebr. 197, 202, 55 N. W. 631, 40 Am. St. Rep. 479, 20 L. R. A. 780. The term embraces "promissory notes." Wagner *v.* Scherer, 89 N. Y. App. Div. 202, 203, 85 N. Y. Suppl. 894.

**In its broadest sense the term embraces** bonds, certificates of stock, and other evidence of debt or property. Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 391, 44 S. W. 906. See also Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299, 308. When not including "certificates of stock" see

see HUSBAND AND WIFE, 21 Cyc. 1382. Deposits of by — Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1258; Insurance Companies, see INSURANCE, 22 Cyc. 1388. Duty to Disclose or Ascertain Authority of Agent as to, see PRINCIPAL AND AGENT, 31 Cyc. 1577 note 6. Effect of Change or Substitution of, see MORTGAGES, 27 Cyc. 1413. Effect of Composition With Creditors on Collateral, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 459. Effect of Sale on Account Stated, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 388. Effect of Usury on, see USURY. Exemption of From Taxation, see TAXATION. For Gambling Consideration, see GAMING, 20 Cyc. 935. Issued in Aid of Railroad — Liability For Interest on, see RAILROADS, 33 Cyc. 83; Payment of or Redemption of, see RAILROADS, 33 Cyc. 110; Sales of, see RAILROADS, 33 Cyc. 83. Liability to Taxation, see TAXATION. Marshaling Assets and Securities, see MARSHALING ASSETS AND SECURITIES, 26 Cyc. 927. Measure of Damages For Breach of Contract to Deliver, see DAMAGES, 13 Cyc. 169. Misapplication, Release, or Loss of as Discharged of Surety, see PRINCIPAL AND SURETY, 32 Cyc. 216, 221. Mode of Assessing, see TAXATION. Of County, see COUNTIES, 11 Cyc. 502. Of District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 536. Of Municipality — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 1575; Collection of Tax on, see MUNICIPAL CORPORATIONS, 28 Cyc. 1680; Legislative Control Over, see MUNICIPAL CORPORATIONS, 28 Cyc. 312. Of Railroad Company, see RAILROADS, 33 Cyc. 442. Of State, see STATES. Of Street Railroad Company, see STREET RAILROADS. Of Territory, see TERRITORIES. Of Town, see TOWNS. Of United States, see UNITED STATES. Operation and Effect of Consolidation of Railroads as to, see RAILROADS, 33 Cyc. 431. Payment of Debt — In Confederate Securities, see PAYMENT, 30 Cyc. 1215; In Depreciated Securities, see PAYMENT, 30 Cyc. 1218; In Municipal Securities, see PAYMENT, 30 Cyc. 1193. Place of Taxation of, see TAXATION. Possession of, as Defense in Action Against Maker of Negotiable Instrument, see COMMERCIAL PAPER, 8 Cyc. 246. Power of County Treasurer to Take, see COUNTIES, 11 Cyc. 438. Power of State to Tax United States Securities, see TAXATION. Powers of — Agent as to Release of, see PRINCIPAL AND AGENT, 31 Cyc. 1388; Corporation to Take, see CORPORATIONS, 10 Cyc. 1106; National Bank to Take, see BANKS AND BANKING, 5 Cyc. 590; Railroad Company to Acquire and Transfer, see RAILROADS, 33 Cyc. 442. Presumption of Authority of Agent to Collect, see PRINCIPAL AND AGENT, 31 Cyc. 1370. Purchase and Sale of by Bank, see BANKS AND BANKING, 5 Cyc. 491. Resorting to Other Securities as Due Diligence in Fixing Liability of Guarantor, see GUARANTY, 20 Cyc. 1457. Right — Of Indemnitor to Return of on Fulfilment of Contract of Indemnity, see INDEMNITY, 22 Cyc. 95; Of Surety to Compel Recourse by Creditor to Other Securities, see PRINCIPAL AND SURETY, 32 Cyc. 97; To Collateral Securities on Assignment of Mortgage or Debt, see MORTGAGES, 27 Cyc. 1298. Rights and Liabilities of Purchasers at Sale Under Foreclosure of Mortgages or Liens on Railroad as to, see RAILROADS. Sale by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 358. Specific Bequest, see WILLS. Subrogation of Insurer to Securities of Insured Mortgagee or Lien-Holder, see FIRE INSURANCE, 19 Cyc. 895. Taking of New Securities by Holder of Commercial Paper, see COMMERCIAL PAPER, 7 Cyc. 891.)

**SECURITY.** That which makes secure or certain;[60] that which renders a

Bank of Commerce *v.* Hart, 37 Nebr. 197, 202, 55 N. W. 631, 40 Am. St. Rep. 479, 20 L. R. A. 780.

**Gold and silver certificates** and notes of the United States are "securities" of the United States, circulating as money, within the rule exempting from taxation by the state's bonds and obligations dependent on the credit of its promise, issued by the United States, except by permission. Howard Sav. Inst. *v.* Newark, 63 N. J. L. 547, 549, 44 Atl. 654.

**Real estate and mortgages** of an insolvent do not partake of the nature of securities, as the term is naturally understood. People *v.* Mercantile Credit Guaranty Co., 35 Misc. (N. Y.) 755, 761, 72 N. Y. Suppl. 373. The term does not include land. Pratt *v.* Worrell, 66 N. J. Eq. 194, 201, 57 Atl. 450.

60. Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 506, where it is said: "In its proper use it relates to pecuniary matters; and often consists of a promise of right not at-

matter sure; an instrument which renders certain the performance of a contract;[61] anything given as a pledge or caution;[62] something which makes the enjoyment or enforcement of a right more secure or certain;[63] anything that makes money more assured in its payment, or more readily recoverable;[64] safety; certainty; anything given or deposited to secure the payment of a debt, or the performance of a contract;[65] something to be given or deposited to make certain the fulfilment of an obligation, the observance of a provision or the payment of a debt;[66] an evidence of debt or of property, as a bond, a certificate of stock, and the like.[67] (Security: In General, see BAIL, 5 Cyc. 1; BONDS, 5 Cyc. 721; CHATTEL MORTGAGES, 6 Cyc. 980; INDEMNITY, 22 Cyc. 78; LIENS, 25 Cyc. 655; MARITIME LIENS, 26 Cyc. 743; MECHANICS' LIENS, 27 Cyc. 1; MORTGAGES, 27 Cyc. 916; PRINCIPAL AND SURETY, 32 Cyc. 1. Acceptance of, as Waiver of Entry or Foreclosure of Mortgage For Condition Broken, see MORTGAGES, 27 Cyc. 1444. Additional on Attachment Bond, see ATTACHMENT, 4 Cyc. 532. Application — Of Collateral to Payment of Debt, see PAYMENT, 30 Cyc. 1193; Of Other Security as Condition Precedent to Action Against Guarantor, see GUARANTY, 20 Cyc. 1457. As Affecting Right to Maritime Lien, see MARITIME LIENS, 26 Cyc. 796. As Condition to Filing Cross Libel in Admiralty, see ADMIRALTY, 1 Cyc. 865. Assignment — For, see ASSIGNMENTS, 4 Cyc. 65; Of as Transferring Debt, see ASSIGNMENTS, 4 Cyc. 72; Of Debt as Transferring, see ASSIGNMENTS, 4 Cyc. 69; Of Judgments as, see JUDGMENTS, 23 Cyc. 1418; Of Partnership Property as by Individual Partner, see PARTNERSHIP, 30 Cyc. 497; Or Transfer of Partner's Interest as, see PARTNERSHIP, 30 Cyc. 498. As Waiver of Lien, see LIENS, 25 Cyc. 675. Authority of Attorney to Accept For Client, see ATTORNEY AND CLIENT, 4 Cyc. 945. Averments as to in Affidavit For Attachment, see ATTACHMENT, 4 Cyc. 514.

tended with possession of the thing upon which it reposes."

**"A security on property** is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated, or made more certain." Rapelje & L. L. Dict. [*quoted* in Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 580, 43 N. W. 536, 6 L. R. A. 92].

61. Bouvier L. Dict. [*quoted* in Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 507].

62. Johnson Dict. [*quoted* in Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 507].

63. Rapalje & L. L. Dict. [*quoted* in Stewart First Nat. Bank *v.* Hollingsworth, 78 Iowa 575, 580, 43 N. W. 536, 6 L. R. A. 92; Coolidge *v.* Ayers, 77 Vt. 448, 452, 61 Atl. 40].

64. Stroud Jud. Dict. [*quoted* in McEwan *v.* Henderson, 10 Manitoba 503, 513].

65. Webster Dict. [*quoted* in Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 507.

66. Webster Dict. [*quoted* in *In re* Sloan, 2 Del. Co. (Pa.) 309, 310].

67. Webster Dict. [*quoted* in Mace *v.* Buchanan, (Tenn. Ch. App. 1899) 52 S. W. 505, 507].

**"A word of broad import"** see Renton *v.* Gibson, 148 Cal. 650, 655, 84 Pac. 186.

**Need not be a lien.**— The term includes process of garnishment, levies of executions, or attachment. Grand Rapids Nat. City Bank *v.* Torrent, 130 Mich. 259, 262, 80 N. W. 938. Not synonymous with "lien" see Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494, 507.

**The term may include a "judgment note"** see McCaul *v.* Thayer, 70 Wis. 138, 144, 35 N. W. 353.

**Often used in the sense of "surety"** see Goggins *v.* Jones, 115 Ga. 596, 598, 41 S. E. 995.

**The addition of the word** to the signature of a bond is *prima facie* evidence of suretyship. Boulware *v.* Hartsook, 83 Va. 679, 684, 3 S. E. 289; Harper *v.* McVeigh, 82 Va. 751, 754, 1 S. E. 193.

**Distinguished from "guaranty"** see Marberger *v.* Pott, 16 Pa. St. 9, 13, 55 Am. Dec. 479.

**In a statute providing that any person bound as security** for another may at any time after action has accrued thereon require the person having such right of action, to commence suit, etc., means only sureties proper on bonds, bills, or notes, but does not include indorsers, whose liability is fixed by notice of dishonor of the bill or note. Ross *v.* Jones, 22 Wall. (U. S.) 576, 591, 22 L. ed. 730.

**A certificate of the receiver of insolvent bank** to the effect that an administrator had deposited certain funds belonging to an estate in the bank, prior to its insolvency, was not a security. Germania Safety Vault, etc., Co. *v.* Driskill, 66 S. W. 610, 613, 23 Ky. L. Rep. 2050.

**Under a statute making it the duty of guardians** to lend the money of wards on bond or note with good and sufficient security, the term means personal security, and the statute does not require the funds of the ward to be invested upon real or government securities. Boyett *v.* Hurst, 54 N. C. 166, 171.

**A book of original entries of work done** or materials sold and delivered is a security. *In re* Sloane, 2 Del. Co. (Pa.) 309, 311.

Bar of Debt by Limitation as Affecting Security and *Vice Versa*, see LIMITATIONS OF ACTIONS, 25 Cyc. 1000, 1004. Bill of Sale as, see CHATTEL MORTGAGES, 6 Cyc. 992. By Bank For Loan or Discount, see BANKS AND BANKING, 5 Cyc. 524, 590. By Claimant For Possession of Property Taken on Execution, see EXECUTIONS, 17 Cyc. 1204. By Depositary, see DEPOSITARIES, 13 Cyc. 814. By Executor For Payment of Legacy, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 596. By Guardian of Insane Person, see INSANE PERSONS, 22 Cyc. 1140. By Insolvent For Current Loan or Credit, see INSOLVENCY, 22 Cyc. 1291. By Intervening Claimant in Garnishment, see GARNISHMENT, 20 Cyc. 1133. By Legatee or Distributee, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 611, 672. By Purchaser at Sale by Order of Court, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 777. Collateral — In General, see PLEDGES, 31 Cyc. 779; To Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 626. Constitutional Guaranty of Personal Security, see CONSTITUTIONAL LAW, 8 Cyc. 883. Conveyance to Secure Preëxisting Debt, see FRAUDULENT CONVEYANCES, 20 Cyc. 504. Deposit of on Making Proposal of Bid, see MUNICIPAL CORPORATIONS, 28 Cyc. 1030. Directions as to Injunction Proceeding, see INJUNCTIONS, 22 Cyc. 960. Discharge Of — Attachment on Giving, see ATTACHMENT, 4 Cyc. 676; Garnishment on Giving, see GARNISHMENT, 20 Cyc. 1102; Guarantor by Taking Additional or Substituted, see GUARANTY, 20 Cyc. 1476, 1477; Maritime Lien on Taking or Giving, see MARITIME LIENS, 26 Cyc. 796. Effect — As to Accrual of Right of Action, see LIMITATIONS OF ACTIONS, 25 Cyc. 1117; As to Claims Against Insolvent Estate, see INSOLVENCY, 22 Cyc. 1314; As to Limitations of Part Payment Derived From, see LIMITATIONS OF ACTIONS, 25 Cyc. 1378; Of Additional, see CHATTEL MORTGAGES, 7 Cyc. 68; Of Discharge of Payment on, see ATTACHMENT, 4 Cyc. 810; Of Renewal of Note Secured, see COMMERCIAL PAPER, 7 Cyc. 879. Enforcement of by Director Against Corporation, see CORPORATIONS, 10 Cyc. 814. Existence of Additional or Other as Bar to Right to Foreclose, see MORTGAGES, 27 Cyc. 1535. Extension of to Other Debts or Liabilities, see MORTGAGES, 27 Cyc. 1073. Failure — Loss, or Surrender of, see COMMERCIAL PAPER, 7 Cyc. 1046; To Exhaust Other Security, see MORTGAGES, 27 Cyc. 1533; To Give as Ground For Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 86. For Administration of Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 128. For Appeal, Correction of Failure to Give, see APPEAL AND ERROR, 2 Cyc. 847. For Appearance, see BASTARDS, 5 Cyc. 655. For Costs — In General, see Costs, 11 Cyc. 170; Discretion of Trial Court, see APPEAL AND ERROR, 3 Cyc. 343 note 57; In Admiralty, see ADMIRALTY, 1 Cyc. 871; In Criminal Case, see COSTS, 11 Cyc. 287; In Mandamus, see MANDAMUS, 26 Cyc. 513; In Proceedings to Establish Street or Highway, see STREETS AND HIGHWAYS; In Suit by Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1591; On Appeal, see COSTS, 11 Cyc. 204; On Granting Leave to Amend, see PLEADING, 31 Cyc. 381. For Creditor by Way of Insurance, see LIFE INSURANCE, 25 Cyc. 706. For Damages Instead of Injunction, see INJUNCTIONS, 22 Cyc. 969. Forfeited Bail-Bond in Civil Action to Stand as, see BAIL, 5 Cyc. 51 note 99. Forfeiture of Lease by Breach of Covenant to Furnish, see LANDLORD AND TENANT, 24 Cyc. 1352 note 30. For Good Behavior From Person Convicted of Crime, see CRIMINAL LAW, 12 Cyc. 973. For Loans and Advances to Receivers, see RECEIVERS, 34 Cyc. 278. For Payment of Alimony, see DIVORCE, 14 Cyc. 783. For Payment of Municipal Taxes, see MUNICIPAL CORPORATIONS, 28 Cyc. 1706. For Release of Attached Property, see ATTACHMENT, 4 Cyc. 676. For Rent, see LANDLORD AND TENANT, 24 Cyc. 1143. For Stay of Execution, see JUSTICES OF THE PEACE, 24 Cyc. 627. For Support of Family, see HUSBAND AND WIFE, 21 Cyc. 1616. Fraudulent Conveyance as Security For Consideration Paid, see FRAUDULENT CONVEYANCES, 20 Cyc. 643. Giving New Security — As Discharge of Mortgage Debt, see MORTGAGES, 27 Cyc. 1413; As Ratification of Altered Instrument by Indorser, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 174. Giving of — Fictitious Bail or Security as Contempt of Court, see CONTEMPT, 9 Cyc. 14; Instead of Granting

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**SECURIUS EXPEDIUNTUR NEGOTIA COMMISSA PLURIBUS, ET PLUS VIDENT OCULI QUAM OCULUS.** A maxim meaning "Business intrusted to several speeds best, and several eyes see more than one." [68]

**SEDATE.**[69] Settled, composed, calm, quiet, still, serene, unruffled by passion, undisturbed, contemplative, sober, serious.[70]

**SEDGE-FLAT.** A flat lying below ordinary high water mark, covered by every tide, and which grows a coarse or long sedge which cattle will not eat, and which, like seaweed, is valuable only for bedding and manure.[71]

**SEDITION.** The raising of commotions or disturbances in the state.[72]

**SEDITIOUS AGITATOR.** A disturber of the public peace and order, a subverter of just laws and a bad citizen.[73]

**SED NON ALLOCATUR.** Literally "But it is not allowed." A phrase used in the old reports, to signify that the court disagreed with the arguments of counsel.[74]

**SEDO.** See CEDO, 6 Cyc. 706.

**SED SI NON PROSUNT SINGULA, JUNCTA JUVANT.** A maxim meaning "If things do not avail when by themselves, let them be joined." [75]

68. Bouvier L. Dict. [*citing* Wrote *v.* Wigges, 4 Coke 45*b*, 46*a*, 76 Eng. Reprint 994].

69. Derived from *sedare* — a Latin verb which signifies to allay, or calm. Ake *v.* State, 30 Tex. 466, 473.

70. Webster Dict. [*quoted* in Ake *v.* State, 30 Tex. 466, 473].

"Sedate, deliberate mind" means a mental condition sufficiently composed to admit of reflection on the design, and to comprehend the nature and proper consequences of the designed act. Primus *v.* State, 2 Tex. App. 369, 376.

71. Church *v.* Meeker, 34 Conn. 421, 429, where the term is distinguished from "meadow."

72. Bouvier L. Dict. [*quoted* in U. S. *v.* Maximo Abad, 1 Philippine 437, 440].

In England, to speak or write against the character and constitution of the government, or to seek to change it by any means except those prescribed, constituted the offense of sedition. State *v.* Shepherd, 177 Mo. 205, 219, 76 S. W. 79, 99 Am. St. Rep. 624.

73. Wilkes *v.* Shields, 62 Minn. 426, 427, 64 N. W. 921.

74. Black L. Dict. See also Lawson *v.* Williamson Coal, etc., Co., 61 W. Va. 669, 678, 57 S. E. 258.

75. Morgan Leg. Max.

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# SEDUCTION

By George G. Calmes

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**CROSS-REFERENCES**

For Matters Relating to:
Abduction, see ABDUCTION, 1 Cyc. 140.
Adultery, see ADULTERY, 1 Cyc. 950.
Alienation of Affection, see HUSBAND AND WIFE, 21 Cyc. 1617.
Bastardy, see BASTARDS, 5 Cyc. 644.
Breach of Marriage Promise, see BREACH OF PROMISE TO MARRY, 5 Cyc. 997.
Criminal Conversation, see HUSBAND AND WIFE, 21 Cyc. 1626.
Fornication, see FORNICATION, 19 Cyc. 1433.
Lewdness and Illicit Cohabitation, see LEWDNESS, 25 Cyc. 209.
Rape, see RAPE, 33 Cyc. 1412.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW, 12 Cyc. 70.

## I. DEFINITION.

Seduction is the act of a man in enticing a woman to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without the employment of force.[1] It may be either a civil injury, giving rise to an action for damages, or a criminal offense, or both.

## II. CIVIL LIABILITY.

**A. Rights of Action and Defenses — 1. Action by Female Seduced — a. At Common Law.** At common law a seduced female has no cause of action against her seducer, not only because she is a party to the wrongful act, but also because loss of service is indispensable to a right of recovery, and no one except

1. Black L. Dict. And see the following cases:

*Arkansas.*— Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

*California.*— Marshall *v.* Taylor, 98 Cal. 55, 60, 32 Pac. 867, 35 Am. St. Rep. 144.

*Connecticut.*— Hart *v.* Knapp, 76 Conn. 135, 139, 55 Atl. 1021, 100 Am. St. Rep. 989.

*Illinois.*— Broughton *v.* Smart, 59 Ill. 440.

*Indiana.*— Robinson *v.* Powers, 129 Ind. 480, 482, 28 N. E. 1112.

*Iowa.*— Egan *v.* Murray, 80 Iowa 180, 183, 45 N. W. 563; Hopkins *v.* Mathias, 66 Iowa 333, 338, 23 N. W. 732; Brown *v.* Kingsley, 38 Iowa 220, 224; Delvee *v.* Boardman, 20 Iowa 446.

*Missouri.*— State *v.* Patterson, 88 Mo. 88, 96, 57 Am. Rep. 374; Comer *v.* Taylor, 82 Mo. 341.

*Oregon.*— Patterson *v.* Hayden, 17 Oreg. 238, 242, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

*Tennessee.*— Reed *v.* Williams, 5 Sneed 580, 73 Am. Dec. 157.

*Texas.*— Wisdom *v.* State, 45 Tex. Cr. 215, 217, 75 S. W. 22.

*Utah.*— Peterson *v.* Crosier, 29 Utah 235, 246, 81 Pac. 860.

*Wisconsin.*— Croghan *v.* State, 22 Wis. 444, 445.

**Other definitions.**— The word "seduce," as found in the statute, imports not only illicit sexual intercourse, but it imports also a surrender of chastity; a surrender of the woman's personal virtue. The statute is for the protection of the chastity of unmarried women, and the existence of the virtue at the time of the intercourse is a necessary ingredient of the offense; for, as has been often said, the woman who has lost her chastity, the prostitute, may be the victim of rape, but is not the subject of seduction. Wilson *v.* State, 73 Ala. 527, 533.

Seduction, in general terms, means to withdraw one from the path of rectitude. It is a leading astray; and, as applied to intercourse with a woman under a promise of marriage, it implies that a woman of previous chaste character has been induced to consent to unlawful sexual relations by persuasion and the promise to marry. Clemons *v.* Seba, 131 Mo. App. 378, 379, 111 S. W. 522.

Under Sandels & H. Dig. Ark. § 1900, it has been defined to consist in the act of seducing an unmarried female "of previous chaste character, and having sexual intercourse with her by virtue of a feigned or pretended marriage or of any false or feigned express promise of marriage." Walton *v.* State, 71 Ark. 398, 401, 75 S. W. 1.

As defined under Ga. Code, § 4371, it is where any person by persuasion and promise of marriage, or other false and fraudulent means, seduces a virtuous unmarried female. Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

Where an unmarried man having by his visits and attentions to an unmarried female gained her affections and confidence importunes her to sexual intercourse with him, and she, through her confidence in him and love for him, yields to his solicitations, it is seduction. Bell *v.* Rinker, 29 Ind. 267.

Seduction is the "offense of a man who abuses the simplicity and confidence of a woman to obtain by false promises what she ought not to give." Brown *v.* Kingsley, 38 Iowa 220 [*quoting* Bouvier L. Dict.]; Stowers *v.* Singer, 113 Ky. 584, 591, 68 S. W. 637, 24 Ky. L. Rep. 395.

An instruction that seduction is the act of inducing a woman of previous chaste character to depart from the path of virtue by the use of arts, persuasions, and wiles, inducing her to submit her person to the sexual embraces of the person accused, is correct. Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466. And see People *v.* Smith, 132 Mich. 58, 92 N. W. 776.

"The wrong of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions overcoming her reluctance and scruples." Hood *v.* Sudderth, 111 N. C. 215, 220, 16 S. E. 397 [*quoting* Abbott L. Dict.].

Seduction is the act of overcoming the chastity of a female by artifice, flattery, or promises. Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244.

Seducing and debauching were held to be synonymous in Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696. But in Missouri they are held to be different and distinct injuries. Mohelsky *v.* Hartmeister, 68 Mo. App. 318; Hartman *v.* McCrary, 59 Mo. App. 571.

**The use of force will not necessarily bar an action.** See *infra*, II, A, 1, c, (I), (C).

those entitled to the services of the female can maintain an action for the seduction, the right of action being based solely upon the relation of master and servant.[2]

**b. By Statute.** In many states, however, a right of action has been expressly given by statute to the female seduced.[3] In some jurisdictions, even when a minor, she may sue in her own behalf.[4] In others where the offense was committed when the female seduced was under age, she may wait until she attains her majority and then sue for the seduction.[5] The right conferred by statute upon an unmarried woman to prosecute an action for seduction has no extraterritorial effect.[6] A statute providing merely that an action for seduction may be maintained without allegation or proof of loss of service does not give the right of action to any other persons than those who could maintain it at common law, and does not authorize an action by a female for her own seduction. It dispenses with proof of loss of service, but not with the necessity for the relation of master and servant or parent and child.[7]

**c. Elements of Cause of Action — (I) *The Seduction* — (A) *In General.*** The essential element of a right of action for seduction is the act of seduction itself, which can only be accomplished by persuasion, flattery, deceit, false promises, or other artifices on the part of the seducer, whereby the female is induced to yield up her virtue.[8] Illicit or unlawful intercourse does not of itself constitute

**2.** *Kentucky.*— Cline *v.* Templeton, 78 Ky 550; Woodward *v.* Anderson, 9 Bush 624.

*Massachusetts.*— Paul *v.* Frazier, 3 Mass. 71, 3 Am. Dec. 95.

*Michigan.*— Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489.

*Missouri.*— See Robinson *v.* Musser, 78 Mo. 153, holding that the maxim, "*Volenti non fit injuria,*" applied in an action for alleged rape.

*New York.*— Hamilton *v.* Lomax, 26 Barb. 615.

*Rhode Island.*— Conlon *v.* Cassidy, 17 R. I. 518, 23 Atl. 100.

See 43 Cent. Dig. tit. "Seduction," §§ 8, 17. And see Rape, 33 Cyc. 1521.

**3.** See Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144 (holding that under Civ. Code, § 374, an unmarried female may prosecute as plaintiff in an action for her own seduction); Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425; Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567 (holding that a debauched woman, although she has consented to her dishonor, is not thereby estopped to sue for the injury); Weiher *v.* Meyersham, 50 Mich. 602, 16 N. W. 160; Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489 (both holding that under Comp. Laws, §§ 6195–6197, an unmarried woman of full age may sue for her seduction in her own name); Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397 (holding that under Const. art. 4, and Code, § 177, an unmarried woman, over twenty-one years of age, may maintain an action for her own seduction).

**4.** Under Ind. Rev. St. (1881) § 263 (Rev. St. (1894) § 264), providing that any unmarried female may prosecute an action for her own seduction, a woman of nonage may maintain such an action. McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93.

**5.** Graham *v.* Wallace, 50 N. Y. App. Div. 101, 63 N. Y. Suppl. 372, holding that a female ward may maintain an action in her own behalf, on attaining her majority, to recover damages of her personal guardian for her seduction by him when she was under the statutory age of consent. And see Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392, holding that under Code, §§ 1696, 1697, if the female was a minor when seduced, either she or her father might sue for the injury on her attaining her majority.

**6.** Buckles *v.* Ellers, 72 Ind. 220, 37 Am. Rep. 156, holding that, under 2 Rev. St. (1876) p. 43, conferring upon an unmarried woman the right to prosecute an action for her seduction, she could not maintain an action in that state for a seduction in Illinois, even though acts of criminal intercourse had continued in the former state as a consequence of such seduction.

**7.** Woodward *v.* Anderson, 9 Bush (Ky.) 624. And see Taylor *v.* Daniel, 98 S. W. 986, 30 Ky. L. Rep. 377.

**8.** *California.*— Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144, holding that under Civ. Code, § 374, providing that an unmarried female might prosecute an action for damages for her own seduction, there must be shown something more than a mere reluctance on the part of the woman to commit the act, and that she must have been solely influenced by promises, flattery, or other artifices of her alleged seducer to surrender to him her person and chastity.

*Connecticut.*— Smith *v.* Richards, 29 Conn. 232, holding that an action for the seduction of a minor brought by her next friend would lie where defendant took her into his house as a servant, and while there under his care and protection, she being destitute and without relatives, taking advantage of her ignorance and dependence and want of friends, and of her fear of him, persuaded her to submit to carnal intercourse with him, in consequence of which he debauched her.

*Indiana.*— Johnson *v.* Holliday, 79 Ind. 151, holding that where, in a suit by a

seduction.[9] Where it appears that she agreed to dispose of her virtue to her alleged seducer for a mercenary consideration she cannot recover;[10] and the same is true where it is shown that she yielded, not by reason of any promises, deception, or other artful influences, but merely to gratify her lustful desires.[11] The action may be maintained, however, even though the female knew that her seducer was a married man.[12] Of course consent of plaintiff will not defeat her right to sue, if it was obtained by persuasion, inducement, or artful means, for seduction implies this.[13]

(B) *Promise of Marriage.* Under some statutes a promise of marriage is not made a necessary element in seduction, but it is often resorted to by the seducer as one of the means of deception to accomplish his purpose, and is a sufficient inducement to bring the case within the statute.[14]

(C) *Use of Force.* In a criminal prosecution for seduction, proof of the use of force making the offense rape will defeat the prosecution;[15] but it is otherwise, in the absence of statutory provision, in a civil action to recover damages for seduction. Neither the element of force nor the fact that the female was unconscious at the time of the sexual intercourse will defeat the action,[16] and it has

woman for her seduction, it is shown that after a renewal from day to day of promises and persuasions, the woman finally yielded to her seducer's solicitations, it is seduction; and that evidence that defendant boasted of his wealth and promised to care for plaintiff if she would yield to him does not show that the connection was the result of a mercenary bargain, and therefore not seduction.

*Iowa.*— Baird *v.* Boehner, 72 Iowa 318, 33 N. W. 694; Delvee *v.* Boardman, 20 Iowa 446, holding that in an action by an unmarried woman for her own seduction, the proof of illicit intercourse alone will not establish the charge; but it must be shown that her consent thereto was obtained by flattery, promises, or other artifices made use of by defendant.

*Oregon.*— Breon *v.* Henkle, 14 Oreg. 494, 13 Pac. 289, holding that in an action brought under Civ. Code, § 35, providing that "an unmarried femals over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor," plaintiff must show that defendant employed such artifice or deceit as was calculated to mislead a virtuous woman; that she was misled in consequence thereof; and that she submitted to the sexual intercourse through the artifice or deception practised on her by defendant.

*Tennessee.*— Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655, holding that any solicitation, statement, or deception which overcomes a woman's unwillingness and causes her to yield her virtue is seduction.

See 43 Cent. Dig. tit. "Seduction," §§ 1, 4, 7.

Mere persuasion of a previously chaste woman, if followed by illicit intercourse as a result thereof, constitutes seduction. Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

9. Bell *v.* Rinker, 29 Ind. 267, holding that "if an unmarried man solicits sexual intercourse with an unmarried female, and she yields through the promptings of her own lascivious and lecherous desires, it is not seduction, such as will entitle her to recover damages in her own right, although a child be begotten by the connection." See also Hill *v.* Wilson, 8 Blackf. (Ind.) 123; Delvee *v.* Boardman, 20 Iowa 446.

10. Wilson *v.* Ensworth, 85 Ind. 399; Johnson *v.* Holliday, 79 Ind. 151; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

11. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Delvee *v.* Boardman, 20 Iowa 446.

12. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144.

13. Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

14. Hawk *v.* Harris, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352 (holding that in an action by a female for her own seduction, a promise of marriage by the seducer who is a minor will form a sufficient inducement, notwithstanding they both knew that it could not be enforced); Weiher *v.* Meyersham, 50 Mich. 602, 16 N. W. 160 (holding that the allegation of a fraudulent promise of marriage upon which an injured female relies, who is given the right to sue for her own seduction, states a good cause of action); Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397 (holding that in a suit by a female for damages for breach of promise and seduction, the action could be construed to be either for the breach of promise with the aggravation of the seduction or for the seduction, the latter being based alone upon the deception and betrayal of confidence on the part of defendant whereby she was induced to yield, relying upon his promise to marry her); Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1074, 76 Am. St. Rep. 655; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

15. See *infra*, III, A, 5, d.

16. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Kennedy *v.* Shea, 110 Mass. 147, 14 Am. St. Rep. 584; Velthouse *v.* Alderink, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. N. S. 587.

been held that in an action by a woman for her own seduction force may be shown in aggravation of the injury.[17]

(II) *FEMALE MUST BE UNMARRIED.* The statutes require that the female must be unmarried at the time of her seduction, in order to maintain an action therefor.[18]

(III) *CHASTITY OF FEMALE.* It will be presumed that a female was chaste at the time of the alleged seduction, but proof that she was unchaste will defeat her action.[19] But a woman of previous unchaste character may reform and afterward be seduced, and if her reformation is genuine she may sue and recover such compensatory damages as she may suffer.[20]

**d. Compromise or Release.** A written agreement between a seduced woman and her seducer, whereby for a valuable consideration the former agrees to waive all claims against the latter either of a civil or criminal nature, is an illegal contract and will not defeat an action brought by her for her seduction.[21]

**e. Subsequent Marriage.** Where a female has a right of action for her seduction while she is unmarried, her subsequent marriage to a person other than her seducer will not bar such right.[22] But as a rule where a woman marries her seducer she cannot afterward sue for the seduction, even after a divorce or annulment of the marriage.[23] It has been held, however, that where a conspiracy is formed for the purpose of defeating the claim of a woman for her seduction, in which a fraudulent purpose to marry and then abandon her enters into and forms a part thereof, the claim for damages for the seduction is not defeated by a marriage entered into for the purpose of carrying such scheme into execution.[24]

**2. ACTION BY PARENT, GUARDIAN, ETC. — a. At Common Law.** A parent, guardian, or other person standing *in loco parentis* has a right of action at common law against one who seduces his daughter under certain circumstances.[25] To enable him to maintain the action at common law the rule as announced under some of the earlier English cases was that some actual service must be shown to exist, although it was sufficient even if of the slightest or most trivial nature, this being held to be absolutely essential to establish the relation of master and servant, which was the foundation of the action.[26] But as civilization advanced and a

17. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144, holding that an unmarried female suing in her own behalf may recover exemplary damages, where it is shown in an action for her own seduction that force was used. See *infra*, II, B, 5, a, (II).

18. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Dowling *v.* Crapo, 65 Ind. 209; Breiner *v.* Nugent, (Iowa 1907) 111 N. W. 446; Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563; Smith *v.* Milburn, 17 Iowa 30; Gover *v.* Dill, 3 Iowa 337; Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397.

19. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692; Bell *v.* Rinker, 29 Ind. 267; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466; Clemons *v.* Seba, 131 Mo. App. 378, 111 S. W. 522; Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

In Iowa, however, it is held that an unmarried woman who was not of previous chaste character may, in an action to recover for her own seduction, recover damages for loss of health and all other injuries consequent upon the act of seduction except injury to or loss of character. Olson *v.* Rice, 140 Iowa 630, 119 N. W. 84; Smith *v.* Milburn, 17 Iowa 30.

20. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Smith *v.* Milburn, 17 Iowa 30.

21. Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454, holding that a written agreement between an unmarried pregnant woman and her seducer by which she agrees for a valuable consideration to leave the town for a specified time, and to waive all claims against him, criminal or civil, is an illegal contract, and constitutes no defense to an action for seduction.

22. Dowling *v.* Crapo, 65 Ind. 209.

23. Henneger *v.* Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848.

24. Bishop *v.* Redmond, 83 Ind. 157.

25. Terry *v.* Hutchinson, L. R. 3 Q. B. 599, 9 B. & S. 487, 37 L. J. Q. B. 257, 18 L. T. Rep. N. S. 521, 16 Wkly. Rep. 932; Harper *v.* Luffkin, 7 B. & C. 387, 6 L. J. K. B. O. S. 23, 1 M. & R. 166, 31 Rev. Rep. 236, 14 E. C. L. 177; Rist *v.* Faux, 4 B. & S. 409, 10 Jur. N. S. 202, 32 L. J. Q. B. 386, 8 L. T. Rep. N. S. 737, 11 Wkly. Rep. 918, 116 E. C. L. 409; Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653, 102 Eng. Reprint 986.

26. Grinnell *v.* Wells, 2 D. & L. 610, 8

higher plane of moral development was reached, the necessity of showing loss of actual service came to be regarded as a mere fiction of law existing more in theory than in fact, giving way to the more enlightened and reasonable view of recognizing the parental relation and the right of the parent to the services of the child, the former being under both a legal and moral obligation to support and educate the latter. Under the relaxation of this rule, both in England and in the United States, it is only necessary to show either the actual or constructive relation of master and servant, predicated on the legal right of the parent to control or command the services of the child.[27] But where the daughter is of full age, being emancipated from parental authority, some kind of service must be shown, although it may be slight or trivial, to give the parent the right to maintain the action.[28]

**b. By Statute.** The rule at common law by which the right is given to parents to maintain the action has not been changed in some of the states, but in others it has been enlarged by statute by abolishing the legal fiction of loss of service as a condition precedent to the right to recover.[29] It has been held, however, that a statute authorizing the maintenance of actions for seduction without allegation or proof of the loss of service of the child by reason of the wrongful act does not modify the common-law rule that the relation of master and servant or parent and child must appear;[30] and therefore that a mother cannot recover for the seduction of her illegitimate daughter on failing to show that the daughter was under twenty-one years of age, or in her service, or that she was entitled to her service.[31]

**c. Who May Sue and When** — (i) *Father* — (A) *In General.* The right of action for the seduction of the infant daughter rests exclusively in the father if living, when the actual or constructive relation of master and servant is shown,

Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033; Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653, 102 Eng. Reprint 986.

27. *Alabama.*—Roberts *v.* Connelly, 14 Ala. 235.

*Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603.

*Illinois.*— Leucker *v.* Steilen, 89 Ill. 545, 31 Am. Rep. 104; White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Ball *v.* Bruce, 21 Ill. 161; Garretson *v.* Becker, 52 Ill. App. 255.

*Indiana.*— Bolton *v.* Miller, 6 Ind. 262.

*Maryland.*— Greenwood *v.* Greenwood, 28 Md. 369.

*Mississippi.*— Ellington *v.* Ellington, 47 Miss. 329.

*New York.*— White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282 [*affirming* 31 Barb. 279]; Mulvehall *v.* Millward, 11 N. Y. 343; Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338; Clark *v.* Fitch, 2 Wend. 459, 20 Am. Dec. 639; Martin *v.* Payne, 9 Johns. 387, 6 Am. Dec. 288.

*Pennsylvania.*— Mohry *v.* Hoffman, 86 Pa. St. 358; Hornketh *v.* Barr, 8 Serg. & R. 36, 11 Am. Dec. 568.

*United States.*— Barbour *v.* Stephenson, 32 Fed. 66.

*England.*—Terry *v.* Hutchinson, L. R. 3 Q. B. 602, 9 B. & S. 487, 37 L. J. Q. B. 257, 18 L. T. Rep. N. S. 521, 16 Wkly. Rep. 932; Maunder *v.* Venn, M. & M. 323, 31 Rev. Rep. 734, 22 E. C. L. 535; Bennett *v.* Allcott, 2 T. R. 166, 100 Eng. Reprint 90.

See 43 Cent. Dig. tit. "Seduction," § 1 *et seq.*

28. *Delaware.*— Herring *v.* Jester, 2 Houst. 66.

*Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603.

*Illinois.*— Ball *v.* Bunce, 21 Ill. 161.

*New York.*— Badgley *v.* Decker, 44 Barb. 577; Nickleson *v.* Styker, 10 Johns. 115, 6 Am. Dec. 318.

*England.*— Postlethwaite *v.* Parkes, 3 Burr. 1878, 97 Eng. Reprint 1147.

See 43 Cent. Dig. tit. "Seduction," § 16.

29. *Indiana.*— Felkner *v.* Scarlet, 29 Ind. 154.

*Iowa.*— Updegraff *v.* Bennett, 8 Iowa 72.

*Kansas.*— Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529.

*Michigan.*— Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

*Minnesota.*— Schmit *v.* Mitchell, 59 Minn. 251, 61 N. W. 140.

*North Carolina.*— Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397, holding that Const. art. 4, § 1, providing that feigned issues should be abolished, thereby abolished the necessity for proof of loss of service.

*Tennessee.*— Franklin *v.* McCorkle, 16 Lea 609, 1 S. W. 250, 57 Am. Rep. 244.

*Virginia.*— Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

*West Virginia.*— Riddle *v.* McGinnis, 22 W. Va. 253.

See 43 Cent. Dig. tit. "Seduction," § 9 *et seq.*

30. Woodward *v.* Anderson, 9 Bush (Ky.) 624; Taylor *v.* Daniel, 98 S. W. 986, 30 Ky. L. Rep. 377.

31. Taylor *v.* Daniel, 98 S. W. 986, 30 Ky. L. Rep. 377.

he being entitled to the profits of her labor and under a legal obligation to support and educate her;[32] and it has been held that he can sue and recover full damages for his minor daughter's seduction, even where a statute provides that every action must be prosecuted in the name of the real party in interest.[33]

(B) *When Daughter Is Under Age* — (1) WHILE LIVING WITH FATHER. Where the daughter is under age at the time of the seduction the rules with respect to the facts and circumstances necessary to show the relation of master and servant and the loss of service to the father as adopted by the courts of this country differ in some important particulars from those where the daughter is of full age. Where she is under age and resides with her father, in a suit by him for her seduction, the relation of master and servant and loss of service will be presumed, he being entitled to her services by reason of his legal right to the custody, care, society, and labor of his infant children.[34]

(2) WHILE IN SERVICE OF ANOTHER OR ABSENT FROM HOME. It is also unnecessary to show actual loss of service where at the time of the injury she is in the service or employment of another or absent from home, so long as she is subject to her father's control and he has not relinquished his right to command her services,[35] even though at the time of the injury she had no intention of returning to her father's house, for the mere exercise of her own volition will not of

**32.** Mulvehall *v.* Millward, 11 N. Y. 343; Scarlett *v.* Norwood, 115 N. C. 284, 20 S. E. 459; Hornketh *v.* Barr, 8 Serg. & R. (Pa.) 36, 11 Am. Dec. 568.

**33.** Scarlett *v.* Norwood, 115 N. C. 284, 20 S. E. 459, holding that under Code, § 177, providing that every action must be prosecuted in the name of the real party in interest, a father may maintain an action for damages resulting from the seduction of his infant daughter, the loss of her services, the expense of her illness, her death, and the consequent injury to his affections.

**34.** *Massachusetts.*— Blanchard *v.* Ilsley, 120 Mass. 487, 21 Am. Rep. 535; Kennedy *v.* Shea, 110 Mass. 147.

*Mississippi.*— Ellington *v.* Ellington, 47 Miss. 329.

*New York.*— Mulvehall *v.* Millward, 11 N. Y. 343; Hewitt *v.* Prime, 21 Wend. 79; Martin *v.* Payne, 9 Johns. 387, 6 Am. Dec. 288.

*Pennsylvania.*— Hornketh *v.* Barr, 8 Serg. & R. 36, 11 Am. Dec. 568; Logan *v.* Murray, 6 Serg. & R. 175, 9 Am. Dec. 422.

*Tennessee.*— Parker *v.* Meek, 3 Sneed 29.

See 43 Cent. Dig. tit. "Seduction," § 9 *et seq.*

**35.** *Arkansas.*— Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52, holding that as long as a father retains his right to control the services of his infant daughter he can sue for her seduction, although he has allowed her to receive her earnings in the service of the one by whom she has been seduced, at whose house she was then living.

*Illinois.*— Ball *v.* Bruce, 21 Ill. 161.

*Indiana.*— Bolton *v.* Miller, 6 Ind. 262.

*Maine.*— Emery *v.* Gowen, 4 Me. 33, 16 Am. Dec. 233.

*Maryland.*— Greenwood *v.* Greenwood, 28 Md. 369.

*Massachusetts.*—Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361; Blanchard *v.* Ilsley, 120 Mass. 487, 21 Am. Rep. 535.

*New Hampshire.*— Davidson *v.* Goodall, 18 N. H. 423, holding that the action will lie although the infant daughter was absent from her father's home on a visit when the act complained of was committed, or soon afterward left his house.

*New York.*— Clark *v.* Fitch, 2 Wend. 459, 20 Am. Dec. 639, holding that a father liable to a third person for the expenses of the lying-in of a daughter who has been seduced, being under the age of twenty-one, may maintain an action for such seduction, although the daughter is a servant *de facto* of another, and although the father has incurred no actual expense.

*North Dakota.*— Ingwaldson *v.* Skrivseth, 7 N. D. 388, 75 N. W. 772.

*Pennsylvania.*— Hornketh *v.* Barr, 8 Serg. & R. 36, 11 Am. Dec. 568.

*West Virginia.*— Riddle *v.* McGinnis, 22 W. Va. 253. And see Hudkins *v.* Haskins, 22 W. Va. 645.

*Wisconsin.*— Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768, holding that a father may recover for loss of service of his infant daughter, caused by her being gotten with an illegitimate child, notwithstanding she was not at the time actually in the service of the father but stopping with defendant and his wife at their request, which she had done from time to time, when not needed at her father's, she having worked there when at home.

*England.*— Griffiths *v.* Teetgen, 15 C. B. 344, 1 Jur. N. S. 426, 24 L. J. C. P. 35, 3 Wkly. Rep. 11, 80 E. C. L. 344, holding that an action would lie where a daughter, who was living with her father, at defendant's request, went and stayed at his house to assist in his shop during the temporary absence of his wife, where, upon the return of the wife within a few weeks, she was paid for her services, and then left and returned to her father's, having been seduced while at defendant's during his wife's absence. See

itself terminate the relation of master and servant.[38] And the same rule obtains in the United States where she is permitted to receive the profits of her own labor.[37] Some of the English authorities, however, hold otherwise.[38]

(3) Fraudulent or Wicked Design. If a fraudulent or wicked design is resorted to by the seducer to obtain possession of the female's person for the purpose of seduction and such purpose is thereby accomplished, the action will still lie, as fraud or deception cannot deprive the father of the right to his daughter's services.[39]

(4) Father's Right to Services Divested. If the father has divested himself of his right to either control or command his daughter's services, as where he has apprenticed her to another,[40] or has intentionally abandoned her to shift for herself,[41] he cannot recover. The rule is different, it seems, where she goes to live with another as a servant under an oral contract instead of a legal indenture, for in such case the father does not transfer his right to her services beyond recall.[42] Although the father may have divested himself of the right to the daughter's services, yet if the contingency arises whereby he can legally reassert his right to them, as where she is released from an apprenticeship, or from the service of another, and on her return home is seduced, the father may recover.[43]

also Holloway *v.* Abell, 7 C. & P. 528, 32 E. C. L. 742.

See 43 Cent. Dig. tit. "Seduction," §§ 14, 16.

**Under Md. Code, art. 6, § 20, providing** that any father may bind out his child as an apprentice "for any time not longer than the full age of such child, that is to say, boys till twenty-one, and girls till eighteen years of age," a female child is not to be considered as of full age at eighteen years, so as to affect the right of the father to maintain an action for her seduction. Greenwood *v.* Greenwood, 28 Md. 369.

**36.** Mulvehall *v.* Millward, 11 N. Y. 343; Clark *v.* Fitch, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639; Martin *v.* Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; Hornketh *v.* Barr, 8 Serg. & R. (Pa.) 36, 11 Am. Dec. 568. But see Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653, 102 Eng. Reprint 986, holding that an action cannot be maintained upon evidence showing that the daughter, although under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the time of the seduction to return to her father's house, although she afterward did return there while within age, in consequence of the seduction, and was maintained by her father.

**37.** *Arkansas.*— Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

*Indiana.*— Boyd *v.* Byrd, 8 Blackf. 113, 44 Am. Dec. 740, holding that a father can maintain a suit for the seduction of his unmarried daughter, under age, although previous to the seduction she had left her father's house, with his consent, without intending to return, and with his license to appropriate her time and services to her own use.

*Maryland.*— Greenwood *v.* Greenwood, 28 Md. 369.

*New York.*— Martin *v.* Payne, 9 Johns. 387, 6 Am. Dec. 288.

*North Dakota.*— Ingwaldson *v.* Skrivseth, 7 N. D. 388, 75 N. W. 772.

**38.** Dean *v.* Peel, 5 East 45, 1 Smith K. B. 333, 7 Rev. Rep. 653, 102 Eng. Reprint 986. See also Grinnell *v.* Wells, 2 D. & R. 610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott N. R. 741, 49 E. C. L. 1033; Blamire *v.* Haley, 4 Jur. 107, 9 L. J. Exch. 147, 6 M. & W. 55; Harris *v.* Butler, 1 Jur. 608, 6 L. J. Exch. 133, M. & H. 117, 2 M. & W. 539.

**39.** Speight *v.* Oliviera, 2 Stark. 493, 20 Rev. Rep. 728, 3 E. C. L. 501, holding that the father might maintain an action for the seduction of his daughter where her seducer hired her as his servant, and thereby obtained possession of her person with the view of seducing her. And see Lawyer *v.* Fritcher, 54 Hun (N. Y.) 586, 7 N. Y. Suppl. 909 [*affirmed* in 130 N. Y. 239, 29 N. E. 268, 27 Am. St. Rep. 521, 14 L. R. A. 700], holding that the action would lie where an infant daughter was taken away as a wife by one who fraudulently obtained the consent of her parents to a void marriage, as fraud vitiated such consent; and the fact that at the time she took poison she was informed that her seducer could not legally marry her, she not being in plaintiff's house and actual service, was immaterial.

**40.** Dain *v.* Wycoff, 7 N. Y. 191, holding that a father who has indented his daughter to another man as a servant, being no longer entitled to her services, cannot maintain an action of seduction against him.

**41.** Ogborn *v.* Francis, 44 N. J. L. 441, 43 Am. Rep. 394.

**42.** Mohry *v.* Hoffman, 86 Pa. St. 358, in which a distinction is drawn between an acknowledged legal indenture and an oral contract, and it is held that where a father verbally agrees that his daughter shall reside as a servant in a stranger's family for a certain number of years, he does not thereby surrender his parental control so as to bar his right to recover for her seduction, during her minority, by a son of her employer.

**43.** Emery *v.* Gowen, 4 Me. 33, 16 Am. Dec. 233 (holding that if a minor daughter is bound an apprentice and her master turns

(c) *When Daughter Is of Full Age* — (1) While Living With Father. Although the daughter is of full age at the time of her seduction, the father may maintain an action for the injury if she resides in his family and performs some service, however slight or trifling,[44] although she may be temporarily absent in the service or employment of another or on a visit.[45] No contract for services is required, although the daughter is of age; the slightest service, if shown, is sufficient.[46]

(2) While Not Living With Father. If an adult daughter does not reside in her father's family and it does not appear that she performs for him some service the action will not lie.[47]

her away, or if, with his consent, she returns to her father and is seduced, the father may have his action); Terry *v.* Hutchinson, L. R. 3 Q. B. 599, 9 B. & S. 487, 37 L. J. Q. B. 257, 18 L. T. Rep. N. S. 521, 16 Wkly. Rep. 932 (holding that an action for seduction is supported by evidence that the daughter, who was under the age of twenty-one, being discharged from service, was returning home at the time of the seduction, and was on her return received into her father's house). See also Sargent *v.* ——, 5 Cow. (N. Y.) 106.

**44.** Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23; Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760 (holding that the father could sue where the adult daughter when seduced was living at home, working during the day for another, returning to the house of her father at night, receiving her own wages and supporting herself and sometimes assisting her mother in paying the rent); Mercer *v.* Walmsley, 5 Harr. & J. (Md.) 27, 9 Am. Dec. 486; Wert *v.* Strouse, 38 N. J. L. 184 (holding that where a daughter is over the age of twenty-nine years, if she still lives in her father's house, and is in a position where he enjoys and can command her services, he may maintain an action for her seduction); Briggs *v.* Evans, 27 N. C. 16. See also Herring *v.* Jester, 2 Houst. (Del.) 66; Phipps *v.* Garland, 20 N. C. 38.

**45.** Bayles *v.* Burgard, 48 Ill. App. 371 (holding that where an adult daughter has continued to live with her father, has been his housekeeper, and cared for his minor children, and has occasionally, with his consent, done work away from home, dividing her earnings with him, the father has an action for loss of service for her seduction); Lipe *v.* Eisenlerd, 32 N. Y. 229; Wallace *v.* Clark, 2 Overt. (Tenn.) 93, 5 Am. Dec. 654 (holding that in an action for the seduction of his daughter, who was above the age of twenty-one years, slight evidence of assistance given by her to her father's family was sufficient to prove her the father's servant, although she may have lived most of the time at her sister's house); Rist *v.* Faux, 4 B. & S. 409, 10 Jur. N. S. 202, 32 L. J. Q. B. 386, 8 L. T. Rep. N. S. 737, 11 Wkly. Rep. 618, 116 E. C. L. 409 (holding that the service was sufficient to support an action by the father where the daughter was employed by defendant as a servant when seduced by him, being absent during the usual working hours from her father's house, where she slept and assisted in the household duties); Mann *v.* Barrett, 6 Esp. 32, 9 Rev. Rep. 804; Ogden *v.* Lancashire, 15 Wkly. Rep. 158.

**46.** Briggs *v.* Evans, 27 N. C. 16; and other cases above cited.

**47.** *Arkansas.*— Patterson *v.* Thompson, 24 Ark. 55.

*Maine.*— Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23, holding that in an action by a father for seduction of an adult daughter, it must appear that the daughter resided in her father's family, and performed some acts of service, however slight, although it is not necessary that the services should be such as the father can command.

*Maryland.*— Mercer *v.* Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486.

*New York.*— Thompson *v.* Millar, 1 Wend. 447; Nickleson *v.* Styker, 10 Johns. 115, 6 Am. Dec. 318.

*North Carolina.*— McDaniel *v.* Edwards, 29 N. C. 408, 47 Am. Dec. 331 (holding that a father cannot maintain an action for the seduction of his daughter where the daughter is over twenty-one years of age, and does not live in her father's family, although he is to receive a part of her wages); Phipps *v.* Garland, 20 N. C. 38 (holding that if the daughter be of full age and does not reside with her father, the action cannot be maintained, although she occasionally visits him and is seduced while she is going to his house on one of these visits).

*Pennsylvania.*— Wilson *v.* Sproul, 3 Penr. & W. 49.

*Tennessee.*— Parker *v.* Meek, 3 Sneed 29.

*Virginia.*— Lee *v.* Hodges, 13 Gratt. 726.

*England.*— Davies *v.* Williams, 10 Q. B. 725, 11 Jur. 750, 16 L. J. Q. B. 369, 59 E. C. L. 725 (holding that when a daughter is seduced while out at service, and leaves in a state of pregnancy and returns home, where she is supported by her father until and after her confinement, the relation of master and servant does not exist at the time of the seduction and the action cannot be maintained); Manly *v.* Field, 7 C. B. N. S. 96, 6 Jur. N. S. 300, 29 L. J. C. P. 79, 97 E. C. L. 96 (holding that when an adult daughter rents a house and carries on the business of a milliner at the time of her seduction, the fact that her mother and brothers and sisters reside with her, she contributing to their support, the father lodging elsewhere but also contributing to their support at times and visiting them, does not entitle the father to maintain the action); Blamire *v.* Haley, 4 Jur. 107, 9 L. J. Exch. 147, 6 M. & W.

(3) When Service Is Presumed. In some jurisdictions it has been held that where the daughter is living in her father's house as a member of his family at the time she attains her majority, rendering him the usual services, from which the relation of master and servant may be implied, such relation is presumed to continue to exist between them until she is emancipated from all control on the part of her father;[48] and such relation will not be terminated by a mere temporary absence from her father's home with the present intention on her part of returning to the same.[49]

(4) Imbecile Daughter. If the daughter is over the age of twenty-one years and incapable of emancipation from parental control by reason of imbecility of mind she still owes service to the father and is subject to his control as though she were a minor; and if she has not been manumitted, and while in the service of another is seduced, the father may recover.[50]

(II) *Mother* — (A) *During Life of Father.* At common law the mother cannot maintain an action for the seduction of her daughter while the father is living;[51] but it has been held otherwise under modern statutes where the father has abandoned the mother and left the state, and the daughter resides with and performs services for the mother.[52]

(B) *After Father's Death.* After the father's death the mother may maintain an action for her daughter's seduction where the relation of master and servant is shown to exist in like manner as the father if he were living.[53] The mother of a minor daughter whose father is dead, being entitled to her services during her minority, may sue and recover for such daughter's seduction.[54] But, unless it is shown that the mother was entitled to the services of her minor daughter

55 (holding that an action cannot be maintained by a father for the seduction of his adult daughter while she is in the service of another, although it be shown that she was there with the intention on the part of her father and herself that she should return to her father when she quit her service, unless she should go into the service of another).

See 43 Cent. Dig. tit. "Seduction," § 13 *et seq.*

48. Wert *v.* Strouse, 38 N. J. L. 184; Parker *v.* Meeks, 3 Sneed (Tenn.) 29; Hudkins *v.* Haskins, 22 W. Va. 645.

49. Hudkins *v.* Haskins, 22 W. Va. 645. And see Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425.

50. Hahn *v.* Cooper, 84 Wis. 629, 54 N. W. 1022, holding that where an adult who was an imbecile and had never been manumitted by the father was placed by the latter in the service of a man, under an agreement to account to the father for her services and was seduced by him, the father could recover, as he had the right to reclaim her services at any time.

51. Badgley *v.* Decker, 44 Barb. (N. Y.) 577.

52. Badgley *v.* Decker, 44 Barb. (N. Y.) 577 (holding that under the statutes relating to married women a wife who has been abandoned by her husband, and who keeps a boarding-house on her sole and separate account, may sue in her own name for the seduction of her daughter, over twenty-one years of age, who lives with and performs services for her about the house); Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268 (holding that where a husband resides out of the state, the wife may maintain an action for the seduction of her daughter). *Compare*, however, Matthews *v.* Koch, 20 Pa. Co. Ct. 363, holding that a married woman deserted by her husband cannot recover damages for the seduction of her daughter, over twenty-one years of age, unless she shows an express contract establishing the relation of mistress and servant between them.

53. Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Gray *v.* Durland, 51 N. Y. 424 [*affirming* 50 Barb. 100]; and other cases in the notes following.

54. Keller *v.* Donnelly, 5 Md. 211; Furman *v.* Van Sise, 56 N. Y. 435, 15 Am. Rep. 441 (holding that where a minor daughter, the father being dead, was seduced while in the service of another under an understanding had with the mother, such daughter receiving the profits of her labor and applying them to her own use, with her mother's consent, the mother could sue for the seduction); Gray *v.* Durland, 50 Barb. (N. Y.) 100 [*affirmed* in 51 N. Y. 424] (holding that a mother, after the father's death, can maintain an action for the seduction of her minor child, notwithstanding the daughter is temporarily in the employment of another person, but when seduced is at home engaged in domestic duties for a few days for her mother); Badgley *v.* Decker, 44 Barb. (N. Y.) 577; Lampman *v.* Hammond, 3 Thomps. & C. (N. Y.) 293; Sargent *v.* ——, 5 Cow. (N. Y.) 106 (holding that an action would lie in favor of the mother for the seduction where a mother bound her minor daughter as an apprentice, and she was thereafter seduced, upon which the indentures were canceled by consent, and the daughter returned to her mother's house and

when seduced, it has been held that she cannot maintain the action, as where the daughter is hired to another,[55] or where she leaves her home on account of her mother being a common prostitute, and during her absence is seduced.[56] The mother may maintain an action when the daughter is living with her and rendering service, however slight, although she is over twenty-one,[57] but not if no service is proved.[58] The right of the mother to sue is not defeated by the fact that she has remarried.[59]

(c) *When Father Dies After Seduction.* In some states it has been held that a mother after the death of the father can maintain an action against the seducer of their daughter where she was seduced while living with her father in his lifetime;[60] but in other states the decisions are to the contrary.[61] Such action will not lie where she was in the actual service of another at the time she was seduced.[62]

(d) *Illegitimate Daughter.* A mother cannot recover for the seduction of her illegitimate daughter if she fails to show that the daughter was under twenty-one years of age, or in her service, or that she was entitled to her services.[63]

(iii) *Persons In Loco Parentis.* As a rule, a grandparent, brother, stepfather, or any other person standing *in loco parentis* to the female seduced may sue for her seduction and recover damages for the injury in all cases where the natural father might sue;[64] but it is held in some states that the action will

was there delivered of a child); Gould *v.* Erskine, 20 Ont. 347.

**Actual loss of service.**—In South *v.* Denniston, 2 Watts (Pa.) 474, it was held that a widowed mother cannot sustain an action for the seduction of her minor daughter unless actual loss of service is shown, it being the gist of the action; the action being founded on the relation of master and servant, not of parent and child.

**In Maryland** it has been held that under the statute a mother is not entitled to command the services of her daughter after she is eighteen, and therefore cannot sue for the daughter's seduction after that age, if she is not in her employ. Keller *v.* Donnelly, 5 Md. 211.

55. Hobson *v.* Fullerton, 4 Ill. App. 282.

56. Roberts *v.* Connelly, 14 Ala. 235.

57. Villepigue *v.* Shuler, 3 Strobh. (S. C.) 462. See also Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Davidson *v.* Abbott, 2 Vt. 570, 36 Am. Rep. 767.

58. Hedges *v.* Tagg, L. R. 7 Exch. 283, 41 L J. Exch. 169, 20 Wkly. Rep. 976 (holding that the mother could not recover where an adult daughter, being in service as a governess, and seduced whilst on a three days' visit, with her employer's permission, to her mother, during which visit she gave some assistance in household duties, at the time of her confinement being in the service of another employer and afterward returning home to her mother); Thompson *v.* Ross, 5 H. & N. 16, 5 Jur. N. S. 1133, 29 L. J. Exch. 1, 1 L. T. Rep. N. S. 43, 8 Wkly. Rep. 44. *Compare*, however, Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L. R. A. 757, holding that a mother may recover for the seduction of her adult daughter, living with her, without averment or proof of loss of services or expenses of sickness.

59. Lampman *v.* Hammond, 3 Thomps. & C. (N. Y.) 293.

60. Coon *v.* Moffet, 3 N. J. L. 583, 4 Am. Dec. 392 (holding that a mother can sue for debauching her daughter, and getting her with child, although accomplished in the lifetime of the father, the loss of service accruing after his death; such loss of service being the ground of the action); Parker *v.* Meek, 3 Sneed (Tenn.) 29 (holding that where the daughter was seduced while living with the father and the latter afterward died before the daughter was delivered of the child, she continuing to live with the mother, the mother might recover for the seduction).

61. Heinrichs *v.* Kerchner, 35 Mo. 378 (holding that a mother cannot maintain an action for the seduction of her daughter where the father was living at the time of the seduction, although he died before the daughter gave birth to a child); Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136 (to the same effect); Logan *v.* Murray, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422.

62. George *v.* Van Horn, 9 Barb. (N. Y.) 523, holding that a mother, after the death of her husband, cannot recover for the seduction of her daughter in his lifetime, where it appears that the daughter was over twenty-one years of age, and in the actual service of another person, although she shortly afterward returned to her mother's family, and was cared for by her during her confinement.

63. Taylor *v.* Daniel, 98 S. W. 986, 30 Ky. L. Rep. 377. See also *supra*, II, A, 2, b.

64. *Illinois.*— Ball *v.* Bruce, 21 Ill. 161.

*Maryland.*— Keller *v.* Donnelly, 5 Md. 211.

*New Hampshire.*— Davidson *v.* Goodall, 18 N. H. 423, holding that where a female under age, having no father, is seduced while serving in the family of a cousin with whom she has resided for several years, the cousin stands *in loco parentis* to the girl, and the relation of master and servant is sufficiently shown to support an action for the seduction even if she was absent on a visit at the time.

*New York.*— Certwell *v.* Hoyt, 6 Hun 575

not lie if the female is at the time of the seduction in the service of a third person.[65] The action will not lie where the female is over the age of twenty-one years and is not in the actual service of the person standing *in loco parentis* at the time of the seduction.[66]

(IV) *GUARDIAN.* The guardian, upon the decease of the father, stands *in loco parentis* in his relation to his ward, and possesses the same right to sue for her seduction as the father would have if living.[67] If the father is living the guardian can only sue where it appears that the former has parted with or waived the right to his daughter's services, and the actual or constructive relation of master and servant is shown to exist between the guardian and his ward.[68]

**d. Elements of Cause of Action** — (I) *THE SEDUCTION.* It has been held in some jurisdictions that seduction, as distinguished from mere illicit intercourse, must be shown to entitle the parent, guardian, or other person *in loco parentis* to sue for the wrong inflicted upon the injured female, and this implies that some pretense or artifice was used on the part of her seducer to accomplish his purpose.[69] At common law, however, loss of service is the basis of the action, and therefore the mere act of intercourse resulting in loss of service is sufficient.[70] In the absence of a statute a promise of marriage is not necessary.[71] The fact that force was used will not defeat the action.[72]

(holding that where, at the request of the deceased parents of a female infant, her grandfather assumes the obligations of a parent in respect to her, he can maintain an action for her seduction, although she was living away from him in the service of the defendant, appropriating the wages received to her own use, at the time of the injury); Bracy *v.* Kibbe, 31 Barb. 273 (holding that a stepfather who has adopted the illegitimate daughter of his wife into his family stands *in loco parentis*, and can maintain an action for her seduction); Ingersoll *v.* Jones, 5 Barb. 661.

*Oregon.*— Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

*South Carolina.*— Villepigue *v.* Shular, 3 Strobh. 462.

*Tennessee.*— Maguinay *v.* Saudek, 5 Sneed 146, stepfather.

See 43 Cent. Dig. tit. "Seduction," §§ 11, 12.

**Effect of statute.**— The common-law action for the seduction of an unmarried female, in the name of the person having the right to her services, for loss of services, is not displaced by B. & C. Comp. Oreg. § 35, authorizing a father, or, in case of his death or desertion of his family, the mother, to maintain an action for the seduction of a daughter, although there is no loss of services, and the common-law right of action for the seduction of a granddaughter, who is a member of plaintiff's household, exists. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

65. Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338 [*reversing* 2 Barb. 182], stepfather.

**Under the Maryland statute** it was held that where the seduced daughter was a minor there must be proof of service to enable the person standing *in loco parentis* to recover. Keller *v.* Donnelly, 5 Md. 211.

66. Thompson *v.* Millar, 1 Wend. (N. Y.) 447 (holding that where the female is over the age of twenty-one, unless she is in the actual service of her sister, who stands *in loco parentis* so as to constitute in law and in fact the relation of master and servant, and resides with her seducer at the time of the seduction, no action for the seduction will lie); Kinney *v.* Laughenour, 89 N. C. 365 (holding that a stepfather cannot recover for the seduction of his stepdaughter if, at the time of the injury, she was not in his service or under his control); Wilson *v.* Sproul, 3 Penr. & W. (Pa.) 49 (holding that a brother-in-law of the seduced cannot sue where she is above the age of twenty-one years, and not in his actual employment).

67. Fernsler *v.* Moyer, 3 Watts & S. (Pa.) 416, 39 Am. Dec. 33.

68. Blanchard *v.* Ilsley, 120 Mass. 487, 21 Am. Rep. 535.

69. Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261; Bailey *v.* O'Bannon, 28 Mo. App. 39; Smith *v.* Young, 26 Mo. App. 575 (recovery of more than compensatory damages); Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529. And see Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244. See also *supra*, II, A, 1, c, (I).

70. Leucker *v.* Steileu, 89 Ill. 545, 31 Am. Rep. 104; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138; McAulay *v.* Birkhead, 35 N. C. 28, 55 Am. Dec. 427; Reed *v.* Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157. And see Hill *v.* Wilson, 8 Blackf. (Ind.) 123; Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361.

71. Comer *v.* Taylor, 82 Mo. 341; Kip *v.* Berdan, 20 N. J. L. 239; Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244; Haynes *v.* Sinclair, 23 Vt. 108.

72. Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584; Dalman *v.* Koning, 54 Mich. 320, 20 N. W. 61; Johnston *v.* Disbrow, 47 Mich. 59, 10 N. W. 79; Lawrence *v.* Spence, 99 N. Y. 669, 2 N. E. 145 [*affirming* 29 Hun

(II) *Loss of Services.* While the right to recover is theoretically founded on loss of actual or constructive service, now, both in England and America, where the female was under twenty-one years of age when seduced, it is only necessary to show that plaintiff in the action was entitled to or had the right to control her services at the time of the seduction.[73] An adult female being legally exempt from parental authority, the relation of master and servant is not implied, as in the case of a minor, but actual service, which, however, may be slight, must be shown to enable the parent to recover.[74] It is immaterial whether such services are paid for or not, or whether they were performed under any special contract.[75] One who contracts with a father for the hire to him of his daughter's services, and accounts to him for them, concedes the father's right to her services, and that the relation of master and servant existed between them, and he is estopped to deny the existence of such relation in an action by the father against him for seduction.[76]

169]; Damon *v.* Moore, 5 Lans. (N. Y.) 454; Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. See also Mohelsky *v.* Hartmeister, 68 Mo. App. 318. *Compare* Hogan *v.* Cregan, 6 Rob. (N. Y.) 138, holding that the seducer must have used insinuating arts to overcome the opposition of the seduced, and must by his wiles and persuasions, without force, have debauched her.

73. *Alabama.*— Roberts *v.* Connelly, 14 Ala. 235.

*Illinois.*—Anderson *v.* Ryan, 8 Ill. 583.

*Massachusetts.*— Kennedy *v.* Shea, 110 Mass. 147, 14 Am. Rep. 584.

*New York.*— Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338 [*reversing* 2 Barb. 182]; Whitney *v.* Elmer, 60 Barb. 250; Hewitt *v.* Prime, 21 Wend. 79.

*Tennessee.*— Franklin *v.* McCorkle, 16 Lea 609, 1 S. W. 250, 57 Am. Rep. 244.

*West Virginia.*— Hudkins *v.* Haskins, 22 W. Va. 645.

See 43 Cent. Dig. tit. "Seduction," § 16. And see *supra*, II, A, 2, a–c, and cases there cited.

74. *Delaware.*— Robinson *v.* Burton, 5 Harr. 335.

*Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603, holding that an express contract between a father and his adult daughter need not be shown, in an action by him for her seduction, where services are performed by her in the family, however slight.

*Illinois.*— Ball *v.* Bruce, 21 Ill. 161, holding that if the woman seduced is not a minor, she must reside with and render service to plaintiff, but slight acts of service will sustain the action. And see Doyle *v.* Jessup, 29 Ill. 460.

*Iowa.*— Humble *v.* Shoemaker, 70 Iowa 223, 30 N. W. 492, under a statute.

*Maryland.*— Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760, holding that the fact that the adult daughter worked for another during the day, returning to her father's house at night, paying her board, and sometimes aiding in paying the rent, showed sufficient service to enable the father to recover for her seduction.

*Missouri.*— Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136, holding that a parent may maintain an action for the seduction of his daughter over twenty-one years of age, where the daughter renders services to the parent which are interrupted by such seduction, although she may be living with and in the service of another.

*New Jersey.*— Sutton *v.* Huffman, 32 N. J. L. 58.

*New York.*— Badgley *v.* Decker, 44 Barb. 577, holding that in an action for the seduction of a daughter over twenty-one years of age, proof of the slightest service rendered by the daughter is sufficient to maintain the action.

*North Carolina.*— Briggs *v.* Evans, 27 N. C. 16, holding that an actual contract for services between the father and his daughter, although she be of age, is not required to be proved. It is presumed from any, even the slightest, services performed by her in the family.

*Vermont.*— Davidson *v.* Abbott, 52 Vt. 570, 36 Am. Rep. 767, holding that where it appears that the adult daughter was living and had always lived at home with plaintiff, assisting about domestic duties, doing errands for the family, working most of the time for another and paying her wages to plaintiff, which were used in support of the family, an action will lie for her seduction, the daughter being *de facto* plaintiff's servant.

*England.*— Satterthwaite *v.* Dewhurst, 4 Dougl. 315, 26 E. C. L. 497, 99 Eng. Reprint 899, 5 East 46 note, 102 Eng. Reprint 986, 7 Rev. Rep. 654 note (holding that no action will lie for debauching a daughter, although the mother maintains her and her adult daughter during her lying-in, unless on the ground of the loss of service); Long *v.* Keightley, Ir. R. 11 C. L. 221 (holding that the loss of service was sufficient to maintain the action where plaintiff's adult daughter was seduced in the house and service of plaintiff, and the day after left and entered the service of another, and after her confinement returned to the house of plaintiff).

See 43 Cent. Dig. tit. "Seduction," § 16. And see *supra*, I, A, 2, a–c, and cases there cited.

75. Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760; Lipe *v.* Eisenlerd, 32 N. Y. 229; Badgley *v.* Decker, 44 Barb. (N. Y.) 577.

76. Hahn *v.* Cooper, 84 Wis. 629, 54 N. W. 1022.

(III) *Pregnancy or Venereal Disease.* It is not essential to the maintenance of the action to show pregnancy or veneral disease, but its existence may be ground to support the action where the proximate effect is an incapacity to perform labor.[77]

(IV) *Remote and Proximate Cause.* The action *per quod servitium amisit* will lie only where the loss of service was the proximate cause of the act complained of; and it will not lie, therefore, where the illness of a daughter was the consequence, not of the seduction, but of the publication of her shame.[78]

**e. Defenses** — (I) *In General.* In an action by a father for the seduction of his minor daughter, defendant cannot set up that it was the result of her misconduct.[79] Nor at common law can he show that she willingly consented or even that she in fact seduced him.[80]

(II) *Subsequent Marriage.* Where a parent sues the seducer of his daughter for loss of her services, her marriage after the seduction, either to the defendant or to another, will not defeat the action.[81]

(III) *Unchastity.* In an action by a parent for seduction of his daughter her previous unchastity may be shown in mitigation of damages, but it is not a complete defense and will not defeat the action,[82] unless by statute.[83] Proof that the daughter had illicit intercourse with others about the same time will not defeat the action.[84] And even where, under the statute, as in some jurisdictions, the action will not lie where the female was unchaste, the fact that she had been previously unchaste will not prevent a recovery, if she had reformed and was leading a virtuous life at the time of the seduction.[85]

(IV) *Consent, Connivance, or Negligence of Parent.* Where the parent or one *in loco parentis* consented to or connived at the intercourse, or where he must have known that the course of conduct allowed by him between the seducer and his daughter would inevitably result in seduction or intercourse, he is not entitled to recover.[86] And conduct not amounting to consent or connivance, but only to negligence, while it will not bar an action, may be shown in mitigation of damages.[87]

(V) *Compromise or Settlement.* A compromise or settlement between the daughter and her seducer, whereby the latter is released from all damages by reason of the wrong done to the former, will not prevent a recovery by the

77. Abrahams *v.* Kidney, 104 Mass. 222, 6 Am. Rep. 220; White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282 [*affirming* 31 Barb. 279]. *Compare* Knight *v.* Wilcox, 14 N. Y. 413.

78. Knight *v.* Wilcox, 14 N. Y. 413 [*reversing* 15 Barb. 279].

79. Bartlett *v.* Kochel, 88 Ind. 425.

80. McAuley *v.* Birkhead, 35 N. C. 28, 55 Am. Dec. 427. See *supra*, II, A, 2, d, (I).

81. Eichar *v.* Kistler, 14 Pa. St. 282, 53 Am. Dec. 551.

**Where no loss resulted.**— But it was held that Iowa Code, § 2556, allowing a father to maintain an action for expense and loss of services caused by an injury to his child, does not entitle him to recover for the seduction of his daughter, where, before her confinement, she married another than her seducer, and the father sustained no loss of service or expense prior to her confinement. Humble *v.* Shoemaker, 70 Iowa 223, 30 N. W. 492.

82. Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696; White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Akerley *v.* Haines, 2 Cai. (N. Y.) 292; Reed *v.* Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157.

83. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

84. White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

85. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

86. Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136; Travis *v.* Barger, 24 Barb. (N. Y.) 614; Graham *v.* Smith, 1 Edm. Sel. Cas. (N. Y.) 267; Akerley *v.* Haines, 2 Cai. (N. Y.) 292; Seagar *v.* Slingerland, 2 Cai. (N. Y.) 219; Fletcher *v.* Randall, Anth. N. P. (N. Y.) 267; Hollis *v.* Wells, 3 Pa. L. J. Rep. 169; Reddie *v.* Scoolt, 1 Peake N. P. 240.

87. Graham *v.* Smith, 1 Edm. Sel. Cas. (N. Y.) 267. And see Parker *v.* Elliott, 6 Munf. (Va.) 587.

**Allowing married man to visit daughter.**— The fact that plaintiff allowed defendant, a married man, to visit his daughter as a suitor, and placed her in exposed situations, does not debar him from maintaining an action for seduction, unless he knew defendant to be married, although it is a circumstance to be considered by the jury. Richardson *v.* Fouts, 11 Ind. 466.

parent.[88] Nor is an action by a stepfather *in loco parentis* for seduction of his stepdaughter barred by a compromise made by the stepdaughter and her mother with defendant in the stepfather's absence.[89]

(VI) *ACQUITTAL OF SEDUCER UNDER INDICTMENT.* An acquittal of the seducer on an indictment for the seduction on the ground of his subsequent marriage with the person seduced will not bar the parent's right to recover for the loss of her services by reason of such seduction.[90]

(VII) *PRIOR RECOVERY BY FEMALE SEDUCED.* And it has been held that the parent of an infant, in an action for debauching her, may recover for loss of services and expenses incident to her confinement, notwithstanding she may have recovered in another suit damages for her own seduction; the latter action being purely statutory.[91]

**3. ACTION BY MASTER.** A master, by reason of the loss of services sustained, although slight, may sue for the seduction of his servant, although there may be no blood relationship existing between them.[92] The servant may be a married woman separated from her husband.[93] The gist of the suit by a master for seduction is the same as that by a parent with reference to recovery of damages involving loss of services.[94] The right of action does not pass to the master's assignees in bankruptcy.[95]

**4. ACTION BY AFFIANCED HUSBAND.** One who seduces an unmarried woman is not liable in damages to her affianced husband.[96]

**B. Actions — 1. NATURE AND FORM OF REMEDY.** The action of trespass will lie when there is an entry by the seducer into the master's or parent's house or on his premises, followed by the seduction, and the consequential loss of service and injury may be alleged as matters in aggravation of damages;[97] or plaintiff may, at his election, bring either an action of trespass or an action on the case.[98] But an action on the case, and not trespass, is the proper action if the seduction was in the house of another person and there was no invasion of plaintiff's premises.[99]

**2. TIME TO SUE AND LIMITATIONS — a. In General.** The statutory provisions of the respective states are by no means uniform in fixing the time within which an action for seduction must be brought before the right of recovery is barred.[1] In some states it is as short as one year.[2]

**88.** Gimbel *v.* Smidth, 7 Ind. 627. And see Sellars *v.* Kinder, 1 Head (Tenn.) 134; Maguinay *v.* Saudek, 5 Sneed (Tenn.) 146.

**89.** Maguinay *v.* Saudek, 5 Sneed (Tenn.) 146.

**90.** Eichar *v.* Kistler, 14 Pa. St. 282, 53 Am. Dec. 551, nor does it bar recovery of exemplary damages.

**91.** Bartlett *v.* Kochel, 88 Ind. 425.

**92.** Ball *v.* Bruce, 21 Ill. 161; Furman *v.* Applegate, 23 N. J. L. 28; White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282 [*affirming* 31 Barb. 279]; Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338 [*reversing* 2 Barb. 182]; Ingersoll *v.* Jones, 5 Barb. (N. Y.) 661; Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Harper *v.* Luffkin, 7 B. & C. 387, 6 L. J. K. B. O. S. 23, 1 M. & R. 166, 31 Rev. Rep. 236, 14 E. C. L. 177; Irwin *v.* Dearman, 11 East 23, 10 Rev. Rep. 423; Fores *v.* Wilson, 1 Peake N. P. 55, 3 Rev. Rep. 652; Bennett *v.* Allcott, 2 T. R. 166, 100 Eng. Reprint 90.

**93.** Harper *v.* Luffkin, 7 B. & C. 387, 6 L. J. K. B. O. S. 23, 1 M. & R. 166, 31 Rev. Rep. 236, 14 E. C. L. 177.

**94.** Furman *v.* Applegate, 23 N. J. L. 28; Bartley *v.* Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338 [*reversing* 2 Barb. 182]; Moran *v.* Dawes, 4 Cow. (N. Y.) 412.

**95.** Howard *v.* Crowther, 5 Jur. 91, 10 L. J. Exch. 355, 8 M. & W. 601.

**96.** Case *v.* Smith, 107 Mich. 416, 65 N. W. 279, 61 Am. St. Rep. 341, 31 L. R. A. 282.

**97.** Parker *v.* Meek, 3 Sneed (Tenn.) 29; Hubbell *v.* Wheeler, 2 Aik. (Vt.) 359.

**98.** *Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603.

*Maryland.*— Mercer *v.* Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486.

*Mississippi.*— Ellington *v.* Ellington, 47 Miss. 329.

*New Jersey.*— Furman *v.* Applegate, 23 N. J. L. 28; Van Horn *v.* Freeman, 6 N. J. L. 322.

*New York.*— Moran *v.* Dawes, 4 Cow. 412.

*North Carolina.*— Briggs *v.* Evans, 27 N. C. 16; McClure *v.* Miller, 11 N. C. 133.

*Pennsylvania.*— Ream *v.* Rank, 3 Serg. & R. 215.

*Tennessee.*— Parker *v.* Meek, 3 Sneed 29.

*Virginia.*— Parker *v.* Elliott, 6 Munf. 587.

*United States.*— Mudd *v.* Clements, 17 Fed. Cas. No. 9,900, 3 Cranch C. C. 3.

See 43 Cent. Dig. tit. "Seduction," § 25.

**99.** Clough *v.* Tenney, 5 Me. 446.

**1.** See the statutes of the different states.

**2.** See Patterson *v.* Thompson, 24 Ark. 55; Davis *v.* Young, 90 Tenn. 303, 16 S. W. 473.

**b. When Statute Commences to Run.** If the action is for the seduction alone, the statute begins to run from the act of seduction;[3] and where there is a succession of acts, they are regarded as one wrong, and the statute begins to run from the date of the last one.[4] But there is some conflict of authority as to when the limitation begins where the loss of services and the expenses consequent upon the seduction are made the gist of the action, the courts in some states holding that the limitation runs from the loss of services,[5] while in other states it is held to run from the time of the seduction.[6] It has been held that a father's cause of action for the seduction of his daughter accrues, not when he discovers her seduction, but when the act is committed.[7]

**3. Pleading — a. Declaration, Complaint, or Petition** — (i) *In General.* The declaration, complaint, or petition in an action for seduction must, as in other cases, state all the facts necessary to constitute a cause of action.[8] Where the declaration or complaint counts on the statute providing that in such actions it shall be unnecessary to show loss of services, but that if the female be a minor the action may be brought by her parent or guardian, and if she be of age by her father or any other relative authorized by her, the statute fixes the character of the action, and the declaration cannot be sustained independently of the statute.[9]

(ii) *Character and Condition of Female* — (a) *Previous Chastity.* In some jurisdictions it has been held that, in an action by a female for her seduction, plaintiff need not plead her former chastity, on the ground that she is presumed to be chaste.[10] In some states it is held that in an action by the woman for her own seduction an allegation that defendant "seduced" plaintiff is a sufficient averment that plaintiff was virtuous prior to the alleged seduction,[11] while in others the averment that she was chaste at the time of the alleged seduction is necessary.[12] In an action by a father for the seduction of his minor daughter it need not be alleged that she was of previous chaste character.[13]

3. Wilhoit *v.* Hancock, 5 Bush (Ky.) 567; Dunlap *v.* Linton, 144 Pa. St. 335, 22 Atl. 819, action by father. See also Davis *v.* Boyett, 120 Ga. 649, 48 S. E. 185, 102 Am. St. Rep. 118, 66 L. R. A. 258.

4. Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341; Davis *v.* Young, 90 Tenn. 303, 16 S. W. 473 [*overruling* Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 250]. See also Haymond *v.* Saucer, 84 Ind. 3.

5. Wilhoit *v.* Hancock, 5 Bush (Ky.) 567 (holding that in an action by a parent for loss of service and expense in consequence of the seduction of his daughter, the limitation begins to run from her recovery after the birth of her child); Hancock *v.* Wilhoite, 1 Duv. (Ky.) 313 (holding that in an action by a father for the loss of his daughter's services, in consequence of her seduction by defendant, the limitation begins to run when the loss has accrued, and not from the act of seduction); Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793 (holding that where the father brings the action as at common law, making the loss of service the gravamen of the action, the limitation is from the loss of service and not from seduction, even though a statute makes allegation and proof of loss of service unnecessary in an action for seduction); Riddle *v.* McGinnis, 22 W. Va. 253.

6. Dunlap *v.* Linton, 144 Pa. St. 335, 22 Atl. 819 (holding that the cause of action being the seduction the statute begins to run from that time); McKay *v.* Burley, 18 U. C. Q. B. 251 (holding that in an action by a brother for the seduction of his sister, where the common-law principles prevail, the statute of limitations begins to run from the time of the seduction). See also Logan *v.* Murray, 6 Serg. & R. (Pa.) 175, 9 Am. Dec. 422.

Under Ga. Code Civ. Proc. §§ 3898–1900, providing that actions for injuries done to the person shall be brought within two years after the right of action accrues, in actions for seduction the statute begins to run from the time of seduction. Hutcherson *v.* Durden, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811.

7. Davis *v.* Boyett, 120 Ga. 649, 48 S. E. 185, 102 Am. St. Rep. 118, 66 L. R. A. 258.

8. See Pleading, 31 Cyc. 1.

Complaint for fraud and deceit distinguished from complaint for seduction see Sears *v.* Wegner, 150 Mich. 388, 114 N. W. 224, 14 L. R. A. N. S. 819.

9. Velthouse *v.* Alderink, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. N. S. 587.

10. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692; Bell *v.* Rinker, 29 Ind. 267; Gemmell *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

11. Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466.

12. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551; Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144.

13. Updegraff *v.* Bennett, 8 Iowa 72.

(B) *Unmarried.* The right conferred upon an unmarried woman to sue for her own seduction, being purely statutory, the fact that she was unmarried at the time must be alleged in the complaint.[14] But if not affirmatively alleged and it can be reasonably inferred from the facts stated in the complaint, it is sufficient on motion in arrest.[15] In a suit by the father of an infant daughter to recover damages for her seduction, it is not necessary to allege that she was unmarried.[16]

(III) *MEANS USED TO ACCOMPLISH SEDUCTION* — (A) *The Act of Seduction.* The authorities are not altogether in harmony as to what constitutes a sufficient averment in charging the act of seduction, but it seems that a general statement of the means resorted to such as that defendant "debauched,"[17] or "had carnal knowledge,"[18] or "seduced,"[19] or "debauched and carnally knew,"[20] or "seduced and debauched,"[21] or "seduced, debauched, and carnally knew"[22] plaintiff or plaintiff's daughter or servant, as the facts may be, is sufficient, unless some particular means are required by the statute.

(B) *Persuasion, Deception, or Other Artifices.* If it is alleged that the seduction was accomplished through artifice and persuasion, failure to state what constituted the artifice does not render the complaint fatally defective, although on motion it may sometimes be required to be made more specific.[23] It has been held in an action by the female that unless the complaint avers that she was seduced by means of some trick or artifice employed by defendant it does not state a good cause of action, and the allegation that she yielded by reason of certain solicitation, such as assurances of love and caressing, is insufficient.[24]

14. Dowling *v.* Crapo, 65 Ind. 209; Galvin *v.* Crouch, 65 Ind. 56; Thompson *v.* Young, 51 Ind. 599.

15. See Dowling *v.* Crapo, 65 Ind. 209.

16. Updegraff *v.* Bennett, 8 Iowa 72.

17. Watson *v.* Watson, 49 Mich. 540, 14 N. W. 489, holding that a declaration in an action on the case for seduction which alleges that defendant debauched plaintiff, enticed her away, and made her his concubine, assaulted her, and got her with child, by force and arms, is not demurrable as being duplicitous, and as stating a cause of action in trespass, the enticement and assault being mere matters of aggravation. See also Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

18. Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770, holding that a count charging that defendant carnally knew the daughter and servant of plaintiff on a certain day, and divers days thereafter, whereby she became unable to do plaintiff's affairs, and thereby plaintiff was deprived of her services, discloses a cause of action.

19. Brown *v.* Kingsley, 38 Iowa 220, holding that the allegation that defendant did seduce plaintiff implies that the act was done by flattery, false promises, or some other influence, and the averment is sufficient.

20. Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906 [*affirming* 74 Ill. App. 129 (holding that a declaration in an action for the seduction of plaintiff's daughter, alleging that defendant "debauched and carnally knew" her, sufficiently charges seduction); Witcell *v.* Blackford, 6 Baxt. (Tenn.) 141 (holding that a declaration in an action for seduction alleging that B "debauched and carnally knew" M, whereby she became pregnant, etc., while she was a *femme sole*, depending on her own labor, etc., stated a good cause of action).

21. McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93, holding that in an action for damages for seduction, a complaint which alleges that defendant seduced and debauched plaintiff's infant daughter, although it does not state that the promise of defendant was relied on, is sufficient. See also Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

22. Peterson *v.* Crosier, 29 Utah 235, 81 Pac. 860, holding that a complaint charging that defendant seduced, debauched, and carnally knew plaintiff was sufficient to charge seduction. And see Hart *v.* Walker, 77 Ind. 331, holding that a complaint that defendant took plaintiff to his home "to be adopted and reared by him as a member of his family," that "he undertook to pay her a reasonable compensation," that she worked as his servant, and that he then and there unlawfully seduced, debauched, and carnally knew her, does not show the relation of parent and child, nor a cause of action for work and labor, but is a good charge of seduction.

23. Gunder *v.* Tibbitts, 153 Ind. 591, 55 N. E. 762, holding that a complaint, alleging that defendant, by taking advantage of plaintiff's youth, loneliness, and ignorance, and through his maturity, experience, and position, seduces her by artifices and persuasions, contains a sufficient general statement of the means employed to effect the seduction, and a motion to make the complaint more specific by stating the facts constituting such artifice and persuasion was properly overruled); Rees *v.* Cupp, 59 Ind. 566.

24. Welsund *v.* Schueller, 98 Minn. 475, 108 N. W. 483.

(c) *Promise to Marry.* Where a complaint for seduction alleges promises of marriage as a means used to accomplish the seduction, it is sufficient without stating in direct terms that plaintiff relied on the promises,[25] or her ability and willingness to marry defendant.[26] A complaint for seduction proceeding on the theory that the seduction was accomplished by an alleged promise of marriage as one of the means used is not bad for failure to aver that defendant failed to keep such promise, where such a promise is not a necessary element in seduction.[27] A promise of marriage need not be alleged in actions by parents, etc., for seduction at common law, loss of service being the gravamen of the charge.[28]

(d) *Force.* An averment that the element of force entered into the accomplishment of the act is not fatal to the complaint, as the use of force will not defeat the action.[29]

(iv) *Relationship and Loss of Services.* At common law, the existence of the actual or constructive relation of master and servant must be alleged where one other than the female seduced is suing.[30] In some of the states the averment and proof of loss of services required at common law have been abrogated by statute;[31] but it has been held that if the statute is silent as to who may bring the action the common-law rule remains in full force and the relation of master and servant or parent and child must still appear in the pleadings.[32] If the female is under age at the time she is seduced in an action by the parent or other person standing *in loco parentis* it must be so alleged, and it is further necessary to allege the fact that plaintiff was entitled to her services.[33] Actual service must be alleged when the female is of full age.[34]

(v) *Damages.* In an action by a female for her own seduction it is a sufficient averment of damages to allege, after alleging the seduction, that plaintiff has been damaged by defendant in a certain sum, for which she asks judgment.[35] Special damages need not be alleged.[36] In an action by a father for the seduc-

25. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692. And see Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.

26. Swett *v.* Gray, 141 Cal. 83, 74 Pac. 551.

27. Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

28. Comer *v.* Taylor, 82 Mo. 341; Kip *v.* Berdan, 20 N. J. L. 239; Hayes *v.* Sinclair, 23 Vt. 108. See *infra*, II, B, 4, b, (III), (B).

29. De Haven *v.* Helvie, 126 Ind. 82, 25 N. E. 874 (holding that a complaint charging that defendant, by force, threats, menaces, intimidation, persuasions, caresses, and flattering words, seduced and debauched plaintiff, so that she became pregnant, states but a single cause of action, the fact that the plaintiff was induced to yield by force not being material); Hodges *v.* Bales, 102 Ind. 494, 1 N. E. 692.

30. Wooten *v.* Geisser, 9 La. Ann. 523; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793 (holding that in an action by a father for seduction of his daughter, a declaration alleging that the daughter was under twenty-one and unmarried at the time of the seduction, and that plaintiff then was and still is entitled to her attentions and services, sufficiently averred the relation of master and servant); Lee *v.* Hodges, 13 Gratt. (Va.) 726; Riddle *v.* McGinnis, 22 W. Va. 253 (allegation sufficient); Hahn *v.* Cooper, 84 Wis. 629, 54 N. W. 1022 (complaint sufficient).

31. Anthony *v.* Norton, 60 Kan. 341, 56 Pac. 529, 72 Am. St. Rep. 360, 44 L. R. A. 757; Franklin *v.* McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; Hudkins *v.* Haskins, 22 W. Va. 645.

32. Taylor *v.* Daniel, 98 S. W. 986, 30 Ky. L. Rep. 377 [*quoting* Woodward *v.* Anderson, 9 Bush 624].

33. Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; Riddle *v.* McGinnis, 22 W. Va. 253.

34. Anderson *v.* Ryan, 8 Ill. 583; Ryan *v.* Fralick, 50 Mich. 483, 15 N. W. 561; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793.

**Imbecile daughter.**— In an action by the father the allegations in the pleading that the daughter was an imbecile, on which account she had never been manumitted by plaintiff, over the age of twenty-one years when seduced by defendant, while in his employment, and that at any and all times plaintiff had the right to reclaim her services, state a good cause of action, the law regarding the daughter as a minor. Hahn *v.* Cooper, 84 Wis. 629, 54 N. W. 1022.

35. Gray *v.* Bean, 27 Iowa 221. Where the facts constituting the seduction are set out in the complaint, together with averments that plaintiff was damaged by reason of the publicity given by defendant to the wrong "and was otherwise injured," plaintiff is entitled to general damages. Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451.

36. McIlvain *v.* Emery, 88 Ind. 298. *Con-*

tion of his daughter, he may recover damages for mental suffering and wounded feelings as a father, without specially alleging the same, the general allegation of loss of services being sufficient.[37]

(VI) *JOINDER OF CAUSES AND COUNTS.* Such wrongs as are the direct consequences of the seduction and to constitute ingredients of the cause of action, such as pregnancy, venereal disease, abortion, and the like, causing sickness or incapacity to labor, whereby plaintiff is deprived of the female's services, may be joined in the same declaration, complaint, or petition charging the seduction.[38] A count for debauching plaintiff's daughter may be joined with a count for breaking into and entering his house for such purpose.[39]

(VII) *JOINDER OF PARTIES.* It has been held that the husband and wife are properly joined as plaintiff in a suit for the seduction of the daughter of the wife by a former husband, where it is alleged in the declaration that she was the servant of the wife and the wife was deprived of her services.[40]

**b. Bill of Particulars.** It is the practice of the courts in some jurisdictions to order a bill of particulars filed with the pleadings when the seduction is not set out with sufficient definiteness, and to require the application to be supported by an affidavit either denying the seduction or alleging an intention of doing so.[41]

**c. Plea or Answer.** In an action by a father for the seduction of his daughter and servant, the plea of not guilty puts in issue both the fact of seduction and the relationship of master and servant.[42] Although in an action by a woman for her own seduction, the presumption of prior chastity may throw the burden of proving want of it on defendant, yet, as previous chastity is a necessary element of plaintiff's cause of action, want of it is not an affirmative defense, within a court rule providing that an affirmative defense must be plainly set forth in a notice added to defendant's plea.[43]

**4. EVIDENCE — a. Presumptions and Burden of Proof** — (I) *CHASTITY OF FEMALE.* In an action by a female for her seduction it is unnecessary to prove her previous chastity; the presumption of law being in favor of virtue, she is presumed to have been chaste.[44]

(II) *FEMALE UNMARRIED.* To recover in an action for her own seduction the female must prove that she was unmarried at the time.[45]

(III) *PATERNITY OF CHILD.* Where plaintiff in an action for seduction was pregnant at the time of her marriage and defendant denies that he had sexual intercourse with her and avers that her present husband is the father of her child, the burden of establishing that her husband did not have intercourse with her prior to their marriage is on plaintiff, because of the presumption in favor of the legitimacy of children born during wedlock.[46]

(IV) *RELATION OF MASTER AND SERVANT.* The presumption of the existence of the relation of master and servant is conclusive where, in an action

*tra*, Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

**37.** Hatch *v.* Fuller, 131 Mass. 574; Phillips *v.* Hoyle, 4 Gray (Mass.) 568; Lunt *v.* Philbrick, 59 N. H. 59; Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770; Rollins *v.* Chalmers, 51 Vt. 592. But see Davis *v.* Young, 90 Tenn. 303, 16 S. W. 473.

**38.** White *v.* Murtland, 71 Ill. 250, 2 Am. Rep. 100.

**39.** Woodward *v.* Walton, 2 B. & P. N. R. 476.

**40.** Anderson *v.* Rigg, 64 N. J. L. 407, 45 Atl. 782.

**41.** Knight *v.* Engle, 61 L. T. Rep. N. S. 780; Thomson *v.* Birkley, 47 L. T. Rep. N. S. 700, 31 Wkly. Rep. 230.

**42.** White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

**In England** it has been held, however, that in order that defendant may question the existence of the relationship of master and servant it must be pleaded specially that the relation does not exist. Torrence *v.* Gibbons, 5 Q. B. 297, D. & M. 226, 7 Jur. 1158, 13 L. J. Q. B. 36, 48 E. C. L. 297; Salter *v.* Walker, 21 L. T. Rep. N. S. 360, 18 Wkly. Rep. 65. *Contra*, Holloway *v.* Abell, 7 C. & P. 528, 32 E. C. L. 742.

**43.** Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466.

**44.** Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

**45.** Breiner *v.* Nugent, (Iowa 1907) 111 N. W. 446. See *supra*, II, A, 1, c, (II).

**46.** Hopkins *v.* Mathias, 66 Iowa 333, 23 N. W. 732.

by the parent or person standing *in loco parentis* for the seduction of a minor female, it is shown that such person at the time of her seduction was entitled to her services;[47] although it is otherwise in a suit by a master for the seduction of his servant.[48] And where the relation of master and servant is shown to have existed between a father and daughter after she became of full age, such relation will be presumed to have continued, and the daughter's temporary absence, if coupled with the purpose to return, does not terminate such relation.[49]

**b. Admissibility** — (I) *In General.* The general rules as to the admissibility of evidence apply of course in actions for seduction;[50] and the decisions as to the admissibility of evidence in criminal prosecutions for seduction will to a great extent apply in civil actions.[51]

(II) *Personal Relations of Parties and Opportunities For Intercourse.* Evidence is admissible as part of the *res gestæ* bearing directly on facts touching the relations of the persons whose conduct is in question.[52] Testimony may be introduced tending to prove acts of sexual intercourse covering even a considerable period of time; also defendant's conduct in seeking to continue his illicit relations after the alleged seduction and any attentions or associations, including acts of familiarity with the female, all going to corroborate the principal charge and showing defendant's continued conduct toward her.[53] And it has been held that evidence of the birth of a child as a result of such acts of intercourse is admissible.[54] The rule applies with some qualification to a married woman who sues one other than her husband for her seduction accomplished before marriage. She may testify to what transpired between her and defendant, such as acts of illicit intercourse, and which she claims constitutes the seduction.[55] Where plaintiff, for the purpose of breaking off her illicit connection with defendant, leaves the state for some months, and after her return resumes her former relations with him, evidence as to the connection of the parties, their conduct, etc., before her departure is admissible to show their relations and the control defendant exercised over her.[56] It may also be shown in what manner and on what terms, defendant visited plaintiff or plaintiff's daughter, the family, and her relations, although, in some states, not that he visited her with the view of marriage or that he made her any promise of marriage.[57] And as indicating the relation of confidence existing between the daughter's father and defendant, evidence that the latter used his influence in securing him an office is competent.[58]

(III) *The Seduction* — (A) *In General.* It is proper to show the means used to corrupt the girl's mind and the circumstances under which she was seduced.[59] Flattery, persuasion, promises, deception, or other artifices may be shown in

47. Anderson *v.* Ryan, 8 Ill. 583; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; Hudkins *v.* Haskins, 22 W. Va. 645; Riddle *v.* McGinnis, 22 W. Va. 253; Barbour *v.* Stephenson, 32 Fed. 66.

48. Anderson *v.* Ryan, 8 Ill. 583.

49. Hudkins *v.* Haskins, 22 W. Va. 645.

50. See Evidence, 16 Cyc. 821; 17 Cyc. 1.

51. See *infra*, III, B, 3, b.

52. Threadgool *v.* Litogot, 22 Mich. 271.

**Negative testimony.**— The testimony of a witness who had lived across the street from plaintiff's home for four years and had been well acquainted with plaintiff and her granddaughters, who lived with her, for over two years, that he had never seen defendant with the granddaughter seduced, was properly excluded. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

53. *Indiana.*— Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93.

*Iowa.*— Breiner *v.* Nugent, 111 N. W. 446.

*Maryland.*— Keller *v.* Donnelly, 5 Md. 211.

*Michigan.*—Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Watson *v.* Watson, 58 Mich. 507, 25 N. W. 497.

*Minnesota.*— Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458.

*Tennessee.*— Thompson *v.* Clendening, 1 Head 287.

See 43 Cent. Dig. tit. "Seduction," § 35.

54. Breiner *v.* Nugent, (Iowa 1907) 111 N. W. 446; Smith *v.* Milburn, 17 Iowa 30.

55. Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567.

56. Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454.

57. Herring *v.* Jester, 2 Houst. (Del.) 66.

**Promise of marriage** see *infra*, II, B, 4, b, (III), (B).

58. Fox *v.* Stevens, 13 Minn. 272.

59. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273.

evidence as the means by which defendant accomplished his purpose.[60] Evidence disclosing the fact that defendant had the female bound to him under indentures of apprenticeship, in order to facilitate the attainment of her ruin, is properly admitted.[61]

(B) *Promise of Marriage.* It has been held that where the female sues for her own seduction, even though it may not be a necessary element of the cause of action, a promise of marriage may be shown as one of the means employed by defendant to accomplish his purpose;[62] and for the same reason in some jurisdictions, where the action is brought by the parent, it has been admitted in evidence.[63] But in other jurisdictions, where the parent and not the woman herself is suing, such evidence has been held inadmissible,[64] although it has been held that in such case plaintiff, in showing the circumstances under which the seduction took place, may prove that defendant addressed his daughter with honorable proposals.[65] It has also been admitted to explain the conduct of plaintiff's daughter where she was attacked.[66]

(C) *Threats and Force.* Evidence of threats made by defendant at the time of the seduction to dismiss plaintiff from his service is competent as indicating an involuntary submission on the part of plaintiff.[67] And it is also competent to show that physical force was used and all of the circumstances attending the commission of the act as explaining the extent of plaintiff's resistance,[68] as well as what occurred immediately after the event.[69]

(IV) *Character and Conduct of Parent and Family* — (A) *In General.* The general good character or conduct of the girl's family, but not any particular members of it, may be shown, their previous respectability being admissible on the question of damages;[70] and on the other hand it would seem that the general bad character of the family may also be shown in mitigation of damages.[71]

60. Stevenson *v.* Belknap, 6 Iowa 96, 71 Am. Dec. 392; Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

61. Dain *v.* Wickoff, 18 N. Y. 45, 72 Am. Dec. 493.

62. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; Lee *v.* Lefley, 21 Ind. 98; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Walters *v.* Cox, 67 Mo. App. 299.

63. *Illinois.*— Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906 [*affirming* 74 Ill. App. 129]; Mains *v.* Cosner, 62 Ill. 465.

*Indiana.*— Haymond *v.* Saucer, 84 Ind. 3; Odell *v.* Stephens, 12 Ind. 384.

*New York.*— Ayer *v.* Colgrove, 81 Hun 322, 30 N. Y. Suppl. 788.

*Oregon.*— Parker *v.* Monteith, 7 Oreg. 277.

*Pennsylvania.*— Phelin *v.* Kenderdine, 20 Pa. St. 354.

*Tennessee.*— Franklin *v.* McCorkle, 16 Lea 609, 1 S. W. 250, 57 Am. Rep. 244.

*Virginia.*— White *v.* Campbell, 13 Gratt. 573.

*United States.*— Mudd *v.* Clements, 17 Fed. Cas. No. 9,900, 3 Cranch C. C. 3.

*England.*— Tullidge *v.* Wade, 3 Wils. C. P. 18, 95 Eng. Reprint 909.

See 43 Cent. Dig. tit. "Seduction," §§ 36, 37.

**In mitigation of damages.**— But in an action by a father for the seduction of his minor daughter and getting her with child, an offer of marriage made by defendant cannot be considered in mitigation of damages. White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

64. *Alabama.*— Drish *v.* Davenport, 2 Stew. 266.

*Delaware.*— Herring *v.* Jester, 2 Houst. 66.

*Missouri.*— Comer *v.* Taylor, 82 Mo. 341.

*New Hampshire.*— Davidson *v.* Goodall, 18 N. H. 423.

*New Jersey.*—Kip *v.* Berdan, 20 N. J. L. 239.

*New York.*— Whitney *v.* Elmer, 60 Barb. 250; Brownell *v.* McEwen, 5 Den. 367; Gillet *v.* Mead, 7 Wend. 193, 22 Am. Dec. 578; Foster *v.* Schofield, 1 Johns. 297.

*Vermont.*— Haynes *v.* Sinclair, 23 Vt. 108.

*England.*— Dodd *v.* Norris, 3 Campb. 519, 14 Rev. Rep. 832; Elliott *v.* Nicklin, 5 Price 641.

See 43 Cent. Dig. tit. "Seduction," § 37.

65. Davidson *v.* Goodall, 18 N. H. 423; Brownell *v.* McEwen, 5 Den. (N. Y.) 367.

66. Robinson *v.* Burton, 5 Harr. (Del.) 335.

67. Brown *v.* Kingsley, 38 Iowa 220.

68. Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563.

69. Colyer *v.* Mayne, 2 C. & K. 1011, 61 E. C. L. 1011.

70. Hill *v.* Wilson, 8 Blackf. (Ind.) 123; McAulay *v.* Birkhead, 35 N. C. 28, 55 Am. Dec. 427; Wilson *v.* Sproul, 3 Penr. & W. (Pa.) 49; Thompson *v.* Clendening, 1 Head (Tenn.) 287.

71. Thompson *v.* Clendening, 1 Head (Tenn.) 287.

(B) *Profligate Character or Dissolute Habits of Parent.* Some of the courts hold that the profligate character and dissolute habits of the parent may be proven, but are not in harmony as to whether it can be done by introducing evidence of his general reputation only, or by showing particular instances as well.[72] Some courts hold that the evidence is not admissible for any purpose.[73]

(C) *Negligence, Indifference, Indiscretion, or Connivance of Parent.* Unless connivance or careless indifference on the part of plaintiff parent is proven in connection with his daughter's seduction, evidence of his negligence is inadmissible.[74] But careless indifference on the part of the parent as to the daughter's chastity affording facilities for criminal intercourse between her and defendant;[75] or the fact that the parent was indiscreet,[76] or that there was connivance on his part in bringing about the intercourse, may be shown in mitigation of damages.[77]

(D) *Invalidity of Parent's Marriage.* Where the alleged father is suing, evidence that the marriage between him and the reputed mother of the girl was void is competent.[78]

(V) *Character and Conduct of Female* — (A) *In General.* In actions by a female for her seduction the presumption of law is in favor of her virtue.[79] Evidence of her good character has been held inadmissible, unless her character is attacked by defendant,[80] and there seems to be no distinction between "character" and "conduct" as applied to a female in an action for seduction.[81] In reply to evidence of improper liberties on the part of the female, her good conduct may be shown.[82] The question whether the sister of the female seduced, who also lived in plaintiff's family, objected when the female seduced went with other men than defendant, is immaterial.[83]

(B) *Previous Unchastity.* Her character being involved in the issue, it may be drawn in question or attacked by defendant, and want of previous chastity on her part may be shown in mitigation of damages, not only by general reputation but by specific acts including wantonness or loose conduct,[84] whether known

72. Robinson *v.* Burton, 5 Harr. (Del.) 335 (plaintiff parent's dissolute habits may be shown, but not his general reputation in this respect); Thompson *v.* Clendening, 1 Head (Tenn.) 287 (general bad reputation of plaintiff parent is admissible, but not particular instances); Reed *v.* Williams, 5 Sneed (Tenn.) 580, 73 Am. Dec. 157 (general character of plaintiff parent as to profligate principles and dissolute habits may be shown, but not that he had a venereal disease at a particular time).

73. Grider *v.* Dent, 22 Mo. 490; Dain *v.* Wyckoff, 18 N. Y. 45, 72 Am. Dec. 493.

74. Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. 9, holding that evidence, in an action for seduction of plaintiff's daughter, that plaintiff's wife was absent for a year, and that plaintiff and his two daughters lived together, that plaintiff was away during the day, and that young men lodged at the house, and that another daughter of plaintiff was seduced during such time is inadmissible to show negligence of plaintiff.

75. Zerfing *v.* Mourer, 2 Greene (Iowa) 520.

76. Parker *v.* Elliott, 6 Munf. (Va.) 587.

77. Travis *v.* Barger, 24 Barb. (N. Y.) 614. See *supra*, II, A, 2, e, (IV).

78. Howland *v.* Howland, 114 Mass. 517, 19 Am. Rep. 381.

79. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691. See *supra*, II, B, 4, a, (I).

80. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273; Wilson *v.* Sproul, 3 Penr. & W. (Pa.) 49; Haynes *v.* Sinclair, 23 Vt. 108; Bamfield *v.* Massey, 1 Campb. 460; Bate *v.* Hill, 1 C. & P. 100, 28 Rev. Rep. 766, 12 E. C. L. 68.

81. Zitzer *v.* Merkel, 24 Pa. St. 408.

82. Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540; Zitzer *v.* Merkel, 24 Pa. St. 408; Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

83. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

84. *Arkansas.*— Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

*Connecticut.*— Mott *v.* Goddard, 1 Root 472.

*Delaware.*— Robinson *v.* Burton, 5 Harr. 335.

*Indiana.*— Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691, holding that evidence of specific acts of immorality prior to the time of seduction is admissible in mitigation of damages, and as tending to show that she was not seduced.

*Iowa.*—West *v.* Druff, 55 Iowa 335, 7 N. W. 636, holding that evidence of improper conversations or association with men prior to the alleged seduction is admissible. And see Kesselring *v.* Hummer, 130 Iowa 145, 106 N. W. 501; Smith *v.* Milburn, 17 Iowa 30.

*Michigan.*— Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

*Missouri.*— Carder *v.* Forehand, 1 Mo. 704, 14 Am. Dec. 317.

to defendant or the public or not.[85] And if she has become so notoriously unchaste as to disgrace her family to such an extent that defendant's misconduct adds nothing to her parents' suffering, nor to the danger of corrupting the family's morals, there can be no recovery beyond loss of services and expenses incurred.[86] The statement of a witness in an action for seduction that he knew that the reputation for chastity of the female seduced was bad, based on what the witness had observed, and not on what he had heard others say, is properly excluded, the witness not having proved his qualification to testify on the subject.[87]

(C) *Bad Character After Seduction.* Evidence of unchaste acts or general bad character of the female after the seduction is inadmissible.[88]

(D) *Hearsay.* Where a witness knows nothing about the general reputation of the female, he cannot testify to what he has heard about her being unchaste.[89] And testimony as to what a sister of the female seduced had said concerning the conduct of the latter is properly excluded, in the absence of the laying of a proper foundation for the impeachment of the sister as a witness.[90]

(E) *Loose Language, Immodest Remarks, and Liberties.* Evidence of loose language and immodest remarks alone unconnected with any immoral act are inadmissible;[91] and if defendant testifies to certain liberties being taken with him by her on the occasion of the seduction, the details are properly excluded on redirect examination, although it might tend to discredit him on his cross-examination.[92] Nor is the introduction by her to her parents, of a person other than the defendant as her husband, admissible.[93] Evidence that the female swore is inadmissible, since this does not necessarily indicate a lewd character.[94]

(F) *Incrimination.* The female cannot be required to testify as to acts of

*New York.*—Wandell *v.* Edwards, 25 Hun 498 (holding that evidence may be introduced in mitigation of damages to prove that before defendant's connection with plaintiff's daughter she had connection with another man); Hogan *v.* Cregan, 6 Rob. 138 (holding that proof of want of chastity, loose conduct, and bad character of the latter is always admissible in mitigation of damages, and particular instances thereof may be given in evidence). See also Bracy *v.* Kibbe, 31 Barb. 273; Fletcher *v.* Randall, Anth. N. P. 267; Akerley *v.* Haines, 2 Cai. 292.

*Pennsylvania.* — Kenderdine *v.* Phelin, 1 Phila. 343, holding that evidence of the daughter's incontinence and wantonness is admissible in mitigation of damages, but not as an answer to the action.

*Tennessee.*— Reed *v.* Williams, 5 Sneed 580, 73 Am. Dec. 157.

*Wisconsin.*— Stewart *v.* Smith, 92 Wis. 76, 65 N. W. 736, holding that evidence of a hack-driver driving the woman, in company with a different man, around the town, without stopping anywhere, and with the hack curtains closed, is admissible to show prior unchastity, and also the fact of her being seen with a dissolute woman to enter rooms kept by young men who did not have any place of business there.

*England.*—Verry *v.* Watkins, 7 C. & P. 308, 32 E. C. L. 628. See also Carpenter *v.* Wall, 11 A. & E. 803, 4 Jur. 964, 9 L. J. Q. B. 217, 3 P. & D. 457, 39 E. C. L. 426.

See 43 Cent. Dig. tit. "Seduction," § 40.

85. Drish *v.* Davenport, 2 Stew. (Ala.) 266 (holding that the daughter's character for chastity may be impeached by general reputation, but not among a particular class of people, this being too circumscribed to prove general reputation); Love *v.* Masoner, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522 [*overruling* Lea *v.* Henderson, 1 Coldw. (Tenn.) 146]. *Compare* Bell *v.* Rinker, 29 Ind. 267, holding that character for chastity can neither be attacked nor sustained by proof of specific acts.

86. Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

87. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

88. *Illinois.*—White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100.

*Indiana.*— Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686.

*Iowa.*— Clifton *v.* Granger, 86 Iowa 573, 53 N. W. 316.

*Michigan.*— Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60.

*Missouri.*— Morgan *v.* Ross, 74 Mo. 318; McKern *v.* Calvert, 59 Mo. 243.

*New Jersey.*— Coon *v.* Moffet, 3 N. J. L. 583, 4 Am. Dec. 392.

*New York.*—Ayer *v.* Colgrove, 81 Hun 322, 30 N. Y. Suppl. 788.

*Tennessee.*— Thompson *v.* Clendening, 1 Head 287.

See 43 Cent. Dig. tit. "Seduction," § 40.

89. Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

90. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

91. Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

92. Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

93. Burtis *v.* Chambers, 51 Iowa 645, 2 N. W. 503.

94. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

unchastity or illicit connection with other men, as this would tend to criminate her.[95]

(G) *Reformation.* If the female has been unchaste, but reforms and afterward leads a virtuous life and is then seduced, her reformation may be shown.[96]

(H) *As Affecting Loss of Services and Expenses.* Proof of bad character or loose conduct on the part of the female, being in mitigation of damages, cannot affect plaintiff's right to show value of loss of services and expense of lying in, etc.[97]

(VI) *AGE.* The age of the female may be shown as bearing upon the question of damages.[98]

(VII) *CHARACTER AND CONDUCT OF DEFENDANT* — (A) *In General.* It is not competent to prove the general character of defendant,[99] unless there is an attempt to impeach it.[1]

(B) *Indecent Familiarities.* But indecent familiarities and previous acts of solicitation and improper intimacy by defendant with the female alleged to be seduced may be shown in evidence as tending to establish the seduction.[2]

(C) *Youthfulness and Indiscretion.* The youthfulness of defendant may be shown in mitigation of damages in connection with other circumstances bearing on his character and surroundings.[3] It is not competent to prove that defendant's parents were opposed to his keeping company with plaintiff's daughter because of his youth and indiscretion, although plaintiff may be indirectly informed of such objection. The rule is otherwise, however, if plaintiff is warned against defendant's bad habits or debased character.[4]

(D) *Keeping Company With Other Women.* Nor is it admissible to show that defendant kept company with other unmarried women at, before, or after the seduction.[5]

(E) *Living in Harmony With Wife.* Evidence as to whether defendant and his wife lived together in harmony is not admissible in an action for seduction.[6]

(VIII) *PECUNIARY AND SOCIAL CONDITION OF PARTIES.* The authorities are not uniform as to whether the pecuniary condition of defendant may be received in evidence in an action for seduction. The weight of modern authority, however, is in favor of its admission upon the ground that what might be a great punishment to one without means would be none at all to one of great

95. *Indiana.*— Smith *v.* Yaryan, 69 Ind. 445, 35 Am. Rep. 232; Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236.

*New Jersey.*—Vaughn *v.* Perine, 3 N. J. L. 728, 4 Am. Dec. 411.

*Pennsylvania.*— Hoffman *v.* Kemerer, 44 Pa. St. 452.

*Tennessee.*— Reed *v.* Williams, 5 Sneed 580, 73 Am. Dec. 157. *Compare* Love *v.* Masoner, 6 Baxt. 24, 32 Am. Rep. 522.

*England.*— Dodd *v.* Norris, 3 Campb. 519, 14 Rev. Rep. 832. *Compare* Andrews *v.* Askey, 8 C. & P. 7, 34 E. C. L. 578.

**Contra.**— Kesselring *v.* Hummer, 130 Iowa 145, 106 N. W. 501, holding that where plaintiff alleged the birth of a child on Jan. 14, 1904, in aggravation of damages, and testified that it was begotten of defendant April 12, 1903, plaintiff was properly required to testify whether she had not had intercourse with another person in the latter part of May and the first part of June, 1903.

96. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529. See *supra*, II, A, 1, c, (III).

97. Akerley *v.* Haines, 2 Cai. (N. Y.) 292; McAulay *v.* Birkhead, 35 N. C. 28, 55 Am. Dec. 427; Wallace *v.* Clark, 2 Overt. (Tenn.) 93, 5 Am. Dec. 654; Verry *v.* Watkins, 7 C. & P. 308, 32 E. C. L. 628.

98. Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696; Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. 522; Phelin *v.* Kenderdine, 20 Pa. St. 354.

99. *Delaware.*— Herring *v.* Jester, 2 Houst. 66.

*Michigan.*— Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111.

*Minnesota.*— Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. 522.

*North Carolina.*— McRae *v.* Lilly, 23 N. C. 118.

*Pennsylvania.*— Zitzer *v.* Merkel, 24 Pa. St. 408.

*Tennessee.*— Maguinay *v.* Saudek, 5 Sneed 146.

See 43 Cent. Dig. tit. "Seduction," § 39.

1. Delvee *v.* Boardman, 20 Iowa 446.

2. Hatch *v.* Fuller, 131 Mass. 574; Matteson *v.* Curtis, 11 Wis. 424.

3. Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

4. Mains *v.* Cosner, 62 Ill. 465.

5. Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451.

6. Burtis *v.* Chambers, 51 Iowa 645, 2 N. W. 503.

wealth, and also because a man's wealth is sometimes used as one of the means of accomplishing the girl's ruin, and the jury should at all events be informed of the condition and circumstances of the parties to the action.[7] Other cases are in favor of its rejection, holding that it is a matter outside of the issues and that defendant should not be punished in a private capacity for an offense against society.[8] The social standing of the families of the parties to the action may be shown.[9]

(IX) *PREGNANCY OF FEMALE AND MATTERS CONNECTED THEREWITH.* Although seduction is not necessarily followed by pregnancy as the result of the intercourse,[10] yet pregnancy, consequent ill-health, disease, or bodily injury to the female may be shown as the proximate result of the seduction, as well as an injury to plaintiff's rights;[11] and as one of the actual incidents of pregnancy plaintiff may prove that premature labor and consequent prolonged sickness were produced by a rumor that caused the female sudden grief and disappointment.[12] Expressions by her indicating pain or illness, subsequent to the seduction, are admissible.[13] The amount expended by plaintiff for medical and lying-in attendance may also be proven, although at the time the expenses were incurred the seduced was over twenty-one years of age;[14] but it is not proper for plaintiff to prove the probable expense of maintaining his daughter's illegitimate child.[15] If defendant admits on cross-examination that he has paid a doctor for services to the woman during confinement, he should be allowed, on redirect examination, to explain the admission.[16]

(X) *ABORTION.* As tending to establish the seduction, evidence may also be received of the fact that defendant produced an abortion upon the female;[17] also that propositions of this nature were made to her by defendant.[18] So too

7. *Delaware.*— Herring *v.* Jester, 2 Houst. 66; Robinson *v.* Burton, 5 Harr. 335.
*Illinois.*— White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Rea *v.* Tucker, 51 Ill. 110, 99 Am. Dec. 539; Grable *v.* Margrave, 4 Ill. 372, 38 Am. Dec. 88.
*Indiana.*—White *v.* Gregory, 126 Ind. 95, 25 N. E. 806; Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; Wilson *v.* Shepler, 86 Ind. 275; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.
*Michigan.*— Bennett *v.* Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442.
*North Carolina.*— McAulay *v.* Birkhead, 35 N. C. 28, 55 Am. Dec. 427.
*Virginia.*— Lee *v.* Hodges, 13 Gratt. 726.
*West Virginia.*— Riddle *v.* McGinnis, 22 W. Va. 253.
*Wisconsin.*— Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Dec. 768; Klopfer *v.* Bromme, 26 Wis. 372.
*England.*— Salter *v.* Walker, 21 L. T. Rep. N. S. 360, 18 Wkly. Rep. 65.

8. West *v.* Druff, 55 Iowa 335, 7 N. W. 636; Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; Dain *v.* Wycoff, 7 N. Y. 191; Hodsoll *v.* Taylor, L. R. 9 Q. B. 79, 43 L. J. Q. B. 14, 29 L. T. Rep. N. S. 53, 22 Wkly. Rep. 89; James *v.* Biddington, 6 C. & P. 589, 25 E. C. L. 590.

9. *Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603.
*Iowa.*—Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261.
*North Carolina.*— McAulay *v.* Birkhead, 35 N. C 28, 55 Am. Dec. 427.
*Ohio.*— Keplinger *v.* Sherrick, Wright 104.
*Oregon.*— Parker *v.* Monteith, 7 Oreg. 277.
See 43 Cent. Dig. tit. "Seduction," § 41.

10. Haymond *v.* Saucer, 84 Ind. 3.

11. *Iowa.*— Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454.
*Massachusetts.*—Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361.
*Michigan.*— Badder *v.* Keefer, 100 Mich. 272, 58 N. W. 1007.
*Minnesota.*—Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458.
*New Hampshire.*— Davidson *v.* Goodall, 18 N. H. 423.
*New York.*—White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282 [*affirming* 31 Barb. 279]; Mulvehall *v.* Millward, 11 N. Y. 343; Whitney *v.* Elmer, 60 Barb. 250; Ingerson *v.* Miller, 47 Barb. 47.
See 43 Cent. Dig. tit. "Seduction," § 42.

12. Davidson *v.* Goodall, 18 N. H. 423.

13. Hatch *v.* Fuller, 131 Mass. 574.

14. Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

15. Haynes *v.* Sinclair, 23 Vt. 108.

16. Stewart *v.* Smith, 92 Wis. 76, 65 N. W. 736. See also Hewitt *v.* Prime, 21 Wend. (N. Y.) 79.

17. Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. 23, holding that evidence was properly admitted that, about three months after the date of the alleged seduction, defendant accompanied the daughter to a city other than that in which they lived, where an abortion was performed upon her, and that on her return she became sick, and so continued for some three weeks. See also White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Klopfer *v.* Bromme, 26 Wis. 372.

18. Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60; Fox *v.* Stevens, 13 Minn. 272.

the testimony of a physician to the effect that defendant consulted him on the subject of abortion is admissable.[19]

(XI) *PATERNITY OF CHILD.*[20] All of defendant's acts of sexual intercourse with the female being really but one transaction, it is proper to introduce evidence of their entire criminal connection as tending to show that he is the father of the child.[21] While a married woman cannot testify to a state of facts tending to bastardize her child born in wedlock, yet if she sues a man not her husband for her seduction and is *enceinte* at the time of her marriage, she may prove defendant has admitted that he was the father of the child born after the alleged seduction.[22] And the reason or inducement for the female swearing the child to another may be shown.[23] Contradictory statements made by her as to the paternity of the child may be introduced in evidence.[24] It has been held that if it is claimed that a child was born as the result of the alleged seduction, she may be asked on cross-examination, as a proper inquiry on the question of paternity, if she has not had sexual intercourse with other men.[25]

(XII) *CONCEALMENT OF PREGNANCY FROM SEDUCER.* It is competent to prove that the female withheld the fact of her pregnancy from the father of the child, upon the advice of others not to do so lest he should leave the state to avoid prosecution before being arrested.[26]

(XIII) *CORRESPONDENCE BETWEEN PARTIES.* Correspondence of any kind between the parties with reference to the female being seduced, her condition by reason of the seduction, their relations, or any admissions of defendant's guilt may be received in evidence.[27]

(XIV) *RELEASE, COMPROMISE, AND PAYMENTS BY DEFENDANT.* Where the parent is suing, it is not competent to prove a receipt by the daughter for money paid her by defendant, purporting to be a release of all claims and demands on account of the bearing and rearing of the children, either to support a plea of accord and satisfaction or in mitigation of damages on account of the seduction;[28] nor is a compromise, where the stepfather is the plaintiff, made by the stepdaughter and her mother with the defendant, in plaintiff's absence, admissible.[29] It is not competent to show how much money defendant furnished the daughter from time to time, unless it was applied to plaintiff's benefit or in reducing his damages.[30]

(XV) *CORROBORATION OF FEMALE.* Statements made by the woman on the morning after the transaction are competent to sustain her version of the affair, especially when denied by defendant.[31]

19. Badder *v.* Keefer, 100 Mich. 272, 58 N. W. 1007.

20. It has been held that the child born to the female seduced may be exhibited to the jury, although under three months of age. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330. *Compare infra*, 1353 note 32. See EVIDENCE, 17 Cyc. 294.

21. Thompson *v.* Clendening, 1 Head (Tenn.) 287. And see Brenier *v.* Nugent, (Iowa 1907) 111 N. W. 446.

22. Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567.

Presumption and burden of proof see *supra*, II, B, 4, a, (III).

23. Bracy *v.* Kibbe, 31 Barb. (N. Y.) 273 (holding that where she swore that she had been induced by defendant's promise to charge the child on another, defendant may show that she not only said the child was not his, but that she had been induced to charge it on him by plaintiff and others of the family); Hewitt *v.* Prime, 21 Wend. (N. Y.) 79 (holding that she may testify that defendant persuaded her to swear the child to another upon a promise that if she did so he would marry her).

24. Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272, holding that she having testified that defendant was the father of the child, and her attendant stating that, shortly after the child was born, plaintiff told her that the child's father was dead, evidence that plaintiff told her physician on the same morning that defendant was the child's father was admissible.

25. Smith *v.* Yargan, 69 Ind. 445, 35 Am. Rep. 232.

26. Lockwood *v.* Betts, 8 Conn. 130.

27. Lee *v.* Cooley, 13 Oreg. 433, 11 Pac. 70; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

28. Sellars *v.* Kinder, 1 Head (Tenn.) 134.

29. Maguinay *v.* Saudek, 5 Sneed (Tenn.) 146.

30. Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458.

31. Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. 1072, 76 Am. St. Rep. 655.

(XVI) *IMPEACHMENT OF FEMALE.* Where the female seduced denies as a witness under oath that she was engaged to a man other than defendant, she having previously stated the contrary, it is not a material matter upon which she may be impeached.[32]

**c. Weight and Sufficiency** — (I) *IN GENERAL.* The weight to be attached to the testimony adduced on the trial of an action for seduction is a matter within the province of the jury,[33] but to warrant a finding or verdict against defendant the evidence should be sufficient to satisfy them of the existence of the facts necessary to a recovery.[34]

(II) *ACTION BY FEMALE SEDUCED.* In an action by the female seduced the evidence must be sufficient to satisfy the jury that she was seduced by defendant,[35] that she was unmarried at the time of the seduction,[36] and that she was at the time of chaste character, where there is evidence rebutting the presumption of chastity.[37] Where there is sufficient evidence in the case to support a verdict for plaintiff outside of her testimony, the judgment will not be disturbed, although plaintiff may be shown by the record to be untruthful.[38] The statutory rule requiring corroborating evidence in proof of seduction applies only to criminal prosecutions, and not to a civil action.[39]

32. Fisher *v.* Hood, 14 Mich. 189.

33. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

34. West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

35. See *supra*, II, A, 1, c, (I).

**Evidence held sufficient** see Eagan *v.* Murray, 80 Iowa 180, 45 N. W. 563; Murrilla *v.* Guis, 51 Wash. 93, 98 Pac. 100.

**Female of weak mind.**— It is error to charge the jury that, if they find that plaintiff is of weak mind, the case does not require as strong proof of defendant's guilt as if she were of strong mind. Delvee *v.* Boardman, 20 Iowa. 446.

**Flattery, deception, or other artifice.**— To sustain a verdict for damages for the seduction something more than illicit intercourse must be shown; there must be evidence that defendant accomplished the ruin of the female by means of some persuasion, false promise, deception, or other artifice. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Robinson *v.* Powers, 129 Ind. 480; Baird *v.* Boehner, 72 Iowa 318, 33 N. W. 694; Smith *v.* Milburn, 17 Iowa 30; Hallock *v.* Kinney, 91 Mich. 57, 51 N. W. 706, 30 Am. St. Rep. 462 [*quoting* Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696]; Bailey *v.* O'Bannon, 28 Mo. App. 39. See *supra*, II, A, 1, c, (I). Evidence that defendant used such promises, artifices, deceit, and influence as would overcome the scruples of a chaste woman is sufficient. Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466. It has also been held that a verdict for plaintiff will not be disturbed, where there was evidence to show that she was induced by defendant to yield by his assurances of love, caresses, and promising to keep her "if anything got the matter." Douglass *v.* Agne, (Iowa 1904) 99 N. W. 550. See also Murrilla *v.* Guis, 51 Wash. 93, 98 Pac. 100, holding the evidence sufficient to make out a *prima facie* case of seduction.

**Promise of marriage.**— It has been held that the evidence is sufficient to warrant a finding that defendant seduced plaintiff where a promise of marriage might be inferred from such conduct and behavior as are customary between persons under a contract to marry, direct evidence of the exact time, circumstances, language, or manner under which the promise was made being unnecessary, or where the conduct of defendant toward plaintiff as an accepted suitor was such as to win her affection and induce her to believe that he intended to marry her. Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563. And see Brenier *v.* Nugent, (Iowa 1907) 111 N. W. 446. And if an engagement of marriage is claimed, even though the female may have made a mistake about the exact date, if it is shown to have been entered into before the seduction, it is sufficient. Breiner *v.* Nugent, *supra*.

36. Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; Dowling *v.* Crapo, 65 Ind. 209; Breiner *v.* Nugent, (Iowa 1907) 111 N. W. 446; Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563; Hood *v.* Sudderth, 111 N. C. 215, 16 S. E. 397. See *supra*, II, A, 1, c, (II).

37. West *v.* Druff, 55 Iowa 335, 7 N. W. 636. See *supra*, II, A, 1, c, (III). *Compare* Murrilla *v.* Guis, 51 Wash. 93, 98 Pac. 100.

**An instruction** that the presumption of chastity can only be overcome by "clear and satisfactory evidence" is erroneous as requiring too high a degree of proof. West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

**Proof of untruthfulness** in a woman does not establish her unchastity, even though it go so far as to show she is a common liar. Harmon *v.* Donohoe, 153 Mo. 263, 54 S. W. 453.

**The fact that a woman's reputation for chastity is not talked of** is evidence that it is good. Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

38. Harmon *v.* Donohoe, 153 Mo. 263, 54 S. W. 453.

39. Olson *v.* Rice, 140 Iowa 630, 119 N. W. 84.

(III) *Action by Parent, Master, or Person In Loco Parentis* — (A) *In General.* In an action by a parent, master, or person *in loco parentis* for seduction of his daughter the evidence must be sufficient to satisfy the jury that defendant had intercourse with her as alleged,[40] and must show that the damage to plaintiff was the result thereof.[41]

(B) *Proof of Loss of Services.* To entitle plaintiff to recover for the seduction of his daughter some loss of her services must generally be proven;[42] but where the relation of master and servant exists proof of the slightest service performed by the daughter is sufficient to enable the parent to maintain the action.[43] In an action by a parent suing for the seduction of his minor daughter, proof that at the time of the seduction he was entitled to her services raises a conclusive presumption that the relation of master and servant existed between them, even though at the time of the seduction she may have been in the actual service of another.[44] Proof that after her majority she continued to reside in her father's family, rendering him the usual services of a daughter, raises the presumption that the relation of master and servant existed between them.[45] If she was over the age of twenty-one years and was living with her father, evidence of assistance, however slight, given by her to the father's family is sufficient to prove her the father's servant.[46]

**5. Damages — a. Action by Female Seduced** — (I) *In General.* In an action by a female under the statute for her own seduction she is entitled to recover such damages as will compensate her for loss of reputation, anguish of mind, and

40. Austin *v.* Barker, 110 N. Y. App. Div. 510, 96 N. Y. Suppl. 814, holding that the evidence was insufficient to sustain a verdict where the female alone testified to the intercourse and stated that she knew nothing of it until afterward hypnotized by a third person.

**Seductive arts**—As a rule it is not necessary to prove that the seduction was accomplished by seductive arts to entitle plaintiff to recover. Leucker *v.* Steileu, 89 Ill. 545, 31 Am. Rep. 104 [*citing* White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100] (holding that in an action by a father for the seduction of a minor daughter proof of sexual intercourse followed by pregnancy, confinement, and childbirth, all while the daughter was living with the father, is sufficient to support the action); Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. 522 (holding that under Gen. St. (1894) § 5163, providing that the father may prosecute an action for the seduction of his daughter, although the daughter is not living with plaintiff at the time of seduction, and there is no loss of services, it is not necessary to show that the debauchment of the daughter was accomplished by seductive arts in order to entitle plaintiff to other than his actual money loss). And see *supra*, II, A, 2, d, (I). It has been held otherwise under the Oregon statute. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

41. Blagge *v.* Ilsley, 127 Mass. 191, 34 Am. Rep. 361 (holding that in an action by a father for the seduction of his minor daughter, where there was evidence, including that of the daughter, that before the seduction the daughter appeared strong and well, and of cheerful spirits, and that after that time she became nervous and excitable, and did not appear to be herself, and there was no other evidence to show that the girl's condition of health was caused by the act of defendant, the evidence would warrant the jury in finding that the girl's health failed as the immediate result of defendant's act); Lawyer *v.* Fritcher, 130 N. Y. 239, 29 N. E. 267, 27 Am. St. Rep. 521, 14 L. R. A. 700 [*affirming* 54 Hun 586, 7 N. Y. Suppl. 909] (holding that in an action for seduction of plaintiff's minor daughter, evidence that defendant by fraud obtained plaintiff's consent to take away the daughter; that he then seduced her; and that, after she was informed that he could not marry her, she took poison, and died, is sufficient to submit to the jury the question whether plaintiff was damaged by the seduction, as it authorizes an inference that the daughter was ill and unable to render service at the time she took poison, and that this condition was caused by the seduction).

42. Grable *v.* Margrave, 4 Ill. 372, 38 Am. Dec. 88; Garretson *v.* Becker, 52 Ill. App. 255; Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. 266; Badgley *v.* Decker, 44 Barb. (N. Y.) 577. And see White *v.* Nellis, 31 N. Y. 405, 88 Am. Dec. 282 [*affirming* 31 Barb. 279]. See also *supra*, II, A, 2, c.

43. Robinson *v.* Burton, 5 Harr. (Del.) 335; Doyle *v.* Jessup, 29 Ill. 460; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575. See *supra*, II, A, 2, c.

44. Snider *v.* Newell, 132 N. C. 614, 44 S. E. 354; Riddle *v.* McGinnis, 22 W. Va. 253. See *supra*, II, A, 2, c, (I), (B).

45. Dodd *v.* Focht, 72 Iowa 579, 34 N. W. 425; Clem *v.* Holmes, 33 Gratt. (Va.) 722, 36 Am. Rep. 793; Hudkins *v.* Haskins, 22 W. Va. 645. See *supra*, II, A, 2, c, (I), (C).

46. Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 76; Wallace *v.* Clark, 2 Overt. (Tenn.) 93, 5

the pain and suffering incident to bearing and giving birth to a child.[47] In estimating her damages the jury may also consider publicity given by defendant to the seduction,[48] and any indignity offered plaintiff during the trial, or any imputation against her character, or impeaching her virtue, if untrue and wantonly made.[49] While loss of social standing by the woman, resulting from the injury, may be an element of damage, the fact that individual acquaintances with whom she associated before her ruin was accomplished refuse to recognize her cannot be considered.[50] If the female is suing for her own seduction, she may recover the value of the time lost by reason of her sickness, but this is determined by what she could have earned during that time.[51]

(II) *EXEMPLARY DAMAGES.* Exemplary damages should be given when it appears that defendant entered into a contract of marriage with the female for the purpose of seducing her.[52]

(III) *MITIGATION.* The amount of damages which the female is entitled to recover is in no way affected by the fact that her parent is also entitled to maintain an action for her seduction.[53]

**b. Action by Parent, Master, or Person In Loco Parentis** — (I) *IN GENERAL.* The damages recoverable at common law in an action by a parent, master, or person *in loco parentis* for seduction must be the natural and proximate consequence of the wrongful act of defendant.[54] And where a statute authorizes the father to sue for the seduction of his daughter, the rule for the recovery of damages is generally the same as at common law.[55]

(II) *ELEMENTS OF DAMAGES* — (A) *Loss of Services and Expenses.* The relation of master and servant being the legal foundation of the action predicated upon loss of services, if such relation does not exist, or no loss of service has been sustained, however infamous the conduct of defendant may have been in accomplishing the ruin of his victim, no damages for the seduction can be recovered against him; on the other hand the value of lost services may be recovered as the direct and immediate consequence of the seduction, during the period of pregnancy, child-birth, and any illness of mind or body, or impairment of health incident thereto, she being thereby incapacitated from rendering service.[56] As incident to such loss of services plaintiff may also recover the actual expenses which he has paid or for which he is legally liable, incurred during the time the seduced female was incapacitated from work by reason of the wrongful act of the seducer,[57] including reason-

Am. Dec. 654; Davidson *v.* Abbott, 52 Vt. 570, 36 Am. Rep. 767. See *supra*, II, A, 2, c, (I), (C).

**47.** Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Smith *v.* Milburn, 17 Iowa 30. *Compare* Breon *v.* Henkle, 14 Oreg. 494, 13 Pac. 289.

**48.** Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451.

**49.** Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

**50.** Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261.

**Loss of character not in issue.**— In Iowa where, in an action for seduction, the question of plaintiff's previous chaste character was not put in issue by the petition, nor submitted to the jury, although evidence on the issue was received without objection, it was held that an instruction authorizing the jury to consider, in determining the damages, loss of character was erroneous. Olson *v.* Rice, 140 Iowa 630, 119 N. W. 84.

**51.** Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562, holding that the value of the time plaintiff lost on account of her sickness, she being a school-teacher, is what she could have earned at teaching during that time.

**52.** Goodall *v.* Thurman, 1 Head (Tenn.) 209.

**53.** Goodall *v.* Thurman, 1 Head (Tenn.) 209.

**54.** Knight *v.* Wilcox, 14 N. Y. 413 [*reversing* 18 Barb. 212], holding that where defendant seduced plaintiff's daughter, but no pregnancy followed and no loss of service was sustained until three months after the seduction, when the daughter suffered some illness in consequence of being threatened with exposure, plaintiff could not recover.

**55.** Pence *v.* Dozier, 7 Bush (Ky.) 133.

**56.** McCoy *v.* Trucks, 121 Ind. 292, 23 N. E. 93; Cook *v.* Barclett, 179 Mass. 576, 61 N. E. 266; Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458; Knight *v.* Wilcox, 14 N. Y. 413; Badgley *v.* Decker, 44 Barb. (N. Y.) 577.

**57.** *Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603.

*Minnesota.*— Fox *v.* Stevens, 13 Minn. 272.

*Missouri.*— Comer *v.* Taylor, 82 Mo. 341.

able charges for medicine and medical attendance, whether he has paid the amount or not;[58] but not compensation for the support and maintenance of the daughter's illegitimate child.[59] If defendant is not the father of the child, the parent cannot recover for loss of services during pregnancy and expenses of nursing and medical attendance, although defendant had seduced her.[60]

(B) *Wounded Feelings, Mental Suffering, Shame, Disgrace, Etc.* Although the relation of master and servant, and not that of parent and child, is technically the legal foundation of the action, it has generally come to be regarded as a mere fiction of the law to open the way to the parent for the redress of his injuries, and he may not only recover damages for actual loss of services, disbursements for medical attention, and other necessary expenses, but he may also be awarded such compensation for wounded feelings, mental suffering, destruction of his domestic peace, and shame and disgrace cast upon him and his family as from the evidence is reasonable and just;[61] but not for the wounded feelings of the family, or where the parties are *in pari delicto*.[62] And it has been held that damages are confined to a strict compensation only for the loss of services during pregnancy, where the conduct of the daughter has been lewd.[63] The father may recover full damages where pregnancy is shown to have resulted from the seduction without being required to wait until the child is born.[64] In the absence of evidence of any fault or connivance on the part of plaintiff parent a verdict for the actual expenses of the confinement only should be set aside.[65]

(C) *Loss of Daughter's Reputation.* The parent cannot recover for an injury

*New York.*— Knight *v.* Wilcox, 14 N. Y. 413.

*Oregon.*— Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A 529.

**58.** Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562; Comer *v.* Taylor, 82 Mo. 341.

**59.** Hitchman *v.* Whitney, 9 Hun (N. Y.) 512; Sellars *v.* Kinder, 1 Head (Tenn.) 134.

**60.** Comer *v.* Taylor, 82 Mo. 341.

**61.** *Arkansas.*— Simpson *v.* Grayson, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52.

*Georgia.*— Kendrick *v.* McCrary, 11 Ga. 603

*Illinois.*— Grable *v.* Margrave, 4 Ill. 372, 38 Am. Dec. 88; Garretson *v.* Becker, 52 Ill. App. 255.

*Indiana.*— Taylor *v.* Shelkett, 66 Ind. 297; Pruitt *v.* Cox, 21 Ind 15.

*Iowa.*— Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392.

*Massachusetts.*— Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. 266; Hatch *v.* Fuller, 131 Mass. 574; Phillips *v.* Hoyle, 4 Gray 568.

*Minnesota.*— Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458; Fox *v.* Stevens, 13 Minn. 272

*Mississippi.*— Ellington *v.* Ellington, 47 Miss. 329.

*Missouri.*— Comer *v.* Taylor, 82 Mo. 341; Morgan *v.* Ross, 74 Mo. 318.

*New Hampshire.*— Lunt *v.* Philbrick, 59 N. H. 59.

*New Jersey.*— Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. 770; Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. 575.

*New York.*— Badgley *v.* Decker, 44 Barb. 577.

*North Carolina.*— Scarlett *v.* Norwood, 115 N. C. 284, 20 S. E. 459.

*Oregon.*— Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

*Pennsylvania.*— Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540; Phelin *v.* Kenderdine, 20 Pa. St. 354.

*Vermont.*— Rollins *v.* Chalmers, 51 Vt. 592.

*West Virginia.*— Riddle *v.* McGinnis, 22 W. Va. 253.

*United States.*— Barbour *v.* Stephenson, 32 Fed. 66.

*England.*— Andrews *v.* Askey, 8 C. & P. 7; 34 E. C. L. 578; Irwin *v.* Dearman, 11 East 23, 10 Rev. Rep. 423; Bedford *v.* McKowl, 3 Esp. 119.

**Person in loco parentis.**— If the action is brought by a grandparent or other person *in loco parentis*, it is governed by the same rules. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

**In Michigan** the fiction that damages beyond loss of service can only be recovered by way of aggravation has been abolished by statute, and adequate damages are allowed for the substantial wrong. Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

**62.** Taylor *v.* Shelkett, 66 Ind. 297; Comer *v.* Taylor, 82 Mo. 341; Breon *v.* Henkle, 14 Oreg. 494, 13 Pac. 289. And see Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

**In Missouri** the rule with respect to the recovery of damages for debauching a female is different from that in case of seduction; in the former, there can be no recovery beyond the loss of service. Mohelsky *v.* Hartmeister, 68 Mo. App. 318; Hartman *v.* McCrary, 59 Mo. App. 571.

**63.** Fletcher *v.* Randall, Anth. N. P. (N. Y.) 267; Akerley *v.* Haines, 2 Cai. (N. Y.) 292.

**64.** Briggs *v.* Evans, 27 N. C. 16.

**65.** Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

sustained by loss of reputation, occasioned by the loose and abandoned character of the daughter after her connection with defendant, although such connection may have led to such loss.[66]

(III) *EXEMPLARY DAMAGES.* In view of the enormity of the offense, as well as the right to compensation by plaintiff, such damages beyond the mere pecuniary loss of services and expenses as result from the injury in the way of wounded feelings and mortification of plaintiff, and dishonor to himself and family, etc., are exemplary and punitive.[67] Where plaintiff stands *in loco parentis*, he or she is entitled to the same kind of redress in the recovery of exemplary damages as the father.[68] It has been held that the rule for the recovery of exemplary damages in an action by the parent is the same whether the daughter is an adult or a minor, where the relation of master and servant is shown to exist.[69] Exemplary damages cannot be recovered where there was no seduction and the parties were *in pari delicto*.[70]

(IV) *MITIGATION.*[71] In an action by the parent of the female seduced a subsequent marriage between her and defendant and an acquittal of defendant on an indictment for seduction by reason of such marriage may be shown in mitigation of damages, but it will not bar recovery of exemplary damages.[72] A former recovery by the daughter, being for her own use, cannot be considered in mitigation of damages in an action by the father;[73] nor can the jury consider in mitigation of damages an offer of marriage by defendant after the alleged seduction,[74] or defendant's liability to a criminal prosecution for seduction and abortion,[75] or the fact that the female, after her seduction by defendant, continued to meet his advances or yielded to others.[76]

**c. Excessiveness of Damages.** The amount of damages that may be awarded in an action for seduction, including exemplary damages, is peculiarly within the

**66.** Coon *v.* Moffet, 3 N. J. L. 583, 4 Am. Dec. 392.

**67.** *Delaware.*— Robinson *v.* Burton, 5 Harr. 335.

*Illinois.*— Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906 [*affirming* 74 Ill. App. 129, and *citing* White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Yundt *v.* Hartrunft, 41 Ill. 9]; Ball *v.* Bruce, 21 Ill. 161.

*Indiana.*— White *v.* Gregory, 126 Ind. 95, 25 N. E. 806.

*Iowa.*— Stevenson *v.* Belknap, 6 Iowa 97, 71 Am Dec. 392, holding that the father may recover exemplary damages, although the daughter, under the Iowa code, may also have her own action.

*Minnesota.*— Russell *v.* Chambers, 31 Minn. 54, 16 N. W. 458.

*New Jersey.*— Coryell *v.* Colbaugh, 1 N J. L. 90, 1 Am. Dec. 192.

*New York.*— Lipe *v.* Eisenlerd, 32 N. Y. 229; Badgley *v.* Decker, 44 Barb. 577; Ingersoll *v.* Jones, 5 Barb. 661; Damon *v.* Moore, 5 Lans. 454.

*Wisconsin.*— Lavery *v.* Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; Klopfer *v.* Bromme, 26 Wis. 372.

*England.*—Andrews *v.* Askey, 8 C. & P. 7; 34 E. C L. 578; Irwin *v.* Dearman, 11 East 23, 10 Rev. Rep. 423; Bedford *v.* McKowl, 3 Esp. 119.

See 43 Cent. Dig tit. "Seduction," § 47. And see *supra*, II, B, 5, b, (II), (B).

Exemplary damages are recoverable when plaintiff is so connected with the female seduced as to be capable of receiving injury through her dishonor, regardless of the existence or non-existence of the malice of defendant. The act of seduction is necessarily wilful. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

**68.** Lipe *v.* Eisenlerd, 32 N. Y. 229; Badgley *v.* Decker, 44 Barb. (N. Y.) 577; Ingersoll *v.* Jones, 5 Barb. (N. Y.) 661; Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330; Manvell *v.* Thomson, 2 C. & P. 303, 31 Rev. Rep. 666, 12 E. C. L. 585; Irwin *v.* Dearman, 11 East 23, 10 Rev. Rep. 423.

**69.** Lipe *v.* Eisenlerd, 32 N. Y. 229.

**70.** Comer *v.* Taylor, 82 Mo. 341; Hogan *v.* Cregan, 6 Rob. (N. Y.) 138. See *supra*, II, B, 5, b, (II), (B).

**71.** Evidence in mitigation of damages as to: Youthfulness and indiscretion of defendant see *supra*, II, B, 4, b, (VII), (C). Unchastity of female see *supra*, II, A, 2, e, (III); II, B, 4, b, (V), (B). Negligence, indifference, or connivance of parent see *supra*, II, A, 2, e, (IV); II, B, 4, b, (IV), (C). Character of parent and family see *supra*, II, B, 4, b, (IV), (A), (B). Payments to and release by daughter see *supra*, II, B, 4, b, (XIV).

**72.** Eichar *v.* Kistler, 14 Pa. St. 282, 53 Am. Dec. 551.

**73.** Pruitt *v.* Cox, 21 Ind. 15.

**74.** White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Ingersoll *v.* Jones, 5 Barb. (N. Y.) 661; Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. 540.

**75.** Klopfer *v.* Bromme, 26 Wis. 372.

**76.** Stoudt *v.* Shepherd, 73 Mich. 588, 41 N. W. 696.

province of the jury, to be determined by them upon all of the circumstances of the case presented under the evidence not to exceed the amount claimed in the pleadings, and the damages awarded by them will be held to be excessive and their verdict set aside only where there has been some flagrant abuse of the powers which the law has confided to them, or the verdict appears to be the result of passion, prejudice, or corruption on their part.[77] Where the suit is brought after the daughter is *enceinte*, but before the birth of the child, a verdict will not be set aside because of the admission of evidence of loss of service and expenses incurred after the commencement of the suit where the cause of action is established independently of such evidence.[78] Although a claim for nursing and curing the female may be alleged, if there is no evidence to sustain it and a general verdict is rendered, a cause of action having been proven for which the jury had a right to award damages to the amount of such verdict, the presumption will be that the jury allowed nothing on such claim.[79]

**d. Showing Innocence on Assessment of Damages After Judgment.** Where a court renders judgment against defendant in favor of plaintiff, and the case is continued for the assessment of damages, it has been held that, as the judgment is conclusive of the former's guilt, evidence of his innocence is not admissible.[80]

77. *California.*— Marshall *v.* Taylor, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144, holding that where plaintiff is a young, chaste, inexperienced girl of sixteen years, and defendant a man of mature years and large property interests, a verdict for twenty-five thousand dollars in her favor is not so excessive as to require a new trial.

*Illinois.*— Doyle *v.* Jessup, 29 Ill. 460, holding that an award by a jury of eight hundred dollars for the seduction of plaintiff's daughter is not excessive.

*Indiana.*— Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762 (holding that where a married man of mature years seduces an orphan seventeen years old, and has two abortions performed on her, which injures her health and reputation, and renders her unable to labor, a verdict of five thousand dollars in her favor is not excessive); Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451 (holding that an award of five thousand dollars damages is not excessive, although there is some evidence detrimental to plaintiff's character); Taylor *v.* Shelkett, 66 Ind. 297; Felkner *v.* Scarlet, 29 Ind. 154 (holding that, where a fifteen-year-old daughter is seduced by a married man with whom she is living at the time, a verdict against him in favor of the mother for five hundred dollars is not excessive); Harris *v.* Rupel, 14 Ind. 209 (upholding a verdict for five thousand dollars).

*Iowa.*— Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563 (holding that a verdict for one thousand five hundred dollars will not be disturbed as excessive, where it appears that plaintiff as the result of her seduction gave birth to an illegitimate child); Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454 (holding that a verdict of six thousand seven hundred and fifty dollars damages, in an action where the woman sues for her own seduction, is not so excessive as to indicate passion and prejudice, and hence will not be set aside); Stevenson *v.* Belknap, 6 Iowa 97, 71 Am. Dec. 392 (holding that a verdict will not be set aside as excessive unless so great as to raise the suspicion of partiality or passion).

*Missouri.*— Morgan *v.* Ross, 74 Mo. 318, holding that a verdict for one thousand seven hundred and fifty dollars is not excessive, where plaintiff's daughter was seduced at the age of seventeen years by defendant at the home of plaintiff.

*New York.*— Knight *v.* Wilcox, 14 N. Y. 413; Ingerson *v.* Miller, 47 Barb. 47 (holding that where plaintiff's minor daughter is seduced and dies suddenly about four months after conception from nervousness superinduced by pregnancy, a verdict for five thousand dollars against defendant will not be set aside); Kerns *v.* Hagenbuchle, 60 N. Y. Super. Ct. 228, 17 N. Y. Suppl. 369 (upholding a verdict for three thousand five hundred dollars).

*Oregon.*— Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

*Rhode Island.*— Thiebault *v.* Prendergast, (1908) 69 Atl. 922, holding that in an action for seduction of plaintiff's minor daughter by force and promises, a verdict awarding plaintiff one thousand two hundred dollars was not excessive, although plaintiff could not recover for any actual loss of the daughter's services.

*West Virginia.*— Riddle *v.* McGinnis, 22 W. Va. 253, holding that a verdict for three thousand dollars damages for the seduction of plaintiff's minor daughter while living and working in defendant's family is not excessive.

*United States.*— Barbour *v.* Stephenson, 32 Fed. 66.

*England.*— Elliott *v.* Nicklin, 5 Price 641, holding that £1000 sterling awarded by a jury, although the parties are in a moderate sphere of life, is not excessive.

See 43 Cent. Dig. tit. "Seduction," § 48.

78. Stiles *v.* Tilford, 10 Wend. (N. Y.) 338.

79. Doyle *v.* Jessup, 29 Ill. 460.

80. Rollins *v.* Chalmers, 51 Vt. 592.

**6. Trial [81] and Review [82] — a. Questions For Jury [83] —** (I) *Relation of Master and Servant.* The question as to the existence of the relation of master and servant is for the jury, where there is evidence tending to show such relation.[84]

(II) *Reasonableness of Physician's Fees.* The reasonableness of the charges of the physician attending the seduced female is a matter for the jury.[85]

(III) *Flattery, Persuasion, and Other Artifices.* Where the seduction is accomplished by flattery, deception, or other artifice, the question as to the sufficiency of the evidence to show acts resorted to by defendant amounting to an artifice, is for the jury.[86]

(IV) *Promise of Marriage.* Where it is shown that plaintiff resisted the persuasions of the alleged seducer for some time and then yielded upon his promise to marry her, the question whether it constituted seduction or a case of barter and sale or intercourse from mutual desire is also for the jury.[87]

(V) *Chastity of Female.* The chastity of the female when attacked or called in question is likewise a matter for the jury.[88]

(VI) *Force.* It is for the jury upon the evidence to determine whether or not force was applied by defendant in the commision of the act.[89]

(VII) *Damages.* The amount of damages is within the discretion of the jury, to be determined by them in the light of all the circumstances.[90]

**b. Instructions [91] —** (I) *In General.* In seduction proper instructions should be given by the court to the jury as to the law applicable to the facts and circumstances of each particular case, in the light of the pleadings and evidence adduced on the trial.[92]

(II) *Elements of Seduction in General.* In defining seduction in instructions to the jury the elements necessary to constitute the offense must be stated; [93] but it has been held not to be error to define seduction as it is defined in the books.[94]

(III) *Influence, Persuasion, Deception, Promise, and Other Artifices.* Where there is evidence showing that the seduction might have been accomplished by means of influence and persuasion, it is error for the court to instruct the jury to return a verdict for defendant; [95] nor is it proper to instruct

**81.** See, generally, Trial.

**82.** See Appeal and Error, 2 Cyc. 474.

**83.** See, generally, Trial.

**84.** Hartman *v.* McCrary, 59 Mo. App. 571.

**85.** Lampman *v.* Bruning, 120 Iowa 167, 94 N. W. 562.

**86.** Hawn *v.* Banghart, 76 Iowa 683, 39 N. W. 251, 14 Am. St. Rep. 261; Hopkins *v.* Mathias, 66 Iowa 333, 23 N. W. 732.

**87.** Becker *v.* Mason, 93 Mich. 336, 53 N. W. 361.

**88.** Dalman *v.* Koning, 54 Mich. 320, 20 N. W. 61.

**89.** Furman *v.* Applegate, 23 N. J. L. 28.

**90.** Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529. See *supra*, II, B, 5, c.

**91.** See, generally, Trial.

**92.** Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395.

**93.** Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112; Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395 (holding that some definition should be given to the word "seduction" in instructing the jury, and it is not sufficient to tell them that they should find for plaintiff if they believe that defendant "seduced, debauched, and carnally knew" his daughter, "and that by reason or means of such seduction and carnal knowledge by defendant of said daughter, said daughter became pregnant," etc.); Breon *v.* Henkle, 14 Oreg. 494, 13 Pac. 289 (holding that an instruction that if the jury should find that defendant did, through enticement, or persuasion, or artifice, overcome plaintiff's reluctance and scruples, and thereby induced her to have unlawful intercourse with him, then they should find for plaintiff, was too vague; that they should have been instructed that plaintiff could not recover unless it appeared from the evidence that defendant employed such artifices or deceit as was calculated to mislead a virtuous woman, and that plaintiff was misled in consequence thereof, and thereby seduced; and that the character of the reluctance and scruples to be overcome should have been explained).

**94.** Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.

**95.** Hallock *v.* Kinney, 91 Mich. 57, 51 N. W. 706, 30 Am. St. Rep. 462, holding that where it appeared that plaintiff accompanied defendant to a village, some distance from home, to attend a dance; that, on arriving at a hotel, a bedroom was obtained, to which plaintiff was taken by defendant, evidently for the express purpose of debauching her;

the jury as to the sufficiency of any promise, influence, or other artifice used to accomplish the seduction, as this would be an invasion of the province of the jury.[96] If a promise of marriage is alleged as such means, and no damages are claimed for the breach of the promise, instructions that such breach cannot be considered with reference to the question of damages, as the action is for seduction only, have been held to be inapplicable and properly refused.[97] A charge that it is not indispensable that defendant should use his seductive arts or promises, but any act or promise or deception of his by which he overcomes the scruples of the woman, and induces her to have sexual intercourse with him, would constitute the offense, is not reversible error, when qualified by the statement that if the woman, without being deceived, and without any false promises, deception, or artifice, voluntarily submits to the connection the law affords her no remedy, and she cannot recover.[98]

(IV) *Rules Governing Seduction and Debauching.* It has been held to be error for the court, in instructing the jury, to apply the rule of damages governing cases of seduction to a case of debauching without the elements of seduction;[99] and it is proper to charge the jury that criminal connection may take place between the parties without seduction, and that if seduction is not proven damages for it should not be given.[1]

(V) *Matters Relating to Female* — (A) *Chastity.*[2] It is proper to instruct the jury that the virtue of the woman at the time of the alleged seduction is presumed, that they are not bound to believe that her reputation for chastity was bad from the evidence, and in deciding whether or not she was chaste they must weigh all of the evidence adduced, if in this connection a correct instruction on the burden of proof has been given;[3] but an instruction that the presumption in favor of plaintiff's chastity remains until it is overcome by clear and satisfactory evidence is erroneous, as only such evidence is required as will satisfy the mind of the jury that plaintiff is unchaste.[4] If the jury has been charged that the woman must have yielded by reason of certain promises and influences of her alleged seducer, it need not be added that it must be proven that she was of previous chaste character, and it is proper for the court to refuse to instruct, in the absence of evidence tending to show the woman's unchastity, that an unchaste woman or one who is not virtuous cannot be seduced.[5] A charge that they have a right to consider evidence offered by defendant tending to prove the previous want of chastity of the female, in connection with other evidence, as bearing on the question of actual seduction, is not erroneous.[6]

that plaintiff was but sixteen, and had hitherto been chaste, it was error to direct a verdict for defendant.

96. Hopkins *v.* Mathias, 66 Iowa 333, 23 N. W. 732, holding that if the court instructs the jury that if they find the facts stated in the instruction to be true, defendant is guilty of seducing plaintiff, as a matter of law, is erroneous, since, in the absence of a promise of marriage, the sufficiency of the promise made, and arts used, to accomplish the seduction, is a question for the jury.

97. Gover *v.* Dill, 3 Iowa 337.

98. Bell *v.* Rinker, 29 Ind. 267; Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

As to persuasion.—An instruction that there must be some "overpersuasion by the man, followed by sexual intercourse as the result of such . . overpersuasion, to constitute the offense of seduction" does not mean that mere persuasion, followed by illicit intercourse, constitutes the offense, where in the same instruction the words "inducements," "promise," "artifice," and "deception" are used as equivalents of "overpersuasion," and the phrase "false or fraudulent persuasion" is used as the equivalent of "false or fraudulent acts, promises, or inducements." Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272.

99. Smith *v.* Young, 26 Mo. App. 575.

1. Hill *v.* Wilson, 8 Blackf. (Ind.) 123.

2. Where on a trial for seduction there was no competent evidence of the reputation for chastity of the female seduced, the court did not err in confining the jury, when determining the issue of chastity, to direct testimony of acts of sexual intercourse, or to circumstantial evidence from which such acts might be inferred. Anderson *v.* Aupperle, 51 Oreg. 556, 95 Pac. 330.

3. Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762.

4. West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

5. Robinson *v.* Powers, 129 Ind. 480, 28 N. E. 1112.

6. Hogan *v.* Cregan, 6 Rob. (N. Y.) 138.

(B) *Venereal Disease.* To refuse to instruct the jury that if they find that, at the time of the alleged seduction, plaintiff was suffering from a venereal disease, this would in itself, if unexplained, be sufficient evidence of unchastity to prevent a recovery, is not error.[7]

(C) *Yielding to Defendant's Desires.* If the court instructs that if plaintiff voluntarily yielded to defendant's desires she cannot recover, it is not objectionable, being rather favorable to defendant than otherwise.[8]

(D) *As Accomplice in Abortion.* It has been held not to be error to refuse to instruct the jury that, if plaintiff consented to an abortion at the instance of defendant, she made herself thereby an accomplice, and the jury could not believe the testimony unless corroborated.[9]

(E) *Credibility.* Upon the question of the credibility of the female as a witness, the jury should be instructed to consider her relation to plaintiff, his influence over her, her contradictory statements as to who was the father of her child, and, where force is charged, the age and physical ability of defendant;[10] and it is proper to instruct that they may refuse to accept her testimony unless corroborated, but they must determine for themselves her credibility, and make up their minds from a view of all the circumstances.[11]

(F) *Statement as to Force.* An instruction to disregard a statement testified to by plaintiff, drawn out on her cross-examination, that the intercourse was in fact effected by force, has been held to be proper.[12]

(G) *As to Being Unmarried.* Where it is alleged in the pleadings that the female was unmarried, and the fact is not specifically denied, the jury need not be instructed that such fact must be proven, as it is admitted.[13]

(VI) *MATTERS RELATING TO DEFENDANT* — (A) *Several Acts of Intercourse.* A charge that the several acts of intercourse characterized by the same inducement as the first act may be regarded as elements of one wrong is a proper instruction.[14]

(B) *Statements by Defendant as to Act of Seduction.* An instruction that in determining the preponderance of evidence the jury must consider any statement by defendant in regard to the manner in which he claimed to have accomplished the seduction is proper.[15]

(C) *Disclosure of Intimacy Between the Parties.* It is not proper to instruct the jury that they cannot consider any damages growing out of the fact that defendant disclosed the intimate relationship existing between him and plaintiff.[16]

(D) *When Defendant Not Father of Child.* If it appears that defendant has debauched plaintiff's daughter, and that she has been delivered of a child, but the jury find that the child is not defendant's, it is proper to direct the jury to render a verdict for defendant.[17]

(E) *Conspiracy in Procuring Marriage of Female to Another.* If no evidence is given under an allegation charging defendant with conspiracy and fraud in procuring the marriage of the female to another it is error to instruct on such point.[18]

7. Patterson *v.* Hayden, 17 Oreg. 238, 21 Pac. 129, 11 Am. St. Rep. 822, 3 L. R. A. 529.

8. Baird *v.* Boehner, 77 Iowa 622, 42 N. W. 454.

9. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

10. Duncan *v.* Welty, 20 Ind. 44.

11. Watson *v.* Watson, 58 Mich. 507, 25 N. W. 497.

12. Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913

13. Gover *v.* Dill, 3 Iowa 337, holding that the allegation in the declaration that plaintiff was unmarried, being affirmative and material, is admitted, unless specifically denied, and the jury need not be instructed that this must be proven, more especially where this fact is conceded, and the jury could not, under the instructions, find for plaintiff without finding this fact.

14. Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691.

15. Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451.

16. Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451.

17. Eager *v.* Grimwood, 1 Exch. 61, 16 L. J. Exch. 236.

18. Humble *v.* Shoemaker, 70 Iowa 223, 30

(F) *Promise to Marry Female After Suit Brought.* In an action for seduction under promise of marriage if it is shown that the purpose of defendant in promising to marry plaintiff after suit was brought was to avoid liability in the action and then abandon her, an instruction to find for defendant, if warranted by the evidence, should also state that they must find differently if they believe such promise was made in bad faith for the purpose stated.[19]

(VII) *DAMAGES.* In an action for the seduction of plaintiff's daughter, a refusal to charge on the question of damages to "allow the plaintiff none for wrong to his daughter, but only for wrong to himself," is not error; the wrong done to the daughter being the wrong done to plaintiff.[20] It is error to instruct the jury to give vindictive damages against defendant if they find him guilty, as the giving of such damages is within the discretion of the jury.[21] The fact that the jury was instructed that if they should find from the evidence that defendant was a man of considerable wealth they might give punitive or exemplary damages and that in law no verdict they would render would be excessive was held not misleading;[22] but it was held error to charge that the pecuniary circumstances of defendant might be considered where there was no evidence on that subject.[23] It is proper to refuse to instruct the jury that, in order to award exemplary damages, they must believe that the seduction and carnal knowledge "were willfully or maliciously accomplished by defendant, or knowingly, wantonly, or recklessly persisted in by him, to the great danger of the impregnation of [the female]," as malice is not required to authorize exemplary damages.[24]

(VIII) *WEIGHT TO BE GIVEN TO FACTS AND CIRCUMSTANCES.* It is error to instruct the jury upon the weight to be given to any fact or circumstance to be considered in connection with any other facts or circumstances proven in connection with the seduction.[25]

(IX) *INSTRUCTION REQUESTED CONTAINED IN ANOTHER INSTRUCTION.* In seduction, as in other cases, if the substance of an instruction requested is contained in another instruction the court may properly refuse to give the former.[26]

(X) *ERROR CURED BY OTHER INSTRUCTIONS.* If a term or expression appearing in an instruction is objectionable because unexplained, but is made intelligible when read in connection with other proper instructions, such objection is thereby overcome.[27]

N. W. 492, holding that where in the petition fraud and conspiracy are alleged in the procurement of the marriage of the female to another by defendant and there is no evidence to sustain such averment, it is error to refuse to instruct the jury that they are not to consider such allegation, and, instead, to charge as to what would follow if they found that defendant was guilty of such fraud and conspiracy.

19. Harmon *v.* Donohoe, 153 Mo. 263, 54 S. W. 453.

20. Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

21. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

22. Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928.

23. De Haven *v.* Helvie, 126 Ind. 82, 25 N. E. 874.

24. Stowers *v.* Singer, 113 Ky. 584, 68 S. W. 637, 24 Ky. L. Rep. 395.

25. Delvee *v.* Boardman, 20 Iowa 446, holding that in an action by an unmarried woman to recover damages for her own seduction, it is error to instruct the jury that, if they find that she is a woman of weak mind, it does not require as strong proof of the defendant's guilt, as if she were a woman of strong mind.

26. Richardson *v.* Fouts, 11 Ind. 466 (holding that a prayer for an instruction that mere sexual intercourse with plaintiff's daughter is not enough to maintain an action is sufficiently answered by instructing the jury that plaintiff must show that defendant got his daughter with child); Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. 266 (holding that a charge that the jury must be satisfied that the inability to render services was due to the seduction was substantially the same as a requested charge that such loss of services must be the direct and proximate result of the defendant's act, so that a refusal to give the latter charge was not error); Thiebault *v.* Prendergast, (R. I. 1908) 69 Atl. 922 (holding that where, in an action for seduction, there was no evidence of loss of wages, an instruction that the jury could not find anything on that score, because there was nothing on which they could compute damages, sufficiently covered a request to charge that plaintiff could not recover for any loss of his daughter's services or earnings after the date of the writ).

27. Harmon *v.* Donohoe, 153 Mo. 263, 54

**c. Special Verdict.** A special verdict should be responsive to the issues submitted to the jury. All of the ultimate facts upon which it may be based need not be stated therein, for the effect of this would be the substitution of the evidence for the verdict.[28]

**d. Review and New Trial.** In the absence of objection at the trial a judgment for plaintiff will not be reversed because counsel in his closing argument applied harsh epithets to defendant.[29] And an instruction upon merely an incidental matter not calculated to mislead the jury, such as money paid out or incurred for medicine and medical attendance, is not ground for reversal.[30] A judgment against defendant will not be reversed and a new trial granted for newly discovered evidence on the ground that after the trial of the civil action he was tried under an indictment for the same offense and found guilty of fornication.[31] And the fact that a marriage was solemnized between plaintiff and defendant subsequent to the trial and judgment is not ground for a motion for a new trial.[32]

## III. CRIMINAL RESPONSIBILITY.

**A. The Offense — 1. In General.** Seduction is not an indictable offense at common law unless a conspiracy can be charged;[33] but it was made a crime by an early English statute, and has been very generally declared a crime in this country.[34]

**2. Nature and Elements of the Offense in General.** The statutes defining the crime of seduction differ.[35] Some of them merely make it a crime to seduce and debauch an unmarried female of good repute, or of previous chaste character, saying nothing as to the means to be employed.[36] Others make it a crime for any man, under promise of marriage, to seduce and have sexual intercourse with such a female.[37] In other jurisdictions the offense consists in the act of persuading or inducing an unmarried woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused.[38]

**3. Who May Commit the Offense.** Subject to qualifications hereafter stated, one may be guilty of seduction under the statute, whether he is married or unmar-

S. W. 453, holding that instructions authorizing a verdict for plaintiff in an action for seduction under promise of marriage, if defendant refused to marry her "without justifiable cause," are not objectionable because not defining "justifiable cause," where, in instructions given for defendant, the court set out what would justify him in refusing to marry her.

28. Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762, holding that a special verdict finding that plaintiff had been chaste until she yielded to defendant through her confidence in him, belief in his flattery, etc., and her reliance on his continued promises of friendship, without disclosing the means employed, from which the court might decide, as a matter of law, that plaintiff yielded, believed, and relied thereon, was proper, since they were ultimate facts for the jury to find from the evidence.

29. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341.

30. Mighell *v.* Stone, 175 Ill. 261, 51 N. E. 906 [*affirming* 74 Ill. App. 129], holding that an instruction including as an element of damages moneys paid out or incurred for physician's services and medicines "if any are shown by the evidence," is not reversible error, even in the absence of proof of moneys so paid out or incurred since the instruction, being on a mere incidental matter, would not mislead the jury.

31. Saunders *v.* Miller, 119 Ga. 873, 47 S. E. 338.

32. Graves *v.* Rivers, 3 Ga. App. 510, 60 S. E. 274.

33. Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776. And see Neary *v.* People, 115 Ill. App. 157; Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809; People *v.* Nelson, 153 N. Y. 90, 93, 46 N. E. 1040, 60 Am. St. Rep. 592; Jennings *v.* Com., 109 Va. 821, 63 S. E. 1086.

Conspiracy to seduce see CONSPIRACY, 8 Cyc. 635.

34. See the statutory provisions of the different states.

35. Definitions of "seduction" and "seduce" see *supra*, I.

36. See *infra*, III, A, 5, a.

37. See People *v.* Krusick, 93 Cal. 74, 28 Pac. 794. See also *infra*, III, A, 5, b.

38. People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257. And see *infra*, III, A, 5, a.

ried,[39] and although he is a minor,[40] so that his promise of marriage is not binding.[41] In some states the statute expressly punishes seduction by a married man.[42]

**4. Against Whom the Offense May Be Committed — a. In General.** Under all of the statutes the offense can only be committed where the female is unmarried.[43] This is true even though the statute does not expressly so provide.[44] A divorced woman is not an "unmarried female" within the meaning of the statute.[45] Unless, as in some states, the statute in terms only applies to a female above or below a certain age, her age is immaterial except in so far as it may affect her actual capacity to consent or constitute a circumstance for consideration of the jury on the question of her seduction.[46]

**b. Chastity of Female**[47] — (I) *In General.* It is also essential, by the express terms of most of the statutes, that the woman shall have been of previous chaste character when seduced;[48] and even when the statute is silent as to her character it is held that the legislature intended to protect chaste women only, and that the state must prove chaste character.[49] But it has been held that

39. State *v.* Donovan, 128 Iowa 44, 102 N. W. 791; State *v.* Primim, 98 Mo. 368, 11 S. W. 732. And see *infra*, III, A, 5, c.

40. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; People *v.* Kehoe, 128 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52 (a boy of sixteen); People *v.* Kenyan, 5 Park. Cr. (N. Y.) 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177], under a statute punishing any "man" who shall, under promise of marriage, seduce, etc.

41. **Promise of marriage not binding** see *infra*, III, A, 5, b, (II).

42. See Flick *v.* Com., 97 Va. 766, 34 S. E. 39; West *v.* State, 1 Wis. 209.

43. *California.*— People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

*Iowa.*— State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230.

*Missouri.*— State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924.

*Texas.*— Mesa *v.* State, 17 Tex. App. 395.

*Wisconsin.*— West *v.* State, 1 Wis. 209.

44. Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538, where the statute punished seduction of a "female" over sixteen years of age.

45. Jennings *v.* Com., 109 Va. 821, 63 S. E. 1080.

46. Whatley *v.* State, 144 Ala. 68, 39 So. 1014; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592 [*reversing* 36 N. Y. Suppl. 1130]. See *infra*, III, A, 5, d.

47. **Under statute punishing defilement of female in one's care, custody, or employment** see *infra*, III, A, 7.

48. *California.*— People *v.* Krusick, 93 Cal. 74, 28 Pac. 794; People *v.* Roderigas, 49 Cal. 9.

*Georgia.*— Brock *v.* State, 95 Ga. 474, 20 S. E. 211; Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664.

*Iowa.*— State *v.* Smith, 124 Iowa 334, 100 N. W. 40; Boak *v.* State, 5 Iowa 430; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708.

*Mississippi.*— Hatton *v.* State, 92 Miss. 651, 46 So. 708.

*Missouri.*— State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

*New York.*— People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; People *v.* Kenyon, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254]; People *v.* Lomax, 6 Abb. Pr. 139.

*North Carolina.*— State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502.

*Pennsylvania.*— Com. *v.* McCarty, 4 Pa. L. J. 136.

*Virginia.*— Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

*Canada.*— Rex *v.* Longheed, 8 Can. Cr. Cas. 184.

See 43 Cent. Dig. tit. "Seduction," §§ 55, 81.

49. *Alabama.*— Smith *v.* State, 118 Ala. 117, 24 So. 55; Munkers *v.* State, 87 Ala. 94, 6 So. 357; Wilson *v.* State, 73 Ala. 527.

*Arkansas.*— Walton *v.* State, 71 Ark. 398, 75 S. W. 1; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17, where the statute made it a crime to seduce "any female." And see Cooper *v.* State, 86 Ark. 30, 109 S. W. 1023.

*Indian Territory.*—Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809.

*Kentucky.*— Smith *v.* Com., 32 S. W. 137, 17 Ky. L. Rep. 541.

*Michigan.*— People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* Clark, 33 Mich. 112.

*Mississippi.*— Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538, a "female" over sixteen. And see Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539.

*Texas.*— Simmons *v.* State, 54 Tex. Cr. 619, 114 S. W. 841; Barnard *v.* State, (Cr. App. 1903) 76 S. W. 475; McCullar *v.* State, 36 Tex. Cr. 213, 36 S. W. 585, 61 Am. St. Rep. 847; Kelly *v.* State, 33 Tex. Cr. 31, 24 S. W. 295; Mrous *v.* State, 31 Tex. Cr. 597, 21 S. W. 764, 37 Am. St. Rep. 834; Putnam *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.

**Previous unchastity is none the less a defense** because defendant, when he made the promise to marry, knew of the unchaste reputation of the woman in the community (Mrous *v.* State, 31 Tex. Cr. 597, 21 S. W. 764, 37 Am. St. Rep. 834); or because her intercourse with a third person followed defendant's

actual chastity is not necessary under a statute punishing intercourse with a female of "good repute" for chastity.[50]

(II) *What Constitutes "Previous Chaste Character."* It is held that the words "previous chaste character" in the statute mean actual personal virtue as a moral and physical fact, and not reputation.[51] It is also held in some jurisdictions that the statute is for the protection of the pure in mind and innocent in heart, who may be led astray, and therefore a woman who is of lewd conversation and manners and is guilty of lascivious acts and indecent familiarity with men is not protected, although she may never have been guilty of sexual intercourse.[52] In other jurisdictions, however, the statute is construed as meaning that the female is *virgo intacta*, so that one who has never submitted to sexual intercourse may be seduced, although she may have permitted familiarities, liberties, or even indecencies at the thought of which other women would blush.[53] A woman debauched by force and against her will is chaste within the meaning of the statute;[54] but by the weight of authority it is otherwise where she has once been seduced, although by defendant,[55] unless she has reformed and been leading a virtuous life.[56] Previous chaste character means chaste character immediately previous to the act, and not at the time of the promise. Such character must have continued down to the time of the seduction; and it is not enough that her character was chaste down to some time prior to that of the seduc-

promise of marriage, if it preceded her intercourse with him (Barnard *v.* State, (Tex. Cr. App. 1903) 76 S. W. 475).

**50.** See *infra*, III, A, 4, b, (IV).

**51.** *Arkansas.*— Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

*Indiana.*— Lyons *v.* State, 52 Ind. 426.

*Iowa.*— Boak *v.* State, 5 Iowa 430; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708.

*Michigan.*— People *v.* Mills, 94 Mich. 630, 54 N. W. 488; People *v.* Clark, 33 Mich. 112.

*Mississippi.*— Hatton *v.* State, 92 Miss. 651, 46 So. 708; Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539; Powell *v.* State, (1896) 20 So. 4.

*New York.*— People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; People *v.* Kenyon, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254]; Crozier *v.* People, 1 Park. Cr. 453.

*Texas.*—A woman who has had intercourse with several persons, and who has become pregnant, which resulted in a miscarriage, is unchaste, and one who subsequently has intercourse with her is not guilty of seduction, within Pen. Code (1879), art. 814, defining and punishing seduction. Simmons *v.* State, 54 Tex. Cr. 619, 114 S. W. 841.

*Canada.*—Rex *v.* Lougheed, 8 Can. Cr. Cas. 184.

**52.** Boak *v.* State, 5 Iowa 430; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708.

**Impropriеties not amounting to unchastity.** — It has been held, however, that the fact that the girl allowed men to hug and kiss her does not indicate such a want of chastity as to overcome a verdict of guilty against the man. State *v.* McIntire, 89 Iowa 139, 56 N. W. 419. And the Minnesota statute, punishing the seduction, under promise of marriage, of "an unmarried female of previous chaste character," is held to apply to the seduction of a woman who, although having a low standard of propriety, and permitting indelicate familiarities, has enough sense of virtue not to surrender her chastity except when induced to do so under promise of marriage. State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

**53.** People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; Washington *v.* State, 124 Ga. 423, 52 S. E. 910; Woodward *v.* State, 5 Ga. App. 447, 63 S. E. 573 (the test of virtue within the seduction statute is whether the female had ever had at the time of the seduction unlawful sexual intercourse, not purity of mind or heart); Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

**Female under age of consent.**— "Chaste character," as used in N. Y. Pen. Code, § 284, relating to the punishment of seduction under promise of marriage of a female of previous chaste character, means actual personal virtue; and a woman who has voluntarily submitted to sexual intercourse prior to the alleged seduction is not within the statute, although she was at the time under the age of consent, provided she was able to comprehend the enormity of the offense. People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

**54.** Pope *v.* State, 137 Ala. 56, 34 So. 840.

**55.** People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592, holding that a woman can be seduced but once under the statute defining seduction under promise of marriage; and the first voluntary act of sexual intercourse on her part, after she is able to understand its nature and comprehend its enormity, is the only one in which she can participate as a victim. See also Hatton *v.* State, 92 Miss. 651, 46 So. 708; Rex *v.* Lacelle, 10 Can. Cr. Cas. 229, 11 Ont. L. Rep. 74; Rex *v.* Lougheed, 8 Can. Cr. Cas. 184. *Contra*, People *v.* Millspaugh, 11 Mich. 278.

**56.** State *v.* Knutson, 91 Iowa 549, 60 N. W. 129. See *infra*, III, A, 4, b, (V).

tion.[57] A statute requiring previous chaste character does not require chaste reputation.[58]

(III) *"VIRTUOUS" FEMALE.* Some statutes punish the seduction of a "virtuous unmarried female," or "an innocent and virtuous woman"; and these have been held to apply to a woman who has never had sexual intercourse, and not to one who has.[59]

(IV) *FEMALE OF "GOOD REPUTE."* A statute declaring it an offense for a man, under promise of marriage, to seduce an unmarried female "of good repute" over eighteen years of age is held to mean a female of "good reputation."[60] In New Jersey it has been held that a statute punishing a single man "who, under promise of marriage, shall have sexual intercourse with any single female of good repute for chastity," who thereby becomes pregnant, applies whether the female be chaste or unchaste, provided she is chaste in public estimation, and therefore, in a prosecution under the statute, evidence that the female had other men than defendant stay all night with her, or had been unchaste with other men, should be excluded.[61] The contrary, however, has been decided under a statute punishing seduction.[62]

(V) *EFFECT OF REFORMATION.* The fact that a woman has been unchaste does not deprive her of the protection of a statute punishing the seduction of an unmarried woman of previous chaste character, if she has reformed and is chaste when seduced;[63] and the same principle applies under a statute punishing the seduction of a female "of good repute."[64] Therefore a man may be guilty of

**57.** State *v.* Gates, 27 Minn. 52, 6 N. W. 404.

**58.** Crozier *v.* People, 1 Park. Cr. (N. Y.) 453.

**59.** Washington *v.* State, 124 Ga. 423, 52 S. E. 910; Keller *v.* State, 102 Ga. 506, 31 S. E. 92; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856; State *v.* Whitley, 141 N. C. 823, 53 S. E. 820; State *v.* Crowell, 116 N. C. 1052, 21 N. E. 502. Defendant cannot be convicted of seduction where the evidence shows that, two months prior to the alleged offense, he and complainant had been guilty of fornication. Brock *v.* State, 95 Ga. 474, 20 S. E. 211.

**A woman who is lustful and desirous of intercourse** may be seduced if she keeps her chastity, and surrenders it because of persuasion and promises of marriage. Keller *v.* State, 102 Ga. 506, 31 S. E. 92.

**The test** by which to determine whether the woman was virtuous at the time of her alleged seduction is physical, not moral, chastity. Washington *v.* State, 124 Ga. 423, 52 S. E. 910.

**60.** State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924. A female of bad reputation at the time defendant obtained connection with her, whether the reputation was acquired by crime or imprudence only, is not within the protection of the Pennsylvania statute punishing the seduction of "any female of good repute," etc. Com. *v.* McCarty, 4 Pa. L. J. 136.

**61.** State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866; Foley *v.* State, 59 N. J. L. 1, 35 Atl. 105 [*affirmed* in 59 N. J. L. 585, 39 Atl. 1113].

**62.** State *v.* Wheeler, 94 Mo. 252, 7 S. W. 103; State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374 [*overruling* State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235]; Com. *v.* Hadfield, 3 Kulp (Pa.) 121.

**63.** *Alabama.*— Smith *v.* State, 118 Ala. 117, 24 So. 55; Luther *v.* State, 118 Ala. 88, 24 So. 43; Wilson *v.* State, 73 Ala. 527.

*Arkansas.*— Cooper *v.* State, 86 Ark. 30, 109 S. W. 1023.

*Georgia.*— Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664.

*Iowa.*— State *v.* Knutson, 91 Iowa 549, 60 N. W. 129; State *v.* Moore, 78 Iowa 494, 43 N. W. 273; State *v.* Carron, 18 Iowa 372, 87 Am. Dec. 401.

*Michigan.*— People *v.* Mills, 94 Mich. 630, 54 N. W. 488; People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257; People *v.* Squires, 49 Mich. 487, 13 N. W. 828; People *v.* Clark, 33 Mich. 112.

*Minnesota.*— State *v.* Timmens, 4 Minn. 325.

*Missouri.*—State *v.* Fogg, 206 Mo. 696, 105 S. W. 618; State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235.

*New York.*— Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

*Pennsylvania.*— Com. *v.* McCarty, 4 Pa. L. J. 136.

*Canada.*— Rex *v.* Lougheed, 8 Can. Cr. Cas. 184.

See 43 Cent. Dig. tit. "Seduction," § 55½.

**64.** State *v.* Sharp, 132 Mo. 165, 33 S. W. 795, holding that, under the statute declaring it an offense for one, under promise of marriage, to seduce an unmarried female "of good repute" under eighteen years of age, a conviction may be had notwithstanding the female had had intercourse with others, she being at the time of intercourse under promise of marriage "of good reputation" as to chastity. See also State *v.* Dent, 170 Mo. 398, 70 S. W. 881.

seducing a woman with whom he has previously had intercourse, if she has reformed and is leading a chaste life.[65] But in such case there must be clear evidence of reformation.[66]

(VI) *UNCHASTITY AFTER SEDUCTION.*[67] The fact that the woman, after the time of the alleged seduction, continued to have intercourse with defendant or with others does not affect his guilt,[68] although it may be considered by the jury as bearing on her previous chaste character.[69]

**5. THE ACTS OR CONDUCT CONSTITUTING SEDUCTION — a. In General.** To constitute seduction there must in all cases be some sufficient promise or inducement, and the woman must yield because of the promise or other inducement. If she consents merely from carnal lust, and the intercourse is from mutual desire, there is no seduction.[70] She must be induced to depart from the path of virtue by the use of some species of arts, persuasions, or wiles which are calculated to have, and do have, that effect,[71] and which result in her ultimately submitting her person to the sexual embraces of the seducer.[72] A promise or payment of compensation merely,[73] or a promise or assurance that the woman will not get into trouble,[74] is not enough. In some states there need be no promise of marriage, but intercourse induced by other means, as by artifice or fraud, etc., is sufficient.[75]

65. State *v.* Knutson, 91 Iowa 549, 60 N. W. 129; State *v.* Moore, 78 Iowa 494, 43 N. W. 273 (holding that, where defendant and prosecutrix had had illicit intercourse for more than a year, when defendant went away, and prosecutrix reformed and led a chaste life until after defendant's return, in about a year, when, under promise of marriage, their relations were resumed, defendant was guilty of seduction when the first offense was committed after their former illicit relations had been broken off); People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* Clark, 33 Mich. 112; People *v.* Millspaugh, 11 Mich. 278; State *v.* Timmens, 4 Minn. 325.

66. People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* Clark, 33 Mich. 112, in both of which cases the evidence was insufficient.

67. **Second seduction** see *supra*, 1331 text and notes 55, 56.

68. Com. *v.* Hodgkins, 111 Ky. 584, 64 S. W. 414, 23 Ky. L. Rep. 829; Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492; Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242. See also People *v.* Wade, 118 Cal. 672, 50 Pac. 841.

69. Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492. And see *infra*, 1350 text and note 11.

70. *Alabama.*— Carney *v.* State, 79 Ala. 14.

*Georgia.*— Cherry *v.* State, 112 Ga. 871, 38 S. E. 341; Keller *v.* State, 102 Ga. 506, 31 S. E. 92.

*Illinois.*— Neary *v.* People, 115 Ill. App. 157.

*Indiana.*— Phillips *v.* State, 108 Ind. 406, 9 N. E. 345.

*Iowa.*— State *v.* Hamann, 109 Iowa 646, 80 N. W. 1064; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; State *v.* Crawford, 34 Iowa 40.

*Michigan.*— People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* Bressler, 131 Mich. 390, 91 N. W. 639; People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Clark, 33 Mich. 112.

*Missouri.*— State *v.* Primm, 98 Mo. 368, 11 S. W. 732; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374.

*Pennsylvania.*— Com. *v.* McCarty, 4 Pa. L. J. 136.

*South Carolina.*— State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

*Virginia.*— Flick *v.* Com., 97 Va. 766, 34 S. E. 39.

*Washington.*— State *v.* Cochran, 10 Wash. 562, 39 Pac. 155.

See 43 Cent. Dig. tit. "Seduction," § 56.

"Seduce" and "debauch."— In Mo. Rev. St. § 1259, declaring that "if any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc., he shall be punished, each of the words "seduce" and "debauch" has its appropriate meaning. There are two steps necessary to be taken in order to consummate the crime: (1) The female must be "seduced"; that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing. Her affections must be gained, and her mind and thoughts polluted. (2) In order to complete the offense she must be "debauched"— that is, she must be carnally known — before the guilty agent becomes amenable to human laws. Thus a female may be "seduced" without being "debauched," or "debauched" without being "seduced." State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

**Seduction under promise of marriage** see *infra*, III, A, 5, b.

71. People *v.* Smith, 132 Mich. 58, 92 N. W. 776.

72. People *v.* Smith, 132 Mich. 58, 92 N. W. 776.

73. State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; People *v.* Clark, 33 Mich. 112.

74. State *v.* Cochran, 10 Wash. 562, 39 Pac. 155.

75. Bracken *v.* State, 111 Ala. 68, 20 So.

The words "illicit connection" in a statute defining seduction under promise of marriage are equivalent to "sexual intercourse." [76]

**b. Promise of Marriage** — (1) *In General.* In some states a promise of marriage alone, if it induced the woman to yield, is sufficient,[77] while in others some additional persuasion or means is necessary.[78] On the other hand, in some

636, 56 Am. St. Rep. 23; Smith *v.* State, 107 Ala. 139, 18 So. 306; Anderson *v.* State, 104 Ala. 83, 16 So. 108; Wilson *v.* State, 58 Ga. 328 (not necessary to prove that defendant employed specific persuasion and a promise to marry to induce the woman's consent to the sexual intercourse); State *v.* Donovan, (Iowa 1905) 102 N. W. 791 (holding that a combination of flattery, love-making, and hypnotism, whereby defendant obtained control over the person of the prosecutrix was a sufficient predicate for a prosecution for seduction); State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288; State *v.* Hayes, 105 Iowa 82, 74 N. W. 757 (where a widower of thirty-eight, with whose family a girl of seventeen was intimate, used coaxing language to obtain her consent to sexual intercourse, assuring her that it would not hurt her); State *v.* Hemm, 82 Iowa 609, 48 N. W. 971 (holding that defendant was guilty of seduction by artifice or fraud if he induced prosecutrix to have intercourse with him "by representing that there was nothing wrong in the act, and that no one would find it out"). People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257.

**76.** State *v.* King, 9 S. D. 628, 70 N. W. 1046.

**77.** *California.*— People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52, where the promise was to marry "when they got old enough."

*Georgia.*— Woodard *v.* State, 5 Ga. App. 447, 63 S. E. 573, holding that to accomplish sexual intercourse with a virtuous woman pending engagement to marry her may be seduction, although consent be obtained without other persuasion than that which is implied in proposing the intercourse and repeating the promise of marriage.

*Indiana.*— Phillips *v.* State, 108 Ind. 406, 9 N. E. 345.

*Michigan.*— People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Millspaugh, 11 Mich. 278.

*Minnesota.*— State *v.* Abrisch, 41 Minn. 41, 42 N. W. 543.

*Missouri.*— State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372.

*New York.*— Boyce *v.* People, 55 N. Y. 644; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254].

*Washington.*— State *v.* O'Hare, 36 Wash. 516, 79 Pac. 39, 104 Am. St. Rep. 970, 68 L. R. A. 107.

See 43 Cent. Dig. tit. "Seduction," §§ 58, 59.

**A woman is "debauched,"** within the meaning of the Missouri statute, where a man has intercourse with her in connection with a promise of marriage. State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

**Time of promise.— It need not be shown** that the promise was made or repeated at the time of the illicit intercourse, if it was the inducing cause. State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235.

**78.** Hill *v.* State, 122 Ga. 166, 50 S. E. 57; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856 (holding that intercourse brought about by promise of marriage only, with no aid from persuasion, or other false and fraudulent means, will not constitute the offense of seduction, under Code, § 4371, declaring that, "if any person shall by persuasion and promise of marriage, or other false and fraudulent means, seduce a virtuous unmarried female," he shall be punished, etc.); Wilson *v.* State, 58 Ga. 328; Putman *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738 (holding that under Pen. Code, art. 814, making it a crime if any person shall, "by promise to marry," seduce an unmarried female, and have carnal knowledge of her; and article 815 declaring that the term "seduction" is used in the sense in which it is commonly understood, to constitute seduction a man must, in addition to the promise of marriage, use some other means than a mere appeal to the lust or passion of the woman).

**"Seduction" means** to "lead away" a female from the path of virtue; to entice or persuade her by means of a promise of marriage to surrender her chastity, and have carnal intercourse with the man making such promise. Putnam *v.* State, 29 Tex. App. 454, 16 S. W. 95, 25 Am. St. Rep. 738.

**Sufficiency of accompanying artifice or deception.**—Where prosecutrix testified that, at the time of the sexual intercourse, defendant promised to marry her, and assured her that the act would not be wrong in view of the fact that they were soon to be married, and she yielded to him on account of such promise to marry, it was held sufficient to bring the case within the rule that the sexual intercourse must be accomplished by false promises, artifices, or deception to constitute the crime of seduction. State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230

**Repeating the engagement vow** at the time of the sexual intercourse may imply persuasion. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140. Where consent is given pending a virtuous engagement, in consequence of a repetition of a promise to marry, already made and accepted, the woman yielding in reliance on the plighted faith of her lover, and he intending that she shall trust and be deceived, such a case constitutes seduction, for to make love to a virtuous unmarried woman, woo her, make honorable proposals of marriage, have them accepted, and afterward undo her under a solemn promise of marriage or repetition of the engagement vow, is to employ per-

jurisdictions a promise of marriage is essential, and seduction by other means, without such a promise, does not constitute the offense.[79] But a promise of marriage, even in those states in which such a promise alone is sufficient, if made and understood as a mere matter of form, or if there was no reliance thereon, is not enough;[80] and in some states it is held that the woman must have consented on the sole consideration of the promise.[81] By express provision in some jurisdictions the promise must have been made to the prosecutrix herself.[82] Good faith in making the promise and willingness to marry is no defense.[83] It is not necessary that the prosecutrix shall have requested defendant to fulfil his promise to marry.[84]

(II) *VALIDITY AND FORM OF PROMISE.* The promise of marriage need not be valid and binding, provided the woman believed in it and consented in reliance on it.[85] Thus an infant may be guilty of seduction under promise of marriage,

suasion as well as promises of marriage. Jones *v.* State, 90 Ga. 616, 16 S. E. 380. See also Hill *v.* State, 122 Ga. 166, 50 S. E. 57; Wilson *v.* State, 58 Ga. 328.

**A definite time for the marriage to take place** need not have been fixed. Jinks *v.* State, 114 Ga. 430, 40 S. E. 320.

**79.** *Indiana.*— Stinehouse *v.* State, 47 Ind. 17.

*Missouri.*— State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

*Nebraska.*— Russell *v.* State, 77 Nebr. 519, 110 N. W. 380.

*New York.*— People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; People *v.* Lomax, 6 Abb. Pr. 139.

*Oregon.*— State *v.* Adams, 25 Oreg. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840, holding that under a statute providing for the punishment of any person who shall under promise of marriage seduce an unmarried female, the gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled, and that without the promise there can be no crime under the statute, however reprehensible the conduct of the man may be.

*South Carolina.*— State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

*Texas.*— Cole *v.* State, 40 Tex. 147; Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242; McCullar *v.* State, 36 Tex. Cr. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

*Canada.*— Reg. *v.* Walker, 5 Can. Cr. Cas. 465.

**It is otherwise in some states** as has already been seen. See *supra*, III, A, 5, a.

**80.** *Alabama.*— Carney *v.* State, 79 Ala. 14.

*Indiana.*— Phillips *v.* State, 108 Ind. 406, 9 N. E. 345.

*Iowa.*— State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

*Michigan.*— People *v.* Smith, 132 Mich. 58, 92 N. W. 776; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; People *v.* Clark, 33 Mich. 112.

*Missouri.*— State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63, holding that to seduce under promise of marriage is to draw a woman of good repute from the paths of virtue because of such promise.

*South Carolina.*— State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

*Texas.*— Nolen *v.* State, 48 Tex. Cr. 436, 88 S. W. 242; Speurath *v.* State, (Cr. App. 1898) 48 S. W. 192; McCullar *v.* State, 36 Tex. Cr. 213, 36 S. W. 585, 61 Am. St. Rep. 847; Putman *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.

*Canada.*— Reg. *v.* Walker, 5 Can. Cr. Cas. 465.

See 43 Cent. Dig. tit. "Seduction," § 58 *et seq.*

**Lapse of time between promise and intercourse.**—Where, in a prosecution under the New Jersey statute providing that, if any single man, "under the promise of marriage, shall have sexual intercourse with any single female," etc., it appeared that intercourse first took place several weeks after the promise, it was held that such intercourse was under the promise of marriage. State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866. It is immaterial that the promise was made previous to the time of the seduction, if defendant made use of it to induce the prosecutrix to yield her person to him. State *v.* Raynor, 145 N. C. 472, 59 S. E. 344.

**If she resists, but finally assents or yields** thereto in reliance upon the promise made, the offense is committed. McCullar *v.* State, 36 Tex. Cr. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

**81.** People *v.* Krusick, 93 Cal. 74, 28 Pac. 794. If prosecutrix did not rely solely on the absolute promise of marriage, but was moved to favor defendant partly through fear, or partly through lust, or through both, defendant should be acquitted, although a promise of marriage was then made, and was part, although not the sole, inducement. Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242; Barnes *v.* State, 37 Tex. Cr. 320, 39 S. W. 684.

**82.** Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242.

**83. Good faith and willingness to marry** see *infra*, III, A, 8.

**84.** Lasater *v.* State, 77 Ark. 468, 94 S. W. 59.

**85.** People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; State *v.* Brock, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep.

if he has reached the age of puberty, although his promise is not binding because of his infancy,[86] and although he has not reached the age at which he can contract marriage.[87] So, unless the statute is limited by its terms to single men, a married man may be guilty of seduction under promise of marriage, if the woman does not know that he is married.[88] There need not be mutual promises so as to make a binding contract;[89] and a promise of marriage made conditional on and followed by intercourse, although illegal and void as a contract, is sufficient.[90] By the weight of authority, under the statutes punishing seduction only when under a promise of marriage, the promise must be absolute, and not conditional upon other events than the intercourse, and a promise to marry in case the woman becomes pregnant or "gets into trouble," etc., is not sufficient.[91] It has been so held even where the statute does not require that the seduction shall be under a promise of marriage;[92] but on this point the weight of authority is to the contrary.[93] The language used in making the promise of marriage is not material,

625; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254]; Crozier *v.* People, 1 Park. Cr. (N. Y.) 453; Harvey *v.* State, (Tex. Cr. App. 1899) 53 S. W. 102.

**86.** *Arkansas.*— Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

*California.*— People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52.

*Missouri.*— State *v.* Brock, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625.

*New York.*— Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254].

*Texas.*— Harvey *v.* State, (Cr. App. 1899) 53 S. W. 102.

**87.** People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; Harvey *v.* State, (Tex. Cr. App. 1899) 53 S. W. 102.

**88.** See *infra*, III, A, 5, c.

**89.** State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State *v.* Primm, 98 Mo. 368, 11 S. W. 732; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; Crozier *v.* People, 1 Park. Cr. (N. Y.) 453.

**90.** Boyce *v.* People, 55 N. Y. 644; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254]; State *v.* Adams, 25 Oreg. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840.

**Attempt of woman to withdraw.**—And the fact that, after consenting on such a promise, the woman endeavored to persuade the man to desist, and at a time when it was too late to withdraw without his permission besought him to leave her, promising never to ask him to marry her, if he would do so, is no excuse or palliation of the offense. Boyce *v.* People, 55 N. Y. 644.

**91.** Russell *v.* State, 77 Nebr. 519, 110 N. W. 380; People *v.* Van Alstyne, 144 N. Y. 361, 39 N. E. 343 [*reversing* 78 Hun 509, 29 N. Y. Suppl. 542]; People *v.* Ryan, 63 N. Y. App. Div. 429, 71 N. Y. Suppl. 527 (even though the parties were engaged to marry at the time of the special promise); People *v.* Duryea, 81 Hun (N. Y.) 390, 30 N. Y. Suppl. 877; State *v.* Adams, 25 Oreg. 172, 35 Pac. 36, 42 Am. St. Rep. 790, 22 L. R. A. 840 (holding that the seduction must be accomplished by an absolute promise of marriage or one that becomes absolute the moment she yields); Simmons *v.* State, 54 Tex. Cr. 619, 114 S. W. 841; Spenrath *v.* State, (Tex. Cr. App. 1898) 48 S. W. 192. *Contra*, State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100, holding that as the statute is general in its terms it includes any promise of marriage, absolute or conditional, and that a promise to marry if the female should become pregnant is sufficient. The case of People *v.* Hustis, 32 Hun (N. Y.) 58, was also to the contrary, but it must be regarded as overruled by the New York cases above cited.

**92.** People *v.* Smith, 132 Mich. 58, 92 N. W. 776.

**93.** State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288, holding that if a man twenty-two years of age, while paying his addresses to an unsophisticated country girl seventeen years of age, succeeds in having sexual intercourse with her under his promise to marry her in event of her becoming pregnant, such transaction may constitute seduction, as it cannot be said, as matter of law, that she is unchaste in yielding on the strength of such promise, or that she submits as a result of passion, rather than of the promise. It is said in this case that whether a woman of chaste character would so yield, and whether, if she does, it is voluntary, and to gratify her desires, rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial. See also Cherry *v.* State, 112 Ga. 871, 38 S. E. 341 (holding that if a single woman allowed an unmarried man to have sexual intercourse with her solely because of a promise by him to marry her in the event she became pregnant, it was purely a meretricious transaction, and not a case of seduction; but if an engagement to marry at a designated time in the future already existed between a marriageable man and woman, and she, on the faith thereof and because of the fact that he had won her affection and confidence, and under the influence of persuasion and entreaties, accompanied by a promise to immediately consummate the marriage in the event of pregnancy, submitted to his lustful embraces, it was a case of seduction); State *v.* O'Hare, 36 Wash. 516, 79 Pac. 39, 104 Am. St. Rep. 970, 68 L. R. A. 107 (dis-

provided it was intended to convey that meaning and was so understood by the prosecutrix.[94]

**c. Married Men.** Under a statute punishing seduction under promise of marriage the offense is not committed where the woman knows the man is married;[95] but it is otherwise if she believes him to be unmarried and relies on the promise;[96] and a man known to be married may be guilty under a statute punishing seduction by other means than a promise of marriage.[97]

**d. Use of Force and Want of Consent.** An indictment for seduction cannot be sustained when the evidence shows that the woman did not consent and force was used, so that the offense was rape.[98] But if consent was in fact obtained, the fact that force was also used, as in the case of slight resistance or reluctance, is immaterial, as a woman cannot be raped with her consent.[99] It has been held that the limitation on the age of consent fixed by a statute defining rape does not apply to the crime of seduction under promise of marriage, and the consent essential to that crime may be given by, and the crime committed against, a female of any age, who, in the judgment of the jury, guided by evidence showing intelligence and ability to distinguish right from wrong, possessed the capacity to consent.[1] This does not apply, however, where the girl is so young as to be in fact as well as in law incapable of consenting.[2]

**6. Pregnancy.** The existence of pregnancy is not necessary to the offense of seduction unless required by the statute;[3] but in some jurisdictions there is a statute punishing the causing of pregnancy, and under such a statute of course the intercourse must result in pregnancy.[4]

**7. Defilement of Female in Care, Custody, or Employ of Accused — a. In General.** In some jurisdictions there is a statute punishing any guardian of any female under a certain age or any other person to whose care any such female shall have been confided, who shall carnally know her while she remains in his care, custody, or employment.[5] The statute includes not only guardians, but also all other persons to whose care or protection any such female shall have been confided.[6] Such a statute applies to seduction of a female pupil by her

tinguishing the New York cases on the ground that the New York statute required a promise of marriage).

94. State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

95. Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664; Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196; Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538; People *v.* Alger, 1 Park. Cr. (N. Y.) 333.

96. State *v.* Primm, 98 Mo. 368, 11 S. W. 732. And see Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538.

97. State *v.* Donovan, 128 Iowa 44, 102 N. W. 791. But such fact may be considered by the jury. State *v.* Groome, 10 Iowa 308.

98. *Georgia.*— Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

*Iowa.*—State *v.* Lewis, 48 Iowa 578; State *v.* Kingsley, 39 Iowa 439.

*Michigan.*—People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863.

*Missouri.*— See State *v.* Woolaver, 77 Mo. 103.

*North Carolina.*— State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

*Wisconsin.*— Croghan *v.* State, 22 Wis. 444.

99. Jones *v.* State, 90 Ga. 616, 16 S. E. 380; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863. See also People *v.* Wallace, 109 Cal. 611, 42 Pac. 159.

1. People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592, 36 N. Y. Suppl. 1136. Judge O'Brien dissented in this case on the ground that "unchastity within the meaning of the statute cannot be imputed to a female in consequence of intercourse involving the crime of rape, whether that crime was the result of violence or of actual or legal incapacity to consent."

2. Carlisle *v.* State, 73 Miss. 387, 19 So. 207, holding that it is rape and not seduction where the female is under the age of ten years.

3. Boyce *v.* People, 55 N. Y. 644; Cook *v.* People, 2 Thomps. & C. (N. Y.) 404.

4. See 1 N. J. Gen. St. p. 1086; Price *v.* State, 61 N. J. L. 500, 39 Atl. 709.

5. Mo. Rev. St. (1899) § 1845. And see Kan. Gen. St. 369, § 233.

6. State *v.* Acuff, 6 Mo. 54.

Application of statute see State *v.* Summar, 143 Mo. 220, 45 S. W. 254 (evidence showing that girl was confided to defendant's care); State *v.* Napper, 141 Mo. 401, 42 S. W. 957 (immaterial whether female was confided to the care and custody of defendant or his wife, if she was a member of the family, under his care and protection);

teacher;[7] and it may apply in the case of mere temporary protection voluntarily and informally assumed.[8] The offense may be committed upon an unchaste female who consents to the intercourse.[9] Consent of the female is no defense.[10] On the contrary, a conviction cannot be had under the statute if the carnal knowledge was accomplished by force.[11]

**b. Attempts.** A man may be punished for an attempt to commit this offense.[12]

**8. Defenses.**[13] In a prosecution for seduction it is of course a good defense, as has already been shown, that some essential element of the offense, as defined by the statute, is lacking, such as chastity of the female, promise of marriage, etc.[14] That the parties were in fact married to each other at the time of the alleged seduction is a good defense.[15] Consent of the female to the intercourse is of course

State *v.* Hill, 134 Mo. 663, 36 S. W. 223 (orphan girl who was a servant in defendant's family by arrangement between her and defendant's wife); State *v.* Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842 (temporary care and protection); State *v.* Sibley, 131 Mo. 519, 33 S. W. 167 (statute includes a stepfather who carnally knows his wife's daughter while she is living as a member of his family, although she was never confided to his care by express agreement).

**Mere employment of the female as a domestic servant** in the family of defendant constitutes a confiding to his care and protection, within the statute. State *v.* Terry, 106 Mo. 209, 17 S. W. 288. It is immaterial whether the contract of employment be made by the girl herself or by her parents or guardian. State *v.* Terry, *supra*. A conviction may be had of one in whose family such female was employed to look after his children, there being evidence that he promised her father to give her clothing and board, and send her to school, and treat her like one of his children. State *v.* Strattman, 100 Mo. 540, 13 S. W. 814. See also State *v.* Young, 99 Mo. 284, 12 S. W. 642. An instruction that it must appear that defendant was her lawful guardian, or occupied a relation similar to a guardian to her, in which a peculiar and confidential trust was reposed," is rightly refused. State *v.* Young, *supra*. But it has been held that the statute does not include a person who merely accepts aid of a girl, in work about his family, upon her parents' consent. State *v.* Arnold, 55 Mo. 89.

**Female under age.**— On a prosecution for defiling a female minor committed to defendant's care, the fact that prosecutrix, at the time she contracted to work for defendant, was under age, is no defense. State *v.* McClain, 137 Mo. 307, 38 S. W. 906.

7. State *v.* Oakes, 202 Mo. 86, 100 S. W. 434 (holding also that where a school-teacher had intercourse with a female pupil under eighteen years of age, who resided with her mother, and whose father was dead, the fact that the mother had knowledge that the teacher was having intercourse with the daughter and consented thereto was no defense to a prosecution against him under the statute); State *v.* Hesterly, 182 Mo. 16, 81 S. W. 624, 103 Am. St. Rep. 634 (holding also that the statute prohibits a teacher from carnally knowing a female pupil, under the age of eighteen years, at any time and under any occasion during the period of the existence of the relation of teacher and pupil).

**That the intercourse occurred after school hours** is no defense. State *v.* Oakes, 202 Mo. 86, 100 S. W. 434. The relation contemplated by the statute exists between a school-teacher and his pupils after school hours as well as within school hours; after the girl reaches home, as well as when he accompanies her to literary exercises held at the school-house at night. State *v.* Hesterley, 182 Mo. 16, 81 S. W. 624, 103 Am. St. Rep. 634. A male teacher, who has sexual intercourse with his pupil with her consent during the school term, is punishable under Ohio Rev. St. § 7024, although the intercourse occurred out of school hours, and at the house of the pupil's parents. Brown *v.* State, 38 Ohio St. 374.

8. State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193; State *v.* Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842.

9. State *v.* Jones, 16 Kan. 608; State *v.* Strattman, 100 Mo. 540, 13 S. W. 814. On a prosecution under Rev. St. (1889) § 3487, making it an offense for an employer to defile a girl under eighteen years of age, while in his employ, defendant cannot show that the girl left his employ because he intercepted her in fulfilling an illicit engagement with another man, since the act of defilement constitutes the crime, without reference to the girl's character or consent. State *v.* Rogers, 108 Mo. 202, 18 S. W. 976.

10. State *v.* Willoughby, 76 Mo. 215.

11. State *v.* Woolaver, 77 Mo. 103. And see *supra*, III, A, 5, d.

12. State *v.* Williams, 39 Mo. App. 43.

13. **Defenses on prosecution for defilement of female in one's care, custody, or employment** see *supra*, III, A, 7.

14. See *supra*, III, A, 2–7.

15. People *v.* Loomis, 106 Mich. 250, 64 N. W. 18, holding that where, on a prosecution for seduction alleged to have been accomplished by means of a sham marriage, it appeared that the parties, who were competent to enter into the marriage contract, went to Canada, and there agreed in the presence of a person whom the prosecutrix then believed to be a minister, to take each other as husband and wife, and that they thereafter cohabited as such, these facts would have been sufficient to establish a valid

no defense.[16] In the absence of statutory provision it is no defense that the crime has been condoned or forgiven by the woman, or that the parties have compromised or settled, or agreed to a settlement,[17] or even that they have married since the seduction.[18] Under most of the statutes, however, the actual marriage of the parties after the seduction is declared a defense;[19] and if the marriage takes place, the good or bad faith or motive of the man in going through the ceremony, or his subsequent abandonment of the female, is immaterial,[20] unless the statute provides otherwise.[21] In most jurisdictions, even under a statute making subsequent marriage a defense, a mere offer or promise to marry, or mere willingness to marry, is no defense;[22] and if a chaste woman is undone

common-law marriage in Michigan, and, in the absence of evidence to the contrary, would be presumed to have constituted a valid marriage under the laws of Canada; that the proof of additional, positive requirements of the Canadian law would not alone defeat this presumption, but a non-compliance therewith must be shown; that such presumption was not rebutted by evidence of respondent's subsequent assertions that the marriage was a mere sham; and that, as the presumption of a valid marriage existed, the prosecution must fail.

16. State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613, seduction under promise of marriage. See *supra*, III, A, 5, a, b, d.

17. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; Barker *v.* Com., 90 Va. 820, 20 S. E. 776. See also Com. *v.* Slattery, 147 Mass. 423, 18 N. E. 399, a case of rape. And see CRIMINAL LAW, 12 Cyc. 161. On a prosecution for seduction instituted by the woman's father the fact that the woman did not desire the prosecution is no defense. State *v.* Stolley, 121 Iowa 111, 96 N. W. 707.

18. *In re* Lewis, 67 Kan. 562, 73 Pac. 77, 100 Am. St. Rep. 479, 63 L. R. A. 281.

19. *Arkansas.*— Carrens *v.* State, 77 Ark. 16, 91 S. W. 30, under Kirby Dig. § 2044, referred to *infra*, note 21.

*Indiana.*— State *v.* Otis, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733.

*Michigan.*— People *v.* Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493.

*Oregon.*— State *v.* Wise, 32 Oreg. 280, 50 Pac. 800.

*Pennsylvania.*— Com. *v.* Eichar, 4 Pa. L. J. Rep. 326.

*Texas.*— Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

20. State *v.* Otis, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733; People *v.* Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; Com. *v.* Eichar, 4 Pa. L. J. Rep. 326; Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

21. See the statutes and cases cited *infra*, this note.

In Arkansas it is provided that if any man against whom a prosecution for seduction has been begun shall marry the female, the prosecution shall not then be terminated, but shall be suspended, and if at any time the accused shall wilfully, and without such cause as now constitutes a legal cause for divorce, desert and abandon such female, the prosecution shall proceed as though no marriage had taken place between the female and accused. Kirby Dig. § 2040. See Carrens *v.* State, 77 Ark. 16, 91 S. W. 30. Under this statute a prosecution which has been suspended by marriage cannot be renewed upon a separation by mutual consent unless the wife has offered to resume the marital relation and her offer has been refused. Burnett *v.* State, 72 Ark. 398, 81 S. W. 382. The prosecution can be revived, however, if the wife's consent to the separation was caused by wrongful conduct on the part of the husband with the intention of forcing the wife to agree to the separation. Burnett *v.* State, *supra*.

In Texas it is provided that, if the parties marry at any time before defendant pleads to the indictment for seduction, then the prosecution shall be suspended, but not dismissed, and if the indictment has been returned the case shall be continued on the docket, and if defendant after said marriage in good faith continues to live with the person so seduced for two years after said marriage then said prosecution shall be dismissed, to be revived, however, in case defendant within two years without cause abandons said wife, etc. Pen. Code, art. 969, as amended by Acts 28th Leg. p. 221, c. 136. This statute does not apply where the marriage occurs prior to the institution of the criminal prosecution, so as to warrant a prosecution where, within two years after a marriage entered into before such prosecution was commenced, defendant abandoned his wife. Eledge *v.* State, 50 Tex. Cr. 223, 96 S. W. 39.

22. *Arkansas.*— Carrens *v.* State, 77 Ark. 16, 91 S. W. 30, holding a mere proposal of marriage refused by the prosecutrix to be no defense under Kirby Dig. § 2044, referred to *supra*, note 21. Under this statute an offer of marriage made to prosecutrix's father and not kept open for her acceptance up to the time of the trial, she having testified that the offer was never made to her, and that she had been and was willing to marry defendant, was no defense to the prosecution. Lasater *v.* State, 77 Ark. 468, 94 S. W. 59.

*California.*— People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201, holding that under Pen. Code, § 269, making marriage prior to information filed a bar to prosecution for seduction, it is no defense that defendant was at all times prior to the

under a promise of marriage, it is no defense that the man made the promise in good faith and with the intention to perform it.[23] Nor is it any defense to show that the prosecutrix, after the seduction, had intercourse with another.[24]

**B. Prosecution and Punishment — 1. Limitation of Prosecution.** The limitation applicable to prosecutions for seduction depends of course upon the statute in the particular jurisdiction.[25] The statute runs from the date of the first sexual intercourse, and not from the date of the promise of marriage,[26] and by the weight of authority subsequent acts of intercourse cannot be relied upon to avoid the bar of the statute, for after the first act the woman is no longer of chaste character.[27] As a rule any time during which defendant was not publicly resident within the state is not to be counted as a part of the limitation.[28]

**2. Indictment or Information**[29] **— a. Requisites and Sufficiency in General.** An indictment or information for seduction must allege every fact which, under

filing of the information ready and willing to marry the prosecutrix, and that his failure to do so was due to her refusal, since she is not compelled to condone his offense by marrying him.

*Connecticut.*— State *v.* Bierce, 27 Conn. 319, holding that it is no defense that the seduction was accomplished by a promise of marriage which defendant made at the time in good faith, and which he was afterward prevented by the plaintiff's improper conduct from performing.

*Iowa.*— State *v.* Mackey, 82 Iowa 393, 48 N. W. 918 (holding that it was error to instruct that the burden of showing defendant's subsequent refusal to marry the prosecutrix was upon the state, since an offer of marriage after seduction was not a bar to the prosecution under the statute, but only an actual marriage); State *v.* Thompson, 79 Iowa 703, 45 N. W. 293.

*Mississippi.*— Williams *v.* State, 92 Misc. 70, 45 So. 146.

*Missouri.*— State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

*Oregon.*— State *v.* Wise, 32 Oreg. 280, 50 Pac. 800, holding an unaccepted offer of marriage insufficient under a statute making marriage a defense.

**Contra.**— Ingram *v.* Com., 114 Ky. 726, 71 S. W. 908, 24 Ky. L. Rep. 1531 (holding that, under St. c. 36, subd. 12, § 1214, declaring that no prosecution for seduction shall be instituted when the person charged shall have married the girl seduced, and any prosecution shall be discontinued if accused marry the girl before final judgment, a *bona fide* offer to marry the prosecutrix before the institution of the prosecution, although refused by her, is a complete defense); Com. *v.* Wright, 27 S. W. 815, 16 Ky. L. Rep. 251.

**In Texas** it is expressly provided that if the parties marry each other at any time before the conviction of defendant, or if defendant in good faith offers to marry the female seduced, no prosecution shall take place, or, if begun, it shall be dismissed. Pen. Code, art. 969. Under this statute the offer in good faith requires only a submission to the marriage rites, and where, during a prosecution, defendant makes an offer of marriage in open court, produces a marriage license, and asks the presiding judge to perform the ceremony, it is error to permit the district attorney to question the good faith of the offer, and, on the refusal by the prosecutrix to marry defendant, it is error for the court to refuse to dismiss the cause on the ground that he does not think defendant intended in good faith to marry the prosecutrix, and to live with her. Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822. But where defendant, a minor, on learning that the prosecutrix was *enceinte*, refused to marry her until he should become of age, her subsequent death was no bar to a prosecution for seduction. Merrell *v.* State, 42 Tex. Cr. 19, 57 S. W. 289.

23. *Arkansas.*— Rucker *v.* State, 77 Ark. 23, 90 S. W. 151.

*California.*— People *v.* Samonset, 97 Cal. 448, 32 Pac. 520.

*Connecticut.*— State *v.* Bierce, 27 Conn. 319.

*Missouri.*— State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

*Texas.*— Harvey *v.* State, (Cr. App. 1899) 53 S. W. 102, holding that it is no defense that defendant was a minor willing to marry prosecutrix, but was prevented by his father's refusal to consent.

24. Com. *v.* Hodgkins, 111 Ky. 584, 64 S. W. 414, 23 Ky. L. Rep. 829, holding that under St. § 1214, prescribing a penalty for the offense of seduction under promise of marriage, and providing that no prosecution shall be instituted when the person charged shall have married the girl seduced, an offender cannot escape punishment by showing that the prosecuting witness subsequently had intercourse with another.

25. See Criminal Law, 12 Cyc. 254.

26. People *v.* Millspaugh, 11 Mich. 278; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592.

27. Hatton *v.* State, 92 Miss. 651, 46 So. 708; People *v.* Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592 [*reversing* 36 N. Y. Suppl. 1130; Rex *v.* Lougheed, 8 Can. Cr. Cas. 184. *Contra*, People *v.* Millspaugh, 11 Mich. 278. See *supra*, III, A, 4, b, (II).

28. See State *v.* Moore, 78 Iowa 494, 43 N. W. 273. And see Criminal Law, 12 Cyc. 256.

29. **Forms of indictment or information** see Moore *v.* State, 65 Ind. 213; State *v.*

the statute, is necessary to constitute the offense,[30] except such facts as are presumed or necessarily implied from the facts stated.[31] Of course the indictment must name the person seduced.[32] As a rule it is sufficient to charge the offense in the language of the statute.[33] On the other hand it is not necessary to follow the exact language of the statute if equivalent language is used.[34] Matters of defense need not be negatived.[35]

**b. Time of Offense.** The fact that an indictment for seduction fails to allege the exact time of the commission of the offense within the period of limitations does not render the indictment insufficient, since time is not a material ingredient of the offense.[36]

**c. Character and Condition of Parties.** Under some statutes it is held that the indictment must show by direct averment or reasonable inference that the female was unmarried [37] at the time of the seduction; [38] but under others, at least

Savoye, 48 Iowa 562 (conspiracy to seduce); State *v.* O'Keefe, 141 Mo. 271, 272, 42 S. W. 725; State *v.* Rogan, 18 Wash. 43, 44, 50 Pac. 582; West *v.* State, 1 Wis. 209.

30. *Arkansas.*—Walton *v.* State, 71 Ark. 398, 75 S. W. 1; Wright *v.* State, 62 Ark. 145, 34 S. W. 545.

*California.*— People *v.* Roderigas, 49 Cal. 9.

*Georgia.*— Langston *v.* State, 109 Ga. 153, 35 S. E. 166.

*Minnesota.*— State *v.* Gales, 27 Minn. 52, 6 N. W. 404.

*Pennsylvania.*— Com. *v.* Schull, 1 Pa. Co. Ct. 52.

**Indictments and informations held sufficient.**— People *v.* Higuera, 122 Cal. 466, 55 Pac. 252; State *v.* Stogdel, 13 Ind. 565; State *v.* Conkright, 58 Iowa 338, 12 N. W. 283; State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100; State *v.* Abrisch, 41 Minn. 41, 42 N. W. 543 (indictment which alleges that defendant "willfully and feloniously, under promise of marriage to T, her, the said T, did then and there seduce, and have sexual intercourse with, said T being then and there an unmarried female of previous chaste character); Carlisle *v.* State, 73 Miss. 387, 19 So. 207; State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725; State *v.* Whitley, 141 N. C. 823, 53 S. E. 820; State *v.* Rogan, 18 Wash. 43, 50 Pac. 582 (information alleging that defendant did "unlawfully, willfully, and feloniously, by persuasions, promises of marriage, and other false and fraudulent means, seduce, have sexual intercourse with, and debauch M, an unmarried woman of previous chaste character").

**Indictment sufficient on motion in arrest** see Tedford *v.* U. S., 7 Indian Terr. 254, 104 S. W. 608.

**An indictment for causing pregnancy,** under section 204 of the Crimes Act (1 Gen. St. p. 1086), is not insufficient because it states more than one occasion upon which illicit intercourse occurred, and omits to state any certain time and place. Price *v.* State, 61 N. J. L. 500, 39 Atl. 709.

31. Moore *v.* State, 65 Ind. 213; State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; Carlisle *v.* State, 73 Miss. 387, 19 So. 207. See *infra*, III, B, 2, h–e.

32. State *v.* Marshall, 121 Mo. 476, 26 S. W. 562, holding that an indictment charging that defendant, unlawfully and feloniously, by virtue of his promise to A, an unmarried female, etc., did "seduce and debauch, against the peace," etc., was bad as not naming the person seduced.

33. *Alabama.*—Wilson *v.* State, 73 Ala. 527.

*California.*— People *v.* Higuera, 122 Cal. 466, 55 Pac. 252; People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110.

*Connecticut.*—State *v.* Bierce, 27 Conn. 319.

*Indian Territory.*— Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809.

*Iowa.*— State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

*Kentucky.*— Cargill *v.* Com., (1890) 13 S. W. 916.

*Minnesota.*— State *v.* Albrisch, 41 Minn. 41, 42 N. W. 543.

*Mississippi.*—Carlisle *v.* State, 73 Miss. 387, 19 So. 207.

*Missouri.*— State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

34. Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; Stinehouse *v.* State, 47 Ind. 17; State *v.* Olson, 108 Iowa 667, 77 N. W. 332; State *v.* Hemm, 82 Iowa 609, 48 N. W. 971, sufficient to use the word "female" instead of "woman."

**The language of the statute must be used** if there is no equivalent language. Com. *v.* Schull, 1 Pa. Co. Ct. 52, holding that the word "seduce" must be used.

35. Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28; Hoff *v.* State, 83 Miss. 488, 35 So. 950; State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

36. State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; Carlisle *v.* State, 73 Miss. 387, 19 So. 207; Price *v.* State, 61 N. J. L. 500, 39 Atl. 709, indictment for causing pregnancy.

37. Moore *v.* State, 65 Ind. 213 (reasonable inference sufficient); Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538 (by inference sufficient); State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924; Mesa *v.* State, 17 Tex. App. 395.

38. State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100, holding that an indictment charging seduction under promise of marriage of a certain person then and there an unmarried female is good as against an objection that it

where such element is not mentioned in the statute, such an averment is unnecessary.[39] It is also held under some statutes that it is necessary to allege that the female was of previous chaste character or good repute [40] at the time of the seduction;[41] but under others this is not necessary, particularly where such element of the offense is not expressly but only impliedly required by the statute.[42] It need not be alleged that the female was over the age (ten years) under which she was incapable of consenting,[43] that she was of sufficient age to marry,[44] or that defendant was of sufficient age to contract marriage;[45] nor need it be specifically alleged that defendant was a man,[46] or that he was unmarried.[47] Using the word "female" or "person," instead of the word "woman," as it is in the statute, does not render the indictment insufficient.[48]

**d. Acts or Conduct Constituting Seduction.** The indictment or information must allege that defendant seduced the female,[49] and it has also been held that the means must be alleged.[50] Where the statute requires a promise of marriage,

does not state facts sufficient to constitute the offense; the words "then and there" referring to the time of and immediately before the same.

**39.** State *v.* Bryan, 34 Kan. 63, 8 Pac. 260 (information sufficient without specific averment that female, alleged to be of the age of only seventeen years, was unmarried); Davis *v.* Com., 98 Ky. 708, 34 S. W. 699, 17 Ky. L. Rep. 1265; Hoff *v.* State, 83 Miss. 488, 35 So. 950 (her marriage being a matter of defense); Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538.

**Conspiracy.**—An indictment charging a conspiracy to commit seduction through a sham marriage need not in terms charge that the female was unmarried. State *v.* Savoye, 48 Iowa 562.

**40.** State *v.* Gates, 27 Minn. 52, 6 N. W. 404. And see People *v.* Roderigas, 49 Cal. 9.

**41.** State *v.* Bryan, 34 Kan. 63, 8 Pac. 260 ("she, the said K., then and there being a female person of good repute" held sufficient); State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100 ("then and there" sufficient as to time); State *v.* Wenz, 41 Minn. 196, 42 N. W. 933 (holding that the allegation in an indictment for seduction, that the woman "was then and there an unmarried female of previous chaste character," is a sufficient allegation of chaste character at the time of the alleged seduction); State *v.* Gates, 27 Minn. 52, 6 N. W. 404 (holding that an indictment for seduction under a promise to marry must show that the woman was of chaste character immediately previous, and down to, the alleged seduction, and that it is not enough to allege that she was of chaste character previous to the promise to marry, or previous to the day on which the seduction is alleged to have been committed).

**42.** Rucker *v.* State, 77 Ark. 23, 90 S. W. 151; Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28 [*overruling* on this point Walton *v.* State, 71 Ark. 398, 75 S. W. 1]; Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809; Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492 (unnecessary where the statute does not use the words, as chaste character will be presumed); State *v.* Turner, 82 S. C. 278, 64 S. E. 424 (holding that under Act Feb. 22, 1905, 24 St. at L. p. 937, providing that no conviction shall be had for seduction if it is proved that prosecutrix was at the time of the alleged offense unchaste, her chastity need not be alleged in the indictment; the want of chastity being a matter of defense).

**An indictment for conspiracy** to commit seduction need not allege the previous chaste character of the female. State *v.* Savoye, 48 Iowa 562.

**43.** Carlisle *v.* State, 73 Miss. 387, 19 So. 207. See *supra*, III, A, 5, d.

**44.** State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

**45.** Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17. See *supra*, III, A, 5, b, (II).

**46.** Carlisle *v.* State, 73 Miss. 387, 19 So. 207.

**47.** *Georgia.*— Jordan *v.* State, 120 Ga. 864, 48 S. E. 352.

*Kansas.*— State *v.* Bryan, 34 Kan. 63, 8 Pac. 260.

*Kentucky.*— Davis *v.* Com., 98 Ky. 708, 34 S. W. 699, 17 Ky. L. Rep. 1265.

*Mississippi.*— Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538.

*Missouri.*— State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

*Texas.*— Luckie *v.* State, 33 Tex. Cr. 562, 28 S. W. 533.

See *supra*, III, A, 5, c.

**48.** State *v.* Olson, 108 Iowa 667, 77 N. W. 332 ("person" of previously chaste character, instead of "woman" of previously chaste character); State *v.* Hemm, 82 Iowa 609, 48 N. W. 971 (unmarried "female," instead of unmarried "woman").

**49.** Com. *v.* Schull, 1 Pa. Co. Ct. 52, holding that the word "seduce" must be used and that no other word will supply its omission, and that it is insufficient, therefore, to charge that defendant had illicit connection with the prosecutrix under promise of marriage.

**50.** Langston *v.* State, 109 Ga. 153, 35 S. E. 166, 779, holding that an indictment which charges the accused with seducing a virtuous unmarried female "by persuasion and promises of marriage, and by other false and fraudulent means," is demurrable for failure to set forth by what means, other than persuasion, accompanied by promises of marriage, the alleged seduction was accomplished.

or a feigned marriage, etc., it must be distinctly alleged that the seduction was accomplished by such means.[51] On the other hand, it has been held sufficient to charge in the language of a statute that defendant "by means of temptations, deceptions, arts, flattery, or a promise of marriage, seduced" the prosecutrix, without charging the facts as to the means employed,[52] or to charge that defendant did unlawfully and feloniously "seduce" or "seduce, carnally know, and debauch," in the language of the statute, without charging the means employed.[53]

**e. Defilement of Female in Care, Custody, or Employ of Accused.** Under the statutes punishing any guardian or other person who shall defile any female while in his care, custody, or employment, the indictment or information must allege every fact necessary to bring the case within the statute,[54] including the age of the female, the relation between her and defendant, and the fact that she was defiled by him while such relation existed.[55]

51. Wright *v.* State, 62 Ark. 145, 34 S. W. 545, holding that an indictment under Sandels & H. Dig. § 1900, providing for the punishment of any one who obtains "carnal knowledge of any female by virtue of any feigned or pretended marriage or of any false or feigned express promise of marriage," must allege that the carnal knowledge was obtained either by virtue of a feigned or pretended marriage or by virtue of a false or feigned promise of marriage.

**Indictments held sufficient.**—An indictment charging that defendant, under a promise that he would marry prosecutrix, did seduce her, etc., being in the form of the statute, is sufficient, without alleging that the promise of marriage was made to prosecutrix. People *v.* Higuera, 122 Cal. 466, 55 Pac. 252. An indictment for seduction under promise of marriage, alleging that defendant had carnal knowledge of the woman "by virtue of a false or feigned promise of marriage," and not alleging that the promise was made to her, is sufficient after verdict. Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538. An indictment alleging that defendant "wilfully and feloniously, under promise of marriage to T, her, the said T, did then and there seduce and have sexual intercourse with, said T, being then and there an unmarried female of previous chaste character," sufficiently alleges the seduction to have been "under promise of marriage." State *v.* Abrisch, 41 Minn. 41, 42 N. W. 543. An indictment charging that defendant did unlawfully seduce prosecutrix, and did unlawfully obtain carnal knowledge of her by means of a promise to marry her, sufficiently alleges that both the seduction and the carnal knowledge were obtained by means and in virtue of a promise of marriage. Wisdom *v.* State, 45 Tex. Cr. 215, 75 S. W. 22. See also State *v.* O'Keefe, 141 Mo. 271, 42 S. W. 725.

**"By means of a promise of marriage."**—An indictment for seduction is not defective because it charges that the seduction was "by means of a promise of marriage," instead of using the words of the statute, "under a promise," etc. Callahan *v.* State, 63 Ind. 198, 30 Am. Rep. 211; Stinehouse *v.* State, 47 Ind. 17.

**Mutual promises.**—It need not be alleged that the person seduced promised to marry defendant; mutual promises and a binding contract of marriage not being necessary. State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State *v.* Primm, 98 Mo. 368, 11 S. W. 732; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177; Crozier *v.* People, 1 Park. Cr. (N. Y.) 453. See *supra*, III, A, 5, b, (II).

52. Wilson *v.* State, 73 Ala. 527.

**The word "seduce,"** when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and it is not necessary, in an information for the crime of seduction, to charge the offense in any other language. State *v.* Bierce, 27 Conn. 319. See also Wilson *v.* State, 73 Ala. 527; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; Carlisle *v.* State, 73 Miss. 387, 19 So. 207. And although the statute uses the terms "seduce and commit fornication," yet the word "seduce," *ex vi termini*, implies the commission of fornication. State *v.* Bierce, *supra*.

53. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554 (holding that an indictment under Code, § 3867, declaring a punishment "if any person seduce and debauch any unmarried woman of previous chaste character," may charge the offense in the words of the statute, and it is not necessary to allege that defendant carnally knew the woman); State *v.* Conkright, 58 Iowa 338, 12 N. W. 283; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; Carlisle *v.* State, 73 Miss. 387, 19 So. 207 (holding that an indictment for seduction which avers that defendant did entice, seduce, and have illicit connection with a female child, necessarily includes the facts that defendant was a man, and used acts and persuasions to lead the woman astray, and had sexual intercourse with her).

**The word "seduction,"** used in reference to a man's conduct toward a female, *ex vi termini* implies sexual intercourse between them. Carlisle *v.* State, 73 Miss. 387, 19 So. 207 [*citing* State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; Bishop St. Cr. § 645]. And see Wilson *v.* State, 73 Ala. 527; State *v.* Bierce, 27 Conn. 319.

54. State *v.* Buster, 90 Mo. 514, 2 S. W. 834.

55. State *v.* Buster, 90 Mo. 514, 2 S. W. 834, holding that under Rev. St. § 1260, which

**f. Issues, Proof, and Variance.** The general rules as to issues, proof, and variance govern in prosecutions for seduction.[56] All the issues must be proved.[57] As time, however, is not of the essence of the offense, the prosecution is not confined to the precise date laid in the indictment, but may prove its commission at any time prior to the finding of the indictment and within the period of limitations.[58]

**3. Evidence — a. Presumptions and Burden of Proof** — (I) *In General.* Except as is hereafter stated, in prosecutions for seduction, as in other cases, defendant is presumed to be innocent and the burden is on the state to prove every essential element of the offense.[59]

(II) *Character of Female.* In some states it is held that in the absence of evidence to the contrary it is presumed that the female was of previous chaste character or virtuous at the time of the seduction, and that the burden of proving unchaste character or want of virtue is on the accused;[60] but other courts hold

provides for the punishment of a guardian defiling his ward by carnally knowing her while she remains in his care, custody, or employment, an indictment is insufficient which fails to allege that the act was committed while the female remained in his care, custody, or employment, although such indictment repeats the allegation that she was then and there confided to the care and protection of defendant.

**Indictments or informations held sufficient.**— State *v.* Sipe, 38 Kan. 201, 16 Pac. 257 (holding sufficient an information under Gen. St. § 2091, alleging that defendant did wilfully, unlawfully, and feloniously defile a female named, by carnally knowing her, she, the said female, "being then and there a female under the age of eighteen years, confided to the care and protection" of defendant, as the words "then" and "there" referred to the female as being, when seduced, under the age of eighteen years, and under the care and protection of defendant); State *v.* Jones, 16 Kan. 608; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; State *v.* Terry, 106 Mo. 209, 17 S. W. 288 (holding that under Rev. St. (1879) § 1260, which provides that if the guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her "while she remains in his care, custody, or employment," he shall be punished, etc., an indictment charging that defendant committed the offense against a female under eighteen years of age, she "there and then being in the care, custody, and employment" of defendant, sufficiently alleges that the crime was committed "while she remained in his care, custody, or employment").

**Mere surplusage** will not render the indictment bad. State *v.* Napper, 141 Mo. 401, 42 S. W. 957, where the statute used the words "while she remains in his care, custody, or employment," and the indictment alleged defilement while she remained in his "care and protection, custody, and employment."

**Indictment for attempt held sufficient.**— State *v.* Williams, 39 Mo. App. 43.

**56.** See Indictments and Informations, 22 Cyc. 445 *et seq.*

**57.** Under a statute punishing "any unmarried man who, under promise of marriage, or any married man, who shall seduce," etc., if an indictment alleges that defendant was a married man, that allegation must be proved. West *v.* State, 1 Wis. 209.

**58.** Smith *v.* State, 107 Ala. 139, 18 So. 306; State *v.* Moore, 78 Iowa 494, 43 N. W. 273; People *v.* Payne, 131 Mich. 474, 91 N. W. 739. And see Indictments and Informations, 22 Cyc. 451. It has been held, however, that when evidence has been introduced for the purpose of proving, and tending directly to prove, an act of seduction at the time alleged in the information, the prosecutor will be deemed to have elected that date, and the jury will not be allowed to convict on evidence of an offense committed on a prior date. People *v.* Bressler, 131 Mich. 390, 91 N. W. 639.

**59.** See the cases cited in the notes following; and Criminal Law, 12 Cyc. 379.

**60.** *Alabama.*— Smith *v.* State, 118 Ala. 117, 24 So. 55; Suther *v.* State, 118 Ala. 88, 24 So. 43; Wilson *v.* State, 73 Ala. 527.

*Arkansas.*— Wilhite *v.* State, 84 Ark. 67, 104 S. W. 531 (even when the indictment alleges previous chastity); Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 78 [*overruling* on this point Walton *v.* State, 71 Ark. 398, 75 S. W. 1]; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

*Georgia.*— McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664; Woodard *v.* State, 5 Ga. App. 447, 63 S. E. 573.

*Illinois.*—Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

*Indian Territory.*— Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809, holding therefore that an instruction that while previous chaste character of the female seduced is presumed, such presumption is overcome by the presumption of defendant's innocence, was erroneous.

*Iowa.*— State *v.* Drake, 128 Iowa 539, 105 N. W. 54; State *v.* Burns, (1899) 78 N. W. 681; State *v.* Hemm, 82 Iowa 609, 48 N. W. 971; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Wells, 48 Iowa 671; State *v.* Bowman, 45 Iowa 418; State *v.* Higdon, 32 Iowa 262; State *v.* Shean, 32 Iowa 88; State *v.* Sutherland, 30 Iowa 570;

that, while chastity is generally presumed, the innocence of the accused is also presumed, and require the state to show affirmatively that the female was of chaste character.[61] When the statute punishes seduction of a female of "good repute" for chastity, the burden is on the state to prove good repute.[62] When a female alleged to have been seduced is proven to have been unchaste the presumption is that she continued so;[63] and as a rule if it is shown that she had intercourse with the accused or with others prior to the alleged seduction the burden is on the state to prove her reformation,[64] at least unless such a length of time has elapsed since the intercourse as to raise a presumption of reformation.[65]

(III) *THE SEDUCTION.* The burden is on the state of course to prove beyond a reasonable doubt the fact of intercourse by defendant with the prosecutrix, and that it was accompanied by the circumstances of persuasion, promises, etc., necessary to make out a case of seduction as distinguished from mere illicit intercourse.[66]

(IV) *PROMISE OF MARRIAGE.* When the seduction is alleged to have been accomplished by means of a promise of marriage, the burden is on the state to prove the promise,[67] and that the intercourse was accomplished by means thereof;[68] but in such a case a consent of the female to marry the accused, amounting to a mutual promise on her part to marry, may be implied.[69]

(V) *NON-MARRIAGE OF FEMALE.* It will not be presumed that the female was unmarried, but the burden is on the state to prove that fact,[70] and to do so by direct evidence.[71]

(VI) *MARRIAGE OR NON-MARRIAGE OF ACCUSED.* When the fact is essential to the offense and is alleged, the burden is on the state to prove that the accused was married[72] or unmarried,[73] as the case may be. But if it be shown

Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708.

*Michigan.*— People *v.* Bressler, 131 Mich. 390, 91 N. W. 639; People *v.* Squires, 49 Mich. 487, 13 N. W. 828; People *v.* Clark, 33 Mich. 112; People *v.* Brewer, 27 Mich. 134.

*Mississippi.*— Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

*New York.*— People *v.* Kane, 14 Abb. Pr. 15; Crozier *v.* People, 1 Park. Cr. 453.

*Virginia.*— Flick *v.* Com., 97 Va. 766, 34 S. E. 39; Mills *v.* Com., 93 Va. 815, 22 S. E. 863; Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

See 43 Cent. Dig. tit. "Seduction," § 67.

**Shift of burden of proof.**— Defendant's evidence that prosecutrix was in the habit of swearing and using vulgar language does not shift upon the state the burden of proving her chastity, it being a question for the jury whether the presumption of chastity is overcome by defendant's evidence. State *v.* Hemm, 82 Iowa 609, 48 N. W. 971.

**61.** People *v.* Wallace, 109 Cal. 611, 42 Pac. 159; People *v.* Krusick, 93 Cal. 74, 28 Pac. 794; *Ex p.* Vandiveer, 4 Cal. App. 650, 88 Pac. 993; State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; State *v.* Wenz, 41 Minn. 196, 42 N. W. 933; Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837; West *v.* State, 1 Wis. 209.

**62.** State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610; Oliver *v.* Com., 101 Pa. St. 215, 47 Am. Rep. 704; Com. *v.* Hadfield, 3 Kulp (Pa.) 121.

When the state proves the age of the female, her good repute, the promise of marriage, and the seduction by virtue of that promise, it makes out a *prima facie* case, and a want of chastity, if relied on in defense, must be shown by the defendant. State *v.* Thornton, 108 Mo. 640, 18 S. W. 841.

**63.** Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809.

**64.** Smith *v.* State, 118 Ala. 117, 24 So. 55; State *v.* Bennett, (Iowa 1907) 110 N. W. 150.

**65.** People *v.* Bressler, 131 Mich. 390, 91 N. W. 639; People *v.* Squires, 49 Mich. 187, 13 N. W. 828; People *v.* Clark, 33 Mich. 112.

**66.** State *v.* Hamann, 109 Iowa 646, 80 N. W. 1064; State *v.* Crawford, 34 Iowa 40; State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 62; State *v.* Turner, 82 S. C. 278, 64 S. E. 424. And see *supra*, III, A, 5, a; *infra*, III, B, 3, b, (III).

**67.** See *supra*, III, A, 5, b; *infra*, III, B, 3, b, (IX).

**68.** State *v.* Turner, 82 S. C. 278, 64 S. E. 424. See *supra*, III, A, 5, a, b; *infra*, III, B, 3, b, (IX).

**69.** People *v.* Kane, 14 Abb. Pr. (N. Y.) 15; People *v.* Kenyon, 5 Park. Cr. (N. Y.) 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177]. See also *supra*, III, A. 5, b, (II).

**70.** People *v.* Krusick, 93 Cal. 74, 28 Pac. 794; State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924; West *v.* State, 1 Wis. 209.

**71.** People *v.* Krusick, 93 Cal. 74, 28 Pac 794.

**72.** West *v.* State, 1 Wis. 209.

**73.** See State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866. It has been held, however, that an indictment for seduction need not allege

that he was single shortly before the offense it may be presumed that he continued so.[74]

**b. Admissibility of Evidence** — (i) *In General.* The general rules as to the admissibility of evidence apply in prosecutions for seduction.[75] Of course the court must exclude irrelevant or immaterial evidence offered either by the state [76] or by defendant.[77] Hearsay is generally inadmissible.[78] But the state may introduce any competent evidence tending to connect defendant with the alleged offense, or to establish any essential element thereof,[79] or to show the time of its

that accused was single, and where the indictment is silent the state need not prove that accused was unmarried, and a verdict of guilty will not be set aside because of the absence of such proof. Jordan *v.* State, 120 Ga. 864, 48 S. E. 352.

74. State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866, holding that where, in a prosecution under the fiftieth section of the Crimes Act (Pamphl. Laws (1898), p. 807), against a single man having sexual intercourse with a single woman under promise of marriage, the state proves defendant single some months prior to the seduction, it is presumed, in the absence of contrary evidence, that he remained single.

75. See, generally, CRIMINAL LAW, 12 Cyc. 390 *et seq.*; EVIDENCE, 16 Cyc. 821; 17 Cyc. 1.

76. **Evidence for state held inadmissible.**— Wilson *v.* State, 73 Ala. 527 (holding that it is not permissible to prove that defendant was accused of the seduction and, with knowledge of the accusation, sought an adjustment with the prosecutrix, where the fact of the accusation rested in mere hearsay, and the proposition for an adjustment did not embody an admission or confession of guilt); Neary *v.* People, 115 Ill. App. 157 (holding that it is error to permit the prosecuting witness in a criminal prosecution for seduction to state that she is a cripple); State *v.* Thompson, 79 Iowa 703, 45 N. W. 293 (testimony of the prosecutrix that she understands that defendant has other children than hers); People *v.* Payne, 131 Mich. 474, 91 N. W. 739 (evidence that the prosecutrix mother was insane, and that her father did not care for her after she was fourteen years of age); Bailey *v.* State, (Tex. Cr. App. 1895) 30 S. W. 669 (evidence that the woman committed suicide two days after the alleged offense).

**Second offense.**—Where the prosecutrix testifies to the first of two offenses charged in the indictment, the admission of her testimony to prove the second is error, since after the commission of the first offense she is no longer "chaste," and the crime cannot be committed as against her. Cook *v.* People, 2 Thomps. & C. (N. Y.) 404. See *supra*, III, A, 4, b, (I).

77. Smith *v.* State, 107 Ala. 139, 18 So. 306.

**Evidence for defendant held inadmissible.**— State *v.* Whalen, 98 Iowa 662, 68 N. W. 554 (evidence that the prosecutrix once agreed to accept a certain sum in settlement of her claims against defendant); Barnes *v.* State, 37 Tex. Cr. 320, 39 S. W. 684 (evidence that prosecutrix adjusted her person in order to accommodate defendant).

78. Smith *v.* State, 107 Ala. 139, 18 So. 306; Wilson *v.* State, 73 Ala. 527.

79. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23; People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729; State *v.* Hill, 91 Mo. 423, 4 S. W. 121; Merrell *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979.

**Evidence for state held admissible.**— Pike *v.* State, 121 Ga. 604, 49 S. E. 680 (holding that evidence in seduction that the mother of prosecutrix was dead and that the accused was the father of the child of prosecutrix was not irrelevant or harmful); People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257 (conversation between the complaining witness, her mother and sister, explanatory of testimony drawn from the sister on cross-examination by the defense, as to occurrences on the alleged occasion of seduction, and tending to disprove defendant's alibi); State *v.* Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842 (evidence that defendant committed an abortion on the prosecutrix); Merrell *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979 (evidence of accused's statement that he had heard that his victim was dead, and that her father had threatened to kill him, and of his request for advice, whereupon witness recommended flight, which suggestion accused followed, is admissible); Bailey *v.* State, (Tex. Cr. App. 1895) 30 S. W. 669 (proof, as showing defendant's intent, that, some months before the alleged seduction, he told the witness that he intended to have carnal knowledge of the woman alleged to have been seduced, but that he did not intend to marry her; and testimony of a hotel-keeper to identify the prosecutrix as the woman who was with defendant at the hotel, where the seduction was alleged to have occurred).

**Redirect examination.**— If the prosecutrix, upon cross-examination, on a trial for seduction, denies having told a third person, in conversation, that she had been seduced by defendant, she should be allowed, on redirect examination, to state what she did say. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

**Rebuttal.**— It may be proved that the father of the prosecutrix applied to the prosecuting attorney, before bastardy proceedings were instituted, and sought to have defendant arrested for the alleged seduction, for the purpose of rebutting an inference, which might be drawn from the circumstances and other evidence in the case, that the criminal prosecution was an afterthought, and instituted

commission,[80] or to corroborate the testimony of the prosecutrix,[81] including confessions and declarations and admissions of the accused;[82] and on the other hand defendant may introduce any competent evidence tending to show that the charge is unfounded, or to disprove any essential element of the offense,[83] including competent expert or opinion evidence.[84]

for the purpose of extorting money from defendant, which claim was made by defendant's counsel on the trial. People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729.

80. People *v.* Orr, 92 Hun (N. Y.) 199, 36 N. Y. Suppl. 398 [*affirmed* in 149 N. Y. 616, 44 N. E. 1127], testimony of a physician as to his examination of the prosecutrix, and her condition, at or about the time of the alleged seduction and intercourse.

81. *Iowa.*— State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288.

*New Jersey.*— State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800 [*affirmed* in 65 N. J. L. 687, 51 Atl. 1109], conversations of witnesses with each other and with the prosecutrix and defendant, pertaining to the elements of the offense, admissible as corroborative of prosecutrix, if, at the time, prosecutrix, defendant, and the witnesses were present, in the hearing of each other, and taking part in such conversations.

*North Carolina.*— State *v.* Kincaid, 142 N. C. 657, 55 S. E. 647, corroborative evidence of statements by the prosecutrix relating to statements by defendant as an excuse for not marrying her, that he was in a mess with another girl, that he would stop with such other girl and come as soon as he could, as a reason why they were not married.

*Oklahoma.*— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.

*Texas.*— Merrell *v.* State, (Cr. App. 1902) 70 S. W. 979.

**Fact testified to by prosecutrix only.**— Under the Iowa statute providing that upon a trial for seduction "the defendant cannot be convicted upon the testimony of the person injured unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense," a fact testified to alone by the person injured is not admissible to corroborate her. State *v.* Kingsley, 39 Iowa 439. See *infra*, III, B, 3, c, (II).

82. *Alabama.*— Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23, criminative letters written by defendant to the prosecutrix after the alleged offense, defendant's handwriting being proved and the genuineness of the letters not being denied.

*Iowa.*— State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288.

*Michigan.*— People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729, conversations with defendant after his arrest for bastardy, tending to show the act of sexual intercourse, and to some extent also the charge of seduction.

*Mississippi.*— Webb *v.* State, (1897) 21 So. 133, letters from defendant to prosecutrix.

*Missouri.*— State *v.* Hill, 91 Mo. 423, 4 S. W. 121.

*New Jersey.*— State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800 [*affirmed* in 65 N. J. L. 687, 51 Atl. 1109], holding that evidence of the admissions of defendant and his acquiescence in the truth of the charge, his conduct, and promises, are admissible in a prosecution for seduction as corroborative proof, even though such admissions, acquiescence, conduct, and promises do not take place until after the time of the alleged promise to marry and seduction and pregnancy.

*Texas.*— Merrell *v.* State, (Cr. App. 1902) 70 S. W. 979.

*Virginia.*— Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683.

See 43 Cent. Dig. tit. "Seduction," § 72 *et seq.*

**A sufficient predicate for the admission of a confession,** made to a witness by defendant, in a prosecution for seduction, is laid, and the confession is admissible in evidence, where it is shown that the witness, a brother of the prosecutrix, went to a field, where defendant was at work, and had a conversation with him, at which no third person was present; that at the time he had no weapon with him, made no threats, and held out no promises or inducement to defendant, and that he did not say that it would be better for defendant to tell all about it. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

83. People *v.* Clark, 33 Mich. 112; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

**Evidence for defendant held admissible.**— People *v.* Clark, 33 Mich. 112 (evidence of a conspiracy between complainant and her father and mother to inveigle defendant into a marriage with complainant, and failing of this to prosecute him); State *v.* Eckler, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372 (holding that it was error for the court not to permit prosecutrix to be asked by defendant if she had ever authorized anybody to settle the suit and accept money to dismiss it); State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349 (holding that where there was conflicting evidence as to the material facts in the case, and no prosecution was instituted until more than a year after the birth of the child alleged to be the result of the connection between the prosecutrix and defendant, during which time the latter married, it was error to refuse to allow the prosecutrix to be asked, on cross-examination, if the idea of prosecuting him did not first present itself to her after his marriage, as that fact might tend to throw light on the *animus* of the prosecutrix).

84. See, generally, EVIDENCE, 17 Cyc. 25 *et seq.* And see People *v.* Clark, 33 Mich. 112, holding that the opinions of medical experts that sexual intercourse under the circumstances described by the prosecutrix (in a buggy) was highly improbable, if not impossible, and also as to the pain and suffering

(II) *Character of Female* — (A) *In General.* Defendant may introduce any competent evidence that the prosecutrix was not of previous chaste character at the time of the alleged seduction.[85] He may show that the first act caused no pain or laceration.[86] He may also introduce evidence showing a lewd disposition or lascivious nature;[87] and may show her bad reputation for chastity under statutes punishing seduction of a female of "good repute" for chastity;[88] but not under statutes punishing seduction of a female of "previous chaste character," except to support or corroborate evidence of actual unchastity.[89] A witness who has not testified to the general character of the prosecutrix cannot be asked on cross-examination as to whether there was not a report in the neighborhood derogatory to her character.[90] The defense cannot, on examination in chief, impeach either the chastity or credit of the female by evidence of what a third person said to the impeaching witness touching her character or conduct,[91] or of statements made by them as to admissions made by prosecutrix.[92] Evidence of the good character or repute of the female is admissible as tending to show her previous chaste character,[93] or in rebuttal of defendant's evidence tending to impeach her chastity;[94] and evidence of the habits and deportment of the

the prosecutrix would have experienced had such an act taken place were admissible.

85. Smith *v.* State, 118 Ala. 117, 24 So. 55; Caviness *v.* State, 42 Tex. App. 420, 60 S. W. 555.

86. Barnes *v.* State, 37 Tex. App. 320, 39 S. W. 684.

87. Keller *v.* State, 102 Ga. 506, 31 S. E. 92; O'Neill *v.* State, 85 Ga. 323, 11 S. E. 655, holding that on an indictment for seducing a virtuous unmarried female, the want of moral chastity may be regarded on the question whether the woman, although a virgin, was really seduced, or whether she shared the intercourse for the gratification of lascivious propensities not inflamed by the arts or importunity of the accused.

**Letters written to a third person by prosecutrix,** showing a vulgar and lascivious mind on her part, were admissible for the purpose of discrediting her, and also to shed light on her chastity at the time of her alleged seduction by defendant. Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242.

88. See *supra*, III, A, 4, b, (IV); III, B, 3, a, (II).

89. Suther *v.* State, 118 Ala. 88, 24 So. 43; State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669; State *v.* Prizer, 49 Iowa 531, 31 Am. Rep. 155; Kenyar *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

90. State *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

91. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; Parks *v.* State, 35 Tex. Cr. 378, 33 S. W. 872.

92. Parks *v.* State, 35 Tex. Cr. 378, 33 S. W. 872.

93. People *v.* Samonset, 97 Cal. 448, 32 Pac. 520; *Ex p.* Vandiveer, 4 Cal. App. 650, 88 Pac. 993; State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539. But see Lewis *v.* State, 89 Ga. 396, 15 S. E. 489; Kauffman *v.* People, 11 Hun (N. Y.) 82.

**Opinion.**— On the issue of the previous chaste character of prosecutrix in a seduction case, the head of a family of which prosecutrix was a member for three months may express an opinion based on his acquaintance and an observation of prosecutrix's general conduct. People *v.* Wade, 118 Cal. 672, 50 Pac. 841.

94. *Alabama.*— Knight *v.* State, 147 Ala. 93, 41 So. 850; Suther *v.* State, 118 Ala. 88, 24 So. 43; Smith *v.* State, 107 Ala. 139, 18 So. 306.

*California.*— People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

*Georgia.*— Lewis *v.* State, 89 Ga. 396, 15 S. E. 489.

*Iowa.*— State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669; State *v.* Lenihan, 88 Iowa 670, 56 N. W. 292; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; State *v.* Shean, 32 Iowa 88.

*Kansas.*— State *v.* Bryan, 34 Kan. 63, 8 Pac. 260.

*Mississippi.*— Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539.

*Missouri.*— State *v.* Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

*Oregon.*— State *v.* Clark, 9 Oreg. 466.

**That witness never heard anything against her character.— On indictment** for seduction, a witness who testifies that he has lived in the neighborhood of the prosecutrix and known her from childhood is competent to testify as to her good character, by stating that he has never heard anything against her character. State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732; State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; State *v.* Brandenberg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

**A teacher's certificate,** held by the prosecuting witness at the time of the alleged seduction, is not competent evidence of reputation or chastity. Russell *v.* State, 77 Nebr. 519, 110 N. W. 380.

**An ex parte certificate of a person connected with a business school,** informing those whom it might concern that prosecutrix was an industrious and conscientious student and had won the esteem of her teachers, was incompetent. Whatley *v.* State, 144 Ala. 68, 39 So. 1014.

prosecutrix,[95] or of declarations and admissions of defendant,[96] is admissible for this purpose. If the woman is a witness she may testify to her previous virtue.[97]

(B) *Specific Acts.* Under a statute punishing seduction of a female "of good repute" for chastity, the evidence must, according to the weight of authority, go to her reputation, and her chastity cannot be impeached by specific acts of unchastity or lewdness.[98] But under statutes requiring the female to have been of previous "chaste character," her chastity may, and generally must,[99] be attacked by evidence of specific acts of unchastity and immorality,[1] unless they are too remote;[2] and her declarations and admissions are admissible for this purpose.[3] It may be shown that she was guilty of lewd and improper conduct, not amounting to sexual intercourse, with other men;[4] that she had intercourse with defend-

**General character.**— In a trial for seduction, a question asked of a witness for the prosecution, as to the complainant, whether he knew "what her character for chastity was in the neighborhood," was held open to objection, in that "general" character was not called for. State *v.* Clark, 9 Oreg. 466.

**General reputation for morality.**— In a prosecution for seduction, the reputation of prosecutrix for morality, which may be shown in rebuttal of evidence tending to show unchastity, is a reputation for morality in sexual relations; and it was error to allow prosecutor to introduce evidence of the general reputation of the prosecutrix for morality. State *v.* Hummer, 128 Iowa 505, 104 N. W. 722.

95. State *v.* Shean, 32 Iowa 88.

96. Suther *v.* State, 118 Ala. 88, 24 So. 43, holding that a witness in a prosecution for seduction under promise of marriage may testify to declarations of defendant that prosecutrix was a "nice" girl and a suitable companion for witness' daughter, and that he intended to marry her.

97. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

98. State *v.* Atterbury, 59 Kan. 237, 52 Pac. 451; State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; Russell *v.* State, 77 Nebr. 519, 110 N. W. 380; State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866; Foley *v.* State, 59 N. J. L. 1, 35 Atl. 105 (both holding that on an indictment for the statutory offense of sexual intercourse "with a single female of good repute for chastity under the age of twenty-one years," under promise of marriage, proof that such woman had been unchaste with two other men was properly excluded, as being irrelevant); Bowers *v.* State, 29 Ohio St. 542. See *supra*, III, A, 4, b, (IV).

**Contra.**— State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374, holding that under Rev. St. § 1259, making it an indictable offense, "under promise of marriage," to "seduce and debauch any unmarried female of good repute," it may be shown that the woman, before the time of the seduction charged, was guilty of acts of lewdness and unchastity with other men than defendant.

99. See *supra*, III, B, 3, b, (II), (A).

1. *Arkansas.*— Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

*Iowa.*— State *v.* Prizer, 49 Iowa 531, 533, 31 Am. Rep. 155; State *v.* Sutherland, 30 Iowa 570.

*Michigan.*— People *v.* Craig, 116 Mich. 388, 74 N. W. 528; People *v.* Clark, 33 Mich. 112.

*Missouri.*— State *v.* Wheeler, 94 Mo. 252, 7 S. W. 103; State *v.* Patterson, 88 Mo. 88, 57 Am. Rep. 374 [*overruling* State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235].

*New York.*— Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177 [*affirming* 5 Park. Cr. 254].

*Texas.*— Davis *v.* State, 36 Tex. Cr. 548, 38 S. W. 174, testimony of other men as to sexual intercourse with them held admissible.

See 43 Cent. Dig. tit. "Seduction," § 74.

**Where immaterial evidence of the chastity of the prosecutrix** has been admitted, it may be contradicted by evidence of lewd conduct. People *v.* McArdle, 5 Park. Cr. (N. Y.) 180.

**Prosecutrix may be cross-examined** upon matters to contradict the legal presumption of previous chastity; as, for instance, whether she had not used indecent language with other men, or been found in bed with men whose names are not given. State *v.* Sutherland, 30 Iowa 570.

2. State *v.* Dunn, 53 Iowa 526, 5 N. W. 707, holding that evidence of improper conduct on the part of the prosecutrix eight years before the trial, when she was only fourteen years of age, was inadmissible to prove her unchaste. See also State *v.* Hemm, 82 Iowa 609, 48 N. W. 971, holding that where prosecutrix was seventeen years old at the time of the seduction, the deposition of a woman for whom she had worked at various times prior to reaching the age of fourteen years, showing that she then swore and used vulgar language, was properly excluded.

3. State *v.* Clemons, 78 Iowa 123, 42 N. W. 562 (holding that her declarations and admissions subsequent to the seduction as to prior practices showing unchastity are admissible); Davis *v.* State, 36 Tex. Cr. 548, 38 S. W. 174 (holding that where prosecutrix testified that she had never had intercourse with any man except defendant, and that she was *enceinte* by him, it was competent to prove by her letters to a third person that she was intimate with said person, and that she denounced him as the cause of the pregnancy). But see People *v.* Brewer, 27 Mich. 134.

4. Creighton *v.* State, 41 Tex. Cr. 101, 51 S. W. 910, that she had kissed, and had been kissed and embraced by, other men. And see *supra*, III, B, 3, b, (II), (A).

ant before the promise;[5] and that she was often out late at night.[6] But conduct not tending to show unchastity is not admissible.[7] Where defendant has proved an act of intercourse between prosecutrix and another, it is competent for the prosecution to show what was said and done in connection therewith to induce prosecutrix to submit.[8]

(c) *Subsequent to Offense.* As a rule evidence as to the unchaste character or conduct of the female, or as to her reputation for chastity, after the alleged seduction is inadmissible,[9] unless the evidence tends to explain what took place before the alleged seduction;[10] but it has been held that the fact that the female continued to have intercourse with defendant after the alleged seduction may be considered by the jury as bearing on her previous chaste character.[11] Evidence of the reputation of the female after the offense is admissible to affect her credibility.[12]

(III) *Character and Conduct of Prosecutrix's Family and Associates.* Defendant may show that the prosecutrix knowingly associated with men of bad character;[13] that indecent remarks were made in her presence by a male acquaintance;[14] and that her family and female associates were of bad character.[15] He cannot show by general reputation that the house of the

5. State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235; Bowers *v.* State, 29 Ohio St. 542.

6. State *v.* Clemons, 78 Iowa 123, 42 N. W. 562.

7. Knight *v.* State, 147 Ala. 93, 41 So. 850 (holding that evidence as to whether prosecutrix had ever consented to have intercourse with a certain witness was irrelevant, where the act was not consummated); State *v.* Payson, 71 Iowa 542, 32 N. W. 484 (that another man had frequently gone home with her properly excluded, although she testified on cross-examination that she kept company with no one but defendant); State *v.* Curran, 51 Iowa 112, 49 N. W. 1006 (holding that it was not competent to establish the unchastity of the prosecutrix by showing that she had, on a particular occasion, acted in such a manner toward male relatives as to be reproved by her stepmother).

8. Anderson *v.* State, 39 Tex. Cr. 83, 45 S. W. 15.

9. *Alabama.*— Smith *v.* State, 118 Ala. 117, 24 So. 55; Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

*Arkansas.*— Wilhite *v.* State, 84 Ark. 67, 104 S. W. 531, holding that where, on a trial for seduction, accused admitted the promise of marriage and the sexual intercourse with prosecutrix, and insisted that he did not fulfil the promise of marriage because of the want of chastity of prosecutrix, the exclusion of a letter from prosecutrix, written subsequently to her surrender of her virtue to accused, and indicating that her thoughts were bent on sexual intercourse with him, was proper.

*California.*— People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; People *v.* Wade, 118 Cal. 672, 50 Pac. 841.

*Georgia.*— Mann *v.* State, 34 Ga. 1.

*Iowa.*— State *v.* Wyckoff, 113 Iowa 670, 83 N. W. 713; State *v.* Abbeglan, 103 Iowa 50, 72 N. W. 305; State *v.* Deitrick, 51 Iowa 467, 1 N. W. 732 (holding that questions upon the subject of the female's chastity must leave no room for inference or doubt that they refer to a time prior to the alleged seduction); State *v.* Wells, 48 Iowa 671.

*Michigan.*—People *v.* Brewer, 27 Mich. 134.

*New York.*— Boyce *v.* People, 55 N. Y. 644.

*Texas.*— Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242; Anderson *v.* State, 39 Tex. Cr. 83, 45 S. W. 15.

10. State *v.* Abbeglan, 103 Iowa 50, 72 N. W. 305; Nolan *v.* State, 48 Tex. Cr. 436, 88 S. W. 242, holding that while the mere fact that prosecutrix subsequently becomes a prostitute is no justification or defense for defendant, yet, if her conduct be such as to indicate general prostitution on her part, this should be considered as a circumstance by the jury in passing on whether she was probably chaste at the time of her alleged seduction.

11. Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

The prosecution may show intercourse between the prosecutrix and defendant after the alleged seduction. State *v.* Robertson, 121 N. C. 551, 28 S. E. 59. See Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

12. State *v.* Summar, 143 Mo. 220, 45 S. W. 254.

13. State *v.* Bige, 112 Iowa 433, 84 N. W. 518.

14. State *v.* Bige, 112 Iowa 433, 84 N. W. 518, although the remarks were not addressed to her.

15. Jeter *v.* State, 52 Tex. Cr. 212, 106 S. W. 371 (holding that, in a seduction trial, it was improper to exclude testimony showing that prosecutrix's sister's reputation for chastity was bad, and had been for two or three years, and that witness knew of her unchaste acts, where the sisters resided with their father, and habitually went to social gatherings together unattended, and would return accompanied by young men); Cairness *v.* State, 42 Tex. Cr. 420, 60 S. W. 555 (that her sisters and a niece with whom she associated gave birth to illegitimate children).

prosecutrix's mother, where the prosecutrix lived, was a house of ill-fame; the fact must be established by proof of particular facts;[16] nor can he prove this by asking the conclusion of a witness.[17] Evidence of the good character and standing of the parents of the prosecutrix and the family generally is inadmissible.[18]

(IV) *AGE OF FEMALE.* The prosecutrix on a trial for seduction under promise of marriage can testify as to her own age, although a question of pedigree is not directly in issue.[19] Defendant is entitled to show that the prosecutrix was older than she had stated herself to be.[20]

(V) *CHARACTER OF ACCUSED.* It is not competent to prove the general moral character of defendant, but only his character for virtue.[21]

(VI) *MARRIAGE OR NON-MARRIAGE OF ACCUSED.* On the prosecution of a married man for seduction under a statute making it a crime for any "married man" to seduce an unmarried female and have illicit connection with her, a distinct, solemn, unequivocal confession or admission by defendant is admissible to prove the fact of marriage.[22]

(VII) *THE SEDUCTION IN GENERAL.* It has been held that the prosecutrix cannot testify to the motive which induced her to submit to intercourse with defendant,[23] but the better opinion is to the contrary.[24] She may testify that she felt an affection for defendant and was willing to become his wife.[25] The state may introduce evidence of defendant's declarations and admissions tending to show intercourse of defendant with the prosecutrix and the means by which it was accomplished.[26] It is proper to admit evidence by the mother of prosecu-

16. People *v.* Kenyon, 5 Park. Cr. (N. Y.) 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177]; Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

17. Barker *v.* Com., 90 Va. 820, 20 S. E. 776, holding that a question asked a witness on a prosecution for seduction as to whether, from facts within his own knowledge, the prosecutrix resided at a bawdy-house, was properly excluded as being too general and calling for a conclusion.

18. Lewis *v.* State, 89 Ga. 396, 15 S. E. 489.

19. State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

20. Whatley *v.* State, 144 Ala. 68, 39 So. 1014.

21. State *v.* Curran, 51 Iowa 112, 49 N. W. 1006. In a prosecution for seduction, testimony as to defendant's bad reputation for chastity up to the time he was accused was properly received, although the crime was committed several months prior thereto. State *v.* King, 9 S. D. 628, 70 N. W. 1046.

22. West *v.* State, 1 Wis. 209.

23. Anderson *v.* State, 104 Ala. 83, 16 So. 108 (holding that the prosecutrix cannot testify that she was caused to have improper intercourse with defendant by his declarations of love for her and his promise of marriage; that the facts should be stated, and the jury left to infer from them whether the prosecutrix was seduced by the alleged acts or conduct of defendant); Wilson *v.* State, 73 Ala. 527 (holding that it is not permissible for the prosecutrix to testify that she did not willingly yield to the embraces of defendant, or that she yielded in consequence of a promise of marriage, or of any act or declaration of defendant, that being a matter of inference or deduction to be drawn by the jury, from facts and circumstances proved or presumed, and not a fact to which a witness may testify).

24. *Georgia.*—Washington *v.* State, 124 Ga. 423, 52 S. E. 910, holding that it is not error to allow the woman alleged to have been seduced to testify that her love for the accused caused her to yield to the sexual intercourse.

*Iowa.*— State *v.* Bennett, (1907) 110 N. W. 150, holding that the prosecutrix was properly permitted to testify that she yielded her person to defendant's embraces because of his promises.

*Michigan.*— See People *v.* Jensen, 66 Mich. 711, 33 N. W. 811, testimony through an interpreter.

*Minnesota.*— State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

*Mississippi.*— Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

*New York.*—Armstrong *v.* People, 70 N. Y. 38.

*North Carolina.*— State *v.* Raynor, 145 N. C. 472, 59 S. E. 344 (holding that in a prosecution for seduction under promise of marriage, the testimony of prosecutrix that she yielded on defendant's promise of marriage is competent); State *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

*Texas.*— Faulkner *v.* State, 53 Tex. Cr. 258, 109 S. W. 199, holding that it was proper to ask the prosecutrix on direct examination whether she believed at the time that defendant and she were to become man and wife the following spring, whether the day of their marriage had been fixed, and whether the time was fixed according to his or her suggestions.

25. State *v.* Burns, 119 Iowa 663, 94 N. W. 238.

26. State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288 (holding

trix that the daughter had told her of the seduction and the promise of marriage.[27] Evidence of a promise by defendant that if the female would yield to him that time he would not make such a request again is admissible.[28] Where the prosecutrix has testified that defendant had told her that certain other girls allowed such liberties, it was proper to ask their names, as evidence bearing on the means used in effecting the seduction.[29]

(VIII) *PREGNANCY AND BIRTH AND PATERNITY OF CHILD.* It is competent for the state to prove that the prosecutrix became pregnant or gave birth to a child as the result of the alleged seduction,[30] unless the child was born so long

that defendant's statement within a week after commission of the act, not having seen prosecutrix in the meantime, that he was going to her house for sexual intercourse, was admissible in rebuttal in a prosecution for seduction, where defendant denied illicit connection, and also in corroboration of the prosecutrix); State *v.* Hill, 91 Mo. 423, 4 S. W. 121 (holding that evidence that defendant boasted to his friends that he had had illicit intercourse with the prosecuting witness, as tending to show, not only an illicit connection, but also, in view of the circumstances under which the admissions were made, the deceptive practices by which it was brought about); Merrell *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979; Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683 (holding that the testimony of the matron of the lying-in hospital as to admissions by defendant that he had seduced the girl, who had been respectable, and that he intended to marry her, is competent to support the evidence of the prosecutrix).

27. State *v.* Whitley, 141 N. C. 823, 53 S. E. 820.

28. McTyier *v.* State, 91 Ga. 254, 18 S. E. 140.

29. Lewis *v.* People, 37 Mich. 518.

30. *Alabama.*—Whatley *v.* State, 144 Ala. 68, 39 So. 1014 (holding that testimony as to when a child was born of prosecutrix was admissible, in corroboration of prosecutrix as to the time of the intercourse); Cunningham *v.* State, 73 Ala. 51 (holding that evidence that the prosecutrix had given birth to a child was admissible, although defendant was not immediately connected therewith in the evidence).

*California.*— People *v.* Goodwin, 132 Cal. 368, 64 Pac. 561, holding that on a prosecution for seduction under promise of marriage, it was not error to allow the prosecutrix to testify that she got in a "family way" by defendant two months after the alleged seduction, as this evidence tended to show, in connection with evidence of her previous chastity, that she had been seduced prior to that time.

*Iowa.*— State *v.* Nugent, 134 Iowa 237, 111 N. W. 927 (holding that prosecutrix could testify that a child was born to her as a result of the act, to support her claim that defendant committed the crime, and as to the date thereof); State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288 (holding that the testimony of the mother of the prosecutrix that she discovered her daughter's pregnancy about four weeks after the alleged seduction is admissible, if objection is made to the admissibility of the evidence only and not to the competency of the witness); State *v.* Burns, (1899) 78 N. W. 681; State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562 (holding that in corroboration of the testimony of prosecutrix that she had sexual intercourse at the time named, she may testify that afterward she gave birth to a child, and may state the date of the birth, the evidence not connecting defendant with the crime; and that she may also state that the child with her is the one alleged to have been begotten by defendant, where the child is not produced to show a resemblance to defendant); State *v.* Richards, 72 Iowa 17, 33 N. W. 342; State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387.

*New York.*—Armstrong *v.* People, 70 N. Y. 38 (holding that on a prosecution for seduction, the testimony of the prosecutrix, an unmarried woman, that she was in the family way at the time of the trial, some seven months after the commission of the alleged offense, was competent); People *v.* Orr, 92 Hun 199, 36 N. Y. Suppl. 398 [*affirmed* in 149 N. Y. 616, 44 N. E. 1127].

*North Carolina.*— State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

*Texas.*— Merrell *v.* State, (Cr. App. 1902) 70 S. W. 979 (holding that proof of the pregnancy of the prosecutrix at the time of her death is admissible); Snodgrass *v.* State, 36 Tex. Cr. 207, 36 S. W. 477 (holding that it was not error to allow it to be proved by the testimony of the prosecutrix that defendant was the father of the child then in her arms).

*Virginia.*— Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683, holding that the fact that a child was born is relevant to show the fact of seduction.

See 43 Cent. Dig. tit. "Seduction," § 76.

**Knowledge of pregnancy.**—Where prosecutrix, alleged to have been seduced, testified that while she knew there was something the matter with her she did not know that she was pregnant until about the time her child was born, the court properly refused the testimony of physicians that it was impossible for a woman to carry a child to birth without knowing it, as it was immaterial whether prosecutrix knew she was pregnant or not. Kerr *v.* U. S., 7 Indian Terr. 486, 104 S. W. 809.

after the alleged seduction that it could not have been the result thereof;[31] and any competent evidence tending to show that defendant is the father of the child is admissible.[32] An inquiry of the prosecutrix as to whether she had not been asked by a certain person whom she was "going to stick," to which she had replied that it was none of his business, is properly excluded where it is not shown how the conversation came up, or what it had reference to.[33] The record of a previous conviction of defendant upon a charge against him by the prosecutrix for bastardy is not admissible.[34]

(IX) *PROMISE OF MARRIAGE AND SUBSEQUENT OFFERS OR REFUSALS TO MARRY.* The state in a prosecution for the crime of seduction may introduce any competent evidence to prove or tending to prove a promise by defendant to marry the prosecutrix at or before the time of the alleged seduction,[35]

**31.** People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736, holding that on a prosecution for seduction alleged to have occurred on July 4, 1885, it was prejudicial error to admit, over objection, evidence of the birth of a full-grown child in August, 1886, thirteen months thereafter, as it neither proved the seduction alleged, nor that the prosecutrix had intercourse with defendant on July 4, 1885, nor that the subsequent intercourse, from which, as alleged, the pregnancy resulted, commenced at that time.

**The ordinary period of gestation** may be shown as raising a slight natural inference as to the time when the child, the issue of the seduction, was begotten; but such inference is by no means conclusive, even in the absence of evidence that the birth of the child was from any cause premature. State *v.* Richards, 72 Iowa 17, 33 N. W. 342. *Compare* State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282, holding that in a prosecution for seduction, alleged to have taken place in March, under promise of marriage, in which the state claimed that the intimacy between defendant and prosecutrix continued until June 12, or later, it was not error to admit evidence of the birth of a child February 28, following.

**32.** State *v.* Burns, (Iowa 1899) 78 N. W. 681; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; Barnes *v.* State, 37 Tex. Cr. 320, 39 S. W. 684.

**Resemblance.**— The child alleged to be the the result of such intercourse may be exhibited to the jury to corroborate the fact of sexual intercourse. State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613. And see *supra*, II, B, 4, b, (XI) note 20; and EVIDENCE, 17 Cyc. 294. But see State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387, holding that the infant alleged to be the fruit of the intercourse cannot be offered in evidence to corroborate the prosecutrix by reason of a supposed resemblance between the child and defendant. And see Barnes *v.* State, 37 Tex. Cr. 320, 39 S. W. 684, holding that evidence of the complexion, and of the color of the hair and eyes, of a child only three or four months old, is not admissible for the purpose of comparison, in order to prove its paternity.

**Admissions and attempt to procure abortion.**— On a prosecution for seduction the testimony of a physician that he examined complainant, and the next day was called on by defendant, who inquired as to her condition, and, when told that she was in the family way, replied, "That leaves me in a pretty fix; I would like to get help out of it," and evidence that defendant tried to induce complainant to have an abortion performed, were properly admitted. People *v.* Orr, 92 Hun (N. Y.) 199, 36 N. Y. Suppl. 398 [*affirmed* in 149 N. Y. 616, 44 N. E. 1127].

**Secondary evidence of defendant's letters.**— It is incompetent to prove by testimony of the prosecutrix that defendant, after moving from the state, wrote letters to her and to others, denying that he was the father of her child, since the letters themselves are the best evidence. State *v.* Thompson, 79 Iowa 703, 45 N. W. 293.

**33.** Williams *v.* State, 3 Ind. App. 350, 29 N. E. 1079.

**34.** State *v.* Wenz, 41 Minn. 196, 42 N. W. 933.

**35.** Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23; Munkers *v.* State, 87 Ala. 94, 6 So. 357; State *v.* Sharp, 132 Mo. 165, 33 S. W. 795; Faulkner *v.* State, 53 Tex. Cr. 258, 109 S. W. 199 (holding that where prosecutrix testified as to the existence of an engagement between her and defendant at the time of the seduction, evidence as to a former engagement between prosecutrix and defendant, which had been broken before the alleged seduction took place, was admissible); Snodgrass *v.* State, 36 Tex. Cr. 207, 36 S. W. 477 (holding that testimony of the mother of the prosecutrix that she had overheard a certain conversation between defendant and the prosecutrix was admissible in corroboration of the testimony of the prosecutrix as to the engagement to marry, and to show the terms upon which defendant was admitted to the house).

**Permitting a juror to ask defendant,** on a prosecution for seduction under promise of marriage, "what his object was in going to see the girl if it was not for the purpose of marrying her," was not error, defendant having testified to repeated visits and attentions to her, that he had taken her among respectable people and to parties and other places, but had never promised or intended to marry her. State *v.* Sharp, 132 Mo. 165, 33 S. W. 795.

including declarations and admissions of defendant;[36] and it has been held that evidence of promises of marriage made by defendant after the alleged seduction, or of renewals of the promise, is admissible.[37] Evidence that defendant did not marry the prosecutrix is admissible.[38] The prosecutrix, according to the weight of authority, may testify as to the alleged promise and that she permitted the intercourse because of it.[39] On the other hand defendant may introduce evidence to rebut evidence on the part of the prosecution tending to prove a promise of marriage, or to show that a promise of marriage was understood by both as a mere matter of form, or was not relied upon by the prosecutrix.[40] In a prosecution for seduction evidence of preparations made by the prosecutrix for her marriage with defendant is incompetent, at least unless brought to the knowledge of defendant.[41] Nor can the prosecutrix testify that she informed her sister or others, in defendant's absence, of his promise to marry her.[42] As a rule evidence of offers of marriage by defendant after the alleged seduction, and of prosecutrix's refusals to marry him, are inadmissible;[43]

**Evidence held inadmissible.**— On a prosecution for seduction, testimony of the mother of the prosecutrix that from the attention paid her daughter by defendant she regarded him as her future son-in-law is incompetent to show that the crime was committed under promise of marriage. Snodgrass *v.* State, (Tex. Cr. App. 1895) 31 S. W. 366. *Compare* State *v.* Curran, 51 Iowa 112, 49 N. W. 1006. It is error to permit prosecutrix to state that she had told others of her engagement to marry defendant, although she is not permitted to name the persons informed thereof. Harvey *v.* State, (Tex. Cr. App. 1899) 53 S. W. 102.

**36.** Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23; Munkers *v.* State, 87 Ala. 94, 6 So. 357 (holding that evidence of declarations of defendant, about the time of the alleged seduction, of an intention to marry the prosecutrix, was properly admitted); McTyier *v.* State, 91 Ga. 254, 18 S. E. 140 (holding that on indictment for seduction by persuasion and promise of marriage, promises of marriage made and letters written by accused to the woman after the seduction, but pending the marriage engagement, are admissible); Webb *v.* State, (Miss. 1897) 21 So. 133.

**Secondary evidence of letters of defendant.** — Prosecutrix was properly allowed to state that she had received a letter from defendant in which he said something about marrying her, the letter being shown to have been destroyed by prosecutrix through no wrong motive. Bracken *v.* State, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 23.

**Remoteness.**— In a prosecution for seduction under promise of marriage, the sexual intercourse having occurred in 1895, letters from defendant to prosecutrix, written in 1892, acknowledging an engagement between them, from which time until 1895 defendant continually visited her, were held admissible to prove the promise of marriage. Webb *v.* State, (Miss. 1897) 21 So. 133.

**37.** Jinks *v.* State, 114 Ga. 430, 40 S. E. 320; Keller *v.* State, 102 Ga. 506, 31 S. E. 92; McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; State *v.* Kincaid, 142 N. C. 657, 55 S. E. 647, holding that testimony of the prosecutrix that defendant, as an excuse for not marrying her after pregnancy, said that he was in a mess with another girl, that he would stop with such other girl, and come as soon as he could, was admissible as showing declarations renewing the obligation to marry, although tending to show the commission of another offense. But see State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

**38.** Merrell *v.* State, (Tex. Cr. App. 1902) 70 S. W. 979.

**39.** See *supra*, III, B, 3, b, (VII).

**40.** Stinehouse *v.* State, 47 Ind. 17 (holding that on a trial for seduction under a promise of marriage, witnesses who had testified on behalf of the prosecution that defendant "kept company" with the prosecutrix, and that the two walked and rode together a few times, might be asked on cross-examination questions for the purpose of proving that at the same time other men kept company with her in like manner, as this would properly tend to weaken the implication of a promise of marriage otherwise arising from the direct testimony); State *v.* Brown, 86 Iowa 121, 53 N. W. 92 (holding that, where it is claimed that seduction was accomplished by means of a promise of marriage, accused should be allowed to testify that he was engaged to be married to a third person at the time of the alleged seduction, and that prosecutrix had knowledge of the fact).

**41.** People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904; State *v.* Buxton, 89 Iowa 573, 57 N. W. 417. Testimony of the prosecuting witness that before any sexual intercourse with defendant she had procured a wedding dress is not admissible as part of the *res gestæ*. State *v.* Lenihan, 88 Iowa 670, 56 N. W. 292.

**42.** State *v.* Sortviet, 100 Minn. 12, 110 N. W. 100.

**43.** Smith *v.* State, 107 Ala. 139, 18 So. 306 (holding that it was not error to exclude questions by defendant intended to show that, after prosecutrix gave birth to a child, he offered to marry her, and she refused, and asking her why she refused to marry him); State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609; State *v.* Dietrick, 51 Iowa 467, 1 N. W.

but it has been held that evidence that defendant offered to marry prosecutrix after she became pregnant, or after the seduction, may be considered so far as it tends to show that the intercourse was obtained under promise of marriage,[44] or to corroborate the testimony of the prosecutrix as to the prior promise of marriage and as tending to prove the sexual intercourse.[45] It is not error to refuse to allow defendant to answer a question as to whether it was his honest intention to marry the prosecutrix and if he is ready to do so.[46] Evidence on the part of the prosecution that defendant, subsequent to the seduction, had refused to marry the prosecutrix is inadmissible.[47] In a prosecution for seduction under promise of marriage, a conversation between prosecutrix and defendant in reference to a previous marriage and divorce of defendant is admissible.[48]

(x) *Personal Relations and Conduct of Parties.*[49] Evidence is admissible to show the personal relations of defendant and the prosecutrix and their conduct before, at the time of, and after the alleged seduction,[50] including

732 (holding that evidence that prosecutrix went to defendant after the alleged seduction and offered to compromise if defendant would pay her five hundred dollars, coupling her offer with a refusal to marry defendant, was inadmissible, since the transaction occurred after the seduction); State *v.* Bradenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

**The willingness of defendant to marry prosecutrix** is admissible only on the question of whether she really was seduced, and in mitigation of punishment. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

**Cross-examination of prosecutrix.**— But where on a prosecution for seduction under promise of marriage there was evidence that defendant offered to marry prosecutrix after the alleged seduction, and that she saw her father and defendant in consultation with reference to the proposed marriage, it was held error to refuse to allow prosecutrix to testify on cross-examination as to a conversation between herself and defendant immediately after the latter's interview with the father, in which defendant stated that he had told the father of the seduction, notwithstanding which he had refused his consent to the marriage. Ingram *v.* Com., 114 Ky. 726, 71 S. W. 908, 24 Ky. L. Rep. 1531.

44. State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609.

45. State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595 (holding that it was not error to admit evidence that, after the preliminary trial, defendant went to the home of prosecutrix and told her parents that he had come to marry her; that he would have married her, according to promise, except for outside influence; and that he had concluded they would get married, and "drop the thing where it was"); Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837 (holding that it was not error to permit the father of the prosecutrix to testify that the prisoner asked him for the prosecutrix at a time subsequent to the alleged illicit intercourse, as such evidence was competent for the purpose of corrohorating the female as to the previous promise of marriage).

46. State *v.* Bradenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

47. Cook *v.* People, 2 Thomps. & C. (N. Y.) 404.

48. Whatley *v.* State, 144 Ala. 68, 39 So. 1014.

49. See also *supra*, III, B, 3, b, (I), (VII), (VIII), (IX).

50. *Alabama.*—Whatley *v.* State, 144 Ala. 68, 39 So. 1014 (holding that testimony as to whether or not defendant was making love to prosecutrix was relevant and material; and also that it was proper for the state to show how long defendant "kept company" with prosecutrix); Weaver *v.* State, 142 Ala. 33, 39 So. 341 (holding that testimony of prosecutrix's brother that he heard defendant tell her that he loved her was admissible to corroborate her testimony to the same effect, and as justifying the inference that defendant was leading prosecutrix to believe that he was going to marry her); Suther *v.* State, 118 Ala. 88, 24 So. 43 (holding that the fact that defendant gave presents to prosecutrix prior to the alleged sexual intercourse may be shown).

*California.*— People *v.* Goodwin, 132 Cal. 368, 64 Pac. 561, holding that on a prosecution for seduction under promise of marriage, a letter from defendant to the prosecutrix, beginning, "My dear, beloved friend Mary," was relevant evidence, as showing the sentiment and feelings of defendant toward prosecutrix.

*Georgia.*— Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664, holding that the conduct and statements of the parties in reference to the *corpus delicti* before and after as well as at the time of the principal fact are admissible as explanatory thereof, and as part of the *res gestæ*.

*Iowa.*— State *v.* Bennett, 137 Iowa 427, 110 N. W. 150; State *v.* Mackey, 82 Iowa 393, 48 N. W. 918 (holding that where the evidence showed that the prosecutrix at the time she yielded to defendant was a child a few days past the age of fourteen, and of weak mental development; that before the first act of intercourse defendant, who was a man of thirty-five, not only promised to marry her, but stated to her that many other young girls in the neighborhood were in the habit of engaging in sexual intercourse, it was error for the court to refuse to permit the fullest

letters and other communications before or after the intercourse, acknowledging the wrong done, referring to promises to marry, suggesting the breaking off of illicit relations, etc.[51] Evidence of the appearance and conduct of the parties on the day following that of the alleged seduction is admissible.[52] And it is competent for the prosecution to show other acts of intercourse between defendant and the prosecutrix since the date of the act alleged.[53] It is also proper to show the relations between defendant and the prosecutrix's family.[54] Where the evidence relied on to corroborate the testimony of prosecutrix consisted largely of evidence that defendant, by visiting her at home and accompanying her to church, had opportunities for committing the crime, it was held error to exclude evidence that at the same time she was receiving similar attentions from another man.[55]

investigation into their subsequent relations with a view of showing whether defendant entered into such contract of marriage in good faith at the time, or merely to gratify his lust); State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

*Michigan.*— People *v.* Hubbard, 92 Mich. 322, 52 N. W. 729 (holding that on a prosecution for seduction under promise of marriage, evidence is admissible of the relations openly entertained between defendant and prosecutrix after the alleged seduction, and that they were kindly and intimate, but not of conversations about marriage); People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257 (holding that where the prosecutrix testified that, while she on all occasions resisted defendant's efforts, she did on the last occasion yield, and that on this occasion he promised to buy her a dress, and finally accomplished the crime, her testimony as to whether he had, before that occasion, made her any presents, or attempted to overcome her by force, was properly admitted).

*North Carolina.*— State *v.* Kincaid, 142 N. C. 657, 55 S. E. 647.

*Oklahoma.*— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837, holding that the actions, conduct, promises, attentions, and letters of the accused to and toward the prosecutrix after the date of the alleged seduction are competent to be shown in evidence in actions for seduction, for the purpose of corroborating the testimony of the prosecutrix as to the promise of marriage.

*Texas.*— Faulkner *v.* State, 53 Tex. Cr. 258, 109 S. W. 199 (holding that testimony of prosecutrix in response to a question whether defendant in his actions toward her appeared "affectionate or loving, kind, and true, as a true lover should" was admissible); Howe *v.* State, 51 Tex. Cr. App. 174, 102 S. W. 409.

See 43 Cent. Dig. tit. "Seduction," § 78.

**Cross-examination of prosecutrix.**—A defendant accused of seduction cannot complain of a refusal to permit the prosecutrix to answer, on cross-examination, whether she ever thought, from his words and conduct prior to her alleged seduction, that he desired to have connection with her, where he was permitted to inquire of her what his object and purpose were in going with her. State *v.* Reilly, 104 Iowa 13, 73 N. W. 356.

**51.** Weaver *v.* State, 142 Ala. 33, 39 So. 341 (holding that where prosecutrix testified that she knew defendant's handwriting, and that she had received certain letters from him through usual channels and knew them to be from defendant, and the contents of the letters tended to show the relations that existed between prosecutrix and defendant, and contained acknowledgments on his part that he had done wrong, and allusions to his previous promise to marry her, they were admissible, although written after the act of seduction); State *v.* Bennett, 137 Iowa 427, 110 N. W. 150 (holding that testimony of the prosecutrix that defendant wrote her in regard to breaking off illicit relations previously existing between them was admissible in connection with a letter from defendant, introduced in evidence, in which he stated he was ashamed of his conduct and promised to quit it once and for all); State *v.* Bell, 79 Iowa 117, 44 N. W. 244 (holding that letters, purporting to be from defendant, tending to show the relation between defendant and the prosecutrix, are admissible, where the prosecutrix and another witness testify that they are in defendant's handwriting, and a third witness testifies to having carried letters from defendant to prosecutrix, and answers from her to him); State *v.* King, 9 S. D. 628, 70 N. W. 1046 (holding that an unsigned typewritten letter, inclosed in an envelope, addressed to the prosecutrix, and postmarked at a place where defendant was then staying, asking prosecutrix to go to that place, and be treated by a physician, was properly admitted, it appearing that she was then pregnant, that defendant had previously given her medicine to relieve her, that she told no one except him of her condition, and that, when she complied with the request in said letter, she was taken in charge by an intimate friend of defendant).

**52.** Lewis *v.* People, 37 Mich. 518. And see State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

**53.** State *v.* Robertson, 121 N. C. 551, 28 S. E. 59. *Contra*, Pope *v.* State, 137 Ala. 56, 34 So. 840. See *supra*, III, B, 3, b, (IX).

**54.** Howe *v.* State, 51 Tex. Cr. 174, 102 S. W. 409, holding that the admission of the testimony of prosecutrix's mother that she welcomed accused to her home, and that he was treated well, was not error.

**55.** State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

But whether the prosecutrix had other men come to see her after the alleged seduction under promise of marriage has been held immaterial,[56] and it is generally immaterial that she kept company with another prior to her keeping company with defendant.[57] It is not error to refuse to allow the prosecutrix to be asked on cross-examination whether she had not, in a conversation with one of her lady friends, compared defendant's picture with that of another man, and said that she thought the latter's picture the nicer.[58]

(XI) *Defilement of Child in Care, Custody, or Employ of Accused.* On a prosecution under a statute for defiling a female in the care, custody, or employ of defendant it is proper to admit evidence of the relations between defendant and the female and any competent evidence tending to show or to disprove that he had intercourse with her,[59] including letters written or dictated by him,[60] but not letters written by his wife without his knowledge or approval.[61] Evidence that defendant committed or attempted to commit an abortion upon the female is admissible.[62] And evidence of continuation of illicit intercourse after termination of the employment of the female by defendant is admissible as tending to prove the offense charged.[63] But since consent of the female is no defense evidence of her reputation for chastity at the time of the alleged offense, or of specific acts of unchastity with others than defendant, is inadmissible.[64] Declarations of the female not constituting part of the *res gestæ* and not made in defendant's presence are mere hearsay and inadmissible.[65]

**c. Weight and Sufficiency of Evidence** — (I) *In General.* To authorize a conviction on a prosecution for seduction the evidence must be sufficient to establish beyond a reasonable doubt all the essential elements of the offense except

56. People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904.

57. In a prosecution for seduction the court refused to allow defendant to ask prosecutrix the questions: "You kept company with Clayton Jones prior to your keeping company with [defendant], didn't you?" and "When did you cease keeping company with Clayton Jones, if you ever did?" This was held proper, in the absence of any disclosure of the purpose of the inquiry. State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282.

58. State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

59. State *v.* Sibley, 131 Mo. 519, 33 S. W. 167.

60. State *v.* Sibley, 131 Mo. 519, 33 S. W. 167, holding that on trial of an indictment under Mo. Rev. St. (1889) § 3487, for defiling a female confided to one's care, where it was claimed that prosecutrix, defendant's stepdaughter, became pregnant through her intercourse with defendant, it was proper to admit letters from defendant's wife to prosecutrix and the person with whom she was staying during her pregnancy, which were dictated by defendant, containing advice as to what prosecutrix should do.

61. State *v.* Sibley, 131 Mo. 519, 33 S. W 167.

**Letter of defendant's wife discrediting her testimony.** In a prosecution for defiling a female servant by carnally knowing her, where defendant's wife testified that the girl, before leaving their house, admitted that she had had intercourse with another man, a letter written by the wife to the girl after she left, expressing the most cordial feelings toward the girl, was admissible to discredit the wife's evidence; and the fact that it might have tended to show the intimate relations between the girl and defendant's family could not have injured him, if considered by the jury for that purpose, since it was proved, and admitted by defendant, that the girl was confided to his care, within the meaning of Mo. Rev. St. (1879) § 1260, punishing the defiling of a female by any person to whose care such female is confided. State *v.* Terry, 106 Mo. 209, 17 S. W. 288.

62. State *v.* Kavanaugh, 133 Mo. 452, 33 S. W. 33, 34 S. W. 842.

63. State *v.* Young, 99 Mo. 284, 12 S. W. 642.

64. State *v.* Summar, 143 Mo. 220, 45 S. W. 254; State *v.* Sibley, 131 Mo. 519, 31 S. W. 1033, 33 S. W. 167. On a prosecution under Rev. St. (1889) § 3487, making it an offense for an employer to defile a girl under eighteen years of age while in his employ, defendant cannot show that the girl left his employ because he intercepted her in fulfilling an illicit engagement with another man, since the act of defilement constitutes the crime, without reference to the girl's character or consent. State *v.* Rogers, 108 Mo. 202, 18 S. W. 976.

65. State *v.* Sibley, 131 Mo. 519, 31 S. W. 1033, 33 S. W. 167, holding that where prosecutrix testified, on a prosecution for defiling a female confided to one's care, that after she became pregnant defendant gave her medicine which so affected her that once, while ironing, she lost her mind, and found herself out on the street, it was error to allow a witness for the state to testify that on that occasion prosecutrix repeatedly said: "Sibley [defendant] done it. I told Sibley it would not do. I

such as are presumed.[66] It must show that the prosecutrix was unmarried;[67]

am crazy — What is the matter with me?" defendant not being present at the time.

66. State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

**Evidence held insufficient** see State *v.* Thomas, 103 Iowa 748, 73 N. W. 474; State *v.* Bollerman, 92 Iowa 460, 61 N. W. 183; State *v.* Primm, 98 Mo. 368, 11 S. W. 732; Garlas *v.* State, 48 Tex. Cr. 449, 88 S. W. 345.

**Evidence held sufficient** see Hall *v.* State, 134 Ala. 90, 32 So. 750; Caldwell *v.* State, 73 Ark. 139, 83 S. W. 929, 108 Am. St. Rep. 28; People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; Washington *v.* State, 124 Ga 423, 52 S. E. 910; Hill *v.* State, 122 Ga. 166, 50 S. E. 57; Wilson *v.* State, 58 Ga. 328; Phillips *v.* State, 108 Ind. 406, 9 N. E. 345; State *v.* Drake, 128 Iowa 539, 105 N. W. 54; State *v.* Donovan, 128 Iowa 44, 102 N. W. 791; State *v.* Stolley, 121 Iowa 111, 96 N. W. 707; State *v.* Maxwell, 117 Iowa 482, 91 N. W. 772; State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325; State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713; State *v.* Knutson, 91 Iowa 549, 60 N. W. 129; State *v.* Timmens, 4 Minn. 325; State *v.* Fogg, 206 Mo. 696, 105 S. W. 618; State *v.* Meals, 184 Mo. 244, 83 S. W. 442; State *v.* Dent, 170 Mo. 398, 70 S. W. 881; State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Ring, 142 N. C. 596, 55 S. E. 194, 115 Am. St. Rep. 759; State *v.* Ayers, 8 S. D. 517, 67 N. W. 611; Howe *v.* State, 51 Tex. Cr. 174, 102 S. W. 409; Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822; Flick *v.* Com., 97 Va. 766, 34 S. E. 39; State *v.* Carter, 8 Wash. 272, 36 Pac. 29; Lybarger *v.* State, 2 Wash. 552, 27 Pac. 449; Reg. *v.* Walker, 5 Can. Cr. Cas. 465.

**Defilement of female under care or custody of accused.**— Evidence held sufficient see State *v.* Oakes, 202 Mo. 86, 100 S. W. 434. On a prosecution for defiling defendant's ward, the fact that prosecutrix testified that defendant always forced her does not render the evidence demurrable as showing another crime, where the circumstances testified to by her tend to show that force was not used. State *v.* Strattman, 100 Mo. 540, 13 S. W. 814.

**Venue.**— Evidence which does not show in what county the alleged seduction was accomplished will not support a verdict of guilty. State *v.* Carr, 60 Iowa 453, 15 N. W. 271. But on a trial for defiling a female minor committed to defendant's care, evidence that the first act was committed in a county other than that in which the indictment was preferred is no ground for demurrer to the evidence, where the act was also committed on several occasions in the latter county. State *v.* McClain, 137 Mo. 307, 38 S. W. 906.

**Construction of testimony of prosecutrix.**— Upon a trial for seduction, it will be presumed that the testimony of the prosecutrix will be given, as far as possible, with the purpose of shielding herself; and her language therefore should not receive a strained construction, in order to sustain a verdict of guilty. State *v.* Haven, 43 Iowa 181. But where it was apparent from the testimony of the prosecutrix that she yielded to defendant's solicitations, but she testified that she did not expressly consent to the act, it was held that the jury properly subordinated the literal terms to the substance of the evidence. People *v.* Wallace, 109 Cal. 611, 42 Pac. 159.

**Defendant's authorship of letters.**— On indictment for seduction, testimony that letters purporting to be from defendant were received by the prosecutrix, and that a third party carried letters from defendant to prosecutrix, in addition to that of experts that they are not all in the same handwriting, is sufficient to warrant an instruction that if defendant procured some other person to write the letters or any of them, and then sent them to prosecutrix as his own, their effect would be the same as if he had written them himself. State *v.* Bell, 79 Iowa 117, 44 N. W. 244.

67. *California.*— People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

*Iowa.*— State *v.* Carr, 60 Iowa 453, 15 N. W. 271; State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230.

*Kansas.*— State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074.

*Missouri.*— State *v.* Wheeler, 108 Mo. 658, 18 S. W. 924.

*Texas.*— Bailey *v.* State, 36 Tex. Cr. 540, 35 S. W. 185; Mesa *v.* State, 17 Tex. App. 395.

*Wisconsin.*— West *v.* State, 1 Wis. 209.

*Compare* Lewis *v.* People, 37 Mich. 518, where the court refused to reverse a conviction for seduction on the ground that the record did not show that the prosecutrix was unmarried, where there was nothing in the record to indicate that any claim was made below that she was married, and it did show that at the time of the seduction she was under the lawful age to marry.

**Direct and circumstantial evidence.**— It has been held that the fact that the prosecutrix was unmarried must be proved by direct evidence. People *v.* Krusick, 93 Cal. 74, 28 Pac. 794, holding that the fact that the prosecutrix was an "unmarried female," being a fact peculiarly within her own knowledge, must be proven directly and affirmatively, and the fact that some of the witnesses in their testimony referred to her as "girl," "young lady," and "Miss," and that she stated that defendant promised to marry her, or that he made arrangements to marry her, furnished no evidence to justify a finding that she was unmarried. But by the weight of authority the fact may be shown by circumstantial evidence. State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230 (holding that evidence that the prosecutrix lived with her father and bore his name, that she had received the addresses of defendant for more than three years, and that a marriage engagement existed between them when the crime was committed, was sufficient to warrant the jury in finding that the prosecutrix was unmarried); State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074 (holding that the fact that the woman was unmarried may be established by circumstances in evidence, and

that she was of previous chaste character, or of good repute for chastity, according to the statute, where there is evidence impeaching her character or reputation in this respect,[68] and in some states even in the absence of such evidence; [69] that defendant had sexual intercourse with her; [70] that there was a prom-

that she lived with her parents under her maiden name and received the attentions of defendant as a suitor are circumstances tending to prove the fact); People *v.* Kenyon, 5 Park. Cr. (N. Y.) 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177] (holding that where the prosecutrix testified that she was unmarried, and it appeared that she was sixteen years of age at the time of the alleged offense, and living with her mother, the fact that she was unmarried was *prima facie* shown).

68. Suther *v.* State, 118 Ala. 88, 24 So. 43; Munkers *v.* State, 87 Ala. 94, 6 So. 357; State *v.* Smith, 124 Iowa 334, 100 N. W. 40 (question for the jury); State *v.* Bryan, 34 Kan. 63, 8 Pac. 260; Garlas *v.* State, 48 Tex. Cr. 449, 88 S. W. 345; Gorzell *v.* State, 43 Tex. Cr. 82, 63 S. W. 126.

**Overcoming presumption.**— In some states there is a presumption of chastity (see *supra*, III, B, 3, a, (II)), which can only be overcome by a fair preponderance of the evidence. State *v.* Wells, 48 Iowa 671. To overcome the presumption of previous chastity defendant must show unchastity by preponderance of evidence. It must not be left in doubt. Wilhite *v.* State, 84 Ark. 67, 104 S. W. 531; State *v.* Hemm, 82 Iowa 609, 48 N. W. 971. On a trial for seduction, the previous want of chastity of the prosecutrix is defensive matter, and accused has the burden of proving it by a preponderance of the evidence, and where there is a reasonable doubt of his guilt on the whole case he is entitled to the benefit of it, but it is not proper to charge that the jury must be convinced beyond a reasonable doubt of the previous chastity of the prosecutrix to warrant a conviction. Wilhite *v.* State, *supra*. The presumption of the previous chastity of prosecutrix is not overcome by testimony of defendant that he had intercourse with her one week before the act of seduction testified to by prosecutrix occurred, since it is immaterial on what date the seduction was consummated. State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609. See also State *v.* Drake, 128 Iowa 539, 105 N. W. 54; State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713 (holding that evidence of prosecutrix's illicit relations with another after her intercourse with accused is insufficient to establish that previous to her connection with him she was not of chaste character); State *v.* McIntire, 89 Iowa 139, 56 N. W. 419 (holding that evidence that the prosecutrix allowed men to kiss her good-night and hug her did not indicate a want of chastity on her part to such an extent as to overcome a verdict of guilty); Boak *v.* State, 5 Iowa 430; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708; State *v.* Whitley, 141 N. C. 823, 53 S. E. 820 (holding that evidence that prosecutrix had before the alleged seduction permitted certain persons to take liberties with her person did not show actual incontinence, but was merely evidence to be considered in determining whether she was virtuous).

69. Norton *v.* State, 72 Miss. 128, 16 So. 264, 18 So. 916, 48 Am. St. Rep. 538; West *v.* State, 1 Wis. 209.

**Circumstantial evidence.**— Unchastity may be shown by circumstantial evidence. Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17; State *v.* Bowman, 45 Iowa 418.

**Reputation.**— Where the state has the burden of proving that the female was of previous chaste character, her reputation may be sufficient evidence of such character. *Ex p.* Vandiveer, 4 Cal. App. 650, 88 Pac. 993.

**Evidence held sufficient** see People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52 (holding that unchaste character previous to the alleged seduction is not shown by mere improprieties, or by intercourse subsequent thereto); State *v.* Kelley, 1 N. J. L. 94 (holding that it must be shown that the prosecutrix was not only in fact chaste, but also of good repute for chastity, which is sufficiently proved, unless overcome, by testimony of persons residing in her neighborhood that they never heard anything against her reputation for chastity).

**Evidence held insufficient** see State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

**Reformation** see Smith *v.* State, 118 Ala. 117, 24 So. 55; State *v.* Bennett, (Iowa 1907) 110 N. W. 150; State *v.* Buxton, 89 Iowa 573, 57 N. W. 417 (no evidence of reformation); State *v.* Gunagy, 84 Iowa 177, 50 N. W. 882 (reformation a question for the jury under the evidence); People *v.* Clark, 33 Mich. 112. Evidence that defendant had previously had intercourse with prosecutrix, but that she had reformed, and for a year had lived a virtuous life, when defendant, by promises of marriage, again induced her to yield to him, is sufficient to sustain a conviction. State *v.* Knutson, 91 Iowa 549, 60 N. W. 129. See *supra*, III, A, 4, b, (v).

70. **Evidence held sufficient** see State *v.* McIntire, 89 Iowa 139, 56 N. W. 419 (holding that the evidence is not rendered insufficient to sustain a conviction by the mere fact that the prosecutrix fixed as the date of the intercourse a day on which several other witnesses testified that defendant was not with her); Bailey *v.* State, 36 Tex. Cr. 540, 38 S. W. 185 (holding that evidence that after defendant had said he intended to have intercourse with the woman they registered at a hotel as man and wife and remained in the same room during the night sufficiently showed the fact of intercourse).

**Time of birth of child.**— The fact that a child was born within two hundred and thirty-eight days from the date of the alleged intercourse, or two hundred and fifty-eight days after the last catamenia, does not disprove the testimony of prosecutrix on a trial for

ise of marriage when this is required by the statute; and that she was induced to consent to the intercourse by such promise,[71] or by persuasion, or other means making a case of seduction under the statute.[72] Where the indictment is against a married man under the statute proof of his marriage in fact is essential, and it is not sufficient to prove cohabitation, acknowledgment, and reputation.[73]

(II) *Corroboration of Female.*[74] In a prosecution for seduction the testimony of the female alone, without corroboration by other evidence, is sufficient,

seduction, where the evidence showed that a developed child may be born within two hundred and sixty days from the last menstrual flow. State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158.

71. *Indiana.*— Stinehouse *v.* State, 47 Ind. 17.

*Minnesota.*— State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642.

*New York.*— Cook *v.* People, 2 Thomps. & C. 404.

*Pennsylvania.*— Rice *v.* Com., 100 Pa. St. 28; Com. *v.* Walton, 2 Brewst. 487.

*South Carolina.*— State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

*Texas.*— Garlas *v.* State, 48 Tex. Cr. 449, 88 S. W. 345; Barnes *v.* State, 37 Tex. Cr. 320, 39 S. W. 684.

**Evidence held sufficient** see People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911, 69 Am. St. Rep. 52; People *v.* Hough, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201; People *v.* Wallace, 109 Cal. 611, 42 Pac. 159 (need only be shown by circumstances sufficient to warrant the inference that sexual intercourse would not have been accomplished in the absence of such promise); Phillips *v.* State, 108 Ind. 406, 9 N. E. 345; State *v.* Drake, 128 Iowa 539, 105 N. W. 54; State *v.* Stolley, 121 Iowa 111, 96 N. W. 707; State *v.* McIntire, 89 Iowa 139, 56 N. W. 419; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642 (holding that the proof of such promise may be sufficient, although the particular words used are not stated; that it is enough if language was used which implied such a promise, and was intended to convey that meaning, and was in fact so understood by the prosecutrix); State *v.* Phillips, 185 Mo. 185, 83 S. W. 1080; State *v.* Meals, 184 Mo. 244, 83 S. W. 442; State *v.* Fisher, 162 Mo. 169, 62 S. W. 690; State *v.* Thornton, 108 Mo. 640, 18 S. W. 841; People *v.* Ryan, 63 N. Y. App. Div. 429, 71 N. Y. Suppl. 527; State *v.* Ring, 142 N. C. 596, 55 S. E. 194, 115 Am. St. Rep. 759 (holding that the prosecution need not show that defendant expressly promised the prosecutrix to marry her, if she would submit to his embraces, but it is sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to defendant the benefit of any reasonable doubt); State *v.* Ayers, 8 S. D. 517, 67 N. W. 611; Bailey *v.* State, 36 Tex. Cr. 540, 38 S. W. 185; Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822; Reg. *v.* Walker, 5 Can. Cr. Cas. 465.

**Evidence held insufficient** see Neary *v.* People, 115 Ill. App. 157; State *v.* Bollerman, 92 Iowa 460, 61 N. W. 183; Rice *v.* Com., 102 Pa. St. 408, holding that the previous promise cannot be proved by evidence of attentions, of expressions of contrition for the seduction, and by a promise made after the seduction to marry the girl after a time.

**An admission by defendant,** in a prosecution for seduction under promise of marriage, that he had sexual intercourse with complainant is not an admission of the alleged seduction. People *v.* Gumaer, 4 N. Y. App. Div. 412, 39 N. Y. Suppl. 326. Testimony of a conversation between defendant and a third person, in the course of which defendant said that "he would give $200 to settle it, and wouldn't give no more, that he was guilty of the crime," was no evidence of a promise of marriage. The admission must be construed to refer to the illicit intercourse with prosecutrix. Rice *v.* Com., 102 Pa. St. 408.

72. State *v.* Hamann, 109 Iowa 646, 80 N. W. 1064; State *v.* Crawford, 34 Iowa 40.

**Evidence held sufficient** see Wilson *v.* State, 58 Ga. 328; State *v.* Donovan, 128 Iowa 44, 102 N. W. 791; State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325 (holding that artifice, deception, and false promise of marriage was sufficiently shown where prosecutrix testified that prior to the time the crime was committed defendant had paid her attentions, and on the occasion, while alone with her, after obtaining her consent to marry him, he asked to have intercourse with her, which she at first refused, but to which she reluctantly yielded on his saying that they were engaged, and "it was all right"); State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713; Flick *v.* Com., 97 Va. 766, 34 S. E. 39 (holding that a conviction was sustained by the evidence where it showed that defendant, a married man, had been in the employ of the father of the prosecutrix for many years, and was almost continually in the company of prosecutrix, and that he had cared for her as a child, and fondled her continuously until she arrived at sixteen years of age, when he induced her to submit to sexual intercourse); State *v.* Carter, 8 Wash. 272, 36 Pac. 29 (holding that where the inducements for sexual intercourse held out by a man to a girl of twelve years of age consisted in kissing and fondling her and feeling her person, and in representations to her that it was not wrong to have sexual intercourse, and that he would not hurt her, these representations being made and his conduct occurring upon a number of occasions when he attempted to have intercourse with her without accomplishing penetration, and also thereafter when he succeeded, they were sufficient, in view of the girl's tender age, to constitute the offense of seduction).

73. West *v.* State, 1 Wis. 209.

74. See also Rape, 33 Cyc. 1495.

in the absence of a statute, to warrant a conviction.[75] In some states, however, it is provided by statute that no conviction shall be had on the uncorroborated or unsupported testimony of the female alleged to have been seduced,[76] or, in

**75.** People *v.* Wade, 118 Cal. 672, 50 Pac. 841; Washington *v.* State, 124 Ga. 423, 52 S. E. 910. And see State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

**In California,** as a crime (Pen. Code, § 268), seduction is not within Pen. Code, § 1108, providing that, on a trial for enticing away an unmarried female of previous chaste character for the purpose of prostitution, defendant cannot be convicted upon the testimony of the woman unless she is corroborated by other evidence. People *v.* Wade, 118 Cal. 672, 50 Pac. 841.

**Not an accomplice.**— In a prosecution for seduction, the prosecutrix is not an accomplice within Pen. Code (1895), § 991, requiring corroboration of the testimony of an accomplice in order to support a conviction. Washington *v.* State, 124 Ga. 423, 52 S. E. 910.

**76.** Ala. Code (1907), § 7776; Sandels & H. Dig. Ark. § 1900; Minn. Rev. Laws (1905), § 4931; Miss. Code (1906), § 1372; N. J. Gen. St. p. 1086, § 204; N. Y. Pen. Laws, § 2177; Va. Code (1904), § 3679. And see the following cases:

*Alabama.*— Suther *v.* State, 118 Ala. 88, 24 So. 43 (holding that Code (1896), § 5503, requiring evidence corroborative of the testimony of prosecutrix in a seduction case, is satisfied by corroboratory evidence as to a material fact which satisfies the jury that the woman is worthy of credit); Wilson *v.* State, 73 Ala. 527; Cunningham *v.* State, 73 Ala. 51 (holding that under the provision that no person shall be convicted of seduction on the uncorroborated testimony of the female, corroboration as to the promise of marriage, where seduction under promise of marriage is alleged, may be sufficient to authorize conviction).

*Arkansas.*— Rucker *v.* State, 77 Ark. 23, 90 S. W. 151; Carrens *v.* State, 77 Ark. 16, 91 S. W. 30 (holding that under the provision that no person shall be convicted of seduction upon testimony of the female, unless the same be corroborated by other evidence, the evidence of prosecutrix must be corroborated by other outside evidence, both as to the promise of marriage and as to the sexual intercourse); Burnett *v.* State, 76 Ark. 295, 88 S. W. 956, 113 Am. St. Rep. 94; Polk *v.* State, 40 Ark. 482, 48 Am. Rep. 17.

*Indian Territory.*— Tedford *v.* U. S., 7 Indian Terr. 254, 104 S. W. 608.

*Minnesota.*— State *v.* Timmens, 4 Minn. 325, holding that under such a statute the female must be corroborated in the material points of the promise to marry, the seduction under such promise, and her previous chaste character. Under the rule as established in Minnesota, in a prosecution for seduction under a promise of marriage, the burden of proof rests upon the state to prove the previous chaste character of the prosecutrix, and her testimony on the subject must be corroborated by other evidence. State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656.

*Mississippi.*— Ferguson *v.* State, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492, holding that the female must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse, but the corroborating evidence need not support all the necessary elements of the crime.

*Nebraska.*— Russell *v.* State, 77 Nebr. 519, 110 N. W. 380, holding that the requirement of the statute that the evidence of prosecuting witness must be corroborated relates to both illicit intercourse and promise of marriage, and existence of one of these does not necessarily prove the existence of the other, nor furnish the corroboration required by statute.

*New Jersey.*— Zabriskie *v.* State, 43 N. J. L. 640, 39 Am. Rep. 610, holding that under a statute making it indictable to seduce a female of good repute for chastity, and requiring the female to be corroborated to the extent required in an indictment for perjury, the corroborating circumstances must be something inconsistent with the truth of defendant's denial; and that courtship, unless of such a character that the jury might infer from it a promise of marriage, is not corroborative, in a legal sense.

*New York.*— In a prosecution under Pen. Code, § 284, for seduction under promise of marriage, the female must be corroborated as to the promise of marriage and as to the sexual intercourse, but corroboration as to the fact that prosecutrix is "an unmarried female of previous chaste character" is unnecessary, this allegation being simply descriptive of the person whom it was the purpose of the statute to protect. People *v.* Kearney, 110 N. Y. 188, 17 N. E. 736 [*distinguishing* People *v.* Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. Rep. 236]; Armstrong *v.* People, 70 N. Y. 38; Boyce *v.* People, 55 N. Y. 644; People *v.* Orr, 92 Hun 199, 36 N. Y. Suppl. 398 [*affirmed* in 149 N. Y. 616, 44 N. E. 1127]; People *v.* Lomax, 6 Abb. Pr. 139; People *v.* Hine, 2 Edm. Sel. Cas. 110; People *v.* Kenyon, 5 Park. Cr. 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177]; Crozier *v.* People, 1 Park. Cr. 453.

*North Carolina.*— State *v.* Raynor, 145 N. C. 472, 59 S. E. 344; State *v.* Ferguson, 107 N. C. 841, 12 S. E. 574, holding that, under Laws (1885), c. 248, making it an offense to seduce an "innocent and virtuous" woman under promise of marriage, and providing "that the unsupported testimony of the woman shall not be sufficient to convict," the additional evidence required must not be confined to the act of sexual intercourse, but must extend to its inducement by a promise of marriage.

*Oklahoma.*— Under St. (1893) § 5211, providing that, on a trial for having under

some states, unless her testimony is corroborated by other evidence tending to connect defendant with the commission of the offense,[77] or, in other states, unless

promise of marriage seduced an unmarried female of previous chaste character, the accused cannot be convicted on the testimony of the person injured, unless she is corroborated with other evidence, the female is only required to be corroborated as to the promise of marriage and illicit intercourse, and not as to being unmarried and of previous chaste character. Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837.

*South Carolina.*—State *v.* Turner, 82 S. C. 278, 64 S. E. 424.

*Virginia.*—Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

See 43 Cent. Dig. tit. "Seduction," § 83 *et seq.*

**Corroboration held sufficient** see Munkers *v.* State, 87 Ala. 94, 97, 6 So. 357; Wilson *v.* State, 73 Ala. 527; Cooper *v.* State, 86 Ark. 30, 109 S. W. 1023; Wilhite *v.* State, 84 Ark. 67, 104 S. W. 531 (holding that where the accused admitted the promise of marriage and the sexual intercourse with the prosecutrix, a charge that no other corroboration of the prosecutrix was necessary to prove the promise of marriage and the sexual intercourse was proper); Lasater *v.* State, 77 Ark. 468, 94 S. W. 59; Rucker *v.* State, 77 Ark. 23, 90 S. W. 151; State *v.* Brinkhaus, 34 Minn. 285, 25 N. W. 642 (as to previous chaste character); State *v.* Timmens, 4 Minn. 325; State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866; Armstrong *v.* People, 70 N. Y. 38 (holding that the provision that no conviction for seduction shall be had on the unsupported testimony of the female seduced is satisfied, as to the promise of marriage, by proof of circumstances which usually attend an engagement to marry, such as exclusive attention to the female by defendant, and the seeking and keeping her society in preference to that of other women); People *v.* Gumaer, 80 Hun (N. Y.) 78, 30 N. Y. Suppl. 17 (holding that, on a trial for seduction under a promise of marriage, evidence of defendant's attentions to prosecutrix in the character of a suitor is a sufficient corroboration of the testimony of prosecutrix); People *v.* Kearney, 47 Hun (N. Y.) 129 [*reversed* on other grounds in 110 N. Y. 188, 17 N. E. 736]; People *v.* Kenyon, 5 Park. Cr. (N. Y.) 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177]; State *v.* Raynor, 145 N. C. 472, 59 S. E. 344 (holding that where the mother of prosecutrix testified that defendant admitted in her hearing the promise and the seduction, the testimony of prosecutrix is sufficiently corroborated); Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683; Rex *v.* Daun, 11 Can. Cr. Cas. 244, 12 Ont. L. Rep. 227.

**Insufficient corroboration** see Cooper *v.* State, 90 Ala. 641, 8 So. 821; Carrens *v.* State, 77 Ark. 16, 91 S. W. 30; La Rosae *v.* State, 132 Ind. 219, 31 N. E. 798; Russell *v.* State, 77 Nebr. 519, 110 N. W. 380 (holding that the requirement of the statute that the evidence of prosecuting witness must be corroborated relates to both illicit intercourse and promise of marriage, and existence of one of these does not necessarily prove the existence of the other, nor furnish the corroboration required by statute); Reg. *v.* Vahey, 2 Can. Cr. Cas. 258 (holding that evidence of the girl's pregnancy, and of her having been employed in domestic service at defendant's residence, and of facts showing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by Cr. Code, § 684).

**Evidence supporting immaterial facts only** is not sufficient. Munkers *v.* State, 87 Ala. 94, 6 So. 357; Crozier *v.* People, 1 Park. Cr. (N. Y.) 453.

77. Iowa Code (1897), § 5488; S. D. Comp. Laws, § 7386; Tex. Code Cr. Proc. art. 769; Can. Cr. Code, § 684. And see State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708; Wisdom *v.* State, 45 Tex. Cr. 215, 75 S. W. 22; Creighton *v.* State, (Tex. Cr. App. 1901) 61 S. W. 492; McCullar *v.* State, 36 Tex. Cr. 213, 36 S. W. 585, 61 Am. St. Rep. 847; Reg. *v.* Wyse, 1 Can. Cr. Cas. 6.

**Construction of statute.**—The corroboration required by the statute must be not only as to the debauching, but also as to the seductive arts. State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609. A conviction cannot be sustained where the evidence of the prosecutrix is not corroborated by facts tending to connect defendant with the offense. State *v.* Crawford, 34 Iowa 40. And see Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708 (holding that the corroborative testimony required by the statute need not be of a character that goes directly to the commission of the offense, but should be such as will tend to strengthen and corroborate the testimony of the injured person, and to point out the defendant as having committed the offense); State *v.* King, 9 S. D. 628, 70 N. W. 1046 (holding that under Comp. Laws, § 7386, requiring the testimony of the prosecutrix in cases of seduction under promise of marriage to be corroborated by other evidence "tending to connect defendant with the commission of the offense," the testimony of the prosecutrix that such an offense was committed need not be corroborated); Gorzell *v.* State, 43 Tex. Cr. 82, 63 S. W. 126 (holding that the fact that defendant had carnal intercourse with the prosecutrix is a vital issue in the case; and to obtain a legal conviction she must be corroborated upon this point).

**Corroboration held sufficient** see State *v.* Mulholland, 115 Iowa 170, 88 N. W. 325; State *v.* Wycoff, 113 Iowa 670, 83 N. W. 713; State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669 (holding that the fact that the parties kept company, and acted as lovers

she is corroborated as to the promise of marriage.[78] The statute does not require

usually do, and other like circumstances, are sufficient corroboration of the evidence of the prosecutrix required by statute); State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158; State *v.* Bradbury, 92 Iowa 512, 61 N. W. 192 (unsigned letters of defendant); State *v.* Knutson, 91 Iowa 549, 60 N. W. 129; State *v.* Baldoser, 88 Iowa 55, 55 N. W. 97; State *v.* Smith, 84 Iowa 522, 51 N. W. 24 (holding that direct corroborative evidence of the seductive arts or promises to obtain intercourse is not required, nor need the corroboration necessarily be as to all the elements of the offense; and where the testimony of the prosecutrix shows the offense, and to connect defendant therewith she is corroborated by witnesses showing intimacy and courtship between the parties, as well as actual intercourse, the case is for the jury, and it is error to direct a verdict for defendant); State *v.* Bell, 79 Iowa 117, 44 N. W. 244 (holding that letters received by the prosecutrix, purporting to be from defendant, in addition to facts showing intimacy, courtship, etc., will amount to such a corroboration of the testimony of the prosecutrix as is required by the statute); State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202; State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230; State *v.* Wells, 48 Iowa 671; State *v.* Ayers, 8 S. D. 517, 67 N. W. 611; Faulkner *v.* State, 53 Tex. Cr. 258, 109 S. W. 199; Creighton *v.* State, (Tex. Cr. App. 1901) 61 S. W. 492; Anderson *v.* State, 39 Tex. Cr. 83, 45 S. W. 15.

**Admissions of defendant** are sufficient corroboration of the testimony of the female. Reg *v.* Wyse, 1 Can. Cr. Cas. 6. And see *infra*, note 78.

**Insufficient corroboration** see State *v.* Dolan, 132 Iowa 196, 109 N. W. 609; State *v.* Kissock, 111 Iowa 690, 83 N. W. 724 (holding that where defendant had not known the prosecutrix prior to the night of the alleged seduction, and never met her but twice afterward, evidence that he accompanied her to her home from a dance on that night, a distance of six or seven miles, and stated to others before leaving that he intended to seduce her, was not sufficient corroboration to support an indictment for seduction); State *v.* Burns, 110 Iowa 745, 82 N. W. 325; State *v.* Enke, 85 Iowa 35, 51 N. W. 1146; State *v.* Richards, 72 Iowa 17, 33 N. W. 342; State *v.* Araah, 55 Iowa 258, 7 N. W. 601; State *v.* Crawford, 34 Iowa 40; State *v.* Tulley, 18 Iowa 88; Fine *v.* State, 45 Tex. Cr. 290, 77 S. W. 806 (holding that evidence of continuous association of defendant and prosecutrix for two years is not alone sufficient corroboration of her testimony as to their engagement, on a prosecution for seduction); Barnard *v.* State, (Tex. Cr. App. 1903) 76 S. W. 475; Sledge *v.* State, (Tex. Cr. App. 1901) 63 S. W. 317; Spenrath *v.* State, (Tex. Cr. App. 1898) 48 S. W. 192; Snodgrass *v.* State, (Tex. Cr. App. 1895) 31 S. W. 366.

**The birth of a child** to the prosecutrix as a result of the alleged intercourse is not corroborative evidence of the alleged seduction by defendant. State *v.* Kissock, 111 Iowa 69, 83 N. W. 724. Proof of the birth of a child, while evidence of seduction, does not tend to connect defendant with the act of seduction. State *v.* Dolan, 132 Iowa 196, 109 N. W. 609.

**Opportunity.**— Evidence that defendant had opportunity to employ arts, deception, and false promises is insufficient to meet the requirement that there shall be corroborating evidence tending to connect him with the offense charged. State *v.* Araah, 55 Iowa 258, 7 N. W. 601. See also State *v.* Burns, 110 Iowa 745, 82 N. W. 325; State *v.* Smith, 54 Iowa 743, 7 N. W. 402 (holding that where there was no other evidence corroborative of that of the prosecuting witness on a trial for seduction than that of defendant's opportunities to seduce, afforded by the witness' employment as a servant in the family of defendant's father, a conviction should be set aside); State *v.* Painter, 50 Iowa 317.

78. Kan. Gen. St. (1905) § 2112; Mo. Annot. St. (1906) § 2631; 1 Purdon Dig. Pa. 1010. And see State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074; State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; Rice *v.* Com., 100 Pa. St. 28.

**Construction of statute.**— Under the Missouri statute providing that there shall be no conviction of seduction unless the female is corroborated as to the promise of marriage, she need be corroborated only as to such promise. The other facts constituting the offense may be proven by her testimony alone or by any competent testimony. State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; State *v.* Stone, 106 Mo. 1, 16 S. W. 890; State *v.* Hill, 91 Mo. 423, 4 S. W. 121; State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235.

**Corroboration held sufficient** see State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074; State *v.* Phillips, 185 Mo. 185, 83 S. W. 1080 (holding that on a prosecution for seduction, testimony of a witness that defendant told him that he had promised prosecutrix to marry her was a sufficient corroboration of the marriage promise); State *v.* Davis, 141 Mo. 522, 42 S. W. 1083; State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; State *v.* Hill, 91 Mo. 423, 4 S. W. 121.

**Insufficient corroboration** see State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511; Rice *v.* Com., 102 Pa. St. 408 (holding that on a prosecution for seduction under promise of marriage proof of such mere social attentions upon the part of defendant to the prosecutrix, as accompanying her from church, calling upon her at the house of her parents, and there waiting upon her now and then for two years, is not sufficient evidence to corroborate the prosecutrix's testimony to the effect that a promise of marriage was made to her, and will not warrant the jury in finding that fact in the affirmative); Com. *v.* McCarty, 4 Pa. L. J. 136 (holding that attentions paid by defendant to

the testimony of another witness, or direct and positive evidence, but the corroborating evidence may be supplied as well by facts and circumstances surrounding the transaction and otherwise established in the case.[79] Nor need the corroboration be of such force as would prove the facts independently of the female's testimony.[80] Where there is some testimony of other witnesses or other evidence supporting testimony on the material questions in the case, it is for the jury to determine whether she is sufficiently corroborated.[81] A fact testified to only by the female is not sufficient to corroborate her;[82] nor can she

prosecutrix are not sufficient corroboration of her testimony to the promise of marriage where his visits are only occasional, and she was visited by others under similar circumstances).

**Evidence of an admission of defendant** that he had promised to marry prosecutrix is corroborative. State *v.* Sublett, 191 Mo. 163, 90 S. W. 374.

**79.** *Arkansas.*— Cooper *v.* State, 86 Ark. 30, 109 S. W. 1023.

*Iowa.*— State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669; State *v.* Hayes, 105 Iowa 82, 74 N. W. 757; State *v.* Smith, 84 Iowa 522, 51 N. W. 24; State *v.* Bell, 79 Iowa 117, 44 N. W. 244; State *v.* McClintic, 73 Iowa 663, 35 N. W. 696; State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006.

*Kansas.*— State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074.

*Minnesota.*— State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; State *v.* Timmens, 4 Minn. 325.

*Missouri.*— State *v.* Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63, holding that the promise of marriage may be corroborated by circumstances alone.

*Nebraska.*— The circumstances relied on as corroborating the evidence of prosecuting witness, as to the promise of marriage, must point so plainly to the proof of her testimony as to equal testimony of a disinterested witness. Russell *v.* State, 77 Nebr. 519, 110 N. W. 380.

*New York.*— Boyce *v.* People, 55 N. Y. 644 (holding that the provision of the statute that no conviction shall be had on the testimony of the female, unsupported by other evidence, does not require direct or positive additional evidence of any of the material facts constituting the offense; that the statute is satisfied if the prosecutrix is supported by such evidence as in the nature of things the case is susceptible of, that is, circumstances ordinarily proved in support of an allegation of mutual promises to marry, such as attentions, correspondence, frequent visits, and familiarities, and other circumstances tending to prove the material facts, and to satisfy the jury that the prosecutrix is worthy of credit); People *v.* Kenyon, 5 Park. Cr. 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177].

*Oklahoma.*— Harvey *v.* Territory, 11 Okla. 156, 65 Pac. 837, holding that the female is not required to be corroborated by direct and positive proof of facts independent of her testimony, but only as to such facts and circumstances as usually form the concomitants of the main fact sought to be established, which facts should be sufficiently strong within themselves, and pertinent in their bearing on the case, to satisfy the jury of the truthfulness of the prosecutrix in her evidence on the principal facts.

*Texas.*—Creighton *v.* State, (Cr. App. 1901) 61 S. W. 492 (holding that on a prosecution for seduction the testimony of the prosecutrix as to the promise of marriage may be corroborated by circumstantial evidence); Wright *v.* State, 31 Tex. Cr. 354, 20 S. W. 756, 37 Am. St. Rep. 822.

**80.** State *v.* Timmens, 4 Minn. 325, holding that the corroboration need only amount to proof of those circumstances usually concomitants of the main facts, and which are sufficiently strong and pertinent to satisfy the jury of the truthfulness of the witness in her testimony on the principal facts.

**81.** *Indian Territory.*— Tedford *v.* U. S., 7 Indian Terr. 254, 104 S. W. 608.

*Kansas.*— State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074.

*Minnesota.*— State *v.* Lockerby, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656.

*New Jersey.*— State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866.

*New York.*— Crandall *v.* People, 2 Lans. 309; People *v.* Kenyon, 5 Park. Cr. 254 [*affirmed* in 26 N. Y. 203, 84 Am. Dec. 177].

**82.** State *v.* Kingsley, 39 Iowa 439. It is error for the court to charge that the prosecutrix is sufficiently corroborated "if defendant, on being informed by her that she was pregnant, advised her to procure an abortion," where the prosecutrix is the only witness who testifies to such fact. State *v.* Enke, 85 Iowa 35, 51 N. W. 1146. Although evidence of circumstances which usually accompany an engagement are sufficient supporting evidence of a promise of marriage, the existence of such circumstances must be shown by other testimony than that of the woman herself. State *v.* McCaskey, 104 Mo. 644, 16 S. W. 511. The additional evidence required to sustain a conviction of seduction under promise of marriage must be such as does not emanate from the mouth of the seduced woman, and must not rest wholly upon her credibility, and must be such as strengthens and corroborates her testimony. Mills *v.* Com., 93 Va. 815, 22 S. E. 863.

**Letters of defendant.**— Where, in a prosecution for seduction, letters alleged to have been written by defendant to prosecutrix were not identified or proved to be the letters of defendant, except by prosecutrix's testimony, they did not afford evidence corroborating prosecutrix's testimony. Carrens *v.* State, 77 Ark. 16, 91 S. W. 30.

be corroborated by evidence of her acts or declarations subsequent to the offense.[83]

**4. Trial — a. Conduct of Trial.**[84] On a trial for seduction under promise of marriage where by statute the previous good repute of the prosecutrix is made an element of the offense, such previous good repute may be shown by the state at the outset of the case.[85] Allowing the prosecutrix to repeat her testimony is within the discretion of the trial court.[86] It is not error to permit prosecutrix's child to be brought before the jury and referred to by the district attorney as "this child," in their presence;[87] but if such child is taken to the witness' stand by the prosecutrix by direction of the prosecuting attorney solely for the purpose of exhibiting it to the jury and of exciting prejudice against defendant, it is sufficient ground for a new trial.[88] It is not error to permit prosecutrix and her mother to sit within the bar of the court during the argument of counsel to the jury.[89] Where by statute the prosecution may be stopped by an offer of marriage before arraignment and pleading, it has been held that the offer comes too late, if made during the progress of the trial.[90]

**b. Summary Trial.** In some jurisdictions there is a statute allowing defendant in a prosecution for seduction to elect to be tried summarily. Under such a statute defendant must be given an opportunity to elect if the charge is amended after an election so as to prefer a new charge.[91]

**c. Questions For Court and Jury.**[92] The question as to the exact amount or kind of seductive arts or promises necessary to establish the offense of seduction, under the statute, must be determined by the jury in view of the peculiar circumstances of each case, together with the condition in life, advantages, age, and intelligence of the parties.[93] The question as to the previous character for chastity

83. Barnard *v.* State, (Tex. Cr. App. 1903) 6 S. W. 475. Evidence that the prosecutrix got a dress ready for her marriage is not sufficient corroboration. Cooper *v.* State, 90 Ala. 641, 8 So. 821. Nor is the report by prosecutrix to her mother of her seduction, and facts in connection therewith, corroborative evidence within the statute requiring her evidence to be corroborated. Snodgrass *v.* State, (Tex. Cr. App. 1895) 31 S. W. 366. *Compare*, however, State *v.* Timmens, 4 Minn. 325, holding that on a prosecution for seduction under promise of marriage, the consultations of the female with her parents concerning her marriage, and her preparations for the same, are in corroboration of her testimony as to the promise.

84. See CRIMINAL LAW, 12 Cyc. 519 *et seq.*

85. State *v.* Hill, 91 Mo. 423, 4 S. W. 121.

86. State *v.* Raynor, 145 N. C. 472, 59 S. E. 344.

87. People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904. See also State *v.* Fogg, 206 Mo. 696, 105 S. W. 618, holding that the fact that the prosecutrix in a seduction case had her child in the court-room during the trial, took it with her to the witness' stand, and held it while testifying was not reversible error.

88. State *v.* Carter, 8 Wash. 272, 36 Pac. 29.

89. State *v.* Whitworth, 126 Mo. 573, 29 S. W. 595.

90. Jinks *v.* State, 114 Ga. 430, 40 S. E. 320. *Compare infra*, III, B, 5.

91. Rex *v.* Lacelle, 10 Can. Cr. Cas. 229, 11 Ont. L. Rep. 74. In this case a prisoner was indicted before a county judge charged under section 181 of the criminal code with having on the 9th of January, 1905, seduced a girl of or above the age of fourteen and under that of sixteen, of, as alleged, previously chaste character, upon which he elected, under section 767 of the code, to be tried summarily, but on the evidence disclosing a connection with her six days previously at another place, the charge was amended by setting up the offense as having been committed on such prior date, and without giving the prisoner the right of electing whether or not he would be tried summarily on such amended charge, he was tried thereon and convicted. It was held that the conviction could not be supported, as the offense could only be committed once, namely, on the first occasion on which the connection took place, so that the date was material to the charge, and while an amendment could be made substituting the prior date, which was in effect preferring a new charge based on a different transaction, the prisoner should have been given the opportunity of electing under section 767 how he would be tried thereon.

92. Corroboration of female see *supra*, III, B, 3, c, (II).

93. State *v.* Higdon, 32 Iowa 262; People *v.* Van Alstyne, 78 Hun (N. Y.) 509, 29 N. Y. Suppl. 542 [*reversed* on other grounds in 144 N. Y. 361, 39 N. E. 343], holding that, on an indictment for seduction, the prosecutrix having testified that defendant said he would marry her if she would submit to his desires; that he said "if he got me in the family way he would marry me"; and that she yielded on his promise to marry her, that the question whether the conditional promise to marry

of the prosecutrix is one of fact to be determined by the jury,[94] as well as whether the presumption of chastity is overcome by defendant's evidence,[95] and whether the prosecutrix, having previously fallen from virtue, had reformed.[96] But it is for the court to determine the meaning of the words "virtuous" female, "chaste character," etc., used in the statute.[97] The meaning of such words as "seduce," "prostitution," and the like are of law for the court, while the jury deduces the facts from the evidence.[98] The weight and credit to be given to the testimony of the prosecutrix are questions exclusively for the jury.[99] It is also for the jury to determine upon all the evidence whether the intercourse was the result of force or seduction.[1]

**d. Instructions — (I) *In General.*** In prosecutions for seduction the court should instruct the jury upon the law as applicable to all the facts and circumstances disclosed by the evidence and the elements necessary to constitute the offense under the statute.[2] A definition of the crime should be given to the jury,

qualified the promise which preceded it was a question for the jury.

**94.** State *v.* Stolley, 121 Iowa 111, 96 N. W. 707 (holding that where it appears that prosecutrix permitted defendant to take liberties with her person by reason of love and affection and promise of marriage, and illicit intercourse resulted, induced by passion thus aroused, it is a question for the jury whether there was prior unchastity, such as to prevent the intercourse constituting seduction); State *v.* Gunagy, 84 Iowa 177, 50 N. W. 882; State *v.* Carron, 18 Iowa 372, 87 Am. Dec. 401; People *v.* Jensen, 66 Mich. 711, 33 N. W. 811.

**95.** State *v.* Hemm, 82 Iowa 609, 48 N. W. 971.

**96.** State *v.* Bennett, (Iowa 1907) 110 N. W. 150.

**97.** McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856; Woodard *v.* State, 5 Ga. App. 447, 63 S. E. 573.

**98.** McTyier *v.* State, 91 Ga. 254, 18 S. E. 140; O'Neill *v.* State, 85 Ga. 383, 11 S. E. 856; Carpenter *v.* People, 8 Barb. (N. Y.) 603.

**99.** State *v.* Bradbury, 92 Iowa 512, 61 N. W. 192 (holding that where the prosecutrix has made an affidavit that defendant did not seduce her, and on the trial she testifies that she was induced to make the affidavit by threats and promises made by defendant, the question of her veracity is for the jury); People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863.

**1.** Knight *v.* State, 147 Ala. 93, 41 So. 850.

**2.** Lasater *v.* State, 77 Ark. 468, 94 S. W. 59 (holding that in a prosecution for seduction under promise of marriage, an instruction that, in order to convict, the jury must not only find that there was an express promise of marriage, but that prosecutrix requested defendant to keep his promise, and that he wilfully refused, was erroneous; it being defendant's duty to keep such promise without a request); Jones *v.* State, 90 Ga. 616, 16 S. E. 380 (holding that the court properly charged that, if the jury believed that defendant and the prosecutrix had sexual intercourse in the county within four years prior to the time that the indictment was found, and that at the time the sexual intercourse was first had between them prosecutrix had never had sexual intercourse with man; that they both were unmarried at the time; and that she was induced to yield, either readily or reluctantly, to defendant, from persuasion and promises of marriage, and allow him to have carnal knowledge of her, as a consequence of persuasion or promises of marriage, they should find the prisoner guilty of seduction); Howe *v.* State, 51 Tex. Cr. 174, 102 S. W. 409 (holding that instructions on a trial for seduction that, to constitute seduction, it must appear that the carnal intercourse was accomplished by means of a prior promise to marry prosecutrix; that she is an accomplice; that defendant cannot be convicted on her testimony unless corroborated; that, if defendant seduced prosecutrix and obtained carnal knowledge of her by means of a prior promise of marriage to her, he is guilty, and that, if he had carnal knowledge of prosecutrix at a time when he was not engaged to marry her, he is not guilty — correctly submits the issues to the jury); Gorzell *v.* State, 43 Tex. Cr. 82, 63 S. W. 126 (holding that where there is evidence that the prosecuting witness was not a chaste woman, it is error, in a trial for seduction, to fail to define the term "seduction" in charging the jury). An instruction that seduction means an enticement of a woman on the part of a man to surrender her chastity by means of some art, violence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated, was not open to the objection that it made a deception, influence, art, or other promise sufficient to constitute the offense, regardless of the character of the deception or promise, and because under the laws of Texas the offense of seduction consists of a woman surrendering her virtue by reason of a promise of marriage. Faulkner *v.* State, 53 Tex. Cr. 258, 109 S. W. 199.

**Offer to marry.** — Under an indictment for seduction it is error to instruct that the burden of showing defendant's subsequent refusal to marry the prosecutrix is upon the state, since an offer of marriage after seduction is not a bar to the prosecution, but

and a failure to do so is reversible error,[3] especially when such an instruction is requested by defendant, where the prosecutrix dies before trial, and the evidence is conflicting at the trial;[4] and the court in instructing on the essentials of the offense must not omit the element of seduction.[5] Such or like omissions, however, from an instruction defining seduction may be cured by proper statements in other parts of the charge.[6] Where the court in charging the jury refers to the prosecutrix, who is an adult, as "the girl,"[7] or uses in the instructions the word "defendant" for "prosecutrix," where the context shows that it is a clerical error not calculated to mislead the jury,[8] while objectionable, has been held not to be reversible error. Since the exact date of the offense is immaterial, an instruction that, if the jury had a reasonable doubt as to whether defendant was with the prosecutrix on the day on which the crime was alleged to have been committed, defendant should be acquitted, is properly refused.[9] Where a requested charge in a prosecution for seduction is refused, but the substance of such charge is embodied in another instruction, the error, if any, is cured.[10]

(II) *Reading Statute to Jury.* It is proper for the court to read to the jury the statute defining the offense, provided, if any of the means named therein by which the offense may be accomplished are omitted in the indictment, that their attention is directed to the fact, and that the state relies on such as are set out in the indictment and sustained by the evidence.[11]

(III) *Chastity or Repute of Prosecutrix.* In those jurisdictions in which the chastity of the prosecutrix is presumed it has been held that an instruction that the jury must find from the evidence, beyond a reasonable doubt, that the prosecutrix was of previous chaste character, as an element of the offense, is misleading, since the chastity of the prosecutrix is presumed, and the burden of disproving it is on the accused,[12] and that defendant is not entitled to a further charge that

only an actual marriage. State *v.* Mackey, 82 Iowa 393, 48 N. W. 918.

3. Sledge *v.* State, (Tex. Cr. App. 1901) 63 S. W. 317; Bailey *v.* State, (Tex. Cr. App. 1895) 30 S. W. 669; Putnam *v.* State, 29 Tex. App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.

**Defendant a married man.**— An instruction that "the fact that the prosecutrix knew the defendant was a married man, and that she allowed him to approach her with such promises . . . should be carefully considered by the jury in determining upon the purity of heart" is proper. State *v.* Groome, 10 Iowa 308.

4. Merrell *v.* State, 42 Tex. Cr. 19, 57 S. W. 289, holding that where prosecutrix died before trial, and the evidence as to whether she had been seduced under defendant's promise of marriage and whether she was chaste before sexual intercourse with defendant was conflicting, it was error for the court to refuse to define the term "seduction" in its charge at defendant's request.

5. State *v.* Hemm, 82 Iowa 609, 48 N. W. 971 (holding that it was proper to refuse as misleading a request to charge that if the jury should find that the prosecutrix and defendant were engaged to be married, and the prosecutrix consented to have sexual intercourse, and the act was consummated, then they are instructed that the promise to marry is not sufficient of itself to constitute seduction, as the term "seduction" was apparently here intended not in its legal signification); State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349 (holding that an instruction that if defendant promised the prosecutrix to marry her, on the faith of which she allowed him to have sexual intercourse with her, defendant should be convicted, was erroneous in omitting the element of seduction from the essentials of the crime).

6. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

7. State *v.* Richards, 72 Iowa 17, 33 N. W. 342.

8. State *v.* Meals, 184 Mo. 244, 83 S. W. 442.

9. People *v.* Goodwin, 132 Cal. 368, 64 Pac. 561; State *v.* Hayes, 105 Iowa 82, 74 N. W. 757.

10. State *v.* Whalen, 98 Iowa 662, 68 N. W. 554; State *v.* McIntire, 89 Iowa 139, 56 N. W. 419.

11. Jones *v.* State, 90 Ga. 616, 16 S. E. 380.

12. State *v.* Brown, 86 Iowa 121, 53 N. W. 92; Flick *v.* Com., 97 Va. 766, 34 S. E. 39.

**Instructions on previous chastity of prosecutrix held to be proper** see Walton *v.* State, 71 Ark. 398, 75 S. W. 1; State *v.* Olson, 108 Iowa 667, 77 N. W. 332; State *v.* Gunagy, 84 Iowa 177, 50 N. W. 882; State *v.* Clemons, 78 Iowa 123, 42 N. W. 562; State *v.* Standley, 76 Iowa 215, 40 N. W. 815; State *v.* Heatherton, 60 Iowa 175, 14 N. W. 230; State *v.* Curran, 51 Iowa 112, 49 N. W. 1006; State *v.* Bell, 49 Iowa 440; Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539; Powell *v.* State, (Miss. 1896) 20 So. 4;

he must be acquitted if, on the whole evidence, there is a reasonable doubt as to the previous chastity of the prosecutrix.[13] In other jurisdictions the courts hold that it is proper to instruct the jury to acquit, if they have a reasonable doubt as to whether the prosecutrix was chaste, for the two-fold reason that it is a prerequisite required by the statute to be proven, and the presumption of the innocence of the accused overcomes the presumption of chastity in the prosecutrix.[14] Under the Mississippi statute the jury must be instructed that actual chastity, and not mere reputation for chastity, is required.[15] It has been held that where the statute provides that no conviction shall be had, if on the trial it is proven that at the time of the alleged seduction the woman was unchaste, the jury should be instructed that the evidence must be strong enough to create a reasonable doubt of the woman's preëxisting chastity.[16]

(IV) *Reformation of Prosecutrix.* Where there is a question as to the reformation of the prosecutrix, it is proper to charge the jury that if illicit intercourse once began between the parties a second seduction cannot be charged without at least showing affirmatively a reformation.[17] If there is no evidence

Luckie *v.* State, 33 Tex. Cr. 562, 28 S. W. 533. One "who has never had illicit intercourse . . . and who is chaste and pure," is a sufficient definition of a virtuous woman, and the refusal to add thereto "that she must have a mind free from lustful and lascivious desires" was proper. State *v.* Crowell, 116 N. C. 1052, 21 S. E. 502.

**Instructions held to be erroneous** see State *v.* Dolan, 132 Iowa 196, 109 N. W. 609; State *v.* Hummer, 128 Iowa 505, 104 N. W. 722 (holding that in a prosecution for seduction, an instruction that "no particular amount of improper conduct or indecent familiarity with men, exclusive of sexual intercourse, is conclusive of unchaste character. . . . No particular amount or degree of lascivious and indecent conduct and conversation can be set down as conclusive evidence of unchastity," while correct as to indecent conduct and conversation, was erroneous in placing lascivious conduct on the same basis as indecency); State *v.* Buxton, 89 Iowa 573, 57 N. W. 417; State *v.* Hemm, 82 Iowa 609, 48 N. W. 971; State *v.* Carr, 60 Iowa 453, 15 N. W. 271; Flick *v.* Com., 97 Va. 766, 34 S. E. 39. An instruction that, "where the character of the prosecutrix for chastity is attacked, it is the right of the state to show her good moral character in her home community," must be understood as extending to morality in the broad sense, and is erroneous. State *v.* Hummer, 128 Iowa 505, 104 N. W. 722. An instruction to the effect that the prosecutrix, by testifying that she lived and associated with certain people, whose names she stated, thereby "established" her previous chaste character, because the presumption of law is that those persons were respectable and reputable people, is erroneous. Her previous chaste character is a fact to be determined by the jury from all the evidence before it, and the effect of such an instruction is to take from the jury all consideration of any other evidence than that referred to in it; and even if it were proved that she lived and associated with reputable people, it would only be evidence from which the jury might infer her character, but would not "establish" it. People *v.* Krusick, 93 Cal. 74, 28 Pac. 794.

**"Repute."**— On an indictment for seduction under promise of marriage, it was held error to charge that "repute, for the purposes of this trial, is limited to the female's reputation for chastity, and signifies the esteem in which she is held generally for chastity in the neighborhood where she resided, or among those with whom she associated." State *v.* Wheeler, 94 Mo. 252, 7 S. W. 103.

13. State *v.* Hemm, 82 Iowa 609, 48 N. W 971.

14. Powell *v.* State, (Miss. 1896) 20 So. 4; West *v.* State, 1 Wis. 209.

15. Carroll *v.* State, 74 Miss. 688, 22 So. 295, 60 Am. St. Rep. 539, holding that where evidence of the good reputation of the prosecutrix for chastity is introduced, it is error to refuse to charge that an unchaste woman may bear a good reputation for chastity, and that defendant must be acquitted if a reasonable doubt is entertained of the actual chastity of prosecutrix.

16. Munkers *v.* State, 87 Ala. 94, 6 So. 357 [*citing* Wilson *v.* State, 73 Ala. 527]. See also Weaver *v.* State, 142 Ala. 33, 39 So. 341; Smith *v.* State, 118 Ala. 117, 24 So. 55; Hussey *v.* State, 86 Ala. 34, 5 So. 484. See also Washington *v.* State, 124 Ga. 423, 52 S. E. 910 (holding that failure in an instruction to differentiate the offense of fornication from that of seduction is unobjectionable, where the jury are properly instructed as to sexual intercourse and the definition of seduction); State *v.* Whitley, 141 N. C. 823, 53 S. E. 820 (holding distinction drawn between a virtuous and an innocent woman in an instruction in a prosecution for seduction under Revisal (1905), § 3354, to be harmless).

17. State *v.* Gunagy, 84 Iowa 177, 50 N. W. 882; State *v.* Moore, 78 Iowa 494, 43 N. W. 273, holding that it is proper to charge the jury that if they believe from the evidence that defendant and the prosecutrix had some time previous thereto illicit intercourse, and that their relations were absolutely broken off, and that she reformed, and, by her con-

that the prosecutrix has reformed, an instruction in regard to reformation is unwarranted.[18]

**5. Discharge on Offer to Marry.** A statute declaring that a prosecution for seduction shall be discontinued, if the accused marry the prosecutrix before final judgment, authorizes the court to discharge one accused of seduction on his offering in good faith, after a verdict of conviction, to marry the prosecutrix, although she refuses to do so.[19]

## IV. Liability on Statutory Bond.

In some jurisdictions provision is made by statute for a bond to be given by the seducer to stop a prosecution against him for seduction on his marrying the female, the condition of such bond being to maintain and support her and her child or children.[20] A failure or refusal on the part of the principal obligor to support and maintain the wife or child at any time within the period fixed in such bond will constitute a breach of the same, and suit may be immediately brought thereon.[21] The liability on such a bond is not affected by wrongful conduct on the part of the wife after the marriage, the husband being bound to maintain and support her and her children during the period fixed by the bond without reference to her behavior.[22] Nor will a money judgment for permanent alimony in favor of the wife against the husband, payable after expiration of the period covered by the bond, bar an action on the bond.[23] It is no ground for canceling a bond executed on marriage under such statute that the man has subsequently discovered proof exonerating him of the crime.[24]

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**SEE.** To bring about as a result; superintend the execution or performance of a thing so as to effect a specified result; make sure.[1]

duct, showed herself to their satisfaction to be a woman of chaste character, and that defendant seduced her, then he is guilty of seduction at that time, even though he had a year or so before had similar connection with her. Where, on a prosecution for seduction, the prosecutrix testified that she had had no intercourse with any man save accused, and with him only under promise of marriage, and accused showed a want of chastity on the part of prosecutrix, and that when a little more than a child she had had intercourse once, the court properly charged that, where a woman reformed and maintained her personal chastity for such a time that the jury could see that she was actually chaste at the time of the alleged seduction, then if accused obtained carnal knowledge of her person by the false express promise of marriage he should be convicted, and if it appeared that the woman at the time of the seduction was not possessed of actual personal chastity he should be acquitted. Cooper *v.* State, 86 Ark. 30, 109 S. W. 1023.

**18.** People *v.* Gibbs, 70 Mich. 425, 38 N. W. 257; State *v.* Primm, 98 Mo. 368, 11 S. W. 732.

**19.** Com. *v.* Akers, 88 S. W. 1108, 28 Ky. L. Rep. 78. *Compare supra*, III, R, 4, a.

**20.** Ga. Pen. Code, §§ 388, 389.

**21.** Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

**Amount of recovery.**— Plaintiff in an action upon such bond is not entitled to recover an amount greater than that which would have been sufficient to adequately support the wife and her offspring, if any, for the period or periods elapsing before the bringing of the suit during which support was witheld. Crew *v.* Hutcheson, 115 Ga. 511, 42 S. E. 16 [*overruling* Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764].

**Effect of fraud.**— That the marriage contract was entered into in consequence of a fraud perpetrated upon the alleged seducer would not constitute a defense to an action on the bond; certainly not unless it be alleged that the marriage had been annulled and set aside in a direct proceeding for that purpose. Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

**22.** Crew *v.* Hutcheson, 115 Ga. 511, 42 S. E. 16, 119 Ga. 142, 45 S. E. 971; Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764.

**23.** Crew *v.* Hutcheson, 115 Ga. 511, 42 S. E. 16.

**Divorce and temporary alimony.**— The institution of a suit for divorce by the wife, and the fact that one verdict for divorce has been obtained as well as a decree for temporary alimony, does not constitute a defense to an action on the bond. Duke *v.* Brown, 113 Ga. 310, 38 S. E. 764. The payment of temporary alimony in a sum less than an amount sufficient for the maintenance and support of the wife and offspring would not be a defense to an action on the bond. Duke *v.* Brown, *supra*.

**24.** Griffin *v.* Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. N. S. 937.

**1.** Century Dict. [*quoted* in Merritt *v.* McNally, 14 Mont. 228, 239, 36 Pac. 41].

"We will see you through" construed see

**SEED.** The fertilized and matured ovule of the higher or flowering plants.[2] (See CUSTOMS DUTIES, 12 Cyc. 1122.)

**SEEDLING.** All trees or plants grown from seed.[3]

**SEEKING TO DO BUSINESS.** A phrase, said to mean, seeking to do further business as well as seeking to begin doing business.[4] (See FOREIGN CORPORATIONS, 19 Cyc. 1267.)

**SEEM.** A term said to be synonymous with APPEAR,[5] *q. v.*

**SEEMING DANGER.** Appearances calculated to produce in a reasonable mind, and really producing, conviction of impending peril to life or limb.[6]

**SEEPAGE.** Water which finds its way through a bank.[7]

**SEEPING.** A Scottish expression said to be equivalent to "oozing."[8]

**SEGNITER IRRITANT ANIMOS DEMISSA PER AUREM QUAM QUÆ SUNT OCULIS SUBJECTÆ FIDELIBUS.** A maxim meaning "What we hear produces a slight impression compared with what we see."[9]

**SEINE.** A large net, one edge of which is provided with sinkers and the other with floats, which hangs vertically in the water and when its ends are brought together or drawn ashore encloses the fish.[10] (See FISH AND GAME, 19 Cyc. 1012.)

**SEISINA FACIT STIPITEM.** A maxim meaning "Seisin makes the stock."[11]

**SEIZE.** To take hold of suddenly and forcibly; to take possession of by force.[12]

Miles *v.* Columbia Packers' Assoc., 41 Oreg. 617, 619, 69 Pac. 827.

**"See you out"** as an agreement of indemnity see Brewster *v.* Countryman, 12 Wend. (N. Y.) 446, 449.

**"I will see the within paid, eventually,"** held equivalent to "I will pay" see Brannin *v.* Henderson, 12 B. Mon. (Ky.) 61.

**A statement by an agent** of the owner of a building that he would "see" that work done on the building would be paid for, naturally meant that the payment was to come from the agent's principal, and could not have referred to the contractor, who was in default, and over whom the owner's agent had no control. Desmond *v.* Schenck, 36 N. Y. App. Div. 317, 318, 55 N. Y. Suppl. 251.

**The words "would see that they had their pay"** should be construed to import an original and not collateral undertaking on the part of the promisors. Greene *v.* Burton, 59 Vt. 423, 425, 10 Atl. 575. See also Maddox *v.* Pierce, 74 Ga. 838.

**Construction of phrase.**— Power to dispose of property "as she shall see fit and proper" as contained in a will see Wells *v.* Seeley, 47 Hun (N. Y.) 109, 110. See also Terry *v.* St. Stephens Protestant Episcopal Church Parish, 79 N. Y. App. Div. 527, 531, 81 N. Y. Suppl. 119.

2. Century Dict.

**Beans,** though "seeds" in the language of botany or natural history, are not so considered in commerce nor in common parlance, but will be classed under the term of "vegetables." Robertson *v.* Salomon, 130 U. S. 412, 413, 9 S. Ct. 559, 32 L. ed. 995.

**"Seed-barley"** is barley which will germinate. Carter *v.* Crick, 4 H. & N. 412, 416, 28 L. J. Exch. 238, 7 Wkly. Rep. 507, where it is said that if by a custom of the trade it means anything more, for instance, barley used for malting purposes, it must be proved.

3. U. S. *v.* American Express Co., 158 Fed. 808, 809, 86 C. C. A. 68.

4. State *v.* Western Union Tel. Co., 75 Kan. 609, 618, 90 Pac. 299.

**The phrase** "seeking to do business in this state," in a statute providing that corporations should comply with certain prerequisites, does not apply only to those corporations which have not heretofore done business in the state but desire to do it in the future, but applies to all corporations who come within the state to do business. State *v.* American Book Co., 65 Kan. 847, 848, 69 Pac. 563.

**"Seeking a livelihood"** is an expression which, as used in a statute, has been said to point to a person carrying on some business on his own account, and not in the subordinate position of a clerk. Smith *v.* Hurrell, 10 B. & C. 542, 543, 21 E. C. L. 231.

5. Jones *v.* Com., 46 S. W. 217, 218, 20 Ky. L. Rep. 355.

**"Seem, shall, or may seem best,"** construction of in will see Leavitt *v.* Beirne, 21 Conn. 1, 10; Naundorf *v.* Schumann, 41 N. J. Eq. 14, 15, 2 Atl. 609.

6. Rogers *v.* State, 62 Ala. 170, 174.

7. Righter *v.* Jersey City Water Supply Co., 73 N. J. L. 298, 300, 63 Atl. 6.

8. McNab *v.* Robertson, [1897] A. C. 129, 135, 61 J. P. 468, 66 L. J. P. C. 27, 75 L. T. Rep. N. S. 666, where the latter term is said to be an accurate description if applied to the escape of percolating water from the strata through which it is passed.

9. Morgan Leg. Max. [*citing* Tayler Leg. Gloss. 401].

10. Webster Dict. [*quoted* in State *v.* Lewis, 134 Ind. 250, 252, 33 N. E. 1024, 20 L. R. A. 52].

11. Peloubet Leg. Max. [*citing* Blackstone Comm. 209].

**Applied in:** Kelly *v.* Mcguire, 15 Ark. 555, 585; Bush *v.* Bradley, 4 Day (Conn.) 298, 305; Hillhouse *v.* Chester, 3 Day (Conn.) 166, 210, 3 Am. Dec. 265; Thompson *v.* Sandford, 13 Ga. 238, 239; Early *v.* Early, 134 N. C. 258, 262, 46 S. E. 503; Bragg *v.* Wiseman, 55 W. Va. 330, 334, 47 S. E. 90.

12. Webster Dict. [*quoted* in The Saratoga, 9 Fed. 322, 326].

**SEIZED.** A word said to be equivalent to "having," [13] or "owning," [14] or "owning" or "entitled to," [15] or "possessed." [16] (See SEIZIN.)

**SEIZIN. A. Meaning of in the Sense of the Ancient Law.** The completion of the feudal investiture by which the tenant was admitted into the feud and performed the rights of homage and fealty.[17]

**B. Common-Law Meaning.** Possession.[18]

**C. Various Other Meanings.** Actual or constructive possession under a perfect legal title; [19] a possession of land under a claim either express or implied by law of an estate amounting at least to a freehold; [20] a word said to be equivalent to ownership; [21] *ex vi termini* the whole legal title; [22] possession with the intention of asserting a claim to a freehold estate in the premises added.[23]

13. Loring *v.* Arnold, 15 R. I. 428, 430, 8 Atl. 335; Bailey *v.* Hoppin, 12 R. I. 560, 569.

14. Dodge *v.* Stevens, 105 N. Y. 585, 591, 12 N. E. 759.

15. Cook *v.* Hammond, 6 Fed. Cas. No. 3,159, 4 Mason 467, 489.

16. Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224, 232.

**Used in connection** with "possessed" the latter word is said to be applicable to personalty while "seized" is more appropriate to realty. Wilton *v.* Colvin, 3 Drew, 617, 622, 2 Jur. N. S. 867, 25 L. J. Ch. 850, 4 Wkly. Rep. 759, 61 Eng. Reprint 1039.

**Not used in contradistinction to** "possessed" in a statute regulating the time for the commencement of actions to recover real property. Seymour *v.* Carli, 31 Minn. 81, 83, 16 N. W. 495.

**Applicable only to freeholds and does not** embrace copyholds and terms of years. Warner *v.* Sprigg, 62 Md. 14, 21.

**As relating to a mine** the term is said to mean, as it would naturally import, an ownership in fee. South End Min. Co. *v.* Tinney, 22 Nev. 19, 36, 35 Pac. 89.

**Imports a fee** when used in a petition for partition. Lucet *v.* Beekman, 2 Cai. (N. Y.) 385.

**"Seized and possessed"** imports seized in fact, not mere seizin in law. Bragg *v.* Wiseman, 55 W. Va. 330, 332, 47 S. E. 90, and said to be words sufficient to constitute an averment of ownership. See Grant *v.* Hathaway, 118 Mo. App. 604, 607, 96 S. W. 417.

**"Seized in execution"** is an expression said to mean rendered liable for the satisfaction of the execution by a valid levy. Morgan *v.* Kinney, 38 Ohio St. 610, 614.

**"Seized of an estate of inheritance"** see Cornog *v.* Cornog, 3 Del. Ch. 407, 415.

**Used in a conveyance** does not confine the description to tangible property, but has reference to the estate and not to the thing in which the estate exists. Hunter *v.* Hunter, 17 Barb. (N. Y.) 25, 77.

**Will not apply** to an equitable title which is really the right to have a title and not to title itself. Tewksbury Tp. *v.* Reddington Tp., 8 N. J. L. 319, 323.

17. Upchurch *v.* Anderson, 3 Baxt. (Tenn.) 410, 411; Sims *v.* Irvine, 3 Dall. (U. S.) 425, 455, 1 L. ed. 665; Taylor *v.* Horde, 1 Burr. 60, 107, 97 Eng. Reprint 190.

18. Woolfolk *v.* Buckner, 67 Ark. 411, 412, 55 S. W. 168; Towle *v.* Ayer, 8 N. H. 57, 59; Frost *v.* Cloutman, 7 N. H. 9, 15, 26 Am. Dec. 723; *In re* Dodge, 40 Hun (N. Y.) 443, 453; Deshong *v.* Deshong, 186 Pa. St. 227, 229, 40 Atl. 402, 65 Am. St. Rep. 855; Ferguson *v.* Witsell, 5 Rich. (S. C.) 280, 284, 57 Am. Dec. 744; Bragg *v.* Wiseman, 55 W. Va. 330, 333, 47 S. E. 90; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224, 232.

**Actual seizin** means possession of the freehold by *pedis positio* of one's self or one's tenant or agent or by construction of law. Carpenter *v.* Garrett, 75 Va. 129, 135.

**A word said** to have no accurately defined technical meaning, but at common law it imported a feudal investiture of title by actual possession. Ford *v.* Garner, 49 Ala. 601, 603.

**Does not necessarily imply possession,** but there may be a constructive seizin which is only the right to the possession. See McGuire *v.* Cook, 13 Ark. 448, 459.

**Denotes ordinarily** a possession in fact by one having or claiming a freehold interest. Jenkins *v.* Fahey, 73 N. Y. 355, 362.

**Seizin of land** is more than a bare, naked possession, and it means the possession of at least a freehold. George *v.* Fisk, 32 N. H. 32, 46.

**"Seizin" and "possession"** said to mean the same thing see Savage *v.* Savage, 19 Oreg. 112, 116, 23 Pac. 890, 20 Am. St. Rep. 795; Carlson *v.* Sullivan, 146 Fed. 476, 478, 77 C. C. A. 32, while in Slater *v.* Rawson, 6 Metc. (Mass.) 439, this difference is said to exist between the terms.

19. McMillan *v.* Hutcheson, 4 Bush (Ky.) 611, 617.

20. Altschul *v.* O'Neill, 35 Oreg. 202, 58 Pac. 95.

21. Whitehead *v.* Foley, 28 Tex. 268, 283; McNitt *v.* Turner, 16 Wall. (U. S.) 352, 361, 21 L. ed. 341; Cook *v.* Hammond, 6 Fed. Cas. No. 3,159, 4 Mason 467.

22. Allen *v.* Allen, 48 Minn. 462, 464, 51 N. W. 473.

23. Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 183, 3 N. E. 272, 56 Am. Rep. 133.

**Applies only** to freehold estates or to the possession of land of a freehold tenure. See Redding *v.* Vogt, 140 N. C. 562, 566, 53 S. E. 337; Houston *v.* Smith, 88 N. C. 312, 313.

**Has always referred to a legal title.** Disborough *v.* Outcalt, 1 N. J. Eq. 298, 305.

**Has reference** to the estate of the person seized, and not to the thing in which such estate exists. Van Rensselaer *v.* Poucher, 5 Den. (N. Y.) 35, 41.

**Used to describe** the title of the owner of

**D. Meaning of Seizin in Deed.** Actual possession;[24] an actual possession of a freehold estate.[25]

**E. Meaning of Seizin in Fact.** Possession of the freehold by the *pedis positio* of one's self or one's tenant or agent or by construction of law;[26] possession with intent on the part of him who holds it to claim a freehold in interest.[27]

**F. Meaning of Seizin in Law.** A right to the possession;[28] the right to immediate possession;[29] the right of immediate possession according to the nature of the estate;[30] a right to the possession of the freehold where there is no adverse occupancy thereof.[31]

(Seizin: Allegations as to — In Bill, Complaint, or Petition For Partition, see PARTITION, 30 Cyc. 215; In Declaration on Writ of Entry, see ENTRY, WRIT OF, 15 Cyc. 1076. Covenants of — In General, see COVENANTS, 11 Cyc. 1068; As Ground of Estoppel, see ESTOPPEL, 16 Cyc. 694; Damages Recovered in Action on, see COVENANTS, 11 Cyc. 1161; Performance or Breach, see COVENANTS, 11 Cyc. 1107, 1161. Necessity of at Death of Husband to Entitle Widow to Rent and Mesne Profits in Dowerable Land, see DOWER, 14 Cyc. 891. Of Demandant For Writ of Right, see REAL ACTIONS, 33 Cyc. 1542. Of Grantor in Deed, see DEEDS, 13 Cyc. 528. Of Husband of Estate by the Curtesy, see CURTESY, 12 Cyc. 1013. Of Intestate Affecting Inheritance, see DESCENT AND DISTRIBUTION, 14 Cyc. 202. Of Wife Requisite to Common-Law Estate by the Curtesy, see CURTESY, 12 Cyc. 1005. Requisite of Conveyance of Land, see DEEDS, 13 Cyc. 528. Want of Actual Seizin in Plaintiff's Grantor Defense to Action of Ejectment, see EJECTMENT, 15 Cyc. 64. See also DISSEIZIN, 14 Cyc. 519; LIVERY OF SEIZIN, 25 Cyc. 1503.)

**SEIZING IN TRANSITU.** The exercise of a qualified right over the property of another, and exists only where the party entitled to exercise it has possession of the property.[32] (See SALES, *ante*, p. 493.)

**SEIZURE.** An assertion of a title in the government;[33] a forcible taking possession;[34] the act of taking possession by virtue of an execution or legal authority;[35] the taking of a thing into possession;[36] a taking possession of goods for the purpose of confiscating them;[37] the taking possession of the property by

a freehold estate. Seymour *v.* Carli, 31 Minn. 81, 83, 16 N. W. 495.

Seizin and ownership said to mean the same thing. See Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 183, 3 N. E. 272, 56 Am. Rep. 133.

"Covenant of seizin" and "covenant of right to convey" said to be synonymous see McNitt *v.* Turner, 16 Wall. (U. S.) 352, 361, 21 L. ed. 341.

24. Tate *v.* Jay, 31 Ark. 576, 579.

25. Houston *v.* Smith, 88 N. C. 312, 313.

Sometimes called "'actual' seizin or seizin 'in fact,'" and it exists where a person is in the actual possession of a freehold estate in lands or corporeal tenements. Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9, 21.

26. Seim *v.* O'Grady, 42 W. Va. 77, 78, 24 S. E. 994.

27. Redding *v.* Vogt, 140 N. C. 562, 566, 53 S. E. 337; Upchurch *v.* Anderson, 3 Baxt. (Tenn.) 410, 412.

To constitute seizin in fact there must be an actual possession of the land. Savage *v.* Savage, 19 Oreg. 112, 116, 23 Pac. 890, 20 Am. Rep. 795.

Seizin in fact and seizin in law distinguished see Garrett *v.* Ramsey, 26 W. Va. 345, 369.

28. Bragg *v.* Wiseman, 55 W. Va. 330, 333, 47 S. E. 90.

29. Tate *v.* Jay, 31 Ark. 576, 579.

30. Redding *v.* Vogt, 140 N. C. 562, 566, 53 S. E. 337; Houston *v.* Smith, 88 N. C. 312, 313; Savage *v.* Savage, 19 Oreg. 112, 116, 23 Pac. 890, 20 Am. St. Rep. 795; Upchurch *v.* Anderson, 3 Baxt. (Tenn.) 410, 412; Bouvier L. Dict. [*quoted* in Todd *v.* Oviatt, 58 Conn. 174, 191, 20 Atl. 440, 7 L. R. A. 693; Martin *v.* Trail, 142 Mo. 85, 95, 43 S. W. 655].

31. Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

A deed is a seizin in law see Watkins *v.* Nugen, 118 Ga. 372, 373, 45 S. E. 262.

Said to exist where the law casts the freehold upon the person who has before exercised any act of ownership over it. See Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9, 21.

Seizin in law and seizin in fact distinguished see Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 183, 3 N. E. 272, 56 Am. Rep. 133.

32. Slater *v.* Gaillard, 3 Brev. (S. C.) 115, 129.

33. The Missouri, 17 Fed. Cas. No. 9,652, 3 Ben. 508, 511.

34. Reg. *v.* Hollingsworth, 2 Can. Cr. Cas. 291, 295.

35. Bouvier L. Dict. [*quoted* in Goubeau *v.* New Orleans, etc., R. Co., 6 Rob. (La.) 345, 348; The Saratoga, 9 Fed. 322, 326].

36. Pelham *v.* Rose, 9 Wall. (U. S.) 103, 106, 19 L. ed. 602.

37. Rodocanachi *v.* Elliott, L. R. 8 C. P. 649, 659, 42 L. J. C. P. 247, 28 L. T. Rep. N. S. 840, 21 Wkly. Rep. 810.

an officer;[38] the taking of a ship by the act of government or other public authority for violation of the laws of trade, or some rule or regulation in a statute as a matter of municipal police or in consequence of an existing state of war.[39] (Seizure: In General, see FISH AND GAME, 19 Cyc. 1035; INTOXICATING LIQUORS, 23 Cyc. 293; SEARCHES AND SEIZURES. Enforcement of Forfeiture by, see FORFEITURES, 19 Cyc. 1359. Meaning of Term in Marine Insurance, see MARINE INSURANCE, 26 Cyc. 657. Necessity of Manual Seizure as Element of False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 323. Of Copyright on Execution, see COPYRIGHT, 9 Cyc. 930. Of Forfeitable Goods, see CUSTOMS DUTIES, 12 Cyc. 1156. Of Property in Detinue Proceedings, see DETINUE, 14 Cyc. 264. Of Ship, Right of Insured to Abandon and Recover For Total Loss, see MARINE INSURANCE, 26 Cyc. 692. Parol Evidence of Under Process, see EVIDENCE, 17 Cyc. 503.)

**SELECT.** A term said to imply CHOICE,[40] *q. v.*; to pick out or choose;[41] to pick out or take from among a number;[42] to choose and take from a number; to take by preference from among others; to pick out; to call.[43]

**SELECTION.** The power to determine between two or more.[44] (See GRAND JURIES, 20 Cyc. 1305; HOMESTEADS, 21 Cyc. 479.)

**SELECTMEN.** Independent public officers, whose duties are prescribed by law, and not by the municipality which elects them.[45] (See, generally, TOWNS.)

**SELF-ACQUIRED PROPERTY.** In the Hindu, it is said to be property which has been acquired by the coparcener himself without any detriment to the good of the father or mother.[46]

**SELF-ANCHORS.** Anchors capable of self-adjustment by having at all times free play, because not attached to their sockets, and so not moving with the movement of the bottom section to which the sockets are attached.[47]

**SELF-DEFENSE.** The resistance of force, or seriously threatened force, actually impending or reasonably apparent, by force sufficient to repel the actual or apparent danger, and no more.[48] (Self-Defense: In Prosecution For — Assault, see ASSAULT AND BATTERY, 3 Cyc. 1046; Homicide, see HOMICIDE, 21 Cyc. 677, 791, 800, 802, 883, 954, 965, 1028, 1050. Statements in Self-Defense as Privileged Against Prosecution For Libel, see LIBEL AND SLANDER, 25 Cyc. 391.)

**SELF-DESTRUCTION.** See SUICIDE.

**SELF-EVIDENT.** A term employed to express the idea of full proof — conviction.[49] (See EVIDENTLY, 17 Cyc. 822.)

38. Bouvier L. Dict. [*quoted* in Carey *v.* German American Ins. Co., 84 Wis. 80, 86, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267].

39. Robinson Gold Min. Co. *v.* Aliance Ins. Co., [1901] 2 K. B. 919, 926, 70 L. J. K. B. 892, 85 L. T. Rep. N. S. 419, 50 Wkly. Rep. 109.

40. Cook *v.* South Park Com'rs, 61 Ill. 115, 119.

41. Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 348, 103 N. W. 756.

42. Cole *v.* Green, 21 Ill. 104, 105.

43. Webster Dict. [*quoted* in Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 367, 51 N. W. 386; Kimball *v.* Salisbury, 19 Utah 161, 171, 56 Pac. 973].

When used by a city mayor in appointing a person to an office, it is said to be equivalent to the word "appoint." People *v.* Fitzsimmons, 68 N. Y. 514, 519.

"Select and set apart" is a phrase said to mean the taking of one or more articles from other articles of a like character. State *v.* Haggard, 1 Humphr. (Tenn.) 390, 392.

44. People *v.* Mosher, 45 N. Y. App. Div. 68, 72, 61 N. Y. Suppl. 452, where the court said: "No choice or selection can be made when there is no alternative; 'Hobson's choice' was no selection."

Doctrine of selection or election see Sparks *v.* Paris Deposit Bank, 115 Ky. 461, 467, 74 S. W. 185, 78 S. W. 171.

45. Felch *v.* Weare, 69 N. H. 617, 618, 45 Atl. 591; Berry *v.* Bickford, 63 N. H. 328, 330.

46. Chettiar *v.* Chinnatambiar, L. R. 9 Indian App. 128, 138.

47. Cammeyer *v.* Newton, 4 Fed. Cas. No. 2,345, 12 Blatchf. 122, 129 [*affirmed* in 94 U. S. 225, 24 L. ed. 72].

48. Springfield *v.* State, 96 Ala. 81, 88, 11 So. 250, 38 Am. St. Rep. 85. See also Smith *v.* State, 142 Ind. 288, 296, 41 N. E. 595; People *v.* Dankberg, 91 N. Y. App. Div. 67, 71, 86 N. Y. Suppl. 423, 426; State *v.* Lilliston, 141 N. C. 857, 861, 54 S. E. 427, 115 Am. St. Rep. 705; State *v.* Turner, 29 S. C. 34, 44, 6 S. E. 891, 13 Am. St. Rep. 706.

49. McWilliams *v.* Rodgers, 56 Ala. 87, 93.

**SELF-EXECUTING.** A constitutional provision is said to be self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law.[50] (See CONSTITUTIONAL LAW, 8 Cyc. 752.)

**SELF-GOVERNMENT.** A phrase which is said to mean everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude.[51] (See GOVERNMENT, 20 Cyc. 1284.)

**SELF-MURDER.** The act of designedly destroying one's own life committed by a person of years of discretion and of sound mind.[52] (See LIFE INSURANCE, 25 Cyc. 876; SUICIDE.)

**SELF-REGARDING or SELF-SERVING EVIDENCE.** Evidence which either serves or disserves the party is so called.[53] (See CRIMINAL LAW, 12 Cyc. 426; EVIDENCE, 16 Cyc. 1040; HOMICIDE, 21 Cyc. 971.)

**SELL.** A term which implies a transmutation of property from one to another in consideration of some price or recompense in value;[54] to part with the ownership thereof of a thing to the buyer for a compensation;[55] to give or transfer to for a price, the opposite of to buy; to part with for an equivalent; to have traffic; to betray for a reward;[56] to transfer a thing from one to another in consideration of a price paid or agreed to be paid in current money;[57] to transfer to another for an equivalent; to give up for a consideration, to dispose of in return for something, especially for money; to exchange, to barter;[58] to deliver; part with or dispose of for some equivalent in money; to exchange for money; to vend;[59] synonymous with CONVEY,[60] *q. v.* (See DEEDS, 13 Cyc. 505; SALES, *ante*, p. 25; VENDOR AND PURCHASER.)

**SELLER.** One of the contracting parties to a sale who gives a thing and passes title to it in exchange for a certain price in current money to the other

50. Cooley Const. Lim. p. 100 [*quoted* in Reeves *v.* Anderson, 13 Wash. 17, 23, 42 Pac. 625].

51. People *v.* Hurlbut, 24 Mich. 44, 98, 9 Am. Rep. 103 [*citing* Lieber Civ. Lib. and Self-Gov. c. 21].

52. Webster Dict. [*quoted* in Connecticut Mut. L. Ins. Co. *v.* Groom, 86 Pa. St. 92, 97, 27 Am. Rep. 689].

53. Black L. Dict.

54. Crick's Estate, 35 Pa. Super. Ct. 39, 44 [*citing* Blackstone Comm.].

55. State *v.* Peo, 1 Pennew. (Del.) 525, 527, 42 Atl. 622.

56. Stormouth Dict. [*quoted* in Canadian Pac. R. Co. *v.* Burnett, 5 Manitoba 395, 421].

57. Howell *v.* S., 124 Ga. 698, 699, 52 S. E. 649; Com. *v.* Davis, 12 Bush (Ky.) 240, 241.

58. Webster Dict. [*quoted* in Canadian Pac. R. Co. *v.* Burnett, 5 Manitoba 395, 421].

59. Worcester Dict. [*quoted* in Canadian Pac. R. Co. *v.* Burnett, 5 Manitoba 395, 421].

60. Elle *v.* Young, 24 N. J. L. 775, 779.

Imperial Dict. [*quoted* in Canadian Pac. R. Co. *v.* Burnett, 5 Manitoba 395, 420], defines the word as follows: "To transfer, as property or the exclusive right of possession to another for an equivalent; to give up for a consideration; to dispose of for something else, especially for money. 2. To make matter of bargain and sale of; to accept a price or reward for, as for a breach of duty, trust, or the like."

Embraces the power to contract, to sell, and to convey or transfer the thing sold. See Hemstreet *v.* Burdick, 90 Ill. 444, 449.

"Sell," "exchange" or "deliver" said to be equivalent see State *v.* Watson, 65 Mo. 115, 119.

"Sales," "sell," "sold," said to have acquired the meaning among traveling salesmen that includes the soliciting of sales see Schultz *v.* Ford, 133 Iowa 402, 405, 109 N. W. 614.

Does not carry with it, in its ordinary meaning, the impression conveyed by the word "steal," so that a statement that, if he continues to "sell," etc., will not be held to imply stealing. See Grand *v.* Dreyfus, 122 Cal. 58, 61, 54 Pac. 389.

Used in connection with other words.—"Sell and convey" see Hawxhurst *v.* Rathgeb, 119 Cal. 531, 533, 51 Pac. 846, 63 Am. St. Rep. 142; Mora *v.* Murphy, 83 Cal. 12, 14, 23 Pac. 63; Sibley *v.* Bullis, 40 Iowa 429, 430; Cooper *v.* Curtiss, 30 Me. 488, 490; Sibley *v.* Spring, 12 Me. 460, 461, 28 Am. Dec. 191; Cooper *v.* Cooper, 56 N. J. Eq. 48, 55, 38 Atl. 198. "Sell and dispose of" see Loveland *v.* Clark, 11 Colo. 265, 268, 18 Pac. 544; Carr, Petitioner, 116 R. I. 645, 647, 19 Atl. 145, 27 Am. St. Rep. 773; Phelps *v.* Harris, 101 U. S. 370, 381, 25 L. ed. 855. "Sell and transfer" see Hawxhurst *v.* Rathgeb, 119 Cal. 531, 533, 51 Pac. 846, 63 Am. St. Rep. 142. "Sell, exchange and dispose of" see Falk *v.* Dashiell, 62 Tex. 642, 649, 50 Am. Rep. 542. "Sell for" see Clifton *v.* Gerrard, 1 B. & P. 524, 525. "Sell tickets" see State *v.* Ray, 109 N. C. 736, 738, 14 S. E. 83, 14 L. R. A. 529.

party who is called the buyer or purchaser;[61] one who disposes of a thing in consideration of money.[62] (See DEEDS, 13 Cyc. 621; SALES, *ante*, p. 26; VENDOR AND PURCHASER.)

**SELLING FOR FUTURE DELIVERY.** See SELLING TO ARRIVE.

**SELLING RACE.** One in which the owner of every horse entered in the race as a contestant places a price on it before the race takes place, and, when the race is over, the winning horse is sold at auction at not less than the price previously fixed.[63] (See GAMING, 20 Cyc. 884.)

**SELLING TO ARRIVE and SELLING FOR FUTURE DELIVERY.** Terms which are said to have a well-known meaning upon the board of trade and in the business world, the former expression meaning the vendor had fourteen days in which to make delivery of the warehouse receipts, and the latter expression meaning that he has any day during some specified month in the future to make such delivery.[64] (See GAMING, 20 Cyc. 886.)

**SEMAPHORE.** A mechanical device for displaying signals by means of which information is conveyed to a distant point.[65] (See MASTER AND SERVANT, 26 Cyc. 1127 note 22.)

**SEMBLE.** It seems; it appears.[66]

**SEMEL BARO, SEMPER BARO.** A maxim meaning "Once a baron, always a baron."[67]

**SEMEL CIVIS SEMPER CIVIS.** A maxim meaning "Once a citizen always a citizen."[68]

**SEMEL MALUS SEMPER PRÆSUMITUR ESSE MALUS IN EODEM GENERE.** A maxim meaning "Whoever is once bad is presumed to be so always in the same degree."[69]

**SEMIANNUALLY.** A term which used in a contract providing for the payment of a sum of money means ordinarily at the expiration of each half year from the date of the agreement or from some other specified event.[70]

**SEMICOLON.** A point of punctuation used to distinguish the conjunct members of a sentence;[71] a point used only to separate parts of a sentence more distinctly than a comma.[72] (See COMMA, 7 Cyc. 405; PUNCTUATION, 32 Cyc. 1261.)

**SEMINARY.** A word said not to have acquired any definite fixed legal meaning though occasionally used in a general way to designate institutions for the promotion of learning;[73] an institution of education; a school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments;[74] a place of education;[75] a school;[76] a place of education; any school, academy, college or university in which persons (especially the young) are instructed in the several branches of learning which may qualify them for their future employments;[77]

61. Eldridge *v.* Kuehl, 27 Iowa 160, 173.

62. Bouvier L. Dict. [*quoted* in Consumers' Brewing Co. *v.* Norfolk, 101 Va. 171, 173, 43 S. E. 336]

63. Applegate *v* Berry, 8 Ky. L. Rep. 432, 433.

64. John Miller Co. *v.* Klovstad, 14 N. D. 435, 438, 105 N. W. 164.

65. Tillson *v.* Maine Cent. R. Co., 102 Me. 463, 466, 67 Atl. 407, where the etymological definition is "sign bearer."

66. Grattan L. Gloss.

67. Morgan Leg. Max. [*citing* Trayner Leg. Max. 554].

68. Black L. Dict. [*citing* Trayner Leg. Max. 554].

69. Bouvier L. Dict. [*citing* Crooke Rep. 317].

70. Cornell *v.* Cornell, 96 N. Y. 108, 112.

71. Case *v.* People, 14 Hun (N. Y.) 503, 506 [*citing* Webster Dict.].

72. Lambert *v.* People, 76 N. Y. 220, 225, 32 Am. Rep. 293, 6 Abb. N. Cas. 181.

**Distinction between "comma" and "semicolon"** see Holmes *v.* Phenix Ins. Co., 98 Fed. 240, 242, 39 C. C. A. 45, 47 L. R. A. 308.

73. Chegaray *v.* New York, 13 N. Y. 220, 229; Abbott L. Dict. [*quoted* in Hennepin County *v.* Grace, 27 Minn. 503, 506, 8 N. W. 761].

74. Henderson *v.* McCullagh, 89 Ky. 448, 453, 12 S. W. 932, 12 Ky. L. Rep. 77.

75. New London *v.* Colby Academy, 69 N. H. 443, 444, 46 Atl. 743.

76. Miami County *v.* Wilgus, 42 Kan. 457, 460, 22 Pac. 615. See also Kansas City Bd. of Education *v.* Kansas City, 62 Kan. 374, 380, 63 Pac. 600.

77. Century Dict. [*quoted* in Maddox *v.* Adair, (Tex. Civ. App. 1901) 66 S. W. 811, 813].

a place of training; institution of education; a school, academy, college or university in which young persons are instructed in the several branches of learning which may qualify them for their future employments.[78] (See, generally, COLLEGES AND UNIVERSITIES, 7 Cyc. 283; SCHOOLS AND SCHOOL-DISTRICTS, *ante*, p. 801.)

**SEMPER IN DUBIIS BENIGNIORA PRÆFERENDA SUNT.** A maxim meaning "In doubtful cases, the more favorable constructions are always to be preferred." [79]

**SEMPER IN DUBIIS ID AGENDUM EST, UT QUAM TUTISSIMO LOCO RES SIT BONA FIDE CONTRACTA, NISI QUUM APERTE CONTRA LEGES SCRIPTUM EST.** A maxim meaning "Always in doubtful cases that is to be done by which a *bona fide* contract may be in the greatest safety, unless when it has been openly made against law." [80]

**SEMPER IN OBSCURIS, QUOD MINIMUM EST SEQUIMUR.** A maxim meaning "In obscure constructions we always apply that which is the least obscure." [81]

**SEMPER IN STIPULATIONIBUS ET IN CŒTERIS CONTRACTIBUS ID SEQUIMUR QUOD ACTUM EST.** A maxim meaning "In stipulations and other contracts we always follow that which was agreed." [82]

**SEMPER ITA FIAT RELATIO, UT VALEAT DISPOSITIO.** A maxim meaning "Reference (of a disposition in a will) should always be so made, that the disposition may have effect." [83]

**SEMPER JUDEX ÆQUITATEM SPECTARE DEBET.** A maxim meaning "A judge ought always to regard equity." [84]

**SEMPER NECESSITAS PROBANDI INCUMBIT EI QUI AGIT.** A maxim meaning "The claimant is always bound to prove, [the burden of proof lies on the actor]." [85]

**SEMPER PRÆSUMITUR PRO LEGITIMATIONE PUERORUM.** A maxim meaning "The presumption always is in favor of the legitimacy of children." [86]

**SEMPER PRÆSUMITUR PRO MATRIMONIO.** A maxim meaning "The presumption is always in favor of the validity of a marriage." [87]

**SEMPER PRÆSUMITUR PRO NEGANTE.** A maxim meaning "The presumption is always in favor of the one who denies." [88]

**SEMPER PRÆSUMITUR PRO SENTENTIA.** A maxim meaning "The presumption is always in favor of the sentence." [89]

78. Hennepin County *v.* Grace, 27 Minn. 503, 560, 8 N. W. 761; Webster Dict. [*quoted* in State *v.* Edgerton Dist. Bd. School-Dist. No. 8, 76 Wis. 177, 215].

79. Burrill L. Dict. [*citing* Dig. 50. 17. 56].

Applied in: Matter of Reed, 18 Misc. (N. Y.) 285, 291, 41 N. Y. Suppl. 156; Ditcher *v.* Benison, 11 Moore P. C. 324, 343, 14 Eng. Reprint 718, 6 Wkly. Rep. 342.

80. Peloubet Leg. Max. [*citing* Dig. 34. 5. 21]

81. Black L. Dict. [*citing* Dig. 50. 17. 9.; 9.; Broom Leg. Max. 687*n*].

Applied in Williams *v.* Crosling, 3 C. B. 957, 962, 4 D. & L. 660, 16 L. J. C. P. 112, 54 E. C. L. 957.

82. Bouvier L. Dict. [*citing* Dig. 50. 17. 34].

83. Burrill L. Dict. [*citing* Curzon's Case, 6 Coke 75*b*, 76*b*, 77 Eng. Reprint 369].

84. Morgan Leg. Max. [*citing* Halkerstone Leg. Max. 71].

85. Black L. Dict.

86. Black L. Dict. [*citing* Bury's Case, 5 Coke 98*b*, 77 Eng. Reprint 207; Coke Litt. 126*a*].

Another form of this maxim is: "*Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari.*" See Bouvier L. Dict.; Morgan Leg. Max.; Peloubet Leg Max.

87. Morgan Leg. Max. [*citing* Wharton Leg. Max.].

Applied in: Erwin *v.* English, 61 Conn. 502, 510, 23 Atl. 753; Hynes *v.* McDermott, 7 Abb. N. Cas. (N. Y.) 98, 109; Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28, 84; *In re* McCausland, 215 Pa. St. 189, 194, 62 Atl. 780, 110 Am. St. Rep. 540; Steadman *v.* Powell, 1 Add. Eccl. 58, 65; Tongue *v.* Allen, 1 Curt. Eccl. 38, 48; Delpit *v.* Cote, 20 Quebec Super. Ct. 338, 362; Sullivan *v.* Oldacre Sullivan, 3 Phillim. 45, 55.

88. Black L. Dict.

Applied in: Denison *v.* Denison, 35 Md. 361, 378; Reg. *v.* Millis, 10 Cl. & F. 534, 8 Jur. 717, 8 Eng. Reprint 844; Dansey *v.* Richardson, 3 E. & B. 722, 723, 18 Jur. 957, 23 L. J. Q. B. 361, 77 E. C. L. 722; *In re* Hall, 8 Ont. App. 135, 136, 140, 155 [*affirming* 32 U. C. C. P. 498, 508]; Starratt *v.* Miller, Hodg. El. Cas. (U. C.) 458, 488.

89. Peloubet Leg. Max. [*citing* Clark *v.* Austin, 3 Bulstr. 36, 42, 81 Eng. Reprint 31].

**SEMPER QUI NON PROHIBET PRO SE INTERVENIRE, MANDARE CREDITUR.** A maxim meaning "He who does not prohibit the intervention of another in his behalf is supposed to authorize it." [90]

**SEMPER SEXUS MASCULINUS ETIAM FEMININUM SEXUM CONTINET.** A maxim meaning "The male sex always includes the female." [91]

**SEMPER SPECIALIA GENERALIBUS INSUNT.** A maxim meaning "Special things are always included in general things." [92]

**SENATE.** The name of the less numerous of the two bodies constituting the legislative branch of the United States and the several states.[93] (Senate: As Judge of Qualifications of Its Own Members, see CONSTITUTIONAL LAW, 8 Cyc. 847 note 31. Enactment of Statute by, see STATUTES. Of State, see STATES. Of United States, see UNITED STATES.)

**SENATE POKER.** See POKER, 31 Cyc. 899 note 2.

**SENATORES SUNT PARTES CORPORIS REGIS.** A maxim meaning "Senators are part of the body of the king." [94]

**SEND.** To cause to be conveyed or transmitted.[95]

**SENILE DEMENTIA.** A form of insanity in the aged;[96] a mental disorder frequently attacking the faculties of old persons;[97] mental imbecility from old age.[98] (See DEMENTIA, 13 Cyc. 778; INSANE PERSONS, 22 Cyc. 1207; WILLS.)

**SENIOR.** An addition to the name of the elder of two persons having the same name.[99] (See NAMES, 31 Cyc. 267.)

**SENSE.** See POPULAR SENSE, 31 Cyc. 915.

**SENSUS VERBORUM EST ANIMA LEGIS.** A maxim meaning "The meaning of words is the spirit of the law." [1]

**SENSUS VERBORUM EST DUPLEX, MITIS ET ASPER, ET VERBA SEMPER ACCIPIENDA SUNT IN MITIORE SENSU.** A maxim meaning "Where the meaning of words is two-fold, mild and harsh, the milder sense is to be preferred." [2]

**SENSUS VERBORUM EX CAUSA DICENDI ACCIPIENDUS EST; ET SERMONES SEMPER ACCIPIENDI SUNT SECUNDUM SUBJECTAM MATERIAM.** A maxim meaning "The sense of words is to be taken from the occasion of speaking them; and discourses are always to be interpreted according to the subject-matter." [3]

**SENTENCE.** As defined by grammarians, an assemblage of words so arranged as to express an entire proposition.[4] In law, a judicial determination of a cause agitated between real parties, upon which a real interest has been settled;[5] the judgment of a court;[6] and as the term is used in criminal law, a judgment on conviction for crime;[7] a final determination by a criminal court or by a court of admiralty;[8] the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained;[9]

90. Bouvier L. Dict. [*citing* 2 Kent 616; Dig. 14. 6. 16; 43. 3. 12. 4].

91. Burrill L. Dict. [*citing* Dig. 32. 62].

92. Morgan Leg. Max. [*citing* Dig. 50. 17. 147].

93. Bouvier L. Dict.

94. Peloubet Leg. Max. [*citing* 4 Inst. 53].

95. Encyclopedic Dict. [*quoted* in State *v.* Dittmar, 120 Ind. 54, 56, 22 N. E. 88].

Leaving a sealed letter containing threats at a gate near a person's house where it was found and eventually carried to such person has been held "sending." Reg. *v.* Grimwade, 1 Car. & K. 592, 597, 1 Cox C. C. 85, 1 Den. C. C. 30, 47 E. C. L. 592.

96. Pyott *v.* Pyott, 191 Ill. 280, 283, 61 N. E. 88.

97. McDaniel *v.* McCoy, 68 Mich. 332, 336, 36 N. W. 84.

98. Hiett *v.* Shull, 36 W. Va. 563, 565, 15 S. E. 146. See also Gates *v.* Cole, 137 Iowa 613, 617, 115 N. W. 236.

99. Black L. Dict.

1. Peloubet Leg. Max. [*citing* Elmer's Case. 5 Coke 2*a*, 2*b*, 77 Eng. Reprint 49].

Applied in Godbe *v.* Salt Lake City, 1 Utah 68, 77.

2. Morgan Leg. Max. [*citing* Cromwell's Case, 4 Coke 12*b*, 13*b*, 76 Eng. Reprint 877]

3. Black L. Dict.

Applied in: Littlefield *v.* Winslow, 19 Me. 394, 398; Cochrane *v.* Stewart, 63 Mo. 424, 427.

4. Bourland *v.* Hildreth, 26 Cal. 161, 232

5. Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 601, 44 N. E. 891; Conklin *v.* La Dow, 33 Oreg. 354, 365, 54 Pac. 218.

6. Allen *v.* Delaware County, 161 Pa. St. 550, 552, 29 Atl. 288.

7. State *v.* Ballard, 122 N. C. 1024, 1025, 29 S. E. 899.

8. Wright *v.* Donaldson, 158 Pa. St. 88, 90, 27 Atl. 867.

9. State *v.* Barnes, 24 Fla. 153, 158, 4 So. 560; State *v.* Moise, 48 La. Ann. 109, 121, 18 So. 943, 35 L. R. A. 701; Munkley *v*

the final determination of a criminal court; the pronouncement by the judge of the penalty or punishment as the consequence to the defendant of the fact of his guilt;[10] the imposition of a punishment or enforcement of a penalty;[11] the order of the court, made in the presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law;[12] the judgment rendered against the defendant in a criminal proceeding.[13] (Sentence: After Remand by Appellate Court, see CRIMINAL LAW, 12 Cyc. 940. Appeal in Criminal Prosecution Dependent Upon, see CRIMINAL LAW, 12 Cyc. 841. As Subject of Mandamus, see MANDAMUS, 26 Cyc. 218. Authority to Pardon, Reprieve, or Commute, see PARDON, 29 Cyc. 1562. Commutation of, see PARDON, 29 Cyc. 1569. Constitutionality of Statutes Regulating, see CONSTITUTIONAL LAW, 8 Cyc. 826. Criminal Sentence as Evidence in Civil Case, see JUDGMENTS, 23 Cyc. 1348. Delay in Executing as Ground For Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 305. Discretion of Court as to, see CRIMINAL LAW, 12 Cyc. 958. Fixing Duration, see FINES, 19 Cyc. 555. In Criminal Prosecution in General, see CRIMINAL LAW, 12 Cyc. 769. Necessity of to Entitle Appellate Court to Review Proceedings, see CRIMINAL LAW, 12 Cyc. 800. Of Court-Martial, see MILITIA, 27 Cyc. 500. Power and Duty of Court as to, see CRIMINAL LAW, 12 Cyc. 769. Presumptions as to on Appeal, see CRIMINAL LAW, 12 Cyc. 905. Reduction or Mitigation of on Appeal, see CRIMINAL LAW, 12 Cyc. 937. Remand For New Sentence, see CRIMINAL LAW, 12 Cyc. 942. Reviewing Final Judgment, Sentence, or Commitment in Habeas Corpus Proceedings, see HABEAS CORPUS, 21 Cyc. 326. Review of Discretion of Trial Court as to, see CRIMINAL LAW, 12 Cyc. 905. Sufficiency of to Entitle Appellate Court to Review Proceedings, see CRIMINAL LAW, 12 Cyc. 801. To Reformatory, see REFORMATORIES, 34 Cyc. 1006. Where Punishment Is Not Prescribed, see CONSPIRACY, 8 Cyc. 690.)

**SENTENTIA A NON JUDICE LATA NEMINI DEBET NOCERE.** A maxim meaning "A sentence passed by one who is not a judge should not harm any one."[14]

**SENTENTIA CONTRA MATRIMONIUM NUNQUAM TRANSIT IN REM JUDICATAM.** A maxim meaning "A sentence against marriage never becomes a matter finally adjudged, *i. e.*, *res judicata*."[15]

**SENTENTIA CONTRA MINOREM INDEFENSUM LATA NULLA EST.** A maxim meaning "An opinion rendered against an unbefriended minor is void."[16]

**SENTENTIA FACIT JUS, ET LEGIS INTERPRETATIO LEGIS VIM OBTINET.** A maxim meaning "The judgment makes the law, and the interpretation has the force of law."[17]

**SENTENTIA FACIT JUS ET RES JUDICATA PRO VERITATE ACCIPITUR.** A maxim meaning "Judgment creates the right, and what is adjudicated is taken for truth."[18]

**SENTENTIA INTERLOCUTORIA REVOCARI POTEST, DEFINITIVA NON POTEST.** A maxim meaning "An interlocutory order may be revoked, but not a final one."[19]

Hoyt, 179 Mass. 108, 109, 60 N. E. 413; Com. *v.* Lockwood, 109 Mass. 323, 325, 12 Am. Rep. 699; People *v.* Adams, 95 Mich. 541, 543, 55 N. W. 461; State *v.* Henson, 66 N. J. L. 601, 607, 50 Atl. 468, 616.

**10.** Featherstone *v.* People, 194 Ill. 325, 334, 62 N. E. 684.

**11.** Com. *v.* Bishoff, 13 Pa. Co. Ct. 503, 504.

**12.** Pennington *v.* State, 11 Tex. App. 281, 282.

**13.** Bouvier L. Dict.; Rapalje & L. L. Dict. both [*quoted* in Bugbee *v.* Boyce, 68 Vt. 311, 313, 35 Atl. 330].

A sentence to the work-house is said to be equivalent to a sentence to hard labor. Durham *v.* State, 89 Tenn. 723, 725, 1 S. W. 74.

**14.** Peloubet Leg. Max. [*citing* Fleta 6. 6. 7].

Applied in Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 39 Wis. 390, 395, 20 Am. Rep. 50.

**15.** Black L. Dict. [*citing* Kenn's Case, 7 Coke 42*b*, 43*b*, 77 Eng. Reprint 474].

**16.** Morgan Leg. Max. [*citing* Halkerstone Leg. Max. 168].

Applied in Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 126, 196.

**17.** Bouvier L. Dict.

**18.** Peloubet Leg. Max. [*citing* Ellesmere Post. 55].

**19.** Bouvier L. Dict. [*citing* Bacon Max. Reg. 20].

**SENTENTIA NON FERTUR DE REBUS NON LIQUIDIS.** A maxim meaning "Sentence is not given upon matters that are not clear." [20]

**SENTIENT BEINGS.** A term applied to those beings having the faculty of sensation, the power to perceive, reason, and think.[21]

**SEPARABLE CONTROVERSY.** See REMOVAL OF CAUSES, 34 Cyc. 1264.

**SEPARALITER.** Separately.[22]

**SEPARATE.** As a verb, to disunite, to divide, to disconnect, to sever; [23] to disunite; to sever; to part in any way; to part; to become disunited; to withdraw from each other.[24] As an adjective, this word is said to mean the same as private.[25]

**SEPARATE ACKNOWLEDGMENT.** See ACKNOWLEDGMENTS, 1 Cyc. 521; HOMESTEADS, 21 Cyc. 544, 597.

**SEPARATE ACTIONS.** See APPEAL AND ERROR, 2 Cyc. 531; JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 436.

**SEPARATE CAUSES OF ACTIONS.** See CONSOLIDATION OF ACTIONS, 8 Cyc. 596; JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 395; PLEADING, 31 Cyc 116.

**SEPARATE ESTATE.** The individual property of one of two persons who stand in a social or business relation, as distinguished from that which they own jointly or are jointly interested in.[26] (See, generally, HUSBAND AND WIFE, 21 Cyc. 1357; MECHANICS' LIENS, 27 Cyc. 65.)

**SEPARATE EXAMINATION.** See SEPARATE ACKNOWLEDGMENT.

**SEPARATE ISSUES.** See TRIAL.

**SEPARATELY PRINTED.** Independently printed.[27]

**SEPARATE MAINTENANCE.** See HUSBAND AND WIFE, 21 Cyc. 1598.

**SEPARATE TRIALS.** See CRIMINAL LAW, 12 Cyc. 505; TRIAL.

**SEPARATION.** The act of separating, severing, or disconnecting; the state of being separate, disunion, disconnection.[28] (Separation: Misconduct of Jurors in Separating, Ground For New Trial, see CRIMINAL LAW, 12 Cyc. 723. Motion — To Compel the Separation of Causes of Action or Defenses, see PLEADING, 31 Cyc. 630, 648; To Require Election Between Causes of Action Not Separately Stated or Numbered, see PLEADING, 31 Cyc. 657. Of Community Property, see HUSBAND AND WIFE, 21 Cyc. 1697. Of Husband and Wife — Generally, see DIVORCE, 14 Cyc. 556; HUSBAND AND WIFE, 21 Cyc. 1592; As Affecting Dissolution of Community, see HUSBAND AND WIFE, 21 Cyc. 1697; As Affecting Husband's Liability For Necessaries and Family Expenses, see HUSBAND AND WIFE, 21 Cyc. 1223; As Affecting Limitations as to Wife, see LIMITATIONS OF ACTIONS, 25 Cyc. 1258; As Affecting Removal of Disabilities of Coverture, see HUSBAND AND WIFE, 21 Cyc. 1307; As Affecting Rights in Wife's Property, see HUSBAND AND WIFE, 21 Cyc. 1161; As Affecting Wife's Equity to a Settlement From Her Estate, see HUSBAND AND WIFE, 21 Cyc. 1191; As Affecting Wife's Right to Sue and Be Sued, see HUSBAND AND WIFE, 21 Cyc. 1514; As Affording Wife Privilege of Sole Trader, see HUSBAND AND WIFE, 21 Cyc. 1335; As Ground For Allowance to Wife For Separate Maintenance, see HUSBAND AND WIFE, 21 Cyc. 1598;

20. Burrill L. Dict. [*citing* Jenkins Cent. 7, case 9].

21. Keeley Brewing Co. *v.* Parnin, 13 Ind. App. 588, 41 N. E. 471, 474.

22. Black L. Dict. See also State *v.* Edwards, 60 Mo. 490, 491 [*citing* Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373], where it was said: "In England, the practice has prevailed — subject, however, to the discretionary power of the court to direct the indictment to be quashed — to indict a number of persons for several offenses of the same nature; but there it must be laid '*separaliter*,' or, otherwise, the indictment thus framed will be quashed." It is further said to be held that the use of this word makes an "indictment drawn in this manner tantamount to 'several indictments'"

23. Meisser *v.* Thompson, 9 Ill. App. 368, 370.

24. Webster Dict. [*quoted* in Com. *v.* Larkin, 15 Pa. Dist. 285, 286, 31 Pa. Co. Ct. 382, 383].

25. Timber *v.* Desparois, 18 S. D. 587, 593, 101 N. W. 879.

Distinguished from "joint" and "general" where it is held to imply division and distribution see Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921, 922.

26. Black L. Dict.

27. Wilson *v.* Calculagraph Co., 144 Fed. 91, 99, 75 C. C. A. 249.

28. Webster Dict.

Conveyance of Homestead by Husband or Wife After Separation, see HOMESTEADS, 21 Cyc. 534; Right to Remarry After Separation, see DIVORCE, 14 Cyc. 729; MARRIAGE, 26 Cyc. 848. Of Jury in Civil Action — Generally, see TRIAL; As Ground For New Trial, see NEW TRIAL, 29 Cyc. 806. Of Jury in Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 723. Of Members of Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1124. Of Witnesses — In Civil Actions, see TRIAL; In Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 903. Personal Rights and Duties of Husband and Wife as Related to and Affected by Separation, see HUSBAND AND WIFE, 21 Cyc. 1592.)

**SEPTICÆMIA.** A dangerous malady, apt to occur after injuries through a purulent infection of the blood, whose exciting causes are the introduction of decomposing pus into the circulation through the wound.[29]

**SEPTIC TANK.** Any tank or receptacle capable of being provided with inlets and outlets and of being made air tight, and so constructed as to exclude light, and which when provided with inlets and outlets so as to prevent undue agitation of the contents, and when so constructed as to be air tight and dark would permit the bacteriological process to go on to completion.[30]

**SEPULTURE.** A grave or tomb; the place of interment of a dead human body.[31] (See CEMETERIES, 6 Cyc. 707; DEAD BODIES, 13 Cyc. 268.)

**SEQUAMUR VESTIGIA PATRUM NOSTRORUM.** A maxim meaning "Let us follow in the footsteps of our fathers." [32]

29. Martin *v.* Courtney, 87 Minn. 197, 201, 91 N. W. 487.

30. Cameron Septic Tank Co. *v.* Saratoga Springs, 151 Fed. 242, 249.

31. See "Law of Burial," 4 Bradf. Surr. (N. Y.) 503–532 appendix (note prepared from a report of Samuel B. Ruggles, referee appointed in the matter of widening Beekman street in the city of New York).

32. Morgan Leg. Max. [*citing* Jenkins Cent.].

# SEQUESTRATION

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* Author of "Lotteries," 25 Cyc. 1631.

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## I. DEFINITION, NATURE, AND PURPOSE.

**A. As Process For Contempt in Equity.** Formerly sequestration had its chief importance as a chancery remedy, a "species of 'grand distress,'"[1] whereby the property of a party, or of a corporation, was seized by officers of the court of chancery to punish contempts or to compel obedience to the order or decree of the court, final or interlocutory.[2] Thus it issued to compel an appearance or an answer, especially against corporations, after fruitless resorts to writs of distringas.[3] Before the use of the writ was authorized it had to be shown that imprisonment had failed to break the spirit of the party in contempt or, by a return of *non est inventus*, upon an attachment, that he could not be found.[4] The court commonly named the persons, usually four, to take possession of and retain the personal property of the party in contempt and the revenues of his lands, until such time as the contempt should be purged.[5] The modern abolition of imprisonment for debt has been construed to abolish sequestrations as processes to compel obedience to decrees for the payment of money;[6] and in the case of

1. See 2 North, Life of Lord Keeper Guilford 73 [*cited* in Angell & A. Corp. § 671].

2. *Maryland.*— Keighler *v.* Ward, 8 Md. 254, 261.

*Massachusetts.*— McCann *v.* Randall, 147 Mass. 81, 93, 17 N. E. 75, 9 Am. St. Rep. 666; Jones *v.* Boston Mill Corp., 4 Pick. 507, 16 Am. Dec. 358.

*Missouri.*— Roberts *v.* Stoner, 18 Mo. 481, 484. See also Conghlin *v.* Ehlert, 39 Mo. 285, 286; McMakin *v.* McMakin, 68 Mo. App. 57, 60.

*New Mexico.*— *In re* Jaramillo, 8 N. M. 598, 610, 45 Pac. 1110.

*New York.*— Foster *v.* Townshend, 68 N. Y. 203; Donnelly *v.* West, 17 Hun 564; Hosack *v.* Rogers, 11 Paige 603.

*Ohio.*— See Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605, 607.

*Pennsylvania.*— See Beeler *v.* Pittsburgh Farmers', etc., Turnpike Road Co., 14 Pa. St. 162, 165.

*Vermont.*— Peck *v.* Crane, 25 Vt. 140.

*Virginia.*— Ross *v.* Colville, 3 Call 382.

*United States.*— See Shainwald *v.* Lewis, 6 Fed. 766, 7 Sawy. 148.

*England.*—Francklyn *v.* Colhoun, 3 Swanst. 276, 36 Eng. Reprint 860.

See 43 Cent. Dig. tit. "Sequestration," § 1.

*Compare* Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596; Bacon Abr. 230; Cook Corp. § 756.

"**The process of sequestration** is a writ or commission under the great seal, sometimes directed to the sheriff, or most commonly to four or more persons of plaintiff's own naming, empowering any two or more of them to enter upon, possess, and sequester the real and personal estate and effects of the defendant (or some particular part and parcel of the lands), and to take and keep the profits, or pay them as the court shall appoint, until the parties have appeared to or answered the plaintiff's bill, or performed some other matter which has been ordered by the court, and for not doing whereof he is in contempt." Angell & A. Corp. § 670; 1 Hind Pr. 127, 136. See also Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6, 11 [*quoting* Worcester Dict.].

**The United States supreme court rules in equity** provide that a writ of sequestration shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court. See Rule 7. Also that if a decree be rendered for the performance of any specific act and the delinquent party cannot be found upon attachment, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree. See Rule 8.

3. Lowten *v.* Colchester, 2 Meriv. 395, 16 Rev. Rep. 187, 35 Eng. Reprint 991; Angell & A. Corp. § 668. See also Jones *v.* Boston Mill Corp., 4 Pick. (Mass.) 507, 16 Am. Dec. 358.

**Sequestration of the property of an insolvent corporation** is in the nature of an attachment or execution on behalf of the creditors. Farmers' L. & T. Co. *v.* Baker, 20 Misc. (N. Y.) 387, 395, 46 N. Y. Suppl. 266.

**After service of writ of execution of a decree against a corporation,** the next process is a distringas and after that a sequestration, which being once awarded they can never after come and pray to enter their appearance as they might have done on the distringas, which issues for that very purpose, to compel them to appear; but the appearing being past, the process must go because the appearance being only in favor of liberty, can be of no service to a corporation, which cannot be committed. Bacon Abr. tit. "Corporations," E, 2.

4. See Roberts *v.* Stoner, 18 Mo. 481; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; Hook *v.* Ross, 1 Hen. & M. (Va.) 310; U. S. Sup. Court Rules Eq. No. 8. *Compare* McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666.

**Return of non est inventus should be made by** the sergeant at arms, not by the sheriff, since the former can go all over the state. Hook *v.* Ross, 1 Hen. & M. (Va.) 310.

5. See Roberts *v.* Stoner, 18 Mo. 481; Angell & A. Corp. § 670.

6. See Coughlin *v.* Ehlert, 39 Mo. 285; Roberts *v.* Stoner, 18 Mo. 481; McMakin *v.*

decrees for the performance of acts other than the payment of money the statutes providing for decrees by default upon failure of defendant to appear or answer and for the issuance of executions, as in the case of judgments at law, upon decrees in equity, have deprived the writ of sequestration of practically all of its former importance in this phase.[7] Indeed the authorities upon this branch of the law of sequestration are confined chiefly to the decisions of the English courts before the declaration of American independence, the subject having never assumed much practical importance in the United States generally in this aspect.[8]

**B. As Process in Execution in Equity — 1. In General.** As a natural development from the use of the writ of sequestration to enforce obedience to decrees, courts of chancery came to employ it as a process in the nature of an execution, by directing that the rents and profits of the property sequestered should be applied to the satisfaction of the decree in cases where the payment of money had been ordered.[9] For many years the process has been used for this purpose where no execution could issue at law,[10] as in the case of public service corporations whose property essential to the exercise of franchise obligations could not be sold at common law,[11] and whose creditors had no other recourse than the sequestration of their debtor's earnings. Statutes authorizing the sale of such corporate property on executions in equity as at law have in some states removed any necessity for this use of the process;[12] and where it has survived,

McMakin, 68 Mo. App. 57; Geery *v.* Geery, 63 N. Y. 252; Hosack *v.* Rogers, 11 Paige (N. Y.) 603. And see Divorce, 14 Cyc. 536.

7. See Roberts *v.* Stoner, 18 Mo. 481; Geery *v.* Geery, 63 N. Y. 252; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; Fletcher Eq. Pl. 735.

8. For a discussion of the ancient learning and English authorities see 3 Blackstone Comm. 444; 2 Daniell Ch. Pr. § 1052 *et seq.*; Hopkins Ch. Pr. § 471; and the American cases cited in the foregoing notes.

The process of sequestration may still be properly resorted to as a means for enforcing the performance of decrees other than the payment of money, where an attachment cannot be served or where defendant chooses to remain in prison after commitment. See Fletcher Eq. Pr. 735; U. S. Sup. Ct. Rules Eq. 7, 8.

9. See Grew *v.* Breed, 12 Metc. (Mass.) 363, 46 Am. Dec. 687; Raynes *v.* Raynes, 54 N. H. 201; Geery *v.* Geery, 63 N. Y. 252; West *v.* Fraser, 5 Sandf. (N. Y.) 653; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6. *Compare* White *v.* Geraerdt, 1 Edw. (N. Y.) 336.

The share of trustees who have wasted the res may be sequestered, and applied to make up the deficit. See Raynes *v.* Raynes, 54 N. H. 201.

A writ of sequestration is in the same nature as a writ of execution; it is final process to enforce payment of a judgment. Reid *v.* Northwestern R. Co., 32 Pa. St. 257. See also Buchi *v.* Pund, 17 Montg. Co. Rep. (Pa.) 11, 12; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

"Sequestration" means "to seize or take possession of the property belonging to another, and hold it till the profits have paid the demand for which it was taken." Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6, 11 [*citing* Worcester Dict.].

Under a Pennsylvania statute the rents of a life-estate may be sequestered and applied to the payment of a debt due a lien creditor whenever such estate is taken in execution. See Lewis's Assigned Estate, 170 Pa. St. 376, 32 Atl. 1046; Holliday *v.* Bruner, 153 Pa. St. 262, 25 Atl. 1128; Gordon *v.* Inghram, 32 Pa. St. 214, 1 Grant 152; Pentland *v.* Kelly, 6 Watts & S. 483; Landis *v.* Lewis, 3 Pa. Dist. 241; Buchi *v.* Pund, 17 Montg. Co. Rep. 11, 12. See also Estates, 16 Cyc. 644.

Statutory sequestration against defaulting treasurer see Stuart's Petition, 10 Pa. Co. Ct. 47; Philadelphia *v.* Marcer, 8 Phila. (Pa.) 319.

10. See Spear *v.* Locust Wood Cemetery Co., 72 N. J. Eq. 821, 66 Atl. 1068, holding that the income from a cemetery not subject to foreclosure might be sequestered and applied to the mortgage debt.

11. See Winchester, etc., Turnpike Road Co. *v.* Vimont, 5 B. Mon. (Ky.) 1; Overton Bridge Co. *v.* Means, 33 Nebr. 857, 51 N. W. 240, 29 Am. St. Rep. 514; Muncy Creek R. Co. *v.* Hill, 84 Pa. St. 459; Penrose *v.* Erie Canal Co., 56 Pa. St. 46, 93 Am. Dec. 778; Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526; Reid *v.* Northwestern R. Co., 32 Pa. St. 257; Steiner's Appeal, 27 Pa. St. 313; Beam's Appeal, 19 Pa. St. 453; Bevans *v.* Dingman's-Choice Turnpike, 10 Pa. St. 174; Susquehanna Canal Co. *v.* Bonham, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315; Huntington, etc., Turnpike Road Co. *v.* Wallace, 8 Watts (Pa.) 316; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687. See also Ammant *v.* New Alexandria, etc., Turnpike Road Co., 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593; Betts *v.* Harrisburg R. Co., 4 Pa. L. J. 322.

12. See Iron City Nat. Bank *v.* Siemens-Anderson Steel Co., 14 Fed. 150. *Compare* Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 451, 39 So. 441.

it has developed into the modern receivership, the law relating to which has been elsewhere considered in this work.[13]

**2. Receiverships.** By a further, and statutory, extension of the old chancery practice, the sequestration of the property of insolvent corporations generally is authorized to-day in practically every state, at the suit of any judgment creditor upon whose execution at law a return of "*nulla bona*" has been made.[14] In such cases the sequestrator appointed by the court is known as a receiver; and the body of modern law treating in detail of the circumstances under which he may be appointed, of the procedure for his appointment, and of his rights, powers, and duties, are more properly discussed under other specific heads in this work.[15]

**C. As Conservatory Remedy to Preserve Property Pending Litigation — 1. In General.** The modern importance of the sequestration process in the United States consists practically altogether in its use as a conservatory writ to preserve pending litigation specific property subject to conflicting claims of ownership or liens and privileges. Courts of chancery have inherent power in cases where there is no adequate legal remedy, to issue the writ and impound the property in controversy, pending proceedings to determine the right thereto;[16] but the process is chiefly employed at law under statutes in Louisiana and Texas, where it serves as a practical substitute for the common-law writ of

13. See Receivers, 34 Cyc. 1 *et seq.*

14. See the following cases:

*Georgia.*— See Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596.

*Massachusetts.*— Atlas Bank *v.* Nahant Bank, 23 Pick. 480.

*Michigan.*— Cook *v.* Detroit, etc., R. Co., 45 Mich. 453, 8 N. W. 74.

*Minnesota.*— McKusick *v.* Seymour, 48 Minn. 172, 50 N. W. 1116; Arthur *v.* Willius, 44 Minn. 409, 46 N. W. 851.

*New York.*— Hunting *v.* Blun, 143 N. Y. 511, 38 N. E. 716; Whittlesey *v.* Frantz, 74 N. Y. 456; Geery *v.* Geery, 63 N. Y. 252; Mann *v.* Pentz, 3 N. Y. 415; Rodbourn *v.* Utica, etc., R. Co., 28 Hun 369; Loder *v.* New York, etc., R. Co., 4 Hun 22; Judson *v.* Rossie Galena Co., 9 Paige 598; Devoe *v.* Ithaca, etc., R. Co., 5 Paige 521; White *v.* Geraerdt, 1 Edw. 336 [*overruled* in Geery *v.* Geery, *supra*].

*Pennsylvania.*— Reid *v.* Northwestern R. Co., 32 Pa. St. 257.

*Wisconsin.*— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185; Merchants' Bank *v.* Chandler, 19 Wis. 434.

*Compare* Spear *v.* Locust Wood Cemetery Co., 72 N. J. Eq. 821, 66 Atl. 1068.

15. See Corporations, 10 Cyc. 1; Receivers, 34 Cyc. 1.

**The inherent power of courts of equity,** apart from statute, to issue writs of sequestration and appoint receivers of corporations under such circumstances is a matter of dispute. That such power exists see Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57. *Contra*, see Neall *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Suydam *v.* Northwestern Ins. Co., 51 Pa. St. 394. See also Receivers, 34 Cyc. 46.

**Refusal to deliver property to receiver.**— Where a party persists in his refusal to deliver over property to a receiver, the property may be sequestered and delivered to the receiver and defendant's agents will be enjoined from delivering it to him or applying it to his use on pain of contempt. People *v.* Rogers, 2 Paige (N. Y.) 103. But *compare* Ansley *v.* Stuart, 119 La. 1, 43 So. 892; West *v.* Fraser, 5 Sandf. (N. Y.) 653.

**Vermont statutes** provide for the issuance by courts of chancery of a writ of sequestration in the nature of an attachment to create a lien on defendant's real estate pending a bill in chancery. "It is apparent that this writ of sequestration is merely an attachment by mesne process in an equity suit. It is called 'sequestration.' It might as well have been called something else. It is not the writ of sequestration known to the English chancery." See Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 576, 21 Blatchf. 138; Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23.

16. *Georgia.*— H. B. Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108.

*Iowa.*— Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978.

*Mississippi.*— Dean *v.* Boyd, 86 Miss. 204, 38 So. 297; Day *v.* Hartman, 74 Miss. 489, 21 So. 302; Stauffer *v.* Garrison, 61 Miss. 67.

*North Carolina.*— Parker *v.* Grammer, 62 N. C. 28; McDaniel *v.* Stoker, 40 N. C. 274; Hall *v.* Paschall, 27 N. C. 668; White *v.* Pettijohn, 23 N. C. 52; Edwards *v.* Massey, 8 N. C. 359.

*Pennsylvania.*— Cornelius *v.* Lincoln Nat. Bank, 15 Pa. Super. Ct. 82.

*Virginia.*— Perkins *v.* Dickinson, 3 Gratt. 335.

*United States.*— Shufeldt *v.* Jenkins, 22 Fed. 359; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138.

See 43 Cent. Dig. tit. "Sequestration," § 1.

replevin.[17] As so employed, it is merely a conservatory measure in the nature of a judicial deposit, and, unlike attachment, creates *per se* no new privilege in favor of the creditor at whose instance it has issued.[18]

**2. Proceeding In Personam or In Rem.** The proceeding in sequestration is *quasi in rem*, issuing upon personal demands secured by claims to specific property.[19] Hence the remedy may be resorted to in proceedings in state courts to enforce liens on vessels, whereas proceedings purely *in rem* may under the national constitution be brought in the federal courts only.[20] So where no personal jurisdiction is obtained, the only judgment that can be rendered is one binding the property sequestered,[21] and effective not against the whole world, but only against the interest of defendant in the property.

**3. Original or Auxiliary Process.** As a conservatory remedy for the preservation of property in dispute, the writ of sequestration is of course an auxiliary rather than an original process,[22] so that error in issuing it will not affect the judgment on the merits,[23] and incorrect recitals in the affidavit for the writ will not deprive the court of jurisdiction over the action in case the facts actually satisfy jurisdictional requirements.[24]

17. See Blum *v.* Gaines, 57 Tex. 135; Wilkins *v.* Weller, 1 Tex. App. Civ. Cas. § 876.

18. Alabama Bank *v.* Hozey, 2 Rob. (La.) 150; Duclerc *v.* Crebassol, 19 La. 91; McManus *v.* Jewett, 6 La. 530; Oddie *v.* His Creditors, 6 Mart. N. S. (La.) 473; Pitot *v.* Elmes, 1 Mart. (La.) 78; Fowler *v.* Stonum, 6 Tex. 60.

**Definitions of Louisiana code.**—"Sequestration is a kind of deposit, which two or more persons, engaged in litigation about any thing, make of the thing in contest to an indifferent person, who binds himself to restore it, when the issue is decided, to the party to whom it is adjudged to belong." Rev. Civ. Code, art. 2973. "The judicial deposit is that which is made in consequence of an order or judgment rendered by a judge in the cases provided for by the laws regulating judicial proceedings." Rev. Civ. Code, art. 2979.

**In Louisiana** a right of attachment is called a "writ of sequestration." Stewart *v.* Potomac Ferry Co., 12 Fed. 296, 306, 5 Hughes 372.

**Proceedings under Louisiana statute of 1826.**— For proceedings by way of sequestration against absconding debtors under the obsolete Louisiana statute of 1826 see Spear *v.* Hagelberg, 16 La. Ann. 8; Tufts *v.* Casey, 15 La. Ann. 258.

**Writs of attachment and sequestration are not antagonistic** or exclusive, the one of the other. An attachment may issue as well when there exists a lien as when there exists none. A sequestration always issues when a right to or on property is averred and there is danger of losing it. Gumbel *v.* Beer, 36 La. Ann. 484.

**The purpose of the law** is to give plaintiff a process to protect him against the apprehended injury until he can establish his right and to exact of defendant, if he would retain the possession to which he is presumptively entitled, that he give security to indemnify plaintiff against misuse of the property and loss of the rents while plaintiff is pursuing his remedy in court to establish his title. See Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

**In Louisiana there can be no sequestration after judgment.**— Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 451, 39 So. 441.

**In Vermont** the writ of sequestration is merely an attachment by mesne process in an equity suit. It is called "sequestration." It might as well have been called something else. It is not the writ of sequestration known to the English chancery. Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 568, 21 Blatchf. 138. The statutory sequestration in Vermont is in effect an attachment to create a lien. Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23.

19. Lemann *v.* Truxillo, 32 La. Ann. 65, holding that a sequestration suit not being a proceeding purely *in rem*, if defendant is without capacity to stand in judgment, no valid decree can be rendered disposing of the property sequestered.

20. Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74. See also Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530.

21. See *infra*, XII, D, 1.

22. Overton *v.* Overton, 10 La. 466; Breed *v.* Repsher, 4 Mart. (La.) 187; Cheatham *v.* Riddle, 8 Tex. 162; Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608. See also Hunter Canal Co. *v.* Robertson, 113 La. 833, 37 So. 771; Wandelohr *v.* Grayson County Nat. Bank, (Tex. 1908) 112 S. W. 1046, 108 S. W. 1154 [*affirming* (Tex. Civ. App. 1907) 106 S. W. 413].

**"A sequestration in a chancery suit is a 'legal process' within the meaning of the 13th section of the Bankruptcy Act, 1869."** *Ex p.* Hughes, L. R. 12 Eq. 137, 40 L. J. Bankr. 46, 19 Wkly. Rep. 771 [*quoted* in *In re* Hastings, 61 L. J. Q. B. 652, 662, 67 L. T. Rep. N. S. 234, 9 Morr. Bankr. Cas. 234].

23. Breed *v.* Repsher, 4 Mart. (La.) 187; Cheatham *v.* Riddle, 8 Tex. 162.

24. See Endel *v.* Norris, 15 Tex. Civ. App 140, 39 S. W. 608.

**Costs of sequestration abide the result of the main action,** sequestration being an

4. CONSTRUCTION OF STATUTES — a. In General. Sequestration being a harsh and unusual process by which the property of defendant is taken from his possession before judgment, without notice, and upon the *ex parte* showing of plaintiff,[25] he who resorts to it must be sure of his ground, and the statutes authorizing its use are uniformly to be construed with strictness.[26] It cannot be extended by implication beyond the cases for which the law has specially provided.[27]

b. Application of State Statutes in Federal Courts. Under the acts of congress giving the supreme, circuit, and district courts power to establish modes of practice in equity by rules of court,[28] and providing for adoption of the state practice in actions at law,[29] the federal courts may in appropriate cases adopt and issue the writs of sequestration established and authorized by state statutes.[30]

## II. IN WHOSE FAVOR AVAILABLE.

**A. Necessity For Lien, Privilege, or Ownership.** Inasmuch as the writ of sequestration, unlike attachment, is designed to protect a specific right of property, it is not available at the instance of an ordinary general creditor, but issues only on the prayer of one claiming title to the property sought to be sequestered or asserting a lien or privilege upon it.[31]

auxiliary process. See Hunter Canal Co. *v.* Robertson, 113 La. 833, 37 So. 771.

**Sequestration as process to bring non-resident into court.**—Attachment being the usual and proper remedy to bring into court a non-resident who has property within the jurisdiction, it seems that sequestration should not be resorted to for that purpose. See Terry *v.* Terry, 10 La. 68. But *compare* McDonald *v.* Vaughan, 13 La. Ann. 405.

25. See Wilson *v.* Churchman, 4 La. Ann. 452.

26. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Pasley *v.* McConnell, 37 La. Ann. 552; Baer *v.* Kopfler, 19 La. Ann. 194; Barriere *v.* Feste, 9 La. Ann. 535; Beck *v.* Brady, 6 La. Ann. 444; Wilson *v.* Churchman, 4 La. Ann. 452; Shropshire *v.* Russell, 2 La. Ann. 961; Talamon *v.* Ytasse, 4 Rob. (La.) 462; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42.

27. Pasley *v.* McConnell, 37 La. Ann. 552; Barriere *v.* Feste, 9 La. Ann. 535; Talamon *v.* Ytasse, 4 Rob. (La.) 462. See also Muncy Creek R. Co. *v.* Hill, 84 Pa. St. 459.

28. U. S. Rev. St. (1878) § 913 [U. S. Comp. St. (1901) p. 683].

29. U. S. Rev. St. (1878) §§ 914, 915, 916 [U. S. Comp. St. (1901) p. 684].

30. Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138; Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23.

31. Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978; Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97; Welton *v.* Burton, 27 La. Ann. 448; Yale *v.* Stevenson, 23 La. Ann. 143; Baer *v.* Kopfler, 19 La. Ann. 194; Slark *v.* Broom, 7 La. Ann. 337; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053. See also Smith *v.* Smith, 2 La. Ann. 447; Fish *v.* Moores, 11 Rob. (La.) 279; Sellick *v.* Kelly, 11 Rob. (La.) 145; Talamon *v.* Ytasse, 4 Rob. (La.) 462; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42.

**The existence of the privilege may be controverted** on the trial on the merits, and the right to contest it is not lost by failure to take a rule to set aside the sequestration before filing an answer. Slark *v.* Broom, 7 La. Ann. 337.

**Sequestration of interest on bonds.**—A holder of city bonds cannot get out a writ of sequestration against a bank for funds deposited by the city to the credit of the interest on the bonds, since the deposit does not vest title to the funds in the holders of the interest coupons. Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97.

**A shareholder in a corporation** is entitled to a sequestration of the corporate property upon the dissolution of the corporation. Eltringham *v.* Clark, 49 La. Ann. 340, 21 So. 547.

**A depositary of notes having an undivided interest therein** may maintain sequestration for the notes even though they have been sued on by the party wrongfully in possession. Lannes *v.* Courege, 31 La. Ann. 74.

**A right to property as indemnity** is sufficient to entitle one to a sequestration thereof. Johnson *v.* Imboden, 7 La. Ann. 110, where certain slaves were delivered by an executor to the sureties on his bond as an indemnity against liability for his misfeasances.

**A partner may sequester partnership property** where his copartner sets up an adverse right. Blanchard *v.* Luce, 19 La. Ann. 46; Johnson *v.* Brandt, 10 Mart. (La.) 638. *Compare* Shropshire *v.* Russell, 2 La. Ann. 961.

**Property belonging to joint owners** may be sequestered where it is alleged that one party is squandering the revenues or committing some other act rendering sequestration advisable in the interest of the other. Interstate Land Co. *v.* Doyle, 120 La. 46, 44 So. 918.

**Plaintiff in a revocatory action** cannot sequester the property which is the subject of that action upon the ground that the vendee is about to dispose of it to the prejudice of

**B. Non-Residents.** In the states where sequestration is commonly resorted to as a conservatory remedy, non-residents may avail themselves of it equally with residents.[32] But in Texas a foreign corporation must allege and prove that it has a permit to do business in the state.[33]

## III. GROUNDS FOR SEQUESTRATION.[34]

**A. In General.** The stringent process of sequestration, being a remedy *stricti juris*, can only be resorted to in cases authorized by the very letter of the law.[35] Unless therefore a complainant can bring his case within the statutory

the vendor's creditors, plaintiff having no lien or privilege. Talamon *v.* Ytasse, 4 Rob. (La.) 462.

**Title at time sequestration levied essential.** — A muniment of title either of negative or of a positive character acquired subsequent to the sequestration will not be admitted to bolster up a defective title or supply the want of title at the time of levy. Yale *v.* Stevenson, 23 La. Ann. 143.

**Overseer's privilege on a crop** is properly enforced by sequestration. Smith *v.* Smith, 2 La. Ann. 447.

**Deposit with real estate agent.**—A plaintiff who has made a deposit with a real estate agent to bind a purchase has of course the ownership requisite for a sequestration. Smith *v.* Kinney, 30 La. Ann. 332, where the point was apparently assumed.

**A wife suing for her paraphernal property** is entitled to sequester all of her husband's estate where the other grounds for sequestration exist. Johnston *v.* Johnston, 13 La. Ann. 581.

**A vendee who has never paid the price** or put the vendor in default and to whom delivery has never been made is not entitled to take possession or to maintain a sequestration. Farr *v.* Davis, 5 La. Ann. 28.

**The consignee of goods** can maintain sequestration as owner against a carrier. Sonia Cotton Oil Co. *v.* The Red River, 106 La 42, 30 So 303, 87 Am. St. Rep. 293.

**Before the war a freed slave** could maintain sequestration in her own behalf. See Marshall *v.* Watrigant, 13 La. Ann. 619.

**Separate actions by partial owners of a note,** although irregular, are not void, and hence do not invalidate writs of sequestration issued before they were consolidated against property mortgaged to secure the note. Avery *v.* Popper, 92 Tex. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

**No sequestration can issue against the city of New Orleans** see Southern Bank *v.* Louisiana Nat. Bank, 28 La. Ann. 97.

**Attachment is the proper and legal remedy** for a judgment creditor who desires to reach a fund belonging to his debtor in the hands of third persons and who has secured no lien on the fund. Bitzer *v.* Washburn, 121 Iowa 462, 96 N. W. 978.

32. Johnson *v.* Imboden, 7 La. Ann. 110; Newman *v.* Wilson, 1 La. Ann. 48 (sheriff of another state); Ohio Ins. Co. *v.* Edmondson, 5 La. 295.

33. Peters *v.* Anheuser Busch Brewing Assoc., (Tex. Civ. App. 1900) 55 S. W. 516. *Compare* Ohio Ins. Co. *v.* Edmondson, 5 La. 295.

34. **As contempt or execution process in equity** see *supra*, I, A, B.

**In receiverships** see *supra*, I, B, 2; and, generally, RECEIVERS, 34 Cyc. 46.

35. Beck *v.* Brady, 6 La. Ann. 444.

**Absence from the state** is not ground for sequestration, attachment being the proper remedy. Stockton *v.* Hasluck, 10 Mart. (La.) 472. But where the grounds for sequestration exist otherwise, the court will acquire jurisdiction quasi *in rem* over a nonresident. McDonald *v.* Vaughan, 13 La. Ann. 405. *Compare* Terry *v.* Terry, 10 La. 68.

**Prospective insolvency** affords no ground for a proceeding by sequestration. Barriere *v.* Feste, 9 La. Ann. 535.

**The mere existence of a lien** where there are no circumstances to imperil it will not justify a sequestration. See Erwin *v.* Jones, 5 La. 344. See also *infra*, V, A.

**The mere existence of a debt** will not justify a sequestration. Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127.

**The prompt collection of revenues and making of necessary repairs** is no ground for a writ of sequestration of real property, where there is no allegation of apprehension that defendants will waste the property in dispute. Pasley *v.* McConnell, 37 La. Ann. 552.

**To obtain the sequestration of real property** there must be an allegation that plaintiff has been evicted through violence or that he has reason to apprehend that defendant will make use of his possession to dilapidate or waste the fruits of the property. Copley *v.* Bonner, 7 La. Ann. 578.

**Absconding or concealment of self.**— Under an early statute in Louisiana any three creditors of a merchant who absconded or concealed himself in order to avoid payment of his debts might cause his property to be sequestered. See Levois *v.* Gerke, 12 La. Ann. 828.

**Where plaintiff did not seek to recover property** purchased and paid for by him, but merely sought damages for defendant's failure to deliver it, he was not entitled to have it sequestered. Houston *v.* Booth, (Tex. Civ. App. 1908) 107 S. W. 887.

**The grounds existing at the time the writ is sued out** must justify its issuance; it cannot be maintained on those arising afterward.

provisions by making a *prima facie* showing of the existence of some one of the grounds for this relief, the writ will not issue,[36] or, having issued improvidently, will be dismissed and set aside.[37]

**B. Necessity For Lien, Privilege, or Ownership.** The distinguishing characteristic of the sequestration process as a conservatory writ is that it issues only to protect a claimant who asserts either title to the property sought to be sequestered or a lien or privilege upon it.[38]

**C. Removal, Concealment, or Disposition of Property.** Under the statutes the ownership or privilege of plaintiff is shown to be endangered sufficiently to justify the issuance of a sequestration if defendant is disposing of the property claimed [39] or is removing it from the state.[40]

**D. Intent to Remove, Conceal, or Dispose of Property.** Intention on the part of defendant to remove, conceal, or dispose of the property will also authorize the issuance of a sequestration,[41] the apparent rather than the actual intent of the debtor being regarded for the purpose of determining the propriety of issuing the writ.[42]

Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Wilson *v.* Churchman, 4 La. Ann. 452. *Compare* Royer Succession, 105 La. 281, 29 So. 511.

**36.** Pasley *v.* McConnell, 37 La. Ann. 552; Levi *v.* Penny, 11 La. Ann. 539; Barriere *v.* Feste, 9 La. Ann. 535; Copley *v.* Bonner, 7 La. Ann. 578; Sellick *v.* Kelly, 11 Rob. (La.) 145; Erwin *v.* Jones, 5 La. 344; De Baillon *v.* Ponsony, 5 Mart. N. S. (La.) 42; Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

**37.** Catlett *v.* Heffner, 23 La. Ann. 577. And see *infra*, XI, B, 2.

**38.** See cases cited *supra*, II, A.

**The writ is based upon, and operates to** preserve, protect, and enforce an antecedent privilege or claim of ownership or possession resting on the property seized. American Nat. Bank *v.* Childs, 49 La. Ann. 1359, 22 So. 384, 386.

**Ownership when determined.**—A writ of sequestration issued for the purpose of a possessory action cannot be maintained until the question of ownership of the property in dispute is determined, as the question of ownership cannot be determined in the possessory action. Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 117 La. 960, 42 So. 467.

**39.** See cases cited *infra*, this note.

**But disposal in the ordinary course of business** will not justify the issuance of the writ. Young *v.* Guess, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. *Compare* Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881; Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405. In American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182, it is said that where a person engaged in selling goods, merchandise, and wares to parties in retail business, sells them on credit, there is an implied consent on his part that the latter should dispose of the goods purchased in the usual and regular order of business.

**Formerly in Louisiana a disposal of property, even in course of business,** authorized a sequestration. Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881. See also Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**40.** Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; Royer's Succession, 105 La. 281, 29 So. 511; Milne *v.* Amelung, 2 Mart. (La.) 209; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97. *Compare* Catlett *v.* Heffner, 23 La. Ann. 577.

**Non-delivery by carrier.**—Where, after the arrival of a steamboat at the landing at which delivery was to be made, the consignee insists on the unloading of the goods on the levee, and the captain, persisting in unloading them on the bar, orders the return of those that have been landed, and the boat leaves the landing and apparently proceeds on its way to another market with the goods, there is ground for a sequestration. Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

**41.** Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42; Johnson *v.* Brandt, 10 Mart. (La.) 638.

**Intention to remove property out of the parish** is insufficient; there must be intention to remove it out of the state. Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42. *Compare* Segur *v.* Sorel, 11 La. 439.

**42.** Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13, holding that the matter to be considered is not what the debtor really intended to do, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent.

**Removal from jurisdiction of court.**—Where sequestration of movables is sought an intent to remove the property in dispute from the jurisdiction of the court will justify the issuance of the writ. Carter *v.* Lewis, 15 La. Ann. 574; Boatner *v.* Wade, 14 La. Ann. 695; Anderson *v.* Stille, 12 La. Ann. 669. *Aliter* where real estate subject to mortgage

**E. Fear of Removal, Concealment, or Disposition of Property** — **1. In General.** A claimant of property is not required to await the actual commission by defendant of such acts as would be fatal to the lien or ownership asserted, but may obtain a sequestration where he fears that defendant will remove the property,[43] or that he will conceal it or dispose of it[44] during the pendency of the suit.[45]

**2. Grounds of Fear.** Although the decisions in Louisiana, where the question has most frequently been before the courts, are not harmonious, the present weight of authority seems to be to the effect that while the affidavit or petition for sequestration need not set forth the grounds for the apprehension entertained by plaintiff,[46] yet in case of contest, as on motion to dissolve the sequestration, plaintiff must be prepared to establish affirmatively the existence of reasonable grounds for his apprehension.[47] The affidavit will, however, be *prima facie* evidence of the existence of the apprehension sworn to,[48] and it is the apparent rather than the actual intention of the debtor that is important.[49]

**F. Preservation of Property in Controversy Pending Litigation.** Where there is danger that the property claimed by both plaintiff and defendant may be wasted or consumed, or impaired in value, if permitted to remain in the custody of defendant, there is good ground for the issuance of a writ of sequestration;[50] and it is in cases of this sort that the court may most properly order,

is sought to be sequestered. Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42.

**43.** Carter *v.* Lewis, 15 La. Ann. 574; Boatner *v.* Wade, 14 La. Ann. 695; Anderson *v.* Stille, 12 La. Ann. 669; Wilson *v.* Churchman, 4 La. Ann. 452; Gardner *v.* Shipley, 4 La. Ann. 184; Bres *v.* Booth, 1 La. Ann. 307; Patterson *v.* Hall, 1 La. Ann. 108; McFarlane *v.* Richardson, 1 La. Ann. 12; Fink *v.* Martin, 10 Rob. (La.) 147; Williams *v.* Duer, 14 La. 531; Wooster *v.* Salzman, 14 La. 98.

**44.** Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405; Lannes *v.* Courege, 31 La. Ann. 74; Daugherty *v.* Vance, 30 La. Ann. 1246; Wilson *v.* Churchman, 4 La. Ann. 452; Fink *v.* Martin, 10 Rob. (La.) 147; Dumonteil *v.* Dubroqua, 1 Rob. (La.) 531. And see cases cited *passim*, this article.

**A stock-holder may sequester** its property upon the dissolution of a corporation to prevent its disposition to his prejudice. Eltringham *v.* Clark, 49 La. Ann. 340, 21 So. 547.

**45.** See cases cited *supra*, notes 39 and 40, especially Wilson *v.* Churchman, 4 La. Ann. 452, holding an affidavit insufficient for failure to allege fear that property would be disposed of "during the pendency of the suit."

**46.** See *infra*, V, B, 3, d, (II), (B), (2), (b).

**47.** Young *v.* Guess, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 770; Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. See also Johnston *v.* Johnston, 13 La. Ann. 581. *Compare* Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**The contrary view.**— In sequestration of movable property based on a vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that defendant will conceal, part with, or dispose of the same in his possession during the pendency of the suit is sufficient, and affiant need not prove any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do. Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**Formerly it was held unnecessary to prove any other grounds** of fear than the facts that plaintiff had a privilege and that it lay in the power of defendant to defeat or destroy it by doing some of the acts which plaintiff swore he feared he might do. See Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**48.** See *infra*, XI, D.

**Property purchased with the identical money stolen** by the purchaser from a succession belongs to the succession and may be sequestered in the hands, and recovered from the possession, of the purchaser by the curator of the succession. Pirtle *v.* Price, 31 La. Ann. 357.

**49.** Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13.

**Apparent intent of debtor considered.**— Not what the debtor really intended to do, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent, is the matter to be considered. Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13.

**The propinquity of the property to the state line** is an important element to be considered in determining whether the fear of removal sworn to by plaintiff is reasonable. Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13.

**50.** Pierce *v.* Sturdivant, 108 La. 558, 32

and has most frequently directed, either *ex proprio motu*, or at the suggestion of one of the claimants, that the property be "judicially sequestered" without bond and remain impounded in the custody of the court until a final determination of the cause.[51]

## IV. ON WHAT DEMANDS REMEDY LIES.

**A. In General.** The writ of sequestration may be resorted to, as the cases cited throughout this article show, in actions sounding *ex delicto* as well as those *ex contractu*, wherever a right of property is involved.[52] So it will issue in a suit to foreclose a mortgage;[53] in an action of trespass to try title;[54] in a suit for the recovery from a husband of a wife's separate property;[55] in an action to recover money stolen from a succession,[56] or to have a guardian removed and the ward's property restored,[57] or for a partition,[58] or for rent.[59]

**B. Immatured Demands.** There are in some jurisdictions express statutory provisions authorizing the issuance of a sequestration on immatured demands in certain cases.[60] In cases other than those thus specifically authorized the extent of the right to a sequestration is doubtful, the authorities being few and discordant.[61]

**C. Claims and Liens Arising Outside State.** It is no valid objection to the issuance of a sequestration that the claim or the lien which it is sought to enforce arose outside the state,[62] since accepted principles of conflict of laws, or what is non-scientifically known as the "comity of nations," as well as provisions of the federal constitution in certain instances, require that the process should be available in such cases in the absence of strong counter reasons of public policy.

## V. PROCEEDINGS TO PROCURE.

**A. Proceedings in Equity.** The original writ of sequestration in chancery was obtained upon motion as of course, upon proper representations of inability

So. 530; Benton's Succession, 106 La. 494, 31 So. 123; Carter *v.* Lewis, 15 La. Ann. 574; Walsh *v.* Wells, 7 La. 337; Adams *v.* Lewis, 7 Mart. N. S. (La.) 400.

**In a suit of trespass to try title** a writ of sequestration is permitted by law to issue for the purpose of preventing injury to the property, its waste, or to prevent the conversion by an occupant of the fruits and revenues of the property, and is permitted for no other purpose. Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

51. See *infra*, V, B, 4, a, (II).

**Where cotton remained unpicked** for more than a month after the closing of the season, and the rains were injuring it and the crop going to waste, a proceeding by sequestration was justified. Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530.

**"Judicial sequestration"** in Louisiana is a term applied to a mandate ordering the sheriff in certain cases to take into his possession and to keep a thing of which another person has the possession until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of that thing. La. Code Pr. 269 [*quoted* in Baldwin *v.* Black, 119 U. S. 643, 646, 647, 7 S. Ct. 326, 30 L. ed. 530].

52. Pirtle *v.* Price, 31 La. Ann. 357; Lyons *v.* Andrews, 12 La. Ann. 685; Blum *v.* Gaines, 57 Tex. 135; and cases cited *passim* this article.

53. See McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

54. Blum *v.* Gaines, 57 Tex. 135; Finnigan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

55. Johnston *v.* Johnston, 13 La. Ann. 581.

56. Pirtle *v.* Price, 31 La. Ann. 357.

57. Lyons *v.* Andrews, 12 La. Ann. 685.

58. Segur *v.* Sorel, 11 La. 439.

59. Hunter Canal Co. *v.* Robertson, 113 La. 833, 37 So. 771, holding that where there has been an imperfect performance of a contract for the irrigation of a rice crop, only the excess of the rent over the loss resulting from imperfect performance can serve as a basis for sequestration.

60. **In Louisiana mortgaged property** may be sequestered before the maturity of the debt. See Catlett *v.* Heffner, 23 La. Ann. 577.

61. See Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; Barriere *v.* Feste, 9 La. Ann. 535; Gardner *v.* Shipley, 4 La. Ann. 184; Neilson *v.* Pool, 17 La. 209.

**Where defendant's alleged insolvency is prospective only** and *non constat* that he will not pay all his debts as they fall due, an apprehension that he may not do so is no ground for a sequestration two years in advance of maturity of plaintiff's claim. Barriere *v.* Feste, 9 La. Ann. 535.

62. Ohio Ins. Co. *v.* Edmondson, 5 La. 295, where sequestration issued to enforce lien created by a bottomry bond made outside the state.

to find the delinquent defendant or of his failure to comply with the decree of the court.[63] The details of the procedure are discussed in the earlier works on chancery practice, but are of little practical importance to-day.[64] The modern proceedings to procure a writ of sequestration in equity being of interest chiefly in connection with the statutory provisions for receiverships, they are more appropriately discussed under other captions in this work.[65] It may be noted here, however, that in such cases the writ is not ordinarily granted upon *ex parte* applications,[66] nor until the return of an execution unsatisfied.[67]

**B. Proceedings Under Statutes to Obtain a Conservatory Writ — 1. In General.** The observance of the requisites prescribed by law is in the nature of a condition precedent,[68] and failure to observe them cannot be aided by the proof adduced at the trial on the merits nor even by admissions of fact contained in subsequent pleadings.[69]

**2. Jurisdiction[70] and Venue — a. Jurisdiction in General.** Jurisdiction must of course be established in the court from which relief by way of sequestration is sought; and to this end it must be shown not simply that the court had the right to take cognizance of the subject-matter involved in the principal demand,[71] but also that all the formal requisites in this proceeding have been complied with. Hence limitation of a court's jurisdiction as to the amount of the principal demand or value of the property sequestered,[72] or as to the nature of the suit,[73] must be observed, and the necessary affidavits and bonds must be provided in order that all jurisdictional elements may be present.[74]

63. See Angell & A. Corp. § 670.

64. See Daniell Ch. Pr. § 471 *et seq.*, § 1050 *et seq.*; Hoffman Ch. Pr. § 471.

65. See Corporations, 10 Cyc. 1; Receivers, 34 Cyc. 46.

66. Cook *v.* Detroit, etc., R. Co., 45 Mich. 453, 18 N. W. 74; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521.

67. See Geery *v.* Geery, 63 N. Y. 252 [*overruling* White *v.* Geraerdt, 1 Edw. (N. Y.) 336]; Rodbourn *v.* Utica, etc., R. Co., 28 Hun (N. Y.) 369; Loder *v.* New York, etc., R. Co., 4 Hun (N. Y.) 22; Reid *v.* Northwestern R. Co., 32 Pa. St. 257; Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185.

**Failure of sheriff to retain execution for sixty days,** the period within which it was made returnable, before returning it, did not invalidate sequestration proceedings instituted immediately upon the return; since the sheriff was entitled to make return at any time after he was satisfied that there was no property on which the execution could be properly levied. See Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185.

68. Wilson *v.* Churchman, 4 La. Ann. 452.

69. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Wilson *v.* Churchman, 4 La. Ann. 452; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42. *Compare* Royer's Succession, 105 La. 281, 29 So. 511; Edwards *v.* Massey, 8 N. C. 359.

70. Jurisdiction in personam or in rem see *supra*, I, C, 2.

71. Overton *v.* Overton, 10 La. 466. *Compare* Alabama Bank *v.* Hozey, 2 Rob. (La.) 150.

72. See Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687. See also Justices of the Peace, 24 Cyc. 470 note 37.

**Presumption of jurisdiction.**—Where the record does not show that the property upon which defendant sought to levy a sequestration was of greater value than the jurisdictional limit, it will be presumed, in a suit for unauthorized sequestration, that the court had jurisdiction; neither the affidavit nor the return of the officer upon the writ being determinative of the value of the property. Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687. And where process is ordered by the judge of an adjoining district, it will be presumed that the case was one of those in which he is authorized to act. Breed *v.* Repsher, 4 Mart. (La.) 187.

73. Cordes *v.* Clarke, 1 Rob. (La.) 271; Overton *v.* Overton, 10 La. 466, both cases involving jurisdiction of the old Louisiana probate court.

**The inferior judges** cannot of their own accord appoint receivers to collect or keep funds or evidences of debt the subject of litigation. Such appointments can be made only with the consent of all parties interested. The judge's assent adds nothing to the powers of such agents, nor can he impose on them restrictions not imposed by their principals. U. S. *v.* U. S. Bank, 11 Rob. (La.) 418; Frazier *v.* Willcox, 4 Rob. (La.) 517.

**The court has no jurisdiction to order, upon motion, a person not a party to the cause,** to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. Johnson *v.* Chippindall, 2 Sim. 55, 29 Rev. Rep. 58, 2 Eng. Ch. 55, 57 Eng. Reprint 711.

74. Lemann *v.* Truxillo, 32 La. Ann. 65.

**b. Jurisdiction of Federal Courts.** Under the sections of the Revised Statutes giving circuit courts of the United States power to issue all writs necessary for the exercise of their respective jurisdictions, and to adopt rules of procedure, the federal courts may, in appropriate cases, provide for the issuance of writs of sequestration in conformity with the practice of the respective states.[75]

**c. Venue.** The proceedings for sequestration must apparently everywhere be instituted either in the county where defendant resides, or in the county where the property involved is situated.[76] In Texas it seems that the suit must be brought in the county where defendant resides, regardless of the *locus* of the property.[77]

**3. Affidavits — a. Necessity of Affidavit.** In order to obtain a writ of sequestration, as in order to obtain a writ of attachment or other extraordinary order permitting the seizing before final judgment of property in the possession of defendant, plaintiff is required by statutes to make an affidavit setting forth the grounds upon which he claims the extraordinary relief;[78] and writs issued without this essential formality having been complied with will be set aside.[79]

**b. Accompanying Pleadings.** The affidavit required by statute may ordinarily be made either *in extenso* in a separate document or by verification, under oath, of the truth of matter set forth in the petition or complaint.[80]

**Supplemental petitions must be separately sworn to.**— Supplemental petitions filed in a purely sequestration suit claiming additional sums must each be separately sworn to and a new order granted and a new seizure made upon each of them; otherwise the court acquires no jurisdiction of the demands in such petitions. Lemann *v.* Truxillo, 32 La. Ann. 65. *Compare* Ohio Ins. Co. *v.* Edmondson, 5 La. 295. And see also Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; Gumbel *v.* Beer, 36 La. Ann. 484.

**Jurisdiction of lower court pending appeal.** — A sequestration may be obtained from the court of the first instance in the cases in which it is authorized by law, although the suit be pending on appeal in the appellate court. McFarlane *v.* Richardson, 1 La. Ann. 12; Fink *v.* Martin, 10 Rob. (La.) 147; Williams *v.* Duer, 14 La. 523. See, generally, Appeal and Error, 2 Cyc. 978.

**In proceedings for receiverships.**—Where plaintiff, in an action for sequestration against a corporation, alleged the recovery of a judgment against defendant in a certain city court, the proper docketing of that judgment, the issuance of an execution thereon, and the return of the same unsatisfied, it presented a case over which the court had jurisdiction to issue sequestration process and appoint a receiver, although the original judgment in the city court may not have been valid. Hunting *v.* Blun, 143 N. Y. 511, 38 N. E. 716. See also Whittlesey *v.* Frantz, 74 N. Y. 456; and, generally, Receivers, 34 Cyc. 46 *et seq.*

75. Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 194. See United Sup. Ct. Equity Rules 7, 8; and *supra*, I, B, 4, c.

76. See Edwards *v.* Marin, 28 La. Ann. 567.

**In Louisiana before 1876** a sequestration could be applied for only in the parish where defendant was domiciled. See Gay *v.* Eaton, 27 La. Ann. 166; Guyol *v.* Duggan, 26 La. Ann. 529; Bradley *v.* McCrea, 26 La. Ann. 380; Bradley *v.* Woodruff, 26 La. Ann. 299; Peterson *v.* Willard, 17 La. Ann. 93. By statute in 1876, it was provided that thenceforward defendant might be cited either in the parish where he was domiciled or on the parish where the property was situated. See Edwards *v.* Marin, 28 La. Ann. 567. But where the suit is brought in the parish where the property is found the jurisdiction is *quasi in rem* and limited to the property. See Lemann *v.* Truxillo, 32 La. Ann. 65. See also Spear *v.* Hagelberg, 16 La. Ann. 8.

77. See Tex. Rev. St. § 1198.

78. See Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; McClendon *v.* Bennett, 16 La. Ann. 335; Logan *v.* Hickman, 14 La. Ann. 300; Sellick *v.* Kelly, 11 Rob. (La.) 145; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42; Cheatham *v.* Riddle, 8 Tex. 162.

79. McClendon *v.* Bennett, 16 La. Ann. 335. And see *infra*, XI, B, 1.

**Affidavit for four plaintiffs on suit by six.** — The court should quash a writ of sequestration issued on an affidavit for four plaintiffs when the suit is for six and when plaintiffs have failed to properly amend. White *v.* Simonton, (Tex. Civ. App. 1902) 67 S. W. 1073

**Necessity of affidavit to supplemental petition.**—Where the original petition for a sequestration is dismissed as premature, the seizure made under it cannot be validated by a supplemental petition unless such supplemental petition be sworn to. Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; Gumbel *v.* Beer, 36 La. Ann. 484. So where supplemental petitions claiming additional sums are filed, each must be sworn to. Lemann *v.* Truxillo, 32 La. Ann. 65. But where the original petition, not praying for a sequestration, is sworn to, a supplemental petition seeking a writ of sequestration need not be accompanied with a new affidavit, the supplemental petition containing no new facts, but referring to the original petition and making it the basis of the demand. Ohio Ins. Co. *v.* Edmondson, 5 La. 295.

80. Lemann *v.* Truxillo, 32 La. Ann. 65;

**c. Who May Make** — (I) *In General.* In the absence of special circumstances the affidavit must be made by plaintiff in person.[81]

(II) *In Absence of Plaintiff.* Where plaintiff is not present, or is physically incapacitated, the affidavit may be made by his agent or attorney in fact.[82] But in such cases it must appear by affidavit or other evidence that the agency is special.[83]

**d. Form and Requisites** — (I) *Statutory Language.* It is always sufficient to recite in the language of the statute the grounds upon which the sequestration is sought;[84] but this method of composing the affidavit is not an exclusive one, nor are the words to be used sacramental, and failure to adopt the statutory verbiage is not fatal, provided the allegations are otherwise sufficient.[85]

(II) *Specific Requisites* — (A) *Claim or Indebtedness.* The affidavit must contain a statement of some specific sum as being due from defendant to plaintiff,[86] both in order that the necessity for sequestration may be apparent and in order that defendant may have an opportunity to release the property of which sequestration is sought by paying the claim.

(B) *Grounds* — (1) In General. The affidavit should in all cases state the grounds upon which the party seeking the sequestration claims to be entitled to it.[87]

Pirtle *v.* Price, 31 La. Ann. 357; Lannes *v.* Courege, 31 La. Ann. 74; Wells *v.* St. Dizier, 9 La. Ann. 119; Ohio Ins. Co. *v.* Edmondson, 5 La. 295; Watts *v.* Overstreet, 78 Tex. 571, 14 S. W 704; Bemis *v.* Wells, 10 Tex. Civ. App 626, 31 S. W. 827.

**81.** Hawley *v.* Tarbe, 14 La. 92, holding that where plaintiff is present and no proper cause shown for his not making affidavit, his agent's oath is not sufficient. See also Logan *v.* Hickman, 14 La. Ann. 300; Stewart *v.* Clark, 11 La Ann. 319.

**Suit for wife's paraphernal property.**— In an action in revendication of the paraphernal property of the wife where the affidavit to obtain the sequestration was made by the husband and he alone signed the bond, the sequestration was properly dissolved, since the property having been under the wife's administration, the real plaintiff is the wife authorized and assisted by her husband. Goodin *v.* Allen, 12 La Ann. 448.

**82.** Allen *v.* Champlin, 32 La. Ann. 511; Carter *v* Lewis, 15 La. Ann. 574; Stewart *v.* Clark, 11 La. Ann. 319; Cahn *v.* Jaffray, 12 Tex Civ. App. 324, 34 S. W. 372.

**83.** Wallace *v.* Byrne, 17 La. Ann. 8.

**An authorization by plaintiff to his agent** to get possession of the property, in a letter wherein he instructed the agent to go ahead, although defendant should object to giving the property up, cannot be presumed to mean that the agent should take possession by force and violence, but, on the contrary, by process of law, and is sufficient therefore to authorize the agent to make the affidavit and execute the bond in order to obtain the writ of sequestration. Carter *v.* Lewis, 15 La. Ann. 574.

**Where principal undisclosed.**—Where a lease was made by plaintiffs as lessors and agents of an undisclosed principal, and they brought suit in their own names and by virtue of their right as agents for the owners, an affidavit and bond for a writ of sequestration in aid of the suit was properly made by them. Hunter *v.* Adone, 38 Tex. Civ. App. 542, 86 S. W. 622.

**84.** Wells *v.* St. Dizier, 9 La. Ann. 119.

**85.** Gumbel *v.* Beer, 36 La. Ann. 484; Wilson *v.* Churchman, 4 La. Ann. 452; Dumonteil *v.* Dubroqua, 1 Rob. (La.) 531; Segur *v.* Sorel, 11 La. 439.

**An affidavit that a party "verily believes,"** instead of that he "fears," that the property will be removed is good. Segur *v.* Sorel, 11 La. 439.

**An affidavit that defendant intends removing property out of the parish** is bad. It should be "out of the state." The language of the statute is plain and if the truth of the case had permitted the assertion, plaintiff could easily have said defendant intended to remove the property out of the state. The presumption therefore is that the facts did not authorize such an allegation. Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42. *Compare* Segur *v.* Sorel, 11 La. 439.

**The necessity for the writ should clearly appear in the affidavit,** hence a mere allegation of fear of disposition of the property is insufficient in that it fails to show apprehension that the property would be disposed of or removed during the pendency of the suit. Wilson *v.* Churchman, 4 La. Ann. 452.

**86.** Gumbel *v.* Beer, 36 La. Ann. 484; Johnston *v.* Cammack, 13 La. Ann. 594; Wilson *v.* Churchman, 4 La. Ann. 452, holding insufficient an allegation that plaintiff had sold defendant "about" nine hundred barrels of flour at five dollars and fifty cents a barrel. But *compare* Blanchard *v.* Luce, 19 La. Ann. 46.

**In Texas the affidavit should state the value** of each article sought to be sequestered in order that there may be a predicate for amount of release bond. See Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704.

**87.** Pasley *v.* McConnell, 37 La. Ann. 552; Blanc *v.* Wallace, 26 La. Ann. 492; Copley *v.* Bonner, 7 La. Ann. 578; Wilson *v.* Churchman, 4 La. Ann. 452; Debaillon *v.* Ponsony,

(2) Necessity of Detailed Statement — (a) Where Affidavit Based on Specific Facts. As in the case of proceedings to procure attachments, where the affidavit purports to be based upon specific facts, the better rule requires the statement at length of the facts which are relied upon to satisfy the statutory provisions.[88]

(b) Where Affidavit Based on Belief or Apprehension. In Louisiana, where the majority of decided cases on this branch of the topic have arisen, an affidavit for sequestration may proceed upon belief and apprehension, and it is not necessary to set forth the facts on which the apprehension is founded,[89] although the fact that the apprehension exists must be clearly and unequivocally set forth;[90] and where defendant charges the untruthfulness of the affidavit upon motion to dissolve, it is, under the later decisions, incumbent upon plaintiff to establish affirmatively the existence of grounds upon which to base his alleged apprehension.[91] In other jurisdictions the rule is different owing to differences in the statutes governing the issuance of the writ.[92]

5 Mart. N. S. (La.) 42; Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372; Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

**An affidavit setting forth any one of the grounds** upon which the writ is authorized to issue is sufficient. Anderson *v.* Stille, 12 La. Ann. 669, holding it sufficient to allege a fear that defendant will send the property out of the jurisdiction of the court without also alleging fear that defendant will conceal, part with, or dispose of the property.

**Distinct grounds not inconsistent.**—An affidavit for a writ of sequestration in an action for possession of land, which avers that plaintiff fears that defendant "will waste and convert to his own use the fruits produced by the same during the pendency of this suit," states distinct grounds, which are not inconsistent, and is sufficient. Duncan *v.* Jouett, (Tex. Civ. App. 1908) 111 S. W. 981.

88. See Edwards *v.* Massey, 8 N. C. 359, holding that where sufficient matter is stated, although insufficiently verified, the want of sufficient verification may be supplied by proofs or admissions. *Compare* Royer's Succession, 105 La. 281, 29 So. 511.

**The circumstances which imperil the loss** of the lien should be shown by the affidavit where it does not allege fear that defendant will conceal, part with, or dispose of the property in his possession. Gumbel *v.* Beer, 36 La. Ann. 484.

**An allegation that defendant is taking off his crop,** in the petition, accompanied by an affidavit declaring all the facts in the petition to be true, that defendant is reputed insolvent and unable to pay his debts, is sufficient to support the sequestration of his crop. Neilson *v.* Pool, 17 La. 209. See also Patterson *v.* Hall, 1 La. Ann. 108.

89. American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Hewitt *v.* Williams, 47 La. Ann. 742, 17 So. 269; Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405; Carter *v.* Lewis, 15 La. Ann. 574; Mabry *v.* Talley, 15 La. Ann. 562; Wells *v.* St. Dizier, 9 La. Ann. 119; Dumonteil *v.* Dubroqua, 1 Rob. (La.) 531. See also Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372.

**The early rule in Louisiana was different.**—See Bres *v.* Booth, 1 La. Ann. 307; Watkinson *v.* Black, 14 La. 351; Clark *v.* Golver, 14 La. 266; Walsh *v.* Wells, 7 La. 337. And *compare* Gumbel *v.* Beer, 36 La. Ann. 484.

90. Pasley *v.* McConnell, 37 La. Ann. 552; Gumbel *v.* Beer, 36 La. Ann. 484; Blanc *v.* Wallace, 26 La. Ann. 492; Wilson *v.* Churchman, 4 La. Ann. 452 (holding insufficient an affidavit alleging that defendant will dispose of the property or send it out of the jurisdiction, in that it fails to show apprehension that the property will be disposed of or removed during the pendency of the suit or before a fieri facias could issue); Sellick *v.* Kelly, 11 Rob. (La.) 145 (holding that it is not any privilege or mortgage which the creditor has on the property but the circumstances which cause him to apprehend that its removal may deprive him of his recourse upon it that gives the right of sequestration and that must be set up in the affidavit. See also Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

91. Young *v.* Guess, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. But *compare* Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**Where the affidavit is made by an agent,** it need not allege that "plaintiff" fears the removal of defendant's property, it being sufficient if it alleges that "affiant" fears the same. Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 So. 372, holding that the statute contemplates that the fear shall exist in the mind of the person applying for the issuance of the sequestration by making the affidavit.

**Writs improperly issued cannot be aided by proof adduced** on trial nor even by the admissions of fact contained in the subsequent proceedings. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Wilson *v.* Churchman, 4 La. Ann. 452. *Compare* Royer's Succession, 105 La. 281, 29 So. 511; Edwards *v.* Massey, 8 N. C. 359.

92. See Edwards *v.* Massey, 8 N. C. 359.

(3) Disjunctive or Alternative Allegations. Affidavits containing alternative statements of grounds are held bad in some jurisdictions,[93] unobjectionable in others,[94] the variance in the decisions not, however, being due to any suggestive differences in the statutes. The cases upholding alternative language proceed upon the theory that it is not always possible for a creditor to swear positively as to his debtor's positive intention, which may be changed at any moment;[95] while the authorities opposed argue that the use of disjunctive allegations gives rise to confusion and uncertainty as to the actual ground relied upon.[96]

(c) *Allegation of Lien, Privilege, or Ownership.* Since the writ of sequestration, unlike that of attachment, issues in this class of cases only in behalf of petitioners who assert title to the property sought to be taken into judicial custody, or a lien or privilege upon it, the affidavit for the writ should explicitly aver either ownership in plaintiff or a lien giving a special property right.[97]

(d) *Description of Property and Its Location.* The property should always be described with sufficient accuracy to enable the sheriff to identify it beyond the chance of error and to distinguish it from property of a like kind.[98] The necessity for specific allegations of one sort or another varies with the statutes. In Texas, where the requirements are specially minute, the affidavit must state separately the value of each article of property sought to be sequestered,[99] as well as the county in which it is to be found.[1]

93. Wheeler *v.* Wheeler, 65 Tex. 573; Duncan *v.* Jouett, (Tex. Civ. App. 1908) 111 S. W. 981; Clark *v.* Elmendorf, (Tex. Civ. App. 1904) 78 S. W. 538. *Compare* Hurlbut *v.* Gainor, 45 Tex. Civ. App. 588, 103 S. W. 409, holding that an affidavit stating plaintiff's fear that defendant will make use of his possession to convert to his own use the fruits "or" revenues produced by the property was not rendered indefinite or uncertain by the use of the word "or"; the words "fruits and revenues" as used in the sequestration statute being synonymous.

94. Kuhn *v.* Embry, 35 La. Ann. 488; Mabry *v.* Tally, 15 La. Ann. 562; Wells *v.* St. Dizier, 9 La. Ann. 119.

The earlier view was otherwise. See Hickman *v.* Flenniken, 12 La. Ann. 268; Ranaldson *v.* Hamilton, 5 La. Ann. 203 [*overruled* in Mabry *v.* Tally, 15 La. Ann. 562]. And *compare* Johnston *v.* Cammack, 13 La. Ann. 594.

95. Kuhn *v.* Embry, 35 La. Ann. 488.

96. See Clark *v.* Elmendorf, (Tex. Civ. App. 1904) 78 S. W. 538.

97. Gumbel *v.* Beer, 36 La. Ann. 484; Baer *v.* Kopfler, 19 La. Ann. 194; Hickman *v.* Flenniken, 12 La. Ann. 268; Ranaldson *v.* Hamilton, 5 La. Ann. 203. See also Anderson *v.* Stille, 12 La. Ann. 669. *Compare* Daugherty *v.* Vance, 30 La. Ann. 1246.

Reference from affidavit to petition.— Where the petition recites that the lumber claimed is the property of plaintiffs, defendants being in possession without any title, an affidavit averring a fear that defendant will dispose of "the property claimed in the within petition" sufficiently alleges ownership. Wells *v.* St. Dizier, 9 La. Ann. 119.

98. Mills *v.* Hackett, 65 Tex. 580; Gravity Canal Co. *v.* Sisk, (Tex. Civ. App. 1906) 95 S. W. 724; Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636; Huckins *v.* Kapf, (Tex. Civ. App. 1889) 14 S. W. 1016.

Sequestration of undivided interest.— Where the affidavit asks for the sequestration of an undivided one fifth of a crop of rice, it is defective for failure to identify, since the officer had no authority to partition the property. Gravity Canal Co. *v.* Sisk, (Tex. Civ. App. 1906) 95 S. W. 724.

Where sequestration of cattle is sought, it is ordinarily sufficient to state the brands; it would be impracticable to require that each sheep be described by age, height, color, and other peculiarities. Halbert *v.* San Saba Springs Land, etc., Assoc. (Tex. Civ. App. 1895) 34 S. W. 636. See also Mills *v.* Hackett, 65 Tex. 580.

The jury should determine what is a substantial misdescription. Mills *v.* Hackett, 65 Tex. 580.

99. McSpadden *v.* La. Force, (Tex. Civ. App. 1897) 39 S. W. 163; Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284; Huckins *v.* Kapf, (Tex. Civ. App. 1889) 14 S. W. 1016.

Necessity of certainty in allegation.— It is not sufficient to state that each article is worth "about" a designated sum, but the allegation as to the value should be definite and certain, since the requirement is not intended only as descriptive of the property but as basis for amount of the bond, which must be double the sum named in the affidavit. Morgan *v.* Turner, 4 Tex. Civ. App. 192, 23 S. W. 284.

The value is sufficiently stated where a debt due is the only amount mentioned in the affidavit and the value of the property is alleged to be the amount "above set forth." McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

1. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163; Huckins *v.* Kapf, (Tex. App. 1889) 14 S. W. 1016.

(E) *Identification of Parties.* The affidavit, as distinguished from the petition, declaration, or complaint, need not name defendants or allege the property to be in their custody.[2]

**4. Bond to Procure Sequestration — a. Necessity of Bond** — (I) *In General.* In order that a plaintiff may obtain the extraordinary relief of a writ of sequestration whereby defendant's property is seized before judgment, the statutes generally require that a bond be given to indemnify defendant against loss in case it should develop that the application was improperly made and entertained.[3]

(II) *Judicial Sequestration in Louisiana.* In Louisiana in exceptional cases, chiefly those where the ownership of real property is in dispute and one of the contending parties does not seem to have a more apparent right to the possession than the other,[4] the judge may, either *ex proprio motu*, or upon the suggestion of one of the parties,[5] direct that the property in controversy be taken into custody by the sheriff pending the determination of the suit, without requiring the party out of possession to furnish an indemnity or sequestration bond. This is known as a "judicial sequestration," properly speaking; and it is within the discretion of the judge to determine from the pleadings and facts of the particular case whether the circumstances require it to be permitted.[6] The circumstances required for granting this extraordinary relief, which is relief, or rather protection, of the same sort as that afforded by the appointment of receivers,[7] are unusual, especially where it is granted at the request of the party who is to be dispensed from giving the usual bond.[8]

**b. Requisites** — (I) *Form.* The bond should read substantially as the law requires, but technical objections should be urged *in limine litis*,[9] and obvious and meaningless clerical blunders will not fatally affect the validity of an obligation otherwise sufficient.[10]

2. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638.

3. Pasley *v.* McConnell, 36 La. Ann. 703; Vestal *v.* Sallis, 24 La. Ann. 153; McClendon *v.* Bennett, 16 La. Ann. 335; Logan *v.* Hickman, 14 La. Ann. 300; White *v.* Pettijohn, 23 N. C. 52; Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318; Nickell *v.* Carter, 23 Tex. Civ. App. 570, 56 S. W. 769; Flynn *v.* Lynch, 1 Tex. App. Civ. Cas. § 787. And see cases cited *passim*, this subheading.

**Where the property is in the hands of several individuals,** it is sufficient to make one bond for double the value of all the property payable to all defendants, there being no statute requiring separate bonds. Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

4. See La. Code Pr. § 274.

5. See Allen *v.* Whetstone, 35 La. Ann. 846.

6. See Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 114 La. 573, 38 So. 458; State *v.* De Baillon, 113 La. 572, 619, 37 So. 481, 534; Ramos Lumber, etc., Co. *v.* Sanders, 112 La. 614, 36 So. 625; State *v.* Allen, 110 La. 853, 34 So. 804; Benton's Succession, 106 La. 494, 31 So. 123, 59 L. R. A. 135; State *v.* Allen, 105 La. 167, 29 So. 719; Schwan *v.* Schwan, 52 La. Ann. 1183, 27 So. 678; *In re* Grant, etc., Furniture Co., 51 La. Ann. 1254, 26 So. 97; Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547; Long *v.* Kee, 44 La. Ann. 309, 10 So. 854; Carcagno's Succession, 43 La. Ann. 1151, 10 So. 251; Pasley *v.* McConnell, 36 La. Ann. 703; Allen *v.* Whetstone, 35 La. Ann. 846; Walker's Succession, 32 La. Ann. 321; Young *v.* Magazine St. R. Co., 24 La. Ann. 40; State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 581. See also Alabama Bank *v.* Hozey, 2 Rob. (La.) 150; Harrod *v.* Paxton, 11 Mart. (La.) 549.

**"Judicial sequestration"** defined see *supra*, 1394 note 51.

7. See Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547, whence the language of the text is taken.

8. See Pasley *v.* McConnell, 36 La. Ann. 703.

**The appointment of a judicial sequestrator is not warranted** where defendants enter into bond to secure their adversaries against any loss or damage that might result from their retaining possession of the street railway in controversy during the pendency of the suit. The preservation and safe-keeping of the property being provided for, the appointment of keeper was unnecessary and productive of unnecessary costs. Young *v.* Magazine St. R. Co., 24 La. Ann. 40.

9. Vestal *v.* Sallis, 24 La. Ann. 153, holding objection too late after release bond given and suit tried.

10. Johnson *v.* Imboden, 7 La. Ann. 110; Hurlbut *v.* Gainor, 45 Tex. Civ. App. 588, 103 S. W. 409. But *compare* McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934, holding that a bond conditioned that plaintiff, a woman, would pay to de-

(II) *AMOUNT.* The amount of the bond is either fixed by statute at a figure bearing a stated relation to the value of the property sought to be sequestered [11] or is left to be determined by the court.[12] Where the amount should be fixed by the judge, failure to apply to him will not invalidate the bond if the sum for which it is taken be sufficiently large, at least not so as to relieve plaintiff of liability thereon.[13]

(III) *EXECUTION* — (A) *In General* — (1) BY PLAINTIFF. The statutes usually require plaintiff to be the principal obligor.[14]

(2) BY AGENT OR ATTORNEY. As with affidavits, a properly authorized agent may make bond in behalf of his principal in the absence or incapacity of the latter.[15]

(B) *By Sureties* — (1) WHO MAY BE — (a) NON-RESIDENTS. It is commonly required that the surety on a sequestration bond must reside within the jurisdiction of the court or within the state, an undertaking by non-residents being insufficient.[16]

(b) CORPORATIONS. Surety companies may be sureties on sequestration bonds where they do business in the state; [17] but it is not necessary to state in the bond that the company going surety is authorized to do business in the state.[18]

(2) SUFFICIENCY OF SURETIES. As in the case of bonds for attachment and the like, the number of sureties should correspond with the statutory provisions,[19] and their responsibility should be established in case of attack; but the fact that a surety on a sequestration bond is the principal obligor on a bond of administration for a large amount is no proof of insolvency.[20]

(IV) *ATTESTATION.* A sequestration bond need not ordinarily be executed before the clerk of court in which the action is pending or any other public officer,[21]

feudants all such charges and damages as may be adjudged against "them" is defective.

**Bond should be identified with suit.**—Plaintiff obtained a writ of sequestration on a bond payable to certain named parties, who were not described as defendants, although they were in fact such. The condition of the bond recited that plaintiff should pay defendants, but did not state who defendants were. The title of the suit was defectively stated in the margin. It was held that the bond was fatally defective as not identified with the suit or correctly describing the parties to the suit. See Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460.

**Effect of misspelling plaintiff's name.**—A bond correctly stating name of plaintiff, the principal obligor in the beginning, and correctly signed by him, is not invalidated by a misspelling in that portion of the bond stating its condition. Hurlbut *v.* Gainor, 45 Tex. Civ. App. 588, 103 S. W. 409.

11. See Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318; Flynn *v.* Lynch, 1 Tex. App. Civ. Cas. § 787.

12. Lemann *v.* Truxillo, 32 La. Ann. 65; Vawter *v.* Morgan, 6 Mart. N. S. (La.) 46.

13. Vawter *v.* Morgan, 6 Mart. N. S. (La.) 46.

14. Goodin *v.* Allen, 12 La. Ann. 448 (holding that where wife sues in revendication of her paraphernal property, a bond signed by the husband alone is insufficient, since the real plaintiff is the wife, authorized and assisted by her husband, and defendant has a right to indemnity from the wife against the effects of wrongful sequestration); Hurlbut *v.* Gainor, 45 Tex. Civ. App. 588, 103 S. W. 409.

15. Allen *v.* Champlin, 32 La. Ann. 511; Stewart *v.* Clark, 11 La. Ann. 319. And see *supra*, V, B, 3, c, (II). For related authorities see ATTACHMENT, 4 Cyc. 534.

**Where principal undisclosed.**—Where a lease was made by plaintiffs for undisclosed principals and they sued on the same in their own name by virtue of their right as agents, the bond was properly made by them. Hunter *v.* Adone, 38 Tex. Civ. App. 542, 86 S. W. 622.

16. Foxworth *v.* Burckhalter, 3 La. Ann. 365; Bres *v.* Booth, 1 La. Ann. 307; Gossett *v.* Cashell, 14 La. 245; Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972. See also ATTACHMENT, 4 Cyc. 535.

17. See Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972.

18. Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972, holding that if defendant wishes to attack the sufficiency of the bond on the ground that surety company is not authorized to do business in the state, he should allege and prove the lack of authority.

19. Dean *v.* Boyd, 86 Miss. 204, 38 So. 297; Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558, writ quashed because only one surety on bond, statute requiring two.

20. Blanchard *v.* Luce, 19 La. Ann. 46.

**Surety approved subsequently found insufficient.**—The fact that a surety once approved by the judge is subsequently ascertained not to be worth the amount of the bond will not render plaintiff liable for damages where the sequestration otherwise legally issued. Isaacson *v.* Wall, 22 La. Ann. 243.

21. Foxworth *v.* Burckhalter, 3 La. Ann. 365.

in order that it may have the effect of and operate as a valid sequestration bond; nor is a seal necessary.[22]

**c. Amendment and Substitution.** The extent of the right to amend a bond originally insufficient is very doubtful, although few cases have apparently arisen.[23] Where, however, a surety originally resident moves out of the jurisdiction of the court, a new bond with a resident surety may be substituted.[24]

## VI. THE WRIT.

**A. Necessity of Writ.** A writ of sequestration is the process under, and by virtue of which, the property in controversy is seized. Hence there can be no sequestration without a writ; and where the original writ is invalid because of the judge's omission to fix the amount of the sequestration bond, a new writ must issue under a supplemental order.[25]

**B. Form and Requisites — 1. STATEMENT OF AMOUNT OF DEBT.** A statement in a writ of sequestration of the amount of the debt sued on is mere surplusage, and a variance between the amount so stated and that stated in the petition and affidavit does not invalidate the writ.[26]

**2. DESCRIPTION OF PROPERTY.** The property to be seized should be described as in the petition, and with sufficient certainty to make it impossible for the sheriff to seize in error any property other than that property liable to the sequestration.[27] Hence it is commonly required that it should state the location of the property.[28]

**3. STATEMENT OF GROUND OF SEQUESTRATION.** In jurisdictions where the statutory form of writ states the ground of the sequestration, it is held that a statement in the alternative will not invalidate the process.[29]

**4. AMENDMENT OF WRIT.** Whether clerical errors in the writ may be amended by the petition will depend upon the law in the particular jurisdiction where the question arises, there being no general rule.[30]

22. Tompkins *v.* Toland, 46 Tex. 584.

23. See Bres *v.* Booth, 1 La. Ann. 307; Gossett *v.* Cashell, 14 La. 245 (refusing amendment where surety non-resident); Dean *v.* Boyd, 86 Miss. 204, 38 So. 297 (permitting amendment). Discussion of the point in attachment cases see ATTACHMENT, 4 Cyc. 538 *et seq.*

**Where the judge omits to fix the amount** of the bond in his order granting the sequestration, the writ cannot be validated by a subsequent order fixing the amount. A new writ must issue under the supplemental order fixing the amount of the bond. Lemann *v.* Truxillo, 32 La. Ann. 65.

24. Foxworth *v.* Burckhalter, 3 La. Ann. 365. *Compare* Gossett *v.* Cashell, 14 La. 245, where surety originally non-resident.

25. Lemann *v.* Truxillo, 32 La. Ann. 65, holding that the writ cannot be validated by a subsequent order fixing the amount.

**The validity of writs issued in equity** and the regularity of their execution are to be judged of exclusively by the court of chancery. Peck *v.* Crane, 25 Vt. 146.

26. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704.

27. Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558; Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318; Woessner *v.* Fly, 63 Tex. 198; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636.

28. Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558.

**The variance is fatal** where the petition describes the property as "one thousand six hundred and forty-six head of sheep, known as the Du Bose sheep," and the writ required the seizure of the "Du Bose flock of sheep, computed to number two thousand four hundred head." Woessner *v.* Fly, 63 Tex. 198.

**Impracticable description not required.**—A description of logs giving their brand, average length, diameter, quantity, and value is sufficient. Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

**Writ quashed for variance.**—Where the petition described and claimed the property sequestered as the separate property of the wife, but in the writ it was described as the property of husband and wife, the writ was properly quashed. Porter *v.* Miller, 7 Tex. 468.

29. Meador *v.* State, 44 Tex. Cr. 468, 72 S. W. 186.

30. See cases cited *infra*, this note.

**In Texas the amendment will be permitted.** See Porter *v.* Miller, 7 Tex. 468, where there was a variance in the description.

**In Louisiana** it is held that a writ originally invalid because the order for sequestration did not fix the amount of the bond cannot be validated by a subsequent order. Lemann *v.* Truxillo, 32 La. Ann. 65.

**Dating the writ nunc pro tunc** see Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638.

## VII. PROPERTY SUBJECT TO SEQUESTRATION.

**A. Realty.** Real estate may be sequestered when the title is in dispute, or in a suit to foreclose a mortgage, provided the requisite danger or fear of waste or dissipation of revenues exists.[31]

**B. Crops and Timber.** Growing crops or trees may be seized where they are subject to conflicting claims of ownership, lien, or privilege, and there is fear of their removal or fraudulent disposition.[32]

**C. Personalty — 1. In General.** All kinds of tangible personal property are unquestionably subject to sequestration in appropriate cases.[33]

**2. Perishable Property.** The perishable nature of property is no reason why it should not be sequestered and the proceeds deposited in court.[34]

**3. Choses in Action — a. In General.** The early authorities are not entirely in accord as to whether choses in action may be reached upon a writ of sequestration issuing out of chancery as process for contempt, but the weight of authority favors the position that they may be sequestered,[35] at least where the party in whose hands the chose is admits the debt to be due and is willing to pay the same over under the order of the court.[36]

**b. Stock Certificates.** Shares of stock in corporations to which adverse claims of ownership are asserted have been held subject to sequestration pending litigation.[37]

**c. Promissory Notes.** Promissory notes are subject to sequestration,[38] and pending the sequestration proceedings no suit can be instituted thereon.[39]

**D. Property Held Jointly; Partnership Property.** Property held jointly, as in partnership, is properly sequestered at the suit of one of those jointly interested against the others.[40] The whole property must be seized since it is manifestly impossible to seize the undivided half.[41]

31. See Ramos Lumber, etc., Co. *v.* Sanders, 112 La. 614, 36 So. 625; Pasley *v.* McConnell, 36 La. Ann. 703; Williams *v.* Duer, 14 La. 531; Blum *v.* Gaines, 57 Tex. 135.

32. See Pharr *v.* Shadel, 115 La. 92, 38 So. 914; Gardner *v.* Shipley, 4 La. Ann. 184; Neilson *v.* Pool, 17 La. 209.

33. See Wooster *v.* Salzman, 14 La. 98; and cases cited in following notes.

**Slaves were formerly subject to sequestration.** See Gibson *v.* White, 4 La. Ann. 14; Rodriguez *v.* Vassant, 11 La. 165.

34. Segur *v.* Sorel, 11 La. 439.

35. See Grew *v.* Breed, 12 Metc. (Mass.) 363, 46 Am. Dec. 687; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; White *v.* Geraerdt, 1 Edw. (N. Y.) 336; Wilson *v.* Metcalfe, 1 Beav. 263, 3 Jur. 601, 8 L. J. Ch. 331, 17 Eng. Ch. 263, 48 Eng. Reprint 941; Franckly *v.* Colhoun, 3 Swanst. 276, 36 Eng. Reprint 860. *Compare* 1 Barb. Ch. Pr. 71; Daniell Ch. Pr. § 1052.

36. See Keighler *v.* Ward, 8 Md. 254 (holding that choses in action are not subject to sequestration and that the court will not in the sequestration proceedings inquire into the validity of the claim of the third party); Keighler *v.* Nicholson, 4 Md. Ch. 86. See, generally, GARNISHMENT, 20 Cyc. 969.

**The books and papers of a corporation may be sequestered,** so far at least as they contain information or give title to property which has been sequestered. Lowten *v.* Colchester, 2 Meriv. 395, 16 Rev. Rep. 187, 35 Eng. Reprint 991.

37. See Ansley *v.* Stuart, 119 La. 1, 43 So. 892; State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 260.

**Estates for life may be sequestered under Pennsylvania statutes** upon the application of a lien creditor wherever such estates have been taken in execution, and their rents and profits applied to the payment of the lienor. See *In re* Lewis, 170 Pa. St. 376, 32 Atl. 1046; Holliday *v.* Bruner, 153 Pa. St. 262, 25 Atl. 1128; Gordon *v.* Inghram, 32 Pa. St. 214, 1 Grant 152; Pentland *v.* Kelly, 6 Watts & S. 483. The distribution of rents and profits among lien creditors must be according to the priority of liens at the time the fund is raised by the sequestrator, not at the time of his appointment. Holliday *v.* Bruner, *supra.* And the statute does not apply where before proceeding in execution the life-tenant makes an assignment for creditors of the life-estate. *In re* Lewis, *supra.* See ESTATES, 16 Cyc. 644.

38. Lannes *v.* Courege, 31 La. Ann. 74; Horne *v.* Belcher, 11 La. Ann. 321.

39. Horne *v.* Belcher, 11 La. Ann. 321.

40. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Blanchard *v.* Luce, 19 La. Ann. 46; Segur *v.* Sorel, 11 La. 439. See PARTNERSHIP, 30 Cyc. 726.

41. Blanchard *v.* Luce, 19 La. Ann. 46; Segur *v.* Sorel, 11 La. 439. See Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 451, 39 So. 441. *Compare* State *v.* Judge Iberville Dist. Ct., 38 La. Ann. 49, where the sequestration was of partnership property.

**E. Property in Custody of Law.** Property in the custody of the law, as property in the hands of a receiver appointed by a court of justice,[42] or already seized by process from another court,[43] is not subject to sequestration.

## VIII. LEVY AND RETURN OF WRIT.

**A. In General.** The writ of attachment, like other legal processes, should be levied by the sheriff.[44] It is his business to find and seize the property, the writ not commanding defendant to do anything in aid of a contemplated seizure,[45] who is justified in using such force as may be necessary for the purpose.[46]

**B. Constructive Levy.** Where the sheriff already has in his custody under a writ property sought to be sequestered, he need not actually seize it again under a subsequent writ, since his having the second writ in his hands constitutes an effective constructive levy.[47]

**C. Return.** The sheriff's return should describe the property seized substantially as in the writ,[48] but it need not be certified.[49]

## IX. CUSTODY AND DISPOSITION OF PROPERTY.

**A. In General.** Pending the determination of the sequestration proceedings the property sequestered is in the custody of the court [50] and is properly in the hands of the sheriff or other officer of the court whence the process issued; [51]

42. Harrison *v.* Waterberry, (Tex. 1894) 27 S. W. 109 [*reversing* (Civ. App. 1894) 27 S. W. 430].

43. Twitty *v.* Clarke, 14 La. Ann. 503.

**Property seized by landlord in suit in municipal court** cannot be taken from the constable by a sequestration issued by the district court. Twitty *v.* Clarke, 14 La. Ann. 503.

**Property attached and released on claimant's bond** is not *in custodia legis* so as to be exempt from sequestration, although the attachment suit is still pending. Brown Mfg. Co. *v.* Watson, 3 Tex. App. Cir. Cas. § 329.

**The pendency of suit on notes filed in court** will not prevent plaintiff who has a right to their possession from sequestering them. Launes *v.* Conrege, 31 La. Ann. 74.

44. See Lemann *v.* Truxillo, 32 La. Ann. 65, holding that a new seizure must be made under a supplemental petition filed in a purely sequestration suit, otherwise the court is without jurisdiction.

45. Ansley *v.* Stuart, 119 La. 1, 43 So. 892, holding that there is no legal obligation on defendant to deliver the property to the sheriff or to the court, and that judgment on a rule ordering him to deliver certain certificates of stock to the sheriff holding a writ of sequestration is not sustainable. *Compare* West *v.* Fraser, 5 Sandf. (N. Y.) 653; People *v.* Rogers, 2 Paige (N. Y.) 102.

46. See Flournoy *v.* Milling, 15 La. Ann. 473, holding the sheriff not liable to parties claiming a privilege on the property sequestered, for breaking open a warehouse and taking possession of the goods.

**One resisting an officer attempting to serve** a writ of sequestration is criminally liable. Meador *v.* State, 44 Tex. Cr. 468, 72 S. W. 186, holding it unnecessary before introducing the writ in evidence to prove a valid affidavit for it, when it is regular on its face and issued from a court with jurisdiction.

**Defendant's pointing out to sheriff the property to be sequestered will not estop** him from afterward claiming it to be his own. Long *v.* Kee, 44 La. Ann. 309, 10 So. 854.

**Service and return of statutory writ in Vermont** see Steam Stone-Cutter Co. *v.* Sears, 23 Fed. 313, 23 Blatchf. 194; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567; Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23.

**Service of writs of sequestration issued by federal courts** is service in the manner provided by state statute. See Steam Stone-Cutter Co. *v.* Sears, 9 Fed. 8, 20 Blatchf. 23.

47. State *v.* Allen, 52 La. Ann. 568, 27 So. 85.

48. Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636.

49. Betterson *v.* Echols, 85 Tex. 212, 20 S. W. 63.

50. Fowler *v.* Stonum, 6 Tex. 60.

**A promissory note sequestered is taken out of commerce** and no suit against the makers thereof can be brought pending the sequestration proceedings. Horne *v.* Belcher, 11 La. Ann. 321.

51. See Ware *v.* Wilson, 22 La. Ann. 102; Field *v.* Broderick, 12 La. Ann. 552; Thompson *v.* Graves, (Tex. App. 1889) 15 S. W. 38; and cases cited in following notes.

**The judicial sequestrator is designated by the law** and the court cannot appoint another unless by consent of the parties. U. S. *v.* U. S. Bank, 11 Rob. (La.) 418.

**Conventional sequestrator.**— The parties may appoint a sequestrator of their own selection, as the law designates the sheriff to act only when they fail to agree upon such an appointment. See Frazier *v.* Willcox, 4 Rob. (La.) 517. Such a conventional sequestrator is subject to the same obligation as a depositary, where he acts without compensation; he must hold the thing intrusted to

but for any injury to, or loss of, the property while it is in such custody, plaintiff and the sureties on his bond will be responsible, although the damage be due entirely to the negligence or fault of the sheriff.[52]

**B. Rights and Duties of Sheriff or Other Sequestrator — 1. Right to Take and Hold and to Compensation Therefor.** The sheriff or other officer seizing property under a writ of sequestration is entitled to hold it until final judgment on appeal notwithstanding an interlocutory order quashing the sequestration,[53] and is entitled to such fees and compensations therefor as the statutes may authorize and the court may allow.[54]

**2. Right to Sue.** In receivership cases the sequestrator appointed to assume charge of all of defendant's property has been held entitled to sue to set aside fraudulent conveyances.[55]

**3. Duty Not to Abandon.** The sheriff may not release the property without taking proper security under order of court. A delivery of property under any other conditions will subject him to individual liability.[56]

him and cannot surrender it unless with the consent of each party or by an order of court. See Lafarge *v.* Morgan, 11 Mart. (La.) 462.

**The sequestrator's possession is that of the party legally entitled** to it, and the rights of neither party on the sequestration are affected Alabama Bank *v.* Hozey, 2 Rob. (La.) 150.

**Purchasers at sheriff's sale** who are plaintiffs in the sequestration proceedings cannot transfer legal custody of the property to themselves by withholding the price. Field *v.* Broderick, 12 La. Ann. 552.

**52.** Hamilton *v.* Hurst, 5 La. Ann. 150; Jones *v.* Doles, 3 La. Ann. 588.

**53** Thompson *v.* Graves, (Tex. App. 1889) 15 S. W. 38.

**Conventional sequestrators,** acting without compensation, are subject to the same obligations as depositaries. If agents of both parties, they must hold the thing intrusted to them and cannot surrender it unless with the consent of each party or by an order of court. Lafarge *v.* Morgan, 11 Mart. (La.) 462. The articles of the civil code defining the duties, etc., of conventional sequestrators do not prevent parties from giving them other powers. Frazier *v.* Willcox, 4 Rob. (La.) 517.

**Refusal to deliver property to sequestrator.** — Where a party perseveres in his refusal to deliver over property to a receiver the property may be sequestered and delivered to the receiver, and defendant's agents will be prohibited from delivering it to him or applying it to his use on pain of contempt. See West *v.* Fraser, 5 Sandf. (N. Y.) 653; People *v.* Rogers, 2 Paige (N. Y.) 102. But *compare* Ansley *v.* Stuart, 119 La. 1, 43 So. 892, holding not sustainable a judgment on a rule ordering defendant to deliver certain certificates of stock to the sheriff holding a writ of sequestration on the ground that there is no legal obligation on defendant in such a case to deliver the property to the sheriff or to the court.

**54** See Ware *v.* Wilson, 22 La. Ann. 102; Parkison *v.* Boyle, 7 Rob. (La.) 82.

**Sheriff cannot demand payment of defendant bonding.**— The sheriff cannot demand of defendant securing the release of the property on bond that he should pay the expenses and fees before the property is restored to him, since defendant is responsible therefor only in case of judgment against him. Fink *v.* Martin, 10 Rob. (La.) 147.

**If the sequestrator of a turnpike advance his own money for repairs,** he does so at his own risk; but when his account, including his advances, has been confirmed, his charges should be paid by priority before distribution. See Beam's Appeal, 19 Pa. St. 453. *Compare* Mestier *v.* D. Chevalier Pavement Co., 108 La. 562, 32 So. 520.

**The sequestrator does not represent plaintiff** at whose instance the sequestration issued in such a way that property sequestered can be seized in another court and released from the sequestration by that other court without making the creditor claiming a lien a party to the second proceeding. Alabama Bank *v.* Hozey, 2 Rob. (La.) 150.

**55.** Foster *v.* Townshend, 68 N. Y. 203; Donnelly *v.* West, 17 Hun (N. Y.) 564; Suydam *v.* Northwestern Ins. Co., 51 Pa. St. 394. *Compare* Beeler *v.* Pittsburgh Farmers, etc., Turnpike Road Co., 14 Pa. St. 162, holding action for tolls of a turnpike company properly brought by the company and not by the sequestrator, on the ground that the sequestrator takes possession of the property for temporary purposes only, to satisfy a demand out of its rents and profits, without having any interest in the thing itself. And see Receivers, 34 Cyc. 1.

**The Pennsylvania statute** provides that sequestrators shall have all the powers of trustees of insolvent debtors. See Bevans *v.* Dingman's-Choice Turnpike, 10 Pa. St. 174; Betts *v.* Harrisburg R. Co., 4 Pa. L. J. 322.

**56.** Nalle *v.* Baird, 30 La. Ann. 1148; Ware *v.* Wilson, 22 La. Ann. 102 (holding parol evidence admissible to show that sheriff had never in fact released the property); Comstock *v.* Paie, 15 La. 481.

**For an unauthorized sale of non-perishable property** pending action the sheriff will, it seems, be liable. See Day *v.* Hartman, 74 Miss. 489, 21 So. 302.

**4. Duty of Care.** The sheriff must take proper care of the sequestered property and administer it as a prudent man would administer his own affairs, using such diligence as will secure it for the benefit of the party to whom it is ultimately adjudged.[57]

**C. Release of Property on Security — 1. In General.** In cases where there is no danger of irreparable injury,[58] and where, accordingly, a bond is adequate protection, the property sequestered may be taken out of judicial custody, upon security for its proper preservation and return being given, conditioned specifically as the statutes direct.[59]

**After nonsuit sheriff may properly return property** to party from whose possession he took it, although such person is plaintiff in the action. Hasluck *v.* Morgan, 2 Mart. N. S. (La.) 9.

57. Parkison *v.* Boyle, 7 Rob. (La.) 82; Parish *v.* Hozey, 17 La. 578.

**Failure to present a bill of exchange for payment** at maturity and if not paid to have it protested and due notice given all parties will make the sheriff having custody of it under a sequestration liable for its amount. Parish *v.* Hozey, 17 La. 578.

**Disbursements for preservation of property.** — The sheriff is authorized to make the disbursements necessary for the preservation of the property. Parkison *v.* Boyle, 7 Rob. (La.) 82. *Compare* Mestier *v.* A. Chevalier Pavement Co., 108 La. 562, 32 So. 520; Beam's Appeal, 19 Pa St. 453.

**Setting and letting estate.** — In Ray *v.* ——, 3 Swanst. 311 note, 36 Eng. Reprint 874, the court refused a motion that sequestrators upon mesne process be ordered to make leases, saying that there never was an order for sequestration to let and set as receivers. In Neale *v.* Bealing, 3 Swanst. 311 note, 36 Eng. Reprint 874, the court refused to grant a motion without notice for sequestrators to let and set, saying that sequestrators have but precarious or temporary powers to levy a debt and that the sequestration might be taken over the next day, or so soon as the demand should be discharged, but the motion was afterward granted upon affidavit of notice thereof.

58. Boimare *v.* St. Geme, 113 La. 898, 37 So 869.

59. Fink *v.* Martin, 10 Rob. (La.) 147; Comstock *v.* Paie, 15 La. 481; and cases cited *infra*, this note.

**La. Code Pr. art. 274,** providing that sequestration of real property may be ordered to continue until the question of ownership has been decided, is governed by the provisions of article 279, authorizing the bonding of any sequestration, whether judicial or otherwise, save in cases of failure. Jackson *v.* Crillton, 121 La. 59, 46 So. 101

**Sheriff responsible if security insufficient.** — Where property is released on bond, the sheriff must make a return showing the amount of the bond, the names of the sureties, etc., so that exception may be taken to the sufficiency of the security if desired. The sheriff will be personally held if the security is not good. See State *v.* Porte, 27 La. Ann. 431; Vawter *v.* Morgan, 6 Mart. N. S. (La.) 46.

**The bond should be treated as representing the property** so that any party showing an interest in the property should be given a corresponding remedy on the bond. See H. B. Claflin Co. *v.* De Vaughn, 106 Ga. 282, 32 S. E. 108.

**Personal property released on bond may be used** without liability for the use being incurred if no injury is done, since the statutory bond is not conditioned for the return of rents of personal property. Segassie *v.* Piernas, 26 La. Ann. 742; McClenny *v.* Floyd, 3 Tex. 114; Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530. But it cannot be sold before judgment. See *infra*, XII, D, 1.

**In Louisiana a debtor who has failed cannot bond** property sequestered. As to what is a "failure" within the meaning of this rule see State *v.* Lewis, 42 La. Ann. 847, 8 So. 602.

**Where partnership property** is sequestered in a suit for liquidation of the partnership, defendant partner cannot bond the property, since he has only an undivided one-half interest therein. A release on bond of one half of each piece of property would leave the other half of each piece in the sheriff's hands, and as that officer would permit no interference with that half, the release would be a vain act. State *v.* Judge Iberville Dist. Ct., 38 La. Ann. 49. *Compare* Blanchard *v.* Luce, 19 La. Ann. 46; Segur *v.* Sorel, 11 La. 439.

**Defendant cannot select and bond a portion** of the property sequestered, leaving the rest in the hands of the sheriff. Taylor *v.* Penrose, 12 La. 137, slaves sequestered.

**Legal custody of the property after bonding** by defendant is in him, and a plaintiff forcibly taking the property out of his possession is liable in trespass. Evidence that plaintiff acted on a well grounded fear of removal of the property is inadmissible, at least for the purpose of reducing the verdict below the actual damage sustained. Fowler *v.* Stonum, 6 Tex. 60. *Compare* Lemann *v.* Truxillo, 32 La. Ann. 65.

**Rights of attaching creditors will not be** affected by the release to plaintiff on bond of property which he has sequestered after levy of the attachments thereon, where such creditors are not parties either to the suit in which the writ issued nor to the motion to dissolve. State *v.* Ninth Judicial Dist. Judge, 39 La. Ann. 1108, 3 So. 342.

**Bonding the sequestration precludes plea of want of citation.** — A defendant who has

**2. In Whose Favor Available.** The right to secure the release of the property on bond has been extended by statute so that it now exists not simply in favor of defendant,[60] but also in favor of plaintiff,[61] and of any third party who asserts title to, or an appropriate lien upon, the property, and becomes a party to the proceedings by appropriate intervention.[62]

secured the release of the sequestered property by giving a bond cannot be heard later to plead want of citation in the original proceeding. Bush *v.* Dewing, 24 La. Ann. 272.

**Stock certificates may be released on bond** after sequestration. State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 260.

**Property may be released on bond pending an appeal** from a judgment in which right to bond is not involved, the lower court retaining jurisdiction for the purpose of permitting the release. State *v.* Monroe, 45 La. Ann. 1322, 14 So. 59.

**Release from judicial sequestration.**— In the extraordinary cases where the property is sequestered in the first instance without bond, the sequestration may still be dissolved upon security for the preservation and return of the property being furnished. See Jackson *v.* Crillton, 121 La. 59, 46 So. 101; Ramos Lumber, etc., Co. *v.* Sanders, 112 La. 614, 36 So. 625; State *v.* Allen, 110 La. 853, 34 So. 804; State *v.* Judge Orleans Parish Super. Dist. Ct., 26 La. Ann. 65.

**Bonding the sequestration precludes plea of want of citation.**—A defendant who has secured the release of the sequestered property by giving a bond cannot be heard later to plead want of citation in the original proceeding. Bush *v.* Dewing, 24 La. Ann. 272.

**Time of filing bond.**— Under La. Code Pr. art. 279, defendant may have the sequestration set aside and the property delivered to him on furnishing a bond in an amount fixed by the judge; but, if defendant fails to furnish such bond within ten days, plaintiff may then furnish such a bond, and defendant's right to dissolve the sequestration on bond is waived. Hecker *v.* Bourdette, 121 La. 467, 46 So. 575. Where defendant, instead of furnishing a bond to dissolve a sequestration within the ten days allowed by statute, served an order to show cause returnable five days after the expiration of the ten days why she should not be permitted to do so, an acceptance of the service of the order to show cause by plaintiff was not a waiver of his right to furnish a bond immediately on the expiration of the ten days allowed to defendant. Hecker *v.* Bourdette, 121 La. 467, 46 So. 575.

**Discretion of court.**—Where property sequestered was about to be partitioned by licitation, it was within the discretion of the court to refuse to dissolve the sequestration on a dissolving bond. Interstate Land Co. *v.* Doyle, 120 La. 46, 44 So. 918.

**60.** See State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 260; Fink *v.* Martin, 10 Rob. (La.) 147; Alabama Bank *v.* Hozey, 2 Rob. (La.) 150; Fowler *v.* Stonum, 6 Tex. 60; and cases cited *passim*, this subsection.

**Costs of sequestration need not be paid** upon application to bond. A defendant seeking to bond the property cannot be required to pay the expenses of the sequestration before the property is released to him, since he is liable for such costs only in the event of final judgment against him. Fink *v.* Martin, 10 Rob. (La.) 147.

**61.** See Hecker *v.* Bourdette, 121 La. 467, 46 So. 575; State *v.* Porte, 27 La. Ann. 431; Duperier *v.* Flanders, 20 La. Ann. 29; Gibson *v.* White, 4 La. Ann. 14.

**In Louisiana** plaintiff has the right to secure the release of the sequestered property on bond only in cases where defendant neglects to do so for ten days after the seizure. See Duperier *v.* Flanders, 20 La. Ann. 29. Where plaintiff does not choose to bond after ten days, defendant is not precluded from doing so. See State *v.* Monroe, 45 La. Ann. 1322, 14 So. 59. *Compare* Catalogne *v.* Bauries, 4 La. Ann. 567. But if defendant fails to furnish bond within ten days, and plaintiff then applies to bond, defendant cannot claim a better right to bonding. Hecker *v.* Bourdette, 121 La. 467, 46 So. 575. Formerly in Louisiana plaintiff could not bond. Comstock *v.* Paie, 15 La. 481. *Compare* State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 260.

**62.** O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872; Phifer *v.* Maxwell, 28 La. Ann. 862; Bee *v.* Carlin, 28 La. Ann. 648; Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22; Neill *v.* Billingsley, 49 Tex. 161; Barton *v.* Stroud-Gibson Grocer Co., (Tex. Civ. App. 1897) 40 S. W. 1050.

**Only owners, pledgees, or consignees can** bond property sequestered in Louisiana, if not parties to the sequestration suit. Hardy *v.* Lemons, 36 La. Ann. 107.

**Formerly no one not a party** to the suit could bond property sequestered. See Alexander *v.* Silbernagel, 27 La. Ann. 557; State *v.* Judge Orleans Parish Fourth Dist. Ct., 25 La. Ann. 299; Duperier *v.* Flanders, 20 La. Ann. 29; Clapp *v.* Phelps, 19 La. Ann. 461, 92 Am. Dec. 545; Haile *v.* Oliver, 52 Tex. 443. *Compare* Block *v.* Barthe, 20 La. Ann. 344; Collins *v.* Edwards, 13 La. Ann. 342; Levi *v.* Penny, 11 La. Ann. 539; Catalogne *v.* Bauries, 4 La. Ann. 567.

**Third parties who have not intervened and** asserted claim to the property in the manner provided by law have no right to bond, and a court has no power to give judgment on a bond wrongfully taken from them. Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29.

**Where the property is bonded by an intervener** with plaintiff's consent, plaintiff cannot afterward seek an alias writ on the ground that his consent has not been acted on and that the property has been delivered to defendant, since the intervener is bound

**3. Appeal From Orders Permitting or Refusing Release on Bond.** Interlocutory orders permitting or refusing the release of sequestered property on bond may be appealed from in cases where irreparable injury is likely to result,[63] otherwise not.[64]

**4. Forthcoming, Release, or Replevy Bonds — a. In General.** The security required for the release of sequestered property usually takes the form of a forthcoming bond conditioned for the return of the property to answer such judgment as may be rendered against it or for the payment of its value.[65]

**b. Form and Sufficiency** — (i) *In General.* Bonds which have none of the elements required by statute are invalid,[66] and sureties on such bonds cannot be held.[67]

(ii) *Substantial Sufficiency.* Where the bond given has all the essential attributes and elements of the statutory form, and is in substantial compliance with it, it will be held sufficient, notwithstanding slight variances.[68]

(iii) *Validity as Common-Law Obligation.* The mere fact that a release bond may be a good statutory bond capable of enforcement in a summary manner provided by statute does not render it incapable of enforcement by suit as a common-law obligation.[69] But a bond can be sustained as a common-law obligation only where those seeking to enforce it, or parties in privity with them, agreed and consented to the contract evidenced thereby with the makers thereof. Hence a bond made solely between defendant and his surety and the sheriff cannot be enforced as a common-law obligation by plaintiff.[70]

**c. Amount.** The amount of the bond should be fixed by the court, usually at a sum representing the value of the property.[71]

by the liability on the bond which he has recognized and defendant's possession is his possession under the circumstances. Levi *v.* Penny, 11 La. Ann. 539.

**63.** Hecker *v.* Bourdette, 121 La. 467, 46 So. 575; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547; Comstock *v.* Paie, 15 La. 481; Van Winckle *v.* Flecheaux, 12 La. 148; Taylor *v.* Penrose, 12 La. 137; Debaillon *v.* Ponsony, 5 Mart. N. S. (La.) 42. See also State *v.* Porte, 27 La. Ann. 431. *Compare* State *v.* Judge New Orleans Fourth Dist. Ct., 17 La. Ann. 282, holding appeal, not mandamus, the proper remedy.

**64.** Richardson *v.* Johnson, 114 La. 1050, 38 So. 826; State *v.* St. Paul, 113 La. 1045, 37 So. 964; State *v.* Allen, 110 La. 853, 34 So. 804; State *v.* Lewis, 42 La. Ann. 847, 8 So. 602; State *v.* Judge Orleans Parish Eighth Dist. Ct., 22 La. Ann. 260; Block *v.* Barthe, 20 La. Ann. 344; State *v.* First Judicial Dist. Judge, 2 Rob. (La.) 395; State *v.* Judge Commercial Ct., 14 La. 590. See Appeal and Error, 2 Cyc. 474.

**Whether irreparable injury is likely to result** will depend usually upon whether the sequestration has been obtained for the protection of a right of property, since if it has issued upon a mere money demand no such injury is threatened. See Hecker *v.* Bourdette, 121 La. 467, 46 So. 575; Eltringham *v.* Clarke, 49 La. Ann. 340, 21 So. 547.

**65.** See cases cited *infra*, following notes.

**In the case of real estate** the bond requires usually an accounting for the rents; *aliter* as to personal property. See Segassie *v.* Piernas, 26 La. Ann. 742; McClenny *v.* Floyd, 3 Tex. 114; Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530.

**Mandamus** controlling see Mandamus, 26 Cyc. 214.

**66.** Haile *v.* Oliver, 52 Tex. 443; Broussard *v.* Hinds, (Tex. Civ. App. 1907) 101 S. W. 855. See also Nalle *v.* Baird, 30 La. Ann. 1148.

**67.** Broussard *v.* Hinds, (Tex. Civ. App. 1907) 101 S. W. 855.

**Collateral attacks upon bond.**— The validity of the bond cannot be collaterally inquired into. See Tucker *v.* Musselman, 6 La. Ann. 226.

**68.** Francis *v.* Martin, 28 La. Ann. 403; Harrell *v.* Sanders, 26 La. Ann. 691; Pait *v.* McCutchen, 43 Tex. 291; Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. 636.

**69.** Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

**70.** Broussard *v.* Hinds, (Tex. Civ. App. 1907) 101 S. W. 855.

**71.** See State *v.* Allen, 110 La. 853, 34 So. 804; State *v.* Judge Orleans Parish Super. Dist. Ct., 26 La. Ann. 116; State *v.* Farrar, 20 La. Ann. 99.

**Reduction.**—In Louisiana the supreme court may, in the exercise of its supervisory jurisdiction, reduce the amount of the bond. State *v.* Allen, 110 La. 853, 34 So. 804. But mandamus proceedings are not appropriate to obtain a reduction. State *v.* Judge Orleans Parish Super. Dist. Ct., 26 La. Ann. 116.

**On mandamus to compel judge to fix amount** of release bond, it is a sufficient an-

**d. Who May Make.** The forthcoming bond should be executed by the party replevying the property [72] or by his authorized agent.[73]

**e. Obligee in Bond.** The statutes controlling the form of bond vary in the different jurisdictions in their specification of the obligee, some requiring the bond to be made to the sheriff,[74] others that it should be made to the adverse party.[75]

**f. Construction.** Sequestration release bonds must be construed with reference to the law or the order of court under which they are given, and conditions that could not legally have been inserted are therefore void.[76]

**g. Liability and Discharge of Obligors** —(I) *Liability Controlled by Statute or Order.* The liability of the obligors on release bonds, as on other judicial bonds, has been held to be controlled and limited by the provisions of the statute or order under which the bond was given rather than by the terms of the bond itself.[77]

(II) *What Constitutes Breach* — (A) *In General.* It is not a breach of the condition of a release bond that defendant enjoined the execution of the judgment against him and that on account of the injunction the property was not delivered on first demand; [78] nor is there a breach where the property is included in defendant's schedule in subsequent insolvency proceedings and sold by order of the same court that issued the writ of sequestration.[79]

(B) *Conditions Precedent to Breach.* As a condition precedent to a suit against the sureties on a release bond, plaintiff must issue execution on his judgment, to be levied on the property sequestered, or he must prove that so to issue execution would be useless.[80] And in order to make out a case of breach of obligation

swer for the respondent judge to show that the sequestration suit has been dismissed at the instance of plaintiff. See State *v.* Farrar, 20 La. Ann. 99.

**72.** See McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

**73.** See Materne *v.* Lion, 35 La. Ann. 988; Comstock *v.* Paie, 15 La. 481, where authority given by defendant to his attorney was found insufficient.

**Surety sued on a release bond cannot question the agent's authority** to execute such a bond for the principal obligor. Materne *v.* Lion, 35 La. Ann. 988.

**If property is sequestered in hands of more than one party,** the release bond may be made jointly by those from whose possession it was taken. Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

**74.** Nalle *v.* Baird, 30 La. Ann. 1148. But see La. Act 103 of 1870.

**75.** Broussard *v.* Hinds, (Tex. Civ. App. 1907) 101 S. W. 855.

**76.** Mulligan *v.* Vallee, 31 La. Ann. 375; Nalle *v.* Baird, 30 La. Ann. 1148; Baker *v.* Morrison, 4 La. Ann. 372; Welsh *v.* Barrow, 9 Rob. (La.) 535. See also Harrell *v.* Sanders, 26 La. Ann. 691.

**On a bond improperly conditioned for payment of judgment,** instead of the return of the property, defendant and his sureties may nevertheless be held to the extent of the value of the property. Mulligan *v.* Vallee, 31 La. Ann. 375; Francis *v.* Martin, 28 La. Ann. 403; Baker *v.* Morrison, 4 La. Ann. 372; Welsh *v.* Barrow, 9 Rob. (La.) 535.

**In Texas where the condition is more onerous** than the law authorizes, the bond must be quashed. See Halbert *v.* San Saba Springs Land, etc., Assoc., (Civ. App. 1895) 34 S. W. 636. *Aliter,* where the condition is less onerous. Whitaker *v.* Sanders, (Civ. App. 1899) 52 S. W. 638.

**Bond not vitiated by incorrect recitals.**— That a bond recites three persons as principals and was executed by only one of them will not invalidate it if the person who executed it was the one who replevied the property described in the bond. McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

**77.** Mulligan *v.* Vallee, 31 La. Ann. 375; Nalle *v.* Baird, 30 La. Ann. 1148; Francis *v.* Martin, 28 La. Ann. 403; Baker *v.* Morrison, 4 La. Ann. 372; Welsh *v.* Barrow, 9 Rob. (La.) 535.

**Liability not terminated pending appeal.**— The liability of the surety on a replevy bond conditioned for the payment of the rents of the land sequestered does not terminate with the rendition of a judgment in plaintiff's favor but continues pending an appeal, until the judgment is affirmed. Maryland Fidelity, etc., Co. *v.* Texas Land, etc., Co., 40 Tex. Civ. App. 489, 90 S. W. 197.

**78.** Gayoso *v.* Wikoff, 4 La. 302.

**79.** Downey *v.* Kenner, 42 La. Ann. 1129, 8 So. 302.

**When breach of condition occurs.**—A bond conditioned that certain slaves should be forthcoming upon further order of the court is not breached until the court of equity makes the order for the forthcoming of the slaves, notice thereof is given to the obligors, and then there is a failure to produce them. See Hall *v.* Paschall, 27 N. C. 668.

**80.** Downey *v.* Kenner, 42 La. Ann. 1129, 8 So. 302; Welsh *v.* Barrow, 9 Rob. (La.)

against the sureties plaintiff must allege and prove that the judgment in the main action recognized him as the owner of the property sequestered or as entitled to a privilege thereon.[81]

(III) *DISCHARGE.* The parties to a release bond may discharge themselves of liability by delivering the property into the hands of the sheriff either before or after verdict,[82] and without obtaining an order of court or special provision in the judgment permitting them so to do.[83]

(IV) *ENFORCEMENT OF LIABILITY* — (A) *Remedies.* The method of enforcing liability of the parties to a release bond varies with the jurisdictions. In Louisiana the sureties cannot be proceeded against by rule or motion in the original suit,[84] summary relief of this sort not having been authorized by statute, and redress must be sought in an ordinary direct action, after execution against the property has been returned *nulla bona.*[85] In Texas a statute provides that when judgment is rendered for plaintiff in sequestration proceedings judgment shall be entered up against the obligors on defendant's release bond for the value of the property replevied.[86] A successful defendant may reconvene in the main suit for damages on the release bond,[87] just as he may on the indemnity bond.[88]

535. *Compare* Noble *v.* Warner, 21 La. Ann. 284; Baker *v.* Morrison, 4 La. Ann. 372.

**A return on a fieri facias that it was impossible** to make a demand upon defendant personally and that no property of his could be found will authorize plaintiff to proceed against the surety on a bond given to release property which had been sequestered. Baker *v.* Morrison, 4 La. Ann. 372.

**81.** See Perret *v.* Coleman, 115 La. 814, 40 So. 176; Nalle *v.* Baird, 30 La. Ann. 1148.

**82.** McClenny *v.* Floyd, 3 Tex. 114; Lewter *v.* Lindley, (Tex. Civ. App. 1904) 81 S. W. 776; Lynch *v.* Burns, (Tex. Civ. App. 1904) 79 S. W. 1084; Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662.

**83.** Mills *v.* Hackett, 65 Tex. 580. *Compare* Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706; Clopton *v.* Goodbar, (Tex Civ. App. 1900) 55 S. W. 972.

**Replacing of property.**—Where defendant replaces such part of the sequestered property as may have been sold or destroyed by use with other property of greater value, which was subsequently subjected by the sequestering creditor to the satisfaction of his judgment, the condition of the release bond was held fulfilled and the sureties not liable for any balance of plaintiff's judgment remaining unsatisfied. Mulligan *v.* Vallee, 31 La Ann. 375.

**A compromise and settlement of the sequestration suit by** which plaintiffs were to satisfy their claims out of the property sequestered which they had taken possession of under bond and sold operates as a cancellation of the release bond, and it may not subsequently be sequestered by creditors of plaintiff. Bee *v.* Carlin, 28 La. Ann. 648.

**Seizure and sale on execution by** plaintiff of the sequestered property releases the surety on the forthcoming bond. Jacobson *v.* Sevill, 6 La. Ann. 277.

**84.** Sharp *v.* Bright, 14 La. Ann. 390; Baker *v.* Doane, 3 La. Ann. 434. See also Perret *v.* Coleman, 115 La. 814, 40 So. 176.

**Failure to answer a rule is not a waiver** by a surety of his right to object and except to the proceedings. Sharp *v.* Bright, 14 La. Ann. 390.

**85.** See Downey *v.* Kenner, 42 La. Ann. 1129, 8 So. 302; Welsh *v.* Barrow, 9 Rob (La.) 535. *Compare* Noble *v.* Warner, 21 La. Ann. 284; Baker *v.* Morrison, 4 La. Ann. 372.

**86.** See Luedde *v.* Hooper, 95 Tex. 172, 66 S. W. 55; Pipkin *v.* Tinch, (Tex. Civ. App. 1906) 97 S. W. 1077; Bigger *v.* Jones, 3 Tex. App. Civ. Cas. § 221.

**87.** Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662.

**88.** See *infra*, XIII, B, 5, c, (II), (A).

**Proceeding against purchaser of property released on bond.**—Where property was released on bond to defendant who sold it, plaintiff may proceed against the purchaser by a motion for execution; and the fact that plaintiff got judgment on the bond and issued execution thereon will not amount to an election on his part to pursue defendant so as to waive any remedy against the purchaser. Crawford *v.* South Rock Island Plow Co., 33 Tex. Civ. App. 510, 77 S. W. 280.

**Writ of possession.**—A judgment against plaintiff need not award a writ of possession against the sureties on the replevy bond, since they are not parties to the suit. Zimmerman *v.* Pearson, (Tex. Civ. App. 1899) 51 S. W. 523.

**Jurisdiction of suit on maritime bond.**—A bond given to release a vessel sequestered in a suit for mariner's wages is properly sued on in a state court. Leon *v.* Galceran, 11 Wall. (U. S.) 185, 20 L. ed. 74.

**Pleading.**—Damages for the rental value of land sequestered must be claimed in the pleadings. Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

**Parties.**—A release bond having been made jointly by several parties, from whose possession the property sequestered was taken, there is no misjoinder in suing them jointly. Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

**Joining sureties on sequestration and release bonds as defendants.**—Where a plaintiff secured the release of property on bond

(B) *Defenses* — (1) DEFENSES ARISING FROM ACT OF OBLIGEE. The sureties on a release bond, like any other sureties, are released from liability, in accordance with the principles of suretyship law,[89] by any act of the obligee which changes the terms of their undertaking or impairs their right of subrogation. Thus they will be released by an agreement of plaintiff to wait upon defendant for payment of the judgment due,[90] or by plaintiff's failure to obtain more than a personal judgment against the principal defendant, since the failure to recognize plaintiff's lien upon the property sequestered deprives the surety of the right to attach the property in the hands of defendant.[91]

(2) ABANDONMENT OF SEQUESTRATION SUIT. A voluntary dismissal of the sequestration proceedings precludes plaintiff from recovering on the replevy bond, even though plaintiff offer in his suit on the bond to show his right to the land sequestered.[92]

(3) CONSENT JUDGMENTS. Judgments by consent are not binding on the sureties on release bonds,[93] against whom they have only the force of private agreements between principal and creditor, which may release the sureties by changing the terms of their contract.[94]

(4) QUASHING OF SEQUESTRATION PROCESS. On the theory that without a lawful writ there is no authority for the seizure of defendant's property, and hence none for its replevy, it has been held, with questionable correctness, that after the quashing of a writ of sequestration for irregularities, no proceedings can be maintained against the sureties on the release bond.[95]

and subsequently abandoned the suit but kept the property, it was held that defendant might in one action recover on both the original indemnity bond and on the release bond, joining the sureties on both. See Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261, a decision hard to justify on any but special local grounds.

**Judgment against husband and wife.**—A bond, with sureties, given to replevy property belonging to a wife in her separate right in a sequestration proceeding, the principals in which were the husband and wife, provided that the obligors and each of them would pay the value of the rents of the property replevied in case either of them should be compelled to do so on the trial of the contest of the right to the property. Judgment was entered against the principals for the property, but only against the husband and the sureties for the rents. It was held that, the wife being liable on the bond, judgment against her was necessary to a correct judgment against the sureties. Wandelohr *v.* Grayson County Nat. Bank, (Tex. 1908) 112 S. W. 1046, 108 S. W. 1154 [*affirming* (Civ. App. 1907) 106 S. W. 413].

89. See SURETYSHIP.

90. Allison *v.* Thomas, 29 La. Ann. 732.

91. Nalle *v.* Baird, 30 La. Ann. 1148. *Compare* Perret *v.* Coleman, 115 La. 814, 40 So. 176.

**A judgment condemning sureties only,** not the principal, cannot be sustained. Sartain *v.* Hamilton, 14 Tex. 348.

**Seizure and sale on execution** of the property sequestered by plaintiff releases the surety of all liability on the release bond. Jacobson *v.* Sevill, 6 La. Ann. 277.

92. Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. 724.

**Dismissal of a sequestration suit as to one of the sureties** on defendant's release bond who has died pending the suit and whose estate is insolvent will not vitiate the judgment in favor of plaintiff. The court would have no power to release the deceased surety's estate from responsibility and a dismissal of the suit as to him would not operate as such release. Mills *v.* Hackett, 65 Tex. 580.

93. Carroll *v.* Hamilton, 30 La. Ann. 520; Herrick *v.* Conant, 4 La. Ann. 276.

94. Allison *v.* Thomas, 29 La. Ann. 732. *Compare* Harrell *v.* Sanders, 26 La. Ann. 691.

95. Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558 (overruling earlier decisions); Avery *v.* Popper, (Tex. 1898) 48 S. W. 572; Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. 638. See also Collins *v.* Edwards, 13 La. Ann. 342; Wilson *v.* Churchman, 4 La. Ann. 452.

**The earlier cases took a different view.**—See McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934; Filgo *v.* Citizens' Nat. Bank, (Tex. Civ. App. 1896) 38 S. W. 237; Cahn *v.* Jaffray, 12 Tex. Civ. App. 324, 34 S. W. 372; Bemis *v.* Wells, 10 Tex. Civ. App. 626, 31 S. W. 827.

**Irregularity in permitting intervener to bond no defense.**—A surety cannot question the regularity of an order permitting an intervener to bond. Collins *v.* Edwards, 13 La. Ann. 342.

**Personal liability where writ set aside for irregularity.**—A plaintiff who is deprived of recourse on the release bond of an intervener by the setting aside of the sequestration writ for irregularity may have personal recourse against the intervener where the latter does not prove that the property is not still in his possession. Wilson *v.* Churchman, 4 La. Ann. 452.

(5) Order of Court in Other Proceedings. It is no defense to the sureties on the replevy bond that the goods were taken from defendant's possession on an order of court rendered in other proceedings to which plaintiff was no party,[96] even though sold in such proceedings to satisfy a lien prior to, and higher in rank than, the lien on which the property was sequestered.[97]

(6) Denial of Obligee's Superior Right to Property. Where the sureties allege fraud and collusion to their prejudice between plaintiff and defendant in the sequestration suit, they may show that the property sequestered did not belong to defendant, that plaintiff had no lien upon it, or that his lien is inferior to a lien in their own favor.[98]

(c) *Pleading.* It has been held that the rights of plaintiff on defendant's replevy bond do not depend on the pleadings, and that there is no need of pleading on plaintiff's part to fix the value as a predicate for the judgment; hence that there may be a judgment for the actual value of the property, although the petition claims less.[99]

(d) *Evidence.* The ordinary rules of evidence apply,[1] in conformity with which it has been held that any evidence of a new contract between plaintiff and the principal obligor, operating to release the surety, being relevant, is admissible;[2] but parol evidence cannot be introduced, in the absence of allegations of fraud, to contradict the judicial records of a court showing delivery of property on a release bond.[3]

**Lack of authority to execute the mortgage** is no defense to sureties on a replevin bond given for the release of property mortgaged by a corporation in an action to foreclose. McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

96. Gordon *v.* Diggs, 9 La. Ann. 422; Levy *v.* Lee, 13 Tex. Civ. App. 510, 36 S. W. 309; Cohen *v.* Adams, 13 Tex. Civ. App. 118, 35 S. W. 303.

97. Clapp *v.* Seibrecht, 11 La. Ann. 528, holding it no defense that property released on bond was subsequently seized and sold to satisfy a lessor's privilege for rent outranking the vendor's lien on which the sequestration proceedings were based, since *non constat* that the landlord would have interfered with the sale of the property if it had not been released from sequestration or that the proceeds would not have satisfied plaintiff's lien as well as the rent due at the time. See also Warfield *v.* Stubbs, 24 La. Ann. 569.

**Seizure and sale of the sequestered property** at the instance of plaintiff, although in other proceedings, bars his suit on the release bond. Jacobson *v.* Sevill, 6 La. Ann. 277.

98. See Carroll *v.* Hamilton, 30 La. Ann. 520.

**Necessity of recognition of plaintiff's lien in judgment.**—A judgment for plaintiff condemning defendant in a sum of money and maintaining a writ of sequestration under which movable property had been seized is in effect a judgment that the property shall be restored to plaintiff and held to respond to the moneyed demand of his judgment, and the surety on the release bond cannot escape liability on the plea that such judgment fails to recognize plaintiff as the owner of the property or as entitled to a privilege thereon. Perret *v.* Coleman, 115 La. 814, 40 So. 176. See also Nalle *v.* Baird, 30 La. Ann. 1148.

**Slaves ceasing to be property.**—Where slaves sequestered and released on bond had ceased to be property before rendition of judgment, by operation of law, the surety on the release bond was relieved of liability. Pait *v.* McCutchen, 43 Tex. 291.

**Execution of release bond does not estop** principal or sureties thereon from moving for or obtaining the dissolution of the sequestration. Carroll *v.* Hamilton, 30 La. Ann. 520.

**Death of animal replevied** does not release obligors on replevin bond. See Bigger *v.* Jones, 3 Tex. App. Civ. Cas. § 227.

**Loss of property through negligence of plaintiff.**—The fact that the property sequestered has been lost by the sheriff's negligence will not avail in defense of him to whom the property has been released or the surety on his bond. Hamilton *v.* Hurst, 5 La. Ann. 150; Jones *v.* Doles, 3 La. Ann. 388.

99. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

1. See Evidence, 16 Cyc. 821.

2. Allison *v.* Thomas, 29 La. Ann. 732.

3. Henderson *v.* Walmsly, 23 La. Ann. 562.

**Evidence excluded where pleadings insufficient.**—Evidence of rental value is properly excluded where there are no pleadings setting up such a claim. Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

**The bond sued on is properly introduced in evidence** even though mutilated by erasures and interlineations, where it has been in the possession of the officers of the law since its execution, the presumption being that it was signed by the parties with the erasures and interlineations previously made. Lalanne *v.* McKinney, 28 La. Ann. 642.

(E) *Measure of Recovery* — (1) IN GENERAL. The amount of recovery is usually controlled by the terms of the bond;[4] but it has been held that the bonds must be construed with reference to the statute in pursuance of which they were given, and that where the measure of liability fixed by their language is greater than that authorized by law, no recovery beyond the amount of the statutory provision can be had.[5]

(2) VALUE OF PROPERTY OR OF ITS USE — (a) IN GENERAL. The value of the property, and not the amount of the judgment, is the proper measure of recovery on a release bond, even though the bond is conditioned for the payment of the judgment.[6] In cases of the sequestration of real estate a plaintiff who has executed a forthcoming bond is responsible thereon for the rents actually received.[7] In the absence of a finding that the writ was wrongfully sued out, he is not liable for the rental value.[8] Inasmuch as the statutory bond for the release of personal property does not require an accounting for its use, no liability arises thereon for the value of the hire or revenue of such property.[9]

(b) MEASURE OF VALUE OF PROPERTY. The value of the property has been in some cases fixed as its market value at the time of the trial,[10] in others at its value at the date the bond was given and the property released with legal interest from that time.[11]

(3) COSTS AND COUNSEL FEES. The decisions are in conflict as to whether

4. Jones *v.* Doles, 3 La. Ann. 598.

**Value of severed crops.**— Plaintiff sued on a bond given by defendant in sequestration proceedings to retain the land during an action for possession, the bond being conditioned to secure plaintiff against damage to the property and the payment of the value of the rents thereof. It was held that the judgment in plaintiff's favor for the land included the growing and unharvested crops, and, as the severance and removal thereof damaged the land to the amount of the value of the crops, the bondsmen were liable therefor in addition to the rental, notwithstanding the severance and removal was after judgment. Love *v.* Perry, (Tex. Civ. App. 1908) 11 S. W. 203.

5. Mulligan *v.* Vallee, 31 La. Ann. 375; Nalle *v.* Baird, 30 La. Ann. 1148; Francis *v.* Martin, 28 La. Ann. 403; Baker *v.* Morrison, 4 La. Ann. 372; Welsh *v.* Barrow, 9 Rob. (La.) 535.

**Damages against surety cannot exceed penalty** stipulated nor the value of the sequestered property. Within those limits he is liable up to the amount of the judgment against his principal. See Collins *v.* Edwards, 13 La. Ann. 342.

6. Carroll *v.* Hamilton, 30 La. Ann. 520; Collins *v.* Edwards, 13 La. Ann. 342. *Compare* Lalanne *v.* McKinney, 28 La. Ann. 642. See also Baker *v.* Morrison, 4 La. Ann. 372; Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706.

7. Taylor *v.* Flynt, 28 Tex. Civ. App. 219, 67 S. W. 347. See also Western Mortg., etc., Co. *v.* Shelton, 8 Tex. Civ. App. 550, 29 S. W. 494.

8. Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596; Moore *v.* Brown, (Tex. Civ. App. 1905) 89 S. W. 310. But *compare* Fidelity, etc., Co. *v.* Texas Land, etc., Co., 40 Tex. Civ. App. 489, 90 S. W. 197, holding defendant liable for rental value.

**Surety not liable unless principal liable also.**— The sureties cannot be held for the value of the use and occupation of the land sequestered unless the judgment holds the principal also. See Sartain *v.* Hamilton, 14 Tex. 348.

9. Segassie *v.* Piernas, 26 La. Ann. 742; McClenny *v.* Floyd, 3 Tex. 114; Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530.

**Use of property prior to execution of bond.** — In a suit for a mule and twenty-five dollars for the use thereof, the judgment against the sureties on defendant's replevin bond should not include the amount claimed for the use of the mule, which was prior to the execution of the bond. Gunn *v.* Pickering, (Tex. App. 1891) 17 S. W. 1115.

10. Luedde *v.* Hooper, 95 Tex. 172, 66 S. W. 55; Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Wood *v.* Fuller, 34 Tex. Civ. App. 178, 78 S. W. 236; Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662; Filgo *v.* Citizens' Nat. Bank, (Tex. Civ. App. 1896) 38 S. W. 237; Western Mortg., etc., Co. *v.* Shelton, 8 Tex. Civ. App. 550, 29 S. W. 494.

**Replevying not a conversion.**— The giving of a replevy bond by plaintiff is not a conversion of the property but a judicial deposit for the purpose of keeping it safely pending the trial, the real contest continuing to be over the property itself. Western Mortg., etc., Co. *v.* Shelton, 8 Tex. Civ. App. 550, 29 S. W. 494.

11. Neill *v.* Billingsley, 49 Tex. 161; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934 [*distinguishing* Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704].

**Rule varies with circumstances of particular case.**— "Our conclusion upon the question presented is that the rule as to the time when the value of the property shall be assessed in adjudging the liability of sureties on a

sureties on a release bond are responsible for costs.[12] In Louisiana counsel fees incurred in the original sequestration suit are recoverable,[13] but not those incurred in the proceedings on the bond.[14]

**D. Sale and Disposition of Property — 1. Sale Before Judgment.** Property may be sold under order of court pending the litigation, if it is perishable,[15] or it may be sold by consent.[16] But one who has secured the release of the sequestered property by giving a forthcoming bond has no right to sell the property before judgment.[17]

**2. Disposition of Property or Proceeds Thereof.** In a suit against defendant and the sureties on his forthcoming bond the judgment should provide that the proceeds of the property should be applied first to the judgment against the sureties.[18] If plaintiff fail to recover the property sued for, defendant is entitled to a judgment restoring the same to his possession, or for its value if it cannot

replevy bond, whether such assessment shall be made at the date of the replevy or at the time of the trial, will vary with the facts and circumstances of the particular case, having in view the purpose of the bond which is indemnity to the obligee in the instrument." See McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934, 937.

**Recovery is not limited to value as alleged in petition,** but extends to actual value as fixed by jury. Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934. *Compare* Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

**Judgment on bonds should state value of** each article separately, since plaintiff has a right to return property seized and have the value thereof credited on the judgment. Lewter *v.* Lindley, (Tex. Civ. App. 1904) 81 S. W. 776; Lynch *v.* Burns, (Tex. Civ. App. 1904) 79 S. W. 1084; Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662. But *compare* Pipkin *v.* Tinch, (Tex. Civ. App. 1906) 97 S. W. 1077.

12. See cases cited *infra*, this note.

**Recovery of costs allowed.**— Norton *v.* Cammack, 10 La. Ann. 10 (restricted to costs incident to the sequestration proper and to the release of the property); Mills *v.* Hackett, 65 Tex. 580; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934. Where plaintiff's right to the possession of cattle sequestered was not disputed, and no evidence was offered traversing the affidavit for the writ, he was entitled to the costs of the proceedings. Rudolph *v.* Snyder, 47 Tex. Civ. App. 438, 109 S. W. 763.

**Recovery of costs not allowed** see Neill *v.* Billingsley, 49 Tex. 161; Zimmerman *v.* Pearson, (Tex. Civ. App. 1899) 51 S. W. 523; Henderson *v.* Brown, 16 Tex. Civ. App. 464, 41 S. W. 406; Collier *v.* Meyers, 14 Tex. Civ. App. 312, 37 S. W. 183. Where property sequestered in mortgage foreclosure proceedings was replevined, and judgment was thereafter rendered for plaintiff, the sureties on the replevin bond were not liable for costs. Pipkin *v.* Tinch, (Tex. Civ. App. 1906) 97 S. W. 1077.

**Partial success.**— Under Rev. St. (1895) art. 1425, providing that the successful party to a suit shall recover all costs, except where otherwise provided, where, in a suit to recover cattle, plaintiff sequestered them and some stock food, and defendant recovered forty-eight dollars, the value of the food, and plaintiff recovered the cattle, defendant may not complain because all costs incurred to a certain time were adjudged against him. Rudolph *v.* Snyder, 47 Tex. Civ. App. 438, 106 S. W. 763.

13. Norton *v.* Cammack, 10 La. Ann. 10.

14. Collins *v.* Edwards, 13 La. Ann. 342.

15. Field *v.* Broderick, 12 La. Ann. 552.

**Property not subject to waste or decay is not properly** sold pending the action; but an unauthorized sale is not ground for setting aside a decree subsequently rendered in the action, the remedy therefor being against the sheriff. See Day *v.* Hartman, 74 Miss. 489, 21 So. 302.

**In equity, where the sequestration issued as a mesne process** the property sequestered could not ordinarily be sold; *aliter* where the writ was used as a final process. See Daniell Ch. Pr. § 1054.

**Plaintiff purchasing at sale cannot withhold proceeds** so as in effect to transfer custody of the sequestered property from the sheriff to himself. See Field *v.* Broderick, 12 La. Ann. 552.

16. Gay *v.* Eaton, 28 La. Ann. 1; Prall *v.* Peet, 3 La. 274, holding plaintiff's lien transferred to the proceeds, which he might sequester.

17. Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551; Pagett *v.* Curtis, 15 La. Ann. 451; Coats *v.* Elliott, 23 Tex. 606; Crawford *v.* Southern Rock Island Plow Co., 33 Tex. Civ. App. 510, 77 S. W. 280. *Compare* Warfield *v.* Stubbs, 24 La. Ann. 569.

**Unauthorized sale by attorney in fact.**— The attorney in fact of a seizing creditor has no right or authority in law to dispose, at private sale before judgment, in favor of his principal, and without any order of court, of the property of the seized debtor coming into his possession by a release bond from judicial sequestration; and for so doing he is liable in damages to the extent of the value of the thing sold. Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551.

18. McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934.

be returned.[19] And in cases where plaintiff is successful the judgment should be alternative, permitting defendant to return any of the property *pro tanto* in satisfaction of the judgment.[20] After nonsuit or dissolution of the sequestration the property sequestered is properly returned by the sheriff to the person from whose possession it was taken,[21] although such person be plaintiff in the unsuccessful suit.[22] After final judgment the property sequestered should be delivered by the sheriff to the party adjudged entitled to it.[23]

**E. Charges For Care and Preservation of Property.** Costs and reasonable charges for preserving the property sequestered and preventing loss are properly deducted from the *res* before it is turned over to the party adjudged owner.[24]

## X. RIGHTS OF THIRD PARTIES.

**A. In General.** Third parties whose property rights are in danger of being prejudiced by the sequestration proceedings may intervene in their own behalf and secure the release of the property on bond,[25] as well as contest the ownership thereof or right thereto;[26] but the statutory remedy permitting them to do so is not exclusive, and they may instead resort to a separate suit at law for the purpose of establishing their right to the property sequestered.[27]

**B. Who May Intervene.** Under the modern practice any person interested in the particular property sequestered as owner or lienor may intervene to protect his right in the property,[28] but not ordinary general creditors without special interest in the specific property which is the subject of the suit.[29]

19. Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706.

20. Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972.

21. Gay *v.* Eaton, 28 La. Ann. 1.

22. Hasluck *v.* Morgan, 2 Mart. N. S. (La.) 9.

23. See Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 451, 39 So. 441.

24. Mestier *v.* A. Chevalier Paving Co., 108 La. 562, 32 So. 520; Beam's Appeal, 19 Pa. St. 453. *Compare* Milne *v.* Amelung, 2 Mart. (La.) 209.

**Repair of sequestered turnpike.**— If the sequestrator of a turnpike advance his own money for repairs, he does so at his own risk; but when his account including his advances has been confirmed, his charges should be paid by priority before distribution. See Beam's Appeal, 19 Pa. St. 453.

**Taxed as costs.**— Under Tex. Rev. St. (1895) art. 4871, providing that an officer retaining sequestered property shall receive compensation and reasonable charges therefor to be taxed and collected as other costs, if defendant was entitled to recover money paid a sheriff to regain possession of sequestered property, he should have the item taxed as costs, and could not have his right thereto determined by the jury. Rudolph *v.* Snyder, 47 Tex. Civ. App. 438, 106 S. W. 763.

25. See *supra*, IX, C, 2.

**Formerly no intervener could bond.**— See State *v.* Judge Orleans Parish Fourth Dist. Ct., 25 La. Ann. 299; Duperier *v.* Flanders, 20 La. Ann. 29; Halle *v.* Oliver, 52 Tex. 443. *Compare* Block *v.* Barthe, 20 La. Ann. 344; Collins *v.* Edwards, 13 La. Ann. 342; Catalogne *v.* Bauries, 4 La. Ann. 567.

26. See Barton *v.* Stroud-Gibson Grocer Co., (Tex. Civ. App. 1897) 40 S. W. 1050; and cases cited in following notes.

27. Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29.

**Interveners are not entitled to open and conclude argument** to the jury. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163.

28. O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872 (vendor's lien claimed); Phifer *v.* Maxwell, 28 La. Ann. 862 (lessor's lien claimed); Bee *v.* Carlin, 28 La. Ann. 648 (vendor's lien claimed); Gay *v.* Eaton, 28 La. Ann. 1; Alexander *v.* Silbernagel, 27 La. Ann. 557; Kirkland *v.* Boyle, 7 La. Ann. 369. See also Catalogne *v.* Bauries, 4 La. Ann. 567; Betterton *v.* Echols, 85 Tex. 212, 20 S. W 63; Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22; Barton *v.* Stroud-Gibson Grocer Co., (Tex. Civ. App. 1897) 40 S. W. 1050.

**Transferee of defendant not served.**—Where an action was filed on a note and chattel mortgage given by M. J. Peters, and was docketed as against J. M. Peters, and M. J. Peters was not personally summoned and did not appear, a writ sequestering the property covered by the mortgage, issued against J. M. Peters, was a nullity as to M. J. Peters, which his transferee could plead in bar of a recovery by plaintiff. Watt *v.* Parlin, etc., Co., 44 Tex. Civ, App. 439, 98 S. W. 428.

29. Hardy *v.* Lemons, 36 La. Ann. 107; Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22.

**Only owners, pledgees, or consignees can bond** sequestered property in Louisiana. See Hardy *v.* Lemons, 36 La. Ann. 107, denying lessee of property the right to bond.

**The owner's legal representative may intervene** see Lemann *v.* Truxillo, 32 La. Ann. 65, where defendant was without capacity to stand in judgment.

**Estoppel.**—A declaration by the intervener to the sheriff after the sequestration that the property sequestered did not belong to him

**C. Right of Intervener to Question Regularity of Sequestration Process.** In Louisiana the intervener cannot question the regularity or sufficiency of the affidavit or bond upon which the sequestration issued,[30] but in Texas the rule is apparently otherwise.[31]

**D. Nature of Intervention Proceedings.** An intervention to set aside an order of sequestration on the ground that it was effected on property claimed by a third person is a separate demand distinct from the issue in the sequestration proceeding and for the purposes of which the intervener must be considered as plaintiff,[32] upon whom rests the burden of making out that defendant's title has been divested in his favor.[33]

**E. Time to Intervene.** After the sequestered property has been released on bond it is too late for a third person to intervene and assert a lien on the property superior to that of the sequestering plaintiff.[34]

**F. Action or Proceeding.** Where the third person claimant of the property proceeds by way of intervention, his petition must in some jurisdictions be sworn to and accompanied by a bond,[35] but the absence of a sufficient bond or affidavit cannot be taken advantage of on general demurrer,[36] and a petition alleging that the intervener was the owner and in possession of the property when it was seized and delivered from his possession to that of plaintiff sufficiently shows the interest in the subject-matter which is the ordinary test of the right to intervene.[37] If the pleading raises a question only as to the ownership of the property the issues must be restricted accordingly, and neither plaintiff's claim nor the privilege which he asserts can be attacked.[38]

**G. Release of Property to Intervener or Claimant on Bond.** The statutes now generally extend to third persons claiming to be interested as owners or lienors the privilege of securing possession of the property sequestered, upon execution of a bond similar to that required of plaintiff or defendant under like circumstances.[39]

will not estop him from intervening to claim the property. Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22.

**Recovery by intervener for wrongful sequestration.**—Where the intervener shows that plaintiff agreed to accept from him payment for the property sequestered and that he has made such payment, he can in the main action recover from plaintiff for the wrongful levy of the writ of sequestration. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163. *Compare* Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251.

**Rights of attaching creditors where property subsequently sequestered.**—An *ex parte* dissolution of a sequestration on bond does not affect attaching creditors who are not parties either to the suit in which the writ issued or to the motion to dissolve; hence a proviso in the order releasing the property that it should not be considered as a release from the attachments was proper and if not expressed would have been implied. State *v.* Judge, 39 La. Ann. 1108, 3 So. 342. See also Alabama Bank *v.* Hozey, 2 Rob. (La.) 150.

30. Hawkins *v.* Beer, 37 La. Ann. 53 (where affidavit was confessedly insufficient); Carroll *v.* Bridewell, 27 La. Ann. 239. *Compare* Kirkland *v.* Boyle, 7 La. Ann. 369, holding that irregularities should be urged before judgment.

31. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163.

**The surety on an intervener's forthcoming bond cannot question the regularity of the order permitting the intervener to bond.** Collins *v.* Edwards, 13 La. Ann. 342.

32. O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872.

33. O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872.

**After appearing and filing an answer,** an intervener cannot urge that the question of his title is not properly involved in the suit. Barton *v.* Stroud-Gibson Grocer Co., (Tex. Civ. App. 1897) 40 S. W. 1050.

34. Phifer *v.* Maxwell, 28 La. Ann. 862; Carroll *v.* Bridewell, 27 La. Ann. 239.

35. See Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22; Osborne *v.* Robinson, (Tex. Civ. App. 1896) 35 S. W. 327.

36. Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22.

37. Irvin *v.* Ellis, 76 Tex. 164, 13 S. W. 22.

38. O'Neil *v.* Walker, 45 La. Ann. 609, 12 So. 872.

39. See *supra*, IX, C, 2.

**Bond filed without oath.**—Where the claimant of sequestered property files a bond but not the required oath, he may file a new bond with the statutory oath attached in response to a motion to dismiss his claim. Osborne *v.* Robinson, (Tex. Civ. App. 1896) 35 S. W. 327.

**The principles applying to the enforcement of such bonds** and to the accrual of rights

## XI. DISSOLUTION, QUASHING, AND VACATING.

**A. Generally.** Sequestration being a harsh and extraordinary process, the party whose property is seized thereunder need not await the trial of the case on the merits of the principal demand, but may have summary redress by motion to dissolve, if the proceedings for sequestration are either in substance or in form defective or unjustified.[40] But although the writ issued improvidently, it will not be set aside if there are grounds sufficient for immediately reinstating it.[41]

**B. Causes — 1. DEFECTS IN PROCEEDING.** Defects either in the affidavit, as failure to describe the property sufficiently for identification, or to allege its value, or to state its location,[42] or in the bond,[43] will justify the quashing of the sequestration process. *A fortiori* will a writ be set aside which has issued without any bond being furnished [44] or without either bond or affidavit.[45]

**2. NON-EXISTENCE OF GROUNDS FOR SEQUESTRATION.** Although the affidavit is *prima facie* evidence of the existence of the grounds for sequestration,[46] the presumption which it creates must yield to proof of its falsity and of the non-existence of grounds for the writ, which must thereupon be dissolved.[47]

**C. By Motion or Rule to Show Cause — 1. IN GENERAL.** In Louisiana the most common and appropriate method of causing a writ of sequestration to be dissolved, quashed, or vacated is by motion or rule to show cause to the contrary,[48] this being a summary process. In Texas, apparently, this method of attack avails only as against defects appearing upon the face of the record.[49]

thereunder are identical whether they be given by plaintiff, defendant, or claimant, and are therefore properly discussed under another heading. See *supra*, IX, C, 4.

40. See Boardman *v.* Glenn, 7 La. Ann. 581; Crawford *v.* Jones, 2 La. Ann. 826; and cases in following notes.

41. Royer's Succession, 105 La. 281, 29 So. 511 [*following* Adams *v.* Lewis, 7 Mart. N. S. (La.) 400].

**Where the delay in filing suit** for the possession of land, after the making of an affidavit for a writ of sequestration, did not authorize the inference that the facts stated in the affidavit had ceased to exist, or cast suspicion on the fairness of the proceedings, it did not authorize the quashing of the affidavit. Duncan *v.* Jouett, (Tex. Civ. App. 1908) 111 S. W. 981.

42. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163; Huckins *v.* Kapf, (Tex. App. 1889) 14 S. W. 1016.

43. See Mitchell *v.* Bloom, 91 Tex. 634, 45 S. W. 558; Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. 934, holding refusal to quash sequestration because of defective bond immaterial, where defendant had replevied the property and plaintiff had recovered judgment, since defendant and his sureties were liable on the replevy bond notwithstanding any quashal of the sequestration process. See *supra*, IX, C, 4, g, (IV), (B), (4).

44. Nickell *v.* Carter, 23 Tex. Civ. App. 570, 56 S. W. 769.

45. McClendon *v.* Bennett, 16 La. Ann. 335.

**Writ must stand or fall on petition as filed** for its issuance. Royer's Succession, 105 La. 281, 29 So. 511. *Compare* Lemann *v.* Truxillo, 32 La. Ann. 65.

**Writ quashed for variance in description.**— Where the description of the property in the writ does not tally with that in the petition, so as to preclude the possibility of the sheriff's sequestering the wrong property, the writ is properly quashed. Woessner *v.* Fly, 63 Tex. 198; Porter *v.* Miller, 7 Tex. 468.

**Whether an intervener or claimant may attack the regularity** of the sequestration proceedings is a question upon which the authorities differ. See Hawkins *v.* Beer, 37 La. Ann. 53; Carroll *v.* Bridewell, 27 La. Ann. 239; McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163.

46. See *infra*, XI, D.

47. Young *v.* Swanson, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. See also Johnston *v.* Johnston, 13 La. Ann. 581. *Compare* Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405.

**Long residence immaterial.**—A sequestration obtained on the ground of apprehension of removal of property cannot be set aside on proof of defendant's long residence in the parish and possession of ample means. Boatner *v.* Wade, 14 La. Ann. 695.

48. Boardman *v.* Glenn, 7 La. Ann. 581; Crawford *v.* Jones, 2 La. Ann. 826; Wooster *v.* Salzman, 14 La. 98; and cases in preceding note. See also Farr *v.* Davis, 5 La. Ann. 28.

49. See Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704, holding that on motion to quash the sufficiency of a writ of sequestration must be tested by the facts appearing upon the face of the proceedings and no extrinsic matters can be shown.

**2. Time to Move.** A motion to quash the sequestration process in Texas may be filed and acted on at any time before the trial on the merits,[50] but the rule in Louisiana is not so liberal.[51]

**3. Formal Requisites of Motion.** The grounds relied upon for dissolving the sequestration ought to be specifically assigned,[52] although failure to do so will not be fatal in the absence of objection.[53]

**D. Evidence.** While the affidavit is *prima facie* evidence of the existence of the grounds upon which the writ issued,[54] the presumption which it creates may be rebutted;[55] and the Louisiana supreme court now apparently subscribes to the doctrine that where an affidavit setting forth plaintiff's fear of removal or disposition of property is attacked, plaintiff must show not simply that he did in fact fear, as alleged, but that he had reasonable grounds for his fear.[56]

**E. Effect of Dissolution.** On the dissolution of a sequestration defendant is entitled to the restitution of the property sequestered,[57] and plaintiff is entitled to make such restitution so as to reduce the *quantum* of damages.[58]

**F. Appeal From Order Granting or Refusing Dissolution — 1. Right to Appeal.** An appeal lies both from an order dissolving [59] and from an order refusing [60] to dissolve a sequestration.

50. Wheeler *v.* Wheeler, 65 Tex. 573; Gravity Canal Co. *v.* Sisk, 43 Tex. Civ. App. 194, 95 S. W. 724.

51. See Slark *v.* Broom, 7 La. Ann. 337.

**New grounds on appeal.**— New grounds for the dissolution of a writ of sequestration cannot be made in the supreme court where there is no formal written assignment of errors. Carter *v.* Lewis, 15 La. Ann. 574.

52. Wells *v.* St. Dizier, 9 La. Ann. 119.

53. Wells *v.* St. Dizier, 9 La. Ann. 119.

54. Young *v.* Swanson, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Royer's Succession, 105 La. 281, 29 So. 511; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. See *supra*, V, B, 3, d, (II), (B), (2), (b). See also Edwards *v.* Massey, 8 N. C. 359.

55. Young *v.* Swanson, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Royer's Succession, 105 La. 281, 29 So. 511; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Cypress Shingle, etc., Co. *v.* Lorio, 46 La. Ann. 441, 15 So. 95; Blanchard *v.* Luce, 19 La. Ann. 46; Carter *v.* Lewis, 15 La. Ann. 574.

56. Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. *Compare* Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405. See *supra*, III, E, 2.

**Proof of grounds of motion to dissolve.**— Defendant may prove the grounds of his motion to set aside the writ where the facts sought to be disproved formed an inducement for granting the order. Van Winkle *v.* Flecheaux, 12 La. 148, where the sequestration was obtained on an allegation of apprehension of removal of slaves from the state based on an allegation that defendant had sold much, if not all, of his crop.

**Notwithstanding plaintiff's proof of debt and lien,** defendant may offer evidence that suing out of sequestration was unjustified. Harris *v.* Finberg, 46 Tex. 79.

**Proof of defendant's long residence** in the parish and possession of ample means will not avail to set aside a sequestration obtained on the ground of plaintiff's apprehension that the slave sued for will be removed out of the jurisdiction of the court. This may demonstrate that plaintiff is well protected on the sequestration bond, but does not show that plaintiff did not in fact entertain the apprehension sworn to or that it was impossible that such apprehension could be realized. Boatner *v.* Wade, 14 La. Ann. 695.

57. Peters *v.* Anheuser-Busch Brewing Assoc., (Tex. Civ. App. 1900) 55 S. W. 516.

58. Long *v.* Kee, 42 La. Ann. 899, 8 So. 610.

**Judgment should therefore itemize** the value of the articles seized. Long *v.* Kee, 42 La. Ann. 899, 8 So. 610. See also Lynch *v.* Burns, (Tex. Civ. App. 1904) 79 S. W. 1084; Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662.

**Costs where sequestration sued out in error.**—Where the sequestration has been sued out as the result of an error for which defendant is as much responsible as plaintiff, the costs thereof must be equally borne by the parties. See Pbarr *v.* Shadel, 115 La. 92, 38 So. 914.

59. Johnston *v.* Johnston, 13 La. Ann. 581; Bres *v.* Booth, 1 La. Ann. 307; Gossett *v.* Cashell, 14 La. 245. But see Giddings' Appeal, 81 * Pa. St. 72.

60. Van Winckle *v.* Flecheaux, 12 La. 148; Taylor *v.* Penrose, 12 La. 137. See, generally, Appeal and Error, 2 Cyc. 474.

**Writ of prohibition to compel granting of suspensive appeal** will not issue where the court's refusal to interfere with the judicial custody was essential to the preservation of the crop. State *v.* Judge Dist. Ct., 38 La. Ann. 49.

**2. Review on Appeal.** New grounds for dissolving a writ cannot be set up for the first time in the supreme court, especially where there has been no formal written assignment of errors.[61] Error in not requiring an affidavit for sequestration to be amended so as to conform literally to the statute is not ground for reversal by the supreme court of a decree refusing to dismiss the sequestration proceedings.[62]

## XII. Proceedings in Main Action.

**A. Necessity For Citation.** To authorize a personal judgment to be rendered against defendant in a sequestration proceeding there must be the usual citation required in proceedings *in personam*.[63] But as in other proceedings *quasi in rem*, a judgment binding the property sequestered may be obtained upon constructive service or service by publication, provided the requisite formalities are strictly complied with.[64]

**B. Effect of Appearance.** Where defendant appears by petition and asks to bond the property sequestered and take it from the possession of the court, he is concluded from urging the plea of want of citation.[65]

**C. Evidence.** The ordinary rules of evidence applicable to the specific case control in the presentation of the principal demand in a sequestration proceeding.[66] Thus it is error to admit evidence of value where there are no allegations of value,[67] or to give judgment for a specific sum where there is no evidence to support it.[68] The burden of proof is of course upon plaintiff to make out his case.[69]

**D. Judgments — 1. Where No Personal Jurisdiction Acquired.** Where no personal jurisdiction of defendants is obtained, the judgment should be only quasi *in rem*, to the extent of defendant's right in the property sequestered, reserving to plaintiffs the right to an action *in personam*.[70]

**2. Where Personal Jurisdiction Is Acquired.** If the essentials for jurisdiction *in personam* exist, a binding personal judgment may be pronounced, notwithstanding errors in the issuance of the sequestration process.[71]

61. Blanchard *v.* Luce, 19 La. Ann. 46; Carter *v.* Lewis, 15 La. Ann. 574.

62. Dean *v.* Boyd, 86 Miss. 204, 38 So. 297.

63. See Bush *v.* Dewing, 24 La. Ann. 272; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

64. See McDonald *v.* Vaughan, 13 La. Ann. 405 (holding a defendant not bound where the citation was served upon an "advocate" instead of upon a "curator *ad hoc*"); Terry *v.* Terry, 10 La. 68. See also *supra*, I, C, 2.

Variance.—Where a publication of citation and a writ of sequestration were directed against J. M. Peters, the writ was void as against M. J. Peters, as having been issued before any citation issued against him, since under the express provision of Sayles Rev. Civ. St. art. 4864, the writ may only issue at the commencement or before final judgment of a suit. Watt *v.* Parlin, etc., Co., 44 Tex. Civ. App. 439, 98 S. W. 428.

65. Bush *v.* Dewing, 24 La. Ann. 272.

66. See Evidence, 16 Cyc. 821.

67. Gillies *v.* Wofford, 26 Tex. 76.

68. Jacobs *v.* Arnold, 17 Tex. 651.

69. Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706.

70. Peterson *v.* Willard, 17 La. Ann. 93. See also Terry *v.* Terry, 10 La. 68.

71. Breed *v.* Repsher, 4 Mart. (La.) 187; Cheatham *v.* Riddle, 8 Tex. 162.

**Separate actions on a note by partial owners of the debt are not void,** although irregular, and hence do not invalidate writs of sequestration issued before they were consolidated, against property mortgaged to secure the note. Avery *v.* Popper, 92 Tex. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

**Failure to file bond leaves suit an ordinary one,** which cannot be filed on Sunday; hence when a sequestration is instituted without bond on Sunday, the court should sustain a motion to dismiss. Nickell *v.* Carter, 23 Tex. Civ. App. 570, 56 S. W. 769.

**Judgment should permit return of property.**— Since the process in sequestration involves a claim to specific property, a judgment for plaintiff should permit defendant to return any of the property *pro tanto* in satisfaction of the judgment. Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972; Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. 315. And if plaintiff fails, defendant is entitled to a judgment restoring the property to his possession or for its value if it cannot be returned. Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706.

**Judgment should state value of property.**— Under the statute authorizing plaintiff in the event of judgment against him for wrongful sequestration to return the property seized and have the value thereof credited on the judgment, the judgment for wrongful sequestration should state the value of each article

**3. Where Immatured Demand Involved.** Where the sequestration process proper fails and the main obligation sued on has not matured, the case must be dismissed for want of jurisdiction.[72]

## XIII. WRONGFUL SEQUESTRATION.

**A. Under Irregular Process.** Where the writ of sequestration issues irregularly, at the instance of a court without jurisdiction, or without compliance with jurisdictional statutory requisites, liability for its issuance rests upon plaintiff who has provoked a seizure without authority of law.[73] Instances of such cases are rare, however, and every presumption of regularity will usually be indulged.[74]

**B. Under Regular Process — 1. Right of Action — a. In General.** Apart from the strict obligation implied by the tenor of the indemnity bond usually required of a plaintiff in sequestration proceedings, it is an actionable wrong, on principles of general law, in those states where sequestration is most commonly employed, to levy a sequestration upon property where legal grounds for this extraordinary proceeding are not present,[75] even though the issuance of the writ was on the showing made by the application absolutely proper and regular in the first instance.[76]

**b. Upon Bond.** Liability for wrongful sequestration on the indemnity bond usually required is controlled of course by the terms of the bond.[77]

**2. Elements of Liability — a. In General.** To maintain a suit for wrongful sequestration it must be shown that no ground for the sequestration actually existed,[78] for where the apprehensions sworn to are shown to have been justified,

separately. See Lynch *v.* Burns, (Tex Civ. App. 1904) 79 S. W. 1084; Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662. *Aliter* where there is no evidence of the value and the jury did not find it, although it would have been proper to instruct the jury to make such a finding.

**Judgment not supported by verdict** see Hines *v* Shafer, (Tex. Civ. App. 1903) 74 S. W. 562, holding it error to render a judgment where the jury failed to find when the contract of pasturage on account of which defendant claimed a lien had expired.

**Costs.**— The judgment in the principal suit carries with it the costs of the sequestration. Hunter Canal Co. *v.* Robertson, 113 La 833, 37 So. 771. *Compare* Pharr *v.* Shadel, 115 La. 92, 38 So. 914.

72. Catlett *v.* Heffner, 23 La. Ann. 577; Egan *v.* Fush, 46 La. Ann. 474, 15 So. 539; Woessner *v.* Fly, 63 Tex 198.

73. See Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687.

74. Thus where the affidavit and the sheriff's return upon the writ both stated the value of the property sequestered in an amount exceeding the jurisdictional limit of the court, but the condition of the record was such that proof might have been made upon the trial of the case showing the value of the property to be in fact within the jurisditional limit, it was held that it would he conclusively presumed upon appeal that such proof was made and that the court had upon inquiry found that it had jurisdiction of the subject-matter. Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687.

75. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Broxton *v.* Bloom, 15 La. Ann. 618; Boardman *v.* Glenn, 7 La. Ann. 581; Patterson *v.* Spaulding, 5 La. Ann. 171; Hamilton *v.* Hurst, 5 La. Ann. 150; Stetson *v.* LeBlanc, 6 La. 266; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053.

**The rule in attachment is different** by the weight of authority, although Louisiana and Texas, the states in which sequestration cases chiefly arise to-day, differ from the authorities elsewhere. See Attachment, 4 Cyc. 833.

**Where property sequestered is lost by sheriff's negligence** while in the custody of that officer, plaintiff is responsible therefor in an action for wrongful sequestration. Hamilton *v.* Hurst, 5 La. Ann. 150.

76. Rogers *v.* Dinwiddie, (Tex. Civ. App. 1903) 76 S. W. 593.

**Affidavit makes only prima facie showing.** — Where it is charged that the allegations of the petition and affidavit were false, plaintiff will be required to show and sustain the grounds and facts upon which his alleged fear rested; although where the question before the court is whether on the face of the papers the district court was justified on the pleadings and affidavit in directing a writ of sequestration to issue, the appellate court will give full weight to the affidavit and take its averments to be true. American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. *Compare* Lowden *v.* Robertson, 40 La. Ann. 825, 5 So. 405. And see *supra*, III, E, 2; XI, D.

77. Biggs *v.* D'Aquin, 13 La. Ann. 21; Hamilton *v.* Hurst, 5 La. Ann. 150.

78. Duncan *v* Wise, 39 La. Ann. 74, 6 So. 13; Kuhn *v.* Embry, 35 La. Ann. 488.

or other requisite grounds are established, the issuing and execution of the writ being lawful can cause no injury.[79] Where plaintiff is without title to, or interest in, the property sequestered,[80] or where no grounds can be shown for the issuance of the process, the wrongfulness of the sequestration is apparent.[81]

**b. Malice or Bad Faith.** Under the authorities in Louisiana and Texas, whence most of this branch of the law of sequestration is derived, malice and bad faith are not essentials to a right of action for wrongful sequestration,[82] although they are essential to a judgment for exemplary damages.[83]

**3. Accrual of Right of Action.** As the cases cited later show,[84] the right of action for wrongful sequestration arises at once upon the seizure of the property, and it is not necessary to await either the dissolution of the writ or the termination of the proceedings in the main action, since the claim for damages may be asserted by means of reconvention or counter-claim in the original proceeding.[85]

**4. Persons Liable — a. In General.** In proceedings independent of the indemnity bond, plaintiff in the sequestration suit will ordinarily alone be liable for damages; but officers and others who conspire with or instigate plaintiff in the unlawful issue of the writ are jointly responsible with him.[86]

**b. Sureties.** To the extent of the obligation imposed upon them by the tenor of the indemnity bond which they have subscribed, but not beyond, the sureties are responsible for the damages occasioned by a wrongful sequestration.[87]

**5. Proceedings to Recover — a. Jurisdiction and Venue.** Where the claim for damages for wrongful sequestration is not set up by way of counter-claim or reconvention [88] in the original proceedings, the usual local rules as to jurisdiction of courts and venue of personal actions will apply,[89] according to which the proceeding is generally required to be brought at the domicile of defendant [90] or in the county from which the writ issued or where the levy was made.[91]

See also Isaacson *v.* Wall, 22 La. Ann. 243. But *compare* Nichols *v.* Paine, (Tex. Civ. App. 1908) 113 S. W. 972.

**Nominal damages for constructive seizure.** — Where property already in the hands of the sheriff is sequestered under a second writ, but is not retained after its release from the first seizure, the second seizure is constructive and entitles defendant to but nominal damages in a suit for wrongful sequestration. Patterson *v.* Spaulding, 5 La. Ann. 171.

79. Kuhn *v.* Embry, 35 La. Ann. 488.

**If the owner of property subject to a lien so acts as to compel sequestration by the** lien-holder for his own protection, such owner is not entitled to a credit for the value of the rents of the property during the time it is held by the officer in obedience to the writ. See Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596.

**Where plaintiff alleged, but did not actually** have, fear of defendant's removal of the property, the latter is entitled to actual damages, even though plaintiff had probable cause to fear. McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414.

80. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251 (where plaintiff discontinued the suit after seizure and detention of the property); Land *v.* Klein, 21 Tex. Civ. App 3, 50 S. W. 638; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053.

**The mere existence of a debt will not** authorize a sequestration. Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127.

81. American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182.

82. See *infra*, XIII, B, 5, f, (I).

**A mortgagee empowered on default to take possession** of the mortgaged chattels and sell them may, on default on a suit to foreclose, sequester the chattels without incurring liability on proof that the grounds stated to obtain the writ of sequestration were untrue, and that the same was maliciously sued out, by reason of which the mortgagor suffered damages. Nichols *v.* Paine, (Tex. Civ. App. 1908) 113 S. W. 972.

83. See *infra*, XIII, B, 5, i, (IV), (A).

84. See *infra*, XIII, B, 5, c, (II), (A).

85. See *infra*, XIII, B, 5, c, (II), (A).

86. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Thomason *v.* Crawford, 46 Tex. Civ. App. 461, 103 S. W. 191; Rountree *v.* Walker, 46 Tex. 200. See also Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

**A partner will not be held in exemplary damages** on account of his associate's malice unless the evidence shows that he participated in the malicious issuing of the writ or that he adopted and ratified his partner's acts. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

87. Tompkins *v.* Toland, 46 Tex. 584. See also Biggs *v.* D'Aquin, 13 La. Ann. 21.

88. See *infra*, XIII, B, 5, c, (I)-(II).

89. See Rountree *v.* Walker, 46 Tex. 200.

90. See Nuzum *v.* Gore, 24 La. Ann. 208.

91. See Thomason *v.* Crawford, 46 Tex. Civ. App. 461, 103 S. W. 191.

**b. Statute of Limitations.** The limitation of actions for wrongful sequestration will vary with the form of action and the local statutes and depends on no peculiar principles.[92] It has been held, however, that where plaintiff sets forth the indemnity bond in his petition, his claim will be considered as one *ex contractu* and not barred by the prescription applying to tort actions, although damages are sought in an amount exceeding the penalty of the bond.[93]

**c. Methods of Enforcing Liability** — (I) *By Proceedings in Main Action; Reconvention.* Defendant successful in a sequestration proceeding may assert his claim for damages by way of reconventional demand or counter-claim in the original proceeding.[94] This is now as well settled in Louisiana [95] as in Texas, a statute [96] having abrogated the former requirement that this could not be done unless plaintiff and defendant resided in different parishes.[97]

(II) *By Proceedings Subsequent to Main Action* — (A) *Proceedings Upon Bond* — (1) In General. Where an indemnity bond is furnished, defendant in sequestration proceedings which have failed need not raise his voice by way of reconvention or counter-claim in the main suit; he may institute an entirely separate proceeding upon the bond against those who are obligors thereon.[98]

(2) Necessity of Showing Breach of Condition. The liability imposed by a sequestration bond being contingent, one suing thereon is required to establish a breach of the condition before he can recover,[99] which ordinarily may be done only by showing abandonment of the original suit or defeat of complainant therein.[1]

(B) *By Action Independently of Bond.* In the same jurisdictions where defendant in sequestration proceedings is permitted to reconvene or counter-claim, or to sue on the bond for damages, he has the option to bring still a third

**In Texas the suit may be brought** in the county where any one of defendants resides or in the county from which the writ issued or where the levy was made. See Thomason *v.* Crawford, 46 Tex. Civ. App. 461, 103 S. W. 191.

92. See Limitations of Actions, 25 Cyc. 963.

93. See Biggs *v.* D'Aquin, 13 La. Ann. 21.

94. Vela *v.* Guerra, 75 Tex. 585, 12 S. W. 1127; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Portier *v.* Fernandez, 35 Tex. 534; Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606; McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163.

**Notice to sureties not required.**— The sureties on the sequestration bond are not entitled to citation or notice of the filing of a plea in reconvention; they practically become parties to the suit upon the execution, approval, and filing of their bond. See Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606.

**Reconvention against a third party not a** party to the original or main action is not permissible. Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 105, where defendant in sequestration asserted a claim against plaintiff's attorney for alleged wrongful and malicious acts. But an intervener claiming title to the property purchased can in the main action recover from plaintiff for the wrongful levy of the writ of sequestration. McSpadden *v.* La Force, (Tex. Civ. App. 1897) 39 S. W. 163. *Compare* Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251.

**Reconvention in later suit on principal demand.**— Defendant may reconvene for damages for wrongful sequestration when sued in a later independent action by the original plaintiff on the notes on which the sequestration had been based. Norwood *v.* Interstate Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 927 [*reversed* on other grounds in 92 Tex. 268, 48 S. W. 3].

95. See American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; Hamilton *v.* Hurst, 5 La. Ann. 150.

96. See Acts (1886), No. 50.

97. See Nuzum *v.* Gore, 24 La. Ann. 208. *Compare* Rodriguez *v.* Vassant, 11 La. 165.

98. Biggs *v.* D'Aquin, 13 La. Ann. 21; Clarke *v.* Scott, 2 La. Ann. 907; Tompkins *v.* Toland, 46 Tex. 584.

**Damages beyond penalty claimed in suit on bond.**— Where plaintiff declares on the bond, but demands damages in excess of the penalty thereof, he may recover beyond the penalty as against the principal obligor, but not as against the sureties. Biggs *v.* D'Aquin, 13 La. Ann. 21.

99. See White *v.* Pettijohn, 23 N. C. 52, where the condition of the bond was that plaintiff should prosecute his said suit with effect, or in case he failed therein, should indemnify defendant for all damages, and it was held that a decretal order in the progress of the cause that the sequestration should be removed and the sequestered property restored to the property of defendant, and that he have leave to put the bond in suit, would not authorize a recovery upon the bond for a breach of its condition, there being no final decision of the matters in contest between the parties.

1. White *v.* Pettijohn, 23 N. C. 52.

action, by way of an independent proceeding sounding in tort against all those proximately causing the injury of which he complains.[2]

**d. Parties.** The sureties on a sequestration bond are proper parties defendant in a suit for damages for wrongful sequestration,[3] and it has been held that the sureties on the sequestration bond and those on the release bond may properly be joined and made parties in one proceeding against all;[4] but where the property wrongfully sequestered has been lost by the sheriff, the latter need not be made a party to the proceeding against original plaintiff, who is responsible for the loss.[5] Where certain persons are improperly joined as defendants, their dismissal from the suit does not entitle those against whom it was properly brought to have the action dismissed as to them.[6]

**e. Pleadings.** The complaint, declaration, or petition in a claim for damages for wrongful sequestration, whether set up by way of reconvention or independently, should show that affidavit was made to obtain the writ and negative its truth,[7] although it need not set out the affidavit *in hæc verba*.[8] It should allege that the writ was issued at the instance of defendant [9] and set forth the value of the property sequestered [10] and the items of special damage.[11] Where the complaint sets forth that there was nothing due on the notes on which the sequestration issued, it will not be held bad on general demurrer for failure to allege the result of the suit in which the writ was sued out.[12] Allegations of malice and want of probable cause are to be regarded in determining whether exemplary damages are to be awarded.[13]

**f. Defenses** — (i) *Absence of Malice or Bad Faith.* The absence of malice or bad faith is no defense where the grounds did not exist for sequestration,[14] since sequestration being an extraordinary and harsh process, one who would use it must make sure of his ground.[15]

2. Hamilton *v.* Hurst, 5 La. Ann. 150; Clark *v.* Christine, 4 Rob. (La.) 196; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Rountree *v.* Walker, 46 Tex. 200; Portier *v.* Fernandez, 35 Tex. 534; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Norwood *v.* Interstate Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 927 [*reversed* on other grounds in 92 Tex. 268, 48 S. W. 3]; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053.

**Suit on sequestration and release bonds in one action.**— Where plaintiff secured the release of the sequestered property on a replevin bond and then abandoned the sequestration proceeding, but kept the property, it was held that defendant could in one action recover on both bonds, joining the sureties on both. Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

3. Tompkins *v.* Toland, 46 Tex. 584.

4. Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 261.

5. Hamilton *v.* Hurst, 5 La. Ann. 150.

6. Portier *v.* Fernandez, 35 Tex. 534.

7. Rountree *v.* Walker, 46 Tex. 200; Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606.

8. Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606.

9. Rountree *v.* Walker, 46 Tex. 200.

10. Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762, where the property was returned uninjured, the decision resting upon the ground that the measure of damages would be the legal rate of interest on the value of the property during its detention.

11. Broxton *v.* Bloom, 15 La. Ann. 618 (holding that where no allegation was made that counsel fees had been incurred or paid, it was error to permit proof that services of plaintiff's attorney in sequestration proceedings were worth one thousand dollars); Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596; Harris *v.* Finberg, 46 Tex. 79. See also Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762.

**Damages claimed for rental value must be pleaded.**— To entitle a possessor to compensation for injury resulting from error or wrongful sequestration, there must be some pleadings to authorize the introduction of evidence. See Bumpass *v.* Morrison, 70 Tex. 756, 759, 8 S. W. 596.

12. Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181.

13. Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181.

**Where the petition alleges injury to plaintiff in his good name,** it is not necessary for plaintiff in such connection to allege that he had a good name. Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181.

14. Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Hines *v.* Shafer, (Tex. Civ. App. 1903) 74 S. W. 562; Simpson *v* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053

**Mistake.**— Where the sequestration has been sued out as a result of an error for which defendant is as much responsible as plaintiff, the costs thereof must be equally borne by the parties. Pharr *v.* Shadel, 115 La. 92, 38 So. 914.

15. See American Furniture Co. *v.* Grant-

(II) *Return of Property Sequestered.* In a proceeding against the sureties on the sequestration bond, defendants may show that all of the property sequestered has been returned.[16]

(III) *Fact That Property Did Not Belong to Defendant.* If the property sequestered did not belong to defendant in the sequestration proceedings he has no right to damages for a wrongful sequestration.[17]

(IV) *Illegality of Claim Asserted in Main Action.* It is no defense to the sureties on a sequestration bond that the original proceedings failed because of the refusal of the court to enforce a contract entered into for purposes reprobated by law.[18]

(V) *Truth of Facts Alleged in Affidavit.* It is of course a complete answer to a suit for wrongful sequestration that the writ issued properly and that the grounds set forth in the affidavit actually existed.[19]

(VI) *Advice of Counsel.* The fact that the opinion of attorneys was taken before the issuance of the writ will avail to protect defendants from the charge of malice, and so from liability for exemplary damages.[20]

**g. Evidence** — (I) *Burden of Proof.* Plaintiff must establish by a preponderance of the evidence all the essential elements of his case: the non-existence of the grounds alleged for suing out the writ;[21] the actual suffering of damage;[22] the exact amount of his damage;[23] all items of special damage;[24] and the existence of malice;[25] while matters peculiarly of defense, as the return of the property sequestered, must be established by defendant.[26]

(II) *Admissibility.* The ordinary rules of evidence apply, and, subject to the limitations established by them, all relevant evidence will be heard by the trial court. Thus hearsay[27] or opinion[28] evidence is inadmissible, but any evidence fairly tending to explain defendant's motive for acting is admissible, as bearing upon the question of malice, in determining the right to exemplary damages.[29]

Jung Furniture Co., 50 La. Ann. 931, 24 So. 182.

16. Jones *v.* Doles, 3 La. Ann. 588.

17. Lacoste *v.* Duvie, 31 La. Ann. 367; Stetson *v.* Le Blanc, 6 La. 266.

But it has been held that the surety on the indemnity bond will not be heard to urge this defense after final judgment on the merits for defendant in sequestration. Jones *v.* Doles, 3 La. Ann. 488.

18. Clarke *v.* Scott, 2 La. Ann. 907, holding that only nominal damages will be awarded, however.

Judgment in favor of plaintiff in sequestration is no bar to a suit by defendant for wrongful sequestration, where the judgment simply recognized plaintiff's title and did not conclude the question of sequestration. Blum *v.* Gaines, 57 Tex. 135.

19. Kuhn *v.* Embry, 35 La. Ann. 488; Allen *v.* Champlin, 32 La. Ann. 511, holding no liability where the surrounding facts furnished good ground to plaintiff for the belief and fear set forth in his affidavit. See also Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Duncan *v.* Wise, 39 La. Ann. 74, 6 So. 13.

Apparent rather than actual intent important.— Where the right to sequester is contested on the averment of no grounds existing warranting resort to the writ, the inquiry is to be directed toward ascertaining whether the debtor was doing or saying that from which the creditor might apprehend an intent to do the hurtful thing that the sequestration would prevent, rather than to ascertain the real intent of the debtor. Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530.

20. See Blum *v.* Gaines, 57 Tex. 135.

21. Harris *v.* Finberg, 46 Tex. 79; McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W 414. *Compare* Young *v.* Guess, 115 La. 230, 38 So. 975; Boimare *v.* St. Geme, 113 La. 898, 37 So. 869; Pierce *v.* Sturdivant, 108 La. 558, 32 So. 530; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182, where, upon motion to dissolve, plaintiff in the sequestration suit was required to prove the truth of his affidavit and the existence of grounds therefor.

22. Penny *v.* Taylor, 5 La. Ann. 713.

The burden of going forward with evidence that the suing out of the writ was wrongful is on defendant in sequestration. Harris *v.* Finberg, 46 Tex. 79.

23. Walker *v.* Miltenberger, 22 La. Ann. 375.

24. Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756, attorney's fees.

25. Blum *v.* Gaines, 57 Tex. 135.

26. Jones *v.* Doles, 3 La. Ann. 588.

27. Blum *v.* Gaines, 57 Tex. 135; Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687.

28. Bonner *v.* Copley, 15 La. Ann. 504.

29. Blum *v.* Gaines, 57 Tex. 135; Falls City Clothing Co. *v.* Cannon, (Tex. Civ. App.

(III) *Weight and Sufficiency* — (A) *In General.* The jury should ordinarily be left to determine the effect of the evidence.[30] Vague and uncertain evidence will not support a verdict or judgment.[31] Where the evidence is conflicting, the appellate court will as usual not disturb a verdict for damages.[32]

(B) *In Relation to Malice and Probable Cause.* While the fact that the opinion of attorneys was taken before the issuance of the writ is competent evidence to show want of malice, it is not conclusive and will not protect defendant from the charge of malice and liability in exemplary damages therefor, if the evidence otherwise discloses it.[33]

(C) *Effect of Judgment in Main Action.* The dissolution of a sequestration in the main action is conclusive upon the wrongfulness of the original proceeding, and the existence of at least a technical right of action.[34] Similarly it is conclusive evidence, even as against the sureties on the sequestration bond, that the property right is in defendant.[35] But where the judgment in the original proceedings was one of nonsuit,[36] or where plaintiff voluntarily discontinued the suit,[37] the surety may show that the property sequestered did not belong to defendant in sequestration.

**h. Instructions.** The general rules as to instructions in civil cases apply,[38] as that specific instructions desired should be requested,[39] and that additional charges covering the same subject-matter need not be given.[40]

**i. Damages** — (I) *Character of Damages Recoverable Not Affected by Method of Enforcing Liability.* The jurisdictions in which the writ of sequestration as a conservatory process is employed most frequently make no distinction as to the character of damages recoverable for wrongful use of the process, between suits on bonds and independent proceedings.[41] Defendant has his option to proceed in either way,[42] and in either case can recover exemplary damages where the elements requisite thereto are present.[43]

(II) *Limitations Imposed by Terms of Bond.* In suits on bonds the limitations imposed by their terms and the nature of the obligation are of course respected, and damages cannot be decreed in an amount exceeding the penalty,[44]

1907) 106 S. W. 189 (holding that where, in reconvention for damages, actual and exemplary, for a wrongful sequestration, malice, express or implied, is shown, evidence relating to injury to defendant's credit, loss of trade, customers, etc., is admissible on the question of exemplary damages); Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706 (admitting evidence to show that plaintiff who claimed ownership had a mortgage lien on the property sequestered); Endel *v.* Norris, (Tex. Civ. App. 1900) 57 S. W. 687 (holding it competent to show report of agent sent to investigate property by the plaintiff in the sequestration proceedings).

**Evidence to show property did not belong to defendant in sequestration** may be introduced by sureties on sequestration bond in a suit against them for damages where the original sequestration proceeding was discontinued or plaintiff therein was nonsuited. Lacoste *v.* Duvie, 31 La. Ann. 367; Stetson *v.* Le Blanc, 6 La. 266. *Aliter* where there was final judgment on the merits for defendant in the original proceedings. Jones *v.* Doles, 3 La. Ann. 488.

30. Casey *v.* Hanrick, 69 Tex. 44, 16 S. W. 405; Rogers *v.* O'Barr, (Tex. Civ. App. 1903) 76 S. W. 593.

31. Walker *v.* Miltenberger, 22 La. Ann. 375.

32. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787. See Johnston *v.* Johnston, 13 La. Ann. 581.

**Necessity of introducing bond, affidavit, writ, and return.**— In reconvention on a sequestration bond, judgment cannot be rendered against the sureties without the introduction into evidence of the bond, affidavit, writ, and officer's return. Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606.

33. Blum *v.* Gaines, 57 Tex. 135.

34. See American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182. *Compare* Clarke *v.* Scott, 2 La. Ann. 907.

35. Jones *v.* Doles, 3 La. Ann. 588.

36. Lacoste *v.* Duvie, 31 La. Ann. 367.

37. Stetson *v.* Le Blanc, 6 La. 266.

38. See Trial.

39. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

40. Blum *v.* Gaines, 57 Tex. 135.

41. See Penny *v.* Taylor, 5 La. Ann. 713; and cases cited *passim*, this subtitle.

42. See Clark *v.* Christine, 4 Rob. (La.) 196.

43. See Broxton *v.* Bloom, 15 La. Ann. 618; Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181. *Compare* Bonner *v.* Copley, 15 La. Ann. 504.

44. Biggs *v.* D'Aquin, 13 La. Ann. 21.

nor can the surety be held for any injury to the property sequestered prior to the date of the bond.[45]

(III) *ACTUAL DAMAGES* — (A) *Right to Recover.* Wrongful sequestration, even though instituted without malice and in good faith, gives rise to a cause of action for actual damages sustained by defendant in the sequestration proceeding.[46] Where plaintiff in the original action acted with a wrongful motive, actual damages are of course allowed, and serve as a basis for the assessment of exemplary or punitive damages.[47]

(B) *Measure of Actual Damages.* Actual damages include all such as proximately flow from the wrongful issuance of the writ and the seizure of the property thereunder.[48]

(IV) *EXEMPLARY OR PUNITIVE DAMAGES* — (A) *Under What Circumstances Allowable.* On the rather anomalous principle which has become imbedded in the general law of damages,[49] exemplary or punitive damages will be allowed where it is found that the sequestration proceedings were instituted by plaintiff with malice,[50] but not otherwise.[51]

(B) *Necessity of Actual Damages as Basis For Exemplary Damages.* Before exemplary damages can be allowed, it must be shown, as required by the general rule, that some actual damages have been sustained,[52] and where there

**45.** McMichael *v.* Gillispie, 7 Rob. (La.) 13.

**46.** Broxton *v.* Bloom, 15 La. Ann. 618; Bonner *v.* Copley, 15 La. Ann. 504; Penny *v.* Taylor, 5 La. Ann. 713; Hamilton *v.* Hurst, 5 La. Ann. 150; Jones *v.* Doles, 3 La. Ann. 588; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Hines *v.* Shafer, (Tex. Civ. App. 1903) 74 S. W. 562; McMillan *v.* Moon, 18 Tex. Civ. App. 227, 44 S. W. 414; Simpson *v.* Lee, (Tex. Civ. App. 1895) 34 S. W. 1053. See also American Furniture Co. *v.* Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182; and cases cited *infra*, notes 50, 51.

**47.** See *infra*, XIII, B, 5, i, (IV).

**48.** Sellick *v.* Kelly, 11 Rob. (La.) 145; Stetson *v.* Le Blanc, 6 La. 266; Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949; Grimes *v.* Shaw, 2 Tex. Civ. App. 20, 21 S. W. 718.

**Damages recoverable from sureties on sequestration bonds** are such as may naturally flow from the seizure and detention of the property and such special damages as may be alleged and proven to have necessarily resulted therefrom. Finegan *v.* Read, 8 Tex. Civ. App. 33, 27 S. W. 161 [*citing* Harris *v.* Finberg, 46 Tex. 79].

**Rent and unpaid notes.**— Where vendor retained a lien for land sold and afterward got possession under sequestration wrongfully sued out, in trespass to try title by the vendor, the court properly allowed the purchaser credit on the unpaid notes for the value of the timber cut and rent while the vendor was wrongfully in possession. Moore *v.* Brown, 46 Tex. Civ. App. 523, 103 S. W. 242.

**The true standard of damages** is defendant's probable loss in being deprived of the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in had the writ not issued. Sellick *v.* Kelly, 11 Rob. (La.) 145; Stetson *v.* Le Blanc, 6 La. 266.

**Damages held excessive** see Falls City Clothing Co. *v.* Cannon, (Tex. Civ. App. 1907) 106 S. W. 189.

**49.** See DAMAGES, 13 Cyc. 1.

**50.** Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Harris *v.* Finberg, 46 Tex. 79; Rea *v.* Schow, 42 Tex. Civ. App. 600, 93 S. W. 706; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053; Grimes *v.* Shaw, 2 Tex. Civ. App. 20, 21 S W. 718; and cases cited in following note.

**51.** Marin *v.* Satterfield, 43 La. Ann. 742; Broxton *v.* Bloom, 15 La. Ann. 618; Biggs *v.* D'Aquin, 13 La. Ann. 21; Penny *v.* Taylor, 5 La. Ann. 713; Culbertson *v.* Cabeen, 29 Tex. 247; Bledsoe *v.* Palmer, (Tex. Civ. App. 1904) 81 S. W. 97; Lynch *v.* Burns, (Tex. Civ. App. 1904) 79 S. W. 1084.

**Existence of probable cause.**— Where plaintiff had the legal title to a house and lot, the holding of possession by defendant under a void contract which he refused to surrender constituted probable cause for suing out a writ of sequestration, and hence defendant is not entitled to exemplary damages. Cobb *v.* Johnson, 101 Tex. 440, 108 S. W. 811 [*reversing* (Civ. App. 1907) 105 S. W. 847].

**Where, in reconvention for damages, actual and exemplary,** for a wrongful sequestration, there was a judgment for actual damages alone, it will be presumed that evidence relating to injury to defendant's credit, loss of trade, customers, etc., was not considered in arriving at the decision, so that the judgment being in excess of the actual damages was excessive. Falls City Clothing Co. *v.* Cannon, (Tex. Civ. App. 1907) 106 S. W. 189.

**52.** Rogers *v.* Dinwiddie, (Tex. Civ. App. 1903) 76 S. W. 593; Lacy *v.* Gentry, (Tex.

is no basis for more than nominal damages, exemplary damages cannot be recovered.[53]

(v) *Nominal Damages.* In cases where the sequestration is found to have wrongfully issued, but no actual loss has been suffered by defendant, the accrual of the technical right of action in his favor will nevertheless entitle him to a verdict and judgment for nominal damages.[54]

(vi) *Particular Items of Damage* — (A) *In General.* All actual expenses incurred and pecuniary losses sustained properly enter into a calculation of actual damages.[55] The inconvenience and cost of forced removal from leased premises may be considered,[56] but the value of defendant's time while attending court and similar incidental expenses are not allowable,[57] nor do allegations of an assault on plaintiff's wife entitle plaintiff to damages where no facts are averred that show such assault and where there is no averment of loss of wife's society or services.[58]

(B) *Interest on Items of Damage.* Interest on the items of damage making up a claim for wrongful sequestration is not allowed.[59]

(C) *Costs of Suit.* The sureties on the sequestration bond and *a fortiori* the principal obligor thereon are responsible for the costs of the original wrongful proceeding.[60]

(D) *Injury to Credit or Reputation.* Damages arising from loss of credit, as through a protest of defendant's commercial paper made in consequence of his property being sequestered, are not too remote to be considered in assessing damages,[61] and injury to plaintiff's good name is properly considered in determining the allowance and amount of exemplary damages.[62]

(E) *Physical or Mental Pain.* It has been held that where the elements for exemplary damages are present [63] the jury may consider evidence showing insults or outrages,[64] but that where the claim is for actual damages it cannot be supported by allegations of physical or mental pain.[65]

(F) *Injury to or Depreciation of Property.* Where the property sequestered is injured during the pendency of the proceeding or depreciates in value during that interval plaintiff in the original action is properly held for such injury or

Civ. App. 1900) 56 S. W. 949; Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762.

53. Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949.

54. Patterson *v.* Spaulding, 5 La. Ann. 171 (where property already in hands of sheriff was seized under a second writ, but was not retained after its release from first suit); Clarke *v.* Scott, 2 La. Ann. 907 (where the sequestration proceedings were dismissed on the ground that courts of justice would not lend their aid to enforce contracts entered into for illegal purposes); Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949 (where the sequestration was wrongful because premature but the property was sold immediately afterward under attachment and foreclosure proceedings based on same debt).

**Nominal damages for constructive seizure** see Patterson *v.* Spaulding, 5 La. Ann. 171.

55. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251.

56. Blum *v.* Gaines, 57 Tex. 135; Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053.

57. Harris *v.* Finberg, 46 Tex. 79.

58. Carson *v.* Texas Installment Co., (Tex. Civ. App., 1896) 34 S. W. 762.

59. Bonner *v.* Copley, 15 La. Ann. 504.

60. Windus *v.* James, (Tex. Civ. App. 1902) 19 S. W. 873. *Compare* Stauffer *v.* Garrison, 61 Miss. 67; Meyer *v.* Hill, (Tex. Civ. App. 1898) 45 S. W. 333.

**Costs upon wrongful sequestration in equity.**— Where defendant had brought a bill in the chancery court to vacate an assignment made by his debtor and had sequestered the latter's property, he was held, in a suit on the sequestration bond, not responsible for fees and costs incident to the defense of the suit on the ground that the seizure was apart from the suit and the bond was security only for the wrongful seizure of the property. Stauffer *v.* Garrison, 61 Miss. 67.

**Where sequestration was sued out in error** for which defendant is as much responsible as plaintiff, the costs thereof must be equally borne by the parties. Pharr *v.* Shadel, 115 La. 92, 38 So. 914.

61. Dyke *v.* Walker, 5 La. Ann. 519.

62. Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181.

63. See *supra*, XIII, B, 5, i, (IV), (A)-(B).

64. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

65. Carson *v.* Texas Installment Co., (Tex. Civ. App. 1895) 34 S. W. 762. See also

depreciation;[66] but it must be clearly shown that such damages were actually sustained by reason of the sequestration,[67] and they cannot be allowed where defendant could have avoided them by bonding the property,[68] where they are not appropriately alleged,[69] where the injury occurred after the property had been bonded,[70] or where the depreciation took place after the dismissal of the writ.[71]

(G) *Value of Use of Property.* A successful defendant in a sequestration suit is entitled to claim the value of the use or the rental value of the property seized during the period of its detention under the process.[72]

(H) *Value of Property Sequestered.* Where the property sequestered is never returned or satisfactorily accounted for, as the law requires,[73] even though lost through the negligence of the sheriff,[74] the measure of damages for which plaintiff in sequestration will be held is the value of the property at the time of the sequestration with interest to the time of trial.[75]

(I) *Attorney's Fees.* Fees paid attorneys in the defense of sequestration proceedings are proper items of actual damage,[76] although they must be restricted

Texas Installment Co. *v.* Lewis, (Tex. Civ. App. 1895) 30 S. W. 486.

66. Sellick *v.* Kelly, 11 Rob. (La.) 145; Stetson *v.* Le Blanc, 6 La. 266; Moore *v.* Brown, 46 Tex. Civ. App. 523, 103 S. W. 242; Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606.

**Value of timber cut while plaintiff wrongfully in possession.**— Where a vendor retained a lien for land sold and afterward got possession under a sequestration wrongfully sued out in trespass to try title, the court properly allowed the purchaser credit on the unpaid notes for the value of the timber cut while vendor was wrongfully in possession. Moore *v.* Brown, 46 Tex. Civ. App. 523, 103 S. W. 242.

67. Penny *v.* Taylor, 5 La. Ann. 713; Jones *v.* Doles, 3 La. Ann. 588; Rodriguez *v.* Vassant, 11 La. 165.

**Death of slave in jail.**— If defendant does not clearly show that his slave died of a disease contracted while he was in jail under sequestration, he cannot recover his loss but is limited to the value of his services from the sequestration till his death. Rodriguez *v.* Vassant, 11 La. 165.

**Amount of note sequestered.**— Where the makers of a promissory note caused its sequestration on the eve of its maturity, being then solvent, and after dismissal of the sequestration proceedings a judgment against them on the note is returned *nulla bona*, the sureties on the sequestration bond are liable for the amount of the note. Horne *v.* Belcher, 11 La. Ann. 321.

68. Biggs *v.* D'Aquin, 13 La. Ann. 21.

69. Harris *v.* Finberg, 46 Tex. 79.

70. Tompkins *v.* Toland, 46 Tex. 584.

71. Tompkins *v.* Toland, 46 Tex. 584.

72. See Biggs *v.* D'Aquin, 13 La. Ann. 21; Sellick *v.* Kelly, 11 Rob. (La.) 145; Rodriguez *v.* Vassant, 11 La. 165; Stetson *v.* Le Blanc, 6 La. 266; Blum *v.* Gaines, 57 Tex. 135; Moore *v.* Brown, 46 Tex. Civ. App. 523, 103 S. W. 242; Wilkinson *v.* Stanley, (Tex. Civ. App. 1897) 43 S. W. 606; Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608; Simpson *v.* Lee, (Tex. Civ. App. 1896) 34 S. W. 1053; Carson *v.* Texas Installment Co., (Tex. Civ. App. 1896) 34 S. W. 762.

73. See Marin *v.* Satterfield, 41 La. Ann. 742, 6 So. 551.

74. Hamilton *v.* Hurst, 5 La. Ann. 150; Jones *v.* Doles, 3 La. Ann. 588.

75. Norwood *v.* Interstate Nat. Bank, 92 Tex. 268, 48 S. W. 3; Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787; Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181; Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608; Texas Installment Co. *v.* Lewis, (Tex. Civ. App. 1895) 30 S. W. 486.

**Ordinarily interest should cover allowance for use;** but where special circumstances make the use specially valuable, its value to the time of trial may be recovered in lieu of interest. Endel *v.* Norris, 15 Tex. Civ. App. 140, 39 S. W. 608.

**Some of the earlier cases** held the measure of damages to be the value at the time of the trial. Avery *v.* Dickson, (Tex. Civ. App. 1899) 49 S. W. 662; Norwood *v.* Interstate Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. 927 [*reversed* in 92 Tex. 268, 48 S. W. 3]. *Compare* Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704.

**The value of a slave's services** from the time of his sequestration until his death in jail can be recovered in a claim for damages by wrongful sequestration. Rodriguez *v.* Vassant, 11 La. 165.

**Where the property sequestered has been released** by a payment to the sheriff the measure of damages is the amount paid to secure the release. Clark *v.* Pearce, 80 Tex. 146, 15 S. W. 787.

**Where the property sequestered has been sold** and the proceeds are in the hands of the clerk of court or sheriff, the amount thereof should be deducted from plaintiff's recovery in the action for wrongful sequestration. Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127; Wheat *v.* Ball, (Tex. Civ. App. 1902) 68 S. W. 181.

76. Yun Loy Co. *v.* Rosser, 52 La. Ann. 1723, 28 So. 251; Vives *v.* Robertson, 52 La. Ann. 11, 26 So. 756; Walker *v.* Miltenberger, 22 La. Ann. 375; Bonner *v.* Copley, 15 La. Ann. 504; Penny *v.* Taylor, 5 La. Ann. 713;

to such portion of the fees as was charged for services relating to the sequestration and the release of the property thereform.[77]

(VII) *MATTERS IN MITIGATION.* After the discontinuance of the sequestration proceedings the circumstances which led plaintiff to act may be considered in mitigation of damages.[78]

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**SEQUI DEBET POTENTIA JUSTITIAM, NON PRÆCEDERE.** A maxim meaning "Power should follow justice, not precede it." [1]

**SERIAL ASSOCIATION.** A name given to a certain kind of building association.[2] (See BUILDING AND LOAN SOCIETIES, 6 Cyc. 117.)

**SERIOUS.** Important, weighty, momentous, and not trifling;[3] grave, important, or weighty;[4] grave; not trivial; not slight.[5] Judicial interpretation has been given to certain phrases in which the term is used, for example, "serious bodily harm or injury," [6] "serious damage," [7] "serious illness," [8] "serious personal injury." [9] (See SERIOUSLY.)

Dyke *v.* Walker, 5 La. Ann. 519; Jones *v.* Doles, 3 La. Ann. 588.

**Incurring of liability sufficient.**— It is immaterial that the fees have not been paid if liability therefor has been incurred. Jones *v.* Doles, 3 La. Ann. 588.

77. Penny *v* Taylor, 5 La. Ann. 713. See also Stauffer *v.* Garrison, 61 Miss. 67, where counsel fees incident to the main suit in chancery, apart from the seizure of the property, were not allowed.

**Texas doctrine.**— In Texas apparently attorneys' fees are not proper elements of actual damage, although they may be considered on the question of exemplary damage. See Wheat *v.* Ball, (Civ. App. 1902) 68 S. W. 181.

**Where there is no allegation** in a suit on a bond that counsel fees have been incurred, it is error to permit proof of the value of the attorney's services. Broxton *v.* Bloom, 15 La. Ann. 618.

78. Stetson *v.* Le Blanc, 6 La. 266, suit against surety on sequestration bond.

1. Peloubet Leg. Max. [*citing* 2 Inst. 454].

2. See Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 821, 30 S. E. 911.

3. Lawlor *v.* People, 74 Ill. 228, 231.

4. Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 315, 32 N W. 610, 8 Am. St. Rep. 894 (where it is said that it is not generally used to signify a dangerous condition); French *v.* Fidelity, etc., Co., 135 Wis. 259, 273, 115 N. W. 869, 17 L. R. A. N. S. 1011.

**"Serious illness"** see Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596, 601.

5. Bruce *v.* State, 41 Tex. Cr. 27, 30, 51 S. W. 954.

6. **"Serious bodily harm or injury"** is an injury that is not a trivial one; not a slight one (Bruce *v.* State, 41 Tex. Cr. 27, 30, 51 S. W. 954); such an injury as gives rise to apprehension, an injury which is attended with danger (Webster Dict. [*quoted* in Head *v.* State, 52 Tex. Cr. 488, 490, 107 S. W. 829; George *v.* State, 21 Tex. App. 315, 317, 17 S. W. 351]). See also Lawlor *v.* People, 74 Ill. 228, 231; State *v.* Battle, 130 N. C. 655, 657, 41 S. E. 66; HOMICIDE, 21 Cyc. 723 note 78.

**An injury is not serious** if the party gets over the injury completely, without leaving any ill consequences, in a few days. Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 230, 20 L. ed. 617.

**Cutting a person by a blow with a loaded walking stick** not a serious bodily injury see Stevens *v.* State, 27 Tex. App. 461, 462, 11 S. W. 459.

**Serious bodily harm synonymous with great bodily harm** see Lawlor *v.* People, 74 Ill. 228, 231.

**The fracture of a rib** which was not a serious or permanent wound is not a serious bodily injury. Halsell *v.* State, 29 Tex. App. 22, 24, 18 S. W. 418.

7. **"'Serious damage'"** is a term which does not imply pecuniary damage, nor does it imply physical damage, such as acute pain or protracted bodily suffering or the defacement of the person, or the impairment of physical power, or mental suffering. It means damages in one or more of these respects, but it implies as well and as certainly, damage to the peace, good order, decencies, and proprieties of society. State *v.* Huntley, 91 N C. 617, 620. See also DAMAGES, 13 Cyc. 1.

8. **"Serious illness,"** as applied to life insurance, is a term said to mean that the applicant has never been so seriously ill as to impair his constitution, and render the risk unusually hazardous (Illinois Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537, 542); such illness as is likely to impair permanently the constitution and render the risk more hazardous (Rand *v.* Providence Sav. L. Assur. Soc., 97 Tenn. 291, 294, 37 S. W. 7; Mutual L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 50, 27 S. W. 286; Kneiper *v.* Equitable L. Assur. Soc., 159 Fed. 206, 212); something which injures a person permanently; any permanent impairment or material impairment of health (Drakeford *v.* Supreme Conclave K. D., 61 S. C. 338, 343, 39 S. E. 523); a sickness attended with danger; giving rise to apprehension (Century Dict. [*quoted* in Caruthers *v.* Kansas Mut. L. Ins. Co., 108 Fed. 487, 490]). See LIFE INSURANCE, 25 Cyc. 814.

9. Harris *v.* State, 2 Ga. App. 487, 489, 58 S. E. 680, where these words were used by the court in a charge to the jury in a homicide case.

**SERIOUSLY.** Gravely, earnestly, or solemnly.[10] (See SERIOUS.)

**SERJEANTIA IDEM EST QUOD SERVITIUM.** A maxim meaning "Serjeantry is the same as service." [11]

**SERMO INDEX ANIMI.** A maxim meaning "Speech is an index of the mind." [12]

**SERMONES SEMPER ACCIPIENDI SUNT SECUNDUM SUBJECTAM MATERIAM ET CONDITIONUM PERSONARUM.** A maxim meaning "Pleadings are to be construed by reference to the subject-matter of the cause and the condition of the parties making them." [13]

**SERMO RELATUS AD PERSONAM INTELLIGI DEBET DE CONDITIONE PERSONÆ.** A maxim meaning "A speech relating to the person is to be understood as relating to his condition." [14]

**SERVANDA EST CONSUETUDO LOCI UBI CAUSA AGITUR.** A maxim meaning "The custom of the place where the action is brought is to be observed." [15]

**SERVANT.** (1) A person employed to labor for the pleasure or interest of another; especially in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer; an employee; (2) specifically a person hired to assist in domestic matters, living within the employer's house, and making part of his family; hired help.[16] Among the many definitions of the word to be found in the books are the following: Any person who works for another for a salary; [17] a person employed by another to render personal services to the employer; [18] a person hired for wages, to work as the employer may direct, and under his control; [19] a person who attends another for the purpose of performing menial offices for hire, or who is employed by another for such offices or other labor, and is subject to his command; [20] a person who, by contract or operation of law, is for a limited time subject to the control of another in a particular trade, business, or occupation; [21] one over whom personal authority is exercised; [22] one who does work under the direction of another who not only prescribes the nature of his work, but directs, or any moment may direct the means also, or as it has been put, retains the power of controlling the work; [23] one who exerts himself or labors for the benefit of a master or employer; an attendant; a subordinate assistant; [24] one who for a valuable consideration engages in the service of another and undertakes to observe his directions in some lawful business; [25] one who for wages serves his employer, following his direction

10. People *v.* Ferry, 84 Cal. 31, 36, 24 Pac. 33.

Biting off a small portion of a person's ear not the infliction of a serious bodily injury see George *v.* State, 21 Tex. App. 315, 317, 17 S. W. 351.

"Seriously disturb or endanger the public peace" in N. Y. Pen. Code, § 675, construed to include the teachings of the doctrine of anarchy see People *v.* Most, 171 N. Y. 423, 430, 64 N. E. 175, 5 L. R. A. 509.

11. Peloubet Leg. Max. [*citing* Coke Litt. 105*b*].

12. Black L. Dict. [*citing* Edrich's Case, 5 Coke 118*a*, 118*b*, 77 Eng. Reprint 238].

13. Morgan Leg. Max. [*citing* Cromwell's Case, 4 Coke 12*b*, 14 *a*, 76 Eng. Reprint 877].

14. Morgan Leg. Max. [*citing* Birchley's Case, 4 Coke 16*a*, 76 Eng. Reprint 894].

15. Peloubet Leg. Max.

Applied in Decouche *v.* Savetier, 3 Johns. Ch. (N Y.) 190, 219, 8 Am. Dec. 478.

16. Standard Dict.; Webster Dict. [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].

17. Frank *v.* Herold, 63 N. J. Eq. 443, 451, 52 Atl. 152.

18. *In re* Grubbs-Wiley Grocery Co., 96 Fed. 183, 184.

19. Morgan *v.* Bowman, 22 Mo. 538, 548.

20. Imperial Dict. [*quoted* in Lang *v.* Simmons, 64 Wis. 525, 530, 25 N. W. 650].

21. Wood M. & S. § 1 [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].

22. Minor Inst. (3d ed.) c. 14, p. 179 [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892], where it is said: "The several classes of servants are, first slaves; secondly, menial servants; third, apprentices; fourth, laborers; fifth, stewards, bailiffs, factors, agents, etc." See also Tipton *v.* State, 53 Fla. 69, 74, 43 So. 684; McColligan *v.* Pennsylvania R. Co., 214 Pa. St. 229, 232, 63 Atl. 792, 112 Am. St. Rep. 739, 6 L. R. A. N. S. 54.

23. Powers *v.* Massachusetts Homœopathic Hospital, 109 Fed. 294, 298, 47 C. C. A. 122.

24. Century Dict. [*quoted* in *In re* Caldwell, 164 Fed. 515; *In re* Scanlan, 97 Fed. 26, 27].

25. Central Coal, etc., Co. *v.* Grider, 115 Ky. 745, 755, 74 S. W. 1058, 25 Ky. L. Rep. 165; Kiser *v.* Suppe, 133 Mo. App. 19, 25, 112 S. W. 1005.

and performing the work;[26] one who is employed to perform an inferior and menial service;[27] one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling;[28] one who is engaged, not merely in doing work or services for another, but who is in his service generally upon or about the premises or property of his employer, and subject to his direction or control therein, and is generally liable to be dismissed;[29] one who serves; correlative of master;[30] one who serves or attends, whether voluntarily or involuntarily; a person employed by another, and subject to his orders; one who exerts himself or herself or labors for the benefit of a master or employer;[31] one who serves or does service voluntary or involuntary; a person who is employed for another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper.[32] In most cases the term is synonymous with EMPLOYEE,[33] *q. v.*, and always includes those who render menial or manual services.[34] (Servant: In General, see APPRENTICES, 3 Cyc. 539; MASTER AND SERVANT, 26 Cyc. 965. Action of Ejectment Against, see EJECTMENT, 15 Cyc. 85. Care Required in Selection of, see CARRIERS, 6 Cyc. 596. Corporation Liable

26. Holmes *v.* Tennessee Coal, etc., R. Co., 49 La. Ann. 1465, 1469, 22 So. 403.

27. Epps *v.* Epps, 17 Ill. App. 196, 201.

28. Hedge *v.* Williams, 131 Cal. 455, 459, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Murray *v.* Dwight, 161 N. Y. 301, 305, 55 N. E. 901, 48 L. R. A. 673; Baldwin *v.* Abraham, 57 N. Y. App. Div. 67, 77, 67 N. Y. Suppl. 1079; Singer *v.* McDermott, 30 Misc. (N. Y.) 738, 741, 62 N. Y. Suppl. 1086.

29. State *v.* Myers, 82 Mo. 558, 561, 52 Am. Rep. 389; Campfield *v.* Lang, 25 Fed. 128, 131.

30. Worcester Dict. [*quoted* in Lang *v.* Simmons, 64 Wis. 525, 530, 25 N. W. 650].

31. Century Dict. [*quoted* in Ginter *v.* Shelton, 102 Va. 185, 188, 45 S. E. 892].

32. Webster Dict. [*quoted* in Flesh *v.* Lindsay, 115 Mo. 1, 18, 21 S. W. 907, 37 Am. St. Rep. 374; Lang *v.* Simmons, 64 Wis. 525, 529, 25 N. W. 650; *In re* Scanlan, 97 Fed. 26, 27].

33. Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96.

**Embraces** all persons of whatever rank or position who are in the employ or subject to the direction or control of another in any department of labor or business. Texas L. Ins. Co. *v.* Roberts, (Tex. Civ. App. 1909) 119 S. W. 926, 929.

34. Wakefield *v.* Fargo, 90 N. Y. 213, 217.

**Confined by common understanding** to that class of persons who make a part of a man's family, whose employment is about the house or appurtenances, or who reside in the house and are at the command of the master. *Ex p.* Meason, 5 Binn. (Pa.) 167, 175. To same effect see Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351, 353; *In re* Miller, 1 Ashm. (Pa.) 323, 327; Booth *v.* Dean, 2 L. J. Ch. 162, 1 Myl. & K. 560, 7 Eng. Ch. 560, 39 Eng. Reprint 793.

**Construed as "domestic servant"** see Patterson *v.* Sams, 2 Ga. App. 755, 59 S. E. 18.

**This term is said to include** apprentices, laborers, menial servants, stewards, factors, bailiffs, clerks and shopmen, merchant seamen, persons working in mills and factories, or mines and collieries (Lewis *v.* Fisher, 80 Md. 139, 142, 30 Atl. 608, 45 Am. St. Rep. 327, 26 L. R. A. 278); clerk or bar-tender in hotel (Weaver *v.* Wheaton, 2 Pa. Co. Ct. 428, 430); engineer and foreman of a mining company (Vincent *v.* Bamford, 12 Abb. Pr. N. S. (N. Y.) 252, 254); one serving for a commission (Riggs *v.* Standard Oil Co., 130 Fed. 199, 201); opera singer or artist (*In re* Winter German Opera, 23 T. L. R. 662, 663); secretary of a manufacturing corporation (Richardson *v.* Abendroth, 43 Barb. (N. Y.) 162, 164. But see Coffin *v.* Reynolds, 37 N. Y. 640, 641); and stage-driver (People *v.* Sherman, 10 Wend. (N. Y.) 298, 299, 25 Am. Dec. 563).

**Does not include** agricultural laborer (Burgess *v.* Carpenter, 2 S. C. 7, 10, 16 Am. Rep. 643); indented apprentices (State *v.* Conover, 3 Harr. (Del.) 565); officers and managers of corporations (Palmer *v.* Van Santvoord, 153 N. Y. 612, 615, 47 N. E. 915, 38 L. R. A. 402; Wells *v.* Southern Minnesota R. Co., 1 Fed. 270, 272, 1 McCrary 18); railroad physician (Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 716, 30 S. W. 1036, 45 Am. St. Rep. 767, 28 L. R. A. 552); road commissioner (McManus *v.* Weston, 164 Mass. 263, 265, 41 N. E. 301, 31 L. R. A. 174); schoolteacher (Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 204, 73 Pac. 954); special officer for theater (Healey *v.* Lothrop, 171 Mass. 263, 264, 50 N. E. 540); superintendent of a mine (Cocking *v.* Ward, (Tenn. Ch. App. 1898) 48 S. W. 287, 289); or traveling salesman (Epps *v.* Epps, 17 Ill. App. 196, 202; Hand *v.* Cole, 88 Tenn. 400, 405, 12 S. W. 922, 7 L. R. A. 96; *In re* Scanlan, 97 Fed. 26, 27).

**Agent distinguished** see People *v.* Treadwell, 69 Cal. 226, 236, 10 Pac. 502; McCroskey *v.* Hamilton, 108 Ga. 640, 644, 34 S. E. 111, 75 Am. St. Rep. 79; Kingan *v.* Silvers, 13 Ind. App. 80, 37 N. E. 413, 416; Territory *v.* Maxwell, 2 N. M. 250, 262; Brown *v.* German-American Title, etc., Co., 174 Pa. St. 443, 451, 34 Atl. 335; Turner *v.* Cross, 83 Tex. 218, 228, 18 S. W. 578, 15 L. R. A. 262.

For Torts Committed by, see CORPORATIONS, 10 Cyc. 1205, 1206, 1208, 1210, 1211. Embezzlement by, see EMBEZZLEMENT, 15 Cyc. 496. Larceny by, see LARCENY, 25 Cyc. 26. Necessity of Appointment by Directors, see CORPORATIONS, 10 Cyc. 933. Notice to, as Notice to Corporation, see CORPORATIONS, 10 Cyc. 1060. Power of County Board to Appoint, see COUNTIES, 11 Cyc. 473. Preference Given to in Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 173 note 2. Quo Warranto Extending to, see CORPORATIONS, 10 Cyc. 752. Within Statute Making Shareholders Liable For Debts, see CORPORATIONS, 10 Cyc. 690. Wrongful Act of, see CASE, ACTION ON, 6 Cyc. 693.)

**SERVATE TERMINOS QUOS PATRES VESTRI POSUERE.** A maxim meaning "Preserve the landmarks which your fathers have set up." [35]

**SERVE.** To perform service.[36] As applied to a writ, to deliver it with judicial effect; in such manner as to charge the person with the receipt of it.[37] (See, generally, PROCESS, 32 Cyc. 448.)

**SERVI.** A word used by the Romans to signify those persons employed in husbandry and manufactures.[38]

**SERVICE.** Applied to the commencement of a suit, that notice given to the defendant, which makes him a party to the proceeding, and makes it incumbent upon him to appear and answer to the cause, or run the risk of having a valid judgment rendered against him, in consequence of his default;[39] serving the defendant with a copy of the process, and showing him the original if he desires it;[40] the particular act of the officer by which the copy of the citation was communicated;[41] the judicial delivery or communication of papers; execution of process; the delivery or communication of a pleading, notice, or other paper in a suit, to the opposite party, so as to charge him with the receipt of it, and subject him to its legal effect.[42] (Service: In General, see PROCESS, 32 Cyc. 447. As Abuse of Process, see ARREST, 3 Cyc. 920, 976; PROCESS, 32 Cyc. 541. Authority of Attorney to — Accept, see ATTORNEY AND CLIENT, 4 Cyc. 935; Waive, see ATTORNEY AND CLIENT, 4 Cyc. 939. Brief on Appeal, see APPEAL AND ERROR, 2 Cyc. 1019. By Publication — Generally, see PROCESS, 32 Cyc. 467; Time For Entering Judgment on, see JUDGMENTS, 23 Cyc. 756. Defects in, see APPEARANCES, 3 Cyc. 517; PROCESS, 32 Cyc. 518. Effect of, on One Defendant, see COMMERCIAL PAPER, 8 Cyc. 297 note 84. Exclusive Manner of, on County Officers, see COUNTIES, 11 Cyc. 612 note 70. False Return of, see JUDGMENTS, 23 Cyc. 996. Judgment on Constructive, see JUDGMENTS, 23 Cyc. 915. Of Affidavit and

35. Morgan Leg. Max. [*citing* Trayner Max. 559].

36. Halsey *v.* San Francisco Super. Ct., 152 Cal. 71, 83, 91 Pac. 987, where it is so used with reference to a grand juror.

37. Philadelphia *v.* Cathcart, 10 Phila. (Pa.) 103.

The term "served," used in connection with service of process, means that the act required by law to acquire jurisdiction over the person of a party to a suit has been accomplished. Continental Ins. Co. *v.* Milliken, 64 Tex. 46, 47. *Compare* Philadelphia *v.* Cathcart, 10 Phila. (Pa.) 103.

By "executed" or "served" on a sheriff's return a legal service is understood. Kennedy *v.* Baker, 159 Pa. St. 146, 152, 28 Atl. 252.

"Served" distinguished from "issued" see Oskaloosa Cigar Co. *v.* Iowa Cent. R. Co., (Iowa 1902) 89 N. W. 1065.

38. *Ex p.* Meason, 5 Binn. (Pa.) 167, 179.

39. Sanford *v.* Dick, 17 Conn. 213, 215; Cross *v.* Barber, 16 R. I. 266, 15 Atl. 69.

40. Goggs *v.* Huntingtower, 1 D. & L. 599, 8 Jur. 66, 13 L. J. Exch. 352, 12 M. & W. 503.

41. Continental Ins. Co. *v.* Milliken, 64 Tex. 46, 47.

42. Burrill L. Dict. [*quoted* in Walker *v.* State, 52 Ala. 192, 193].

Construed as meaning "personal service" see McDermott *v.* Metropolitan Police Dist. Bd., 25 Barb. (N. Y.) 635, 647.

Service by mail see Thompson *v.* Brennan, 76 Cal. 618, 620, 18 Pac. 783; Soper *v.* Greenwich, 48 N. Y. App. Div. 354, 355, 62 N. Y. Suppl. 1111; Griffin *v.* Walworth County, 20 S. D. 142, 146, 104 N. W. 1117.

"Notice of service" see Mackin *v.* Madden, 104 Wis. 61, 63, 80 N. W. 100.

The term as applied to the act of a marshal is said ordinarily to imply something in the nature of an act or proceeding adverse to the party served, or of a notice to him. U. S. *v.* McMahon, 164 U. S. 81, 88, 17 S. Ct. 28, 41 L. ed. 357.

Applied to execution, it includes every act and proceeding necessary to be taken by the sheriff to make the money, and includes a sale of the property when necessary. Peck *v.* City Nat. Bank, 51 Mich. 353, 359, 16 N. W. 681, 47 Am. Rep. 577.

Notice — For Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 665, 685; For Arrest in Civil Action, see ARREST, 3 Cyc. 929; For Attachment, see ATTACHMENT, 4 Cyc. 469; For Attachment For Rent, see LANDLORD AND TENANT, 24 Cyc. 1238; Of Motion to Strike Out Pleading, Proof of, see PLEADING, 31 Cyc. 662. Of Affidavits and Other Motion Papers — Generally, see MOTIONS, 28 Cyc. 9; On Motion For New Trial, see NEW TRIAL, 29 Cyc. 939. Of Alternative Writ, see MANDAMUS, 26 Cyc. 474. Of Assignment of Error, see APPEAL AND ERROR, 2 Cyc. 1005. Of Attachment in Contempt Proceedings, see CONTEMPT, 9 Cyc. 42. Of Bill, Case, or Statement, see NEW TRIAL, 29 Cyc. 939. Of Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 46. Of Brief, see APPEAL AND ERROR, 2 Cyc. 1019. Of Citation on Writ of Error, Necessity, and Sufficiency of Service, see APPEAL AND ERROR, 2 Cyc. 510. Of Copies of Papers on Appeal, see APPEAL AND ERROR, 3 Cyc. 132. Of Copy of Account — Alleged in Pleading, see PLEADING, 31 Cyc. 590; In Action on Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 477. Of Copy of — Application For Rehearing, see APPEAL AND ERROR, 3 Cyc. 218; Record on Appeal, see APPEAL AND ERROR, 2 Cyc. 1028; Return, see MANDAMUS, 26 Cyc. 451. Of Demand For Assignment of Dower, see DOWER, 14 Cyc. 976. Of Interrogatories For Examination of Adverse Party Before Trial, see DISCOVERY, 14 Cyc. 355. Of Inventory of Attached Property, see ATTACHMENT, 4 Cyc. 602. Of List — Of Grand Jurors, see CRIMINAL LAW, 12 Cyc. 505; Of Jurors on Defendant in Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 518. Of Motion to Dismiss Appeal, see APPEAL AND ERROR, 3 Cyc. 193. Of Notice — Generally, see NOTICE, 29 Cyc. 1118; By Surety to Creditor to Proceed Against Principal, see PRINCIPAL AND SURETY, 32 Cyc. 99; In Proceedings to Establish Highways, see STREETS AND HIGHWAYS; Of Appeal, see APPEAL AND ERROR, 2 Cyc. 860; Of Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 686; Of Appearance, see APPEARANCES, 3 Cyc. 504; Of Application For Appointment of Receiver, see RECEIVERS, 34 Cyc. 120; Of Application For Discharge of Poor Debtor, see EXECUTIONS, 17 Cyc. 1555; Of Assessment For Benefits of Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1147; Of Attorney's Lien, see ATTORNEY AND CLIENT, 4 Cyc. 1008; Of Claim For Injuries From Defect or Obstruction in Highway or Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1459; STREETS AND HIGHWAYS; Of Claim For Injuries to Animals In or Near Railroad Tracks, see RAILROADS, 33 Cyc. 1252; Of Levy, see EXECUTIONS, 17 Cyc. 1098; Of Lien Claim, see MECHANICS' LIENS, 27 Cyc. 123; Of Meeting of Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 640; Of Motion, see INJUNCTIONS, 22 Cyc. 987, 1022; MOTIONS, 28 Cyc. 9; Of Motion or Intention to Apply For New Trial, Time For, see NEW TRIAL, 29 Cyc. 939; Of Non-Payment and Protest of Negotiable Instrument, Sufficiency, see COMMERCIAL PAPER, 7 Cyc. 1099; Of Notice and Proofs of Loss, see ACCIDENT INSURANCE, 1 Cyc. 286; Of Proceedings For Revival on Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 110; Of Proposed Public Improvement, or Resolution Therefor, see MUNICIPAL CORPORATIONS, 28 Cyc. 983; Of Taking Depositions, see DEPOSITIONS, 13 Cyc. 874; Or Demand Preliminary to Unlawful Detainer or Summary Proceedings of Landlord For Possession, see LANDLORD AND TENANT, 24 Cyc. 1402; To Public Authorities to Remove Pauper, see PAUPERS, 30 Cyc. 1135; To Quit, and Demand of Possession, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1145. Of Offer of Judgment, see JUDGMENTS, 23 Cyc. 730. Of Order and Affidavit — For Examination in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1428; For Examination of Adverse Party Before Trial, see DISCOVERY, 14 Cyc. 350; For Removal of Pauper, see PAUPERS, 30 Cyc. 1116. Of Order to Show Cause, see MANDAMUS, 26 Cyc. 471. Of Papers to Bring One Into Contempt, see ARBITRATION AND AWARD, 3 Cyc. 795. Of Personal Notice of Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1471. Of Pleading — Generally, see PLEADING, 31 Cyc. 591; Time For, see PLEADING, 31 Cyc. 597. Of Process — In General, see JUDGMENTS, 23 Cyc. 684, 753, 1581; PROCESS, 32 Cyc. 447; As Suspending Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1292;

Collateral Attack on Judgment Based on Want of, or Defects Therein, see JUDGMENTS, 23 Cyc. 1075; Costs For, see COSTS, 11 Cyc. 100; For Arrest in Civil Action, see ARREST, 3 Cyc. 955; Judgment on Service by Publication as Foundation For Execution, see EXECUTIONS, 17 Cyc. 931; Matters Admitted by Default Judgment Where Service Is Constructive, see JUDGMENTS, 23 Cyc. 753; Objections to as Grounds For Opening or Vacating Judgments in General, see JUDGMENTS, 23 Cyc. 913; On Legal Holiday, see HOLIDAYS, 21 Cyc. 443; Priorities Between Garnishments as Affected by, see GARNISHMENT, 20 Cyc. 1061; Privilege From, see ATTORNEY AND CLIENT, 4 Cyc. 918; Recitals as to Judgment Rendered in Actions By or Against Infant, see INFANTS, 22 Cyc. 681; Removal of Cause as Waiver of Objections to, see REMOVAL OF CAUSES, 34 Cyc. 1310, note 40; Resisting or Obstructing, see OBSTRUCTING JUSTICE, 29 Cyc. 1328; Sufficiency of, as Affecting Operations in Other States of Judgment of State Courts, see JUDGMENTS, 23 Cyc. 1581; Time For Taking Judgment by Default Where Service Is by Publication, see JUDGMENTS, 23 Cyc. 756; To Sustain Judgment, see JUDGMENTS, 23 Cyc. 686; Waiver by Appearance of Defects in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 515; Want of or Irregularity in, and Falsity of Return, Proof, or Recitals as to, as Ground of Equitable Relief Against Judgment, see JUDGMENTS, 23 Cyc. 994. Of Proposed Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 31. Of Protest Against Duties Paid, see CUSTOMS DUTIES, 12 Cyc. 1161. Of Rule of Reference, see REFERENCES, 34 Cyc. 798. Of Rule to Show Cause, see CONTEMPT, 9 Cyc. 39; MOTIONS, 28 Cyc. 10. Of Scire Facias or Notice to Garnishee to Show Cause Against Judgment Against Him, see GARNISHMENT, 20 Cyc. 1113. Of Scire Facias to Revive Judgment, see JUDGMENTS, 23 Cyc. 1454. Of Venire, see JURIES, 24 Cyc. 228. Of Warning-Out Notice on Pauper, see PAUPERS, 30 Cyc. 1099. Of Warrant, see LANDLORD AND TENANT, 24 Cyc. 1312. Of Writ — In Replevin, see REPLEVIN, 34 Cyc. 1454; Of Attachment, see ATTACHMENT, 4 Cyc. 595; Of Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 316; Of Return on Judgment in Replevin, see REPLEVIN, 34 Cyc. 1545; Of Review, see REVIEW, 34 Cyc. 1717; Or Order of Injunction, Time For, see INJUNCTIONS, 22 Cyc. 961; To Revive Judgment, see JUDGMENTS, 23 Cyc. 1454. On Infant, see INFANTS, 22 Cyc. 653. On Parent, see INFANTS, 22 Cyc. 675. Priority of Service of Attachment, see ATTACHMENT, 4 Cyc. 643. Recital of, see JUDGMENTS, 23 Cyc. 767. Upon Authorized Agent, as Ground For Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 88 note 60. Waiver of Service by Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 939. Want or Defect of, see JUDGMENTS, 23 Cyc. 994.)

**SERVICE PIPE or WIRE.** The connection from the street main or wire to the house.[43]

**SERVICE REAL.** In civil law, a service which one estate owes to another, or the right of doing something or having a privilege in one man's estate for the advantage and convenience of the owner of another estate.[44]

**SERVICES.** An advantage conferred; that which promotes interest or happiness; benefit;[45] work done by one person at the request of another.[46] "Service," the singular of "services" is often used as having the same meaning.[47] (Services:

43. Moore *v.* Champlain Electric Co., 88 N. Y. App. Div. 289, 292, 85 N. Y. Suppl. 37.

44. Karmuller *v.* Krotz, 18 Iowa 352, 357, where it is said that to constitute such service there must be two estates, the one giving and the other receiving the advantage.

45. Standard Dict.; Webster Dict. [*quoted* in Dayton *v.* Ewart, 28 Mont. 153, 156, 72 Pac. 420, 98 Am. St. Rep. 549].

46. Boyd *v.* Gorman, 157 N. Y. 365, 367, 52 N. E. 113.

**Used in connection with other words.**— "For his services" see Erie County *v.* Jones, 119 N. Y. 339, 344, 23 N. E. 742. "Services rendered" in keeping a railroad in repair see Poland *v.* Lamoille Valley R. Co., 52 Vt. 144, 180.

**Used in a contract** for the erection of a house the term may include expenditures as well as labor. See Tracy *v.* Waters, 162 Mass. 562, 563, 39 N. E. 190.

47. See cases cited *infra*, this note.

**"Labor or service"** see U. S. *v.* Laws, 163 U. S. 258, 264, 16 S. Ct. 998, 41 L. ed. 151. See U. S. *v.* Holy Trinity Church, 36 Fed. 303, 305.

In General, see APPRENTICES, 3 Cyc. 539; ATTORNEY AND CLIENT, 4 Cyc. 889; FACTORS AND BROKERS, 19 Cyc. 109; LABOR UNIONS, 24 Cyc. 815; MASTER AND SERVANT, 26 Cyc. 1017; PRINCIPAL AND AGENT, 31 Cyc. 1430; WORK AND LABOR. Acceptance of Benefits as Implied Ratification of, see PRINCIPAL AND AGENT, 31 Cyc. 1267. Acceptance of, in Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 336. Accountability of Husband For Increase and Profit of Wife's Estate Resulting From His Skill and Labor, see HUSBAND AND WIFE, 21 Cyc. 1429. Accrual of Right of Action on Accounts For, see LIMITATIONS OF ACTIONS, 25 Cyc. 1032. Action — Between Partners For Compensation For, see PARTNERSHIP, 30 Cyc. 448; By Executor or Administrator, Set-Off and Counter-Claim of Claims For Services Rendered Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1136; By Master For Loss of, see MASTER AND SERVANT, 26 Cyc. 1582; For Account of Share of Profits, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 407; For Breach of Contract For, see CONTRACTS, 9 Cyc. 690; Of Book-Account or Book-Debt For, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 364. Adequacy of Future Services as Consideration For Conveyances, see FRAUDULENT CONVEYANCES, 20 Cyc. 492. Agistment, see ANIMALS, 2 Cyc. 315. Agricultural Lien For, see AGRICULTURE, 2 Cyc. 58. Application of Statute of Frauds to Contract Relating to, see FRAUDS, STATUTE OF, 20 Cyc. 207. As Payment of Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 1014. Assignability of Future Earnings — Generally, see ASSIGNMENTS, 4 Cyc. 17; Invalid as Against Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 524. Assignment of Contract For Personal, see ASSIGNMENTS, 4 Cyc. 23. As Sufficient Consideration For Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 711. Authority — Of Corporate Officers and Agents to Contract For, see CORPORATIONS, 10 Cyc. 926, 949; Of County to Contract For, see COUNTIES, 11 Cyc. 473. Bill of Particulars as to, see PLEADING, 31 Cyc. 574. Books of Account as Evidence, see EVIDENCE, 17 Cyc. 365. Burden of Proof in Action For, see HUSBAND AND WIFE, 21 Cyc. 1568. Competency — Of Expert as to Value, see EVIDENCE, 17 Cyc. 116; Of Grand Juror as Affected by Prior Services, see GRAND JURIES, 20 Cyc. 1299. Constitutional Guaranty — Against Deprivation of Property as Applied to Regulation of Payment of Wages and Sales of Goods to Employees, see CONSTITUTIONAL LAW, 8 Cyc. 888; Against Imprisonment For Debt Not Violated by Imprisonment For Failure to Perform Contract, see CONSTITUTIONAL LAW, 8 Cyc. 879; Of Equal Protection of the Laws as Applied to Statutes Prescribing Employment of Chinese, see CONSTITUTIONAL LAW, 8 Cyc. 1065. Constitutional Guaranty Against Abridgment of Privileges of Citizens as Applied to Statutes Regulating — Hours of Labor, see CONSTITUTIONAL LAW, 8 Cyc. 1065; Payment of Wages, see CONSTITUTIONAL LAW, 8 Cyc. 1065. Constitutionality of Statutes — Creating Liability For Services Rendered to Employee, see CONSTITUTIONAL LAW, 8 Cyc. 1100; Providing For Protection of Employee, see CONSTITUTIONAL LAW, 8 Cyc. 889; Regulating Employment, see CONSTITUTIONAL LAW, 8 Cyc. 888; Regulating Hours of Labor, see CONSTITUTIONAL LAW, 8 Cyc. 1065. Contract For Services of Stallion, see ANIMALS, 2 Cyc. 330. Contract Labor Law, see ALIENS, 2 Cyc. 123. Contracts — Between Husband and Wife Respecting Each Other's Services, see HUSBAND AND WIFE, 21 Cyc. 1277; By Married Woman to Perform Services, see HUSBAND AND WIFE, 21 Cyc. 1315; For Buildings and Other Work, see BUILDERS AND ARCHITECTS, 6 Cyc. 7; For Improvement or Cultivation of Land, see CONTRACTS, 2 Cyc. 59. Contracts For Services — Generally, see MASTER AND SERVANT, 26 Cyc. 1017; Assignability, see ASSIGNMENTS, 4 Cyc. 20; As Subjects of Protection and Relief by Injunction, see INJUNCTIONS, 22 Cyc. 856; Effect of Custom as to Performance, see CUSTOMS AND USAGES, 12 Cyc. 1070; Implied Contract For, see WORK AND LABOR; In Influencing Legislation, see CONTRACTS, 9 Cyc. 486; In Influencing Public Officer, see CONTRACTS, 9 Cyc. 490; In Transportation of Mail, see POST-OFFICE, 31 Cyc. 990; In Working Mines, Quarries, or Wells, see MINES AND MINERALS, 27 Cyc. 769; Measure of Damages For Failure to Perform, see DAMAGES, 13 Cyc. 162; Not to Be Performed Within One Year, see FRAUDS, STATUTE OF, 20 Cyc. 207; Recov-

ery Under Contract Voidable Under Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 299; Specific Performance, see SPECIFIC PERFORMANCE; With Attorney For, see CONTRACTS, 9 Cyc. 259 note 93. Creditors Not Entitled to Husband's, see HUSBAND AND WIFE, 21 Cyc. 1375 note 70. Crop, Lien For, see AGRICULTURE, 2 Cyc. 58, 65. Description of in Declaration or Complaint in Suit to Enforce Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 375. Disqualification of Juror by Prior Services, see JURIES, 24 Cyc. 203. Employment — By Another as Defense to Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 159; Of Prohibited Person as Offense Under Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 84; Of Servant by Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1315. Evidence of Value — In General, see EVIDENCE, 16 Cyc. 1144; Expert Evidence, see EVIDENCE, 17 Cyc. 121. Exemption — Against Claim For Wages, see EXEMPTIONS, 18 Cyc. 1394; Of Earnings, Wages, or Salary of Debtors, see EXEMPTIONS, 18 Cyc. 1429. Expert Evidence as to, see EVIDENCE, 17 Cyc. 116. Fidelity Insurance, see FIDELITY INSURANCE, 19 Cyc. 516. Garnishment of — Interest Under Contracts For, see GARNISHMENT, 20 Cyc. 994; Salary of Public Employee, see GARNISHMENT, 20 Cyc. 1030; Wages to Become Due, see GARNISHMENT, 20 Cyc. 1007. Impairment of Obligation of Contract by Statutory Regulation of — Hours of Labor, see CONSTITUTIONAL LAW, 8 Cyc. 1065; Laborer's Lien, see CONSTITUTIONAL LAW, 8 Cyc. 1006; Payment of Laborers, see CONSTITUTIONAL LAW, 8 Cyc. 1065. Injunction Relating to Interference With Occupation, see LABOR UNIONS, 24 Cyc. 830. In Preparing and Publishing Judicial Decision, see REPORTS, 34 Cyc. 1610. Interest Under Contracts For Services, Liability to Execution, see EXECUTIONS, 17 Cyc. 968. Intervention in Attachment to Enforce Claims of Laborers, see ATTACHMENT, 4 Cyc. 727 note 33. In Winding Up Firm Business, Compensation For, see PARTNERSHIP, 30 Cyc. 696. Joinder of Contracts For Personal, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 442. Joint or Several Liability For Wages, see CONTRACTS, 9 Cyc. 663. Judgment in Action For, see JUDGMENTS, 23 Cyc. 1205. Legal Services, see ATTORNEY AND CLIENT, 4 Cyc. 926. Liabilities — For Services to Pauper, see PAUPERS, 30 Cyc. 1122; Of Estate For Services Rendered After Decedent's Death, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 248, 272; Of Estate For Services Rendered Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 409; Of Railroad Company For Work and Labor, see RAILROADS, 33 Cyc. 346; Of Stock-Holder to Employee, see CORPORATIONS, 10 Cyc. 688; Of Wife, see HUSBAND AND WIFE, 21 Cyc. 1456. Libel or Slander by Imputation of Unfitness For or Misconduct in Employment, see LIBEL AND SLANDER, 25 Cyc. 346. Liens — For Labor in Constructing Telegraph and Telephone Lines, see TELEGRAPH AND TELEPHONES; For Maritime Services, see MARITIME LIENS, 26 Cyc. 751; In Driving or Hauling Logs, see LOGGING, 25 Cyc. 1580; In Erecting, Improving, or Repairing Buildings and Other Structures, see MECHANICS' LIENS, 27 Cyc. 31; In Mines, Quarries, or Wells, see MINES AND MINERAL, 27 Cyc. 769; Of Bailee, see BAILMENTS, 5 Cyc. 193; Of Seaman, see SEAMEN, *ante*, p. 1230; On Logs and Lumber, see LOGGING, 25 Cyc. 1580; On Railroad, see RAILROADS, 33 Cyc. 458. Measure of Damages For — Failure to Perform, see DAMAGES, 13 Cyc. 162; Loss of, see DAMAGES, 13 Cyc. 145. Military, see ARMY AND NAVY, 3 Cyc. 812. Militia, see MILITIA, 27 Cyc. 489. Necessity of — Including All, in One Action, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 445 note 68; Setting Forth, in Claim, see MECHANICS' LIENS, 27 Cyc. 170. Of Assignee, and His Compensation, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 256; BANKRUPTCY, 5 Cyc. 354; INSOLVENCY, 22 Cyc. 1361. Of Bailee, and His Compensation, see BAILMENTS, 5 Cyc. 191. Of Particular Persons and Their Compensation Therefor — Agister, see ANIMALS, 2 Cyc. 315; Ambassador or Consul, see AMBASSADORS AND CONSULS, 2 Cyc. 263; Apprentice, see JUSTICES OF THE PEACE, 24 Cyc. 449 note 9; Arbitrator, Compensation, see ARBITRATION AND AWARD, 3 Cyc. 726; Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 256; BANKRUPTCY, 5 Cyc. 354; INSOLVENCY, 22 Cyc. 1361; Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 926; Attorney-General,

see ATTORNEY-GENERAL, 4 Cyc. 1027; Attorney or Officer in Insolvency, see INSOLVENCY, 22 Cyc. 1360; Auctioneer, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1051; Bailee, see BAILMENTS, 5 Cyc. 191; Bank Officer, see BANKS AND BANKING, 5 Cyc. 457; Child, see PARENT AND CHILD, 29 Cyc. 1623; Civilian Employee, see ARMY AND NAVY, 3 Cyc. 842; Clergyman, see RELIGIOUS SOCIETIES, 34 Cyc. 1144; Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 206; Convict, see CONVICTS, 9 Cyc. 878; Coroner, see CORONERS, 9 Cyc. 994; Corporate Officer or Agent, see CORPORATIONS, 10 Cyc. 952; County Officer, Compensation, see COUNTIES, 11 Cyc. 428; Court Officer or Employee, see COURTS, 11 Cyc. 721; Custodian of Attached Property, see ATTACHMENTS, 4 Cyc. 653; Customs Officer, see CUSTOMS DUTIES, 12 Cyc. 1132; Detective, see DETECTIVES, 14 Cyc. 235; Election Officer, see ELECTIONS, 15 Cyc. 313; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 248, 272, 409, 1136, 1141; Grand Juror, see GRAND JURIES, 20 Cyc. 1357; Health Officer, see HEALTH, 21 Cyc. 386; Highway Officer, see STREETS AND HIGHWAYS; Husband or Wife, see HUSBAND AND WIFE, 21 Cyc. 1153, 1277, 1315, 1427, 1456, 1522, 1649 note 62; Immigration Officer, see ALIENS, 2 Cyc. 120; Impounder of Estrays, see ANIMALS, 2 Cyc. 454; Infant, see INFANTS, 22 Cyc. 599; Inspector, see INSPECTION, 22 Cyc. 1368; Insurance Agent or Broker, see INSURANCE, 22 Cyc. 1439; Internal Revenue Officer, see INTERNAL REVENUE, 22 Cyc. 1658, 1661; Judge, see JUDGES, 23 Cyc. 526; Juror, see JURIES, 24 Cyc. 264; Laborer or Materialman, see MECHANICS' LIENS, 27 Cyc. 1; Livery-Stable Keeper, see LIVERY-STABLE KEEPERS, 25 Cyc. 1512; Logger, see LOGGING, 25 Cyc. 1580; Maritime Workman, see MARITIME LIENS, 26 Cyc. 751; Master or Commissioner in Chancery, see EQUITY, 16 Cyc. 432; MINES AND MINERALS, 27 Cyc. 769; Municipal Officer, Agent, or Employees, see MUNICIPAL CORPORATIONS, 28 Cyc. 466; Notary, see NOTARIES, 29 Cyc. 1107; Officer in General, see OFFICERS, 29 Cyc. 1422; Partner, see PARTNERSHIP, 30 Cyc. 448; Party to Joint Adventure, see JOINT ADVENTURES, 23 Cyc. 452; Pauper, see PAUPERS, 30 Cyc. 1147; Physician or Surgeon, see PHYSICIANS AND SURGEONS, 30 Cyc. 1592; Prosecuting or District Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 695; Receiver, see RECEIVERS, 34 Cyc. 351; Referee, see REFERENCES, 34 Cyc. 892; Register of Deeds, see REGISTERS OF DEEDS, 34 Cyc. 1024; School Officer, see SCHOOLS AND SCHOOL-DISTRICTS, *ante*, p. 858; Seaman, see SEAMEN, *ante*, p. 1176; Sheriff or Constable, see SHERIFFS AND CONSTABLES; Soldier, Marine, or Military or Naval Officer, see ARMY AND NAVY, 3 Cyc. 812, 842; MILITIA, 27 Cyc. 489; State Officer, see STATES; Stevedore, see MARITIME LIENS, 26 Cyc. 751; Tax Assessor, see TAXATION; Tax Collector, see TAXATION; Teacher, see SCHOOLS AND SCHOOL-DISTRICTS, *ante*, p. 1064; Town Officer, see TOWNS; Trustee, see BANKRUPTCY, 5 Cyc. 339; TRUSTS; United States Officer, see UNITED STATES; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS; Ward, see GUARDIAN AND WARD, 21 Cyc. 71; Witness, Compensation, see WITNESSES. Of Wife — As Community Property, see HUSBAND AND WIFE, 21 Cyc. 1649 note 62; As Sufficient Consideration, see FRAUDULENT CONVEYANCES, 20 Cyc. 524; Suit to Recover For, see HUSBAND AND WIFE, 21 Cyc. 1522. On Foreclosure, For Which Allowance May Be Made to Attorney, see MORTGAGES, 27 Cyc. 1781. Parol Evidence to Reconstruct, Vary, or Add to Terms of Contract For, see EVIDENCE, 17 Cyc. 604. Payment of — Debt in, see PAYMENT, 30 Cyc. 1188; Negotiable Instrument in, see COMMERCIAL PAPER, 7 Cyc. 1014; Subscription to Corporate Stock in, see CORPORATIONS, 10 Cyc. 397. Performance of, see MASTER AND SERVANT, 26 Cyc. 1017. Performed at Request, as Sufficient Consideration, see CONTRACTS, 9 Cyc. 322 note 92. Performed, Books of Account to Prove, see EVIDENCE, 17 Cyc. 377. Preference of Claims For Labor as Affecting Validity of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 173. Priority Between Landlord's Lien and Lien For Labor, see LANDLORD AND TENANT, 24 Cyc. 1260. Priority of Claims For Services — Against Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 269; Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 552 Priority of Claims of Wages

Against Insolvent Estate, see INSOLVENCY, 22 Cyc. 1320. Recovery For — Services Rendered Under Contract Voidable Under Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 299; Work and Labor in Fitting House For Gambling, see GAMING, 20 Cyc. 935. Rendered — Actions Against County For, see COUNTIES, 11 Cyc. 487; By Husband For Wife, see FRAUDULENT CONVEYANCES, 20 Cyc. 359; By Minor Child, see FRAUDULENT CONVEYANCES, 20 Cyc. 532; By Parent For Child, see FRAUDULENT CONVEYANCES, 20 Cyc. 361; By Request, see CORPORATIONS, 10 Cyc. 891 note 77; Evidence of Admissibility Under Pleadings, see HUSBAND AND WIFE, 21 Cyc. 1569; In Part Payment of Conditional Sale, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 499 note 3. Rendition of — As Mode of Acquiring Settlement, see PAUPERS, 30 Cyc. 1088; On Sunday, see SUNDAY. Rewards For Services Outside Regular Duties, see REWARDS, 34 Cyc. 1755. Right of Action by Husband or Wife For — Loss of Services of Wife, see HUSBAND AND WIFE, 21 Cyc. 1525; Wife's Personal Services, see HUSBAND AND WIFE, 21 Cyc. 1522. Right of — Contribution Between Employer and Employee, see CONTRIBUTION, 9 Cyc. 808; Natural Guardian to, see GUARDIAN AND WARD, 21 Cyc. 72; Subrogation, see SUBROGATION. Rights and Liabilities of Husband as to His Services in Connection With Wife's Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1427. Rights of Parties Contributing, see JOINT ADVENTURES, 23 Cyc. 459. Right to Services Of — Apprentice, see APPRENTICES, 3 Cyc. 553; Wife, see HUSBAND AND WIFE, 21 Cyc. 1277. Sharing Profits as Compensation For, as Constituting Partnership, see PARTNERSHIP, 30 Cyc. 369. Special or Extraordinary, see REWARDS, 34 Cyc. 1730. Statement of Cause of Action in Actions in Justice's Court For, see JUSTICES OF THE PEACE, 24 Cyc. 558. Statute Requiring Payment of Wages at Certain Times as Invasion of Constitutional Right to Pursuit of Happiness, see CONSTITUTIONAL LAW, 8 Cyc. 889. Supplementary Proceedings Against Earnings — Generally, see EXECUTIONS, 17 Cyc. 1415; Of Public Employee, see EXECUTIONS, 17 Cyc. 1416. Term of, see GRAND JURIES, 20 Cyc. 1332; JUDGES, 23 Cyc. 513; JURIES, 24 Cyc. 263; OFFICERS, 29 Cyc. 1395. To Corporation by Member or Stock-Holder, see CORPORATIONS, 10 Cyc. 691. To Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 409. To Decedent's Family, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 412. To Vessel — Generally, see MARITIME LIENS, 26 Cyc. 751; PILOTS, 30 Cyc. 1607; SALVAGE, *ante*, p. 716; SEAMEN; SHIPPING; TOWAGE; Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 819. Unascertained Value of, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 371. Wages as Preferred Claim, see EXECUTIONS, 17 Cyc. 1354. Weight and Sufficiency of Evidence on Disputed Claims For, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 532. Wife Employing Husband, see HUSBAND AND WIFE, 21 Cyc. 1277.)

**SERVIDUMBRE.** The term used in the Spanish law to denote a servitude.[48]

**SERVIENT ESTATE** or **TENEMENT.** See EASEMENTS, 14 Cyc. 1134.

**SERVILI EST EXPILATIONIS; SOLA INNOCENTIA LIBERA.** A maxim meaning "The crime of theft is slavish; innocence alone is free."[49]

**SERVITIA PERSONALIA SEQUUNTUR PERSONAM.** A maxim meaning "Personal services follow the person."[50]

**SERVITUDE.** See EASEMENTS, 14 Cyc. 1139.

**SERVITUS EST CONSTITUTIO DE JURE GENTIUM, QUA QUIS DOMINO ALIENO CONTRA NATURAM SUBJICITUR.** A maxim meaning "Slavery is an institution by the law of nations, by which a man is subjected to a foreign master, contrary to nature."[51]

**SESSION** or **SESSIONS.** A court of a church which consists of a minister and

"'Servicee" of this State, or of the United States" see Atty.-Gen. *v.* Fenton, 5 Munf. (Va.) 292, 295. See also Howes *v.* Middleborough, 108 Mass. 123, 126.

48. Mulford *v.* Le Franc, 26 Cal. 88, 103.

49. Morgan Leg. Max. [*citing* 2 Inst. 573].

50. Peloubet Leg. Max. [*citing* 2 Inst. 374].

51. Peloubet Leg. Max. [*citing* Coke Litt. 116*b*].

Applied in Com. *v.* Aves, 18 Pick. (Mass.) 193, 215.

two or more ruling elders;[52] an actual assembly of the members of the legislature for business;[53] an actual sitting of a court, legislative body, or other assembly, not interrupted by adjournment; an actual sitting continued by adjournments in ordinary course from day to day, or over Sundays and holidays, but not interrupted by adjournments to a distant day;[54] a particular sitting of the general assembly;[55] sitting;[56] the time during the term which a court sits for the transaction of business;[57] a sitting; sometimes used for the time during which any body of persons or tribunal is organized, competent for transaction of its business; in other connections, the time during which it is convened and actually engaged in business;[58] the sitting of a court, legislature, council, commission, etc., for the transaction of its proper business;[59] the time during which a legislative body, or court, or other assembly, sits for the transaction of business; a term;[60] the sitting of a court; the sitting of justices or judges in court; the time during which a court is held;[61] the sitting together of a body of individuals for the transaction of business; the sitting of a court, academic body, council, legislature, etc., or the actual assembly of the members of these or any similar body for the transaction of business; the time, space, or term during which a court, council, legislature, or the like meets daily for business, or transacts business regularly without breaking up;[62] a meeting of the justices.[63] Synonymous with TERM,[64] *q. v.* (Session or Sessions: Of Congress, see UNITED STATES. Of Court, see COURTS, 11 Cyc. 729, 951, 966. Of Grand Jury, see GRAND JURIES, 20 Cyc. 1332. Of Legislature, see STATES.)

**SET.** To frame or mount, as a precious stone, in gold, silver, or other metal.[65]

**SET ASIDE.** To annul, to make void.[66] (Set Aside: Accord and Satisfaction,

52. Fussell *v.* Hail, 134 Ill. App. 620, 622.

53. John V. Farwell Co. *v.* Matheis, 48 Fed. 363, 364.

**Distinguished from extraordinary session"** of the legislature see People *v.* Monroe County, 65 Hun (N. Y.) 263, 284, 20 N. Y. Suppl. 97.

54. U. S. *v.* Dietrich, 126 Fed. 659, 660.

**Terms "session" and "meeting" when not used in a technical sense have reference** merely to a time when a body is lawfully convened and in session for the transaction of business. Burkleo *v.* Washington County, 38 Minn. 441, 443, 38 N. W. 108.

55. Williams *v.* Nashville, 89 Tenn. 487, 494, 15 S. W. 364.

56. People *v.* Powell, 14 Abb. Pr. (N. Y.) 91, 93.

57. Lipari *v.* State, 19 Tex. App. 431, 433 [*citing* Webster Dict.], where it is further said to be the time of the actual sitting of the court. See also Heim *v.* State, 145 Ind. 605, 608, 44 N. E. 638.

"Sessions of the peace" is a sitting of justices for the execution of those purposes which are confided to them by their commission and by several acts of parliament (Chitty Cr. L. [*quoted* in People *v.* Powell, 14 Abb. Pr. (N. Y.) 91, 93]); a court of record held before two or more justices of the peace for the execution of the authority given them by their commission and certain acts of parliament (Jacob L. Dict. [*quoted* in People *v.* Powell, 14 Abb. Pr. (N. Y.) 91, 93]).

58. Abbott L. Dict. [*quoted* in U. S. *v.* Dietrich, 126 Fed. 659, 660].

59. Black L. Dict. [*quoted* in U. S. *v.* Dietrich, 126 Fed. 659, 661].

60. Bouvier L. Dict. [*quoted* in People *v.* Rose, 166 Ill. 422, 428, 47 N. E. 64; People *v.* Auditor Public Accounts, 64 Ill. 82, 86; U. S. *v.* Dietrich, 126 Fed. 659, 661].

61. Burrill L. Dict. [*quoted* in U. S. *v.* Dietrich, 126 Fed. 659, 661].

62. Century Dict. [*quoted* in U. S. *v.* Dietrich, 126 Fed. 659, 661].

63. Johnson Dict. [*quoted* in People *v.* Powell, 14 Abb. Pr. (N. Y.) 91, 93].

64. Ravenscraft *v.* Blaine County, 5 Ida. 178, 181, 47 Pac. 942.

**Equivalent of "term"** see U. S. *v.* Dietrich, 126 Fed. 659, 661; MacNaughton *v.* Southern Pac. Co., 19 Fed. 881, 882. Used interchangeably with "term" see Rakowski *v.* Wagoner, (Okla. 1909) 103 Pac. 632, 633.

**Distinguished from "term"** see Bryan *v.* Pinney, 2 Ariz. 390, 392; Robertson *v.* State, 44 Tex. Cr. 270, 271, 70 S. W. 542.

65. Century Dict. [*quoted* in Smith *v.* Computing Scale Co., 147 Fed. 890, 891].

**Insertion of an agate** in a computing scale not "set" within the tariff act see Smith *v.* Computing Scale Co., 147 Fed. 890, 891.

66. State *v.* Primm, 61 Mo. 166, 171; Bouvier L. Dict. [*quoted* in Brandt *v.* Brandt, 40 Oreg. 477, 485, 67 Pac. 508].

**Distinguished from "rescind"** see Brooke *v.* Eastman, 17 S. D. 339, 348, 96 N. W. 699.

**Not synonymous with excused** when used with reference to a juror see Santee *v.* Standard Pub. Co., 36 N. Y. App. Div. 555, 556, 55 N. Y. Suppl. 361.

**The terms "void" and "set aside"** in an adjudication that a voluntary deed is void as against the creditors of a grantor are to be understood as meaning only that the conveyance, while good as against all others, shall not operate to defeat the equity of the creditors of the grantor. Steinmeyer *v.* Steinmeyer, 64 S. C. 413, 417, 42 S. E. 184, 92 Am. St. Rep. 809, 59 L. R. A. 319.

see ACCORD AND SATISFACTION, 1 Cyc. 338. Account — Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1196; Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 181; Of Trustee, see TRUSTS. Adoption, see ADOPTION OF CHILDREN, 1 Cyc. 928. Appeal — Effect as to Sureties on Appeal-Bond, see APPEAL AND ERROR, 2 Cyc. 931; From Judgment That Has Been Set Aside, see APPEAL AND ERROR, 2 Cyc. 617. Assessment by Municipal Council — For Benefits From Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1176; For Taxes in General, see TAXATION. Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 276. Attachment — Generally, see ATTACHMENT, 4 Cyc. 769; Default Judgment, see ATTACHMENT, 4 Cyc. 825; Necessity of Appearance, see ATTACHMENT, 4 Cyc. 784. Award, see ARBITRATION AND AWARD, 3 Cyc. 759. Compromise and Settlement, see COMPROMISE AND SETTLEMENT, 8 Cyc. 523. Conveyance of Mortgaged Property to Mortgagee, see MORTGAGES, 27 Cyc. 1377. Discharge of Receiver, see RECEIVERS, 34 Cyc. 480. Dismissal or Nonsuit, see DISMISSAL AND NONSUIT, 14 Cyc. 387. Execution — Generally, see EXECUTIONS, 17 Cyc. 1152; For Enforcement of Mechanics' Liens, see MECHANICS' LIENS, 27 Cyc. 441. Foreclosure of — Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 119; MORTGAGES, 27 Cyc. 1505, 1710; Mortgage or Other Lien on Railroad, see RAILROADS, 33 Cyc. 588. Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 419. Garnishment, see GARNISHMENT, 20 Cyc. 1125. Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 410. Injunction, see INJUNCTIONS, 22 Cyc. 947, 973. Judgment — Generally, see JUDGMENTS, 23 Cyc. 889; Assignment of, see JUDGMENTS, 23 Cyc. 1427; By Confession by Individual Partner, see PARTNERSHIP, 30 Cyc. 519; In Action or Scire Facias on Recognizance, see RECOGNIZANCES, 34 Cyc. 554; In Equity, see JUDGMENTS, 23 Cyc. 976; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 604; Mandamus to Compel, see MANDAMUS, 26 Cyc. 211; Of Appellate Court, see APPEAL AND ERROR, 3 Cyc. 472; On Bond, see BONDS, 5 Cyc. 857. Judicial Sale in General, see JUDICIAL SALES, 24 Cyc. 37. Letters of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 151. Marriage, see DIVORCE, 14 Cyc. 556; MARRIAGE, 26 Cyc. 899. Order of — Arrest, see ARREST, 3 Cyc. 955; Court in General, see MOTIONS, 28 Cyc. 15; Reference, see REFERENCES, 34 Cyc. 802. Partnership Accounting, see PARTNERSHIP, 30 Cyc. 751. Patent to Public Lands, see PUBLIC LANDS, 32 Cyc. 894. Proceedings to Consolidate, see RELIGIOUS SOCIETIES, 34 Cyc. 1191. Quashing or Vacating Writ of Replevin, see REPLEVIN, 34 Cyc. 1463. Report of — Master or Commissioner, see EQUITY, 16 Cyc. 447; Referee, see REFERENCES, 34 Cyc. 871. Return of Attachment, see ATTACHMENT, 4 Cyc. 621. Sale — By Receiver, see RECEIVERS, 34 Cyc. 321; For Taxes, see TAXATION; Of Assets of Assigned Estates, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 241; Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 796; Of Infant's Property Under Order of Court, see INFANTS, 22 Cyc. 578; Of Land For Assessments or Special Taxes For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1246; Of Partnership Assets in Action For Dissolution and Accounting of Partnership, see PARTNERSHIP, 30 Cyc. 751; Of Property Under Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 447; Of Ward's Property by Guardian, see GUARDIAN AND WARD, 21 Cyc. 84; On Execution, see EXECUTIONS, 17 Cyc. 1267; On Mortgage Foreclosure, see MORTGAGES, 27 Cyc. 1505, 1710; On Partition, see PARTITION, 30 Cyc. 284. Sale Under Power — In General, see POWERS, 31 Cyc. 1135; In Mortgage, see MORTGAGES, 27 Cyc. 1505. Statutory New Trial as of Right in Suit to Set Aside Conveyance, see NEW TRIAL, 29 Cyc. 1034. Submission to Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 610. Tax Deed, see TAXATION. Verdict — In Civil Action, see NEW TRIAL, 29 Cyc. 707; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 701. Will or Probate Thereof, see WILLS. Writ of Assistance, see ASSISTANCE, WRIT OF, 4 Cyc. 297. Written Instrument in General, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.)

**SET LINE.** A line to which a number of baited hooks are attached, and which,

supported by a buoy, is extended on the surface of the water;[67] a name applied to a long line having attached to it at regular intervals lines armed with hooks, at either end of which is an anchor to hold the trawl in place, furnished also with a line and buoy to indicate its position;[68] a line with baited hooks fastened to it set or anchored for taking fish.[69] (See, generally, FISH AND GAME, 19 Cyc. 1013 note 36.)

**SET-OFF.** See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 625.

**SET ON FOOT.** Arrange, place in order, set forward, put in way of being ready.[70]

**SET OUT.** Words which when applied to pleading are said to mean, aver or allege;[71] recite or state in full.[72] When applied to substance, to assign, to allot, to mark by boundaries or distinctions of space.[73]

**SET SCREW.** A screw, as in a cramp, screwed through one part tightly upon another to bring pieces of the wood, metal, etc., in close contact;[74] a screw employed to hold or move objects to their bearings;[75] a screw sometimes cupped or pointed at one end, and screwed through one part, as of a machine, tightly upon another part, to prevent the one slipping upon the other.[76]

**SETTING.** A placing, or putting in a place, condition, state, or posture.[77] (See SETTING DOG.)

**SETTING A CASE FOR TRIAL.** An entry or order made in the cause by the court, either by its own motion, in regulating its business, in compliance with the statute, or rules of the court made conformably therewith, or by agreement of parties, by which a day certain is fixed, on or after which the case may be called for final disposition or trial.[78] (See CRIMINAL LAW, 12 Cyc. 498; TRIAL.)

**SETTING DOG.** Any dog who stops at his game;[79] one kept for the purpose of killing and destroying game.[80] (See POINTER DOG, 31 Cyc. 894.)

**SETTING FORTH.** Placing or putting in a place to be seen or viewed;[81] synonymous with "alleges."[82] (See PLEADING, 31 Cyc. 92.)

**SETTING UP A CLAIM.** A phrase which refers to some assertion of rights or interest in real estate the effect of which is necessary to throw a cloud over the title and which claim is liable to be used by the party asserting it for an improper purpose to the injury of the real estate owner.[83] (See CLAIM, 7 Cyc. 180.)

**SETTING UP IN PRACTICE.** Applied to a doctor, the going and habitually practicing in a district, irrespectively of whether he has a house or not.[84] (See GOOD-WILL, 20 Cyc. 1275.)

67. 4 Encyclopedic Dict. [*quoted* in State *v.* Stevens, 69 Vt. 411, 413, 38 Atl. 80].

68. 3 Johnson Universal Cyclopedia [*quoted* in State *v.* Stevens, 69 Vt. 411, 413, 38 Atl. 80].

69. Standard Dict. [*quoted* in State *v.* Stevens, 69 Vt. 411, 413, 38 Atl. 80, 81].

70. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975, 2 Whart. Cr. L. § 2802 note.

71. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

72. Black L. Dict.; Webster Int. Dict. [both *quoted* in Chadron First Nat. Bank *v.* Engelbercht, 58 Nebr. 639, 641, 79 N. W. 556].

73. Webster Dict. [*quoted* in Booth *v.* Booth, 7 Conn. 350, 375].

74. Imperial Dict. [*quoted* in Mast *v.* Rude Bros. Mfg. Co., 53 Fed. 120, 124, 3 C. C. A. 477].

75. Knight Mech. Dict. [*quoted* in Mast *v.* Rude Bros. Mfg. Co., 53 Fed. 120, 124, 3 C. C. A. 477].

76. Webster Dict. [*quoted* in Potter *v.* Knox County Lumber Co., 146 Ind. 114, 116, 44 N. E. 1000].

77. Seibs *v.* Engelhardt, 78 Ala. 508, 510.

**In dog parlance** the term has a somewhat technical meaning, and means that he is standing and intently looking in one direction, and the attitude is also called "pointing." Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 319, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

78. Moore *v.* Sargent, 112 Ind. 484, 488, 14 N. E. 466.

79. Briarly *v.* Athorpe, 5 B. & Ald. 320 note, 7 E. C. L. 180.

80. Hayward *v.* Horner, 5 B. & Ald. 317, 320, 7 E. C. L. 178.

81. Seibs *v.* Engelhardt, 78 Ala. 508, 510.

82. *In re* Harrison, 46 Minn. 331, 334, 48 N. W. 1132.

83. Maxon *v.* Ayers, 28 Wis. 612, 614 [*quoted* in Fox *v.* Williams, 92 Wis. 320, 324, 66 N. W. 357].

84. Robertson *v.* Buchanan, 73 L. J. Ch. 408, 410, 90 L. T. Rep. N. S. 390].

**Distinguished from "practise"** see Robertson *v.* Buchanan, 73 L. J. Ch. 408, 410, 90 L. T. Rep. N. S. 390.

**Visiting two or three old patients not a "setting up in practice"** see Robertson *v.* Buchanan, 73 L. J. Ch. 408, 410, 90 L. T. Rep. N. S. 390.

**SETTLE.** To adjust; to liquidate;[85] to adjust, to liquidate, to pay;[86] to approve;[87] to go into a settlement, to adjust, to fix or determine a balance, which may be on the one side or the other;[88] to pay;[89] to place a person in a permanent seat or to fix him in a stable course of life;[90] to together adjust and ascertain what may be due to the one or the other;[91] to adjust or ascertain; to pay;[92] to adjust, as accounts; to liquidate; to adjust differences or accounts; to balance; to settle as an account;[93] to adjust differences, claims, or accounts; come to an agreement;[94] to liquidate, balance, pay;[95] to adjust; to liquidate; to balance as an account; to pay as a debt;[96] synonymous with ADJUST,[97] *q. v.* Applied to land, the term conveys the idea of permanent inhabitance.[98] (See SETTLEMENT; and, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 373.)

**SETTLED.** A term which implies a permanent condition; something finally established by mutual agreement;[99] paid;[1] paid or discharged;[2] placed, fixed,

85. Fort *v.* Gooding, 9 Barb. (N. Y.) 371, 377, where it is said the words do not necessarily mean "to pay."

86. Gandolfo *v.* Appleton, 40 N. Y. 533, 541.

87. Denver, etc., R. Co. *v.* U. S., 9 N. M. 309, 313, 51 Pac. 679, where it is so used with reference to a bill of exceptions.

88. Bell *v.* Crawford, 8 Gratt. (Va.) 110, 123, where it is said that it is a word of somewhat equivocal import and may mean "pay."

89. State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924; Webster Dict. [*quoted* in People *v.* Green, 5 Daly (N. Y.) 194, 201]; Worcester Dict. [*quoted* in Moses *v.* Moses, 13 Ont. Pr. 144, 145], where the court said that an agreement to settle is not necessarily a promise to pay, that there are many ways in which defendant might settle the amount; he might give goods or produce, or might leave by will, or in some other manner arrange for the liquidation of the claim.

90. Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405, 413.

91. McMasters *v.* Burnett, 92 Ky. 358, 361, 17 S. W. 1021, 13 Ky. L. Rep. 617.

**Term implies the mutual adjustment of accounts** between different parties, an agreement upon the balance. Baxter *v.* State, 9 Wis. 38, 44; Anderson L. Dict. [*quoted* in Toombs *v.* Stockwell, 131 Mich. 633, 92 N. W. 288].

92. Bouvier L. Dict. [*quoted* in Auzerais *v.* Naglee, 74 Cal. 60, 66, 15 Pac. 371].

93. Century Dict.; Webster Int. Dict. [*quoted* in Salomon *v.* Holdom, 72 Ill. App. 346, 352].

94. Century Dict. [*quoted* in Toombs *v.* Stockwell, 131 Mich. 633, 92 N. W. 288].

95. Century Dict. [*quoted* in Taylor *v.* Miller, 113 N. C. 340, 342, 18 S. E. 504].

96. Webster Dict. [*quoted* in Applegate *v.* Baxley, 93 Ind. 147, 149; National Bank *v.* Norton, 1 Hill (N. Y.) 572, 576].

97. State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924; Lynch *v.* Nugent, 80 Iowa 422, 429, 46 N. W. 61; Webster Dict. [*quoted* in People *v.* Green, 5 Daly (N. Y.) 194, 201].

**A promise to "settle"** a liquidated demand, respecting which there was no dispute between the parties, is a promise to pay the same. Tuggle *v.* Minor, 76 Cal. 96, 101, 18 Pac 131; Brody *v.* Doherty, 30 Miss. 40, 44; Edson *v.* Fuller, 22 N. H. 183, 190; Stilwell *v.* Coope, 4 Den. (N. Y.) 225, 226; Pinkerton *v.* Bailey, 8 Wend. (N. Y.) 600, 601; Taylor *v.* Miller, 113 N. C. 340, 342, 18 S. E. 504; Moore *v.* Hyman, 35 N. C. 272, 274.

**May consist of the mere striking of a balance,** where there may have been interest accounts, a compromise, composition, payment in goods, or the procurement of a release. Kearney *v.* Collins, 2 Miles (Pa.) 13, 14, where it is said not always to mean a payment or even a payment in money.

**"Settle up and liquidate"** equivalent to "pay" see Wilson *v.* Stilwell, 9 Ohio St. 467, 470, 75 Am. Dec. 477.

**"We can settle"** plainly implies an accounting together, and not a promise of payment by one to another. Bell *v.* Crawford, 8 Gratt. (Va.) 110, 124.

**Equivalent of "to fix — to arrange;" "to determine; to establish; to regulate"** see Lynch *v.* Nugent, 80 Iowa 422, 429, 46 N. W. 61.

**"Settles the case"** in a statute means fixes the rights of the parties. Gallagher *v.* McHugh, 85 Tex. 446, 447, 21 S. W. 1033.

98. Webster Dict. [*quoted* in Burleson *v.* Durham, 46 Tex. 152, 160].

**"Settle" and "occupy,"** words in a public land act which are inapplicable to any other state of things than a *bona fide* use and improvement of the land. *In re* Selby, 6 Mich. 193, 204.

99. Coleman *v.* Ferrar, 112 Mo. 54, 69, 20 S. W. 441.

1. Kelley *v.* Thompson, 175 Mass. 427, 430, 56 N. E. 713.

2. Gandolfo *v.* Appleton, 40 N. Y. 533, 541.

**Equivalent to "paid"** see Hopkins *v.* Warner, 109 Cal. 133, 41 Pac. 868.

**"Paid" and "settled,"** when used in common conversation in relation to a debt, are understood equally as conveying the idea that the debt is discharged. Waters *v.* Creagh, 4 Stew. & P. (Ala.) 410, 414.

**"Settled by note,"** written at the foot of an account, means not that the account has been actually paid, but that the account has been adjusted and a note taken for it. Port Darlington Harbor Co. *v.* Squair, 18 U. C. Q. B. 533, 535.

**"Settled by renewed note and mortgage,"** in an indorsement on a mortgage, construed as a renewal and extension of the same debt, and not a payment of the debt or discharge of the lien of the first mortgage see Miller *v.* Griffin, 102 Ala. 610, 614, 15 So. 238.

established.[3] (See DETERMINED, 14 Cyc. 238; SETTLE; SETTLEMENT, and Cross-References Thereunder.)

**SETTLED ACCOUNT.** See ACCOUNTS AND ACCOUNTING, 1 Cyc. 364.

**SETTLED ESTATE.** In both legal and popular language, as contradistinguished from estate in fee simple, one in which the powers of alienation, of devising, and of transmission according to ordinary rules of descent are restrained by the limitations of the settlement.[4] (See ESTATES, 16 Cyc. 595.)

**SETTLED INSANITY.** A term applied to *delirium tremens*.[5] (See DELIRIUM TREMENS, 13 Cyc. 773.)

**SETTLED LAND.** Land which is held subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period.[6]

**SETTLEMENT.** A compromise, for peace's sake, of a claim, the validity of which is denied;[7] a contract between two parties by means of which they ascertain the state of the accounts between them and strike a balance;[8] a determination by agreement;[9] a mutual adjustment of accounts between different parties, and an agreement upon the balance;[10] an accounting; adjustment; liquidation in regard to amounts; as a settlement of accounts;[11] an adjustment between persons concerning their dealings or difficulties, whereby a balance is ascertained to be due from one to the other, or an agreement is entered into which terminates their controversy;[12] an adjustment of accounts;[13] a payment of the amount found to be due on the examination by parties of their mutual accounts according to the intention of the parties;[14] liquidation of amount, arrangement of difficulties, an adjusting, etc.;[15] payment;[16] payment, or accord and satisfaction, or something equivalent to accord and satisfaction, admissible as a defense under the general issue;[17] the locating one's self upon land, with a view to make a permanent residence, and manifesting that intention by preparing a hollow tree for shelter, or by erecting a camp or cabin, and living in it;[18] the payment of a claim

**Implies a general and not a special account** see Dorsey *v.* Kollock, 1 N. J. L. 35, 41.

**"Before my estate is settled"** construed to mean the time before funeral expenses, debts, and legacies were paid. *In re* Batchelor, 119 Mich. 239, 242, 77 N. W. 941; Calkins *v.* Smith, 41 Mich. 409, 412, 1 N. W. 1048.

**Nearly synonymous with "allowed"** see Atchison, etc., R. Co. *v.* Cone, 37 Kan. 567, 569, 15 Pac. 499.

3. Casler *v.* Connecticut Mut. L. Ins. Co., 22 N. Y. 427, 531.

**Conveys the idea of a rule** see McWhorter *v.* Benson, Hopk. (N. Y.) 32, 42.

**Marking of a cause "settled" by the trial** judge is equivalent to a discontinuance of the action. Rogers *v.* Marcus, 93 N. Y. App. Div. 552, 553, 87 N. Y. Suppl. 941.

**Distinguished from "sign"** as used in reference to a bill of exceptions see Montana Lumber, etc., Co. *v.* Howard, 10 Mont. 296, 298, 25 Pac. 1024.

**Used in the sense of having brought** the matter to a conclusion see Redding *v.* Redding, 69 Vt. 500, 505, 38 Atl. 230.

4. Micklethwait *v.* Micklethwait, 4 C. B. N. S. 790, 858, 5 Jur. N. S. 41, 28 L. J. C. P. 121, 7 Wkly. Rep. 117, 93 E. C. L. 790, where it is said: "It would be a perversion of language to apply the term 'settled' to an estate taken out of settlement, and brought back to the condition of an estate in fee simple."

5. Evers *v.* State, 31 Tex. Cr. 318, 330, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421, where in a homicide case the term "settled insanity" is distinguished from the term "temporary insanity," or drunkenness directly resulting from drink.

6. *In re* Childs, [1907] 2 Ch. 352, 76 L. J. Ch. 565, 97 L. T. Rep. N. S. 80, 23 T. L. R. 609.

7. Pentz *v.* Pennsylvania F. Ins. Co., 92 Md. 444, 448, 48 Atl. 139.

8. Jackson *v.* Ely, 57 Ohio St. 450, 459, 49 N. E. 792.

9. Miller *v.* Consolidated Patrons', etc., Mut. Ins. Co., 113 Iowa 211, 215, 84 N. W. 1049.

10. Phipps *v.* Willis, (Oreg. 1908) 96 Pac. 866, 870.

11. Albers *v.* Merchants' Exch., (Mo. App. 1909) 120 S. W. 139, 142.

12. McKinney *v.* Statesman Pub. Co., 34 Oreg. 509, 516, 56 Pac. 651.

13. Greene County *v.* Light, 72 Ark. 41, 43, 77 S. W. 915.

14. McKinney *v.* Statesman Pub. Co., 34 Oreg. 509, 516, 56 Pac. 651.

15. Nettleton *v.* Sherwood, 1 C. Pl. (Pa.) 140 [*citing* Brown Dict.; Webster Dict.].

16. Goenen *v.* Schroeder, 18 Minn. 66, 75; McKinney *v.* Statesman Pub. Co., 34 Oreg. 509, 517, 56 Pac. 651.

17. Curtis *v.* Egan, 53 N. H. 511, 514.

18. Davis *v.* Young, 2 Dana (Ky.) 299, 313.

to the extent to which it is conceded to be due;[19] the payment of a debt;[20] payment in full;[21] an agreement by which two or more persons who have dealings together so far arrange their accounts as to ascertain the balance due from one to the other;[22] an adjustment of accounts or claims, liquidation, payment.[23] (Settlement: In General, see ACCORD AND SATISFACTION, 1 Cyc. 305; ACCOUNTS AND ACCOUNTING, 1 Cyc. 351; COMPOSITIONS WITH CREDITORS, 8 Cyc. 409; COMPROMISE AND SETTLEMENT, 8 Cyc. 499; PAYMENT, 30 Cyc. 1173; RELEASE, 34 Cyc. 1039. Acceptance of Benefits as Implied Ratification of Settlement by Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1271. Account and Settlement With Ward by Guardian, see INSANE PERSONS, 22 Cyc. 1152. Action — Between Partners For Breach of Contract For, or Fraud or Mistake In, see PARTNERSHIP, 30 Cyc. 712; For Recovery of Land Under Laws Relating to Settlement on Indian Lands, see INDIANS, 22 Cyc. 129. Allowance For Support and Education of Child on Making, see PARENT AND CHILD, 29 Cyc. 1619. Ascertainment and Adjudication of, to Fix Liability For Support of Pauper, see PAUPERS, 31 Cyc. 1077. As Condition Precedent to Action Between Partners, see PARTNERSHIP, 30 Cyc. 713. As Defense, see CRIMINAL LAW, 12 Cyc. 161. As Evidence of Probable Cause, see MALICIOUS PROSECUTION, 26 Cyc. 37. As Ground of Equitable Relief Against Judgment, When Not Interposed as Defense to Former Action, see JUDGMENTS, 23 Cyc. 1000. As to Royalties For Use of Patent, see PATENTS, 30 Cyc. 965. Authority to Settle Claims, see ATTORNEY AND CLIENT, 4 Cyc. 945; PRINCIPAL AND AGENT, 31 Cyc. 1392. Between — Heirs and Distributees, see DESCENT AND DISTRIBUTION, 14 Cyc. 132; Parties to Bond, Defense to Action Thereon, see BONDS, 5 Cyc. 847; Partners in Limited Partnership, see PARTNERSHIP, 30 Cyc. 766. Between Principal and Agent — Generally, see PRINCIPAL AND AGENT, 31 Cyc. 1531; Effect as to Credit Given to Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1554; Effect as to Liabilities of Principal to Third Person For Agent's Acts, see PRINCIPAL AND AGENT, 31 Cyc. 1580. By Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 246. By Copartner After Dissolution of Firm, see PARTNERSHIP, 30 Cyc. 712. By County Officer For Funds Received, see COUNTIES, 11 Cyc. 443. By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1104. By Guardian — Generally, see GUARDIAN AND WARD, 21 Cyc. 150; Conclusiveness on Sureties, see GUARDIAN AND WARD, 21 Cyc. 238; With Ward, see GUARDIAN AND WARD, 21 Cyc. 237. By Infant, see INFANTS, 22 Cyc. 589. By Partner, see PARTNERSHIP, 30 Cyc. 498. By Receiver, see RECEIVERS, 34 Cyc. 450. By Statutory Partnership Administrator, see PARTNERSHIP, 30 Cyc. 633. By Surviving Partner — As Executor or Administrator of Deceased Partner's Estate, see PARTNERSHIP, 30 Cyc. 632; Continuing Partnership Business, see PARTNERSHIP, 30 Cyc. 636. By Trustee, see TRUSTS. Conclusiveness of, by

19. Pentz *v.* Pennsylvania F. Ins. Co., 92 Md. 444, 448, 48 Atl. 139.

20. Greene County *v.* Light, 72 Ark. 41, 43, 77 S. W. 915.

21. Bouvier L. Dict. [*quoted* in Stewart *v.* Union Mut. L. Ins. Co., 155 N. Y. 257, 266, 49 N. E. 876, 42 L. R. A. 147].

22. Bouvier L. Dict. [*quoted* in Jackson *v.* Ely, 57 Ohio St. 450, 459, 49 N. E. 792].

23. Webster Dict. [*quoted* in Applegate *v.* Baxley, 93 Ind. 147, 149].

**Equivalent to "liquidated"** see Parris *v.* Hightower, 76 Ga. 631, 634.

**The receipt of a note "in settlement of a debt,"** "for or on account of a debt," or "in payment of" the same, means the same thing. See Combination Steel, etc., Co. *v.* St. Paul City R. Co., 47 Minn. 207, 209, 49 N. W. 744.

**"Settlement as usual"** in an offer to lease certain mining property, related to one of two well understood premises: (1) To the former method of computation and time and manner of payments existing between the parties; or (2) a well known and established custom of the district; either one of which was sufficiently definite to constitute a part of the contract. Cochrane *v.* Justice Min. Co., 16 Colo. 415, 419, 26 Pac. 780.

**"Settlement of a case,"** in N. Y. Code Civ. Proc. § 2545, means the settlement of a case on appeal. *In re* Prout, 11 N. Y. Suppl. 160.

**The words "settlement of the estate,"** when applied to the estates of deceased persons, refer to the settlement of the probate account. Allen *v.* Dean, 148 Mass. 594, 20 N. E. 314.

**The phrase, "settlement of estates of deceased persons,"** refers to the adjustment of the claims in favor of or against the estate, and does not necessarily include the word "distribution." *In re* Creighton, 12 Nebr. 280, 282, 11 N. W. 313.

**Same as "valid distribution"** see Mathews' Appeal, 72 Conn. 555, 558, 45 Atl. 170, where it is so used with reference to estates.

Guardian, see INSANE PERSONS, 22 Cyc. 1157. Continuing Term of Corporation After Dissolution For Purpose of Winding Up, see CORPORATIONS, 10 Cyc. 1323, 1325. Discharge by — Of Mortgage Debt, see MORTGAGES, 27 Cyc. 1404; Of Surety, see PRINCIPAL AND SURETY, 32 Cyc. 173. Effect of — As Bar in Bastardy Proceedings, see BASTARDS, 5 Cyc. 647; Previous Settlement as to Action Between Partners, see PARTNERSHIP, 30 Cyc. 464. Ground of Equitable Relief — Against Judgment, In General, see JUDGMENTS, 23 Cyc. 1000; Reliance on Settlement as Excuse For Failure to Obtain Relief in Former Action, see JUDGMENTS, 23 Cyc. 1029. Justice Court's Jurisdiction of Settlement of Partnership Affairs, see JUSTICES OF THE PEACE, 24 Cyc. 478. Marriage Settlements — Generally, see HUSBAND AND WIFE, 21 Cyc. 1241; Reformation of, see REFORMATION OF INSTRUMENTS, 34 Cyc. 925. Money Received in, see MONEY RECEIVED, 27 Cyc. 852. Of Action By or Against Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1756. Of Administration of Community Property, see HUSBAND AND WIFE, 21 Cyc. 1717. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 246. Of Bill of Exceptions — In Civil Action, see APPEAL AND ERROR, 3 Cyc. 23, 31; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 850. Of Boundary Lines of Counties, see COUNTIES, 11 Cyc. 347. Of Case — Generally, in Application For New Trial in Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 746; Or Statement on Appeal, see APPEAL AND ERROR, 2 Cyc. 1089; CRIMINAL LAW, 12 Cyc. 885. Of Case Made on Appeal — Generally, see APPEAL AND ERROR, 3 Cyc. 68; In Criminal Prosecution, 12 Cyc. 885. Of Case Out of Court, Effect on Costs, see COSTS, 11 Cyc. 83. Of Claim — By Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1752; For Death by Wrongful Act, see DEATH, 13 Cyc. 325; In Suit as Defense Before Judgment, Duty to Set up, see JUDGMENTS, 23 Cyc. 1000. Of Community Rights, see HUSBAND AND WIFE, 21 Cyc. 1701, 1713. Of Conflicting Claims and Equities Before Sale, see JUDICIAL SALES, 24 Cyc. 9. Of Disputed Claims as Consideration For Mortgage, see MORTGAGES, 27 Cyc. 1052. Of Dissolved Community, see HUSBAND AND WIFE, 21 Cyc. 1701. Of Estate of Deceased Husband, see HUSBAND AND WIFE, 21 Cyc. 1713. Of Indian Lands Forbidden by Statute, see INDIANS, 22 Cyc. 129. Of Interrogatories, see DEPOSITIONS, 13 Cyc. 898. Of Land After Abandonment, see ABANDONMENT, 1 Cyc. 7. Of Life Insurance Policy, see LIFE INSURANCE, 25 Cyc. 902. Of Loss Under Insurance Policy, see FIRE INSURANCE, 19 Cyc. 872; LIFE INSURANCE, 25 Cyc. 902; MARINE INSURANCE, 26 Cyc. 709; MUTUAL BENEFIT INSURANCE, 29 Cyc. 164. Of Official Account, see OFFICERS, 29 Cyc. 1437. Of Pauper, see PAUPERS, 30 Cyc. 1077. Of Public Lands, see PUBLIC LANDS, 32 Cyc. 786. Of Statement on Motion For New Trial, see NEW TRIAL, 29 Cyc. 970. Of Suit by Guardian of Infant, see INFANTS, 22 Cyc. 663. Of Ward's Estate, see GUARDIAN AND WARD, 21 Cyc. 150. Part Payment in Full Settlement When Does Not Suspend Statute, see LIMITATIONS OF ACTIONS, 25 Cyc. 1373. Post-Nuptial in Pursuance of Ante-Nuptial Oral Agreement, see FRAUDS, STATUTE OF, 20 Cyc. 158; FRAUDULENT CONVEYANCES, 20 Cyc. 507. Presumption of, to Wife, see HUSBAND AND WIFE, 21 Cyc. 1404. Private Accounting and Settlement With Ward, see GUARDIAN AND WARD, 21 Cyc. 169. Ratification by Firm of Settlement by Individual Partner, see PARTNERSHIP, 30 Cyc. 528. Reformation of, see REFORMATION OF INSTRUMENTS, 34 Cyc. 926. Rights and Remedies of Surety as to Principal After Compromise and Settlement, see PRINCIPAL AND SURETY, 32 Cyc. 250. Right to Trial by Jury in Actions Involving Accounting and Settlement, see Juries, 24 Cyc. 114. Settlement or Attempted Settlement With Accused as Showing Want of Probable Cause, see MALICIOUS PROSECUTION, 26 Cyc. 37. To Abate Bastardy Proceedings, see BASTARDS, 5 Cyc. 647. Upon Wife, Effect of on Allowance of Permanent Alimony, see DIVORCE, 14 Cyc. 770. Wife's Equity to Sue, see HUSBAND AND WIFE, 21 Cyc. 1189.)

**SETTLEMENT RIGHT.** A certificate allowing a settler to appropriate so much land, including the place where he settled.[24]

24. Davis *v.* Young, 2 Dana (Ky.) 299, 313.

**SETTLER.** Any one who has taken up his permanent abode in any particular locality;[25] one who actually resided on the land settled;[26] the man who penetrated the wilderness in pursuit of future residence, and, having found a place suited to his wishes or necessity, there stopped, ceased his rambles, and began to improve, with a view to a permanent home.[27]

**SETTLES THE CASE.** Fixes the rights of the parties.[28]

**SET UPON.** Assault.[29] (See ASSAULT AND BATTERY, 3 Cyc. 1014.)

**SEUL HERITIER.** In French law, the person who is entitled by succession.[30]

**SEVENTY.** A term applied to a member in good standing in the Mormon Church.[31]

**SEVERABLE CONTRACT.** A contract liable simply to be severed;[32] one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be;[33] one, the consideration of which by its terms is susceptible of division and apportionment;[34] one the consideration of which is by its terms susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side;[35] one in which the consideration is expressly or by necessary implication apportioned;[36] one in which the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item or is left to be implied by law;[37] one where the part to be performed by one party consists of several distinct and independent items, and the price to be paid by the other is apportioned to each item;[38] one where the part to be performed by one party consists of several separate and distinct items and the price to be paid is apportioned to each item according to the value thereof and not as one unit in a whole, or a part of the round sum.[39] (Severable Contract: In General, see CONTRACTS, 9 Cyc. 569, 648. Accrual of Right of Action on, see LIMITATIONS OF ACTIONS, 25 Cyc. 1106. Avoidance or Forfeiture of For Misrepresentation or Breach of Warranty, see FIRE INSURANCE, 19 Cyc. 707. Construction of Insurance Contract as to Its Being Severable, see FIRE INSURANCE, 19 Cyc. 674. Persons Who Must Join in Action on, see PARTIES, 30 Cyc. 106.)

**SEVERAL.** More than one;[40] more than two or not very many;[41] respective;[42]

**25.** Hume *v.* Gracy, 86 Tex. 671, 672, 27 S. W. 584, where it is said that the term is ordinarily applied to those who first come to a country either partially or wholly uninhabited, and who make their residence there.

**26.** Burleson *v.* Durham, 46 Tex. 152, 160.

**27.** Davis *v.* Young, 2 Dana (Ky.) 299, 312, where it is said: "The person was a 'settler' from the time he built his 'half-faced' camp, or erected his tent, provided he did it with the intention of remaining and living at that spot."

**Settlers on swamp and overflowed land** see McIntyre *v.* Sherwood, 82 Cal. 139, 143, 22 Pac. 937.

**28.** Gallagher *v.* McHugh, 85 Tex. 446, 447, 21 S. W. 1033, where it is held that this result is not reached by a decision of an appellate court reversing the judgment and remanding the cause.

**29.** Yazoo, etc., R. Co. *v.* Williams, 87 Miss. 344, 353, 39 So. 489, where the term is said to imply an unwarranted attack.

**30.** Lloyd *v.* Trimlestown, 4 Sim. 296, 302, 6 Eng. Ch. 296, 58 Eng. Reprint 111.

**31.** U. S. *v.* Brown, 6 Utah 115, 118, 21 Pac. 461.

**The duty of "A Seventy"** was to teach and preach the doctrines of the church. U. S. *v.* Brown, 6 Utah 115, 118, 21 Pac. 461.

**32.** Norrington *v.* Wright, 5 Fed. 768, 771.

**33.** Sterling *v.* Gregory, 149 Cal. 117, 120, 85 Pac. 305; Packard *v.* Byrd, 73 S. C. 1, 6, 51 S. E. 678, 6 L. R. A. N. S. 547.

**34.** Bradford *v.* Montgomery Furniture Co., 115 Tenn. 610, 627, 92 S. W. 1104.

**35.** Weil *v.* Stone, 33 Ind. App. 112, 69 N. E. 698, 700, 104 Am. St. Rep. 243.

**36.** Clay Commercial Tel. Co. *v.* Root, 1 Pa. Cas. 485, 486, 4 Atl. 828.

**37.** Osgood *v.* Bauder, 75 Iowa 550, 555, 39 N. W. 887, 1 L. R. A. 655; Ming *v.* Corbin, 142 N. Y. 334, 340, 37 N. E. 105; Dowley *v.* Schiffer, 13 N. Y. Suppl. 552, 553.

**38.** Johnson *v.* Union Switch, etc., Co., 42 N. Y. St. 337, 343.

**39.** Barlow Mfg. Co. *v.* Stone, 200 Mass. 158, 160, 86 N. E. 306.

**40.** U. S. *v.* Durkee, 25 Fed. Cas. No. 15,008, where it is said: "It cannot mean 'separate.'"

**41.** Einstein *v.* Marshall, 58 Ala. 153, 156, 25 Am. Rep. 729; The North Star, 108 Fed. 436, 441.

**42.** Brown *v.* Hawkins, 26 R. I. 400, 59 Atl. 78, 79. But see Colton *v.* Fox, 67 N. Y. 348, 352.

each particular, or a small number, singly taken;[43] synonymous with MANY,[44] *q. v.*, and with VARIOUS, *q. v.*; DIVERS, *q. v.*; or SUNDRY,[45] *q. v.* (Several: Commissioners, see DEPOSITIONS, 13 Cyc. 850. Contract, see CONTRACTS, 9 Cyc. 651. Execution, see EXECUTIONS, 17 Cyc. 1013. Fishery, see SEVERAL FISHERY, *post*, this page. Liability of — Party to Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 653, 8 Cyc. 92; Party to Contract, see CONTRACTS, 9 Cyc. 651; Stock-Holder, see CORPORATIONS, 10 Cyc. 649. Maker, see COMMERCIAL PAPER, 7 Cyc. 653.)

**SEVERAL CONTRACTS.** See JOINT AND SEVERAL CONTRACTS, 23 Cyc. 463; and, generally, CONTRACTS, 9 Cyc. 227.

**SEVERAL COUNT.** See *ante*, this page, note 45.

**SEVERAL COVENANT.** See *ante*, this page, note 45.

**SEVERAL FISHERY.** A private exclusive right of fishing in a navigable river or arm of the sea;[46] the right of fishing exclusive of all others in a particular place;[47] the exclusive right of fishing which is derived from the ownership of the soil;[48] the exclusive right to fish in one's own waters.[49] (See, generally, FISH AND GAME, 19 Cyc. 988.)

**SEVERAL LIABILITY.** See COMMERCIAL PAPER, 7 Cyc. 653, 8 Cyc. 92; CONTRACTS, 9 Cyc. 651; TORTS.

**SEVERALLY.** Respectively;[50] distinctly, separately or apart from others.[51] (See SEVERAL, *ante*, p. 1446.)

**43.** Webster Dict. [*quoted* in Lauderdale County *v.* Fargason, 7 Lea (Tenn.) 153, 168].

**44.** Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140.

**45.** Strickland *v.* Harger, 16 Hun (N. Y.) 465, 467.

Construed as "all" in a will see Outcalt *v.* Outcalt, 42 N. J. Eq. 500, 501, 8 Atl. 532. But see Strickland *v.* Harger, 16 Hun (N. Y.) 465, 467.

"Several actions."— Where a separate and distinct action is brought against each of two or more persons who are all liable to the plaintiff in respect to the same subject-matter. Black L. Dict. See, generally, CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 612.

"Several counts."— Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same action, subject to certain rules which the law prescribes. Black L. Dict. [*citing* Wharton L. Lex.]. See CRIMINAL LAW, 12 Cyc. 692; PLEADING, 31 Cyc. 112, 142.

"Several covenant" is a covenant by two or more, separately; a covenant made so as to bind the parties severally or individually. Black L. Dict. See, generally, COVENANTS, 11 Cyc. 1055.

"Several current funds," in an act providing for depositing of state and county funds in banks, were employed with reference to the various designations or divisions of the public moneys of the state. State *v.* Bartley, 39 Nebr. 353, 359, 58 N. W. 172, 23 L. R. A. 67.

"Several defendants," in N. Y. Code, § 5096, refers to joint defendants and not to cases of several liability. North Star Boot, etc., Co. *v.* Stebbins, 3 S. D. 540, 547, 54 N. W. 593.

"Several demises."— In ejectment, it was formerly customary, in case there was any doubt as to legal estate being in plaintiff, to insert in the declaration several demises from as many different persons. Black L. Dict. See, generally, EJECTMENT, 15 Cyc. 97.

"Several inheritance" is an inheritance conveyed so as to descend to two persons severally by moieties, etc. Black L. Dict. See INHERITANCE, 22 Cyc. 722; and, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 34.

"Several issues."— This occurs where there is more than one issue involved in a case. Black L. Dict. [*citing* 3 Stephen Comm. 560]. See ISSUE, 23 Cyc. 368.

"Several tail" is an entail severally to two. Black L. Dict. [*citing* Cowell], where it is said that it is as if land is given to two men and their wives, and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety and the issue of the other the other moiety. See, generally, ESTATES, 16 Cyc. 608.

"Several tenancy" is a tenancy which is separate and not held jointly with another person. Black L. Dict. See, generally, JOINT TENANCY, 23 Cyc. 482.

**46.** Reg. *v.* Robertson, 6 Can. Sup. Ct. 52, 67, where it is said: "But whether it must be accompanied with ownership in the soil, in that the authorities differ."

**47.** Holford *v.* Bailey, 13 Q. B. 426, 445, 13 Jur. 278, 18 L. J. Q. B. 109, 66 E. C. L. 426.

**48.** Freary *v.* Cooke, 14 Mass. 488, 489; Brookhaven *v.* Strong, 60 N. Y. 56, 65.

**49.** Hardin *v.* Jordan, 140 U. S. 371, 389, 11 S. Ct. 808, 838, 35 L. ed. 428.

Distinguished from "free or common fishery" see Melvin *v.* Whiting, 7 Pick. (Mass.) 79, 81; Freary *v.* Cooke, 14 Mass. 488, 489.

**50.** Presque Isle County *v.* Thompson, 61 Fed. 914, 926, 10 C. C. A. 154.

**51.** State Nat. Bank *v.* Reilly, 124 Ill. 464, 471, 14 N. E. 657.

In a note the legal effect of "severally" binds each of the signers. Bradlee *v.* Boston Glass Mfg. Co., 16 Pick. (Mass.) 347, 351.

"Severally liable," when applied to a number of persons usually implies that each one

**SEVERALTY.** A technical word applied to tenants meaning a sole, separate, and exclusive dominion.[52] (See, generally, FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1142.)

**SEVERANCE.** In pleading, the separation by defendants in their pleas; the adoption by several defendants of separate pleas instead of joining in the same plea. In estates, the destruction of any one of the joint unities of a joint tenancy. The term is also used to signify the cutting of crops or the separating of anything from the realty.[53] (Severance: As to Parties on Assessment of Damages — In Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 946; In Verdict in Civil Action, see TRIAL. Effect of Severance as to Parties of Record Concluded by Judgment, see JUDGMENTS, 23 Cyc. 1243. Of Actions, see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 611. Of Contracts, see CONTRACTS, 9 Cyc. 706. Of Crops, see CROPS, 12 Cyc. 981. Of Easement and Transfer of Right, see EASEMENTS, 14 Cyc. 1185. Of Ecclesiastic Connections, see RELIGIOUS SOCIETIES, 34 Cyc. 1167. Of Fixture, see FIXTURES, 19 Cyc. 1069. Of Issue For Separate Trial, see CRIMINAL LAW, 12 Cyc. 505; TRIAL. Of Joint Tenancy, see JOINT TENANCY, 23 Cyc. 487. Of Minerals, Effect of Conveyance Apart From the Land, see MINES AND MINERALS, 27 Cyc. 687. Of Parties in Action on Administrator's Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1301. Of Suits in Admiralty, see ADMIRALTY, 1 Cyc. 850. Of Timber From Land, see LOGGING, 25 Cyc. 1555. On Trial of Joint Defendants, see CRIMINAL LAW, 12 Cyc. 505. Practice on Appeal by One Party From Judgment Against Others, see APPEAL AND ERROR, 2 Cyc. 758.)

**SEWAGE** or **SEWERAGE.** Any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals;[54] a substance which consists of human excrements and refuse animal and vegetable matter, which constantly and continuously generates gases;[55] excreted, as well as waste, refuse, or foul matter carried off in sewers and drains, whether open or closed, by water flowing therein;[56] something noxious, corrupt, and impure;[57] the liquid and solid matter flowing from water-closets through the sewer and drain to the river;[58] the refuse and foul matter, solid or liquid, carried through the sewer by the water therein flowing;[59] the refuse and foul matter, solid or liquid, which a sewer carries off;[60] that which passes through a sewer;[61] the general drainage of a city or town by means of sewers.[62] (Sewage Discharge of a Nuisance, see NUISANCE, 29 Cyc. 1171. Injunction to Prevent Discharge of, see INJUNCTIONS, 22 Cyc. 785. Taking Property For Discharge of by Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 660.)

**SEWER.** A closed or covered waterway[63] for conveying and discharging filth, refuse and foul matter, liquid or solid;[64] a large and generally, though not always, underground passage (or conduit) for fluid and feculent matter from a

is liable alone. But when the whole of N. Y. Code, § 136, is considered they are understood as referring to all the defendants served the same as if they were one person. Pruyn *v.* Black, 21 N. Y. 300, 303.

52. Funk *v.* Haldeman, 53 Pa. St. 229, 246.

53. Black L. Dict. [*citing* Stephens Pl. 257; Brown L. Dict.].

54. Com. *v.* Emmers, 221 Pa. St. 298, 301, 70 Atl. 762 [*affirming* 33 Pa. Super. Ct. 151, 155].

55. Fuchs *v.* St. Louis, 167 Mo. 620, 636, 67 S. W. 610, 57 L. R. A. 136.

56. Durham *v.* Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. N. S. 1163.

57. Morgan *v.* Danbury, 67 Conn. 484, 495, 35 Atl. 499.

58. Durham *v.* Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. N. S. 1163.

59. Winchell *v.* Waukesha, 110 Wis. 101, 112, 85 N. W. 668, 84 Am. St. Rep. 902.

60. Morgan *v.* Danbury, 67 Conn. 484, 494, 35 Atl. 499.

61. Century Dict.; Webster Int. Dict. [both *quoted* in Morgan *v.* Danbury, 67 Conn. 484, 494, 35 Atl. 499].

62. Webster Dict. [*quoted* in Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330].

**Includes all kinds of drainage or water discharge** see Aldrich *v.* Paine, 106 Iowa 461, 467, 76 N. W. 812.

**"Drainage" distinguished** see Wetmore *v.* Fiske, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629.

63. State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 124, 35 Atl. 835.

64. Durham *v.* Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. N. S. 1163.

house or houses to some other locality, usually the place of discharge;[65] the underground canal or passage by means of which cities are drained and the filth or refuse liquids are carried to the sea, river or other places of reception;[66] a drain or passage to convey or carry off water and filth underground;[67] a drain or passage to carry off water underground; a subterranean canal, particularly in cities;[68] an underground structure for conducting the water of a natural stream;[69] a fresh water trench, artificially made, encompassed with banks on both sides to carry surface water into the sea;[70] a fresh water trench, compassed in on both sides with a bank, a small current or little river.[71] (Sewer: As an Internal Improvement, see WORDS AND PHRASES, 22 Cyc. 1590. Assessment and Special Taxes For, see MUNICIPAL CORPORATIONS, 28 Cyc. 1113. Damages From Construction or Improvement of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1315. Defects or Obstructions, see MUNICIPAL CORPORATIONS, 28 Cyc. 1316. Delegation of Legislative Power to Establish, see CONSTITUTIONAL LAW, 8 Cyc. 839. Department of Sewers, see MUNICIPAL CORPORATIONS, 28 Cyc. 556. Description of in Ordinance or Resolution For Improvement Thereof, see MUNICIPAL CORPORATIONS, 28 Cyc. 1003. Enforcement of Right of Property-Owner to Connection With, see MANDAMUS, 26 Cyc. 302. Legislative Regulations of Connections, see CONSTITUTIONAL LAW, 8 Cyc. 1123 note 46. Location of Property Liable to Assessment For, see MUNICIPAL CORPORATIONS, 28 Cyc. 838. Necessity of Notice of Proposed Improve-

65. Durham *v.* Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. N. S. 1163.

66. Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330.

67. Webster Dict. [*quoted* in Drexel *v.* Lake, 127 Ill. 54, 57, 20 N. E. 38; Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330; Aldrich *v.* Paine, 106 Iowa 461, 465, 76 N. W. 812; Wetmore *v.* Fiske, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629].

68. Clark *v.* Peckham, 9 R. I. 455, 467; Webster Dict. [*quoted* in Aldrich *v.* Paine, 106 Iowa 461, 466, 76 N. W. 812; Fuchs *v.* St. Louis, 167 Mo. 620, 636, 67 S. W. 610, 57 L. R. A. 136; Hanscom *v.* Omaha, 11 Nebr. 37, 43, 7 N. W. 739; Gale *v.* Dover, 68 N. H. 403, 44 Atl. 535].

69. Aldrich *v.* Paine, 106 Iowa 461, 466, 76 N. W. 812.

70. Callis Sewers 80; 1 Crabb Real Prop. § 113; Woolrych Law Sewers 1 [all *quoted* in Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330].

71. Callis Sewers 80 [*quoted* in Wetmore *v.* Fiske, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629].

**"Culvert" distinguished** see Gale *v.* Dover, 68 N. H. 403, 44 Atl. 535.

**"Ditch" distinguished** see State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 124, 35 Atl. 835.

**"Ditch" or "drain"** as terms of similar meaning see Aldrich *v.* Paine, 106 Iowa 461, 466, 76 N. W. 812.

**"Ditch" or "drain" distinguished** see Durham *v.* Eno Cotton Mills, 144 N. C. 705, 708, 57 S. E. 465, 11 L. R. A. N. S. 1163.

**"Drain" distinguished** see St. Matthew *v.* London School Bd., [1898] A. C. 190, 194, 62 J. P. 532, 67 L. J. Q. B. 234, 77 L. T. Rep. N. S. 635, 46 Wkly. Rep. 353.

**Drain of every description** becoming a sewer where two or more houses drain into it see Wood *v.* Ealing Tenants, [1907] 2 K. B. 390, 71 J. P. 456, 76 L. J. K. B. 764, 5 Loc. Gov. 1055, 97 L. T. Rep. N. S. 520; Haedricke *v.* Frien Barnet Urban Dist. Council, [1904] 2 K. B. 807, 820, 68 J. P. 473, 73 L. J. K. B. 976, 20 T. L. R. 567; Silles *v.* Fulham, [1903] 1 K. B. 829, 831, 67 J. P. 273, 72 L. J. K. B. 397, 1 Loc. Gov. 643, 88 L. T. Rep. N. S. 753, 19 T. L. R. 398, 51 Wkly. Rep. 598; Sykes *v.* Sowerby Urban Dist. Council, [1900] 1 Q. B. 584, 588, 64 J. P. 340, 69 L. J. Q. B. 464, 82 L. T. Rep. N. S. 177, 16 T. L. R. 225; Geen *v.* Vestry of St. Mary, [1898] 2 Q. B. 1, 5, 62 J. P. 565, 67 L. J. Q. B. 557, 46 Wkly. Rep. 624; Pemsel *v.* Tucker, [1907] 2 Ch. 191, 200, 71 J. P. 547, 76 L. J. Ch. 621, 97 L. T. Rep. N. S. 86; Wilkinson *v.* Llandaff, [1903] 2 Ch. 695, 702, 68 J. P. 1, 73 L. J. Ch. 8, 2 Loc. Gov. 174, 89 L. T. Rep. N. S. 462, 20 T. L. R. 30, 52 Wkly. Rep. 50; Hedley *v.* Webb, [1901] 2 Ch. 126, 130, 65 J. P. 425, 70 L. J. Ch. 663, 84 L. T. Rep. N. S. 526, 17 T. L. R. 393; London, etc., R. Co. *v.* Runcorn Rural Dist. Council, [1898] 1 Ch. 561, 562, 62 J. P. 643, 67 L. J. Ch. 324, 78 L. T. Rep. N. S. 343, 14 T. L. R. 331, 46 Wkly. Rep. 484.

**"Wall" or "bank"** may be included in the meaning. Poplar Dist. *v.* Knight, E. B. & E. 408, 429, 96 E. C. L. 408.

**Stream or watercourse becoming a sewer** see West Riding of Yorkshire *v.* Gaunt, 19 T. L. R. 140, 141.

**Manhole held to be part of sewer** see King's College *v.* Uxbridge, [1901] 2 Ch. 768, 773, 70 L. J. Ch. 844, 85 L. T. Rep. N. S. 303, 17 T. L. R. 762.

**Pipe a sewer, when** see Thompson *v.* Eccles Corp., [1904] 2 K. B. 1, 6, 68 J. P. 315, 73 L. J. K. B. 497, 90 L. T. Rep. N. S. 507; Croysdale *v.* Sunbury-on-Thames, [1898] 2 Ch. 515, 519, 62 J. P. 520, 67 L. J. Ch. 585, 79 L. T. Rep. N. S. 26, 46 Wkly. Rep. 667; Wood Green Urban Council *v.* Joseph, 74 L. J. K. B. 954, 957, 3 Loc. Gov. 1147, 93 L. T. Rep. N. S. 434; Bullock *v.* Reeve, 70 L. J. K. B. 42, 44, 84 L. T. Rep. N. S. 55, 49 Wkly. Rep. 93.

ment, see MUNICIPAL CORPORATIONS, 28 Cyc. 979. Petition of Property-Owners as Condition Precedent to Exercise of Power of City to Construct, see MUNICIPAL CORPORATIONS, 28 Cyc. 957. Pollution of Watercourse by, see WATERS. Powers of City as to Construction or Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 949. Taking Private Property For, see EMINENT DOMAIN, 15 Cyc. 594. Use and Regulation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 919. See also DRAINS, 14 Cyc. 1018.)

**SEWERAGE.** See SEWAGE.

**SEWING MACHINE.** A machine for stitching fabrics operated by foot or other power.[72] (Sewing Machine: Dealer in or Agent of as Subject of License or Fee, see CONSTITUTIONAL LAW, 8 Cyc. 1068 note 9; LICENSES, 25 Cyc. 626. Seller of, Whether Peddler, see HAWKERS AND PEDDLERS, 21 Cyc. 372 note 48. Sewing-Machine Contract as Basis of Confession of Judgment by Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1491 note 18. Whether a Family Expense, see HUSBAND AND WIFE, 21 Cyc. 1232. Whether a Necessary, see HUSBAND AND WIFE, 21 Cyc. 1219 note 21.)

**SEWING-MACHINE COMPANY.** A company which manufactures sewing machines.[73]

**SEX.** The distinction between male and female; or that property or character by which an animal is male or female.[74] (Sex: Averment as to in Indictment or Information, see LEWDNESS, 25 Cyc. 213. Denial of Admission to Colleges or Universities on Account of, see COLLEGES AND UNIVERSITIES, 7 Cyc. 28 note 27. Eligibility of Woman as Administrator — Generally, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 85, 96; To Hold Office, see OFFICERS, 29 Cyc. 1377. Of Child as Fixing Right to Custody or Control, see PARENT AND CHILD, 29 Cyc. 1595. Personal Discrimination Against on Account of, see CONSTITUTIONAL LAW, 8 Cyc. 1049, 1075. Qualification For Voter, see ELECTIONS, 15 Cyc. 298. Woman as Citizen, see CITIZENS, 7 Cyc. 135.)

**SEXTON.** A person who has the care of a house of public worship, and who discharges certain duties connected therewith, which differ more or less, according to the requirements or practice of the religious sect to which the congregation belongs for whom he acts;[75] the keeper of the holy things belonging to the divine worship.[76]

**SEXUAL INTERCOURSE.** The actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter.[77] (Sexual Intercourse: In General, see ADULTERY, 1 Cyc. 950; FORNICATION, 19 Cyc. 1433; INCEST, 22 Cyc. 42; LEWDNESS, 25 Cyc. 209; PROSTITUTION, 32 Cyc. 731; RAPE, 33 Cyc. 1412; SEDUCTION. Abduction For Purpose of, see ABDUCTION, 1 Cyc. 152. Action For Criminal Conversation, see HUSBAND AND WIFE, 21 Cyc. 1626. Averments as to Imputations in Declaration, Complaint, or Petition For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 442. Proof of in Action For Alienation of Affections, see HUSBAND AND WIFE, 21 Cyc. 1624.)

**S. F.** An abbreviation of scire facias.[78] (See, generally, SCIRE FACIAS, *ante*, p. 1147.)

**SHACK, COMMON OF.** See COMMON LANDS, 8 Cyc. 350.

**SHACKERS.** A term applied to hogs fed upon mast, such as beech-nuts and acorns.[79]

**SHAFT.** A handle or haft; a shaven or smoothed rod;[80] an axle, mandrel, arbor, or other long and usually cylindrical bar especially if rotating and subject

72. Century Dict.

73. Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 118, 25 S. E. 249, 35 L. R. A. 497.

74. Black L. Dict. [*citing* Webster Dict.].

75. Stern *v.* Congregation Schaare Rachmin, 2 Daly (N. Y.) 415, 417.

76. 3 Burns Eccl. L. (6th London ed.) [*quoted* in Stern *v.* Congregation Schaare Rachmin, 2 Daly (N. Y.) 415, 417].

77. State *v.* Frazier, 54 Kan. 719, 725, 39 Pac. 819.

78. Grattan L. Gloss.

79. Bartlett *v.* Hoppock, 34 N. Y. 118, 119, 88 Am. Dec. 428.

80. Peterson *v.* Modern Brotherhood, 125 Iowa 562, 565, 101 N. W. 289, 67 L. R. A. 631, where it is said: "The medical profession are agreed that the shaft of a bone

to torsional stress; a lengthy shafting;[81] any vertical opening through the strata which is or may be used for purposes of ventilation or escapement, or for the hoisting or lowering of men and material in connection with the mining of coal.[82] (Shaft: Discovery, see MINES AND MINERALS, 27 Cyc. 557. Duty of Master as to, see MASTER AND SERVANT, 26 Cyc. 1116. Liability of Owner For Injuries to Children For Negligently Guarding, see NEGLIGENCE, 29 Cyc. 464. See also SHAFTING.)

**SHAFTING.** The system of shafts which connects machinery with the prime mover, and through which motion is communicated to the former by the latter;[83] a system of stout rods or shafts, usually cylindrical, mounted in bearings, and serving to carry pulleys, gear, wheels, or the like, for communicating power;[84] a system of connecting shafts for communicating motion.[85] (See SHAFT.)

**SHALL.** In common parlance, a term which, it is said, has always a compulsory meaning,[86] and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future;[87] but it may be used in the preterit present sense of "must," of which it is a synonym.[88] As used in statutes, the word is generally mandatory;[89] although it is not always imperative but may be consistent with an exercise of discre-

is something entirely distinct from the malleolus process."

81. Standard Dict. [*quoted* in Cole *v.* North American Lead Co., 130 Mo. App. 253, 256, 112 S. W. 753].

82. Cox *v.* Mt. Olive, etc., Coal Co., 127 Ill. App. 24, 25.

83. Century Dict. [*quoted* in Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 378, 112 N. W. 443].

84. Standard Dict. [*quoted* in Cole *v.* North American Lead Co., 130 Mo. App. 253, 256, 112 S. W. 753; Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 377, 112 N. W. 443].

85. Webster Dict. [*quoted* in Cole *v.* North American Lead Co., 130 Mo. App. 253, 256, 112 S. W. 753].

"**'Flexible shafting'**" is a device made up of advancing spiral wire coils, serving to transmit rotary motion around corners, etc., to portable machinery. Van de Bogart *v.* Marinette, etc., Paper Co., 132 Wis. 367, 378, 112 N. W. 443.

86. Farmers', etc., Bank *v.* Johnson, 3 Humphr. (Tenn.) 26, 28.

87. Jones *v.* Stockgrowers' Nat. Bank, 17 Colo. App. 79, 67 Pac. 177, 179. See also Forbes *v.* State, 2 Pennew. (Del.) 197, 203, 43 Atl. 626; Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294, 304.

"**In the early English,** and hence in our English Bible, 'shall' is an auxiliary, mainly used in all persons to express simple futurity." Webster Dict. [*quoted* in Jones *v.* Stockgrowers' Nat. Bank, 17 Colo. App. 79, 67 Pac. 177, 179].

As referring to future time see Meadowcroft *v.* People, 163 Ill. 56, 78, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84, 88; Stisser *v.* New York Cent., etc., R. Co., 32 N. Y. App. Div. 98, 101, 52 N. Y. Suppl. 861; *In re* Birdsall, 22 Misc. (N. Y.) 180, 196, 49 N. Y. Suppl. 450; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 374, 4 L. ed. 97; National Sewing Mach. Co. *v.* Wilcox, etc., Sewing Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654; *In re* Gorringe, [1906] 2 Ch. 341, 355, 75 L. J. Ch. 687, 95 L. T. Rep. N. S. 574.

It "**shall have been**" is the future perfect tense which represents an event as completed in a future time. State *v.* Newark, 40 N. J. L. 92, 96; People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 417, 110 N. Y. Suppl. 769; Dewart *v.* Purdy, 29 Pa. St. 113, 117.

88. Blake *v.* Pine Mountain Iron, etc., Co., 76 Fed. 624, 656, 22 C. C. A. 430 [*citing* Century Dict.]. See also Reg. *v.* Christchurch, 12 Q. B. 149, 154, 64 E. C. L. 149.

89. State *v.* Talty, 166 Mo. 529, 559, 66 S. W. 361; Holmes *v.* Royal Loan Assoc., 128 Mo. App. 329, 336, 107 S. W. 1005; Mau *v.* Stoner, 14 Wyo. 183, 83 Pac. 218, 219; Reg. *v.* Buchanan, 1 Can. Cr. Cas. 442, 447.

**Imperative or mandatory sense** see Coleman *v.* Eutaw, 157 Ala. 327, 340, 47 So. 703; *Ex p.* Simonton, 9 Port. (Ala.) 390, 396, 33 Am. Dec. 320; State *v.* Johnson, 26 Ark. 281, 286; Madderom *v.* Chicago, 194 Ill. 572, 573, 62 N. E. 846; Clarke *v.* Chicago, 185 Ill. 354, 364, 57 N. E. 15; Smith *v.* Noe, 30 Ind. 117, 125; State *v.* Vicknair, 118 La. 963, 967, 43 So. 635; Tyson *v.* Hamer, 2 How. (Miss.) 669, 671; Hoole *v.* Kinkead, 16 Nev. 217, 220; Cooke *v.* State Nat. Bank, 52 N. Y. 96, 106, 11 Am. Rep. 667; People *v.* Brooklyn, 39 N. Y. 81, 83; Greater New York Athletic Club *v.* Wurster, 19 Misc. (N. Y.) 443, 448, 43 N. Y. Suppl. 703; Matter of O'Rourke, 9 Misc. (N. Y.) 564, 566, 30 N. Y. Suppl. 375; *In re* Rochester, 10 N. Y. Suppl. 436, 437; Rogers *v.* Wing, 5 How. Pr. (N. Y.) 50; Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 14, 101 S. W. 770; Haseltine *v.* Simpson, 61 Wis. 427, 430, 21 N. W. 299, 302; State *v.* Dousman, 28 Wis. 541, 546; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 329, 4 L. ed. 97; *In re* Burton, [1903] 2 K. B. 300, 302, 72 L. J. K. B. 752, 89 L. T. Rep. N. S. 549, 19 T. L. R. 581, 51 Wkly. Rep. 668; Atty.-Gen. *v.* Lock, 3 Atk. 164, 166, 26 Eng. Reprint 897.

**Construed as "must"** see People *v.* St. Lawrence County, 90 Hun (N. Y.) 568, 577, 36

tion.[90] Thus it may be construed to mean "may" when no right or benefit to any one depends on its imperative use;[91] when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction;[92] or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government;[93] and it also means "may" when used by a legislature in a grant of authority to a court.[94] It is often used in remedial statutes in a general sense including both past and future, and should be so considered when a more restricted interpretation is not required.[95] (See MAY, 26 Cyc. 1590; MIGHT, 27 Cyc. 487; MUST, 28 Cyc. 1780.)

N. Y. Suppl. 40; Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 14, 101 S. W. 770; West Wisconsin R. Co. *v.* Foley, 94 U. S. 100, 103, 24 L. ed. 71; Madison *v.* Daley, 58 Fed. 751, 753.

**Used in the sense of "will"** see U. S. *v.* Boyd, 24 Fed. 692, 695.

**90.** Matter of O'Hara, 40 Misc. (N. Y.) 355, 359, 82 N. Y. Suppl. 293. See also State *v.* Straight, 94 Minn. 384, 391, 102 N. W. 913.

**91.** People *v.* Chicago Sanitary Dist., 184 Ill. 597, 604, 56 N. E. 953.

**92.** Montgomery *v.* Henry, 144 Ala. 629, 634, 39 So. 507, 1 L. R. A. N. S. 656; Wheeler *v.* Chicago, 24 Ill. 105, 107, 76 Am. Dec. 736; Helena First Nat. Bank *v.* Neill, 13 Mont. 377, 382, 34 Pac. 180. See also Madison *v.* Daley, 58 Fed. 751, 753.

**93.** City Sewage Utilization Co. *v.* Davis, 8 Phila. (Pa.) 625, 627.

**94.** Anderson's Appeal, 215 Pa. St. 119, 122, 64 Atl. 443; Becker *v.* Lebanon, etc., St. R. Co., 188 Pa. St. 484, 496, 41 Atl. 612.

**Construed to mean "may"** see Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 361, 9 Pac. 309; Cooke *v.* Spears, 2 Cal. 409, 412, 56 Am. Dec. 348; Manufacturers Exhibition Bldg. Co. *v.* Landay, 219 Ill. 168, 174, 76 N. E. 146; Canal Com'rs *v.* Chicago Sanitary Dist., 184 Ill. 597, 604, 56 N. E. 953; Whipple *v.* Eddy, 161 Ill. 114, 118, 43 N. E. 789; Beasley *v.* People, 89 Ill. 571, 576; Burns *v.* Henderson, 20 Ill. 264, 266; Boyer *v.* Onion, 108 Ill. App. 612, 615; Seneca First Nat. Bank *v.* Lyman, 59 Kan. 410, 413, 53 Pac. 125; Dorchester County Com'rs *v.* Meekins, 50 Md. 28, 45; Suburban Light, etc., Co. *v.* Boston, 153 Mass. 200, 202, 26 N. E. 447, 10 L. R. A. 497; Cason *v.* Cason, 31 Miss. 578, 592; State *v.* Douglass County, 27 Nev. 469, 472, 77 Pac. 984; Buch *v.* Danzenbacker, 37 N. J. L. 359, 361; People *v.* Nusbaum, 32 Misc. (N. Y.) 1, 8, 66 N. Y. Suppl. 129; Matter of Lent, 16 Misc. (N. Y.) 606, 608, 40 N. Y. Suppl. 570; State *v.* West, 3 Ohio St. 509, 511; Anderson's Appeal, 215 Pa. St. 119, 122, 64 Atl. 443; Becker *v.* Lebanon, etc., R. Co., 188 Pa. St. 484, 496, 41 Atl. 612; Com. *v.* Provident L., etc., Co., 9 Pa. Dist. 479, 482; Sherrod *v.* Hughes, 110 Tenn. 311, 315, 75 S. W. 717; Farmers', etc., Bank *v.* Johnson, 3 Humphr. (Tenn.) 26, 28; Downer *v.* Hazen, 10 Vt. 418, 419; Clancy *v.* McElroy, 30 Wash. 567, 568, 70 Pac. 1095; Cairo, etc., R. Co. *v.* Hecht, 95 U. S. 168, 170, 24 L. ed. 423; Madison *v.* Daley, 58 Fed. 751, 753; U. S. *v.* Boyd, 24 Fed. 692, 695.

**95.** Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 145, 90 N. W. 378. See also Plum *v.* Fond du Lac, 51 Wis. 393, 396, 8 N. W. 283.

**Used in connection with other words.—** "He shall pay" see Ebert *v.* Loewenstein, 42 N. Y. App. Div. 109, 111, 58 N. Y. Suppl. 889. "Shall' and 'will'" see Thomas *v.* Courtnay, 1 B. & Ald. 1, 8. "Shall be" see *In re* Strawbridge, 39 Ala. 367, 375; Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 492, 11 Pac. 3; Grimes *v.* Bryne, 2 Minn. 89, 95; Alden *v.* Newark, 40 N. J. L. 92, 96; Com. *v.* Bradley, 210 Pa. St. 66, 69, 59 Atl. 433; Clapp *v.* Sherman, 14 R. I. 299, 301; National Sewing Mach. Co. *v.* Wilcox, etc., Sewing Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654; Doe *v.* Page, 5 Q. B. 767, 772, Dav. & M. 601, 8 Jur. 999, 13 L. J. Q. B. 153, 48 E. C. L. 767. "'Shall' be allowed" see *Ex p.* Jordan, 94 U. S. 248, 251, 24 L. ed. 123. "Shall be and are hereby granted" see Shankland *v.* McNamara, 87 Cal. 371, 375, 26 Pac. 345; Wright *v.* Roseberry, 121 U. S. 488, 496, 7 S. Ct. 985, 30 L. ed. 1039. "Shall be born" see Gibbons *v.* Gibbons, 6 App. Cas. 471, 480, 50 L. J. P. C. 45, 45 L. T. Rep. N. S. 177. "'Shall be brought'" see Perkins *v.* Perkins, 7 Conn. 558, 563, 18 Am. Dec. 120. "Shall become an inmate" see Com. *v.* Dracut, 8 Gray (Mass.) 455, 458. "'Shall be completed'" see York, etc., R. Co. *v.* Reg., 1 E. & B. 858, 863, 17 Jur. 690, 22 L. J. Q. B. 225, 1 Wkly. Rep. 358, 72 E. C. L. 858. "Shall be contracted" see Doland *v.* Clark, 143 Cal. 176, 183, 76 Pac. 958. "Shall be dropped" see Westchester Golf Club *v.* Pinkney, 43 Misc. (N. Y.) 338, 341, 87 N. Y. Suppl. 153. "Shall be filled" see People *v.* Babcock, 123 Cal. 307, 311, 55 Pac. 1017. "Shall be fixed" see Com. *v.* Mathues, 210 Pa. St. 372, 394, 59 Atl. 961. "'Shall be lawful'" see *Ex p.* Wittington, 34 Ark. 394, 398; Clark *v.* Elizabeth, 61 N. J. L. 565, 581, 40 Atl. 616, 737; Williamson *v.* Williamson, 1 Johns. Ch. (N. Y.) 488, 491; Com. *v.* Marshall, 3 Wkly. Notes Cas. (Pa.) 182, 185; Downer *v.* Hazen, 10 Vt. 418, 419; Harrison *v.* Wissler, 98 Va. 597, 600, 36 S. E. 982; Mason *v.* Fearson, 9 How. (U. S.) 248, 259, 13 L. ed. 125; *Ex p.* Dyson, 8 Fed. Cas. No. 4,228; Reg. *v.* Oxford, 4 Q. B. D. 245, 247, 48 L. J. Q. B. 609, 41 L. T. Rep. N. S. 122; Great Western R. Co. *v.* Reg., 1 E. & B. 874, 877, 72 E. C. L. 874. "Shall be lawful for the court" see Davison *v.* Davison, 17 N. J. L. 169, 171. "Shall be secured" see Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 562, 20 S. Ct. 477, 44 L. ed. 587. "Shall be

**SHAM.** False, counterfeit or pretended;[96] synonymous with FALSE,[97] *q. v.* (Sham: Answer — Generally, see PLEADING, 31 Cyc. 623; In Foreclosure Suit, see MORTGAGES, 27 Cyc. 1603. Pleading, see PLEADING, 31 Cyc. 623.)

**SHAM PLEADING.** See PLEADING, 31 Cyc. 623.

**SHAPE.** A technical word applied to certain standard products of structural steel material — e. g., tees, angle bars, bulbs, etc.[98]

**SHARE.** A part or definite portion of a thing owned by a number of persons in common;[99] one of the parts into which a sum of money or other divisible thing may be divided.[1] (Share or Shares: In General, see STOCK OR SHARES OF CORPORATIONS. Agreement to Raise Crop On, see AGRICULTURE, 2 Cyc. 57 note 10; CROPS, 12 Cyc. 979. Construction in Will, see WILLS. Persons Entitled and Their Respective Shares, see DESCENT AND DISTRIBUTION, 14 Cyc. 34.)

**SHARE AND SHARE ALIKE.** See WILLS.

**SHAREHOLDER.** See STOCK-HOLDER.

**SHARE OF STOCK.** See CORPORATIONS, 10 Cyc. 1; STOCK OR SHARES OF.

**SHARP.** A mere relative term.[2]

**SHAVE.** To strip, to oppress, by extortion, to fleece;[3] to strip, to oppress by extortion, to pillage;[4] a term sometimes used to denote the buying of existing

submitted to the electors" see State *v.* Blaisdell, (N. D. 1909) 119 N. W. 360, 362. "Shall be vested" see Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 329, 4 L. ed. 97. "Shall die" see Murphy *v.* McKeon, 53 N. J. Eq. 406, 412, 32 Atl. 374. "Shall die in my lifetime" see *In re* Chapman, 32 Beav. 382, 384, 9 Jur. N. S. 657, 11 Wkly. Rep. 578, 55 Eng. Reprint 150. "Shall extend" see Citizens' St. R. Co. *v.* City R. Co., 56 Fed. 746, 747. "Shall go" see Williams *v.* Williams, 91 Ky. 547, 553, 16 S. W. 361, 13 Ky. L. Rep. 293; Middleton *v.* Middleton, 43 S. W. 677, 19 Ky. L. Rep. 1232. "Shall have a claim" see Mason *v.* Heyward, 5 Minn. 74, 77. "'Shall have become an habitual drunkard'" see Porritt *v.* Porritt, 16 Mich. 140. "Shall have been commenced" see Clark *v.* Kansas City, etc., R. Co., 219 Mo. 524, 535, 118 S. W. 40. "Shall have died" see *In re* Schedel, 73 Cal. 594, 598, 15 Pac. 297; Douglas *v.* James, 66 Vt. 21, 24, 28 Atl. 319, 44 Am. St. Rep. 817. "'Shall have' lawfully begotten, at the time of her death" see Den *v.* English, 17 N. J. L. 280, 290. "Shall have levied" see Norris *v.* Sullivan, 47 Conn. 474, 476; Whedon *v.* Gorham, 38 Conn. 408, 412. "Shall have power" see State *v.* Miller, 3 Ala. 343, 346. "Shall have received" see Johnes *v.* Beers, 57 Conn. 295, 304, 18 Atl. 100, 14 Am. St. Rep. 101. "Shall marry another person" see State *v.* Stewart, 194 Mo. 345, 356, 92 S. W. 878, 112 Am. St. Rep. 529. "Shall meet and act together" see Dunphy *v.* Ford, 2 Mont. 300, 301. "Shall not" see Parker *v.* U. S., 18 Fed. Cas. No. 10,751, 2 Wash. 361. "Shall not allow" see Crabtree *v.* Fern Spinning Co., 85 L. T. Rep. N. S. 549, 552, 18 T. L. R. 91, 50 Wkly. Rep. 167. "Shall not be admitted" see Haley *v.* Supreme Ct. of Honor, 139 Ill. App. 478, 486. "Shall not be changed" see Tyler *v.* St. Louis Southwestern R. Co., 99 Tex. 491, 500, 91 S. W. 1. "Shall not be lawful" see Chenango Bridge Co. *v.* Binghampton Bridge Co., 3 Wall. (U. S.) 51, 81, 18 L. ed. 137. "Shall not issue except" see Eddy *v.* Coldwell, 23 Oreg. 163, 171, 31 Pac. 475, 37 Am. St. Rep. 672. "Shall pay off or discharge" see Ezzard *v.* Bell, 100 Ga. 150, 155, 28 S. E. 28. "Shall remain ratified and confirmed" see Viterbo *v.* Friedlander, 120 U. S. 707, 726, 7 S. Ct. 962, 30 L. ed. 776; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 339, 10 L. ed. 481. "Shall vest in such issue" see Smith *v.* Jordan, 77 Conn. 469, 472, 59 Atl. 507. "When a suit shall be commenced" see Gomez *v.* Garr, 18 Wend. (N. Y.) 577. "Who shall be married" see Kelly *v.* Owen, 7 Wall. (U. S.) 496, 498, 19 L. ed. 283.

96. Seward *v.* Miller, 6 How. Pr. (N. Y.) 312, 313; Webster Dict. [*quoted* in Nichols *v.* Jones, 6 How. Pr. (N. Y.) 355, 356].

97. State *v.* Weber, 96 Minn. 422, 424, 105 N. W. 490, 113 Am. St. Rep. 630.

98. U. S. *v.* Buehne Steel Wool Co., 154 Fed. 93, 94.

Included in design see Heath *v.* Rollason, [1898] A. C. 499, 501, 67 L. J. Ch. 565, 79 L. T. Rep. N. S. 1, 14 T. L. R. 478.

99. Turner *v.* Balfour, 62 Conn. 89, 91, 25 Atl. 448.

1. De Nottebeck *v.* Astor, 13 N. Y. 98, 102.

"Share in net profits" is an interest in the profits as profits, and implies a participation in the profits and losses. Parker *v.* Pullman, 24 Misc. (N. Y.) 505, 507, 53 N. Y. Suppl. 839.

"Sharing of profits."— The sharing of gross returns with or without a common interest in property from which the returns come does not amount to "sharing of profits." Tyson *v.* Bryan, (Nebr. 1909) 120 N. W. 940, 942.

2. Austin Mfg. Co. *v.* American Wellworks, 121 Fed. 76, 79, 57 C. C. A. 330, 334, where it is said to be commonly applied in reference to the cutting edge of a knife or razor, to the tooth of a man or animal, or to the prow of a ship.

Handle of a pitchfork not a sharp dangerous weapon see Filkins *v.* People, 69 N. Y. 101, 102, 25 Am. Rep. 143.

3. Webster Dict. [*quoted* in Stone *v.* Cooper, 2 Den. (N. Y.) 293, 295].

4. Johnson Dict. [*quoted* in Stone *v.* Cooper, 2 Den. (N. Y.) 293, 295].

The term is sometimes used to denote the

notes, and other securities for money at a discount beyond the nominal amount of the debt and interest due or to become due on such notes or securities.[5] (See CORPORATIONS, 10 Cyc. 1289.)

**SHAWL.** An article of wearing apparel; a wrap which a woman wears when she goes out walking, driving, or traveling;[6] a cloth of wool, cotton, silk, or hair, used especially by women as a loose covering for the neck and shoulders.[7]

**SHAWNEE AND DELAWARE INDIANS.** A term used in a statute to refer to the tribes and not to individual members of those tribes of Indians.[8] (See, generally, INDIANS, 22 Cyc. 109.)

**SHEAVE.** A grooved wheel in a block, mast, yard, etc., on which a rope works; also as the wheel of a pulley.[9]

**SHED.** See BUILDING, 6 Cyc. 115.

**SHEEP.** A wether more than a year old.[10] (Sheep: Bailment of, see ANIMALS, 2 Cyc. 310. Fleece of, Whether Covered by Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1031 note 52. Killing of by Dog, see ANIMALS, 2 Cyc. 371 note 87. Pleading and Proof as to Description in Prosecution For Larceny, see LARCENY, 25 Cyc. 83. Raising or Grazing as Subject of License or Tax, see LICENSES, 25 Cyc. 615.)

**SHEEP WASH.** A preparation used to destroy the parasites, vermin, and cure the sores which affect the skin of sheep.[11]

**SHEER.** In nautical meaning, is a deviation from the line of the course in which a vessel should be steered, and though it may occur from causes unpreventable by the most skilful seamanship, it more frequently happens from an unsteady helmsman.[12]

**SHEET.** A broad piece of paper;[13] an article of bed furniture, composed of various substances, as linen, cotton, wool, singly or in combination.[14]

**SHELLEY'S CASE, RULE IN.** See RULE IN SHELLEY'S CASE, 34 Cyc. 1819.

**SHELL-FISH.** Fish covered with a shell;[15] any aquatic animal whose external covering consists of a shell, either testaceous, as in oysters, clams, and other mollusks, or crustaceous, as in lobsters or crabs.[16] (See, generally, FISH AND GAME, 19 Cyc. 995.)

act of obtaining property of another by oppression and extortion, that is, by taking an inequitable and unconscientious advantage of his situation to fleece or strip him of his property. Stone *v.* Cooper, 2 Den. (N. Y.) 293, 300.

5. Stone *v.* Cooper, 2 Den. (N. Y.) 293, 300.

In the Tennessee revenue statute of 1901 the word "shave" means simply the buying of notes, accounts, judgments, or evidences of indebtedness, at a discount. Trentham *v.* Moore, 111 Tenn. 346, 351, 76 S. W. 904.

Persons shaving notes in a statute does not include the purchaser of a judgment on a note for less than the face thereof. Mace *v.* Buchanan, (Tenn. Ch. App. 1899) 52 S. W. 505, 507.

"'Shaved'" is an expression, in its offensive sense, which is equivalent to deceived, defrauded, or overcharged. Bronson *v.* Winan, 10 Barb. (N. Y.) 406, 428.

6. Com. *v.* Gombert, 11 Pa. Dist. 435, 438, 439.

7. Webster Dict. [*quoted* in Ingersoll *v.* Magone, 48 Fed. 159, 160].

8. Blackfeather *v.* U. S., 190 U. S. 368, 374, 23 S. Ct. 772, 47 L. ed. 1099.

9. Gregson *v.* New Soddy Coal Co., (Tenn. Ch. App. 1899) 54 S. W. 113, 114.

10. Rex *v.* Birket, 4 C. & P. 216, 217, 19 E. C. L. 482.

Ram, ewe, sheep and lamb are all covered by the word "sheep." U. S. *v.* Debs, 64 Fed. 724, 748. *Contra*, see Rex *v.* Birket, 4 C. & P. 216, 217, 19 E. C. L. 482. Includes a lamb see State *v.* Tootle, 2 Harr. (Del.) 541; Reg. *v.* Spicer, 1 C. & K. 699, 700, 1 Den. C. C. 82, 47 E. C. L. 699.

11. Shallus *v.* Stone, 150 Fed. 605.

12. Camden, etc., R. Co. *v.* Brady, 1 Black (U. S.) 62, 74, 17 L. ed. 84.

13. Falk *v.* Heffron, 56 Fed. 299.

"Sheet of letterpress" included in book see Davis *v.* Benjamin, [1906] 2 Ch. 491, 493, 75 L. J. Ch. 800, 95 L. T. Rep. N. S. 671, 22 T. L. R. 702.

14. Alkenbrack *v.* People, 1 Den. (N. Y.) 80, where it is said: "The word has reference to the form and not the material of which the article is made."

"Sheet steel" under tariff act see Boker *v.* U. S., 124 Fed. 59, 60, 59 C. C. A. 425.

"Sheet steel in strips" under tariff act see U. S. *v.* Boker, 158 Fed. 396, 397, 86 C. C. A. 32.

15. Caswell *v.* Johnson, 58 Me. 164, 166.

16. Webster Dict. [*quoted* in White *v.* Hill, 125 N. C. 194, 197, 34 S. E. 432].

The term is chiefly applied in commerce to crabs, lobsters, and crawfish, oysters, mussels, periwinkles, and whelks. Worcester Dict. [*quoted* in White *v.* Hill, 125 N. C. 194, 198, 34 S. E. 432].

# SHERIFFS AND CONSTABLES

By Joseph Walker Magrath*

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4. *Parties — Joinder of Actions*, 2011
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6. *Variance*, 2013
7. *Evidence*, 2013
8. *Trial*, 2013
9. *Judgment*, 2013
10. *Damages*, 2014
11. *Review*, 2014

**CROSS-REFERENCES**

For Matters Relating to:

Acknowledgment of Certificate of Sale by Sheriff, see ACKNOWLEDGMENTS, 1 Cyc. 519 note 33.

**For** Matters Relating to — (*continued*)

Action by:

Mortgagee Against Levying Officer to Recover Mortgaged Chattel, see CHATTEL MORTGAGES, 7 Cyc. 20.

Officer in Aid of Attachment, see ATTACHMENT, 4 Cyc. 829.

Administration of Oath to:

Coroner by Sheriff, see CORONERS, 9 Cyc. 983 note 20.

Sheriff by Probate Judge, see JUDGES, 23 Cyc. 538 note 82.

Admission by Deputy as Evidence Against Sheriff, see EVIDENCE, 16 Cyc. 1003.

Amendment of Return as to Sale Under Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 16 note 67.

Appeal by Sheriff From Personal Judgment as Bar to Action on Bond, see APPEAL AND ERROR, 2 Cyc. 912 note 68.

Appeal From Refusal of Motion to Amerce Sheriff, see APPEAL AND ERROR, 2 Cyc. 621 note 23.

Appointment of Officer to Make Judicial Sale, see JUDICIAL SALES, 24 Cyc. 11.

Arrest by Sheriff or Constable, see ARREST, 3 Cyc. 875, 877.

Assignability of Fee Bill of Public Officer, see ASSIGNMENTS, 4 Cyc. 19.

Assignment of Judgment as Carrying Right of Action Against Sheriff, see JUDGMENTS, 23 Cyc. 1422 note 53.

Attachment of Property in Sheriff's Hands, see ATTACHMENT, 4 Cyc. 569.

Auctioneer as Agent of Sheriff, see ATTACHMENT, 4 Cyc. 712 note 43.

Authority of Sheriff to Take Bail, see BAIL, 5 Cyc. 14, 83.

Bond of Officer Appointed to Make Judicial Sale, see JUDICIAL SALES, 24 Cyc. 12.

Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 193.

Conclusiveness of Judgment Against Officer on His Successor, see JUDGMENTS, 23 Cyc. 1270.

Conspiracy to Resist Officer, see CONSPIRACY, 8 Cyc. 634.

Conveyance by Successor of Sheriff Making Sale, see JUDICIAL SALES, 24 Cyc. 50 note 64.

Coroner, see CORONERS, 9 Cyc. 980.

Custody and Care of Property Taken Under:

Attachment, see ATTACHMENT, 4 Cyc. 653.

Execution, see EXECUTIONS, 17 Cyc. 1121.

Deputy Sheriff as:

Juror, see CRIMINAL LAW, 12 Cyc. 715.

Surety on Bail-Bond, see BAIL, 5 Cyc. 22 text and note 8.

Detective, see DETECTIVES, 14 Cyc. 234.

Disbursements Made Through Sheriff as Debt Incurred For Preservation of Crops, see AGRICULTURE, 2 Cyc. 58 note 22.

Disqualification of Sheriff to Summon Special Venire, see JURIES, 24 Cyc. 238 note 17.

Distribution of Proceeds of Sale Under:

Attachment, see ATTACHMENT, 4 Cyc. 716.

Execution, see EXECUTIONS, 17 Cyc. 1351.

Order of Court, see JUDICIAL SALES, 24 Cyc. 74.

Duress by Sheriff in Procuring Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1100 note 71.

Effect of Sheriff's Sale on Ground-Rent, see GROUND-RENTS, 20 Cyc. 1386.

Election of Sheriff or Constable, see ELECTIONS, 15 Cyc. 268.

Eligibility to Office of:

Alien, see OFFICERS, 29 Cyc. 1377.

Infant, see INFANTS, 22 Cyc. 515.

Insane Person, see INSANE PERSONS, 22 Cyc. 1104.

For Matters Relating to — (*continued*)
- Execution of Writ of:
  - Assistance, see ASSISTANCE, WRIT OF, 4 Cyc. 297.
  - Attachment, see ATTACHMENT, 4 Cyc. 571.
  - Execution, see EXECUTIONS, 17 Cyc. 1076.
  - Replevin, see REPLEVIN, 34 Cyc. 1454.
- Execution Sale, see EXECUTIONS, 17 Cyc. 1233.
- Exemption of:
  - Deputy Sheriff From Arrest, see ARREST, 3 Cyc. 921 note 26.
  - Sheriff or Constable From Jury Duty, see JURIES, 24 Cyc. 205 text and notes 46, 47.
- Extortion by Officer, see EXTORTION, 19 Cyc. 35.
- Failure to Pay Sheriff's Fees as Ground For Quashal of Supersedeas, see APPEAL AND ERROR, 2 Cyc. 906 note 44.
- False Imprisonment by Officer, see FALSE IMPRISONMENT, 19 Cyc. 350.
- False Personation of Officer, see FALSE PERSONATION, 19 Cyc. 381.
- Functions of Sheriff as Jailer, see PRISONS, 32 Cyc. 320, 339.
- Interpleader in Case of Conflicting Claims to Property Seized or Proceeds Thereof, see ATTACHMENT, 4 Cyc. 724; EXECUTIONS, 17 Cyc. 1199; INTERPLEADER, 23 Cyc. 17; REPLEVIN, 34 Cyc. 1326.
- Judicial Knowledge of Identity of Sheriff, see EVIDENCE, 16 Cyc. 914.
- Jurisdiction of Justice of the Peace in Action Against Officer, see JUSTICES OF THE PEACE, 24 Cyc. 460.
- Liability of Attorney:
  - For Officer's Fees, see ATTORNEY AND CLIENT, 4 Cyc. 922.
  - To Sheriff For Delivering False Writ, see ATTORNEY AND CLIENT, 4 Cyc. 924 note 41.
- Liability on Bond Given as Collector of:
  - School Taxes, see SCHOOLS AND SCHOOL-DISTRICTS, *ante*, p. 868.
  - Taxes, see TAXATION.
- Lien of Sheriff, see ANIMALS, 2 Cyc. 318 note 11.
- Mandamus:
  - Against Sheriff or Constable, see MANDAMUS, 26 Cyc. 200, 219 note 25.
  - To Compel Acceptance or Approval of Official Bond, see MANDAMUS, 26 Cyc. 252.
- Marshal of Incorporated City, Town, etc., see MUNICIPAL CORPORATIONS, 28 Cyc. 493.
- Notice to Sheriff of Certiorari, see CERTIORARI, 6 Cyc. 769 note 70.
- Officer as Person Concluded by Judgment, see JUDGMENTS, 23 Cyc. 1270.
- Officers Generally, see OFFICERS, 29 Cyc. 1359.
- Payment by Sheriff as Extinguishing Judgment, see JUDGMENTS, 23 Cyc. 1473.
- Payment of:
  - Judgment by Officer, see JUDGMENTS, 23 Cyc. 1473.
  - Sheriff's Fees as Condition of Setting Aside Execution on Appeal, see APPEAL AND ERROR, 2 Cyc. 895 note 6.
- Pendency of Action Against Deputy as Ground For Abatement of Action Against Sheriff, see ABATEMENT AND REVIVAL, 1 Cyc. 33 note 64.
- Police Officer of Incorporated City, Town, etc., see MUNICIPAL CORPORATIONS, 28 Cyc. 486.
- Possession of:
  - Deputy Sheriff as Possession of Sheriff, see DETINUE, 14 Cyc. 258 note 71.
  - Officer Under Process as Constituting Bailment, see BAILMENTS, 5 Cyc. 157.
- Privity Between Sheriff and:
  - Deputy, see JUDGMENTS, 23 Cyc. 1270.
  - Indemnitor, see JUDGMENTS, 23 Cyc. 1273.

For Matters Relating to — (*continued*)
Privity Between Sheriff and — (*continued*)
Predecessor in Office, see JUDGMENTS, 23 Cyc. 1270.
Purchaser at Sheriff's Sale, see JUDGMENTS, 23 Cyc. 1259 note 89.
Punishment of Officer For Contempt, see CONTEMPT, 9 Cyc. 24.
Recovery of Money in Hands of Sheriff by Action of Book-Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 498 note 97.
Replevin Against Sheriff or Constable, see REPLEVIN, 34 Cyc. 1367.
Resistance or Obstruction of Process, see OBSTRUCTING JUSTICE, 29 Cyc. 1327.
Return of Sale by Sheriff as Giving Color of Title, see ADVERSE POSSESSION, 1 Cyc. 1097.
Sale:
By Deputy Where Sheriff Appointed to Sell, see JUDICIAL SALES, 24 Cyc. 12 note 43.
Of Mortgaged Property in Parcels as Breach of Official Duty, see CHATTEL MORTGAGES, 7 Cyc. 25 note 32.
Seizure Under Void Process as Larceny, see LARCENY, 25 Cyc. 22.
Service of Process by Sheriff or Constable, see PROCESS, 32 Cyc. 452.
Sheriff as:
Necessary Party to:
Appeal, see APPEAL AND ERROR, 2 Cyc. 766 note 30.
Suit to Enjoin Proceedings Under Process, see INJUNCTIONS, 22 Cyc. 914 note 20.
Obligee in Bail-Bond, see BAIL, 5 Cyc. 17.
Public Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 118.
Surety on Bail-Bond, see BAIL, 5 Cyc. 23 text and note 18.
Sheriff's Deed as Instrument of Fraudulent Transfer, see FRAUDULENT CONVEYANCES, 20 Cyc. 391 note 10.
Sheriff's Jury to:
Assess Damages on Writ of Inquiry, see DAMAGES, 13 Cyc. 225.
Determine Claim of Third Person to Property Levied on, see EXECUTIONS, 17 Cyc. 1209.
Special Oath to Sheriff Before Summoning Jurymen, see JURIES, 24 Cyc. 246, 247 text and notes 29, 30.
Survival of Action Against Sheriff, see ABATEMENT AND REVIVAL, 1 Cyc. 55, 92 note 54.
Taking of Bail by Sheriff or Constable, see BAIL, 5 Cyc. 14, 83.
Taxation of Sheriff's Fees as Costs, see COSTS, 11 Cyc. 103.
Unauthorized Seizure by Sheriff as Larceny, see LARCENY, 25 Cyc. 22.
United States Marshal, see UNITED STATES MARSHALS.
Validity of:
Private Act Giving Sheriff Power to Sell Land For Taxes, see CONSTITUTIONAL LAW, 8 Cyc. 1137 note 97.
Promise of Additional Compensation For Executing Process, see CONTRACTS, 9 Cyc. 234 note 41.
Voluntary Payment by Sheriff or Constable, see MONEY PAID, 27 Cyc. 838.
Wrongful:
Attachment, see ATTACHMENT, 4 Cyc. 831.
Seizure on Execution, see EXECUTIONS, 17 Cyc. 1570.

## I. DEFINITIONS.

**A. Sheriff — 1. IN AMERICAN LAW.** In American law the sheriff is the chief executive and administrative officer of a county, being chosen by popular election. His principal duties are in the aid of the criminal courts and civil courts of record, such as serving process, summoning juries, executing judgments, holding

judicial sales, and the like. He is also chief conservator of the peace within his territorial jurisdiction.[1]

**2. In English Law.** In English law the sheriff is the principal officer in every county, and has the transacting of the public business of the county. The duties of the sheriff consist principally in executing writs, præcepts, warrants from justices of the peace for the apprehension of offenders, etc.[2]

**3. Sheriff as a Generic Term.** The statutes frequently use the word "sheriff" as a generic term, including not only the sheriff proper but also deputy sheriffs, constables, and the whole class of officers performing duties usually appertaining to the office of sheriff.[3]

**B. Deputy Sheriff.** A deputy sheriff is the deputy of the sheriff — one appointed to act for the sheriff and not in his own name, person, or right.[4]

**C. Constable — 1. In American Law.** In American law a constable is an officer of a municipal corporation, usually elected, whose duties are similar to those of the sheriff, although his powers are less and his jurisdiction smaller. He is to preserve the peace, execute process of magistrates' courts and of some other tribunals, serve writs, attend the sessions of the criminal courts, have the custody of juries, and discharge other functions sometimes assigned to him by the local law or by statute.[5]

**2. In English Law.** In English law a constable is a public civil officer whose proper and general duty is to keep the peace within his district, although he is frequently charged with additional duties.[6]

## II. Election or Appointment, Qualification, and Tenure.

**A. Sheriffs — 1. In General.** In the United States, at the present time, the office of sheriff is elective and is filled by the person chosen by the people of the county [7] at an election held under and governed by the general rules relating to popular elections,[8] except when peculiar circumstances call for a temporary

1. Black L. Dict. See also the following cases:

*Florida.*— Matter of Executive Communication, 13 Fla. 687.

*Michigan.*— Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443.

*Missouri.*— State *v.* Finn, 4 Mo. App. 347.

*New Jersey.*— Tichenor *v.* Hewson, 14 N. J. L. 26; De Wit *v.* Decker, 9 N. J. L. 148.

*New York.*— Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

*North Carolina.*— Denson *v.* Sledge, 13 N. C. 136.

*Pennsylvania.*— Com. *v.* Cluly, 56 Pa. St. 270, 94 Am. Dec. 75; Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

*United States.*— Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180.

**Territorial jurisdiction of sheriff** see *infra*, III, A, 2.

2. Black L. Dict.

3. *Iowa.*— Conway *v.* McGregor, etc., R. Co., 43 Iowa 32.

*New York.*— Cumming *v.* Brown, 43 N. Y. 514.

*Oregon.*— Hume *v.* Norris, 5 Oreg. 478.

*Texas.*— O'Brien *v.* State, 6 Tex. App. 665.

*Vermont.*— Winchell *v.* Pond, 19 Vt. 198.

But *compare* George *v.* Fellows, 58 N. H 494.

4. Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645. See also Tillotson *v.* Cheetham, 2 Johns. (N. Y.) 63; State *v.* Brooks, 42 Tex. 62.

5. Black L. Dict. See also Leavitt *v.* Leavitt, 135 Mass. 191; Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; Com. *v.* Deacon, 8 Serg. & R. (Pa.) 47; Pearson *v.* Brunswick County, 91 Va. 322, 21 S. E. 483.

**The constable is a township officer.**—White *v.* Manistee County, 105 Mich. 608, 63 N. W. 653; Johnson *v.* Stedman, 3 Ohio 94.

**The constable is a state and not a city officer.**— State *v.* McKee, 69 Mo. 504.

6. Black L. Dict.

7. Com. *v.* Certain Intoxicating Liquors, 110 Mass. 172; Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360; Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106]. And see *supra*, I, A, 1.

8. See, generally, Elections, 15 Cyc. 268.

**Who entitled to vote for sheriff.**—Where a supplement to the charter of a borough extended the jurisdiction of the borough courts over certain townships and gave the inhabitants of such townships the right to vote for sheriff of the borough "for the ensuing year" this was construed to give them the right to vote for sheriff for the year ensuing after each annual meeting and not merely for the year ensuing after the enactment of the supplement to the charter. State *v.* Chase, 20 N. J. L. 218.

appointment, as in case of a vacancy which cannot be at once filled by an election.[9]

**2. Duty to Serve.** In earlier times a person elected or appointed sheriff was bound to serve,[10] and his refusal sometimes subjected him to a penalty.[11]

**3. Eligibility [12] — a. In General.** In order to fill the office of sheriff a person must possess the qualifications required by the constitution,[13] and be free from any disqualifications established thereby;[14] and the eligibility of a person is not established by the fact that he has been elected by the people,[15] has taken the oath of office and given an official bond as sheriff,[16] or has received a commission as such officer.[17] But an election of an unqualified person has been held to be voidable merely and not void.[18] The removal of a sheriff does not, in the absence of any constitutional or statutory provision to that effect, render him ineligible to reëlection as sheriff during the remainder of his original term.[19]

**b. Ineligibility Resulting From Previous Incumbency.** In some states the constitutions provide that the same person shall be ineligible for the office of sheriff for more than a certain number of years within a prescribed larger period of time;[20] but a limitation of this character is upon the person and has no such

**Validity of election.**—Where an amendment to a state constitution provided for the election of sheriffs by the people in such manner as should be prescribed by law, the fact that the office of sheriff was not vacant at the time of the first election under the constitutional amendment and the law enacted pursuant thereto did not affect the validity of such election. Pratt *v.* Allen, 13 Conn. 119.

**9. Appointments to fill vacancies** see *infra*, II, A, 7, g, (II).

**In case of the establishment of a new county** the governor is sometimes authorized to appoint a sheriff to serve until such time as a sheriff shall be regularly elected by the people. See State *v.* Finn, 4 Mo. App. 347, where the title to the office of sheriff of the county called the "City of St. Louis" was involved.

**10.** See Collins *v.* Nall, 14 N. C. 457; King *v.* McClanahan, Jeff. (Va.) 9; Reg. *v.* Hutchinson, L. R. 32 Ir. 142.

**11.** See King *v.* McClanahan, Jeff. (Va.) 9, holding that a person whose name was not in the sheriff's commission, although the office was offered to him by the county court, was not liable to the penalty for refusing the office provided by the Virginia statute.

**12. Eligibility to office of:** Constable see *infra*, II, B, 2. Deputy see *infra*, II, C, 4.

**13.** *Iowa.*— State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622, citizenship.

*Kentucky.*— Patterson *v.* Miller, 2 Metc. 493, residence in county for one year previous to election.

*Maryland.*— Hatcheson *v.* Tilden, 4 Harr. & M. 279; Roberts *v.* Gibson, 6 Harr. & J. 116, both relating to property qualification.

*New Jersey.*— State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207, residence and property qualification.

*New York.*— People *v.* Champlain, 16 Misc. 92, 37 N. Y. Suppl. 633, citizenship and residence.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 1½ *et seq.*

**Property qualification.**—Where the constitution requires that the candidate for the office of sheriff shall have real "and" personal property to a certain value, he must have both real and personal property at the time he is voted for, and property held in trust cannot be considered on the question of eligibility. Hatcheson *v.* Tilden, 4 Harr. & M. (Md.) 279.

**Votes cast for an ineligible candidate are void.**— Hatcheson *v.* Tilden, 4 Harr. & M. (Md.) 279.

**14.** Com. *v.* Shaver, 3 Watts & S. (Pa.) 338 (conviction of infamous crime); State *v.* Boyles, 80 S. C. 352, 60 S. E. 233 (holding that under Civ. Code (1902), § 829, providing that no sheriff or deputy sheriff shall act as an attorney at law, a practising attorney may not be a sheriff or deputy sheriff).

**A disqualification of any "person liable for public moneys unaccounted for"** applies to private citizens as well as public officers who are so liable. Hoskins *v.* Brantley, 57 Miss. 814.

**15.** Patterson *v.* Miller, 2 Metc. (Ky.) 493.

**The certificate of the examining board** that a certain person is elected to the office of sheriff is not even *prima facie* evidence that he was eligible to the office. Patterson *v.* Miller, 2 Metc. (Ky.) 493.

**16.** Patterson *v.* Miller, 2 Metc. (Ky.) 493, so holding on the ground that the county court, which administered the oath of office and passed upon the bond, had no power to inquire into the eligibility of a person claiming to be elected and applying to be qualified.

**17.** State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207.

**18.** State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207. But *compare* Newman *v.* Jefferson County Justices, 6 Humphr. (Tenn.) 41.

**19.** Gordon *v.* State, 43 Tex. 330.

**20.** See State *v.* Linkhauer, 142 Ind. 94, 41 N. E. 325; State *v.* Pontius, 78 Ohio St. 353, 85 N. E. 540; State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785.

relation to the tenure as to permit the computation, as against a *pro tempore* incumbent appointed to fill an unexpired term, of the time his predecessor had occupied the office.[21] In other states the constitutions forbid the same person holding the office of sheriff for two successive terms;[22] but such provisions are held to apply only to full terms,[23] and not to render a person who has served the unexpired portion of a term under an appointment or election to fill a vacancy,[24] or who has been elected sheriff of a newly created county for a statutory term less than the full constitutional term and running until the next general election,[25] ineligible to reëlection for the succeeding full term. So also one who has served one term is eligible for election to fill a vacancy occurring during the next ensuing term.[26] And where a constitutional provision that sheriffs should serve two years and be eligible for only four years in any period of six was amended by increasing the term to four years and making sheriffs ineligible to reëlection, a person who was elected sheriff for a two-year term at the same election at which the amendment was adopted by the voters was eligible for reëlection for a four-year term.[27] In some states a person is ineligible for the office of sheriff for more than two consecutive terms.[28]

**c. Removal of Disqualification.** It has been held that, although a sheriff, at the time of his election, is an alien, and is consequently ineligible to hold office, his naturalization as a citizen before induction to office removes this disability and entitles him to the office.[29]

**4. Commission.** Where one is elected by the people to the office of sheriff a commission from the governor is not necessary to authorize him to act,[30] unless the issuance of such commission is made, by constitution or statute, a prerequisite to his entering upon the duties of the office.[31] It is not a good objection to the validity of a sheriff's commission that it bears date prior to the expiration of the term of his predecessor where it was not to take effect until after such term

**Extension of term to conform to new election times.**—Where a constitutional amendment provided for biennial elections and authorized the legislature to extend the terms of incumbents until the time when the terms of their successors under the new law would commence, a sheriff whose first term of two years was accordingly extended to three years was not ineligible for reëlection for another two-year term because of a constitutional provision rendering a sheriff ineligible for more than four years in any period of six years. State *v.* Pontius, 78 Ohio St. 353, 85 N. E. 540 [*following* State *v.* Harris, 77 Ohio St. 481, 83 N. E. 912].

**21.** State *v.* Linkhauer, 142 Ind. 94, 41 N. E. 325 [*following* Gosman *v.* State, 106 Ind. 203, 6 N. E. 349], holding that this would be true even in the absence of the provision of the Indiana constitution that an appointment *pro tempore* should not be reckoned as a part of that term.

**22.** See the following cases:

*Alabama.*— Black *v.* Pate, 130 Ala. 514, 30 So. 434.

*Mississippi.*— Bozeman *v.* Laird, 91 Miss. 719, 45 So. 722.

*Missouri.*— State *v.* Dirckx, 211 Mo. 568, 111 S. W. 1.

*West Virginia.*— Gorrell *v.* Bier, 15 W. Va. 311.

*Wisconsin.*— State *v.* Giles, 2 Pinn. 166, 52 Am. Dec. 149, 1 Chandl. 112.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 1½, 2.

**First election under constitution.**— Wis. Const. art. 7, § 2, declaring that sheriffs should be ineligible for two years next succeeding the termination of their offices, did not apply to those persons elected at the first election under the constitution, although they held office as sheriff under the territorial government at the time the constitution was adopted. State *v.* Giles, 2 Pinn. (Wis.) 166, 52 Am. Dec. 149, 1 Chandl. 112.

**23.** Black *v.* Pate, 130 Ala. 514, 30 So. 434; Bozeman *v.* Laird, 91 Miss. 719, 45 So. 722.

**24.** Black *v.* Pate, 130 Ala. 514, 30 So. 434; Bozeman *v.* Laird, 91 Miss. 719, 45 So. 722.

**25.** Bozeman *v.* Laird, 91 Miss. 719, 45 So. 722.

**26.** Gorrell *v.* Bier, 15 W. Va. 311, so holding under a constitutional provision that "the same person shall not be elected sheriff for two consecutive full terms."

**27.** State *v.* Dirckx, 211 Mo. 568, 111 S. W. 1, holding that the amendment was prospective only in its operation.

**28.** See Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643.

**29.** State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

**30.** Graves *v.* Hayden, 2 Litt. (Ky.) 61.

**31.** State *v.* Pool, 41 Mo. 32 [*followed* in State *v.* Morrison, 41 Mo. 238].

expired.[32] If the governor should ascertain that he has, through mistake or otherwise, improperly issued a commission to one person when it ought to have been issued to another he may correct the error by issuing a commission to the person legally entitled thereto.[33]

**5. QUALIFICATION [34] — a. In General.** A sheriff is ordinarily required, before entering upon the duties of his office, to qualify by taking a prescribed oath of office,[35] and giving a bond or entering into a recognizance for the faithful performance of the duties of his office.[36] But it has been held that the irregularity of inducting a sheriff into office without all the bonds required by law is cured by a subsequent tender and acceptance thereof.[37] The statutes usually require the person elected sheriff to qualify within a prescribed time,[38] failing in which

**32.** Treasury Com'rs *v.* Muse, 3 Brev. (S. C.) 150.

**33.** Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

**34. Qualification of:** Constable see *infra*, II, B, 3. Deputy see *infra*, II, C, 5.

**35.** People *v.* Fletcher, 3 Ill. 482; Laberie *v.* Freret, 32 La. Ann. 1093; People *v.* Mayworm, 5 Mich. 146; Flatan *v.* State, 56 Tex. 93.

**Compelling administration of oath.**—Where the sheriff-elect complies with the law as to giving bond, and offers to take the oath of office within the time allowed by statute in which to qualify, the clerk of the court may be compelled by mandamus to administer the oath. People *v.* Fletcher, 3 Ill. 482.

**In administering the oath the clerk of the court acts ministerially,** under the direction of the law and not of the court, and this may be done as well out of court as in court. People *v.* Fletcher, 3 Ill. 482.

**When the sheriff acts as umpire between appraisers** under La. Rev. St. § 67, no oath in addition to his general oath of office is required. Laberie *v.* Freret, 32 La. Ann. 1093.

**36.** *Alabama.*— *Ex p.* Candee, 48 Ala. 386; Garner *v.* Clay, 1 Stew. 182.

*Georgia.*—Crawford *v.* Howard, 9 Ga. 314.

*Idaho.*— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

*Kansas.*— McCracken *v.* Todd, 1 Kan. 148.

*Louisiana.*— Mechanics', etc., Bank *v.* Labiche, 3 La. Ann. 539; Whitehurst *v.* Hickey, 3 Mart. N. S. 589, 15 Am. Dec. 167.

*Mississippi.*— State *v.* Basham, 77 Miss. 688, 27 So. 996; French *v.* State, 52 Miss. 759.

*New York.*— People *v.* Holley, 12 Wend. 481 [*followed* in Hall *v.* Luther, 13 Wend. 491].

*North Carolina.*—People *v.* Smith, 81 N. C. 304.

*Ohio.*— State *v.* Paulding County, 61 Ohio St. 506, 56 N. E. 473; State *v.* Lewis, 10 Ohio St. 128.

*Pennsylvania.*— McMicken *v.* Com., 58 Pa. St. 213.

*Tennessee.*— Thomason *v.* Justices, 3 Humphr. 233; Goodrum *v.* Carroll, 2 Humphr. 490, 37 Am. Dec. 564.

*Texas.*— Flatan *v.* State, 56 Tex. 93.

*Vermont.*— Taylor *v.* Nichols, 29 Vt. 104; State Treasurer *v.* Kelsey, 4 Vt. 371.

*Virginia.*—Washington County *v.* Dunn, 27 Gratt. 608; Branch *v.* Randolph, 5 Call 546.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 7.

**Before whom recognizance entered into.**—A statute requiring a sheriff, before entering upon the duties of his office, to become bound by recognizance, with surety, before the chief judge of the county court, or, in case of his absence or death, before one of the assistant judges, is constitutional and valid, although the constitution provides that the recognizance shall be taken by the chief judge only. State *v.* Kelsey, 4 Vt. 371.

**Additional bond as tax collector** see French *v.* State, 52 Miss. 759.

**A sheriff's omission to give bond as collector of taxes** within the prescribed time does not *per se* affect his capacity as to the execution of judicial process. Mechanics', etc., Bank *v.* Labiche, 3 La. Ann. 539.

**37.** People *v.* Smith, 81 N. C. 304.

**38.** *Alabama.*— *Ex p.* Candee, 48 Ala. 386.

*Georgia.*— Crawford *v.* Howard, 9 Ga. 314; Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

*Illinois.*— People *v.* Fletcher, 3 Ill. 482.

*Iowa.*— State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

*Kentucky.*— Com. *v.* Yarbrough, 84 Ky. 496, 2 S. W. 68, 8 Ky. L. Rep. 483.

*Michigan.*— People *v.* Mayworm, 5 Mich. 146.

*New York.*— People *v.* Holley, 12 Wend. 481 [*followed* in Hall *v.* Luther, 13 Wend. 491].

*Ohio.*— State *v.* Paulding County, 61 Ohio St. 506, 56 N. E. 473; State *v.* Lewis, 10 Ohio St. 128.

*Texas.*— Flatan *v.* State, 56 Tex. 93; Maddox *v.* York, 21 Tex. Civ. App. 622, 54 S. W. 24.

*Virginia.*— Bowers *v.* Millar, 3 Munf. 492.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 5–7.

**Where qualification prevented by injunction.**—Where the statute provides that, when any election is contested, the person elected shall have twenty days in which to qualify after the date of the decision, an injunction restraining the person elected from qualifying as sheriff is so much in the nature of a contest that he will be entitled to at least a reasonable time after a decision in his favor

the office is to be deemed vacant.[39] Where a claimant of the office of sheriff is acting as such, that circumstance, together with the certificate of election, raises the presumption that he has executed his bond and taken the oath of office.[40] It is error to permit a person to qualify as sheriff where it does not appear that he has been appointed or elected to the office.[41]

**b. Form and Requisites of Bond.**[42] While the form of a sheriff's bond is sometimes prescribed by statute,[43] a failure to comply literally with the form prescribed by the legislature does not invalidate the bond,[44] but it is sufficient if the conditions of the bond are substantially and in effect the same as those prescribed by the statute;[45] and a bond which has been accepted and approved is not invalidated by the fact that the obligee is not the obligee designated by the statute.[46] Neither is a bond, executed in the form and for the sum prescribed by law, vitiated by having annexed to the names of some of the sureties words expressing the true liability of the parties.[47] It is usually required that the

in which to qualify. State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622.

**One seeking an extension of the time must show some extraordinary reason** why it should be granted. Flatan *v.* State, 56 Tex. 93.

39. *Alabama.*— *Ex p.* Candee, 48 Ala. 386.
*Illinois.*— Davis *v.* Haydon, 4 Ill. 35.
*Michigan.*— People *v.* Mayworm, 5 Mich. 146.
*North Carolina.*— Sneed *v.* Bullock, 80 N. C. 132.
*Ohio.*— State *v.* Paulding County, 61 Ohio St. 506, 56 N. E. 473.
*Texas.*— Flatan *v.* State, 56 Tex. 93; State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982; Maddox *v.* York, 21 Tex. Civ. App. 622, 54 S. W. 24.
See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 5–7.

**One to whom the board of canvassers have refused a certificate of election,** although he was elected, does not forfeit his right to the office by failing to qualify within the prescribed time. People *v.* Mayworm, 5 Mich. 146.

**Second commission to same person.**—Where two persons, who were successively commissioned to execute the office of sheriff, have failed to give bonds within the time prescribed by law, the governor cannot thereupon issue a second commission to the person first commissioned. Bowers *v.* Millar, 3 Munf. (Va.) 492.

**Whether statute directory or mandatory.**— A statute requiring a person elected as sheriff to qualify within a prescribed time, under penalty of losing the office, will be construed as directory only in a case where the sheriff is prevented from qualifying within the time allowed by reasons beyond his control (Flatan *v.* State, 56 Tex. 93. But *compare* State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982), but not in case of neglect or refusal to qualify within the time limited (Flatan *v.* State, *supra*).

**Acceptance of bond after statutory time.**— Where a sheriff-elect had, within the time prescribed by law after his election, executed a bond, which was duly approved by the commissioners, and the attorney-general refused to approve it on account of a supposed informality, and in consequence the treasurer refused to accept it, and the sheriff afterward, but after the expiration of the three weeks, executed another bond, which was approved and accepted, he did not incur a forfeiture of his office. State *v.* Yates, 3 Hill (S. C.) 230. See also Monteith *v.* Com., 15 Gratt. (Va.) 172.

40. People *v.* Clingan, 5 Cal. 389.

41. Johnson *v.* Ellis, Litt. Sel. Cas. (Ky.) 24.

42. **Form and requisites of bond of:** Constable see *infra*, II, B, 3, b. Deputy see *infra*, II, C, 5.

43. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187; State *v.* Yates, Riley (S. C.) 256, 3 Hill 230.

44. Young *v.* State, 7 Gill & J. (Md.) 253.

45. McCracken *v.* Todd, 1 Kan. 148, 163 (holding that a bond conditioned that the sheriff "shall faithfully perform the duties of such sheriff, as aforesaid, and faithfully demean himself in office, pay over all moneys that may come into his hands by virtue of said office, according to the lawful direction of the same, and in all things act according to law," is valid under a statute requiring the bond to be conditioned "that he will faithfully collect and pay over all moneys entrusted to him for collection, and account for all moneys coming into his hands, and faithfully and impartially demean himself in office"); King *v.* Frazer, 2 Tex. App. Civ. Cas. § 788 (holding that a bond conditioned that the sheriff will "well and truly perform" the duties of his office is a substantial compliance with a statute requiring the bond to be conditioned that he will "faithfully perform" such duties).

46. Bay County *v.* Brock, 44 Mich. 45, 6 N. W. 101 (holding that a bond naming the county as obligee is valid, although the statute requires the bond to be given to the people); Treasurers *v.* Stevens, 2 McCord (S. C.) 107 (holding that a bond to the "commissioners of the treasury" is good, although the statute requires sheriffs to give bond to the "treasurers of the state").

47. State *v.* Yates, 3 Hill 230, so holding as to a bond, containing, annexed to the names of some of the bondsmen, the words:

sureties shall justify before the county court or some designated officer.[48] In the absence of a statute requiring a sheriff's official bond to be acknowledged by the signers thereof, such acknowledgment is not necessary to its validity,[49] and although the law may require the bond to be acknowledged in open court, the omission of this formality does not invalidate the bond.[50] Where there is not a local chief judge in each county, a statute requiring a sheriff's recognizance to be taken before the first judge of the county court is complied with by its being taken before the assistant judge of the county whose name appears first in order upon the record of the election.[51]

**c. Amount of Bond.**[52] The amount of a sheriff s bond is usually fixed by statute;[53] but the county commissioners may require a larger bond when the exigencies of the case demand it;[54] and conversely, when a sheriff's official bond has been accepted, it is not void because the penalty is less than is required by the statute.[55]

**d. Delivery of Bond.** In order for a sheriff's bond to become effective it must be delivered to the proper authority.[56]

**e. Approval, Filing, and Recording of Bond.**[57] It is generally required that the sheriff's bond, in order that it may become effective as a part of his qualification, shall be approved by the county court,[58] or some designated judicial officer,[59]

"For $2,500 *pro rata*, with the other co-obligors on this bond."

**48.** See Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

**49.** Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

**50.** McLean *v.* Buchanan, 53 N. C. 444.

**51.** Wing *v.* Gleason, 36 Vt. 371.

**52. Amount of bond on constable** see *infra*, II, B, 3, c.

**53.** Grimes *v.* Butler, 1 Bibb (Ky.) 192; Dixon *v.* Beaufort County Com'rs, 80 N. C. 118; State *v.* Yates, Riley (S. C.) 256, 3 Hill 230.

**54.** Burnett *v.* Nesmith, 62 Ala. 261; Dixon *v.* Beaufort County Com'rs, 80 N. C. 118 [*modifying* Sikes *v.* Bladen County Com'rs, 72 N. C. 34].

**Bond with penalty larger than fixed by order of court requiring same.**—Where, because of an administration committed to the sheriff, his bond became insufficient security, and the probate judge thereon notified the commissioners' court, then in session, which required the sheriff to give an additional bond in a penalty larger than that of a former bond, the fact that the judge of probate took and approved an official bond, reciting the facts, without stating the penalty prescribed in said orders, and fixed the penalty at a much greater sum than that required in the order, did not render the bond invalid. Burnett *v.* Nesmith, 62 Ala. 261.

**55.** Grimes *v.* Butler, 1 Bibb (Ky.) 192.

**56.** Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187, holding that where a sheriff's bond was irregular on its face, in that the sheriff's name did not appear thereon as principal; the name of only one of the six signing sureties was written in the body of the instrument; the minutes or entries of amounts made opposite the signatures of the sureties showed that they had signed in the aggregate for only seven thousand dollars, whereas the bond called for ten thousand dollars; and two of the sureties who signed had not justified, the county was put upon inquiry as to the authority of the sheriff to deliver the bond on behalf of the sureties, and the latter were not estopped to deny his want of authority, and as the defects were such as to refute any apparent authority on the part of the sheriff to deliver the same for the sureties, the question of the sheriff's actual authority to so deliver it was one of fact.

**57. Approval, filing, and recording of bond of constable** see *infra*, II, B, 3, e.

**58.** *Alabama.*— McLure *v.* Colclough, 17 Ala. 89.

*Kentucky.*— Com. *v.* Yarbrough, 84 Ky. 496, 2 S. W. 68, 8 Ky. L. Rep. 483.

*Oregon.*— Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

*Tennessee.*— Thomason *v.* Justices, 3 Humphr. 233.

*Texas.*— Wright *v.* Leath, 24 Tex. 24.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 7.

**After a judge has approved the sheriff's bond his duties cease,** and he has no more control over it. People *v.* Fletcher, 3 Ill. 482.

**A judge's certificate** that a sheriff's bond was executed with the concurrence of himself and the justices of the peace is sufficient, without the latters' signatures to show that the sureties were approved by them. Whitehurst *v.* Hickey, 3 Mart. N. S. (La.) 589, 15 Am. Dec. 167.

**The delivery of the bond to the chief justice** for the approval of the county court is a sufficient delivery on the part of the obligors, and a deposit of it in the proper office fully evidences its delivery to and acceptance by the state, and renders it effectual without other proof of approval by the county court. Wright *v.* Leath, 24 Tex. 24.

**59.** Johnson *v.* Caffrey, 59 Ala. 331, probate judge.

**Delivery of bond for record.**— The delivery of a sheriff's bond by the justices of the orphans' court to the clerk of the county court to be there recorded shows that the

or the clerk of the court,[60] or the county commissioners or supervisors,[61] and filed with the clerk of the county court,[62] and recorded.[63] A duly elected sheriff is entitled to have the bond presented by him passed upon and, if sufficient, approved by the officers whose approval is required by statute,[64] and mandamus is the proper remedy to compel them to perform their duty in this respect.[65] The county court should keep a record of the delivery and acceptance of sheriffs' bonds,[66] and enter the approval of such bonds upon the minutes,[67] although a failure to do these things does not prevent the enforcement of a bond regularly given and accepted.[68]

**f. Validity of Bond.**[69] The validity of a bond accepted and approved by a judge of the county court cannot be affected by his negligence or mistake in the performance of an act not within the scope of his official duties.[70] Where a sheriff's bond is joint and several it is not invalidated by the sheriff's failure to sign it.[71] It has been held that a sheriff's official bond which is not accepted by the county court within the time fixed by statute is void, although it was executed within such time;[72] but it has also been held that a bond given voluntarily by the sheriff after the time limited by statute, although bad as a statutory bond, is good as a common-law bond.[73] The failure of the justices of the orphans' court to attest a sheriff's bond does not affect its validity.[74] Where a sheriff's bond is given to "the justices composing" the county court, and one of such justices is also one of the obligors, the bond is void.[75]

**g. Periodical Renewal of Bond.** The sheriff is sometimes required by statute to renew his official bond periodically during his term of office,[76] and upon

bond was so accepted by the court as to be obligatory upon the signers. Young *v.* State, 7 Gill & J. (Md.) 253.

**Duty ministerial.**— The duty of the judge of probate to approve the sheriff's bond is ministerial and not judicial. *Ex p.* Candee, 48 Ala. 386.

60. Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

**Discretion as to approval.**— The clerk is a mere ministerial officer, and in respect to the approval of the bond he has no discretion other than to determine whether the security offered is sufficient. Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49.

61. Bay County *v.* Brock, 44 Mich. 45, 6 N. W. 101.

**Approval of county supervisors final.**— Bay County *v.* Brock, 44 Mich. 45, 6 N. W. 101.

62. State *v.* Armstrong, 1 Mart. N. S. (La.) 269; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

**The clerk may be compelled by mandamus to receive a bond** which has been executed within the prescribed time and approved by the judge. People *v.* Fletcher, 3 Ill. 482.

**A sheriff's bond is legally delivered** when it is signed by the sheriff and his sureties in the office of the clerk of the county court and left upon the table, whence it is taken by the deputy clerk and filed among the papers of the office where it remains except when applied for and used by attorneys in causes against the sheriff, and this is true, although the bond is not a good statutory bond. Goodrum *v.* Carroll, 2 Humphr. (Tenn.) 490, 37 Am. Dec. 564.

63. Copley *v.* Dinkgrave, 7 La. Ann. 595; Young *v.* State, 7 Gill & J. (Md.) 253.

**Where there is no separate book for sheriffs' bonds,** a registry in the mortgage book is sufficient. Copeley *v.* Dinkgrave, 7 La. Ann. 595.

**Recording not essential to validity of bond.** —McLean *v.* Buchanan, 53 N. C. 444.

**Sureties bound, although bond not recorded.** — Whitehurst *v.* Hickey, 3 Mart. N. S. (La.) 589, 15 Am. Dec. 167.

64. *In re* Ewing, 4 Phila. (Pa.) 370.

65. *Ex p.* Candee, 48 Ala. 386; Gulick *v.* New, 14 Ind. 93, 77 Am. Dec. 49; State *v.* Lewis, 10 Ohio St. 128. And see, generally, MANDAMUS, 26 Cyc. 252.

66. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

67. Baker County *v.* Huntington, 46 Oreg 275, 79 Pac. 187.

68. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

69. **Validity of bond of:** Constable see *infra*, II, B, 3, g. Deputy see *infra*, II, C, 5.

70. McLure *v.* Colclough, 17 Ala. 89, signing name of surety.

71. State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 93 Am. St. Rep. 137 [*following* Kurtz *v.* Froquer, 94 Cal. 91, 29 Pac. 413; People *v.* Slocum, 1 Ida. 62]; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

72. Com. *v.* Yarbrough, 84 Ky. 496, 2 S. W. 68, 8 Ky. L. Rep. 483.

73. Crawford *v.* Howard, 9 Ga. 314; Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

74. Young *v.* State, 7 Gill & J. (Md.) 253.

75. Dickey *v.* Alley, 15 N. C. 43 [*following* Cumberland Justices *v.* Armstrong, 14 N. C. 284; Pasquotank Justices *v.* Shannonhouse, 13 N. C. 6].

76. Renshaw *v.* Cook, 129 Ky. 347, 111

his failure to comply with such a requirement his office may be declared to have become vacant.[77]

**h. Production of Receipts or Settlements.** It is sometimes required that a sheriff shall periodically during his term,[78] or before being inducted into office for a second or subsequent term,[79] produce receipts or settlements showing that his dealings with public moneys have been faithful and just,[80] and such a requirement is not unconstitutional, as imposing qualifications upon the eligibility of such sheriff elect, other than those required by the constitution.[81]

**i. Setting Aside Qualification.** It has been held that where the county court has permitted one to qualify and give bond as sheriff, it may at the same term set aside such qualification and bond.[82]

**j. Evidence [83] of Qualification.**[84] Where the record of the county court, after reciting the election of a sheriff, states that he appeared in court and took the several oaths prescribed by law, and entered into and acknowledged a bond in a named penalty with certain persons as security, the record is, in the absence of fraud, conclusive that the bond was properly executed by the persons whose names are affixed to it.[85]

**k. Death, Removal, Insolvency, or Discharge of Sureties.**[86] It is sometimes provided by statute that in case of the death, removal, or insolvency of a surety,[87] or of the application of a surety to be discharged from the bond,[88] the sheriff must give new or additional security within a prescribed time,[89] failing in which the office is to be regarded as vacant; [90] and such a requirement is not in conflict with a constitutional provision that sheriffs shall hold their offices for a specified term.[91]

**6. Term of Office [92] — a. In General.** The term of office of a sheriff is fixed by constitutional or statutory provisions; [93] and a person who is elected to the office and qualifies is entitled to hold the same for the full term to which he was

S. W. 377, 33 Ky. L. Rep. 860, 895, holding that under Sess. Laws (1906), p. 152, c. 22, requiring the sheriff on or before a designated day in each year to enter into bonds for the faithful performance of his duties, and declaring that a quietus by the auditor of public accounts and from the fiscal court shall be produced by each sheriff to the county court on or before such date, and no tax book shall be delivered to the sheriff who shall fail to exhibit such quietus, etc., the obtaining of the quietus is not a condition precedent to the execution of the bond required.

77. Schuff *v.* Pflanz, 99 Ky. 97, 35 S. W. 132, 18 Ky. L. Rep. 25, holding that Const. § 227, specifying causes for which a sheriff or other officer shall be subject to indictment, and providing that, on conviction, his office shall become vacant, is not exclusive, and does not preclude the legislature from vesting county courts with power to declare the office vacant for a failure to execute the bonds which section 103 of the constitution authorizes the legislature to require, the power being necessary to enforce compliance with such requirement.

**Vacancy in office** generally see *infra*, II, A, 7.

78. Renshaw *v.* Cook, 129 Ky. 347, 111 S. W. 377, 33 Ky. L. Rep. 860, 895.

79. Lee *v.* Dunn, 73 N. C. 595.

80. Lee *v.* Dunn, 73 N. C. 595, production of tax receipts. See also Johnson *v.* Ellis, Litt. Sel. Cas. (Ky.) 24.

81. Lee *v.* Dunn, 73 N. C. 595.

82. Bunting *v.* Willis, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

83. See, generally, Evidence, 16 Cyc. 821.

84. **Evidence of qualification of constable** see *infra*, II, B, 3, h.

85. Calwell *v.* Com., 17 Gratt. (Va.) 391.

86. **Death, removal, insolvency, or discharge of sureties of constable** see *infra*, II, B, 3, i.

87. State *v.* Taylor, 2 Bailey (S. C.) 524.

88. Bruner *v.* Bryan, 50 Ala. 522; Bennett *v.* State, 58 Miss. 556 [*followed* in State *v.* Morgan, 59 Miss. 349].

89. Bruner *v.* Bryan, 50 Ala. 522; Bennett *v.* State, 58 Miss. 556 [*followed* in State *v.* Morgan, 59 Miss. 349]; State *v.* Taylor, 2 Bailey (S. C.) 524.

90. Bruner *v.* Bryan, 50 Ala. 522; Bennett *v.* State, 58 Miss. 556 [*followed* in State *v.* Morgan, 59 Miss. 349]; State *v.* Taylor, 2 Bailey (S. C.) 524.

**Vacancy in office** generally see *infra*, II, A, 7.

91. State *v.* Taylor, 2 Bailey (S. C.) 524.

92. **Term of office of:** Constable see *infra*, II, B, 4. Deputy see *infra*, II, C, 6.

93. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643; Collins *v.* Nall, 14 N. C. 457; Burt *v.* Bobo, 4 Sneed (Tenn.) 234; State *v.* Saxton, 13 Wis. 168.

**Change in length of term.**—Where the term of office is prescribed by the constitution it is not within the power of the legislature to

elected.[94] It has been held that a constitutional provision that sheriffs shall hold their offices for two years means that the term of a sheriff shall be from one general election to another and not exactly two calendar years;[95] but it has also been held that where, under the law, an election gave only a right to be inducted into the office, a provision that sheriffs should hold office for two years meant calendar years.[96] Upon the election and qualification of the new sheriff, the powers of the previous incumbent cease.[97]

**b. When Term Commences.** Under earlier constitutional or statutory provisions the term of the sheriff began upon his election or qualification and ran for a certain period thereafter;[98] but this rule led to much confusion and litigation with regard to the commencement, duration, and termination of particular terms, and the modern rule is that the terms of sheriffs begin and end at fixed dates, and one who is chosen to fill a vacancy[99] serves no longer than the unexpired portion of his predecessor's term.[1] Where a sheriff is elected for a term of fixed length merely, and not with reference to some designated time when his tenure shall commence, his election entitles him to the office from the time that the term of his predecessor expires,[2] and if his predecessor dies or resigns before the expiration of his term the new sheriff is thereupon entitled to the office at once.[3] The induction of a sheriff into office before the beginning of the term for which he was elected is a nullity.[4]

**c. Holding Over.**[5] As a general rule a sheriff holds his office until his successor is duly elected[6] and qualified;[7] and so where a constitutional amendment or statutory provision readjusting the times of holding elections leaves an interval between the expiration of the term of a sheriff and the time when his successor

prolong or diminish it. Atty.-Gen. *v.* Brunst, 3 Wis. 787 [*approved* in State *v.* Saxton, 13 Wis. 168].

**A statute changing the date of the commencement of the terms** of sheriffs has been held void as creating a vacancy which in some counties could not be filled by the incumbent of the office holding over by reason of a constitutional limitation of tenure. State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785, where it is said that the power granted to the legislature to provide for filling vacancies does not imply a power to create an interval between the official terms of two persons elected to fill the office.

**94.** State *v.* Spence, 7 Ala. 500, holding that the sheriffs, elected under the act of 1833, "for the organization of certain counties therein named," were entitled to their offices for the constitutional term of three years, although their successors might have been elected before the expiration of that period.

**95.** Thornton *v.* Boyd, 25 Miss. 598 [*approving* Paris *v.* Hiram, 12 Mass. 262; Hughes *v.* Buckingham, 5 Sm. & M. (Miss.) 632; Smith *v.* Halfacre, 6 How. (Miss.) 582], holding that a sheriff, who was elected at the general election, held on the 2d and 3d days of November, 1841, for the constitutional term of two years, remained in office until the last day of the general election in 1843, which was held on the 6th and 7th days of November in that year. But *compare* Collins *v.* Nall, 14 N. C. 457.

**96.** Burt *v.* Bobo, 4 Sneed (Tenn.) 234, holding that where a sheriff elected for two years was inducted into office on April 6, 1852, and, being reëlected, qualified on April 3, 1853, his second term did not expire until April 6, 1856.

**97.** Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223.

**98.** See Garner *v.* Clay, 1 Stew. (Ala.) 182 (holding that a sheriff's term commenced at his election); McCracken *v.* Todd, 1 Kan. 148 (holding that a sheriff held his office from the date of acceptance of his commission); People *v.* Green, 2 Wend. (N. Y.) 266 (holding that a sheriff, elected to supply a vacancy occasioned by the death of his predecessor, held his office for three years); Atty.-Gen. *v.* Brunst, 3 Wis. 787 (holding that under Const. art. 6, § 4, providing that sheriffs, coroners, etc., "shall be chosen . . . once in every two years, and as often as vacancies shall happen," when a person was legally elected to fill a vacancy in the office of sheriff, it was for a term of two years, and not for the unexpired term of his predecessor).

**99. Filling vacancies** see *infra*, II, A, 7, f.

1. See the constitutions and statutes of the various states.
2. State *v.* Spence, 7 Ala. 500.
3. State *v.* Spence, 7 Ala. 500.
4. People *v.* Smith, 81 N. C. 304.
5. **Holding over by constable** see *infra*, II, B, 4, b.
6. Sneed *v.* Bullock, 80 N. C. 132; Collins *v.* Nall, 14 N. C. 457; State *v.* Vincent, 20 S. D. 90, 104 N. W. 914.
7. *Alabama.*— Garner *v.* Clay, 1 Stew. 182.

*Indiana.*— State *v.* Linkhauer, 142 Ind. 94; 41 N. E. 325; Akers *v.* State, 8 Ind. 484.

*Kansas.*— Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643 [*following* State *v.* Andrews, 64

can be elected the incumbent is entitled to hold over during such period,[8] although no provision is made by the constitutional amendment or by statute for such interval,[9] and even though the effect of such holding over is to continue him in office for a longer consecutive period than is permitted by the constitution.[10] But in some states it is held that where one is appointed to fill a vacancy for an unexpired term, his right to the office ceases on the expiration of the term for which he was originally appointed, and he is not entitled to hold over, although the sheriff elected for the succeeding term fails to qualify or the election for such term is void, but in such case there is again a vacancy in the office which can be filled by another appointment.[11]

**7. Vacancies[12] — a. Occurrence and Declaration.** Where a sheriff elect is entitled, upon qualifying, to hold office for a specified term, anything which prevents him from so doing creates a constructive or virtual vacancy in the office for his entire term,[13] which is as effectual to authorize an appointment to fill the office as a literal vacancy caused by his death after qualifying would be;[14] and hence where the sheriff elect dies after the term of his predecessor has expired, although before he has received notice of his election, the previous incumbent is not entitled to hold over for the succeeding term.[15] Under various constitutional or statutory provisions the office of sheriff may be declared vacant because of the

Kan. 474, 67 Pac. 870, and *distinguishing* Horton *v.* Watson, 23 Kan. 229].

*Kentucky.*— Cate *v.* Ross, 2 Duv. 243.

*Louisiana.*— Pumphrey *v.* Delahoussaye, 9 Rob. 42.

*North Carolina.*— Sneed *v.* Bullock, 80 N. C. 132; Collins *v.* Nall, 14 N. C. 457.

*Rhode Island.*— Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

*South Dakota.*— State *v.* Vincent, 20 S. D. 90, 104 N. W. 914.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 9.

**A constitutional limitation of tenure to** two consecutive terms means two full terms and an indeterminate and uncertain period thereafter until a successor is qualified. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643.

**A sheriff who is reappointed** may act under his first appointment until duly qualified under the second. Pumphrey *v.* Delahoussaye, 9 Rob. (La.) 42.

**Where a person elected sheriff is ineligible,** the previous incumbent should hold until a successor is elected at an election ordered for that purpose. Hoskins *v.* Brantley, 57 Miss. 814.

**Where a sheriff elect fails to qualify** a vacancy occurs which is to be filled by appointment, and the former incumbent is not entitled to hold over until the next general election. Sneed *v.* Bullock, 80 N. C. 132 [*distinguishing* Jones *v.* Jones, 80 N. C. 127; Battle *v.* McIver, 68 N. C. 467].

8. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643 [*following* State *v.* Andrews, 64 Kan. 474, 67 Pac. 870, and *distinguishing* Davis *v.* Patten, 41 Kan. 480, 21 Pac. 677; Horton *v.* Watson, 23 Kan. 229]; State *v.* Harris, 77 Ohio St. 481, 83 N. E. 912 [*followed* in State *v.* Pontius, 78 Ohio St. 353, 85 N. E. 540] (where the terms of incumbents were extended by the legislature); State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785.

**No vacancy exists during such period** and the governor is not authorized to appoint a person to the office of sheriff for such period. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643.

9. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643 [*following* State *v.* Andrews, 64 Kan. 474, 67 Pac. 877, and *distinguishing* Davis *v.* Patten, 41 Kan. 480, 21 Pac. 677; Horton *v.* Watson, 23 Kan. 229].

10. Pruitt *v.* Squires, 64 Kan. 855, 68 Pac. 643 [*following* State *v.* Andrews, 64 Kan. 474, 67 Pac. 877, and *distinguishing* Davis *v.* Patten, 41 Kan. 480, 21 Pac. 677; Horton *v.* Watson, 23 Kan. 229]; State *v.* Harris, 77 Ohio St. 481, 83 N. E. 912 [*followed* in State *v.* Pontius, 78 Ohio St. 353, 85 N. E. 540], where the constitutional amendment regulating elections authorized the legislature to extend existing terms. But *compare* State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785.

**The extension being merely temporary** the constitutional limitation of tenure is not applicable. State *v.* Harris, 77 Ohio St. 481, 83 N. E. 912 [*followed* in State *v.* Pontius, 78 Ohio St. 353, 85 N. E. 540].

**Limitation of tenure** see *supra*, II, A, 3, b.

11. Terry *v.* Hargis, 74 S. W. 271, 24 Ky. L. Rep. 2498 [*following* Olmstead *v.* Augustus, 112 Ky. 365, 65 S. W. 817, 23 Ky. L. Rep. 1772; Campbell *v.* Dotson, 111 Ky. 125, 63 S. W. 480, 23 Ky. L. Rep. 510]; State *v.* Spears, (Tenn. Ch. App. 1899) 53 S. W. 247.

12. **Vacancy in office of constable** see *infra*, II, B, 5.

13. Maddox *v.* York, 21 Tex. Civ. App. 622, 54 S. W. 24 [*disapproving* and *criticizing* as "more technical than sound" Kimberlin *v.* State, 130 Ind. 120, 29 N. E. 773, 30 Am. St. Rep. 208, 14 L. R. A. 856; State *v.* Hunt, 54 N. H. 431; State *v.* Dahl, 55 Ohio St. 195, 45 N. E. 56; State *v.* Hopkins, 10 Ohio St. 509].

14. Maddox *v.* York, 21 Tex. Civ. App. 622, 54 S. W. 24.

15. Maddox *v.* York, 21 Tex. Civ. App. 622, 54 S. W. 24.

**Holding over** generally see *supra*, II, A, 6, c.

failure of the sheriff elect to qualify,[16] the failure of the sheriff to give a new bond when required,[17] or the unauthorized and protracted absence of the sheriff from the county;[18] and a vacancy may also result from the death of the sheriff, or his resignation,[19] removal,[20] suspension,[21] or abandonment of the office.[22] It has been held that the failure of a sheriff to execute or renew the official bond required by the statute does not *ipso facto* vacate his office,[23] but is merely a cause of forfeiture and vacancy which may be declared in a proper judicial proceeding;[24] but it has also been held that no formality of trial before the county commissioners' court is necessary to determine whether the office has become vacant by failure to give bond.[25] A sheriff's acceptance of an incompatible office *ipso facto* vacates the office of sheriff,[26] or according to other authority warrants a declaration by the court that the office is vacated.[27] If the county court accept a bond not executed until after the time prescribed by the statute it cannot subsequently declare the office vacant for failure to give the bond in time.[28] A vacancy in the office of sheriff which may be filled by appointment implies that no one has any title to the office,[29] and such a vacancy does not exist when judgment of ouster against the incumbent of the office is obtained on quo warranto on the ground that relator has a superior title.[30] The vacancy is to be declared by the officer or court designated by the statute;[31] but a statute authorizing a designated officer to certify to the executive the existence of the facts which under the law create a vacancy does not authorize such officer to declare the office vacant,[32] and if such officer certifies a vacancy when in fact none exists, an appointment to fill such supposed vacancy is void and does not affect the right of the incumbent.[33]

16. See *supra*, II, A, 5, a.

17. Bosworth *v.* Walters, 46 Ga. 635, holding that where the governor ordered a sheriff to give a new bond to the ordinary of the county within ten days, and he failed to comply, he forfeited his right to exercise the duties of his office, although meanwhile a vacancy in the office of ordinary occurred, the law providing that the clerk of the superior court might then act as ordinary. And see, generally, *supra*, II, A, 5, g.

18. See Hill *v.* State, 1 Ala. 559; Stokes *v.* Kirkpatrick, 1 Metc. (Ky.) 138.

19. See *infra*, II, A, 7, b.

20. See *infra*, II, A, 7, e.

21. See *infra*, II, A, 7, d.

22. See *infra*, II, A, 7, c.

23. *Ex p.* Candee, 48 Ala. 386; Brown *v.* Grover, 6 Bush (Ky.) 1; Clark *v.* Ennis, 45 N. J. L. 69; Vann *v.* Pipkin, 77 N. C. 408. *Contra*, Bennett *v.* State, 58 Miss. 556 [*followed* in State *v.* Morgan, 59 Miss. 349], holding that the failure of a sheriff to supply new sureties, when so ordered by the board of supervisors, on petition of sureties to be released, *ipso facto* vacates the office.

24. *Ex p.* Candee, 48 Ala. 386, holding further that in such a proceeding it is a good defense that a sufficient bond was presented in the time limited, and that the probate judge, without any legal reason, refused to approve and file it.

25. Flatan *v.* State, 56 Tex. 93, so holding on the ground that the only question of fact to be determined is whether or not the person elected has neglected or refused to qualify, and such fact is known to the court judicially, and the fact that such court declares the office vacant without process or formal trial does not prevent its action from being judicial.

26. Shell *v.* Cousins, 77 Va. 328 [*following* Rex *v.* Trelawney, 3 Burr. 1616, 97 Eng. Reprint 1010; Milward *v.* Thatcher, 2 T. R. 81, 1 Rev. Rep. 432, 100 Eng. Reprint 45], holding that in such case no order of amotion is necessary.

**In Virginia any other office is incompatible** with that of sheriff, the constitution providing that "sheriffs shall hold no other office." Shell *v.* Cousins, 77 Va. 328.

**A resignation from the second office** after it has been accepted cannot restore the late sheriff to his office of sheriff. Shell *v.* Cousins, 77 Va. 328.

27. Stokes *v.* Fitzpatrick, 1 Metc. (Ky.) 138.

28. Schuff *v.* Pflanz, 99 Ky. 97, 35 S. W. 132, 18 Ky. L. Rep. 25.

29. State *v.* Ralls County Ct., 45 Mo. 58.

30. State *v.* Ralls County Ct., 45 Mo. 58.

31. Flatan *v.* State, 56 Tex. 93, holding that under the Texas statutes the power to declare the office vacant is vested in the commissioners' court of the county, and not exclusively in the judge of the district court.

**The officer or officers upon whom is imposed the duty of filling vacancies** have as a necessary result the authority and duty to inquire and ascertain whether a vacancy exists. Hill *v.* State, 1 Ala. 559.

32. Hill *v.* State, 1 Ala. 559.

33. Bruner *v.* Bryan, 50 Ala. 522 (holding that in certifying a vacancy to the governor the probate judge acts ministerially and not judicially); Hill *v.* State, 1 Ala. 559 (holding that a commission issued by an executive officer in a supposed case of vacancy gives only a *prima facie* right to exercise the office which ceases when it is judicially ascertained that the office was not vacant).

**b. Resignation.**[34] Where a sheriff transmits his resignation to take immediate effect, to the proper authorities, and it is received by them, a vacancy exists in the office,[35] and the sheriff cannot withdraw such resignation,[36] even with the concurrence of the authorities to whom it was sent.[37]

**c. Abandonment of Office.** If a lawful sheriff, whose sureties have been discharged on their own application, and whose office has been certified to the governor to be vacant on account of his failure to give a new bond, when in fact there is no vacancy, accepts an appointment by the governor as in case of vacancy, such acceptance does not amount to an abandonment of his right to the office under his former title.[38]

**d. Suspension.**[39] A statute authorizing the governor to remove a sheriff from office for malfeasance or nonfeasance in the performance of his official duties gives him by implication, as an incident to such power, the power to suspend a sheriff pending removal proceedings.[40] Under some statutes a sheriff may be suspended from his office by the district court for certain causes,[41] and in case of such suspension the county supervisors may appoint a temporary sheriff in his place.[42]

**e. Removal** [43] — (i) *POWER TO REMOVE.* In some states the power to remove a sheriff is an executive power, vested in the governor,[44] while in other states the statutes provide for proceedings in the courts for the removal of such officers.[45] The power to remove sheriffs is an extraordinary one, to be executed out of the usual course of the administration of the law, and should never be called into operation except in cases of great necessity and for clear and manifest

**34. Resignation of deputy** see *infra*, II, C, 6.

**35.** State *v.* Hauss, 43 Ind. 105, 13 Am. Rep. 384. But *compare* Ross *v.* McMartin, 7 U. C. Q. B. 179, holding that where, after a writ of fieri facias was delivered to the sheriff, he tendered his resignation, which was accepted, but the writ was returned between the time of the acceptance of his resignation and the appointment of his successor, such return being made by the deputy sheriff who remained in the office to wind up the old business, the old sheriff must be considered as in office at the time of the return of the writ and liable for a false return thereon.

**36.** State *v.* Hauss, 43 Ind. 105, 13 Am. Rep. 384.

**37.** State *v.* Hauss, 43 Ind. 105, 13 Am. Rep. 384.

**38.** Bruner *v.* Bryan, 50 Ala. 522.

**39. Suspension of constable** see *infra*, II, B, 5, b.

**40.** State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534.

**The power to suspend during investigation is not arbitrary,** but involves the exercise of discretion by the governor, to be exercised when reasonable grounds shall indicate a necessity therefor. State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534.

**41.** McCue *v.* Wapello County Cir. Ct., 51 Iowa 60, 50 N. W. 488.

**Filing of petition for removal.**—Under Code (1873), § 756, providing that the judge of a district court may on his own motion suspend a sheriff for certain causes, and section 757, providing that on such suspension he may direct the district attorney to file a petition charging the sheriff with the alleged offense, an order of suspension is valid, although the petition be not filed, as ordered, at the term when the suspension is made. McCue *v.* Wapello County Cir. Ct., 51 Iowa 60, 50 N. W. 488.

**42.** McCue *v.* Wapello County Cir. Ct., 51 Iowa 60, 50 N. W. 488, holding that such appointee, and not the deputy of the suspended sheriff, was authorized to discharge the duties of the office.

**43. Removal of:** Constable see *infra*, II, B, 5, c. Deputy see *infra*, II, C, 6.

**44.** State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534; *In re* Guden, 175 N. Y. 529, 64 N. E. 451 [*affirming* 71 N. Y. App. Div. 422, 75 N. Y. Suppl. 794 (*reversing* 37 Misc. 390, 75 N. Y. Suppl. 786)]; People *v.* Parker, 6 Hill (N. Y.) 49.

**The governor may remove a sheriff appointed by him on account of a vacancy in** the office, although no charges have been preferred against such sheriff. People *v.* Parker, 6 Hill (N. Y.) 49.

**Action of governor not reviewable by courts.**— *In re* Guden, 171 N. Y. 529, 64 N. E. 451 [*affirming* 71 N. Y. App. Div. 422, 75 N. Y. Suppl. 794 (*reversing* 37 Misc. 390, 75 N. Y. Suppl. 786)].

**45.** *California.*— Thurston *v.* Clark, 107 Cal. 285, 40 Pac. 435.

*Iowa.*— State *v.* Welsh, 109 Iowa 19, 79 N. W. 369.

*Kansas.*— State *v.* Welfelt, 73 Kan. 791, 85 Pac. 583.

*Kentucky.*— Stokes *v.* Kirkpatrick, 1 Metc. 138.

*Louisiana.*— State *v.* Cannon, 45 La. Ann. 1231, 14 So. 130; State *v.* Waggner, 42 La. Ann. 54, 8 So. 209.

cause, and even then should be exercised with great caution and in strict conformity with the authority given.[46]

(II) *CAUSES FOR REMOVAL.*[47] A sheriff is subject to be removed from office for misconduct,[48] nonfeasance,[49] corruption,[50] extortion,[51] oppression,[52] or neglect [53] in regard to the duties of his office; and this is true, although the misconduct was committed in a preceding term,[54] at least if there has been no intervening term in which the office has been held by another person; [55] and the fact that an act committed by a sheriff is punishable as a crime does not affect his liability to removal from office for the same act.[56] It is also ground for removal that the

*New Mexico.*— Territory *v.* Sanches, (1908) 94 Pac. 954.

*Oklahoma.*— Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507.

*Texas.*— Davis *v.* State, 35 Tex. 118 (removal by district judges); Robinson *v.* State, (Civ. App. 1894) 28 S. W. 566 (holding that the district court has concurrent jurisdiction with the commissioners' court over a proceeding to remove a sheriff from office for failure to give bond).

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 14.

46. Davis *v.* State, 35 Tex. 118.

47. **Causes for removal of constable** see *infra*, II, B, 5, c, (II).

48. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369; State *v.* Cannon, 47 La. Ann. 278, 16 So. 666, (1894) 15 So. 626; State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534; Territory *v.* Sanches, (N. M. 1908) 94 Pac. 954.

**Voluntary intoxication** while engaged in the performance of an official duty is ground for removal. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369.

**Failure to enter and promptly pay over collections.**— The failure of a sheriff to enter on the books provided for that purpose all taxes and licenses, with the interest thereon, collected, and pay the same to the parish treasurer in the first week of each month, as required by statute, constitutes a misconduct in office justifying his removal, although he finally pays over the moneys collected by him. State *v.* Cannon, 47 La. Ann. 278, 16 So. 666, (1894) 15 So. 626.

**Conviction of crime** is a sufficient ground for removal. Stokes *v.* Kirkpatrick, 1 Metc. (Ky.) 138.

**A sheriff may be removed for misconduct prior to his election,** affecting his usefulness as a public officer, as where he corruptly promised to appoint another his counsel in the event of his election. Matter of Guden, 71 N. Y. App. Div. 422, 75 N. Y. Suppl. 794 [*reversing* 37 Misc. 390, 75 N. Y. Suppl. 786, and *affirmed* in 171 N. Y. 529, 64 N. E. 451].

**A sheriff will not be removed for a technical disregard of laws** governing his official conduct, where his acts were done pursuant to advice of counsel and in good faith. State *v.* Bourgeois, 47 La. Ann. 184, 16 So. 655.

49. State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534.

**A sheriff's failure to comply with a verbal command of the district judge** to convey prisoners to the jail of an adjacent county is not ground for removal, since such an order is not lawful authority to the sheriff to make the transfer. Davis *v.* State, 35 Tex. 118.

**Failure to make arrests and execute process,** not showing corruption, gross neglect, or inefficiency will not authorize the removal of the sheriff. State *v.* Bourgeois, 47 La. Ann. 184, 16 So. 655.

50. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369, holding that a sheriff who, besides receiving compensation for services of a bailiff, procures the allowance to himself of fees for services of the latter, knowing he is not entitled thereto, is guilty of corruption in office, although he makes no false returns, and may be removed therefor.

51. State *v.* Waggner, 42 La. Ann. 54, 8 So. 209, holding that it is an act of extortion or oppression in office for a sheriff to demand and recover from an accused person in custody the sum of one dollar in cash, as a condition precedent to his release on an appearance bond, and in advance of any trial, conviction, and sentence to pay costs.

52. State *v.* Waggner, 42 La. Ann. 54, 8 So. 209, holding that when the sheriff ignores the law and advertises each piece of property separately instead of in a list, and in larger type than such as the law requires, in a newspaper which he personally owns, he is guilty of extortion and oppression in office, and is subject to removal.

53. State *v.* Carneall, 10 Ark. 156; State *v.* Welsh, 109 Iowa 19, 79 N. W. 369, holding that a sheriff who allows a prisoner condemned to imprisonment in the penitentiary his liberty for thirty hours is guilty of a wilful neglect of duty, justifying his removal from office.

**The neglect must be either habitual or wilful** in order to warrant a removal. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369.

54. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369; State *v.* Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534 (holding that this is true where many charges relating to the term previous to the incumbency are of the same nature as one specific act occurring during his term, and large sums illegally collected during previous years are still retained by him); Territory *v.* Sanches, (N. M. 1908) 94 Pac. 954. *Contra*, Thurston *v.* Clark, 107 Cal. 285, 40 Pac. 435.

55. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369; Territory *v.* Sanches, (N. M. 1908) 94 Pac. 954.

56. Territory *v.* Sanches, (N. M. 1908) 94 Pac. 954.

sheriff is ineligible,[57] or has failed to give bond as required by statute,[58] or to furnish new security when this is lawfully required of him.[59] Malfeasance or misconduct of a deputy sheriff does not subject the sheriff to removal or suspension from office, unless he has encouraged or sanctioned the delinquency of the deputy.[60] The fact that after the election and qualification of a sheriff his name is stricken from the list of registered and qualified voters is not ground for his removal.[61]

(III) *NOTICE* [62] *AND HEARING.*[63] Before a sheriff is removed he is entitled to notice of the charges against him,[64] and an opportunity of being heard in his defense.[65]

(IV) *PROCEEDINGS.*[66] In some states a sheriff can be removed from office only by direct proceedings instituted for that purpose;[67] and a statute creating a prescription applicable to the civil liability of a sheriff for acts of misfeasance and nonfeasance has no application to proceedings for his removal under the

57. See State *v.* Reid, 45 La. Ann. 162, 12 So. 189, holding that an averment in a suit against a sheriff for his removal from office, on the ground that he had not obtained a discharge required by the constitution with reference to the collection of public money, to the effect that he was duly elected, commissioned, and qualified as sheriff, although subsequently filed, cannot operate or be given effect as an estoppel against the further prosecution of a pending suit previously filed against the same sheriff for his removal from office upon the score of constitutional ineligibility to hold office.

**Eligibility** generally see *supra*, II, A, 3.

58. Stokes *v.* Kirkpatrick, 1 Metc. (Ky.) 138; State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982; Robinson *v.* State, (Tex. Civ. App. 1894) 28 S. W. 566. See *supra*, II, A, 5, a.

**Qualification under previous appointment** — Where defendant had been elected sheriff and tax collector, but, after notice of his election, he failed to give bond as required by statute, the fact that he had previously been appointed sheriff by the commissioners' court, before his election, and had given bond as such appointee, did not preclude his removal for failure to give a new bond after his election. State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982.

**Constitutional provision for holding over.**— Tex. Const. art. 16, § 17, providing that all officers shall continue to perform the duties of their offices until their successors shall be duly qualified, does not deprive the district court of jurisdiction to remove a sheriff who has failed to give bond after reëlection. Robinson *v.* State, (Tex. Civ. App. 1894) 28 S. W. 566.

**Motive in removal.**—Where the commissioners' court has removed a sheriff for his failure to give bond as required by statute, their motive in making such removal is immaterial. State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982.

59. Renshaw *v.* Cook, 129 Ky. 347, 111 S. W. 377, 33 Ky. L. Rep. 860; Bartly *v.* Fraine, 4 Bush (Ky.) 375; Catching *v.* Davis, 3 B. Mon. (Ky.) 61. See, *supra*, II, A, 5, g.

60. State *v.* Budd, 39 La. Ann. 232, 1 So. 453.

61. Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

62. See, generally, NOTICE, 29 Cyc. 1110.

63. **Notice and hearing before removal of constable** see *infra*, II, B, 5, c, (III).

64. State *v.* Carneall, 10 Ark. 156; Matter of Guden, 171 N. Y. 529, 64 N. E. 451 [*affirming* 71 N. Y. App. Div. 422, 75 N. Y. Suppl. 794 (*reversing* 37 Misc. 390, 75 N. Y. Suppl. 786)]; People *v.* Parker, 6 Hill (N. Y.) 49; Gordon *v.* State, 43 Tex. 330.

**A rule on a sheriff requiring him to show cause** why he should not be removed from office answers the purpose of a citation, as he is supposed to be always in court and to be apprised of its orders. Davis *v.* State, 35 Tex. 118.

**When notice unnecessary.**—Where the statutes authorize the county court to require the sheriff to give additional bonds, and require the court to cause the sheriff annually to renew his bond, and on his failure to do so to enter an order suspending him from acting until he gives the bond, or vacating the office, and require the sheriff on or before a certain day in each year to enter into bonds for the faithful performance of his duties, and provide that on his failure to do so he shall forfeit his office and the county court may appoint one to fill the vacancy, the county court may, on the failure of the sheriff to give the required bonds, enter an order declaring the office vacant and appoint another to fill the vacancy, without giving the sheriff notice. Renshaw *v.* Cook, 129 Ky. 347, 111 S. W. 377, 33 Ky. L. Rep. 860.

65. State *v.* Carneall, 10 Ark. 156; Matter of Guden, 171 N. Y. 529, 64 N. E. 451 [*affirming* 71 N. Y. App. Div. 422, 75 N. Y. Suppl. 794 (*reversing* 37 Misc. 390, 75 N. Y. Suppl. 786)]; People *v.* Parker, 6 Hill (N. Y.) 49; Gordon *v.* State, 43 Tex. 330.

66. **Proceedings for removal of constable** see *infra*, II, B, 5, c, (IV).

67. Stokes *v.* Kirkpatrick, 1 Metc. (Ky.) 138.

**In Kansas**, a proceeding for the purpose of removing a sheriff from his office for failure properly to perform his duties should be brought first in the district court, and not in the supreme court by original proceeding in quo warranto. State *v.* Welfelt, 73 Kan. 791, 85 Pac. 583.

**In Oklahoma**, a proceeding for removal of a sheriff is a special proceeding which is to

constitution.[68] General allegations of incompetency or unfitness do not show sufficient cause for the removal of a sheriff,[69] but some official delinquency or some default or occurrence since his election, showing his unfitness for the office must be alleged against him.[70] The general rules as to the admissibility and sufficiency of evidence [71] govern in proceedings to remove a sheriff.[72] A sheriff is not entitled to a trial by jury in a proceeding for his removal from office,[73] and the trial court has the right to direct a verdict against him if the evidence would warrant such a direction in a civil case, and if the facts thus found, or any of them, constitute as a matter of law any one of the grounds for removal enumerated in the statute, and enter a judgment for removal.[74] Where, in a proceeding for the removal of the sheriff from office for failure to qualify and to execute his bond as sheriff and tax collector, defendant admitted that he had never qualified after his election, a verdict finding that defendant had not "neglected and failed to present and have approved" official bonds as sheriff, and "take the oath of office as such sheriff within the time prescribed by law" was insufficient to sustain a judgment for defendant.[75] On the removal of a sheriff the cause thereof should be made a matter of record,[76] and where he is removed irregularly or for insufficient cause, the order or judgment is subject to be revised on appeal.[77] But an order of the district court overruling a demurrer to a written accusation against a sheriff, filed in order to obtain his removal, is not appealable.[78] On certiorari the court has discretionary authority and it has refused to vacate the commission of a person who had been elected and was acting as sheriff, although ineligible, because it deemed that the public service would suffer by such removal.[79] Where a judgment removing a sheriff from office and declaring the office vacant is reversed, an order of court is not necessary to restore the sheriff to his office.[80] In an action by the state to remove a sheriff from office, the state is not required to pay any costs, and cannot be required to make a deposit of jury costs.[81]

be conducted in all respects in the same manner as a trial on an indictment for a misdemeanor. Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507, holding that an arraignment may be waived by defendant and is waived by his filing an announcement that he is ready for trial.

**In proceedings before the board of county commissioners** to declare a sheriff's office vacant because of his default, the board acts in a quasi-judicial capacity. It is a court of special and inferior jurisdiction, and there is no presumption arising in its favor as to the regularity of its proceedings, but its jurisdiction must be made to appear upon the record of the proceedings, and evidence thereof cannot be sought *aliunde*. Armijo *v.* Bernalillo County, 3 N. M. 477, 7 Pac. 19, holding that the board of county commissioners cannot consider the acts of a defaulting sheriff, without first receiving a certificate of the default under the hand and seal of the clerk or territorial auditor.

68. State *v.* Bourgeois, 47 La. Ann. 184, 16 So. 655.

69. Gordon *v.* State, 43 Tex. 330.

70. Gordon *v.* State, 43 Tex. 330.

**Accusation held sufficient.**—An accusation for removal of a sheriff charging that it was his duty to collect a specific sum under a tax warrant, and that he corruptly received money for refusing to do the duty with which he was charged under the warrant, is sufficiently specific. Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507.

71. See EVIDENCE, 16 Cyc. 821.

72. State *v.* Cannon, 45 La. Ann. 1231, 14 So. 130 (holding that in a suit to have a sheriff removed because he is a defaulter, the quietus of the auditor, although given after his election, the receipt of the parish treasurer and receipts of the auditor, the manner in which the police jury makes its settlements with the tax collector for amounts paid the parish treasurer, to show that this was only a partial payment, and parol and written evidence as to the fact of defalcation, are all admissible); Rutter *v.* Territory, 11 Okla. 454, 68 Pac. 507 (holding that in proceedings to remove a sheriff for corruptly refusing to collect a tax warrant, it is not necessary to show that the tax warrant was in all respects legal, but it is sufficient that it was regular on its face and issued by a competent officer in discharge of his duty).

73. Davis *v.* State, 35 Tex. 118.

74. Territory *v.* Sanches, (N. M. 1908) 94 Pac. 954.

75. State *v.* Box, 34 Tex. Civ. App. 435, 78 S. W. 982.

76. Davis *v.* State, 35 Tex. 118.

77. Gordon *v.* State, 43 Tex. 330.

78. Myrick *v.* McCahe, 5 N. D. 422, 67 N. W. 143.

79. State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207.

80. Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

81. State *v.* Waggner, 42 La. Ann. 54, 8 So. 209.

(v) *WHAT AMOUNTS TO REMOVAL.* A statute providing for the election of sheriffs by the people, and that the persons then holding the office of sheriff in the several counties shall hold the same until a designated day, and no longer, unless elected by the people, is a legal and effective removal from office, after the day named, of those sheriffs who are not so elected.[82]

**f. Forfeiture of Office.** In Canada it has been held that where a sheriff agreed with a certain person to give him all the fees of the office, except for certain services specified, in consideration of which such person was to pay the sheriff a certain amount per year absolutely and without reference to the amount of the fees, the effect of such agreement was to forfeit the office upon conviction under a proceeding by scire facias.[83]

**g. Filling Vacancies** [84] — (i) *IN GENERAL.* Where the term of office of the sheriff is made to correspond with the general elections by the people and the constitution makes no provision for filling vacancies which may occur during the term, the mode of filling vacancies in the office is within the control of the legislature.[85]

(ii) *APPOINTMENT.* Vacancies in the office of sheriff are usually filled in the first instance by an appointment [86] by the governor,[87] the county commissioners,[88] or the county court.[89] But as a rule such appointments are merely temporary and are operative only until a new sheriff can be elected,[90] and do not

**82.** Pratt *v.* Allen, 13 Conn. 119.

**83.** Reg. *v.* Moodie, 20 U. C. Q. B. 389.

**84. Filling vacancy in office of constable** see *infra*, II, B, 5, d.

**85.** State *v.* Crow, 20 Ark. 209.

**86.** *Alabama.*— Dowling *v.* White, 116 Ala. 306, 23 So. 133; State *v.* Spence, 7 Ala. 500.

*Georgia.*— Heys *v.* Walters, 46 Ga. 386.

*Kentucky.*— Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823; Cate *v.* Ross, 2 Duv. 243; Johnson *v.* Ellis, Litt. Sel. Cas. 24.

*Missouri.*—State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048.

*New Mexico.*— Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

*North Carolina.*— Sneed *v.* Bullock, 80 N. C. 132.

*Ohio.*— State *v.* Paulding County Com'rs, 61 Ohio St. 506, 56 N. E. 473.

*South Dakota.*— State *v.* Vincent, 20 S. D. 90, 104 N. W. 914.

*Tennessee.*—State *v.* Spears, (Ch. App. 1899) 53 S. W. 247.

*Texas.*— Flatan *v.* State, 56 Tex. 93.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 12.

**A statute authorizing the governor to fill vacancies by appointment is valid,** although the constitution provides that sheriffs shall be chosen by the electors, and fails to confer the power of appointment on the governor in any case. Sprague *v.* Brown, 40 Wis. 612.

**87.** State *v.* Spence, 7 Ala. 500; State *v.* Ayres, Minor (Ala.) 323; Johnson *v.* Ellis, Litt. Sel. Cas. (Ky.) 24; Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170; Sprague *v.* Brown, 40 Wis. 612.

**When appointment complete.**—An appointment of a sheriff by the executive is complete upon the delivery of the commission, and such commission is at least *prima facie* evidence that the person holding it is lawfully entitled to the office. Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

**88.** Sneed *v.* Bullock, 80 N. C. 132; State *v.* Paulding County Com'rs, 61 Ohio St. 506, 56 N. E. 473; State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785; State *v.* McGregor, 44 Ohio St. 628, 10 N. E. 66; State *v.* Vincent, 20 S. D. 90, 104 N. W. 914; Flatan *v.* State, 56 Tex. 93, county commissioners' court.

**89.** *Arkansas.*— State *v.* Crow, 20 Ark. 209, presiding judge of the county court.

*Georgia.*— Heys *v.* Walters, 46 Ga. 386, judge of superior court.

*Kentucky.*— Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823; Cate *v.* Ross, 2 Duv. 243.

*Missouri.*— State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048.

*Tennessee.*— State *v.* Spears, (Ch. App. 1899) 53 S. W. 247.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 12.

**90.** *Alabama.*— Dowling *v.* White, 116 Ala. 306, 23 So. 133; State *v.* Spence, 7 Ala. 500; State *v.* Ayres, Minor 323.

*Georgia.*— Heys *v.* Walters, 46 Ga. 386.

*Kentucky.*— Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823; Cate *v.* Ross, 2 Duv. 243.

*Missouri.*— State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048.

*North Carolina.*— Sneed *v.* Bullock, 80 N. C. 132.

*South Dakota.*— State *v.* Vincent, 20 S. D. 90, 104 N. W. 914.

*Tennessee.*— State *v.* Spears, (Ch. App. 1899) 53 S. W. 247.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 12.

But *compare* State *v.* McClintock, 1 McCord (S. C.) 245, holding that under the provision of the South Carolina constitution

give the appointee the right to the office for the entire unexpired term of his predecessor,[91] unless it is so provided by constitution or statute.[92] An appointee to fill a vacancy holds, however, for the period fixed in the statute, without regard to the time the appointing power may fix for his tenure of office.[93]

(III) *ELECTION.*[94] As a rule a vacancy in the office of sheriff is filled for the balance of the unexpired term at the next general election,[95] or at a special election held for the purpose.[96]

**8. TITLE TO AND POSSESSION OF OFFICE**[97] **— a. In General.** A person possessing all the qualifications required by law to vote and hold office at the time he is elected and qualified as sheriff of a county has a vested right in the office, of which he cannot be deprived except for cause[98] and by due process of law.[99] But a sheriff elect has not such a complete title to the office as will entitle him to a mandamus to compel his induction into the office until he has given bond with sufficient sureties who have justified.[1]

**b. Evidence of Title.**[2] A sheriff who wishes to prove his title to the office must produce record evidence;[3] but a third person may, in his own behalf, prove by parol that the alleged sheriff acted as such officer.[4]

**c. Evidence of Incumbency.**[5] An order of court appointing a person sheriff is admissible to prove that he was sheriff;[6] and a sheriff's official bond is competent evidence to show that he was sheriff[7] and was in office at a particular time.[8] The fact that a person acted as sheriff at a certain time is, as against him, *prima facie* evidence that he was sheriff,[9] and proof by reputation that a certain person was the sheriff has been held sufficient to establish his official character.[10]

that sheriffs should hold their office for four years, a sheriff appointed by the governor to fill a vacancy held his office for four years.

**91.** State *v.* Ayres, Minor (Ala.) 323.

**92.** State *v.* McGregor, 44 Ohio St. 628, 10 N. E. 66, holding that where a person elected to the office of sheriff for a full term at a biennial election dies after he has qualified, but before the commencement of the term to which he has been elected, a person appointed to fill the vacancy will hold office for the term for which his predecessor had been elected; and this is so, although for a part of the time the office was filled by the coroner.

**93.** Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823.

**94.** See, generally, ELECTIONS, 15 Cyc. 268.

**95.** Dowling *v.* White, 116 Ala. 306, 23 So. 133; State *v.* Ayres, Minor (Ala.) 323; Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823; Cate *v.* Ross, 2 Duv. (Ky.) 243; State *v.* Vincent, 20 S. D. 90, 104 N. W. 914.

**Election at which office may be filled.—** Under Ky. Const. § 152, providing that vacancies in elective offices shall be filled by appointment until "the next succeeding annual election at which either city, town, county, district or state officers are to be elected," and then filled by an election for the remainder of the term, a vacancy in the office of sheriff cannot be filled at an election at which only a representative in congress is to be voted for in the county in which the vacancy exists, although an election for judge of the court of appeals is being held in another district. Neeley *v.* McCollum, 107 Ky. 143, 53 S. W. 37, 21 Ky. L. Rep. 823.

**96.** State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048.

**The general election law is applicable to a special election** to fill a vacancy in the office of sheriff. State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048.

**97. Title to and possession of office of:** Constable see *infra*, II, B, 6. Deputy see *infra*, II, C, 7.

**98.** Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

**Grounds for removal** see *supra*, II, A, 7, e, (II).

**99.** Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

**Notice and hearing in removal proceedings** see *supra*, II, A, 7, e, (III).

**Due process of law** generally see CONSTITUTIONAL LAW, 8 Cyc. 1080.

**1.** Thomason *v.* Justices, 3 Humphr. (Tenn.) 233.

**2. Evidence of title to office of:** Constable see *infra*, II, B, 6, b. Deputy see *infra*, II, C, 7, b.

**3.** Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441.

**4.** Wells *v.* Caldwell, 1 A. K. Marsh. (Ky.) 441.

**5. Evidence of incumbency of office of:** Constable see *infra*, II, B, 6, b. Deputy see *infra*, II, C, 7, b.

**6.** State *v.* Crow, 20 Ark. 209.

**7.** State *v.* Crow, 20 Ark. 209, where the bond contained an admission of the appointment.

**8.** Brazeal *v.* Smith, 5 Ala. 206.

**9.** Lucier *v.* Pierce, 60 N. H. 13; Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547.

**10.** Hall *v.* Luther, 13 Wend. (N. Y.) 491.

**d. Estoppel [11] to Deny Title or Incumbency.[12]** Where a person has acted as sheriff, both he [13] and the sureties on his official [14] bond are estopped to deny his incumbency and official character.

**e. Proceedings to Determine Right to Office.** In Iowa the district court, and the supreme court on appeal, has jurisdiction to try a cause involving the right to the office of sheriff on a petition filed by one claimant against another.[15] In Louisiana it is held that a suit to contest the right of a sheriff to his office should not be brought in the adverse claimant's own name, but the remedy of the claimant is under the "Intrusion Act." [16] Where, in an action by the defeated candidate against the successful candidate for the office of sheriff, it is alleged that the latter is an alien and that he has fraudulently concealed that fact from the electors, allegations in the answer of facts tending to refute the charge of fraud are material.[17] In a suit against a sheriff and *ex officio* tax collector to determine his right to hold the office, no advantage can be taken of respondent for declining to make a settlement on terms with which he was under no legal obligation to comply.[18] In a proceeding by quo warranto to try the title to the office of sheriff the question is as to the *de jure* title to the office and not as to a *de facto* office or officer.[19] In proceedings to ascertain whether a sheriff is entitled to hold the office, it is incumbent on him to prove his eligibility.[20] The right of a sheriff to his office cannot be collaterally questioned by third persons.[21]

**f. Proceedings to Protect Possession of Office.** A court of equity may, at a suit of a lawful sheriff, in possession of his office, interfere by injunction to restrain another person from usurping, intruding upon, or exercising the duties of the office.[22]

**9. De Facto Sheriffs.[23]** A person who has been duly elected sheriff and

**11.** See, generally, Estoppel, 16 Cyc. 671.

**12. Estoppel to deny title to of incumbency of office of:** Constable see *infra*, II, B, 6, c. Deputy see *infra*, II, C, 7, c.

**13.** *Kentucky.*— Wells *v.* Caldwell, 1 A. K. Marsh. 441.

*New York.*— Hall *v.* Luther, 13 Wend. 491.

*North Carolina.*— Stuart *v.* Fitzgerald, 6 N. C. 255.

*Virginia.*— Monteith *v.* Com., 15 Gratt. 172.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 17.

**14.** McWhorter *v.* McGehee, 1 Stew. (Ala.) 546; State *v.* Swigart, 22 Ark. 528; Hall *v.* Luther, 13 Wend. (N. Y.) 491; Monteith *v.* Com., 15 Gratt. (Va.) 172. See *infra*, X, C, 19.

**15.** State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622, so holding under Code (1873), tit. 20, c. 6, § 3352, providing that, "when several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto."

**16.** Breaux *v.* Lejeune, 25 La. Ann. 364.

**17.** State *v.* Van Beek, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622, where the court accordingly overruled a motion to strike out allegations in the answer that defendant was advised that his father had been naturalized before defendant attained his majority, and never until the commencement of the proceeding in question had reason to doubt that he was a citizen of the United States; that relying thereon he had exercised the rights of a citizen since arriving at age; and that he had served in the army of the United States.

**18.** State *v.* Reid, 45 La. Ann. 162, 12 So. 189.

**19.** State *v.* Finn, 4 Mo. App. 347.

**20.** State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207, so holding on the ground that such proof is peculiarly within his power.

**21.** Turner *v.* Hill, 21 La. Ann. 543 [*following* Gradnigo *v.* Moore, 10 La. Ann. 670], holding that the question whether a person is constitutionally and legally a sheriff cannot be determined in a proceeding for an injunction to restrain him from making a levy under an execution.

**22.** Bruner *v.* Bryan, 50 Ala. 522 (holding that a lawful sheriff, whose office has not been vacated or abandoned, although his sureties have been discharged from liability on his bond, and a vacancy has been certified to the governor and has been filled by appointment, may maintain a bill in equity against the person so appointed, to enjoin him from exercising the duties or receiving the emoluments of the office); Armijo *v.* Baca, 3 N. M. 294, 6 Pac. 938; Ewing *v.* Thompson, 43 Pa. St. 372 (holding that where one claiming an election as sheriff was commissioned by the governor, but a suit brought to test the validity of the election was decided in favor of the contestant, and thereupon, pending a certiorari, the governor issued another commission to the latter, an injunction would issue to restrain the person last commissioned from interfering with the office).

**23. De facto:** Constable see *infra*, II, B, 7. Deputy see *infra*, II, C, 8. Officer generally see Officers, 29 Cyc. 1389.

exercises the duties of the office is sheriff *de facto,* although his bond was not executed within the time prescribed by law after his election;[24] and a sheriff who has properly qualified by giving the bond required by statute, and who is reëlected at the next election, but fails to renew the bond, is a *de facto* sheriff after the expiration of the first term.[25] So also, although the statute makes the election of a defaulter to any office of trust or profit void, where a defaulter is elected sheriff, and acts as such, he is sheriff *de facto.*[26] But a person attempting to hold the office of sheriff in opposition to the authority of the United States and the laws and decisions of the courts of the state cannot be regarded as a *de facto* officer.[27]

**B. Constables — 1. Election[28] or Appointment — a. In General.** Although in the United States the office of constable is usually elective,[29] in some states provision has been made by constitution or statute for the appointment of such officers,[30] and an appointment by the proper officials confers a good title to the office.[31]

**b. Number of Constables.** The number of constables to be elected by municipalities is regulated by statute, generally with reference to population;[32] and a constitutional provision directing that the different counties shall be laid off in districts of convenient size and providing for the election of constables for the different districts does not limit the power of the legislature to increase the number.[33]

**24.** Crawford *v.* Howard, 9 Ga. 314; Monteith *v.* Com., 15 Gratt. (Va.) 172.

**25.** Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683.

**26.** Bates *v.* Dyer, 9 Humphr. (Tenn.) 162.

**27.** State *v.* McFarland, 25 La. Ann. 547.

**28.** See, generally, ELECTIONS, 15 Cyc. 268.

**29.** *Arkansas.*— Helena *v.* Biscoe, 19 Ark. 417.

*Illinois.*— People *v.* Bollam, 182 Ill. 528, 54 N. E. 1032, holding that a statutory provision for the appointment of a village constable is void, as the constitution provides that constables shall be elected.

*Michigan.*— Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

*Missouri.*— State *v.* McKee, 69 Mo. 504.

*North Carolina.*— McCall *v.* Fullenwider, 26 N. C. 364.

*Ohio.*— Johnson *v.* Stedman, 3 Ohio 94.

*Tennessee.*— Britton *v.* Moody, 2 Coldw. 15; State *v.* Clark, 1 Head 369.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 20; and *supra,* I, C, 1.

**The provision of the Michigan constitution** that constables shall be elected in organized townships does not apply to cities. White *v.* Manistee County, 105 Mich. 608, 63 N. W. 653.

**County court cannot appoint constable except in case of vacancy.**— Pierce *v.* Jones, 26 N. C. 326; State *v.* Wiggins, 26 N. C. 273; State *v.* Lightfoot, 24 N. C. 306. See also State *v.* Briggs, 25 N. C. 357.

**A municipal ordinance** respecting the election of constables is void when it conflicts with a state statute on the subject. State *v.* McKee, 69 Mo. 504.

**30.** See Helena *v.* Biscoe, 19 Ark. 417 (holding that the provisions of the charter granted to the town of Helena by the territorial legislature as to the mode of appointing the town constable were not repealed by the constitutional provision for the election of township constables by the qualified voters); Smith *v.* Thursby, 28 Md. 244; Loper *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

**Constitutionality of statute.**— Mass. St. (1865) c. 249, providing for the appointment of state constables, is not in violation of the constitutional provision which requires that sheriffs shall be elected by the people. Com. *v.* Certain Intoxicating Liquors, 110 Mass. 172.

**31.** Smith *v.* Thursby, 28 Md. 244.

**By whom appointment made.**— The Maryland constitution which took effect on Oct. 5, 1867, provided for an election of a new mayor and city council for the city of Baltimore, which was duly held, and the former incumbents superseded, on Nov. 18, 1867. It also provided that the mayor and city council should appoint city constables, who should hold their office for two years, while under the old constitution the mayor and council did not possess this power of appointment. On Oct. 8, 1867, the persons who were then in office as constables were reappointed by the old mayor and council, and after Nov. 18, 1867, other persons were appointed by the new mayor and council to the same offices. It was held that the first appointment was valid. Smith *v.* Thursby, 28 Md. 244. Where the charter of a city provided that the "constables of the several wards thereof shall be appointed by the mayor and common council," and the mayor, according to usage, nominated a person to the office; but the council disregarded his action, and one of their members nominated, and they voted for, another person, and declared that he was elected, their action was illegal, and the person chosen by them was not entitled to the office. Loper *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

**32.** See Sanchez *v.* Fordyce, 141 Cal. 427, 75 Pac. 56, holding that St. (1901) p. 686, c. 234, § 56, providing that in all townships having less than six thousand inhabitants only one constable shall be elected is authorized by the constitution.

**33.** Britton *v.* Moody, 2 Coldw. (Tenn.) 15.

**c. Time for Election.** Constables must be elected at the times fixed by statute.[34]

**d. Mode and Sufficiency of Election.** Under the New England town system [35] constables can be chosen only by a majority of all the votes cast at an annual town meeting;[36] and in order to constitute an election it is necessary that the person claiming to be chosen should at the time he is voted for be presented distinctly to the mind of each elector who votes, so that he should know for what individual he votes.[37] In North Carolina the county court is the proper judge of the return of the election of a constable, and its adjudication that a person was elected cannot, while it remains in force, be questioned.[38]

**e. Validity of Election.** Where the statutes give notice of the time and place of election and of the officer to be elected, an election of a constable is valid, although the township supervisors, by proclamation, called for the election of two constables, whereas the township was entitled to elect only one.[39]

**f. Validity of Appointment.** Although it may be the duty of the county court to lay off the county into districts, and, in the appointment of constables, to designate their districts, yet an appointment of a constable for the county generally is not void.[40] But an order of court appointing a person constable is void and confers no authority, where it does not appear that any case existed in which the court could by law exercise the power of appointing a constable.[41]

**g. Record and Evidence of Appointment or Election.** A record of the county court reciting that the court appointed a certain person constable, he having been elected in a certain district, is sufficient evidence of an election by the people, and not of an appointment by the court;[42] and it has been held that a statement in the record of the county court that a certain person, having been "appointed" constable, came into court and qualified, must be understood to mean that he had been elected by the people according to law.[43] But an entry on the county court records that a certain person was permitted to renew his bond as constable is not evidence that such person was duly appointed a constable.[44] Parol evi-

34. Beacher *v.* Hart, 1 Root (Conn.) 135 (holding that a constable cannot be chosen after the annual town meeting in December, except in case of a vacancy in the office by death or removal); Starr *v.* Flynn, 62 Kan. 845, 62 Pac. 659 (time for election of court marshal).

**In Pennsylvania** there can be no election of constables at any other time than at the statutory period, every three years. Murphy's Case, 19 Pa. Co. Ct. 160 (holding that where a borough was divided into two wards and the court appointed a certain person constable of the second ward "until his successor shall be duly elected," no election for constable could be had until the statutory time); English's Case, 16 Pa. Co. Ct. 129. Under the act of Feb. 14, 1889 (Pamphl. Laws 6), providing for the election of constables on the "third Tuesday of February next," and triennially thereafter, the first election was to be held on such Tuesday of February, 1890. English's Case, 16 Pa. Co. Ct. 129; Com. *v.* Erdman, 11 Pa. Co. Ct. 285; *In re* Constables' Bonds, 8 Pa. Co. Ct. 282; Hunsinger's Case, 8 Pa. Co. Ct. 173; *In re* Tallon, 7 Pa. Co. Ct. 636. See also Com. *v.* Benfield, 5 Pa. Dist. 382. *Contra*, *In re* Weikel's Bond, 8 Pa. Co. Ct. 121; *In re* Constables, 7 Pa. Co. Ct. 550, both holding that the first election under the statute was to be held on the third Tuesday of February, 1889. See also *In re* Burrell Tp. Constable, 11 Pa. Co. Ct. 436. The act of Feb. 14, 1889 (Pamphl. Laws 6; Purdon Dig. p. 2457), which provides that all constables shall be elected triennially, and which repeals all acts inconsistent therewith, repeals a prior special charter, providing for the election of such officers yearly. *In re* Womer's Bond, 2 Pa. Dist. 670.

35. See, generally, TOWNS.

36. Crowell *v.* Whittier, 39 Me. 530.

37. Crowell *v.* Whittier, 39 Me. 530, holding that the vote of a town that whoever should make the lowest bid for collecting the taxes should be the constable was not an election to that office of the person who made such bid.

38. Bailey *v.* Washburn, 26 N. C. 19.

39. Sanchez *v.* Fordyce, 141 Cal. 427, 75 Pac. 56.

40. Chambers *v.* Thomas, 1 Litt. (Ky.) 268, 3 A. K. Marsh. 536.

41. State *v.* Briggs, 25 N. C. 357.

42. Dickson *v.* Eskridge, 27 N. C. 411.

43. Welch *v.* Scott, 27 N. C. 72; McCall *v.* Fullenwider, 26 N. C. 364.

44. McRae *v.* Wall, 24 N. C. 267, holding that a bond executed in pursuance of such an order and without any other evidence of appointment as constable could not legally be accepted by the court and was therefore void. But *compare* Merrill *v.* McMinn, 29 N. C. 344.

dence that a person acted as constable is admissible against him;[45] and it has also been held that proof of general reputation and acting as constable is competent evidence on behalf of the person claiming to have been constable,[46] although the township records, where these have been properly kept, are the best evidence of such official character;[47] and where the statute requires the appointment of a special constable by a justice of the peace to be noted on the docket of such justice, the appointment can be proved only by the record.[48]

**2. Eligibility.**[49] It is usually required that the constable shall be a resident[50] and a qualified voter[51] of the municipality or district for which he is elected. A mere charge of crime, of which one has never been convicted, does not render one ineligible for the office of constable;[52] and where the statute forbids the reëlection of a constable who fails on or before a certain day in each year "to pay over all moneys collected by him to the treasury to which they belong," the mere fact that certain taxes remain uncollected does not preclude the reëlection of a constable.[53]

**3. Qualification**[54] **— a. In General.** A constable is generally required, before entering upon the duties of his office, to take a prescribed oath of office,[55] and give a bond conditioned for the faithful discharge of his duties.[56] But it has been held that a person elected to the office of constable may discharge its duties without having executed a bond to the town if it has not been required of him

45. Stout *v.* Hopping, 6 N. J. L. 125.

46. Johnson *v.* Stedman, 3 Ohio 94 [*followed* in Eldred *v.* Sexton, 5 Ohio 215].

47. Johnson *v.* Stedman, 3 Ohio 94 [*followed* in Eldred *v.* Sexton, 5 Ohio 215].

48. Benninghoof *v.* Finney, 22 Ind. 101, holding that the statute requiring the justices to note such appointments was imperative and not merely directory.

49. **Eligibility to office of:** Deputy see *infra*, II, C, 4. Sheriff see *supra*, II, A, 3.

50. Barre *v.* Greenwich, 1 Pick. (Mass.) 129.

51. Wilson *v.* Wheeler, 55 Vt. 446.

**What constitutes one a voter.**— One resident and subject to taxation in a town is a "voter" at the town meeting therein, and therefore eligible to the office of constable, although at the annual assessment next preceding the election he was a resident of another town, he being the owner of real estate in both towns, and assessed in both. Wilson *v.* Wheeler, 55 Vt. 446.

52. *In re* Miller, 1 Browne (Pa.) 349, holding that where the statute provided that the electors should choose eight persons, of whom the court of quarter sessions should appoint four as constables, and the court had declared that they would uniformly appoint the highest on the return, unless there was either a moral, intellectual, physical, or legal inability, a mere charge of having committed an indictable offense, of which the candidate had not been convicted, was not sufficient reason for refusing to appoint him.

53. Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92.

54. **Qualification of:** Deputy see *infra*, II, C, 5. Sheriff see *supra*, II, A, 5.

55. Stone *v.* Healy, 5 Conn. 278; Franklin *v.* Kaufman, 65 Ga. 260; Com. *v.* Sullivan, 165 Mass. 183, 42 N. E. 566; Johnson *v.* Stedman, 3 Ohio 94; Barrett *v.* Reid, 2 Ohio 409.

**A constable who is reëlected may lawfully continue to serve before he has been sworn in for the second time.** Kelsy *v.* Wright, 1 Root (Conn.) 83.

**A constable who is in office at the time of the adoption of a constitutional provision requiring that all executive officers shall take the oath therein prescribed before they enter on the duties of their office may continue to perform the duties of his office rightfully, although he has not taken that oath.** Stone *v.* Healy, 5 Conn. 278.

**Constable not required to file copy of official oath with town clerk.— Brunott *v.*** McKee, 6 Watts & S. (Pa.) 513.

56. *Georgia.*— Franklin *v.* Kaufman, 65 Ga. 260.

*Illinois.*— Long *v.* Scott County Ct., 27 Ill. 384.

*Maine.*— Stacey *v.* Graves, 74 Me. 368; Quimby *v.* Adams, 11 Me. 332.

*Massachusetts.*— Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443; Tracy *v.* Goodwin, 5 Allen 409; Whitney *v.* Blanchard, 2 Gray 208.

*Missouri.*— State *v.* Kirby, 9 Mo. 298; Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

*Nebraska.*— Noble *v.* Himeo, 12 Nebr. 193, 10 N. W. 499.

*New Jersey.*— Nottingham *v.* Giles, 2 N. J. L. 111.

*New York.*— Warner *v.* Racey, 20 Johns. 74.

*North Carolina.*— McRae *v.* Wall, 24 N. C. 267.

*Ohio.*— Johnson *v.* Stedman, 3 Ohio 94; Barrett *v.* Reed, 2 Ohio 409.

*Pennsylvania.*— *In re* Doylestown's High Constable, 16 Pa. Co. Ct. 90; Com. *v.* Sheppard, 4 Pa. L. J. 180.

*Vermont.*— State *v.* Buchanan, 65 Vt. 445, 27 Atl. 166.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 24.

or if its execution and delivery are delayed for the time being with the consent of the selectmen.[57] The statutes sometimes require that constables shall qualify within a certain time after their election or appointment,[58] failing in which the office is to be deemed vacant.[59]

**b. Form and Requisites of Bond.**[60] A constable's bond must conform to the statute,[61] but substantial compliance is sufficient.[62] Where the statute requires security but is silent as to its form, the security may be in the form of a penal bond to the people;[63] but it has been considered preferable that it should be in the form of a simple agreement, without any penalty, to pay to any person who may be aggrieved by the constable's neglect of duty.[64] It is necessary to the validity of a constable's bond that it should name an obligee,[65] and the bond should run to the obligee designated by the statute.[66] But although the bond

**Constables in office when statute requiring bond enacted.**— The provision of Mass. St. (1851) c. 94, § 2, that no constable should be competent to serve civil process until he should have given bond to the city or town for the faithful performance of his duties applied to constables who were in office at the time of its passage. Whitney *v.* Blanchard, 2 Gray (Mass.) 208.

57. Langdon *v.* Rutland, etc., R. Co., 29 Vt. 212.

58. State *v.* Kirby, 9 Mo. 298; Dutton *v.* Kelsey, 2 Wend. (N. Y.) 615; Westerhaven *v.* Clive, 5 Ohio 136; State *v.* Buchanan, 65 Vt. 445, 27 Atl. 166.

59. Franklin *v.* Kaufman, 65 Ga. 260; State *v.* Buchanan, 65 Vt. 445, 27 Atl. 166. But *compare* Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159, holding that, in order to disqualify a constable on account of his not furnishing bonds, there must be not only a demand of bonds by the selectmen, but also a peremptory refusal to let him proceed with his official duties, either in the present tense or after a certain limited period of indulgence.

60. Form and requisites of bond of: Deputy see *infra*, II, C, 5. Sheriff see *supra*, II, A, 5, b.

61. Middletown *v.* McCormick, 3 N. J. L. 500 (holding that a constable's bond, conditioned that "in all respects whatsoever, he shall do and execute all services, acts, and duties appertaining to his office to the best of his judgment and ability" is insufficient); Nottingham *v.* Giles, 2 N. J. L. 111.

62. Magner *v.* Knowles, 67 Ill. 325 (so holding as to a constable's bond reciting that the principal obligor named therein, having been chosen constable of the town, and certain other persons, named as sureties, "do hereby, jointly and severally, agree to pay each and every person who may be entitled thereto, all such sums of money as said constable may become liable to pay on account of any execution which shall be delivered to him for collection by virtue of said office," followed by the date of the bond); Quimby *v.* Adams, 11 Me. 332 (holding that a bond conditioned for faithful discharge of duty "as constable" is a substantial compliance with a statute which requires him to give bond for "faithful performance of his duties and trust, as to all processes by him served and executed"); State *v.* Kirby, 9 Mo. 298 (holding that under a statute providing that every constable shall give bond to the state, conditioned that he will execute all process to him directed and pay over all moneys received by him, a bond executed by a constable, conditioned for the faithful discharge of the duties of his office as constable, is sufficient); Com. *v.* Sheppard, 4 Pa. L. J. 180 (holding that, under a statute providing that a constable's bond shall be conditioned "for the just and faithful discharge by the said constable of the duties of his office," a constable's bond conditioned "that he shall faithfully execute the said office, and perform every duty and trust in him reposed," is not void as imposing a greater burden than required by law).

63. People *v.* Holmes, 5 Wend. (N. Y.) 191.

64. People *v.* Holmes, 5 Wend. (N. Y.) 191. See also Fellows *v.* Gilman, 4 Wend. (N. Y.) 414, holding that an instrument in writing under seal, entered into by a constable and sureties, whereby they "jointly and severally agree to pay to each and every person such sum or sums of money as the said constable shall become liable for on account of any execution which shall be delivered to such constable for collection," is good and complies with the requirements of an act incorporating a village, prescribing that constables shall, before they enter upon the duties of their respective offices, give "such security for the faithful performance of the trust reposed in them as the major part of the trustees of the village for the time being shall deem sufficient."

65. Roberts *v.* Parlin, 81 Ill. 230. But *compare* Magner *v.* Knowles, 67 Ill. 325.

66. Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443 (holding that a constable's bond in cities other than Boston should run to the city, and not to the treasurer); Tracy *v.* Goodwin, 5 Allen (Mass.) 409 (holding that a constable's bond in the city of Boston is properly made to the treasurer of the city); Middletown Tp. *v.* McCormick, 3 N. J. L. 500; Woolwick Tp. *v.* Forest, 2 N. J. L. 115; Davis *v.* Kruger, 4 E. D. Smith (N. Y.) 350; Davis *v.* Haffner, 2 Abb. Pr. (N. Y.) 187.

**In Illinois** a constable's bond is properly executed to the county court which succeeded to all the power, jurisdiction, and authority

names the wrong obligee it is valid as a common-law bond when it is voluntarily executed and there is nothing in the condition contrary to law,[67] and a constable may justify his acts under his office, although his bond does not run to the proper obligee.[68] Where the statute does not designate an obligee, the bond may run to the people of the state,[69] or "each and every person" to whom "the constable shall become liable." [70] In the absence of a statutory requirement it is not necessary that a constable's bond should specify the township for which he was elected.[71] A condition in a constable's bond that he shall execute all writs and process to him directed does not render the bond open to the exception that the condition is beyond the terms required by law, since only legally directed writs must be executed.[72]

**c. Amount of Bond.**[73] The bond should be conditioned for the payment of a certain sum of money,[74] which is usually fixed by statute; [75] but a bond taken in more than the amount required by statute but not extorted *colore officii* is valid,[76] at least for the amount of the statute penalty.[77] Where the law does not fix any amount as the penalty of a constable's bond, a bond in which a reasonable sum is fixed as the penalty is not invalid where not given as the result of extortion, duress, or any kind of unfairness; [78] while on the other hand no limitation of liability is necessary to make the bond valid.[79] In the absence of any statute so providing, the county court has no power to require a constable to give a new bond because the penalty in the bond previously given is, in the estimation of the court, insufficient.[80]

**d. Delivery of Bond.** A constable's bond is not delivered so as to become effective unless it has been accepted by some authorized agent of the state or the municipality or unless in law its acceptance can be presumed.[81] A city or town clerk is an officer to whom a constable may properly deliver his bond in the first instance, the statute not designating to whom such bond shall be delivered; [82] but it has also been considered that a delivery of the bond to the selectmen of the town would be sufficient.[83]

**e. Approval, Filing, and Recording of Bond.**[84] The bond of a constable is

of the county commissioners' court. Long *v.* Scott County Ct., 27 Ill. 384. A constable's official bond, made to "Samuel S. Gilbert, County Judge, George A. W. Cloud and George Judd, Justices, of the county of Macoupin," is invalid, since the court cannot presume that the judge and justices of the peace named in the bond constitute the county court. Boice *v.* Gilbert, 29 Ill. 527.

67. Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443, bond running to the treasurer of a city instead of to the city.

**Naming wrong person as governor.**—A constable's bond, given to A, governor of Tennessee, and his successors, for the faithful performance of his official duty, is valid, although in fact B was at the time the governor of the state. Findley *v.* Tipton, 4 Hayw. (Tenn.) 216.

68. Barret *v.* Reed, 2 Ohio 409.

69. People *v.* Holmes, 2 Wend. (N. Y.) 281, 282, where it is said: "The bond of a constable may be given to the people, though it is not deemed necessary that it should be thus executed, as intimated in Warner *v.* Racey, 20 Johns. (N. Y.) 74."

70. Dutton *v.* Kelsey, 2 Wend. (N. Y.) 615. See also Fellows *v.* Gilman, 4 Wend. (N. Y.) 414.

71. State *v.* Kirby, 9 Mo. 298.

72. Musselman *v.* Com., 7 Pa. St. 240.

73. **Amount of bond of sheriff** see *supra*, II, A, 5, c.

74. Roberts *v.* Parlin, 81 Ill. 230. But *compare* Magner *v.* Knowles, 67 Ill. 325.

75. Bagby *v.* Chandler, 9 Ala. 770; Stacey *v.* Graves, 74 Me. 368; Quimby *v.* Adams, 11 Me. 332; McRae *v.* Wall, 24 N. C. 267.

76. Bagby *v.* Chandler, 9 Ala. 770 (where the court said that this view rendered it unnecessary to consider whether the judge of the county court had a discretion to require a bond in certain cases with a penalty larger than that prescribed by the statute); Quimby *v.* Adams, 11 Me. 332.

77. Bagby *v.* Chandler, 9 Ala. 770.

78. Williams *v.* Golden, 10 Nebr. 432, 6 N. W. 766 [*followed* in Noble *v.* Himeo, 12 Nebr. 193, 10 N. W. 499].

79. Noble *v.* Himeo, 12 Nebr. 193, 10 N. W. 499.

80. Sheeley *v.* Wiggo, 32 Mo. 398.

81. Braddy *v.* Shirley, 23 N. C. 597, holding that a constable's bond, made payable to the state, taken by a person not authorized by law to take it, was void for want of delivery.

82. Stacey *v.* Graves, 74 Me. 368; State *v.* Buchanan, 65 Vt. 445, 27 Atl. 166.

83. State *v.* Buchanan, 65 Vt. 445, 27 Atl. 166.

84. **Approval, filing, and recording of bond of sheriff** see *supra*, II, A, 5, e.

usually required to be approved by the township trustees,[85] or the county court,[86] or a judge thereof,[87] or, in vacation, by the clerk of the court,[88] or the selectmen and town clerk.[89]

**f. Amendment of Bond.** In a case where a constable's bond was in proper form, and recited his election, but by a clerical error the name of his surety was inserted in the condition, the court granted a rule to amend the bond by substituting the name of the constable.[90]

**g. Validity of Bond.**[91] A constable's bond is not void because it is not given until after he has commenced the discharge of his official duties,[92] or until after the time allowed by statute in which to qualify.[93] But a constable's bond, extorted from the constable and his sureties under color of office, but without lawful authority, as a condition precedent to his remaining in office, is void;[94] and where the appointment of a constable is void, the bond taken under it is also void.[95]

**h. Record**[96] **and Evidence**[97] **of Qualification.**[98] The qualification of a constable should be noted by the township clerk in his book of record.[99] An entry on the record of a town meeting that a certain candidate for the office of constable was "declared elected and sworn" sufficiently indicates that such person was sworn.[1]

**i. Death, Removal, Insolvency, or Discharge of Sureties.**[2] The constable may be required to give new security where one of the sureties on his bond dies,[3] removes from the county,[4] is discharged,[5] or becomes,[6] or appears likely to become,[7] insolvent or insufficient.

**j. Effect of Removal of Constable on Bond.** A constable's official bond is not vacated or rendered void by his temporary removal from office, but covers his official conduct after his reinstatement in office as well as before the suspension of his functions.[8]

**4. Term of Office**[9] **— a. In General.** Constables hold office for such term as is fixed by constitutional or statutory provision,[10] and the time at which the

85. Johnson *v.* Stedman, 3 Ohio 94.

86. Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

**Bond taken by clerk in vacation.**— The failure of the county court to approve or reject a constable's bond taken by the clerk in vacation will not invalidate the bond. Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

**A high constable of a borough** is in no way a court or county officer, and his bond cannot, like that of a township constable, be approved by the court of quarter sessions. *In re* Doylestown's High Constable, 16 Pa. Co. Ct. 90.

87. Seaman *v.* Dufphey, 4 Stew. & P. (Ala.) 159.

**Approval need not be entered of record in open court.**— Seaman *v.* Dufphey, 4 Stew. & P. (Ala.) 159.

**The judge's certificate** that a constable is authorized to enter on the discharge of the duties of his office is sufficient evidence of approval. Seaman *v.* Dufphey, 4 Stew. & P. (Ala.) 159.

88. Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

**Evidence of approval.**—Where the clerk received a constable's bond, indorsed it "filed," subscribed his name thereto, and filed it in his office, this was sufficient evidence of his approval, the statute not requiring his approval to be expressed in any particular manner. Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

89. Quimby *v.* Adams, 11 Me. 332.

**Approval need not be in writing.**— Quimby *v.* Adams, 11 Me. 332.

90. Matter of Bransby, 1 Wkly. Notes Cas. (Pa.) 326.

91. **Validity of bond of:** Deputy see *infra*, II, C, 5. Sheriff see *supra*, II, A, 5, f.

92. Dickens *v.* State, 7 Blackf. (Ind.) 358.

93. Dutton *v.* Kelsey, 2 Wend. (N. Y.) 615; Westerhaven *v.* Clive, 5 Ohio 136.

94. Woolwick Tp. *v.* Forest, 2 N. J. L. 115.

95. Little *v.* Powell, 24 N. C. 275; Little *v.* Wall, 24 N. C. 272.

96. See, generally, Records, 34 Cyc. 577.

97. See, generally, Evidence, 16 Cyc. 821.

98. **Evidence of qualification of sheriff** see *supra*, II, A, 5, j.

99. Johnson *v.* Stedman, 3 Ohio 94.

1. Com. *v.* Sullivan, 165 Mass. 183, 42 N. E. 566.

2. **Death, removal, insolvency, or discharge of surety of sheriff** see *supra*, II, A, 5, k.

3. Sheeley *v.* Wiggs, 32 Mo. 398.

4. Sheeley *v.* Wiggs, 32 Mo. 398.

5. Sheeley *v.* Wiggs, 32 Mo. 398.

6. Sheeley *v.* Wiggs, 32 Mo. 398.

7. Sheeley *v.* Wiggs, 32 Mo. 398.

8. U. S. *v.* Bill, 24 Fed. Cas. No. 14,594, 2 Cranch C. C. 518.

9. **Term of office of:** Deputy see *infra*, §§, C, 6. Sheriff see *supra*, II, A, 6.

10. Starr *v.* Flynn, 62 Kan. 845, 62 Pac. 659, term of court marshal.

term of a constable begins and ends is also regulated by such provisions.[11] Where the office of constable is not established by the constitution, the legislature may shorten the term of an incumbent.[12]

**b. Holding Over.**[13] A constable is usually considered entitled to hold over until his successor is chosen[14] and has qualified.[15] Where, however, there are two constables in a township having a certain population, and a statute is enacted providing that in townships of such population there shall be but one constable, the effect of such statute is to abolish the two previously existing offices and to create a new office which can be filled only by election or appointment, and consequently neither of the constables then in office is entitled to hold over after the expiration of his term.[16] So also, notwithstanding a determination at an annual town meeting that the number of constables shall be three, the election of only two ousts all of the constables elected for the preceding year, and although the number then chosen was three, no one of them can hold over on the pretense that no person is chosen in his place.[17] Where a constable at the close of his term turned over to a person holding a certificate of election his badge, pistol, and handcuffs, and accepted from such person an appointment as deputy, and took the oath and thereafter acted as such, he thereby surrendered and abandoned the office, and could not thereafter claim that he was holding over after his term.[18]

**5. Vacancies**[19] **— a. Occurrence and Declaration.** A vacancy occurs when there is a failure to elect a constable[20] or the constable elect fails to qualify.[21] A vacancy is also created where a constable accepts an appointment to the office of deputy sheriff,[22] or removes with his family into another town with the intent

**In Pennsylvania** the term of constables is fixed by the acts of 1889 and 1895 at three years. Com. *v.* Clipsham, 16 Pa. Super. Ct. 50; Com. *v.* Benfield, 5 Pa. Dist. 382; Com. *v.* Atticks, 4 Pa. Dist. 310, 16 Pa. Co. Ct. 147; *In re* Sadbury's Constable, 3 Pa. Dist. 589; *In re* Womer's Bond, 2 Pa. Dist. 670; Tyson's Case, 2 Pa. Dist. 633, 13 Pa. Co. Ct. 212; *In re* Allegheny County Constables, 17 Pa. Co. Ct. 622; *In re* English, 16 Pa. Co. Ct. 129; *In re* Beaver Falls Election, 14 Pa. Co. Ct. 289; *In re* Burrell Tp. Constable, 11 Pa. Co. Ct. 436; *In re* Green Tp. Constable, 11 Pa. Co. Ct. 287; Com. *v.* Erdman, 11 Pa. Co. Ct. 285; *In re* Rudy, 9 Pa. Co. Ct. 467; *In re* Barr, 8 Pa. Co. Ct. 64. But these provisions are not applicable to the city of Philadelphia. Com. *v.* Clipsham, 16 Pa. Super. Ct. 50; *In re* Barr, 8 Pa. Co. Ct. 64.

**Constitutionality of statutes.**— The Pennsylvania acts of 1889 and 1895, fixing the terms of constables at three years, are not unconstitutional. *In re* Allegheny County Constables, 17 Pa. Co. Ct. 622.

**Statutory extension of term** see Matter of Constables' Election, 13 Phila. (Pa.) 583.

11. See *In re* Constable's Bond, 5 Pa. Dist. 185.

**Under the North Carolina act of 1833** providing that constables should be elected at any time within one month preceding the first county court after January of each year and should qualify to act for one year a constable's term did not expire one year from the day on which he qualified, but expired as soon as his successor qualified. Waring *v.* Wilson, 32 N. C. 329.

**Under the Tennessee act of 1835,** the term of a constable commenced at the date of his qualification and not at the date of his election. State *v.* Parchmen, 3 Head 609.

12. Com. *v.* Benfield, 5 Pa. Dist. 382.

13. **Holding over by sheriff** see *supra,* II, A, 6, c.

14. Hammondsport Law, etc., Assoc. *v.* Knizell, 43 Misc. (N. Y.) 505, 89 N. Y. Suppl. 534.

15. Hammondsport Law, etc., Assoc. *v.* Knizell, 43 Misc. (N. Y.) 505, 89 N. Y. Suppl. 534. *Contra,* State *v.* McLure, 84 N. C. 153, holding that the provision of Const. art. 4, § 25, that "all incumbents of said offices shall hold until their successors are qualified," does not embrace the office of constable.

**A constable who is elected his own successor,** but does not qualify, holds over until his successor is qualified. Miller *v.* Burger, 2 Ind. 337.

16. People *v.* Davidson, 2 Cal. App. 96, 83 Pac. 159.

17. People *v.* Jones, 17 Wend. (N. Y.) 81.

18. People *v.* Davidson, 2 Cal. App. 96, 83 Pac. 159, holding further that there was no error in admitting in evidence the certificate of appointment of the former constable as deputy, although the oath subscribed by him erroneously described the office.

19. **Vacancy in office of sheriff** see *supra,* II, A, 7.

20. Franklin *v.* Kauffman, 65 Ga. 260; King *v.* McLure, 84 N. C. 153.

**The county commissioners have no authority to order a new election** in such case but the vacancy must be filled by appointment. Franklin *v.* Kauffman, 65 Ga. 260.

21. See *supra,* II, B, 3, a.

22. State *v.* Slagle, 115 Tenn. 336, 89 S. W.

to remain there.[23] But the office of constable is not *ipso facto* vacated by the incumbent's going into military service as a conscript.[24] The county court has no general power to vacate the office of a constable, but can declare the office vacant only under the circumstances provided for by statute.[25]

**b. Suspension.**[26] It has been held that on an affidavit stating that a constable has dismissed a peace warrant, and has received a certain sum for his services, he may be suspended from office without notice, and ruled to show cause why an attachment for contempt should not issue.[27]

**c. Removal** [28] — (I) *POWER TO REMOVE.* In some states the power to remove constables is vested in the various local courts.[29]

(II) *CAUSES FOR REMOVAL.*[30] A constable may be removed for misconduct while in the exercise of the duties of his office,[31] or because from habits of intemperance or neglect of duty he is unfit and incompetent to discharge his official duties.[32]

(III) *NOTICE* [33] *AND HEARING.*[34] As a rule a constable can be removed only after notice of the charges against him [35] and an opportunity for a hearing on and investigation of such charges.[36]

(IV) *PROCEEDINGS.*[37] Proceedings for the removal of a constable may be summary by rule to show cause why he should not be removed.[38] Upon a rule on a constable to show cause why he should not be removed "for extortion under color of his office," it is not necessary that there should be any specification of

326, holding that in such case the court may summarily declare the office of constable vacant and appoint a person to fill the vacancy.

23. Barre *v.* Greenwich, 1 Pick. (Mass.) 129, holding that this is true, although the towns are not situated such a distance apart as to render it impossible for a resident in one to perform the duties of constable in the other.

24. *In re* Bradshaw, 60 N. C. 379.

25. Sheeley *v.* Wiggs, 32 Mo. 398.

26. **Suspension of sheriff** see *supra*, II, A, 7, d.

27. *Ex p.* Bowling, 3 Fed. Cas. No. 1,737, 1 Cranch C. C. 39.

28. **Removal of:** Deputy see *infra*, II, C, 6. Sheriff see *supra*, II, A, 7, e.

29. See Glass *v.* Jacoby, Litt. Sel. Cas. (Ky.) 181 (county court); *In re* Peters, 10 Kulp (Pa.) 93 (court of quarter sessions); Fields *v.* State, Mart. & Y. (Tenn.) 168 (county court).

30. **Causes for removal of sheriff** see *supra*, II, A, 7, e, (II).

31. U. S. *v.* McGill, 26 Fed. Cas. No. 15,677, 1 Hayw. & H. 59.

**Collection of illegal fee.**— A constable in the District of Columbia may be ordered to be dismissed from his office for collecting an illegal fee, unless he returns the same, and pays the cost of the rule served on him. U. S. *v.* McPherson, 26 Fed. Cas. No. 15,704, 1 Hayw. & H. 105.

**Presenting false claim.**— A constable may be removed for presenting and obtaining payment of a claim against the county for mileage for conveying certain prisoners to the county jail, when such prisoners were conveyed to the county jail by the sheriff. U. S. *v.* McPherson, 26 Fed. Cas. No. 15,704, 1 Hayw. & H. 105.

**Abuse of process.**— A constable who uses a criminal process behind which to enter forcibly a man's premises, ostensibly to serve a civil warrant for debt, and for the purpose of taking unlawful possession of property held lawfully as a pledge for a debt, will be dismissed from office. U. S. *v.* Merryman, 26 Fed. Cas. No. 15,759*a*, 2 Hayw. & H. 337.

**Previous conviction not necessary.**— It is not a necessary prerequisite to the removal or suspension of a constable that he be first convicted of misuser of his office. State *v.* Williams, 2 Speers (S. C.) 26; Fields *v.* State, Mart. & Y. (Tenn.) 168.

32. *In re* Peters, 10 Kulp (Pa.) 93, holding that a constable may be removed for such causes on the petition of his surety unless he gives such additional security as the court may direct.

33. See, generally, NOTICE, 29 Cyc. 1110.

34. **Notice and hearing before removal of sheriff** see *supra*, II, A, 7, e, (III).

35. Loper *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

36. Loper *v.* Millville, 53 N. J. L. 362, 21 Atl. 568.

37. **Proceedings for removal of sheriff** see *supra*, II, A, 7, e, (IV).

38. Larue *v.* Davies, 8 Cal. App. 750, 97 Pac. 903; State *v.* Williams, 2 Speers (S. C.) 26 (holding that statutory provisions in relation to the office of constable, which prescribe a proceeding by indictment in cases of official misconduct, do not supersede or impair a judge's common-law jurisdiction over the subordinate officers of court, in the exercise of which a constable may be stricken off the roll on rule); Fields *v.* State, Mart. & Y. (Tenn.) 168.

**Evidence** sufficient to warrant findings against defendant in removal proceedings see Larue *v.* Davies, 8 Cal. App. 750, 97 Pac. 903.

the particular facts relied upon.[39] In a proceeding to remove a constable for neglect of duty, an accusation alleging that a number of persons "wilfully and unlawfully" disturbed the peace by fighting in the streets, and that defendant refused to prevent them, etc., is sufficient, although it does not allege that such persons "maliciously" disturbed the peace.[40] In Kentucky the presence of a majority of the justices of the county is necessary to render a judgment of dismissal against a constable.[41] A constable who resigns his office pending a prosecution commenced for his removal is not thereby protected from payment of the costs.[42]

**d. Filling Vacancies.**[43] Vacancies in the office of constable are usually filled by appointment[44] by the county commissioners,[45] the township trustees,[46] the county court,[47] or the justices of the peace of the district;[48] but the appointee usually serves merely until a successor can be elected, and not for the entire unexpired term.[49]

**6. Title to and Possession of Office**[50] **— a. In General.** The right of a constable to his office cannot be collaterally questioned;[51] but where one has received a commission as constable and has qualified, his right to the office or his subsequent vacation of it can be determined only by a direct proceeding to which he is a party.[52] A person who is not entitled to the office of constable cannot maintain an action to prevent another from usurping the office.[53] Where defendant in replevin justifies as a constable, and his official character is directly put in issue, proof that he was an acting constable is insufficient, but he must show that he was a constable *de jure*.[54]

**b. Evidence of Title or Incumbency.**[55] The records of a county court, showing several bonds, executed by a constable biennially, the last within one year of the time when the question arose, with proof that he was recognized as such by the county court, is sufficient proof that he was in office, without proof that he took the oaths or was allotted to a district;[56] and evidence that a certain person acted as constable and was generally reputed to be such is admissible in proof that he was a constable.[57]

39. Jones *v.* Woodrow, 13 Fed. Cas. No. 7,509, 1 Cranch C. C. 455.

40. Larue *v.* Davies, 8 Cal. App. 750, 97 Pac. 903.

41. Glass *v.* Jacoby, Litt. Sel. Cas. (Ky.) 181.

42. Glass *v.* Jacoby, Litt. Sel. Cas. (Ky.) 181, holding that it is not necessary that a majority of the justices of the county should be present when the judgment for costs is pronounced.

43. **Filling vacancy in office of sheriff** see *supra*, II, A, 7, g.

44. Franklin *v.* Kaufman, 65 Ga. 260; Pierce *v.* Jones, 26 N. C. 326; Harris *v.* Wiggins, 26 N. C. 273; Horne *v.* Lightfoot, 24 N. C. 306; State *v.* Comer, 7 Ohio Cir. Ct. 258, 4 Ohio Cir. Dec. 585; Rudy's Case, 9 Pa. Co. Ct. 467.

45. King *v.* McLure, 84 N. C. 153.

46. State *v.* Comer, 7 Ohio Cir. Ct. 258, 4 Ohio Cir. Dec. 585.

47. Hoell *v.* Cobb, 49 N. C. 258; Ferrand *v.* Burcham, 33 N. C. 436; Pierce *v.* Jones, 26 N. C. 326; Harris *v.* Wiggins, 26 N. C. 273; Horne *v.* Lightfoot, 24 N. C. 306; State *v.* Powell, 24 N. C. 275; State *v.* Wall, 24 N. C. 275; McRae *v.* Wall, 24 N. C. 267.

48. Franklin *v.* Kaufman, 65 Ga. 260.

49. State *v.* Comer, 7 Ohio Cir. Ct. 258, 4 Ohio Cir. Dec. 585. See also Beasley *v.* Ferriss, 1 Lea (Tenn.) 461.

**Under the Pennsylvania act of 1889** the appointee holds for the unexpired term. Sadbury's Constable, 3 Pa. Dist. 589; Tyson's Bond, 2 Pa. Dist. 633, 13 Pa. Co. Ct. 212; English's Case, 16 Pa. Co. Ct. 129; Falls Election, 14 Pa. Co. Ct. 289. See also *In re* Green Tp. Constable, 11 Pa. Co. Ct. 287. *Contra*, *In re* Dauphin Borough Constable, 4 Pa. Dist. 35; *In re* Davis, 3 Pa. Dist. 677, 7 Kulp 355; Rudy's Case, 9 Pa. Co. Ct. 467.

50. **Title to and possession of office of:** Deputy see *infra*, II, C, 7. Sheriff see *supra*, II, A, 8.

51. Case *v.* State, 69 Ind. 46.

**The validity of an appointment** as constable, made by officers having the authority to appoint, cannot be questioned in a collateral action. Wood *v.* Peake, 8 Johns. (N. Y.) 69, so holding where defendant in trespass justified under an appointment as constable.

52. *Ex p.* Strobach, 49 Ala. 443.

53. Rutledge *v.* Farrar, 6 Bush (Ky.) 491.

54. Outhouse *v.* Allen, 72 Ill. 529.

55. **Evidence of title to or incumbency of office of:** Deputy see *infra*, II, C, 7, b. Sheriff see *supra*, II, A, 8, b, c.

56. Linville *v.* Black, 5 Dana (Ky.) 176.

57. State *v.* Row, 81 Iowa 138, 46 N. W.

**c. Estoppel to Deny Title or Incumbency.**[58] The sureties on the official bond of a constable cannot deny his title to or incumbency of the office.[59]

**7. De Facto Constables.**[60] One who has been elected or appointed and is serving as constable is at least a *de facto* constable, although he is not under bond [61] or did not furnish a bond within the time required by statute,[62] or his bond is defective,[63] or he has ceased to be a resident of the county in which he holds his office,[64] or the term of his appointment has expired.[65] But where the statute provides for the appointment of one constable only in each township, a person appointed by the county court as additional constable in a township having one constable whose tenure is undisputed is not an officer *de facto*.[66]

**8. Abolition of Office.** Where the office of constable is not established by the constitution it may be abolished by the legislature.[67]

**C. Deputies, Assistants, Substitutes, and Special Officers — 1. Deputies and Under-Sheriffs — a. In General.** While the judicial functions of a sheriff cannot be delegated to another,[68] the ministerial duties of the office may be performed by a deputy sheriff or under-sheriff,[69] who, however, performs the duties delegated to him, not in his own name or right, but as the representative of the sheriff,[70] although he is recognized as a public officer.[71] There are two kinds of deputies well known in practice: (1) A general deputy or under-sheriff who, by virtue of his appointment, has authority to execute all the ordinary duties of the sheriff,[72] and who executes process without special power from the sheriff; [73] and (2) a special deputy, who is an officer *pro hac vice* to execute a particular writ in some certain action and who acts under a specific and not a general appointment of authority.[74]

**b. Number of Deputies.** The number of deputies to be appointed by the sheriff is sometimes fixed or limited by statute,[75] or left to be determined by the county

872; Hart *v.* Robinett, 5 Mo. 11; Johnson *v.* Stedman, 3 Ohio 94.

**58. Estoppel to deny title to or incumbency of office of:** Deputy see *infra*, II, C, 7, c. Sheriff see *supra*, II, A, 8, d.

**59.** See *infra*, X, C, 19.

**60. De facto:** Deputy see *infra*, II, C, 8. Sheriff see *supra*, II, A, 9. Officer, generally, see Officers, 29 Cyc. 1389.

**61.** Harrison *v.* Richardson, 99 Ga. 763, 27 S. E. 173; Gunn *v.* Tackett, 67 Ga. 725.

**Failure of reëlected officer to qualify.**— In the absence of any proof that an order has been made by the proper officer for a reëlected constable to qualify, he continues to be an officer *de facto*, although he has failed to file a new bond or take a new oath. State *v.* Bates, 23 Iowa 96.

**62.** Weston *v.* Sprague, 54 Vt. 395.

**63.** Adams *v.* Tator, 42 Hun (N. Y.) 384.

**64.** Case *v.* State, 69 Ind. 46.

**65.** Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; Hammondsport Law, etc., Assoc. *v.* Kinzell, 43 Misc. (N. Y.) 505, 89 N. Y. Suppl. 534.

**66.** Jester *v.* Spurgeon, 27 Mo. App. 477.

**67.** Com. *v.* Benfield, 5 Pa. Dist. 382.

**68.** Jobson *v.* Fennell, 35 Cal. 711.

**The holding of an inquisition on real estate** levied on under a fieri facias is a judicial act, which involves the exercise of discretion, and which the sheriff cannot do by deputy. Haberstroh *v.* Toby, 9 Phila. (Pa.) 614.

**69.** *California.*— Jobson *v.* Fennell, 35 Cal. 711.

*Illinois.*— Gradle *v.* Hoffman, 105 Ill. 147.

*Kentucky.*— Lewis *v.* Knox, 2 Bibb 453.

*Maryland.*— Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361.

*Minnesota.*— Hotchkiss *v.* Cutting, 14 Minn. 537.

*Montana.*— Hogan *v.* Cascade County, 36 Mont. 183, 92 Pac. 529.

*New York.*— Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

*Tennessee.*— Reves *v.* State, 11 Lea 124.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 31, 32.

**70.** Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645.

**The deputy is the servant of the sheriff in civil matters.**— People *v.* Champlain, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739.

**71.** Gradle *v.* Hoffman, 105 Ill. 147; State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

**Deputy sheriff not a "state officer."**— State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

**A special deputy is not an officer** in the proper sense of that term. State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

**In Connecticut a deputy sheriff is not the** mere agent of the sheriff, but is, to a certain extent, an independent public officer. Dayton *v.* Lynes, 30 Conn. 351.

**72.** Allen *v.* Smith, 12 N. J. L. 159; Com. *v.* Armstrong, 4 Pa. Co. Ct. 5, 7, where it is said that the deputy "may execute all the ministerial parts of the office."

**73.** Allen *v.* Smith, 12 N. J. L. 159.

**74.** Allen *v.* Smith, 12 N. J. L. 159.

**75.** People *v.* Champlain, 33 N. Y. App.

commissioners;[76] and where the constitution provides that sheriffs shall be authorized by the county commissioners to appoint such deputies as the business of their office may require, the sheriff has no power to appoint a deputy until authorized by the action of the county commissioners.[77] Where the number of deputies is not limited by law the rule is that it is the duty of the sheriff to have a sufficient number of deputies to execute the mandates of the court within the time prescribed by law.[78]

**2. Deputy Constables.** As the functions and duties of a constable are wholly ministerial,[79] he may, in the absence of any statutory provision on the subject, act by deputy.[80] But according to some authorities, his power in this respect is limited to delegating his authority to and acting by a deputy in reference to particular acts which he is for some reason unable to perform in person,[81] and he cannot appoint a permanent deputy for the general discharge of the duties of his office.[82] And in some states it is held that a constable has no power to appoint a deputy in any case.[83]

**3. Appointment.**[84] Deputy sheriffs are appointed to their positions by the

Div. 277, 53 N. Y. Suppl. 739; Trammel *v.* Shelton, 18 Tex. Civ. App. 366, 45 S. W. 319, holding that Rev. St. (1895) art. 4896, permitting sheriffs to appoint deputies, and providing that the number shall be limited to not exceeding three in any one justice precinct, is directory, and a violation of the latter clause cannot be taken advantage of in a suit to set aside a judgment rendered in an action in which the papers were served by an additional deputy.

76. Hogan *v.* Cascade County, 36 Mont. 183, 92 Pac. 529; Jobb *v.* Meagher County, 20 Mont. 424, 51 Pac. 1034, holding that the act of March 19, 1895 (Code, §§ 4597, 4603), providing that "the whole number of deputies allowed the sheriff is one undersheriff, and . . . in counties of the 7th . . . class, one [deputy]. . . . The officers entitled to deputies must . . . file a certificate of appointment of the deputies," does not repeal the act of March 9, 1893, amending the act of 1891, section 4, authorizing the county commissioners to determine the number and compensation of deputy sheriffs.

77. Campbell *v.* Canyon County, 5 Ida. 53, 46 Pac. 1022.

**Finding as to necessity for deputy.**— Ida. Const. art. 18, § 6, providing that the sheriff shall be empowered by the county commissioners to appoint such deputies as the business of the office may require, requires a finding of the necessity for a deputy before the commissioners can empower the sheriff to appoint a deputy. Taylor *v.* Canyon County, 6 Ida. 466, 56 Pac. 168, holding further that the fact that the county commissioners examined evidence, and, after being advised in the matter, empowered the sheriff to appoint a deputy, will not raise the presumption that they found the appointment of a deputy a necessity.

**Review of order of county commissioners.**— An order of the board of county commissioners authorizing or refusing to authorize the appointment of a deputy sheriff may be reviewed on appeal by the district court, and when such an appeal is taken the district court must try the matter *de novo*. Campbell *v.* Canyon County, 5 Ida. 53, 46 Pac. 1022.

78. Hallett *v.* Lee, 3 Ala. 28; Freudenstein *v.* McNeir, 81 Ill. 208; Bloomfield *v.* Jones, 2 La. Ann. 936.

79. Kaysen *v.* Steele, 13 Utah 260, 44 Pac. 1042.

80. *California.*— Jobson *v.* Fennell, 35 Cal. 711; Taylor *v.* Brown, 4 Cal. 188, 60 Am. Dec. 604.

*Delaware.*— Lawson *v.* Buzines, 3 Harr. 416.

*Indiana.*— New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243.

*Oregon.*— Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49.

*England.*— Midhurst *v.* Waite, 3 Burr. 1259, 97 Eng. Reprint 821; Rex *v.* Clarke, 1 T. R. 679, 99 Eng. Reprint 1317.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 32, 40.

81. Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49; *In re* Deputy Constables, 4 Pa. Dist. 217, 16 Pa. Co. Ct. 297; Kaysen *v.* Steele, 13 Utah 260, 44 Pac. 1042. See also *In re* Schnyder, 2 Lehigh Val. L. Rep. (Pa.) 424; Matter of Deputy Constables, 11 Phila. (Pa.) 391, holding that the constable of a magistrate's court is not entitled to a deputy when he is able to attend to all the business of the court.

82. Prickett *v.* Cleek, 13 Oreg. 415, 11 Pac. 49; *In re* Deputy Constables, 4 Pa. Dist. 217, 16 Pa. Co. Ct. 297; Kaysen *v.* Steele, 13 Utah 260, 44 Pac. 1042.

83. People *v.* Ferguson, 79 Ill. App. 417; Helms *v.* U. S., 2 Indian Terr. 595, 52 S. W. 60 (holding that a constable in the Indian Territory has no authority to appoint a deputy, although Act Cong. March 1, 1895, § 5 (28 U. S. St. at L. 696), relating to the Indian Territory, provides that constables shall perform all the duties required of constables by the laws of the state of Arkansas, and Mansfield Dig. Ark. c. 24, provides that each constable may appoint one or more deputies, to be approved by the county court, as such appointment is a power and not a duty); Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376. See also Stacy *v.* Bernard, 20 Colo. App. 293, 78 Pac. 615.

84. **Appointment or election of:** Constable

sheriff;[85] but in some states such appointments are subject to the approval of the county supervisors,[88] the county judge,[87] or county court;[88] and it has also been held that the county court may guard the public against an abuse of the sheriff's power to appoint deputies by refusing to administer the oath of office to an appointee who is not competent and of good character.[89] In some states the constitutions or statutes require the appointment of a deputy sheriff to be in writing,[90] under the hand and seal of the sheriff,[91] and to be filed in the office of a designated official,[92] and

see *supra*, II, B, 1. Sheriff, generally, see *supra*, II, A, 1. To fill vacancy see *supra*, II, A, 7, g, (II), (III).

85. *Alabama.*— Perkins *v.* Reed, 14 Ala. 536; McGee *v.* Eastis, 3 Stew. 307.

*Dakota.*— Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645.

*Delaware.*— Morris *v.* Jones, 2 Houst. 123.

*Georgia.*— Matthis *v.* Polland, 3 Ga. 1.

*Idaho.*— Taylor *v.* Canyon County, 6 Ida. 466, 56 Pac. 168.

*Illinois.*— McWilliams *v.* Richland County, 16 Ill. App. 333.

*Iowa.*— Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

*Kansas.*— Baxter *v.* Yeagley, 8 Kan. App. 657, 56 Pac. 509.

*Kentucky.*— Day *v.* Justices Fleming County Ct., 3 B. Mon. 198; Lewis *v.* Knox, 2 Bibb 453.

*Maine.*— Dane *v.* Gilmore, 51 Me. 544.

*Maryland.*— Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361.

*Minnesota.*— State *v.* McIntyre, 25 Minn. 383.

*Montana.*— Hogan *v.* Cascade County, 36 Mont. 183, 92 Pac. 529; Jobb *v.* Meagher County, 20 Mont. 424, 51 Pac. 1034.

*New York.*— Blust *v.* Collier, 62 N. Y. App. Div. 478, 70 N. Y. Suppl. 774; Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899; Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106]; Paddock *v.* Cameron, 8 Cow. 212.

*North Carolina.*— State *v.* Allen, 27 N. C. 36.

*Pennsylvania.*— Com. *v.* Armstrong, 4 Pa. Co. Ct. 5.

*Tennessee.*— Reves *v.* State, 11 Lea 124.

*Texas.*— Trammel *v.* Shelton, 18 Tex. Civ. App. 366, 45 S. W. 319; Alford *v.* State, 8 Tex. App. 545.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 32.

**A sheriff cannot delegate to another the power to appoint a deputy for him.** Perkins *v.* Reed, 14 Ala. 536.

**County supervisors have no authority to appoint deputy sheriffs.** McWilliams *v.* Richland County, 16 Ill. App. 333.

**Under-sheriffs cannot appoint general deputy.**— McGuffie *v.* State, 17 Ga. 497.

86. Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

**The failure of the minute book of the board of supervisors to show an approval** of the appointment of an alleged deputy sheriff, and the absence from the files in the auditor's office of any written appointment of such deputy sheriff, is at least *prima facie* evidence that the appointment was never made or approved. Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

87. Dassey *v.* Sanders, 33 S. W. 193, 17 Ky. L. Rep. 972; State *v.* McIntyre, 25 Minn. 383. See also Commercial Bank *v.* Sandford, 103 Fed. 98, judge of circuit court in South Carolina.

88. Cecil *v.* Early, 10 Gratt. (Va.) 198.

89. Day *v.* Justices Fleming County Ct., 3 B. Mon. (Ky.) 198.

90. Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688; Baxter *v.* Yeagley, 8 Kan. App. 657, 56 Pac. 509 (holding that the sheriff's appointment of a person to serve a summons must be in writing); Edmunds *v.* Barton, 31 N. Y. 495; Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899; Alford *v.* State, 8 Tex. App. 545 (holding that under Const. art. 4520, the appointment of a deputy sheriff must be in writing, on which is indorsed his oath of office).

91. Edmunds *v.* Barton, 31 N. Y. 495; Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899.

**The fact that the appointment is signed by the sheriff individually** instead of in his official capacity does not invalidate it. Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190.

92. *Iowa.*— Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

*Kansas.*—Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281.

*Missouri.*— State *v.* Dierberger, 90 Mo. 369, 2 S. W. 286.

*New York.*— Edmunds *v.* Barton, 31 N. Y. 495; Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899.

*Ohio.*— Haines *v.* Lindsey, 4 Ohio 88, 19 Am. Dec. 586.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 32.

**Statute directory merely.**—The requirement of Kan. Gen. St. (1901) § 1745, that the appointment of a deputy sheriff shall be filed with the county clerk, is directory, and failure to file an appointment actually made will not invalidate the appointment or the official acts of the deputy. Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281. The same is true of Mo. Rev. St. § 652, requiring the appointment of a deputy constable to be filed in the office of the county clerk of the county in which he is appointed. State *v.* Dierberger, 90 Mo. 369, 2 S. W. 286.

**Proof of filing.**— The fact of filing in the clerk's office a warrant constituting a person deputy sheriff need not appear by an indorsement of the clerk thereon, but it may be

recorded;[93] but in the absence of any such provisions it is not necessary that the appointment of a deputy sheriff should be in writing.[94] Under a statute making the sheriffs of the various counties in the state *ex officio* deputies of the sheriff of the supreme court, no special appointment of the deputies as such is necessary.[95] Where a sheriff appointed deputies "assigned to jail, nominally as engineers to maintain steam in boilers to heat jail, and who likewise are assigned to do duty in relieving turnkeys, and generally as deputy sheriffs when so required by the sheriff," and the services required of such appointees included frequent acts as deputies, the appointment was not a violation of a statute providing that no person should be appointed or employed under any title not appropriate to the duties to be performed.[96]

**4. ELIGIBILITY.**[97] A deputy sheriff must be a resident of the county for which he is appointed,[98] and a deputy constable must be a resident of the same ward or township with the constable who deputizes him.[99] The fact that a person was previously of bad moral character does not authorize the county court to refuse to approve his appointment as deputy sheriff where a complete reformation is shown.[1] In New York a deputy sheriff is included in the class of appointive officers exempt from examination by the civil service commission, and may be appointed by the sheriff without having taken such examination.[2]

**5. QUALIFICATION.**[3] The deputy sheriff or under-sheriff is usually required, before entering upon the duties of his office, to qualify by taking a prescribed oath of office[4] and giving bond to the sheriff for the faithful performance of his

proved by other evidence. Haines *v.* Lindsey, 4 Ohio 88, 19 Am. Dec. 586.

**Withdrawal after record.**— A statute directing that the appointment of a deputy sheriff shall be lodged in the clerk's office does not require it to remain there, but after it has been recorded the deputy sheriff may take it away. Dane *v.* Gilmore, 51 Me. 544.

**93.** Coffin *v.* Chase, 13 Me. 72; Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899; Sprague *v.* Brown, 40 Wis. 612, holding, however, that Rev. St. c. 13, § 101, requiring a sheriff's appointment of a deputy to be recorded, being merely directory, is sufficiently complied with by filing the appointment with the clerk of the proper court, although without having it recorded.

**Record as notice of appointment.**— After an appointment of a deputy sheriff has been lodged according to the statute in the clerk's office, and has been recorded, it is notice to all of the fact of the appointment. Dane *v.* Gilmore, 51 Me. 544.

**Statute requiring recording of deputy sheriff's commissions prospective only in operation.**— Coffin *v.* Chase, 13 Me. 72.

**When record deemed made.**— Where a deputy sheriff, on December 1, took the oath of office, and left his deputation and oath with the county clerk, for record, and paid the clerk for recording the same, and it remained in the county clerk's office until the August following, and the clerk then recorded it upon a book in his office, it was held that, although the record was perfected at a subsequent time, constructively it must be deemed to have existed from the time when the instrument was lodged for record, and that the officer was authorized to act as a deputy sheriff, and had competent authority to act as such, from the time he so left his deputation *bona fide* for record. Ferris *v.* Smith, 24 Vt. 27.

**94.** *Alabama.*— McGee *v.* Eastis, 3 Stew. 307.

*Delaware.*— Morris *v.* Jones, 2 Houst. 123.

*Georgia.*— Matthis *v.* Pollard, 3 Ga. 1.

*New York.*— Boardman *v.* Halliday, 10 Paige 223 [*recognized* in Edmunds *v.* Barton, 31 N. Y. 495].

*North Carolina.*— State *v.* Allen, 27 N. C. 36.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 32.

**95.** State *v.* Johnson, 35 Fla. 539, 17 So. 650.

**96.** Blust *v.* Collier, 62 N. Y. App. Div. 478, 70 N. Y. Suppl. 774.

**97. Eligibility to office of:** Constable see *supra*, II, B, 2. Sheriff see *supra*, II, A, 3.

**98.** People *v.* Champlain Auditors, 16 Misc. (N. Y.) 92, 37 N. Y. Suppl. 633.

**99.** *In re* Schnyder, 2 Lehigh Val. L. Rep. (Pa.) 424.

**1.** Dassey *v.* Sanders, 33 S. W. 193, 17 Ky. L. Rep. 972, so holding in the case of one who had, five years before his appointment as deputy sheriff, been indicted for felonies, whose certificate as a teacher had been revoked on the ground of immoral conduct, and who had abandoned two wives, where, at the time of his appointment, and for several years prior thereto, he had shown himself a capable, honest, and courageous public officer, and friends and foes alike testified as to his present good character.

**2.** Blust *v.* Collier, 62 N. Y. App. Div. 478, 70 N. Y. Suppl. 774.

**3. Qualification of:** Constable see *supra*, II, B, 3. Sheriff see *supra*, II, A, 5.

**4.** *Georgia.*—Stephens *v.* State, 106 Ga. 116, 32 S. E. 13.

duties.[5] Where the statute provides that all official bonds of county officers must be made payable to the county in which the officer is elected or appointed, and that deputies shall give bonds in the same manner and for the same sum as their principals, the bond of a deputy sheriff must be for the same amount as his principal's, and must run to the county, and not to his principal.[6] A deputy sheriff's bond conditioned to perform "the duties of the said office as deputy sheriff" is sufficient whether or not the deputy sheriff be considered as an officer;[7] and a bond containing, beside the usual indemnity conditions, a condition to pay the sheriff a certain sum of money both at the beginning and ending of the deputy's term of office, will not be held invalid, as conditioned to pay those sums of money for the appointment of the deputy, where that fact neither appears on the face of the bond nor is alleged.[8] A deputy sheriff's bond of indemnity to the sheriff is valid and enforceable notwithstanding the fact that the office of deputy was illegally sold by the sheriff to the principal obligor.[9] The validity of a deputy sheriff's bond is not affected by the fact that he did not take the oath of office,[10] or that, through inadvertence, the proper record was not made by the county court at the time of his appointment.[11] A deputy sheriff's bond is operative only from the time of its delivery;[12] and where the condition counts upon and

*Kentucky.*—Day *v.* Justices Fleming County Ct., 3 B. Mon. 198.

*Missouri.*— State *v.* Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

*New Jersey.*— Lee *v.* Evaul, 1 N. J. L. 283.

*New York.*— Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899.

*Texas.*— Broach *v.* Garth, (Civ. App. 1899) 50 S. W. 594.

*Virginia.*— Cecil *v.* Early, 10 Gratt. 198.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 35.

Aliter in Maryland. Turner *v.* Holtzman, 64 Md. 148, 39 Am. Rep. 361.

**A deputy sheriff cannot act until sworn into office,** and his swearing in will not have relation back, so as to validate previous acts. Lee *v.* Evaul, 1 N. J. L. 283.

**Mandamus is a proper remedy** to compel the county court to administer the oath to a person appointed a deputy sheriff. Day *v.* Justices Fleming County Ct., 3 B. Mon. (Ky.) 198.

5. *Dakota.*— Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645.

*Georgia.*— Stephens *v.* State, 106 Ga. 116, 32 S. E. 13.

*Kentucky.*— Lewis *v.* Knox, 2 Bibb 453.

*New York.*— Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011 [*affirming* 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129]; Mott *v.* Robbins, 1 Hill 21, 37 Am. Dec. 286.

*Texas.*— Broach *v.* Garth, (Civ. App. 1899) 50 S. W. 594.

*Virginia.*— Cecil *v.* Early, 10 Gratt. 198.

*West Virginia.*— Davis *v.* Baker, 45 W. Va. 455, 32 S. E. 239.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 35.

**It is not unreasonable to permit the sheriff** to take security for his indemnity against any violation of the duties of the office by the deputy. Lewis *v.* Knox, 2 Bibb (Ky.) 453.

**Taking bond not forbidden by statute.**— A bond conditioned to save the sheriff harmless from liability on account of his deputy's misconduct, and for paying over half the fees received by the deputy, is not contrary to a statute prohibiting the sheriff from taking bonds *colore officii*, or a statute prohibiting the sale of offices. Mott *v.* Robbins, 1 Hill (N. Y.) 21, 37 Am. Dec. 286.

**Approval of bond.**— In Georgia the statute does not require the bond of a deputy sheriff to be approved, and therefore Pen. Code, § 272, providing that any public officer required by law to give bond, who performs any official act before his bond is approved and filed as required, is guilty of a misdemeanor, does not apply to deputy sheriffs. Stephens *v.* State, 106 Ga. 116, 32 S. E. 13.

**A deputy's bond is the property of the sheriff** and a recovery thereon belongs to him, and the county has no interest in the money so recovered, although the default on which the recovery was based was a failure to pay over to the sheriff money which it was the duty of the latter to pay over to the county. San Francisco *v.* McAllister, 76 Cal. 246, 248, 18 Pac. 315, where it is said that the county "was protected against the defaults of Nunan [the sheriff] by his official bonds, on which, if aggrieved, it has its remedy."

**A bond given by a deputy to assure the sheriff a fixed salary or allowance** is void where the amount is payable absolutely instead of out of the profits of the office. Foott *v.* Bullock, 4 U. C. Q. B. 480.

6. Riggs *v.* Miller, 34 Nebr. 666, 52 N. W. 567.

7. Gradle *v.* Hoffman, 105 Ill. 147, 153, where it is said: "Such deputies are generally known and designated as officers. But if it were not so, defendants in their bond designate him an officer, or his place as an office, if the construction of appellant must be adopted. But the word 'office,' used in the condition, may refer as well, or better, to the office of sheriff as to that of deputy."

8. Lewis *v.* Knox, 2 Bibb (Ky.) 453.

9. Kouns *v.* Davis, 2 B. Mon. (Ky.) 278.

10. Cecil *v.* Early, 10 Gratt. (Va.) 198.

11. Cecil *v.* Early, 10 Gratt. (Va.) 198.

12. Reilly *v.* Dodge, 42 Hun (N. Y.) 646.

refers to a deputation already made for a limited term, the bond operates for such term and no longer.[13]

**6. Term of Office,[14] Removal,[15] and Cessation of Authority.** The appointment of a deputy sheriff can continue no longer than the term for which the sheriff was elected,[16] and if the sheriff is reëlected a new appointment is necessary to continue the deputy in office.[17] A deputy sheriff holds office during the pleasure of the sheriff,[18] who may remove him at any time;[19] and while it is very proper that the removal should be by some act in writing and be notified to the displaced deputy,[20] the formality of a seal is not indispensable unless required by some positive law.[21] Unless provision is made by statute for the deputy to exercise the duties of the office temporarily in case of a vacancy,[22] the authority of the deputy ceases when the sheriff ceases to have authority to act,[23] as when the sheriff dies,[24] resigns, or is removed,[25] or is duly succeeded by another sheriff,[26] or his term expires under such circumstances that he is not entitled to hold over.[27] The absconding of a sheriff does not deprive his deputy of power to act, but the latter may discharge the duties of the office until the office is declared vacant by a court of competent jurisdiction or an election is held and a successor to the sheriff is elected and qualified.[28] A deputy sheriff may resign his office,[29] and when his resignation is received by the sheriff, the deputy ceases to hold his office.[30]

**7. Title to and Possession of Office[31] — a. In General.** The title of a deputy sheriff to his office or the validity of his appointment cannot be attacked collaterally.[32]

**13.** Williams *v.* Miller, Kirby (Conn.) 189, holding that this is true, although the deputy continues in office after the expiration of such term.

**14. Term of office of:** Constable see *supra*, II, B, 4. Sheriff see *supra*, II, A, 6.

**15. Removal of:** Constable see *supra*, II, B, 5, c. Sheriff see *supra*, II, A, 7, e.

**16.** Greenwood *v.* State, 17 Ark. 332.

**17.** Greenwood *v.* State, 17 Ark. 332.

**18.** Reves *v.* State, 11 Lea (Tenn.) 124; Hoge *v.* Trigg, 4 Munf. (Va.) 150.

**19.** Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Edmunds *v.* Barton, 31 N. Y. 495; Hoge *v.* Trigg, 4 Munf. (Va.) 150, holding that a sheriff may remove his deputy from office at any time, notwithstanding the deputy has given bonds to indemnify the sheriff, in case of his neglect or misconduct, and notwithstanding an agreement between them that the deputy should hold his office as long as the sheriff continued in office under his then commission, but that the deputy has a remedy by an action against the sheriff for an undue exercise of such authority, and holding further that it is a good defense to an action by a deputy against the sheriff for turning him out of office in violation of his contract that the deputy has been guilty of a certain misfeasance and other specified improprieties in his office, for which he was so dismissed, and a plea to that effect is a full answer to the declaration.

**Deputy can be removed by sheriff only.**— State *v.* McIntyre, 25 Minn. 383.

**20.** Edmunds *v.* Barton, 31 N. Y. 495.

**21.** Edmunds *v.* Barton, 31 N. Y. 495.

**22.** See *infra*, III, A, 3, b.

**23.** Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Boardman *v.* Halliday, 10 Paige (N. Y.) 223.

**24.** Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645; Boardman *v.* Halliday, 10 Paige (N. Y.) 223. See also Paddock *v.* Cameron, 8 Cow (N. Y.) 212.

**A statute providing that a deputy may continue to act** as such after the death of the sheriff is not repealed by a subsequent statute providing that in case of the death of the sheriff the coroner shall act as sheriff. McCluskey *v.* McNeely, 8 Ill. 578.

**25.** Boardman *v.* Halliday, 10 Paige (N. Y.) 223. See also Paddock *v.* Cameron, 8 Cow. (N. Y.) 212.

**26.** Wilson *v.* Russell, 4 Dak. 376, 31 N. W. 645.

**27.** Lamoreaux *v.* Atty.-Gen., 89 Mich. 146, 50 N. W. 812, holding that Howard Annot. St. Mich. § 582, providing that in case of a vacancy in the office of sheriff of any county the under-sheriff shall execute the duties of the office of sheriff until a sheriff be elected and qualified, does not apply where the full term is to be supplied because the person elected to fill such term is ineligible, and the former sheriff is incapable of holding over by reason of a constitutional limitation upon the length of time for which a sheriff may hold office.

**28.** Ballance *v.* Loomis, 22 Ill. 82.

**29.** Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

**Resignation need not be under seal.**— Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

**30.** Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

**31. Title to and possession of office of:** Constable see *supra*, II, B, 6. Sheriff see *supra*, II, A, 8.

**32.** *Illinois.*—Ballance *v.* Loomis, 22 Ill. 82.

*Louisiana.*— Williamson *v.* Richardson, 31 La. Ann. 685.

*New Hampshire.*— Morse *v.* Calley, 5 N. H. 222.

**b. Evidence of Official Character.**[33] As a general rule evidence that a person acted as deputy sheriff or constable and was reputed to be and recognized as such is admissible and sufficient to prove his official character;[34] but where one seeks to justify as a deputy sheriff, proof that he acted as such is not sufficient to establish his official character.[35] Where a deputy sheriff has taken a forthcoming bond, and returned it forfeited, it is not sufficient evidence of his legal incapacity to do so that the clerk of the probate court had twice searched the records of his office unsuccessfully to find the record of his appointment as deputy sheriff, and believed it did not exist in that office, it being proved that the office had been kept carelessly by his predecessor, and there being other evidence besides the taking and returning of the bond that the deputy had served in that capacity.[36] In passing on a deputy sheriff's claim for services, the deputy's affidavit that he is such, his commission, and proof of his oath of office establishes a *prima facie de jure* title to the office, behind which the town board of auditors cannot go.[37] In an action against a sheriff for the default or misconduct of a person alleged to have been his deputy [38] the fact that the sheriff appointed such person his deputy,[39] or an admission by the sheriff that such person was his deputy,[40] is sufficient proof of the deputation; but the return of the person alleged to have been a deputy is not sufficient proof that he was such.[41] Declarations of a person performing the duties of an under-sheriff that he was such under-sheriff and had charge of all the business, made while transacting no business incident to such position or connected with its duties are inadmissible to prove the authority conferred on him by the sheriff.[42]

**c. Estoppel to Deny Title or Incumbency.**[43] One who has acted as deputy sheriff is estopped to deny that he was such;[44] and a person ruled in the superior court as a deputy sheriff of the county to show cause why he had not collected the amount of an execution levied by him cannot raise the question of his official character after he has answered the rule and a verdict has been rendered against him upon a traverse of his answer.[45]

**8. De Facto Deputies.**[46] One who is actually acting as a deputy sheriff or constable under color of an appointment is such officer *de facto*, although his appointment was merely verbal, whereas the statute requires such appointment to be in writing;[47] although his appointment is not under seal, as required by

*South Dakota.*—Williamson *v.* Lake County, 17 S. D. 353, 96 N. W. 702, holding that such title cannot be attacked on a motion to which the deputy is not a party to compel the clerk to tax as costs in a cause certain fees of the deputy for service of process.

*Texas.*— Broach *v.* Garth, (Civ. App. 1899) 50 S. W. 594; Trammell *v.* Shelton, 18 Tex. Civ. App. 366, 45 S. W. 319.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 39.

33. **Evidence of official character as:** Constable see *supra*, II, B, 6, b. Sheriff see *supra*, II, A, 8, b, c.

34. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187; Earl *v.* State, 124 Ga. 28, 52 S. E. 78; Matthis *v.* Pollard, 3 Ga. 1; Hart *v.* Robinett, 5 Mo. 11; Potter *v.* Luther, 3 Johns. (N. Y.) 431.

35. Hughes *v.* James, 3 J. J. Marsh. (Ky.) 699; Eaton *v.* White, 2 Wis. 292, holding that where defendant justifies the taking of property as a special deputy for the performance of a particular act, it is not sufficient for him to show that he acted as a public officer, but it is necessary to show his special authority.

36. Pritchard *v.* Myers, 11 Sm. & M. (Miss.) 169.

37. People *v.* Champlain, 33 N. Y. App. Div. 277, 53 N. Y. Suppl. 739.

38. **Liability of sheriff for acts or defaults of deputy** see *infra*, V, B.

39. Currier *v.* Brackett, 18 Me. 59.

40. Bunch *v.* Deliesseline, Harp. (S. C.) 226.

41. Slaughter *v.* Barnes, 3 A. K. Marsh. (Ky.) 412, 13 Am. Dec. 190.

42. Buttling *v.* Hatton, 48 N. Y. App. Div. 577, 62 N. Y. Suppl. 899.

43. **Estoppel to deny title to or incumbency of office of:** Constable see **supra**, II, B, 6, c. Sheriff see *supra*, II, A, 8, d.

**Estoppel generally** see **Estoppel**, 16 Cyc. 671.

44. Hughes *v.* James, 3 J. J. Marsh. (Ky.) 699; Womack *v.* Nichols, 39 Miss. 320.

45. O'Pry *v.* Kennedy, 86 Ga. 662, 12 S. E. 940.

46. **De facto:** Constable see *supra*, II, B, 7. Sheriff see *supra*, II, A, 9. Officer generally see **Officers**, 29 Cyc. 1389.

47. Abington *v.* Steinberg, 86 Mo. App. 639; Broach *v.* Garth, (Tex. Civ. App. 1899) 50 S. W. 594.

the statute;[48] although he has not filed his appointment as required by statute;[49] although his appointment as deputy has not been confirmed by the judge of the circuit court, as required by statute;[50] although the appointment contains limitations which are void;[51] although he is ineligible under the constitution;[52] although he has not taken the oath of office,[53] or has not filed his oath of office as required by statute;[54] or although he has not given bond.[55] But where one who was appointed a deputy sheriff refused to take the oath and cut the same off from his appointment, and there was no showing that he exercised the duties of the office, or had the reputation in the community of being a deputy sheriff, he was not an officer *de facto*.[56]

**9. Special Appointment or Deputation.** A special deputy sheriff to perform a particular service may be appointed by the sheriff,[57] or by a general deputy or under-sheriff.[58] Such a special deputy is the mere agent of the sheriff in each particular case and not a public officer;[59] and hence there is no reason why a sheriff may not appoint a minor as his special deputy.[60] The appointment of a special deputy must be in writing when so required by the statute;[61] but in the absence of any statutory requirement it is not necessary that the appointment

**48.** Jewell *v.* Gilbert, 64 N. H. 13, 5 Atl. 80, 10 Am. St. Rep. 357.

**49.** Buis *v.* Cooper, 63 Mo. App. 196 (failure to file notice of appointment); Williamson *v.* Lake County, 17 S. D. 353, 96 N. W. 702; Weatherford *v.* State, 31 Tex. Cr. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

**50.** Commercial Bank *v.* Sandford, 103 Fed. 98.

**51.** Trammell *v.* Shelton, 18 Tex. Civ. App. 366, 45 S. W. 319.

**52.** Broach *v.* Garth, (Tex. Civ. App. 1899) 50 S. W. 594.

**53.** Stephens *v.* State, 106 Ga. 116, 32 S. E. 13 (although the statute makes it a misdemeanor to enter upon the duties of the office without first taking and filing the oath); Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541; Merrill *v.* Palmer, 13 N. H. 184; Broach *v.* Garth, (Tex. Civ. App. 1899) 50 S. W. 594.

**54.** Buis *v.* Cooper, 63 Mo. App. 196; Williamson *v.* Lake County, 17 S. D. 353, 96 N. W. 702.

**55.** Broach *v.* Garth, (Tex. Civ. App. 1899) 50 S. W. 594.

**56.** Brown *v.* State, 43 Tex. Cr. 411, 66 S. W. 547.

**57.** *Illinois.*— Gehrke *v.* Foreman, 177 Ill. 618, 52 N. E. 852; Guyman *v.* Burlingame, 36 Ill. 201.

*Indiana.*— Procter *v.* Walker, 12 Ind. 660.

*Michigan.*— People *v.* Moore, 2 Dougl. 1.

*New York.*—Coyles *v.* Hurtin, 10 Johns. 85.

*Tennessee.*— State *v.* Kizer, 4 Sneed 563.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 40.

**Urgent necessity for deputation will be presumed.**— State *v.* Kizer, 4 Sneed (Tenn.) 563.

**Deputies for preservation of the peace.**— In Illinois in times of disorder, the sheriff may appoint as many special deputies as are necessary for the preservation of the peace (Christian County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479 [*affirming* 92 Ill. App. 428]; Philips *v.* Christian County, 87 Ill. App. 481), and this power is not suspended by the ordering out of the militia for the same purpose (Christian County *v.* Merrigan, *supra*). Such deputies are subject to the sheriff's orders and liable to fine and imprisonment for a refusal to act when called upon. Philips *v.* Christian County, *supra*). The county is liable for the subsistence while on duty of a special deputy appointed by the sheriff for the preservation of the peace whether such subsistence is provided by the deputy for himself at his own home, or elsewhere. Christian County *v.* Merrigan, *supra*.

**58.** *Georgia.*—McGuffie *v.* State, 17 Ga. 497.

*Illinois.*— Gehrke *v.* Foreman, 177 Ill. 618, 52 N. E. 852.

*Indiana.*— New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243.

*New Jersey.*— Allen *v.* Smith, 12 N. J. L. 159.

*New York.*— Hunt *v.* Burrel, 5 Johns. 137

*Pennsylvania.*— Com. *v.* Armstrong, 4 Pa. Co. Ct. 5.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 40.

But *compare* Perkins *v.* Reed, 14 Ala. 536, 537 (where it is said: "The sheriff, who himself holds an office under delegation from the people, cannot confer upon a third person the authority to depute one or more persons to act for him in the execution of process whenever in their judgment the emergency demands it"); Welch *v.* Jamison, 1 How. (Miss.) 160.

**59.** Kavanaugh *v.* State, 41 Ala. 399; Meyer *v.* Bishop, 27 N. J. Eq. 141 (holding that neither his appointment nor his relation to the sheriff can be presumed from his acts); State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

**60.** State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

**61.** People *v.* Moore, 2 Dougl. (Mich.) 1; Nelson *v.* Nye, 43 Miss. 124.

**Deputy to serve original writ.**— A sheriff cannot constitute a special deputy to serve even an original writ by a mere verbal command without delivery of the writ. Meyer *v.* Bishop, 27 N. J. Eq. 141.

of a special deputy to serve certain papers should be in writing,[62] indorsed on or attached to the papers,[63] or filed with such papers,[64] or recorded in the office of the clerk of the court.[65] As a general rule it is not necessary that a person appointed a special deputy sheriff or special constable to perform a particular service should take an oath of office,[66] or give a bond for the discharge of his duties,[67] unless this is required by the officer making the appointment.[68] Under some statutes a justice of the peace is authorized to appoint a special constable to act in a particular matter where a necessity exists and no qualified constable can conveniently be found in the township.[69] A statute providing that if the judges of a court deem the attendance of an additional number of constables desirable or necessary they may authorize the sheriff to summon "such additional constables" has been held to authorize the judges to require the sheriff to summon as constables such persons as they select, and not to limit their power to determining the necessity for constables and the number to be summoned.[70]

**10. BAILIFFS.** It is the duty of the sheriff, when he cannot attend to such duties in person, to appoint deputies to attend upon the terms of court,[71] and when such deputies are put in charge of juries the term "bailiff" is applied to them.[72] The term "bailiff" is also used, however, as meaning a sheriff's officer or deputy generally,[73] although it is considered that a sheriff's bailiff is not a

62. State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

63. Nelson *v.* Nye, 43 Miss. 124; State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

64. Nelson *v.* Nye, 43 Miss. 124.

65. Nelson *v.* Nye, 43 Miss. 124; Allen *v.* Smith, 12 N. J. L. 159.

66. Kavanaugh *v.* State, 41 Ala. 399; Procter *v.* Walker, 12 Ind. 660; State *v.* Trapp, 8 Blackf. (Ind.) 312; Allen *v.* Smith, 12 N. J. L. 159.

67. State *v.* Trapp, 8 Blackf. (Ind.) 312; State *v.* Toland, 36 S. C. 515, 15 S. E. 599.

68. State *v.* Trapp, 8 Blackf. (Ind.) 312.

69. Brewer *v.* Mock, 14 Colo. App. 454, 60 Pac. 578, holding that where the regularly qualified constable had left the country, and there was some evidence that he had resigned, and a justice appointed a special constable to serve the summons and writ in attachment, and indorsed the appointment on the papers so served, stating that there was no regular constable at command, and three weeks after the judgment the office was declared vacant by the county commissioners, the appointment was valid.

**Necessity must exist.**— A justice has no authority to appoint such special officer unless some legal right is liable to be jeopardized before a regular constable can be found. Cunningham *v.* Bostwick, 7 Colo. App. 169, 43 Pac. 151.

**Burden of proof as to necessity.**— The burden is on the constable justifying under such an appointment to show affirmatively that the causes authorizing it existed, and that it was made in the manner prescribed by law. Cort *v.* Newman, 6 Colo. App. 154, 40 Pac. 242.

**Showing insufficient to establish necessity.** — The requirement of the Tennessee statute that the affidavit for deputizing a special constable shall state that "there is no regular officer at hand" is not satisfied by an averment that plaintiff, being a regular brakeman on a specified railroad, "cannot see an officer convenient," and the deputation thereunder is void. Hazleton *v.* Simpson, 11 Heisk. (Tenn.) 679.

**Necessity for seal.**— Under a statute providing that justices of the peace may appoint special constables by written indorsement under seal on the back of the process such special officer is to execute, an appointment regular in every other respect is invalid if without a seal or scroll, although a justice's court is not a court of record. Bruce *v.* Endicott, 16 Colo. App. 506, 66 Pac. 679.

70. Cox *v.* Passaic County Ct. of C. Pl., 45 N. J. L. 328.

71. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

**Number of bailiffs.**— Where the statute authorizes the sheriff to employ as many bailiffs as may be necessary, an order of court limiting the number is unauthorized. *Ex p.* Strobach, 49 Ala. 443.

72. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

**They are none the less deputies of the sheriff,** however, in the performance of such duty, even though they be deputized by the sheriff for that specific duty alone. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

**It is not the province of the presiding judge to appoint bailiffs** to take charge of juries while considering their verdicts. Nicholson *v.* State, 38 Fla. 99, 20 So. 818.

73. 1 Backstone Comm. 344; Black L. Dict.; Bouvier L. Dict.

**A bound bailiff** is one who is bound with securities to the high sheriff in an obligation for the due execution of his office. Latta *v.* Owens, 10 Manitoba 153.

**A special bailiff** is an officer appointed for a special purpose by the sheriff, e. g., the exoneration of a particular writ, at the instance of plaintiff, or of his attorney, and exists *pro hac vice*. Latta *v.* Owens, 10 Manitoba 153.

general but a special agent of the sheriff who employs him,[74] and cannot be regarded as a public officer [75] or as a peace officer.[76] When the duty of acting as bailiff is assigned to a deputy specially appointed for that purpose alone, a special oath is necessary to be administered to him.[77]

**11. Substitutes For Sheriff — a. In General.** The statutes generally provide for special appointments of persons to perform particular services appertaining to the sheriff's office in case there is no sheriff or the sheriff is unable to act,[78] and the coroner is unable to fulfil his duties.[79] Where a sheriff is in his office ready to serve process issued by the probate judge, and the sheriff's office is in the same building with that of the probate judge, the latter has no authority to appoint a special sheriff to serve the process.[80]

**b. Coroner [81] Acting as Sheriff.** Both at common law and under the statutes of most if not all of the states, the coroner is authorized to perform all the duties and functions of the sheriff where the latter dies, resigns, is removed,[82] or vacates his office,[83] or is for any reason incapable of acting,[84] and there is no deputy or under-sheriff in office who can assume its duties.[85] This has led one court to

74. Latta *v.* Owens, 10 Manitoba 153.

75. Latta *v.* Owens, 10 Manitoba 153.

76. Latta *v.* Owens, 10 Manitoba 153.

77. Nicholson *v.* State, 38 Fla. 99, 20 So. 818; Hare *v.* State, 4 How. (Miss.) 187.

**Where the sheriff himself acts as bailiff** no special oath is required to be administered to him. Nicholson *v.* State, 38 Fla. 99, 20 So. 818; Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559.

78. Whitehead *v.* Brigham, 1 La. Ann. 317; Russell *v.* Millett, 20 Wash. 212, 55 Pac. 44, holding that under the statutes of Washington a writ of garnishment may be served on the sheriff by a private disinterested individual.

79. Whitehead *v.* Brigham, 1 La. Ann. 317, holding, however, that a private person cannot be appointed to act in the place of the sheriff during the trial of a case in which the latter is a party, on the ground of the absence of the coroner from the parish, as the statute provides for such an appointment for the service of process only.

**Coroner acting as sheriff** see *infra*, II, C, 11, b.

80. Skinner *v.* Cowley County, 63 Kan. 557, 66 Pac. 635.

81. See, generally, Coroners, 9 Cyc. 980.

82. People *v.* Phœnix, 6 Cal. 92; Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; Longacre *v.* State, 2 How. (Miss.) 637; Com. *v.* Mallini, 214 Pa. St. 50, 63 Atl. 414; Mays *v.* Forbes, 11 Tex. 284.

**Where there is no sheriff in an organized county** the coroner can exercise the powers and perform the duties of the sheriff. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

83. Reed *v.* Reber, 62 Ill. 240.

**Coroner acting as sheriff may appoint deputy.**— Reed *v.* Reber, 62 Ill. 240.

**Right as between coroner and sheriff claiming to hold over.**— Where a sheriff and a coroner were elected to their respective offices, and the coroner duly qualified and was inducted into his office, but the sheriff-elect died before the time when his term was to begin, although after the induction of the coroner, the coroner was entitled to the office of sheriff as against the incumbent of that office who claimed to hold over. State *v.* Epler, 12 Ohio St. 428.

**Coroner cannot act where office of sheriff vacant.**— In his ministerial capacity the coroner is merely the substitute of the sheriff and has no authority to act in that capacity when there is no sheriff in office. Richardson *v.* Croft, 1 Bailey (S. C.) 264, holding that the service of process by the coroner during the interval between the election of a sheriff and his entering upon the duties of his office is void.

84. *Colorado.*— Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

*Idaho.*— State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

*Louisiana.*— Whitehead *v.* Brigham, 1 La. Ann. 317.

*Massachusetts.*— Adams *v.* Vose, 1 Gray 51.

*Mississippi.*— Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; Longacre *v.* State, 2 How. 637.

*Missouri.*— State *v.* Smith, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288; Orscheln *v.* Scott, 79 Mo. App. 534.

*Pennsylvania.*— Com. *v.* Mallini, 214 Pa. St. 50, 63 Atl. 414.

*South Carolina.*— Richardson *v.* Croft, 1 Bailey 264.

*Texas.*— Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640; Mays *v.* Forbes, 11 Tex. 284.

*Washington.*— Russell *v.* Millett, 20 Wash. 212, 55 Pac. 44.

*Wisconsin.*— Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

*Canada.*— Horsfall *v.* Sutherland, 31 Nova Scotia 471.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 42.

**Disqualification of sheriff to act in particular cases** see *infra*, III, A, 7.

**Where the sheriff is defendant in replevin proceedings** in a justice's court, the process should be served by a constable, and not by the coroner. Griswold *v.* Nichols, 111 Wis. 344, 87 N. W. 300.

85. Lipscomb *v.* State, 76 Miss. 223, 25 So.

say that strictly speaking there can be no vacancy in the office of sheriff;[86] but this is inaccurate, for where the sheriff dies, resigns, or is removed there is none the less a vacancy in the office of sheriff because of the fact that the duties of the office are performed by the coroner,[87] and the correct statement is that as a matter of public policy there is always some person who is legally authorized to perform the duties appertaining to the office of sheriff. This authority of the coroner is, however, merely temporary, lasting only until a new sheriff is elected or appointed and qualified,[88] and it has been said that the coroner cannot perform the duties of the sheriff in cases not provided for by statute,[89] or when no reason is shown why the sheriff should not act.[90]

**c. Elisors.** In cases where neither the sheriff nor the coroner can act the emergency is provided for by the appointment of a special officer called an "elisor" to perform the required duties;[91] but the inability of the sheriff alone does not authorize such an appointment where the coroner is able to act.[92] Where, however, an elisor has been appointed, the presumption is that the circumstances authorizing such appointment existed.[93] In the absence of a statute so requiring it is not necessary that an elisor should take an oath of office.[94]

**12. Clerks.** An appointment by a sheriff to a position as clerk in his office cannot extend beyond his own term,[95] and such clerk may be dismissed by the sheriff at any time.[96]

**13. Posse Comitatus.** In a proper case the sheriff can summon to his aid in the performance of his duties the "*posse comitatus*,"[97] or the whole power of the county,[98] and persons so called upon by the sheriff are bound to aid and assist

158; Paddock *v.* Cameron, 8 Cow. (N. Y.) 212; Com. *v.* Mallini, 214 Pa. St. 50, 63 Atl. 414.

**When duties of sheriff devolve upon deputy** see *infra*, III, a, 3, b.

**When the sheriff is living and in office but disqualified to act** in a particular case the coroner, and not the deputy sheriff, must act in his place. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

86. People *v.* Phœnix, 6 Cal. 92.

87. State *v.* MacGregor, 44 Ohio St. 628, 633, 10 N. E. 66, where it is said that the coroner "does not cease to be coroner by the office of sheriff becoming vacant; on the contrary, he continues to be coroner, and as such performs the duties of sheriff during the vacancy in that office."

88. People *v.* Phœnix, 6 Cal. 92.

89. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

90. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471.

91. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Young, 108 Cal. 8, 41 Pac. 281; Reed *v.* Moffatt, 62 Ill. 300; Jackson *v.* Chew, 3 Cow. (N. Y.) 298.

**Interest not sufficient to disqualify sheriff and coroner.**— The court has refused to appoint elisors to execute a writ of inquiry, although it appeared that both the sheriff and the coroner were members of a corporation which was interested in, and had defended another cause, at the suit of plaintiff in the writ of inquiry, the determination of which depended upon the same questions as those upon which the suit on which the writ issued was determined. Jackson *v.* Rathbone, 3 Cow. (N. Y.) 296.

**Elisor may be appointed to serve attachment against sheriff.**— Anonymous, 23 Wend. (N. Y.) 102.

**Residence of elisor.**— It is not necessary that an elisor appointed by the court to serve an attachment on the sheriff, for the latter's failure to return an attachment delivered to him, should be a resident of the same county with the officer in default, but under special circumstances an elisor residing in a different county may be appointed. Anonymous, 23 Wend. (N. Y.) 102.

92. People *v.* Fellows, 122 Cal. 233, 54 Pac. 830; Orscheln *v.* Scott, 79 Mo. App. 534.

93. Turner *v.* Billagram, 2 Cal. 520.

94. Reed *v.* Moffatt, 62 Ill. 300.

95. Sargent *v.* Gorman, 14 N. Y. Suppl. 481 [*affirmed* in 131 N. Y. 191, 29 N. E. 946].

96. Sargent *v.* Gorman, 14 N. Y. Suppl. 481 [*affirmed* in 131 N. Y. 191, 29 N. E. 946], holding that an honorably discharged Union soldier employed as clerk in the sheriff's office is subject to such removal under Laws (1887), c. 464, and Laws (1890), c. 67.

97. Sutton *v.* Allison, 47 N. C. 339.

98. Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

**All able-bodied male persons over the age** of fifteen years may be summoned to act as members of the *posse comitatus*. Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

**The sheriff may avail himself of the services of military organizations,** and order them into his posse, not as soldiers, but as citizens trained and disciplined for effective service in critical emergencies. Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

**Number to be called.**— Under Ky. St. § 1241*a*, authorizing the county judge to order the sheriff or any constable to summon

him.[99] It is his duty to do this when such aid is necessary for the execution of mesne process in criminal proceedings,[1] or final process in civil actions;[2] but he is not required to summon the *posse comitatus* to aid in the execution of mesne process in a civil action,[3] although he has the right to do so.[4]

## III. RIGHTS, POWERS, AND DUTIES.

**A. Nature and Extent — 1. In General.** Although the sheriffs and constables are common-law officers with common-law powers and duties,[5] which are inherent in the office,[6] their powers and duties are, at the present time, to a very large extent regulated by statute,[7] and the sheriff is obligated to perform such duties as may be constitutionally imposed upon him in his capacity as a county officer.[8] The powers and duties of a sheriff are ordinarily of a ministerial nature,[9] although he may at times exercise judicial functions and examine evidence and make up judgments which are to become the basis of his actions and conduct and of the actions and conduct of others.[10] A sheriff, while in the discharge of his official duties, cannot divest himself of his official character and do as an individual that which he cannot do as a public officer.[11] A provision of a city charter for the appointment by the judges of the municipal court, from the constables elected for the several wards of the city, of such a number thereof as may be required to do the work of the court, does not create a new office, but the acts

a posse of not less than two or more than ten men to guard certain property, the discretion of determining the number of men, within the specified limits, of which the party shall consist, is vested in the sheriff, and such an order properly left the number of the posse indeterminate. Hopkins County *v.* St. Bernard Coal Co., 114 Ky. 153, 70 S. W. 289, 24 Ky. L. Rep. 942.

99. Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85.

**Disobedience of summons a misdemeanor.**— Com. *v.* Martin, 7 Pa. Dist. 219, 9 Kulp 69.

1. State *v.* Allison, 47 N. C. 339.

2. State *v.* Allison, 47 N. C. 339.

3. Bell *v.* North, 4 Litt. (Ky.) 133; State *v.* Allison, 47 N. C. 339.

4. Bell *v.* North, 4 Litt. (Ky.) 133.

5. Allor *v.* Wayne County, 43 Mich. 76, 43 N. W. 492; People *v.* Smith, 9 Mich. 193; Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360; Norris *v.* Smithville, 1 Swan. (Tenn.) 164.

**A constable appointed by a town** in pursuance of its act of incorporation has, and may exercise, within the limits of the corporation, the powers and duties appertaining to a constable at common law, in reference to subjects in which the corporation is interested. Norris *v.* Smithville, 1 Swan (Tenn.) 164.

**Where duties not prescribed.**— Where a state constitution provides for the election of a sheriff without prescribing in express words the duties which shall attach to the office it must be presumed that the duties are those attaching to the office at common law. Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360.

6. See Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

7. St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; Lang *v.* Walker, 46 Fla. 248, 254, 35 So. 78 (where it is said: "Our constitution, section 6, article VIII, expressly makes the powers, duties and compensation of sheriffs dependent upon legislative action"); People *v.* Smith, 9 Mich. 193.

**The repeal of a provision in a city charter prescribing the powers of constables** leaves them with the same general powers which belong to the office in towns. People *v.* Smith, 9 Mich. 193.

8. Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

**The duty of acting as a member of a board to appoint police commissioners** may properly be imposed on the sheriff, and is not inconsistent with the inherent duties of his office. Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 442 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

9. Hutcherson *v.* Robinson, 82 Ga. 783, 9 S. E. 722; Rogers *v.* Silas, 42 Ga. 541; State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62, 35 Cinc. L. Bul. 82; Pitman *v.* Clark, 1 McMull. (S. C.) 316.

10. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62, 35 Cinc. L. Bul. 82; South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**For example** the sheriff acts judicially when determining the necessity of calling to his aid the military forces of the state. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62, 35 Cinc. L. Bul. 82.

11. Ball *v.* Pratt, 36 Barb. (N. Y.) 402, 409, where it is said: "It is doubtless true that he may become the agent of the plaintiff, to a certain extent, and take responsibilties which go beyond his strict official duty, when he acts in good faith and in the supposed discharge of his duty as an officer; and that the plaintiff may protect him in doing so. But he cannot increase his fees by entering into a personal engagement on his individual account, which he is not allowed

of an appointee are by virtue of his office as constable.[12] Where the statutes require constables to execute all process delivered to them by any lawful officer, and also require all process, unless otherwise provided, to be directed to both sheriff and constable, a constable has power to sell land under an order of sale issued from the district court, although the sheriff is competent to act.[13]

**2. Territorial Extent of Authority.** The sheriff being a county officer, his authority extends over the entire county;[14] and as a general rule his authority is limited to his own county,[15] and *a fortiori* the authority of a deputy sheriff is so limited.[16] The authority of a constable has been held to be limited to his own district, precinct, or town;[17] but the more general rule is that his authority is coextensive with the limits of the county to which his precinct belongs;[18] and it has been held that even though a constable is prohibited by law, under a penalty, from executing warrants and levying executions out of his particular precinct, yet his official acts in any part of the county are valid.[19]

to do as a public officer. The policy of the law will not allow him to do more than his official duty with a view to increase his fees and emoluments."

12. Levin *v.* Rohie, 5 Misc. (N. Y.) 529, 25 N. Y. Suppl. 982.

13. Texas Land, etc., Co. *v.* Masterson, 11 Tex. Civ. App. 483, 33 S. W. 376.

14. Dudley *v.* Jones, 6 Tex. Civ. App. 466, 26 S. W. 445.

**Effect of division of county.**— Where, after an execution is levied on realty in a certain county, the county is subdivided, such subdivision does not deprive the officer of the power to complete the execution of the process by a sale of the property levied on. Tyrell *v.* Rountree, 7 Pet. (U. S.) 464, 8 L. ed. 749 [*affirming* 24 Fed. Cas. No. 14,313, 1 McLean 95].

15. *Alabama.*— Jones *v.* Baxter, 146 Ala. 620, 41 So. 781.

*Georgia.*— State *v.* Harrell, Ga. Dec. 130.

*Indiana.*— Dederick *v.* Brandt, 16 Ind. App. 264, 44 N. E. 1010.

*Kansas.*— Morrell *v.* Ingle, 23 Kan. 32.

*Kentucky.*— York *v.* Com., 82 Ky. 360.

*Louisiana.*— Dingrave *v.* Sloan, 13 La. Ann. 393.

*Michigan.*— Baker *v.* Casey, 19 Mich. 220.

*Nevada.*— Washoe County *v.* Humboldt County, 14 Nev. 123, holding that a sheriff has no authority to serve a subpœna on witnesses residing in any other than his county, unless such other county be within the same judicial district.

*South Carolina.*— Finley *v.* South Carolina Canal, etc., Co., 2 Rich. 567.

*Texas.*— Alred *v.* Montague, 26 Tex. 732, 84 Am. Dec. 603; Jones *v.* State, 26 Tex. App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 101.

**Sale of land partly without county.**— A sale under execution by a sheriff of land lying partly outside of his county is void as to that without the county, although valid as to the part within the county. Alred *v.* Montague, 26 Tex. 732, 84 Am. Dec. 603.

16. **No presumption that authority of deputy limited to bailiwick.**— Evans *v.* Wait, 5 J. J. Marsh. (Ky.) 110; York *v.* Com., 82 Ky. 360.

17. Davidson *v.* Hayden, 38 S. W. 897, 18 Ky. L. Rep. 931 (so holding as to a town marshal elected under a charter provision that such officer should have the same powers "within the corporation" that constables possess under the laws of the state); Riley *v.* James, 73 Miss. 1, 18 So. 930; Norris *v.* Smithville, 1 Swan (Tenn.) 164.

18. *California.*— Lafontaine *v.* Greene, 17 Cal. 294.

*Georgia.*— Lapsley *v.* Georgia Loan, etc., Co., 99 Ga. 459, 27 S. E. 717 [*distinguishing* and *limiting* Divine *v.* Bailey, 62 Ga. 235].

*Kentucky.*— Com. *v.* Hughes, 10 B. Mon. 461.

*North Carolina.*— Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815 [*followed* in Upper Appomattox County *v.* Buffaloe, 121 N. C. 37, 27 S. E. 999]; Governor *v.* Morris, 7 N. C. 146.

*Texas.*— Cundiff *v.* Teague, 46 Tex. 475; Medlin *v.* Seideman, 39 Tex. Civ. App. 553, 88 S. W. 250; Texas Land, etc., Co. *v.* Masterson, 11 Tex. Civ. App. 483, 33 S. W. 376; Dudley *v.* Jones, 6 Tex. Civ. App. 466, 26 S. W. 445, so holding as to the authority of a marshal.

*Virginia.*— McNeale *v.* Governor, 3 Gratt. 299.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 101.

**Direction to town constable as such.**— A constable of an incorporated town cannot legally serve a summons outside of the corporate limits unless it is directed to him as constable of such town. Davis *v.* Sanderlin, 119 N. C. 84, 25 S. E. 815 [*followed* in Upper Appomattox County *v.* Buffaloe, 121 N. C. 37, 27 S. E. 999].

**Extension of power throughout state** see Dix *v.* Batchelder, 55 Vt. 562.

**A marshal of the municipal court of the city of New York,** borough of Manhattan, has no power to act as such in the county of Kings. Loewer's Gambrinus Brewing Co. *v.* Lithauer, 36 Misc. (N. Y.) 539, 73 N. Y. Suppl. 947 [*following* Tausend *v.* Handlear, 33 Misc. 587, 68 N. Y. Suppl. 77].

**A constable of the city of Detroit** has power to execute the criminal process of a justice of the peace of such city for offenses committed in the county of Wayne and outside of the city. Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

19. McNeale *v.* Governor, 3 Gratt. (Va.) 299.

**3. Authority of Deputies and Assistants — a. In General.** While a deputy sheriff cannot exercise any judicial authority belonging to the sheriff,[20] he has authority to exercise any of the powers or perform any of the duties appertaining to the office of the sheriff, which are ministerial in their nature.[21] Accordingly he may act for the sheriff in making a judicial [22] or execution [23] sale, appraising the property as a preliminary to such sale,[24] and executing a deed to the purchaser,[25] executing a writ of ad quod damnum,[26] serving an execution for taxes,[27] receiving an appearance bond [28] and discharging the accused upon its execution,[29] executing a warrant of arrest,[30] executing process of attachment for witnesses,[31] and impaneling a sheriff's jury [32] and administering the oath to them.[33] But it has been held that the writ de homine replegiando can be served only by the sheriff and not by a deputy,[34] and that the holding of an inquisition to ascertain

**20.** Wood *v.* Ross, 11 Mass. 271; Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 71 N. W. 63; Klopp *v.* Breitenbach, 2 Leg. Chron. (Pa.) 73, 6 Leg. Gaz. 87; McMullen *v.* Orr, 8 Phila. (Pa.) 342.

**21.** *Connecticut.*— Clark *v.* Bray, Kirby 237.

*Louisiana.*— State *v.* Wilson, 12 La. Ann. 189.

*Maryland.*— Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361.

*Massachusetts.*— Wood *v.* Ross, 11 Mass. 271.

*Nebraska.*— Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 71 N. W. 63 [*followed* in Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553; Maginn *v.* Pickard, 57 Nebr. 642, 78 N. W. 295; Hamer *v.* McKinley-Lanning Loan, etc., Co., 52 Nebr. 705, 72 N. W. 1041; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313; Post *v.* Smith, 1 Nebr. (Unoff.) 94, 95 N. W. 500].

*Tennessee.*— Stevens *v.* Duck River Nav. Co., 1 Sneed 237.

*Texas.*— Shely *v.* State, 35 Tex. Cr. 190, 32 S. W. 901.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 104.

**22.** Post *v.* Smith, 1 Nebr. (Unoff.) 94, 95 N. W. 500 [*following* Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553; Hamer *v.* McKinley-Lanning Loan, etc., Co., 52 Nebr. 705, 72 N. W. 1041; Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 71 N. W. 63 (*followed* in Maginn *v.* Pickard, 57 Nebr. 642, 78 N. W. 295; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313)].

A demand for the return of property, made on a deputy sheriff who conducted a sale of the same under a chattel mortgage foreclosure, is sufficient to bind the sheriff. Dobbins *v.* Mounce, 5 Ida. 325, 48 Pac. 1070.

**23.** Jackson *v.* Davis, 18 Johns. (N. Y.) 7.

**24.** Nebraska Loan, etc., Assoc. *v.* Marshall, 51 Nebr. 534, 537, 71 N. W. 63 [*followed* in Scottish-American Mortg. Co. *v.* Nye, 58 Nebr. 661, 79 N. W. 553; Maginn *v.* Packard, 57 Nebr. 642, 78 N. W. 295; Hamer *v.* McKinley-Lanning Loan, etc., Co., 52 Nebr. 705, 72 N. W. 1041; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313; Post *v.* Smith, 1 Nebr. (Unoff.) 94, 95 N. W. 500] (where it is said: "It is true that this court has many times held that the appraisers act judicially. They are not, however, a court, nor are they judges, and when this court has said that they act judicially, we take it that it has meant merely that to them is committed the exercise of judgment and discretion in making the appraisement, and that their determination of the matter is final unless seasonably and regularly set aside. The execution of a decree of foreclosure is in its nature a ministerial act and certainly the officer performing that act is a ministerial officer within the meaning of section 893. He is none the less a ministerial officer and his acts are none the less ministerial, as that term is generally used, because at one stage of the proceeding there is committed to him the exercise of a discretionary power requiring a decision of facts. It is impossible to entirely separate so-called ministerial and judicial functions. If it were not that the exercise of judgment and discretion are frequently required in the performance of ministerial duties, a considerable saving of human energy, if not money, might be effected by manufacturing machines which would perform such duties as well as men. For the reasons indicated we think that the statutes taken and construed together in the light of principle permit a deputy to make the appraisement."

**25.** Winslow *v.* Austin, 5 J. J. Marsh. (Ky.) 408; Jackson *v.* Davis, 18 Johns. (N. Y.) 7.

**26.** Gay *v.* Caldwell, Hard. (Ky.) 63; Wroe *v.* Harris, 2 Wash. (Va.) 126. But *compare* Wood *v.* Ross, 11 Mass. 271.

**27.** Clark *v.* Bray, Kirby (Conn.) 237, holding further that a special deputy is not disqualified because he is an inhabitant of the town in whose favor the execution is.

**28.** State *v.* Wilson, 12 La. Ann. 189.

**29.** State *v.* Wilson, 12 La. Ann. 189.

**30.** State *v.* Green, 66 Mo. 631, holding that a deputy county marshal has authority to execute a warrant placed in his hands, without any special instruction from his principal.

**31.** Shely *v.* State, 35 Tex. Cr. 190, 32 S. W. 901, holding that the deputy may also make an affidavit required by statute with reference to the fees due for executing such process.

**32.** Stevens *v.* Duck River Nav. Co., 1 Sneed (Tenn.) 237.

**33.** Stevens *v.* Duck River Nav. Co., 1 Sneed (Tenn.) 237.

**34.** Wood *v.* Ross, 11 Mass. 271.

whether the rents and profits of real estate will be sufficient to satisfy an execution is a judicial act, which cannot be performed by the deputy sheriff.[35] A deputy sheriff can only act in the name of his principal,[36] and a sheriff cannot give his deputy authority to do an act which the sheriff himself is not authorized to do.[37] While the sheriff is in the execution of his office the under-sheriff has no more power than any other general deputy.[38] A deputy has no general authority to make advances for the sheriff,[39] or to bind him by a contract or promise,[40] unless it be to pay over money collected under process;[41] nor is a deputy's acceptance of service of a notice of a claim to property levied on such an official act as is binding upon the sheriff.[42]

**b. Termination of Incumbency of Sheriff.**[43] At common law the authority of a deputy sheriff *ipso facto* terminates when the sheriff goes out of office by death, resignation, removal, or otherwise,[44] except that an execution once begun by a deputy may be carried on to completion by him, notwithstanding the sheriff has gone out of office.[45] And it is held that where a sheriff who, at the expiration of his term of office, has in his hands process not fully executed, dies before the complete execution thereof, his late under-sheriff becomes substituted in his place, and assumes all his duties in respect to such process.[46] But to remedy the difficulty resulting from having no sheriff in office the statutes usually provide that in such case the duties of the office shall be discharged by the deputy or under-sheriff until a new sheriff is appointed and qualifies.[47]

**c. Ratification of Act of One Assuming Without Authority to Act as Deputy.** A sheriff cannot ratify the illegal act of one assuming without authority to act as his deputy in making a levy in his name, so as to render such act valid.[48]

**4. Authority of Coroner[49] Acting as Sheriff.** A coroner who is performing the duties of the sheriff[50] has the same rights and powers as the sheriff.[51] In case of a vacancy in the office of sheriff the coroner may complete the execution of a process directed to the sheriff and partly executed by him before the vacancy occurred.[52] A coroner is authorized to serve process on the sheriff,[53] and the fact

35. Klopp *v.* Breitenbach, 2 Leg. Chron. (Pa.) 73, 6 Leg. Gaz. 87.

36. Ryan *v.* Eads, 1 Ill. 217. But *compare* Towns *v.* Harris, 13 Tex. 507, holding that a return by a deputy sheriff in his own name as deputy sheriff is valid.

37. Calvert *v.* Stone, 10 B. Mon. (Ky.) 152.

38. Tillotson *v.* Cheetham, 2 Johns (N. Y.) 63 [*reversed* on other grounds in 5 Johns. 430].

39. Hanks *v.* Williams, Cheves Eq. (S. C.) 203.

40. Tomlinson *v.* Wheeler, 1 Aik. (Vt.) 194. See also *infra*, IV, D, 8.

41. Tomlinson *v.* Wheeler, 1 Aik. (Vt.) 194.

42. Chapin *v.* Pinkerton, 58 Iowa 236, 12 N. W. 282.

43. **Effect of change in incumbency upon powers of sheriff** see *infra*, III, C.

44. See *supra*, II, C, 6.

45. Neilson *v.* Churchill, 5 Dana (Ky.) 333; Jackson *v.* Collins, 3 Cow. (N. Y.) 89.

46. Newman *v.* Beckwith, 61 N. Y. 205 [*reversing* 5 Lans. 80].

47. Opinion of the Justices, 126 Mass. 557; Lamoreaux *v.* Atty.-Gen., 89 Mich. 146, 50 N. W. 812; Boardman *v.* Halliday, 10 Paige (N. Y.) 223; McPherson *v.* Hamilton, 5 U. C. Q. B. O. S. 490.

**The "senior deputy sheriff in service,"** who, by St. (1877) c. 200, § 23, is required, in case a vacancy occurs in the office of sheriff in any county, to perform all the duties required by law to be performed by the sheriff until the office of sheriff is filled in the manner required by law, is the deputy sheriff who has been longest in office continuously when the vacancy occurs. Opinion of Justices, 126 Mass. 603.

**Statute providing only for vacancy by death.** — Where the statute provides that in case of the death of the sheriff, the under-sheriff shall in all things execute the office of sheriff until another shall be appointed, where the office of sheriff becomes vacant by his election to another office, or by any cause other than his death, the under-sheriff cannot execute the duties of sheriff. Paddock *v.* Cameron, 8 Cow. (N. Y.) 212.

48. Perkins *v.* Reed, 14 Ala. 536.

49. **Coroners** generally see Coroners, 9 Cyc. 980.

50. **Coroner acting as sheriff** see *supra*, II, C, 11, b.

51. Horsfall *v.* Sutherland, 31 Nova Scotia 471.

**A coroner may convey land** sold by him under execution. Winslow *v.* Austin, 5 J. J. Marsh. (Ky.) 408.

52. Greenup *v.* Stoker, 12 Ill. 24, 52 Am. Dec. 474.

53. Adams *v.* Vose, 1 Gray (Mass.) 51, criminal process.

that he is also a deputy sheriff does not preclude him from acting as sheriff in a case in which the sheriff is interested.[54] Where a coroner has acted as sheriff, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance;[55] and a coroner to whom an execution has been directed and who pretends to act under it is estopped from denying his authority to do so in an action on his bond, although the necessity for the writ being executed by the coroner does not appear.[56]

**5. Authority of Special Officers.** Where a special constable has once been appointed in a cause he is authorized to perform all the subsequent duties required of a constable in that cause.[57] A person acting as a special constable to execute a warrant is authorized to command assistance in case of opposition.[58]

**6. Authority of De Facto Officers.**[59] The acts of a *de facto* sheriff, deputy sheriff, or constable, so far as they concern the public or third persons, have the same validity as though the officer were such *de jure*,[60] and his authority can be questioned only by those whose persons or property are directly affected by his acts.[61]

**7. Disqualification to Act in Particular Cases.**[62] A sheriff or constable cannot lawfully perform the duties of his office in a case in which he is interested,[63] even

**54.** Wood *v.* Quincy, 11 Cush. (Mass.) 487. See also Colby *v.* Dillingham, 7 Mass. 475, holding that a coroner who is also a deputy sheriff may serve process upon another deputy of the sheriff.

**55.** Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640.

**In order to entitle a coroner to serve a writ of error,** the petition for the writ must state that there is no sheriff, or that there is some objection to the sheriff. Mays *v.* Forbes, 11 Tex. 284.

**56.** Longacre *v.* State, 2 How. (Miss.) 637.

**57.** Hood *v.* Sennett, 70 Ind. 329, holding that the appointment of a special constable to serve a summons empowers him also to serve an execution on the judgment entered in the action.

**58.** Patterson *v.* Kise, 2 Blackf. (Ind.) 127.

**Right to summon posse comitatus** generally see *supra*, II, C, 13.

**59. Who are de facto:** Constables see *supra*, II, B, 7. Deputies see *supra*, II, C, 8. Sheriffs see *supra*, II, A, 9.

**De facto officers** generally see Officers, 29 Cyc. 1393.

**60.** *Alabama.*— Thrower *v.* State, 52 Ala. 22; Garner *v.* Clay, 1 Stew. 182.

*California.*— Shores *v.* Scott River Water Co., 17 Cal. 626; People *v.* Roberts, 6 Cal. 214.

*Connecticut.*— Soudant *v.* Wadhams, 46 Conn. 218.

*Georgia.*— Stephens *v.* State, 106 Ga. 116, 32 S. E. 13; Harrison *v.* Richardson, 99 Ga. 763, 27 S. E. 173; Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436; Crawford *v.* Howard, 9 Ga. 314.

*Illinois.*— Ballance *v.* Loomis, 22 Ill. 82; McCluskey *v.* McNeely, 8 Ill. 578.

*Indiana.*— Case *v.* State, 69 Ind. 46.

*Iowa.*— Stickney *v.* Stickney, 77 Iowa 699, 42 N. W. 518.

*Kentucky.*— Wilson *v.* King, 3 Litt. 457, 14 Am. Dec. 84.

*Louisiana.*— Dorsey *v.* Vaughan, 5 La. Ann. 155.

*Maine.*— Bliss *v.* Day, 68 Me. 201.

*Massachusetts.*— Bucknam *v.* Ruggles, 15 Mass. 180, 8 Am. Dec. 98; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62.

*Mississippi.*— Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541.

*Missouri.*— Abington *v.* Steinberg, 86 Mo. App. 639; Powers *v.* Braley, 41 Mo. App. 556.

*New Hampshire.*— Lisbon *v.* Bow, 10 N. H. 167; Moore *v.* Graves, 3 N. H. 408.

*New Jersey.*— Clark *v.* Ennis, 45 N. J. L. 69; State *v.* Anderson, 1 N. J. L. 318, 1 Am. Dec. 207.

*New York.*— Hammondsport Law, etc., Assoc. *v.* Kinzell, 43 Misc. 505, 89 N. Y. Suppl. 534; Snyder *v.* Schram, 59 How. Pr. 404.

*North Carolina.*— Mabry *v.* Turrentine, 30 N. C. 201 (*de facto* coroner acting as sheriff); Welch *v.* Scott, 27 N. C. 72.

*South Dakota.*—Williamson *v.* Lake County, 17 S. D. 353, 96 N. W. 702.

*Tennessee.*— Bates *v.* Dyer, 9 Humphr. 162.

*Texas.*— Broach *v.* Garth, (Civ. App. 1899) 50 S. W. 594; Trammell *v.* Shelton, 18 Tex. Civ. App. 366, 45 S. W. 319.

*United States.*— Commercial Bank *v.* Sandford, 103 Fed. 98.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 8, 25, 36, 112.

**61.** Moore *v.* Graves, 3 N. H. 408.

**62. Eligibility to office of:** Constable see *supra*, III, B, 2. Deputy see *supra*, III, C, 4. Sheriff see *supra*, II, A, 3.

**63.** *Georgia.*— Knight *v.* Morrison, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405.

*Kentucky.*— Chambers *v.* Thomas, 1 Litt. 268, holding that a deputy sheriff cannot legally execute a fieri facias which is issued in his own name and for his own benefit.

*Maine.*— Dane *v.* Gilmore, 51 Me. 544.

*Massachusetts.*— Merrill *v.* Berkshire, 11 Pick. 269; Gage *v.* Graffam, 11 Mass. 181.

*New York.*— Carpenter *v.* Stilwell, 11 N. Y. 61; Mills *v.* Young, 23 Wend. 314.

*Pennsylvania.*— Smith *v.* Nicola, 6 Pa. Dist. 595, 19 Pa. Co. Ct. 440.

though he is not directly affected by the act to be performed;[64] and prejudice on the part of the sheriff against a person accused of crime may disqualify him for the duty of summoning jurors for his trial.[65] The disqualification of the sheriff in a particular case is not personal but extends to the entire force of his office, and hence a deputy cannot do an act as to which the sheriff is disqualified.[66] So also the sheriff cannot legally serve or execute process upon his deputy,[67] nor is it proper for one deputy to serve process in a cause to which another deputy of the same sheriff is a party.[68]

**8. Inability to Act in Particular Cases.** The physical illness of a sheriff will not excuse a failure to perform the duties of his office, for he should provide deputies to act in such an emergency;[69] nor can a constable who retains process intrusted to him avoid liability for a failure to perform his duties in respect thereto on the ground of disability resulting from illness,[70] although it has been held that he may in such case relieve himself of liability by putting the business into the hands of another constable who is qualified to act.[71]

**B. Particular Powers and Duties**[72] **— 1. Conservation of the Peace and Arrest of Offenders.** The duties of a sheriff are in a large measure the same as are imposed upon police officers,[73] and he necessarily exercises police powers[74]

*Texas.*— See Ellis *v.* Blanks, (Civ. App. 1904) 25 S. W. 309.

*Vermont.*— Rutland Bank *v.* Parsons, 21 Vt. 199.

*Virginia.*— Carter *v.* Harris, 4 Rand. 199.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 113; and Attachment, 4 Cyc. 577 text and notes 65, 66; Executions, 17 Cyc. 1078, 1079 text and note 18; Process, 32 Cyc. 452 text and note 79, 454 text and note 3.

**A deputy sheriff who is the guardian of plaintiff in replevin** cannot properly execute the writ. Kneas *v.* Fitler, 2 Serg. & R. (Pa.) 263, holding, however, that the evidence was insufficient to show that the deputy acted in his official capacity.

**Inhabitancy of town as constituting interest.**— A deputy sheriff, who is an inhabitant of a town through which a highway is laid out by the county commissioners, is incompetent, by reason of interest, to summon or preside at the trial before a jury granted on the application of a party aggrieved by the doings of the commissioners in locating the way or assessing damages. Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

**An offer to pay a sheriff an extra fee** in case of collection does not give the sheriff such an interest in an execution as will disqualify him from acting. Ellis *v.* Blanks, (Tex. Civ. App. 1894) 25 S. W. 309.

**Agreements as to compensation** generally see *supra*, IV, A, 4, b.

64. State *v.* Jeter, 60 Ga. 489, holding that where the sheriff is one of defendants in an execution, he cannot levy the execution on the property of his cosurety and co-defendant.

65. See State *v.* Barber, 13 Ida. 65, 88 Pac. 418; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

**The court is not bound to take the affidavit of a party as conclusive** proof of prejudice alleged against the sheriff. State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

66. State *v.* Barber, 13 Ida. 65, 88 Pac. 418.

67. Dane *v.* Gilmore, 51 Me. 544, holding that this is true even though such process is directed to the sheriff.

**The fact that the sheriff attached property before the owner was appointed a deputy** does not authorize him to serve the execution after such appointment. Dane *v.* Gilmore, 51 Me. 544.

**The sheriff is not estopped** from showing, in a suit against him for not serving an execution against his deputy, which he had taken for service, that he had no power to serve the precept. Dane *v.* Gilmore, 51 Me. 544.

68. Gage *v.* Graffam, 11 Mass. 181.

**Such service is not void** but merely subject to be set aside, and if defendant appears and answers without objection the irregularity is cured. Gage *v.* Graffam, 11 Mass. 181.

69. Freudenstein *v.* McNeir, 81 Ill. 208 [*approved* but *distinguished* in Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895].

**Duty to provide sufficient number of deputies** see *supra*, II, C, 1, b.

70. Freudenstein *v.* McNeir, 81 Ill. 208; Campbell *v.* Luttrell, 13 Mo. 27.

71. Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895, holding that a constable who is unable, by reason of sickness, to take charge of and sell property on which he has levied, may relieve himself of liability by turning over the property and execution to another constable of his township. See also Freudenstein *v.* McNeir, 81 Ill. 208. But *compare* Calhoun County Ct. *v.* Buck, 27 Ill. 440; Downs *v.* McGlynn, 2 Hilt. (N. Y.) 14 (holding that a constable has no power to substitute another officer in the performance of duties intrusted to him, and, where another undertakes these duties, the first becomes responsible for his default or neglect); Dows *v.* McGlynn, 6 Abb. Pr. (N. Y.) 241.

72. **Power of sheriff to take bail:** In civil cases see Bail, 5 Cyc. 14. In criminal cases see Bail, 5 Cyc. 83.

73. Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

74. Pearce *v.* Stephens, 18 N. Y. App. Div.

and must enforce the laws enacted for the protection of the lives, persons, property, health, and morals of the people.[75] So it is his duty to act as a conservator of the peace within his county,[76] and to prevent breaches of the peace;[77] and he is bound to suppress an affray [78] or unlawful assembly,[79] and to arrest a breaker of the peace if the offense happen within his view.[80] It is also his right and duty to arrest all persons, with their abetters, who oppose the execution of process.[81] A constable also is a peace officer [82] throughout the county,[83] and as such he has authority and it is his duty to arrest offenders against the law.[84]

**2. Custody and Control of Convicts.**[85] At common law the sheriff is jailer *ex officio* and has the right to the custody and control of the county prisons and of the prisoners confined therein;[86] but where the state constitution has expressly made the powers and duties of sheriffs dependent upon legislative action, it has been said that the sheriff has no exclusively inherent or constitutional right to the custody, care, and keeping of county convicts or to the emoluments to be derived therefrom.[87] It is no part of the duty of the sheriff to see that county convict contractors execute the bonds required by statute before entering upon the discharge of their duties.[88]

**3. Protection of Property.** A sheriff or deputy cannot, as such, engage to guard the property of a private individual or corporation not in the custody of the law;[89] and the fact that one is a deputy sheriff does not entitle him to any more rights or privileges in and about private property than any other person except while in the performance of some official duty.[90]

**4. Destruction of Dogs Running at Large.** A statute directing sheriffs and constables to kill unlicensed dogs which they find going at large does not authorize an officer to enter into private premises in order to kill a dog,[91] or to obtain

101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

**75.** Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061.

**76.** Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85; Com. *v.* Vandyke, 57 Pa. St. 34.

**Territorial extent of authority** generally see *supra* III, A, 2.

**Only such force as is necessary may be used** by the sheriff and those aiding him in preserving the peace. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62, 35 Cinc. L. Bul. 82.

**77.** Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061.

**78.** Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

**79.** Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061, holding that it was the duty of the sheriff to suppress games of baseball upon Sunday.

**80.** Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061; Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106].

**81.** Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85.

**82.** Winkler *v.* State, 32 Ark. 539; Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; Reg. *v.* Lautz, 19 Nova Scotia 1.

**A statute establishing a police force does** not deprive constables of their common-law powers as peace officers. Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106]; Schiellein *v.* Kings County, 43 Barb. (N. Y.) 490; South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**83.** Winkler *v.* State, 32 Ark. 539.

**Territorial extent of authority** generally see *supra*, III, A, 2.

**84.** Winkler *v.* State, 32 Ark. 539; Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344; Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492; Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

**85.** **Convicts** generally see CONVICTS, 9 Cyc. 869.

**86.** See PRISONS, 32 Cyc. 320 note 48.

**87.** Lang *v.* Walker, 46 Fla. 248, 35 So. 78.

**88.** State *v.* Busham, 77 Miss. 688, 27 So. 996.

**89.** St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, 24 So. 881, 41 Am. St. Rep. 105; Texas, etc., R. Co. *v.* Parsons, (Tex. Civ. App. 1908) 109 S. W. 240 [*affirmed* in (1908) 113 S. W. 914], where it is said that the right to eject trespassers from private premises or to guard private property from molestation and private employees from interference are private rights, and the authority for their exercise by another than the owner or employer, is derived alone from the owner or employer, and no officer has such right *ex officio*.

**90.** Texas, etc., R. Co. *v.* Parsons, (Tex. Civ. App. 1908) 109 S. W. 240 [*affirmed* in (1908) 113 S. W. 914].

**91.** Kerr *v.* Seaver, 11 Allen (Mass.) 151; Bishop *v.* Fahay, 15 Gray (Mass.) 61. See also Cozzens *v.* Nason, 109 Mass. 275.

possession of and carry away the body of a dog which he has killed in the exercise of his official duty.[92]

**5. Attendance at Court.**[93] It is one of the usual duties of the sheriff to attend in person or by deputy at the sessions of court held in his county;[94] but he has no power to originate motions or present questions, in the names of the parties to a suit, for the action of the court.[95]

**6. Service, Execution, and Return of Process**[96] **— a. In General.** It is the duty of a sheriff or constable to serve or execute all process delivered to him for that purpose,[97] which appears on its face to have issued from competent authority,[98] and with legal regularity,[99] and the service or execution of which is within

92. McAuliffe *v.* Gash, 17 R. I. 355, 22 Atl. 276.

93. Courts generally see Courts, 11 Cyc. 633.

94. *In re* Lawson, 3 Ark. 363; Rhodes *v.* Moseley, 6 Fla. 12; La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196, holding that a sheriff in whose county there is a probate court is obliged to attend it without request of the judge.

When attendance necessary.—A statute providing that a sheriff shall attend on the several courts of record in his county, and receive a sum per day therefor, does not require him to be continually present in court whenever it is in session, but merely requires him to attend at such times as his presence is required or is necessary. Robson *v.* Dickinson County, 8 Kan. App. 374, 55 Pac. 520.

95. Rhodes *v.* Moseley, 6 Fla. 12.

96. See, generally, Process, 32 Cyc. 412.

97. *Alabama.*— Patton *v.* Hamner, 28 Ala. 618.

*Arkansas.*— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

*California.*— Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Delaware.*— Rust *v.* Pritchett, 5 Harr. 260.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*Georgia.*— Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Smedley *v.* Williams, 112 Ga. 114, 37 S. E. 111 (holding that it is not the duty of a sheriff to serve official papers until the same are placed in his hands for that purpose); Rogers *v.* Silas, 42 Ga. 541; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Illinois.*— Pike *v.* Colvin, 67 Ill. 227; Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201; Swan *v.* Gilbert, 67 Ill. App. 236 [*affirmed* in 175 Ill. 204, 51 N. W. 604, 67 Am. St. Rep. 208].

*Indiana.*— Terrell *v.* State, 66 Ind. 570; State *v.* Melogue, 9 Ind. 196.

*Kentucky.*— Com. *v.* Gill, 14 B. Mon. 20; Thompson *v.* Morris, 2 B. Mon. 35; Hardin *v.* Grover, 2 S. W. 64, 8 Ky. L. Rep. 260.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791.

*Missouri.*— State *v.* Finn, 87 Mo. 310; State *v.* Leland, 82 Mo. 260.

*New York.*— Hoffman *v.* Conner, 76 N. Y. 121; Clearwater *v.* Brill, 4 Hun 728 [*affirmed* in 63 N. Y. 627]; Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621]; Parmelee *v.* Hitchcock, 12 Wend. 96.

*North Carolina.*— McGloughan *v.* Mitchell, 126 N. C. 681, 36 S. E. 164.

*Ohio.*— King *v.* Nichols, 16 Ohio St. 80.

*Pennsylvania.*— Com. *v.* Vandyke, 57 Pa. St. 34.

*South Carolina.*— Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144.

*Vermont.*— Dix *v.* Batchelder, 55 Vt. 562; Hill *v.* Pratt, 29 Vt. 119. See also Flinn *v.* St. John, 51 Vt. 334, holding that where an authorized person, not an officer, receives a writ with directions to secure the debt, and attempts to serve it, it is his duty, without being specifically instructed to do so, to attach property, if openly visible.

*Wisconsin.*— Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779; State *v.* Giles, 10 Wis. 101.

*England.*— Gawler *v.* Chaplin, 2 Exch. 503, 18 L. J. Exch. 42.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.*

98. *Connecticut.*— Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791.

*New York.*— Clearwater *v.* Brill, 4 Hun 728 [*reversed* on other grounds in 63 N. Y. 627].

*Ohio.*— King *v.* Nichols, 16 Ohio St. 80.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.*

99. *Connecticut.*— Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791.

*New York.*— Clearwater *v.* Brill, 4 Hun 728 [*reversed* on other grounds in 63 N. Y. 627]; Parmelee *v.* Hitchcock, 12 Wend. 96.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.*

A variance between the amount of the judgment and that specified in the execution does not relieve the sheriff of his duty to

the lawful powers of his office.[1] This duty is not affected by any private knowledge which he may have concerning the existence of the cause of action to which the process relates,[2] or the validity of the proceedings in which the process was issued;[3] nor can a sheriff refuse to serve a process regularly issued to him, because in his opinion it is irregular.[4]

**b. Extent of Authority.** In so far as relates to the execution of process the power possessed by the sheriff is conferred by the statutes,[5] and no power exists in him except such as is expressly so conferred or may be fairly implied from the provisions thereof.[6] In connection with the execution and return of civil process a constable has the same powers and duties as the sheriff.[7]

**c. Authority as Affected by Direction of Process.** A constable cannot execute process addressed to the sheriff,[8] although the sheriff delivers it to him,[9] unless he is appointed a deputy sheriff for the purpose.[10] Neither can the sheriff serve process addressed to a constable[11] unless the statute so provides.[12] But where process directed to "any constable or other lawful officer of the county" comes into the hands of the sheriff he must execute it.[13]

**d. Time For Execution.** A sheriff should execute a writ without delay and within a reasonable time after he receives it.[14] So where a sheriff has knowledge or reasonable ground to believe that there will be danger of loss to the creditor through delay in the execution of a writ, it is his duty to execute it immediately;[15] but otherwise execution of the writ within the time allowed by law is sufficient.[16]

**e. Marking Day of Receipt on Process.** Under a statute making it the duty of the sheriff to mark on each process the day on which he received it, a sheriff is bound to mark the true date on a writ placed in his hands for execution.[17]

**f. Order of Execution.** Where two or more writs against the same defendant are placed in the hands of the sheriff, it is his duty to execute them in the order in which he received them.[18]

execute the writ. Parmelee *v.* Hitchcock, 12 Wend. (N. Y.) 96.

**Officer not bound to serve or execute invalid process.**— Cornell *v.* Barnes, 7 Hill (N. Y.) 35.

1. Dix *v.* Batchelder, 55 Vt. 562.

**Process from supreme court** — Under Fla. Rev. St. (1892) § 1241, each sheriff is required in person or by deputy to execute all process of the supreme court to be executed in his county. Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

2. Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

3. Clearwater *v.* Brill, 4 Hun (N. Y.) 728 [*reversed* on other grounds in 63 N. Y. 627]; People *v.* Warren, 5 Hill (N. Y.) 440.

4. Roth *v.* Duvall, 1 Ida. 149; Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

5. McArthur *v.* Boynton, 19 Colo. App. 234, 74 Pac. 540; Johnson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285.

6. McArthur *v.* Boynton, 19 Colo. App. 234, 74 Pac. 540; Benson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285.

7. Cundiff *v.* Teague, 46 Tex. 475; Medlin *v.* Seideman, 39 Tex. Civ. App. 553, 88 S. W. 250; Texas Land, etc., Co. *v.* Masterson, 11 Tex. Civ. App. 483, 33 S. W. 376.

8. Winkler *v.* State, 32 Ark. 539; McGloughan *v.* Mitchell, 126 N. C. 681, 36 S. E. 164.

**In Pennsylvania** a constable cannot be compelled to serve a subpœna issued from the office of the prothonotary or by the clerk of the court of quarter sessions for the attendance of witnesses at court. Kottcamp *v.* York County, 28 Pa. Super. Ct. 96.

9. Winkler *v.* State, 32 Ark. 539, warrant of arrest.

10. Winkler *v.* State, 32 Ark. 539.

11. McGloughan *v.* Mitchell, 126 N. C. 681, 36 S. E. 164.

12. See Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185.

13. McGloughan *v.* Mitchell, 126 N. C. 681, 36 S. E. 164.

14. Lawson *v.* State, 10 Ark. 28, 58 Am. Dec. 238; Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571; Cake *v.* Cannon, 2 Houst. (Del.) 427; State *v.* Leland, 82 Mo. 260.

**Where a sheriff receives no intimation that prompt attention in levying a writ is important** and advisable, he is only bound to exercise ordinary diligence in the premises. Tucker *v.* Bradley, 15 Conn. 46; Cake *v.* Cannon, 2 Houst. (Del.) 427.

15. Tucker *v.* Bradley, 15 Conn. 46.

16. Tucker *v.* Bradley, 15 Conn. 46.

17. Hathaway *v.* Freeman, 29 N. C. 109, where the court said that marking on the writ a date other than that on which it was actually received was no more a compliance with the statute than marking no date at all.

18. Rust *v.* Pritchett, 5 Harr. (Del.) 260; Albrecht *v.* Long, 25 Minn. 163; State *v.* Harrington, 28 Mo. App. 287; Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429; Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779.

**g. Directions as to Mode of Executing Process or Writ** — (I) *DIRECTIONS OF PARTY OR ATTORNEY.*[19] The party at whose instance certain process or writs, such as attachment or executions, have issued, or his attorney, has the right to give the sheriff directions as to how they shall be executed, which directions, when not in conflict with the law, the sheriff is bound to follow;[20] and the officer is not bound, in such case, to execute the process or writ in any other manner than according to the directions given him.[21] But it is not the duty of the sheriff upon an execution against one party, to levy upon the property of another, or

**The fact that the junior execution creditor has been more successful than the sheriff in discovering property** of the debtor subject to sale on execution does not prevent the application of the rule. Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779.

19. **Implied promise of indemnity arising from directions** as to mode of executing process or writ see *infra*, VI, I.

20. *Alabama.*— Patton *v.* Hammer, 28 Ala. 618.

*Arkansas.*—Zickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292. But *compare* Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238, holding that plaintiff in execution has no power to select the property to be levied on.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46.

*Delaware.*— State *v.* Gemmill, 1 Houst. 9.

*Illinois.*— Morgan *v.* People, 59 Ill. 58; Swan *v.* Gilbert, 67 Ill. App. 236 [*affirmed* in 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208].

*Maine.*— Kimball *v.* Davis, 19 Me. 310.

*Massachusetts.*—Peirce *v.* Partridge, 3 Metc. 44; Coggeshall *v.* Varnum, 19 Pick. 422.

*Nebraska.*— Burton *v.* Cave, 26 Nebr. 186, 41 N. W. 1099.

*New Hampshire.*— Smith *v.* Judkins, 60 N. H. 127; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Ball *v.* Badger, 6 N. H. 405.

*New York.*— Smith *v.* Erwin, 77 N. Y. 466; Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348.

*Pennsylvania.*— Lynch *v.* Com., 16 Serg. & R. 368, 16 Am. Dec. 582.

*Texas.*— Daugherty *v.* Moon, 59 Tex. 397.

*Washington.*— Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.* And see also ATTACHMENT, 4 Cyc. 580 text and note 96; EXECUTIONS, 11 Cyc. 1076 text and note 8, 1077 text and note 10, 1079 text and note 21.

**Control of attorney over execution** generally see ATTORNEY AND CLIENT, 4 Cyc. 942, 943 text and notes 56–64.

**Verbal directions** as to the articles or species of property to be attached are binding on the officer where an attachment has been issued with general written directions to the officer to attach goods sufficient to satisfy it. Kimball *v.* Davis, 19 Me. 310. See also Rice *v.* Wilkins, 21 Me. 558. *Compare* Betts *v.* Norris, 15 Me. 468.

**Instructions by telegram.**—Where plaintiff in execution sends a telegram to the sheriff for the purpose of giving directions to be acted on in regard to the sale, the message which is delivered at the end of the line must be considered the original message, and is obligatory on the sheriff. Morgan *v.* People, 59 Ill. 58.

**Direction as to settlement.**—Where plaintiff directed a sheriff to settle an execution with defendant by taking certain property at the appraisal of certain persons, if he could not do better, and saying to him, "I submit all to your judgment and management, and will abide by what you do, only do not let them deceive you," and the persons named as appraisers refused to act, a settlement by taking such property at an appraisal made by others was valid. Smith *v.* Hunt, 1 How. Pr. (N. Y.) 241.

**Assignment of judgment.**—A sheriff, to whom an execution has been issued after notice of an assignment of the judgment, may not take his instructions from plaintiff's attorney, but must obey his execution, and conform to the rules of law in regard thereto, except as otherwise instructed by the assignee. Robinson *v.* Brennan, 90 N. Y. 208.

**Compliance held sufficient.**—Where an attorney, who had received merely general orders to secure a demand, delivered the writ to an officer with written orders thereon to attach sufficient property, and at the same time gave verbal directions to the officer to attach certain particular property, and to take therefor the receipt of a person named, the officer could not be held for non-compliance with the directions, because in the receipt given by the person named he required such person to deliver the property attached "on demand after judgment." Rice *v.* Wilkins, 21 Me. 558.

**Where the execution plaintiff and his attorney give contrary directions those of** plaintiff must be followed. Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

**The sheriff is not bound to obey directions of a person other than the owner of the** judgment, although such person claims an interest therein. Daugherty *v.* Moon, 59 Tex. 397.

21. Ball *v.* Badger, 6 N. H. 405.

**Assent to limitations imposed by sheriff.**—Where an execution is offered to a sheriff, with directions, and he declines to receive it, except under certain limitations as to time or manner of collection, and the creditor delivers the execution to him under such circumstances, the duty of the officer does not extend beyond the limitations he has prescribed for himself. Ball *v.* Badger, 6 N. H. 405.

to apply firm property to the satisfaction of an execution against one of the partners, although plaintiff may direct him so to do.[22]

(II) *DUTY IN ABSENCE OF DIRECTIONS.* Where an officer receives a writ without any special directions he is bound to execute it according to its precept if he can find property by reasonable diligence.[23]

(III) *APPLICATION TO COURT FOR DIRECTIONS.* The court will not direct the sheriff in what manner he shall execute process,[24] nor will it advise the sheriff by ordering him to do particular acts as being essential and proper to the rightful performance of his duty,[25] but the sheriff must act upon his own responsibility.[26]

**h. Diligence Required.** The sheriff or constable must in good faith make a reasonable effort and use reasonable diligence to execute the process placed in his hands;[27] but he is not required to use all possible efforts to execute process in any particular case,[28] as he might thereby lose the opportunity of executing other process in his hands.[29]

22. Swan *v.* Gilbert, 67 Ill. App. 236 [*affirmed* in 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208].

**It is not the duty of a sheriff to examine the files** of a cause in which an execution issues, to ascertain whether such execution, which is against one of the partners of a firm, is for a firm or an individual indebtedness. Swan *v.* Gilbert, 67 Ill. App. 236 [*affirmed* in 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208].

23. Hill *v.* Pratt, 29 Vt. 119.

24. Bowie *v.* Brahe, 4 Duer (N. Y.) 676, 2 Abb. Pr. 161.

25. Bowie *v.* Brahe, 4 Duer (N. Y.) 676, 2 Abb. Pr. 161.

26. Bowie *v.* Brahe, 4 Duer (N. Y.) 676, 2 Abb. Pr. 161.

27. *Alabama.*— Whitsett *v.* Slater, 23 Ala. 626.

*Connecticut.*—Tucker *v.* Bradley, 15 Conn. 46.

*Delaware.*— State *v.* Porter, 1 Harr. 126; Cake *v.* Cannon, 2 Houst. 427; State *v.* Gemmill, 1 Houst. 9.

*Illinois.*— Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201; Gilbert *v.* Gallup, 76 Ill. App. 526.

*Iowa.*— Crosby *v.* Hungerford, 59 Iowa 712, 12 N. W. 582.

*Kentucky.*— Com. *v.* Gill, 14 B. Mon. 20.

*Maine.*— Strout *v.* Pennell, 74 Me. 260; Kidder *v.* Parlin, 7 Me. 80.

*Michigan.*— Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683.

*Minnesota.*— Guiterman *v.* Sharvey, 46 Minn. 183, 48 N. W. 780, 24 Am. St. Rep. 218.

*Missouri.*— State *v.* Finn, 87 Mo. 310; State *v.* Ownby, 49 Mo. 71; Taylor *v.* Wimer, 30 Mo. 126; Fisher *v.* Gordon, 8 Mo. 386.

*Nebraska.*— Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022.

*New York.*— Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621]; Tomlinson *v.* Rowe, Lalor 410; Hinman *v.* Borden, 10 Wend. 367, 25 Am. Dec. 568.

*North Carolina.*—Denson *v.* Sledge, 13 N. C. 136.

*Tennessee.*— Barnes *v.* Thompson, 2 Swan 313.

*Vermont.*— Hill *v.* Pratt, 29 Vt. 119.

*England.*— *In re* Comyns, 1 Ir. Eq. 72; Hodgson *v.* Lynch, Ir. R. 5 C. L. 353.

*Canada.*— Hutchings *v.* Button, 6 U. C. C. P. 452; Finnigan *v.* Jarvis, 8 U. C. Q. B. 210; Darling *v.* Corbett, 8 U. C. Q. B. 72; O'Connor *v.* Hamilton, 4 U. C. Q. B. 243.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.*

**A sheriff having process to execute must go to defendant's house** to see whether he is absent or not. Hinman *v.* Borden, 10 Wend. (N. Y.) 367, 25 Am. Dec. 568.

**What constitutes reasonable diligence depends on circumstances of each case.**— State *v.* Porter, 1 Harr. (Del.) 126; Guiterman *v.* Sharvey, 46 Minn. 183, 48 N. W. 780, 24 Am. St. Rep. 218.

28 *California.*—Whitney *v.* Butterfield, 13 Cal. 338, 73 Am. Dec. 584.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46.

*Indiana.*— State *v.* Blanch, 70 Ind. 204.

*Iowa.*— Crosby *v.* Hungerford, 59 Iowa 712, 12 N. W. 582.

*Kentucky.*— Com. *v.* Gill, 14 B. Mon. 20.

*Louisiana.*— See Bloomfield *v.* Jones, 2 La. Ann. 936.

*Maine.*— Strout *v.* Pennell, 74 Me. 260.

*Minnesota.*— Guiterman *v.* Sharvey, 46 Minn. 183, 48 N. W. 780, 24 Am. St. Rep. 218.

*Missouri.*— State *v.* Finn, 87 Mo. 310.

*New York.*— Cross *v.* Williams, 63 How. Pr. 191; Hinman *v.* Borden, 10 Wend. 367, 25 Am. Dec. 568.

*Tennessee.*— Barnes *v.* Thompson, 2 Swan 313; Trigg *v.* McDonald, 2 Humphr. 386.

*England.*— Hodgson *v.* Lynch, Ir. R. 5 C. L. 353.

*Canada.*— Darling *v.* Corbett, 8 U. C. Q. B. 72.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 119 *et seq.*

**He is required merely to act in each case honestly and diligently,** with due regard to his duties to all litigants and to the public. Com. *v.* Gill, 14 B. Mon. (Ky.) 20 [*approved* in State *v.* Finn, 87 Mo. 310].

29. Com. *v.* Gill, 14 B. Mon. (Ky.) 17 [*approved* in State *v.* Finn, 87 Mo. 310].

**i. Use of Force.** The rule is well established that a sheriff or constable may not break into or forcibly enter a dwelling-house for the purpose of seizing goods under attachment,[30] execution,[31] or other process;[32] but where an officer has peaceably entered a dwelling-house and seized goods, he may if necessary break open the outer door in order to carry the goods away.[33]

**j. Levy of Attachment.**[34] In levying an attachment, a sheriff is not bound to levy on property whereof the title is not in doubt, in preference to property as to the title to which there is some doubt.[35]

**k. Levy of Execution**[36] — (I) *IN GENERAL.* In levying an execution it is the duty of the sheriff to seize so much of defendant's goods as will be reasonably sufficient, if sold, to satisfy the debt and costs.[37] And when the right of exemption is one which may be waived or claimed at will,[38] it is the duty of the officer to proceed until some claim for exemption is lawfully interposed.[39]

(II) *PROPERTY TO BE LEVIED ON.* In execution proceedings it is not the business of the sheriff to judge, as between parties, who is the legal owner of land, but it is proper for him to levy on land as the property of him who appears to be owner, according to the land records of the county.[40] The statutes sometimes allow defendant in execution to designate the property on which the levy shall be made;[41] but where defendant is absent, and cannot be notified thereof, it is the duty of the sheriff to levy on all property not specifically exempt,[42] or so much thereof as is reasonably necessary to satisfy the execution,[43] and permit defendant to make his selection afterward.[44]

(III) *RELEASE OF LEVY.*[45] Under a statute declaring the effect of perfecting an appeal and giving a stay bond to be to release from levy property levied on under execution issued on the judgment,[46] it has been held to be the duty of the sheriff to release all property levied on immediately on notice of the perfection of an appeal and the filing of the stay bond, without regard to the sufficiency of the sureties.[47]

(IV) *RECORDING LEVY ON REAL ESTATE.* It is sometimes made the duty of an officer who levies on real estate to cause such levy to be recorded in the office of the register of deeds of the county in which the land lies.[48]

30. See ATTACHMENT, 5 Cyc. 581.

31. See EXECUTIONS, 17 Cyc. 1080.

32. Hillman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788, holding that an officer, having in his hands an order for the sale of specific property, issued in an action to foreclose a lien thereon, is not entitled to effect a forcible entry into the dwelling of defendant for the purpose of seizing the property.

**An officer cannot climb through an open window, in order to execute civil process,** of defendant's dwelling, if that is an unusual place of entry. Hinman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788.

**Forcible reentry after peaceable entry.**—An officer who, in executing civil process, has once effected a lawful entry into a dwelling-house, and thereby acquired a right to use all necessary force in making a levy, but who voluntarily leaves without doing so, is not entitled to reënter the house by force. Hinman *v.* Edwards, 28 Tex. Civ. App. 308, 66 S. W. 788.

33. Pugh *v.* Griffith, 7 A. & E. 827, 7 L. J. Q. B. 169, 3 N. & P. 187, 34 E. C. L. 431.

34. See, generally, ATTACHMENT, 4 Cyc. 368.

35. Robinson *v.* Chapline, 9 Iowa 91.

**Liability for levy on property not belonging to defendant** see *infra*, V, E, 14.

36. See, generally, EXECUTIONS, 17 Cyc. 878.

37. Governor *v.* Powell, 9 Ala. 83; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Gawler *v.* Chaplin, 2 Exch. 503, 18 L. J. Exch. 42.

38. See EXEMPTIONS, 18 Cyc. 1449.

39. Terrell *v.* State, 66 Ind. 570; State *v.* Mclogue, 9 Ind. 196. See also Tullis *v.* Orthwein, 5 Minn. 377.

**The sheriff must make an inventory and appraisement** within a reasonable time where he levies on property of a class or species which is exempt from execution to a certain amount or value. Tullis *v.* Orthwein, 5 Minn. 377.

40. Hardin *v.* Grover, 2 S. W. 64, 8 Ky. L. Rep. 260.

41. See EXECUTIONS, 17 Cyc. 1083.

42. People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418.

43. See *supra*, III, B, 6, k, (I).

44. People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418.

45. **Release upon refusal of indemnity** see *infra*, VI, N, 1.

46. See APPEAL AND ERROR, 2 Cyc. 885; EXECUTIONS, 17 Cyc. 1135.

47. Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80.

48. Thompson *v.* Goding, 63 Me. 425 (hold-

**l. Arrest Under Body Execution.**[49] Under a statute providing that constables shall serve all lawful process issued and legally directed to them a constable is authorized to arrest a debtor under an execution against his body.[50] A sheriff is not bound to arrest defendant on a capias ad satisfaciendum, lodged with him for fixing his bail, even if he can arrest him as well as not.[51]

**m. Preparation of Forthcoming Bond.** Where property is taken by a sheriff under an execution, and defendant desires to retain the possession of it and offers security for its forthcoming at the day of the sale,[52] it is the duty of the sheriff to prepare the bond.[53]

**n. Protection of Execution Debtor in Exemption Rights.**[54] Under some statutes it is the duty of a sheriff or constable having an execution in his hands to apprise the execution debtor of his exemption rights and protect him therein.[55]

**o. Execution of Writ of Assistance.**[56] A sheriff is bound to execute a properly issued writ of assistance[57] as soon as practicable after it is received,[58] and cannot refuse to do so upon the ground that the person in possession has a better title than the claimant under the writ.[59]

**p. Return.** Where the process is of a nature requiring a return it is the duty of the sheriff to return the same within the time fixed by law.[60] If the sheriff refuses to return a writ the court will compel him to do so,[61] and if he makes an evasive return he may be required to perfect the same according to the facts of the case.[62] A retiring constable who delivers to his successor unexpired executions is not required to return the same.[63] A sheriff may be permitted to amend his return according to the truth of the case, provided rights acquired under it are not thereby prejudiced.[64]

**7. Custody and Care of Property.** It is the duty of the sheriff to keep in his custody and care for property of which he has taken possession under any process

ing that this should be done within three months after the levy); Cheshire *v.* Briggs, 2 Metc. (Mass.) 486 [*followed* in Goodnow *v.* Willard, 5 Metc. (Mass.) 517].

**Where the statute does not in terms impose upon the officer the duty** of having the record made, but provides merely that it shall be made, it is not the official duty of the officer to cause the levy to be recorded. Cheshire *v.* Briggs, 2 Metc. (Mass.) 486 [*followed* in Goodnow *v.* Willard, 5 Metc. (Mass.) 517]; Tobey *v.* Leonard, 15 Mass. 200.

**49.** See, generally, Executions, 17 Cyc. 1512.

**50.** Dalton-Ingersoll Co. *v.* Hubbard, 174 Mass. 307, 54 N. E. 862.

**51.** Van Winkle *v.* Alling, 17 N. J. L. 446.

**52. Right of defendant to retain possession on executing forthcoming and delivery bond** see Executions, 17 Cyc. 1124.

**53.** Price *v.* Honaker, 5 T. B. Mon. (Ky.) 562, so holding upon the ground that the sheriff has the execution in his possession, to which the bond should be made in some degree to conform, is allowed a fee for taking the bond, is bound to take a valid bond, and must fix the day of sale.

**54. Exemption** generally see Exemptions, 18 Cyc. 1369.

**55.** State *v.* Barnett, 96 Mo. 133, 8 S. W. 767, holding that therefore a constable was not liable for failing to pay over to an execution creditor an amount which was exempt under the statute.

**56.** See, generally, Assistance, Writ of, 4 Cyc. 289.

**57.** Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571; State *v.* Giles, 10 Wis. 101.

**58.** See *supra*, III, B, 6, d.

**59.** State *v.* Giles, 10 Wis. 1001. And see *supra*, III, B, 6, a.

**60.** Moody *v.* Mahurin, 4 N. H. 296; Jenkins *v.* McGill, 4 How. Pr. (N. Y.) 205; Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20. See Attachment, 4 Cyc. 606; Executions, 17 Cyc. 1365.

**Where the sheriff returns process by mail,** he must pay the postage. It is not the duty of the clerk to take from the post-office unpaid letters. Jenkins *v.* McGill, 4 How. Pr. (N. Y.) 205.

**An agreement by the execution creditor** with the officer to postpone the sale after a levy of an execution issued by a justice of the peace does not absolve the officer from his duty to return the execution. Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

**When return of levy unnecessary.—Where** a sheriff levied an execution on property claimed to belong to defendant but in the adverse possession of a stranger, he was not bound to make a return of such levy. Com. *v.* Abell, 6 J. J. Marsh. (Ky.) 476.

**61.** Bowie *v.* Brahe, 4 Duer (N. Y.) 676 2 Abb. Pr. 161.

**62.** Davis *v.* Weyburn, 1 How. Pr. (N. Y.) 153, holding that this may be done, although the statutory time for bringing an action for a false return has elapsed since the date of the return.

**63.** Northern *v.* State, 1 Ind. 113, Smith 71.

**64.** Clarke *v.* Gary, 11 Ala. 98.

or writ,[65] until it can be disposed of in some lawful manner, as by a sale to satisfy the debt or by a return thereof to the owner,[66] unless it is necessary to sell the property before such time on account of its perishable nature.[67]

**8. Sales and Conveyances.** It is one of the duties of the sheriff to conduct the sale of property seized by him under execution [68] within a reasonable time,[69] and to collect the purchase-money;[70] and the fact that if he made the sale some superior lien might claim the money is not a sufficient reason for a failure to perform his duty in this respect.[71] It is also quite usual for him to be designated as the officer to make a sale which has been ordered by the court.[72] The sheriff to execute conveyances of real estate sold by him,[73] and where he sells personal property must deliver the same to the purchaser.[74]

**65.** *California.*—Wood *v.* Lowden, 117 Cal. 232, 49 Pac. 132, holding that the safe-keeping by the sheriff of property taken on attachment is part of the execution of the writ.

*Nevada.*— Newman *v.* Kane, 9 Nev. 234.

*New York.*— McKay *v.* Harrower, 27 Barb. 463.

*Oklahoma.* — See Hennessey First Nat. Bank *v.* Hesser, 14 Okla. 115, 77 Pac. 36.

*Vermont.*— Briggs *v.* Taylor, 35 Vt. 57.

*England.*—Ackland *v.* Paynter, 8 Price 95.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 124.

**The sheriff cannot consider the element of expense** in the keeping or preservation of the property, but must keep it ready, subject to the judgment. Newman *v.* Kane, 9 Nev. 234.

**Threshing grain.**— If it be necessary for the preservation of grain in the straw which has been attached that it be threshed, it is the duty of the attaching officer to thresh it. Briggs *v.* Taylor, 35 Vt. 57.

**Repairs.**—Where a canal company permitted the locks and gates of the canal to get into such bad condition as to threaten the community with a crevasse, and the property, in that condition, passed into the custody of a sheriff under writs of attachment, the legal duty was not thrown on him, even had he legal authority so to do, to close primarily, at his own expense, the mouth of the canal, by a dam or levee, for the reason that it might be deemed necessary that this should be done for the protection of the property in his charge. Wheelwright *v.* St. Louis, etc., Transp. Co., 48 La. Ann. 606, 19 So. 591.

**The property cannot be hired out** by the sheriff, unless by the consent of parties. Bowman *v.* McKleroy, 14 La. Ann. 587, so holding as to slaves.

**66.** McKay *v.* Harrower, 27 Barb. (N. Y.) 463.

**Delivery of attached property to trustee in insolvency** see Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

**67.** Newman *v.* Kane, 9 Nev. 234; McKay *v.* Harrower, 27 Barb. (N. Y.) 463.

**68.** Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Ball *v.* Pratt, 36 Barb. (N. Y.) 402; Buckley *v.* Hampton, 23 N. C. 318. See Executions, 17 Cyc. 1233.

**Amount to be sold.**— It is the duty of the sheriff's officer to stop the sale as soon as sufficient money is raised (Cook *v.* Palmer, 6 B. & C. 739, 9 D. & R. 723, 5 L. J. K. B. O. S. 234, 13 E. C. L. 331), and he is not justified, after he has sold as much as will apparently satisfy the writ, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident (Aldred *v.* Constable, 6 Q. B. 370, 8 Jur. 956, 51 E. C. L. 370).

**A constable is not bound to sell under a fieri facias,** unless special reasons or plaintiff's orders require such despatch. Lord *v.* Townsend, 5 Harr. (Del.) 457.

**Failure to indemnify sheriff as ground for refusal to sell** see *infra*, VI, N, 1.

**69.** Campbell *v.* Cobb, 2 Sneed (Tenn.) 18.

**If he cannot sell for a full price** within a reasonable time he must sell for what he can get. Campbell *v.* Cobb, 2 Sneed (Tenn.) 18.

**70.** Anderson *v.* Frazier, 112 Ga. 66, 37 S. E. 93.

**Collection and disposition of money** generally see *infra*, III, B, 9.

**Rights against purchaser on failure to collect.**—Where a sheriff who sold wild lands under tax executions issued against the same, and extended credit for all of the purchase-money in excess of the amounts due for the taxes and costs, was thereafter lawfully compelled to pay into the state treasury a sum equal to the balance of the purchase-money, he did not, because of this fact, and of the further fact that he subsequently allowed the debt due for such balance by the purchaser of the lands to become barred by the statute of limitations, acquire any right, either legal or equitable, to the possession or ownership of the property so sold, which would enable him to compel the purchaser to pay the barred debt. Anderson *v.* Frazier, 112 Ga. 66, 37 S. E. 93.

**71.** Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465.

**72.** See Judicial Sales, 24 Cyc. 11; Mortgages, 27 Cyc. 1695.

**73.** Anderson *v.* Frazier, 112 Ga. 66, 37 S. E. 93; Perkerson *v.* Overby, 59 Ga. 414. See Executions, 17 Cyc. 1340; Judicial Sales, 24 Cyc. 50; Mortgages, 27 Cyc. 1744.

**Sheriff cannot give warranty deed.**— Ball *v.* Pratt, 36 Barb. (N. Y.) 402.

**74.** See Spear *v.* Alexander, 2 Phila. (Pa.) 89.

**Loss of property by purchaser after delivery.**—Where a constable sold a piano under execution, received the purchase-money, and left the purchaser in the house with the

**9. Collection and Disposition of Money.**[75] A sheriff or constable is bound to make the money if possible on an execution placed in his hands,[76] and has no authority to accept anything but money, or bank-notes circulating as such, in satisfaction of a judgment,[77] unless the creditor has instructed him otherwise.[78] When the money is collected he is bound to pay it over to the person entitled thereto,[79] or his attorney,[80] or under some statutes, usually applying to constables only, into the court.[81] He may, if he sees fit, pay over such money before the return-day of the writ,[82] but he is not bound to do so.[83] Indeed it is held that a sheriff or constable may lawfully hold money collected by him on an execution until a demand upon him therefor is made by one entitled to receive it;[84] but a demand upon the officer turns the claim into an ordinary debt and renders it his duty to seek out the creditor and make payment within a reasonable time.[85] The statutes sometimes authorize the sheriff to collect debts and credits of defendant which have been attached;[86] and under such a statute, on the dismissal of an attachment, the sheriff is bound to pay to the successful defendant moneys collected under the attachment from such defendant's debtor.[87] So also when an execution on which money has been made is superseded, it is the duty of the sheriff to refund the money to defendant, if it is in his hands at the time.[88] A sheriff, in receiving money paid to redeem property sold on foreclosure of a mortgage, acts only in his official capacity and is in no sense the agent of the purchaser at the foreclosure sale.[89] Where the statute makes it the duty of the sheriff to collect forthwith the jury fee from the person in whose favor a verdict is rendered,

property, and went away, and the purchaser obtained a car to remove the property, but was enticed out of the house and the door locked on him, the constable, having delivered the property to the purchaser, was not liable to him in an action of trover. Spear *v.* Alexander, 2 Phila. (Pa.) 89, where the court said, however, that if the purchaser had requested the officer to remain while he went for assistance, it would have been the officer's duty to do so.

**75. Collection of purchase-money on execution sale** see *supra*, III, B, 8.

**76.** Neely *v.* Woodward, 7 Heisk. (Tenn.) 495.

**A sheriff, having in his hands a writ for service,** has no authority in his official capacity to settle the demand and receive the money of the debtor. Waite *v.* Delesdernier, 15 Me. 144.

**77.** Draper *v.* State, 1 Head (Tenn.) 262.

**Receipt of confederate money not binding on judgment creditor.**— Neely *v.* Woodward, 7 Heisk. (Tenn.) 495.

**78.** Draper *v.* State, 1 Head (Tenn.) 262.

**79.** Howe *v.* Thayer, 24 Ill. 246; Paige *v.* Willet, 38 N. Y. 28.

**Assignment of judgment.**—Where a sheriff with an execution in his hands receives notice of the assignment of the judgment, he must hold the money when collected thereon for the use of the assignee. Burgess *v.* Cave, 52 Mo. 43.

**Application to oldest lien.**— Miss. St. Feb. 24, 1844, requiring the officer to examine the judgment-roll and pay the money raised by execution on the oldest lien, applied only to sales by sheriffs or coroners, and not to sales by constables under judgments of a justice. Hightower *v.* Taylor, 35 Miss. 389.

**The pendency of a motion to discharge an attachment** of the debtor's property does not affect the duty of the sheriff. Paige *v.* Willet, 38 N. Y. 28.

**Where a sheriff has sold real estate on execution,** and the sale has been confirmed by the court, it is his duty to immediately pay the purchase-money in his hands to the person entitled thereto, and he has no right to wait until a deed is executed or demanded by the purchaser. Ferguson *v.* Tutt, 8 Kan. 370.

**80.** Paige *v.* Willet, 38 N. Y. 28.

**81.** Howe *v.* Thayer, 24 Ill. 246.

**Sheriff not bound to pay into court money collected on execution.**— McBroom *v.* Governor, 6 Port. (Ala.) 32.

**82.** Howe *v.* Thayer, 24 Ill. 246; McIner ney *v.* Chicago Times Co., 41 Ill. App. 438.

**83.** McInerney *v.* Chicago Times Co., 41 Ill. App. 438. *Compare* Rogers *v.* Sumner, 16 Pick. (Mass.) 387, where it is said that while it may be questionable whether the sheriff is bound to pay over money before the return-day without a demand, it is his duty to pay it over upon a demand being made.

**84.** McBroom *v.* Governor, 6 Port. (Ala.) 32.

**He is not bound to search out plaintiff** and tender him the money collected. McBroom *v.* Governor, 6 Port. (Ala.) 32; Wills *v.* Sugg, 25 N. C. 96.

**85.** Wills *v.* Sugg, 25 N. C. 96.

**86.** Michener *v.* Fransham, 33 Mont. 108, 81 Pac. 953.

**87.** Michener *v.* Fransham, 33 Mont. 108, 81 Pac. 953.

**88.** Trueman *v.* Berry, 6 B. Mon. (Ky.) 536.

**89.** Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222, holding that the fact that the person redeeming paid the sheriff more than was necessary gave him no rights as against the purchaser.

the sheriff is responsible for the fee, and the court will aid him in its collection.[90] A sheriff or constable has no authority as such to receive payment of a debt due a party to an action until a writ of execution is issued to him,[91] nor is it any part of his official duty to endeavor to collect demands put into his hands without process;[92] but if he undertakes to do so he acts merely as the agent of the party.[93] Where a sheriff having several writs against the same person in favor of different creditors takes an indemnity bond [94] from one of the creditors and sells in consequence of that indemnity, he has no right to apply to the court for its advice as to the distribution or payment of the money raised by the same, especially where he has not paid the money into court.[95] Where a sheriff has paid out money collected under process in satisfaction of a junior lien, he cannot recover the same back upon his being compelled to pay a senior lien to which such money should have been applied.[96]

**10. Acting as Attorney.** The statutes sometimes forbid the constable who serves process in an action from appearing as attorney at the trial;[97] and where the constable has appeared for plaintiff and proved his cause of action, a judgment in his favor cannot be allowed to stand, although there was no appearance by defendant, or any one in his behalf.[98]

**11. Preservation and Exhibition of Papers.** It is the duty of the sheriff to preserve the papers left with him by a creditor redeeming property sold under

**90.** Evans *v.* Reed, 4 Luz. Leg. Reg. (Pa.) 277, 5 Pittsb. Leg. J. N. S. 79.

**91.** Goings *v.* Mills, 1 Ark. 11.

**92.** *Kentucky.*—White *v.* Com., 3 Dana 461.

*Louisiana.*— Merchants' Bank *v.* Peters, 2 Rob. 214, holding that a sheriff to whom an order for the seizure of mortgaged property has been directed has no authority to receive the amount of any other mortgage, or any other sum than that which the writ commands him to make.

*Mississippi.*— Crane *v.* Bedwell, 25 Miss. 507.

*North Carolina.*—Hutchins *v.* Holcombe, 24 N. C. 211.

*Tennessee.*— Fowler *v.* Bledsoe, 8 Humphr. 509; Lee *v.* Hardeway, 6 Yerg. 502.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 126.

**Under a statute authorizing a constable to act as collecting agent** he is bound to exercise such degree of diligence as a prudent man would ordinarily exercise in the management of his own business, but is not bound to such strict accountability as when process is delivered to him as an officer. Morgan *v.* Horne, 44 N. C. 25.

**93.** Harding *v.* Chappell, 51 N. C. 350; Fowler *v.* Bledsoe, 8 Humphr. (Tenn.) 509; Cooney *v.* Wade, 4 Humphr. (Tenn.) 444, 40 Am. Dec. 657; Lee *v.* Hardeway, 6 Yerg. (Tenn.) 502.

**94. Indemnity to officer** see *infra*, VI.

**95.** Ramsour *v.* Young, 26 N. C. 133.

**96.** Krumbhaar *v.* Yewdall, 153 Pa. St. 476, 26 Atl. 219, holding that where a sheriff paid to the judgment creditor the proceeds due him of an execution sale, and it afterward appeared that before the sale an unrecorded municipal lien existed against the land, which was discharged by the same and should have been paid from the proceeds, and which the sheriff was required to pay, the sheriff could not recover the amount from the judgment creditor as the payment to him was voluntary. See also Sanger *v.* Mellon, 51 Wis. 560, 8 N. W. 487, holding that where a sheriff who had sold property under process in his hands paid to a constable the amount of a valid execution in the latter's hands, against the same debtor, and the constable paid over the money to plaintiff in his execution, and the payment by the sheriff was made without any mistake of fact, he could not recover back the amount from the constable by showing that in a subsequent suit to which the constable was not a party he, the sheriff, had been compelled to pay to the assignee in bankruptcy of the judgment debtor the sum so paid to the constable.

**97.** Wilkinson *v.* Vorce, 41 Barb. (N. Y.) 370; Hitchcock *v.* Van Pelt, 4 E. D. Smith (N. Y.) 485; Knight *v.* Odell, 18 How. Pr. (N. Y.) 279; Ford *v.* Smith, 11 Wend. (N. Y.) 73.

**Such appearances have been condemned in the absence** of any statute forbidding them. Tallman *v.* Woodworth, 2 Johns. (N. Y.) 385.

**A person specially deputized by** a justice of the peace to serve a summons issued by such justice is to be deemed a constable *quoad* the action, and is prohibited from appearing as attorney for plaintiff on the trial. Knight *v.* Odell, 18 How. Pr. (N. Y.) 279 [*followed* in Wilkinson *v.* Vorce, 41 Barb. (N. Y.) 370].

**Statute not applicable to courts in city of New York.**— Hitchcock *v.* Van Pelt, 4 E. D. Smith 485.

**A statute forbidding the constable to "appear and advocate"** was not violated where the constable who served the summons appeared for plaintiff, and presented his demand to the justice, but did not appear at the trial. Phinney *v.* Earle, 9 Johns. (N. Y.) 352. See also Kittle *v.* Baker, 9 Johns. (N. Y.) 354.

**98.** Ford *v.* Smith, 11 Wend. (N. Y.) 73

execution, and to exhibit them, on request, to any third person having an interest in the matter.[99]

**12. Pledging Credit of County.** The sheriff, being a mere ministerial officer, has no authority in the absence of statute, to pledge the credit of the county or create a county debt.[1]

**C. Effect of Change in Incumbency**[2] — **1. Rights, Powers, and Duties of Retiring Sheriff — a. In General.** While the general powers of a sheriff or constable cease when he goes out of office,[3] it is a rule of the common law, preserved by express statute in many jurisdictions, that the officer who commences the execution of a process or writ must complete it even though he goes out of office before he can do so.[4] And it has been laid down that a sheriff who has, during his term, begun an execution under proper authority may be compelled to proceed with the same.[5]

**b. Completion of Levy.** A sheriff who has commenced a levy on property while in office may complete the same after the termination of his office.[6]

**c. Custody of Attached Property.**[7] A sheriff or constable who seizes property under attachment should retain possession thereof until the suit is determined or the attachment is dissolved, although he goes out of office before that time,[8]

99. People *v.* Ranson, 4 Den. (N. Y.) 145 [*affirmed* in 2 N. Y. 490], holding that this is the case, although the statute does not in terms impose any such obligation on the sheriff.

**Redemption from execution sale** generally see Executions, 17 Cyc. 1324.

1. Hutcherson *v.* Robinson, 82 Ga. 783, 9 S. E. 722 (holding that the sheriff had no authority to make a contract for a conveyance used in execution of a warrant, and bind the county for payment); Crawford County *v.* Spenney, 21 Ill. 288 (holding that the sheriff had no power to offer a reward for apprehension of a criminal who had escaped from his custody and make the county liable therefor); True *v.* Crow Wing County, 83 Minn. 293, 86 N. W. 102 (holding that the sheriff had no authority to employ counsel to conduct litigation in behalf of his county, and that in the case at bar such employment had not been ratified by the board of county commissioners); Elliott *v.* Franklin County Com'rs, 9 Ohio Dec. (Reprint) 644, 16 Cinc. L. Bul. 69 (holding that the sheriff could not render the county liable on a contract for official advertisements which he had no authority under the statute to make).

2. **Powers of deputy after termination of incumbency of sheriff** see *supra*, III, A, 3, b.

3. Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

4. *Arkansas.*— Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

*California.*— Sagely *v.* Livermore, 45 Cal. 613.

*Colorado.*— People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409.

*Kentucky.*— Winslow *v.* Austin, 5 J. J. Marsh. 408; Trimble *v.* Breckenridge, 4 Bibb 479; Allen *v.* Trimble, 4 Bibb 21, 7 Am. Dec. 726.

*Louisiana.*— Sauvinet *v.* Maxwell, 26 La. Ann. 280.

*Maine.*— Morton *v.* White, 16 Me. 53.

*Maryland.*— Purl *v.* Duvall, 5 Harr. & J. 69, 9 Am. Dec. 490.

*Massachusetts.*— O'Brien *v.* Annis, 120 Mass. 143; Capen *v.* Doty, 13 Allen 262; Welsh *v.* Joy, 13 Pick. 477.

*Michigan.*— Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

*Minnesota.*— Butler *v.* White, 25 Minn. 432.

*New Jersey.*—Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452; State *v.* Hamilton, 16 N. J. L. 153.

*New York.*— Wood *v.* Colvin, 5 Hill 228; Ferguson *v.* Lee, 9 Wend. 258.

*Rhode Island.*— Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

*Tennessee.*— Fondrin *v.* Planters' Bank, 7 Humphr. 447; Todd *v.* Jackson, 3 Humphr. 398.

*United States.*— Kent *v.* Roberts, 14 Fed. Cas. No. 7,715, 2 Story 591.

*England.*— Clerk *v.* Withers, 1 Salk. 322, 91 Eng. Reprint 286.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 109, 110.

**Rule not applicable to deputy sheriff.**— Ferguson *v.* Lee, 9 Wend. (N. Y.) 258.

5. Bondurant *v.* Buford, 1 Ala. 359, 35 Am. Dec. 33. See also State *v.* Hamilton, 16 N. J. L. 153.

6. Clark *v.* Pratt, 55 Me. 546; O'Brien *v.* Annis, 120 Mass. 143; Blair *v.* Compton, 33 Mich. 414. But *compare* Rutherford *v.* Crawford, 53 Ga. 138, holding that it is not competent for a deputy sheriff, after his term has expired, or while he is the deputy of a succeeding sheriff, to perfect the entry of a levy on a described lot of land by signing the same.

7. See, generally, Attachment, 4 Cyc. 653.

8. *California.*— Sagely *v.* Livermore, 45 Cal. 613.

*Maine.*— Tukey *v.* Smith, 18 Me. 125, 36 Am. Dec. 704; Morton *v.* White, 16 Me. 53.

*Massachusetts.*— Lawrence *v.* Rice, 12 Metc. 527.

*Michigan.*— Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

*New York.*— McKay *v.* Harrower, 27 Barb. 463.

unless the statute provides for the delivery of such property to his successor;[9] but he cannot, after going out of office, retain such property for the purpose of sale under final process.[10]

**d. Sale of Property.**[11] A sheriff may sell property after the expiration of his term where before such time he had seized the same under execution,[12] or commenced the execution of an order for the sale thereof.[13] But where, pending the arrest of a levy by an affidavit of illegality, and after the sheriff has taken the statutory bond, his term of office expires, he is in no default for returning the papers to the clerk's office without selling the property.[14]

**e. Collection of Purchase-Money or Enforcement of Liability on Bid.** A sheriff who has sold property at judicial or execution sale may, after going out of office, sue the successful bidder for the purchase-money,[15] or for the difference between his bid and the price at which the property was resold on his default in payment.[16] But, on the other hand, it has been held that, after a sheriff has resigned, he has no right to keep or collect bonds given to him for the price of the property sold.[17]

**f. Paying Over Money.** It is proper for a sheriff, on going out of office, to

*Texas.*— Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 109, 110.

**Action for conversion.**—Where a deputy sheriff has made a valid attachment of property, his subsequent resignation of his office does not deprive him of the right to bring an action for conversion of the property attached. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

9. See *infra*, III, C, 1, j.

10. Fletcher *v.* Morrell, 78 Mich. 176, 181, 44 N. W. 133, where it is said: "It is the duty of an ex-sheriff, who has property in his custody by virtue of having attached it, after an execution has been issued in the suit, to expose such property to the sheriff, when requested by him, in order that such goods may be taken in execution and sold to satisfy the same." But *compare* McKay *v.* Harrower, 27 Barb. (N. Y.) 463.

11. See, generally, EXECUTIONS, 17 Cyc. 1233; JUDICIAL SALES, 24 Cyc. 1.

12. *Alabama.*— Ryan *v.* Couch, 66 Ala. 244; Leavitt *v.* Smith, 7 Ala. 175.

*Kentucky.*— Rogers *v.* Darnaby, 4 B. Mon. 238; Ferguson *v.* Williams, 3 B. Mon. 302, 39 Am. Dec. 466.

*Massachusetts.*— Welsh *v.* Joy, 13 Pick. 477.

*New York.*— Alderman *v.* Share, 7 Wend. 220.

*North Carolina.*— McLin *v.* Hardie, 25 N. C. 407.

*Rhode Island.*— Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 109; and EXECUTIONS, 17 Cyc. 1233, text and note 78.

**The sheriff acquires a special property in goods levied on which enables him to make the sale after his term has expired.** Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

**If property be taken from the possession of the sheriff by writ of replevin, and there is a judgment de retorno habendo, it is his duty to obtain the possession, sell the property, and discharge the execution, although his term of office has expired.** Rogers *v.* Darnaby, 4 B. Mon. (Ky.) 238; Ferguson *v.* Williams, 3 B. Mon. (Ky.) 302, 39 Am. Dec. 466.

**Resale after redemption.**—Where land sold on execution and bid in by a third person for less than the amount of the judgment was subsequently redeemed by the debtor, a resale for the balance due was regularly made by the sheriff who had made the first sale, although he had gone out of office before the debtor redeemed. Wood *v.* Colvin, 5 Hill (N. Y.) 228.

**Delivery of process as unexecuted.**—Where a sheriff levied an execution on certain lands by indorsement of the levy on the execution, and afterward resigned his office, turning over the process to the coroner of the county as unexecuted, he had no power to subsequently sell the lands under the levy. St. Louis Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285.

13. Holmes *v.* Crooks, 56 Nebr. 466, 76 N. W. 1073; National Black River Bank *v.* Wall, 3 Nebr. (Unoff.) 316, 91 N. W. 525; Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452; Union Dime Sav. Inst. *v.* Anderson, 83 N. Y. 174 [*affirming* 19 Hun 310]; Cord *v.* Hirsch, 17 Wis. 403.

14. Tucker *v.* Keen, 60 Ga. 410.

15. Trustees, etc., Ins. Corp. *v.* Bowling, 2 Kan. App. 770, 44 Pac. 42. See also Underwood *v.* Jacobs, 3 McCord (S. C.) 447. But *compare* Bradley *v.* Frellsen, 10 La. Ann. 310, holding that the administrator of a deceased sheriff is not entitled to recover the price of property sold by the sheriff at judicial sale without the assent of the deceased sheriff's successor in office, since all official trusts pass to the sheriff's successor in office, and not to his personal representative.

16. Fife *v.* Bohlen, 22 Fed. 878, where it was held that such a suit might be brought more than two years after the sheriff's term of office had expired and was not barred by a statute forbidding the bringing of suits against the sheriff more than two years after the expiration of his term.

17. Buisson *v.* Hyde, 17 La. 22.

pay over money which he has realized on writs and has on hand to the person legally entitled to receive it.[18]

**g. Execution of Deed.**[19] In the absence of statute to the contrary the sheriff who conducted a sale of property may execute a deed therefor after the expiration of his term of office.[20]

**h. Making or Amendment of Return.** After going out of office a sheriff or constable may make a return on process which he commenced to execute during his incumbency,[21] and a return made by such officer while in office may, with the sanction of the court, be amended by him after going out of office.[22] But the better rule appears to be that without such sanction an officer cannot amend a return after he has gone out of office.[23] Where the return of the sheriff does not appear to be sworn to, the fact that it was in fact sworn to, and that the clerk's jurat was omitted, may be shown by the sheriff after he has gone out of office.[24]

**i. Undertaking New Business** — (1) *IN GENERAL.* The mere delivery of a process or writ to a sheriff does not give him an indefeasible right to execute it, but if he does not commence to execute it before going out of office he cannot afterward proceed to do so.[25] It is not proper to issue a process or writ to a sheriff after his term has expired,[26] and when a process or writ comes to his hands after the expiration of his term of office he has no more authority to execute it than any other private individual.[27] *A fortiori* a sheriff who has gone out of office

**18.** Sauvinet *v.* Maxwell, 26 La. Ann. 280.

**19.** See, generally, DEEDS, 13 Cyc. 505; EXECUTIONS, 17 Cyc. 1340; JUDICIAL SALES, 24 Cyc. 50.

**20.** Welsh *v.* Joy, 13 Pick. (Mass.) 477. See also McElmurray *v.* Ardis, 3 Strobh. (S. C.) 212. See EXECUTIONS, 17 Cyc. 1341 text and notes 3, 4.

**Tax-sale.**— Under N. C. Rev. Code, c. 37, § 30, a sheriff who sells land for taxes cannot make a deed therefor after he goes out of office. Taylor *v.* Allen, 67 N. C. 346.

**21.** Howell *v.* Albany City Ins. Co., 62 Ill. 50; Welsh *v.* Joy, 13 Pick. (Mass.) 477.

**Return on capias ad respondendum.**—A sheriff who has arrested a person on a capias ad respondendum has no right to return the writ after he is out of office, but should deliver it to the new sheriff with the assignment of the prisoner so that the latter may return it with his indorsement of the discharge of the prisoner on bail. Richards *v.* Porter, 7 Johns. (N. Y.) 137.

**22.** *Georgia.*— Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307.

*Indiana.*— Dwiggins *v.* Cook, 71 Ind. 579.

*Kentucky.*— Gay *v.* Caldwell, Hard. 63.

*Massachusetts.*— Adams *v.* Robinson, 1 Pick. 461; Childs *v.* Barrows, 9 Metc. 413.

*Missouri.*— Blaisdell *v.* William Pope, 19 Mo. 157.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 109, 110.

**A sheriff may be permitted to amend a return of his deputy** since deceased, after, as well as before, the expiration of his own term of office. Avery *v.* Bowman, 39 N. H. 393.

**Pendency of action for trespass.**— The court has refused to allow a sheriff who had gone out of office to amend his return pending an action against him for trespass committed under the writ. McElrath *v.* Kintzing, 5 Pa. St. 336.

**23.** Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307; Jessup *v.* Gragg, 12 Ga. 261 [*distinguishing* Kelsey *v.* Wyley, 10 Ga. 371]. See also Hand *v.* Greenville, 22 Ga. 476, holding that a sheriff who has retired from office cannot move to reinstate a case to which he is not a party, which has been dismissed by the court, and to amend his return. *Contra*, Howell *v.* Albany City Ins. Co., 62 Ill. 50.

**24.** Lake Winola Assoc. *v.* Mott, 1 Pa. Super. Ct. 304.

**25.** *Alabama.*— Bondurant *v.* Buford, 1 Ala. 359, 35 Am. Dec. 33.

*Delaware.*— Simonton *v.* Pattin, 1 Marv. 399, 41 Atl. 91.

*Louisiana.*— Sauvinet *v.* Maxwell, 26 La. Ann. 280.

*North Carolina.*— McLin *v.* Hardie, 25 N. C. 407.

*Tennessee.*— State *v.* Parchmen, 3 Head 609; Fondrin *v.* Planters' Bank, 7 Humphr. 447; Todd *v.* Jackson, 3 Humphr. 398.

*England.*— Fonsec *v.* Magnay, 1 Marsh. 554, 6 Taunt. 231, 1 E. C. L. 591.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 109, 110.

But *compare* Hogan *v.* Hisles, 4 Ky. L. Rep. 370.

**26.** Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415 (holding that a special execution, under an order of condemnation, for the sale of attached property in the possession of a sheriff whose term has expired, should run to his successor); Johnson *v.* Foran, 58 Md. 148.

**27.** Andress *v.* Broughton, 21 Ala. 200; Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

**The ex-sheriff's indorsement** on a special execution issued to him after his term expires cannot be considered an official return. Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

**Levy of execution by officer who made attachment.**—Where an attachment is made by one sheriff, but a new sheriff is in office when execution is issued, the latter and not the

has no authority to do an official act under an execution which is directed to his successor.[28]

(II) *SHERIFF HOLDING OVER.*[29] A sheriff may enter upon new business notwithstanding the expiration of his term where he is holding over by reason of his successor having not yet qualified and taken possession of the office.[30]

**j. Turning Over Property, Records, Process, Writs, and Prisoners to Successor.** It is the duty of the outgoing sheriff to turn over to the incoming sheriff all books and papers appertaining to the office;[31] all property of the county which is in his possession as sheriff;[32] all money, scrip, instruments in writing, or articles paid or deposited to abide the result of legal proceedings;[33] all process and writs which he has not begun to execute;[34] and all prisoners in his custody;[35] and some statutes also require him to turn over to his successor attached property in his possession,[36] and bonds payable to him in his official capacity.[37] But an incoming sheriff has not the right to require his predecessor to deliver to him the moneys realized by the latter on executed writs, and for which the outgoing sheriff and his sureties are liable on his official bond.[38] The actual delivery of property to the new sheriff is sufficient to make him liable therefor and relieve the retiring sheriff from liability,[39] although a receipt provided for by statute be not

former is the proper officer to proceed with the execution. Kent *v.* Roberts, 14 Fed. Cas No. 7,715, 2 Story 591.

28. Spruill *v.* Bateman, 20 N. C. 627.

29. **Right to hold over** see *supra*, II, A, 6, c.

30. Curtis *v.* Kimball, 12 Wend. (N. Y.) 275 [*approved* in Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536]; Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

31. Fockler *v.* Martin, 32 Iowa 117; Osborne *v.* Huger, 1 Bay (S. C.) 179, holding, however, that the South Carolina act of 1791, obliging sheriffs to turn over all books and papers to their successors, did not extend to any of the old sheriffs in office when the act was passed.

32. Sagely *v.* Livermore, 45 Cal. 613.

33. Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855.

34. *California.*— Sagely *v.* Livermore, 45 Cal. 613.

*Georgia.*— Matthis *v.* Pollard, 3 Ga. 1.

*Indiana.*— Northern *v.* State, 1 Ind. 113, Smith 71.

*Missouri.*— Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133.

*New Jersey.*— State *v.* Hamilton, 16 N. J. L. 153.

*Tennessee.*— Todd *v.* Jackson, 3 Humphr. 398.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 111.

**Dispensing with indenture and schedule.**— Although the statute requires a sheriff going out of office to turn over processes in his possession to his successor by indenture and schedule, if the successor or his deputy receive such processes without that formality, he will be liable for the proper execution of them. Matthis *v.* Pollard, 3 Ga. 1.

35. Partridge *v.* Westervelt, 13 Wend. (N. Y.) 500; Tallmadge *v.* Richmond, 9 Johns. (N. Y.) 85 [*reversed* on other grounds in 16 Johns. 307]; Richards *v.* Porter, 7 Johns. (N. Y.) 137. And see PRISONS, 32 Cyc. 329 note 43. But *compare* French *v.* Willet, 10 Bosw. (N. Y.) 566, holding that the New York Revised Statutes do not imperatively make it the duty of a retiring sheriff to sign over, at the end of his term, to the new sheriff, a debtor taken in execution, who is on the jail limits, so as to make him, if he omits so to do, liable to the judgment creditor in the amount of the debt, as though it were an escape.

**Sufficiency of indenture of assignment of prisoners** see Tallmadge *v.* Richmond, 9 Johns. (N. Y.) 85 [*reversed* on other grounds in 16 Johns. 307].

**Failure of new sheriff to serve certificate of appointment.**—A sheriff whose term has expired, and who has turned over to his successor the jail and prisoners actually therein, is not liable for a failure to deliver to him a prisoner in his custody on a body execution, if the new sheriff has not served the certificate of appointment required by the statute. Feerick *v.* Conner, 9 Daly (N. Y.) 523.

**A former sheriff is not liable for the escape of a prisoner** during the term of his successor, although such prisoner was committed on mesne process during his own continuance in office, provided he has regularly delivered over such prisoner to his successor. Day *v.* Sweetser, 2 Tyler (Vt.) 283.

36. Fockler *v.* Martin, 32 Iowa 117. See also McKay *v.* Thorington, 15 Iowa 25 [*followed* in McKay *v.* Leonard, 17 Iowa 569].

**Retaining custody of attached property** generally see *supra*, III, C, 1, c.

37. Simpson *v.* Allain, 7 Rob. (La.) 500; Buisson *v.* Hyde, 17 La. 22, holding that where a bond is taken to a sheriff in his official capacity, although it be not payable to his successors in office, yet, on his resignation, his successor ought to be the judicial depository of the bond.

38. Sauvinet *v.* Maxwell, 26 La. Ann. 280.

39. McKay *v.* Thorington, 15 Iowa 25 [*followed* in McKay *v.* Leonard, 17 Iowa 569].

**Accepting keepers.**—Where a retiring sheriff turned over all the papers, etc., of his of-

taken;[40] and even an offer of the sheriff, on expiration of his term of office, to deliver property to his successor discharges him from future responsibility for the safe-keeping of the property.[41]

**2. Rights, Powers, and Duties of New Sheriff — a. In General.** It is the duty of the new sheriff to complete the unfinished business left by his predecessor in so far as his agency is necessary therefor,[42] where the business is not of such character that the retiring sheriff should complete it notwithstanding his having gone out of office.[43] So where a sheriff goes out of office after levying an attachment, his successor is the proper person to levy an execution issued on a judgment in the action in which the attachment issued,[44] and an order for the sale of real estate taken in an attachment suit goes to the sheriff in office at the time, and not to his predecessor, who served the writ.[45] The successor of a deceased sheriff has been held to be the proper person to demand and receive from a bank money collected by his predecessor as proceeds of an execution sale and deposited in the bank to the credit of his account as sheriff.[46]

**b. Execution of Process Directed to Predecessor.** It is the duty of a new sheriff o execute all process and writs which are in the sheriff's office at the time when he is inducted thereinto and which his predecessor has not previously begun to execute,[47] notwithstanding the fact that such process or writs are directed to his predecessor.[48]

**c. Execution or Acknowledgment of Deed For Property Sold by Predecessor.** While the statutes in many jurisdictions permit a sheriff to execute the deed for property sold at judicial or execution sale by his predecessor in office,[49] he cannot do this in the absence of statute,[50] nor can a sheriff acknowledge a deed executed by his predecessor for property sold by him.[51]

**3. Return by Sheriff After Death of Deputy.** A sheriff may make a return on a writ of execution of a sale by his deputy, who died without making his return.[52]

## IV. Compensation and Reimbursement.

**A. General Considerations — 1. Right to Compensation.** At common law the sheriff was required to perform the duties of his office gratuitously and could

fice, including the receipts of the keepers of attached property, to his successor without objection, while the attachment writs were pending and long before judgment had been obtained, and the incoming sheriff accepted the keepers of the property and made them his own, the old sheriff was released from all liability for the safe-keeping of the property. Coleman *v.* Hope, 26 La. Ann. 629.

40. McKay *v.* Thorington, 15 Iowa 25 [*followed* in McKay *v.* Leonard, 17 Iowa 569].

41. Fockler *v.* Martin, 32 Iowa 117.

42. Marx *v.* Sanders, 108 La. 140, 32 So. 331; Penn *v.* Isherwood, 5 Gill (Md.) 206 (holding that after the term of office of the sheriff who made a sale under a fieri facias or venditioni exponas shall have terminated, the writ of habere facias may be issued to any succeeding sheriff, coroner, or elisor, provided the other provisions of the law are complied with); Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575; Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133.

43. See *supra*, III, C, 1, a.

44. Butler *v.* White, 25 Minn. 432.

45. Crane *v.* Hardy, 1 Mich. 56.

46. Allegheny Bank's Appeal, 48 Pa. St. 328.

47. *Alabama.*— Lawson *v.* Orear, 4 Ala. 156.

*Missouri.*— Dunnica *v.* Coy, 28 Mo. 525, 75 Am. Dec. 133.

*North Carolina.*— McLin *v.* Hardie, 25 N. C. 407.

*Tennessee.*— Todd *v.* Jackson, 3 Humphr. 398.

*England.*— Fonsec *v.* Magnay, 1 Marsh. 554, 6 Taunt. 231, 1 E. C. L. 591.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 111.

48. Greenup *v.* Stokes, 12 Ill. 24, 52 Am. Dec. 474; Maxton *v.* Mount, 86 Ill. App. 187. See also Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536, holding that for the purpose of receiving summons to be served, an outgoing sheriff, retaining possession of the office after his successor is entitled to it, may be deemed the latter's agent.

49. McElmurray *v.* Ardis, 3 Strobh. (S. C.) 212; Wortham *v.* Cherry, 3 Head (Tenn.) 468. See Executions, 17 Cyc. 1341, 1342 text and notes 8, 9; Judicial Sales, 24 Cyc. 50 note 64.

50. Anthony *v.* Wessel, 9 Cal. 103.

51. Woods *v.* Lane, 2 Serg. & R. (Pa.) 53 [*followed* in Lutes *v.* Randall, 9 Kulp (Pa.) 295].

52. Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276.

recover no compensation therefor;[53] but at the present time the universal rule, under the statutes, is that the sheriff is compensated for his services,[54] either by fees or commissions for particular services performed,[55] or by a fixed salary,[56] or in some instances by a salary and fees in addition thereto.[57] But as the right

53. *Connecticut.*— Preston *v.* Bacon, 4 Conn. 471.

*Maryland.*— Cape Sable Co.'s Case, 3 Bland 606.

*Michigan.*— Peck *v.* City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

*New York.*— Campbell *v.* Cothran, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70]; O'Brien *v.* Allen, 40 Misc. 693, 83 N. Y. Suppl. 251; Hildreth *v.* Ellice, 1 Cai. 192.

*Pennsylvania.*— Totton *v.* Cumberland County, 11 Pa. Co. Ct. 316.

*England.*— Sneary *v.* Abdy, 1 Ex. D. 299, 45 L. J. Exch. 803, 34 L. T. Rep. N. S. 801; Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164; Mitchell *v.* Reynolds, 10 Mod. 130, 88 Eng. Reprint 660; Stanton *v.* Suliard, Cro. Eliz. 654, 78 Eng. Reprint 893.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 45.

54. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133.

55. *Arizona.*—Williamson *v.* Gila County, 5 Ariz. 237, 52 Pac. 353.

*Connecticut.*— Preston *v.* Bacon, 4 Conn. 471.

*Louisiana.*— State *v.* Fisher, 30 La. Ann. 514.

*Maine.*— Thompson *v.* Wiley, 20 Me. 479.

*Maryland.*— Hall *v.* Belt, 8 Gill & J. 470.

*New Jersey.*— Daly *v.* Ely, 53 N. J. Eq. 270, 31 Atl. 396.

*New York.*— Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521.

*North Carolina.*— Kincaid *v.* Smyth, 35 N. C. 496.

*Oregon.*— Pugh *v.* Good, 19 Oreg. 85, 23 Pac. 827.

*Pennsylvania.*—Lenhart *v.* Cambria County, 216 Pa. St. 25, 64 Atl. 876 [*affirming* 29 Pa. Super. Ct. 350]; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141. See also McCoy *v.* Cumberland County, 18 Pa. Co. Ct. 459.

*South Carolina.*— Huger *v.* Osborne, 1 Bay 319.

*Tennessee.*— Barnes *v.* Jackson, 2 Sneed 416.

*Wisconsin.*— Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

*England.*— Sneary *v.* Abdy, 1 Ex. D. 299, 45 L. J. Exch. 803, 34 L. T. Rep. N. S. 801; Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 45, 46.

**The sheriff cannot be compelled to accept a certain sum** or sums of money in lieu of the fees of office allowed by statute unless he has voluntarily contracted with the police jury to do so. State *v.* Fisher, 30 La. Ann. 514.

**Salary in lieu of fees for services to county.** — County supervisors have no authority, by resolution, to vote the sheriff a salary in lieu of all statutory fees for services rendered the county. Hewitt *v.* White, 78 Mich. 117, 43 N. W. 1043.

56. *Illinois.*— Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432].

*Indiana.*— Starr *v.* Delaware County, 40 Ind. App. 7, 79 N. E. 390, 76 N. E. 1025.

*Iowa.*— Dallas County *v.* Hanes, 135 Iowa 550, 113 N. W. 345; Holmes *v.* Lucas County, 53 Iowa 211, 4 N. W. 918.

*Missouri.*— Jackson County *v.* Stone, 168 Mo. 577, 68 S. W. 926.

*Nebraska.*— Power *v.* Douglas County, 75 Nebr. 734, 106 N. W. 782.

*New Jersey.*— Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25.

*New York.*— Matter of Beck, 157 N. Y. 151, 52 N. E. 5 [*reversing* 31 N. Y. App. Div. 361, 53 N. Y. Suppl. 156]; People *v.* Denton, 41 N. Y. App. Div. 386, 58 N. Y. Suppl. 722.

*Oregon.*— Marquam *v.* Sears, 36 Oreg. 61, 58 Pac. 660.

*South Carolina.*— Gilreath *v.* Greenville County, 70 S. C. 389, 50 S. E. 18.

*Wisconsin.*— State *v.* McClure, 91 Wis. 313, 64 N. W. 992; Parsons *v.* Waukesha County, 83 Wis. 288, 53 N. W. 507.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 45, 46.

**Statute authorizing changing method of compensation.**— Under Wis. Laws (1901), p. 269, c. 217, authorizing the county board of any county to change the method of compensation of the sheriff at any time before or during his term of office, and declaring the act applicable to all sheriffs, "including those now holding office," a resolution of a county board that the then "present method of paying the sheriff a salary for work done within the county" be changed, and that he shall thereafter be paid a salary for all work, wherever done, applies to sheriffs holding office at the time of the passage of the act. State *v.* Erickson, 120 Wis. 435, 98 N. W. 253, holding also that the act applies to a county whose sheriff was being compensated at the time of its passage by a salary for all services in the county, and fees for services outside the county. Under Wis. Rev. St. (1898) § 694*a*, authorizing county boards severally to change the method of compensating sheriffs from the fee to the salary system, where a county board has made such a change, it has no power to change back to the fee system. Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

57. See People *v.* Leech, 43 Misc. (N. Y.) 435, 89 N. Y. Suppl. 178.

**In Arizona** county supervisors have no authority to allow salary in addition to fees to

of a sheriff to compensation is wholly derived from and dependent upon statute,[58] he is not entitled to any compensation except such as is given him by law,[59] and can recover no compensation for services, although within the line of his duties, for which no compensation is provided by law.[60] The commissions given by statute to sheriffs and other collecting officers are intended as compensation for services actually rendered, and the officer can set up no claim to the commissions

sheriff of a county of the fifth class. Williamson *v.* Gila County, 5 Ariz. 237, 52 Pac. 353.

**58.** *Georgia.*—Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133.

*Massachusetts.*— Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

*Missouri.*— Jackson County *v.* Stone, 168 Mo. 577, 68 S. W. 926.

*New York.*— Campbell *v.* Cothran, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70]; O'Brien *v.* Allen, 40 Misc. 693, 83 N. Y. Suppl. 251.

*England.*— Sneary *v.* Abdy, 1 Ex. D. 299, 45 L. J. Exch. 803, 34 L. T. Rep. N. S. 801; Colls *v.* Coates, 11 A. & E. 826, 9 L. J. Q. B. 232, 3 P. & D. 511.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 45.

**59.** *Connecticut.*— Beach *v.* Walker, 6 Conn. 190.

*Illinois.*— Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432].

*Kentucky.*— Oatts *v.* Jones, 12 B. Mon. 49.

*Nebraska.*— Red Willow County *v.* Smith, 67 Nebr. 213, 93 N. W. 151.

*Nevada.*— Washoe County *v.* Humboldt County, 14 Nev. 123.

*New York.*— People *v.* Clinton County, 19 N. Y. Suppl. 642.

*Ohio.*— Mathers *v.* Ramsey, 2 Disn. 334.

*Pennsylvania.*— Geissinger *v.* Huntingdon County, 3 Pa. Co. Ct. 106; Curtis *v.* Alleghany County, 1 Phila. 237.

*Texas.*— Templeton *v.* Ryburn, 59 Tex. 209.

*Vermont.*— Fitch *v.* Stanton, 1 Tyler 28.

*England.*— Davies *v.* Edmonds, 1 D. & L. 395, 13 L. J. Exch. 1, 12 M. & W. 31; Phillips *v.* Canterbury, 1 D. & L. 283, 12 L. J. Exch. 401, 11 M. & W. 619.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 45 *et seq.*

**60.** *Alabama.*— Torbert *v.* Hale County, 131 Ala. 143, 30 So. 453; Rainer *v.* McElroy, 20 Ala. 347.

*Arkansas.*— Hempstead County *v.* Jones, 62 Ark. 272, 35 S. W. 230; McHenry *v.* Hot Springs County, 57 Ark. 565, 22 S. W. 175.

*Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366; Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Idaho.*— Eakin *v.* Nez Perces County, 4 Ida. 131, 36 Pac. 702 [*followed* in Campbell *v.* Logan County, 4 Ida. 181, 37 Pac. 329].

*Iowa.*— Twinam *v.* Lucas County, 104 Iowa 231, 73 N. W. 473; Painter *v.* Polk County, 70 Iowa 596, 31 N. W. 879; King *v.* Shepherd, 68 Iowa 215, 26 N. W. 82.

*Kentucky.*— Suter *v.* Stone, 108 Ky. 518, 56 S. W. 971, 22 Ky. L. Rep. 224; Yantis *v.* Burditt, 2 Dana 254.

*Massachusetts.*—Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

*Minnesota.*—Miesen *v.* Ramsey County, 101 Minn. 516, 112 N. W. 874 [*following* Justus *v.* Ramsey County, 94 Minn. 72, 101 N. W. 943; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166; Chapel *v.* Ramsey County, 71 Minn. 18, 73 N. W. 520 (*overruling* Schmid *v.* Brown County, 44 Minn. 67, 46 N. W. 145)]; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166.

*Mississippi.*— Thomas *v.* Hinds County Sup'rs, 69 Miss. 665, 12 So. 558.

*Missouri.*— State *v.* Brown, 146 Mo. 401, 47 S. W. 504; State *v.* Mason, 82 Mo. App. 239; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

*Nebraska.*— Red Willow County *v.* Smith, 67 Nebr. 213, 93 N. W. 151.

*Nevada.*— Washoe County *v.* Humboldt County, 14 Nev. 123.

*New Hampshire.*— Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

*New York.*— Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 46 How. Pr. 481 (*affirming* 13 Abb. Pr. N. S. 128)]; People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122; People *v.* Clinton County, 19 N. Y. Suppl. 642; Benedict *v.* Warriner, 14 How. Pr. 568.

*North Dakota.*— Wilson *v.* Cass County, 8 N. D. 456, 79 N. W. 985.

*Ohio.*— Home Bldg., etc., Co. *v.* Hoskins, 8 Ohio S. & C. Pl. Dec. 437, 6 Ohio N. P. 274.

*Pennsylvania.*— Lehigh County *v.* Semmel, 124 Pa. St. 358, 16 Atl. 876 [*reversing* 5 Pa. Co. Ct. 447]; Dougherty *v.* Cumberland County, 26 Pa. Super. Ct. 610; McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423 (holding that a constable is not entitled to fees for making his quarterly return to court); Price *v.* Blair County, 6 Pa. Dist. 313; Davison *v.* Franklin County, 5 Pa. Dist. 745, 18 Pa. Co. Ct. 374; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225; Hancox *v.* Venango County, 20 Pa. Co. Ct. 508; Gillon *v.* Potter County, 19 Pa. Co. Ct. 540 [*following* Mercer County *v.* Patterson, 2 Rawle 106; Irwin *v.* Northumberland County, 1 Serg. & R. 505; Totton *v.* Cumberland County, 11 Pa. Co. Ct. 316; Allen *v.* Warren County, 2 Pa. Co. Ct. 532]; Hulsizer *v.* Northampton County, 19 Pa. Co. Ct. 385; Geissinger *v.* Huntingdon County, 3 Pa. Co. Ct. 106; Allen *v.* Warren County, 2 Pa. Co. Ct. 532 [*followed* in Totton *v.* Cumberland County, 11 Pa. Co. Ct. 316]; Curtis *v.* Alleghany County, 1 Phila. 237.

*South Carolina.*— Lancaster *v.* Barnwell County, 40 S. C. 445, 19 S. E. 74; State *v.* Charleston Dist. Sheriff, 1 McCord 419.

*Wisconsin.*— McDonald *v.* Milwaukee

unless the services be rendered.[61] Where an officer is precluded by statute, or by judicially established principles of public policy, from demanding and collecting for his own use a fee for a particular service he cannot demand and collect it for the use of the state.[62]

**2. CONSTITUTIONALITY OF STATUTES.** The general rules by which the constitutionality of statutes is tested [63] are to be applied in determining whether statutes relating to the compensation of sheriffs and constables are open to any constitutional objection.[64]

**3. CONSTRUCTION AND OPERATION OF STATUTES.**[65] Statutes regulating the compensation of sheriffs are, as a rule, prospective only in their operation,[66] and will be construed so to conform to rather than to conflict with the constitution.[67]

County, 41 Wis. 642 [*following* Crocker *v.* Brown County, 35 Wis. 284].

*Canada.*— Grant *v.* Grant, 10 Ont. Pr. 40.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 45, 58.

**No compensation for services to state.**— State *v.* Brewer, 59 Ala. 130.

**A deputy marshal of a city** is not a peace officer, within Iowa Code (1873), § 4109, designating sheriffs "and their deputies," constables, and marshals and policemen of incorporated cities and towns as "peace officers;" and therefore is not entitled to compensation under Acts 23d Gen. Assembly, c. 43, § 6, providing for compensation to "peace officers" for arresting vagrants. Twinam *v.* Lucas County, 104 Iowa 231, 73 N. W. 473.

61. Barnes *v.* Jackson, 2 Sneed (Tenn.) 416, 419, where it is said: "His reception of the commissions, under such circumstances, would subject him to an indictment for extortion."

62. Walsh *v.* Luzerne County, 36 Pa. Super. Ct. 425, holding that a member of the state constabulary cannot collect from a county for the use of the commonwealth a fee for serving a criminal warrant.

63. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 695.

64. See the following cases:

*California.*— Kiernan *v.* Swan, 131 Cal. 410, 63 Pac. 768 [*following* Dwyer *v.* Parker, 115 Cal. 544, 47 Pac. 372] (holding that a statute establishing a fee bill may be valid as fixing the fees for particular items of service, although it contains an unconstitutional provision limiting the yearly or monthly total of fees); Fleckenstein *v.* Placer County, (1894) 37 Pac. 931 [*citing* Cody *v.* Murphey, 89 Cal. 522, 26 Pac. 1081; Longan *v.* Solano County, 65 Cal. 122, 3 Pac. 463] (holding that a statute providing that the fees allowed constables for services in criminal actions other than felonies shall not exceed a designated amount for any one quarter is not in conflict with a constitutional provision which makes it the duty of the legislature to regulate the fees of officers in proportion to their duties, or invalid as being a local annd special law).

*Indiana.*— Fulk *v.* Monroe County, 46 Ind. 150, holding that a fee and salary act was not unconstitutional because it made the salary of the sheriff payable out of a particular fund, or because the amount of said fund might be less than the amount of salary and deputy hire, on account of the deficiency of the fund or of the amount paid in by the sheriff; but that such act was unconstitutional by reason of making the salaries of sheriff's non-uniform.

*Louisiana.*— Parish Bd. *v.* Hebert, 112 La. 467, 36 So. 497, holding that a statute which, when defendant is convicted and condemned to pay costs, allows the sheriff, in addition to the limited sum to be paid by the county in all criminal cases, certain fees, which are to be recovered as costs from defendants, is not in violation of a constitutional provision limiting the amount to be paid by each parish to its sheriff for his services in criminal matters.

*Pennsylvania.*— Edwards *v.* McLean, 23 Pa. Super. Ct. 43 (holding that a statute allowing compensation to constables for services rendered prior to its enactment violates a constitutional provision forbidding legislation giving any extra compensation to public officers after services have been rendered); Com. *v.* Kromer, 4 Pa. Co. Ct. 241 (holding that a statute imposing additional duties without additional compensation is unconstitutional as applied to officers elected or appointed before its passage but not as to officers subsequently elected or appointed).

*Wisconsin.*— State *v.* Erickson, 120 Wis. 435, 98 N. W. 253, holding that a statute authorizing the county board of any county to change the method of compensating the sheriff to that of a fixed salary, in lieu of all other compensation, does not violate a constitutional provision requiring the legislature to establish but one system of county government, nor does it, although declared applicable to all sheriffs, including those holding office at the time of its passage, violate a constitutional provision that the compensation of a public officer shall neither be increased nor diminished during his term.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 46.

65. See, generally, STATUTES.

66. Kountze *v.* Train, 4 Nebr. 291.

**The repeal of a statute** allowing the sheriff certain commissions does not operate retrospectively, so as to deprive him of commissions to which he had become entitled, but which had not been collected, when the repealing act was passed. Barron *v.* Tart, 18 Ala. 668.

67. Davidson *v.* New York, 13 Daly (N. Y.) 252.

Apparently contradictory statutes in reference to the compensation of sheriffs will be construed so as to give effect to both, if possible,[68] and in ascertaining the intention of the legislature with reference to a statute establishing a fee bill a contemporaneous construction put upon the same words of a previous fee bill should be taken into consideration.[69] A statute authorizing the allowance of fees to sheriffs and other public officers for services rendered in criminal prosecutions, and in executing judgments rendered therein, is a statute giving costs and must be strictly construed.[70] A number of illustrative cases with reference to the construction and effect of particular statutes relating to compensation are cited in the note.[71]

**4. Amount of Compensation**[72] — **a. In General.** The amount of the compensation of the sheriff is usually regulated by statute,[73] or in some states, where the

**A statute reducing or authorizing the reduction of a sheriff's compensation** must be deemed to apply, not to the incumbent at the time of its enactment, but only to his successors in office. Davidson *v.* New York, 13 Daly (N. Y.) 252. See also Com. *v.* Kromer, 4 Pa. Co. Ct. 241.

**68.** Williams *v.* McLendon, 44 S. C. 174, 21 S. E. 616.

**69.** Davison *v.* Franklin, 18 Pa. Co. Ct. 374.

**70.** State *v.* Brewer, 59 Ala. 130.

**71.** *California.*— Kiernan *v.* Swan, 131 Cal. 410, 63 Pac. 768; Orr *v.* Kern County, (1894) 37 Pac. 649; Nelson *v.* Breen, 98 Cal. 245, 33 Pac. 85; Cody *v.* Murphey, 89 Cal. 522, 26 Pac. 1081; Allen *v.* Napa County, 82 Cal. 187, 23 Pac. 43; Simonton *v.* El Dorado County, 22 Cal. 554.

*Connecticut.*— Camp *v.* Bates, 13 Conn. 1.

*Iowa.*— Dallas County *v.* Hanes, 135 Iowa 550, 113 N. W. 345; Jones County *v.* Arnold, 134 Iowa 580, 111 N. W. 973; Painter *v.* Polk County, 70 Iowa 596, 31 N. W. 879; Bell *v.* Weddington, 54 Iowa 561, 6 N. W. 731; Garber *v.* Clayton County, 19 Iowa 29.

*Louisiana.*— Parish Bd. *v.* Hebert, 112 La. 467, 36 So. 497.

*Maine.*— Sterling *v.* Cumberland, 91 Me. 316, 39 Atl. 1003.

*Minnesota.*— Billings *v.* Otter Tail County Com'rs, 78 Minn. 9, 80 N. W. 777; Richter *v.* St. Paul, 29 Minn. 198, 12 N. W. 532.

*Missouri.*— State *v.* Brown, 72 Mo. App. 651.

*Nebraska.*— Porter *v.* Merrick County, 42 Nebr. 397, 60 N. W. 588.

*Nevada.*— State *v.* Beard, 21 Nev. 218, 29 Pac. 531.

*New Jersey.*—American Ins. Co. *v.* Andrew, 30 N. J. Eq. 87.

*New York.*— Matter of Beck, 157 N. Y. 151, 52 N. E. 5 [*reversing* 31 N. Y. App. Div. 361, 53 N. Y. Suppl. 156]; German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585 [*reversing* 9 Hun 204]; Titman *v.* New York, 60 Hun 123, 14 N. Y. Suppl. 518, 20 N. Y. Civ. Proc. 376; People *v.* Leech, 43 Misc. 435, 89 N. Y. Suppl. 178.

*Ohio.*— State *v.* Root, 46 Ohio St. 510, 24 N. E. 595.

*Oregon.*— Landis *v.* Lincoln County, 31 Oreg. 424, 50 Pac. 530.

*Pennsylvania.*— Mansel *v.* Fulmer, 175 Pa. St. 377, 34 Atl. 794; Lackawanna County *v.* Stevens, 105 Pa. St. 465; Hays *v.* Cumberland County, 5 Pa. Super. Ct. 159 [*affirmed* in 186 Pa. St. 109, 40 Atl. 282]; Price *v.* Blair County, 6 Pa. Dist. 313; Leitzel *v.* Centre County, 6 Pa. Dist. 208, 18 Pa. Co. Ct. 649; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141.

*Wisconsin.*— State *v.* Erickson, 120 Wis. 435, 98 N. W. 253.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 46.

**72. Liability of county for deficit where fees do not reach amount allowed as salary** see *infra*, III, D, 6, b.

**73.** *Alabama.*— Trapp *v.* State, 122 Ala. 394, 25 So. 194; U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 10 So. 917.

*California.*— Kiernan *v.* Swan, 131 Cal. 410, 63 Pac. 768; Johnston *v.* Los Angeles County, (1897) 47 Pac. 374; Martin *v.* Santa Barbara County, 105 Cal. 208, 38 Pac. 687; Fleckenstein *v.* Placer County, (1897) 37 Pac. 931.

*Colorado.*— Colorado Mortg., etc., Co. *v.* Messemer, 12 Colo. App. 361, 55 Pac. 611.

*Connecticut.*— Preston *v.* Bacon, 4 Conn. 471.

*Florida.*— Lang *v.* Walker, 46 Fla. 248, 35 So. 78.

*Georgia.*— McMichael *v.* Southern R. Co., 117 Ga. 518, 43 S. E. 850; Floyd County *v.* Foster, 112 Ga. 131, 37 S. E. 120.

*Illinois.*— Carroll County *v.* Durham, 219 Ill. 64, 76 N. E. 78.

*Indiana.*— Starr *v.* Delaware County, 40 Ind. App. 7, 79 N. E. 390, (App. 1906) 76 N. E. 1025.

*Michigan.*— Peck *v.* City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

*Minnesota.*— Billings *v.* Otter Tail County, 78 Minn. 9, 80 N. W. 777.

*Nebraska.*— Power *v.* Douglas County, 75 Nebr. 734, 106 N. W. 782; Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*New Jersey.*— Daly *v.* Ely, 53 N. J. Eq. 270, 31 Atl. 396.

*New York.*— Matter of Beck, 157 N. Y. 151, 52 N. E. 5 [*reversing* 31 N. Y. App. Div. 361, 53 N. Y. Suppl. 156]; Mayhew *v.* Duncan, 31 Barb. 87; Mayhew *v.* Wilson, 10 Abb. Pr. 289.

*North Carolina.*— Kincaid *v.* Smyth, 35 N. C. 496.

*Ohio.*— Ross County Com'rs *v.* State, 49 Ohio St. 373, 34 N. E. 735; Ketter *v.* Scioto County Com'rs, 29 Ohio Cir. Ct. 149.

compensation is in the form of a salary, this is fixed by the county commissioners.[71] The sheriff is entitled to only such compensation as the law prescribes for the performance of his duties,[75] and if a salary is fixed he is bound to perform the

*Oregon.*— Landis *v.* Lincoln County, 31 Oreg. 424, 50 Pac. 530; Pugh *v.* Good, 19 Oreg. 85, 23 Pac. 827.

*Pennsylvania.*—Lenhart *v.* Cambria County, 216 Pa. St. 25, 64 Atl. 876 [*affirming* 29 Pa. Super. Ct. 350]; Lackawanna County *v.* Stevens, 105 Pa. St. 465; Irvin *v.* Jones, 3 Pa. Dist. 782, 16 Pa. Co. Ct. 97; Hancox *v.* Venango County, 20 Pa. Co. Ct. 508; McCoy *v.* Cumberland County, 18 Pa. Co. Ct. 459; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141.

*South Carolina.*—Mullins *v.* Marion County, 72 S. C. 84, 51 S. E. 535; Gilreath *v.* Greenville County, 70 S. C. 389, 50 S. E. 18.

*Tennessee.*— Shaw *v.* Armstrong, 2 Heisk. 420; Barnes *v.* Jackson, 2 Sneed 416.

*Wisconsin.*— Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

*England.*— Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 45, 46.

**The legislature has constitutional power to limit the amount** of compensation which a sheriff or constable shall receive for the performance of the duties of his office. Johnson *v.* Los Angeles County, (Cal. 1897) 47 Pac. 374.

**Change of statute.**—Where the sheriff had commenced performance of services before the enactment of the code of civil procedure, his fee therefor was regulated by the old code. Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521.

**74.** Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432]; People *v.* Darrah, 84 Ill. App. 515; Windmuller *v.* People, 78 Ill. App. 273; Holmes *v.* Lucas County, 53 Iowa 211, 4 N. W. 918; State *v.* Erickson, 120 Wis. 435, 98 N. W. 253; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867; State *v.* McClure, 91 Wis. 313, 64 N. W. 992; Parsons *v.* Waukesha County, 83 Wis. 288, 53 N. W. 507.

**Salary in addition to disbursements.**— Under Wis. Laws (1901), p. 269, c. 217, authorizing the county board of any county to change the method of compensating the sheriff to that of a fixed salary, in lieu of all fees *per diem*, and compensation, the board are at liberty to fix a salary which shall be in addition to lawful disbursements, as well as a salary which shall include such lawful disbursements. State *v.* Erickson, 120 Wis. 435, 98 N. W. 253.

**The salary may be fixed before the services are rendered,** and where the sheriff renders services on the faith of such action, there is a contract between him and the county, which is binding on the county. Holmes *v.* Lucas County, 53 Iowa 211, 4 N. W. 918.

**Salary must be fixed at meeting prior to election of sheriff.**— State *v.* McClure, 91 Wis. 313, 64 N. W. 992.

**75.** *Alabama.*— State *v.* Brewer, 59 Ala. 130.

*Colorado.*— Colorado Mortg., etc., Co. *v.* Messemer, 12 Colo. App. 361, 55 Pac. 611.

*Connecticut.*— Preston *v.* Bacon, 4 Conn. 471.

*Georgia.*— Floyd County *v.* Foster, 112 Ga. 133, 37 S. E. 90; Price *v.* Cutts, 29 Ga. 142, 74 Am. Dec. 52; Hicks *v.* Moore, 2 Ga. 240.

*Illinois.*— Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432].

*Iowa.*— Culbertson *v.* Jefferson County, 1 Greene 416.

*Louisiana.*— Ware *v.* Wilson, 22 La. Ann. 102.

*Maine.*— Sterling *v.* Cumberland, 91 Me. 316, 39 Atl. 1003.

*Massachusetts.*— Weston *v.* Weston, 102 Mass. 514.

*Michigan.*—Fletcher *v.* Kalaska Cir. Judge, 81 Mich. 186, 45 N. W. 641; Hewitt *v.* White, 78 Mich. 117, 43 N. W. 1043; Peck *v.* Grand Rapids City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577; People *v.* Ingham County, 38 Mich. 658; Burk *v.* Webb, 32 Mich. 173.

*Minnesota.*—Miesen *v.* Ramsey County, 101 Minn. 516, 112 N. W. 874 [*following* Justus *v.* Ramsey County, 94 Minn. 72, 101 N. W. 943; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166; Chapel *v.* Ramsey County, 71 Minn. 18, 73 N. W. 520 (*overruling* Schmid *v.* Brown County, 44 Minn. 67, 46 N. W. 145)].

*Missouri.*— Ford *v.* Howard County, 3 Mo. 309; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

*Nebraska.*— O'Shea *v.* Kavanaugh, 65 Nebr. 639, 91 N. W. 578; Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*New Hampshire.*—Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679; Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446.

*New York.*— Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 46 How. Pr. 481 (*affirming* 13 Abb. Pr. N. S. 128)].

*North Carolina.*— Bryan *v.* Edgecombe Com'rs, 84 N. C. 105.

*Ohio.*— Rea *v.* Smith, 2 Handy 193; Ketter *v.* Scioto County Com'rs, 29 Ohio Cir. Ct. 149.

*Pennsylvania.*— Hinkel *v.* Cumberland County, 9 Pa. Dist. 550; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225; Hahn *v.* Derr, 1 Woodw. 178.

*South Carolina.*— Smith *v.* Smith, 1 Bailey 70.

*Wisconsin.*— Crocker *v.* Brown County, 35 Wis. 284.

*England.*— Dew *v.* Parsons, 2 B. & Ald. 562, 1 Chit. 295, 21 Rev. Rep. 404, 18 E. C. L. 164.

duties of the office for such salary and cannot recover any additional compensation for any service within the line of his official duty.[76] A statute giving to the sheriff for services not otherwise provided for such sums as the board of supervisors may allow does not apply to services performed by the sheriff when not acting in his official capacity.[77] Under a constitutional provision that no law shall increase the salary or emoluments of any public officer after his election or appointment, a law increasing the compensation of sheriffs or constables can apply only to officers elected or appointed after its passage.[78] A constable who renders services which pertain to the office of sheriff is entitled to compensation according to the sheriff's fee bill,[79] while a sheriff who performs the duties of a constable is entitled to the fees allowed constables for such services,[80] and can charge therefor no other or different fees than are allowed by law to a constable.[81] Where a statute expressly allows compensation for certain services but fails to fix the amount a reasonable compensation should be allowed,[82] in fixing which the compensation fixed by another statute for the performance of a similar duty is properly taken as indicating the legislative measure.[83]

**b. Agreements as to Compensation.** Where the compensation of the sheriff for certain services which it is his duty to perform is fixed by statute, the sheriff cannot recover upon a contract for a greater compensation,[84] nor can he recover

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 45.

**A usage of the court of equity will not** warrant the sheriff in making a higher charge for his services than is fixed by the fee bill. Smith *v.* Smith, 1 Bailey (S. C.) 70.

**If a sheriff works slaves taken by him by** virtue of an attachment, he must account for the value of their labor, and is not entitled to it in addition to his legal fees. Hicks *v.* Moore, 2 Ga. 240.

**76.** *Arizona.*—Avery *v.* Pima County, 7 Ariz. 26, 60 Pac. 702.

*Illinois.*— Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432].

*Massachusetts.*— Briggs *v.* Taunton, 110 Mass. 423.

*Nevada.*— State *v.* Beard, 21 Nev. 218, 29 Pac. 531.

*New Jersey.*— Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25.

*New York.*— See People *v.* Leech, 43 Misc. 435, 89 N. Y. Suppl. 178.

*Oregon.*— Marquam *v.* Sears, 36 Oreg. 61, 58 Pac. 660.

*South Carolina.*— Gilreath *v.* Greenville County, 70 S. C. 389, 50 S. E. 18.

*Wisconsin.*— Parsons *v.* Waukesha County, 83 Wis. 288, 53 N. W. 507.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 45, 58.

**A statute prohibiting constables from charging or accepting any fee,** or other compensation in addition to their salary, does not violate the constitution. McAllister *v.* Armstrong County, 20 Pa. Co. Ct. 201.

**77.** Follenshee *v.* St. Clair County, 67 Mich. 614, 35 N. W. 257.

**78.** Hancox *v.* Venango County, 20 Pa. Co. Ct. 508. See also Martin *v.* Santa Barbara County, 105 Cal. 208, 38 Pac. 687.

**79.** Kottcamp *v.* York County, 28 Pa. Super. Ct. 96; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141; Cutts *v.* Rock County, 58 Wis. 641, 17 N. W. 636.

**80.** Mullins *v.* Marion County, 72 S. C. 84, 51 S. E. 535.

**Salary or fees.**—Where the statute provides that a magistrate may appoint a constable at a fixed salary, or may direct his papers to the sheriff, who shall receive the same compensation for serving them as a constable would be entitled to, and the magistrate has the papers served by the sheriff, and appoints no constable, the sheriff may collect the fees provided for constables by statute for the services rendered but is not entitled to the full salary named. Mullins *v.* Marion County, 72 S. C. 84, 51 S. E. 535.

**81.** Jones County *v.* Arnold, 134 Iowa 580, 111 N. W. 973; Pugh *v.* Good, 19 Oreg. 85, 23 Pac. 827; Lancaster *v.* Barnwell County, 40 S. C. 445, 19 S. E. 74.

**Service to which rule not applicable.**—Ala. Code, § 3741, authorizing sheriffs to execute process required of constables, and providing that they shall receive the same fees fixed for such service, does not apply to warrants of arrest issued by a committing magistrate, executed by a sheriff as authorized by Code, § 5209, and hence the sheriff is entitled to a fee of two dollars therefor, although the constable's fee for such service, fixed by Code, § 4576, is only fifty cents. Trapp *v.* State, 122 Ala. 394, 25 So. 194.

**82.** Garber *v.* Clayton County, 19 Iowa 29.

**83.** Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

**Resort may not be had to the general fee bill** fixing the fees for like services, if no fee is prescribed for the particular service rendered. Miesen *v.* Ramsey County, 101 Minn. 516, 112 N. W. 874 [*following* Justus *v.* Ramsey County, 94 Minn. 72, 101 N. W. 943; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166; Chapel *v.* Ramsey County, 71 Minn. 18, 73 N. W. 520 (*overruling* Schmid *v.* Brown County, 44 Minn. 67, 46 N. W. 145)].

**84.** *Georgia.*— Forbes *v.* Morel, R. M. Charlt. 23.

*Iowa.*— See Gilman *v.* Des Moines Valley

upon a *quantum meruit* for such services a sum in excess of that allowed by the statute.[85] But when such an officer performs services which it is not his duty to perform, although of such character as appertain to his office, he may lawfully contract for and recover compensation like a private individual,[86] or in the absence of an express contract as to compensation recover a reasonable compensation.[87]

**c. Interest [88] on Claim For Services.** A sheriff cannot be allowed interest on a claim against the county for services until his account has been presented to the board of supervisors for allowance,[89] and no interest whatever will be allowed on a sheriff's claim for costs due him for services in a litigated cause.[90]

**d. Estoppel [91] as to Amount of Fees.** Where a sheriff who has performed services in redeeming from a foreclosure sale states, without any intention to deceive and on the advice of the persons interested in making the redemption, that his fees are a certain amount, and settles for such amount, he is not estopped from claiming more fees on discovering that he is entitled to more than he stated.[92] But it has been held that where the sheriff has procured an order of court fixing the wages of a keeper of malefactors with a stipulation that such compensation covers all fees to the sheriff or the keeper on the commitment of vagrants, the sheriff is estopped to claim the fee allowed by the fee bill "on commitment for any criminal matter." [93]

**5. Particular Matters Affecting Compensation or Right Thereto — a. Place of Performing Services.** As a sheriff cannot perform any duty, as such, outside the state,[94] all fees prescribed by law for the compensation of sheriffs relate to duties performed within the state.[95]

**b. Residence of Sheriff.** The right of a sheriff to his fees and charges for his services is not defeated because he did not reside in the state during the time when the services were rendered.[96]

**c. Unauthorized Appointment of Special Officer.** An unauthorized appointment of a special sheriff, and the execution of process wrongfully issued to him, will not deprive the sheriff of the emoluments attached by law to his office; and he will be entitled to recover from the county the compensation fixed by law for the service of such process, if the same has not already been paid by the county to the special officer.[97]

R. Co., 40 Iowa 200, where a contract by a sheriff to perform certain official services for a gross sum in lieu of the statutory fees was held void, although it did not appear whether the stipulated sum was greater or less than the legal fees.

*Michigan.*—Wilcoxson *v.* Andrews, 66 Mich. 553, 33 N. W. 533.

*Nebraska.*— Phœnix Ins Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*New Hampshire.*— Edgerly *v.* Hale, 71 N. H. 138, 51 Pac. 679.

*New York.*— Crofut *v.* Brandt, 13 Abb. Pr. N. S. 128 [*affirmed* in 46 How. Pr. 481 (*affirmed* in 58 N. Y. 106, 17 Am. Rep. 213)]; Hatch *v.* Mann, 15 Wend. 44 [*reversing* 9 Wend. 262].

*Pennsylvania.*— Price *v.* Lancaster County, 24 Pa. Co. Ct. 225.

*Vermont.*— Brown *v.* Godfrey, 33 Vt. 120.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 47.

85. Wilcoxson *v.* Andrews, 66 Mich. 553, 33 N. W. 533.

86. Brown *v.* Godfrey, 33 Vt. 120, going outside of jurisdiction to execute criminal process.

87. Waldron *v.* Tuttle, 4 N. H. 149, holding that where a person delivered to a constable a warrant issued on his complaint by a justice of the peace on a prosecution not sanctioned by the government, and promised to pay the constable for the service of the process, an action might be maintained on such promise, and a reasonable compensation recovered, although there was no statute prescribing the fees to be taken by a constable for such services.

88. See, generally, Interest, 22 Cyc. 1459.

89. People *v.* Clinton County, 19 N. Y. Suppl. 642.

90. Galbraith *v.* Walker, 95 Pa. St. 481 [*following* Baum *v.* Reed, 74 Pa. St. 320; Rogers *v.* Burns, 27 Pa. St. 525]. See, generally, Costs, 11 Cyc. 1.

91. See, generally, Estoppel, 16 Cyc. 671.

92. Sharvey *v.* Rust, 50 Minn. 97, 52 N. W. 277.

93. Dougherty *v.* Cumberland, 26 Pa. Super. Ct. 610.

94. Territorial extent of sheriff's authority generally see *supra*, III, a, 2.

95. Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

96. Morgan *v.* Mitchell, 3 Mart. N. S. (La.) 576.

97. Skinner *v.* Cowley County, 63 Kan. 557, 66 Pac. 635.

**d. Settlement Between Parties** — (I) *EFFECT ON RIGHT TO STATUTORY FEES.* A settlement between the parties cannot deprive the sheriff of his right to the statutory fees for the services actually rendered by him.[98]

(II) *EFFECT ON RIGHT TO COMMISSIONS.* The sheriff is not entitled to any commissions upon money paid to a judgment creditor before execution is issued,[99] and even after execution is issued payment to or settlement or compromise with the execution creditor before the execution is served or levied defeats the sheriff's right to commissions.[1] But if a debt is compromised or settled between the parties after the levy of an execution the sheriff is entitled to his fees or commissions,[2] and in order to make the same he may sell so much as is necessary of the property

98. Daly *v.* Ely, 53 N. J. Eq. 270, 31 Atl. 396 (holding that a sheriff who in good faith advertises a sale under execution is entitled to the fee allowed by statute for advertising the sale, although a sale is prevented by a payment of the debt); German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585 [*reversing* 9 Hun 204]; Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

99. Miles *v.* Ohaver, 14 Ind. 206.

1. *Indiana.*— Miles *v.* Ohaver, 14 Ind. 206.

*Kentucky.*—Snell *v.* Woodford, 9 Dana 128.

*Missouri.*— Gaty *v.* Vogel, 40 Mo. 553.

*North Carolina.*— Kincaid *v.* Smyth, 35 N. C. 496, where the execution was never levied and was *functus officio* at the time of the payment. See also Siler *v.* Blake, 20 N. C. 90, holding that a sheriff is not entitled to commissions on a fieri facias, although defendant pay the money to plaintiff while the fieri facias is in his hands, if at the time defendant held no property on which the fieri facias could be levied.

*Vermont.*— Barnard *v.* Stephens, 2 Ark. 429, 16 Am. Dec. 733.

*Canada.*—Morris *v.* Boulton, 2 C. L. Chamb. (U. C.) 60; Leeming *v.* Hagerman, 5 U. C. Q. B. O. S. 38.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 48.

**Turning over receipts to sheriff.**— The fact that defendant gave the sheriff, on service of the execution, his receipts from plaintiff, cannot amount to a payment on which the sheriff can have a commission, as he has no right to receive anything but cash. Miles *v.* Ohaver, 14 Ind. 206.

2. *Connecticut.*— Preston *v.* Bacon, 4 Conn. 471.

*Delaware.*— Middletown Academy *v.* Cochran, 3 Pennew. 56, 50 Atl. 285; Lofland *v.* Jefferson, 4 Harr. 303. See also Read *v.* Randel, 3 Harr. 36.

*Indiana.*—Kirland *v.* Robinson, 24 Ind. 105.

*Kentucky.*— Davis *v.* Gott, 130 Ky. 486, 113 S. W. 826. See also Snell *v.* Woodford, 9 Dana 128.

*Maryland.*—Howard *v.* Levy Court, 1 Harr. & J. 558; Cape Sable Co.'s Case, 3 Bland 606.

*New York.*— German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585 [*reversing* 9 Hun 204]; Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213; Hoyt *v.* Phillips, 1 Sweeny 76; O'Brien *v.* Allen, 40 Misc. 693, 83 N. Y. Suppl. 251; Parsons *v.* Bowdoin, 17 Wend. 14 (holding that this is true, although the property is covered with prior liens above its value); Bolton *v.* Lawrence, 9 Wend. 435; Hildreth *v.* Ellice, 1 Cai. 192.

*North Carolina.*— Matlock *v.* Gray, 11 N. C. 1. *Contra,* under later statute. Dawson *v.* Graffin, 84 N. C. 100.

*Pennsylvania.*— Middleton *v.* Summers, 3 Serg. & R. 549; Larzelere *v.* Fisher, 24 Pa. Super. Ct. 194, so holding under Pa. Act July 11, 1901 (Pamphl. Laws 663). *Contra,* under different statute. Irwin *v.* Jones, 3 Pa. Dist. 782, 16 Pa. Co. Ct. 97; Hantsch *v.* Zell, 2 Woodw. 92.

*England.*— Alchin *v.* Wells, 5 T. R. 470, 2 Rev. Rep. 641, 101 Eng. Reprint 265.

*Canada.*— Brown *v.* Johnson, 5 Can. L. J. O. S. 17 [*explaining* Walker *v.* Fairfield, 8 U. C. C. P. 95]; Grant *v.* Hamilton, 2 Can. L. J. N. S. 262; Morris *v.* Boulton, 2 C. L. Chamb. (U. C.) 60. See also Morrison *v.* Taylor, 9 Ont. Pr. 390. But *compare* Hamilton, etc., R. Co. *v.* Gore Bank, 20 Grant Ch. (U. C.) 190 [*following* Buchanan *v.* Frank, 15 U. C. C. P. 196; Michie *v.* Reynolds, 24 U. C. Q. B. 303].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 48.

**Contra.**— Gaff *v.* Holland, 31 Ark. 543; Nordyke-Marmon Co. *v.* Jones, 93 Iowa 705, 61 N. W. 1085; Wynne *v.* Mississippi, etc., R. Co., 45 Miss. 569; O'Shea *v.* Kavanaugh, 65 Nebr. 639, 91 N. W. 578; Vance *v.* Columbus Bank, 2 Ohio 214; Bushnell *v.* Eaton, Wright (Ohio) 720.

**Failure to give notice to defendant.**— Under Del. Dig. 241, providing that if an execution be levied on property, and settled, without a sale, after the expiration of thirty days from the levy and notice to defendant, the sheriff should be entitled to dollarage; but, if settled before the expiration of such thirty days, dollarage should not be allowed, a sheriff's dollarage was disallowed on an execution levied for more than thirty days, and then settled without sale, where no notice had been given to defendant. Read *v.* Randel, 3 Harr. (Del.) 36.

**Where a settlement is obtained by means of pressure exerted by the sheriff** he is entitled to reasonable compensation for services performed, although no special fee be assigned for such service in any statute or table of costs. Grant *v.* Hamilton, 2 Can. L. J. N. S. 262.

**Settlement by promissory notes.**—Where, after seizure by a sheriff under an execution, the execution was settled between the parties by the taking of promissory notes from de

levied on.[3] The general rule in such case is that the sheriff shall receive the same compensation as though the service begun had been actually consummated.[4] Accordingly, where an execution has been levied on property sufficient to satisfy the judgment, and the judgment is compromised for less than the whole amount, the sheriff is entitled to commissions on the whole amount;[5] and a sheriff is entitled to commission on a capais ad satisfaciendum which he has executed on defendant who, before the return-day of the execution, pays the amount thereof to the execution creditor by whom he is discharged from custody.[6] So also where the debt is settled between the parties after the service or levy of an attachment the sheriff is entitled to commissions[7] at the rate allowed upon executions,[8] upon the value of the property attached,[9] not exceeding the sum at which the settle-

fendant, and the sheriff was ordered to deliver up possession but the writ was not withdrawn, the execution was satisfied so as to entitle the sheriff to something for poundage. McRoberts *v.* Hamilton, 7 Ont. Pr. 95.

**Withdrawal from possession pursuant to order based on agreement of parties.**—Where the sheriff under a fieri facias seized goods sufficient to cover the claim, and afterward withdrew from possession, in obedience to a judge's order founded upon an undertaking of defendant to credit the amount of the levy on an execution which he held against plaintiff, the sheriff was entitled to poundage. Thomas *v.* Cotton, 12 U. C. Q. B. 148.

**Defendant not liable.**—Where the money is paid to plaintiff after the levy of an execution defendant is not liable to the sheriff for his commission. Gordons *v.* Maupin, 10 Mo. 352, 354, 47 Am. Dec. 118 [*followed* in Irwin *v.* Milburn, 10 Mo. 456], where it is said: "The question whether the plaintiff in the execution would be liable to the sheriff for his commission, is not now before us, nor is it intended to give any opinion respecting it."

3. Howard *v.* Levy Court, 1 Harr. & J. (Md.) 558.

4. Preston *v.* Bacon, 4 Conn. 471.

**Body execution.**—Where an officer had arrested the execution debtor, and was on his way with him to the jail, when a settlement was effected, the officer was entitled to be allowed for his services only what he would have obtained had he committed the debtor to prison. Preston *v.* Bacon, 4 Conn. 471. But *compare* Corbet *v.* McKenzie, 6 U. C. Q. B. 605, holding that under the rule of Hilary Term, 10 Vict., where the sheriff has defendant in custody on a capias ad satisfaciendum, he has so far made the money as to entitle him to poundage, the body of defendant being satisfaction.

5. Hoyt *v.* Phillips, 1 Sweeny (N. Y.) 76.

6. Gardner *v.* Neal, 9 Gratt. (Va.) 85.

7. Miller *v.* Miller, 108 N. Y. App. Div. 310, 95 N. Y. Suppl. 763; Plummer *v.* International Power Co., 88 N. Y. App. Div. 452, 85 N. Y. Suppl. 107; Woodruff *v.* Imperial F. Ins. Co., 27 Hun (N. Y.) 229 [*distinguishing* as decided under a different statute German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585 (*reversing* 9 Hun 204)]; Pritchard *v.* California Bank, 51 Barb. (N. Y.) 184 (holding that the sheriff was entitled to poundage where an arrangement had been made by which defendants agreed to pay certain drafts if the suit should be discontinued, and this was done, and the money was paid); O'Brien *v.* Obel, 46 Misc. (N. Y.) 449, 92 N. Y. Suppl. 333; O'Brien *v.* National Conduit, etc., Co., 43 Misc. (N. Y.) 327, 87 N. Y. Suppl. 131; Haase *v.* Levering, 38 N. Y. Suppl. 432, 1 N. Y. Annot. Cas. 404; Bartlett *v.* Jessup, 18 Abb. Pr. (N. Y.) 448 [*followed* in Muller *v.* Santler, 18 Abb. Pr. (N. Y.) 450, 28 How. Pr. 87 (*approved* in Jellinghaus *v.* Scheidt, 18 Abb. Pr. (N. Y.) 452)]; Allaire Works *v.* The Hu Quang, 18 Abb. Pr. (N. Y.) 448 note; Trenor *v.* Fachin, 12 Abb. Pr. (N. Y.) 136, 20 How. Pr. 405; Mathews *v.* Matson, 67 How. Pr. (N. Y.) 116; Shaw *v.* Armstrong, 2 Heisk. (Tenn.) 420. *Contra*, Hoge *v.* Page, 11 How. Pr. (N. Y.) 207.

**Where the sheriff attaches the interest of defendant in a mining company,** and the parties thereupon compromise the claim for a specified sum, the sheriff is not entitled to poundage, because he has not attached any property which he could sell by virtue of the attachment, but in such case he is entitled to the fees allowed by statute for the services rendered. Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

**What amounts to settlement.**—Where a sheriff has made a levy and put a person in charge, and a stay is taken, and judgment affirmed, and payment made directly to plaintiff's attorney, this is a "settlement," within N. Y. Code, § 3307, subd. 7, and the sheriff is entitled to poundage and to an allowance. Mathews *v.* Matson, 67 How. Pr. (N. Y.) 116. But the discharge of the property by the filing of an undertaking by defendant is not a settlement and the sheriff is not entitled to poundage. Haase *v.* Levering, 38 N. Y. Suppl. 432, 1 N. Y. Annot. Cas. 404.

**Sheriff entitled to poundage, although action settled without consideration.**— Miller *v.* Miller, 108 N. Y. App. Div. 310, 95 N. Y. Suppl. 763.

8. Muller *v.* Santler, 18 Abb. Pr. (N. Y.) 450, 28 How. Pr. 87 [*approved* in Jellinghaus *v.* Scheidt, 18 Abb. Pr. (N. Y.) 452].

9. Plummer *v.* International Power Co., 88 N. Y. App. Div. 452, 85 N. Y. Suppl. 107; Woodruff *v.* Imperial F. Ins. Co., 27 Hun (N. Y.) 229 [*affirmed* in 90 N. Y. 521]; O'Brien *v.* Obel, 46 Misc. (N. Y.) 449, 92 N. Y. Suppl. 333.

ment is made; [10] and also to be repaid his necessary disbursements,[11] and the statutes sometimes permit him to retain the property levied on until his fees and commissions are paid.[12] In order to entitle the sheriff to compensation upon the ground that the debt has been settled, although the money has not passed through his hands, it is necessary that the debt should be paid by or for defendant.[13] In several of the states it is provided that when an attachment or execution which has been levied is settled between the parties without a sale the sheriff is entitled to one half of the commission allowed in case of a sale.[14] Where such half commission is allowed in case of an attachment upon the demand sued upon it must be computed upon the amount really due and paid and accepted on the settlement and not the amount for which the attachment was sued out; [15] but the plaintiff cannot deprive the sheriff of all or a part of his commission by remitting all or part of the amount really due him from defendant.[16] Where the amount of an execution is paid by the debtor to the execution plaintiff after the return-day of the writ, the sheriff is not entitled to commissions, the money not being made by him.[17]

**e. Expiration of Term of Office.** A deputy sheriff who has levied upon goods and retains them in his custody after his principal's term of office has expired is entitled to the fees for such custody, until he surrenders the goods to the new sheriff.[18] Where an attachment is levied by a sheriff and the property released on a forthcoming bond, and, the attachment being sustained, the proceeds of the property are paid to and disbursed by the successor of the sheriff who levied the attachment, such successor, and not the former sheriff, is entitled to the commissions.[19] Where after a jury has been summoned for the circuit, but before the return-day of the venire, the sheriff goes out of office, he is entitled to the fees for summoning the jury, but not for returning the venire.[20] A sheriff, after expiration of his term of office, may sue for fees and commissions in an attachment concluded during his term.[21]

**6. Acts Performed by Deputy.** When sheriff's fees are given by statute, they

10. Plummer *v.* International Power Co., 88 N. Y. App. Div. 452, 85 N. Y. Suppl. 107; Woodruff *v.* Imperial F. Ins. Co., 27 Hun (N. Y.) 229 [*affirmed* in 90 N. Y. 521]; Shaw *v.* Armstrong, 2 Heisk. (Tenn.) 420, holding that where after an attachment had been levied defendant became bankrupt, and plaintiff agreed to take five hundred dollars, and release the attachment, and prove his debt in bankruptcy, the sheriff should be allowed commissions on the five hundred dollars, but not on what might be realized in bankruptcy. See also Pritchard *v.* California Bank, 51 Barb. (N. Y.) 184; Trenor *v.* Fachin, 12 Abb. Pr. (N. Y.) 136, 20 How. Pr. 405.

11. Trenor *v.* Fachin, 12 Abb. Pr. (N. Y.) 136, 20 How. Pr. 405.

12. O'Brien *v.* National Conduit, etc., Co., 43 Misc. (N. Y.) 327, 87 N. Y. Suppl. 131.

13. Larzelere *v.* Fisher, 24 Pa. Super. Ct. 194, holding that where a levy had been made under a levari facia sur mortgage, but before the sale plaintiff sold and assigned the judgment to another and received the money therefor, without such money going through the hands of the sheriff, the latter was not entitled to commissions on such money.

14. Morrow *v.* Rosentihl, 106 Ala. 198, 17 So. 608; U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 10 So. 917; Morse *v.* Gibbons, 43 Cal. 377; Gates *v.* Buck, 75 Mo. 688; Gaty *v.* Vogel, 40 Mo. 553; Sturges *v.* Lackawanna, etc., R. Co., 27 N. J. L. 424.

**This allowance "is made for the trouble, care, and risk** of the officer in discovering and levying upon the property of the defendant, and its safe-keeping for the purpose of a sale and the securing the payment of the amount due." Sturges *v.* Lackawanna, etc., R. Co., 27 N. J. L. 424, 426 [*quoted* with approval in Morrow *v.* Rosentihl, 106 Ala. 198, 200, 17 So. 608].

**Assignment of judgment to defendant.**— The sheriff was entitled to such half commissions when, after a levy, but before sale, the judgment was assigned to defendant, who recalled the execution and settled the judgment. Gates *v.* Buck, 75 Mo. 688.

15. U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 10 So. 917 [*approved* in Morrow *v.* Rosentihl, 106 Ala. 198, 17 So. 608].

16. Morrow *v.* Rosentihl, 106 Ala. 198, 17 So. 608, so holding where the levy was sufficient to satisfy the claim of plaintiff in full.

17. Lofland *v.* Jefferson, 4 Harr. (Del.) 303.

18. Doliver *v.* Collingwood, 15 R. I. 510, 8 Atl. 711.

19. Ring *v.* Vogel Paint, etc., Co., 46 Mo. App. 374.

20. Woods *v.* Gibson, 6 Johns. (N. Y.) 125.

21. O'Brien *v.* Obel, 46 Misc. (N. Y.) 449, 92 N. Y. Suppl. 333.

are given to the sheriff, although the services may be rendered by a deputy;[22] but where a writ of habeas corpus is served upon the sheriff, the costs for such service belong to the officer by whom the writ is served and not to the sheriff.[23] Where the statute provides that a certain duty shall be performed by the police force of a city, and that deputy sheriffs shall not receive compensation for such service, the sheriff is not entitled to compensation for such service when performed by deputies.[24] Where a sheriff is allowed compensation by the county for the services of a bailiff, he is not entitled to make a further claim against the county for fees earned by the bailiff.[25]

**7. Services Outside of Official Duties.**[26] Where a sheriff or constable, in connection with the execution of a writ, performs services which are no part of his official duty, such services are performed in his private capacity and in order to recover therefor he must show an employment for the purpose;[27] and where a statute requires certain acts to be done but does not designate the person or officer who shall perform the service, a constable who renders the service is entitled to compensation, although none is specifically provided for by the statute.[28]

**8. Excessive Fees or Charges.**[29] The sheriff or constable will not be allowed to make excessive charges or to collect excessive fees;[30] but although the unlawful excess of fees charged by an officer for serving the writ of a prior attaching creditor, and taxed in the bill of costs, has absorbed the debtor's property to the injury of a subsequent attaching creditor, the latter can maintain no action against the officer for the injury.[31]

**9. Forfeitures[32] and Penalties.**[33] Under some statutes a sheriff who claims or exacts illegal or excessive fees forfeits his fees,[34] or subjects himself to a penalty.[35]

22. Sargent *v.* La. Plata County, 21 Colo. 158, 40 Pac. 366; Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 494; Chipman *v.* Wayne County, 127 Mich. 490, 86 N. W. 1024; Day *v.* New York, 66 N. Y. 592 [*reversing* 6 Hun 92]. But *compare* Locke *v.* Belknap County, 71 N. H. 208, 51 Atl. 914, holding that under Pub. St. c. 287, § 20, providing that jailers shall be entitled to fifty cents for receiving a prisoner into custody and discharging him, a deputy jailer appointed by the sheriff, who, under Pub. St. c. 282, § 3, has the legal custody of the prisoner in the sheriff's absence or disability, and who performs the sheriff's duties of receiving and discharging prisoners, is entitled to the fees therefor, instead of the sheriff, so far as the sheriff is concerned.

23. Geissinger *v.* Huntingdon County, 3 Pa. Co. Ct. 106.

24. Chipman *v.* Wayne County, 127 Mich. 490, 86 N. W. 1024.

25. State *v.* Welsh, 109 Iowa 19, 79 N. W. 369.

26. Duties of sheriff or constable see *supra*, III.

27. Colorado Mortg., etc, Co. *v.* Messemer, 12 Colo. App. 361, 55 Pac. 611.

28. Early *v.* Luzerne County, 7 Kulp (Pa.) 512.

29. Recovery back of excessive payments see *infra*, IV, G, 1.

30. Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050, (App. 1897) 50 Pac. 1076; Chase *v.* De Wolf, 69 Ill. 47 (holding that a charge of eighty-five dollars for replevying one or two express wagon loads of goods — such charge amounting to almost one half the value of the goods — should not be allowed); Feusier *v.* Virginia City, 3 Nev. 58 (holding that in an action by a sheriff against a city for services and fees, he cannot justify extortionate fees by evidence that he was directed by the city attorney to follow the revenue law in making the service of summons and notice of sale, and that he followed the custom of other officers in performing unnecessary services in order to charge therefor).

31. Turner *v.* Norris, 35 Me. 112, so holding on the ground that the subsequent attaching creditor had, under the statute, the right to become a party to the prior attachment suit, and as he did not do so the judgment in that suit was conclusive of its own correctness so long as it remained unreversed.

32. See, generally, Forfeitures, 19 Cyc. 1355.

33. See, generally, Penalties, 30 Cyc. 1331. Amercement of sheriff or constable generally see *infra*, IX.

34. Ware *v.* Wilson, 22 La. Ann. 102.

35. *Colorado.*— Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050, (App. 1897) 50 Pac. 1076.

*Connecticut.*— Littlefield *v.* Cowles, 74 Conn. 241, 50 Atl. 737; Stoddard *v.* Couch, 23 Conn. 238.

*Massachusetts.*— Shattuck *v.* Woods, 1 Pick. 171.

*Michigan.*— Peck *v.* City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

*Nebraska.*—O'Shea *v.* Kavanaugh, 65 Nebr. 639, 91 N. W. 578, holding that the fact that a litigant against whom the sheriff has collected fees not authorized by law has a remedy by a motion to retax costs does not deprive him of his right to proceed against the

The right of action for the statutory penalty for charging excessive fees is usually limited to the person against whom such fees were charged.[36] Where, in an action against an officer to recover a statutory penalty because of illegal fees charged, the complaint alleged that several writs were served at the same time, the fees charged for each service being illegal, and that defendant received in payment of his fees a certain sum, it was not demurrable, as stating several causes of action in one count.[37] A statute providing that sheriffs shall forfeit their fees whenever they return a paper or process into court without indorsement thereon of the fees claimed by them applies only to fees accruing on any process or paper returned into court.[38] The fact that an officer has been guilty of an impropriety in connection with the discharge of an official duty does not necessarily deprive him of his right to his fees.[39]

**10. Right of De Facto Officer.** One who is only a sheriff *de facto* has no right to the emoluments of the office for the time he occupies the same, as against one who during such period was the sheriff *de jure*;[40] and one who assumes the office of sheriff, being constitutionally ineligible, cannot recover compensation from the county for his services, although he was apparently well elected, and was permitted to serve without any proceedings of ouster.[41]

**11. Rights of Deputies, Assistants, and Substitutes.** Deputy sheriffs are

sheriff and his bondsmen, under Comp. St. c. 28, § 34, for the recovery of the fifty dollars penalty therein provided.

*New Hampshire.*— Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679; McClure *v.* Locke, 61 N. H. 14.

*Vermont.*— Johnson *v.* Burnham, 22 Vt. 639.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 57, 340.

**A charge of the maximum fee allowed by law,** although excessive in the particular case, does not subject the sheriff to a penalty. Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050, (App. 1897) 50 Pac. 1076.

**The fact that one has paid the sum demanded** without pointing out the particular items of illegal charge is no waiver of his right to exact the penalty therefor. McClure *v.* Locke, 61 N. H. 14.

**Construction of statutes.**—An officer is not, under the statutes of Dec. 6, 1796, and June 13, 1813, liable to a penalty for taking fees on account of services for which no fees are enumerated in the statutes, but only when he takes more than the prescribed amount for services to which fees are fixed by the statutes. Walker *v.* Ham, 2 N. H. 238. Rev. St. (1849) tit. 49, § 23, imposing a penalty on any officer who indorses on a writ, or demands and receives, more than his legal fees, is a penal act relating to civil suits only, and hence a constable who arrested defendant, charged with the commission of a riot, was not liable thereunder for an excessive charge of fees. Stoddard *v.* Couch, 23 Conn. 238.

36. Littlefield *v.* Cowles, 74 Conn. 241, 50 Atl. 737.

**Recovery of fees paid from adverse party.** — An officer who charges a greater amount of fees than is allowed by law for serving a writ, and who receives the amount so charged from plaintiff in that suit, while that suit is pending in court, is liable to plaintiff, from whom he so receives payment, for the penalty imposed by statute for receiving illegal fees, notwithstanding plaintiff has subsequently obtained judgment in his favor, in the suit in which the fees were charged, and the fees as charged by the officer have been taxed in the bill of costs and paid to the attorney of plaintiff by defendant in that suit. Johnson *v.* Burnham, 22 Vt. 639.

37. Littlefield *v.* Cowles, 74 Conn. 241, 50 Atl. 737.

38. Smardon *v.* Green, 10 La. Ann. 701, holding that therefore a sheriff's charges for keeping property are not forfeited by failure to return the amount thereof into court.

39. Thompson *v.* Wiley, 200 Me. 479, holding that where defendant in an action of scire facias against him as bail procured a constable to attend the court to receive the principal on his being surrendered by the bail, such constable was not deprived of his right to recover his legal fees of defendant because he was guilty of an impropriety in detaining the principal for a day or two.

40. McCue *v.* Wapello County, 56 Iowa 698, 10 N. W. 248, 41 Am. Rep. 134.

**The rightful officer can recover** from the *de facto* officer the fees and perquisites received by him while in office, after deducting the necessary expenses of earning the same. Bier *v.* Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17.

**If the action is brought more than five years after the intrusion commenced** but within less than that time before it ended, plaintiff may recover the profit of office received within five years before the action was commenced, but not profits received more than five years before that time. Bier *v.* Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17.

41. Matthews *v.* Copiah County, 53 Miss. 715, 24 Am. Rep. 715, where it is said that by bringing suit against the county plaintiff put his title in issue.

entitled to compensation for their services,[42] which is sometimes fixed by statute,[43] or left to be determined by the county commissioners[44] or the county court,[45] subject to a limit as to amount,[46] but is also sometimes fixed by private contract between the sheriff and the deputy.[47] Where the statute allows no fees or a deputy sheriff a person who is appointed a deputy sheriff, without any contract with the sheriff as to his compensation, can recover from the sheriff the reasonable value of services performed, on a *quantum meruit*;[48] but persons summoned by the sheriff under his authority to summon the power of the county[49] are not deputies, and the sheriff is not liable to them for compensation.[50] To entitle persons summoned to attend a circuit court or court of oyer and terminer as marshals or constables to their fees, it is enough that they are summoned and attending, ready to perform their duties as marshals or constables.[51] Where the statute gives the sheriff no fee for a particular service, a deputy who performs such service can claim no compensation;[52] and under a statute prohibiting the payment to an officer of constructive fees, or fees not specifically allowed by law, where a sheriff, who is obliged to act as bailiff of the circuit court, appoints one of his regular deputies to so act, such deputy is not entitled to pay from the county

42. Philips *v.* Christian County, 87 Ill. App. 481.

**A special deputy sheriff,** appointed for a year to preserve the peace, is "a civil officer," within a statute allowing such officers a certain sum in the bill of costs for arresting and prosecuting to conviction any of the offenses therein enumerated. Reves *v.* State, 11 Lea (Tenn.) 124.

**The fees earned by a deputy sheriff while the office of sheriff** is vacant by reason of the death, resignation, or removal of the incumbent, belong to the deputy himself, and neither the representatives of the late sheriff nor the newly appointed sheriff have any right or claim thereto. McKellar *v.* Henderson, 27 Grant Ch. (U. C.) 181.

**Attendance at court.**—Where the judge of the superior court requires the sheriff and all his deputies to attend upon the sessions of that court, and the sheriff has been paid for such services the amount fixed by statute, the deputies have no claim, either in their own names or in the name of the sheriff, against the county for the services thus rendered. Floyd County *v.* Foster, 112 Ga. 133, 37 S. E. 90.

**The fact that the executive calls out a part of the military force** of the state for the preservation of the peace in the same exigencies under which a special deputy is enrolled, and under which he is compelled to perform like services, furnishes no reason why he should not recover from the county for the time served by him during which the militia are called out. Philips *v.* Christian County, 87 Ill. App. 481.

**Overtime work.**—A special deputy sheriff appointed under the Illinois act of June 16, 1887, cannot recover for overtime under the eight-hour law. Philips *v.* Christian County, 87 Ill. App. 481.

43. Christine County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479 [*affirming* 92 Ill. App. 428]; Henry *v.* Yamhill County, 37 Oreg. 562, 62 Pac. 375.

44. Hogan *v.* Cascade County, 36 Mont. 183, 92 Pac. 529, holding that Laws (1905), p. 164, did not create a new class of deputies or authorize the sheriff to appoint deputies to act as jailers and to fix their salaries without the consent or approval of the commissioners.

45. Henry *v.* Yamhill County, 37 Oreg. 562, 62 Pac. 375.

**Where a constable is appointed as special bailiff** to summon talesmen, his compensation is to be fixed by the court at a just and reasonable amount in view of the time employed and his traveling expenses, and he is not entitled to the fees allowed by law to a sheriff for that service. Carroll *v.* Durham, 219 Ill. 64, 76 N. E. 78.

46. Hogan *v.* Cascade County, 36 Mont. 183, 92 Pac. 529.

47. Bale *v.* Mudd, 63 S. W. 451, 23 Ky. L. Rep. 594; Falls *v.* Powell, 20 Grant Ch. (U. C.) 454; Fraser *v.* Fraser, 11 U. C. Q. B. 109.

**Adjustment of accounts under contract for division of fees** see Bale *v.* Mudd, 63 S. W. 451, 23 Ky. L. Rep. 594.

**Construction of agreement for division of fees** see Fraser *v.* Fraser, 11 U. C. Q. B. 109.

**Change in duties as affecting compensation.** —Where a sheriff appoints a deputy at a stipulated compensation, and the latter executes a bond to the sheriff reciting that the deputy is to act as such during the sheriff's term, the acceptance of such bond by the sheriff constitutes a contract between him and the deputy, and the latter, having performed his duties during the sheriff's entire term, is entitled to his stipulated compensation, although a part of the duties originally assigned to him were taken away from him by the sheriff. Davis *v.* Baker, 45 W. Va. 455, 32 S. E. 239.

48. Mayfield *v.* Moore, 139 Ala. 417, 36 So. 21.

49. See *supra*, II, C, 13.

50. Power *v.* Douglas County, 75 Nebr. 734, 106 N. W. 782.

51. People *v.* Green, 64 Barb. (N. Y.) 493.

52. Day *v.* New York, 66 N. Y. 592 [*reversing* 6 Hun 92].

for his services.[53] But a deputy sheriff may receive compensation for furnishing evidence which leads to the conviction of persons implicated in the commission of a crime, when he had no legal duty to perform by virtue of his office, and the offense was committed and the trial had out of his county.[54] Where the statute limits the portion of the fees for travel and services which a sheriff may demand and receive from his deputies, a bond from the deputy to the sheriff, conditioned to pay over a larger amount of such fees, is void;[55] but under such a statute a sheriff may take the bond from his deputy, conditioned to pay over the portion allowed by law of all fees that he shall receive.[56] An elisor appointed to execute powers and orders of the court is invested with the powers, duties, and responsibilities of the sheriff in the performance of such duties, and is entitled to the compensation allowed the sheriff for performing such duties, when he demands the same.[57] Where the statute limits the power of a sheriff in the selection of attendants upon courts of oyer and terminer to a selection from the existing constables and marshals, one not at the time either constable or marshal, who is appointed by the sheriff "a special deputy sheriff to assist in preserving the public peace, to attend the Court of Oyer and Terminer," cannot recover from the county compensation for his attendance upon the court under such appointment, although the statute gives compensation to constables or marshals for attending court.[58] One appointed to attend on a criminal court for which he is paid a *per diem* is not entitled to the fees allowed sheriffs for summoning special juries.[59]

**12. Unnecessary Services.** A sheriff who in the performance of a duty does more than is necessary will not be allowed fees for the extra and superfluous services;[60] but as a constable is required to execute all the warrants that come into his hands, he is entitled to compensation for each that he executes, and is not responsible if the magistrate unduly multiplies warrants.[61]

**13. Contract Making Payment of Fees Contingent on Success of Litigant.** A contract by which the payment of a sheriff's fees is made to depend upon the contingency of success in the proceedings in which he is employed is void as contrary to public policy.[62]

**14. Fees Erroneously Charged and Included in Judgment.** The facts that a sheriff has erroneously charged a fee to which he is not entitled and that the same has been included in the judgment do not entitle the sheriff to recover the amount from plaintiff,[63] even though the amount has been collected from defendant.[64]

**15. Statement or Return of Items.** Under some statutes a sheriff cannot recover fees if he neglects or refuses, when required, to furnish a bill of particulars,[65]

53. Logan County *v.* Roady, 56 Ark. 581, 20 S. W. 519.

54. Harris *v.* More, 70 Cal. 502, 11 Pac. 780.

55. Farrar *v.* Barton, 5 Mass. 395.

56. Mattoon *v.* Kidd, 7 Mass. 33.

57. Griffith *v.* Montandon, 4 Ida. 75, 35 Pac. 704.

58. Day *v.* New York, 66 N. Y. 592 [*reversing* 6 Hun 92].

59. Brantly *v.* State, 4 Baxt. (Tenn.) 307.

60. Ft. Smith Sewer Dist. No. 1 *v.* Ft. Smith School Dist., 70 Ark. 59, 66 S. W. 152 (holding that where sixty-six tracts of land owned by one party were joined in the same proceeding, and sixty-six copies of the complaint were served on the owner, the sheriff was entitled to but one fee therefor, service of one copy only being necessary in such case); Feusier *v.* Virginia City, 3 Nev. 58; Com. *v.* Murr, 7 Pa. Dist. 685; Com. *v.* Clark, 7 Pa. Dist. 683; Com. *v.* Milley, 7 Pa. Dist. 680.

A custom of other officers to perform unnecessary services in order to charge therefor cannot justify such a charge. Feusier *v.* Virginia City, 3 Nev. 58.

61. Davison *v.* Franklin County, 18 Pa. Co. Ct. 374.

62. Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

63. Miesen *v.* Ramsey County, 101 Minn. 516, 112 N. W. 874.

64. Steenerson *v.* Polk County, 68 Minn. 509, 518, 71 N. W. 687, where it is said: "If the fees were illegal, the plaintiff [sheriff] is not entitled to them, whether paid or not; and, if they were not properly and legally taxed and inserted in the judgment, and hence paid by the defendants, that is no concern of the plaintiff, but of the defendants named in the warrants."

65. Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

A person indebted for fees may waive such itemized statement.—Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

or the officer's right to fees upon mesne or final process is made to depend on his returning upon the process the particular items of his charges.[66]

**B. Subjects of Compensation or Reimbursement — 1. Service of Process, Notices, Etc.[67] — a. In General.** A sheriff or constable is as a rule allowed compensation for the service and return of process, notices, and the like.[68]

**b. Service of Same Process or Writ on Several Persons.** Where a sheriff is required to serve the same process or writ on a number of persons, he is entitled to his statutory fee for each individual served,[69] and not merely to one fee for service upon all;[70] and the fact that he is unable to serve all does not deprive him of his right to his fees for the services which he has made.[71]

**c. Unsuccessful Attempts to Serve Process.** The statutes sometimes allow a sheriff compensation for endeavoring to serve process, although he is unable to find and serve the party;[72] but in the absence of some such provision the sheriff is entitled to no fees for unsuccessful attempts to serve process.[73]

**2. Arrest, Keeping, and Transportation of Prisoners in Civil Proceedings[74] — a. In General.** A sheriff or constable is usually allowed compensation for his official services in executing a warrant of arrest,[75] or commitment,[76] or arresting a debtor and committing him to prison under a body execution,[77] or

66. Van Etten *v.* Selden, 36 Nebr. 209, 54 N. W. 261.

67. Process generally see Process, 32 Cyc. 412.

Notice generally see Notice, 29 Cyc. 1110.

Compensation for service or levy and return of process against property see *infra*, IV, B, 6.

68. McMichael *v.* Southern R. Co., 117 Ga. 518, 43 S. E. 850 (holding that on service of a writ in certiorari the sheriff is entitled to a fee of two dollars); Wilmarth *v.* Knight, 14 Gray (Mass.) 112; Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679; McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423; Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987].

Service of writ in trustee process.—The execution of the command in a trustee writ to summon the trustee, although creating an attachment of defendant's property in the trustee's possession, is a service of process on the trustee, which entitles the sheriff to the fee allowed by statute. Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

Services in causes tried before same jury.—On several warrants on complaints which the law requires to be tried by the same jury, the fees of the sheriff for the service, and for summoning jurors and notifying the parties and his compensation for presiding at the trial, are to be the same as if there had been one warrant. Wilmarth *v.* Knight, 14 Gray (Mass.) 112.

No fee for return of "not found" on subpœna in chancery.—Oatts *v.* Jones, 12 B. Mon. (Ky.) 49.

No fee chargeable for serving papers not requiring an answer.—Erwin *v.* Martin, 2 Wend. (N. Y.) 250.

69. Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987, and *followed* in McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423; Barron *v.* Lackawanna, 7 Pa. Super. Ct. 124; McKniff *v.* Delaware, 7 Pa. Super. Ct. 123]; Moore *v.* McClure, 26 Tex. Civ. App. 459, 64 S. W. 810.

70. Moore *v.* McClure, 26 Tex. Civ. App. 459, 64 S. W. 810.

71. Moore *v.* McClure, 26 Tex. Civ. App. 459, 64 S. W. 810.

72. Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166.

73. Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166.

74. See, generally, Arrest, 3 Cyc. 867.

75. Davison *v.* Franklin County, 18 Pa. Co. Ct. 374.

76. Davison *v.* Franklin County, 18 Pa. Co. Ct. 374. See also Thomas *v.* St. Louis County, 61 Mo. 547.

Commitment by sheriff.—Wagner St. p. 626, § 14, allowing sheriffs a fee "for committing any person to jail," relates to the execution of a warrant issued by an officer exercising judicial functions, and does not contemplate cases where the prisoner is arrested under a capias, and, in default of bail, is committed by the sheriff to the county jail. Thomas *v.* St. Louis County, 61 Mo. 547.

77. *Maryland.*— Stewart *v.* Dorsey, 3 Harr. & M. 401.

*Mississippi.*—Bourdeaux *v.* Warren County, 66 Miss. 231, 5 So. 227.

*New Hampshire.*— Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446.

*New York.*— Scott *v.* Shaw, 13 Johns. 378; Adams *v.* Hopkins, 5 Johns. 252.

*Virginia.*— Gardner *v.* Neal, 9 Gratt. 85.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 60.

The fact that the execution is subsequently countermanded by the legislature does not defeat the sheriff's right to his poundage fees. Stewart *v.* Dorsey, 3 Harr. & M. (Md.) 401.

Violation of privilege.— A sheriff is not entitled to any fees where he arrests a person on a capias ad satisfaciendum while such person is privileged from arrest, such service

making an arrest under an attachment issued against a person charged with contempt.[78]

**b. Safe-Keeping and Transportation.** Where a sheriff necessarily incurs expense in the safe-keeping and transportation of a debtor arrested under an execution, he is entitled to be reimbursed therefor.[79] But it has been held that, in the absence of statutory provision, a sheriff is not entitled to mileage, in addition to his own travel, for conveying a witness under arrest to a magistrate's office, and from thence to jail.[80]

**c. Erroneous Detention of Prisoner.** Where defendant in an action of scire facias against him as bail has procured a constable to attend the court to receive the principal surrendered by the bail, errors on the part of the officer in detaining the principal will not deprive him of his right to his legal fees.[81]

**d. Arrest or Commitment of Several Persons on Same Process.** It has been held that a sheriff or constable is entitled to but a single fee for executing a warrant of arrest, although two or more persons are named therein;[82] but that he is entitled to the statutory fee for each person committed where more than one is named in the commitment.[83] Where several persons are named in an attachment the sheriff is entitled to his fee for each person attached.[84]

**e. Arrest of Same Person on Several Writs.** Where, on the same date, two attachments, in different suits, issued to the sheriff, each for the same persons, who had neglected to appear as witnesses, and separate returns were made thereon, they having been served at different dates, and the witnesses produced at different times, it was held that the sheriff is entitled to his fees in each case for attaching each person named in the attachment and mileage on each writ.[85]

**f. Vacation of Writ.** It has been held that a sheriff is not entitled to poundage upon vacation of an execution against the person issued after failure to collect the money after an execution against property.[86]

**3. Services in Criminal Proceedings**[87] **— a. In General.** Sheriffs and constables are usually allowed compensation for their services in criminal proceed-

being irregular, void, and of no effect. Wragg *v.* Swart, 10 Johns. (N. Y.) 93.

**Sheriff not entitled to poundage unless judgment paid.**— Bowe *v.* Campbell, 63 How. Pr. (N. Y.) 167; Milne *v.* Davis, 2 Binn. (Pa.) 137.

**Surrender of defendant by bail.**—Where a capias ad satisfaciendum was delivered with instructions to return it "*non est inventus*" after four days, and the bail in the meantime surrendered defendant into the custody of the sheriff, he was entitled to poundage. Gillespie *v.* Nickerson, 1 Ont. Pr. 305.

**The death of the judgment debtor while in custody** does not entitle the sheriff to poundage. Flack *v.* State, 95 N. Y. 461 [*affirming* 29 Hun 286].

**Discharge of defendant.**—Where a defendant was taken under a capias ad satisfaciendum, and discharged from custody on the ground that no previous fieri facias had been issued on the judgment, there being special bail in the action, the sheriff was entitled to his poundage, as he had incurred the risk of being made liable for an escape, in an action in which he could not avail himself of the irregularity as a defense. Scott *v.* Shaw, 13 Johns. (N. Y.) 378. See also Hinman *v.* Brees, 13 Johns. (N. Y.) 529.

78. Smith *v.* Birdsall, 9 Johns. (N. Y.) 328, holding that a sheriff is entitled to his reasonable fees and expenses for arresting a former sheriff on an attachment for a contempt in not returning process.

79. Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446.

80. Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214.

81. Thompson *v.* Wiley, 20 Me. 479.

82. McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423 [*reversing* on other grounds 19 Pa. Co. Ct. 449, and *distinguishing* Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 (*affirmed* in 189 Pa. St. 95, 41 Atl. 987)]; Keller *v.* Clinton County, 4 Pa. Dist. 216; English *v.* Tioga County, 21 Pa. Co. Ct. 340; Davison *v.* Franklin County, 18 Pa. Co. Ct. 374; Deihl *v.* Dauphin County, 18 Pa. Co. Ct. 146; Woomer *v.* Clearfield County, 17 Pa. Co. Ct. 665; Humer *v.* Cumberland County, 16 Pa. Co. Ct. 552.

83. Wilhelm *v.* Fayette County, 168 Pa. St. 462, 31 Atl. 1009; McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423 [*reversing* 19 Pa. Co. Ct. 449]; Davison *v.* Franklin County, 18 Pa. Co. Ct. 374.

84. Crippen *v.* Lackawanna County, 3 Lack. Leg. N. (Pa.) 138.

85. Crippen *v.* Lackawanna County, 3 Lack. Leg. N. (Pa.) 138.

86. O'Brien *v.* American Surety Co., 88 N. Y. App. Div. 526, 85 N. Y. Suppl. 316.

87. See, generally, Criminal Law, 12 Cyc. 70.

ings,[88] but, in accordance with the general rule on the subject,[89] they are entitled to fees for such services only in criminal proceedings as the statutes provide compensation for,[90] and for services for which no compensation is provided no fees can be collected.[91] Where the statute allows sheriffs a sum not exceeding a certain amount per annum from the county for services in criminal cases of a certain class, they are not entitled to any other compensation in such cases.[92] Where the statute allows compensation to a sheriff for assistance in executing a commitment to the state prison, only when he has a certificate of necessity therefor, a county board has no authority to make such allowance otherwise.[93] The failure of a prosecution because the law under which it was instituted had expired or been repealed before the prosecution was commenced cannot affect the right of the sheriff to his costs.[94]

**b. Arrest** [95] — (i) *IN GENERAL.* The making of arrests is a service for which sheriffs and constables are ordinarily allowed compensation.[96] If a warrant of arrest in a criminal action is regular and valid on its face, the sheriff or constable is bound to serve it, and may collect his fees from the county for so doing, notwithstanding any knowledge of his own as to matters affecting the validity

88. See State *v.* Heege, 40 Mo. App. 650; Com. *v.* Taylor, 5 Pa. Co. Ct. 510, holding that under the act of April 2, 1868, entitling the sheriff to a fee on indictment in every capital case, and also a certain fee in every other criminal case, the sheriff is entitled to costs in every criminal case, except capital cases, although no indictment has been drawn.

**A town constable or marshal** appointed by municipal authorities, under authority of the town charter, is entitled to the same costs in criminal prosecutions in such towns, under the state laws, as an ordinary constable is entitled to. State *v.* Heege, 40 Mo. App. 650.

89. See *supra*, IV, A, 1.

90. McHenry *v.* Hot Spring County, 57 Ark. 565, 22 S. W. 175; Wagener *v.* Ramsey County, 76 Minn. 368, 79 N. W. 166 (holding that the only compensation to which the sheriff of Ramsey county is entitled for bringing prisoners into the municipal court of the city of St. Paul, for final trial in that court, charged with offenses against the laws of the state or against the city ordinances, is that covered by his *per diem* fees for attending said court); State *v.* Mason, 82 Mo. App. 239.

91. Thomas *v.* Scott County Com'rs, 15 Minn. 324; State *v.* Mason, 82 Mo. App. 239 [*following* State *v.* Brown, 146 Mo. 401, 47 S. W. 504] (holding that the sheriff was not entitled to collect fees for attending the St. Louis circuit court in criminal business or for summoning juries to serve therein); Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].

92. Culbertson *v.* Jefferson County Com'rs, 1 Greene (Iowa) 416; Ross County *v.* State, 49 Ohio St. 373, 34 N. E. 735. But *compare* Parker *v.* Robertson, 14 La. Ann. 249, holding that Act (1855), § 15, which gave the sheriffs one hundred dollars per annum as compensation for their services in criminal cases, did not intend this sum as their sole compensation.

93. Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

94. Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

95. See, generally, ARREST, 3 Cyc. 867.

96. *Alabama.*— Trapp *v.* State, 122 Ala. 394, 25 So. 194.

*California.*— Dyer *v.* Placer County, 90 Cal. 276, 27 Pac. 197.

*Michigan.*— Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

*Minnesota.*— Dean *v.* Renville County, 50 Minn. 232, 52 N. W. 650.

*Pennsylvania.*— Hays *v.* Cumberland County, 5 Pa. Super. Ct. 159 [*affirmed* in 186 Pa. St. 109, 40 Atl. 282].

*Wisconsin.*— Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 62.

**A constable of the city of Detroit,** being a common-law peace officer, and having power to execute criminal process of the justices of the peace of such city for offenses committed in the county of Wayne outside of the city, is entitled to compensation for the arrest of parties charged to have committed crimes outside of the city and in Wayne county, partly subject to trial by a justice of the peace and partly beyond his trial powers. Allor *v.* Wayne County, 43 Mich. 76, 4 N. W. 492.

**Arrest outside of state.**—A constable who, having a warrant for the arrest of a criminal, pursues him into another state under directions of the prosecuting attorney, and arrests him therein and leaves him there until he returns and obtains a requisition, and then brings him back to the county, cannot recover for his services and expenses, since the arrest in another state was a violation of both public and private rights, nor can a promise to pay therefor be implied. Smith *v.* Portage County, 9 Ohio 25.

**No extra allowance can be made for serving** a warrant of arrest. Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

**Fraudulently evading or attempting to evade payment of railroad fare is a public** offense within a statute allowing compensa-

of the proceedings;[97] but such an officer is not entitled to fees for making an arrest under a criminal process which states no offense and is therefore void on its face.[98] Constables have been held not entitled to fees for arresting vagrants, disorderly persons, or incorrigible children, where the persons arrested were not committed.[99]

(II) *ARREST OF PERSON AGAINST WHOM SEVERAL WARRANTS ISSUED.* Where a sheriff arrests a person against whom he holds several warrants he is entitled to but a single fee and not to a fee for each warrant.[1]

(III) *ARREST OF SEVERAL PERSONS UNDER ONE WARRANT.* Under a statute allowing a certain fee for executing a warrant on behalf of the state, a constable is entitled to but a single fee for executing a warrant of arrest regardless of the number of persons named therein.[2]

(IV) *VOLUNTARY RETURN OF FUGITIVE FROM JUSTICE.* Under some statutes a sheriff is not entitled to compensation for the apprehension and voluntary return of fugitives from justice from without the state, unless authorized in writing by the district attorney, certifying that the ends of justice will thereby be subserved.[3]

(V) *SEARCH FOR PERSONS NOT FOUND.* A sheriff is not entitled to a fee for an unsuccessful search for a witness or a person charged with crime under a warrant of arrest lodged in his office.[4]

(VI) *PURSUIT OF PERSONS CHARGED WITH CRIME.* The statutes sometimes allow a sheriff compensation for the time occupied and the necessary expense incurred in the pursuit of a person accused of felony and who has escaped from custody or pursuit without fault or negligence of the sheriff;[5] and under a statute authorizing the county board to defray the expenses of any person aiding in the pursuit or arrest of persons accused of felony, the board may, in its discretion, pay the sheriff for expenses incurred by him in capturing and returning to the county persons charged with felony.[6]

**c. Procuring Backing of Warrant.** A constable has been held entitled to reimbursement of the sum paid the justice of another county for backing a warrant.[7]

**d. Transportation of Prisoners.** Compensation is usually allowed for trans-

tion for arresting persons charged with a public offense. Dyer *v.* Placer County, 90 Cal. 276, 27 Pac. 197.

**Money paid by the sheriff to a third person for finding defendant's hiding place** is not within the class of fees and compensations allowed by the statute. Rockwell *v.* Monroe County, 10 Iowa 591.

**97.** Dean *v.* Renville County, 50 Minn. 232, 52 N. W. 650.

**98.** Dean *v.* Renville County, 50 Minn. 232, 52 N. W. 650.

**99.** Price *v.* Lancaster County, 24 Pa. Co. Ct. 225.

**1.** McHenry *v.* Hot Spring County, 57 Ark. 565, 567, 22 S. W. 175, where it is said: "He could not have lawfully arrested him more than once, without setting him at liberty, or his escape, neither of which, it appears, occurred."

**2.** Woomer *v.* Clearfield County, 5 Pa. Dist. 362; Humer *v.* Cumberland County, 4 Pa. Dist. 588, 16 Pa. Co. Ct. 552; Keller *v.* Clinton County, 4 Pa. Dist. 216; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225 [*following* McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423]; English *v.* Tioga, 21 Pa. Co. Ct. 340; Deihl *v.* Dauphin County, 18 Pa. Co. Ct. 146 (the words "for each defendant" in a corresponding clause of an earlier statute having been omitted in the later); Com. *v.* Lloyd, 9 Kulp (Pa.) 48.

**There is but one warrant where several are jointly charged** with a crime whether such warrant be made out on one piece of paper for all or on a separate piece of paper for each. Deihl *v.* Dauphin County, 18 Pa. Co. Ct. 146.

**3.** Douglas Co. *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

**4.** Thomas *v.* Scott County Com'rs, 15 Minn. 324; *Ex p.* Wyles, 1 Den. (N. Y.) 658; Whittle *v.* Saluda County, 56 S. C. 505, 35 S. E. 203 (holding that Rev. St. § 2561, providing that the sheriff shall be entitled to a certain fee for every search for persons or goods not found, and return on the execution of *non est inventus* or *nulla bona* applies only to a civil execution); Green *v.* Anderson County, 56 S. C. 411, 34 S. E. 691 (holding that Rev. St. § 2561, does not relate to process issued by a magistrate). But *compare* Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

**5.** Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

**6.** La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

**7.** McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423.

porting prisoners to the place where they are to be confined,[8] or bringing to court and producing as witnesses persons confined in the penitentiary;[9] and in the absence of fraud, county commissioners cannot, on the presentation of a sheriff's bill of expenses, question his exercise of discretion in taking prisoners separately to the reformatory.[10] The sheriff is also entitled to be reimbursed for traveling expenses in transporting prisoners,[11] and the amount paid for necessary guards[12] and help.[13] A sheriff is sometimes allowed compensation for his official services in bringing a prisoner who is confined in jail into court for trial[14] and returning

8. *California.*— Dyer *v.* Placer County, 90 Cal. 276, 27 Pac. 197.
*Illinois.*— Goodell *v.* Townsend, 13 Ill. 600.
*Iowa.*— Bringolf *v.* Polk, 41 Iowa 554.
*Michigan.*— Hursley *v.* Auditor-Gen., 90 Mich. 439, 51 N. W. 530.
*Ohio.*— Ketter *v.* Scioto County, 29 Ohio Cir. Ct. 149.
*Oregon.*— Crossen *v.* Earhart, 8 Oreg. 370.
*Pennsylvania.*— Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911; Yordy *v.* Lebanon County, 4 Pa. Co. Ct. 162.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 64.

**The sheriff is entitled to a per diem compensation only,** together with mileage and expenses for removing convicts to the penitentiary, without regard to the number of convicts removed. Yordy *v.* Lebanon County, 4 Pa. Co. Ct. 162, so holding under the Pennsylvania fee bill of 1868.

**Money paid by the sheriff to a third person for conveying the prisoner** to the place of custody is not within the class of fees and compensations allowed by the statute. Rockwell *v.* Monroe, 10 Iowa 591.

**Unless provided by statute** a sheriff or constable cannot hold a county liable for the transportation of prisoners arrested by him. McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423, holding that a statute allowing such officers "the expenses of removing any person charged with having committed an offense in one county into another county" does not apply to the transportation of a prisoner arrested in one county on a warrant issued by a justice of the peace of another county. Neither is a sheriff entitled to be reimbursed out of the state treasury for the cost of transporting to another county a witness in a criminal case charged with contempt where the statute makes no provision therefor. Suter *v.* Stone, 108 Ky. 518, 56 S. W. 971, 22 Ky. L. Rep. 224. In the absence of statute a county is not liable for the expense of taking a prisoner from the place of confinement to a justice's office for further hearing, but even without statutory authority a county may be held liable to a constable for the car-fare of a prisoner brought up on commitment. Long *v.* Northumberland County, 20 Pa. Co. Ct. 70.

9. Bringolf *v.* Polk County, 41 Iowa 554.

10. Rio Grande County *v.* Hobkirk, 13 Colo. App. 180, 56 Pac. 993.

11. *Arizona.*— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430, excluding personal expenses of sheriff.
*Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.
*Iowa.*— Bringolf *v.* Polk County, 41 Iowa 554.
*Pennsylvania.*— Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911; Stryker *v.* Lycoming County, 20 Pa. Super. Ct. 345; Com. *v.* Lloyd, 9 Kulp 48; Shrope *v.* Northampton County, 3 Lanc. L. Rev. 123.
*South Carolina.*— Carson *v.* Sumter County, 32 S. C. 121, 10 S. E. 875; Taggart *v.* Hutson, Rice 300.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 64.

**Prisoner arrested in another county.**— Under the Pennsylvania act of Feb. 17, 1899, providing that, in addition to a fixed fee for each defendant, the constable shall receive for conveying defendants to jail the actual cost of transportation, a constable is entitled to recover from a county a sum which he has paid for railroad fare of a prisoner whom he has arrested in another county and brought back and lodged in jail. Stryker *v.* Lycoming County, 20 Pa. Super. Ct. 345.

**Horse hire** may be allowed. Taggart *v.* Hutson, Rice (S. C.) 300.

**Where a sheriff is entitled to receive a fixed salary in lieu of all fees and compensation** for services within the county, except for keeping and maintaining prisoners in the county jail, an allowance and payment to him of bills for street car and railway fare of prisoners in transporting them to and from the county jail, workhouse, and courts, is illegal. Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

**Where a constable goes into another county** and makes an arrest, and conveys the prisoner to the county where the warrant was issued, he is entitled to payment of the prisoner's railroad fare by the latter county. Com. *v.* Lloyd, 9 Kulp (Pa.) 48.

12. Bringolf *v.* Polk County, 41 Iowa 554; Taggart *v.* Hutson, Rice (S. C.) 300.

13. Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911.

**A statute allowing the sheriff a sum for "necessary help and expenses"** covers reasonable help and expenses in transporting and delivering convicts to the penitentiary. Lenhart *v.* Cambria County, 29 Pa. Super. Ct. 350 [*affirmed* in 216 Pa. St. 25, 64 Atl. 876].

**Reasonableness of charges a question for jury.**— Lenhart *v.* Cambria County, 29 Pa. Super. Ct. 350 [*affirmed* in 216 Pa. St. 25, 64 Atl. 876].

14. Sapp *v.* Rozar, 70 Ga. 722; Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Kottcamp *v.* York County, 28 Pa. Super. Ct. 96. See also Roberson *v.*

him,[15] but he is not entitled to a fee for each time he may conduct the prisoner to and from jail pending his trial.[16] In other jurisdictions a sheriff is not entitled to any fees for bringing defendant in a criminal case into court during the trial.[17] Under some statutes it is held that the mileage allowed for transporting prisoners is intended as full compensation for the time and personal expenses of the officer, and no further allowance can be made.[18]

**e. Commitment and Discharge of Prisoners** — (I) *In General.* Sheriffs and constables are usually entitled to fees for the commitment of persons placed under arrest,[19] and for discharging prisoners from the jail.[20] But a sheriff is not entitled to a fee for merely arraigning prisoners;[21] and a constable is not entitled to a commitment fee where the hearing is merely adjourned, and defendant is detained in custody.[22]

(II) *Commitment of Several Persons on Same Charge.* It has been held that where several are committed on the same charge or commitment paper, the sheriff is entitled to a fee for each person so committed,[23] but there is also authority to the contrary.[24]

**f. Custody and Maintenance of Prisoners.**[25] A sheriff is usually allowed compensation or reimbursement for the custody and care of prisoners,[26] and the

State, 16 Lea (Tenn.) 133, bringing prisoner into county in which supreme court sits.

**Under Iowa Laws (1882), c. 94, § 19, providing that a sheriff shall receive "for attending before any judge with a prisoner, one dollar per day," a sheriff is not entitled to a fee of one dollar for each prisoner brought before the court for arraignment, trial, or sentence, but only for bringing a prisoner before a judge out of term-time.** Painter *v.* Polk County, 70 Iowa 596, 31 N. W. 879.

15. Sapp *v.* Rozar, 70 Ga. 722.

16. Sapp *v.* Rozar, 70 Ga. 722; Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Lee *v.* Ionia County, 68 Mich. 330, 36 N. W. 83; Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21.

17. Washoe County *v.* Humboldt County, 14 Nev. 123; People *v.* Clinton County, 19 N. Y. Suppl. 642.

**The per diem allowed to a sheriff as compensation for attendance on terms of court covers all services that may be required of him in and about the business of the term, such as bringing into court and removing prisoners whose presence is necessary for arraignment, trial, or sentence.** Connelly *v.* Dakota County, 35 Minn. 365, 29 N. W. 1.

18. Wheeler *v.* Clinton County, 92 Iowa 44, 60 N. W. 207; Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396.

**Charge for "railroad fare" unauthorized.—** An officer arresting a criminal is not authorized to charge "railroad fare" for the prisoner in his bill of costs. He is only authorized to charge mileage; and, if he conveys the prisoner on the railroad, it is on his own responsibility. Peters *v.* State, 9 Ga. 109.

19. *Indiana.*— Hawthorn *v.* Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124.

*Michigan.*— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Lee *v.* Ionia County, 68 Mich. 330, 36 N. W. 83.

*Missouri.*— Thomas *v.* St. Louis County, 61 Mo. 547.

*New York.*—People *v.* Saratoga County, 45 N. Y. App. Div. 52, 60 N. Y. Suppl. 1122.

*Ohio.*— Ketter *v.* Scioto County Com'rs, 29 Ohio Cir. Ct. 149.

*Pennsylvania.*—Wilhelm *v.* Fayette County, 168 Pa. St. 462, 31 Atl. 1009 [*affirming* 15 Pa. Co. Ct. 559]; Hays *v.* Cumberland County, 5 Pa. Super. Ct. 159; Com. *v.* Truxtun, 1 Ashm. 34.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 63.

**When statute not available.—** A statute allowing a certain fee for committing persons to jail and discharging them therefrom is not available to the officer, where there is no provision therein for payment from the county treasury. Ketter *v.* Scioto County Com'rs, 29 Ohio Cir. Ct. 149.

**The refusal of the officers of a penal institution to receive a person committed** thereto on the ground that he has an infectious disease does not defeat the constable's right to his fees for delivering the prisoner to such institution. Rees *v.* Potter County, 8 Pa. Dist. 590.

20. Hawthorne *v.* Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124; Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Lee *v.* Ionia County, 68 Mich. 330, 36 N. W. 83; People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

21. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

22. Winters *v.* Dauphin County, 18 Pa. Co. Ct. 151.

23. Wilhelm *v.* Fayette County, 168 Pa. St. 462, 31 Atl. 1009 [*affirming* 15 Pa. Co. Ct. 559]; Long *v.* Northumberland County, 20 Pa. Co. Ct. 70.

24. Woomer *v.* Clearfield County, 5 Pa. Dist. 362; Keller *v.* Clinton County, 4 Pa. Dist. 216; Deihl *v.* Dauphin County, 18 Pa. Co. Ct. 146.

25. See, generally, Prisons, 32 Cyc. 321, 329.

26. Chipman *v.* Wayne County Auditors,

expense of furnishing them with meals.[27] But in accordance with the general rule,[28] a sheriff is not, in the absence of statute, entitled to compensation for services in looking after prisoners or feeding them, but only to be repaid the money actually expended.[29]

**g. Execution of Death Sentence.** For executing a death sentence a sheriff is entitled to only his statutory fee and cannot recover for expenses for which the statute makes no provision.[30]

**4. Conveying Lunatics to Asylum.**[31] A sheriff is usually allowed compensation for conveying insane persons to the asylum,[32] and reimbursement for the expenses of transportation.[33] But where the sheriff's compensation is fixed at a *per diem* and mileage the sheriff cannot make an additional charge for his necessary expenses;[34] and mileage allowed by law for such service has been held to be intended as full compensation for the time spent and expense incurred in the performance thereof.[35]

**5. Serving Subpœna or Attachment For Witnesses and Procuring Attendance**[36] **— a. In General.** Sheriffs and constables are, as a general rule, allowed fees for their official services in serving subpœnas on witnesses,[37]

127 Mich. 490, 86 N. W. 1024; State *v.* Clark, 170 Mo. 67, 70 S. W. 489. *Contra*, Avery *v.* Pima County, 7 Ariz. 26, 60 Pac. 702, holding that under Rev. St. pars. 496, 1972, 2457, 2447, defining the duties of county sheriffs and prescribing their salary, an extra payment to a county sheriff, beyond his salary, for caring for United States prisoners who are imprisoned in the county jail, is unauthorized.

**Allowance by county supervisors.**— Under Mich. Comp. Laws (1897), § 12006, entitling sheriffs to compensation for services "not specially provided for, in such sum as may be allowed by the board of supervisors," such board has power to allow the sheriff compensation for care and custody of prisoners in jail, and mandamus will lie to compel them to consider a claim for such services which they have rejected on the ground that they are without power to allow it. Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

**Prisoners confined in city jail.**—As Mo. Rev. St. (1899) § 3246, allows a sheriff a fee of one dollar and twenty-five cents a day for the safe-keeping of a person held under a capias while undergoing an examination preparatory to his commitment, where such person is so held for more than one day, and no law or ordinance of the city of St. Louis requires the police department of the city to keep prisoners for the sheriff, the sheriff is entitled to the fee, although the prisoner was placed by the sheriff in the St. Louis city calaboose, and there cared for by the city until commitment. State *v.* Clark, 170 Mo. 67, 70 S. W. 489.

**Prisoner awaiting trial.**— Under Mo. Rev. St. (1899) § 3246, allowing the sheriff one dollar and twenty-five cents per day for keeping a prisoner while undergoing an examination preparatory to his commitment, the sheriff is not entitled to that allowance for keeping a prisoner who has been arrested under a capias issued on an information and is in jail awaiting trial. State *v.* Allen, 187 Mo. 560, 86 S. W. 144.

**A sheriff who has not provided support** for any prisoners cannot recover anything from the county therefor. Locke *v.* Belknap County, 71 N. H. 208, 51 Atl. 914.

27. Dyer *v.* Placer County, 90 Cal. 276, 27 Pac. 197; McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423; Shrope *v.* Northampton, 3 Lanc. L. Rev. (Pa.) 123; Gilreath *v.* Greenville County, 63 S. C. 75, 40 S. E. 1028; Williams *v.* Kershaw County, 56 S. C. 400, 34 S. E. 694.

28. See *supra*, IV, A, 1.

29. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

30. Ford *v.* Howard County Cir. Ct., 3 Mo. 309.

31. Asylums generally see Asylums, 4 Cyc. 362.

Lunatics generally see Insane Persons, 22 Cyc. 1104.

32. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196; Irvin *v.* Alexander County, 63 Ill. 528; Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396; Proctor *v.* Cascade County, 20 Mont. 315, 50 Pac. 1017; Commissioners *v.* Lodwick, 9 Ohio Dec. (Reprint) 567, 15 Cinc. L. Bul. 126.

33. Scharrenbroich *v.* Lewis, etc., County, 33 Mont. 250, 83 Pac. 482.

**A statute allowing a sheriff a sum for "necessary help and expenses"** covers reasonable help and expenses in transporting and delivering lunatics to the asylum. Lenhart *v.* Cambria County, 29 Pa. Super. Ct. 350 [*affirmed* in 216 Pa. St. 25, 64 Atl. 876].

**Reasonableness of charges a question for jury.**— Lenhart *v.* Cambria County, 29 Pa. Super. Ct. 350 [*affirmed* in 216 Pa. St. 25, 64 Atl. 876].

34. Irvin *v.* Alexander County, 63 Ill. 528; Commissioners *v.* Lodwick, 9 Ohio Dec. (Reprint) 567, 15 Cinc. L. Bul. 126.

35. Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396; Proctor *v.* Cascade County, 20 Mont. 315, 50 Pac. 1017.

36. Witnesses generally see Witnesses.

37. *Arizona.*— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

or executing attachments against them,[38] and procuring their attendance at court.[39] The amount of such fees is fixed by statute,[40] and no greater compensation than that allowed by statute can be recovered.[41] A constable who serves subpœnas issued out of court is entitled to the same compensation as the sheriff for serving subpœnas,[42] while if the sheriff serves subpœnas issued by a magistrate, he may charge the fees allowed by the constable's fee bill.[43] But a sheriff is not entitled to compensation for serving an ineffective subpœna which he was not bound to serve.[44]

**b. Necessity For Actual Service.** As a general rule a sheriff must actually serve subpœnas in order to be entitled to fees therefor,[45] and a mere offer to serve them is not sufficient.[46] But under some statutes a sheriff is allowed a fee for diligent search, inquiry, and return not found on a subpœna.[47]

*Arkansas.*— Phillips County *v.* Pillow, 47 Ark. 404, 1 S. W. 686.

*Maryland.*— Deale *v.* Estep, 3 Bland 433.

*Ohio.*— State *v.* Bauder, 34 Ohio St. 210.

*Pennsylvania.*— Kerr *v.* Sun Co., 32 Pa. Super. Ct. 239; Bannon *v.* Lackawanna County, 3 Lack. Leg. N. 148.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 67.

**Evidence of employment.**— The minutes of the board of supervisors, showing that on motion it was ordered that the sheriff be allowed mileage to subpœna witnesses in Utah in a certain criminal case, are sufficient evidence of the employment of the sheriff to serve the subpœna in the case, so as to entitle him to reasonable compensation therefor. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

**No fee for serving subpœna in coroner's inquest.**— *In re* Shaft, 3 Pa. Co. Ct. 10.

38. Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21.

39. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430. See also Mann *v.* Com., 102 Ky. 383, 43 S. W. 694, 19 Ky. L. Rep. 1437.

**Non-resident witnesses.**— Under Ariz. Rev. St. (1887) § 79, cl. 9, providing that contingent expenses necessarily incurred for the use and benefit of the county shall be a county charge, where the sheriff acts as the messenger of the board of supervisors in securing the attendance in criminal cases of necessary non-resident witnesses, he is entitled, in the absence of any agreement with the board, to a reasonable compensation for his services. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

40. Deale *v.* Estep, 3 Bland (Md.) 433; State *v.* Bauder, 34 Ohio St. 210; Kerr *v.* Sun Co., 32 Pa. Super. Ct. 239; O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24; Bannon *v.* Lackawanna County, 3 Lack. Leg. N. (Pa.) 148; Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21. See, generally, *supra*, IV, A, 4, a.

**Service of order for appearance.**—Where on a motion for change of venue for prejudice of the trial judge, the court ordered persons signing affidavits in support thereof to appear for cross-examination, and directed that subpœnas should be served on such of them as the adverse party should indicate to the clerk, and the clerk issued "an order to appear for cross-examination," in which he recited the above order, and notified the persons named therein to appear in court and submit to cross-examination on a day stated, this order amounted to no more than a subpœna, and that the sheriff was only entitled to the fees provided for the service of subpœnas for serving the same. Spangler *v.* Beaver, 106 Iowa 744, 75 N. W. 668.

41. Humer *v.* Cumberland County, 4 Pa. Dist. 588, 16 Pa. Co. Ct. 552.

**Sheriff cannot charge for livery bill in serving attachment against witness.**— Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21.

**Statute not limiting fees.**— Mansfield Dig. Ark. § 3248, providing that, when the costs in criminal cases are paid by the county, "no sheriff . . . serving subpœnas for witnesses shall be allowed to receive from the county pay for making more than two returns on subpœnas," does not limit the fees of sheriffs for serving subpœnas. Phillips County *v.* Pillow, 47 Ark. 404, 1 S. W. 686.

42. Hannum *v.* Becker, 4 Pa. Dist. 444; Meagher *v.* Clearfield County, 3 Pa. Dist. 444; Com. *v.* Thorn, 19 Pa. Co. Ct. 299; Coleman *v.* Hess, 1 Browne (Pa.) 274; Com. *v.* Neeley, 2 Chest. Co. Rep. (Pa.) 105; Com. *v.* Neeley, 1 Del. Co. (Pa.) 532; Youngs *v.* Harold, 7 Kulp (Pa.) 285; Shrope *v.* Northampton County, 3 Lanc. L. Rev. (Pa.) 123. See also Davison *v.* Franklin County, 18 Pa. Co. Ct. 374.

43. Com. *v.* Neeley, 1 Del. Co. (Pa.) 532.

44. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430, holding that under Pen. Code, § 2054, which provides that a witness in a criminal case, non-resident of the county in which the case is tried, shall not be obliged to attend unless an order to that effect shall have been indorsed by the judge of the court upon the subpœna requiring such attendance, a sheriff is not bound to serve a subpœna without such indorsement thereon, and service thereof does not entitle him to any fee.

45. Deitrick *v.* Northumberland County, 24 Pa. Super. Ct. 22. See also O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24.

46. Deitrick *v.* Northumberland County, 24 Pa. Super. Ct. 22. See also O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24.

47. Barman *v.* Miller, 23 Minn. 458.

**c. Service on Several Witnesses Named in Single Subpœna.** According to some authorities a sheriff or constable is entitled to a fee for each person named in a subpœna and actually served;[48] but other authorities hold that the compensation for serving subpœnas is not determined by the number of persons served, but by the number of subpœnas.[49]

**d. Service in Cause to Which Sheriff a Party.** A sheriff or deputy sheriff who serves a subpœna in his own cause does so as an individual, and not in his official capacity, and is not entitled to any fee for such service.[50]

**e. Who Entitled to Fees.** A statute fixing the fees to be charged by the sheriff for serving a subpœna confers on the sheriff no exclusive right to serve subpœnas in criminal cases;[51] but the district attorney may employ a constable to make the service, in which case the constable and not the sheriff is entitled to the fees.[52] A sheriff may appoint a deputy to serve a subpœna, for whose services he is entitled to fees the same as if he had made the service in person.[53]

**6. Service or Levy and Return of Process Against Property — a. In General.** The service or levy and return of process against property and the collection of money thereon are duties for the performance of which the sheriff is entitled to compensation in the form of fees for the services actually rendered or a commission in case the money is collected,[54] but he is not entitled to compensation for executing void process against property.[55]

**b. Attachment**[56] — (I) *IN GENERAL.* A sheriff or constable is, as a general rule, entitled to a fee for his official services in making the levy[57] and

48. Price *v.* Lancaster County, 189 Pa. St. 95, 41 Atl. 987; McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423 [*reversing* 6 Pa. Dist. 766, 19 Pa. Co. Ct. 449]; Price *v.* Lancaster County, 24 Pa. Co. Ct. 225; Murphy *v.* Fayette County, 19 Pa. Co. Ct. 99, 13 Montg. Co. Rep. 81; Bannon *v.* Lackawanna County, 3 Lack. Leg. N. (Pa.) 148.

49. Conley *v.* York County, 5 Pa. Dist. 748; Woomer *v.* Clearfield County, 5 Pa. Dist. 362; Long *v.* Northumberland County, 20 Pa. Co. Ct. 70; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141; Lancaster *v.* Barnwell County, 40 S. C. 445, 19 S. E. 74, so holding as to a sheriff serving a witness warrant issued by a trial justice in a case cognizable by the court of sessions. See also Davison *v.* Franklin County, 5 Pa. Dist. 745, 18 Pa. Co. Ct. 374 (holding that when a subpœna issues from a magistrate the constable is entitled to fifty cents for serving it, no difference how many persons are named in it, but if it requires the attendance of witnesses at court, he is entitled, as a sheriff's officer, to fifteen cents for each witness served); English *v.* Tioga County, 20 Pa. Co. Ct. 303; Long *v.* Northumberland County, *supra*; Com. *v.* Thorn, 19 Pa. Co. Ct. 299.

A sheriff can charge but a single fee for arresting all witnesses whose names are contained in one warrant for the arrest of witnesses and not a fee for each witness. Whittle *v.* Saluda County, 56 S. C. 505, 35 S. E. 203.

50. Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 494.

51. O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24. See also Deitrick *v.* Northumberland County, 24 Pa. Super. Ct. 24.

52. O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24. See also Deitrick *v.* Northumberland County, 24 Pa. Super. Ct. 22.

53. Chicago, etc., R. Co. *v.* Dunning, 18 Ill. 494.

54. See O'Brien *v.* Allen, 40 Misc. (N. Y.) 693, 83 N. Y. Suppl. 251; and cases cited *infra*, IV, B, 6, b–f.

55. Wingate *v.* Wallis, 5 Sm. & M. (Miss.) 249, so holding with respect to a void process issued by a judge of probate commanding the sheriff to take property of an intestate out of the hands of the administrator.

56. See, generally, ATTACHMENT, 4 Cyc. 368.

57. *California.*— Young *v.* Miller, 63 Cal. 302.

*Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Maryland.*— Maddox *v.* Cranch, 4 Harr. & M. 343.

*Massachusetts.*— Washington Bank *v.* Boston Glass Mfg. Co., 6 Pick. 375.

*Missouri.*— Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374; Miller *v.* Muegge, 27 Mo. App. 670.

*New York.*— Lynch *v.* Butler, 43 Hun 605; Mayhew *v.* Duncan, 31 Barb. 87; Alburtis *v.* Dudley, 12 Abb. Pr. 361, 21 How. Pr. 456; Mayhew *v.* Wilson, 10 Abb. Pr. 289; Calhoun *v.* Lee, 29 How. Pr. 1.

*Tennessee.*— Harris *v.* Petigrew, 5 Lea 596.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 70.

In New Hampshire the statute expressly forbids the sheriff from charging any fee for an attachment of real estate (Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679; McClure *v.* Locke, 61 N. H. 14), or a nominal attachment of personal property (Edgerly *v.* Hale, *supra*).

Unavailing levy.— The sheriff is entitled to one-fourth poundage fees for levying an attachment on lands, although the lands were not sold or delivered to plaintiff or liable to

return [58] of an attachment; but in accordance with the general rule on the subject,[59] he can demand for an attachment no other compensation than the statute prescribes.[60] It has been held that if the attached property is not sold, the sheriff is not entitled as matter of right to poundage or commissions;[61] but where money is collected under the attachment the sheriff is held entitled to commissions on such amount as on money collected under execution.[62] Where, however, land attached by a sheriff in a suit to enforce a vendor's lien is afterward sold by the clerk and master under a decree, the sheriff is entitled only to his fee for the levy.[63]

(II) *ATTACHMENTS IN DIFFERENT COUNTIES.* Where, in the same action, attachments are levied or served in different counties, there can be but one allowance of poundage, which is to be apportioned among the several attaching officers according to the proportionate values of the property attached by them.[64]

(III) *LEVY ON SEPARATE PARCELS OF PROPERTY.* Where there is more than one defendant in an attachment suit a levy upon the property of each defendant is a separate levy for which the sheriff is entitled to a separate fee;[65] but it has been laid down as the rule where a sheriff levies an attachment against a single defendant, although upon several separate parcels of property, he is entitled to but a single fee.[66]

(IV) *MAKING OF INVENTORY.* The making of an inventory of attached property, under a statute requiring the sheriff to make a full inventory of such property as part of his return, is not a matter necessarily involving the expenditure of money, and the sheriff is not entitled to costs therefor, in addition to the statutory fees for serving and otherwise executing attachment writs.[67]

(V) *APPRAISEMENT.* In the absence of statute the sheriff is not entitled to charge as costs the expense of an appraisement of goods seized under a writ of attachment.[68]

(VI) *DISCHARGE OF ATTACHMENT.* Where an attachment is discharged by defendant giving the usual undertaking, the sheriff is entitled to poundage;[69] and it has also been held that the sheriff's right to fees and poundage cannot be defeated by an order discharging the attachment.[70] But in such case the amount or value of property attached must be made to appear in order to

be condemned under the attachment. Maddox *v.* Cranch, 4 Harr. & M. (Md.) 343.

**58.** Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

**59.** See *supra*, IV, A, 1.

**60.** Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446. See also Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1, holding that a sheriff cannot be allowed an additional compensation for executing an attachment, over and above his prescribed fees, unless he is put to trouble or incurs expenses in taking possession of or in preserving the property attached.

**61.** Demorest *v.* Torry, 9 Abb. Pr. N. S. (N. Y.) 95; Alburtis *v.* Dudley, 12 Abb. Pr. (N. Y.) 361, 21 How. Pr. 456; Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

**62.** Jellinghaus *v.* Scheidt, 18 Abb. Pr. (N. Y.) 452.

**In Canada** the court has refused to allow poundage on moneys made upon attachments. *In re* Duggan, 2 U. C. Q. B. 118.

**63.** Harris *v.* Petegrew, 5 Lea (Tenn.) 596.

**64.** Tilley *v.* De Wolf, 12 R. I. 347.

**65.** Miller *v.* Muegge, 27 Mo. App. 670.

**66.** Washington Bank *v.* Boston Glass Mfg. Co., 6 Pick. (Mass.) 375 (levies on separate parcels of real property); Miller *v.* Muegge, 27 Mo. App. 670 (levies on both real and personal property). *Contra*, Young *v.* Miller, 63 Cal. 302, holding that the levy of an attachment on several separate pieces of real property constitutes an independent levy on each piece and the sheriff is entitled to compensation for each levy.

**67.** Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; Eastman *v.* Coos Bank, 1 N. H. 23.

**68.** Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

**69.** B. P. Ducas Co. *v.* American Silk Dyeing, etc., Co., 84 N. Y. Suppl. 878; Colberg *v.* Emerson, 30 N. Y. Suppl. 146, 23 N. Y. Civ. Proc. 337. *Contra*, Demorest *v.* Torry, 9 Abb. Pr. N. S. (N. Y.) 95.

**70.** Tribune Assoc. *v.* Eisner, etc., Co., 49 N. Y. App. Div. 141, 63 N. Y. Suppl. 94 (*ex parte* order procured without notice to sheriff); O'Brien *v.* Obel, 46 Misc. (N. Y.) 449, 92 N. Y. Suppl. 333.

**Where an attachment is annulled and vacated on plaintiff's motion** the sheriff is entitled to poundage, to be recovered from plaintiff. O'Brien *v.* National Conduit, etc., Co., 43 Misc. (N. Y.) 327, 87 N. Y. Suppl. 131.

**Vacation of attachment as to part of property.**—Where a stipulation was made for an order vacating an attachment as to a part of the property affected, thereby leaving it in

warrant the taxation of fees and poundage.[71] A statutory right of the sheriff, on the discharge of an attachment, to retain the property levied on until his fees and poundage are paid gives him no cause of action for poundage against one indebted to the attachment debtor.[72]

**c. Execution**[73] — (I) *In General.* A sheriff is entitled to compensation for levying and returning an execution,[74] and is usually allowed a commission upon the money realized.[75]

(II) *Execution Against Municipality.* A sheriff is entitled to poundage when he makes the money on a fieri facias against a municipal corporation,[76] although he may have levied a rate to collect the money.[77]

(III) *Execution Against Several Defendants.* Where an execution is issued against several defendants the sheriff is entitled to a levying fee for each.[78] But where there are several executions against several defendants for the same debt, the sheriff is entitled to poundage fees only on the sum actually due.[79]

(IV) *Several Executions Against Same Defendant.* Where a sheriff has several executions against a defendant, and makes one levy on his property, and enters the same on each execution, he is entitled to charge for but one levy, and not for a levy on each execution.[80]

(V) *Executions in Different Counties.* Where executions go to different counties, on either a joint judgment or on several judgments for the same debt, the sheriffs of such counties must divide among them the poundage fee on the real debt.[81] So where each sheriff makes a levy on property, and by reason of an arrangement between the parties no sale takes place, each sheriff is not entitled to his commission on the amount of the execution,[82] but only to

force as to a portion of the property greatly exceeding in value any claim the sheriff might have for poundage, the sheriff was not entitled to poundage upon the property affected by the order. Plummer *v.* International Power Co., 88 N. Y. App. Div. 452, 85 N. Y. Suppl. 107.

**71.** Tribune Assoc. *v.* Eisner, etc., Co., 49 N. Y. App. Div. 141, 63 N. Y. Suppl. 94, holding that a bank cashier's statement to a sheriff, on attachment of a deposit, that it was sufficient to satisfy the claim, without any showing of the amount of the deposit, or the certificate required by Code Civ. Proc. § 650, showing the amount, nature, and description of the property held by the bank for the benefit of the debtor, is insufficient to authorize the allowance of sheriff's fees and poundage on the vacation of the writ.

**72.** O'Brien *v.* Manhattan R. Co., 45 Misc. (N. Y.) 643, 91 N. Y. Suppl. 69.

**73.** See, generally, Executions, 17 Cyc. 878.

**74.** Mastin *v.* Cullom, 28 Ala. 670; Camp *v.* Bates, 13 Conn. 1; Peck *v.* Grand Rapids City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

**75.** *Alabama.*— Brainard *v.* Harrison, 53 Ala. 360.

*Kentucky.*— Lipstine *v.* Campbell, 14 Bush 417.

*Maryland.*— Cape Sable Co.'s Case, 3 Bland 606.

*Michigan.*—Peck *v.* Grand Rapids City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

*New York.*— Campbell *v.* Cothran, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70]; Benedict *v.* Wright, 19 Hun 27.

*North Carolina.*— Dibble *v.* Aycock, 58 N. C. 399.

*Pennsylvania.*— Wall *v.* Lloyd, 1 Serg. & R. 320.

*South Carolina.*— Whitmore *v.* Rumple, 2 Mill 120.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 69.

**Debts due to crown.**— In England under St. 3 Geo. I, c. 15, the sheriff is entitled to poundage where the debt is due to the crown. Stevens *v.* Rothwell, 3 B. & B. 143, 6 Moore C. P. 338, 7 E. C. L. 651.

**The sheriff may charge poundage upon each of several writs,** although they were all issued by the same solicitor and placed in his hands at the same time. Grant *v.* Grant, 10 Ont. Pr. 40.

**76.** Grant *v.* Hamilton, 2 Can. L. J. N. S. 262.

**77.** Grant *v.* Hamilton, 2 Can. L. J. N. S. 262.

**78.** State *v.* Burton, 4 Harr. (Del.) 457.

**79.** Howard *v.* Levy Ct., 1 Harr. & J. (Md.) 558.

**80.** Thrower *v.* Vaughan, 1 Rich. (S. C.) 18.

**81.** Howard *v.* Anne Arundel County Levy Ct., 1 Harr. & J. (Md.) 558. But *compare* Rex *v.* Barber, Anstr. 717, holding that where two extents issued into different counties for the same debt, and both sheriffs seized goods but the debt was paid to one before any venditioni exponas issued to either, the sheriff to whom the debt was paid was entitled to the whole poundage.

**82.** Sturges *v.* Lackawanna, etc., R. Co., 27 N. J. L. 424; Brown *v.* Johnson, 5 Can. L. J. 17.

a commission on the value of the goods levied on by him,[83] or if the total levies exceed in value the amount of the execution, a *pro rata* commission based on the value of the goods which he seized.[84]

(VI) *RIGHT DEPENDENT UPON MAKING MONEY.* A sheriff is not entitled to commissions unless he makes the money,[85] or is prevented from so doing by reason of some act or interference of plaintiff which in law is deemed to be the equivalent of collection.[86]

(VII) *NECESSITY FOR SERVICE OF WRIT.* Under a statute allowing a compensation for every execution served and returned, a sheriff or constable is not entitled to a fee for an execution returned but not served.[87]

(VIII) *NECESSITY FOR SALE.* It has been held that the sheriff is not entitled to commissions on property taken on execution, unless a sale is actually made;[88] but there is also authority for the view that the sheriff does not lose his right to commissions when a sale is prevented without his fault.[89] Certainly a sheriff who by the compulsion of a levy actually collects the money is entitled to commissions, although such money is paid to him by the execution debtor and the goods levied on are not sold.[90]

(IX) *NECESSITY FOR EXTENT.* A sheriff is not entitled to poundage upon an *elegit*, unless he has extended the land under the writ.[91]

(X) *COLLECTION WITHOUT LEVY.* Where the sheriff receives the money under the authority of an execution in his hands he is entitled to his commissions thereon, although he may not have made any levy on the property of defendant.[92]

**Effect of settlement between parties on right to commissions** generally see *supra*, IV, A, 5, d, (II).

**83.** Sturges *v.* Lackawanna, etc., R. Co., 27 N. J. L. 424.

**84.** Sturges *v.* Lackawanna, etc., R. Co., 27 N. J. L. 424.

**85.** *Kentucky.*— Herndon *v.* Mason, 4 J. J. Marsh. 575.

*Michigan.*—Peck *v.* Grand Rapids City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

*New York.*— Flack *v.* State, 95 N. Y. 461 [*affirming* 29 Hun 286, and *approved* in O'Brien *v.* Allen, 40 Misc. 693, 83 N. Y. Suppl. 251]; Bowe *v.* Campbell, 63 How. Pr. 167.

*Virginia.*— Com. *v.* Brown, 5 Call 569.

*Canada.*— Grant *v.* Hamilton, 2 Can. L. J. N. S. 262; Buchanan *v.* Frank, 15 U. C. C. P. 196.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 69.

**Application of proceeds of sale.**—A sheriff who, having two executions on two judgments against the same defendant, both owned by the same plaintiff, applied the proceeds from the sale of property seized on the second execution, was not entitled to costs for fees and poundage on the first execution, nothing having been done under it. Rathbun *v.* Woodworth, 1 How. Pr. (N. Y.) 150.

**Poundage due only in respect to money collected on execution.**— Campbell *v.* Cothran, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70].

**86.** Flack *v.* State, 95 N. Y. 461 [*affirming* 29 Hun 286, and *approved* in O'Brien *v.* Allen, 40 Misc. (N. Y.) 693, 83 N. Y. Suppl. 251]; Campbell *v.* Cothram, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70].

**87.** U. S. *v.* Little, 26 Fed. Cas. No. 15,609, 1 Cranch C. C. 411.

**88.** Com. *v.* Brown, 5 Call (Va.) 569; Anonymous, Lofft. 433, 98 Eng. Reprint 732.

**In Canada** a sheriff has no right to poundage on writs against lands unless there is an actual sale. Morris *v.* Boulton, 2 C. L. Chamb. (U. C.) 60; Merchants Bank *v.* Campbell, 32 U. C. C. P. 170 [*followed* in French *v.* Lake Superior Mineral Co., 14 Ont. Pr. 541].

**Inability to sell.**—A constable cannot be allowed his fees on an execution, where he has levied on property and returned that it remains on his hands for want of buyers. Pixley *v.* Butts, 2 Cow. (N. Y.) 421.

**89.** Baldwin *v.* Shaw, 35 Vt. 273, holding that where, after a sheriff had levied an execution on personal property and advertised it for sale, the property was taken out of his hands by replevin, and the officer thereupon returned the execution unsatisfied, stating in his return the facts in relation to the replevin of the property, he was entitled to his fees for travel and poundage.

**90.** Mortimore *v.* Cragg, 3 C. P. D. 216, 47 L. J. C. P. 348, 38 L. T. Rep. N. S. 116, 26 Wkly. Rep. 363 [*approving* Bissicks *v.* Bath Colliery Co., 2 Ex. D. 459, 46 L. J. Q. B. 611, 36 L. T. Rep. N. S. 800; Rex *v.* Robinson, 2 C. M. & R. 334, 4 Dowl. P. C. 447, 1 Gale 209, 4 L. J. Exch. 319, 5 Tyrw. 1095; Chapman *v.* Bowlby, 1 Dowl. P. C. N. S. 83, 10 L. J. Exch. 299, 8 M. & W. 249; Alchin *v.* Wells, 5 T. R. 470, 2 Rev. Rep. 641, 101 Eng. Reprint 265, and *overruling* Roe *v.* Hammond, 2 C. P. D. 300, 46 L. J. C. P. 791].

**91.** Carter *v.* Hughes, 2 H. & N. 714, 27 L. J. Exch. 225, 6 Wkly. Rep. 212.

**92.** Wynne *v.* Mississippi, etc., R. Co., 45 Miss. 569; Consolidated Bank *v.* Bickford, 7

(XI) *LEVY ON PROPERTY NOT BELONGING TO DEFENDANT.* The sheriff is not entitled to poundage or any allowance in lieu thereof where he seizes under execution property which belongs, not to defendant, but to a stranger.[93]

(XII) *LEVY CONTRARY TO DIRECTIONS OF PLAINTIFF.* A sheriff cannot claim compensation for levying an execution which plaintiff has instructed him not to levy or merely to hold to bind the debtor's property.[94]

(XIII) *APPRAISEMENT OF PROPERTY LEVIED ON.* The sheriff is not entitled to the fees of an appraiser for assisting in appraising real estate levied upon.[95]

(XIV) *WHEN RIGHT TO COMMISSIONS ACCRUES.* It has been said that the right of a sheriff to commissions on a levy under execution accrues at the time when he makes the levy.[96]

(XV) *SETTING ASIDE OF WRIT.* Some cases hold that a sheriff is entitled to poundage where, after he has made a levy under an execution, the writ is set aside for irregularity or superseded;[97] but other cases deny the right of the sheriff to commissions under such circumstances.[98]

(XVI) *STAY OF WRIT.* A sheriff has been held entitled to commissions where an execution is stayed after a levy,[99] but other cases deny the right of the sheriff to commissions where the execution is stayed.[1] The statutes sometimes allow the sheriff half commissions for levying an execution which is stayed,[2] or suspended by the creditor's order.[3]

(XVII) *STAY OF SALE.* Under some statutes the sheriff is entitled to a fee where, after the levy of an execution, the sale thereunder is stayed.[4]

Ont. Pr. 172. See also Roop *v.* State, 1 Blackf. (Ind.) 323, holding that a constable who collects money on an execution without a levy and sale is entitled to the fee allowed by statute for serving an execution. *Contra*, Colls *v.* Coates, 11 A. & E. 826, 9 L. J. Q. B. 232, 3 P. & D. 511, 39 E. C. L. 438.

In Missouri the sheriff is entitled only to half commissions when he receives the money without making a levy. Gaty *v.* Vogel, 40 Mo. 553.

93. Bilke *v.* Havelock, 3 Campb. 374, 14 Rev. Rep. 758; Turner *v.* Crozier, 14 Ont. Pr. 272. See also Manitoba, etc., Loan Co. *v.* Routley, 3 Manitoba 521.

94. Oswitchee Co. *v.* Hope, 5 Ala. 629.

95. Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

96. Cape Sable Co.'s Case, 3 Bland (Md.) 606; *In re* Black, 3 Fed. Cas. No. 1,458, 2 Nat. Bankr. Reg. 171.

97. Cape Sable Co.'s Case, 3 Bland (Md.) 606; Campbell *v.* Cothran, 56 N. Y. 279 [*affirming* 65 Barb. 534, 1 Thomps. & C. 70]; Bradley *v.* Blue Ridge Hosiery Mill, 56 Misc. (N. Y.) 125, 106 N. Y. Suppl. 1107; O'Brien *v.* Allen, 40 Misc. (N. Y.) 693, 83 N. Y. Suppl. 251 (so holding under Laws (1892), c. 418, § 17, subd. 7, amending Laws (1890), c. 523); Bullen *v.* Ansley, 6 Esp. 111, 9 Rev. Rep. 810; Rawstorne *v.* Wilkinson, 4 M. & S. 256, 16 Rev. Rep. 455; Weegar *v.* Grand Trunk R. Co., 16 Ont. Pr. 371 [*following* Morrison *v.* Taylor, 9 Ont. Pr. 390; Brockville, etc., R. Co. *v.* Canada Cent. R. Co., 7 Ont. Pr. 372].

Withdrawal from possession before writ superseded.— Where a sheriff made a seizure under a fieri facias against the goods of defendants, but, learning that they were about to appeal, of his own motion, and for the purpose of saving expense to the parties, withdrew his officer in possession, and, the appeal having been subsequently brought, the execution was superseded, it was held that the sheriff had not so withdrawn from the seizure as to disentitle him to poundage or an allowance in lieu thereof. Weegar *v.* Grand Trunk R. Co., 16 Ont. Pr. 371 [*following* Morrison *v.* Taylor, 9 Ont. Pr. 390; Brockville, etc., R. Co. *v.* Canada Cent. R. Co., 7 Ont. Pr. 372].

98. Miles *v.* Harris, 12 C. B. N. S. 550, 31 L. J. C. P. 361, 6 L. T. Rep. N. S. 649, 104 E. C. L. 550; Winters *v.* Kingston, etc., Permanent Bldg. Soc., 1 Ch. Chamb. (U. C.) 276 (holding that where, after seizure under the writ, but before the money was levied, defendants obtained a stay of the execution on the terms of paying the money into court, which was done, the sheriff, not having actually levied the money under the execution, was entitled only to fees for services actually rendered and not to poundage); Walker *v.* Fairfield, 8 U. C. C. P. 95.

99. Benedict *v.* Wright, 19 Hun (N. Y.) 27, holding that where, property levied on by the sheriff having been assigned, the judgment creditor's attorney directed a stay, and the assignee sold the property and applied a portion of the proceeds to the payment of the judgment, the sheriff was entitled to a poundage, although no money had been realized on the levy.

1. Smith *v.* Morrison, 1 Chest. Co. Rep. (Pa.) 291. See also Fitch *v.* Stanton, 1 Tyler (Vt.) 28, holding that the sheriff cannot charge fees for return of an execution stayed by supersedeas in a writ of error.

2. Lipstine *v.* Campbell, 14 Bush (Ky.) 417.

3. Boyd *v.* Harper, 3 Bush (Ky.) 142.

4. Mastin *v.* Cullom, 28 Ala. 670, holding, however, that under Code, §§ 3042, 3047, a

(XVIII) *AMOUNT ON WHICH COMMISSIONS COMPUTED.* A sheriff is entitled to commissions only on the amount which he collects under the execution and not upon the amount claimed or the value of the property seized;[5] and the commission is to be computed only on the sum paid over by him and not on what he retains for himself.[6] Where before the issue of an execution the sheriff agreed with plaintiff to charge commissions only on the amount of the judgment after deducting a set-off, to be ascertained in a pending chancery suit, and thereupon plaintiff caused the issue of the execution, the sheriff is entitled to commissions only on the amount of the judgment after deducting the set-off, and not upon the nominal amount thereof.[7] Where an injunction was granted to restrain the collection of a part of an execution, on the condition that the execution defendants would pay into the clerk's office a certain amount of it, admitted in the pleadings to be due, the sheriff who levied the execution was entitled to his commissions on the amount paid.[8]

**d. Possessory Writ.**[9] A sheriff is allowed compensation for serving a writ of seizin and possession in real actions,[10] but is limited to his statutory fee,[11] and is not entitled to an allowance for assistance,[12] or extra time and trouble.[13]

**e. Writ of Replevin.**[14] The statutes usually allow the sheriff a fee for the execution of a writ or requisition of replevin.[15]

**f. Distress Warrant.**[16] A sheriff to whom the county treasurer has given a distress warrant for delinquent taxes cannot charge the county a fee for a return upon such warrant of "No property found."[17]

**7. CUSTODY, CARE, AND REMOVAL OF PROPERTY — a. In General.** In a number of states the sheriff is allowed charges or compensation for the care and custody of property of which he has taken possession under an attachment,[18] execu-

sheriff cannot in any case be entitled to a fee "for levying fieri facias and making money thereon," and to another fee, under the same execution, "for levying fieri facias when sale is stayed, after levy, by a restraining order."

5. Pierce *v.* Delesdernier, 17 Me. 431; Rex *v.* Robinson, 2 C. M. & R. 334, 4 Dowl. P. C. 447, 1 Gale 209, 4 L. J. Exch. 319, 5 Tyrw. 1095.

6. Michie *v.* Reynolds, 24 U. C. Q. B. 303 [*followed* in Hamilton, etc., R. Co. *v.* Gore Bank, 20 Grant Ch. (U. C.) 190]. See also Davis *v.* Davidson, 14 Grant Ch. (U. C.) 206.

7. Brainard *v.* Harrison, 53 Ala. 360.

Agreements as to compensation generally see *supra*, IV, A, 4, b.

8. Dibble *v.* Aycock, 58 N. C. 399.

9. See, generally, EJECTMENT, 15 Cyc. 184.

10. Weston *v.* Weston, 102 Mass. 514.

11. Weston *v.* Weston, 102 Mass. 514.

12. Weston *v.* Weston, 102 Mass. 514.

13. Weston *v.* Weston, 102 Mass. 514.

14. See, generally, REPLEVIN, 34 Cyc. 1342.

15. Stewart *v.* Fidelity Loan Assoc., 19 Misc. (N. Y.) 49, 42 N. Y. Suppl. 705.

16. See, generally, LANDLORD AND TENANT, 24 Cyc. 845; TAXATION.

17. Red Willow County *v.* Smith, 67 Nebr. 213, 93 N. W. 151.

18. *Arizona.*—Southwestern Commercial Co. *v.* Owesney, 10 Ariz. 49, 85 Pac. 724.

*California.*— Alexander *v.* Wilson, (1904) 79 Pac. 274; Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Bower *v.* Rankin, 61 Cal. 108; Geil *v.* Stevens, 48 Cal 590; Smith *v.* Richmond, 19 Cal. 476.

*Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

*Idaho.*— McConnell *v.* McCormick, 3 Ida. 227, 28 Pac. 421.

*Illinois.*— Eames *v.* Hennessy, 22 Ill. 628; Olds *v.* Loomis, 10 Ill. App. 498.

*Iowa.*— Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401.

*Maine.*— Baldwin *v.* Hatch, 54 Me. 167.

*Massachusetts.*— Tarbell *v.* Dickinson, 3 Cush. 345; Phelps *v.* Camphell, 1 Pick. 59; Sewall *v.* Malton, 9 Mass. 535. But *compare* Com. *v.* Dennie, Thach. Cr. Cas. 165.

*Minnesota.*— Barman *v.* Miller, 23 Minn. 458.

*Missouri.*— Hesse *v.* Kimm, 14 Mo. 395; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

*Montana.*— McDermott *v.* Murphy, 11 Mont. 122, 27 Pac. 334.

*Nebraska.*— Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788.

*New Hampshire.*— Eastman *v.* Coos Bank, 1 N. H. 23.

*New Jersey.*—Hanness *v.* Smith, 21 N. J. L. 495.

*New York.*— Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521; German American Bank *v.* Morris Run Coal Co., 74 N. Y. 58; Lynch *v.* Butler, 43 Hun 605; Hall *v.* U. S. Reflector Co., 34 Hun 467; Coffin *v.* Northwestern Constr. Co., 19 Abb. N. Cas. 383; Alburtis *v.* Dudley, 12 Abb. Pr. 361, 21 How. Pr. 456.

*Oregon.*— Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

*Pennsylvania.*— Lord *v.* Toby Valley Supply Co., 5 Pa. Dist. 290.

tion,[19] writ of sequestration,[20] or order, writ, or requisition of replevin.[21] Such an allowance may be in the form of reimbursement for his reasonable and necessary expenditures in taking care of the property,[22] or, it has been held, of a reasonable compensation for his own services if he performs the duty in person.[23] The sheriff has also been held entitled to be allowed the expense of a removal of property in his custody from one place to another which was necessary for its safe-keeping.[24] But the risk incurred by the sheriff from the possession of attached property is no ground for a claim of poundage.[25]

**b. Actual Rendition of Service or Making of Expenditure.** In order to war-

*South Dakota.*— See Porter *v.* Booth, 1 S. D. 558, 47 N. W. 960.

*Texas.*— Worley *v.* Shelton, (Civ. App. 1905) 86 S. W. 794.

*Vermont.*— Templeton *v.* Capital Sav. Bank, etc., Co., 76 Vt. 345, 57 Atl. 818; Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435; Gleason *v.* Briggs, 28 Vt. 135; Dean *v.* Bailey, 12 Vt. 142.

*Wisconsin.*— Stevens Point First Nat. Bank *v.* Kickbusch, 78 Wis. 218, 47 N. W. 267; Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745.

*Wyoming.*— Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

But *compare* Mathers *v.* Ramsey, 2 Disn. (Ohio) 334.

**Circumstances warranting additional compensation.**— Where a sheriff, seeking to levy an attachment on bonds in the possession of a depositary, was refused possession by the depositary, whereupon he threatened to take them forcibly, and it was then agreed that the bonds should be placed in the sheriff's view, that he should take possession of and levy on them, and that he should return them to the depositary to be held for him, the sheriff was entitled to additional compensation, as he had possession of the bonds. Coffin *v.* Northwestern Constr. Co., 19 Abb. N. Cas. (N. Y.) 383.

**Attachment out of marine court.**— The regular fees of officers executing attachments issued out of the marine court of the city of New York include compensation for caring for property attached and an additional charge therefor is unauthorized. Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612.

**Where the sheriff acquires illegal possession** of property under color of an attachment, he cannot charge defendant in attachment for keeping the property. Gardner *v.* Hust, 2 Rich. (S. C.) 601.

**19.** *California.*— Geil *v.* Stevens, 48 Cal. 590.

*Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Georgia.*— Hopkins *v.* Bolton, T. U. P. Charlt. 294.

*Illinois.*— Olds *v.* Loomis, 10 Ill. App. 498.

*Indiana.*— State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90.

*Louisiana.*— Silllven *v.* Bellocq, 20 La. Ann. 305.

*Minnesota.*— See Barman *v.* Miller, 23 Minn. 458.

*Missouri.*—State *v.* Stinebaker, 90 Mo. App. 280.

*New York.*— Waite *v.* Kaldenberg, 19 N. Y. App. Div. 379, 46 N. Y. Suppl. 516; Hoyt *v.* Phillips, 1 Sweeny 76. *Contra*, Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 13 Abb. Pr. N. S. 128].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

**20.** Crusel *v.* Brooks, 121 La. 243, 46 So. 224; Witkouski *v.* Witkouski, 16 La. Ann. 232; Jure *v.* Ballatin, 8 La. Ann. 18; Parkison *v.* Boyle, 7 Rob. (La.) 82.

**A sheriff administering sequestered property** is entitled to a just compensation for his services, to be determined by the court and paid out of the proceeds of the property. Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 118 La. 262, 42 So. 930; Parkison *v.* Boyle, 7 Rob. (La.) 82; Graham *v.* Swayne, 1 Rob. (La.) 186; Avart *v.* King, 14 La. 62.

**21.** Stewart *v.* Fidelity Loan Assoc., 19 Misc. (N. Y.) 49, 42 N. Y. Suppl. 705; Dudley *v.* Clevenger, 19 Okla. 208, 91 Pac. 908. But *compare* Chase *v.* De Wolf, 69 Ill. 47, holding that a statute providing that constables shall be allowed reasonable charges, to be fixed by the justice, for removing and taking care of property levied on by them does not apply to the taking and delivery of property under a writ of replevin.

**22.** Worley *v.* Shelton, (Tex. Civ. App. 1905) 86 S. W. 794.

**23.** Worley *v.* Shelton, (Tex. Civ. App. 1905) 86 S. W. 794. But *compare* Farrar *v.* Rowley, 3 La. Ann. 276, holding that a sheriff who has paid himself out of funds in his hands for all disbursements made by him cannot make an additional charge for his responsibility and care generally, as he is remunerated for this by the emoluments of his office.

**A sheriff is not entitled to compensation** for mere personal care of attached property. King *v.* Shepherd, 68 Iowa 215, 26 N. W. 82; Fletcher *v.* Kalkaska Cir. Judge, 81 Mich. 186, 45 N. W. 641; Lynch *v.* Butler, 43 Hun (N. Y.) 605.

**24.** Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; Olds *v.* Loomis, 10 Ill. App. 498. *Contra*, Curtis *v.* Hulsizer, 5 N. J. L. 496; Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 13 Abb. Pr. N. S. 128], goods seized under execution. And see Mathers *v.* Ramsey, 2 Disn. (Ohio) 334.

**25.** Haase *v.* Levering, 38 N. Y. Suppl. 432, 1 N. Y. Annot. Cas. 404.

rant an allowance the services must have been actually rendered,[26] or the expense actually incurred,[27] and hence a sheriff or constable is not entitled to any compensation for receiving and keeping property levied on, where the amount of the execution was paid as soon as the levy was made.[28]

**c. Necessity For Service or Expenditure.** In order to authorize a charge for the care and custody of property the services rendered or the expense incurred must have been necessary.[29]

**d. Payment by Sheriff as Prerequisite to Allowance.** Even if it is a prerequisite to recovery by a sheriff of the expenses of preserving attached property at the request of plaintiff in attachment that the sheriff shall have paid the watchman placed in charge by him, it is enough that he has paid with his note.[30]

**e. Necessity For Possession.** A sheriff cannot recover any compensation for the custody of property seized under an order of sale, when he has never had actual possession of the property, has never appointed a keeper, and has not been subjected to any expense or trouble for its safe-keeping.[31]

**f. Manner of Securing Possession.** A statutory provision allowing a sheriff a reasonable sum for securing attached property is applicable where the attachment is by lodging a copy in the town clerk's office.[32]

**g. Necessity For Certificate of Reasonableness.** Where the statute allows the sheriff such further compensation for his trouble and expense in taking possession of property and preserving the same as the court from which the writ or order issued may certify to be just and reasonable, in the absence of the required certificate the sheriff is entitled to nothing more than the fees enumerated in the statute.[33]

**h. Indorsement of Charges on Writ.** A sheriff's charges for securing attached property subsequent to the completion of the service and return of the writ may be recovered without having been indorsed thereon.[34]

**i. Period For Which Charge Allowed.** An allowance to a sheriff for the care and custody of property can be made for only such period as the property was in his possession;[35] and a sheriff who has attached property at the instance of plaintiff

**26.** Spence *v.* Thompson, 11 Ala. 746; Demorest *v.* Torry, 9 Abb. Pr. N. S. (N. Y.) 95.

**The return** of a sheriff on a preceding execution that he had levied on slaves does not prove that he kept them for any definite time, so as to warrant a charge for their keeping; the time of keeping not being stated in the return. Spence *v.* Thompson, 11 Ala. 746.

**27.** Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; Olds *v.* Loomis, 10 Ill. App. 498; Grant *v.* Grant, 10 Ont. Pr. 40.

**Necessity of payment.**— Where a sheriff, who had attached property, alleged that "at the plaintiff's instance and request" he employed a custodian of the property, he could not recover from the plaintiff for the services of the custodian, without showing that he had paid the claim or had taken an assignment of it from the custodian. Porter *v.* Booth, 1 S. D. 558, 47 N. W. 960.

**28.** State *v.* Stinebaker, 90 Mo. App. 280, 283, where it is said: "A levy does not, *ipso facto*, entitle a constable or his appointed watchman to such a fee; there must be a 'receiving and keeping' of property, or some difficulty or expense about the levy beyond a merely formal service of the writ and an instant acceptance of payment from the execution debtor."

**29.** *Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Idaho.*— McConnell *v.* McCormick, 3 Ida. 227, 28 Pac. 421.

*Illinois.*— Olds *v.* Loomis, 10 Ill. App. 498.

*Missouri.*— Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

*New York.*— Depew *v.* Solomonowitz, 48 N. Y. App. Div. 512, 62 N. Y. Suppl. 916.

*Oregon.*— Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

*Canada.*— Grant *v.* Grant, 10 Ont. Pr. 40.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

**30.** Southwestern Commercial Co. *v.* Owesney, 10 Ariz. 49, 85 Pac. 724.

**31.** Ledoux *v.* Rucker, 4 La. Ann. 218.

**32.** Willey *v.* Laraway, 64 Vt. 566, 567, 25 Atl. 435, where it is said: "Property so attached is held to be in the custody of the officer; and he is liable for a failure to produce it, unless he can excuse himself by showing that he exercised the same degree of care regarding it that is required in the case of property taken into actual possession. . . . In the exercise of this care, it often becomes necessary for the officer to take measures for securing the property after lodging the copy. It is evident that the necessity existed in this case."

**33.** Geil *v.* Stevens, 48 Cal. 590.

**34.** Templeton *v.* Capital Sav. Bank, etc., Co., 76 Vt. 345, 57 Atl. 818.

**35.** Dudley *v.* Clevenger, 19 Okla. 208, 91 Pac. 908.

**The return of a sheriff on an order of replevin is conclusive** as to him, and where it

in the suit cannot charge him with the expenses incurred in holding the property after he has been notified that plaintiff has released his claim.[36]

**j. Time When Charges Recoverable.** A sheriff's charges for securing and keeping attached property may be recovered of plaintiff before the termination of the suit in which the attachment issued.[37]

**k. Propriety of Particular Charges.** The sheriff is properly allowed charges for the wages of a person whom he has placed in charge of property which is in his custody,[38] or necessarily employed to look after the same;[39] a watchman to guard and protect goods;[40] keepers, watchers, and gaugers employed about oil wells;[41] a bookkeeper to keep the records of the products of oil wells;[42] clerk hire which is shown to be necessary in connection with the keeping of attached property;[43] the hire of help to assist in husking standing corn attached;[44] keeping cattle or horses;[45] the

shows that he delivered cattle seized under the writ to defendant, with the consent of plaintiff, within ten days after taking such property, he cannot be allowed as a part of the costs for feeding and caring for such cattle for seventy days. Dudley *v.* Clevenger, 19 Okla. 208, 91 Pac. 908.

**36.** Hall *v.* U. S. Reflector Co., 34 Hun (N. Y.) 467.

**37.** Templeton *v.* Capital Sav. Bank, etc., Co., 76 Vt. 345, 57 Atl. 818.

**38.** Southwestern Commercial Co. *v.* Owesney, 10 Ariz. 49, 85 Pac. 724; Waite *v.* Kaldenberg Co., 19 N. Y. App. Div. 879, 46 N. Y. Suppl. 516; Deegan *v.* Karp, 13 N. Y. Civ. Proc. 202; Alburtis *v.* Dudley, 12 Abb. Pr. (N. Y.) 361. *Contra*, Townsend *v.* Ross, 45 N. Y. Super. Ct. 447.

**Selection of custodian.**— The fact that, some time after the employment of the custodian, the sheriff refused to substitute for him another, employed and offered by the attaching creditor, is immaterial since, being responsible for the goods, he has a right to choose a custodian therefor. McDermott *v.* Murphy, 11 Mont. 122, 27 Pac. 334.

**Time for which payment authorized.**— Under Mass. Pub. St. c. 161, §§ 42, 43, and c. 199, § 6, authorizing the appointment and payment of keepers of personal property taken on attachment or execution, payment is to be made only for the keeper while he is in charge, and his custody in that capacity cannot properly extend two days beyond the time when the sale at auction was made on the execution. Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

**Time of rendition of bill.**— Where a sheriff, at the request of an attaching creditor's attorneys, employed a custodian for the goods attached, the sheriff can recover the costs of employing such custodian, although he did not render a bill therefore before the rendition of a judgment in favor of the attaching creditor. McDermott *v.* Murphy, 11 Mont. 122, 27 Pac. 334.

**Authority from attachment creditor.**— Where a sheriff, at the request of an attaching creditor's attorneys, employed a custodian for the goods attached, the fact that the attaching creditor paid several hundred dollars as compensation to the custodian raises the presumption that he authorized such employment, and the sheriff can recover the balance of the compensation paid the custodian. McDermott *v.* Murphy, 11 Mont. 122, 27 Pac. 334.

**39.** State *v.* Stinebaker, 90 Mo. App. 280.

**Property in possession of lessee.**— Where a plantation on which an order of seizure and sale has been levied is in the possession of a lessee, the sheriff cannot appoint a keeper to manage and preserve it, and hence is not entitled to be recompensed for compensation paid him. Decoux *v.* Louisiana Bank, 2 La. Ann. 157.

**40.** Smith *v.* Huddleston, 103 Ala. 223, 15 So. 521; State *v.* Hitchens, 25 Ind. App. 244. 57 N. E. 935, 81 Am. St. Rep. 90; Hoyt *v.* Phillips, 1 Sweeny (N. Y.) 76. *Contra, In re* Patton, 2 Pars. Eq. Cas. (Pa.) 103; Deal *v.* Tower, 1 Phila. (Pa.) 268.

**41.** Crusel *v.* Brooks, 121 La. 243, 46 So. 224.

**42.** Crusel *v.* Brooks, 121 La. 243, 46 So. 224.

**43.** Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

**44.** Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788.

**45.** *California.*— Smith *v.* Richmond, 19 Cal. 476.

*Louisiana.*— Jure *v.* Ballatin, 8 La. Ann. 18 [*approved* in Crusel *v.* Brooks, 121 La. 243, 46 So. 224].

*Massachusetts.*— Phelps *v.* Campbell, 1 Pick. 59.

*Nebraska.*— Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788.

*Oklahoma.*— See Dudley *v.* Clevenger, 19 Okla. 208, 91 Pac. 908.

*Vermont.*— Gleason *v.* Briggs, 28 Vt. 135.

*England.*— See Gaskell *v.* Sefton, 3 D. & L. 267, 15 L. J. Exch. 107, 14 M. & W. 802, 804, where it is said: "The question is, whether the sheriff, who has been ordered to withdraw from the possession of goods on payment to him of 'possession money,' has a right to make an additional charge for the keep of cattle. I think he has not. He might have applied for the expense of keeping these horses when all the parties were before the Judge; and then, if the learned Judge had thought it ought to be allowed, he would have made an order accordingly."

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

storage of goods;[46] and a lock for the room in which goods are stored.[47] But a sheriff is not entitled to an allowance for insurance on property in his possession;[48] nor is he entitled to be reimbursed for money paid to recover stolen property as for expenses incurred in the preservation of the property.[49]

**l. How Allowance Made.** In the absence of proof, compensation is not allowable to the sheriff for trouble and expense in taking and preserving property;[50] and it has been held necessary that such allowance shall be made or ordered by the court.[51] The expense of keeping and caring for property for the time between the entry of a writ and the judgment cannot be allowed as part of the expense for serving the writ,[52] but should be presented to the court by way of an additional return on the writ before the final judgment so that it may be taxed in the costs of the suit and included in the judgment.[53]

**m. Amount of Allowance.** The sheriff's charges must be reasonable,[54] and

**Where the sheriff uses a horse attached by him** sufficiently to pay for the keeping, he cannot recover of the attaching creditor for the pay for such keeping. Dean *v.* Bailey, 12 Vt. 142.

**46.** State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90; Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580; Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345; Eastman *v.* Coos Bank, 1 N. H. 23; Ramsey *v.* Overaker, 1 Disn. (Ohio) 569.

**47.** State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90.

**48.** Smith *v.* Huddleston, 103 Ala. 223, 15 So. 521; Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713 (holding that the sheriff cannot subject the execution debtor to the cost of insurance without his express consent); Owens *v.* Davis, 15 La. Ann. 22 (holding that where a sheriff has not been authorized, as the legal agent of the seizing creditors, to insure property in his custody, he has no authority under the law to effect such insurance, and his claim for the return of the premium paid cannot be allowed as costs of suit); Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 13 Abb. Pr. N. S. 128].

**49.** Worthen *v.* Thompson, 54 Ark. 151, 15 S. W. 192.

**50.** Haase *v.* Levering, 38 N. Y. Suppl. 432, 1 N. Y. Annot. Cas. 404.

**51.** Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841 (holding that under the statute relating to the fees of the sheriff of Lassen county, which provides that he shall be allowed for his trouble and expense in keeping property under attachment such sum as the court shall order, not exceeding three dollars *per diem*, for keeper's fees, the sheriff has no right to the fees unless the court makes such order, and where the judge of a court in which an attachment suit was pending told the sheriff, in a conversation with him on the street, to pay certain keeper's fees, this did not amount to an order allowing the sheriff for his expenses in taking and keeping the property); Bower *v.* Rankin, 61 Cal. 108; Barman *v.* Miller, 23 Minn. 458 (holding that a previous allowance by the court is necessary to authorize the clerk as taxing officer to tax the expenses incurred by the sheriff in securing and safely keeping property, in the adjustment of a bill of costs, but that when such a sum is taxed without a previous order of allowance by the court, the irregularity is cured by the subsequent action of the court on appeal in approving the same as reasonable and necessary).

**52.** Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

**53.** Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

**54.** *California.*— Geil *v.* Stevens, 48 Cal. 590.

*Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

*Illinois.*— Eames *v.* Hennessy, 22 Ill. 628; Olds *v.* Loomis, 10 Ill. App. 498.

*Louisiana.*— Crusel *v.* Brooks, 121 La. 243, 46 So. 224; Silliven *v.* Bellocq, 20 La. Ann. 305; Jure *v.* Ballatin, 8 La. Ann. 18.

*Missouri.*— Hesse *v.* Kimm, 14 Mo. 395; Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

*New York.*— Lynch *v.* Butler, 43 Hun 605; Hoyt *v.* Phillips, 1 Sweeny 76; Stewart *v.* Fidelity Loan Assoc., 19 Misc. 49, 42 N. Y. Suppl. 705; Deegan *v.* Karp, 13 N. Y. Civ. Proc. 202; Coffin *v.* Northwestern Constr. Co., 19 Abb. N. Cas. 383; Alburtis *v.* Dudley, 12 Abb. Pr. 361, 21 How. Pr. 456.

*Oregon.*— Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

*Pennsylvania.*— Lord *v.* Toby Valley Supply Co., 5 Pa. Dist. 290.

*Texas.*— Worley *v.* Shelton, (Civ. App. 1905) 86 S. W. 794.

*Vermont.*— Templeton *v.* Capital Sav. Bank, etc., Co., 76 Vt. 345, 57 Atl. 818; Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435.

*Wisconsin.*— Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745.

*Canada.*— Michie *v.* Reynolds, 24 U. C. Q. B. 303.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

**An item paid for storage** of property held under attachment should be allowed on the basis of the actual rental value, and not measured by the customary rates of charges made by warehousemen. Olds *v.* Loomis, 10 Ill. App. 498.

the amount of the allowance which should be made generally rests in the discretion of the court.[55]

**8. Sales and Conveyances[56] — a. In General.** Compensation is allowed for selling property levied on under execution,[57] or ordered by the court to be sold;[58] but a sheriff is not entitled to commissions on a sale not conducted by him,[59] nor can he be allowed a commission on a sale unless the statute authorizes such a charge.[60] A sheriff who levied on property under a writ of attachment has been held not entitled to a fee for an application by him to the court for the sale of such property.[61]

**b. Advertisement or Notice of Sale.** The statutes sometimes allow a fee for advertising the sale,[62] or reimbursement of the money necessarily expended therefor,[63] but a fee for advertising cannot be claimed unless there has been an actual advertisement;[64] and where the sheriff causes more notices of sale than the law

55. *California.*— Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Bower *v.* Rankin, 61 Cal. 108; Geil *v.* Stevens, 48 Cal. 590.

*Colorado.*— City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

*Illinois.*— Eames *v.* Hennessy, 22 Ill. 628; Olds *v.* Loomis, 10 Ill. App. 498.

*Louisiana.*— Silliven *v.* Bellocq, 20 La. Ann. 305; Parkison *v.* Boyle, 7 Rob. 82. But *compare* Witkouski *v.* Witkouski, 16 La. Ann. 232, holding that the charges of a sheriff for keeping property under a writ of sequestration, so far as they are not regulated by the fee bill, are the subject of proof, and not of judicial discretion.

*Minnesota.*— Barman *v.* Miller, 23 Minn. 458.

*Missouri.*— Hesse *v.* Kimm, 14 Mo. 395.

*New York.*— German American Bank *v.* Morris Run Coal Co., 74 N. Y. 58; Stewart *v.* Fidelity Loan Assoc., 19 Misc. 49, 42 N. Y. Suppl. 705.

*Oregon.*— Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

*Wisconsin.*— Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 72.

**Allowance will not be disturbed unless there was an abuse of discretion.**— Stewart *v.* Fidelity Loan Assoc., 19 Misc. (N. Y.) 49, 42 N. Y. Suppl. 705.

56. See, generally, Executions, 17 Cyc. 1233; Judicial Sales, 24 Cyc. 1.

57. *Illinois.*— Bryan *v.* Buckmaster, 1 Ill. 408.

*Kentucky.*— Boyd *v.* Harper, 3 Bush 142.

*Louisiana.*— Dwight *v.* Curtis, 2 La. Ann. 752.

*New Jersey.*— Harrison *v.* Maroney, 35 N. J. Eq. 41.

*South Carolina.*— State *v.* Beckett, 3 McCord 290.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 75.

**Where there is only one levy and sale** the sheriff is entitled to no more for a sale under a venditioni exponas than if the sale had been under the fieri facias. Boyd *v.* Harper, 3 Bush (Ky.) 142.

**Sheriff not entitled to fees for selling land under school fund mortgage.**—Jackson County *v.* Stone, 168 Mo. 577, 68 S. W. 926.

58. Thompson *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 353, 4 N. W. 603; McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 26 Tex. Civ. App. 49, 62 S. W. 122].

59. Whitlock *v.* Webster, 123 Ill. App. 78 (holding that a sheriff is not entitled to commissions on a sale made pursuant to a chattel mortgage given to secure the debt represented by the judgment, notwithstanding the amount of such sale is credited upon the execution); Harris *v.* Petigrew, 5 Lea (Tenn.) 596 (holding that where, in a suit to enforce a vendor's lien, the sheriff levies an attachment, and the land is afterward sold by the clerk and master under a decree, the sheriff is not entitled to commissions on the amount of the sale).

60. *In re* Crossgrove, (Del. 1907) 67 Atl. 159.

61. Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

62. State *v.* Burton, 4 Harr. (Del.) 457; Anonymous, 22 N. J. L. 211; State *v.* Beckett, 3 McCord (S. C.) 290.

**In the absence of a statute allowing it,** a constable cannot charge for preparing advertisements for the sale of property under execution. Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

63. Gardner *v.* Brown, 22 Ind. 447; Rogers *v.* Simmons, 155 Mass. 259, 20 N. E. 580; Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956; Camp *v.* Garr, 6 Wend. (N. Y.) 535. But *compare* Anonymous, 22 N. J. L. 211, holding that the sheriff on a sale of lands cannot charge defendant the printer's bill for advertising, as the statute prescribes the exact compensation to which he is entitled for advertising.

**Expenses** generally see *infra*, IV, B, 8, d.

**Period of advertising.**— A sheriff cannot charge for advertising real estate under execution for a longer time than six weeks, unless plaintiff has authorized a postponment beyond the six weeks, or subsequently assented to such postponement. Camp *v.* Garr, 6 Wend. (N. Y.) 535.

64. State *v.* Burton, 4 Harr. (Del.) 457, holding that the sheriff was not entitled to an advertising fee on an execution sale where the advertisement was omitted at defendant's request.

prescribes to be published, the amount paid for the unauthorized advertisements is properly struck from his bill of charges.[65] In Texas a sheriff has been held not entitled to compensation for service of notices of the sale of property for delinquent city taxes on parties and their attorneys;[66] but in Louisiana compensation has been allowed for services in writing notices of the sale of property seized under execution.[67]

**c. Amount and Computation of Fees or Commissions.** The amount of a sheriff's fees or commission for making a sale is fixed by statute;[68] but in a case where the several creditors of an insolvent agreed to divide the proceeds of an execution sale, it was held that the sheriff did not act officially in making the sale, but rather as the special agent of the participating creditors, and as such he was entitled to a reasonable compensation for his services, without regard to statutory sheriff's fees.[69] Where only a part of the debt is realized by a sale, the sheriff is entitled to commissions on the sum made;[70] while, on the other hand, if the proceeds of the sale exceed the amount of the debt the sheriff is entitled to a commission on the latter amount only.[71] Where property is sold in parcels the sheriff is entitled to but a single fee and not to a fee for each parcel.[72]

**d. Expenses Connected With Sale.**[73] A sheriff has been held entitled to be reimbursed for lighting the room where the goods sold were during the evenings while he was conducting the sale;[74] but in the absence of a statute allowing it, a constable cannot charge for a flag used at an auction sale of property under an execution.[75] A sheriff cannot charge for the expense of arranging goods for sale with a view of making them bring a better price,[76] and a charge for making and typewriting an inventory of the goods has been held not a legitimate expense of the officer in making an execution sale.[77] A sheriff or constable is not as a rule entitled to the expense of procuring an auctioneer[78] and clerk to make the

**65.** Virtue *v.* Reburn, 12 Quebec Super. Ct. 343.

**66.** San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 130.

**67.** Dwight *v.* Curtis, 2 La. Ann. 752.

**68.** See the following cases:

*Georgia.*— Fitts *v.* Rose, 19 Ga. 165; Aycock *v.* Buffington, 2 Ga. 268.

*Kentucky.*— Boyd *v.* Harper, 3 Bush 142.

*Minnesota.*— Thompson *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 353, 4 N. W. 603.

*New Jersey.*— Harrison *v.* Maroney, 35 N. J. Eq. 41.

*Pennsylvania.*— Fowler *v.* Atkinson, 5 Lanc. L. Rev. 92.

*South Carolina.*— State *v.* Beckett, 3 McCord 290. See also Smith *v.* Smith, 1 Bailey 70.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 75.

**69.** Blake *v.* Baldwin, 54 Conn. 5, 5 Atl. 299.

**70.** Bryan *v.* Buckmaster, 1 Ill. 408; Evans *v.* Elmes, 2 Pa. L. J. 216.

**71.** Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713; Fitts *v.* Rose, 19 Ga. 165; Sinnickson *v.* Gale, 16 N. J. L. 21.

**Payment to subsequent lien creditors.**— Where real estate sold on execution produces more than the amount of the debt, and the surplus is paid out by the sheriff to subsequent lien creditors who have issued execution, the sheriff is entitled to poundage on the whole amount paid out by him. Evans *v.* Elmes, 2 Pa. L. J. 216.

**72.** Wooden *v.* Allen County Com'rs, 22 Kan. 532; McLennan *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 62 S. W. 122]. See also Fowler *v.* Atkinson, 5 Lanc. L. Rev. (Pa.) 92.

**73. Cost of advertising sale** see *supra*, IV, B, 8, b.

**Disbursement and incidental expenses generally** see *infra*, IV, B, 17.

**74.** State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90.

**75.** Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

**76.** Miles *v.* Huber, 1 Pa. L. J. Rep. 483.

**77.** Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896.

**78.** *Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Indiana.*— State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90.

*New York.*—Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213 [*affirming* 13 Abb. Pr. N. S. 128].

*United States.*— Wallis *v.* Shelly, 30 Fed. 747.

*England.*— Rex *v.* Crackenthorp, Anstr. 412.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 75.

**It is only when an auctioneer is employed at the request of a party** that the sheriff can make a claim for the expense. Crofut *v.* Brandt, 13 Abb. Pr. N. S. (N. Y.) 128 [*affirmed* in 58 N. Y. 106, 17 Am. Rep. 213]; Wallis *v.* Shelly, 30 Fed. 747.

**Amount allowable under statute.**— As 1 N. Y. Rev. St. p. 532, § 23, limited the commission which may be charged by auctioneers,

sale.[79] The sheriff may not charge for expenses attending a sale a greater amount than he actually paid out.[80]

**e. Sale Under Void Judgment.** A sheriff who has sold property under a fieri facias regular on its face, but issued on a judgment which was void because the judge was incompetent to try the case, is not, as against the execution defendant, entitled to commissions.[81]

**f. Purchase by Judgment Creditor.** According to some authorities, a sheriff who makes a sale is entitled to his commission, although the property is bid in by the judgment creditor for an amount not exceeding what is due him under the judgment, and the price is merely credited on the judgment without any money passing;[82] but other cases deny the right of the sheriff to a commission under such circumstances.[83]

**g. Purchase by Person Entitled to Whole Proceeds.** It has been held that the sheriff is not entitled to poundage where real estate sold on foreclosure is bought by one entitled to the whole of the proceeds arising from the sale, although such purchaser was not a party to the foreclosure decree.[84]

**h. Failure to Consummate Sale.** The sheriff is entitled to his fee or commission on the sale of land where the sale fails of completion by reason of an arrangement between plaintiff and purchaser at the sale,[85] or where he is enjoined from executing a deed or receiving the money.[86]

**i. Quashal of Sale.** The sheriff's right to a full commission on a sale under a fieri facias is not affected by the creditor's subsequent quashal of the sale.[87]

**j. Redemption of Property.** A sheriff who has sold property under execution and collected the percentage allowed him by law for the sale cannot, on redemption of the property, charge such percentage again.[88]

**9. Collection and Payment of Money.** The sheriff is usually allowed compensation in the form of a commission for collecting money under legal process and paying out the same,[89] and where money is collected by a sale of property the

in the absence of written contract, to two and one-half per cent on the amount of sales, Laws (1890), c. 523, § 12, authorizing a sheriff to employ an auctioneer, and pay him a fee not to exceed the "customary market rate," must be construed to mean the market rate not exceeding two and one-half per cent. Hubbard *v.* Jaeger Electric Lamp Co., 38 N. Y. Suppl. 158, 2 N. Y. Annot. Cas. 114.

79. State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90.

80. Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

81. Wilson *v.* Sawyer, 37 Ala. 631.

82. *Iowa.*— Litchfield *v.* Ashford, 70 Iowa 393, 30 N. W. 649.

*Minnesota.*— Sharvey *v.* Central Vermillion Iron Co., 57 Minn. 216, 58 N. W. 864.

*Montana.*— Jurgens *v.* Hauser, 19 Mont. 184, 47 Pac. 809.

*Ohio.*— Home Bldg., etc., Co. *v.* Hoskins, 8 Ohio S. & C. Pl. Dec. 437, 6 Ohio N. P. 274, so holding under a statute allowing the sheriff a certain commission "on the amount of all sales."

*Tennessee.*— Arnold *v.* Dinsmore, 3 Coldw. 235.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 69.

83. Coleman *v.* Ross, 14 Oreg. 349, 12 Pac. 648 (so holding under a statute allowing the sheriff a commission on "all sums of money actually made on any process and returned to the clerk"); Peery *v.* Wright, 13 Utah 480, 45 Pac. 46 (so holding under a statute allowing the sheriff a commission "for receiving and paying over money on execution or other process when property has been sold"); State *v.* Prince, 9 Wash. 107, 37 Pac. 291 [*followed* in Soderberg *v.* King County, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670; State *v.* Pugh, 9 Wash. 694, 38 Pac. 79] (so holding under a statute allowing a percentage on money "actually made and paid to the sheriff").

84. Major *v.* International Coal Co., 76 Ohio St. 200, 81 N. E. 240, so holding under Rev. St. § 1230.

85. Freeman *v.* McLean, 27 Nova Scotia 324.

86. Cherry *v.* Planters' Warehouse Co., 65 Ga. 535.

87. Boyd *v.* Harper, 3 Bush (Ky.) 142.

88. Coeur D'Alene Hardware Co. *v.* Cameron, 4 Ida. 494, 42 Pac. 509.

89. *Indiana.*— Roop *v.* State, 1 Blackf. 323.

*Kentucky.*— Stith *v.* Lansdale, 2 J. J. Marsh. 152.

*Maine.*— Pierce *v.* Delesdernier, 17 Me. 431.

*Missouri.*— Miller *v.* Muegge, 27 Mo. App. 670.

*Montana.*— Jurgens *v.* Hauser, 19 Mont. 184, 47 Pac. 809.

*Nebraska.*— O'Shea *v.* Kavanaugh, 65 Nebr. 639, 91 N. W. 578; Kent *v.* Shickle, etc., Iron Co., 42 Nebr. 274, 60 N. W. 563.

*Ohio.*—Vance *v.* Columbus Bank, 2 Ohio 214.

*Pennsylvania.*— Miller *v.* Griffith, 2 Pa. Co.

sheriff is usually entitled to a percentage of the proceeds of sale.[90] But the sheriff is not entitled to commissions on moneys collected and retained by him as fees.[91] The sheriff is entitled to poundage only on the amount received by him, and not on the amount of the debt or writ;[92] but it has been held that, if a sheriff applies money raised under an execution on land to mortgages or judgments which are a prior lien, he is entitled to poundage on the amount so paid, although it exceeds the real debt in the action.[93]

**10. Selection and Summoning of Jurors**[94] — **a. In General.** The sheriff is usually allowed a fee for summoning[95] and drawing[96] jurors, the amount of such

Ct. 531; Fowler *v.* Anderson, 5 Lanc. L. Rev. 92; Evans *v.* Elmes, 2 Pa. L. J. 216.

*Texas.*— Shaw *v.* Brown, 41 Tex. 446.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 76.

**Crediting on judgment for militia fines.**— Where a judgment is rendered against the sheriff for militia fines put in his hands for collection, he is entitled to deduct for his commissions for such collection. Stith *v.* Lansdale, 2 J. J. Marsh. (Ky.) 152.

**Receipt and use of check.**— Where, on a sheriff's sale of real property, a check of the purchaser has been received and used by the sheriff with the assent of all parties concerned, the commission of the sheriff will not be denied simply because, technically speaking, no money was received or disbursed by him. Kent *v.* Shickle, etc., Iron Co., 42 Nebr. 274, 60 N. W. 563.

**Receiving and paying over costs.**— It being the duty of the county commissioners, when the county is liable for the costs of the case, to pay each witness, a sheriff is not entitled to a claim of two per cent commission for receiving and paying over the costs, if he does so for convenience. Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21.

**Where a sheriff pays money into court** to be distributed by the court or by an auditor, he is not entitled to poundage on such money as if it had been paid by him to plaintiff. *In re* Allison, 4 Pa. Co. Ct. 550 [*following* Nicholson's Appeal, 10 Cent. Rep. 354].

**No commission on amounts collected for fines.**— State *v.* Charleston Dist., 1 McCord (S. C.) 419. *Contra*, Shaw *v.* Brown, 41 Tex. 446.

**90.** McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 26 Tex. Civ. App. 49, 62 S. W. 122]; San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 130 (holding that where the judgment foreclosing a city tax lien on several parcels of land required an apportionment against each parcel, the sheriff was entitled to commissions on money collected on the sale of one of the parcels, although he had received commissions on money collected under the same order without sale of the other parcels); Davies *v.* Edmonds, 1 D. & L. 395, 13 L. J. Exch. 1, 12 M. & W. 31. And see *supra*, IV, B, 8, a.

**Surrender of bonds.**— Where in a suit to foreclose a mortgage, brought by a trustee for the bondholders, the mortgaged property was sold by the sheriff, and was purchased by the bondholders, they paying in cash a sufficient sum to cover the costs of the sale and the residue by the surrender to the sheriff of mortgage bonds in an amount to cover the balance of the purchase-price, the sheriff could not collect poundage on the amount of the bonds so surrendered as for money actually made and paid. Major *v.* International Coal Co., 76 Ohio St. 200, 81 N. E. 240.

**91.** Miller *v.* Muegge, 27 Mo. App. 670.

**92.** Miller *v.* Griffith, 2 Pa. Co. Ct. 531.

**93.** Petry *v.* Beauvarlet, 1 Binn. (Pa.) 97, holding this to be true, although the fee bill provides "that no poundage shall be paid for more than the real debt in the execution."

**94.** See, generally, Grand Juries, 20 Cyc. 1291; Juries, 24 Cyc. 82.

**95.** *Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.

*Massachusetts.*— Wilmarth *v.* Knight, 14 Gray 112.

*Nevada.*— Washoe County *v.* Humboldt County, 14 Nev. 123.

*New York.*— Powens *v.* Jones, 10 Abb. N. Cas. 458; Little *v.* Coyle, 60 How. Pr. 76; Boynton *v.* Dormott, 3 How. Pr. 232.

*Ohio.*— State *v.* Root, 46 Ohio St. 510, 24 N. E. 595.

*Pennsylvania.*—Marberry *v.* Lehigh County, 10 Pa. Cas. 6, 13 Atl. 196.

*South Dakota.*—Remer *v.* Lawrence County, 13 S. D. 418, 83 N. W. 554; Neher *v.* McCook County, 11 S. D. 422, 78 N. W. 998.

*Tennessee.*— Girdner *v.* State, 7 Lea 435; Smith *v.* State, 6 Baxt. 537.

*Canada.*— *In re* Davidson, 24 U. C. Q. B. 66; Haldimand County *v.* Martin, 19 U. C. Q. B. 178.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 77.

**Attempts to serve jurors.**— Where a sheriff finds only part of the jurors named in a venire, he is entitled to his fees "for miles actually traveled in attempting to find and serve jurors whose names appeared upon the venire, but who could not be found and served." Washoe County *v.* Humboldt County, 14 Nev. 123.

**Special panels.**— The provision of Tenn. Code, § 4564, subs. 11, allowing sheriffs fifteen cents for summoning each juror for a special venire by order of court, does not apply to panels of jurors made up generally from the bystanders for the trial of felonies. Girdner *v.* State, 7 Lea (Tenn.) 435 [*overruling* Smith *v.* State, 6 Baxt. (Tenn.) 537].

**Constable not entitled to fee from county for summoning coroner's jury.**— *In re* Coroner's Inquests, 1 Pa. Co. Ct. 14.

**96.** Chester County *v.* Hoopes, 6 Pa. Co. Ct.

fees being fixed by statute.[97] But in accordance with the general rule,[98] where the statute provides no compensation for the selection or summoning of jurors the sheriff must perform these duties without compensation;[99] and a fee for such services cannot be claimed from the county by a sheriff to whom the statute allows a fixed salary in lieu of fees and costs which may be chargeable against the county.[1] It has also been held that a sheriff is not entitled to a fee for each jury called by a bailiff in addition to the *per diem* paid by the county for the latter.[2]

**b. Notices, Venires, and Panels.** Under a statute providing that the sheriff shall receive a certain amount for each juror summoned to attend court, the sheriff is not entitled to receive additional compensation for preparing notices to the jurors;[3] and where the law requires the clerk to issue venires which the sheriff may serve by reading or delivering a copy, a sheriff cannot be allowed compensation for making copies in addition to the compensation specifically provided for summoning jurors.[4] But the sheriff is sometimes allowed to charge for copies of the panels.[5]

**c. Certificates of Attendance.** Under a statute allowing a sheriff to charge for certificates of attendance for jurymen, he is entitled to charge only for such certificates as are demanded by the jurors, and cannot prepare them beforehand and charge whether they are asked for or not.[6]

**d. Computation of Fees.** A sheriff has been held entitled to full fees for summoning jurors for two courts, although the same persons were summoned for both courts and served at the same time with both summonses;[7] but on the other hand the sheriff has been held entitled to but a single fee for summoning a jury to serve in several matters.[8]

**11. Attendance at Court[9] — a. In General.** Under some statutes a sheriff is entitled to compensation for attendance upon the terms of court;[10] but, such

51, holding, however, that the sheriff, not being required to take part in the filling of the jury wheel, is not entitled to any compensation for services connected therewith. *Contra*, Allen *v.* Warren County, 2 Pa. Co. Ct. 532 [*followed* in Totten *v.* Cumberland County, 11 Pa. Co. Ct. 316 (*disapproving* Chester County *v.* Hoopes, 6 Pa. Co. Ct. 51)].

**97.** *New York.*— Boynton *v.* Dormott, 3 How. Pr. 232.

*Ohio.*— State *v.* Root, 46 Ohio St. 510, 24 N. E. 595.

*Pennsylvania.*— Chester County *v.* Hoopes, 6 Pa. Co. Ct. 51.

*South Dakota.*— Neher *v.* McCook County, 11 S. D. 422, 78 N. W. 998.

*Canada.*— *In re* Davidson, 24 U. C. Q. B. 66.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 77.

**98.** See *supra*, IV, A, 1.

**99.** Hempstead County *v.* Jones, 62 Ark. 272, 35 S. W. 230 (holding that a sheriff cannot be allowed fees for summoning special jurors to serve in felony cases); Decatur County *v.* Cox, 65 Ga. 80; Bryner *v.* Peoria County, 24 Ill. 195; Irwin *v.* Northumberland County, 1 Serg. & R. (Pa.) 505; Gillon *v.* Potter Co., 19 Pa. Co. Ct. 540; Allen *v.* Warren County, 2 Pa. Co. Ct. 532.

A statute requiring the commissioner of jurors to notify jurors to attend court impliedly repeals an earlier statute allowing the sheriff a fee for such service. Costa *v.* New York City R. Co., 100 N. Y. Suppl. 558.

**1.** Briggs *v.* Taunton, 110 Mass. 423; Hunter *v.* Bamberg County, 63 S. C. 149, 41 S. E. 26. See also Lake *v.* Caddo Parish, 37 La. Ann. 788.

**2.** Bringolf *v.* Polk County, 41 Iowa 554.

**3.** Marberry *v.* Lehigh County, 10 Pa. Cas. 6, 13 Atl. 196; Chester County *v.* Hoopes, 6 Pa. Co. Ct. 51.

**4.** Remer *v.* Lawrence County, 13 S. D. 418, 83 N. W. 554.

**5.** *In re* Davidson, 22 U. C. Q. B. 405.

**6.** *In re* Davidson, 22 U. C. Q. B. 405.

**7.** *In re* Davidson, 24 U. C. Q. B. 66. See also Haldimand County *v.* Martin, 19 U. C. Q. B. 178.

**8.** Robb *v.* A. K. & D. M. R. Co., 44 Iowa 440 (holding that where a sheriff summoned a jury to assess damages on all land appropriated for a right of way, and on the same day an assessment was made by the same jury for several tracts, allowing separate amounts to different owners, a direction to the jury to proceed from one tract to another was not a separate summons within a statute entitling a sheriff to certain fees for summoning a jury to assess damages for taking land for internal improvements); Wilmarth *v.* Knight, 14 Gray (Mass.) 112 (holding that on several warrants on complaints for flowing lands, which the law requires to be tried before the same jury, the fees of the sheriff for summoning jurors are to be the same as if there had been one warrant).

**9.** Courts generally see Courts, 11 Cyc. 633.

**10.** *Georgia.*— Floyd County *v.* Foster, 112 Ga. 131, 37 S. E. 120.

attendance being incident to his office,[11] he cannot claim any compensation therefor in the absence of statute allowing the same.[12] It has been held, however, that where the statute imposes upon the sheriff the duty of attending court if required by the judge, but provides no fees for such attendance, it is within the power of the board of county auditors to allow reasonable compensation therefor.[13] Where a fee is provided only for attending certain courts, the sheriff cannot claim such fee for attending other courts;[14] and, under a statute allowing constables a fee for attending each trial in a criminal case, a constable is not entitled to such fee where there is a plea of guilty, and judgment thereon, and no evidence is introduced.[15]

**b. Character of Attendance.** A sheriff is not entitled to fees for a mere nom-

*Illinois.*— La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

*Indiana.*— Daviess County *v.* Fitzgerald, 40 Ind. App. 24, 79 N. E. 393; Miller *v.* Boone County, 5 Ind. App. 225, 31 N. E. 1123.

*Kansas.*— Robson *v.* Dickinson County, 8 Kan. App. 374, 55 Pac. 520.

*Michigan.*— See Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

*Minnesota.*— Connelly *v.* Dakota County, 35 Minn. 365, 29 N. W. 1.

*Nebraska.*— Kissinger *v.* Staley, 44 Nebr. 783, 63 N. W. 55.

*Nevada.*— Washoe County *v.* Humboldt County, 14 Nev. 123.

*New York.*— People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. App. Div. 1122.

*Texas.*— Ledbetter *v.* Dallas County, (Civ. App. 1908) 111 S. W. 193.

*Wisconsin.*—Holzhauer *v.* Milwaukee County, 41 Wis. 639.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 78.

**Per diem in addition to salary.**— In Indiana the sheriff is entitled to retain from his fees, over and above his salary, the amounts allowed him for his *per diem* attendance upon the sessions of the circuit and commissioners' courts. Daviess County *v.* Fitzgerald, 40 Ind. App. 24, 79 N. E. 393 [*following* Board *v.* Neely, 36 Ind. App. 706, 75 N. E. 829; Morgan County *v.* Crone, 36 Ind. App. 283, 75 N. E. 826].

**A constable** is entitled to the same fee for attending a justice's court with a prisoner as the statute allows the sheriff. Cutts *v.* Rock County, 58 Wis. 641, 17 N. W. 636.

**11.** Decatur County *v.* Cox, 65 Ga. 80.

**Duty to attend court** see *supra*, III, B, 5.

**12.** *Colorado.*— Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366, holding that there is no statutory authority for allowing a *per diem* fee to a sheriff for attendance before a justice of the peace at the trial of a criminal action.

*Georgia.*— Decatur County *v.* Cox, 65 Ga. 80.

*Idaho.*— Eakin *v.* Nez Perces County, 4 Ida. 131, 36 Pac. 702 [*followed* in Campbell *v.* Logan County, 4 Ida. 181, 37 Pac. 329].

*Michigan.*— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

*Missouri.*— State *v.* Brown, 146 Mo. 401, 47 S. W. 504.

*New York.*— *Ex p.* Minier, 2 Hill 411.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 78.

**Statute allowing compensation to deputy.** — Under a statute providing that deputy sheriffs in attendance on circuit court shall be paid one thousand dollars per annum, the sheriff is not entitled, as a matter of right, to compensation for attendance on the circuit court. Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

**Certificates of judges** of criminal courts that certain fees not allowed by statute are due the sheriff for attendance thereon can give him no right to such fees. State *v.* Brown, 146 Mo. 401, 47 S. W. 504.

**A constable** is not entitled, under the law of New York, to make a charge for attendance upon the court except when he attends a court of record pursuant to a notice for that purpose given by the sheriff. Matter of Hempstead, 36 N. Y. App. Div. 321, 53 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].

**13.** Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

**14.** *Alabama.*—Torbert *v.* Hale County, 131 Ala. 143, 30 So. 453.

*Missouri.*— State *v.* Brown, 146 Mo. 401, 47 S. W. 504.

*Nebraska.*— Kissinger *v.* Staley, 44 Nebr. 783, 63 N. W. 55.

*New York.*— People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122, holding that by Code Civ. Proc. § 3307, subd. 21, providing that a sheriff shall receive three dollars per day for attending a term of court which he is required by law to attend, does not entitle a sheriff to compensation for attending sessions of the surrogate's court, as there is no law requiring him to attend that court.

*Texas.*— Robinson *v.* Smith County, 33 Tex. Civ. App. 251, 76 S. W. 584, holding that under Rev. St. (1895) art. 2460, which provides that the sheriff shall be entitled to two dollars for each day that he shall attend "the district or county court," the sheriff is not entitled to two dollars a day for attending on the commissioners' court, but his compensation therefor is the *ex officio* allowance under Rev. St. (1895) art. 2462.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 78.

**15.** Wheeler *v.* Clinton County, 92 Iowa 44, 60 N. W. 207.

inal, colorable, or constructive attendance at court;[16] but a constable summoned and actually attending court is entitled to his fees, although he does not actually perform any of the duties of a constable.[17]

**c. Duty or Necessity of Attendance.** In order to entitle a sheriff to compensation for attendance at court it must have been his duty to attend or his attendance must have been necessary.[18]

**d. Amount of Compensation.** The amount of the sheriff's compensation for attending terms of court is fixed by statute;[19] and where the statute allows the sheriff a certain *per diem* for attendance by himself or deputy he cannot recover pay for two deputies attending the court.[20] Neither can a sheriff and his deputy both claim their *per diem* for attendance on the same court.[21] But where there are two judges holding court at the same time in the county, and it is the duty of the sheriff to attend upon each, he is entitled to an allowance for attendance before each judge;[22] and where a statute gives the sheriff a *per diem* for attendance on a circuit or municipal court, and the same statute also contains a provision allowing him a certain amount per day for attending any court or officer with a prisoner, a sheriff is not precluded from recovering the fee for attending a municipal court with a prisoner by the fact that he has charged and received his *per diem* for attending on the same court on the same days.[23]

**12. ATTENDANCE ON JURY.**[24] While the statutes sometimes allow a sheriff compensation for attendance upon or custody of juries,[25] he can claim no compensation for such service in the absence of any statute providing therefor;[26] and

16. Hickey *v.* Oakland County, 62 Mich. 94, 28 N. W. 771; Vincent *v.* Mecosta County, 52 Mich. 340, 17 N. W. 938 (holding that a sheriff is not entitled to payment for attendance in court, when he can produce no certificate from the court showing his attendance, and when he has in fact been employed elsewhere); Lewis *v.* Hoboken, 42 N. J. L. 377; People *v.* Livingston County, 89 N. Y. App. Div. 152, 85 N. Y. Suppl. 284.

17. People *v.* Columbia County, 4 Cow. (N. Y.) 146, where it is said: "It is enough that he was summoned, and attending ready to perform his duty as constable, if called on."

18. St. Clair County *v.* Irwin, 15 Ill. 54 (holding that it is not the duty of the sheriff to attend sessions of the county court held for the transaction of probate business, unless required by the judge, and he is entitled to no compensation for attendance unless so required); Robson *v.* Dickinson County, 8 Kan. App. 374, 55 Pac. 520 (holding that under a statute providing that the sheriff shall attend on the several courts of record in his county, and receive a certain sum per day therefor, the sheriff is not entitled to pay for every day the court is in session, regardless of whether his presence is required by the judge or there is any service for him to perform); People *v.* Livingston County, 89 N. Y. App. Div. 152, 85 N. Y. Suppl. 284 (holding that a sheriff is not entitled to fees for attendance at a court to be held at the chambers of the county judge on days designated therefor, in cases where the county judge was absent from the county, and no court was in fact held, and no adjournment was made or other services rendered by the officer, there being no statute requiring him to attend such terms); People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

19. Floyd County *v.* Foster, 112 Ga. 131, 37 S. E. 120; Ledbetter *v.* Dallas County, (Tex. Civ. App. 1908) 111 S. W. 193.

**Night sessions.**— Where the fee bill authorizes the sheriff to charge a certain amount for one day's attendance upon the court, he cannot charge an additional sum for attendance at a night session. Washoe County *v.* Humboldt County, 14 Nev. 123.

20. Ledbetter *v.* Dallas County, (Tex. Civ. App. 1908) 111 S. W. 193, holding that this is true, although the appointment of the extra deputy was authorized by the court itself.

21. Crouch *v.* Plummer, 17 Mo. 420.

22. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

23. Holzhauer *v.* Milwaukee County, 41 Wis. 639.

24. See, generally, GRAND JURIES, 20 Cyc. 1291; JURIES, 24 Cyc. 82.

25. Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101].

**Computation of allowance.**— A constable appointed to attend the grand jury is entitled to his *per diem* for each day on which he performs any *bona fide* service for that body, such as serving subpœnas, whether the grand jury is actually in session or has temporarily adjourned. Connors *v.* Shelby County, 113 Tenn. 177, 81 S. W. 598.

**Expenses of keeping jury together.**— A sheriff, who is directed by the district court to keep together and lodge a jury in a criminal case, is not entitled to be reimbursed for provisions furnished them, but can recover only for necessary fire, water, stationery, etc., supplied by him, and for providing a room and a bailiff. White *v.* Panola County, 12 Tex. 173.

26. McHenry *v.* Hot Springs County, 57 Ark. 565, 22 S. W. 175.

a sheriff who receives an annual salary is not entitled to additional compensation for services in connection with juries.[27]

**13. Attendance Upon and Services in Connection With Elections.**[28] The statutes sometimes allow sheriffs and constables fees for attendance upon and services in connection with elections;[29] but the compensation is limited to the statutory allowance,[30] and no compensation whatever can be recovered for such services in the absence of some statutory provision therefor.[31]

**14. Bonds and Undertakings.**[32] A sheriff is sometimes allowed a fee for preparing a bail-bond,[33] or taking and returning a forthcoming bond;[34] but in the absence of some statutory provision a sheriff is not entitled to a fee for taking appearance bonds.[35]

**15. Copies of Writs and Processes.** The statutes sometimes allow the sheriffs to make a certain charge for copies of writs and processes,[36] and to demand a fee for attesting the same.[37]

**16. Office Expenses, Supplies, and Clerk Hire.** The sheriff is sometimes allowed reimbursement for money paid out for office rent;[38] but where he is not compelled to keep an office open at the county-seat, but is permitted to occupy

**Sheriff not entitled to fee for attendance upon view by jury.**— Weaver *v.* Bushong, 9 Lanc. Bar (Pa.) 33.

27. Briggs *v.* Taunton, 110 Mass. 423, holding that a sheriff who receives an annual salary is not entitled to additional compensation for presiding as sheriff at a jury trial to assess damages for land taken for a highway or for drawing up the return of the verdict.

28. See, generally, Elections, 15 Cyc. 268.

29. Ft. Smith School Dist. *v.* Williams, 61 Ark. 71, 31 S. W. 980.

**Pa. Act, June 15, 1897,** providing for payment of constables' fees for attending elections "in all cases where the same remain unpaid," applies not only to fees unpaid at the time the statute was enacted, but also to those which may remain so at any time while the law is in force. Sattazahan *v.* Lebanon County, 21 Pa. Co. Ct. 574.

**A statute enacted during the term of a constable** cannot entitle him to compensation for services in connection with elections when the statute in force at the time of his election or appointment allowed him none. Hancox *v.* Venango County, 20 Pa. Co. Ct. 508.

30. Logan County *v.* Doan, 34 Nebr. 104, 51 N. W. 598 (holding that as the only compensation for posting up election notices which the statute provides for a sheriff is five cents a mile for each mile actually and necessarily traveled, he cannot recover from the county a *per diem* for the time spent in posting such notices); Chester County *v.* Hoopes, 6 Pa. Co. Ct. 51. See also Burnett *v.* Mercer County, 3 Pa. Dist. 379.

31. McCallister *v.* Armstrong County, 9 Pa. Super. Ct. 423; Eckerd *v.* Perry County, 6 Pa. Dist. 284; Hancox *v.* Venango County, 20 Pa. Co. Ct. 508; Long *v.* Northumberland County, 20 Pa. Co. Ct. 70; Hulsizer *v.* Northampton County, 19 Pa. Co. Ct. 385; Gilmore *v.* Reed, 13 Montg. Co. Rep. (Pa.) 96.

32. See, generally, Bonds, 5 Cyc. 721.

33. People *v.* Elmer, 3 Paige (N. Y.) 85.

**Bail-bonds** generally see Bail, 5 Cyc. 1.

34. Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374.

**Forthcoming bonds** generally see Attachment, 4 Cyc. 677.

35. Court Officers *v.* Wyatt, 62 Ga. 172.

36. *Iowa.*— Painter *v.* Polk County, 70 Iowa 596, 31 N. W. 879; Bringolt *v.* Polk County, 41 Iowa 554.

*Nebraska.*— Dodge County *v.* Gregg, 14 Nebr. 305, 15 N. W. 741.

*New Hampshire.*—Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

*New York.*— Calhoun *v.* Lee, 29 How. Pr. 1.

*Vermont.*— Willey *v.* Laraway, 64 Vt. 566, 25 Atl. 435.

*Wisconsin.*— Bound *v.* Beach, 44 Wis. 600.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 82.

**Necessity for copies.**— The sheriff's return must be taken as conclusive as to the necessity of copies of subpœnas to be served on witnesses in a criminal examination in ascertaining his fees. Dodge County *v.* Gregg, 14 Nebr. 305, 15 N. W. 741.

**The fact that plaintiff voluntarily furnishes the necessary copies** of a summons and complaint for service does not interfere with the right of the sheriff to demand and receive the statutory fees for making such copies. Bound *v.* Beach, 44 Wis. 600.

**Computation of charge** see Painter *v.* Polk County, 70 Iowa 596, 31 N. W. 879; Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

37. Edgerly *v.* Hale, 71 N. H. 138, 51 Atl. 679.

38. Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432], holding that, although a sheriff was elected in 1894, and had his compensation fixed by the county board at a certain sum, a resolution of the county board in 1896 authorizing certain expense for office rent rendered evidence of the incurring of such expense admissible in an action by him to recover expenses incurred, in addition to his salary. But *compare* Peck *v.* Kent County, 47 Mich. 477, 11 N. W. 279, holding that a sheriff by virtue of his office has no authority to furnish himself with an office at the expense of the county, and whether authority to do so

a room in the court-house at his option, he cannot recover from the county for the lighting of and fuel for his office.[39] In the absence of a statutory provision therefor a sheriff is not entitled to an allowance for stationery,[40] although it has been held that where the city or county is bound by law to furnish the necessary furniture, books, stationery, and fuel required by the sheriff for his office, but fails to do so, the sheriff may buy such supplies and recover for their cost.[41] A sheriff cannot recover for the cost of record books which he is required to keep in the absence of any statute requiring that such books be provided for him.[42] It has been held that where a sheriff's compensation consists of fees or commissions fixed by statute he is not entitled to an extra allowance for clerk hire;[43] and an allowance for a stenographer has also been denied.[44] But a sheriff who receives a salary as compensation for his personal services merely has been held entitled to return out of the fees collected by him such reasonable sums as he has necessarily paid out for clerk hire and other expenses of his office.[45] When the constitution provides that the county board shall fix the compensation of sheriffs with the amount of their necessary clerk hire, stationery, fuel, and other expenses, an allowance of a certain amount "for paying his deputies" will be deemed to have been intended to cover all that the board thought necessary for all purposes.[46]

**17. Disbursements and Incidental Expenses**[47] — **a. In General.** Under some statutes the sheriff is entitled to be reimbursed his expenses necessarily incurred in performing his duties,[48] but in the absence of some statutory provision no allowance for expenses can be made.[49]

**b. Propriety of Particular Allowances** — (i) *In General.* The sheriff is properly allowed reimbursement for amounts which he has necessarily paid out in the discharge of his duties for railroad fare,[50] sleeping-car tickets under proper

was given to him by the board of county supervisors or any authorized committee or member thereof is a question of fact.

**39.** Armsby *v.* Warren County, 20 Ill. 126.

**40.** Bryner *v.* Peoria County, 24 Ill. 195; Armsby *v.* Warren County, 20 Ill. 126.

**41.** Wright *v.* Philadelphia, 14 Phila. (Pa.) 170.

**42.** State *v.* Public Buildings Com'rs, 2 Strohh. (S. C.) 149.

**43.** Kahn *v.* Locke, 75 Ala. 332.

**44.** Drexel *v.* Douglas County, 62 Nebr. 862, 87 N. W. 1053, so holding where the stenographer was employed without the authorization of the board of county commissioners.

**45.** Hodge *v.* People, 8 Ill. App. 193.

**46.** People *v.* Gregory, 11 Ill. App. 370.

**47. Expenses in connection with care, custody, and removal of property** see *supra*, IV, B, 7.

**48.** *Florida.*— Nassau County *v.* Downie, 16 Fla. 171.

*Iowa.*— Bybee *v.* Marion County, 128 Iowa 610, 105 N. W. 118.

*Kentucky.*— Mann *v.* Com., 102 Ky. 383, 43 S. W. 694, 19 Ky. L. Rep. 1437.

*Louisiana.*— Wheelwright *v.* St. Louis, etc., Transp. Co., 48 La. Ann. 606, 19 So. 591.

*New York.*— *In re* Beck, 157 N. Y. 151, 52 N. E. 5 [*reversing* 31 N. Y. App. Div. 361, 53 N. Y. Suppl. 156]; People *v.* Denton, 41 N. Y. App. Div. 386, 58 N. Y. Suppl. 722 (expenses incurred in serving process); Dos Passos *v.* New York, 45 Misc. 394, 90 N. Y. Suppl. 398.

*Pennsylvania.*— See Shrope *v.* Northampton County, 3 Lanc. L. Rev. 123.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 84.

**The expenditures of a sheriff which are taxable as costs** of suit are those incurred by him in the performance of obligations cast upon him by the law itself. Wheelwright *v.* St. Louis, etc., Transp. Co., 48 La. Ann. 606, 19 So. 591.

**49.** McGuire *v.* Iowa County, 133 Iowa 636, 111 N. W. 34 (holding that a constable is not entitled to expenses incurred in serving a warrant of arrest, when no judgment can be entered because of the discontinuance of the prosecution, owing to a failure to acquire jurisdiction over the accused); McDonald *v.* Milwaukee County, 41 Wis. 642 [*following* Crocker *v.* Brown County, 35 Wis. 284]. See also Marion County *v.* Lear, 108 Ill. 343 (holding that a statutory provision that no more fees in criminal cases where defendant is discharged without costs shall be paid to the sheriff than will make up the "salary" of such sheriff refers merely to the compensation allowed for personal services, and does not include reimbursement for expenses); Weston *v.* Weston, 102 Mass. 514 (holding that legal fees for serving an execution for possession of land cannot include a charge for "assistance"); Com. *v.* Goudon, 2 Leg. Op. (Pa.) 21; Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

**50.** Bybee *v.* Marion County, 128 Iowa 610, 105 N. W. 118; Stryker *v.* Lycoming County, 20 Pa. Super. Ct. 345. *Contra*, Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

**A sheriff who travels on a free pass cannot** be allowed the amount of ordinary railroad fare as expenses actually and necessarily in-

circumstances,[51] hotel bills,[52] and meals.[53] And a sheriff has also been held entitled to reimbursement of reasonable expenses incurred in an effort to collect fees of his office which it was his statutory duty to collect and pay into the city treasury.[54]

(II) *HORSE AND CARRIAGE HIRE.* The statutes sometimes allow a sheriff to make a charge for horse and carriage hire in serving process, executing writs, and the like;[55] but such allowance is dependent upon the conveyance having been necessary,[56] and actually used,[57] which facts are sometimes required to be set forth in a certificate.[58]

(III) *ATTORNEY'S FEES AND EXPENSES OF SUITS.* As a general rule a sheriff is not entitled to be allowed the amount paid by him to an attorney for legal advice in respect to the discharge of his functions,[59] but such a charge may be allowed in exceptional cases.[60] A sheriff taking property under execution cannot charge for expenses incurred by reason of an adverse claim to the property,[61] nor can a constable recover the expenses of a suit brought against him for executing a writ of attachment improperly.[62] Where the statute provides that when habeas corpus is allowed in behalf of a person detained on a criminal accusation, the district attorney of the proper county shall have notice of the hearing on the return of the writ, the sheriff has no authority to employ counsel at the expense of the county at such hearing, and cannot therefore recover such expenses.[63]

curred. But if he pays the fare he may include it in his expenses, although he has a pass. Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366.

**51.** Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366, holding that where a sheriff has traveled a wearisome journey of three hundred and fifty miles with a prisoner in charge, the cost of a sleeping-car ticket on his return journey during the night is properly chargeable as a necessary expense.

**52.** Bybee *v.* Marion County, 128 Iowa 610, 105 N. W. 118. *Contra*, Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

**53.** Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366. But *compare* Nassau County *v.* Downie, 16 Fla. 171, holding that the sheriff is not authorized to bind the county for the board of bailiffs in a criminal case.

**54.** Dos Passos *v.* New York, 45 Misc. (N. Y.) 394, 90 N. Y. Suppl. 398, holding that where the sheriff of New York county expended money in an attempt to recover poundage fees, a recovery thereof could be enforced by the sheriff or his assignees only against the city of New York, whether the liability to the sheriff was that of the county or city.

**55.** *Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.

*Iowa.*— Bybee *v.* Marion County, 128 Iowa 610, 105 N. W. 118. *Contra*, Boyle *v.* Plymouth County, 89 Iowa 376, 56 N. W. 523.

*Massachusetts.*—Weston *v.* Weston, 102 Mass. 514.

*Pennsylvania.*— Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911. But *Compare* Com. *v.* Gandon, 2 Leg. Op. 21.

*South Carolina.*— Taggart *v.* Hutson, Rice 300.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 84.

**Contra.**— Crocker *v.* Brown County Sup'rs, 35 Wis. 284.

**56.** Weston *v.* Weston, 102 Mass. 514.

**57.** Weston *v.* Weston, 102 Mass. 514.

**58.** Weston *v.* Weston, 102 Mass. 514.

**59.** Crusel *v.* Brooks, 121 La. 243, 46 So. 224; Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 118 La. 262, 42 So. 930.

"**The sheriff is an officer of the court,** is in touch with the court and its other officers, and has never been considered as an officer in need of regular professional advice, to be charged in the suit in executing the process of the court. The parties to the writ should not be held liable for such fees. As an executive officer of the court, the sheriff is amply protected by its order if properly executed. This can be done without specially retained attorney at the expense of the parties to the suit." Crusel *v.* Brooks, 121 La. 243, 245, 46 So. 224.

**60.** As where the sheriff has rendered services in the nature of those usually rendered by a receiver. Jennings-Heywood Oil Syndicate *v.* Houssiere-Latreille Oil Co., 118 La. Ann. 262, 42 So. 930.

**A sheriff, discharging the duties on attachment which formerly devolved on the trustees,** may employ attorneys, and is entitled to be paid the necessary disbursements therefor in the same manner that such disbursements were allowed to the trustees, whether or not the action is successful, if it is prosecuted in good faith. Mayhew *v.* Duncan, 31 Barb. (N. Y.) 87.

**61.** Crofut *v.* Brandt, 58 N. Y. 106, 17 Am. Rep. 213, so holding on the ground that his poundage and fees allowed to him are full compensation.

**62.** Curtis *v.* Hulsizer, 5 N. J. L. 496.

**63.** McDonald *v.* Milwaukee County, 41 Wis. 642.

(IV) *PAY OF DEPUTIES AND ASSISTANTS.* Some statutes in terms make the sheriff an allowance for a deputy or deputies;[64] but in the absence of some such provision it is held that the sheriff must compensate his deputies out of the fees and emoluments of his office,[65] and cannot recover from the county for the services of deputies furnished by him.[66] A sheriff who is paid by a salary has been held entitled to deputy hire in addition thereto,[67] unless it appears that such salary was intended not merely as personal compensation but as including expenses.[68] A sheriff has been allowed for guards necessarily employed,[69] and held entitled to recover from a railroad company for money paid to men sworn in as deputy sheriffs at its request and upon its promise to pay therefor, to prevent apprehended injury to its property from strikers;[70] but reimbursement for the expense of hiring an armed force to prevent a riot has been denied.[71]

**18. SPECIAL OR EXTRA SERVICES OR EXPENSES.** The statutes sometimes contain a general provision allowing a sheriff compensation for services not specifically provided for;[72] and it has been held that, although there is no law requiring the sheriff to attend the meetings of the board of county commissioners or allowing him compensation therefor, the board has the power to ask the attendance of the sheriff or his deputies and reasonably remunerate such service from the county treasury.[73]

**C. Mileage — 1. RIGHT TO ALLOWANCE — a. In General.** A sheriff or constable

**64.** Mentzner *v.* Marion County, 114 Iowa 478, 87 N. W. 440; Bringolf *v.* Polk County, 41 Iowa 554, holding that the sheriff should be reimbursed by the county for the amount expended by him to pay for the service of bailiffs to the number designated by the court.

**65.** Jefferson County *v.* Hudson, 22 Ark. 595; Mayhew *v.* Duncan, 31 Barb. (N. Y.) 87.

**66.** Decatur County Com'rs *v.* Leaman, 73 Kan. 785, 85 Pac. 590. See also Mercer County *v.* Patterson, 2 Rawle (Pa.) 106, holding that the sheriff cannot charge to the county the daily sum he has paid to the crier of the court.

**67.** Windmiller *v.* People, 78 Ill. App. 273 [*followed* in People *v.* Darrah, 84 Ill. App. 515] (holding that the word "salary," as used by the county board in an order providing for the salary of a sheriff, unless it appears a different meaning is intended, must be accepted in its usual significance, as an annual or periodical payment for services, and will not be held to include moneys necessarily paid to others in the discharge of the duties of the office); Beck *v.* Erie County, 157 N. Y. 151, 52 N. E. 5 [*reversing* 31 N. Y. App. Div. 361, 53 N. Y. Suppl. 156].

**Payments by county directly to deputy.**— In an action by a county against a former sheriff to recover moneys illegally paid to him, a judgment including a payment to a deputy sheriff, who presented the claim, which was audited and allowed, and county orders issued in the deputy's name therefor, and paid to him personally, is erroneous. Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

**68.** People *v.* Darrah, 84 Ill. App. 515; Windmiller *v.* People, 78 Ill. App. 273.

**69.** Ledbetter *v.* Dallas County, (Tex. Civ. App. 1908) 111 S. W. 193.

**70.** Sullivan *v.* Utah, etc., R. Co., 11 Mont. 236, 28 Pac. 307, holding that such recovery was not precluded by Comp. St. div. 5, § 856, providing that it shall be the duty of the sheriff, under-sheriff, and deputies to keep and preserve peace, to quiet and suppress riots and unlawful assemblies, for which purpose they may call to their aid such persons as they deem necessary, and section 864, providing that no sheriff shall directly or indirectly ask or receive for any service to be by him performed in the discharge of any of his official duties any greater fees than are allowed by law, there having been no riot at the time and the sheriff having assured the company that he was able and willing to prevent any trouble with his regular force, and his offer to put the strikers out of the yard having been refused.

**71.** Curtis *v.* Alleghany County, 1 Phila. (Pa.) 237, so holding on the ground that the sheriff had no right to hire such a force at the county's expense instead of raising the *posse comitatus.*

**72.** See Allen *v.* Spoon, 72 N. C. 369, holding that executing a writ of possession by removing defendant's property from the premises to a house about one half a mile distant, where the daughter of defendant resided, was not "seizing of specific property under an order of the Court, or executing any other order of a Court or Judge not specially provided for," wherefor extra compensation may be allowed to the sheriff under Battle's Revisal, c. 105, § 21.

**A sheriff cannot be allowed an additional compensation for executing an attachment,** over and above his prescribed fees, unless he is put to trouble or incurs expenses in taking possession of or in preserving the property attached, the statute not authorizing compensation for any other trouble or expense. Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

**73.** La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

is usually allowed mileage for necessary travel in executing process,[74] serving notices,[75] making returns to court,[76] executing warrants of arrest,[77] taking prisoners before magistrates [78] to the place where they are to be tried,[79] or to their place of confinement,[80] producing in court as witnesses prisoners confined in the penitentiary,[81] taking insane persons to the insane asylum [82] or paupers to the poorhouse,[83] serving subpœnas on witnesses,[84] summoning jurors,[85] posting elec-

**74.** *Colorado.*— Larimer County Com'rs *v.* Love, 15 Colo. 430, 25 Pac. 557.

*Maine.*—Pierce *v.* Delesdernier, 17 Me. 431.

*Nebraska.*— Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*Pennsylvania.*— McGee *v.* Dillon, 103 Pa. St. 433; Price *v.* Lancaster, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987, and *followed* in Barron *v.* Lackawanna County, 7 Pa. Super. Ct. 124; McKniff *v.* Delaware County, 7 Pa. Super. Ct. 123].

*Canada.*— Burwell *v.* Tomlinson, (Hil. T. 2 Vict.) 3 Ont. Case Law Dig. 6423.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 68, 87.

**75.** State *v.* Ward, 79 Minn. 362, 82 N. W. 686.

**76.** Price *v.* Blair County, 6 Pa. Dist. 313; Davison *v.* Franklin County, 5 Pa. Dist. 745, 18 Pa. Co. Ct. 374; McCoy *v.* Cumberland County, 18 Pa. Co. Ct. 459.

**77.** Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430; McHenry *v.* Hot Springs County, 57 Ark. 565, 22 N. W. 175; Overall *v.* Tulare County, 100 Cal. 51, 34 Pac. 519; Cunningham *v.* San Joaquin County, 49 Cal. 323; Simonton *v.* El Dorado County, 22 Cal. 554; Warren *v.* Fremont County, 4 Ida. 591, 43 Pac. 327.

**No mileage on arrest without warrant.**— McHenry *v.* Hot Springs County, 57 Ark. 565, 22 S. W. 175.

**78.** Cunningham *v.* San Joaquin County, 49 Cal. 323.

**79.** Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.

**The sheriff is entitled to mileage for taking a prisoner before a court or magistrate,** regardless of whether the prisoner was arrested with a warrant. Warner *v.* Fremont County, 4 Ida. 591, 43 Pac. 327.

**80.** *Alabama.*— Greene *v.* McGhee, 37 Ala. 164.

*Arizona.*— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

*California.*— Sherman *v.* Santa Barbara County, 59 Cal. 483.

*Idaho.*— Warner *v.* Fremont County, 4 Ida. 591, 43 Pac. 327.

*Indiana.*— Dunn *v.* State, 4 Ind. 529.

*Iowa.*— Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396; Maynard *v.* Cedar County, 51 Iowa 430, 1 N. W. 701; Bringolf *v.* Polk County, 41 Iowa 554.

*Kentucky.*— Mann *v.* Com., 102 Ky. 383, 43 S. W. 694, 19 Ky. L. Rep. 1437.

*New York.*— People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

*Pennsylvania.*— Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 64, 87.

**Contra.**— Crossen *v.* Earhart, 8 Oreg. 370, holding that a sheriff is not entitled to mileage in addition to the other fees prescribed by statute for transporting a convict to the penitentiary.

**81.** Bringolf *v.* Polk County, 41 Iowa 554; Utica Bank *v.* Kibbe, 7 Cow. (N. Y.) 424.

**82.** *Illinois.*— Irvin *v.* Alexander County, 63 Ill. 528.

*Iowa.*— Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396.

*Montana.*— Proctor *v.* Cascade County, 20 Mont. 315, 50 Pac. 1017.

*Nebraska.*— Porter *v.* Merrick County, 42 Nebr. 397, 60 N. W. 588 [*followed* in Smith *v.* Franklin County, 49 Nebr. 164, 68 N. W. 381].

*Ohio.*— Ward *v.* Russell, 57 Ohio St. 144, 48 N. E. 666; Commissioners *v.* Lodwick, 9 Ohio Dec. (Reprint) 567, 15 Cinc. L. Bul. 126.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 66, 87.

**83.** Berks County Directors of Poor *v.* Shingle, 84 Pa. St. 37, holding, however, that a constable who executes an order of relief by conveying a pauper from a certain township to the county poorhouse is not entitled to the mileage allowed in conveying a pauper from the district where he has become chargeable to the district of his settlement, under an order of removal.

**84.** Redfield *v.* Shelby County, 64 Iowa 11, 19 N. W. 828; Haley *v.* Ulster County, 12 Wend. (N. Y.) 237; Humer *v.* Cumberland County, 4 Pa. Dist. 588, 16 Pa. Co. Ct. 552; Com. *v.* Nash, 4 Pa. Dist. 470; English *v.* Tioga County, 20 Pa. Co. Ct. 303; Bannon *v.* Lackawanna County, 3 Lack Leg. N. (Pa.) 148; Green *v.* Anderson County, 56 S. C. 411, 34 S. E. 691, serving warrants for witnesses in criminal cases.

**85.** *Arkansas.*— Williams *v.* Hempstead County, 39 Ark. 176.

*Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.

*Illinois.*—La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

*Indiana.*— Ross *v.* Chinworth, 83 Ind. 598.

*South Dakota.*—Remer *v.* Lawrence County, 13 S. D. 418, 83 N. W. 554; Neher *v.* McCook County, 11 S. D. 422, 78 N. W. 998.

*Canada.*— *In re* Davidson, 24 U. C. Q. B. 66.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 77, 87.

**Contra.**— Templeton *v.* Ryburn, 59 Tex. 209.

**No mileage for summoning jurors to attend view.**— Weaver *v.* Bushong, 9 Lanc. Bar (Pa.) 33.

tion notices,[86] and making election returns.[87] But the right to mileage is purely statutory,[88] and for services in connection with which no mileage is allowed by statute the sheriff is entitled to none.[89] And a sheriff or constable who receives a salary "in lieu of all costs and fees in criminal cases" is not entitled to mileage fees for services in such cases.[90] Mileage charges have been considered as "fees" within a statute providing that fees earned by the sheriff and uncollected at the end of each year shall belong to the county.[91]

**b. Necessity For Actual Travel.** Actual travel is necessary to entitle a sheriff or constable to mileage,[92] and mileage can be allowed only for the distance actually traveled.[93] The court has refused to allow any mileage where the entire distance traveled was less than a mile.[94]

**c. Unnecessary Travel.** As a rule mileage can only be claimed for such distance as is actually necessary to be traveled for the particular service committed to the officer.[95]

**d. Travel in Unsuccessful Attempts to Perform Duty.** The general rule is that a sheriff has no right to mileage in attempting to serve process or make an arrest which is not actually or lawfully served or made,[96] and even though he

**86.** Logan County *v.* Doan, 34 Nebr. 104, 51 N. W. 598.

**87.** Eckerd *v.* Perry County, 6 Pa. Dist. 284.

**88.** Ward *v.* Russell, 57 Ohio St. 144, 48 N. E. 666.

**89.** *Arkansas.*— McHenry *v.* Hot Spring County, 57 Ark. 565, 22 S. W. 175.

*Michigan.*— Vincent *v.* Mecosta County Sup'rs, 52 Mich. 340, 17 N. W. 938.

*Oregon.*— Houser *v.* Umatilla County, 30 Oreg. 486, 49 Pac. 867.

*Pennsylvania.*— Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141.

*Texas.*—Templeton *v.* Ryburn, 59 Tex. 209.

*Canada.*— Burwell *v.* Tomlinson, (Hil. T. 2 Vict.) 3 Ont. Case Law Dig. 6423.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

**90.** Hightower *v.* Bamberg County, 54 S. C. 536, 32 S. E. 576.

**91.** Cremer *v.* Wapello County, 139 Iowa 580, 117 N. W. 954.

**92.** Barnes *v.* Marion County, 54 Iowa 482, 6 N. W. 697; Bringolf *v.* Polk County, 41 Iowa 554 (holding that a sheriff who produces a prisoner in court from the jail will not be entitled to mileage therefor, where the agreed statement in the case does not show that he traveled a mile, or any fraction thereof, in performing the service); Grundysen *v.* Polk County, 57 Minn. 212, 58 N. W. 864; Com. *v.* Thorn, 19 Pa. Co. Ct. 299; Jordan *v.* Coates, 7 N. Brunsw. 107.

**93.** Ross *v.* Chinworth, 83 Ind. 598; Sayles *v.* Murphy, 8 N. Y. Civ. Proc. 325; Com. *v.* Nash, 4 Pa. Dist. 470, holding that a constable's charge for mileage for serving a subpœna must begin at the place where the subpœna is received by him, and end with the point where the subpœna is returned by him.

**94.** Fleck *v.* Dauphin County, 1 Pearson (Pa.) 220.

**95.** Grundysen *v.* Polk County, 57 Minn. 212, 58 N. W. 864; Com. *v.* Thorn, 19 Pa. Co. Ct. 299; Jordan *v.* Coates, 7 N. Brunsw. 107.

**Where process might have been served without travel** by a deputy who was on the spot, the sheriff cannot charge mileage for unnecessary travel in serving it. State *v.* Johnson, 35 Fla. 539, 17 So. 650, holding that, although the sheriff of Leon county is, by statute, the sheriff of the supreme court, and can, in person, legally serve process of such court in any county of the state, he cannot charge mileage for service of civil process in a distant county, without showing that the sheriff of that county was disqualified, or that it was necessary that the service be so made. See also Carreau *v.* Hebert, 11 Quebec Super. Ct. 314.

**96.** *Arizona.*— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

*California.*— Broughton *v.* Santa Barbara County, 65 Cal. 257, 3 Pac. 877 [*followed* in Overall *v.* Tulare County, 100 Cal. 61, 34 Pac. 519].

*Illinois.*— Vannatta *v.* Brewer, 85 Ill. 114.

*Michigan.*— People *v.* Ingham County, 38 Mich. 658.

*New York.*— *Ex p.* Wyles, 1 Den. 658.

*Pennsylvania.*— Com. *v.* Lesher, 2 Pa. Dist. 859, 13 Pa. Co. Ct. 462.

*Wisconsin.*—Schneider *v.* Waukesha County, 103 Wis. 266, 79 N. W. 228 [*followed* in Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867], holding that a sheriff cannot recover mileage for travel in an unsuccessful attempt to execute a criminal warrant, but, where felony is charged, compensation may be allowed by the county board, in its discretion, on the proper certificate of the district attorney.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

But *compare* Grundysen *v.* Polk County, 57 Minn. 212, 58 N. W. 864.

**The county supervisors may allow the sheriff** for such services performed for the county in criminal cases. People *v.* Ingham County, 38 Mich. 658.

**Failure not due to fault of officer.**— A sheriff or constable is entitled to mileage for traveling to serve a criminal warrant, al-

ultimately serves the process or makes the arrest he cannot charge mileage for previous unsuccessful attempts.[97]

**e. Travel Outside of State or County.** According to some authorities a sheriff or constable may be entitled to mileage for travel outside of his state or county,[98] but other authorities deny the right to mileage for such travel.[99]

**f. Travel by Deputies.** The sheriff is entitled to mileage for travel by his deputies as well as by himself.[1]

**g. Indorsement of Mileage on Return.** A sheriff is not deprived of his right to claim mileage for summoning jurymen by the fact that he has omitted to indorse such mileage on the venire as part of his return, where the statute provides that sheriffs' returns may, in the discretion of the court, be amended even after judgment.[2]

**h. Allowance of Expenses of Transporting Prisoners in Addition to Mileage.** An allowance of mileage to a sheriff is intended to cover his own traveling expenses,[3] and where he transports prisoners he is properly allowed their car or railroad fare in addition to his mileage.[4]

**2. Amount and Computation of Mileage — a. In General.** The amount of mileage is fixed by the statute allowing the same,[5] which also usually indicates the legislative intent as to how mileage shall be computed,[6] and the sheriff can

though he fails to make the arrest, where such failure was not due to his fault. Davis *v.* Le Sueur County, 37 Minn. 491, 35 N. W. 364. See also Thomas *v.* Scott County, 15 Minn. 324; Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

97. Shrope *v.* Northampton County, 3 Lanc. L. Rev. (Pa.) 123. See also Benedict *v.* Warriner, 14 How. Pr. (N. Y.) 568, where it is said that only one travel fee can be allowed on each writ.

98. Cunningham *v.* San Joaquin County, 49 Cal. 323 [*followed* in Allen *v.* Napa County, 82 Cal 187, 23 Pac. 43 (*followed* in Monahan *v.* San Diego County, (Cal. 1892) 29 Pac. 417)] (holding that a sheriff or constable is entitled to his mileage outside of the county in going to make an arrest and taking a prisoner to the magistrate); Franklin County *v.* Bell, 48 Kan. 131, 29 Pac. 392.

99. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430 (holding that a statute allowing a sheriff to charge mileage for each mile he may be compelled to travel in executing a criminal warrant does not entitle the sheriff to mileage for travel beyond the state); Clyne *v.* Bingham County, 6 Ida. 75, 60 Pac. 76; Ginter *v.* York County, 3 Pa. Co. Ct. 111 (holding that a sheriff or constable in charge of a requisition for a fugitive in another state acts as the agent of a state, and not in his official capacity, and is entitled to only the actual expenses of the trip).

1. Sargent *v.* La Plata County, 21 Colo 158, 40 Pac. 366.

2. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

3. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

4. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122. See, generally, *supra*, IV, B, 3, d.

5. See the following cases:

*California.*— Overall *v.* Tulare County, 100 Cal. 61, 34 Pac. 519; Simonton *v.* El Dorado County, 22 Cal. 554.

*Colorado.*— Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366.

*Idaho.*— Ellis *v.* Bingham County, 7 Ida. 86, 60 Pac. 79.

*Iowa.*— Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396.

*Montana.*— Procter *v.* Cascade County, 20 Mont. 315, 50 Pac. 1017.

*Nebraska.*— Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956; Porter *v.* Merrick County, 42 Nebr. 397, 60 N. W. 588 [*followed* in Smith *v.* Franklin County, 49 Nebr. 164, 68 N. W. 381].

*Ohio.*— Ward *v.* Russell, 57 Ohio St. 144, 48 N. E. 666.

*Pennsylvania.*— Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987, and *followed* in Barron *v.* Lackawanna County, 7 Pa. Super. Ct. 124; McKniff *v.* Delaware County, 7 Pa. Super. Ct. 123].

*South Dakota.*— Remer *v.* Lawrence County, 13 S. D. 418, 83 N. W. 554.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

**A statute changing the allowance for mileage** is applicable to a sheriff who is in office at the time of its enactment, notwithstanding a constitutional prohibition against increasing or diminishing an officer's "salary or emolument" after his election or appointment. Scharrenbroich *v.* Lewis, etc., County, 33 Mont. 250, 83 Pac. 482.

**Idaho act of March 13, 1891** (Acts (1891), p. 177), amending Rev. St. § 2126, subs. 23, relating to mileage allowed sheriffs in criminal cases, by increasing the amount allowed from twenty to thirty-five cents per mile, is not applicable to the fees of constables, although Ida. Rev. St. § 2136, provides that constables shall receive the same mileage in criminal cases that sheriffs are allowed. Ellis *v.* Bingham County, 7 Ida. 86, 60 Pac. 79.

6. See the following cases:

*Alabama.*— Greene *v.* McGhee, 37 Ala. 164.

claim as mileage no greater amount than the statute allows.[7] Under a statute allowing the sheriff a certain sum for each mile he is necessarily compelled to travel in executing criminal process, "to be charged one way only," the mileage should be paid for the distance traveled until a warrant of arrest is completely executed by disposing of the prisoner as directed.[8] Where the statute allows mileage for the distance "from the place of holding the court to the place of residence of the defendant or witness" the charge may be for such distance only, although it is necessary for the officer to travel a greater distance than to such place of residence in order to make the service.[9]

**b. Route on Which Computation Based.** The statutes frequently contain a designation of the route on which the computation of mileage shall be based, which is of course governing.[10]

**c. Circular or One-Way Mileage.** It has been held that except where circular mileage is expressly given by the statute all mileage is on a straight basis of one way;[11] but where the legislative intent to that effect is clear, mileage both going and returning must be allowed.[12] So also it has been held, where the statute

*Colorado.*— Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366.

*Idaho.*— Ellis *v.* Bingham County, 7 Ida. 86, 60 Pac. 79.

*Indiana.*— Ross *v.* Chinworth, 83 Ind. 598.

*Iowa.*— Maynard *v.* Cedar County, 51 Iowa 430, 1 N. W. 701.

*Maine.*— Pierce *v.* Delesdernier, 17 Me. 431.

*Nebraska.*— Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*New York.*— Sayles *v.* Murphy, 8 N. Y. Civ. Proc. 325.

*Oregon.*— Howe *v.* Douglas County, 3 Oreg. 488.

*Texas.*— Gulf, etc., R. Co. *v.* Dawson, 69 Tex. 519, 7 S. W. 63.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

7. Ward *v.* Russell, 57 Ohio St. 144, 48 N. E. 666.

8. Coconino County *v.* Coconino County Sup'rs, (Ariz. 1907) 89 Pac. 543.

9. Vannatta *v.* Brewer, 85 Ill. 114.

10. Greene *v.* McGhee, 37 Ala. 164 (holding that a statute allowing a sheriff a certain amount for the distance traveled in conveying convicts to the penitentiary by "the land route usually traveled" refers to such a route within the state, and a sheriff is not entitled to mileage for conveying a convict by a route passing through other states, although such route is the one usually traveled between the county court-house and the penitentiary); Maynard *v.* Cedar County, 51 Iowa 430, 1 N. W. 701 (holding that a statute providing for mileage to be computed by "the most direct route of travel" means the route by which the journey may be most speedily performed rather than the route which is shortest in actual distance; and that therefore a sheriff conveying prisoners to a penitentiary by a railway, which is the customary route of travel, is entitled to mileage computed by that route, although there is an old wagon road, much shorter, but along which no public conveyance runs); Pierce *v.* Delesdernier, 17 Me. 431 (holding that where the statute allows mileage for travel to be computed "by the usual way" the distance must be computed by the road usually traveled regardless of whether the sheriff in fact traveled by a more or less distant way to suit his own personal convenience).

11. Bordeaux *v.* Warren County, 66 Miss. 231, 5 So. 227 (holding that a statute allowing a sheriff for certain necessary travel a certain sum for every mile "going and returning" entitles him to the sum specified for both going and returning and does not authorize an allowance of the specified sum per mile for going and also for returning); Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987, and *followed* in Barron *v.* Lackawanna County, 7 Pa. Super. Ct. 124; McKniff *v.* Delaware County, 7 Pa. Super. Ct. 123; English *v.* Tioga County, 21 Pa. Co. Ct. 340]; Conley *v.* York County, 5 Pa. Dist. 748; Davison *v.* Franklin County, 5 Pa. Dist. 745, 18 Pa. Co. Ct. 374; Long *v.* Northumberland County, 20 Pa. Co. Ct. 70; Ingram *v.* Chester County, 18 Pa. Co. Ct. 388; Winters *v.* Dauphin County, 18 Pa. Co. Ct. 151; Boyle *v.* Luzerne County, 17 Pa. Co. Ct. 214, 8 Kulp 141; Martin *v.* Clinton County, 17 Pa. Co. Ct. 15, 8 Kulp 83.

12. *Colorado.*—Sargent *v.* La Plata County, 21 Colo. 158, 40 Pac. 366.

*Illinois.*— Vannatta *v.* Brewer, 85 Ill. 114.

*Indiana.*— Dunn *v.* State, 4 Ind. 529.

*Iowa.*— Harding *v.* Montgomery County, 55 Iowa 41, 7 N. W. 396, holding that under Code (1873), § 3788, allowing a sheriff "for conveying each convict to the penitentiary . . . sixteen cents for each mile traveled, to be computed from the county seat where the conviction took place by the most direct route of travel," payment should be made for each mile traveled on the journey going and returning.

*New York.*— Utica Bank *v.* Kibbe, 7 Cow. 424, holding that the sheriff is entitled to have his mileage for bringing up a prisoner on a habeas corpus ad testificandum computed both for going and returning.

*Oregon.*— Howe *v.* Douglas County, 3 Oreg. 488.

providing for mileage mentions the execution of a warrant of arrest, and the taking of a prisoner before a magistrate as separate and distinct acts, the sheriff or constable is entitled to mileage for each.[13]

**d. Performance of More Than One Service on Single Trip.** Under some statutes a sheriff who performs more than one duty of his office on a single trip is held entitled to full mileage for each service;[14] but under other statutes his

*Pennsylvania.*— Peeling *v.* York County, 212 Pa. St. 245, 61 Atl. 911 [*followed* in Lenhart *v.* Cambria County, 216 Pa. St. 25, 64 Atl. 876 (*affirming* 29 Pa. Super. Ct. 350 [*following* Kottcamp *v.* York County, 28 Pa. Super. Ct. 96 (*distinguishing* Price *v.* Lancaster County, 7 Pa. Super. Ct. 119 [*affirmed* in 189 Pa. St. 95, 41 Atl. 987])])], holding that under a statute allowing a sheriff a certain amount "for each mile actually traveled and necessary" a sheriff is entitled to circular mileage where the return trip is necessary.

*Texas.*— Gulf, etc., R. Co. *v.* Dawson, 69 Tex. 519, 7 S. W. 63.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

**13.** Cunningham *v.* San Joaquin County, 49 Cal. 323, 324 [*followed* in Allen *v.* Napa County, 82 Cal. 187, 23 Pac. 43 (*followed* in Monahan *v.* San Diego County, (Cal. 1892) 29 Pac. 417)], where it is said: "The words 'in going only' which immediately precede the words 'in executing any warrant of arrest,' cannot be held to apply to the taking of a prisoner before the magistrate, except as applicable to the distance traveled from the place of the arrest to the magistrate, and the officer making the arrest was entitled to his mileage for that distance." *Contra*, Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430, holding that, although the statute provides that a sheriff shall be entitled to charge mileage "one way only" in executing a warrant, and also provides mileage one way only "for removing a prisoner," the sheriff is not entitled to charge mileage for going to make the arrest, and again for bringing back the prisoner, for the execution of a warrant includes both the arrest of the prisoner and his removal thence to the place named in the writ.

**14.** *California.*— Sherman *v.* Santa Barbara County, 59 Cal. 483, holding that where a sheriff takes several prisoners together from the same court to the same jail, he is entitled to mileage for each.

*Colorado.*— Larimer County *v.* Love, 15 Colo. 430, 25 Pac. 557, holding that a sheriff who serves process issued in different cases at the same place and on the same journey is entitled to mileage in each case for the entire distance.

*Illinois.*— Vannatta *v.* Brewer, 85 Ill. 114, holding that where an officer serves a subpœna for several witnesses residing at one place, on the same day, requiring one trip only, he may rightfully charge mileage for each.

*Minnesota.*— State *v.* Ward, 79 Minn. 362, 82 N. W. 686 (holding that where several notices under Laws (1899), c. 322, providing for the clearing up of delinquent taxes, are served by the sheriff at the same time upon one person, who is the occupant of several tracts, the officer is entitled to full mileage upon each notice served); Steenerson *v.* Polk County, 68 Minn. 509, 71 N. W. 687 [*approving* U. S. *v.* Fletcher, 147 U. S. 664, 13 S. Ct. 434, 37 L. ed. 322; U. S. *v.* Harmon, 147 U. S. 268, 13 S. Ct. 327, 37 L. ed. 164; Campbell *v.* U. S., 65 Fed. 777, 13 C. C. A. 128].

*New York.*— Haley *v.* Ulster County, 12 Wend. 237, holding that a constable who serves a subpœna issued by a district attorney containing names of several persons as witnesses is entitled to mileage from the court-house of the county to the residence of each witness.

*Pennsylvania.*—Lenhart *v.* Cambria County, 216 Pa. St. 25, 64 Atl. 876 [*affirming* 29 Pa. Super. Ct. 350] (holding that under a statute providing for mileage "to be allowed on each separate writ, rule, order, decree, process or service performed," a sheriff who executes several writs or orders at the same time and by a single trip is entitled to full mileage on each); Smith *v.* Altoona, etc., R. Co., 182 Pa. St. 139, 37 Atl. 930 (holding that under the provision of the fee bill act that the officer "shall have travelling expenses on each writ for each mile travelled," mileage is taxable on each of several writs of execution served at the same time on the same defendant, there being a different plaintiff in each case); McGee *v.* Dillon, 103 Pa. St. 433 (holding that where a plaintiff brings a number of separate suits before a justice against different defendants, and recovers judgment, the constable who served the writs is entitled to demand from plaintiff, in addition to fees for service, mileage in each case, although he did not make a separate trip to serve each defendant); Shrope *v.* Northampton County, 3 Lanc. L. Rev. 123.

*South Carolina.*— Green *v.* Anderson County, 56 S. C. 411, 34 S. E. 691, holding that under Rev. St. § 2562, allowing mileage for each mile necessarily traveled in serving warrants for witnesses in a criminal case, a sheriff serving warrants for witnesses in six cases against the same defendant was entitled to the distance necessarily traveled in each case, although all the warrants were served on one trip, but was not entitled to a multiplication of witness warrants in each case as a basis for a charge for mileage on each warrant, and also holding that the fact that the sheriff, at the time of making an arrest, was executing warrants in other cases, and receiving mileage therefor, did not prevent him from recovering full mileage necessarily traveled in making such arrest.

mileage is allowed only on the basis of actual travel, although several services may be performed on the same trip.[15]

**D. Liability For Fees and Disbursements — 1. In General.** In the absence of a statute casting the primary liability for costs upon the unsuccessful party,[16] the rule is that the party at whose instance services have been performed is primarily liable to the sheriff for his compensation therefor,[17] even though

*Texas.*— Gulf, etc., R. Co. *v.* Dawson, 69 Tex. 519, 7 S. W. 63.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

15. *California.*— Overall *v.* Tulare County, 100 Cal. 61, 34 Pac. 519, holding that where a sheriff arrests two or more persons at the same time he is not entitled to mileage at the statutory rate for each person arrested.

*Iowa.*— Redfield *v.* Shelby County, 64 Iowa 11, 19 N. W. 828 (holding that where a sheriff makes but one trip in serving seven subpœnas in as many cases on one witness, he is entitled to mileage for one trip only); Barnes *v.* Marion County, 54 Iowa 482, 6 N. W. 697 (holding that a sheriff who, with separate orders for each person, conveys on one trip a prisoner and two witnesses from the penitentiary to the place of trial, is entitled to mileage as for one person only); Bringolf *v.* Polk County, 41 Iowa 554 (holding that where, under the same order of court, a sheriff produces several prisoners as witnesses he is entitled to but a single allowance of mileage and not to full mileage for each prisoner).

*Minnesota.*— Grundysen *v.* Polk County, 57 Minn. 212, 215, 58 N. W. 864, where it is said: "However it may be when a sheriff or constable has different writs, for different persons, in independent proceedings, and serves all of them at the same place, in respect to his right to charge upon each for mileage to and from that place, though he makes but one trip for all, we think the sheriff who receives the tax warrants at the same time (as all ought to be issued at the same time) on behalf of the same person, to wit, the county, in the same general proceeding, to wit, the enforcement of personal taxes, can charge the county mileage only for the distance actually and necessarily traveled by him upon all of those uncollected, for which travel he has not received pay on those collected."

*Montana.*— Scharrenbroich *v.* Lewis, etc., County, 32 Mont. 250, 83 Pac. 482, holding that a sheriff transporting persons to an insane asylum or reform school under order of court, subsequent to the passage of the act of March 3, 1905, is not entitled to ten cents per mile traveled and ten cents per mile additional for each person transported, according to the law in force at the time of his election, but is entitled only to the expenses incurred in the transportation of such persons.

*Nebraska.*— Logan County *v.* Doan, 34 Nebr. 104, 51 N. W. 598, holding that where the sheriff, at the same time and places, posts notices of two elections, he is only entitled to mileage for one trip.

*New York.*— Matter of Hempstead, 36 N. Y. App. Div. 321, 55 N. Y. Suppl. 345 [*affirmed* in 160 N. Y. 685, 55 N. E. 1101], holding that an officer traveling with prisoners in his custody is entitled to but one allowance of mileage and not to full mileage for each prisoner.

*Oregon.*— Howe *v.* Douglas County, 3 Oreg. 488.

*Pennsylvania.*— English *v.* Tioga County, 20 Pa. Co. Ct. 303; Cresson, etc., R. Co. *v.* Bell's Gap R. Co., 3 Pa. Co. Ct. 545; Woodburn *v.* Rickards, 3 Pa. Co. Ct. 433, holding that where an execution attachment and interrogatories are served by the sheriff at the same time on the same person and in the same case, mileage can be allowed him only on the execution attachment and not on the interrogatories.

*Canada.*— Jordan *v.* Coates, 7 N. Brunsw. 107 (holding that a constable serving summons under the Justices Act (4 Wm. IV, c. 45) is not entitled to mileage for each of two defendants unless he actually and necessarily travels twice to effect the service); *In re* Davidson, 24 U. C. Q. B. 66 [*approving* Haldemand *v.* Martin, 19 U. C. Q. B. 178] (holding that where the sheriff travels to summon grand and petit jurors at the same time, he is entitled to charge only for the number of miles actually traveled in order to serve all the jurors).

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 87.

Where a sheriff arrests a defendant against whom he has several warrants, he is entitled to mileage as for one arrest only. McHenry *v.* Hot Springs County, 57 Ark. 565, 22 S. W. 175.

16. See Costs, 11 Cyc. 90 note 32.

17. *Louisiana.*—Houssiere-Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 116 La. 347, 40 So. 727.

*Maine.*— Thompson *v.* Wiley, 20 Me. 479.

*Massachusetts.*— Boswell *v.* Dingley, 4 Mass. 411, holding that where a sheriff commits a debtor, who takes the benefit of the Poor Prisoners Act, the sheriff is entitled to his fees of poundage and travel from the judgment creditor.

*Michigan.*— See Citizens' Sav. Bank *v.* Kock, 116 Mich. 118, 75 N. W. 444.

*New Hampshire.*— Joyce *v.* Morgan, 66 N. H. 487, 23 Atl. 78; Eastman *v.* Coos Bank, 1 N. H. 23.

*New Jersey.*— Curtis *v.* Hulsizer, 5 N. J. L. 496.

*New York.*— Ousterhout *v.* Day, 9 Johns. 114.

*Pennsylvania.*— Lyon *v.* McManus, 4 Binn. 167.

See 43 Cent. Dig. tit. "Sheriffs and Con-

judgment has been rendered in his favor and the ultimate liability for the costs, as between the parties, cast upon the adverse party.[18] A statute providing that the sheriff's fees and expenses in executing a warrant of attachment are to be adjusted by the judge issuing the warrant gives such judge no power to order who shall pay such fees and expenses.[19]

**2. Liability of Plaintiff — a. In General.** A plaintiff in attachment is liable to the sheriff for his fees and expenses in connection with the seizure and detention of the property [20] where the attachment is dissolved,[21] or released by plaintiff before the termination of the suit,[22] or the judgment in the action is in favor of defendant.[23] The attachment plaintiff is also responsible for the legal costs of the sheriff or constable in executing the writ, where defendant has no property.[24] Plaintiff in execution is liable for the sheriff's compensation where the sheriff has made a levy under an execution which is regular and valid on its face, but has been subsequently vacated,[25] or where plaintiff accepts a composition after the execution has been levied.[26]

**b. Exeess of Authority by Sheriff.** Where the sheriff had, under the statute, no authority to retain possession of property seized by him under an order in a detinue suit, for a longer term than ten days, plaintiff did not make himself liable to the sheriff for expense incurred in keeping the property for a longer time, by insisting through his attorney on such further detention by the officer, on the ground of its being his legal duty to retain the property, where he carefully abstained from making any personal request.[27]

**3. Liability of Plaintiff's Attorney.** In the absence of notice to the contrary an attorney is personally liable to a sheriff or constable for his fees on process or writs which he commits to the officer for service or execution;[28] but the officer

stables," § 88. And see also Costs, 11 Cyc. 90 note 31.

**An agreement between attorney and client,** unknown to the sheriff, that the client should be subjected to no costs on account of any claim sued, unless collected, does not affect the client's liability to the officer for fees. Joyce *v.* Morgan, 66 N. H. 487, 23 Atl. 78.

18. Houssiere-Latreille Oil Co. *v.* Jennings-Heywood Oil Syndicate, 116 La. 347, 40 So. 727. See also Costs, 11 Cyc. 90 note 33.

19. Hall *v.* U. S. Reflector Co., 31 Hun (N. Y.) 609 [*affirmed* in 96 N. Y. 629].

20. Southwestern Commercial Co. *v.* Owesney, 10 Ariz. 49, 85 Pac. 724, holding that where the statute makes no provision as to keeping attached property, except that a sale thereof may be ordered when it appears that the keeping of it till the trial will necessarily be attended with such expense as greatly to lessen the amount likely to be realized, and that if it be not replevied, claimed, or sold, the judge may make an order for its preservation, a sheriff who, at the request of plaintiff in attachment, without order of court, places a person in charge of the property, may recover the expense of such plaintiff without regard to the result of the attachment proceedings.

21. Green *v.* Garcia, 3 La. Ann. 702; Upton *v.* Electric Constr., etc., Co., 89 Hun (N. Y.) 502, 35 N. Y. Suppl. 426.

22. Duffy *v.* Burton, 20 N. Y. App. Div. 51, 46 N. Y. Suppl. 642 [*affirmed* in 164 N. Y. 608, 58 N. E. 1087]; Templeton *v.* Capital Sav. Bank, etc., Co., 76 Vt. 345, 57 Atl. 818.

23. Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 317; Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

**No express promise is necessary** to render plaintiff liable to the sheriff for the expense of maintaining animals attached. Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

24. Curtis *v.* Hulsizer, 5 N. J. L. 496.

25. Gurley *v.* Lee, 11 Gill & J. (Md.) 395; Bradley *v.* Blue Ridge Hosiery Mill, 56 Misc. (N. Y.) 125, 106 N. Y. Suppl. 1107.

26. Sneary *v.* Abdy, 1 Exch. Div. 299, 45 L. J. Exch. 803, 34 L. T. Rep. N. S. 801.

27. Hall *v.* Perryman, 42 Ala. 122.

28. *Connecticut.*— Heath *v.* Bates, 49 Conn. 342, 44 Am. Rep. 234.

*Maine.*— Tilton *v.* Wright, 74 Me. 214, 43 Am. Rep. 578.

*Nebraska.*— Wolfe *v.* Kyd, 46 Nebr. 292, 64 N. W. 968.

*New Hampshire.*— Joyce *v.* Morgan, 66 N. H. 487, 23 Atl. 78; Towle *v.* Hatch, 43 N. H. 270.

*New York.*— Duffy *v.* Burton, 20 N. Y. App. Div. 51, 46 N. Y. Suppl. 642 [*affirmed* in 164 N. Y. 608, 58 N. E. 1087]; Adams *v.* Hopkins, 5 Johns. 252 [*followed* in Campbell *v.* Cothran, 56 N. Y. 279 (*affirming* 1 Thomps. & C. 70, 65 Barb. 534); Camp *v.* Garr, 6 Wend. 535; Ousterhout *v.* Day, 9 Johns. 114; Watertown *v.* Cowen, 5 Paige 510]; Jackson *v.* Anderson, 4 Wend. 474 [*affirmed* in Craft *v.* Merrill, 14 N. Y. 456].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 88.

**When attorney liable.— A sheriff may** look to plaintiff's attorney for his compensation on execution only when the judgment itself is satisfied or discharged, or the attorney

may, if he elects to do so, waive his right against the attorney and look to the client for his fees.[29] When, however, the officer has made his election to look to either the attorney[30] or the client[31] for payment, he must abide by it, and cannot afterward resort to the other. No action lies by the sheriff against a plaintiff's attorney to recover poundage upon an execution which the attorney has placed in his hands to be executed;[32] nor does the delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor give rise to any implied or express obligation on the part of a solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy under the execution.[33]

**4. Liability of Defendant.** Defendant is as a general rule liable for fees and commissions or poundage where money is collected on execution,[34] and the burden of paying a sheriff's charges for the expense of keeping and selling property attached rests upon the debtor rather than the creditor.[35] But a sheriff cannot execute against defendant for his poundage fees when the writ of venditioni exponas is countermanded before execution;[36] and it has been held that where the execution creditor accepts a composition after levy of the execution, the execution debtor is not liable for the sheriff's fees and expenses.[37] A statute imposing a penalty on "any officer or other person refusing to deliver a copy of any order, warrant, process, or other authority, by which he detains any person, to any one who demands such copy, and tenders the fees thereof," does not authorize a sheriff to deliver copies of bench warrants to the parties named therein, and charge the county therefor, but if such copies be demanded, the sheriff must collect from defendant his fees for delivering the same.[38]

**5. Charging Expenses Upon Assets.** It has been asserted that the expenses of taking care of and preserving attached property do not abide the result of the suit but are a charge upon the assets;[39] but other cases hold that where a sheriff

has countermanded the execution. Van Kirk *v.* Sedgwick, 87 N. Y. 265 [*reversing* 23 Hun 37, and *followed* in O'Brien *v.* Allen, 40 Misc. (N. Y.) 693, 83 N. Y. Suppl. 251]. And hence where, after a levy was made by a sheriff, the execution defendant exhibited to him an instrument purporting to be a release of the judgment and the sheriff released the levy, he was not entitled to recover commissions from plaintiff's attorney. O'Brien *v.* Allen, *supra*.

**Where a plaintiff's attorney employs a special bailiff** of his own to execute any process he is personally liable to such bailiff for his compensation, as he makes such bailiff his servant upon the occasion. Corbet *v.* McKenzie, 6 U. C. Q. B. 605.

29. Joyce *v.* Morgan, 66 N. H. 487, 23 Atl. 78; Eastman *v.* Coos Bank, 1 N. H. 23. See also Ousterhout *v.* Day, 9 Johns. (N. Y.) 114.

**Liability of party at whose instance service rendered** see *supra*, IV, D, 1.

30. Ousterhout *v.* Day, 9 Johns. (N. Y.) 114.

31. Joyce *v.* Morgan, 66 N. H. 487, 23 Atl. 78; Eastman *v.* Coos Bank, 1 N. H. 23.

32. Corbet *v.* McKenzie, 6 U. C. Q. B. 605.

33. Taylor *v.* Robertson, 31 Can. Sup. Ct. 615.

34. Gurley *v.* Lee, 11 Gill & J. (Md.) 395; Howard *v.* Levy Ct., 1 Harr. & J. (Md.) 558; Gilmor *v.* Brien, 1 Md. Ch. 40; Rieck *v.* Steelman, 66 N. J. L. 515, 49 Atl. 1083; Oliver *v.* Sale, 19 S. C. 17; Reg. *v.* Patton, 9 U. C. Q. B. 307, writ of extent. But *compare* Fisher *v.* Beatty, 3 Harr. & M. (Md.) 148.

**Rule applicable, although execution stayed by injunction.**— Gurley *v.* Lee, 11 Gill & J. (Md.) 395.

**Fees incurred after satisfaction.**— Fees incurred by a sheriff on an alias writ of fieri facias de bonis et terris, after satisfaction of the judgment debt by payment to another officer holding the original execution are payable by defendant in execution, unless they are incurred after notice of the satisfaction has been given to the sheriff, or to plaintiff in execution. Rieck *v.* Steelman, 66 N. J. L. 515, 49 Atl. 1083.

35. Baldwin *v.* Match, 54 Me. 167 [*following* Twombly *v.* Hunewell, 2 Me. 221; Tyler *v.* Ulmer, 12 Mass. 163; Sewall *v.* Mattoon, 9 Mass. 535].

**Quashal of execution.**— Where the levy of an execution under a judgment foreclosing a chattel mortgage was dismissed and the execution quashed for invalidity of the judgment, the sheriff could not recover, as against defendant, the necessary expense of keeping the goods levied on pending the proceedings. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133.

36. Fisher *v.* Beatty, 3 Harr. & M. (Md.) 148.

37. Sneary *v.* Abdy, 1 Ex. D. 299, 45 L. J. Exch. 803, 34 L. T. Rep. N. S. 801.

38. Steenerson *v.* Polk County, 68 Minn. 509, 71 N. W. 687.

39. Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

has levied upon or seized property under a process or writ which is afterward quashed or set aside, he has no lien on the property for the necessary expense of keeping the same while the proceedings were pending.[40]

**6. Liability of County [41] or State — a. In General.** A county cannot be held liable for sheriff's fees in a criminal cause in the absence of a statute imposing such liability upon it.[42] In a number of states, however, the fees and expenses allowed a sheriff for his services in connection with the enforcement and execution of the criminal or penal laws of the state are payable by the county,[43] or by the

**Charging assignee.**— Where a debtor was adjudged a bankrupt on his own petition, but prior to the filing thereof a flock of sheep belonging to him had been taken on an attachment, and such sheep were kept by the sheriff until delivered to the assignee, the sheriff was entitled to recover compensation from the assignee for keeping the sheep until claimed and received by the assignee. Zeiber *v.* Hill, 30 Fed. Cas. No. 18,206, 1 Sawy. 268, 8 Nat. Bankr. Reg. 239 [*following In re* Housberger, 11 Fed. Cas. No. 6,374, 2 Ben. 504, 2 Nat. Bankr. Reg. 92; *In re* Williams, 29 Fed. Cas. No. 17,705, 3 Nat. Bankr. Reg. 229].

40. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133 (so holding in a case where the levy of an execution under a judgment foreclosing a chattel mortgage was dismissed and the execution quashed because of invalidity of the judgment); Green *v.* Garcia, 3 La. Ann. 702 (holding that a sheriff who has taken property under an attachment which has been dissolved cannot detain it until paid his costs).

41. **County not liable for compensation of deputies** see *infra*, IV, D, 8.

42. Alexander County *v.* Myers, 64 Ill. 37; Hinkel *v.* Cumberland County, 9 Pa. Dist. 550, holding that where the statute provides no compensation for the high constable other than that allowed by the borough authorities, the county cannot be held liable to him for his services.

**Under Ill. Rev. St. c. 53, § 14,** it is only when the whole amount of the fees collected by the sheriff is less than his salary that the county is obliged to pay him the fees in criminal cases where no conviction is had. Crawford County *v.* Lindsay, 11 Ill. App. 261. See also Marion County *v.* Lear, 108 Ill. 343.

**The county is not liable for the sheriff's expenses** attending the execution of criminal process. Crawford County *v.* Spenney, 21 Ill. 288.

**Transportation of prisoners.**— Where the sheriff of a county in which there was no jail took prisoners convicted of misdemeanors under a warrant of commitment to a jail in another county, he could not recover against his county for mileage and railroad and stage fare. Osborne County *v.* Honn, 23 Kan. 256.

43. *Indiana.*— Hawthorn *v.* Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124.

*Kansas.*— Gleason *v.* McPherson County, 30 Kan. 492, 2 Pac. 644.

*Minnesota.*— Dean *v.* Renville County, 50 Minn. 232, 52 N. W. 650.

*New York.*— People *v.* Columbia County, 67 N. Y. 330 [*reversing* 8 Hun 275].

*Ohio.*— State *v.* Bauder, 34 Ohio St. 210, fees for serving subpœnas for witnesses before grand jury.

*Wisconsin.*—Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867; Fernekes *v.* Milwaukee County Sup'rs, 43 Wis. 303.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 88.

But *compare* Irwin *v.* Northumberland County, 1 Serg. & R. (Pa.) 505.

**A habeas corpus proceeding** brought by one committed by a magistrate on examination on a criminal charge is a criminal case, not a civil one, being in effect an appeal from the decision of the magistrate, and the county is therefore liable for the sheriff's fees. Gleason *v.* McPherson County, 30 Kan. 53, 1 Pac. 384. But *compare* Geissinger *v.* Huntingdon County, 3 Pa. Co. Ct. 106; Taggart *v.* Hutson, Rice (S. C.) 300.

**A bastardy proceeding** is not a criminal case and the county is not liable for the sheriff's fees therein. Gleason *v.* McPherson County, 30 Kan. 492, 2 Pac. 644.

**Arresting person out on bail at instance of surety.**— A county is not liable for expenses incurred by a sheriff in arresting a person out on bail, at the instance of his surety, as the mittimus issued under Mich. Comp. Laws, § 7877, is to subserve private purposes and protect sureties, and does not profess to be exerted at the instance of the people, and need not be executed by the sheriff. Kinney *v.* Kent Sup'rs, 51 Mich. 620, 17 N. W. 207.

**Liability of county for costs in criminal cases** generally see Costs, 11 Cyc. 273.

**Where the venue is changed** the county in which the indictment was found is not liable for the fees of the sheriff of the county in which the trial was had. Ross County *v.* State, 49 Ohio St. 373, 34 N. E. 735. But see Costs, 11 Cyc. 276 note 98.

**Effect of judgment against complainant.**— Where criminal process is regular and valid on its face, the right of the sheriff being to collect his fees for serving it from the county is not affected by the fact that a justice of the peace, pursuant to statute, has entered judgment for the costs against the complainant. Dean *v.* Renville County, 50 Minn. 232, 52 N. W. 650.

**The liability of the county extends to quasi-criminal offenses,** such as violations of

state,[41] although as a rule the statutes limit the liability for fees in connection with criminal prosecutions to cases where the prosecution fails to secure a conviction or the fees cannot be made from defendant,[45] and the county's liability extends only to fees incurred by the prosecution and not to those claimed for services on behalf of defendant.[46] The county is generally made liable to the sheriff for his compensation for attending and preserving order in the courts.[47] Where the statute charges the county with the duty of providing and paying grand and petit jurors the sheriff's fees for summoning such jurors are payable by the county.[48] The county is not liable for sheriff's fees in a civil action,[49] and cannot be made liable merely because he is unable to collect the same from any other source.[50] A county is not liable for expenses incurred by the sheriff without authority of law, although in connection with the performance of his duties;[51] and where the fees and mileage allowed by law for conveying insane persons to the insane hospitals do not belong to the sheriff, but must be accounted for by him to the county, the collection of such fees and mileage does not render invalid his claim against the county for expenses incurred by him in conveying such persons.[52]

**b. Where Fees Do Not Amount to Fixed Compensation.** In some states where the fees and commissions received by a sheriff in a year do not reach a specified amount fixed as the compensation to which he is entitled, the county is required to make up the deficit;[53] but in other states the sheriff must look alone to the fees of his office for his salary and those of his deputies, and the expenses of the office, and if such fees are insufficient to pay them in full he cannot recover the deficit from the county.[54]

city ordinances. People *v.* Columbia County, 67 N. Y. 330 [*reversing* 8 Hun 275].

**A policeman** commissioned by the governor on the application of a railroad corporation is a private officer, and is not entitled to the costs in a criminal prosecution from the county as if he were a legally elected constable, as his compensation must be paid by the company for which he was appointed. Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462.

**44.** Hursley *v.* Stone, 90 Mich. 439, 51 N. W. 530, holding that the sheriff's compensation for conveying a person convicted of crime to the place of confinement is a state charge.

**Liability of state for costs in criminal cases generally** see COSTS, 11 Cyc. 277.

**45.** Hendershott *v.* Fillmore County, 45 Minn. 281, 47 N. W. 810; Taggart *v.* Hutson, Rice (S. C.) 300.

**46.** Hendershott *v.* Fillmore County, 45 Minn. 281, 47 N. W. 810 [*approving* Hutt *v.* Winnebago County, 19 Wis. 116].

**47.** Miller *v.* Boone County, 5 Ind. App. 225, 31 N. E. 1123.

**The services of a bailiff** being necessary for the orderly and proper conduct of the business of a court of record, the expense thereby incurred should be paid by the county as part of the expenses of the court. Sargeant *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366, holding that such expense is not to be deducted from the amount to be paid to a sheriff for his deputy's salary.

**48.** La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

**49.** Irwin *v.* Northumberland County, 1 Serg. & R. (Pa.) 505; Com. *v.* Truxtun, 1 Ashm. (Pa.) 34.

**In New York** a county is liable for the fees of a sheriff for services in actions which are brought for the commissioners of excise in his county, but a sheriff's fees for services in actions which are brought for the benefit of the metropolitan police fund or the state treasury are not county charges. People *v.* Haws, 12 Abb. Pr. 192, 21 How. Pr. 117.

**50.** Gleason *v.* McPherson County, 30 Kan. 492, 2 Pac. 644.

**51.** Hutcherson *v.* Robinson, 82 Ga. 783, 9 S. E. 722, holding that under Code, §§ 1864, 1864*a*, declaring that the expense of confining a lunatic shall be paid out of the county funds, if the estate of the lunatic is insufficient for the purpose, and in such event the ordinary shall draw his warrant on the treasurer of the county for such sum as shall be necessary to defray the expenses of executing a commission of lunacy and of conveying the insane person to the asylum, the county is not liable for the expense of a hack engaged by the sheriff for the conveyance of a lunatic without authority from the ordinary.

**52.** La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

**53.** Campbell *v.* Logan County, 4 Ida. 181, 37 Pac. 329, holding that it is the duty of the board of commissioners to order a warrant drawn for such amount.

**54.** Coles County *v.* Messer, 195 Ill. 540, 63 N. E. 391 [*reversing* 92 Ill. App. 432]; Jennings *v.* Fayette County, 97 Ill. 419 [*affirming* 5 Ill. App. 614]; Power *v.* Douglas County, 75 Nebr. 734, 106 N. W. 782.

**7. Liability of Prisoner Brought Up on Habeas Corpus.**[55] It has been held that as the conveying of a prisoner under habeas corpus from one district to another is not in the usual administration of justice, but is done at his instance and for his benefit alone, he must pay all legal and proper charges of the sheriff for such conveyance, whether acquitted or convicted.[56]

**8. Liability of Sheriff For Services of Deputies and Other Subordinates.** Under some statutes the sheriff must compensate his deputies out of the fees and emoluments of his office and the county is not liable for their compensation;[57] and a sheriff who employs a person as keeper or guard of property in his custody is directly liable to such person for his services.[58] But a sheriff is not liable for the services of a keeper or watchman employed by a deputy,[59] unless the deputy had special authority to bind his principal by such a contract of employment,[60] or the employment has been ratified by the sheriff.[61]

**E. Taxation, Payment, and Collection — 1. Right to Prepayment.** The statutes sometimes authorize a sheriff to demand that his fees be paid or secured before he performs the duties for which such fees are payable;[62] but in the absence of statute the better opinion appears to be that the sheriff has no such right,[63]

**55. Habeas corpus** generally see Habeas Corpus, 21 Cyc. 279.

**56.** Taggart *v.* Hutson, Rice (S. C.) 300.

**57.** Jefferson County *v.* Hudson, 22 Ark. 595 [*followed* in Logan County *v.* Roady, 56 Ark. 581, 20 S. W. 519 (*followed* in Logan County *v.* Trimm, 57 Ark. 487, 22 S. W. 164)]; Gage County *v.* Wilson, 38 Nebr. 168, 56 N. W. 880.

**The salary of a deputy sheriff is not an absolute personal charge** against the sheriff, under the statute, but is to be paid only out of fees earned and collected. Wolfe *v.* Kyd, 46 Nebr. 292, 64 N. W. 968.

**58.** Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401. But *compare* Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592, holding that by the employment of a keeper in attachment, a sheriff does not make himself personally responsible for his wages, unless he expressly agrees to pay them, but acts for the benefit of plaintiff, who may be called on to advance the wages.

**59.** *California.*— Krum *v.* King, 12 Cal. 412.

*Maine.*— Kendrick *v.* Smith, 31 Me. 162.

*Massachusetts.*— Dooley *v.* Root, 13 Gray 303 [*distinguishing* Baker *v.* Fuller, 21 Pick. 318].

*New Hampshire.*— Lucier *v.* Pierce, 60 N. H. 13; Dow *v.* Rowe, 58 N. H. 125.

*Pennsylvania.*— Morris *v.* Oliver, 24 Pa. Super. Ct. 64.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 88.

**Contra.**— Ramsey *v.* Strobach, 52 Ala. 513; Rice *v.* Penfield, 49 Hun (N. Y.) 368, 2 N. Y. Suppl. 641, 15 N. Y. Civ. Proc. 268; Foster *v.* Rhinehart, 11 N. Y. Suppl. 629. And see Chenowith *v.* Cameron, 4 Ida. 515, 516, 42 Pac. 503, where it is said: "'*Qui facit per alium facit per se*' is a maxim peculiarly applicable to cases of this kind."

**60.** Krum *v.* King, 12 Cal. 412.

**61.** See Chenowith *v.* Cameron, 4 Ida. 515, 42 Pac. 503, holding that a sheriff who acquiesced for fourteen months in the employment of plaintiff as keeper of attached property by a deputy sheriff could not avoid liability for plaintiff's wages.

**The deputy's employment of a watchman will not be deemed to have been ratified** by the sheriff where it appears that the sheriff was not informed of the nature of the contract of employment, the rate of compensation of the watchman, or how long he had been at work. Munis *v.* Oliver, 24 Pa. Super. Ct. 64.

**62.** *Georgia.*— Cooper *v.* Stonecypher, 111 Ga. 818, 35 S. E. 675.

*Idaho.*— Naylor *v.* Vermont Loan, etc., Co., 6 Ida. 251, 55 Pac. 297.

*Indian Territory.*— Cutler *v.* Tully, 5 Indian Terr. 180, 82 S. W. 714.

*Louisiana.*— Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 615, 39 So. 705.

*New Jersey.*— Brockhurst *v.* Kaiser, 75 N. J. L. 162, 67 Atl. 75.

*New York.*— Wait *v.* Schoonmaker, 15 How. Pr. 460.

*North Carolina.*— Vannoy *v.* Haymore, 71 N. C. 128; Jones *v.* Gupton, 65 N. C. 48; Lute *v.* Reilly, 65 N. C. 20 [*approved* in Taylor *v.* Rhyne, 65 N. C. 530].

*Washington.*— Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 91.

**N. J. Act, Feb. 21, 1905,** respecting sheriffs, in counties of the first class (Pamphl. Laws (1905), p. 19, § 3), authorizes the sheriff to exact payment in advance only for services required to be performed by him, and so much of the section as authorizes sheriffs to receive deposits in advance in excess of the fees actually demandable is intended merely for the convenience of the parties, and it is optional with them whether such deposit shall be made. Brockhurst *v.* Kaiser, 75 N. J. L. 162, 67 Atl. 75.

**63.** *Indiana.*— McFarlan *v.* State, 149 Ind. 149, 48 N. E. 625.

*Louisiana.*— See State *v.* Waggner, 42 La. Ann. 54, 8 So. 209. But *compare* Adams *v.* Dinkgrave, 26 La. Ann. 626.

but must perform the duties of his office when required, and rely upon the ordinary legal remedies for securing payment therefor.[64] Even where a sheriff has a right to demand prepayment, if he undertakes the service without making such demand, he cannot refuse to complete it until his fees are paid,[65] nor can he in such case avoid liability for neglect of duty on the ground of non-payment of his fees.[66] It has also been held that the right of a sheriff to refuse to execute the process until his fees are paid or tendered does not excuse him for a failure to make a return of the process.[67] The fact that a sheriff has waived prepayment of his fees does not defeat his right to recover the same.[68]

**2. Affidavit, Account, or Return of Charges or Expenses.** In some jurisdictions the allowance for the expense of taking and keeping property or other charges and expenditures is based on an affidavit of the sheriff or a deputy [69] or an account [70] showing in detail all items of expense incurred.[71] But it has also been held that

*Nebraska.*— Beach *v.* State, 27 Nebr. 398, 43 N. W. 177.

*New York.*— Webber *v.* Blunt, 19 Wend. 188, 32 Am. Dec. 445.

*North Carolina.*— Jones *v.* Gupton, 65 N. C. 48.

*Ohio.*—Moriarity *v.* Devine, 1 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 49; Whitley *v.* Long, 9 Ohio Dec. (Reprint) 731, 17 Cinc. L. Bul. 86, holding that a sheriff cannot refuse to serve a writ directed to him in a civil action because his fees are not paid or secured in advance, unless the suit is brought by a non-resident or by a firm in the firm-name, in which cases the statute requires security for costs to be furnished.

*England.*— White *v.* Haugh, Str. 1262, 93 Eng. Reprint 1169.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 91.

But *compare* Dawes *v.* Dawes, (N. J. Sup. 1899) 43 Atl. 984.

64. McFarlan *v.* State, 149 Ind. 149, 48 N. E. 625; White *v.* Haugh, Str. 1262, 93 Eng. Reprint 1169.

65. Wait *v.* Schoonmaker, 15 How. Pr. (N. Y.) 460; Carlisle *v.* Soule, 44 Vt. 265.

66. Cooper *v.* Stonecypher, 111 Ga. 818, 35 S. E. 675; Stewart *v.* Leonard, 103 Me. 128, 68 Atl. 638; Perkins *v.* Pitman, 34 N. H. 261; Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010.

67. McRae *v.* Colclough, 2 Ala. 74; Herr *v.* Atkinson, 40 Ark. 377; Jones *v.* Gupton, 65 N. C. 48.

**Liability for failure to make return** see *infra*, v, J, 1.

68. Naylor *v.* Vermont Loan, etc., Co., 6 Ida. 251, 55 Pac. 297.

69. Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135. See also German American Bank *v.* Morris Run Coal Co., 74 N. Y. 58, holding that the compensation of a sheriff for taking and preserving attached property may be determined on affidavits.

**Sufficiency of affidavit.**—Affidavits on an application by the sheriff for the adjustment and fixing of his compensation for services under an attachment, averring that he levied on and attached a United States bond, are sufficient to make out a *prima facie* case on the part of the sheriff from which it may be inferred that he did take possession and so was entitled to compensation. Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521.

**The court or judge cannot dispense with proof,** by affidavit or otherwise, that the sheriff was entitled to the amount claimed, especially where the opposing affidavits tend to show that the real expenses were much less. Nestor *v.* Bischoff, 123 N. Y. 517, 25 N. E. 1046 [*reversing* on grounds not considered in the lower court 1 Silv. Sup. 329, 5 N. Y. Suppl. 312].

**New or amended affidavit.**—Where an affidavit of the deputy sheriff showing the expense incurred in the keeping of attached property has been presented at the term at which the judgment in the action was rendered, but the order allowing the same has been vacated at the succeeding term, a new affidavit or amended affidavit may be filed, and the court has jurisdiction to entertain and determine the same. Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1139.

70. Ellis *v.* Bingham County, 7 Ida. 86, 60 Pac. 79.

**A sheriff's account for expenses must be sworn to** and cannot be verified by his official certificate. Hohman *v.* Comal County, 34 Tex. 36.

71. Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135. See also People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122; Stryker *v.* Lycoming County, 20 Pa. Super. Ct. 345, holding that a constable is not entitled to recover from a county a lump sum claimed as "paid police authorities for detention, boarding and lodging" of a prisoner in a city outside of the county, where there is nothing to explain what "detention" meant, or what part of the sum was paid for "detention."

**Requisites of itemization.**—An item in a constable's claim or account against a county for services in serving process in a criminal case must specify the court in which the action is pending, name the offense, the party served, and place of service, so that the correctness of the item shall *prima facie* appear from the claim itself. Ellis *v.* Bingham County, 7 Ida. 86, 60 Pac. 79.

a charge for storage of property levied on under execution should be presented as an additional return on the writ, to be taxed in the costs of suit and included in the judgment.[72] A claim of a sheriff against a town for services in a criminal case should make it appear that the crime was committed in the town.[73]

**3. Place of Taxation.** The Ontario statute has given the right to tax any sheriff's bill, upon notice, either at the head offices of the courts in Toronto, or at the office of the deputy clerk in the sheriff's county, whichever the party taxing may prefer.[74]

**4. Audit of Claims.** Some statutes require the claim of a sheriff for fees for services to the county to be audited by the county board of auditors,[75] in which case such an audit is a prerequisite to the sheriff's right to recover.[76] But the audit of the claim is not a final judgment as to its merits, precluding any future inquiry as to whether it was properly allowed.[77]

**5. Allowance by Court — a. In General.** As a general rule the allowance to a sheriff for his fees and expenses is made by the court,[78] and such allowance is a prerequisite to a recovery,[79] and until it is made the sheriff has no right to retain anything for such fees and expenses out of moneys collected by him.[80] The allowance is properly made in the suit wherein the property was seized,[81] in which

72. Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580, holding that such charge cannot be allowed as part of the expense for serving the execution.

73. People *v.* Champlain, 16 Misc. (N. Y.) 92, 37 N. Y. Suppl. 633.

74. Dominion Type Founding Co. *v.* Nagle, 8 Ont. Pr. 174.

75. See Reynolds *v.* Ontario County, 30 U. C. C. P. 14; *In re* Lincoln County Sheriff, 34 U. C. Q. B. 1.

**Audit under order of justices.**— The fees of the sheriffs of the different districts payable by the districts for services rendered in the administration of justice are to be audited and paid by the order of the justices of the several districts in sessions, and not under the direction of the district councils. *In re* Hamilton, (Trin. T. 5 & 6 Vict.) 3 Ont. Case. Law Dig. 6415.

**A statute making a certain appropriation for the commitment and care of the insane** in certain years does not limit the duties of the territorial auditor, under a prior statute, to audit all accounts against the territory, or modify a prior statute providing that the compensation and expenses of the sheriff incurred in the care of the insane shall be paid out of the territorial treasury, in the usual manner; but it is the duty of the auditor, when the accounts of a sheriff, incurred in the care of the insane, are presented, to audit the same, and issue a warrant to the territorial treasurer therefor, although the appropriation may be exhausted. Johnson *v.* Cameron, 2 Okla. 266, 37 Pac. 1055.

76. Reynolds *v.* Ontario County, 30 U. C. C. P. 14.

77. Reynolds *v.* Ontario County, 30 U. C. C. P. 14, holding that where in an action for the recovery of fees for services connected with the administration of justice within defendant county, rendered by plaintiff as sheriff, it was alleged that such fees had been duly audited by the county board of auditors, a good defense was shown by a plea on equitable grounds setting up that the right to such fees had been disputed and submitted to the court of queen's bench by a special case, and that the alleged audit was made under a misconception of the judgment, which the auditors erroneously understood to decide that plaintiff was entitled to such fees, whereas in fact the decision was to the contrary.

78. *California.*— Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Bower *v.* Rankin, 61 Cal. 108.

*Colorado.*— Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

*Indiana.*— Gardner *v.* Brown, 22 Ind. 447.

*Iowa.*— Barnes *v.* Marion County, 54 Iowa 482, 6 N. W. 697.

*Louisiana.*— New Orleans *v.* Patton, 27 La. Ann. 168, certification by judge and clerk of court.

*Michigan.*— Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133, such charges not being allowed by statute.

*New York.*— Jones *v.* Gould, 119 N. Y. App. Div. 817, 104 N. Y. Suppl. 935; Matter of Tamsen, 23 N. Y. App. Div. 389, 48 N. Y. Suppl. 313.

*Rhode Island.*— Gerardi *v.* Caruolo, 27 R. I. 214, 61 Atl. 599.

*Texas.*— McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 26 Tex. Civ. App. 49, 62 S. W. 122].

*Wisconsin.*—Stevens Point First Nat. Bank *v.* Kickbush, 78 Wis. 218, 47 N. W. 267.

*Wyoming.*— Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135.

*Canada.*— Wadsworth *v.* Bell, 8 Ont. Pr. 478.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 90.

79. Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Bower *v.* Rankin, 61 Cal. 108; Lane *v.* McElhany, 49 Cal. 421; Geil *v.* Stevens, 48 Cal. 590.

80. Stevens Point First Nat. Bank *v.* Kickbusch, 78 Wis. 218, 47 N. W. 267.

81. Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841 (holding that the allowance can be made only in such suit); Beeman, etc., Mer-

case the same objections are open to the party sought to be charged as though a separate suit had been brought.[82]

**b. Jurisdiction.** Ordinarily the allowance of a sheriff's fees and disbursements in connection with the execution of process or writs is to be made by the court from which such process or writs issued,[83] and cannot be made by another court.[84] A statute authorizing a particular court to tax such fees and disbursements on the application of the person liable to pay the same does not warrant a taxation by such court on the application of the sheriff.[85]

**c. Time For Allowance.** The court cannot make an order directing either party to pay the sheriff's fees until there is some final determination as to which party is liable to pay them.[88]

**d. Notice of Motion For Allowance.** A motion to the court to adjudge to the sheriff commissions on an alleged levy under a fieri facias,[87] or an application for the allowance of charges for the custody of property,[88] should be upon notice to the parties interested.

**e. What Amounts to Allowance.** A judge's indorsement, as correct, of a sheriff's account for expenses and fees, not purporting to be an act of court, but merely recommending that the account be allowed, is not an allowance, within a statute providing for the payment by the county of expenses "audited and allowed by the court trying the case." [89]

**f. Sufficiency of Certificate of Allowance.** A certificate, by a probate judge, directed to the county auditor, stating merely that a person named has served as sheriff in removing a lunatic under a proper warrant and is entitled to a certain sum, has been held insufficient, in failing to show that the probate judge has ascertained the amount and that he has declared and ordered said amount fixed.[90]

**g. Conclusiveness of Allowance or Certification.** Where the statute makes the settlement of a city sheriff's account by the circuit court final and conclusive against the city and binding upon all its officers, the auditor has no authority to inquire into the correctness of the settlement, but must issue his warrant for the amount shown by the settlement to be due the sheriff.[91] In Louisiana it has been

cantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135.

**82.** Beeman, etc., Mercantile Co. *v.* Sorenson, 15 Wyo. 450, 89 Pac. 745, 1135, holding that defendant was entitled upon a motion, the purpose of which was to tax the costs of keeping attached property against him, to show that he was not the owner thereof.

**83.** Matter of Tamsen, 23 N. Y. App. Div. 389, 48 N. Y. Suppl. 313.

The trial court has jurisdiction of a motion to retax the sheriff's fees on an execution sale at a term subsequent to the term at which the judgment was entered. McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. 861 [*reversing* 26 Tex. Civ. App. 49, 62 S. W. 122].

In New York a motion to tax the fees of a sheriff should be made in the county where the action is brought, but when no objection is raised to the taxation in another county the irregularity will be deemed waived. Nestor *v.* Bischoff, 5 N. Y. Suppl. 312 [*reversed* on other grounds in 123 N. Y. 517, 25 N. E. 1046].

**84.** Hudgins *v.* Beavers, 69 Ark. 577, 65 S. W. 99, holding that where the circuit court on appeal from a justice in an action by a deputy sheriff to recover for services rendered in caring for attached property dismissed the suit as on contract, it was without jurisdiction to permit it to progress as a motion to retax the costs in the attachment case, such costs not having accrued in that court, and neither the sheriff nor the parties to the action having moved for such retaxation.

**85.** Matter of Tamsen, 23 N. Y. App. Div. 389, 48 N. Y. Suppl. 313.

**86.** Jones *v.* Gould, 119 N. Y. App. Div. 817, 104 N. Y. Suppl. 935; Upton *v.* Electric Constr., etc., Co., 89 Hun (N. Y.) 502, 35 N. Y. Suppl. 426, holding that where receivers of an attachment debtor, appointed after attachments were levied, procured an order directing the sheriff to turn over to them the attached property, and requiring them to hold it subject to the liens of the attachment and of the sheriff, a motion by the sheriff, before trial of the actions in which the attachments were issued, to have his fees and disbursements adjusted and allowed was premature.

**87.** Oswitchee Co. *v.* Hope, 5 Ala. 629. See also Decuir *v.* Lejeune, 15 La. Ann. 216.

**88.** Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

**89.** Barnes *v.* Marion County, 54 Iowa 482, 6 N. W. 697.

**90.** State *v.* High, 7 Ohio Cir. Ct. 128, 3 Ohio Cir. Dec. 694.

**91.** State *v.* Brown, 72 Mo. App. 651,

held that the approval by the clerk and judge of the criminal court of the criminal sheriff's account for fees and expenses of his office does not preclude the city from contesting the correctness of the account, as such approval does not amount to a judicial decree in his favor for the amount of the account.[92]

**6. Actions[93] For Fees and Expenses — a. Right of Action.** A sheriff may maintain an action to recover fees which he has earned from the person liable therefor;[94] but such an action is premature when brought before the costs have been taxed or the allowances made in the manner prescribed by statute.[95] Where the statute makes it the duty of the county auditor upon presentation to him of a transcript of proceedings containing a bill of constable's costs to examine the same, correct the errors, if any, in the charges, and draw on the treasurer for the amount allowed, the auditor's refusal to perform his duty does not subject the county commissioners to liability, but the constable's remedy is by mandamus.[96]

**b. Defenses.** Where after a levy under execution by a sheriff the property is taken out of his hands by replevin, the fact that the writ of replevin was served on him by one of his own deputies, and that the latter was guilty of official default in not returning the replevin writ or bond into court, furnishes no defense, on the ground of failure of consideration, to the sheriff's action for his fees on the levy of the execution.[97]

**c. Counter-Claims.**[98] In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counter-claim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested;[99] but he may set up by way of counter-claim his costs in a suit in which he had appeared for the sheriff.[1]

**d. Parties.**[2] Under the general rule that all fees of the sheriff's office belong to the sheriff,[3] it would seem that the sheriff alone is the proper person to sue for such fees; but it has been held that a sheriff's officer may maintain an action for fees when there was an express promise to pay him.[4] So also where the

holding that mandamus is the proper remedy to compel him to do so.

92. State *v.* New Orleans, 30 La. Ann. 82 *Contra*, New Orleans *v.* Patton, 27 La. Ann. 168.

93. Actions generally see Actions, 1 Cyc. 634.

94. *California.*— Lane *v.* McElhany, 49 Cal. 421.

*Idaho.*— Naylor *v.* Vermont Loan, etc., Co., 6 Ida. 251, 55 Pac. 297.

*New Hampshire.*— Burnham *v.* Strafford County Sav. Bank, 5 N. H. 446.

*New York.*— Jones *v.* Gould, 119 N. Y. App. Div. 817, 104 N. Y. Suppl. 935.

*Oregon.*— Herbert *v.* Dufur, 23 Oreg. 462, 32 Pac. 302.

*England.*— Lyster *v.* Bromley, Cro. Car. 286, 79 Eng. Reprint 852, W. Jones 307, 82 Eng. Reprint 163; Stanton *v.* Suliard, Cro. Eliz. 654, 78 Eng. Reprint 893; Tyson *v.* Paske, 2 Ld. Raym. 1212, 92 Eng. Reprint 300, 1 Salk. 333, 91 Eng. Reprint 294; Rawstorne *v.* Wilkinson, 4 M. & S. 256; White *v.* Haugh, 1 Str. 1262, 93 Eng. Reprint 1169. See also Ormerod *v.* Foskett, 2 Peake N. P. 77.

*Canada.*— Thomas *v.* Great Western R. Co., 24 U. C. Q. B. 326.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 93.

**Action must be at law.**— The claim of a sheriff for poundage fees is a legal, and not an equitable, claim, and hence its payment must be enforced by a proceeding at law. Gilmor *v.* Brien, 1 Md. Ch. 40.

**Recovery cannot be based on quantum meruit.**— Peck *v.* Grand Rapids City Nat. Bank, 51 Mich. 353, 16 N. W. 681, 47 Am. Rep. 577.

**A demand is not a prerequisite** to the maintenance of such an action. Lane *v.* McElhany, 49 Cal. 421.

95. Gerardi *v.* Caruola, 27 R. I. 214, 61 Atl. 599.

96. Smith *v.* Portage County, 9 Ohio 25. See also State *v.* Brown, 72 Mo. App. 651.

97. Baldwin *v.* Shaw, 35 Vt. 273, 276, where it is said: "The defendant's claim, and the plaintiff's liability, do not rest at all in contract, and an action to enforce it must be in form an action *ex delicto*."

98. See, generally, Recoupment, Set-Off, and Counter-Claim, 34 Cyc. 618.

99. Taylor *v.* Robertson, 31 Can. Sup. Ct. 615, so holding on the ground that such overcharges, if recoverable, do not belong to the solicitor but to the clients for whom he acted.

1. Taylor *v.* Robertson, 31 Can. Sup. Ct. 615, holding that this may be done notwithstanding his omission to render a signed bill of the costs prior to the filing of the counter-claim.

2. See, generally, Parties, 30 Cyc. 1.

3. See *supra*, IV, A, 6.

4. Odmerod *v.* Foskett, 2 Peake N. P. 77, where, in view of such promise, the court con-

statute makes the demand of a deputy sheriff for his salary a personal right the sheriff cannot sue therefor unless it has been assigned to him.[5] The sheriff cannot maintain an independent action against the execution debtor for his poundage.[6]

**e. Pleading.**[7] In an action by the sheriff for official services in levying an execution it is not necessary to allege the value of the services;[8] but in an action to recover for services in keeping property levied on, a complaint is insufficient which avers neither what the services were reasonably worth, nor that the court from which the execution issued had certified that the amount was just and reasonable.[9] In an action by the sheriff for services in levying an execution an allegation of a special request that plaintiff should perform the services is sufficient;[10] and it is not necessary to aver that the sums due the sheriff were not collected by a sale of the property levied on.[11] In an action by a constable to recover his fee for executing in another county a warrant issued by a justice of the peace, it is not essential that the complaint should allege that the warrant was indorsed by a magistrate of the county in which it was executed.[12] In an action by a sheriff against the county to recover the salary of a deputy the complaint must allege facts showing the authority to appoint a deputy.[13]

**f. Evidence.**[14] The general rules as to the necessity[15] and methods[16] of proof and the admissibility[17] and sufficiency[18] of evidence are applicable in an action by a sheriff to recover his fees or expenses.

**7. Review[19] of Allowance.** In the United States the general rule is that the discretion of a court or the county commissioners in fixing the amount of the allowance to a sheriff for compensation or reimbursement will not be reviewed[20]

sidered it unnecessary to decide the general question whether the sheriff only could sue.

5. Henry *v.* Yamhill County, 37 Oreg. 562, 62 Pac. 375.

6. Thomas *v.* Great Western R. Co., 24 U. C. Q. B. 326.

7. See, generally, PLEADING, 31 Cyc. 1.

8. Lane *v.* McElhany, 49 Cal. 421, so holding on the ground that the law fixes their value.

9. Lane *v.* McElhany, 49 Cal. 421.

10. Lane *v.* McElhany, 49 Cal. 421.

11. Lane *v.* McElhany, 49 Cal. 421.

12. Allen *v.* Napa County, 82 Cal. 187, 23 Pac. 43, so holding on the ground that it would not be presumed that the constable acted unlawfully by executing a warrant not so indorsed.

13. Taylor *v.* Canyon County, 6 Ida. 466, 56 Pac. 168, holding that the complaint must allege that the county commissioners found that the business of the sheriff's office required the appointment of a deputy, since Const. art. 18, § 6, made such a finding a condition precedent to authorizing such appointment.

14. See, generally, EVIDENCE, 16 Cyc. 821.

15. Avart *v.* King, 14 La. 62, holding that where a sheriff takes a rule on plaintiff to show cause why his bill for keeping property seized under an order of court should not be paid, and plaintiff makes no answer, although duly notified, the judge may, if he have sufficient knowledge of the facts on which his discretion is asked, make the rule absolute without evidence.

16. Lane *v.* McElhany, 49 Cal. 421, holding that, in an action to recover for keeping property levied on, the certificate of the court from which the execution issued that the charge is just and reasonable is the proper evidence of the value of the services.

17. Garfield County *v.* Adams, 16 Colo. App. 513, 66 Pac. 683, holding that, in an action by a sheriff for the maintenance of a lunatic committed to his care by the county board, it was not error to receive in evidence the board's order of commitment made to the sheriff, although plaintiff presented his claim as an individual, where it appeared that the sheriff and plaintiff were the same person.

18. La Salle County *v.* Milligan, 34 Ill. App. 346; Woodruff *v.* Imperial F. Ins. Co., 90 N. Y. 521 [*affirming* 27 Hun 229] (holding that, on a sheriff's application for compensation for services rendered under an attachment, affidavits alleging that he levied on and attached certain property sufficient to satisfy plaintiff's demand, and that the demand was afterward settled and paid by defendant, make out a *prima facie* case entitling the sheriff to recover, in the absence of contrary proof); Herbert *v.* Dufur, 23 Oreg. 462, 32 Pac. 302 (holding that where in an action by a sheriff to recover fees in attachment proceedings wherein defendant was attorney, the evidence for plaintiff tended to show that defendant agreed to pay him for his services; that before any services had been rendered defendant had told him to go ahead, and he would pay the fees, and that plaintiff had rendered the services accordingly; and that defendant had paid some of the bills, had admitted his liability, and had never made any objection to their reasonableness until a short time before suit, there was no error in refusing a nonsuit).

19. Review generally see APPEAL AND ERROR, 2 Cyc. 474; REVIEW, 34 Cyc. 1695.

20. *Arkansas.*— Clark County *v.* Spence, 21 Ark. 465.

unless an abuse of discretion plainly appears.[21] And in England it is held that a taxation of sheriffs' costs and charges by a master of the supreme court or district registrar of the high court, under the general order as to fees, is not subject to review.[22] In Canada it has been held that an application to review the taxation of the fees and poundage of the sheriff is properly made to a judge in chambers;[23] and that where a sheriff's fees have been taxed before a deputy clerk of the crown a revision of such taxation cannot take place before the principal clerk of the crown, but the court may refer the bill back to the same deputy clerk for a revision of the taxation, where it appears that items have been improperly allowed.[24] Where a sheriff's fees and poundage had been taxed by a deputy clerk of the crown at the instance of plaintiffs, and it appeared that the amount allowed was not unreasonable, a revision of the taxation was refused.[25]

**8. Services Outside of Official Duty.** If any claim arises in favor of a sheriff for extra services or expenses rendered on special request, outside the scope of his official duty, his remedy therefor is by action against the person at whose request they were incurred, and such expenses cannot be allowed on taxation, which is limited to the adjustment of mere statutory fees.[26]

**9. Waiver of Right to Taxation.** An execution plaintiff does not waive his right to insist on taxation of the sheriff's fees according to law by signing, after execution sale, an account prepared by the sheriff.[27]

**10. Method of Computation.** Where poundage is allowed at a certain rate on sums not exceeding a certain amount, and at a smaller rate on larger sums, the proper method of computation is to allow the larger rate up to the limit fixed, and the smaller rate upon the excess;[28] and under such a provision the sale of a large number of tracts of land to several persons, but under one execution and notice, constitutes but one sale, and the commission should be computed on the total amount, and not on the amount realized from the sale of each tract.[29] Where the compensation for certain services is fixed at a certain amount per day, a day's time in the performance of such duties includes all the time in which the sheriff may be so engaged in the single calendar day.[30]

**11. Time For Payment.** In Canada it is held that a sheriff's account against a county is payable as soon as audited by the county board of audit, and the

*Colorado.*— Sargent *v.* La Plata County Com'rs, 21 Colo. 158, 40 Pac. 366.

*Iowa.*— Toledo Sav. Bank *v.* Johnston, 90 Iowa 749, 57 N. W. 622.

*Louisiana.*— Townsend *v.* Palms, 7 La. Ann. 217.

*Missouri.*— Irwin *v.* Milburn, 10 Mo. 456.

*New York.*— German American Bank *v.* Morris Run Coal Co., 74 N. Y. 58; *Ex p.* Farrington, 2 Cow. 407.

*Ohio.*— Avery *v.* Ruffin, 4 Ohio 420.

*Wisconsin.*— Reid *v.* Martin, 77 Wis. 142, 45 N. W. 820.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 96.

21. Avery *v.* Ruffin, 4 Ohio 420.

22. Townend *v.* Yorkshire, 24 Q. B. D. 621, 54 J. P. 598, 59 L. J. Q. B. 156, 62 L. T. Rep. N. S. 402, 38 Wkly. Rep. 381, so holding on the ground that such taxation is a mere calculation of amount, and *per se* fixes no liability on the person assessed.

23. Grant *v.* Grant, 10 Ont. Pr. 40.

24. Hay *v.* Drake, 8 Ont. Pr. 120.

25. Brockville, etc., R. Co. *v.* Canada Cent. R. Co., 7 Ont. Pr. 372.

26. Crofut *v.* Brandt, 13 Abb. Pr. N. S. (N. Y.) 128 [*affirmed* in 58 N. Y. 106, 17 Am. Rep. 213].

27. O'Connor *v.* O'Connor, 47 N. Y. Super. Ct. 498.

28. Fleming *v.* Hall, 9 Ont. Pr. 310, holding that where the sheriff's tariff allowed "on executions, and on attachments in the nature of executions, where the sum named shall not exceed $1,000, six per cent.; where the sum is over $1,000 and under $4,000, three per cent.; where the sum is $4,000 and over, one and a half per cent.," it was proper to allow six per cent on the first one thousand dollars, and in addition thereto three per cent on the amount over one thousand dollars and under four thousand dollars, and in addition thereto one and one-half per cent on the amount over four thousand dollars.

29. McLennan County *v.* Graves, 94 Tex 635, 64 S. W. 861 [*reversing* 26 Civ. App. 49, 62 S. W. 122].

30. Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

An eight-hour law is not applicable to a deputy sheriff, but he is entitled to only one day's pay for a day's work, notwithstanding the fact that he works more than eight hours, in the absence of any agreement for an eight-hour day. Christian County *v.* Merrigan, 191 Ill. 484, 61 N. E. 479 [*affirming* 92 Ill. App. 428].

county treasurer is not justified in withholding payment until the account has been allowed and paid by the government to the county;[31] and that a sheriff upon arresting a judgment debtor upon a capias ad satisfaciendum becomes at once entitled as against the execution creditor to full poundage on the amount of the execution.[32]

12. **Fund Out of Which Payment to Be Made.** The statutes sometimes designate a particular fund out of which the sheriff's fees, payable by the county, are to be paid;[33] and in such case the fact that the fund is insufficient to pay his claims in full is no reason for not applying thereto so much as is available.[34]

13. **Retention by Sheriff of Fees or Expenses.** It has been held proper for a sheriff to retain from the proceeds of a sale of property seized by him his costs or fees in the suit and the expenses of the sale;[35] but where a sale of goods taken on mesne process is made by the deputy sheriff without the consent of defendant, and the latter prevails in the action, the sheriff is not entitled to retain out of the proceeds of the sale the expenses of selling.[36] So also a sheriff who seizes property not belonging to the judgment debtor is not entitled to retain his fees or expenses out of such property or its proceeds.[37] A sheriff, holding funds arising from the sale of goods attached, may deduct a reasonable compensation for the expense of keeping and selling the same before applying the balance to the satisfaction of the execution,[38] although such charges have not been taxed and allowed in plaintiff's bill of costs.[39] But a sheriff who collects the full amount of an execution has no legal right to retain his commissions out of the amount to which the creditor is entitled by his judgment.[40] A sheriff has no power to deduct from a balance in his hands, arising from the sale of attached property, counsel fees for defending an action of trover brought against him by a third person for the

31. *In re* Lincoln County Sheriff, 34 U. C. Q. B. 1.

32. McNab *v.* Oppenheimer, 11 Ont. Pr. 348.

33. See Stone *v.* Ames, 91 Ala. 644, 8 So. 421 (where the court passed upon the priority of claims upon the fine and forfeiture fund under Code, §§ 4895, 4896, and the act of Feb. 10, 1887); Branson *v.* Larimer County Com'rs, 5 Colo. App. 231, 37 Pac. 957 (holding that under Laws (1891), p. 307, which provides that the sheriff's traveling expenses shall be "paid out of and not exceeding" a certain mileage allowance, and that the sheriff must turn over all fees to the county, the sheriff's traveling expenses must be paid out of the fees turned over to the county, and not out of the general county fund).

**Construction of appropriation.**—A state general appropriation bill appropriating money "for prosecuting delinquents for infraction of revenue laws, to be expended under the direction of the controller," does not create a fund available for the payment of sheriff's fees in a suit by the state against the estate of a delinquent state treasurer and the sureties on his official bond. Swift *v.* Doron, 6 Nev. 125.

34. Stone *v.* Ames, 91 Ala. 644, 8 So. 421.

35. Cramer *v.* Brasher, 15 Colo. 216, 25 Pac. 180; Robertson *v.* Smith, 37 Ga. 604; State *v.* Hitchens, 25 Ind. App. 244, 57 N. E. 935, 81 Am. St. Rep. 90 (holding that in an action by a judgment debtor to compel a constable to turn over to him a sum of money alleged to have been unlawfully retained by the constable from the proceeds of an execution sale, the constable is entitled to credit against the sum received from the sales sums which it clearly appears from the evidence he is entitled to, although he did not itemize the services for which he charged in the return of the execution under which the sale was had); McLennan County *v.* Graves, 26 Tex. Civ. App. 49, 62 S. W. 122 [*reversed* on other grounds in 94 Tex. 635, 64 S. W. 861].

**Retaining costs on abandoned process.**—Where an execution issued on the foreclosure of a landlord's lien and a distress warrant in his favor are placed in the hands of a constable, the latter is entitled to retain from the proceeds of a sale of the property of defendant all costs legitimately accruing in executing both processes, although the prosecution of one was abandoned by plaintiff. Moran *v.* Childs, 110 Ga. 871, 36 S. E. 235.

**Where the property is covered by prior liens** these must be satisfied before the sheriff's fees can be deducted from the fund realized. Brand *v.* Brown, 70 Hun (N. Y.) 388, 24 N. Y. Suppl. 262.

**A sheriff who has failed to itemize his fees on the return,** as required by statute, cannot legally retain the amount thereof out of the proceeds of the property sold. Harrington *v.* Hill, 51 Vt. 44.

36. York *v.* Sanborn, 47 N. H. 403.

37. Brand *v.* Brown, 70 Hun (N. Y.) 388, 24 N. Y. Suppl. 262.

38. Baldwin *v.* Hatch, 54 Me. 167 [*following* Twombly *v.* Hunewell, 2 Me. 221; Tyler *v.* Ulmer, 12 Mass. 163; Sewall *v.* Mattoon, 9 Mass. 535].

39. Baldwin *v.* Hatch, 54 Me. 167 [*following* Twombly *v.* Hunewell, 2 Me. 221].

40. Snell *v.* Woodford, 9 Dana (Ky.) 128.

conversion of the goods levied on under the attachment.[41] Where a county board fixes the personal salary of a sheriff, but omits to fix the amount of his deputy hire, he has the legal right to retain out of the fees collected by him the reasonable amount which he has paid for his necessary deputy hire.[42]

**14. Lien[43] on Property Seized — a. Where Seizure Rightful.** In some states a sheriff who has seized property under a valid attachment or execution has a lien thereon, and the right to retain the same until his fees and charges are paid,[44] although the attachment is discharged by the giving of a statutory bond,[45] or the execution superseded by the giving of a stay bond,[46] or where, after the levy of an attachment or execution, the debt or claim is compromised or settled between the parties.[47] It is, however, the duty of the sheriff to inform the owner of the property of the amount of his fees,[48] and, when demand for the property is made, to offer to return the same upon payment of his fees.[49]

**b. Where Seizure Wrongful.** Where the process or writ under which property has been seized is set aside or quashed, the sheriff has no lien on the property for his fees and charges,[50] nor can he sell such property in order to compensate or reimburse himself;[51] and *a fortiori* a sheriff who has seized property not belonging to defendant acquires no lien thereon.[52]

**c. Waiver of Lien.** A sheriff or constable who relinquishes possession of property seized by him under legal process waives any lien on such property for his fees and charges.[53]

41. Cramer *v.* Brasher, 15 Colo. 216, 25 Pac. 180.

42. People *v.* Darrah, 84 Ill. App. 515.

43. Liens generally see Liens, 25 Cyc. 655.

44. Pailhes *v.* Thielen, 1 La. Ann. 34; Rhoads *v.* Woods, 41 Barb. (N. Y.) 471; McNeil *v.* Bean, 32 Vt. 429.

A reasonable sum for the expenses of regaining possession of property which has been levied on by a sheriff and afterward taken out of his possession follows the lien of the sheriff, and to this extent he may insist on being paid, if he acquires possession in a lawful manner. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471.

The sheriff's prior lien extends only to the avails of the property itself, and not to money received from one who recognized to plaintiff for costs, and who makes payment in satisfaction of his liability under such recognizance. McNeil *v.* Bean, 32 Vt. 429.

45. Jones *v.* Gould, 119 N. Y. App. Div. 817, 104 N. Y. Suppl. 935 (where the order discharging the attachment provided for such payment); Tribune Assoc. *v.* Eisner, etc., Co., 49 N. Y. App. Div. 141, 63 N. Y. Suppl. 94; Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36 [*affirming* 16 Misc. 151, 38 N. Y. Suppl. 297, *distinguishing* Rowe *v.* U. S. Reflector Co., 36 Hun (N. Y.) 407, and *followed* in Esselstyn *v.* Union Surety, etc., Co., 82 N. Y. App. Div. 474, 81 N. Y. Suppl. 532].

46. Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80.

47. Perrin *v.* McMann, 97 Cal. 52, 31 Pac. 837; Howard *v.* Levy Ct., 1 Harr. & J. (Md.) 558, holding that where the parties compromised the debt after a levy the sheriff might sell to the amount of his poundage fees. *Contra*, Jackson *v.* Anderson, 4 Wend. (N. Y.) 474 [*approved* in Craft *v.* Merrill, 14 N. Y. 456; Whitehall *v.* Weed, 8 How. Pr. (N. Y.) 104] (holding that the sheriff has no right to sell the property of a defendant in an execution for the purpose of collecting his fees, after notice of satisfaction of the judgment, unless, perhaps, where there was collusion between the parties and plaintiff and his attorney are irresponsible); Felker *v.* Emerson, 17 Vt. 101.

48. Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80.

49. Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80.

50. Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133 [*followed* in Read *v.* Williams, 95 Ga. 108, 22 S. E. 213]; Upton *v.* Electric Constr., etc., Co., 89 Hun (N. Y.) 502, 35 N. Y. Suppl. 426 (holding that Laws (1892), c. 418, providing that where an attachment is vacated the sheriff is entitled to poundage on the value of the property attached, and such additional compensation for his trouble and expenses as the judge issuing the warrant allows, does not entitle the sheriff to a lien on the attached goods, unless the attachment is finally sustained); Bowe *v.* U. S. Reflector Co., 36 Hun (N. Y.) 407 [*overruling* as to this point but affirming on other grounds 66 How. Pr. 41 (*following* Hall *v.* U. S. Reflector Co., 66 How. Pr. (N. Y.) 31), and *followed* in Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36 (*affirming* 16 Misc. 151, 38 N. Y. Suppl. 297)] (holding that Code Civ. Proc. § 709, is unconstitutional and void in so far as it attempts to make defendant liable for the sheriff's costs and expenses under an attachment which has been vacated and set aside).

51. Read *v.* Williams, 95 Ga. 108, 22 S. E. 213 [*following* Ward *v.* Barnes, 95 Ga. 103, 22 S. E. 133].

52. Longnecker *v.* Shields, 1 Colo. App. 264, 28 Pac. 659; Morton *v.* Hodgdon, 32 Me. 127.

53. Citizens' Sav. Bank *v.* Kock, 117 Mich.

**15. Detention of Prisoner Until Fees Paid.** A constable who has arrested a prisoner under a body execution has a right to detain such prisoner until his fees are paid, and is not obliged to release him on payment of the amount of the execution less such fees.[54]

**F. Recording of Fees.** In Alabama the sheriff is required to keep a fee book and enter all his fees therein, and if he keeps no book he is entitled to no fees, while if he does keep the book he is not entitled to fees which he has failed to enter therein.[55]

**G. Recovery Back of Money Paid to or Collected by Sheriff — 1. Right of County.** A county may recover from the sheriff money paid him by it in excess of what he was lawfully entitled to receive,[56] or compensation which he drew without the statute in reference to the allowance thereof having been complied with;[57] and it has been held that such recovery may be had even though the payment was made under a misapprehension of law,[58] and on the order of its governing body, with full knowledge of the facts and without fraud.[59]

**2. Right of Private Individual.** A private individual who has paid money to a sheriff for his services, with full knowledge of the facts and without legal compulsion, cannot recover back such payment;[60] and where the money collected under an execution is not enough to satisfy the debt and lawful costs, and the sheriff retains more than his lawful fees, defendant in execution cannot, after paying to plaintiff the balance of his debt, allowing the sum appropriated by the sheriff, recover from the sheriff the amount unlawfully retained by him.[61] But one who has, in order to release his property from an execution, paid the sheriff commissions to which he is entitled if the execution is legal, may recover such payment if the execution be in fact illegal;[62] and an action will lie to recover

118, 75 N. W. 444 (holding that a constable who, at the direction of a mortgagee of a corporation, takes possession of the property under a chattel mortgage and sells the same, waives all lien for his fees by delivering the property to the purchaser, and is not entitled to an allowance on a receiver being appointed for the corporation, but has a personal claim against the mortgagee alone); Miller *v.* Miller, 108 N. Y. App. Div. 310, 95 N. Y. Suppl. 763.

54. Tait *v.* Stronach, 17 N. Brunsw. 226.

55. Bilbro *v.* Drakeford, 78 Ala. 318 [*followed* in McDonald *v.* Cox, 104 Ala. 379, 16 So. 113].

**Entry in private memorandum book not sufficient.**— McDonald *v.* Cox, 104 Ala. 379, 16 So. 113.

56. Jones County *v.* Arnold, 134 Iowa 580, 111 N. W. 973; Megaarden *v.* Hennepin County, 102 Minn. 134, 112 N. W. 899; Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25 [*following* Camden *v.* Varney, 63 N. J. L. 325, 43 Atl. 889].

**The double payment by a county of fees and costs to a sheriff, through a mistake of** the clerk in twice certifying to bills for the same services, is a mistake of fact on the part of the supervisors and the amount erroneously paid may be recovered back. Holmes *v.* Lucas County, 53 Iowa 211, 4 N. W. 918.

**Time for bringing action.**—A statute providing that an action against a sheriff for any act done in his official capacity and in virtue of his office or for any omission of an official duty shall be commenced within three years of the accrual of the cause of action does not bar an action commenced after that period against a sheriff to recover for money obtained from the county on fraudulent bills for official services. Megaarden *v.* Hennepin County, 102 Minn. 134, 112 N. W. 899.

**Measure of recovery.**—Where it appeared that the sheriff had received county orders which, when issued and delivered, had a market value of but ninety per cent of their face value, and had transferred such orders to others at that rate. it was held that the measure of recovery was the amount which the sheriff received, and not the face value of the orders. Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

57. Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249.

58. Douglas County *v.* Sommer, 120 Wis. 424, 98 N. W. 249. *Contra*, Painter *v.* Polk County, 81 Iowa 242, 47 N. W. 65, 25 Am. St. Rep. 489.

59. Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25 [*following* Camden *v.* Varney, 63 N. J. L. 325, 43 Atl. 889]. But *compare* La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

**The defense of voluntary payment is not available** in such a case. Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25 [*following* Camden *v.* Varney, 63 N. J. L. 325, 43 Atl. 889]. *Contra*, Randall *v.* Lyon County, 20 Nev. 35, 14 Pac. 583.

60. Newell *v.* March, 30 N. C. 441; Strafford *v.* Blaisdell, 45 Vt. 549.

61. Chenault *v.* Walker, 22 Ala. 275.

62. Cleveland *v.* McCravy, 46 S. C. 252, 24 S. E. 175.

commissions received and retained by a sheriff on an unauthorized sale which has been set aside.[63]

**H. Liability of Sheriff to County For Receipts of Office.** Even where he is paid a salary the sheriff usually receives fees for his services,[64] but is required to account for and pay into the county treasury the fees received,[65] or the excess of such fees over the amount allowed him for salary and expenses.[66] Accordingly a sheriff has been held accountable for amounts received for the transportation of prisoners to the state prison [67] or insane persons to an insane asylum,[68] money paid by the federal government for keeping prisoners in excess of what is needed for their food and care,[69] fees received for committing prisoners to and discharging them from the county jail,[70] and the surplus of moneys paid him by the county for the care of prisoners.[71] But it has been held that he need not account for his *per diem* for attendance at court,[72] money paid him to defray expenses of advertising,[73] amounts received for services in his individual rather than official capacity,[74] or the fees allowed to guards and assistants in conveying prisoners to the penitentiary.[75]

**63.** Shropshire *v.* Pullen, 3 Bush (Ky.) 512.

**The statute of limitations** does not begin to run against such an action until the sale is set aside. Shropshire *v.* Pullen, 3 Bush (Ky.) 512.

**64.** Carroll County *v.* Durham, 219 Ill. 64, 76 N. E. 78; Starr *v.* Delaware County, 40 Ind. App. 7, 76 N. E. 1025, 79 N. E. 390; People *v.* Denton, 41 N. Y. App. Div. 386, 58 N. Y. Suppl. 722.

**65.** *California.*— Santa Clara County *v.* Branham, 77 Cal. 592, 20 Pac. 75; Adams *v.* San Francisco, 50 Cal. 117.

*Idaho.*— Naylor *v.* Vermont L. & T. Co., 6 Ida. 251, 55 Pac. 297.

*Illinois.*— La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196.

*Indiana.*— Starr *v.* Delaware County, 40 Ind. App. 7, 76 N. E. 1025, 79 N. E. 390.

*Missouri.*— Jackson County *v.* Stone, 168 Mo. 577, 68 S. W. 926, 90 Am. St. Rep. 440.

*New York.*— People *v.* Denton, 41 N. Y. App. Div. 386, 58 N. Y. Suppl. 722; Dos Passos *v.* New York, 45 Misc. 394, 90 N. Y. Suppl. 398.

*Wisconsin.*— See Cutts *v.* Rock County, 82 Wis. 17, 51 N. W. 881, holding that where the sheriff receives a salary in lieu of all fees and compensation for the sheriff, undersheriff, and deputy sheriff, for all services rendered by such officers within the limits of the county, for which salary the county is liable, the fact that a county has collected fees for services of such officers in attendance on cases which came into the county on changes of venue from other counties does not entitle the sheriff to such fees, and that an under-sheriff who is also a constable cannot recover from his county for services as such constable in attendance at the circuit court, even though he was required by the sheriff to attend only as such constable.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 98.

**66.** Carroll *v.* Durham, 219 Ill. 64, 76 N. E. 78; People *v.* Gregory, 11 Ill. App. 370; Harrington *v.* St. Louis, 107 Mo. 327, 17 S. W. 897.

**67.** Adams *v.* San Francisco, 50 Cal. 117 [*followed* in Santa Clara County *v.* Branham, 77 Cal. 592, 20 Pac. 75]; People *v.* Foster, 133 Ill. 496, 23 N. E. 615; Drexel *v.* Douglas County, 62 Nebr. 862, 87 N. W. 1053.

**68.** Adams *v.* San Francisco, 50 Cal. 117 [*followed* in Santa Clara County *v.* Branham, 77 Cal. 592, 20 Pac. 75].

**69.** Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25.

**70.** Smith *v.* State, 169 Ind. 260, 82 N. E. 450; Starr *v.* Delaware County, 40 Ind. App. 7, 76 N. E. 1025, 79 N. E. 390.

**71.** Hudson County *v.* Kaiser, 75 N. J. L. 9, 69 Atl. 25, so holding on the ground that the moneys were either received by the sheriff as the agent of the board of freeholders to be used solely for the purpose of performing his statutory duty, which would necessitate the return of the portion not so used, or they were received partly for that purpose and partly as compensation for his own services in caring for the witnesses in the jail, in which case the surplus received as compensation belonged to the county by virtue of Laws (1905), c. 6, p. 19, § 4, which provides for the payment of a salary to such sheriffs in full compensation of all services rendered by them, and "in lieu of all fees and other compensation whatever theretofore provided."

**72.** State *v.* Flynn, 161 Ind. 554, 69 N. E. 159; Seiler *v.* State, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; Morgan County *v.* Crone, 36 Ind. App. 283, 75 N. E. 826 [*followed* in Morgan County *v.* Neely, 36 Ind. App. 706, 75 N. E. 829]; Comer *v.* Morgan County, 32 Ind. App. 477, 70 N. E. 179.

**73.** Philadelphia *v.* Wright, 12 Phila. (Pa.) 467.

**74.** Drexel *v.* Douglas County, 62 Nebr. 862, 87 N. W. 1053, holding that a sheriff is not required to account to the county for moneys received by him while acting as temporary receiver.

**75.** Drexel *v.* Douglas County, 62 Nebr. 862, 87 N. W. 1053.

**I. Reports and Accountings.** Where the fees of the office belong to the county rather than to the sheriff,[76] that officer is usually required to make periodical reports to the county officials of the fees received,[77] and to account for such fees from time to time.[78] Under a statute providing that the sheriff shall not perform any official service except upon prepayment of his fees, the sheriff must account for all fees earned, whether collected or not.[79]

## V. CIVIL LIABILITIES.

**A. General Rules in Relation to Liability — 1. OFFICER LIABLE FOR MISFEASANCE OR NONFEASANCE.** A sheriff or constable who is guilty of misfeasance or nonfeasance in office is liable therefor to the person injured thereby;[80] and the ignorance of the officer as to what was his duty under the circumstances cannot protect him from liability for neglect to perform that duty.[81] But where a duty of the sheriff may lawfully be performed by the judgment creditor and he undertakes to perform it he cannot hold the sheriff liable for failure to perform it;[82] and *a fortiori* a sheriff cannot be held liable for a failure to do something which he had no authority to do.[83]

**2. JUDICIAL OR MINISTERIAL FUNCTIONS.** The sheriff is always liable for a breach of his ministerial duties;[84] but no liability can arise out of what he has done when

76. See *supra*, IV, H.

77. People *v.* Foster, 133 Ill. 496, 23 N. E. 615 (holding that the sheriff should include in his report fees received by him from the state for conveying prisoners to the penitentiary); Macon County *v.* Mauzy, 38 Ill. App. 129 (holding that Fees and Salary Act, § 51, which requires the sheriff to report fees received during the half year which have been earned in previous years, does not require him to report money received in payment of a judgment which he had recovered against the county for fees theretofore earned); Harrington *v.* St. Louis, 107 Mo. 327, 17 S. W. 897 (holding that the sheriff must make a separate statement of account for each year, which must contain a statement of all fees, etc., earned during the year, although not then collected, and cannot combine the accounts of two years, and thus fill out a deficiency of one year by an excess of another year).

78. Trice *v.* Crittenden County, 7 Ark. 159; Adams *v.* San Francisco, 50 Cal. 117; Davis *v.* McAlpin, 26 N. C. 140.

In a proceeding against a sheriff for an account of moneys in his hands belonging to the county, the record must show that the officer failed to settle his account as required by law. Trice *v.* Crittenden County, 7 Ark. 159.

Settlement prima facie binding on sheriff and his sureties.— Davis *v.* McAlpin, 26 N. C. 140.

Interest on balance.—Where an account between the state and a sheriff had passed through the auditor-general's office and been approved by the treasurer, finding a large balance due to the state, but the sheriff had no notice of the statement of the accounts, and had never presented an account for settlement, and after a suit on his bond the balance was reduced by the sheriff's application to the auditor-general, the state was not entitled to interest on the reduced balance. Com. *v.* Fitler, 12 Serg. & R. (Pa.) 277.

Method of excepting to settlement.— Under Ky. St. § 4146, providing that the report of settlement made with a sheriff by the commissioner of the court "shall be filed in the county court clerk's office and be subjected to exceptions by the sheriff or county attorney, who shall represent the Commonwealth and county, and the county court shall try and determine such exceptions," no person except the sheriff or the county attorney can file exceptions to the sheriff's settlement; and therefore the remedy of any other person is a suit in equity to surcharge the settlement. Little *v.* Strow, 112 Ky. 527, 66 S. W. 282, 23 Ky. L. Rep. 1829.

79. Naylor *v.* Vermont Loan, etc., Co., 6 Ida. 251, 55 Pac. 297.

80. *Alabama.*— Clarke *v.* Gary, 11 Ala. 98.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46.

*Georgia.*— York *v.* Clopton, 32 Ga. 362.

*New York.*— Carpenter *v.* Doody, 1 Hilt. 465.

*Vermont.*— Hutchinson *v.* Parkhurst, 1 Aik. 258.

*United States.*— South *v.* Maryland, 18 How. 396, 15 L. ed. 433.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 137.

Sheriffs are liable for direct injuries caused by neglect or want of skill in executing their duties. Lambeth *v.* New Orleans, 6 La. 731.

81. York *v.* Clopton, 32 Ga. 362.

82. Thompson *v.* Goding, 63 Me. 425, so holding as to the recording of an extent.

83. Hall, etc., Woodworking Mach. Co. *v.* Barnes, 115 Ga. 945, 42 S. E. 276, holding that a sheriff cannot be held liable by plaintiff in trover against a corporation for failure to arrest the officers, or for failure to take a bond from defendant for the property, when it declines to give one.

84. Scott *v.* Ryan, 115 Ala. 587, 22 So. 284; South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

acting in a judicial capacity,[85] even though he has acted corruptly,[86] unless he has maliciously deprived some person of his rights.[87]

**3. Acts Done After Termination of Incumbency.** Where a sheriff levies on and sells property under an execution coming to his hands after the expiration of his term, he is liable as a trespasser.[88]

**4. Liabilities of Deputies — a. In General.** Where a deputy of the sheriff, acting in the sphere of his office, does a voluntary wrong, he may be held personally liable therefor, as by such act he becomes a personal wrong-doer;[89] but he incurs no personal liability to an individual who is injured by reason of his mere official nonfeasance,[90] neglect,[91] or unintentional misfeasance,[92] as in such case the wrong is purely official and not the personal act of the deputy and hence is attributable to the sheriff alone,[93] unless the statute expressly gives a remedy against the deputy.[94] So where a deputy sheriff collects money on an execution and pays it over to the sheriff, the deputy cannot be held liable for not paying the money to the execution plaintiff.[95] But a deputy sheriff who gives his receipt for notes placed in his hands to be collected thereby assumes an agency for the owner of such notes which is extra-official, and is personally liable for negligence or misconduct in the matter,[96] and a deputy sheriff who insures property in his hands as such is liable for the premium.[97] The deputy is of course liable

85. Scott *v.* Ryan, 115 Ala. 587, 22 So. 284; South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433 [*explaining* Ashby *v.* White, 2 Ld. Raym. 938, 92 Eng. Reprint 126].

86. Scott *v.* Ryan, 115 Ala. 587, 22 So. 284.

87. South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433; Ashby *v.* White, 2 Ld. Raym. 938, 92 Eng. Reprint 126.

88. Andress *v.* Broughton, 21 Ala. 200.

89. *Kentucky.*— Murrell *v.* Smith, 3 Dana 462.

*Maine.*— Ross *v.* Philbrick, 39 Me. 29.

*Maryland.*— Mark *v.* Lawrence, 5 Harr. & J. 64.

*Massachusetts.*— McCabe *v.* Maguire, 182 Mass. 255, 65 N. E. 162.

*Vermont.*— Hutchinson *v.* Parkhurst, 1 Aik. 258.

*Wisconsin.*— Remlinger *v.* Weyker, 22 Wis. 383.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 138.

**Deputy constable personally liable for levying on goods not belonging to execution defendant.**— Hoye *v.* Raymond, 25 Kan. 665.

90. *Alabama.*— Pond *v.* Vanderveer, 17 Ala. 426, holding that a deputy sheriff is not liable to a plaintiff in attachment for failing to require sufficient security on the replevy bond taken by him for goods seized under the attachment.

*Kentucky.*— Harlan *v.* Lumsden, 1 Duv. 86 (holding that a deputy sheriff is not liable directly to the state for failure to pay into the treasury public revenues collected by him); Murrell *v.* Smith, 3 Dana 462; Owens *v.* Gatewood, 4 Bibb 494. See also Caldwell *v.* Holly, 1 A. K. Marsh. 429.

*New Hampshire.*— Wilson *v.* Rich, 5 N. H. 455.

*New York.*— Colvin *v.* Holbrook, 2 N. Y. 126 [*affirming* 3 Barb. 475], holding that where a deputy sheriff has rightfully received money in that character, and refuses on demand, while the money is yet in his hands, to pay it to the person to whom it belongs, such person cannot maintain assumpsit against such deputy therefor.

*North Carolina.*— Tarkinton *v.* Hassell, 27 N. C. 359; Mitchell *v.* Durham, 13 N. C. 538.

*Vermont.*— Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Hutchinson *v.* Parkhurst, 1 Aik. 258.

*Virginia.*— Armistead *v.* Marks, 1 Wash. 325; White *v.* Johnson, 1 Wash. 159.

*Canada.*— See Bird *v.* Hopkins, (Hil. T. 5 Vict.) 3 Ont. Case Law Dig. 6389.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 138.

But *compare* Draper *v.* Arnold, 12 Mass. 449. And see Esty *v.* Chandler, 7 Mass. 464.

91. Buck *v.* Ashley, 37 Vt. 475.

92. Murrell *v.* Smith, 3 Dana (Ky.) 462 (taking insufficient security); Holt *v.* Jarvis, Draper (U. C.) 190.

93. Murrell *v.* Smith, 3 Dana (Ky.) 462; Paddock *v.* Cameron, 8 Cow. (N. Y.) 212.

**Liability of sheriff for acts or omissions of deputy** see *infra*, V, B.

94. Helm *v.* Haycraft, 2 Litt. (Ky.) 171. See also Vance *v.* Campbell, 8 Humphr. (Tenn.) 524.

95. Varner *v.* Wooten, 38 Ga. 575 (holding that in such case plaintiff must pursue his remedy against the sheriff); Bartlett *v.* Halligan, 10 N. Y. Suppl. 35 [*distinguishing* Whitman *v.* Haines, 4 N. Y. Suppl. 48] (holding that a deputy sheriff cannot be held for contempt, in refusing to pay over money collected on execution, where it appears that the deputy paid the money so collected to the sheriff, who on the same day paid it back to the deputy in settlement of wages due).

96. Rose *v.* Lane, 3 Humphr. (Tenn.) 218.

97. White *v.* Madison, 26 N. Y. 117, 26 How. Pr. 481, where a deputy sheriff who had insured property held under legal process in a mutual insurance company, giving a

to the sheriff for nonfeasance and unintentional misfeasance as well as for wilful misfeasance.[98]

**b. Deputy Acting as Sheriff.** It has been held that where a sheriff who at the expiration of his term of office has in his hands process not fully executed dies before the complete execution thereof, his under-sheriff becomes substituted in his place, assumes all his liabilities in respect to such process, and is personally liable for moneys collected by him thereunder.[99]

**5. Liabilities of Coroner Acting as Sheriff.** Where a coroner acts as sheriff [1] his liabilities are the same as those of the sheriff.[2]

**6. Liabilities of De Facto Officers.** One who has acted as a sheriff, deputy, or constable under such circumstances as to make him an officer *de facto* [3] is subject to the same liability for official misfeasance or nonfeasance as though he were the rightful incumbent of the office; [4] and in addition to this he may be held liable for acts which would impose no liability were he the rightful incumbent, under the rule that one who justifies his acts under his official character puts his title in issue and must establish his right to the office in order to escape liability.[5]

**7. Liabilities of Persons Aiding Officers.** A stranger who comes to the aid of an officer in the lawful execution of process incurs no liability thereby,[6] although the subsequent acts or omissions of the officer are such as to make the officer a trespasser *ab inito*.[7] But where the original act of the officer is unlawful in itself any stranger who aids him in it is liable to the person injured thereby,[8] although he acts at the officer's command.[9] The mere fact that an officer has committed illegal acts in the course of the execution of process can, however, impose no liability upon persons who come to his assistance after the illegal acts have been committed and without knowledge thereof, and who aid only in acts which are in themselves legal.[10] Where plaintiff in replevin undertakes to serve

premium note signed, "N. D. Snow, Sheriff, by A. Z. Madison, Deputy," was held liable for the amount of the note, and of costs of a previous action against the sheriff, which was nonsuited for want of authority in the deputy to give such note, on the ground of an implied warranty that he had such authority.

98 Harlan *v.* Lumsden, 1 Duv. (Ky.) 86; Kouns *v.* Davis, 2 B. Mon. (Ky.) 278; Wilson *v.* Rich, 5 N. H. 455; Colvin *v.* Holbrook, 2 N. Y. 126 [*affirming* 3 Barb. 475].

**Wrongful recovery against sheriff without notice to deputy.**—Where suit was brought against a sheriff for an alleged default of his deputy, and he made no defense and gave the deputy no notice of the proceedings, in consequence of which a judgment was rendered which was erroneous as to the law and unjust as to the merits, the sheriff could not recover the amount of the judgment from his deputy. Fletcher *v.* Chapman, 2 Leigh (Va.) 560.

**Liability of deputy employed by person to whom office farmed out.**—Where a sheriff farmed out his office to A, giving him the management of the office, with powers to select, employ, control, and dismiss deputies, and A selected B as a deputy, who gave no bond to the sheriff, it was held that B, who had paid over money collected on executions and returned executions to A, was not liable to the sheriff because A had failed to pay the money collected and to return the executions to the creditors, although the sheriff had been compelled to pay for his default. Holland *v.* Helm, 7 Gratt. (Va.) 245.

99. Newman *v.* Beckwith, 61 N. Y. 205 [*reversing* 5 Lans. 80].

1. Coroner acting as sheriff see *supra*, II, C, 11, b.

2. Horsfall *v.* Sutherland, 31 Nova Scotia 471.

3. De facto: Constable see *supra*, II, B, 7. Deputy see *supra*, II, C, 8. Sheriff see *supra*, II, A, 9.

4. Berry *v.* Hart, 1 Colo. 246; Dunphy *v.* People, 25 Mich. 10; Lawrence *v.* Sherman, 15 Fed. Cas. No. 8,144, 2 McLean 488.

5. Patterson *v.* Miller, 2 Metc. (Ky.) 493; Hughes *v.* James, 3 J. J. Marsh. (Ky.) 699; Pearce *v.* Hawkins, 2 Swan (Tenn.) 87, 57 Am. Dec. 54.

6. Oystead *v.* Shed, 12 Mass. 506.

7. Oystead *v.* Shed, 12 Mass. 506.

8. *Massachusetts.*— Oystead *v.* Shed, 12 Mass. 506.

*Michigan.*— Kane *v.* Hutchisson, 93 Mich. 488, 53 N. W. 624.

*North Carolina.*— State *v.* Whitaker, 107 N. C. 802, 12 S. E. 456.

*South Carolina.*— McElhenny *v.* Wylie, 3 Strobh. 284, 49 Am. Dec. 643.

*Vermont.*— Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 138.

9. Oystead *v.* Shed, 12 Mass. 506; Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679.

10. Oystead *v.* Shed, 13 Mass. 520, 7 Am.

the writ as the servant of the sheriff, and in doing so takes property of a third person, he is liable as a trespasser, although the sheriff might have a valid defense, as in such case he is a principal as well as a servant of the officer.[11]

**8. Application of Maxim De Minimis to Injuries by Sheriff.** Where an act of a sheriff, although perhaps an invasion of right, is of little importance and the injury resulting therefrom, if any, is trifling, an application of the maxim *de minimis non curat lex* [12] may prevent any recovery therefor.[13]

**9. Effect of Directions of Party or Attorney.** Within certain limits the party at whose instance process is issued or his attorney has the right to direct the sheriff or constable as to how it shall be executed,[14] and where such directions are given the officer is liable for any loss resulting from his failure to follow the same,[15] and excused from liability to the party for any results proceeding from his compliance therewith.[16] So a direction from an execution plaintiff to stay

Dec. 172, so stating the law in a case where an officer after illegally breaking into a house, summoned to his aid in execution process persons having no knowledge of his unlawful entry.

One who merely appraises or assists in making an inventory of goods levied upon by a sheriff or marshal, in obedience to the summons of the latter, is not a trespasser. Thrailkill *v.* Daily, 16 Nebr. 114, 19 N. W. 595.

11. Williams *v.* Bunker, 78 Me. 373, 5 Atl. 882.

12. See 13 Cyc. 779.

13. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75, holding that where an officer, who had attached certain hay and grain, made use of a pitchfork belonging to the debtor in removing the same, and, when he had completed the removal, left it where he found it, and it was received by the debtor, and was in no way injured, the officer was not liable in trespass for such use of the pitchfork. But *compare* Fullam *v.* Stearns, 30 Vt. 443, holding that a mortgagee of bands connecting with machinery might recover of an officer levying an attachment on the machinery for damages to the bands, caused by cutting the thongs by which the bands were laced together in order to disengage the bands from the machinery, instead of untying the thongs, as he could have done easily, although the thongs were considerably worn and of little value.

14. See *supra*, III, B, 6, g, (I); and Attachment, 4 Cyc. 580; Executions, 17 Cyc. 1077.

15. *Maine.*— Kimball *v.* Davis, 19 Me. 310.

*Massachusetts.*— Peirce *v.* Partridge, 3 Metc. 44; Trowbridge *v.* Cushman, 24 Pick. 310; Coggeshall *v.* Varnum, 19 Pick. 422; Fairfield *v.* Baldwin, 12 Pick. 388; Barnard *v.* Ward, 9 Mass. 269.

*New Hampshire.*— Smith *v.* Judkins, 60 N. H. 127; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603, holding that a sheriff taking a writ, with special directions as to service, and requiring no written indemnity, is liable for failure to follow his directions, except on proof that he could not legally have done so.

*New York.*— Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348.

*North Carolina.*— Nixon *v.* Bagby, 52 N. C. 4.

*Washington.*— Murray *v.* Mead, 5 Wash. 693, 32 Pac. 780.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 140.

It is not necessary that the grounds of the request should be communicated to the officer in order to render him liable for disregarding it. Peirce *v.* Partridge, 3 Metc. (Mass.) 44.

The fact that the sheriff acted in good faith in refraining from complying with the directions given him does not relieve him from liability. Smith *v.* Judkins, 60 N. H. 127.

Where an execution plaintiff and his attorney give conflicting directions the sheriff is liable if he obeys those of the attorney instead of those of the party. Murray *v.* Mead, 5 Wash. 693, 32 Pac. 780.

Direction of execution defendant as outweighing that of plaintiff.— Where the statute gives the execution defendant the right to designate the property first to be taken, if there be no reasonable doubt of title, the sheriff and his sureties are not liable on his bond for failing to levy on personal property of the debtor as directed by plaintiff, where the officer has levied on real estate designated by the execution defendant. State *v.* Willis, 33 Ind. 118.

16. *Alabama.*— Robertson *v.* Coker, 11 Ala. 466; McClure *v.* Colclough, 5 Ala. 65 [*approved* in Gary *v.* Boykin, 7 Ala. 154].

*Arkansas.*— Bickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292.

*Connecticut.*— Bacon *v.* Fitch, Kirby 373.

*Delaware.*— State *v.* Gemmill, 1 Houst. 9.

*Georgia.*— See Holcombe *v.* Dupree, 50 Ga. 335.

*Illinois.*— People *v.* Offerman, 84 Ill. App. 132.

*Indiana.*— State *v.* Boyd, 63 Ind. 428.

*Iowa.*— Melhop *v.* Seaton, 77 Iowa 151, 41 N. W. 600, holding that where a sheriff releases property attached, by order of counsel for both parties to the action, as the result of an agreement between them, he is not liable to plaintiff for its value, although defendant fails to carry out his agreement on which the release was ordered.

*Maine.*— Farnham *v.* Gilman, 24 Me. 250. But *compare* Steele *v.* Putney, 15 Me. 327, holding that where the owner of an undivided share of goods directed an officer to attach

the execution of the writ will relieve the officer from liability for failure to levy,[17] or delay in levying,[18] or failure to arrest defendant on a body execution;[19] and in an action against a sheriff for an escape, he may rely on the fact that the attorney of plaintiff ordered defendant's discharge.[20] So also a sheriff who would otherwise

the whole at the suit of himself and others, without knowing at the time that he had any interest therein, he was not thereby precluded from recovering the value from the officer.

*Missouri.*— State *v.* Woods, 7 Mo. 536 (holding that a sheriff is not liable for the escape of a prisoner arrested on execution, if at the time of the escape he was deviating from the line of his duty at the request of plaintiff or his agent, even though the prisoner escaped by his negligence. State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250; Muir *v.* Orear, 87 Mo. App. 38 (holding that a constable, obeying the direction of the attorney for plaintiff in attachment to release the property, is protected from any liability on account of surrendering it).

*New Hampshire.*— Goodrich *v.* Foster, 20 N. H. 177.

*New Jersey.*— Stryker *v.* Merseles, 24 N. J. L. 542; Paterson Bank *v.* Hamilton, 13 N. J. L. 159.

*New York.*— Douglas *v.* Haberstro, 88 N. Y. 611, 2 N. Y. Civ. Proc. 186 [*reversing* 25 Hun 262].

*Ohio.*— Webb *v.* Anspach, 3 Ohio St. 522.

*South Carolina.*—Treasury Com'rs *v.* Allen, 2 Mill 88 [*followed* in Kilpatrick *v.* Vandiver, 2 Mill 341].

*Tennessee.*— Granberry *v.* Crosby, 7 Heisk. 579; Koger *v.* Donnell, 1 Head 377; Billingsly *v.* Rankin, 2 Swan 82; State *v.* McDonald, 9 Humphr. 606; Robinson *v.* Harrison, 7 Humphr. 189.

*Texas.*— Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455, holding that where an attachment was levied on goods, and a list of them taken by the officer, but by order of plaintiffs the goods were not removed, or taken into the officer's possession, and the officer at the time notified plaintiffs that he would not be responsible, but that, if he left the goods, it would be at the risk of plaintiffs, and they agreed to this, the officer could not be held responsible for a loss of the goods.

*Vermont.*— Willard *v.* Goodrich, 31 Vt. 597; Abbott *v.* Edgerton, 30 Vt. 208, holding that notwithstanding an officer returns an attachment of property upon a writ, when by the direction of plaintiff the attachment was merely nominal, and the officer did not take possession of the property, he will not be liable to plaintiff for not having the property described in his return to respond to the judgment.

*Canada.*— McIntosh *v.* Jarvis, 8 U. C. Q. B. 535.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 140, 195 *et seq.*

**Consent and approbation.**— If a sheriff makes a return of a process in a particular manner, with the consent and approbation of plaintiff, plaintiff cannot sustain an action for a false return against the sheriff, whether the return be true or false. Hayes *v.* Lusby, 5 Harr. & J. (Md.) 485.

**The advice of plaintiff's attorneys** to a sheriff to release the levy of an attachment unless plaintiff will execute an indemnifying bond exonerates the sheriff from all liability for damages accruing to plaintiff from said release, although he may not have been entitled to an indemnifying bond. State *v.* Rayburn, 50 Mo. App. 683.

**Directions from a person other than plaintiff or his attorney** do not excuse a sheriff for failure to perform his duty. Stephens *v.* Clark, 8 N. J. L. 270, so holding in the case of a sheriff who refrained from selling property levied on at the direction of an assignor and guarantor of the bond on which the suit was brought.

**An execution creditor's assent to an escape, after it has happened** and without consideration, will not discharge the sheriff from liability. Powers *v.* Wilson, 7 Cow. (N. Y.) 274.

**Verbal directions** as to the application of money made on an execution are sufficient to protect the sheriff. Treasury Com'rs *v.* Allen, 2 Mill (S. C.) 88 [*followed* in Kilpatrick *v.* Vandiver, 2 Mill (S. C.) 341]. But where the statute provides that no directions to a sheriff in relation to the execution of process or any act in relation thereto shall be available to relieve the sheriff from liability, unless contained in writing, the sheriff cannot escape liability for the loss of a debt through his failure to safely keep property levied on by showing that he acted pursuant to verbal orders of plaintiff (Sanford *v.* Boring, 12 Cal. 539), and only a written consent will excuse the officer's failure to execute a writ (Davis *v.* Gott, 130 Ky. 486, 113 S. W. 826; Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188).

17. State *v.* Gemmill, 1 Houst. (Del.) 9; Bohon *v.* State, 5 Blackf. (Ind.) 467; Smith *v.* Smith, 60 N. Y. 161; Hampton *v.* Boylan, 46 Hun (N. Y.) 151; Humphrey *v.* Hathorn, 24 Barb. (N. Y.) 278; Crounse *v.* Bailey, 10 N. Y. Suppl. 273, 11 N. Y. Suppl. 910. See also Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.

**Verbal direction sufficient to relieve sheriff.** — State *v.* Gemmill, 1 Houst. (Del.) 9.

**A stay of "sales only"** indorsed on a fieri facias does not excuse a failure to levy. Farrar *v.* Wingate, 4 Rich. (S. C.) 35, 53 Am. Dec. 709.

**After the assignment of an execution** directions of the judgment creditor will not excuse the sheriff's failure to levy. Gregory *v.* Waters, 19 Ga. 71.

18. State *v.* Gemmill, 1 Houst. (Del.) 9.

19. King *v.* Deliesseline, Harp. (S. C.) 357.

20. Scott *v.* Seiler, 5 Watts (Pa.) 235,

be liable as bail may be relieved by the fact that his deputy returned the execution at the request and by the direction of plaintiff's attorney before the return-day thereof.[21] Authority or instructions from plaintiff in execution or his attorney to hold up the writ will relieve the sheriff from liability for a failure to return it;[22] but he is not excused from a failure to return an execution by reason of instructions to return it "to be renewed,"[23] or to hold up or postpone a sale after levy.[24] A direction as to certain matters in connection with the execution of a writ does not relieve the sheriff from the consequences of a neglect of duty in another respect,[25] and a direction which the party had no authority to give affords no protection whatever.[26] Neither does the fact that the officer has acted under directions of plaintiff relieve him of liability to defendant or others for what he has done.[27] But, although a debt has been assigned before judgment, if the judgment is rendered and execution issued in the name of the assignor, the sheriff not knowing of the assignment, incurs no liability to the assignee by following the assignor's directions.[28] An officer who attempts to escape liability on the

holding, however, that the sheriff will not be relieved if it appears that the order was given after the escape.

21. Douglas *v.* Haberstro, 88 N. Y. 611 [*reversing* 25 Hun 262].

22. *Alabama.*— Robertson *v.* Coker, 11 Ala. 466; McClure *v.* Colclough, 5 Ala. 65 [*approved* in Gary *v.* Boykin, 7 Ala. 154].

*Arkansas.*— Bickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292; Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693.

*Kentucky.*— Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188; Com. *v.* Hurt, 4 Bush 64; Basset *v.* Bowmar, 3 B. Mon. 325; Shannon *v.* Clark, 3 Dana 152.

*Louisiana.*— Laforet *v.* Weber, 23 La. Ann 253; Simons *v.* R. White, 21 La. Ann. 590; Webb *v.* Kemp, 2 La. Ann. 370.

*Mississippi.*— Simms *v.* Quinn, 58 Miss. 221 [*approved* in Skinner *v.* Wilson, 61 Miss. 90].

*New York.*— Humphrey *v.* Hathorn, 24 Barb. 278.

*Pennsylvania.*— Amey *v.* Kennedy, 1 Ashm. 160.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Koger *v.* Donnell, 1 Head 377; Robinson *v.* Harrison, 7 Humphr. 189; Kennedy *v.* Smith, 7 Yerg. 472.

*Virginia.*— Bullock *v.* Goodall, 3 Call 44, holding that a sheriff is not liable to a fine for not returning an execution where such default is due to plaintiff's direction.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 140.

Subsequent instructions, after the return-day, cannot render the officer liable for failure to return the execution. Shannon *v.* Clark, 3 Dana (Ky.) 152.

Written authority is necessary to protect the sheriff. Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188.

Instructions of beneficiary of judgment.— Where a judgment was rendered in favor of the clerk of the court in which a suit was pending, for the benefit of the litigants, and in consequence of instructions from the attorney of one of said litigants the execution issued thereon was not returned, the sheriff was liable, as he should have obeyed no attorney except the one recognized by the clerk, or one representing all the interested parties. State *v.* Rose, 3 Lea (Tenn.) 531.

23. Bershears *v.* Warner, 5 Sneed (Tenn.) 676 [*approved* in Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388], holding that such instructions will not excuse the sheriff from liability for a failure to return the execution on the day fixed by law.

24. Bently *v.* Kirk, 1 Baxt. (Tenn.) 385; Koger *v.* Donnell, 1 Head (Tenn.) 377. See also Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

25. Austin *v.* Burlington, 34 Vt. 506, holding that a direction by the attorney of an attaching creditor to the officer holding the writ not to attach real estate does not relieve the officer from liability for not keeping personal property which has been attached by him on the same writ to respond to the execution.

26. Beecher *v.* Anderson, 45 Mich. 543, 8 N. W. 539 (holding that as a prosecuting attorney cannot control the action of the sheriff by directing him not to execute a valid warrant of arrest placed in his hands for execution, the sheriff is responsible if he fails in his duty in following the advice of such attorney); State *v.* Johnson, 78 Mo. App. 569 (holding that as a plaintiff in attachment has no right to direct or dictate to the officer as to the form of his return, the latter is not relieved from liability for a defective return by the fact that plaintiff's attorney wrote the return on the writ); Lewis *v.* Hamilton, 15 Fed. Cas. No. 8,324*a*, Hempst. 21 (holding that where a sheriff receives an execution on which costs are due the clerk, directions received from the execution plaintiff cannot relieve him from liability for a failure to make such costs when practicable).

27. Minthorn *v.* Hemphill, 73 Iowa 257, 34 N. W. 844; Wilcox *v.* Brown, 26 Nebr. 751, 42 N. W. 887; Pittock *v.* Jordan, 19 Oreg. 7, 13 Pac. 510; Scott *v.* Seiler, 5 Watts (Pa.) 235.

28. Atkinson *v.* Cooper, 2 Humphr. (Tenn.) 361.

ground that he acted in accordance with plaintiff's instructions has the burden of proof as to such instructions.[29]

**10. Effect of Interference of Party or Attorney.** Where the interference of a party or his attorney has prevented the sheriff from performing his duty, such party cannot hold the sheriff liable for such failure;[30] nor can a sheriff be held liable to plaintiff for an insufficient return, where the delinquency is attributable to a statement of facts made to the sheriff by the agent of plaintiff.[31] But a sheriff cannot escape liability for failure to return a writ by showing that the conduct of plaintiff embarrassed him in making sales or adjusting or collecting the proceeds thereof.[32]

**11. Lien[33] on Fees of Office.** A sheriff's official defalcations create no lien on fees of office due to him, but debts due him on whatever account form, with his other property, a common fund for all his creditors.[34]

**B. Liability For Acts or Omissions of Deputies[35] — 1. General Rule.** For all civil purposes the acts of a deputy sheriff or constable are those of his principal,[36] and hence the sheriff or constable is liable for the acts, defaults, torts, or other misconduct done or committed by his deputy *colore officii*,[37] his liability

**29** Bohon *v.* State, 5 Blackf. (Ind.) 467; Commonwealth *v.* Hurt, 4 Bush (Ky.) 64.

**An indorsement on an execution,** "Returned by order of" plaintiff, does not alone show sufficient excuse for not executing the writ. Bohon *v.* State, 5 Blackf. (Ind.) 467.

**Evidence insufficient to show that creditor controlled execution** see Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.

**30.** Groover *v.* White, 54 Ga. 601; Robinson *v.* Harrison, 7 Humphr. (Tenn.) 189.

**If the sheriff is misled by advice of plaintiff's attorney,** so that he postpones the date of sale beyond the lifetime of the writ, this may furnish satisfactory reason for not selling and for not having the money to render to plaintiff, but it is no excuse for not returning the process upon its return-day. Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693.

**31.** Billingsly *v.* Rankin, 2 Swan (Tenn.) 82.

**32.** Norris *v.* State, 22 Ark. 524.

**33. Liens** generally see Liens, 25 Cyc. 655.

**34.** Alabama Bank *v.* Hozey, 2 Rob. (La.) 150.

**35. Liability of sheriff for compensation of keeper or watchman employed by deputy** see *supra*, IV, D, 8.

**Amercement of sheriff for default of deputy** see *infra*, IX, D, 2.

**36.** Frizzell *v.* Duffer, 58 Ark. 612, 25 S. W. 1111; Mosby *v.* Mosby, 9 Gratt. (Va.) 584.

**37.** *Alabama.*— Stephens *v.* Head, 138 Ala. 455, 35 So. 565; Rogers *v.* Carroll, 111 Ala. 610, 20 So. 602; Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187; Pond *v.* Vanderveer, 17 Ala. 426; Clarke *v.* Gary, 11 Ala. 98.

*Arkansas.*—Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Frizzell *v.* Duffer, 58 Ark. 612, 25 S. W. 1111; Badgett *v.* Martin, 12 Ark. 730.

*California.*—Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; Nixon *v.* Rauer, (1901) 66 Pac. 221; Towle *v.* Matheus, 130 Cal. 574, 62 Pac. 1064.

*Connecticut.*— Palmer *v.* Gallup, 16 Conn. 555. The statute makes a deputy sheriff substantially an independent officer, and the liability of the sheriff for the acts of his deputy is limited to his "neglects and defaults," to the injury of the parties to the suit. Coite *v.* Lynes, 33 Conn. 109, where, however, the court recognizes the common-law rule to be as stated in the text. See also Dayton *v.* Lynes, 30 Conn. 351.

*Georgia.*— Matthis *v.* Pollard, 3 Ga. 1; *In re* Stephens, 1 Ga. 584.

*Indiana.*— Bosley *v.* Farquar, 2 Blackf. 61; McGruder *v.* Russell, 2 Blackf. 18.

*Kansas.*— Frankhonser *v.* Cannon, 50 Kan. 621, 32 Pac. 379; Hoye *v.* Raymond, 25 Kan. 665; Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578.

*Kentucky.*— Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832; Mann *v.* Martin, 82 Ky. 242; Winterbowen *v.* Haycraft, 7 Bush 57; Bottom *v.* Williamson, 3 Bush 521; Harlan *v.* Lumsden, 1 Duv. 86; Murrell *v.* Smith, 3 Dana 462; Owens *v.* Gatewood, 4 Bibb 494. See also Caldwell *v.* Holly, 1 A. K. Marsh. 429.

*Louisiana.*— Grabenheimer *v.* Budd, 40 La. Ann. 107, 3 So. 724; State *v.* Budd, 39 La. Ann. 232, 1 So. 453; Frazier *v.* Parsons, 24 La. Ann. 339; Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294.

*Maine.*— Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9; Norton *v.* Nye, 56 Me. 211; Hamilton *v.* Goding, 55 Me. 419; Dyer *v.* Woodbury, 24 Me. 546; Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; Bailey *v.* Hull, 16 Me. 408; Norton *v.* White, 16 Me. 53; Adams *v.* Jewett, 10 Me. 426; Williams College *v.* Balch, 9 Me. 74; Kidder *v.* Parlin, 7 Me. 80; Green *v.* Lowell, 3 Me. 373; Walker *v.* Foxcroft, 2 Me. 270.

*Massachusetts.*— Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Clapp *v.* Thomas, 7 Allen 188; Robinson *v.* Ensign, 6 Gray 300; King *v.* Rice, 12 Cush. 161; Codman *v.* Freeman, 3 Cush. 306; Goodnow *v.* Willard, 5 Metc. 517; Sexton *v.* Nevers, 20 Pick. 451, 32 Am. Dec. 225; Campbell *v.* Phelps, 1 Pick. 62, 11 Am. Dec. 139, 17 Mass. 244; Larned

in this respect extending not only to acts of misfeasance but also to official nonfeasance.[38]

**2. Acts of De Facto Deputies.** A sheriff or constable is liable for the official misconduct, defaults, etc., of a person whom he has held out as his deputy,[39] and who has acted as a deputy,[40] with the consent of the sheriff or constable,[41] and been generally reputed to be such,[42] although such person may not have

*v.* Allen, 13 Mass. 295; Draper *v.* Arnold, 12 Mass. 449; Rice *v.* Hosmer, 12 Mass. 127; Barnard *v.* Ward, 9 Mass. 269; Esty *v.* Chandler, 7 Mass. 464; Marshall *v.* Hosmer, 4 Mass. 60; Grinnell *v.* Phillips, 1 Mass. 530.

*Michigan.*— Handy *v.* Clippert, 50 Mich. 355, 15 N. W. 507; Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448; Ackworth *v.* Kemp, Dougl. 40.

*Minnesota.*— Albrecht *v.* Long, 25 Minn. 163.

*Mississippi.*— State *v.* Dalton, 69 Miss. 611, 10 So. 578.

*Missouri.*— State *v.* Moore, 72 Mo. 285; State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563; Blunt *v.* Sheppard, 1 Mo. 219; State *v.* Claudius, 1 Mo. App. 551.

*New Hampshire.*— Haley *v.* Thurston, 60 N. H. 204; Rider *v.* Chick, 59 N. H. 50; Moody *v.* Mahurin, 4 N. H. 296; Morse *v.* Betton, 2 N. H. 184.

*New York.*— Sheldon *v.* Paine, 10 N. Y. 398; People *v.* Schuyler, 4 N. Y. 173; Beyer *v.* Sigel, 75 N. Y. App. Div. 83, 77 N. Y. Suppl. 1018 [*affirmed* in 177 N. Y. 575, 69 N. E. 1120]; McKinley *v.* Tucker, 59 Barb. 93; Pond *v.* Leman, 45 Barb. 152; Stewart *v.* Wells, 6 Barb. 79; King *v.* Orser, 4 Duer 431; Paddock *v.* Cameron, 8 Cow. 212; People *v.* Brown, 6 Cow. 41; McIntyre *v.* Trumbull, 7 Johns. 35.

*North Carolina.*— Martin *v.* Martin, 47 N. C. 285; Tarkinton *v.* Hassell, 27 N. C. 359; Lyle *v.* Wilson, 26 N. C. 226; Satterwhite *v.* Carson, 25 N. C. 549.

*Pennsylvania.*— Wheeler *v.* Hambright, 9 Serg. & R. 390; Hazard *v.* Israel, 1 Binn. 240, 2 Am. Dec. 438.

*South Carolina.*— Jentry *v.* Hunt, 2 McCord 410; Teasdale *v.* Hart, 2 Bay 173.

*Tennessee.*—Wiseman *v.* Bean, 2 Heisk. 390; Draper *v.* State, 1 Head 262; Atkins *v.* Scarborough, 9 Humphr. 517; Estes *v.* Williams, Cooke 413.

*Texas.*— King *v.* Brown, 100 Tex. 109, 94 S. W. 328 [*reversing* 41 Tex. Civ. App. 588, 93 S. W. 1017]; Herring *v.* Patten, 18 Tex. Civ. App. 147, 44 S. W. 50; Tarver *v.* Carter, (Civ. App. 1897) 42 S. W. 229.

*Vermont.*—Stimpson *v.* Pierce, 42 Vt. 334; Seaver *v.* Pierce, 42 Vt. 325; Bradley *v.* Chamberlain, 31 Vt. 468; Newbury Bank *v.* Baldwin, 31 Vt. 311; Mason *v.* Ide, 30 Vt. 697; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Wetherby *v.* Foster, 5 Vt. 136; Johnson *v.* Edson, 2 Aik. 299; Smith *v.* Joiner, 1 D. Chipm. 62.

*Virginia.*—Allenbaugh *v.* Coakley, 75 Va. 628; Mosby *v.* Mosby, 9 Gratt. 584; Scott *v.* Tankersley, 10 Leigh 581; Douglass *v.* Stumps, 5 Leigh 392; Moore *v.* Dawney, 3 Hen. & M. 127; James *v.* McCubbin, 2 Call 273; Armistead *v.* Marks, 1 Wash. 325; White *v.* Johnson, 1 Wash. 159. See also Stowers *v.* Smith, 5 Munf. 401.

*West Virginia.*—Lucas *v.* Locke, 11 W. Va. 81.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612; Cotton *v.* Marsh, 3 Wis. 221.

*United States.*— Clute *v.* Goodell, 5 Fed. Cas. No. 2,911, 2 McLean 193; Lawrence *v.* Sherman, 14 Fed. Cas. No. 8,144, 2 McLean 488.

*England.*— Smart *v.* Hutton, 8 A. & E. 568 note, 2 N. & M. 426, 35 E. C. L. 734; Gregory *v.* Cotterell, 5 E. & B. 571, 2 Jur. N. S. 16, 25 L. J. Q. B. 33, 4 Wkly. Rep. 48, 85 E. C. L. 571; Anonymous, Lofft. 81, 98 Eng. Reprint 543. See also Martin *v.* Bell, 6 M. & S. 220, 1 Stark. 413, 18 Rev. Rep. 354, 2 E. C. L. 160.

*Canada.*— Holt *v.* Jarvis, Draper (U. C.) 190; Ross *v.* McMartin, 7 U. C. Q. B. 179.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 158 *et seq.*

**The sheriff of the supreme court is not** liable for the misconduct of the sheriffs of the several counties when acting as his deputies. McGruder *v.* Russell, 2 Blackf. (Ind) 18.

**The authority of the deputy must be made to appear** in order to charge the sheriff. Lowes *v.* Jarvis, 5 U. C. Q. B O S. 134, holding that in the case at bar such authority did not sufficiently appear.

38. Murrell *v.* Smith, 3 Dana (Ky.) 462; Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9; Whitney *v.* Farrar, 51 Me. 418; Morse *v.* Betton, 2 N. H. 184; Wetherby *v.* Foster, 5 Vt. 136; Hutchinson *v.* Parkhurst, 1 Aik. (Vt.) 258. And see *supra*, note 37.

39. Pickens *v.* McNutt, 12 Sm. & M. (Miss.) 651.

40. *Alabama.*— Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187.

*Indiana.*— Bosley *v.* Farquar, 2 Blackf. 61.

*Kentucky.*— Mann *v.* Martin, 82 Ky. 242.

*Mississippi.*— Pickens *v.* McNutt. 12 Sm. & M. 651.

*Tennessee.*— Wiseman *v.* Bean, 2 Heisk. 390.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 159.

41. Bosley *v.* Farquar, 2 Blackf. (Ind.) 61; Mann *v.* Martin, 82 Ky. 242; Pickens *v.* McNutt, 12 Sm. & M. (Miss.) 651. See also Wiseman *v.* Bean, 2 Heisk. (Tenn.) 390.

**Written deputation need not be shown.**— Horne *v.* Allen, 27 N. C. 36; Buchanan *v.* McIntosh, 24 N. C. 53. *Contra*, Curtis *v.* Fay, 37 Barb. (N. Y.) 64.

42. Holt *v.* Jarvis, Draper (U. C.) 190, holding that to charge a sheriff with the acts of his deputy done *colore officii*, it is enough

been legally appointed a deputy,[43] or may not have qualified in the manner required by statute.[44]

**3. Acts Done After Termination of Deputy's Incumbency.** Where a deputy ceases to be such, as by removal, expiration of his term, or otherwise, the sheriff is liable for his subsequent acts in connection with the execution of process which he had begun to execute while in office;[45] but the sheriff is not liable for any acts of the former deputy in connection with new business which he has assumed to undertake after ceasing to be deputy.[46]

**4. Acts Done After Termination of Sheriff's Incumbency.** Where a sheriff, while in office, places process in the hands of his deputy for execution, he is liable for the official misfeasance or nonfeasance of the deputy in relation to such process, although the act or omission complained of does not occur until after the sheriff has gone out of office,[47] and the deputy has become the deputy of his successor.[48]

**5. Acts of Deputy of Predecessor.** A sheriff is not responsible for the acts or omissions of the deputy of his predecessor in relation to process placed in his hands for execution by the old sheriff,[49] although the new sheriff has appointed the same person his own deputy,[50] and the acts or omissions complained of did not occur until after the new sheriff had gone into office.[51]

**6. Acts of Deputy Nominated by Creditor.** It has been held that the mere fact that a special deputy to execute certain process was appointed by the sheriff on the nomination of the creditor does not relieve the sheriff from liability to the creditor for the misconduct or neglect of such deputy,[52] unless there was collusion or a want of good faith in making the nomination.[53]

**7. Acts Outside of Scope of Official Duties of Deputy.** A sheriff or constable is not liable for the acts of his deputy outside of the scope of his official duties,[54] or from the deputy's neglect of any act or duty which the law does not require

to prove the authority of such deputy by general reputation.

**43.** Bosley *v.* Farquar, 2 Blackf. (Ind.) 61; Mann *v.* Martin, 82 Ky. 242; Pickens *v.* McNutt, 12 Sm. & M. (Miss.) 651.

**44.** Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187; Pickens *v.* McNutt, 12 Sm. & M. (Miss.) 651.

**45.** Buck *v.* Kimball, 75 Me. 440; Lambard *v.* Fowler, 25 Me. 308; Morton *v.* White, 16 Me. 53; Morse *v.* Betton, 2 N. H. 184; Ross *v.* Campbell, 19 Hun (N. Y.) 615; Coburn *v.* Chamberlin, 31 Vt. 326.

**A deputy sheriff who has gone out of office may waive a demand on him for attached property in his possession by the officer holding the execution, so that the sheriff will be liable for his neglect to deliver the property notwithstanding the lack of a demand. Morton *v.* White, 16 Me. 53.**

**46.** Edmunds *v.* Barton. 31 N. Y. 495.

**47.** *Alabama.*— Hill *v.* Fitzpatrick, 6 Ala. 314.

*Massachusetts.*— Larned *v.* Allen, 13 Mass. 295.

*New Hampshire.*—Morse *v.* Betton, 2 N. H. 184.

*Vermont.*—Stimpson *v.* Pierce, 42 Vt. 334; Coburn *v.* Chamberlin, 31 Vt. 326.

*Virginia.*— Douglass *v.* Stumps, 5 Leigh 392, sheriff holding over after expiration of commission.

*Canada.*— Ross *v.* McMartin, 7 U. C. Q. B. 179.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 163.

**48.** Stimpson *v.* Pierce, 42 Vt. 334.

**49.** Hamilton *v.* Vail, 2 Metc. (Ky.) 511; Barden *v.* Douglass, 71 Me. 400; Wilton Mfg. Co. *v.* Butler, 34 Me. 431; Pillsbury *v.* Small, 19 Me. 435.

**50.** Hamilton *v.* Vail, 2 Metc. (Ky.) 511; Wilton Mfg. Co. *v.* Butler, 34 Me. 431; Pillsbury *v.* Small, 19 Me. 435.

**51.** Hamilton *v.* Vail, 2 Metc. (Ky.) 511; Barden *v.* Douglass, 71 Me. 400.

**52.** Martin *v.* Martin, 47 N. C. 285. See also State *v.* Dalton, 69 Miss. 611, 10 So. 578, holding that the sheriff is not released from liability because in deciding which deputy should execute a writ, he chose the one selected by plaintiff rather than another whom he desired to have perform the duty. *Contra*, Skinner *v.* Wilson, 61 Miss. 90.

**53.** Martin *v.* Martin, 47 N. C. 285.

**54.** *Colorado.*— Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432.

*Georgia.*— Reynolds *v.* Dale, 33 Ga. 585.

*Indiana.*— Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440.

*Kentucky.*— Com. *v.* Hurt, 64 S. W. 911, 65 S. W. 610, 23 Ky. L. Rep. 1171.

*Maine.*—Dyer *v.* Tilton, 71 Me. 413; Smith *v.* Berry, 37 Me. 298; Kendrick *v.* Smith, 31 Me. 162; Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719.

*Massachusetts.*— Davis *v.* Smith, 130 Mass. 113; Tobey *v.* Leonard, 15 Mass. 200; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

*Minnesota.*— Dorr *v.* Mickley, 16 Minn. 20.

*Missouri.*— State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

him officially to perform.[55] So where a sheriff delivered a fieri facias to a deputy sheriff, with written directions to make a levy and await further orders from the execution plaintiff, thereby severing the relation of principal and deputy, and making the deputy plaintiff's agent, the sheriff was not answerable for the deputy's subsequent acts or defaults.[56] And it has been held that the fact that an unofficial act was done by the deputy sheriff in the belief that it was within his official power, and that the sheriff, on being informed of it, approved it, and afterward acted on it, in the same belief, will not render the latter liable.[57] Neither can a sheriff be held liable for the performance of an unofficial contract made by his deputy.[58]

**8. Directions to Deputy as Affecting Liability of Sheriff.**[59] Where plaintiff in a writ gives instructions to a deputy sheriff as to its execution, and such instructions are followed, the sheriff is discharged from liability for the deputy's acts on the ground that plaintiff has made the deputy his agent,[60] and the same is true where the deputy acts under the instructions of the attorney of such party.[61] But the mere fact that plaintiff has given instructions to a deputy does not affect the liability of the sheriff for the deputy's acts where the deputy has done nothing in pursuance of such instructions,[62] or where the default complained of was not committed in the course of following such directions.[63]

**9. Release of Deputy From Legal Duty by Act of Creditor.** A creditor who has by his own act released the deputy from the obligation to perform his legal duty cannot hold the sheriff liable for the deputy's neglect.[64]

*New York.*— Beyer *v.* Sigel, 75 N. Y. App. Div. 83, 77 N. Y. Suppl. 1018 [*affirmed* in 177 N. Y. 575, 69 N. E. 1120].

*Pennsylvania.*— Munis *v.* Oliver, 24 Pa. Super. Ct. 64.

*South Carolina.*—Chiles *v.* Holloway, 4 McCord 164.

*Texas.*— Moore *v.* Jarrett, 10 Tex. 201; Brown *v.* Wallis, (Civ. App. 1906) 101 S. W. 1068 [*affirmed* in 100 Tex. 546, 101 S. W. 1070, 12 L. R. A. N. S. 1019]; Maddox *v.* Hudgeons, 31 Tex. Civ. App. 291, 72 S. W. 414.

*Vermont.*— Cowdery *v.* Smith, 50 Vt. 235.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 158 *et seq.*

55. Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719.

56. Mickles *v.* Hart, 1 Den. (N. Y.) 548, holding that if plaintiff wished to restore the liability of the sheriff he must give him notice and directions to the deputy were not sufficient.

57. Dorr *v.* Mickley, 16 Minn. 20. But *compare* Blair *v.* Flack, 62 Hun (N. Y.) 509, 17 N. Y. Suppl. 64.

**The sheriff's execution of a deed** on a sale of lands made by his deputy will not operate to affirm the irregular acts of his deputy, and make them his own official acts. Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

58. Weatherby *v.* Foster, 5 Vt. 136.

59. **Effect of directions of party or attorney** generally see *supra*, V, A, 9.

60. *Kentucky.*— Samuel *v.* Com., 6 T. B. Mon. 173.

*Massachusetts.*— See Wright *v.* Willis, 2 Allen 191.

*New Hampshire.*— Stevens *v.* Colby, 46 N. H. 163.

*New York.*— Sheldon *v.* Paine, 10 N. Y. 398; Pond *v.* Leman, 45 Barb. 152; Acker *v.* Ledyard, 8 Barb. 514; Mickles *v.* Hart, 1 Den. 548; Gorham *v.* Gale, 6 Cow. 467 note, 7 Cow. 739, 17 Am. Dec. 549; Armstrong *v.* Garrow, 6 Cow. 465.

*Vermont.*—Stimpson *v.* Pierce, 42 Vt. 334; Bellows *v.* Allen, 23 Vt. 169; Ordway *v.* Bacon, 14 Vt. 378; Fletcher *v.* Bradley, 12 Vt. 22, 36 Am. Dec. 324.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 162.

61. Wright *v.* Willis, 2 Allen (Mass.) 191; Corning *v.* Southland, 3 Hill (N. Y.) 552; Mickles *v.* Hart, 1 Den. (N. Y.) 548; Kimball *v.* Perry, 15 Vt. 414.

**Secret intent of attorney immaterial.**— Wright *v.* Willis, 2 Allen (Mass.) 191.

**Conferring discretionary power on deputy** —Where the attorney of a party wrote a letter to a deputy sheriff, inclosing an execution to collect, giving him a discretionary power either to serve or get security for the execution, and in consequence the deputy omitted to serve the execution, the sheriff was not accountable for such omission. Strong *v.* Bradley, 13 Vt. 9.

62. Sheldon *v.* Payne, 7 N. Y. 453, 10 N. Y. 398; Corning *v.* Southland, 3 Hill (N. Y.) 552; Mason *v.* Ide, 30 Vt. 697.

63. Green *v.* Lowell, 3 Me. 373 (holding that where a deputy sheriff received a writ, with directions to attach property if practicable, otherwise to make no service, and he undertook to receive the money of the debtor and make no service of the writ, the sheriff was liable for his neglect in the matter); Seaver *v.* Pierce, 42 Vt. 325 (holding that the fact that plaintiff directed a deputy to sell on credit instead of for cash did not relieve the sheriff from liability for money which the deputy actually collected and failed to pay over).

64. Mason *v.* Ide, 30 Vt. 697.

**10. Particular Acts or Omissions — a. Acts or Omissions For Which Sheriff Liable.** The liability of a sheriff or constable for the acts of his deputy extends to abuse of process,[65] assaults committed while performing the duties of the office,[66] defaults or negligence of the deputy in respect to the care of property in his official custody,[67] the escape of a prisoner through the fault of the deputy,[68] failure to serve process,[69] failure to make a levy according to the mandate of a writ,[70] failure on receiving an execution to make a demand on attaching officer so as to fix his liability,[71] failure to return a writ,[72] making a premature return by reason of which the party is damaged,[73] making a false [74] or improper [75] return, failure to sell goods levied on,[76] improper conduct of a sale,[77] failure or refusal of the deputy to pay over money collected by him,[78] or to apply money received from sales of property attached to the satisfaction of executions issued on judgments

65. Foley *v.* Martin, (Cal. 1903) 71 Pac. 165.

66. Towle *v.* Matheus, 130 Cal. 574, 62 Pac. 1064.

67. Congdon *v.* Cooper, 15 Mass. 10; State *v.* Dalton, 69 Miss. 611, 10 So. 578; Eastman *v.* Judkins, 59 N. H. 576; Morse *v.* Betton, 2 N. H. 184; Buck *v.* Ashley, 37 Vt. 475.

**Sheriff not liable for loss not caused by want of ordinary care.**— Eastman *v.* Judkins, 59 N. H. 576.

68. Palmer *v.* Hatch, 9 Johns. (N. Y.) 329; Wheeler *v.* Hambright, 9 Serg. & R. (Pa.) 390.

69. Rogers *v.* Carroll, 111 Ala. 610, 20 So. 602.

**Mistake of law on part of deputy.**— The fact that the deputy believed that the summons could not be served after the first day it was in his hands, because there was less than twenty days to intervene between the return term of court, is a mistake of law, which will not relieve the sheriff from liability for his failure to serve the summons. Rogers *v.* Carroll, 111 Ala. 610, 20 So. 602.

70. Adams *v.* Jewett, 10 Me. 426; Green *v.* Lowell, 3 Me. 373; Barnard *v.* Ward, 9 Mass. 269; Haley *v.* Thurston, 60 N. H. 204; Wetherby *v.* Foster, 5 Vt. 136.

**Where property not subject to levy.**—A sheriff is not liable for failure of his deputy to make an attachment of land in which defendant has no attachable interest. Lambard *v.* Pike, 33 Me. 141.

**Where an execution misrecited the recognizance upon which it was issued,** the sheriff was not liable for the deputy's failure to serve it. Albee *v.* Ward, 8 Mass. 79.

71. Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

72. Lawrence *v.* Rice, 12 Metc. (Mass.) 535; Goodnow *v.* Willard, 5 Metc. (Mass.) 517; Corning *v.* Southland, 3 Hill (N. Y.) 552; People *v.* Brown, 6 Cow. (N. Y.) 41; Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20; Newbury Bank *v.* Baldwin, 31 Vt. 311.

**Special delivery of writ to deputy.**—Where an execution creditor placed an execution in the hands of a deputy constable for the single object of procuring his signature to a previously prepared special deputation, the delivery was special, and not for the purpose of official action, and the constable was not liable for the failure of such deputy to return it. Miller *v.* Heck, 9 Watts (Pa.) 439.

**The fact that a deputy sheriff is general agent for the collection of a debt does not** absolve him from his duties and liabilities as an officer, so as to relieve the sheriff from liability for his non-return of an execution on a judgment which he obtains on the debt. Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

73. Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448.

74. Kidder *v.* Parlin, 7 Me. 80; Clough *v.* Monroe, 34 N. H. 381; Houser *v.* Hampton, 29 N. C. 333.

**The ignorance of the deputy** does not excuse the sheriff if the return is in fact false. Houser *v.* Hampton, 29 N. C. 333.

75. Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448.

76. Clute *v.* Goodell, 5 Fed. Cas. No 2,911, 2 McLean 193.

77. Wright *v.* Child, L. R. 1 Exch. 358, 4 H. & C. 529, 35 L. J. Exch. 209, 15 L. T. Rep. N. S. 141, holding that in the case at bar the interference of the debtor did not make the officer his agent, and that the sheriff was not relieved from his liability in respect of the negligent conduct of his officer in conducting the sale.

78. *Alabama.*— Hill *v.* Fitzpatrick, 6 Ala. 314.

*Georgia.*— Matthis *v.* Pollard, 3 Ga. 1; *In re* Stephens, 1 Ga. 584.

*Kentucky.*— James *v.* Yates, 3 Metc. 343.

*Maine.*— Norton *v.* Nye, 56 Me. 211.

*Massachusetts.* — Hammond *v.* Root, 15 Gray 516; Weston *v.* Ames, 10 Metc. 244; Mansfield *v.* Sumner, 6 Metc. 94; Esty *v.* Chandler, 7 Mass. 464.

*New Hampshire.*— Moody *v.* Mahurin, 4 N. H. 296.

*New York.*— James *v.* Gurley, 48 N. Y. 163; Walden *v.* Davison, 15 Wend. 575; People *v.* Dunning, 1 Wend. 16.

*Tennessee.*— Draper *v.* State, 1 Head 262.

*Vermont.*— Stimpson *v.* Pierce, 42 Vt. 334.

*Virginia.*— Miller *v.* Jones, 9 Gratt. 584; Tyree *v.* Donnally, 9 Gratt. 64; Douglass *v.* Stumps, 5 Leigh 392.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 170.

**Where no execution had been lodged in the sheriff's office** at the time when the deputy received the money the sheriff was not

obtained by the attaching creditors,[79] giving erroneous information as to matters within the scope of his duties,[80] injuries unlawfully inflicted while making arrests [81] or preventing the escape of persons arrested,[82] loss through the deputy's negligence of property levied on by the deputy and in his possession,[83] a sale of property under a defective execution,[84] taking more fees on levying an execution than are allowed by law,[85] taking insufficient bail,[86] taking an insufficient bond in replevin,[87] taking possession of goods under a void execution,[88] a trespass committed by a deputy in enforcing legal process,[89] a wrongful arrest under a void warrant,[90] a wrongful levy on or other taking of property under color of legal process,[91]

responsible therefor. Chiles *v.* Holloway, 4 McCord (S. C.) 164.

**Where a claim against a deputy is turned in to him in payment** of a claim placed in his hands for collection the sheriff may be held liable for the amount. Draper *v.* State, 1 Head (Tenn.) 262.

**Receipt of notes in satisfaction.**—Where a deputy sheriff received from defendant in execution notes of other persons in full satisfaction of such writ, the sheriff was not responsible as for money collected, as such transaction was not within the sphere of the duties of such deputy, and bound no one except himself. Reynolds *v.* Dale, 33 Ga. 585.

**Money paid over and subsequently lent to deputy.**— The sheriff is not liable for money collected on execution by his deputy, and paid to plaintiff's attorney, and then lent by the latter to the deputy. Odom *v.* Gill, 59 Ga. 180.

**Measure of liability where goods sold.**— Where the sheriff's deputy, at the suit of plaintiff, had attached and sold on execution certain property, and then died before completing his return, the sheriff was entitled to show the actual proceeds and expenses of the sale, and, the proceedings appearing to have been in good faith, was liable to plaintiff only for the actual amount remaining in his hands. Lovett *v.* Pike, 41 Me. 340, 66 Am. Dec. 248.

**Sheriff liable, although money collected under execution directed to sheriff of another county.**—Walden *v.* Davison, 15 Wend. (N. Y.) 575.

**Sale on partition by plaintiff's attorney.**— If the lands decreed to be sold in a partition suit are sold, and the whole transaction connected with the sale carried on by plaintiff's attorney with the assent of the sheriff, he will be deemed to be the sheriff's agent, and the sheriff will be held accountable for all moneys received by the attorney in the transactions. Van Tassel *v.* Van Tassel, 31 Barb. (N. Y.) 439.

**The sheriff cannot take advantage of a defect in the process** under which the deputy received the money, where such process is merely erroneous or irregular and not void. James *v.* Gurley, 48 N. Y. 163; People *v.* Dunning, 1 Wend. (N. Y.) 16.

**Where two deputies concerned.**— The fact that the levy of a fieri facias was made by one deputy, and the return on venditioni exponas by another, does not impair the right of the execution plaintiff to subject the sheriff for the money returned on the venditioni exponas. Tyree *v.* Donnally, 9 Gratt. (Va.) 64.

**Claim of property of third person.**— In an action against a sheriff for the default of his deputy in not paying money paid to him on an execution which he returned satisfied, and on which he sold chattels alleged by him in his return to have been the property of the execution debtor, the sheriff cannot defend by evidence tending to show that such chattels were the property of a third person who forbade the sale thereof, and directed a suit to be brought against the deputy for a trespass, without evidence that such suit was commenced and a judgment recovered against the deputy. Weston *v.* Ames, 10 Metc. (Mass.) 244.

79. New Hampshire Sav. Bank *v.* Varnum, 1 Metc. (Mass.) 34.

80. State *v.* Moore, 72 Mo. 285, holding that where a sheriff's sale was advertised to be held at A, and the deputy informed plaintiff's attorney that it was to be held at B, in consequence of which the attorney did not attend at the former place, and the property was sacrificed, the sheriff was responsible for the loss.

81. King *v.* Brown, 100 Tex. 109, 94 S. W. 328 [*reversing* 41 Tex. Civ. App. 588, 93 S. W. 1017].

**The deputy must have authority to make the arrest** in order to render the sheriff liable. See King *v.* Brown, 100 Tex. 109, 94 S. W. 328 [*reversing* 41 Tex. Civ. App. 588, 93 S. W. 1017].

82. Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423, shooting misdemeanant fleeing to escape after arrest.

83. Buck *v.* Ashley, 37 Vt. 475.

84. Lawrence *v.* Sherman, 14 Fed. Cas. No. 8,144, 2 McLean 488.

85. McIntyre *v.* Trumbull, 7 Johns. (N. Y.) 35.

86. Young *v.* Hosmer, 11 Mass. 89; Teasdale *v.* Hart, 2 Bay (S. C.) 173.

87. Harriman *v.* Wilkins, 20 Me. 93.

88. Stephens *v.* Head, 138 Ala. 455, 35 So. 565.

89. People *v.* Schuyler, 4 N. Y. 173.

90. Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578.

91. *Kansas.*— Frankhouser *v.* Cannon, 50 Kan. 621, 32 Pac. 379.

*Louisiana.*— Frazier *v.* Parsons, 24 La. Ann. 339.

*Maine.*— Hamilton *v.* Goding, 55 Me. 419; Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719.

and a wrongful taking of money by the deputy under color of his office.[92] Where a deputy sheriff receives an execution commanding, not his principal, but the sheriff of another county, to make the money for which the process issues, and proceeds to collect the money, he becomes possessed of it under color or by virtue of his office, and the sheriff is liable to plaintiff therefor.[93] A sheriff has also been held liable for money paid into the hands of a clerk in his office who embezzled it.[94]

**b. Acts or Omissions For Which Sheriff Not Liable.** The sheriff is not liable for failure of a deputy, who has undertaken to secure an alias execution, to secure the same in time to be available,[95] failure to record the levy of an execution,[96] a wrongful arrest by his deputy without a warrant for an offense not committed in his presence,[97] or an injury inflicted by the deputy while making such arrest,[98] the acts of his deputy in executing an order of a justice of the peace for the removal of an obstruction in a town way or private way,[99] or the breach of a promise made by his deputy.[1] Neither can the representations of a deputy sheriff at an execution sale that the title to the property is clear and all right, made under the belief that they are true, bind the sheriff so as to render him liable to the purchaser for failure of title.[2]

**11. Release[3] of Liability.** When a deputy sheriff, relying upon defendant in an execution to pay it, and for his special accommodation, has suffered the execution to run out in his hands, and the consequent liability of the sheriff has become fixed, the mere passive acquiescence of plaintiff in a further delay in order to give time to the deputy and defendant in the execution to make the money does not *ipso facto* operate as a release of the cause of action against the sheriff.[4]

*Michigan.*— Handy *v.* Clippert, 50 Mich. 355, 15 N. W. 507.

*New Hampshire.*— Rider *v.* Chick, 59 N. H. 50.

*New York.*— Pond *v.* Leman, 45 Barb. 152; King *v.* Orser, 4 Duer 431.

*North Carolina.*— Satterwhite *v.* Carson, 25 N. C. 549.

*Pennsylvania.*— Hazard *v.* Israel, 1 Binn. 240, 2 Am. Dec. 438.

*South Carolina.*— Jentry *v.* Hunt, 2 McCord 410.

*Tennessee.*— Estes *v.* Williams, Cooke 413.

*Virginia.*— James *v.* McCubbin, 2 Call 273.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

*United States.*— Lawrence *v.* Sherman, 14 Fed. Cas. No. 8,144, 2 McLean 488.

*Canada.*— Holt *v.* Jarvis, Draper (U. C.) 190.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 167.

It is not necessary that there should be an actual process under which the deputy is acting. Holt *v.* Jarvis, Draper (U. C.) 190.

Levy by one deputy on goods in possession of another.—Where one deputy sheriff attaches goods, and another deputy of the same sheriff attaches and takes the same goods out of his possession by virtue of another precept against the same debtor, the sheriff will be liable to the first deputy therefor. Walker *v.* Foxcroft, 2 Me. 270.

The personal presence of the sheriff when goods are wrongfully taken by a deputy is not necessary to render him liable. King *v.* Orser, 4 Duer (N. Y.) 431.

Proof that the sheriff directed, sanctioned, or ratified the act of the deputy is not necessary. Pond *v.* Leman, 45 Barb. (N. Y.) 152. But *compare* Tower *v.* Wilson, 3 Cai. (N. Y.) 174.

92. Jons *v.* Perchard, 2 Esp. 507.

93. Walden *v.* Davison, 15 Wend. (N. Y.) 575.

94. Abercrombie *v.* Marshall, 2 Bay (S. C.) 90 [*followed* in Carlin *v.* Kerr, 2 Bay (S. C.) 112], holding that this was true, although the clerk might not have been authorized to receive the money.

95. Cowdery *v.* Smith, 50 Vt. 235.

96. Tobey *v.* Leonard, 15 Mass. 200, so holding upon the ground that such failure was not a violation of official duty.

97. Maddox *v.* Hudgeons, 31 Tex. Civ. App. 291, 72 S. W. 414; Smart *v.* Hutton, 8 A. & E. 568 note, 2 N. & M. 426, 35 E. C. L. 734, arrest of person under fieri facias.

98. Brown *v.* Wallis, (Tex. Civ. App. 1906) 101 S. W. 1068 [*affirmed* in 100 Tex. 546, 101 S. W. 1070, 12 L. R. A. N. S. 1019], so holding on the ground that no power to act under such circumstances can be implied in the appointment.

99. Davis *v.* Smith, 130 Mass. 113, so holding on the ground that the power of the justice to order such removal is not judicial and the sheriff or deputy is not bound in his official capacity to execute it.

1. Tomlinson *v.* Wheeler, 1 Aik. (Vt.) 194.

2. Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440.

3. See, generally, Release, 34 Cyc. 1039.

4. McKinley *v.* Tucker, 59 Barb. (N. Y.) 93, so holding where plaintiff had consented in writing not to proceed against the sheriff until the maturity of certain notes which defendant proposed to deposit with the dep-

But where the owner of goods wrongfully levied on brings trespass against the deputy and recovers judgment and takes out execution, the sheriff is discharged of his responsibility.[5]

**C. Defaults in Respect to Execution of Process — 1. General Rule of Liability.** A sheriff to whom process has been delivered for execution is liable for failure to serve or execute the same,[6] for any damage which may have resulted

uty for collection, the proceeds thereof to be applied to satisfy the execution.

**5.** Harrington *v.* Fuller, 18 Me. 277, 279, 36 Am. Dec. 719, where it is said: "After the plaintiff had recovered judgment against him [the deputy] in trespass, and had taken out execution and collected a part of the amount so recovered the property was changed. It was no longer held in an official character. It became a part of his own estate. . . . It is the act of the plaintiff, not the act of the law alone in connection with his own acts, which has occasioned his becoming the owner in absolute right of property. The plaintiff cannot by his own voluntary act transfer the property from himself to the deputy, and still insist, that such absolute property is held in an official capacity. As soon as the special property, which he held as an officer, was by the election of the plaintiff changed into an absolute title against all persons the custody ceased to be official. The debt due for it became his own private debt by the plaintiff's own election; and the defendant ceased to be responsible for any after act or neglect of the deputy."

**6.** *Alabama.*— Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Birmingham Dry-Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153, 113 Ala. 418, 21 So. 403; Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727; Harris *v.* Murfree, 54 Ala. 161; Whitsett *v.* Slater, 23 Ala. 626; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Governor *v.* Campbell, 17 Ala. 566; Spence *v.* Tuggle, 10 Ala. 538; Crenshaw *v.* Harrison, 8 Ala. 342; Mason *v.* Watts, 7 Ala. 703; Bell *v.* King, 8 Port. 147; Harrison *v.* Marshall, 6 Port. 65.

*Arkansas.*— McKinney *v.* Blakely, 87 Ark. 405, 112 S. W. 976.

*California.*— Alexander *v.* Wilson, 144 Cal. 5, 77 Pac. 706; Howe *v.* White, 49 Cal. 658.

*Connecticut.*— Palmer *v.* Gallup, 16 Conn. 555; Clark *v.* Smith, 9 Conn. 379; Derby Bank *v.* Landon, 2 Conn. 417; White *v.* Wilcox, 1 Conn. 347; Ackley *v.* Chester, 5 Day 221; Frost *v.* Dongal, 1 Day 128.

*Delaware.*— State *v.* Gemmill, 1 Houst. 9.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*Georgia.*— Harrigan *v.* Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961; Singer Sewing Mach. Co. *v.* Barnett, 76 Ga. 377; Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161; Langley *v.* Wynn, 70 Ga. 430; Kemp *v.* Williams, 43 Ga. 211; Brown *v.* McCrary, 30 Ga. 878; Levy *v.* Shockley, 29 Ga. 710; Mullings *v.* Bothwell, 29 Ga. 706; Porter *v.* Pierce, 19 Ga. 268; Gregory *v.* Waters, 19 Ga. 71; Wallace *v.* Holley, 13 Ga. 389, 58 Am. Dec. 578; Hixon *v.* Callaway, 2 Ga. App. 678, 58 S. E. 1120.

*Illinois.*— Freudenstein *v.* McNeir, 81 Ill. 208; Pike *v.* Colvin, 67 Ill. 227; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193; Ross *v.* Weber, 26 Ill. 221; Brother *v.* Cannon, 2 Ill. 200; Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201; Gilbert *v.* Gallup, 76 Ill. App. 526.

*Indiana.*— Limpus *v.* State, 7 Blackf. 43.

*Kansas.*— Chittenden *v.* Crosby, 5 Kan. App. 534, 48 Pac. 209.

*Kentucky.*— Com. *v.* Hurt, 4 Bush 64; Phillips *v.* Ronald, 3 Bush 244, 96 Am. Dec. 216; Arnold *v.* Com., 8 B. Mon. 109; Emanuel *v.* Cocke, 6 Dana 212; Com. *v.* O'Cull, 7 J. J. Marsh. 149, 23 Am. Dec. 393; Allen *v.* Johnson, 4 J. J. Marsh. 235; Com. *v.* Begley, 66 S. W. 754, 23 Ky. L. Rep. 1985. See also Helm *v.* Haycraft, 2 Litt. 171.

*Louisiana.*— State *v.* Bondy, 15 La. Ann. 573, 77 Am. Dec. 198; Bottom *v.* Breed, 4 La. 343.

*Maine.*— Stewart *v.* Leonard, 103 Me. 128, 68 Atl. 638; Townsend *v.* Libbey, 70 Me. 162; Abbott *v.* Jacobs, 49 Me. 319; Ware *v.* Fowler, 24 Me. 183; Bradford *v.* McLellan, 23 Me. 302; Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347; Kidder *v.* Parlin, 7 Me. 80; Varrill *v.* Heald, 2 Me. 91.

*Massachusetts.*— Tyler *v.* Ulmer, 12 Mass. 163; Barnard *v.* Ward, 9 Mass. 269; Perley *v.* Foster, 9 Mass. 112; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

*Missouri.*— Campbell *v.* Lottrell, 13 Mo. 27; Douglass *v.* Baker, 9 Mo. 41; State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254; State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250; State *v.* Harrington, 41 Mo. App. 439.

*Montana.*— Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232; Montana Milling Co. *v.* Jeffries, 14 Mont. 143, 35 Pac. 908.

*Nebraska.*— Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022.

*New Hampshire.*— Benson *v.* Ela, 35 N. H. 402; Grafton Bank *v.* White, 17 N. H. 389; Raulett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603.

*New Jersey.*— Hunt *v.* Gulick, 9 N. J. L. 205.

*New Mexico.*— Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783.

*New York.*— Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Bowman *v.* Cornell, 39 Barb. 69; Humphrey *v.* Hathorn, 24 Barb. 278; Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621]; French *v.* Willet, 4 Bosw. 649, 10 Abb. Pr. 99; Williams *v.* Lowndes, 1 Hall 637; Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Suppl. 1100; Clark *v.* Carnley, 3 Code Rep. 136.

*North Carolina.*— Erwin *v.* Lawrence, 64

from his negligence or default in the execution of the process,[7] or from delay in proceeding to execute the same.[8] But a sheriff cannot be held liable for a failure to levy on particular property pointed out by the execution plaintiff when he levies on other property of the execution defendant sufficient to satisfy the execution.[9]

**2. Jurisdiction of Court.**[10] An officer is not liable for failure to levy an execution where the court had no jurisdiction in the action.[11]

**3. Regularity of Proceedings.** Defects or irregularities in the proceeding in which process is issued cannot relieve the sheriff from liability for failure to execute the same,[12] nor can he escape liability on the ground that prior to the entry of

N. C. 483; Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459; Murphy *v.* Troutman, 50 N. C. 379.

*Ohio.*— Coopers *v.* Wolf, 15 Ohio St. 523; Bode *v.* Mungavin, 4 Ohio S. & C. Pl. Dec. 270, 2 Ohio N. P. 269.

*Pennsylvania.*— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

*South Carolina.*— Carr *v.* Scott, Riley 193; Graham *v.* Durant, 2 Hill 517; Sims *v.* Tarrant, 2 Nott & M. 123.

*South Dakota.*—Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20; Ayres, etc., Co. *v.* Sundback, 5 S. D. 31, 58 N. W. 4.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Shaw *v.* Holmes, 4 Heisk. 692.

*Texas.*— Robinson *v.* Schmidt, 48 Tex. 13; Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

*Vermont.*— Dix *v.* Batchelder, 55 Vt. 562 (holding that a constable, duly empowered by vote of a town to serve process throughout the state, is liable for failure to serve a writ, although the service is to be made beyond the limits of the town); Barnard *v.* Henry, 25 Vt. 289; Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52; Stoddard *v.* Tarbell, 20 Vt. 321; Ives *v.* Strong, 19 Vt. 546; Kidder *v.* Barker, 18 Vt. 454; Watkinson *v.* Bennington, 12 Vt. 404; Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

*Virginia.*— Ronald *v.* Bentley, 4 Hen. & M. 461, holding that a sheriff is liable at common law for not executing process in chancery.

*England.*— Dennis *v.* Whetham, L. R. 9 Q. B. 345, 43 L. J. Q. B. 129, 30 L. T. Rep. N. S. 514, 22 Wkly. Rep. 571.

*Canada.*— Massey Mfg. Co. *v.* Clement, 9 Manitoba 359; Tower *v.* Stephenson, 10 N. Brunsw. 93; Thorpe *v.* McLean, 11 Nova Scotia 200; Burnham *v.* Hall, 44 U. C. Q. B. 297; Nehon *v.* Baby, 14 U. C. Q. B. 235; O'Connor *v.* Hamilton, 4 U. C. Q. B. 243; Decatur *v.* Jarvis, 3 U. C. Q. B. 133.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**Failure to find defendant.**—A sheriff is not liable for failure to serve a non-resident defendant when he has followed the directions of plaintiff and failed to find defendant. Hamilton *v.* Lyle, 9 Phila. (Pa.) 98.

**A sergeant-at-arms of a district court** is not subject to the statutory liability for failure to perform the duties prescribed by the district court act respecting executions out of said court delivered to him, which such act imposes upon constables. Nixon *v.* Fithian, 61 N. J. L. 4, 38 Atl. 698.

7. *New Hampshire.*— Kittredge *v.* Bellows, 7 N. H. 399.

*New York.*—Lewis *v.* Douglass, 53 Hun 587, 6 N. Y. Suppl. 888; Hoffman *v.* Conner, 13 Hun 541 [*affirmed* in 76 N. Y. 121]; Ransom *v.* Halcott, 18 Barb. 56.

*Pennsylvania.*— Com. *v.* Osler, 34 Pa. Super. Ct. 138.

*Wisconsin.*—Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429; Elmore *v.* Hill, 51 Wis. 365, 8 N. W. 240.

*England.*— *In re* Comyns, 1 Ir. Eq. 72.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

8. *Alabama.*— Hallett *v.* Lee, 3 Ala. 28.

*California.*—Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46.

*Georgia.*— Mohr *v.* Mattox, 120 Ga. 962, 48 S. E. 410; French *v.* Kemp, 64 Ga. 749; Hunter *v.* Phillips, 56 Ga. 634; Kimbro *v.* Edmondson, 46 Ga. 130; Caruthers *v.* Sprayberry, 26 Ga. 437.

*Illinois.*— People *v.* Wiltshire, 9 Ill. App. 374.

*North Carolina.*— Hearn *v.* Parker, 52 N. C. 150; Nixon *v.* Bagby, 52 N. C. 4 (holding that where there was an apparent necessity for an officer to proceed immediately to the collection of a debt, and he was instructed to do so, a delay of sixteen days was negligence); Lindsay *v.* Armfield, 10 N. C. 548, 14 Am. Dec. 603.

*South Carolina.*— Solomon *v.* Richardson, 1 Hill 396.

*Wisconsin.*— Elmore *v.* Hill, 46 Wis. 618, 1 N. W. 235; State *v.* Brophy, 38 Wis. 413.

*England.*— Clifton *v.* Hooper, 6 Q. B. 468, 8 Jur. 958, 14 L. J. Q. B. 1, 51 E. C. L. 468; Mason *v.* Paynter, 1 Q. B. 974, 1 G. & G. 381, 6 Jur. 214, 10 L. J. Q. B. 299, 41 E. C. L. 865; Terrell *v.* Fisher, 10 Wkly. Rep. 796.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

9. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

10. See, generally, Courts, 11 Cyc. 633.

11. State *v.* Forry, 64 Ind. 260; Cornell *v.* Barnes, 7 Hill (N. Y.) 35.

12. *Alabama.*— Martin *v.* Hall, 70 Ala. 421.

*Georgia.*— Horrigan *v.* Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961; Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161.

judgment the parties agreed to dismiss the cause, and that thereafter plaintiff took judgment and caused the execution to issue.[13]

**4. Validity and Force of Judgment.**[14] A sheriff or constable is not liable for failure to serve a writ which, although regular upon its face, is based upon a void judgment,[15] or to levy and sell under an execution based on a judgment which was dormant when the writ was placed in his hands.[16] But it is no excuse for a sheriff's failing to levy an execution on a judgment that the judgment is irregular [17] or erroneous,[18] or that the consideration therefor has failed.[19]

**5. Validity of Process.**[20] A sheriff cannot escape liability for failure to execute or neglect or delay in executing process by reason of the fact that it is irregular,[21] erroneous,[22] or defective in form;[23] but he is not liable for failure to serve process which is void upon its face,[24] and, even though a writ be regular

*Illinois.*— Brother *v.* Cannon, 2 Ill. 200.

*Missouri.*— State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250.

*Pennsylvania.*— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

*South Carolina.*— Graham *v.* Allen, 2 Nott & M. 492.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 174 *et seq.*, 240, 268.

But *compare* Whiting *v.* Trafton, 16 Me. 398, holding that a sheriff was not liable for refusal to deliver a bail-bond to the creditor or to return it to the clerk's office, after returning that he had arrested the body of the debtor and taken bail, where the affidavit accompanying the writ was not sufficient to justify an arrest.

13. State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254.

14. See, generally, Judgments, 23 Cyc. 623.

15. *Illinois.*— People *v.* Whitehead, 90 Ill. App. 614, 622, where it is said: "The rule of law which in some cases protects an officer not serving a writ, regular on its face but issued on a void judgment, is solely for the protection of the officer. The plaintiff in the judgment can have no benefit of the rule."

*Maine.*— Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309; Adams *v.* Balch, 5 Me. 188.

*Massachusetts.*— Belcher *v.* Sheehan, 171 Mass. 513, 51 N. E. 19, 68 Am. St. Rep. 445.

*Ohio.*— Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769.

*Vermont.*— Hill *v.* Wait, 5 Vt. 124.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 174 *et seq.*, 268.

16. Blue *v.* Collins, 109 Ga. 341, 34 S. E. 598.

17. State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250.

18. Adams *v.* Balch, 5 Me. 188.

19. Arnold *v.* Com., 8 B. Mon. (Ky.) 109.

20. See, generally, Process, 32 Cyc. 412.

21. *Alabama.*— Spence *v.* Tuggle, 10 Ala. 538.

*Georgia.*— Singer Sewing Mach. Co. *v.* Barnett, 76 Ga. 377.

*Kentucky.*— Com. *v.* O'Cull, 7 J. J. Marsh. 149, 23 Am. Dec. 393; Allen *v.* Johnson, 4 J. J. Marsh. 235.

*New York.*— Mollinneaux *v.* Mott, 78 N. Y. App. Div. 493, 79 N. Y. Suppl. 661 (holding that the issuance of a second execution, before return of the first, being only an irregularity, making it voidable at election only of the party against whom it has been issued, is no justification for the sheriff's failure to execute it); French *v.* Willet, 4 Bosw. 649, 10 Abb. Pr. 99.

*South Carolina.*— Carr *v.* Scott, Riley 193.

*Tennessee.*—Shaw *v.* Holmes, 4 Heisk. 692.

*Texas.*— Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

*Vermont.*—Stoddard *v.* Tarbell, 20 Vt. 321; Whitehall Bank *v.* Pettes, 13 Vt. 395, 37 Am. Dec. 600.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 174 *et seq.*, 268.

**Affidavit of illegality.**— In answer to a rule against a sheriff for neglect of duty in levying on and selling property, he cannot set up that he was served by defendant with an affidavit of illegality, which was predicated solely on his own or his deputy's neglect of duty. Wheeler *v.* Thomas, 57 Ga. 161 [*approved* in Morgan *v.* Spring, 72 Ga. 257].

22. Langley *v.* Wynn, 70 Ga. 430; Stoddard *v.* Tarbell, 20 Vt. 321; Whitehall Bank *v.* Pettes, 13 Vt. 395, 37 Am. Dec. 600.

23. State *v.* Fowler, 4 Harr. (Del.) 358; Johnson *v.* Price, 47 Fla. 265, 36 So. 1031 (holding that the sheriff is not relieved from liability by reason of a formal defect in the process, which is amendable, where he did not refuse to execute the process because of such defect and does not set up such defect as an excuse for his failure to execute it); Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.

24. *Alabama.*— Graham *v.* Chandler, 15 Ala. 342.

*Delaware.*— State *v.* Fowler, 4 Harr. 358.

*Kentucky.*—Williams *v.* Hall, 2 Dana 97.

*Missouri.*— State *v.* Armstrong, 25 Mo. App. 532.

*New York.*— Bacon *v.* Cropsey, 7 N. Y. 195; French *v.* Willet, 4 Bosw. 649, 10 Abb. Pr. 99.

*Texas.*— Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

*Vermont.*— Stoddard *v.* Tarbell, 20 Vt. 321; Whitehall Bank *v.* Pettes, 13 Vt. 395, 37 Am. Dec. 600.

*Wisconsin.*— Campbell *v.* Sherman, 35 Wis. 103.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 174 *et seq.*, 268.

upon its face, if it is in fact unauthorized and void, the sheriff is not liable for refusing to execute it.[25] A sheriff who has failed to execute a writ cannot, however, escape liability by reason of a statute, enacted after his default, establishing certain requisites which the writ did not have.[26]

**6. Injury to Party at Whose Instance Process Issued.** An action cannot be maintained against a sheriff for not executing or not properly executing a writ without showing actual pecuniary damage.[27]

**7. Lack of Diligence Necessary to Liability.** The sheriff being required only to use reasonable diligence in the execution of process,[28] a sheriff is not liable unless he has been lacking in such degree of diligence.[29] So as an officer has until the return-day of a writ to execute it, he will not be liable for not executing it sooner, unless there were special circumstances making it his duty to do so.[30]

**An officer in whose hands an alias execution is placed** for service is not entitled to refuse to serve the same on the ground that prior executions issued were invalid, and is liable for such refusal. State *v.* Stokes, 99 Mo. App. 236, 73 S. W. 254.

25. *Alabama.*— Tombeckbee Bank *v.* Godbold, 3 Stew. 240, 20 Am. Dec. 80.

*Massachusetts.*— Belcher *v.* Sheehan, 171 Mass. 513, 51 N. E. 19, 68 Am. St. Rep. 445.

*New York.*— Reid *v.* Stegman, 99 N. Y. 646, 1 N. E. 672; Tucker *v.* Malloy, 48 Barb. 85; Cornell *v.* Barnes, 7 Hill 35.

*Ohio.*— Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769.

*Wisconsin.*— Loomis *v.* Wheeler, 21 Wis. 271.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 174 *et seq.*, 268.

**An execution must be issued under the authority of a judgment** in order that the sheriff may be liable for failure to execute it. Tombeckbee Bank *v.* Godbold, 3 Stew. (Ala.) 240, 20 Am. Dec. 80.

**Even though a writ has been partly executed** by an officer he may show that it was issued without jurisdiction in order to escape liability for failure to fully execute it. Tucker *v.* Malloy, 48 Barb. (N. Y.) 85.

26. Kemp *v.* Williams, 43 Ga. 211, holding that where a sheriff had failed to levy an execution founded on a debt contracted before June 1, 1865, he could not claim protection from liability under the subsequent act of Oct. 13, 1870, requiring an affidavit that the taxes were duly paid to be attached to the execution before it could lawfully proceed.

27. *Connecticut.*— Hartford County Bank *v.* Waterman, 26 Conn. 324.

*Georgia.*— Hall, etc., Woodworking Mach. Co. *v.* Barnes, 115 Ga. 945, 42 S. E. 276 (holding that where, in trover against a corporation, the sheriff seizes all of the property which can be found, he is not liable for failure to seize the remainder); Green *v.* Jones, 39 Ga. 521; Prince *v.* Walker, 1 Ga. App. 282, 58 S. E. 61.

*Indiana.*— State *v.* Blanch, 70 Ind. 204.

*Louisiana.*—See Bloomfield *v.* Jones, 2 La. Ann. 936, holding that a party seeking to render a sheriff liable for damages resulting from the failure to serve a citation sooner than ordinary diligence would have required must show that the officer was notified of the necessity of earlier service to prevent the prescription of the claim.

*Maine.*— McNally *v.* Kerswell, 37 Me. 550.

*Massachusetts.*— Walker *v.* Haskell, 11 Mass. 177.

*New Hampshire.*— Webster *v.* Quimby, 8 N. H. 382.

*England.*— Hobson *v.* Thelluson, L. R. 2 Q. B. 642, 8 B. & S. 476, 36 L. J. Q. B. 302, 16 L. T. Rep. N. S. 837, 15 Wkly. Rep. 1037. *Contra*, Clifton *v.* Hooper, 6 Q. B. 468, 8 Jur. 958, 14 L. J. Q. B. 1, 51 E. C. L. 468, holding that in such case nominal damages may be recovered.

See 43 Cent. Dig. tit. "Sheriffs and Constables," 174 *et seq.*

**Damage as prerequisite to enforcement of penalty for default** see *infra*, IX, I, 11.

28. See *supra*, III, B, 6, h.

29. Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584; State *v.* Ownby, 49 Mo. 71; Fisher *v.* Gordon, 8 Mo. 386; Ervin *v.* Scott, 15 Rich. (S. C.) 12; Rigney *v.* Ruttan, 5 U. C. Q. B. O. S. 707.

**Facts showing lack of diligence sufficient to render sheriff liable** see the following cases:

*Alabama.*—Whitsett *v.* Slater, 23 Ala. 626.

*Kentucky.*— Phillips *v.* Ronald, 3 Bush 244, 96 Am. Dec. 216.

*Michigan.*—Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683.

*Minnesota.*— Guiterman *v.* Sharvey, 46 Minn. 183, 48 N. W. 780, 24 Am. St. Rep. 218.

*New York.*—Hollister *v.* Johnson, 4 Wend. 639.

*North Carolina.*— Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459; Hearn *v.* Parker, 52 N. C. 150; Murphy *v.* Troutman, 50 N. C. 379.

*Wisconsin.*— Elmore *v.* Hill, 46 Wis. 618, 1 N. W. 235.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**Facts not showing lack of diligence sufficient to render officer liable** see Daton *v.* Lynes, 31 Conn. 578; Ervin *v.* Scott, 15 Rich. (S. C.) 12; Rigney *v.* Ruttan, 5 U. C. Q. B. O. S. 707.

30. State *v.* McMahan, 13 Mo. 179; State *v.* Ferguson, 13 Mo. 166.

**The burden of proof** as to such special circumstances rests upon plaintiff. State *v.* Mc-

**8. Authority to Execute Writ.**[31] Where an officer had no authority to execute a writ he cannot be held liable for a failure to do so.[32]

**9. Particular Process or Writs.** The liability of the sheriff for failure to execute, or negligence or delay in the service or execution of process,[33] extends to summonses,[34] subpœnas,[35] attachments,[36] executions against property,[37] writs

Mahan, 13 Mo. 179; State *v.* Ferguson, 13 Mo. 166.

31. Authority of officer as affected by direction of process see *supra*, III, B, 6, c.

32. Governor *v.* Lindsay, 14 Ala. 658 (holding that a coroner is not liable to an action for not executing a writ of execution delivered to him addressed "To any sheriff of the State of Alabama"); Rutland Bank *v.* Parsons, 21 Vt. 199 (holding that a sheriff who receives an execution in favor of a private corporation of which he is a member is not liable for neglecting to levy and return it; and it makes no difference that he served the original writ in the suit in which the execution issued, by attaching property, and took a receipt for the property, and had prosecuted a suit against the receiptor to final judgment, which was unsatisfied by reason of the insolvency of the receiptor).

33. See *supra*, V, C, 1–8.

34. Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110.

35. Birmingham Dry Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153, 113 Ala. 418, 21 So. 403.

36. *Alabama.*— Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

*Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46.

*Kansas.*— Chittenden *v.* Crosby, 5 Kan. App. 534, 48 Pac. 209.

*Maine.*— Townsend *v.* Libbey, 70 Me. 162; Abbot *v.* Jacobs, 49 Me. 319; Bradford *v.* McLellan, 23 Me. 302.

*Massachusetts.*— Perley *v.* Foster, 9 Mass. 112; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

*Montana.*—Montana Milling Co. *v.* Jeffries, 14 Mont. 143, 35 Pac. 908.

*New Hampshire.*— Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Kittredge *v.* Bellows, 7 N. H. 399.

*Tennessee.*— Shaw *v.* Holmes, 4 Heisk. 692.

*Vermont.*—Stoddard *v.* Tarbell, 20 Vt. 321.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 176.

37. *Alabama.*— Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727; Whitsett *v.* Slater, 23 Ala. 626; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Governor *v.* Campbell, 17 Ala. 566; Crenshaw *v.* Harrison, 8 Ala. 342; Mason *v.* Watts, 7 Ala. 703; Hallett *v.* Lee, 3 Ala. 28; Bell *v.* King, 8 Port. 147.

*California.*— Howe *v.* White, 49 Cal. 658.

*Connecticut.*— Derby Bank *v.* Landon, 2 Conn. 417; Frost *v.* Dougal, 1 Day 128.

*Delaware.*— State *v.* Gemmill, 1 Houst. 9.

*Georgia.*—Singer Sewing Mach. Co. *v.* Barnett, 76 Ga. 377; Hunter *v.* Phillips, 56 Ga. 634; Kemp *v.* Williams, 43 Ga. 211; Brown *v.* McCrary, 30 Ga. 878; Levy *v.* Shockley, 29 Ga. 710; Mullings *v.* Bothwell, 29 Ga. 706.

*Illinois.*— Freudenstein *v.* McNeir, 81 Ill. 208; Pike *v.* Colvin, 67 Ill. 227; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; Ross *v.* Webber, 26 Ill. 221; Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201.

*Kansas.*— Chittenden *v.* Crosby, 5 Kan. App. 534, 48 Pac. 209.

*Kentucky.*— Com. *v.* Hurt, 4 Bush 64; Arnold *v.* Com., 8 B. Mon. 109; Emanuel *v.* Cocke, 6 Dana 212; Com. *v.* O'Cull, 7 J. J. Marsh. 149, 23 Am. Dec. 393; Allen *v.* Johnson, 4 J. J. Marsh. 235; Com. *v.* Begley, 66 S. W. 754, 23 Ky. L. Rep. 1985.

*Louisiana.*— Bottom *v.* Breed, 4 La. 343.

*Maine.*— Kidder *v.* Parlin, 7 Me. 80.

*Missouri.*— Campbell *v.* Lottrell, 13 Mo. 27.

*Montana.*— Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232.

*Nebraska.*— Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022.

*New Hampshire.*—Benson *v.* Ela, 35 N. H. 402.

*New Mexico.*—Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783.

*New York.*— Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Bowman *v.* Cornell, 39 Barb. 69; Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621]; French *v.* Willet, 4 Bosw. 649, 10 Abb. Pr. 99; Williams *v.* Lowndes, 1 Hall 637; Clark *v.* Carnley, 3 Code Rep 136.

*North Carolina.*— Hearn *v.* Parker, 52 N. C. 150.

*Pennsylvania.*— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

*South Dakota.*— Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20; Ayers, etc., Co. *v.* Sundback, 5 S. D. 31, 58 N. W. 4.

*Tennessee.*—Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

*Texas.*— Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

*Vermont.*— Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52; Watkinson *v.* Bennington, 12 Vt. 404.

*Wisconsin.*—Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429; Elmore *v.* Hill, 51 Wis. 365, 8 N. W. 240; Elmore *v.* Hill, 46 Wis. 618, 1 N. W. 235; State *v.* Brophy, 38 Wis. 413.

*England.*— Dennis *v.* Whetham, L. R. 9 Q. B. 345, 43 L. J. Q. B. 129, 30 L. T. Rep. N. S. 514, 22 Wkly. Rep. 571; Clifton *v.* Hooper, 6 Q. B. 468, 8 Jur. 958, 14 L. J. Q. B. 1, 51 E. C. L. 468.

*Canada.*— Massey Mfg. Co. *v.* Clement, 9 Manitoba 359; Thorpe *v.* McLean, 11 Nova Scotia 200.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 175.

of possession,[38] writs of replevin,[39] writs of restitution,[40] body executions,[41] and warrants of arrest.[42]

**10. Particular Defaults or Omissions — a. Recognizing Claim of Exemption.**[43] A sheriff is not liable to an execution creditor for recognizing a claim of exemption made by the debtor,[44] except in case of a formal waiver,[45] or a wilful and wanton disregard of the creditor's plain rights.[46] But the fact that a defendant, against whom execution has been issued, is absent and cannot be notified thereof, so as to claim his exemption, does not excuse the sheriff for a failure to levy.[47]

**b. Giving Preference to Junior Writ.** A sheriff who, having two or more writs in his hands for execution, improperly gives preference to a junior writ, is liable to plaintiff in the senior writ if his debt is thereby lost or the amount which he would otherwise have received diminished;[48] while if the giving of such preference results in a seizure of the property of a surety of defendant in the writs,

**38.** *California.*— Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571, holding that where a sheriff received a writ of assistance commanding him forthwith to deliver possession of certain real estate to plaintiff, and went with plaintiff to the premises for the purpose of putting him in possession, but for some reason not stated, in opposition to plaintiff's wishes and against plaintiff's protestation, he declined to take any action in the matter and did not execute the writ until a subsequent day, and in the meantime the parties in possession, being those against whom the writ ran, destroyed a number of valuable fixtures and by their wilful and malicious acts injured the premises in other respects, the sheriff was liable for the damage thus done.

*Louisiana.*— State *v.* Bondy, 15 La. Ann. 573, 77 Am. Dec. 198.

*Missouri.*— State *v.* Harrington, 41 Mo. App. 439.

*Wisconsin.*— Loomis *v.* Wheeler, 21 Wis. 271.

*England.*— Mason *v.* Paynter, 1 Q. B. 974, 1 G. & D. 381, 6 Jur. 214, 10 L. J. Q. B. 299, 41 E. C. L. 865.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 178.

**39.** People *v.* Wiltshire, 9 Ill. App. 374.

**40.** Bode *v.* Mungavin, 4 Ohio S. & C. Pl. Dec. 270, 2 Ohio N. P. 269.

**41.** *Alabama.*— Spence *v.* Tuggle, 10 Ala. 538.

*Georgia.*— Porter *v.* Pierce, 19 Ga. 268, holding that it is no excuse to a sheriff for the failure to execute a capias ad satisfaciendum that he has already executed another capias ad satisfaciendum against the same defendant in favor of a different plaintiff, whereupon defendant gave bond to take the benefit of the Honest Debtor's Act, and notified plaintiff in the non-executed capias ad satisfaciendum of his intention to take the benefit of said act.

*North Carolina.*— Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459; Murphy *v.* Troutman, 50 N. C. 379.

*South Carolina.*— Sims *v.* Tarrant, 2 Nott & M. 123.

*Canada.*— Tower *v.* Stephenson, 10 N. Brunsw. 93; Nelson *v.* Baby, 14 U. C. Q. B. 235; O'Connor *v.* Hamilton, 4 U. C. Q. B. 243.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 179.

**42.** Brother *v.* Cannon, 2 Ill. 200; Phillips *v.* Ronald, 3 Bush (Ky.) 244, 96 Am. Dec. 216; Solomon *v.* Richardson, 1 Hill (S. C.) 396.

**43.** Exemptions generally see Exemptions, 18 Cyc. 1369.

**44.** Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281, holding that a sheriff was not liable to an execution creditor for allowing a claim of exemptions after the execution debtor had caused the goods seized to be claimed by his wife, when the fact that the debtor caused such claim to be made was not known by the sheriff, and that an objection by the execution creditor to the allowance of exemptions, on the ground "that the conduct of the defendant has been such as to forfeit his right to the benefit of the exemption laws," was not sufficiently definite to affect the sheriff with notice of defendant's acts, and thus render him liable for allowing the exemption.

**45.** Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281.

**46.** Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281.

**47.** People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418.

**48.** *Kentucky.*—Arberry *v.* Noland, 2 J. J. Marsh. 421.

*Louisiana.*— Grabenheimer *v.* Budd, 40 La. Ann. 107, 3 So. 724.

*New York.*— Camp *v.* Chamberlain, 5 Den. 198.

*Wisconsin.*— Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429.

*Canada.*— See McKee *v.* Woodruff, 13 U. C. C. P. 583.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**Circumstances not excusing sheriff.**—A sheriff is not relieved from liability for failure to levy a senior execution in its proper order by the facts that, at the time when the junior execution was levied, plaintiff well knew of the execution defendant's interest in the property so levied on, but did not inform the officer thereof, or request him to levy thereon, and that it "was supposed and believed" by the officer and by the plaintiff that a levy of plaintiff's execution, previously

who was surety for only the debt represented by the senior writ, and hence would not have been compelled to pay the sum had the proper order of precedence been observed, the sheriff is liable to such surety.[49]

**c. Failure to Remove Goods Attached.** An officer attaching goods and neglecting to remove them is liable to plaintiff should a subsequent creditor attach the same goods.[50]

**d. Failure to File Notice Required by Statute.** A sheriff levying an attachment on land is liable for the resulting damage where the debt is lost by reason of his negligent omission to file a notice required by statute in such cases,[51] and the fact that the sheriff files a notice at the request of plaintiff's attorney after a conveyance of the land to a *bona fide* purchaser, and after rendition of judgment in the attachment suit, does not defeat plaintiff's right of action against him for the original default.[52] Neither can the sheriff by interposing as a defense a suggestion that the deed is invalid, and that the purchaser had actual notice, compel plaintiff, in effect, to litigate with such purchaser the validity of his deed.[53]

**e. Failure to Execute Writ on Holiday.**[54] A sheriff may be held liable for failure to "immediately" execute a warrant of attachment placed in his hands as required by statute, although it is delivered to him on a holiday when his office is closed.[55]

**f. Failure to Arrest Defendant.** A sheriff may be held liable in damages for a negligent failure to arrest a defendant on civil process.[56]

**g. Failure to Bring in Body of Prisoner Enlarged on Bail.** It has been held that an attachment cannot be issued against a sheriff for not bringing in the body of a party whom he has enlarged on bail.[57]

**h. Insufficient Levy.** The sheriff is liable to the party at whose instance process was issued, where in making the levy thereunder he fails to seize so much of defendant's goods as a reasonable and prudent man would deem sufficient to satisfy the debt and costs if so much is available;[58] but if the property is sufficient when levied on the sheriff does not become liable because of a subsequent deprecia-

made on other property, "would be amply sufficient to satisfy plaintiff's judgment." Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429.

**Where later writ more specific.**—Where a sheriff received two attachments on the same day; the earlier directing him generally to garnish any person indebted to the attachment defendant, after filling in certain blanks with their names from books in his possession, and the later specifically directing him to garnish certain persons, named therein, he was not liable to the earlier attachment creditor for obeying the specific directions in the later writ first. Remington *v.* Weber, 11 Utah 181, 39 Pac. 822.

49. Staton *v.* Com., 2 Dana (Ky.) 397.

50. Gale *v.* Ward, 14 Mass. 352, 7 Am. Dec. 223.

51. Lewis *v.* Douglass, 53 Hun (N. Y.) 587, 590, 6 N. Y. Suppl. 888, where it is said: "In some respects this notice is the act of both the sheriff and the attorney. Assuming that either had a right to file it when properly prepared and executed, the sheriff, by undertaking with the attorney to do it, relieved the attorney from responsibility in the matter, and the attorney, as well as the party, had the right to rely on the promise of the sheriff. By such promise the act did not cease to be a part of his official duty."

52. Lewis *v.* Douglass, 53 Hun (N. Y.) 587, 6 N. Y. Suppl. 888.

53. Lewis *v.* Douglass, 53 Hun (N. Y.) 587, 6 N. Y. Suppl. 888.

54. Holiday generally see HOLIDAYS, 21 Cyc. 440.

55. Dailey *v.* Fenton, 47 N. Y. App. Div. 418, 62 N. Y. Suppl. 337, 7 N. Y. Annot. Cas. 222, holding that a sheriff was not justified in refusing to receive and serve an attachment offered to him for service between three and four o'clock on a Saturday afternoon, in a village where the property to be seized was situated, since the half-holiday law merely authorized him to close his office and did not deprive him of his official powers, or relieve him of his obligation to perform any official duties on Saturday afternoons which could be discharged outside his office.

56. Pugh *v.* McRae, 2 Ala. 393.

57. Jackson *v.* Campbell, 1 Nova Scotia 18.

58. *Alabama.*— Clarke *v.* Gary, 11 Ala. 98; Governor *v.* Powell, 9 Ala. 83; Griffin *v.* Ganaway, 8 Ala. 625.

*Arkansas.*— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

*Illinois.*— French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

*Kentucky.*— Com. *v.* Lightfoot, 7 B. Mon. 298.

*Nebraska.*— Conway *v.* Magill, 53 Nebr. 370, 73 N. W. 702.

*New Hampshire.*— Richards *v.* Gilmore, 11 N. H. 493.

tion in its value,[59] unless the depreciation is such as a prudent man should have foreseen and provided for.[60] Where the officer levies on property which ought in the estimation of a prudent person to produce sufficient to satisfy the writ, but the sale thereof proves unproductive, and he immediately levies on other property of sufficient value to satisfy the writ, he has shown sufficient diligence, and is not liable for failure to make the money, although the property last seized cannot be sold until after the return-day.[61]

**i. Defective Levy.** A sheriff is liable to the party at whose instance process was issued, where in executing the same he makes a levy so defective that property which might have been secured to satisfy the debt is lost to the creditor.[62]

**11. Necessity For Demand.** A demand is not a prerequisite to an action against a sheriff for a default in respect to the execution of process.[63]

**12. Relief From Liability — a. Right to Excuse Apparent Default.** The failure of a sheriff to execute process does not impose upon him an absolute liability, but he may escape liability by showing that the circumstances are not such as to impute to him official negligence or misconduct.[64]

**b. Particular Matters Affecting Liability**[65] — (i) *Availability of Property For Seizure* — (a) *In General.* The officer cannot be held liable for not seizing property which he could not legally seize under his writ;[66] and in order to charge him with liability for failure to seize property under a writ it must

*New York.*— Ransom *v.* Halcott, 18 Barb. 56, 9 How. Pr. 119.

*Tennessee.*— McKinney *v.* Craig, 4 Sneed 577.

*Texas.*— Dewitt *v.* Oppenheimer, 51 Tex. 103.

*Vermont.*— Hill *v.* Pratt, 29 Vt. 119.

*United States.*— Adams *v.* Spangler, 17 Fed. 133, 5 McCrary 334.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 194.

**The test to be applied** in scanning the conduct of the sheriff, when he has made an insufficient levy on land, is not the estimated cash value of such lands in the neighborhood, but the price at which such lands usually sold for at a sheriff's sale. Governor *v.* Powell, 9 Ala. 83.

**The burden of proof as to the debtors possessing sufficient property** to satisfy the debt rests upon the party seeking to hold the sheriff liable for an insufficient levy. Conway *v.* Magill, 53 Nebr. 370, 73 N. W. 702.

**Where the return shows an insufficient levy** the sheriff cannot contradict it and show that in fact a sufficient levy was made. Clarke *v.* Gary, 11 Ala. 98. See, generally, *infra*, VII, K, 4, b.

**In Maine,** if an officer without written directions to make special service of an attachment seizes property of less value than the full amount of the debt, no action can be maintained against him for not attaching additional property. Betts *v.* Morris, 15 Me. 468.

**Using current bank-notes as basis of calculation.**—Where a sheriff makes a levy on property which would satisfy the judgment were it sold for bank-notes, but would be insufficient were it sold for specie, he is not chargeable for a breach of duty, unless he was notified that specie alone would be received. Governor *v.* Carter, 10 N. C. 328, 14 Am. Dec. 588.

59. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Governor *v.* Carter, 10 N. C. 328, 14 Am. Dec. 588; Crow *v.* Buchanan, 36 Nova Scotia 1, so holding in a case of depreciation resulting from a delay in selling occasioned by the act of the court.

60. French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193; Dewitt *v.* Oppenheimer, 51 Tex. 103.

61. Powell *v.* Governor, 9 Ala. 36.

62. Sanders *v.* Carter, 124 Ga. 676, 52 S. E. 887; Linton *v.* Com., 46 Pa. St. 294; Bell *v.* Roberts, 13 Vt. 582.

**Where the debtor had no title to the property** at the time of the defective levy, the officer is not liable for the debt (Fitch *v.* Smith, 9 Conn. 42), but only for nominal damages (Bell *v.* Roberts, 15 Vt. 741).

63. Douglass *v.* Baker, 9 Mo. 41 (holding that, in an action against a sheriff for failing to levy an execution, a demand on him for the amount of the execution is not necessary, as the statute makes him absolutely liable for the amount where he fails to levy); Com. *v.* Yeisley, 6 Pa. Super. Ct. 273, 41 Wkly. Notes Cas. 522 (holding that the written demand required to be made, by the act of March 21, 1772, before suit against a constable applies, only where the constable has acted in obedience to his writ and has no application where the cause of action is based on his open contempt of and disobedience to his writ).

64. See Gallup *v.* Robinson, 11 Gray (Mass.) 20; and, generally, *infra*, V, C, 11, b.

65. **Directions of party or attorney** see *supra*, V, A, 9.

66. *Maine.*—Annis *v.* Gilmore, 47 Me. 152 (holding that where execution on a judgment recovered in an action to enforce a lien for labor in cutting logs, aided by attachment of the logs, is issued in common form, with directions to satisfy it out of the goods, chattels, or lands of the debtor, and for want thereof upon his body, the levying officer is

appear that there was property of defendant available for seizure,[67] and that the officer knew of such property,[68] or had notice of facts which should have caused him to make a search therefor,[69] or failed to use due diligence in searching for property on which to levy.[70] The sheriff cannot relieve himself from liability for neglect to levy an execution on goods attached by him, by showing that he had previously sold them without the consent of the creditor.[71] Neither does a sale and delivery of property by an attachment debtor after the writ came to the hands of the officer excuse the officer from levying on such property, but he is liable if he fails to do so.[72]

(B) *Amount of Property Available.* It is not essential to the liability of a sheriff for failure to levy under an execution that there should have been enough property of defendant available to pay the entire debt, but if he might have seized enough property to pay a part thereof and failed to do so he is liable.[73] But if a sheriff honestly thinks that the value of property on which he can levy will not pay the expense of sale, he may refuse to levy, state the facts, and return the execution unsatisfied, although he does so at his peril, and if he is mistaken is liable to the injured party.[74]

not liable for not seizing and selling the attached logs); McNally *v.* Kerswell, 37 Me. 550.

*Massachusetts.*— Gallup *v.* Robinson, 11 Gray 20.

*Missouri.*— State *v.* Armstrong, 25 Mo. App. 532.

*Texas.*— Carey *v.* Tinsley, 22 Tex. 383.

*Vermont.*— West River Bank *v.* Gorham, 38 Vt. 649, holding that where a party gives a sheriff a writ, and directs him to attach certain property, knowing that it is then under attachment by another sheriff, the sheriff receiving the writ is not liable for failure to make the attachment because of the prior levy.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**The burden of proof rests on the officer** who refuses to levy on chattels in the debtor's possession to show that they were not subject to levy. Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306 [*reversing* 70 Ill. App. 251].

**67.** *Alabama.*— Governor *v.* Campbell, 17 Ala. 566; Mason *v.* Watts, 7 Ala. 703.

*Georgia.*— See Morgan *v.* Spring, 72 Ga. 257; Davis *v.* Reid, 57 Ga. 188.

*Missouri.*— Taylor *v.* Wimer, 30 Mo. 126.

*New York.*—Ledyard *v.* Jones, 7 N. Y. 50 [*affirming* 4 Sandf. 67]; Bowman *v.* Cornell, 39 Barb. 69.

*South Dakota.*— Swenson *v.* Christoferson, 10 S. D. 188, 72 N. W. 459, 66 Am. St. Rep. 712.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**Representation of an estate as insolvent** relates back to the time of the decease, so that an officer is not liable for not having levied an execution thereon in the interval. Smith *v.* Holmes, Brayt. (Vt.) 133.

**68.** Governor *v.* Campbell, 17 Ala. 566; Palmer *v.* Gallup, 16 Conn. 555 (holding that an officer is not liable to the creditor for not attaching real estate of the debtor which the creditor never directed him to attach); Taylor *v.* Wimer, 30 Mo. 126.

**Sufficiency of designation of property.**— When an indemnifying bond and money for the sheriff's fees were delivered to him, and he was informed that the property on which the execution was to be levied was certain machinery in a mill near the dwelling-house of the creditor and at a distance of some miles from the dwelling of the sheriff, and that, if he would call at the house of the creditor when he came to make the levy, the particular articles on which it was to be made would be pointed out to him, there was a sufficient designation of the property to render the sheriff liable for failure to levy, unless it was made to appear that the sheriff called at the house of the creditor for the purpose of having a more specific designation, and the creditor failed to make it. Benson *v.* Ela, 35 N. H. 462. Where the sheriff was informed where property subject to seizure was situated, this was a sufficient pointing out to render him liable for failure to seize it. Marshall *v.* Simpson, 13 La. Ann. 437.

**Where defendant had no property in his possession** during the time when an execution was on the sheriff's hands, the sheriff is not liable for failing to make the money, unless defendant was the owner of property which could have been levied on and of which the sheriff had notice. Governor *v.* Campbell, 17 Ala. 566.

**Withholding information.**— If plaintiff's counsel, on being applied to by the sheriff to point out property on which to levy an execution, withholds information which would enable the officer to make a levy, the latter cannot be made liable. Batte *v.* Chandler, 53 Tex. 613.

**69.** Taylor *v.* Wimer, 30 Mo. 126. See also Hutchings *v.* Ruttan, 6 U. C. C. P. 452.

**70.** State *v.* Ownby, 49 Mo. 71; Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022. See also Hutchings *v.* Ruttan, 6 U. C. C. P. 452.

**71.** Fairbanks *v.* Stanley, 18 Me. 296.

**72.** McKinney *v.* Blakely, 87 Ark. 405, 112 S. W. 976.

**73.** Com. *v.* Hurt, 4 Bush (Ky.) 64.

**74.** *In re* Mowry, 12 Wis. 52.

(c) *Exempt Property.* A showing that property was exempt [75] relieves the sheriff from liability for a failure to levy thereon.[76]

(d) *Property on Indian Reservation.*[77] The refusal of an Indian agent to consent to entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not excuse the sheriff from making the levy.[78]

(e) *Property in Possession of Sheriff.* A sheriff cannot exonerate himself from failure to levy an attachment or execution upon personal property by claiming to have possession of the same under chattel mortgages.[79]

(ii) *OWNERSHIP OF PROPERTY.* A sheriff is not liable for failure to levy on property which did not belong to defendant,[80] even though it was pointed out to him as defendant's property.[81] But a sheriff cannot escape liability for failure to make the money on an execution on the ground that there was a doubt as to the title to property on which he might have levied, or an adverse claim thereto, if the property was really liable,[82] even though the property was in the possession of a third person,[83] especially if the property was shown to him as

**75.** Exemptions generally see EXEMPTIONS, 18 Cyc. 1369.

**76.** Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; Redus *v.* State, 54 Miss. 712.

**77.** Indian reservation generally see INDIANS, 22 Cyc. 123.

**78.** Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232, holding that this was true, although the United States district attorney advised that the sheriff had no right to enter the reservation without the agent's consent.

**79.** Chittenden *v.* Crosby, 5 Kan. App. 534, 48 Pac. 209.

**80.** *Alabama.*— Union Bank *v.* Benham, 23 Ala. 143.

*Georgia.*— Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135 [*approved* in Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689]; Hixon *v.* Callaway, 2 Ga. App. 678, 58 S. E. 1120.

*Louisiana.*— Ammonette *v.* Crandell, 10 La. Ann. 174, holding that a sheriff is not liable for the amount of an execution, where he refuses to seize property the title to which is in another, in a form recognized as valid by law, and it does not appear that he had reason to believe that the title was simulated.

*Massachusetts.*— Canada *v.* Southwick, 16 Pick. 556, holding that where an officer was directed to "attach property or make no service," and he attached certain property which he alleged in his return belonged to the debtor, he might prove in defense to an action against him for not seizing on execution that it was not the property of the debtor.

*Mississippi.*— Redus *v.* State, 54 Miss. 712.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**81.** Redus *v.* State, 54 Miss. 712.

**82.** Minter *v.* Bigelow, 9 Port. (Ala.) 481; Robertson *v.* Beavers, 3 Port. (Ala.) 385; Emanuel *v.* Cocke, 6 Dana (Ky.) 212; Marshall *v.* Simpson, 13 La. Ann. 437; Bradford *v.* McLellan, 23 Me. 302.

**A bare suspicion that there might be some difficulty** with regard to the title to property pointed out to him does not justify the sheriff in refusing to seize it. Marshall *v.* Simpson, 13 La. Ann. 437.

**A mere disclaimer** by the judgment debtor of the ownership of personal property in its possession, with an allegation that the title thereto is in a foreign corporation, does not excuse the sheriff's failure to make a levy of an execution thereon, as possession of personal property is *prima facie* evidence of title; and it is the sheriff's duty to make the levy unless he knows that the apparent title is different from the real title. Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783.

**An assignment** of goods in a store belonging to the debtor, dated after the taking of a judgment on which executions issued, the goods being left in the debtor's hands, without any good reason shown therefor, does not relieve the sheriff from liability for failure to levy the execution, such assignment being fraudulent and void. Williams *v.* Lowndes, 1 Hall (N. Y.) 579.

**A sheriff cannot refuse to execute a writ of possession** on the ground that a person is in possession of the premises under a grant from defendant pending the action of ejectment, and also under a conveyance from a stranger to the action of a title paramount to that of the parties thereto, and will be liable in case of such refusal in substantial damages to plaintiff. State *v.* Harrington, 41 Mo. App. 439.

**A sheriff who holds several executions against the same defendant** will be held liable for a neglect to levy one of them, when injury results to plaintiff, although a claim has been interposed to property levied on by him under another. Brown *v.* McCrary, 30 Ga. 878.

**A finding of a sheriff's jury** that certain property does not belong to defendant in execution does not excuse the sheriff for a failure to levy on or hold the same if, as a matter of fact, it does belong to defendant. Pearson *v.* Fisher, 4 N. C. 72.

**83.** Emanuel *v.* Cocke, 6 Dana (Ky.) 212. But *compare* Ayers, etc., Co. *v.* Sundback, 5 S. D. 31, 58 N. W. 4, holding that where a mortgage is valid on its face, and the mortgagee is in possession, a sheriff is not liable for failure to levy an execution against the mortgagor on the goods, although the mort-

liable,[84] and he has not demanded and been refused indemnity,[85] and the burden is upon him to show that it was not liable.[86] But a sheriff has been held not liable for failure to levy an execution issued pending the trial of the right of property under a former levy on the property as that of a third person.[87]

(III) *PRIOR LIENS ON PROPERTY.* The mere existence of liens on property which are prior to an execution does not excuse the sheriff for a failure to levy thereon,[88] although a sheriff may justify a refusal to levy by showing that the property was subject to valid liens to an amount exceeding its value and prior to the writ in his hands.[89] But if for any reason of which the sheriff has notice, or by reasonable inquiries could discover, a chattel mortgage is not entitled to priority over a writ of execution in his hands, he cannot rely on it as a justification for not levying under the writ.[90]

(IV) *VALIDITY OF LIEN ON WHICH PROCESS BASED.*[91] A sheriff cannot escape liability for a failure to levy a mortgage fieri facias upon the mortgaged property upon the ground that the mortgage lien is superseded in consequence of a failure to record it.[92]

gage is in fact fraudulent as to such execution creditor.

**A sheriff cannot escape liability for failure to levy a mortgage fieri facias** upon the mortgaged property upon the ground that the property belongs to a third person and is in his possession adversely to the mortgagor. Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

84. Emanuel *v.* Cocke, 6 Dana (Ky.) 212.

85. Minter *v.* Bigelow, 9 Port. (Ala.) 481.

**Effect of refusal of indemnity or failure to indemnify** see *infra*, V, C, 12, b, (VII).

86. Minter *v.* Bigelow, 9 Port. (Ala.) 481; Redus *v.* State, 54 Miss. 712.

87. Hill *v.* Reitz, 24 Ill. App. 391.

88. *Alabama.*— Bell *v.* King, 8 Port. 147.
*Delaware.*— State *v.* Gemmill, 1 Houst. 9.
*Illinois.*— Ross *v.* Weber, 26 Ill. 221.
*Texas.*— Smothers *v.* Field, 65 Tex. 435.
*England.*— Dennis *v.* Whetham, L. R. 9 Q. B. 345, 43 L. J. Q. B. 129, 30 L. T. Rep. N. S. 514, 22 Wkly. Rep. 571.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

**Defendant's equity of redemption is subject to his debts,** and plaintiff in execution has the right to have that sold for what it will bring and the proceeds applied to the payment of his judgment. Smothers *v.* Field, 65 Tex. 435.

**The question whether the subsequent levy is available** does not affect the duty of the sheriff. State *v.* Gemmill, 1 Houst. (Del.) 9.

**The preference of an older execution over** a younger does not excuse the sheriff from a levy of the latter execution, where the property is not needed to satisfy the former. Bell *v.* King, 8 Port. (Ala.) 147.

**Where a senior execution is stayed** by agreement of the parties the officer is liable for failure to levy under a junior execution. Ross *v.* Weber, 26 Ill. 221.

**A levy under a prior attachment,** which had been discharged, does not justify a sheriff in refusing to levy a subsequent attachment on the same goods. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

**Payment of mortgage debt before levy.**— A statute providing that before levying on property included in a chattel mortgage the officer must pay or tender the amount of the mortgage debt and interest has no application to a mortgage claimed by a creditor to be fraudulent and void, and hence it is no excuse for a sheriff's failure to levy an execution on property so mortgaged that plaintiff failed to pay or tender the amount due on the mortgage. Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

89. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150; Phelps, etc., Co. *v.* Skinner, 63 Kan. 364, 65 Pac. 667.

**Only nominal damages can be recovered** against the sheriff for refusing to levy on and sell property on executions against the mortgagor where the amount of the mortgages exceeds the value of the property. Coopers *v.* Wolf, 15 Ohio St. 523.

**Secret deed of trust.**—A sheriff could not excuse failure to levy an execution on the ground that there was an unrecorded and secret deed of trust on the goods to secure other creditors in a sum greater than their value, and that they were subsequently disposed of and their proceeds applied to this debt. Grove *v.* Harris, 35 Tex. 320.

**Where the property of a partnership has been attached** in a suit against one of the partners individually, subsequent judgment creditors of the partnership, who have not applied to the court to set the attachment aside or to have their debts first paid out of the partnership property, cannot impose on the sheriff the burden of deciding on the legality of the respective claims, and they cannot recover for his failure to proceed under the executions on their judgments. Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010.

90. Massey Mfg. Co. *v.* Clement, 9 Manitoba 359.

91. **Lien,** generally, see LIENS, 25 Cyc. 655.

92. Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

(v) *ACTS OF PARTY ISSUING PROCESS.*[93] A sheriff is not released from liability for failure to levy on property of the debtor out of which the money could have been made by proper diligence by the fact that plaintiff had released a levy which had been made on his own property as that of the execution defendant.[94]

(vi) *AGREEMENTS BETWEEN PARTIES.* Agreements between the parties as to suspending the execution of the writ[95] or settling the claim on which it relates[96] do not relieve the sheriff of liability for failure to proceed with the writ where he has received no instructions from plaintiff or his attorney not to proceed.[97]

(vii) *REFUSAL OF INDEMNITY OR FAILURE TO INDEMNIFY.* Where the circumstances are such that the sheriff is entitled to demand indemnity before proceeding to execute a writ,[98] and he in good faith demands indemnity, which is refused, his subsequent failure to proceed subjects him to no liability to the party at whose instance the writ issued,[99] although as a matter of fact he would have incurred no liability to any other person by proceeding.[1] But in the absence of a demand for indemnity the failure of plaintiff to furnish it does not release the sheriff from liability for failure to levy under the writ,[2] nor can an officer, after a default has occurred, escape liability therefor by a subsequent demand for indemnity which is refused.[3]

(viii) *PROMISE OF DEBTOR TO PAY.* A sheriff is not excused from a default in levying an execution because he delayed in reliance upon the debtor's promise to pay.[4]

(ix) *ABSENCE OF DEBTOR.* The fact that neither the body nor any property of an execution defendant was within the territorial jurisdiction of an officer during the time the execution was in his hands goes in mitigation of damages, in an action against the officer for failure to execute the process.[5]

(x) *BANKRUPTCY*[6] *OR INSOLVENCY*[7] *OF DEBTOR.* Where a judgment is

93. **Directions of party or attorney** see *supra*, V, A, 9.

**Interference of party or attorney** generally see *supra*, V, A, 10.

94. Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

95. Derby Bank *v.* Landon, 2 Conn. 417, holding that where the execution creditor agreed with the debtor to suspend the levy of an execution, but afterward delivered the writ to an officer to be executed, such agreement did not excuse the officer's failure to levy during the time to which it related.

96. Crenshaw *v.* Harrison, 8 Ala. 342 (agreement to set off debt); Nye *v.* Kellam, 19 Vt. 548.

97. Crenshaw *v.* Harrison, 8 Ala. 342.

98. See *infra*, VI, A, 1.

**Where the sheriff does not show that he was entitled to demand indemnity** a refusal to indemnify him furnishes no excuse. Craft *v.* Brandow, 24 Misc. (N. Y.) 306, 52 N. Y. Suppl. 1078, so holding in a case where the sheriff did not set up a determination of a jury against the debtor's title in the special proceedings provided by Code Civ. Proc. §§ 1418, 1419, or that the property was not in defendant's possession, or that it was not clear that it belonged to defendant, notwithstanding the fact that the creditor had promised to give a bond.

99. *Alabama.*— McGehee *v.* Chandler, 15 Ala. 659.

*Kentucky.*— Crane *v.* Crane, 105 S. W. 370, 32 Ky. L. Rep. 82.

*Maine.*—Bradford *v.* McLellan, 23 Me. 302.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*New York.*— See Orange County Bank *v.* Dubois, 21 Wend. 351.

*South Carolina.*— Emory *v.* Davis, 4 S. C. 23.

*Tennessee.*— State *v.* Sharp, 2 Sneed 615.

*Virginia.*—Huffman *v.* Leffell, 32 Gratt. 41.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 174 *et seq.*

1. Crane *v.* Crane, 105 S. W. 370, 32 Ky. L. Rep. 82.

2. Levy *v.* Shockley, 29 Ga. 710; Mullings *v.* Bothwell, 29 Ga. 706. See also Bosley *v.* Farquar, 2 Blackf. (Ind.) 61; Perley *v.* Foster, 9 Mass. 112; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603. But *compare* State *v.* Sharp, 2 Sneed (Tenn.) 615.

3. Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022.

4. Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

5. Kidder *v.* Barker, 18 Vt. 454 [*followed* in Ives *v.* Strong, 19 Vt. 546]. See also State *v.* Rollins, 13 Mo. 179, holding that, in an action against a sheriff for failure to arrest an execution defendant, it is competent for him to show that defendant was out of his county from the date of the writ until he applied for the benefit of the bankrupt law.

6. See, generally, BANKRUPTCY, 5 Cyc. 227.

7. See, generally, INSOLVENCY, 22 Cyc. 1249.

avoided by an adjudication of bankruptcy against the judgment debtor within four months after its rendition,[8] the sheriff is not liable for a failure to make the money on an execution issued on such judgment;[9] or at most can be subjected to only nominal damages for not serving the execution.[10] So also, in an action against a sheriff for not serving a writ of execution, he may show the insolvency of the debtor in mitigation of damages.[11]

(XI) *CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.* A person cannot recover from a sheriff for negligence by which an attempted levy of a writ was rendered ineffectual, if he has contributed to the result by his own negligence or that of an attorney employed to supervise the procedure.[12]

(XII) *INTENTIONS OF SHERIFF.* The fact that the sheriff has no corrupt or bad intentions does not relieve him from liability for failure to serve or execute process.[13]

(XIII) *DIFFICULTY OF EXECUTING PROCESS.* Difficulty in obtaining possession of property on which the sheriff is directed to levy does not excuse his failure to levy,[14] nor is it any excuse to a sheriff for failing to execute a capias ad satisfaciendum that he and his deputies had always found difficulty in arresting defendant in execution.[15]

(XIV) *LACK OF KNOWLEDGE OF FACTS.* A sheriff cannot escape liability for failure to levy an execution by setting up want of knowledge of defendant having any estate or effects,[16] or showing that plaintiff did not point out to him any property on which to levy,[17] or notify him that defendant resided or had property within the county.[18]

(XV) *CONSIDERATION FOR DEBTOR.* It is no excuse for the default of a sheriff in levying an execution that he delayed on account of the sickness of the debtor or the distress of his family.[19] But in a case where an attachment was issued against a life-tenant for disobedience of a decree requiring her to give security for the principal intrusted to her, and the writ which ordered her to be brought before the court was placed in the hands of the assistant sheriff, with instructions to execute it, and finding her so ill that she could not be moved, he procured a physician's certificate as to her condition, and made return of the facts, and the court made no further order in the matter, and no further application was made to it, it was held that the sheriff was not liable to the remainderman as for a neglect of duty.[20]

(XVI) *COLLECTABILITY OF DEBT.* A sheriff cannot escape liability for failure to levy under an execution by showing that the judgment debtor is solvent and has property which may be subjected to the judgment, and that the judgment

8. See BANKRUPTCY, 5 Cyc. 367.

9. Wohr *v.* Mattox, 120 Ga. 962, 48 S. E. 410 [*distinguishing* McKenney *v.* Cheney, 118 Ga. 387, 45 S. E. 433].

10. Selfridge *v.* Lithgow, 2 Mass. 374.

11. Varrill *v.* Heald, 2 Me. 91; Dininny *v.* Fay, 38 Barb. (N. Y.) 18, holding that in a suit against a sheriff for default of his deputy in neglecting to take the body of a debtor on execution issued against the body, defendant may prove, in mitigation of damages, that at the time of and after the judgment against defendant, he was utterly insolvent, and that nothing could have been gained by his arrest.

12. Parrott *v.* McDonald, 72 Nebr. 97, 100 N. W. 132.

13. Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110.

14. Howe *v.* White, 49 Cal. 658, holding that where an execution was placed in the hands of a sheriff with directions to levy on a sum of money in the hands of a corporation, and he exhibited the execution to the company and demanded the money, the facts that the company, while admitting that it had the money, refused to deliver it to the sheriff, and that the sheriff could not seize or take manual possession of the money, and that plaintiff's attorney had notice of these things at the time, did not excuse the sheriff for failing to levy the execution, whether the company had the money as a distinct sum belonging to defendant, or he was its creditor for the amount.

15. Spence *v.* Tuggle, 10 Ala. 538.

16. Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201.

17. Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201.

18. Tomlinson *v.* Rowe, Lalor (N. Y.) 410.

19. Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

20. Potteiger *v.* Ridgway, 173 Pa. St. 292, 34 Atl. 19.

debt is thus collectable;[21] but it may be shown, in mitigation of damages, that the amount could not have been collected by due diligence on the part of the sheriff.[22]

(XVII) *PREVENTION OF LEVY BY GIVING BOND.* Where the statute allows a defendant in attachment to prevent a levy by giving bond, a sheriff who omits to make a levy upon such bond being given is not liable therefor,[23] although plaintiff in attachment is unable to collect his full claim on the bond.[24]

(XVIII) *ISSUANCE OF EXECUTION AFTER JUDGMENT IN ATTACHMENT SUIT.* Where a sheriff has failed to attach property, and before judgment in the suit such property has gone beyond the reach of process, the issuance of an execution within the time after the judgment for which an attachment lien remains in effect is not necessary to fix the liability of the sheriff.[25]

(XIX) *ISSUANCE OF SECOND WRIT.* Where an officer has neglected to levy an execution, the act of plaintiff in taking out an alias execution and causing it to be levied on other property, and thus collecting a part of his debt, does not deprive him of his remedy against the officer for the previous neglect.[26]

(XX) *FAILURE TO ISSUE SECOND WRIT.* Where a sheriff has negligently failed to make the money on an execution plaintiff is not deprived of his right of action against the sheriff by the fact that he has failed to proceed further against the execution defendant, although he might have made the money by so doing.[27] But where plaintiff who has recovered judgment in ejectment fails, on the expiration of the term of office of the sheriff, to place an alias writ of restitution in the hands of the new sheriff, he cannot, in an action against the old sheriff for failing to execute the original writ, recover damages for any time subsequent to that at which he might have obtained possession under such alias writ.[28]

(XXI) *SUPERSEDEAS*[29] *OR STAY OF WRIT.* A sheriff's failure to levy an execution on a day named, as peremptorily directed by the judgment creditor's attorney, cannot be excused by any judicial order staying the execution served on the sheriff after that day.[30] A stay law which has expired before an execution is placed in a sheriff's hands cannot excuse his failure to levy;[31] and where, while a statute known as the "stay law" was considered in force, plaintiffs in a fieri facias notified the sheriff that a judgment was recovered against defendant as bail, which was one of the excepted cases in the statute, to which it did not apply,

21. Evans *v.* Governor, 18 Ala. 659, 54 Am. Dec. 172; Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67, and *overruling* Stevens *v.* Rowe, 3 Den. (N. Y.) 327]; Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543. But *compare* Townsend *v.* Libbey, 70 Me. 162, holding that where a sheriff, ordered to attach real estate, neglects to do so, and it is conveyed by the debtor before judgment in the action, the value of other real estate owned by the debtor and remaining subject to levy, but which has not been levied on, should be allowed in reduction of damages in an action against the sheriff for such neglect.

22. Humphrey *v.* Hathorn, 24 Barb. (N. Y.) 278; Ledyard *v.* Jones, 4 Sandf. (N. Y.) 67 [*affirmed* in 7 N. Y. 550]. But *compare* Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

**Only nominal damages are recoverable** in such cases. Ives *v.* Strong, 19 Vt. 546.

23. Ayres *v.* Burr, 132 Cal. 125, 64 Pac. 120.

24. Ayres *v.* Burr, 132 Cal. 125, 64 Pac. 120.

25. Abbott *v.* Jacobs, 49 Me. 319 [*followed* in Townsend *v.* Libbey, 70 Me. 162]; Hill *v.* Pratt, 29 Vt. 119.

**Duration of attachment lien** see ATTACHMENT, 4 Cyc. 625.

26. Wetherby *v.* Foster, 5 Vt. 136.

27. Evans *v.* Governor, 18 Ala. 659, 54 Am. Dec. 172; Franklin County Nat. Bank *v.* Kimball, 152 Mass. 331, 25 N. E. 460, holding that a plaintiff in execution, whose lien is lost by the negligence of a sheriff in levying the execution on real estate, is not deprived of his right to recover more than the expense of proceedings to satisfy the judgment by further proceedings upon it, by failing to waive the levy and take out another execution, without any request from the officer to do so or offer of indemnity from him, but may recover the value of the lost lien.

28. State *v.* Harrington, 44 Mo. App. 297.

29. See, generally, APPEAL AND ERROR, 2 Cyc. 885.

30. State *v.* Brophy, 38 Wis. 413. But *compare* Mongie *v.* Cheney, 1 Hill (S. C.) 145, holding that an order staying proceedings on an execution, although erroneous, if acquiesced in by plaintiff, discharged any antecedent liability of the sheriff for failure to levy.

31. Armstrong *v.* Jones, 34 Ga. 309.

and directed him to proceed to make the money by a levy, it was no excuse for his refusal to levy that the fieri facias did not show on its face that the case was within the exception.[32] A sheriff is not justified in refusing to levy an execution, because he has been served with notice of appeal and of the filing of an undertaking staying proceedings on the judgment, unless the appeal has been duly perfected and the undertaking on which the stay is claimed is in due form;[33] but a constable is excused for not serving an execution issued by the justice, where the justice has gone to him and withdrawn the execution in consequence of a certiorari delivered to him, although no bail was entered on taking out the certiorari.[34] Where a sheriff, upon a capias ad satisfaciendum being placed in his hands, received the amount of the debt and costs from defendant, and gave his receipt, stipulating to return the money if an injunction to restrain further proceedings should be obtained, and the injunction was obtained, and he returned the money, he was held not to be liable to an attachment for having failed to execute the capias ad satisfaciendum.[35] It is no excuse for failure to levy an execution that defendant in execution falsely represented that he had taken a stay of or appeal from the judgment on which it issued.[36]

(XXII) *PAYMENT*[37] *OF DEBT.* An officer may show, as an excuse for not making the money on an execution placed in his hands, that the amount has been paid to the execution plaintiff,[38] and if a part of the execution has been paid the sheriff's liability is decreased *pro tanto*.[39]

(XXIII) *INJUNCTION AGAINST PROCESS.*[40] The fact that the execution of process has been enjoined relieves the sheriff of liability for failure to execute the same.[41]

(XXIV) *RELEASE OF DEBTOR.* Where an execution against two defendants is placed in the hands of a sheriff he cannot escape liability for failing to make the money merely because plaintiff has released one of defendants.[42]

(XXV) *DISCHARGE OF DEBTOR FROM ARREST.* A judgment creditor's right of action against a sheriff for failure to levy an execution is not barred by

32. Pinney *v.* Levy, 38 Ga. 141.

33. Clark *v.* Carnley, 3 Code Rep. (N. Y.) 136.

34. Sherfy *v.* Fisher, 2 Rawle (Pa.) 147

35. Wilks *v.* Hasket, Harp. (S. C.) 490.

36. Steele *v.* Crabtree, 40 Nebr. 420, 58 N. W. 1022.

37. Payment generally see PAYMENT, 30 Cyc. 1173.

38. Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617; Wheeler *v.* Thomas, 57 Ga. 161.

Payment after the return of the writ relieves the sheriff of liability. Freeman *v.* Womack, 4 Ala. 539.

Payment by sureties.—Where a sheriff has become liable for a mere default in not collecting or returning an execution, and certain of the execution debtors who are sureties merely pay the amount of the execution for the purpose of securing an assignment to them of the interest of the execution creditor, such payment extinguishes the right of action against the sheriff. Bellows *v.* Allen, 23 Vt. 169, holding, however, that, although such payment extinguished the right of action against the sheriff, it was not competent for the sureties to take an assignment of the interest of the creditor.

39. Wheeler *v.* Thomas, 57 Ga. 161; Richards *v.* Gilmore, 11 N. H. 493. See also Gary *v.* State Bank, 11 Ala. 771.

40. Injunction generally see INJUNCTIONS, 22 Cyc. 724.

41. McCall *v.* McRae, 10 Ala. 313 (holding that after an execution has been perpetually enjoined the sheriff cannot be made liable for failing to make the money on it, although it was several years in his hands before the decree was made); Cason *v.* Mulling, 50 Ga. 598. But *compare* Caruthers *v.* Sprayberry, 26 Ga. 437 [*approving* Neal *v.* Price, 11 Ga. 297], holding that the officer is not relieved of liability for a failure to levy an execution by the fact that an injunction was interposed, where such injunction had no merit in it and did not in fact prevent the officer from making the money.

42. Mason *v.* Watts, 7 Ala. 703, 705, where it is said: "So far as the sheriff is concerned, the agreement between the plaintiff and one of the defendants in execution, and his discharge, that is entirely personal." See also Gary *v.* State Bank, 11 Ala. 771, holding that where a fieri facias issued on a joint judgment against the principal and his security is returned unsatisfied, it is no answer to a suggestion by plaintiff that the sheriff could with due diligence have made the money thereon that the surety paid the execution in part, upon an agreement with plaintiff that the latter should proceed against the sheriff and his sureties for the neglect of the latter to make the money of the principal, before the surety should be looked to for the payment of the residue.

the creditor's discharging the debtor from a capias ad satisfaciendum, although such discharge operates as a satisfaction of the judgment.[43]

(XXVI) *RELEASE OF LEVY BY CREDITOR.* The release by the execution creditor of his own property which has been levied on as the property of defendant does not discharge the sheriff from liability for not making the money out of property which really belonged to defendant;[44] nor can the sheriff claim to be discharged from liability because plaintiff releases a levy on property to which a claim is interposed by a third person who gives bond to try the right of property, according to the statute.[45]

**13. EXTENT OF LIABILITY — a. Failure to Execute Process.** An officer who fails to execute or to properly execute process is *prima facie* liable for the amount of the debt,[46] together with interest[47] and costs;[48] but he may reduce his liability by showing that his default was not the real cause of the loss,[49] as in a case where the debt could not have been collected in any event,[50] so that his ultimate liability is only for the injury caused by his default,[51] unless his default has been wilful.[52] So where it appears that there was property of defendant which might have been levied on and the value of which equaled or exceeded the debt, the officer is liable for the entire debt;[53] but where such property was worth less than the amount of the debt, the officer is liable for only the value of the property at

43. Hargrave *v.* Penrod, 1 Ill. 401, 12 Am. Dec. 201, holding that the judgment creditor's right of action against the sheriff was perfect before such discharge.

44. Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

45. Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

46. *Alabama.*— Bondurant *v.* Lane, 9 Port. 484.

*Georgia.*— Clement *v.* Bunn, 60 Ga. 334; Spicer *v.* Myres, 47 Ga. 559.

*Michigan.*— Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683.

*Missouri.*— Douglass *v.* Baker, 9 Mo. 41.

*New Hampshire.*— Sanborn *v.* Emerson, 12 N. H. 57.

*New Jersey.*— Hunt *v.* Gulick, 9 N. J. L. 205.

*New York.*— Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406]; Bowman *v.* Cornell, 39 Barb. 69; Humphrey *v.* Hathorn, 24 Barb. 278; Davis *v.* Bowe, 50 N. Y. Super. Ct. 298; Ledyard *v.* Jones, 4 Sandf. 67 [*affirmed* in 7 N. Y. 550]; Rome Bank *v.* Curtiss, 1 Hill 275; People *v.* Adgate, 2 Cow. 504.

*South Carolina.*— Graham *v.* Durant, 2 Hill 517.

*Texas.*— Hamilton *v.* Ward, 4 Tex. 356; Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

*Vermont.*— Goodrich *v.* Starr, 18 Vt. 227; Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 306.

47. Murray *v.* Evans, 25 Tex. Civ. App 331, 60 S. W. 786.

Allowance of interest generally see *infra*, VII, P, 6.

48. Miller *v.* State, 61 Ind. 503 (holding that in an action for failing to levy on property pointed out by the execution plaintiff, the costs recovered against the judgment defendant may be included, whether paid by plaintiff or not); Sanborn *v.* Emerson, 12 N. H. 57; Hunt *v.* Gulick, 9 N. J. L. 205; Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

49. Humphrey *v.* Hathorn, 24 Barb. (N. Y.) 278; Ledyard *v.* Jones, 4 Sandf. (N. Y.) 67 [*affirmed* in 7 N. Y. 550]; Hobson *v.* Thellusson, L. R. 2 Q. B. 642, 8 B. & S. 476, 36 L. J. Q. B. 302, 16 L. T. Rep. N. S. 837, 15 Wkly. Rep. 1037. But *compare* Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

Where part of the loss is due to plaintiff's negligence he cannot recover for such part. Palmer *v.* Gallup, 16 Conn. 555.

50. Hamilton *v.* Ward, 4 Tex. 356. See also *supra*, V, C, 12, b, (I), (II), (III), (X), (XVI).

51. *Alabama.*— Harris *v.* Murfree, 54 Ala. 161; Griffin *v.* Ganaway, 8 Ala. 625.

*Connecticut.*— Palmer *v.* Gallup, 16 Conn. 555; Clark *v.* Smith, 9 Conn. 379; Ackley *v.* Chester, 5 Day 221.

*Georgia.*— Cowart *v.* Dunbar, 56 Ga. 417.

*Illinois.*— French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

*Kentucky.*— Arnold *v.* Com., 8 B. Mon. 109.

*Maine.*— Ware *v.* Fowler, 24 Me. 183; Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347.

*New Hampshire.*— Grafton Bank *v.* White, 17 N. H. 389.

*North Carolina.*— Erwin *v.* Lowrance, 64 N. C. 483.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 306.

General rule of damages see *infra*, VII, P, 1.

52. Ackley *v.* Chester, 5 Day (Conn.) 221; Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347.

Exemplary or punitive damages see *infra*, VII, P, 5.

53. *Alabama.*— Harris *v.* Murfree, 54 Ala. 161.

*Georgia.*— Spicer *v.* Myres, 47 Ga. 559.

the time it should have been seized.[54] And even a recovery of the latter amount may be denied where it appears that plaintiff would not have derived any benefit from a levy.[55] An officer who on mesne process fails without good excuse to render services legally incumbent upon him, must respond to plaintiff in damages for whatever amount the services, if faithfully performed, would have been worth in the proceeding in which they were due.[56]

**b. Giving Preference to Junior Writ.** A sheriff who improperly gives precedence to a junior writ is liable to the holder of the senior writ for the amount which he would have received had the officer done his duty,[57] while if such act results in the property of a surety of the execution defendant as to the debt represented by the senior writ being seized, whereas, but for the sheriff's wrongful act, the surety would not have been compelled to pay the debt, the surety is entitled to recover from the sheriff an amount equal to the value of so much of the debtor's property as was wrongfully applied upon the junior writ.[58]

**c. Insufficient Levy.** Where a sheriff negligently makes an insufficient levy, by reason of which a part of the debt is lost, the measure of damages is the difference between the amount named in the writ, with costs, and the amount realized from a sale of the goods seized,[59] and the officer cannot be held liable for the full amount of the execution, unless that measures the injury.[60]

*Massachusetts.*— **Fairfield** *v.* **Baldwin, 12** Pick. 388.

*New Hampshire.*— Perkins *v.* Pitman, 34 N. H. 261.

*Texas.*— Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

*Wisconsin.*— State *v.* Brophy, 38 Wis. 413.

*England.*— See Hobson *v.* Thelluson, L. R. 2 Q. B. 642, 8 B. & S. 476, 36 L. J. Q. B. 302, 16 L. T. Rep. N. S. 837, 15 Wkly. Rep. 1037.

See 43 Cent Dig. tit. "Sheriffs and Constables," § 306.

**54.** *Alabama.*— Harris *v.* Murfree, 54 Ala. 161.

*Georgia.*— Spicer *v.* Myres, 47 Ga. 559; Baker *v.* Bower, 44 Ga. 14.

*Indiana.*— Limpus *v.* State, 7 Blackf. 43.

*Massachusetts.*— Tyler *v.* Ulmer, 12 Mass. 163.

*New Hampshire.*— Perkins *v.* Pitman, 34 N. H. 261.

*North Carolina.*— Erwin *v.* Lowrance, 64 N. C. 483.

*Pennsylvania.*— Corson *v.* Hunt, 14 Pa. St. 510, 53 Am. Dec. 568.

*Texas.*— Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

*England.*— See Hobson *v.* Thelluson, L. R. 2 Q. B. 642, 8 B. & S. 476, 36 L. J. Q. B. 302, 16 L. T. Rep. N. S. 837, 15 Wkly. Rep. 1037.

See 43 Cent Dig. tit. "Sheriffs and Constables," § 306.

The cash value and not a fluctuating auction price is the measure. Wetherby *v.* Foster, 5 Vt. 136. But *compare* Gilbert *v.* Gallup, 76 Ill. App. 526, holding that the measure of a sheriff's liability for negligently failing to levy on property of defendant in an execution is the amount which the property would have brought if sold at public sale to the highest and best bidder.

The value at the time when the execution should have been levied is controlling.— Tyler *v.* Ulmer, 12 Mass. 163, where a sheriff returned that he had attached cattle, when in fact he had delivered them to a third person for keeping, and they were lost, and an execution subsequently issued was returned, "No property found," and it was held that, in an action against him for neglect in not procuring satisfaction of the execution, he could not show in mitigation of damages that the expense of keeping the cattle between the attachment and the execution would have exceeded the value of the cattle.

**55.** See Hobson *v.* Thelluson, L. R. 2 Q. B. 642, 8 B. & S. 476, 36 L. J. Q. B. 302, 16 L. T. Rep. N. S. 837, 15 Wkly. Rep. 1037.

**56.** Snell *v.* Mayo, 62 Ga. 743, holding that where a sheriff had served a declaration and process in bail trover, by leaving a copy at defendant's most notorious place of abode, without making any return as to the property or as to any arrest of defendant, the eventual condemnation money was the proper measure of his liability, and he could not reduce his liability by controverting plaintiff's title, or by adducing evidence that the real value of the property was less than the amount of the recovery.

**57.** Grabenheimer *v.* Budd, 40 La. Ann. 107, 3 So. 724.

**58.** Staton *v.* Com., 2 Dana (Ky.) 397, holding that the sheriff is liable to the surety for the full value of his property which was sold, unless the execution defendant's effects were insufficient to satisfy the senior execution, in which case the officer is liable for only so much of the surety's property as sold for the sum which the effects of the principal brought, and not for what would have been in any event required to make up a deficiency on the execution for which the surety was liable as such.

**59.** Com. *v.* Lightfoot, 7 B. Mon. (Ky.) 298; Adams *v.* Spangler, 17 Fed. 133, 5 McCrary 334.

**60.** Com. *v.* Lightfoot, 7 B. Mon. (Ky.) 298.

**d. Defective Levy.** A sheriff who makes a levy so defective that the property is lost to the execution creditor is liable for all the resulting damage.[61]

**D. Improprieties in Connection With Execution of Process — 1. Abuse of Process.**[62] A sheriff is liable where, under color of executing process, he unlawfully injures property,[63] or arrests and imprisons a citizen, and while holding him under duress illegally seizes and takes away and disposes of his property.[64]

**2. Causing Unnecessary Injury or Hardship.** Where a sheriff executes process at such an improper time and in such an improper manner as to wilfully cause unnecessary injury or hardship he may be held liable therefor;[65] but no recovery can be had against an officer for executing a writ of sequestration according to its mandate, unless it is alleged and proved that he conspired with or instigated plaintiff in the malicious issuing and levy of the writ.[66]

**61.** Parker *v.* Peabody, 56 Vt. 221.

**62. Abuse of process generally** see Process, 32 Cyc. 541.

**63.** Grothgar *v.* Lewis, 100 Fed. 326, 40 C. C. A. 382, where it appeared that a schooner injured in a storm during a voyage unloaded her cargo, and went into a shipyard for repairs, and while there was further injured by another storm, which drove her on the shore in the yards, and while she was so lying defendant, as sheriff, entered upon her, cut off her spars, tore down her rigging, and removed the same, together with her furniture, for the purpose of levying a writ of attachment upon the parts so removed, and it was held that, so long as the ship remained in a condition to be repaired, she was an entirety, consisting of her hull, tackle, apparel, and furniture, and the acts of defendant in dismantling her constituted an unjustifiable trespass.

**64.** Frazier *v.* Parsons, 24 La. Ann. 339.

The measure of damages in such case will be governed by the aggravation and unprovoked character of the sheriff's conduct. Frazier *v.* Parsons, 24 La. Ann. 339.

**65.** *Maine.*— Smith *v.* Grant, 56 Me. 255, forcible removal of a tenant, his family, and his furniture under writ of replevin for a house.

*Missouri.*— State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440.

*New Hampshire.*— Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

*New York.*— Rogers *v.* Brewster, 5 Johns. 125, holding that where a constable, having a warrant against plaintiff for the collection of a militia fine, executed it by taking a valuable horse out of plaintiff's team with the avowed intent of hurting his feelings, notwithstanding plaintiff showed him other property, and requested him to take it and leave the horse, he was liable in damages.

*Pennsylvania.*— Hocker *v.* Stricker, 1 Dall. 225, 1 L. ed. 111 (holding that if the sheriff refuses defendant in replevin a reasonable time to find security before the goods in question are removed, he is liable in trespass); Goodman *v.* Condo, 12 Pa. Super. Ct. 456 (holding that where a sheriff, in aid of the arrest of a desperate criminal, burned the house in which he had sought shelter, and the only purpose of destroying the house was to render the arrest more easy and less dangerous, he was personally liable for the damage to the house).

*Texas.*— Morgan *v.* Oliver, (Civ. App. 1904) 80 S. W. 111 [*reversed* on other grounds in 98 Tex. 218, 82 S. W. 1028], holding that where a sheriff, in carrying out the orders of a commissioners' court to open a road, cut fences not on the line of the route opened by order of the court, he was liable in damages therefor.

*Vermont.*— Fullam *v.* Stearns, 30 Vt. 443.

*Wisconsin.*— Andrea *v.* Thatcher, 24 Wis. 471, holding that a sheriff who, within an hour after the rendition of judgment in an action for forcible entry, turned defendant and his family into the street in the nighttime, at an inclement season of the year and without giving him time to move his family or provide for their protection, was guilty of abuse of legal process, and was liable therefor.

*United States.*— Giddings *v.* Freedley, 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327 [*affirming* 119 Fed. 438].

*Canada.*— Bedard *v.* Bachand, 16 Quebec Super. Ct. 348, holding that where an officer instead of levying the first time on all the movables which he found at the home of the debtor, levied on only a part, and afterward made a second and third levy on property which could have been taken on the first levy, he became responsible to the debtor for the damage and annoyances which the repeated levies caused him.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 137 *et seq.*

**A sheriff does not become a trespasser ab initio by doing slight injury** to a building while exercising reasonable care in removing machinery therefrom, while executing a writ of attachment. Fullam *v.* Stearns, 30 Vt. 443, holding that where an officer, in attaching a lathe, took up a platform to which it was attached, and also took down a partition, it being necessary to remove such platform and partition in order to take the lathe from the building, he was not liable as a trespasser *ab initio* for not replacing the platform and partition.

**66.** Rountree *v.* Walker, 46 Tex. 200.

**Protection afforded by process, judgment, or order of court** generally see *infra*, V, L.

**3. Defeating Execution.** Where a constable received an execution, and without the consent of the creditor delivered it to another officer, and then gave information of it to the debtor, who in consequence thereof avoided the execution, the constable was liable to the creditor for the damages sustained by him.[67]

**4. Neglect to Note Time of Receipt on Execution.** Where the statute makes it the duty of the sheriff, on receiving an execution, to make a minute thereon of the time of its receipt, he is liable for an omission to do so if any loss or damage results from such neglect.[68]

**5. Refusal to Release Debtor Arrested on Civil Process.** Under a statute providing that no man's person shall be arrested and imprisoned for any debt where sufficient means of satisfaction can otherwise lawfully be found from his estate, to be shown and presented by him, a constable who, on demand, is refused property to satisfy an execution, and thereupon arrests defendant, is not liable because he subsequently refuses to release the debtor on the receipt of chattels sufficient to satisfy the execution.[69]

**6. Taking Arrested Person Before Wrong Magistrate.** A sheriff who arrested a person for drunkenness and took him before a trial justice in an adjoining town, instead of one in the town wherein the arrest was made, as required by statute, has been held to be a trespasser.[70]

**7. Committing Debtor to Jail Other Than That Nearest Residence.** Where there are several jails in the county to which a sheriff may lawfully commit a debtor arrested on civil process, he is not guilty of oppression or abuse of authority rendering him liable to the debtor, where he commits the debtor to the jail furthest from his residence, although the debtor requests that he be committed to a nearer jail.[71]

**8. Forcible Entry Into Dwelling-House.** A sheriff is liable for breaking into a dwelling-house to serve or execute civil process,[72] and as an attachment so made is unlawful, the value of the goods attached cannot be deducted from the damages for which the sheriff is liable for his wrongful act.[73]

**9. Entry on and Search of Premises of Stranger.** Where a sheriff, having an execution, enters the outer door of a stranger to the writ, goes into his buildings, and breaks open his outhouses in search of property of defendant, but finds none, he is liable in trespass.[74] But where an officer having a writ of replevin enters a house peaceably and upon the invitation of the owner and makes a search for the goods, he incurs no liability thereby,[75] unless he does unnecessary injury in making the search.[76]

**E. Wrongful Levy on or Other Taking of Property**[77] **— 1. Liability in General.** Where the act of a sheriff or constable in seizing or levying upon

67. Isham *v.* Eggleston, 2 Vt. 270, 19 Am. Dec. 714.

68. O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Abbott *v.* Edgerton, 30 Vt. 208, holding, however, that as such minute is no part of the execution of the process, the sheriff cannot be held liable for an omission to make it without proof of actual damage.

**Estoppel to urge lack of authority to deliver writ.**—Where a sheriff accepts a writ of execution from another than plaintiff, without requiring evidence of his authority to deliver it, he cannot, in proceedings against him for not indorsing the date of delivery thereon, urge a want of authority in such person to deliver it. O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

**Effect of directions of plaintiff.**—The fact that plaintiff in execution, after delivery of the writ to the sheriff, ordered him to return it before the return-day, is not defense to a motion against the sheriff for failure to indorse the date of delivery on the writ. O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

69. Hall *v.* Hall, 1 Root (Conn.) 120, so holding on the ground that the election of the debtor to turn over property must be made before the arrest, and after arrest the officer is not bound to release him unless he pays the money.

70. Papineau *v.* Bacon, 110 Mass. 319.

71. Woodward *v.* Hopkins, 2 Gray (Mass.) 210.

72. Calvert *v.* Stone, 10 B. Mon. (Ky.) 152; Ilsley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Welsh *v.* Wilson, 34 Minn. 92, 24 N. W. 327; State *v.* Armfield, 9 N. C. 246, 11 Am. Dec. 762.

73. Ilsley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425.

74. Walker *v.* Fox, 2 Dana (Ky.) 404.

75. Bruce *v.* Ulery, 79 Mo. 322.

76. Bruce *v.* Ulery, 79 Mo. 322.

77. Process, judgment, or order of court as protection from liability see *infra*, V, L.

property is wrongful he is liable to the owner of the property for the resulting damage.[78]

**2. What Constitutes a Seizure.** In order to constitute a seizure of personalty the officer must exercise some dominion or control over it,[79] which amounts to an interference with the owner's right to possession and control;[80] but it is not necessary that the officer should take the property into his actual possession,[81] or remove[82]

**78** *Alabama.*—Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Lyon *v.* Goree, 15 Ala. 360.

*Arkansas.*— Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222.

*California.*— Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601; Rowe *v.* Bradley, 12 Cal. 226.

*Colorado.*—Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342; Duncan *v.* Burchinell, 14 Colo. App. 471, 61 Pac. 61.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24.

*Delaware.*— Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

*Georgia.*— Waldrop *v.* Almand, 94 Ga. 623, 19 S. E. 994; Mosely *v.* Sanders, 76 Ga. 293.

*Illinois.*— Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286 [*affirming* 81 Ill. App. 556]; MacVeagh *v.* Bailey, 29 Ill. App. 506.

*Indian Territory.*— Orr, etc., Shoe Co. *v.* Frankenthal, 4 Indian Terr. 368, 69 S. W. 906.

*Iowa.*— Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Parmlee *v.* Leonard, 9 Iowa 131.

*Kansas.*— Cook *v.* Higgins, 66 Kan. 762, 71 Pac. 259; Hagar *v.* Haas, 66 Kan. 333, 71 Pac. 822.

*Kentucky.*— Emanuel *v.* Cocke, 6 Dana 212; Brock *v.* Church, 5 Ky. L. Rep. 855.

*Louisiana.*— Mock *v.* Kennedy, 14 La. Ann. 32; Carraby *v.* Morgan, 5 Mart. N. S. 499.

*Maine.*— Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259; Foss *v.* Stewart, 14 Me. 312.

*Massachusetts.*— Deyo *v.* Jennison, 10 Allen 410; Kent *v.* Willey, 11 Gray 368; Mack *v.* Parks, 8 Gray 517, 69 Am. Dec. 267.

*Michigan.*— Mayhue *v.* Snell, 37 Mich. 305.

*Minnesota.*— Caldwell *v.* Arnold, 8 Minn. 265.

*Mississippi.*— Yarborough *v.* Harper, 25 Miss. 112.

*Missouri.*— Gilbert *v.* Peck, 43 Mo. App. 577; Muelrath *v.* Roemheld, 3 Mo. App. 564.

*Nebraska.*— Bartlett *v.* Cheeseborough, 32 Nebr. 339, 49 N. W. 360.

*New Hampshire.*— Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189; York *v.* Sanborn, 47 N. H. 403.

*New York.*— McAllaster *v.* Bailey, 127 N. Y. 583, 28 N. E. 591 [*affirming* 1 N. Y. Suppl. 12]; Campbell *v.* Conner, 70 N. Y. 424 [*affirming* 41 N. Y. Super. Ct. 459]; Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Stewart *v.* Wells, 6 Barb. 79; Rathowsky *v.* Dunn, 64 N. Y. Suppl. 934; Fosgate *v.* Mahon, 16 Johns. 162.

*North Carolina.*— Burgin *v.* Burgin, 23 N. C. 453.

*Pennsylvania.*— Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733; Brechtel *v.* Cortright, 13 Pa. Super. Ct. 384.

*Rhode Island.*— Hunt *v.* Lathrop, 7 R. I. 58.

*South Dakota.*— Kieffer *v.* Smith, 16 S. D. 433, 93 N. W. 645.

*Texas.*— Fatheree *v.* Williams, 13 Tex. Civ. App. 430, 35 S. W. 324.

*Utah.*— Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100.

*United States.*— McKnight *v.* U. S., 130 Fed. 659, 65 C. C. A. 37.

*England.*— Keene *v.* Dilke, 4 Exch. 388, 18 L. J. Exch. 440; London, etc., R. Co. *v.* Cable, 80 L. T. Rep. N. S. 119.

*Canada.*— Robinson *v.* Rapelje, 4 U. C. Q. B. 289.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 180 *et seq.*

**79.** Fernald *v.* Chase, 37 Me. 289 (holding that where a sheriff counted certain logs frozen in the ice, declared them to be attached, took a receipt for them, and made a return on his writ to that effect, of which he lodged a copy with the town clerk, this was not such a taking of possession or exercise of dominion or control over the property as to render him liable for conversion); Wood *v.* Orser, 25 N. Y. 348.

**A levy of an attachment on account-books** does not constitute a levy on the accounts or debts charged therein, and hence if such levy is wrongful it does not amount to a conversaion of the accounts, for which the sheriff making the levy is liable in an action against him therefor. Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309; Kreher *v.* Mason, 33 Mo. App. 297.

**80.** Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639; Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781; Gallagher *v.* Bishop, 15 Wis. 276.

**It is immaterial that the officer assumes to levy only on the interest of the execution debtor.**— Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639; Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 735.

**81.** Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639; Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781; Gallagher *v.* Bishop, 15 Wis. 176.

**82.** Rogers *v.* King, 151 Ala. 628, 44 So. 655; Stewart *v.* Wells, 6 Barb. (N. Y.) 79; Welsh *v.* Bell, 32 Pa. St. 12 [*approved* in Dixon *v.* White Sewing-Machine Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659].

**Where a levy of an attachment is made by a mere indorsement on the writ,** without disturbing the property, the sheriff is liable only for nominal damages if the levy proves to be wrongful. Peoria Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456, 30 Atl. 212, holding that this is true even though the

or sell it.[83] In order to constitute a seizure of real property for which, if wrongful, the sheriff will be liable, it is not necessary that there should be an ouster of the owner, but it is sufficient that the sheriff has, through himself or another, asserted an unlawful dominion over the property.[84] When property is already in the possession of an officer under a lawful seizure he incurs no liability by a formal levy on the same property under another writ, even though the latter levy be wrongful, where the property is not detained from the owner by reason of the second levy.[85]

**3. Liability of Sheriff as Dependent Upon Liability of Party Issuing Process.** A sheriff who seizes property in claim and delivery proceedings is merely the agent of plaintiff, and he incurs no liability by the seizure unless plaintiff is liable therefor.[86]

**4. Levy Under Writ Improperly Procured.** A sheriff or constable levying a writ of attachment is not liable with the attachment plaintiff for the wrongful suing out of the writ, in the absence of any evidence to show that the officer participated in the procurement of the writ.[87]

**5. Levy Under Void Writ.** An officer who levies on property under a void writ is liable in damages for the trespass,[88] and it is no defense that he afterward seized and sold the property under a valid writ in favor of a person other than plaintiff in the void writ.[89]

**6. Failure to Observe Statutory Order of Levy.**[90] Where the statute provides that in levying an execution "personal property shall be last taken" a sheriff who levies upon the personal property of an execution defendant who designates sufficient real property for the levy is liable for all damages resulting therefrom.[91] But where the statute requires personalty to be first levied on a sheriff does not become liable to a recovery for a misfeasance in office by levying on lands where defendant in the execution had personal property to satisfy the debt, unless it appears that such property was known and accessible to the sheriff,[92] and that he knew it to belong to defendant,[93] or it was pointed out to him as such and an indemnity offered to sell it.[94]

**7. Levy on Surety's Property Before Exhausting That of Principal.** As a general rule an officer charged with the execution of a writ is not required to investigate and determine the respective equities of the different defendants as against each other, and may without incurring any liability levy upon the property of either, without inquiring whether he was principal or surety in the liability which was merged in the judgment;[95] but where a judgment is rendered and execution issued against a principal and a surety, and the surety has caused the

property attached was subsequently sold under order of court as perishable.

**83.** Stewart *v.* Wells, 6 Barb. (N. Y.) 79.

**84.** Rowe *v.* Bradley, 12 Cal. 226, holding that putting a receiver in possession is sufficient.

**85.** Page *v.* Carpenter, 10 N. H. 77 (where a sheriff attached property on a writ against a partnership, and afterward, while it was in his possession under that attachment, he returned an attachment of the same property on a writ against one of the partners, and it was held that, having a lawful right to the possession of the property under the first attachment, his return that he had attached it on a second writ could not render him liable for conversion, although he had no right to make the latter attachment); Luce *v.* Hoisington, 54 Vt. 428 (holding that where a constable attached a chattel, and, while holding possession, attached it again on another writ against the same party, and retained the chattel only while entitled to do so under the first attachment, he was not liable in trespass for the second attachment).

**86.** Francisco *v.* Aguirre, 94 Cal. 180, 29 Pac. 495.

**87.** Faroux *v.* Cornwell, 40 Tex. Civ. App. 529, 90 S. W. 537.

**88.** Leise *v.* Mitchell, 53 Mo. App. 563. See also *infra*, V, L, 5, a.

**89.** Leise *v.* Mitchell, 53 Mo. App. 563.

**90.** Statutory order of levy generally see Executions, 17 Cyc. 1090.

**91.** MacVeagh *v.* Bailey, 29 Ill. App. 606.

**92.** Swingle *v.* Boyler, 1 Overt. (Tenn.) 226.

**93.** McCoy *v.* Beard, 9 N. C. 377, 6 Am. Dec. 773.

**94.** McCoy *v.* Beard, 9 N. C. 377, 6 Am. Dec. 773.

**95.** Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

question of suretyship to be tried and determined, and has procured an order to be made as provided by statute, that the principal's property shall be first exhausted, the sheriff may be held liable for levying upon the property of the surety before exhausting that of the principal.[96]

**8. Denial of Debtor's Right to Designate Property For Levy.** Where the debtor has the right to point out the property to be levied on [97] the sheriff is liable if he fails to respect such designation [98] or to allow the debtor an opportunity to designate.[99]

**9. Seizure of Property Without Process or Warrant.** An officer who, without any process, seizes property against the protest of the owner, is liable therefor, although he believed that his act was authorized;[1] and even though the statute authorizes a seizure of property without a warrant under certain circumstances, an officer acting under such statute is held to a strict compliance with all its requirements, failing in which he is liable for the seizure.[2]

**10. Seizure of Property Not Covered by Process or Order.**[3] Where a process or order of court requires the sheriff to seize or take possession of certain designated property he is liable if, under color of such process or order, he seizes other property,[4] and no demand is necessary before bringing an action against him for such unlawful seizure.[5]

**11. Seizure of Property Outside of Jurisdiction.** A sheriff or constable who seizes property outside of the territory over which his authority extends [6] is to be regarded as though he were a stranger having no writ, and is liable in trespass to the owner.[7] But it has been held that a constable who is sued for taking property out of his precinct by virtue of mesne process may show, in mitigation of damages, that, having taken the property to a place within his precinct, he attached it there, on the same process, as the property of the same debtor, subsequent to the commencement of the action against him.[8]

**12. Seizure of Property Not Subject to Levy** [9] **— a. In General.** A sheriff is liable for damages caused by his act in seizing property not subject to levy under the writ which he was assuming to execute.[10]

96. Bliss *v.* Douch, 110 Ind. 296, 11 N. E. 293, 80 Ind. 316.

97. See Attachment, 4 Cyc. 581; Executions, 17 Cyc. 1083.

98. Fatheree *v.* Williams, 13 Tex. Civ. App. 430, 35 S. W. 324.

99. Handy *v.* Clippert, 50 Mich. 355, 15 N. W. 507; Fatheree *v.* Williams, 13 Tex. Civ. App. 430, 35 S. W. 324.

1. Ader *v.* Foley, 50 La. Ann. 1262, 24 So. 333.

2. Adams *v.* Allen, 99 Me. 249, 59 Atl. 62; Kent *v.* Willey, 11 Gray (Mass.) 368, holding that an officer who seizes property under St. (1855) c. 214, § 13, without a warrant, for being employed in the illegal transportation of intoxicating liquors, and does not procure a warrant within a reasonable time afterward, is liable as a trespasser.

3. Seizure of property not subject to levy see *infra*, V, E, 12.

4. Burnet *v.* Union Distilling Co., 90 Ill. App. 305; Arthur *v.* Flanders, 10 Gray (Mass.) 107; Kane *v.* Hutchisson, 93 Mich. 488, 53 N. W. 624; Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Popkin *v.* Lubin, 30 Misc. (N. Y.) 773, 62 N. Y. Suppl. 480.

5. Kane *v.* Hutchisson, 93 Mich. 488, 53 N. W. 624.

6. Territorial extent of authority see *supra*, III, A, 2.

7. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622.

*Iowa.*— Parmlee *v.* Leonard, 9 Iowa 131.

*Kentucky.*— Board *v.* Head, 3 Dana 489.

*Vermont.*— Stewart *v.* Martin, 16 Vt. 397; Emerson *v.* Bailey, 11 Vt. 656.

*Canada.*— Cook *v.* Jarvis, 4 U. C. Q. B. O. S. 250.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 180 *et seq.*

Demand of copy of writ as prerequisite to action see Varley *v.* Zahn, 11 Serg. & R. (Pa.) 185.

8. Stewart *v.* Martin, 16 Vt. 397.

9. Property subject to levy see Attachment, 4 Cyc. 554; Executions, 17 Cyc. 940.

Seizure of property not covered by process or order see *supra*, V, E, 10.

10. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622, levy on property in one county under execution from another county.

*Kentucky.*— Secrets *v.* Markwell, 11 Bush 316; Phillips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

*Louisiana.*— Carraby *v.* Morgan, 5 Mart. N. S. 499.

*Massachusetts.*— Mack *v.* Parks, 8 Gray 517, 69 Am. Dec. 267, holding that as a

**b. Exempt Property** [11] — (I) *IN GENERAL.* A sheriff or constable may be held liable for the damage which has resulted from his making a levy on exempt property,[12] and refusing to restore the same,[13] where he knew,[14]

watch on a debtor's person is not liable to attachment, an officer who, on its being handed to him by the debtor merely to be looked at, and while still annexed to a silk guard which passes around the debtor's neck, severs the guard and attaches the watch, is a trespasser.

*New York.*— McAllaster *v.* Bailey, 127 N. Y. 583, 28 N. E. 591 [*affirming* 1 N. Y. Suppl. 12] (money in hands of assignee for benefit of creditors, the avails of the property assigned); Grunberg *v.* Grant, 3 Misc. 230, 22 N. Y. Suppl. 747.

*Vermont.*— See Reed *v.* Shepardson, 2 Vt. 120, 19 Am. Dec. 697.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 182.

**Facts not amounting to voluntary payment** — Where defendant sheriff, under an attachment, pretended to levy on a certain fund which plaintiff claimed the right to hold as assignee for the benefit of creditors, and plaintiff objected to such levy, but defendant still asserted his right to the possession of the fund, and demanded its surrender, whereupon plaintiff drew the money out of the bank, and laid it on a table, at the same time forbidding defendant to take it, this was not a voluntary payment to defendant, and a taking by him, under the circumstances, amounted to a conversion. McAllaster *v.* Bailey, 127 N. Y. 583, 28 N. E. 591 [*affirming* 1 N. Y. Suppl. 12].

11. Exemptions generally see EXEMPTIONS, 18 Cyc. 1369; HOMESTEADS, 21 Cyc. 448.

12. *Arizona.*—Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777.

*Arkansas.*— Meadow *v.* Wise, 41 Ark. 285; Parham *v.* McMurray, 32 Ark. 261.

*California.*— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

*Colorado.*— Duncan *v.* Burchinell, 14 Colo. App. 471, 61 Pac. 61.

*Connecticut.*— Williams *v.* Miller, 16 Conn. 144.

*Illinois.*— Campbell *v.* Conover, 26 Ill. 64, statutory liability for three times the value of exempt property taken.

*Kentucky.*— Prewitt *v.* Walker, 7 J. J. Marsh. 332; Buck *v.* Ball, 58 S. W. 468, 22 Ky. L. Rep. 614; Whittington *v.* Pence, 47 S. W. 877, 20 Ky. L. Rep. 900, 38 S. W. 843, 18 Ky. L. Rep. 942.

*Maine.*— Wentworth *v.* Sawyer, 76 Me. 434; Foss *v.* Stewart, 14 Me. 312.

*Massachusetts.*— Copp *v.* Williams, 135 Mass. 401; Woods *v.* Keyes, 14 Allen 236, 92 Am. Dec. 765; Mannan *v.* Merritt, 11 Allen 582; Deyo *v.* Jennison, 10 Allen 410; Clapp *v.* Thomas, 7 Allen 188.

*Minnesota.*— Murphy *v.* Sherman, 25 Minn. 196; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

*Missouri.*— Muelrath *v.* Roemheld, 3 Mo. App. 564. See also State *v.* Lindsay, 73 Mo. App. 473.

*Nebraska.*— Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945.

*New Hampshire.*— Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189; Cooper *v.* Newman, 45 N. H. 339.

*New York.*— Frost *v.* Mott, 34 N. Y. 253; Hoyt *v.* Van Alstyne, 15 Barb. 568.

*North Carolina.*— Duvall *v.* Rollins, 68 N. C. 220.

*North Dakota.*— Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

*Ohio.*— Frost *v.* Shaw, 3 Ohio St. 270.

*Pennsylvania.*— Freeman *v.* Smith, 30 Pa. St. 264; Schock *v.* Waidelich, 27 Pa. Super. Ct. 215; Brechtel *v.* Cortright, 13 Pa. Super. Ct. 384.

*South Dakota.*— Thompson *v.* Donahue, 16 S. D. 244, 92 N. W. 27; Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840.

*Texas.*— Rodgers *v.* Ferguson, 36 Tex. 544; Laroux *v.* Cornwell, 40 Tex. Civ. App 529, 90 S. W. 537.

*Vermont.*— Luce *v.* Hoisington, 56 Vt. 436.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 182.

**Where final process is never issued** no action can be maintained against an officer for refusing the benefits of the Exemption Act in the execution of mesne process. Blakeley *v.* Smith, 27 Pa. Super. Ct. 583.

**An officer seizing exempt property is not a trespasser ab initio,** as exemption is a personal privilege which is waived if not asserted by the debtor. Hammersmith *v.* Avery, 18 Nev. 225, 2 Pac. 55.

**An officer who levies on both exempt and non-exempt property** is not a trespasser *ab initio* as to all the property. Wentworth *v.* Sawyer, 76 Me. 434.

**Levy on exempt property in possession of bailee.**—Where plaintiff leased to another person his only cow, which was therefore exempt, for the term of one year, and, before the expiration of that time, a deputy sheriff levied upon the cow by virtue of an execution in his hands against plaintiff, but left her in the possession of the bailee until the expiration of the year, and then drove her away and sold her, it was held that, although plaintiff might not have been able to sustain trespass against the deputy for the levy, within the year, yet the cow, after the determination of the bailment, was constructively in plaintiff's possession, and the driving away of the cow was a fresh trespass, for which plaintiff might maintain the action. Keyes *v.* Howe, 18 Vt. 411.

13. Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777.

14. Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945; Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189; Sullivan *v.* Farley, 63 How. Pr. (N. Y.) 371.

**The mere silence of the party** affords no protection to the officer. Frost *v.* Mott, 34 N. Y. 253.

or was bound under the law to know,[15] or had reasonable ground for believing,[16] that the property was specifically exempt, or the exemption was claimed by the debtor,[17] or some other person entitled to take advantage of his statutory exemption.[18] But a mere seizure of property does not render the sheriff liable where he did not know that the property was exempt.[19] Neither does the officer incur any liability by making the levy where the debtor has waived his exemption,[20] or assented to the levy on the property,[21] or where the property is not specifically exempt by statute and the debtor declines to designate the articles which he desires to claim.[22] Where the statute requires an officer levying an execution to see that an appraisement of the debtor's property is made for the purpose of determining how much thereof he is entitled to hold exempt from execution, the officer cannot, in an action against him by the debtor for taking exempt property, claim in defense that the property was not shown to be exempt because no appraisement was made.[23]

(II) *FAILURE TO ALLOW OR SET OFF EXEMPTIONS.* Under some statutes the rule is that the sheriff may in the first instance levy upon any of the debtor's property which he can find,[24] and hold the same until an inventory and appraisement can be made;[25] but when he does so it becomes his duty to apprise the debtor of his exemption rights,[26] and to allow him to select the property which

**An officer who attaches an entire flock of sheep,** without leaving defendant the ten sheep exempt by law, cannot justify the wrong by the claim that he did not know which to leave, when he did not request defendant to designate them. Frost *v.* Mott, 34 N. Y. 253.

15. Frost *v.* Shaw, 3 Ohio St. 270.

16. Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

17. Campbell *v.* Conover, 26 Ill. 64; Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; Buck *v.* Bull, 58 S. W. 468, 22 Ky. L. Rep. 614; Sullivan *v.* Farley, 63 How. Pr. (N. Y.) 371.

**A claim of exemption as to all the debtor's property** to an amount greater than the law allows is not such a selection as the law intends and the officer may safely disregard it. Brown *v.* Hoffmeister, 71 Mo. 411.

**When affidavit of exemption unnecessary.—** Under Code, § 2465, which provides that no officer levying on property exempt from execution is liable for damages unless defendant make affidavit that the property about to be levied on is exempt, and exhibit the same to such officer, a purchaser of property which, in the hands of the vendor, was exempt from execution, may, without making such affidavit, maintain an action against a sheriff who levies on it under an execution against the vendor. Cook *v.* Baine, 37 Ala. 350.

18. Thompson *v.* Donahoe, 16 S. D. 244, 92 N. W. 27, holding that where the debtor's wife claims the exemption the husband is entitled to recover from the sheriff as for a wrongful levy on his refusal to have the property appraised.

19. *Indiana.*— Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789.

*New York.*— Sullivan *v.* Farley, 63 How. Pr. 371.

*North Carolina.*— Henson *v.* Edwards, 32 N. C. 43; State *v.* Morgan, 25 N. C. 186, 38 Am. Dec. 714.

*Ohio.*— Frost *v.* Shaw, 3 Ohio St. 270.

*Tennessee.*— McCoy *v.* Dail, 6 Baxt. 137.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 182.

20. Ward *v.* Deadman, 124 Ala. 288, 26 So. 916, 82 Am. St. Rep. 172 (holding that under Code, § 2107, providing, in case claim of waiver of homestead or other exemption is sustained, for the indorsement of the fact of waiver on the execution, such indorsement is a command to the officer to disregard any claim of defendant in contravention thereof, and he is justified in obeying it, as in case of other mandates which he is legally bound to execute, and this whether or not the pleadings averred or the judgment entry disclosed a waiver); Smith *v.* Chadwick, 51 Me. 515.

**Indorsement on writ of partial waiver.—** An indorsement on a fieri facias made by the prothonotary at the instance of plaintiff, calling the sheriff's attention to a waiver of exemption, will not relieve the sheriff if he seizes property to which the waiver does not apply; nor does a reference to a waiver in the judgment entered by a justice of the peace relieve the sheriff in such a case. Schock *v.* Waidelich, 27 Pa. Super. Ct. 215.

21. Duncan *v.* Burchinell, 14 Colo. App. 471, 61 Pac. 61.

22. Behymer *v.* Cook, 5 Colo. 395.

23. Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840.

24. Tullis *v.* Orthwein, 5 Minn. 377; Bonnel *v.* Dunn, 29 N. J. L. 435 [*reversing* 28 N. J. L. 153].

**A wrongful detention must be shown** in order to subject the sheriff to liability for a levy on exempt property. Tullis *v.* Orthwein, 5 Minn. 377.

25. Bonnel *v.* Dunn, 29 N. J. L. 435 [*reversing* 28 N. J. L. 153].

26. Linck *v.* Troll, 84 Mo. App. 49; State *v.* O'Neill, 78 Mo. App. 20; State *v.* Lindsay, 73 Mo. App. 473; State *v.* Sondag, 15 Mo. App. 312.

**Where a debtor claimed all his property as exempt before a levy,** but the officer afterward levied on a part of it, there was no

he will hold as exempt,[27] or in a proper case to set off the debtor's exemptions for him,[28] and he is liable to the debtor for failing to perform his duty in these respects.[29] But it has been held that where defendant learns of his rights in time to make application for his exemption, and does make such application, he can recover nothing on a petition which alleges that the sheriff failed to apprise him of his exemption rights.[30]

(III) *INTERMINGLING OF EXEMPT AND NON-EXEMPT PROPERTY.* Where the exempt property is confused with property not exempt, the sheriff is not liable for levying on the whole unless the debtor sets apart, or claims to set apart, the exempt property.[31]

(IV) *SECOND LEVY AFTER RELEASE OF PROPERTY AS EXEMPT.* Where an officer has levied on goods and afterward released them as exempt from seizure, an attempt by such officer to make a second seizure of such goods is without authority of law and a trespass.[32]

(V) *NECESSITY FOR CLAIM OF EXEMPTION.* A demand or claim of exemption is necessary to support an action against the officer where he did not know and was not chargeable with knowledge that the property levied on was exempt;[33] but no demand is necessary where the officer knows of the exemption or wrongfully levies on articles which are specifically exempted by statute.[34]

(VI) *CLAIM OF ARTICLES OTHER THAN THOSE SET OFF.* Where a debtor has more property of a particular kind than is exempt from execution, and a writ is levied upon a portion of such property, leaving as much as the law exempts, and thereafter the debtor claims as exempt a portion of the property levied on, and the residue in the hands of the officer would not be sufficient to satisfy the writ, the debtor must, in order to make good his claim of exemption, surrender to the officer the other property of the same general kind subject to execution, or so much as may be necessary to satisfy the writ, and if he fails to do so he is not entitled to recover against the officer for an unlawful seizure.[35]

**e. Property In Custodia Legis.** As property *in custodia legis* is not subject to seizure under other process,[36] an officer may be held liable for any damage resulting from a seizure or attempt to seize the same.[37] And where plaintiff, a constable, attached certain goods, and defendant, another constable, subsequently attached the same goods while they were in plaintiff's custody, the fact that the person under whose process plaintiff acted had agreed to save him harmless for not removing the property did not affect his right of action against defendant for the trespass.[38] An officer who in levying an execution on goods in the

necessity for the officer afterward to go through the idle ceremony of informing the debtor of his rights under the exemption law, and he was not liable for failing to do so. Brown *v.* Hoffmeister, 71 Mo. 411.

27. Tullis *v.* Orthwein, 5 Minn. 377; Wilson *v.* Ellis, 28 Pa. St. 238. See also Bonnel *v.* Dunn, 29 N. J. L. 435 [*reversing* 28 N. J. L. 153]; Nevling *v.* Arnot, 42 Leg. Int. (Pa.) 489.

28. Wyckoff *v.* Wyllis, 8 Mich. 48; Linck *v.* Troll, 84 Mo. App. 49; State *v.* O'Neill, 78 Mo. App. 20; State *v.* Lindsay, 73 Mo. App. 473; State *v.* Sondag, 15 Mo. App. 312.

29. See *supra*, notes 26–28.

Demand for copy of warrant as prerequisite to recovery see Bassett *v.* Walker, 3 Pa. Co. Ct. 183.

30. State *v.* O'Neill, 78 Mo. App. 20.

31. Smith *v.* Chadwick. 51 Me. 515. See also Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726.

The intermingling in the owner's house of articles of household furniture, which are exempt from attachment with other similar articles not so exempt is not such a confusion of goods as will justify a constable, on failure of the owner to claim any of the articles as exempt, in attaching all of them, and he may be held liable for conversion if he does so. Copp *v.* Williams, 135 Mass. 401.

32. State *v.* Davies, 80 Mo. App. 239.

33. Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; Sullivan *v.* Farley, 63 How. Pr. (N. Y.) 371; Frost *v.* Shaw, 3 Ohio St. 270; McCoy *v.* Dail, 6 Baxt. (Tenn.) 137.

34. Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 765; Murphy *v.* Sherman, 25 Minn. 196; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

35. Keybers *v.* McComber, 67 Cal. 395, 7 Pac. 838.

36. See ATTACHMENT, 4 Cyc. 569; EXECUTIONS, 17 Cyc. 980; REPLEVIN, 34 Cyc. 1368.

37. Pond *v.* Skidmore, 40 Conn. 213; Robinson *v.* Ensign, 6 Gray (Mass.) 300.

38. Huntley *v.* Bacon, 15 Conn. 267.

custody of another officer under a prior levy interferes with the latter's possession is liable only for nominal damages, if the first execution is subsequently satisfied by the sale of part of the property levied on.[39]

**13. Seizure of Property Subject to Lien[40] or Encumbrance — a. Property Subject to Chattel Mortgage.**[41] Under the common-law rule that the equity of a mortgagor of chattels was not subject to attachment[42] or execution[43] a sheriff has been held liable as a trespasser where he seized mortgaged chattels under process running against the mortgagor;[44] but under the modern rule that the mortgagor's interest is subject to levy[45] it is held that where personal property subject to a chattel mortgage remains in the possession of the mortgagor, the sheriff incurs no liability to the mortgagee by seizing the same under process against the mortgagor,[46] where he does nothing to place the property beyond the reach of the mortgagee[47] or to prevent him from taking possession of it when his right of possession accrues.[48] But where the mortgagee of chattels is in possession an officer renders himself liable to the mortgagee by levying on the chattels under process against the mortgagor;[49] and where the statute requires the officer

39. Allen *v.* Davis, 53 Mo. App. 15.

40. Lien generally see LIENS, 25 Cyc. 655.

41. Chattel mortgage generally see CHATTEL MORTGAGES, 6 Cyc. 980.

42. See ATTACHMENT, 4 Cyc. 557; CHATTEL MORTGAGES, 7 Cyc. 52.

43. See EXECUTIONS, 17 Cyc. 961.

44. Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484; Watson *v.* Macquire, 5 C. B. 836, 57 E. C. L. 836; Boys *v.* Smith, 8 U. C. C. P. 248; Porter *v.* Fluitoff, 6 U. C. C. P. 335.

**Notice that property is mortgaged is sufficient** to put a sheriff levying an attachment on inquiry, although he did not know to whom the mortgage was given. Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484.

**An officer is bound by actual notice of a prior mortgage,** whether he receives notice before or after the writ is in his hands. Stewart *v.* Smith, 60 Iowa 275, 14 N. W. 310.

45. See ATTACHMENT, 4 Cyc. 557; CHATTEL MORTGAGES, 7 Cyc. 52; EXECUTIONS, 17 Cyc. 962.

46. *Illinois.*— People *v.* Dickson, 65 Ill. App. 99.

*Massachusetts.*— Cousins *v.* O'Brien, 188 Mass. 146, 74 N. E. 289; Horne *v.* Briggs, 98 Mass. 510.

*Missouri.*— State *v.* White, 70 Mo. App. 1.

*Nebraska.*— Locke *v.* Shreck, 54 Nebr. 472, 74 N. W. 970.

*New Jersey.*— Ayres *v.* Tinsman, 74 N. J. L. 295, 65 Atl. 887.

*New York.*— Hall *v.* Samson, 23 How. Pr. 84.

*Canada.*— Street *v.* Hamilton, 5 U. C. Q. B. O. S. 658. See also Swift *v.* Cobourg, etc., R. Co., 5 Can. L. J. 253.

See 43 Cent Dig. tit. "Sheriffs and Constables," § 184.

**Notice to mortgagee.**—A sheriff is not liable for non-compliance with Wash. Code, § 1990, providing for notice to the mortgagee on levy on mortgaged personalty, unless it appears that, being well informed of the mortgagee's address, he failed to notify him of a levy upon mortgaged chattels, and that the mortgagee lost his security or suffered damage from the sheriff's acts. Byrd *v.* Forbes, 3 Wash. Terr. 318, 13 Pac. 715.

**Necessity for demand.**—A sheriff cannot be sued in trover for levying on, and removing to a safe place, goods in the possession of a mortgagor thereof, before default in the payment of the debt secured, and before any claim of the mortgagee to the possession of the goods, until a demand for the goods has been made by the mortgagee. Hall *v.* Samson, 19 How. Pr. (N. Y.) 481.

47. Locke *v.* Shreck, 54 Nebr. 472, 74 N. W. 970.

48. Locke *v.* Shreck, 54 Nebr. 472, 74 N. W. 970.

**Detaining property after demand for possession.**— The seizure amounts to a breach of a condition in the mortgage against any sale or alienation and where the mortgage gives the mortgagee a right to possession upon such a breach, the sheriff is liable to the mortgagee if he detains the property after the mortgagee has demanded of him the possession thereof. State *v.* White, 70 Mo. App. 1.

49. *California.*— Rider *v.* Edgar, 54 Cal. 127; McRae *v.* Lackmann, 8 Cal. App. 241, 96 Pac. 505.

*Kansas.*— See Johnson *v.* Anderson, 60 Kan. 578, 57 Pac. 513.

*Minnesota.*— Edson *v.* Newell, 14 Minn. 228.

*New Jersey.*— Fox *v.* Cronan, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190, holding that where a sheriff, with notice of the mortgagee's claim, attaches the entire mortgaged property, and not the interest alone of the mortgagor, and takes it from the possession of the mortgagee, and it is subsequently sold by an auditor by virtue of such attachment, the sheriff, by reason of the wrongful levy, is liable to the mortgagee for the mortgage debt.

*Texas.*— Jones *v.* Hess, (Civ. App. 1898) 48 S. W. 46.

*Canada.*— Peterson *v.* Maughan, 39 U. C. Q. B. 371. See also Swift *v.* Cobourg, etc., R. Co., 5 Can. L. J. 253 (where it is said: "If the mortgagee has the legal custody of the

upon seizing mortgaged chattels to tender to or deposit for the mortgagee the amount due him, a sheriff is liable for a seizure without such tender or deposit.[50] The officer may show in defense that the mortgage is invalid,[51] or that the mortgage debt had no real existence, in which case the mortgagee's damages will be only in reference to the possession.[52] Under a statute requiring that a mortgagee of property attached by another, demanding payment of the money due, shall state in writing a true account of his debt for which the property is liable, and deliver it to the attaching creditor or officer, a mortgagee cannot maintain a suit for conversion against an attaching officer where he had demanded more than the amount due him.[53]

**b. Property Subject to Seller's Lien.**[54] A sheriff who seizes goods while they are in transit under an attachment against the purchaser is liable to the seller for refusing to recognize the seller's lien or right of stoppage *in transitu*.[55]

**c. Property Subject to Carrier's Lien.**[56] A sheriff has been held liable for seizing under process goods shipped for transportation and thus subject to the lien of the master or ship-owner for freight, expenses, charges, etc., without furnishing indemnity.[57]

**d. Property Subject to Factor's Lien.**[58] It has been held that where a sheriff seizes under attachment goods in the possession of a consignee, who has made advances thereon, he is liable to the consignee as a trespasser.[59]

**e. Property Subject to Landlord's Lien.**[60] The sheriff incurs no liability by levying on property of a tenant on the demised premises where the property is not removed from the premises;[61] but in some states an officer is liable to a landlord for removing from demised premises property levied on under execution without paying rent then due,[62] although in order to enforce such liability it must be shown that the officer had notice that rent was due[63] before he removed the goods.[64]

goods the sheriff cannot of course upon an execution against the goods of the mortgagor, take the property from the custody of the mortgagee, but still, I apprehend he must seize them in order to sell the mortgagor's interest"); Street *v.* Hamilton, 5 U. C. Q. B. O. S. 658.

See 43 Cent Dig. tit. "Sheriffs and Constables," § 184.

**What constitutes a taking.**—A levy by the sheriff on personal property under attachments against a mortgagor thereof, and the appointment of a keeper therefor, is a sufficient "taking" to justify an action of trover against him, although the property is not disturbed, and is released before any demand from plaintiff. Rider *v.* Edgar, 54 Cal. 127.

50. Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601, holding that a sheriff who, at the suit of the mortgagor's creditor, attaches a mortgaged crop of grain, and places a keeper in charge thereof, makes himself liable as for a conversion, although he does not remove the same, and releases the attachment two days after an action commenced against him by the mortgagee.

51. Fletcher *v.* Wrighton, 184 Mass. 547, 69 N. E. 313.

52. Jones *v.* Hess, (Tex. Civ. App. 1898) 48 S. W. 46.

53. Hanly *v.* Davis, 170 Mass. 517, 49 N. E. 914.

54. Seller's lien generally see SALES, 35 Cyc. 486.

55. Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

56. Carrier's lien generally see CARRIERS, 6 Cyc. 501.

57. Campbell *v.* Connor, 70 N. Y. 424 [*affirming* 41 N. Y. Super. Ct. 459].

58. Factor's lien generally see FACTORS AND BROKERS, 19 Cyc. 156.

59. Brownell *v.* Carnley, 3 Duer (N. Y.) 9. *Contra*, Kenner *v.* Morgan, 3 Mart. (La.) 209.

60. Landlord's lien generally see LANDLORD AND TENANT, 24 Cyc. 1244.

61. Clarke *v.* Farrell, 31 U. C. C. P. 584.

62. Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098]; *In re* Connor, 12 Rich. (S. C.) 349; Kingston *v.* Shaw, 6 Can. L. J. 280. See also Robertson *v.* Fortune, 9 U. C. C. P. 427.

**Removing goods of subtenant.**—A sheriff is not liable to a landlord for removing the goods of an under-tenant from the demised premises, leaving the rent unpaid, although notice of such rent being due is duly served. Brown *v.* Fay, 6 Wend. (N. Y.) 392.

**Sheriff not liable for rent becoming due after levy.**—*In re* Connor, 12 Rich. (S. C.) 349.

63. Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098]; Ayres *v.* Johnson, 7 N. J. L. 119; Kingston *v.* Shaw, 6 Can. L. J. 280.

**Formal notice not necessary.**—Sharpe *v.* Fortune, 9 U. C. C. P. 523.

**Notice need not be in writing.**—Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098].

64. Ayres *v.* Johnson, 7 N. J. L. 119; Kingston *v.* Shaw, 6 Can. L. J. 280.

**f. Notice of Claim.** It is sometimes required that a mortgagee, in order to have a right of action against an officer for a levy on the mortgaged property, must present to the officer a just and true account of his claim [65] and demand payment.[66]

**14. Seizure of Property Not Belonging to Defendant — a. In General.** Where a sheriff or constable, acting under a writ which specifies no particular property to be levied on thereunder,[67] levies on property belonging to a person other than defendant in the writ, he is liable to the owner of the property for the resulting damage; [68] and the sheriff's liability for such a wrongful seizure is not dependent

65. Hills *v.* Farrington, 6 Allen (Mass.) 80 (holding that where a mortgage was given to secure the payment of a round sum at a future date, and all other sums of money which should become due for goods sold by the mortgagee to the mortgagor, a statement by the mortgagee to an attaching officer of the aggregate amount due therefor was a sufficient account of the debt or demand if the particular items were not asked for); Haskell *v.* Gordon, 3 Metc. (Mass.) 268.

66. Haskell *v.* Gordon, 3 Metc. (Mass.) 268.

**Excessive demand.**—A demand is not invalidated by including therein the costs of protest of the notes secured by the mortgage where the amount due exceeds the value of the property. Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896.

67. Meadow *v.* Wise, 41 Ark. 285.

**Seizure of property specified in writ** see *infra*, V, E, 14, k.

68. *Alabama.*— Rogers *v.* King, 151 Ala. 628, 44 So. 655; Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Cambell *v.* Anderson, 107 Ala. 656, 18 So. 218; Locke *v.* Garrett, 16 Ala. 698; Lyon *v.* Goree, 15 Ala. 360.

*Arkansas.*— Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222; Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Meadow *v.* Wise, 41 Ark. 285.

*California.*— Curtner *v.* Lyndon, 128 Cal. 35, 60 Pac. 462; Black *v.* Clasby, 97 Cal. 482, 32 Pac. 564; Van Pelt *v.* Littler, 14 Cal. 194; Markley *v.* Rand, 12 Cal. 275; Rowe *v.* Bradley, 12 Cal. 226; Rhodes *v.* Patterson, 3 Cal. 469.

*Colorado.*— Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24.

*Delaware.*— Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

*Georgia.*—Bodega *v.* Parkerson, 60 Ga. 516; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

*Illinois.*— Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286 [*affirming* 81 Ill. App. 556]; Pike *v.* Colvin, 67 Ill. 227; Ilg *v.* Burbank, 59 Ill. App. 291.

*Indian Territory.*— Orr, etc., Shoe Co. *v.* Frankenthal, 4 Indian Terr. 368, 69 S. W. 906.

*Iowa.*— Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Duke *v.* Vincent, 29 Iowa 308. See also Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569.

*Kansas.*— Cook *v.* Higgins, 66 Kan. 762, 71 Pac. 259; Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200.

*Kentucky.*— Lewis *v.* Mansfield, 78 Ky. 460; Harrison *v.* Shanks, 13 Bush 620; Emanuel *v.* Cocke, 6 Dana 212; Vaughn *v.* Justice, 78 S. W. 424, 25 Ky. L. Rep. 1666; Roche *v.* Link, 15 Ky. L. Rep. 702; Brock *v.* Church, 5 Ky. L. Rep. 855.

*Louisiana.*— Mock *v.* Kennedy, 14 La. Ann. 32; James *v.* Thompson, 12 La. Ann. 174; Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294; Duperron *v.* Van Wickle, 4 Rob. 39, 39 Am. Dec. 509; Barney *v.* De Russy, 1 Rob. 75; Crocker *v.* De Passau, 5 La. 37; Peet *v.* Morgan, 6 Mart. N. S. 580; Yocum *v.* Bullit, 6 Mart. N. S. 324, 17 Am. Dec. 184; Peet *v.* Morgan, 6 Mart. N. S. 137. See also Kenner *v.* Morgan, 3 Mart. 209.

*Maine.*— Carpenter *v.* Dresser, 72 Me. 377, 39 Am. Rep. 337; Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.

*Massachusetts.*— Kelley *v.* Swift, 127 Mass. 187; Davis *v.* Stone, 117 Mass. 486; Mitchell *v.* Stetson, 7 Cush. 435; Boyd *v.* Brown, 17 Pick. 453; Com. *v.* Kennard, 8 Pick. 133; Hallowell, etc., Bank *v.* Howard, 14 Mass. 181.

*Michigan.*— Weber *v.* Henry, 16 Mich. 399; Rathbun *v.* Ranney, 14 Mich. 382.

*Minnesota.*— Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733; Caldwell *v.* Arnold, 8 Minn. 265.

*Mississippi.*— Yarborough *v.* Harper, 25 Miss. 112.

*Missouri.*— State *v.* Hadlock, 52 Mo. App. 297; Vaughn *v.* Fisher, 32 Mo. App. 29; Kreher *v.* Mason, 25 Mo. App. 291; Kreher *v.* Mason, 20 Mo. App. 29; Dowell *v.* Taylor, 2 Mo. App. 329.

*Nebraska.*— Bartlett *v.* Cheeseborough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919.

*New Hampshire.*— Kingsbury *v.* Pond, 3 N. H. 511.

*New Jersey.*— Farrel *v.* Colwell, 30 N. J. L. 123.

*New York.*— Moravec *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533; Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Sharp *v.* Lamy, 37 N. Y. App. Div. 136, 55 N. Y. Suppl. 784; Alvord *v.* Haynes, 13 Hun 26; Hoyt *v.* Van Alstyne, 15 Barb. 568; Stewart *v.* Wells, 6 Barb. 79; Kuhlman *v.* Orser, 5 Duer 242; Siersema *v.* Meyer, 38 Misc. 358, 77 N. Y. Suppl. 901; Coppola *v.* Gross, 34 Misc. 807, 68 N. Y. Suppl. 942; Rathowsky *v.* Dunn, 64 N. Y.

upon his selling the property.[69] The officer is liable for taking property in which the execution debtor has no interest, although he assumes to levy only on the interest of the execution debtor therein.[70] But where property levied on belongs to the execution debtor, the sheriff, levying execution thereon, is not liable to a third person claiming the same, although there is an agreement, unknown to the sheriff, between such person and the execution creditor, whereby the creditor is estopped to question such person's ownership of the property.[71]

**b. Property of Person of Same Name as Defendant.** Although two persons or corporations have the same name, the sheriff is liable for executing against one of them a writ directed against the other.[72]

**c. Property Purchased Pendente Lite.** One who, during the pendency of an action of replevin[73] and with notice thereof, purchases the property from defendant, does so at his peril, and must abide the result of the action, and the sheriff incurs no liability by taking the property from his possession.[74]

**d. Property Fraudulently Conveyed.**[75] In an action against a sheriff for seizing property of one person under process against another he may show that the property was conveyed to the claimant by the debtor in fraud of creditors,[76] provided he makes the necessary showing that he represents a creditor of the

Suppl. 934; Chapman *v.* Douglas, 15 Abb. Pr. N. S. 421; Wintringham *v.* Lafoy, 7 Cow. 735.

*North Carolina.*—Gay *v.* Mitchell, 146 N. C. 509, 60 S. E. 426; Burgin *v.* Burgin, 23 N. C. 453.

*Ohio.*— Searles *v.* Abbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 64.

*Pennsylvania.*— Dixon *v.* White Sewing Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659; Rothermel *v.* Marr, 98 Pa. St. 285; Evans *v.* Matson, 56 Pa. St. 54; Welsh *v.* Bell, 32 Pa. St. 12; McMichael *v.* Mason, 13 Pa. St. 214; Dallam *v.* Fitler, 6 Watts & S. 323; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733; Oliver *v.* Wheeler, 26 Pa. Super. Ct. 5; Berwald *v.* Ray, 8 Pa. Super. Ct. 365, 43 Wkly. Notes Cas. 217; Bank *v.* Allen, 1 Del. Co. 277; Lehr *v.* Brodbeck, 12 York Leg. Rec. 143.

*Rhode Island.*— Hunt *v.* Lathrop, 7 R. I. 58.

*South Carolina.*— Cholett *v.* Hart, 2 Bay 156.

*South Dakota.*— Keiffer *v.* Smith, 16 S. D. 433, 93 N. W. 645.

*Texas.*— Vickery *v.* Crawford, 93 Tex. 273, 55 S. W. 560, 77 Am. St. Rep. 891, 49 L. R. A. 773; Heidenheimer *v.* Sides, 67 Tex. 32, 2 S. W. 87; Lyons *v.* Reed, 2 Tex. Unrep. Cas. 581; Terry *v.* Webb, (Civ. App. 1906) 96 S. W. 70; Maddox *v.* Tierney, 3 Tex. App. Civ. Cas. § 396.

*Utah.*— Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100.

*Virginia.*—Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7; Claytor *v.* Anthony, 6 Rand. 285.

*Washington.*— Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612; Beveridge *v.* Welch, 7 Wis. 465.

*United States.*— McDowell *v.* McCormick, 90 Fed. 393.

*England.*— Ackworth *v.* Kempe, Dougl. (3d ed.) 40, 99 Eng. Reprint 30; London, etc., R. Co. *v.* Cable, 80 L. T. Rep. N. S. 119; Sanderson *v.* Baker, W. Bl. 832, 96 Eng. Reprint 490, 3 Wils. C. P. 309, 95 Eng. Reprint 1072.

*Canada.*— Robinson *v.* Rapelje, 4 U. C. Q. B. 289; Grant *v.* McLean, 3 U. C. Q. B. O. S. 443.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 187 *et seq.*

**Sale by successor in office.**— The rule that a wrong-doer cannot avoid liability by handing over the fruits of his trespass to another applies where a sheriff takes the goods of one person under an attachment against another, and a recovery may be had against him for the trespass after he has gone out of office, although his successor sold the goods and received the proceeds arising therefrom. Duke *v.* Vincent, 29 Iowa 308.

**The circumstances of a case may exempt a sheriff from liability** for seizing a third person's property under a writ of attachment. Whitton *v.* Jones, 2 La. Ann. 802.

**A demand upon the officers for a copy of his process** is not a prerequisite to an action for such seizure. Mollison *v.* Bowman, 5 Pa. L. J. 181.

69. Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

**Liability for sale of property not belonging to defendant** see *infra*, V, G, 11.

70. Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

71. Young *v.* Stone, 33 N. Y. App. Div. 261, 53 N. Y. Suppl. 656.

72. Hallowell, etc., Bank *v.* Howard, 14 Mass. 181, 183, where it is said: "The ignorance of the officer does not excuse him; for in such a case he is not bound to serve the precept upon either, without the express direction of the creditor, and an indemnifying engagement from him."

73. See REPLEVIN, 34 Cyc. 1342.

74. Swantz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98.

75. **Fraudulent conveyances** generally see FRAUDULENT CONVEYANCES, 20 Cyc. 323.

76. *California.*— Ellsasser *v.* Hunter, 26 Cal. 279.

*Illinois.*— Pease *v.* Anderson, 44 Ill. 218.

*Maine.*— La Page *v.* Hill, 87 Me. 158, 32 Atl. 801.

seller,[77] and if he establishes that such is the case he is not liable for making the seizure.[78]

**e. Seizure of Common Property Under Process Against Cotenant.**[79] In the absence of statute an officer under process against one of several cotenants may, without liability, seize and take into his exclusive possession the common property under a levy on defendant's interest therein;[80] but if he assumes to levy on the whole property his act is wrongful as against the cotenant not named in the process, and he is liable therefor.[81]

**f. Seizure of Partnership Property Under Process Against One Partner.**[82] It has been held that an officer who takes possession of personal property of a partnership on a writ against one partner is liable as a trespasser.[83]

*Massachusetts.*— Leggett *v.* Baker, 13 Allen 470.

*New Hampshire.*— Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605.

*New York.*— Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140; Hall *v.* Stryker, 27 N. Y. 596.

*Pennsylvania.*—Evans *v.* Matson, 56 Pa. St. 54.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 180 *et seq.*

**Seizure under warrant from insolvent court.**—A sheriff who seized, under a warrant from the insolvent court commanding him to take the property of the insolvent, personal property conveyed by the insolvent prior to his insolvency, in fraud of creditors, could not defend a suit by the purchaser against him, on the ground that the conveyance was made in fraud of creditors. La Page *v.* Hill, 87 Me. 158, 32 Atl. 801.

**In an action for the seizure and sale of a crop** under an execution against plaintiff's husband, it appeared that the crop was grown on land conveyed to plaintiff several years before the debt sought to be enforced accrued, and managed and controlled by plaintiff for her own use and benefit, and there was no evidence that the husband was in possession of the wheat, or that he managed the land or received the proceeds thereof, and it was held that defendant could not show that the husband had transferred the land to plaintiff in fraud of his creditors. Sanders *v.* Chandler, 26 Minn. 273, 3 N. W. 351.

**Conveyance by one of two defendants.**—Where a judgment was rendered against A and B, and, A having died, an execution was issued and levied on certain property as the property of B, and the constable sold the same, and it appeared that previous to the issuing of the execution A had sold and conveyed said property to C, it was held in a suit by C against the constable to recover damages for a wrongful levy, in which suit it was assumed that A had title to the property at the time of his transfer to C, that defendant was not in a position to make out a defense by showing that A had transferred the property to C with a view to hinder and defraud his creditors. Barley *v.* Tipton, 29 Mo. 206.

**77.** Bond *v.* Endicott, 149 Mass. 282, 21 N. E. 361; Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012; Pemberton *v.* Smith, 3 Head (Tenn.) 18.

**Showing necessary where property claimed by third person** generally see *infra*, V, L, 9.

**After the discharge of attachment proceedings** an officer cannot defend his seizure and possession of goods under the attachment on the ground that they were fraudulently conveyed by the attachment defendant to the claimant. Simpson *v.* Vose, 31 Kan. 227, 1 Pac. 601.

**78.** *California.*— Ellsasser *v.* Hunter, 26 Cal. 279.

*Illinois.*— Pease *v.* Anderson, 44 Ill. 218.

*New Hampshire.*— Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605.

*New York.*— Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75, 31 N. Y. 140; Hall *v.* Stryker, 27 N. Y. 596.

*Pennsylvania.*— Helfrich *v.* Stem, 17 Pa. St. 143.

*United States.*— Carson *v.* Hawley, 122 Fed. 55, 58 C. C. A. 237.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 189, 269.

**Affirmance of sale.**—Where the fraudulent character of the sale of personal property found in the possession of the vendee makes a seizure of it by the sheriff under a writ of attachment against the vendor rightful, no subsequent affirmance of the sale, without the consent of the sheriff, by the attaching creditor, or his representative, the trustee in bankruptcy of the vendor can make the sheriff's seizure wrongful, or estop him from defending an action for conversion on account of it, on the ground that the sale was fraudulent and invalid. Carson *v.* Hawley, 122 Fed. 55, 58 C. C. A. 237.

**79. Cotenancy** generally see JOINT TENANCY, 23 Cyc. 482; TENANCY IN COMMON.

**80.** Pettingill *v.* Bartlett, 1 N. H. 87; Beezley *v.* Crossen, 16 Oreg. 72, 17 Pac. 577; Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100.

**81.** Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100.

**82. Partnership** generally see PARTNERSHIP, 30 Cyc. 334.

**83.** Michalover *v.* Moses, 19 N. Y. App. Div. 343, 46 N. Y. Suppl. 456; Cropper *v.* Coburn, 6 Fed. Cas. No. 3,416, 2 Curt. 465. See, generally, PARTNERSHIP, 30 Cyc. 600 text and note 91. But *compare* Smith *v.* Orser, 43 Barb. (N. Y.) 187 [*affirmed* in 42 N. Y. 132].

**One partner cannot recover** against a sheriff for levying upon the firm property on an execution against his copartner. Hughes *v.* Boring, 16 Cal. 81.

**g. Seizure of Wife's Property Under Process Against Husband.**[84] A sheriff or constable is liable for the resulting damage where he levies on the separate property of a married woman under process against her husband.[85]

**h. Possession of Property at Time of Seizure.** Where property is in the possession of defendant in a writ, as apparent owner, an officer does not become liable as a trespasser by making a levy thereon,[86] unless he had notice of the true ownership of the property at the date of the levy,[87] or has refused to deliver possession to the owner after he received information as to the ownership [88] and a proper demand for possession has been made.[89] A sheriff who levies upon property in the possession of a person other than defendant in the writ under which he acts does so at his own risk; [90] but he is not liable as a trespasser for making the levy if the property really belongs to defendant.[91]

**i. Confusion of Goods.**[92] Where goods of a third person are mixed with goods of the debtor so that they cannot be distinguished [93] the sheriff is not liable for

84. Separate estate of married woman generally see HUSBAND AND WIFE, 21 Cyc. 1357.

85. Atkinson *v.* Atkinson, 15 La. Ann. 491; Mock *v.* Kennedy, 14 La. Ann. 32; Alvord *v.* Haynes, 13 Hun (N. Y.) 26; Freeman *v.* Apple, 99 Pa. St. 261; Von Storch *v.* Winslow, 13 R. I. 23, 43 Am. Rep. 10.

**Seizing cattle of Indian wife.**—A sheriff is liable for levying an attachment against a man on cattle owned by his Indian wife residing on a reservation, which cattle she could not lawfully dispose of, except with the consent of the Indian agent, and which, as required by law, bore the brand of the Indian department, as well as her own brand, which was different from that of her husband; and it is immaterial that they were in the possession of the husband, or with cattle owned by him — the brands being sufficient to put him on inquiry as to the ownership. McKnight *v.* U. S., 130 Fed. 659, 65 C. C. A. 37.

86. *Alabama.*— Stephens *v.* Head, 119 Ala. 511, 24 So. 738.

*California.*— Daumiel *v.* Gorham, 6 Cal. 43.

*Iowa.*— Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426.

*Kentucky.*—Armstrong *v.* Bell, 102 Ky. 149, 42 S. W. 1131, 19 Ky. L. Rep. 1156.

*Louisiana.*— See McDonald *v.* Lewis, 4 La. Ann. 201.

*Massachusetts.*— Willard *v.* Kimball, 10 Allen 211, 87 Am. Dec. 632.

*Minnesota.*— Vose *v.* Stickney, 8 Minn. 75.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 187 *et seq.*

87. *Alabama.*— Stephens *v.* Head, 119 Ala. 511, 24 So. 738.

*California.*— Daumiel *v.* Gorham, 6 Cal. 43.

*Georgia.*— Waldrop *v.* Almand, 94 Ga. 623, 19 S. E. 994.

*Iowa.*— Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426.

*Kentucky.*—Armstrong *v.* Bell, 102 Ky. 149, 42 S. W. 1131, 19 Ky. L. Rep. 1156.

*Minnesota.*— Vose *v.* Stickney, 8 Minn. 75.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 127 *et seq.*

**Circumstances indicating possession as mere bailee.**—Where the occupation of defendant and the circumstances of his possession are such as to indicate that he holds the property as a mere bailee, the sheriff may be liable for seizing the same if it really belongs to another. See Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286 [*affirming* 81 Ill. App. 556] (where a sheriff was held liable for seizing grain in a warehouse under an execution against the warehouseman); Moore *v.* Hillabrand, 16 Abb. N. Cas. (N. Y.) 477 (where a sheriff was held liable to a consignor of goods for levying on the proceeds of the goods in the hands of the factor to whom they were consigned under process against the latter).

88. Adams *v.* Gorham, 6 Cal. 68; Armstrong *v.* Bell, 102 Ky. 149, 42 S. W. 1131, 19 Ky. L. Rep. 1156.

89. Daumiel *v.* Gorham, 6 Cal. 43; Armstrong *v.* Bell, 102 Ky. 149, 42 S. W. 1131, 19 Ky. L. Rep. 1156.

**A demand upon a special bailiff in custody of the property** is sufficient. Armstrong *v.* Bell, 102 Ky. 149, 42 S. W. 1131, 19 Ky. L. Rep. 1156.

90. *Georgia.*—Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 578.

*Illinois.*— Gauche *v.* Mayer, 27 Ill. 134.

*Louisiana.*— James *v.* Thompson, 12 La. Ann. 174.

*Massachusetts.*— Kelley *v.* Swift, 127 Mass. 187.

*South Carolina.*—Cholett *v.* Hart, 2 Bay 156.

*Virginia.*—Clayton *v.* Anthony, 6 Rand. 285.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 127 *et seq.*

**Authority from real owner.**—A sheriff who seized goods in plaintiff's possession under an execution against a person other than the owner cannot justify his trespass by an authority from the rightful owner, but plaintiff is entitled to nominal damages for the trespass to his possession. Rogers *v.* Fales, 5 Pa. St. 154.

91 Hutcheson *v.* Ross, 1 Litt. (Ky.) 217.

**Where the debtor held the legal record title to real estate** but had given bond to convey it to another person who was in possession, the officer did not become liable as a trespasser by levying on such property. Knight *v.* Mayberry, 48 Me. 158.

92. See, generally, CONFUSION OF GOODS, 8 Cyc. 570.

93. Wellington *v.* Sedgwick, 12 Cal. 469; Tuttle *v.* Hemenway, 92 Ill. App. 53.

seizing the whole,[94] where the confusion of goods is due to the act of the third person [95] and he makes no attempt to point out or have set aside his own goods on being afforded an opportunity to do so.[96] But on a demand before suit brought, properly distinguishing the goods not belonging to the debtor, the sheriff must restore them,[97] and is liable for a failure or refusal to do so.[98] Where the goods are in the debtor's possession, the sheriff is not liable for seizing the whole, although the intermixture was effected without the consent of the third person;[99] but where a debtor, with the intent to prevent a seizure of his goods on execution, has intermixed them with the goods of another in the possession of such other, and without such other's knowledge, the officer must at his peril avoid seizing the goods of the innocent third person.[1] The owner of goods levied on is not estopped to sue for their conversion, although they were mixed with others levied on, and he did not till the next day claim that they belonged to him where none of the goods belonged to the execution defendant, and he told the officer that this was the case before the levy.[2] Where merchandise belonging to a debtor has been fraudulently mixed with that of a third person and the latter points out such goods as he prefers should be taken by an officer making an attachment against the debtor, the officer is not liable for taking the goods pointed out, although they did not belong to the debtor.[3]

**j. Notice of Claim** — (1) *NECESSITY*. Where property is in the possession of defendant in a writ as apparent owner,[4] and the sheriff has no actual knowledge that another person is the true owner,[5] or the goods are so intermingled that they cannot be distinguished,[6] an action cannot be maintained against the sheriff for seizing such property until he has received notice of the true ownership,[7] and has

**The officer must show that he made a reasonable effort to distinguish** and separate the goods and was unable to do so or that from the nature of the mixture they could not be separated. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

**94.** *California.*—Wellington *v.* Sedgwick, 12 Cal. 469; Daumiel *v.* Gorham, 6 Cal. 43.

*Illinois.*— Tuttle *v.* Hemenway, 92 Ill. App. 53. *Contra*, Foote *v.* People, 14 Ill. App. 280.

*Massachusetts.*— Stearns *v.* Herrick, 132 Mass. 114; Shumway *v.* Rutter, 8 Pick. 443, 19 Am. Dec. 340.

*Mississippi.*— Smokey *v.* Peters-Calhoun Co., 66 Miss. 471, 5 So. 632, 14 Am. St. Rep. 575.

*New Hampshire.*— Gilman *v.* Hill, 36 N. H. 311; Albee *v.* Webster, 16 N. H. 362; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 188.

**95.** Tuttle *v.* Hemenway, 92 Ill. App. 53; Stearns *v.* Herrick, 132 Mass. 114. *Contra*, where there was no fraudulent intent. Foote *v.* People, 14 Ill. App. 280.

**96.** Tuttle *v.* Hemenway, 92 Ill. App. 53; Smolsey *v.* Peters-Calhoun Co., 66 Miss. 471, 5 So. 632, 14 Am. St. Rep. 575; Albee *v.* Webster, 16 N. H. 362. See also Helfrich *v.* Stenn, 17 Pa. St. 143.

**97.** Wellington *v.* Sedgwick, 12 Cal. 469; Albee *v.* Webster, 16 N. H. 362.

**98.** Moore *v.* Bowman, 47 N. H. 494.

**99.** Lewis *v.* Wittemore, 5 N. H. 364, 22 Am. Dec. 466.

**1.** Kingsbury *v.* Pond, 3 N. H. 511, so holding in a case where the debtor drove his sheep into the close of another person, where they intermixed with such other person's sheep.

**2.** Beaman *v.* Stewart, 19 Colo. App. 222, 74 Pac. 342.

**3.** Slattery *v.* Stewart, 45 Ill. 293.

**4.** Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Killey *v.* Scannell, 12 Cal. 73; Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14; Barry *v.* McGrade, 14 Minn. 163; Dodge *v.* Chandler, 9 Minn. 97; Vose *v.* Stickney, 8 Minn. 75; Mariner *v.* Wasser, (N. D. 1908) 117 N. W. 343.

**5.** George H. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Mariner *v.* Wasser, (N. D. 1908) 117 N. W. 343.

**6.** Tufts *v.* McClintock, 28 Me. 424, 48 Am. Dec. 501; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28 [*approved* in Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340]; Wilson *v.* Lane, 33 N. H. 466; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

**Designation as affecting necessity for demand.**—Where the goods of a stranger to an execution are so intermingled with goods of the execution debtor that they cannot be distinguished, and the stranger to the execution does not designate his goods, and the officer levies on the whole, a demand by the stranger for the return of his property is a condition precedent to an action against the officer by the stranger, but if the stranger to the execution offers to designate his goods and the officer refuses to allow him to do so or to heed his designation no demand is necessary before suit. Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722 [*affirming* 114 Ill. App. 483].

**7.** Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694 [*disapproving* Wellman *v.*

refused to restore the property to the true owner upon demand,[8] accompanied, in the case of intermingling, with an identification of the goods claimed.[9] Where the property is in the possession of a person other than defendant in the writ, the general rule is that the sheriff acts at his peril in seizing it, and if defendant is not the true owner, the seizure is wrongful in the first instance, and no demand or notice is essential to fix the liability of the sheriff or support an action against him,[10] although a notice is sometimes required by statute where the officer had

English, 38 Cal. 583; Boulware *v.* Craddock, 30 Cal. 190]; Barry *v.* McGrade, 14 Minn. 286; Dodge *v.* Chandler, 9 Minn. 97; Vose *v.* Stickney, 8 Minn. 75; Mariner *v.* Wasser, (N. D. 1908) 117 N. W. 343.

**Statute requiring notice not retroactive.**— Edson *v.* Newell, 14 Minn. 228.

**Affidavit of claim.**— In New York a person cannot maintain an action against an officer for property seized under replevin directed against a third person, without having previously filed an affidavit with the officer asserting his claim, as required by statute (Fitzpatrick *v.* Krause, 27 Misc. (N. Y.) 792, 58 N. Y. Suppl. 283), unless the taking was not authorized by the process under which the officer acted, in which case no affidavit is necessary (Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]).

**One notice sufficient.**—Where the owner of property levied on by a sheriff under an execution against a third person asserts his claim before the sheriff, who notifies plaintiff in the execution of such claim, who in consequence thereof executes an indemnifying bond in which he admits knowledge of the claim, the owner is not required to again assert such claim, by forbidding the sale, to enable him to maintain a suit on the indemnity bond. Anthony *v.* Bartholow, 69 Mo. 186.

8. *California.*— Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694 [*disapproving* Wellman *v.* English, 38 Cal. 583; Boulware *v.* Craddock, 30 Cal. 190]; Killey *v.* Scannell, 12 Cal. 73.

*Maine.*— Tufts *v.* McClintock, 28 Me. 424, 48 Am. Dec. 501.

*Massachusetts.*— Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28 [*approved* in Shumway *v.* Rutter, 8 Pick. 443, 19 Am. Dec. 340].

*Minnesota.*— Vose *v.* Stickney, 8 Minn. 75.

*New Hampshire.*— Wilson *v.* Lane, 33 N. H. 466; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

*North Dakota.*— Mariner *v.* Wasser, (1908) 117 N. W. 343.

*Wisconsin.*— A demand is necessary where the goods of the debtor and of the third person were so intermingled that they could not be distinguished (Smith *v.* Welch, 10 Wis. 91), but not where the goods of the third person could be readily separated from those of the debtor, although they were in his possession (Norwegian Plow Co *v.* Hanthorn, 71 Wis. 529, 37 N. W. 825).

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 266

**Contra.**— Masten *v.* Webb, 24 Hun 90 [*reversing* 60 How. Pr. 302]. And see Norris *v.* McCanna, 29 Fed. 757.

9. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28 [*approved* in Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340]; Wilson *v.* Lane, 33 N. H. 466; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

10. *Alabama.*—Williams *v.* McKissack, 117 Ala. 441, 22 So. 489.

*California.*— Black *v.* Clasby, 97 Cal. 482, 32 Pac. 564; Moore *v.* Murdock, 26 Cal. 514. See also Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499.

*Colorado.*— Beaman *v.* Stewart, 34 Colo. 356, 83 Pac. 629 [*following* Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792, and *distinguishing* Riethmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684; Moynahan *v.* Prentiss, 10 Colo. App. 295, 51 Pac. 94].

*Illinois.*— Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722 [*affirming* 114 Ill. App. 483].

*Iowa.*— Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14.

*Louisiana.*— Macias *v.* Sheriff, 41 La. Ann. 300, 6 So. 538.

*Massachusetts.*— Stickney *v.* Davis, 16 Pick. 19 (holding that where plaintiff suffered a pair of his oxen to be attached with the cattle of a stranger, on a writ against the stranger, without giving the officer notice of his title, and acted as keeper under him, and, after the lien by attachment had terminated, and the oxen had been separated from the other cattle, the officer seized them on execution against the stranger, plaintiff might maintain trespass against the officer without a previous demand); Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345.

*Minnesota.*— Granning *v.* Swenson, 49 Minn. 381, 52 N. W. 30; Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733; Bailey *v.* Chandler, 27 Minn. 174, 6 N. W. 480; Jones *v.* Town, 26 Minn. 172, 2 N. W. 473; Moulton *v.* Thompson, 26 Minn. 120, 1 N. W. 836; Dodge *v.* Chandler, 9 Minn. 97.

*Montana.*— Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

*New York.*— Kluender *v.* Lynch, 2 Abb. Dec. 538. See also Carpenter *v.* Lott, 31 Hun 349.

*North Dakota.*— Aber *v.* Twichell, (1908) 116 N. W. 95 [*approved* in Mariner *v.* Wasser, (1908) 117 N. W. 343], holding that Rev. Codes (1905), § 6954, providing that when property of a third person is taken under a writ of attachment the sheriff is not liable for damages for so doing unless such third person notifies him by a verified claim

reason to believe that the property belonged to defendant in the process,[11] or was directed to levy thereon.[12]

(II) *FORM AND REQUISITES.* The manner of receiving the notice is immaterial;[13] but where written notice is required by the statute in order to charge the officer he must in some manner receive the original notice,[14] and it is not sufficient to read the notice to him,[15] and deliver to him a copy thereof.[16] A notice which failed to state the source of claimant's interest or the consideration paid has been held sufficient to charge the officer.[17] The service on the levying officer of the affidavit and notice of claim prescribed by statute is a sufficient demand.[18]

**k. Seizure of Property Specified in Writ.** Where a writ is issued by a court or judge and commands the sheriff to seize certain property specified therein, the sheriff incurs no liability by obeying such mandate, although the property belongs to a person other than the party against whom the writ issued;[19] but although a writ commands the officer to take certain specified property from the possession of defendant named therein, the officer is liable if he executes the writ by seizing and taking the property by force from a stranger to the writ, who is the *bona fide* owner and in the actual possession.[20]

**l. Voluntary Surrender of Property.** Where a person acquired title to property stored in a warehouse by a transfer of the warehouse receipt and the issuance of a new one in his name, the delivery of the goods by the warehouseman to the sheriff on replevin process against another person will not operate as a voluntary surrender by the owner so as to defeat a recovery against the sheriff for conversion.[21]

of such ownership is not applicable where the property is taken from the actual possession of such third person.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 266.

**Property in custodia legis.**—An officer attaching and removing property which has already been attached and locked up by the first attaching officer is liable to an action therefor without demand. Pond *v.* Skidmore, 40 Conn. 213.

11. Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569; Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426; Whitney *v.* Gammon, (Iowa 1896) 67 N. W. 405; Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14.

12. Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426; Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14.

**Statute requiring notice not in violation of constitution.**—Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14 [*distinguishing* Foule *v.* Mann, 53 Iowa 42, 3 N. W. 814].

13. Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569; Murray *v.* Thiessen, 114 Iowa 657, 87 N. W. 672; Peterman *v.* Jones, 94 Iowa 591, 63 N. W. 388; Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10.

**A formal demand,** as prescribed by a statute providing for a special proceeding by the officer to determine the ownership of property levied on under execution and claimed by another, is not essential to the maintenance of an action against a sheriff for the conversion of property seized under an attachment. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

14. Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569.

15. Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569; Gray *v.* Parker, 49 Iowa 624, 53 Iowa 505, 5 N. W. 697.

16. Frazier *v.* Hill, 123 Iowa 116, 98 N. W. 569.

17. Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426.

18. Manning *v.* Keenan, 73 N. Y. 45.

19. Haslett *v.* Rogers, 107 Ga. 239, 33 S. E. 44; Willard *v.* Kimball, 10 Allen (Mass.) 211, 87 Am. Dec. 632. But *compare* Dowell *v.* Taylor, 2 Mo. App. 329 (holding that the statutory bond in a replevin proceeding is no protection to the officer against the claims of persons having no interest in the controversy, but the officer, seizing the property of a stranger and delivering it to plaintiff, does so at his peril); Lackey *v.* Campbell, (Tex. Civ. App. 1899) 54 S. W. 46 (holding that a writ commanding a sheriff to seize certain property and deliver it to a third person, although fair and valid on its face and issued by a court of competent jurisdiction, merely relieves the sheriff from exemplary damages, in the absence of irregularity in his action as officer, and does not relieve him from actual damages where the property is owned by a person not a party to the proceedings).

**Protection afforded by process generally** see *infra*, V, L.

**Description held not sufficient to protect attaching officer** see Wright *v.* Shelt, 19 Ind. App. 1, 48 N. E. 26.

20. McDowell *v.* McCormick, 90 Fed. 393.

21. Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116], so holding on the ground that the surrender was made by the warehouseman knowing and acknowledging the right of the true owner.

**m. Estoppel [22] to Show Title.** In an action against a sheriff for seizing goods alleged to belong to plaintiff under an execution against another, the fact that about a year before the sheriff in his official capacity sold the goods to plaintiff does not estop him from showing that at the time of the levy the goods belonged to defendant in execution.[23] Where a sheriff levied upon property as that of the husband, and, although both the husband and wife were present at the time of the levy, inventory, and appraisement, neither of them claimed that the wife had any interest therein or that they were holding the property as tenants in the entireties, but they permitted the sheriff to treat the property as that of the husband, they were estopped to thereafter assert that the title to the property was other than in the husband.[24]

**n. Release [25] of Damages.** A provision in a statute providing a method of trying the right of a third person to property levied on under attachment that a claim made by one intervening under the statute shall operate as a release of damages for making the levy, being in derogation of common law, it will not be extended to claims otherwise made.[26]

**15. Levy at Improper Time.**[27] It has been held that an officer is not to be regarded as a trespasser because he levies under an attachment less than the time required before the return-day,[28] although he might be so regarded if he levied on a day, as a Sunday, service on which is made null and void by statute.[29] But it has also been held that a sheriff is liable as a trespasser where he levies under an attachment more than the time prescribed by statute before the return-day.[30]

**16. Levy After Expiration of Writ.** An officer who levies an execution after the writ has expired is liable in damages therefor.[31]

**17. Levy After Going Out of Office.** A sheriff who, after going out of office, levies under a writ which he had not commenced to execute while in office commits a wrong for which he is liable in damages.[32]

**18. Excessive Levy.** The sheriff is liable to defendant against whom process is issued for an unreasonable and unnecessary levy on more of his goods than are necessary to satisfy the debt and costs.[33] But the mere fact that a levy may be excessive does not subject the sheriff to any liability unless he appears to have committed acts which persons of ordinary care and prudence would not under like circumstances have committed, and has so far departed from his duty as to

22. See, generally, Estoppel, 16 Cyc. 671.

23. Kissock *v.* Jarvis, 9 U. C. C. P. 156.

24. Znehlke *v.* Stone, 148 Mich. 478, 111 N. W. 1065.

25. See, generally, Release, 34 Cyc. 1039.

26. Terry *v.* Webb, (Tex. Civ. App. 1906) 96 S. W. 70, holding that where one to whom attached property had been assigned by the debtor was made a defendant in the attachment, and he answered, claiming title and right to possession, a judgment restoring the property to him did not bar an action by him against the sheriff and the sureties on his bond for the trespass.

27. Levy after return or return-day see *infra*, V, L, 13.

28. Hammond *v.* Wilder, 25 Vt. 342.

29. Hammond *v.* Wilder, 25 Vt. 342.

30. Nelson *v.* Denison, 17 Vt. 73.

31. Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2.

32. Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2.

33. *Arkansas.*— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

*Kentucky.*— Vance *v.* Vanarsdale, 1 Bush 504.

*Missouri.*— State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44.

*Rhode Island.*— Holland *v.* Anthony, 19 R. I. 216, 36 Atl. 2.

*Tennessee.*— Beasly *v.* Johnson, 10 Heisk. 413.

*Texas.*— Hilliard *v.* Wilson, 65 Tex. 286; Fatheree *v.* Williams, 13 Tex. Civ. App. 430, 35 S. W. 324.

*England.*— Gawler *v.* Chaplin, 2 Exch. 503, 18 L. J. Exch. 42.

*Canada.*— Lockart *v.* Gray, 2 Can. L. J. N. S. 163.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 194.

**The officer does not become a trespasser ab initio** by making an excessive levy on property. Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

**Distress for rent.**—A constable is not bound to make a distress for rent, and if under a warrant he makes a distress for more rent than is due he is liable therefor. McElroy *v.* Dice, 17 Pa. St. 163.

warrant the conclusion that he intended to do wrong and to use his legal authority as a cover for an unlawful act.[34]

**19. Taking Possession of More Property Than Levied on.** Where a sheriff, upon levying an attachment upon part of a stock of goods, takes and holds possession of the whole stock, and refuses to yield possession to the owner, he is liable as for the conversion of the entire stock;[35] and an officer who has levied a wrongful attachment on a stock of merchandise, and excluded the owner from the store, is responsible for whatever articles he allows others to take therefrom, although he has not levied on them, and they are taken under process against another person.[36] So also where an officer who attaches cattle on mesne process takes defendant's hay to feed them without his consent, he will be held liable in trover for the hay.[37]

**20. Irregularities Subsequent to Seizure.** An officer cannot be made a trespasser for attaching property under mesne process, by reason of any irregularity in the proceedings of another officer in selling the property under execution.[38]

**21. Particular Matters Affecting Liability — a. Intent of Officer.** While it has been said that the conduct and motives of an officer at the time of making an attachment are to be looked at in determining whether he acted unlawfully,[39] it is well settled that the good faith of an officer or the innocence of his intent do not relieve him of liability for levying on exempt property[40] or on property which does not belong to defendant in the process under which he acts.[41]

**b. Matters Relating to Title.**[42] An officer against whom replevin is brought for property attached by him under process against a person other than plaintiff in replevin may avail himself of any title of the person for whom he made the attachment;[43] but an officer sued as a trespasser for an unlawful taking of property in the hands of a person other than defendant in the process under which he acted cannot set up a paramount title in a stranger as a defense.[44] In an action in a state court against a sheriff for taking and carrying away plaintiff's goods to satisfy an attachment against a third person, defendant has the right to show that the title claimed by plaintiff to the goods is void, because deduced from a sale in violation of a state law,[45] but he cannot set up that such sale was void under the national bankruptcy law.[46] Where property in the possession of a person claiming title to it from a corporation of which a receiver had been appointed was levied on as property of the corporation, under an execution on a

34. Davis *v.* Webster, 59 N. H. 471; Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167.

35. Burdge *v.* Kelchner, 66 Kan. 642, 72 Pac. 232.

The fact that other levies were subsequently made by the sheriff on the other portions of the same stock did not affect the right of action of the owners for the wrongful possession first taken, which was never surrendered. Burdge *v.* Kelchner, 66 Kan. 642, 72 Pac. 232.

36. Simpson *v.* Vose, 31 Kan. 227, 1 Pac. 601.

37. York *v.* Sanborn, 47 N. H. 403.

38. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

39. Moulton *v.* Chadborne, 31 Me. 152.

40. Meadow *v.* Wise, 41 Ark. 285; Deyo *v.* Jennison, 10 Allen (Mass.) 410, holding that where a creditor fraudulently induces his debtor to bring property into the state, which under the law of his own state is exempt from attachment, and causes a levy to be made, the attaching officer is liable for the wrong, although he had no knowledge of the fraud.

Liability for levy on exempt property see *supra*, V, E, 12, b.

41. Meadow *v.* Wise, 41 Ark. 285; London, etc., R. Co. *v.* Cable, 80 L. T. Rep. N. S. 119.

The officer's belief that the property belonged to defendant in the writ under which he acted does not excuse him if the fact is otherwise. Ilg *v.* Burbank, 59 Ill. App. 291; Duperron *v.* Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509; Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733; Campbell *v.* Ulch, 24 Tex. Civ. App. 618, 60 S. W. 272.

Liability for seizure of property not belonging to defendant see *supra*, V, E, 14.

42. Property fraudulently conveyed see *supra*, V, E, 14, d.

43. Reed *v.* Starkey, 69 Vt. 200, 37 Atl. 297.

44. King *v.* Orser, 4 Duer (N. Y.) 431

45. Stanley *v.* Sutherland, 54 Ind. 339.

46. Stanley *v.* Sutherland, 54 Ind. 339.

judgment rendered subsequent to the appointment of the receiver, it was held that the obligors on an indemnity bond given to the sheriff upon such seizure could not, in order to escape liability, set up that the corporation's title had never passed to the person in posesssion of the property.[47]

**c. Liens[48] on Property.** An officer who has attached the property of one person on a writ against another person cannot set up, in bar of an action of trover against him by the owner, that the property when attached was in the possession of a carrier who had a lien upon it for freight.[49]

**d. Filing of Attachment Bond.**[50] The filing of an attachment bond required by a statute, authorizing the issuance of an attachment against any defendant on the filing of a bond, and providing that, when the property is in possession of a person other than defendant, such person shall be summoned as a garnishee, will not excuse the sheriff from liability for seizing the garnishee's goods, as the bond inures as security only to defendant in the attachment, and not to the garnishee.[51]

**e. Taking of Indemnity.**[52] The liability of a sheriff for wrongfully levying upon property not belonging to defendant is not affected by the fact that he took a bond of indemnity,[53] unless the statute makes the indemnity a substitute for the liability of the sheriff.[54]

**f. Failure to Take Indemnity.** The officer's failure to take the indemnity provided for by statute,[55] being his own neglect, cannot relieve him from liability for damages resulting from a wrongful seizure.[56]

**g. Authority From Owner.** Where an officer takes goods from the possession of one person under an execution against a third person, he cannot justify by an authority from the real owner of the property, but the person who was in possession is entitled to at least nominal damages for the trespass to his possession.[57]

**h. Trial of Right of Property.**[58] According to some authorities, where the right to property is tried by a sheriff's jury, a finding that the property belongs to defendant in the process and is subject to levy relieves the sheriff of all liability for levying thereon;[59] but other authorities hold that such a finding does not relieve the sheriff of all liability,[60] although it may go in mitigation of damages.[61] A trial of the right of property levied on will not protect the sheriff where the debtor claims it as exempt;[62] and where the trial results in an order of restitution

47. Chapman *v.* Douglas, 5 Daly (N. Y.) 244, holding that the receiver was the only person who could assert the corporation's interest in the property.

48. Liens generally see LIENS, 25 Cyc. 655.

49. Stearns *v.* Dean, 129 Mass. 139.

50. Attachment bond generally see ATTACHMENT, 4 Cyc. 527.

51. Rothermel *v.* Marr, 98 Pa. St. 285.

52. Indemnity to officer see *infra*, VI.

53. Lewis *v.* Mansfield, 78 Ky. 460; Macias *v.* Sheriff, 43 La. Ann. 289, 8 So. 886 (holding that where it had been decided on appeal that plaintiff had a cause of action against the sheriff for the seizure and sale of his goods under attachment, as the property of another, the subsequent execution of a bond of indemnity to the sheriff, and his offer to assign it to plaintiff, would not bar the latter's action); James *v.* Thompson, 12 La. Ann. 174; Searles *v.* Ahbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 63.

54. See Harrison *v.* Shanks, 13 Bush (Ky.) 620.

Indemnity as substituted for liability of officer see *infra*, VI, L, 3.

55. Indemnity to officer see *infra*, VI.

56. Norris *v.* McCanna, 29 Fed. 757.

57. Rogers *v.* Fales, 5 Pa. St. 154.

58. See, generally, EXECUTIONS, 17 Cyc. 1206.

59. Emanuel *v.* Cocke, 6 Dana (Ky.) 212; Terril *v.* Cockeril, 3 Bibb (Ky.) 258; Patty *v.* Mansfield, 8 Ohio 369 [*approved* in Abbey *v.* Searls, 4 Ohio St. 598]; Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403; Remdall *v.* Swackhamer, 8 Oreg. 502. But see Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166.

A constable as well as a sheriff is protected.— Terril *v.* Cockeril, 3 Bibb (Ky.) 258.

60. Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166 (holding that a finding against the claimant merely protects the sheriff from liability on account of the sale of the property and does not relieve him of liability which he has incurred by reason of the wrongful taking and detention of the property or abuse of the same before sale); Townsend *v.* Phillips, 10 Johns. (N. Y.) 98. But see Emanuel *v.* Cocke, 6 Dana (Ky.) 212; Terril *v.* Cockeril, 3 Bibb (Ky.) 258.

61. Townsend *v.* Phillips, 10 Johns. (N. Y.) 98; Pearson *v.* Fisher, 4 N. C. 72.

62. Prewit *v.* Walker, 7 J. J. Marsh. (Ky.) 332.

and a return of the property pursuant to the order, it is no bar to an action by the claimant against the officer to recover damages for the seizure and detention of the property.[63]

**i. Default of Claimant in Trustee Process.** Where the statute in reference to trustee process requires all questions affecting the interests of a mortgagee in the chattels to be finally determined in the action in which the same were attached, a mortgagee who is summoned as trustee but defaults is estopped to maintain an action against the officer for a conversion of the chattels.[64]

**j. Order For Sale of Property.** Where a sheriff seizes the property of a third person under an attachment, a subsequent order of court directing the property as perishable will not protect him from liability.[65]

**k. Application of Proceeds.** Where an officer has made a wrongful seizure of property, he cannot escape liability therefor, or even reduce the amount of his liability, by showing that the proceeds of the property or a part thereof were applied to the payment of the debts of the owner,[66] unless such application was with the consent of the owner [67] or unless the debt paid was a valid and subsisting lien by way of mortgage upon the property applied to the payment thereof.[68] But even though the original taking was wrongful, yet if the property is afterward legally taken and sold on execution against the owner and the proceeds applied to his debt, this will reduce the damages to such only as resulted from the wrongful taking and preclude inquiry as to the value of the property.[69] In an action against a sheriff for seizing and selling plaintiff's property under process against another, the fact that the surplus proceeds of the sale were paid over to plaintiff

63. Abbey *v.* Searls, 4 Ohio St. 598.

64. Flanagan *v.* Cutler, 121 Mass. 96.

65. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; State *v.* Hadlock, 52 Mo. App. 297.

66. *Michigan.*— Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2, holding that, in an action against a sheriff for the illegal seizure of property on execution, after the writ had expired and after the expiration of his term of office, an offer to apply the amount obtained for the property at the execution sale on the execution judgment could not be pleaded in mitigation of damages.

*Minnesota.*— Welsh *v.* Wilson, 34 Minn. 92, 24 N. W. 327, holding that where a sheriff made an unlawful levy by breaking into a dwelling-house and was sued for the trespass, it could not be taken in mitigation of damages that, pursuant to such levy, he sold the goods and paid the proceeds to the execution creditor.

*Pennsylvania.*— McMichael *v.* Mason, 13 Pa. St. 214.

*Rhode Island.*— Hunt *v.* Lathrop, 7 R. I. 58, so holding in the case of a seizure of property in the hands of an assignee for the benefit of creditors under process against the assignor.

*Texas.*— Erwin *v.* Bowman, 51 Tex. 513 (holding that an officer who, through having been interested in the judgment beyond his legal fees, had committed a trespass by a levy and sale of the debtor's chattels, could not set up in mitigation of damages the fact that the proceeds of sale were appropriated to pay plaintiff's debt, if such appropriation was without plaintiff's assent); Nash *v.* Noble, 46 Tex. Civ. App. 369, 102 S. W. 736 (so holding in the case of a seizure of a person's property under process against another).

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 180 *et seq.*

**Payment of rent.**— In trespass against a sheriff for seizing and selling plaintiff's goods under a judgment against another person, the amount paid out of the proceeds of sale for rent of the premises where the goods were cannot be shown to abate the damages. Dallam *v.* Fitler, 6 Watts & S. (Pa.) 323.

67. Mitchell *v.* Corbin, 91 Ala. 599, 8 So. 810 (holding that where the owner of exempt property seized under execution was present at the sale of it, and made no objection thereto, and consented to the application of the proceeds to his debt, he could recover only nominal damages from the sheriff for the unlawful seizure); Goodrich *v.* Foster, 20 N. H. 177 (holding that where, although the original taking was wrongful, the property had, with the owner's consent, been applied by the officer to the payment of executions against him, the owner could recover such damages only as were attributable to the wrongful seizure). See also Erwin *v.* Bowman, 51 Tex. 513.

68. Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22.

**Where foreclosure proceedings void.**—A sheriff who makes an illegal attachment of goods cannot, in a claim against him by the owner of the goods for their value, show, in mitigation of damages, proceedings by him after the attachment to foreclose a mortgage thereon, where the foreclosure was void by reason of the absence of notices. Chezum *v.* Parker, 19 Wash. 645, 54 Pac. 22.

69. *Kentucky.*— Board *v.* Head, 3 Dana 489.

as agent of the execution defendant is not available in reduction of damages;[70] nor does the fact that a sheriff, after taking and selling exempt property under execution, deposited with the justice who issued the execution, the surplus proceeds, which the owner might, if he chose, have demanded and received, affect the owner's right in an action against the sheriff for wrongfully taking the property, he not having received the money.[71] So also in an action against a sheriff by an administrator with the will annexed for seizing the goods of the testator, while in the hands of the administrator *pendente lite*, under an execution against such administrator for his personal debt, the sheriff cannot reduce the damages by showing that he had paid the administrator *pendente lite* the surplus of money arising from the sales that remained after satisfying the execution.[72]

**l. Sale of Property by Owner.** Where, after a levy under execution on property not belonging to defendant, the true owner sells such property to defendant, he parts with his right of action against the officer for the making of such levy.[73]

**m Voluntary Surrender of Property by Bailee.** Where a person acquired title to property stored in a warehouse by a transfer of the warehouse receipt and the issuance of a new one in his name, the delivery of the goods by the warehouseman to the sheriff on replevin process will not defeat a recovery against the sheriff for conversion.[74]

**n. Release or Return of Property.** An officer cannot escape liability for a wrongful seizure of property by returning the same to the owner,[75] but such return

*Massachusetts.*— Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Squire *v.* Hollenback, 9 Pick. 551, 20 Am. Dec. 506.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

*New Hampshire.*— Goodrich *v.* Foster, 20 N. H. 177.

*New York.*— Sherry *v.* Schuyler, 2 Hill 204. But *compare* Hanmer *v.* Wilsey, 17 Wend. 91.

*Vermont.*— Stewart *v.* Martin, 16 Vt. 397; Clark *v.* Washburn, 9 Vt. 302; Irish *v.* Cloyes, 8 Vt. 30, 30 Am. Dec. 446.

See 43 Cent Dig. tit. "Sheriffs and Constables," § 307.

Where the property is exempt an application of the proceeds to an execution against the owner is not available even in mitigation of damages. Cambell *v.* Anderson, 107 Ala. 656, 18 So. 218.

70. Locke *v.* Garrett, 16 Ala. 698.

71. Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132.

72. Satterwhite *v.* Carson, 25 N. C. 549.

73. Hodge *v.* Adee, 2 Lans. (N. Y.) 314, holding further that such right of action cannot be reinvested in the original owner by a resale to him by the execution debtor before a sale under the execution.

74. Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116], so holding on the ground that the surrender was made by the warehouseman knowing and acknowledging plaintiff's right.

75. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622.

*Colorado.*— Duncan *v.* Burchinill, 14 Colo. App. 471, 61 Pac. 61.

*Kentucky.*— Vaughn *v.* Justice, 78 S. W. 424, 25 Ky. L. Rep. 1666.

*Nebraska.*— Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945.

*New York.*— Hanmer *v.* Wilsey, 17 Wend. 91.

*Vermont.*— See Smith *v.* McCall, 48 Vt. 422, where defendant, a deputy sheriff, had taken plaintiff's property on an execution against another, and in trespass for the property defendant's evidence tended to show that plaintiff agreed that, if defendant would return the property to the place from which he took it, that should settle plaintiff's claim for damages, and that defendant began to return the property accordingly, but before it was fully returned plaintiff told him he should claim damages for the taking, but to put the property where he found it, which he did, and plaintiff used it, and it was held that it was competent for plaintiff to repudiate the agreement, as the testimony tended to show, and that, if defendant understood that plaintiff declined to receive the property in full, but insisted upon his damages also, and with this knowledge chose to return it and discharge his liability thus far, such return would not have the effect to discharge plaintiff's claim for damages.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 180 *et seq.*

A mere tender of the return of goods wrongfully seized will not prevent a recovery of the value of such goods. Dugan *v.* Mclogue, 7 Blackf. (Ind.) 144, 146, where it is said: "There are cases in which the court will stay proceedings upon the restoration of the property, and payment to the plaintiff of such damages as he may have sustained by the temporary loss and deterioration of the property, and his costs. Admitting this to be such a case, and the property to be such as a Court would order the restoration of, no application was made to the Court for that purpose. The defendant should have followed up the tender made by Dicken with such an

can avail only to mitigate the damages which would otherwise be recoverable.[76] There is authority for the view that the owner of the property has the right to refuse to receive it when the officer offers to return it, in which case such offer cannot avail even to mitigate the damages; [77] but it has also been held that where a sheriff offers to restore property wrongfully levied on, he is not liable for its value but only for the temporary detention.[78] A sheriff is not relieved from liability for a wrongful seizure of property by a mere paper release of the levy without a restoration of the property,[79] nor can such release reduce the damages for the temporary detention; [80] but in order to relieve the officer there must be a formal release of the property and an acceptance of it by the owner.[81] Where personal property attached on a writ was surrendered to defendant therein, at his request and for his convenience, on the substitution of an equivalent in money, it was held that defendant could not maintain an action against the officer for the wrongful attachment of such property, although the writ was not returned to court.[82]

**o. Recovery of Property.** One whose property has been wrongfully seized by an officer under process against another person does not lose his right to recover damages for the trespass by recovering judgment for the property in replevin against the officer,[83] or the purchaser at the execution sale; [84] or, when the seizure is under attachment, by coming into court in the attachment case, filing his plea claiming the property, and recovering judgment for its restitution.[85] On the other hand, however, it has been held that where a claimant of property levied on under process against another resorts to the statutory remedy to try the right of property this amounts to a waiver of his remedy by action against the levying officer.[86]

**p. Assent to Levy.** Where a mortgagee of chattels assents to a levy thereon under process against the mortgagor, on condition that such levy be made in recognition of the mortgage, such assent will not protect the officer in making an unqualified levy.[87]

**q. Withdrawal of Claim.** A person whose goods are taken by a sheriff in proceedings of claim and delivery against another person can maintain an action against the sheriff for damages, although, after giving the sheriff notice of his claim, he withdrew it to enable the sheriff to deliver the goods.[88]

**r. Relinquishment of Claim to Damages.** Where the goods of one person

application, and an offer to pay to the plaintiff the damages he had sustained and the costs he had incurred."

76. Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Duncan *v.* Burchinell, 14 Colo. App. 471, 61 Pac. 61; Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

77. Carpenter *v.* Dresser, 72 Me. 377, 39 Am. Rep. 337; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91. See also Weaver *v.* Ashcroft, 50 Tex. 427.

78. Kreher *v.* Mason, 20 Mo. App. 29, 25 Mo. App. 291.

79. Kreher *v.* Mason, 25 Mo. App. 291, 20 Mo. App. 29.

80. Kreher *v.* Mason, 25 Mo. App. 291, 20 Mo. App. 29.

81. Kieffer *v.* Smith, 16 S. D. 433, 93 N. W. 645, holding that merely turning live stock levied on back on the owner's range without notice to him was insufficient.

**Return of property to third person.**—Where a sheriff, under process against one person, levies upon and takes into his possession property of another person, which is in the hands of a third person, his subsequent abandonment of the levy and return of the property to such third person will not relieve him from liability to the owner unless it appears that the third person was authorized to receive such property at the time of its return. Caldwell *v.* Arnold, 8 Minn. 265.

82. Taylor *v.* Knowlton, 10 Allen (Mass.) 137.

83. Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417, holding that the recovery of a judgment in replevin against the officer who made a levy on property does not bar an action in trover against the obligors in a bond given to indemnify the sheriff for levying.

**A tender of the goods** after the judgment in replevin does not satisfy the judgment so as to bar an action of trover against the indemnitors of the officer. Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

84. Nagle *v.* Mullison, 34 Pa. St. 48.

85. Trieber *v.* Blocher, 10 Md. 14.

86. Howeth *v.* Mills, 19 Tex. 295.

87. Norris *v.* McCanna, 29 Fed. 757.

88. Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. 63.

are attached on a writ against another person, and subsequently again attached on another writ in favor of a different creditor, a release by the owner of all claim to damages in consequence of the second attachment in consideration of its relinquishment has no effect upon his right to recover damages for the first taking.[89]

**s. Concealment of Property.** In an action for levying upon goods which were exempt from execution, the officer may show, in mitigation of damages, that the debtor had other property, exceeding in value the amount of his exemption, which he fraudulently withheld from levy.[90]

**22. Extent of Liability — a. Wrongful Seizure in General** — (i) *Where Owner Does Not Regain Possession.* Where property wrongfully seized by a sheriff is not restored to the owner, the officer is liable for the value of the property [91] at the time of the seizure [92] and at the place where the property was when

**89.** Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.

**90.** Freeman *v.* Smith, 30 Pa. St. 264.

**91.** *Alabama.*— Screws *v.* Watson, 48 Ala. 628.

*California.*— Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497 (holding that the award cannot be less than the admitted value of the property); Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847; Pelberg *v.* Gorham, 23 Cal. 349; Van Pelt *v.* Littler, 14 Cal. 194; Phelps *v.* Owens, 11 Cal. 22.

*Dakota.*— Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465; Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

*Delaware.*— Kirkley *v.* Lacey, 7 Houst. 213, 30 Atl. 994.

*Illinois.*— McGillis *v.* Bishop, 27 Ill. App. 53.

*Indiana.*— Dugan *v.* Melogue, 7 Blackf. 144.

*Louisiana.*— Ader *v.* Foley, 50 La. Ann. 1262, 24 So. 333.

*Maine.*— Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49 (holding that such is the rule where plaintiff is the general owner of the property or has only a special ownership and is answerable over to others); Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259; Smith *v.* Putney, 18 Me. 87.

*Massachusetts.*— Clapp *v.* Thomas, 7 Allen 188; Mitchell *v.* Stetson, 7 Cush. 435; Ayer *v.* Bartlett, 9 Pick. 156.

*Michigan.*— Rathbun *v.* Ranney, 14 Mich. 382.

*Missouri.*— State *v.* Smith, 31 Mo. 566; State *v.* Fidelity, etc., Co., 94 Mo. App. 184, 67 S. W. 958; Green *v.* Stephens, 37 Mo. App. 641; Vaughn *v.* Fisher, 32 Mo. App. 29.

*Nebraska.*— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Barlass *v.* Braash, 27 Nebr. 212, 42 N. W. 1028.

*New Jersey.*— Farrel *v.* Colwell, 30 N. J. L. 123, holding that in an action against a constable for levying on a horse of plaintiff as belonging to a third person, the measure of damages was the value of the horse to plaintiff in his business.

*New York.*— Moravec *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533.

*North Carolina.*—Duvall *v.* Rollins, 68 N. C. 220.

*Ohio.*— Searles *v.* Abbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 63.

*Pennsylvania.*— Rogers *v.* McDowell, 134 Pa. St. 424, 21 Atl. 166.

*Texas.*— Nash *v.* Noble, 46 Tex. Civ. App. 369, 102 S. W. 736.

*Virginia.*— Anderson *v.* Fox, 2 Hen. & M. 245; Crump *v.* Ficklin, 1 Patt. & H. 201.

*Washington.*— Skavdale *v.* Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

**An appraisement for exemption purposes** does not furnish a measure of value in an action against a sheriff for the wrongful detention and conversion of the property. Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

**The fair market value** of the property is the measure of damages. Barlass *v.* Braash, 27 Nebr. 212, 42 N. W. 1028; Newman *v.* Kane, 9 Nev. 234.

**Proceeds of sale as evidence of value.**— Where a sheriff has sold the property wrongfully seized by him, he cannot, in an action against him for the seizure, claim that the property was worth less than the amount which he received for it, but he is liable for that amount. Kirkley *v.* Lacey, 7 Houst. (Del.) 213, 30 Atl. 994; Skavdale *v.* Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481. The proceeds of such sale do not, however, fix the measure of damages as against the owner, but he is entitled to recover the value of the property as it stood before its removal. Ayer *v.* Bartlett, 9 Pick. (Mass.) 156.

**92.** *Alabama.*— Screws *v.* Watson, 48 Ala. 628.

*California.*— Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847; Pelberg *v.* Gorham, 23 Cal. 349; Phelps *v.* Owens, 11 Cal. 22.

*Maine.*— Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49; Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259; Smith *v.* Putney, 18 Me. 87.

*Massachusetts.*—Mitchell *v.* Stetson, 7 Cush. 435.

*Missouri.*— Green *v.* Stephens, 37 Mo. App. 641.

*Nebraska.*— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Barlass *v.* Braash, 27 Nebr. 212, 42 N. W. 1028.

*North Carolina.*—Duvall *v.* Rollins, 68 N. C. 220.

*Virginia.*— Crump *v.* Ficklin, 1 Patt. & H. 201.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

seized,[93] together with a fair compensation for the time and money expended in pursuit of the property.[94] But plaintiff cannot, in addition thereto, recover the value of the use or hire of the property after the seizure.[95]

(II) *WHERE OWNER REGAINS POSSESSION.* Where the owner recovers his property he is considered as having received it in mitigation of damages and the measure of damages is the expense of procuring its return;[96] and so where plaintiff has repurchased his property the measure of damages is the amount paid by him therefor,[97] together with any special damage which may be shown,[98] such as a depreciation in the value of the property while it was withheld.[99] Apart from the expense of regaining possession, if it appears that the property has a usable value the officer is liable for the value of the use of the property during the time of its detention by him,[1] unless the circumstances were such that the seizure did

**The amount for which the officer sold the goods** is not a proper criterion for determining their value at the time of their conversion. Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163.

93. Ayer *v.* Bartlett, 9 Pick. (Mass.) 156; Barlass *v.* Braash, 27 Nebr. 212, 42 N. W. 1028.

**Property seized while in transitu.**— In trespass against a sheriff for a wrongful attachment of property *in transitu*, the measure of damages is the value of the property at the time in the place of consignment, less the charges of the carriers for delivering it there. Eby *v.* Schumacher, 29 Pa. St. 40.

94. Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601; Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847; Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465. But *compare* Brinker *v.* Leinkauff, 64 Miss. 236, 1 So. 170.

95. Daniel *v.* Holland, 4 J. J. Marsh. (Ky.) 18.

96. *California.*— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

*Louisiana.*— See Ader *v.* Foley, 50 La. Ann. 1262, 24 So. 333.

*North Carolina.*— Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170.

*Pennsylvania.*— Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998; Kline *v.* McCandless, 139 Pa. St. 223, 20 Atl. 1045.

*England.*— Keene *v.* Dilke, 4 Exch. 388, 18 L. J. Exch. 440, holding that where a sheriff wrongfully seized goods which were afterward taken from him by another wrong-doer, the owner of the goods might, in an action against the sheriff, recover as special damages the amount necessarily paid to the other wrong-doer, in order to get back the goods.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

97. *Arkansas.*— Parham *v.* McMurray, 32 Ark. 261.

*California.*— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

*Connecticut.*— Baldwin *v.* Porter, 12 Conn. 473 [*approved* in Lazarus *v.* Ely, 45 Conn. 504; Curtis *v.* Ward, 20 Conn. 204].

*Kansas.*— Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200.

*Minnesota.*— Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

*New Hampshire.*—Felton *v.* Fuller, 35 N. H. 226.

*Pennsylvania.*— Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998; Rogers *v.* McDowell, 134 Pa. St. 424, 21 Atl. 166; Forsyth *v.* Palmer, 14 Pa. St. 96, 53 Am. Dec. 519.

*Texas.*— Field *v.* Munster, 11 Tex. Civ. App. 341, 32 S. W. 417 [*affirmed* in 89 Tex. 102, 33 S. W. 852 (*overruling* Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Casey *v.* Chaytor, 5 Tex. Civ. App. 385, 23 S. W. 1114)].

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

**Where a sheriff wrongfully levies on and sells exempt property in connection with other property,** and all is repurchased by the owner for less than its value, the amount so paid should be apportioned between the exempt and the other property in determining the damages caused by the seizure and sale of the exempt property. Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

**Where the property is bought in for plaintiff by his agent** he cannot waive his rights and treat the purchase as being by the agent for himself in order to recover the full value of the property from the sheriff. Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998.

**Sheriff cannot object that sum paid exceeds value of property.**— Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733. But *compare* Sprague *v.* Brown, 40 Wis. 612.

98. *California.*— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157.

*Kansas.*— Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200.

*New Hampshire.*— Felton *v.* Fuller, 35 N. H. 266.

*Pennsylvania.*— Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998.

*Wisconsin.*— Sprague *v.* Brown, 40 Wis. 612.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

99. Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. 200; Field *v.* Munster, 11 Tex. Civ. App. 341, 32 S. W. 417 [*affirmed* in 89 Tex. 102, 33 S. W. 852 (*overruling* Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Casey *v.* Chaytor, 5 Tex. Civ. App. 385, 23 S. W. 1114)].

1. Clapp *v.* Thomas, 7 Allen (Mass.) 188;

not deprive the owner of the use of his property,[2] together with the amount of any damage to the property occasioned by the officer or his agents while it was under seizure.[3] Where the property seized is kept for sale rather than for use, the measure of damages is the diminution of the value of the property by reason of its seizure and detention.[4]

(III) *INJURY TO BUSINESS AND CREDIT.* It has been held that in an action against a sheriff for wrongfully seizing property the injury to plaintiff's business[5] and credit[6] is proper to be considered in fixing the damages. But in an action against a sheriff by a merchant for wrongful seizure of part of his stock in trade, by reason of which he was compelled to discontinue business and sell the balance of his stock for less than its value, the loss resulting from the sale of such balance was held too remote a consequence of the levy to form the basis of an assessment of damages.[7]

(IV) *LOSS OF PROFITS.* That a loss of prospective profits is an element of damage in an action for a wrongful seizure of plaintiff's stock in trade has been both affirmed[8] and denied.[9]

(V) *COUNSEL FEES.* One whose property has been wrongfully seized cannot recover from the officer the attorney's fees which he has incurred and paid in asserting or defending his claim to the property,[10] nor can the fee of the attorney who brings the action for the wrongful seizure be allowed as part of the damages.[11]

**b. Seizure of Mortgaged Property.**[12] Where mortgaged property is wrong-

Luce *v.* Hoisington, 56 Vt. 436; Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7.

The value of the use at the place where the property is located furnishes the criterion. Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7.

2. Shearer *v.* Taylor, 106 Va. 26, 29, 55 S. E. 7, 29, where it appeared that the furniture levied on was in storage when levied on and remained in storage for some time after it was released, and the court said: "If no use of the property was contemplated by the plaintiff, she suffered no loss of use in consequence of the levy, and therefore was not damaged."

3. Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7, holding that whether there had been any such damage was a question for the jury.

4. Palmer *v.* Augenstein, 18 App. Cas. (D. C.) 511, 513 (where it is said: "In other words, it was the market value of the goods at the time and place of seizure, less their market value at the time of their return"); Green *v.* Stephens, 37 Mo. App. 641; Searles *v.* Abbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 63.

5. Ader *v.* Foley, 50 La. Ann. 1262, 24 So. 333; Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661. *Contra*, Phelps *v.* Owens, 11 Cal. 22 (where trespass not wilful or wanton); Searles *v.* Abbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 63. And see Dexter *v.* Paugh, 18 Cal. 372.

6. Ader *v.* Foley, 50 La. Ann. 1262, 1265, 24 So. 333 (where it is said: "In connection with the alleged injury to plaintiff's business and credit we must give due consideration to his condition of financial embarrassment resulting, as we gather from the record in his cession to his creditors"); Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

7. Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

8. Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661 (so holding on the ground that a loss of profits is a loss which may be reasonably and naturally expected to follow from the closing up of a merchant's place of business, and the seizure of his goods); Langan *v.* Potter, 8 Misc. (N. Y.) 541, 28 N. Y. Suppl. 752. See also Nightingale *v.* Scannell, 18 Cal. 315, 326, where it is said: "There may be cases in which it would be proper to award damages upon the basis of a calculation of profits, but in this case there were no data for the calculation to proceed upon."

9. Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604 (so holding on the ground that the loss of profits is too remote and uncertain to be allowed); Moravec *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533 (holding that the allowance of interest takes the place of a recovery for loss of profits).

The value of the goods in the retail market is not the proper measure of damages for a wrongful seizure. State *v.* Smith, 31 Mo. 566.

10. *Kansas.*—Adams *v.* Gillam, 53 Kan. 131, 36 Pac. 51.

*Kentucky.*— Vaughn *v.* Justice, 78 S. W. 424, 25 Ky. L. Rep. 1666.

*Maryland.*— Corner *v.* Mackintosh, 48 Md. 374.

*Mississippi.*— Brinker *v.* Leinkauff, 64 Miss. 236, 1 So. 170.

*Texas.*— McCart *v.* Maddox, 68 Tex. 456, 5 S. W. 150. But *compare* Findley *v.* Mitchell, 50 Tex. 143.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 298.

11. Ader *v.* Foley, 50 La. Ann. 1262, 24 So. 333.

12. Mortgaged property generally see CHATTEL MORTGAGES, 6 Cyc. 980.

fully seized and thereby lost to the mortgagee, he is entitled to recover from the officer the amount of his mortgage if the property is worth so much,[13] or the value of the property if it is worth less than the mortgage debt,[14] together with compensation for the loss of time and expenses properly incurred in pursuit of the property in either case.[15]

**c. Seizure of Pledged Property.**[16] In an action by a pledgee against a sheriff for a conversion of goods pledged, if the sheriff has seized them under a lawful writ in his hands, he will be treated as in privity with the owner, the pledgor, provided he has pursued the law in making such seizure, and will be held only for plaintiff's special interest in the goods;[17] but in any other event he will be treated as a stranger and held for their full value.[18]

**d. Seizure of Property Subject to Landlord's Lien.**[19] Where an officer seizes and sells property which is subject to a landlord's lien, by reason of which the lien is lost, the measure of damages is the value of the property,[20] unless such value exceeds the amount of the rent due, in which case the latter amount is the measure of damages.[21]

**e. Seizure of Property in Custody of Law.** An officer who seizes and sells property which at the time of the seizure was in the custody of another officer under a prior seizure is liable to the latter officer for the value of such property.[22]

**F. Liabilities Arising Out of Custody of Property — 1. Loss or or Injury to Property — a. General Liability of Officer.** A sheriff who has property in his custody is liable for the loss thereof or injury thereto resulting from his failure to use due care and diligence to preserve the same,[23] and property is lost within this rule where it goes beyond the reach of the party for whom it was the

13. *California.*—Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601.
*Indiana.*— Collins *v.* State, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. Rep. 298.
*Montana.*— Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. 533.
*Washington.*— Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.
*United States.*— Norris *v.* McCanna, 29 Fed. 757.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

14. *California.*— Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601.
*Montana.*— Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. 533.
*Nebraska.*— Hamilton *v.* Lau, 24 Nebr. 59, 37 N. W. 688.
*Washington.*— Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.
*United States.*— Norris *v.* McCanna, 29 Fed. 757.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 307.

15. Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601.

16. Pledged property generally see Pledges, 31 Cyc. 779.

17. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770.

18. Treadwell *v.* Davis, 34 Cal. 601, 94 Am. Dec. 770.

19. Landlord's lien generally see Landlord and Tenant, 24 Cyc. 1244.

20. Burket *v.* Boude, 3 Dana (Ky.) 209; Crawford *v.* Jarrett, 2 Leigh (Va.) 630.

21. Burket *v.* Boude, 3 Dana (Ky.) 209.

22. Robinson *v.* Ensign, 6 Gray (Mass.) 300, holding that where plaintiff levied an attachment in favor of A on certain property which he left with a keeper, and defendant, by his deputy, levied an attachment in favor of B on the same property, having the same keeper in charge, and subsequently plaintiff levied another attachment in favor of C on the property, the subsequent withdrawal of an execution in favor of A did not entitle defendant to have the amount of such execution deducted from the value of the property in fixing his liability.

23. *Alabama.*— O'Bryan *v.* Webb, 142 Ala. 259, 37 So. 935; Eldridge *v.* Spence, 16 Ala. 682.
*Arkansas.*— Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.
*California.*— Aigeltinger *v.* Whelan, 133 Cal. 110, 65 Pac. 125 (holding that where a sheriff, without an order of court, allowed attached property in his possession to be sold by a warehouseman for storage charges, he was liable for conversion); Sanford *v.* Boring, 12 Cal. 539.
*Delaware.*— Janiver *v.* Vandever, 3 Harr. 29.
*Georgia.*— Johns *v.* Robinson, 119 Ga. 59, 45 S. E. 727; Gilmore *v.* Moore, 30 Ga. 628.
*Indiana.*— Stewart *v.* Nunemaker, 2 Ind. 47; State *v.* Nelson, Smith 401.
*Iowa.*— Cresswell *v.* Burt, 61 Iowa 590, 16 N. W. 730; Dean *v.* Goddard, 13 Iowa 292, 81 Am. Dec. 433.
*Kentucky.*— Rowe *v.* Williams, 7 B. Mon. 202; Conover *v.* Com., 2 A. K. Marsh. 566, 12 Am. Dec. 451, holding that a sheriff who loses goods seized on execution after defendant has paid plaintiff the amount of the execution will be liable to defendant for their value on proof of payment of the debt.

duty of the sheriff to keep it available.[24] So if goods which a sheriff has attached are taken from him by force, it is his duty to retake them, by summoning the *posse comitatus* or by replevin, if no other way presents itself, failing in which he is liable for the loss.[25]

**b. Loss or Injury Through Act or Neglect of Custodian or Keeper.**[26] A sheriff who has property in his official custody is liable for a loss of or injury to the same resulting from the default or negligence of a keeper or custodian whom he has placed in charge of the property;[27] and where a sheriff leaves property levied on in the debtor's possession, and it is taken beyond the jurisdiction of the court, so that plaintiffs in execution lose a portion of their debt, the sheriff is

*Louisiana.*— Lambeth *v.* Jeffrian, 41 La. Ann. 749, 6 So. 558; McRay *v.* Scott, 39 La. Ann. 1116, 2 So. 584; McCarthy *v.* Lewis, 5 La. Ann. 115; Green *v.* Garcia, 3 La. Ann. 702.

*Maine.*— Willard *v.* Whitney, 49 Me. 235; Franklin Bank *v.* Small, 24 Me. 52; Lovejoy *v.* Hutchins, 23 Me. 272; Higgins *v.* Kendrick, 14 Me. 83; Weld *v.* Green, 10 Me. 20.

*Massachusetts.*— Rich *v.* Bell, 16 Mass. 294; Tyler *v.* Ulmer, 12 Mass. 163; Phillips *v.* Bridge, 11 Mass. 242; Sewall *v.* Mattoon, 9 Mass. 535. See also Howard *v.* Smith, 12 Pick. 202.

*Michigan.*— Standard Wine Co. *v.* Chipman, 135 Mich. 273, 97 N. W. 679, 106 Am. St. Rep. 394.

*Mississippi.*— Collins *v.* Terrall, 2 Sm. & M. 383.

*New Hampshire.*— Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352.

*New York.*— Moore *v.* Westervelt, 27 N. Y. 234 [*affirming* 9 Bosw. 558]; Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 1 Bosw. 357]; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179; Browning *v.* Hanford, 5 Hill 588, 40 Am. Dec. 369; Jenner *v.* Joliffe, 9 Johns. 381.

*North Carolina.*— Gay *v.* Mitchell, 146 N. C. 509, 60 S. E. 426; McLean *v.* Douglass, 28 N. C. 233.

*Pennsylvania.*— Hartleib *v.* McLane, 44 Pa. St. 510, 84 Am. Dec. 464; Clevenger's Estate, 1 Lanc. L. Rev. 277.

*Tennessee.*— Snell *v.* State, 2 Swan 344.

*Texas.*— Smith *v.* Tooke, 20 Tex. 750; Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

*Vermont.*— Fay *v.* Munson, 40 Vt. 468; Briggs *v.* Taylor, 28 Vt. 180.

*Canada.*— Hobbs *v.* Hall, 14 U. C. C. P. 479.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 200.

**Where a sheriff deposits in a bank** money collected on fieri facias he is liable for the loss of the same through the failure of the bank. Phillips *v.* Lamar, 27 Ga. 228, 73 Am. Dec. 731.

**Taking of property by receiver.**—A sheriff, being in possession of a stock of goods by virtue of a levy made in pursuance of writs of attachment in his hands, is not responsible to a subsequent chattel mortgagee for conversion, when a receiver, duly appointed by the court from which the orders of attachment issued, takes exclusive control and possession of the goods, sells the same, and receives the proceeds. Smith-Frazier Boot, etc., Co. *v.* Ware, 47 Kan. 483, 28 Pac. 159.

24. *California.*— Sanford *v.* Boring, 12 Cal. 539.

*Georgia.*— O'Pry *v.* Kennedy, 86 Ga. 662, 12 S. E. 940.

*Indiana.*— Collins *v.* State, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. Rep. 298.

*Kentucky.*— Rowe *v.* Williams, 7 B. Mon. 202.

*Louisiana.*— Crane *v.* Quinn, 23 La. Ann. 512; Byrne *v.* Anderson, 8 La. Ann. 139.

*Maine.*— Lovejoy *v.* Hutchins, 23 Me. 272; Humphreys *v.* Cobb, 22 Me. 380; Higgins *v.* Hendrick, 14 Me. 83.

*Massachusetts.*— Congdon *v.* Cooper, 15 Mass. 10; Tyler *v.* Ulmer, 12 Mass. 163; Phillips *v.* Bridge, 11 Mass. 242; Sewall *v.* Mattoon, 9 Mass. 535.

*New York.*— Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

*Ohio.*— State *v.* Fuller, 14 Ohio 545.

*Vermont.*— Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 195, 200.

**Where a rescue of personalty levied on is effected,** the sheriff is responsible. State *v.* Lowry, 8 Mo. 48.

**The issuance of a venditioni exponas is not** a prerequisite to an action against a sheriff who has negligently permitted the removal of goods levied on. Com. *v.* Rowland, 2 Del. Co. (Pa.) 31.

25. Wood *v.* Bodine, 32 Hun (N. Y.) 354.

26. **Liability of sheriff for acts or omissions of deputies** see *supra*, V, B.

27. *Alabama.*— Eldridge *v.* Spence, 16 Ala. 682.

*Florida.*— Chapman *v.* Reddick, 41 Fla. 120, 25 So. 673.

*Indiana.*— State *v.* Nelson, 1 Ind. 522; State *v.* Nelson, Smith 401.

*Mississippi.*— Collins *v.* Terrall, 2 Sm. & M. 383.

*New York.*— Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 1 Bosw. 357]; Browning *v.* Hanford, 5 Den. 586 [*reversing* 7 Hill 120]; Browning *v.* Hanford, 5 Hill 588, 40 Am. Dec. 369.

*Vermont.*— Briggs *v.* Gleason, 29 Vt. 78.

*Canada.*— Hobbs *v.* Hall, 14 U. C. C. P. 479.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 195, 200.

liable for the damages sustained, as his responsibility for property levied on continues so long as he can keep possession under the execution.[28] Where a sheriff delivers attached goods to a receiptor, he does so at his own risk, unless the taking of the receipt is directed or ratified by the creditor, and is liable for their safe-keeping;[29] but a sheriff is not liable for the negligence of a receiptor to whom he has delivered the attached property by direction of plaintiff in the attachment.[30]

**c. Degree of Care Required.** A sheriff is held to the same degree of prudence, vigilance, and care with respect to property under seizure and in his custody as a careful and prudent man would be likely to exercise over his own property;[31] but he is not liable as an insurer, and hence if the property in his possession or under his control is lost, destroyed, or damaged without neglect on his part he is not liable.[32]

**Where bailee nominated by plaintiff.**—An officer attaching goods on mesne process, and delivering them for safe-keeping to a bailee nominated by plaintiff, is not responsible to plaintiff for the fidelity of such bailee. Donham *v.* Wild, 19 Pick. (Mass.) 520, 31 Am. Dec. 161.

28. Byrne *v.* Anderson, 8 La. Ann. 139.

29. Porter *v.* Tarlton, Smith (N. H.) 372.

30. Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571.

**Directions of party or attorney as affecting liability of sheriff** generally see *supra*, V, A, 9.

31. *Alabama.*— O'Bryan *v.* Webb, 142 Ala. 259, 37 So. 935.

*Indiana.*— Stewart *v.* Nunemaker, 2 Ind. 47; State *v.* Nelson, 1 Ind. 522.

*Iowa.*— Cresswell *v.* Burt, 61 Iowa 590, 16 N. W. 730.

*Kentucky.*— Vance *v.* Vanarsdale, 1 Bush 504.

*Louisiana.*— Lambeth *v.* Joffrion, 41 La. Ann. 749, 6 So. 558; McRay *v.* Scott, 39 La. Ann. 1116, 2 So. 584.

*Maine.*— Strout *v.* Pennell, 74 Me. 260; Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

*Massachusetts.*— Dorman *v.* Kane, 5 Allen 38. See also Briggs *v.* Dearborn, 99 Mass. 50, holding that the responsibility of a sheriff for articles contained in a boat, but not forming a part of it, at the time of its attachment by him, is merely that of a bailee without hire.

*Michigan.*— Standard Wine Co. *v.* Chipman, 135 Mich. 273, 97 N. W. 679, 106 Am. St. Rep. 394.

*New Hampshire.*— Kendall *v.* Morse, 43 N. H. 553.

*New York.*— Moore *v.* Westervelt, 27 N. Y. 234, 25 How. Pr. 277 [*affirming* 9 Bosw. 558].

*Tennessee.*— Snell *v.* State, 2 Swan 344.

*Vermont.*— Briggs *v.* Taylor, 28 Vt. 180; Bridges *v.* Perry, 14 Vt. 262.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 199.

**The sheriff is liable where the property is** lost or injured because of its being kept in an unsafe place (Gilmore *v.* Moore, 30 Ga. 628; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381), or negligently exposed to destruction (Jenner *v.* Joliffe, *supra*).

32. *Alabama.*— Price *v.* Stone, 49 Ala. 543; Eldridge *v.* Spence, 16 Ala. 682.

*Arkansas.*— Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.

*Louisiana.*— McCarthy *v.* Lewis, 5 La. Ann. 115.

*Maine.*— Robinson *v.* Barrows, 48 Me. 186, holding that an officer who has seized intoxicating liquors under proceedings in accordance with the statute is not responsible for their deterioration, occurring without his fault, while they are in the custody of the law.

*Massachusetts.*— Blake *v.* Kimball, 106 Mass. 115; Parrott *v.* Dearborn, 104 Mass. 104; Scovill *v.* Root, 10 Allen 414; Dorman *v.* Kane, 5 Allen 38; Hubbell *v.* Root, 2 Allen 185; Congdon *v.* Cooper, 15 Mass. 10.

*Michigan.*— Standard Wine Co. *v.* Chipman, 135 Mich. 273, 97 N. W. 679, 106 Am. St. Rep. 394.

*Mississippi.*— State *v.* Dalton, 69 Miss. 611, 10 So. 578.

*New Hampshire.*— McConnell *v.* Flanders, 68 N. H. 604, 44 Atl. 304; Eastman *v.* Judkins, 59 N. H. 576; Kendall *v.* Morse, 43 N. H. 553; Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Ferrin *v.* Symonds, 11 N. H. 363.

*New York.*— Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 1 Bosw. 357]; Browning *v.* Hanford, 5 Den. 586 [*reversing* 7 Hill 120]; Browning *v.* Hanford, 5 Hill 588, 40 Am. Dec. 369.

*South Carolina.*— Emory *v.* Davis, 4 S. C. 23.

*Tennessee.*— Cook *v.* Potts, 3 Baxt. 227; Turney *v.* Carter, 3 Baxt. 199, death of horse levied on.

*Vermont.*— Bridges *v.* Perry, 14 Vt. 262. See also Fullam *v.* Stearns, 30 Vt. 443, holding that where machinery, belonging to the mortgagor, was levied upon while in a building belonging to the mortgagee, and the officer was allowed by the mortgagee to sell it in the building, the officer and his assistants were liable to the mortgagee for articles of personal property belonging to the latter which were taken or lost by the bidders without the knowledge of the officer or those assisting him.

*England.*— Willis *v.* Combe, Cab. & E. 353.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 199.

**The sheriff is not liable where the property** is captured and confiscated by the public enemy in time of war (Congdon *v.* Cooper,

**d. Necessity For Demand.** Where the sheriff negligently loses property in his official custody no demand for a restoration thereof is necessary to support an action by the owner.[33]

**e. Particular Matters Affecting Liability** — (i) *PROPRIETY OF LEVY.* Where the officer levies on the property of one person under process against another and takes possession of the property, he is liable to the owner for the loss thereof, although such loss was not due to his fault;[34] but no such liability accrues where the officer did not take possession of the property levied on, and the loss was not attributable to his fault or to the making of the levy.[35] A sheriff is not liable to account to the creditor for property attached on his suit where that property did not belong to the debtor,[36] or was exempt from attachment,[37] unless it was attached by consent of the owner.[38] So also in an action by a surety against a sheriff for failing to keep the property of the principal, which was levied on whereby the surety was compelled to pay more than he otherwise would have paid, it is a sufficient defense that the property was replevied by another person who, in an action whereof the surety herein had due notice, was adjudged to be the owner.[39]

(ii) *VALIDITY OF JUDGMENT*[40] *OR PROCESS.*[41] A sheriff who is sued for neglect to safely keep attached property cannot impeach the validity of plaintiff's judgment in the attachment suit in order to escape liability;[42] and where an execution is not void, the fact that it is irregular does not relieve the sheriff of liability for the loss of property levied on thereunder.[43]

(iii) *EXISTENCE OF LIEN.*[44] In a suit against a sheriff for not retaining and selling on execution logs upon which it has been attempted to enforce a lien claim, if no judgment confirming the validity of the lien appears on record, it is

15 Mass. 10); stolen without negligence on his part (Blake *v.* Kimball, 106 Mass. 115; Dorman *v.* Kane, 5 Allen (Mass.) 38. *Contra*, Hartleib *v.* McLane, 44 Pa. St. 510, 84 Am. Dec. 464; Clevenger's Estate, 1 Lanc. L. Rev. (Pa.) 277), or destroyed by fire where there was no apparent reason for thinking the place where the goods were kept unsafe (State *v.* Dalton, 69 Miss. 611, 10 So. 578; Norris *v.* McCanna, 29 Fed. 757).

Conversion by bailee.—An officer who attaches goods by virtue of a writ, and deposits them for safe-keeping with a bailee, who converts them to his own use without the knowledge or assent of the officer, is not liable as a joint trespasser with such bailee. Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505.

Estoppel of creditor.—An attaching creditor, knowing the circumstances and assenting to what is done, is estopped from claiming that the officer's act in leaving the property in the care of a keeper was negligent. Eastman *v.* Judkins, 59 N. H. 576.

Property left with defendant.—Where an action of replevin was brought against the master of a vessel lying at a pier, for her cargo, and the sheriff declined to deliver the cargo to plaintiff until his surety justified, but put a keeper in charge of the cargo with the consent of the master, the sheriff did not under the circumstances become an insurer of the cargo by not removing it, and hence where the vessel sank the sheriff was not liable to plaintiff in replevin for the damages sustained by the cargo and the expense of raising it, unless he was guilty of negligence in not taking proper precautions for the security of the vessel. Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 1 Bosw. 357].

33. Conover *v.* Com., 2 A. K. Marsh. (Ky.) 566, 567, 12 Am. Dec. 451 (where it is said: "It is the negligence of the sheriff in keeping the goods, and not his refusal to restore them, that constitutes the cause of action"); Johnson *v.* Edson, 2 Aik. (Vt.) 299 (holding that one whose goods are attached by a sheriff and delivered to a receiptor, who converts them to his own use, may, after final judgment in his favor, maintain trover against the attaching officer, without demanding the goods).

34. Duncan *v.* Stone, 45 Vt. 118.

35. Sammis *v.* Sly, 54 Ohio St. 511, 44 N. E. 508, 56 Am. St. Rep. 731, so holding in a case where an attachment was levied on the property of a third person under the mistaken belief that it belonged to defendant in the attachment suit, but no such custody was taken of the property by the officer as deprived the owner of his control over it, and it was lost by fire before the commencement of a suit for the conversion.

36. West *v.* Meserve, 17 N. H. 432; Cilley *v.* Jenness, 2 N. H. 87.

37. Cilley *v.* Jenness, 2 N. H. 87.

38. Cilley *v.* Jenness, 2 N. H. 87.

39. Wells *v.* Baldwin, 61 Ind. 265.

40. See, generally, JUDGMENTS, 23 Cyc. 623.

41. See, generally, PROCESS, 32 Cyc. 412.

42. Williard *v.* Whitney, 49 Me. 235; Adams *v.* Balch, 5 Me. 188; West *v.* Meserve, 17 N. H. 432.

43. Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

44. See, generally, LIENS, 25 Cyc. 655.

competent for him to show, in defense, that the lien did not exist, or that it has been lost.[45]

(IV) *CONTROL OF PARTIES.* Where the parties restrain the sheriff by orders or agreements so that he has no control over property which he has been ordered to seize and keep, and loss results from such orders or agreements, there can be no recourse against the sheriff therefor.[46]

(V) *APPLICATION OF AMOUNT TO USE OF DEBTOR.* Where an officer is charged by the original debtor with having lost or wasted a portion of the goods which he has attached, it is competent for him to excuse himself from liability by showing that he has applied the amount to the use of the debtor by paying with it the expenses of keeping the goods.[47]

(VI) *PAYMENT OF DEBT.* The payment and discharge of the execution during the pendency of an action against a sheriff for not properly keeping property attached goes merely in mitigation of damages and does not prevent a recovery of nominal damages.[48]

(VII) *SUBSEQUENT SEIZURE OF OTHER PROPERTY.* Where a sheriff has become liable to an execution plaintiff by the loss of property levied on, he cannot escape liability by a subsequent levy of the execution on other property, which fails to yield enough for its satisfaction.[49]

(VIII) *WITHDRAWAL OF SUIT.* The withdrawal of an attachment suit is a bar to a recovery by plaintiff therein against the sheriff for neglect to preserve the property under his attachment,[50] although the suit is revived at the same term and judgment entered against defendant therein.[51]

(IX) *NATURE OF SEIZURE.* Where defendant in attachment was notified by the sheriff that he had attached certain fish traps lying in a field, and that defendant, if he meddled with the traps, would do so at his peril, the sheriff was liable to the defendant for the loss of the traps.[52]

(X) *DELIVERY OF PROPERTY TO RECEIPTOR.* An officer who has attached property and delivered the same to a third person upon his own responsibility and for his own convenience, and taken an accountable receipt therefor, remains liable to the parties by virtue of the attachment for the safe-keeping and legal disposition of the property.[53]

(XI) *INJURY TO PLAINTIFF.* A sheriff cannot be held liable for failure to retain possession of property seized by him unless such failure has resulted in some injury to the complaining party.[54]

**f. Liability as Trespasser Ab Initio.** In reference to the care and management of personal property levied on, much must be left to the judgment of the officer,[55] and there are many irregularities for which the officer would be liable in damages to an aggrieved party, but which would not render him a trespasser from the beginning by relation.[56] The rule as to this is that the officer will not by reason of his disposition or management of personal property before sale become a trespasser *ab initio* unless there has been a substantial violation of the

45. Annis *v.* Gilmore, 47 Me. 152.
46. Pepin *v.* Dunham, 20 La. Ann. 88.
47. Twombly *v.* Hunewell, 2 Me. 221.
48. Brown *v.* Richmond, 27 Vt. 583.
49. Eldridge *v.* Spence, 16 Ala. 682.
50. Union Mfg. Co. *v.* Pitkin, 14 Conn. 174.
51. Union Mfg. Co. *v.* Pitkin, 14 Conn. 174.
52. Burns *v.* Lane, 138 Mass. 350, so holding upon the ground that the representation to defendant was not one of law as to whether the facts constituted an attachment, but was a representation that the traps had in fact been attached.
53. Torrey *v.* Otis, 67 Me. 573.
54. West *v.* Meserve, 17 N. H. 432; Munger *v.* Fletcher, 2 Vt. 524.
55. Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.
56. Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366; Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316 (holding that the mere neglect of a duly authorized person, who has regularly attached personal property, to take proper care thereof while it is in his custody under the attachment, does not render him a trespasser *ab initio*); Hale *v.* Huntley, 21 Vt. 147 (holding that mere nonfeasance by a sheriff in regard to caring for property seized by him under attachment does not render him liable as a trespasser).

legal rights of the party, of such a character as to show a gross or wanton disregard of duty on the part of the officer.[57]

**2. Release of Property Levied on — a. In General.** A sheriff who wrongfully releases a levy and surrenders the property is liable to the party at whose instance the process was issued for the resulting damage;[58] and in order to escape liability the officer must affirmatively show that he parted with the possession of the property under the order of a court of competent jurisdiction,[59] or that the writ under which he levied could not legally have been enforced.[60]

**b. Release on Bond.**[61] Where the statute allows defendant in attachment to dissolve the attachment and secure the return of the property by giving bond,[62] the sheriff incurs no liability by releasing the property on a sufficient bond being given,[63] but he is liable if he releases the property on a bond which is invalid on its face.[64]

57. Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366; Ferrin *v.* Symonds, 11 N. H. 363 (holding that where a sheriff, having a writ of attachment, entered on defendant's land for the purpose of executing the writ, and took and carried away his goods, and deposited them in a place in the open air, but in which they were in no danger of injury, except from malice or wantonness, and a portion of the same were afterward destroyed by a person unknown, the sheriff did not thereby become a trespasser *ab initio*); Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352; Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

**Threshing grain.**—Where a sheriff, having levied an execution on grain in the stack or shock, caused it, before sale, to be threshed and handled through an elevator, this was not such misapplication or abuse of his authority as to render him a trespasser *ab initio*. Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

58. *Alabama.*—Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727; Griffin *v.* Isbell, 17 Ala. 184.

*Arkansas.*— Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363.

*California.*— Sanford *v.* Boring, 12 Cal. 539.

*Colorado.*— Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222.

*Georgia.*— Woodward *v.* McDonald, 116 Ga. 748, 42 S. E. 1030.

*Iowa.*— Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788, 51 Iowa 605, 2 N. W. 420.

*Louisiana.*— Crane *v.* Quinn, 23 La. Ann. 512; Fernandez *v.* McVittie, 2 Rob. 239; Lacy *v.* Buhler, 8 Mart. N. S. 661.

*Maine.*— Kelley *v.* Tarbox, 102 Me. 119, 66 Atl. 9.

*Massachusetts.*— Cooper *v.* Mowry, 16 Mass. 5; Tyler *v.* Ulmer, 12 Mass. 163; Rockwood *v.* Allen, 7 Mass. 254.

*Michigan.*— Terry *v.* Metevier, 104 Mich. 50, 62 N. W. 164.

*Missouri.*— State *v.* Rayburn, 22 Mo. App. 303.

*Nebraska.*— McCormick Harvesting Mach. Co. *v.* Dunn, 63 Nebr. 81, 88 N. W. 159.

*New Hampshire.*— Chapman *v.* Bellows, Smith 127.

*New York.*— Ansonia Brass, etc., Co. *v.* Babbitt, 74 N. Y. 395 [*reversing* on other grounds 8 Hun 157]; Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

*Pennsylvania.*— Com. *v.* Contner, 18 Pa. St. 439; Pollock *v.* Ingram, 6 Pa. Super. Ct. 556.

*Texas.*— Dewitt *v.* Oppenheimer, 51 Tex. 103; Ranken *v.* Jones, (Civ. App. 1899) 53 S. W. 583, holding that a constable cannot excuse his failure to keep attached property on the ground that, in adjusting equities between third persons, he delivered the property to the one who had the best right to it.

*Vermont.*— Brandon Iron Co. *v.* Gleason, 24 Vt. 228, holding that where two attachments were levied on property at different times, and the officer delivered it to the first attaching creditor, under an agreement with the debtor that he would take it at its value in discharge of his claim, and dismiss his suit without judgment, the officer was liable to the second attaching creditors, who perfected their lien by judgment and execution, the first lien being lost by discontinuing the suit before judgment.

*United States.*— Lowenberg *v.* Jefferies, 74 Fed. 385.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 196.

**An order for the sale of attached property** is not necessary to render the officer liable to plaintiff for releasing the attachment, but it is enough that an execution has issued on the judgment. Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222.

**Liability for value of property.**—Where a constable delivered to another property held by him under a writ of sequestration, he cannot, in an action by the owner to recover the value of the property, discharge his liability by returning it, but only by paying the value thereof. Crane *v.* Quinn, 23 La. Ann. 512.

59. Woodward *v.* McDonald, 116 Ga. 748, 42 S. E. 1030; Crane *v.* Quinn, 23 La. Ann. 512. See also Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363; Fernandez *v.* McVittie, 2 Rob. (La.) 239.

60. Woodward *v.* McDonald, 116 Ga. 748, 42 S. E. 1030.

61. **Liabilities in respect to taking bond or security** see *infra*, V, I.

62. See Attachment, 4 Cyc. 676.

63. Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363. See also Nagle *v.* Lumpkin, 48 Ga. 521.

64. Bowditch *v.* Harmon, 183 Mass. 290,

**c. Liability to Subsequent Creditors of Owner of Property.** Where a sheriff so negligently conducts himself in respect to personal property levied on by him that it is lost, and the execution is satisfied out of the real estate of defendant, whereby the security of subsequent mortgage creditors upon the real estate of defendant in the execution is reduced, no action lies by such mortgage creditors against the sheriff for such malfeasance, unless there has been a fraudulent intent to diminish their security.[65]

**d. Particular Matters Affecting Liability** — (i) *VALIDITY OF LEVY.* Where a levy is void because the property is already in the custody of the law under a prior levy the officer is not liable for allowing the property to be taken away by the purchaser at a sale under the first levy.[66]

(ii) *OWNERSHIP OF PROPERTY.* It is a sufficient excuse for a release of property levied on that such property did not belong to defendant in the process under which it was seized, but to the person by whom it was claimed and to whom it was released; [67] but the burden of proof is upon the officer to establish that such is the fact.[68]

(iii) *EXEMPTION OF PROPERTY.* A sheriff who has levied on exempt property incurs no liability by releasing the same,[69] and cannot be held liable on the ground that plaintiff's debt was contracted before the enactment of the exemption law, unless it be shown that the sheriff had notice, actual or implied, of that fact.[70]

(iv) *PRIOR LIENS ON PROPERTY.* In an action against a sheriff for an unauthorized release of attached property, he may set up in mitigation of damages the facts that plaintiff's attachment was subsequent to many others, and that judgments have been rendered in the other actions more than sufficient to exhaust the attached property.[71]

(v) *FAILURE OR REFUSAL TO INDEMNIFY SHERIFF.* Where property [72] levied on by a sheriff is claimed by a third person and the sheriff demands indemnity, which is refused, he is not liable for releasing the property; [73] but where he did not demand indemnity he cannot escape liability for releasing the property because of the fact that none was given.[74]

(vi) *SOLVENCY OF DEBTOR.* In an action against a sheriff for his neglect in releasing possession of property seized under an attachment, it is not competent for him to show in mitigation of damages that the judgment debtor is solvent.[75]

67 N. E. 333, holding that as under the statute the approval of the bond by a master only determines the sufficiency of the sureties, a sheriff commits a breach of official duty in releasing an attachment on the approval of the bond by the master, where the bond is invalid on its face, because executed by the sureties alone, although purporting in its recitals to be executed by the principal as well.

65. Rome Bank *v.* Mott, 17 Wend. (N. Y.) 554.

66. Camp *v.* Williams, 119 Ga. 152, 46 S. E. 66. See also Mumper *v.* Rushmore, 79 N. Y. 19.

67. Union Bank *v.* Benham, 23 Ala. 143; Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; Tyler *v.* Ulmer, 12 Mass. 163; Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

**The fact that the sheriff received an indemnity bond** before making the levy did not preclude him from showing that the goods were not subject to seizure. Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

68. Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788.

69. Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727; Seamans *v.* King, 79 Ga. 611, 5 S. E. 53; Johnson *v.* Bartek, 56 Nebr. 422, 76 N. W. 878.

**Reversal of judgment sustaining claim of exemption.**—A constable is not liable for delivering to the debtor a chattel seized under garnishment, and ordered sold, but claimed by the debtor as exempt in an affidavit of illegality, and so adjudged by the court, and then by a jury appealed to, and thereupon ordered to be released, although the judgment is afterward reversed on certiorari, a new trial had before the justice, the chattel declared subject, and again ordered sold, while meantime the debtor has put it out of reach. Seamans *v.* King, 79 Ga. 611, 5 S. E. 53.

70. Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727.

71. Lowenberg *v.* Jefferies, 74 Fed. 385.

72. **Right to demand indemnity** see *infra*, VI, A, 1.

73. State *v.* Sharp, 2 Sneed (Tenn.) 615. *Contra*, State *v.* Rayburn, 22 Mo. App. 303.

74. Dewitt *v.* Oppenheimer, 51 Tex. 103.

75. Tyler *v.* Ulmer, 12 Mass. 163.

(VII) *BANKRUPTCY* [76] *OR INSOLVENCY* [77] *OF DEBTOR.* A sheriff who has levied an execution on property has been held liable for releasing it to a United States marshal, who took it in proceedings in bankruptcy subsequent to the levying of the execution;[78] but under a state insolvency statute an officer has been held not liable for delivering attached property to the debtor's assignee in insolvency,[79] even though the insolvency proceedings were subsequently annulled.[80] Where a sheriff has wrongfully released property levied on under execution the execution plaintiff does not lose his right of action against the sheriff by proving his claim against the bankrupt estate of the execution debtor and accepting a dividend.[81]

(VIII) *DISSOLUTION OF WRIT.* On the dissolution of an attachment, the officer is not bound to retain the property to enable plaintiff to appeal and give a stay bond; and if he delivers the property to the debtor he is not liable in an action therefor by plaintiff in attachment.[82]

(IX) *EXPIRATION OF LIEN.* A sheriff is not liable for failure to keep attached property where no execution is issued or no demand for the property is made on him by the attaching creditor until after the expiration of the period after judgment for which the sheriff is entitled to hold the goods under the attachment.[83]

(X) *JUDICIAL PROCEEDINGS AFFECTING RIGHT TO POSSESSION.* When a sheriff holds, under attachment, property seized as that of the attachment debtor, and the court in which the attachment suits are pending appoints a receiver in a suit commenced to determine conflicting rights in the property and directs such property to be turned over to him, such taking of the property from the sheriff's possession is a proper defense in an action against him, by plaintiff in one of the attachment suits, for an unauthorized release of the attached property.[84] And where a sheriff levies an execution on goods, and, an injunction being served on him, redelivers the goods, he is not liable to plaintiff, although no security has actually been given for the injunction.[85] So also a sheriff who has levied an execution on personal property and has been deprived of the possession thereof by

**76.** See, generally, BANKRUPTCY, 5 Cyc. 227.

**77.** See, generally, INSOLVENCY, 22 Cyc. 1249.

**78.** Ansonia Brass, etc., Co. *v.* Babbitt, 74 N. Y. 395 [*reversing* on other grounds 8 Hun 157].

**Under the present bankruptcy law** the rule would be otherwise unless the lien of the judgment or execution attached four months before the filing of the petition in bankruptcy. See BANKRUPTCY, 5 Cyc. 365.

**79.** Penniman *v.* Freeman, 3 Gray (Mass.) 245, so holding under St. (1838) c. 163, § 5, providing that an assignment in insolvency made thereunder shall vest the estate of the debtor in the assignees, "'although the same may be then attached on mesne process as the property of the said debtor,' and 'shall be effectual to pass all the said estate, and dissolve any such attachment.'"

**Insolvency of partnership.**—A sheriff who has levied on the interest of one partner on the suit of his separate or individual creditor may release the levy without liability when the partnership is insolvent and the sale of the partner's interest would have been unproductive of anything to satisfy the execution. Wilson *v.* Strobach, 59 Ala. 488.

**80.** Penniman *v.* Freeman, 3 Gray (Mass.) 245.

**81.** Dorrance *v.* Henderson, 27 Hun (N. Y.) 206 [*affirmed* in 92 N. Y. 406].

**Failure to disclose lien arising from levy.**—Proof of the debt in the bankruptcy proceedings without disclosing the lien arising on the levy of the execution, and the allowance of the same and the declaration of a dividend thereon, will relieve the sheriff from liability for releasing the levy. Ansonia Brass, etc., Co. *v.* Babbitt, 74 N. Y. 395 [*reversing* 8 Hun 157].

**82.** Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. 298; Memphis Grocery Co. *v.* Anderson, 76 Miss. 322, 24 So. 387.

**Successful appeal by plaintiff.**—On the dissolution of a levy of attachment, the attachment plaintiff, who took an appeal without notifying the sheriff thereof, and without obtaining a writ of supersedeas, could not, when the appeal resulted in his favor, hold the sheriff liable for the value of the attached property which the claimant below had removed. Memphis Grocery Co. *v.* Anderson, 76 Miss. 322, 24 So. 387.

**83.** Howard *v.* Smith, 12 Pick. (Mass.) 202 (holding that this was true, although before the judgment the sheriff had accepted a receiptor and relinquished the property); Goodrich *v.* Church, 20 Vt. 187.

**84.** Lowenberg *v.* Jefferies, 74 Fed. 385.

**85.** Taggert *v.* Hill, 3 N. C. 81, 1 N. C. 117.

writ of replevin at the suit of a claimant is not liable for the debt and damages on the motion of the judgment creditor.[86]

(xi) *PAYMENT OF AMOUNT CLAIMED IN WRIT.* The sheriff who makes the attachment incurs no liability to plaintiff by releasing the property on defendant's paying to him the amount of the claim as stated in the writ, and costs,[87] although the amount of the claim is understated through mistake and plaintiff afterward recovers a judgment for a larger amount.[88]

(xii) *EXISTENCE OF ACTUAL LEVY.* A plaintiff in attachment cannot hold a sheriff liable for releasing property, unless there was an actual levy upon such property under his writ.[89]

**3. FAILURE TO HAVE PROPERTY FORTHCOMING TO SATISFY WRIT — a. In General.** Where a sheriff has taken possession of property under mesne process, and plaintiff is successful in the action, the officer is liable if he fails to have the property forthcoming to satisfy final process issued on behalf of plaintiff,[90] unless it appears

86. Swain *v.* Alcorn, 50 Miss. 320; Taylor *v.* Howren, 1 McCord (S. C.) 418.

**The fact that the creditor has given the sheriff indemnity** does not make the latter liable. Swain *v.* Alcorn, 50 Miss. 320.

**Wrongful acts of plaintiff in replevin** after the delivery of the property to him impose no liability on the sheriff. King *v.* Cook, 4 Ill. App. 525.

87. Page *v.* Belt, 17 Mo. 263.

88. Page *v.* Belt, 17 Mo. 263.

89. Freiberg *v.* Johnson, 71 Tex. 558, 565, 9 S. W. 455, where the following instruction was held correct: "And if, after this [a release of a levy under an attachment] was done, plaintiffs sued out a second writ of attachment, the mere fact that the sheriff copied the return on the former writ of attachment (if he did so) would not constitute a levy of said last attachment, but he would be compelled in order to make a legal levy, to go to the place, and in the presence of the goods to be levied upon, and take such possession thereof, or so controlling said goods as that he would be guilty of trespass against the owners of the goods but for the writ which he attempted to execute."

90. *Connecticut.*— Jordan *v.* Gallup, 16 Conn. 536; Scott *v.* Crane, 1 Conn. 255.

*Maine.*— Franklin Bank *v.* Small, 26 Me. 136; Lovejoy *v.* Hutchins, 23 Me. 272 (holding that the return of an attachment of personal property as made "at the risk of the plaintiff" does not relieve the officer making the attachment from his responsibility in keeping the property until judgment and execution, and it is no excuse to the officer for failure to keep logs attached by him to be taken on execution that by reason of the current of the water in which the logs lay and the resistance of the owners he was unable to keep them within his precinct, since by his attachment he acquired a special property under which he could have proceeded and reclaimed them anywhere); Humphreys *v.* Cobb, 22 Me. 380 (holding that the liability of an officer for property attached by him, which he has delivered to a third person, taking his receipt for the same, to redeliver it, is not discharged by his giving the receipt to the attorney of the creditor within thirty days after judgment, without any request or agreement that it should be received as a substitute for the property, although the attorney takes measures to obtain the property from the receiptor); Gordon *v.* Wilkins, 20 Me. 134 (holding that an officer, having property under an attachment, is not released from responsibility by his offer to deliver the property at the place of its deposit to the officer having the execution in the action, if the property is deposited at an inconvenient and unreasonable place); Higgins *v.* Kendrick, 14 Me. 83.

*Massachusetts.*— Congdon *v.* Cooper, 15 Mass. 10; Sewall *v.* Mattoon, 9 Mass. 535.

*New Hampshire.*— Lovell *v.* Sabin, 15 N. H. 29; Chapman *v.* Bellows, Smith 127, holding that a sheriff, attaching goods at the suit of several creditors in a certain order, must keep them safely, so that the last creditor may have the benefit of the goods to satisfy his demand, if the others have not been prosecuted.

*Vermont.*— McK. Ormsby *v.* Morris, 29 Vt. 417; Smith *v.* Church, 27 Vt. 168.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 204.

**Application of value of property on final process.**—Where personal property was attached by a sheriff on sundry suits in favor of A, and afterward in a suit in favor of B against a third person, and the sheriff delivered the property to D, who gave a written receipt, promising to redeliver it on demand, and with the executions issued in the suits first served the sheriff afterward demanded such property of D, who neglected to redeliver it, but paid the value thereof to the sheriff, who applied the sum so paid in part payment of the executions, it being insufficient to satisfy the full amount, and B, having obtained an execution in his suit and having in vain demanded the property of the sheriff, brought an action against him for negligence, and the sheriff set up such facts as a defense, it was held that the delivery of the property to D, the taking from him of a promise for its redelivery when demanded, his subsequent payment of the full value of the property, and the application of the money by the sheriff on the execution in favor of A, did not excuse the sheriff for not having the property forthcoming to be taken on B's execution. Jordan *v.* Gallup, 16 Conn. 536.

that the property did not belong to the debtor [91] or was not subject to sale on final process,[92] or the mesne process has been dissolved,[93] or the facts are such that the officer's failure to produce the property cannot be attributed to his negligence or fault.[94]

**b. Nature of Seizure.** Property attached by lodging a copy in the town clerk's office is in custody of the officer, and he is liable for failure to produce it, unless he can excuse himself by showing that he exercised the same degree of care regarding it that is required of property taken into actual possession.[95]

**The approval by a plaintiff of the person taken as receiptor** for property attached on his writ does not exonerate the sheriff from making effort to find the property that it may be sold on the execution. Allen *v.* Doyle, 33 Me. 420.

**Judgment in favor of substituted plaintiff.**—Where an assignee of an insolvent debtor, being authorized under Mass. St. (1841) c. 124, § 5, prosecutes a suit against the debtor in which the debtor's property is attached, continues the suit to judgment, and takes out execution therefor in his own name as assignee, it is no excuse for the sheriff's failure to have the attached property forthcoming that the names of the parties are not the same in the execution as in the original writ, he having the means of knowledge from the record. Bacon *v.* Lincoln, 2 Cush. (Mass.) 124.

91. Jordan *v.* Gallup, 16 Conn. 536.

**Detinue proceedings against officer.**—A sheriff may escape liability for not having property attached by him forthcoming to satisfy an execution issued on a judgment in the attachment suit by showing that such property was taken from him in detinue proceedings by a claimant thereof. Governor *v.* Gibson, 14 Ala. 326, holding that in such case it was sufficient for the officer to notify the attachment plaintiff of the detinue proceedings and called on him for indemnity, and it was not indispensable to his protection that he should have replevied the property by giving bond; and even the omission to give the attachment plaintiff notice would not make the officer chargeable with the value of the property.

**When title in receiptor not available.**—Where a receiptor for property attached gives a receipt declaring that "this receipt shall be conclusive evidence against us as to our receipt of said property, its value, before mentioned, and our liability under all circumstances," the sheriff cannot set up as a defense to an action by the creditor for refusing to deliver the property attached, to be taken on execution, that it did not belong to the creditor, but to the receiptor, as the latter is estopped by his receipt to deny that the property belongs to the debtor. Penobscot Boom Corp. *v.* Wilkins, 27 Me. 345.

92. Taggard *v.* Buckmore, 42 Me. 77.

93. Grant *v.* Lyman, 4 Metc. (Mass.) 470, holding that where a creditor caused the goods of his debtor to be attached, and the officer took a receipt therefor, and the debtor afterward applied for the benefit of the Insolvent Act, and all his property was thereupon assigned under the statute, thus dissolving the attachment, and the attachment creditor recovered judgment and took out a writ of execution, which the attaching officer returned wholly unsatisfied, the officer was not liable for failure to have the property forthcoming to satisfy the execution, although the attached goods never came into the possession of the debtor's assignees.

94. Dayton *v.* Lynes, 31 Conn. 578 (holding that where an officer made demand on receiptors for personal property attached in the suit and delivered to them, which demand was made within the time allowed by the terms of the execution for its service and return, but after the lien of the judgment had expired by the lapse of sixty days from the time of the judgment, the execution having been issued some time after the rendition of the judgment, but no information of that fact having been given to the officer, he was not chargeable with negligence in not having the property forthcoming to satisfy the execution); Gordon *v.* Wilkins, 20 Me. 134 (holding that where property attached on mesne process was bulky, and was deposited in a suitable and convenient place for safe-keeping, and the attaching officer was ready and willing to deliver the same to the officer having the execution issued in the case, he having seasonably made demand therefor, but was prevented by the failure of the officer making the demand to go with him and receive it, he was discharged); Howard *v.* Wittemore, 9 N. H. 133 [*following* Runlett *v.* Bell, 5 N. H. 433] (holding that a sheriff, who has attached property on mesne process and delivered it to a person apparently in good circumstances, taking his receipt and promise to redeliver, is not liable, if he demands the property on the execution and is unable to obtain it in season to satisfy the writ).

**Removal of property attached but not removed by officer.**—Where articles of personal property which, by reason of their bulk, or other cause, cannot immediately be removed, are attached in the manner provided in Mass. Rev. St. c. 90, § 33, and the officer is guilty of no misconduct or neglect of duty respecting the property, he is not responsible, as if such articles were in his actual custody, if, without his consent or knowledge, they are afterward removed, so that they cannot be found to be taken on execution. Scovill *v.* Root, 10 Allen (Mass.) 414; Hubbell *v.* Root, 2 Allen (Mass.) 185.

**That property attached has been taken from the officer by a trespasser** will not excuse the non-production of the property in satisfaction of the execution issued in the suit. Lovell *v.* Sabin, 15 N. H. 29.

95. Willey *v.* Laraway, 64 Vt. 566, 25 Atl.

**c. Necessity For Demand or Delivery of Final Process.** A demand upon the officer or the delivery of final process to him, within the time after judgment during which the mesne process remains in force, is necessary to fix his liability for failure to have property seized on mesne process forthcoming to satisfy final process,[96] unless other facts are shown which supersede the necessity of a demand,[97] and failing such demand or delivery the officer is not liable, although he would have been unable to produce the property if demand had been made or the process delivered to him.[98]

**d. Effect of Application of Property to Senior Writs.** Where a sheriff levies successive attachments of different creditors on property of a debtor, he will be liable only for nominal damages for failure to have it forthcoming to satisfy the execution of a junior attaching creditor, where he has applied it to satisfy the executions of senior attaching creditors previously obtained, complying with all the requirements of the statute in making the application.[99]

**4. Release of Surety by Delivery of Property to Principal Debtor.** Where a sheriff, after levying upon property, delivers it to the principal debtor, thereby releasing the surety from the judgment debt, he becomes liable to the creditor, if the latter is not in fault.[1]

**5. Failure to Deliver Property to Party Entitled Thereto.** When it becomes the duty of the sheriff to deliver to a particular person property of which he has taken possession in his official capacity, his failure to so deliver it is a default for which he is liable.[2] But an officer cannot be held liable for failure to return attached property to defendant upon payment of the debt to plaintiff or a settlement between the parties, where no notice is given to him and the suit is not

435; Fay *v.* Munson, 40 Vt. 468; McKOrmsby *v.* Morris, 29 Vt. 417; Smith *v.* Church, 27 Vt. 168.

96. Wetherell *v.* Hughes, 45 Me. 61; Lawrence *v.* Rice, 12 Metc. (Mass.) 527; Jameson *v.* Mason, 12 Vt. 599.

**Demand outside of precinct.**—Where a personal demand is made, under an execution, on a constable, without his official precinct, for goods previously attached by him, an unqualified refusal to deliver up such goods will subject him to an action at the suit of the creditor. Scott *v.* Crane, 1 Conn. 255.

97. Wetherell *v.* Hughes, 45 Me. 61.

**Waiver of demand.**— In an action against the sheriff for failure of his deputy to deliver goods taken on attachment, proof of waiver by the deputy of a demand for the goods is equivalent to proof of demand, although the deputy was out of office at the time. Morton *v.* White, 16 Me. 53.

98. Wetherell *v.* Hughes, 45 Me. 61; Lawrence *v.* Rice, 12 Metc. (Mass.) 527; Jameson *v.* Mason, 12 Vt. 599.

99. Jordan *v.* Gallup, 16 Conn. 536.

1. Lumsden *v.* Leonard, 55 Ga. 374.

2. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318 (holding that where an officer who has seized property in an action of replevin refuses to release the same upon tender of a bond in double the value of the property within the proper time, as the statute requires him to do, but delivers it to plaintiff in the action, he is a trespasser *ab initio* and is liable for all damages resulting from his misconduct); Elrod *v.* Hamner, 120 Ala. 463, 24 So. 882, 74 Am. St. Rep. 43 [*following* Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Burgin *v.* Rapler, 100 Ala. 433, 14 So. 205; Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; Gay *v.* Burgess, 59 Ala. 575; McElhaney *v.* Gilliland, 30 Ala. 183] (holding that under Code (1886), § 2717, providing, if plaintiff in detinue makes the affidavit and bond required, the officer executing the writ shall take the property into his possession, unless defendant gives a forthcoming bond; and section 2718, providing, if defendant neglects for five days to give such bond, the property must be delivered to plaintiff, on his giving a forthcoming bond with sufficient surety, and, if he fail to give such bond for five days after expiration of the time allowed defendant, the property must be returned to defendant, failure to restore the property to defendant where no forthcoming bond is given is an official misfeasance, for which it cannot be set up in defense or in mitigation of damages that defendant did not own the property, or had merely a qualified interest therein, or that it was subject to a mortgage, and it is no defense that plaintiff in detinue gave a forthcoming bond after the expiration of the ten days); Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992 (holding that an officer who removes attached property from defendant's possession is liable for conversion of the same on dissolution of the attachment if he fails to deliver it to defendant on demand, and that therefore a charge that on dissolution of the attachment the officer was bound only to remove the keeper placed in charge of the property and leave it where he found it was properly refused); Gates *v.* Gates, 15 Mass. 310 (holding that after an attachment suit has terminated in a judgment against plaintiff on an account filed as a set-off, a third person owning the property under a

discontinued,[3] nor does the failure of an officer to deliver goods seized by him on demand amount to a conversion, when he has lawfully parted with their possession.[4] Neither can an officer be held liable for conversion because, before the dissolution of an attachment, he refused to deliver the property to a mortgagee, who had been summoned as trustee.[5] It has been held that a previous demand is necessary to support an action against a sheriff for a refusal to return property in his official custody to the owner when the latter has become entitled to such return.[6]

**6. Removal of Property.** Where an officer acting under a writ of sequestration of a house and lot exercises ordinary care in the removal of defendant's effects from the premises, he is not liable for injuries resulting to the property in consequence of the removal.[7]

**7. Conversion[8] of Property.** A sheriff is liable for wrongfully converting property to his own use, although he originally obtained possession thereof by a lawful seizure under process.[9]

**8. Use of Property.** A sheriff or constable cannot be held liable as a trespasser *ab initio* for using personal property in his official custody unless the property has been injured or has been used by him for his own benefit or for the benefit of someone other than the debtor.[10] And although the use of property seized be such as to make the officer a trespasser *ab initio*, and *prima facie* liable for the

sale from the original defendant may maintain his property by making demand on the officer therefor; and, if the latter fail to deliver it, he will be answerable in damages); Freeman *v.* Grant, 132 N. Y. 22, 30 N. E. 247 [*affirming* 8 N. Y. Suppl. 912] (holding that where a sheriff has lawfully come into possession of property by a levy thereon under executions, but subsequently the debtor makes an assignment for the benefit of creditors, the sheriff cannot lawfully retain a surplus arising on the sale under such executions in order to apply the same on other executions which came into his hands after the assignment, and if he does so he is liable as for conversion); Patterson *v.* Anderson, 40 Pa. St. 359, 80 Am. Dec. 579 (holding that where, after a sale of goods on execution, the sheriff retained possession of the goods until the bid was paid, and then refused to deliver them to the purchaser, who was plaintiff in the execution, and who offered indemnity, but delivered possession of the goods and the store in which they were to a person claiming to be the partner of the execution debtor, against whom the purchaser afterward established his title to the goods, the sheriff was liable to such purchaser for the value thereof).

**Officer not liable to party who is not injured.**—Vawter *v.* Morgan, 6 Mart. N. S. (La.) 46.

**Where property in possession of party's assignee.**—Although Wis. Rev. St. § 2746, requiring that on dissolution of an attachment the property shall be delivered to defendant, is imperative, the officer is exonerated from liability to defendant by showing that the property is already in possession of defendant's assignee for benefit of creditors by virtue of replevin proceedings. Clark *v.* Lamoreux, 70 Wis. 508, 36 N. W. 393.

3. Wheeler *v.* Nichols, 32 Me. 233; Livingston *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

4. Halsey *v.* Huse, 46 Conn. 389.

5. Jackson *v.* Kimball, 121 Mass. 204.

6. Conover *v.* Gatewood, 2 A. K. Marsh. (Ky.) 566, 12 Am. Dec. 451. *Contra*, Elrod *v.* Hamner, 120 Ala. 463, 24 So. 882, 74 Am. St. Rep. 43.

**Waiver of right to notice of payment of judgment.**—Where a judgment debtor whose property has been attached on mesne process has paid the amount of the judgment and informs the officer thereof and demands the return of his property, before the expiration of the attachment lien, and the officer, without asking for delay or authority from the judgment creditor to deliver up the property, replies that it is lost and he cannot deliver it up, this is a waiver of any right which he might otherwise have had to further notice of the payment of the judgment. Dorman *v.* Kane, 5 Allen (Mass.) 38.

7. Patton *v.* Slade, 15 Tex. Civ. App. 156, 38 S. W. 832.

8. See, generally, Trover and Conversion.

9. Christensen *v.* Beebe, 32 Utah 406, 91 Pac. 129.

10. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75, holding that where an officer attached a horse, wagon, and harness, and immediately put them in use in removing other personal property of the debtor attached by him at the same time, and it appeared that they were not thereby injured, he was not liable for such use as a trespasser *ab initio*, and holding further that where it appeared that the officer on the next day subsequent to the attachment was seen driving the horse and wagon in the highway and it did not appear for what purpose he was using them, the jury might infer from the time and circumstances that he was removing them for the purpose of securing them in a convenient place for keeping them while subject to the attachment. See also Callaway *v.* Bobo, 15 La. Ann. 467.

full value thereof, yet if the property be received back by its owner, or is legally disposed of on execution against him issued in the suit in which it was seized, the officer is not liable for the full value of the property, but only for such damages as were occasioned by the use.[11]

**9. Holding Possession of Premises Containing Goods Seized Under Process.** Where a sheriff seizes goods he may, without subjecting himself to liability, hold the house in which they are for such time as is reasonably sufficient to make an inventory and remove the goods,[12] or remain in the premises for such time as is reasonably necessary to enable him to remove the goods;[13] but if he remains or authorizes another person to remain in the premises for a longer time he becomes liable as a trespasser,[14] and if he holds possession of the premises for a longer time he may be held liable for rent.[15]

**10. Liability For Value of Occupancy of Real Estate Under Seizure.** It is the duty of the sheriff when he seizes productive real estate to take at the same time all the rents, issues, and revenues which the property may yield;[16] and when he neglects to do so efficiently in a proper case, and the judgment and seizing creditor is injured thereby, the sheriff is bound to repair the damage which he has occasioned by his fault.[17] But where the sheriff seizes the residence of a defendant which is occupied by defendant, and is without power either to expel defendant or to compel him to pay rent, he cannot be held liable for the value of the use of the property.[18]

**11. Disposition of Property.** A sheriff incurs no liability to a prior lienholder by turning over attached property to plaintiff upon order of defendant,

**11.** Collins *v.* Perkins, 31 Vt. 624.

**12.** Hooks *v.* Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991. See also Rowley *v.* Rice, 11 Metc. (Mass.) 337.

**Liability for deprivation of use of property seized.**—An officer who attaches personal property and summons a mortgagee as the trustee of defendant, who thereupon surrenders possession of the property to the mortgagee, does not, by unreasonably keeping possession of a building of defendant in which the property is, render himself liable to defendant in damages for depriving him of the use of the personal property. Leavitt *v.* Butterfield, 15 Gray (Mass.) 67.

**Sheriff not liable for rent.**—Where property of a tenant, located in rooms of an office building, which he occupied under a yearly lease, is attached, and left there by the sheriff in charge of a watchman, the tenant, and not the sheriff, is liable for the rents pending a disposition of the property. Northwestern Mut. L. Ins. Co. *v.* Hill, (Tenn. Ch. App. 1897) 46 S. W. 1009, holding that a notice to the watchman, who was not a deputy sheriff, that rent would be charged was not notice to the sheriff sufficient to charge him with the rent.

**13.** Malcom *v.* Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675.

**14.** Malcom *v.* Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675 (holding that a constable who enters a house by authority of law and attaches goods therein becomes a trespasser *ab initio* by placing there an unfit person as keeper of the goods, against the remonstrance of the owner of the house); Rowley *v.* Rice, 11 Metc. (Mass.) 337.

**Delay held unreasonable.**—A constable's delay for seven hours in the middle of the day to remove furniture attached by him, and over which he had placed a keeper in a dwelling-house in a city, the property belonging to and being attached under a writ against one temporarily residing in such house, was unreasonable, and rendered him liable as a trespasser. Davis *v.* Stone, 120 Mass. 228.

**15.** Hooks *v.* Pafford, 34 Tex. Civ. App. 516, 78 S. W. 991, holding that where a sheriff took possession of a building rented by plaintiffs to use in connection with certain goods purchased, which the sheriff levied on as the property of the seller, and the sheriff used the building until he had disposed of the goods, he was liable to plaintiffs for the rent, without regard to the validity of the sale of the goods levied on. But *compare* Whitman *v.* Bowe, 56 Hun (N. Y.) 141, 9 N. Y. Suppl. 65.

**Where a sheriff takes exclusive possession** of premises in which goods seized by him are, he is chargeable with the rent of such premises for the time they are occupied by him. Carman *v.* Kelly, 5 Hun (N. Y.) 283. See also Clapp *v.* Thomas, 7 Allen (Mass.) 188, holding that where a sheriff kept possession of an entire building in which property attached was found, the owner was entitled to recover for the loss of the use and occupation of that portion of the building not occupied by the attached property.

**Duty to surrender premises on notice.**—A constable, who, under an attachment of goods of a tenant by the day, holds possession of them in the landlord's house by his consent, must surrender the house within one day of the landlord's notice to vacate, or is liable in damages for the fair rental value for the time of unlawful detention. Frizzell *v.* Duffer, 58 Ark. 612, 25 S. W. 1111.

**16.** Conte *v.* Handy, 34 La. Ann. 862.

**17.** Conte *v.* Handy, 34 La. Ann. 862.

**18.** Conte *v.* Handy, 34 La. Ann. 862.

although he knew of the existence of the prior lien.[19] Where property in the hands of an agent is sequestered and there is a nonsuit in the sequestration proceedings the sheriff incurs no liability to the owner of the property by returning it to the agent;[20] and where the interest of one tenant in common in personal property is attached, the attaching officer, after the attachment is dissolved, may relieve himself from liability to the debtor for the property by delivering it to the cotenant.[21] Where the right of a sheriff to hold attached property has ceased by reason of a composition between the debtor and creditor, and the property is seized by another officer under process, without the knowledge and against the will of the sheriff, the sheriff is not liable because the debtor or his assignee is unable to get possession of the property.[22] Where property has been attached and judgment obtained the officer is liable for turning over the proceeds to a third person on mere notice of claim without proof of title.[23] Where an officer who has seized property under attachment releases the lien of the attachment by turning over the property to plaintiff in the attachment, he becomes a trespasser from the beginning.[24]

12. ESTOPPEL[25] TO DENY LAWFUL POSSESSION. Where a constable having a writ of attachment, and, not being misled by any instructions from plaintiff or his attorney, represents to plaintiff that he has made a valid attachment, and thereby induces plaintiff to rely on it, and forego making any further attachment, he is estopped, in an action of trespass on the case, from showing that in fact he made no legal attachment.[26]

13. EXTENT OF LIABILITY FOR LOSS OR RELEASE OF PROPERTY LEVIED ON. A sheriff who voluntarily releases or negligently loses control of property levied on so that it is not available for the satisfaction of an execution is liable to the execution plaintiff for the amount of the debt[27] and costs,[28] unless the property seized was not sufficient to satisfy the debt, in which case the measure of damages is the value of the property,[29] at the time when it should have been applied to the debt.[30] But the officer may reduce his liability by showing that the property was subject to prior liens by reason of which the full amount of the execution could not have been realized by a sale.[31] In a suit by a creditor against an officer for neglecting to keep personal property attached on mesne process so that it might be taken on execution, such officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses which might have attended the keeping, had it been kept safely;[32] nor can an officer who has permitted property attached by him to return to the hands of the debtor be allowed

19. Baldwin *v.* Manning, 50 S. W. 683, 20 Ky. L. Rep. 1995.

20. Hasluck *v.* Morgan, 2 Mart. N. S. (La.) 9.

21. Frost *v.* Kellogg, 23 Vt. 308 [*followed* in Gassett *v.* Sargeant, 26 Vt. 424].

22. Irwin *v.* Kessler, 2 Cinc. Super. Ct. (Ohio) 1.

23. State *v.* Langdon, 57 Mo. 353.

24. Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339.

25. See, generally, ESTOPPEL, 16 Cyc. 671.

26. Howes *v.* Spicer, 23 Vt. 508.

27. Montegut *v.* Waggaman, McGloin (La.) 69; Dorrance *v.* Henderson, 27 Hun (N. Y.) 206 [*affirmed* in 92 N. Y. 406]; Com. *v.* Contner, 18 Pa. St. 439.

28. Montegut *v.* Waggaman, McGloin (La.) 69.

29. *Louisiana.*— Montegut *v.* Waggaman, McGloin 69.

*Maine.*— Willard *v.* Whitney, 49 Me. 235; Franklin Bank *v.* Small, 24 Me. 52; Weld *v.* Green, 10 Me. 20.

*Massachusetts.*— Tyler *v.* Ulmer, 12 Mass. 163; Rockwood *v.* Allen, 7 Mass. 254.

*Missouri.*— State *v.* Langdon, 57 Mo. 350.

*Pennsylvania.*— Com. *v.* Contner, 18 Pa. St. 439.

*United States.*— See Pierce *v.* Strickland, 19 Fed. Cas. No. 11,147, 2 Story 292.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 303.

The value of the property attached, as stated in the officer's return and in a receipt taken for it, may, in the absence of all contradictory proof, be taken as the true value of the property for which the sheriff is liable. Willard *v.* Whitney, 49 Me. 235.

30. Tyler *v.* Ulmer, 12 Mass. 163, holding that where a sheriff lost property attached by him, the measure of damages was the value of the property at the time the execution should have been levied, and not at the time of the attachment.

31. Com. *v.* Contner, 18 Pa. St. 439; Southwick *v.* Weeks, 3 Vt. 49.

32. Lovejoy *v.* Hutchins, 23 Me. 272.

a deduction from his liability for expense of keeping the property, where such expense was borne by the debtor.[33]

**G. Liabilities Arising Out of Sale of Property — 1. Sale Not Authorized by Process.** A sheriff is liable for selling property which he had no authority to sell under his process.[34] So a sheriff who attaches property on mesne process and sells it thereon without the consent of the creditor and owner,[35] or an order for such sale,[36] or otherwise than by the mode prescribed by statute,[37] becomes liable as a trespasser; and the liability of the officer for an illegal sale under attachment is not affected by the fact that he has subsequently attached the proceeds of the sale on another writ in favor of the same plaintiff and against the same defendant.[38] The fact that a purchaser at a sheriff's sale has notice of the circumstances under which the sale is made does not bar an action by him against the sheriff for breach of the implied covenant that the sheriff had authority to sell, which was recited in his deed.[39]

**2. Sale After Satisfaction of Judgment.**[40] A sheriff who sells property seized under execution after the judgment has been, to his knowledge, satisfied, is liable therefor to the execution defendant.[41]

**3. Sale After Tender of Amount Due.**[42] Where a sheriff refuses a tender by the judgment debtor of the full amount collectable on an execution in the sheriff's hands, and consequently sells the property under the execution, he is liable for conversion.[43]

**4. Sale After Garnishment of Debt.**[44] A sheriff incurs no liability by a sale of property under execution, although he is notified that the debt has been garnished in a suit by a third person against the creditor, he not being a party to the garnishment proceeding.[45]

**5. Sale After Death of Debtor.** Where a sheriff levies an execution on property and sells it, after the death of defendant, for its full value, and returns the execution satisfied, the personal representatives of defendant cannot, in an action against the sheriff, recover the value of the property which may have been so appropriated in satisfaction of the debts of the decedent.[46]

33. Higgins *v.* Kendrick, 14 Me. 83.

34. Shannon *v.* Jones, 34 N. C. 206, sale of growing crop which is afterward gathered by purchaser.

35. Ross *v.* Philbrick, 39 Me. 29.

36. Terry *v.* Metevier, 104 Mich. 50, 62 N. W. 164.

37. Ross *v.* Philbrick, 39 Me. 29; Wallis *v.* Truesdell, 6 Pick. (Mass.) 455.

The officer becomes a trespasser ab initio by selling attached property without proceeding according to the requirements of the statute, and in such case he is liable to an action without any previous demand on him for the property. Wallis *v.* Truesdell, 6 Pick. (Mass.) 455.

38. Everett *v.* Herrin, 48 Me. 537.

39. Stoney *v.* Shultz, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429.

40. Satisfaction of judgment generally see Judgments, 23 Cyc. 1463.

41. Sherman *v.* Boyce, 15 Johns. (N. Y.) 443 (where a deputy sheriff having a fieri facias in his hands agreed with defendant in the execution to delay the sale and to join with defendant in making a note on which money should be raised and applied to the satisfaction of the judgment, provided that he should still retain the execution in his hands, and if he was called on for the payment of the note he might then proceed to sell for his own indemnity, and the note was accordingly made and the money raised and paid over to the agent for the creditors' attorneys in satisfaction of the judgment, the officer at the time informing the agent that the execution was still to be kept in life for his own indemnity, and the officer being afterward called upon for the payment of the note sold defendant's property under the execution, and it was held that the payment to the judgment creditor, not being a conditional payment, was a satisfaction of the judgment, and therefore the execution was spent, and could not be used by the officer to enforce his own agreement with the debtor, such agreement being illegal and tending to oppression and abuse, and that defendant in the execution might maintain an action of trespass against the officer for the property taken and sold by him); Kuhn *v.* North, 10 Serg. & R. (Pa.) 399.

42. Tender generally see Tender.

43. Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612 [*affirming* 5 Lans. 153].

44. Garnishment generally see Garnishment, 20 Cyc. 969.

45. Gastineau *v.* Sanders, 68 S. W. 5, 24 Ky. L. Rep. 126.

46. Boyer *v.* Herndon, 14 B. Mon. (Ky.) 222. See also Haynsworth *v.* Frierson, 11 Rich. (S. C.) 476, where both the levy and the sale occurred after the death of the debtor.

**6. Sale After Bankruptcy of Debtor.**[47] Where a sheriff levied on certain goods under executions, and a writ of attachment in bankruptcy was afterward issued against the execution debtor, but the sheriff subsequently proceeded to sell under the executions and paid over the proceeds to the execution creditors, he was liable therefor.[48]

**7. Sale After Injunction,**[49] **Stay Order,**[50] **or Supersedeas.**[51] A sheriff is liable where he sells property after receiving notice of an injunction restraining the sale,[52] or an order staying proceedings on the writ,[53] or a supersedeas of the writ.[54]

**8. Sale Pending Appeal.**[55] Where a prior attachment was vacated and declared subordinate to a second attachment against the same defendant, but subsequently such vacation was set aside on appeal, but no stay of proceedings pending such appeal was obtained, and the sheriff, without notice of the pendency thereof, in good faith and in accordance with the decision setting aside the first attachment, sold the property and distributed the proceeds under the second attachment, he was not liable to plaintiff in the first attachment for the amount of his execution.[56]

**9. Sale Under Void Process.** An officer who sells property under process which is void on its face is liable for any damage resulting from such act.[57]

**10. Sale Under Writ Subsequently Set Aside.** Where a sheriff permits plaintiff in execution to purchase the goods levied on before the return-day of the writ, and the writ is set aside by the court, he is liable to subsequent execution creditors.[58] Where a sheriff sells attached goods on mesne process, pursuant to statute, and, after the suit on which they were attached is dismissed, defendant in that suit brings an action against the officer to recover the proceeds of the goods, the officer may defend by showing that the goods were the property of a third person, who has recovered or demanded satisfaction of him for seizing them.[59]

**11. Sale of Property Not Belonging to Defendant — a. In General.** A sheriff who sells property not belonging to defendant in the process under which he acts is liable to the true owner for the resulting damage,[60] although the

Where administrators neglected to procure a stay of an execution against the estate of their intestate, and his chattels were afterward sold on such execution, the estate being insolvent, they had no right of action against the officer who levied the execution. Clark *v.* May, 11 Mass. 233.

47. Bankruptcy generally see Bankruptcy, 5 Cyc. 227.

48. Kinney *v.* Dudman, 11 Nova Scotia 19, holding further that a verdict for the net proceeds of the sale with twelve per cent added was not excessive, the evidence justifying the finding of the jury that the goods would have brought that amount if properly sold. But *compare* Moore *v.* Allen, 25 Miss. 363.

49. Injunction generally see Injunctions, 22 Cyc. 724.

50. Stay of execution generally see Executions, 17 Cyc. 1135.

51. Supersedeas generally see Appeal and Error, 2 Cyc. 885.

52. Buffandeau *v.* Edmondson, 17 Cal. 436, 17 Am. Dec. 139.

53. Spencer *v.* Long, 39 Cal. 700.

54. O'Donnell *v.* Mullin, 27 Pa. St. 199, 67 Am. Dec. 458.

55. Appeal generally see Appeal and Error, 2 Cyc. 474.

56. Clark *v.* Smith, 57 N. Y. App. Div. 524, 68 N. Y. Suppl. 39.

57. Brayman *v.* Whitcomb, 134 Mass. 525.

58. Williams' Appeal, 9 Pa. St. 267.

59. Mansfield *v.* Sumner, 6 Metc. (Mass.) 94.

60. *Alabama.*— Locke *v.* Garrett, 16 Ala. 698.

*Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

*California.*— Curtner *v.* Lyndon, 128 Cal. 35, 60 Pac. 462; Rankin *v.* Ekel, 64 Cal. 446, 1 Pac. 895.

*Indiana.*— Jamison *v.* Hendricks, 2 Blackf. 94, 18 Am. Dec. 131.

*Kentucky.*— Forsythe *v.* Ellis, 4 J. J. Marsh. 298, 20 Am. Dec. 218 [*approved* in Harrison *v.* Shanks, 13 Bush 620]; Roche *v.* Link, 15 Ky. L. Rep. 702.

*Louisiana.*— Terrail *v.* Tinney, 20 La. Ann. 444; Wright *v.* Cain, 4 Rob. 136.

*Maine.*— Holyoke *v.* Gilmore, 45 Me. 566; Sibley *v.* Brown, 15 Me. 185.

*Massachusetts.*— Shumway *v.* Rutter, 8 Pick. 443, 19 Am. Dec. 340.

*Michigan.*— Scudder *v.* Anderson, 54 Mich. 122, 19 N. W. 775.

*Missouri.*— Burk *v.* Baxter, 3 Mo. 207; Vaughn *v.* Fisher, 32 Mo. App. 29; Vaughn *v.* Allgaier, 27 Mo. App. 523.

*Nebraska.*—Whitney *v.* Preston, 29 Nebr. 243, 45 N. W. 619.

*New Hampshire.*—McFarland *v.* Farmer, 42 N. H. 386.

sale was made without taking actual possession of the property,[61] and the officer making the sale did not remove it;[62] and he cannot escape liability because he sold only "the right, title, and interest" of the debtor.[63] If the true owner recovers the property from the purchaser the sheriff is liable to the purchaser for the damage which he has sustained.[64] But if the sheriff after selling under execution property not belonging to the debtor surrenders the property to the true owner and returns the purchase-price to the purchaser, he thereby incurs no liability to the execution creditor.[65]

**b. Sufficiency of Claim.**[66] Where the owner of property levied on under process against another person notifies the sheriff of his ownership and forbids a sale this is tantamount to a demand for the property and renders the sheriff liable if he subsequently sells it.[67]

**c. Sale While Claim Pending.** Where a claimant of property levied on has taken the proper steps under the statute to protect his rights until a trial thereof can be had, a sheriff who refuses to recognize such rights and sells in violation thereof is liable in damages.[68]

**d. Effect of Finding on Trial of Right of Property.**[69] According to some authorities where the right of property is tried in the manner provided by statute, a finding that the property belongs to the debtor relieves the sheriff from liability for consequently selling the same under his process, even though the property really belongs to another;[70] but other authorities hold that, the proceeding

*New York.*— Cole *v.* Mann, 62 N. Y. 1 [*affirming* 3 Thomps. & C. 380]; Sharp *v.* Lamy, 37 N. Y. App. Div. 136, 55 N. Y. Suppl. 784.

*North Carolina.*— Davis *v.* Calloway, 72 N. C. 479; Parish *v.* Wilhelm, 63 N. C. 50.

*Pennsylvania.*— Kline *v.* McCandless, 139 Pa. St. 223, 20 Atl. 1045; Forsyth *v.* Palmer, 14 Pa. St. 96, 53 Am. Dec. 519; McMichael *v.* Mason, 13 Pa. St. 214; Dallam *v.* Fitler, 6 Watts & S. 323; Berwald *v.* Ray, 8 Pa. Super. Ct. 365; Lehr *v.* Brodbeck, 12 York Leg. Rec. 143.

*England.*— See Lancashire Wagon Co. *v.* Fitzhugh, 6 H. & N. 502, 30 L. J. Exch. 231, 3 L. T. Rep. N. S. 703.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 211.

**Even though the sheriff has in his hands an execution against the owner of property, he is liable if he sells it under an execution against another person. Davis *v.* Calloway, 72 N. C. 479.**

**Sale of property levied on by predecessor.—** Where a sheriff levied upon the chattels of a wife by virtue of an execution against her husband, and the successor in office of the sheriff so levying sold the property in defiance of a notice that the chattels belonged to the wife, the sheriff who made the sale was liable in trespass to the wife. Freeman *v.* Apple, 99 Pa. St. 261.

**Chattels hired by debtor.—Where a hirer of chattels for an indefinite time puts them with his own for the purpose of using them to greater advantage, they being of such a nature as to be easily distinguished and separated at any time, and while thus in his possession, the whole is attached, taken away, and sold as his property, the officer is liable to the real owner. Sibley *v.* Brown, 15. Me. 185.**

**Where personal property is contracted to be sold and delivered with a condition precedent to be performed by the vendee, it being agreed that until performance the absolute ownership and property shall remain in the vendor, the sheriff is liable if, before such condition is performed, he sells the property as that of the vendee. McFarland *v.* Farmer, 42 N. H. 386. See also Cole *v.* Mann, 62 N. Y. 1 [*affirming* 3 Thomps. & C. 380].**

**Where a sale of goods is procured by fraud on the part of the vendee, a sheriff who by virtue of an execution against the vendee and without notice of the fraud seizes and sells the goods under execution against the vendee to *bona fide* purchasers is liable for the value of the goods in trespass at the suit of the vendor. Ash *v.* Putnam, 1 Hill (N. Y.) 302.**

**A vendor who has the right of stoppage in transitu may hold the sheriff liable for selling the goods under process against the vendee. Pottinger *v.* Hecksher, 2 Grant (Pa.) 309.**

61. Burk *v.* Baxter, 3 Mo. 207.

62. Scudder *v.* Anderson, 54 Mich. 122 19 N. W. 775; Reynolds *v.* Shuler, 5 Cow. (N. Y.) 323.

63. Rankin *v.* Ekel, 64 Cal. 446, 1 Pac. 895. But *compare* Kile *v.* Giebner, 114 Pa. St. 381, 7 Atl. 154.

64. McGhee *v.* Ellis, 4 Litt. (Ky.) 244, 14 Am. Dec. 124.

65. McCarthy *v.* O'Marr, 19 Mont. 215, 47 Pac. 953, 61 Am. St. Rep. 502, where the sheriff had demanded indemnity which was not furnished.

66. See, generally, EXECUTIONS, 17 Cyc. 1203.

67. Vaughn *v.* Allgaier, 27 Mo. App. 523.

68. Houx *v.* Shaw, 18 Mo. App. 45.

69. Verdict and findings on trial of right of property generally see EXECUTIONS, 17 Cyc. 1221.

70. Emanuel *v.* Cocke, 6 Dana (Ky.) 212; Terril *v.* Cockeril, 3 Bibb (Ky.) 258.

being not judicial, such a finding affords the sheriff no protection if it is erroneous.[71]

**e. Effect of Appeal From Judgment on Trial of Right of Property.**[72] After an appeal by a claimant from a judgment rendered against him on a trial of the right of property, the officer selling the property does so at his peril of a reversal of such judgment.[73]

**f. Abandonment of Claim.** Under some statutes a claimant of property seized by a sheriff or constable is deemed to have abandoned his claim unless he takes action to vindicate and enforce the same within a specified time after it is asserted,[74] and in such case the officer incurs no liability by proceeding to sell the property.[75]

**g. Confusion of Goods.**[76] Where goods of a debtor and a third person have, without fraud or collusion, become mixed so that they cannot be distinguished, but after seizure the third person points out his goods to the officer, and demands a redelivery of them, and the officer, notwithstanding, sells all the goods, he will be liable.[77] But where, however, the goods are so intermingled that the sheriff is unable to distinguish them and the third person does not himself identify and point out his goods, the officer is justified in selling the whole as the property of the debtor.[78]

**h. Property in Possession of Fraudulent Grantee.**[79] Where a sheriff levies an attachment in favor of existing creditors of the grantor, on goods claimed by the grantee under a conveyance which is fraudulent and void as to such creditors, his subsequent sale of the goods, without an order of court, does not render him liable to the grantee as a trespasser *ab initio*.[80]

**i. Sale of Subtenant's Crops For Rent.** Where the statute makes crops raised on rented land liable for the rent,[81] the mere fact that the sheriff, after levying on a sufficiency of the crop of a tenant to satisfy the rent, suffers him to retain and dispose of it, does not render him liable to a subtenant for a consequent seizure and sale of the crop raised by the subtenant on the rented premises.[82]

**j. Process Against Specific Property Sold.** A sheriff seizing and selling property under a special execution, directing him to seize and sell that identical property, is not liable for the execution of the process,[83] unless it appears from the

**Failure of jury to agree.**—Where a jury summoned to try the right to property taken on execution cannot agree, the sheriff is bound to sell, and is not liable to any suit on account of such sale. Com. *v.* Herndon, 2 Dana (Ky.) 429.

71. Perkins *v.* Thornburgh, 10 Cal. 189. See also Pearson *v.* Fisher, 4 N. C. 72.

72. **Appeal from judgment on trial of right of property** generally see EXECUTIONS, 17 Cyc. 1224.

73. People *v.* Ward, 41 Ill. App. 464.

74. Van Marter *v.* Lucas, 64 N. J. L. 182, 44 Atl. 865 [*followed* in Masters *v.* Champion, 75 N. J. L. 768, 69 Atl. 224].

**Mode of proceeding.**—The claimant is not restricted to the procedure authorized by the statute, but the purpose of the law is effected and his claim saved if within the prescribed time he brings an action of tort or replevin against the officer. Van Marter *v.* Lucas, 64 N. J. L. 182, 44 Atl. 865 [*followed* in Masters *v.* Champion, 75 N. J. L. 768, 69 Atl. 224].

**The fact that the goods were in the possession of the claimant,** and that the constable had not taken manual possession thereof at the time of the levy, did not take the case out of the rule stated in the text. Masters *v.* Champion, 74 N. J. L. 323, 65 Atl. 899.

**Notice served on Sunday.**—The fact that the notice in writing given by a claimant of property taken under execution to the constable making the levy was delivered on Sunday did not take the case out of the rule stated in the text where the notice was prepared and signed on Saturday and was not acted on by the constable till the Monday following. Masters *v.* Champion, 74 N. J. L. 323, 65 Atl. 899.

75. Van Marter *v.* Lucas, 64 N. J. L. 182, 44 Atl. 865 [*followed* in Masters *v.* Champion, 75 N. J. L. 768, 69 Atl. 224].

76. See, generally, CONFUSION OF GOODS, 8 Cyc. 570.

77. Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

78. Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233.

79. **Fraudulent conveyances** generally see FRAUDULENT CONVEYANCES, 20 Cyc. 323.

80. Hartshorn *v.* Williams, 31 Ala. 149.

81. See LANDLORD AND TENANT, 24 Cyc. 1256.

82. Givens *v.* Easley, 17 Ala. 385.

83. State *v.* Hailey, 71 Mo. App. 200.

writ itself that the court issuing it had no jurisdiction of the subject-matter,[84] or unless he finds the property in the possession of one not in privity with the execution defendant.[85]

**k. Effect of Taking Bond From Plaintiff in Process.** The sheriff who levies an attachment and makes a sale thereunder is not protected from action by claimants of the property by the fact that he takes a bond from the attaching creditor, containing a provision, unauthorized by the statute under which it is taken, obligating such creditor to pay to any claimant of the property the damage he may sustain from the seizure or sale.[86]

**l. Estoppel[87] of Owner or Claimant.** Where the property seized is at the time of seizure in the possession of defendant who is apparently the owner, and another person, who is the real owner, although informed of the levy, gives the officer no notice of his claim,[88] and the officer does not otherwise know of the claim, the owner is estopped from suing the sheriff for selling the goods levied on.[89] But notice given by one at sheriff's sale that the goods belong to him, and that the purchaser will take no title, does not, in the absence of bad faith, estop him to sue the sheriff in trespass, and confine him to his remedy against the purchaser.[90] Where a person whose property has been seized by an officer under an execution against a third person notifies the officer that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer.[91]

**m. Necessity For Demand.** A sale of property of one person under process against another makes the conversion complete and no demand is necessary to entitle the owner to maintain an action against the officer for the wrong.[92]

**12. Sale of Common Property Under Process Against Cotenant.**[93] Although the sheriff may sell the interest of a cotenant in the common property under process against him,[94] if he assumes to sell the entire property, his act is wrongful as against the cotenant not named in the process, and he is liable for the resulting damage.[95]

Where a sheriff sells under a fieri facias property which has been specifically condemned by a court of competent jurisdiction, he is not responsible for the sale to a person claiming title to the property, although the claimant was not a party to the suit, especially where the claimant might have claimed the property before condemnation but neglected to do so. Ranahan *v.* O'Neale, 6 Gill & J. (Md.) 298, 26 Am. Dec. 576, so holding on the ground that the sheriff cannot be held liable as a tort-feasor for an act which, as a public officer, he was bound to perform.

84. State *v.* Hailey, 71 Mo. App. 200.

85. State *v.* Hailey, 71 Mo. App. 200.

86. Fite *v.* Briedenback, 127 Ky. 504, 105 S. W. 1182, 32 Ky. L. Rep. 400.

87. Estoppel generally see ESTOPPEL, 16 Cyc. 671.

88. Notice of claim to property see ATTACHMENT, 4 Cyc. 729; EXECUTIONS, 17 Cyc. 1201.

89. Stephens *v.* Head, 119 Ala. 511, 24 So. 738.

90. Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998.

91. Wright *v.* Cain, 4 Rob. (La.) 136.

92. Hanchett *v.* Williams, 24 Ill. App. 56; Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

93. Cotenancy generally see JOINT TENANCY, 23 Cyc. 482; TENANCY IN COMMON.

94. Sale of common property under execution see EXECUTIONS, 17 Cyc. 954, 955.

95. *Alabama.*— Sheppard *v.* Shelton, 34 Ala. 652.

*Iowa.*— Edgar *v.* Caldwell, Morr. 434.

*Maine.*— Moore *v.* Pennell, 52 Me. 162, 83 Am. Dec. 500; Knight *v.* Herrin, 48 Me. 533; Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

*Massachusetts.*— Melville *v.* Brown, 15 Mass. 82.

*Michigan.*— Kunze *v.* Cox, 113 Mich. 546, 71 N. W. 864, 67 Am. St. Rep. 480.

*New York.*— Michalover *v.* Moses, 19 N. Y. App. Div. 343, 46 N. Y. Suppl. 456; Walsh *v.* Adams, 3 Den. 125; Waddell *v.* Cook, 2 Hill 47, 37 Am. Dec. 372; Wheeler *v.* McFarland, 10 Wend. 318. See also Kaufman *v.* Schoeffel, 46 Hun 571 [*affirmed* in 113 N. Y. 635, 20 N. E. 878].

*Pennsylvania.*— Bogue *v.* Steel, 1 Phila. 90.

*Utah.*— Spaulding *v.* Allred, 23 Utah 354, 64 Pac. 1100; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

*Vermont.*— Heald *v.* Sargeant, 15 Vt. 506, 40 Am. Dec. 694.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 209.

This rule is not applicable where under the statute a sale under execution against one of the coöwners passes only the interest of the debtor. Spalding *v.* Allred, 23 Utah 354, 64

**13. Sale of Exempt Property [96] — a. In General.** Where a sheriff sells exempt property after he has been notified of the exemption he is liable to the owner for the resulting damage;[97] and an officer cannot justify the sale of property selected as exempt on the ground that the debtor had other property.[98] An officer may also be held liable where a claim of exemption is made and he sells the property without taking the steps required by statute to ascertain the extent of the exemption.[99] But in order to hold the sheriff liable it must be made to appear that the property was exempt at the time when it was levied on,[1] that the exemption was claimed by the debtor,[2] and that the exemption was available

Pac. 1100. See also Pettingill *v.* Bartlett, 1 N. H. 87.

**Sale to cotenant.**—Where a tenant in common of personalty had assigned his share, and, after such assignment, the sheriff, under an execution against the assignor, sold the common property, and delivered the same to the other original tenant, who had become the purchaser at such sale, the sheriff was not liable to the assignee for a conversion. Grim *v.* Wicker, 80 N. C. 343.

96. **Exemption** generally see Exemptions, 18 Cyc. 1369; Homesteads, 21 Cyc. 448.

97. *Alabama.*— Stallings *v.* Gilbreath, 146 Ala. 483, 41 So. 423.

*Arkansas.*— Parham *v.* McMurray, 32 Ark. 261.

*California.*— Blewett *v.* Miller, 131 Cal. 149, 63 Pac. 157; Spencer *v.* Long, 39 Cal. 700.

*Indiana.*— Austin *v.* Swank, 9 Ind. 109; Stephens *v.* Lawson, 7 Blackf. 275.

*Kentucky.*— Buck *v.* Ball, 58 S. W. 468, 22 Ky. L. Rep. 614; Whittington *v.* Pence, 47 S. W. 877, 20 Ky. L. Rep. 900, 38 S. W. 843, 18 Ky. L. Rep. 942.

*Michigan.*— Parker *v.* Canfield, 116 Mich. 94, 74 N. W. 296.

*Minnesota.*— Howard *v.* Rugland, 35 Minn. 388, 29 N. W. 63.

*Missouri.*— State *v.* Farrell, 6 Mo. App. 581.

*Pennsylvania.*— Smith *v.* Emerson, 43 Pa. St. 456; Elliott *v.* Flanigan, 37 Pa. St. 425; Hutchinson *v.* Campbell, 25 Pa. St. 273; Brechtel *v.* Cortright, 13 Pa. Super. Ct. 384; Houston *v.* Smith, 1 Phila. 221, holding that this is true, although the sale is made under a venditioni exponas.

*Tennessee.*— Davis *v.* Bryan, 7 Yerg. 88, holding that a constable who sold property exempted from execution was liable to the owner, although the time when the contract upon which the judgment was founded was made was not indorsed on the execution as required by statute.

*Vermont.*— Hart *v.* Hyde, 5 Vt. 328.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 210.

**A sale after the filing but before the trial of an exemption claim** is a conversion for which the officer was liable, the claim being ultimately sustained. Stallings *v.* Gilbreath, 146 Ala. 483, 41 So. 423.

**Withdrawal of consent to levy.**—Where defendant consented to a levy on exempt articles, it was competent for him to withdraw such consent before the day of sale, and a constable selling such articles, after notice of such withdrawal, was liable for so doing. Hutchinson *v.* Campbell, 25 Pa. St. 273.

**The facts that a third person claimed the property** under a mortgage and that the debtor did not deny such claim do not relieve the sheriff from liability. State *v.* Farrell, 6 Mo. App. 581.

**Facts not showing sale on execution.**— Where plaintiff's evidence showed that a certain person having obtained a judgment against plaintiffs, a deputy sheriff levied execution on a stock of goods, and told plaintiffs to be on hand to care for exemptions, and while they were designating these the sheriff announced that he had a chattel mortgage on all the goods, and would not permit exemptions to be removed, and the deputy set aside certain of the goods as exempt, and sold the stock to execution creditors, subject to the exemptions and mortgage, and the sheriff then sold all of the goods at chattel mortgage sale, it was held that on plaintiff's own showing, the exempt property was not sold on execution, and the sheriff was not liable for conversion. Lester *v.* Addison, 139 Mich. 232, 102 N. W. 643.

**In North Dakota** a sale by a sheriff under execution of exempt real estate conveys no title to the purchaser, and the officer making it is not liable in an action for damages, except for costs incurred in removing an apparent cloud on the title. Johnson *v.* Twichell, 13 N. D. 426, 101 N. W. 318.

98. Austin *v.* Swank, 9 Ind. 109. *Compare* Trovillo *v.* Shingles, 10 Watts (Pa.) 438, holding that where a debtor was in possession of two cows as the apparent owner, although one of them might have belonged to a third person, the debtor, having made the question of ownership doubtful by his own act, could not recover in trespass against the sheriff who sold one of the cows which the debtor claimed was exempt from execution.

99. Daley *v.* Peters, 47 Nebr. 848, 66 N. W. 862, holding that where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by Code Civ. Proc. § 522, and the officer neglects or refuses to cause the property to be appraised, but proceeds to sell it to satisfy his writ, he is thereby guilty of the conversion of the property, although the averments in the affidavit attached to the inventory were false.

1. Greaton *v.* Pike, 34 Me. 233.

2. McGuire *v.* Galligan, 57 Mich. 38, 23 N. W. 479; and see *supra*, note 97.

against the debt under which the sale was made.[3] Where the sheriff fails to inform the appraisers of property seized on execution of a mortgage lien thereon, set forth in the claim by defendant in execution that the property is exempt from seizure and sale, and the appraisement is made without any allowance therefor, the sheriff cannot interpose such appraisement as a defense in an action for selling the property when the amount of the lien would reduce defendant's interest to less than the amount exempt by law.[4]

**b. Sale Under Specific Lien.** Where an officer sells property under a chattel mortgage covering both exempt and non-exempt property, and the proceeds of the non-exempt portion are sufficient to satisfy the debt, and the mortgagor demands that they be so applied, but the officer further proceeds to sell the exempt part, he is personally liable for its value.[5]

**c. Effect of Disclaimer of Title.** Where a debtor at the time of the appraisement of goods levied on, for the purpose of setting aside his exemption, disclaims title to a portion of the goods, he cannot afterward maintain an action of trespass against the officer for selling such goods.[6]

**d. Purchase by Debtor.** A judgment debtor whose exempt property is sold under execution is not prejudiced in an action by him on the sheriff's indemnity bond, by his having bidden off the property in good faith and without collusion for a bank which had a mortgage thereon.[7]

**14. Sale of Mortgaged or Encumbered Property.**[8] An officer incurs no liability to a mortgagee of personal property by selling under process the mortgagor's interest therein,[9] where the property is found in the possession of the mortgagor,[10] and the mortgage is not due,[11] and the officer does not deliver possession of the property to the purchaser.[12] And even a delivery of possession to the purchaser without requiring the satisfaction of the mortgage, it being due and payable, subjects the officer only to nominal damages, where the property is still within the county, at a place near the residence of the mortgagee, and the security has not been in any way injured.[13] So also, where a judgment is assigned as collateral security for an indebtedness in a sum less than the face of the judgment, the assignee cannot maintain an action for conversion against an officer because of a levy and sale of the judgment, subject to the assignment, under an execution against the judgment plaintiff.[14] Where, however, property is covered by a mortgage of which the sheriff has notice he is liable for conversion if he assumes to make an absolute sale of the property under process against the mortgagor,[15]

**3.** Harleman *v.* Buck, 30 Pa. St. 267.

**4.** Strong *v.* Combs, 68 Nebr. 315, 94 N. W. 149.

**5.** Baughn *v.* Allen, (Tex. Civ. App. 1903) 73 S. W. 1063.

**6.** Gilleland *v.* Rhoads, 34 Pa. St. 187.

**7.** Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

**8.** See, generally, Chattel Mortgages, 6 Cyc. 980; Mortgages, 27 Cyc. 916.

**9.** *Illinois.*— People *v.* Dickson, 65 Ill. App. 99. But *compare* Gilbert *v.* National Cash Register Co., 67 Ill. App. 606 [*reversed* on other grounds in 176 Ill. 288, 52 N. E. 22].

*Indiana.*— State *v.* Bergner, 20 Ind. App. 390, 50 N. E. 824, 67 Am. St. Rep. 261.

*Minnesota.*— See Appleton Mill Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791.

*New Jersey.*—Ayres *v.* Tinsman, 74 N. J. L. 295, 65 Atl. 887.

*New York.*— Hull *v.* Samson, 23 How. Pr. 84.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 214.

**Contra.**— Eggleston *v.* Mundy, 4 Mich. 295.

**The officer is not responsible for the subsequent acts of the purchaser.**— People *v.* Dickson, 65 Ill. App. 99.

**Sale for less than true value.**—Where an officer attached and sold mortgaged perishable goods for less than their value, under Pub. St. c. 161, §§ 90, 91, 93, which would protect him if they had not been mortgaged, and the attaching creditor was directed to pay the amount found due on the mortgage, but he did not do so, the officer was liable for the full value of the goods, as section 80 makes the attachment void, and requires the restoration of the property on such non-compliance. Rund *v.* Blatt, 170 Mass. 469, 49 N. E. 642.

**10.** People *v.* Dickson, 65 Ill. App. 99; Hull *v.* Samson, 23 How. Pr. (N. Y.) 84.

**11.** People *v.* Dickson, 65 Ill. App. 99.

**12.** Ayres *v.* Tinsman, 74 N. J. L. 295, 65 Atl. 887.

**13.** State *v.* Bergner, 20 Ind. App. 390, 50 N. E. 824, 67 Am. St. Rep. 261.

**14.** Baker *v.* Mills, 108 Iowa 490, 79 N. W. 268.

**15.** Collins *v.* State, 3 Ind. App. 542, 30

and consents to the removal thereof.[16] And where by the terms of the mortgage the mortgagee is entitled to demand possession of and sell the property at any time and has demanded possession, the sheriff is liable to the mortgagee if he subsequently assumes to sell even the mortgagee's interest.[17]

**15. Sale of Property on Demised Premises.**[18] Under a statute providing that no property on demised premises shall be liable to be taken under execution, unless the party at whose suit the execution is sued out shall pay the landlord the rent due, an officer may be held liable to a landlord where he sells property on demised premises on which rent is due[19] without paying the rent,[20] provided he had notice that rent was due.[21] And he cannot escape liability by showing that the levy under which he sold was invalid.[22] The liability of the officer extends to the amount of the entire proceeds of the sale[23] when they are less than the rent.[24]

**16. Sale of Property in Custody of Law.** Where a sheriff levies on property held by a constable under prior executions, and sells the same for enough to satisfy the prior executions, he is liable for that amount to the constable, without any promise to pay.[25]

**17. Sale Without Levy.** If an officer sells any portion of the goods of a debtor without a levy thereon he is liable therefor to the owner.[26]

**18. Sale Without Appraisement.** Where the statute requires that a sheriff or constable shall have property distrained for rent appraised before its sale by him,[27] an officer who sells such property without appraisement will be liable in trover for a wrongful conversion thereof.[28]

**19. Sale Without Proper Notice.** Where a sheriff omits to advertise or give notice of a sale of property as required by statute, or does not advertise or give notice of the sale in the manner and for the time required by statute,[29] he is liable for any damage occasioned by such neglect of duty.[30]

N. E. 12, 50 Am. St. Rep. 298; Christopher *v.* Covington, 2 B. Mon. (Ky.) 357; Peck *v.* Inlow, 8 Dana (Ky.) 192; Appleton Mill Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791.

**Estoppel to claim under mortgage.**—Where judgment was confessed for a debt secured by a chattel mortgage, and execution issued thereon, and levied upon the mortgaged chattels, which were advertised for sale thereunder, and, after the same property was sold upon another execution against the mortgagor, the mortgagees moved the supreme court for an order directing the sheriff to apply the proceeds of the sale upon their execution, it was held, in an action of trover by the mortgagees against the sheriff who made the sale, that these acts were repugnant to any claim under the mortgage, and precluded plaintiffs from so claiming the property Butler *v.* Miller, 1 N. Y. 496 [*affirming* 5 Den. 159].

16. Collins *v.* State, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. Rep. 298; Peck *v.* Inlow, 8 Dana (Ky.) 192.

**Actual loss at the time suit is brought** is not necessary. Collins *v.* State, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. Rep. 298.

17. See Farrell *v.* Hildreth, 38 Barb. (N. Y.) 178.

18. Leases generally see Landlord and Tenant, 24 Cyc. 845.

19. *Kentucky.*— Burket *v.* Boude, 3 Dana 209.

*New Jersey.*— Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098].

*New York.*— Westervelt *v.* Pinckney, 14 Wend. 123, 28 Am. Dec. 516.

*South Carolina.*— Sullivan *v.* Ellison, 20 S. C. 481.

*Canada.*— Robertson *v.* Fortune, 9 U. C. C. P. 427.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 205 *et seq.*

20. Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098]; Westervelt *v.* Pinckney, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516; Sullivan *v.* Ellison, 20 S. C. 481.

21. Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098]; Sullivan *v.* Ellison, 20 S. C. 481.

**Notice need not be in writing.**— Hand *v.* Howell, 61 N. J. L. 142, 38 Atl. 748 [*affirmed* in 61 N. J. L. 694, 43 Atl. 1098].

22. Westervelt *v.* Pinckney, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516, holding that the sheriff could not show that the levy was not made until after the return-day of the writ.

23. Sullivan *v.* Ellison, 20 S. C. 481.

24. Sullivan *v.* Ellison, 20 S. C. 481.

25. Betts *v.* Hoyt, 19 Barb. (N. Y.) 412.

26. Ward *v.* Taylor, 1 Pa. St. 238.

27. See Landlord and Tenant, 24 Cyc. 1319.

28. Tripp *v.* Grouner, 60 Ill. 474.

29. Notice of sale generally see Executions, 17 Cyc. 1243; Judicial Sales, 24 Cyc. 17.

30. *Alabama.*—Wright *v.* Spencer, 1 Stew. 576, 18 Am. Dec. 76.

**20. Improprieties in Conduct of Sale**[31] **— a. In General.** The sale at one time on several executions of a large variety of goods in one lot at one price is not necessarily irregular or improper, so as to render the officer liable for a conversion thereof;[32] and even though property should have been sold in parcels a sale in bulk is merely irregular and not void, and the sheriff can only be held liable for it thereafter in case he wrongfully fails to retake the property after the sale is set aside.[33] It is, however, negligence for which the sheriff is liable to sell a large amount of miscellaneous merchandise on an advertised list which he knows to be defective, without ascertaining and making known to the bidders the extent of the discrepancy.[34] Where a sale by a sheriff fails by reason of his failure to comply with the law he is liable to the purchaser for the damage which he has sustained by reason of such failure.[35] The mere fact that the sheriff, when about to sell property, stated, at a time not defined and under circumstances not disclosed, that if any one bid at his sale he would get the property, is not sufficient to show that his conduct was tortious and render him liable.[36]

**b. Premature Sale.** An officer may be held liable for selling property levied on before the time when he was legally authorized to do so.[37]

**c. Sale After Time Prescribed by Law.** Where the statute absolutely limits the time within which a sale must be made, an officer selling after such time is liable to the owner of the property as a trespasser *ab initio*.[38]

**d. Sale at Improper Place.** Where a sheriff advertises property seized under process for sale at a designated place and sells it at another and a different place

*Georgia.*— Johnson *v.* Reese, 31 Ga. 601; Johnson *v.* Reese, 28 Ga. 353, 73 Am. Dec. 757.

*Louisiana.*— Fleming *v.* Lockhart, 10 Mart. 308; Crocker *v.* Watkins, 4 Mart. 540; Tupery *v.* Harper, McGloin 162.

*Maine.*— Hayes *v.* Buzzell, 60 Me. 205.

*Massachusetts.*— Sexton *v.* Nevers, 20 Pick. 451, 32 Am. Dec. 225.

*North Carolina.*—Winburne *v.* Bryan, 73 N. C. 47, holding that a sheriff is liable to the owner of property for selling the same under execution without serving upon the owner a written notice as required by statute.

*Pennsylvania.*— Carrier *v.* Esbaugh, 70 Pa. St. 239; Ward *v.* Taylor, 1 Pa. St. 238.

*South Dakota.*— Fodness *v.* Juelfs, 13 S. D. 145, 82 N. W. 396, holding that Comp. Laws, § 6117, providing that constables to whom executions from justices' courts are directed shall have all the powers of sheriffs as to levy and sale thereunder, provided notice of sale shall not be given by publication in a newspaper, but by posting notices at public places in the county, applies equally to sheriffs when acting under executions from justices' courts.

*Vermont.*— Evarts *v.* Burgess, 48 Vt. 205.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 207.

When property has been advertised but not sold at the time fixed, the sheriff is liable if he sells without advertising anew. Crocker *v.* Watkins, 4 Mart. (La.) 540.

31. Conduct of sale generally see Executions, 17 Cyc. 1236; Judicial Sales, 24 Cyc. 21.

32. Bergin *v.* Hayward, 102 Mass. 414.

33. Orton *v.* Brown, 113 Cal. 561, 45 Pac. 835.

34. Cramer *v.* Oppenstein, 16 Colo. 504, 27 Pac. 716.

An agreement to make a rebate in proportion to the shortage does not excuse such negligence; and paying a rebate on the uncorroborated claim of the purchaser, without any evidence as to the character and amount of the alleged shortage, is still greater negligence. Cramer *v.* Oppenstein, 16 Colo. 504, 27 Pac. 716.

35. Friedlander *v.* Bell, 17 La. Ann. 42 (holding that where a sheriff's sale of land is declared a nullity for failure of the sheriff to seize the land, he is liable to indemnify the purchaser for all expenses incurred in consequence of his purchase); Fleming *v.* Lockhart, 10 Mart. (La.) 308 (holding that if by reason of non-compliance with the formalities of law the owner recovers a runaway slave sold by the sheriff, the latter is liable in damages to the purchaser, and a failure to notify him of the owner's action will not release him, unless he shows he could have prevented a recovery); Sexton *v.* Nevers, 20 Pick. (Mass.) 451, 32 Am. Dec. 225.

36. Atkinson *v.* Hires, 43 N. J. L. 297.

37. Camp *v.* Ganley, 6 Ill. App. 499.

Liability as trespasser ab initio.—Where a sheriff is vested by statute with discretion to sell property in his custody without an order of court when the charge of keeping it is very great, he cannot be held liable as a trespasser *ab initio* because of a sale on that ground unless he has grossly abused his discretion. Griel *v.* Hunter, 40 Ala. 542. But where the statute absolutely forbids a sale before a prescribed time, a sheriff selling before such time is a trespasser *ab initio*. Smith *v.* Gates, 21 Pick. (Mass.) 55.

38. Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

he becomes a trespasser *ab initio*,[39] and is liable to the owner of the property,[40] for all the consequences of his wrongful act.[41] Where, however, the statute vests the sheriff with some discretion in selecting the place of sale, a sale at a place not embraced in the terms of the statute does not constitute the sheriff a trespasser, but is at most an irregularity rendering him liable in an action on the case for any actual damages sustained by reason of such irregularity.[42]

**e. Sale in Improper Order.** Where the statute requires the principal's property to be exhausted before proceeding to sell that of the surety, the officer is liable to the surety for any damage resulting from a disregard of such direction.[43]

**f. Purchase by Officer.** As an officer is not allowed to become the purchaser of property sold by him at judicial[44] or execution sale[45] an action lies against him if he does so purchase;[46] but the amount paid by him on the goods may go in mitigation of damages.[47]

**21. Improprieties in Connection With Delivery of Property.** Where a sheriff, by virtue of a sale on execution, proceeds to turn out of the possession of the premises sold by him persons other than defendant in execution and his heirs or tenants, he becomes a trespasser, and may be sued therefor at law.[48]

**22. Sale at Inadequate Price.**[49] Where a sale of property is fairly conducted by the sheriff, he is not liable in damages merely because the price realized is inadequate;[50] but where property is sold for less than its fair value by reason of the misconduct of the officer he is liable.[51] Where a sheriff sells land for less than two thirds of its appraised value, in violation of the statute, but the judgment debtor, who is the only person injured, waives the invalidity of the sale, by suing the sheriff for damages sustained by reason of such irregular sale, the sheriff will not be allowed to plead his own wrong, or set forth his own void sale, to defeat the action.[52]

**23. Failure to Deliver Property Sold.** A sheriff may be held liable to a purchaser for failure to deliver the property sold,[53] unless exceptional circumstances preclude the purchaser from looking to the sheriff for a delivery.[54]

39. Ryan *v.* Young, 147 Ala. 660, 41 So. 954; Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896; Molette *v.* Hodges, 1 Tex. App. Civ. Cas. § 398. See also Jordan *v.* Gallup, 16 Conn. 536.

**The fact that the officer has paid over the proceeds** of the sale does not relieve him of liability. Molette *v.* Hodges, 1 Tex. App. Civ. Cas. § 398.

40. Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896.

**A fraudulent grantee or mortgagee** of the property cannot have the benefit of or enforce such liability. Ryan *v.* Young, 147 Ala. 660, 41 So. 954 [*following* Hartshorn *v.* Williams, 31 Ala. 149].

41. Ryan *v.* Young, 147 Ala. 660, 41 So. 954.

42. Sheppard *v.* Shelton, 34 Ala. 652.

43. Sellars *v.* Fite, 3 Baxt. (Tenn.) 131.

44. See Judicial Sales, 24 Cyc. 29.

45. See Executions, 17 Cyc. 1254.

46. Perkins *v.* Thompson, 3 N. H. 144; Giberson *v.* Wilber, 3 N. J. L. 410.

47. Perkins *v.* Thompson, 3 N. H. 144.

48. Anthony *v.* Brooks, 5 Ga. 576.

49. **Inadequacy of price as ground for setting aside:** Execution sale see Executions, 17 Cyc. 1276. Judicial sale generally see Judicial Sales, 24 Cyc. 39. Sale by executor or administrator see Executors and Administrators, 18 Cyc. 790, 810.

50. Powell *v.* Governor, 13 Ala. 516; Lynch *v.* Com., 6 Watts (Pa.) 495, 31 Am. Dec. 490.

51. Daggett *v.* Adams, 1 Me. 198.

**Either fraud or gross negligence on the part of the officer must appear** in order to charge him. Powell *v.* Governor, 13 Ala. 516.

**Waiver of right of action.**—Where a sheriff's sale of real estate has been made, and the owner thereof moves to set it aside for the reason that the property was not sold for two thirds of its appraised value, as required by statute, and for other reasons, and the motion is overruled by the court, and the sale confirmed, the owner does not thereby waive his right to sue the sheriff for any injury which he may have sustained by reason of such sale. De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666.

52. De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666.

53. Dunkle *v.* Harrington, 101 Pa. St. 462, holding that where a sheriff, at a public sale, turns aside from his official duty and agrees to deliver certain property, not in sight, but which he announces is included in the sale, he makes a personal contract, and is liable in damages if he fails to fulfil it.

54. Duncan *v.* Garratt, 1 C. & P. 169, 2 L. J. K. B. O. S. 142, 26 Rev. Rep. 629, 12 E. C. L. 107, where a person purchased goods of the sheriff under an execution, with a knowledge that they were deposited at the manufacturers, but did not apply for a deliv-

**24. Refusal to Execute Deed.** A sheriff is liable for a refusal to execute a deed for land sold by him.[55]

**25. Conveyance or Delivery of Property Without Payment of Price.** Where a sheriff conveys or delivers property sold on execution to the purchaser without payment of the purchase-money he becomes liable to the execution creditor for the amount of the debt, not exceeding the purchase-price,[56] and for any surplus of the price over the amount of the debt, the sheriff is liable to the owner of the property or the person entitled thereto.[57] Where the property is sold on mesne process and plaintiff therein does not recover in his action the officer is liable to the owner of the property for the full price.[58]

**26. Failure to Enforce Payment of Bid.**[59] A sheriff may be held liable for failing to enforce a bid made and accepted at a sale of property made by him, by reason of which the property is resold at a less price and the difference lost to the owner or the creditor;[60] but in an action by the execution defendant for such default the sheriff may show in defense that the price bid by the first purchaser was in consequence of the fraudulent misrepresentations of the execution defendant respecting his title.[61]

**27. Removal of Goods From Premises Ordered Sold.** A sheriff who has an order of sale fair on its face, authorizing him to sell a certain house in foreclosure of a chattel mortgage, is not liable for entering such house and removing therefrom the goods of persons who are not parties to the suit, even though such persons are the owners of the house, and in possession of it.[62]

**28. Liability For Cost of Advertising Sale.** The general rule is that in the absence of any special contract or agreement to that effect a sheriff is not personally liable to the publisher for the cost of advertisements of sales to be made by him in his official capacity,[63] although he procures the publication thereof;[64]

ery until after the time when the sheriff was bound to pay over the money, and it was held that he could not maintain an action against the sheriff upon the manufacturer refusing to deliver them up.

**55.** Lusk *v.* Briscoe, 65 Mo. 555.

**56.** *Alabama.*— Kelly *v.* Governor, 14 Ala. 541 [*approved* in Moore *v.* Barclay, 18 Ala. 672].

*Georgia.*— Davis *v.* Irwin, 8 Ga. 153.

*Kansas.*— Walker *v.* Braden, 34 Kan. 660, 9 Pac. 613.

*Kentucky.*— Payne *v.* Cowan, 1 J. J. Marsh. 12.

*Louisiana.*— Leboeuf *v.* Merle, 1 La. Ann. 144, so holding in a case where the purchaser claimed to retain the price on the ground of a privilege entitling him to be paid in preference to the seizing creditor.

*Michigan.*— Munger *v.* Sanford, 144 Mich. 323, 107 N. W. 914.

*Minnesota.*— Kumler *v.* Brandenburg, 39 Minn. 59, 38 N. W. 704.

*New Jersey.*— Adams *v.* Disston, 44 N. J. L. 662; Disston *v.* Strauck, 42 N. J. L. 546.

*Pennsylvania.*— See Mark *v.* Osmer, 138 Pa. St. 1, 20 Atl. 841.

*South Carolina.*— Thomasson *v.* Kennedy, 3 Rich. Eq. 440; Davis *v.* Hunt, 2 Bailey 412.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 223.

**An officer has no legal right to sell on credit** personal property attached or taken on execution, unless by agreement of the parties or the order of the creditor, and if he does so it is at his own risk of loss from the credit given. Chase *v.* Monroe, 30 N. H. 427. See also Nelson *v.* Williams, 4 Hayw. (Tenn.) 161.

**The sheriff cannot set up that the purchaser was the real owner** of the property sold as there is no warranty of title in execution sales and if the purchaser bought his own property it was his own folly. Davis *v.* Hunt, 2 Bailey (S. C.) 412.

**57.** Kumler *v.* Brandenburg, 39 Minn. 59, 38 N. W. 704; Coats *v.* Stewart, 19 Johns. (N. Y.) 298.

**Where the amount realized is less than the amount of the execution** the sheriff is not liable to the execution debtor. Moore *v.* Barclay, 8 Ala. 672.

**58.** Appleton *v.* Bancroft, 10 Metc. (Mass.) 231 [*following* Wheelock *v.* Hastings, 4 Metc. (Mass.) 504].

**59. Liability of successful bidder on refusal to comply with bid** see Executions, 17 Cyc. 1260.

**60.** State *v.* Spencer, 79 Mo. 314. See also Ford *v.* Godbold, 2 Strobh. (S. C.) 109. *Contra*, Roberts *v.* Westbrook, 1 Coldw. (Tenn.) 115.

**61.** Ford *v.* Godbold, 2 Strobh. (S. C.) 109.

**62.** Thompson *v.* State, 3 Ind. App. 371, 28 N. E. 996.

**63.** Gardner *v.* Brown, 22 Ind. 447; Baker *v.* Wade, 25 Kan. 531; Ellis *v.* Casey, 12 Ky. L. Rep. 508. *Contra*, Haile *v.* Rils, 9 Rob. (La.) 509 [*followed* in Downes *v.* Scott, 2 La. Ann. 399].

**64.** Gardner *v.* Brown, 22 Ind. 447; Baker *v.* Wade, 25 Kan. 531.

but the publisher must look to the party for whose benefit the advertisement is made.[65]

**29. Excessive Sale.** A sheriff who sells more property of the debtor than is necessary to satisfy the debt and costs is liable with respect to the excess,[66] although he has not been guilty of actual corruption or intentional fraud.[67] And where a sheriff, under an order of sale in a partition suit authorizing him to sell half of a tract of land, advertises and sells the entire tract, a purchaser, who has paid for the full tract without knowledge of the sheriff's want of authority to sell it, may recover of the sheriff for any loss which he has sustained thereby.[68]

**30. Second Sale of Property Already Sold.** In an action against a sheriff for selling under execution the same property which he has previously sold on a different execution the sheriff may show that the first sale was fraudulent.[69]

**31. Damage Done by Purchaser.** If the purchaser of property, which is wrongfully sold under execution, has caused any damage to the execution defendant in removing the property, he alone is liable therefor and not the sheriff.[70]

**32. Failure to Sell — a. In General.** A sheriff is liable in damages to the execution plaintiff where he improperly neglects or refuses to sell property levied on;[71] and it is no excuse that defendants notified him of their intention to file a

65. Ellis *v.* Casey, 12 Ky. L. Rep. 508.

66. Roberts *v.* Beeson, 4 Port. (Ala.) 164; Cantine *v.* Clark, 41 Barb. (N. Y.) 629; Batchelor *v.* Vyse, 4 Moore & S. 552, 30 E. C. L. 565, 1 M. & Rob. 331; Stead *v.* Gascoigne, 8 Taunt. 527, 4 E. C. L. 261.

**Liability to mortgagee.**—An officer who, after selling on an execution sufficient property to satisfy it, proceeds to sell other property of the judgment debtor, does not thereby become liable as a trespasser *ab initio* to one who holds an unrecorded mortgage of a portion of the property which was rightfully sold. Wolcott *v.* Root, 2 Allen (Mass.) 194.

67. Cantine *v.* Clark, 41 Barb. (N. Y.) 629.

68. Lusk *v.* Briscoe, 65 Mo. 555.

69. McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560, so holding on the ground that the sheriff in making a sale is but the instrument of the law, and the execution creditor, who had the property sold the second time, has a right to show in such proceedings that the first sale was collusive.

70. Davis *v.* Gott, 130 Ky. 486, 113 S. W. 826.

71. *Alabama.*— Leavitt *v.* Smith, 7 Ala. 175.

*California.*—Alexander *v.* Wilson, 144 Cal. 5, 77 Pac. 706.

*Georgia.*— Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135; Treadwell *v.* Beauchamp, 82 Ga. 736, 9 S. E. 1040; Gladden *v.* Cobb, 73 Ga. 235; Charles *v.* Foster, 56 Ga. 612; Dawson *v.* Merchants, etc., Bank, 30 Ga. 664; Neal *v.* Price, 11 Ga. 297.

*Indiana.*— Caldwell *v.* Sheffer, 8 Blackf. 116; State *v.* Herod, 6 Blackf. 444.

*Kentucky.*— Potts *v.* Com., 4 J. J. Marsh. 202, 20 Am. Dec. 213; Royse *v.* Reynolds, 10 Bush 286.

*Louisiana.*— Dussin *v.* Allain, 9 Rob. 394.

*Maine.*— Doyle *v.* True, 36 Me. 542.

*Mississippi.*— Butler *v.* Williams, 14 Sm. & M. 54.

*New York.*— Van Winkle *v.* Udall, 1 Hill 559.

*North Carolina.*— Buckley *v.* Hampton, 23 N. C. 318.

*Pennsylvania.*— Dorrance *v.* Com., 13 Pa. St. 160; Hamner *v.* Griffith, 1 Grant 193; Stone *v.* Mahon, 4 C. Pl. 165; Com. *v.* Rowland, 2 Del. Co. 31.

*Vermont.*— Bond *v.* Wilder, 16 Vt. 393.

*West Virginia.*— Virginia Exch. Bank *v.* Horner, 26 W. Va. 442.

*United States.*— Dunlop *v.* West, 8 Fed. Cas. No. 4,170, Brunn. Col. Cas. 27.

*England.*— Jacobs *v.* Humphrey, 2 Cromp. & M. 413, 3 L. J. Exch. 82, 4 Tyrw. 272, holding that a sheriff is liable for failure to sell goods taken under a fieri facias within a reasonable time and before the return of the venditioni exponas.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 206.

**The measure of damages** is what the property would have produced if sold. Dunlop *v.* West, 8 Fed. Cas. No. 4,170, Brunn. Col. Cas. 27.

**Delivery of writ and property to successor.**—A sheriff who has levied an execution is not excused for failure to sell the goods levied on by the fact that he has delivered the execution and goods to his successor. Leavitt *v.* Smith, 7 Ala. 175.

**Action in good faith under statute whose construction doubtful.**—Where a judgment was obtained in 1870 on a debt contracted before June 1, 1865, on which execution issued, and the sheriff failed to sell the property, on receiving from defendant an affidavit that the taxes due thereon had not been paid, together with a claim of an offset and recoupment in favor of defendant, according to the act of Oct. 13, 1870, which affidavit set forth that the debt had not been reduced according to the equities between the parties under the relief act of 1868, it was held that the sheriff was not liable for the amount of the judgment, the proper construction of the act of 1870 being at that time unsettled, and

bill to enjoin the execution, and he thought the bill would be sanctioned; [72] that, on advice of counsel, he refrained from selling on the interposition of an affidavit of illegality, where he ought not to have received such affidavit; [73] that the property would not sell for its appraised value as required by a statute enacted after the levy was made,[74] or that he acted honestly and in good faith,[75] and intended no disobedience to the precept of the court.[78] But an omission to sell property levied on cannot make the sheriff a trespasser *ab initio*.[77]

**b. Property Not Subject to Writ** [78] — (i) *IN GENERAL.* Where it is sought to hold a sheriff liable for failure to sell property on which he has made a levy under execution he may exculpate himself by showing that the property was not subject to the execution.[79]

(ii) *PROPERTY NOT BELONGING TO DEFENDANT.* An officer incurs no liability by refusing to sell property seized under process where before the day of sale he has ascertained that such property does not belong to defendant; [80] but the mere interposition by a third person of a claim to the property which is not duly authenticated does not excuse the officer's failure to sell; [81] nor will a proper

the sheriff having apparently acted in good faith. Myers *v.* Wilcox, 44 Ga. 336.

**Failure to resell on default of purchaser.**— A sheriff who sells property and upon the failure of the purchaser to pay his bid allows the return-day of the writ to pass without putting the property up for resale is liable to another execution creditor who is injured by his neglect. Com. *v.* Conroy, 174 Pa. St. 355, 34 Atl. 581.

**Where property is seized under several executions** but is insufficient to satisfy them all, the sheriff's failure to sell the property does not render him liable to a junior execution creditor whose debt would not have been satisfied had there been a sale. Smith *v.* Hogan, 4 Ala. 93. See also Commercial Bank *v.* Wilkins, 9 Me. 28. But *compare* Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Potts *v.* Com., 4 J. J. Marsh. (Ky.) 202, 20 Am. Dec. 213. But where a sheriff levied on property of a defendant under two executions, in favor of different plaintiffs, and the first execution was withdrawn, by consent of plaintiff and defendant, but the sheriff neglected to proceed and sell the property under the second, he was liable to the second plaintiff for such neglect. Van Winkle *v.* Udall, 1 Hill (N. Y.) 559.

**Levy on property in hands of another officer.**—Where a sheriff levied on certain property belonging to the debtor, in the hands of another officer, who refused to deliver it until his costs were paid, and the creditor made no offer to advance costs, and did not propound interrogatories to the officer, it was held that there was no such lack of diligence on the part of the sheriff as rendered him liable for not selling the property. Pailhes *v.* Thielen, 1 La. Ann. 34.

72. Dawson *v.* Merchants', etc., Bank, 30 Ga. 664.

73. Treadwell *v.* Beauchamp, 82 Ga. 736, 9 S. E. 1040.

74. Caldwell *v.* Sheffer, 8 Blackf. (Ind.) 116.

75. Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161; Charles *v.* Foster, 56 Ga. 612; Butler *v.* Williams, 14 Sm. & M. (Miss.) 54, holding that it was not a sufficient excuse to a sheriff who had levied on both real and personal estate at the same time, and had omitted to sell the latter, that the land levied on had been appraised under the valuation law at a sum such that two thirds of its value was more than the amount of the judgment, and the land failing, when offered, to bring the two thirds, he had postponed the sale for twelve months, and returned the personal property to defendant, as he should have sold the personalty.

76. Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161.

77. Bell *v.* North, 4 Litt. (Ky.) 133. *Contra*, Bond *v.* Wilder, 16 Vt. 393.

78. **What property is subject to:** Attachment, see ATTACHMENT, 4 Cyc. 554. Execution, see EXECUTIONS, 17 Cyc. 940.

79. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689.

80. *Georgia.*—Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135; Prince *v.* Walker, 1 Ga. App. 282, 58 S. E. 61.

*Kentucky.*— Potts *v.* Com., 4 J. J. Marsh. 202, 20 Am. Dec. 213.

*Nebraska.*— See Burton *v.* Cave, 26 Nebr. 186, 41 N. W. 1099.

*Pennsylvania.*— Necker *v.* Sedgwick, 36 Pa. Super. Ct. 593; Com. *v.* Megee, 4 Phila. 258.

*South Dakota.*— McFarland *v.* Schuler, 12 S. D. 83, 80 N. W. 161.

*Tennessee.*— See State *v.* Sharp, 2 Sneed 615.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 206.

**The sheriff may refuse to act without demanding indemnity** where the property is claimed by a third person. State *v.* Sharp, 2 Sneed (Tenn.) 615.

**The failure of the real owner to come in and interplead** under a rule taken by the sheriff does not preclude the sheriff from setting up his title as an excuse for not selling. Com. *v.* Megee, 4 Phila. (Pa.) 258.

81. Charles *v.* Foster, 56 Ga. 612, holding that this is true, although the officer acted in good faith.

claim of title by a third person excuse the officer's failure to sell where a jury impaneled to try the right of property have found it subject to the process.[82] Where a laborer who had a lien for helping to drive the logs of several owners intermingled together, in order to enforce his lien, attached a part of them, and seasonably delivered the execution to the sheriff, who refused to sell them, the sheriff was liable for such refusal where he did not show that he would have been required to take the property of one person to pay the debt of another, or to do any unlawful act;[83] but where, previous to the time appointed for an execution sale, the property levied on was replevied on a writ in favor of a third person, served on the sheriff by one of his deputies, this was a sufficient excuse to the sheriff for not selling it under execution.[84] The verdict of a jury, summoned by the sheriff to find whether goods belong to defendant in execution, is not conclusive on plaintiff in the execution so as to bar his action against the sheriff for failure to sell.[85]

(III) *PROPERTY CLAIMED AS EXEMPT.*[86] A sheriff is not liable for failing to sell property which the debtor claims as exempt,[87] where the creditor fails to contest the claim[88] or the contest remains undetermined,[89] or where the creditor refuses to indemnify him.[90]

**c. Property Subject to Prior Liens or Claims.** Where a sheriff has levied on a crop in the field, but neglected to sell the same, and is ruled by the execution plaintiff for failure to make the money, it is not a sufficient answer that after the levy the landlord of the owner of the crop carried the crop away in satisfaction of a lien due him superior to that of plaintiff.[91]

**d. Property Seized by Predecessor.** A sheriff cannot be held responsible for failure to sell property seized by his predecessor in office, without proof that the property so seized had come into his possession, or that he had bound himself in some way for it.[92]

**e. Bankruptcy[93] of Debtor.** It has been held that where property is levied on by a sheriff under an execution from a state court and defendant is adjudged a bankrupt, and no proceedings are taken in the bankruptcy court to compel the property levied on to be brought into that tribunal for distribution, the adjudication of bankruptcy and the issuing of the ordinary writ of protection will not excuse the sheriff for not proceeding to sell the property and raise the money.[94]

**f. Injunction[95] Against Sale.** It has been held that a sheriff is not liable for not selling property, the sale of which has been enjoined;[96] but in a case where

82. Potts *v.* Com., 4 J. J. Marsh. (Ky.) 202, 20 Am. Dec. 213.

83. Doyle *v.* True, 36 Me. 542.

84. Shaw *v.* Baldwin, 33 Vt. 447.

85. Person *v.* Fisher, 4 N. C. 72.

86. **Exemption** generally see EXEMPTIONS, 17 Cyc. 1369; HOMESTEADS, 21 Cyc. 448.

87. Burton *v.* Cave, 26 Nebr. 186, 41 N. W. 1099; Corry *v.* Tate, 48 S. C. 548, 26 S. E. 794, property claimed a homestead.

**Where the circumstances indicate collusion** between the sheriff and defendant that the goods shall not be sold under a mortgage fieri facias until defendant has obtained his homestead exemption so as to prevent the sale, the sheriff may be held liable for not selling. Kimbro *v.* Edmondson, 46 Ga. 130.

88. Block *v.* Bragg, 68 Ala. 291.

89. Block *v.* Bragg, 68 Ala. 291.

90. Corry *v.* Tate, 48 S. C. 548, 26 S. E. 794.

**Indemnity to officer** see *infra*, VI.

91. Prince *v.* Walker, 1 Ga. App. 282, 283, 58 S. E. 61, so holding on the ground that the landlord had no title to the crop and no right to take it away, but "his only remedy by which he could protect his lien after the levy by the sheriff was to sue out a distress warrant, and to place it in the hands of the sheriff for the purpose of claiming the proceeds upon rule to distribute."

92. Ballew *v.* Bobb, 13 La. Ann. 375.

93. See, generally, BANKRUPTCY, 5 Cyc. 227.

94. Sharman *v.* Howell, 40 Ga. 257, 2 Am. Rep. 576.

**Under the present bankruptcy law** the rule would be otherwise if the execution were levied less than four months before the filing of the petition in bankruptcy. See BANKRUPTCY, 5 Cyc. 366.

95. See, generally, INJUNCTIONS, 22 Cyc. 724.

96. Alexander *v.* Wilson, 144 Cal. 5, 77 Pac. 706 (holding that a sheriff was authorized to obey an order of a court of bankruptcy restraining a sale of attached property); Conway *v.* Jett, 3 Yerg. (Tenn.) 481, 24 Am. Dec. 590 (holding that this is true even though such injunction has been dis-

the sheriff was chargeable with negligence in not selling property levied on before the time when an injunction against the collection of the execution was granted, it was held that such injunction afforded him no protection.[97]

**g. Interruption of Proceedings by Act of Plaintiff.** Where, after the sheriff has levied a fieri facias, plaintiff enters into negotiations with defendant, whereby the proceedings are interrupted and the debt lost, the sheriff is not liable for failure to sell.[98]

**h. Impossibility of Selling.** Where the property has been properly offered for sale but remains unsold for want of buyers, the sheriff is not liable;[99] and a failure to make a sale may also be excused where the property is so obviously valueless that an attempt to sell it would be an idle ceremony.[1] Neither is the sheriff liable as for neglect or refusal to make a sale of property levied on under execution, where it appears by his return that he had not time to sell on the day appointed by law for making sales, because other sales required by law to be made on that day consumed the whole time within which sales might lawfully be made.[2] So also it is a sufficient excuse for a sheriff for not selling property, advertised for sale on execution during a certain term of court, during that term that the court adjourned at an unusually early hour of the first day of the term.[3]

**i. What Constitutes Failure to Sell.** Where the successful bidder at a sheriff's sale repudiated the sale on account of an omission in the advertisement, and the sheriff duly returned the order of sale, with a certificate of the facts thereon, and afterward another order of sale was issued, the fact that the property sold for a much less sum than at the first sale did not constitute a failure on the part of the sheriff to execute the first order, so as to subject him to an amercement provided for by statute.[4]

**33. Delay in Selling — a. In General.** A sheriff who improperly delays making a sale of property which he has seized under process and should sell is liable to plaintiff in the process for the damage resulting from such delay,[5] and a mere postponement of the sale, if improper, renders the sheriff liable to plaintiff

solved on condition that plaintiff give security to refund the proceeds, where such security is not given).

97. Neal *v.* Price, 11 Ga. 297 [*approved* in Caruthers *v.* Sprayberry, 26 Ga. 437].

98. Dorrance *v.* Com., 13 Pa. St. 160.

99. Com. *v.* Fuqua, 3 Litt. (Ky.) 41; Ruston *v.* Hatfield, 3 B. & Ald. 204, 5 E. C. L. 124; Anonymous, 2 Chit. 390, 18 E. C. L. 698; Levy *v.* Hale, 6 Jur. N. S. 702, 29 L. J. C. P. 127, 1 L. T. Rep. N. S. 132, 8 Wkly. Rep. 125.

1. Scranton *v.* Conlie, 29 Tex. 237, holding that under a statute requiring sheriffs to offer for sale at the end of a certain time runaway slaves in their custody, if not reclaimed, it was a sufficient excuse for the omission of the sale that the slave was insane and of no value.

2. State *v.* Borden, 15 Ark. 611.

3. Mitchel *v.* Gregg, 4 Mo. 37.

4. Moore *v.* Burdge, 7 Kan. App. 80, 52 Pac. 912.

5. *Delaware.*— Janvier *v.* Vandever, 3 Harr. 29.

*Georgia.*— Neal *v.* Price, 11 Ga. 297.

*Indiana.*— State *v.* Herod, 6 Blackf. 444.

*Pennsylvania.*— Dorrance *v.* Com., 13 Pa. St. 160; Spang *v.* Com., 12 Pa. St. 358; Com. *v.* Rowland, 2 Del. Co. 31.

*England.*— Aireton *v.* Davis, 9 Bing. 740, 2 L. J. C. P. 89, 3 Moore & S. 138, 23 E. C. L. 784; Jacobs *v.* Humphrey, 2 Cromp. & M. 413, 3 L. J. Exch. 82, 4 Tyrw. 272; Bales *v.* Wingfield, 2 N. & M. 831, 28 E. C. L. 592; Carlile *v.* Parkins, 3 Stark. 163, 3 E. C. L. 638. See also Ayshford *v.* Murray, 23 L. T. Rep. N. S. 470.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 206.

**Reasonable delay on notice of act of bankruptcy.**—A sheriff who, having seized goods under a fieri facias, receives notice in general terms that the execution debtor has committed an act of bankruptcy, may take reasonable time to inquire whether the statement is true before proceeding to sell, unless he is aware of circumstances which cause him to think that the notice is a mere pretense. Ayshford *v.* Murray, 23 L. T. Rep. N. S. 470.

**Affidavit of illegality.**—Whether a sheriff shall receive an affidavit of illegality on the ground of payment, and thereupon stay the execution, is for him to determine, but at his peril, and, if he determines wrong, he will be liable to the person injured. Tucker *v.* Respass, 28 Ga. 613.

**Delay not such as to render sheriff liable.**—Where a sheriff levied on personal property, subject at the time to a mortgage which became absolute in sixteen days after the levy, the sheriff was not chargeable with neglect of duty in omitting to sell the property previous

for the damage resulting therefrom.[6] But unless the sheriff has grossly abused his authority a delay in selling does not render him liable as a trespasser *ab initio*;[7] and where plaintiff has not been prejudiced by the delay he cannot recover against the sheriff therefor.[8]

**b. Property Claimed as Exempt.**[9] Where property levied on is claimed as exempt, the sheriff is not liable for deferring a sale until such claim can be passed upon.[10]

**c. Delay Pending Proceedings to Open Judgment.**[11] Where a rule to show cause why a judgment should not be opened was entered, and the sheriff delayed an execution sale under the judgment, although no order staying the proceedings was entered, he was liable for the loss occasioned by the property being sold under a subsequent execution.[12]

**d. Delay at Instance of Judgment Creditor.** A sheriff is not liable to defendant in execution for damages resulting from the postponement of a resale of land, where he acted at the instance of the judgment creditor.[13]

**34. Liability as Warrantor of Title.**[14] An officer selling property under process incurs no liability as a warrantor of title;[15] but if he knows of defects in the title or the existence of an adverse claim he should make these facts known at the sale for the guidance of purchasers.[16]

**35. Liability as Trespasser Ab Initio.** A sheriff who has originally acted with propriety under legal process, pursuant to which property has come into his possession, cannot be made liable as a trespasser *ab initio* for subsequent illegal acts connected with the sale thereof,[17] unless he is shown to have grossly abused

to the forfeiture, it not appearing that he had notice of the existence of the mortgage at the time of the levy. Smith *v.* Dunning, 7 Wend. (N. Y.) 135.

6. Gilbert *v.* Watts-De Golyer Co., 66 Ill. App. 625 [*affirmed* in 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154].

In Alabama it is held that the sheriff is not responsible for postponing a sale of land until it is too late to make another levy and sale before the return-day, if in good faith and in the exercise of ordinary prudence he was justified in supposing the land would sell for a sum sufficient to pay the executions in his hands. But it seems that the rule is otherwise in the case of a levy on personal property. Patterson *v.* Powell, 15 Ala. 205.

7. Griel *v.* Hunter, 40 Ala. 542.

8. Markle *v.* Thomas, 13 U. C. Q. B. 321.

9. Exemption generally see Exemptions, 13 Cyc. 1369; Homesteads, 21 Cyc. 448.

10. Van Horn *v.* Bradford, 49 Ga. 75 (holding that where a sheriff levied a mortgage execution on defendant's land, and before sale was notified that defendant's wife had had a homestead set apart in the land, and that an appeal had been taken from the order allowing the homestead, he did not render himself liable to rule by postponing the sale until plaintiff could obtain an order directing him to sell the land, although plaintiff offered to indemnify him if he would proceed with the sale); Blivens *v.* Johnson, 40 Ga. 297 (holding that where a sheriff, having levied an execution on land, postponed the sale, under the impression, formed after consulting counsel and honestly entertained, that he had no authority to make the sale, pending an application of the judgment debtor to have a homestead assigned him, the sheriff was not liable for the debt, on a rule against him for contempt, in not obeying the process of the court, the property having been subsequently set apart as a homestead pursuant to the application. In this case the court relied upon the fact that the proper course for the sheriff to pursue was, under a recently enacted statute, very doubtful, and no construction of the new policy of the state in regard to homesteads had then been made); Kirby *v.* Woods, 5 S. C. 1 (holding that a sheriff will not be ruled in contempt for failing to sell a decedent's lands on the date commanded by an execution, where such failure was due to the widow having duly interposed a claim of homestead, and the sheriff thereupon taking the necessary legal proceedings to have the validity of such claim judicially determined).

11. Opening judgment generally see Judgments, 23 Cyc. 889.

12. Spang *v.* Com., 12 Pa. St. 358.

13. State *v.* Yongue, 10 Rich. (S. C.) 448.

14. Warranty of title to: Personal property see Sales, 35 Cyc. 389, 393. Real property see Vendor and Purchaser.

15. Morgan *v.* Fencher, 1 Blackf. (Ind.) 10; Harrison *v.* Shanks, 13 Bush (Ky.) 620 [*criticizing* McGhee *v.* Ellis, 4 Litt. (Ky.) 244, 14 Am. Dec. 124]; Forsythe *v.* Ellis, 4 J. J. Marsh. (Ky.) 298, 20 Am. Dec. 218; Monday *v.* Wilson, 4 La. 338; Saunders *v.* Pate, 4 Rand. (Va.) 8. And see Executions, 17 Cyc. 1299.

16. Harrison *v.* Shanks, 13 Bush (Ky.) 620.

17. Griel *v.* Hunter, 40 Ala. 542; Bell *v.* North, 4 Litt. (Ky.) 133; Purrington *v.* Loring, 7 Mass. 388.

the process under which he acted,[18] in which case he becomes a trespasser *ab initio*.[19]

**36. Extent of Liability — a. Wrongful Sale in General.** As a general rule one whose property is wrongfully sold by a sheriff may recover the value of the property,[20] or, if he regains property, the expense of doing so;[21] but if the property was legally seized and only the sale was wrongful the value of the property at the time of the sale and not at the time of the seizure fixes the measure of damages.[22] Where, in an action against a sheriff for selling property exempt from execution, it appears that plaintiff fraudulently concealed property to more than the value of his exemptions, he is entitled to only nominal damages.[23] Where a sheriff sells goods on execution unlawfully, he cannot set up, in mitigation of damages, a subsequent sale on another valid execution;[24] but in an action against a sheriff for selling exempt property he may show, in reduction of damages, that plaintiff owned only a part interest in the property.[25]

**b. Sale Without Proper Notice.** In an action against an officer for selling property without giving proper notice, the measure of damages is not the value of the article sold, but the deficit in the price the article should have produced.[26] But where the sheriff sells property on execution without serving upon the owner a written notice as required by statute the owner cannot be held entitled to nominal damages only unless he proves that the property sold for less than it would have sold for if the notice had been given.[27]

**c. Sale at Inadequate Price.** Where by reason of a sheriff's misconduct goods taken under execution by him are sold for less than their fair value, he is responsible for the difference between the fair value and the amount realized by the sale.[28]

**d. Improprieties in Conduct of Sale.** In order to entitle an execution defendant to recover damages for irregularities in the conduct of an execution sale he must show some loss or damage resulting to himself as a natural and legal consequence of the irregularities and improprieties complained of,[29] and he cannot fix the measure of his own damages by his voluntary act in paying money to recover back from the execution purchaser the property alleged to have been irregularly sold.[30] But where, in an action of trespass against an officer, it appeared that the officer had advertised to sell at a certain place goods of plaintiff taken on an execution against him, but had actually sold them at a different

18. Griel *v.* Hunter, 40 Ala. 542.

19. *Kentucky.*— Bell *v.* North, 4 Litt. 133.

*Maine.*— Everett *v.* Herrin, 48 Me. 537; Ross *v.* Philbrick, 39 Me. 29.

*Massachusetts.*— McGough *v.* Wellington, 6 Allen 505; Smith *v.* Gates, 21 Pick. 55; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Melville *v.* Brown, 15 Mass. 82.

*Michigan.*—Terry *v.* Metevier, 104 Mich. 50, 62 N. W. 164.

*North Carolina.*— Parish *v.* Wilhelm, 63 N. C. 50.

*Utah.*— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

*Vermont.*— Heald *v.* Sargeant, 15 Vt. 506, 40 Am. Dec. 694.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 205 *et seq.*

20. See *supra*, V, E, 22, a, (I).

21. See *supra*, V, E, 22, a, (II).

22. Newman *v.* Kane, 9 Nev. 234; Walker *v.* Wilmarth, 37 Vt. 289.

23. Smith *v.* Emerson, 43 Pa. St. 456.

24. Parker *v.* Conner, 44 N. Y. Super. Ct. 416, so holding on the ground that the latter sale cannot be considered a fair one, in view of the fact that the property has already been once sold.

25. Wright *v.* Pratt, 31 Wis. 99.

26. Wright *v.* Spencer, 1 Stew. (Ala.) 576, 18 Am. Dec. 76. But *compare* Carrier *v.* Esbaugh, 70 Pa. St. 239, holding that a sheriff who sells property levied on without giving the proper notice is liable to the original owner for the value of the property sold, and cannot be permitted to show in mitigation of damages that he paid the execution plaintiff out of the proceeds of the sale.

27. Winburne *v.* Bryan, 73 N. C. 47, 50, where it is said: "*Non constat*, that the property would have been sold if the defendant had performed the duty required of him by law. On the contrary it is almost an irresistible inference from the evidence, that the plaintiff would have satisfied the execution and prevented a sale, if he had received the required notice, and this is the very purpose of the statute."

28. Daggett *v.* Adams, 1 Me. 198.

29. Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

30. Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

place, without the consent of plaintiff and without having adjourned the sale from the place advertised, it was held that plaintiff was entitled to recover the full value of the goods, although the officer had paid over the proceeds of the sale to the execution creditor.[31]

**e. Failure to Sell.** The measure of the sheriff's liability for not selling property levied on is the actual injury sustained by the execution plaintiff,[32] which will ordinarily be the value of the property [33] at the time when it should have been sold [34] up to the amount of the writ,[35] or such proportion of the value as would have been applicable on plaintiff's writ,[36] if the property is finally lost to plaintiff and satisfaction cannot otherwise be had.[37]

**f. Defective Sale.** Where plaintiff, the grantee of an equity of redemption, for the purpose of strengthening his title, caused the equity to be sold on an execution which he held against his grantor, and bid it off himself for the amount of the execution, and took a deed of it from the sheriff, paying the latter no money except his expenses, and in consequence of a neglect of the sheriff the sale proved ineffectual, but plaintiff's title was valid independent of the sale, the measure of plaintiff's damages, in an action on the case against the sheriff for his default, was not the sum bid by plaintiff at the sale, but the amount of the expenses actually paid by him, with interest from the time of payment.[38]

**H. Liabilities Arising Out of Collection, Custody, or Disposition of Money — 1. General Rule of Liability.** A sheriff or constable is liable in his official capacity for the safe-keeping and proper disposition of all moneys which have come into his possession by virtue of his office; [39] and an agreement of parties to leave in the hands of the sheriff a fund of which he is the legal custodian does not release him from responsibility for that fund.[40] But where property was sold for cash, but it was agreed that the purchaser might make such arrangements as he could with the execution creditors, and some of them agreed to accept notes, which were given for an amount which added to the cash payments exceeded the purchase-money, it was held that the sheriff was not liable to the purchaser for the excess, he not having received more than he should have.[41] Where an officer executing a writ obtains more money than is necessary to satisfy the same he is liable to defendant for the surplus.[42]

31. Hall *v.* Ray, 40 Vt. 576, 94 Am. Dec. 440.

32. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135; Potts *v.* Com., 4 J. J. Marsh. (Ky.) 202, 20 Am. Dec. 213.

**General rule of damages** see *infra*, VII, P, 1.

33. Royse *v.* Reynolds, 10 Bush (Ky.) 286; Hamner *v.* Griffith, 1 Grant (Pa.) 193; Virginia Exch. Bank *v.* Horner, 26 W. Va. 442.

**Sheriff may show that value of property was less than amount of execution.**—Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135.

34. Virginia Exch. Bank *v.* Horner, 26 W. Va. 442.

35. Hamner *v.* Griffith, 1 Grant (Pa.) 193.

36. Buckley *v.* Hampton, 23 N. C. 318.

**The sheriff may show in mitigation of damages** that the property was encumbered by a lien sufficient to absorb it, or that other executions would have exhausted it or shared in the proceeds. Potts *v.* Com., 4 J. J. Marsh. (Ky.) 202, 20 Am. Dec. 213.

37. Royse *v.* Reynolds, 10 Bush (Ky.) 286.

38. Sexton *v.* Nevers, 20 Pick. (Mass.) 451, 32 Am. Dec. 225.

39. Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47, holding that where a sheriff on refusal of the purchaser at an execution sale of land to comply with the terms of the sale resells the land for a less sum, and brings an action in his own name against the former purchaser for breach of contract, he will be liable in his official capacity to those entitled to the proceeds for the amount recovered.

**Proceeds of sale of property not belonging to defendant.**—A sheriff who, having received an indemnity bond, has sold property on execution, is liable to the execution plaintiff therefor, although defendant in execution did not own the property. Adams *v.* Disston, 44 N. J. L. 662.

40. New Orleans *v.* Waggaman, 31 La. Ann. 299.

41. Kennedy *v.* Moodie, 8 U. C. C. P. 544.

42. Damm *v.* O'Connell, 1 Mo. App. 268; Van Gelder *v.* Hallenbeck, 2 N. Y. Suppl. 252.

**Money received under judgment in favor of officer in replevin.**—Where a constable levied on personal property, and defendant in execution brought suit to replevin the same, in which suit the constable obtained judgment for the property, or for its assessed value, and he elected to take the money, which exceeded the amount necessary to satisfy the

**2. Failure to Collect.** An officer who negligently fails to collect money which he might have collected is liable therefor;[43] but under some statutes a demand within a certain time is essential to fix such liability.[44] In a proceeding against a sheriff for his failure to collect out of partnership assets or property the money due on a judgment against a partner recovered by an individual creditor, it is competent for the sheriff to prove the insolvency of the partnership.[45]

**3. Delay in Collecting.** An officer who undertakes to collect money but fails to take any steps for that purpose for an unreasonable time is liable for such negligence.[46]

**4. Acceptance of Payment Otherwise Than in Cash.**[47] A sheriff who receives anything other than cash in discharge of an execution or in payment for property sold by him makes the debt his own and must respond to the execution plaintiff's demand in cash,[48] unless of course his action in the matter was authorized by the execution plaintiff.[49]

**5. Acceptance of Depreciated Currency.**[50] A sheriff is liable to the execution plaintiff where he receives depreciated currency in satisfaction of the execution, without plaintiff's consent.[51]

execution, he was liable to defendant for the surplus. Damm *v.* O'Connell, 1 Mo. App. 268.

43. *Georgia.*— Harrigan *v.* Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961; Boyles *v.* State Bank, 96 Ga. 796, 22 S. E. 582; Singer Sewing Mach. Co. *v.* Bornett, 76 Ga. 377; Davis *v.* Irwin, 8 Ga. 153.

*Kentucky.*— Walters *v.* Chinn, 1 Metc. 499; Helm *v.* Haycraft, 2 Litt. 171.

*North Carolina.*—Wood *v.* Skinner, 25 N. C. 564.

*Pennsylvania.*— Stewart *v.* Westmoreland County, 1 Pa. Co. Ct. 70 [*following* Com. *v.* County Com'rs, 3 Serg. & R. 601]; Kirkendall *v.* Luzerne County, 11 Phila. 575, holding that the sheriff is liable to the county for the jury fee, under the act of April 8, 1809, and nothing but the insolvency of the party from whom it should be collected, or a showing of his own diligence in endeavoring to collect it, will relieve him from liability, and the fact that a rule of court exists requiring the payment by the successful party in a civil action of the jury fee, before judgment can be entered on the verdict, does not relieve the sheriff from liability.

*South Carolina.*— Davis *v.* Hunt, 2 Bailey 412.

*Tennessee.*— Kinnard *v.* Willmore, 2 Heisk. 619; Lee *v.* Hardeway, 6 Yerg. 502.

*United States.*— Lewis *v.* Hamilton, 15 Fed. Cas. No. 8,324*a*, Hempst. 21, holding that where costs due a clerk in an execution may be, and are not, made by a sheriff, he becomes responsible therefor, nor does the order of plaintiff vary the case as to them.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 223.

44. Walters *v.* Chinn, 1 Metc. (Ky.) 499, holding that under the Kentucky statute a constable is not liable for the amount of a fee bill unless he fails on demand to return the same within six months from the time it is placed in his hands for collection.

**Necessity for demand** generally see *infra*, V, H, 21.

45. Wilson *v.* Strobach, 59 Ala. 488.

46. Lipscomb *v.* Cheek, 61 N. C. 332; Nixon *v.* Bagby, 52 N. C. 4.

47. **Medium of payment generally** see Payment, 30 Cyc. 1187.

48. Phillips *v.* Behn, 19 Ga. 298; Allin *v.* Davis, 1 A. K. Marsh. (Ky.) 567; Tiffany *v.* Johnson, 27 Miss. 227; Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465.

**The sheriff's return that he has made the money** estops him to deny that he received the cash. Tiffany *v.* Johnson, 27 Miss. 227. See also Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465.

**Rceipt of check.**—Where a sheriff sold land at public auction on execution, and took the purchaser's check for the amount of his bid, and the check was not paid, and on another sale a less amount was bid, the sheriff was liable for the difference. Robinson *v.* Brennan, 90 N. Y. 208.

**If a sheriff receives bank-notes as cash** in payment of an execution, it discharges the execution, and the sheriff is liable to plaintiff in execution for the amount, if the notes become worthless in his hands. Harper *v.* Fox, 7 Watts & S. (Pa.) 142.

**Receipt of note.**—Where a sheriff, selling goods under an attachment, took a note with an indorser, making due inquiry as to the solvency of the indorser at the time of the sale, he was not liable on the note being protested for non-payment, although the evidence showed that the indorser was insolvent when the sale was made, but the fact was not generally known in the commercial community. Borgstede *v.* Lewis, 6 La. Ann. 322.

49. See Allin *v.* Davis, 1 A. K. Marsh. (Ky.) 567.

**Consent of all creditors necessary.**—Where a sheriff has levied a number of executions and is selling under them all, he has no right to make an arrangement with some of the execution plaintiffs to receive from them, in payment for such property as they may buy, something other than cash, unless he has the permission of the other execution plaintiffs to make such arrangement. Phillips *v.* Behn, 19 Ga. 298.

50. **Medium of payment** generally see Payment, 30 Cyc. 1187.

51. Randolph *v.* Ringgold, 10 Ark. 279, 52

**6. Liability For Deferred Payments on Credit Sale.** Where a sheriff, under proceedings in partition, has sold the land for a certain sum in hand, taking judgment notes for the balance as he was authorized to do, his return of sale renders him liable to pay the money into court, or to the several persons interested, as soon as their shares are ascertained, or to a call to bring the judgment notes into court, that the parties may have them properly disposed of;[52] and in case the money represented by the judgment notes is lost his liability therefor depends upon whether or not he was guilty of negligence, which is a question for the jury.[53]

**7. Liability to State For Money Received as Bail.** A sheriff who had in his charge a prisoner arrested by him on a warrant on which bail was indorsed has been held liable to the state for money received by him on deposit from such prisoner in lieu of bail, even though there was no statute permitting the sheriff to receive such deposit.[54]

**8. Liability For Money Left With Third Person.** A sheriff who, in execution of a writ of attachment, leaves a sum of money in the hands of a third person, and takes his receipt for it, constitutes him keeper, and the legal possession is in the sheriff, who is accountable to defendant on the dissolution of the attachment in the same manner as though the money had been actually taken into the sheriff's own possession.[55]

**9. Agreements as to Application of Money.** Where a sheriff receives money from a judgment debtor, and agrees with him to apply it on the execution, provided such execution be just and legal, otherwise to return it, he is not bound to do more than to allow to such debtor the full time which the execution has to run to determine the legality of the execution, and where, at the expiration of that time, no proceedings to attack the execution have been instituted, he incurs no liability to the debtor by applying the money on the execution.[56]

**10. Loan of Money.** A sheriff who lends out money in his hands is responsible therefor;[57] and an order of court directing a sheriff to loan money in his hands on certain terms and upon certain security will not protect him from liability to account for such money where he does not, in making a loan, exact the terms and security prescribed.[58]

**11. Payment Into Court.**[59] At common law it was proper for the sheriff to pay into court money collected under an execution,[60] and if he failed to do so he was liable to the parties entitled to the moneys;[61] but the more general modern

Am. Dec. 235 [*overruling* Ringgold *v.* Edwards, 7 Ark. 86], holding that in such case the execution plaintiff may at his election proceed against the execution defendant for a satisfaction of the judgment or against the sheriff for a breach of official duty.

52. Snively *v.* Com., 40 Pa. St. 75.

53. Snively *v.* Com., 40 Pa. St. 75.

54. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426, 430, so holding, on the ground that the transaction, if illegal, could never be questioned by the prisoner, who participated therein, and the sheriff was estopped to deny the legality of the transaction, as against the state, by the fact that he received the money.

55. Watkins *v.* Cawthon, 33 La. Ann. 1194.

56. Richards *v.* Nye, 5 Oreg. 382.

57. Lindsey *v.* Cock, 40 Ga. 7, holding that a sheriff was liable for the value of current bank bills received by him in payment for property sold under execution, which funds, pending an injunction against the payment to plaintiff, he loaned, and for which he subsequently received Confederate money in payment.

58. Hubbard *v.* Elden, 43 Ohio St. 380, 2 N. E. 434, where the court, in view of the facts, did not consider the question whether a strict compliance with the order would have released the sheriff and his sureties from liability.

59. See Executions, 17 Cyc. 1361; and, generally, Deposits in Court, 13 Cyc. 1030.

60. Frazier's Appeal, 6 Pa. Cas. 492, 9 Atl. 492; Enterline *v.* Comrey, 15 Pa. Co. Ct. 627; Nelson *v.* Williams, 4 Hayw. (Tenn.) 161; Shuter *v.* Leonard, 3 U. C. Q. B. O. S. 314.

**Payment into court ends sheriff's responsibility.**— Com. *v.* Walter, 99 Pa. St. 181; McDonald *v.* Todd, 1 Grant (Pa.) 17; O'Donnell *v.* Rorer, 4 Pa. Dist. 146; Enterline *v.* Comrey, 15 Pa. Co. Ct. 627.

**A payment of the proceeds of a sale to the prothonotary** without the intervention and knowledge of the court itself is not such a payment into court as will relieve the sheriff from liability. Com. *v.* Walter, 99 Pa. St. 181.

61. McDonald *v.* Todd, 1 Grant (Pa.) 17; Nelson *v.* Williams, 4 Hayw. (Tenn.) 161.

practice is for the sheriff to pay such moneys directly to the persons entitled thereto,[62] and he cannot discharge himself from liability to such parties by paying the money into court.[63]

**12. Payment to Agent.**[64] Where the statute requires that the appointment of an agent shall be indorsed on an execution when plaintiff does not reside in the county to which it goes, or shall be made in writing, the sheriff may refuse to pay until such evidence is furnished him;[65] but he waives such evidence where he either pays any part of the money or in any other manner recognizes the agency.[66]

**13. Payment to Attorney.** While the attorney of record of a party in whose favor a judgment has been rendered has authority to receive the money and give acquittance therefor to the sheriff,[67] the sheriff is liable to the judgment creditor if he pays money to the latter's attorney when he is chargeable with knowledge or notice that such attorney's authority has been revoked,[68] or after notice from plaintiff not to pay the money to the attorney.[69]

**14. Payment to Wrong Person.** A sheriff who has collected money under process is liable to plaintiff in such process if he pays out such money to another person to whom he was not authorized to pay it;[70] but the sheriff cannot be held liable for paying over money realized on an execution to the execution creditor unless he is affected with notice that another person is entitled thereto.[71]

62. Shuter *v.* Leonard, 3 U. C. Q. B. O. S. 314. See, generally, Executions, 17 Cyc. 1351.

63. Crane *v.* Dygert, 4 Wend. (N. Y.) 675 (holding that in an action against a sheriff for failure to account for the proceeds of a sale on execution, payment of the money into court by the sheriff after the commencement of the suit is no defense); Gladstone *v.* French, 9 U. C. C. P. 30; Shuter *v.* Leonard, 3 U. C. Q. B. O. S. 314.

**Where an execution commands the sheriff to have the money ready to render to plaintiff** on the return-day, the sheriff cannot discharge himself from liability to plaintiff by paying the money to the clerk and taking his receipt. Brown *v.* People, 3 Colo. 115.

**Waiver by taking out money paid in.**— Where a plaintiff obtained an order to take out of court money paid in by the sheriff, on condition that he should pay the master's charges, and was given to understand that he might either take it on these terms or sue the sheriff for it, and availed himself of this order, he could not afterward recover from the sheriff the fees paid to the master on the ground that the money had been improperly paid into court. Crombie *v.* Davidson, 19 U. C. Q. B. 369.

**Remedy.**—When the sheriff has improperly paid money into court, a judge will not order him to pay the costs of such payment into court, but the proper application is for the sheriff to pay over the money returned by him as made, without reference to the payment into court. Crombie *v.* McNaughton, 5 Can. L. J. 161.

64. **Authority of agent to receive payment** generally see Principal and Agent, 31 Cyc. 1368.

65. Brazeal *v.* Smith, 5 Ala. 206.

66. Brazeal *v.* Smith, 5 Ala. 206.

67. Williams *v.* State, 65 Ark. 159, 46 S. W. 186; Custer *v.* Agnew, 83 Ill. 194. See, generally, Attorney and Client, 4 Cyc. 947.

**Payment to attorney procuring partition sale.**— A sheriff's liability to the parties entitled thereto for moneys received by him at a partition sale is not discharged by paying the money to the attorney who procured such sale, but who was not specially authorized to receive it, either by the parties entitled or by order of the court. Calvin *v.* Bruen, 39 Ohio St. 610.

68. Custer *v.* Agnew, 83 Ill. 194; Parker *v.* Downing, 13 Mass. 465.

69. State *v.* Goettie, 7 Rich. (S. C.) 126.

70. Chicago First Nat. Bank *v.* Hanchett, 126 Ill. 499, 16 N. E. 907 [*reversing* 25 Ill. App. 274] (holding that where a sheriff received a writ of attachment, with orders to levy on the contents of the debtors' warehouse, including goods on which the latter had liens for the storage and advances, to collect the amount of the liens, and release the goods, he was liable to the attachment creditor for money so collected, and paid out by him on the order of the debtor to another, whether the goods were attachable or not, since at all events he should have attached the money, and paid it into court); Suydam *v.* Huggeford, 23 Pick. (Mass.) 465; Bowman *v.* Nelson First Nat. Bank, 36 Nebr. 117, 54 N. W. 124.

71. Russell *v.* Lawton, 14 Wis. 202, 80 Am. Dec. 769, where an execution was given to a sheriff on February 9, with orders to levy on certain coin, which he accordingly seized and paid over as money made on the execution, and on the preceding 4th of February an execution against the same defendants had been put into the hands of one of his deputies, and was returned "No property found," but it was conceded that the sheriff acted in good faith, and did not, at the time of paying over the money seized, know that the other execution was in the hands of his deputy, and in suit by plaintiffs in the 4th of February execution to hold the sheriff liable, it was held that the sheriff was not affected with knowledge of the deposit of this execu-

**15. Repayment of Money to Defendant on Supersedeas of Writ.** A sheriff to whom an execution defendant has paid the amount of the execution in order to secure the release of property levied on is liable for the return of the money upon the execution being superseded;[72] and incurs no liability to the execution plaintiff by returning such money to defendant.[73]

**16. Distribution of Proceeds of Sale.** A sheriff in distributing or paying over the proceeds of sales made by him must at his peril see that each person entitled to share in such proceeds receives the amount to which he is entitled, failing in which he is liable to the party injured by his default,[74] although his action may have been based upon the belief that the writ under which the party whom he

tion with his deputy, and that the suit could not be maintained.

**Notice given before execution received.**— Notice to a sheriff by a third person not to pay over money made under an execution to plaintiff therein given before the execution came into the sheriff's hands will not render him liable to such third person for paying the same to plaintiff. Donohue *v.* Harding, 1 Rob. (La.) 69.

**Payment after assignment of judgment.**— Where after notice of the assignment of a judgment, the sheriff voluntarily appropriates the money received from the debtor to satisfy executions in his hands against plaintiff in such judgment be is liable to account therefor to the assignee. McClane *v.* Rogers, 42 Tex 214. An assignee of a judgment cannot hold liable a sheriff who collects the money on execution and pays it over to the judgment creditor, although the assignee had given notice to the officer of such assignment, and demanded the money of him before it was paid over to the assignor, where the assignment was not indorsed on the execution and the judgment creditor insisted that he was entitled to the money. Triplett *v.* Helm, 5 J. J. Marsh. (Ky.) 651.

72. Kyd *v.* Exchange Bank, 56 Nebr. 557, 76 N. W. 1058.

73. Seymour *v.* Dascomb, 12 Wend. (N. Y.) 584, so holding under a statute directing the sheriff on production of a justice's certificate of appeal to relieve the "goods and chattels" of defendant from the execution.

74. *Alabama.*— Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

*California.*— Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849.

*Delaware.*— Smith *v.* Simmons, 2 Pennew. 462, 46 Atl. 746; Farmers' Bank *v.* Grantham Terre-Tenants, 3 Harr. 289.

*Indiana.*— State *v.* Hamilton, 32 Ind. 104.

*Louisiana.*— Citizens' Bank *v.* Payne, 21 La. Ann. 380; Ethridge *v.* Milling, 15 La. Ann. 513.

*Massachusetts.*— Felton *v.* Wadsworth, 7 Cush. 587; Putnam *v.* Hall, 3 Pick. 445.

*Minnesota.*— Fuller *v.* Langum, 37 Minn. 74, 33 N. W. 122.

*Nebraska.*— Bowman *v.* Nelson First Nat. Bank, 36 Nebr. 117, 54 N. W. 124.

*North Carolina.*— Isler *v.* Colgrove, 75 N. C. 334, 342, where it is said: "A sheriff who sells under execution may take on himself to decide which one of several executions in his hands is entitled to priority of payment out of the purchase-money. But such decision would be at his peril, and he is not required to make it."

*Ohio.*— Doll *v.* Barr, 58 Ohio St. 113, 50 N. E. 434.

*Pennsylvania.*— Com. *v.* Comrey, 174 Pa. St. 355, 34 Atl. 581; Campbell *v.* McCleary, 166 Pa. St. 1, 30 Atl. 1132; Krumbhaar *v.* Yewdall, 153 Pa. St. 476, 26 Atl. 219; Com. *v.* Walter, 99 Pa. St. 181; Hopkins *v.* Forsythe, 14 Pa. St. 34, 53 Am. Dec. 513; Mather *v.* McMichael, 13 Pa. St. 301 (holding that where arrears of ground-rent are properly payable out of the proceeds of a sheriff's sale, he cannot relieve himself from liability by annexing conditions to the sale that, unless the bill for the same is presented before he parts with the money, such arrears will be paid by the purchaser); McClelland *v.* Slingluff, 7 Watts & S. 134, 42 Am. Dec. 224; Com. *v.* Alexander, 14 Serg. & R. 257; Frazier's Appeal, 6 Pa. Cas. 492, 9 Atl. 493; Enterline *v.* Comrey, 15 Pa. Co. Ct. 627; Com. *v.* Robinson, 7 Kulp 253; McCaulley *v.* Boeshore, 2 Lanc. L. Rev. 337; Bird *v.* Shirk, 2 Leg. Chron. 158, 6 Leg. Gaz. 149.

*South Carolina.*— State *v.* Boles, 18 S. C. 534; Wallace *v.* Graham, 13 Rich. 322; Thomasson *v.* Kennedy, 3 Rich. Eq. 440.

*Vermont.*— Munger *v.* Fletcher, 2 Vt. 524.

*Canada.*— Crowe *v.* Buchanan, 36 Nova Scotia 1; Galbraith *v.* Fortune, 9 U. C. C. P. 211.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 225.

**Amendment of writ.**— Where a writ of attachment commanding the officer to attach property to the value of six dollars was afterward, with the consent of defendant, amended by changing the amount to six hundred dollars, and the officer sold the property in pursuance thereof, but in the meantime the officer had received another writ in favor of plaintiff, the amendment could not affect the rights of plaintiff, and the officer was liable to him for applying the property in full satisfaction of the first writ, by reason of which there was not a sufficient surplus remaining to satisfy plaintiff's writ. Putnam *v.* Hall, 3 Pick. (Mass.) 445.

**Withholding application of proceeds until lien dissolved.**— Where attached property was sold before judgment, and the proceeds left in the hands of a prior attaching creditor, and judgment was afterward rendered, and execution issued, but no application of the money was made thereon within thirty days,

failed to pay claims was invalid;[75] but where he acts in good faith he is not liable for paying such proceeds to a claimant who was apparently, although not really, entitled thereto,[76] or for failing to pay a claimant of whose prior claim he had no notice and was not chargeable with notice,[77] unless such claimant has been prejudiced by the officer's distributing the proceeds before the proper time.[78] Where a person entitled to receive part of such proceeds directs the sheriff to pay the money to another person who is not entitled to receive it, he cannot hold the

the lien thus being dissolved, the attaching officer was liable to the subsequent attaching creditor for the property or the proceeds thereof. Morse *v.* Knowlton, 5 Allen (Mass.) 41.

**Refusal of proper offer.**— Where a constable had raised money by the sale of property on several executions, but not enough to satisfy them, and one of the creditors, entitled only to a small part, demanded the whole or none, and the constable offered him more than his proportion but he refused it, the creditor could not recover and the constable was not bound to show that he had the money with him when he proposed such payment. State *v.* Fair, 46 N. C. 173.

**Payment to administrator.**— Under Pa. Act (1705), § 7, directing that, where lands shall be sold for more than will satisfy the debts or damages and reasonable costs, the sheriff who shall make the sale shall "render the overplus to the debtor or defendant," a sheriff is not liable to the heir of a deceased debtor for paying over to an administrator the surplus remaining in his hands on an execution against such administrator, levied on real estate, where the heir did not object to such payment before it was made. Com. *v.* Rohm, 2 Serg. & R. (Pa.) 375.

**Where the sheriff sells under execution goods on demised premises,** he should give the landlord time to make his claim under Pa. Act March 21, 1772, § 4, and payment by the sheriff to the execution creditor the next day after the sale, and ten days before the return-day of the execution, is too soon, and renders the sheriff liable to the landlord. Fisher *v.* Allen, 2 Phila. (Pa.) 115.

**The reading of the sheriff's return in open court,** and acknowledgment of his deed, without objection, do not relieve him of liability for misapplication of the proceeds of the sale over and above the lien. Com. *v.* Robinson, 7 Kulp (Pa.) 253.

75. Felton *v.* Wadsworth, 7 Cush. (Mass.) 587.

76. Burnett *v.* Gentry, 32 S. C. 597, 11 S. E. 96, holding that a sheriff who in good faith applies the proceeds of official sales to the satisfaction of a senior execution in his possession, which is open, regular on its face, and contains nothing to show that it is void or paid, but which in fact has been paid by a private settlement between the parties, is not liable to the claimants under a junior execution, where he had no further notice of the payment than that it was disputed between the parties.

**The bona fide payment of an erroneous judgment** by the sheriff out of proceeds of land sold by him, on which it was a lien, protects him in an action against him by the judgment debtor or his subsequent judgment creditors after reversal of the judgment. Com. *v.* Rogers, Brightly (Pa.) 450.

**A mere notice** given to the sheriff at the time of an execution sale by a junior execution creditor not to apply the money to the oldest execution, as it had been paid, and a notice to the attorney in that execution that he would move at the next term to have satisfaction entered on it is not sufficient to relieve the sheriff of liability for not applying the proceeds on the oldest execution; but he must show that the party contesting the right to the money had promptly and vigorously asserted his right in some form of legal proceeding. Wallace *v.* Graham, 13 Rich. (S. C.) 322.

77. Polk County *v.* Sypher, 17 Iowa 358, 85 Am. Dec. 568; Donohue *v.* Harding, 1 Rob. (La.) 69; Bacon *v.* Leonard, 4 Pick. (Mass.) 227 (holding that where a mortgagor assigned his equity of redemption after attachment, and a deputy sheriff, without notice of the assignment, sold the equity, satisfied the judgment, and applied the surplus to satisfy another execution, the officer was not liable to the assignee for such surplus); Downing *v.* Overmire, 37 Nebr. 412, 55 N. W. 880. See also Thomas *v.* Johnson, 53 Ga. 69; Ethridge *v.* Milling, 15 La. Ann. 513.

**When notice too late.**— Where a sheriff levied an execution on defendant's chattels, and immediately afterward was notified by plaintiff not to make a sale, as he deemed it better to allow the property to be sold by defendant, and the chattels were therefore sold by defendant at public sale, and of the proceeds there came to the hands of the sheriff only his costs, and after the return-day and sale, notice was served on the sheriff that a third person claimed a certain amount as arrears of rent from the proceeds of sale of the chattels, which were liable to distress for the rent, the notice came too late, and the sheriff could not be held liable. Work's Appeal, 92 Pa. St. 258.

**Where an execution is lodged in the sheriff's office, and entered in full on his books,** this is sufficient notice to render him liable for paying the proceeds of real estate to a junior creditor. State *v.* Boles, 18 S. C. 534.

78. Doll *v.* Barr, 58 Ohio St. 113, 50 N. E. 434, holding that under Rev. St. § 5382, forbidding any preference among executions sued out during the term in which the judgments were rendered, or within ten days thereafter, and requiring that the fund arising from the sale, if insufficient to satisfy all of such writs, shall be distributed *pro rata* to the creditors, an officer who distributes the money before

sheriff liable for so doing.[79] Where the property sold was not subject to a certain debt the creditor cannot hold the sheriff liable for not applying the proceeds thereto,[80] nor can a person hold the sheriff liable for not paying over to him a part of the proceeds which he was not entitled to receive.[81] So also a person cannot hold the sheriff liable for failure to apply the proceeds of a sale to his debt where the debt has since been satisfied.[82] A sheriff who, after satisfying the creditor under whose process property is sold, applies the surplus to subsequent general mortgages binding on the debtor, thereby incurs no liability to the debtor, as the latter is not thereby prejudiced.[83] Where, of several attachments levied on property, some are prior to and some subsequent to a mortgage covering only a part of the property, and executions in all the attachment cases are delivered to the sheriff without special directions, he is not bound to so sell the property attached and so apply the proceeds as to satisfy all the executions, if he can, without regard to the right of the mortgagee, and if the method adopted by him is legal he incurs no liability to execution creditors who remain unpaid, although he might by proceeding in a different manner have secured payment for them to the exclusion of the mortgagee.[84] Where a debtor's homestead was sold by a sheriff under mortgage foreclosure, the sheriff was not liable for failure to apply an excess arising on the sale on an execution in his hands against the mortgagor, and for delivering such excess to the mortgagor,[85] unless the sheriff knew when he turned over the money to the mortgagor that he did not intend it for reinvestment in another homestead.[86] It is a clear breach of duty for which a sheriff is liable to suffer the attorney for plaintiff to take into his hands the proceeds of a sale and to deal with and dispose of them at his pleasure, and at a time most suitable to his convenience.[87] A sheriff who applies the proceeds of property seized to the judgment of a junior attaching creditor may avoid liability to the senior attaching creditor by showing that his judgment was fraudulently

the expiration of the specified time, thereby depriving a creditor of his proper share, is liable to the creditor; and it is immaterial whether such creditor's writ was in the officer's hands before the day of sale.

79. Fitts *v.* Johnson, 22 Ga. 307.

**Directions of party or attorney** generally see *supra*, V, A, 9.

80. Staton *v.* Com., 2 Dana (Ky.) 397, holding that where a sheriff has two executions against a defendant, and levies the junior execution on property of a stranger, he is not liable to plaintiff in the elder execution, or to the surety of defendant, for not first applying the proceeds on the elder execution.

81. Adams *v.* Duprey, 8 Mart. N. S. (La.) 470, holding that where property was sold under execution subject to a mortgage, and the sheriff, after paying plaintiff in execution, left the balance in the hands of the purchaser for the security of the mortgage, he was not liable for failure to pay over to the original owner the surplus for which the property was sold after satisfying the creditor.

82. Strong *v.* Linn, 5 N. J. L. 799, so holding where, after the sale and application of the proceeds, the creditor who had not been paid caused the arrest of the debtor on capias ad satisfaciendum and afterward ordered his discharge.

83. Powell *v.* Kellar, 5 Rob. (La.) 272.

84. Laflin *v.* Willard, 16 Pick. (Mass.) 64, 26 Am. Dec. 629.

85. State *v.* Hull, 99 Mo. App. 703, 709, 74 S. W. 888, where it is said: "It would seem, therefore, to be the logical conclusion that the sheriff should turn the money over to him under his claim of exemption. It was only exempt if wanted in acquiring another homestead, and the defendant was justified in assuming that was the purpose of the claim of exemption. If it turned out that such was not Maney's intention then it was the relator's place, as execution creditor, to seek the money, or other thing in which he may have put it, in any of the usual ways of creditors pursuing their debtors. There was no way for defendant to have tested Maney's intention to purchase another homestead."

86. State *v.* Hull, 99 Mo. App. 703, 74 S. W. 888, holding, however, that such knowledge on the part of the sheriff was not sufficiently shown.

87. Van Tassel *v.* Van Tassel, 31 Barb. (N. Y.) 439, where it is said that in executions upon a common-law judgment, where the subject belongs exclusively to plaintiff, little or no injury can result from such a course because plaintiff is in fact dealing with what is his own; but in sales in actions for the partition of lands, and the foreclosure of mortgages, or to carry the trusts of a will or deed into execution, when numerous persons other than plaintiff are interested and entitled to share in the proceeds, the officer fails in fulfilling his official obligations if he suffers the purchase-money to pass into hands which are not his own, and will be held to a rigorous accountability for so doing.

obtained; [88] but a sheriff who is sued for his failure to apply on an execution the proceeds of attached property cannot defend on the ground that the judgment was erroneous, if the judgment debtor has given a release of errors therein.[89]

**17. Failure or Refusal to Pay Over Money** [90] — **a. Liability in General.** A sheriff who has made the money on a writ placed in his hands, or is otherwise in possession of money in his official capacity, is liable for the amount if he fails or refuses to pay it over to the person or persons entitled thereto; [91] and even though process is in fact invalid, if he treats it as valid, for the purpose of collecting the money for plaintiff from his debtor, if he cannot treat it afterward as invalid and

88. Pierce *v.* Jackson, 6 Mass. 242.

89. Hill *v.* Keyes, 10 Allen (Mass.) 258.

90. **Penalty for failure or refusal to pay over money** see *infra*, IX, D, 1.

91. *Alabama.*— Barton *v.* Lockhart, 2 Stew. & P. 109.

*Arkansas.*— Borden *v.* State, 9 Ark. 252.

*Georgia.*— Strickland *v.* Smith, 53 Ga. 79 [*followed* in Smith *v.* Wade, 64 Ga. 116]; Cowart *v.* Chaffee, 51 Ga. 606; Bottoms *v.* Mithvin, 26 Ga. 481, 71 Am. Dec. 225; Phillips *v.* Behn, 19 Ga. 298.

*Kentucky.*— Hudgin *v.* Warner, 9 Dana 196.

*Louisiana.*— Chase *v.* Bell, 32 La. Ann. 460.

*Massachusetts.*— McCabe *v.* Maguire, 182 Mass. 255, 65 N. E. 162; Suydam *v.* Huggeford, 23 Pick. 465.

*Michigan.*— Munger *v.* Sanford, 144 Mich. 323, 107 N. W. 914.

*Minnesota.*— Hull *v.* Chapel, 78 Minn. 6, 80 N. W. 692.

*Mississippi.*— Mackey *v.* Smith, (1890) 7 So. 222; Trotter *v.* Parker, 38 Miss. 473.

*Nebraska.*— Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*New Hampshire.*— Moody *v.* Mahurin, 4 N. H. 296.

*New York*— James *v.* Gurley, 48 N. Y. 163; Van Gelder *v.* Hallenbeck, 2 N. Y. Suppl. 252, 15 N. Y. Civ. Proc. 333; Graydon *v.* Stone, 1 Edm. Sel. Cas. 221; Armstrong *v.* Garrow, 6 Cow. 465.

*Ohio.*— Calvin *v.* Bruen, 39 Ohio St. 610, holding that a sheriff is liable for failure to pay over the money paid him for a note and mortgage taken for the deferred payment of purchase-money of land sold on partition, although no special order of distribution was made, and the money was paid him after the expiration of his term.

*South Carolina.*— Hooks *v.* Byrd, 10 Rich. 120; Wallace *v.* Graham, 13 Rich. 322; Walker *v.* Kennerly, 3 Rich. 64; Summers *v.* Caldwell, 2 Nott & M. 341.

*South Dakota.*— Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78.

*Tennessee.*— See Cook *v.* Smith, 1 Yerg. 148.

*Vermont.*— Coburn *v.* Chamberlin, 31 Vt. 326.

*Canada.*— Michie *v.* Reynolds, 24 U. C. Q. B. 303; Burnham *v.* Manners, 2 U. C. Q. B. 94.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 224.

**Claim against plaintiff.**— A sheriff will not be allowed to retain money made on an execution, on the ground that he has himself a claim against plaintiff, who has absconded, when plaintiff's attorney is the person entitled to it in consequence of advances made to plaintiff. Burnham *v.* Manners, 2 U. C. Q. B. 94.

**Loan to deputy by person entitled.**—Where property taken under attachment sued out by a bank was, pursuant to an order to that effect, sold before final judgment, and the purchaser, with the consent of the sheriff, gave his note to the bank for the estimated share of its proceeds, and at maturity the bank extended the payment thereof, and when it was paid placed the money to the credit of the sheriff's account, and before final judgment the bank paid the money to the sheriff's deputy, on checks drawn in the name of the sheriff, after having first taken the deputy's individual note therefor, the sheriff was not liable to the bank for its share of the proceeds of the sale, conceding the funds to have been his property, since the bank, having loaned it without the authority of the sheriff, was liable to account therefor. Boone County Bank *v.* Eoff, 66 Ark. 321, 50 S. W. 688.

**Money paid to a sheriff on an execution after the return-day** will not satisfy such execution, and therefore the sheriff will not be liable, as such, for failing to pay over money so received. Barton *v.* Lockhart, 2 Stew. & P. (Ala.) 109; Hamilton *v.* Ward, 4 Tex. 356.

**What constitutes receipt in official capacity.**—Where judgment creditors purchased certain cord wood at sheriff's sale on execution, no money being paid, but each intending that his bid should be credited on his execution, but the sheriff demanded money for his fees, and also for the purpose of paying preferred labor liens upon the property, and the judgment creditors, at his suggestion, disposed of their interests to a third person, who thereafter paid the money to the sheriff, who neglected and refused to pay the same, or any part thereof, to the judgment creditors, it was held that the disposal of the interests of the judgment creditors was a transfer of the bids instead of a sale of the property, and that the sheriff received the money in his official capacity. Nash *v.* Muldoon, 16 Nev. 404.

**Officer who commences service liable.**— Where a constable, having levied under an execution, procures another officer to sell, and the latter fails to pay over the money to plaintiff in the execution, the constable mak-

withhold the money.[92] But an officer who releases a levy upon receiving the money to cover the amount of the execution, and agrees that such money is held subject to the disposition of the "matter" according to law, is not liable to return such money to the execution defendant after an appeal has been taken, which is dismissed for failure to file a sufficient appeal-bond.[93]

**b. Proceeds of Property Sold Under Mesne Process.** Where property seized on mesne process is sold before judgment the sheriff is not in default or liable for not paying over the proceeds of such sale to the party at whose instance the process issued until the court has ordered him to do so,[94] and under some statutes a sheriff cannot be required to pay over such money, or held liable for failure to do so, until final process has issued.[95]

**c. Extent of Liability.** In an action against a sheriff for failure to pay over money he is liable for the full amount collected,[96] and the damages recoverable are the same, whether the action is brought in the name of the creditor of record or that of the real owner of the judgment.[97] But in an action against a sheriff to recover the amount of an execution collected by him, plaintiff is not entitled to recover as costs fees coming to his attorney on the judgment obtained by him for plaintiff on which the executions were issued, plaintiff not having paid these fees to the attorney.[98] Where, in an action against a sheriff for money collected by him on an execution in favor of plaintiff, it appeared, from the return indorsed by the sheriff on the execution that he had paid part of the sum levied to a certain person for rents due and demanded for the property where the goods seized were located, it was held that the sheriff must be deemed to have paid the rent in plaintiff's behalf and for his benefit, and plaintiff was entitled to recover no more than the residue of the sum levied after deducting the amount paid for the rent.[99]

**d. Particular Matters Affecting Liability** — (I) *IN GENERAL.* It is no excuse for the failure of an officer to pay over money collected under final process that he retained the money merely because defendant in execution insisted on its application to some other debt,[1] or because he desired the direction of the court as to the application thereof.[2] The fact that an execution issued for a less sum than that for which judgment was rendered furnishes no excuse for the sheriff who has collected it for failing to pay to the creditor the money so collected;[3] nor does an injunction against paying out a portion of a fund excuse the officer's failure to pay out the remainder.[4]

(II) *CLAIM BY THIRD PERSON.* Where the statute provides that the proceeds of sales on execution shall be paid into court, or otherwise disposed of as the court or judge may order, it requires the disobedience by the sheriff of an order of court, or the judge thereof, to put the sheriff in default as to an execution plaintiff, where there is a pending action by a third person against the sheriff, claiming the property or the proceeds of the sale thereof on execution.[5] But a mere notice by a third person stating that he holds a claim against the execution creditor, and has sued out an attachment against him as a non-resident, and requiring the sheriff to retain

ing the levy is liable to plaintiff in the execution. Cook *v.* Smith, 1 Yerg. (Tenn.) 148.

92. Graydon *v.* Stone, 1 Edm. Sel. Cas. (N. Y.) 221; Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78. See also James *v.* Gurley, 48 N. Y. 163.

93. People *v.* Peck, 138 Ill. App. 348.

94. State *v.* Hickman, 150 Mo. 626, 51 S. W. 680.

95. Sabin *v.* Barnett, 79 Fed. 947, holding that, under 2 Hill Code Wash. § 496, the actual issuance of an execution is necessary to make it the duty of the sheriff to pay over to the clerk of the court the proceeds of a sale of attached property, and he is not in default, or liable upon his bond, for failure to pay the money over upon a simple order directing him to pay the money into court.

96. Hudgin *v.* Warner, 9 Dana (Ky.) 196; Bradley *v.* Chamberlain, 31 Vt. 468.

97. Bradley *v.* Chamberlain, 31 Vt. 468.

98. Pontius *v.* Com., 4 Watts & S. (Pa.) 52.

99. Griffith *v.* Ketchum, 12 Johns. (N. Y.) 379.

1. Mackey *v.* Smith, (Miss. 1890) 7 So. 222.

2. Mackey *v.* Smith, (Miss. 1890) 7 So. 222.

3. Coburn *v.* Chamberlin, 31 Vt. 326.

4. Phillips *v.* Bean, 19 Ga. 298.

5. State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410.

money collected until the next term of court, will not justify the sheriff in withholding the money from plaintiff under whose process he received it.[6]

(III) *NOTIFICATION NOT TO PAY OVER MONEY.* It is no justification of the failure of a sheriff to pay over money collected on execution that he was notified not to pay over such money, on the ground that the estate of defendant was insolvent, and therefore returned the money into court, and asked direction as to its payment, where it does not appear that said estate was insolvent in fact, or that it had been so declared by the probate court before the levy of the execution.[7] Neither is a mere direction by an execution debtor to a sheriff not to pay over to plaintiff money made on the execution a sufficient excuse for not paying it over.[8] But where a sheriff had collected money under execution in favor of plaintiff, and, before a demand was made on him by plaintiff to pay over the money, he received written notice from the attorney of certain attaching creditors not to pay over, but to retain the sum collected in his hands, and that they intended to file a suggestion to set aside plaintiff's judgment and execution as fraudulent and void, it was held that the sheriff was justified in retaining the money.[9]

(IV) *RIGHT OF OR PAYMENT TO ANOTHER PERSON.* It is a sufficient answer to an action against the sheriff for not paying over money to a certain person that such money has been rightfully paid to another[10] or should be so paid,[11] and a general plea of payment is a proper defense to an action to recover from a sheriff the surplus proceeds of an execution sale.[12]

(V) *RECOVERY AGAINST OFFICER FOR SELLING PROPERTY.* An officer cannot be held liable for not paying over money collected by him on execution, where a recovery has been had against him for selling the property, by the sale of which the money collected by him was made, and such recovery equals or exceeds the amount of the execution.[13] But a party who elects to proceed in an action

6. Strickland *v.* Smith, 53 Ga. 79 [*followed* in Smith *v.* Wade, 64 Ga. 116].

7. Trotter *v.* Parker, 38 Miss. 473.

8. Walker *v.* Kennerly, 3 Rich. (S. C.) 64.

9. Thomas *v.* Yates, 1 McMull. (S. C.) 179. But *compare* Hooks *v.* Byrd, 10 Rich. (S. C.) 120.

10. Summers *v.* Caldwell, 2 Nott & M. (S. C.) 341 (holding that a rule on the sheriff to show cause why he should not be ordered to pay over to plaintiff money which he had collected on an execution is properly discharged on a showing by the sheriff that he had levied an execution which he had in his hands against plaintiff on the money, and paid it over to plaintiff in that execution); Thomasson *v.* Kennedy, 3 Rich. Eq. (S. C.) 440 (holding that a sheriff who has sold land and executed title to the bidder may exonerate himself from failure to pay over the money or credit it on plaintiff's execution by showing that the amount of the bid was received by defendant in execution, and applied by him to the oldest executions according to the priority of their liens).

**Loan of money.**— Where a sheriff received notes for collection, and obtained judgment thereon, and execution on the judgment came to the hands of a constable, who collected the money, it was held, on a motion of the owner of the notes against the constable to compel payment, that the constable, in order to exonerate himself, would have to show that he actually paid over the money collected to the sheriff, and it would be insufficient to show that he had loaned that amount to the sheriff, and that on notice of the motion they agreed to convert the loan into a payment. Pate *v.* Parks, 4 Sneed (Tenn.) 330.

11. Lambert *v.* Clement, 11 Manitoba 519, holding that where the landlord makes a claim for rent as against goods seized by the sheriff under an execution, and the sheriff sells the goods for a sum not exceeding the landlord's claim, and the execution creditor claims the money in an action against the sheriff, it is a sufficient answer to plaintiff's action to show that the landlord has a good claim to the money, although it has not been paid over to him.

**Setting up right of parties who make no claim.**— A sheriff who is called on by rule to pay over to the execution plaintiff the proceeds of the sale cannot set up as a defense superior privileges in favor of attaching creditors, who, although made parties to the rule, do not make such claim for themselves. Chase *v.* Bell, 32 La. Ann. 460.

12. State *v.* Early, 81 Ind. 540, 541, where it is said: "It is not necessary that a plea of payment allege to whom payment was made."

13. Newland *v.* Baker, 21 Wend. (N. Y.) 264, holding that this is true, although the execution plaintiff on the delivery of the process executed a bond of indemnity to the officer and the latter has sued thereon. But *compare* Chandler *v.* Riddle, 119 Ala. 507, 24 So. 498, holding that where a sheriff had been ordered to pay plaintiff the proceeds of attached property, it is no defense to an action therefor that a claimant of the property had

of trespass against an officer for selling his property under void process, and recovers therein, is precluded from bringing suit against the officer for an admitted balance remaining in his hands, the proceeds of the sale, after satisfying the amount for which the process issued.[14]

(VI) *ATTACHMENT*[15] *OR GARNISHMENT*[16] *OF MONEY.* A sheriff cannot be held liable for not paying over money which has been attached in his hands;[17] but it is no defense to an action against a sheriff for not paying over money collected on execution that such money was garnished in the hands of a deputy sheriff.[18]

(VII) *RECEIPT OF DEPRECIATED CURRENCY BY OFFICER.* An officer proceeded against for failure to pay over money collected cannot reduce his liability by showing that the payment was received by him in a depreciated currency.[19]

(VIII) *RECEIPT OF MONEY AFTER RETURN-DAY OF WRIT.* A sheriff who receives money on an execution after the return-day is not liable therefor to the execution plaintiff in his official capacity,[20] although he is personally liable for the amount.[21]

(IX) *RECOVERY OF JUDGMENT AGAINST DEPUTY.* It has been held that as a sheriff and his deputy are jointly and separately liable to the execution creditor for moneys collected by the deputy, a recovery of a judgment against the deputy is no bar to an action against the sheriff while such judgment remains unsatisfied.[22]

(X) *REFUSAL TO RECEIVE MONEY.* The fact that the person entitled to money in the sheriff's possession has once refused to receive the money does not relieve the sheriff from liability if the person entitled to the money subsequently demands it and he refuses to pay it over.[23]

(XI) *PROPRIETY OF SALE OF PROPERTY.* Where a sheriff is authorized under certain circumstances to sell attached property without obtaining an order therefor, he is estopped in a proceeding against him to account for the proceeds of property so sold to set up that the sale was not properly made and therefore claim that he is not liable to account for the money.[24]

**18. DELAY IN PAYING OVER MONEY.** A sheriff may be held liable for an improper delay in paying money in his hands to the person entitled thereto;[25] but he is guilty of no breach of duty and incurs no liability by failure to pay over money before the return-day of the process under which it was collected.[26] If both

recovered judgment therefor against plaintiff, and that the proceeds of other property claimed by the attachment defendant to have been exempt was paid to claimant in satisfaction of his judgment.

14. Clarke *v.* Hallock, 16 Wend. (N. Y.) 607.

15. See, generally, ATTACHMENT, 4 Cyc. 362.

16. See, generally, GARNISHMENT, 20 Cyc. 969.

17. Powers *v.* Scott, (Hill. T. 3 Vict.) 3 Ont. Case Law Dig. 6402.

Service of summons of garnishment on defendant in execution is not a ground of which the sheriff can avail himself in an answer to a rule against him to show cause why he should not pay the money due on the execution. Cowart *v.* Chaffee, 51 Ga. 606.

18. Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471, so holding upon the ground that the money, although in the actual possession of the deputy, was in the official custody of the sheriff and the garnishment against the deputy was effective as against the sheriff.

19. Rigsby *v.* Walter, 7 Coldw. (Tenn.) 147, so holding on the ground that the receipt of such currency was contrary to the legal duty of the officer.

20. Edwards *v.* Ingraham, 31 Miss. 272, holding that the sheriff receives such money merely as the agent of the judgment debtor with the implied understanding that it shall be applied in payment of the judgment.

21. Dean *v.* Governor, 13 Ala. 526.

22. Christian *v.* Hoover, 6 Yerg. (Tenn.) 505.

23. Hull *v.* Chapel, 78 Minn. 6, 80 N. W. 692, holding that where, after foreclosure, the sheriff receives redemption money, and tenders it to the mortgagee who refuses to accept it, and thereafter, on demand, the sheriff refuses to turn it over to the mortgagee but deposits it in a bank, taking a certificate of deposit, and the bank fails, the sheriff is liable to the mortgagee for the amount of the redemption money from the date of the demand.

24. Dane *v.* McArthur, 57 Ala. 448.

25. Wallace *v.* Graham, 13 Rich. (S. C.) 322, holding that a sheriff neglecting to pay over money for several years without good excuse may be compelled to pay other and good money, if that which he received has in the meantime depreciated.

26. State *v.* Muir, 24 Mo. 263; State *v.* Mann, 35 N. C. 444; Fisher *v.* Allen, 2 Phila. (Pa.) 115.

plaintiff and defendant consent that the sheriff sell property levied on on credit, they cannot complain that he does not pay the proceeds immediately on the sale.[27]

**19. Loss of Money Sent Through Mail.** Where a sheriff, without any directions to that effect, sends money through the mail, he does so at his own risk, and if the money is lost he is liable therefor to the person to whom he should have paid it;[28] but it is otherwise if he has been authorized by such party to remit by mail.[29]

**20. Interest.**[30] Where the sheriff so places money in his official custody that it produces interest, such interest should be treated as an accretion to the money, and belongs to the party entitled to the money;[31] and if the sheriff be authorized to sell on credit he is liable for the interest received by him on deferred payments.[32] But where the officer, on his own responsibility, sells property on credit, and applies the full amount for which the property sold to the satisfaction of executions in his hands, he cannot be held liable to the creditor on account of interest which he receives on the amounts for which he extended credit.[33]

**21. Necessity For Demand.** According to some authorities a demand is a necessary prerequisite to an action against an officer for failure to pay over money,[34] but other authorities hold that a demand is not necessary in order to render a

27. Langdon *v.* Summer, 10 Ohio St. 77.

28. Wakefield *v.* Lithgow, 3 Mass. 249.

29. Wakefield *v.* Lithgow, 3 Mass. 249.

30. See, generally, Interest, 22 Cyc. 1459.

**Necessity for demand to charge sheriff with interest** see *infra*, V, H, 21.

31. Jackson *v.* Smith, 52 N. H. 9 (holding that an attaching officer who sells property on mesne process and deposits the proceeds in a savings bank is liable to the attaching creditor as well as to the debtor for interest received thereon); Farley *v.* Monroe, 21 N. H. 146; Richmond *v.* Collamer, 38 Vt. 68.

32. Gannett *v.* Cunningham, 34 Me. 56.

33. Chase *v.* Monroe, 30 N. H. 427, 433, where it is said: "The officer sold on credit at the request of the debtor only; and the creditors, having given no directions, are not to suffer by any loss that may arise in consequence of such a sale. . . . Neither can they avail themselves of any advantage derived from such sale, other than those which arise from the sale itself. If the goods sold for more upon credit than they otherwise would, that is an advantage of which they cannot be deprived. But there is no other advantage that they can gain."

34. *Illinois.*— McInerney *v.* Chicago Times Co., 41 Ill. App. 438.

*Maine.*— Steele *v.* Putney, 15 Me. 327.

*Massachusetts.*— Wakefield *v.* Lithgow, 3 Mass. 249.

*New Hampshire.*— Moody *v.* Mahurin, 4 N. H. 296.

*North Carolina.*— Kivett *v.* Massey, 63 N. C. 240.

*South Carolina.*— Sims *v.* Anderson, 1 Hill 394; Wright *v.* Hamilton, 2 Bailey 51, 21 Am. Dec. 513.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 266.

**Where the creditor resides in another county** than that of the sheriff, a demand is a prerequisite to a suit against the latter for money collected by him. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.

**Demand on agent.**— Where a sheriff, after his term of office had expired, appointed an agent to attend to all the business relating to the office, with full authority to pay out, or to refuse to pay, a demand on such agent for money collected was sufficient to charge the sheriff. Alexander *v.* Hancock, 2 Rich. (S. C.) 100.

**Demand by agent.**— Where payment of the amount collected by a deputy on an execution is demanded of the deputy by an agent of the execution creditor, and the deputy promises to pay the amount at a future time, he cannot, on an action being commenced against the sheriff for the money, object that no evidence was shown to him, at the time the demand was made, of the authority of the agent to make the demand and receive the money. Barron *v.* Pettes, 18 Vt. 385.

**Sufficiency of demand.**— Where a sheriff sold on an execution certain property on which plaintiff had a chattel mortgage, and plaintiff made a written demand on the sheriff for the amount due him, together with the costs of protest of the notes secured by the mortgage, which amount due exceeded the value of the property, it was held that such demand properly included the costs of the protest. Bigelow *v.* Caper, 145 Mass. 270, 13 N. E. 896.

**Where the sheriff asserts a right to retain the money,** in opposition to plaintiff's claim, no demand is necessary before action. Sims *v.* Anderson, 1 Hill (S. C.) 394.

**Demand for county moneys.**— A sheriff whose term of office has expired, having in his hands moneys belonging to the county court of his county, is not liable to be sued therefor, until some order of the county court is made and entered of record, directing him to pay the same to his successor in office, or to some other person, or until some draft made in pursuance of such order has been presented to him for payment, and payment thereof has been refused. State *v.* Hays, 30 W. Va. 107, 3 S. E. 177.

sheriff liable for failure to pay over money collected by him.[35] It is also held that a sheriff cannot be charged with interest on money collected by him until a demand has been made upon him for such money.[36] But where an officer has sold property levied on under execution for more than sufficient to satisfy the debt and costs no demand is necessary to entitle the execution debtor to sue him for the surplus.[37] Where money has been collected by a deputy a demand on either the deputy [38] or the sheriff [39] is sufficient to sustain an action against the sheriff. An action of debt on a sheriff's official bond for money collected, and a nonsuit therein, is a sufficient demand to enable plaintiff to sustain an action on the case for the same cause of action.[40] A sheriff may maintain an action against his deputy for the latter's failure to pay over money collected by him without a demand.[41]

**22. Necessity For Order of Court as to Payment.** Where the sheriff is required by law to retain the proceeds arising from a sale of perishable property held under attachment, made by order of the court during the pendency of the action, subject to the order of the court after the final judgment in the action, a sheriff cannot be sued for the proceeds of such property until the court has made an order for the disposition thereof.[42]

**23. Effect of Reversal of Judgment.** An officer who has collected the amount of an execution and paid the money over to or on the order of plaintiff is not, in case the judgment is reversed on appeal, liable for such amount to defendant,[43] or to a garnishee from whom the money was collected.[44] Where one member of a firm confessed a judgment against the partnership, and execution was issued thereon, and the partners paid the amount to the sheriff after a levy on partnership property, and subsequently the judgment was reversed as to the partner who was not a party to it, plaintiff in execution was entitled to recover of the sheriff the amount received by him on the execution.[45]

**I. Liabilities Arising Out of Taking of Bond or Security — 1. Acceptance of Bond Insufficient in Form.** A sheriff who accepts a bond which is defective in form and for that reason does not afford the proper protection to the party for whose protection it is taken is liable therefor,[46] notwithstanding the fact that

35. Janvier *v.* Vandever, 3 Harr. (Del.) 29; Nelson *v.* Kerr, 59 N. Y. 224 [*affirming* 2 Thomps. & C. 299, and *approving* Crane *v.* Dygert, 1 Wend. (N. Y.) 534; Brewster *v.* Van Ness, 18 Johns. (N. Y.) 133]; Houston *v.* Russell, 52 Vt. 110 (holding that a collector of a school-district may bring suit against a constable for money not paid over within a reasonable time, without first making demand); Dale *v.* Birch, 3 Campb. 347.

36. Hantz *v.* York Bank, 21 Pa. St. 291. See also Farley *v.* Monroe, 21 N. H. 146, holding that where in assumpsit against a sheriff to recover surplus money received by him on an execution sale it appeared that the sheriff had received a promissory note for the property sold and had received interest on the note, it was held that the interest belonged to the owner of the principal, but as no demand was made on him before the commencement of the suit, he should account for interest only from that time. See, generally, Interest, 22 Cyc. 1547.

A rule on the sheriff to pay the money into court which was not actually served, there being at the same time a dispute among the creditors as to who was entitled to the money, is not equivalent to a demand. Hantz *v.* York Bank, 21 Pa. St. 291.

37. Munger *v.* Sanford, 144 Mich. 323, 107 N. W. 914.

38. Lyle *v.* Wilson, 26 N. C. 226.

39. King *v.* Rice, 12 Cush. (Mass.) 161, so holding in a case where the deputy had gone out of office and left the state.

40. Fagan *v.* Williamson, 53 N. C. 433.

41. Nelms *v.* Williams, 18 Ala. 650.

42. Yell *v.* Lawson, 7 Ark. 352.

43. Elliott *v.* Sneed, 2 Ill. 517; Com. *v.* Rogers, Brightly (Pa.) 450.

44. Elliott *v.* Sneed, 2 Ill. 517.

45. Harper *v.* Fox, 7 Watts & S. (Pa.) 142.

46. Fitzhugh *v.* Hackley, 70 Ark. 54, 66 S. W. 146 (holding that under Sandels & H. Dig. §§ 406, 407, providing that a claimant of property attached must give bond to the sheriff conditioned that the claimant will interplead, and, if unsuccessful, will redeliver the property, and that such bond shall have the force and effect of a judgment, a sheriff who released attached property on a bond defective in form, not having the force and effect of a judgment, and not obligating the claimant to return the property or pay the value, was liable); O'Grady *v.* Keyes, 1 Allen (Mass.) 284 (so holding in a case where no penal sum was inserted in the bond).

Taking imperfect bond in addition to sufficient bond.— Where a sheriff took and returned with his writ a good and sufficient replevin bond, the fact that an imperfect bond was also found among the papers, even if placed there by the sheriff himself, did not

such party has failed to seasonably take advantage of the defect in the form of the bond.[47]

**2. Acceptance of Bond Not Conforming to Statute.** Where the statute makes it the duty of sheriffs to collect fines, the taking of a bond not in conformity with statutory requirements does not acquit the sheriff of liability for a fine adjudged against a prisoner in his custody.[48]

**3. Acceptance of Bond in Insufficient Amount.** Where the sheriff is invested with the power to determine the amount of a bond to be taken by him in the course of his duties or the amount of the bond is fixed by statute, he is liable if he negligently accepts a bond in an insufficient amount.[49]

**4. Acceptance of Bond With Improper Condition.** Where it becomes the duty of a sheriff to take a bond conditioned in a particular manner he is liable if he accepts a bond conditioned otherwise.[50]

**5. Acceptance of Bond With Insufficient Sureties — a. In General.** Where under the statute the sheriff has the power to decide as to the sufficiency of a bond he is liable if he wilfully or negligently accepts a bond with insufficient sureties,[51] whether his acceptance is evidenced by a formal approval in writing, or by merely

render the good bond void, or make the sheriff liable for a failure to take a good and sufficient bond. Rodrick *v.* People, 81 Ill. App. 121.

47. O'Grady *v.* Keyes, 1 Allen (Mass.) 284, so holding in an action by a defendant in replevin against the sheriff.

48. Wilson *v.* White, 82 Ark. 407, 102 S. W. 201, holding that this is true even though the bond taken is valid as a common-law obligation.

49. *Alabama.*— Scott *v.* Ryan, 115 Ala. 587, 22 So. 284.

*Illinois.*— Pickett *v.* People, 114 Ill. App. 188 (holding that a constable in taking a replevin bond should not rely upon the statement contained in the affidavit for replevin, or take and approve the bond without attempting to ascertain the value of the property sought to be replevied); Mayer *v.* People, 92 Ill. App. 123 [*affirmed* in 190 Ill. 109, 60 N. E. 96].

*Louisiana.*— Dugat *v.* Villejoin, 3 La. 23, holding that a sheriff who sells property under execution, and does not require a bond for an amount sufficient to satisfy the debt, interest, and costs, makes himself personally liable for the deficiency.

*Maine.*— Hall *v.* Monroe, 73 Me. 123; Kimball *v.* True, 34 Me. 84; Dyer *v.* Woodbury, 24 Me. 546.

*Texas.*— See Lipscomb *v.* Mensing, 2 Tex. App. Civ. Cas. § 535.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 219.

50. Hardy *v.* Poss, 120 Ga. 385, 47 S. E. 947 (holding that the officer is liable where, upon a counter affidavit being filed to the levy of a distress warrant, he takes a bond conditioned otherwise than for the eventual condemnation money); Ford *v.* Perkerson, 59 Ga. 359; Raiford *v.* Taylor, 43 Ga. 250 (holding that the positive provision of Rev. Code, § 3676, that the claimant of property levied on under execution shall give bond to pay to plaintiff all damages which the jury on the trial may assess, in case it may appear that the claim is interposed for delay only, is not complied with by a forthcoming bond; and, if the sheriff has turned the property over to the claimant on such bond alone, the judge may properly hold him liable for the value of the property levied on); Faircloth *v.* Freeman, 10 Ga. 249 (holding that under Cobb New Dig. pp. 386, 387, requiring that, on the arrest of defendant on a capias ad satisfaciendum the sheriff should keep him in custody unless he gave bond payable to plaintiff, conditioned for his appearance at the next term of court in which the writ was obtained, then and there to abide by such proceedings as might be had by the court in relation to his taking the benefit of the Debtor's Act, a sheriff who took a bond, conditioned for defendant's appearance "from term to term, and not to depart thence without leave of the Court," and no more, was liable to plaintiff on failure to make the amount of the execution). See also Lipscomb *v.* Mensing, 2 Tex. App. Civ. Cas. § 535.

51. *Alabama.*— Scott *v.* Ryan, 115 Ala. 587, 22 So. 284.

*Illinois.*— Larney *v.* People, 82 Ill. App. 564.

*Kentucky.*— Edwards-Barnard Co. *v.* Pflanz, 115 Ky. 393, 73 S. W. 1018, 24 Ky. L. Rep. 2296; Com. *v.* Thompson, 3 Dana 301.

*Maine.*— Newbert *v.* Cunningham, 50 Me. 231; 79 Am. Dec. 612; Lord *v.* Bicknell, 35 Me. 53; Wilkins *v.* Dingley, 29 Me. 73; Dyer *v.* Woodbury, 24 Me. 546.

*Massachusetts.*— Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869; Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486; Miner *v.* Coburn, 4 Allen 136; Young *v.* Hosmer, 11 Mass. 89; Sparhawk *v.* Bartlet, 2 Mass. 188.

*Missouri.*— Mortland *v.* Smith, 32 Mo. 225, 82 Am. Dec. 128.

*Nebraska.*— Shull *v.* Burton, 67 Nebr. 311, 93 N. W. 132, 62 Nebr. 570, 87 N. W. 322, 58 Nebr. 741, 79 N. W. 732, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698 (holding that an officer who, after objection to the sufficiency of a replevin bond, merely takes the affidavit of the surety on the bond that he is

executing the process without a formal approval of the bond;[52] and the good faith of the officer will not protect him from liability if he has been negligent,[53] nor is it essential to his liability that he should have known the sureties to be insufficient.[54]

**b. Liability as Guarantor of Sufficiency.** Some cases hold that the officer is absolutely liable for the sufficiency of sureties accepted by him, and cannot escape liability by any showing of diligence;[55] but the better rule and that supported by the weight of authority is that the officer is not a guarantor or insurer of the sufficiency of sureties accepted by him, but if he has acted in good faith and exercised reasonable care and diligence to ascertain their sufficiency, he is not liable if they ultimately prove insufficient.[56]

the owner of real estate situate in the county where the replevin action is pending, not exempt from execution, and of twice the value of the replevied property, and approves the bond without making any further inquiry, or acquiring any further knowledge as to the surety's financial condition, the surety being in fact insolvent, is negligent in approving the bond); Adams *v.* Weisberger, 62 Nebr. 325, 87 N. W. 16; Thomas *v.* Edgerton, 40 Nebr. 25, 58 N. W. 551, 36 Nebr. 254, 54 N. W. 426 [*followed* in Busch *v.* Moline, etc., Co., 52 Nebr. 83, 71 N. W. 947].

*New Hampshire.*— Choate *v.* Stark, 18 N. H. 131.

*New York.*— Hofheimer *v.* Campbell, 7 Lans. 157; Gallarati *v.* Orser, 4 Bosw. 94 [*reversed* on other grounds in 27 N. Y. 324]; Brayton *v.* Smith, 6 Paige 489.

*North Carolina.*— See Wells *v.* Bourne, 113 N. C. 82, 18 S. E. 106.

*Pennsylvania.*— Murdoch *v.* Will, 1 Dall. 341, 1 L. ed. 166.

*South Carolina.*— Jones *v.* Blair, 4 McCord 281; Clark *v.* Moore, 1 Treadw. 150; Teasdale *v.* Kennedy, 1 Bay 322.

*Tennessee.*— McKinney *v.* Craig, 4 Sneed 577.

*Vermont.*— Middlebury Bank *v.* Rutland, 33 Vt. 414; Harrington *v.* Bogue, 15 Vt. 179; Hazard *v.* Slade, 1 D. Chipm. 199.

*England.*— Jeffery *v.* Bastard, 4 A. & E. 823, 2 Harr. & W. 60, 6 N. & M. 303, 31 E. C. L. 362; Scott *v.* Waithman, 3 Stark. 168, 3 E. C. L. 639.

*Canada.*—Jackson *v.* Campbell, 1 Nova Scotia 18.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 219.

**Necessity for exception.**— The sheriff is not answerable for taking insufficient sureties, unless defendant enter a formal exception to their insufficiency. Wilson *v.* Williams, 18 Wend. (N. Y.) 581. Nebr. Code Civ. Proc. § 189, requiring defendant in replevin to give notice that he excepts to the sufficiency of a replevin bond is not applicable to such a bond taken by a constable in an action pending before a justice of the peace. Thomas *v.* Edgerton, 40 Nebr. 25, 58 N. W. 551, 36 Nebr. 254, 54 N. W. 426 [*followed* in Busch *v.* Moline, etc., Co., 52 Nebr. 83, 71 N. W. 947].

**Where a surety does not reside within the state and has no property within it the officer is liable.** Wilkins *v.* Dingley, 29 Me. 73.

**Where one of the sureties is sufficient** the officer is not liable, although the other is insufficient. Lord *v.* Bicknell, 35 Me. 53.

**The failure of sureties to justify** is satisfactory evidence, in an action against the sheriff, that they were not qualified, notwithstanding their affidavit to the contrary attached to the undertaking. Hofheimer *v.* Campbell, 7 Lans. (N. Y.) 157.

**The fact that the principal is insolvent** is no excuse to a sheriff for taking insolvent sureties on a prison bounds bond. Jones *v.* Blair, 4 McCord (S. C.) 281.

**Acceptance of improper person.**—Where execution against two is levied on the goods of one, and he gives a forthcoming bond, with the other as surety, the surety is not such as the law requires, and if execution on the forthcoming bond prove unavailing, the sheriff is liable to the creditor, although he prove that the surety on the bond had sufficient goods at the time the bond was taken. Garland *v.* Lynch, 1 Rob. (Va.) 545.

**Improper justification.**— Where the statute requires sureties in replevin bonds to swear that they are worth sums amounting in the whole to the penalty of the bond, "over and above all debts and exemptions," the omission of the words "and exemptions" in the oath of one surety renders the officer a trespasser *ab initio* and liable to an action. Whitney *v.* Jenkinson, 3 Wis. 407.

**52.** Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

**53.** Shull *v.* Barton, 67 Nebr. 311, 93 N. W. 132, 62 Nebr. 570, 87 N. W. 322, 58 Nebr. 741, 79 N. W. 732, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698.

**54.** Sparhawk *v.* Bartlet, 2 Mass. 188.

**55.** Adams *v.* Weisberger, 62 Nebr. 325, 87 N. W. 16; Gibbs *v.* Bull, 18 Johns. (N. Y.) 435; Pearce *v.* Humphreys, 14 Serg. & R. (Pa.) 23; Oxley *v.* Cowperthwaite, 1 Dall. (Pa.) 349, 1 L. ed. 170.

**56.** *Alabama.*— Gary *v.* McCown, 6 Ala. 370.

*Illinois.*— People *v.* Robinson, 89 Ill. 159; People *v.* Core, 85 Ill. 248; Larney *v.* People, 82 Ill. App. 564; Robinson *v.* People, 8 Ill. App. 279.

*Kentucky.*— Edwards-Barnard Co. *v.* Pflanz, 115 Ky. 393, 73 S. W. 1018, 24 Ky. L. Rep. 2296.

*Maine.*— Strout *v.* Pennell, 74 Me. 260.

*South Carolina.*—Bennett *v.* Brown, 5 Rich. 347.

**c. Insolvency or Insufficiency Occurring After Acceptance of Bond.** According to some authorities the sheriff is answerable for the solvency and sufficiency of sureties accepted by him, not only at the time when the bond is accepted but also at the time when the sureties are called upon to respond to their obligations;[57] but even where this rule is recognized it is conceded to establish a hardship only tolerated because of established precedent and not to be extended to a case not clearly within the precedent,[58] and the preponderance of authority supports the more reasonable view that if the sureties were sufficient when they were accepted the sheriff cannot be held liable because they have subsequently become insolvent or insufficient.[59]

**d. Extent of Liability.** The liability of a sheriff for accepting insufficient sureties cannot exceed that of the sureties themselves,[60] and hence the penalty of the bond is the limit of damages.[61]

**6. Acceptance of Bond With Insufficient Number of Sureties.** Where the law requires a certain number of sureties the sheriff is liable if he accepts a bond with less and the bond proves insufficient,[62] although the sureties on the bond were apparently sufficient in respect to credit and means when the bond was accepted.[63]

**7. Acceptance of Bond Without Sureties.** Where the statute requires an officer before executing certain process to take a bond with sureties for the protection of defendant he is liable as a trespasser if he accepts a bond without sureties and proceeds with the process;[64] and where a sheriff, on a sale of property on credit, accepts a bond without a surety, he is liable for the amount of the bond.[65]

**8. Acceptance of Bond With Forged Signatures.** An officer who is lawfully directed to arrest a defendant is answerable to plaintiff, if he takes a bail-bond to which the sureties' names are forged, and thereupon discharges defendant from custody.[66]

**9. Failure to Take Bond.** Where it is the duty of an officer to take a bond for the protection of a party before taking certain steps and he takes such steps

*Tennessee.*— McKinney *v.* Craig, 4 Sneed 577.

*England.*— Hindle *v.* Blades, 1 Marsh. 27, 5 Taunt. 225, 1 E. C. L. 122; Scott *v.* Waithman, 3 Stark. 168, 3 E. C. L. 639.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 219.

57. Myers *v.* Clark, 3 Watts & S. (Pa.) 535; Pearce *v.* Humphreys, 14 Serg. & R. (Pa.) 23; Oxley *v.* Cowperthwaite, 1 Dall. (Pa.) 349, 1 L. ed. 170; Clawsen *v.* Seanor, 23 Pa. Co. Ct. 257. See also Com. *v.* Watmough, 1 Pa. L. J. Rep. 412, 3 Pa. L. J. 63.

58. Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597, conceding that the rule is applicable to a replevin bond but holding that a sheriff is not liable, although the sureties accepted by him on a claim of property bond in replevin are insolvent when judgment in the replevin suit was rendered, where, at the time he accepted them, they were solvent, and there was no apparent danger of future insolvency.

59. *Kentucky.*— Com. *v.* Thompson, 3 Dana 301.

*Massachusetts.*— Rice *v.* Hosmer, 12 Mass. 127.

*Nebraska.*— Shull *v.* Barton, 67 Nebr. 311, 93 N. W. 132, 62 Nebr. 570, 87 N. W. 322, 58 Nebr. 741, 79 N. W. 732, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698; Busch *v.* Moline, etc., Co., 52 Nebr. 83, 71 N. W. 947.

*South Carolina.*— Teasdale *v.* Kennedy, 1 Bay 322. *Contra,* Clark *v.* Moore, 1 Treadw. 150.

*Vermont.*—Middlebury Bank *v.* Rutland, 33 Vt. 414; Harrington *v.* Bogue, 15 Vt. 179.

*Canada.*—Jackson *v.* Campbell, 1 Nova Scotia 18.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 219.

A sheriff who accepts a single surety where the law requires two does so at his peril and cannot escape liability by showing that the surety was sufficient when accepted. Rice *v.* Hosmer, 12 Mass. 127.

60. Edwards Barnard Co. *v.* Pflanz, 115 Ky. 393, 73 S. W. 1018, 24 Ky. L. Rep. 2296.

61. Jeffery *v.* Bastard, 4 A. & E. 823, 2 Harr. & W. 60, 6 N. & M. 303, 31 E. C. L. 362.

62. Glezen *v.* Rood, 2 Metc. (Mass.) 490; Long *v.* Billings, 9 Mass. 479 [*followed* in Rice *v.* Hosmer, 12 Mass. 129].

63. Long *v.* Billings, 9 Mass. 479 [*followed* in Rice *v.* Hosmer, 12 Mass. 129].

64. Wilson *v.* Williams, 52 Ark. 360, 12 S. W. 780, execution of order of delivery in replevin.

65. Overton *v.* Ricord, 2 La. Ann. 805; Semple *v.* Buhler, 6 Mart. N. S. (La.) 469.

Taking the purchaser's wife as surety is equivalent to taking no surety. Semple *v.* Buhler, 6 Mart. N. S. (La.) 469.

66. Marsh *v.* Bancroft, 1 Metc. (Mass.) 497.

without exacting such bond, he thereby becomes liable for the resulting damage.[67] But a sheriff cannot be held liable in damages for failure to take a bond from a defendant arrested on civil process, unless plaintiff shows he recovered judgment in the action in which the arrest was ordered.[68] Where, under the statute, the officer making a levy under an execution may take a delivery bond, his failure to take such bond places the risk as to the property on himself, and where such property is not forthcoming on the day of sale, he is personally liable to the execution creditor.[69]

**10. Refusal to Deliver Bond.** Where a sheriff returns on an original writ that he has taken bail, but refuses to deliver the bond, he is liable for such default [70] and cannot show in mitigation of damages that the original debtor is poor or insolvent and unable to pay the debt.[71] But he may show the insolvency of the bail in mitigation of damages.[72]

**11. Failure to Return Bond.** A sheriff who fails to return a replevin bond as required by law is liable for the damage which results from his neglect.[73]

**12. Liability of Officer as Bail.**[74] An officer who arrests a defendant under civil process, and permits him to go at large without bail, or upon insufficient bail, or without taking the proper steps with respect to the bail-bond, may be held liable as special bail;[75] but where a sheriff returns on a writ of capias ad respondendum that defendant broke custody before he reached the jail, he cannot be pro-

**67.** Smith *v.* Hightower, 80 Ga. 669, 7 S. E. 165 (holding that an officer accepting a claim interposed to property under levy, and releasing the property, is not relieved from liability to plaintiff by taking a forthcoming bond only, but must also take a damage bond); Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841 (holding that if a sheriff erroneously decides that his levy is subordinate to a constable's, and relinquishes possession without taking a bond of indemnity, or referring the question to the court, he must bear the loss); Crane *v.* Warner, 14 Vt. 40 (holding an officer liable for failure to take bail).

**68.** Lyles *v.* Bolles, 8 S. C. 258; Nelson *v.* Williams, 4 Hayw. (Tenn.) 161.

**69.** Campbell *v.* Pope, 4 Fed. Cas. No. 2,365*a*, Hempst. 271.

**70.** Simmons *v.* Bradford, 15 Mass. 82 [*followed* in Seeley *v.* Brown, 14 Pick. (Mass.) 177]; Bradt *v.* Holden, 12 R. I. 335.

**71.** Simmons *v.* Bradford, 15 Mass. 82 [*followed* in Seeley *v.* Brown, 14 Pick. (Mass.) 177]; Bradt *v.* Holden, 12 R. I. 335.

**72.** Bradt *v.* Holden, 12 R. I. 335.

**73.** Robinson *v.* People, 8 Ill. App. 279, holding that in such case the sheriff was not as of course liable for the value of the property replevied and the cost of the replevin suit, but only for such damages as plaintiff showed that he had suffered.

**74.** Bail generally see Bail, 5 Cyc. 1.

**75.** *Alabama.*— Neal *v.* Gaines, 1 Stew. 158.

*Georgia.*— Townsend *v.* Stoddard, 26 Ga. 430; De Longchamp *v.* Hicks, 25 Ga. 200.

*Kentucky.*— McClelland *v.* Strong, Hard. 522. See also Dougherty *v.* Morrison, Ky. Dec. 267.

*Mississippi.*— Rowand *v.* Gridley, 1 How. 210.

*New York.*— McKenzie *v.* Smith, 48 N. Y. 143 [*affirming* 27 How. Pr. 20]; Bensel *v.* Lynch, 44 N. Y. 162 [*affirming* 2 Rob. 448]; Smith *v.* Knapp, 30 N. Y. 581; Douglass *v.* Haberstro, 21 Hun 320; Douglass *v.* Warren, 19 Hun 1; Metcalf *v.* Stryker, 31 Barb. 62 [*affirmed* in 31 N. Y. 255]; Gallarati *v.* Orser, 4 Bosw. 94 [*reversed* on other grounds in 27 N. Y. 324]; Seaver *v.* Genner, 10 Abb. Pr. 256; Douglass *v.* Warren, 58 How. Pr. 264; McKenzie *v.* Smith, 27 How. Pr. 20; Sartos *v.* Merceques, 9 How. Pr. 188; Buckman *v.* Carnley, 9 How. Pr. 180.

*North Carolina.*— Adams *v.* Jones, 60 N. C. 198; Washington *v.* Vinson, 49 N. C. 380; Savage *v.* Hussey, 48 N. C. 149; Malpass *v.* Fennell, 48 N. C. 79; Jackson *v.* Hampton, 32 N. C. 679; Ferrall *v.* Brickell, 27 N. C. 67; Gray *v.* Hoover, 15 N. C. 475; Hart *v.* Lanier, 10 N. C. 244.

*Tennessee.*— McKee *v.* Love, 2 Overt. 243.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 220.

**Deposit in lieu of bail.**—Where, on an order of arrest, defendant's bail deposits a sum of money with the sheriff, to secure the latter until such bail shall justify, it is only a deposit in lieu of bail, and the sheriff is liable as bail until the bail justifies. Commercial Warehouse Co. *v.* Graber, 2 Sweeny (N. Y.) 638 [*affirmed* in 45 N. Y. 393].

**Bond sufficient to protect sheriff.**—A bond, taken by the sheriff on the execution of a writ, payable to him as sheriff, in double the sum claimed in the writ, and conditioned for the appearance of defendant at court at the return term of the writ, to answer to the plaintiff "in a case to his damages four thousand five hundred dollars, and there to stand to and abide the judgment of the said Court," is a bail-bond, under the statute, and will protect the sheriff from being subjected as special bail. Watt *v.* Johnston, 48 N. C. 124.

**Sheriff cannot be held as special bail in action of trover.**— Outlaw *v.* Gilmer, 27 Ga.

ceeded against as bail.[76] Where the circumstances are such that the sheriff had no power to take bail, he cannot, on a failure to produce the prisoner, be held as bail; [77] but his liability is for the escape.[78] Neither can a sheriff be charged with liability as bail, where plaintiff furnished the debtor with articles by means whereof he made his escape.[79] In order to hold a sheriff as bail plaintiff must except to the bond in due time,[80] and give the officer notice,[81] and there must be a judgment declaring the insufficiency of the bail, and adjudging that the sheriff stand as special bail.[82] The liability of the officer is the same as that of ordianry bail,[83] and he is entitled to every plea and method of escaping liability which would exonerate bail, and every other plea adapted to his peculiar situation by way of defense.[84] It has been held that where a sheriff, liable as bail, has forty days to arrest the prisoner, under an execution against his person, and plaintiff's attorney

365 [*followed* in Gladden *v.* Dozier, 71 Ga. 380].

**Notice of place of justification.**— Under N. C. Code, § 305, providing that when plaintiff objects to bail for defendant taken by the sheriff, the latter shall notify him when and where the bail will justify, such notice must be in writing, otherwise the sheriff is liable as special bail, although plaintiff was near by, and knew of the justification, and the sheriff acted in good faith. Howell *v.* Jones, 113 N. C. 429, 18 S. E. 672.

**Indorsement on writ.**—A sheriff who arrests a debtor upon mesne process may himself become bail for such debtor, by indorsing his own name upon the back of the writ, in the manner required by statute. Meriam *v.* Armstrong, 22 Vt. 26.

76. Hart *v.* Lanier, 10 N. C. 244.

77. Montgomery *v.* McAlpin, 23 N. C. 463.

**After a sheriff has committed a defendant** on mesne process, he is not liable as special bail, although he afterward permits him to go at large. Buffalow *v.* Hussey, 44 N. C. 237.

78. Montgomery *v.* McAlpin, 23 N. C. 463.

**Liability for escape generally** see *infra*, V, K, 7.

79. Love *v.* McAlister, 4 Hayw. (Tenn.) 65.

80. Neal *v.* Gaines, 1 Stew. (Ala.) 158; Watt *v.* Johnston, 48 N. C. 124.

**Where a sheriff fails to take bail** on making an arrest, plaintiff need not file exceptions or give notice in order to fix him as bail, and where the paper returned by a sheriff as a bail-bond is so defective and imperfect as to be adjudged not to be such, this may be said to be a failure to take bail, rendering the sheriff liable as bail, without the necessity of filing exceptions or giving notice. Adams *v.* Jones, 60 N. C. 198.

81. Neal *v.* Gaines, 1 Stew. (Ala.) 158; Rowand *v.* Gridley, 1 How. (Miss.) 210; Worth *v.* Winbourne, 52 N. C. 431; Watt *v.* Johnston, 48 N. C. 124. *Contra*, Gray *v.* Hoover, 15 N. C. 475.

82. Worth *v.* Winbourne, 52 N. C. 431. See also Dougherty *v.* Morrison, 1 Ky. Dec. 267.

**After the trial and judgment in the principal suit** it is too late to give notice and have such adjudication. Worth *v.* Winbourne, 52 N. C. 431.

83. Gallarati *v.* Orser, 4 Bosw. (N. Y.) 94 [*reversed* on other grounds in 27 N. Y. 324]; Seaver *v.* Genner, 10 Abb. Pr. (N. Y.) 256; McKenzie *v.* Smith, 27 How. Pr. (N. Y.) 20.

84. Brady *v.* Brundage, 59 N. Y. 310; Metcalf *v.* Stryker, 31 N. Y. 255 [*affirming* 31 Barb. 62, and *followed* in Bensel *v.* Lynch, 44 N. Y. 162 (*affirming* 2 Rob. 448)]; Douglas *v.* Haberstro, 2 N. Y. Civ. Proc. 186; McGregory *v.* Willett, 17 How. Pr. (N. Y.) 439; McKee *v.* Love, 2 Overt. (Tenn.) 243. *Contra*, Sims *v.* Tarrant, 2 Nott & M. (S. C.) 123.

**Sheriff may escape liability by surrendering debtor into custody.**— Brady *v.* Brundage, 59 N. Y. 310 [*affirming* 2 Thomps. & C. 621]; Douglas *v.* Haberstro, 21 Hun (N. Y.) 320, 59 How. Pr. 194; Seaver *v.* Genner, 10 Abb. Pr. (N. Y.) 256; McGregory *v.* Willett, 17 How. Pr. (N. Y.) 439; Buckman *v.* Carnley, 9 How. Pr. (N. Y.) 180 [*followed* in Sartos *v.* Merceques, 9 How. Pr. (N. Y.) 188]; Brayton *v.* Smith, 6 Paige (N. Y.) 489; Huggins *v.* Fonville, 14 N. C. 392. The sheriff can only exonerate himself by rearresting defendant and holding him in actual custody. Douglass *v.* Warren, 19 Hun (N. Y.) 1.

**The sheriff may escape liability by the giving and justification of bail** at any time before process is issued against the debtor, but not afterward. Buckman *v.* Carnlay, 9 How. Pr. (N. Y.) 180.

**Circumstances not relieving sheriff.**—Where a sheriff was bail for two defendants, and after judgment a capias ad satisfaciendum was issued and executed on one, who gave security for his appearance at court, but the other defendant could not be found, and before the day when defendant who was arrested was bound to appear, he and plaintiff entered into an agreement that he would secure plaintiff in some other debts he owed him, and, in consideration thereof, plaintiff would release him from the capias ad satisfaciendum, and would not at court oppose his discharge under the insolvent debtor's law, this did not discharge the sheriff from his liability as bail for the other defendant. Ferrall *v.* Brickell, 27 N. C. 67.

**Excessive judgment.**—A sheriff who has become special bail by reason of failing to take a bail-bond from defendant in the original action, cannot, upon a scire facias to subject him as bail, avail himself in defense

directs the sheriff to forthwith return the execution, "Defendant not found," which he does, such direction is a waiver of the sheriff's liability as bail.[85]

**13. To Whom Officer Liable.** The liability of a sheriff for failure to take a proper bond exists only in favor of a party to whom he owed a duty in the premises, to whose benefit the bond would accrue, and who has been damaged by his default.[86]

**14. Necessity For First Proceeding Against Bail.** It is not a prerequisite to an action against an officer who has taken insufficient bail that proceedings should first be brought against the bail.[87]

**15. Necessity For Body Execution Against Defendant.** Where a sheriff after arresting a defendant on mesne process releases him without sufficient bail, and plaintiff recovers judgment, plaintiff may maintain an action against the sheriff after execution against the property of defendant has been issued and returned unsatisfied, and it is not essential to the maintenance of such an action that an execution against the body of defendant should be issued and returned unsatisfied.[88]

**16. Necessity For Demand on Officer.** Where a sheriff who has seized goods in replevin delivers the same to plaintiff in replevin, without requiring a sufficient bond as provided by statute, the act of delivery is an exercise of authority and dominion, which deprives the replevin defendant of his property, and furnishes evidence of a conversion sufficient to support an action against the sheriff without proof of a previous demand.[89]

**17. Sufficiency of Adjudication as to Validity of Bond.** Where, in a suit on a prison bounds bond, a court of competent jurisdiction has adjudged the bond to be invalid, plaintiff may sue the sheriff without appealing from such judgment.[90]

**18. Particular Matters Affecting Liability**[91] **— a. Obligation to Take Security.** Where a sheriff is under no legal obligation to take a bond for the benefit of a party, he cannot be held liable for failure to take bond,[92] or, if he does take a bond, for the insufficiency of the sureties.[93] Neither can an officer be held liable for taking insufficient security unless the obligation of seeing that the security was sufficient rested upon him, and he acted on insufficient security when he might legally have refrained on account of such insufficiency.[94]

**b. Accrual of Liability on Bond.** A sheriff cannot be held liable for the acceptance of insufficient sureties until such a judgment has been rendered as to charge

of the fact that the judgment in the original suit exceeded the sum demanded in the writ. Savage *v.* Hussey, 48 N. C. 149.

85. Douglas *v.* Haberstro, 2 N. Y. Civ. Proc. 186.

Effect of directions of party or attorney generally see *supra*, V, A, 9.

86. Ford *v.* Perkerson, 59 Ga. 359 (holding that the liability of an attaching officer for failing to take a proper replevin bond on surrendering the property to defendant is to the attachment plaintiff only, and other creditors of defendant, although under an older judgment, cannot avail themselves of such liability); Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612.

87. Rayner *v.* Bell, 15 Mass. 377 [*following* Young *v.* Hosmer, 11 Mass. 89]. See also Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869, holding that an action might be maintained against a sheriff for taking insufficient sureties on replevin bonds where it appeared that plaintiff had brought one suit on both bonds which had failed because the makers could not be found.

88. Gallarati *v.* Orser, 4 Bosw. (N. Y.) 94 [*reversed* on other grounds in 27 N. Y. 324], holding also, the principal action having been a replevin suit, that under the circumstances it was not necessary that a writ de retorno habendo should have been issued and returned unsatisfied.

89. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

90. Hooe *v.* Tebbs, 1 Munf. (Va.) 501.

91. Effect of directions of party or attorney see *supra*, V, A, 9.

92. Williams *v.* Campbell, 1 Wash. (Va.) 153.

93. Clawsen *v.* Seanor, 23 Pa. Co. Ct. 257; Williams *v.* Campbell, 1 Wash. (Va.) 153.

Where an arrest is unauthorized, the officer is not liable to the creditor for neglecting to take sufficient bail. Mason *v.* Hutchings, 20 Me. 77.

94. Chase *v.* Stevens, 11 Me. 128, holding that where plaintiff in attachment agreed with the coroner executing the writ to take charge of the defense of the replevin suit should one be commenced, and the property was replevied, and plaintiff in attachment successfully defended it, and had judgment for a return, and the principal and surety in the replevin were proved to be insolvent, the coroner was not liable in damages for receiving an insufficient bond, as the responsibility as to its sufficiency did not rest on him but on the officer serving the replevin.

the bond,[95] or there has been such a breach of the condition that the liability of the sureties has accrued,[96] and an execution has been issued against the sureties and returned unsatisfied.[97]

**e. Regularity of Judgment [98] or Process.**[99] A sheriff who has become liable as bail cannot escape liability because of the fact that the judgment in the original action is irregular and erroneous, where it is not void;[1] nor can he object that the order of arrest was improperly or irregularly granted,[2] or take advantage of irregularities in the execution under which the debtor was arrested.[3]

**d. Sufficiency of Judgment to Charge Sureties.** Where a sheriff releases a defendant arrested on mesne process, on bond being given, he cannot be held liable for the failure of the sureties to justify on being excepted to, where the final judgment rendered in the case is not such as to charge the sureties.[4]

**e. Irregularities in Bond.** It is no defense to an action against a sheriff for accepting insufficient sureties on a replevin bond that such bond did not run to the proper obligee.[5]

**f. Sufficiency of Recourse on Bond.** Where a bond taken by an officer is merely irregular and not void, and when the liability on the bond accrues, a recourse thereto would afford the party for whose benefit the bond was taken all the relief to which he is entitled, he cannot hold the officer liable.[6]

**g. Attempt to Enforce Bond.** Where a sheriff takes an insufficient bond, the party for whose benefit the bond was taken does not lose his remedy against

**95.** Edwards-Barnard Co. *v.* Pflanz, 115 Ky. 393, 73 S. W. 1018, 24 Ky. L. Rep. 2296, holding that in order to charge a sheriff with liability for having taken insolvent sureties on a forthcoming bond, it was necessary that a judgment be rendered sustaining the attachment itself, and a mere personal judgment against defendant is insufficient.

**Nature of judgment.**— In order to charge a sheriff for giving up the custody of a vessel, taken under attachment without requiring the bond prescribed by the statute, it is not necessary to show a judgment against the vessel *in rem*, but a judgment *in personam* against the owner, in favor of an attaching creditor, will charge the sheriff. West *v.* Tuttle, 11 Wend. (N. Y.) 639.

**96.** Shull *v.* Barton, 67 Nebr. 311, 93 N. W. 132, 62 Nebr. 570, 87 N. W. 322, 58 Nebr. 741, 79 N. W. 732, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698, holding that where property levied on under writs of attachment was taken from an officer by replevin proceedings, and after judgment in the attachment case the same property was levied on and seized by the officer from whom it was replevied by virtue of an execution issued on the judgment, and he regained possession of the same property under the execution, undiminished in value, these facts constituted a defense in an action against the officer for taking insufficient sureties on the replevin bond, and the fact that the property was subsequently replevied by plaintiffs in the first replevin action or their assignees did not render the defense unavailing.

**A sheriff, sued for taking an insufficient pledge** for the appearance of a debtor, who had been arrested, will be protected by showing that the pledge was not forfeited. Dussin *v.* Allain, 9 Rob. (La.) 394.

**97.** Wells *v.* Bourne, 113 N. C. 82, 18 S. E. 106.

**98.** See, generally, JUDGMENTS, 23 Cyc. 623.

**99.** See, generally, PROCESS, 32 Cyc. 412.

**1.** Bensel *v.* Lynch, 44 N. Y. 162 [*affirming* 2 Rob. 448]; Savage *v.* Hussey, 48 N. C. 149.

**2.** Bensel *v.* Lynch, 44 N. Y. 162 [*affirming* 2 Rob. 448].

**3.** Douglas *v.* Haberstro, 25 Hun (N. Y.) 262 [*reversed* on other grounds in 88 N. Y. 611]. But *compare* Sherwood *v.* Pearl, 1 Tyler (Vt.) 319.

**4.** Gallarati *v.* Orser, 27 N. Y. 324 [*reversing* 4 Bosw. 94], so holding in a case where, on the arrest of a defendant in replevin, an undertaking was given for the delivery of the property if adjudged and for the payment of such sum as for any cause might be recovered against such defendant, but the judgment in the replevin action was for damages only and not for the delivery of the property.

**5.** Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869, where the court said that if this were the case it would be only an additional reason for holding the sheriff liable.

**6.** Glezen *v.* Rood, 2 Metc. (Mass.) 490 (holding that an officer is not liable for returning a bail-bond signed by defendant and only one surety, whereas the statute requires two, even though the surety is not an inhabitant of the state, and has no real property there, provided he has personal property in the county sufficient to meet plaintiff's demand); State *v.* Leutzinger, 41 Mo. 498 (holding that a bond taken by an officer to secure, jointly, claimants filing several claims for distinct portions of property levied on, under the provisions of Sess. Acts (1855), p. 464, and Sess. Acts (1858–1859), p. 439, concerning the duties of sheriff and marshal in St. Louis county, is not void so as to render the officer liable for breach of duty in not taking good and sufficient indemnifica-

the sheriff by attempting to enforce the bond;[7] but where a replevin bond is in an insufficient amount, but the replevin defendant nevertheless resorts to his remedy under the bond, he waives his right to hold the sheriff as a trespasser.[8]

**h. Release[9] of Surety.** The release of a surety in a replevin bond by defendant in replevin releases the sheriff from liability for taking insufficient security.[10]

**i. Agreement Releasing Sheriff From Liability.** An agreement by defendant in replevin to discharge a sheriff from liability for non-justification of the sureties on the replevin bond, on his delivery to defendant of the property replevied, has been held void.[11]

**j. Waiver of Right to Object.** It has been held that the filing of a declaration in chief after receiving notice of special bail is a waiver of any objection to the sufficiency of the bail, and plaintiff cannot subsequently proceed against the sheriff on the ground of insufficiency of the bail.[12]

**k. Lack of Injury to Complainant.** An officer may escape liability for taking insufficient security, or at least reduce his liability to nominal damages, by showing that the complainant was not injured by his default.[13]

**l. Insolvency[14] of Debtor.** A sheriff who is proceeded against as bail cannot show the insolvency of the debtor in mitigation of damages.[15]

**19. Extent of Liability.** The general rule that the measure of damages for an official default is the actual loss suffered in consequence thereof[16] applies in cases where it is sought to enforce a sheriff's liability for failure to take security or

tion bonds); Com. *v.* Rees, 3 Whart. (Pa.) 124 (holding that where the sheriff assigned a replevin bond to defendant, suit could not be brought against the sheriff by the assignee, until judicial proof of the insolvency of the obligors of the bond was produced); Dickison *v.* Coward, 3 Rich. (S. C.) 49 (holding that a sheriff is not liable for taking as bail one not a resident of his district, and having no property therein, if the bail is in other respects sufficient). See also Com. *v.* Watmough, I Pa. L. J. Rep. 412, 3 Pa. L. J. 63.

7. Semple *v.* Buhler, 6 Mart. N. S. (La.) 469; Sparhawk *v.* Bartlet, 2 Mass. 188; Bennett *v.* Brown, I Strobh. (S. C.) 303.

**Where bond not genuine.**—In Washington it is held that the persons for whose benefit a redelivery bond was taken have but one remedy and must elect whether they will proceed against the sheriff or upon the bond, but in making such election they have a right to assume that the bond is genuine; and where in an action upon such bond it develops that it is not genuine, and that one of the parties appearing thereon as a surety did not in fact execute it, the persons for whose benefit the bond was taken cannot be held to have waived their right to look to the sheriff by bringing an action upon the bond. Magnus *v.* Woolery, 14 Wash. 43, 44 Pac. 130.

8. Hall *v.* Monroe, 73 Me. 123.

9. Release generally see Release, 34 Cyc. 1039.

10. Myers *v.* Clark, 3 Watts & S. (Pa.) 535; Follett *v.* Shumway, 68 Vt. 68, 33 Atl. 1067.

11. Hofheimer *v.* Campbell, 7 Lans. (N. Y.) 157, 161, where it is said: "The agreement set up in the answer constituted no defence. If it was exacted or taken by the sheriff, upon a delivery of the property before judgment, it operated directly as an indemnity against a violation of the sheriff's duty. . . . If it was exacted or taken upon a delivery of the property after the judgment in favor of Beamish [defendant in replevin] it was illegal, because it was the duty of the sheriff to return the property unconditionally."

12. People *v.* Stevens, 9 Johns. (N. Y.) 72.

13. Case *v.* Babbitt, 16 Gray (Mass.) 278 (holding that in an action brought by a defendant in replevin against the officer who served the writ for taking an informal bond, by reason of which the replevin was dismissed on defendant's motion, the officer might show in mitigation of damages that the property replevied was at the time of the service of the replevin, and had since remained, the property of plaintiff in replevin and was in the possession of the latter); Nye *v.* Smith, 11 Mass. 188; Shull *v.* Burton, 58 Nebr. 741, 79 N. W. 732, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698 (holding that in an action against an officer for approving an insufficient replevin bond, the fact that the property released was afterward retaken on execution in the replevin suit was a complete defense if at the time of the latter seizure the chattels were in the same condition and of the same value as when originally seized, but otherwise it was only a defense *pro tanto*).

14. See, generally, Insolvency, 22 Cyc. 1249.

15. Metcalf *v.* Stryker, 31 N. Y. 255 [*affirming* 31 Barb. 62, and *followed* in Bensel *v.* Lynch, 44 N. Y. 162 (*affirming* 2 Rob. 448)]; Winborne *v.* Mitchell, 111 N. C. 13, 15 S. E. 882. But *compare* Young *v.* Hosmer, 11 Mass. 89, holding that in an action against a sheriff for taking insufficient bail on arrest under mesne process, he might prove, in mitigation of damages, that the original debtor had no property.

16. See *infra*, VII, P, 1.

for taking insufficient security,[17] although in the case of insufficient bail the *prima facie* liability of the officer is the amount of the judgment against the debtor.[18] In an action against a sheriff for taking insufficient sureties, plaintiff may recover for sums reasonably expended in endeavoring to avail himself of the bond taken.[19]

**J. Liabilities Arising Out of Duty to Return Process — 1. Failure to Make Return — a. In General.** Where a process or writ is placed in the hands of a sheriff or constable for service or execution, he is liable if he fails to return the same[20] within the time which is allowed by law for the making of his return

17. *Illinois.*— Robinson *v.* People, 8 Ill. App. 279.

*Maine.*— Dyer *v.* Woodbury, 24 Me. 546.

*Massachusetts.*— Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486 (holding that in a suit against a constable for damages for accepting insufficient sureties on a replevin bond, the measure of damages is not the value of the property replevied, but the amount plaintiff has lost by reason of the misdoing of defendant in accepting insufficient sureties); Danforth *v.* Pratt, 9 Cush. 318; West *v.* Rice, 9 Metc. 564; Shackford *v.* Goodwin, 13 Mass. 187.

*Missouri.*— Mortland *v.* Smith, 32 Mo. 225, 82 Am. Dec. 128.

*New Hampshire.*— Gerrish *v.* Edson, 1 N. H. 82, holding that the measure of damages in an action against a sheriff who knowingly took insufficient bail was the amount of plaintiff's judgment against the bail, after deducting the probable value of that and the judgment against the principal.

*New York.*— Gibbs *v.* Bull, 18 Johns. 435.

*Pennsylvania.*— Murdoch *v.* Will, 1 Dall. 341, 1 L. ed. 166, holding that where the sheriff took inadequate security on a replevin bond, the measure of damages in an action against him for such neglect was the value of the distress at the time of the replevin.

*Texas.*— Barclay *v.* Scott, 1 Tex. App. Civ. Cas. § 110.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 305.

But *compare* Jones *v.* Blair, 4 McCord (S. C.) 281; Magnus *v.* Woolery, 14 Wash. 43, 44 Pac. 130, holding that under Code Proc. § 260, providing that the sheriff shall be responsible for defendants' sureties on a redelivery bond in replevin, the measure of the liability of a sheriff, who took a bond insufficiently executed by one of the sureties, is the amount plaintiffs were entitled to recover upon the redelivery bond.

18. West *v.* Rice, 9 Metc. (Mass.) 564.

Where there is no proof of the insolvency of a debtor who has absconded, the liability of the officer who failed to take bail is for the full amount of the debt. Crane *v.* Warner, 14 Vt. 40.

19. Choate *v.* Stark, 18 N. H. 131, holding, however, that plaintiff could not recover for poundage or journeys taken to give notice to the sureties without the state, charged to him by the officer to whom he committed his execution, for the security of which the insufficient bond was taken.

20. *Alabama.*— Governor *v.* Baker, 14 Ala. 652; Reid *v.* Dunklin, 5 Ala. 205; McRae *v.* Colclough, 2 Ala. 74; McWhorter *v.* Marrs, Minor 376; Anderson *v.* Cunningham, Minor 48.

*Arkansas.*— Bickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292; Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Atkinson *v.* Heer, 44 Ark. 174; Herr *v.* Atkinson, 40 Ark. 377.

*California.*— Alexander *v.* Wilson, 144 Cal. 5, 77 Pac. 706; Boyd *v.* Desmond, 79 Cal. 250, 21 Pac. 755; Hoag *v.* Warden, 37 Cal. 522.

*Connecticut.*— Clark *v.* Smith, 9 Conn. 379, 10 Conn. 1, 25 Am. Dec. 47; White *v.* Wilcox, 1 Conn. 347.

*Delaware.*— Wright *v.* Cannon, 3 Harr. 487.

*Illinois.*— Calhoun County Ct. *v.* Buck, 27 Ill. 440.

*Indiana.*—Phillips *v.* Vickers, 5 Blackf. 281.

*Iowa.*— Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500.

*Kentucky.*— Judy *v.* Howard, 2 Metc. 44; Cynthiana Deposit Bank *v.* Glenn, 1 Metc. 585; Williams *v.* Hall, 2 Dana 97; Keith *v.* Com., 5 J. J. Marsh. 359; Com. *v.* Bradley, 4 J. J. Marsh. 209; Kennedy *v.* Coleman, 2 Litt. 6; Johnston *v.* Governor, 2 Bibb 186, 4 Am. Dec. 694.

*Louisiana.*— Hill *v.* Labarre, 12 La. Ann. 419; La Selle *v.* Whitfield, 12 La. Ann. 81; Magee *v.* Robins, 2 La. Ann. 411; Gasquet *v.* Robins, 2 La. Ann. 407.

*Maine.*— Ware *v.* Fowler, 24 Me. 183; Varrill *v.* Heald, 2 Me. 91.

*Massachusetts.*— Gallup *v.* Robinson, 11 Gray 20; Lawrence *v.* Rice, 12 Metc. 535; Goodnow *v.* Willard, 5 Metc. 517; Laflin *v.* Willard, 16 Pick. 64, 26 Am. Dec. 629; Wade *v.* Merwin, 11 Pick. 280, holding that a neglect by an officer to return an execution, under which he has sold an equity of redemption, constitutes a breach of his covenant in the deed of sale that he has obeyed all the requisitions of the law in the proceeding.

*Mississippi.*— Skinner *v.* Wilson, 61 Miss. 90; Cox *v.* Ross, 56 Miss. 481; Helm *v.* Gridley, Walk. 511.

*Missouri.*— State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152; Bennett *v.* Vinyard, 34 Mo. 216.

*New Hampshire.*— Grafton Bank *v.* White, 17 N. H. 389; Webster *v.* Quimby, 8 N. H. 382 (holding that an officer is liable for failure to return a writ, whether or not he was bound, under the instructions given him by plaintiff, to serve it); Runlett *v.* Bell, 5 N. H. 433.

*New York.*— Wehle *v.* Connor, 63 N. Y. 258 [*affirming* 40 N. Y. Super. Ct. 24]; Swezey *v.* Lott, 21 N. Y. 481, 78 Am. Dec. 160; Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Dolson *v.* Saxton, 11 Hun 565; Bechstein *v.* Sammis, 10 Hun 585; Bowman

thereon,[21] and the fact that a return is made after the expiration of such time does not relieve him of liability for his default.[22] But in order to enforce such liability it must be shown that the writ was actually placed in his hands for execution,[23] and that he actually failed to return it on the return-day.[24] It is not, however, necessary that the officer should have been ruled to return the writ.[25]

**b. Necessity For Damage.** There is authority for the view that a sheriff cannot be held liable in damages for failure to return process at the proper time unless it appears that the complaining party was injured by such default,[26] but it

*v.* Cornell, 39 Barb. 69; Humphrey *v.* Harthorn, 24 Barb. 278; Carpenter *v.* Doody, 1 Hilt. 465; Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Suppl. 1100; Clark *v.* Carnley, 3 Code Rep. 136; Stevens *v.* Rowe, 3 Den. 327; Pardee *v.* Robertson, 6 Hill 550.

*North Carolina.*— Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705; Hamlin *v.* March, 31 N. C. 35.

*Oregon.*— Gerdes *v.* Sears, 13 Oreg. 358, 10 Pac. 631.

*Pennsylvania.*— Bachman *v.* Fenstermacher, 112 Pa. St. 331, 4 Atl. 546; Stone *v.* Mahon, 4 C. Pl. 165.

*South Carolina.*— Graham *v.* Durant, 2 Hill 517.

*Tennessee.*— Porter *v.* Burton, 10 Heisk. 415; Smith *v.* Van Bebber, 1 Swan 110; Planters' Bank *v.* Porter, 10 Humphr. 316; Webb *v.* Armstrong, 5 Humphr. 379.

*Texas.*—Griswold *v.* Chandler, 22 Tex. 637; Smith *v.* Tooke, 20 Tex. 750; Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295; Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

*Vermont.*—Newbury Bank *v.* Baldwin, 31 Vt. 311; Barnard *v.* Henry, 25 Vt. 289; Ives *v.* Strong, 19 Vt. 546; Kidder *v.* Barker, 18 Vt. 454; Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485; Hamilton *v.* Marsh, 2 Tyler 403; Woolcott *v.* Gray, Brayt. 91.

*England.*— See *In re* Heiron, 12 Ch. D. 795, 48 L. J. Ch. 688, 27 Wkly. Rep. 750.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 230.

**A capias ad satisfaciendum** is as much an execution as a fieri facias or any other writ of execution, and the sheriff is liable for failure to return such a writ. McWhorter *v.* Marrs, Minor (Ala.) 376; Phillips *v.* Vickers, 5 Blanchf. (Ind.) 281.

**Sheriff liable for failure to return venditioni exponas.**— Johnston *v.* Governor, 2 Bibb (Ky.) 186, 4 Am. Dec. 694.

**The ordinary fieri facias** under the civil code is a "writ of execution" for failure to return which the sheriff is liable. Cynthiana Deposit Bank *v.* Glenn, 1 Metc. (Ky.) 585.

**A constable is not required to indorse on the execution his return to the justice,** but a manual delivery of it, with the moneys collected, to the justice, relieves him from liability for failure to return the execution. Hunt *v.* Barry, 6 N. Y. Suppl. 568, 16 N. Y. Civ. Proc. 362.

**21.** *Alabama.*— Neale *v.* Caldwell, 3 Stew. 134.

*Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Atkinson *v.* Heer, 44 Ark. 174.

*Illinois.*— Calhoun County Ct. *v.* Buck, 27 Ill. 440.

*Indiana.*— Phillips *v.* Vickers, 5 Blackf. 281.

*Kentucky.*— Cynthiana Deposit Bank *v.* Glenn, 1 Metc. 585; Bruce *v.* Dyall, 5 T. B. Mon. 125; Com. *v.* Begley, 66 S. W. 754, 23 Ky. L. Rep. 1985.

*Louisiana.*— Laforet *v.* Webster, 23 La. Ann. 253; Taylor *v.* Hancock, 19 La. Ann. 466; Webb *v.* Kemp, 2 La. Ann. 370.

*Massachusetts.*— McGregor *v.* Brown, 5 Pick. 170, holding that where the return-day of an execution levied on land falls within the time allowed by law for recording the execution, if the officer does not either cause it to be duly recorded, or return it into the clerk's office on or before the return-day, or deliver it to the creditor in season to be put upon record, he will be liable to the creditor for the value of the land lost by his neglect.

*Missouri.*— Milburn *v.* State, 11 Mo. 188, 47 Am. Dec. 148.

*New York.*— Brookfield *v.* Remsen, 1 Abb. Dec. 210; McGuire *v.* Bausher, 52 N. Y. App. Div. 276, 65 N. Y. Suppl. 382.

*Pennsylvania.*— Amey *v.* Kennedy, 1 Ashm. 160; McClain *v.* Smith, 7 Leg. Int. 183. But *compare* Com. *v.* Magee, 8 Pa. St. 240, 248, 44 Am. Dec. 509, where it is said: "The non-return of the first execution until after November Term, is not such negligence as of itself makes the sheriff liable to an action. Though it would be better, regularly, to make return of all such writs, it seems to be settled he need not do so, unless specially ruled."

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 230.

**Evidence sufficient to show that return was made at proper time** see Ryan *v.* Young, 147 Ala. 660, 41 So. 954.

**An officer who neglects to return a fee bill** within ninety days from the date thereof becomes liable to pay the same. People *v.* Roper, 5 Ill. 560.

**No matter how shortly before the return-day the writ is received,** the officer is liable if he fails to return it. Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Chaffin *v.* Stuart, 1 Baxt. (Tenn.) 296; Smith *v.* Gilmore, 3 Sneed (Tenn.) 481.

**22.** Brookfield *v.* Remsen, 1 Abb. Dec. (N. Y.) 210, 4 Transcr. App. 278.

**23.** Destrehan *v.* Garcia, 2 Rob. (La.) 291, holding that a statement in the judgment that a writ was issued was not sufficient.

**24.** Destrehan *v.* Garcia, 2 Rob. (La.) 291.

**25.** Burk *v.* Campbell, 15 Johns. (N. Y.) 456.

**26.** Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500; State *v.* Case, 77 Mo. 247 [*following* Stevenson *v.* Judy, 49 Mo. 227]

has also been held that an execution creditor may recover nominal damages against a sheriff for neglect to return an unsatisfied execution, although he may have sustained no damages in consequence thereof; for, where there is a neglect of duty, the law presumes that damages have been sustained.[27]

**c. Right to Excuse Default.** As a general rule the liability of a sheriff or constable for failure to return a writ within the proper time is not absolute, but he may be relieved of liability upon a showing of circumstances which excuse his default.[28]

**d. Particular Matters Affecting Liability**[29] — (i) *VALIDITY OF PROCESS OR JUDGMENT.* Where an execution is issued from competent authority and duly authenticated an officer cannot escape liability for failure to return the same by setting up that the writ is irregular,[30] or founded upon an erroneous or voidable judgment.[31] But a sheriff has been held not liable for failure to return a writ which, although regular on its face, is issued upon a void judgment;[32] or is not founded upon any judgment.[33]

(ii) *OWNERSHIP OF PROPERTY.* A sheriff who is sued for failing to return an attachment may show in mitigation of damages that, by a mortgage and sale of the property levied on, previous to its seizure, defendant had parted with his interest.[34]

(iii) *UNCOLLECTABILITY OF DEBT.* A sheriff may avoid liability for failure to return an execution by showing that the money for which the writ issued could not have been collected by the use of proper official diligence,[35]

(holding that a sheriff is not liable, even for nominal damages, for failure to return an execution at the time fixed by law, where no damages are proved); Webster *v.* Quimby, 8 N. H. 382; Com. *v.* Lelar, 1 Phila. (Pa.) 173.

**27.** Laflin *v.* Willard, 16 Pick. (Mass.) 64, 26 Am. Dec. 629.

**28.** *Alabama.*— Starnes *v.* Pierce, 2 Port. 227.

*Arkansas.*— Bickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292.

*Kentucky.*— Bassett *v.* Bowmar, 3 B. Mon. 325 [*approving* Thompson *v.* Ross, 1 J. J. Marsh. 600] (holding that if the failure of a sheriff to return an execution arise *bona fide* from such casualties, inadvertencies, mistakes, or omissions as men of ordinary prudence are subject to, a good cause such as will relieve him of liability under the statute is made out); Waring *v.* Thomas, 1 Litt. 253; Wilson *v.* Huston, 4 Bibb 332.

*Louisiana.*— James *v.* Thompson, 12 La. Ann. 174 [*following* Miller *v.* Roy, 10 La. Ann. 744; Lay *v.* Boyce, 3 La. Ann. 622]; Webb *v.* Kemp, 2 La. Ann. 370.

*Pennsylvania.*— Keller *v.* Clark, 6 Watts & S. 534.

*Texas.*— Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 235.

**29.** **Directions of party or attorney** see *supra*, V, A, 9.

**Non-payment of fees** see *supra*, IV, E, 1.

**30.** *Alabama.*— Shute *v.* McRae, 9 Ala. 931; Samples *v.* Walker, 9 Ala. 726; McRae *v.* Colclough, 2 Ala. 74; Bondurant *v.* Woods, 1 Ala. 543; Anderson *v.* Cunningham, Minor 48.

*Arkansas.*— Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462; Hawkins *v.* Tyler, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

*Kentucky.*— Wilson *v.* Huston, 4 Bibb 332.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Webb *v.* Armstrong, 5 Humphr. 379.

*Texas.*— See Griswold *v.* Chandler, 22 Tex. 637.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 235.

**Variance between judgment and execution.** — Where an execution recites that the judgment on which it purports to have been issued is for an amount greater than the actual judgment in the case, the officer to whom it is issued is not liable to amercement for neglecting to return it until after its return-day. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341.

**31.** Godhold *v.* Planters', etc., Bank, 4 Ala. 516; Anderson *v.* Cunningham, Minor (Ala.) 48; Norris *v.* State, 22 Ark. 524 (holding that it is no excuse to a sheriff for failing to return an execution issued on a judgment on a forfeited delivery bond that the surety in the delivery bond was a married woman); Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Perdue *v.* Dodd, 1 Lea (Tenn.) 710; Cannon *v.* Wood, 2 Sneed (Tenn.) 177; Griswold *v.* Chandler, 22 Tex. 632.

**32.** Godhold *v.* Planters', etc., Bank, 4 Ala. 516; People *v.* Whitehead, 90 Ill. App. 614.

**33.** Shute *v.* McRae, 9 Ala. 931; Godbold *v.* Planters', etc., Bank, 4 Ala. 516.

**34.** Governor *v.* Baker, 14 Ala. 652.

**35.** *Louisiana.*— Miller *v.* Roy, 10 La. Ann. 744; Lay *v.* Boyce, 3 La. Ann. 622.

*Nebraska.*— Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689 [*followed* in Hellman *v.* Spielman, 19 Nebr. 152, 27 N. W. 131].

*New York.*— In an action against a sheriff for failure to return an execution he can show, in mitigation of damages, that defendant had no property out of which the debt could have been levied (Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Hum-

unless the statute makes him absolutely liable for the debt upon failure to return the writ.[36]

(IV) *INSOLVENCY*[37] *OF DEFENDANT.* A mere showing that the execution defendant was insolvent does not absolve the sheriff from liability for failure to return the execution,[38] as this does not necessarily establish that the debt was not collectable,[39] especially where there is other evidence tending to show that defendant owned property subject to execution and within the sheriff's jurisdiction.[40] But the sheriff may show the insolvency of the debtor in mitigation of damages,[41] and proof of this fact and that the debtor had no property out of which any part of the debt could have been collected exempts the officer from more than nominal damages.[42]

(V) *LEVY ON PLAINTIFF'S INTEREST IN JUDGMENT.* In an action against a sheriff for failure to return an execution it may be proved, in mitigation of damages, that prior to the return-day plaintiff's interest in the judgment was levied upon by virtue of an attachment, and was liable to be applied thereon; and in such case plaintiff is entitled to nominal damages only.[43]

(VI) *PAYMENT TO PLAINTIFF OF AMOUNT DUE.* While it has been held that where plaintiff has received payment of the amount due him, he cannot hold the sheriff liable in damages for a failure to return or delay in returning the writ,[44]

phrey *v.* Hathorn, 24 Barb. 278), or not enough property to satisfy the same (Humphrey *v.* Hathorn, *supra*; Pardee *v.* Robertson, 6 Hill 550).

*Texas.*— Griswold *v.* Chandler, 22 Tex. 637.

*Vermont.*— Kidder *v.* Barker, 18 Vt. 454 [*followed* in Ives *v.* Strong, 19 Vt. 546], holding that the fact that neither the body nor any property of an execution defendant was within the territorial jurisdiction of an officer, while the execution was in his hands, goes in mitigation of damages in an action against the officer for failure to return the writ.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 235.

**Actual notice to plaintiff.**— The fact that the sheriff notified plaintiff of his inability to find any property, and of defendant's refusal to give up any when demanded, is sufficient to relieve the sheriff from liability for failure to return the writ, as plaintiff is thereby as fully notified of the officer's inability to execute the writ as he would have been by a return to that effect made on the writ within the legal delay. Lay *v.* Boyce, 3 La. Ann. 622.

**36.** See *infra*, IX, H, 5.

**37.** **Insolvency** generally see INSOLVENCY, 22 Cyc. 1249.

**38.** *Alabama.*— Noble *v.* Whetstone, 45 Ala. 361 (bankruptcy); Harris *v.* Bradford, 4 Ala. 214.

*Arkansas.*— Atkinson *v.* Heer, 44 Ark. 174; Herr *v.* Atkinson, 40 Ark. 377.

*Kentucky.*— Basset *v.* Bowman, 3 B. Mon. 325.

*Louisiana.*— Holmes *v.* Dunn, 13 La. Ann. 153; Brand *v.* Wilkinson, 11 La. Ann. 273; Magee *v.* Robins, 2 La. Ann. 411.

*Massachusetts.*— Gallup *v.* Robinson, 11 Gray 20, holding that proceedings in insolvency against a judgment debtor will not deprive the judgment creditor from recovering at least nominal damages against a deputy sheriff for his neglect to return an execution issued on the judgment.

*Pennsylvania.*— McClain *v.* Smith, 4 Pa L. J. Rep. 452.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Chaffin *v.* Stuart, 1 Baxt. 296; Porter *v.* Burton, 10 Heisk. 415; Fowler *v.* McDaniel, 6 Heisk. 529; Webb *v.* Armstrong, 5 Humphr. 379.

*Texas.*— Griswold *v.* Chandler, 22 Tex. 637; Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 235.

**39.** Griswold *v.* Chandler, 22 Tex. 637, 640, where it is said: "A debtor may be hopelessly insolvent, and yet a diligent judgment creditor may make his money upon execution, if officers of the law do their duty."

**40.** Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

**41.** Varrill *v.* Heald, 2 Me. 91.

**Release on poor debtor's bond.**— Where a sheriff arrested a debtor, who gave a poor debtor's bond, which was approved by two justices, and the debtor was released, but neither the execution nor the bond was returned into the clerk's office, the sheriff was permitted to show in mitigation of damages, in an action against him for neglecting his official duty, that the obligors were insolvent and unable to pay the debt. Ware *v.* Fowler, 24 Me. 183.

**42.** Smith *v.* Perry, 18 Tex. 510, 70 Am Dec. 295.

**43.** Wehle *v.* Conner, 69 N. Y. 546 [*reversing* 41 N. Y. Super. Ct. 201].

**44.** Powell *v.* Massey-Herndon Shoe Co., 69 Ark. 79, 62 S. W. 66 (holding that where, subsequent to the return of an execution, an amount was paid to plaintiff's attorney sufficient to discharge the judgment on which the execution was issued, plaintiff could not maintain an action against the sheriff for failure to return the execution within the prescribed time, since the acceptance of payment

or at least he can recover only nominal damages for the default.[45] There is also authority for the view that the failure to return an execution within the time prescribed by law fixes the liability of the officer, which cannot be discharged by a subsequent tender of the amount due.[46]

(VII) *COLLECTABILITY OF DEBT.* The fact that the debt is still collectable cannot serve to mitigate the damages in an action against a sheriff for failure to return an execution.[47]

(VIII) *COMPROMISE*[48] *OF ACTION.* The fact that plaintiff and defendant in attachment made a compromise by which a portion of the property was released from the attachment and the rest delivered to plaintiff is no excuse for not duly returning the attachment.[49]

(IX) *UNSUCCESSFUL EFFORT TO MAKE RETURN.* A sheriff is not excused from liability for failure to return an execution by the fact that he had indorsed a return on the writ and had gone to the clerk's office to file the same, but did not do so because of the absence of the clerk, where it does not appear that the filing could not have been made at another time.[50] But where a sheriff acted in good faith in attempting to return an execution emanating from another county, and actually included it in a letter for the purpose of returning it, and put it in the post-office addressed to the proper place, he was held not liable, although there was a mistake in the name of the person to whom it was addressed.[51]

(X) *OFFER TO DELIVER WRIT TO PROPER OFFICER.* A sheriff or constable may be protected from liability as for failure to return a writ by the fact that he has offered to deliver the same to the proper officer before the return-day.[52] But where the law requires a writ to be returned to the court and not to the clerk, it is not a sufficient excuse to an officer for neglecting to return a process to the proper term of the court that he had tendered it to the clerk, who had refused to receive it, or that the clerk had died during the term.[53]

(XI) *UNDERTAKING OF PLAINTIFF TO RETURN WRIT.* Where plaintiff in execution undertakes to return the writ and the sheriff delivers it to him for that purpose, he cannot hold the sheriff responsible for his own neglect in failing to return the writ within the time prescribed by law.[54]

(XII) *INDORSEMENT OF RETURN ON WRIT.* The mere indorsement of a return on an execution does not avoid the liability of the sheriff for a failure to make an actual return to the clerk of the execution itself within the time required by law.[55]

(XIII) *RENEWAL OF WRIT.* A sheriff is not liable for failure to return an

of the judgment constituted a waiver of any claim against the sheriff); Evans *v.* Boggs, 2 Watts & S. (Pa.) 229 (holding that a constable is not liable for not returning an execution where the judgment was paid before the execution issued); Bellows *v.* Allen, 23 Vt. 169 (holding that a payment of the amount of the execution by the sureties of the debtor and an assignment of the execution to them extinguishes the right of action against the sheriff, which cannot be revived by a reassignment of the judgment and execution to the creditor).

45. Governor *v.* Baker, 14 Ala. 652.

46. Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360.

47. Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67, and *overruling* Stevens *v.* Rowe, 3 Den. (N. Y.) 327]. But *compare* Woolcott *v.* Gray, Brayt. (Vt.) 91, holding that in an action for failure to return process the sheriff may show, in mitigation of damages, that the original defendants are within reach of process and responsible.

48. Compromise generally see COMPROMISE AND SETTLEMENT, 8 Cyc. 499.

49. Womack *v.* Bird, 63 Ala. 500.

50. Atkinson *v.* Heer, 44 Ark. 174.

51. Thompson *v.* Ross, 1 J. J. Marsh. (Ky.) 600. See also Wilson *v.* Huston, 4 Bibb (Ky.) 332.

52. Loveless *v.* State, 64 Ark. 205, 41 S. W. 418, so holding in a case where a constable was given an execution which should, by law, have been returned on the 14th of February, and on the 12th of February, the constable having the execution with him, ready to be returned, met the justice who issued it, and told him he was ready to return it, and the justice told the constable that he was going away, and that he should leave it with a certain person at his store, which direction the constable obeyed, but the execution was not filed by the justice until his return on February 16.

53. Hamlin *v.* March, 31 N. C. 35.

54. Vastbinder *v.* Spinks, 16 Ala. 385.

55. Atkinson *v.* Heer, 44 Ark. 174 [*followed*

execution where plaintiff has obtained, directed, or consented to a renewal of the writ;[56] but the renewal of an execution at the instance of an officer without the consent of plaintiff will not relieve such officer from liability for the damages sustained by plaintiff because of his failure to make return of the execution within the time named in the writ as provided by statute.[57]

(XIV) *ISSUANCE OF SECOND WRIT.* The issuing of a second execution after a sheriff has failed to return the first within the time prescribed does not release him from liability for his default,[58] although it has been held that in such case the officer is entitled to credit for the amount made on the subsequent execution in reduction of his liability.[59]

(XV) *PRESS OF BUSINESS.* A sheriff cannot excuse his failure to return an execution by alleging that he had more official business than he and his deputies could perform.[60]

(XVI) *ILLNESS OF EMPLOYEE.* It is no excuse for the failure of a sheriff to return an execution that he was deprived of the services of his clerk on account of illness.[61]

(XVII) *INDULGENCE TO OFFICER.* Mere indulgence, without consideration, by an execution creditor to an officer who has collected the money affords him no excuse for failing to make the proper return of the execution.[62]

(XVIII) *MISTAKE AS TO TIME FOR RETURN.* An officer cannot escape liability for failure to return process within the proper time by showing that the default was due to his mistake as to the time for making the return.[63]

(XIX) *LOSS OF WRIT.* The fact that an execution was mislaid and could not be found after a most careful search has been held a sufficient excuse for failure to return it.[64]

(XX) *ABOLITION OF WRIT.* A sheriff cannot be made liable for failing to return a writ where such writ has been abolished by statute before the return-day.[65]

(XIX) *AGENCY OF OFFICER FOR PLAINTIFF.* The fact that the officer was plaintiff's agent for the collection of a debt does not relieve him of liability in his official capacity for failure to return an execution for the debt.[66]

(XXII) *AGREEMENT TO POSTPONE SALE.* An agreement by plaintiff that the sale of property levied on be postponed does not excuse the officer for failure to return the execution.[67]

in Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870].

**56.** Homan *v.* Liswell, 6 Cow. (N. Y.) 659, 660, where it is said: "After it was renewed, no return could be made upon it, as an original execution; and after the plaintiff has assented to an act, which rendered a return impossible, he cannot have an action for not making such return."

**57.** McGuire *v.* Bausher, 52 N. Y. App. Div. 276, 65 N. Y. Suppl. 382.

**58.** Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125; Kennedy *v.* Coleman, 2 Litt. (Ky.) 6; Evans *v.* Boggs, 2 Watts & S. (Pa.) 229; Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Chaffin *v.* Stuart, 1 Baxt. (Tenn.) 296; Barnes *v.* White, 2 Swan (Tenn.) 442; Doyle *v.* Glenn, 4 Humphr. (Tenn.) 309; Kirkmans *v.* Rice, 4 Humphr. (Tenn.) 267. See also Dunnaway *v.* Collier, 2 Heisk. (Tenn.) 10. But *compare* Miller *v.* Roy, 10 La. Ann. 744.

A sale of property levied on under a pluries venditioni exponas does not relieve the sheriff of liability for failure to return any previous process. Sawyers *v.* Glenn, 11 Heisk. (Tenn.) 754.

**59.** Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125. But *compare* Kirkmans *v.* Rice, 4 Humphr. (Tenn.) 267.

**60.** McRae *v.* Colclough, 2 Ala. 74.

**61.** But *compare* Helm *v.* Gridley, Walk. (Miss.) 511, so holding on the ground that such service could have been easily performed by another.

**62.** Judy *v.* Howard, 2 Metc. (Ky.) 44.

**63.** Bell *v.* Wycoff, 131 N. C. 245, 42 S. E. 608 (holding that a sheriff is not relieved from liability for failure to return a summons within the time required by reason of the facts that it was his impression that the summons was returnable at a later date, and that his failure was occasioned by endeavoring to obtain service); Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388 (holding that it is no defense to a motion for non-return of an execution of a justice within thirty days that the sheriff construed the law to be that thirty days and a calendar month are the same).

**64.** Waring *v.* Thomas, 1 Litt. (Ky.) 253 [*followed* in Shippen *v.* Curry, 3 Metc. (Ky.) 184, and *approved* in Thompson *v.* Ross, 1 J. J. Marsh. (Ky.) 600].

**65.** Frey *v.* Hebenstreit, 1 Rob. (La.) 561, so holding as to a capias ad satisfaciendum.

**66.** Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

**67.** Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W.

(XXIII) *PROCESS AGAINST SHERIFF.* Where the sheriff has received process for execution, the fact that he is defendant therein does not excuse him from making due return of it.[68]

(XXIV) *PROPERTY NOT SUBJECT TO WRIT.* A sheriff is liable for at least nominal damages for failure to return an attachment, although the property levied on was not subject to attachment and could not have been subjected to any judgment recovered by plaintiff.[69]

(XXV) *ATTACHMENT*[70] *OR REPLEVIN*[71] *AGAINST PLAINTIFF IN EXECUTION.* A sheriff is not excused for failure to return an execution because prior to the return-day he received a warrant of attachment against plaintiff, a copy of which he served on the judgment debtor, and received a certificate acknowledging indebtedness to plaintiff in the amount of the judgment.[72] Neither will the fact that the debt has been replevied relieve the sheriff of liability for failure to return an execution.[73]

(XXVI) *APPEAL OR WRIT OF ERROR.*[74] The taking of an appeal or the suing out of a writ of error does not excuse a sheriff for failure to return an execution unless a stay of execution has been obtained.[75]

(XXVII) *INJUNCTION*[76] *OR RESTRAINING ORDER.* While an injunction against the collection of a debt has been held not to excuse the failure of a sheriff to return an execution issued therefor,[77] it has also been asserted that where a sheriff is restrained by an order of the United States court, made in a pending bankruptcy proceeding, from proceeding under an execution, the time for the return is thereby extended for as many days as the restraining order is in force, and no action can be maintained against him for failure to return the execution before the expiration of the extended time.[78]

(XXVIII) *RETURN MADE AFTER COMMENCEMENT OF ACTION.* Where the return is made after the commencement of an action against the sheriff for failing to make a return of execution, plaintiff can recover nominal damages only.[79]

(XXIX) *FAILURE OF PLAINTIFF TO ENFORCE PERSONAL JUDGMENT IN FORECLOSURE SUIT.* In an action by a mortgagee against a sheriff who made a sale under a decree of foreclosure to recover damages for the sheriff's failure to return the order of sale, whereby plaintiff was prevented from obtaining a deficiency judgment, the sheriff cannot escape liability because of the failure of plaintiff to enforce by execution a personal judgment taken in the foreclosure suit.[80]

(XXX) *WAIVER OF DEFAULT.* Where an execution plaintiff treats the execution as being properly in the officer's hands after the return-day he waives his right of action against the officer for failure to return the writ.[81]

(XXXI) *TERMINATION OF INCUMBENCY.* A sheriff who goes out of office

388; Clingman *v.* Barrett, 6 Humphr. (Tenn.) 20.

**68.** Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672.

**69.** Governor *v.* Baker, 14 Ala. 652.

**70.** Attachment generally see ATTACHMENT, 4 Cyc. 368.

**71.** Replevin generally see REPLEVIN, 34 Cyc. 1342.

**72.** Wehle *v.* Conner, 63 N. Y. 258 [*affirming* 40 N. Y. Super. Ct. 24].

**73.** Kennedy *v.* Coleman, 2 Litt. (Ky.) 6.

**74.** See, generally, APPEAL AND ERROR, 2 Cyc. 474.

**75.** Clark *v.* Carnley, 3 Code Rep. (N. Y.) 136 (holding that a sheriff, who refuses to return an execution on mere notice to him from defendant of an appeal, will be liable where the undertaking on which the stay is claimed was invalid); People *v.* Allen, 9 Wend. (N. Y.) 224.

**76.** Injunction generally see INJUNCTIONS. 22 Cyc. 724.

**77.** Kennedy *v.* Coleman, 2 Litt. (Ky.) 6.

**78.** Ansonia Brass, etc., Co. *v.* Conner, 11 Daly (N. Y.) 326 [*affirming* 6 N. Y. Civ. Proc. 173].

**79.** Bechstein *v.* Sammis, 10 Hun (N. Y.) 585.

**80.** Boyd *v.* Desmond, 79 Cal. 250, 71 Pac. 755, so holding on the ground that, although plaintiff had his election to treat the judgment as personal or take an order of sale, he could not do both, and the personal judgment could not be enforced as such after the issuance of an order of sale until the return thereof and then only for the deficiency.

**81.** McKinley *v.* Tucker, 6 Lans. (N. Y.) 214.

**Instructions given by the party to a deputy** after the return-day, implying a consent that he may retain the execution, make the deputy

before the return-day of a writ cannot be held liable for failure to return the same unless he commenced to execute it while in office.[82]

(XXXII) *PROCESS NOT REGULARLY DELIVERED TO OFFICER.* An officer cannot be held liable for failure to return an execution which was never regularly delivered to him.[83]

**e. Extent of Liability.** An officer who fails to return an execution is *prima facie* liable for the whole amount thereof,[84] but he may relieve himself of such liability by showing that the execution creditor was not injured by his default,[85] or not injured to the extent of the entire debt;[86] and hence the general rule is that the liability of the officer is for the actual damages occasioned by his neglect to make the return,[87] except of course where a penalty for such default

the party's agent, and discharge the sheriff from an accrued cause of action for its non-return. McKinley *v.* Tucker, 6 Lans. (N. Y.) 214.

**82.** State *v.* Parchmen, 3 Head (Tenn.) 609. See also Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

**Delivery of process to successor.**— Under a statute providing that, if an officer to whom an execution has been delivered go out of office before such writ has been executed, his successor shall proceed thereon, a constable who, on going out of office, delivered an unexpired execution to his successor is not liable for failure to make a return. Northern *v.* State, 1 Ind. 113, Smith 71.

**83.** Rash *v.* Parris, 4 Harr. (Del.) 81.

**84.** *Alabama.*— Reid *v.* Dunklin, 5 Ala. 205; Neale *v.* Caldwell, 3 Stew. 134.

*Arkansas.*—Bickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. 292.

*Georgia.*— Dobbs *v.* Murray County, 17 Ga. 624.

*Louisiana.*— Leforet *v.* Weber, 23 La. Ann. 253; Taylor *v.* Hancock, 19 La. Ann. 466; Hill *v.* Labarre, 12 La. Ann. 419; Magee *v.* Robins, 2 La. Ann. 411; Dupuy *v.* Barlow, 4 Mart. N. S. 239.

*New York.*— Wehle *v.* Conner, 69 N. Y. 546 [*reversing* 41 N. Y. Super. Ct. 201]; Swezey *v.* Lott, 21 N. Y. 481, 78 Am. Dec. 160; Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Brookfield *v.* Remsen, 1 Abb. Dec. 210; Bowman *v.* Cornell, 39 Barb. 69; Humphrey *v.* Hathorn, 24 Barb. 278; People *v.* Lott, 21 Barb. 130; Carpenter *v.* Doody, 1 Hilt. 465; Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Suppl. 1100; Van Praag *v.* Flack, 13 N. Y. Suppl. 590; Stevens *v.* Rowe, 3 Den. 327; Pardee *v.* Robertson, 6 Hill 550.

*South Carolina.*—Graham *v.* Durant, 2 Hill 517.

*Texas.*— Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295; Hamilton *v.* Ward, 4 Tex. 356; Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

*Vermont.*— Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 230, 306.

**Where the execution is for bank-notes** the value of such notes and not of specie is the measure of damages. Williams *v.* Hall, 2 Dana (Ky.) 97.

**Deduction for expenses not permissible.**— Where, in an action against a sheriff for not returning an execution, no excuse for his not prosecuting an undertaking in replevin is shown, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, without deduction for the expenses of the replevin, although the original bond given by plaintiff before levy was for indemnity against all expenses in consequence thereof. Swezey *v.* Lott, 21 N. Y. 481, 78 Am. Dec. 160.

**85.** Hoag *v.* Warden, 37 Cal. 522 (holding that where a sheriff, after receipt of an execution, collected and paid to plaintiff the amount, he was not liable to plaintiff for the amount so collected as a measure of damages for a subsequent failure to return the writ); Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Humphrey *v.* Hathorn, 24 Barb. (N. Y.) 278; Carpenter *v.* Doody, 1 Hilt. (N. Y.) 465; Smith *v.* Geraty, 61 Misc. (N. Y.) 101, 112 N. Y. Suppl. 1100; Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295; Hamilton *v.* Ward, 4 Tex. 356; Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

**Nominal damages may be recovered,** although no actual damage is shown. Goodnow *v.* Willard, 5 Metc. (Mass.) 517.

**86.** Taylor *v.* Com., 3 Bibb (Ky.) 356; Dupuy *v.* Barlow, 4 Mart. N. S. (La.) 239; Ledyard *v.* Jones, 7 N. Y. 550 [*affirming* 4 Sandf. 67]; Dolson *v.* Saxton, 11 Hun (N. Y.) 565; Carpenter *v.* Doody, 1 Hilt. (N. Y.) 465; Hamilton *v.* Ward, 4 Tex. 356.

**87.** *Connecticut.*— Clark *v.* Smith, 9 Conn 379, 10 Conn. 1, 25 Am. Dec. 47.

*Iowa.*— Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500.

*Kentucky.*— Com. *v.* Bradley, 4 J. J. Marsh. 209.

*Louisiana.*— Gasquet *v.* Robins, 2 La. Ann. 407, holding that where a sheriff, by whom a twelve months' bond has been taken for the price of property sold under execution, neglects to return the writ and retains the bond in his hands for more than eleven months, and, in consequence of his failure to return it, it is destroyed, he is liable to the creditor for its amount.

*Maine.*— Ware *v.* Fowler, 24 Me. 183.

*Massachusetts.*— McGregor *v.* Brown, 5 Pick. 170.

*Missouri.*— State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152; Bennett *v.* Vinyard, 34 Mo. 216.

*Nebraska.*— Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689 [*followed* in Hellman *v.* Spielman, 19 Nebr. 152, 27 N. W. 131].

is imposed by statute.[88] Where the officer's default was intentional, the jury may award, in addition to the amount of the debt, the costs and incidental expenses incurred by plaintiff.[89] In an action for failure to return a venditioni exponas the value of the property levied on and which should have been sold is the proper measure of damages.[90]

**2. Non-Entry of Return.** A sheriff who has seasonably returned a writ is not responsible for the return not having been duly entered.[91]

**3. Insufficient or Defective Return — a. In General.** A sheriff who makes an insufficient or defective return is liable for the resulting damage,[92] as such return is in legal effect equivalent to no return at all.[93]

**b. Particular Matters Affecting Liability** — (I) *Substitution of Officers.* Where a constable to whom a justice directs and delivers an execution erases his name therefrom and substitutes that of another constable, to whom he delivers the writ, such other constable incurs no liability for making an insufficient return.[94]

(II) *Acceptance of Return.* The acceptance by a justice of the peace of a constable's return to an execution will not relieve the constable from liability, if it be in fact insufficient.[95]

(III) *Issuance of Alias Writ.* The issuance of an alias writ does not operate as a waiver of the right to hold the officer liable for an insufficient return on the original writ.[96]

(IV) *Acceptance of Part of Debt.* A plaintiff in execution who receives a part of his debt, which has been made by the officer, does not thereby waive the right to hold the officer liable for an insufficient return of the writ.[97]

**4. False Return**[98] **— a. In General.** A sheriff or constable who makes a false return to process in his hands is liable therefor;[99] but the mere fact that an officer's

*New Hampshire.*— Grafton Bank *v.* White, 17 N. H. 389.

*New York.*— Dolson *v.* Saxton, 11 Hun 565; Carpenter *v.* Doody, 1 Hilt. 465; Brown *v.* Jones, 1 Hilt. 204, 3 Abb. Pr. 80. See also McGuire *v.* Bausher, 52 N. Y. App. Div. 276, 65 N. Y. Suppl. 382.

*Texas.*— Crow *v.* State, 24 Tex. 12; Hamilton *v.* Ward, 4 Tex. 356.

*Vermont.*— Hamilton *v.* Marsb, 2 Tyler 403.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 230, 306.

88. **Penalty for failure to return process** see *infra*, IX, D, 1.

89. Dobbs *v.* Murray County, 17 Ga. 624.

90. Johnston *v.* Gwathney, 2 Bibb (Ky.) 186, 4 Am. Dec. 694.

91. Hall *v.* Monroe, 73 Me. 123; Gregivere *v.* Chalker, 125 Mich. 80, 83 N. W. 1024. See also Frink *v.* Scovel, 2 Day (Conn.) 480.

92. *Kentucky.*— Bartlett *v.* Marshall, 2 Bibb 467.

*Missouri.*— State *v.* Johnson, 78 Mo. App. 569.

*Pennsylvania.*— Shover *v.* Funk, 5 Watts & S. 457.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Dunnaway *v.* Collier, 2 Heisk. 10; Wingfield *v.* Crosby, 5 Coldw. 241; Hassell *v.* Southern Bank, 2 Head 381; McCrory *v.* Chaffin, 1 Swan 307; Mullins *v.* Johnson, 3 Humphr. 396.

*Vermont.*— Howes *v.* Spicer, 23 Vt. 508.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 233.

**A return "stopped by order of the plaintiff"** is a good return because plaintiff has the control of the execution. State *v.* McDonald, 9 Humphr. (Tenn.) 606.

93. State *v.* McDonald, 9 Humphr. (Tenn.) 606; Harman *v.* Childress, 3 Yerg. (Tenn.) 327.

94. Farley *v.* Newton, 1 Pa. Super. Ct. 300.

95. Shover *v.* Funk, 5 Watts & S. (Pa.) 457; Daniel *v.* Buss, 4 Whart. (Pa.) 56.

96. Barnes *v.* White, 2 Swan (Tenn.) 442 [*followed* in Dunnaway *v.* Collier, 2 Heisk. (Tenn.) 10].

**A sale of property** levied on under a pluries venditioni exponas does not relieve the sheriff of liability for an insufficient return of any previous process. Sawyers *v.* Glenn, 11 Heisk. (Tenn.) 754.

97. Barnes *v.* White, 2 Swan (Tenn.) 442 [*followed* in Dunnaway *v.* Collier, 2 Heisk. (Tenn.) 10].

98. **Statutory penalty for false return** see *infra*, IX, D, 1.

99. *Alabama.*— Martin *v.* Barney, 20 Ala. 369.

*Arkansas.*— Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.

*Colorado.*— People *v.* Finch, 19 Colo. App. 512, 76 Pac. 1120.

*Connecticut.*— Frost *v.* Dougal, 1 Day 128.

*Florida.*— McLeod *v.* Ward, 9 Fla. 18.

*Georgia.*— Duncan *v.* Webb, 7 Ga. 187.

*Illinois.*— Bowen *v.* Parkhurst, 24 Ill. 257; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Brother *v.* Cannon, 2 Ill. 200.

*Indiana.*— Stevens *v.* Beckes, 3 Blackf. 88.

return is erroneous in some respect does not subject him to liability unless the error is properly attributable to some official misconduct or negligence.[1]

**b. What Constitutes False Return** A false return is defined as a return made by the sheriff or other ministerial officer to a writ in which is stated as a fact something contrary to the truth and injurious to one of the parties or to someone having an interest in it;[2] and as there is an obvious distinction between a false

*Kentucky.*— Com. *v.* Booker, 6 Dana 441; Taylor *v.* Com., 3 Bibb 356.

*Louisiana.*— Balfour *v.* Browder, 6 Mart. N. S. 708; Fisk *v.* Browder, 6 Mart. N. S. 691.

*Maine.*— Remick *v.* Wentworth, 89 Me. 392, 36 Atl. 622; Thayer *v.* Roberts, 44 Me. 247; Nash *v.* Whitney, 39 Me. 341; Norton *v.* Valentine, 15 Me. 36; Kidder *v.* Parlin, 7 Me. 80; Eaton *v.* Ogier, 2 Me. 46.

*Massachusetts.*— Simmons *v.* Richards, 171 Mass. 281, 50 N. E. 617 (holding that in an action by the surety on the recognizance given by a judgment debtor on his arrest on execution, against the officer for making a false return on such execution, on the ground that there had been a prior arrest thereon, and that, therefore, the arrest in question was illegal, although such illegality was not apparent on the face of the record, it was proper to submit such issues to the jury, as defendant's return of arrest was conclusive as to the parties and privies, and plaintiff could not defend against such recognizance, in an action thereon, by contradicting such return); Woods *v.* Varnum, 21 Pick. 165; Whitaker *v.* Sumner, 9 Pick. 308; Caesar *v.* Bradford, 13 Mass. 169; Weld *v.* Bartlett, 10 Mass. 470; Brinley *v.* Allen, 3 Mass. 561.

*Michigan.*— Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448.

*Missouri.*— State *v.* Finn, 87 Mo. 310; State *v.* Case, 77 Mo. 247; State *v.* Harrington, 28 Mo. App. 287; State *v.* Wolff, 13 Mo. App. 285; State *v.* Finn, 11 Mo. App. 400.

*New York.*— Bacon *v.* Cropsey, 7 N. Y. 195; Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406]; Williams *v.* Lowndes, 1 Hall 579; Camp *v.* Chamberlain, 5 Den. 198; Tomlinson *v.* Rowe, Lalor 410; Curtis *v.* Patterson, 8 Cow. 65; Green *v.* Ferguson, 14 Johns. 389.

*North Carolina.*— Martin *v.* Martin, 50 N. C. 349.

*Pennsylvania.*— McMichael *v.* McKeon, 10 Pa. St. 143; Forsyth *v.* Dickson, 1 Grant 26; Jacobs *v.* People's Electric, etc., Co., 21 Pa. Co. Ct. 492; Sawyer *v.* Curtis, 2 Ashm. 127; Com. *v.* Lelar, 1 Phila. 336.

*Tennessee.*— Shaw *v.* Holmes, 4 Heisk. 692; McBee *v.* State, Meigs 122.

*Texas.*— Hale *v.* Bickett, (Civ. App. 1904) 78 S. W. 531.

*United States.*— Pierce *v.* Strickland, 19 Fed. Cas. No. 11,147, 2 Story 292.

*England.*— Dennis *v.* Whetham, L. R. 9 Q. B. 345, 43 L. J. Q. B. 129, 30 L. T. Rep. N. S. 514, 22 Wkly. Rep. 571; Mullett *v.* Challis, 16 Q. B. 239, 15 Jur. 243, 20 L. J. Q. B. 161, 71 E. C. L. 239; Holmes *v.* Clifton, 10 A. & E. 673, 8 L. J. Q. B. 247, 2 P. & D. 556, 4 P. & D. 112, 37 E. C. L. 357; Wordall *v.* Smith, 1 Campb. 332; Stubbs *v.* Lainson, 5 Dowl. P. C. 162, 2 Gale 122, 5 L. J. Exch. 240, 1 M. & W. 728, Tyrw. & G. 1000; Jones *v.* Clayton, 4 M. & S. 349.

*Canada.*— Tower *v.* Stephenson, 10 N. Brunsw. 93; Young *v.* Moderwell, 14 U. C. C. P. 143; McKee *v.* Woodruff, 13 U. C. C. P. 583; Young *v.* Baby, 4 U. C. C. P. 537; Hewitt *v.* Corbett, 15 U. C. Q. B. 39; Decatur *v.* Jarvis, 3 U. C. Q. B. 133; Mead *v.* Hamilton, 2 U. C. Q. B. 135. See also Upper Canada Bank *v.* Macfarlane, 4 U. C. Q. B. 396.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 236.

**Where a sheriff is directed to levy on money supposed to be in his possession,** he is not liable as for a false return because he ought to have had a given balance in his hands after paying former writs, although in fact he had not, for if he had never received the money, or had misappropriated it to other debts, he could not levy on it under such writ. Crow *v.* Com., 15 Leg. Int. (Pa.) 36.

1. Strout *v.* Pennell, 74 Me. 260 (holding that where a sheriff, in levying an execution on land to the best of his ability and without negligence, returned that the appraisers were disinterested men, when in fact one of them was not disinterested, a person holding a mortgage of later date than the attachment in the suit upon which levy was made could not maintain an action against the sheriff based upon the ground that, had the sheriff returned that the appraisers were not disinterested men, the levy would have been void); Cross *v.* Williams, 63 How. Pr. (N. Y.) 191 (holding that if a sheriff has made a fair and honest effort to determine whether the execution defendant has any property on which he could levy, and has been unable to find any, he will not be liable as for a false return on returning *nulla bona*).

**In order to make a return of nulla bona a false return,** the sheriff must be informed or chargeable with knowledge that the debtor has goods in the county and must have an opportunity to make a levy. Barnes *v.* Thompson, 2 Swan (Tenn.) 313; Trigg *v.* McDonald, 2 Humphr. (Tenn.) 386.

2. State *v.* Jenkins, 170 Mo. 16, 24, 70 S. W. 152 [*quoting* Bouvier L. Dict.].

**Illustrations.**— Where a sheriff, levying on property which he afterward finds not subject to the execution, returns that the property was not sold for want of time, instead of returning the facts, he will be liable for a false return. Com. *v.* Booker, 6 Dana (Ky.) 441. A return of "Not to be found" on a capias is not true, because of defendant's being out of the state at the time the return is made, if

statement and a failure to state all the facts, a sheriff cannot be held liable as for a false return because he has failed to make a full return of all he did or of all the facts.[3]

**c. To Whom Officer Liable.** In case of a false return the sheriff is liable to the person injured thereby,[4] even though such person is not a party to the suit in connection with which the return is made.[5]

**d. Necessity For Fraudulent Intent.** It has been held that a fraudulent intent on the part of the sheriff is necessary to render him liable for a false return.[6]

**e. Necessity For Damage.** In order to entitle a person to maintain an action against a sheriff for a false return he must have sustained some damage by reason thereof.[7]

the officer had an opportunity of making the arrest previously, while the process was in his hands. Martin *v.* Martin, 50 N. C. 349. A sheriff's return of an execution, "Ready to satisfy," when in fact it had not been levied, is not a false return in the legal sense rendering the sheriff liable therefor, as it is equivalent to a return that he had proceeded on the execution and was ready to pay the money. Kemper *v.* Kemper, 3 Rand. (Va.) 8.

3. Tarleton *v.* Gibson, 2 Ala. 638 (holding that where a sheriff returns that an execution has been levied, but that he sold the property to satisfy an old execution in his hands at the same time, he is not liable to a motion for a false return, if the facts as stated by him in his return are true, although a sum of money may remain in his hands unappropriated after satisfying the oldest execution); State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152; State *v.* Buxton, 102 N. C. 129, 8 S. E. 774. See also Nichols *v.* Ketcham, 19 Johns. (N. Y.) 84. But *compare* McMichael *v.* McKeon, 10 Pa. St. 143, holding that where the sheriff, under a *liberari*, delivers possession of premises held under a lease for years, he should return the fact of the lease specially; and a return that he has delivered possession, without more, renders him liable for a false return.

4. *Alabama.*— Martin *v.* Barney, 20 Ala. 369.

*Georgia.*— Duncan *v.* Webb, 7 Ga. 187.

*Missouri.*— State *v.* Harrington, 28 Mo. App. 287.

*Pennsylvania.*— Sawyer *v.* Curtis, 2 Ashm. 127.

*Tennessee.*— Huffaker *v.* Greer, 1 Coldw. 160; McBee *v.* State, Meigs 122.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 236.

5. Remick *v.* Wentworth, 89 Me. 392, 36 Atl. 622 (holding that where plaintiff had a valid attachment on certain land, and thereafter and while the attachment was in full force, defendant, an officer, falsely returned upon an execution in favor of a stranger against the same debtor a seizure and regular sale of the debtor's interest in the same land, under an attachment prior to plaintiff's whereby plaintiff lost his attachment and the satisfaction of his debt, defendant was liable therefor); Thayer *v.* Roberts, 44 Me. 247; Whitaker *v.* Sumner, 9 Pick. (Mass.) 308 (holding that where a sheriff, having attached on mesne process an equity of redemption, sold it on execution without giving notice of the place of sale, but falsely returned that he had given such notice, in consequence of which return a subsequent attaching creditor, being unable to sell the equity of redemption, was prevented from obtaining satisfaction of his demand, the sheriff was liable to such creditor in an action for the false return); Brinley *v.* Allen, 3 Mass. 561 (holding that where an officer executed a writ by arresting defendant, who gave bail, and the officer afterward attached defendant's property under the same writ, making a return as to the attachment only, he was liable to a subsequent creditor for a false return, for, if he had made a true return, the subsequent creditor could have enforced his attachment, the prior attachment being invalid); Tower *v.* Stephenson, 10 N. Brunsw. 93 (holding that a constable is liable in an action on the case at the suit of the bail in a cause in a justice's court for refusing to arrest defendant on an execution issued by the justice in that cause, and making a false return thereto, in consequence of which the bail were sued and compelled to pay the debt). But *compare* Huffaker *v.* Greer, 1 Coldw. (Tenn.) 160, holding that only plaintiff in the execution or someone having the beneficial interest therein, by transfer or assignment from him, either in fact or by operation of law can be regarded as the party aggrieved by the false return of an execution so as to be entitled to maintain an action against the sheriff for damages resulting therefrom.

Where one became bail at the request of a third person, the sheriff was liable to him for a false return on the execution, although such third person afterward paid the bail the principal part of the judgment which the bail had been compelled to pay. Kidder *v.* Parlin, 7 Me. 80.

6. Sutherland *v.* Cunningham, 1 Stew. (Ala.) 438.

7. *Alabama.*—Tombeckbee Bank *v.* Godbold, 3 Stew. 240, 20 Am. Dec. 80.

*Connecticut.*— Hartford County Bank *v.* Waterman, 26 Conn. 324.

*Kentucky.*— Bennett *v.* Bell, 46 S. W. 4, 701, 20 Ky. L. Rep. 308, holding that a person cannot recover damages for a false return made by defendant as sheriff on a summons against him, where he alleges that he compromised the claim against him, that allegation being inconsistent with his averment that he was compelled to pay the default judgment rendered against him.

**f. Particular Matters Affecting Liability** — (I) *VALIDITY OF PROCESS* [8] *OR JUDGMENT.*[9] If process is regular on its face and issued by competent authority, an officer is not excused for a false return because the process was irregularly or erroneously issued,[10] but a false return to void process subjects the officer to no liability,[11] and so where the circumstances are such that the elder of two writs must be deemed fraudulent and void as against a junior writ the sheriff is not liable for applying goods levied on to the junior writ and returning *nulla bona* to the other.[12] But the officer cannot be permitted to show, in order to reduce damages, that the execution directed the collection of a greater sum than was due plaintiff.[13] In an action for falsely returning an execution, the sheriff may show in mitigation of damages that the judgment on which the execution was issued was void.[14]

(II) *PROPRIETY OF JUDGMENT RENDERED ON FALSE RETURN OF SUMMONS.* Where a summons was issued against a certain person which the constable by mistake served on another person, and returned the summons "personally served," and judgment was rendered against the real defendant for a penalty alleged to have been incurred by the violation of a statute, the officer was entitled, in an action by such defendant against him for a false return, to show that defendant had been guilty of the offense.[15]

(III) *REVERSAL OF JUDGMENT.* An officer is not liable for a false return of *nulla bona*, where the judgment on which the execution issued has since been reversed.[16]

(IV) *JUDICIAL DETERMINATION IN ACCORDANCE WITH RETURN.* A person cannot recover against a sheriff for an alleged false return of service of summons upon him where he appeared in the action for the purpose of litigating the question whether he was before the court and such question was decided in the affirmative.[17]

(V) *TITLE TO PROPERTY.* In order to relieve himself from liability for a false return on an attachment levy, the sheriff is entitled to sustain his return of *nulla bona* by showing that the property in question was not the property of the attachment debtor;[18] and a finding by a sheriff's jury in an inquisition that the

*Maine.*— Nash *v.* Whitney, 39 Me. 341.

*New Jersey.*— Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819, holding that, although a return on a summons may be false in stating that it was served personally, this fact alone does not render the sheriff liable to plaintiff in the action, for the service actually made may have been legal and the judgment obtained thereon valid and binding, in which case there would be no actionable wrong or failure on the part of the sheriff to perform his duty.

*England.*— Wylie *v.* Birch, 4 Q. B. 566, 3 G. & D. 629, 12 L. J. Q. B. 260, 45 E. C. L. 566; Todd *v.* Batt, Ir. R. 11 Ch. 473; O'Dowd *v.* Kirwan, Ir. R. 11 Ch. 75; Levy *v.* Hale, 6 Jur. N. S. 702, 29 L. J. C. P. 127, 1 L. T. Rep. N. S. 132, 8 Wkly. Rep. 125.

*Canada.*— See Everarghim *v.* Leonard, 3 U. C. Q. B. O. S. 121.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 236.

8. Validity of process generally see PROCESS, 32 Cyc. 412.

9. Validity of judgment generally see JUDGMENTS, 23 Cyc. 623.

10. Humphrey *v.* Case, 8 Conn. 101, 20 Am. Dec. 95; Brother *v.* Cannon, 2 Ill. 200; Bacon *v.* Cropsey, 7 N. Y. 195 (holding that it is no excuse for a false return that the execution was prematurely issued); Blivin *v.* Bleakley, 23 How. Pr. (N. Y.) 124.

11. Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89 [*reversing* 47 Hun 241], holding that the fact that the officer has treated the process as valid does not estop him to set up that it was void.

12. Storm *v.* Woods, 11 Johns. (N. Y.) 110, so holding in a case where goods of defendant were levied on under the senior execution, but the sale was delayed, and the goods left for nearly a year in the possession of defendant, by the direction of plaintiff in such writ.

13. Bacon *v.* Cropsey, 7 N. Y. 195.

14. Dorrance *v.* Henderson, 27 Hun (N. Y.) 206 [*affirmed* in 92 N. Y. 406]. But *compare* Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621], holding that in an action against the sheriff for a false return, he cannot set up that plaintiff's judgment is invalid under the Bankruptcy Act.

15. Green *v.* Ferguson, 14 Johns. (N. Y.) 389.

16. Inman *v.* McNeil, 57 How. Pr. (N. Y.) 151.

17. Bennett *v.* Bell, 46 S. W. 4, 5, 701, 20 Ky. L. Rep. 308, where it is said: "The judgment thereon, deciding his motion, was notice to him that he was before the court, and afforded him opportunity to present such valid or other defense as he might have had."

18. Blair *v.* Flack, 62 Hun (N. Y.) 509,

property in goods taken on a fieri facias is not in defendant exonerates the sheriff from liability for a false return of *nulla bona* [19] unless it is shown that the sheriff did not act in good faith.[20] But the fact that a judgment debtor against whom an execution was issued held the property which had been levied on by an assignment fraudulent as to one of the assignors does not relieve the sheriff from liability for a false return on the execution, the other assignor having the right to convey.[21]

(VI) *PRIOR LIENS ON PROPERTY.* In an action against a sheriff for a false return on an execution, he may show, in mitigation of damages, that other executions in his hands would have taken the proceeds of a sale.[22]

(VII) *PROPERTY NOT SALABLE UNDER WRIT.* A sheriff who has sold property under an execution and received the money cannot return *nulla bona* and avoid liability on the ground that such property was not properly salable under the writ.[23]

(VIII) *BANKRUPTCY* [24] *OR INSOLVENCY* [25] *OF DEBTOR.* A sheriff who makes a false return on a writ of execution is not exonerated by the fact that the execution defendant was insolvent.[26] But it has been held that the poverty of a debtor may mitigate the damages in an action against the sheriff for a false return on a capias, that he had taken bail for the debtor's appearance.[27] So also where in an action by a creditor against a sheriff for falsely returning that he had served on the creditor a copy of the notification that a debtor intended to take the poor debtor's oath, it appears that the copy actually served was such that the creditor, if he had chosen, might have been present at the examination, the officer may show in mitigation of damages that the debtor had no attachable or visible property.[28] Where, however, a sheriff, having in his hands final process against the body of a debtor, neglects an opportunity to arrest him, and afterward the debtor absconds and the sheriff returns "*non est inventus*," he cannot show the insolvency of the debtor in mitigation of damages in an action for the false return.[29] In Canada a sheriff has been held liable for a return of *nulla bona* where during the time the execution was in his hands the debtor had goods on which he might have levied, although before the return the debtor's goods were seized under a commission in bankruptcy.[30]

(IX) *TRANSACTIONS SUBSEQUENT TO RETURN.* An execution plaintiff's cause of action for a false return accrues when the return is made and cannot be defeated by anything which has since taken place between plaintiff and another person.[31]

17 N. Y. Suppl. 64, holding that this may be done notwithstanding the sheriff's failure to demand indemnity from plaintiffs.

**Estoppel to set up lack of title.**— In an action against the sheriff for falsely returning *nulla bona* on an execution, he is not precluded from setting up as a defense that the goods did not belong to the execution defendant, because of the fact that he had seized part of the property as owned by defendant in the attachment, and had made and filed a return in due form of law, stating that he had so attached the property and taken an inventory thereof as the property of defendant (Buffalo Third Nat. Bank *v.* Elliott, 42 Hun (N. Y.) 121 [*affirmed* in 114 N. Y. 622, 21 N. E. 416]), or because of the fact that he had previously sold the property on a prior execution against defendant, and paid over the surplus moneys to the purchaser at the sale, who claimed the property also by virtue of a bill of sale from defendant (Blivin *v.* Bleakley, 23 How. Pr. (N. Y.) 124).

19. Bayley *v.* Bates, 8 Johns. (N. Y.) 185.

20. Bayley *v.* Bates, 8 Johns. (N. Y.) 185.

21. Colwell *v.* Bleakley, 1 Abb. Dec. (N. Y.) 400.

22. Forsyth *v.* Dickson, 1 Grant (Pa.) 26.

23. Hewitt *v.* Corbett, 15 U. C. Q. B. 39.

24. **Bankruptcy** generally see BANKRUPTCY, 5 Cyc. 227.

25. **Insolvency** generally see INSOLVENCY, 22 Cyc. 1249.

26. Stevens *v.* Beckes, 3 Blackf. (Ind.) 88; State *v.* Case, 77 Mo. 247.

27. Weld *v.* Bartlett, 10 Mass. 470, holding that it might be shown in mitigation of damages that the debtor was in extreme sickness and poverty, and that having recovered his health he did not conceal himself.

28. Woods *v.* Varnum, 21 Pick.(Mass.) 165.

29. Goodrich *v.* Starr, 18 Vt. 227.

30. Decatur *v.* Jarvis, 3 U. C. Q. B. 133.

**Under the United States Bankruptcy Act** by which the filing of a petition in bankruptcy dissolves judgment and execution liens having their inception within the preceding four months the rule would probably be held otherwise. See BANKRUPTCY, 5 Cyc. 365.

31. Wordall *v.* Smith, 1 Campb. 332 [*fol-*

(x) *Arrangements Between Parties.* Where, after a levy under execution, a compromise is effected between the parties, the sheriff cannot be held liable for a subsequent return of *nulla bona*, although defendant did not pay according to his agreement.[32]

(xi) *Order For Publication of Summons.* The fact that in the regular course of practice an order of publication intervened between an officer's false return of *non est* to a summons and judgment by default will not shield the officer from liability for the false return.[33]

(xii) *Omission to Demand Bail-Bond.* A sheriff's liability for falsely returning that he had taken bail is not discharged by the creditor's omitting to demand the bail-bond within a year after he has recovered judgment.[34]

(xiii) *Failure of Bail to Surrender Principal.* The failure of sureties on a bail-bond to surrender their principal in accordance with the provisions of the statute after action begun on the bond and before answer, when such surrender was advised by the sheriff, and the sureties were able to make it, may be pleaded by the sheriff in mitigation of damages in an action on the sureties' claim for damages sustained by reason of the sheriff's false return to an execution issued against the person of the principal.[35]

(xiv) *Simultaneous Executions.* Where there is statutory authority for the issuance of an execution to a county other than that in which the judgment was rendered, the issuance of two executions to different counties on the same day affords no defense to an officer who has made a false return on one of such executions.[36]

(xv) *Improper Direction of Writ.* Where an indifferent person, who was not authorized to serve a writ of attachment for want of a legal direction, made service in fact, his acting under the writ did not preclude him, in an action against him for a false return, from denying that the writ was legally directed to him.[37]

(xvi) *Receipt of Amount Returned.* Where a sheriff returns on an execution that part of the debt has been made and that the debtor has no goods which can be levied on for the remainder, the creditor does not waive his right of action for a false return by accepting the amount collected.[38]

(xvii) *False Representations of Creditor.* A subsequent attaching creditor is not estopped from maintaining an action against a sheriff for a false return of the sale of an equity of redemption on execution, by a representation, made by such creditor when acting as an auctioneer, that the land was under no encumbrance but the mortgage.[39]

**g. Extent of Liability.** A sheriff who makes a false return on an execution is *prima facie* liable for the amount thereof;[40] but he may reduce his liability by showing that the loss resulting from the false return was less than that amount,[41] so that the real measure of damages is the injury suffered by the complaining party.[42]

*lowed* in Aitkin *v.* Moody, 13 U. C. Q. B. 169], holding that an action lies against the sheriff for a false return to a fieri facias, notwithstanding plaintiff, before commencing the suit, has charged the original defendant in execution.

**An amendment of the return,** by leave of court, by striking out the false statement, does not relieve the sheriff of liability. State *v.* Case, 77 Mo. 247.

32. Everarghim *v.* Leonard, 3 U. C. Q. B. O. S. 121.

33. State *v.* Finn, 87 Mo. 310.

34. Caesar *v.* Bradford, 13 Mass. 169.

35. Privridi *v.* O'Brien, 46 Misc. (N. Y.) 56, 91 N. Y. Suppl. 324.

36. People *v.* Finch, 19 Colo. App. 512, 76 Pac. 1120.

37. Case *v.* Humphrey, 6 Conn. 130.

38. Dunnaway *v.* Collier, 2 Heisk. (Tenn.) 10 [*disapproving* Trigg *v.* McDonald, 2 Humphr. (Tenn.) 386]; Holmes *v.* Clifton, 10 A. & E. 673, 8 L. J. Q. B. 247, 2 P. & D. 556, 4 P. & D. 112, 37 E. C. L. 357 [*disapproving* Beynon *v.* Garrat, 1 C. & P. 154, 12 E. C. L. 99].

39. Whitaker *v.* Sumner, 7 Pick. (Mass.) 551, 19 Am. Dec. 298.

40. Bacon *v.* Cropsey, 7 N. Y. 195; Forsyth *v.* Dickson, 1 Grant (Pa.) 26; Goodrich *v.* Starr, 18 Vt. 227.

**Sheriff cannot show that amount indorsed on execution was not due on judgment.**—Bacon *v.* Cropsey, 7 N. Y. 195.

41. Norton *v.* Valentine, 15 Me. 36.

42. Thayer *v.* Roberts, 44 Me. 247.

Where a deputy sheriff, having a writ of attachment against a person who had removed out of his precinct, falsely returned that he had left a summons at his last and usual place of abode, being the place of his late residence, and the judgment went by default, defendant having no notice of the suit, it was held that the officer was not liable for the cost of an application for a review of the original judgment,[43] or for the amount of such judgment until it had been proved erroneous by the successful termination of the proceedings to review it,[44] but if the debt should prove to be due the officer might be liable for the amount of the original costs.[45] Where a litigant is prejudiced by a false return of the sheriff, but discovers the error in time to avoid such damages as would arise from proceeding further, the sheriff cannot be held liable for the consequences of the litigant so proceeding unless he assented thereto.[46] Where a sheriff makes a false return of personal service in an action on a special tax bill, by reason of which defendant's property is sold, the measure of damages is the reasonable value of the land when sold.[47]

**K. Other Liabilities — 1. Assault.**[48] A sheriff or constable is liable for an assault where in performing his duties he uses unnecessary force and a person is thereby injured.[49] So where a sheriff had arrested one by mistake for another, and under the mistake shot at him, when escaping, he was liable if he could, with due care and diligence, have ascertained his mistake before shooting.[50]

**2. Injury to Convict.**[51] A sheriff is not liable for an injury to a convict occurring while the latter is in the custody of a county convict contractor.[52]

**3. Ill-Treatment of Prisoner.**[53] Any cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering, while in the custody of the officer arresting him, is unlawful, and the officer is liable therefor.[54]

**4. Wrongful Arrest.**[55] Where a constable arrests defendant immediately on receiving an execution, without searching or inquiring for property, he does so at his peril;[58] and if it is shown that defendant had property in his open and visible possession, which was subject to execution and might with reasonable diligence have been found, he will be liable for making the arrest.[57] So also where an officer, without a warrant and because of personal anger, arrests a person for a breach of the peace, and fails to sustain the charge, he is liable in damages to the person arrested.[58] But where a defendant's christian name is erroneously stated in process against him, but such process is served upon the person intended and he does not plead the misnomer in abatement, but suffers judgment by default,

43. Waterhouse *v.* Gibson, 4 Me. 234.

44. Waterhouse *v.* Gibson, 4 Me. 234.

45. Waterhouse *v.* Gibson, 4 Me. 234.

46. Wright *v.* Keith, 24 Me. 158 (holding that where a sheriff has, by mistake, made a false return in certifying that he had left with plaintiff a true copy of a notice to appear and submit to an examination, etc., that he might thereby prevent the issuing of an execution against his body, when in fact there was an error in the copy, but the mistake was known to plaintiff in season to have avoided any inconvenience thereby at a trifling expense, he was entitled to recover only such sums as would have fully compensated him for any inconvenience in ascertaining the truth, and not damages for the injury sustained by him in being arrested and imprisoned on the execution); Prosser *v.* Coots, 50 Mich. 262, 15 N. W. 448.

47. State *v.* Finn, 13 Mo. App. 285.

48. Assault generally see Assault and Battery, 4 Cyc. 1014.

49. Towle *v.* Matheus, 130 Cal. 574, 69 Pac. 1064; Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423. See also Head *v.* Martin, 85 Ky. 480, 3 S. W. 622, 9 Ky. L. Rep. 45, where a person who had been arrested on a charge of bastardy was killed by the officer while he was attempting to escape.

50. Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577.

51. Convicts generally see Convicts, 9 Cyc. 869.

52. State *v.* Basham, 77 Miss. 688, 27 So. 996, holding that this is true, although the convict contractor has not given the bond required by statute.

53. Prisoners generally see Convicts, 9 Cyc. 869; Prisons, 32 Cyc. 312.

54. Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344.

55. See, generally, Arrest, 3 Cyc. 867.

56. Hollister *v.* Johnson, 4 Wend. (N. Y.) 639.

57. Hollister *v.* Johnson, 4 Wend. (N. Y.) 639.

58. Smith *v.* Dulion, 113 La. 882, 37 So. 864.

he cannot hold the officer liable for arresting him under final process in which the misnomer also appears.[59]

**5. False Imprisonment.**[60] Where a constable arrested a debtor under an execution, and also on the same day seized certain goods, chattels, and wearing apparel of the debtor, but wholly neglected to render an account of the moneys arising from the sale of such goods, or to indorse them as a credit on the execution, by reason whereof the debtor was kept in jail until he paid the whole of the debt, interest, and costs, without any credit for the goods, the officer was liable to the debtor for the injury.[61]

**6. Seizure and Detention of Property on Making Arrest For Larceny.** An officer upon arresting a person charged with larceny has no right to take from him property other than that alleged to have been stolen, and if he does so is liable in damages.[62] And although an officer on serving a warrant for larceny may lawfully take from defendant goods alleged to have been stolen, he is liable for conversion if he refuses to return the same upon defendant being discharged.[63]

**7. Escape**[64] **— a. In General.** As a general rule a sheriff who has a prisoner in his custody[65] is liable for the damage resulting from an escape of such prisoner.[66]

59. Trull *v.* Howland, 10 Cush. (Mass.) 109, 57 Am. Dec. 82.

60. See, generally, False Imprisonment, 19 Cyc. 316.

61. Mershon *v.* McCullough, 3 N. J. L. 416.

62. King *v.* Ham, 6 Allen (Mass.) 298.

**Measure of damages.**— Where an officer upon arresting a person charged with larceny took from him a promissory note, which was not the property alleged to have been stolen, and refused to give it up on demand and retained possession of it for two years after the person arrested had been convicted, and the maker of the note became insolvent before the officer offered to return it, the officer was liable for the value of the note at the time of the conversion and interest thereafter. King *v.* Ham, 6 Allen (Mass.) 298.

63. Fitzgerald *v.* Jordan, 11 Allen (Mass.) 128, holding that the officer was not excused from liability by reason of the fact that the complainant in the criminal process had obtained judgment against him upon his default for conversion of the property, and taken it away from him on execution, such complainant not being in fact the owner of the property.

64. **Criminal liability for escape** see Escape, 16 Cyc. 537.

65. See Barth *v.* Clise, 12 Wall. (U. S.) 400, 20 L. ed. 393.

**Where a sheriff refused to receive a judgment debtor** arrested under a body execution, when brought to him for imprisonment in the county jail, and the prisoner was never legally in the sheriff's custody, the latter was not liable for such refusal in an action for an escape. Saffier *v.* Dike, 82 N. Y. App. Div. 485, 81 N. Y. Suppl. 593.

**A prisoner brought up on habeas corpus** is in the custody of the court, and the sheriff is not liable for his escape before a remand or other order placing new duties on him. Barth *v.* Clise, 12 Wall. (U. S.) 400, 20 L. ed. 393.

66. *Alabama.*— Pugh *v.* McRae, 2 Ala. 393.

*Connecticut.*— Hart *v.* Stevenson, 25 Conn. 499.

*Georgia.*—Abbott *v.* Holland, 20 Ga. 598.

*Illinois.*— Pease *v.* Hubbard, 37 Ill. 257; Brother *v.* Cannon, 2 Ill. 200.

*Indiana.*— State *v.* Mullen, 50 Ind. 598; McGruder *v.* Russell, 2 Blackf. 18.

*Maryland.*— Koones *v.* Maddox, 2 Harr. & G. 106.

*Massachusetts.*— Griffin *v.* Brown, 2 Pick. 304; Colby *v.* Sampson, 5 Mass. 310.

*Michigan.*— People *v.* Gebhardt, 154 Mich. 504, 118 N. W. 16.

*Missouri.*— Warberton *v.* Wood, 6 Mo. 8.

*New Jersey.*—Richardson *v.* Rittenhouse, 40 N. J. L. 230.

*New York.*— Metcalf *v.* Stryker, 31 N. Y. 255 [*affirming* 31 Barb. 62]; Smith *v.* Knapp, 30 N. Y. 581; Hutchinson *v.* Brand, 9 N. Y. 208; Latham *v.* Westervelt, 26 Barb. 256; Latham *v.* Westervelt, 16 Barb. 421; McCreery *v.* Willett, 4 Bosw. 643; Cosgrove *v.* Bowe, 10 Daly 353, 2 N. Y. Civ. Proc. 61; Levy *v.* Melody, 50 Misc. 509, 99 N. Y. Suppl. 153; Brown *v.* Littlefield, 1 Wend. 398; Armstrong *v.* Garrow, 6 Cow. 465; Jones *v.* Cook, 1 Cow. 309; Palmer *v.* Hatch, 9 Johns. 329; Van Slyck *v.* Taylor, 9 Johns. 146; Dash *v.* Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; Russell *v.* Turner, 7 Johns. 189, 5 Am. Dec. 254; Olmstead *v.* Raymond, 6 Johns. 62; Rawson *v.* Turner, 4 Johns. 469.

*North Carolina.*—Winborne *v.* Mitchell, 111 N. C. 13, 15 S. E. 882; Mabry *v.* Turrentine, 30 N. C. 201.

*Pennsylvania.*— Wheeler *v.* Hambright, 9 Serg. & R. 390; Blue *v.* Commonwealth, 4 Watts 215; Shewel *v.* Fell, 4 Yeates 47; Saunders *v.* Keim, 4 Pa. Co. Ct. 572 [*reversed* on other grounds in 120 Pa. St. 121, 13 Atl. 710].

*Rhode Island.*— Carpenter *v.* Fifield, 14 R. I. 73.

*South Carolina.*— Cook *v.* Irving, 4 Strobh. 204.

*Tennessee.*—Williamson *v.* Webb, 2 Humphr. 133; Love *v.* McAlister, 4 Hayw. 65.

And it is not essential to the maintenance of an action against an officer for the escape of a prisoner arrested on mesne process that a demand should be made upon him for the body of defendant on final process in the original action,[87] or that he should have written notice that such final process is in the hands of an officer for service.[88]

**b. Matters Affecting Liability**—(i) *VALIDITY AND REGULARITY OF PROCESS.* A sheriff is not relieved from liability for an escape by the fact that the process on which the prisoner was arrested was irregular and voidable;[89] but he is not liable for an escape where the process on which the prisoner was arrested was void[70] or insufficient to authorize the arrest.[71]

(ii) *POVERTY OR INSOLVENCY*[72] *OF DEBTOR.* In an action against a sheriff for an escape, the poverty or insolvency of the debtor may be shown in mitigation of damages;[73] but it is not available as a bar to the action.[74]

(iii) *RELINQUISHMENT OF SECURITY.* Where a plaintiff, having obtained security from defendant for his debt, relinquishes it, after knowledge of an escape, the sheriff may avail himself of such fact in mitigation of damages, in an action against him for the escape.[75]

(iv) *PRIVILEGE FROM ARREST.* Where the person arrested is absolutely privileged from arrest[76] the officer incurs no liability by allowing him to escape;[77] but where the privilege is temporary and limited,[78] the sheriff is liable for an escape if, upon his own responsibility, he releases the prisoner.[79]

(v) *WAIVER OF RIGHT OF ACTION.* Where, after the sheriff has become liable for an escape by taking an insufficient bond from a prisoner in contempt, the prosecutor takes an assignment of the bond after breach of its condition, and also takes an order for a further attachment, but fails to issue such further attachment, and the prisoner is surrendered by his bail, the prosecutor's right of action against the sheriff for the escape is waived.[80]

*United States.*— Mewster *v.* Spalding, 17 Fed. Cas. No. 9,513, 6 McLean 24; Spafford *v.* Goodell, 22 Fed. Cas. No. 13,197, 3 McLean 97.

*Canada.*— Burnham *v.* Hall, 44 U. C. Q. B. 297.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 142, 164; and PRISONS, 32 Cyc. 339.

**Where a new sheriff receives a prisoner from his predecessor** he is bound to detain him and is answerable for his escape, although a voluntary escape may have existed in the time of the predecessor. Rawson *v.* Turner, 4 Johns. (N. Y.) 469 [*following* Grant *v.* Southers, 6 Mod. 183, 87 Eng. Reprint 938; James *v.* Pierce, 2 Lev. 132, 83 Eng. Reprint 484, 1 Vent. 269, 86 Eng. Reprint 180; Lenthal *v.* Lenthal, 2 Lev. 109, 83 Eng. Reprint 473], holding, however, that if plaintiff elects to sue the old sheriff for the escape and recovers judgment, this bars any action against the new sheriff for a fresh escape.

67. Hart *v.* Stevenson, 25 Conn. 499.

68. Hart *v.* Stevenson, 25 Conn. 499.

69. Woodruff *v.* Barrett, 15 N. J. L. 40; Ginochio *v.* Orser, 1 Abb. Pr. (N. Y.) 433; Jones *v.* Cook, 1 Cow. (N. Y.) 309. And see PRISONS, 32 Cyc. 335.

70. Tuttle *v.* Wilson, 24 Ill. 553; Jones *v.* Cook, 1 Cow. (N. Y.) 309. And see PRISONS, 32 Cyc. 335.

71. Governor *v.* Stribling, 2 Blackf. (Ind.) 24; Hitchcock *v.* Baker, 2 Allen (Mass.) 431; Lutterloh *v.* Powell, 2 N. C. 395.

72. **Insolvency** generally see INSOLVENCY, 22 Cyc. 1249.

73. Metcalf *v.* Stryker, 31 N. Y. 255 [*affirming* 31 Barb. 62]; Smith *v.* Knapp, 30 N. Y. 581 (escape on mesne process); Potter *v.* Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; Boyce *v.* Barksdale, 4 McCord (S. C.) 141; State Treasurer *v.* Weeks, 4 Vt. 215. And see PRISONS, 32 Cyc. 346 note 69 *et seq.*

**In Indiana,** it has been laid down as the rule that in case of a voluntary escape the sheriff is liable for the whole amount of the judgment whether the prisoner is solvent or insolvent; but where the escape is merely negligent, the officer, while *prima facie* liable for the amount of the judgment, may show in mitigation of damages that the prisoner had no property or means with which he could have paid or secured the debt in whole or in part, and that he could not procure the same to be replevied. State *v.* Mullen, 50 Ind. 598 [*following* State *v.* Hamilton, 33 Ind. 502]. See also Lakin *v.* State, 89 Ind. 68.

74. Barnes *v.* Willett, 35 Barb. (N. Y.) 514.

75. Russell *v.* Turner, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254.

76. See ARREST, 3 Cyc. 921.

77. Green *v.* Edson, 2 N. H. 293; Ray *v.* Hogeboom, 11 Johns. (N. Y.) 433.

78. See ATTORNEY AND CLIENT, 4 Cyc. 918.

79. Willard *v.* Sperry, 1 Wend. (N. Y.) 32; Secor *v.* Bell, 18 Johns. (N. Y.) 52.

80. Morton *v.* Campbell, 14 Abb. Pr. (N. Y.) 410.

**c. Extent of Liability.** A sheriff who allows a prisoner arrested on mesne process to escape is *prima facie* liable for the entire debt,[81] but may reduce his liability by showing that the creditor was not injured to that extent,[82] by reason of the fact that the debt could not have been made out of the debtor,[83] thus making the actual loss the real measure of damages.[84] And according to some authorities the same rule applies in case of an escape of a prisoner arrested on final process.[85] But other authorities hold that where a debtor is arrested on final process his escape renders the sheriff absolutely liable for the debt.[86]

**8. Injuries by Mobs or Rioters.** A sheriff cannot be held liable for injuries to persons or property suffered through the violence of mobs, riots, or insurrections,[87] where his failure to prevent the injury was due to physical inability to cope with the force confronting him.[88] But he is liable if, having the force at hand to prevent the injury, he stands idle and permits it.[89]

**9. Furnishing Erroneous Information.** Where a surety in a poor debtor's bond, before the condition had expired, applied to the sheriff for information as to its date, and the officer stated to him a time later than its true one, the surety could maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive.[90]

**10. Neglect to Record Assignment.** Where a deed of assignment of an insolvent person, executed in pursuance of the assignment laws, in favor of the sheriff as assignee, is rendered void because of the latter's failure to have the same filed and recorded within the time required by law, and by reason thereof the property of the insolvent is lost to the general creditors, the sheriff is liable to such creditors;[91] and it is not a prerequisite to the maintenance of an action by a creditor who has thus suffered loss that he should have his claim against the insolvent filed with and approved by the county court.[92]

**L. Protection Afforded by Process, Judgment, or Order of Court — 1. Rule of Protection — a. In General.** It is well established as a general rule that the process, judgment, or order of a court affords complete protection to a sheriff or constable from liability for any proper or necessary act done in its execution.[93]

81. Faulkner *v.* State, 6 Ark. 150; Latham *v.* Westervelt, 26 Barb. (N. Y.) 256; Sheldon *v.* Upham, 14 R. I. 493.

82. Sheldon *v.* Upham, 14 R. I. 493; Duryee *v.* Webb, 8 Fed. Cas. No. 4,198, 16 Conn. 558 note.

83. Faulkner *v.* State, 6 Ark. 150; Latham *v.* Westervelt, 26 Barb. (N. Y.) 256.

84. Daguerre *v.* Orser, 15 Abb. Pr. (N. Y.) 113; Russell *v.* Turner, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; Sheldon *v.* Upham, 14 R. I. 493; Blanding *v.* Rogers, 2 Brev. (S. C.) 394, 4 Am. Dec. 595.

85. Perkins *v.* Giles, 9 Leigh (Va.) 397, 33 Am. Dec. 249. See also Slocum *v.* Riley, 145 Mass. 370, 14 N. E. 174.

86. Latham *v.* Westervelt, 26 Barb. (N. Y.) 256; Shewel *v.* Fell, 4 Yeates (Pa.) 47, 3 Yeates 17.

87. State *v.* Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628 (holding that, in the absence of malicious intent, a sheriff is not liable for the acts of a mob in taking a prisoner charged with murder from the county jail wherein he had been confined, and lynching him, although such jail was insecure, and the guard had been removed therefrom, and the keys given to an old and infirm negro, and the sheriff had knowledge of the existence of public excitement, and had been requested by the prisoner and his counsel to remove him to a more secure jail, and although the sheriff was present and offered no resistance); South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433. See also Entick *v.* Carrington, 19 How. St. Tr. 1029.

88. State *v.* Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628.

89. State *v.* Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628. See also Asher *v.* Cabell, 50 Fed. 818, 1 C. C. A. 693.

90. Moulton *v.* Jose, 25 Me. 76.

91. Huddleson *v.* Polk, 70 Nebr. 492, 102 N. W. 464, 70 Nebr. 489, 100 N. W. 802, 70 Nebr. 483, 97 N. W. 624.

92. Huddleson *v.* Polk, 70 Nebr. 492, 102 N. W. 464, 70 Nebr. 489, 100 N. W. 802, 70 Nebr. 483, 97 N. W. 624.

93. *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Murphy *v.* State, 55 Ala. 252; Kirksey *v.* Dubose, 19 Ala. 43; Payne *v.* Governor, 18 Ala. 320; Averett *v.* Thompson, 15 Ala. 678; Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Dec. 140; Governor *v.* Gibson, 14 Ala. 326; Smith *v.* Leavitts, 10 Ala. 92; Fortner *v.* Flannagan, 3 Port. 257; Wright *v.* Spencer, 1 Stew. 576, 18 Am. Dec. 76; Bender *v.* Graham, Minor 269.

**b. Protection of Deputies.** A deputy sheriff or constable executing process is

*Arkansas.*— Huddleston *v.* Spear, 8 Ark. 406.

*California.*— Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316; Norcross *v.* Nunan, 61 Cal. 640; McCullough *v.* Clark, 41 Cal. 298; Buffandeau *v.* Edmondson, 17 Cal. 436, 79 Am. Dec. 139; Taylor *v.* Brown, 4 Cal. 188, 60 Am. Dec. 604; McRae *v.* Lackmann, 8 Cal. App. 241, 96 Pac. 505.

*Colorado.*— Archibald *v.* Thompson, 2 Colo. 388.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24; Toby *v.* Reed, 9 Conn. 216; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Delaware.*— Prettyman *v.* Dean, 2 Harr. 494.

*Florida.*— Camp *v.* Moseley, 2 Fla. 171.

*Georgia.*— Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856; Haslett *v.* Rodgers, 107 Ga. 239, 33 S. E. 44; Rounsaville *v.* McGinnis, 93 Ga. 579, 21 S. E. 123; Johnson *v.* Fox, 51 Ga. 270; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518

*Idaho.*— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310; Blumaur-Frank Drug Co. *v.* Branstetter, 4 Ida. 557, 43 Pac. 575, 95 Am. St. Rep. 151.

*Illinois.*— Johnson *v.* Holloway, 82 Ill. 334; Outhouse *v.* Allen, 72 Ill. 529; Booth *v.* Rees, 26 Ill. 45; Tuttle *v.* Wilson, 24 Ill. 553 [*followed* in Housh *v.* People, 75 Ill. 487]; McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Barnes *v.* Barber, 6 Ill. 401 [*followed* in Parker *v.* Smith, 6 Ill. 411]; Lattin *v.* Smith, 1 Ill. 361; Magerstadt *v.* People, 105 Ill. App. 316; Gilbert *v.* Buffalo Bill's Wild West Co., 70 Ill. App. 326; McGillis *v.* Bishop, 27 Ill. App. 53.

*Indiana.*— Hartlep *v.* Cole, 101 Ind. 458; Thurston *v.* Boardman, Wils. 433; State *v.* King, 30 Ind. App. 389, 66 N. E. 85; Thompson *v.* State, 3 Ind. App. 371, 28 N. E. 996.

*Iowa.*— Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. 328; Henke *v.* McCord, 55 Iowa 378, 7 N. E. 623; Webster *v.* Reid, Morr. 467.

*Kansas.*— Allen *v.* Corlew, 10 Kan. 70; Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

*Kentucky.*— Pepper *v.* Mayes, 81 Ky. 673; Clay *v.* Sandefer, 12 B. Mon. 334; Hunt *v.* Ballew, 9 B. Mon. 390; Kleissendorff *v.* Fore, 3 B. Mon. 471; Percefull *v.* Com., 3 B. Mon. 347; Ringo *v.* Ward, 2 B. Mon. 127; Ashcraft *v.* Elliott, 38 S. W. 1062, 18 Ky. L. Rep. 934.

*Louisiana.*— Crusel *v.* Brooks, 121 La. 243, 46 So. 224; Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122; Rau *v.* Katz, 26 La. Ann. 463; Brainard *v.* Head, 15 La. Ann. 489; Flournoy *v.* Milling, 15 La. Ann. 473; Ellmore *v.* Hufty, 13 La. Ann. 227; Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294; Clavarie *v.* Waggaman, McGloin 35.

*Maine.*— Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; Lashus *v.* Matthews, 75 Me. 446; Gray *v.* Kimball, 42 Me. 299; Wilton Mfg. Co. *v.* Butler, 34 Me. 431; Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309.

*Maryland.*— State *v.* Timmons, 90 Md. 10; Thomson *v.* Baltimore, etc., Co., 33 Md. 312.

*Massachusetts.*— Goldis *v.* Gately, 168 Mass. 300, 47 N. E. 96; O'Shaughnessy *v.* Baxter, 121 Mass. 515; Bergin *v.* Hayward, 102 Mass. 414; Whipple *v.* Kent, 2 Gray 410, 61 Am. Dec. 470; Twitchell *v.* Shaw, 10 Cush. 46, 57 Am. Dec. 80; Hoit *v.* Hook, 14 Mass. 210; Pearce *v.* Atwood, 13 Mass. 324; Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Nichols *v.* Thomas, 4 Mass. 232.

*Michigan.*— O'Meara *v.* Merritt, 128 Mich. 249, 87 N. W. 197; Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051; Dunn *v.* Gilman, 34 Mich. 256; Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185; Ortman *v.* Greenman, 4 Mich. 291.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Hill *v.* Raiscot, 34 Minn. 270, 25 N. W. 604; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704; Orr *v.* Box, 22 Minn. 485; Clark *v.* Norton, 6 Minn. 412.

*Missouri.*— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; Howard *v.* Clark, 43 Mo. 344; Higdon *v.* Conway, 12 Mo. 295; Milburn *v.* Gilman, 11 Mo. 64; Brown *v.* Henderson, 1 Mo. 134; State *v.* Smith, 81 Mo. App. 671.

*Nebraska.*— Philips *v.* Spotts, 14 Nebr. 139, 15 N. W. 332.

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548.

*New Hampshire.*— York *v.* Sanborn, 47 N. H. 403; Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

*New Jersey.*— Mangold *v.* Thorpe, 33 N. J.L. 134.

*New Mexico.*—Archibeque *v.* Miera, 1 N. M. 419.

*New York.*— Day *v.* Bach, 87 N. Y. 56 [*affirming* 46 N. Y. Super. Ct. 460]; Hill *v.* Haynes, 54 N. Y. 153; Bullis *v.* Montgomery, 50 N. Y. 352; Acker *v.* Ledyard, 8 N. Y. 62 [*reversing* 8 Barb. 514]; Bacon *v.* Cropsey, 7 N. Y. 195; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Seward *v.* Wales, 40 N. Y. App. Div. 539, 58 N. Y. Suppl. 42 [*affirmed* in 167 N. Y. 538, 60 N. E. 1120]; Bodine *v.* Thurwachter, 34 Hun 6; Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406]; Bovee *v.* King, 11 Hun 250 [*affirmed* in 75 N. Y. 609]; Pinckney *v.* Hagerman, 4 Lans. 374; Shaw *v.* Davis, 55 Barb. 389; Smith *v.* Orser, 43 Barb. 187 [*affirmed* in 42 N. Y. 132]; Dominick *v.* Eacker, 3 Barb. 17; Fulton *v.* Heaton, 1 Barb. 552; People *v.* Brennan, 6 Thomps. & C. 120; Barron *v.* Boyd, 1 Thomps. & C. 457; Heath *v.* Westervelt, 2 Sandf. 110; Farrington *v.* Root, 10 Misc. 347, 21 N. Y. Suppl. 126, 24 N. Y. Civ. Proc. 196, 31 N. Y. Suppl. 126; Piepgras *v.* Edmunds, 5 Misc. 314, 25 N. Y. Suppl. 961 [*affirmed* in 26 N. Y. Suppl. 1134]; American Hosiery Co. *v.* Riley, 12 Abb. N. Cas. 329; Sheldon *v.* Stryker, 21 How. Pr. 329; People *v.* Warren, 5 Hill 440; Noble *v.* Holmes, 5 Hill 194; Webber *v.* Gay, 24 Wend. 485; Earl *v.* Camp, 16 Wend. 562;

entitled to the same protection in respect to his acts in connection therewith as would be afforded his principal.[94]

**c. Protection of Coroner Acting as Sheriff.**[95] A coroner performing the duties of sheriff is entitled to the same protection in the execution of apparently valid process as would be accorded the sheriff.[96]

**d. Protection to Persons Assisting Officer.** Persons aiding an officer in the execution of apparently valid process are protected from liability, even though the process was in fact invalid, where they have acted in good faith under the command of the officer.[97] But if they were mere volunteers in the service or acted

Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181; Suydam *v.* Keys, 13 Johns. 444; Warner *v.* Shed, 10 Johns. 138; Jenner *v.* Joliffe, 9 Johns. 381; Beach *v.* Furman, 9 Johns. 229; Cantillon *v.* Graves, 8 Johns. 472; Bealls *v.* Guernsey, 8 Johns. 52.

*North Carolina.*— O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126; State *v.* Ferguson, 67 N. C. 219; Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75; Stewart *v.* Ray, 26 N. C. 269; Farley *v.* Lea, 20 N. C. 307, 32 Am. Dec. 680. See also McNamara *v.* Kerns, 24 N. C. 66.

*Ohio.*— Henline *v.* Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736; Champaign County Bank *v.* Smith, 7 Ohio St. 42.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776; White *v.* Thompson, 3 Oreg. 115.

*Pennsylvania.*— Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456, 30 Atl. 212; Breckwoldt *v.* Morris, 149 Pa. St. 291, 24 Atl. 300; Barr *v.* Boyles, 96 Pa. St. 31; Zacharias *v.* Totton, 90 Pa. St. 286; Leonard *v.* Dillon, 76 Pa. St. 44; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Hutton *v.* Blaine, 2 Serg. & R. 75; Paul *v.* Vankirk, 6 Binn. 123; Com. *v.* Rogers, 4 Pa. L. J. Rep. 252.

*Rhode Island.*— Curry *v.* Johnson, 13 R. I. 121; Humes *v.* Taber, 1 R. I. 464.

*South Carolina.*— Brown *v.* Thompson, 19 S. C. 572; Thrower *v.* Vaughan, 1 Rich. 18; Foster *v.* Gault, 2 McMull. 335; Brown *v.* Wood, 1 Bailey 457; Swanzy *v.* Hunt, 2 Nott & M. 211; Treasurer *v.* Ford, 1 Nott & M. 234.

*South Dakota.*— Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144; Crockett *v.* Latimer, 1 Humphr. 272.

*Texas.*— Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167; Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; Tierney *v.* Frazier, 57 Tex. 437; Wettermark *v.* Campbell, (Civ. App. 1900) 57 S. W. 904.

*Utah.*— Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743; Hammer *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

*Vermont.*— Casselini *v.* Booth, 77 Vt. 255, 59 Atl. 833; Luce *v.* Hoisington, 54 Vt. 428; Brown *v.* Mason, 40 Vt. 157; Eaton *v.* Cooper, 29 Vt. 444; Peck *v.* Crane, 25 Vt. 146; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Churchill *v.* Churchill, 12 Vt. 661; Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487; Childs *v.* Morse, 2 Tyler 221.

*Virginia.*— Price *v.* Holland, 1 Patt. & H. 289.

*Washington.*— Mack *v.* Doak, 50 Wash. 119, 96 Pac. 825.

*Wisconsin.*— Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105; Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101; McLean *v.* Cook, 23 Wis. 364; Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334; James *v.* Van Duyn, 45 Wis. 512]; Young *v.* Wise, 7 Wis. 128; Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

*United States.*— Matthews *v.* Densmore, 109 U. S. 216, 3 S. Ct. 126, 27 L. ed. 912 [*followed* in Marks *v.* Shoup, 181 U. S. 562, 21 S. Ct. 724, 45 L. ed. 1002]; Conner *v.* Long, 104 U. S. 228, 26 L. ed. 723; O'Brien *v.* Weld, 92 U. S. 81, 23 L. ed. 675; Erskine *v.* Hohnback, 14 Wall. 613, 20 L. ed. 745; Norris *v.* McCanna, 29 Fed. 757; Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst. 34.

*England.*— Cheasley *v.* Barnes, 10 East 73, 103 Eng. Reprint 703; Philips *v.* Biron, Str. 509, 93 Eng. Reprint 667; Parsons *v.* Lloyd, W. Bl. 845, 96 Eng. Reprint 498. See also Brunswick *v.* Slowman, 8 C. B. 317, 18 L. J. C. P. 299, 65 E. C. L. 317.

*Canada.*— Crowl *v.* Adams, 21 Can. Sup. Ct. 342; McLean *v.* Bradley, 2 Can. Sup. Ct. 535; Beemer *v.* Inkster, 3 Manitoba 534; Reg. *v.* O'Leary, 16 N. Brunsw. 264; Seaman *v.* De Wolf, 1 Nova Scotia 193. See also McGilvray *v.* Gibbons, 2 Nova Scotia 152.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**94.** Taylor *v.* Brown, 4 Cal. 188, 60 Am. Dec. 604; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; State *v.* Ferguson, 67 N. C. 219, deputy accompanying sheriff.

**95.** See *supra*, II, C, 11, b.

**96.** Manning *v.* Keenan, 73 N. Y. 45 [*affirming* 9 Hun 686].

**97.** *Delaware.*— Prettyman *v.* Dean, 2 Harr. 494.

*Georgia.*— Robinson *v.* State, 93 Ga. 77, 18 S. E. 1018, 44 Am. St. Rep. 127.

*Illinois.*— Page *v.* De Puy, 40 Ill. 506.

*Kansas.*— Allen *v.* Corlew, 10 Kan. 70.

*Kentucky.*— Hunt *v.* Bellew, 9 B. Mon. 390; Reed *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

*Mississippi.*— See Payne *v.* Green, 10 Sm. & M. 507.

*New York.*— Jennings *v.* Carter, 2 Wend. 446, 20 Am. Dec. 635; Patcher *v.* Sprague, 2 Johns. 462.

*North Carolina.*— State *v.* Ferguson, 67 N. C. 219.

officiously they must show a valid process in order to escape liability;[98] and if the process is void upon its face it furnishes no protection ven though the person aiding the officer did so at his command.[99]

**2. JURISDICTION OF COURT [1] — a. In General.** In order that the process, order, or judgment of a court should afford protection to the officer executing it, it is necessary that the court should have had jurisdiction of the matter in which it acted,[2]

*Ohio.*— Taylor *v.* Alexander, 6 Ohio 144.

*Canada.*— Seaman *v.* De Wolf, 1 Nova Scotia 193.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 144.

**Such person need not remain in the actual presence of the officer** in order to be protected in aiding him, if the two are in the same neighborhood and acting in concert, the officer giving orders and the other obeying. Robinson *v.* State, 93 Ga. 77, 18 S. E. 1018, 44 Am. St. Rep. 127.

**Property must be actually taken by the officer.**— A person cannot justify taking the property of a third person, as an assistant of a sheriff, unless the property is in fact taken by the officer under his process. It is no justification of such taking that the assistant supposed, from the conduct of the officer, that the property had been attached. Johnson *v.* Stone, 40 N. H. 197, 75 Am. Dec. 706.

**98.** Morrison *v.* Wright, 7 Port. (Ala.) 67; Hunt *v.* Ballew, 9 B. Mon. (Ky.) 390; Reed *v.* Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122. See also Osgood *v.* Carver, 43 Conn. 24.

**99.** McKinney *v.* Chambliss, 3 La. Ann. 577.

**Validity of process generally** see *infra*, V, L, 5.

**1.** See, generally, COURTS, 11 Cyc. 633.

**2.** *Alabama.*— Murphy *v.* State, 55 Ala. 252; Kirksey *v.* Dubose, 19 Ala. 43; Fortner *v.* Flanagan, 3 Port. 257.

*Arkansas.*— Huddleston *v.* Spear, 8 Ark. 406.

*California.*— Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316; Weaver *v.* Ward, 49 Cal. 297; Buffandean *v.* Edmonson, 17 Cal. 436, 79 Am. Dec. 139.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Florida.*— Camp *v.* Moseley, 2 Fla. 171.

*Georgia.*— Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856; Johnson *v.* Fox, 51 Ga. 270; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

*Idaho.*— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310.

*Illinois.*— Sample *v.* Broadwell, 87 Ill. 617; Tuttle *v.* Wilson, 24 Ill. 553 [*followed* in Housh *v.* People, 75 Ill. 487]; McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Barnes *v.* Barber, 6 Ill. 401 [*followed* in Parker *v.* Smith, 6 Ill. 411]; Lattin *v.* Smith, 1 Ill. 361; Boyden *v.* Frank, 20 Ill. App. 169.

*Indiana.*— Hartlep *v.* Cole, 101 Ind. 458.

*Iowa.*— Gates *v.* Neimeyer, 54 Iowa 110, 6 N. W. 150.

*Kansas.*— Allen *v.* Corlew, 10 Kan. 70; Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

*Kentucky.*— Pepper *v.* Mayes, 81 Ky. 673.

*Louisiana.*— Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122; Clavarie *v.* Waggaman, McGloin 35.

*Maine.*— Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; Gray *v.* Kimball, 42 Me. 299; Thurston *v.* Adams, 41 Me. 419.

*Massachusetts.*— Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Dwinnels *v.* Boynton, 3 Allen 310; Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381.

*Michigan.*— O'Meara *v.* Merritt, 128 Mich. 249, 87 N. W. 197; Dunn *v.* Gilman, 34 Mich. 256; Ortman *v.* Greenman, 4 Mich. 291.

*Minnesota.*— Clark *v.* Norton, 6 Minn. 412.

*Missouri.*— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; Howard *v.* Clark, 43 Mo. 344; Milburn *v.* Gilman, 11 Mo. 64; Brown *v.* Henderson, 1 Mo. 134.

*Nebraska.*— Philips *v.* Spotts, 14 Nebr. 139, 15 N. W. 332.

*New Jersey.*— Mangold *v.* Thorpe, 33 N. J. L. 134.

*New York.*— Shaw *v.* Davis, 55 Barb. 389; Fulton *v.* Heaton, 1 Barb. 552; Earl *v.* Camp, 16 Wend. 562; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181; Warner *v.* Shed, 10 Johns. 138; Beach *v.* Furman, 9 Johns. 229.

*North Carolina.*— O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126; State *v.* Ferguson, 67 N. C. 219; Cohoon *v.* Speed, 47 N. C. 133.

*Ohio.*— Henline *v.* Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.

*Pennsylvania.*— Hutton *v.* Blaine, 2 Serg. & R. 75.

*Rhode Island.*— Humes *v.* Taber, 1 R. I. 464.

*South Carolina.*— Swanzy *v.* Hunt, 2 Nott & M. 211.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144.

*Utah.*— Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743.

*Vermont.*— Driscoll *v.* Place, 44 Vt. 252; Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487.

*Virginia.*— Price *v.* Holland, 1 Patt. & H. 289.

*Wisconsin.*— Campbell *v.* Sherman, 35 Wis. 103; McLean *v.* Cook, 23 Wis. 364; Bogert *v.* Phelps, 14 Wis. 88; Weimberg *v.* Conover, 4 Wis. 803.

*Canada.*— Reg. *v.* O'Leary, 16 N. Brunsw. 264.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

and authority to issue the process under which the officer justifies,[3] in the absence of which no protection can be afforded by the process or order,[4] although the officer acted in good faith in proceeding under it.[5] Where the court has jurisdiction of the subject-matter and the process shows apparent jurisdiction in the particular case, the officer is protected,[6] although the court did not in fact acquire jurisdiction,[7] or although the court had lost jurisdiction before the process was

3. *Alabama.*— Noles *v.* State, 24 Ala. 672.
*Illinois.*— Booth *v.* Rees, 26 Ill. 45; Tuttle *v.* Wilson, 24 Ill. 553 [*followed* in Housh *v.* People, 75 Ill. 487]; Hall *v.* Blaisdell, 2 Ill. 332; McGillis *v.* Bishop, 27 Ill. App. 53.
*Kentucky.*— Clay *v.* Sandefer, 12 B. Mon. 334.
*Maine.*— Thurston *v.* Adams, 41 Me. 419.
*North Carolina.*— State *v.* Ferguson, 67 N. C. 219; State *v.* McDonald, 14 N. C. 468.
*Pennsylvania.*— Stephens *v.* Wilkins, 6 Pa. St. 260.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

4. *Alabama.*— Noles *v.* State, 24 Ala. 672.
*Arkansas.*— McClure *v.* Hill, 36 Ark. 268; Howell *v.* Milligan, 13 Ark. 40; Huddleston *v.* Spear, 8 Ark. 406.
*California.*— Weaver *v.* Wood, 49 Cal. 297.
*Georgia.*— Hamer *v.* White, 110 Ga. 300, 34 S. E. 1001.
*Illinois.*— Hull *v.* Blaisdell, 2 Ill. 332.
*Iowa.*— Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. 328.
*Kentucky.*— Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832.
*Louisiana.*— New Orleans *v.* Morgan, 7 Mart. N. S. 1, 18 Am. Dec. 232.
*Maine.*— Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49; Thurston *v.* Adams, 41 Me. 419.
*Massachusetts.*— Fisher *v.* McGirr, 1 Gray 1, 65 Am. Dec. 381.
*New York.*— Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406].
*North Carolina.*— Cohoon *v.* Speed, 47 N. C. 133; State *v.* McDonald, 14 N. C. 468.
*Pennsylvania.*— Stephens *v.* Wilkins, 6 Pa. St. 260.
*Tennessee.*— Martin *v.* England, 5 Yerg. 313.
*Texas.*— Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114, 442; Fendrick *v.* Shea, 1 Tex. App. Civ. Cas. § 912.
*Vermont.*— Driscoll *v.* Place, 44 Vt. 252.
*Wisconsin.*— Campbell *v.* Sherman, 35 Wis. 103.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**Where jurisdiction of particular magistrate not ascertainable.**— Where there were two circuit court commissioners and the statute gave jurisdiction of proceedings for dissolution of attachment to only the commissioner holding the senior commission, but no means were provided for determining which held the elder commission, it not being a fact of public notoriety, and no power was given to the sheriff to demand an inspection of the commissions, a sheriff was not liable for obeying a process issued by the magistrate holding the junior commission (the sheriff not knowing the fact), and under such process delivering up the property attached. People *v.* Rix, 6 Mich. 144.

5. Hamer *v.* White, 110 Ga. 300, 34 S. E. 1001.

6. *Illinois.*— Outhouse *v.* Allen, 72 Ill. 529; McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Barnes *v.* Barber, 6 Ill. 401 [*followed* in Parker *v.* Smith, 6 Ill. 411]; Magerstadt *v.* People, 105 Ill. App. 316.
*Indiana.*— Gott *v.* Mitchell, 7 Blackf. 270.
*Iowa.*— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522.
*Kentucky.*— Percefull *v.* Com., 3 B. Mon. 347.
*Massachusetts.*— Whipple *v.* Kent, 2 Gray 410, 61 Am. Dec. 470.
*Minnesota.*— Orr *v.* Box, 22 Minn. 485.
*Missouri.*— Howard *v.* Clark, 43 Mo. 344.
*New York.*— Cornell *v.* Barnes, 7 Hill 35; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181.
*North Carolina.*— State *v.* Ferguson, 67 N. C. 219; Stewart *v.* Ray, 26 N. C. 269.
*Ohio.*— Champaign County Bank *v.* Smith, 7 Ohio St. 42.
*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.
*Pennsylvania.*— Barr *v.* Boyles, 96 Pa. St. 31.
*South Carolina.*— Bragg *v.* Thompson, 19 S. C. 572; Brown *v.* Wood, 1 Bailey 457.
*Vermont.*— Casselini *v.* Booth, 77 Vt. 255, 59 Atl. 833; Churchill *v.* Churchill, 12 Vt. 661.
*Wisconsin.*— Young *v.* Wise, 7 Wis. 128.
*United States.*— Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst. 34.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

7. *Illinois.*— Magerstadt *v.* People, 105 Ill. App. 316.
*Indiana.*— Thurston *v.* Boardman, Wils. 433.
*Iowa.*— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Thompson *v.* Jockson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92.
*Massachusetts.*— Whipple *v.* Kent, 2 Gray 410, 61 Am. Dec. 470.
*Missouri.*— Howard *v.* Clark, 43 Mo. 344.
*New York.*— Cornell *v.* Barnes, 7 Hill 35; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181.
*Ohio.*— Champaign County Bank *v.* Smith, 7 Ohio St. 42.
*Vermont.*— Casselini *v.* Booth, 77 Vt. 255, 59 Atl. 833.
*Wisconsin.*— Comphell *v.* Sherman, 35 Wis. 103.
See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

issued.[8] But the process affords no protection where it shows upon its face that the court did not have jurisdiction,[9] or exceeded its authority in issuing the process.[10]

**b. When Affirmative Showing of Jurisdiction Necessary.** Where the authority of a court to make a particular order is not appurtenant to its general jurisdiction but is derived solely from a statute which requires that certain proceedings shall be taken in order to warrant the granting of such an order, the sheriff cannot justify under an order simply directing what is to be done but must show that all proceedings were taken which the statute requires in order to give jurisdiction in the particular case.[11] But if the order recites facts showing that such proceedings were taken he may rely upon such recitals as proof thereof and is justified in acting under the order, although the proceedings were never in fact taken.[12] It is also held that where the power of a justice of the peace to issue an order of delivery depends upon the amount and the law requires the value of the property to be stated in the order, an order which does not state the value affords no protection.[13]

**3. Regularity of Proceedings.** Defects or irregularities in the proceedings leading up to a judgment or order,[14] or to the issuance of process,[15] do not deprive the officer of protection in executing such process or order. And *a fortiori* a sheriff

8. Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105.

9. *Illinois.*— Martin *v.* Walker, 15 Ill. 377; Tefft *v.* Ashbaugh, 13 Ill. 602.

*Maryland.*— Campbell *v.* Webb, 11 Md. 471.

*Massachusetts.*— Whipple *v.* Kent, 2 Gray 410, 61 Am. Dec. 470.

*Missouri.*— Howard *v.* Clark, 43 Mo. 344.

*New Hampshire.*— Batchelder *v.* Currier, 45 N. H. 460.

*New York.*— Castellanos *v.* Jones, 5 N. Y. 164.

*North Carolina.*— Cohoon *v.* Speed, 47 N. C. 133; State *v.* Mann, 27 N. C. 45.

*Ohio.*— Champaign County Bank *v.* Smith, 7 Ohio St. 42.

*Vermont.*— Casselini *v.* Booth, 77 Vt. 255, 59 Atl. 833; Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

10. Thurston *v.* Adams, 41 Me. 419.

11. Seward *v.* Wales, 40 N. Y. App. Div. 539, 58 N. Y. Suppl. 42 [*affirmed* in 167 N. Y. 538, 60 N. E. 1120], so holding as to an order for the discharge of an imprisoned debtor. See also Shaffer *v.* Riseley, 114 N. Y. 23, 20 N. E. 630.

12. Seward *v.* Wales, 40 N. Y. App. Div. 529, 58 N. Y. Suppl. 42 [*affirmed* in 167 N. Y. 538, 60 N. E. 1120].

13. McClure *v.* Hill, 36 Ark. 268.

14. *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Averett *v.* Thompson, 15 Ala. 678.

*California.*— Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627 (fraud in obtaining judgment); Norcross *v.* Nunan, 61 Cal. 640; Buffandeau *v.* Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

*Connecticut.*— Taylor *v.* Judd, 41 Conn. 483.

*Idaho.*— Blumaur-Frank Drug Co. *v.* Branstetter, 4 Ida. 557, 43 Pac. 575, 95 Am. St. Rep. 151.

*Kentucky.*— Ringo *v.* Ward, 2 B. Mon. 127.

*Maine.*— Wilton Mfg. Co. *v.* Butler, 34 Me. 431.

*Massachusetts.*— Bergin *v.* Haywood, 102 Mass. 414.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704.

*Missouri.*— Higdon *v.* Conway, 12 Mo. 295.

*New Hampshire.*— Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

*New York.*— Bodine *v.* Thurwachter, 34 Hun 6; Cantillon *v.* Graves, 8 Johns. 472.

*Pennsylvania.*— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

*Utah.*— Hamner *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

15. *Alabama.*— Martin *v.* Hall, 70 Ala. 421.

*Illinois.*— Booth *v.* Rees, 26 Ill. 45; Parker *v.* Smith, 6 Ill. 411; Lattin *v.* Smith, 1 Ill. 361.

*Indiana.*— Gott *v.* Mitchell, 7 Blackf. 270.

*Kentucky.*— Banta *v.* Reynolds, 3 B. Mon. 80. But *compare* Matthews *v.* Denamore, 2 Ky. L. Rep. 74.

*Massachusetts.*— Dwinnels *v.* Boynton, 3 Allen 310; Sanford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151.

*Missouri.*— Melcher *v.* Scruggs, 72 Mo. 406.

*Nebraska.*— Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975.

*New Mexico.*— Archibeque *v.* Miera, 1 N. M. 419.

*New York.*— Arrex *v.* Brodhead, 19 Hun 269.

*North Carolina.*— State *v.* Mann, 27 N. C. 45.

*Ohio.*— Taylor *v.* Alexander, 6 Ohio 144.

*Oregon.*— White *v.* Thompson, 3 Oreg. 115.

*Rhode Island.*— Humes *v.* Taber, 1 R. I. 464.

*South Carolina.*— Foster *v.* Gault, 2 McMull. 335.

*South Dakota.*— Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084, holding that a criminal complaint for disposing of mortgaged property is sufficient to protect the officer executing a warrant of arrest, although it does not allege that the act was done wilfully.

who levies under mesne process is not deprived of protection by irregularities in the subsequent proceedings resulting in the judgment.[16]

**4. Validity of Judgment or Order[17] — a. In General.** A sheriff or constable is not bound to inquire into the validity of the proceedings forming the basis of the process which is placed in his hands for execution;[18] but provided that the court has jurisdiction of the subject-matter,[19] and the judgment or order is apparently valid,[20] and that the process is regular and valid upon its face,[21] the officer is not deprived of protection by reason of the fact that the order under which he acts or the judgment on which the process is based is erroneous,[22] invalid, and voidable,[23] or even void,[24] for any cause other than a lack of jurisdiction of the subject-matter,[25] unless the writ or the papers attached thereto give notice of the defects in the proceedings[26] or the officer has acted wilfully with the intent to oppress defendant.[27]

**b. Judgment Rendered or Order Made Under Unconstitutional Law.** A judgment or order of court will protect an officer in what he does pursuant thereto notwithstanding the fact that the statute under which the judgment was rendered or the order made is unconstitutional.[28]

*Texas.*— Randall *v.* Rosenthal, (Civ. App. 1895) 31 S. W. 822.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

16. Grady *v.* Bowe, 11 Daly (N. Y.) 259; Eaton *v.* Cooper, 29 Vt. 444.

17. See, generally, Judgments, 23 Cyc. 623.

18. Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856.

19. See *supra*, V, L, 2.

20. Rounsaville *v.* McGinnis, 93 Ga. 579, 21 S. E. 123; Breckwoldt *v.* Morris, 149 Pa. St. 291, 24 Atl. 300.

21. See *infra*, V, L, 5.

22. *Alabama.*— Smith *v.* Leavitts, 10 Ala. 92; Bender *v.* Graham, Minor 269.

*Georgia.*— Rounsaville *v.* McGinnis, 93 Ga. 579, 21 S. E. 123.

*Illinois.*— Smith *v.* People, 99 Ill. 445.

*Kentucky.*— Ashcraft *v.* Elliott, 38 S. W. 1062, 18 Ky. L. Rep. 934.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704.

*Missouri.*— Milburn *v.* Gilman, 11 Mo. 64.

*Pennsylvania.*— Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

*Virginia.*— Price *v.* Holland, 1 Patt. & H. 289, holding that this is true, although the error is apparent on the face of the proceedings.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**Reversal of judgment** see *infra*, V, L, 20.

23. *Arkansas.*— Byrd *v.* Clendenin, 11 Ark. 572.

*California.*— Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627.

*Michigan.*— Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051; Ortman *v.* Greenman, 4 Mich. 291.

*Missouri.*— State *v.* Ferguson, 13 Mo. 166; Brown *v.* Henderson, 1 Mo. 134; State *v.* Smith, 81 Mo. App. 671.

*New York.*— American Hosiery Co. *v.* Riley, 12 Abb. N. Cas. 329; Sheldon *v.* Stryker, 21 How. Pr. 329; Jennings *v.* Carter, 2 Wend. 446, 20 Am. Dec. 635.

*Pennsylvania.*— Breckwoldt *v.* Morris, 149 Pa. St. 291, 24 Atl. 300. See also Hutton *v.* Blaine, 2 Serg. & R. 75.

*Texas.*— Fendrick *v.* Shea, 1 Tex. App. Civ. Cas. § 912.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**Necessity for amendment of judgment.**— In an action against the sheriff and his deputy for a wrongful seizure of property under an execution wherein the judgment debtor's name was misstated, defendants cannot justify under such execution until the judgment and all proceedings are amended in a direct action for that purpose. Casper *v.* Klippen, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

24. *Georgia.*— Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856, judgment against garnishee void because prematurely rendered.

*Idaho.*— Blumaur-Frank Drug Co. *v.* Branstetter, 4 Ida. 557, 43 Pac. 575, 95 Am. St. Rep. 151.

*Illinois.*— People *v.* Whitehead, 90 Ill. App. 614.

*Iowa.*— Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92, judgment void for lack of jurisdiction of defendant.

*New York.*— Crouse *v.* Johnson, 65 Hun 337, 20 N. Y. Suppl. 177, judgment void because of non-compliance with statutory requirement that in case of judgment by confession an affidavit must be filed alleging that the confession was not made "or taken" with intent to defraud any creditor.

*South Carolina.*— Goodgion *v.* Gilreath, 32 S. C. 388, 11 S. E. 207 [*following* Bragg *v.* Thompson, 19 S. C. 572].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

25. See *supra*, V, L, 2, a.

26. Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856.

27. Thompson *v.* Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92.

**Liability for causing unnecessary injury or hardship in execution of process** see *supra*, V, D, 2.

28. Webster *v.* Reid, Morr. (Iowa) 467; Norris *v.* McCanna, 29 Fed. 757.

**5. Validity of Process**[29] — **a. In General.** It is sufficient for the protection of the officer that the process under which he acted should be valid on its face,[30] and if it is so the officer does not become liable for his acts because the process may be in fact irregular and voidable.[31] And it has been held that even though process be in fact void, if it does not upon its face carry knowledge of this fact to

**29.** See, generally, Process, 32 Cyc. 412.

**30.** *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Murphy *v.* State, 55 Ala. 252; Wilson *v.* Sawyer, 37 Ala. 631; Kirksey *v.* Dubose, 19 Ala. 43; Averett *v.* Thompson, 15 Ala. 678; Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Dec. 140; Governor *v.* Gibson, 14 Ala. 326; Fortner *v.* Flannagan, 3 Port. 257.

*California.*— Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316; Norcross *v.* Nunan, 61 Cal. 640.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Florida.*— Camp *v.* Moseley, 2 Fla. 171.

*Georgia.*— Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856; Johnson *v.* Fox, 51 Ga. 270; Hall *v.* Lyon, 37 Ga. 636; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518.

*Idaho.*— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310.

*Illinois.*— Sample *v.* Broadwell, 87 Ill. 617; Johnson *v.* Holloway, 82 Ill. 334; Outhouse *v.* Allen, 72 Ill. 529; Tuttle *v.* Wilson, 24 Ill. 553 [*followed* in Housh *v.* People, 75 Ill. 487]; Lattin *v.* Smith, 1 Ill. 361; Boyden *v.* Frank, 20 Ill. App. 169.

*Indiana.*— Hartlep *v.* Cole, 101 Ind. 458; Gott *v.* Mitchell, 7 Blackf. 270.

*Iowa.*— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623.

*Kansas.*— Allen *v.* Corlew, 10 Kan. 70; Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

*Kentucky.*— Roettger *v.* Riefkin, 130 Ky. 197, 113 S. W. 88; Pepper *v.* Mayes, 81 Ky. 673; Percefull *v.* Com., 3 B. Mon. 347; Ringos *v.* Ward, 2 B. Mon. 127.

*Maine.*— Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; Gray *v.* Kimball, 42 Me. 299; Wilton Mfg. Co. *v.* Butler, 34 Me. 431; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

*Massachusetts.*—Goldis *v.* Gately, 168 Mass. 300, 47 N. E. 96; Bergin *v.* Hayward, 102 Mass. 414; Hoit *v.* Hook, 14 Mass. 210; Pearce *v.* Atwood, 13 Mass. 324; Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Nichols *v.* Thomas, 4 Mass. 232.

*Michigan.*— O'Meara *v.* Merritt, 128 Mich. 249, 87 N. W. 197; Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051; Dunn *v.* Gilman, 34 Mich. 256; Ortman *v.* Greenman, 4 Mich. 291.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704; Orr *v.* Box, 22 Minn. 485; Clark *v.* Norton, 6 Minn. 412.

*Missouri.*— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; Melcher *v.* Scruggs, 72 Mo. 406; Higdon *v.* Conway, 12 Mo. 295; State *v.* Smith, 81 Mo. App. 671.

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548.

*New Hampshire.*— Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

*New Jersey.*—Mangold *v.* Thorpe, 33 N. J. L. 134.

*New Mexico.*— Archibeque *v.* Miera, 1 N. M. 419.

*New York.*— Bodine *v.* Thurwachter, 34 Hun 6; Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406]; Shaw *v.* Davis, 55 Barb. 389; Fulton *v.* Heaton, 1 Barb. 552; Noble *v.* Holmes, 5 Hill 194; Earl *v.* Camp, 16 Wend. 562; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181; Wattles *v.* Marsh, 5 Cow. 176; Warner *v.* Shed, 10 Johns. 138; Beach *v.* Furman, 9 Johns. 229.

*North Carolina.*— O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126; State *v.* Ferguson, 67 N. C. 219; Stewart *v.* Ray, 26 N. C. 269.

*Ohio.*— Henline *v.* Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.

*Pennsylvania.*— Breckwoldt *v.* Morris, 149 Pa. St. 291, 24 Atl. 300; Barr *v.* Boyles, 96 Pa. St. 31; Leonard *v.* Dillon, 76 Pa. St. 44; Fall Creek Coal, etc., Co. *v.* Smith, 71 Pa. St. 230; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Paul *v.* Vaukirk, 6 Binn. 123.

*South Carolina.*— Bragg *v.* Thompson, 19 S. C. 572; Foster *v.* Gault, 2 McMull. 335; Brown *v.* Wood, 1 Bailey 457; Swanzy *v.* Hunt, 2 Nott & M. 211.

*Tennessee.*— Mason *v.* Vance, 1 Sneed 178, 60 Am. Dec. 144.

*Texas.*— Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; Wettermark *v.* Campbell, (Civ. App. 1900), 57 S. W. 904.

*Utah.*— Munus *v.* Loveland, 15 Utah 250, 49 Pac. 743.

*Vermont.*— Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487.

*Wisconsin.*— Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105; Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388; McLean *v.* Cook, 23 Wis. 364; Bogert *v.* Phelps, 14 Wis. 88; Young *v.* Wise, 7 Wis. 128.

*United States.*— Matthews *v.* Densmore, 109 U. S. 316, 27 L. ed. 912 [*followed* in Marks *v.* Shoup, 181 U. S. 562, 21 S. Ct. 724, 45 L. ed 1002]; Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst, 34.

*Canada.*— Beemer *v.* Inkster, 3 Manitoba 534; Reg. *v.* O'Leary, 16 N. Brunsw. 264.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**31.** *Alabama.*— Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Dec. 140.

*Colorado.*— Archibald *v.* Thompson, 2 Colo. 388.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24.

the officer but is regular upon its face, he is protected in levying thereunder.[32] But no protection whatever is afforded by process or an order of court which is upon its face void.[33] So where the proceedings before a magistrate on which he issued an execution are annexed to the execution, and it is apparent from them that there is no judgment authorizing an execution, the constable who has the

*Georgia.*— Hall *v.* Lyon, 37 Ga. 636.

*Kentucky.*— Roettger *v.* Riefkin, 130 Ky. 197, 113 S. W. 88; Kleissendorff *v.* Fore, 3 B. Mon. 471.

*Maine.*— State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

*Maryland.*— State *v.* Timmons, 90 Md. 10, 44 Atl. 1003.

*Massachusetts.*— Goldis *v.* Gately, 168 Mass. 300, 47 N. E. 96; Hoit *v.* Hook, 14 Mass. 210; Pearce *v.* Atwood, 13 Mass. 324; Sanford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Nichols *v.* Thomas, 4 Mass. 232.

*Missouri.*— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240; Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124; State *v.* Smith, 81 Mo. App. 671.

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548.

*New Hampshire.*— Batchelder *v.* Currier, 45 N. H. 460; Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

*New York.*— Bacon *v.* Cropsey, 7 N. Y. 195; Arrex *v.* Brodhead, 19 Hun 269; Dominick *v.* Eacker, 3 Barb. 17; Piepgras *v.* Edmunds, 5 Misc. 314, 25 N. Y. Suppl. 961, 31 Abb. N. Cas. 39, 23 N. Y. Civ. Proc. 241 [*affirmed* in 26 N. Y. Suppl. 1134]; Webber *v.* Gay, 24 Wend. 485; Wattles *v.* Marsh, 5 Cow. 176.

*North Carolina.*— Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75; State *v.* Mann, 27 N. C. 45.

*Ohio.*— Taylor *v.* Alexander, 6 Ohio 144.

*Pennsylvania.*— Fall Creek Coal, etc., Co. *v.* Smith, 71 Pa. St. 230; Paul *v.* Vankirk, 6 Binn. 123.

*South Carolina.*— Foster *v.* Gault, 2 McMull. 335; Treasurer *v.* Ford, 1 Nott & M. 234

*Vermont.*— Stewart *v.* Martin, 16 Vt. 397.

*United States.*— Matthews *v.* Densmore, 109 U. S. 316, 27 L. ed 912 [*followed* in Marks *v.* Shoup, 181 U. S. 562, 21 S. Ct. 724, 45 L. ed 1002].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**An execution which is prematurely issued** is merely voidable and not void, and unless quashed it protects the officer. Roettger *v.* Riefkin, 130 Ky. 197, 113 S. W. 88.

**32.** Hill *v.* Haynes, 54 N. Y. 153 (holding that an execution out of the county court, and signed by an attorney, even if void under Code, § 64, because not signed by the clerk, would, if nothing appeared therein to notify the sheriff that it was issued on a transcript of a justice's judgment, protect him in levying on and holding the property of the judgment debtor); Horton *v.* Hendershot, 1 Hill (N. Y.) 118. But *compare* Hagar *v.* Haas, 66 Kan. 333, 71 Pac. 822.

**Rejecting or declining to receive affidavit of illegality.**— If the sheriff rejects an affidavit of illegality he does so at his own risk, and if he declines to receive an affidavit of illegality he becomes responsible to the injured party. Mosely *v.* Sanders, 76 Ga. 293.

**33.** *Alabama.*— Smith *v.* Hilton, 147 Ala. 642, 41 So. 747; Stephens *v.* Head, 138 Ala. 455, 35 So. 565; Noles *v.* State, 24 Ala. 672; Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Dec. 140.

*Connecticut.*— Osgood *v.* Carver, 43 Conn. 24.

*Georgia.*— Howard *v.* Reid, 51 Ga. 328.

*Iowa.*— See Gates *v.* Neimeyer, 54 Iowa 110, 6 N. W. 150.

*Kansas.*— Hagar *v.* Haas, 66 Kan. 333, 71 Pac. 822; Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578.

*Louisiana.*— McKinney *v.* Chambliss, 3 La. Ann. 577.

*Maine.*— Adams *v.* Allen, 99 Me. 249, 59 Atl. 62; Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; Brown *v.* Howard, 86 Me. 342, 29 Atl. 1094; Snow *v.* Weeks, 77 Me. 429, 1 Atl. 243; Waterville *v.* Barton, 64 Me. 321.

*Maryland.*— State *v.* Timmons, 90 Md. 10, 44 Atl. 1003.

*Massachusetts.*— Hoit *v.* Hook, 14 Mass. 210; Pearce *v.* Atwood, 13 Mass. 324; Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Nichols *v.* Thomas, 4 Mass. 232.

*Missouri.*— Linck *v.* Troll, 84 Mo. App. 49.

*New Hampshire.*— Hussey *v.* Davis, 58 N. H. 317.

*New York.*— Goldberg *v.* Markowitz, 94 N. Y. App. Div. 237, 87 N. Y. Suppl. 1045 [*affirmed* in 182 N. Y. 540, 75 N. E. 1129]; Bergman *v.* Noble, 45 Hun 133; Bullymore *v.* Cooper, 2 Lans. 71 [*affirmed* in 46 N. Y. 236]; Patrick *v.* Solinger, 9 Daly 149; Toof *v.* Bentley, 5 Wend. 276. See also Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116].

*North Carolina.*— State *v.* McDonald, 14 N. C. 468.

*South Carolina.*— Prater *v.* Wilson, 55 S. C. 468, 33 S. E. 561; Beazley *v.* Dunn, 8 Rich. 345; Foster *v.* Gault, 2 McMull. 335.

*Tennessee.*— Clark *v.* Bond, 7 Baxt. 288.

*Vermont.*— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

*Wisconsin.*— Campbell *v.* Sherman, 35 Wis. 103; Mericle *v.* Mulks, 1 Wis. 366.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**Where an officer has sold attached property on a void execution,** and applied the proceeds on a void judgment, he cannot defend an action for its conversion, brought six months after the levy of the attachment, on the ground that the property was seized under a valid writ of attachment, as that writ confers no right to sell. Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

execution must take notice of the fact, and will be guilty of a trespass if he proceeds to make a levy under the process.[34]

**b. Obeying Improper Mandate of Writ.** A sheriff is not protected in obeying a mandate of a writ which is upon its face improper and unauthorized.[35]

**6. Necessity For Entry of Order or Judgment.** It has been held that an action will not lie against a sheriff for the payment of money pursuant to an order for judgment before the judgment is entered, unless the order is set aside.[36] But there is also authority for the view that a sheriff cannot justify under an execution which was delivered to him prior to the docketing of the judgment on which it is based,[37] although he is not deprived of protection by the fact that the execution bears a date prior to the docketing of the judgment where it was not delivered to him until after such time.[38]

**7. Necessity For Showing of Authority to Execute Process.** One who seeks to justify the taking of property under legal process must show that he was an officer and had lawful authority to take the property,[39] for, although process is valid and properly issued, it can afford no protection to an officer who is not authorized to execute it.[40]

**8. Necessity For Return of Process.** In order to be protected from liability for acts done in the execution of mesne process the sheriff must make his return thereon[41]

**34.** Whitfield *v.* Johnston, 23 N. C. 473.

**35.** Wilton Town Co. *v.* Humphrey, 15 Kan. 372, 374 (where it is said: "It cannot be doubted that an officer is not protected in seizing the property of A under an execution which recites only a judgment against B, and is issued upon a judgment only against B, notwithstanding it commands him to seize the property of A." In this case, however, the execution under which the officer acted read as follows: "You are commanded to take into your possession enough of the personal property of the Wilton Town Company to satisfy a judgment for $2.55, together with all costs that have or may accrue in a case where John M. Hatfield was plaintiff, and C. H. Norton and J. W. Borton, officers of the Wilton Town Company, defendants, rendered this twentieth day of February, 1874, before Hiram Bersie, a justice of the peace," etc., and it was doubtful from the entire record whether the proceedings and judgment in the action in which the execution was issued were not in fact prosecuted and rendered against the said Wilton Town Company, and the execution failed to show against whom the judgment was actually rendered, and under these circumstances the supreme court held that it would not reverse the ruling of both a justice of the peace and the district court, to the effect that the execution protected the officer in making a levy upon personal property of the Wilton Town Company and that the Town Company could not maintain replevin against him); Lackey *v.* Campbell, (Tex. Civ. App. 1899) 54 S. W. 46 (holding that a writ commanding a sheriff to seize certain property and deliver it to a third person, which is fair and valid on its face and issued by a court of competent jurisdiction, does not relieve him from actual damages where the property is owned by a person not a party to the judgment on which the writ was issued, although it will relieve the officer from exemplary damages in the absence of irregularity in his action).

**36.** Gribble *v.* Wagener, 79 Minn. 306, 82 N. W. 640, so holding on the ground that it was only an irregularity for the sheriff to comply with the order before the judgment was entered.

**37.** Carson *v.* Fuller, 11 S. D. 502, 78 N. W. 960, 74 Am. St. Rep. 823 [*distinguishing* McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815].

**38.** McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815.

**39.** Copley *v.* Rose, 2 N. Y. 115.

**40.** Schaw *v.* Dietrichs, Wils. (Ind.) 153 [*following* Benninghoof *v.* Finney, 22 Ind. 101] (holding that as a special constable has no authority to execute process directed to "any constable of the county" merely and not to him by name, he is not protected on his acts thereunder); Barley *v.* Tipton, 29 Mo. 206 (holding that a constable who levies on and sells property under an execution not directed to him and illegally in his hands may be treated as a mere trespasser); Mitchell *v.* Shaw, 53 Mo. App. 652 (holding that a town marshal, appointed a special constable by a justice of the peace to execute a writ of replevin, is liable as a trespasser in executing the writ, since, under Rev. St. § 6149, such special constable has power only to execute a summons). See also Cook *v.* Jarvis, 4 U. C. Q. B. O. S. 250.

**41.** *Alabama.*— Womack *v.* Bird, 63 Ala. 500; Kirksey *v.* Dubose, 19 Ala. 43; McAden *v.* Gibson, 5 Ala. 341.

*Connecticut.*— Pratt *v.* Pond, 45 Conn. 386; Toby *v.* Reed, 9 Conn. 216.

*Florida.*— Dowling *v.* Bowden, 25 Fla. 712, 6 So. 765.

*Kentucky.*— Allen *v.* Feland, 10 B. Mon. 306.

*Maine.*— Adams *v.* McGlinchy, 66 Me. 474, holding that where a coroner, having in his possession a replevin writ and bond, takes property under such writ from the possession of a sheriff holding it under a warrant, and fails to return the writ, with the bond, into

within the time prescribed by the statute,[42] or at least show a legal excuse for his failure to do so;[43] but a return is not necessary to entitle the officer to protection in the execution of final process.[44]

**9. Showing Necessary Where Property Claimed by Third Person.** In case of an action against the officer by the party against whom process is issued, the process itself, being valid on its face, constitutes a complete justification;[45] but in case of a suit by another person claiming title to the property seized under the

court, he cannot justify, in an action by the sheriff against him for taking and carrying away the property, on the ground that the person assisting him in taking the property under the replevin writ was the general owner, who had the right to take it without any writ.

*Massachusetts.*— Fletcher *v.* Wrighton, 184 Mass. 547, 69 N. E. 313; Wiggin *v.* Atkins, 136 Mass. 292; Paine *v.* Farr, 118 Mass. 74; Williams *v.* Babbitt, 14 Gray 141, 74 Am. Dec. 670; Russ *v.* Butterfield, 6 Cush. 242; Wilder *v.* Holden, 24 Pick. 8; Oystead *v.* Shed, 12 Mass. 506.

*New Hampshire.*—Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352. See also Parker *v.* Pattee, 4 N. H. 530.

*New Jersey.*— Brown *v.* Bissett, 21 N. J. L. 46.

*South Dakota.*— Carson *v.* Fuller, 11 S. D. 502, 78 N. W. 960, 74 Am. St. Rep. 823.

*Vermont.*— Wright *v.* Marvin, 59 Vt. 437, 9 Atl. 601.

*England.*— Lucas *v.* Nockells, 10 Bing. 157, 25 E. C. L. 80; Cheasley *v.* Barnes, 10 East 73, 103 Eng. Reprint 703; Freeman *v.* Blewett, 1 Ld. Raym. 632, 91 Eng. Reprint 1323.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*; and Attachment, 4 Cyc. 607 text and note 42.

**A mistake or omission in the return** does not render the officer a trespasser *ab initio*. Parker *v.* Pattee, 4 N. H. 530 [*followed* in Smith *v.* Moore, 17 N. H. 380].

**Making return of sale to wrong court.**— Where a constable attached property on a justice's writ, and while the case was pending on appeal in the county court, sold the property by request of the creditor, he was not a trespasser *ab initio*, because he made his return to the magistrate, instead of to the county clerk. Bentley *v.* White, 54 Vt. 564.

**Interest insufficient to support claim against officer.**— Where a certain person, through a fraudulent purchase, obtained goods of plaintiff and before the fraud was discovered the purchaser's creditors attached the goods, and a settlement was made between them and the purchaser, under which the attachments were withdrawn and the goods delivered by the officer to the attaching creditors, and the officer made no return of the writs, it was held that plaintiff, having at the time of the attachment and surrender of the goods, no title or interest except a bare right to defeat the purchaser's title by rescinding the sale, could not take advantage of the officer's failure to return the writ in order to hold him liable as a trespasser. Halsey *v.* Huse, 46 Conn. 389.

42. Dowling *v.* Bowden, 25 Fla. 712, 6 So. 765; Williams *v.* Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670; Russ *v.* Butterfield, 6 Cush. (Mass.) 242; Wilder *v.* Holden, 24 Pick. (Mass.) 8; Carson *v.* Fuller, 11 S. D. 502, 78 N. W. 960, 74 Am. St. Rep. 823.

**Where action is commenced before the return-day** the officer must nevertheless return the writ in order to secure protection (Williams *v.* Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670), unless the trial is had before the return-day, in which case his production of the writ with his return upon it is sufficient, he being the proper custodian until the return-day (Williams *v.* Babbitt, *supra*).

**Where an attachment is dissolved before the return-day** the officer must nevertheless make his return in order to secure protection. Williams *v.* Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670.

43. Kirksey *v.* Dubose, 19 Ala. 43 [*following* McAden *v.* Gibson, 5 Ala. 341]; Dowling *v.* Bowden, 25 Fla. 712, 6 So. 765.

44. *Alabama.*— McAden *v.* Gibson, 5 Ala. 341.

*Connecticut.*— Pratt *v.* Pond, 45 Conn. 386; Toby *v.* Reed, 9 Conn. 216.

*Maine.*— Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309.

*Massachusetts.*— Tubbs *v.* Tukey, 3 Cush. 438, 50 Am. Dec. 744. See also Ingersoll *v.* Sawyer, 2 Pick. 276.

*New Jersey.*— Brown *v.* Bissett, 21 N. J. L. 46.

*New York.*— Bealls *v.* Guernsey, 8 Johns. 52.

*England.*— Cheasley *v.* Barnes, 10 East 73, 103 Eng. Reprint 703.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**An officer who arrests a debtor on execution** and discharges him upon his exhibiting a writ of protection and returns the execution unsatisfied without stating the arrest in his return cannot justify under the execution when sued by the debtor for the arrest. Munroe *v.* Merrill, 6 Gray (Mass.) 236.

45. *Alabama.*— Kirksey *v.* Dubose, 19 Ala. 43; Governor *v.* Gibson, 14 Ala. 326.

*Arkansas.*— Townsly-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 Am. St. Rep. 97, 22 S. W. 564.

*California.*—Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698.

*Illinois.*— Johnson *v.* Holloway, 82 Ill. 334.

*Minnesota.*— Mower *v.* Stickney, 5 Minn. 397.

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548.

*New York.*— Cross *v.* Phelps, 16 Barb. 502; Horton *v.* Hendershot, 1 Hill 118; Holmes *v.* Nuncaster, 12 Johns. 395.

party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show that he acted for or on behalf of a creditor.[46] So, under such circumstances, when the officer claims to have acted under process of execution, he must produce the execution,[47] and the judgment on which it issued,[48] and such judgment must be valid

*Pennsylvania.*— Kerlin *v.* Heacock, 3 Binn. 215.

*Utah.*— Hammer *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

*Wisconsin.*— Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334; James *v.* Van Duyn, 45 Wis. 512].

*Canada.*— Crowe *v.* Adams, 21 Can. Sup. Ct. 342 [*following* McLean *v.* Harmon, 3 Can. Sup. Ct. 706 (*reversing* 12 Nova Scotia 101)].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**46.** *Arkansas.*—Townsly-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 Am. St. Rep. 97, 22 S. W. 564.

*California.*— Darville *v.* Mayhall, 128 Cal. 617, 61 Pac. 276; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316; Horn *v.* Corvarubias, 51 Cal. 524; McRae *v.* Lackmann, 8 Cal. App. 241, 96 Pac. 505.

*Illinois.*— Cook *v.* Miller, 11 Ill. 610.

*Kansas.*— See Simpson *v.* Vose, 31 Kan. 227, 1 Pac. 601.

*Massachusetts.*— Bond *v.* Endicott, 149 Mass. 282, 21 N. E. 361.

*Minnesota.*— Homberger *v.* Brandenberg, 35 Minn. 401, 29 N. W. 123.

*New York.*— Cross *v.* Phelps, 16 Barb. 502.

*Oklahoma.*— Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

*Tennessee.*— Maley *v.* Barrett, 2 Sneed 501.

*Utah.*— Jones *v.* McQueen, 13 Utah 178, 45 Pac. 202.

*Wisconsin.*— James *v.* Van Duyn, 45 Wis. 512; Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334].

*Canada.*— See Culbert *v.* Conger, 7 U. C. Q. B. 395.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 146, 149.

**Until the claimant gives some evidence of title the sheriff is not put to his defense or called upon to justify.** Crowe *v.* Adams, 21 Can. Sup. Ct. 342; McLean *v.* Hannon, 3 Can. Sup. Ct. 706; Kirchhoffer *v.* Clement, 11 Manitoba 460.

**A sheriff who has wrongfully seized goods in execution out of his district cannot question the right of the person from whose possession the property was taken, as by setting up that such person received the property under an assignment fraudulent as against creditors.** Cook *v.* Jarvis, 4 U. C. Q. B. O. S. 250.

**47.** Ford *v.* McMaster, 6 Mont. 240, 11 Pac. 669; Beaty *v.* Swarthout, 32 Barb. (N. Y.) 293; McCune *v.* Peters, 54 Misc. (N. Y.) 165, 105 N. Y. Suppl. 896.

**Officer must show that he acted under valid writ.**— Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067. Validity of process generally see *supra*, V, L, 5.

**48.** *Arkansas.*—Townsley-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 Am. St. Rep. 97, 22 S. W. 564.

*California.*— Darville *v.* Mayhull, 128 Cal. 617, 61 Pac. 276; Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698; Bickerstaff *v.* Doub, 19 Cal. 109, 79 Am. Dec. 204; Paige *v.* O'Neal, 12 Cal. 483.

*Idaho.*— Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122.

*Illinois.*— Johnson *v.* Holloway, 82 Ill. 334; Thatcher *v.* Maack, 7 Ill. App. 635.

*Kansas.*— Mills *v.* Talbott, 63 Kan. 14, 64 Pac. 964.

*Massachusetts.*— Damon *v.* Bryant, 2 Pick. 411.

*Minnesota.*— Mower *v.* Stickney, 5 Minn. 397.

*Montana.*— Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056; Ford *v.* McMaster, 6 Mont. 240, 11 Pac. 669.

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548; McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

*New Jersey.*— Hamilton *v.* Decker, 5 N. J. L. 813.

*New York.*— Heath *v.* Westervelt, 2 Sandf. 110; McCune *v.* Peters, 54 Misc. 165, 105 N. Y. Suppl. 896; Noble *v.* Holmes, 5 Hill 194; Jansen *v.* Acker, 23 Wend. 480; Earl *v.* Camp, 16 Wend. 562; High *v.* Wilson, 2 Johns. 46.

*Oklahoma.*— Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

*Tennessee.*—Pemberton *v.* Smith, 3 Head 18.

*Wisconsin.*— Bughee *v.* Lombard, 88 Wis. 271, 60 N. W. 414; Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334; James *v.* Van Duyn, 45 Wis. 512].

*England.*—White *v.* Morris, 11 C. B. 1015, 16 Jur. 500, 21 L. J. C. P. 185, 73 E. C. L. 1015.

*Canada.*— Kirchhoffer *v.* Clement, 11 Manitoba 460 [*distinguishing* Crowe *v.* Adams, 21 Can. Sup. Ct. 342; McLean *v.* Hannon, 3 Can. Sup. Ct. 706]. See also King *v.* Macdonald, 15 U. C. C. P. 397; Powers *v.* Ruttan, 4 U. C. Q. B. O. S. 58. But *compare* Keeser *v.* McMartin, 3 U. C. Q. B. 327.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 146.

**Contra.**— Tralor *v.* McKeown, 12 Rich. (S. C.) 251 [*distinguishing* Etters *v.* Etters, 11 Rich. (S. C.) 413]. And see Davis *v.* White, 1 Houst. (Del.) 228; Hunter *v.* McElhany, 2 Brev. (S. C.) 103.

**Voluntary assignees of defendant who became such after a levy** under an execution are not strangers within the meaning of the rule which requires an officer justifying against a stranger to show a judgment as well as an execution, and in an action of such assignee against a sheriff it is sufficient

in order to entitle the officer to protection.[49] If the officer claims to have acted under mesne process, the debt must be proved by some other competent evidence,[50] and the officer must show a valid writ,[51] regularly issued upon proper proceedings,[52] by a court having jurisdiction of the parties as well as of the subject-matter of

for the latter to produce his execution and the assignees cannot impair his right to retain the goods levied on by attacking the judgment. Heath *v.* Westervelt, 2 Sandf. (N. Y.) 110.

49. *Arkansas.*—Townsly-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 Am. St. Rep. 97, 22 S. W. 564.

*Idaho.*— Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122.

*Illinois.*— Thatcher *v.* Maack, 7 Ill. App. 635.

*Kansas.*— Mills *v.* Talbott, 63 Kan. 14, 64 Pac. 964.

*Montana.*— Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056; Ford *v.* McMaster, 6 Mont. 240, 11 Pac. 669.

*New York.*— Bovee *v.* King, 11 Hun 250 [*affirmed* in 75 N. Y. 609].

*Oklahoma.*— Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 146.

**Claimant of property may attack judgment.**— Palmer *v.* McMaster, 8 Mont. 186, 19 Pac. 585.

50. *Arkansas.*—Townsley-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 Am. St. Rep. 97, 22 S. W. 564.

*California.*— Brown *v.* Cline, 109 Cal. 156, 41 Pac. 862; Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698; Glazer *v.* Clift, 10 Cal. 303; Thornburgh *v.* Hand, 7 Cal. 554.

*Idaho.*— Beckstead *v.* Griffith, 11 Ida. 738, 83 Pac. 764.

*Kansas.*— Mills *v.* Talbott, 63 Kan. 14, 64 Pac. 964.

*Massachusetts.*— Damon *v.* Bryant, 2 Pick. 411.

*Michigan.*—Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946; Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129; Braley *v.* Byrnes, 20 Minn. 435.

*Nebraska.*— Bartlett *v.* Cheesebrough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919.

*New Hampshire.*—Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

*New York.*— Cross *v.* Phelps, 16 Barb. 502; Noble *v.* Holmes, 5 Hill 194. See also Horton *v.* Hendershot, 1 Hill 118.

*Oregon.*— Fisher *v.* Kelly, 39 Oreg. 1, 46 Pac. 146.

*Utah.*— Newton *v.* Brown, 2 Utah 126.

*Wisconsin.*— Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334; James *v.* Van Duyn, 45 Wis. 512].

*Canada.*— Mills *v.* McLean, 10 Nova Scotia 379; Grant *v.* McLean, 3 U. C. Q. B. O. S. 443.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 149.

**The papers in an attachment suit are not sufficient evidence of the debt.** Brown *v.* Cline, 109 Cal. 156, 41 Pac. 862; Mills *v.* McLean, 10 Nova Scotia 379.

**Officer must show that debt was actually due.**— Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

51. *California.*— Thornburgh *v.* Hand, 7 Cal. 554 [*followed* in Horn *v.* Corvarubias, 51 Cal. 524].

*Idaho.*— Sears *v.* Lydon, 7 Ida. 358, 49 Pac. 122.

*Illinois.*— Taylor *v.* Morrison, 73 Ill. 565.

*Kansas.*— Huey *v.* Brimer, 9 Kan. App. 149, 58 Pac. 485, holding that in an action by a stranger to the writ for an attempted seizure of property under a void writ of attachment, the sheriff cannot attack the *bona fides* of a sale and delivery of such property.

*Michigan.*—Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

*Nebraska.*— Hakanson *v.* Brodke, 36 Nebr. 42, 53 N. W. 1033 [*following* Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975; Bartlett *v.* Cheesebrough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919; Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517; Oberfelder *v.* Kavanaugh, 21 Nebr. 483, 32 N. W. 295].

*New York.*— Cross *v.* Phelps, 16 Barb. 502.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 149.

52. *California.*— Laughlin *v.* Thompson, 76 Cal. 287, 290, 18 Pac. 330 (where it is said: "In case of 'claim and delivery,' the affidavit, order indorsed thereon, and undertaking, all go into the hands of the officer, and constitute the process. He must determine whether they are regular and sufficient"); Thornburgh *v.* Hand, 7 Cal. 554 [*followed* in Horn *v.* Corvarubias, 51 Cal. 524].

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

*Nebraska.*— Hakanson *v.* Brodke, 36 Nebr. 42, 53 N. W. 1033 [*following* Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975; Bartlett *v.* Cheesebrough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919; Williams *v.* Eikenberry, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517, 22 Nebr. 210, 34 N. W. 373; Oberfelder *v.* Kavanaugh, 21 Nebr. 483, 32 N. W. 295].

*Nevada.*— Keys *v.* Grannis, 3 Nev. 548.

*New York.*— Decker *v.* Bryant, 7 Barb. 182; Noble *v.* Holmes, 5 Hill 194.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 149.

**Curing defects.**— After trespass has been brought against a constable for the seizure of goods of a third person under an attachment which was not properly served, the defect in service cannot be cured, for the purpose of

the suit.[53] Where, however, a sale by the debtor of property seized under mesne process is merely colorable, or only a transfer of possession merely for concealment, with no intention of transferring the title, the writ alone, if regular on its face and emanating from a tribunal having jurisdiction of the subject-matter, is a full protection to the officer.[54]

**10. Protection Personal to Officer.** The protection from liability afforded by apparently valid process is personal to the officer executing it, and affords no shelter to a wrong-doer under color of whose process the officer is called upon to act.[55]

**11. Second Levy.** Although a sheriff or constable has levied on property sufficient to satisfy an execution, the writ protects him from liability for a second levy on other property.[56]

**12. Levy After Payment of Debt.** An officer having a valid execution in his hands and not being instructed by plaintiff to forbear is protected in levying thereunder, although the execution has been satisfied,[57] and defendant exhibits to him a receipt given by plaintiff in full for the judgment debt.[58] Neither can an officer be held liable for levying an attachment on a satisfied debt,[59] unless there has been a discontinuance of the suit or at least notice to the sheriff of the satisfaction.[60]

**13. Levy After Return or Return-Day.** A sheriff who makes a levy under a writ after he has returned the same [61] or after the return-day [62] is a mere trespasser and the process affords him no protection.

**14. Actions After Expiration of Writ.** A writ which under the statute remains in force for a limited time only can afford the officer no protection as to anything done after such time.[63]

**15. Effect of Supersedeas.**[64] A sheriff is protected in acts done in the execu-

sustaining the justification in the action in trespass, by taking out a new attachment. Fairbanks *v.* Bennett, 52 Mich. 61, 17 N. W. 696.

**53.** Hakanson *v.* Brodke, 36 Nebr. 42, 53 N. W. 1033 [*following* Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975; Bartlett *v.* Cheesebrough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919; Williams *v.* Eikenberry, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517, 22 Nebr. 210, 34 N. W. 373; Oberfelder *v.* Kavanaugh, 21 Nebr. 483, 32 N. W. 295]; Smith *v.* Holt, 37 N. Y. App. Div. 24, 55 N. Y. Suppl. 731.

**Reason of the rule.**— This proof is required not because it affects the process or is in that respect necessary to protect the officer, but because it affects the title to the property in question, and as no one but a creditor can question the title of a fraudulent vendee the officer must, in order to make out his justification, show that the relation of debtor and creditor exists between the person against whom the process runs and the person in whose behalf it was issued. Townsly-Myrick Dry Goods Co. *v.* Fuller, 58 Ark. 181, 24 S. W. 108, 41 S. W. 97; Bogert *v.* Phelps, 14 Wis. 88 [*followed* in Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334].

**54.** Thornburgh *v.* Hand, 7 Cal. 554; Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; Keys *v.* Grannis, 3 Nev. 548.

**55.** Tuttle *v.* Wilson, 24 Ill. 553 [*followed* in Housh *v.* People, 75 Ill. 487].

**56.** Denvrey *v.* Fox, 22 Barb. (N. Y.) 522, so holding on the grounds that a sufficient levy is not a satisfaction of the judgment, and that the sufficiency of a levy cannot be certainly ascertained until the sale.

**57.** Brick *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Thrower *v.* Vaughan, 1 Rich. (S. C.) 18.

**Where a judgment is not satisfied when execution issues,** the writ, being fair on its face, protects the officer in case the judgment is afterward satisfied. Davis *v.* Gott, 129 Ky. 486, 113 S. W. 826.

**Effect of knowledge of officer that debt paid** see *infra*, V, L, 21, c.

**58.** Twitchell *v.* Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80 (so holding upon the ground that the officer was not bound to investigate the genuineness or sufficiency of the receipt); Tierney *v.* Frazier, 57 Tex. 437.

**59.** Livingston *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

**60.** Livingston *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

**61.** Chaney *v.* Burford Lumber Co., 132 Ala. 315, 31 So. 369.

**62.** Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; Jordan *v.* Henderson, 39 Tex. Civ. App. 89, 86 S. W. 961; Barnard *v.* Stevens, 2 Aik. (Vt.) 429, 16 Am. Dec. 733.

**63.** Bander *v.* Burley, 15 Barb. (N. Y.) 604.

**Expired process not properly renewed.**— A constable, executing process not renewed by the signature of the justice himself, as required by the statute, is a trespasser, although the body of the renewal is in the handwriting of the justice. Barhydt *v.* Valk, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124.

**64.** See, generally, Appeal and Error, 2 Cyc. 908.

tion of process in his hands, although such process has been superseded, where he had no notice from the proper source of the supersedeas;[65] but he is entitled to no protection in respect to anything which he does after receiving notice of the supersedeas.[66] A supersedeas or stay order protects the officer from any liability for not proceeding with the process.[67]

**16. Declarations of Officer.** The lawfulness of a seizure of property does not depend upon what the officer declared but upon the sufficiency of his authority, and hence where the officer justifies under valid process it is immaterial what he said at the time of the seizure.[68]

**17. Process Against Two or More Parties.** Where an execution against two parties does not distinguish which is principal and which is surety the sheriff has a right to collect it from either,[69] and the one from whom the debt is collected has no cause of action, although he claims to be only a surety,[70] and plaintiff in the execution directed the sheriff to collect it from the other party.[71]

**18. Process Issued at Instance of Sheriff.** The sheriff is not protected as to his acts in the execution of process where he is the moving party in causing the process to be wrongfully issued for his own sole benefit,[72] and knows that the judgment upon which it is issued has been fully paid and satisfied.[73]

**19. Subsequent Actions of Court or Party.** A sheriff who obeys the mandate of a writ is protected thereby regardless of the subsequent actions of the court in

65. Payne *v.* Governor, 18 Ala. 320; Morrison *v.* Wright, 7 Port. (Ala.) 67; Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185 [*approved* in Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051]; Western Seed, etc., Co. *v.* McDonald, 5 Nebr. (Unoff.) 553, 99 N. W. 517.

**Where the officer has perpetrated a fraud** on defendant in execution by refusing to take a certificate of appeal from the justice of the peace who issued the execution, by which further proceedings on the execution would be stayed, after he has agreed to call on the justice and receive the same, he is not protected by the execution from liability for property afterward levied on under the execution. Streeter *v.* Frank, 4 Chandl. (Wis.) 9, 3 Pinn. 285.

66. Morrison *v.* Wright, 7 Port. (Ala.) 67.

**The notice must be actual,** and not merely constructive, to deprive the officer of protection. Morrison *v.* Wright, 7 Port. (Ala.) 67.

**The officer must be served with a written order** requiring him to suspend all action upon an execution in his hands before he can be held liable for executing it. Payne *v.* Governor, 18 Ala. 320.

**The notice must proceed from the same authority as the writ** in order to be binding on the sheriff. Leonard *v.* Dillon, 76 Pa. St. 44.

**A notice from defendant** that the case has been appealed does not make the sheriff liable for proceeding with the execution. Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185 [*approved* in Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051], where it further appeared that the justice by whom the judgment was rendered insisted that no appeal had been perfected.

**Placing the supersedeas in the hands of a deputy** is not such notice to the sheriff as will deprive him of protection. Morrison *v.* Wright, 7 Port. (Ala.) 67.

67. Walker *v.* Hunter, 36 Ala. 125; State *v.* Ferguson, 13 Mo. 166 (holding that this is true, although the order is issued by two justices, whereas it should have been issued by the clerk); Com. *v.* Magee, 8 Pa. St. 240, 44 Am. Dec. 509; Shuman *v.* Pfoutz, 1 Penr. & W. (Pa.) 61.

**Sufficiency of supersedeas.**— When a supersedeas, referring to the petition, fiat, and supersedeas bond, is set up in justification of a failure on the part of the sheriff to collect money on execution, it is sufficient if it appears from the supersedeas, aided by the petition, fiat, and bond, that the parties to the execution, the amount required to be collected, the court from which, and the time when, it issued, are correctly described, and that the execution is the only one in the sheriff's hands to which plaintiffs in it are parties, although the description is inaccurate in other respects. Walker *v.* Hunter, 36 Ala. 125.

**Stopping sale and releasing bidders.**— Where an order staying a levy and sale was served on the sheriff before the sale began, but received by his deputy, who was conducting it, after some of the chattels levied on had been struck off, and the deputy thereupon declared that the sale "was for nothing," the sheriff was not liable to the execution creditor for declaring the sale off and releasing the bidders, since the stay order was operative from the time of its service on the sheriff. Bernheim *v.* Daggett, 12 Abb. N. Cas. (N. Y.) 316 [*affirmed in* 84 N. Y. 670].

68. State *v.* Elrod, 28 N. C. 250.

69. Shuford *v.* Cline, 35 N. C. 463.

70. Shuford *v.* Cline, 35 N. C. 463.

71. Shuford *v.* Cline, 35 N. C. 463.

72. Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791, execution issued for collection of sheriff's fees in another action.

73. Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791.

reference to the matter.[74] And the omission to take out execution on a judgment within the time during which an attachment remains effective does not render the officer who levied the attachment a trespasser *ab initio*.[75]

**20. Ultimate Success of Party at Whose Instance Process Issued.** The right of the sheriff to protection in proper acts done in the execution of mesne process valid on its face does not depend upon the ultimate success in the action of the party at whose instance the process issued;[76] nor is an officer deprived of protection in executing final process by the subsequent reversal of the judgment under which he has acted.[77]

**21. Forfeiture of Protection — a. In General.** An officer who fails to perform his full duty under a process or writ may thereby forfeit all right to protection and become liable for his acts while assuming to execute it.[78] And it is also held that where, in an action against a justice and a constable for false imprisonment under a warrant void because the justice was without jurisdiction to issue it, defendants answer jointly, the constable thereby puts himself on the same grounds as the justice, and it is immaterial whether the warrant could have been a protection to the constable had he defended separately.[79]

**b. Effect of Taking Indemnity.** The fact that an officer has taken indemnity from the persons under whose process he has acted [80] does not deprive him of the protection which his process affords.[81]

**c. Personal Knowledge of Officer.** The rule of protection against liability for proper acts in the execution of process valid upon its face is not affected by the personal knowledge of the officer with respect to the justice of the claim to which the process relates or the propriety of its issuance,[82] or any irregularity or fraud in the obtaining of the judgment [83] or in the judgment itself,[84] or any irregularity

**74.** State *v.* Spencer, 30 Mo. App. 407, holding that where a sheriff distributes the proceeds of an execution sale in accordance with directions contained in the writ, he will be protected, although the court subsequently reduces the rate of interest which should have been paid on a senior judgment.

**75.** McGough *v.* Wellington, 4 Allen (Mass.) 502.

**76.** Houseman *v.* Stewart, 28 Ala. 684; Lashus *v.* Latthews, 75 Me. 446; York *v.* Sanborn, 47 N. H. 403. See also Gates *v.* Gates, 15 Mass. 310.

**77.** Beckley *v.* Boardman, 6 Conn. 372; Ashcraft *v.* Elliott, 38 S. W. 1062, 18 Ky. L. Rep. 934; Barrowcliff *v.* Harrison, 9 Daly (N. Y.) 473.

**78.** Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Williams *v.* Ives, 25 Conn. 568; Boston, etc., R. Co. *v.* Small, 85 Me. 462, 27 Atl. 349, 35 Am. St. Rep. 379 (holding that where an officer serving a search warrant omitted to seize intoxicating liquors which he found on the premises described, he forfeited the protection of his warrant and was liable for any injury done by him to person or property while assuming to execute it, notwithstanding the fact that he acted in good faith upon the belief that the intoxicating liquor found was not intended for unlawful sale); Carter *v.* Allen, 59 Me. 296, 8 Am. Rep. 420; Brackett *v.* Vining, 49 Me. 356; Ross *v.* Philbrick, 39 Me. 29; Blanchard *v.* Dow, 32 Me. 557 (holding that where a tax collector regularly sold cattle under a tax warrant, but omitted afterward to render an account in writing of the sale and charges, as required by the statute and the warrant, this omission deprived him of the protection of the warrant); Williams *v.* Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670; Tubbs *v.* Turkey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744 (holding that where an officer who arrested a person on criminal process and committed him to jail discharged him from arrest on the following morning instead of taking him before the police court as required by law, the omission deprived him of all justification for the arrest); Smith *v.* Gates, 21 Pick. (Mass.) 55.

**79.** Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955. But *compare* Jennings *v.* Carter, 2 Wend. (N. Y.) 446, 451, 20 Am. Dec. 635, where it is said: "The officer has not, in any case that the courts have observed, lost his justification by joining in a notice with others who could not avail themselves of the same justification."

**80. Indemnity to office** see *infra*, VI.

**81.** Horton *v.* Hendershot, 1 Hill (N. Y.) 118.

**82.** *Connecticut.*— Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

*Indiana.*— Gott *v.* Mitchell, 7 Blackf. 270.

*Kansas.*— Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.

*Texas.*— Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**83.** Hammer *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

**84.** Hammer *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

in the process under which he acts,[85] and a sheriff is protected in complying with an order of court which he knows was made under an error of fact.[86] It has also been held that where the court has jurisdiction of the subject-matter and the process is apparently valid the officer is protected in executing it, although he has notice of the fact that the court did not acquire jurisdiction of defendant.[87] But there is also authority for the view that, although process is valid on its face, an officer may be held liable for executing the same where he knows that the court acted without jurisdiction,[88] or that the process was issued without authority of law,[89] or that the debt has been paid.[90] So also it is held that an officer selling property under the mandate of a writ of venditioni exponas is not protected thereby if he knows that the property does not belong to the party under judgment against whom it is sold.[91]

**d. Wrongful Acts of Officer.** A process, judgment, or order of court cannot protect an officer from liability for wrongful acts which have been committed by him in connection with its execution,[92] although it may be effective to protect

**85.** Webber *v.* Gay, 24 Wend. (N. Y.) 485.

**86.** Brainard *v.* Head, 15 La. Ann. 489.

**87.** Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522; Bovee *v.* King, 11 Hun (N. Y.) 250 [*affirmed* in 75 N. Y. 609]; People *v.* Warren, 5 Hill (N. Y.) 440.

**88.** Parker *v.* Smith, 6 Ill. 411 [*following* Barnes *v.* Barber, 6 Ill. 401]; Harris *v.* Gunn, 37 Misc. (N. Y.) 796, 77 N. Y. Suppl. 20 [*distinguishing* Earl *v.* Camp, 16 Wend. (N. Y.) 562]; Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613. See also Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105.

**89.** See Martin *v.* Walker, 15 Ill. 377; Tefft *v.* Ashbaugh, 13 Ill. 602.

**90.** Breck *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Stanley *v.* Nutter, 16 N. H. 22. But *compare* Twitchell *v.* Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.

**91.** Burgin *v.* Raplee, 100 Ala. 433, 14 So. 205.

**92.** *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; West *v.* Hayes, 120 Ala. 92, 23 So. 727, 74 Am. St. Rep. 24; Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Lyon *v.* Goree, 15 Ala. 360; Wright *v.* Spencer, 1 Stew. 576, 18 Am. Dec. 76.

*Arkansas.*—Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222; McClure *v.* Hill, 36 Ark. 268, holding that an order of delivery issued by a justice of the peace, even if valid, will constitute no protection to a constable who executes it without first taking bond from plaintiff.

*Connecticut.*— Williams *v.* Miller, 16 Conn. 144.

*Illinois.*— Haskins *v.* Haskins, 67 Ill. 446; Upton *v.* Craig, 57 Ill. 257; Ilg *v.* Burbank, 59 Ill. App. 291.

*Indiana.*— State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257.

*Kansas.*— Cook *v.* Higgins, 66 Kan. 762, 71 Pac. 259; Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993.

*Kentucky.*— Clay *v.* Sandefer, 12 B. Mon. 334; Calvert *v.* Stone, 10 B. Mon. 152; Hunt *v.* Ballew, 9 B. Mon. 390; Walker *v.* Fox, 2 Dana 404.

*Louisiana.*— Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294.

*Maine.*— Smith *v.* Grant, 56 Me. 255; Hinckley *v.* Gilmore, 49 Me. 59.

*Massachusetts.*— Billings *v.* Thomas, 114 Mass. 570; Nichols *v.* Thomas, 4 Mass. 232, arrest of member of corporation on execution against the corporation by the name of the president, directors, and company, directing the officer for a want of estate to take their bodies.

*Michigan.*— Williams *v.* Raper, 67 Mich. 427, 34 N. W. 890; Sexton *v.* McDowd, 38 Mich. 148.

*Mississippi.*— Yarborough *v.* Harper, 25 Miss. 112.

*Missouri.*— State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440; State *v.* Hadlock, 52 Mo. App. 297.

*New York.*— Otis *v.* Williams, 70 N. Y. 208; Bullis *v.* Montgomery, 50 N. Y. 352; Einstein *v.* Dunn, 61 N. Y. App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Hoyt *v.* Van Alstyne, 15 Barb. 568; Stimpson *v.* Reynolds, 14 Barb. 506.

*North Carolina.*— State *v.* Armfield, 9 N. C. 246, 11 Am. Dec. 762.

*Ohio.*— Eckert *v.* Colvin, 1 Ohio Dec. (Reprint) 11, West. L. J. 54.

*Pennsylvania.*— Snyder *v.* Berger, 3 Pa. Cas. 318, 6 Atl. 733; Zacharias *v.* Totten, 90 Pa. St. 286; Houston *v.* Smith, 1 Phila. 221.

*Texas.*— Vickery *v.* Crawford, 93 Tex. 273, 55 S. W. 560, 77 Am. St. Rep. 891, 49 L. R. A. 773; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

*Vermont.*— Nelson *v.* Denison, 17 Vt. 73.

*United States.*— McKnight *v.* U. S., 130 Fed. 659, 65 C. C. A. 37.

*England.*— Six Carpenters' Case, 8 Coke 146, 77 Eng. Reprint 695. See also Brunswick *v.* Slowman, 8 C. B. 317, 18 L. J. C. P. 299, 65 E. C. L. 317.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 143 *et seq.*

**Liability as trespasser ab initio.**—An officer forfeits the protection which the proper execution of legal process affords, and becomes a trespasser *ab initio*, when he is guilty of such an improper and illegal exercise of authority under it as warrants the conclusion that he intended from the first to use his legal au-

him against a recovery of exemplary damages by showing that his act was not malicious.[93]

**22. Particular Process, Judgments, or Orders.** The general rules with reference to the protection of the officer which have been stated[94] apply to orders for the sale of property[95] or directing the disposition of the proceeds of sales,[96] orders for the payment of money into court,[97] warrants of arrest,[98] writs of capias ad satisfaciendum,[99] warrants of commitment,[1] attachments against defaulting witnesses,[2] orders for the discharge of prisoners,[3] possessory warrants,[4] search warrants,[5] distress

thority as a cover for his illegal conduct. Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993.

**93.** Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

**Disregarding mortgage in making levy.**— Where the statute provides for the sale of chattels pledged by way of mortgage, on execution, subject to the lien of the mortgage, an officer who does not levy subject to the mortgage, which proves to be a valid lien, is not protected from liability for the levy and sale. Williams *v.* Raper, 67 Mich. 427, 34 N. W. 890.

**94.** See *supra*, V, L, 1–21.

**95.** *California.*— McCullough *v.* Clark, 41 Cal. 298.

*Indiana.*— Thompson *v.* State, 3 Ind. App. 371, 28 N. E. 996.

*Louisiana.*— Rau *v.* Katz, 26 La. Ann. 463.

*Maryland.*— Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

*Minnesota.*— Hill *v.* Rasicot, 34 Minn. 270, 25 N. W. 604.

*Wisconsin.*— Sterling *v.* Ripley, 3 Pinn. 155, 3 Chandl. 166.

*United States.*— Conner *v.* Long, 104 U. S. 228, 26 L. ed. 723; O'Brien *v.* Weld, 92 U. S. 81, 23 L. ed. 675.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 147.

**96.** American Hosiery Co. *v.* Riley, 12 Abb. N. Cas. (N. Y.) 329; O'Brien *v.* Weld, 92 U. S. 81, 23 L. ed. 675. But *compare* State *v.* Boles, 13 S. C. 283, holding that where a sheriff pays over the proceeds of property sold on execution to a junior judgment creditor, under the order of the circuit court in proceedings by rule to which the senior judgment creditor was not made a party, he is not thereby released from his liability to such senior judgment creditor.

**97.** Acker *v.* Ledyard, 8 N. Y. 62 [*reversing* 8 Barb. 514].

**98.** *Alabama.*— Murphy *v.* State, 55 Ala. 252.

*Connecticut.*— Neth *v.* Crofut, 30 Conn. 580.

*Kentucky.*— Hunt *v.* Ballew, 9 B. Mon. 390.

*Massachusetts.*— Whipple *v.* Kent, 2 Gray 410, 61 Am. Dec. 470.

*Missouri.*— Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124.

*New York.*— Stewart *v.* Hawley, 21 Wend. 552, holding that a constable executing a warrant of arrest is not liable in trespass, where the magistrate issuing the warrant had jurisdiction of the alleged offense, and the warrant is regular on its face, although the facts alleged in the warrant of arrest do not, as a matter of law, constitute an offense.

*North Carolina.*— Cohoon *v.* Speed, 47 N. C. 133; Welch *v.* Scott, 27 N. C. 72, holding that a constable is justified in executing a warrant of arrest issued by a magistrate, where the subject-matter is within the jurisdiction of the magistrate, although it does not appear on what evidence it was issued.

*Ohio.*— Taylor *v.* Alexander, 6 Ohio 144; Carothers *v.* Scott, Tapp. 227.

*South Dakota.*— Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 157.

**Alteration of warrant.**— A warrant of arrest, which, after it has left the hands of the magistrate who issued it, is altered by another magistrate by inserting a name of another person to be apprehended, will be no justification to the officer who executes it for taking such other person. Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426.

**A special constable** appointed to make an arrest will be protected by the warrant. Carothers *v.* Scott, Tapp. (Ohio) 227.

**99.** Lattin *v.* Smith, 1 Ill. 361; State *v.* Hamilton, 9 Mo. 794 (holding that a sheriff, having an execution running against the body of defendant, is not liable in trespass for arresting him, although not legally liable to arrest); Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242 (holding that a capias ad satisfaciendum, issued on a judgment which has been previously paid, will protect the officer making the arrest from liability to the debtor for false imprisonment).

**1.** Reg. *v.* O'Leary, 16 N. Brunsw. 264.

**2.** Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105.

**3.** Pinckney *v.* Hagerman, 4 Lans. (N. Y.) 374 [*affirmed* in 53 N. Y. 31]; Cantillon *v.* Graves, 8 Johns. (N. Y.) 472; Stevenson *v.* Carothers, 3 Yeates (Pa.) 180.

**4.** Chipstead *v.* Porter, 63 Ga. 220.

**5.** *Maine.*— Small *v.* Orne, 79 Me. 78, 8 Atl. 152; Wall *v.* Farnham, 46 Me. 525; Gray *v.* Kimball, 42 Me. 299; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

*Massachusetts.*— Sanford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Dwinnels *v.* Boynton, 3 Allen 310.

*Michigan.*— O'Mears *v.* Merritt, 128 Mich. 249, 87 N. W. 197.

*Missouri.*— Melcher *v.* Scruggs, 72 Mo. 406.

*New Hampshire.*— Hussey *v.* Davis, 58 N. H. 317.

*North Carolina.*— State *v.* Mann, 27 N. C. 45; State *v.* McDonald, 14 N. C. 468.

warrants,[6] writs of assistance,[7] writs of attachment,[8] writs of execution,[9]

*Rhode Island.*— Humes *v.* Taber, 1 R. I. 464.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 154.

6. Roberts *v.* Tennell, 4 Litt. (Ky.) 286 (holding that the officer is protected in executing the warrant whether or not any rent is due); Brown *v.* Mosher, 83 Me. 111, 21 Atl. 835; Randall *v.* Rosenthal, (Tex. Civ. App. 1895) 31 S. W. 822.

7. Arrex *v.* Brodhead, 19 Hun (N. Y.) 269; State *v.* Giles, 10 Wis. 101.

8. *Alabama.*— Houseman *v.* Stewart, 28 Ala. 684; Kirksey *v.* Dubose, 19 Ala. 43; Governor *v.* Gibson, 14 Ala. 326.

*California.*— Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316.

*Colorado.*— Archibald *v.* Thompson, 2 Colo. 388.

*Illinois.*— Booth *v.* Rees, 26 Ill. 45; McGillis *v.* Bishop, 27 Ill. App. 53.

*Kansas.*— Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

*Kentucky.*— Clay *v.* Sandefer, 12 B. Mon. 334.

*Maine.*— Lashus *v.* Matthews, 75 Me. 446.

*Missouri.*— State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240.

*New York.*— Fulton *v.* Heaton, 1 Barb. 552; Webber *v.* Gay, 24 Wend. 485; Earl *v.* Camp, 16 Wend. 562; Jenner *v.* Joliffe, 9 Johns. 381.

*North Carolina.*— Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75.

*Oregon.*— White *v.* Thompson, 3 Oreg. 115.

*Pennsylvania.*— Fall Creek Coal, etc., Co. *v.* Smith, 71 Pa. St. 230.

*South Carolina.*— Foster *v.* Gault, 2 McMull. 335; Swanzy *v.* Hunt, 2 Nott & M. 211.

*Texas.*— Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

*Utah.*— Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743.

*Vermont.*— Luce *v.* Hoisington, 54 Vt. 428; Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316; Eaton *v.* Cooper, 29 Vt. 444; Stewart *v.* Martin, 16 Vt. 397.

*Wisconsin.*— Bogert *v.* Phelps, 14 Wis. 88.

*United States.*— Matthews *v.* Densmore, 109 U. S. 216, 3 S. Ct. 126, 27 L. ed. 912 [*followed* in Marks *v.* Shoup, 181 U. S. 562, 21 S. Ct. 724, 45 L. ed. 1002].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 149.

9. *Alabama.*— Stephens *v.* Head, 138 Ala. 455, 35 So. 565; Payne *v.* Governor, 18 Ala. 320; Averett *v.* Thompson, 15 Ala. 678; Cogburn *v.* Spence, 15 Ala. 549, 50 Am. Dec. 140.

*Arkansas.*— Byrd *v.* Clendenin, 11 Ark. 572; Huddleston *v.* Spear, 8 Ark. 406.

*California.*— Norcross *v.* Nunan, 61 Cal. 640.

*Connecticut.*— Toby *v.* Reed, 9 Conn. 216.

*Georgia.*— Wilbur *v.* Stokes, 117 Ga. 545, 43 S. E. 856; Rounsaville *v.* McGinnis, 93 Ga. 579, 21 S. E. 123.

*Idaho.*— Coombs *v.* Collins, 6 Ida. 536, 57 Pac. 310.

*Illinois.*— Johnson *v.* Holloway, 82 Ill. 334; Outhouse *v.* Allen, 72 Ill. 529.

*Indiana.*— Gott *v.* Mitchell, 7 Blackf. 270; Thurston *v.* Boardman, Wils. 433.

*Iowa.*— Heath *v.* Halfhill, 106 Iowa 131, 76 N. W. 522.

*Kentucky.*— Kleissendorff *v.* Fore, 3 B. Mon. 471; Percefull *v.* Com., 3 B. Mon. 347; Ringo *v.* Ward, 2 B. Mon. 127.

*Maine.*— Wilton Mfg. Co. *v.* Butler, 34 Me. 431; Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309.

*Massachusetts.*— Bergin *v.* Hayward, 102 Mass. 414.

*Michigan.*— Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051; Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185.

*Minnesota.*— Johnson *v.* Randall, 74 Minn. 44, 76 N. W. 791; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704; Orr *v.* Box, 22 Minn. 485.

*Missouri.*— Howard *v.* Clark, 43 Mo. 344; Higdon *v.* Conway, 12 Mo. 295; Milburn *v.* Gilman, 11 Mo. 64; Brown *v.* Henderson, 1 Mo. 134; State *v.* Smith, 81 Mo. App. 671.

*New Hampshire.*— Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

*New York.*— Hill *v.* Haynes, 54 N. Y. 153; Goldberg *v.* Markowitz, 94 N. Y. App. Div. 237, 87 N. Y. Suppl. 1045 [*affirmed* in 182 N. Y. 540, 75 N. E. 1129]; Bodine *v.* Thurwachter, 34 Hun 76; Bovee *v.* King, 11 Hun 250 [*affirmed* in 75 N. Y. 609]; Denvrey *v.* Fox, 22 Barb. 522; Barron *v.* Boyd, 1 Thomps. & C. 457; Heath *v.* Westervelt, 2 Sandf. 110; Piepgras *v.* Edmunds, 5 Misc. 314, 25 N. Y. Suppl. 961 [*affirmed* in 26 N. Y. Suppl. 1134]; Sheldon *v.* Stryker, 21 How. Pr. 329; Cornell *v.* Barnes, 7 Hill 35; Bealls *v.* Guernsey, 8 Johns. 52.

*North Carolina.*— O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126; Stewart *v.* Ray, 26 N. C. 269; Farley *v.* Lee, 20 N. C. 307, 32 Am. Dec. 680.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776.

*Pennsylvania.*— Breckwoldt *v.* Morris, 149 Pa. St. 291, 24 Atl. 300; Barr *v.* Boyles, 96 Pa. St. 31; Zacharias *v.* Totton, 90 Pa. St. 286; Leonard *v.* Dillon, 76 Pa. St. 44; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Paul *v.* Vankirk, 6 Binn. 123.

*South Carolina.*— Bragg *v.* Thompson, 19 S. C. 572; Thrower *v.* Vaughan, 1 Rich. 18; Brown *v.* Wood, 1 Bailey 457; Treasurer *v.* Ford, 1 Nott & M. 234.

*Tennessee.*—Crockett *v.* Latimer, 1 Humphr. 272.

*Texas.*— Wettermark *v.* Campbell, (Civ. App. 1900) 57 S. W. 904.

*Utah.*— Hamner *v.* Ballantyne, 13 Utah 324, 44 Pac. 704, 57 Am. St. Rep. 736.

*Wisconsin.*— Young *v.* Wise, 7 Wis. 128.

*United States.*— Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst. 34.

*England.*— Cheasley *v.* Barnes, 10 East 73, 103 Eng. Reprint 703.

*Canada.*— Crowe *v.* Adams, 21 Can. Sup. Ct. 342.

writs of possession,[10] writs of or requisitions in replevin,[11] writs of restitution,[12] writs of sequestration,[13] requisitions in claim and delivery proceedings,[14] writs of habeas corpus ad testificandum,[15] and, generally, to anything which may be properly considered as process.[16] But an instrument signed by a sheriff, directing his deputy to rearrest a defendant for failure of his bail to justify, is not process, within the rule that process regular upon its face protects those acting under it.[17] Where the statute provides for the foreclosure of chattel mortgages by notice of sale, a sheriff who seizes and sells under such a notice incurs no liability to the mortgagor, although the latter protested against the sheriff's action, where he did not avail himself of a method provided by statute for preventing an unauthorized foreclosure.[18]

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 146.

10. *Alabama.*— Morrison *v.* Wright, 7 Port. 67.

*Illinois.*— Page *v.* Du Puy, 40 Ill. 506.

*Massachusetts.*— Fiske *v.* Chamberlin, 103 Mass. 495 (holding that a sheriff is protected by a writ of possession in removing without force from the premises the wife of defendant therein, although she claims title in her own right, if her claim is invalid); Howe *v.* Butterfield, 4 Cush. 302, 50 Am. Dec. 785.

*Missouri.*— State *v.* Devitt, 107 Mo. 573, 17 S. W. 900, 28 Am. St. Rep. 440.

*North Carolina.*— State *v.* Ferguson, 67 N. C. 219.

*Vermont.*— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 153.

11. *Connecticut.*— Osgood *v.* Carver, 43 Conn. 24.

*Illinois.*— Sample *v.* Broadwell, 87 Ill. 617; Gilbert *v.* Buffalo Bill's Wild West Co., 70 Ill. App. 326; Boyden *v.* Frank, 20 Ill. App. 169.

*Nebraska.*— Philips *v.* Spotts, 14 Nebr. 139, 15 N. W. 332.

*New York.*—Bullis *v.* Montgomery, 50 N. Y. 352 [*followed* in Barron *v.* Boyd, 1 Thomps. & C. 457]; Foster *v.* Pettibone, 20 Barb. 350 (holding that the owner of goods cannot maintain trespass against a sheriff, who took them under a writ of replevin against another person in whose possession they were); Van Keuren *v.* Switzer, 11 N. Y. Suppl. 263.

*Rhode Island.*— Curry *v.* Johnson, 13 R. I. 121.

*Wisconsin.*—Weinberg *v.* Conover, 4 Wis. 803.

*Canada.*—Beemer *v.* Inkster, 3 Manitoba 534.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 150.

**Writ will not justify taking from person other than defendant.**— Billings *v.* Thomas, 114 Mass. 570; Sexton *v.* McDowd, 38 Mich. 148; Stimpson *v.* Reynolds, 14 Barb. (N. Y.) 506. *Contra*, Shipman *v.* Clark, 4 Den. (N. Y.) 446, 47 Am. Dec. 264; Hallett *v.* Byrt, Carth. 380, 90 Eng. Reprint 821.

12. *California.*— Burnham *v.* Stone, 101 Cal. 164, 35 Pac. 627.

*Illinois.*— Smith *v.* People, 99 Ill. 445; Miller *v.* White, 80 Ill. 580; Haskins *v.* Haskins, 67 Ill. 446.

*Kansas.*—Allen *v.* Corlew, 10 Kan. 70.

*New Mexico.*—Archibeque *v.* Miera, 1 N. M. 419.

*Wisconsin.*— Gaertner *v.* Bues, 109 Wis. 165, 85 N. W. 388.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 153.

**Defective description.**— A writ of restitution issued upon a judgment in forcible detainer will not protect an officer in evicting another under it, where it describes the land as a part of a certain tract, but fails to state what part thereof. Haskins *v.* Haskins, 67 Ill. 446.

13. Flournoy *v.* Milling, 15 La. Ann. 473; Vickery *v.* Crawford, 93 Tex. 273, 55 S. W. 560, 77 Am. St. Rep. 891, 49 L. R. A. 773; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638; Peck *v.* Crane, 25 Vt. 146.

14. Bullis *v.* Montgomery, 50 N. Y. 352; Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. 63.

**Requisition does not justify taking from person other than defendant.**— Bullis *v.* Montgomery, 50 N. Y. 352. So a sheriff is not protected in taking the property from a defendant's wife who has it in possession under claim of independent title. Otis *v.* Williams, 70 N. Y. 208.

15. Wattles *v.* Marsh, 5 Cow. (N. Y.) 176.

16. See Blumaur-Frank Drug Co. *v.* Branstetter, 4 Ida. 557, 43 Pac. 575, 95 Am. St. Rep. 151 (holding that the affidavit and notice for the foreclosure of a chattel mortgage under Rev. St. §§ 3390, 3391, are process, and as such protect the sheriff in the execution thereof by proceeding to levy and sale); Miller *v.* Weida, 41 Ind. 199 (holding that a fee bill, legal on its face and showing jurisdiction in the court from which it issued, is a justification to an officer acting under it in making a levy and sale of property, and that the fact that the costs for which a fee bill was issued were made by a party to the suit in which they originated, other than the party against whom the fee bill was issued, and should properly have been taxed to such other party, did not render the sheriff a trespasser); Worland *v.* Sutten, 3 Dana (Ky.) 477 (holding that a witness certificate has the force and effect of an execution and an officer seizing property by authority of such a certificate may justify under it).

17. Arteaga *v.* Flack, 2 N. Y. Civ. Proc. 152.

18. Mack *v.* Doak, 50 Wash. 119, 96 Pac. 825.

## VI. INDEMNITY[19] TO OFFICER.

**A. Right to Require Indemnity — 1. IN GENERAL.** Under the common law the sheriff was bound at his peril to do his duty and to judge of both the law and the facts, being liable to plaintiff for a false return if he failed to levy on property subject to the writ,[20] while a levy on property not subject thereto rendered him liable to the person injured thereby in an action of trespass;[21] but in modern times the responsibility of the sheriff in this respect has been much modified by statute,[22] and he is very generally given the right to require indemnity before proceeding with the execution of a writ, in case he reasonably anticipates that he may subject himself to some liability by proceeding.[23] So the sheriff is entitled to require indemnity where he has reason to believe that there is a doubt as to the title

19. **Indemnity** generally see INDEMNITY, 22 Cyc. 78.

20. See, generally, *supra*, V, C, 1; V, J, 4.

21. State *v.* Doan, 39 Mo. 44; Hamblet *v.* Herndon, 3 Humphr. (Tenn.) 34. And see generally *supra*, V, E, 12.

**Common-law modes of obtaining protection.**— The first mode recognized by the common-law practice for the protection of the officer, where property seized under process was claimed by a person other than defendant, was to demand indemnity of plaintiff for the seizure and sale, and of the claimant for releasing the property. In the event of both parties refusing to give indemnity the officer might make an application to the court out of which the writ issued. It was discretionary with the court whether it would interfere, but the courts nearly always acted when they were satisfied of the *bona fides* of the officer's doubts, that they were based on reasonable grounds, and that he was not in collusion with defendant in the writ. Unless plaintiff could then indemnify the officer the court usually postponed the return-day of the writ until the officer had further time for investigation, and if reasonable grounds of apprehension continued the court would defer the return indefinitely, unless plaintiff complied with the request for indemnity. The other mode was for the officer, under a writ of proprietate probando, to impanel a jury to inquire into the *prima facie* title of the property; and if the jury found in favor of the claimant the officer might release to him the property, and such finding justified the officer in making a return *nulla bona* unless plaintiff gave him the indemnity. State *v.* Koontz, 83 Mo. 323.

22. State *v.* Doan, 39 Mo. 44.

23. *Alabama.*— McGehee *v.* Chandler, 15 Ala. 659.

*Arkansas.*— Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609.

*California.*— Long *v.* Neville, 36 Cal. 455, 95 Am. Dec. 199.

*Colorado.*— Porter *v.* Stapp, 6 Colo. 32.

*Georgia.*— Levy *v.* Shockley, 29 Ga. 710.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Illinois.*— Second Nat. Bank *v.* Gilbert, 70 Ill. App. 251.

*Iowa.*— Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524.

*Kentucky.*— Chisholm *v.* Gooch, 79 Ky. 468; Board *v.* Helm, 2 Metc. 500; Watts *v.* Cook, 2 Bush 141; Gunn *v.* Gudehus, 15 B. Mon. 447.

*Maine.*— Leathers *v.* Carr, 24 Me. 351.

*Maryland.*— Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

*Massachusetts.*— Marsh *v.* Gold, 2 Pick. 285; Perley *v.* Foster, 9 Mass. 112.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*Mississippi.*— Gulfport Bank *v.* O'Neal, 86 Miss. 45, 38 So. 630.

*Missouri.*— State *v.* Jenkins, 170 Mo. 116, 70 S. W. 152.

*Montana.*— Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

*Nebraska.*—Mihalovitch *v.* Burlass, 36 Nebr. 491, 54 N. W. 826.

*Nevada.*— Gaudette *v.* Roeder, 13 Nev. 341.

*New Hampshire.*— Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319; Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603.

*New Jersey.*— Thompson *v.* Coleman, 4 N. J. L. 216.

*New Mexico.*— Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783.

*New York.*— O'Donohue *v.* Simmons, 31 Hun 267; Leonard *v.* Buttling, 19 Misc. 219, 44 N. Y. Suppl. 273 [*affirmed* in 13 N. Y. App. Div. 179, 43 N. Y. Suppl. 387].

*Oklahoma.*—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

*Pennsylvania.*— Com. *v.* Vandyke, 57 Pa. St. 34.

*South Carolina.*—Emory *v.* Davis, 4 S. C. 23.

*South Dakota.*—Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

*Tennessee.*—Hamblet *v.* Herndon, 3 Humphr. 34.

*Texas.*— Illies *v.* Fitzgerald, 11 Tex. 417; Vickery *v.* Crawford, (Civ. App. 1900) 57 S. W. 326; Seasongood *v.* Campbell, (Civ. App. 1899) 49 S. W. 407.

*Virginia.*— McClunn *v.* Steel, 2 Va. Cas. 256.

*Washington.*—Carpenter *v.* Barry, 26 Wash. 255, 66 Pac. 393.

*West Virginia.*— Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

*Wisconsin.*— Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

*Wyoming.*— Main Co. *v.* Morrow, 8 Wyo. 323, 57 Pac. 915.

*United States.*— Norris *v.* McCanna, 29 Fed. 757.

of property which he is required to seize,[24] and that a controversy may arise in relation thereto,[25] where the property is in the possession of a person other than defendant,[26] where a third person asserts a claim to the property adverse to that of defendant,[27] where it is claimed by defendant that the property is exempt

*England.*—Blackett *v.* Crissop, 1 Ld. Raym. 278, 91 Eng. Reprint 1082.

*Canada.*— Bonnet *v.* Ritchie, 8 Can. L. T. Occ. Notes 376, 20 Nova Scotia 228.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

But *compare* Bosley *v.* Farquar, 2 Blackf. (Ind.) 61 [*approved* in Allwein *v.* Sprinkle, 87 Ind. 240; State *v.* Sandlin, 44 Ind. 470].

**Under some statutes the sheriff is entitled** to indemnity only in execution cases and not in attachment cases. Hall *v.* Ballou, 58 Iowa 585, 12 N. W. 475; Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; State *v.* Koontz, 83 Mo. 323; State *v.* Fitzpatrick, 64 Mo. 185; Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692 [*doubted* in State *v.* Manly, 11 Lea (Tenn.) 636].

**In case of a levy on real estate** an officer has no authority to accept a bond of indemnity. McDowell *v.* Coleman, 2 Ky. L. Rep. 389.

**24.** *Alabama.*— Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789; Ogden *v.* Powell, 7 Ala. 243; Minter *v.* Bigelow, 9 Port. 481.

*Colorado.*— Porter *v.* Stapp, 6 Colo. 32.

*Illinois.*— Baker *v.* Duddleson, 125 Ill. App. 483.

*Iowa.*— Robinson *v.* Chapline, 9 Iowa 91.

*Kentucky.*— Gunn *v.* Gudehus, 15 B. Mon. 447.

*Maine.*— Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

*Massachusetts.*— Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*Mississippi.*— Gulfport Bank *v.* O'Neal, 86 Miss. 45, 38 So. 630; Butler *v.* Alcus, 51 Miss. 47; Forniquet *v.* Tegarden, 24 Miss. 96.

*Nebraska.*— Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73; Mihalovitch *v.* Barlass, 36 Nebr. 491, 54 N. W. 826.

*Pennsylvania.*— Rothermel *v.* Marr, 98 Pa. St. 285; Com. *v.* Vandyke, 57 Pa. St. 34; Shriver *v.* Harbaugh, 37 Pa. St. 399; Spangler *v.* Com., 16 Serg. & R. 68, 16 Am. Dec. 548.

*South Carolina.*— Adair *v.* McDaniel, 1 Bailey 158, 19 Am. Dec. 664.

*Tennessee.*— Jobe *v.* Sellars, 9 Humphr. 178.

*Texas.*— Campbell *v.* Ulch, 24 Tex. Civ. App. 618, 60 S. W. 272. A sheriff who has levied on personalty and has doubts as to the title may demand indemnity before selling, but he has no such right where the levy is on realty. Bryan *v.* Bridge, 6 Tex. 137.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

**Liability of sheriff for levy on property not belonging to defendant** see *supra*, V, E, 14.

**25.** *Alabama.*— Hall *v.* McHenry, 5 Port. 123.

*Maine.*— Gower *v.* Emery, 18 Me. 79.

*Massachusetts.*— Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*Tennessee.*— Jobe *v.* Sellars, 9 Humphr. 178.

*United States.*— Norris *v.* McCanna, 29 Fed. 757.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

**26.** Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518; Chamberlain *v.* Beller, 18 N. Y. 115; Bank *v.* Allen, 1 Del. Co. (Pa.) 277; Emory *v.* Davis, 4 S. C. 23.

**27.** *Alabama.*— Ogden *v.* Powell, 7 Ala. 243.

*Illinois.*— Monmouth Second Nat. Bank *v.* Gilbert, 70 Ill. App. 251 [*reversed* on other grounds in 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306].

*Iowa.*— Whitney *v.* Gammon, (1896) 67 N. W. 405; Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524.

*Maryland.*— Robey *v.* State, 94 Md. 61, 50 Atl. 411; Jessop *v.* Brown, 2 Gill & J. 404.

*Missouri.*— Smith *v.* Rogers, 191 Mo. 334, 90 S. W. 1150 [*affirming* 99 Mo. App. 252, 73 S. W. 243]; State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152; State *v.* O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121; State *v.* Doan, 39 Mo. 44; Cochran *v.* Goddard, 27 Mo. 500; State *v.* Slayback, 90 Mo. App. 300; State *v.* Springgate, 58 Mo. App. 402; State *v.* Harrington, 38 Mo. App. 303; State *v.* Smit, 20 Mo. App. 50; Eichelmann *v.* Weiss, 7 Mo. App. 87.

*Montana.*— Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

*Nebraska.*— Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73.

*Nevada.*— Gaudette *v.* Roeder, 13 Nev. 341.

*New Hampshire.*— Smith *v.* Osgood, 46 N. H. 178.

*New Jersey.*— Howard W. Middleton Co. *v.* Souder, 74 N. J. L. 87, 64 Atl. 975; Stevens *v.* Deats, 41 N. J. L. 340.

*New York.*— Williams *v.* Lowndes, 1 Hall 637.

*Pennsylvania.*— Com. *v.* Vandyke, 57 Pa. St. 34; Spangler *v.* Com., 16 Serg. & R. 68, 16 Am. Dec. 548.

*South Carolina.*— Emory *v.* Davis, 4 S. C. 23.

*South Dakota.*— Matheson *v.* F. W. Johnson Co., 16 S. D. 347, 92 N. W. 1083.

*Tennessee.*— Hunt *v.* Walker, 12 Heisk. 551.

*Washington.*— Carpenter *v.* Barry, 26 Wash. 255, 66 Pac. 393; Brotton *v.* Lunkley, 11 Wash. 581, 40 Pac. 140.

*Canada.*— Thomas *v.* Johnston, 4 U. C. Q. B. 110.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

But *compare* Dunlap *v.* Freret, 10 La. Ann. 83, 63 Am. Dec. 590.

**Time of making claim.**— A constable is entitled to demand a bond of indemnity, al-

from levy,[28] or where the officer in good faith doubts whether it is subject to levy and sale.[29] The sheriff has, however, no right to act arbitrarily or capriciously in demanding indemnity, but in order to support such a demand there must be a real and substantial reason to doubt defendant's title to the property or to apprehend that the officer may incur liability by proceeding,[30] and *a fortiori* the sheriff is not entitled to require indemnity where he would incur no liability by executing the writ according to its mandate.[31]

**2. Where Attachment Bond [32] Provided For.** Where the statute provides for an attachment bond to protect defendant or claimants of the attached property from damage, the sheriff has no right to demand any indemnity beyond such bond as a condition of levying the attachment.[33]

**3. Determination by Sheriff's Jury.**[34] Under some statutes where property levied on is claimed by a third person the sheriff is not entitled to require nor is plaintiff bound to tender an indemnity bond until the claim has been passed upon by a sheriff's jury and determined in favor of the claimant;[35] but nevertheless,

though he has previously attached the property in the suit in which the judgment was rendered, and no notice is given or claim made until after execution levy on the property on final judgment. Smith *v.* Rogers, 191 Mo. 334, 90 S. W. 1150 [*affirming* 99 Mo. App. 252, 73 S. W. 243].

**One claim or demand sufficient.**— A claim of ownership of goods made by a person against an attaching officer will authorize the officer to demand a bond of indemnity from another person attaching the same goods, without a second demand from the claimant. State *v.* Doan, 39 Mo. 44.

**28.** Mayberry *v.* Whittier, 144 Cal. 322, 78 Pac. 16; Gulfport Bank *v.* O'Neal, 86 Miss. 45, 38 So. 630.

**Liability of sheriff for levy on exempt property** see *supra*, V, E, 12, b.

**29.** *Arkansas.*—Harris *v.* Harrison, 40 Ark. 50.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Kentucky.*— Dixon *v.* Bacon, 3 Bush 534; Board *v.* Helm, 2 Metc. 500; Gunn *v.* Gudehus, 15 B. Mon. 447; Davis *v.* Tibbats, 7 J. J. Marsh. 264; Crane *v.* Crane, 105 S. W. 370, 32 Ky. L. Rep. 82.

*Virginia.*—Huffman *v.* Leffell, 32 Gratt. 41.

*West Virginia.*— Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

**Liability of sheriff for levy on property not subject to levy** see *supra*, V, E, 12.

**30.** *Alabama.*— Ogden *v.* Powell, 7 Ala. 243.

*Illinois.*— Kickham *v.* Kane, 135 Ill. App. 628, holding that possession of property by an attachment defendant is *prima facie* evidence of ownership, and the sheriff is bound to levy without an indemnifying bond if he has no knowledge of any other claim.

*New York.*— Williams *v.* Lowndes, 1 Hall 637, holding that if goods in the hands of defendant are pointed out to the sheriff by plaintiff, and he is requested to levy on them, he is bound so to do without indemnity, if no claim is made by third persons.

*South Carolina.*— Adair *v.* McDaniel, 1 Bailey 158, 19 Am. Dec. 664.

*West Virginia.*— Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

**31.** *Idaho.*— Ah Klie *v.* Gregory, 3 Ida. 64, 34 Pac. 812, holding that where the court had decided that plaintiff was entitled to the possession of certain property and ordered that he be put in possession, and a writ of restitution was thereupon issued, the sheriff was not entitled to indemnity before executing the writ.

*Kentucky.*—Mitchell *v.* Vance, 5 T. B. Mon. 528, 17 Am. Dec. 96, holding that where a claimant fails to establish his right to the property and the statute imperatively commands the officer to sell under such circumstances a bond given to induce him to sell was void.

*Mississippi.*— Gibson *v.* Lock, 58 Miss. 298, holding that since one whose property on demised premises was exempt from distraint for rent had no remedy in case of a levy but by replevin of the property before the sale under the distress warrant, the sheriff had no right to demand indemnity before levying on such property.

*Missouri.*— Bradley *v.* Holloway, 28 Mo. 150, holding that a constable was not authorized to demand indemnity of plaintiff in execution, unless claim was made to the property levied on substantially as provided by the statute, as such a claim was necessary to give the claimant a right of action against the officer.

*Tennessee.*—State *v.* Manly, 11 Lea 636, holding that where an order of sale is regularly made in an attachment proceeding the sheriff cannot demand an indemnity bond before selling, although the title to the property is disputed.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 130.

**32. Attachment bond** see Attachment, 4 Cyc. 527.

**33.** Cutler *v.* Tully, 5 Indian Terr. 180, 82 S. W. 714.

**34.** See, generally, Executions, 17 Cyc. 1209.

**35.** Platt *v.* Sherry, 7 Wend. (N. Y.) 236; Curtis *v.* Patterson, 8 Cow. (N. Y.) 65; Matheson *v.* F. W. Johnson Co., 16 S. D. 347, 92 N. W. 1083. See also Craft *v.* Brandow, 24 Misc. (N. Y.) 306, 52 N. Y. Suppl. 1078.

where plaintiff has voluntarily executed an undertaking of indemnity without a jury having been summoned, and the sheriff thereupon has held the property, such undertaking is valid and enforceable.[36]

**4. Indemnity For Expenses of Suit.** Where property levied on by the sheriff has been taken from him by replevin, in which he has obtained judgment, he is not entitled to demand indemnity from the original plaintiff before prosecuting the sureties in the replevin bond, if necessary.[37] And where a constable has delivered attached property to a bailee, a contract not under seal to indemnify the officer against the expense of a suit to recover the property from the bailee has been held void for want of consideration.[38]

**5. Indemnity on Allowing Claim of Exemption.** A sheriff has no right to demand indemnity from an execution defendant as a condition of allowing a claim of exemption.[39]

**B. Necessity of Demand.** It is not the duty of plaintiff to tender an indemnity bond without a request therefor.[40]

**C. Time For Demanding Indemnity.** The right to demand indemnity is not confined to cases where doubts arise before a seizure; but in case of doubts arising or claims being made after the property is seized, the sheriff may demand indemnity before proceeding further,[41] and a bond to indemnify the sheriff against the consequences of a levy on property is valid, although not given until after the levy is made.[42] It has been held that even after making a sale the sheriff, upon being notified of an adverse claim, may demand indemnity before paying over the proceeds to plaintiff.[43]

**D. By Whom Indemnity to Be Given — 1. In General.** It is not necessary to the validity of an indemnity bond that plaintiff should be the obligor, but such a bond executed by a stranger to the judgment is a good statutory bond.[44] Nevertheless it has been held that a sheriff who is entitled to indemnity has a right to demand the same from plaintiff in the writ and cannot be compelled to proceed upon receiving the bond of any other person.[45]

**2. Sureties.**[46] In order to relieve the sheriff from responsibility[47] the bond

**36.** Matheson *v.* F. W. Johnson Co., 16 S. D. 347, 92 N. W. 1083.

**37.** Swezey *v.* Lott, 21 N. Y. 481, 78 Am. Dec. 160.

**38.** Balcom *v.* Craggin, 5 Pick. (Mass.) 295, where it did not appear that the suit was prosecuted at the request of the attaching creditor.

**39.** Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281.

**40.** Platt *v.* Sherry, 7 Wend. (N. Y.) 236. See also Bosley *v.* Farquar, 2 Blackf. (Ind.) 61. But *compare* State *v.* Sharp, 2 Sneed (Tenn.) 615, holding that under Acts (1825), c. 40, § 2, excusing a sheriff from levying on property where the title thereto is disputed, without a proper indemnity against the peril which he would incur, it is not necessary for the sheriff to notify plaintiff that the title is disputed, or demand indemnity, to become entitled to the protection of the statute.

**41.** *Alabama.*— Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789.

*Kentucky.*— Board *v.* Helm, 2 Metc. 500; Davis *v.* Tibbats, 7 J. J. Marsh. 264.

*Maryland.*— Jessop *v.* Brown, 2 Gill & J. 404.

*Missouri.*— State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152.

*Nebraska.*—Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73.

*New Hampshire.*—Smith *v.* Osgood, 46 N. H. 178.

*New York.*— Williams *v.* Lowndes, 1 Hall 579.

*Texas.*— Dewitt *v.* Oppenheimer, 51 Tex. 103; Illies *v.* Fitzgerald, 11 Tex. 417.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 128.

**42.** Dewitt *v.* Oppenheimer, 51 Tex. 103.

**43.** Westervelt *v.* Frost, 1 Abb. Pr. (N. Y.) 74, holding that a bond given after the sale was valid and enforceable. *Contra,* Carrington *v.* Herrin, 4 Bush (Ky.) 624, holding that in order to protect the officer the bond must be taken before the sale. In this case it appeared that on making the sale the sheriff took in payment the purchaser's bond payable to plaintiff but the decision did not turn upon the proceeds having been thus turned over to plaintiff.

**44.** Jobe *v.* Sellars, 9 Humphr. (Tenn.) 178.

**45.** Hall *v.* McHenry, 5 Port. (Ala.) 123, holding that a sheriff could not be compelled to proceed and sell property of one defendant — the principal in the obligation sued on — on receiving indemnity from a co-defendant who was a surety on such obligation.

**46.** See, generally, Principal and Surety, 32 Cyc. 1.

**47.** Effect of indemnity as substitute for liability of sheriff see *infra,* VI, L, 3.

must have the number of sureties required by the statute.[48] The sheriff has the right to require that the sureties should reside in his county.[49]

**E. Amount of Indemnity.** The sheriff cannot demand an indemnity bond with a penalty in excess of the sum necessary to secure him;[50] but he is justified in refusing to accept a bond of indemnity, the penalty of which is less than the value of the property.[51]

**F. Form[52] and Requisites of Indemnity — 1. In General.** Where the statute prescribes the form for the indemnifying bond a substantial compliance therewith is necessary,[53] but the fact that the bond contains more in the way of indemnity than the statute requires does not divest it of the character of a statutory bond;[54] nor is the bond given to indemnify a claimant of the property levied on invalidated by omisson of the condition prescribed by statute for indemnifying the sheriff.[55] So also a bond conditioned according to the statute to indemnify the sheriff and any person claiming title to the property has been held good as a statutory bond, although it did not contain a provision for the protection of the purchaser of the property required by a later statute.[56] A bond of indemnity is a continuation of the proceedings on the execution,[57] and it is not necessary that it should set out the execution,[58] or state in detail the proceedings thereunder,[59] nor is it invalidated by an imperfect recital thereof.[60] Where a partnership is plaintiff in execution the recital of the partmership name in the indemnifying bond is sufficient, without the names of the partners being set out;[61] and a bond executed by one member of the firm in the partnership name is a good bond of the person executing it.[62] Where a bond of indemnity is signed and acknowledged by three persons, it is the joint promise of all, although only two of them are named in the body of the instrument.[63]

**2. Necessity For Writing.** It is not necessary to the validity of an agreement by plaintiff in a writ to indemnify the sheriff for proceeding therewith that it should be in writing,[64] but a writing is necessary to the validity of such a promise by another person.[65]

**3. Consideration.**[66] Where a stranger to the execution requests an officer to take and sell goods thereon, and promises to indemnify him for so doing, such promise is not void for want of consideration.[67] But a promise to indemnify an officer is invalid for lack of consideration where it is made after the acts out of which the liability arises have been performed and the officer incurs no new liability in reliance upon the promise.[68]

48. Kreher *v.* Mason, 25 Mo. App. 291.

49. Com. *v.* Vandyke, 57 Pa. St. 34.

50. Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420 (holding that the officer could not enforce an agreement to give such a bond); Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783 (holding that a sheriff who had wrongfully levied an execution on the cars, locomotives, road-bed, etc., of a railroad company, greatly exceeding in value the amount of the judgment against it, had no right to demand of plaintiffs an indemnifying bond for the value of the property so wrongfully levied on; and plaintiffs' failure to comply with his demand would not excuse him from selling sufficient of the property to satisfy the judgment, where plaintiffs tendered him an indemnity bond in double the amount of the judgment).

51. State *v.* Springgate, 58 Mo. App. 402.

52. **Form of indemnity bond held sufficient** see Whitney *v.* Gammon, (Iowa 1896) 67 N. W. 405, 406; State *v.* Slayback, 90 Mo. App. 300, 301; Bonnett *v.* Ritchie, 20 Nova Scotia 228.

**Return of indemnity bond as condition precedent to suit thereon** see *infra*, VII, C, 2.

53. See State *v.* Slayback, 90 Mo. App. 300.

54. State *v.* Slayback, 90 Mo. App. 300.

55. Flint *v.* Young, 70 Mo. 221.

56. Aylett *v.* Roane, 1 Gratt. (Va.) 282.

57. Gatzweiler *v.* Morgner, 51 Mo. 47.

58. Davis *v.* Davis, 2 Gratt. (Va.) 363.

59. Gatzweiler *v.* Morgner, 51 Mo. 47.

60. Gatzweiler *v.* Morgner, 51 Mo. 47.

61. Davis *v.* Davis, 2 Gratt. (Va.) 363.

62. Davis *v.* Davis, 2 Gratt. (Va.) 363.

63. Crawford *v.* Jarrett, 2 Leigh (Va.) 630.

64. Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232; Thompson *v.* Coleman, 4 N. J. L. 216; Corbett *v.* O'Reilly, 8 U. C. Q. B. 130, agreement by attorney.

65. Snow *v.* Hix, 54 Vt. 478, so holding as to a promise by plaintiff's attorney.

66. **Consideration** generally see Contracts, 9 Cyc. 308.

67. Tarr *v.* Northey, 17 Me. 113, 35 Am. Dec. 232.

68. Snow *v.* Hix, 54 Vt. 478.

**4. Seal.**[69] The fact that a bond of indemnity is sealed does not affect its validity or standing as a statutory undertaking, although the statute does not require a seal.[70]

**5. Single Indemnity on Several Writs.** An officer having in his hands several executions in favor of different plaintiffs against the same defendant may properly take a single indemnity bond to protect him in what is done under all the executions.[71]

**G. Validity of Indemnity — 1. In General.** An agreement to indemnify a sheriff for seizing under an execution or other writ property which is really not subject thereto is valid, where the sheriff acts in good faith, with no other view than obtaining satisfaction of the execution or obeying the mandate of the writ, and the act committed amounts simply to an unintentional wrong;[72] and the same is true where the writ, although in fact invalid, does not appear upon its face to be so.[73] But an agreement to indemnify the sheriff against the consequences of a wilful trespass is void as being against public policy,[74] as is also a bond given to indemnify the sheriff for levying under a writ which is void on its face,[75] or a promise to indemnify the sheriff against the consequences of any violation or neglect of his duty;[76] and the unlawful purpose for which a bond was given may be shown, although it does not appear upon the face of the instrument.[77] But an indemnity against the consequences of an illegal act previously done and not known at the time to be illegal is valid.[78] Where there is a controversy between the owner of property taken on execution and the judgment creditor as to whether

69. See, generally, Seals, *ante*.

70. Schoregge *v.* Gordon, 29 Minn. 367, 13 N. W. 194.

71. Baxter *v.* Ray, 62 Iowa 336, 17 N. W. 576; Davis *v.* Davis, 2 Gratt. (Va.) 363.

The execution creditors are estopped to deny the validity of the bond because so executed. Baxter *v.* Ray, 62 Iowa 336, 17 N. W. 576.

72. *California.*— Stark *v.* Raney, 18 Cal. 622.

*Kentucky.*—Davis *v.* Tibbats, 7 J. J. Marsh. 264.

*Mississippi.*— Forniquet *v.* Tegarden, 24 Miss. 96.

*New Jersey.*— Thompson *v.* Coleman, 4 N. J. L. 216.

*England.*—Arundel *v.* Gardiner, Cro. Jac. 652, 79 Eng. Reprint 563; Blackett *v.* Crissop, 1 Ld. Raym. 278, 91 Eng. Reprint 1082.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 131.

73. Illies *v.* Fitzgerald, 11 Tex. 417.

74. *Alabama.*— Prewitt *v.* Garrett, 6 Ala. 128, 41 Am. Dec. 40.

*California.*— Stark *v.* Raney, 18 Cal. 622.

*Kentucky.*— Davidson *v.* Hayden, 38 S. W. 679.

*New Jersey.*— Thompson *v.* Coleman, 4 N. J. L. 216.

*New York.*— Griffiths *v.* Hardenbergh, 41 N. Y. 464, holding that a bond indemnifying against the consequences of an illegal act to be committed in the future is void.

*England.*— Blackett *v.* Crissop, 1 Ld. Raym. 278, 91 Eng. Reprint 1082.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 131.

75. Collier *v.* Windham, 27 Ala. 291, 62 Am. Dec. 767; Illies *v.* Fitzgerald, 11 Tex. 417.

76. *Alabama.*— Murray *v.* Ezell, 3 Ala. 148, holding that where a claimant, on trial of the right to property levied on, appeals from the justice's court to the circuit court, and the constable, instead of delivering him the property, sells it under a bond of indemnity from plaintiff in execution, such bond is void.

*California.*— Buffendeau *v.* Brooks, 28 Cal. 641, holding that an indemnity bond, given to a sheriff to induce him to sell property on execution in violation of an order existing at the time of the delivery of the bond enjoining such sale, is void.

*Missouri.*— Johnson *v.* Ragsdale, 73 Mo. App. 594 [*following* Harrington *v.* Crawford, 136 Mo. 467, 38 S. W. 80, 58 Am. St. Rep. 638, 35 L. R. A. 227, and *distinguishing* McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250], holding that an indemnifying bond taken by a constable to indemnify him against the violation of a legal duty in refusing to permit an execution debtor to exercise his right of selection of property exempt under the statute is founded upon an illegal consideration, and void as against public policy.

*New York.*—Webber *v.* Blunt, 19 Wend. 188, 32 Am. Dec. 445, holding that a promise to a sheriff to indemnify him against all damages to which he may be subjected in consequence of discharging from custody a third person, whom he has arrested on legal process, is void, as taken *colore officii*, although he was induced to grant the discharge upon a false representation of the promisor that the debt, to enforce payment of which the process had been issued, had been satisfied.

*Vermont.*—Abbott *v.* Kimball, 23 Vt. 542.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 131.

77. Buffendeau *v.* Brooks, 28 Cal. 641.

Showing illegality of consideration generally see Evidence, 17 Cyc. 660.

78. Griffiths *v.* Hardenbergh, 41 N. Y. 464.

such property is exempt, an indemnity bond given by the judgment creditor to the sheriff to induce the sale of the property is valid, regardless of the judgment creditor's knowledge as to whether or not the property was exempt at the time of levy, or of any secret purpose he may have had in giving the bond,[79] and notwithstanding the fact that it turns out that the property was not subject to levy.[80] It has been held that an indemnity bond given in a case where the sheriff had no right to demand it was void,[81] but there is also authority for the view that such a bond may be upheld as a common-law obligation.[82] An indemnity bond is not invalidated by a slight inaccuracy in the description of the property to which it refers, where it is certainly identified.[83] Under a statute providing that a bond in any legal proceeding shall inure to the person of whom it is designed by law as security, and be subject to judgment in his favor and against the obligor the same as if it were conditioned as prescribed by law, a recovery may be had on an indemnity bond, although not conditioned according to law to meet the case presented by the facts appearing of record.[84] The fact that a claim made to property seized is informal does not invalidate the indemnity bond.[85]

**2. Indemnity From Judgment Debtor Against Liability For Failure to Levy.** Where the validity of an execution depended on a new statute, which had not been construed by the court, and the sheriff was in honest doubt as to his right to levy, and the judgment debtors, desiring to test plaintiff's right to levy on their property, executed a bond to indemnify the sheriff against loss or damage for failing to levy, it was held that taking the bond was not against public policy, or in contravention of any statute.[86]

**H. Objections to Indemnity.** The statutes sometimes allow the claimant to object to the sufficiency of the bond;[87] but an order sustaining his objections, without notice to either the sheriff or plaintiff in the writ, is of no effect.[88]

**I. Implied Promise of Indemnity.** Where plaintiff in an attachment, execution, replevin, or other writ directs the sheriff to serve the process in a particular manner or to seize certain designated property thereunder, the law implies a promise on his part to indemnify the sheriff against any liability arising out of his compliance with such directions,[89] and a similar promise will be implied on

**79.** Whitney *v.* Gammon, (Iowa 1900) 83 N. W. 807, 103 Iowa 363, 72 N. W. 551.

**80.** Whitney *v.* Gammon, (Iowa 1900) 83 N. W. 807, 103 Iowa 363, 72 N. W. 551.

**81.** Servanti *v.* Lusk, 43 Cal. 238 (holding that where a sheriff, having attached property shown to be exempt, exceeds his authority by requiring an undertaking before he will release it, such undertaking is void for want of consideration); Mitchell *v.* Vance, 5 T. B. Mon. (Ky.) 528, 17 Am. Dec. 96; Gibson *v.* Lock, 58 Miss. 298.

**82.** Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; Clement *v.* Courtright, 9 Pa. Super. Ct. 45; Matheson *v.* F. W. Johnson Co., 16 S. D. 347, 92 N. W. 1083, where a bond was upheld, although the adverse claim had not been determined by a sheriff's jury as provided by statute.

**83.** Smith *v.* Rogers, 191 Mo. 334, 90 S. W. 1150 [*affirming* 99 Mo. App. 252, 73 S. W. 243], where a "Russell" steam engine was referred to as a "Birdsall" engine.

**84.** Gulfport Bank *v.* O'Neal, 86 Miss. 45, 38 So. 630, where a bond intended to indemnify the officer on a seizure and sale of property claimed as exempt was conditioned according to the statute providing for a bond of indemnity in case of a doubt as to the title of the property.

**85.** State *v.* Smit, 20 Mo. App. 50; Eichelmann *v.* Weiss, 7 Mo. App. 87.

**86.** Ray *v.* McDevitt, 126 Mich. 417, 85 N. W. 1086, 86 N. W. 543, 86 Am. St. Rep. 548, holding that the right to levy having been sustained, and the sheriff's bondsmen having been compelled to pay the amount of the execution, they could recover on the bond of indemnity.

**87.** State *v.* Harrington, 38 Mo. App. 303.

**Time for objection.**—Although the statute requires all objections to the sufficiency of the security to be made "within the first six days after the return-day" of the execution, where the execution is not returned until after the return-day named therein, the six days only begin to run from the date of the actual return. State *v.* Harrington, 38 Mo. App. 303.

**88.** State *v.* Harrington, 38 Mo. App. 303.

**89.** *Georgia.*— Levy *v.* Shockley, 29 Ga. 710; Mullings *v.* Bothwell, 29 Ga. 706; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 578.

*Illinois.*— Nelson *v.* Cook, 17 Ill. 443, 19 Ill. 440; Grimes *v.* Taylor, 93 Ill. App. 494; Selz *v.* Guthman, 62 Ill. App. 624.

*Maine.*— Gower *v.* Emery, 18 Me. 79.

*Maryland.*—Arnold *v.* Fowler, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444.

the part of an attorney who gives directions as to the execution of a writ which he has placed in the hands of the sheriff.[90] The sheriff is not, however, bound to seize property pointed out by plaintiff in reliance upon the implied promise of indemnity arising from such action;[91] but if he does not deem this sufficient he may demand that the indemnity be made sufficient before he proceeds.[92] No promise to indemnify the sheriff will be implied where a process or writ is merely delivered to him for service or execution without any directions as to how he shall proceed;[93] and where a bond of indemnity is given this prevents any implication of indemnity, which might support a recovery by the officer where the circumstances are such that he cannot recover on the bond.[94]

**J. Promise to Furnish Indemnity.** Where plaintiff's attorneys had given the sheriff a writing stating that "plaintiffs will indemnify the sheriff" on selling certain goods, the court, on the application of the sheriff ordered that the attorneys should by a day named enter into or procure two sufficient persons to enter into a bond of indemnity to the sheriff to be approved by the master, or else pay the sheriff the damage he had sustained by reason of selling the goods.[95]

**K. When Indemnity Takes Effect.** A bond of indemnity to a sheriff takes effect from the time of its delivery.[96]

**L. Effect of Indemnity**[97] **— 1. As Protection For Sheriff and Sureties.** The ordinary effect of a bond or promise of indemnity against liability resulting from official acts is not to protect the officer from direct and primary liability to the party injured by his acts,[98] but to shield him from ultimate loss by enabling him to resort to the indemnity in case he is subjected to any liability,[99] which

*New Hampshire.*— Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603.

*Washington.*— Standley *v.* Marsh, 1 Wash. 512, 20 Pac. 592.

*England.*— Humphrys *v.* Pratt, 5 Bligh N. S. 154, 5 Eng. Reprint 269, 2 Dow. & Cl. 288, 6 Eng. Reprint 735.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 128.

In Texas it is provided by statute that an officer who makes a levy without requiring a bond of indemnity does so at his own risk, but it is conceded that in the absence of any such statute the rule is as stated in the text. Stevens *v.* Wolf, 77 Tex. 215, 14 S. W. 29.

90. Higgins *v.* Russo, 72 Conn. 238, 43 Atl. 1050, 77 Am. St. Rep. 307.

Failure of sheriff to communicate facts known to him.—Where plaintiff's attorney directed the sheriff to levy upon certain goods under an attachment, believing that the goods had been fraudulently assigned by the debtor to his brother, and on levying, the sheriff learned that they had been assigned to the brother by someone else, but not being aware of the theory of attachment he informed the attorney that the goods did not belong to the debtor, but did not inform him by whom they had been assigned to the debtor's brother, the attorney was liable to indemnify the sheriff, notwithstanding the latter's failure to furnish this information. Higgins *v.* Russo, 72 Conn. 238, 43 Atl. 1050, 77 Am. St. Rep. 307.

91. Levy *v.* Shockley, 29 Ga. 710.

92. Levy *v.* Shockley, 29 Ga. 710.

93. *Illinois.*— Nelson *v.* Cook, 17 Ill. 443; England *v.* Clark, 5 Ill. 486; Grimes *v.* Taylor, 93 Ill. App. 494.

*Maine.*— Weld *v.* Chadbourne, 37 Me. 221.

*Massachusetts.*— Avery *v.* Halsey, 14 Pick. 174; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28; Marshall *v.* Hosmer, 4 Mass. 60.

*New York.*— Averill *v.* Williams, 1 Den. 501; Coventry *v.* Barton, 17 Johns. 142, 8 Am. Dec. 376.

*Pennsylvania.*— Fitler *v.* Fossard, 7 Pa. St. 540, 49 Am. Dec. 492.

*Tennessee.*— Saunders *v.* Harris, 4 Humphr. 72.

*England.*— Wilson *v.* Milner, 2 Campb. 452.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 128.

94. Preston *v.* Yates, 24 Hun (N. Y.) 534, 17 Hun 92.

95. Corbett *v.* Smith, 7 U. C. Q. B. 13.

96. Buffendeau *v.* Brooks, 28 Cal. 641.

97. Indemnity does not affect protection afforded by process see *supra*, V, L, 21, b.

98. Turner *v.* Robinson, 11 Ky. L. Rep. 717, so holding in respect to an indemnity bond taken before levying an attachment.

99. *Kentucky.*— Turner *v.* Robinson, 11 Ky. L. Rep. 717.

*Missouri.*— See Stewart *v.* Thomas, 45 Mo. 42.

*New Hampshire.*— Philbrick *v.* Shaw, 61 N. H. 356.

*New York.*— Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744. [*affirmed* in 178 N. Y. 552, 70 N. E. 1098].

*Oklahoma.*— Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

*Oregon.*— Howard *v.* Conde, 22 Oreg. 581, 30 Pac. 454.

*Rhode Island.*— Tilley *v.* Cottrell, 21 R. I. 309, 43 Atl. 369.

*Texas.*— Vickery *v.* Crawford, (Civ. App. 1900) 57 S. W. 326.

*Washington.*— Van de Vanter *v.* Davis, 23 Wash. 693, 63 Pac. 555.

right of recourse extends to the sureties on the official bond of the officer as well as to the officer himself.[1]

**2. As Protection For Claimant.** The indemnity bond given to the sheriff is, however, frequently so worded as to inure to the benefit of and afford protection to the real owner of the property seized;[2] but a bond given for the indemnity of a particular claimant becomes inoperative when he withdraws his claim and does not indemnify a subsequent claimant.[3]

**3. As Substitute For Liability of Sheriff.** Under some statutes the effect of a bond of indemnity given to the sheriff is to impute to the obligors of the bond the entire responsibility which rested at the common law on the sheriff for an illegal levy on personal property,[4] and the bond is in substitution and bar of a suit against the sheriff,[5] its effect being to relieve the sheriff of all legal responsibility,[6] and the remedy of the injured person being a suit upon the bond,[7] which

*Canada.*— Bonnett *v.* Ritchie, 20 Nova Scotia 228.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 128.

1. Philbrick *v.* Shaw, 61 N. H. 356.

2. Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Stewart *v.* Thomas, 45 Mo. 42; Herring *v.* Hoppock, 3 Duer (N. Y.) 20.

**Indemnitors liable jointly with sheriff.**— Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

**A cestui que trust,** for whose benefit property was conveyed to secure a debt, having claimed it from an officer levying an attachment thereon, may maintain an action on an indemnity bond given the officer by the attaching creditor for the retention of the property. State *v.* McKellop, 40 Mo. 184.

3. State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152.

4. Harris *v.* Harrison, 40 Ark. 50; Woolner *v.* Spalding, 65 Miss. 204, 3 So. 583; Shattuck *v.* Miller, 50 Miss. 386; Swain *v.* Alcorn, 50 Miss. 320; Kreher *v.* Mason, 25 Mo. App. 291.

5. *Arkansas.*— Harris *v.* Harrison, 40 Ark. 50.

*Iowa.*— Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788. But *compare* Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524.

*Kentucky.*—Chisholm *v.* Gooch, 79 Ky. 468; Rudy *v.* Johnson, 11 Bush 543; Gunn *v.* Gudehus, 15 B. Mon. 447; Turner *v.* Robinson, 11 Ky. L. Rep. 717 (holding that such is the effect of an indemnity bond taken before levying an execution, although it is otherwise as to a bond taken before levying an attachment); Brock *v.* Church, 5 Ky. L. Rep. 855.

*Mississippi.*— Marshall *v.* Stewart, 67 Miss. 494, 7 So. 284; Shattuck *v.* Miller, 50 Miss. 386; Swain *v.* Alcorn, 50 Miss. 320; Moore *v.* Allin, 25 Miss. 363.

*Missouri.*— Steele *v.* Farber, 37 Mo. 71; Stewart *v.* Bull, 35 Mo. 209; Revercomb *v.* Duker, 74 Mo. App. 570.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 128, 136.

**Constitutionality of statute.**—A statute providing that the claimant or purchaser of any property, for the seizure and sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property, and shall be confined to an action on the bond as his only remedy, is unconstitutional and void in so far as it prohibits one claiming to be the owner from maintaining an action for the recovery of the specific property taken, as in this respect its effect is to deprive him of his property without due process of law, and compel him, even if he establishes his ownership, to accept instead its market value. Foule *v.* Mann, 53 Iowa 42, 3 N. W. 814 [*approved* in Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895].

**A common-law bond of indemnity cannot** bar an action against the sheriff. Hall *v.* Ballou, 58 Iowa 585, 12 N. W. 475.

**The sheriff must have taken and returned the bond in order to escape liability.** Rudy *v.* Johnson, 11 Bush (Ky.) 543; Green *v.* Hackley, 3 Metc. (Ky.) 386. See also Chisholm *v.* Gooch, 3 Ky. L. Rep. 247. If he fails to return or even to take out a bond before action has been begun against him, a subsequent taking out and return thereof will not operate to defeat so much of the action as seeks a recovery for the damages incident to the seizure of the property and its detention up to the date of the bond, although it will operate to defeat so much of the action as seeks a recovery for the value of the property. Rudy *v.* Johnson, *supra* [*explaining* Green *v.* Hackley, *supra*].

**Persons who do not make a claim to the property in writing** are not barred of their actions against the sheriff. Steele *v.* Farber, 37 Mo. 71; Bradley *v.* Holloway, 28 Mo. 150.

6. State *v.* Doan, 39 Mo. 44; State *v.* Watson, 30 Mo. 122; Kreher *v.* Mason, 25 Mo. App. 291; Paddock-Hawley Iron Co. *v.* Mason, 16 Mo. App. 320; Eichelmann *v.* Weiss, 7 Mo. App. 87.

**Exemption from liability extends to action of replevin.**— St. Louis, etc., R. Co. *v.* Castello, 30 Mo. 124.

7. Harris *v.* Harrison, 40 Ark. 50; Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447; Woolner *v.* Spalding, 65 Miss. 204, 3 So. 583; Shattuck *v.* Miller, 50 Miss. 386; State *v.* Doan, 39 Mo. 44; Revercomb *v.* Duker, 74 Mo. App. 570; Kreher *v.* Mason, 25 Mo. App. 291.

may be brought as soon as the injury is inflicted,[8] unless the obligors are or become insolvent,[9] or the bond is for some reason invalid [10] or insufficient [11] at the time when it is taken.[12] In order to protect the sheriff from liability the bond must conform strictly to the statute and by its terms furnish to the claimant and the purchaser all the protection to which they are entitled.[13] Unless the statute expressly so provides, the giving of an indemnity bond does not deprive the claimant of his remedy against the sheriff,[14] and the sureties on his official bond,[15] but merely furnishes him with an additional cumulative remedy.[16]

**M. Duty of Sheriff to Proceed on Receiving Indemnity — 1. In General.** Under some statutes, where a bond of indemnity is given to the sheriff it is his duty to proceed,[17] and levy upon the property,[18] or if a levy has already been made to hold [19] and sell it,[20] and he cannot escape liability for releasing property levied on by showing that the title was actually not in defendant but in another.[21] But unless the absolute duty to proceed is imposed by statute the sheriff may decline to proceed notwithstanding indemnity is furnished him,[22] and may justify

8. Woolner *v.* Spalding, 65 Miss. 204, 3 So. 583.

9. Shattuck *v.* Miller, 50 Miss. 386.

10. Shattuck *v.* Miller, 50 Miss. 386.

11. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247; Kreher *v.* Mason, 25 Mo. App. 291, holding that the sheriff is not relieved from liability where the bond lacks the requisite number of sureties.

12. Harris *v.* Harrison, 40 Ark. 50; Green *v.* Hackley, 3 Metc. (Ky.) 386.

13. Harrison *v.* Shanks, 13 Bush (Ky.) 620; Rudy *v.* Johnson, 11 Bush (Ky.) 543; Curry *v.* Ball, 58 S. W. 534, 22 Ky. L. Rep. 592; McClnnn *v.* Steel, 2 Va. Cas. 256.

**The bond must contain an express covenant to pay** the claimant any damages which he may sustain. Jewell *v.* Mills, 3 Bush (Ky.) 62; Curry *v.* Ball, 58 S. W. 534, 22 Ky. L. Rep. 592.

14. Lewis *v.* Mansfield, 78 Ky. 460 [*followed* in Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221]; Howard *v.* Conde, 22 Oreg. 581, 30 Pac. 454.

15. Lewis *v.* Mansfield, 78 Ky. 460 [*followed* in Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221].

**Liabilities on official bonds** generally see *infra*, X.

16. Howard *v.* Coude, 22 Oreg. 581, 30 Pac. 454.

17. *Iowa.*— Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524; Cox *v.* Currier, 62 Iowa 551, 17 N. W. 767.

*Massachusetts.*— Hamberger *v.* Seavey, 165 Mass. 505, 43 N. E. 297; Peirce *v.* Partridge, 3 Metc. 44.

*Mississippi.*— Swain *v.* Alcorn, 50 Miss. 320.

*New York.*— Baker *v.* Brintnall, 52 Barb. 188, 5 Abb. Pr. N. S. 253.

*Pennsylvania.*— Watmough *v.* Francis, 7 Pa. St. 206 [*reversing* 4 Pa. L. J. 302].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 134.

18. Com. *v.* Watmough, 6 Whart. (Pa.) 117; Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20, holding that a sheriff who has been given an indemnity bond is liable for failure to levy execution on property specified, although the property is covered by mortgage valid on its face.

19. Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895; Bowe *v.* Wilkins, 1 How. Pr. N. S. (N. Y.) 21 [*reversed* on other grounds in 105 N. Y. 322, 11 N. E. 839].

**Sheriff must use all proper means to make levy effective.**— Cox *v.* Currier, 62 Iowa 551, 17 N. W. 767.

20. *Kentucky.*— Davis *v.* Tibbats, 7 J. J. Marsh. 264, holding that it is the duty of the sheriff, if indemnified, to sell the property even after a jury impaneled to try the right has decided that it is not subject to sale under the fieri facias which he has levied upon it.

*Mississippi.*— Swain *v.* Alcorn, 50 Miss. 320.

*Missouri.*— Steele *v.* Farber, 37 Mo. 71.

*North Carolina.*— Pearson *v.* Fisher, 4 N. C. 72.

*Pennsylvania.*— Corson *v.* Hunt, 14 Pa. St. 510, 53 Am. Dec. 568; Com. *v.* Watmough, 6 Whart. 117. See also Connelly *v.* Walker, 45 Pa. St. 449, holding that it is the duty of a sheriff, when indemnified by a plaintiff in an execution, after levy, to sell the goods levied, or, if they be claimed by others, to apply for an interpleader.

*Virginia.*— Stone *v.* Pointer, 5 Munf. 287.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 134.

21. Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895 [*distinguishing* Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788].

22. *Iowa.*—Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788 [*recognized* in Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895].

*Kansas.*— Phelps, etc., Co. *v.* Skinner, 63 Kan. 364, 65 Pac. 667.

*Louisiana.*—See James *v.* Thompson, 12 La. Ann. 174.

*Michigan.*— Coville *v.* Bentley, 76 Mich. 248, 42 N. W. 1116, 15 Am. St. Rep. 312.

*Pennsylvania.*— Com. *v.* Watmough, 6 Whart. 117 [*followed* in Com. *v.* Vandyke, 57 Pa. St. 34 (*distinguishing* Connelly *v.* Walker 45 Pa. St. 449)].

*Tennessee.*— Hamblet *v.* Herndon, 3 Humphr. 34.

his refusal by showing that the property did not belong to defendant or was not subject to levy.[23] But the burden of proof is upon him,[24] and if he fails to make out his justification he is liable to plaintiff for not executing the writ.[25] An indemnity bond given by plaintiff against a claim of ownership made by a third person does not impose upon the sheriff any duty to withhold the property from defendant upon a claim of exemption made by him.[26]

**2. Where Indemnity Defective.** Where the sheriff has a right to require indemnity,[27] he is entitled to a bond which needs no explanations and is on its face subject to no objections,[28] and he is justified in refusing to act where the bond furnished him is defective.[29]

**N. Effect of Refusal of Indemnity — 1. In General.** Where plaintiff refuses or neglects to give an indemnity bond required of him the sheriff may refuse to make the levy[30] or execute the writ,[31] or if a levy has already been made he may refuse to proceed to a sale[32] and release the property,[33] or the court will

*Texas.*— Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

*Vermont.*— Hutchinson *v.* Lull, 17 Vt. 133.

*Canada.*— McLeod *v.* Fortune, 19 U. C. Q. B. 98.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 134.

**23.** Phelps, etc., Co. *v.* Skinner, 63 Kan. 364, 65 Pac. 667.

**24.** Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788 [*recognized* in Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895]; Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

**25.** Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788 [*recognized* in Evans *v.* Thurston, 53 Iowa 122, 4 N. W. 895]; Colville *v.* Bentley, 76 Mich. 248, 42 N. W. 1116, 15 Am. St. Rep. 312; Com. *v.* Watmough, 6 Whart. (Pa.) 117.

Liability for failure to execute process generally see *supra*, V, C.

**26.** State *v.* Thomas, 7 Mo. App. 205.

**27.** Right to require indemnity see *supra*, VI, A.

**28.** Second Nat. Bank *v.* Gilbert, 70 Ill. App. 251 [*reversed* on other grounds in 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306].

**29.** Second Nat. Bank *v.* Gilbert, 70 Ill. App. 251 [*reversed* on other grounds in 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306] (so holding in a case where an indemnity bond was furnished in which plaintiff purported to be the principal, but which was not sealed by it); Smith *v.* Cicotte, 11 Mich. 383 (holding that where a sufficient indemnity bond was offered to the sheriff levying an attachment, but before it was actually received and accepted the principal surety found that he had been deceived in respect to his liability and erased his name, and the bond was never actually accepted, the sheriff could not be held liable for refusing to execute the process).

**30.** *Alabama.*— McGehee *v.* Chandler, 15 Ala. 659.

*Arkansas.*— Harris *v.* Harrison, 40 Ark. 50.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Illinois.*— Second Nat. Bank *v.* Gilbert, 70 Ill. App. 251.

*Iowa.*— Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*South Carolina.*— Emory *v.* Davis, 4 S. C. 23.

*Texas.*—Seasongood *v.* Campbell, (Civ. App. 1899) 49 S. W. 407.

*Virginia.*— Huffman *v.* Leffell, 32 Gratt. 41.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 134.

But *compare* Bosley *v.* Farquar, 2 Blackf. (Ind.) 61 [*approved* in Allwein *v.* Sprinkle, 87 Ind. 240; State *v.* Sandlin, 44 Ind. 504].

Where goods seized are practically of the value of the penalty of the indemnity bond, the officer may refuse to make another levy unless a further bond is given. Seasongood *v.* Campbell, (Tex. Civ. App. 1899) 49 S. W. 407.

**31.** Long *v.* Neville, 36 Cal. 455, 95 Am. Dec. 199, writ of possession.

**32.** Harris *v.* Harrison, 40 Ark. 50; Smith *v.* Osgood, 46 N. H. 178.

**33.** *Alabama.*— Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. 789.

*Iowa.*—Whitney *v.* Gammon, 67 N. W. 405; Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524; Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788.

*Kentucky.*— Rudy *v.* Johnson, 11 Bush 543.

*Michigan.*— Smith *v.* Cicotte, 11 Mich. 383.

*Missouri.*— State *v.* Jenkens, 170 Mo. 16, 70 S. W. 152; Bradley *v.* Holloway, 28 Mo. 150.

*Nevada.*— Gaudette *v.* Roeder, 13 Nev. 341.

*New York.*— Manning *v.* Keenan, 73 N. Y. 45; People *v.* Ames, 35 N. Y. 482, 91 Am. Dec. 64.

*South Dakota.*— Matheson *v.* F. W. Johnson Co., 16 S. D. 347, 92 N. W. 1083.

*Washington.*— Brotton *v.* Lunkley, 11 Wash. 581, 40 Pac. 140.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 134.

**Contra.**— Roth *v.* Duvall, 1 Ida. 149, holding that if the sheriff attaches property and returns his writ, he places all question as to its validity before the court, and an application for the release of the property should be made, not to the sheriff who holds it subject to the order of the court, but to the court or judge. And see Dunlap *v.* Freret, 10 La. Ann. 83, 63 Am. Dec. 590; Dewitt *v.* Oppenheimer, 51 Tex. 103.

on his own application enlarge the time to make his return.[34] In the case of conflicting claims to money collected on execution, the refusal of the execution creditor to give the officer a bond of indemnity may excuse the officer for retaining the money until the question of title is decided.[35]

**2. Refusal by One of Several Creditors.** Where an officer may require an indemnity before attaching personal property on mesne process,[36] and there are several creditors, some of whom do not furnish indemnity, the officer may decline to act for those not furnishing indemnity, and may sell the property on the executions of those that do.[37]

**O. Liabilities of Indemnitors — 1. In General.** The liability of the sureties on a bond of indemnity is measured by the terms of the contract of indemnity contained therein.[38] And so a contract to hold a sheriff harmless for selling property on executions in his hands "at this time" in certain named cases applies only to such writs as are in his hands at the time, and does not extend to such as are afterward committed to him for service.[39] But where an indemnity bond recited that the officer had levied an execution on property claimed by a third person, and was conditioned to save him harmless, "in case said execution be levied on wrong property, and the same sold," the obligors were bound to indemnify the constable, although the property was replevied from him by the claimant, the owner, before a sale had been made.[40] And an indemnity to the sheriff has been held to include the damages caused by the sheriff closing and retaining possession of the place of business where the goods were until their sale, to the exclusion of the rightful occupant.[41] The execution of a bond of indemnity against a levy or sale of particular property makes the obligors liable as trespassers if the property does not really belong to defendants.[42] Where it is the sheriff's duty under the attachment law to retain the attached property, and, if any judgment is recovered, to sell it as in other cases on execution, a bond conditioned to indemnify the sheriff from all damages, etc., which he may sustain by reason of the attachment, seizing, levying, taking, or retention in his custody of the property described in the bond, protects him against damages resulting from a sale of the property

34. Ogden *v.* Powell, 7 Ala. 243; Jessop *v.* Brown, 2 Gill & J. (Md.) 404; Com. *v.* Van Dyke, 57 Pa. St. 34; Nagle *v.* Stroh, 4 Watts (Pa.) 124, 28 Am. Dec. 695.

35. Rogers *v.* Sumner, 16 Pick. (Mass.) 387.

36. See *supra*, VI, A, 1.

37. Smith *v.* Osgood, 46 N. H. 178.

38. Fury *v.* White, 2 Ida. (Hasb.) 662, 23 Pac. 535; Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309; Dickinson *v.* Jones, 34 N. C. 45; Sanger *v.* Baumberger, 51 Wis. 592, 8 N. W. 421, holding that where an indemnifying bond, given to a sheriff who was about to levy on property, recited: "Whereas . . . Casper M. Sanger, sheriff . . . is about to seize and levy on certain personal property, about which there is a reasonable doubt as to the ownership, or its liability to be taken on the said writ of attachment," and the condition was to indemnify S, and those acting under his authority as sheriff, against all suits, etc., arising against him, or any of them, by reason of such levy and seizure, or of the subsequent proceedings thereon, the liability on such bond was limited to the contingency expressed in the recital.

39. Jones *v.* Wolcott, 2 Allen (Mass.) 247.

40. Finckh *v.* Evers, 25 Ohio St. 82.

41. Ebenreiter *v.* Dahlman, 19 Misc. (N. Y.) 9, 42 N. Y. Suppl. 867.

42. *Alabama.*— Sparkman *v.* Swift, 81 Ala. 231, 8 So. 160; Screws *v.* Watson, 48 Ala. 628.

*Arkansas.*— Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609.

*California.*— Lewis *v.* Johns, 34 Cal. 629.

*Massachusetts.*— Knight *v.* Nelson, 117 Mass. 458.

*Minnesota.*— Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

*Missouri.*— Allred *v.* Bray, 41 Mo. 484, 97 Am. Dec. 283; Wetzell *v.* Waters, 18 Mo. 396; Peckham *v.* Lindell Glass Co., 9 Mo. App. 459; Luebbering *v.* Oberkoetter, 1 Mo. App. 393.

*New York.*— Herring *v.* Hoppock, 15 N. Y. 409; Pozzoni *v.* Henderson, 2 E. D. Smith 146; Weber *v.* Ferris, 37 How. Pr. 102 (holding that where execution creditors indemnify the sheriff and direct him to sell property in possession of and claimed by a third person, who is in fact the owner, they are liable as original trespassers, although the proceeds of the sale are applied to a prior execution); Davis *v.* Newkirk, 5 Den. 92; Fonda *v.* Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Allen *v.* Crary, 10 Wend. 349, 25 Am. Dec. 566; Root *v.* Chandler, 10 Wend. 110, 25 Am. Dec. 546.

*North Carolina.*— Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679.

*Tennessee.*— Hunt *v.* Walker, 12 Heisk. 551.

under an execution issued on the judgment pursuant to the statute.[43] Where the sheriff has seized on execution property which the debtor claims as exempt, whereupon the execution creditor gives indemnity for holding the property, the right of the sheriff to resort to the bond is not affected by the fact that before the original writ was or could have been fully executed an alias writ was necessary to be and was issued in order to sell the property.[44] When a bond of indemnity can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable to the officer for the consequences of a trespass or other wrongful act committed by him which they neither directed nor authorized.[45] So where a levy is grossly excessive, an indemnity bond given to the sheriff by the execution plaintiff does not cover the sheriff's liability as to the excess over a proper levy;[46] nor are the indemnitors liable for the act of the sheriff in making a levy after the return-day,[47] where they neither advised, directed, nor

*United States.*— Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129; Parrish *v.* Danford, 18 Fed. Cas. No. 10,770, 1 Bond 345.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 136, 319.

**Contra.**— McLeod *v.* Fortune, 19 U. C. Q. B. 98.

**Creditor, sureties, and sheriff are joint trespassers.**— Sparkman *v.* Swift, 81 Ala. 231, 8 So. 160; Screws *v.* Watson, 48 Ala. 628; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

**Sureties on different bonds not jointly liable.**—Where several writs of attachment have been levied at different times, the sheriff taking an indemnifying bond in each case, the sureties on the different bonds are not jointly liable in trespass, although the attaching creditors employed the same attorney and the goods were sold in bulk to a single purchaser, as the acts which culminated in the wrongs complained of were not contemporaneous. Sparkman *v.* Swift, 81 Ala. 231, 8 So. 160.

**Sureties as well as principal liable as trespassers.**— Peckham *v.* Lindell Glass Co., 9 Mo. App. 459.

**43.** Gaudette *v.* Roeder, 13 Nev. 341; Van de Vanter *v.* Davis, 23 Wash. 693, 63 Pac. 555.

**44.** Tunstead *v.* Nixdorf, 80 Cal. 647, 22 Pac. 472.

**45.** Smith *v.* Johnson, 95 Ala. 482, 11 So. 20; Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839 [*reversing* 1 How. Pr. N. S. 21] (holding that a bond of indemnity to a sheriff, under an attachment, conditioned that the obligors should indemnify the sheriff from all liability, suits, and judgment against him by reason of the levy sale under or by virtue of such attachment, and for the defense of any action brought against him for such taking, did not indemnify the sheriff for the expense of a suit against him for refusing, without the knowledge or consent of the obligors, to return the property after the attachment had been vacated); Clark *v.* Woodruff, 83 N. Y. 518 [*affirming* 18 Hun 419] (holding that a bond of indemnity given by a judgment creditor to a marshal, who had levied on property of a judgment debtor claimed by another, which recited the levy, the claim of such party, and the agreement to hold the marshal harmless from his levy and sale under the execution, was intended only as indemnity for the levy already made, and did not render the judgment creditor liable to the marshal for damages from a subsequent unauthorized levy or sale by the marshal of other property belonging to the debtor); Cudahy *v.* Rhinehart, 60 Hun (N. Y.) 414, 15 N. Y. Suppl. 514, 21 N. Y. Civ. Proc. 52 [*reversed* on other grounds in 133 N. Y. 248, 30 N. E. 1004, 28 Abb. N. Cas. 327] (holding that where an attaching creditor gave the sheriff written instructions to search for and seize certain specified property, and executed an indemnifying bond, which did not specify any particular property, such bond did not indemnify the sheriff against the sale of any property other than such as was specified in the written instructions); Blair *v.* Boring, 200 Pa. St. 27, 49 Atl. 365 (holding that where a constable to whom was issued a landlord's warrant for rent was given a bond, because, as recited therein, he did not certainly know what were the goods of the tenant, which indemnified him against liability for selling by direction of the landlord and by force of his warrant the goods of any one else, supposing them to be the goods of the tenant, and the officer sold goods on the premises, belonging to another than the tenant, but which were liable for the rent, and was held liable therefor only because he failed to give the proper notice of appraisement and to have the appraisement made by proper persons, he could not recover on the bond, as his liability was caused by his own wrong).

**46.** Sharvy *v.* Cash, 66 Minn. 200, 68 N. W. 1070.

**Estoppel to deny liability for excessive levy.**—Where a sheriff, in an action against him for an unlawful seizure of property, and also for an excessive levy, obtains an order substituting his indemnitors, the execution creditors, as defendants, and requiring them to give a further bond conditioned to pay any judgment plaintiff may obtain in the action, and the reversal of such order is opposed by the indemnitors, they cannot be heard to claim that they are not liable for the excessive levy, because not covered by their original bond. McBride *v.* Tappen, 10 N. Y. Suppl. 137.

**47.** Jordan *v.* Henderson, 39 Tex. Civ. App. 89, 86 S. W. 961.

ratified his act.[48] Neither can the sureties on a bond given to a sheriff to indemnify him against a levy on the property of a third person be held liable for a levy on property of the judgment debtor which was exempt from execution.[49] The obligors in an indemnity bond conditioned to secure the sheriff harmless for levying on goods which he or they may judge to belong to the debtor are not liable for the act of the sheriff in seizing goods conceded to belong to a third person,[50] unless they have expressly or impliedly authorized or ratified such act.[51] Neither are sureties on an indemnifying bond liable for the loss of or injury to goods attached, resulting from the negligence or misconduct of the sheriff in keeping them.[52] So also, where the damages recovered against the sheriff were based upon a sale made by him in disregard of the indemnifying creditor's directions not to sell, he cannot hold the indemnitors liable.[53] Neither can a sheriff indemnified for seizing property under attachment have recourse to his indemnitors when a judgment is recovered against him for refusing to surrender the property on demand when the attachment was vacated.[54] A bond of indemnity given for the execution of a writ of fieri facias does not cover expenses incurred in the employment of a watchman and for insurance.[55] A constable who, after levying an attachment for which he was indemnified, levied other attachments on the property, cannot, after damages have been awarded against him for wrongfully attaching the property, recover on the indemnity bond for damages awarded against him for levying the subsequent attachments.[56] Where an indemnifying bond recited that certain goods which appeared to belong to the execution debtor were claimed by certain mortgagees, and was conditioned to indemnify the sheriff against all damage, suits, and executions which might at any time arise, or be brought against him for levying, etc., by virtue of the execution, but the bond did not recite any claim by the execution debtor to an exemption as to the property in question, the bond did not cover any liability of the sheriff for selling the property arising out of the fact that it was exempt.[57]

**2. Acts Done Before Execution of Bond.** The indemnity may apply to acts done before the bond was executed where a fair construction of the instrument indicates that such was the intention of the obligors.[58]

48. Jordan *v.* Henderson, 39 Tex. Civ. App. 89, 86 S. W. 961.

49. Evans *v.* Collar, 75 Mich. 433, 42 N. W. 957.

50. Chapman *v.* Douglas, 5 Daly (N. Y.) 244, holding that this is true even though the goods are contained in a safe claimed to belong to the debtor and cannot be removed therefrom on account of the safe being locked, and that in such a case the indemnitors are liable only where they have expressly or impliedly authorized or ratified the acts of the sheriff in making the seizure. See also O'Donohue *v.* Simmons, 36 Hun (N. Y.) 331.

51. Chapman *v.* Douglas, 5 Daly (N. Y.) 244.

52. Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003; Smokey *v.* Peters-Calhoun Co., 66 Miss. 471, 5 So. 632, 14 Am. St. Rep. 575.

53. McMahon *v.* Ingersoll, (Hil. T. 5 Vict.) 3 Ont. Case Law Dig. 6425.

54. Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839.

55. Brahb's Appeal, 42 Leg. Int. (Pa.) 28.

56. Tilley *v.* Cottrell, 21 R. I. 309, 43 Atl. 369.

57. Winters *v.* Judd, 59 Hun (N. Y.) 32, 12 N. Y. Suppl. 411.

58. Griffiths *v.* Hardenbergh, 41 N. Y. 464 (holding that a bond indemnifying a sheriff against damages for making a levy under an execution, and for entering any building or other premises to make such levy, covered damages recovered for entering a dwelling-house to make a levy, although such entry was previous to the execution of the bond); Alston *v.* Conger, 66 Barb. (N. Y.) 272 (holding that a bond conditioned that the obligors should save, keep harmless, and indemnify said sheriff "from all harm," etc., "that may at any time arise, as well for levying and making sale, under and by virtue of such execution, of all or any goods which he or they may judge to belong to" the judgment debtor, applied to a levy previously made); Grant *v.* Tefft, 7 N. Y. Suppl. 129 [*affirmed* in 16 Daly 49, 8 N. Y. Suppl. 465]; Reilly *v.* Coleman, 62 How. Pr. (N. Y.) 289, 290 [*approving* Alston *v.* Conger, *supra*] (holding that an indemnity bond given to a sheriff to save him harmless from all damage, liability, costs, etc., that might arise by reason of a levy and sale under execution, was broad enough to cover a levy and sale made by him before the bond was given, the court saying: "The defendant is charged with the knowledge of the prior levy and sale by the giving of the bond"); Watmough *v.*

**3. Extent of Liability.** The indemnitors of a sheriff are liable to him for the amount of a judgment rendered against him in an action based upon the act to which the indemnity relates,[59] together with counsel fees, costs, and expenses incurred by him in the defense of such act;[60] and in an action by the injured party the indemnitors are liable only for such damages as plaintiff could have

Francis, 7 Pa. St. 206 [*reversing* 4 Pa. L. J. 302]; Hines *v.* Norris, (Tex. Civ. App. 1904) 81 S. W. 791 [*approving* Illies *v.* Fitzgerald, 11 Tex. 417, and *distinguishing* and *criticizing* Longcope *v.* Bruce, 44 Tex. 434]. But *compare* Leonard *v.* Buttling, 19 Misc. (N. Y.) 219, 44 N. Y. Suppl. 273 [*affirmed* in 13 N. Y. App. Div. 179, 43 N. Y. Suppl. 387].

59. *California.*— Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593; Graves *v.* Moore, 58 Cal. 435.

*Maine.*— Nutt *v.* Merrill, 40 Me. 237.

*Massachusetts.*— Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745.

*Montana.*— Tuttle *v.* Hardenberg, 15 Mont. 219, 38 Pac. 1070, holding that where a sheriff notified sureties on an indemnity bond in an attachment suit of a suit against him and his successor by the owners of the attached property, and such sureties appeared and defended the suit, he could maintain an action against them for the sum paid by him on the judgment recovered, although he only held the property about two months, and turned it over to such successor, by whom it was sold.

*Nebraska.*— Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

*New York.*— Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098]; Audley *v.* Townsend, 49 Misc. 23, 96 N. Y. Suppl. 439, where the sheriff recovered the amount of the judgment against him and his fees and expenses in the action less the amount realized by the sale of the property.

*Pennsylvania.*— Huzzard *v.* Nagle, 40 Pa. St. 178.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 323.

**The fact that the funds were furnished by a surety** on the sheriff's official bond does not impeach an allegation that the officer paid the amount, and such furnishing of funds is a sufficient consideration for an assignment of the indemnity by the officer to his surety. Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

**Admission of value.**—Where the sheriff, after unsuccessfully attempting to compel the indemnitors to defend, has, in good faith, admitted that the property was of a certain value whereupon a verdict against him for that amount has been directed by the court, he can recover such amount from the indemnitors. Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098].

**The fact that the judgment was entered by agreement** does not prevent a recovery by the officer where there is no evidence that the judgment was collusive or fraudulent, or that the action could have been successfully defended. Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745.

60. *California.*— Graves *v.* Moore, 58 Cal. 435; Stark *v.* Raney, 18 Cal. 622.

*Connecticut.*— Jones *v.* Mallory, 22 Conn. 386.

*Iowa.*— Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 98 N. W. 277, where the covenant was to indemnify against "all damages."

*Louisiana.*— Stewart *v.* Lapsley, 7 La. Ann. 641.

*Maine.*— Nutt *v.* Merrill, 40 Me. 237.

*Massachusetts.*— Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745.

*New York.*— Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098]; Bancroft *v.* Winspear, 44 Barb. 209; De Sisto *v.* Loewy, 24 Misc. 725, 53 N. Y. Suppl. 807, so holding on the ground that a receipt for a sum of money deposited with a marshal, in lieu of a bond of indemnity, and "as security for damages" which he might sustain by reason of levying a certain execution, imported an agreement on the part of such officer to defend any action which might be brought against him by reason of such act; but holding further that the officer was not entitled to reimbursement for counsel fees incurred by him in defending actions brought against him for the recovery of the fund so deposited, after the expiration of the time within which it should have been returned.

*Ohio.*— Finckh *v.* Evers, 25 Ohio St. 82.

*Texas.*— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83, holding the sheriff entitled to counsel fees incurred by him after the neglect of the indemnitors to employ counsel. But *compare* Kellogg *v.* Muller, 68 Tex. 182, 4 S. W. 361, holding that a sheriff held liable with the attaching creditor in a suit for a wrongful attachment, if entitled to a judgment in that suit against his co-defendant on the indemnity bond, is not entitled to have an attorney's fee included in such judgment in the first instance.

*Washington.*— Brotton *v.* Lunkley, 11 Wash. 581, 40 Pac. 140, so holding, although the officer's defense was successful.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 323.

Aliter where the judgment creditor had employed counsel and taken steps to defend such action. Martin-Brown Co. *v.* Auld, (Tex. Civ. App. 1896) 34 S. W. 1050.

**Cost of postponement of trial.**— The sheriff is entitled to recover from the obligor in the indemnity bond the costs incurred in respect of putting off the trial of the cause against himself, on account of the absence of a material witness. Corbett *v.* Wilson, 8 U. C. Q. B. 22.

recovered from the sheriff had there been no bond.[61] This liability is not affected by any considerations as to whether or not the sheriff is solvent or actually able to pay the judgment against him.[62] But an indemnity to the sheriff does not include his costs or disbursements in the action in which the process was issued [63] or attorney's fees for filing suit on the indemnity bond, in the absence of a provision in the bond giving such fees.[64] Where a sheriff has unsuccessfully endeavored to compel a surety on an indemnifying bond to defend a claimant's action wherein damages are claimed for loss of business and for the value of goods seized in excess of the penalty of the bond, the sheriff is entitled to compromise the claim, provided that in so doing he acts honestly and in good faith, and the surety may be held for the amount.[65] The obligors in a bond of indemnity given an officer on attachment of property cannot require the officer to pay a judgment rendered against him for conversion of the attached property, and to deduct the value of the property vesting in him by virtue of such payment from the amount of their bond, their obligation being to protect him from such judgment by paying it, and taking the property.[66] A bond given to indemnify and save harmless an attaching sheriff from suits, actions, and costs will not support a recovery by the attachment defendant, to whom the sheriff has assigned the bond, for the loss of interest on money which was attached.[67] If property not subject to execution is levied on, and an indemnifying bond given, and a sale is made for more than sufficient to satisfy the execution, the obligors in the bond are liable, not only for the amount of the execution, but for the entire damage sustained in consequence of the seizure and sale.[68] Where an execution creditor directed the sheriff to levy it on money already in the sheriff's hands resulting from a sale of the debtor's goods, but claimed by a third person, and executed to the sheriff an indemnity bond, and also an agreement that the sheriff might retain the money until the question of title should be settled, and the sheriff was sued by the claimant, and, the debtor having paid the execution creditor the amount of his judgment, he directed the sheriff to pay the money levied on to the claimant, and the sheriff paid such claimant the principal, with interest thereon, and costs, the sheriff was entitled to recover the interest on such sum, in an action on the indemnity bond, although on making the levy he had refused to turn the money over to the execution creditor, and had used it himself.[69] An attachment plaintiff who, at his own request, is appointed custodian of attached property, cannot reduce his liability on a bond of indemnity given by him to the officer, by the amount of a loss due to damage sustained by the goods while in his custody and through his negligence;[70] but the liability of the surety on the bond may be reduced on this account.[71] The liability of the sureties on a bond of indemnity is limited to the penal sum named in the bond,[72]

61. Moore *v.* Allen, 25 Miss. 363.

62. White *v.* Fratt, 13 Cal. 521.

63. Tully *v.* Cutler, 5 Indian Terr. 180, 82 S. W. 714, so holding as to an indemnity bond conditioned to protect the marshal, his deputies, and persons acting with him from all actions, costs, damages, and expense which should come to them by execution of a writ of attachment and the retaining possession of and selling the attached property.

64. Moore *v.* Moore, (Tex. Civ. App. 1899) 52 S. W. 565.

**Provision for counsel fees in action on bond.** —Under a bond of indemnity to a sheriff for a sale under execution, providing that the obligors will save him harmless from all damages, including counsel fees, which he may incur in consequence of the legal enforcement of payment of the penalty of the bond, the sheriff can recover of the obligors a reasonable amount which he paid as attorney's fees in an action on the bond. Tunstead *v.* Nixdorf, 80 Cal. 647, 22 Pac. 472.

65. Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098].

66. Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003.

67. Clement *v.* Courtright, 9 Pa. Super. Ct. 45, so holding on the ground that such injury was peculiar to the attachment defendant and did not affect the sheriff.

68. Secrets *v.* Markwell, 11 Bush (Ky.) 316; Lobdell *v.* Union Bank, 8 La. Ann. 117.

69. Jones *v.* Mallory, 22 Conn. 386.

70. Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003.

71. Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003.

72. White *v.* French, 15 Gray (Mass.) 339; Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309 (holding that where several writs have

together with interest on such amount,[73] which runs, however, only from the time of the breach.[74]

**4. When Liability Accrues.**[75] Where the covenant is to protect the sheriff from liability or judgments the officer's cause of action against the indemnitors is complete when judgment is rendered against him, although it has not been paid,[76] and where a liability of the officer becomes fixed otherwise than by judgment the officer may resort to his indemnity before paying out his own money to discharge such liability.[77] But where the obligation is to save the sheriff harmless from damage or expense, his cause of action does not accrue until he has been compelled to pay out something because of the acts as to which he has been indemnified.[78]

been levied on property, and several indemnity bonds executed to the sheriff, and the damages recovered for the taking exceed the amount of the penalties in all the bonds, the obligors in each bond should be charged to the extent of the penalty thereof); Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246; Stevens *v.* Wolf, 77 Tex. 215, 14 S. W. 29.

In New York it is held that the indemnitors with respect to a wrongful seizure and sale of property become participants in the original wrong, and their liability is not limited to the amount of the bond but extends to the full amount of the damages caused by such wrong. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533 [*followed* in Cassani *v.* Dunn, 44 N. Y. App. Div. 248, 60 N. Y. Suppl. 756].

**73.** White *v.* French, 15 Gray (Mass.) 339; Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.

**74.** Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.

**75.** See, generally, Indemnity, 22 Cyc. 90.

**76.** *California.*— Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593; Tunstead *v.* Nixdorf, 80 Cal. 647, 22 Pac. 472; McBeth *v.* McIntyre, 57 Cal. 49; White *v.* Fratt, 13 Cal. 521.

*Massachusetts.*— Briggs *v.* McDonald, 166 Mass. 37, 43 N. E. 1003; Cook *v.* Merrifield, 139 Mass. 139, 29 N. E. 540, in both of which cases the obligation was to indemnify against "all suits, damages, and costs whatsoever."

*New York.*— Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 [*reversing* on other grounds 16 N. Y. Suppl. 836]; Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439 [*affirming* 35 Hun 507, and *followed* in Flack *v.* Thaxter, 17 N. Y. Suppl. 359 (*affirming* 14 N. Y. Suppl. 366)] (where the covenant was to well and truly save, keep, and bear harmless, and indemnify the officer "of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments that may at any time arise, come, accrue or happen to be brought against him"); Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098]; Alston *v.* Conger, 66 Barb. 272.

*North Carolina.*— Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035, where the bond of indemnity was conditioned for the payment of such sums as a third person "may recover" from the sheriff.

*Oklahoma.*—Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

*Pennsylvania.*— Huzzard *v.* Nagle, 40 Pa. St. 178.

*Texas.*— Heidenheimer *v.* Johnston, 1 Tex. App. Civ. Cas. § 645.

*Canada.*— See Ruttan *v.* Conger, 9 U. C. C. P. 16.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 323.

In an action by a deputy sheriff against a party who directed him to attach certain property, for which act the sheriff was sued and held responsible, the deputy may recover the damages assessed against the sheriff and the counsel fees incurred, although he has not yet paid them to the principal sheriff, the deputy being ultimately liable therefor. Nutt *v.* Merrill, 40 Me. 237.

**77.** Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209, holding that an officer who had received a bond to indemnify him against "all damages, costs, charges, trouble and expense" that he might be "put to, sustain or suffer" by reason of a levy and sale of property on execution, might maintain an action thereon for the costs and expenses of a suit against him which he has successfully defended, although he had not paid the same.

**78.** *California.*— Tunstead *v.* Nixdorf, 80 Cal. 647, 22 Pac. 472; Oaks *v.* Scheifferly, 74 Cal. 478, 16 Pac. 252 [*distinguishing* McBeth *v.* McIntyre, 57 Cal. 49] (where the obligation was to save the officer harmless from "all damage, expenses, costs, and charges"); Lott *v.* Mitchell, 32 Cal. 23.

*Iowa.*— Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 98 N. W. 277, holding that where a sheriff accepted a bond to indemnify him against liability for damages sustained by a levy on personal property, he could not recover thereon for attorney's fees incurred in defending an action for conversion of the property levied on, until such fee had been actually paid by him.

*Kansas.*— Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

*New Hampshire.*—Conner *v.* Bean, 43 N. H. 202.

*New York.*— Scott *v.* Tyler, 14 Barb. 202.

*Oregon.*— Howard *v.* Conde, 22 Oreg. 581, 30 Pac. 454.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 323.

A payment by note of the officer if accepted as actual payment and satisfaction of the judgment against him is sufficient to en-

Where the officer relies upon an implied indemnity only he has no cause of action until he has suffered actual damage by being compelled to pay over something.[79]

**5. Conclusiveness on Indemnitors of Judgment Against Sheriff.**[80] Where a sheriff has given his indemnitors notice of an action against him in respect to the matters to which the indemnity relates, so as to afford them an opportunity to come in and defend or aid in the defense, a judgment against the sheriff is conclusive as between him and the indemnitors, on the question of the officer's liability;[81] and some authorities hold that where the indemnity is against judgments a judgment against the officer is conclusive against the indemnitors even though they had no notice of the action against the officer,[82] unless such judgment was obtained through fraud or collusion.[83] But other authorities hold that in the absence of notice to the indemnitors the judgment against the sheriff is not conclusive upon them,[84] although it is *prima facie* evidence as between them and the sheriff of the liability of the latter.[85]

title him to recover against his indemnitors. Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

**79.** Williams *v.* Mercer, 139 Mass. 141, 29 N. E. 540.

**80. Conclusiveness and effect of adjudication against indemnitee** generally see Indemnity, 22 Cyc. 106.

**81.** *California.*— Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593; Showers *v.* Wadsworth, 81 Cal. 270, 22 Pac. 663; Dutil *v.* Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

*Colorado.*— Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171; Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

*Illinois.*— Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392 [*affirming* 114 Ill. App. 472].

*Kentucky.*— Jones *v.* Henry, 3 Litt. 427.

*Massachusetts.*— Boynton *v.* Morrill, 111 Mass. 4; Train *v.* Gold, 5 Pick. 380.

*Montana.*— Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369; Tuttle *v.* Hardenberg, 15 Mont. 219, 38 Pac. 1070.

*New Hampshire.*— Burrill *v.* West, 2 N. H. 190.

*New York.*— Carter *v.* Bowe, 41 Hun 516.

*Ohio.*— Miller *v.* Rhoades, 20 Ohio St. 494.

*South Carolina.*— Gist *v.* Davis, 2 Hill Eq. 335, 29 Am. Dec. 89.

*Texas.*— Illies *v.* Fitzgerald, 11 Tex. 417.

*United States.*—Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 322.

**Notice to an indemnitor will be implied** where he has knowledge of the pendency of the suit and participates in the defense thereof. Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392 [*affirming* 114 Ill. App. 472].

**Notice need not be in writing.**— Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679.

**82.** Pasewalk *v.* Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. Rep. 399 [*followed* in Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246]; Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 [*reversing* on other grounds 16 N. Y. Suppl. 836] (where it is said that by their contract the indemnitors made themselves privy to any action brought against the sheriff for that cause); Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439 [*affirming* 35 Hun 507, and *followed* in Flack *v.* Thaxter, 17 N. Y. Suppl. 359 (*affirming* 14 N. Y. Suppl. 366)].

**83.** Mihalovitch *v.* Barlass, 36 Nebr. 491, 54 N. W. 826; Pasewalk *v.* Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. Rep. 399 [*followed* in Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246]; Wheeler *v.* Sweet, 137 N. Y. 435, 443, 33 N. E. 483 [*reversing* on other grounds 16 N. Y. Suppl. 836] (where it is said: "We think good faith and fair dealing require that a sheriff, if requested, should give the indemnitors a right to present any defense in the action against the sheriff, and that if this is refused or prevented by his act, he cannot say that the indemnitors have not been injured or that the judgment determines their liability"); Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439 [*affirming* 35 Hun 507, and *followed* in Flack *v.* Thaxter, 17 N. Y. Suppl. 359 (*affirming* 14 N. Y. Suppl. 366)]. But *compare* Audley *v.* Townsend, 49 Misc. (N. Y.) 23, 96 N. Y. Suppl. 439.

**The fact that judgment is confessed by defendant** does not of itself show fraud or collusion. Mihalovitch *v.* Barlass, 36 Nebr. 491, 54 N. W. 826.

**84.** Stewart *v.* Thomas, 45 Mo. 42 (holding that where there was no notice to the indemnitors any defense which would have been available to the sheriff in the action against him is available to the indemnitors in an action by the sheriff against them); Audley *v.* Townsend, 49 Misc. (N. Y.) 23, 96 N. Y. Suppl. 439; Huzzard *v.* Nagle, 40 Pa. St. 178. See also Williams *v.* Warren, 82 Tex. 319, 18 S. W. 560.

**Waiver of notice.**—Where the sheriff turned the summons and complaint in the action against him over to the attorney of the indemnitors who answered and defended and he also wrote to the indemnitors informing them of the action and that their attorney had put in an answer, to which they made no dissent, their acquiescence was a waiver of formal notice. Audley *v.* Townsend, 49 Misc. (N. Y.) 23, 96 N. Y. Suppl. 439 [*reversed* on other grounds in 126 N. Y. App. Div. 431, 110 N. Y. Suppl. 575].

**85.** Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171; Stewart *v.* Thomas, 45 Mo. 42.

**6. Estoppel to Deny Ownership of Property.** Where execution plaintiffs have directed a levy upon and sale of property which the debtor claims as exempt, and have indemnified the sheriff, they are estopped to deny, in an action on the bond, that the debtor was the owner of the property.[86]

**7. Liability as Affected by Disposition of Proceeds of Property.** According to some authorities, where property has been seized under writs issued by several different parties, each of whom has given indemnity, the liability of each indemnitor is limited to the extent of his participation in the distribution of the proceeds of the property,[87] and where one of several seizing creditors gives indemnity and part of the property is applied to the satisfaction of writs levied before that to which the indemnity relates, the indemnitors are liable only to the extent of what remains after such payments,[88] and if all the property goes to satisfy writs entitled to priority, the indemnitors whose indemnity relates to the writ on which nothing was paid are not liable to the officer for the damage which he has sustained by reason of the seizure.[89] But other authorities hold that the fact that a portion of the proceeds of an execution sale accrued to the benefit of judgment creditors other than the one who indemnified the officer does not affect the liability on the indemnity bond;[90] and that the indemnitors may be held liable, although all the property seized was applied on writs prior to that to which the indemnity relates.[91] And it has also been held that where an officer acting under two indemnity bonds from different parties, is damaged by making a levy, he may resort for compensation to either or both of the parties, and, if he bring action against one and recover only a part of his damages, he may then institute action on the other bond for the balance.[92] Certainly where the claim of the indemnifying creditor has been satisfied in full, he cannot avoid liability or reduce the extent thereof by reason of the fact that the surplus proceeds of the property were applied to the claims of other creditors who had given no indemnity.[93] Where an execution plaintiff has indemnified an officer for a sale of property levied on, which is accordingly sold, it is not essential to the officer's right to resort to his indemnity that he should have paid over the proceeds of the sale to the execution plaintiff or to the justice who issued the writ.[94]

**8. Release[95] or Discharge of Indemnity or Liability Thereon.** An officer who has failed to execute the process to which his indemnity relates with fidelity and reasonable diligence cannot claim the benefit of the indemnity;[96] and where an indemnity bond provided that, in case any suit should be brought against the officer, the indemnitors should be notified and permitted to defend it, and on suit being brought against the officer he notified the indemnitors, but selected his own attorney, instead of complying with their request to send the papers to an attorney named by them and allow him to defend, the officer could not recover

See also Huzzard *v.* Nagle, 40 Pa. St. 178, holding that the record of a suit against the sheriff for an illegal levy is admissible, but not conclusive, evidence in his favor in an action by him against the surety in a bond of indemnity, even though the surety was not a party and had no notice of the suit.

86. Sharp *v.* Wood, 51 S. W. 15, 21 Ky. L. Rep. 189.

87. Dyett *v.* Hyman, 13 N. Y. Suppl. 895 [*affirmed* in 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533].

88. Lee *v.* Maxwell, 98 Mich. 496, 57 N. W. 581; Posthoff *v.* Schrieber, 47 Hun (N. Y.) 593.

89. Davidson *v.* Dallas, 8 Cal. 227 [*disapproved* in Davidson *v.* Dallas, 15 Cal. 75]; Fury *v.* White, 2 Ida. (Hasb.) 662, 23 Pac. 535. See also Smith *v.* Johnson, 95 Ala. 482, 11 So. 20.

90. Brotton *v.* Lunkley, 11 Wash. 581, 40 Pac. 140.

91. Watmough *v.* Francis, 7 Pa. St. 206 [*reversing* 4 Pa. L. J. 302]. See also Davidson *v.* Dallas, 15 Cal. 75, where, although not deciding the point, the court expressed the opinion that the law was as stated in the text, and expressed its disapproval of the case of Davidson *v.* Dallas, 8 Cal. 227.

92. Findlay *v.* Hutzell, 29 Pa. St. 337.

93. Chamberlain *v.* Beller, 18 N. Y. 115 [*approved* in Berry *v.* Hemingway, 56 Barb. (N. Y.) 70].

94. Thompson *v.* Coleman, 4 N. J. L. 216.

95. See, generally, Release, 34 Cyc. 1039.

96. O'Donohne *v.* Simmons, 58 Hun (N. Y.) 467, 12 N. Y. Suppl. 843.

**An officer who fails to complete an attachment** of property by returning the writ on which the attachment was made, cannot, after

on the bond, although judgment was rendered against him.[97] In an action by a sheriff on a bond of indemnity which was given to procure a levy of attachment on goods which were already in his possession under the levy of prior attachments, if it is shown that the levy was discharged by agreement between the attachment creditor and the claimant of the goods, who thereupon released the creditor from liability on account of the levy, but afterward recovered judgment against the sheriff, defendants may show that such judgment was founded on the levy of the prior attachments, in which case they are liable, if at all, only for nominal damages.[98] A bond to indemnify an officer for making a levy is not released by the act of the officer in subsequently levying other attachments on the property without the knowledge or consent of the signers of the bond; [99] and where an officer has wrongfully levied upon exempt property, the fact that he subsequently sells the property to one of his deputies in violation of law does not release the sureties on an indemnity bond given to the officer to make the levy.[1] Neither are the sureties on an indemnity bond given for the seizure of goods under process relieved from liability to the sheriff by the loss of the goods by fire, where the sheriff was not negligent in caring for the goods.[2] An execution creditor is not released from liability on his indemnity bond by reason of the fact that the execution is vacated before the sheriff has performed all the acts to which the indemnity related,[3] or that upon such vacation the sheriff has surrendered the goods levied on without the consent of the execution creditor.[4] The indemnitors of the sheriff cannot avoid liability on the ground that the sheriff took complete possession of the premises where the goods were and retained them longer than was necessary to remove the goods; [5] and where an execution plaintiff has directed a sheriff to sell property levied on and given an indemnity bond, the sureties cannot escape liability by claiming that the sheriff should have merely returned the execution with the levy indorsed thereon and not sold the property.[6] The fact that an indemnity bond recites that the officer has been directed to levy upon property of the judgment debtor will not prevent a recovery thereon if he was actually directed to levy upon property of a third person and did so at the request of the principal in the bond.[7] Where a large mass of goods has been levied on and claimed by a third person, a slight understatement of the number of pieces, some of which are only remnants, in the sheriff's indemnity bond, will not release the sureties thereon, when there is no question but that the mass of the goods is identical.[8] Where persons receiving from an officer goods which he had taken under an attachment gave an indemnity bond, their liability thereon to the officer ceased on the creditor's failure to take out execution within the time after judgment during which the attachment remained effective.[9] Where a judgment creditor gave an officer indemnity for a levy on specified goods, and a claimant

judgment against him in an action by the owner of attached property, maintain an action against the obligor in the bond given to him by the attaching creditor to indemnify him against liability by reason of the attachment. Wiggin *v.* Atkins, 136 Mass. 292.

97. Preston *v.* Yates, 17 Hun (N. Y.) 92, 24 Hun 534.

98. Smith *v.* Johnson, 95 Ala. 482, 11 So. 20.

99. Tilley *v.* Cottrell, 21 R. I. 309, 43 Atl. 369.

1. Railey *v.* Hopkins, (Tex. Civ. App. 1908) 110 S. W. 779.

2. Vickery *v.* Crawford, (Tex. Civ. App. 1900) 57 S. W. 326.

The failure of a sheriff to insure property seized by him under process, and held pending the settlement of a disputed claim thereto, will not discharge his indemnitors, where he has been required to pay the value of such property by reason of its destruction by fire. Flack *v.* Thaxter, 14 N. Y. Suppl. 366 [*affirmed* in 17 N. Y. Suppl. 359].

3. W. F. Main Co. *v.* Morrow, 8 Wyo. 323, 57 Pac. 915.

4. W. F. Main Co. *v.* Morrow, 8 Wyo. 323, 57 Pac. 915.

5. Ebenreiter *v.* Dahlman, 19 Misc. (N. Y.) 9, 42 N. Y. Suppl. 867.

6. Davidson *v.* Hayden, 38 S. W. 897, 18 Ky. L. Rep. 931, so holding on the ground that plaintiff in execution would be conclusively presumed to have denied that any one other than defendant in the execution had any interest in the property.

7. Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

8. State *v.* Benedict, 51 Mo. App. 642.

9. Stackpole *v.* Hilton, 121 Mass. 449.

of the goods obtained a judgment in trespass against both the creditor and the officer, on which the creditor paid more than the penalty of the bond, such payment was not a performance of the condition of the bond, and hence the creditor was liable to the officer for the amount paid by him on the judgment.[10] The contingent liability of the principal in the indemnity bond is not affected by his discharge in bankruptcy;[11] nor can the indemnitors escape liability to the officer by showing that there were irregularities in the execution to which the indemnity related.[12] The sheriff cannot, by a covenant not to sue the sureties on an indemnity bond, exempt them from liability to the owner of property wrongfully seized.[13] Where defendants, with other judgment creditors, executed indemnifying bonds to protect plaintiff, as sheriff, against counsel fees, actions, and judgments by reason of his sale of property levied on under their execution, and plaintiff sold the property, and paid defendants the amount of their execution, and suit was thereupon brought against him by the assignee for benefit of creditors of the judgment debtor, for conversion, in an action by the sheriff on the bond, defendants could not escape liability for their proportionate share of the expense incurred by plaintiff in defending such action, by showing that they orally notified him that they did not wish it defended.[14] The sureties on a bond given by an execution creditor to indemnify a sheriff for any damage sustained by him by reason of his enforcing the execution against property claimed by a third person are not discharged from liability thereon by reason of the fact that the sheriff wrongfully paid the proceeds arising from the execution sale to the execution creditor instead of to the claimant of the property.[15] A sheriff who appeals from a judgment rendered against him for the conversion of property wrongfully taken under execution, and gives a stay bond pending appeal, does not thereby grant such an extension to an execution creditor who has given a bond to indemnify him from all damages sustained by him by reason of his enforcing the execution as to discharge the sureties on the bond.[16] Where a sheriff has levied an attachment on personal property, and, on claim thereto being made by a third person, has required the attaching creditor to give him a bond of indemnity, the court will not cancel the bond, on motion by plaintiff in the attachment suit, when the rights of the claimant as against the sheriff have not been determined in the action.[17] And even though a sheriff has taken nothing under the writ of attachment in respect to which a bond of indemnity was given, and has sold all defendants' property under a judgment in another action, the court will not cancel the bond until the time limited by statute for bringing action against the sheriff has expired.[18]

**P. Summary Remedies of Officers Against Indemnitors.** Under some statutes a sheriff is entitled to recover judgment on motion against the indemnitors, in case a judgment is rendered against him, on account of the act or acts to which the indemnity relates,[19] provided he has given the indemnitors notice of the action against him,[20] and of the motion for judgment over against them.[21] And it has been considered that such a statute is not to be rigidly con-

10. Findlay *v.* Hutzell, 29 Pa. St. 337.
11. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.
12. Stanton *v.* McMullen, 7 Ill. App. 326, holding that this is especially true where the recovery against the officer did not arise out of such irregularities.
13. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679.
14. Grant *v.* Tefft, 16 Daly (N. Y.) 49, 8 N. Y. Suppl. 465.
15. Oakes *v.* Scheifferly, 74 Cal. 478, 16 Pac. 252.
16. Oakes *v.* Scheifferly, 74 Cal. 478, 16 Pac. 252.
17. Thebaud *v.* National Cordage Co., 57 Fed. 567.
18. Allen *v.* Marckwald, 27 Misc. (N. Y.) 683, 58 N. Y. Suppl. 706.
19. Magee *v.* Toulmin, 5 Ala. 141; Atwood *v.* Craig, 3 Stew. & P. (Ala.) 21; Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593; Dennis *v.* Packard, 28 Cal. 101; Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171; Baker *v.* Agey, 2 Humphr. (Tenn.) 13.
20. Atwood *v.* Craig, 3 Stew. & P. (Ala.) 21; Dennis *v.* Packard, 28 Cal. 101; Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.
21. Magee *v.* Toulmin, 5 Ala. 141 (holding that the record must show that the obligors

strued against the officers and in favor of the obligors,[22] although it cannot apply to cases not falling within its terms.[23] On a motion for judgment over on the bond, the sheriff makes a *prima facie* showing by the production of the bond and the judgment against him and proof of notice to the sureties to appear and defend the action;[24] and the burden is on the sureties to show that the judgment against the sheriff had been satisfied by themselves, or by a return of the property seized, or that the property to satisfy it still is, or ought to be, in the sheriff's possession.[25] A statute providing for judgment over against the indemnitors does not require a joint judgment, if the sureties' bond be several, and for different amounts, or forbid a judgment for less than that against the sheriff, if the sureties are bound for less, but in such case judgment should be entered against the sureties for the amount of the bond, and for which each has bound himself, not to exceed the judgment against the sheriff, and costs.[26]

**Q. Actions[27] by Officers[28] Against Indemnitors — 1. Right of Action — a. In General.** An officer who has suffered injury or loss through an act as to which he has been indemnified has a right of action on the bond for reimbursement;[29] and so a sheriff making a sale of property levied on by him under an execution may enforce a bond given to induce him to make the sale, although at the time of the sale a third person has instituted a suit against him for the property, and the coroner has taken the same from the sheriff's possession under process issued in that suit.[30] And a sheriff can maintain an action on the agreement of indemnity, although in making sale of the goods attached he has not strictly complied with the requirements of the statute, unless it is expressly shown that such failure to comply was the ground of recovery of the judgment against him in the claimant's action.[31] A sheriff's failure to give his indemnitors notice of an action against him as provided by statute does not preclude an action by him against the indemnitors upon the bond;[32] nor will his failure to notify his

had sixty days' notice of the motion; and it is not sufficient that it shows such notice of the action against the sheriff); Atwood *v.* Craig, 3 Stew. & P. (Ala.) 21. But *compare* Park *v.* Mighell, 3 Wash. 737, 29 Pac. 556, holding that Hill Code, § 317, providing that the indemnity bond of defendant in attachment "shall be part of the record, and, if judgment go against defendant, the same shall be entered against him and sureties," authorized judgment against the sureties without notice to them.

It is not necessary that the record should set out the notice at length, but it is sufficient that it recites that it appeared to the satisfaction of the court that notice of the pendency of the action and of the motion had been given at the proper time. Atwood *v.* Craig, 3 Stew. & P. (Ala.) 21.

22. Atwood *v.* Craig, 3 Stew. & P. (Ala.) 21.

23. Mansony *v.* Toulmin, 6 Ala. 474 (holding that the acts of 1807 and 1827, which relate in terms to bonds given on execution, cannot be construed to give a summary remedy on a bond given under Act (1833), § 12, authorizing an officer levying an attachment to require plaintiff therein to execute a bond for his indemnity); Baker *v.* Agey, 2 Humphr. (Tenn.) 13 (holding that Acts (1825), c. 40, providing a remedy for the sheriff by motion on an indemnity bond taken on levying an execution on property, the title of which is disputed, and a recovery subsequently had by the rightful owner of such property, does not extend to cases where the recovery is had by defendant in execution against the sheriff, but only to cases where title to the property does not reside in defendant).

24. Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593.

25. Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593.

26. Moore *v.* McSleeper, 102 Cal. 277, 36 Pac. 593.

27. See, generally, Actions, 1 Cyc. 634.

28. Actions by officers generally see *infra*, XII, F.

29. Evans *v.* Graham, 37 W. Va. 657, 17 S. E. 200, holding that where a constable has required an indemnifying bond before levying on property, his right to recover after a judgment has been obtained against him and his sureties in his official bond for making a sale of the property does not depend on the question whether the doubt as to whether the property was liable to levy, which led him to require the bond, was well founded or not.

Although the bond is defective as a statutory bond, if it is good at common law, the sheriff may maintain an action on it, for indemnity against damages recovered against him by the owner of the property seized and sold. Dabney *v.* Catlett, 12 Leigh (Va.) 383.

30. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

31. Crossman *v.* Owen, 62 Me. 528.

32. Whinnery *v.* Wiley, 38 Colo. 203, 88

indemnitors of his payment of a judgment against him, before commencing an action against them, preclude a recovery therein.[33]

**b. Actions by Deputies.** In some states a deputy sheriff is allowed to maintain an action on a bond of indemnity given to him;[34] and in a case where a deputy sheriff was given a verbal promise to indemnify him for making levy and sale under execution, and afterward the original owner of the property recovered judgment against the principal sheriff for damages for the levy, it was held that the deputy might maintain an action in his own name against the indemnitor, who could not be heard to question the right of the deputy to sue, as he was not affected by the rights or equities existing between the deputy and his principal.[35]

**c. Actions by Sureties[36] of Officer.** A surety on the official bond of an officer who has been compelled to pay out money on account of an act of the officer, as to which he was indemnified, may maintain an action against the indemnitors.[37]

**2. Nature of Action.** An action on a bond given to indemnify an officer against the consequences of a levy under process is *ex contractu*.[38]

**3. Defenses.** It is a good defense to an action on an indemnity bond that the bond was obtained through fraud,[39] or that the judgment against the indemnitee was obtained by default, through collusion between the indemnitee and the claimant of the property, and without notice to the indemnitors.[40] But it is no defense to an action by a sheriff on an indemnity bond, in an attachment case, that after the claimant got judgment against the sheriff for the wrongful attachment, and the judgment was satisfied, the sheriff sold the property at private sale by direction of plaintiff in attachment;[41] nor is it any defense that the sheriff, instead of paying the claim of the party indemnified against after he had paid the execution creditor, who was the obligee in the indemnity bond, chose to pay the surplus proceeds of the sale to the assignee of the execution debtor who has since become bankrupt, and so was damnified.[42] Where plaintiff in attachment indemnified the the sheriff against the claims of a third person, and an action of replevin against the sheriff was discontinued by the claimant at his own cost, but in a subsequent action he recovered judgment against the sheriff for the value of the goods, the discontinuance of the replevin action was no defense to the sheriff's action on the indemnity bond.[43] Where a suit was brought against a constable for levying on property under an execution, and the case was submitted to arbitration; but, the day fixed for the meeting of the arbitrators happening on Sunday, the constable agreed to a postponement to another day, this postponement could not be set up as a defense in an action by the officer against his indemnitors.[44] Where in an action upon a bond of indemnity given by defendant for not selling goods, a verdict

Pac. 171 (holding that such failure affected merely the conclusiveness of the judgment against the sheriff as between him and the indemnitors); Wheeler *v.* Sweet, 137 N. Y. 435, 33 N. E. 483 [*reversing* on other grounds 16 N. Y. Suppl. 836]; Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439 [*affirming* 35 Hun 507]; Thomas *v.* Johnston, 4 U. C. Q. B. 110.

33. Topliff *v.* Hayes, 20 Vt. 362.

34. Lindsey *v.* Parker, 142 Mass. 582, 8 N. E. 745.

35. Heidenheimer *v.* Johnston, 1 Tex. App. Civ. Cas. § 645.

36. Actions by sureties generally see PRINCIPAL AND SURETY, 32 Cyc. 261.

37. Philbrick *v.* Shaw, 63 N. H. 81, holding that such an action might be maintained, although the officer had died insolvent, and that, although the indemnitor was a junior attaching creditor, under whose execution the officer had levied, thereby incurring liability to a senior attaching creditor, it was immaterial that the officer's returns on the writs stated that the indemnitor's attachment was the prior one.

38. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

39. Raphael *v.* Goodman, 8 A. & E. 565, 7 L. J. Q. B. 220, 3 N. & P. 547, 1 W. W. & H. 363, 35 E. C. L. 733.

40. Armour Packing Co. *v.* Orrick, 4 Okla. 661, 46 Pac. 573.

41. Barnett *v.* O'Loughlin, 8 Wash. 260, 35 Pac. 1099, holding that when judgment was obtained against the officer and paid, the title to the property seized passed to the sheriff in trust for plaintiff in attachment.

42. Corbett *v.* Wilson, 8 U. C. Q. B. 22, so holding on the ground that the sheriff could not be called upon to treat as valid, with respect to the indemnitors, the very claim against which he had been indemnified.

43. Bowe *v.* Brown, 26 N. Y. Wkly. Dig. 47.

44. Barber *v.* Wolcott, 15 Pa. St. 57.

and judgment against the sheriff in a county court, which he had been obliged to pay, was alleged, and defendant pleaded that he had defended the action for plaintiff, and moved for a new trial, which was refused, and that he then gave a bond to appeal, according to the statute, and applied to the judge to certify the proceedings, but plaintiff, without notice to defendant, and against his will, paid the money, by means whereof defendant was prevented from prosecuting the appeal, it was held that whether or not such plea would constitute a good defense if proved, it was not proved in the case then before the court, as it appeared that no bond was given until the fifth day after judgment was entered and that the judge of the county court had refused to interfere on that ground, so that the appeal was not prevented by plaintiff's payment as alleged, but by the entry of the judgment.[45]

4. LIMITATIONS.[46] It has been held that the statute of limitations does not begin to run against an action on a bond of indemnity for the amount paid out by the officer on a judgment against him until the time of such payment.[47]

5. PARTIES[48] — JOINDER OF ACTIONS.[49] Under some statutes an action on an indemnity bond given to a sheriff for the sale of goods taken in execution, although it must be brought in the name of the sheriff, can only be maintained at the relation of the party injured.[50] Where a deputy sheriff took a bond running to the sheriff to indemnify the latter and all assisting him in the execution of certain process, an action would lie in the name of the sheriff for the deputy's benefit, without any assignment of the cause of action.[51] It has been held that a sheriff may maintain one action on several bonds given to indemnify him on proceeding with a sale of property levied on under execution, so that the court may apportion the liability of each bond, and of the several sureties thereon;[52] but there is also authority for the view that where two plaintiffs each execute a bond to the sheriff to indemnify him for attaching the same property, he must sue separately on each bond.[53] Where an officer obtained from the creditor's attorney a promise of indemnity, and the partner of such attorney subsequently adopted and ratified the promise it was held that the officer might maintain an action on such promise against them jointly.[54]

6. PLEADING.[55] Where the condition of an indemnity bond is that the obligors will pay the damages sustained in consequence of the seizure and sale of the property, the petition in an action on the bond must allege as a breach of that condition the failure of the obligors to pay the damages sustained;[56] but a declaration alleging the execution of the bond, the recovery of a judgment against the obligee for the conversion of the property attached, the payment of such judgment, and the failure of the obligors to indemnify him, is sufficient after verdict to support a judgment for plaintiff.[57] Where the complaint in an action on a bond of indemnity to a sheriff does not, on its face, show that the creditor executing the bond and the sheriff connived to do an illegal act, and that the bond was given for the furtherance thereof, a demurrer to the complaint on the ground that the bond was given to indemnify the sheriff from any claim which might result from the seizure of exempt

45. Kingsmill *v.* Weller, 16 U. C. Q. B. 479.

46. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963.

47. Benson *v.* Caulfield, 64 Nebr. 101, 103, 89 N. W. 664, where it is said: "That the making of this payment under compulsion of the judgment was a 'harm and damage' arising out of the levy of the execution procured by means of this indemnity bond, seems clear. If so, it was a new breach of the condition of the bond and recoverable for, independently of the question whether there could have been a recovery for the breach caused by the mere rendition of the judgment. If this is true, the statute of limitations would not begin to run as to this breach of the bond until the time of payment."

48. See, generally, PARTIES, 30 Cyc. 1.

49. See, generally, JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376.

50. Lewis *v.* Adams, 6 Leigh (Va.) 320.

51. Stillwell *v.* Hurlbert, 18 N. Y. 374.

52. Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

53. White *v.* Fratt, 13 Cal. 521.

54. Marsh *v.* Gold, 2 Pick. (Mass.) 285.

55. See, generally, PLEADING, 31 Cyc. 1.

56. Brock *v.* Church, 5 Ky. L. Rep. 855.

57. Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392 [*affirming* 114 Ill. App. 472].

property cannot be sustained.[58] An objection to a demand in an action by a sheriff on an indemnity bond received by him, based on expenses incurred by the sheriff in his efforts to adjust the case by inducing defendants to pay the judgment against him, cannot be raised by demurrer, but the remedy is by motion to strike.[59] In a suit by a sheriff upon several indemnity bonds, the objection of a misjoinder of causes of action must be taken by demurrer, and where defendants jointly answer the objection is waived.[60] *Nil debet* is not a proper plea to an action by a sheriff on a bond of indemnity given to him to make a levy under an attachment.[61] A release of the sureties on the bond must be specially pleaded in order to be available.[62] Where to a plea of *non damnificatus* to an action on an indemnity bond given by defendant to the sheriff, for seizing and selling goods as the property of a certain person on an execution of defendant against such person, plaintiff replied a judgment and execution against the person in question at the suit of defendant; that the sheriff was about to return the writ "*nulla bona*," and that defendant gave the bond to the sheriff to seize certain goods as goods of the execution defendant; that the sheriff did accordingly seize and sell, and that he paid the money arising from the sale to defendant; that an action of trespass for seizing and selling the goods had been brought against the sheriff by their owner, and a judgment for a certain amount recovered against him in the district court; and so he was damnified — the replication was good on general demurrer.[63]

**7. Issues, Proof, and Variance.**[64] In an action by a sheriff on an indemnity bond to recover the amount of a judgment rendered against him in a suit by a party claiming the property levied on, the only question is whether the judgment is included in the terms of the bond,[65] and the merits of the action in which the judgment was rendered against the sheriff cannot be inquired into,[66] unless an issue of fraud or collusion in such judgment is raised.[67] An allegation that a bond was obtained by fraud of the sheriff is sustained by proof that it was obtained by fraud of a sheriff's officer; [68] and there is no material variance between an allegation that the officer paid the judgment against him and proof that it was paid through him by one of the sureties on his official bond.[69] But under a plea that plaintiff was damnified by his own wrong, defendant cannot show that the sheriff incurred the damages complained of irrespective of the execution of the writ to which the indemnity related.[70] Allegations in the petition that the obligees agreed to indemnify the sheriff, "and hold him free and harmless from all trouble, loss, suits, costs, and judgments resulting from the service of said order of attachment and the sale of all or any goods or chattels taken thereunder," are so repugnant to a recital in the bond that the condition is "to hold him (the sheriff) harmless from all loss and damage by reason of such levy," as to require the sustaining of a motion to strike such allegations.[71]

**8. Evidence.**[72] In order to entitle a sheriff to recover upon a bond indemnifying him against all actions, suits, judgments, etc., he must show a judgment entered in proper form against him; [73] and where the bond is to indemnify the

**58.** Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

**59.** Whinnery *v.* Wiley, 38 Colo. 203, 88 Pac. 171.

**60.** Teague *v.* Collins, 134 N. C. 62, 45 S. E. 1035.

**61.** Butler *v.* Alcus, 51 Miss. 47, holding that the bond was not such a bond for the payment of money as was contemplated by Code (1871), § 600.

**62.** Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

**63.** Hamilton *v.* McFarland, (East T. 3 Vict.) 3 Ont. Case Law Dig. 6424.

**64.** See, generally, Pleading, 31 Cyc. 670.

**65.** Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.

**66.** Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.

**67.** Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.

**68.** Raphael *v.* Goodman, 8 A. & E. 565, 7 L. J. Q. B. 220, 3 N. & P. 547, 1 W. W. & H. 363, 35 E. C. L. 733.

**69.** Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

**70.** Corbett *v.* Wilson, 8 U. C. Q. B. 22.

**71.** Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

**72.** See, generally, Evidence, 16 Cyc. 821.

**73.** Ruttan *v.* Conger, 9 U. C. C. P. 16.

officer for selling under a particular execution, he must show that he sold under the execution mentioned in the bond in order to recover thereon.[74] Where the statute requires a bond of indemnity to a sheriff to make a levy under an attachment to be returned with the papers in the attachment suit, and on a suit on such a bond the plea denies that it was returned with the papers, and plaintiff in his replication avers that it was so returned, he holds the affirmative of the issue, and must prove it.[75] Parol evidence of the contents of the sheriff's answer in the suit against him is admissible where the proper foundation for such evidence is laid by showing that the answer had been removed from the files of that case to be used as evidence in another case and could not be found.[76] In an action on an indemnifying bond given by an execution creditor, the fact that defendant in execution, without the consent of the sheriff, took and sold the goods which had been levied on, is not admissible.[77] In an action by a sheriff upon a bond indemnifying him for a levy and sale under an execution, where a recovery has been had against him by a third person claiming the property sold, it is proper for defendants to prove, in mitigation of damages, the amount received by the sheriff on the sale.[78] Where the obligors in a bond of indemnity had agreed to pay counsel fees incurred by the sheriff, proof of the payment of a certain amount was sufficient to support a recovery without proof that such amount was reasonable, where the reasonableness thereof was attacked by neither the answer of defendants nor evidence at the trial.[79]

**9. Trial.**[80] Where an indemnified sheriff is sued for trespass, and plaintiff recovers, and a suit is afterward brought on the indemnity bond by the sheriff, the legality of the act which was the basis of the action against the officer cannot be again inquired into, especially where the indemnifier had notice of the suit for damages, which, if recovered, he is bound to make good.[81] It is within the discretion of the court to refuse to permit the sureties to file during the trial a plea setting up a release to themselves from liability on the bond.[82] Whether the judgment against the officer was fraudulent or collusive is a question for the jury.[83] In an action by a sheriff on an indemnity bond to secure him from liability for seizing property which he should deem to belong to the execution debtor, defendants are entitled to a charge that they are entitled to a verdict, if the sheriff did not judge that the property seized belonged to the debtor.[84] In an action by a sheriff on a bond given to indemnify him on a levy of execution, it is error to instruct that, in order to deprive the sheriff of his indemnity by reason of misconduct of an auctioneer employed by him, something more than mere negligence or misconduct on the part of the auctioneer must be shown, and that fraud must be shown.[85]

**10. Judgment.**[86] In an action by a sheriff on a verbal agreement to indemnify him for seizing certain property on execution, the clerk may enter judgment on default of defendant in not answering after his demurrer has been overruled.[87]

**11. Review.**[88] Objections not interposed in the trial court cannot be urged

74. Dickinson *v.* Jones, 34 N. C. 45.

75. Butler *v.* Alcus, 51 Miss. 47.

76. Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. 392 [*affirming* 114 Ill. App. 472].

77. Norris *v.* Brunswick, 73 Mo. 256, holding that such evidence could not be admitted, either as tending to disprove plaintiff's claim of title or for the purpose of diminishing the amount of his recovery.

78. O'Brien *v.* McCann, 58 N. Y. 373, holding that the onus is then upon the officer to show that he has paid or is liable to pay a portion of such receipts to another.

79. Grant *v.* Tefft, 7 N. Y. Suppl. 129 [*affirmed* in 16 Daly 49, 8 N. Y. Suppl. 465].

80. See, generally, Trial.

81. Illies *v.* Fitzgerald, 11 Tex. 417.

Conclusiveness on indemnitors of judgment against sheriff generally see *supra*, VI, O, 5.

82. Leader *v.* Mattingly, 140 Ala. 444, 37 So. 270.

83. Dunn *v.* National Surety Co., 80 N. Y. App. Div. 605, 80 N. Y. Suppl. 744 [*affirmed* in 178 N. Y. 552, 70 N. E. 1098].

84. O'Donohue *v.* Simmons, 36 Hun (N. Y.) 331.

85. O'Donohue *v.* Simmons, 58 Hun (N. Y.) 467, 12 N. Y. Suppl. 843.

86. See, generally, Judgments, 23 Cyc. 623.

87. Stark *v.* Raney, 18 Cal. 622.

88. See, generally, Appeal and Error, 2 Cyc. 474; Review, 34 Cyc. 1695.

on appeal.[89] Where in an action by the sheriff against the obligors in his indemnity bond to recover the amount of a judgment paid by him, which was recovered against him by defendants in attachment, the judgment in the suit against the sheriff is offered in evidence, and it appears by the language of the trial court that the sole ground of recovery was the sheriff's wrongful refusal, subsequent to the vacating of the attachment, to surrender the property on demand, no presumption can be entertained on appeal that there was evidence tending to establish the sheriff's liability under the attachment.[90]

**12. Costs.**[91] Where, on default of defendant in an action on an indemnity bond, a referee was appointed to assess the sheriff's damages, but the default was subsequently opened by an order which did not tax the fees of the referee, such fees were a proper item of disbursement to be taxed in the costs on final judgment for the sheriff.[92]

## VII. Actions[93] Against Officers or Indemnitors.[94]

**A. Right of Action — 1. In General.** The sheriff is liable to a civil action for failure to levy[95] or execute process,[96] releasing property levied on,[97] levying on exempt property[98] and selling the same,[99] seizing or levying on property not belonging to defendant in the process under which he acts[1] and selling the

**89.** Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246, so holding as to an objection that the sheriff's cause of action was barred by the statute of limitations.

**90.** Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839.

**91.** See, generally, Costs, 11 Cyc. 1.

**92.** Bowe *v.* Brown, 26 N. Y. Wkly. Dig. 47.

**93.** See, generally, Actions, 1 Cyc. 634.

**94. With respect to actions against indemnitors,** an indemnity to the sheriff may, as has been seen, operate either: (1) As a protection for the sheriff and his sureties see *supra*, VI, L, 1; (2) as a protection for the claimant of property seized see *supra*, VI, L, 2; or (3) as a substitute for the liability of the sheriff see *supra*, VI, L, 3. In the two last mentioned aspects the liability of the indemnitors is the same as that of the sheriff where no indemnity is given, and hence it is deemed proper to treat in this chapter actions by the injured person against the indemnitors as well as against the sheriff. Matters relating to actions by the sheriff or his sureties against the indemnitors have already been discussed. See *supra*, VI, Q.

**95.** Groom *v.* Pickett, 4 Bush (Ky.) 372; Douglass *v.* Baker, 9 Mo. 41; Wetherby *v.* Foster, 5 Vt. 136; Creighton *v.* Daniels, 2 Nova Scotia 304. See, generally, *supra*, V, C, 1.

**96.** *Connecticut.*—Crocker *v.* Waldo, 2 Root 251.

*Delaware.*— State *v.* Fowler, 4 Harr. 358.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*New York.*— Packard *v.* Hesterberg, 48 Misc. 30, 96 N. Y. Suppl. 72.

*Virginia.*— Ronald *v.* Bentley, 4 Hen. & M. 461.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, C, 1.

**97.** Lowenberg *v.* Jefferies, 74 Fed. 385. See, generally, *supra*, V, F, 2.

**98.** Amend *v.* Murphy, 69 Ill. 337; Allen *v.* Coates, 29 Minn. 46, 11 N. E. 132; Strong *v.* Combs, 68 Nebr. 315, 94 N. W. 149; Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840. See, generally, *supra*, V, E, 12, b.

**99.** Amend *v.* Murphy, 69 Ill. 337; Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132; Strong *v.* Combs, 68 Nebr. 315, 94 N. W. 149. See, generally, *supra*, V, G, 13.

**The owner of the property may waive the statutory penalty** and sue for and recover the value of the property. Amend *v.* Murphy, 69 Ill. 337.

**1.** *Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

*California.*— Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499.

*Illinois.*—Hanchett *v.* Williams, 24 Ill. App. 56.

*Iowa.*— Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14.

*Kansas.*— Huey *v.* Brimer, 9 Kan. App. 149, 58 Pac. 485.

*Kentucky.*— Vaughn *v.* Justice, 78 S. W. 424, 25 Ky. L. Rep. 1666.

*Louisiana.*— Macias *v.* Lorio, 43 La. Ann. 289, 8 So. 886.

*Maine.*— Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

*Maryland.*— Trieber *v.* Blocher, 10 Md. 14.

*Massachusetts.*—Stearns *v.* Dean, 129 Mass. 139; Codman *v.* Freeman, 3 Cush. 306; Stickney *v.* Davis, 16 Pick. 19; Woodbury *v.* Long, 8 Pick. 543, 19 Am. Dec. 345.

*Mississippi.*— Perry *v.* Lewis, 49 Miss. 443.

*Missouri.*— State *v.* McKellop, 40 Mo. 184.

*Nebraska.*— Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

*New Hampshire.*— Hills *v.* Hoitt, 18 N. H. 386.

*New Jersey.*— Browning *v.* Skillman, 24 N. J. L. 351.

*New York.*— Manning *v.* Keenan, 73 N. Y. 45; Hill *v.* Page, 108 N. Y. App. Div. 71, 95 N. Y. Suppl. 465; Einstein *v.* Dunn, 61 N. Y.

same,[2] seizing property in the custody of the law,[3] selling property attached on mesne process without the consent of the creditor and owner, or otherwise than by the mode prescribed by statute,[4] failure to collect money,[5] failure or refusal to pay over money collected by him [6] or in his official custody,[7] loss of property in his official custody [8] or negligently permitting the same to be damaged,[9] misapplying the proceeds of a sale,[10] failure to sell property levied on,[11] failure to return process,[12]

App. Div. 195, 70 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 648, 63 N. E. 1116]; Carpenter *v.* Lott, 31 Hun 349; Hodge *v.* Adee, 2 Lans. 314; Haskins *v.* Kelly, 1 Rob. 160, 1 Abb. Pr. N. S. 63; Moore *v.* Hillabrand, 16 Abb. N. Cas. 477.

*North Dakota.*— Mariner *v.* Wasser, (1908) 117 N. W. 343.

*Pennsylvania.*— Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811; Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659; Nagle *v.* Mullison, 34 Pa. St. 48.

*Vermont.*— Smith *v.* McCall, 48 Vt. 422.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, E, 14.

2. *Illinois.*— Hanchett *v.* Williams, 24 Ill. App. 56.

*Iowa.*— Nutter *v.* Ricketts, 6 Iowa 92.

*Louisiana.*— Macias *v.* Sheriff, 43 La. Ann. 289, 8 So. 886.

*Maine.*— Lothrop *v.* Arnold, 25 Me. 136, 43 Am. Dec. 256.

*Massachusetts.*— Bryant *v.* Clifford, 13 Metc. 138.

*New Jersey.*— Browning *v.* Skillman, 24 N. J. L. 351.

*New York.*— Hill *v.* Page, 108 N. Y. App. Div. 71, 95 N. Y. Suppl. 465.

*Pennsylvania.*— Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811; Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, G, 11.

**One who is either the sole owner or the owner in common** with defendant in the process of the goods sold may sue the officer for the conversion. Bryant *v.* Clifford, 13 Metc. (Mass.) 138.

**The levying on, carrying away, and sale constitute a single trespass,** and although the acts took place upon different days, plaintiff cannot be put to his election as to which he will proceed upon. Browning *v.* Skillman, 24 N. J. L. 351.

3. Huntley *v.* Bacon, 15 Conn. 267; Walker *v.* Foxcroft, 2 Me. 270; Dearborn *v.* Kelley, 3 Allen (Mass.) 426; Robinson *v.* Ensign, 6 Gray (Mass.) 300. See, generally, *supra*, V, E, 12, c.

**Suit by deputy against sheriff.**—Where a deputy sheriff attaches goods, and another deputy of the same sheriff attaches and takes the same goods out of his possession by virtue of another precept against the same debtor, the deputy who made the first attachment may maintain an action for this injury against the sheriff himself. Walker *v.* Foxcroft, 2 Me. 270; Robinson *v.* Ensign, 6 Gray (Mass.) 300.

4. Ross *v.* Philbrick, 39 Me. 29, holding that in such case the pendency of the action in which the property was attached presents no obstacle to an immediate suit by the owner.

5. Crane *v.* Lewis, 4 La. Ann. 320. See, generally, *supra*, V, H, 2.

6. *Colorado.*— Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713.

*Massachusetts.*— King *v.* Rice, 12 Cush. 161.

*Missouri.*— Evans *v.* Hays, 1 Mo. 697.

*New York.*— Nelson *v.* Kerr, 59 N. Y. 224 [*affirming* 2 Thomps. & C. 299]; Crane *v.* Dygert, 1 Wend. 534; Armstrong *v.* Garrow, 6 Cow. 465.

*Pennsylvania.*— Enterline *v.* Comrey, 15 Pa. Co. Ct. 627.

*South Carolina.*— State *v.* Sheriff, 1 Mill 145.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, H, 17.

**Where the sheriff retains moneys above his proper fees and costs,** the party entitled to the surplus may recover the same by action. Cramer *v.* Oppenstein, 16 Colo. 495, 27 Pac. 713, holding that in such cases the remedy is not limited to a proceeding to retax the sheriff's fees and costs, although that course may be pursued, nor to a suit for treble damages under the statute.

7. Munger *v.* Sanford, 144 Mich. 323, 107 N. W. 914. See, generally, V, H, 17.

8. Conover *v.* Com., 2 A. K. Marsh. (Ky.) 566, 12 Am. Dec. 451. See, generally, *supra*, V, F, 1.

**Where property of a tenant in common is attached** and receipted for, and left in the possession of the cotenant, who before the attachment is dissolved sells it, no action can be maintained against the officer by the debtor, but his only remedy is by an action against his cotenant for his share of the avails. Frost *v.* Kellogg, 23 Vt. 308.

9. Briggs *v.* Taylor, 35 Vt. 57. See, generally, *supra*, V, F, 1.

10. Enterline *v.* Comrey, 15 Pa. Co. Ct. 627. See, generally, *supra*, V, H, 16.

11. Hamner *v.* Griffith, 1 Grant (Pa.) 193. See, generally, *supra*, V, G, 32.

12. *Georgia.*—Wood *v.* Hunt, 23 Ga. 379.

*Kentucky.*— Groom *v.* Pickett. 4 Bush 372.

*New York.*— McKinley *v.* Tucker, 6 Lans. 214; Brown *v.* Jones, 1 Hilt. 204, 3 Abb. Pr. 80; Wilson *v.* Wright, 9 How. Pr. 459; Burk *v.* Campbell, 15 Johns. 456.

*Tennessee.*— Chaffin *v.* Stuart, 1 Baxt. 296.

making a false return,[13] permitting an escape of one arrested under civil process,[14] and in general any official default or misconduct by which injury is caused.[15] Under a statute authorizing suit against an officer who has made a wrongful delivery of property replevied, an action cannot be maintained against a constable for retaining property taken under a replevin writ after the action is dismissed, where an appeal is taken.[16]

**2. Injury to Complainant as Natural Consequence of Default.** In order to support a civil action against the sheriff it is necessary that the complaining party shall have sustained some injury through the act or default of the officer,[17]

*Virginia.*— Ronald *v.* Bentley, 4 Hen. & M. 461.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, J, 1.

13. Whitaker *v.* Sumner, 7 Pick. (Mass.) 551, 19 Am. Dec. 298; Clough *v.* Monroe, 34 N. H. 381; Watson *v.* Brennan, 39 N. Y. Super. Ct. 81 [*reversed* on other grounds in 66 N. Y. 621]; Stoors *v.* Kelsey, 2 Paige (N. Y.) 418. But *compare* Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 11 S. E. 264, holding that as the statutes provide only for an amercement, on motion, for the failure of a sheriff to make "due and proper" return of process, a civil action will not lie for such failure. See, generally, *supra*, V, J, 4.

14. *Alabama.*— Sawyer *v.* Ballew, 4 Port. 116.

*Connecticut.*— Hart *v.* Stevenson, 25 Conn. 499.

*Illinois.*— Plumleigh *v.* Cook, 13 Ill. 669.

*New York.*— Smith *v.* Knapp, 30 N. Y. 581; Beckwith *v.* Smith, 4 Lans. 182.

*South Carolina.*— Boyce *v.* Barksdale, 4 McCord 141.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260; and, generally, *supra*, V, K, 7; and Prisons, 32 Cyc. 343.

15. See Hutchins *v.* Lee, Walk. (Miss.) 293, holding that where property sells for less money than it should because of any neglect in the sheriff to perform his duty, the remedy is by an action against such sheriff for the damages sustained.

16. Rich *v.* Conley, 64 N. Y. Suppl. 333.

17. *Indiana.*— Harmon *v.* State, 82 Ind. 197, holding that an action cannot be maintained against a sheriff who assumes to sell land under an execution already satisfied by a levy on personal property, which, however, has been wasted by the sheriff, as the sale conveys nothing.

*Maine.*— Moulton *v.* Jose, 25 Me. 76 (holding that a surety in a poor debtor's bond cannot maintain an action against the officer for neglecting to return the execution on which the principal was arrested, with the bond, into the clerk's office from which it had issued, within the time prescribed by law, he not being a party injured by the neglect); Wright *v.* Keith, 24 Me. 158 (holding that a debtor who was arrested and discharged on taking the poor debtor's oath could not maintain an action against the officer making the arrest on the ground that such officer returned illegal fees by reason of which the debtor was detained in prison longer than he otherwise would have been).

*Massachusetts.*— Whitney *v.* Blanchard, 2 Gray 208 (holding that no action lies against a constable, who has failed to give bond as required by St. (1851) c. 94, § 2, for neglecting to serve process, since under the statute his act would have been a nullity, and hence plaintiff could not be injured by his omission to perform it); Bond *v.* Padelford, 13 Mass. 394 (holding that where a deputy sheriff attached personal property on mesne process and delivered it to a third person on his accountable receipt, and the latter permitted the general owner to retain it, and later the deputy sheriff retook the property from the possession of such general owner, the latter having no right to the possession, the deputy sheriff's act was no injury to him, and he could not maintain an action therefor).

*Minnesota.*— Liljengren *v.* Ege, 46 Minn. 488, 49 N. W. 250, holding that under Gen. St. (1878) c. 90, § 22, which secures to mechanics and laborers a preference of payment, where a business or its assets is about to be closed out under process, and section 23 which provides that, in case of attachments and executions against the employer, it shall be lawful for such mechanics, laborers, or servants to give notice in writing of their claims, and the amount thereof, to the officer executing the writ, at any time before the actual sale of the property levied on, where an officer levied on the property of such employer, the sale, if made, was by virtue of the writ, and not by virtue of the lien conferred by the statute, and therefore, if the officer released the levy, the lien-holders had no right of action against him; for, as long as the writ remained unexecuted, it was as if no levy had been made, and the lien-holder might enforce his lien as before.

*Missouri.*— Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

*New York.*— Ray *v.* Hogeboom, 11 Johns. 433.

*North Carolina.*— Henry *v.* Rich, 64 N. C. 379, holding that where money is paid by an execution debtor to an officer having the execution in his hands it is at once, in contemplation of law, applied to the satisfaction of the execution, and if the officer misapplies the money he is liable to the execution creditor alone and the execution debtor cannot recover the money, although the officer promised to return it if not applied on the execution.

*Pennsylvania.*— Dixon *v.* White Sewing Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15

and that the injury suffered shall have been the legal and natural consequence of the default or misconduct of which complaint is made,[18] and not the result of the negligence of the complaining party.[19]

**3. Matters Affecting Right of Action Against Sheriff — a. In General.** An action may be maintained against a levying officer notwithstanding the fact that his proceedings up to the time of the commencement of the action were regular and legal, where after such time and before the trial he is guilty of acts which

Am. St. Rep. 683, 5 L. R. A. 659; Hamner *v.* Griffith, 1 Grant 193, holding that a junior execution creditor cannot recover against the sheriff for failure to sell under his execution, where the sheriff had senior executions in his hands which had been levied on the same goods, and which equaled or exceeded their value.

*South Carolina.*—Gains *v.* Downs, Harp. 72, holding that an execution plaintiff could not hold a sheriff liable for failure to produce property levied on, where there were prior executions equaling or exceeding the value of the property.

*Tennessee.*— Whitly *v.* Steakly, 3 Baxt. 393, holding that one who parted with his title to property before the levy of an attachment thereon is not entitled to recover damages against the sheriff making the levy.

*Texas.*— Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295.

*Vermont.*— West River Bank *v.* Gorham, 38 Vt. 649; Burroughs *v.* Wright, 16 Vt. 619 (holding that where an officer, having attached property, levied an execution on the same property, subject to such attachment, and the execution in the suit in which the attachment was made was put into the hands of another officer in season to charge the property, and the first officer proceeded and sold the property on the execution in his hands, and then tendered to the second officer the amount of the execution which he held, together with his fees, the second officer could not refuse such tender, and commence an action against the first officer for his proceedings with the property); Fletcher *v.* Bradley, 12 Vt. 22, 36 Am. Dec. 324.

*Virginia.*— Governor *v.* Williams, 12 Leigh 508.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 260.

**Misapplication of proceeds of sale.**—A sheriff who applies the proceeds of the sale of property made on execution, which are insufficient to satisfy the execution, to a prior judicial mortgage, cannot be sued for the money by the debtor, as the debtor's only right is to see that the proceeds are applied to the execution. Sittig *v.* Morgan, 5 La. Ann. 574.

**Injury sufficient to support action.**—Where a return, headed with the name of the state of Vermont and one of its counties, stated that a copy of a petition of foreclosure was left with D, one of the defendants in the process, and no place was specified in the return where such process was left with D, and in fact it was delivered to him by defendant, a Vermont sheriff, in the state of New Hampshire, and D did not appear in the cause, and a decree of foreclosure was taken against him, without any continuance of the cause, and a short time fixed for redemption, upon the expiration of which, without payment, the tenant of D, then in possession of the premises, was ousted by virtue of the decree, it was held that D had sustained sufficient damage to maintain an action against the sheriff for making a false return. Davis *v.* Richmond, 35 Vt. 419.

**An action on a bond of indemnity** may be prosecuted in the name of the sheriff or other officer to whom it was given, without proving that any damage was sustained by such officer. Carrington *v.* Anderson, 5 Munf. (Va.) 32.

**A prosecutrix in bastardy proceedings** has no right of action against a constable for an escape of defendant after arrest and before sentence. Booz *v.* Engarman, 18 Pa. St. 263. *Contra*, Lantz *v.* Lutz, 8 Pa. St. 405.

**Where the statute imposes an absolute liability** upon an officer as a consequence of an official default, damage to plaintiff is not necessary to support an action against the officer. Douglass *v.* Baker, 9 Mo. 41, so holding under a statute making the sheriff liable for the full amount of the execution where he failed to levy.

18. Speller *v.* Lee, 43 Ala. 381 (holding that an execution debtor has no cause of action against the sheriff for his eviction from his land under a void execution sale); Hullinger *v.* Worrell, 83 Ill. 220 (holding that where an assailant with a deadly weapon is carelessly permitted by a sheriff to escape from his custody, another person afterward put to expense to have him bound over to keep the peace cannot maintain an action on the case against the sheriff to recover for the same); Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575; Persons *v.* Parker, 3 Barb. (N. Y.) 249.

19. Butler *v.* Bennett, 11 Pa. Co. Ct. 88 (holding that where the assignee of a term of years, who holds over after its expiration, is dispossessed by proceedings by the landlord against the original lessee, he is not entitled to recover against the constable for a false return of the summons in the proceedings, both because he is not a party to the suit, and because any injury resulting to him is due to his concurrent negligence in remaining in the premises after his interest therein has expired); Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386 (holding that where, in an action against a sheriff for taking an insufficient claimant's bond on certain personal property levied on by plaintiffs, it appeared that certain lands of defendant in attachment had been levied on, and that, although the attachment lien had been foreclosed, plaintiffs

render him a trespasser *ab initio*.[20] An action of tort against an officer for taking property from plaintiff by virtue of a writ of replevin in which the bond was defective is not defeated by proof that plaintiff in replevin became nonsuit, and the present plaintiff had judgment therein for damages and a return of the goods, if in fact that judgment remains unsatisfied and the goods have not been returned.[21] Where an officer sells goods taken on a void execution after having been notified by a creditor, who has placed in his hands another execution against the same debtor that he claims the first execution to be void, and that, if the officer sells the goods under it, so that they cannot be taken on his execution, he will hold him responsible therefor, such creditor does not by purchasing the goods at the sale and receiving possession of them, become estopped from maintaining an action against the officer.[22] One who has ratified the acts of a sheriff with reference to the disposal of property levied on cannot thereafter maintain an action against him because of such acts.[23]

**b. Obligation of Officer to Complaining Party.** In order to support an action against a sheriff for an official default, as distinguished from active misconduct in the nature of a trespass, it must appear that the sheriff is bound by the duties of his office to the complaining party.[24]

**c. Effect of Availability of Summary Remedy.** The fact that the liability of a sheriff for an official default might be enforced by summary proceedings does not preclude an ordinary civil action against him by the injured party;[25] but where a party proceeds by attachment, and receives the principal of the debt, he cannot afterward sue the sheriff for damages for the detention thereof.[26]

**d. Effect of Availability of Remedy on Bond.**[27] The fact that a sheriff's bond might be made to respond for an official default does not preclude a direct action against the sheriff alone.[28]

**4. Matters Affecting Right of Action Against Indemnitors.** An action cannot be maintained against indemnitors of the sheriff unless an action could have been maintained against the sheriff for the act complained of if no indemnity had been given,[29] and the right of action against indemnitors of the sheriff is sometimes confined to claimants who gave notice to the sheriff of their claims and in reference to whose claims the bond was given,[30] other claimants being left to their remedy by a common-law action against the sheriff.[31] A claimant of property sold under execution is not deprived of his right of action on an indemnifying bond executed to the officer because the officer has rendered himself liable by failure to return the indemnifying bond.[32] The right of a judgment debtor to sue on a bond of indemnity for the seizure and sale of exempt property is not affected by his failure to give the sheriff notice of his claim of exemption.[33] Where, upon a claim being made to property seized by a sheriff under execution, he took an indemnifying bond from the execution creditor, and subsequently another execution in favor of another creditor of the same debtor was levied on the same property, and the property was sold under the first execution, and it was satis-

had not caused a sale of these lands, a charge by the court that, even if the bond was insufficient, plaintiffs could not recover, if they had negligently failed to make good their debt out of the sale of these lands was proper).

**20.** McGough *v.* Wellington, 6 Allen (Mass.) 505.

**21.** Dearborn *v.* Kelley, 3 Allen (Mass.) 426.

**22.** Brayman *v.* Whitcomb, 134 Mass. 525.

**23.** Hewes *v.* Parkman, 20 Pick. (Mass.) 90.

**24.** Ross *v.* Jacobs, 2 Harr. (Del.) 445 (holding that an action will not lie by plaintiff in an older execution in the hands of a constable against another constable holding and selling on a younger execution and misapplying the proceeds); Harrington *v.* Ward, 9 Mass. 251; Butler *v.* Bennett, 11 Pa. Co. Ct. 88.

**25.** See *infra*, VIII, A.

**26.** Daniel *v.* Capers, 4 McCord (S. C.) 237.

**27. Liabilities on official bonds** see *infra*, X.

**28.** Briley *v.* Copeland, 14 Ill. 38; Lagan *v.* Williamson, 53 N. C. 433; Enterline *v.* Comrey, 15 Pa. Co. Ct. 627.

**29.** Whitney *v.* Gammon, (Iowa 1896) 67 N. W. 405; Marshall *v.* Stewart, 67 Miss. 494, 7 So. 284; Moore *v.* Allen, 25 Miss. 363.

**30.** Steele *v.* Farber, 37 Mo. 71; Stewart *v.* Ball, 35 Mo. 209.

**31.** Stewart *v.* Ball, 35 Mo. 209.

**32.** Chisholm *v.* Gooch, 79 Ky. 468.

**33.** Whitney *v.* Gammon, 103 Iowa 363,

fied, leaving a surplus, which the sheriff paid to the second execution creditor, requiring, however, a bond of indemnity from him, the claimant, having brought an action on the bond given by the first execution creditor and recovered for the amount of goods applied to his execution, was not barred thereby from bringing an action on the bond given by the second execution creditor.[34]

**5. Right of Action Against Deputies.** Although under the rule that the official default of a deputy is chargeable to the sheriff,[35] an action is properly brought against the sheriff for such default,[36] and no action lies against the deputy therefor,[37] yet a suit may be brought against the deputy for a breach of his direct promise to the party suing, although such promise related to his official duties,[38] or for active malfeasance,[39] such action being against him as a wrong-doer [40] and not in his capacity of deputy.[41]

**6. Persons Entitled to Bring Action.**[42] One who has acquired the title to property after a wrongful seizure of the same under process may maintain an action against the officer or his indemnitors for damages resulting from such seizure.[43] It has been held that all claimants of property, whether legal or equitable, whose rights might otherwise be jeopardized by the wrongful seizure or sale of property under process have a right of action against the obligors on a bond of indemnity as to such act.[44] An execution defendant may maintain an action against the indemnitors of the sheriff for a seizure and sale of exempt property.[45] Where an officer seizes under execution property in the possession of another officer who has seized it under attachment, the right of action for such trespass is in the attaching officer and not in the attachment creditor.[46] The person who has paid illegal fees is the party injured by the taking thereof, and

72 N. W. 551, so holding on the ground that the object of the notice was merely to enable the officer to protect himself by demanding indemnity, which the officer had done without such notice.

34. State *v.* Doan, 39 Mo. 44.

35. See *supra*, V, B.

36. *Kentucky.*— Owens *v.* Gatewood, 4 Bibb 494.

*Massachusetts.*— Codman *v.* Freeman, 3 Cush. 306; Campbell *v.* Phelps, 17 Mass. 244.

*Missouri.*— Evans *v.* Hays, 1 Mo. 697.

*New Hampshire.*— Clough *v.* Monroe, 34 N. H. 381.

*New York.*— Colvin *v.* Holbrook, 3 Barb. 475 [*affirmed* in 2 N. Y. 126].

*Virginia.*— Overton *v.* Hudson, 2 Wash. 172.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 260, 276.

37. Owens *v.* Gatewood, 4 Bibb (Ky.) 494; Colvin *v.* Holbrook, 3 Barb. (N. Y.) 475 [*affirmed* in 2 N. Y. 126]; Tarkinton *v.* Hassell, 27 N. C. 359.

**In Massachusetts,** where the deputy is recognized to some extent as an independent officer, it has been held that an action for the deputy's default may be brought against either the sheriff or the deputy. Draper *v.* Arnold, 12 Mass. 449. See also Esty *v.* Chandler, 7 Mass. 464. But an action will not lie against a sheriff and his deputy jointly for a tort by the deputy alone. Campbell *v.* Phelps, 1 Pick. 62, 11 Am. Dec. 139 [*approved* in Pervear *v.* Kimball, 8 Allen 199]. And after a judgment against a deputy in trespass *de bonis asportatis*, and execution levied on the body of the deputy, but not satisfied, no action lies against the sheriff for the same cause. Campbell *v.* Phelps, 1 Pick. 62, 11 Am. Dec. 139. No action lies against a sheriff on a judgment recovered against his deputy. Pervear *v.* Kimball, 8 Allen 199.

38. Winterbower *v.* Haycraft, 7 Bush (Ky.) 57; Tarkinton *v.* Hassell, 27 N. C. 359.

39. Mark *v.* Lawrence, 5 Harr. & J. (Md.) 64 (purchase of property at his own sale); Campbell *v.* Phelps, 17 Mass. 244 (tortious injury to the person or property of another).

40. Mark *v.* Lawrence, 5 Harr. & J. (Md.) 64.

41. Mark *v.* Lawrence, 5 Harr. & J. (Md.) 64.

42. See also *supra*, VII, A, 4.

43. Gates *v.* Neimeyer, 54 Iowa 110, 6 N. W. 150; Vicksburg Bank *v.* Little, 67 Miss. 159, 6 So. 648; Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811.

44. Watts *v.* Cook, 2 Bush (Ky.) 141, holding that persons who were vested with a paramount and exclusive lien as landlords of the debtor had a right of action on the bond under a statute giving such right to "any claimant." But *compare* Garlands *v.* Jacobs, 2 Leigh (Va.) 651, holding that a bond given a sheriff, under 1 Rev. Code, c. 134, to indemnify him for selling property under execution, can only be put in suit at the relation of the person having the legal title to the property sold, and not at the relation of the person having the equitable title.

45. Dixon *v.* Bacon, 3 Bush (Ky.) 534.

46. Foulks *v.* Pegg, 6 Nev. 136. But *compare* State *v.* Boisliniere, 40 Mo. 566.

**Payment of prior lien.**—Where property

may maintain an action against the officer therefor.[47] Where a mortgage was executed to several mortgagees, with a power of sale given to one of their number, who took possession and harvested the crop, and left it in charge of the mortgagor, and it was subsequently levied on by a creditor of the latter, the holder of the power of sale had such an interest in the property that he could maintain an action on a bond of indemnity given to the sheriff making a sale under such execution, and recover, not only for his individual share of the crop, but for the whole of it for the benefit of the other mortgagees.[48] The fact that a small amount is due from the mortgagor to the holder of a prior mortgage, who is in possession of the property, does not affect the right of a subsequent mortgagee to recover for a conversion of the property by a sheriff, under a writ of attachment.[49]

**B. Nature and Form of Remedy — 1. In General.** When a sheriff has failed to levy under a writ the remedy is by action against him,[50] and not by rule to amend his return;[51] and where a sheriff makes a false return the remedy of the injured party is an action for damages against the officer[52] and not a motion to set aside the return.[53] Where a sheriff returns an execution *nulla bona*, and refuses to pay over money collected on it, the action must be for a false return.[54] An action against a sheriff for an unauthorized release of attached property is an action in tort.[55]

**2. Particular Forms of Action — a. Assumpsit.**[56] Assumpsit is a proper form of action against a sheriff where he fails or refuses to pay over to the person entitled thereto money collected by him[57] or by his deputy,[58] or pays money in his hands to a person other than the one really entitled thereto;[59] and if the officer selling property at an official sale delivers the same to the purchaser without collecting the purchase-money, the person entitled to the proceeds of the sale may recover the amount in an action of assumpsit.[60] It has also been held that a person who is

held by a constable under attachments is seized and taken from his possession by the sheriff under another attachment, and is sold by order of the circuit court, and in a subsequent action against the sheriff for its conversion the constable is awarded from the proceeds the full amount of all valid liens held by him, he has no further interest in such proceeds, and cannot further litigate the validity of the attachment under which the sheriff acted. Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

47. Gault *v.* Dunbar, 1 Phila. (Pa.) 26.

48. Steele *v.* Farber, 37 Mo. 71.

49. Johnson *v.* Anderson, 60 Kan. 578, 57 Pac. 513.

50. Creighton *v.* Daniels, 2 Nova Scotia 304.

51. Creighton *v.* Daniels, 2 Nova Scotia 304.

52. Jacobs *v.* People's Electric, etc., Co., 21 Pa. Co. Ct. 492.

53. Jacobs *v.* People's Electric, etc., Co., 21 Pa. Co. Ct. 492. But *compare* Stoors *v.* Kelsey, 2 Paige (N. Y.) 418.

54. Egery *v.* Buchanan, 5 Cal. 53.

55. Lowenberg *v.* Jefferies, 74 Fed. 385.

56. See, generally, Assumpsit, Action of, 4 Cyc. 317.

57. Pettyjohn *v.* Hudson, 4 Harr. (Del.) 468; Crane *v.* Dygert, 1 Wend. (N. Y.) 534; Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465; Overton *v.* Hudson, 2 Wash. (Va.) 172.

**Assumpsit lies, although officer liable on his bond.**— Pettyjohn *v.* Hudson, 4 Harr. (Del.) 468.

**Receipt of notes by officer.**—Where the coroner received notes in payment of an execution in his hands, and returned that he had received the amount of the execution in full, and such notes were subsequently demanded by plaintiff, the demand was a ratification of the act of the officer, and plaintiff was entitled to recover against him in an action of assumpsit on money counts, and need not bring trover on account of the notes. Townsend *v.* Olin, 5 Wend. (N. Y.) 207.

**Assumpsit against representatives of deceased sheriff proper.**— Overton *v.* Hudson, 2 Wash. (Va.) 172.

58. Evans *v.* Hays, 1 Mo. 697; Overton *v.* Hudson, 2 Wash. (Va.) 172.

59. Merchants', etc., Nat. Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737.

**Where right not clear.**—Where a debtor conveyed his land after a first judgment, but before a second judgment had been recovered against him, and executions on both judgments were placed in the sheriff's hands, and the land was sold under the first execution for more than enough to satisfy it, but the sheriff paid the balance in his hands to the grantee of the debtor, instead of applying it on the second execution, it was held that, if any action would lie against the sheriff by the second execution creditor, it should be case for false return, and the action of assumpsit would not lie. Every *v.* Edgerton, 7 Wend. (N. Y.) 259.

60. Appleton *v.* Bancroft, 10 Metc. (Mass.) 231; Denton *v.* Livingston, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264.

injured by the misconduct of an officer may waive the tort and recover by an action of assumpsit any money in the hands of the tort-feasor as the fruits derived from the wrongful act.[61] So also where an officer fails to execute and return a writ which has been renewed upon his agreement to be responsible therefor the remedy is by assumpsit upon his promise.[62]

**b. Book-Account.**[63] An officer cannot be made liable in an action of book-account for money which he has failed to collect.[64]

**c. Case.**[65] An action on the case is a proper remedy to enforce the sheriff's liability for failure to execute [66] or return [67] process, permitting the escape of a debtor arrested on civil process,[68] failure to set aside to the debtor goods exempt from execution,[69] selling property claimed as exempt,[70] making a false [71] or improper [72] return, making an excessive levy,[73] selling property levied on at a place other than one of those authorized by the statute,[74] failure to sell property levied on within a reasonable time after the seizure,[75] neglect to take proper care of property seized by him under process,[76] refusing to take bail from a debtor arrested on mesne process,[77] disregarding a proper notice of labor claims when he has in his hands funds derived from the master's property,[78] failure to take security,[79] taking insufficient security,[80] failure to pay over money collected,[81] or seizing property under an execution on a judgment procured by fraud to which the officer was a party.[82] But case is not a proper remedy against the sheriff for levying an execution after the return-day,[83] or selling property levied on without giving the proper notice.[84] Where process is issued by competent authority and is regular upon its face, case for the malicious motive or want of probable cause for the proceeding is the only remedy available where the officer has executed it according to its mandate against defendant's person or property.[85] In New Hampshire it has been provided by statute that an action upon the case and no

**61.** Richardson *v.* Kimball, 28 Me. 463.

**62.** Homan *v.* Liswell, 6 Cow. (N. Y.) 659.

**63.** See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 493.

**64.** Gleason *v.* Briggs, 28 Vt. 135.

**65.** See, generally, CASE, ACTION ON, 6 Cyc. 681.

**66.** Platt *v.* Sherry, 7 Wend. (N. Y.) 236 (holding that the statute which renders a constable liable in an action of debt for not levying an execution is cumulative of the common-law remedy by an action on the case); Flinn *v.* St. John, 51 Vt. 334.

**67.** Burk *v.* Campbell, 15 Johns. (N. Y.) 456.

Where an original execution has been renewed on a constable's responsibility and on good consideration, case is not the proper form of action against him for not returning it, if any will lie. Homan *v.* Liswell, 6 Cow. (N. Y.) 659.

**68.** Sawyer *v.* Ballew, 4 Port. (Ala.) 116; Colby *v.* Sampson, 5 Mass. 310; Rawson *v.* Dole, 2 Johns. (N. Y.) 454 (holding that the common-law remedy by action on the case against a sheriff for an escape was not taken away by a statute permitting an action for the debt for which the debtor was committed and damages); Boyce *v.* Barksdale, 4 McCord (S. C.) 141.

**69.** Briggs *v.* Bell, 8 N. J. L. J. 251.

**70.** Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643, holding that in such case trespass and case are concurrent remedies.

**71.** Humphrey *v.* Case, 8 Conn. 101, 20 Am. Dec. 95; Clough *v.* Monroe, 34 N. H. 381, holding that case against the sheriff is a proper remedy for an attaching creditor who has lost his attachment by reason of the false return of a deputy of such sheriff upon another writ against the same debtor.

**72.** Sutherland *v.* Cunningham, 1 Stew. (Ala.) 438.

**73.** Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

**74.** Sheppard *v.* Shelton, 34 Ala. 652.

**75.** Bales *v.* Wingfield, 2 N. & M. 831, 28 E. C. L. 592.

**76.** Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

**77.** Churchill *v.* Churchill, 12 Vt. 661.

**78.** Yeager *v.* Toole, 1 Dauph. Co. Rep. (Pa.) 120.

**79.** Gibbs *v.* Bull, 18 Johns. (N. Y.) 435.

**80.** Gilbert *v.* Buffalo Bill's Wild West Co., 70 Ill. App. 326 (taking property out of the custody of defendant in replevin on an insufficient replevin bond); Gibbs *v.* Bull, 18 Johns. (N. Y.) 435.

**81.** Fagan *v.* Williamson, 53 N. C. 433, holding that Rev. Code, c. 78, §§ 1, 2, giving an action of debt on a sheriff's official bond for money collected by virtue of his office does not take away plaintiff's right to bring an action on the case for the same cause.

**82.** Brown *v.* Wood, 1 Bailey (S. C.) 457.

**83.** Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

**84.** Carrier *v.* Esbaugh, 70 Pa. St. 239.

**85.** Luddington *v.* Peck, 2 Conn. 700; Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst. 34.

other shall lie against a sheriff for any damages arising from his official default or misconduct.[86]

**d. Debt.**[87] An action of debt is a proper remedy where the sheriff has failed to execute [88] or return [89] process, received depreciated currency in satisfaction of an execution,[90] failed to pay over money collected,[91] failed without legal excuse to apply property levied on under an execution to the satisfaction of the same,[92] or permitted the escape of a defendant arrested on a writ of capias ad satisfaciendum.[93]

**e. Detinue.**[94] An officer who levies process on personal property may be sued in detinue by one who claims a legal right to such property.[95]

**f. Replevin.**[96] Relief may be obtained in an action of replevin where an officer seizes under process property not belonging to defendant therein,[97] or seizes exempt property of defendant and refuses to release the same.[98]

**g. Trespass.**[99] Trespass is a proper form of remedy to enforce the liability of a sheriff or his indemnitors for a wrongful seizure by the sheriff of property not belonging to defendant,[1] and the sale of such property as that of defendant,[2] levying on property of defendant which is exempt under the statute,[3] or upon

86. Hills *v.* Hoitt, 18 N. H. 386.

87. See, generally, DEBT, ACTION OF, 13 Cyc. 402.

88. Platt *v.* Sherry, 7 Wend. (N. Y.) 236; Pierce *v.* Sheldon, 13 Johns. (N. Y.) 191, holding that debt is the only form of action available in such case.

89. Pierce *v.* Sheldon, 13 Johns. (N. Y.) 191, holding that debt is the only form of action available in such case.

90. Randolph *v.* Ringgold, 10 Ark. 279, 52 Am. Dec. 235.

91. Fagan *v.* Williamson, 53 N. C. 433 (under a statute so providing); Bodenhamer *v.* Bodenhamer, 6 Humphr. (Tenn.) 264.

92. Bodenhamer *v.* Bodenhamer, 6 Humphr. (Tenn.) 264.

93. Plumleigh *v.* Cook, 13 Ill. 669; Rawson *v.* Dole, 2 Johns. (N. Y.) 454; Boyce *v.* Barksdale, 4 McCord (S. C.) 441. See also Sawyer *v.* Ballew, 4 Port. (Ala.) 116.

94. See, generally, DETINUE, 14 Cyc. 239.

95. Governor *v.* Gibson, 14 Ala. 326; Easley *v.* Dye, 14 Ala. 158; Bissell *v.* Lindsay, 9 Ala. 162.

96. See, generally, REPLEVIN, 34 Cyc. 1342.

97. See REPLEVIN, 34 Cyc. 1370, 1376.

98. Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784; Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467. And see REPLEVIN, 34 Cyc. 1369, 1375.

99. See, generally, TRESPASS.

1. *Alabama.*— Sparkman *v.* Swift, 81 Ala. 231, 8 So. 160; Screws *v.* Watson, 48 Ala. 628.

*Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609.

*Maryland.*— Trieher *v.* Blocher, 10 Md. 14.

*Massachusetts.*— Codman *v.* Freeman, 3 Cush. 306.

*Mississippi.*—Perry *v.* Lewis, 49 Miss. 443.

*Missouri.*— Wetzell *v.* Waters, 18 Mo. 396; Peckham *v.* Lindell Glass Co., 9 Mo. App. 459.

*New Hampshire.*— Hills *v.* Hoitt, 18 N. H. 386, holding that Rev. St. c. 180, § 12, which prescribes the action on the case as the sole remedy for damages arising from the official misconduct or default of sheriffs, does not take away the action of trespass at the suit of one whose property has been taken on a process against a stranger.

*New York.*— Pozzoni *v.* Henderson, 2 E. D. Smith 146.

*Pennsylvania.*— Bogue *v.* Steel, 1 Phila. 90.

*United States.*— Lovejoy *v.* Murray, 3 Wall. 1, 18 L. ed. 129; Parrish *v.* Danford, 18 Fed. Cas. No. 10,770, 1 Bond 345.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 256.

**Trespass against sheriff proper remedy for wrongful seizure by deputy.**— Codman *v.* Freeman, 3 Cush. (Mass.) 306.

**Necessity for right of possession.**— In order to maintain trespass for a mere levy upon the goods of a person other than defendant in the writ, plaintiff must have had at the time of the levy either actual possession or the right to take possession. Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659 [*approved* in Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811].

2. Berwald *v.* Ray, 165 Pa. St. 192, 30 Atl. 727 (holding that where an attachment execution is issued, under which goods of a third person are sold by the sheriff as the goods of the debtor, the real owners thereof are not confined to an action on the attachment bond); Bogue *v.* Steel, 1 Phila. (Pa.) 90 (holding that an action of trespass may be maintained against the sheriff, where he has seized, sold, and delivered the goods of the partnership under an execution against one of the partners for his individual debt).

**A reversionary or conditional right of possession** is sufficient to support an action for the sale of the goods. Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659 [*approved* in Kitchen *v.* McCloskey, 150 Pa. St. 376, 24 Atl. 688, 30 Am. St. Rep. 811].

3. Cornelia *v.* Ellis, 11 Ill. 584 (holding that defendant in the execution may waive the penalty of treble the value of the property, given by the law, and proceed in an ordinary action of trespass for single dam-

which, under the circumstances, a levy was not authorized,[4] selling property claimed as exempt,[5] levying an execution after the return-day,[6] selling, under a levari facias, grain growing on mortgaged premises,[7] selling property levied on without giving the proper notice,[8] delivering property seized under a writ of replevin to plaintiff therein without requiring a sufficient bond,[9] or an injury done by his deputy to the person or property of another.[10] But trespass is not a proper form of action to enforce a sheriff's liability for making an excessive levy,[11] seizure of property under an execution on a judgment procured by fraud to which the officer was a party,[12] levying on property already in the custody of the law,[13] refusing to permit an attachment defendant to replevy the property on a valid and sufficient bond,[14] taking property out of the custody of defendant in replevin on an insufficient replevin bond,[15] selling property levied on at a place other than one of those authorized by statute,[16] taking the goods of the execution defendant without an auction sale, on defendant's consent,[17] misapplication of the proceeds of a sale of property levied on,[18] making an improper return,[19] or refusing to take bail from a debtor arrested on mesne process.[20] Where a writ is issued from competent authority and is regular on its face, an officer cannot be held liable in trespass for executing it according to its mandate, against defendant's person or property, although he has acted maliciously.[21]

**h. Trover and Conversion.**[22] Trover is a proper form of action against a sheriff who seizes[23] or sells the property of one person under process against

ages); Davlin *v.* Stone, 4 Cush. (Mass.) 359; Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202.

**Trespass the proper remedy for refusal to release property claimed as exempt.**— Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784. *Contra*, Briggs *v.* Bell, 8 N. J. L. J. 251.

4. Gorham *v.* Hood, 27 Ga. 299, decided under the act of 1811, prohibiting any levy on negroes or real estate unless sufficient personalty to satisfy the debt could not be found.

5. Stephens *v.* Lawson, 7 Blackf. (Ind.) 275 [*approved* in Mandlove *v.* Burton, 1 Ind. 39]; Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643 (holding that in such case trespass and case are concurrent remedies); Stamer *v.* Nass, 3 Grant (Pa.) 240.

6. Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

7. Myers *v.* White, 1 Rawle (Pa.) 353.

8. Wright *v.* Spencer, 1 Stew. (Ala.) 576, 18 Am. Dec. 76; Carrier *v.* Esbaugh, 70 Pa. St. 239.

9. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98, so holding on the ground that such disposal of the property renders the original taking unlawful. *Compare* Gilbert *v.* Buffalo Bill's Wild West Co., 70 Ill. App. 326.

10. Campbell *v.* Phelps, 17 Mass. 244.

11. Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

12. Brown *v.* Wood, 1 Bailey (S. C.) 457.

13. King *v.* Macdonald, 15 U. C. C. P. 397, 402, where it is said that the goods, being in the custody of the law, "could not be seized by the sheriff's bailiff so as to make the sheriff a trespasser."

14. Walker *v.* Hampton, 8 Ala. 412.

15. Gilbert *v.* Buffalo Bill's Wild West Co., 70 Ill. App. 326. *Compare* Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

16. Sheppard *v.* Shelton, 34 Ala. 652.

17. Barnes *v.* Rogers, 23 Ill. 350.

18. Walker *v.* Lovell, 28 N. H. 138, 61 Am. Dec. 605.

19. Sutherland *v.* Cunningham, 1 Stew. (Ala.) 438.

20. Churchill *v.* Churchill, 12 Vt. 661.

21. Luddington *v.* Peck, 2 Conn. 700; Smith *v.* Miles, 22 Fed. Cas. No. 13,079*a*, Hempst. 34. See also Osgood *v.* Carver, 43 Conn. 24, applying the same principle to persons assisting an officer.

22. See, generally, TROVER AND CONVERSION.

23. *Colorado.*—Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417.

*Illinois.*— Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286 [*affirming* 81 Ill. App. 556].

*New York.*— Manning *v.* Keenan, 73 N. Y. 45; Hill *v.* Page, 108 N. Y. App. Div. 71, 59 N. Y. Suppl. 465.

*Pennsylvania.*— See Hall *v.* Moor, Add. 376.

*Texas.*— Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 257.

**Where actual possession not taken.**—Where an officer, having a writ in his hands, went to the debtor, and finding him in the actual possession of goods, informed him that he was directed to make an attachment thereof, and should do so, but did not in fact interfere with the goods, or take them into his custody, and the debtor informed the officer that the goods belonged to a third person, and not to him, but still procured one other than the owner to give a receipt therefor to the officer, this did not amount to such conversion of the goods by the officer as would enable the owner to maintain an action of trover therefor against him. Rand *v.* Sargent, 23 Me. 326, 39 Am. Dec. 625.

another,[24] seizes mortgaged chattels in the possession of the mortgagee,[25] seizes exempt property,[26] refuses to release it,[27] and sells it under his process notwithstanding the claim of exemption,[28] or sells property without giving the notice required by law;[29] and the purchase by an officer at his own sale of goods seized by him on execution may be regarded as a conversion of the property, so as to justify an action of trover against him.[30] So also where an officer who has attached oxen feeds them on defendant's hay without his consent, defendant, on being successful in the attachment suit, may maintain trover against the officer for the hay.[31] But trover is not an appropriate remedy for the injury caused by the act of the sheriff in selling property levied on at a place other than one of those authorized by the statute,[32] failure to take a bond with sufficient sureties on executing a writ of replevin,[33] taking judgment against a receiptor for property for too small a sum,[34] or neglect to take proper care of property seized by him under process.[35] Neither can an officer who has attached and sold property under regular process be held liable in trover therefor, although defendant is ultimately successful in the suit.[36] Where a sheriff levied on property under executions prior to an assignment for the benefit of creditors by the owner, and after such assignment other executions came into his hands and he claimed the right to apply the unsold portion of the goods to the latter executions, and the assignee in order to procure the release of the goods paid to the sheriff the amount of such executions, the assignee had no right of action against the sheriff as for conversion of the goods, but his only remedy was an action as for money had and received.[37] In order to maintain trover the complainant must have had not only a property in the goods but a right to the actual possession thereof at the time of the conversion;[38] but

**Where possession not disturbed.**—An action of trover cannot be maintained by the owner of property against an officer who attached the same as the property of another, where the officer did not take actual custody of possession or require any receipt for the property, and the owner has not been disturbed in his possession. Amadon *v.* Meyers, 9 Vt. 308.

**24.** Hanchett *v.* Williams, 24 Ill. App. 56; Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781; Hill *v.* Page, 108 N. Y. App. Div. 71, 59 N. Y. Suppl. 465; Hunt *v.* Walker, 12 Heisk. (Tenn.) 551.

**Action for conversion lies, although buyer has not actually removed property.**—Hill *v.* Page, 108 N. Y. App. Div. 71, 59 N. Y. Suppl. 465.

**Acquiescence in sale of property incapable of manual delivery.**—Where property of such bulky character as to be incapable of immediate manual delivery is assumed to be sold by a sheriff under execution, against the protest of the owner, as the property of the execution debtor, and the purchaser is left to take possession for himself, the owner may acquiesce in the sale, and sue the sheriff for a conversion. Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781.

**25.** Rider *v.* Edgar, 54 Cal. 127.

**26.** Davlin *v.* Stone, 4 Cush. (Mass.) 359; Hawkins *v.* Pearce, 11 Humphr. (Tenn.) 44; Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467, holding that in such case trover and replevin are concurrent remedies.

**27.** Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

**28.** Mandlove *v.* Burton, 1 Ind. 39; Hawkins *v.* Pearce, 11 Humphr. (Tenn.) 44; Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

**29.** Wright *v.* Spencer, 1 Stew. (Ala.) 576, 18 Am. Dec. 76.

**30.** Perkins *v.* Thompson, 3 N. H. 144.

**31.** York *v.* Sanborn, 47 N. H. 403.

**32.** Sheppard *v.* Shelton, 34 Ala. 652.

**33.** Parker *v.* Young, 188 Mass. 600, 75 N. E. 98, holding, however, that, under Rev. Laws, c. 190, § 9, providing that an officer executing a writ of replevin shall not deliver the property to plaintiff until a bond has been given with sufficient sureties, the delivery of the property to plaintiff without requiring a sufficient bond renders the original taking by the owner unlawful, and he is liable in trover.

**34.** Bissell *v.* Huntington, 2 N. H. 142.

**35.** Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

**36.** York *v.* Sanborn, 47 N. H. 403; Abbott *v.* Kimhall, 19 Vt. 551, 47 Am. Dec. 708.

**37.** Freeman *v.* Grant, 132 N. Y. 22, 30 N. E. 247 [*affirming* 8 N. Y. Suppl. 912].

**38.** Dubois *v.* Harcourt, 20 Wend. (N. Y.) 41, holding that an officer who levies on property previously levied upon by another officer cannot maintain trover against a third officer who illegally seizes and sells the property. See also Vincent *v.* Perry, Harp. (S. C.) 388.

**Levy on hired property.**—Where a horse, hired for a given time, was levied on before the expiration of the time, and sold under an execution against the bailee, the general owner could not maintain trover against the sheriff, either before or after the determination of the bailment. Caldwell *v.* Cowan, 9 Yerg. (Tenn.) 262.

a conversion by the officer to his own use is not necessary to sustain the action.[39]

**3. Changing Form of Action by Amendment.** It has been held that an objection as to the form of the action may be obviated by amendment of the declaration.[40]

**4. Waiver of Objection as to Form.** Where no objection is taken at the trial to the form of the action such an objection cannot be raised afterward.[41]

**5. Joinder and Splitting of Actions.** The general rules with respect to the joinder of causes of action[42] apply to actions against sheriffs and constables for official defaults.[43] Where a sheriff has disposed of a portion of personal property alleged to have been wrongfully seized by him under a writ of attachment, the owner of the property may split his cause of action and maintain conversion for the goods disposed of, and replevin for the remainder.[44]

**C. Conditions Precedent**[45] — **1. Security For Costs.**[46] A sheriff is not entitled to security for costs of an action brought against him for negligence in not making a seizure under a writ of fieri facias.[47]

**2. Return of Indemnity Bond.** The obligors in an indemnity bond may be sued by the claimant or execution defendant, although the sheriff has failed to return the bond as required by statute.[48]

**3. Notice**[49] **of Action.** In some jurisdictions a sheriff or constable is entitled to notice before an action is brought against him;[50] and where a plaintiff agreed with the sheriff in consideration that he would not retake defendant who had escaped, that plaintiff would not sue the sheriff without notice, and reasonable time to retake, it was held that he could not sue without such notice, the consideration being a good one.[51]

**4. Demanding Copy of Warrant.** In Pennsylvania it has been provided by statute that no action shall be brought against any constable for anything done in

39. Nutter *v.* Ricketts, 6 Iowa 92.

40. Rider *v.* Chick, 59 N. H. 50.

41. Rider *v.* Chick, 59 N. H. 50.

42. See Joinder and Splitting of Actions, 23 Cyc. 376.

43. Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766 (holding that an action against a constable for injury to property, in which the sureties on his bond are joined, does not improperly join two causes of action, as one in tort, and one on contract); Vaule *v.* Steenerson, 63 Minn. 110, 65 N. W. 257 (holding that a cause of action for failure of defendant sheriff to levy an execution cannot be joined with a cause of action for a wrongful levy on property and a conversion of the same under another judgment); Sandford *v.* Colfax, 4 N. J. L. 120 (holding that neglect to make money under an execution, suffering defendant to escape, and not returning the execution in thirty days, may all be united in an action of debt against a constable); Longcope *v.* Bruce, 44 Tex. 434 (holding that an action against a sheriff for a wrongful seizure of property on execution cannot be joined with a suit on a bond of indemnity to the sheriff against the obligors of such bond).

44. Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168, 119 Am. St. Rep. 864.

45. Notice or demand as a prerequisite to action for: Failure to — Collect money see *supra*, V, H, 2; Execute process see *supra*, V, C, 11; Have property forthcoming to satisfy writ see *supra*, V, F, 3, c; Pay over money see *supra*, V, H, 21. Loss of or injury to property see *supra*, V, F, 1, d. Sale of property under process against another see *supra*, V, G, 11, m. Taking insufficient security see *supra*, V, I, 16. Wrongful seizure see *supra*, V, E, 12, b, (v); V, E, 14, j.

Order for payment of money as prerequisite to suit therefor see *supra*, V, H, 22.

Proceedings against bail as condition precedent to action against officer taking insufficient bail see *supra*, V, I, 14.

46. Security for costs generally see Costs, 11 Cyc. 170.

47. Creighton *v.* Sweetland, 18 Ont. Pr. 180 [*following* McWhirter *v.* Corbett, 4 U. C. C. P. 203], so holding on the ground that a sheriff executing a writ of fieri facias is not fulfilling a public duty.

48. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

49. Notice generally see Notice, 29 Cyc. 1110.

50. Bassett *v.* Walker, 3 Pa. Co. Ct. 183 (holding that where an action of trespass is brought against a constable for refusing to allow the exemption given by the act of April 9, 1849, the justice having indorsed on the writ, "Hereon allow no exemption," the constable is entitled to notice before suit brought, as required by the act of March 21, 1772); Robicheau *v.* Arsineau, 11 N. Brunsw. 72 (holding that a constable is entitled to a month's notice of an action against him for official misconduct). But *compare* McWhirter *v.* Corbett, 4 U. C. C. P. 203, holding that a sheriff is not entitled to notice of an action against him arising out of the execution of a fieri facias in a private suit.

51. Powers *v.* Wilson, 7 Cow. (N. Y.) 274.

obedience to any warrant until demand has been made for a perusal and a copy of the warrant.[52]

**D. Defenses.**[53] A sheriff who is sued for an act done by him in the execution of process has the right to take on himself the conduct of the defense, and retain what attorney he chooses, notwithstanding the fact that he has been indemnified by the party suing out the process.[54] Where the action is against indemnitors they may avail themselves of any defense which would be available to the sheriff if no bond had been taken.[55] The fact that an indemnity bond recites that the officer has been directed to levy on property of the judgment debtor will not prevent a recovery against the indemnitors if the officer was actually directed to levy on property of a third person by the principal in the bond.[56] An officer who takes property under a writ of replevin in favor of the owner is the owner's agent in the taking and may defend as such, although his justification under the process fails.[57]

**E. Jurisdiction and Venue.**[58] The question of what particular court has jurisdiction of an action against a sheriff or constable for official default or misconduct is governed by the statutes of the various states.[59] Under some statutes an action against a sheriff or constable for a neglect of duty in respect to the execution of process is properly brought in the county in which the judgment was rendered or the proceeding had pursuant to which the process issued;[60] but the remedy is not necessarily to be sought in the court from which the process issued;[61] and under other statutes such an action must be brought in the sheriff's own county, although the process issued from a court of another county.[62] Under some statutes an action against a sheriff or constable for official misconduct must be tried in the county where the cause of action arose;[63] but it has also been held that an action

52. Osborn *v.* Burket, 1 Browne (Pa.) 343 (holding that an action of trespass against a constable who arrested plaintiff on a warrant for a debt, and assaulted and beat him, was within the act of March 21, 1772, so providing); Mollison *v.* Bowman, 5 Pa. L. J. 181 (holding, however, that the act of March 21, 1772, so providing, was intended to protect the constable only where he acted pursuant to the warrant, and hence, in trespass against a constable for taking goods under an execution against another person, plaintiff need not show that he demanded a copy of the warrant).

53. Matters affecting liability for particular defaults see *supra*, V, *passim*.

54. Peck *v.* Acker, 20 Wend. (N. Y.) 605.

55. Moore *v.* Allen, 25 Miss. 363.

56. Benson *v.* Caulfield, 64 Nebr. 101, 89 N. W. 664.

57. Wheeler *v.* Selden, 62 Vt. 310, 20 Atl. 197.

58. Jurisdiction generally see COURTS, 11 Cyc. 633.

Venue generally see VENUE.

59. See Strong *v.* Combs, 68 Nebr. 315, 94 N. W. 149 [*following* Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224; Neihardt *v.* Kilmer, 12 Nebr. 35, 10 N. W. 531] (holding that an action against a sheriff to recover damages for seizure and sale of exempt property under execution is not a suit for misconduct in office, within Code Civ. Proc. § 907, of which the county court has no jurisdiction); Hoops *v.* Crowley, 12 Serg. & R. (Pa.) 219 note (holding that the court of common pleas has jurisdiction of a special action on the case for a neglect of duty in a constable employed by plaintiff to distrain goods for arrears of rent due plaintiff); Bell *v.* Jarvis, 6 U. C. Q. B. 423 (holding that under 8 Vict. c. 13, § 5, the district courts have no jurisdiction in an action on the case for a false return).

60. Adams *v.* Simmons, 65 S. W. 152, 23 Ky. L. Rep. 1389 (holding that under St. § 1716, an action against a sheriff for failing to return within thirty days from the return-day an execution issued from another county was properly brought in the county whence the execution issued); Ingram *v.* Turner, 51 S. W. 148, 21 Ky. L. Rep. 283 (holding that this is true under St. c. 46, art. 18, which, being the last enactment, governs notwithstanding the provisions of the code of practice); Watson *v.* Mitchell, 108 N. C. 364, 12 S. E. 836 (holding that under Code, § 200, an action for false return will lie against the sheriff in the county from which the summons issued, although he is sheriff of another county).

61. Oger *v.* Daunoy, 7 Mart. N. S. (La.) 656 [*following* Dum *v.* Vail, 7 Mart. (La.) 416]; Clark *v.* Morgan, 4 Mart. (La.) 79.

62. Groom *v.* Pickett, 4 Bush (Ky.) 372 (holding that this was true under Civ. Code, § 94, and that the provisions of the Revised Statutes giving jurisdiction to the court from which the process issued were repealed by the civil code); Packard *v.* Hesterberg, 48 Misc. (N. Y.) 30, 96 N. Y. Suppl. 72.

63. *Michigan.*— Morse *v.* Dunham, 48 Mich. 590, 12 N. W. 865, holding that under Comp. Laws, § 5970, an action against a sheriff for trespass on lands must be brought in the county where the trespass occurred, where he had assumed to act officially under process, notwithstanding there may have been some infirmity in the process.

of debt against the sheriff for an escape is a transitory action, and plaintiff may lay the venue in any county he pleases,[64] and that a sheriff may be sued for neglecting to return an execution in any county where either party dwells, whether the original judgment was rendered there or not.[65]

**F. Time to Sue and Limitations**[66] — **1. Time When Action May Be Commenced — Premature Actions.** Where the property of a defendant in replevin is taken by the officer and delivered to plaintiff without authority of law, defendant may sue the officer at once,[67] or he may elect to abide the result of the replevin suit.[68] But an action by the execution defendant for the surplus proceeds of a sale under the writ is premature when brought before the return-day of the writ and without any demand upon the officer.[69] It has been held that an action for failure to pay over money collected on a writ cannot be brought until after the return-day of the writ,[70] but there is also authority for the view that where a sheriff who has collected money on a writ refuses to pay it over on demand an action may be brought against him before the return-day.[71] Where goods in the possession of a mortgagor are attached and the mortgagee is summoned by a trustee writ, an action by the mortgagee for conversion is premature when brought

*New Jersey.*— Dennis *v.* Ford, 7 N. J. L. 200.

*New York.*— Murphy *v.* Callan, 69 N. Y. App. Div. 413, 74 N. Y. Suppl. 1009 (holding that an action for conversion, although not referring to the character in which defendant assumed to act when taking possession of the property, if against an officer who took possession, however wrongfully, by virtue of his office, under a warrant duly issued, must be tried in the county where the cause of action arose); Lamson Consolidated Store Service Co. *v.* Hart, 1 Silv. Sup. 427, 5 N. Y. Suppl. 889 (holding that an action against a sheriff, to restrain him from selling plaintiff's property under an execution against another person, should be tried in the county wherein the levy was made, although the execution defendant resides in another county, and is joined with the sheriff as a defendant); Seeley *v.* Birdsall, 15 Johns. 267. See also Abrahams *v.* Benson, 22 Hun 605, 60 How. Pr. 208.

*North Carolina.*— Harvey *v.* Brevard, 98 N. C. 93, 3 S. E. 911.

*Texas.*— See Willis *v.* Hudson, 72 Tex. 598, 10 S. W. 713; Plum *v.* Strong, 71 Tex. 321, 6 S. W. 167; Hilliard *v.* Wilson, 65 Tex. 286.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 273.

**What constitutes action for official act.**— An action against a sheriff to restrain the sale of property levied on under execution is for an act done by virtue of his office, where the complaint demands judgment for damages on account of the levy. Lamson Consol. Store Service Co. *v.* Speir, 6 N. Y. Suppl. 577, 22 Abb. N. Cas. 355.

**When statute not applicable.**— 1 Rev. Laws, p. 155, providing that actions against a sheriff for any trespass, etc., for acts committed by virtue of his office, shall be laid in the county where the act was done, does not apply unless the act was done in obedience to a warrant and within the jurisdiction of the court issuing it. Green *v.* Rumsey, 2 Wend. (N. Y.) 611. 2 Rev. St. p. 353, § 15, providing that actions against public officers for acts done by them by virtue of their offices must be brought in the county where the act complained of happened, applies only to affirmative acts, and not to mere omissions. Wilson *v.* Jenkins, 1 Edm. Sel. Cas. (N. Y.) 384; Fairchild *v.* Case, 24 Wend. (N. Y.) 381; Hopkins *v.* Haywood, 13 Wend. (N. Y.) 265; Elliott *v.* Cronk, 13 Wend. (N. Y.) 35.

**An action against a sheriff's indemnitors** is not within Code, § 191, providing that actions against a public officer for an official act, or against a person who by his command or in his aid shall do anything touching the duties of such officer, shall be tried in the county where the cause arose. Harvey *v.* Brevard, 98 N. C. 93, 3 S. E. 911.

**The burden rests on plaintiff** in an action for a false return to show that the cause of action arose within the county wherein the venue is laid. Seeley *v.* Birdsall, 15 Johns. (N. Y.) 267.

64. Jones *v.* Pemberton, 7 N. J. L. 350.

65. Burrows *v.* Fitch, Kirby (Conn.) 113, 114, so holding as to an execution issuing from the superior court, the court saying: "This court is the same within the meaning of the statute, sitting in any county in the state." See also Huntington *v.* Lothrop, 1 Root (Conn.) 90.

66. See, generally, Limitations of Actions, 25 Cyc. 963.

67. Whitney *v.* Jenkinson, 3 Wis. 407.

68. Whitney *v.* Jenkinson, 3 Wis. 407.

69. Bortel *v.* Ostrander, 15 How. Pr. (N. Y.) 572.

70. McInerney *v.* Chicago Times Co., 41 Ill. App. 438.

71. Rogers *v.* Sumner, 16 Pick. (Mass.) 387. See also Adams *v.* Bowe, 3 N. Y. Civ. Proc. 191, 12 Abb. N. Cas. 322, holding that where a sheriff seized the property of an execution debtor, who gave to the sheriff a certified check to hold as security, while the debtor made arrangements to get the judgment reversed or modified, and the sheriff thereupon released the property, the execution creditor might sue the sheriff for the

while the attachment is in force and before he has been discharged as trustee.[72] Where a deputy sheriff, having collected money on execution, was summoned as trustee of the execution creditor, the pendency of the trustee proceedings did not suspend the right of the execution creditor to commence an action on the case against the sheriff for the refusal to pay him the money on demand.[73] It has been held that a claimant of property sold under execution may commence action against the obligors in an indemnity bond immediately after its execution.[74]

**2. Time Within Which Action Must Be Commenced — Limitations — a. In General.** In a number of states there are statutes of limitation specially applicable to actions against sheriffs and constables for negligence or misconduct in connection with their official duties providing that such an action must be brought within a specified time after the cause of action accrues;[75] but such statutes sometimes in terms exclude or are held not applicable to actions against such officers to recover money collected by them or in their official custody,[76] nor do they apply

amount, although the writ had not been returned and the return-day had not arrived.

72. Emery *v.* Seavey, 148 Mass. 566, 20 N. E. 177.

73. Hicks *v.* Gleason, 20 Vt. 139.

74. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

75. *California.*— Lambert *v.* McKenzie, 135 Cal. 100, 67 Pac. 6.

*Colorado.*— People *v.* Cramer, 15 Colo. 155, 25 Pac. 302.

*Connecticut.*— Hartford County Bank *v.* Waterman, 26 Conn. 324.

*Illinois.*— McDonough *v.* People, 72 Ill. App. 376, limitation of action for taking insufficient replevin bond.

*Iowa.*— Lower *v.* Miller, 66 Iowa 408, 23 N. W. 897.

*Kentucky.*— Fish *v.* Simmermans, 5 T. B. Mon. 81.

*Louisiana.*— Fisk *v.* Browder, 6 Mart. N. S. 691.

*Maine.*— Bailey *v.* Hall, 16 Me. 408; Williams College *v.* Balch, 9 Me. 74, both of which cases relate to the limitation of actions for misconduct or negligence of deputies.

*Missouri.*— State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410; State *v.* Spencer, 30 Mo. App. 407.

*New York.*— Cumming *v.* Brown, 43 N. Y. 514; Smith *v.* Knapp, 30 N. Y. 581; Davy *v.* Field, 1 Abb. Dec. 490, 2 Keyes 608; Beyer *v.* Sigel, 75 N. Y. App. Div. 83, 77 N. Y. Suppl. 1018 [*affirmed* in 177 N. Y. 575, 69 N. E. 1120]; Rice *v.* Penfield, 49 Hun 368, 2 N. Y. Suppl. 641, 15 N. Y. Civ. Proc. 268; Peck *v.* Hurlburt, 46 Barb. 559; Kings *v.* Walter, 6 Thomps. & C. 338; Bowne *v.* O'Brien, 5 Daly 474; Fisher *v.* Pond, 2 Hill 338; Roe *v.* Beakes, 7 Wend. 459, holding that 1 Rev. Laws, p. 247, limiting suits against sheriffs, for escapes of persons imprisoned on civil process, to one year, applies as well to escapes after arrest and before commitment as to escapes after commitment.

*Ohio.*— State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305.

*Pennsylvania.*— Smith *v.* Jackson, 9 Pa. Dist. 353, 24 Pa. Co. Ct. 420.

*Wisconsin.*— Bishop *v.* McGillis, 82 Wis. 120, 51 N. W. 1075.

*United States.*— Bernard *v.* Bowe, 41 Fed. 30, construing N. Y. Code Civ. Proc. § 385.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 274; 33 Cent. Dig. tit. "Limitations of Actions," § 312 *et seq.*

**The statutory limitation applies to an action against the sheriff for failure to return an execution** (Peck *v.* Hurlburt, 46 Barb. (N. Y.) 559), or wrongfully delivering plaintiff's property to a third person, after the attachment suit in which the sheriff had seized the property had been dismissed (Bernard *v.* Bowe, 41 Fed. 30).

76. Church *v.* Clark, 1 Root (Conn.) 303; Beyer *v.* Sigel, 75 N. Y. App. Div. 83, 77 N. Y. Suppl. 1018 [*affirmed* in 177 N. Y. 575, 69 N. E. 1120]; King *v.* Walter, 6 Thomps. & C. (N. Y.) 338; Bowne *v.* O'Brien, 5 Daly (N. Y.) 474; Bernard *v.* Bowe, 41 Fed. 30, construing N. Y. Code Civ. Proc. § 385.

**Case not within exception.**—Where a deputy sheriff sold attached property under order of court as perishable and took in part payment the note of the purchaser secured by a mortgage on the property, and plaintiff in attachment secured judgment entitling him to the proceeds of the sale, an action by him against the sheriff for the purchase-price represented by the note was within N. Y. Code Civ. Proc. § 385, which bars, after one year, an action against a sheriff on a liability incurred by him in doing an act in his official capacity, or by the omission of an official duty, except "the non-payment of money collected upon an execution." Beyer *v.* Sigel, 75 N. Y. App. Div. 83, 77 N. Y. Suppl. 1018 [*affirmed* in 177 N. Y. 575, 69 N. E. 1120].

**An action against a sheriff by a purchaser at an execution sale** which was afterward set aside for irregularity, to recover back the money paid, is an action for the non-payment of money collected on an execution, within the provision of Laws (1871), c. 733, § 2, excepting such actions from the operation of that statute requiring actions against sheriffs to be brought within one year from the time the cause of action accrued. Bowne *v.* O'Brien, 5 Daly (N. Y.) 474.

**Money paid on fraudulent vouchers.**— Laws (1871), c. 733, § 2, provides that "no action shall be brought against a sheriff on a lia-

to actions based upon contracts of the sheriff, although such contracts may have been connected with his official duties.[77] A statute limiting actions against sheriffs, on a liability for an official act or the omission of official duty, does not extend to acts done *colore officii*;[78] but the seizure by a sheriff of property which he supposes to be that of a debtor against whom he has a lawful process is an act done in his official capacity, within the meaning of a statute limiting the time for commencing suit for such acts, although the property in fact belonged to another person as to whom the officer is a trespasser.[79] A statutory limitation of time within which an action may be brought against bail is not applicable to an action against a sheriff for an escape.[80] An action against a sheriff for a false return of a fieri facias, being founded on a judgment, is within a statutory provision "that no statute of limitations shall ever be pleaded as a bar, or operate as such, to any action founded on an instrument or contract in writing, whether the same be sealed or unsealed."[81] A statute limiting the time for bringing an action against a sheriff for official misconduct does not protect the obligors in a bond of indemnity given to him in respect to the act complained of.[82]

**b. When Cause of Action Accrues** —(I) *DEFAULTS IN RESPECT TO EXECUTION OF PROCESS.* According to the weight of authority the right of action of the party in whose behalf mesne process was issued against a sheriff for negligence in the execution of such process accrues when actual injury is suffered in consequence thereof, and the statute of limitations does not begin to run until such time;[83] but there is also authority for the view that in such case the cause of action accrues and the statute commences to run at the time of the return of the writ.[84] In the case of negligence in the execution of final process the injury is suffered and the cause of action accrues when such process is returned unsatisfied in whole or in part,[85] and such return on final process also fixes the time of the accrual of the cause of action for defaults in respect to mesne process.[86] Where an execution is apparently satisfied but the levy is defective so that title to the property levied on does not pass the cause of action accrues at the time of the levy and not at the time of an eviction by the judgment debtor.[87]

(II) *WRONGFUL LEVY OR OTHER TAKING OF PROPERTY.* The cause of

bility incurred by the doing of an act in his official capacity and in virtue of his office, unless commenced in one year from the time the cause of action shall have accrued," does not apply to an action by the county supervisors against the sheriff to recover moneys paid on fraudulent vouchers for the board of fictitious prisoners in the county jail. Kings County *v.* Walter, 6 Thomps. & C. (N. Y.) 338.

**Mo. Rev. St. (1899) § 4274,** includes actions for non-payment of money collected on an execution. State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410.

**77.** Rice *v.* Penfield, 49 Hun (N. Y.) 368, 2 N. Y. Suppl. 641, 15 N. Y. Civ. Proc. 268, holding that a sheriff's liability for a debt contracted by his deputy in the care of cattle levied on does not come within Code Civ. Proc. § 385, providing that an action against a sheriff "upon a liability incurred by him by doing an act in his official capacity" must be brought within one year.

**78.** Morris *v.* Van Voast, 19 Wend. (N. Y.) 283.

**79.** Cumming *v.* Brown, 43 N. Y. 514 [*followed* in Hill *v.* White, 46 N. Y. App. Div. 360, 61 N. Y. Suppl. 515].

**80.** Brown *v.* Lord, Kirby (Conn.) 209, so holding on the ground that the sheriff is liable in his official capacity and not as bail.

**81.** Stevens *v.* Beckes, 3 Blackf. (Ind.) 88.

**82.** Bishop *v.* McGillis, 82 Wis. 120, 51 N. W. 1075, so holding on the ground that as to the person injured the indemnitors were principals and tort-feasors.

**83.** People *v.* Cramer, 15 Colo. 155, 25 Pac. 302 [*approving* Hartford County Bank *v.* Waterman, 26 Conn. 324, and *disapproving* Betts *v.* Norris, 21 Me. 314, 38 Am. Dec. 264]; Hartford County Bank *v.* Waterman, *supra*, holding that where a sheriff, undertaking to attach real estate, has left with the town clerk a copy of his writ with an indorsement that he has attached property different from that described in his return, by reason of which default plaintiff is unable to satisfy his claim, plaintiff's cause of action accrues at the time when he has sustained actual damage by failure to obtain satisfaction of his execution, and not at the time of the service of the writ or of the false return.

**84.** Betts *v.* Norris, 21 Me. 314, 38 Am. Dec. 264.

**85.** Smith *v.* Yale, 50 Conn. 526.

**86.** Welles *v.* Russell, 38 Conn. 193 [*approved* in Smith *v.* Yale, 50 Conn. 526].

**87.** Hall *v.* Tomlinson, 5 Vt. 228.

action by a defendant in attachment against the sheriff to recover goods attached accrues at the time when the attachment is dissolved; and the statute of limitations begins to run from that time.[88] The cause of action against an indemnitor of the sheriff for a wrongful levy has been held to accrue when judgment was rendered against the sheriff for conversion of the property.[89]

(III) *DEFAULTS IN RESPECT TO CUSTODY OF PROPERTY.* Where attached property is not forthcoming to satisfy an execution issued in the attachment suit the cause of action for failure to keep the same accrues immediately upon the return of the execution unsatisfied;[90] or, according to another authority, at the expiration of the period after judgment during which an attachment lien continues.[91] It has also been held, however, that the cause of action against a sheriff for damages occasioned by his unauthorized release of attached property, pending the trial of the attachment proceedings, accrues at the date of the judgment in the attachment suit and not at the time of the release.[92]

(IV) *WRONGFUL SALE OF PROPERTY.* The cause of action against a sheriff for an illegal sale of a homestead under an execution in his hands accrues when the sale is made;[93] and the time of sale also fixes the accrual of a mortgagee's cause of action for selling the mortgaged chattels under process against the mortgagor.[94]

(V) *FAILURE TO EXECUTE DEED.* The purchaser at a sheriff's sale under execution, who pays the amount of his bid, is entitled to his deed or an immediate return of his money, if for any reason a deed cannot be made, and his claim against the sheriff in respect thereto accrues at that time.[95]

(VI) *WRONGFUL OR ERRONEOUS RECEIPT OF MONEY.* In a case where a sheriff drew divers sums of money at different times from the treasurer of the county on false and fraudulent accounts and vouchers for insolvent costs claimed as due him, and for official services claimed to have been rendered, it was held that the statute of limitations did not commence to run in favor of the sheriff until he went out of office.[96]

(VII) *FAILURE TO PAY OVER MONEY.* As to the time when the liability of the sheriff attaches for neglect to account for moneys collected on execution and a consequent right of action accrues against him the decisions of the courts of the different states are variant,[97] it having been held that such liability accrues when payment is demanded and not before,[98] when the money is received,[99] when the writ is returnable,[1] and when the fact of collection is made to appear by a return of the writ satisfied in whole or in part.[2] A landowner's right of action against a sheriff for money received from a railroad company in condemnation proceedings accrues immediately upon the expiration of the time allowed by statute for taking an appeal from the assessment.[3] An attachment creditor's cause of action against a sheriff for the proceeds of a sale of the attached property does not accrue until final judgment in the attachment suit.[4] Where money is received by a sheriff on a sale of land in partition, and there is no fraud or concealment,

88. Bailey *v.* Hall, 16 Me. 408.

89. Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

90. Welles *v.* Russell, 38 Conn. 193.

91. Lambard *v.* Fowler, 25 Me. 308.

92. Lesem *v.* Neal, 53 Mo. 412.

93. State *v.* Barefoot, 104 N. C. 224, 10 S. E. 170.

94. Adams *v.* Overboe, 105 Minn. 295, 117 N. W. 496.

95. State *v.* Spencer, 30 Mo. App. 407.

96. Cook *v.* Houston County Com'rs, 62 Ga. 223, 233, where it is said: "Our ruling upon the statute of limitations in this case stands upon ground of public policy as well as upon the peculiar relation that the sheriff, as such, sustained towards the county while he was, by color of his office, making himself the creditor of the county, and thus getting possession of its funds."

97. See State *v.* Minor, 44 Mo. 373.

98. Weston *v.* Ames, 10 Metc. (Mass.) 244; Wright *v.* Hamilton, 2 Bailey (S. C.) 51, 21 Am. Dec. 513. See also Church *v.* Clark, 1 Root (Conn.) 303.

99. Thompson *v.* Central Bank, 9 Ga. 413.

1. Williams College *v.* Balch, 9 Me. 74.

2. Governor *v.* Stonum, 11 Ala. 679 [*approved* in State *v.* Minor, 44 Mo. 373 (*followed* in Kirk *v.* Sportsman, 48 Mo. 383)].

3. Lower *v.* Miller, 66 Iowa 408, 23 N. W. 897.

4. State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654, so holding upon the

the statute of limitation begins to run against an action therefor from the time it was his duty on demand to pay it over.[5] As against the claim of plaintiff in foreclosure against the sheriff for money received on the sale of the mortgaged premises that statute does not begin to run until the sheriff's deed is delivered and the sale perfected.[6] Where a sheriff, acting under numerous writs against the same debtor, makes successive collections and sales, the statute of limitations does not begin to run against one of the creditors the moment the sheriff has collected enough to satisfy his process, but the fund so received may be regarded as single and entire, and it may be regarded as the right and duty of the sheriff to retain the fund until the whole is collected, and conflicting claims of priority are determined.[7] It has been held that the statute did not begin to run against the liability of a sheriff for the conversion of the proceeds of a sale under execution of property, which was claimed by a third person under an alleged superior title until the determination on appeal of the claim of such third person, even though no appeal-bond was given in the cause.[8] Where an action is based upon an express promise to pay money the statute runs from the time when such promise was made.[9]

(VIII) *DEFAULTS IN RESPECT TO TAKING BOND OR SECURITY.* The right of action against a sheriff for taking insufficient bail commences on the sheriff's return of *non est inventus* on the execution against the principal.[10] The cause of action of a defendant in replevin against the sheriff for serving the writ without taking a sufficient bond accrues when the writ is served;[11] but where in replevin a bond in proper form is taken, the sureties on which are worthless, a right of action against the officer executing the writ does not accrue until there is a breach of the conditions of the bond.[12] Where a sheriff returns property to a defendant in claim and delivery proceedings without taking such a bond as the statute requires plaintiff's cause of action accrues at once.[13]

(IX) *FAILURE TO RETURN PROCESS.* The cause of action against an officer for failure to return final process accrues immediately upon the expiration of the time allowed by statute for making the return.[14]

(X) *FALSE OR INSUFFICIENT RETURN.* The cause of action of a plaintiff against a sheriff for a false return of final process,[15] or an insufficient return of an

ground that the creditor's right to the money does not become absolute until such time.

5. Van Tassel *v.* Van Tassel, 31 Barb. (N. Y.) 439 (holding that the statute runs against an action against a sheriff for his omission to pay over to the county treasurer the proceeds of a sale of lands in a partition suit, from the time of the omission, and not from the time when the party in interest is apprised of it); Townsend *v.* Eichelberger, 51 Ohio St. 213, 38 N. E. 207. See also State *v.* Minor, 44 Mo. 373 [*followed* in Kirk *v.* Sportsman, 48 Mo. 383], holding that the liability of a sheriff for the proceeds of a partition sale does not accrue until there has been either a demand of payment by the parties in interest or until the officer has made a proper return or report to the court ordering the sale of the moneys realized therefrom.

6. Van Nest *v.* Lott, 16 Abb. Pr. (N. Y.) 130.

7. Davy *v.* Field, 1 Abb. Dec. (N. Y.) 490, 2 Keyes 608.

8. State *v.* O'Neill, (Mo. App. 1905) 90 S. W. 410.

9. Tarkinton *v.* Hassell, 27 N. C. 359, holding that where a deputy sheriff received money on an execution in his hands, but failed to indorse it on the execution or give credit for it, and afterward collected the whole amount, without deducting the sum so paid, and thereafter promised to pay defendant in the execution if such mistake had been made, the statute of limitations only began to run against such promise from the time of the promise, not from the time the money was received, or from the time of the failure to pay it over.

10. West *v.* Rice, 9 Metc. (Mass.) 564; Mather *v.* Green, 17 Mass. 60; Cæsar *v.* Bradford, 13 Mass. 169; Rice *v.* Hosmer, 12 Mass. 127.

11. Garlin *v.* Strickland, 27 Me. 443. But *compare* McDonough *v.* People, 72 Ill. App. 376, holding that the cause of action for taking an insufficient replevin bond accrues and the statute of limitations begins to run at least when the writ of return is awarded, and not when it is returned.

12. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98.

13. Hughes *v.* Newsom, 86 N. C. 424.

14. Fish *v.* Simmermans, 5 T. B. Mon. (Ky.) 81; Peck *v.* Hurlburt, 46 Barb. (N. Y.) 559.

15. Balfour *v.* Browder, 6 Mart. N. S. (La.) 708. See also Fisk *v.* Browder, 6 Mart. N. S. (La.) 691; State *v.* Barefoot, 104 N. C. 224, 10 S. E. 170.

original writ,[16] accrues at the time when the return is made. But where a sheriff falsely returns that he has served a defendant in a suit, and on such false return judgment by default is rendered against him, the sheriff is guilty of fraud against defendant, and the statute of limitations will not begin to run against an action by such defendant against the sheriff from the time of the return.[17]

(xi) *Actions by Sheriffs Against Deputies.* A sheriff's right of action against his deputy for a default of the latter subjecting the sheriff to liability accrues at the time when the sheriff's liability becomes fixed,[18] and not when such liability is discharged by payment.[19]

(xii) *Actions by Deputies Against Sheriffs.* Where a deputy is, by the terms of his employment, to receive as compensation a stipulated share of the emoluments of the sheriff's office, the statute does not begin to run against his claim against the sheriff for such compensation until the relation between the parties comes to an end.[20]

**c. Effect of Acknowledgment of Liability.** Where the default complained of is that of a deputy his continuing acknowledgment of liability may preclude the sheriff from setting up the statute of limitations.[21]

**d. Effect of Reëlection of Sheriff.** Where a sheriff having money in his official custody is reëlected, this does not arrest the operation of the statute of limitations so that it begins to run anew from the commencement of his new term.[22]

**G. Parties[23] — 1. Plaintiffs — a. In General.** A *cestui que trust* has been held entitled to sue in his own name for the damage resulting from a levy upon the property held in trust for him under process against a third person;[24] but it has also been held that the beneficiary in a trust deed given to secure a debt due him cannot sue in his own name for a seizure and sale of the property under process against the debtor.[25] An action against a sheriff for special damage to one of several principals in a replevin bond should be brought on the relation of the person on whom the damage fell.[26] It has been held that where a sheriff, after receiving an execution with notice that the claim on which the judgment had

16. Miller *v.* Adams, 16 Mass. 456.

17. Foley *v.* Jones, 52 Mo. 64.

Accrual of right of action for fraud generally see Limitations of Actions, 25 Cyc. 1173.

18. *Arkansas.*— Badgett *v.* Martin, 12 Ark. 730.

*Kentucky.*— Bottom *v.* Williamson, 3 Bush 521, holding that the statute does not commence to run until judgment is rendered against the sheriff by reason of the deputy's default.

*South Carolina.*— Roshorough *v.* Albright, 4 Rich. 39, holding that a sheriff's right of action against a jailer for an escape accrues on the day of the escape and the statute runs from that time.

*Tennessee.*— Atkins *v.* Scarborough, 9 Humphr. 517, holding that the cause of action accrues as soon as judgment is rendered against the sheriff for the deputy's default.

*Virginia.*— Allebaugh *v.* Coakley, 75 Va. 628, holding this to be true under Code (1873), c. 49, § 46.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 274; 33 Cent. Dig. tit. "Limitations of Actions," § 312 *et seq.*

19. Badgett *v.* Martin, 12 Ark. 730; Roshorough *v.* Albright, 4 Rich. (S. C.) 39; Atkins *v.* Scarborough, 9 Humphr. (Tenn.) 517 [*distinguishing* Maxey *v.* Carter, 10 Yerg. (Tenn.) 521; Marshall *v.* Hudson, 9 Yerg. (Tenn.) 57.

In Virginia and West Virginia it is held that the statute does not begin to run against a sheriff's right of action against his deputy for the latter's default until the sheriff has paid the debt occasioned by such default or some part thereof. Allebaugh *v.* Coakley, 75 Va. 628; Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737 [*followed* in Adkins *v.* Stephens, 38 W. Va. 557, 18 S. E. 740].

20. Rowan *v.* Chenowith, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

Limitation of actions between principal and agent generally see Limitations of Actions, 25 Cyc. 1078 *et seq.*

21. Welles *v.* Russell, 38 Conn. 193, where the default consisted in turning over attached property to a receiptor who refused to deliver it when it was demanded after execution issued, whereupon the deputy brought suit upon the receipt, and it was held that during the pendency of such action there was a continuing acknowledgment by the deputy of liability for the original debt.

22. Lower *v.* Miller, 66 Iowa 408, 23 N. W. 897.

23. See, generally, Parties, 30 Cyc. 1.

24. State *v.* McKellop, 40 Mo. 184.

25. Marshall *v.* Stewart, 67 Miss. 494, 7 So. 284.

26. Com. *v.* Kelly, 2 B. Mon. (Ky.) 459.

been recovered had been assigned to another person, and was prosecuted at his cost, collects the amount of the execution, and pays it to the nominal plaintiff, the assignee may maintain an action against him in the name of the assignor;[27] but there is also authority for the view that the assignee of an execution may, in his own name, without styling himself assignee, bring an action against the sheriff for money collected on the execution.[28] Where attached property is replevied, but the officer executing the replevin process fails to take a sufficient bond, the attachment plaintiff may maintain an action in his own name as relator against the officer for the resulting damage, although he is not the nominal party in interest.[29] Where goods purchased by an individual are afterward seized as the property of the vendor, the purchaser is the proper party to sue for the resulting damage, although the property was purchased on account of and paid for by a firm of which the purchaser was a member.[30] An action against a sheriff for neglect to return an execution must be brought in the name of the execution plaintiff, although he was a mere nominal party, without any interest in the execution.[31] Where the owner of a non-negotiable note has commenced an action upon it in the name of the payee, and recovered judgment, and delivered the execution to an officer to levy, the owner of the judgment may sustain an action against the officer for neglect to levy and return the writ in the name of the payee of the note, in whose name the judgment was recovered.[32] An action upon a bond of indemnity for the wrongful seizure or sale under process of property not belonging to defendant therein may be prosecuted by the claimant in his own name,[33] or in the name of the officer to whom the bond was given for the benefit of the claimant.[34]

**b. Joinder.** Where a sheriff receives money of one of several debtors against whom he has a writ, under an agreement to pay it over to the creditor, but neglects to do so, and the debtor is again sued and pays the money, the debtor alone may maintain an action against the officer, without joining the other defendants in the original writ;[35] and where the goods of one of several joint debtors are taken in execution and wasted, he alone can sue the sheriff for redress, and it is not proper to join the other debtors as plaintiffs.[36] But the liability of a sheriff for failure to deliver to the proper parties the money paid him on the purchase-money of land sold on partition may be enforced by the parties in interest in a joint action against him, when no objection is made for misjoinder.[37]

**2. DEFENDANTS — a. In General.** The sureties on a sheriff's official bond are not necessary parties to an action against him for an official default,[38] but such action may be prosecuted against the sheriff alone,[39] although the statute makes the sureties as well as the sheriff liable therefor.[40] As a sheriff and his indemnitors are jointly and severally liable for the wrong it is no defense in an action by the owner of the property wrongfully seized or sold against one or more of the wrongdoers to show that others who are also liable were not joined as defendants.[41] Where an execution sale was enjoined by a third person, claiming to be the owner of the property seized, and pending an appeal from a dissolution of the injunction

27. Riley *v.* Taber, 9 Gray (Mass.) 372.
28. Alexander *v.* Hancock, 2 Rich. (S. C.) 100.
29. State *v.* Boisliniere, 40 Mo. 566. But *compare* Foulks *v.* Pegg, 6 Nev. 136.
30. State *v.* Merritt, 70 Mo. 275.
31. Woodman *v.* Jones, 8 N. H. 344.
32. Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.
33. Williams *v.* Simons, 70 Fed. 40, 16 C. C. A. 628, so holding under Mansfield Dig. Ark. § 3024.
34. Carrington *v.* Anderson, 5 Munf. (Va.) 32.
35. Waite *v.* Delesdernier, 15 Me. 144.
36. Ulmer *v.* Cunningham, 2 Me. 117, holding the same to be true of unlawful fees deducted from the proceeds of such property and retained by the sheriff.
37. Calvin *v.* Bruen, 39 Ohio St. 610.
38. Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.
39. Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.
40. Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786, holding that such a provision is for the benefit of the injured party.
41. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533.

the sheriff improperly released the seizure, and the claimant sold the property at auction, the claimant and his sureties on the injunction bond were not necessary parties to an action against the sheriff for the illegal release of the property.[42]

**b. Joinder and Bringing in of Parties** — (I) *In General.* One whose property is sold under process against another may join in the same action therefor the sheriff who made the sale and the persons who procured him to make it;[43] but the purchaser of the property at the sheriff's sale cannot be joined as a defendant in a suit against the officer for his wrongful act.[44] Where an execution sale was enjoined by a claimant of the property seized, and pending an appeal from an order dissolving an injunction, the sheriff illegally released the goods of the complainant, who sold them at auction, on action being brought against the sheriff for releasing the property, he could not call in the claimant and his sureties on the injunction bond.[45] Where the circumstances are such that a sheriff and his deputy are both liable for a wrongful act of the latter, the deputy as a wilful trespasser and the sheriff as having commanded the wrongful act, they may be sued jointly therefor.[46] A sheriff in office and his predecessor cannot be joined as defendants in an action for the value of property alleged to have been seized by the former and lost while in charge of the latter.[47]

(II) *Indemnitors.* Where a sheriff has been indemnified against liability from any act performed by him,[48] an action for damages resulting therefrom may be brought against the sheriff alone,[49] or against the indemnitors alone,[50] or against the sheriff and the indemnitors jointly,[51] unless under the statute the bond of indemnity is a substitute for the sheriff's liability and bars an action against him.[52] And under some statutes where the action is commenced against the sheriff alone the indemnitors may upon his motion be brought in as defendants,[53] but in such case the sheriff remains a necessary party to the action.[54]

**c. Substitution of Parties** — (I) *In General.* The statutes sometimes

**42.** Cohen *v.* Avery, 26 La. Ann. 359.

**43.** Fite *v.* Briedenback, 127 Ky. 504, 105 S. W. 1182, 32 Ky. L. Rep. 400. But *compare* Clay *v.* Sandifer, 12 B. Mon. (Ky.) 334, holding that a joint recovery cannot be had against a sheriff and plaintiff who improperly sues out an attachment or directs levy on property of a third person, as neither of defendants is responsible for the other's trespass.

**44.** Gloss *v.* Black, 91 Pa. St. 418.

**45.** Cohen *v.* Avery, 26 La. Ann. 359.

**46.** Hoye *v.* Raymond, 25 Kan. 665; Waterbury *v.* Westervelt, 9 N. Y. 598 [*disapproving* Phelps *v.* Campbell, 1 Pick. (Mass.) 59 (*followed* in Moulton *v.* Norton, 5 Barb. (N. Y.) 286), and *followed* in King *v.* Orsser, 4 Duer (N. Y.) 431]. But *compare* Pascal *v.* Ducros, 8 Rob. (La.) 112, 41 Am. Dec. 294.

**47.** New Orleans Ins. Assoc. *v.* Harper, 32 La. Ann. 1165.

**48.** Indemnity to officer see *supra*, VI.

**49.** Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

**50.** Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

**51.** Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Stevens *v.* Wolf, 77 Tex. 215, 14 S. W. 29; Davis *v.* Bingham, (Tex. Civ. App. 1900) 56 S. W. 132; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1, 18 L. ed. 129.

**Seizure under several writs.**—Where a sheriff is sued for alleged wrongful levies under several attachments issued almost simultaneously and all the attaching creditors have given indemnity, the sureties in each case being the same, it is proper, under Tex. Rev. St. art. 1204, to join all the attaching creditors as parties. Davis *v.* Bingham, (Tex. Civ. App. 1900) 56 S. W. 132 [*distinguishing*, as having been decided prior to the enactment of the statute referred to, Thomas *v.* Chapman, 62 Tex. 193].

**52.** Indemnity as substitute for liability of sheriff see *supra*, VI, L, 3.

**53.** Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309; Williams *v.* Warren, 82 Tex. 319, 18 S. W. 560; Denson *v.* Ham, (Tex. App. 1891) 16 S. W. 182; Numsen *v.* Ellis, 3 Tex. App. Civ. Cas. § 134; Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535, 7 S. Ct. 1265, 30 L. ed. 1235, quoting Minn. Gen. St. (1878) c. 66, § 155.

**Separate indemnities from different creditors.**— In an action against a sheriff for an alleged wrongful seizure of goods under several writs of different creditors, each of whom has given the sheriff indemnity, the indemnitors cannot be brought in as defendants. Thomas *v.* Chapman, 62 Tex. 193, 197, where it is said: "The sheriff had several and distinct causes of action against each of the attaching firms and their sureties, based on the several indemnity bonds, and it was error to join either the parties or causes of action arising on the indemnity bonds in one action."

**54.** Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535, 7 S. Ct. 1265, 30 L. ed. 1235.

authorize the substitution of the party in whose favor process issued as defendant in an action against the sheriff for an alleged wrongful seizure under such process;[55] but the granting of permission to substitute is discretionary with the trial court, and error cannot be assigned upon its action unless there has been an abuse of discretion.[56]

(II) *INDEMNITORS.* The statutes sometimes permit the substitution of the sheriff's indemnitors as defendants in an action against the sheriff for an official act as to which he has been indemnified;[57] but whether such substitution shall

55. See Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047, decided under Code Civ. Proc. § 3917, which provides that, in actions against a sheriff for the recovery of property taken under an execution and replevied by the execution debtor, the court may, on application of defendant and of the party in whose favor the execution issued, permit the latter to be substituted as defendant; security for costs being given.

**In what actions substitution permitted.**—A statute permitting the substitution of attachment plaintiffs as defendants in a suit against an officer for the recovery of property seized will not authorize such substitution in an action against the officer for trespass in levying the attachment. Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4, so holding on the ground that such a statute refers to the recovery of specific personal property only.

56. Pierce *v.* Engelkemeier, 10 Okla. 308, 61 Pac. 1047, holding that an application for permission to be substituted was properly refused where it was unverified, and no security for costs was given, and the property had not been replevied by the execution debtor.

57. Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699 [*affirming* 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972]; Hayes *v.* Davidson, 98 N. Y. 19 [*reversing* 34 Hun 243]; Hein *v.* Davidson, 96 N. Y. 175, 48 Am. Rep. 612; Hessberg *v.* Riley, 91 N. Y. 377, 3 N. Y. Civ. Proc. 165 (holding that such substitution may be made in an action against the sheriff for entering plaintiff's store and wrongfully taking away and converting certain personal property, and for closing said store, interrupting plaintiff's business, and injuring his credit); Cassani *v.* Dunn, 44 N. Y. App. Div. 248, 60 N. Y. Suppl. 756; Pool *v.* Ellison, 56 Hun (N. Y.) 108, 9 N. Y. Suppl. 171; Carter *v.* Bowe, 47 Hun (N. Y.) 628; Farjeon *v.* Grant, 54 N. Y. Super. Ct. 535 (holding that the indemnitors are properly substituted as defendants in an action against a sheriff for seizing the property of plaintiff "with intent to injure the plaintiff and destroy her business," and for converting the property to his own use); Smedley *v.* Smith, 15 Daly (N. Y.) 421, 8 N. Y. Suppl. 100 [*affirmed* in 126 N. Y. 637, 27 N. E. 411]; Krauss *v.* Merklee, 53 Misc. (N. Y.) 277, 103 N. Y. Suppl. 192; Terhune *v.* Dunn, 23 Misc. (N. Y.) 600, 51 N. Y. Suppl. 1122; Leonard *v.* Buttling, 19 Misc. (N. Y.) 219, 44 N. Y. Suppl. 273 [*affirmed* in 13 N. Y. App. Div. 179, 43 N. Y. Suppl. 387]; Corn *v.* Tamsen, 16 Misc. (N. Y.) 670, 39 N. Y. Suppl. 129, 25 N. Y. Civ. Proc. 283; Hart *v.* Sexton, 11 Misc. (N. Y.) 446, 32 N. Y. Suppl. 222; Jakobi *v.* Gorman, 1 Misc. (N. Y.) 222, 21 N. Y. Suppl. 466 [*affirmed* in 2 Misc. 190, 21 N. Y. Suppl. 762]; Fleig *v.* Gorman, 1 Misc. (N. Y.) 194, 20 N. Y. Suppl. 615; Berg *v.* Grant, 18 Abb. N. Cas. (N. Y.) 449.

**Statute authorizing substitution constitutional.**—Hein *v.* Davidson, 96 N. Y. 175, 48 Am. Rep. 612 [*recognized* in Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699 (*affirming* 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972); Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533; Hayes *v.* Davidson, 98 N. Y. 19; Cassani *v.* Dunn, 44 N. Y. App. Div. 248, 60 N. Y. Suppl. 756; De Shields *v.* Creamer, 43 N. Y. App. Div. 579, 60 N. Y. Suppl. 245; McBride *v.* Tappen, 10 N. Y. Suppl. 137, where the court dissented from the decision but recognized it as binding]. See also Hessberg *v.* Riley, 91 N. Y. 377.

**Substitution permissible where successive levies have been made.**—Corn *v.* Tamsen, 16 Misc. (N. Y.) 670, 39 N. Y. Suppl. 129, 25 N. Y. Civ. Proc. 283.

**Who may ask substitution.**—N. Y. Code Civ. Proc. § 1711, providing that, in an action against the sheriff by a claimant of the property replevied, the sureties on his indemnity bond are entitled to be substituted as defendants, gives the right of substitution to the indemnitors only, such substitution to be granted by the court only on motion made by them or on their behalf, and they cannot, under such section, be substituted on motion of the sheriff without any hearing as to them. Leonard *v.* Buttling, 13 N. Y. App. Div. 179, 43 N. Y. Suppl. 387.

**The executor of the estate of a deceased indemnitor** cannot be substituted. Buchner *v.* Tamsen, 26 N. Y. App. Div. 612, 50 N. Y. Suppl. 125.

**Time of giving bond.**—In an action against a sheriff for a wrongful levy, it is not necessary to authorize the substitution of his indemnitors, that the bond should have been given before the levy, but it is sufficient that it was given when plaintiff claimed the property. Hessberg *v.* Riley, 91 N. Y. 377, 3 N. Y. Civ. Proc. 165.

**Nev. Comp. Laws, § 165, providing that** where judgment is rendered against a sheriff for goods attached, the court may order a separate judgment in favor of the sheriff against the sureties on the indemnity bond for the amount of the judgment, does not au-

be allowed is a matter resting in the discretion of the court,[58] and it is properly refused where the damages claimed by plaintiff greatly exceed the amount of the indemnity bond, and the indemnitors claim that the bond fixes the limit of their liability,[59] or the substitution would make it necessary for plaintiff to litigate other questions than those arising between him and the sheriff upon the determination of which his right of recovery might depend.[60] But it is proper to substitute the indemnitors in place of the sheriff notwithstanding the fact that the damages claimed exceed the amount of the bond, where according to the law under which the bond was given the liability of the indemnitors extends to all the injury done and is not limited to the amount specified in the bond.[61] Where a sheriff, indemnified as to property levied on, makes wilful default in replevin, so that judgment is taken against him, it is proper on motion of the indemnitors to set aside the default and substitute the indemnitors as defendants and allow them to defend; [62] but a motion by the sureties on an indemnity bond to set aside a judgment rendered against the sheriff by default, and to permit them to come in and defend, is properly denied where it appears that the action against the sheriff was pending about eight months before judgment was rendered and that the judgment was paid and satisfied of record before the motion was made and there is no proof of collusion and no disclosure as to the proposed defense.[63] Where the indemnitors of a sheriff are substituted as defendants with their own consent and the consent of the other parties, by an order of court providing that they shall be responsible for the acts of the sheriff on the levy and for his other acts in relation to the matter, their liability is not limited to the amount of their undertakings, but they are liable to the same extent as the sheriff.[64] It has been held that in order to warrant the substitution of the indemnitors of a sheriff as defendants in an action brought to recover personalty levied on by him, or damages for the levy, the papers on which the motion therefor is made must show that the indemnitors became such before the commencement of the action.[65] And a service on

thorize an order substituting the sureties as defendants in an action against the sheriff. Gaudette *v.* Roeder, 13 Nev. 341.

**58.** Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699 [*affirming* 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972]; Jakobi *v.* Gorman, 1 Misc. (N. Y.) 222, 21 N. Y. Suppl. 466 [*affirmed* in 2 Misc. 190, 21 N. Y. Suppl. 762].

**A clear case must be made out before the** court will direct such substitution. Berg *v.* Grant, 18 Abb. N. Cas. (N. Y.) 449.

**A statute which is mandatory in requiring** the substitution and leaves no discretion with the court is to that extent unconstitutional. Levy *v.* Dunn, 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699 [*affirming* 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972], so holding as to Code Civ. Proc. § 1421, as amended in 1887. That this statute is mandatory see also Rosenblum *v.* Gorman, 21 N. Y. App. Div. 618, 47 N. Y. Suppl. 754; Ullman *v.* Gorman, 21 N. Y. App. Div. 616, 47 N. Y. Suppl. 756; Mandel *v.* Gorman, 19 Misc. (N. Y.) 349, 43 N. Y. Suppl. 390; Canton *v.* Grant, 10 N. Y. Suppl. 223.

**59.** Levy *v.* Dunn, 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972 [*affirmed* in 160 N. Y. 504, 55 N. E. 288].

**60.** De Shields *v.* Creamer, 43 N. Y. App. Div. 579, 60 N. Y. Suppl. 245 (where the indemnitors resisted their substitution and denied their liability on the bond and the commission of any acts which would render them liable with the sheriff as joint tort-feasors); Levy *v.* Dunn, 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972 [*affirmed* in 160 N. Y. 504, 55 N. E. 288]; Carter *v.* Bowe, 47 Hun (N. Y.) 628 [*followed* in Corn *v.* Tamsen, 16 Misc. (N. Y.) 670, 39 N. Y. Suppl. 129, 25 N. Y. Civ. Proc. 283] (holding that an indemnitor will not be substituted for the sheriff, in an action to recover for damages caused by several successive seizures, where it cannot be certainly determined what goods were seized in the suit in which the indemnitor became a surety).

**61.** Cassani *v.* Dunn, 44 N. Y. App. Div. 248, 60 N. Y. Suppl. 756 [*distinguishing* Levy *v.* Dunn, 39 N. Y. App. Div. 605, 57 N. Y. Suppl. 972 (*affirmed* in 160 N. Y. 504, 55 N. E. 288, 73 Am. St. Rep. 699)]. See also Hessberg *v.* Riley, 91 N. Y. 377, 3 N. Y. Civ. Proc. 165.

**62.** Jakobi *v.* Gorman, 1 Misc. (N. Y.) 222, 21 N. Y. Suppl. 466 [*affirmed* in 2 Misc. 190, 21 N. Y. Suppl. 762].

**63.** Cohen *v.* Gorman, 25 N. Y. Suppl. 460 [*distinguishing* Jakobi *v.* Gorman, 2 Misc. (N. Y.) 190, 21 N. Y. Suppl. 762 (*affirming* 1 Misc. 222, 21 N. Y. Suppl. 466)].

**64.** Smedley *v.* Smith, 15 Daly (N. Y.) 421, 8 N. Y. Suppl. 100 [*affirmed* in 126 N. Y. 637, 27 N. E. 411].

**65.** Hayes *v.* Davidson, 98 N. Y. 19 [*reversing* 34 Hun 243]. But *compare* Terhune *v.* Dunn, 23 Misc. (N. Y.) 600, 51 N. Y. Suppl. 1122, holding that in an action of

plaintiff's attorney, who procured the indemnity, of notice of an application by the sheriff to substitute his indemnitors as defendants in his stead, is not a sufficient compliance with a statute providing that, "where the application is made by the officer, notice of the application must be given to the indemnitors or their attorney." [66] The substitution of indemnitors in place of the sheriff may be granted upon his application without requiring him to furnish additional security to answer the final result of the litigation, although such security might have been required of the indemnitors if they had made the application.[67] Even where there is no formal substitution of parties it is the practice in some states where a sheriff is sued in conversion for property attached and retained, for him to deliver the papers so served to plaintiff in the original action, or his attorney, and to perfunctorily verify the answer, and permit such plaintiff to control the litigation, after he has furnished an indemnity bond,[68] or the officer may cite his indemnitors to defend him, which they are bound to do.[69]

(III) *SUCCESSORS IN OFFICE.* In an action against a sheriff and his deputy, as individuals, for an unlawful seizure of property, the sheriff's successor in office is not liable so as to be properly substituted by defendants, against plaintiff's will, on the expiration of their term of office, by reason of the fact that plaintiff replevied the property and defendants seek to obtain a return by reason of their seizure.[70]

**H. Process.**[71] An action against a sheriff, like an action against a private individual, must be commenced by the service of process upon him; [72] but under some statutes the delivery of a summons to a deputy of the sheriff at the sheriff's office is a sufficient service upon the sheriff.[73] Where a civil action against a sheriff is commenced by his arrest, the process is improper and the action must abate.[74]

**I. Pleading — 1. In General.** The general rules of pleading [75] are applicable to actions against sheriffs or constables for official misconduct or default.[76]

replevin brought against a sheriff to recover property levied upon by him under an execution, a motion to substitute indemnitors will lie, although their undertaking was not given until after the action of replevin was begun.

66. Hero Fruit Jar Co. *v.* Grant, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 28.

67. Fleig *v.* Gorman, 1 Misc. (N. Y.) 194, 20 N. Y. Suppl. 615.

68. Dutil *v.* Pacheco, 21 Cal. 438, 82 Am. Dec. 749; Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369.

69. Thompson *v.* Chauveau, 6 Mart. N. S. (La.) 458.

70. Greig *v.* Ware, 25 Colo. 184, 188, 55 Pac. 163, where it is said: "We do not understand that the property being in the possession of the plaintiff instead of the original defendants . . . would make any difference in regard to the question of substitution, because the former was still seeking to enforce his rights against them as individuals, and not as officials."

71. See, generally, Process, 32 Cyc. 412.

72. Smith *v.* Hunt, 1 McCord (S. C.) 464.

Time for service.— Service on the officer twelve days before the return-day is sufficient in a common-law action for neglect of duty (White *v.* Wilcox, 1 Conn. 347), seizing exempt property (Sanborn *v.* Hamilton, 18 Vt. 590), or seizing property not belonging to defendant in the process (Johnson *v.* Rice, 14 Vt. 391).

73. Dunford *v.* Weaver, 84 N. Y. 445, holding this to be true under 2 Rev. St. 285, § 55, although the sheriff has not filed with the county clerk a notice of the place of his office, as required by statute. *Contra*, Sherman *v.* Conner, 16 Abb. Pr. N. S. (N. Y.) 396, 50 How. Pr. 29, holding that 2 Rev. St. p. 285, §§ 55, 56, which provides that every notice or other paper required to be served on a sheriff may be served by leaving the same at the office designated in his statutory notice of the place of the office applies only to papers in respect to which it is the sheriff's duty to provide official care and attention, and which are served on him as sheriff by virtue of his office.

74. Avery *v.* Wetmore, Kirby (Conn.) 48.

75. See Pleading, 31 Cyc. 1.

76. See Bennett *v.* Bell, 46 S. W. 4, 701, 20 Ky. L. Rep. 308; Clark *v.* Bowe, 60 How. Pr. (N. Y.) 98 (holding that in an action against a sheriff for executing a commitment valid on its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void can have no greater force than a previous recital of the facts, which shows that it was authorized and valid, and a demurrer must be sustained); Hull *v.* Southworth, 5 Wend. (N. Y.) 265 (holding that in trover against an officer for levying an execution on property in possession of defendant, which in fact belongs to a third person, defendant is entitled to the benefit of Rev. Laws, p. 155, entitled "An act for more

**2. Petition, Declaration, or Complaint[77] — a. In General.** Where the statute requires the statement of facts to be plain and concise, certainty to a common intent is all that is required in a complaint against a sheriff for official misconduct or default;[78] but a complaint which is not to this extent definite and certain is fatally defective,[79] and in an action against a sheriff for a neglect of an official duty the complaint must allege the particular neglect or omission upon which plaintiff relies.[80] In an action by the claimant of the property or the execution defendant upon an indemnity bond, it is not necessary to allege that the bond was returned by the sheriff.[81] In trespass against an officer,[82] or a suit against him for money collected by him on execution,[83] it is not necessary to declare against him in his official capacity. Neither is it necessary, in a suit against a sheriff for the misfeasance of his deputy, that defendant should be described as sheriff.[84]

**b. Allegations as to Particular Defaults or Misfeasances** — (i) *Failure to Execute Process.* A mere statement that a writ was delivered to an officer is not sufficient in an action for failure to execute the same, but the non-performance of some duty must be charged.[85] In an action against a sheriff for failure to execute a writ of venditioni exponas the complaint must allege that the failure was negligent or wrongful,[86] but an averment that a sheriff wholly failed and neglected to serve a summons is sufficient to charge him with actionable negligence.[87] In an action against a constable for neglecting or refusing to execute process issued on a judgment rendered by a justice of the peace, the declaration must clearly show that the justice had jurisdiction of the action.[88] In an action against a sheriff for failing to execute a writ, a declaration which shows that there was a debt payable in future is sufficient.[89] In an action against the sheriff for refusing to execute a writ of assistance by putting plaintiff in possession of land purchased by him at a foreclosure sale, the complainant should show the parties to the foreclosure judgment and the term at which it was entered, otherwise it does not state a cause of action;[90] but it is not necessary for the complainant to set forth all the facts which gave the court jurisdiction of the foreclosure suit.[91] Where the declaration in an action for failing to collect an execution alleged that

easy pleading in certain suits," although he was indemnified).

77. Form of declaration in action by claimant of property sold on bond of indemnity see Carrington *v.* Anderson, 5 Munf. (Va.) 32.

78. Chatten *v.* Snider, 126 Ind. 387, 26 N. E. 166, holding that a complaint in an action against a sheriff for selling property of plaintiff which he was entitled to hold exempt from execution which alleged that defendant levied, under an execution issued on a judgment recovered against plaintiff on a note, on plaintiff's land, of the value of seven thousand dollars; that plaintiff made the schedule of his property, as required by law, and demanded that all his personal property, appraised at two hundred and eighty-seven dollars, be set apart, and that defendant, after selling the land, pay over the difference between the appraised value of the personal property and the sum of six hundred dollars, the amount of his exemption, and that defendant refused to recognize his claim to an exemption, and refused to pay over any part of the proceeds of said land, was sufficient.

79. Clark *v.* Gleason, 30 Mich. 158, holding that in an action for misconduct in returning unsatisfied an execution for costs, a declaration which does not specifically describe the execution as of some date and return-day, so that it can be identified and the time of return clearly ascertained from the declaration, is bad on demurrer.

80. Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629.

81. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

82. Davis *v.* Cooper, 6 Mo. 148.

83. Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465.

84. Curtis *v.* Fay, 37 Barb. (N. Y.) 64; Stillman *v.* Squire, 1 Den. (N. Y.) 327.

85. Laming *v.* Denney, 3 N. J. L. 611; Bonnet *v.* Bozorth, 3 N. J. L. 543.

The particular neglect of which the officer has been guilty must be specified. Boyd *v.* Rose, 4 N. J. L. 230.

86. O'Bryan *v.* Webb, 142 Ala. 259, 37 So. 935.

87. Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819.

88. Robinson *v.* Harlan, 2 Ill. 237, holding that the complaint should set out specifically the kind of action and the extent of plaintiff's claim in order to show that the justice had jurisdiction.

89. Berry *v.* Burkhartt, 1 Mo. 418.

90. Loomis *v.* Wheeler, 18 Wis. 524.

91. Loomis *v.* Wheeler, 18 Wis. 524.

the officer levied on certain personal property, but did not make the money thereon, and "wrongfully, falsely and deceitfully" returned the writ as not satisfied, because of an appeal, it was held that as the gist of the action was neglect to levy or the failure to make the money on the execution, and not a false return, the return was not an essential part of the declaration; and, in passing on the sufficiency thereof, the return would not be assumed as true merely because it was not positively alleged to be false.[92] A petition which alleges that the sheriff levied on money as that of a judgment debtor, and, on a claim of a third person that the money belonged to him, released it, and then garnished such third person, but which does not allege that said money was the property of the judgment debtor, or that it was lost by the negligence of the officer, or any facts showing injury by the sheriff's negligence, does not state a cause of action.[93] But an allegation that plaintiff has sustained damage to an amount greater than the debt sought to be recovered by the attachment is equivalent to an allegation that the same is unpaid and good on general demurrer.[94] A complaint which alleges that the attachment was placed in the sheriff's hands with instructions to levy at once on certain real estate of the debtor; that the sheriff negligently failed to make such levy, until after several judgments had been obtained against the debtor; that executions were issued on these judgments, and levied upon said real estate, which was sold and bid in by the judgment creditors; and that it was necessary for plaintiff to buy the certificates of purchase issued to the judgment creditors, which he did for their face value, states a cause of action.[95] In an action against a sheriff for neglect of his deputy to levy an execution, a declaration alleging that plaintiff offered to turn out to the deputy property of the debtor sufficient in value to satisfy the execution, and all legal fees thereon, and the said deputy did then agree that he would, on the next day, without any attempt on the part of plaintiff to turn out the same, take, hold, and dispose, was not open to objection on the ground that the gravamen was a contract with the deputy to do an act aside from his duty, as the substance of the charge was that he neglected to levy on and dispose of the property of the debtor when it was in his power to do so.[96] In an action against a sheriff for not arresting defendant on an execution running against real and personal estate, and, in default thereof, against the body of defendant, plaintiff should allege that there was not sufficient property of defendant on which to levy the judgment, and that the sheriff failed to have the money before the court before the return-day of the writ.[97]

(II) *IMPROPRIETIES IN EXECUTION OF PROCESS.* A complaint in an action against a sheriff for removing plaintiff's goods from a house about to be sold under a mortgage which alleges that the removal was done "wrongfully, maliciously, and without right," during a rain storm, is not sufficient to show that the removal was effected in an oppressive or negligent manner.[98]

(III) *WRONGFUL LEVY OR SEIZURE* — (A) *In General.* In an action for a wrongful seizure of property reasonable certainty in the description of the property is all that is required;[99] but a count in a declaration against a constable for a malicious and excessive levy and sale, which states merely a seizure and sale by the officer of "the property," to a greater value than the debt to be satisfied, without stating whether the property was real or personal, or that, if personal, it was indivisible, is insufficient.[1] A petition alleging that there were no proceedings pending in a justice court, and that no affidavit had been made on which an execu-

92. Beveridge *v.* Wagner, 48 Ill. 525.
93. Hawkeye Lumber Co. *v.* Diddy, 84 Iowa 634, 51 N. W. 2.
94. Griffin *v.* Ganaway, 6 Ala. 148.
95. People *v.* Cramer, 15 Colo. 155, 25 Pac. 302.
96. Wetherby *v.* Foster, 5 Vt. 136.
97. Hammett *v.* State, 7 Ark. 220.
98. Thompson *v.* State, 3 Ind. App. 371, 28 N. E. 996.
99. Harris *v.* Russell, 93 Ala. 59, 9 So. 541, holding that a complaint in such an action which describes the property by the name, style, and quantity of the different articles is sufficient.
1. Honeycut *v.* Angel, 20 N. C. 449.

tion could issue, but that, in order to illegally exact costs, an execution had been levied on plaintiff's property, to his damage, sets out a cause of action against the officers issuing and levying the same.[2] Where it is sought to recover damages for loss of credit sustained by reason of a wrongful attachment, the petition is not demurrable for omitting to give the names of persons who refused plaintiff credit because of such attachment.[3] Where plaintiff relies on the fact that the process under which the officer levied and sold had been superseded, he should not only state this fact in the declaration, but should also charge notice of the fact to the officer.[4] In an action for a fraudulent levy upon the lands of plaintiff, and a return of the same to the court, whereby an order of sale was obtained, and the lands sold, it is necessary to state an eviction of plaintiff, or some disturbance by defendant, or by some person deriving a title under the sheriff's sale and conveyance.[5]

(B) *Seizure of Property Under Process Against Another.* Plaintiff in an action for the seizure of his property under process against another is not required to set out the facts which constituted him the owner of the property,[6] and a petition which alleges that the goods were taken from plaintiff, and that defendant knew that they belonged to him, is sufficient as an averment of ownership where not excepted to;[7] but, in order to state a case for conversion, facts should be alleged showing that, after being advised of plaintiff's ownership, the officer refused to surrender the property.[8] In an action to recover the possession of property seized under process against another party in whose possession the property was, plaintiff must affirmatively show notice and demand,[9] but a declaration in trover need not allege that defendant took the property in his official capacity in order to lay the foundation for a subsequent suit on his bond.[10] Where plaintiff seeks to recover from the sheriff, for a wrongful seizure of his property under a writ of attachment, the money paid the sheriff for the surrender of the property to him, it must appear in the complaint that he was compelled to pay the money as a condition to the delivery of possession, that such detention was unlawful, that the payment was made under protest, and that the detention was attended by circumstances of hardship or inconvenience to plaintiff.[11] Where it is sought in an action against the indemnitors of the seizing officer to hold them as trespassers,[12] the complaint must, in order to state a cause of action, allege that the seizure was induced by the giving of the indemnity bond.[13]

(C) *Levy on Exempt Property.* In an action against a sheriff for seizing exempt

2. Hathaway *v.* Smith, 117 Ga. 946, 43 S. E. 984.

3. Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661, holding that averments that, at the time of the wrongful attachment, plaintiff enjoyed among wholesale dealers and manufacturers first-class credit, and was doing a profitable business, and that, by reason of the attachment, plaintiff's business and credit were injured in a certain sum, are sufficiently specific to permit the introduction of evidence of loss of credit by plaintiff.

4. Johnson *v.* Fox, 51 Ga. 270.

5. Honeycut *v.* Angel, 20 N. C. 449, holding that an allegation that the sheriff "made title to the purchaser," without stating that some person in particular, claiming and getting title by virtue of the sheriff's deed, turned or kept plaintiff out of possession, is insufficient.

6. Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369, holding that such facts are matters of evidence and not of pleading.

7. Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. 161.

8. George H. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694.

9. Killey *v.* Scannell, 12 Cal. 73 (holding that it is not necessary that defendant should plead want of notice and demand); Shaw *v.* Tyrell, 129 Iowa 556, 105 N. W. 1006.

Where a sheriff failed to comply with a statute requiring the return in claim and delivery to be made within a certain time after seizure of the property, it was not necessary for plaintiff in an action to recover property wrongfully seized to allege or prove that he had served on the sheriff the affidavit and notice of his claim required by statute. Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190.

10. Dane *v.* Gilmore, 49 Me. 173.

11. O'Brien *v.* Quinn, 35 Mont. 441, 90 Pac. 166, holding that a mere allegation that the sheriff stated that he would accept a certain sum in lieu of the possession of the property and did accept a certain sum in lieu thereof is insufficient.

12. See *supra*, VI, O, 1.

13. Unsell *v.* Sisk, 37 Tex. Civ. App. 34, 83 S. W. 34.

property the complaint must show plaintiff's right to the exemption,[14] and that he has taken the steps required by statute to entitle him to assert the right; [15] and where the exemption is of property up to a certain value, the complaint should also show the value of the property seized.[16] Where the action is for refusing to allow plaintiff to select, as exempt, certain articles seized on execution, an allegation in the declaration that defendant, by his deputy, did convert the property to his own use, is sufficient to show that the deputy was acting under defendant as sheriff.[17]

(D) *Levy on Mortgaged Property.* In an action by a mortgagor for a seizure of the mortgaged goods in his possession under an attachment against the mortgagee, a complaint alleging peaceable possession, and that the taking was wrongful, and further alleging that the mortgagor had taken such possession by virtue of a chattel mortgage executed to him by the attachment debtor, states a cause of action without affirmatively showing any default in the mortgage,[18] and it is not necessary to allege that the demand made by plaintiff on the officer, as required by statute, contained a just and true account of the mortgage debt.[19] Neither is it necessary to plead the value of the goods taken, where no elements of special damage are pleaded.[20]

14. Huseman *v.* Sims, 104 Ind. 317, 4 N. E. 42. But *compare* Stevens *v.* Somerindyke, 4 E. D. Smith (N. Y.) 418, where the court overruled an objection to the sufficiency of the complaint upon the ground that it should have been set forth therein that plaintiff was married and had a family and that the property taken was exempt from execution, saying: "It was sufficient for the plaintiff to allege an unlawful taking. If the defendant had any authority to take the plaintiff's property, he was bound to set it up in the pleadings, and prove it as matter of defence."

A failure to expressly allege that plaintiff is the head of a family does not render the complaint fatally defective where the facts stated clearly indicate that such is the case. Thompson *v.* Donahue, 16 S. D. 244, 92 N. W. 27.

In trespass for selling exempt property the declaration must aver that plaintiff was the head of a family. Pollard *v.* Thomason, 5 Humphr. (Tenn.) 56 [*explained* in Hawkins *v.* Pearce, 11 Humphr. (Tenn.) 44, where such averment was considered unnecessary in trover].

An express allegation that plaintiff is a resident of the state so as to be entitled to exemptions is not essential to the sufficiency of the complaint. State *v.* Clark, 42 Mo. 519 (holding that an allegation that plaintiff "was residing . . . with his family in the said township of Washington," sufficiently showed that he was not a non-resident); Thompson *v.* Donahoe, 16 S. D. 244, 92 N. W. 27 (holding that where, in an action for a wrongful levy on property claimed to be exempt, the complaint charged that all the acts done by plaintiff, his wife, and the sheriff were done within the county and state in which the suit was brought, and there was nothing in the complaint to indicate that plaintiff was a non-resident, an objection that, because the complaint did not affirmatively allege that plaintiff was a resident, it did not show that he was entitled to exemptions, was not well founded).

15. Huseman *v.* Sims, 104 Ind. 317, 4 N. E. 42, holding that the complaint must show that the statute had been substantially complied with in making, verifying, and filing the schedule.

Sufficiency of averments.— In an action for conversion, a complaint which, after alleging the taking of the property by defendant sheriff under an execution, alleges that, within the time allowed by statute, plaintiff prepared, subscribed, verified, and delivered to defendant a schedule of all his personal property, which did not, as so shown and as alleged in said complaint, amount to one thousand five hundred dollars, and made and served on him a notice claiming the property so levied upon as exempt, and that defendant declined and refused to select an appraiser, or allow said property to be appraised, but sold the same against the protest and will of plaintiff, states a cause of action against defendant, without alleging other or further demand. Holdridge *v.* Lee, 3 S. D. 134, 52 N. W. 265.

16. Boesker *v.* Pickett, 81 Ind. 554, holding that a complaint alleging that "said property does not exceed in value the sum of $600," sufficiently shows the value of the property.

17. Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431.

18. First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96. See also Malcolm *v.* O'Reilly, 46 N. Y. Super. Ct. 222 [*affirmed* in 89 N. Y. 156], holding that in an action against a sheriff for the conversion of certain chattels to which plaintiff claimed title as mortgagee, the mortgage being in the form of a bill of sale, with condition that it should be void on payment of a certain sum on demand, the mortgagor to remain in possession until default, etc., an allegation that plaintiff was the owner of the chattels is sufficient to sustain the action, without averring that the mortgagor had made default.

19. Gassett *v.* Sanborn, 8 Gray (Mass.) 218.

20. Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

(E) *Levy After Appeal.* The petition in an action for an unlawful levy made after appeal should allege that a supersedeas bond was filed.[21]

(F) *Levy on Surety's Property Before Exhausting That of Principal.* In an action by one of two co-defendants, claiming to be the surety of the other, against the sheriff for his failure to levy the executions, issued against both, on his principal's property, the complaint is bad, if it does not allege that the court made an order directing the sheriff to levy the execution first on and exhaust the property of the principal debtor before making a levy on the surety's property, or that the clerk indorsed a memorandum of such order on the executions.[22]

(IV) *Removal and Sale of Goods on Demised Premises.* In an action against a sheriff for removing and selling goods on demised premises without paying the rent due it is sufficient to allege in the declaration that defendant had notice of plaintiff's claim for rent before the sale, although after the removal.[23]

(V) *Refusal to Permit Replevin of Attached Property.* A count in an action on the case against a sheriff for refusing to permit one whose property was attached to replevy it is sufficient if it allege a tender to the sheriff of a bond executed by plaintiff with good and sufficient sureties, conforming to the requirements of the statute, and a refusal to accept it.[24]

(VI) *Loss of Property.* In an action by an execution defendant against a sheriff for negligently losing property taken by him to satisfy the writ, the amount of the execution must be averred as well as the value of the property taken.[25]

(VII) *Release of Property Levied on.*[26] A complaint in an action against a sheriff for releasing property taken under a writ of replevin which alleges that the property was sold to defendant in replevin by plaintiff and delivered to him, and that he shipped the same to a certain place, where it was taken, under the writ, from the freight house of the carrier, sufficiently alleges that the property was taken from the possession of defendant in replevin or his agent.[27]

(VIII) *Conversion of Property Levied on.* In an action by a sheriff against his deputy for conversion of property levied on under attachment, a complaint which alleges that defendant was deputy sheriff of a certain county, that a writ of attachment issued out of the district court of said county in a certain action, and was delivered to defendant for service, and that under such writ defendant seized certain personal property in that county, sufficiently shows that the court issuing the attachment had jurisdiction of the subject-matter, and that the writ was regular on its face, nothing to the contrary appearing in the complaint.[28]

(IX) *Failure to Apply Attached Property on Execution.* In an action against an officer for not keeping attached property so that it could be levied upon, it must appear from the declaration that the property was charged by execution within the time from the rendition of judgment, during which the attachment lien remained in force;[29] but a declaration against the sheriff for not applying property, attached by him to satisfy plaintiff's execution, and for falsely returning on the execution that the property attached was subject to a former attachment, need not state the kind of attachment, or that defendant could

21. Thomas *v.* Nicklas, 58 Iowa 49, 11 N. W. 722.

22. Douch *v.* Bliss, 80 Ind. 316.

23. Kingston *v.* Shaw, 20 U. C. Q. B. 223.

24. Chenault *v.* Walker, 14 Ala. 151.

An averment that plaintiff tendered a "proper forthcoming bond" to the officer as provided by the statute is sufficient, without showing in detail that the bond complied with the requirements of the statute. Elrod *v.* Hamner, 120 Ala. 463, 24 So. 882, 74 Am. St. Rep. 43.

25. Owens *v.* Gatewood, 4 Bibb (Ky.) 494, so holding on the ground that unless the value of the property exceeded the amount of the execution plaintiff was not damaged by the loss of the property.

26. See also *infra*, VII, I, 2, b, (IX).

27. Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580.

28. Linn *v.* Jackson, 5 N. D. 46, 63 N. W. 208.

29. Ormsby *v.* Morris, 28 Vt. 711. See also Hale *v.* Dennie, 4 Pick. (Mass.) 501.

have seized, or was requested to seize, the property, where it is alleged that the execution was delivered to him to be levied on the property attached while the lien of the attachment remained in force.[30] Where two deputies of a sheriff had made simultaneous attachments of the same property in favor of different creditors, and an action was brought by one creditor against the sheriff for neglect of duty by one deputy in not retaining one-half the proceeds on execution, to satisfy the execution held by the other deputy, who had given him notice, at the time of the sale, of said simultaneous attachment, and had demanded one-half the proceeds of the sale, it was held that plaintiff should have averred that the deputy who made the sale had surplus funds in his hands at the time of the demand that plaintiff's execution had been delivered to him, and that it had been returned into court.[31]

(x) *SALE OF EXEMPT PROPERTY.* A petition against a sheriff for wrongfully selling exempt property under final process, alleging the seizure, the sale, and the filing of an affidavit with the officer showing the exempt character of the property, that it was exempt, that plaintiff was a resident of the state, the head of a family, and not the owner of a homestead, and that the property was of a stated value, is sufficient, although the allegations do not follow strictly the language of the statute.[32]

(xi) *SALE WITHOUT PROPER NOTICE.* In an action by an execution debtor against a sheriff for selling land without notice, the complaint need not allege that the sheriff's return that he has given notice is false;[33] and in an action for not giving notice of the sale of property, at the most public place in the township it is not necessary to set out the name of such place.[34]

(xii) *SALE AT INADEQUATE PRICE.* In an action against a sheriff for selling goods upon plaintiff's execution under their value, the judgment in the original action must be set out.[35] In an action against the sheriff for the injury done in causing, by his wrongful representations, property seized by him under legal process to be sold for less than its value, it is not necessary to aver that the representations were made maliciously.[36]

(xiii) *FAILURE TO SELL PROPERTY LEVIED ON.* Where the complaint in an action for failure to dispose of property levied on shows a levy on sufficient personal property to satisfy the judgment, and a breach of duty in failing to advertise and sell, it need not also show that the debtor did not have other property out of which the judgment could have been made.[37]

(xiv) *FAILURE TO EXECUTE DEED.* A complaint against a sheriff for not executing a deed to plaintiff for property purchased by him at sheriff's sale, and claiming special damages for the failure to get possession of the land sold, is bad without an averment that plaintiff's failure to get possession was caused solely by the want of the deed.[38]

(xv) *FAILURE TO COLLECT MONEY.* An averment in the petition in an action against an officer for failure to collect the money on fee bills put into his hands for collection that if he did not collect the money it was his own neglect and fault is not sufficient under a statute making him liable "for failing to collect the same when by proper diligence it might have been collected."[39] The declaration in an action against a sheriff for failure to collect a list of militia fines should show the name of each person fined and the amount of his fine.[40]

(xvi) *FAILURE TO PAY OVER MONEY.* Where the statute requires plead-

30. Hale *v.* Dennie, 4 Pick. (Mass.) 501.
31. Wheeler *v.* Willard, 14 Pick. (Mass.) 486.
32. Hamilton *v.* Fleming, 26 Nebr. 240, 41 N. W. 1002.
33. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849.
34. Malcolm *v.* Rapelje, Taylor (U. C.) 361.
35. Billings *v.* Hamilton, 6 U. C. Q. B. O. S. 113.
36. Griffin *v.* Isbell, 17 Ala. 184, holding that an averment that they were made falsely and fraudulently is sufficient.
37. Waymire *v.* State, 80 Ind. 67.
38. Knight *v.* Fair, 12 Cal. 296.
39. Walters *v.* Chinn, 1 Metc. (Ky.) 499.
40. State *v.* Leavell, 3 Blackf. (Ind.) 117.

ings to be verified merely by an affidavit that the party believes the statement thereof to be true, the petition in an action against an officer for failure to pay over money collected must positively aver the collection thereof;[41] but a declaration against a sheriff alleging that he failed to pay over the money collected "in virtue" of an execution is sufficient, without stating expressly that the collection was made while the execution was in force.[42] It has been held that an action against a sheriff for failure to pay over money collected by him on execution must allege a demand on him therefor.[43] In an action against a sheriff for the purchase-money of lands sold by him on execution, the judgment and proceedings on which the execution issued must be averred in the declaration.[44] In an action against a sheriff for money received by him by virtue of his office, the nature of the debt or demand should be so far stated in the declaration as to distinguish it from private debts or contracts.[45] A complaint, in an action by the state against the sheriff to recover money deposited with him in lieu of bail and forfeited, which alleges that the prisoner failed to appear, and that the deposit was declared forfeited, is not defective because it fails to allege that such forfeiture had never been set aside;[46] and where such complaint alleges both that the sheriff had failed to pay the money to the clerk of the court and that he failed to pay it as he was in duty bound, it is not defective because it fails to allege that he did not pay it to his successor.[47] Neither is it necessary for the complaint in such case to allege that an indictment was actually returned against the prisoner where he was recognized to answer any indictment which might be returned against him to the grand jury.[48] Where the statute requires a sheriff upon return of an execution to pay the money realized thereon to the clerk, a complaint in an action against the sheriff to recover the surplus realized from the sale of land above the sum due on a decree of foreclosure is demurrable where it does not allege that the sheriff failed to pay such money to the clerk at the time his writ was returnable.[49] Where the complaint in an action against a sheriff by an execution defendant shows that executions were levied on his lands by the sheriff, and sales of the lands were made, and that the sheriff executed deeds for the lands but failed to collect the purchase-money, an averment that the executions were satisfied does not show that such satisfaction arose other than by sale, and does not show a right in the plaintiff to recover from the sheriff the proceeds of the sale.[50]

(XVII) *IMPROPER APPLICATION OF MONEY.* Where a sheriff, having two executions in his hands, one against plaintiff and another jointly, and another against the other person alone, levied both on lands belonging to plaintiff and wrongfully applied a portion of the proceeds on the execution against the other person alone, it was not necessary, in a suit by plaintiff against the sheriff to recover the amount so wrongfully applied, to set out in the complaint the judgments on which the executions were issued.[51] In an action against a sheriff for not paying over surplus money arising from a sale on execution, after paying off

41. Walters *v.* Chinn, 1 Metc. (Ky.) 499, holding that an allegation that plaintiff "believes" that the officer has collected the money is insufficient.

42. Canterberry *v.* Com., 1 Dana (Ky.) 415, holding also that where the declaration is for failing to pay over commonwealth's paper, an averment that he failed to pay "the amount" implies a charge of failing to pay in that paper, and is sufficient.

43. McBroom *v.* Governor, 6 Port. (Ala.) 32; Church *v.* Clark, 1 Root (Conn.) 303; Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.

44. Ennis *v.* Waller, 3 Blackf. (Ind.) 472.

45. Overton *v.* Hudson, 2 Wash. (Va.) 172.

46. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

47. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

48. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426, so holding on the ground that it was the prisoner's duty to appear from day to day until the case had been disposed of.

49. Butler *v.* Smith, 20 Oreg. 126, 25 Pac. 381.

50. Moore *v.* Barclay, 18 Ala. 672, holding further that an additional averment in another count that the proceeds of sale remained after all executions in the hands of the sheriff were satisfied did not change the legal effect of the previously stated facts, or warrant the conclusion that the executions were satisfied, other than by the sale.

51. State *v.* Hamilton, 32 Ind. 104.

previous attachments, it is necessary to aver that the sale was made by the sheriff *virtute officii*, and that plaintiff's execution was delivered to the sheriff before he had paid over the surplus money to the debtor.[52] A declaration which sets forth in detail the making and delivery of a chattel mortgage, its non-payment, the sale of the mortgaged goods under execution, and refusal on the part of the officer who made the sale to pay to plaintiff the proceeds of the sale, as provided by statute, is sufficient.[53] Where a complaint against a sheriff for misappropriation of a surplus arising on a sale of land under a senior mortgage averred that plaintiff was a junior encumbrancer, whose mortgage had been foreclosed, and that his claim was in the form of a sheriff's certificate of purchase; that the suit to foreclose the senior mortgage was brought subsequent to his purchase; that he was a party thereto; and that the court therein decreed that he held the next oldest lien on the land, evidenced by said certificate, and was entitled to redeem within a year, these averments were sufficient to raise the question of priority of liens, without setting out all the steps by which plaintiff's lien was acquired.[54]

(XVIII) *ACCEPTANCE OF DEFECTIVE OR INSUFFICIENT SECURITY.* A complaint in an action against a sheriff for taking an insufficient surety on a replevin bond must, in addition to alleging the insufficiency of the surety, aver that the principal was insolvent or unable to pay;[55] and in an action against the sheriff for taking a bail-bond insufficient because not in proper form, the declaration should aver that the principal failed to appear in the original suit.[56] It has been held that in an action against the sheriff for not taking sufficient security, under the New York statute relating to the replevin of a distress for rent, the declaration must allege that a writ of retorno habendo has been issued, and *elongata* returned,[57] and must pursue the words of the statute, and allege that the sheriff made deliverance, etc., without taking security "to prosecute the suit and return the property, if return thereof shall be adjudged."[58] Where the statute makes the sheriff responsible for the sufficiency of the sureties in replevin only where defendant in replevin has excepted to the sufficiency of the sureties, and they, or new sureties, have failed to justify, a declaration in an action against the sheriff for taking insufficient sureties must contain averments to bring the case within the statute.[59] A petition alleging proceedings by attachment, and levy thereunder, and the release of the property by the sheriff on a void replevin bond, the loss of plaintiff's lien on the property, and that it had been removed by the debtor beyond the jurisdiction of the court, and that the debtor was insolvent, whereby plaintiff had lost his debt, is sufficient on demurrer.[60]

(XIX) *NEGLECT TO RETURN BAIL-BOND.* In a declaration for not returning a bail-bond with the writ on which the officer returned an arrest and the taking of bail, it is not necessary to allege a return of *non est inventus* within one year, or an avoidance of the principal, or that the oath necessary to authorize an arrest was taken.[61]

(XX) *FAILURE TO RETURN PROCESS.* In an action for failing to return an execution, it is necessary to aver the nature and amount of the damage sustained by plaintiff;[62] but an allegation that the officer's fees were paid is not necessary.[63]

52. Wheeler *v.* Willard, 14 Pick. (Mass.) 486.
53. Fournier *v.* Wilson, 19 R. I. 15, 31 Atl. 306.
54. White *v.* Shirk, 20 Ind. App. 589, 51 N. E. 126.
55. Fisher *v.* Davis, Litt. Sel. Cas. (Ky.) 132.
56. Handley *v.* Ewings, 4 Bibb (Ky.) 505.
57. Gibbs *v.* Bull, 18 Johns. (N. Y.) 435 [*followed* in Knapp *v.* Colburn, 4 Wend. (N. Y.) 616].
58. Gibbs *v.* Bull, 18 Johns. (N. Y.) 435.
59. Westervelt *v.* Bell, 19 Wend. (N. Y.) 531.
60. Barclay *v.* Scott, 1 Tex. App. Civ. Cas. § 110.
61. Prescott *v.* Bancroft, 1 Metc. (Mass.) 500, so holding on the ground that the neglect to return the bail-bond with the writ was itself a breach of official duty and an allegation of such neglect was sufficient.
62. Bennett *v.* Vinyard, 34 Mo. 216.
63. Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954.

(XXI) *FALSE RETURN.* In an action for a false return an averment that the officer "failed to make true and correct returns" is insufficient;[64] but the complaint must state the nature of the return made,[65] and show in what respect it was false[66] or injurious to plaintiff.[67] The complaint need not allege deceit or fraud, as it is enough that the return is untrue;[68] and it is proper to charge the false return to have been made when the writ was returnable, although it was actually made long afterward.[69] Where the complaint in an action against an officer for making a false return of service of summons on plaintiff, whereby judgment was rendered against plaintiff, avers that plaintiff filed a motion to quash the alleged false return, it will be assumed, in the absence of any averment to the contrary, that such motion was made before judgment was rendered in the action and a demurrer to the complaint is properly sustained.[70] Where the declaration, in an action on the case for the false return of a writ, averred that the writ was directed to defendant, as an indifferent person, to serve and return, and that, after it had been returned to the court to which it was returnable, plaintiff in that suit recovered judgment by default, this was equivalent to an averment that the writ was legally directed to defendant, and that a lawful judgment was rendered thereon.[71]

(XXII) *ESCAPE.*[72] In an action by an execution creditor against a sheriff or constable for an escape, plaintiff must aver the existence of a judgment against the execution debtor;[73] but it is not necessary to set forth the indorsement on the execution, directing the sheriff what sum to levy.[74] Where the action is for an

64. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.

65. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.

66. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161; Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819; Drum *v.* Holton, 1 Pinn. (Wis.) 456.

**Complaints held sufficient.**—Where a deputy sheriff returned that he had made an attachment on real estate by leaving at the dwelling-house of the clerk of the city in which the land was situated an attested copy of the writ and his return thereon, it is a sufficient averment of the falsity of such return to allege that the deputy did not at the time specified, or at any other time, leave an attested copy of such writ and his return thereon at the dwelling-house of such clerk, and it is not necessary to specify in what particulars the copy of the writ and return actually left with the clerk differed from a true and attested copy of the same. Clough *v.* Monroe, 34 N. H. 381. A declaration averring that plaintiff delivered his writ to the sheriff with instructions not to proceed upon it until some other writ of execution against the same defendant should come into his hands, that another did come into his hands, and that the sheriff seized and sold under both writs and made sufficient money to satisfy both, but falsely returned that proceedings had been stayed on plaintiff's writ and that he could not in consequence make the money, was good on general demurrer. Strange *v.* Jarvis, 6 U. C. Q. B. O. S. 160.

**Complaint held insufficient.**— In an action by bail against the sheriff for falsely returning *non est inventus* as to the principal, a declaration alleging that the sheriff "could have taken" the body of the debtor does not state a cause of action, where it fails to allege that he was in the sheriff's presence, or to describe at what time and in what place he might have been found. Eldridge *v.* Bellows, Smith (N. H.) 356.

**Where the facts alleged show that the return was true,** the declaration is bad on demurrer. Knapp *v.* Cox, 58 N. H. 488.

67. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161; Astor *v.* Heller, 61 N. J. L. 78, 38 Atl. 819.

**An averment of special damage** is necessary in order to maintain an action against a sheriff for a false return to a fieri facias where no damage could necessarily result to the creditor, it appearing that the goods in question had become vested in the assignees of the debtor, who had become bankrupt. Wylie *v.* Birch, 4 Q. B. 566, 3 G. & D. 629, 12 L. J. Q. B. 260, 45 E. C. L. 566.

**It is a sufficient allegation of the resulting damage** to aver that by reason of the false return plaintiff was prevented from lodging his execution on the lands falsely returned as attached, and lost the benefit of an attachment thereof made on his own writ, and was wholly deprived of any advantage from his judgment against the debtor. Clough *v.* Monroe, 34 N. H. 381.

68. Peebles *v.* Newson, 74 N. C. 473.

69. Michaels *v.* Shaw, 12 Wend. (N. Y.) 587.

70. Bennett *v.* Bell, 46 S. W. 701, 20 Ky. L. Rep. 308, holding that plaintiff's averment that "a default judgment was rendered against him when he did not know that said cause was pending on the docket" was not equivalent to an averment that he did not know the case was pending, and therefore did not show that the motion made by him was made after judgment.

71. Case *v.* Humphrey, 6 Conn. 130.

72. See also PRISONS, 32 Cyc. 344.

73. Hall *v.* Johnson, 3 Blackf. (Ind.) 363.

74. Jones *v.* Cook, 1 Cow. (N. Y.) 309.

escape of a prisoner arrested on mesne process the fact that the prisoner is indebted to plaintiff must be distinctly alleged in the complaint.[75] In an action for the escape of a defendant taken under a capias ad satisfaciendum, it is not necessary that the declaration should aver that the oath required by law was made before the writ issued.[76] The complaint must allege that the prisoner was at large, beyond the liberties of the jail,[77] and set forth the proceedings to, and including, the escape, and demand appropriate judgment; [78] but all allegations as to the character of the sheriff as statutory bail should be omitted.[79]

(XXIII) *FAILURE TO TURN OVER PRISONER TO SUCCESSOR IN OFFICE.* In an action against a sheriff for not delivering to his successor in office a prisoner taken by him and committed to jail on an execution against the body, averred to have been duly issued upon a judgment in an action brought to recover a debt which was fraudulently contracted, it is not essential that the complaint should also state that an order for the arrest of defendant was obtained.[80]

**3. PLEA OR ANSWER — a. Justification Under Office.** Where a defendant in an action for an alleged wrongful act seeks to justify under his office he must in his pleading show a good title to such office,[81] and he should also allege that he was acting within his territorial jurisdiction.[82]

**b. Justification Under Process.** Where an officer seeks to justify under process such justification must be specially pleaded,[83] and the plea must set forth matters which if true will bar the action.[84] To conform to this rule the plea should substantially describe the process [85] and state the facts relied on to justify the acts done under it,[86] and allege, in case a seizure of property is complained of, that defendant in the process had some interest in the property seized subject to seizure,[87] and that the goods were seized before the return-day of the writ; [88] but it is not necessary to set forth minutely every fact relating to the action in which the process issued.[89] Neither is it necessary for a plea justifying a seizure of goods under process to aver that the entry into plaintiff's premises was peaceable and quiet where a forcible entry is not charged.[90] Where the officer seeks to justify under mesne process he must aver the return thereof,[91] or show some legal excuse for not returning it,[92] unless the action is brought before the return-day.[93] Where a sheriff justifies under a writ of execution it is not necessary to allege that a judgment was rendered in the case in which the execution issued,[94] or to set out the judgment; [95]

75. Cosgrove *v.* Bowe, 10 Daly (N. Y.) 353, 2 N. Y. Civ. Proc. 61.

76. Lattin *v.* Smith, 1 Ill. 361.

77. Cosgrove *v.* Bowe, 10 Daly (N. Y.) 353, 2 N. Y. Civ. Proc. 61, holding that it is not sufficient to aver that he was at large.

78. Smith *v.* Knapp, 30 N. Y. 581.

79. Smith *v.* Knapp, 30 N. Y. 581. See also Nehresheimer *v.* Bowe, 3 N. Y. Civ. Proc. 368.

**When the creditor elects to proceed against the sheriff as bail,** under the statute, he must set forth the proceedings to and including the escape (Smith *v.* Knapp, 30 N. Y. 581. *Compare* Nehresheimer *v.* Bowe, 3 N. Y. Civ. Proc. 368), and allege that defendant is bail and demand the appropriate judgment (Smith *v.* Knapp, *supra*).

80. French *v.* Willett, 4 Bosw. (N. Y.) 649, 10 Abh. Pr. 99.

81. Case *v.* Hall, 21 Ill. 632 (holding that a plea which does not allege that defendant was duly elected and qualified to the office under which he justifies is insufficient); Smith *v.* Wilson, 21 R. I. 327, 43 Atl. 634 (so holding in an action for an assault committed in executing process).

82. McPherson *v.* Reynolds, 6 U. C. C. P. 440.

83. Glazer *v.* Clift, 10 Cal. 303; Shultz *v.* Frank, 1 Wis. 352; Pollock *v.* Fraser, 4 U. C. Q. B. 352; Lee *v.* Rapelje, 2 U. C. Q. B. 368; Stull *v.* McLeod, (Mich. T. 4 Vict.) R. & J. Dig. 3531.

84. McAden *v.* Gibson, 5 Ala. 341.

85. McAden *v.* Gibson, 5 Ala. 341; Cook *v.* Miller, 11 Ill. 610.

86. Kelly *v.* Fritz, 11 Heisk. (Tenn.) 7.

87. Howard *v.* Conde, 22 Oreg. 581, 30 Pac. 454; Krewson *v.* Purdom, 11 Oreg. 266, 3 Pac. 822, holding that an allegation in an answer, in an action against a sheriff for conversion, that the property was levied on under a writ of attachment "as the property" of the attachment defendant, is not a sufficient allegation of ownership to justify the levy.

88. Outwater *v.* Dafoe, 6 U. C. Q. B. 256.

89. Towdy *v.* Ellis, 22 Cal. 650.

90. Evans *v.* Kingsmill, 3 U. C. Q. B. 118.

91. McAden *v.* Gibson, 5 Ala. 341 [*followed* in Kirksey *v.* Dubose, 19 Ala. 43].

92. McAden *v.* Gibson, 5 Ala. 341 [*followed* in Kirksey *v.* Dubose, 19 Ala. 43].

93. Briggs *v.* Mason, 31 Vt. 433.

94. Shepherd *v.* Nabors, 6 Ala. 631.

95. Jackson *v.* Hobson, 5 Ill. 411; Burton

neither is it necessary for defendant to state that he sold the property levied on.[96] But a plea of justification under execution is bad if it state the writ to have issued before judgment was entered.[97] Where an officer justifies under the process of an inferior court he must state facts showing that the court had jurisdiction.[98] An averment that a warrant under which an officer justified was under the hand of the officer issuing it has been held sufficient, although the statute required such a warrant to be under the hand and seal of the issuing officer.[99] Where a sheriff justifies under a writ of attachment, which is annexed to the answer, but is so materially defective that it could confer no authority on him to take the property, a demurrer to so much of the answer as justifies under the writ must be sustained.[1]

**c. Limitations.** Where the statute provides that actions against sheriffs for any act in their official capacity shall be brought within three years after the cause of action shall have accrued, a plea in such action of "Not guilty within three years" is bad on a special demurrer for not following the terms of the statute,[2] although it might be good on general demurrer.[3]

**d. Pleas to Charges of Particular Defaults or Misfeasances** — (I) *FAILURE TO EXECUTE PROCESS.* Where the declaration in an action for not levying under an execution alleges that there were goods out of which defendant could have made or levied the money indorsed on the writ, but that he did not levy the same, a plea that before defendant could by due diligence have levied the moneys the goods were destroyed by fire is bad.[4] In an action for not levying an execution on a particular lot of land pointed out by plaintiff in execution, a plea that, after return of such execution, plaintiff sued out another execution on the same judgment, which was, by his direction, levied on other property, is bad where it does not allege what disposition was made of the property under the levy.[5]

(II) *WRONGFUL LEVY OR SEIZURE* — (A) *In General.* Where, in an action against a sheriff for the conversion of personal property, defendant denied plaintiff's title and possession, the taking, etc., and alleged that a third person, while the owner and in possession of the property, mortgaged the same, and set out various proceedings to foreclose the mortgage, resulting in the sale of the property by defendant, as sheriff, to satisfy the mortgage, one of the proceedings being an action by the mortgagee against such third party to recover possession from such third party for the purpose of foreclosing, it was proper to refuse to strike out such allegations.[6] In trespass *de bonis* against a sheriff, a plea that the goods belonged to a third person, and were taken by virtue of an execution against him, has been held bad, as amounting to the general issue.[7] In a plea of justification by an officer for taking property in satisfaction of a rate or tax imposed by an incorporated aqueduct company, it has been held sufficient to aver that by the act of incorporation the original proprietors were declared a body politic and corporate in fact if such were the terms of the act without averring the organization of the company.[8]

*v.* Sweaney, 4 Mo. 1; Davis *v.* Davis, 2 Gratt. (Va.) 363. But *compare* Adams *v.* Kingsmill, 1 U. C. Q. B. 355.

96. Burton *v.* Sweaney, 4 Mo. 1.

97. Dougall *v.* Moodie, 1 U. C. Q. B. 374.

98. Cleveland *v.* Rogers, 6 Wend. (N. Y.) 438, holding that a constable, in justifying under an execution issued by a justice of the peace, must state the statute under which the justice acted, and that by virtue thereof he issued process, or that under it a plaint was levied, or the answer will be held bad on demurrer.

99. Beekman *v.* Traver, 20 Wend. (N. Y.) 67.

1. Deforest *v.* Swan, 4 Greene (Iowa) 357.

2. Fisher *v.* Pond, 2 Hill (N. Y.) 338.

3. Fisher *v.* Pond, 2 Hill (N. Y.) 338.

4. Ross *v.* Grange, 25 U. C. Q. B. 396, so holding on the ground that levying includes both seizure and sale and consistently with defendant's plea the goods might have been destroyed in his custody after seizure, in which case he would be liable.

5. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

6. Anderson *v.* Medbery, 16 S. D. 329, 92 N. W. 1087, so holding on the grounds that the title in the third person would have been no defense unless defendant connected himself therewith, and therefore the facts were necessarily pleaded, and the proceedings and foreclosure would be rightful against plaintiff, and binding on him, if the third person was in fact the owner of the property when the mortgage was executed.

7. Brown *v.* Artcher, 1 Hill (N. Y.) 266.

8. Beekman *v.* Traver, 20 Wend. (N. Y.) 67.

(B) *Seizure of Property Under Process Against Another.* Where an officer seeks to justify his seizure and possession of attached property as against a stranger to the writ who claims the same, he must allege and prove all the facts necessary to support the writ,[9] and also the existence of a debt in favor of the attachment plaintiff against the attachment defendant.[10] If the seizure was under final process the sheriff must plead that the property was taken under a valid execution and judgment;[11] and a plea alleging that the property was taken under an execution as the proper goods and chattels of the execution defendant is bad, as it does not traverse that plaintiff was the owner.[12] Where the sheriff relies on the fact that a sale, mortgage, or pledge by the debtor to plaintiff was fraudulent, the fraud must be specially pleaded.[13] In an action to recover the possession of property seized under attachment against a person in whose possession the property was, it is not necessary for the sheriff to plead want of notice and demand from plaintiff.[14]

(C) *Levy on Exempt Property.* In an action for a wrongful attachment of exempt property, a waiver of exemption must, if relied on as a defense, be specially pleaded.[15]

(III) *REMOVAL AND SALE OF GOODS ON DEMISED PREMISES.* In an action for removing and selling goods on demised premises without paying the rent due a plea that after the removal there remained sufficient to satisfy the rent due is bad,[16] as is also a plea that defendant had no notice before the removal where the declaration charges notice before the sale.[17]

(IV) *LOSS OF PROPERTY.* In an action for the loss of goods seized by defend-

9. *California.*— Glazer *v.* Clift, 10 Cal. 303; Thornburgh *v.* Hand, 7 Cal. 554.

*Idaho.*— Beckstead *v.* Griffith, 11 Ida. 738, 83 Pac. 764; Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122.

*Michigan.*—Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012; Comstock *v.* Hollon, 2 Mich. 355.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946; Braley *v.* Byrnes, 20 Minn. 435.

*Montana.*— Hootman *v.* Bray, 3 Mont. 409.

*New Hampshire.*— Sanford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

*New York.*— Noble *v.* Holmes, 5 Hill 194.

*Oregon.*— Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

*Utah.*— Newton *v.* Brown, 2 Utah 126.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 285.

**Jurisdiction of court.**— Where a third person claims attached property by virtue of a prior sale, and the officer attempts, in his answer, to justify his levy by impeaching such sale for fraud, such answer must show that the attachment was regularly issued by a court having jurisdiction. Hootman *v.* Bray, 3 Mont. 409.

10. *California.*— Glazer *v.* Clift, 10 Cal. 303; Thornburgh *v.* Hand, 7 Cal. 554.

*Idaho.*— Beckstead *v.* Griffith, 11 Ida. 738, 83 Pac. 764.

*Massachusetts.*— Damon *v.* Bryant, 2 Pick. 411.

*Michigan.*—Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946; Braley *v.* Byrnes, 20 Minn. 435.

*New Hampshire.*— Sandford Mfg. Co. *v.* Wiggin, 14 N. H. 441, 40 Am. Dec. 198.

*New York.*— Noble *v.* Holmes, 5 Hill 194.

*Oregon.*— Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

*Utah.*— Newton *v.* Brown, 2 Utah 126.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 285.

11. Stephens *v.* Head, 138 Ala. 455, 35 So. 565 (holding that a plea in an action for conversion alleging that defendant took the goods alleged to have been converted, as sheriff, under an execution issued out of the circuit court, to sell them under a judgment, and that plaintiff, by his presence and failure to object, is estopped to claim them, is insufficient, in failing to show that the sheriff held an execution against the judgment debtor); Masters *v.* Teller, 7 Okla. 668, 56 Pac. 1067.

12. Harris *v.* Paynes, 5 Litt. (Ky.) 105; Barley *v.* Cannon, 17 Mo. 595.

13. Merchants' Nat. Bank *v.* Barker, 8 Tex. Civ. App. 332, 28 S. W. 698; Norton *v.* Kearney, 10 Wis. 443.

**Plea held sufficient.**— Where, in an action against a sheriff for the conversion of certain goods conveyed by deed of trust, defendant averred that the creditors of the grantor alleged that the deed was fraudulent and void, and that he had seized and sold the goods under execution against the grantor on a belief that such allegation was true, the answer was sufficient to raise an issue as to the alleged fraud. Boone *v.* Hardie, 83 N. C. 470.

14. Killey *v.* Scannell, 12 Cal. 73, so holding on the ground that it is incumbent upon plaintiff to affirmatively show notice and demand.

15. Murphy *v.* Sherman, 25 Minn. 196.

16. Kingston *v.* Shaw, 20 U. C. Q. B. 223.

17. Kingston *v.* Shaw, 20 U. C. Q. B. 223.

ant while acting as an officer, a plea that he kept the goods in a safe, suitable, and proper place, designating it, is sufficient as against a demurrer.[18]

(v) *FAILURE TO HAVE ATTACHED PROPERTY FORTHCOMING TO SATISFY EXECUTION.* In an action for failure to have attached property forthcoming to satisfy execution, a plea averring generally that the property had been appropriated in the manner prescribed by law in satisfaction of prior attachment liens is insufficient, but the facts showing how the appropriation was made should be specifically alleged.[19]

(vi) *SALE OF PROPERTY NOT BELONGING TO DEBTOR.* In an action by an owner of chattels leased to a third person against an officer for selling them under an execution against the lessee, a plea that the officer sold only the right, title, and interest of the lessee and that plaintiff has not sustained any damage at the commencement of the suit and will not sustain any damages by reason of the sale is good.[20]

(vii) *SALE AT INADEQUATE PRICE.* In an action for wrongfully selling lands in execution much below their real value, a plea that defendant sold the lands for the best price that he could get for them is good against a general demurrer.[21]

(viii) *FAILURE TO PAY OVER MONEY.* Where in an action to recover money from an officer the complaint alleges that defendant refused to pay plaintiff the money, and wrongfully retains and still holds the possession thereof, and the answer merely contains a denial "that defendant wrongfully retains or holds possession" of the sum or any part thereof, such denial operates merely to deny the "wrongful" possession and constitutes an admission of possession.[22]

(ix) *FALSE RETURN.* In an action for a false return, the sheriff cannot plead to the merits of the original action,[23] and a plea that there was no such writ duly sued out and duly returned is bad on demurrer.[24] In an action against a sheriff for a false return of *nulla bona,* a plea that the judgment debt upon which he was required to levy was satisfied is good,[25] as is also a plea that defendant levied and made a part and no more, which he paid over,[26] and a plea by way of estoppel that plaintiff requested defendant to return *nulla bona* and accepted and acted upon that return, and took out a venditioni exponas with full knowledge of the facts.[27] But in an action against a sheriff for falsely returning *nulla bona* on an execution after having levied the money, a plea that the execution defendant had no goods and chattels out of which the sheriff could have levied is bad on demurrer as being an argumentative denial;[28] and a plea that defendant as sheriff

18. Perkins *v.* Gibbs, 29 Vt. 343.

19. Jordan *v.* Gallup, 16 Conn. 536.

20. Grafflin *v.* Jackson, 40 N. J. L. 440, so holding on the ground that the damages sustained by plaintiff are the foundation of the action.

21. Watson *v.* McDonell, 6 U. C. Q. B. O. S. 450.

22. Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77.

23. Grantham *v.* Jarvis, 6 U. C. Q. B. 511.

24. Grantham *v.* Jarvis, 6 U. C. Q. B. 511 [*following* Upper *v.* Hamilton, 1 U. C. Q. B. 467, and *followed* in Jones *v.* Ruttan, 12 U. C. Q. B. 202].

25. Potter *v.* Carroll, 9 U. C. C. P. 442 [*affirmed* in 7 Can. L. J. 42, 1 Grant Err. & App. (U. C.) 341]. But *compare* Commercial Bank *v.* Jarvis, (Mich. T. 6 Vict.) R. & J. Dig. 3528.

26. Miller *v.* Thomas, 11 U. C. Q. B. 302, 303 (holding that in an action against a sheriff for falsely returning to an execution goods on hand to a certain amount and *nulla bona* as to the residue when enough had in fact been seized to satisfy the writ, a plea that defendant did not seize or take in execution the said goods and chattels in the declaration mentioned is good, the court saying: "When, therefore, the defendant answers that he did not take in execution the said goods and chattels in the said count mentioned we must understand him, we think, to say, that he did not, as the plaintiff alleges, seize goods enough to satisfy the writ, or seize more than of the value of five shillings, and so that his return of *nulla bona* as to the residue beyond five shillings is not false"); Watson *v.* Hamilton, 6 U. C. Q. B. O. S. 114, 115 (where it is said: "The plaintiffs have not averred that goods of less value than the debt were seized, or that there were other goods which might and ought to have been seized. The defendant therefore is only called upon to answer for the goods actually seized; this he has done: and it appears to me that the demurrer should be overruled and judgment be for the defendant").

27. Miller *v.* Thomas, 11 U. C. Q. B. 302.

28. Taylor *v.* Jarvis, 13 U. C. Q. B. 373.

did take in execution goods and chattels of the execution debtor under and by virtue of the writ and did levy thereout the moneys indorsed thereon as was commanded is bad on demurrer as admitting plaintiff's cause of action.[29] In an action against a sheriff for damages for a false return of an execution issued by plaintiff, an answer merely alleging the issuing of prior executions by other creditors should be stricken out, where it does not aver that the prior executions had been or could be levied on the debtor's property, or that the property was exhausted by a sale under such prior executions.[30] In an action against a sheriff for falsely returning to an execution goods on hand for want of buyers when he might have levied the amount, a plea that defendant did take goods on which he could have levied, the amount of which goods remained and still remains in his hands for want of buyers is bad on demurrer.[31]

(x) *ESCAPE.* In an action for the escape from his custody of a person arrested on a process for contempt, it is essential to the sufficiency of the answer that it contain averments amounting to a distinct allegation that the alleged escape was made without defendant's consent.[32] Where a declaration alleged the escape to have been in September, and the sheriff's pleas alleged that the debtor was in custody in April, and admitted that he had not been in custody subsequent to that time, it appeared with sufficient certainty, on general demurrer, that the escape mentioned in the plea was the same escape for which the action was brought.[33]

**e. Opening Default.** When a sheriff is sued he is held to no greater diligence in pleading than a private individual and a default by him will be set aside and an answer permitted where the circumstances are such that it would be proper to grant such indulgence to an individual.[34]

**4. REPLICATION OR REPLY.** Where the officer's plea denies or amounts to a denial of plaintiff's cause of action a replication *de injuria* is not proper.[35] And so where defendant in trespass justifies under a legal warrant, an act relied on to make him a trespasser *ab initio* should then be newly assigned.[36] Where under a declaration for several escapes defendant pleads a voluntary return, plaintiff must newly assign if he wishes to confine the defense to any particular escape or escapes.[37] Where a declaration in trespass charges defendant with entering a dwelling-house late at night and seizing and carrying away certain property, and defendant justifies on the ground that he acted under command of a lawful constable serving a warrant, it is incumbent upon plaintiff in his replication to newly assign the entry at an unlawful hour if he intends to rely thereon.[38] Where a declaration contained a minute statement of plaintiff's whole cause of action for breaking and entering his store and forcibly expelling him therefrom, and keeping him out for a considerable time, and the plea professed to answer the whole, not only the breaking and entering but also the ejectment and exclusion of plain-

29. Tyson *v.* Jarvis, 10 U. C. Q. B. 378.

30. Johnson *v.* Reilly, 59 How. Pr. (N. Y.) 354.

31. Jones *v.* Ruttan, 12 U. C. Q. B. 202, 204, where it is said: "It is consistent with what is stated in this plea that the defendant may have let the time go by when he could have sold the goods, and that they now remain in his hands unsold in consequence of that neglect."

32. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391, holding that an answer in such an action which avers as a separate and distinct defense that such person may have wrongfully and privily, and without the knowledge of defendant, escaped, and that, if he did so escape, he afterward returned into custody is insufficient, as it does not deny, either generally or specially, the allegation of the complaint that the sheriff permitted the prisoner to escape.

33. Powers *v.* Wilson, 7 Cow. (N. Y.) 274.

34. Cutler *v.* Haycock, 32 Utah 354, 90 Pac. 897.

35. Graffin *v.* Jackson, 40 N. J. L. 440. But *compare* Lincoln *v.* McLaughlin, 74 Ill. 11, holding that where, in an action by a married woman for trespass to her separate property by a levy upon it as the property of her husband, the defendant justifies under his writ, averring that the property belonged to the husband, a replication *de injuria* is sufficient.

36. Jarratt *v.* Gwathmey, 5 Blackf. (Ind.) 237.

37. Middle Dist. Bank *v.* Deyo, 6 Cow. (N. Y.) 732.

38. Soudant *v.* Wadhams, 46 Conn. 218.

tiff, all of which was traversed in the replication, it was held that the pleadings were sufficient and that no new assignment was necessary.[39] Where a petition against an officer for selling property exempt from execution states the necessary facts, and the answer avers that the property was partnership property, and the judgment was against the firm, such new matter is only a denial, and does not require a reply.[40] Where the complaint in an action against a sheriff to recover property taken by him on attachment averred that plaintiff owned and was entitled to possession of the property in question, and the answer denied the averment, and set up that, at the time of the levy for the wrongful making of which defendant was sued, the property was possessed and owned by a third person, such averments were not new matter which was admitted by failure to file a replication.[41] Where in trespass against a sheriff for entering plaintiff's premises and taking away property the answer averred that the entry was by virtue of an execution and that the property taken was that of the debtor, a replication that the property did not belong to the execution debtor, but to plaintiff, was sufficient on demurrer.[42] Where, in an action against a sheriff to recover the value of property, the answer was that it was sold on execution, a reply stating that, on the same judgment, and by the same justice, a previous execution had been issued and levied on the property, whereupon it had been set off as exempt from execution, was not defective because it did not aver that the judgment on which the execution was issued was within the exemption law.[43] An allegation in the reply to the effect that a writ under which the sheriff acted was void is not a departure from or inconsistent with an allegation in the complaint that defendant was acting as sheriff in the matters complained of.[44] Where a constable sued in trespass justified under a writ of possession, and plaintiff's replication set forth a supersedeas, issued and served on the constable, which recited that plaintiff had sued out a certiorari to the justice, it was held that the replication was defective in not directly averring that a certiorari had been issued.[45] A replication which merely traverses an immaterial allegation of the sheriff's answer is bad.[46]

**5. Rejoinder.** Where a defendant in trespass justifies on the ground that he acted under the command of a lawful officer serving a warrant, and the replication sets forth that such officer had not qualified and therefore had no authority either to act himself or to compel defendant to act, a rejoinder that the officer was such *de facto*, and that defendant believed him to be such *de jure*, and therefore might lawfully submit to his command, is sufficient.[47]

**6. Demurrer.** Where an execution is set out in a complaint for failure to levy the same, the sufficiency of the writ can be questioned only by demurrer.[48]

**7. Amendments.** The court may in its discretion permit the pleadings in an action against a sheriff or constable, like the pleadings in other actions,[49] to be amended where such course appears proper,[50] or refuse to allow an amendment

39. Perry *v.* Carr, 42 Vt. 50, 55, where it is said, however: "If the defendant had merely justified the breaking and entering the store for the purpose alleged, the plaintiff would have been required to new assign if he claimed to recover on the ground that the defendant remained in the store and kept the exclusive possession of it longer than was necessary to make the attachment."

40. Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986.

41. Woodworth *v.* Knowlton, 22 Cal. 164.

42. McGee *v.* Givan, 4 Blackf. (Ind.) 16.

43. Austin *v.* Swank, 9 Ind. 109.

44. Gehlert *v.* Quinn, 38 Mont. 1, 98 Pac. 369, 370, where it is said: "We are of opinion that his status was not changed by the infirmity in his process, although it may thereby have been rendered void. He purported to act by virtue of it, and was none the less acting officially."

45. McWilliams *v.* King, 32 N. J. L. 21.

46. Hale *v.* Dennie, 4 Pick. (Mass.) 501, holding that where, in an action for not levying an execution on goods attached, the officer pleaded a previous attachment of the same goods in the hands of a trustee, and that he took them into his possession, subject to that attachment, a replication traversing that he so took the goods was bad as tendering an immaterial issue.

47. Soudant *v.* Wadhams, 46 Conn. 218.

48. State *v.* Hart, 12 Ind. 424.

49. Amendment of pleadings generally see Pleading, 31 Cyc. 359.

50. Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760, holding that in an action against a sheriff for seizing goods in plaintiff's pos-

which would in its opinion cause injustice [51] or be otherwise improper.[52] Where, in an action against a sheriff for levying on property claimed by plaintiff under process against another, the indemnitors of the sheriff are brought in [53] or substituted as defendants,[54] it is not necessary for plaintiff to amend his complaint by showing the nature of their liability.[55] In an action against a sheriff for conversion, where the petition alleged that the levy of the execution was by him as sheriff, an amendment, filed after an action was barred, which alleged that the levy was made by a deputy sheriff, acting by authority of the sheriff, did not state a new cause of action.[56]

**8. Waiver and Cure of Objections and Defects.**[57] Where a complaint states a cause of action, an objection that it is insufficient in form is cured by a verdict in favor of plaintiff,[58] and even after going to trial it is too late to object to a formal defect in the complaint.[59] So also where a sheriff's indemnitors were brought in as defendants in an action against the sheriff for a wrongful levy,[60] it was held that, although the facts as to the giving of the indemnity and showing that the indemnitors were chargeable were not pleaded either in the complaint or in the answer

session under a writ of attachment against another, the sheriff might be permitted to amend his answer by alleging the filing of the affidavit and bond in the proceedings in which the attachment was issued, although the facts contained in the amendment were known to the sheriff before filing a former amended answer, and although he did not file any affidavits showing cause why the amendment was necessary.

**51.** Redding *v.* Dodge, 59 N. H. 98 (holding that where, in an action against the sheriff of M county for the trespass of his deputy, it appeared that the deputy seized the goods in B county on a writ returnable in M county, and brought them into M county, where he sold them, it was not error to refuse to allow an amendment to the declaration, so as to allege the wrongful taking as in M instead of B county); Roessel *v.* Rosenberg, 10 Misc. (N. Y.) 38, 30 N. Y. Suppl. 812 (holding that where the sureties of the sheriff in a retaking bond, given by the sheriff in a replevin suit against him, which limits their liability to a return of the chattels replevied, or their value, are substituted as defendants, it is error to allow an amendment of the complaint changing the cause of action to conversion).

**52.** Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056, holding that where in an action against a sheriff for the conversion of personal property, he justifies under an execution, and the judgment on which the execution issues is void, it is not error to reject an amendment to the answer alleging more fully the indebtedness on which the original action was brought, and setting forth the petition and writ of attachment.

**53. Bringing in indemnitors as parties defendant** see *supra*, VII, G, 2, b, (II).

**54. Substitution of indemnitors as parties defendant** see *supra*, VII, G, 2, c, (II).

**55.** Richardson *v.* McLaughlin, 55 Minn. 489, 57 N. W. 210 (holding that the sheriff must show the liability of the indemnitors in his answer, and when the indemnitors are properly brought in they might plead to plaintiff's complaint and the sheriff's answer); Poole *v.* Ellison, 56 Hun (N. Y.) 108, 9 N. Y. Suppl. 171 (holding that in such case it was only necessary to prove the cause of action against the sheriff, as the indemnitors were defendants in the place and stead of the sheriff and answering the cause of action alleged against him, for which, if established, they had made themselves liable). See also Kerner *v.* Boardman, 14 N. Y. Suppl. 787 [*affirmed* in 133 N. Y. 539, 30 N. E. 1148].

**56.** Herring *v.* Patten, 18 Tex. Civ. App. 147, 44 S. W. 50.

**57.** See, generally, Pleading, 31 Cyc. 714.

**58.** Doman *v.* Bedunnah, 57 Ind. 219 (holding that a complaint by a widow against a sheriff and his deputy, alleging that the deputy had collected a certain sum, which by law belonged to complainant, on an execution against a third person in favor of the executor of her husband's estate, and that such deputy, having fraudulently forged her name to a pretended receipt on such execution for such money, had unlawfully returned the execution to the clerk's office without having paid the money, to which complaint no objection was made, could not be attacked after verdict on motion in arrest of judgment); Livermore *v.* Boswell, 4 Mass. 437 (holding that a declaration against a sheriff for charging illegal fees for levying an execution, which merely stated the parties to and the date of the execution, without stating from what court it issued or to what court made returnable was cured by verdict); Wetherby *v.* Foster, 5 Vt. 136 (holding that in a suit against a sheriff for neglect to levy on personalty a defective setting forth of the articles and their value which would be bad on demurrer was cured by a verdict for plaintiff).

**59.** State *v.* Beamer, 73 Mo. 37, holding that where the petition in an action against a sheriff for an unlawful levy stated a cause of action, it could not be objected after the trial that it failed to state the value of the property taken.

**60. Bringing in indemnitors as parties** see *supra*, VII, G, 2, b, (II).

of the sheriff, the defect was cured by the answer of the indemnitors, setting forth those facts.[61]

**J. Issues, Proof, and Variance.**[62] The proof adduced in an action against a sheriff or constable must be within the issues presented,[63] must relate to matters set up in the pleadings,[64] and must conform to the pleadings of the party by whom it is sought to be introduced.[65] The material allegations of the complaint or

**61.** Leaher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

**62.** See, generally, PLEADING, 31 Cyc. 670.

**63.** Strong *v.* Patterson, 6 Cal. 156; Livingstone *v.* Brown, 18 Minn. 308; Barnard *v.* Henry, 25 Vt. 289. See also Comstock *v.* Hollon, 2 Mich. 355.

**Proof held within issues.**— Where, in an action against a sheriff, the point in issue is whether or not the sheriff has wrongfully appropriated property which he had seized under legal process, to his own use, proof that he purchased it from defendant, and paid him a part of the purchase-money after the levy, is admissible as tending to show the fact of such appropriation. Griffin *v.* Isbell, 17 Ala. 184.

**64.** *California.*— McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115 (holding that a sheriff, in an action against him for misappropriating funds obtained under an attachment, cannot avail himself of matters which occurred after the issue of the attachment, as operating to dissolve it, unless he specially pleads them); Strong *v.* Patterson, 6 Cal. 156 (holding that in an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor, testimony that the property had been claimed by a third person, and the right of property tried before a sheriff's jury, and decided in favor of the claimant, is irrelevant and inadmissible, when those facts have not been set up, as new matter of defense, in the answer).

*Illinois.*— McGillis *v.* Bishop, 27 Ill. App. 53, holding that in an action against a sheriff for the wrongful seizure of plaintiff's goods under an attachment against a third person, matter showing that defendant by subsequent wrongful acts became a trespasser *ab initio* should be specifically alleged in the reply in order to let in evidence thereof.

*Massachusetts.*— Oystead *v.* Shed, 12 Mass. 506, holding that in trespass *de bonis asportatis*, under a replication *de injuria* to a justification as a deputy sheriff acting under a writ, plaintiff cannot show that, by breaking an outer door, defendant became a treapasser *ab initio*.

*Michigan.*— Hatch *v.* Saunders, 66 Mich. 181, 33 N. W. 178.

*New York.*— Hoffman *v.* Conner, 76 N. Y. 121; Richtmeyer *v.* Remsen, 38 N. Y. 206 (holding that in an action against a sheriff to recover the amount of an execution against a judgment debtor who had escaped from his custody, evidence of facts legally excusing defendant from recapturing the judgment debtor is new matter, and inadmissible under the code, unless set up in the answer); Douglas *v.* Haberstro, 25 Hun 262 [*reversed* on other grounds in 88 N. Y. 611].

*Vermont.*— Sumner *v.* Brown, 34 Vt. 194, holding that in trespass against a sheriff for attaching a cow, on the ground that she was exempt from attachment, plaintiff cannot prove that on the next day after the cow was attached defendant came and took away another cow and converted her to his own use, as such evidence introducea a new and different cause of action.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

**Evidence disproving defense not set up.**— In an action against a sheriff for seizing plaintiff's property under process against another it is not prejudicial error to admit evidence on behalf of plaintiff that he served on the sheriff the sworn claim provided for by Cal. Code Civ. Proc. § 689, although this is not pleaded, as the statute is for the benefit of the sheriff only as matter of defense. Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759.

**Showing vacation of attachment set up.**— In an action against the sheriff for a wrongful taking, wherein the latter justifies under an attachment, plaintiff may show, without further pleading, that the attachment had been vacated, and that the sheriff had subsequently refused to return the property. Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839.

**Refuting claim that execution defendant worthless.**— Where the sheriff, in an action against him for neglecting to return a writ of attachment, pleads that the execution defendant was worthless, fraud in a bill of sale executed by the execution defendant may be shown by plaintiff, although not pleaded. Smith *v.* Tooke, 20 Tex. 750.

**65.** *Alabama.*— Griffin *v.* Ganaway, 6 Ala. 148, holding that an action against a sheriff for failure to levy an attachment on sufficient property cannot be supported by evidence that the money had been collected by the sheriff.

*Connecticut.*— Case *v.* Humphrey, 6 Conn. 130.

*Illinois.*— Wheeler *v.* McCorristen, 24 Ill. 40, holding that a sheriff relying on a justification under an execution must specially plead the execution, and cannot show it under a general plea of property in himself or another.

*Massachusetts.*— Whitney *v.* Bayley, 4 Allen 173, holding that where a sheriff, in an action against him by a mortgagee for the conversion of personal property, justified the taking under a single writ of attachment against the mortgagor, and it appeared that the value of goods which were taken and

petition must be proved as laid,[66] unless such allegations are admitted by the

sold by him was very much larger than the amount which the writ ordered him to attach, he could not be permitted, under such an answer, to introduce evidence to show that he held the surplus remaining, after satisfying the claim in the writ, to be applied to the satisfaction of other attachments.

*Montana.*— Yank *v.* Bordeaux, 29 Mont. 74, 74 Pac. 77, holding that where, in an action against a constable to recover money received as the proceeds of the sale of property levied on, alleged to belong to plaintiff, defendant, in his answer, admitted possession of the money when the demand was made, evidence that at the time of such demand defendant had paid over the money on the executions was properly refused.

*United States.*— Suydam *v.* Aldrich, 23 Fed. Cas. No. 13,652, 3 McLean 383, holding that in an action for an escape, where the declaration describes the judgment upon which the execution was issued, any variance between the judgment described and the record will exclude the record from being received as evidence.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

**Proof held conformable to pleadings** see the following cases:

*California.*— Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692, holding that a sheriff who is sued by a buyer for possession of property seized under attachment against the seller may prove that the sale was fraudulent as to creditors, under a denial of plaintiff's title and possession, and an allegation of title in the seller, in connection with a plea of justification.

*Connecticut.*— De Forest *v.* Brainerd, 2 Day 528, holding that an allegation that the sheriff appointed defendant one of his deputies at a time specified is supported by proof that the sheriff, having previously appointed him, continued him in office at and after that time.

*Michigan.*— Williams *v.* Raper, 67 Mich. 427, 34 N. W. 890 (holding that where the declaration alleges that defendant unlawfully took, sold, and disposed of certain property mortgaged to plaintiff, the latter may introduce evidence that defendant sold the property in parcels, and not in one lot, subject to plaintiff's mortgage); Harvey *v.* McAdams, 32 Mich. 472 [*approved* in Williams *v.* Raper, *supra*] (holding that where the declaration counts upon a conversion of plaintiff's property without stating the nature of his interest a mortgage from the owner to plaintiff is admissible).

*Missouri.*— Jackman *v.* Bentley, 10 Mo. 293, holding that where in an action before a justice of the peace against a constable to recover the amount of illegal fees alleged to have been collected from plaintiff on an execution, the execution was described as in favor of A against B and C, and of date Nov. 1, 1843, an execution in favor of A, assignee of D and E, and against B and C, and of date Nov. 6, 1844, was properly received in evidence.

*New Jersey.*— Grafflin *v.* Jackson, 40 N. J. L. 440, holding that in an action on the case by an owner of chattels, against an officer, for selling them under an execution against D, the defense that the officer sold only the right, title, and interest of D, to whom the chattels were leased, and that plaintiff had not sustained, at the time of the commencement of the suit, and would not sustain, any damage therefrom, could be made under the general issue.

*New York.*— Crounse *v.* Bailey, 10 N. Y. Suppl. 273 (holding that in an action against a sheriff for failure to levy and return an execution, where defendant pleads that the judgment was, at the date thereof, and is yet, uncollectable, he may give evidence that the judgment debtor had no property subject to levy); Michaels *v.* Shaw, 12 Wend. 587 (holding that, in an action against a sheriff for a false return, a return made long after the return-day may be given in evidence under a declaration alleging such return to have been made on the return-day); Lindsley *v.* Keys, 5 Johns. 123 (holding that where, in an action for trespass against a special constable, defendant pleaded the general issue, and gave notice of special matter to the effect that defendant having a warrant issued by a justice of the peace in favor of the other defendant, against plaintiff, repaired to the dwelling-house of plaintiff for the purpose of arresting him by virtue of the warrant, that the other defendant accompanied the constable as the creditor of plaintiff, for the purpose of settling his demand, etc., the warrant was sufficiently set forth in the notice to entitle defendant to offer it in evidence).

*Texas.*— Freybe *v.* Tiernan, 76 Tex. 286, 13 S. W. 370, holding that in an action against a sheriff for the seizure of goods conveyed to plaintiff evidence of a counter-claim of the debtor against plaintiff is admissible under an averment in the answer that the debt in consideration of which the goods were conveyed to plaintiff was fictitious.

*England.*— Jones *v.* Clayton, 4 M. & S. 349, holding that where a plaintiff declares for a false return of *nulla bona* against the goods of R and S, and alleges that, although R and S had goods, etc., within his bailiwick, yet the sheriff did not levy, etc., this allegation is sustained by proof that either R or S had goods.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

66. Reeder *v.* Huffman, 148 Ala. 472, 41 So. 177, holding that where plaintiff alleged that defendant, a constable, "refused and wholly failed" to execute two writs for the seizure of personal property, etc., the allegation being conjunctive, plaintiff was bound to prove, not only that the constable failed to exercise due diligence, but that he refused to execute the process.

**Official character.**— In trespass against a

answer,[67] but such proof is not necessary as to allegations which are merely surplusage.[68] And so also where a complaint against a sheriff for seizing plaintiff's goods charges a trespass on land, but also charges that defendant took therefrom the goods of plaintiff, copying substantially the form for trespass in taking goods, it is not necessary for plaintiff to prove trespass on land.[69] When it is alleged in the petition, and not denied, that plaintiff was the owner of property sold on execution, the action cannot be defeated by proof that his wife owned the property.[70] A material variance between pleading and proof is fatal to an action against a sheriff or constable for alleged official misconduct or default;[71] but a variance which does not affect the gist of the action or mislead the adverse party to his prejudice is immaterial and will not prevent a recovery.[72] So as a sheriff is responsible for the official default or misfeasance of his deputy[73] an allegation that an act was done or omitted by a sheriff may be supported by proof that it was done or omitted by a deputy.[74] It has been held that under a general denial defendant cannot show in evidence matters tending to excuse merely and not to disprove the act or

constable for taking exempt goods on execution, it is not necessary to prove the official character of the officer who issued the writ under which defendant acted, or the official character of defendant in the suit. Wymond *v.* Amsbury, 2 Colo. 213.

**Proof of one of several counts.**— Where in an action for an escape the declaration contains several counts stating escapes on different days but at the trial plaintiff proves only one judgment, he can recover on only one count. Middle Dist. Bank *v.* Deyo, 6 Cow. (N. Y.) 732.

**67.** Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111, holding that in an action against a sheriff for trespass it is not necessary to prove that defendant was sheriff, where his plea of justification states that he was such officer.

**68.** Tudor *v.* Lewis, 3 Metc. (Ky.) 378 (holding that where the petition of one who seeks to hold a sheriff responsible for a loss of property through negligence of such sheriff alleges a greater degree of negligence than is necessary for creating such responsibility, such fact does not oblige plaintiff to prove such extra negligence); Jones *v.* Cook, 1 Cow. (N. Y.) 309 (so holding as to an allegation setting forth an indorsement on the execution, and directing the sheriff what sum to levy); Garrett *v.* Hutchinson, 86 Va. 872, 11 S. E. 406 (holding that in trespass on the case against a sheriff for the unlawful levy and seizure of plaintiff's goods under the alleged authority of an execution against a stranger, plaintiff need not offer in evidence the execution under which the levy was made, as the fact that the levy was made under a proper execution is matter of defense). See also Middle Dist. Bank *v.* Deyo, 6 Cow. (N. Y.) 732.

**69.** Smith *v.* Kaufman, 100 Ala. 408, 14 So. 111.

**70.** Sharp *v.* Wood, 51 S. W. 15, 21 Ky. L. Rep. 189.

**71.** Churchman *v.* Stockton, 46 Ill. 410 (holding that in an action against an officer for a wrongful levy of an execution, a declaration describing the execution as in favor of A for the use of B and C, against D, was not sustained by proof of an execution in favor of B and A for the use of C against D); State *v.* Martin, 77 Mo. 670 (holding that where a petition against a sheriff charged only a wrongful levy, seizure, and detention of goods, the sheriff was not liable thereunder for an excessive sale).

**72.** Plumleigh *v.* Cook, 13 Ill. 669; Fields *v.* Vallance, 87 S. W. 770, 27 Ky. L. Rep. 992 (holding that where, in an action against a sheriff for the destruction of property in his custody under a writ of attachment, the petition alleged that the loss was due to the negligence of the sheriff's agent, while the proof showed that the negligence was that of a care-taker appointed by the sheriff's deputy, while the answer denied any negligence, the variance was harmless); Crane *v.* Dygert, 4 Wend. (N. Y.) 675; Jones *v.* Cook, 1 Cow. (N. Y.) 309 (holding that where the declaration in an action for an escape set forth an execution, with the usual words, "and him safely keep," and the execution produced in evidence omitted the word "keep," there was not a fatal variance); Page *v.* Woods, 9 Johns. (N. Y.) 82 (holding that where the declaration against a sheriff for an escape alleged a judgment recovered in the common pleas, held, etc., at S, in the county of W, etc., and in the record produced in evidence the town was not mentioned, the variance was immaterial); Bissell *v.* Kip, 5 Johns. (N. Y.) 89; Patten *v.* Sowles, 51 Vt. 388 (holding that where the declaration in case against a constable alleged that defendant refused to serve a writ put into his hands, whereby plaintiff lost his debt, and the proof was that plaintiff offered defendant the writ, and requested him to serve it immediately, and the latter refused to serve it, for reasons given, and did not take it into his hands, there was no variance).

**73.** See *supra*, V, B.

**74.** *Alabama.*— Prewitt *v.* Neal, Minor 386.

*Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

*California.*— Poinsett *v.* Taylor, 6 Cal. 78.

*Maine.*— Pratt *v.* Bunker, 45 Me. 569.

*Texas.*—Tarver *v.* Carter, (Civ. App. 1897) 42 S. W. 229.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

default complained of,[75] unless, where such is the practice, notice has been given that defendant intends to show such matters;[76] but there is also considerable authority for the contrary view.[77] Where in an action against a sheriff for his refusal to levy a writ against property, the petition alleged that the debtor "had sufficient property and effects on which a levy might have been made to have fully satisfied plaintiff's demand," and a general denial to the petition was filed, and plaintiff's evidence tended to show the debtor's ownership of a stock of goods, evidence of chattel mortgage liens on the goods to an amount in excess of their

75. *Alabama.*— Daniel *v.* Hardiwick, 88 Ala. 557, 7 So. 188 (holding that where a demurrer to a plea in justification by a sheriff that he took the property on an execution against plaintiff's husband had been sustained, and defendant had to plead over, he could not, on the trial under the general issue, introduce evidence of the judgment and execution, for the purpose of showing that plaintiffs therein were creditors of the husband, and that the wife's claim was fraudulent as to them); Davis *v.* Hooper, 4 Stew. & P. 231, 24 Am. Dec. 751 (holding that in an action of trespass against a sheriff for taking goods, he cannot, under the general issue, show that the goods were taken as the property of plaintiff's father, and that they were his property, although in plaintiff's possession).

*California.*— Glazer *v.* Clift, 10 Cal. 303, holding that where in an action to recover possession of goods alleged to be the property of plaintiff and to have been wrongfully seized and detained by defendant, the answer is merely a general denial, defendant cannot show on the trial that the goods were seized under process.

*Maine.*— Daggett *v.* Adams, 1 Me. 198.

*Michigan.*— See Wait *v.* Kellogg, 63 Mich. 138, 30 N. W. 80. But *compare* McLaughlin *v.* Smith, 45 Mich. 277, 7 N. W. 908.

*New York.*— Klinger *v.* Bondy, 36 Hun 601, holding that, in an action for wrongfully attaching plaintiff's property on a writ against another, the sheriff could not show under a general denial that plaintiff's title was founded in fraud.

*Texas.*— Reilly *v.* Lewis, (Civ. App. 1898) 47 S. W. 552, holding that an officer who is sued for failing to seize certain property under an order of sale and execution cannot show a general denial that the property was in the possession of another officer, under another writ.

*Vermont.*— Briggs *v.* Mason, 31 Vt. 433 [*recognized* in Collins *v.* Perkins, 31 Vt. 624], holding that where, in trespass against an officer for taking certain goods, defendant pleaded the general issue, and plaintiff, in making out his case, put in evidence the writ and return under which the goods were taken, defendant could not take advantage of the justification thus made out by plaintiff's evidence.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

**Evidence tending merely to mitigate the damages,** but not to justify the trespass, is admissible under the general issue. Collins *v.* Perkins, 31 Vt. 624.

76. Wait *v.* Kellogg, 63 Mich. 138, 30 N. W. 80. But *compare* McLaughlin *v.* Smith, 45 Mich. 277, 7 N. W. 908.

**Under Ark. Rev. St. c. 116, § 71,** authorizing special matter to be given in justification under the general issue in trespass against an officer by giving notice thereof, where a constable sued in trespass desires to introduce under the general issue special matter in justification, he must not only file a notice in writing to the adverse party, but must set out substantially the facts relied on in justification. Pryor *v.* Clay, 7 Ark. 96.

**Sufficiency of special notice of defense.**— Where, in trespass *de bonis* against the sheriff, the defense is that the goods were taken under attachment against a third person, a special notice of such defense, giving the names of the parties, the dates and commands of the writs, and the taking of the property by virtue thereof, is sufficient to warrant the introduction as evidence of the writs and attachments, although it does not mention the affidavits required to be annexed, and which were annexed, to the writ. Rosenbury *v.* Angell, 6 Mich. 508.

77. *Massachusetts.*— Fuller *v.* Holden, 4 Mass. 498, holding that in an action against an officer for not levying an execution on goods which had been attached, he may show property in a stranger under the general issue.

*Michigan.*— McLaughlin *v.* Smith, 45 Mich. 277, 7 N. W. 908, holding that, in trover against an officer, justification under process could be shown under the general issue, and notice was not essential. But *compare* Wait *v.* Kellogg, 63 Mich. 138, 30 N. W. 80.

*New Jersey.*— Hall *v.* Snowhill, 14 N. J. L. 551, holding that in an action on the case for an injury to a reversionary interest, defendant might show under the general issue that he seized the goods as sheriff by virtue of a judgment and execution, and that the mortgage under which plaintiff claimed was void as against creditors.

*Pennsylvania.*— McBride *v.* Duncan, 1 Whart. 269, holding that, in trespass against a sheriff for taking plaintiff's goods, he might show under the general issue that the goods belonged to a third person at the time of the trespass, and that he took them under a judgment and execution against the third person.

*South Carolina.*— Paris *v.* Du Pre, 17 S. C. 282 (holding that under a general denial to a complaint which alleged plaintiff's lawful possession of personal property taken from him by defendant, and demanded its recovery and damages, defendant, after proof of his

value was admissible under the general denial.[78] In an action to recover from a sheriff the amount received on a sale of property under execution, an order of court fixing the compensation of a special custodian in accordance with a statute providing that the court shall allow such compensation, is admissible without being specially pleaded.[79] A sheriff is not bound to prove all the facts set up in his defense if he proves enough to relieve him of legal liability.[80] It has been held that where, in an action against a sheriff for neglecting to return an execution, he gives evidence that the execution defendant in the fieri facias did not have sufficient property to satisfy the writ, plaintiff may show that he did have such property, although the declaration contains no averment on the subject.[81] And where, in an action against a constable for failure to execute and return a writ, defendant sets up as a defense that he had delivered the writ over to another officer, who had returned it in due time, but unsatisfied, plaintiff may show, without any allegation to that effect in his declaration, that after such delivery to the other officer the constable sued had given information of it to the debtor, who was able thereby to avoid the execution.[82] Where the sheriff justifies a seizure under process, plaintiff cannot show that the property taken was exempt where such exemption has not been pleaded by him.[83] Where in an action against a sheriff he set up a bond of indemnity and prayed that his indemnitors be made parties, and that he have judgment over against them for whatever sum was adjudged against him, and such indemnitors were made parties and answered plaintiff's petition, but did not answer defendant's cross action, it was not necessary for defendant to put in evidence the indemnity bond to entitle him to judgment over against the indemnitors as by default.[84]

**K. Evidence**[85] — **1. Presumptions.** The presumption of law that public officers have done their duty[86] applies in its full force in the case of sheriffs and constables and their deputies and assistants.[87] But such presumption will not

seizure, as sheriff, of such property under attachment against one W, and that W had been the owner, might offer evidence to show a want of *bona fide* consideration in the transfer from W to plaintiff, although the answer alleged neither fraud nor facts tending to show it); Traylor *v.* McKeown, 12 Rich. 251 (holding that a constable sued for seizing goods might justify by producing the execution under which he acted, under the general issue).

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 289.

**Confusion of goods.**— In trespass for an illegal levy on plaintiff's goods, the officer under the general issue may show that they had been so intermingled with the debtor's goods that it was impossible for him to distinguish between them. Taylor *v.* Jones, 42 N. H. 25.

78. Phelps *v.* Skinner, 63 Kan. 364, 65 Pac. 667.

79. Blyth *v.* People, 16 Colo. App. 526, 66 Pac. 680.

80. Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309; Middle Dist. Bank *v.* Deyo, 6 Cow. (N. Y.) 732, holding that in an action for an escape an averment in a plea of a voluntary return or recaption "that the prisoner continued in custody intermediate the return or recaption, and the suit" is immaterial, and need not be proved under an issue on the plea. But *compare* Clarkson *v.* Crummell, 37 N. J. L. 541, holding that where, in an action of trespass *quare clausum fregit*, a sheriff pleaded justification under a judgment in ejectment, and a writ of habere facias thereon, and the judgment did not include the land in question, the officer, having pleaded the judgment, could not justify under the writ alone.

81. Pardee *v.* Robertson, 6 Hill (N. Y.) 550. But *compare* Stevens *v.* Rowe, 3 Den. (N. Y.) 327 [*doubting* Pardee *v.* Robertson, 6 Hill (N. Y.) 550; Rome Bank *v.* Curtiss, 1 Hill (N. Y.) 275], holding that where in an action against a sheriff for neglecting to return an execution there was no averment in the complaint that the debtor had real estate, and there was evidence that there was not sufficient personal property to satisfy the writ, plaintiff could not show that the debtor had real estate.

82. Isham *v.* Eggleston, 2 Vt. 270, 19 Am. Dec. 714, holding also that plaintiff might show on trial, without any allegation to that effect in his declaration, that the constable failed of service, and plaintiff had sustained damage by reason of the constable not retaining the execution in his hands, or in consequence of some act or omission of duty in regard to it, for which he would have been liable if he had retained it.

83. Beatty *v.* Holloway, 4 Ala. 178.

84. Davis *v.* Bingham, (Tex. Civ. App. 1895) 33 S. W. 1025.

85. See, generally, Evidence, 16 Cyc. 821.

86. See Evidence, 16 Cyc. 1076.

87. *Alabama.*— Smith *v.* Heineman, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150.

be indulged as to the acts of one officer where the effect thereof would be to put another officer in default.[88] It is also presumed that a sheriff or constable knows his duty,[89] and hence when he is shown to have been guilty of misconduct the presumption arises that his act was wilful.[90] Where an officer is sued upon the ground that he exceeded his authority, it is not to be presumed that he was justified by extraordinary circumstances.[91] The statements in a sheriff's return are presumed to be true.[92] Injury to an execution creditor is presumed where an officer fails to levy the execution on property in defendant's possession,[93] or to make the money within the time prescribed by law.[94] In an action against a sheriff for not executing process, if a writ of sequestration be proved to have issued, the presumption is that the citation also issued as prayed for in the petition.[95] Where an officer has failed to return an order for the sale of attached property it will be presumed that the property was sufficient to satisfy the debt;[96] and where a sheriff neglects to return an execution within the time required by law, or to levy on property as commanded in the writ, it will be presumed that plaintiff in the execution has suffered the loss of his debt;[97] but in an action against a sheriff for failure to return an execution it will not be presumed without any allegation to that effect that he failed to pay over the money collected under the writ.[98] Where a sheriff allows a debtor arrested on civil process to escape, the presumption is that the creditor lost the entire debt thereby,[99] and if the prisoner returns after a volun-

*Colorado.*— Leppel *v.* Kus, 38 Colo. 292, 88 Pac. 448.

*Illinois.*— Dukes *v.* Rowley, 24 Ill. 210.

*Indiana.*—Adams *v.* Hessian, 11 Ind. App. 598, 39 N. E. 530.

*Kentucky.*— Caae *v.* Colston, 1 Metc. 145; Smith *v.* Com., 4 S. W. 798, 9 Ky. L. Rep. 215.

*Louisiana.*— Drouet *v.* Rice, 2 Rob. 374; Brosnahan *v.* Turner, 16 La. 433.

*Maine.*— Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

*New York.*— Barhydt *v.* Valk, 12 Wend. 145, 27 Am. Dec. 124.

*North Carolina.*— McLane *v.* Moore, 51 N. C. 520.

*Oregon.*— Butler *v.* Smith, 20 Oreg. 126, 25 Pac. 381.

*Rhode Island.*— Foster *v.* Berry, 14 R. I. 601.

*Texas.*— Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682.

*Virginia.*— Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612.

*United States.*— Simon *v.* Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. ed. 1165.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 290.

**Accordingly it will be presumed** that an officer acted in good faith in making an attachment (Mullen *v.* Sherman, 37 Vt. 493); that a sheriff made a proper application of money coming into his hands as the proceeds of an execution sale (Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612); that money received by a sheriff from the county treasurer, under a resolution of the board of county commissioners, was disbursed by him also, under the resolution, for the benefit of the county (Mecosta County *v.* Vincent, 65 Mich. 503, 33 N. W. 44); that a sheriff has paid the surplus realized from the sale of land above the sum due on a decree of foreclosure, to the clerk of court, as required by statute (Butler *v.* Smith, 20 Oreg. 126, 25 Pac. 381); and that a sheriff exercised proper care in respect to property in his official custody (Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487).

**All presumptions** are against an officer suppressing process of the court in his hands. Stout *v.* Hopping, 6 N. J. L. 125.

**88.** Brown *v.* Wallis, (Tex. Civ. App. 1906) 101 S. W. 1068, holding that where it is sought to charge the sheriff for personal injuries inflicted on plaintiff by his deputy it cannot be presumed that at the time of the act complained of the deputy was acting within the scope of his authority. See also Skinner *v.* White, 9 N. H. 204. But *compare* Gordon *v.* Wilkins, 20 Me. 134, holding that in an action against a sheriff for the default of his deputy in not retaining certain property under an attachment, a demand made by the officer having the execution issued on a judgment in the attachment suit on such deputy, by whom the attachment was made, on the last day of the continuance of the lien created by the attachment, will be presumed to have been in sufficient season on that day to enable such deputy to discharge himself, and to render the sheriff liable.

**89.** Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

**90.** Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

**91.** Stilson *v.* Gibbs, 40 Mich. 42.

**92.** Lay *v.* Boyce, 3 La. Ann. 622.

**93.** Armstrong *v.* Jones, 34 Ga. 309; Hixon *v.* Callaway, 2 Ga. App. 678, 58 S. E. 1120.

**94.** Hixon *v.* Callaway, 2 Ga. App. 678, 58 S. E. 1120.

**95.** Dupuy *v.* Barlow, 4 Mart. N. S. (La.) 239.

**96.** Ranken *v.* Jones, (Tex. Civ. App. 1899) 53 S. W. 583.

**97.** Moore *v.* Floyd, 4 Oreg. 101.

**98.** Hoag *v.* Warden, 37 Cal. 522.

**99.** Faulkner *v.* State, 6 Ark. 150.

tary escape the affirmation of the recaption by plaintiff in execution, so as to destroy his right of action against the sheriff for the escape, will not be presumed.[1] In an action by a mortgagor against a sheriff for damages for having sold the mortgaged premises without giving due notice of sale, it will be presumed that the mortgagor was the owner of the premises at the time the mortgage was executed.[2] In an action against an officer for neglect to seize property in a debtor's possession it may be presumed that such property belonged to the debtor.[3] Where an officer who has attached a horse and wagon is seen driving the same, there is no presumption that such use is unlawful.[4] Where a sheriff, who has attached goods on process against a fraudulent vendee, refuses on demand by the vendor, to deliver the goods, without requiring any evidence of the vendor's title, or expressing any doubts concerning it, the jury, in an action of trover by the vendor, may presume a waiver by the officer of any information on that subject.[5] Where a sheriff holds two executions against the same debtor, on one of which he has received an indemnifying bond, and he levies and sells the property levied on, and an action on the bond is brought by a claimant of the property, it will be presumed, in the absence of all evidence to the contrary, that the sheriff sold the property under the execution for which he was indemnified, rather than under that for which he had no indemnity.[6] Where indemnity is given to a sheriff for the purpose of inducing him to levy on certain property the presumption is that the indemnitors thereby made themselves parties to the trespass.[7] In an action against a sheriff for seizing goods of plaintiff in an execution against another person, the fact that about a year before the levy the sheriff in his official capacity sold the goods to plaintiff affords no presumption that the goods belonged to plaintiff at the time of the levy.[8]

**2. Burden of Proof — a. In General.** In an action against a sheriff or constable for an official default or misfeasance the burden rests upon plaintiff to make out his case,[9] and to show the extent of the damage suffered by him;[10] but where the officer admits the act or omission complained of and seeks to justify the same he assumes the burden of proof as to the matters relied on in justification,[11] and the burden of proof also rests upon the officer where he sets up affirmative defenses resting upon matters peculiarly within his knowledge.[12] Where a sheriff or constable justifies under his office it is incumbent upon him to establish his title to such office,[13] while if he justifies under process he must produce such process in evidence.[14]

**b. In Actions For Particular Defaults or Misfeasances** — (i) *Failure to Levy or Execute Process.* In an action against a sheriff for failure to make a levy

1. Brown *v.* Littlefield, 1 Wend. (N. Y.) 398.

2. State *v.* Leach, 10 Ind. 308, holding that if he has since sold his equity of redemption that is a matter to be affirmatively alleged by defendant.

3. Bradford *v.* McLellan, 23 Me. 302.

4. Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75, holding that the jury might infer from the circumstances that he was removing them for the purpose of securing them in a convenient place while subject to the attachment.

5. Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

6. Hartman *v.* Campbell, 5 W. Va. 394.

7. Pool *v.* Ellison, 56 Hun (N. Y.) 108, 9 N. Y. Suppl. 171.

8. Kissock *v.* Jarvis, 9 U. C. C. P. 156.

9. Jackson *v.* Comisky, 30 Misc. (N. Y.) 622, 62 N. Y. Suppl. 705.

10. Jones *v.* Fletcher, 41 Me. 254.

11. *Delaware.*— Saunders *v.* Millward, 4 Harr. 246.

*Louisiana.*— Montegut *v.* Waggaman, McGloin 69.

*Michigan.*— Stilson *v.* Gibbs, 40 Mich. 42.

*New York.*— Hills *v.* White, 71 Hun 511, 24 N. Y. Suppl. 1065; Lord *v.* Brown, 5 Den. 345.

*Rhode Island.*— Smith *v.* Wilson, 21 R. I. 327, 43 Atl. 634.

*Wisconsin.*—Shultz *v.* Frank, 1 Wis. 352.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 290.

12. Faulkner *v.* State, 6 Ark. 150.

13. Calvert *v.* Stone, 10 B. Mon. (Ky.) 152; Smith *v.* Wilson, 21 R. I. 327, 43 Atl. 634. See also Copley *v.* Rose, 2 N. Y. 115.

14. McCune *v.* Peters, 54 Misc. (N. Y.) 165, 105 N. Y. Suppl. 896. See also Copley *v.* Rose, 2 N. Y. 115.

**Showing necessary where property claimed by person other than defendant in process** see *supra*, V, L, 9.

under process the burden is upon plaintiff to show that defendant in such process had property subject to levy which the sheriff neglected to seize,[15] and out of which the money could have been made,[16] and that plaintiff has been damaged by the officer's default.[17] Where the officer sets up that property in the possession of the debtor did not belong to him, the burden of proving that such is the fact rests upon the officer,[18] while if he justifies his refusal to levy an execution by alleging that the property of the judgment debtor had been previously mortgaged for a valuable consideration, the burden is on him to establish the *bona fides* of the mortgage.[19] So also, where the sheriff seeks to avoid liability for failure to serve or execute process on the ground that the person against whom the process was directed was insolvent, the burden is on him to show such insolvency,[20] while if he seeks to avoid liability for a failure to levy on the ground that the property was exempt, or not subject to levy, he must affirmatively show that fact.[21]

(II) *WRONGFUL LEVY OR SEIZURE* — (A) *In General.* Where an attachment suit against two defendants is dismissed as to one, who thereupon brings an action against the sheriff to recover money collected under the attachment, it is incumbent upon him to show that such money belonged to him and not to his co-defendant.[22]

(B) *Seizure of Property Under Process Against Another.* In an action against a sheriff for levying on plaintiff's property under process against another, it is incumbent on plaintiff to prove his ownership,[23] and that the sheriff had or was chargeable with notice thereof.[24] But where plaintiff proves a sale to him which

15. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364; Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665; Phelps *v.* Cutler, 4 Gray (Mass.) 137; Davis *v.* Johnson, 3 Munf. (Va.) 81, holding that where the return on the execution is "that there were no effects with which the debt could be satisfied," the burden of proof is thrown on plaintiff of proving the falsehood of such return.

**Shifting of burden.**— Evidence that, several days before the levying of an attachment, there was more property on hand than the sheriff afterward levied on, does not of itself create a presumption against a sheriff, so as to shift the burden on him to show that he levied on all the property there was, its probative force being for the jury. Smith *v.* Heineman, 118 Ala. 195, 24 So. 364.

16. Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665.

17. Wolfe *v.* Dorr, 24 Me. 104. But *compare* Moore *v.* Floyd, 4 Oreg. 101.

18. Bradford *v.* McLellan, 23 Me. 302.

19. Studebaker Bros. Mfg. Co. *v.* Zollars, 12 S. D. 296, 81 N. W. 292.

**After a mortgage valid on its face is shown** the burden is on the other party to invalidate the mortgage by showing it to be fraudulent, and it is not for the sheriff affirmatively to prove that it was not so. Smith *v.* Cicotte, 11 Mich. 383.

20. Murphy *v.* Troutman, 50 N. C. 379 [*followed* in Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459]; Taylor *v.* Fryar, 18 Tex. Civ. App. 266, 44 S. W. 183.

**Transfer to assignee for benefit of creditors.** — Where a sheriff seeks to excuse his failure to execute an attachment upon the ground that the property upon which he was directed to levy had been transferred to an assignee for the benefit of creditors, it is incumbent upon him to show that a bond had been filed by the assignee within the time required by statute, or that creditors had intervened to enforce the assignment. Beard *v.* Clippert, 63 Mich. 716, 30 N. W. 323.

21. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187; Bonnell *v.* Bowman, 53 Ill. 460; Terrell *v.* State, 66 Ind. 570.

**Officer bound to prove valid exemption.**— Johns *v.* Robinson, 119 Ga. 59, 45 S. E. 727; Smith *v.* Banks, 60 Ga. 642.

22. Michener *v.* Fransham, 33 Mont. 108, 81 Pac. 953, holding that after such evidence has been introduced, the sheriff is entitled to show, if possible, that such was not the fact, but that he is entitled to hold the money to apply upon any judgment which the attachment plaintiff may recover against the other attachment defendant.

23. West *v.* St. John, 63 Iowa 287, 19 N. W. 238; Whipple *v.* Walsh, 167 Mass. 470, 45 N. E. 932 (holding that this was true even though the answer justified the taking only on the ground that the property belonged to defendant in the attachment, defendant having denied plaintiff's ownership); McKay *v.* Ross, 40 Mich. 548.

**Distinguishing intermingled goods.**— One purchasing goods, after a lien has attached thereon by a delivery of a writ of execution against the owner to a sheriff, and mingling goods of his own with such goods, has the burden of showing which goods are his exclusive property, in an action against the sheriff for taking them under his writ. James *v.* Burnet, 20 N. J. L. 635.

24. West *v.* St. John, 63 Iowa 287, 19 N. W. 238. But *compare* Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242, holding that in an action by the trustee of an insolvent debtor to recover damages against a deputy sheriff for taking

defendant claims was fraudulent, the burden of proving the sale fraudulent rests upon defendant.[25]

(c) *Levy on Exempt Property.* In an action for levying on property claimed to be exempt the burden is upon plaintiff to prove the facts making such property exempt.[26]

(III) *FAILURE TO INDORSE DAY OF RECEIPT ON EXECUTION.* In an action against a sheriff for failure to indorse on an execution the date of delivery to him, the burden is on plaintiff to show that the writ was delivered before the return-day thereof.[27]

(IV) *LOSS OF PROPERTY.* Where, in an action against a sheriff for not safely keeping goods in his official custody, he proves the loss of the goods and the attendant circumstances, the burden of proof is then on the creditor to show negligence.[28]

(V) *RELEASE OF PROPERTY LEVIED ON.* Where an officer releases property levied on the burden rests upon him to show a sufficient cause for his action.[29]

(VI) *WRONGFUL SALE OF PROPERTY.* Where an officer sells goods attached on mesne process, and after the dismissal of the suit in which the goods were attached defendant therein sues him for the proceeds of the goods and he defends upon the ground that the goods were the property of a third person who has demanded or recovered of him satisfaction for the seizure, the burden of proving such defense rests upon the officer.[30]

(VII) *DELAY IN SELLING PROPERTY LEVIED ON.* Where a sheriff relies on the acquiescence of an execution plaintiff to relieve him from liability for improperly postponing a sale it is incumbent on him to prove such acquiescence and the time of it.[31]

(VIII) *FAILURE TO PAY OVER MONEY.* Where a sheriff is sued for failure to turn over money collected on execution within the proper time after demand, it is incumbent on him to show that he acted in good faith and that the money was not detained for improper purposes.[32]

(IX) *WRONGFUL DISTRIBUTION OF PROCEEDS OF SALE.* In an action for a wrongful distribution of the proceeds of a sheriff's sale, the burden is upon plaintiff to make out his case by showing not only that he had a lien against the property sold, but that he had a right to participate in the proceeds and that the sheriff paid the money to others who were not entitled to receive it.[33]

(X) *FAILURE TO TAKE BOND.* Where, in an action against an officer for serving a writ of replevin without taking a bond, it is proved that the bond returned with the writ was made originally to a different obligee, and was altered by the

out of his possession certain personal property included in an assignment, and afterward selling the same, the burden is on defendant to prove that he had no knowledge of the assignment, although the complaint alleges that plaintiff made demand for the attached property and informed defendant of the fact that the assignment had been made, and such allegations are denied in the answer.

25. Stewart *v.* Thomas, 15 Gray (Mass.) 171. See also State *v.* Fidelity, etc., Co., 94 Mo. App. 184, 67 S. W. 958.

26. Clapp *v.* Thomas, 5 Allen (Mass.) 158.

27. O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413.

28. Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

The fact that the property was stolen from the officer does not afford presumptive evidence of a want of ordinary care. Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487.

29. Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665 (holding that the burden is on the sheriff to show that the property released was exempt); Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420; Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580; Blivin *v.* Bleakley, 23 How. Pr. (N. Y.) 124 (holding that where a sheriff released goods which he had seized on the ground that he had discovered that they were not the property of the execution debtor, the burden was on him to show property in the goods out of the execution debtor).

30. Mansfield *v.* Sumner, 6 Metc. (Mass.) 94.

31. Fisher *v.* Vanmeter, 9 Leigh (Va.) 18, 33 Am. Dec. 221, holding proof of the time necessary because acquiescence after the sale would be of little importance, the mischief being done.

32. Thomas *v.* Yates, 1 McMull. (S. C.) 179.

33. Dowd *v.* Crowe, 205 Pa. St. 214, 54 Atl. 780.

officer, who made it payable to plaintiff, the burden of proof is on the officer to show that he had authority to make such alteration.[34]

(xi) *Failure to Return Process.* In an action against a sheriff for failing to return an execution, the burden is on defendant to prove that he did return the process,[35] or show facts excusing his default,[36] or that plaintiff suffered no loss by reason of his default.[37] But where plaintiff alleges that defendant in execution had property sufficient to satisfy the same, he has the burden of proving that such was the fact.[38] In order to enforce the liability of a constable for failing to return an execution for commonwealth notes, the value of the notes at the return-day must be proved.[39]

(xii) *Failure to Return Order of Sale.* Where it is sought to recover against an officer the amount of a judgment in attachment, on account of his neglect to return an order of sale of the attached property, the burden of showing that the property was not sufficient to satisfy the judgment is on the officer.[40]

(xiii) *False Return.* Ordinarily in an action against a sheriff for falsely returning an execution *nulla bona*, the burden is on plaintiff to show that there was property on which defendant, by the exercise of proper diligence, could have levied, and not on defendant to show that he could find none;[41] but a sheriff who levies on property and returns *nulla bona* assumes the responsibility, in an action against him for a false return, of supporting his return by showing that the property levied on did not belong to the debtor.[42]

(xiv) *Personal Injury Inflicted by Deputy.* In an action against a sheriff for a personal injury inflicted by his deputy it is incumbent upon plaintiff to show that when the injury was inflicted the deputy was acting in his official capacity and within the scope of his authority.[43]

(xv) *Wrongful Arrest.* In an action for an unlawful arrest on execution, the burden of proof is on plaintiff to show that he had property clearly subject to the execution, and that the officer had due notice thereof.[44]

(xvi) *Escape.* In an action for an escape on mesne process plaintiff must show the cause of action in the original suit,[45] the issuance of the warrant[46] and its delivery to the officer,[47] the arrest,[48] and the escape,[49] unless those matters are admitted by the pleadings;[50] but it is not necessary for him to show that the debtor was in solvent circumstances so that the debt could have been made out of him.[51] It is incumbent on the sheriff to prove that there was no negligence on his part,[52] and that the proper means were used to retake the prisoner.[53]

**3. Admissibility of Evidence — a. In General.** Subject to the general rules of evidence[54] any evidence is admissible which bears upon the right to recover or properly tends to establish or refute the contentions of either party,[55] or to

34. Dolbier *v.* Norton, 17 Me. 307.

35. State *v.* Melton, 8 Mo. 417, holding, however, that in the case at bar the burden of proof was shifted to plaintiff, who undertook to prove that no return of the process was made by inattention to an evasive plea of the sheriff that he did not neglect to return, etc.

36. Wilson *v.* Wright, 9 How. Pr. (N. Y.) 459.

37. Moore *v.* Floyd, 4 Oreg. 101.

38. Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500.

39. Williams *v.* Hall, 2 Dana (Ky.) 97.

40. Ranken *v.* Jones, (Tex. Civ. App. 1899) 53 S. W. 583.

41. Watson *v.* Brennan, 66 N. Y. 621.

42. Magne *v.* Seymour, 5 Wend. (N. Y.) 309 [*approved* in Buffalo Third Nat. Bank *v.* Elliott, 42 Hun (N. Y.) 121 (*affirmed* in 114 N. Y. 622, 21 N. E. 416)].

43. Brown *v.* Wallis, (Tex. Civ. App. 1906) 101 S. W. 1068.

44. Barhydt *v.* Valk, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124.

45. Faulkner *v.* State, 6 Ark. 150.

46. Faulkner *v.* State, 6 Ark. 150.

47. Faulkner *v.* State, 6 Ark. 150.

48. Faulkner *v.* State, 6 Ark. 150.

49. Faulkner *v.* State, 6 Ark. 150.

50. Faulkner *v.* State, 6 Ark. 150.

51. Faulkner *v.* State, 6 Ark. 150.

52. Johnston *v.* Macon, 4 Call (Va.) 367.

53. Johnston *v.* Macon, 4 Call (Va.) 367.

54. See, generally, Evidence, 16 Cyc. 821.

55. *Alabama.*— Pruitt *v.* Gunn, 151 Ala. 651, 44 So. 569.

*Kansas.*— De Ford *v.* Orvis, 42 Kan. 302, 21 Pac. 1105.

*Maine.*— Woodside *v.* Howard, 69 Me. 160, holding that where the issue in trespass by a wife against a constable is whether the pos-

indicate the amount which should be recovered by the successful party.[56] Plaintiff

session of the premises was in her or her husband, evidence of acts of the officer under a writ of possession against the husband is admissible.

*Massachusetts.*— Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869; Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486; Dorman *v.* Kane, 5 Allen 38.

*Michigan.*— Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931; Hatch *v.* Saunders, 66 Mich. 181, 33 N. W. 178.

*Minnesota.*— Homberger *v.* Brandenberg, 35 Minn. 401, 29 N. W. 123.

*New Hampshire.*— Morgan *v.* Joyce, 66 N. H. 538, 27 Atl. 225 (holding that where a deputy sheriff, after service of a writ, delivers it to plaintiff's attorney without making formal return, such officer may, in an action by plaintiff against him for damages, show by oral evidence that he complied with the directions of plaintiff's attorney as to service); Metcalf *v.* Weed, 66 N. H. 176, 19 Atl. 1091; Benson *v.* Ela, 35 N. H. 402.

*New Jersey.*— Browning *v.* Flanagin, 22 N. J. L. 567; Johnson *v.* Darrah, 8 N. J. L. 282.

*New York.*— Ginsberg *v.* Cohen, 38 Misc. 751, 78 N. Y. Suppl. 823; Farrington *v.* Baley, 21 Wend. 65 (holding that in an action against a constable for refusing to levy under an execution in favor of the landlord for the amount of rent claimed by him, evidence that no agreement for the payment of rent existed between the landlord and the tenant is admissible); Van Cleef *v.* Fleet, 15 Johns. 147 (holding that in an action for a false return, after plaintiff had introduced evidence sufficient *prima facie* to establish property in the judgment debtor and a levy thereon, the sheriff had a right to controvert such evidence and prove the property did not belong to the judgment debtor, but to another person).

*Pennsylvania.*— Helfrich *v.* Stem, 17 Pa. St. 143 (holding that in an action against a sheriff for an alleged wrongful levy and sale, where the sheriff had given evidence to show that the sale of the property in dispute to plaintiff, shortly before the judgment on which the levy was made, was fraudulent, evidence was admissible in rebuttal that plaintiff paid for the goods by assuming or paying debts of the seller, where this was done in pursuance of the contract of sale, or at the seller's request, or shortly after the sale, before any one had disputed its fairness); Pfeil *v.* McCallin, 1 Pa. Cas. 252, 1 Atl. 654; Graham *v.* Lane, 3 Brewst. 92 (holding that where, in an action against a sheriff for trespass, plaintiff proved that the goods were sold before he brought suit, and defendant then established that this was a mistake and that the sale had taken place after the action was brought, plaintiff might properly prove in rebuttal that the levy was made before suit brought); Barker *v.* Robinson, 7 Kulp 467 (holding that where, in an action against a sheriff for a false return, defendant claimed that plaintiff was not harmed, because the entire fund belonging to the judgment debtor was distributable to a prior writ, plaintiff might show in rebuttal that such writ was fraudulent, and that he so informed defendant, and requested him to pay the money into court).

*Texas.*— Taylor *v.* Thurman, (1889) 12 S. W. 614, holding that in an action against a sheriff by a prior attaching creditor to recover the proceeds of the sale of the goods under a subsequent attachment, evidence that the sheriff held the property until it was sold to satisfy plaintiff's claims, and plaintiff received the proceeds of the latter sale, is relevant.

*Vermont.*— Bentley *v.* White, 54 Vt. 564 (holding that, in trover against a constable for a wrongful sale of property under an attachment, parol evidence is admissible to show that the notice to the debtor, required when attached property is sold at the instance of the creditor, was given, although the return fails to state the fact); Downer *v.* Bowen, 12 Vt. 452.

*Virginia.*— Hammen *v.* Minnick, 32 Gratt. 249, holding that in an action against a sheriff to recover the amount of an execution which he had levied, but had not paid to plaintiff, the fact that the sheriff had prior executions on the same property, the proceeds of which had been consumed in paying them, and that there was no other property out of which plaintiff's execution could be satisfied, was competent evidence for the sheriff.

*Canada.*— Valentine *v.* Smith, 9 U. C. C. P. 59; Robinson *v.* Rapelje, 4 U. C. Q. B. 289.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 291.

**Proof of authority of sheriff's officer.**— In an action against the sheriff for taking the goods of plaintiff, an affidavit made by the sheriff's officer on an interpleader application respecting the goods, is admissible to prove that the officer who seized the goods is the servant of the sheriff. Brickell *v.* Hulse, 7 A. & E. 454, 7 L. J. Q. B. 18, 2 N. & P. 426, 34 E. C. L. 248.

**Declarations** made by a sheriff's officer whilst in possession of goods, after the return of a fieri facias, are evidence against the sheriff in an action for failure to sell the goods. Jacobs *v.* Humphrey, 2 Cromp. & M. 413, 3 L. J. Exch. 82, 4 Tyrw. 272.

**56.** *Arkansas.*— Faulkner *v.* State, 6 Ark. 150.

*Idaho.*— Sears *v.* Lydon, 5 Ida. 358, 49 Pac. 122, holding that in an action for seizing plaintiff's property under process against another the officer may, to protect himself against exemplary damages, show that the chattels seized by him under such writ were recently in possession of defendant to the writ, and in connection therewith he may also show a lack of change of possession.

*Iowa.*— Etter *v.* O'Neil, 83 Iowa 655, 49 N. W. 1013.

*Kentucky.*— Vance *v.* Vanarsdale, 1 Bush 504, holding that in an action against a constable for injuries to attached property in his

may introduce evidence tending to show that there has been negligence on the part of the officer with respect to the matters complained of,[57] or that the officer was actuated by malice in what he did,[58] while on his part the officer may introduce evidence tending to show that he acted honestly and in good faith.[59] Where a sheriff is sued for acts of his deputy in enforcing an execution, and the execution is introduced as part of plaintiff's case, the sheriff has a right to show that such execution was issued on a valid judgment.[60] But evidence which is irrelevant [61]

possession, occasioned by his negligence, evidence of his wilfulness is admissible to enhance the damages.

*Louisiana.*— Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294.

*Massachusetts.*— Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869 (holding that, in an action by a replevin defendant for taking insufficient sureties on replevin bonds, evidence of the amount which plaintiff had agreed to pay his counsel for services in the replevin actions and the suits on the replevin bonds was competent, although not conclusive, on the question of damages); Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486; Danforth *v.* Pratt, 9 Cush. 318 (holding that, in an action against a sheriff for taking insufficient bail, evidence of the pecuniary condition of the debtor three months before he was liable to be taken in execution was competent); West *v.* Rice, 9 Metc. 564.

*Nebraska.*— Huddleson *v.* Polk, 70 Nebr. 492, 102 N. W. 464, 70 Nebr. 489, 100 N. W. 802, 70 Nebr. 483, 97 N. W. 624; Kyd *v.* Cook, 56 Nebr. 71, 76 N. W. 524, 71 Am. St. Rep. 661, holding that in an action against a sheriff for wrongfully attaching a merchant's goods, removing the greater part thereof from his store, and retaining them for three months, evidence of the sales made by the merchant in his business during the three corresponding months of the previous year under substantially the same conditions, is competent, as it affords a reasonably certain basis for determining the profits lost by the merchant in consequence of the interruption of his business.

*New York.*— Perlberger *v.* Grell, 77 N. Y. App. Div. 128, 78 N. Y. Suppl. 1038 (holding that where in an action against a sheriff for wrongfully converting property of a third person, consisting of store fixtures, etc., under a warrant of attachment, the purchaser under the attachment testified that he had added certain shelving, and a witness for plaintiff had previously testified as an expert that shortly before the trial he had examined the property, and he gave an estimate of its value, a question to the purchaser as to the amount he paid for the shelving added by him was proper as tending to fix the amount to be deducted from the expert's estimate); Every *v.* Edgerton, 7 Wend. 259 (holding that where it is sought to charge a sheriff for the avails of property sold, and it is uncertain what the property did in fact bring, evidence on his part that the interest of the debtor in the premises was of little or no value is competent and admissible).

*Rhode Island.*— Kelley *v.* Schuyler, 20 R. I. 432, 39 Atl. 893, 44 L. R. A. 435.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 291.

**The sheriff may show that no injury resulted** to plaintiff by reason of the matters on which he bases his claim to recover. Necker *v.* Sedgwick, 36 Pa. Super. Ct. 593.

**An acknowledgment** by an absconding debtor of the amount he owed plaintiff may be proved by a witness who heard such acknowledgment in an action against an officer for not returning an attachment against such debtor. Stout *v.* Hopping, 6 N. J. L. 125.

**57.** Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869, holding that in an action by a replevin defendant for taking insufficient sureties on replevin bonds, a conversation between plaintiff and defendant was competent to show admissions made by defendant tending to show that he had acted negligently in taking insufficient sureties.

**58.** Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638, holding that for this purpose it is competent to show his language and conduct in making the seizure.

**59.** Howe *v.* Mason, 12 Iowa 202; Richmond *v.* Willis, 13 Gray (Mass.) 182, holding that in an action against a sheriff for arresting a stock-holder on an execution against a manufacturing corporation, defendant may give in evidence his instructions from the judgment creditor.

**60.** Stilson *v.* Gibbs, 40 Mich. 42.

**61.** *California.*— Stokes *v.* Balaam, 73 Cal. 154, 14 Pac. 574, holding that in trover against a sheriff who, under an attachment against the vendee in a conditional sale, had levied on the property thus sold, evidence as to the amount of payments on account made by the vendee, and the amount still due, is irrelevant.

*Colorado.*— Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; Barton *v.* Laws, 4 Colo. App. 212, 35 Pac. 284, holding that, in an action against a sheriff for conversion, it is proper to reject defendant's offer of a writ in an attachment suit, and the return on it which recites a levy on real property only.

*Connecticut.*— Gibney *v.* Lewis, 68 Conn. 392, 36 Atl. 799, holding that in an action for making a false return of service of a subpœna on plaintiff, where defendant had made an arrest on a warrant, and signed a blank return on a subpœna which he gave to his superior, stating that it had not been served, evidence that it was the custom of the officer making the arrest on a warrant to sign the return, although a different officer served the subpœna attached thereto, was irrelevant on the question whether defendant was negligent in signing the return.

or immaterial,[62] tends merely to prejudice the jury against one of the parties,[63]

*New Hampshire.*— Harrington *v.* Wadsworth, 63 N. H. 400, holding that in an action against a sheriff for neglecting to arrest on execution, evidence that the debtor intended to take the poor debtor's oath was properly excluded for remoteness.

*New York.*— Mitchell *v.* Baucus, 4 Silv. Sup. 54, 7 N. Y. Suppl. 91, holding that in an action against a sheriff for neglecting to arrest a judgment debtor on an execution against his person, evidence of directions given by plaintiff to a former sheriff as to another execution against the debtor, on the same judgment, was inadmissible.

*North Carolina.*— Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459, holding that in an action against a sheriff for failure to arrest a debtor, where the question was as to the ability of the debtor to meet the debt, if he had been arrested, evidence of his being indebted to others was inadmissible.

*North Dakota.*— Ward *v.* Gradin, 15 N. D. 649, 109 N. W. 57, holding that where a sheriff was sued in conversion for seizing and selling property in a proceeding to collect personal property taxes, and one of the contested issues was whether the property belonged to the taxpayer or to plaintiffs, it was error to admit evidence that the taxpayer, who defendant claimed owned the property seized, had never voluntarily paid the taxes imposed on him.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 291.

62. *Alabama.*— Stephens *v.* Head, 138 Ala. 455, 35 So. 565 (holding that evidence of remarks of plaintiff in an action for conversion that he would not have commenced the action if a creditor had not been pressing him was immaterial); Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665 (holding that in an action against a sheriff for releasing property from levy, a letter written by plaintiff's attorney to the sheriff, warning him not to discharge the levy, was inadmissible in evidence).

*California.*—Boyd *v.* Desmond, 79 Cal. 250, 21 Pac. 755, holding that in an action by a mortgagee against the sheriff, who made a sale under the decree of foreclosure, to recover damages for the sheriff's failure to file the order of sale, with his return thereon, in the clerk's office, whereby plaintiff was prevented from obtaining a deficiency judgment against the mortgagor, evidence that the sheriff's deputy, who actually made the sale, was a competent, prudent, and careful man, was immaterial, it not being shown that he was in any way responsible for the failure to file the order.

*Colorado.*— Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

*Illinois.*— Gray *v.* St. John, 35 Ill. 222.

*Iowa.*— Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921, holding that in an action against a sheriff for the unlawful attachment of goods claimed as exempt, evidence to show that defendant was informed before making the levy that plaintiff had left the state was not admissible.

*Massachusetts.*— Riley *v.* Tolman, 181 Mass. 335, 63 N. E. 892 (holding that in an action by an attachment defendant against a deputy sheriff for failing to remove the attached property, receipts for money paid by plaintiff to the attachment creditor for some of the attached property were immaterial, and properly excluded, title of the property covered by the receipts not being in dispute); Holland *v.* Seagrave, 11 Gray 207.

*Minnesota.*—Hathaway *v.* Brown, 18 Minn. 414.

*Missouri.*— State *v.* Finn, 100 Mo. 429, 13 S. W. 712.

*New York.*— Wehle *v.* Conner, 83 N. Y. 231 (holding that in an action by a judgment creditor against a sheriff for failure to return an execution on a judgment which had been attached in the sheriff's hands on claims against the judgment creditor, evidence intended to prove a conspiracy between the attachment creditors, the judgment debtor, and the sheriff to issue the attachment, and thereby prevent plaintiff from collecting the judgment, was properly excluded); Craft *v.* Brandow, 61 N. Y. App. Div. 247, 70 N. Y. Suppl. 364; Paton *v.* Westervelt, 2 Duer 362 (holding that in an action against the sheriff for falsely returning an execution *nulla bona*, he having sold the property under a senior execution, evidence offered by plaintiff that the senior judgment was confessed with intent to hinder, delay, and defraud creditors, and that the same and the execution were fraudulent and void against plaintiffs, was properly rejected as immaterial, since the sheriff was not bound to try the issue of fraud or decide between the claimants).

*North Carolina.*— Jenkins *v.* Troutman, 52 N. C. 169, 75 Am. Dec. 459.

*Oregon.*— Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776, holding that where a sheriff had levied on goods under an execution regular on its face and issued out of a court of competent jurisdiction, evidence to charge him with knowledge that the judgment on which the execution was based had in fact been paid was not admissible in an action against him for illegal seizure.

*Pennsylvania.*— Gault *v.* Dunbar, 1 Phila. 27, holding that in an action against a constable for taking illegal fees, evidence of defendant's statement, at the time he took the fees, that if there was any mistake he would rectify it, is inadmissible.

*Texas.*— Edloff *v.* Mason, 79 Tex. 215, 14 S. W. 1036.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 291.

63. Whittington *v.* Pence, 47 S. W. 877, 20 Ky. L. Rep. 900, holding that in an action to recover damages for the sale by defendant, as sheriff, of exempt property under execution, the testimony of a witness that he offered to lend plaintiff the money to pay off the execution, and take a bill of sale for the property, which plaintiff declined, saying that, if he did so, he would lose his action against the sheriff, is inadmissible.

or is otherwise objectionable under the general rules of evidence [64] should be excluded.

**b. Documentary Evidence** — (i) *In General.* Subject to the general rules governing the admission of such evidence,[65] documentary evidence is properly receivable in an action against a sheriff or constable for an official default or misfeasance.[66] Where the holder of a note secured by chattel mortgage sues an officer for levying upon and selling the mortgaged chattels under execu-

64. *California.*— Cassin *v.* Marshall, 18 Cal. 689, holding that, in an action against the sheriff for an illegal levy, evidence offered by defendant that the property, when sold by him at sheriff's sale, brought full and fair auction prices, and what these prices actually were, and also that the sale was by a competent auctioneer, was properly rejected, although plaintiff was himself about to have sold the goods levied on at public auction.

*Massachusetts.*— Long *v.* Lamkin, 9 Cush. 361.

*Michigan.*— Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560, holding that in trover against a sheriff for the conversion of goods taken on attachment, defendant, when he appointed the appraisers, could not offer their appraisal as evidence of value.

*Nebraska.*— Barlass *v.* Braash, 27 Nebr. 212, 42 N. W. 1028.

*New Hampshire.*— Kendall *v.* Morse, 43 N. H. 553, holding that when, in a suit against a sheriff for negligence in regard to attached property, the question was whether the goods were deposited by him in a suitable place, proof that certain insurance companies were accustomed to treat as extrahazardous buildings like that where these goods were placed was not admissible, being in its nature hearsay.

*South Dakota.*— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069, holding that, in an action against a sheriff and his indemnitors, to recover the value of property released from attachment on a claim for exemptiona, evidence was properly excluded which tended only to show that a stranger to the suit, douhting the authority of the officer to release the property, had, in a subsequent action against the attachment debtor, caused the same officer to levy an attachment on the same property.

*Texas.*— Moore *v.* Moore, (Civ. App. 1899) 52 S. W. 565 (holding that where a complaint in an action against a constable for selling property under execution alleged that the execution was void for the reason that it was not issued at the instance of plaintiffs in the judgment, but at the instance and for the benefit of one of defendants, evidence that the judgment had been paid before the issuance of the execution was not admissible); Garcia *v.* Sanders, (Civ. App. 1896) 35 S. W. 52.

*Vermont.*— Briggs *v.* Taylor, 35 Vt. 57; Middlebury *v.* Haight, 1 Vt. 423, holding that in an action against a sheriff for an escape, evidence was not admissible to show that the act for which the prisoner had been sued was wilful and malicious, or that before the escape his friends had offered to pay plaintiff a part of the debt to secure the prisoner's discharge.

*Canada.*— Galbraith *v.* Fortune, 10 U. C. C. P. 109.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 291.

**Former evidence of deceased witness.**— In an action against a sheriff for conversion by wrongful attachment, a disclosure in the attachment suit by a witness who has since died is not admissible against the sheriff, where he was not a party to the attachment suit. Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 942.

**Admissions of under-sheriff.**— In an action against the sheriff, admissions by the under-sheriff are not evidence unless they accompany some official act of the latter, or tend to charge himself. Snowball *v.* Goodricke, 4 B. & Ad. 541, 2 L. J. K. B. 53, 1 N. & M. 235, 24 E. C. L. 238.

65. See, generally, Evidence, 17 Cyc. 296.

66. *Alabama.*— Skipper *v.* Reeves, 93 Ala. 332, 8 So. 804, holding that in trespass for attaching a stock of goods as that of plaintiff's vendor the bond of indemnity given by the creditors to the sheriff was admissible in evidence to charge the sureties thereon as joint trespassers.

*Kentucky.*— Bell *v.* Com., 1 J. J. Marsh. 550, holding that an incomplete replevin bond in the handwriting of a deputy was admissible, in an action against the sheriff, to prove that the execution was in the hands of the deputy, and the time when it was so.

*Louisiana.*— Bottom *v.* Breed, 4 La. 343, holding that a constable's deed was proper evidence without having been recorded.

*Nebraska.*— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163 (holding that in an action against an officer for conversion of property seized by him under a writ of attachment, the inventory and appraisement made and signed by such officer in the attachment proceedings were admissible on the question of the value of the property, being in the nature of admissions by such officer); Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217 (holding that in an action against a constable for selling property in execution of a judgment in attachment after the filing by the debtor of his inventory and affidavit of exemption, such inventory and affidavit were admissible as evidence of the facts therein stated); Barlass *v.* Braash, 27 Nebr. 212, 62 N. W. 1028 (holding that where mortgaged chattels in the possession of the mortgagee were seized on execution against the mortgagor, and to protect his lien the mortgagee replevied them and executed a replevin bond for their redelivery, such bond was admissible in evidence in an action against a sheriff, who subsequently

tion against the mortgagor, the note is not admissible without proof of its execution.[67]

(II) *JUDICIAL RECORDS AND PROCEEDINGS.* As a general rule the record and proceedings in the action in which process issued are admissible in an action against an officer for his alleged default or misconduct in respect to the execution of such process.[68] But a transcript of the docket of a justice of the peace is not admissible to prove a matter not required or authorized to be entered on the docket.[69] In an action against an officer for taking goods claimed by plaintiff, defendant may give in evidence the record of the judgment on which the sale of the goods under which plaintiff claims was made, in order to show that the judgment was void and the sale fraudulent;[70] but in an action by a wife against a sheriff for wrongfully levying executions against her husband on her separate property, the record of a judgment recovered many years before by the wife against a former sheriff for levying like executions on her property, alleged to be the same as that in controversy, is not admissible in evidence.[71]

seized and sold the goods on another execution against the mortgagor, pending the replevin suit).

*New Hampshire.*— Morse *v.* Powers, 17 N. H. 286, holding that where a chattel mortgage was conditioned to save the mortgagee harmless from certain liabilities, and also to save a third person harmless from a note to which he and the mortgagor were parties, but which was properly the mortgagor's personal debt, and the mortgagor at the time was deeply insolvent, in trover by the mortgagee against an attaching officer and creditor, this note was admissible in evidence to repel a presumption of fraud, which might have been based on its non-production.

*New York.*— Woodman *v.* Penfield, 2 Silv. Sup. 246, 6 N. Y. Suppl. 803 (holding that in an action by a wife against a sheriff for the conversion of goods seized on execution against the husband, the sheriff alleging that the goods were transferred by the husband to plaintiff in fraud of his creditors, an inventory of the goods at the time they were transferred, made by a witness, might be given in evidence by plaintiff); Goodman *v.* Goetz, 13 N. Y. Suppl. 267 (holding that where indemnitors of the sheriff were substituted as defendants in an action against him for taking goods claimed by plaintiff under execution against another, the admission of the bond of indemnity as evidence against them was not error, although a cause of action against them had not been set out by amended or supplemental complaint; especially as one indemnitor was an original defendant, and the objection to the bond was general).

*Pennsylvania.*— Smith *v.* Emerson, 43 Pa. St. 456, holding that in an action against a sheriff for selling exempt property on execution, a written demand by the execution defendant for the benefit of the exemption law, dated on the day the writ came into the hands of the sheriff and returned by him attached thereto without any reason for disregarding it, was properly admitted as evidence that he received the notice in due time.

*South Dakota.*— Anderson *v.* Medbury, 16 S. D. 329, 92 N. W. 1087, holding that where, in a suit against a sheriff for the conversion of personalty, his answer justified the taking as under mortgage foreclosure proceedings against a third person alleged to be the owner, it was proper to receive in evidence the mortgage and various proceedings leading up to the foreclosure.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 292.

**67.** Flynn *v.* Hathaway, 65 Ill. 462.

**68.** *California.*— Aigeltinger *v.* Whelan, 133 Cal. 110, 65 Pac. 125; Dexter *v.* Paugh, 18 Cal. 372; Walker *v.* Woods, 15 Cal. 66.

*Connecticut.*— Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242; Hart *v.* Stevenson, 25 Conn. 499.

*Indian Territory.*— Shear *v.* McAlester, 2 Indian Terr. 520, 53 S. W. 321.

*Michigan.*— Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931.

*Mississippi.*— Moseley *v.* Anderson, 40 Miss. 49.

*Missouri.*— Snead *v.* Wegman, 23 Mo. 263; Davis *v.* Cooper, 6 Mo. 148.

*Nebraska.*— Sonnenschein *v.* Bartels, 37 Nebr. 592, 56 N. W. 210.

*Pennsylvania.*— Pfeil *v.* McCallin, 1 Pa. Cas. 252, 1 Atl. 654.

*Utah.*— Hamner *v.* Ballantyne, 16 Utah 436, 52 Pac. 770, 67 Am. St. Rep. 643.

*Vermont.*— Sartwell *v.* Sowles, 72 Vt. 270, 48 Atl. 11, 32 Am. St. Rep. 943.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 293.

But *compare* Burns *v.* Taylor, 3 Port. (Ala.) 187, holding that, in an action against a sheriff for taking plaintiff's property under process against another, the record of the suit in which such process issued is not admissible on behalf of the sheriff where plaintiff was neither a party nor a privy to such writ, and the relevancy of the evidence offered is not otherwise shown.

**69.** Hunt *v.* Boylan, 6 N. J. L. 211, holding that, in an action against a constable for not returning an execution, the transcript of the docket of the justice who issued the execution was not admissible to prove the delivery of the execution to the constable.

**70.** Skillman *v.* Applegate, 7 N. J. L. 62.

**71.** Palmer *v.* McMaster, 8 Mont. 186, 19 Pac. 585.

(III) *PROCESS AND RETURN* — (A) *In General.* In an action against an officer for an official default or misfeasance in connection with the execution of process it is proper to admit in evidence the process under which the officer acted,[72] and his return thereon.[73] And in an action for returning a writ of fieri facias "*nulla bona,*" other writs of fieri facias issued on the same day, or about the same time, and either countermanded or returned *nulla bona,* are admissible to show the

**72.** *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139; Nelms *v.* Steiner, (1897) 22 So. 435, holding that, in an action for conversion against an attaching officer, the levy and sale might be shown by introducing the writ of attachment with indorsements thereon, without putting in the entire record.

*Arkansas.*— Jones *v.* Buzzard, 2 Ark. 415.

*California.*—Boyd *v.* Desmond, 79 Cal. 250, 21 Pac. 755.

*Connecticut.*— Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

*Delaware.*— Davis *v.* White, 1 Houst. 228.

*Idaho.*— Pecotte *v.* Oliver, 2 Ida. (Hash.) 251, 10 Pac. 302.

*Illinois.*— Lattin *v.* Smith, 1 Ill. 361 (holding that in an action against an officer for the escape of a defendant taken under a capias ad satisfaciendum, the writ was not rendered inadmissible in evidence because it failed to recite that the oath required by law was made before it issued); Forlouf *v.* Bowlin, 29 Ill. App. 471 (holding that a constable sued for trespass had a right to show the circumstances under which he was on the premises, and for that purpose to introduce in evidence a distress warrant placed in his hands, even though the same was not levied); McGillis *v.* Bishop, 27 Ill. App. 53.

*Indiana.*— Bosley *v.* Farquar, 2 Blackf. 61, holding that, in an action for a false return, the execution was admissible in evidence, although it failed to specify the date on which it was returnable.

*Kentucky.*— Mitchell *v.* Franklin, 3 J. J. Marsh. 477.

*Michigan.*— Miller *v.* Hahn, 116 Mich. 607, 74 N. W. 1051.

*New York.*—Bealls *v.* Guernsey, 8 Johns. 52.

*South Carolina.*— Hunter *v.* McElhany, 2 Brev. 103.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 294.

**The want of an indorsement** on an execution of the time when it was received by the sheriff will not render it inadmissible in evidence in an action against him for taking and carrying away the property under it. Bealls *v.* Guernsey, 8 Johns. (N. Y.) 52.

**When proof of judgment necessary.**— In an action against a sheriff for the conversion of personal property, where defendant justifies under an execution against the property of a third person, alleging him to be the real owner, it is not error to exclude the execution unless defendant proves or offers to prove the existence of a valid judgment on which the execution issued. Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056. And see, generally, *supra,* V, L, 9. But *compare* Davis *v.* White, 1 Houst. (Del.) 228; Hunter *v.* McElhany, 2 Brev. (S. C.) 103.

**A void process** under which defendant acted cannot be introduced in evidence in mitigation of damages, in an action for conversion, where punitive damages are not claimed. Stephens *v.* Head, 138 Ala. 455, 35 So. 565.

**73.** *Alabama.*— Adamson *v.* Noble, 137 Ala. 668, 35 So. 139.

*California.*— Boyd *v.* Desmond, 79 Cal. 250, 21 Pac. 755, holding that in an action by a mortgagee against the sheriff, who made a sale under the decree of foreclosure, to recover damages for the sheriff's failure to file the order of sale, with his return thereon, in the clerk's office, whereby plaintiff was prevented from obtaining a deficiency judgment against the mortgagor, the order of sale, and sheriff's return indorsed thereon, were properly admitted in evidence on behalf of defendants, without first proving that they had been filed in the clerk's office.

*Connecticut.*— Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

*Iowa.*— Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754, holding that in an action against a sheriff and the sureties on an indemnifying bond for the wrongful seizure and sale of property under an attachment, the sheriff's return on the attachment was admissible in evidence against him and the sureties on the bond.

*Maine.*— Smith *v.* Bodfish, 39 Me. 136.

*Massachusetts.*— Sanborn *v.* Baker, 1 Allen 526, holding that in an action against an officer for the conversion of property attached by him on a writ against a third person, his return on the writ, showing a sale of the property under the statute as perishable, and the certificate of the appraisers, and a schedule of prices received for the same at the auction sale thereof, which were annexed to the return as a part thereof, were competent evidence against him on the question of damages.

*Missouri.*— State *v.* Smit, 20 Mo. App. 50, holding that in an action by a claimant of property on an indemnity bond given by an execution creditor on the levy of an execution thereon, the constable's return on the execution, reciting that a claim on the property was made by plaintiff, was competent evidence of that fact. But *compare* State *v.* Hamilton, 9 Mo. 794, holding that in an action against a sheriff for not arresting a defendant in an execution, the sheriff's return reciting that defendant was not liable to arrest because he had taken the benefit of a bankrupt law could not be received as evidence for him.

*New Hampshire.*— Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720, holding that a sheriff's return on a writ of attachment was admissible in evidence in an action against

circumstances of the debtor.[74] So also in an action by the assignee of an insolvent debtor against a sheriff to recover the value of property attached and sold by him on mesne process against the debtor, defendant, after proving a demand on him for the property by a mortgagee thereof, may give in evidence a writ subsequently sued out against him by the mortgagee, containing a bill of particulars of the property, for the purpose of showing that the mortgagee was still insisting on his rights.[75] Where, in an action for accepting insufficient sureties, plaintiff seeks to prove the insufficiency of the bond by showing that he brought suit on it and had been unable to realize anything therefrom, the return of the officer on the execution issued therein is admissible, although the execution has not been returned into court.[76] Where a sheriff was sued for breaking and entering plaintiff's dwelling-house after being forbidden so to do, and his right so to enter depended on his having previously levied on personal property therein, a statement of such levy, indorsed by the sheriff on the execution, which had not been filed, with an inventory of the goods levied on attached thereto, was competent evidence for him.[77]

(B) *Copies.* In a case where deputy sheriffs had seized property in a claim and delivery action, and the clerk of the court testified that there were no papers on file in the action, it was held that copies of the papers served on defendant were admissible, and were *prima facie* proof of the existence of the originals, and that the officers were acting thereunder when they made the seizure.[78]

**c. Evidence in Actions For Particular Defaults or Misfeasances** — (I) *FAILURE TO EXECUTE PROCESS.* In an action for failure to execute process plaintiff may show that defendant in the process had property subject to seizure,[79] and the sheriff may show that property pointed out to him was not subject to levy,[80] or did not belong to defendant in the process,[81] or that the process was stayed.[82] But the declarations of defendant in execution that he had disposed of certain property

him for trespass committed in making the attachment, although the attachment was still pending.

*Pennsylvania.*— Com. *v.* Robinson, 7 Kulp 250, holding that when a lien creditor sued the sheriff for the surplus proceeds of a sale, which the sheriff had paid to the terre-tenant, without search for liens in the recorder's office, the sheriff's return was competent evidence of such misapplication.

*Tennessee.*—McCully *v.* Malcom, 9 Humphr. 187, holding that a sheriff, who was sued for false imprisonment and justified by virtue of a state warrant against plaintiff, might introduce his return on the warrant to prove that at the time of the imprisonment he had it in his hands.

*Vermont.*— Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 294.

But *compare* Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917, holding that in an action by a wife against a sheriff for seizing her goods under an execution against her husband and others, the sheriff's return on the execution containing statements which it was not his duty to make, to the effect that the judgment creditor had directed the levy, and all defendants had consented to it, and agreed to pay their proportionate share, but that afterward, the husband refusing to pay, the sheriff sold the husband's property, was not evidence against the wife, she not being a party.

Return not admissible without writ.— In trover against a sheriff for taking and converting certain goods, the officer's return to a writ of replevin, whereby he took the goods, cannot be read in evidence against him, unless the writ itself is also admitted. Weinberg *v.* Conover, 4 Wis. 803.

74. Keedy *v.* Newcomer, 1 Md. 241.

75. Caverly *v.* Gray, 7 Gray (Mass.) 216.

76. Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486.

77. Glover *v.* Whittenhall, 2 Den. (N. Y.) 633.

78. Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190.

79. Zelinsky *v.* Price, 8 Wash. 256, 36 Pac. 28, holding that in an action against a sheriff for failure to levy an attachment, plaintiff may testify that he pointed out to defendant's deputy the residence of the debtor, and told him that the property could be found there on which to levy, and that the deputy then had papers with him, not for the purpose of showing the service or non-service of the papers, but as tending to show information furnished the officer that defendants in the suit had property subject to seizure under the writ.

80. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187.

81. Dornin *v.* McCandless, 146 Pa. St. 344, 23 Atl. 245, 28 Am. St. Rep. 798.

82. Harris *v.* Snyder, 113 Wis. 451, 89 N. W. 660, holding that where, in an action against a sheriff for not executing final process, it appeared that plaintiff's attorney was given notice of appeal on August 27, and that execution issued August 31, and was partially executed by the sheriff on September

before the execution was placed in the sheriff's hands are not admissible at the instance of defendant.[83] In an action against a sheriff for failing to secure by execution on land the full amount covered by the writ, the estimated cash value of land in the neighborhood in which the land was situated is admissible to determine the sufficiency of the levy;[84] and a sheriff's statement to an insurance agent as to the worth of the goods when seized, and his declarations to the different creditors that their claims were small as compared with the value of the debtor's goods, are evidence of value against the officer.[85]

(II) *SEIZURE OF PROPERTY UNDER PROCESS AGAINST ANOTHER.* Where plaintiff relies upon a seizure of his property under process against another he is properly allowed to give evidence to establish his title,[86] and to show matters tending to disprove any title in the person under process against whom the seizure was made,[87] and evidence tending to show that defendant had notice of plaintiff's title or claim is also admissible.[88] The sheriff may introduce evidence tending to show that the property belonged to defendant in the process under which it was seized,[89] or that a sale thereof by such defendant was fraudulent.[90]

1, but, on being informed by the execution defendant that an appeal had been regularly taken, he redelivered possession, an order staying execution, made on September 1, but not served on the sheriff until after he had refused to execute the process, was admissible in his behalf.

An appeal-bond in a certain amount, reciting that such amount was that fixed by the court, was not inadmissible, because the record did not show the order fixing the amount. Harris *v.* Snyder, 113 Wis. 451, 89 N. W. 660.

83. Spence *v.* Tuggle, 10 Ala. 538.

84. Patterson *v.* Powell, 15 Ala. 205.

85. Hobbs *v.* Hall, 14 U. C. C. P. 479.

86. Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664 (holding that in an action for conversion against a sheriff, who sold as the property of plaintiff's husband buildings and hay alleged to belong to plaintiff, testimony of her witness as to where she secured the lumber that went into the buildings, what it cost, and that it had been paid for by her, was competent on the question of her ownership); McDonald *v.* City Trust, etc., Co., 39 Misc. (N. Y.) 552, 80 N. Y. Suppl. 405 (holding that where an owner of horses executed an instrument to plaintiff, which was either a mortgage or a bill of sale of the horses, but which was not filed as required by law, and the sheriff levied upon them, and plaintiff sued for a wrongful levy, evidence offered by plaintiff that the owner of the horses had transferred them to him in payment of the loan was admissible); Leibman *v.* Abramson, 30 Misc. (N. Y.) 90, 61 N. Y. Suppl. 897 (holding that testimony of plaintiff as to whose possession the goods were in when seized is competent); Marcy *v.* Parker, 78 Vt. 73, 62 Atl. 19 (holding that in trover against a sheriff for the conversion of lumber standing in the yard of a third person, a contract between plaintiff and the third person giving plaintiff title to the lumber in the yard until advancements made by him should be repaid, leases of the yard from the third person to plaintiff, and a quitclaim deed executed by the third person, prior to the taking by defendant, conveying the yard to plaintiff, were admissible in evidence, although the third person remained in possession and control of the premises until the execution of the quitclaim deed, where there was testimony showing that, when the quitclaim deed was executed, plaintiff assumed control of the premises and took exclusive possession of the lumber, and continued so in possession until after the lumber was taken by defendant at the instance of a creditor of the third person).

Instrument giving creditor benefit of chattel mortgage security.— An instrument executed on the same day as a chattel mortgage made for the benefit of creditors, and which adds another creditor to those named therein, and which was duly recorded, is competent to be offered in evidence, as a supplement to said mortgage, in an action on an indemnity bond given to the sheriff in attachment. Parlin, etc., Co. *v.* Hanson, 21 Tex. Civ. App. 401, 53 S. W. 62.

87. Whitaker *v.* Wheeler, 44 Ill. 440 (holding that declarations of defendant in the process made before the levy and while he was in apparent possession, explanatory of such possession and in disparagement of any claim in himself, were admissible in behalf of plaintiff); Leavering *v.* Smith, 115 N. C. 385, 20 S. E. 446.

88. Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429.

89. Pruitt *v.* Gunn, 151 Ala. 651, 44 So. 569; Cafe Central *v.* Reordan, 84 N. Y. Suppl. 863, holding that, on an issue as to the ownership of liquor taken under execution, it was proper to admit in evidence mortgages given thereon by one who claimed to be the owner, his affidavit attached to one of them, and his application on a liquor tax certificate.

90. Carr *v.* Van Hoesen, 26 Hun (N. Y.) 316 (holding that in an action by a general assignee for the benefit of creditors to recover goods taken under a warrant against the assignor, the sheriff might show that the assignment was fraudulent and void as against attaching creditors); Evans *v.* Matson, 56 Pa. St. 54.

(III) *LEVY ON EXEMPT PROPERTY.* In an action against a sheriff for the attachment of exempt property, plaintiff may put in evidence a demand made by him on the attaching creditor for the restoration of the goods, and the latter's refusal to restore them, it appearing that the sheriff acted under the creditor's direction and with the understanding that he was to be indemnified by the creditor.[91] Where evidence of fraudulent concealment of property on the part of plaintiff in an action against a sheriff for levying and selling property exempt from execution was admitted in mitigation of damages, and, if believed, would, under the charge, have made the damages only nominal, it was not error to refuse to admit it in bar of the action.[92]

(IV) *RELEASING PROPERTY LEVIED ON.* In an action against a sheriff for damages for releasing goods seized by him in his possession on a claim of ownership by a third person, defendant may introduce evidence showing that defendant in the process under which the seizure was made was not the owner of the goods,[93] while plaintiff may introduce evidence tending to show that defendant in the process was the true owner.[94]

(V) *WRONGFUL SALE.* Where an officer sells property under a judgment in attachment which is afterward set aside on appeal, he can, in an action for damages, show that the proceeds of the sale were applied to the payment of the debt of defendant in attachment.[95] In an action by the owner of property against an officer, who attached and sold the same as the property of another, and so stated in his return on the writ, evidence of plaintiff to show that the attachment had been dissolved before the sale of the property by neglect of the officer to keep possession was competent.[96]

(VI) *FAILURE TO SELL PROPERTY LEVIED ON.* Where a sheriff is sued for a failure to sell property levied on under execution he may show that the property did not belong to the execution debtor,[97] or that plaintiff's agent had directed the proceedings to be stayed.[98]

(VII) *TAKING INSUFFICIENT SECURITY.* In an action against an officer for accepting insufficient sureties on a bond, it is competent for plaintiff to show that he brought suit on the bond, and had been unable to realize anything therefrom, in order to prove the insufficiency of such bond.[99]

(VIII) *FALSE RETURN.* A sheriff who is sued for a false return of *nulla bona* on an execution may show that the execution defendant was not the owner of property which it is alleged that the sheriff should have seized and applied on the execution;[1] and evidence of what was said by the bailiff, to whom the warrant

**Where the sheriff fails to show a valid judgment** on which the execution was issued, evidence as to the possession of the property at the time of the levy is properly excluded. Ford *v.* McMaster, 6 Mont. 240, 11 Pac. 669. Necessity for showing valid judgment see *supra*, V, L, 9.

**91.** Mannan *v.* Merritt, 11 Allen (Mass.) 582.

**92.** Smith *v.* Emerson, 43 Pa. St. 456.

**93.** Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788, 51 Iowa 605, 2 N. W. 420.

**94.** Peck *v.* Manning, 99 N. C. 157, 5 S. E. 743, holding that where a sheriff attempted to justify the release of property levied on, by showing that it had been sold to a bank, and the execution debtors admitted that a bill of sale had been given, but alleged that it was to secure a loan, and one of them testified that they regularly received notices from the bank to pay interest thereon, such evidence was properly admitted, and that it was also competent to show the relation which the execution debtors bore to the property, by showing their continuous possession up to the time of the levy, and that they, and not the person to whom it was alleged to have been sold, gave it in to the revenue officers, and paid the taxes.

**95.** Ashcraft *v.* Elliott, 38 S. W. 1062, 18 Ky. L. Rep. 934.

**96.** Jordan *v.* Farnsworth, 15 Gray (Mass.) 517.

**97.** Necker *v.* Sedgwick, 36 Pa. Super. Ct. 593.

**98.** State *v.* Kennedy, 8 Rich. (S. C.) 206, holding also that the agency might be proved by parol.

**99.** Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486.

**1.** Lummis *v.* Kasson, 43 Barb. (N. Y.) 373 (holding that in an action against a sheriff for making a false return of *nulla bona* on an execution issued on a judgment in a case in which he had made an attachment of goods and received a bond of indemnity from plaintiff, evidence was admissible in his favor to show that the goods attached did not be-

was directed, when asked by plaintiff's attorney, before the return of the writ, why he did not execute it, is admissible against the sheriff.[2]

(IX) *ESCAPE.* In an action against an officer for an escape on mesne process, the admissions of defendant in the original suit may be proved to show a cause of action in such suit.[3]

**4. WEIGHT AND SUFFICIENCY OF EVIDENCE — a. In General.** The general rules as to the weight and sufficiency of evidence [4] govern in actions against sheriffs and constables for official misconduct or defaults, as appears from a number of illustrative cases cited in the notes where the courts have passed on the effect of evidence adduced to establish the connection of a sheriff with the acts of his officer [5] and that a deputy was acting officially at a particular time; [6] the existence of a judgment; [7] the seasonable delivery of process to an officer; [8] the non-service of a summons or writ; [9] the ownership of property; [10] the *bona fides* of a claim to property; [11] fraud in a transfer of property; [12] the possession of property at the time of a seizure thereof; [13] notice to the sheriff of the existence of a mortgage on the property seized; [14] that goods were not fraudulently intermingled; [15] the taking possession of property alleged to have been seized; [16] that the sheriff acted maliciously in seizing certain property under process; [17] the payment of money to an officer to release a levy; [18] negligence in failing to sell property; [19] the existence of a debt [20] and that such debt is due; [21] the collection or receipt of money by the sheriff; [22] a demand on the sheriff for money collected by him; [23] a ratification of the officer's disposition of the proceeds of a sale; [24] the execution and acceptance of a bond,[25] and the exercise of reasonable care by the officer in passing upon the

long to the judgment debtor, where plaintiff had not proved that the latter owned any other goods than those attached); Dornin *v.* McCandless, 146 Pa. St. 344, 23 Atl. 245, 28 Am. St. Rep. 798 (holding that where it was alleged that there was property which ought to have been seized, and which defendant had seized, but released, evidence showing the true ownership of the property in question should have been admitted).

2. North *v.* Miles, 1 Campb. 389, 10 Rev Rep. 710.

3. Hart *v.* Stevenson, 25 Conn. 499.

4. See EVIDENCE, 17 Cyc. 753.

5. Scott *v.* Marshall, 2 Cromp. & J. 238, 1 L. J. Exch. 97, 2 Tyrw. 257.

6. Brown *v.* Wallis, 100 Tex. 546, 101 S. W. 1070, 12 L. R. A. N. S. 1019 [*affirming* (Civ. App. 1906) 101 S. W. 1068]; Luck *v.* Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418.

7. Tombeckbee Bank *v.* Godbold, 3 Stew. (Ala.) 240, 20 Am. Dec. 80, holding that a memorandum, signed by the clerk, of the amount, parties, and date of a judgment is not sufficient evidence of the judgment to sustain an action against the sheriff for a false return on a fieri facias purporting to have been issued by authority of such judgment.

8. Wilson *v.* Gale, 4 Wend. (N. Y.) 623.

9. Chetelat *v.* Kelter, 7 Colo. App. 68, 42 Pac. 495.

10. Pollock *v.* Brennan, 39 N. Y. Super. Ct. 477; Martin-Brown Co. *v.* Auld, (Tex. Civ. App. 1896) 34 S. W. 1050; Crowe *v.* Adams, 21 Can. Sup. Ct. 342.

11. State *v.* Steele, 108 Mo. App. 363, 83 S. W. 1023.

12. Ford *v.* Chambers, 19 Cal. 143.

13. Marcy *v.* Parker, 79 Vt. 73, 62 Atl. 19.

14. Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484.

15. Davis *v.* Stone, 120 Mass. 228.

16. Lucas *v.* Sheridan, 124 Wis. 567, 102 N. W. 1077.

17. Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

18. Cafe Union *v.* Reordan, 84 N. Y. Suppl. 994.

19. O'Bryan *v.* Webb, 142 Ala. 259, 37 So 935, holding that in an action against a sheriff for wrongful failure to execute a writ of venditioni exponas, evidence that he had a reasonable time to make the sale before the destruction of the property by fire, which occurred while it was in his possession and failed to do so, makes a *prima facie* case for plaintiff.

20. Johnston *v.* Donaldson, 4 N. C. 727; Howard *v.* Dwight, 8 S. D. 398, 66 N. W. 935.

21. Johnston *v.* Donaldson, 4 N. C. 727.

22. Work *v.* Kinney, 7 Ida. 460, 63 Pac. 596; Doty *v.* Turner, 8 Johns. (N. Y.) 20.

Time of receipt.— Where a sheriff actually levies an execution on the property of a defendant two months before its return, and then, seven months after the writ is returnable, returns that he has made the amount directed to be levied, such evidence is *prima facie* sufficient to establish the fact that he received the money before the commencement of a suit brought against him nearly three months after the time when the writ was returnable. Crane *v.* Dygert, 4 Wend. (N. Y.) 675.

23. Currier *v.* Brackett, 18 Me. 59.

24. State *v.* Early, 81 Ind. 540.

25. Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486.

sufficiency of the sureties;[26] the value of property;[27] the possession of property by an officer,[28] or his exercise of dominion over the same;[29] the falsity of a return;[30] that a debtor alleged to have escaped was in the custody of the officer against whom the action for the escape is brought;[31] injury to plaintiff by reason of the matters complained of;[32] and other matters tending, if established, to support or defeat a recovery,[33] or to indicate the amount which should be recovered by the successful party.[34] Where the sheriff's indemnitors have been substituted in an action against the sheriff for the wrongful seizure of plaintiff's property, proof of a right to recover against the sheriff will authorize a recovery against the substituted defendants.[35]

26. Edwards-Barnard Co. *v.* Pflanz, 115 Ky. 393, 73 S. W. 1018, 24 Ky. L. Rep. 2296.

27. State *v.* Steele, 108 Mo. App. 363, 83 S. W. 1023 (holding that in an action on an indemnity bond to recover the value of personal property wrongfully taken on execution, evidence of the amount paid therefor by claimant, at the time of its purchase, which was near the time of conversion, was sufficient evidence of its value to sustain a judgment for plaintiff); Kelly *v.* Mesier, 18 N. Y. App. Div. 329, 46 N. Y. Suppl. 51 (holding that the amount bid at a sheriff's sale to realize the amount of the execution under which he sold was not conclusive evidence of the value of the property sold, and could not control other positive evidence as to its value).

**An appraisement** of property is not conclusive evidence of its value in an action against the sheriff for failure to sell the same. Parsons First Nat. Bank *v.* Franklin, 20 Kan. 264.

**The return on an attachment** is sufficient evidence of the true value of the property, in the absence of other evidence on that point. French *v.* Stanley, 21 Me. 512.

**An officer's failure to return the value of property levied on** is not conclusive evidence against him that it was of sufficient value to satisfy the writ. Campbell *v.* Pope, 4 Fed. Cas. No. 2,365*a*, Hempst. 271.

28. Wetherell *v.* Hughes, 45 Me. 61.

29. Copley *v.* Rose, 2 N. Y. 115, holding that where, in an action of trespass against an officer, he testified that he had made a levy on the property, and showed the execution by virtue of which he acted, there was sufficient evidence that he had exercised such dominion over the property as would make a trespasser.

30. Magne *v.* Seymour, 5 Wend. (N. Y.) 309, holding that *prima facie* evidence of the falsity of a sheriff's return is sufficient to put him to proof of its correctness.

31. Jackson *v.* Comisky, 30 Misc. (N. Y.) 622, 62 N. Y. Suppl. 705.

32. Kirksey *v.* Pryor, 13 Ala. 190, 48 Am. Dec. 47; McGuire *v.* Bausher, 57 N. Y. App. Div. 201, 68 N. Y. Suppl. 284.

33. *Arkansas.*— Haynes *v.* Tunstall, 5 Ark. 680.

*California.*— Boyd *v.* Desmond, 79 Cal. 250, 21 Pac. 755.

*Colorado.*—Watson *v.* Lederer, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854.

*Kentucky.*—White *v.* Com., 3 Dana 461.

*Louisiana.*— Bennet *v.* Starnes, 8 La. Ann. 78.

*Maine.*— Pratt *v.* Bunker, 45 Me. 569.

*Massachusetts.*—Riley *v.* Tolman, 181 Mass. 335, 63 N. E. 892; Savage *v.* Darling, 151 Mass. 5, 23 N. E. 234; Bowen *v.* Sanborn, 1 Allen 389; Marble *v.* Keyes, 9 Gray 219; Goodnow *v.* Willard, 5 Metc. 517.

*Michigan.*— Treat *v.* Dunham, 74 Mich. 114, 41 N. W. 876, 16 Am. St. Rep. 616.

*Minnesota.*—Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351.

*Missouri.*— Stevenson *v.* Judy, 49 Mo. 227, holding that where plaintiff in an action against a sheriff for failure to levy an execution showed merely that the sheriff was directed to levy on certain property, without showing that the execution defendant had any interest in such property subject to execution, the proof was insufficient to put the sheriff on his defense.

*New Hampshire.*— Stevens *v.* Sabin, 20 N. H. 529.

*New Jersey.*— Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109.

*New York.*— Cudahy *v.* Rinehart, 60 Hun 414, 15 N. Y. Suppl. 514, 21 N. Y. Civ. Proc. 52 [*reversed* on other grounds in 133 N. Y. 248, 675, 30 N. E. 1004, 31 N. E. 444]; Popkin *v.* Subin, 30 Misc. 773, 62 N. Y. Suppl. 480.

*South Dakota.*—Anderson *v.* Medbery, 16 S. D. 324, 92 N. W. 1089.

*Texas.*— Triplett *v.* Morris, 18 Tex. Civ. App. 50, 44 S. W. 684.

*Virginia.*— Johnston *v.* Macon, 4 Call 367.

*Wisconsin.*— Rhodes *v.* Stephens, 61 Wis. 388, 21 N. W. 239.

*Canada.*— Tilt *v.* Jarvis, 5 U. C. C. P. 486; Johnson *v.* McDonald, 23 U. C. Q. B. 183.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 295.

34. Sherman *v.* Finch, 71 Cal. 68, 11 Pac. 847 (holding that in trover against a sherifl for conversion of chattels, in order to entitle plaintiff to compensation for "time and money properly expended in the pursuit of the property," as allowed by Civ. Code, § 3336, the evidence must be definite and certain); Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869; Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 1 Bosw. 357] (holding that in an action against a sheriff for not delivering a cargo of coal to plaintiff, which had been replevied, the bill of lading was not *prima facie* evidence of the quantity of coal aboard the vessel).

35. Kerner *v.* Boardman, 14 N. Y. Suppl.

**b. Conclusiveness of Officer's Return.**[36] The return of the sheriff is conclusive against him,[37] and he cannot be allowed to introduce evidence contradicting it.[38] And a deputy's return cannot be contradicted by either the deputy[39] or the sheriff.[40] But the return is not conclusive in favor of the officer,[41] or against the party seeking to hold him liable for an official default or misfeasance,[42] although the officer's return has been held to be *prima facie* evidence in his favor.[43]

**L. Trial**[44] **— 1. Questions Proper For Determination.** Where, in an action against a sheriff for money collected under a delinquent tax judgment, the sheriff

787 [*affirmed* in 133 N. Y. 539, 30 N. E. 1148].

36. Conclusiveness of return as against sureties of officer see *infra*, X, H, 13, d, (II).

37. *California.*— Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849.

*Colorado.*— Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222.

*Illinois.*— Major *v.* People, 40 Ill. App. 323.

*Maine.*— Allen *v.* Doyle, 33 Me. 420.

*Massachusetts.*— Boynton *v.* Willard, 10 Pick. 166.

*Pennsylvania.*— Welsh *v.* Bell, 32 Pa. St. 12; Paxton *v.* Steckel, 2 Pa. St. 93; Shewel *v.* Fell, 3 Yeates 17.

*Vermont.*— Parker *v.* Peabody, 56 Vt. 221.

*United States.*— Hardesty *v.* Pyle, 15 Fed. 778.

*Canada.*— Phelp *v.* McDonell, 6 U. C. Q. B. O. S. 258.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 296.

**The enumeration of the articles attached** in the sheriff's return to a writ of attachment is not conclusive against him in an action by the owner of the property to recover damages for the taking of such articles. Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475.

**In an action for failure to allow a debtor's claim of exemptions** the officer is not concluded by his return but may show that the property claimed as exempt did not belong to the execution debtor. State *v.* Springate, 51 Mo. App. 619.

38. *Alabama.*— Burns *v.* Taylor, 3 Port. 187.

*Maine.*— Allen *v.* Doyle, 33 Me. 420; Haynes *v.* Small, 22 Me. 14.

*Massachusetts.*— Canada *v.* Southwick, 16 Pick. 556; Denny *v.* Willard, 11 Pick. 519, 22 Am. Dec. 389; Boynton *v.* Willard, 10 Pick. 166.

*New York.*— Kuhlman *v.* Orser, 5 Duer 242; Townsend *v.* Olin, 5 Wend. 207.

*Pennsylvania.*— McClelland *v.* Slingluff, 7 Watts & S. 134, 42 Am. Dec. 224 [*followed* in Kintzing *v.* McElrath, 5 Pa. St. 467]; Shewel *v.* Fell, 4 Yeates 47; Clevenger's Estate, 1 Lanc. L. Rev. 277, 6 L. T. N. S. 136.

*Texas.*— Rankin *v.* Jones, (Civ. App. 1899) 53 S. W. 583; McKee *v.* Le Gette, 1 Tex. App. Civ. Cas. § 1144.

*United States.*— Duryee *v.* Webb, 8 Fed. Cas. No. 4,198, 16 Conn. 558 note.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 296.

**A necessary implication** from the return cannot be contradicted by the sheriff. Kuhlman *v.* Orser, 5 Duer (N. Y.) 242.

**Evidence not inconsistent with return.**— Where a sheriff's return shows that he holds the attached property subject to the order of the court, evidence that the property is held by a receiptor under the direction of the creditor is not inadmissible as contradicting the return. Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571. One who is sued in the capacity of sheriff for taking an insufficient replevin bond may show by parol evidence that he was only a deputy, and acted as such when he took the bond, although afterward, in returning final execution on the replevin bond, he described himself as sheriff, the facts being that he was first deputy and afterward sheriff. Murrell *v.* Smith, 3 Dana (Ky.) 462. In defense of an action against a sheriff by a stock-holder of a manufacturing corporation, for arresting him on an execution against the corporation, it may be shown that he was a stock-holder, although the return on the execution states that he was arrested as "now or formerly an officer of the within named corporation." Richmond *v.* Willis, 13 Gray (Mass.) 182. An officer's return that he has attached property does not preclude him from showing that such property did not belong to defendant in attachment. Canada *v.* Southwick, 16 Pick. (Mass.) 556; Buffalo Third Nat. Bank *v.* Elliott, 42 Hun (N. Y.) 121 [*affirmed* in 114 N. Y. 622, 21 N. E. 416]. Evidence that an officer did not remove property does not necessarily contradict his return that he attached the same. Boynton *v.* Willard, 10 Pick. (Mass.) 166.

39. Gardner *v.* Hosmer, 6 Mass. 325.

40. Gardner *v.* Hosmer, 6 Mass. 325; Sheldone *v.* Paine, 10 N. Y. 398.

**Showing as to official character.**— Where a constable sometimes acted as a deputy sheriff, but only when specially deputized, a return made by him as deputy is not conclusive on the sheriff that he was authorized to act as deputy in that particular case. Patterson *v.* Britt, 33 N. C. 383.

41. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849; Dreese *v.* Keller, 66 Kan. 313, 71 Pac. 520; Whithead *v.* Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362.

42. Wilkie *v.* Hall, 15 Conn. 32; Browning *v.* Flanagin, 22 N. J. L. 567; Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.

43. Vaughan *v.* Warnell, 28 Tex. 119.

44. See, generally, Trial.

claims the right to withhold a part of the fund for costs, the question of his right thereto may be properly determined.[45] Where a sheriff is sued for not keeping attached goods, so that they might be forthcoming to satisfy an execution, and he shows in defense, for the purpose of proving a dissolution of the attachment, that the estate of the judgment debtor was assigned before judgment, plaintiff cannot be permitted to contest the validity of the assignment by showing irregularities in the proceedings had against the debtor under the insolvent law.[46]

**2. Order of Proof.**[47] At the trial of an action against an officer for taking property which plaintiff claims, on levy of an execution against another, on plaintiff adducing evidence of his right to the property, if the officer relies on the fact that the property was in the possession of such other person at the time of the taking, he must adduce evidence to show that it was in such possession, under circumstances raising a presumption of ownership in such person; and plaintiff, in reply thereto, if he relies upon an affidavit claiming the property under the statute, or upon notice, must then prove the same.[48] In trespass against a person for entering plaintiff's premises, defendant cannot introduce in evidence an execution against plaintiff and a written authority from a sheriff, empowering him to levy the execution on the property of plaintiff, without first introducing evidence to show that the person from whom he received the authority was then the sheriff.[49]

**3. Questions For Court and Jury.**[50] It is for the jury to pass upon disputed questions of fact arising upon the trial,[51] but questions of law must be passed

**45.** San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 130.

**46.** Grant *v.* Lyman, 4 Metc. (Mass.) 470.

**47.** See, generally, Trial.

**48.** Perkins *v.* Zarracher, 32 Minn. 71, 19 N. W. 385, holding that plaintiff need not make such proof as part of his case in chief.

**49.** Calvert *v.* Stone, 10 B. Mon. (Ky.) 152.

**50.** See, generally, Trial.

**51.** *Alabama.*— O'Bryan *v.* Webb, 142 Ala. 259, 37 So. 935 (holding that whether a sheriff used reasonable care in keeping property levied on was a question for the jury); O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413 (holding that whether a writ was delivered to a sheriff was a question for the jury); Harris *v.* Russell, 93 Ala. 59, 9 So. 541 (holding that where, in trespass against the sheriff and two different attaching creditors and the sureties on their indemnifying bonds, the sheriff's returns on the writs of attachment showed that the attachments were levied on different goods, while the sheriff testified that they were levied at the same time on the same goods, it was for the jury to determine whether there was one levy on all the goods, and whether defendants were therefore liable as joint trespassers).

*Colorado.*— Duncan *v.* Burchinell, 14 Colo. App. 471, 61 Pac. 61, holding that whether a return of exempt property levied on was tendered within a reasonable time was a question for the jury.

*Delaware.*— State *v.* Gemmill, 1 Houst. 9, holding that in an action for negligence in executing a fieri facias it was a question for the jury whether the neglect of the officer to levy on articles of a perishable nature caused any damage to plaintiff.

*Illinois.*— Wilbur *v.* Turner, 39 Ill. App. 526, holding that in an action for damages against one who was claimed to have assisted a constable in a wrongful seizure of goods, the question whether defendant aided him was for the jury.

*Kentucky.*— Thome *v.* Haley, 1 Dana 268, holding that in an action against a sheriff by an execution creditor for failure to sell property levied on, the question whether the property alleged to belong to defendant in the execution was liable to the levy or not was for the jury.

*Maryland.*— Mark *v.* Lawrence, 5 Harr. & J. 64, holding that whether a sheriff had been guilty of fraud in the sale of certain property was a question for the jury.

*Massachusetts.*— Stearns *v.* Dean, 129 Mass. 139, holding that it was for the jury to determine whether an officer attached and assumed dominion over certain property.

*Minnesota.*— Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639 (holding that, in an action for a wrongful levy upon wheat, it was for the jury to determine the sheriff's intention or purpose in consenting that the wheat might be threshed while refusing to release the levy); Ohlson *v.* Manderfeld, 28 Minn. 390, 10 N. W. 418 (holding that whether there was such possession of property as to make a statutory affidavit by a claimant necessary was a question for the jury); Tullis *v.* Orthwein, 5 Minn. 377 (holding that whether a sheriff was guilty of unreasonable neglect in making an inventory of property levied on was a question for the jury).

*Missouri.*—State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250, holding that whether an execution was returned unexecuted by order of plaintiff's attorney was a question for the jury.

*Nebraska.*—Norwegian Plow Co. *v.* Haines, 21 Nebr. 689, 33 N. W. 475, holding that in an action for a wrongful levy, whether it was the intention of the officer to levy only on property belonging to the judgment debtor was a question for the jury.

upon by the court and it is error to leave them to the determination of the jury.[52]

*New Hampshire.*— Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189 (holding that where an attachment was maliciously levied on exempt property of a married woman, under such circumstances as would justify an inference that she would thereby be made mentally distressed and sick from exposure to inclement conditions of the weather, and she was made sick upon such exposure, the question whether the levy of the attachment was the proximate cause of her injury was for the jury); Taylor *v.* Jones, 42 N. H. 25 (holding that where a third person's goods were so intermingled with those of a debtor that a sheriff having an attachment against the latter was unable to distinguish them from those of the debtor, in an action of trespass by such third person against the sheriff, it was for the jury to determine whether a refusal to surrender the goods on demand made or an offer to point them out, and a subsequent sale thereof under process, rendered the original taking by the sheriff a trespass).

*New York.*— Moore *v.* Westervelt, 21 N. Y. 103 [*reversing* 2 Duer 59] (holding that whether a sheriff was guilty of negligence in not taking proper precautions for the security of a vessel was a question for the jury); Feinberg *v.* Allen, 118 N. Y. App. Div. 497, 103 N. Y. Suppl. 339 (holding that in an action for conversion of wood, which it was claimed defendant as sheriff wrongfully levied on and sold under an execution against plaintiff's wife, the question whether defendant, after making the levy, relied on plaintiff's statement that he was not the owner of the wood in having it measured, appraised, and sold was for the jury); Blair *v.* Flack, 62 Hun 509, 17 N. Y. Suppl. 64 (holding that the ownership of certain property was a question for the jury); Baker *v.* Brintnall, 52 Barb. 188 (holding that in an action for returning an execution unsatisfied when the same might have been collected, the question whether defendant in the execution had sufficient property to pay the same was for the jury); Moriarity *v.* Wagner, 84 N. Y. Suppl. 864 (holding that where a warrant for the removal of the property of a tenant directed the officer to remove the tenant's property "from the store floor" of certain premises, and in an action against the officer for the loss of plaintiff's property so removed, plaintiff's evidence tended to show that defendant entered and removed such property from a part of the building other than the "store floor," the question whether the property lost was so wrongfully removed was for the jury).

*Oregon.*— Moore *v.* Floyd, 4 Oreg. 101, holding that in an action against a sheriff for refusing to levy on property sold by a debtor, the possession of which he retained, the question of good faith should have been submitted to the jury.

*Utah.*— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522, holding that where, in an action against a constable for the taking and detention of certain personalty, plaintiff alleged that defendant took possession of his place of business and closed it, thereby suspending his business, to his damage, the questions whether plaintiff was at the time of the injury occupying the building, and whether defendant as an officer excluded him from it more than he need have done, were for the jury.

*Vermont.*— Spalding *v.* Stewart, 38 Vt. 78 (holding that where defendant, as sheriff, attached a wagon really belonging to plaintiff as the property of a third person, and the evidence tended to show that subsequently plaintiff told defendant, in answer to a question as to what plaintiff claimed in regard to the wagon, that all he asked was to have it returned to such third person, or to the place from whence defendant took it, which defendant did the next morning, such third person assisting him, the question whether it was the understanding that such return was to be a discharge of all claim plaintiff had on defendant for the taking and detention of the wagon, as well as the wagon itself, was for the jury); Bourne *v.* Merritt, 22 Vt. 429 (holding that whether or not a certain person had a special interest in property levied on was a question for the jury).

*Virginia.*— Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7, holding that whether there had been any damage to property while detained under a wrongful seizure was a question for the jury.

*United States.*— Grothgar *v.* Lewis, 100 Fed. 326, 40 C. C. A. 382, holding that in an action against a sheriff for dismantling a ship in levying an attachment, the question whether the ship could have been repaired at a reasonable cost was for the jury.

*England.*— Fermor *v.* Phillips, Holt N. P. 537, 3 E. C. L. 213, holding that whether a certain person acted under the sheriff's authority was a question for the jury.

*Canada.*— McLean *v.* Hannon, 3 Can. Sup. Ct. 706, holding that whether plaintiff had shown title to or a right to possession of certain goods was a question for the jury.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 309.

Whether a sheriff has used reasonable diligence in endeavoring to arrest a debtor upon execution is a mixed question of law and fact. Hopkinson *v.* Holmes, 18 Vt. 18.

52. Bevan *v.* Byrd, 48 N. C. 397 (holding that in an action against a constable for misconduct in a sale under execution, the question whether or not the property levied on was properly sold was for the court); Com. *v.* Vandyke, 57 Pa. St. 34 (holding that whether an indemnifying bond tendered a sheriff by plaintiff in execution was reasonable in amount ought not to be broadly submitted to a jury without instructions, in an action against the sheriff for a false return of *nulla bona*, but it was a question for the court, leaving the facts, if in dispute, to the jury).

Neither is it proper to submit to the determination of the jury a matter as to which, under the evidence, there is no uncertainty.[53]

**4. INSTRUCTIONS.**[54] The court should explain to the jury the character of the action,[55] and properly instruct them as to the legal principles governing the right of the complaining party to a recovery,[56] the issues which are presented for their

53. Briggs *v.* Taylor, 28 Vt. 180 (holding that where a carriage, wagon, and sleighs, which were not past use, were attached and allowed by the sheriff to remain during the winter in the open fields, wholly exposed to the weather, for which no excuse was offered, except the difficulty of finding a place for them under cover, it was error, in an action on the case against the sheriff, to submit to the jury the question whether the officer exercised proper care; but the jury should have been instructed that he was liable for the damage done to the property); Strong *v.* Bradley, 14 Vt. 55 (holding that if instructions given by the creditor with regard to collecting an execution would in any sense influence the conduct of the officer, his acts must be referred to them, in the absence of positive proof to the contrary, and the point whether he was or was not actuated by the instructions should not in such case be submitted to the jury).

54. See, generally, TRIAL.

55. Goldstein *v.* Abramson, 86 N. Y. Suppl. 30, where the instructions given were held erroneous because failing to explain with sufficient clearness the character of the action.

56. *California.*— Zaro *v.* Dakan, 76 Cal. 565, 18 Pac. 680, holding that in an action against a sheriff for seizing, as property of a third person, goods claimed by plaintiff, it was error to charge that the verdict must be for plaintiff if, at the time of the levy, he was owner or in possession, as ownership was the point in issue, and possession merely evidence of title.

*Colorado.*— Autrey *v.* Wright, 4 Colo. App. 179, 35 Pac. 186, holding that where, in an action against a sheriff for the seizure under attachment of exempt property, it appeared that the property was mortgaged, the jury should have been instructed that, if the mortgagee was in possession at the time of the seizure, plaintiff, the mortgagor, could not recover, as in such case he would have no title.

*Connecticut.*— Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242, holding that in an action by the trustee of an insolvent against a sheriff for failing to deliver to plaintiff the proceeds of an attachment levied within sixty days before the insolvent proceedings were begun, as required by Gen. St. (1888) § 523, defendant could not complain of an instruction that if defendant, knowing of the assignment of insolvency, failed to deliver the property to plaintiff, but sold it under the execution, and paid the proceeds to the attaching creditor he was liable, but he was not liable if he made the payment in ignorance of such facts.

*Kentucky.*— Tudor *v.* Lewis, 3 Metc. 378 (holding that the fact that the degree of misconduct and negligence charged in the petition and put in issue by the answer was not the proper test did not relieve the court from the duty of defining what amount of negligence was necessary to charge the sheriff); Nelson *v.* Terry, 56 S. W. 672, 22 Ky. L. Rep. 111 (holding that where plaintiff claimed in his pleading only a mortgage lien on the property on which the execution was levied, the court properly instructed the jury that plaintiff had a prior lien thereon, if there was a valuable consideration for the mortgage, and to find for defendant if there was no consideration for the mortgage, no claim as purchaser being asserted by plaintiff, and there being therefore no issue as to the validity of a sale, because of the failure of the purchaser to take possession).

*Michigan.*— Wheeler *v.* Wallace, 53 Mich. 355, 19 N. W. 33, holding that in an action against a sheriff for wrongful sale, an instruction that if the jury should find that through plaintiff's fault the property did not bring its full value he could not complain, was error, as plaintiff, being in no manner responsible for the sale, was chargeable with no fault in respect to it, unless he actively interfered to prevent a sale for fair value.

*Minnesota.*— Hopkins *v.* Swensen, 41 Minn. 292, 42 N. W. 1062, holding that in an action against a sheriff for levying on plaintiff's personal property under an execution against another person, plaintiff being present at the time the sheriff took the goods, a charge to the jury that, to entitle plaintiff to a verdict, she must prove, not only that the goods were hers, but "that at the time they were taken she asserted her title thereto," was erroneous, because it omitted the essential element of an estoppel, that the sheriff was influenced by her silence.

*South Dakota.*— Fodness *v.* Juelfs, 13 S. D. 145, 82 N. W. 396, holding that in an action against a sheriff for a wrongful execution sale, it was proper to instruct that, if the jury found plaintiff to have been the owner of personal property wrongfully taken or in possession thereof at the time of taking, she was entitled to recover, since possession was presumptive evidence of ownership against all persons not themselves owners.

*Texas.*— Purnell *v.* Gandy, 46 Tex. 190, holding that in a suit against an officer for seizing property claimed as belonging to the estate of a person against whom proceedings in bankruptcy were taken, where there was evidence tending to show that the goods seized had been conveyed by the bankrupt in violation of the provisions of the bankrupt law, it was error to refuse instructions asked by defendant, informing the jury of the terms and provisions of the bankrupt law, apparently violated by the bankrupt, as to the goods so seized.

consideration,[57] the questions which are involved therein,[58] the matters proper to be considered in deciding those questions,[59] and the measure and elements of damages,[60]

*Utah.*— Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100, holding that where the ownership and possession of personal property were in issue, as in an action for conversion by a sheriff acting under a writ not directed against plaintiff, instructions that, as a matter of law, the writ justified the sheriff in taking and selling the property not claimed by plaintiff as his individual property, and that the justification of the sheriff justified all those acting or claiming under him as to all property not proved, by the preponderance of the evidence, to be the individual property of plaintiff, were erroneous, and might be taken advantage of by a general exception.

*Vermont.*— Strong *v.* Bradley, 14 Vt. 55, holding that where the creditor, in committing an execution to a sheriff for collection, gave written instructions, and on the trial of an action against the officer for neglect in collecting the same the instructions were relied on by way of defense, it was the duty of the court to direct the jury in regard to the legal effect of such instructions.

*Wisconsin.*— Lucas *v.* Sheridan, 124 Wis. 567, 102 N. W. 1077, holding that in an action against a sheriff and under-sheriff for conversion of personal property belonging to plaintiff, and located in a house-boat levied on, an instruction that if the man in charge of the boat knew that plaintiff was the owner, or if at the time he was so informed by plaintiff, and he forbade plaintiff to take the property, such denial of plaintiff's right was a denial by defendants, and amounted to a conversion, entitling plaintiff to recover was proper, as was also an instruction that if, after the conversion, and before defendants' offer to return the property to plaintiff, it was materially injured, by rain or otherwise, or had been in part carried away by persons unknown, plaintiff was not bound to accept such return, but was entitled to recover the reasonable value of the property.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 310.

57. Acton *v.* Knowles, 14 Ohio St. 18 (holding that where, in an action for a false return by a sheriff on an execution, which recited that the property had been previously levied on by a former sheriff, the answer affirmed the truth of the return and averred that the property, when the return was made, was subject to a subsisting levy made by a former sheriff, an instruction assuming the continued vitality of the levy as a necessary element of the defense, presented the true scope and effect of the issue joined between the parties); Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708 (holding that where an attaching creditor was sued jointly with the sheriff in trover for property attached, the mere joining with the sheriff in a special plea, where there was also a general several plea on the record, would not involve the creditor with the officer, or excuse the court from giving proper instructions to the jury as to all the points in the case as to both defendants, considered separately, whether instructions were particularly requested on all the points or not).

58. Hopkins *v.* Gary, 7 Ala. 46, holding that in a proceeding against a sheriff for failure to exercise due diligence to make the money on an execution placed in his hands for collection, it was not error to instruct, without explanation, that the question whether defendant was sheriff was involved in the issue to be tried, and, unless it was proved, the finding should be in his favor.

**Charge held proper.**— Where in an action by the trustee of an insolvent estate against the sheriff, for selling property levied on within sixty days prior to the assignment, the court, after instructing that the burden was on plaintiff to show that the debtor was, at the date of the assignment, the owner of the property in question, instructed as follows: "If you find, upon the evidence that the sale in question was merely colorable and not made in good faith, or was not accompanied or followed by any change of possession, or use, then you will find that issue for the plaintiff; if you find that it was made in good faith and was accompanied and followed by an actual change of possession, then you will find that issue for the defendant," defendant had no just ground to complain of the instruction because of the court's failure to charge that the claimed possession of the property by the vendor might be explained. Boseli *v.* Doran, 62 Conn. 311, 25 Atl. 242.

59. Sexton *v.* McDowd, 38 Mich. 148, holding that in a suit against a sheriff for the conversion of an article seized under a writ of replevin, the special verdict rendered in the replevin suit, that defendant was not in possession when the article was demanded or suit was brought, would not warrant an instruction that the right of plaintiff in replevin had been adversely decided by it, and that evidence to the contrary need not be considered.

60. Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836 (holding that where in an action on an indemnity bond given a sheriff before levy of executions, plaintiff claimed he had paid certain amounts on the judgments which were not credited on the executions, the jury should have been instructed that, if plaintiff was entitled to credit on the executions for any greater sums than were given, they should find for him for such amounts); Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931; Perry *v.* Carr, 42 Vt. 50; Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7 (holding that in an action for a wrongful levy a requested instruction that there could be no recovery except for such loss as plaintiff herself, and no one else, suffered should have been given).

**Effect of instruction.**— In an action against a deputy sheriff for attaching a vessel bound on a voyage, an instruction to the jury that they were to estimate the damages according

taking care that the instructions are clear and not such as to mislead, or be liable to mislead, the jury.[61] But the court should not give instructions which assume matters in controversy,[62] are predicated upon a state of facts not established by the evidence,[63] ignore matters which have been properly brought before the jury,[64] or are not based upon the evidence.[65]

to the value of the vessel at the time of the taking, "and the additional damage sustained, if any," did not justify the jury in assessing damages for the breaking up of the voyage. Boyd *v.* Brown, 17 Pick. (Mass.) 453.

61. *Connecticut.*— Tucker *v.* Bradley, 15 Conn. 46, holding that in an action against a constable for neglect of official duty, an instruction that, where a writ of attachment was delivered to an officer without any special instructions as to its service, he was not to be deemed guilty of unnecessary delay if he exercised ordinary diligence in serving the writ, "and he is not bound to employ, for that purpose, the time which is usually devoted to rest or refreshment," was erroneous, as the jury might infer therefrom that under such circumstances the officer could not spend more time before the service than what was usually devoted to rest and refreshment.

*Kentucky.*— Vaughn *v.* Justice, 78 S. W. 424, 25 Ky. L. Rep. 1666, holding that where, in an action for wrongful seizure by a sheriff in claim and delivery of certain poles being driven down a river, there was evidence that those seized and those not seized were commingled, and that some of them were lost; but how many of each was not shown, and there was no pleading or proof showing liability of the sheriff for loss of any except those seized, an instruction that, if plaintiffs were the owners of the poles in controversy, and by reason of the seizure the poles were, while separated, swept into the river, and thereby some of them were lost, plaintiffs could recover for the loss, was misleading, as under it the jury might have allowed damages for loss of poles not seized.

*Maryland.*— Cloud *v.* Needles, 6 Md. 501.

*New York.*— Moore *v.* Westervelt, 9 Bosw. 558, holding that in an action against a sheriff for damages sustained by the loss of a cargo of coal, which was sunk at a wharf during a violent storm, while in his possession, an instruction "that the sheriff was responsible for the negligence of the master and crew" was properly refused, for want of exactness.

*Vermont.*— Flinn *v.* St. Johns, 51 Vt. 334.

*Virginia.*— Davis *v.* Johnson, 3 Munf. 81, holding that where, in an action on the case against a sheriff for failing to levy an execution, the return being "that there were no effects with which the debt could be satisfied," defendant requested an instruction "that it was incumbent on plaintiff to prove the falsity of the return mentioned in the declaration," and no return was distinctly stated therein, it was proper to decline to give any instruction in pursuance of such request.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 310.

**Instructions held proper.**— In an action against a sheriff for refusing to allow plaintiffs to replevy property levied on by defendant, a charge that, if the persons on the bond refused by the sheriff "were solvent, and responsible for the penalty of the bond," the sheriff was liable to the party aggrieved was sufficiently precise, as the term "solvent and responsible" is equivalent to "good for the penalty of the bond." Chenault *v.* Walker, 14 Ala. 151. In an action against a sheriff for the conversion of grain in a public warehouse, and alleged to belong to plaintiff, instructions that if plaintiff was the owner, and entitled to possession, when the action was begun, and defendant wrongfully detained the grain after demand, plaintiff should recover; and that, if defendant levied on it under an execution against the warehouseman, and sold it without plaintiff's consent, it would be a conversion, and plaintiff should recover; and that if defendant got possession lawfully, yet if, before suing, plaintiff demanded possession, and defendant refused it, and afterward sold the grain, this would amount to conversion, were proper, and not misleading as authorizing recovery on the supposition that the warehouseman in charge of the grain was doing business as a private warehouseman. Yockey *v.* Smith, 181 Ill. 564, 54 N. E. 1048, 72 Am. St. Rep. 286 [*affirming* 81 Ill. App. 556].

**Harmless surplusage.**— Where, in an action against a sheriff to recover the possession of certain property taken by him under an attachment regular on its face, the jury had been instructed that defendant could justify the taking under the attachment, unless plaintiff was a *bona fide* purchaser, a further instruction that the writ of attachment, affidavit, bond, and transcript of the record introduced in evidence authorized a levy on the goods of the attachment defendant was proper, since so much thereof as referred to the affidavit and bond was merely harmless surplusage. Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

62. Birmingham Dry-Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153; Sugarman *v.* Brengel, 68 N. Y. App. Div. 377, 74 N. Y. Suppl. 167.

63. Windmiller *v.* Chapman, 139 Ill. 163, 28 N. E. 979; Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. 931. See also Allen *v.* Wright, 136 Mass. 193.

64. Birmingham Dry-Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153, holding that where, in an action against a sheriff for failure to serve a subpœna, the sheriff introduced evidence showing an excuse therefor, it was proper to refuse to charge that a return before the return-day of the writ, without service, would constitute negligence.

65. Brownell *v.* McCormick, 7 Mont. 12, 14

**5. Dismissal, Nonsuit,[66] or Direction of Verdict.[67]** In determining whether the evidence makes a case for the jury, the court should take the most favorable view of the evidence for plaintiff which is fairly admissible;[68] and if, considering the evidence in connection with the admissions of the answer, it is found sufficient to justify the jury, if satisfied of its credibility, in inferring the ultimate fact upon which plaintiff bases his right to recover, the case should be submitted to the jury and it is error to dismiss the action[69] or to direct a verdict for defendant.[70] So also, in an action against a sheriff for failure to execute a capias ad respondendum, where the proceedings in the case in which the writ was issued are valid on their face, and offer is made to show complete jurisdiction in the court issuing the writ, plaintiff is entitled to put in his proofs and have the case tried by the jury, and it is error for the court to direct a verdict for defendant.[71] Where there is a complete failure of proof as to facts essential to plaintiff's right to recover it is proper to dismiss the complaint when plaintiff closes his case,[72] or to order a nonsuit;[73] but a failure to prove all the allegations of the complaint will not warrant a dismissal where enough is proved to support the cause of action.[74] Where plaintiff has introduced evidence *prima facie* sufficient to entitle him to recover, and defendant introduces no evidence controverting the same, it is proper to direct a verdict for plaintiff.[75] Where the uncontradicted evidence in an action against a sheriff for not properly executing process shows that the officer acted in good faith and in accordance with the directions of plaintiff or his attorney it is proper to direct a verdict for defendant.[76]

**6. Verdict and Findings.[77]** Where a sheriff who is sued for wrongfully taking personal property answers that he took the same by virtue of an attachment, and that the goods were the property of defendant in the attachment, who

Pac. 651, holding that where, in an action against a constable for wrongfully attaching property in the hands of bailees as property of such bailees, there was no evidence that the property had been concealed to hinder and defraud the creditors of the bailees, an instruction that, if the property had been covered up, the jury should find for defendant was unwarranted.

**66.** See, generally, Dismissal and Nonsuit, 14 Cyc. 387.

**67.** See, generally, Trial.

**68.** Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639.

**69.** Kloos *v.* Gatz, 97 Minn. 167, 105 N. W. 639.

**70.** Hagar *v.* Haas, 66 Kan. 333, 71 Pac. 822 (holding that where plaintiff in an action against an officer for an illegal attachment made a *prima facie* showing of ownership and right of possession of the property attached as that of another, and the attachment under which the officer justified was held void, it was error to direct a verdict for the officer); Blair *v.* Flack, 62 Hun (N. Y.) 509, 17 N. Y. Suppl. 64; Houser *v.* West, 39 Oreg. 392, 65 Pac. 82 (holding that where, in an action on a sheriff's indemnifying bond, there was ample evidence that the property levied on was that directed to be seized and sold by defendant, it was proper to deny a motion for the direction of a verdict for defendant on the ground that one of plaintiff's witnesses testified that the property sold was located at a place other than that at which the property which the sheriff was directed to seize was located). See also Johnson *v.* Dinsmore, 11 Nebr. 391, 9 N. W. 558.

**71.** Hatch *v.* Saunders, 66 Mich. 181, 33 N. W. 178.

**72.** Lucker *v.* Gross, 31 Misc. (N. Y.) 750, 63 N. Y. Suppl. 1074.

**73.** Milling *v.* Sanders, 26 S. C. 610, 2 S. E. 386, holding that a nonsuit was proper in an action which was brought by the receiver of certain assigned assets against the sheriff, who, it was alleged, had levied on a portion of the assigned assets under executions in another action, where there was no evidence tending to show that the property which was in the sheriff's possession was a part of that which had been conveyed in the assignment.

**74.** McGuire *v.* Bausher, 52 N. Y. App. Div. 276, 278, 65 N. Y. Suppl. 382, where it is said: "Where no arrest is made, or where no right to make such arrest is asserted, the mere fact that a plaintiff alleges fraud does not require him to establish such fact in order that he may recover upon the merits of an action which is completely established independently of the fraud."

**75.** Sanders *v.* Chandler, 26 Minn. 273, 3 N. W. 351, so holding in a case where plaintiff, in an action against a sheriff for the seizure and sale of his property under an execution against a third person, introduced evidence that the property taken was his, and defendant introduced the execution in evidence, but offered no proof that the goods taken under it were the property of the execution debtor. See also Elmore *v.* Hill, 51 Wis. 365, 8 N. W. 240.

**76.** Gregg *v.* Murphy, 73 Hun (N. Y.) 389, 26 N. Y. Suppl. 556.

**77.** See, generally, Trial.

had fraudulently sold them to plaintiff, the court must find on the issue of fraud thus raised.[78] In an action of conversion against a sheriff for taking plaintiff's goods under an attachment against another it is not necessary to make a finding on the allegation of plaintiff's demand for the goods, where it appears affirmatively by the answer that any demand would have been unavailing.[79] In an action by a mortgagee for the wrongful seizure of the mortgaged goods by a sheriff on writs of attachment, it is not essential for the jury to find the value of the goods taken, where it appears that it exceeds the amount of the mortgagee's claim.[80] Although the statute of limitations is set up as a bar, it is not necessary that the court find expressly as to statute where the facts found or admitted show that the action is not barred.[81] In an action against a sheriff for failure to return a capias ad satisfaciendum it is not necessary that it be shown by verdict that the execution was delivered to the sheriff and that he failed to return it, unless such facts are specially controverted.[82] In an action against a sheriff for not attaching certain property on writs of attachment delivered to him, a finding generally for defendant involves a finding that he exercised due diligence.[83] In an action by the vendee of a chattel against a sheriff seizing the same under an attachment against the vendor, a finding that plaintiff was not and never had been the owner warrants a judgment for defendant.[84] A finding that defendant, as sheriff, on process against a third person, took plaintiff's wheat from a bin in the barn of defendant in the process, after being told by plaintiff that he had wheat there which must not be taken, is sufficient to support a judgment for conversion.[85] Where in an action for the wrongful release of a levy, the issue made prominent on the trial is whether the execution defendant was the owner of the property levied on, and plaintiff's evidence shows that he was, a finding by the court that the allegations in the complaint are true is sufficient to warrant a judgment in plaintiff's favor, although there is no direct allegation in the complaint that the execution defendant owned the property seized and levied on, and although the court makes no express finding to that effect.[86] Where actual damages are alleged by reason of a sheriff's failure to return an execution, and the allegation is denied by the answer, a finding that the sheriff has not returned the execution is not a finding that actual damages were sustained, and does not authorize a judgment for plaintiff.[87] Where the statute provides that no judgment shall be entered against an officer for an escape unless the jury expressly find that the prisoner did escape with his consent or through his negligence, a general verdict, in an action for an escape, in favor of plaintiff for a certain sum is not sufficient,[88] and a verdict that the sheriff suffered a prisoner "voluntarily and negligently to escape" has also been held contradictory and insufficient.[89] But under such a statute where the sheriff by his plea admitted that the escape was with his consent, and the only issue tendered was whether the escape was produced by the order of plaintiff's attorney, on which issue the jury found for plaintiff, this was sufficient to warrant a judgment against the sheriff.[90]

78. Harris *v.* Burns, 51 Cal. 528.
79. Hunt *v.* Hammel, 142 Cal. 456, 76 Pac. 378, holding this to be true notwithstanding Code Civ. Proc. §§ 549, 689, providing that no claim of a third person to goods attached shall be valid against a sheriff unless set up by a written claim verified by the oath of the claimant.
80. Stevens *v.* Breen, 75 Wis. 595, 44 N. W. 645.
81. Woodham *v.* Cline, 130 Cal. 497, 62 Pac. 822.
82. McWhorter *v.* Marrs, Minor (Ala.) 376.
83. Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319.
84. Joshua Hendy Mach. Works *v.* Connolly, 76 Cal. 305, 18 Pac. 327, holding that in such action it was unnecessary that there should be any finding as to whether the vendor was the owner of the chattel when it was seized.
85. Behler *v.* Drury, 51 Mich. 111, 16 N. W. 256.
86. Crosson *v.* Olson, 47 Minn. 27, 49 N. W. 406.
87. Glascock *v.* Ashman, 52 Cal. 420.
88. Rountree *v.* Smith, 1 Stew. (Ala.) 157; Biggs *v.* Rucker, 3 Litt. (Ky.) 175. See also Hooe *v.* Tebbs, 1 Munf. (Va.) 501.
89. Grimes *v.* Butler, 1 Bibb (Ky.) 192.
90. Noble *v.* Beatty, 4 Bibb (Ky.) 507.

**7. CONTINUANCES.**[91] It has been held that a statute providing that when a court has allowed the principal and surety on an indemnity bond to be made co-defendants in an action against a sheriff for a wrongful seizure, a continuance "may" be granted to allow of service on such co-defendants, is mandatory, and the allowance of such continuance does not rest in the court's discretion.[92]

**M. References.**[93] In a proper case a reference may be ordered in an action against an officer for an official default.[94]

**N. New Trial.**[95] A new trial should be granted where instructions were given by the court which might have misled the jury and operated on their minds to the prejudice of the party against whom the verdict was rendered;[96] and where the jury has erroneously included in the verdict a sum for which defendant is not liable a new trial should be granted unless plaintiff discharges any claim which he may have for such amount.[97] But where the jury has found for defendant, and he acted in good faith, following a practice which was general, although perhaps not strictly consonant to law, a new trial is properly refused.[98] Where plaintiff has neglected to produce on the trial an essential part of the evidence necessary to support his demand, a new trial will not be granted on his allegation that he was taken by surprise, and hence unprepared to produce the proof when the exception was taken.[99] Nor will a new trial be granted after a verdict against defendant in an action for a false return on the ground that the judgment debtor testified to facts which took defendant by surprise.[1]

**O. Judgment**[2] **— 1. In General.** An officer who gives in evidence in justification the process under which he made the seizure complained of is entitled to judgment, although the suit is brought in favor of one who claims the property by virtue of a sale from the person as whose the property was seized, where the jury has found the sale to be fraudulent against the creditors of the vendor.[3] Where the owner of attached property, which has been destroyed through negligence, sues the sheriff for the value of the property, and the attaching creditor is made a party, and awarded a sufficient portion of the judgment to satisfy his debt, the sheriff is not prejudiced by the fact that the judgment against him is for the whole amount.[4] Where, in an action against a sheriff for refusing to sell land on execution, the court has found that the complicated condition of the title justified the sheriff in refusing to sell, it is proper to render a decree directing the sale, but exonerating the sheriff, where no damages appear to have been sustained.[5] Where an action on a sheriff's indemnifying bond was dismissed as to the sureties, but continued as to the principal, and there were issues respecting an oral contract of indemnity preceding the bond, it was proper to deny a motion for judgment for

91. See, generally, CONTINUANCES IN CIVIL CASES, 9 Cyc. 75.

92. Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369.

93. See, generally, REFERENCES, 34 Cyc. 770.

94. Clevenger's Estate, 1 Lanc. L. Rev. (Pa., 277, 6 L. T. N. S. 136, holding that where it was sought to make a constable responsible for his levy by reason of his return, and the evidence showed that property similar to that levied on was subsequently levied on by the sheriff in another proceeding as the property of the same defendant, and sold by the sheriff, the matter would be referred back to the auditor to take the sheriff's evidence as to whether the property sold by him was that levied on by the constable.

95. See, generally, NEW TRIAL, 29 Cyc. 707.

96. Tucker *v.* Bradley, 15 Conn. 46.

97. Palmer *v.* Gallup, 16 Conn. 555; Roblin *v.* Moodie, 15 U. C. Q. B. 185, holding that where, in trespass against the sheriff for taking goods, the jury gave the full value of all seized, although plaintiff had expressly claimed only a portion, declaring that the rest were not his, a new trial should be granted.

98. Taggert *v.* Hill, 1 N. C. 283.

99. Porter *v.* Wood, 4 N. C. 226.

1. Young *v.* Moderwell, 14 U. C. C. P. 143, so holding on the ground that defendant should have gone to trial prepared to show all transactions with the judgment debtor.

2. See, generally, JUDGMENTS, 23 Cyc. 623.

3. Stewart *v.* Martin, 16 Vt. 397.

4. Fields *v.* Vallance, 87 S. W. 770, 27 Ky. L. Rep. 992.

5. Porter *v.* Trompen, 2 Nebr. (Unoff.) 76, 96 N. W. 226.

defendant notwithstanding the verdict for plaintiff, on the ground that the complaint did not state a sufficient cause of action on the oral contract of indemnity, it being sufficient, counting on the bond, to support the judgment.[6]

**2. Enforcement.** Under some statutes a judgment against a sheriff may be enforced by an execution against the body where an execution against property has proved unavailing.[7] A statute authorizing a stay of proceedings on a judgment against the sheriff for an escape until he can collect of the bondsman of the escaped judgment debtor confers a discretionary power on the court, which will not be exercised where the sheriff has not proceeded with diligence.[8] In Pennsylvania it has been held that a transcript of a judgment of a justice of the peace against a constable for not returning an execution might be filed in the court of common pleas and an execution issued from that court, without any previous issuance of an execution from the justice.[9] Where an officer who is sued for failure to execute a writ of execution has the obligors in a claim bond under which the property levied on was taken from him made parties to the suit, so that, in case of judgment against him, he may have judgment over against them, he cannot enforce the judgment over until he has paid the judgment against him.[10]

**3. Equitable Relief.**[11] A judgment entered against a sheriff, under a mistaken view of the clerk that a bail-piece was insufficient, may be relieved against in equity;[12] and it has been held that where judgment has been obtained against a sheriff for failing to return an execution, he may have relief in equity by showing that, as between plaintiff and defendant in the execution, it ought never to have been collected.[13]

**P. Damages**[14] **— 1. In General.** As a general rule the actual injury sustained by plaintiff in consequence of the act or default complained of furnishes the measure of damages in an action against a sheriff or constable for official misfeasance or nonfeasance;[15] and in case where an attachment was illegally and maliciously levied on exempt property of a married woman, by reason of which she was compelled to suffer from cold and exposure, it was held that she could

6. Houser *v.* West, 39 Oreg. 392, 65 Pac. 82, holding that where plaintiff's counsel at the trial, while attempting to prove the contents of the bond, which had been lost, stated that he was not relying on the bond, and only sought to introduce its contents for the purpose of proving the contract between plaintiff and defendant, such statement did not constitute a waiver of the bond as the foundation of the action against defendant, counsel having stated, after such contention was advanced, that he intended by his language only to convey the idea of a waiver so far as concerned the sureties on the bond.

7. Chaffe *v.* Handy, 36 La. Ann. 22, holding that Code Pr. art. 730, providing that when a judgment was rendered against a sheriff for money received by him in his official capacity, and converted to his use and not accounted for, and a fieri facias was returned "No property found," a capias ad satisfaciendum might be taken out and executed against such sheriff, was not affected by the act of 1840 abolishing imprisonment for debt, and under it a capias might issue against a former sheriff.

8. Potts *v.* Davidson, 15 Abb. N. Cas. (N. Y.) 185.

9. Parchment *v.* Aiken, 3 Watts (Pa.) 278.

10. Denson *v.* Ham, (Tex. Civ. App. 1891) 16 S. W. 182.

11. Equitable relief against judgments generally see Judgments, 23 Cyc. 976.

12. Smith *v.* Wallace, 1 Wash. (Va.) 254.

13. Harrison *v.* Harrison, 1 Litt. (Ky.) 137.

14. See, generally, Damages, 13 Cyc. 1.

Extent of liability for particular acts or defaults see *supra*, V, *passim*.

15. *Alabama.*— Griffin *v.* Ganaway, 8 Ala. 625; Pugh *v.* McRae, 2 Ala. 393; Sutherland *v.* Cunningham, 1 Stew. 438.

*California.*— Dorsey *v.* Manlove, 14 Cal. 553.

*Connecticut.*— Palmer *v.* Gallup, 16 Conn. 555; Clark *v.* Smith, 9 Conn. 379, 10 Conn. 1, 25 Am. Dec. 47; Ackley *v.* Chester, 5 Day 221.

*Georgia.*— Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135; Dobbs *v.* Murray County, 17 Ga. 624.

*Illinois.*— Lear *v.* Montross, 50 Ill. 507; French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193; Robinson *v.* People, 8 Ill. App. 279.

*Iowa.*— Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500.

*Kansas.*— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666.

*Kentucky.*—Arnold *v.* Com., 8 B. Mon. 109; Com. *v.* Lightfoot, 7 B. Mon. 298; Board *v.* Head, 3 Dana 489; Staton *v.* Com., 2 Dana 397; Com. *v.* Bradley, 4 J. J. Marsh. 209; Potts *v.* Com., 4 J. J. Marsh. 202, 20 Am. Dec. 213; Taylor *v.* Com., 3 Bibb 356.

recover full compensation for all injuries sustained, mental as well as material.[16] But the officer should not be held liable for losses which are remotely consequential.[17]

2. SPECIAL DAMAGES. Special damages cannot be recovered where not alleged in the petition or complaint.[18]

3. MITIGATION OF DAMAGES.[19] Facts which legitimately tend to excuse the act or default complained of or to show that the injury to plaintiff was not so great as he claims are proper for consideration in mitigation of damages.[20] But where,

*Louisiana.*— Grabenheimer *v.* Budd, 40 La. Ann. 107, 3 So. 724; Bogel *v.* Bell, 15 La. Ann. 163; Bonnabel *v.* Bouligny, 1 Rob. 292; Stinson *v.* Buisson, 17 La. 567; Smith *v.* Bradford, 14 La. 281; Clarke *v.* Wright, 5 Mart. N. S. 122; Morgan *v.* Woorhies, 3 Mart. 462.

*Maine.*— Thayer *v.* Roberts, 44 Me. 247; Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259; Dyer *v.* Woodbury, 24 Me. 546; Ware *v.* Fowler, 24 Me. 183; Hodsdon *v.* Wilkins, 7 Me. 113, 20 Am. Dec. 347.

*Massachusetts.*— Slocum *v.* Riley, 145 Mass. 370, 14 N. E. 174; Carter *v.* Duggan, 144 Mass. 32, 10 N. E. 486; Danforth *v.* Pratt, 9 Cush. 318; West *v.* Rice, 9 Metc. 564; Sexton *v.* Nevers, 20 Pick. 451, 32 Am. Dec 225; Shackford *v.* Goodwin, 13 Mass. 187.

*Missouri.*— Bennett *v.* Vinyard, 34 Mo. 216; Mortland *v.* Smith, 32 Mo. 225, 82 Am. Dec. 128.

*Nebraska.*— Huddleson *v.* Polk, 70 Nebr. 492, 102 N. W. 464, 70 Nebr. 489, 100 N. W. 802, 70 Nebr. 483, 97 N. W. 624 (holding that where an assignment for the benefit of creditors to a sheriff proved void because of failure of the sheriff to file the assignment, as required by law, a general creditor thereby losing his rights under the assignment could recover from the sheriff the *pro rata* share which he would have been entitled to had the assignment not proved invalid); Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689 [*followed* in Hellman *v.* Spielman, 19 Nebr. 152, 27 N. W. 131].

*New Hampshire.*— Stevens *v.* Sabin, 20 N. H. 529; Grafton Bank *v.* White, 17 N. H. 389.

*New York.*—Wehle *v.* Conner, 69 N. Y. 546 [*reversing* 41 N. Y. Super. Ct. 201]; Smith *v.* Knapp, 30 N. Y. 581; Dolson *v.* Saxton, 11 Hun 565; Dininny *v.* Fay, 38 Barb. 18; Latham *v.* Westervelt, 26 Barb. 256; Griffith *v.* Ketchum, 12 Johns. 379.

*North Carolina.*— Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170; Winburne *v.* Bryan, 73 N. C. 47.

*Ohio.*— Woodborne *v.* Scarborough, 20 Ohio St. 57.

*Pennsylvania.*— Com. *v.* Contner, 18 Pa. St 439; Forsyth *v.* Palmer, 14 Pa. St. 96, 53 Am. Dec. 519; Hamner *v.* Griffith, 1 Grant 193.

*Rhode Island.*— Sheldon *v.* Upham, 14 R. I. 493.

*South Carolina.*— Blanding *v.* Rogers, 2 Brev. 394, 4 Am. Dec. 595.

*Texas.*— Heidenheimer *v.* Sides, 67 Tex. 32, 2 S. W. 87; Hamilton *v.* Ward, 4 Tex. 356; Faroux *v.* Cornwell, 40 Tex. Civ. App. 529, 90 S. W. 537; Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386; Barclay *v.* Scott, 1 Tex. App. Civ. Cas. § 110.

*Vermont.*— Collins *v.* Perkins, 31 Vt. 624; Blodgett *v.* Brattleboro, 30 Vt. 579; Southwick *v.* Weeks, 3 Vt. 49; Hamilton *v.* Marsh, 2 Tyler 403.

*Virginia.*— Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7; Perkins *v.* Giles, 9 Leigh 397, 33 Am. Dec. 249.

*United States.*— Lowenberg *v.* Jefferies, 74 Fed. 385; Adams *v.* Spangler, 17 Fed. 133, 5 McCrary 334; Darst *v.* Duncan, 6 Fed. Cas. No. 3,580 [*affirmed* in 1 How. 301, 11 L. ed. 139] (holding such to be the rule where the remedy is sought by action on the case); Duryee *v.* Webb, 8 Fed. Cas. No. 4,198, 16 Conn. 558 note; Pierce *v.* Strickland, 19 Fed. Cas. No. 11,147, 2 Story 292.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 297, 303 *et seq.*

Damages held excessive see the following cases:

*Kentucky.*— Daniel *v.* Holland, 4 J. J. Marsh. 18.

*Louisiana.*— Bogel *v.* Bell, 15 La. Ann. 163.

*Maine.*— Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49.

*Massachusetts.*— Boyd *v.* Brown, 17 Pick. 453.

*Canada.*— McGivern *v.* McCausland, 19 U. C. C. P. 460.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 303.

Damages held not excessive see Friedly *v.* Giddings, 119 Fed. 438 [*affirmed* in 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327].

16. Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

17. Lambeth *v.* New Orleans, 6 La. 731; Fatheree *v.* Williams, 13 Tex. Civ. App. 430, 35 S. W. 324 (holding that in an action against a sheriff for a wrongful levy on cattle, expenses incurred by plaintiff in attempting to find a purchaser for the cattle after levy were too remote to be considered as elements of damage suffered by plaintiff; nor could he claim for a loss on cattle which he himself sold, in excess of the number necessary to sell in order to satisfy the executions); Luce *v.* Hoisington, 56 Vt. 436 (holding that where a constable seized an ox, which was exempt, and, after the execution was paid, returned the ox, the failure to raise crops by reason of being deprived of the use of the ox was not a proximate result of the seizure of the ox, and could not be considered in assessing the damages).

18. Lusk *v.* Briscoe, 65 Mo. 555; Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

19. Matters affecting liability for particular acts or default see *supra*, V, *passim*.

20. *Alabama.*— Stephenson *v.* Wright, 111

pending a suit against an officer for wrongful attachment, plaintiff assigned his cause of action to one to whom the officer had delivered the property, taking his receipt therefor, stipulating that it would be returned on demand, a refusal of the receiptor to deliver the property on demand could not be shown in mitigation of damages, where the officer did not offer to surrender the receipt and release him from his obligation.[21]

**4. Nominal Damages.** An award of nominal damages is proper where a wrongful act has been committed or a duty negligently omitted by the officer but no real injury is shown to have resulted therefrom.[22] But in an action against the sheriff for a wrongful levy on exempt property, the fact that the jury found that the property was mortgaged for more than its value does not prevent the owner from recovering more than nominal damages, where the sheriff had sold the prop-

Ala. 579, 20 So. 622; McLane *v.* Miller, 10 Ala. 856.

*Illinois.*— Camp *v.* Ganley, 6 Ill. App. 499, holding that in an action against an officer for a premature sale of property levied on, he should be allowed, by way of reduction of damages, for the amount which the property brought.

*Kansas.*— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666.

*Maine.*— Varrill *v.* Heald, 2 Me. 91.

*Massachusetts.*— Leggett *v.* Baker, 13 Allen 470; Case *v.* Babbitt, 16 Gray 278; Perry *v.* Chandler, 2 Cush. 237; West *v.* Rice, 9 Metc. 564.

*Minnesota.*— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

*Nebraska.*— Huddleson *v.* Polk, 70 Nebr. 492, 102 N. W. 464, 70 Nebr. 489, 100 N. W. 802, 70 Nebr. 483, 97 N. W. 624, holding that in an action against a sheriff for damages for failing to duly file an assignment made to him for the benefit of creditors, whereby plaintiff lost his claim, the fact that there were other creditors entitled to participate in the assets of the insolvent was proper to be considered in mitigation of damages.

*New Hampshire.*— Richards *v.* Gilmore, 11 N. H. 493.

*New York.*— Metcalf *v.* Stryker, 31 N. Y. 255 [*affirming* 31 Barb. 62]; Smith *v.* Knapp, 30 N. Y. 581; Dorrance *v.* Henderson, 27 Hun 206 [*affirmed* in 92 N. Y. 406]; Haskins *v.* Kelly, 1 Rob. 160, 1 Abb. Pr. N. S. 63; Sherry *v.* Schuyler, 2 Hill 204; Patterson *v.* Westervelt, 17 Wend. 543; Green *v.* Ferguson, 14 Johns. 389; Russell *v.* Turner, 7 Johns. 189, 5 Am. Dec. 254; Potter *v.* Lansing, 1 Johns. 215, 3 Am. Dec. 310.

*South Carolina.*— Boyce *v.* Barksdale, 4 McCord 141.

*Vermont.*— Stewart *v.* Martin, 16 Vt. 397; State Treasurer *v.* Weeks, 4 Vt. 215.

*Virginia.*— Garland *v.* Lynch, 1 Rob. 545; Stevens *v.* Bransford, 6 Leigh 246.

*United States.*— Lowenberg *v.* Jefferies, 74 Fed. 385.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 301.

21. Ellis *v.* Howard, 17 Vt. 330.

22. *Alabama.*— Mitchell *v.* Corbin, 91 Ala. 599, 8 So. 810.

*Connecticut.*— Jordan *v.* Gallup, 16 Conn. 536.

*Illinois.*— Robinson *v.* People, 8 Ill. App. 279.

*Indiana.*— Slifer *v.* State, 114 Ind. 291, 14 N. E. 595, 16 N. E. 623; State *v.* Emmons, 99 Ind. 452.

*Kentucky.*— Keith *v.* Com., 5 J. J. Marsh. 359.

*Louisiana.*—Clarks *v.* Wright, 5 Mart. N. S. 122.

*Maine.*— Eaton *v.* Ogier, 2 Me. 46; Daggett *v.* Adams, 1 Me. 198, holding that where a sheriff, in the service of an execution, conducted it irregularly, but the goods taken were fairly sold, and the proceeds were applied in payment of the execution on which they were sold, the sheriff was responsible to the debtor for nominal damages only.

*Massachusetts.*— Gallup *v.* Robinson, 11 Gray 20; Lawrence *v.* Rice, 12 Metc. 535; Glezen *v.* Rood, 2 Metc. 490; Woods *v.* Varnum, 21 Pick. 165; Laflin *v.* Willard, 16 Pick. 64, 26 Am. Dec. 629; Rich *v.* Bell, 16 Mass. 294; Nye *v.* Smith, 11 Mass. 188; Weld *v.* Bartlett, 10 Mass. 470; Selfridge *v.* Lithgow, 2 Mass. 374.

*Missouri.*— Metzner *v.* Graham, 66 Mo. 653; Lusk *v.* Briscoe, 65 Mo. 555; Allen *v.* Davis, 53 Mo. App. 15; State *v.* Finn, 11 Mo. App. 400. But *compare* State *v.* Case, 77 Mo. 247 [*following* Stevenson *v.* Judy, 49 Mo. 227], holding that a sheriff was not liable in even nominal damages for failure to return an execution where no damages were proved.

*New Hampshire.*— Cooper *v.* Newman, 45 N. H. 339; Webster *v.* Quimby, 8 N. H. 382; Runlett *v.* Bell, 5 N. H. 433.

*New Jersey.*— Bigelow Co. *v.* Heintze, 53 N. J. L. 69, 21 Atl. 109.

*New York.*— Wehle *v.* Conner, 69 N. Y. 546 [*reversing* 41 N. Y. Super. Ct. 201]; Bechstein *v.* Sammis, 10 Hun 585; Mickles *v.* Hart, 1 Den. 548.

*North Carolina.*— Wood *v.* Skinner, 25 N. C. 564.

*Ohio.*— Coopers *v.* Wolf, 15 Ohio St. 523.

*Pennsylvania.*— Smith *v.* Emerson, 43 Pa. St. 456; Rogers *v.* Fales, 5 Pa. St. 154.

*Texas.*— Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295.

*Vermont.*— Newbury Bank *v.* Baldwin, 31 Vt. 311; Brown *v.* Richmond, 27 Vt. 583; Goodrich *v.* Church, 20 Vt. 187; Kidder *v.* Barker, 18 Vt. 454 [*followed* in Ives *v.* Strong, 19 Vt. 546]; Stewart *v.* Martin, 16 Vt. 397; Bell *v.* Roberts, 15 Vt. 741.

erty for a considerable sum and there was no finding that he did not require the purchaser to comply with the mortgage conditions as provided by statute.[23]

**5. PUNITIVE OR EXEMPLARY DAMAGES — a. In General.** Punitive or exemplary damages may be awarded where it appears that the officer has acted maliciously and oppressively,[24] but in the absence of such a showing only actual damages can be recovered.[25] And the malicious motives of plaintiff in the writ under which an officer acted cannot be imputed to the latter so as to furnish ground for an award of exemplary damages.[26]

**b. For Act or Default of Deputy.** A sheriff cannot be held liable in punitive damages for the misconduct of his deputy,[27] unless he authorized [28] or ratified [29] such misconduct; and where plaintiff seeks to charge the sheriff with punitive damages upon the ground of ratification, he should, before commencing the action, make his cause of action complete by informing the principal of the facts and giving him an opportunity of redressing the wrong before being forced to defend it.[30]

**6. INTEREST.**[31] Interest on the amount of the loss is properly allowed in a suit against a sheriff for seizing goods under process against another,[32] or seizing

*United States.*— Spafford *v.* Goodell, 22 Fed. Cas. No. 13,197, 3 McLean 97.

*England.*— Bales *v.* Wingfield, 4 Q. B. 580 note, 2 N. & M. 831, 45 E. C. L. 580.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 300.

23. Adams *v.* Hessian, 11 Ind. App. 598, 39 N. E. 530.

24. *Alabama.*—Alley *v.* Daniel, 75 Ala. 403.

*California.*— Nightingale *v.* Scannell, 18 Cal. 315.

*Connecticut.*— Huntley *v.* Bacon, 15 Conn. 267.

*Delaware.*— Prettyman *v.* Dean, 2 Harr. 494.

*Kentucky.*— Board *v.* Head, 3 Dana 489.

*Louisiana.*— Stinson *v.* Buisson, 17 La. 567. See also Pascal *v.* Ducros, 8 Rob. 112, 41 Am. Dec. 294.

*Minnesota.*— See Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

*Missouri.*— Bruce *v.* Ulery, 79 Mo. 322.

*New Hampshire.*— See Ahearn *v.* Connell, 72 N. H. 238, 56 Atl. 189.

*Rhode Island.*—See Von Storch *v.* Winslow, 13 R. I. 23, 43 Am. Rep. 10.

*Texas.*— Rodgers *v.* Ferguson, 36 Tex. 544; Faroux *v.* Cornwell, 40 Tex. Civ. App. 529, 90 S. W. 537; Steel *v.* Mercalf, 4 Tex. Civ. App. 313, 23 S. W. 474.

*United States.*— Giddings *v.* Freedly, 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327 [*affirming* 119 Fed. 438].

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 302.

25. *Alabama.*— Stephenson *v.* Wright, 111 Ala. 579, 20 So. 622; Alley *v.* Daniel, 75 Ala. 403.

*California.*— Spooner *v.* Cady, (1896) 44 Pac. 1018; Nightingale *v.* Scannell, 18 Cal. 315; Dorsey *v.* Manlove, 14 Cal. 553; Van Pelt *v.* Littler, 14 Cal. 194; Phelps *v.* Owens, 11 Cal. 22.

*Illinois.*— McGillis *v.* Bishop, 27 Ill. App. 53.

*Kansas.*— Adams *v.* Gillan, 53 Kan. 131, 36 Pac. 51.

*Kentucky.*— Daniel *v.* Holland, 4 J. J. Marsh. 18.

*Louisiana.*—Stinson *v.* Buisson, 17 La. 567; Smith *v.* Bradford, 14 La. 281.

*Missouri.*— Bruce *v.* Ulery, 79 Mo. 322.

*New Hampshire.*— Moore *v.* Bowman, 47 N. H. 494.

*Texas.*— Heidenheimer *v.* Sides, 67 Tex. 32, 2 S. W. 87; Land *v.* Klein, 21 Tex. Civ. App. 3, 50 S. W. 638.

*Vermont.*— Blodgett *v.* Brattleboro, 30 Vt. 579.

*Virginia.*— Shearer *v.* Taylor, 106 Va. 26, 55 S. E. 7.

*Wisconsin.*— Beveridge *v.* Welch, 7 Wis. 465.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 302.

26. Nightingale *v.* Scannell, 18 Cal. 315.

27. Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; Nixon *v.* Rauer, (Cal. 1901) 66 Pac. 221.

28. Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

29. Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

30. Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123, holding that a sheriff did not ratify the oppressive misconduct of his deputy so as to make him liable for punitive damages therefor by not discharging the deputy, where he had no personal knowledge of the transaction until served with the summons, and was not then furnished with any proofs, and had no means of informing himself except by inquiry of the deputies, from whom he learned that they had done nothing except as specifically directed by an order of a justice's court.

31. See, generally, INTEREST, 22 Cyc. 1459. Allowance of interest in summary proceedings see *infra*, VIII, S.

32. *Alabama.*— Screws *v.* Watson, 48 Ala. 628.

*California.*—Blewitt *v.* Miller, 131 Cal. 149; Sukeforth *v.* Lord, 87 Cal. 399, 25 Pac. 497; Casain *v.* Marshall, 18 Cal. 689; Van Pelt *v.* Littler, 14 Cal. 194; Phelps *v.* Owens, 11 Cal. 22.

*Dakota.*— Keith *v.* Haggart, 4 Dak. 438, 33 N. W. 465.

exempt property under process against the owner,[33] or failure to execute[34] or return[35] process; and a sheriff is properly charged with interest upon money withheld by him after it became his duty to pay over or distribute the same,[36] or upon money which he has paid to the wrong person.[37] But in an action against a sheriff for the defalcation of his deputy in not paying over to the county money collected by the deputy on a tax levy, the sheriff has been held not liable for interest accruing before the date of the judgment.[38] Where an agreement was made between two contending claimants for money in the sheriff's hands that the sheriff should deposit the amount in bank until the questions were decided, and the sheriff deposited it, but took it out again soon after, he was held liable for interest from the time the money was thus taken out of the bank.[39]

**Q. Review.**[40] An appeal lies only from a final judgment in the action[41] and some statutes deny any review.[42] Where an indemnified sheriff is sued for

*Delaware.*— Kirkley *v.* Lacey, 7 Houst. 213, 30 Atl. 994.

*District of Columbia.*— Palmer *v.* Augenstein, 18 App. Cas. 511.

*Maine.*— Warren *v.* Kelley, 80 Me. 512, 15 Atl. 49.

*Massachusetts.*— Clapp *v.* Thomas, 7 Allen 188; Sexton *v.* Nevers, 20 Pick. 451, 32 Am. Dec. 225.

*Missouri.*— State *v.* Smith, 31 Mo. 566; State *v.* Fidelity, etc., Co., 94 Mo. App. 184, 67 S. W. 958; State *v.* Finn, 13 Mo. App. 285.

*Nevada.*— Newman *v.* Kane, 9 Nev. 234.

*New Hampshire.*— Felton *v.* Fuller, 35 N. H. 226; Sanborn *v.* Emerson, 12 N. H. 57.

*New York.*— Moravec *v.* Grell, 78 N. Y. App. Div. 146, 79 N. Y. Suppl. 533.

*Ohio.*— Woodborne *v.* Scarborough, 20 Ohio St. 57; Searles *v.* Abbey, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 63.

*Texas.*— Field *v.* Munster, 11 Tex. Civ. App. 341, 32 S. W. 417 [*affirmed* in 89 Tex. 102, 33 S. W. 852].

*Vermont.*— Goodrich *v.* Starr, 18 Vt. 227.

*Virginia.*— Crump *v.* Ficklin, 1 Patt. & H. 201.

*Washington.*— Sheehan *v.* Levy, 1 Wash. 149, 23 Pac. 802.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 299.

33. Clapp *v.* Thomas, 7 Allen (Mass.) 188.

34. Hunt *v.* Gulick, 9 N. J. L. 205. *Contra*, State *v.* Harrington, 44 Mo. App. 297, 301, where it is said: "The rule, which we extract from the adjudications of this state in reference to the recovery of interest as damages in actions of tort, is that, where an action *ex delicto* is based upon the simple negligence of the defendant, to whom no pecuniary benefit has or could have accrued by reason of the injury or wrong, interest is not allowable."

35. Thomas *v.* Weed, 14 Johns. (N. Y.) 255, holding that interest might be recovered in a common-law action on the case for money had and received, but not in a statutory action of debt.

36. *Delaware.*— *In re* Jefferson, 3 Harr. 25.

*Illinois.*—Beaird *v.* Foreman, 2 Ill. 40.

*New York.*— Thompson *v.* Sweet, 73 N. Y. 622; Whitman *v.* Haines, 51 Hun 640, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148] (holding that where a sheriff disobeyed an order of court requiring him to deposit money with a trust company, in consequence of which plaintiff instituted proceedings to punish him for contempt, the sheriff was properly charged with interest on such sum from the time of the service of the order requiring him to deposit it); Crane *v.* Dygert, 4 Wend. 675; Slingerland *v.* Swart, 13 Johns. 255.

*North Carolina.*— Horne *v.* Allen, 27 N. C. 36.

*South Carolina.*— Daniel *v.* Capers, 4 McCord 237, holding that where a party proceeded by attachment against a sheriff for failure to collect and pay over money on an execution, and received the principal of the debt, the court might, as a condition of discharging from the attachment, order the sheriff to pay interest by way of damages for detention.

*Vermont.*— Barron *v.* Pettes, 18 Vt. 385.

*Canada.*— Michie *v.* Reynolds, 24 U. C. Q. B. 303.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 299.

37. Reed *v.* Reed, 1 Watts & S. (Pa.) 235, so holding in a case where it appeared that refunding receipts had been taken by the officer. See also McCaulley *v.* Boeshore, 2 Lanc. L. Rev. (Pa.) 237.

Time from which interest runs.—If a sheriff of his own motion makes distribution of part of the proceeds of a sale under execution to a person not entitled thereto, in an action against him he is only liable for interest on such wrongful payment from the return-day of the fieri facias, although he received notice of plaintiff's adverse claim nearly a month earlier. McCaulley *v.* Boeshore, 2 Lanc. L. Rev. (Pa.) 337.

38. Colter *v.* Morgan, 12 B. Mon. (Ky.) 278 [*following* Grayham *v.* Washington County Ct., 9 Dana (Ky.) 182].

39. Com. *v.* Crevor, 3 Binn. (Pa.) 121.

40. See, generally, APPEAL AND ERROR, 2 Cyc. 474; REVIEW, 34 Cyc. 1695.

41. Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 11 S. E. 264, where an appeal from an order in an action for a false return allowing an amendment of the return was dismissed.

42. See Barnard *v.* Henry, 25 Vt. 289, holding that under St. c. 28, § 17, no review is to be allowed in any suit brought against a

damages, and the obligor has notice of the suit, and plaintiff recovers, the officer is not bound to appeal.[43] A matter not set up in the pleadings or presented at the trial cannot be urged for the first time in the appellate court,[44] unless it goes to the jurisdiction of the trial court,[45] and the verdict of the jury upon a question of fact cannot be reviewed on appeal.[46] The judgment will not be reversed because of errors which were harmless to the appellant,[47] and in a doubtful case the supreme court will not reverse the ruling of both the district court and a justice of the peace.[48] Where, in an action by a mortgagee against an officer for levying on the mortgaged property, the court erroneously decided that the mortgage was void and that no right could be asserted thereunder, and gave judgment for defendant, the fact that the record did not show that defendant ever levied on or sold the property was no ground for affirming the judgment.[49]

**R. Costs.**[50] A sheriff who has been guilty of negligence is properly adjudged to pay costs,[51] even though he has been guilty of no actual corruption or intentional fraud.[52] But it is not proper to tax against the officer costs incurred by reason of other persons being made defendants.[53] In an action to set aside an execution sale made by the sheriff, where it appeared that neither the complainant nor the purchaser were in any way at fault, but the litigation had arisen solely on account of the sheriff's negligence, it was held that the sheriff, being a party to the bill, should be taxed with all the costs of court.[54]

## VIII. SUMMARY PROCEEDINGS AGAINST OFFICERS.[55]

**A. In General.** Although a sheriff or constable is usually liable to an action by the party who is injured by his default,[56] this remedy is not exclusive, as the statutes very generally provide for summary proceedings by which the officer's liability may be established and enforced,[57] or the officer compelled to perform

sheriff for not executing or duly returning a writ of execution — when a receipt was given by such officer, at the time of delivery thereof.

**43.** Illies *v.* Fitzgerald, 11 Tex. 417.

**44.** Richey *v.* Haley, 138 Cal. 441, 71 Pac. 499.

**45.** Hero Fruit Jar Co. *v.* Grant, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 28.

**46.** Baker *v.* Brintnall, 52 Barb. (N. Y.) 188, 5 Abb. Pr. N. S. 253.

**47.** Mann *v.* McKiernan, 110 Ill. 19; Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129; Halcomb *v.* Stubblefield, 76 Tex. 310, 13 S. W. 231.

**48.** Wilton Town Co. *v.* Humphrey, 15 Kan. 372, holding that where an officer, acting under an execution which read as follows: "You are commanded to take into your possession enough of the personal property of the Wilton Town Company to satisfy a judgment of $2.55, together with all costs that have or may accrue in a case wherein John M. Matfield was plaintiff, and C. H. Norton and J. W. Borton, officers of the Wilton Town Company, defendants, rendered this twentieth day of February, 1874, before Hiram Bersie, a justice of the peace," etc., levied upon certain personal property of said W. T. Co., and where it was doubtful from the entire record whether the proceedings and judgment in the action in which the execution was issued were not in fact prosecuted and rendered against the W. T. Co., and the execution failed to show against whom the judgment actually was rendered, the supreme court would not reverse the ruling of both a justice of the peace and the district court to the effect that the execution protected the officer in making the levy.

**49.** Plano Mfg. Co. *v.* Griffith, 75 Iowa 102, 39 N. W. 214, holding that after the mortgage had been held void it would have been a work of supererogation for plaintiff to have introduced evidence of the levy and sale.

**50.** See, generally, COSTS, 11 Cyc. 1.

Security for costs see *supra*, VII, C, 1.

**51.** Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411.

**52.** Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411.

**53.** Baughn *v.* Allen, (Tex. Civ. App. 1903) 73 S. W. 1063.

**54.** Lawyers' Co-operative Pub. Co. *v.* Bennett, 34 Fla. 302, 16 So. 185.

**55.** Summary proceedings generally see SUMMARY PROCEEDINGS.

Summary proceedings on official bond see *infra*, X, G.

Abatement of summary proceeding against officer see ABATEMENT AND REVIVAL, 1 Cyc. 59.

**56.** Actions against sheriff or constable see *infra*, VII.

**57.** *Alabama.*— Birmingham Dry-Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153, 113 Ala. 418, 21 So. 403; Chandler *v.* Francis Vandergrift Shoe Co., 94 Ala. 233, 10 So. 353; Monts *v.* Stephens, 43 Ala. 217; Jones *v.* Brooks, 30 Ala. 588; Barnett *v.* Bass, 10 Ala. 951; Smith *v.* Leavitts, 10 Ala. 92; Evans *v.* Stevens, 8 Ala. 517; Godbold *v.* Planters, etc., Bank, 4 Ala. 516; Kirkmans *v.* Harkins, 1

the duties which devolve upon him,[58] or to remedy an official mistake.[59] But as statutes giving such summary remedies are in derogation of the common law, they must be strictly construed,[60] and not extended beyond the cases for which they were, by their terms, intended to provide.[61] And *a fortiori* a statute will

Port. 22; Anderson *v.* Cunningham, Minor 48.

*Arkansas.*— Williams *v.* State, 65 Ark. 159, 46 S. W. 186; Scarborough *v.* Arnold, 21 Ark. 231; Humphries *v.* Lawson, 7 Ark. 344; Levy *v.* Lawson, 5 Ark. 212.

*Delaware.*— Stidham *v.* Chase, 3 Harr. 418; Hukill *v.* Staats, 2 Harr. 385.

*Georgia.*— De Longchamp *v.* Hicks, 25 Ga. 200; Hand *v.* Greenville, 22 Ga. 476; Currell *v.* Phillips, 18 Ga. 469.

*Illinois.*— Day *v.* Hackney, 20 Ill. 133; Buckmaster *v.* Drake, 10 Ill. 321; Beaird *v.* Foreman, 2 Ill. 40.

*Kentucky.*— Johnson *v.* Bradley, 11 Bush 666; Todd *v.* Caines, 18 B. Mon. 620; Quiry *v.* Prather, Hard. 294.

*Louisiana.*— Waldo *v.* Bell, 13 La. Ann. 329; Lay *v.* Boyce, 3 La. Ann. 622; Graham *v.* Swayne, 1 Rob. 186.

*Minnesota.*— Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965; Hull *v.* Chapel, 71 Minn. 408, 74 N. W. 156; *In re* Grundysen, 53 Minn. 346, 55 N. W. 557; Kumler *v.* Brandenburg, 39 Minn. 59, 38 N. W. 704; Coykendall *v.* Way, 29 Minn. 162, 12 N. W. 452, 453.

*Mississippi.*— Steen *v.* Briggs, 3 Sm. & M. 326; Dunn *v.* Newman, 7 How. 582; Rowand *v.* Gridley, 1 How. 210.

*Missouri.*— Roach *v.* Settles, 19 Mo. 397; Hart *v.* Robinett, 5 Mo. 11.

*New Jersey.*— Disston *v.* Strauck, 42 N. J. L. 546.

*New York.*— Frankel *v.* Elias, 60 How. Pr. 74; Burk *v.* Campbell, 15 Johns. 456.

*North Carolina.*— Buchanan *v.* McKenzie, 53 N. C. 95; Oats *v.* Darden, 5 N. C. 500.

*Pennsylvania.*— Ebersole *v.* Boeshore, 1 Pa. Co. Ct. 92; Hill *v.* Rice, 7 Kulp 311.

*South Carolina.*— Kirkpatrick *v.* Ford, 2 Speers 110; Pennsylvania Bank *v.* Condy, 1 Hill 209.

*Tennessee.*— Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; Sawyers *v.* Glenn, 11 Heisk. 754; Tennessee Bank *v.* Cannon, 2 Heisk. 428; Young *v.* Donaldson, 2 Heisk. 52; Cannon *v.* Wood, 2 Sneed 177; Watkins *v.* Barnes, 1 Sneed 201; Hand *v.* State, 5 Humphr. 515; Burt *v.* Davidson, 5 Humphr. 425; Benson *v.* Porter, Meigs 519; Phillips *v.* Cunningham, 5 Yerg. 416.

*Texas.*— Robinson *v.* Schmidt, 48 Tex. 13; Little *v.* Guest, 30 Tex. 1; Vaughan *v.* Warnell, 28 Tex. 119; Spinks *v.* Caldwell, 23 Tex. 623; De Witt *v.* Dunn, 15 Tex. 106.

*Virginia.*— Stone *v.* Wilson, 10 Gratt. 529; Tyree *v.* Donnally, 9 Gratt. 64.

*United States.*— Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 237 *et seq.*

**Summary remedy of surety against sheriff** see Bacchus *v.* Gee, 2 Leigh (Va.) 68.

**58.** *California.*— McMann *v.* Superior Ct., 74 Cal. 106, 15 Pac. 448; Leese *v.* Clark, 29 Cal. 664.

*Georgia.*— Brannon *v.* Central Bank, 18 Ga. 361.

*Illinois.*—Buckmaster *v.* Drake, 10 Ill. 321.

*New Jersey.*— Brown *v.* Dunn, 50 N. J. L. 111, 11 Atl. 149.

*New York.*— Holmes *v.* Rogers, 2 N. Y. Suppl. 501; Hatfield *v.* Hatfield, 15 N. Y. St. 788; *In re* Dawson, 13 N. Y. Civ. Proc. 142, 20 Abb. N. Cas. 188 [*affirming* 47 Hun 634], holding that where the sheriff returns an execution unsatisfied when it is in fact satisfied, the execution defendant may by motion require the sheriff to make a proper return.

*Pennsylvania.*— Littleboy *v.* Blankman, 1 Miles 279, holding that where defendant gives bail to the sheriff, and then puts in special bail, which is seasonably excepted to, and is not justified, nor new special bail put in, the sheriff will be ruled to bring in the body, if plaintiff apply for such rule within a reasonable time.

*South Carolina.*— Murray *v.* Peay, 1 McMull. 10.

Sec 43 Cent. Dig. tit. "Sheriffs and Constables," § 237 *et seq.*

**59.** Moore *v.* Byne, 1 Rich. (S. C.) 94, holding that where a sheriff, acting under the process of court, mistakes his duty, and seizes property when the process does not authorize a seizure, the court has authority to undo the injury by ordering the sheriff to restore the possession of the property to the party illegally divested, on motion by him for that purpose.

**60.** Evans *v.* Stevens, 8 Ala. 517; Baylor *v.* Scott, 2 Port. (Ala.) 315; Connell *v.* Lewis, Walk. (Miss.) 251; Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; Wingfield *v.* Crosby, 5 Coldw. (Tenn.) 241; State *v.* Deberry, 9 Humphr. (Tenn.) 605; Smith *v.* Wells, 5 Yerg. (Tenn.) 202; Hamilton *v.* Ward, 4 Tex. 356. But *compare* Oats *v.* Darden, 5 N. C. 500.

**61.** Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353; Evans *v.* Stevens, 8 Ala. 517; Gary *v.* McCown, 6 Ala. 370 (holding that under Clay Dig. 218, § 85, permitting summary proceedings against a sheriff for failure to make the money on an execution, by a suggestion that the "money could have been made by the sheriff by due diligence," a motion will not lie for a sheriff's failure to take a sufficient security on a forthcoming bond); Magee *v.* Childers, 6 Ala. 196; Wingfield *v.* Crosby, 5 Coldw. (Tenn.) 241; Wood *v.* Orr, 10 Yerg. (Tenn.) 505; Smith *v.* Wells, 5 Yerg. (Tenn.) 202 (holding that Acts (1803), c. 18, § 1, authorizing judgment on motion for failing to return process issued from the county or circuit court, and providing for a summary judgment in cases where an escape has been

not be held to authorize summary proceedings unless such intent is clear,[62] nor can such proceedings be maintained in the absence of statutory authority.[63] When a statute authorizing a summary judgment against a sheriff is repealed without a saving clause, there can be no judgment subsequently entered thereunder, even in proceedings begun before the repeal.[64] When a summary remedy is invoked all the statutory requirements must be strictly complied with.[65] The statutory summary remedies are cumulative to the remedy by action,[66] but the complaining party is put to his election and cannot pursue both remedies at the same time.[67]

**B. Proceedings Against Deputies.** Although the rule is that, as respects the public and third persons, the sheriff and not the deputy is responsible for the official defaults of the latter,[68] and summary remedies provided by statute are therefore not usually available against deputies,[69] yet such a remedy may be made available against a deputy where it is clear that such is the legislative inteut.[70] So under some statutes the sheriff has the right to proceed summarily against his deputy for an official default.[71]

**C. Right to Proceed Summarily.** Summary proceedings against a sheriff cannot be instituted by a person other than the one for whom the remedy was intended by the statute;[72] and under some statutes a rule against the sheriff for failing to levy on the property of defendant in execution until after the return term will not be made absolute unless it appears that the moving party has been injured by the default.[73] An execution defendant who is a mere surety for the

permitted, does not authorize a judgment on motion to be had against a constable for an escape on a process issued by a justice of the peace, or for a failure to return the process); Waugh *v.* Carter, 2 Munf. (Va.) 333.

**Extension of remedy to execution defendant.**— The statute of 1807, which provides that a defendant in execution shall have the same remedy against a sheriff for failing to pay over an excess collected by him on the execution that a plaintiff has for failure to pay over money collected, is not to be so construed as to extend to defendants the benefit of subsequent statutes, by which plaintiff's remedy is changed. Baylor *v.* Scott, 2 Port. (Ala.) 315.

**Summary proceedings will not lie against the executor of a deceased sheriff** for the decedent's failure to return executions. State *v.* Deberry, 9 Humphr. (Tenn.) 605.

62. Sample *v.* Royall, 4 Ala. 344.

63. Cooper *v.* Harris, 46 Tex. 189, holding that in the absence of any statute authorizing a motion to be made against a sheriff who levies an attachment for failing to take a sufficient replevin bond such motion cannot be maintained.

64. Williams *v.* McCurdy, 22 Ala. 696.

65. Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353; Robinson *v.* Schmidt, 48 Tex. 13.

66. *Alabama.*— Chapman *v.* Weaver, 19 Ala. 626.

*Arkansas.*— Levy *v.* Lawson, 5 Ark. 212.

*Delaware.*— Pettyjohn *v.* Hudson, 4 Harr. 468.

*Georgia.*— French *v.* Kemp, 64 Ga. 749; Wood *v.* Hunt, 23 Ga. 379; Currell *v.* Phillips, 18 Ga. 469.

*Illinois.*— Beaird *v.* Foreman, 2 Ill. 40.

*Kentucky.*— Mars *v.* Buckler, 1 Bibb 267.

*Missouri.*— State *v.* Durant, 53 Mo. App. 493.

*New York.*— Beckwith *v.* Smith, 4 Lans. 182; Hatfield *v.* Hatfield, 15 N. Y. St. 788; Wilson *v.* Wright, 9 How. Pr. 459; Gibbs *v.* Bull, 18 Johns. 435; Burk *v.* Campbell, 15 Johns. 456; Stoors *v.* Kelsey, 2 Paige 418.

*South Carolina.*—State *v.* Charleston Dist., 1 Mill 145.

*Tennessee.*— Rader *v.* Davis, 5 Lea 536.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 237 *et seq.*, 254.

67. Wood *v.* Hunt, 23 Ga. 379.

68. See *supra*, V, A, 4; V, B.

69. Robertson *v.* Lessan, 7 Coldw. (Tenn.) 159.

70. Helm *v.* Haycraft, 2 Litt. (Ky.) 171 (holding that under 2 Dig. St. p. 899, a motion for failing to pay over the amount of a list of militia fines lies against the deputy sheriff, into whose hands it was put); Vance *v.* Campbell, 8 Humphr. (Tenn.) 524 [*explaining* and *distinguishing* Rose *v.* Lane, 3 Humphr. (Tenn.) 218]; Heymann *v.* Cunningham, 51 Wis. 506, 8 N. W. 401.

71. Baldwin *v.* Gully, 11 Ala. 716; Stowers *v.* Smith, 5 Munf. (Va.) 401.

72. Riley *v.* Marshall, 5 Ala. 682 (holding that where a coroner collected money under an execution which was afterward quashed before the money was paid over, defendants could not, by notice and motion, recover of the coroner the amount thus collected and retained, as the acts giving such remedy intended it only for plaintiff in execution); Ebersole *v.* Boeshore, 1 Pa. Co. Ct. 92.

**The heir at law of a deceased execution defendant** cannot proceed by rule to compel the sheriff to pay over an alleged surplus in his hands arising from an execution sale of defendant's property, on the ground that there are no debts chargeable against the estate. Carr *v.* Berry, 116 Ga. 372, 42 S. E. 726.

73. Turner *v.* Winn, 83 Ga. 761, 10 S. E.

other defendants, but who pays the execution, cannot proceed summarily against the sheriff for the statutory damages imposed for a failure to return the execution.[74] An execution plaintiff does not, by opposing a claim interposed to property levied on, waive the right to proceed summarily against the sheriff for failing to make the money.[75] A solicitor *pro tempore* of the county court who obtains an order allowing him fees may rule the sheriff for money collected in such court for fines and forfeitures.[76] The pendency of an action against a sheriff and his surety for an official delinquency in failure to collect an execution when it was in his hands, and for making a false return thereon, is no bar to the prosecution of a motion against them to recover statutory damages for the failure of the sheriff to return the execution within the proper time.[77]

**D. Defaults For Which Summary Remedies Available — 1. General Rules.** The statutes giving summary remedies usually apply to cases of neglect of duty,[78] as well as to cases of active misconduct.[79] But such remedies must be confined to the precise facts or defaults which authorize the remedy attempted to be enforced,[80] and are not available for any official default or misconduct which is not provided for in the statutes relating to such proceedings.[81] Neither should a statute giving a summary remedy be permitted to have a retroactive application to cases of preëxisting default.[82]

**2. Defaults of Deputies.**[83] Summary proceedings may be had against a sheriff for the official default of his deputy.[84]

**3. Particular Defaults.** Under various statutes a sheriff or constable may be proceeded against summarily for failure to execute process,[85] delay in levying

368; Hunter *v.* Phillips, 56 Ga. 634; Currell *v.* Phillips, 18 Ga. 469.

**74.** Sanders *v.* Commonwealth Bank, 2 Metc. (Ky.) 327.

**75.** Leavitt *v.* Smith, 7 Ala. 175.

**76.** Mize *v.* Blalock, 71 Ga. 861.

**77.** Sanders *v.* Kentucky Bank, 2 Metc. (Ky.) 327.

**78.** Wright *v.* Cannon, 3 Harr. (Del.) 487.

**79.** Wright *v.* Cannon, 3 Harr. (Del.) 487.

**80.** *Alabama.*— Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353; Smith *v.* Leavitts, 10 Ala. 92, 102 (where it is said: "It is not sufficient that the mischief is the same"); Gary *v.* McCown, 6 Ala. 370.

*Arkansas.*— Lawson *v.* Johnson, 5 Ark. 168, holding that where a sheriff had property supposed to belong to a person charged with crime, under the belief that he was entitled to detain it, and afterward levied on it under an execution against such person, he was not amenable to the court in a summary manner, as it is only where such officer acts in obedience to or by virtue of some process that he is liable in such proceedings, and not where the property did not come to his hands by virtue of process.

*Kentucky.*— Morford *v.* Thomas, Ky. Dec. 214.

*Louisiana.*— La Salle *v.* Whitfield, 12 La. Ann. 81.

*Tennessee.*— Raines *v.* Childress, 2 Humphr. 449.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Default must be official.**— A statutory summary remedy is available only in case of an official default, and not where the officer has acted merely as the agent of the complaining party. McCrea *v.* Galey, 1 Overt. (Tenn.) 251.

**81.** Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353; Day *v.* Hackney, 20 Ill. 133; Miller *v.* Roy, 10 La. Ann. 744; Boyd *v.* Murray, 62 N. C. 238.

**82.** Wood *v.* Orr, 10 Yerg. (Tenn.) 505 (so holding as to a statute giving the right to recover, by motion, the whole amount of an execution, on the ground that it created a new right as well as furnished a new remedy); Burroughs *v.* Goodall, 2 Head (Tenn.) 29. But *compare* Oats *v.* Darden, 5 N. C. 500.

**83.** Liability of sheriff for default of deputy generally see *supra*, V, B.

**84.** Flournoy *v.* Rubey, 1 J. J. Marsh. (Ky.) 560; People *v.* Brown, 6 Cow. (N. Y.) 41 [*distinguishing* People *v.* Gilleland, 7 Johns. (N. Y.) 555, and *disapproving* People *v.* Waters, 1 Johns. Cas. (N. Y.) 137], holding that the sheriff is liable to an attachment for not returning process pursuant to a rule, although it never came to his own hands, but only to the hands of his deputy.

**85.** *Alabama.*— Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 21 So. 403 (holding that Code, § 3106, authorizing a summary judgment for failure "to execute summons, attachments or other mesne process," includes a subpœna); Pharr *v.* Hale, 9 Ala. 312; Robertson *v.* Beavers, 3 Port. 385.

*Georgia.*— Heard *v.* Callaway, 51 Ga. 314; Spicer *v.* Myres, 47 Ga. 559; McDonald *v.* Feagin, 43 Ga. 360; De Longchamp *v.* Hicks, 25 Ga. 200; Currell *v.* Phillips, 18 Ga. 469; Chittenden *v.* Brady, Ga. Dec. Pt. II 219.

*Missouri.*— Roach *v.* Settles, 19 Mo. 397.

*Tennessee.*— Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067.

*Texas.*— Batte *v.* Chandler, 53 Tex. 613;

under an execution,[86] failure to arrest defendant in a body execution,[87] failure to collect money [88] or to pay over money collected [89] or received by him by virtue of his office,[90] paying over money in his hands to the wrong person,[91] failure to comply with an order made in summary proceedings directing him to pay over money,[92] failure to pay over the amount realized by a sale of property in his official capacity, whether he receives the money or not,[93] failure to account for the amount realized by hiring out property in his official custody,[94] failure to sell property

Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Judgment for costs.**— A plaintiff may proceed by motion against the sheriff for failure to make the money on an execution issued on a judgment for costs. Pharr *v.* Hale, 9 Ala. 312.

**86.** Caruthers *v.* Sprayberry, 26 Ga. 437.

**87.** De Longchamp *v.* Hicks, 25 Ga. 200; Currell *v.* Phillips, 18 Ga. 469.

**88.** *Alabama.*— Hood *v.* Blair, 95 Ala. 629, 10 So. 671; Andrews *v.* Keep, 38 Ala. 315; Whitsett *v.* Slater, 23 Ala. 626; Union Bank *v.* Benham, 23 Ala. 143; Graham *v.* Chandler, 12 Ala. 829; Hodges *v.* Laird, 10 Ala. 678; Evans *v.* Stevens, 8 Ala. 517; Kirkmans *v.* Harkins, 1 Port. 22.

*Georgia.*— Horrigan *v.* Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961; Boyles *v.* State Bank, 96 Ga. 796, 22 S. E. 582; O'Pry *v.* Kennedy, 86 Ga. 662, 12 S. E. 940; Singer Sewing Mach. Co. *v.* Barnett, 76 Ga. 377; Wheeler *v.* Thomas, 57 Ga. 161; White *v.* Haslett, 49 Ga. 262; Martin *v.* Huson, 42 Ga. 83; Davis *v.* Irwin, 8 Ga. 153.

*Kentucky.*— Helm *v.* Haycraft, 2 Litt. 171.

*Minnesota.*— Kumler *v.* Brandenburg, 39 Minn. 59, 38 N. W. 704, delivery of property sold to purchaser without receiving the purchase-money.

*South Carolina.*— Eve *v.* Mosely, 2 Strobh. 203; Pitman *v.* Clark, 1 McMull. 316; *Ex p.* Thurmond, 1 Bailey 605.

*United States.*— Lewis *v.* Hamilton, 15 Fed. Cas. No. 8,324*a*, Hempst. 21, failure to make clerk's costs on execution.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Contra.**— Day *v.* Hackney, 20 Ill. 133.

**An execution issuing from the orphan's court** for the collection of money has the same attributes as an execution issued on a judgment at common law, must be executed in the same mode, and may be enforced in the same manner, and hence a motion may be made against the sheriff for failing to make the money thereon. Graham *v.* Chandler, 12 Ala. 829.

**89.** *Alabama.*— Spence *v.* Rutledge, 11 Ala. 557; Evans *v.* Stevens, 8 Ala. 517; Broughton *v.* State Bank, 6 Port. 48.

*Arkansas.*— Scarborough *v.* Arnold, 21 Ark. 231; Humphries *v.* Lawson, 7 Ark. 344; Levy *v.* Lawson, 5 Ark. 212.

*Delaware.*— Hukill *v.* Staats, 2 Harr. 385.

*Georgia.*— Bottoms *v.* Mithvin, 26 Ga. 481, 71 Am. Dec. 225; De Longchamp *v.* Hicks, 25 Ga. 200; Davis *v.* Green, 23 Ga. 185; Currell *v.* Phillips, 18 Ga. 469; Murphy *v.* Justices Wilkinson County Inferior Ct., 11 Ga. 331; Thompson *v.* Central Bank, 9 Ga. 413; Bethune *v.* Bonner, 2 Ga. 169.

*Illinois.*— Day *v.* Hackney, 20 Ill. 133; Buckmaster *v.* Drake, 10 Ill. 321; Beaird *v.* Foreman, 2 Ill. 40.

*Kentucky.*— Patton *v.* Sims, 13 B. Mon. 397; Quiry *v.* Prather, Hard. 294.

*Mississippi.*— Pugh *v.* Boyd, 38 Miss. 326; Dunn *v.* Newman, 7 How. 582.

*New York.*— Whitman *v.* Haines, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148]; Hatfield *v.* Hatfield, 15 N. Y. St. 788.

*South Carolina.*— Kirkpatrick *v.* Ford, 2 Speers 110; Pitman *v.* Clarke, 1 McMull. 316; *Ex p.* Thurmond, 1 Bailey 605; Kilpatrick *v.* Vandiver, 2 Mill 341; State *v.* Charleston Dist., 1 Mill 145.

*Tennessee.*— Rigsby *v.* Walter, 7 Coldw. 147; Cook *v.* Smith, 1 Yerg. 148; Metcalf *v.* Grainger, 1 Overt. 61.

*Texas.*— Little *v.* Guest, 30 Tex. 1; Spinks *v.* Caldwell, 23 Tex. 623; Beaver *v.* Batte, 19 Tex. 111; De Witt *v.* Dunn, 15 Tex. 106.

*Virginia.*— Tyree *v.* Donnally, 9 Gratt. 64.

*United States.*—Turner *v.* Fendell, 1 Cranch 116, 2 L. ed. 53.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Contra.**— Riviere *v.* Ross, 2 Mart. (La.) 46 [*followed* in Chew *v.* Delogny, 2 Mart. (La.) 114].

**Sale by other than levying officer.**— If one constable seizes property on execution, and procures another constable to sell it, and the latter fails to pay over the money, the first constable is subject to judgment by motion. Cook *v.* Smith, 1 Yerg. (Tenn.) 148.

**90.** Graham *v.* Swayne, 1 Rob. (La.) 186; *In re* Grundysen, 53 Minn. 346, 55 N. W. 557, holding that money paid to a sheriff to redeem land from a foreclosure sale is money received "by virtue of his office," within the meaning of Gen. St. (1878) c. 8, § 198, as amended in 1885, which provides for a summary proceeding against the sheriff on failure to pay over such money.

**91.** English *v.* Reid, 55 Ga. 240.

**92.** Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965; Wandling *v.* Thompson, 41 N. J. L. 142; Whitman *v.* Haines, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148].

**93.** Scarborough *v.* Arnold, 21 Ark. 231 (holding, however, that where the purchaser at an execution sale refused to pay his bid, and the sheriff did no act treating the sale as complete, it was not such a sale of the property as would render the sheriff liable to a motion for judgment); Disston *v.* Strauck, 42 N. J. L. 546.

**94.** Hendrick *v.* Tompkins, 14 Ga. 86.

levied on,[95] failure to take bond or security when it became his duty to do so,[96] failure to return process,[97] within the proper time,[98] or making a false [99] or insufficient [1] return, permitting the escape of a debtor arrested on civil process,[2] failure to release an execution upon defendant being adjudged a bankrupt,[3] or disobedience to an interpleader order.[4] The sheriff being an officer of the court, the court has power to control his conduct when acting under color of its authority, and

**95.** Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; Gladden *v.* Cobb, 73 Ga. 235; Kimbro *v.* Edmondson, 46 Ga. 130.

**96.** Bartlett *v.* Marshall, 2 Bibb (Ky.) 467; Rowand *v.* Gridley, 1 How. (Miss.) 210; Malpass *v.* Fennell, 48 N. C. 79; Gray *v.* Hoover, 15 N. C. 475.

**97.** *Alabama.*— Whitsett *v.* Slater, 23 Ala. 626; Huggins *v.* Powell, 19 Ala. 129; Caskey *v.* Nitcher, 8 Ala. 622; Evans *v.* Stevens, 8 Ala. 517; Godbold *v.* Planters', etc., Bank, 4 Ala. 516; Armstrong *v.* Robertson, 2 Ala. 164; Marchbanks *v.* Rogers, 1 Stew. 148.

*Arkansas.*— Humphries *v.* Lawson, 7 Ark. 344.

*Delaware.*— Wright *v.* Cannon, 3 Harr. 487; Stidham *v.* Chase, 3 Harr. 418.

*Illinois.*— Day *v.* Hackney, 20 Ill. 133; People *v.* Hallett, 3 Ill. 566; People *v.* Needles, 3 Ill. 361.

*Indiana.*— Baker *v.* Mortimer, 5 Blackf. 32.

*Kentucky.*— Flournoy *v.* Rubey, 1 J. J. Marsh. 560; Bruce *v.* Dyall, 5 T. B. Mon. 125; Holderman *v.* Brasfield, Litt. Sel. Cas. 271; Kennedy *v.* Coleman, 2 Litt. 6; Fergus *v.* Ball, 1 Litt. 197.

*Louisiana.*— Taylor *v.* Hancock, 19 La. Ann. 466; Hill *v.* Labarre, 12 La. Ann. 419; Brand *v.* Wilkinson, 11 La. Ann. 273; Lay *v.* Boyce, 3 La. Ann. 622. But *compare* La Selle *v.* Whitfield, 12 La. Ann. 81.

*Mississippi.*— Steen *v.* Briggs, 3 Sm. & M. 326.

*New York.*— Mollineaux *v.* Mott, 78 N. Y. App. Div. 493, 78 N. Y. Suppl. 661; Parker *v.* Bradley, 46 N. Y. Super. Ct. 244; People *v.* Lownds, 1 Hall 252; Brown *v.* James, 1 Hilt. 204, 3 Abb. Pr. 80; Wilson *v.* Wright, 9 How. Pr. 459; Anonymous, 23 Wend. 102; People *v.* Brown, 6 Cow. 41; People *v.* Chapman, 1 Cow. 579; Burk *v.* Campbell, 15 Johns. 456; People *v.* Ferris, 9 Johns. 160.

*Pennsylvania.*— Hill *v.* Rice, 7 Kulp 311.

*Tennessee.*— Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Lane *v.* Keith, 2 Baxt. 189; Reese *v.* Creson, 1 Baxt. 458; State Bank *v.* Cannon, 2 Heisk. 428; Robertson *v.* Lessan, 7 Coldw. 159; Lashley *v.* Wilkinson, 2 Head 482; Watkins *v.* Barnes, 1 Sneed 201; Hand *v.* State, 5 Humphr. 515 (holding that Acts (1803), c. 18, § 1, authorizing judgment "on motion of the party aggrieved," against a sheriff failing to return an execution, authorizes judgment on motion by the solicitor for the state for a failure to return executions for fine and costs in favor of the state against individuals); Webb *v.* Armstrong, 5 Humphr. 379; McMullen *v.* Goodman, 4 Humphr. 239; Benson *v.* Porter, Meigs 519; Wood *v.* Orr, 10 Yerg. 505; Phillips *v.* Cunningham, 5 Yerg. 416; Smith *v.* Wells, 5 Yerg. 202; Porter *v.* Webb, 4 Yerg. 161; Vance *v.* Cheatham, 5 Hayw. 39.

*Texas.*— Vaughan *v.* Warnell, 28 Tex. 119; Crow *v.* State, 24 Tex. 12; Spinks *v.* Caldwell, 23 Tex. 623.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

A writ of venditioni exponas is an execution, within the meaning of the statutes authorizing motions against sheriffs and constables for failure to return executions. Webb *v.* Armstrong, 5 Humphr. (Tenn.) 379.

**98.** Stidham *v.* Chase, 3 Harr. (Del.) 418; Sanders *v.* Kentucky Bank, 2 Metc. (Ky.) 327; Taylor *v.* Hancock, 19 La. Ann. 466; Lay *v.* Boyce, 3 La. Ann. 622; Armstrong *v.* Apple, 2 Coldw. (Tenn.) 280; Porter *v.* Webb, 4 Yerg. (Tenn.) 161.

**99.** *Delaware.*— Wright *v.* Cannon, 3 Harr. 487; Hukill *v.* Staats, 2 Harr. 385.

*Georgia.*— De Longchamp *v.* Hicks, 25 Ga. 200; Currell *v.* Phillips, 18 Ga. 469.

*Missouri.*— Roach *v.* Settles, 19 Mo. 397.

*New York.*— *In re* Dawson, 13 N. Y. Civ. Proc. 142, 20 Abb. N. Cas. 188 [*affirming* 47 Hun 634].

*Tennessee.*— Young *v.* Donaldson, 2 Heisk. 52; Fussell *v.* Greenfield, 1 Sneed 437; Watkins *v.* Barnes, 1 Sneed 201.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Contra.**— McLeod *v.* Ward, 9 Fla. 18; Morford *v.* Thomas, Ky. Dec. 214.

Under the Tennessee statute a sheriff is liable on motion only in cases where the falsehood or insufficiency of the return appears upon the face itself, and it was not the intention of the legislature to make the summary remedy by motion a substitute for the common-law remedy by action for negligence or for a false return. Raines *v.* Childress, 2 Humphr. 449 [*followed* in Howell *v.* Donaldson, 7 Heisk. 206; Fussell *v.* Greenfield, 1 Sneed 437 (*approved* in Hill *v.* Hinton, 2 Head 124)].

**1.** Hukill *v.* Staats, 2 Harr. (Del.) 385; Young *v.* Donaldson, 2 Heisk. (Tenn.) 52; Dunnaway *v.* Collier, 2 Heisk. (Tenn.) 10; Fussell *v.* Greenfield, 1 Sneed (Tenn.) 437; Watkins *v.* Barnes, 1 Sneed (Tenn.) 201; Howard *v.* Union Bank, 7 Humphr. (Tenn.) 26; Phillips *v.* Cunningham, 5 Yerg. (Tenn.) 416.

**2.** Stone *v.* Wilson, 10 Gratt. (Va.) 529, holding that a return by the sheriff that the county court had not provided a jail, and that he had therefore permitted a debtor taken in execution to go at large, was sufficient to support the remedy by motion against him for an escape.

**3.** Gary *v.* Bates, 12 Ala. 544.

**4.** Maclean *v.* Antony, 6 Ont. 330.

hence may order him to refund the money collected under a process improperly issued.[5] A coroner cannot be held liable on motion for omission to collect more than the usual rate of interest on a judgment against a sheriff for a default, when neither the execution nor the judgment directs it to be done.[6]

**E. Considerations Affecting Availability of Summary Remedies** — **1. Doubt as to Duty or Liability.** The summary remedies provided by statute are available only when a plain and undisputed duty has been wilfully neglected, and not where the officer's duty or liability is fairly open to dispute;[7] and so, where there are conflicting claims to money in the sheriff's hands, he cannot be proceeded against summarily by one of the claimants for failure to pay over the same, but is entitled to have the question as to who is entitled to the money determined in a civil action to which all the claimants may be made parties.[8]

**2. Acquiescence of Party.** A party who has acquiesced in the acts of an officer cannot proceed against him summarily for such acts unless there has been some fraud or collusion.[9]

**3. Injury to Complaining Party.** It has been held that summary remedies against the sheriff are not available unless the moving party has sustained some injury by reason of the officer's default;[10] but a sheriff is not excused from liability to an attachment for not returning a fee bill because he could not collect it of defendant therein.[11]

5. McMann *v.* Superior Ct., 74 Cal. 106, 15 Pac. 448.

6. Herrin *v.* Woodward, 11 Ala. 792.

7. *Arkansas.*— Williams *v.* State, 65 Ark. 159, 46 S. W. 186.

*Georgia.*— Chambers *v.* Mayo, 51 Ga. 610; Hutchins *v.* Hullman, 34 Ga. 346. See also Lanham *v.* Vaughan, 26 Ga. 358.

*Minnesota.*— Deering *v.* Burke, 74 Minn. 80, 76 N. W. 1020; Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965. See also Coykendall *v.* Way, 29 Minn. 162, 12 N. W. 452.

*New York.*— Frankel *v.* Elias, 60 How. Pr. 74.

*South Carolina.*— Brown *v.* Furze, 2 Rich. 530; Cannady *v.* Odum, 2 Rich. 527; Dawkins *v.* Pearson, 2 Bailey 619; State *v.* Charleston, 1 Mill 145.

*Tennessee.*— Cannon *v.* Wood, 2 Sneed 177, holding that the summary remedy by motion against a constable for failing to return an execution cannot be maintained, where the judgment on which the execution issued does not sufficiently state the nature of the liability of the judgment debtor or the forum in which the judgment was rendered.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

**Failure to collect fee bills.**— On a motion for judgment against a sheriff for the amount of fee bills delivered to him for collection, it must appear from such fee bills, or it must be shown, that they were of the description which he was bound by law to collect and account for. May *v.* Johnston, 2 Bibb (Ky.) 220.

8. Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965; Deering *v.* Burke, 74 Minn. 80, 76 N. W. 1020; Hull *v.* Chapel, 71 Minn. 408, 74 N. W. 156; Cannady *v.* Odum, 2 Rich. (S. C.) 527; Dawkins *v.* Pearson, 2 Bailey (S. C.) 619; Scott *v.* Angus, 2 Nova Scotia 183.

9. Bottoms *v.* Mithvin, 26 Ga. 481, 71 Am. Dec. 225, holding that an execution creditor who was present at a sale by the sheriff of property to satisfy an execution was so far bound by an announcement, made by the sheriff at the time of the sale without objection from him, that the vendor's lien on the property would be paid out of the proceeds of the sale, that he could not maintain a summary proceeding against the sheriff to show cause why he did not pay over the amount due on the execution.

10. *Georgia.*— Green *v.* Jones, 39 Ga. 521 (holding that the failure of a sheriff to collect the money on an execution within the statutory time is not sufficient to sustain an order of court compelling him to pay the judgment himself, where he has acted in good faith and plaintiff has not been damnified); Hackett *v.* Green, 32 Ga. 512 (where a sheriff neglected to sell property on the day when it was advertised to be sold on execution, and soon after a claim to the property was interposed by a third party, and a rule having been served on the sheriff to show cause why he should not pay the amount due on said execution to the attorney of plaintiff therein, it was held that the sheriff was not then liable to attachment, it not being certain that plaintiff had suffered any injury by the neglect of the sheriff, but the court ordered the rule to be kept open till the disposition of the claim interposed). See also Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768.

*Indiana.*— See Baker *v.* Mortimer, 5 Blackf. 32.

*New York.*—See Post *v.* Van Dine, 1 Johns. Cas. 412.

*South Carolina.*— Connor *v.* Archer, 1 Speers 89; McLean *v.* DuBose, 1 Bailey 646 [*approved* in Pitman *v.* Clarke, 1 McMull. 316].

*Texas.*— Hamilton *v.* Ward, 4 Tex. 356.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 239.

11. People *v.* Nichols, 5 Ill. 560.

**4. Reasonable Cause For Not Proceeding.** A rule against a sheriff to show cause why he had not collected the balance and interest due on an execution is properly discharged, where it appears that he has collected the sum really due, although a larger sum is expressed in the execution, and that he has delayed enforcing the execution for the balance until the court could decide on defendant's application to be relieved from it.[12]

**F. Methods of Proceeding — 1. Rule or Order[13] — a. In General.** A very common remedy against a sheriff or constable who has failed in the discharge of his duty is by a rule *nisi* or rule to show cause why he should not pay to the party injured by his default the amount which *prima facie* such party has lost in consequence thereof,[14] together with any statutory penalty to which the officer has become subject through his default,[15] which rule is made absolute upon the officer's failure to excuse his default.[16] The performance of duties devolving

**12.** Pennsylvania Bank *v.* Condy, 1 Hill (S. C.) 209, 210, where it is said: "Although the sheriff is not to be encouraged, in searching out flaws in the proceedings, or in detecting errors in calculation, yet a palpable case like this, is considered by the Court as furnishing reasonable cause for not proceeding, and why he should not be held in contempt."

**13. Orders** generally see Orders, 29 Cyc. 1511.

**14.** *Alabama.*— Whitsett *v.* Slater, 23 Ala. 626; Union Bank *v.* Benham, 23 Ala. 143; Vastbinder *v.* Spinks, 16 Ala. 385; Barnett *v.* Bass, 10 Ala. 951; Hodges *v.* Laird, 10 Ala. 678; Mason *v.* Watts, 7 Ala. 703.

*Florida.*— McLeod *v.* Ward, 9 Fla. 18.

*Georgia.*— Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465; Horrigan *v.* Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961; Wilkin *v.* American Freehold Land Mortg. Co., 106 Ga. 182, 32 S. E. 135; McConnell *v.* West, 105 Ga. 468, 30 S. E. 654; Brown *v.* Usry, 99 Ga. 302, 25 S. E. 650; Boyles *v.* State Bank, 96 Ga. 796, 22 S. E. 582; Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161; Morgan *v.* Spring, 72 Ga. 257; Mize *v.* Blalock, 71 Ga. 861; Wakefield *v.* Moore, 65 Ga. 268; Snell *v.* Mayo, 62 Ga. 743; Davis *v.* Reid, 57 Ga. 188; Wheeler *v.* Thomas, 57 Ga. 161; Wheeler *v.* Redding, 55 Ga. 87; Pugsley *v.* Drew, 52 Ga. 339; Cowart *v.* Chaffee, 51 Ga. 606; Lee *v.* Armstrong, 49 Ga. 609; Spicer *v.* Myres, 47 Ga. 559; Bell *v.* Thorpe, 44 Ga. 509; McDonald *v.* Feagin, 43 Ga. 360; Martin *v.* Huson, 42 Ga. 83; Albert *v.* Howell, 32 Ga. 548; DeLongchamp *v.* Hicks, 25 Ga. 200; Davis *v.* Green, 23 Ga. 185; Hand *v.* Greenville, 22 Ga. 476; Phillips *v.* Behn, 19 Ga. 298; Gregory *v.* Waters, 19 Ga. 71; Kellogg *v.* Bucker, 17 Ga. 187; Davis *v.* Dempsey, 15 Ga. 182; Hendrick *v.* Tompkins, 14 Ga. 86; Thompson *v.* Central Bank, 9 Ga. 413; Davis *v.* Irwin, 8 Ga. 153; Brantley *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

*Kentucky.*—McClelland *v.* Strong, Hard. 522.

*Louisiana.*—Chase *v.* Bell, 32 La. Ann. 460; Blair *v.* Taylor, 25 La. Ann. 144; Connors *v.* Citizens' Mut. Ins. Co., 22 La. Ann. 330; Taylor *v.* Hancock, 19 La. Ann. 466; Hill *v.* Labarre, 12 La. Ann. 419.

*Maryland.*— Cadwallader *v.* Ringgold, 4 Harr. & J. 564.

*Minnesota.*— Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

*North Carolina.*— *Ex p.* Schenck, 63 N. C. 601.

*South Carolina.*— Wallace *v.* Graham, 13 Rich. 322; Dawson *v.* Dewan, 12 Rich. 499; Eve *v.* Mosely, 2 Strobh. 203; Kirkpatrick *v.* Ford, 2 Speers 110; Carr *v.* Scott, Riley 193; Pennsylvania Bank *v.* Condy, 1 Hill 209; Dawkins *v.* Pearson, 2 Bailey 619; Summers *v.* Caldwell, 2 Nott & M. 341; State *v.* Charleston Dist., 1 Mill 145.

*Tennessee.*— Phillips *v.* Cunningham, 5 Yerg. 416.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 246.

**It must appear that the sheriff is in contempt** in order to warrant a proceeding by rule against him. Hunter *v.* Phillips, 56 Ga. 634.

**Such proceeding by rule is not a regular suit,** but an exercise of the court's power over its officer to compel him to do his duty or to suffer the consequences of a failure. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465. But *compare* Roberts *v.* Keeler, 111 Ga. 181, 36 S. E. 617.

**15.** Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965.

**16.** Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465 (holding that where a rule has been issued against a constable to show cause why he should not pay the amounts due on fieri facias placed in his hands, if he is in default in making answer, the court may proceed to grant a rule absolute against him, and is not required to wait until he shall voluntarily appear or to institute other proceedings to compel an answer); Boyles *v.* State Bank, 96 Ga. 796, 22 S. E. 582; Valentine *v.* Kwilecki, 89 Ga. 98, 14 S. E. 878; English *v.* Reid, 55 Ga. 240; Spicer *v.* Myres, 47 Ga. 559; Kimbro *v.* Edmondson, 46 Ga. 130; Martin *v.* Huson, 42 Ga. 83; Albert *v.* Howell, 32 Ga. 548; Hendrick *v.* Tompkins, 14 Ga. 86; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

**Failure to take seasonable advantage of leave to amend.**— Where a rule *nisi* against a sheriff was ordered to be made absolute, but

upon the sheriff may also be compelled by rule.[17] Two writs of fieri facias may be introduced in one rule *nisi* against the sheriff,[18] and where such officer has simultaneously collected different sums by process in several different actions against the same defendant, one order requiring him to pay it over may be properly made in all the actions.[19] When a *prima facie* case is made against a sheriff, either upon affidavit or other sufficient proof, a rule *nisi* is granted as of course.[20] A rule against an officer to show cause why he should not pay the amounts due on fieri facias placed in his hands should be given a fair and reasonable construction so as not to work oppressively on him,[21] but should not be so construed as to allow him to take his own time to prepare to be heard and to require the court to wait until he is ready.[22] Where, pending a rule against him, the officer is guilty of a new default, such default may be alleged by way of amendment to the rule, and the rule may be made absolute as a consequence of that default.[23] The fact that a sheriff has neglected to make the money on an execution does not warrant a rule for failing to pay over money as actually collected, notwithstanding he has promised to pay over the money for which he is liable.[24] On rule against a sheriff to show cause why he should not be compelled to pay over the amount of an execution in his hands, it is not proper to give summary relief in the premises by ordering him to pay the money or to stand committed, where it appears that he has not made the money thereon.[25] A rule is properly discharged where the effect of making it absolute would be to prevent the sheriff from obeying the mandate of a coördinate court.[26] A rule *nisi* against a sheriff, setting forth at its head the name of plaintiff and defendant in the fieri facias, the amount of the principal and interest at the date of the judgment, and the court to which the fieri facias is returnable, and alleging that the sheriff has had the fieri facias long enough to have made the money, is not demurrable for want of certainty.[27] A rule on a sheriff to pay over money collected on execution must state the court in which the judgment was rendered on which the execution issued.[28] Where a sheriff

by consent of counsel for plaintiff the sheriff was granted leave to amend, but at the next term, such additional return not having been made, the sheriff moved for leave to be heard again upon the merits of the issue, it was held that as he had already had his day in court upon the merits of the issue as it stood, leave to amend was properly denied, and that the rule was properly made absolute *nunc pro tunc*. Hendrick *v.* Tompkins, 14 Ga. 86.

17. *Georgia.*— Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

*Illinois.*— People *v.* McHatton, 3 Ill. 566.

*New York.*— Coons *v.* McManus, 15 Johns. 181.

*Pennsylvania.*— Littleboy *v.* Blankman, 1 Miles 279.

*South Carolina.*— Murray *v.* Peay, 1 McMull. 10.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 246.

In case an officer neglects to return any precept, the practice is to issue a rule against him to return the same; and it is irregular to issue a rule in the first instance to show cause why an attachment should not issue. People *v.* Needles, 3 Ill. 361. But *compare* People *v.* Hallett, 3 Ill. 566.

18. Lee *v.* Armstrong, 49 Ga. 609.

The fact that one of the writs is not fully described will not support a general demurrer to the rule. Lee *v.* Armstrong, 49 Ga. 609.

19. Whitman *v.* Haines, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148].

20. *Ex p.* Schenck, 63 N. C. 601.

Surplusage in the affidavit will not impair its effect. *Ex p.* Schenck, 63 N. C. 601.

21. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465.

22. Puckett *v.* State Banking Co., 130 Ga. 586, 61 S. E. 465, holding that a rule against a constable to show cause why he should not pay the amounts due on fieri facias placed in his hands, which on its face is returnable "instanter, or as soon as counsel can be heard," is returnable promptly on service being made, and is subject to be then heard or to be dealt with as soon as counsel can be heard, and does not remain open indefinitely until the constable may see fit to employ counsel, and the latter is ready to be heard.

23. Valentine *v.* Kwilecki, 89 Ga. 98, 14 S. E. 878.

24. Hodges *v.* Laird, 10 Ala. 678.

25. McLeod *v.* Ward, 9 Fla. 18.

26. Meixell *v.* Meixell, 1 Lehigh Val. L. Rep. (Pa.) 127, holding that where a sheriff made the money on a testatum fieri facias requiring that he should have the money made under it before the judges of that court on the return-day of the writ, a rule obtained by attaching creditors to pay the moneys so made into the court under whose jurisdiction the money was made will be discharged.

27. Lee *v.* Armstrong, 49 Ga. 609.

28. Bethune *v.* Bonner, 2 Ga. 169.

had received money on a fieri facias exceptions to the sufficiency of a rule against him, taken on the trial, eighteen months after the filing of the rule, came too late.[29] Although a sheriff has become liable for a debt by allowing a defendant, arrested on a ne exeat, to leave without giving sufficient bail, an order will not issue against the sheriff to compel him to pay the debt without first giving him time to produce defendant or to recover the debt on the bail-bond.[30]

**b. Service of Rule or Order.**[31] It has been held that an order or rule upon a sheriff to return process still in his hands should be served on him by copy, and not by reading it to him,[32] and that a rule on the sheriff to bring in the body of defendant cannot be served until after the expiration of twenty days after the term to which the writ is returnable.[33]

**c. Setting Aside Rule or Order.** A rule absolute against a sheriff for failure to collect money under an execution does not, like a judgment, operate as an estoppel,[34] but rests upon the fact of a contempt by the sheriff,[35] and may be set aside by the court for sufficient cause,[36] as where the charge of contempt is disproved.[37] So also a peremptory order to a sheriff, without notice of a hearing thereon, to pay the proceeds from a sale under execution into court, will be set aside.[38]

**2. CONTEMPT[39] PROCEEDINGS — a. In General.** Another very usual method of proceeding summarily against a sheriff for an official default is by attachment,[40]

**29.** Thompson *v.* Central Bank, 9 Ga. 413.

**30.** Brayton *v.* Smith, 6 Paige (N. Y.) 489.

**31.** Notice or process generally see *infra*, VIII, K.

**32.** People *v.* McHatton, 3 Ill. 566.

**33.** Coons *v.* McManus, 15 Johns. (N. Y.) 181.

**34.** Holcombe *v.* Dupree, 50 Ga. 335.

**35.** Holcombe *v.* Dupree, 50 Ga. 335.

**36.** Holcombe *v.* Dupree, 50 Ga. 335; Davis *v.* Dempsey, 15 Ga. 182, holding that a rule absolute made against a sheriff for a failure to show cause why he had not paid over certain moneys due on a mortgage fieri facias would be set aside on a showing that the mortgagees were themselves the purchasers, that he had nothing in his hands due to him, and that he learned from the parties in interest, when the rule *nisi* was served, that the object was simply to adjust their rights under the agreement, and not to require him to pay over money which he had not received.

**37.** Holcombe *v.* Dupree, 50 Ga. 335.

**38.** Dewoody *v.* Dewoody, 157 Pa. St. 603, 27 Atl. 667.

**39.** Contempt generally see CONTEMPT, 9 Cyc. 1.

**40.** *Georgia.*— Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689; French *v.* Kemp, 64 Ga. 749; Heard *v.* Callaway, 51 Ga. 314; Currell *v.* Phillips, 18 Ga. 469; Chittenden *v.* Brady, Ga. Dec. Pt. II, 219.

*Minnesota.*— Roche *v.* Dunn, 97 Minn. 529, 106 N. W. 965.

*New York.*— Mollineaux *v.* Mott, 78 N. Y. App. Div. 493, 79 N. Y. Suppl. 661 (holding that where a sheriff has failed to return an execution an order may issue directing an attachment for contempt against him unless he returns the writ within a specified time, but such an order should not contain any direction as to the form of the return); Parker *v.* Bradley, 46 N. Y. Super. Ct. 244; People *v.* Lownds, 1 Hall 252; Brown *v.* Jones, 1 Hilt. 204, 3 Abb. Pr. 80; Whitman *v.* Haines, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148]; Holmes *v.* Rogers, 2 N. Y. Suppl. 501; Hatfield *v.* Hatfield, 15 N. Y. St. 788; Wilson *v.* Wright, 9 How. Pr. 459; Anonymous, 23 Wend. 102; Anonymous, 3 Wend. 423; People *v.* Brown, 6 Cow. 41; People *v.* Chapman, 1 Cow. 579; Burk *v.* Campbell, 15 Johns. 456; People *v.* Ferris, 9 Johns. 160; Franklin *v.* Lamb, 1 Johns. 508.

*South Carolina.*— Pitman *v.* Clarke, 1 McMull. 316; *Ex p.* Thurmond, 1 Bailey 605; Kilpatrick *v.* Vandiver, 2 Mill 341; State *v.* Charleston Dist., 1 Mill 145.

*Tennessee.*— Phillips *v.* Cunningham, 5 Yerg. 416.

*Texas.*— Crow *v.* State, 24 Tex. 12.

*Canada.*— Maclean *v.* Anthony, 6 Ont. 330; Rex *v.* Niagara, Draper (U. C.) 331.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 248.

But *compare* Clark *v.* Foxcroft, 6 Me. 296, 301, 20 Am. Dec. 309, where it is said: "It has never been our practice to proceed by attachment, with or without a rule to show cause, against the sheriff for not returning process mesne or final."

**Nature of process.**— The process of attachment against a sheriff for not collecting or paying over money is civil as to redressing the injured party, and criminal as to punishing the sheriff for neglect of official duty. *Ex p.* Thurmond, 1 Bailey (S. C.) 605.

**The court of appeals will not award an attachment against a sheriff for proceeding to carry into execution a decree from which an appeal has been granted by the judge who pronounced it, although he had notice of the appeal, if such proceeding took place before the record was brought up, as there could be no contempt of the court, until the cause was pending therein.** Cheshire *v.* Atkinson, 1 Hen. & M. (Va.) 210.

rule to show cause why an attachment should not issue,[41] rule *nisi* for an attachment,[42] or other proceedings as for contempt.[43] But it does not necessarily follow, because the sheriff would be liable under the law in an action on the case against him for a certain default, that he would be liable to an attachment for contempt of court,[44] as the latter proceeding would depend upon the good faith of his conduct, in view of the circumstances under which he acted, of which the court is to judge.[45] Where an attachment against a sheriff for not returning an execution is not accompanied with instructions in what amount to take the recognizance for the sheriff's appearance, and a recognizance is taken for a less amount than the execution, and the sheriff does not appear on his recognizance, plaintiff may, on motion, proceed by an alias attachment, which will answer every requisite purpose without a suit on the recognizance.[46] If special bail has been put in, but the bail-piece is lost in its transmission to the clerk's office, the sheriff should be discharged from an attachment for not bringing in the body.[47] On an attachment against a sheriff for not returning a fieri facias, the court may properly order him to recognize in double the amount of the fieri facias,[48] and direct that he shall answer such interrogatories as may be regularly exhibited.[49] Where an order was made that an attachment should issue, unless the sheriff should, within a specified time, pay the money on a fieri facias which he had neglected to return, and he within that time sold all defendant's property, and applied the proceeds to satisfy older liens, the attachment was properly dissolved.[50] In New York the practice has been to give the sheriff a day in term for his appearance subsequent to the return-day of the attachment, and the court has refused to order the prosecution of a bond given by the sheriff on being served with an attachment until the fourth day after the return.[51]

**b. Purging Contempt.** Where an attachment has been granted against a

41. *Georgia.*— Cowart *v.* Dunbar, 56 Ga. 417; Davis *v.* Irwin, 8 Ga. 153, holding that when a rule is made absolute against a sheriff for the payment of money, an attachment will not be issued thereon against him until he is called on to show cause why an attachment should not issue.

*New Jersey.*— Wandling *v.* Thompson, 41 N. J. L. 142.

*South Carolina.*— McLean *v.* Du Bose, 1 Bailey 646; State *v.* Charleston Dist., 1 Mill 145.

*United States.*—*Ex p.* Bowling, 3 Fed. Cas. No. 1,737, 1 Cranch C. C. 39.

*England.*— Blake *v.* Newburn, 5 D. & L. 601, 12 Jur. 882, 17 L. J. Q. B. 216, 2 Saund. & C. 263; Hatfield *v.* Hatherfield, 1 D. & L. 809, 6 M. & G. 724, 7 Scott N. R. 430, 46 E. C. L. 724.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 248.

**Where the sheriff fails to show good cause** on the return of a rule against him, the rule should be absolute, after giving him a reasonable time to perform the duty omitted. State *v.* Charleston Dist., 1 Mill (S. C.) 145.

42. Wilton *v.* Chambers, 1 Harr. & W. 582, 5 L. J. K. B. 72, 5 N. & M. 431.

43. Wood *v.* Orr, 10 Yerg. (Tenn.) 505; Heymann *v.* Cunningham, 51 Wis. 506, 8 N. W. 401.

44. Heard *v.* Callaway, 51 Ga. 314.

**Both the justice and the necessity of the attachment should be made to appear** where it is demanded as an individual remedy, that is, as an execution to get money. Brown *v.* Furze, 2 Rich. (S. C.) 530.

45. Pugsley *v.* Drew, 52 Ga. 339 (holding that where a sheriff levied on property of the principal pointed out by the surety, and a claim was interposed thereto, which was afterward dismissed for some technical defect, and the amount due was paid to plaintiff in the fieri facias by the surety, the sheriff was not liable to be attached for contempt for failing to proceed with the execution, in the absence of further instructions from the surety); Heard *v.* Callaway, 51 Ga. 314 (holding that where a sheriff proceeding to sell land under an execution, was served by defendant with an affidavit of illegality, averring that the land was included in his schedule in bankruptcy and was exempt as a homestead, and thereupon suspended the sale and returned the affidavit to the court, praying adjudication upon the facts, the sheriff, acting in good faith, would not be liable, under Code, § 3949, to attachment for contempt for failing to execute the process of the court).

46. People *v.* Chapman, 1 Cow. (N. Y.) 579.

47. People *v.* Shoemaker, 2 Wend. (N. Y.) 253.

48. People *v.* Lownds, 1 Hall (N. Y.) 252.

49. People *v.* Lownds, 1 Hall (N. Y.) 252.

50. McLean *v.* Du Bose, 1 Bailey (S. C.) 646.

51. Anonymous, 3 Wend. (N. Y.) 423, holding that the Revised Statutes did not require the court to depart from such practice. See also People *v.* Acker, 20 Wend. (N. Y.) 612.

sheriff for neglecting to levy an execution, he may purge his contempt by selling all defendant's property and bringing the money into court before the attachment issues, even if other executions claim it all.[52]

**3. Motion[53] or Suggestion.** Under some statutes the remedy against the sheriff for an official default is by motion,[54] or by a suggestion to the court, upon which an issue as to the alleged default is ordered,[55] and an officer may properly be proceeded against on the same motion for a failure to pay over money collected on an execution and a failure to return the execution, and judgment may be rendered for either cause.[56] A sheriff may proceed against his deputy by motion for a failure to pay over costs collected by the deputy on execution placed in his hands,[57] and such a motion need not set out the various executions, if a schedule or list of the executions is filed with the motion.[58]

**4. Judgment Nisi.**[59] Summary proceedings against a sheriff are sometimes in

**52.** Chittenden *v.* Brady, Ga. Dec. Pt. II 219.

**53. Motion** generally see Motions, 28 Cyc. 1.

**54.** *Alabama.*— Hood *v.* Blair, 95 Ala. 629, 10 So. 671; Andrews *v.* Keep, 38 Ala. 315; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Huggins *v.* Powell, 19 Ala. 129; Casky *v.* Haviland, 13 Ala. 314; Graham *v.* Chandler, 12 Ala. 829; Gary *v.* State Bank, 11 Ala. 771; Spence *v.* Rutledge, 11 Ala. 557; Pharr *v.* Hale, 9 Ala. 312; Evans *v.* Stevens, 8 Ala. 517; Godbold *v.* Planters', etc., Bank, 4 Ala. 516; Hallett *v.* Lee, 3 Ala. 28; Armstrong *v.* Robertson, 2 Ala. 164; Broughton *v.* State Bank, 6 Port. 48; Hill *v.* State Bank, 5 Port. 537; Robertson *v.* Beavers, 3 Port. 385; Marchbanks *v.* Rogers, 1 Stew. 148. See also Williams *v.* McBroom, 1 Stew. 192.

*Arkansas.*— Scarborough *v.* Arnold, 21 Ark. 231; Humphries *v.* Lawson, 7 Ark. 344; Levy *v.* Lawson, 5 Ark. 212.

*Connecticut.*— Beckley *v.* Boardman, 6 Conn. 372.

*Georgia.*— Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161.

*Illinois.*— Buckmaster *v.* Drake, 10 Ill. 321; Beaird *v.* Foreman, 2 Ill. 40.

*Indiana.*— Dixon *v.* Boyer, 7 Blackf. 547.

*Kentucky.*— Johnson *v.* Bradley, 11 Bush 666; Sanders *v.* Kentucky Bank, 2 Metc. 327; Todd *v.* Caines, 18 B. Mon. 620; Flournoy *v.* Rubey, 1 J. J. Marsh. 560; Wood *v.* Sayre, 7 T. B. Mon. 663; Gore *v.* Hedges, 7 T. B. Mon. 520; Bruce *v.* Dyall, 5 T. B. Mon. 125; Helm *v.* Haycraft, 2 Litt. 171; Kennedy *v.* Coleman, 2 Litt. 6; Allen *v.* Gant, 1 A. K. Marsh. 409; Davis *v.* Armstrong, 1 A. K. Marsh. 364; May *v.* Johnston, 2 Bibb 220; Mars *v.* Buckler, 1 Bibb 267; Quiry *v.* Prather, Hard. 294.

*Louisiana.*— Brand *v.* Wilkinson, 11 La. Ann. 273; Lay *v.* Boyce, 3 La. Ann. 622; Dussin *v.* Delaroderie, 5 Rob. 202.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481 [*followed* in Tapp *v.* Bonds, 57 Miss. 281]; Pugh *v.* Boyd, 38 Miss. 326; Fulcord *v.* Hamberlin, 4 Sm. & M. 649; Steen *v.* Briggs, 3 Sm. & M. 326; Dunn *v.* Newman, 7 How. 582.

*New Jersey.*— Disston *v.* Strauck, 42 N. J. L. 546; Scott *v.* Dow, 14 N. J. L. 350.

*New York.*— *In re* Dawson, 13 N. Y. Civ. Proc. 142, 20 Abb. N. Cas. 188 [*affirming* 47 Hun 634].

*North Carolina.*— Oats *v.* Darden, 5 N. C. 500.

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Sawyers *v.* Glenn, 11 Heisk. 754; Tennessee Bank *v.* Cannon, 2 Heisk. 428; Young *v.* Donaldson, 2 Heisk. 52; Dunnaway *v.* Collier, 2 Heisk. 10; Robertson *v.* Lessan, 7 Coldw. 159; Rigsby *v.* Walker, 7 Coldw. 147; Pate *v.* Parks, 4 Sneed 330; Chaffin *v.* Crutcher, 2 Sneed 360; Cannon *v.* Wood, 2 Sneed 177; Watkins *v.* Barnes, 1 Sneed 201; Hand *v.* State, 5 Humphr. 515; Burt *v.* Davidson, 5 Humphr. 425; Webb *v.* Armstrong, 5 Humphr. 379; McMullen *v.* Goodman, 4 Humphr. 239; Phillips *v.* Cunningham, 5 Yerg. 416; Smith *v.* Wells, 5 Yerg. 202; Porter *v.* Webb, 4 Yerg. 161; Cook *v.* Smith, 1 Yerg. 148; Vance *v.* Cheatham, 5 Hayw. 39.

*Texas.*— Batte *v.* Chandler, 53 Tex. 613; Little *v.* Guest, 30 Tex. 1; Vaughan *v.* Warnell, 28 Tex. 119; Spinks *v.* Caldwell, 23 Tex. 623; De Witt *v.* Dunn, 15 Tex. 106; Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

*Virginia.*— Stone *v.* Wilson, 10 Gratt. 529; Tyree *v.* Donnally, 9 Gratt. 64; Scott *v.* Tankersley, 10 Leigh 581; Tolson *v.* Elwes, 1 Leigh 436.

*West Virginia.*— Virginia Exch. Bank *v.* Horner, 26 W. Va. 442.

*United States.*— Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53; Lewis *v.* Hamilton, 15 Fed. Cas. No. 8,324*a*, Hempst. 21.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 245.

**When remedy by motion unavailable.**— The remedy by motion given by Code Pr. arts. 766, 767, to any one entitled to money received by a sheriff, is not applicable to proceedings against a sheriff to make him responsible on the ground of his having illegally released defendant from arrest, and motion is not the proper remedy in such case. Dussin *v.* Delaroderie, 5 Rob. (La.) 202.

**55.** Gary *v.* Hathaway, 6 Ala. 161; Hallett *v.* Lee, 3 Ala. 28; Adams *v.* White, 2 Ala. 37; Kirkmans *v.* Hawkins, 1 Port. (Ala.) 22.

**56.** Spinks *v.* Caldwell, 23 Tex. 623.

**57.** Womack *v.* Nichols, 39 Miss. 320.

**58.** Womack *v.* Nichols, 39 Miss. 320.

**59.** See, generally, Judgments, 23 Cyc. 768.

the form of granting a judgment *nisi* against him for the amount which he is apparently liable.[60]

**5. Scire Facias.**[61] In some states the liability of a sheriff for an official default may be enforced by scire facias.[62] A scire facias to subject a sheriff as special bail, by reason of his default in not taking a bail-bond, need not set forth the declaration in the original action, but it must show how he became bail, by stating that the writ in the original action came into his hands as sheriff, and that he arrested defendant therein and neglected to take a bail-bond.[63]

**G. Necessity For Demand.** A demand is a condition precedent to a summary proceeding by notice and motion against a sheriff for failure to pay over the amount made on an execution;[64] but a personal demand is not a prerequisite to contempt proceedings against an officer who fails to pay over money after service upon him of an order requiring such payment.[65]

**H. Defenses.**[66] Summary proceedings against a sheriff or constable being a mere substitute for the more tedious and expensive remedy by action,[67] anything which would constitute a valid defense for an officer in an action on the case for an official default is equally available as a defense in a summary proceeding against him.[68] A sheriff against whom a rule absolute is granted at one term and an attachment *nisi* at the next cannot, in answer to the latter, set up grounds decided against him before the rule was made absolute.[69] Ordinarily a rule against a sheriff for contempt in not executing process will be discharged, where the sheriff has acted in good faith,[70] and under the advice of counsel.[71] It is no defense to an attachment for failure to return an execution that the officer has not been ruled or notified to make a return.[72]

**I. Jurisdiction.**[73] The jurisdiction of summary proceedings against sheriffs and constables is a matter which is regulated by statutes,[74] which usually vest

**60.** Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705.

**61.** See, generally, Scire Facias, 35 Cyc. 1147.

**62.** Baker *v.* Mortimer, 5 Blackf. (Ind.) 32; Savage *v.* Hussey, 48 N. C. 149; Malpass *v.* Fennell, 48 N. C. 79; Gray *v.* Hoover, 15 N. C. 475; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; McClain *v.* Smith, 7 Leg. Int. (Pa.) 183. See also Griffin *v.* Davis, 3 Lack. Leg. N. (Pa.) 41.

**Scire facias will not lie for escape.**— Hall *v.* Johnson, 3 Blackf. (Ind.) 363.

**63.** Malpass *v.* Fennell, 48 N. C. 79.

**64.** Broughton *v.* State Bank, 6 Port. (Ala.) 48. See also Patton *v.* Sims, 13 B. Mon. (Ky.) 397 (holding that on a motion against a constable for not paying over moneys collected by him, no judgment can be rendered thereon for a greater sum than the amounts collected and legal interest, unless a demand on the officer be alleged and proved or admitted); Moore *v.* Moore, 2 Disn. (Ohio) 490 (where the dealings between the parties were considered equivalent to a demand).

**A plaintiff in an execution residing out of the county** cannot recover, on a motion against the sheriff, the money collected, unless he has appointed an agent in the county or made a personal or written demand in the county. Allen *v.* Gant, 1 A. K. Marsh. (Ky.) 409; Davis *v.* Armstrong, 1 A. K. Marsh. (Ky.) 364; Mars *v.* Buckler, 1 Bibb (Ky.) 267.

**Notice to the officer of an intent to move against** him for judgment is a sufficient application to him for money collected on execution, which he is bound to pay over, to support the motion. Cook *v.* Smith, 1 Yerg. (Tenn.) 148.

**65.** Whitman *v.* Haines, 4 N. Y. Suppl. 48 [*affirmed* in 119 N. Y. 639, 23 N. E. 1148].

**66. Matters affecting liability for particular defaults** see *supra*, V, *passim*.

**67.** Billingsly *v.* Rankin, 2 Swan (Tenn.) 82.

**68.** Billingsly *v.* Rankin, 2 Swan (Tenn.) 82.

**69.** Mize *v.* Blalock, 71 Ga. 861.

**70.** Perry *v.* Christie, 65 Ga. 642; Harrell *v.* Feagin, 59 Ga. 821.

**Interposition of affidavit of illegality.**— Where in answer to a rule against a sheriff, he set up that an affidavit of illegality was tendered him by defendant in execution, and that he suspended the levy of the execution on land and returned it to court in good faith, believing that there was an issue raised by the affidavit requiring the judgment of the court, and it was not shown that plaintiff in execution suffered any special damage or loss by the sheriff's action, it was not an abuse of discretion for the court to discharge the rule, although the affidavit in itself was not sufficient to arrest the execution. Turner *v.* Winn, 83 Ga. 761, 10 S. E. 368.

**71.** Harrell *v.* Feagin, 59 Ga. 821.

**72.** Parker *v.* Bradley, 46 N. Y. Super. Ct. 244.

**73. Jurisdiction of courts** generally see Courts, 11 Cyc. 633.

**74.** See the following cases:

*Alabama.*— Hood *v.* Blair, 95 Ala. 629, 10 So. 671.

such jurisdiction in the court out of which issued the process in connection with which the default occurred,[75] or to which such process is returnable.[76] According to some authorities a court of one county may entertain summary proceedings against the sheriff of another county for defaults in respect to the execution of its process.[77]

**J. Time For Instituting Proceedings.**[78] The statutes sometimes limit the time within which summary proceedings against a sheriff may be instituted;[79] and it has been held that even though a statute respecting the commencement of actions against sheriffs does not by its terms apply to proceedings as for contempt to enforce civil remedies, it is applicable in its spirit and intent and the court has power to withhold the exercise of its jurisdiction in a summary proceeding on motion against a sheriff, whenever an action for the claim sought to be enforced is barred by the statute of limitations.[80] In the absence of statute summary proceedings must be instituted within a reasonable time after the default.[81] As a general rule the summary remedy against a sheriff for a default with respect to the execution of process is not limited to the return term, but may be sought at a subsequent

*Georgia.*— McDonald *v.* Feagin, 43 Ga. 360; Bell *v.* Brown, 29 Ga. 212; Davis *v.* Green, 23 Ga. 185.

*Kentucky.*— Patton *v.* Sims, 13 B. Mon. 397; Jennings *v.* Jones, 4 J. J. Marsh. 216.

*Minnesota.*— Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481.

*Missouri.*— Roach *v.* Settles, 19 Mo. 397.

*North Carolina.*— Buchanan *v.* McKenzie, 53 N. C. 95.

*South Carolina.*— James *v.* Smith, 2 S. C. 183.

*Tennessee.*— Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; State Bank *v.* Cannon, 2 Heisk. 428; Benson *v.* Porter, Meigs 519.

*Texas.*— De Witt *v.* Dunn, 15 Tex. 106; Moore *v.* Harris, 1 Tex. 36.

*Canada.*— Rex *v.* Niagara, Draper (U. C.) 331.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 241.

**Where a motion presents two separate and distinct causes of action,** as to one of which the court is without jurisdiction, a demurrer to the motion is properly sustained, but the court should allow an amendment of the motion by striking out the cause of action as to which it has no jurisdiction, and hence it is error in such case to dismiss the motion without allowing the moving party an opportunity to amend. Hood *v.* Blair, 95 Ala. 629, 10 So. 671.

**75.** *Alabama.*— Evans *v.* Stevens, 8 Ala. 517. See also Andrews *v.* Keep, 38 Ala. 315.

*Minnesota.*— Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

*Missouri.*— Roach *v.* Settles, 19 Mo. 397.

*Tennessee.*— Tennessee Bank *v.* Cannon, 2 Heisk. 428, holding that a motion lies in the supreme court against a sheriff for failing to return an execution issued from that court.

*Texas.*— De Witt *v.* Dunn, 15 Tex. 106; Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 241.

**76.** Humphries *v.* Lawson, 7 Ark. 344; Cox *v.* Ross, 56 Miss. 481 [*followed* in Tapp *v.* Bonds, 57 Miss. 281].

**77.** Kennedy *v.* Coleman, 2 Litt. (Ky.) 6; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622; Cox *v.* Ross, 56 Miss. 481 [*followed* in Tapp *v.* Bonds, 57 Miss. 281]; Virginia Exch. Bank *v.* Horner, 26 W. Va. 442. *Contra,* Kellogg *v.* Buckler, 17 Ga. 187 [*followed* in Sheffield *v.* State, 69 Ga. 730; Hodges *v.* Myers, 17 Ga. 292]; Wood *v.* Orr, 10 Yerg. (Tenn.) 505.

**Constitutionality of statute.**— An act for summary proceedings against a sheriff for failure to levy an execution, permitting the court to which the process was returnable to enter judgment against the officer on motion, although the sheriff may reside in another county, is not unconstitutional. Virginia Exch. Bank *v.* Horner, 26 W. Va. 442.

**78. Limitations of actions** generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963.

**79.** Quiry *v.* Prather, Hard. (Ky.) 294, holding that a motion against a sheriff to pay money collected must be made at the court next succeeding the return of the execution; otherwise, the remedy by motion is lost.

**80.** Van Tassel *v.* Van Tassel, 31 Barb. (N. Y.) 439. But *compare* Hill *v.* Rice, 7 Kulp (Pa.) 311, holding that the act of March 21, 1772, requiring suits against constables for acts done in obedience to a justice's warrant to be brought within six months after the act committed, was not applicable to a summons against a constable to show cause why an execution should not issue against him for the amount of the execution directed to him, to which he had not made return according to law.

**81.** Jourden *v.* Hawkins, 17 Johns. (N. Y.) 35 [*following* Rex *v.* Perring, 3 B. & P. 151; Rex *v.* Surry, 7 T. R. 452, 101 Eng. Reprint 1072] (holding that where plaintiff delayed eighteen months after the return of the writ before ruling the sheriff to bring in the body, and the deputy sheriff, who became special bail, and his sureties had become insolvent, the court would not grant an attachment); People *v.* Gilleland, 7 Johns. (N. Y.) 555 (holding that an

term,[82] and a statute providing for summary proceedings to be instituted at a particular term does not require that the judgment shall be rendered as such term.[83] According to the weight of authority a sheriff may be proceeded against summarily after he has gone out of office.[84]

**K. Notice[85] or Process[86] — 1. Necessity.** As a general rule summary proceedings against a sheriff must be preceded by notice to him,[87] or the issuance

attachment would not be granted against the sheriff for failure to return an execution, where it appeared that the execution had been delivered to his deputy fourteen years before, and the deputy was dead); Mongie *v.* Cheney, 1 Hill (S. C.) 145 (holding that a rule against the sheriff for failure to levy would not be granted three years after the alleged failure); Young *v.* Donaldson, 2 Heisk. (Tenn.) 52 (holding that where plaintiff had adopted and ratified an insufficient return, and had taken benefit under it to the extent of the full satisfaction of his judgment and interest, and slept on his rights for two years, he must be held to have waived his right, and could take nothing by a motion for judgment against the sheriff because of such return). But *compare* Brockway *v.* Wilber, 5 Johns. (N. Y.) 356, where a rule for an attachment against a sheriff for not returning an execution delivered to his deputy was granted, although twelve years had elapsed after the execution was issued.

**82.** Kirkmans *v.* Harkins, 1 Port. (Ala.) 22; Steen *v.* Briggs, 3 Sm. & M. (Miss.) 326.

**83.** Turner *v.* Fendall, 1 Cranch (U. S.) 116, 2 L. ed. 53 [*affirming* 8 Fed. Cas. No. 4,727, 1 Cranch C. C. 35].

**84.** Bell *v.* Thorpe, 44 Ga. 509; Hand *v.* Greenville, 22 Ga. 476; Buckmaster *v.* Drake, 10 Ill. 321; Tapp *v.* Bonds, 57 Miss. 281; Oats *v.* Darden, 5 N. C. 500. *Contra*, Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Neil *v.* Beaumont, 3 Head (Tenn.) 556; Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672.

**One who retains money deposited with him as sheriff**, after ceasing to act as such, keeps up his official relation with the court in which he might have deposited it, and continues subject to the summary process provided by law for suitors. Graham *v.* Swayne, 1 Rob. (La.) 186 [*recognized* in Grayson *v.* Paris, 16 La. Ann. 256].

**85.** See, generally, Notice, 29 Cyc. 1110.

**86.** See, generally, Process, 32 Cyc. 412.

**87.** *Alabama.*— Huggins *v.* Powell, 19 Ala. 129 (holding that the act of March 3, 1848, entitling a sheriff to three days' notice of the motion against him for failing to return an execution, repeals the act of Jan. 27, 1845, authorizing proceedings against a sheriff without notice); Armstrong *v.* Robertson, 2 Ala. 164; Broughton *v.* State Bank, 6 Port. 48; Hill *v.* State Bank, 5 Port. 537; Marchbanks *v.* Rogers, 1 Stew. 148.

*Georgia.*— Brannon *v.* Central Bank, 18 Ga. 361.

*Indiana.*— Dixon *v.* Boyer, 7 Blackf. 547.

*Kentucky.*— Johnson *v.* Bradley, 11 Bush 666; Todd *v.* Caines, 18 B. Mon. 620; Fergus *v.* Ball, 1 Litt. 197.

*Louisiana.*—Taylor *v.* Hancock, 19 La. Ann. 466.

*Maryland.*— Cadwallader *v.* Ringgold, 4 Harr. & J. 564, holding that where a rule has been made on a sheriff to return a writ of execution issued from the court of appeals by a particular day, and he fails to make the return by such day, no judgment can be rendered against him in that court, under the acts of 1794, chapter 54, unless there is an affidavit stating that the execution had been delivered to him, or that he has been served with a copy of the rule.

*Mississippi.*— Weber *v.* Everman, 47 Miss. 540; Vance *v.* Connell, Walk. 254.

*Missouri.*— Dickerson *v.* Apperson, 19 Mo. 319.

*New York.*— People *v.* Acker, 20 Wend. 612; People *v.* Ten Eyck, 1 Wend. 306. See also People *v.* Adams, 6 Hill 236.

*Pennsylvania.*— Dewoody *v.* Dewoody, 157 Pa. St. 603, 27 Atl. 667.

*Tennessee.*— Chaffin *v.* Crutcher, 2 Sneed 360; Singleton *v.* Bell, Cooke 267.

*Virginia.*— Stone *v.* Wilson, 10 Gratt. 529.

*West Virginia.*— Exchange Bank *v.* Horner, 26 W. Va. 442.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 244.

**Notice must appear of record.**—Marchbanks *v.* Rogers, 1 Stew. (Ala.) 148. See also Singleton *v.* Bell, Cooke (Tenn.) 269.

**Under the Alabama act of 1826** in a proceeding against a sheriff for not collecting the money due on an execution, notice to him of the suggestion to the court is not necessary, as the application is *ex parte*, and the issue is ordered as of course on plaintiff's suggestion. Kirkmans *v.* Harkins, 1 Port. 22.

**A coroner's return that he has made the money** on an execution will warrant judgment against him on motion, without notice, for not bringing it into court. Metcalf *v.* Coroner, 1 Overt. (Tenn.) 61.

**Where a sheriff amends his return on an** execution, after notice of a motion against him founded on the original return, a second notice is not necessary. Stone *v.* Wilson, 10 Gratt. (Va.) 529.

**In Tennessee** no notice of motion is required if the motion is made at the return term of the process in a court of record, or within six months after the right to the motion has accrued in any other court. Lane *v.* Keith, 2 Baxt. 189; Phillips *v.* Cunningham, 5 Yerg. 416; Vance *v.* Cheatham, 5 Hayw. 39; Singleton *v.* Bell, Cooke 267. So when the process is delivered to the officer no notice is required. Lane *v.* Keith, *supra*; Reese *v.* Creson, 1 Baxt. 458. But where it is sought to hold the sheriff liable on the certificate of the clerk of the court that he

of process advising him of the proceedings against him,[88] which notice or process must be served upon the officer,[89] a specified time before the hearing or the granting of the rule or attachment sought; [90] and when notice is given to a sheriff that a motion will be made for judgment against him for an official default, the motion must be made at the time appointed, or some other proceedings had to keep alive the notice, or it will lose its force.[91] The officer may, however, waive the requirement of notice [92] for the time provided by statute,[93] or any irregularity in the notice.[94]

**2. Contents and Sufficiency.** The notice must inform the sheriff of the act or default upon which his alleged liability is based,[95] and of the remedy which it is sought to enforce against him,[96] and where the statute prescribes the form of process to be issued, such form must be adhered to.[97] In some states the rule is that the notice in summary proceedings against a sheriff for an official default must contain all the requisites of a petition,[98] and the moving party must aver and prove every fact necessary to establish the officer's liability.[99] In a notice to a sheriff of a rule for failing to pay over moneys collected on execution, it is sufficient to state a demand after the collection, and before the notice, without

mailed the process to him, the sheriff is entitled to notice. Lane *v.* Keith, *supra*; Reese *v.* Creson, *supra*. When the motion is made after the return term, notice is necessary. Phillips *v.* Cunningham, *supra*; Vance *v.* Cheatham, *supra*.

**A recital in the judgment** that notice of the motion had been served on defendant ten days before the first day of the term at which the judgment was rendered is sufficient to show that defendant had notice, although the return itself is not incorporated in the record. Dixon *v.* Boyer, 7 Blackf. (Ind.) 547.

**88.** Hukill *v.* Staats, 2 Harr. (Del.) 385.

**89.** Anonymous, Lofft 301, 98 Eng. Reprint 662, holding that personal service is necessary.

**90.** People *v.* Acker, 20 Wend. (N. Y.) 612; People *v.* Ten Eyck, 1 Wend. (N. Y.) 306; Franklin *v.* Lamb, 1 Johns. (N. Y.) 508; Stewart *v.* Williams, 2 Johns. Cas. (N. Y.) 71; McGourch *v.* Armstrong, Col. Cas. (N. Y.) 55.

**The return of the notice of motion** must show that the notice was served five days before the time set for trial. Burt *v.* Davidson, 5 Humphr. (Tenn.) 425.

**91.** Armstrong *v.* Robertson, 2 Ala. 164. See also Gary *v.* State Bank, 11 Ala. 771.

**92.** Watkins *v.* Barnes, 1 Sneed (Tenn.) 201, holding that appearance and defense cure the want of notice of a motion for judgment against a sheriff for failure to return an execution. See also Burt *v.* Davidson, 5 Humphr. (Tenn.) 425.

**93.** Murray *v.* Evans, 25 Tex. Civ. App. 331, 60 S. W. 786, holding that under Rev. St. art. 2386, providing that an officer failing to levy an execution shall be liable for the debt, and that recovery therefor may be had on motion after five days' notice, an acceptance of service, filed only three days before judgment, but dated some twelve days before, was valid as a waiver of notice, as the time of waiver should be computed from the date it was executed, and not from the date it was filed.

**94.** Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360 (holding that if the sheriff appears at the time of the motion and makes no exception to the notice, he must be held to have waived any irregularity therein); Winston *v.* Hanover County, 4 Call (Va.) 357 (waiver by appearance).

**95.** Hill *v.* State Bank, 5 Port. (Ala.) 537 [*followed* in McRae *v.* Colclough, 2 Ala. 74]; Hukill *v.* Staats, 2 Harr. (Del.) 385; Johnson *v.* Bradley, 11 Bush (Ky.) 666.

**96.** McRae *v.* Colclough, 2 Ala. 74 [*following* Hill *v.* State Bank, 5 Port. (Ala.) 537].

**A notice describing the execution as a "fieri facias"** sufficiently shows that it issued against property and not against the person, and hence that the remedy sought is that authorized by the act of 1819. McRae *v.* Colclough, 2 Ala. 74.

**Harmless error.**— A notice to a sheriff that a motion will be made against him for failure to return a fieri facias for the amount of the judgment, instead of the execution, is good under the act of 1819. Godbold *v.* Planters', etc., Bank, 4 Ala. 516.

**Sufficiency of designation.**— Where there were two statutes giving the right to proceed against a sheriff for failure to return an execution, one giving a fine of five per cent on the amount of the judgment, and the other the amount of the judgment itself, a notice to the sheriff that plaintiff would proceed for the amount specified in the writ of execution sufficiently indicated under what statute he would proceed. Caskey *v.* Nitcher, 8 Ala. 622.

**Summons need not specify on what particular statute proceedings based.**— Hart *v.* Robinett, 5 Mo. 11.

**97.** Hukill *v.* Staats, 2 Harr. (Del.) 385, holding that in a proceeding under the act of Feb. 6, 1833, the process should not be generally to answer plaintiff's demand, but to show cause why execution should not issue against him for the amount of the original execution.

**98.** Johnson *v.* Bradley, 11 Bush (Ky.) 666; Terrill *v.* Cecil, 3 Metc. (Ky.) 347.

**99.** Johnson *v.* Bradley, 11 Bush (Ky.)

alleging a day certain when the demand was made;[1] and to specify the term at which the motion is to be made, without designating any particular day.[2] Neither is it necessary in such a notice to allege that plaintiff resides in the county where the judgment was rendered.[3] The notice of a motion against an officer for failure to return an execution need not require him to produce the execution;[4] nor is the validity of such a notice affected by the fact that it demands, as a legal conclusion, more or less by way of interest or damages than plaintiff is entitled to.[5] An allegation in a notice of motion against a sheriff for neglect to return an execution that defendant was sheriff when the writ was placed in his hands is sufficient without averring the continuance of his official character up to the return-day;[6] and such a notice is sufficiently certain if it describes the execution without mentioning any credits that may be indorsed on it.[7] Where a rule *nisi* calls on a sheriff to make return of his actings and doings in the premises, and also to show cause why he should not be attached for a contempt, this is such a notice as to justify making the rule absolute and granting an attachment.[8] A notice is not invalidated by an error in the date.[9]

**L. Parties.**[10] As a general rule summary proceedings against a sheriff are properly instituted by and in the name of the person who is injured by his default,[11] and when the statute designates the party by whom summary proceedings shall

666; Thompson *v.* Healy, 4 Metc. (Ky.) 257; Terrill *v.* Cecil, 3 Metc. (Ky.) 347. See also Todd *v.* Caines, 18 B. Mon. (Ky.) 620.

1. Price *v.* Cloud, 6 Ala. 248 [*followed* in Spence *v.* Rutledge, 11 Ala. 557].

2. McRae *v.* Colclough, 2 Ala. 74 [*followed* in Welch *v.* Fourier, 6 Ala. 516].

3. Spence *v.* Rutledge, 11 Ala. 557, holding that if plaintiff resides in a different county, it is a matter of defense to the sheriff who, by making that proof, will cast on plaintiff the necessity of proving a personal demand or an order in writing.

4. Armstrong *v.* Apple, 2 Coldw. (Tenn.) 280.

5. Lashley *v.* Wilkinson, 2 Head (Tenn.) 482.

6. Casky *v.* Haviland, 13 Ala. 314, 319, where it is said: "If the determination of his [the sheriff's] office between the periods of the receipt and return of the execution, could have availed anything in the defence, it devolved upon him to show the fact."

7. Fergus *v.* Ball, 1 Litt. (Ky.) 197.

8. Brannon *v.* Central Bank, 18 Ga. 361.

9. Scott *v.* Dow, 14 N. J. L. 350. See also Gore *v.* Hedges, 7 T. B. Mon. (Ky.) 520, holding that an error in the year, in the date of a notice given to a sheriff of a motion against him, is corrected by the statement of the time the court would be held at which the motion would be made.

10. See, generally, PARTIES, 30 Cyc. 1.

11. *Alabama.*— Kirkmans *v.* Harkins, 1 Port. 22.

*Arkansas.*— Humphries *v.* Lawson, 7 Ark. 344.

*Kentucky.*—Sanders *v.* Commonwealth Bank, 2 Metc. 327.

*South Carolina.*— Kirkpatrick *v.* Ford, 2 Speers 110.

*United States.*—Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53 [*affirming* 8 Fed. Cas. No. 4,727, 1 Cranch C. C. 35], holding that a motion against the sheriff for not paying over moneys received on execution must be made in the name of such creditor, although he may have been discharged under the insolvent law of the state.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 243.

But *compare* Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432, holding that a proceeding against a sheriff seeking to compel him, under penalty of imprisonment, to pay the amount of a loss suffered through his unlawful action, can be instituted only by and in the name of the people.

**Bankruptcy of injured party.**— A motion against a sheriff for neglecting to release an execution against one who was afterward declared a bankrupt must be in the name of the assignee in bankruptcy. Gary *v.* Bates, 12 Ala. 544.

**The execution defendant is not** "the party aggrieved" by a failure to return the writ or pay over the money collected, and hence cannot institute summary proceedings against the sheriff for such default. Humphries *v.* Lawson, 7 Ark. 344.

**Application in name of inferior court.**— Where a sheriff has money in his hands raised from the sale of a runaway slave, a rule against him requiring him to pay it over is properly applied for in the name of the inferior court of the county, although the sale was made by virtue of a process issued on an order of the justices of the inferior court in the name of the clerk of said court. Murphy *v.* Justices Wilkinson County Inferior Ct., 11 Ga. 331.

**Proceeding in name of state.**— A sheriff is responsible to the state, and also to the individual, for an omission of his duty, and therefore a rule against a sheriff to show cause for not paying over money alleged to be in his hands is properly brought in the name of the state and placed on the docket of the state cases. State *v.* Charleston Dist., 1 Mill (S. C.) 145.

be instituted the court cannot take such proceedings on its own motion.[12] Several plaintiffs having distinct interests cannot unite in a summary proceeding against the sheriff.[13] It has been held that proceedings by attachment as for contempt should be in the name of the state.[14] The sheriff must of course be made a party to summary proceedings to compel him to pay over money;[15] and a motion against "the sheriff of" a particular county, without mentioning his name, for the purpose of correcting proceedings under a judgment, cannot be considered.[16] But the sureties of a sheriff are not necessary parties to summary proceedings against him for an official default.[17] Summary proceedings for the official default of a deputy must be directed against the sheriff and not against the deputy.[18] An applicant for a rule against a sheriff for the distribution of a fund in his hands need not in the first instance make other claimants of the fund parties to the proceeding;[19] but after the granting of the rule, upon proper notice to such other claimants, either by the applicant or by the sheriff, they can, if they so desire, come in and be made parties.[20] Plaintiff's attorney is not a proper party to a motion against a sheriff for a failure to pay over money collected on execution because of the fact that he claims a lien on such money for the compensation for professional services and has notified the sheriff of such claim.[21] The permission of an execution plaintiff that a motion for statutory damages for the sheriff's failure to return an execution shall be carried on for the benefit of one of the defendants who was a mere surety for the others, but paid the amount, does not invest the surety with such a beneficial interest as requires that he be a party to the motion.[22] A sheriff who has been ruled for a failure to make the money due upon an execution placed in his hands cannot convert the proceeding thus instituted against him into a rule against himself and a third person, not an official, by having the latter made a co-defendant to the rule.[23]

**M. Pleading.**[24] On a summary proceeding or motion to hold the sheriff liable for the debt because of his failure to levy an execution, a petition or motion alleging that the execution issued to the sheriff, that he failed and refused to execute it and returned it unsatisfied, and that at the time the debtor had property in his possession in the county, subject to execution, sufficient to satisfy the same, and praying for judgment for the amount of the debt with interest and costs, is sufficient.[25] In some jurisdictions where the proceeding is by motion,

**Assignee of injured party.**— A motion for a rule to compel a sheriff to pay over money collected by him on execution does not lie in favor of an assignee of the party entitled to the money, to whom he has given an order for it on the sheriff. Beaver *v.* Batte, 19 Tex. 111.

**The person for whose benefit a writ was sued out** cannot maintain the motion in his own name. Tolson *v.* Elwes, 1 Leigh (Va.) 436.

12. Hodges *v.* State, 8 Ala. 55.

13. Patterson *v.* Mobile Cir. Ct., 11 Ala. 740. *Contra*, Taylor *v.* Johnson, 17 Ga. 521.

14. State *v.* Charleston Dist., 1 Mill (S. C.) 145. See also People *v.* Ferris, 9 Johns. (N. Y.) 160, holding that before the attachment issues against the sheriff the proceedings are to be entitled in the names of the parties in the suit; but after granting of the attachment the proceedings must be entitled in the name of the people.

15. Buckner *v.* Baker, 11 La. 459.

16. Weems *v.* Brazoria County, 48 Tex. 481.

17. Garey *v.* Frost, 5 Ala. 636.

18. Caldwell *v.* Holly, 1 A. K. Marsh. (Ky.) 429.

19. Berrie *v.* Smith, 97 Ga. 782, 25 S. E. 757.

20. Berrie *v.* Smith, 97 Ga. 782, 25 S. E. 757, holding that whether they do so or not they will be bound by the judgment rendered on the rule if they actually participated in the hearing had upon the same.

21. Pugh *v.* Boyd, 38 Miss. 326.

22. Sanders *v.* Commonwealth Bank, 2 Metc. (Ky.) 327.

23. McConnell *v.* West, 105 Ga. 468, 30 S. E. 654.

24. See, generally, PLEADING, 31 Cyc. 1.

25. Murray *v.* Evans, 25 Tex. Civ. App. 331, 333, 60 S. W. 786, where it is said: "It is pointed out that the motion does not set out the return endorsed by the defendant upon the execution; that it does not in terms allege that he failed or refused to levy upon or sell any property justly liable to execution, when the same might have been done, and does not allege that he had knowledge of the existence of any such property. If in fact, this were a proceeding to recover a penalty arbitrarily fixed by statute, without reference to the right and wrong of the transaction, we might sustain some of these contentions. . . . But article 2386, under which this proceeding was

the notice of the motion serves as the initiatory pleading of the moving party,[26] and a written declaration is not necessary.[27] A rule against a sheriff for breach of duty for failing to levy an execution is not within statutes regulating defaults under ordinary procedure, and the court in its discretion may allow the officer to make answer at any time before the rule is made absolute.[28] An answer by a sheriff to a rule or motion for failure to make money on an execution must, in order to be sufficient, set up some facts as a legal excuse for inactivity and show that the money could not have been collected by reasonable diligence;[29] but where a sheriff is called to respond by a rule *nisi*, and if the rule be made absolute is liable to an execution against him or to an attachment for contempt, it is error to strike from his answer any meritorious matter of defense tending to prevent the issuance of the rule absolute.[30] Where an answer to a rule against the sheriff for failure to make a proper levy and return is defective in not responding to specific allegations in the rule touching possession of certain property by defendant in execution, this matter is for special, and not general, demurrer.[31] On a rule against an officer for failure to make the money on a levy of an execution, an answer by the officer denying each and every allegation of the petition is properly allowed to stand.[32] Where the sheriff answers the rule against him to show cause why he has not made the amount of a judgment out of property seized by him, admitting the levy and justifying his failure to sell, but not suggesting that the value of the property was less than the amount of the debt, the sufficiency of the property to pay the debt is by implication admitted.[33] An answer of the sheriff which is so vague, uncertain, and indefinite that it cannot be traversed is insufficient.[34]

instituted, renders the officer liable only when it is made to appear that he failed or refused to levy upon or sell property justly liable to execution, when the same might have been done, and his liability does not extend beyond the amount of the debt, interest and costs; and if the property which could have been levied upon was of less value than the debt, the value of the property would be the measure of the liability."

**26.** Walker *v.* Turnipseed, 8 Ala. 679. See *supra*, VIII, K, 2.

**The notice may be amended on motion.**— Walker *v.* Turnipseed, 8 Ala. 679.

**27.** Condry *v.* Henley, 4 Stew. & P. (Ala.) 9.

**28.** Hixon *v.* Callaway, 2 Ga. App. 678, 58 S. E. 1120.

**29.** Hallett *v.* Lee, 3 Ala. 28 (holding that on motion against a sheriff, suggesting that by due diligence the money could have been made on an execution, a plea stating that the execution was levied a short time before the return-day, and a delivery bond taken, returned, and forfeited, without showing a sufficient excuse for the delay, was bad); Wheeler *v.* Redding, 55 Ga. 87 (holding that where the sheriff had levied a fieri facias on land for a debt existing prior to the constitution of 1868, it was not sufficient for him to show, in answer to a rule for the money, that he did not sell because the property had been set apart to defendant as a homestead by the ordinary, but his answer at least should have showed affirmatively that the homestead was not greater in quantity or value than the exemption allowed by law prior to the adoption of that constitution); Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960 (holding that an answer which admitted that the execution was in the sheriff's hands for a considerable length of time, but denied the allegation that plaintiff during that time had on more than one occasion pointed out to him property on which he could levy, was insufficient).

**Answers held sufficient as against demurrer** see Wheeler *v.* Thomas, 57 Ga. 161 (holding that where, on a rule against a sheriff to show cause why he should not pay over certain money or account for failure to collect it on execution, the sheriff in his answer showed that the execution had been paid off in whole or in part, and that plaintiff was not injured by his default to the extent claimed, it was error to strike such answer on demurrer); Holcombe *v.* Dupree, 50 Ga. 335.

**30.** Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

**31.** Davis *v.* Reid, 57 Ga. 188.

**32.** Sanders *v.* Carter, 124 Ga. 676, 677, 52 S. E. 887, where it is said: "The plaintiff alleged that there had been a levy, that the property levied upon was sufficient to satisfy his lien, and that the officer had had ample time in which to 'make said money and has not done so.' In denying each and every allegation of the petition the officer necessarily denied that there had been a levy; and if there was no levy, it follows as a logical sequence that there were no funds in his hands out of which to satisfy the plaintiff's lien. The answer could not be construed as evasive or ambiguous."

**33.** O'Pry *v.* Kennedy, 86 Ga. 662, 13 S. E. 940, holding that after the sheriff's answer had been traversed, the traverse tried, and a verdict rendered on that issue, he was not entitled to amend his answer by alleging that the property was only of a certain value, or of less value than the amount of the execution.

**34.** Albert *v.* Howell, 32 Ga. 548.

In proceedings by suggestion under a statute requiring the court to cause an issue to be made up to try the fact, a traverse of the allegations of the suggestion presents an issue.[35] The sworn answer of the officer in summary proceedings against him is to be taken as true if not traversed;[36] and therefore, when no traverse is taken, and the facts set out in the answer constitute a sufficient defense, the rule should be discharged.[37]

**N. Issues.**[38] On scire facias against the sheriff to hold him as special bail, he having discharged defendant without taking bail, the objection that a capias ad satisfaciendum had not issued against defendant and been returned *non est inventus*, as required by statute, must be taken by special plea, and cannot be raised under the plea of *nul tiel record*.[39] Where on a motion against one as sheriff for not making the money on an execution, a general denial is interposed, the question whether defendant is or is not sheriff is involved in the issue.[40]

**O. Variance.**[41] Whether or not a variance between the execution described in a notice of motion against the sheriff and that offered in evidence is fatal depends upon the extent and materiality of the variance.[42] When a motion against a sheriff is based upon an alias fieri facias a variance between the fieri facias described in the notice and the one produced in evidence cannot be aided by the production of the original fieri facias which corresponds with the notice.[43] A motion for a failure to return process cannot be sustained by proof of falsity or insufficiency of the return made.[44]

**P. Evidence.** In summary proceedings against officers the general rules of evidence[45] must be adhered to in determining the matters necessary to be proved,[46]

35. Hallett *v.* Lee, 3 Ala. 28.

36. Clement *v.* Bunn, 60 Ga. 334; Holcombe *v.* Dupree, 50 Ga. 335; Nagle *v.* Lumpkin, 48 Ga. 521; Pound *v.* Carr, 40 Ga. 81; Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

Time for making traverse.— In Georgia it is not necessary that a traverse to the answer of the sheriff to a rule against him for failure to make money on an execution should be made at the first term, but such traverse may be made at the second term before the case is called for trial. Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

37. Perry *v.* Christie, 65 Ga. 642; Cason *v.* Mulling, 50 Ga. 598; Pound *v.* Carr, 40 Ga. 81.

38. See, generally, PLEADING, 31 Cyc. 670.

39. Gray *v.* Hoover, 15 N. C. 475.

40. Hopkins *v.* Gary, 7 Ala. 46.

41. See, generally, PLEADING, 31 Cyc. 700.

42. Spence *v.* Rutledge, 11 Ala. 557 (holding that on a motion against a sheriff for failing to pay over on demand money collected in execution, a variance of two dollars was fatal on error, although it might have been cured by amendment in the trial court); Fulcord *v.* Hamberlin, 4 Sm. & M. (Miss.) 649 (holding that a variance of sixty-two and one-half cents in the amount of costs between the execution described in the notice and that offered in evidence was not ground for rejecting the evidence); Lashley *v.* Wilkinson, 2 Head (Tenn.) 482 (holding that a variance between the date of the execution produced on the trial and the one described in the notice was not fatal); Howard *v.* Union Bank, 7 Humphr. (Tenn.) 26 (holding that a motion against a sheriff for failing to make a return which was in behalf of the "President, Directors and Company of the Union Bank of the State of Tennessee" did not constitute a material variance from the title of the execution, which was in the name of the "President and Directors of the Bank of Tennessee"); McMullen *v.* Goodman, 4 Humphr. (Tenn.) 239 (holding that where the notice of a motion against a constable for the nonreturn of an execution described the execution as against the principal only and the execution offered on evidence was against the principal and a surety, it was properly admitted).

43. Walker *v.* Turnipseed, 8 Ala. 679.

44. Watkins *v.* Barnes, 1 Sneed (Tenn.) 201.

45. See, generally, EVIDENCE, 16 Cyc. 821.

46. *Alabama.*— Godbold *v.* Planters', etc., Bank, 4 Ala. 516, holding that in order to support a summary proceeding against a sheriff for failure to return an execution, plaintiff need not produce the judgment.

*Georgia.*— Gladden *v.* Cobb, 73 Ga. 235, 6 S. E. 161, holding that plaintiff in a motion against a sheriff for having failed to hold certain property under an execution is not required, in order to support his execution, to introduce in evidence all the proceedings on which the execution is founded.

*Kentucky.*— Flournoy *v.* Rubey, 1 J. J. Marsh. 560, holding that on a motion against a sheriff to charge him for the failure of his deputy to return an execution, it is necessary to prove that the person to whom the writ was delivered was his deputy.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481, holding that an execution plaintiff is bound, in order to make out his case, to introduce in evidence the judgment on which the execution issued, on a motion against a sheriff of another county, under Code (1871), § 227, for failing to return the execution, counting on the alleged judgment for the amount

the presumptions which are to be indulged,[47] and upon which of the parties lies the burden of proof as to the various matters;[48] and passing upon the admissibility,[49]

thereof, instead of on the execution, where the sheriff takes issue on the allegation of the existence of the judgment.

*Tennessee.*— Porter *v.* Webb, 4 Yerg. 161, holding that under Acts (1803), c. 18, providing that, if the sheriff shall fail to make return of an execution that may have come to him from the court of the county for which he is sheriff on or before the second day of the term to which such execution is made returnable, judgment may be rendered against him, in a proceeding by motion against the sheriff for the non-return of a fieri facias, proof that the execution came to his hands is insufficient, without evidence showing from what court it issued, to what term it was returnable, or what was the amount thereof.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 250.

**The official character of defendant must be proved** where a general denial is interposed. Hopkins *v.* Gary, 7 Ala. 46.

**47.** Stone *v.* Wilson, 10 Gratt. (Va.) 529, holding that on a motion against a sheriff, under Rev. Code (1819), c. 134, § 48, giving a summary remedy for an escape, the court is bound, on a return of "Executed" and the proof of an escape, to presume it to have been made with the consent of the sheriff.

**48.** *Alabama.*— Smith *v.* Leavitts, 10 Ala. 92, holding that where, on a rule against a sheriff, suggesting that by due diligence he could have made the money on an execution, he justifies his refusal to make a levy, or his restoration of the property after a levy has been made, on the ground that defendant had transferred the property, he assumes the burden of proving that the transfer was *bona fide* and effectual in law for the purpose for which it was made.

*California.*— Leese *v.* Clark, 29 Cal. 664, holding that on a hearing on an order to show cause why a sheriff shall not proceed to execute a writ of possession, the burden of proof is on the sheriff, if the cause is that the parties in possession were in possession at the time of the institution of the suit in which such writ was issued, and were not parties to such suit.

*Georgia.*— Reeves *v.* Parish, 80 Ga. 222, 4 S. E. 768 (holding that on a rule against a constable to show cause why he should not be attached for contempt in failing to levy an execution, the burden is on him to show that plaintiff has not been injured; and simply attaching an affidavit of illegality to his answer, without showing the truth of any of the grounds therein alleged, will not prevent the rule being made absolute); Murphy *v.* Wilkinson County, 11 Ga. 331 (holding that where to a rule calling on the sheriff to pay over money, his return was that the money had been raised and paid over to the person authorized to receive it, and such return was traversed, the sheriff had the burden of proving his averment).

*Louisiana.*— Brand *v.* Wilkinson, 11 La. Ann. 273 [*followed* in Hill *v.* Labarre, 12 La. Ann. 419], holding that where, on motion against a sheriff for failure to return a fieri facias, the default is established, the burden is on the sheriff to show a legal excuse.

*Tennessee.*— Cannon *v.* Wood, 2 Sneed 177, holding that in summary *ex parte* proceedings against a constable by motion for the amount of an execution placed in his hands, where defendant has no day in court, the onus is on plaintiff to make out his case in every material point.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 250.

**49.** Monts *v.* Stephens, 43 Ala. 217 (holding that in a summary proceeding against a constable, a transcript of his bond was not admissible, where it did not appear from the transcript that the bond thus offered was approved and filed as prescribed by law); Whitsett *v.* Slater, 23 Ala. 626 (holding that when the sheriff is ruled for failing to make the money on an execution, evidence that defendant in execution "was in possession of a house and lot . . . as of his own property, prior to the day on which the executions came into the hands of the defendant in this suit, claiming ownership thereof, and continued in possession until after the return-day of the executions," is admissible for plaintiff); Union Bank *v.* Benham, 23 Ala. 143; Lay *v.* Boyce, 3 La. Ann. 622 (holding that in a proceeding by motion against a sheriff, under St. April 7, 1826, § 17, to render him liable in the amount for which a fieri facias was issued on account of his failure to return the writ within the legal delay, evidence is inadmissible to show that defendant in execution owned property while the writ was in the hands of the sheriff, which the latter neglected to seize, since in such case the inquiry is whether the officer has incurred the penalties of the act.

**Right of plaintiff to contradict recital in writ.**— Where a motion was made for an attachment to compel a sheriff to make return of an execution, and on motion for reargument the sheriff presented affidavits to show that a prior execution had been issued in the action and a levy made under it, a recital in the second execution that a levy had been made under the prior one, although it was an admission of the fact, did not estop plaintiff from showing that in fact no levy was made by the sheriff to whom the executions were originally delivered. Holmes *v.* Rogers, 2 N. Y. Suppl. 501.

**Showing omission from record.**— On a rule against a sheriff to show cause why judgment should not be rendered against him for permitting a prisoner convicted of a misdemeanor to escape, it was not error to allow the sheriff to show by parol evidence that on a subsequent day of the same term at which defendant was convicted he was called into court and discharged from custody, and

competency,[50] and materiality [51] of the evidence offered, and the weight and sufficiency of the evidence produced.[52]

**Q. Trial or Hearing.**[53] Issues of fact arising in summary proceedings are properly submitted to a jury,[54] unless submitted to the court by agreement,[55] and the issue must be tried at the time at which the cause is called for trial unless good cause for a continuance is shown.[56] But where all the facts are admitted it is proper to refuse to award an issue,[57] and where no evidence is introduced in support of a traverse of the answer of a sheriff on a rule against him, it is proper for the court to dispose of the case on the facts set forth in the answer.[58] Where the

that by inadvertence the order of discharge was not entered on the record. State *v.* Womack, 17 Tex. 237.

**50.** Gresham *v.* Walker, 10 Ala. 370, holding that a delivery bond which does not purport to be taken in the same case is not competent evidence for the sheriff in a rule against him for failing to make money on an execution.

**The sheriff cannot make evidence for himself** by stating in his return an excuse for not performing his duty, and such return is not admissible. Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125; Rowand *v.* Gridley, 1 How. (Miss.) 210.

**51.** Sanders *v.* Carter, 124 Ga. 676, 52 S. E. 887 (holding that where, upon the hearing of a rule against a constable for a failure to sell property upon which it was alleged in plaintiff's petition that he made a levy, the evidence showed that there has been no valid levy, it was proper to refuse to admit evidence tending to identify the specific property upon which the attempted seizure was made); Batte *v.* Chandler, 53 Tex. 613 (holding that on a motion against a sheriff for failing to levy an execution that came to his hands in November, tax rolls showing that defendant rendered no property for taxes on the first day of the preceding January were inadmissible); Vaughan *v.* Warnell, 28 Tex. 119 (holding that on motion against a sheriff for failing to return an execution, evidence that the execution defendant was reputed insolvent was inadmissible).

**52.** See the following cases:

*Alabama.*— Baldwin *v.* Gully, 11 Ala. 716.

*Georgia.*— Smith *v.* Hightower, 80 Ga. 669, 7 S. E. 165; French *v.* Kemp, 64 Ga. 749.

*Illinois.*— People *v.* Needles, 3 Ill. 361.

*Kentucky.*— Holderman *v.* Brasfield, Litt. Sel. Cas. 271, holding that on motion against the sheriff to recover the amount of an execution on the ground of failure to return it, an amendment of the return setting up that the execution was not returned because it had been lost a few days after it was received, and that the sheriff had forgotten it was in his possession until it was found by him the day it was returned, could not be admitted to affect the judgment which should otherwise be rendered against him, since he could not be permitted to thus make evidence in his own favor.

*Louisiana.*— Connors *v.* Citizens' Mut. Ins. Co., 22 La. Ann. 330, holding that as the sheriff was authorized by law to pay his own costs and those of the clerk of the court who issued the process out of the funds realized by the sale of property under execution, and the debtor could claim only the surplus after such costs were paid, a rule against the sheriff to pay over certain amounts in his hands, realized from the sale of property under seizure, should be discharged if the evidence did not show the amount which he was entitled to retain for costs.

*New York.*— Camp *v.* McCormick, 1 Den. 641, holding that an application by plaintiff for an order to compel a sheriff to pay over money levied on execution would be denied, and plaintiff left to his action, where the sheriff set up a defense, the evidence respecting which was contradictory.

*Tennessee.*— Roberts *v.* Bostick, 6 Humphr. 232, holding that a statement by the clerk that he did not recollect whether the fieri facias was returned the first or second day of the term was insufficient evidence to authorize a judgment against the sheriff for failure to return the writ.

*Virginia.*— Stone *v.* Wilson, 10 Gratt. 529; Stowers *v.* Smith, 5 Munf. 401.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 250.

**A fair preponderance of evidence is sufficient** to support a judgment either for or against the officer, and proof beyond a reasonable doubt is not necessary. Casky *v.* Haviland, 13 Ala. 314.

**A sheriff's return is not conclusive in his favor** in summary proceedings against him, but may be shown to be false. Levy *v.* Lawson, 5 Ark. 212; Craig *v.* Maltbie, 1 Ga. 544.

**53.** See, generally, TRIAL.

**54.** Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Dawson *v.* Dewan, 12 Rich. (S. C.) 499.

**Issue as to diligence.**— On a rule against a sheriff to show cause why a judgment should not be entered against him for failure to make return on an execution delivered to him, what constitutes due diligence on his part is a mixed question of law and fact; the jury must determine the facts, while the court decides whether they constitute due diligence. Whitsett *v.* Slater, 23 Ala. 626.

**55.** Read Phosphate Co. *v.* S. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

**56.** Brantley Co. *v.* Southerland, 1 Ga. App. 804, 57 S. E. 960.

**57.** Eve *v.* Mosely, 2 Strobh. (S. C.) 203.

**58.** Brown *v.* Usry, 99 Ga. 302, 25 S. E. 650; Clement *v.* Bunn, 60 Ga. 334; Wall *v.* Clark, 59 Ga. 631.

parties to summary proceedings appear and an issue is tried by a jury, the proceedings are like other suits in court commenced in the ordinary mode [59] and are to be governed by the same rules which govern other suits, when a judgment is rendered upon the finding of a jury,[60] with the single exception that it must appear affirmatively upon the record that the court had jurisdiction to entertain the motion.[61] In a summary proceeding against a sheriff for failure to return a fieri facias, the court can inquire into no other matters than the alleged failure of the sheriff to return the writ, although there are other grounds suggested in the motion which might be considered in an ordinary action; [62] and in a summary proceeding against a sheriff for a false or insufficient return, the inquiry is confined to the face of the return.[63] Even though the sheriff makes default in summary proceedings against him, the statements in the notice cannot be taken for confessed, but the matters relied on to sustain the motion must be established by proof.[64] On a rule against a sheriff to show cause for not obeying an order to pay into court money raised on execution, the facts on which the order was issued will be looked into only in determining the proper measure of redress, and the validity of the order cannot be assailed if the sheriff had opportunity to be heard.[65] Where, in summary proceedings against a sheriff, suggesting that by due diligence he could have made the amount of an execution, his sureties are not made parties, the fact of suretyship need not be found by the jury to sustain a judgment against them, but the proper course is to prove the fact of suretyship to the courts.[66] Where affidavits on a motion to compel a sheriff to make return on an execution allege facts and circumstances which, if uncontradicted, would justify a holding that the sheriff received the execution from his predecessor, among them statements alleged to have been made by the sheriff to plaintiff's attorney, the motion will not be denied on a mere denial by the sheriff of the fact in issue, without any attempt to explain such statements.[67] On trial of a motion against a constable for failure to pay over money made on an execution, a finding by the jury for plaintiff on an issue to the merits includes all the facts necessary to the ascertainment of defendant's liability, unless the statute requires the facts to be specially found.[68] On a rule against a sheriff to show cause why immediate possession should not be given to a purchaser of land sold on execution, and an answer of cause that the widow is in possession under a claim of dower, it was held not competent to go into evidence that the widow had accepted a provision under the will of her husband in lieu of dower.[69] In Delaware the trial in a proceeding by summons against a constable for neglect in failing to return a writ of venditioni exponas in due time must be by the justice himself, and not by referee.[70]

**R. Judgment.**[71] Where a judgment *nisi* is rendered against a sheriff for failure to return process and he shows no sufficient reason for such failure the judgment is properly made absolute.[72] On a motion against the sheriff for a default in returning executions issued on two judgments against different parties for the same debt, the court will render but one judgment.[73] A motion against an officer charging him with failing to pay over money collected by him on execu-

59. Garey *v.* Frost, 5 Ala. 636.
60. Garey *v.* Frost, 5 Ala. 636.
61. Garey *v.* Frost, 5 Ala. 636.
62. Brand *v.* Wilkinson, 11 La. Ann. 273.
63. Hill *v.* Hinton, 2 Head (Tenn.) 124.
64. Adams *v.* White, 2 Ala. 37 (holding that on a motion against a sheriff for the amount of a fieri facias on a suggestion that the same might have been made by due diligence, and default made, a verdict must affirmatively find the want of due diligence in order to support a judgment); Todd *v.* Caines, 18 B. Mon. (Ky.) 620.
65. Wandling *v.* Thompson, 41 N. J. L. 142.
66. Garey *v.* Frost, 5 Ala. 636.
67. Holmes *v.* Rogers, 2 N. Y. Suppl. 501.
68. Welch *v.* Fourier, 6 Ala. 516.
69. Rambo *v.* Bell, 3 Ga. 207, 208, where it is said: "So grave and intricate a question could not be tried in this summary and collateral way."
70. Stidham *v.* Chase, 3 Harr. (Del.) 418.
71. See, generally, JUDGMENTS, 23 Cyc. 623.
72. Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705.
73. Tennessee Bank *v.* Cannon, 2 Heisk. (Tenn.) 428.

tion, and also with failing to return the execution, will warrant a judgment against the constable for either of the causes alleged, although it be asked for only on one of these grounds.[74] Every fact which is necessary to give the court jurisdiction and to authorize the judgment must be set out in the judgment as having been made to appear.[75] A judgment commanding the officer to pay out of a fund in his hands plaintiff's claim and the costs of the proceeding, which, together, exceed the amount of such fund, is erroneous.[76] Where a sheriff neglected to take a bail-bond, and a proceeding was had thereupon against defendant and the sheriff for an office judgment, and the sheriff pleaded, but defendant made default, a verdict against the sheriff alone was proper, but the judgment should have been against both defendant and the sheriff.[77] After notice of appeal from an order, made under a rule against the sheriff, directing an attachment to issue against him, the trial court may modify such order so as to meet the justice and law of the case.[78]

**S. Damages.**[79] Only such amount as is contemplated by the statute may be recovered in summary proceedings;[80] and so where the proceeding is under a statute allowing a recovery of the amount of the debt or of the debt and damages, interest cannot be allowed, although it might be recoverable in a common-law action.[81] In statutory summary proceedings an execution plaintiff cannot recover from the sheriff more than the value of the execution defendant's property subject to levy;[82] and on a motion by a plaintiff in an execution against the sheriff and his sureties for failure to return it in the proper time, when the amount of the execution has been paid to plaintiff by one of defendants after such default, plaintiff cannot recover the amount of the execution, but only the statutory damages for which the sheriff has rendered himself liable by his delinquency.[83] Where the sheriff's answer to a rule against him for money realized on a levy sets up expenses incurred by him in selling the property, etc., and is not traversed, such expenses are properly allowed to him.[84] A sheriff against whom a judgment is rendered for the default or misconduct of his deputy cannot recover against such deputy, on motion, judgment for greater damages than have been recovered against himself.[85]

**T. Review.**[86] A sheriff has the right to appeal from an order directing an attachment to issue against him unless the money due on plaintiff's execution be paid by a day named;[87] but where a rule absolute is rendered against a sheriff

74. Spinks *v.* Caldwell, 23 Tex. 623.

75. Burt *v.* Davidson, 5 Humphr. (Tenn.) 425, holding that this is true in summary proceedings before justices as well as before courts of record.

**The judgment on which an execution issued must be recited** in a judgment against a constable by motion before a justice of the peace for failing to return the execution. Burt *v.* Davidson, 5 Humphr. (Tenn.) 425.

76. Grimsley *v.* Alexander, 106 Ga. 165, 32 S. E. 24.

77. Bartlett *v.* Marshall, 2 Bibb (Ky.) 467.

78. Gibson *v.* Gibson, 7 S. C. 356.

79. See, generally, DAMAGES, 13 Cyc. 1.

80. Birmingham Dry Goods Co. *v.* Bledsoe, 117 Ala. 495, 23 So. 153 (holding that where a summary judgment is asked against a sheriff for failure to serve a subpœna, under a statute fixing the minimum and maximum damages, it is error not to confine the jury to the limits prescribed by the statute); Wood *v.* Sayre, 7 T. B. Mon. (Ky.) 663 (holding that under an act of assembly providing that, if the sheriff fail or refuse to settle with the paymaster of the regiment on account of militia fines, he may proceed to recover the moneys due from the sheriff by motion in the county court, a sheriff is not liable by motion for damages or interest for failure to account for such fines, as the sum due only is recoverable).

81. Brown *v.* Littlefield, 1 Wend. (N. Y.) 398; Thomas *v.* Weed, 14 Johns. (N. Y.) 255.

82. Gary *v.* Hathaway, 6 Ala. 161, holding, however, that where several plaintiffs having judgments and executions of equal dignity severally suggest at the same term that the sheriff could have made the money on execution by due diligence, the sheriff cannot reduce the amount of the recovery in any case by proving that judgments had been rendered against him on other suggestions sufficient to absorb the value of all defendant's property subject to sale by execution.

83. Sanders *v.* Kentucky Bank, 2 Metc. (Ky.) 327.

84. Wall *v.* Clark, 59 Ga. 631.

85. Stowers *v.* Smith, 5 Munf. (Va.) 401, holding, however, that he is entitled to recover, in addition to the original judgment, coroner's commissions included in a forthcoming bond, costs of a judgment on that bond, and costs and damages on appeal, until its final affirmance.

86. See, generally, APPEAL AND ERROR, 2 Cyc. 474; REVIEW, 34 Cyc. 1695.

87. Emory *v.* Davis, 4 S. C. 23.

for his failure to make the money on an execution, defendant in execution cannot except to the judgment.[88] A refusal to allow a sheriff to amend his return on an execution, pending a motion against him for neglect of duty in respect to the execution, cannot be assigned for error in the judgment on the motion.[89] An appellate court will not interfere with the discretion of the trial court in making absolute a rule against a sheriff, where the answer of the sheriff to the rule is evasive;[90] and a court has refused to disturb on appeal a rule absolute against a sheriff on his failure to make a sum of money on a mortgage execution on lands, although the trial court certified that by inadvertence execution was issued against the sheriff upon the rule absolute, and also an attachment against him, whereas the statute authorizes only one of those remedies at a time.[91] A final order in a proceeding by rule against the sheriff is in the nature of a final judgment, on appeal from which the court may revise any intermediate order in the same proceeding involving the merits and necessarily affecting the judgment.[92] Where in a proceeding on notice and motion against the high sheriff for not paying over money collected on an execution, in entering up judgment, damages for too much are given, but the proceedings are otherwise correct, and the proper amount only is claimed by plaintiff, the judgment will be amended and affirmed.[93]

**U. Costs.**[94] A sheriff who fails to pay over money collected by him on an execution is liable to the execution creditor for the costs of a rule against him to compel payment.[95] And where, on an attachment for not returning defendant's body, it appeared that the bail had been put in and had justified after the rule for attachment, but notice had not been given to plaintiff's attorney, it was held that for this irregularity the sheriff should pay the costs incurred subsequently to the rule.[96]

## IX. AMERCEMENT, FINES,[97] AND PENALTIES.[98]

**A. In General.** Amercement, in a general sense, is a pecuniary penalty in the nature of a fine imposed upon a person for some fault or misconduct;[99] but the word has long been especially used as meaning a mulct or penalty imposed by a court upon its officers for neglect of duty; and in particular the remedy against a sheriff for failing to levy an execution or make return of proceeds of sale or other official default is in several of the states known as amercement.[1]

**B. Construction of Statutes.**[2] Statutes providing for the amercement of sheriffs or constables are penal in their nature,[3] and are, like other penal statutes,

In **Pennsylvania** it has been held that a constable against whom a judgment had been rendered in a summary proceeding for neglect of duty in not returning an execution was not entitled to an appeal under the act of March 20, 1810. Johnston *v.* Meeker, 10 Watts 403. But an appeal was given by the act of Oct. 13, 1840.

88. White *v.* Haslett, 49 Ga. 262, holding that if the sheriff failed to except and thereafter attempted to enforce the judgment against defendants, they would then have the opportunity to protect themselves.

89. Casky *v.* Haviland, 13 Ala. 314, holding that if the sheriff is prejudiced by such refusal his remedy is by mandamus.

90. Willis *v.* Powell, 51 Ga. 475.

91. Clement *v.* Bunn, 60 Ga. 334, holding that the lower court had authority to make the necessary correction.

92. Emory *v.* Davis, 4 S. C. 23.

93. Tyree *v.* Donnally, 9 Gratt. (Va.) 64, so holding on the ground that the error is merely clerical.

94. See, generally, COSTS, 11 Cyc. 1.

95. Sutton *v.* Robinson, 72 Ga. 195.

96. Mitchell *v.* Roulstone, 1 Hall (N. Y.) 218.

97. See, generally, FINES, 19 Cyc. 543.

98. See, generally, PENALTIES, 30 Cyc. 1331.

99. Black L. Dict. An amercement is a pecuniary penalty imposed upon an offender by a judicial tribunal. Bouvier L. Dict.

1. Bouvier L. Dict.

2. See, generally, STATUTES.

3. *Arkansas.*— Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

*Kansas.*— Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561]; Bond *v.* Weber, 17 Kan. 410; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

*Kentucky.*— Bernard *v.* Flournoy, 4 J. J. Marsh. 99.

*Mississippi.*— State *v.* Nichols, 39 Miss. 318.

*Ohio.*— Langdon *v.* Summers, 10 Ohio St. 77; Conkling *v.* Parker, 10 Ohio St. 28.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

strictly construed and held to apply only to defaults clearly within their terms.[4] The party who seeks to amerce the sheriff must bring himself within both the letter and the spirit of the law;[5] and not more than one fine can be legally imposed on a sheriff or other officer for failing to return one execution.[6] A statute imposing a certain penalty will not yield and give place exclusively to a later statute imposing a larger penalty, unless there is such a clear repugnance between the statutes that both cannot stand;[7] but when the incongruity between two statutes is so great as to leave but little doubt that the legislature intended the later enactment to repeal the former, it will be so construed.[8]

**4.** *Alabama.*— State *v.* McDuffie, 52 Ala. 4, holding that a sheriff could not be subjected to a penalty for failing to execute a warrant of arrest returnable to the county court.

*Arizona.*— Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777, holding that Rev. St. par. 502, authorizing the recovery of money, with twenty-five per cent damages and ten per cent per month interest, from a sheriff into whose hands money has come by virtue of his office, and who neglects or refuses on demand to pay over the same to the person entitled thereto, is not applicable to a case where the sheriffs wrongfully withbolds money which is exempt from execution, received through garnishment process.

*Arkansas.*— Williams *v.* State, 65 Ark. 159, 46 S. W. 186; Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

*Kentucky.*— Oatts *v.* Jones, 12 B. Mon. 49; Maury *v.* Cooper, 3 J. J. Marsh. 224.

*Louisiana.*— Gasquet *v.* Robins, 2 La. Ann. 407.

*Missouri.*— State *v.* Chaney, 49 Mo. App. 511.

*New Hampshire.*— Crowley *v.* Hurd, 58 N. H. 75; Pierce *v.* Hoit, 21 N. H. 237.

*New Jersey.*— Hoagland *v.* Todd, 37 N. J. L. 544, holding that under Revision, p. 1102, § 22, relative to sheriffs, a sheriff could not be amerced for refusal to grant an adjournment of his sale.

*New York.*— Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580; Curry *v.* Farley, 8 Daly 228, holding that under Laws (1857), c. 344, § 57, providing that a constable should be liable to a party in whose favor an execution is issued for the amount thereof, "when he suffers the twenty days to elapse without making a true return thereof, and filing the same with the clerk of the court, and paying to him or to the party entitled thereto the money collected thereon," a constable did not incur the statutory penalty of being liable for the amount of the execution by a failure to make and file a return within the twenty days, where he had not collected any money under the execution.

*North Carolina.*— Yeargin *v.* Wood, 84 N. C. 326; Cockerham *v.* Baker, 52 N. C. 288; Martin *v.* Martin, 50 N. C. 349 (holding that Rev. Code, c. 105, § 17, imposing a penalty on a sheriff for making false return of "all writs and other process to him legally issued and directed," although general in its terms, applies to process in civil cases only, and not to that in criminal proceedings); Lemit *v.* Freeman, 29 N. C. 317; Davis *v.* Lancaster, 5 N. C. 255.

*Ohio.*— Conkling *v.* Parker, 10 Ohio St. 28; Bushnell *v.* Eaton, Wright 720; State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305, holding that a sheriff is not liable to amercement for failing to pay over a fine collected by him on an execution.

*South Carolina.*— Thomas *v.* Yates, 1 McMull. 179.

*Tennessee.*—Norton *v.* Bynum, 7 Yerg. 301.

*Texas.*— De Witt *v.* Dunn, 15 Tex. 106.

*Vermont.*— McMahan *v.* Edgerton, 34 Vt. 77, holding that an officer is not liable for the penalty imposed by the statute for neglecting or refusing to give a person a copy of the process by virtue of which he is arrested, unless he have process for such arrest in his hands at the time.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

**5.** Coffey *v.* Wilson, 65 Iowa 270, 21 N. W. 602 [*followed* in Enfield *v.* Blyler, 67 Iowa 295, 25 N. W. 251]; Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561]; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218; Pierce *v.* Hoit, 21 N. H. 237; Langdon *v.* Summers, 10 Ohio St. 77; Conkling *v.* Parker, 10 Ohio St. 28; Webb *v.* Anspach, 3 Ohio St. 522; Duncan *v.* Drakeley, 10 Ohio 45; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104.

**6.** Tomkies *v.* Downman, 6 Munf. (Va.) 557.

**7.** Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82, holding that there was no such repugnance between Mansfield Dig. § 3061, imposing upon an officer for failure to "return any such execution on or before the return day therein specified" a penalty of "the whole amount of money in such execution specified" and no more, and Mansfield Dig. § 2964, enacted subsequently, imposing upon a sheriff "for failure to return an execution" a penalty equal to the amount of the judgment and costs and ten per cent thereon, as required the earlier statute to yield and give place exclusively to the later, as both might stand by applying section 3061, according to its terms, in cases where there was a failure to return the execution "on or before the return day therein specified," and applying section 3964 to cases wherein no return had been made at all.

**8.** Wilson *v.* Slaughter, 3 J. J. Marsh.

**C. Necessity For Compliance With Statutes.** The right to demand a judgment of amercement against a sheriff rests upon no equitable grounds,[9] and in the enforcement of a statutory penalty the courts will hold parties to a strict observance of the requisitions of the statute.[10]

**D. Defaults For Which Amercement Proper — 1. In General.** A sheriff or constable may be amerced for failure to execute process,[11] which includes any misconduct which deprives the party of the substantial benefits of his process,[12] leaving goods levied on in possession of the judgment debtor,[13] failure to sell property levied on,[14] failure to sell property under an order of sale[15] or to properly execute the order of sale,[16] failure to return process[17] within the time allowed by

(Ky.) 593, holding that St. (1811) giving thirty per cent damages against "sheriffs and other officers" for a failure to return an execution within one month after the return-day, was, so far as it regarded constables, repealed by the statute of 1812, which gave ten per cent against a constable who failed to return an execution within twenty days.

9. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561]; Moore *v.* McClief, 16 Ohio St. 50.

10. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561]; Judy *v.* Howard, 2 Metc. (Ky.) 44; Taylor *v.* Rhyne, 65 N. C. 530; Duncan *v.* Drakeley, 10 Ohio 46.

11. *Alabama.*—State *v.* McDuffie, 52 Ala. 4.

*California.*— Glascock *v.* Ashman, 52 Cal. 493.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*Georgia.*— Boynton *v.* Houston, 23 Ga. 40.

*Indiana.*— Limpus *v.* State, 7 Blackf. 43.

*Minnesota.*— Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

*Mississippi.*— Vance *v.* Connell, Walk. 254.

*Nebraska.*— Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

*New Jersey.*— White *v.* Rockafellar, 45 N. J. L. 299; Stryker *v.* Merseles, 24 N. J. L. 542.

*North Carolina.*— Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110.

*Ohio.*— Graham *v.* Newton, 12 Ohio 210.

*Texas.*— Sparks *v.* State, 42 Tex. Cr. 374, 60 S. W. 246, holding that where a subpœna was returned by the sheriff prior to the return-day, and subsequently, but prior to the return-day, the witness presented to the sheriff the affidavit required by Acts Sp. Sess. 25th Leg. p. 58, requiring the sheriff to advance the expense of a witness for whom he has process in a prosecution for felony when such witness makes affidavit of lack of funds, a fine imposed by the court for failure to execute process was not improper, on the ground that the affidavit was presented subsequent to the return, since the return was premature, it being the duty of the officer to ascertain what disposition he was to make of the witness before making a return.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

12. Hoagland *v.* Todd, 37 N. J. L. 544, holding that a sheriff who, after levy, permits defendant in execution to continue selling goods taken under the execution, "neglects or refuses" to execute the writ within the meaning of Rev. St. p. 1102, § 22, providing that for such failure he shall be amerced in the value of the debt.

13. Pettit *v.* Ebright, 2 Ohio Dec. (Reprint) 651, 4 West. L. Month. 328.

14. Harris *v.* Kirkpatrick, 35 N. J. L. 392; Scott *v.* Dow, 14 N. J. L. 350; Lorillard *v.* Welsted, 8 N. J. L. 271; Stansbury *v.* Patent Cloth Mfg. Co., 5 N. J. L. 433.

15. Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

16. Sharp *v.* Ross, 7 Ohio Cir. Ct. 55, 3 Ohio Cir. Dec. 660, holding that a sheriff was liable to amercement for failure to execute an order to sell mortgaged property for cash where he accepted the bid of the mortgagor and closed the sale to him without payment of the price.

17. *Alabama.*— Huggins *v.* Powell, 19 Ala. 129; Patterson *v.* Gaston, 17 Ala. 223; Evans *v.* Stevens, 8 Ala. 517; Rodgers *v.* Waters, 2 Ala. 644.

*Arkansas.*— Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82; Atkinson *v.* Heer, 44 Ark. 174.

*Florida.*— Johnson *v.* Price, 47 Fla. 265, 36 So. 1031.

*Georgia.*— Boynton *v.* Houston, 23 Ga. 40.

*Indiana.*— State *v.* Youmans, 5 Ind. 280.

*Kansas.*— Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

*Kentucky.*— Louisville Bank *v.* Hurt, 8 Bush 633; Sanders *v.* Commonwealth Bank, 2 Metc. 327; Cynthiana Deposit Bank *v.* Glenn, 1 Metc. 585; Partlow *v.* Lawson, 2 B. Mon. 46; Fellows *v.* Cross, 1 B. Mon. 10; Clifford *v.* Cabiness, 1 Dana 384; Flournoy *v.* Rubey, 5 J. J. Marsh. 322; Bernard *v.* Flournoy, 4 J. J. Marsh. 99; Thompson *v.* Ross, 1 J. J. Marsh. 600; Bruce *v.* Dyall, 5 T. B. Mon. 125; Com. *v.* Bradley, 1 Litt. 48.

*Louisiana.*— Gasquet *v.* Robins, 2 La. Ann. 407; Riviere *v.* Ross, 2 Mart. 46.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Missouri.*— State *v.* McLernan, 10 Mo. 780.

*Nebraska.*— Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134; Ghost *v.* Hill, 11 Nebr. 472, 9 N. W. 642.

*New Jersey.*— McLaren *v.* McVicar, 41 N. J. L. 271. *Contra*, Hoagland *v.* Todd, 37

law for the making of the return,[18] making a false [19] or insufficient or improper [20] return, failure to indorse on an execution the date of its delivery to him,[21] failure to file an inventory when it was his duty to do so,[22] failure to have property levied

N. J. L. 544; Todd *v.* Hoagland, 36 N. J. L. 352; Waterman *v.* Merrill, 33 N. J. L. 378; Ritter *v.* Merseles, 24 N. J. L. 627.

*New York.*— Rutzkowski *v.* George, 92 Hun 412, 36 N. Y. Suppl. 762.

*North Carolina.*— Bell *v.* Wycoff, 131 N. C. 245, 42 S. E. 608; McGlonghan *v.* Mitchell, 126 N. C. 681, 36 S. E. 164; Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705; Turner *v.* Page, 111 N. C. 291, 16 S. E. 174; Boyd *v.* Teague, 111 N. C. 246, 6 S. E. 338; Richardson *v.* Wicker, 80 N. C. 172; State *v.* Latham, 51 N. C. 233; Hyatte *v.* Allison, 48 N. C. 533; Morrow *v.* Allison, 33 N. C. 217; Halcombe *v.* Rowland, 30 N. C. 240; Lemit *v.* Freeman, 29 N. C. 317.

*Pennsylvania.*— Bachman *v.* Fenstermacher, 112 Pa. St. 331, 4 Atl. 546.

*South Dakota.*— Swenson *v.* Christoferson, 10 S. D. 188, 72 N. W. 459, 66 Am. St. Rep. 712.

*Tennessee.*— Hill *v.* Hinton, 2 Head 124; Webb *v.* Armstrong, 5 Humphr. 379; Atkins *v.* Murphey, 9 Yerg. 264; —— *v.* Peebles, Peck 196.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 230, 231, 330 *et seq.*

**Failure to return an order of sale** subjects the sheriff to amercement, although the making of such return was not demanded by plaintiff. Sharp *v.* Ross, 7 Ohio Cir. Ct. 55, 3 Ohio Cir. Dec. 660.

**An informal return** may be sufficient to protect the officers from a penalty for non-return of process. —— *v.* Peebles, Peck (Tenn.) 196 [*followed* in Hill *v.* Hinton, 2 Head (Tenn.) 124].

**18.** Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82 (holding that where the return-day fell on a Sunday, it was the sheriff's duty to make return on the preceding Saturday, and hence a return on the following Monday rendered him liable for the penalty imposed for a failure to make return on or before the return-day); Gore *v.* Hedges, 7 T. B. Mon. (Ky.) 520; Rutzkowski *v.* George, 92 Hun (N. Y.) 412, 36 N. Y. Suppl. 762. And see cases cited, *supra*, note 17.

**19.** State *v.* Nichols, 39 Miss. 318; Garrett *v.* Hamblin, 11 Sm. & M. (Miss.) 241; Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705; Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777; Finley *v.* Hayes, 81 N. C. 368; Allbright *v.* Tapscott, 53 N. C. 473; Tomlinson *v.* Long, 53 N. C. 469; Martin *v.* Martin, 50 N. C. 349; Martin *v.* Martin, 50 N. C. 346; Lemit *v.* Mooring, 30 N. C. 312; Houser *v.* Hampton, 29 N. C. 333; Lemit *v.* Freeman, 29 N. C. 317; Hill *v.* Hinton, 2 Head (Tenn.) 124.

**The return must be false in point of fact** in order to subject the sheriff to a penalty, and it is not sufficient that the return is false, as importing, from facts truly stated, a wrong legal conclusion. Lemit *v.* Mooring, 30 N. C. 312 [*followed* in Hassell *v.* Latham, 52 N. C. 465].

**A defective return** does not render the sheriff liable to a penalty for a false return. Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777.

**20.** Watson *v.* Hoel, 1 N. J. L. 136; Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 11 S. E. 264; McKeithan *v.* Terry, 64 N. C. 25; Frost *v.* Rowland, 27 N. C. 385; Buckley *v.* Hampton, 23 N. C. 322; Douglas *v.* Auld, 4 N. C. 112; Hill *v.* Hinton, 2 Head (Tenn.) 124; Harman *v.* Childress, 3 Yerg. (Tenn.) 327. See also Hustick *v.* Allen, 1 N. J. L. 168.

**Return held sufficient.**— Where a sheriff indorsed on an execution the words "Debt and interest due to sheriff, costs paid into office," and upon another the word "Satisfied," without stating what disposition he had made of the fund, the returns were sufficient in law to relieve the sheriff from amercement for not making "due return." Person *v.* Newsom, 87 N. C. 142.

**21.** Chandler *v.* Henry, 90 Ala. 271, 8 So. 96 (holding, however, that where an execution placed in the hands of the sheriff of one county is, by the direction of plaintiff, transmitted to the sheriff of another county, who indorses thereon the date of its delivery to him, as required by Code (1886), § 3105, plaintiff must be regarded as having waived the indorsement of the writ by the sheriff of the former county of the time the writ was delivered to him, and therefore he is not liable to plaintiff for the penalty imposed by said statute for his failure to make such indorsement); Duncan *v.* Philpot, 64 N. C. 479; Hathaway *v.* Freeman, 29 N. C. 109; De Witt *v.* Dunn, 15 Tex. 106 (holding, however, that Hartley Dig. art. 1332, which declared that the sheriff should indorse on each execution the day on which it came into his hands, and, if more than one had been received on the same day against the same person, he should number them as received, and on failure he should be liable to pay twenty per cent on the amount of the execution, together with such damages as plaintiff in execution might sustain by such failure to number, etc., prescribed the penalty only for the failure, when several executions had been received against the same person, to number them as received, and therefore the penalty was not incurred by a failure to date or number, where it did not appear that more than one execution had been received.

**Marking a date other than the true one** on the writ subjects the officer to the penalty. Hathaway *v.* Freeman, 29 N. C. 109.

**22.** Todd *v.* Hoagland, 36 N. J. L. 352. See also Hoagland *v.* Todd, 37 N. J. L. 544.

**Until a return is made** the sheriff cannot be amerced for failure to file an inventory. Hoagland *v.* Todd, 37 N. J. L. 544.

on appraised and return the appraisement,[23] delivering a chattel seized in replevin proceedings to either party without the consent of the other,[24] selling property without giving notice as required by statute,[25] failure to collect money which might have been collected by the use of reasonable diligence,[26] failure to pay over money actually collected,[27] misapplication or improper distribution of the proceeds of a sale,[28] serving a writ without having given bond,[29] levying on exempt property [30]

23. See Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104, holding that under Rev. St. p. 103, §§ 10, 11, requiring the sheriff, on levy of execution on lands, to make an appraisement and to deposit a copy of the return of the appraisement with the clerk of the court from which the execution issued, where a sheriff had two executions issuing from different counties, and levied them both on the same land lying within one of the counties, and returned a copy of the appraisement to that county in which the land was, he was not liable to amercement for not returning a copy to the other county.

24. Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580; Koerkle *v.* Pangburn, 30 Misc. (N. Y.) 776, 62 N. Y. Suppl. 814.

**Penalty not incurred by delivery to third person.**— Albany Belting, etc., Co. *v.* Grell, 67 N. Y. App. Div. 81, 73 N. Y. Suppl. 580.

25. Bellmer *v.* Blessington, 136 Cal. 3, 68 Pac. 111; Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654, 849; Kelley *v.* Desmond, 63 Cal. 517; Askew *v.* Ebberts, 22 Cal. 263; Coffey *v.* Wilson, 65 Iowa 270, 21 N. W. 602; Willard *v.* Longstreet, 2 Dougl. (Mich.) 172; Freeman *v.* Leonard, 99 N. C. 274, 6 S. E. 259.

**There must be a completed sale by which** the owner is deprived of his property in order to subject the sheriff to the penalty. Askew *v.* Ebberts, 22 Cal. 263.

26. Evans *v.* Stevens, 8 Ala. 517; Bondurant *v.* Lane, 9 Port. (Ala.) 484; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622; Scott *v.* Dow, 14 N. J. L. 350.

27. *Alabama.*— Evans *v.* Stevens, 8 Ala. 517; Morgan *v.* Billings, 3 Ala. 172.

*Arkansas.*— Craig *v.* Smith, 74 Ark. 364, 85 S. W. 1124; Williams *v.* State, 65 Ark. 159, 46 S. W. 186; Borden *v.* State, 9 Ark. 252.

*California.*— Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Johnson *v.* Gorham, 6 Cal. 195, 65 Am. Dec. 501; Egery *v.* Buchanan, 5 Cal. 53.

*Illinois.*— Custer *v.* Agnew, 83 Ill. 194.

*Kentucky.*— Hudgin *v.* Warner, 9 Dana 196.

*Maine.*— Bulfinch *v.* Balch, 8 Me. 133.

*Massachusetts.*—Bartlett *v.* Eveleth, 4 Metc. 149; Thompson *v.* Brown, 17 Pick. 462; Rogers *v.* Sumner, 16 Pick. 387; Bayley *v.* French, 2 Pick. 586; Esty *v.* Chandler, 7 Mass. 464; Wakefield *v.* Lithgow, 3 Mass. 249.

*Minnesota.*— Coykendall *v.* Way, 29 Minn. 162, 12 N. W. 452, 453.

*Mississippi.*— Connell *v.* Vance, Walk. 254.

*Missouri.*— State *v.* Cayce, 85 Mo. 456; Conway *v.* Campbell, 11 Mo. 71; Pope *v.* Hays, 1 Mo. 450.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404; Giffin *v.* Smith, 2 Nev. 274.

*New York.*— Van Gelder *v.* Hallenbeck, 2 N. Y. Suppl. 252.

*North Carolina.*— Williamson *v.* Jones, 127 N. C. 178, 37 S. E. 202. *Contra,* Cockerham *v.* Baker, 52 N. C. 288.

*Ohio.*— *In re* Worstall, 8 Ohio S. & C. Pl. Dec. 264, 6 Ohio N. P. 525. See also Webb *v.* Anspach, 3 Ohio St. 522.

*South Carolina.*— Walker *v.* Kennerly, 3 Rich. 64; Thomas *v.* Yates, 1 McMull. 179; Kelly *v.* Payne, 1 McCord 138.

*South Dakota.*— Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78.

*Texas.*— Richards *v.* Bemis, (Civ. App. 1903) 78 S. W. 239.

*Vermont.*— Smith *v.* Pike, 44 Vt. 61.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

**Sheriff cannot be amerced for not paying over money** before return-day of execution. Stone *v.* Ruffin, 2 Ohio 503.

28. State *v.* Simmons, 2 Pennew. (Del.) 62, 46 Atl. 746; Kothman *v.* Prest, 34 Kan. 179, 8 Pac. 228 (holding that where a special execution commanded the sheriff to pay all taxes on the land, and a purchaser agreed with the judgment creditor, before confirmation of the sale, to pay all delinquent taxes, and, in pursuance thereof, bought the outstanding tax certificates, the sheriff had no authority, after confirmation of the sale, to pay the taxes, and where he did so, with knowledge of all the facts, and against the objections of the party interested, he might be amerced therefor); Mushback *v.* Ryerson, 11 N. J. L. 346. See also Richards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. 239.

29. Fournier *v.* Cyr, 64 Me. 32; Eustis *v.* Kidder, 26 Me. 97; Barter *v.* Martin, 5 Me. 76.

**Non-approval of bond.**— Where a constable has conformed in all respects to the provisions of Rev. St. c. 104, § 35, relative to the giving of bonds, except that the approval of the selectmen of the town is not indorsed thereon, he does not incur the penalty provided therein for serving writs without having given bond. Eustis *v.* Kidder, 26 Me. 97 [*followed* in Stacey *v.* Graves, 74 Me. 368 (*distinguishing* Rounds *v.* Bangor, 46 Me. 541, 74 Am. Dec. 469; Rounds *v.* Mansfield, 38 Me. 586)].

**Where a constable's bond was good when a writ was served,** the penalty for serving a writ without having given bond cannot be recovered against him because the bond has been subsequently avoided by the unauthorized alteration of it by another. Fournier *v.* Cyr, 64 Me. 32.

30. Yates *v.* Gransbury, 9 Colo. 323, 12 Pac. 206; Madera *v.* Hildredge, 4 Colo. App. 126,

and selling the same,[31] discharging a prisoner arrested without taking him before a magistrate,[32] refusal to give a prisoner a copy of the process under which he is detained,[33] delivering property under a writ of replevin before trying the validity of a claim interposed,[34] failure to turn over to his successor all the books, furniture, etc., appertaining to his office,[35] or in general any misconduct or neglect of duty.[36]

**2. Default of Deputy.** A sheriff may be amerced for a default of his deputy,[37] unless under the statute the deputy himself is liable to amercement therefor.[38]

**E. Necessity and Sufficiency of Demand.** A demand on the sheriff is necessary to render him liable to a penalty for failure to pay over money,[39] or to give a person a copy of the process under which he is detained.[40] And where the penalty is in the form of interest,[41] such interest on money collected can be computed only from the time of the demand made.[42] The demand must be made by a person having authority to receive the money and execute a legal and valid discharge;[43] and a demand for an amount greater than that claimed in a suit therefor, and much greater than that found due by the court, is not sufficient to justify the court in allowing the penalty and interest for failure to pay over money.[44]

**F. Discretion of Court.** Under some statutes it has been held that the amercement of a sheriff rests in the discretion of the court,[45] but other authorities hold that when a case clearly within the statute is presented the court has no discretion but must render judgment of amercement.[46]

**G. Amercement of Deputies.** Under some statutes a deputy sheriff may be amerced for an official default.[47]

**H. Amount of Penalty or Amercement — 1. In General.** An amercement, strictly speaking, is a penalty, and is for a fixed sum without regard to the extent of the injury suffered by the complaining party by reason of the default for which it is imposed;[48] but under a number of statutes the amount of the penalty for an official default or misfeasance is fixed with reference to the injury which has or is assumed to have resulted therefrom.[49]

35 Pac. 52; Shear *v.* Reynolds, 90 Ill. 238; Figueira *v.* Pyatt, 88 Ill. 402; Amend *v.* Murphy, 69 Ill. 337; Cornelia *v.* Ellis, 11 Ill. 584; Pace *v.* Vaughan, 6 Ill. 30.

31. Shear *v.* Reynolds, 90 Ill. 238 (holding that a sheriff who, without making any general demand for property on which to levy, took and sold a horse which the debtor claimed was exempt, and which, in fact, was so, it being the manifest purpose of the sheriff to take that particular horse, was liable to the statutory penalty, without reference to what other property the debtor might have had); Amend *v.* Murphy, 69 Ill. 337; McCluskey *v.* McNeely, 8 Ill. 578.

32. Crowley *v.* Hurd, 58 N. H. 75, holding, however, that an officer making an arrest without a warrant, on a view, between sunset and sunrise, pursuant to Gen. St. c. 236, § 4, was not liable to the penalty for discharging his prisoner without carrying him before a magistrate, provided by section 6 of the statute.

33. Duff *v.* Karr, 91 Mo. App. 16.

34. Colton *v.* Mott, 15 Wend. (N. Y.) 619.

35. State *v.* Kennedy, 5 Strobh. (S. C.) 160.

36. Evans *v.* Stevens, 8 Ala. 517; Rich *v.* Conley, 64 N. Y. Suppl. 333; People *v.* Dole, 1 Cai. (N. Y.) 181.

37. Esty *v.* Chandler, 7 Mass. 464; Horne *v.* Allen, 27 N. C. 36.

38. State *v.* Nichols, 39 Miss. 318.

Amercement of deputies see *infra*, IX, G.

39. Morgan *v.* Billings, 3 Ala. 172; Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841; Bulfinch *v.* Balch, 8 Me. 133; State *v.* Cayce, 85 Mo. 456; Pope *v.* Hays, 1 Mo. 450.

The institution of a suit for the money is a demand. State *v.* Cayce, 85 Mo. 456.

A demand for money before the return-day of the process under which it was collected does not render the officer liable for one hundred per cent interest under Mo. Rev. Code (1845), p. 665, § 23. State *v.* Muir, 24 Mo. 263.

40. Duff *v.* Karr, 91 Mo. App. 16.

A demand by the prisoner's attorney for a copy is not sufficient, as proof of a demand to give the prisoner a copy is necessary. Duff *v.* Karr, 91 Mo. App. 16.

41. See *infra*, IX, H, 7.

42. Morgan *v.* Billings, 3 Ala. 172; Williams *v.* State, 65 Ark. 159, 46 S. W. 186; State *v.* Cayce, 85 Mo. 456.

43. Bulfinch *v.* Balch, 8 Me. 133.

44. Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841.

45. Rodgers *v.* Waters, 2 Ala. 644; McClelland *v.* Hobbs, Hard. (Ky.) 2.

46. Smith *v.* Simmons, 2 Pennew. (Del.) 462, 46 Atl. 746; Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341; Coykendall *v.* Way, 29 Minn. 162, 12 N. W. 452; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104.

47. State *v.* Nichols, 39 Miss. 318.

48. Thompson *v.* Berry, 65 N. C. 484.

49. See *infra*, IX, H, 3, 4, 5, 6, 7.

**2. Statutes Fixing Amount.** Under some statutes a sheriff who is guilty of specified defaults becomes subject to penalties of definite amounts fixed by the statute,[50] or may be fined an amount not exceeding a fixed statutory limit.[51]

**3. Liability Based Upon Value of Property.** Under some statutes an officer who levies upon exempt property is liable for three times the value of the property.[52]

**4. Liability Based Upon Amount Collected.** In Illinois the statute has subjected a sheriff who unreasonably neglects, on demand, to pay over money collected on execution to a forfeiture of five times the amount with interest.[53]

**5. Liability For Amount of Debt.** A very common form of amercement for defaults in connection with the execution of process is the imposition upon the officers of an absolute liability for the amount of the debt for the collection of which the process issued.[54]

**6. Liability For Loss Sustained.** It has also been held that in proceedings to amerce a sheriff for failure to execute or return process the measure of damages is limited to the actual loss sustained by plaintiff in the value or availability of his security by reason of the acts of the officer.[55]

**7. Penal Interest.**[56] A species of amercement adopted in a number of statutes is the imposition upon a sheriff who has been guilty of an official default of a liability for interest, exceeding to a greater or less degree the legal rate, upon the amount for which his default has rendered him liable.[57] But where, after an officer has incurred the penalty, the original judgment is amended so as to increase

**50.** Coffey *v.* Wilson, 65 Iowa 270, 21 N. W. 602; State *v.* Nichols, 39 Miss. 318; People *v.* Dole, 1 Cai. (N. Y.) 181; Williamson *v.* Jones, 127 N. C. 178, 37 S. E. 202; Graham *v.* Sturgill, 123 N. C. 384, 31 S. E. 705; Harrell *v.* Warren, 100 N. C. 259, 6 S. E. 777; Duncan *v.* Philpot, 64 N. C. 479; Martin *v.* Martin, 50 N. C. 346; Lemit *v.* Freeman, 29 N. C. 317.

**51.** Patterson *v.* Gaston, 17 Ala. 223; Breuer *v.* Elder, 33 Minn. 147, 22 N. W. 622.

**52.** Yates *v.* Gransbury, 9 Colo. 323, 12 Pac. 206; Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52; Figueira *v.* Pyatt, 88 Ill. 402; Pace *v.* Vaughan, 6 Ill. 30.

**53.** Custer *v.* Agnew, 83 Ill. 194.

**54.** *Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870 (holding that Mansfield Dig. §§ 3061, 3062, making a sheriff, on failure to return an execution, liable for the amount specified thereiu, are not repealed by implication by Civ. Code, §§ 672–679); Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82; Atkinson *v.* Heer, 44 Ark. 174.

*Kansas.*— Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561; Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341.

*Kentucky.*— Clifford *v.* Cabiness, 1 Dana 384; Flournoy *v.* Rubey, 5 J. J. Marsh. 322.

*Louisiana.*— Gasquet *v.* Rohins, 2 La. Ann. 407.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Missouri.*— State *v.* Case, 77 Mo. 247.

*New Jersey.*— Hoagland *v.* Todd, 37 N. J. L. 544; Watson *v.* Hoel, 1 N. J. L. 136.

*New York.*— Rutzkowski *v.* George, 92 Hun 412, 36 N. Y. Suppl. 762; Dunford *v.* Weaver, 21 Hun 349 [*affirmed* in 84 N. Y. 445].

*Ohio.*— Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28; Graham *v.* Newton, 12 Ohio 210.

*Pennsylvania.*— Bachman *v.* Fenstermacher, 112 Pa. St. 331, 4 Atl. 546; Bachman *v.* Fenstermacher, 2 Pa. Co. Ct. 499; Stone *v.* Mahon, 4 C. Pl. 165; Amey *v.* Kennedy, 1 Ashm. 160. See also McClain *v.* Smith, 7 Leg. Int. 183.

*Tennessee.*— Smith *v.* Van Bebber, 1 Swan 110; Webb *v.* Armstrong, 5 Humphr. 379. See also Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

*United States.*— Darst *v.* Duncan, 6 Fed. Cas. No. 3,580, Brunn. Col. Cas. 521 [*affirmed* in 1 How. 301, 11 L. ed. 139], escape.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

**55.** Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134 [*citing* Hellman *v.* Spielman, 19 Nebr. 152, 27 N. W. 131; Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689].

**56.** Interest generally see Interest, 22 Cyc. 1459.

**57.** *Alabama.*— Chandler *v.* Henry, 90 Ala. 271, 8 So. 96; Huggins *v.* Powell, 19 Ala. 129; Evans *v.* State Bank, 13 Ala. 787; Johnson *v.* Petty, 5 Ala. 528; Morgan *v.* Billings, 3 Ala. 172; Rodgers *v.* Waters, 2 Ala. 644; Barton *v.* Lockhart, 2 Stew. & P. 109; Bondurant *v.* Lane, 9 Port. 484.

*Arizona.*— Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777.

*Arkansas.*— Craig *v.* Smith, 74 Ark. 364, 85 S. W. 1124; Williams *v.* State, 65 Ark. 159, 46 S. W. 186; Jones *v.* Goodhar, 60 Ark. 182, 29 S. W. 462; Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82; Atkinson *v.* Heer, 44 Ark. 174; Borden *v.* State, 9 Ark. 252.

*California.*— Shumway *v.* Leakey, 73 Cal. 260, 14 Pac. 841.

*Delaware.*— Smith *v.* Simmons, 2 Pennew. 462, 46 Atl. 746.

*Illinois.*— Buckmaster *v.* Drake, 10 Ill. 321; Beaird *v.* Foreman, 2 Ill. 40.

the amount thereof, the officer's liability must be figured on the amount of the original judgment.[58] Where part of the debt has been paid the officer is not liable for interest on that part as a penalty for not returning the execution at the proper time.[59]

**8. Discretionary Fine.** Where a discretionary fine is to be imposed the discretion of the court must be justly, and not arbitrarily, exercised, and the fine must not be excessive.[60]

**I. Particular Matters Affecting Liability — 1. Duty to Act.** A sheriff cannot be amerced for not executing process where the circumstances are such that he is not bound to execute it;[61] and a statute imposing on a sheriff a forfeiture for neglecting to pay over on demand money collected on execution has been held to apply only where it is the sheriff's plain duty to pay, and his neglect is wilful, and not where the right of plaintiff to the payment is doubtful.[62] So also, where a writ is delivered to a constable other than one of those to whom under the statute it should be directed, he is not liable to a statutory penalty for failure to return the same.[63]

**2. Validity and Regularity of Judgment and Process.** Where an execution plaintiff seeks to amerce a sheriff for a default in respect to the execution of his

*Indiana.*— State *v.* Youmans, 5 Ind. 280; Limpus *v.* State, 7 Blackf. 43.

*Kansas.*— Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561.

*Kentucky.*— Louisville Bank *v.* Hurt, 8 Bush 633; Goodrum *v.* Root, 2 Metc. 427; Mershon *v.* Com., 2 Metc. 371; Sanders *v.* Kentucky Bank, 2 Metc. 327; Judy *v.* Howard, 2 Metc. 44; Stephens *v.* Lewis, 8 B. Mon. 150; Partlow *v.* Lawson, 2 B. Mon. 46; Hudgin *v.* Warner, 9 Dana 196; Clifford *v.* Cabiness, 1 Dana 384; Flournoy *v.* Rubey, 5 J. J. Marsh. 322; Bernard *v.* Flournoy, 4 J. J. Marsh. 99; Wilson *v.* Slaughter, 3 J. J. Marsh. 593; Gore *v.* Hedges, 7 T. B. Mon. 520; Com. *v.* Bradley, 1 Litt. 48; McClelland *v.* Hobbs, Hard. 2.

*Massachusetts.*— Bartlett *v.* Eveleth, 4 Metc. 149; Thompson *v.* Brown, 17 Pick. 462; Bayley *v.* French, 2 Pick. 586; Esty *v.* Chandler, 7 Mass. 464.

*Minnesota.*— Coykendall *v.* Way, 29 Minn. 162, 12 N. W. 452.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Garrett *v.* Hamblin, 11 Sm. & M. 219, 49 Am. Dec. 53; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Missouri.*— State *v.* Cayce, 85 Mo. 456; State *v.* Muir, 24 Mo. 263; Conway *v.* Campbell, 11 Mo. 71; State *v.* McLernan, 10 Mo. 780; Pope *v.* Hays, 1 Mo. 450.

*Nebraska.*— Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*North Carolina.*— Williamson *v.* Jones, 127 N. C. 178, 37 S. E. 202.

*Ohio.*— Moore *v.* McClief, 16 Ohio St. 50; Conkling *v.* Parker, 10 Ohio St. 28; Graham *v.* Newton, 12 Ohio 210.

*South Carolina.*— Thomas *v.* Yates, 1 McMull. 179; Kelly *v.* Payne, 1 McCord 138.

*Tennessee.*— Smith *v.* Van Bebber, 1 Swan 110; Lashley *v.* Wilkinson, 2 Head 482.

*Texas.*— Haley *v.* Greenwood, 28 Tex. 680; De Witt *v.* Dunn, 15 Tex. 106; Richards *v.* Bemis, (Civ. App. 1903) 78 S. W. 239; Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

*Vermont.*— Smith *v.* Pike, 44 Vt. 61.

*Virginia.*— Guerrant *v.* Tayloe, 2 Call 208.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

58. Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462.

59. Louisville Bank *v.* Hurt, 8 Bush (Ky.) 633.

60. Bullock *v.* Goodall, 3 Call (Va.) 44, holding that where a sheriff had neglected to return an execution, but the person for whose benefit it was issued had sustained no injury, a fine of £264 imposed on such officer was excessive.

Excessive fines generally see Criminal Law, 12 Cyc. 965.

61. Duncan *v.* Drakeley, 10 Ohio 45 (holding that a sheriff could not be amerced for not executing a capias ad satisfaciendum from another county, unless the indorsement, "Funds are deposited to pay the sheriff on this writ," was made thereon by the clerk as provided by statute, although the judgment creditor tendered the sheriff an amount more than sufficient to satisfy all fees which would accrue); Bereman *v.* Xenia Bank, 1 Ohio Dec. (Reprint) 218, 4 West. L. J. 500 (holding that a sheriff was not liable to an amercement for refusing to execute a writ of venditioni exponas, unless the printer's fee was advanced).

62. Custer *v.* Agnew, 83 Ill. 194. See also *infra*, IX, I, 6.

63. Bachman *v.* Fenstermacher, 2 Pa. Co. Ct. 499, holding that under Act March 20, 1810, § 11, providing that every justice of the peace rendering judgment shall grant execution, which shall be directed to the constable of the ward, district, or township where defendant resides, or the next constable most convenient to defendant, a constable is not liable to the penalty for failure to make the return of an execution on or before the return-day where he is not one of the officers to whom the execution should be directed.

writ he must show a valid judgment,[64] and the execution must conform strictly to that judgment.[65] Where an execution is null and void, the sheriff cannot be amerced for neglecting or refusing to make a return thereon;[66] and where by mistake of the clerk certain costs are erroneously taxed and indorsed on an execution, the sheriff, after selling land under it, cannot be amerced for failing to pay over to the execution creditor the amount of such costs.[67]

**3. Non-Collection of Money.** A sheriff who has sold property cannot be amerced for failure to pay over the proceeds where he shows that the property was properly sold upon a credit and the purchase-money not paid to him;[68] and where a sheriff on levying an execution took the check of the judgment debtor in full amount of the judgment and costs, and returned the writ indorsed, "money in full," being obliged to make the return before he knew whether the check would be paid or not, and the check not being paid, the judgment creditor, after demanding the money of the sheriff, sought to amerce him for failure to pay it, it was held that the taking of the check was not a receipt of the money, within a statute providing that an officer might be amerced for neglect on demand to pay persons entitled thereto any money received by him for the use of such person.[69]

**4. Uncollectability of Debt.** Where the statute imposes upon an officer who is guilty of an official default in connection with the execution of process an absolute liability for the amount of the debt, such liability cannot be reduced by a showing that the debt could not have been collected even though there had been no default on his part;[70] but a mere failure to collect the amount of an execution cannot subject the sheriff to amercement, where it appears that the debtor had no property out of which the amount or any part thereof could have been made.[71]

**5. Payment of Debt.** A statutory penalty for the sheriff's failure to return a writ may be enforced notwithstanding a payment of the debt after the return-day;[72] and where a sheriff fails to return an execution within the proper time and a defendant surety pays the amount thereof to plaintiff, plaintiff does not lose his right to recover the penalty imposed by statute on the sheriff for his fail-

**64.** Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561].

**65.** Bittman *v.* Mize, 45 Kan. 450, 25 Pac. 875 (holding that a sheriff is not liable to amercement for failing to serve and return, in sixty days, an execution misreciting the date of the judgment on which it purports to be issued); Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Gleason *v.* Itten, 52 Kan. 218, 34 Pac. 892; Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561] (holding that where the recitals in an execution show that the judgment upon which it purports to have been issued is for an amount substantially greater than the actual judgment rendered in the case, the officer to whom the execution issued is not liable to amercement for neglecting to return it on or before the return-day); Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218 (holding that where an execution commanded the sheriff to collect a sum in excess of that named in the judgment, the sheriff could not be amerced for failure to return the same within the time allowed); Moore *v.* McClief, 16 Ohio St. 50 (holding that an officer is not liable to amercement for failure to return an execution on its return-day, when the execution sets forth a judgment substantially greater than the amount of the actual judgment recovered).

**66.** Bowen *v.* Jones, 35 N. C. 25, 55 Am. Dec. 426, so holding in the case of an execution directed to a sheriff who was a party to the suit.

**67.** Kothman *v.* Prest, 34 Kan. 179, 8 Pac. 228.

**68.** Langdon *v.* Summers, 10 Ohio St. 77.

**69.** *In re* Worstall, 8 Ohio S. & C. Pl. Dec. 264, 6 Ohio N. P. 525.

**70.** Rutzkowski *v.* George, 92 Hun (N. Y.) 412, 36 N. Y. Suppl. 762; Dunford *v.* Weaver, 21 Hun (N. Y.) 349 [*affirmed* in 84 N. Y. 445]; Webb *v.* Armstrong, 5 Humphr. (Tenn.) 379; Darst *v.* Duncan, 6 Fed. Cas. No. 3,580 [*affirmed* in 1 How. 301, 11 L. ed. 139].

**71.** Richardson *v.* Wicker, 80 N. C. 172, where the debtor had no property in excess of his exemptions.

**72.** Smith *v.* Van Bebber, 1 Swan (Tenn.) 110; Planters' Bank *v.* Porter, 10 Humphr. (Tenn.) 316. *Contra*, Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249, holding that if a plaintiff accepts the money collected by a sheriff on execution, being the full amount thereof, with knowledge of the loss of the execution by the sheriff, such acceptance absolves the sheriff from amercement for not returning the execution.

**Tender of amount due.**— The failure of an officer to return a writ within the time prescribed by law fixes his liability, which cannot be discharged by a tender of the amount

ure, by allowing the motion against the sheriff for such damages to be carried on for the benefit of the surety.[73] But a motion to amerce a sheriff for failure to serve an execution is properly overruled, where it appears that the judgment on which the execution was based has been in fact satisfied,[74] especially where it further appears that at the time of the hearing of the motion to amerce a judgment has been duly entered canceling the judgment on which the execution issued.[75] And it has been considered that a sheriff might escape a fine for a false return in not returning property attached and sold as perishable, by showing that the proceeds were paid to the attachment plaintiff.[76]

**6. Conflicting Claims to Money Collected.** A statutory penalty for failure to pay over money is not recoverable where the failure is caused by the fact that there are conflicting claims to such money which the officer cannot determine and which have not been determined by the courts.[77]

**7. Injunction[78] Against Payment.** A sheriff who has been enjoined from paying over money cannot be amerced for not paying over the same.[79]

**8. Notice of Motion Not to Pay Over Money.** Where a sheriff has collected money on execution, and is notified not to pay the same over to plaintiff, and a motion for that purpose is made in court, he is not liable to plaintiff for the penalty for not paying him the money until the decision of such motion.[80]

**9. Attachment[81] of Money.** Where an execution commands a sheriff to make the money, and have it before the judge on the return-day to satisfy plaintiff, he cannot protect himself against a motion to amerce on failing to have the money by showing that a foreign attachment had been served on him;[82] nor can an officer who has received satisfaction of an execution escape liability for failure to pay over the money on the ground that by direction of the debtor he had attached it on a writ in favor of the debtor against the creditor.[83]

**10. Claim of Third Persons to Property.** The fact that property found in the possession of a defendant in execution and levied on by a sheriff is claimed by third persons will not prevent the amercement of the officer for refusing to sell the property at the request of plaintiff, where he asks no indemnity of plaintiff, and takes no measure to secure himself against such claim;[84] but where, upon an adverse claim to property levied on being made, the sheriff asks for instructions from plaintiff's attorneys, which are promised him, he is not liable to amercement for not selling until he has disobeyed or disregarded positive, reasonable, and lawful directions to that end.[85]

**11. Absence of Injury.** It has been held that a sheriff cannot escape a penalty imposed by statute for a failure to serve, execute, or return process by showing that the party at whose instance the process issued was not injured by his default;[86]

due after notice of a motion against him. Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360 [*approved* Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Young *v.* Donaldson, 2 Heisk. (Tenn.) 52].

73. Sanders *v.* Commonwealth Bank, 2 Metc. (Ky.) 327.

74. Freeman *v.* Womack, 4 Ala. 539 (where the debt was paid before the amercement proceedings were begun); Union Stove, etc., Works *v.* Caswell, 50 Kan. 787, 32 Pac. 362.

75. Union Stove, etc., Works *v.* Caswell, 50 Kan. 787, 32 Pac. 362.

76. Garrett *v.* Hamblin, 11 Sm. & M. (Miss.) 241, holding, however, that in the case at bar such payment was not shown, as it did not appear that receipts produced by the sheriff referred to such property.

77. Johnson *v.* Gorham, 6 Cal. 195, 65 Am. Dec. 501; Bartlett *v.* Eveleth, 4 Metc. (Mass.) 149; Rogers *v.* Sumner, 16 Pick. (Mass.) 387; Bayley *v.* French, 2 Pick. (Mass.) 586; Thomas *v.* Yates, 1 McMull. (S. C.) 179; Rickards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. 239.

78. See, generally, Injunctions, 22 Cyc. 724.

79. Langdon *v.* Summers, 10 Ohio St. 77.

80. Conway *v.* Campbell, 11 Mo. 71.

81. See, generally, Attachment, 4 Cyc. 368.

82. Dawson *v.* Holcomb, 1 Ohio 275, 13 Am. Dec. 618, so holding on the ground that the officer was bound to disregard such attachment.

83. Thompson *v.* Brown, 17 Pick. (Mass.) 462.

84. Harris *v.* Kirkpatrick, 35 N. J. L. 392.

85. Kemble *v.* Harris, 36 N. J. L. 526.

86. *Arkansas.*— Atkinson *v.* Heer, 44 Ark. 174.

*Kansas.*— Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

but it has also been held a complete defense to a proceeding to amerce a sheriff for failure to return an execution before the return-day that the debtor had no property subject to execution during the life of the writ, and hence the judgment creditor was not injured;[87] and that a sheriff cannot be amerced for failure to sell attached property under an order of sale, where it appears that at the time of the levy of the attachment the property was subject to a chattel mortgage for its full value.[88] So also, where, by reason of the inadequacy of defendant's means to pay more than an older fieri facias, the utmost exertions of the sheriff would only have resulted in a return of *nulla bona* on a junior fieri facias, it was held that, although the sheriff ought to have sold under the junior fieri facias and had failed to do so, he was not subject to the statutory penalties, whether failure to return or failure to execute was charged against him.[89] Where a statute imposes a penalty of a fixed amount "in addition to the actual damages sustained" the penalty cannot be recovered by one who has sustained no actual damages.[90]

**12. Innocent Mistake.** A sheriff has been held not liable to amercement for applying money collected in satisfaction of the wrong execution, where he was not influenced by corrupt or personal motives,[91] or for a mistake in the application of money, without gross carelessness, and where none of the money is in the sheriff's hands.[92] But it has also been held that a return made by a sheriff, which is false in fact, will subject him to the penalty for a false return, although it was made through mistake, without any criminal intent.[93] Where a sheriff acting in good faith actually inclosed an execution emanating from another county in a letter and posted it, for the purpose of having it returned, but by mistake it was directed to the wrong person, he was not liable to the penalty for failing to return process.[94]

**13. Validity of Sale.** A sheriff does not incur the penalty provided by law for selling property without the required notice, if the sale is void in consequence of the unconstitutionality of the law under which it was made,[95] or if the process under which the sale is made is void.[96]

**14. Purchase of Property by Judgment Debtor.** The fact that property levied on was bid in for the judgment debtor by his agent, and continued in the debtor's hands thereafter, does not render the proceeding any the less a sale, so as to exempt the sheriff from the penalty for making a sale contrary to statutory provisions.[97]

**15. Issuance of Second Writ.** A sheriff is not relieved from the penalty for failure to return an execution at the proper time by the fact that an alias execution

*Kentucky.*— Fellows *v.* Cross, 1 B. Mon. 10, failure to return process.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481 [*distinguishing* Dailey *v.* State, 56 Miss. 475] (failure to return process); Morehead *v.* Holliday, 1 Sm. & M. 625.

*North Carolina.*— Swain *v.* Phelps, 125 N. C. 43, 34 S. E. 110.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 330 *et seq.*

Damage as prerequisite to civil action see *supra*, VII, A, 2.

87. Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689; Swenson *v.* Christoferson, 10 S. D. 188, 72 N. W. 459, 66 Am. St. Rep. 712.

88. Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

89. Townsend *v.* Kleckley, 4 Rich. (S. C.) 206.

90. Coffey *v.* Wilson, 65 Iowa 270, 21 N. W. 602 [*followed* in Enfield *v.* Blyler, 67 Iowa 295, 25 N. W. 251], holding that where an officer sold property without notice for a sum equal to its value, and applied the proceeds on the execution and costs, and the owner sustained no actual damages by reason of the want of notice, he was not entitled to recover the penalty imposed by Code (1873), § 3081, providing that if an officer sold property under execution without giving the statutory notice he should forfeit one hundred dollars to defendant in the execution in addition to the actual damages sustained.

91. McMahan *v.* Hall, 36 Tex. 59.

92. Nash *v.* Muldoon, 16 Nev. 404; Giffin *v.* Smith, 2 Nev. 374.

93. Finley *v.* Hayes, 81 N. C. 368; Peebles *v.* Newsom, 74 N. C. 473; Albright *v.* Tapscott, 53 N. C. 473.

94. Thompson *v.* Ross, 1 J. J. Marsh. (Ky.) 600.

95. Willard *v.* Longstreet, 2 Dougl. (Mich.) 172.

96. Bellmer *v.* Blessington, 136 Cal. 3, 68 Pac. 111.

97. Freeman *v.* Leonard, 99 N. C. 274, 6 S. E. 259.

has been issued on which he has collected the money; [98] but a plaintiff waives the right to amerce the sheriff for improperly allowing the debtor to retain possession of goods levied on where, with knowledge of the facts, he issues another execution to the sheriff commanding him to sell the property thus levied on and to make a further levy.[99]

**16. Return of Collection of Money.** It has been held that a statutory penalty for a failure to pay over money is recoverable only when by the return of the sheriff he admits the collection and refuses to pay it over, and not where he has returned *nulla bona*.[1]

**17. Repeal of Statute.** Where, pending proceedings to amerce a sheriff, the statute providing for the amercement is repealed without any saving clause as to pending suits, the penalty falls with the law and cannot be enforced.[2]

**18. Illness of Officer.** The fact that the failure of a sheriff to return an execution at the proper time has been caused by his illness may relieve him from a statutory penalty for the default.[3]

**19. Termination of Incumbency.** A sheriff who is guilty of an official default while in office may be amerced therefor after his incumbency has terminated by expiration of his term or otherwise; [4] but where a sheriff who has not commenced to execute a writ goes out of office before the return-day, he is not subject to amercement for failure to return it.[5]

**20. Notice of Rights of Complaining Party.** A sheriff cannot be amerced for failure to respect the rights of a particular party where he had no notice of such rights.[6]

**21. Interference of Complaining Party.** A sheriff will not be amerced where the interference of plaintiff has prevented him from discharging his duty.[7]

**22. Consent of Complaining Party.** Where an execution plaintiff has consented to the sheriff making such arrangements as he may see fit with the debtor, he cannot subject the sheriff to amercement for his acts in reference to the writ.[8]

98. Turner *v.* Page, 111 N. C. 291, 16 S. E. 174. But *compare* Hustick *v.* Allen, 1 N. J. L. 168, holding that where, after irregular return to a fieri facias has been filed, plaintiff sues out a capias ad satisfaciendum, which is executed, he cannot subsequently proceed against the sheriff for amercement, because of the irregularity in his proceedings.

99. Pettit *v.* Ebright, 2 Ohio Dec. (Reprint) 651, 4 West. L. Month. 328.

1. Egery *v.* Buchanan, 5 Cal. 53. But *compare* Nash *v.* Muldoon, 16 Nev. 404.

2. Broughton *v.* Mobile Branch Bank, 17 Ala. 828; State *v.* Youmans, 5 Ind. 280.

3. Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125, holding, however, that the sheriff's statement, in his return, made after the proper time, of the cause of the delay, is not evidence in his behalf.

4. Armstrong *v.* Grant, 7 Kan. 285; Hustick *v.* Allen, 1 N. J. L. 168; State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305.

5. McLin *v.* Hardie, 25 N. C. 407 [*followed* in Parker *v.* Woodside, 29 N. C. 296].

6. State *v.* Judges Inferior Ct. C. Pl., 10 N. J. L. 391, holding that where a plaintiff assigned his interest in a suit, and then took the benefit of an insolvent act, and the sheriff was appointed his assignee, and the suit was carried on to judgment and execution and the sheriff made the money, but did not pay it to the assignees of the interest in the suit, he would not be amerced without proof that he had notice of the assignment to them, and that he voluntarily omitted to pay them after such notice.

7. Stryker *v.* Merseles, 24 N. J. L. 542.

8. Simms *v.* Quinn, 58 Miss. 221, 225, where a sheriff held a writ of venditioni exponas for sixteen thousand dollars, and on the day before the return-day defendant applied for indulgence, which the sheriff refused to grant without the assent of plaintiffs' attorneys, and defendant thereupon went to plaintiffs' attorneys who told him that whatever arrangements he could make with the sheriff would be satisfactory to them, but that they would not release the sheriff from any legal liabilities which he might incur or show him any favors, and defendant delivered only the first part of the message to the sheriff, suppressing the declaration that plaintiffs' attorneys would not release him from liability, and the sheriff delayed returning the execution with a small amount collected thereon until the day following the return-day, and it was held that a motion to amerce the sheriff in the full amount of the judgment for the delay of one day in making the return must be denied, the court saying: "The officer was misled by the message brought him by one whom the plaintiffs' attorneys had permitted to act as their agent in the transmission of their wishes in the matter. While the officer was not told in so many words that he might hold up the writ, he did receive instructions

**23. Failure to Give Indemnity.** When a sheriff is entitled to demand indemnity before proceeding further in the execution of certain process,[9] and has demanded the same, he cannot be amerced for not proceeding if the indemnity is not furnished.[10]

**24. Failure of Plaintiff to Notify Officer of Facts.** Where the course of an officer would have been proper, except for the existence of certain facts within the knowledge of plaintiff, but not of the officer, he cannot be amerced unless it is made to appear that he was notified of the facts.[11]

**25. Agreements Between Parties.** Where a scire facias has been sued out on a judgment, the sheriff is liable to amercement for failure to return the process, although the parties agreed, while it was in his hands, that the collection of the money should be suspended, so as to enable them to make a full settlement.[12]

**26. Ratification of Acts.** An execution plaintiff who has ratified the acts of the sheriff in relation to the writ cannot subsequently procure his amercement because of such acts.[13]

**27. Reversal of Judgment Establishing Delinquency.** Under a statute providing that every sheriff against whom a judgment is rendered for a delinquency shall forfeit and pay a certain sum, to be recovered at the same time for the use of the county, the judgment for the penalty is only an incident to the main judgment against the sheriff, and on reversal of such judgment the judgment for the penalty falls with it.[14]

**28. Necessity For Conversion of Property.** Under a statute providing that, if any officer under any execution or other process shall seize exempt property, he shall be liable to the party injured for three times the value of the property so seized, the mere seizure does not give a right of action for such treble damages, but there must be something which is equivalent to a conversion of the property.[15]

**29. Terms of Sale of Property.** A sheriff's liability to a statutory penalty for selling exempt property under execution is not affected by the fact that the sale was made on credit and the money not paid by the purchaser.[16]

**30. Residence of Debtor.** A debtor is not precluded from recovering the statutory penalty from a sheriff for selling on execution property exempt by law, by the fact that he lives in a county other than that in which the levy on his property was made.[17]

from which he was fairly led to infer a willingness upon the part of plaintiffs' attorneys for him to do so."

9. **Right to demand indemnity** see *supra*, VI, A, 1.

10. Weller *v.* Lanning, 41 N. J. L. 477.

11. Thompson *v.* Berry, 65 N. C. 484, holding that where an ordinance of a state convention provided that all writs of execution should be returned after levy without a sale of the property, unless the judgment was rendered on a contract made subsequent to a particular date, a sheriff could not be amerced for failing to collect on a judgment, unless it was shown that he had actual notice that such judgment was rendered on a contract made subsequent to the date specified in the ordinance.

12. Morrow *v.* Allison, 33 N. C. 217.

13. Waterman *v.* Merrill, 33 N. J. L. 378 (holding that a letter from plaintiff's attorney, received by the sheriff after levy made, and before the return of the writ, in these words: "You may delay proceeding till you hear from me or Mr. W., holding on to your levy," amounted to such an acceptance and ratification by plaintiff of whatever had been done or omitted by the sheriff up to that time as to preclude plaintiff from alleging any such act of omission as a ground of amercement); Scott *v.* Dow, 14 N. J. L. 350 (holding that where plaintiff, after notice of amercement, informed the sheriff that he should "not move to amerce him in pursuance of such notice," but should "trust to his raising the money in the next vacation," he could not afterward move for an amercement because the sheriff neglected to file a true inventory, etc.); Paterson Bank *v.* Hamilton, 13 N. J. L. 159 (holding that where plaintiff in execution by letter directed the sheriff "to adjourn the sale and stay until further orders," such direction amounted to a ratification of the sheriff's previous conduct in respect to the writ and absolved him from liability to amercement for any neglect to execute the writ which had previously occurred). See also Le Roy *v.* Blauvelt, 13 N. J. L. 341.

14. Buchanan *v.* McKenzie, 53 N. C. 93.

15. Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52, holding that the officer has the right to return the property on demand and thus escape the penalty.

16. McCluskey *v.* McNeely, 8 Ill. 578.

17. McCluskey *v.* McNeely, 8 Ill. 578.

**31. Mailing Return.**[18] Where an execution is directed to the sheriff of a county other than the one in which it is issued, and the sheriff after having performed all that is required of him in an attempt to execute the writ makes out a certificate of his doings thereunder, dates the same, and has the clerk of the court of his county enter the return on his execution docket, and then deposits the same in the United States post-office, addressed to the clerk of the court from which the writ issued, in sufficient time for it to reach him on the return-day, the sheriff is not liable to amercement for not making his return in the proper time, although the return actually fails to reach the office of the clerk who issued it on or before the return-day.[19]

**32. Fraud in Claim of Exemption.** A sheriff cannot be subjected to a statutory penalty for levying on exempt property where the claim of exemption is fraudulent.[20]

**J. Proceedings — 1. In General.** While proceedings for the amercement of a sheriff or constable are ordinarily summary in their nature and based upon motion,[21] yet where the penalty consists in an absolute liability for the debt [22] or interest on the loss at a specified rate [23] it is often regarded as a mere statutory measure of damages [24] and enforced in an ordinary action of law.[25]

**2. Who May Proceed For Amercement.** Where, on a sale under a decree in foreclosure, the price obtained is sufficient only to pay the first two liens, the holder of a third lien has no claim against the sheriff for amercement.[26] An execution debtor cannot maintain in the name of the execution creditor a motion to fine the sheriff for failure to return the writ.[27] A purchaser at an execution sale is not a party aggrieved within a statute imposing a penalty on an officer for selling real property without notice, recoverable by the party aggrieved.[28]

**3. Effect of Pendency of Other Proceedings.** A motion for a rule against a sheriff to show cause why an information should not be filed against him for false swearing, under an act imposing a penalty on every sheriff whose affidavit, accompanying his plea in an action instituted against him for an escape, should at any time afterward appear to be false, has been denied, where it appeared that a suit was pending between the creditor and the sheriff, in the prosecution of which all the circumstances relating to the escape would be fully developed and examined, and every object attained for which the information was intended.[29]

**4. Jurisdiction [30] and Venue.**[31] The question of what court has jurisdiction of proceedings for the enforcement of a penalty against an officer is governed by

**18. Mistake in address** see *supra*, IX, I, 12.

**19.** Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

**20.** Yates *v.* Gransbury, 9 Colo. 323, 12 Pac. 206, holding that where a judgment debtor having two wagons, one of which he is entitled to exempt from execution, concealed one, and claimed the other as exempt, and a levy thereon by the sheriff was no ground for recovery of a penalty imposed by statute on an officer who levied on exempt property.

**21.** *Alabama.*—Patterson *v.* Gaston, 17 Ala. 223, holding that the penalties to which coroners are subjected by the act of 1833 for defaults in execution of process may be recovered in the summary mode prescribed by the act of 1807, as the latter act, so far as it prescribed the remedy and mode of proceedings, was not repealed by the former.

*Kansas.*— Reese *v.* Rice, 1 Kan. App. 311, 41 Pac. 218.

*Kentucky.*— Com. *v.* Bradley, 1 Litt. 48.

*Mississippi.*— State *v.* Nichols, 39 Miss. 318.

*Missouri.*— Conway *v.* Campbell, 11 Mo. 71.

*New Jersey.*— Stryker *v.* Merseles, 24 N. J. L. 542.

*Ohio.*— Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104.

*Tennessee.*— Hill *v.* Hinton, 2 Head 124.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 332, 342.

**22.** See *supra*, IX, H, 5.

**23.** See *supra*, IX, H, 7.

**24.** See Smith *v.* Pike, 44 Vt. 61.

**25.** See *supra*, VII.

**26.** Russell *v.* Grimes, 27 Nebr. 812, 44 N. W. 107, 31 Nebr. 784, 48 N. W. 905.

**27.** Fletcher *v.* Chapman, 2 Leigh (Va.) 560, holding this to be true, although the debtor had paid the amount of the execution to the creditor, and was a party injured by the failure to return the writ.

**28.** Kelley *v.* Desmond, 63 Cal. 517.

**29.** People *v.* Dole, 1 Cai. (N. Y.) 181.

**30.** See, generally, Courts, 11 Cyc. 633.

**31.** See, generally, Venue.

the statutes of the different states.[32] As between courts of equal jurisdiction proceedings for the amercement of a sheriff are properly brought in the court out of which the process issued in respect to the execution on which the default occurred.[33]

**5. Time For Proceeding — Limitations.**[34] It is not necessary that an amercement for failure to return process should be at the term to which the process is returnable but it may be at a subsequent term;[35] and a sheriff who fails to sell property levied on may be amerced at the next term after that to which the execution is returnable.[36] The statutes sometimes require proceedings to amerce a sheriff for an official default to be brought within a comparatively short time after the occurrence thereof;[37] but in the absence of any statute of limitations applying in terms to amercement proceedings it has been considered that a sheriff's liability to amercement continued indefinitely, or at least until the lapse of such time as would raise a presumption of payment.[38]

**6. Notice**[39] **or Process.**[40] A sheriff is entitled to notice of proceedings for his amercement[41] for a certain time before the hearing,[42] and such notice must be personally served upon him.[43] Under some statutes the notice of amercement comes in the place and performs the office of the declaration in an action at common law;[44] and in such case the notice should set out the cause of complaint with the same certainty, although not necessarily with the same formality, as is required in the declaration itself;[45] and the cause set out must be one for which the sheriff

**32.** Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46 (holding that Sess. Acts (1835), p. 302, imposing a penalty of thirty per cent, recoverable before a justice of the peace, on a constable for failure to return an execution within the prescribed time, constructively repeals all prior enactments denouncing penalties against constables for failing to return executions, and hence the justices of the peace alone have original jurisdiction in all such cases); Ghost *v.* Hill, 11 Nebr. 472, 9 N. W. 642 (holding that a county court has authority to amerce an officer for failing to return an execution issued by such court and delivered to him).

**33.** Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. 341 [*followed* in Reynolds *v.* Nelson, 40 Kan. 41, 19 Pac. 353], holding that where a judgment is rendered in one county and an execution is issued to the sheriff of another county, who fails to return the same as required by law, proceedings to amerce the sheriff are properly begun in the court out of which the execution issued.

**34.** See, generally, Limitations of Actions, 25 Cyc. 963.

**35.** Halcombe *v.* Rowland, 30 N. C. 240 [*followed* in Hyatte *v.* Allison, 48 N. C. 533].

**36.** Lorillard *v.* Welsted, 8 N. J. L. 271 [*distinguishing* New Brunswick Bank *v.* Welsted, 8 N. J. L. 271], holding that the sheriff might be so amerced, although he had offered the property for sale and adjourned two or three times for want of bidders, where he did not specially inform plaintiff or his attorney of the time of sale or adjournment.

**37.** Fuller *v.* Wells, 42 Kan. 551, 22 Pac. 561, holding that a proceeding to amerce a sheriff under Civ. Code, § 472, is barred by failure to prosecute within one year.

**38.** State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305, where amercement proceedings brought ten years after the alleged liability arose were held to be not barred.

**39.** See, generally, Notices, 29 Cyc. 1110.

**40.** See, generally, Process, 32 Cyc. 412.

**41.** *Mississippi.*— State *v.* Nichols, 39 Miss. 318; Jenkins *v.* State, 33 Miss. 382; Connell *v.* Vance, Walk. 254.

*Nebraska.*— Philadelphia Fire Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723, holding that a judgment of amercement against a sheriff is of no validity, if the officer had no notice of the proceedings to amerce prior to the entry of such judgment.

*New Jersey.*— Anonymous, 6 N. J. L. 159.

*North Carolina.*— Yeargin *v.* Wood, 84 N. C. 326, holding that a judgment absolute against a sheriff for failure to return process is properly set aside where it appears that he had no notice of the rule upon him to show cause.

*Ohio.*— Woodbury *v.* Berry, 18 Ohio St. 456.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 335, 342.

**42.** Woodbury *v.* Berry, 18 Ohio St. 456, construing Code, §§ 451, 455.

**43.** Anonymous, 6 N. J. L. 159, holding that proof of notice sent by mail was not sufficient.

**Evidence of receipt of notice sent by mail.** — On a motion to amerce a sheriff for not duly executing an execution, proof that notice of the motion was sent to him by mail, inclosed with a capias which he had returned served, and that the packet would have reached him in season by the usual course of the mail, was not sufficient to show that the notice was received in time. Melvin *v.* Purdy, 17 N. J. L. 162.

**44.** Ritter *v.* Merseles, 24 N. J. L. 627; Stryker *v.* Merseles, 24 N. J. L. 542; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104.

**45.** Ritter *v.* Merseles, 24 N. J. L. 627 (holding that a notice of amercement "for not having returned said execution accord-

is liable to be amerced by the terms of the statute.[46] A notice of a motion to amerce to be made on a day specified, which is a legal holiday, "or as soon thereafter as the court can attend to the same," has been held a good notice for the day succeeding the one designated.[47] An irregularity in the notice of motion to amerce is waived by the taking of testimony under the notice and the adjournment of the hearing without objection;[48] and where a formal issue and service of summons is necessary, a want thereof is waived when defendant enters his appearance.[49] A notice of amercement is operative from time of service,[50] and is good without a date,[51] or with an impossible date.[52]

**7. PARTIES.**[53] An action for the statutory penalty for a false return on a writ in which two persons are plaintiffs may be brought by plaintiffs jointly.[54] An action for a penalty given by statute against an officer for making deliverance of property under a writ of replevin before trying the validity of a claim interposed must be brought in the names of all those making the claim.[55] An action against an outgoing sheriff for a statutory penalty for refusal to turn over to his successor all the books, furniture, etc., appertaining to the office, must be brought by and for the state, and not by or for any private person, or through the means of a *qui tam* action.[56] In an action to recover treble damages for levying on exempt property, under a statute giving such penalty only against the officer, plaintiff in the execution cannot be made a party.[57] The makers of a bond indemnifying a sheriff from the consequences of paying out an execution fund to them are entitled to contest the right of plaintiffs, who claim the fund, to recover the statutory penalty from the sheriff for failure to pay over the fund to them.[58] In North Carolina it has been held that an action to recover from a sheriff the penalty for neglecting to note upon process the day of receiving it must be brought in the name of the state.[59]

**8. PLEADING.**[60] In an action under a statute providing a penalty of treble the value of the property against the officer seizing exempt property, the declaration must count specially on the statute, to entitle plaintiff to recover such treble damages;[61] and where the statute allows the debtor to select in lieu of specific articles exempted property of a certain value, plaintiff must allege that he made such selection and claim, and that he did not have any or either of the articles enumerated in the statute as exempt.[62] In an action for a statutory penalty for

ing to law, and for neglect of duty by you in relation to said execution," was insufficient); Stryker *v.* Merseles, 24 N. J. L. 542 (holding that a notice assigning as the ground for amercement that it was "for not executing the writ of execution" was insufficient, as the notice should assign neglect or refusal to execute it).

**Language equivalent to that of statute.**— A notice of a motion for a penalty against a sheriff is sufficient if it describes the default in language equivalent to that of the statute, although not in the exact words thereof. Gore *v.* Hedges, 7 T. B. Mon. (Ky.) 520, holding that a notice that plaintiff would move for the imposition of a penalty for the sheriff's failure to return an execution "within one month from" the return-day was sufficient under a statute imposing a penalty for failure to make return "for the space of one month after" the return-day.

46. Ritter *v.* Merseles, 24 N. J. L. 627.
47. White *v.* Rockafellar, 45 N. J. L. 299.
48. White *v.* Rockafellar, 45 N. J. L. 299.
49. Hawkins *v.* Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.
50. Scott *v.* Dow, 14 N. J. L. 350.
51. Scott *v.* Dow, 14 N. J. L. 350.
52. Scott *v.* Dow, 14 N. J. L. 350.
53. See, generally, PARTIES, 30 Cyc. 1.
54. Houser *v.* Hampton, 29 N. C. 333.
55. Colton *v.* Mott, 15 Wend. (N. Y.) 619, holding that if it is not so brought defendant may avail himself of the objection at the trial and need not plead the non-joinder of the proper plaintiffs in abatement.
56. State *v.* Kennedy, 5 Strobh. (S. C.) 160.
57. Pace *v.* Vaughan, 6 Ill. 30.
58. Rickards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. 239.
59. Duncan *v.* Philpot, 64 N. C. 479.
60. See, generally, PLEADING, 31 Cyc. 1.
61. Pace *v.* Vaughan, 6 Ill. 30. But *compare* Madera *v.* Holdrege, 4 Colo. App. 126, 35 Pac. 52, holding that a complaint states facts sufficient to constitute a cause of action, without an allegation that the action is brought to recover the statutory penalty, where it alleges plaintiff's title, his right under the statute, the levy of process, his demand and the refusal to return, and his right to the possession of the property, and prays treble damages therefor.
62. Figueira *v.* Pyatt, 88 Ill. 402, 403, holding that it is not sufficient to allege that

failure to pay over money collected, an allegation of non-payment is a sufficient assignment of the breach.[63] In an action against a constable for the penalty given by statute for serving a justice's execution and taking fees before he had given bond, it is necessary to allege that defendant was a constable at the time of the service,[64] and to set forth the amount of the debt so that it may appear that the precept was within his authority to serve.[65] Where the notice takes the place of the petition or complaint,[66] no pleadings are necessary.[67]

**9. Issues, Proof, and Variance.**[68] In an action against a sheriff for the statutory penalty for neglecting to levy when requested, defendant may show payment of the judgment before suit brought;[69] and he may also show payment after suit brought if a supplemental answer be filed averring such payment.[70] Any but the slightest variance between the notice of the motion to amerce and the motion itself is fatal.[71]

**10. Evidence.**[72] In amercement proceedings the complaining party is held to strict proof of the alleged delinquency,[73] and must affirmatively prove every essential element of his right to recover,[74] and overcome the presumption in favor of the propriety of the sheriff's official conduct by a clear preponderance of proof.[75] One moving to amerce a sheriff for neglecting to levy a fieri facias need not show the precise value of the property on which levy might have been made, but it is sufficient to show that the neglect has deprived him of a substantial benefit under his writ.[76] Proof that a writ was directed by the clerk to a sheriff of another county, and mailed in due time to reach him in the regular course of the mail, is sufficient evidence that the writ came to his hands to authorize the entering of a judgment *nisi* for an amercement for failure to return it.[77] In an action against a sheriff for a penalty for selling property without notice, the sheriff's return is only *prima facie* evidence in his favor,[78] and may be overcome by slight evidence *aliunde*;[79] and when, in the face of positive testimony that subsequent

plaintiff did not have the articles specifically exempted, naming them, the court saying: "This averment might be true, and at the same time the plaintiff may have possessed one-half or three-fourths of the articles described in the list as exempt."

63. Kelly *v.* Payne, 1 McCord (S. C.) 138.

64. Eustis *v.* Kidder, 26 Me. 97, holding that it is not sufficient to allege that, having the writ in his custody "in the capacity of a constable," he then and there served it "in the capacity of a constable."

65. Barter *v.* Martin, 5 Me. 76.

66. See *supra*, IX, J, 6.

67. Wadsworth *v.* Parsons, 6 Ohio 449, holding that the practice does not require a plea or answer or issue to be made up in form.

68. See, generally, Pleading, 31 Cyc. 1.

69. Glascock *v.* Ashman, 52 Cal. 493.

70. Glascock *v.* Ashman, 52 Cal. 493.

71. Webb *v.* Anspach, 3 Ohio St. 522.

72. See, generally, Evidence, 16 Cyc. 821.

73. Maury *v.* Cooper, 3 J. J. Marsh. (Ky.) 224; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104. See also Craig *v.* Smith, 74 Ark. 364, 85 S. W. 1124, holding that in the case at bar the facts were insufficient to establish that the sheriff wilfully and corruptly neglected to pay over the money collected by him, within Kirby Dig. § 4487, providing that under such circumstances the officer should be liable for the amount collected, and ten per cent per month damages after demand.

**The testimony must be very clear to authorize judgment against the officer.** Bernard *v.* Flournoy, 4 J. J. Marsh. (Ky.) 99.

74. McMahan *v.* Edgerton, 34 Vt. 77.

75. Stevens *v.* Deats, 41 N. J. L. 340.

**Evidence insufficient to overcome presumption.**— On a rule against a sheriff to show cause why he should not be amerced for failure to enforce a fieri facias, the presumption that his conduct in respect to the writ was such as is required by law is not overcome by proof that the execution defendant was the owner of real estate on which the writ might have been levied, if it also appears that defendant's title was not of record and there is nothing to show that defendant was in actual possession or that a reasonably diligent inquiry by the sheriff would have disclosed his ownership; nor is such presumption overcome by mere proof that the execution defendant was the owner of personal property when the writ was put in the sheriff's hands, unless it further appears that such property was within the county and subject to levy, and was either in the possession of the execution defendant or else so situated that a reasonably diligent inquiry by the sheriff would have disclosed his ownership. Force *v.* Gardner, 43 N. J. L. 417.

76. White *v.* Rockafellar, 45 N. J. L. 299.

77. State *v.* Latham, 51 N. C. 233.

78. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654.

79. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654.

to making the return he has admitted its falsity, the officer offers neither denial nor explanation of such admissions, the effect of the return as evidence in his favor is completely overcome.[80]

**11. Trial or Hearing.**[81] The motion for amercement must be made in open court;[82] and on *scire facias* against a sheriff, issued on an amercement *nisi*, for not returning a writ, to which the sheriff appears and pleads, plaintiff is entitled to a trial at the return term of the scire facias.[83] It has been held that the sheriff is not entitled to a jury trial in amercement proceedings;[84] but according to other authority in proceedings to amerce a sheriff for failure to make a due return of an execution, the question as to whether it was made in proper time is a question of fact to be decided by a jury.[85]

**12. Judgment[86] or Order[87] of Amercement.** Where the proceedings for a statutory penalty are summary the judgment must set forth the facts necessary to give the court jurisdiction,[88] and make it appear that the moving party was entitled to make the motion.[89] An order of amercement has the force and effect of a judgment.[90] Where a plaintiff in an execution files a motion to compel the sheriff to pay over money collected under execution, and for the penalty for failing to pay on the return-day, and the motion is overruled, and plaintiff receives the principal sum, he cannot then have the judgment overruling the motion set aside and proceed for the penalty.[91] Where a judgment of amercement has been improvidently entered, it will be set aside[92] on application being made in due time.[93]

**13. Review.**[94] The proper mode of reviewing an order of amercement is by petition in error.[95] An order setting aside an amercement is not reviewable on writ of error or certiorari.[96]

## X. Liabilities on Official Bonds.

**A. What Bonds Are Official.** It has been held that any bond required by law to be executed by a sheriff should be regarded as an official bond;[97] and a bond of the sheriff in a penal sum to be paid to "the governor" is clearly an official bond, although in naming the obligee he is designated as "Captain General and Commander in Chief."[98]

**B. Persons Protected by Bond.** Although the nominal obligee in a sheriff's bond is a public officer, the bond inures to the benefit of individuals who

80. Raker *v.* Bucher, 100 Cal. 214, 34 Pac. 654.

81. See, generally, Trial.

82. Webb *v.* Anspach, 3 Ohio St. 522, holding that filing a paper in the clerk's office in vacation was not sufficient.

83. Hogg *v.* Bloodworth, 1 N. C. 531.

84. Reece *v.* Rice, 1 Kan. App. 311, 41 Pac. 218; Conkling *v.* Parker, 10 Ohio St. 28; Cook *v.* Drake, 1 Ohio Dec. (Reprint) 12, 1 West. L. J. 104.

85. Waugh *v.* Brittain, 49 N. C. 470.

On a trial in the supreme court for not returning process issued from that court, issues of fact must be tried on affidavits as the court has no power to call a jury. Kea *v.* Melvin, 48 N. C. 243.

86. See, generally, Judgments, 23 Cyc. 623.

87. See, generally, Orders, 29 Cyc. 1511.

88. Atkins *v.* Murphey, 9 Yerg. (Tenn.) 264.

89. Atkins *v.* Murphey, 9 Yerg. (Tenn.) 264.

90. Knox *v.* Merrill, 22 Kan. 572, holding that this is true even where the delinquent is an officer of the county in which the process issued.

An order of amercement is a lien on the real estate of the officer within the county from at least the day on which it is entered. Knox *v.* Merrill, 22 Kan. 572.

91. Conway *v.* Campbell, 11 Mo. 71.

92. Le Roy *v.* Blauvelt, 13 N. J. L. 341.

93. Le Roy *v.* Blauvelt, 13 N. J. L. 341, holding that where a judgment of amercement was entered against a sheriff without his knowledge in the September term, but no execution was issued thereon until after the November term, and it did not appear that he had knowledge thereof until the execution was issued, an application at the next term to set aside the judgment was not too late.

94. See, generally, Appeal and Error, 2 Cyc. 674; Review, 34 Cyc.

95. Ghost *v.* Hill, 11 Nebr. 472, 9 N. W. 642.

96. Wright *v.* Green, 11 N. J. L. 334.

97. Com. *v.* Adams, 3 Bush (Ky.) 41.

98. Governor *v.* Montfort, 23 N. C. 155, 157, where it is said: "Even if the epithet 'gov-

are injured by the misfeasance or nonfeasance of the officer,[99] the nominal obligee being a mere trustee of the bond for those who are injured by breaches of the condition thereof.[1]

**C. General Rules in Relation to Liability — 1. Liability Limited by Terms of Bond.** The contract of the sureties of a sheriff or constable is *strictissimi juris*;[2] they stand upon the letter of the bond, and are bound no further than the letter goes,[3] and cannot be held liable for a default not fairly covered by the condition of the bond,[4] nor can their liability be extended by implication or construction,[5] beyond a reasonable meaning of the terms of the bond, construed with reference to the purposes contemplated by the law requiring the bond.[6] But where the bond contains a condition not authorized or illegal, such condition may, unless the statute makes the bond void in consequence thereof, be disregarded and the bond enforced as though it were not present.[7] Where a deputy sheriff executes a bond to his principal for the performance of "all the duties required of him as deputy sheriff," these words embrace all the duties which are by law devolved on the sheriff.[8] Where a surety on the bond of a deputy sheriff executes the bond several days before the expiration of the term of the deputy, and delivers the bond to him, and he is appointed for a new term, at the beginning of which he delivers the bond to the sheriff, it cannot be held as a matter of law that the surety's intention was to have the bond cover the new term, although the recitals in the bond would apply to either the old or the new term.[9]

ernor' were not found in the instrument, we are not sure the bond would be bad; since we know the legal identity of the Governor and the Captain General."

99. Skinner *v.* Phillips, 4 Mass. 68.

1. Skinner *v.* Phillips, 4 Mass. 68.

2. Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116; People *v.* Foster, 133 Ill. 496, 23 N. E. 615; Com. *v.* Stone, 114 Ky. 511, 71 S. W. 428, 24 Ky. L. Rep. 1297; State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131.

3. State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131; McIntosh *v.* Jarvis, 8 U. C. Q. B. 530.

4. *California.*— Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504.

*Colorado.*— Tate *v.* People, 6 Colo. App. 202, 40 Pac. 471, holding that where a sheriff's bond was conditioned merely that he would turn over all moneys, etc., that might come into his hands as such officer to his successors in office, a suit could not be maintained thereon by one to whom the sheriff failed to turn over moneys collected on an execution.

*Florida.*— Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194.

*Kentucky.*— Com. *v.* Stone, 114 Ky. 511, 71 S. W. 428, 24 Ky. L. Rep. 1297, holding that where a county levied and the sheriff collected a tax for county purposes in excess of the constitutional limit, the sureties on his general official bond, conditioned as required by St. § 4556, that he should "well and truly discharge all the duties of said office, and pay over to such persons, at such times as they may be respectively entitled thereto, all money that may come into his hands as sheriff," were not liable for such excess of tax collected.

*Massachusetts.*— Thomas *v.* Blake, 126 Mass. 320.

*Mississippi.*— Brown *v.* Mosely, 11 Sm. & M. 354.

*New York.*— People *v.* Lucas, 93 N. Y. 585 [*reversing* 25 Hun 610].

*North Carolina.*— Governor *v.* Morris, 7 N. C. 146.

*Pennsylvania.*— Com. *v.* Hoffman, 74 Pa. St. 105.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 345 *et seq.*

5. Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504; People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

6. Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194; Com. *v.* Stone, 114 Ky. 511, 71 S. W. 428, 24 Ky. L. Rep. 1297 [*following* Osenton *v.* Burnett, 41 S. W. 270, 19 Ky. L. Rep. 610]; Eaton *v.* Kelly, 72 N. C. 110; Matlock *v.* State Bank, 7 Yerg. (Tenn.) 91.

**Duties for which special bond required.**— Where the condition of a sheriff's bond has appropriate words to secure the performance of a certain class of duties imposed on him by law, general terms superadded thereto, although they are large enough to include all his official duties, will not have the effect of extending the liability of the sureties to other duties for which by law a separate bond is directed to be given, such special bond not having been given. Governor *v.* Matlock, 12 N. C. 214.

7. State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822, where the bond of a sheriff provided for the faithful discharge of his duties as sheriff, and that he "shall account for and pay over all money that shall come to his hands for school purposes for the year 1893, as provided in section 46, chapter 45, of the code," and the clause "for the year 1893" was eliminated by the court, and the bond held to cover school money received by the sheriff in any year of his term.

8. Wood *v.* Cook, 31 Ill. 271.

9. Thomas *v.* Bleakie, 136 Mass. 568.

**2. Liability as Between Sureties on Different Bonds — a. Where Officer Serves Successive Terms** — (I) *In General.* Where an officer serves several successive terms the liability for a default falls upon the sureties upon his bond for the term in which such default occurred.[10] And so where process is delivered to a sheriff during one term, but he does not commence to execute it until he has entered on a new term with new sureties, such new sureties are liable for any defaults in respect to such process,[11] and the old sureties cannot be held therefor.[12] But the rule that a sheriff who commences execution of process must complete the same [13] leads to the further rule that, where a sheriff commences the execution of process during one term of office, his sureties for that term are responsible for whatever he does or neglects to do in relation thereto, although his default does not occur until after he has entered upon a new term of office and qualified with new sureties;[14] and the new sureties cannot be held to respond for such default.[15]

(II) *Deputy Serving Through Successive Terms of Same Sheriff.* It has been held that an under-sheriff's bond need not be renewed, on the reappointment of the sheriff or the renewal of his commission, if there be no intermediate time when he is not sheriff, but the original bond is security against subsequent breaches;[16] but there is also authority for the view that where a sheriff takes a bond from his deputy to indemnify, etc., during his continuance in office, such bond refers only to the term of the principal's office then current, and cannot be held to embrace defaults which occur during the succeeding term.[17]

**b. Where Officer Gives Successive Bonds.** The general rule is that where a

10. *Idaho.*— Work *v.* Kinney, 8 Ida. 771, 71 Pac. 477.

*Indiana.*— Rany *v.* Governor, 4 Blackf. 2.

*Kansas.*— Studebaker *v.* Johnson, 41 Kan. 326, 21 Pac. 271, 13 Am. St. Rep. 287.

*Kentucky.*— Cook *v.* Clark, 16 S. W. 269, 13 Ky. L. Rep. 100.

*Missouri.*— State *v.* McCormack, 50 Mo. 568; Ingram *v.* McCombs, 17 Mo. 558; Warren *v.* State, 11 Mo. 583.

*North Carolina.*— Waring *v.* Wilroy, 32 N. C. 329.

*Tennessee.*—Sherrell *v.* Goodrum, 3 Humphr. 419.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 355.

**Continuing breach.**— When a claim was put into a constable's hands for collection during one year, and he was guilty of a breach of duty in not collecting it during that year, and he was reappointed for the succeeding year, and, the claim still remaining in his hands, he was again guilty of a similar breach of duty, the party injured had his election to sue on the bond of either year, or on both bonds. Hubbard *v.* Wall, 31 N. C. 20; Governor *v.* Lee, 20 N. C. 594.

11. State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62; Sherrell *v.* Goodrum, 3 Humphr. (Tenn.) 419.

12. Sherrell *v.* Goodrum, 3 Humphr. (Tenn.) 419.

**Statutory duty to execute process received during term.**— Where the statute makes it the duty of an officer who receives process to execute the same, although his term expires before the return-day, an officer's sureties for his first term are liable for his acts with respect to process received by him during such term, although he did nothing with respect thereto until he had entered upon a second term and qualified with new sureties. McCormick *v.* Moss, 41 Ill. 352.

13. See *supra*, III, C, 1, a.

14. *Colorado.*— People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409.

*Kentucky.*— Colyer *v.* Higgins, 1 Duv. 6, 85 Am. Dec. 601.

*Missouri.*— Marney *v.* State, 13 Mo. 7, holding that where a sheriff sells real estate on a credit, and collects the money during a second term of office, for which he has given bond, a failure to pay it over is a breach of the bond given for the term of office during which the sale was made. But *compare* cases cited *infra*, note 15.

*New Jersey.*— State *v.* Hamilton, 16 N. J. L. 153.

*Tennessee.*— Campbell *v.* Cobb, 2 Sneed 18.

*Virginia.*— Tyree *v.* Wilson, 9 Gratt. 59, 58 Am. Dec. 213.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 355; and *infra*, X, C, 14, b.

**Reappointment of deputy.**— Where a sheriff resigned his office before the return-day of a warrant of distress on which his deputy had collected part of the money due, and the succeeding sheriff reappointed the same deputy, who afterward completed the collection and embezzled all the money, the sureties on the bond to the first sheriff were liable to the first sheriff for the whole amount. Larned *v.* Allen, 13 Mass. 295.

15. Colyer *v.* Higgins, 1 Duv. (Ky.) 6, 85 Am. Dec. 601. But *compare* State *v.* McCormack, 50 Mo. 568; Ingram *v.* McCombs, 17 Mo. 558; Warren *v.* State, 11 Mo. 583.

16. Hughes *v.* Smith, 5 Johns. (N. Y.) 168.

17. Thomas *v.* Summey, 46 N. C. 554 [*following* Banner *v.* McMurray, 12 N. C. 218]; Munford *v.* Rice, 6 Munf. (Va.) 81 [*following* Com. *v.* Fairfax, 4 Hen. & M. (Va.) 208,

sheriff gives two or more successive bonds the liability for a default falls upon the sureties on the bond which was in force when the default occurred,[18] and the renewal bond does not cover any defaults which occurred before its execution,[19] unless by its terms the liability is so extended.[20] But it has also been held that as soon as process is delivered to a sheriff it attaches itself, in contemplation of law, to the bond which is then in force and which gives him authority to act at that time, and such bond, rather than a subsequent bond, must respond for any default in connection with such writ.[21] Under some statutes a renewal bond does not supersede the original bond, but the sureties on both bonds are bound as cosureties for any future default or misfeasance of the sheriff.[22]

**c. Liability as Between General and Special Bond.** Where a sheriff is required by law to give a special bond in respect to certain duties, the liability for a default in respect to such duties falls upon such special bond rather than upon his general

*distinguishing* Royster *v.* Leake, 2 Munf. (Va.) 280, and *followed* in Tyler *v.* Nelson, 14 Gratt. (Va.) 214].

**18.** *Alabama.*— Dumas *v.* Patterson, 9 Ala. 484 (holding that where a sheriff has renewed his bond, so as to have several sets of sureties, those sureties will be liable for his default in not paying over money collected on executions, who were such at the time he converted it, for it is from this latter period, and not its collection, that their liability to suit commences); Governor *v.* Robbins, 7 Ala. 79.

*Maryland.*— Heuitt *v.* State, 6 Harr. & J. 95, 14 Am. Dec. 259.

*North Carolina.*— Miller *v.* Davis, 29 N. C. 198; Goforth *v.* Lackey, 25 N. C. 25, holding that where money had been collected during one year, although a demand upon the officer to pay what had been so collected was not made until the next year, the breach occurred in the former year, and the sureties for that year were alone responsible.

*Ohio.*— Woolard *v.* Favorite, 17 Ohio Cir. Ct. 72, 9 Ohio Cir. Dec. 686, holding that the last of two successive bonds given by a sheriff during a single term is liable for his official default in failing to pay over to his successor moneys received and remaining in his hands as sheriff, unless it be affirmatively shown that such default became absolute during the time covered by the first bond.

*West Virginia.*— State *v.* Wade, 15 W. Va. 524.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 355.

**Application of payments.**— Where the same person was sheriff in 1871 and in 1872, with different sureties on his bonds, and a balance due from him in 1871 was carried over into his settlement for the levy of 1872, and between the two settlements he paid over more than the amount of this balance, it was held that, in the absence of any appropriation for payment, it should be applied, as between the sureties, to the prior indebtedness of 1871, it not appearing that any part of it was paid from taxes collected in 1872. Helm *v.* Com., 79 Ky. 67.

**Where there has been a substitution of sureties** the old sureties will be relieved from a judgment entered against them through negligence, for a default which occurred after the substitution. Hutchinson *v.* Baby, 2 Ont. Pr. 126.

**19.** Ketler *v.* Thompson, 13 Bush (Ky.) 287; State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654.

**20.** State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654 (holding that where during a sheriff's term of office a new official bond was given, reciting that "whereas, the said John Finn was, on the fifth day of November, 1878, duly and regularly elected sheriff . . . and whereas, by order of the circuit court made on the twenty-ninth day of November, 1879, said John Finn was ordered to give a new bond in lieu of the bond approved on November 21, 1878: Now, therefore . . . if the said John Finn shall well and faithfully in all things discharge the duties of the office of the sheriff . . . during his continuance in the said office, then the above obligation to be void," etc., the new sureties were liable as from the beginning of the term); Treasurers *v.* Taylor, 2 Bailey (S. C.) 524 (holding that under the act of 1820, requiring sheriffs in office to give additional security for the faithful performance of their official duties, the sureties to a bond executed by the sheriff in office for additional security are liable as well for moneys collected by him before the execution of the bond as for moneys collected afterward, unless, perhaps, where the sheriff and his original sureties were sued to insolvency before the additional bond was executed).

**21.** State *v.* Turner, 8 Gill & J. (Md.) 125; State *v.* McDonald, 2 N. J. L. 355 (holding that the sureties on a sheriff's bond for one year are not liable for money raised by him in that year on executions of another year); Holliday *v.* Eastwood, 12 N. C. 157; Fitts *v.* Hawkins, 9 N. C. 394 (holding that a sheriff's sureties for one year are not liable for any taxes received by him under the lists furnished in the preceding year; but the sureties of that year are liable); Wooddell *v.* Bruffy, 25 W. Va. 465.

**22.** Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188; Ketler *v.* Thompson, 13 Bush (Ky.) 287; Poole *v.* Cox, 31 N. C. 69, 49 Am. Dec. 410; State *v.* Crooks, 7 Ohio, Pt. II, 221. But *compare* Miller *v.* Davis, 29 N. C. 198.

**Apportionment of liability.**— Under a stat-

official bond;[23] and a surety on the special bond who is subjected to liability can have no recourse on the general official bond of the sheriff.[24] Where a sheriff becomes liable for money received by him from a bank as compensation for deposits of tax money which he has made therein, it is proper to sue for such amount on his bond as sheriff, and not upon the additional bond which the sheriff is required to give as collector of taxes.[25]

**3. Liability on Voluntary Bond Given in Addition to Bond Required by Law.** Although a sheriff has been already inducted into office and is acting under an official bond duly accepted and approved, there is nothing to prevent him from voluntarily executing another official bond, and if the latter bond be in form and is accepted and duly approved, he and his sureties will be liable upon it for any neglect or other improper conduct.[26]

**4. Defaults Prior to Execution or Approval of Bond.** The sureties of a sheriff cannot be held liable for a default which occurred before the bond was executed;[27] and where, under the statute, the bond takes effect only from its approval, there can be no recovery thereon for any act of the officer prior to such approval.[28] It is also held that the sureties of a sheriff are not responsible for money collected by him on an execution which came into his hands as deputy of a former sheriff, although the money was received after they became sureties.[29] But the fact that process was delivered to an officer before his bond was executed does not relieve his sureties from liability for his failure, after they became bound, to execute and return it.[30]

**5. Duties Imposed After Execution of Bond.** The official bond of a sheriff or constable refers to the duties of the officer prescribed by law at the time of its execution,[31] and does not cover new duties imposed upon the officer after its execution,[32] unless the words of the bond, or the law in force at its date, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions.[33] But where duties existed at the time the bond was executed the sureties cannot avoid liability in respect thereto on the ground that the duties were created by a statute enacted after that under whose provisions the bond was given.[34]

**6. Unofficial Acts.** The bond merely protects for what the officer unlawfully

ute providing that the sureties on all bonds executed by the sheriff shall be jointly and severally liable for his default during the term in which the bonds may be executed, whether such liability occurred before or after the execution of such bond or bonds, it has been held that the sureties of a sheriff on his revenue bonds for the collection of taxes for two separate years were each liable for one half of the sheriff's default in the payment of county claims, for which sufficient taxes had been collected by him. Baker *v.* Maryland Fidelity, etc., Co., 73 S. W. 1025, 24 Ky. L. Rep. 2196.

23. Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289 (holding that where the sheriff, as public administrator, on being appointed administrator of an estate gave an additional bond as required by statute, the sureties on such bond and not those on the sheriff's official bond were primarily liable for losses resulting from his failure to properly administer the estate, and that the remedy on the administration bond must be exhausted before resort could be had to the officer's general official bond); Fork Lick Dist. Bd. of Education *v.* Rader, 42 W. Va. 178, 24 S. E. 680 (holding that as, under Acts (1877), c. 77, § 46, it was the duty of the county court to require the sheriff-elect to give a special bond to account for school money, the sureties on his general bond could not be held liable for any default by him as to school funds).

Special bond as tax collector see *infra*, X, D, 10.

24. Briggs *v.* Manning, 80 Ark. 304, 97 S. W. 289.

25. Hughes *v.* People, 82 Ill. 78.

26. Johnson *v.* Caffey, 59 Ala. 331. See also Harris *v.* State, 55 Miss. 50.

27. Governor *v.* Gibson, 14 Ala. 326 (conversion of money); Ketler *v.* Thompson, 13 Bush (Ky.) 287; Thomas *v.* Blake, 126 Mass. 320 (bond of deputy).

28. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346; Bruce *v.* State, 11 Gill & J. (Md.) 382.

29. People *v.* McHenry, 19 Wend. (N. Y.) 482.

30. Faulkner *v.* State, 9 Ark. 14.

31. People *v.* Brush, 6 Wend. (N. Y.) 454.

32. White *v.* East Saginaw, 43 Mich. 567, 6 N. W. 86; New York *v.* Ryan, 4 Transcr. App. (N. Y.) 363, 35 How. Pr. 408. See also People *v.* Brush, 6 Wend. (N. Y.) 454; King *v.* Nichols, 16 Ohio St. 80.

33. King *v.* Nichols, 16 Ohio St. 80. See also Bartlett *v.* Governor, 2 Bibb (Ky.) 556.

34. People *v.* Brush, 6 Wend. (N. Y.) 454.

does or omits to do in the execution of his office or some official duty imposed by law,[35] and does not cover any act or omission done without authority of law or in his private or personal capacity as a man or citizen,[36] or acts invoking a mere abuse or usurpation of power [37] and done without process of any kind.[38] According to some authorities where an officer does a wrongful act under color of office, although not by virtue thereof, his sureties are liable;[39] but it has also been held that the liability of the sureties extends only to acts done by virtue of the office and

35. *Illinois.*— People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

*Maine.*— Dane *v.* Gilmore, 49 Me. 173.

*Maryland.*— State *v.* Brown, 50 Md. 318 [*followed* in State *v.* Timmons, 90 Md. 10, 44 Atl. 1003].

*Missouri.*— State *v.* Dierker, 101 Mo. App. 636, 74 S. W. 153.

*New York.*— De Sisto *v.* Stimmel, 58 N. Y. App. Div. 486, 69 N. Y. Suppl. 431 [*affirming* 31 Misc. 711, 65 N. Y. Suppl. 314 (*reversing* 29 Misc. 769, 61 N. Y. Suppl. 57)].

*Oregon.*— Feller *v.* Gates, 40 Oreg. 543, 67 Pac. 416, 91 Am. St. Rep. 492, 56 L. R. A. 630.

*South Carolina.*— Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

*Texas.*—Sneed *v.* McFathridge, 43 Tex. Civ. App. 592, 97 S. W. 113; Baughn *v.* Allen, (Civ. App. 1903) 73 S. W. 1063.

*West Virginia.*— State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 356.

36. *Alabama.*— Bruister *v.* Gavin, 127 Ala. 317, 28 So. 410; Governor *v.* Hancock, 2 Ala. 728 [*followed* in Governor *v.* Pearce, 31 Ala. 465].

*Arizona.*— Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116.

*California.*— Schloss *v.* White, 16 Cal. 65; Hill *v.* Kemble, 9 Cal. 71.

*Illinois.*— Greenberg *v.* People, 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223 [*affirming* 125 Ill. App. 626]; People *v.* Foster, 133 Ill. 496, 23 N. E. 615; People *v.* Wilmoth, 45 Ill. App. 73; Cornell *v.* People, 37 Ill. App. 490; Walsh *v.* People, 6 Ill. App. 204.

*Indiana.*— State *v.* Clausmeier, 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73; Wilson *v.* State, 13 Ind. 341.

*Kentucky.*— Com. *v.* Sommers, 3 Bush 555; Jewell *v.* Mills, 3 Bush 62; Sanders *v.* Parrott, 1 Duv. 292; Com. *v.* Cole, 7 B. Mon. 250, 46 Am. Dec. 506.

*Louisiana.*— Gay *v.* Lejeune, 26 La. Ann. 250.

*Maine.*— Smith *v.* Berry, 37 Me. 298, holding that a sheriff cannot recover on the bond of his deputy for losses sustained in defending a suit based on unofficial acts of the deputy.

*Maryland.*— State *v.* Dayton, 101 Md. 598, 61 Atl. 624; State *v.* Brown, 54 Md. 318 [*followed* in State *v.* Timmons, 90 Md. 10, 44 Atl. 1003].

*Massachusetts.*— Austin *v.* French, 7 Metc. 126.

*Mississippi.*— Furlong *v.* State, 58 Miss. 717; Robinson *v.* State, 47 Miss. 423; Radford *v.* Hull, 30 Miss. 712.

*Missouri.*— State *v.* Davis, 88 Mo. 585.

*New York.*— De Sisto *v.* Stimmel, 58 N. Y. App. Div. 486, 69 N. Y. Suppl. 431 [*affirming* 31 Misc. 711, 65 N. Y. Suppl. 314 (*reversing* 29 Misc. 769, 61 N. Y. Suppl. 57)].

*Pennsylvania.*— Juniata Bank *v.* Beale, 1 Watts & S. 227.

*South Carolina.*— Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

*Tennessee.*— Haynes *v.* Bridge, 1 Coldw. 32.

*Texas.*— Baughn *v.* Allen, (Civ. App. 1903) 73 S. W. 1063; Brent *v.* Hohorst, 1 Tex. App. Civ. Cas. § 343.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 356.

37. *Maryland.*— State *v.* Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628.

*Missouri.*— State *v.* Dierker, 101 Mo. App. 636, 74 S. W. 153; State *v.* Hendricks, 88 Mo. App. 560.

*Nebraska.*— Kendall *v.* Aleshire, 28 Nebr. 707, 45 N. W. 167, 26 Am. St. Rep. 367.

*Oregon.*— Feller *v.* Gates, 40 Oreg. 543, 67 Pac. 416, 91 Am. St. Rep. 492, 56 L. R. A. 630.

*South Carolina.*— Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

*Texas.*— Sneed *v.* McFathridge, 43 Tex. Civ. App. 592, 97 S. W. 113.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 356.

38. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547; State *v.* Mann, 21 Wis. 684. See also Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278.

39. *Alabama.*— Couch *v.* Davidson, 109 Ala. 313, 19 So. 507.

*Arizona.*— Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116.

*Georgia.*— Jefferson *v.* Hartley, 81 Ga. 716, 9 S. E. 174.

*Illinois.*— Greenberg *v.* People, 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223 [*affirming* 125 Ill. App. 626]. See also People *v.* Wilmoth, 45 Ill. App. 73.

*Indiana.*— State *v.* Clausmeier, 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73; State *v.* Druly, 3 Ind. 431; State *v.* Walford, 11 Ind. App. 392, 39 N. E. 162.

*Kentucky.*— Jewell *v.* Mills, 3 Bush 62.

*Massachusetts.*— Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278; Lowell *v.* Parker, 10 Metc. 309, 43 Am. Dec. 436.

*Minnesota.*— Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219.

*New York.*— Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Suppl. 872.

*North Carolina.*— The rule stated in the

not to acts done merely under color of office.[40] The mere fact that the deputy sheriff is directed by his principal to levy on specific property under an execution does not constitute him the servant or special agent of the sheriff for that particular service; and if the sheriff is subjected to damages in consequence of his acts in respect to such execution, the deputy and his sureties are liable to indemnify the sheriff, notwithstanding such instructions.[41] In the note are cited a number of illustrative cases as to acts which have been held not covered by the bond,[42] and acts in the performance of which the sheriff has been held to act officially so as to render his sureties liable.[43]

**7. Acts of Constable Outside of Precinct or District.** Where the authority of a constable extends over the whole county,[44] his sureties are liable for his official acts within the county, although outside of his own precinct or district,[45] unless of course the condition of the bond is such that it must be construed to apply only to acts within his own district.[46]

text is now established by express statute. See State *v.* Boyd, 120 N. C. 56, 26 S. E. 700. But earlier decisions held otherwise. See *infra*, note 40.

*Virginia.*— Mosby *v.* Mosby, 9 Gratt. 584, holding that the sureties in a deputy sheriff's official bond, the condition of which is that the sheriff shall be saved harmless from all losses or damages which he may sustain or be liable for in consequence of any failure or misconduct on the part of the deputy, are liable for the acts of the deputy done *colore officii*, although without lawful authority, whereby the sheriff became chargeable.

*West Virginia.*— Lucas *v.* Locke, 11 W. Va. 81.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 356.

**40.** Huffman *v.* Koppelkom, 8 Nebr. 344, 1 N. W. 243; Butts *v.* Brown, 33 N. C. 141 [*following* State *v.* Long, 30 N. C. 415]; Taylor *v.* Parker, 43 Wis. 78.

**41.** Tuttle *v.* Cook, 15 Wend. (N. Y.) 274.

**42.** *Illinois.*— People *v.* Foster, 133 Ill. 496, 23 N. E. 615, holding that the sureties are not liable for the act of the sheriff in falsely and fraudulently certifying to bills rendered by bailiffs against the county, it forming no part of the sheriff's official duties.

*Indiana.*— State *v.* Clausmeier, 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73, holding that a sheriff does not act officially in sending photographs of an accused person, with descriptions of such person, to various individuals and police departments, whereby the accused is held out to the world as a criminal; and the sheriff and his sureties are not liable on his official bond for such acts.

*Maryland.*— State *v.* Wade, 87 Md. 529, 40 Atl. 104, 40 L. R. A. 628, holding that the sureties on the sheriff's bond are not liable for the acts of the sheriff in maliciously aiding a mob to lynch a prisoner in his charge.

*Oregon.*— Feller *v.* Gates, 40 Oreg. 543, 67 Pac. 416, 91 Am. St. Rep. 492, 56 L. R. A. 630, holding that the act of a constable in receiving money from an execution debtor under a contract not to serve an execution against the debtor, and which required the constable to repay the money on the reversal of the judgment on an appeal therefrom, being beyond his powers and a violation of his duty, the sureties on his official bond were not liable to the execution debtor for his conversion of the money.

*Pennsylvania.*— Juniata Bank *v.* Beale, 1 Watts & S. 227, holding that a sheriff's sureties are not liable on their bond for the amount of an execution placed in the hands of the sheriff, which he agreed to pay plaintiff in consideration of his indebtedness to defendant, if it appears that defendant's personal property which had been levied on had been sold and the proceeds applied to prior levies, although the sheriff may have given a receipt to defendant in the execution for the amount of the money, stating how the money had been paid.

*Texas.*— Sneed *v.* McFathridge, 43 Tex. Civ. App. 592, 97 S. W. 113, holding that where a warrant was issued by a justice of the peace, and not indorsed as required by the statute, but the sheriff of another county arrested defendant under the warrant, his act was extraofficial, and the sureties on his official bond not liable therefor.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 356.

**43.** State *v.* Griffith, 63 Mo. 545 (holding that a sheriff appointed in the place of a trustee to execute a deed of trust acts officially, and for breach of trust or failure of duty in that regard is liable on his bond); Stephenson *v.* Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137 (holding that where a prisoner charged with a misdemeanor attempts to escape from the custody of a constable, and the officer, in order to prevent his escape, fires on the prisoner, and kills a horse ridden by the latter, the sureties on the officer's bond are liable for the value of the horse, although the officer had no right to fire on the prisoner).

**44.** See *supra*, III, A, 2.

**45.** McNeale *v.* Governor, 3 Gratt. (Va.) 286, 293, where it is said: "The Court is further of opinion, that the constable is an officer appointed for the whole county, and though he is prohibited by law, under a penalty, from executing warrants and levying executions out of his particular precinct, yet that his official acts in any part of the county are valid, and he and his sureties in his official bond responsible therefor."

**46.** Governor *v.* Morris, 7 N. C. 146, hold-

**8. Acts of Deputies.** As a general rule the official bond of a sheriff or constable may be liable to answer for the official defaults or misconduct of his deputies,[47] but not for acts of a deputy outside of the scope of his powers or duties.[48]

**9. Existence of Office.** Where an office has no legal existence the bond of a person assuming to hold such office imposes no liability upon the sureties.[49]

**10. Validity of Election or Appointment of Officer.**[50] Where the appointment of a constable is void for lack of authority in the appointing officer to make the appointment, the constable's official bond is also void and cannot be sued upon;[51] but where the appointment or election of a sheriff or constable and his induction into office are void because of his ineligibility to the office,[52] his sureties are nevertheless liable for his official acts or defaults while he is actually holding the office.[53] Where the record of the county court showed that a certain person was appointed a constable for a year, and it was proved that he acted as such for the year ensuing, he and his sureties were held liable for a breach of his bond occurring within the ensuing year, although his appointment was not made at the term prescribed by law for appointing constables, the condition of the bond not expressing the term for which he was appointed.[54]

**11. Failure of Officer to Take Oath of Office.**[55] Where a person duly elected or appointed a sheriff or constable has duly acted as such the sureties on his official

ing that where a constable was appointed "for the district of N" in C county, and gave a bond truly to discharge his official duties "in said district," such bond did not cover a default occurring outside of N district, although it occurred within the county of C and the constable's authority extended throughout the county.

**47.** *Alabama.*— Hill *v.* Fitzpatrick, 6 Ala. 314; McBroom *v.* Governor, 4 Port. 90.

*California.*— Towle *v.* Matheus, 130 Cal. 574, 62 Pac. 1064.

*Georgia.*— Crawford *v.* Howard, 9 Ga. 314.

*Indiana.*— Snell *v.* State, 43 Ind. 359.

*Iowa.*— Brayton *v.* Town, 12 Iowa 346.

*Kansas.*— McCracken *v.* Todd, 1 Kan. 148.

*Kentucky.*— Johnson *v.* Williams, 111 Ky. 289, 63 S. W. 759, 23 Ky. L. Rep. 658, 54 L. R. A. 220; Shields *v.* Pflanz, 101 Ky. 407, 41 S. W. 267, 19 Ky. L. Rep. 648; Winterbowen *v.* Haycraft, 7 Bush 57; Scarce *v.* Page, 12 B. Mon. 311; Stevens *v.* Stevens, 4 T. B. Mon. 524.

*Mississippi.*— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423.

*Missouri.*— State *v.* Muir, 20 Mo. 303 (holding that the sureties of a constable are liable for the delinquencies of one acting as deputy, with the consent of the constable, although his appointment is not filed as required by law); State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563; Evans *v.* Hays, 1 Mo. 697.

*New York.*— People *v.* Ten Eyck, 13 Wend. 448; Paddock *v.* Cameron, 8 Cow. 212. See also Flack *v.* Brassel, 1 N. Y. App. Div. 538, 37 N. Y. Suppl. 578 [*affirmed* in 153 N. Y. 621, 47 N. E. 807].

*North Carolina.*— Quin *v.* Roane, 24 N. C. 144.

*Tennessee.*— Todd *v.* Jackson, 3 Humphr. 398; Snell *v.* Rawlings, 3 Humphr. 85.

*Virginia.*— Tyree *v.* Wilson, 9 Gratt. 59, 58 Am. Dec. 213.

*Wisconsin.*— Dishneau *v.* Newton, 91 Wis. 199, 64 N. W. 879.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 358.

**Liability for nonfeasance only.**— Under a statute providing that "sheriffs shall be responsible for the neglect and default of their deputies in the execution of their office" the sheriff is not liable on his bond for the active malfeasance, as distinguished from mere nonfeasance of his deputy; and so where a deputy sheriff by direction of plaintiff in the suit wrongfully took the property of a third person, claiming it to be the property of defendant in the action, the sheriff was not liable on his bond therefor. Coite *v.* Lynes, 33 Conn. 109.

**An action for death** caused by a deputy killing a person attempting to escape will not lie against the sheriff under Tex. Rev. St. art. 2899. Hendrick *v.* Walton, 69 Tex. 192, 6 S. W. 749.

**48.** Edwards *v.* Taylor, 4 Bibb (Ky.) 353.

**49.** Tinsley *v.* Kirby, 17 S. C. 1, holding that where the constitution provided that constables should be chosen, etc., in such manner as the general assembly should direct, but the legislature had made no provision for the election of constables, there could be therefore no regularly commissioned constable in the state, and hence a surety on a constable's bond could not be held liable for misfeasance in office of one claiming to act as constable.

**50. Election or appointment** generally see *supra*, II, A, B.

**51.** Olds *v.* State, 6 Blackf. (Ind.) 91.

**52. Eligibility to office of:** Constable see *supra*, II, B, 2. Deputy see *supra*, II, C, 4. Sheriff see *suspra*, II, A, 3.

**53.** Com. *v.* Teal, 14 B. Mon. (Ky.) 29 (holding that where a non-resident of the district is appointed a constable, his bond may be enforced as a common-law obligation); Jones *v.* Scanland, 6 Humphr. (Tenn.) 195, 44 Am. Dec. 300.

**54.** Shipman *v.* McMinn, 60 N. C. 122.

**55. Oath of:** Constable see *supra*, II, B,

bond cannot escape liability for his acts or defaults on the ground that he never took the oath of office prescribed by law.[56]

**12. Irregularities or Informalities in Bond — a. In General.** The sureties on the official bond are not relieved of liability thereon because of irregularities or informalities in the bond,[57] or erroneous recitals therein.[58] And a bond given as an official bond by a sheriff, although not valid as a statute bond, because not conforming to statute, may be enforced as a common-law bond.[59]

**b. Excessive Penalty.** Where a bond is voluntarily given by the sheriff, the fact that the penalty is larger than the statute prescribes does not relieve the sureties from liability for a breach.[60]

**c. Lack of Approval.** According to some authorities the purpose of a statute requiring the approval of the official bond of a sheriff or constable [61] is merely to

3, a. Deputy see *supra*, II, C, 5. Sheriff see *supra*, II, A, 5.

**56.** Burtles *v.* State, 4 Md. 273; Musselman *v.* Com., 7 Pa. St. 240.

**57.** *Indiana.*— State *v.* Lynch, 6 Blackf. 395, holding that an action of debt against a constable and his sureties may be maintained on a bond taken by the clerk in vacation and regular in every respect, except that the penalty was not fixed by the county board, as provided by statute.

*Iowa.*— Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148, holding that the sureties on a sheriff's official bond, made "to the People of Woodbury county," are liable thereon, although there is no such person or corporation known to the law.

*Louisiana.*— See Villere *v.* Armstrong 4 Mart. N. S. 21.

*Maryland.*— Young *v.* State, 7 Gill & J. 253, holding that it was no defense, in an action against the sureties on a sheriff's official bond, that the bond was not attested by the justices of the orphans' court, as required by statute, since this ceremony was prescribed, not for the protection of the sureties, but in order to render them the more securely bound.

*Nebraska.*— Riggs *v.* Miller, 34 Nebr. 666, 52 N. W. 567 (holding that, although the statute required the bond of a deputy sheriff to run to the sheriff, the fact that it was made to run to the county instead was a mere irregularity, and would not affect the liability of the principal or sureties thereon); Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577 (holding that the fact that a sheriff's bond was made payable to the state, instead of to the county for which the sheriff was elected, as required by Comp. Laws, c. 10, § 3, was a mere irregularity, of which neither the sheriff nor his sureties could take advantage in an action thereon).

*New York.*—Skellinger *v.* Yendes, 12 Wend. 306.

*North Carolina.*—White *v.* Miller, 20 N. C. 50, holding that a bond executed by a constable, which stipulated that he should "well and faithfully execute the office of constable during his continuance in said office, agreeably to an act of assembly," etc., was good as an official bond, under the act of 1818 prescribing the duties of constables, although it did not contain all which the statute required, and an action might be sustained against the sureties on such bond.

*South Carolina.*—Treasury Com'rs *v.* Muse, 3 Brev. 150, holding that in an action on a sheriff's bond, exceptions to the condition thereof on the ground that it contained the words "as required by law," instead of the words "as required, or to be required by law," were not well taken; the condition of the bond being substantially good. See also Treasurers *v.* Stevens, 2 McCord 107.

*Tennessee.*— Rader *v.* Davis, 5 Lea 536, holding that where a constable's bond was acknowledged by the parties in open court, and the constable inducted into office on the faith of it, it was immaterial, as affecting the liability in an action thereon, that his name was not inserted in the blank in the body of the bond.

*Vermont.*— Rutland *v.* Paige, 24 Vt. 181.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 347.

But *compare* Middleton Tp. *v.* McCormick, 3 N. J. L. 500; Nottingham Tp. *v.* Giles, 2 N. J. L. 120.

**58.** State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 93 Am. St. Rep. 137, holding that the fact that a sheriff's official bond recites that it was given in pursuance of the "election" of a sheriff, when in fact he was appointed by the governor, does not avoid liability thereon.

**59.** *Georgia.*— Stephens *v.* Crawford, 3 Ga. 499.

*Missouri.*— State *v.* Horn, 94 Mo. 162, 7 S. W. 116.

*New York.*— See Davis *v.* Haffner, 2 Abb. Pr. 187.

*North Carolina.*— Reid *v.* Humphreys, 52 N. C. 258; Davis *v.* McAlpin, 26 N. C. 140; Governor *v.* Witherspoon, 10 N. C. 42.

*Ohio.*— Barret *v.* Reed, 2 Ohio 409.

*Tennessee.*— State *v.* Clark, 1 Head 369.

*Vermont.*— Weston *v.* Sprague, 54 Vt. 395.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 347.

**60.** Johnston *v.* Gwathney, 2 Bibb (Ky.) 186, 4 Am. Dec. 694; Henderson *v.* Matlock, 9 N. C. 366; State Treasurers *v.* Bates, 2 Bailey (S. C.) 362 [*following* Treasurers *v.* Stevens, 2 McCord (S. C.) 107; State *v.* Mayson, 2 Nott & M. (S. C.) 425].

**61. Necessity for approval of:** Constable's bond see *supra*, II, B, 3, e. Sheriff's bond see *supra*, II, A, 5, e.

insure greater security to the public,[62] and such a bond may be enforced, although it has been not approved,[63] or although the approval is defective.[64] But other authorities deny that a bond not properly approved may be enforced as a statutory bond.[65]

**d. Lack of Filing or Recording.** As statutory requirements of the filing or recording of official bonds[66] are for the benefit of the public, the official bond of a sheriff or constable may be enforced, although not filed[67] at the time required by law[68] or recorded.[69]

**e. Validating Acts.** A bond given by a sheriff for the discharge of his official duties, although defective because those who accepted it had no legal authority to do so, may become valid *ab initio* by reason of a subsequent act of the legislature, declaring that such bonds should be considered as having been legally delivered, so that an action may be maintained thereon against the obligors.[70] But where a constable's official bond was signed by four persons as obligors, with a blank for the constable's name in the condition, which was left unfilled, so that it did not appear from the bond who was constable, the omission was not cured by a statute declaring that any variance in the penalty or condition in an official bond from the provisions prescribed by law should not invalidate the bond or condition.[71] A statute providing that any bonds which have been or may hereafter be given by any sheriff shall be held and deemed to be valid, notwithstanding any defect in the election or appointment of such person to office, applies to bonds made before its passage, as well as those made after it.[72]

**13. Acts or Instructions of Complaining Party.** Where an alleged default has been occasioned by the act of the party complaining thereof there can be no recovery on the bond therefor,[73] nor can a plaintiff in process set up as a breach of the officer's bond acts done pursuant to his own instructions[74] or the instruc-

62. People *v.* Edwards, 9 Cal. 286; Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

63. Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180; Musselman *v.* Com., 7 Pa. St. 240; State *v.* Proudfoot, 38 W. Va. 736, 18 S. E. 949. But *compare* McBride *v.* Com., 2 Watts (Pa.) 448.

64. People *v.* Edwards, 9 Cal. 286; Treasurers *v.* Stevens, 2 McCord (S. C.) 107.

65. Crawford *v.* Meredith, 6 Ga. 552 (so holding as to a bond approved by only two justices whereas the statute required the approval of three justices); Fletcher *v.* Leight, 4 Bush (Ky.) 303 (holding that where the order approving an official bond recited that certain named persons were sureties but one of such persons had not signed the bond, and no order approving a bond without his name ever issued, the other sureties were not liable on the bond).

66. **Necessity for filing or recording of:** Constable's bond see *supra*, II, B, 3, e. Sheriff's bond see *supra*, II, A, 5, e.

67. Musselman *v.* Com., 7 Pa. St. 240.

68. Dutton *v.* Kelsey, 2 Wend. (N. Y.) 615.

69. Whitehurst *v.* Hickey, 3 Mart. N. S. (La.) 589, 15 Am. Dec. 167.

70. Jordan *v.* Pool, 27 N. C. 105.

71. Grier *v.* Hill, 51 N. C. 572.

72. Murray *v.* Jones, 29 N. C. 359.

73. People *v.* Johnson, 15 Ill. App. 153; State *v.* Cave, 49 Mo. 129; Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

**Refusal to permit sale.**— Where, in an action against the sureties on a constable's bond, under a statute providing for an action for a penalty against the sureties for the constable's failure to make a sale of property taken under execution, it appeared that on the day set for the sale the constable was mentally unsound and incapable of making the sale, and that the deputy constable offered to make it, but that plaintiffs, the execution creditors, by their attorneys, refused to permit him to do so, it was held that the sureties were not liable for the penalty. Moore *v.* Rooks, 71 Ark. 562, 76 S. W. 548, holding that an answer setting up these facts stated a good defense, although it did not state to whom the offer to sell was made.

74. *Indiana.*— State *v.* Sorrels, 60 Ind. 381 (holding that a constable was not liable on his official bond for failure to sell personal property on which he had levied, where, after he had advertised and offered the same for sale, he had by direction of the execution plaintiff delivered the property to the sheriff, who claimed the same under an older execution); State *v.* Hawkins, 81 Ind. 486 (holding that a sheriff will not be liable on his official bond for failure to levy an execution on personal property, where he was directed by the execution plaintiff to levy it on real estate instead).

*Louisiana.*— Pepin *v.* Dunham, 20 La. Ann. 88; Lynch *v.* Leckie, 9 La. Ann. 506.

*Missouri.*— State *v.* Cave, 49 Mo. 129; Rollins *v.* State, 13 Mo. 437, 53 Am. Dec. 151.

*Pennsylvania.*— McCoy *v.* Reed, 5 Watts 300.

tions of his attorney.[75] Neither can a sheriff be held liable on his bond for acts which have been done pursuant to the advice of plaintiff's attorney.[76] So also where plaintiff or his attorney is informed by the sheriff of what he proposes to do and acquiesces therein, he cannot set up what is done as a breach of the bond;[77] nor can one who has ratified what has been done in his behalf subsequently set up such matters as a breach of the bond.[78] Where a sheriff gives his deputy binding instructions as to what he shall do in connection with certain matters, and the sheriff is subjected to liability on account of the deputy following such directions, he cannot resort to the deputy's bond for indemnity;[79] but the deputy cannot escape liability on his bond on the ground that his acts were pursuant to directions of the sheriff, where such directions were merely in the nature of information and advice, leaving the deputy at liberty to act according to his own judgment, and not binding instructions to be followed at all events.[80]

**14. Duration of Liability — a. In General.** The duration of the liability upon the official bond of a sheriff or constable is a matter governed by the statute under which the bond is given.[81] But where a bond is conditioned only for a particular time it cannot be enlarged to embrace a default occurring after that time on the ground that the law requires a bond for the whole term of office.[82]

**b. Effect of Termination of Incumbency.** The sureties of a sheriff or constable are not as a general rule liable for his acts or defaults after he has gone out of office.[83] So where a sheriff goes out of office before commencing to execute process and before the return-day thereof his sureties cannot be held liable for his failure

*Texas.*— Freiberg *v.* Johnson, 71 Tex. 558, 9 S. W. 455.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 345 *et seq.*

**75.** People *v.* Offerman, 84 Ill. App. 132; State *v.* Boyd, 63 Ind. 428.

**76.** McClure *v.* Colclough, 5 Ala. 65, holding that a sheriff will not be liable on his official bond for not returning an execution three days before the return-day, when he was advised by plaintiff's attorney or agent that it was sufficient to return it the first day of the term.

**Mere reliance upon the attorney's advice** is no protection when it does not appear that the action of the officer was induced by such advice or that the attorney represented plaintiff in giving the advice. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

**77.** Cake *v.* Cannon, 2 Houst. (Del.) 427.

**In an action by a sheriff on his deputy's bond** to recover the amount of a judgment rendered against the sheriff because of omissions of duty by the deputy, defendants cannot set up as a defense that the act complained of were done by leave of the sheriff. Thomas *v.* Hubbell, 18 Barb. (N. Y.) 9 [*reversed* on other grounds in 15 N. Y. 405, 69 Am. Dec. 619, and *following* Hart *v.* Brady, 1 Sandf. (N. Y.) 626].

**78.** Teague *v.* Maddox, 150 U. S. 128, 14 S. Ct. 46, 37 L. ed. 1025 [*reversing* 9 Mont. 126, 22 Pac. 386].

**79.** Tuttle *v.* Cook, 15 Wend. (N. Y.) 274.

**80.** Tuttle *v.* Cook, 15 Wend. (N. Y.) 274.

**81.** Bruce *v.* State, 11 Gill & J. (Md.) 382 (holding that a sheriff's bond, dated on the 21st day of December, 1832, continued in force until the 1st day of January, 1833, unless between that day and the 8th of the antecedent October, a new sheriff's bond had been given); Keck *v.* Coble, 13 N. C. 489 (holding that under the act of 1818 the official bond of a constable ceased to be obligatory at the expiration of one year after his appointment).

**82.** Prince *v.* McNeill, 77 N. C. 398.

**83.** *Alabama.*— Dixon *v.* Caskey, 18 Ala. 97. See also Cuthbert *v.* Higgins, 21 Ala. 349.

*Arkansas.*— State *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

*Louisiana.*— Lynch *v.* Leckie, 9 La. Ann. 506, holding that when it is neither alleged nor shown that a sheriff was reappointed after the term for which his bond was given, or that he acted as sheriff afterward, his sureties will not be liable for his subsequent acts, as the court cannot presume that the liability of the sureties was extended beyond the sheriff's term.

*Mississippi.*— State *v.* Morgan, 59 Miss. 349 [*following* Bennett *v.* State, 58 Miss. 556].

*North Carolina.*— Graham *v.* Buchanan, 60 N. C. 93 (holding that where the deputy of a sheriff received the note of a married woman for collection within a magistrate's jurisdiction, and failed to collect the same during the sheriff's official term, but afterward, when acting as the deputy of his successor, collected it and failed to pay over the money, there was no breach of the former sheriff's official bond); Harrell *v.* Lane, 35 N. C. 253.

*Tennessee.*— Crittenden *v.* Terrill, 2 Head 588; Atkins *v.* Baily, 9 Yerg. 111, holding that the sureties of a constable were not bound for money collected by him after he had resigned his office.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 354 *et seq.*

**Where a sheriff has received the resignation of his deputy,** the sureties on the deputy's

to execute or return the same,[84] or for any of his acts with relation to the execution of such process after he has gone out of office; [85] but as it is usually the right and duty of a retiring sheriff to complete the execution of process which he has begun to execute while in office,[86] his sureties are liable for his defaults in respect thereto, although such defaults did not occur until after the sheriff had gone out of office.[87] So also the sureties in a bond given to a sheriff for the faithful conduct of his deputy are liable for the deputy's misconduct in embezzling money collected by him on a precept which comes into his hands while the sheriff is in office, although the money is collected and embezzled after the sheriff has resigned.[88] The sureties of a sheriff are also liable for money properly paid to him as sheriff, after he is out of office; [89] but they are not liable for his failure to pay over money voluntarily paid to him by the county board after the expiration of his term.[90] Where a sheriff has received money by virtue of his office the expiration of his term does not release his sureties of liability therefor; [91] and in fact the general rule is that where the officer has been guilty of official default or misfeasances while in office, his going out of office does not release his sureties of liability therefor,[92] even though no action is commenced while he is in office.[93] Where a constable ceases to be a resident of the county in which he holds his office, thereby forfeiting his office, but continues to act as constable, his official sureties are still liable for his acts as those of a *de facto* constable.[94]

**c. Holding Over by Sheriff.**[95] Where a sheriff's bond is conditioned for the discharge of his duties until a successor shall be elected and qualified, the liability of his sureties continues until that event.[96] And if such officer is reëlected and enters on his new term without giving a new bond, he may, as respects the sureties on his old bond, be regarded as holding over so that they remain liable for his acts or defaults.[97]

bond are not responsible for alleged breaches by such deputy after his resignation in not returning executions delivered to him, for which neglect of duty the sheriff has become liable. Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

**84.** Dixon *v.* Caskey, 18 Ala. 97; Haynes *v.* Bridge, 1 Coldw. (Tenn.) 32; State *v.* Parchmen, 3 Head (Tenn.) 609; Fondrin *v.* Planters' Bank, 7 Humphr. (Tenn.) 447.

**85.** McDonald *v.* Bradshaw, 2 Ga. 248, 46 Am. Dec. 385 (holding that the sureties on a sheriff's bond were not liable for money received by the sheriff on an execution after he had gone out of office, and converted or not accounted for by him); Ringold *v.* McGowan, 34 N. C. 44 (holding that where a constable was appointed, at the February term of a court in 1848, his appointment being for one year, and in August, 1848, a claim was put into his hands for collection, on which he obtained a judgment, and a stay of six months was granted, which expired February term, 1849, and the constable was not reappointed at that term, but in July following was appointed deputy sheriff, and then took out execution on the claim, collected it, and failed to pay it over, he was not responsible on his constable's bond, no default having been committed during the year of his appointment).

**86.** See *supra*, III, C, 1.

**87.** Dixon *v.* Caskey, 18 Ala. 97; Baker *v.* Baldwin, 48 Conn. 131; Haynes *v.* Bridge, 1 Coldw. (Tenn.) 32. See also Ballard *v.* Thomas, 19 Gratt. (Va.) 14. And see *supra*, X, C, 2, a, (I).

**Statutory provision for execution of process by successor.**— Where the statute provides that on expiration of a sheriff's term all process wholly or partly unexecuted shall be executed by his successor, the sureties for the first term of a sheriff are not liable for his negligence in completing during a succeeding term the execution of process partly unexecuted at the beginning thereof. Wood *v.* Lowden, 117 Cal. 232, 49 Pac. 132.

**88.** Larned *v.* Allen, 13 Mass. 295.

**89.** Elkin *v.* People, 4 Ill. 207, 36 Am. Dec. 541, redemption money after execution sale.

**90.** People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

**91.** Pearce *v.* Hall, 113 Ala. 245, 21 So. 250; Dixon *v.* Caskey, 18 Ala. 97; Hubbard *v.* Elden, 43 Ohio St. 380, 2 N. E. 434; Collins *v.* Skillen, 16 Ohio St. 382, 88 Am. Dec. 458; King *v.* Nichols, 16 Ohio St. 80.

**92.** Wyche *v.* Myrick, 14 Ga. 584.

**93.** Wyche *v.* Myrick, 14 Ga. 584.

**Statutes of limitations** sometimes require an action against the sureties to be commenced within a comparatively short time after the officer goes out of office, after which time such an action is barred. See *infra*, X, H, 7, b, (I).

**94.** Case *v.* State, 69 Ind. 46.

**95. Right to hold over** see *supra*, II, A, 6, c.

**96.** Akers *v.* State, 8 Ind. 484; Com. *v.* Drewry, 15 Gratt. (Va.) 1. But *compare* Cuthbert *v.* Huggins, 21 Ala. 349.

**97.** Butler *v.* State, 20 Ind. 169. But *compare* State *v.* Crooks, 7 Ohio, Pt. II, 221; Monteith *v.* Com., 15 Gratt. (Va.) 172.

**d. Legislative Extension of Term.** When the term of office of a constable is extended by an act of the legislature, he becomes his own successor, and the liability of his bondsmen continues until he qualifies as such or is displaced by a successor.[98]

**e. Failure to Renew Bond.** Where a sheriff fails to renew his bond at the time required by statute, but continues in office and remains sheriff *de facto*, the sureties on his original bond are, according to some authorities, liable for any subsequent breach of his official duty.[99]

**f. Death of Officer.** The death of a sheriff cannot relieve his sureties of liability for his previous defaults;[1] but where at the time of the death of a sheriff he was in no default for which his sureties were liable, subsequent events cannot subject them to any liability upon the bond.[2]

**15. Extent of Liability[3] — a. In General.** The extent of the liability of a surety on the bond of a sheriff or constable is to be ascertained by the terms of the bond,[4] strictly construed so as not to extend the liability of a surety by implication beyond its terms,[5] but also reasonably construed so as not to defeat the purpose of requiring sureties for the protection of the public against official misconduct.[6] Where judgment has been entered against a sheriff and his sureties on his bond, the sureties are not to be credited with payments made by the sheriff, or obtained by process out of his property, on account of the official debt or default for which the judgment was obtained; but they remain liable for his defalcations to the extent of their aliquot parts of the penalty, after all his means are exhausted.[7] Where a county makes a settlement with the sheriff as required by law, and on such settlement directs certain warrants to be drawn in his favor, and such warrants are drawn and delivered to him, in a suit between the county and the sheriff and his surety, the surety is not entitled to have the amount represented by such warrants credited on the judgment against the sheriff, unless such warrants are produced and surrendered on the trial, or it appears that the sheriff is the owner thereof.[8] Where a fine against a sheriff for failure to make due return of an execution is paid by the sureties on his bond, they are entitled, in any subsequent proceeding against them based on the judgment or decree on which the execution issued, to a credit on the judgment or decree for the amount of the fine or fines so paid.[9] Where

98. State *v.* Kurtzeborn, 9 Mo. App. 245.

99. Dunphy *v.* Whipple, 25 Mich. 10; Vann *v.* Pipkin, 77 N. C. 408. But *compare* Com. *v.* Fairfax, 4 Hen. & M. (Va.) 208.

Where the failure to renew the bond ipso facto vacates the office, the sureties on the original bond are not liable for any official malfeasance or nonfeasance by the sheriff after the occurrence of the vacancy. Bennett *v.* State, 58 Miss. 556.

1. Morris *v.* Graham, 1 U. C. Q. B. 521.

2. *Alabama.*— Clark *v.* Lamb, 76 Ala. 406, holding that where a sheriff collected money under an execution, regular on its face, issued by a court of competent jurisdiction on a judgment which was reversed after his death, the sureties on his bond were not liable to the execution defendant for the amount of his commissions collected and retained by the sheriff.

*Arkansas.*— Moore *v.* Rooks, 71 Ark. 562, 76 S. W. 548, holding that, although under the statute the sureties of an officer might be liable for a penalty for the officer's failure to return an execution, they were relieved from liability where the officer died before the time for making the return had expired.

*Indiana.*— State *v.* Vananda, 7 Blackf. 214, holding that where a sheriff, having collected money on an execution, died without having paid over the money, and the judgment was afterward reversed, there was no breach of the sheriff's official bond, but whatever right the execution defendant might have to recover the money would be against the sheriff's estate.

*New York.*— See Johnson *v.* Haynes, 37 Hun 303.

*Canada.*—McLeod *v.* Boulton, 2 U. C. Q. B. 44, holding that where, after the death of a sheriff, his deputy made a false return to a writ, the remedy was against the sureties given by the deputy to the sheriff, and not against the sureties given by the sheriff himself.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 345 *et seq.*

3. Extent of liability for particular defaults see *infra*, X, D, *passim*.

4. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

5. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

6. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

7. State Treasurers *v.* Harris, 2 Bailey (S. C.) 621.

8. Bingham County *v.* Fidelity, etc., Co., 13 Ida. 34, 88 Pac. 829.

9. Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

a sheriff has paid over amounts collected as taxes, directing the same to be applied to the taxes of a particular year, to which they are properly applicable, his sureties for that year are entitled to credit for the full amounts on their liability for the taxes of such year.[10] Where additional sureties are given on a sheriff's bond, in place of those who have died, removed, or become insolvent, all the sureties are liable to the sheriff's creditors for their aliquot proportions of the penalty, according to the number in the original bond.[11]

**b. Penal Sum as Limit of Liability.** The liability of the sureties on the official bond of a sheriff or constable is limited to the penal sum named therein,[12] and so a complaint claiming more than that amount is demurrable as to the excess;[13] and when a recovery has been had for the full amount of the bond this prevents a recovery for any other defaults,[14] even though actions therefor are then pending.[15] But where the sureties have become liable for a certain amount which they have refused to pay on demand, they may be held liable for interest on such amount from the time of the demand, although the addition of such interest raises their liability to an amount exceeding the penal sum of the bond.[16]

**16. Liability For Penalty or Amercement.** Some statutes subject the sureties as well as the officer to pecuniary penalties or amercement, particularly in the form of penal interest or absolute liability for the debt, for the official defaults of the latter;[17] but in the absence of such a statutory provision the rule is that the

**10.** State *v.* Wade, 15 W. Va. 524.

**11.** State Treasurers *v.* Harris, 1 Hill (S. C.) 282 [*distinguishing* Harris *v.* Ferguson, 2 Bailey (S. C.) 397 (*followed* in State Treasurers *v.* Taylor, 2 Bailey (S. C.) 524)].

**12.** *Arkansas.*—Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222.

*Colorado.*— Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

*Georgia.*— Bothwell *v.* Sheffield, 8 Ga. 569.

*Louisiana.*—Marcy *v.* Praeger, 34 La. Ann. 54.

*New York.*— Lewis *v.* Ball, 6 Cow. 583.

*Canada.*— Sinclair *v.* Baby, 2 Ont. Pr. 117. See also Hexon *v.* Hamilton, 6 U. C. Q. B. O. S. 155.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 354 *et seq.*

Costs of actions brought against the sureties cannot be included in calculating the amount for which they are liable. Hexon *v.* Hamilton, 6 U. C. Q. B. O. S. 155.

**13.** Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222.

**14.** Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222; Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662; Bothwell *v.* Sheffield, 8 Ga. 569; Sinclair *v.* Baby, 2 Ont. Pr. 117.

**15.** Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222; Bothwell *v.* Sheffield, 8 Ga. 569.

A different view has been expressed by McCulloch, J., who, delivering the opinion of the court in Albie *v.* Jones, 82 Ark. 414, 422, 102 S. W. 222, but dissenting in this respect from the opinion of the majority, said: "Each of the cases involves separate and distinct wrongful acts of the constable which constituted separate breaches of the bond, and the sureties should be held liable, it seems to me, to the extent of the amount of the bond for all damages resulting from each separate act constituting a breach of the bond, while it remained in force. The bond of a sheriff or constable is a continuing liability extending over the entire term of the officer, unless sooner ended by the execution of a new bond, and it constitutes an undertaking to answer in damages not exceeding the amount of the bond for each separate breach thereof. The accrual of liability to the extent of the amount named in the bond does not operate as a discharge of the sureties from further liability for additional breaches of the bond while it remains in force. Of course, the sureties could not be held liable for a sum in excess of the amount of the bond for a single breach thereof."

**16.** Maddox *v.* Rader, 9 Mont. 126, 22 Pac. 386 [*following* Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462].

**17.** *Alabama.*— Evans *v.* State Bank, 13 Ala. 787; Johnson *v.* Petty, 5 Ala. 528; Barton *v.* Lockhart, 2 Stew. & P. 109.

*Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870.

*California.*— Askew *v.* Ebberts, 22 Cal. 263.

*Illinois.*— Roberton *v.* Marshall County Com'rs, 10 Ill. 559.

*Kentucky.*— Goodrum *v.* Root, 2 Metc. 427; Mershon *v.* Com., 2 Metc. 371; Sanders *v.* Commonwealth Bank, 2 Metc. 327; Judy *v.* Howard, 2 Metc. 44; Stephens *v.* Lewis, 8 B. Mon. 150.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Garrett *v.* Hamblin, 11 Sm. & M. 219, 49 Am. Dec. 53; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Missouri.*— State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; State *v.* Muir, 24 Mo. 263.

*Nebraska.*—Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*North Carolina.*— Horne *v.* Allen, 27 N. C. 36; Governor *v.* Montfort, 23 N. C. 155.

*South Carolina.*—Posey *v.* Ramey, 4 Strobh. 20.

liability of the sureties is limited to the actual damages caused by the sheriff's act or default and they are not liable for statutory penalties to which the sheriff has become liable.[18] Where the statute makes the sureties liable for a penalty, they are not relieved by reason of the fact that plaintiff has suffered no actual injury because of the officer's default.[19]

**17. Release[20] or Discharge of Sureties — a. In General.** The sureties on a sheriff's bond are not released by the failure of the county court to appoint a commissioner to settle the sheriff's accounts concerning the county levy, as required by the statute,[21] nor does the failure of the county court to require a sheriff to renew his bond annually as provided by statute release the sureties on the old bond.[22] A legislative extension of time within which a sheriff may settle taxes does not exonerate the sureties on his bond;[23] nor are the sureties released by an order of the county court giving the sheriff further time to pay a balance due the county, which is without consideration and revocable.[24] Where the same persons were sureties on the official bond of a sheriff, and also on a recognizance for the same amount, they were not discharged from liability on the bond by a recovery on the recognizance and a sale of the sheriff's real estate thereunder for a sum equal to the penalty of the bond.[25] The arrest of the sheriff under a capias ad satisfaciendum and his discharge under the prison bounds statute do not discharge him and his sureties from liability on his bond.[26] A surety on the official bond of a deputy sheriff is not relieved from liability by the fact that after the execution of the bond, and before the breach assigned, the sheriff and his deputy, without the consent of the surety, entered into an unlawful and corrupt agreement by which the sheriff sold the entire office to the deputy.[27] Where a sheriff, liable for certain defaults of his deputy, and being insolvent, delivered

*Tennessee.*— Lashley *v.* Wilkinson, 2 Head 482.

*Texas.*— Haley *v.* Greenwood, 28 Tex. 680; Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 371.

**Statute not retroactive.**— A statute making a sheriff's bond liable for penalties does not apply to a bond executed before its enactment. Posey *v.* Ramey, 4 Strobh. (S. C.) 20.

**Compounding penalty.**— Where a sheriff collects money on an execution, and fails to pay it over, in an action on his official bond it is erroneous to render judgment for the amount collected, interest, and penalty, and for ten per cent per month on the amount of the judgment until paid, as that would be a compounding of the penalty. Borden *v.* State, 9 Ark. 252.

**18.** *Alabama.*— Patterson *v.* Grace, 1 Ala. 264; McWhorter *v.* Marss, 1 Stew. 63.

*California.*— Glascock *v.* Ashman, 52 Cal. 493.

*Colorado.*— Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050, 10 Colo. App. 368, 50 Pac. 1076.

*Idaho.*— Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815.

*Illinois.*— Casper *v.* People, 6 Ill. App. 28.

*Kentucky.*— Ardery *v.* Com., 7 J. J. Marsh. 166; Com. *v.* Bradley, 1 Litt. 48.

*North Carolina.*—Governor *v.* Montfort, 23 N. C. 155.

*South Carolina.*— State Treasurers *v.* Hilliard, 8 Rich. 412; State Treasurers *v.* Buckner, 2 McMull. 323.

*Texas.*— Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.

*Virginia.*— Asberry *v.* Calloway, 1 Wash. 72.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 371.

But *compare* Wyche *v.* Myrick, 14 Ga. 584, holding that statutory interest imposed on the sheriff for a default cannot be considered alone in the character of a penalty, and the sureties are liable therefor.

**19.** Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. (Miss.) 625.

**20. Release** generally see RELEASE, 34 Cyc. 1039.

**21.** Bonta *v.* Mercer County Ct., 7 Bush (Ky.) 576.

**22.** Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188. See also People *v.* Dumpley, 2 Mich. N. P. 197, holding that the failure of the sheriff to give a new annual bond, as required by the statute, will not release his sureties from liability on account of process placed in his hands for execution before such renewal is required.

**23.** Prairie *v.* Worth, 78 N. C. 169 [*followed* in Worth *v.* Cox, 89 N. C. 44], holding this to be true whether or not the condition of the statute was complied with and whether or not the sureties had notice of the extension. See also Bennett *v.* McWhorter, 2 W. Va. 441.

**24.** Helm *v.* Com., 79 Ky. 67.

**25.** Com. *v.* Montgomery, 31 Pa. St. 519.

**26.** State Treasurers *v.* Bates, 2 Bailey (S. C.) 362.

**27.** Martin *v.* Royster, 8 Ark. 74.

over to his own sureties the deputy's official bond, with authority to put it in suit and apply the proceeds to their own indemnity, it was held that the authority granted by the sheriff did not authorize a discharge of the bond, or the discharge or assignment of the judgment recovered by the sureties for the full penalty of the bond, but only authorized them to avail themselves of it to such extent as might be necessary for their own indemnity.[28]

**b. Release or Discharge by Court.** Apart from statute, after an official bond of a sheriff has been given and approved, the justices who approved it have no authority to discharge the obligation by the substitution of another bond;[29] but the statutes sometimes provide for the discharge of a sheriff's sureties by the court on due application therefor.[30] Such an application must be upon notice to the officer,[31] stating the cause why the discharge is asked.[32] Where the sheriff denies the matters assigned as cause for seeking the release such matters must be proved upon the trial or hearing.[33] Where the statute allows the discharge of the sureties "for good cause," any reasonable cause, whether it relates to the surety or to the officer alone, or to both, may be deemed sufficient;[34] and the court judging of the cause must be allowed a considerable discretion,[35] and its conclusion as to the sufficiency of the cause will not be disturbed by a higher court unless for a palpable mistake of judgment.[36]

**c. Cancellation of Bond by Governor.** Under a statute providing that the governor may erase and annul all bonds and all mortgages furnished by any public officer, the cancellation of the official bond of a sheriff by the governor, and the erasure of the mortgage, discharges the sureties from liability on the bond.[37]

**d. Legislative Release.** Where a judgment was rendered in favor of the state on a sheriff's bond for the amount thereof, and an assessment of damages for the breaches assigned was made, it was held that an act of the legislature releasing on certain conditions defendant's liability on said judgment must be construed as a release only of the judgment so fixed and determined, and not of any liability thereafter to be established.[38]

**e. Discharge by Giving New Bond.**[39] It has been held that the liability of the sureties on a bond given to the sheriff by his deputy is not discharged by the sheriff's receiving a new bond from the deputy and continuing him in office after his resignation, without making a new appointment or the deputy taking the oath of office anew;[40] and under a statute providing for the discharge of sureties on official bonds after the giving of a new bond as is therein provided for, the sureties on a sheriff's official bond are not released by the erasure of their names and the substitution of the names of others by direction of the board of supervisors.[41]

**f. Giving Additional Bond Not Required by Statute.** The fact that an officer gives a voluntary bond in addition to the official bond required by statute does

28. Adams *v.* Gould, 8 Me. 438.

29. Towns *v.* Stephens, 9 Ga. 585, holding that this was especially true where one of such justices was a coöbligor on the first bond.

30. Bruner *v.* Bryan, 50 Ala. 522.

Prerequisites to discharge.— Under a statute providing that upon petition to the county court by the sureties of a sheriff, and it appearing to the court that a certain notice has been given and that such sureties are in danger of sustaining damages by the neglect or misconduct of the sheriff, the court shall require the sheriff to give other and sufficient sureties in the place of the persons applying to be discharged, and upon his failure to do so shall suspend him from office, and in either case the petitioners shall be discharged from all further liability, the court has no power to discharge the sureties of a sheriff without previously taking other sureties or by their judgment depriving the sheriff of his office. McGhee *v.* Anderson, 11 Humphr. (Tenn.) 595.

31. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393, holding that the officer must have reasonable notice of not less than ten days.

32. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393.

33. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393.

34. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393.

35. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393.

36. Lemon *v.* Peck, 13 B. Mon. (Ky.) 393.

37. Lockwood *v.* Penn, 22 La. Ann. 29.

38. People *v.* Compher, 14 Ill. 447.

39. **New bond after notice of withdrawal by sureties of deputy** see *infra*, X, C, 18.

40. Gilbert *v.* Luce, 11 Barb. (N. Y.) 91.

41. State *v.* Matthews, 57 Miss. 1.

not release the sureties on the official bond,[42] even with respect to the particular defaults to which the additional bond relates.[43]

**g. Forfeiture of Office.** The sureties on an official bond are not relieved from liability for the officer's failure to pay over money collected by him by the fact that he has forfeited his office.[44]

**h. Change in Law.** Where after the execution of a sheriff's bond the law is changed with respect to the duties and obligations of the office, so as to increase the risk of the sureties, such change operates to release them;[45] but the mere enactment of a new law concerning sheriffs does not release the sureties in a bond previously given unless the change operates to their prejudice.[46]

**i. Release From Liability For Particular Defaults.** A voluntary dismissal of a suit by plaintiff is a discharge of the sureties of the officer who served the process for any irregularities by him in his proceedings, even though the motion to dismiss was made by plaintiff on account of those irregularities;[47] and where after a constable collected money on an execution plaintiff told him he might keep it for a considerable time, the sureties on his official bond were discharged from liability therefor.[48] Where the sheriff and execution plaintiff, after an order to the sheriff to make a levy, consulted counsel and were advised not to make it, but to proceed on another fieri facias already levied, and the sheriff understood that the order to make such levy was withdrawn, he and his sureties were relieved from liability for his failure to levy.[49] A judgment against a sheriff, on a rule to pay over money, is not satisfaction, and is no discharge of the sureties on his bond until it is paid;[50] nor are the sureties discharged by the issuance of an execution upon an order absolute against the sheriff, although such execution is irregular and void, the proper remedy being an attachment.[51] The mere fact that plaintiff in an execution has made application to the court for an erroneous order for the sale of property does not make the sheriff executing such order the agent of plaintiff therein, so as to relieve the sureties on his official bond of their liability.[52] The sureties are not released from liability for money paid the sheriff by the county board for a reported deficit in his compensation, when such deficit was made to appear by his failure to report to the board all the earnings of his office, and by the fact that the members of the county board were guilty of gross negligence in not investigating the sheriff's accounts and ascertaining the amount of his earnings.[53] Where a sheriff, having a defendant in custody, discharges him on receiving a deposit of certain claims in the hands of the prisoner as security, the fact that plaintiff's attorney consented to the release does not relieve the sheriff's sureties of liability, where it appears that the attorney's consent was based on the sheriff's liability.[54]

**18. WITHDRAWAL OF SURETIES.** In the absence of any statute so providing the surety of a deputy cannot discharge himself from liability on his bond by giving

42. Sheeley *v.* Wiggs, 32 Mo. 398.

43. State *v.* Matthews, 57 Miss. 1, holding that where a sheriff is *ex officio* tax collector the sureties on his official bond as sheriff are liable for his default as tax collector, although he has also given a tax collector's bond which is not required by statute. For rule where special bond as collector of taxes required see *infra*, X, D, 10.

44. State *v.* Muir, 20 Mo. 303, so holding in the case of a constable who had forfeited his office by removing from the state.

45. Roman *v.* Peters, 2 Rob. (La.) 479, 38 Am. Dec. 222; White *v.* East Saginaw, 43 Mich. 567, 6 N. W. 86.

46. People *v.* Leet, 13 Ill. 261, holding that where the law under which a bond was given was repealed, but all the material provisions of the old law were incorporated into the new, and the duties of the sheriff were not changed or enlarged, the change in the law did not have the effect to *ipso facto* exonerate the sureties on the sheriff's bond from liability thereon.

47. Richmond County *v.* Barr, Dudley (Ga.) 32.

48. Wells *v.* Gant, 4 Yerg. (Tenn.) 491. *Compare* McNairy *v.* Marshall, 7 Humphr. (Tenn.) 229.

49. Smith *v.* Banks, 60 Ga. 642.

50. Towns *v.* Hicks, 6 Ga. 239.

51. Towns *v.* Hicks, 6 Ga. 239.

52. Rollins *v.* State, 13 Mo. 437, 53 Am. Dec. 151.

53. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

54. Treasurers *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166.

notice to the sheriff that he will no longer be bound for the deputy,[55] or by giving notice to the sheriff of the deputy's unfitness for office and requesting his removal.[56] The statutes, however, sometimes allow the surety of a deputy to withdraw by serving upon the sheriff a notice that he will not be further bound;[57] but such a notice does not operate to discharge the surety until a reasonable time has elapsed, sufficient to enable the sheriff to give notice to the deputy and the other sureties and to permit a new bond to be given.[58] When a new bond is given and accepted, the sureties on the old bond are discharged.[59]

**19. Estoppel[60] of Sureties to Deny Official Character of Principal.** The execution of the official bond of a sheriff or constable estops the sureties to deny the official character of their principal.[61]

**20. Lien[62] Arising From Bond.** Under some statutes the execution of a sheriff's official bond creates a lien,[63] having its inception at the date of the bond[64] or of its registry,[65] upon the real estate of the sheriff,[66] whether owned by him at the time of the execution of the bond,[67] or subsequently acquired.[68] And where a judgment is obtained against the sheriff and his sureties there is a lien upon all of the estate of the judgment defendants from the time of the commencement of the action.[69] This lien operates for the protection of private individuals who may

55. McGehee *v.* Gewin, 25 Ala. 176; Barnard *v.* Darling, 11 Wend. (N. Y.) 28.

56. Crane *v.* Newell, 2 Pick. (Mass.) 612, 13 Am. Dec. 461.

57. Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011 [*affirming* 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129].

**Service of such notice** by leaving it at the sheriff's office with the person in charge is not sufficient, although a notice so served becomes operative when it comes to the knowledge of the sheriff. Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011 [*affirming* 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129].

58. Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011 [*affirming* 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129].

**One month after notice of withdrawal by** a surety on a deputy sheriff's bond is not, as matter of law, an unreasonable length of time to allow a sheriff in which to secure a new bond. Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011 [*affirming* 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129].

59. Reilly *v.* Dodge, 59 N. Y. Super. Ct. 199, 14 N. Y. Suppl. 129 [*affirmed* in 131 N. Y. 153, 29 N. E. 1011].

60. **Estoppel** generally see Estoppel, 16 Cyc. 671.

61. *Alabama.*— McWhorter *v.* McGehee, 1 Stew. 546.

*Arkansas.*— State *v.* Swigart, 22 Ark. 528.

*Illinois.*— Shaw *v.* Havekluft, 21 Ill. 127 [*following* Green *v.* Wardwell, 17 Ill. 278]; Foster *v.* People, 121 Ill. App. 165.

*New York.*— Hall *v.* Luther, 13 Wend. 491.

*Pennsylvania.*— Musselman *v.* Com., 7 Pa. St. 240, holding that the sureties cannot take advantage of the neglect of the court to swear the constable or to approve his bond.

*Tennessee.*— State *v.* Clark, 1 Head 369, holding that where one was elected constable to fill a vacancy, and gave bond and was qualified according to law, and at a subsequent regular election, within the term for which he had been elected, was a successful candidate for the same office, and gave new bond, and was again qualified, the sureties on the new bond could not set up the invalidity of the second election.

*Virginia.*— Montieth *v.* Com., 15 Gratt. 172.

62. **Lien** generally see Liens, 25 Cyc. 655.

63. Hall *v.* Com., 8 Bush (Ky.) 378; Gale's Succession, 30 La. Ann. 351; Fluker *v.* Bobo, 11 La. Ann. 609 [*followed* in David's Succession, 14 La. Ann. 730]; *In re* McKenzey's Appropriation, 3 Pa. St. 156; Miller *v.* Com., 5 Watts & S. (Pa.) 488; Snyder *v.* Com., 3 Penr. & W. (Pa.) 286.

**Where the bond is invalid as a statutory bond,** because executed in the month of June, when the law requires it to be executed in the preceding January or February, its execution creates no lien on the estate of the sheriff. Hall *v.* Com., 8 Bush (Ky.) 378.

**Statute not applicable to bond executed before its passage.**— Miller *v.* Com., 5 Watts & S. (Pa.) 488.

64. Hall *v.* Com., 8 Bush (Ky.) 378.

65. Gale's Succession, 30 La. Ann. 351; Fluker *v.* Bobo, 11 La. Ann. 609 [*followed* in David's Succession, 14 La. Ann. 730].

66. Hall *v.* Com., 8 Bush (Ky.) 378; *In re* McKenzey's Appropriation, 3 Pa. St. 156 (holding that the recognizance of a sheriff and his sureties, taken pursuant to the provisions of the act of April 13, 1834, is a lien on their lands as well as on their goods and chattels); Miller *v.* Com., 5 Watts & S. (Pa.) 488; Snyder *v.* Com., 3 Penr. & W. (Pa.) 286.

67. Hall *v.* Com., 8 Bush (Ky.) 378.

68. Hall *v.* Com., 8 Bush (Ky.) 378.

**The recognizance of a sheriff** binds all his real estate and that of his sureties in the same county as effectually as a judgment of a court of record. *In re* Morris, 4 Pa. St. 162.

69. Hall *v.* Com., 8 Bush (Ky.) 378. See also Norton *v.* Mulligan, 4 Strobh. (S. C.) 355, holding that a judgment in favor of the state on a sheriff's bond was a lien on the sheriff's property for all prior and subsequent

be injured by the acts of the sheriff as well as the state.[70] The lien does not expire with the sheriff's term of office,[71] but continues until the sheriff obtains his quietus for all the revenues and public dues for which he is bound.[72] It has been held that the legal mortgage on a sheriff's property, resulting from the registry of his official bond, is extinguished by prescription, unless reinscribed within ten years from the date of said registry;[73] but in another jurisdiction it has been asserted that the lien of the official recognizance of a sheriff is unlimited both in duration and extent.[74]

**21. Effect of Action Against Sheriff.** The fact that a person injured by the official misconduct or default of a sheriff has brought an action directly against the officer therefor does not bar another action on the official bond for the same cause, whether the judgment in the action against the officer alone has been in favor of plaintiff[75] or defendant.[76]

**D. Liability as to Particular Matters — 1. General Rule.** The general rule is that the bond of a sheriff or constable is answerable for any official misconduct or neglect on his part;[77] but as the liability of the sureties is limited by the terms of the bond,[78] the fact that a sheriff may have subjected himself to a personal liability does not necessarily give rise to a liability upon his bond.[79]

breaches of his bond, giving a subsequent assessment priority over an individual creditor's judgment.

70. Fluker *v.* Bobo, 11 La. Ann. 609 [*followed* in David's Succession, 14 La. Ann. 730].

71. Fluker *v.* Bobo, 11 La. Ann. 609 [*followed* in David's Succession, 14 La. Ann. 730].

72. Hall *v.* Com., 8 Bush (Ky.) 378.

73. Gale's Succession, 30 La. Ann. 351.

74. Snyder *v.* Com., 3 Penr. & W. (Pa.) 286.

75. Carmack *v.* Com., 5 Binn. (Pa.) 184 (holding that the recovery of a judgment in trover against the sheriff for the taking of the property of another person in an action against another is not a bar to an action on his official bond for the same cause); Com. *v.* Lelar, 1 Phila. (Pa.) 336 (holding that a recovery against a sheriff, in an action on the case for a false return, does not bar an action on his official bond for the same cause); State *v.* Cason, 11 S. C. 392 (holding that a judgment against a sheriff recovered after the expiration of his term for moneys received while in office does not bar a subsequent action on the official bond, alleging breaches generally, and setting forth a recovery of the judgment above referred to and the sheriff's failure to pay the same).

76. State *v.* Goettie, 7 Rich. (S. C.) 126, holding that a judgment for defendant in proceedings, under the statute, to recover of the sheriff five per cent per month on money collected by him and not paid over does not bar an action on the sheriff's bond for the money actually received.

77. *California.*— Van Pelt *v.* Littler, 14 Cal. 194.

*Illinois.*— People *v.* Robinson, 89 Ill. 159.

*Kentucky.*— Tudor *v.* Lewis, 3 Metc. 378.

*Louisiana.*— Smith *v.* Dulion, 113 La. 882, 37 So. 864.

*Massachusetts.*— Austin *v.* French, 7 Metc. 126, holding that where the condition of a bond given to a sheriff by his deputy was that said deputy "shall keep a fair register, or registers, of all warrants, summonses, writs and precepts, that may come to his hands as a deputy sheriff, and of his doings and fees thereon, in such fit and concise manner as the said A. (the sheriff) shall order, and subject to his inspection," etc., "and shall annually (in certain months named) furnish said A. with a true copy of the said register or registers," the sheriff's order in what manner the register should be kept was not a condition precedent, and that the deputy was bound, although no such order was given, to keep a register in some convenient form which would exhibit a correct statement of all processes committed to him, and of his doings and fees thereon, and that his omission to keep such full and accurate register was a breach of said condition.

*Missouri.*— State *v.* Griffith, 63 Mo. 545.

*Nebraska.*— Huddleson *v.* Polk, 70 Nebr. 483, 97 N. W. 624 (holding that the sureties on the official bond of a sheriff are liable for his misconduct, when acting as assignee, under the direct provisions of Comp. St. (1899) c. 6, § 7); Kendall *v.* Aleshire, 28 Nebr. 707, 45 N. W. 167; Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577.

*New York.*— Flack *v.* Brassel, 1 N. Y. App. Div. 538, 37 N. Y. Suppl. 578 [*affirmed* in 153 N. Y. 621, 47 N. E. 807]; People *v.* Brush, 6 Wend. 454.

*South Carolina.*— Maloney *v.* Buckner, 2 McMull. 323.

*Texas.*— Morgan *v.* Oliver, (Civ. App. 1904) 80 S. W. 111 [*reversed* on other grounds in 98 Tex. 218, 82 S. W. 1028].

*Virginia.*— Smith *v.* Butcher, 28 Gratt. 144.

*Washington.*—Magnus *v.* Woolery, 14 Wash. 43, 44 Pac. 130.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 354.

78. See *supra*, X, C, 1.

79. See Brown *v.* Mosely, 11 Sm. & M. (Miss.) 354; Com. *v.* Hoffman, 74 Pa. St. 105.

**2. Defaults in Respect to Execution of Process — a. Failure to Serve or Execute Process.** An officer's failure to serve process [80] or to levy an attachment or execution [81] constitutes a breach of his official bond.

**b. Delay in Executing Process.** An unreasonable delay in executing process placed in his hands may constitute a breach of the officer's bond.[82]

**c. Improperly Staying Execution.** Where the statute provides that, whenever any goods and chattels liable for the payment of rent shall be seized in execution, the proceedings on such execution shall not be stayed by plaintiff therein without the consent of the landlord, a sheriff who returns an execution stayed after notice of the landlord's claim and without the consent of the latter is liable therefor on his official bond.[83]

**d. Giving Preference to Junior Writ.** An officer who gives preference to a junior execution instead of levying first under the writ which first came to his hands is liable on his official bond to the senior execution creditor.[84] And it has also been held that there was a breach of a constable's official bond where he, at different times, levied a number of writs in his hands without regard to, or mention of, an intermediate levy made by a sheriff, and such intermediate levy was, in consequence, ignored in the application of the proceeds of the property by the successor in office of such constable.[85]

**e. Insufficient Levy.** There is a breach of an officer's bond when he makes an insufficient levy, although there is enough property of the debtor available at the time to satisfy the entire debt.[86]

80. Ivey *v.* Colquitt, 63 Ga. 509.

**Facts amounting to negligence.**— Where a debtor resided in one county, and had places of business in two other counties adjoining, and a sheriff, having a warrant to serve on him for the collection of a claim, went three times during three months to such residence, at the end of which time the debtor became insolvent, and it appeared that the debtor was usually absent from home during such time, but it did not appear that the sheriff made any effort to find him, except the three visits stated, and no process was ever executed, or other means used to collect the debt for a period of nearly three months, the sheriff was guilty of such laches as to render him and his sureties liable on his official bond. McLean *v.* Buchanan, 53 N. C. 444.

81. *Alabama.*— Abbott *v.* Gillespy, 75 Ala. 180; Couch *v.* Atkinson, 32 Ala. 633.

*Arkansas.*— McKinney *v.* Blakely, 87 Ark. 405, 112 S. W. 976; State *v.* Crow, 11 Ark. 642; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Faulkner *v.* State, 9 Ark. 14.

*Kentucky.*— Com. *v.* O'Cull, 7 J. J. Marsh. 149, 23 Am. Dec. 393; Com. *v.* Begley, 66 S. W. 754, 23 Ky. L. Rep. 1985. See also Demint *v.* Thompson, 80 Ky. 255.

*Louisiana.*— Marshall *v.* Simpson, 13 La. Ann. 437.

*Michigan.*— People *v.* Dumpley, 2 Mich. N. P. 197.

*Missouri.*— State *v.* Cave, 49 Mo. 129.

*New Jersey.*— State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62, holding that where an execution remains in the hands of a sheriff wholly unexecuted until by a new election he is again charged with the office, an omission to execute it will constitute a breach of his official bond.

*New York.*— Freeland *v.* Akers, 5 Misc. 528, 25 N. Y. Suppl. 986.

*Oregon.*—Habersham *v.* Sears, 11 Oreg. 431, 5 Pac. 208, 50 Am. Rep. 481.

*Virginia.*— O'Bannon *v.* Saunders, 24 Gratt. 138.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 359.

**Failure to levy on the property of replevin bail** will not support an action on the sheriff's bond when the undertaking of the replevin bail is void. Hougland *v.* State, 43 Ind. 537.

**A demand for the making of a levy is** necessary to render the sheriff and his sureties liable for a failure to levy. Lyendecker *v.* Martin, 38 Tex. 287.

82. State *v.* Porter, 1 Harr. (Del.) 126; Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683. See also Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

**Delay held not unreasonable.**— Where an execution sued out December 15, was on the same day placed in the sheriff's hands with no particular instructions, and he made no levy until December 22, when he found that the debtor had made an assignment on the preceding day, this delay alone would not make the sheriff liable on his bond. State *v.* Leland, 82 Mo. 260. See also Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

83. Borlin *v.* Com., 110 Pa. St. 454, 1 Atl. 404.

84. Com. *v.* Straton, 7 J. J. Marsh. (Ky.) 90 (holding that where an officer, who holds an elder and a junior execution in his hands, levies the junior execution first, and thus exhausts the property, and by reason thereof the elder execution is satisfied out of the estate of the surety of defendant in the elder execution, the officer is liable to a suit on his official bond in behalf of the surety); Boddie *v.* Vick, 25 N. C. 488.

85. State *v.* Curran, 45 Mo. App. 142.

86. Com. *v.* Lightfoot, 7 B. Mon. (Ky.)

**f. Particular Matters Affecting Liability** — (I) *VALIDITY OF PROCESS.* The fact that process is irregular does not preclude liability on the bond for the officer's failure to execute it where such process is not void,[87] but the bond cannot be held to respond for the officer's failure to execute process which is void on its face.[88]

(II) *EXISTENCE OR VALIDITY OF JUDGMENT ON WHICH PROCESS BASED.* An officer's failure to execute final process is none the less a breach of his bond because of irregularities in the judgment on which such process is based, where the judgment is not void;[89] but a plea denying the existence of such a judgment as the one on which it is alleged the execution issued presents a sufficient defense.[90]

(III) *AUTHORITY TO EXECUTE PROCESS.* Where a sheriff has no legal authority to serve or execute process delivered to him his failure to do so cannot constitute a breach of his bond.[91]

(IV) *DUTY TO EXECUTE PROCESS.* Under a statute providing that executions on judgments by justices of the peace "shall be directed to the constable of the ward, district or township where the defendant resides, or the next constable most convenient to the defendant," it has been held that the refusal of a constable to levy an execution which should not under such statute be directed to him furnished no cause of action on his bond.[92]

(V) *LIABILITY OF PROPERTY TO SEIZURE* — (A) *In General.* A sheriff's failure to levy on property which he cannot lawfully seize under the process in his hands cannot constitute a breach of his bond.[93]

(B) *Exemption of Property.* A failure to levy on exempt property cannot constitute a breach of the officer's official bond,[94] but a mistaken belief of the officer that the property was exempted will not relieve his sureties.[95]

(C) *Ownership of Property.* A mere suspicion that there might be some difficulty with regard to the title to property pointed out does not relieve the sheriff from liability on his official bond for refusing to seize it under an execution;[96] but in an action for failure to levy on property after being indemnified, it may be

298; Sutherland *v.* McKinney, 10 N. Y. Suppl. 876, 18 N. Y. Civ. Proc. 216.

87. Couch *v.* Atkinson, 32 Ala. 633; Com. *v.* O'Cull, 7 J. J. Marsh. (Ky.) 149, 23 Am. Dec. 393.

**Irregularity of process may be shown in mitigation of damages.**— Com. *v.* O'Cull, 7 J. J. Marsh. (Ky.) 149, 23 Am. Dec. 393.

88. Vogel *v.* People, 37 Ill. App. 388 (writ issued by justice in excess of his authority); Hawkins *v.* Com., 1 T. B. Mon. (Ky.) 144.

89. Couch *v.* Atkinson, 32 Ala. 633; People *v.* Dumpley, 2 Mich. N. P. 197.

**Attack on judgment not permitted.**— In an action on a sheriff's official bond for refusing to execute a writ of restitution issuing on a judgment for plaintiff in ejectment, the defense that the title on which the judgment was based was invalid cannot be made. State *v.* Harrington, 44 Mo. App. 297.

90. State *v.* Saddler, 6 Ark. 235.

91. State *v.* Atkinson, 53 Ark. 98, 13 S. W. 415 (holding that where a special execution is improperly issued to a sheriff after his term has expired, his failure to execute it is no breach of his bond); Dane *v.* Gilmore, 51 Me. 544.

92. Com. *v.* Lentz, 106 Pa. St. 643.

93. State *v.* Marshall, 69 Miss. 486, 13 So. 668 (holding that a sheriff is not liable on his bond for failing to levy an attachment against a corporation on the individual property of natural persons composing it, even though it afterward turns out that the individuals were liable as partners, owing to a defective organization of the corporation); State *v.* Boothe, 68 Mo. 546 (holding that where personal property was seized by the sheriff under an attachment, and, being perishable, was sold and the proceeds deposited in a bank to the sheriff's general account, and the attachment was afterward dissolved and execution issued for the amount of the debt, which was delivered to the sheriff, who was directed to levy the same on the money in his hands, the sheriff was not liable on his official bond for refusal to comply with such directions, as such money was not seizable under the execution).

94. State *v.* Harper, 120 Ind. 23, 22 N. E. 80; Redus *v.* State, 54 Miss. 712.

95. Abbott *v.* Gillespy, 75 Ala. 180. See also Sage *v.* Dickinson, 33 Gratt. (Va.) 361.

**A sheriff and his sureties may be held liable for his refusal to levy on a homestead,** as directed by an execution creditor, where the homestead was liable to the debt on which the execution issued, although at the time of such refusal the law as established by decisions of the state courts was that the homestead was not liable, the supreme court of the United States having subsequently reversed such holding and established as the law that the homestead was liable. Smith *v.* Banks, 60 Ga. 642.

96. Marshall *v.* Simpson, 13 La. Ann. 437.

shown in mitigation of damages that the property belonged to a person other than the execution defendant and was therefore not subject to levy.[97]

(VI) *PRIOR LIENS ON PROPERTY.* A sheriff is not relieved from liability on his official bond for refusing to levy on a particular lot of land by the fact that the land was subject to mortgage, and therefore the levy might have been valueless.[98]

(VII) *PRIOR WRITS AGAINST SAME DEFENDANT.* A sheriff is not relieved from liability on his official bond for failure to levy an execution by the fact that he had a prior execution against the same defendant in his hands, unless it was actually levied;[99] and it has been held that where a sheriff holds property under an attachment, and another writ is placed in his hands, it is his duty to execute the process subject to the prior attachment, and he will be liable on his bond for a failure so to do.[1]

(VIII) *INSOLVENCY OF DEFENDANT IN PROCESS.* An officer is not liable on his official bond for failing to levy an execution, where it appears that at the time he received the execution, and continuously thereafter during his term of office, the execution debtor was insolvent;[2] but the mere fact that the debtor is reputed to be insolvent will not release the officer from liability on his official bond for failure to use due diligence in endeavoring to collect the debt.[3]

(IX) *DEPRECIATION OF PROPERTY.* Where a sheriff levies on sufficient property to satisfy an execution, but before he can sell the same the property depreciates in value by reason of casualties over which he has no control, and fails to sell for enough to satisfy the execution, he is not responsible on his official bond as for an insufficient levy.[4]

(X) *LACK OF INDEMNITY.* Where a sheriff has begun to execute a writ without requiring indemnity and has so proceeded as to incur a liability to plaintiff, he cannot escape liability on his official bond for neglect to fully execute the writ because of the want of indemnity.[5]

(XI) *LEVY ON SUFFICIENT PROPERTY.* A sheriff is not liable on his official bond for failure to levy an execution on a particular lot of land pointed out to him by the execution plaintiff where he levies on other lands of defendant sufficient to satisfy the writ.[6]

(XII) *ERROR OF JUDGMENT.* The sureties of a sheriff are not liable as for wilful misconduct by the sheriff, where the act complained of consists in a mere error in judgment in deciding *bona fide* upon the priority of executions in his hands.[7]

(XIII) *NEGLIGENCE OF PLAINTIFF OR ATTORNEY.* A plaintiff's attorney is not guilty of such negligence as will prevent a recovery on a sheriff's bond for failure to serve process on a defendant, because he did not see to it, by examining the papers, that defendant was served.[8]

(XIV) *IMPOSSIBILITY OF EXECUTING PROCESS.* The failure of a sheriff to execute process cannot constitute a breach of his bond where the circumstances are such that he could not lawfully execute it.[9]

97. Snoddy *v.* Foster, 1 Metc. (Ky.) 160.

98. Lawson *v.* State, 10 Ark. 228, 50 Am. Dec. 238.

99. Abbott *v.* Gillespy, 75 Ala. 180.

1. Halpin *v.* Hall, 42 Wis. 176.

2. State *v.* Neff, 74 Ind. 146. See also People *v.* Wiltshire, 9 Ill. App. 374.

3. Howell *v.* Edwards, 32 N. C. 242.

4. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

5. Com. *v.* Lelar, 1 Phila. (Pa.) 173. See also Miller *v.* Com., 5 Pa. St. 294.

6. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

7. Bradbury *v.* Adams, 1 U. C. Q. B. 538.

8. Ivey *v.* Colquitt, 63 Ga. 509, holding that the attorney had the right to presume that the officer had done his duty and to rely on such presumption.

9. Com. *v.* Straub, 35 Pa. St. 137, holding that where to a writ of restitution issued after a judgment on a scire facias ad computandum et rehabendum terram against plaintiff in an extent, the sheriff returned that he did not find plaintiff in the extent, or any person holding or claiming under him, in the possession of the premises, but that he found A B and C D in possession, claiming title thereto in fee simple, wherefore he could not deliver possession to the party named in the writ, he was not liable on his official bond for neglect to execute the writ.

**g. Extent of Liability.** The general rule is that the bond must respond to the extent of the loss sustained by the complaining party by reason of the officer's failure to serve or execute process,[10] and *prima facie* the liability is for the amount of the debt for the collection of which the process issued.[11]

**3. Improprieties in Connection With Execution of Process — a. In General.** A recovery may be had upon the official bond of a sheriff or constable for official misconduct in connection with the levy of an execution [12] even though the act in question was malicious.[13]

**b. Failure to Note Time of Receipt on Execution.** The sureties of a sheriff may be held liable for his failure to note upon an execution the time of its delivery to him, as required by statute.[14]

**c. Causing Unnecessary Hardship.** Where an officer acts oppressively in making a levy so as to cause unnecessary hardship to the debtor, this constitutes a breach of his bond.[15]

**d. Unnecessary Levy on Property of Surety of Debtor.** Where an officer having an execution against a judgment debtor and his replevin bail levies on a sufficiency of goods of the principal debtor to satisfy the execution, and wastes them, and subsequently levies on and makes the money demanded out of the property of the bail, the sureties of the officer will be held responsible on his official bond to the bail.[16]

**e. Breaking Into Dwelling.** Where an officer breaks into a dwelling while executing civil process he is guilty of unlawful conduct in the actual discharge of his duties, and is not acting merely by color of his office; and the sureties on his bond are therefore liable for his acts.[17]

**4. Wrongful Levy on or Other Taking of Property — a. In General.** An officer's act in seizing under process property not subject to levy is a breach of his bond.[18]

**10.** Ivey *v.* Colquitt, 63 Ga. 509; Marshall *v.* Simpson, 13 La. Ann. 437.

**The value of property which might have been levied on,** with interest, not exceeding the amount of the debt, is the measure of the recovery in an action for failure to make a levy as required by an execution plaintiff. Redus *v.* State, 54 Miss. 712.

**In an action for an insufficient levy** the actual injury, and not necessarily the amount of the execution, is the measure of damages. Com. *v.* Lightfoot, 7 B. Mon. (Ky.) 298.

**11.** Dailey *v.* State, 56 Miss. 475; O'Bannon *v.* Saunders, 24 Gratt. (Va.) 138.

**12.** *Illinois.*— Greenberg *v.* People, 125 Ill. App. 626 [*affirmed* in 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223]; Cash *v.* People, 32 Ill. App. 250.

*Indiana.*— State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257.

*Massachusetts.*— Turner *v.* Sisson, 137 Mass. 191.

*Nebraska.*—Huffman *v.* Koppelkom, 8 Nebr. 344, 1 N. W. 243.

*Ohio.*—Rischer *v.* Meehan, 11 Ohio Cir. Ct. 403, 5 Ohio Cir. Dec. 416.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 354, 360.

**If the process is regular upon its face the** bond must answer for the sheriff's acts thereunder, although the process is not in fact based upon the judgment of a competent court. State *v.* Crow, 11 Ark. 642.

**13.** Greenberg *v.* People, 125 Ill. App. 626 [*affirmed* in 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223].

**14.** Chandler *v.* Henry, 90 Ala. 271, 8 So. 96, holding that under Code (1886), § 3105, providing that summary judgment may be had against the sheriff and his sureties "for failing to indorse on an execution the true date of its delivery to him, for ten per cent of the amount of the execution; and the officer is also responsible for any injury or loss which may arise from such omission," a judgment in summary proceedings against the sheriff and the sureties on his official bond for failing to make such indorsement can be for ten per cent of the amount of the execution only, and not for ten per cent of the execution as increased by accrued interest.

**15.** State *v.* Fowler, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L. R. A. 849.

**A levy so grossly excessive as to be oppressive** is a breach of the officer's bond. State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

**The fact that property levied on was intended for special use** in providing a meal for the execution defendant's boarders, and that it did not realize on the sale the amount it would have brought to the execution defendant if used in his business, did not of itself show that the levy was oppressive, so as to render the constable liable on his official bond. Coffey *v.* Wilson, 65 Iowa 270, 21 N. W. 602.

**16.** State *v.* Druly, 3 Ind. 431.

**17.** State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257; Jewell *v.* Mills, 3 Bush (Ky.) 62.

**18.** Butler *v.* State, 20 Ind. 169.

**b. Levy on Property Not Belonging to Defendant in Process.** The seizure of property of one person under process against another is a breach of the official bond of a sheriff or constable,[19] notwithstanding the fact that it is an excess of the officer's authority and a trespass.[20]

**c. Levy on Exempt Property.** There is a breach of the official bond of a sheriff or constable when the officer levies on exempt property,[21] or refuses to restore exempt property levied on when a proper claim therefor is made;[22] and a mere failure of a levying officer to apprise defendant in the process of his exemption rights may constitute a breach of the officer's bond,[23] unless it appears that such defendant knew of his rights and claimed his exemptions at the proper time.[24]

**d. Levy on Property Subject to Landlord's Lien.** Where an officer, with

19. *Alabama.*— Albright *v.* Mills, 86 Ala. 324, 5 So. 591.

*California.*— George H. Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694; Van Pelt *v.* Littler, 14 Cal. 194.

*Connecticut.*— Norwalk *v.* Ireland, 68 Conn. 1, 35 Atl. 804.

*District of Columbia.*— U. S. *v.* Hine, 3 MacArthur 27.

*Illinois.*— Wickler *v.* People, 68 Ill. App. 282; Jones *v.* People, 19 Ill. App. 300; Horan *v.* People, 10 Ill. App. 21.

*Indiana.*— State *v.* White, 88 Ind. 587.

*Iowa.*— Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

*Kansas.*— Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

*Kentucky.*— Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; Lewis *v.* Mansfield, 78 Ky. 460; Com *v.* Stockton, 5 T. B. Mon. 192.

*Maine.*— Harris *v.* Hanson, 11 Me. 241; Archer *v.* Noble, 3 Me. 418.

*Massachusetts.*— Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278; Turner *v.* Sisson, 137 Mass. 191; Tracy *v.* Goodwin, 5 Allen 409; Greenfield *v.* Wilson, 13 Gray 384; Lowell *v.* Parker, 10 Metc. 309, 43 Am. Dec. 436.

*Michigan.*— People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

*Missouri.*— State *v.* McBride, 81 Mo. 349; State *v.* Fitzpatrick, 64 Mo. 185; State *v.* Hadlock, 52 Mo. App. 297.

*Nebraska.*—Thomas *v.* Markmann, 43 Nebr. 823, 62 N. W. 206; Walker *v.* Wonderlick, 33 Nebr. 504, 50 N. W. 445; Turner *v.* Killian, 12 Nebr. 580, 12 N. W. 101.

*New York.*— People *v.* Schuyler, 4 N. Y. 173 [*reversing* 5 Barb. 166]; Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 [*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551]; Fohs *v.* Rain, 39 Misc. 316, 79 N. Y. Suppl. 872.

*Ohio.*— State *v.* Jennings, 4 Ohio St. 418.

*Pennsylvania.*—Brunott *v.* McKee, 6 Watts & S. 513; Carmack *v.* Com., 5 Binn. 184.

*Texas.*— Holliman *v.* Carroll, 27 Tex. 23, 84 Am. Dec. 606.

*Virginia.*— Sangster *v.* Com., 17 Gratt. 124.

*Washington.*—Fish *v.* Nethercutt, 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892.

*Wisconsin.*— Dishneau *v.* Newton, 91 Wis. 199, 64 N. W. 879. *Contra,* Taylor *v.* Parker, 43 Wis. 78.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 360.

Contra.— State *v.* Brown, 54 Md. 318 [*followed* in State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417] (holding that such a seizure was not in discharge of the official duty of the officer); State *v.* Conover, 28 N. J. L. 224, 78 Am. Dec. 54.

Condition of bond excluding liability for wrongful seizure.— The wrongful seizure and sale, by a constable, of the property of one person on an execution against another, does not constitute a breach of the condition of the bond prescribed by 1 Rev. St. p. 346, § 21, that the constable will pay to the person entitled thereto "all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection." People *v.* Lucas, 93 N. Y. 585 [*reversing* 25 Hun 610, and *distinguishing* People *v.* Schuyler, 4 N. Y. 173 (*reversing* 5 Barb. 166)].

20. Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 [*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551].

21. *Alabama.*— McElhaney *v.* Gilleland, 30 Ala. 183.

*Iowa.*— Strunk *v.* Ocheltree, 11 Iowa 158.

*Minnesota.*— Hursey *v.* Marty, 61 Minn. 430, 63 N. W. 1090.

*Missouri.*— State *v.* Barada, 57 Mo. 562; State *v.* Farmer, 21 Mo. 160; State *v.* Carroll, 9 Mo. App. 275; State *v.* Samuels, 28 Mo. App. 649.

*Washington.*— Mace *v.* Gaddis, 3 Wash. Terr. 125, 13 Pac. 545.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 360.

22. Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777; State *v.* Barada, 57 Mo. 562; State *v.* Lindsay, 73 Mo. App. 473; Scott *v.* Kenan, 94 N. C. 296, refusal to lay off personal property exemption.

Where the property levied on does not belong to the execution debtor he cannot predicate a breach of the sheriff's bond upon his refusal to set off the debtor's exemptions out of such property. State *v.* Springate, 51 Mo. App. 619.

23. State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44; Linck *v.* Troll, 84 Mo. App. 49; State *v.* Lindsay, 73 Mo. App. 473.

24. State *v.* Brooke, 29 Mo. App. 286.

notice of a landlord's lien on property, seizes and sells such property under execution, this is a breach of his bond for which the sureties must respond.[25]

**e. Levy on Mortgaged Property.** A levy on and removal of mortgaged property after notice of the mortgagee's right of possession is a breach of the officer's bond.[26]

**f. Particular Matters Affecting Liability — (i)** *VALIDITY OF PROCESS.* According to some authorities a wrongful seizure under process which is void upon its face is not a breach of the officer's bond;[27] but the bond must respond for a wrongful seizure under process which is voidable merely.[28]

(ii) *AUTHORITY TO EXECUTE PROCESS.* A seizure of one person's property under process against another has been held a breach of an officer's bond, although he had no authority to execute the process.[29]

(iii) *MISTAKE AS TO AUTHORITY.* The fact that a wrongful seizure and sale was made by an officer under the mistaken belief that it was authorized does not render it any the less a breach of his bond.[30]

(iv) *FRAUDULENT DISPOSITION OF PROPERTY BY DEFENDANT IN PROCESS.* An officer cannot escape liability on his bond for seizing and selling exempt property under execution by setting up that at the time of the seizure the execution defendant was fraudulently selling and disposing of such property.[31]

(v) *TAKING OF INDEMNITY.* Unless the statute so provides, one whose property is wrongfully seized by a sheriff who has taken indemnity is not restricted to his remedy by suit on the indemnity bond, but may resort to his common-law remedy by an action against the sheriff and the sureties on his official bond.[32]

(vi) *ABSENCE OF MALICE.* Where a sheriff has made a wrongful levy and sale under execution the fact that he did not act maliciously affords his sureties no protection.[33]

(vii) *DISPOSITION OF PROPERTY OR PROCEEDS THEREOF.* It is not a defense to an action on an officer's bond for a wrongful seizure that before the goods were so taken they had been mortgaged by a previous owner, that the mortgage was outstanding, and that the officer delivered the goods to the mortgagee on demand;[34] nor is it any defense to an action by an assignee of an insolvent debtor against a sheriff and his bondsmen, attaching property in the assignee's hands, that the goods, after being so converted, were sold, and a part of the proceeds deposited with the clerk of the court subject to the assignee's order.[35]

(viii) *TITLE TO PROPERTY.* In an action for a wrongful seizure it is competent to attack the deed under which plaintiff claims as fraudulent and void and to show that the property levied on was really that of the grantor in such deed, who was defendant in the process under which the seizure was made.[36]

**g. Extent of Liability.** Where the owner of property wrongfully seized by the sheriff does not recover his property, the bond must respond for the value thereof;[37] while if the owner recovers his property the bond must answer for any

25. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350; Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Governor *v.* Edwards, 4 Bibb (Ky.) 219.

26. Newman *v.* People, 4 Colo. App. 46, 34 Pac. 1006.

27. State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417 [*following* State *v.* Brown, 54 Md. 318]; Jones *v.* Hess, (Tex. Civ. App. 1898) 48 S. W. 46. But *compare* Couch *v.* Davidson, 109 Ala. 313, 19 So. 507, holding that if the officer acted under what purported to be an execution issued by a magistrate, his acts were done under color of his office, and his sureties were liable therefor, even though the writ was void.

28. Couch *v.* Davidson, 109 Ala. 313, 19 So. 507.

29. Turner *v.* Sisson, 137 Mass. 191. See also Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436. But *compare* State *v.* Hendricks, 88 Mo. App. 560.

30. State *v.* Edmundson, 71 Mo. App. 172.

31. State *v.* Samuels, 28 Mo. App. 649.

32. Lewis *v.* Mansfield, 78 Ky. 460 [*followed* in Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053 (*citing* also Gevedon *v.* Branham, 47 S. W. 589, 20 Ky. L. Rep. 791)]; State *v.* McBride, 81 Mo. 349.

33. State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44.

34. Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436.

35. Thomas *v.* Chapman, 62 Tex. 193.

36. State *v.* McBride, 81 Mo. 349.

37. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676;

depreciation in its value while it was withheld,[38] and such damages as may have accrued by reason of the loss of the use of the property.[39] Where the goods of a tenant subject to a landlord's lien are wrongfully levied on by a constable, whereby the landlord is prevented from enforcing his lien for rent under the lease, the landlord's measure of damages is the amount of his lien and not the value of the property levied on where such value exceeds the amount of the lien.[40]

**5. Defaults in Respect to Custody of Property — a. Loss of Property.** The loss of property levied on is a breach of the official bond of a sheriff,[41] whether the property be lost outright, or merely lost to the creditor under whose process it was seized.[42]

**b. Injury to Property.** When property seized under process or otherwise in the official custody of an officer is damaged by reason of his negligence, his official bond must respond therefor.[43]

**c. Releasing Property Levied on.** An unauthorized release of property levied on is a breach of the officer's official bond.[44]

People *v.* Crowe, 130 Ill. App. 349 (holding the cash market value of the property when taken to be the measure of damages); State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44.

**Purchase by owner.**— Where goods assigned for the benefit of creditors are attached and sold, the fact that the assignee purchased the goods at the sale cannot affect the measure of the damages which he is entitled to recover in an action against the sheriff and his sureties for the wrongful attachment. Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181.

38. People *v.* Crowe, 130 Ill. App. 349.

39. People *v.* Crowe, 130 Ill. App. 349.

40. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350.

41. *Iowa.*— Tieman *v.* Haw, 49 Iowa 312 (holding that where a coroner, acting *ex officio* as sheriff, seizes property under an unauthorized warrant or order, he and his sureties are liable, if the property is lost by his negligence); Dean *v.* Goddard, 13 Iowa 292, 81 Am. Dec. 433.

*Kansas.*— Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536, holding that there is a breach of a sheriff's bond where, through his negligence in respect to the threshing of wheat levied on, a large quantity thereof is wasted.

*Mississippi.*— Garrett *v.* Hamblin, 11 Sm. & M. 219, 49 Am. Dec. 53, holding that where a sheriff who held property under an attachment so conducted himself that a part was taken out of his custody, a part was lost, and a part escaped, and judgment having been recovered, and a venditioni exponas issued to the sheriff, he made no mention in his return thereon of the property which had escaped or perished, and as to the part which was taken out of his custody he returned that it was forcibly taken, which was proved not to be true, the sheriff and his sureties were liable on the bond for those portions of the property which he had so omitted to mention, or respecting which he had so untruly returned, and that it was not necessary that the return itself should show in so many words that "he voluntarily and without authority omitted to levy."

*Texas.*— Smith *v.* Tooke, 20 Tex. 750; Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

*West Virginia.*—Lyon *v.* Horner, 32 W. Va. 432, 9 S. E. 875.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 361.

**Property left with execution defendant.**— The fact that property levied on by a constable is left in the care of the execution defendant is not of itself sufficient to render the officer liable on his official bond for a subsequent loss. State *v.* Nelson, Smith (Ind.) 401.

42. *Alabama.*— Scarborough *v.* Malone, 67 Ala. 570.

*Kentucky.*—Com. *v.* Hurt, 4 Bush 64, holding that where the sheriff levies an execution on property of defendant, and afterward permits him to remove or dispose of it in such a way as to deprive plaintiff of his debt, he is liable therefor on his official bond, although no levy was indorsed on the execution.

*Louisiana.*— Sandridge *v.* Jones, 2 La. Ann. 933, holding that a sheriff and his sureties are liable where, after an attachment of property, the debtor is enabled, through the officer's negligence, to remove it to another state, plaintiff thereby losing his recourse against it.

*Pennsylvania.*— Mitchell *v.* Com., 37 Pa. St. 187.

*Wisconsin.*— Halpin *v.* Hall, 42 Wis. 176, holding that where the sheriff delivers property levied on to the owner of paramount liens, which are for a less sum than the property is worth, and in consequence of such delivery the subsequent attaching creditor is prevented from collecting his judgment, this is a breach of the sheriff's bond.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 361.

43. Witkowski *v.* Hern, 82 Cal. 604, 23 Pac. 132.

44. Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420; Com. *v.* Contner, 18 Pa. St. 439; Fisher *v.* Vanmeter, 9 Leigh (Va.) 18, 33 Am. Dec. 221; Indiana *v.* Baldwin, 6 Fed. 30, 10 Biss. 165, holding that an underfiling creditor in an attachment proceeding not dis-

**d. Failure to Have Property Forthcoming to Satisfy Writ.** The sureties upon a sheriff's bond are liable for his failure to deliver attached property in order to satisfy the judgment in the attachment suit.[45]

**e. Failure to Deliver Property to Person Entitled Thereto.** Where it becomes the duty of a sheriff or constable to deliver property in his official custody to a particular person, his failure or refusal to do so is a breach of his official bond.[46]

**f. Incurring Unnecessary Expense in Custody of Property.** It has been held that there is a breach of the bond of a deputy sheriff where he unnecessarily appoints keepers for property levied on by him and thereby imposes upon the sheriff a liability for their hire.[47]

**g. Particular Matters Affecting Liability**— (i) *VALIDITY OF PROCESS.* The fact that the process under which property is seized is irregular does not relieve the officer from liability on his bond for neglect or misconduct with respect to the care of such property.[48]

(ii) *NEGLIGENCE OF COMPLAINING PARTY.* Where, after judgment against a debtor in attachment, plaintiff neglects to have execution issued with reasonable diligence, and in consequence of such negligence his lien is lost, the sureties of the officer who levied the attachment are not liable in an action on the bond by the creditor for the loss of the goods.[49]

(iii) *RETURN BY SHERIFF OF PROCESS EXECUTED BY DEPUTY.* The fact that a sheriff has made a return on process executed by his deputy does not amount to an adoption of the acts of the deputy so as to preclude a suit by the sheriff on the deputy's bond for the loss of property seized under such process.[50]

(iv) *DEPRIVATION OF POSSESSION BY DETINUE PROCEEDINGS.* Where

missed of record has a right of action against the sheriff and his sureties for the release of the attached property, without notice, under an agreement between the original parties to the attachment suit.

**The fact that a levy is excessive** will not relieve the sheriff from liability on his official bond for releasing without authority the whole levy. Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420.

**Property held as bailee of predecessor.**— Since the special property acquired by a sheriff in chattels on which he levies an execution continues after expiration of his term, and his duty in regard to the same is not relieved by Code, § 3133, requiring a vacating officer to deliver to his successor all property appertaining to the office, but is an exception to such section, the new sheriff and his sureties are not liable on the bond of such sheriff for his act in releasing property delivered to him with a writ of attachment by his predecessor in office, since he is only an agent or bailee of his predecessor in regard to such property. Bruister *v.* Gavin, 127 Ala. 317, 28 So. 410.

**45.** Baker *v.* Baldwin, 48 Conn. 131.

**Offer of other property.**— A deputy sheriff is not liable on his official bond for not turning out attached property to be levied on under execution, where he offered other property sufficient to satisfy the judgment. Hoit *v.* Barron, Brayt. (Vt.) 117.

**46.** Williams *v.* Ragan, 153 Ala. 397, 45 So. 185; Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749 (holding that where an officer who has seized the property in detinue fails to redeliver the same, as required by statute, on plaintiff's failure to take possession and give bond within the time prescribed by statute after the seizure, he and his sureties are liable therefor); Dennie *v.* Smith, 129 Mass. 143 (holding that the refusal of a constable to restore attached property after a judgment for the owner is a breach of his official bond); State *v.* Fitzpatrick, 64 Mo. 185 (holding that while, on the dismissal of an attachment, defendant is *prima facie* the true owner of the property, yet if he has, pending the attachment and subject thereto, sold the property, and the officer is notified of the fact, it is his duty, on dismissal of the suit, to deliver it to the vendee; and if, in such case, he returns the property to defendant, and it is lost to the vendee, the officer will be liable therefor on his official bond); Levy *v.* McDowell, 45 Tex. 220 (holding that where plaintiff in attachment directs the release of a levy, the sheriff's failure to restore the property levied on to defendant in attachment is a breach of his bond).

**47.** Gorman *v.* Finn, 56 N. Y. App. Div. 155, 67 N. Y. Suppl. 546 [*affirmed* in 171 N. Y. 628, 63 N. E. 1117], where the bond of the deputy was conditioned to save harmless the sheriff touching the execution and return of all such writs as should be delivered to the sheriff, and to save harmless and indemnify the sheriff from and against all charges against the sheriff by reason of any neglect of the deputy in executing wrongfully, or neglecting to execute, the office of deputy.

**48.** Dean *v.* Goddard, 13 Iowa 292, 81 Am. Dec. 433; Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

**49.** Snell *v.* Allen, 1 Swan (Tenn.) 208.

**50.** Thomas *v.* Hubbell, 35 N. Y. 120.

property in the possession of a sheriff under an attachment is taken out of his possession by the coroner by virtue of a writ of detinue, the sureties of the sheriff cannot be held liable for his failure to deliver up the property to satisfy the judgment in the attachment suit.[51]

(v) *POSSIBILITY OF RETAKING PROPERTY.* In an action against the sureties of a sheriff for his neglect in releasing a boat attached under admiralty process, the fact that a subsequent sheriff, to whom final process was issued, could have seized and sold it, is not sufficient to mitigate the damages, unless plaintiff is connected with the last neglect by some wilful default.[52]

**h. Extent of Liability.** The bond must respond to the extent of the value of property lost outright or lost to the creditor under whose process it was seized,[53] unless the value of the property exceeds the amount of the debt, in which case the latter sum is measure of liability to the creditor.[54]

**6. MATTERS RELATING TO SALES — a. Sale of Property Not Belonging to Defendant in Process.** There is a breach of the official bond of a sheriff or constable when he sells under process property not belonging to defendant in such process;[55] and an officer who sells, under an execution against the holder, property held by virtue of a contract of conditional sale, and delivers it to the purchaser without requiring him to fulfil the conditions of the contract, is liable on his official bond to the real owner of the property.[56]

**b. Sale of Exempt Property.** A wrongful sale by a sheriff of property exempt from execution is a breach of his official bond;[57] but the sureties are not liable for the officer's act in selling exempt property where he acted under a chattel mortgage containing a power of sale, and not in his official capacity.[58]

**c. Sale of Mortgaged Property.** There is a breach of a sheriff's official bond where he sells mortgaged chattels on execution and delivers them to the purchaser without requiring him to comply with the conditions of the mortgage;[59] or where, in violation of statute, he sells mortgaged realty in fee, although the rents and profits have been appraised at a sum more than sufficient to satisfy the execution and costs.[60]

**d. Sale of Property Subject to Landlord's Lien.** There is a breach of a sheriff's bond where he sells a tenant's goods taken in execution without satisfying a landlord for his rent, if notice is given him that rent is in arrear.[61]

**e. Substitution of Other Property in Place of That Advertised.** Where an officer, after levying an execution on the property of a debtor and advertising it for sale, substituted in its place and sold other property of the debtor under an

**51.** Governor *v.* Gibson, 14 Ala. 326.

**52.** Bagby *v.* Harris, 9 Ala. 173.

**53.** Sandridge *v.* Jones, 2 La. Ann. 933; State *v.* Langdon, 57 Mo. 350.

**54.** Mitchell *v.* Com., 37 Pa. St. 187.

**55.** Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143; Spalding *v.* Walden, 23 La. Ann. 474; Noble *v.* Himeo, 12 Nebr. 193, 10 N. W. 499; Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 [*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551]; Fohs *v.* Rain, 39 Misc. (N. Y.) 316, 79 N. Y. Suppl. 872.

**The silence of the owner, although cognizant of the sale,** does not preclude a recovery by him on the officer's bond. Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143.

**56.** Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

**57.** *Alabama.*— McElhaney *v.* Gilleland, 30 Ala. 183.

*Iowa.*— Strunk *v.* Ocheltree, 11 Iowa 158.

*Missouri.*— State *v.* Samuels, 28 Mo. App. 649.

*Nebraska.*— Kriesel *v.* Eddy, 37 Nebr. 63, 55 N. W. 224.

*New York.*— Grieb *v.* Northrup, 66 N. Y. App. Div. 86, 72 N. Y. Suppl. 481; Bishop *v.* Mosher, 65 Hun 519, 20 N. Y. Suppl. 594.

*North Carolina.*— State *v.* Barefoot, 104 N. C. 224, 10 S. E. 170; Scott *v.* Kenan, 94 N. C. 296.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 360.

**58.** Baughn *v.* Allen, (Tex. Civ. App. 1903) 73 S. W. 1063.

**59.** McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739; Kackley *v.* State, 91 Ind. 437.

**The fact that the officer did not know of the mortgage lien** does not relieve him from liability on his bond where the mortgage was recorded within ten days of its execution. McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739.

**60.** State *v.* Leach, 10 Ind. 308.

**61.** Couch *v.* Davidson, 109 Ala. 313, 19 So. 507; Governor *v.* Edwards, 4 Bibb (Ky.) 219.

agreement with him, this constituted official misconduct for which he was liable on his official bond.[62]

**f. Selling Attached Property at Private Sale.** There is a breach of the official bond of an officer where he sells attached property at private sale.[63]

**g. Wrongful Resale at a Loss.** There is a breach of a sheriff's bond, where after having sold on execution defendant's property for more than sufficient to satisfy the debt, he afterward wrongfully resells it at a reduced price, causing a loss to defendant of the difference.[64]

**h. Failure to Make Known Defect in Title to Property Sold.** Where a sheriff on offering property for sale under execution fails to make known a defect of title which is within his knowledge, he and his sureties are responsible to the purchaser to the extent of the injury resulting from such failure of duty.[65]

**i. Ineffective Sale.** Where a sheriff acts in good faith in selling property under an execution, there is no breach of his bond because by reason of his mistake or oversight the purchaser obtains no title.[66]

**j. Failure to Sell.** An officer's failure to sell property which he has levied on under execution or which it has in any other manner become his duty to sell is a breach of his official bond;[67] but a breach of the bond cannot be predicated upon a failure to make a sale which the officer could not have legally made,[68] or upon a failure to sell which was due to a lack of bidders,[69] or an injunction against the sale.[70] It has also been held that a sheriff is not guilty of a breach of his bond in failing to sell attached property in his possession under an order of condemnation directing such sale, unless a legal demand has been made on him for an execution of the order.[71]

62. State *v.* Fuller, 14 Ohio 545.

63. Holdredge *v.* McCombs, 8 Kan. App. 663, 56 Pac. 536.

64. Sanderson *v.* Hamilton, 1 U. C. Q. B. 460.

65. Com. *v.* Dickinson, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139.

66. State *v.* Prime, 54 Ind. 450.

67. *California.*— Sheehy *v.* Graves, 58 Cal. 449, holding the sheriff liable for failure to sell the interest of an execution defendant in property owned jointly by him and another and in the possession of a mortgagee of the interest of the other.

*Iowa.*— Cox *v.* Currier, 62 Iowa 551, 17 N. W. 767.

*Kansas.*— Sponenbarger *v.* Lemert, 23 Kan. 55.

*Mississippi.*— Butler *v.* Williams, 14 Sm. & M. 54.

*North Carolina.*— Buckley *v.* Hampton, 23 N. C. 318.

*Ohio.*— State *v.* Meyers, 14 Ohio 538.

*Pennsylvania.*— Beale *v.* Com., 11 Serg. & R. 299; Com. *v.* Yeisley, 6 Pa. Super. Ct. 273.

*Tennessee.*— State *v.* Manly, 11 Lea 636 (failure to sell under order of sale in attachment proceedings); Union Bank *v.* Barnes, 10 Humphr. 244.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 364.

68. State *v.* Hammett, 7 Ark. 492, holding that under Rev. St. c. 60, § 47, requiring that a sale of land or slaves levied on under execution must be made on the first day of a term of the circuit court of the county, where no term of the circuit court intervened between the time of the delivery of the execution to the sheriff and the return term, the fact that the sheriff did not sell the property levied and have the money in court on the return-day of the writ did not constitute a breach of his bond, since he could not legally make a sale before the return-day of the writ.

**The fact that the property did not belong to defendant** in the process under which it was seized is sufficient to excuse a failure to sell the same. State *v.* Swigart, 22 Ark. 528; Dobbs *v.* Murray County, 17 Ga. 624; Com. *v.* Booker, 6 Dana (Ky.) 441; Chapman *v.* Smith, 16 How. (U. S.) 114, 14 L. ed. 868. But *compare* Miller *v.* Com., 5 Pa. St. 294.

**A failure to sell exempt property** is not a breach of the bond. State *v.* Boyd, 63 Ind. 428.

69. Com. *v.* Fuqua, 3 Litt. (Ky.) 41.

70. Easley *v.* Walker, 10 Ala. 671, holding that where a sheriff levied an execution on property which was in the hands of a third person, who claimed to have an interest therein, but stated that the interest of defendant in execution was amply sufficient to satisfy the debt, and the sheriff left the property in the claimant's possession, and duly attempted to sell it before the return-day, but the sale was enjoined by the claimant, the sheriff was not guilty of any negligence rendering himself and sureties liable, as the injunction which he was in duty bound to obey, and not the sheriff's act in leaving the property in the claimant's possession, was the real cause of the failure to make the money on the execution.

71. Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

**k. Failure to Execute Deed.** The failure of a sheriff who has sold real estate under execution to make and tender a deed to the vendee is a breach of his official bond.[72]

**l. Effect of Lack of Authority to Execute Process.** The sureties of a sheriff have been held not liable for his wrongful sale of property under process which he was not authorized to execute.[73]

**m. Extent of Liability.** Where an officer sells property not belonging to defendant in the process under which he acts, the bond must respond to the owner for the value of the property;[74] and the measure of damages for a sale of exempt property is the same.[75] Although a sheriff's sale is declared a nullity because of the officer's default, the purchaser cannot recover taxes and insurance premiums paid by him in an action on the sheriff's bond.[76] Where the sheriff fails to sell property levied on the value of such property is the measure of liability.[77]

**7. Matters Relating to Collection, Custody, or Disposition of Money — a. Failure to Pay Over or Account For Money.** There is a breach of the official bond of a sheriff or constable where he fails to pay over to the person entitled thereto, or to account for, money collected by him under process or otherwise in his official custody.[78] And even though money was collected by a sheriff

**72.** State *v.* Lines, 4 Ind. 351, holding that this is true whether such failure be the result of a corrupt intention or mere neglect.

**73.** State *v.* Hendricks, 88 Mo. App. 560, holding that where a constable undertook the sale of property under an execution not directed to him, and which he was not authorized to execute, and in connection with such sale refused to set off the owner's statutory exemption, the owner's right of action was against him for the wrongful conversion of his property, and not against the sureties on his official bond. But *compare* Turner *v.* Sisson, 137 Mass. 191.

**74.** Noble *v.* Himeo, 12 Nebr. 193, 10 N. W. 499.

**75.** State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44; Kriesel *v.* Eddy, 37 Nebr. 63, 55 N. W. 224, holding that an officer who sold exempt property under execution was liable on his bond for the value of the property, at least to the statutory limit of five hundred dollars.

A sale of a debtor's homestead being absolutely void, the debtor cannot recover the value of the homestead, but only damages and costs. McCracken *v.* Adler, 98 N. C. 400, 4 S. E. 138, 2 Am. St. Rep. 340.

**76.** Friedlander *v.* Bell, 17 La. Ann. 42.

**77.** State *v.* Meyers, 14 Ohio 538; Hurlock *v.* Reinhardt, 41 Tex. 580.

The amount of the judgment is not the measure of damages. Hurlock *v.* Reinhardt, 41 Tex. 580.

**78.** *Alabama.*— Pearce *v.* Hall, 113 Ala. 245, 21 So. 250; Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Evans *v.* Governor, 18 Ala. 659, 54 Am. Dec. 172; Hill *v.* Fitzpatrick, 6 Ala. 314.

*Arkansas.*— Martin *v.* Royster, 8 Ark. 74; Governor *v.* Pleasants, 4 Ark. 193.

*California.*— People *v.* Edwards, 9 Cal. 286.

*Colorado.*— People *v.* Kendall, 14 Colo. App. 175, 59 Pac. 409.

*Connecticut.*— Baker *v.* Baldwin, 48 Conn. 131.

*Delaware.*— State *v.* Clymer, 3 Houst. 20, holding that a defendant in an execution, whose goods have been sold under it by a constable, may maintain an action on the official bond of such constable to recover any surplus remaining in his hands after satisfying all the executions, levies, liens, and demands to which the same is legally subject.

*Idaho.*— Bingham County *v.* Fidelity, etc., Co., 13 Ida. 34, 88 Pac. 829 (holding that where a person pays a required license-tax to the sheriff for a license to engage in the liquor business, and fails to apply to the county commissioners therefor, and fails to file the bond required by law, the money so paid belongs to the county from the moment that the applicant begins business, and the surety on the sheriff's bond is liable therefor, and also that where the portion of the county in which such business is carried on is annexed to another county, the license-tax so paid to the sheriff must be paid to the treasurer of his county, and his surety is liable to such county therefor); Work *v.* Kinney, 5 Ida. 716, 51 Pac. 745; State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

*Illinois.*— Wood *v.* Cook, 31 Ill. 271 [*followed* in Bay *v.* Cook, 31 Ill. 336].

*Indiana.*— Snell *v.* State, 43 Ind. 359.

*Kentucky.*— Griffith *v.* Com., 10 Bush 281; Boswell *v.* Sheriff, 8 Bush 97; Com. *v.* Peters, 4 Bush 403; Sanders *v.* Parrott, 1 Duv. 292; Colter *v.* Morgan, 12 B. Mon. 278; Scott *v.* Com., 5 J. J. Marsh. 643 (holding that under the act of 1803 (1 Dig. p. 293), providing that an action may be maintained on the official bond of a constable who fails or refuses to pay over money collected on an execution, his sureties are liable for his failure to turn over bank-notes so collected); Morrow *v.* Governor, Hard. 489.

*Louisiana.*— New Orleans *v.* Waggaman, 31 La. Ann. 299; Hardee *v.* Dunn, 13 La. Ann. 161.

*Maryland.*— Merryman *v.* State, 5 Harr. & J. 423.

*Missouri.*— State *v.* Peterson, 142 Mo. 526.

before the execution of his bond, the sureties have been held liable for a subsequent

39 S. W. 453, 40 S. W. 1094 (holding that under Rev. St. (1889) § 6320, making a constable and his bondsmen liable to a penalty of one hundred per cent per annum for failing to pay over, when requested, money collected on a judgment "or other demand," they are liable for a failure to turn over fees of a justice of the peace); State *v.* Cayce, 85 Mo. 456; State *v.* Grupe, 36 Mo. 365; Evans *v.* Hays, 1 Mo. 697.

*Montana.*— Maddox *v.* Rader, 9 Mont. 126, 22 Pac. 386 [*reversed* on other grounds in 150 U. S. 128, 14 S. Ct. 46, 37 L. ed. 1025].

*Nebraska.*— Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*New York.*— People *v.* Ring, 15 Wend. 623.

*North Carolina.*— Dunton *v.* Doxey, 52 N. C. 222; Graves *v.* Reed, 27 N. C. 357; Davis *v.* McAlpin, 26 N. C. 140.

*Ohio.*— Hubbard *v.* Elden, 43 Ohio St. 380, 2 N. E. 434; Sidner *v.* Alexander, 31 Ohio St. 378; King *v.* Nichols, 16 Ohio St. 80; Woolard *v.* Favorite, 17 Ohio Cir. Ct. 72, 9 Ohio Cir. Dec. 686 (holding that Rev. St. § 1218, providing that a retiring sheriff shall pay over to his successor all moneys received by him then remaining in his hands, makes the mere failure of a retiring sheriff to pay over such moneys a breach of his official bond); State *v.* Newall, 2 Ohio Cir. Ct. 203, 1 Ohio Cir. Dec. 444.

*Pennsylvania.*— Clark *v.* Worley, 7 Serg. & R. 349; Com. *v.* Clipsham, 16 Pa. Super. Ct. 50; Com. *v.* Sheppard, 4 Pa. L. J. 180.

*South Carolina.*— State *v.* Cason, 11 S. C. 392; Black *v.* Ramey, 4 Strobh. 79.

*Tennessee.*— Rader *v.* Davis, 5 Lea 536; State *v.* Gilmore, 3 Sneed 503; Jones *v.* Scanland, 6 Humphr. 195, 44 Am. Dec. 300.

*Texas.*— Heidenheimer *v.* Brent, 59 Tex. 533; De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328.

*Virginia.*— Tyree *v.* Wilson, 9 Gratt. 59, 58 Am. Dec. 213.

*West Virginia.*— State *v.* McGuire, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822; State *v.* Hill, 17 W. Va. 452; Lucas *v.* Locke, 11 W. Va. 81.

*Canada.*— Kero *v.* Powell, 25 U. C. C. P. 448; Kent *v.* Mercer, 12 U. C. C. P. 30. See also McMartin *v.* Graham, 2 U. C. Q. B. 365.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 365.

**Deposit in and loan by bank.**— Where property taken under attachment sued out by a bank was, pursuant to an order to that effect, sold before final judgment; and the purchaser, with the consent of the sheriff, gave his note to the bank for its estimated share of the proceeds, and at maturity the bank extended the payment thereof, and, when it was paid, placed the money to the credit of the sheriff's account, and before final judgment the bank paid the money to the sheriff's deputy, on checks drawn in the name of the sheriff, after having first taken the deputy's individual note therefor, it was held that, on the entry of final judgment in favor of the bank, the sheriff and his sureties were not liable to the bank for its share of the proceeds of the sale, since the fund paid to the bank by the purchaser was its property, subject to the final judgment in the attachment suit. Boone County Bank *v.* Eoff, 66 Ark. 321, 50 S. W. 688.

**Bond covers all collections.**— Where there is nothing in the order of the county court appointing a deputy sheriff which limits his services to any particular district or to any particular character of service, and no such limitation appears in the bond executed by him to the sheriff, the bond covers all collections made by him as deputy sheriff for his entire term. Bates *v.* Smith, 66 S. W. 714, 23 Ky. L. Rep. 2134.

**Sureties liable, although no receipt given.**— The fact that the statute makes it the duty of a constable to receive demands for collection, and to give his receipt therefor, and that the act concerning justices' courts provides a summary mode of proceeding against him for a failure to pay over on demand the money received on any demand placed in his hands for collection, and for which he shall have given his receipt, does not make his liability on his bond depend on his giving a receipt. State *v.* Grupe, 36 Mo. 365.

**Dealings equivalent in law to collection.**— Where a sheriff, before a judgment is obtained, makes an arrangement with defendant by which he undertakes, for a valuable consideration, to pay the debt to plaintiff, when the judgment is rendered and execution sued out, and returns "ready to render," he will be considered as having "levied the debt," within the meaning of the statute; and if he fails to pay plaintiff, the sureties in his official bond will be liable for his default, unless plaintiff was privy to such arrangement. Norris *v.* Crummey, 2 Rand. (Va.) 323.

**Where the execution plaintiff permits the sheriff to retain and use money collected** on the writ, the amount becomes a loan for which the officer's sureties are not liable. Hill *v.* Kemble, 9 Cal. 71.

**Payment in currency not authorized by law.**— Where a defendant in an execution paid to the sheriff the amount thereof in depreciated currency, adding a sum to make it equal to par, and plaintiff in the execution refused to receive it, so that defendant was compelled to pay the amount in other funds, and the sheriff on demand failed to repay him the depreciated funds, the sheriff's sureties were not liable therefor on his official bond, although the sheriff was personally liable. Brown *v.* Mosely, 11 Sm. & M. (Miss.) 354.

**Failure to deliver securities.**— A sheriff and his sureties are liable on his official bond for his failure to deliver to the proper parties, in accordance with the order of court, securities received by him in his official capacity

default with respect to such money.[79] *A fortiori* the fact that an execution was delivered to an officer before his bond was executed does not relieve his sureties of liability for money received thereon afterward.[80]

**b. Conversion or Embezzlement of Money.** The bond of a sheriff must respond for his conversion or embezzlement of money received by virtue of his office;[81] and where a sheriff who has sold perishable property so mingles and mixes the proceeds with his own funds that after his death his administrator cannot distinguish the one from the other, such disposition of the money is equivalent to a conversion, and a breach of his official bond, for which his sureties are liable.[82] But where the parties have by agreement taken attached property out of the custody of the law, and authorized the sheriff to sell it without reference to the legal proceedings, an appropriation by him of the funds arising from the sale is a breach of private trust, and not an act of official misconduct giving rise to a liability on his official bond.[83]

**c. Misapplication of Proceeds of Sale.** There is a breach of the officer's official bond where he misapplies or improperly distributes the proceeds of a sale made by him in his official capacity.[84]

as the proceeds of a sale on partition. Collins *v.* Skillen, 16 Ohio St. 382, 88 Am. Dec. 458.

**Release from liability.**— Mo. Const. art. 11, § 4, providing that "no person shall be prosecuted in any civil action or criminal proceeding for or on account of any act by him done, performed, or executed after the first day of January, 1861, by virtue of military authority vested in him by the government of the United States, or that of this State, to do such act, or in pursuance of orders received by him from any person vested with such authority," did not relieve a sheriff from liability on his bond for a misapplication, under federal military orders, of money coming into his hands as sheriff, for if it had that effect it would impair the obligation of the sheriff's contract to pay over money in his hands and thus contravene the federal constitution. State *v.* Gatzweiler, 49 Mo. 17, 8 Am. Rep. 119.

79. Wentz *v.* Ledoux, 24 La. Ann. 131; State Treasurers *v.* Taylor, 2 Bailey (S. C.) 524.

80. Faulkner *v.* State, 9 Ark. 14; People *v.* Ring, 15 Wend. (N. Y.) 623. See also Boswell *v.* Sheriff, 8 Bush (Ky.) 97, holding that while the surety on a constable's bond is not liable for money collected without suit, on claims placed in the constable's hands for collection before the execution of the bond, he is liable if the money is made by renewing executions, orders of attachment, or process after the execution of the bond.

81. State *v.* Roberts, 21 Ark. 260; Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541; Hughes *v.* Smith, 5 Johns. (N. Y.) 168; Griffin *v.* Underwood, 16 Ohio St. 389.

**Money received by the sheriff on a sale under foreclosure** is money received by virtue of his office. Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541.

**Facts not amounting to conversion.**—A mere payment of money collected by a sheriff on execution to plaintiff in another execution, or an appropriation of it by the sheriff to other purposes, is not a conversion, subjecting him and his sureties to liability for failure to pay it over, if he retains other money ready to be paid to plaintiff on demand. Dumas *v.* Patterson, 9 Ala. 484.

**Where officer acts as agent of party.**— Where an execution creditor or his attorney directs a sheriff to proceed under it in some way other than that prescribed by law, he makes the sheriff his agent, and the sheriff's sureties are not liable for his misapplication of the funds. Rollins *v.* State, 13 Mo. 437, 53 Am. Dec. 151.

**Conversion of securities.**—Where a sheriff, on a sale of premises under an order of court, takes securities in his own name as part of the purchase-money a conversion of them to his own use is a breach of his bond, for which his sureties will be liable. Griffin *v.* Underwood, 16 Ohio St. 389.

**Conversion of note.**— Where an officer received a note for collection, and never collected the money on it, but used it in payment of his own debt, his sureties were not responsible. Haynes *v.* Bridge, 1 Coldw. (Tenn.) 32.

82. State *v.* Roberts, 21 Ark. 260.

83. Brent *v.* Hohorst, 1 Tex. App. Civ. Cas. § 343.

84. *California.*— McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115, holding that where a sheriff, on the ground that he adjudges an attachment which is regular on its face, void on the pleadings, applies the proceeds of property on which it had been levied to the satisfaction of a lien under a junior attachment, he is liable on his official bond.

*Louisiana.*— Lynch *v.* Leckie, 9 La. Ann. 506.

*Missouri.*— State *v.* Langdon, 57 Mo. 350 (holding that a constable who turns over the proceeds of attached property to a third person on mere notice of claim, without proof of title, becomes liable therefor on his bond); Howard *v.* Clark, 43 Mo. 344; State *v.* Taylor, 6 Mo. App. 277.

*New York.*— Rowe *v.* Richardson, 5 Barb. 385, holding where a sale is made by a deputy sheriff under a junior execution, and he re-

**d. Failure to Collect.** There is a breach of an officer's bond when he fails to collect money which it was his duty to collect and which he might have collected if he had acted with reasonable diligence.[85]

**e. Exacting Excessive Payments.** Where a sheriff, having writs which authorize him to collect certain sums, exacts from the debtor more than is lawfully required, this amounts to a violation of his official bond.[86]

**f. Particular Matters Affecting Liability** — (i) *AUTHORITY TO RECEIVE MONEY* — (A) *In General.* The sureties are not responsible for the officer's misapplication or conversion of money which he had no official authority to receive.[87] So where an officer collects money without legal process of any kind,

fuses to apply the proceeds of an older execution in the hands of the sheriff, it is a breach of his bond.

*North Carolina.*— Titman *v.* Rhyne, 89 N. C. 64, holding that a sheriff is liable on his bond for failure to apply the proceeds of sale of a debtor's land in payment of an execution, in his hands at the time of the sale, issued on a judgment having the prior lien.

*South Carolina.*— State *v.* Boles, 18 S. C. 534.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 367.

**A sheriff acting in place of a trustee, under appointment of the circuit court, acts officially,** in executing the deed of trust, and the sureties on his bond are liable for a misapplication of the funds arising from a sale under the deed of trust. State *v.* Taylor, 6 Mo. App. 277. But the sureties are not liable if a sheriff misappropriates the proceeds of land sold by him under a trust which substitutes him as trustee in case the original trustee will not act. State *v.* Davis, 88 Mo. 585.

85. *California.*— Meherin *v.* Saunders, 110 Cal. 463, 42 Pac. 966, holding that where a constable sells property under execution, issues his certificate of purchase, and fails to collect a portion of the price, he and his sureties are liable for the amount for which the property was sold.

*Maryland.*— Burtles *v.* State, 4 Md. 273 (holding that a constable appointed for one election district is liable on his official bond for failure to collect claims put in his hands for collection in the county, but without his election district); Mantz *v.* Collins, 4 Harr. & M. 65.

*North Carolina.*— Hubbard *v.* Wall, 31 N. C. 20; Lindsay *v.* Stephens, 25 N. C. 92 (holding that where a person put into the constable's hands for collection a note, the amount of which exceeded the jurisdiction of a justice of the peace, and the constable procured the maker to substitute for it two notes, each within the jurisdiction of a justice, and afterward failed to collect the same when he might have done so, he was liable on his bond); Quin *v.* Roane, 24 N. C. 144.

*Texas.*— Walton *v.* Compton, 28 Tex. 569.

*West Virginia.*—State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131, holding that a constable was liable on his bond for officers' fee bills put into his hands for collection, where the parties had promised to pay such bills.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 366.

**Failure to take out process.**— In North Carolina it has been held that a constable's sureties were not liable for his omitting, without instructions to the contrary, to sue out execution against an insolvent debtor (Fisher *v.* Carraway, 14 N. C. 436), and that a sheriff, who had received for collection the note of a *feme covert* within a magistrate's jurisdiction, was not guilty of negligence, so as to become liable on his official bond, by failing to take out a warrant on the claim (Graham *v.* Buchanan, 60 N. C. 93).

**Failure to return uncollected notes.**—Where a constable received notes to collect, and for want of time did not collect them before his term of office expired, and afterward refused to deliver them up, his sureties were liable therefor on his official bond. Respass *v.* Johnson, 29 N. C. 77.

**Where it is not the official duty of the sheriff to collect** a claim put in his hands for collection, he cannot be held liable upon his bond for failure to collect the same. State *v.* Long, 29 N. C. 379; State *v.* McCallum, 2 Baxt. (Tenn.) 101. See, generally, *supra*, X, C, 6.

86. Treasurers *v.* Buckner, 2 McMull. (S. C.) 327.

87. *Iowa.*— Sample *v.* Davis, 4 Greene 117.

*Kentucky.*— Griffith *v.* Com., 10 Bush 281 (holding that the sureties on a sheriff's official bond are not liable on his covenant to collect and account for fee bills of which he has acknowledged the receipt, but are only liable for money collected on writs and process which the law makes it his duty to take and collect); Com. *v.* Sommers, 3 Bush 555.

*Louisiana.*— Bacas *v.* Hernandez, 31 La. Ann. 85 (holding that as the sheriff is not authorized to receive from the purchaser of property at a judicial sale the amount of the mortgage or privileged debts which rank the claim of the seizing creditor, the sureties of the sheriff cannot be held for the amount of such debts received and not accounted for by the sheriff); Merchants' Bank *v.* Peters, 2 Rob. 214.

*New York.*— De Sisto *v.* Stimmel, 58 N. Y. App. Div. 486, 69 N. Y. Suppl. 431 [*affirming* 31 Misc. 711, 65 N. Y. Suppl. 314 (*reversing* 29 Misc. 769, 61 N. Y. Suppl. 57)], holding that where a city marshal's bond provided that, if he should faithfully execute the duties of his office, the obligation should be void, and after the marshal had levied on

the sureties are not liable therefor,[88] unless the statute expressly subjects them to such liability;[89] and where a sheriff sells property taken on attachment by agreement between plaintiff and defendant, and without an order of court, his sureties are not liable on their bond for his failure to pay over the money.[90]

(B) *Money Received After Return-Day of Process.* Where money is paid to a sheriff by judgment debtor after the return-day of the execution, the sheriff's failure to pay it over to the judgment creditor is not a breach of his bond,[91] unless the statute has expressly extended the liability of the sureties to cover such a default.[92] But it is otherwise where such money is paid to release property levied on before the return-day and in the officer's possession;[93] or where the money is realized by a sale after the return-day of property levied on before that time.[94]

(II) *OFFICIAL RECEIPT OR CUSTODY OF MONEY.* Where a sheriff's receipt and custody of money are in his private rather than his official capacity, his sureties are not responsible for his disposition thereof.[95] But where a sheriff, by consent of the parties in interest, receives the purchase-money of land sold

personal property on an execution, plaintiff therein deposited two hundred and fifty dollars with the marshal to secure him against any damages from the levy, to be returned if suit was not commenced for the property within twenty days, and no suit was begun, and the marshal converted the money to his own use, the marshal's bondsmen were not liable for the conversion of the money, since the marshal had no official authority to receive the deposit.

*North Carolina.*— Blythe *v.* Outland, 33 N. C. 134; Ellis *v.* Long, 30 N. C. 513.

*Ohio.*— Bradt *v.* Skillen, 2 Ohio Dec. (Reprint) 727, 5 West. L. Month. 72, holding that where a sheriff, making a sale on partition, exceeds the authority of his office by receiving and collecting the notes, instead of having the notes made to the parties and delivering them to the parties, the sureties on his bond are not liable for the money so collected.

*Texas.*— Heidenheimer *v.* Brent, 59 Tex. 533.

*United States.*— People *v.* Hilton, 36 Fed. 172, holding that where a sheriff having a writ of replevin for execution received from plaintiff in replevin a deposit of money in lieu of the bond required by statute for the diligent prosecution of the suit, and subsequently embezzled the money, the sureties on his official bond were not liable for the amount.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 365.

**Setting up lack of authority to receive payment otherwise than in money.**—Where plaintiff placed in the hands of a deputy sheriff a claim for collection against a person who, in payment thereof, turned in a claim which he held against such deputy, and plaintiff thereupon sued on the sheriff's official bond to recover the amount of his claim, the sureties were entitled to set up the lack of power in the officer to receive anything in satisfaction of a claim placed in his hands for collection except money, or bank-notes circulating as such. Draper *v.* State, 1 Head (Tenn.) 262.

**88.** *Illinois.*— Henckler *v.* Monroe County Ct., 27 Ill. 39.

*Kentucky.*— Jones *v.* Com., 2 Litt. 357; Bernard *v.* Johnston, 3 Bibb 432.

*Mississippi.*— Radford *v.* Hull, 30 Miss. 712.

*Missouri.*— Bogard *v.* Green, 8 Mo. 115.

*North Carolina.*— Mills *v.* Allen, 52 N. C. 564 [*following* Ellis *v.* Long, 30 N. C. 513; State *v.* Long, 30 N. C. 415]. *Contra,* Holcomb *v.* Franklin, 11 N. C. 274.

*Tennessee.*— Turner *v.* Collier, 4 Heisk. 89. *Contra,* Bosley *v.* Smith, 3 Humphr. 406.

*Texas.*— Heidenheimer *v.* Brent, 59 Tex. 533.

*United States.*— U. S. *v.* Cranston, 25 Fed. Cas. No. 14,889, 3 Cranch C. C. 289.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 365.

**89.** See Jones *v.* Com., 2 Litt. (Ky.) 357.

**90.** Governor *v.* Perrine, 23 Ala. 807.

**91.** Forward *v.* Marsh, 18 Ala. 645 (holding that, where an execution was, on its face, returnable at a time anterior to the term to which by law it should have been made returnable, and was not amended, the sureties of the officer were not liable for money collected on it by him after the day on which it was on its face returnable, and which he failed to pay over); Fitzpatrick *v.* Montgomery Branch Bank, 14 Ala. 533; Dean *v.* Governor, 13 Ala. 526; Farmers' Bank *v.* Reid, 3 Ala. 299 [*following* Barton *v.* Lockhart, 2 Stew. & P. 109]; Stephens *v.* Boswell, 2 J. J. Marsh. (Ky.) 29; Rudd *v.* Johnson, 5 Litt. (Ky.) 19; Turner *v.* Collier, 4 Heisk. (Tenn.) 89; Thomas *v.* Browder, 33 Tex. 783 [*citing* Hamilton *v.* Ward, 4 Tex. 356]; Haley *v.* Greenwood, 28 Tex. 680.

**92.** James *v.* Yates, 3 Metc. (Ky.) 343 [*distinguishing* Stephens *v.* Boswell, 2 J. J. Marsh. (Ky.) 29; Rudd *v.* Johnson, 5 Litt. (Ky.) 19].

**93.** Evans *v.* Governor, 18 Ala. 659, 54 Am. Dec. 172; Beale *v.* Com., 7 Watts (Pa.) 183.

**94.** Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Nash *v.* Muldoon, 16 Nev. 404.

**95.** *Louisiana.*— Gay *v.* Lejeune, 26 La. Ann. 250.

*Massachusetts.*— Boston *v.* Moore, 3 Allen 126, holding that the condition of a constable's bond which provides that "he shall

under a judgment in partition before the same is payable under the order of sale, he will be deemed to have received it in his official capacity, and the sureties on his bond are liable for his default in paying it over to the persons entitled to it.[96]

(III) *VALIDITY OF JUDGMENT OR PROCESS.* The sureties are not relieved of liability because of an irregularity in the process under which the money was collected,[97] or an error or irregularity in the rendition of the judgment upon which such process is based.[98]

(IV) *VALIDITY OF SALE BY WHICH MONEY REALIZED.* In an action on a sheriff's bond for failure to pay over the proceeds of an execution sale of land, it may be shown in defense that the execution defendant had but an equitable title to the land which could not be sold under execution at law.[99]

(V) *DUTY TO PAY OVER MONEY.* A breach of a sheriff's bond cannot be predicated upon his failure to pay over money unless it was his duty to pay over the same.[1]

(VI) *TENDER AND REFUSAL.* The sureties are relieved from liability where the officer has tendered payment to a person entitled to receive the money who has refused it.[2]

faithfully perform all the duties of a constable in the service of all civil process which may be committed to him" is not broken by his failure to pay to plaintiff in a writ money intrusted to him for that purpose by defendant therein after completion of the service.

*North Carolina.*— Martin *v.* Long, 30 N. C. 415, holding that where on making an arrest the sheriff did not take a bail-bond, but in lieu thereof took a deposit in money, the sureties of the sheriff were not liable for the amount, although defendant in the process offered to surrender himself and demanded the money of the sheriff, because as between defendant and the sheriff, the contract was merely personal and in their natural capacities.

*South Carolina.*— Treasurers *v.* Buckner, 2 McMull. 327; Treasurers *v.* Temples, 2 Speers 48.

*United States.*— See Virginia *v.* Turner, 28 Fed. Cas. No. 16,971, 1 Cranch C. C. 286.

*Canada.*— Kero *v.* Powell, 25 U. C. C. P. 448.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 365.

**Money paid by mistake.**— The refusal of a sheriff to pay back, on demand, money received through a mutual mistake, in excess of the true amount of an execution collected by him, is a private matter, to be settled between the parties, and is not a breach of his official bond for which his sureties can be held responsible. Ireland *v.* Tapscott, 68 N. C. 300.

**An overpayment to a sheriff on an execution** under a threat to levy if the sum demanded is not paid is obtained by "virtue of his office," and the sureties on his official bond are liable therefor, even though the actual payment was to his deputy. Snell *v.* State, 43 Ind. 359.

96. State *v.* Cayce, 85 Mo. 456.

97. State *v.* Norris, 19 Ark. 247 (holding that it is no defense to an action on a sheriff's official bond for failure to pay over money made on execution issued from the circuit court on a justice's judgment that no execution had been issued by the justice and returned *nulla bona* before filing the transcript of the judgment in the circuit court); Rollins *v.* State, 13 Mo. 437, 53 Am. Dec. 151.

**Neither the sheriff nor his bondsmen can attack the validity of the process** under which the sheriff collected the money in his hands. Watts *v.* Colquitt, 66 Ga. 492.

98. State *v.* Hicks, 2 Blackf. (Ind.) 336, 20 Am. Dec. 118.

**The officer and his sureties are estopped** to deny the regularity of the judgment on which the money was made. Nutzenholster *v.* State, 37 Ind. 457.

99. Kelly *v.* Governor, 14 Ala. 541.

1. State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410, holding that as the termination of the office of a sheriff did not *ipso facto* require him to pay into court the proceeds of a sale on execution, his failure to do so did not constitute a breach of his bond.

**When money collected under a judgment has been paid to the judgment creditor** while the judgment is in full force and has not been stayed, the officer's failure to return the money to the judgment debtor on the reversal of the judgment is not a breach of his bond. Monahan *v.* Triumph Artificial Limb Co., 6 Ohio Cir. Ct. 150, 3 Ohio Cir. Dec. 390.

2. Hull *v.* Chapel, 77 Minn. 159, 79 N. W. 669, 77 Am. St. Rep. 666, holding that the sureties on a sheriff's bond were not liable for a sum received by the sheriff on redemption from a mortgage foreclosure, where the sheriff had duly tendered payment thereof to plaintiff's agent, who had authority to accept and to give a receipt for the money, which had been refused, notwithstanding the fact that a subsequent demand was made by plaintiff, and the sheriff refused to pay the money.

**Facts not amounting to tender.**—Where in an action by a sheriff on the official bond of his deputy for failure to pay over money collected on a fieri facias, it appeared that the deputy had "proposed to pay" the money collected by him to his principal, and the latter "told him that he would see the per-

(VII) *PAYMENT OF DEBT.* A sheriff who has collected money on an execution cannot, in an action upon his bond therefor, dispute the right of plaintiff to the money, upon the ground that the judgment was satisfied by a recovery and satisfaction in another case founded upon the same cause of action;[3] but payments by the debtor to execution creditors are a defense *pro tanto* to an action on the sheriff's bond for failure to collect the execution.[4] If the sheriff pays to plaintiff the amount of an execution then in force in his deputy's hands, and the deputy afterward collects it from defendant in execution, his sureties are liable on their bond if he fails to account for it;[5] and where a deputy has neglected to pay over money collected on an execution, the sureties on his official bond are not relieved from liability to the sheriff by the fact that, on being sued, the latter paid the money voluntarily without defending the suit.[6]

(VIII) *NECESSITY FOR DEMAND.* It has been held that in order for a sheriff's failure to pay over money to the person entitled thereto to constitute a breach of his bond, the person entitled must have demanded the money or offered a reasonable opportunity for payment;[7] but that a demand is not necessary before the bringing of an action for money collected by the sheriff for public purposes.[8]

(IX) *NECESSITY FOR ENFORCEMENT OF SHERIFF'S LIABILITY FOR DEPUTY'S DEFAULT.* It has been held that there is a breach of a deputy sheriff's bond if he fails to pay over money collected on execution, even though the sheriff should never be sued or made to pay the amount.[9]

(X) *PROPER APPLICATION OF MONEY.* There is no liability on the official bond of a sheriff as to money which has been properly applied by him.[10]

(XI) *ORDER TO LEND MONEY.* It has been held that where a court has ordered a sheriff, as its agent, to lend out money in his custody, the sureties on his official bond are not responsible for the faithful execution of the personal trust thus imposed.[11]

(XII) *ORDER TO BRING MONEY INTO COURT.* An order of court directing a sheriff, who has money arising from a sale of goods taken by him on attachment

sons it was going to, and that he could pay it to them," it was held that this did not amount to a tender of the money to the principal, so as to relieve the deputy's sureties from liability on their bond, but was a direction to the deputy to pay it to the persons entitled to receive it, and on his failure to do so, in consequence of which the sheriff was compelled to pay it, the sureties of the deputy were liable on their bond. McGehee *v.* Gewin, 25 Ala. 176.

3. Hill *v.* Fitzpatrick, 6 Ala. 314.

4. Com. *v.* Bosley, 5 Bush (Ky.) 221.

5. McGehee *v.* Gewin, 25 Ala. 176, holding that no one but the execution defendant could take advantage of the payment by the sheriff.

6. Andrus *v.* Bealls, 9 Cow. (N. Y.) 693.

7. Woolard *v.* Favorite, 17 Ohio Cir. Ct. 72, 9 Ohio Cir. Dec. 686, so holding in a case where there had been an order of court for such payment.

8. Moore County *v.* McIntosh, 31 N. C. 307.

9. Willet *v.* Stewart, 43 Barb. (N. Y.) 98, 101, where it is said: "The deputy's liability depends solely upon his own omission to pay the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it."

10. People *v.* Foster, 133 Ill. 496, 23 N. E. 615 (holding that the sureties of a sheriff are not liable for money received by him from the state for conveying convicts, and not reported by him to the county board, when such money was necessarily expended by the sheriff in defraying the cost and expense of conveying such convicts); *In re* Bastian, 90 Pa. St. 472 (holding that an execution creditor cannot recover upon the sheriff's bond for the proceeds of real estate seized and sold under his process where such proceeds were applied by the sheriff to the payment of prior liens on the property).

11. Sanders *v.* Parrott, 1 Duv. (Ky.) 292.

**Failure to fully comply with order.**—Where the right to money in the hands of a sheriff is disputed, and before the rightful claimant is ascertained the court orders the sheriff to lend the money in a certain manner and on certain terms, a partial compliance with such order, without showing good reason why the order was not strictly obeyed, will not release the liability of the sheriff's bondsmen. Hubbard *v.* Elden, 43 Ohio St. 380, 2 N. E. 434.

**Failure to give bond as commissioner to lend.**—Where an ex-county sheriff was appointed a commissioner to lend for the benefit of a widow certain money belonging to her, which he held for her in his capacity as sheriff, and as such commissioner was directed to give bond, which he failed to do, it was held that, as the appointment as commissioner never took effect, such sheriff was liable for the amount on his bond as sheriff. State *v.* Peacock, 45 Mo. 263.

and sold, to bring it into court, furnishes no defense to an action on his official recognizance for the money, unless the money was brought into court by him pursuant to the order.[12]

(XIII) *JUDGMENT FOR FALSE RETURN.* It has been held that where an execution plaintiff has recovered judgment against a sheriff for falsely returning *nulla bona* after he had made the money, he cannot afterward bring an action on the sheriff's official bond for his failure to pay over such money.[13]

(XIV) *VOLUNTARY PAYMENT TO SHERIFF.* The sureties on a sheriff's official bond are not liable for money illegally paid by the county board to the sheriff upon auditing his account, to reimburse him for the balance shown to be due him by such account, when such payment was voluntarily made by the board of mistake of law, and with full knowledge of the facts, no fraud, concealment, or misrepresentation having been practised by the sheriff.[14]

(XV) *MONEY PAYABLE IN PRIVATE CAPACITY.* Where the obligation of a sheriff to pay over certain money rests in private contract rather than on his official duty, his sureties are not liable for his failure to pay.[15]

(XVI) *EFFORTS OF PLAINTIFF TO COLLECT.* The fact that, after the failure of an officer to collect a claim put into his hands for collection, plaintiff endeavored unsuccessfully to collect it himself, does not operate as a waiver of his right of action on the officer's bond for such default.[16]

(XVII) *NON-RECEIPT OF MONEY.* Where a sheriff has sold real estate under an execution or order of court and the sale has been confirmed by the court, the sheriff cannot be allowed to show, in an action on his official bond for failure to pay over the money raised by such sale, that he has not received the purchase-money, since it is his duty to receive it when the sale is made.[17]

(XVIII) *OWNERSHIP OF PROPERTY FROM WHICH MONEY REALIZED.* In an action upon a sheriff's bond to recover the proceeds of property levied on and sold by him as the property of an execution defendant, the sureties cannot deny that the property was that of the execution defendant.[18]

**g. Extent of Liability.** In an action for failure to turn over money collected the measure of damages is the amount collected and not paid over, with interest from the time of demand.[19]

**8. DEFAULTS IN CONNECTION WITH TAKING OF BOND OR SECURITY.** Where it is the duty of a sheriff to take a bond or other security there is a breach of his official bond if he fails to take bond,[20] accepts a bond with insufficient sureties,[21] or takes

12. State *v.* Willard, 2 Houst. (Del.) 11.

13. Miller *v.* Corbett, 26 U. C. Q. B. 478 [*following* Sloan *v.* Creasor, 22 U. C. Q. B. 127].

14. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

15. Wilson *v.* State, 13 Ind. 341 (holding that where a constable attached certain property, and left it with a certain person and taxed the expense of keeping it with the costs, and collected the amount, but failed to pay it over to the custodian of the property, the constable was not liable on his bond); Allen *v.* Ramey, 4 Strobh. (S. C.) 30 [*approved* in Wieters *v.* May, 71 S. C. 9, 50 S. E. 547] (holding that the sureties of a sheriff were not liable for printer's fees which he refused or neglected to pay over to the printer).

16. Quin *v.* Roane, 24 N. C. 144, so holding in an action on a sheriff's bond for his deputy's failure to collect.

17. Ferguson *v.* Tutt, 8 Kan. 370.

18. Smithers *v.* State, 7 Mo. 342. See also People *v.* Reeder, 25 N. Y. 302.

19. De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328. See also Governor *v.* Raley, 34 Ga. 173, holding that where a sheriff has failed to account for money collected on an execution, and the attorney of the execution plaintiff was obliged to pay the amount of the execution to plaintiff, the bond must respond to the attorney for the amount of the execution with interest.

20. People *v.* Dikeman, 3 Abb. Dec. (N. Y.) 520; Governor *v.* Munroe, 15 N. C. 412; Black *v.* Ramey, 4 Strobh. (S. C.) 79. But *compare* Arundell *v.* Jones, 9 N. C. 359, holding that a sheriff is not liable on his official bond for omitting to take bail when he executes a capias in a civil case but is liable only as bail on a scire facias.

21. *California.*— Noble *v.* Desmond, 72 Cal. 330, 14 Pac. 16.

*Kentucky.*— Miller *v.* Com., 4 B. Mon. 304.

*Nebraska.*— Adams *v.* Weisberger, 62 Nebr. 325, 87 N. W. 16.

*North Carolina.*— Witherspoon *v.* Davidson, 14 N. C. 361, holding that where an insolvent constable became surety for a stay of an

a bond which is informal,[23] does not contain conditions required by statute,[23] or is otherwise defective,[24] or is for an inadequate penal sum.[25] Failure to return a replevin bond may also constitute a breach of the sheriff's official bond;[26] and the sureties of the sheriff are liable for his failure to respond to his statutory liability as bail for a person arrested who fails to give bail.[27] But a sheriff's sureties are not liable for mistake of the sheriff or his deputy or clerk, in reciting in a bail-bond that the action is in the county court, when it is in the common pleas.[28] An attempt to enforce an insufficient bond taken by an officer does not bar the remedy on his official bond for the default;[29] but in an action by attachment creditors on the official bond of the attaching officer for taking an insufficient bond in replevin for the attached property, where the replevin was not decided on the merits, but on a voluntary discontinuance of the attachment, defendant may show that the attached property was exempt.[30]

**9. Defaults in Respect to Return of Process — a. In General.** There is a breach of the bond of a sheriff or constable where he fails to return process[31]

execution committed to him for collection, there was a breach of his bond, as the law required him to take responsible sureties.

*Texas.*— Lipscomb *v.* Mensing, 2 Tex. App. Civ. Cas. § 535.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 363.

When the sheriff has not been negligent in determining the sufficiency of sureties, he is not liable on his bond, although the sureties eventually prove insufficient. People *v.* Robinson, 89 Ill. 159.

22. Lipscomb *v.* Mensing, 2 Tex. App. Civ. Cas. § 535.

23. Traweek *v.* Heard, 97 Ala. 715, 12 So. 166.

24. Love *v.* People, 94 Ill. App. 237; Treasurers *v.* Barksdale, 1 Hill (S. C.) 272, void bond.

The measure of damages for the taking of an insufficient or defective replevin bond is the injury suffered by defendant in the replevin, and is not necessarily confined to the value of the property as stated in the affidavit. Love *v.* People, 94 Ill. App. 237.

25. Mayer *v.* People, 190 Ill. 109, 60 N. E. 96 [*affirming* 92 Ill. App. 123]; People *v.* Core, 85 Ill. 248; Pickett *v.* People, 114 Ill. App. 188.

The good faith of a sheriff who has taken an insufficient replevin bond will not relieve him from liability on his official bond, unless he has used the best means of forming a correct opinion as to the value of the property. Robinson *v.* People, 8 Ill. App. 279.

The failure of a defendant in replevin to object to the replevin bond on the ground of insufficiency at the earliest possible moment, and his going to trial without such objection, is not a waiver of the insufficiency so as to deprive him of his remedy on the sheriff's official bond if the replevin bond is in fact insufficient. Mayer *v.* People, 190 Ill. 109, 60 N. E. 96 [*affirming* 92 Ill. App. 123], holding also that defendant in the replevin suit was not estopped from alleging that the value of the property replevied was greater than the jurisdiction of the justice of the peace, by appearing in the replevin suit and taking judgment against plaintiff by default, where defendant had not by any affirmative act invoked or consented to the jurisdiction of the justice, or accepted any benefits of the judgment.

26. People *v.* Robinson, 89 Ill. 159, so holding on the ground that a replevin bond is taken as well for the benefit of defendant in replevin as for indemnity to the sheriff, and hence it is the duty of the officer to return it, with the writ, in court, so as to afford defendant an opportunity to require additional security.

27. Evans *v.* Blalock, 47 N. C. 377 [*following* Governor *v.* Montfort, 23 N. C. 155].

28. Nelson *v.* Baby, 14 U. C. Q. B. 235.

29. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

30. People *v.* Lee, 71 Mich. 493, 39 N. W. 731.

31. *Alabama.*— Marcum *v.* Burgess, 67 Ala. 556.

*Arkansas.*— Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Faulkner *v.* State, 9 Ark. 14; Governor *v.* Pleasants, 4 Ark. 193.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Illinois.*— Calhoun County Ct. *v.* Buck, 27 Ill. 440; Babka *v.* People, 73 Ill. App. 246; People *v.* Johnson, 15 Ill. App. 153.

*Indiana.*— State *v.* Youmans, 1 Ind. 90; State *v.* Guard, 6 Blackf. 519; State *v.* Spencer, 4 Blackf. 310.

*Kentucky.*— Johnston *v.* Governor, 2 Bibb 186, 4 Am. Dec. 694; Goodman *v.* Root, 2 Metc. 427; Com. *v.* Begley, 66 S. W. 754, 23 Ky. L. Rep. 1985.

*Louisiana.*— Gardiner *v.* Carpenter, 10 La. Ann. 128.

*Michigan.*— Dunphy *v.* People, 25 Mich. 10.

*Missouri.*—Alexander *v.* Eberhardt, 35 Mo. 475.

*New Jersey.*— State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62.

*New York.*— Carpenter *v.* Doody, 1 Hilt. 465; Sloan *v.* Case, 10 Wend. 370, 25 Am. Dec. 569.

*North Carolina.*— McRae *v.* Evans, 18 N. C. 243.

*Pennsylvania.*— Myers *v.* Com., 2 Watts & S. 60.

*South Carolina.*— State Treasurers *v.* Hilliard, 8 Rich. 412.

within the time allowed by law therefor,[32] or makes a false[33] or defective[34] return.

**b. Particular Matters Affecting Liability** — (I) *VALIDITY OF PROCESS.* Failure to return process which is on its face void is not a breach of an officer's bond;[35] but the bond must respond for a failure to return process which is merely irregular.[36]

(II) *VALIDITY OF JUDGMENT.* It has been held that where judgment on which an execution issues is void, the sheriff's failure to return the writ is not a breach of his bond;[37] but irregularities in the judgment do not affect the liability on the officer's bond for his failure to return an execution.[38]

(III) *AUTHORITY TO EXECUTE PROCESS.* The failure of a sheriff to return process which he was not authorized to execute is not a breach of his official bond.[39]

(IV) *DELIVERY OF PROCESS TO OFFICER IN OFFICIAL CAPACITY.* It has been held that the sureties of a constable are liable for his failure to return an execution only when it is delivered to him in his official capacity by a magistrate.[40]

(V) *TIME OF RECEIPT OF PROCESS.* The failure of a sheriff to return process

*Tennessee.*— Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388; Chaffin *v.* Stuart, 1 Baxt. 296; Kinzer *v.* Helm, 7 Heisk. 672; Armstrong *v.* Apple, 2 Coldw. 280; Smith *v.* Gilmore, 3 Sneed 481; Planters' Bank *v.* Porter, 10 Humphr. 316; Hand *v.* State, 5 Humphr. 518.

*Texas.*— Griswold *v.* Chandler, 22 Tex. 637; Smith *v.* Tooke, 20 Tex. 750.

*Virginia.*—Grandstaff *v.* Ridgely, 30 Gratt. 1.

*Canada.*— Nelson *v.* Baby, 14 U. C. Q. B. 235.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 359.

**Although a sheriff is liable to a fine, at** the discretion of the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by his failure. Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

32. *Arkansas.*—Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870.

*Idaho.*— Roth *v.* Duvall, 1 Ida. 149.

*Illinois.*— Bahka *v.* People, 73 Ill. App. 246; People *v.* Johnson, 15 Ill. App. 153.

*Indiana.*— State *v.* Guard, 6 Blatchf. 519.

*Louisiana.*— Gardiner *v.* Carpenter, 10 La. Ann. 128.

*New York.*— Carpenter *v.* Doody, 1 Hilt. 465.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 359.

33. *Arkansas.*— Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; Levy *v.* Lawson, 5 Ark. 212.

*Illinois.*— Foster *v.* People, 121 Ill. App. 165, holding that the bondsmen of a constable are liable for a levy made under an execution issued on a judgment obtained on a fraudulent return made by such officer.

*Indiana.*— State *v.* Youmans, 1 Ind. 90.

*Kentucky.*— Com. *v.* Williams, 4 Litt. 335.

*Missouri.*—State *v.* Case, 77 Mo. 247; State *v.* Finn, 24 Mo. App. 344.

*New York.*— Walter *v.* Middleton, 68 N. Y. 605.

*Pennsylvania.*— Com. *v.* Yeisley, 6 Pa. Super. Ct. 273; Com. *v.* Lelar, 1 Phila. 336.

*Canada.*— Clandinan *v.* Dickson, 8 U. C. Q. B. 281; Hexon *v.* Hamilton, 6 U. C. Q. B. O. S. 115.



See 43 Cent. Dig. tit. "Sheriffs and Constables," § 370.

34. State *v.* Johnson, 78 Mo. App. 569.

35. Hawkins *v.* Com., 1 T. B. Mon. (Ky.) 144.

**Issuance to wrong officer.**—The provision of the act of March 4, 1861, directing justices elected by the different wards of St. Louis to issue their processes to the constable for such wards, being merely directory, it was not fatal to an execution that it issued to the constable in another ward, so as to relieve him of liability on his bond for failure to return the same. Alexander *v.* Eberhardt, 35 Mo. 475.

36. Shute *v.* McRae, 9 Ala. 931; Samples *v.* Walker, 9 Ala. 726; Wofford *v.* Robinson, 7 Ala. 489; Roy *v.* Hamilton, 6 U. C. Q. B. O. S. 110.

37. Dailey *v.* State, 56 Miss. 475. But *compare* Perdue *v.* Dodd, 1 Lea (Tenn.) 710, holding that on motion against a sheriff's sureties for the insufficient return of an execution in favor of plaintiff, they will not be permitted to show in defense that the judgment on which the execution issued was void.

38. Germon *v.* Swartwout, 3 Wend. (N. Y.) 282.

**The mere claim of a stayer of an execution** that there were defects in the judgment and defenses to the execution will not relieve a sheriff from liability on his official bond for failure to make a proper return. Cowan *v.* Sloan, 95 Tenn. 424, 32 S. W. 388.

39. Johnson *v.* McLaughlin, 9 Ala. 551, so holding as to an execution on a judgment against the sheriff which was directed to him and delivered to him to be executed. But *compare* Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672, holding that, although a sheriff is not obliged to receive an execution to which he is a party defendant, if he does receive it, he will be liable on his official bond for failure to return it.

40. Snapp *v.* Com., 2 Pa. St. 49, holding that the sureties on a constable's official bond were not liable for his failure to return an execution delivered to him by another constable.

is a breach of his bond, although he received it too late to fully execute it before the return-day.[41]

(VI) *INSOLVENCY OF DEFENDANT IN PROCESS.* A sheriff is not relieved from liability on his bond for failure to return an execution by the fact that when the execution came to the sheriff's hands the execution defendant had no property, but was then and still continued to be insolvent;[42] but the insolvency or poverty of defendant may go in mitigation of damages.[43]

(VII) *PROVIDENTIAL CAUSE PREVENTING RETURN.* It has been held that the sureties are not liable for a failure to return process which was due to a providential cause beyond the sheriff's control.[44]

(VIII) *LOSS OF WRIT.* Where an execution was accidentally misplaced by the sheriff, and in consequence thereof was not returned by him until some time after the return-day, but the property had been regularly replevied by persons abundantly good for the debt, the sheriff and his sureties were held not liable on his official bond for failure to return the process as required by law.[45]

(IX) *NO PROPERTY IN OFFICER'S POSSESSION.* The fact that the property never came to the hands of a sheriff does not excuse him from liability on his official bond for neglect to return a venditioni exponas or for falsely returning the same.[46]

(X) *RETURN MADE TO TOWN CLERK.* In New York it has been held that when, before the return-day of an execution, the justice by whom it was issued removed from the town and delivered his official docket and papers to the town clerk, and before the return-day the constable to whom the execution was delivered returned the same to the town clerk, the constable and his sureties could not be held liable for failure to return the writ to the justice.[47]

(XI) *ACTS OF PLAINTIFF AS CAUSE OF DAMAGE.* Where the damages suffered by plaintiff in an action for a false return have resulted from his own act rather than the false return, he cannot recover on the bond of the officer.[48]

41. Smith *v.* Gilmore, 3 Sneed (Tenn.) 481 [*followed* in Chaffin *v.* Stuart, 1 Baxt. 296].

42. *Indiana.*— State *v.* Spencer, 4 Blackf. 310.

*Kentucky.*— Goodrum *v.* Root, 2 Metc. 427.

*South Carolina.*— State Treasurers *v.* Hilliard, 8 Rich. 412.

*Tennessee.*—Webb *v.* Armstrong, 5 Humphr. 379.

*Texas.*— Vaughan *v.* Warnell, 28 Tex. 119; Griswold *v.* Chandler, 22 Tex. 637, holding that in order to avoid liability on the bond, not only the execution defendant's insolvency, but also that the money could not have been collected, must be shown.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 359.

43. Dobbs *v.* Murray County, 17 Ga. 624; State Treasurers *v.* Hilliard, 8 Rich. (S. C.) 412.

**Where the statute subjects the sheriff and his sureties to absolute liability** for the debt, in case of a failure to return an execution, the insolvency of the execution defendant cannot reduce their liability. Robertson *v.* Marshall County Com'rs, 10 Ill. 559.

44. Harris *v.* Bradford, 4 Ala. 214 (holding that in an action on a sheriff's bond for a deputy's failure to return an execution it is an available defense that the deputy was prevented by sickness from making the return, and that on the return-day the sheriff was absent from the county, if, at the time when the sheriff left, the deputy was able and expected to perform the duties of the office); State *v.* Guard, 6 Blackf. (Ind.) 519 (holding that the sureties of a sheriff were not liable for his failure to return an execution, where it appeared that on the return-day thereof and for six days before he was sick, and thereby rendered incapable of returning the writ or attending the duties of his office, and that he so continued until his death).

45. Shippen *v.* Curry, 3 Metc. (Ky.) 184.

46. State *v.* Youmans, 1 Ind. 90.

47. Hampton *v.* Boylan, 46 Hun (N. Y.) 151.

48. Walter *v.* Middleton, 68 N. Y. 605, where, in an action by a sheriff on the bond of his deputy for a false return, it appeared that the sheriff delivered to his deputy a body execution which the latter falsely returned "not found," and after the false return, but before any action therefor had been brought, the debtor was surrendered by his bail to and taken into custody by the sheriff, but before the bail had taken the necessary steps to exonerate themselves from liability, the sheriff wrongfully discharged the debtor, in consequence whereof the bail were held liable and in turn recovered against the sheriff; and it was held that the sheriff could not recover on the bond of the deputy for the injury thus sustained, as the fault of the deputy had been remedied by the surrender of the debtor. It was further held in this case, however, that the fact that the under-

(XII) *PARTICIPATION IN MAKING OF RETURN.* Where a return is made out by the sheriff but signed by a deputy, the sheriff cannot, on being held liable for an insufficient return, recover against the deputy and his sureties,[49] and where a sheriff sees the return indorsed on process by a deputy before the same is delivered into the clerk's office, and, with a knowledge of the facts, allows the return to be made, it is in law and fact his return, and he cannot sue on the deputy's official bond, although the return may be false.[50]

(XIII) *ISSUANCE OF ALIAS WRIT.* Where a sheriff fails to return an execution, plaintiff therein does not relinquish his right of action on the sheriff's official bond by issuing an alias writ.[51]

(XIV) *RETURN MADE AFTER INSTITUTION OF SUIT.* It is no defense to an action on a sheriff's bond for failing to return an execution that, after the institution of the suit and subsequent to the return-day of the execution, at the instance and request of plaintiff, the sheriff returned it to a different county from the one to which it is returnable on its face.[52]

(XV) *PAYMENT TO PLAINTIFF.* A recovery on a sheriff's bond for his failure to return an execution is not barred by the fact that before the action was commenced one of the execution defendants paid the amount of the execution to plaintiff.[53]

**c. Extent of Liability.** *Prima facie* the bond must respond for a sheriff's failure to return final process to the extent of the amount named in the writ,[54] but such amount cannot be recovered where it is clear that the loss of the debt did not result from the failure to return the process.[55] A false return warrants a recovery on the bond of the damages proximately resulting therefrom.[56]

**10. MATTERS RELATING TO COLLECTION OF TAXES.**[57] Where it is a part of the official duty of the sheriff to act as collector of taxes, his official bond covers what is done or omitted by him in that capacity,[58] unless he is required to give a special bond as collector of taxes, in which case such bond rather than the general bond

sheriff knew that the deputy's return was false was not a defense, as such knowledge was not imputable to the sheriff as between him and the deputy.

49. Cate *v.* Howard, 1 Swan (Tenn.) 15, holding that the act of 1829, providing that, where a sheriff has paid or is liable to pay money for the default or misconduct of his deputy, he may by motion recover judgment against the deputy and his sureties, on satisfactory proof, does not change the common-law principles applicable to such cases.

50. Wasson *v.* Linster, 83 N. C. 575.

51. Myers *v.* Com., 2 Watts & S. (Pa.) 60.

52. State *v.* Saddler, 6 Ark. 235.

53. Com. *v.* Bradley, 4 J. J. Marsh. (Ky.) 209.

54. Roth *v.* Duvall, 1 Ida. 149; Dailey *v.* State, 56 Miss. 475. See also Goodrum *v.* Root, 2 Metc. (Ky.) 427.

**The liability for failure to return a venditioni exponas** is limited to the value of the property which ought to have been exposed to sale. Johnston *v.* Governor, 2 Bibb (Ky.) 186, 4 Am. Dec. 694.

**Failure to return attachment.**—Where, in an action on the official bond of a sheriff for his failure to return a writ of attachment, it appears that defendant had sufficient property to satisfy the debt, the demand of plaintiff is the measure of damages. Smith *v.* Tooke, 20 Tex. 750.

55. Hill *v.* Turner, 3 Bush (Ky.) 27.

56. State *v.* Finn, 24 Mo. App. 344, holding that a sheriff who makes a false return of "Not found" on a summons in a back tax suit against one who is a resident of the bailiwick, and who could have been found by the exercise of reasonable diligence, is responsible on his official bond for all damages resulting from a judicial sale of the property on constructive service.

**Value of property as measure of damages.** — In an action on a sheriff's bond for a false return alleging the delivery of property replevied to plaintiff, the measure of damages is the reasonable value of the property not so delivered at the time it should have been delivered, independent of the value of the property stated in plaintiff's complaint in the replevin suit. Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.

**The amount due upon the execution at the** return-day is the measure of damages for a false return of *nulla bona*. Gibson *v.* Governor, 11 Leigh (Va.) 600.

57. **Collection of taxes generally see TAXATION.**

58. *California.*— People *v.* Edwards, 9 Cal. 286.

*Idaho.*— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

*Louisiana.*— New Orleans *v.* Gauthreaux, 36 La. Ann. 109.

*Mississippi.*— State *v.* Matthews, 57 Miss. 1.

*Missouri.*— State *v.* Powell, 44 Mo. 436.

*North Carolina.*— Brunswick County *v.*

must respond,[59] although under some statutes if the sheriff fails to give a special bond as tax collector as it is his duty to do, his general official bond must respond for his defaults in that capacity.[60] Where, however, the law does not require a special bond as tax collector, the fact that such a bond is actually given does not relieve the officer's general official bond of liability.[61] Accordingly the sureties must answer for the sheriff's failure to pay over or account for taxes collected by him.[62] The bond cannot, however, be made to answer for taxes collected by the officer, but which he was not authorized by law to collect;[63] nor can a sheriff's failure to collect taxes which he was not authorized to collect subject him or his sureties to any liability on the bond.[64]

**11. Matters Relating to Fees or Compensation.**[65] The sureties on a sheriff's bond are liable for fees improperly collected by him;[66] but the sureties on the bond of a *de facto* sheriff are not liable to the *de jure* sheriff, upon his recovery of the office, for the fees, salary, or other emoluments of the office which were received by their principal while exercising the functions of the office.[67] The sureties of a sheriff are not liable for money paid to him by the county board for a reported deficit in his compensation, when such deficit was made to appear by his failure to report to the board all the earnings of his office, as required by statute;[68] nor

Woodside, 31 N. C. 496 (holding that, although the tax list made out by the clerk and delivered to the sheriff may be defective, he is liable on his official bond for failing to collect and pay over the taxes); Moore County *v.* McIntosh, 31 N. C. 307.

*Virginia.*— Munford *v.* Nottoway, 2 Rand. 313.

*West Virginia.*— State *v.* Hill, 17 W. Va. 452.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 369.

**A deputy sheriff's bond** must respond for his default in connection with the collection of taxes (Wood *v.* Cook, 31 Ill. 271 [*followed* in Bay *v.* Cook, 31 Ill. 336]; Colter *v.* Morgan, 12 B. Mon. (Ky.) 278; Jarnagin *v.* Atkinson, 4 Humphr. (Tenn.) 470. *Contra*, Amos *v.* Johnson, 3 Harr. & M. (Md.) 216), although the sheriff is required to give a special bond as collector of taxes (Wood *v.* Cook, *supra* [*followed* in Bay *v.* Cook, *supra*]).

59. *Illinois.*— Cooper *v.* People, 85 Ill. 417.

*Louisiana.*— Baker *v.* Towles, 11 La. 432; Police Jury *v.* Bullit, 8 Mart. N. S. 323.

*North Carolina.*— Governor *v.* Matlock, 12 N. C. 214 [*followed* in Jones *v.* Montfort, 20 N. C. 69 (*approving* Campbell *v.* Barr, 12 N. C. 65; Crumpler *v.* Governor, 12 N. C. 52)].

*Oregon.*— Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187 (holding that such was the law prior to the act of 1901 [Laws (1901), p. 245]); Columbia County *v.* Massie, 31 Oreg. 292, 48 Pac. 694.

*Pennsylvania.*— Stoneboro School Dist. *v.* Jenkins, 17 Pa. Co. Ct. 153, 2 Pa. Co. Ct. 300.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 369; and, generally, *supra*, X, C, 2, c.

**The exaction of an additional bond by a city** to secure the prompt collection and settlement of city taxes does not affect the sheriff's liability on his general official bond in connection with the collection of taxes, where the ordinance requiring the additional bond declares that it is not intended to supersede or affect his bond as sheriff. New Orleans *v.* Gauthreaux, 36 La. Ann. 109.

60. Kenton County *v.* Lowe, 91 Ky. 367, 16 S. W. 82, 13 Ky. L. Rep. 97. See also State *v.* Hill, 17 W. Va. 452.

61. State *v.* Matthews, 57 Miss. 1.

62. *California.*— People *v.* Edwards, 9 Cal. 286.

*Idaho.*— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

*Illinois.*— Wood *v.* Cook, 31 Ill. 271 [*followed* in Bay *v.* Cook, 31 Ill. 336].

*Kentucky.*— Kenton County *v.* Lowe, 91 Ky. 367, 16 S. W. 82, 13 Ky. L. Rep. 97; Colter *v.* Morgan, 12 B. Mon. 278.

*West Virginia.*— State *v.* Hill, 17 W. Va. 452.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 369.

63. Greenwell *v.* Com., 78 Ky. 320; Anderson *v.* Thompson, 10 Bush (Ky.) 132; Middleton *v.* Caldwell, 4 Bush (Ky.) 392; Jersey City *v.* Kline, 41 N. J. L. 223; Dudley *v.* Oliver, 27 N. C. 227; State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131, holding that a constable's bond was not liable for tax bills once in the hands of the sheriff, and accounted for by him, which he had put into the hands of the constable for collection, unless those owing the same had promised the sheriff to pay them, as, under Code, c. 30, § 23, a constable could only collect such delinquent taxes as have been put into his hands by the auditor.

64. State *v.* Harris, 52 Miss. 686.

65. **Compensation** generally see *supra*, IV.

66. Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076; Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956; Treasurers *v.* Buckner, 2 McMull. (S. C.) 323 [*approved* in Wieters *v.* May, 71 S. C. 9, 50 S. E. 547].

67. Curry *v.* Wright, 86 Tenn. 636, 8 S. W. 593.

68. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

are they liable for the act of the sheriff in reporting fees earned from the county in his account as keeper of the jail, instead of as earnings of his office, where it does not appear but that he duly charged himself with such fees in his next report, after they had been paid by the board.[69] And it has also been held that the condition of a sheriff's recognizance is not broken by his refusal to repay to the county commissioners overpayments to him as fees.[70] In an action on a sheriff's bond to recover for fees collected and not turned over to the county, payments made by the sheriff for deputy hire may be set up in defense.[71]

**12. Acts With Respect to Indemnity.**[72] Where it is a matter resting in the discretion of the sheriff what indemnity he shall require or take, any indemnity taken by him is taken by virtue of his office; and if in such case the sheriff accepts a deposit of money as indemnity, the sureties on his official bond are liable for damages resulting from his failure to preserve and properly account for the security thus obtained.[73] But it has been held that where the statute prescribes what bond, pledge, security, or indemnity the sheriff shall take or accept for the protection of the parties or for his own protection in the course of the execution of any process intrusted to him officially, he not only may, but must, demand and accept precisely that obligation or indemnity and no other; and if in lieu thereof he accepts a deposit of a sum of money, this latter act is done, not by virtue, but merely by color, of his office, and the sureties on his official bond are not liable for his default or misfeasance with respect to such deposit.[74]

**13. Abuse or Excess of Authority.** If a sheriff or constable, while attempting to execute some duty of his office, abuses or exceeds his authority or executes it in an unlawful manner, to the injury of another, his bond is liable.[75]

**14. Wrongful Arrest or Imprisonment.**[76] A recovery may be had upon the official bond of an officer for his wrongful act in arresting one person under process against another;[77] and a wrongful imprisonment by an officer may constitute a breach of his bond.[78] Where an officer wrongfully makes an arrest without a warrant, there is a breach of the bond if the arrest is upon a charge for which the officer is authorized to make an arrest without a warrant,[79] but not otherwise.[80] An arrest by a sheriff or constable under process void on its face is not a breach of his official bond,[81] although he may be personally liable therefor.[82]

69. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

70. Com. *v.* Hoffman, 74 Pa. St. 105.

71. Windmiller *v.* People, 78 Ill. App. 273, holding that the sheriff and his sureties were not estopped to set up such payments because they had not been reported by the sheriff.

72. Indemnity generally see *supra*, VI.

73. Comstock-Castle Stove Co. *v.* Caulfield, 1 Nebr. (Unoff.) 542, 95 N. W. 783 [*following* Mihalovitch *v.* Barlass, 36 Nebr. 491, 54 N. W. 826].

74. Comstock-Castle Stove Co. *v.* Caulfield, 1 Nebr. (Unoff.) 542, 95 N. W. 783.

General rule as to liability for acts under color of office see *supra*, X, C, 6.

75. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

76. See, generally, False Imprisonment, 19 Cyc. 316.

77. Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278.

78. Gomez *v.* Scanlan, 2 Cal. App. 579, 84 Pac. 50 (holding that where a constable, in executing a valid search warrant, exceeded his authority and committed a trespass by causing a person to be imprisoned, the sureties on his official bond were liable); State *v.* Boyd, 120 N. C. 56, 26 S. E. 700 (holding that Code, § 1883, making the bonds of constables liable to the person injured "for all acts done by said officer by virtue and under color of his office" is broad enough to cover a case of false imprisonment by a constable as such, without process or color thereof).

79. Yount *v.* Carney, 91 Iowa 559, 60 N. W. 114; Clancy *v.* Kenworthy, 74 Iowa 740, 35 N. W. 427, 7 Am. St. Rep. 508.

80. State *v.* Dierker, 101 Mo. App. 636, 74 S. W. 153, holding that an arrest without a warrant for a misdemeanor not committed in the view of the officer was not a breach of the officer's bond, because such an arrest was not under color of office, although the officer thought he was acting officially and was personally liable for his misconduct.

81. Allison *v.* People, 6 Colo. App. 80, 39 Pac. 903; McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738.

Action on official bond cannot be maintained even against sheriff.—McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738. But *compare* Roberts *v.* Brown, 43 Tex. Civ. App. 206, 94 S. W. 388.

82. McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738.

Personal liability of sheriff generally see *supra*, V.

**15. Assault and Battery.**[83] A liability upon the bond of an officer arises where in discharging a duty of his office he commits an assault and battery,[84] or where in overcoming resistance to the exercise of his duty he so exceeds his authority as to become the aggressor in an assault and battery to the injury of another.[85]

**16. Escape.** The escape of a prisoner constitutes a breach of the sheriff's bond to faithfully perform the duties of his office; [86] but the liability of the sureties is limited to the actual injury which has resulted from the default and does not necessarily extend to the full amount of the debt for which the arrest was made,[87] although they are *prima facie* liable for such amount.[88] Accordingly it may be shown in mitigation of damages that the person arrested was insolvent or unable to pay all his debts,[89] or that after the escape the officer rearrested the debtor and committed him to jail.[90]

**17. Neglect to Commit Prisoner.** A sheriff's neglect to commit a person convicted of bastardy until his sentence be complied with, according to the decree of the court, renders him liable on his bond to the mother of the child.[91]

**18. Injury to Prisoner.** A sheriff is liable on his official bond for any injuries resulting to a prisoner, while in his custody, through his negligence.[92]

**19. Failure to Deliver Unexecuted Process to Successor.** A sheriff's failure to deliver over to his successor in office process which he has not commenced to execute has been considered not a breach of his official bond for which his sureties are liable.[93]

83. See, generally, Assault and Battery, 3 Cyc. 1014.

84. Greenberg *v.* People, 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223 [*affirming* 125 Ill. App. 626]; Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

**Service of civil process.**—Where an officer in the service or execution of civil process and for the purpose of making the service or execution commits an unlawful assault, such assault may be regarded as a breach of his bond for which a recovery may be had on the bond. Greenberg *v.* People, 225 Ill. 174, 80 N. E. 100, 116 Am. St. Rep. 127, 8 L. R. A. N. S. 1223 [*affirming* 125 Ill. App. 626]; Cambridge *v.* Foster, 195 Mass. 411, 81 N. E. 278. But a constable who, while engaged in levying a writ of fieri facias, without provocation or necessity, assaults one not a party to the writ is guilty of an individual tort, for which the sureties on his official bond cannot be held responsible. People *v.* Wilmoth, 45 Ill. App. 73; State *v.* Dayton, 101 Md. 598, 61 Atl. 624.

**Making arrest.**—Where an officer in making an arrest commits an unlawful assault on the person arrested he is liable on his official bond therefor. Cash *v.* People, 32 Ill. App. 250; Carlisle *v.* Silver Creek, 85 Miss. 380, 37 So. 1015. And where an officer executing a warrant of arrest of a person charged with a misdemeanor, wrongfully and negligently kills such person, thereby becoming liable in an action under the statute for wrongful death, the sureties on the official bond of such officer are liable for the damages recovered for such act. State *v.* Walford, 11 Ind. App. 392, 39 N. E. 162; Black *v.* Moore, 35 Tex. Civ. App. 613, 80 S. W. 867; Moore *v.* Lindsay, 31 Tex. Civ. App. 13, 71 S. W. 298. See also Johnson *v.* Williams, 111 Ky. 289, 63 S. W. 759, 23 Ky. L. Rep. 658, 54 L. R. A. 220.

85. Wieters *v.* May, 71 S. C. 9, 50 S. E. 547.

86. Gruer *v.* People, 60 Ill. App. 123; Lusk *v.* Falls, 63 N. C. 188; Williamson *v.* Webb, 2 Humphr. (Tenn.) 133; Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114, 442.

87. Crawford *v.* Andrews, 6 Ga. 244; State *v.* Johnson, 1 Ind. 158, Smith 37; State *v.* Lawson, 2 Gill (Md.) 62; State *v.* Falls, 63 N. C. 188; Governor *v.* Matlock, 8 N. C. 425.

88. Lakin *v.* State, 89 Ind. 68 (holding that the amount adjudged against defendant in a bastardy prosecution is *prima facie* the amount of recovery allowable in an action on the constable's bond, for permitting such defendant's escape); State *v.* Mullen, 50 Ind. 598.

89. Crawford *v.* Andrews, 6 Ga. 244 (escape of prisoner arrested on mesne process); State *v.* Baden, 11 Md. 317 (escape of debtor arrested on capias ad satisfaciendum); State *v.* Lawson, 2 Gill (Md.) 62 (escape of debtor arrested on capias ad satisfaciendum). *Contra*, Lakin *v.* State, 89 Ind. 68 (escape of defendant committed to jail in bastardy proceedings); Lines *v.* State, 6 Blackf. (Ind.) 464 (escape of debtor arrested on capias ad satisfaciendum).

90. State *v.* Caldwell, 115 Ind. 6, 17 N. E. 185.

91. Snyder *v.* Com., 1 Penr. & W. (Pa.) 94.

92. *Ex p.* Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114; Indiana *v.* Gobin, 94 Fed. 48.

93. State *v.* Parchmen, 3 Head (Tenn.) 609. But see Governor *v.* McNair, 1 Mo. 302, where the trial court held the contrary of the rule stated in the text, and such judgment was affirmed on an equal division of opinion of the judges of the supreme court.

**20. Costs and Expenses of Litigation.**[94] The official bond may be held to respond for the costs and expenses of litigation which has resulted from the default of the officer.[95]

**21. Personal Contracts of Officer.** The sureties of a sheriff or constable are not liable for obligations of their principal which rest merely on his personal contracts.[96]

**22. Criminal Defaults of Officer.** Where the sheriff is punishable by indictment as for a misdemeanor in case of a breach of some public duty, his sureties are not bound to suffer in his place,[97] or to indemnify individuals for the consequences

**94.** Costs generally see Costs, 11 Cyc. 1.

**95.** Pruett *v.* Williams, 156 Ala. 346, 47 So. 318 (holding that attorney's fees, in an action to recover possession of a horse taken in an action of detinue, and which the constable refused to deliver, notwithstanding the tender of a bond in double the value of the horse, constitute an element of damages in an action on the constable's bond); Burns *v.* George, 119 Ala. 504, 24 So. 718, 154 Ala. 626, 45 So. 421 (holding that the owner of a judgment, suing on a sheriff's bond for accepting a spurious bond for a release of property levied on under execution on the judgment, may recover costs and attorney's fees expended in defending against a supersedeas prosecuted by the putative obligors on the ground that they did not execute the bond, under an allegation that he claims a certain sum as special damages for such expenses, without alleging how much was paid for costs, and how much for attorney's fees); White *v.* Blake, 79 Me. 114, 8 Atl. 457 (holding that where a deputy sheriff settled a judgment obtained against the sheriff for acts done by the deputy, but failed to have satisfaction entered, he was liable to the sheriff on his bond, conditioned to indemnify the sheriff against all suits having their origin in the default of the deputy, for expenses incurred by the sheriff in defending a suit subsequently brought on the unsatisfied judgment); State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44 (holding that where the fact that an execution sale of land was void as being a sale of a homestead did not appear from any of the proceedings leading up to the execution, or upon the face of the sheriff's deed, the owner of the homestead was entitled to recover the reasonable cost of a suit to set aside the sheriff's deed). *Contra*, Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 [*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551], holding that the sureties cannot be held liable for the costs of a litigation against their principal to which they were not parties.

The bond of a deputy has been held liable to indemnify the sheriff for the expenses incurred by him in good faith in defending an action brought against him for an alleged default of the deputy. Smith *v.* Berry, 37 Me. 298 (holding the sheriff to be entitled to counsel fees paid by him, although the counsel was employed by the deputy and the suit against him was unsuccessful); Hoitt *v.* Holcomb, 32 N. H. 185 (holding that in an action on a deputy sheriff's bond, conditioned to indemnify plaintiff, as sheriff, against all loss, damages, and costs on account of the acts and neglects of the deputy, plaintiff is entitled to receive as damages, in addition to the sums paid by him or his sureties on his official bond to the county to satisfy judgments recovered against him for the defaults of the deputy and interest thereon, all such reasonable expenses as were incurred by him in the defense of the suits in which such judgments were rendered, including counsel fees and reasonable compensation for his services; also the necessary expenses incurred by him in prosecuting his action, beyond the taxable costs, and the value of his services; but not the costs or expenses incurred by him in a suit on his official bond to enforce payment of a judgment rendered against him because of the default of the deputy). But *compare* Franklin *v.* Hunt, 2 Hill (N. Y.) 671. But it seems that a deputy's bond cannot be made to respond for the expenses of unsuccessful appeals taken by the sheriff from the judgment against him without the consent, express or implied, of the deputy. Conner *v.* Keese, 32 Hun (N. Y.) 98.

**96.** Wilson *v.* State, 13 Ind. 341 [*followed* in McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739] (holding that where an officer delivered attached property to a bailee for hire, and collected the expense of keeping the property with the costs in the case, but failed to pay the bailee, the latter could not recover from the sureties of the officer); Austin *v.* French, 7 Metc. (Mass.) 126 (holding that where the obligation of a deputy sheriff to pay to the sheriff a part of his fees rests merely upon agreement between the parties, a failure to make such payment is not a breach of the deputy's bond to perform his duties faithfully).

**Printer's fees.**— The sureties on the official bond of a sheriff are not liable to a printer for his fees for publishing notices of audits, inquisitions, sales, and the like on the order of the sheriff (Gould *v.* News Pub. Co., 2 Pennew. (Del.) 548, 49 Atl. 170 [*overruling* News Pub. Co. *v.* Gould, 1 Pennew. (Del.) 366, 40 Atl. 659]; Com. *v.* Swope, 45 Pa. St. 535, 84 Am. Dec. 518; Allen *v.* Ramey, 4 Strobh. (S. C.) 30), although it was the duty of the sheriff to cause such advertisements to be made (Gould *v.* News Pub. Co., *supra* [*overruling* News Pub. Co. *v.* Gould, *supra*]).

**97.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

of such criminal neglect.[98] But where the acts complained of subject the sheriff to civil liability, the sureties cannot escape liability on the ground that such acts also constitute a crime.[99]

**E. Admissibility and Conclusiveness Upon Sureties of Adjudication Against Officer.** With respect to the admissibility and conclusiveness upon the sureties of an adjudication against the officer, the authorities are far from uniform. Thus some authorities hold that a judgment against the sheriff is not evidence against the sureties in an action on the bond,[1] while according to other authority, a judgment against the sheriff is admissible as constituting at least some evidence of the default and the extent of the officer's liability.[2] Still other authorities hold a judgment against a sheriff or constable conclusive upon his sureties,[3] both as to the fact of misconduct or negligence [4] and as to the extent of the damages sustained by plaintiff,[5] even though the declaration in the action against the officer did not in terms describe him as being such officer; [6] while on the other hand other authorities deny that a judgment against a sheriff is conclusive upon his sureties.[7] Again, the matter of notice to the sureties has been considered the controlling element, the judgment against a sheriff being conclusive upon his sureties, where they were notified of the action in which such judgment was rendered; [8] but not conclusive against them where they were not notified of such action or afforded an opportunity of defending the same,[9] unless upon a fair construction of the bond the sureties have undertaken to be responsible for the result of a suit against the sheriff.[10] But

**98.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433, holding that an action will not lie on the official bond of a sheriff for his neglect or refusal to preserve the public peace, in consequence of which plaintiff claims to have been injured, since such neglect is a neglect of a public duty, punishable by indictment only.

**99.** Indiana *v.* Gobin, 94 Fed. 48.

**1.** *Alabama.*— Lucas *v.* Governor, 6 Ala. 826 [*distinguishing* McClure *v.* Colclough, 5 Ala. 67, where it was held that the sureties on a sheriff's bond, against whom a summary judgment, upon motion, had been obtained, under the statute, could not, in equity, controvert the conclusiveness of that judgment], holding that a judgment against the sheriff is not admissible in a common-law action against the sureties.

*Arizona.*— Gray *v.* Noonan, 5 Ariz. 167, 50 Pac. 116.

*Montana.*— Rodini *v.* Lytle, 17 Mont. 448, 43 Pac. 501.

*New York.*—People *v.* Russell, 25 Hun 524 [*following* Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619, and *approved* in Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 (*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551)]. But *compare* New York *v.* Ryan, 7 Daly 436; Carpenter *v.* Doody, 1 Hilt. 465.

*North Carolina.*—See Governor *v.* Montfort, 23 N. C. 155, holding that a judgment against a sheriff for an amercement imposed on him is not evidence against his sureties to prove his default but is evidence against them to prove the fact of the existence of the amercement itself.

*Virginia.*—McDowell *v.* Burwell, 4 Rand. 317.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 351.

**2.** Grayham *v.* Washington County Ct., 9 Dana (Ky.) 182.

**3.** Tracy *v.* Goodwin, 5 Allen (Mass.) 409 [*followed* in Dennie *v.* Smith, 129 Mass. 143]; Masser *v.* Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668 [*followed* in Musselman *v.* Com., 7 Pa. St. 240; Evans *v.* Com., 8 Watts (Pa.) 398, 34 Am. Dec. 477; Eagles *v.* Kern, 5 Whart. (Pa.) 144]. See also Blyth *v.* People, 16 Colo. App. 526, 66 Pac. 680.

**4.** Masser *v.* Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668 [*followed* in Evans *v.* Com., 8 Watts (Pa.) 398, 34 Am. Dec. 477].

**5.** Masser *v.* Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668 [*followed* in Evans *v.* Com., 8 Watts (Pa.) 398, 34 Am. Dec. 477].

**6.** Dennie *v.* Smith, 129 Mass. 143.

**7.** *Louisiana.*— Mullen *v.* Scott, 9 La. Ann. 173.

*Maine.*— See Dane *v.* Gilmore, 51 Me. 544.

*Minnesota.*— Beauchaine *v.* McKinnon, 55 Minn. 318, 56 N. W. 1065, 43 Am. St. Rep. 506 [*overruling* Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511, and *followed* in Hursey *v.* Marty, 61 Minn. 430, 63 N. W. 1090].

*North Carolina.*— Parker *v.* Woodside, 29 N. C. 296.

*South Dakota.*—Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 352.

**8.** McBroom *v.* Governor, 4 Port. (Ala.) 90; State *v.* Colerick, 3 Ohio 487.

**9.** White *v.* State, 1 Blackf. (Ind.) 557; Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249 [*followed* in Fay *v.* Edmiston, 25 Kan. 439]; State *v.* Colerick, 3 Ohio 487 [*followed* in State *v.* Jennings, 14 Ohio St. 73].

**10.** Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249 [*followed* in Fay *v.* Edmiston, 25 Kan. 439].

the latter authorities are opposed by the view asserted by at least one court that the sureties are concluded by judgment against the sheriff, even though they had no notice of the action or proceeding in which such judgment was rendered.[11] The view most favored by the courts, however, is that a judgment against the officer is *prima facie* evidence, and *prima facie* evidence only against his sureties,[12] even though the sureties had no notice of the action against the officer;[13] but that where such judgment was obtained without notice to the sureties that may contest its conclusiveness against them on the ground that it was obtained through fraud or collusion,[14] or may impeach the judgment for lack of jurisdiction in the court by which it was rendered.[15]

**F. Admissibility and Conclusiveness Upon Sureties of Deputy of Adjudication Against Sheriff.** A judgment against the sheriff for a default of his deputy has been held not to be evidence against the deputy and his sureties in an action by the sheriff against them.[16] But it has also been held that a judgment against a sheriff for the default of his deputy is *prima facie* evidence against the sureties of the deputy,[17] even though they had no notice of the action in which the judgment was rendered;[18] but that such judgment is not conclusive evidence against the sureties of the deputy, in the absence of notice to them.[19] Where the sureties of the deputy had notice of the action against the sheriff and the deputy defended the same, a judgment against the sheriff has been held conclusive on such sureties.[20]

**G. Summary Proceedings on Official Bonds**[21] — **1. In General.** In a number of states the statutes provide a summary remedy on the bond of a sheriff

**11.** State *v.* Hamilton, 16 N. J. L. 153, so holding upon the theory that the sureties have by their bond become liable for all official delinquencies of the officer, and the judgment has established such a delinquency.

**12.** *Georgia.*—A rule absolute taken against a sheriff is *prima facie* evidence against his sureties. Taylor *v.* Johnson, 17 Ga. 521; Crawford *v.* Word, 7 Ga. 445.

*Kansas.*— Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249 [*followed* in Fay *v.* Edmiston, 25 Kan. 439].

*Louisiana.*— Heath *v.* Shempp, 22 La. Ann. 167.

*Massachusetts.*— Lowell *v.* Parker, 10 Metc. 309, 43 Am. Dec. 436, where the court did not find it necessary to decide whether the judgment was in any respect conclusive.

*Michigan.*— People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

*Minnesota.*— Beauchaine *v.* McKinnon, 55 Minn. 318, 56 N. W. 1065, 43 Am. St. Rep. 506 [*overruling* although approving on principle Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511, and *followed* in Hursey *v.* Marty, 61 Minn. 430, 63 N. W. 1090].

*New York.*— Carpenter *v.* Doody, 1 Hilt. 465, holding that a judgment against a constable is *prima facie* evidence of the amount for which the surety is liable.

*North Carolina.*— Parker *v.* Woodside, 29 N. C. 296.

*Ohio.*— State *v.* Jennings, 14 Ohio St. 73 [*following* Westerhaven *v.* Clive, 5 Ohio 136; State *v.* Colerick, 3 Ohio 487].

*South Carolina.*— State *v.* Cason, 11 S. C. 392 [*distinguishing* Smith *v.* Moore, 7 S. C. 209, 24 Am. Rep. 479].

*South Dakota.*—Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

*Virginia.*— Carr *v.* Meade, 77 Va. 142. But *compare* McDowell *v.* Burwell, 4 Rand. 317.

See 42 Cent. Dig. tit. "Sheriffs and Constables," § 352.

**13.** Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249 [*followed* in Fay *v.* Edmiston, 25 Kan. 439]; State *v.* Jennings, 14 Ohio St. 73 [*following* Westerhaven *v.* Clive, 5 Ohio 136; State *v.* Colerick, 3 Ohio 487]; State *v.* Cason, 11 S. C. 392.

**14.** Dane *v.* Gilmore, 51 Me. 544; Hayes *v.* Seaver, 7 Me. 237; Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; Parker *v.* Woodside, 29 N. C. 296; State *v.* Colerick, 3 Ohio 487 [*followed* in State *v.* Jennings, 14 Ohio St. 73].

**15.** Fall River *v.* Riley, 140 Mass. 488, 5 N. E. 481.

**16.** Johnson *v.* Thompson, 4 Bibb (Ky.) 294.

**17.** Westervelt *v.* Smith, 2 Duer (N. Y.) 449; Cox *v.* Thomas, 9 Gratt. (Va.) 323. See also Hall *v.* Luther, 13 Wend. (N. Y.) 491.

**18.** Westervelt *v.* Smith, 2 Duer (N. Y.) 449.

**19.** Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619 [*reversing* 18 Barb. 9, *reaffirmed* in Thomas *v.* Hubbell, 35 N. Y. 120, and *followed* in People *v.* Russell, 25 Hun (N. Y.) 524]. But *compare* Fay *v.* Ames, 44 Barb. (N. Y.) 327.

**20.** Chamberlain *v.* Godfrey, 36 Vt. 380, 84 Am. Dec. 690.

**21.** Summary proceedings generally see SUMMARY PROCEEDINGS.

or constable in favor of a person who has been injured by the official default or misfeasance of the officer.[22] Such summary remedies must be taken and pursued in strict conformity to the statutes creating them,[23] and as the statutes providing therefor are penal in their nature[24] they must be strictly construed,[25] and will not be extended beyond their terms,[26] or held to apply to defaults not clearly provided for,[27] or which were not committed by the officer in his official capacity.[28] *A fortiori* there can be no summary remedy on the bond unless given by statute,[29] and a statute giving a summary remedy against the sheriff[30] does not include, and will not be extended by implication to include, the right to proceed summarily against the sureties.[31] The summary remedy against a sheriff's sureties is cumulative merely and does not supersede the remedy by action on the bond.[32]

**Summary proceedings against sheriff alone** see *supra*, VIII.

**22.** See the following cases:

*Alabama.*— Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Samples *v.* Walker, 9 Ala. 726; Johnson *v.* McLaughlin, 9 Ala. 551.

*Arkansas.*—Milor *v.* Farrelly, 25 Ark. 353.

*California.*—Wilson *v.* Broder, 10 Cal. 486.

*Illinois.*— People *v.* McHatton, 7 Ill. 731.

*Indiana.*— Dawson *v.* Shaver, 1 Blackf. 204.

*Kentucky.*— Com. *v.* Webb, 42 S. W. 737, 19 Ky. L. Rep. 944.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*North Carolina.*— Jenkins *v.* Howell, 65 N. C. 61.

*Pennsylvania.*— Com. *v.* Lelar, 13 Pa. St. 22.

*Tennessee.*—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Barnes *v.* White, 2 Swan 442; Hand *v.* State, 5 Humphr. 518; Cowan *v.* Lay, (Ch. App. 1896) 42 S. W. 68.

*Texas.*— Haley *v.* Greenwood, 28 Tex. 680; Griswold *v.* Chandler, 22 Tex. 637.

*Virginia.*— Carr *v.* Meade, 77 Va. 142; Shelton *v.* Ward, 1 Call 538.

*West Virginia.*— State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976; Barrett *v.* Smith, 4 W. Va. 709.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 372 *et seq.*

**23.** Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Milor *v.* Farrelly, 25 Ark. 353.

**Proceeding must be for default actually committed.**—Where a sheriff has committed a default in relation to an execution by which he is chargeable by one particular mode, and he afterward offers to pay the sum for which he is liable, these facts will not warrant a rule against him and his sureties for failure to pay over money as actually collected, when in fact the default was in not making the money at all. Hodges *v.* Laird, 10 Ala. 678.

**24.** Reid *v.* Bibb, 5 Ala. 281; Milor *v.* Farrelly, 25 Ark. 353; Wilson *v.* Broder, 10 Cal. 486; Wood *v.* Orr, 10 Yerg. (Tenn.) 505.

**25.** Wilson *v.* Broder, 10 Cal. 486; O'Bannon *v.* Huffman, 1 B. Mon. (Ky.) 212; Hearn *v.* Ewin, 3 Coldw. (Tenn.) 399; Park *v.* Walker, 2 Sneed (Tenn.) 503.

**26.** Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Westmoreland *v.* Hale, 11 Ala. 122; Robertson *v.* Locke, 6 Ala. 246; Reid *v.* Bibb, 5 Ala. 281; Hand *v.* State, 4 Humphr. (Tenn.) 475; Wood *v.* Orr, 10 Yerg. (Tenn.) 505. See also Calloway *v.* Com., 4 Bush (Ky.) 383.

**The personal representative of a deceased surety** on a sheriff's bond are not liable to be proceeded against by the summary method of judgment on motion. Smith *v.* Gilmore, 3 Sneed (Tenn.) 481; Park *v.* Walker, 2 Sneed (Tenn.) 503.

**Jurisdiction must appear of record.**— In proceedings against a sheriff and sureties by motion, all the facts and circumstances required by the statute for the exercise of jurisdiction in such summary manner must appear in the record. Yancey *v.* Hankins, Minor (Ala.) 171.

**27.** Leinkauff *v.* Tuskaloosa Sale, etc., Co., 105 Ala. 328, 16 So. 891; Johnson *v.* Petty, 5 Ala. 528; Reid *v.* Bibb, 5 Ala. 281; Mars *v.* Buckler, 1 Bibb (Ky.) 267; Tapp *v.* Bonds, 57 Miss. 281, holding that the return of a writ of execution *nulla bona* within four days after its receipt and some time before the return-day will not support a motion against the sheriff and his sureties, under Code (1871), § 227, for failure to return on the return-day.

**28.** Radford *v.* Hull, 30 Miss. 712, holding that a motion cannot be maintained on the official bond of a constable for money paid to him by a judgment debtor without an execution.

**29.** Hernandez *v.* Hugh, 22 La. Ann. 245; Soule *v.* Worsham, 22 La. Ann. 78; Crumpler *v.* Governor, 12 N. C. 52.

**30. Summary remedies against sheriff** see *supra*, VIII.

**31.** Soule *v.* Worsham, 22 La. Ann. 78; Morrow *v.* Newman, 1 N. J. L. 54.

**Reading "them" for "him."**— It has been held that the true intent and meaning of a statute providing that, when a sheriff failed to settle with the auditor, the auditor should furnish to the treasurer a copy of the bond of the sheriff and his sureties, and the treasurer should, on motion, recover judgment against "him" was to authorize a judgment as upon the bond against the sheriff and his sureties, and hence that the word "him" in the statute should be read "them." Jenkins *v.* Howell, 65 N. C. 61.

**32.** *Arkansas.*—Levy *v.* Lawson, 5 Ark. 212.

**2. Right to Proceed Summarily.** A statute giving a summary remedy against a sheriff's bondsmen for his failure to pay over money which he has collected on execution "on demand of plaintiff" refers to the execution plaintiff and not to plaintiff in the original action, and hence is available to a defendant in whose favor judgment has been rendered.[33] A sheriff against whom judgment has been obtained on account of the misconduct or default of his deputy may have his remedy by motion for a judgment against the deputy's sureties.[34] The state is entitled to the benefit of the statutory remedy on the official bond of a sheriff for a default in respect to process issued on behalf of the state.[35]

**3. Sufficiency of Bond to Justify Proceedings.** It has been held that the liability of the sureties in summary proceedings depends upon the validity of the bond,[36] so that where the bond is not good as a statutory bond the summary remedy is not available.[37] But where the statute expressly provides that a sheriff's bond shall be "valid and binding," although not in the statutory form, the summary remedy is available against the sureties;[38] and it has been held that a summary proceeding upon the bond was not precluded by the fact that the bond was not recorded in the county court,[39] or that such bond, although duly registered, did not appear to have been accepted by the county commissioners and registered by their order.[40]

**4. Defaults For Which Summary Remedies Available.** Under various statutes a summary proceeding against the bond of a sheriff is available for failure to serve a summons;[41] failure to pay a county order;[42] failure to collect money which might have been collected by the use of reasonable diligence;[43] failure to pay over money collected[44] or to account for money in his official custody;[45] failure to settle his accounts with the county auditor;[46] the loss of property in the official

*Kentucky.*— Carter *v.* Sympson, 8 B. Mon. 155; Mars *v.* Buckler, 1 Bibb 267.

*Pennsylvania.*—Com. *v.* Lelar, 13 Pa. St. 22.

*Texas.*— De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328.

*Vermont.*— State Treasurer *v.* Kelsey, 4 Vt. 371.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 372 *et seq.*

**33.** Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

**34.** Weaver *v.* Skinker, 4 Gratt. (Va.) 160 (holding that the sheriff may so proceed, although he has not yet paid the judgment against him); Shelton *v.* Ward, 1 Call (Va.) 538.

**35.** State *v.* Nichols, 39 Miss. 318.

**36.** Paddleford *v.* Moore, 32 Miss. 622.

**37.** Hall *v.* Com., 8 Bush (Ky.) 378; Calloway *v.* Com., 4 Bush (Ky.) 383; Goodwin *v.* Sanders, 9 Yerg. (Tenn.) 91 (holding that a motion will not lie on a sheriff's bond which is not acknowledged and delivered as required by law); Mallory *v.* Miller, 2 Yerg. (Tenn.) 113 (holding that a motion cannot be maintained against a sheriff for the nonpayment of taxes, if the bond is made payable to the county trustee, instead of to the governor, as required by the act; but, the bond being defective under the statute, the remedy, if any, is by an action thereon at law).

Where the penalty is larger than is required by law a summary judgment against the sureties cannot be entered on motion. State Bank *v.* Twitty, 9 N. C. 5.

**38.** Cox *v.* Ross, 56 Miss. 481, 485, where it is said: "The meaning of the section is . . . that it shall be valid and binding as a statutory bond, and entitle parties protected by it to invoke all the remedies pointed out by the law-giver."

**39.** Barnes *v.* White, 2 Swan (Tenn.) 442.

**40.** Jenkins *v.* Howell, 65 N. C. 61.

**41.** Atkinson *v.* Hulse, 30 Ark. 760.

**42.** State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

**43.** Hodges *v.* Laird, 10 Ala. 678; Leavitt *v.* Smith, 7 Ala. 175; Robertson *v.* Locke, 6 Ala. 246 (holding, however, that where a sheriff had made all the money on an execution, a part before the return-day and the residue afterward, he and his sureties were not chargeable in a summary proceeding under the statute for negligence in making the money); Reid *v.* Jackson, 1 Ala. 207.

**44.** *Alabama.*— Price *v.* Cloud, 6 Ala. 248; Robertson *v.* Locke, 6 Ala. 246.

*Arkansas.*— Milor *v.* Farrelly, 25 Ark. 353.

*California.*— Wilson *v.* Broder, 10 Cal. 486.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*Tennessee.*— Snell *v.* Rawlings, 3 Humphr. 85.

*Texas.*— Haley *v.* Greenwood, 28 Tex. 680.

*Virginia.*— Carr *v.* Meade, 77 Va. 142; Goss *v.* Southall, 23 Gratt. 825; Cook *v.* Hays, 9 Gratt. 142; Tyree *v.* Donnally, 9 Gratt. 64; Chapman *v.* Chevis, 9 Leigh 297; Hogue *v.* Cottle, 2 Va. Cas. 229.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 375.

**45.** Dane *v.* McArthur, 57 Ala. 448; People *v.* McHatton, 7 Ill. 731 (neglect to pay over proceeds of tax-sales); Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

**46.** Jenkens *v.* Howell, 65 N. C. 61.

custody of the officer;[47] failure to note on an execution the time of its delivery to him;[48] failure to return process[49] within the time prescribed by law;[50] or making a false[51] or insufficient[52] return. A summary remedy against the sureties of a sheriff may be available for a default of the sheriff's deputy.[53] A statute giving a summary remedy against a sheriff and his sureties will not be permitted to have a retroactive application to cases of defaults which occurred before its enactment.[54]

**5. Considerations Affecting Availability of Summary Remedy — a. Doubt as to Duty.** The summary remedy against a sheriff and his sureties is available only in cases of intentional delinquency on the part of the officer,[55] and hence cannot be pursued for a failure to pay over money which was due to a well-founded doubt as to the right of the party to receive it.[56]

**b. Validity of Judgment or Process.** On motion against a sheriff and his sureties for a neglect to pay over the proceeds of sales of land, the sureties cannot object to the sufficiency of the judgment[57] or execution[58] under which the sales were made and the money received. Neither is the fact that an execution was irregular and voidable any defense to a motion against a sheriff and his sureties for an illegal return of the same "not satisfied."[59]

**c. Pendency of Action.** The pendency of an action against a sheriff and his sureties for official delinquency in failing to collect an execution when it was in his hands, and for making a false return thereon, is no bar to the prosecution of a motion against them to recover damages for the failure of the sheriff to return the execution within the proper time.[60]

**d. Injury to Complaining Party.** The fact that an execution plaintiff has suffered no injury through a sheriff's failure to return an execution does not bar a motion against the sheriff and his sureties for a statutory penalty for the default.[61]

**e. Liability of Property to Seizure.** On a motion under the statute against the sheriff and the sureties on his bond for failing to make the money on an execution, it is competent for the latter to show that property in the execution defendant's possession was not subject to levy and sale to satisfy the writ.[62]

**f. Receipt of Money.** Where plaintiff in execution has received the money or property thereon either before or after the return of the execution, he cannot

47. Cleveland *v.* Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

48. Chandler *v.* Henry, 90 Ala. 271, 8 So. 96.

49. *Alabama.*— Noble *v.* Whetstone, 45 Ala. 361; Shute *v.* McRae, 9 Ala. 931; Samples *v.* Walker, 9 Ala. 726; Johnson *v.* McLaughlin, 9 Ala. 551; Wofford *v.* Robinson, 7 Ala. 489.

*Kentucky.*— Mitcheson *v.* Foster, 3 Metc. 324; Goodrum *v.* Root, 2 Metc. 427; Sanders *v.* Commonwealth Bank, 2 Metc. 327; Stephens *v.* Lewis, 8 B. Mon. 150; Trover *v.* Sharp, 4 J. J. Marsh. 79; Kennedy *v.* Coleman, 2 Litt. 6.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481.

*Tennessee.*— Chaffin *v.* Crutcher, 2 Sneed 360; Webb *v.* Armstrong, 5 Humphr. 379; Doyle *v.* Glenn, 4 Humphr. 309; Snell *v.* Rawlings, 3 Humphr. 85; Wood *v.* Orr, 10 Yerg. 505; Williams *v.* Harvey, Cooke 466.

*Texas.*— Vaughan *v.* Warnell, 28 Tex. 119; Griswold *v.* Chandler, 22 Tex. 637.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 375.

**Execution from orphans' court.**— The act of 1819, which gives a summary remedy against a sheriff and his sureties for the failure to return an execution, does not extend to an execution issued on a decree of the orphans' court, and made returnable to one of the return-days which the judge of the county court is required by the act of 1821 to appoint. Westmoreland *v.* Hale, 11 Ala. 122.

50. Wofford *v.* Robinson, 7 Ala. 489; Mitcheson *v.* Foster, 3 Metc. (Ky.) 324; Sanders *v.* Com. Bank, 2 Metc. (Ky.) 327; Kennedy *v.* Coleman, 2 Litt. (Ky.) 6.

51. Garrett *v.* Hamblin, 11 Sm. & M. (Miss.) 219, 49 Am. Dec. 53; Hand *v.* State, 5 Humphr. (Tenn.) 518.

52. Perdue *v.* Dodd, 1 Lea (Tenn.) 710; Eaken *v.* Boyd, 5 Sneed (Tenn.) 204; Barnes *v.* White, 2 Swan (Tenn.) 442.

53. Snell *v.* Rawlings, 3 Humphr. (Tenn.) 85; Hogue *v.* Cottle, 2 Va. Cas. 229.

54. Wood *v.* Orr, 10 Yerg. (Tenn.) 505.

55. Wilson *v.* Broder, 10 Cal. 486.

56. Wilson *v.* Broder, 10 Cal. 486.

57. People *v.* McHatton, 7 Ill. 731.

58. People *v.* McHatton, 7 Ill. 731.

59. Stevenson *v.* McLean, 5 Humphr. (Tenn.) 332, 42 Am. Dec. 434.

60. Sanders *v.* Commonwealth Bank, 2 Metc. (Ky.) 327.

61. Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. (Miss.) 625.

62. Leavitt *v.* Smith, 7 Ala. 175.

recover by motion against the constable and his sureties damages for a failure to return the execution within the time prescribed.[63]

**g. Tender of Amount Due.** In summary proceedings against an officer on his official bond for failure to return an execution, a tender by him of the amount thereof after notice and before judgment is no defense, since a tender is not a discharge of the liability.[64]

**h. Issuance of Alias Writ.** The mere issuing of an alias execution is not a forfeiture of plaintiff's right to proceed by motion against the sheriff and the sureties on his official bond for a failure to return an execution [65] or the making of an insufficient return.[66]

**i. Legality of Tax Levy.** Where a county levy was laid by the county court, which directed the sheriff to pay certain claims against the county out of it, and the sheriff received the commissioner's book and proceeded to collect the levy as far as possible, and returned a list of the insolvents, upon a motion by one of the county creditors, whose claim was directed to be paid out of the levy, against the sheriff and his sureties to recover the amount, it was not competent for defendants to object that the county court was not legally authorized to lay the levy.[67]

**j. Unavailing Judgment Against Sheriff.** Under the statute providing for a motion against a sheriff or his sureties for failure to pay over the county levy, the fact of an unavailable judgment having been recovered on a motion against the sheriff is not a bar to a similar motion against the sureties.[68]

**6. Methods of Proceeding.** The usual method of summary proceeding is by motion for judgment against the officer and his sureties for the amount for which they have become liable,[69] but a proceeding by rule to show cause why such a judgment should not be entered is also countenanced.[70]

**7. Conditions Precedent — a. Demand.** A demand upon the sheriff for money in his hands is a prerequisite to summary proceedings against him and his sureties for failure to pay over the same; [71] but where a judgment is rendered in favor of plaintiff, on a motion under the statute against a sheriff and his sureties on his official bond, for a voluntary and unauthorized omission to levy an execution,

63. Sharp *v.* Trover, 7 J. J. Marsh. (Ky.) 275.

64. Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360.

65. Kennedy *v.* Coleman, 2 Litt. (Ky.) 6 (so holding where the alias writ was not issued until a month had elapsed after the first writ ought to have been returned); Doyle *v.* Glenn, 4 Humphr. (Tenn.) 309.

66. Barnes *v.* White, 2 Swan (Tenn.) 442, holding that after the sheriff had rendered himself liable by an insufficient return on an execution, the fact that plaintiff caused an alias execution to be issued on the same judgment, and receives partial payment thereof, is no waiver of the right to have judgment by motion against the sheriff and the sureties on his official bond for the remainder of the judgment and the damages given by the statute.

67. Cook *v.* Hays, 9 Gratt. (Va.) 142.

68. Grayham *v.* Washington County Ct., 9 Dana (Ky.) 182.

69. See the following cases:

*Alabama.*— Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475; O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Shute *v.* McRae, 9 Ala. 931.

*California.*— Wilson *v.* Broder, 10 Cal. 486.

*Illinois.*— People *v.* McHatton, 7 Ill. 731.

*Indiana.*— Dawson *v.* Shaver, 1 Blackf. 204.

*Kentucky.*— Calloway *v.* Com., 4 Bush 383; Goodrum *v.* Root, 2 Metc. 427.

*Mississippi.*— Cox *v.* Ross, 56 Miss. 481; Morehead *v.* Holliday, 1 Sm. & M. 625.

*Nevada.*— Nash *v.* Muldoon, 16 Nev. 404.

*North Carolina.*— Jenkins *v.* Howell, 65 N. C. 61.

*Tennessee.*— Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969; Park *v.* Walker, 2 Sneed 503; Hand *v.* State, 5 Humphr. 518; Wood *v.* Orr, 10 Yerg. 505; Cowan *v.* Lay, (Ch. App. 1896) 42 S. W. 68.

*Texas.*— Griswold *v.* Chandler, 22 Tex. 637.

*Virginia.*— Carr *v.* Meade, 77 Va. 142; Shelton *v.* Ward, 1 Call 538.

*West Virginia.*— State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 372 *et seq.*

70. See Haley *v.* Greenwood, 28 Tex. 680.

71. Wallace *v.* Taylor, 7 Ala. 668; Thompson *v.* Healy, 4 Metc. (Ky.) 257; Cook *v.* Hays, 9 Gratt. (Va.) 142, holding that where the amount collected by a sheriff on a tax levy is insufficient to pay all the claims directed to be paid out of it, a demand on him for payment of a claim is necessary to support a motion against him and his sureties for its payment.

**Proof of demand.**—Where no objection for want of demand is made in the trial court, and the notice avers a demand and the judg-

the statutory penal interest from the date of the return of the process follows as of course, without a previous demand on the sheriff.[72]

**b. Return of Receipt of Money.** A return by a sheriff admitting the receipt of money is not a condition precedent to the institution of summary proceedings against the sheriff and the sureties on his official bond for refusal to pay over money.[73]

**c. Judicial Ascertainment of Default.** It has been held that, in order to entitle a sheriff to proceed summarily against a deputy and his surety for the deputy's default, the existence of such default and the sheriff's liability therefor must first have been judicially ascertained,[74] and that a scire facias cannot be maintained against the sureties on the recognizance of a deceased sheriff until the extent of the liability of the sheriff's estate has become fixed by an allowance against it for the damage sustained by reason of the official misconduct of which complaint is made.[75]

**8. DEFENSES.** A defense to a summary motion for judgment on a sheriff's bond for failure to pay a county order may be made in the same manner and to the same extent as in an action at law.[76] On motion against a sheriff and his sureties for failing to pay over money made on execution, the return showing satisfaction, a plea by a surety, which attempts to deny the liability of the principal on behalf and in the name of the surety, is bad, as such defense can be made only by the sheriff.[77] Parties sought to be charged on motion as the securities of a sheriff may contest the fact of their suretyship, and introduce proof to show that they were not his securities at the time of the supposed default.[78]

**9. JURISDICTION.**[79] The jurisdiction of particular courts to entertain summary proceedings on an official bond is a matter regulated by statute.[80] Two or more distinct defaults cannot be consolidated in a single proceeding for the purpose of so raising the amount in controversy as to enable the proceeding to be brought in a court which could not take cognizance of the amount involved in any one of the

ment gives credit for part of the debt as paid on the day when it was demandable, there is sufficient proof of demand. Cook *v.* Hays, 9 Gratt. (Va.) 142.

A demand upon the deputy of the sheriff is not sufficient. Thompson *v.* Healy, 4 Metc. (Ky.) 257.

Where the execution plaintiff lives in the county, he need not demand the money on the execution before proceeding by notice against the high sheriff and the sureties on his official bond therefor. Tyree *v.* Donnally, 9 Gratt. (Va.) 64.

Authority to make demand.—Where a judgment creditor employs an attorney other than the one who prosecuted the cause to demand of the sheriff the amount made by the execution, and such demand is made, it is too late to object, on a motion against the sheriff and his sureties for failure to pay over the money, that the attorney had no authority to make the demand for the money. Chapman *v.* Chevis, 9 Leigh (Va.) 297.

72. Garrett *v.* Hamblin, 11 Sm. & M. (Miss.) 219, 49 Am. Dec. 53.

73. Nash *v.* Muldoon, 16 Nev. 404, holding that the receipt of the money may be established by other evidence.

74. Patterson *v.* Coleman, 4 Humphr. (Tenn.) 64.

75. Tute *v.* James, 46 Vt. 60, holding this to be true, although the sheriff's estate is entirely insolvent.

76. State *v.* Keadle, 44 W. Va. 594, 29 S. E. 976.

77. Price *v.* Cloud, 6 Ala. 248.

78. Dixon *v.* Caskey, 18 Ala. 97.

79. Jurisdiction of courts generally see COURTS, 11 Cyc. 633.

80. Mitcheson *v.* Foster, 3 Metc. (Ky.) 324 (holding that the court of appeals had jurisdiction of a motion against a sheriff and his sureties to recover the amount of an execution, which issued from the clerk of such court, and the damages thereon for failing to return it to the office whence it issued for thirty days after the return-day, without reasonable excuse for such failure); Anderson *v.* Bradford, 7 J. J. Marsh. (Ky.) 623 (holding that under Acts (1799), § 21, the county court had no jurisdiction over a motion by a sheriff against his deputy and the sureties on his official bond); Lindsey *v.* McClelland, 1 Bibb (Ky.) 262 (holding that under 1 Bradf. Laws, p. 405, § 22, and 2 Bradf. Laws, p. 30, § 21, and p. 182, § 7, the general court had no jurisdiction of a motion by a sheriff against his deputies and their sureties for arrearages of the revenue tax, for which they were bound to indemnify him); Bradley *v.* Tompkins, Hard. (Ky.) 184 (holding that under Acts (1797), p. 152, §§ 4, 5, the county court had jurisdiction to entertain a motion by a sheriff against his deputy and his sureties); Carr *v.* Meade, 77 Va. 142 (holding that Acts (1872–1873), c. 395, § 9, which merely withdrew from the

defaults standing alone; [81] but the court in which a judgment was rendered is the proper one to entertain summary proceedings, although after affirmance on appeal the judgment amounts to a sum beyond the jurisdiction of that court.[82]

**10. VENUE.**[83] When the law is silent as to where summary proceedings shall be brought, they must be instituted in the sheriff's own county,[84] although the process in reference to which the default occurred was issued to him from another county.[85] But under some statutes summary proceedings on a sheriff's official bond are to be brought in the court to which the process in reference to which the default occurred is returnable, although such court is not in the sheriff's county.[86]

**11. TIME FOR PROCEEDING AND LIMITATIONS.**[87] It is not necessary that summary proceedings against a sheriff's sureties should be brought at the first term of court after the default [88] or after a demand on the sheriff; [89] but, unless specially limited, such proceedings may be brought at any time before the claim is barred by the statute of limitations.[90] Where the statute limits the time within which such proceedings must be brought they cannot be instituted subsequently.[91] A motion against a sheriff and his sureties for failure to return process may be made after the officer's term of office has expired.[92]

**12. ABATEMENT AND REVIVAL.**[93] A return of "no inhabitants" as to some of the sureties will authorize an abatement of the proceedings as to the non-residents; [94] and on the death of one or more of the sureties the proceeding may abate as to him.[95] Where a motion in summary proceedings against a sheriff and his sureties has abated by the death of the sheriff, no step can be taken against the sureties until the motion is revived against the personal representative of the sheriff.[96]

**13. NOTICE** [97] **— a. Necessity.** Summary proceedings upon the official bond of a sheriff must as a rule be upon notice to the sureties,[98] as well as to the

county courts certain chancery jurisdiction, and declared all acts and parts of acts inconsistent therewith repealed, did not repeal Code, c. 163, § 5, giving the county courts the right to entertain motions on sheriff's bonds in case of default in paying over money received on an execution).

81. Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46 [*following* Harris *v.* Smith, 7 T. B. Mon. (Ky.) 310].

82. Banner *v.* Henry, (Tex. Civ. App. 1895) 31 S. W. 1098.

83. See, generally, VENUE.

84. Milor *v.* Farrelly, 25 Ark. 353.

85. Milor *v.* Farrelly, 25 Ark. 353.

86. Cox *v.* Ross, 56 Miss. 481; Griswold *v.* Chandler, 22 Tex. 637.

87. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963.

88. Hogue *v.* Cottle, 2 Va. Cas. 229.

89. Evans *v.* State Bank, 13 Ala. 787.

90. Evans *v.* State Bank, 13 Ala. 787.

91. Mars *v.* Buckler, 1 Bibb (Ky.) 267.

**A statute limiting the period within which fines and forfeitures may be recovered** does not apply to a summary proceeding against a sheriff and securities for failing to return an execution. McRae *v.* Colclough, 2 Ala. 74.

92. Tapp *v.* Bonds, 57 Miss. 281; Earl *v.* Smith, 26 Tex. 522.

93. See, generally, ABATEMENT AND REVIVAL, 1 Cyc. 10.

94. Grayham *v.* Washington County Ct., 9 Dana (Ky.) 182; Commonwealth Bank *v.* Cravens, 5 J. J. Marsh. (Ky.) 383.

95. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

96. Burroughs *v.* Goodall, 2 Head (Tenn.) 29, holding that the abatement as to the sheriff operates also as an abatement as to the sureties.

97. See, generally, NOTICES, 29 Cyc. 1110.

98. *Alabama.*—Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730; Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

*Arkansas.*— Milor *v.* Farrelly, 25 Ark. 353.

*Kentucky.*—Wood *v.* Sayre, 7 T. B. Mon. 663.

*Mississippi.*—Demoss *v.* Camp, 5 How. 516; Coleman *v.* Saunders, 5 How. 287; Vance *v.* Connell, Walk. 254.

*Tennessee.*—Wynne *v.* Taylor, 5 Heisk. 691; Metcalf *v.* Grainger, 1 Overt. 61. See also Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969, holding that under a statute which provides that in suit by motion against a constable on his bond, plaintiff, before judgment against the sureties, must produce a certified copy of the bond, where no notice is served on the sureties, and the copy of the bond produced is not properly certified, the justice has no jurisdiction over the sureties.

*Texas.*— Haley *v.* Greenwood, 28 Tex. 680.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 372 *et seq.*

**Originally,** in Alabama, the proceeding could have been pursued against the sheriff only, and if the fact of suretyship was proved a judgment could have been obtained against the sureties without notice to them. McRae *v.* Colclough, 2 Ala. 74. See *infra*, notes 2, 3.

**The remedy of a surety** on a sheriff's official bond, against whom summary judgment was taken on motion and without notice in the supreme court, is by bill in equity to

sheriff.[99] Under some statutes, however, the sheriff and his sureties are liable to be proceeded against summarily without notice;[1] while under other statutes notice to either the sheriff or the sureties is sufficient,[2] and notice to the officer is sufficient without notice to the sureties[3] or the sureties may be proceeded against without notice to the sheriff.[4] And it has been held that notice to a deputy and his surety of a motion by the sheriff against them to charge them with an amount for which he has become liable through the deputy's default is not necessary,[5] although it must appear on such motion that the deputy had notice of the proceeding against the sheriff because of such deputy's default.[6] Such notice as the statute requires is essential to the jurisdiction of the court to entertain the proceedings;[7] and it has been held that a judgment rendered on a motion made at a term of court subsequent to that designated in the notice is void,[8] as the motion is deemed abandoned unless it is made at the term indicated in the notice or some other proceeding is had at such term to keep it alive.[9] Where the notice has not been served on all the obligors plaintiff in the motion may discontinue against those not served and prosecute his motion to judgment against the residue.[10] Where the sheriff and his sureties have come into court and the parties have referred their case to the decision of the court, it will be intended that defendants were served with notice or waived the notice or any irregularity therein.[11] But it has been held that the mere fact that defendants are before the court when the motion is made does not cure the lack of notice for the time prescribed by the statute.[12]

**b. Form and Requisites.** The notice must be in writing[13] and personally served.[14] Under some statutes the notice performs the functions not only of a summons,[15] but

have the judgment declared void. Kinzer *v.* Helm, 7 Heisk. (Tenn.) 672.

**An officer's return that he has made the money** on an execution will not warrant a judgment against his sureties for his failure to pay it over without notice to them. Metcalf *v.* Grainger, 1 Overt. (Tenn.) 61.

**99.** Demoss *v.* Camp, 5 How. (Miss.) 516; Lewis *v.* Garrett, 5 How. (Miss.) 434; Coleman *v.* Saunders, 5 How. (Miss.) 287.

**Notice to sheriff in proceedings against him alone** see *supra*, VIII, K, 1.

**1.** Colloway *v.* Com., 4 Bush (Ky.) 383; Williams *v.* Harvey, Cooke (Tenn.) 466.

**2.** McRae *v.* Colclough, 2 Ala. 74; Mason *v.* Parker, 1 Ala. 684; McWhorter *v.* Marrs, Minor (Ala.) 376.

**3.** Hughes *v.* Hale, 5 Ala. 63; Reid *v.* Planters, etc., Bank, 3 Ala. 712; Reid *v.* Jackson, 1 Ala. 207; McWhorter *v.* Marrs, Minor (Ala.) 376 [*followed* in Neale *v.* Caldwell, 3 Stew. (Ala.) 134]; Baxter *v.* Marsh, 1 Yerg. (Tenn.) 460 [*followed* in Hopson *v.* Hoge, 8 Yerg. (Tenn.) 153]. But *compare* Jameson *v.* Harper, 1 Port. (Ala.) 431, 432, where it is said that, although by its liberal terms the statute authorized a judgment against a sheriff and his securities upon notice to the sheriff alone, yet "no judgment could be rendered against such security, without notice, or a waiver of it, by appearance."

**4.** Bondurant *v.* State Bank, 5 Ala. 171; Williamson *v.* Montgomery Branch Bank, 3 Ala. 504.

**5.** Stephens *v.* Womack, 3 Ala. 738.

**6.** Stephens *v.* Womack, 3 Ala. 738.

**7.** Mason *v.* Brazier, 1 Ala. 635.

**The record must affirmatively show notice** where the judgment is by default. Allums *v.* Hawley, 8 Ala. 584.

**8.** Thomison *v.* Douglass, 3 Baxt. (Tenn.) 74. But *compare* Chandler *v.* Reid, 114 Ala. 390, 21 So. 475.

**9.** Garey *v.* Edwards, 15 Ala. 105. But *compare* Russell *v.* Rolfe, 50 Ala. 56, holding that a motion for a summary judgment against a sheriff and his sureties is not discontinued by the mere omission of plaintiff to have it formally continued at a former term.

**10.** McCrosky *v.* Riggs, 12 Sm. & M. (Miss.) 712.

**11.** Bondurant *v.* Woods, 1 Ala. 543; Chaffin *v.* Crutcher, 2 Sneed (Tenn.) 360. See also Jameson *v.* Harper, 1 Port. (Ala.) 431; State *v.* Faust, 7 Coldw. (Tenn.) 109 (appearance and obtaining continuance); Patterson *v.* Coleman, 4 Humphr. (Tenn.) 64. *Compare* Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186, holding that by appearance to a motion against a sheriff and his securities, and repeated continuance of the case generally, by consent of parties, defendants waived any objection to the notice, because not served in time, but they did not thereby preclude themselves from moving to quash the notice, because fatally defective on its face.

After a verdict against defendants an irregularity in the notice cannot be objected to. Morgan *v.* Billings, 3 Ala. 172.

**12.** Yancey *v.* Hankins, Minor (Ala.) 171.

**13.** Milor *v.* Farrelly, 25 Ark. 353.

**14.** Milor *v.* Farrelly, 25 Ark. 353.

**15.** Milor *v.* Farrelly, 25 Ark. 353; Lewis *v.* Garrett, 5 How. (Miss.) 434 (holding that in proceedings by motion against a sheriff on his bond, no process is required to bring in the sheriff, other than service of notice); Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139.

also of the declaration or petition in an ordinary case.[16] In such case the notice should contain all the requisites of a declaration or petition,[17] and aver every fact necessary to support a recovery,[18] inform defendants, with certainty, as to the matters for which they are sought to be held liable,[19] and describe the bond with as much particularity as is required in a declaration.[20] So, where the motion is for failure to serve process, the notice must show that it was the duty of the officer to serve it,[21]

*Compare* Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99, where it is said: "The notice given to the officer is not the commencement of the suit, is not process, but an individual act of the party."

16. Condry *v.* Henley, 4 Stew. & P. (Ala.) 9; Milor *v.* Farrelly, 25 Ark. 353; Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139; Wright *v.* McKenney, 34 Tex. 568.

17. Johnson *v.* Bradley, 11 Bush (Ky.) 666.

18. Broughton *v.* State Bank, 6 Port. (Ala.) 48; Johnson *v.* Bradley, 11 Bush (Ky.) 666; Thompson *v.* Healy, 4 Metc. (Ky.) 257 (holding that the notice of a motion against a sheriff and his sureties for failing to pay a county creditor a claim due him must, where the claim is ordered to be paid by the court after the county levy for the year has been imposed, aver that there was in the hands of the sheriff a sufficient sum to pay the claim after deducting the previously allowed claims; but it is not necessary, when the claim is ordered to be paid at the time the county levy for the year is imposed, to aver that the sheriff had collected a sufficient sum to pay it and all other claims allowed at the same time); State *v.* Keadle, 63 W. Va. 645, 60 S. E. 798 (holding that a notice of motion for judgment against an ex-sheriff and the sureties on the bond, which failed to allege or recite that such ex-sheriff had notice of the order of the county court, requiring him to pay over to his successor the balance found in his hands, for which judgment was sought, and that such order after being signed by the president and clerk of the county court was presented to him, and demand made on him for payment, was fatally defective, and should be quashed on motion); Licking Dist. Bd. of Education *v.* Parsons, 22 W. Va. 580 (holding that a notice to an ex-sheriff and his sureties of motion for judgment for his neglect to pay over school money due a board of education, which failed to show on its face that the board had ordered him to pay over such money to his successor, was fatally defective); Barrett *v.* Smith, 4 W. Va. 709 (holding that a notice of motion against a constable and his sureties was fatally defective, where it did not aver that he had collected any money on the claims placed in his hands).

**Notices held sufficient.**— In a summary proceeding by motion against a constable and his sureties, the notice is sufficient where it describes the note placed in the constable's hands for collection, the date and amount of such note, the date and amount of the judgment rendered upon it, and the execution issued to him in the case; and alleges that the execution had not been returned into the office from which it issued within thirty days thereafter, nor the money due thereon paid over according to law; and that, therefore, judgment is demanded against the officer and his sureties for the amount of the judgment of the justice of the peace, with legal interest from the rendition thereof, and twelve and one-half per cent interest on the same from the time it was demanded, by way of damages. Lashley *v.* Wilkinson, 2 Head (Tenn.) 482. A notice by the county supervisors to a sheriff and his sureties stating that the sheriff had collected as levies for a certain year a specified amount, which he had failed to account for and pay over as required by law, and that they would move for judgment for such amount at a term of court named, was sufficiently specific to warrant a judgment thereon. Washington County *v.* Dunn, 27 Gratt. (Va.) 608. A notice of a motion for judgment against a sheriff and his sureties alleging that the sheriff levied an attachment on defendant's property, which attachment was quashed, and the sheriff ordered to return the property, which he refused to do, and that plaintiff asks judgment for the value of the property, is not fatally defective, on motion to quash, because it fails to allege that plaintiff owned the property when it was ordered to be returned. And where the notice alleges that the sheriff executed his official bond, which was afterward approved by the county court, a failure to state that it was filed in the clerk's office of the county court is not a fatal defect. Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186.

19. Garey *v.* Edwards, 15 Ala. 105, holding that the notice in question sufficiently indicated under which of two statutes the remedy was sought.

**A misdescription of the execution** is a fatal defect in a proceeding for failure to pay over money collected on execution. Johnson *v.* Gray, 6 Ala. 276.

**Statutory damages** cannot be recovered in a summary proceeding by motion against the sheriff and the sureties on his official bond for failing to pay over money, unless the notice of such motion shows that the parties intend proceedings for damages, as well as the amount collected and interest. Barton *v.* Lockhart, 2 Stew. & P. (Ala.) 109.

20. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204; Wright *v.* McKenney, 34 Tex. 568.

21. Atkinson *v.* Hulse, 30 Ark. 760, holding that where under the statute the officer is not compelled to serve process unless his fees and mileage are first tendered, the payment or tender thereof must be alleged in the notice of a motion for failure to serve a summons.

and where a demand is necessary [22] the notice should aver the making thereof.[23] It is also necessary that the notice should show that plaintiff is entitled to the remedy which he seeks to enforce.[24] A notice of a motion for failure to pay over money should negative any lawful disposition thereof.[25] A notice stating that the sheriff "has failed to return an execution," which is described, is sufficient, without an allegation that he failed to return it at the proper time; [26] and an allegation that the execution was received by the sheriff in sufficient time to return it to the next succeeding term is sufficient.[27] The notice may be in the name of plaintiff in the motion, and need not be in the name of the state for the use of such plaintiff.[28] A notice to certain persons, as sureties of a sheriff, of a motion against them for his failure to return an execution, is sufficient, without averring that they are in fact the sureties of the sheriff; [29] and it has been held that a notice of a motion against a sheriff and his sureties for default as to certain taxes of a certain year need not state on which one of several bonds executed by him the motion is to be made.[30] It is not necessary that the notice of a motion for failure to return an execution should aver the continuance of the official character of the officer up to the time when the writ was returnable.[31] The notice to a sheriff of a summary proceeding against him and the sureties on his official bond for failure to return an execution need not state the names of the sureties,[32] nor is it essential that such notice should be dated.[33] And such notice may be subscribed by plaintiff's attorney.[34] The notice is sufficient if it informs defendants of the demand intended to be set up with reasonable certainty,[35] and apprises them when and where the motion will be made.[36] The joinder in the notice of two distinct grounds of recovery is not a demurrable defect,[37] and one joint notice to a constable and his sureties of a motion for judgment on his bond, on his defaults in several cases, has

22. See *supra*, X, G, 7, a.

23. Wallace *v.* Taylor, 7 Ala. 668; Terrill *v.* Cecil, 3 Metc. (Ky.) 347.

24. Terrill *v.* Cecil, 3 Metc. (Ky.) 347, holding that under a statute making a sheriff liable on his official bond for failure to satisfy county creditors "whose names are upon the list furnished him by the clerk," a notice of motion against a sheriff and his sureties which fails to show that the name of plaintiff in the motion was on the list of names furnished by the clerk is defective.

25. Dawson *v.* Shaver, 1 Blackf. (Ind.) 204, holding that where the statute requires a sheriff to pay over money collected on execution to the judgment creditor or into the clerk's office, the notice of a motion against him and his sureties by the creditor should aver that the money has not been paid to plaintiff, or into the clerk's office.

26. Caskey *v.* Nitcher, 8 Ala. 622.

27. Mobile Branch Bank *v.* Broughton, 10 Ala. 147, holding that it is not necessary to allege that it was received by him a sufficient time before the return-day to enable him to make the money.

28. Lyon *v.* Horner, 32 W. Va. 432, 9 S. E. 875.

29. Mobile Branch Bank *v.* Broughton, 10 Ala. 147; Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139.

An appearance and defense by the sureties admits the character in which they are sued. Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139.

30. Monteith *v.* Com., 15 Gratt. (Va.) 172.

31. Casky *v.* Haviland, 13 Ala. 314.

32. McRae *v.* Colclough, 2 Ala. 74.

33. McRae *v.* Colclough, 2 Ala. 74.

34. McRae *v.* Colclough, 2 Ala. 74.

35. Martin *v.* Hardin Justices, 6 J. J. Marsh. Ky.) 7; Kennedy *v.* Coleman, 2 Litt. (Ky.) 6 (holding that a notice to a sheriff and his sureties that judgment will be moved for, for his failing to return an execution, is sufficient, if it apprises them of what is demanded and describes the execution intended); Mars *v.* Buckler, 1 Bibb (Ky.) 267. See also Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27.

Any notice, however informal, which informs defendants of the nature and object of the motion, is sufficient to sustain a motion on the bond of a sheriff for an official default. Carr *v.* Meade, 77 Va. 142; Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186; Licking Dist. Bd. of Education *v.* Parsons, 22 W. Va. 308, 314.

36. Martin *v.* Hardin Justices, 6 J. J. Marsh. (Ky.) 7.

A notice is sufficient where it designates the term at which the motion will be made without specifying any particular day. McRae *v.* Colclough, 2 Ala. 74 [*followed* in Welch *v.* Fourier, 6 Ala. 516].

37. McMahan *v.* Kyle, 9 Port. (Ala.) 507, 508 (where it is said: "The Circuit court could have put the plaintiff to his election, or, if the notice was otherwise defective, as a statement of the cause of complaint, could have caused the pleadings to be made up under our statutes"); Tucker County Ct. *v.* Miller, 34 W. Va. 791, 12 S. E. 1078 (holding that a notice of a motion against a sheriff and his sureties for judgment in favor of a county for moneys due from the sheriff for collection of county levy and road

been held sufficient.[38] Mere surplusage in the notice or suggestion will not vitiate the proceeding.[39] A notice against a constable and his sureties, informing them that a motion will be made before a justice for the constable's failure to return an execution, may be issued by and returned to the successor of the magistrate who issued the execution.[40]

**c. Construction and Effect.** Where a notice to a sheriff and his sureties states several defaults of the sheriff, and informs them that a motion against them will be made for one, specifying it, the notice will be considered as embracing only that ground of complaint.[41]

**14. PARTIES.**[42] It has been held that a motion against a sheriff and his sureties to compel the payment of money collected by execution must be in the name of the execution plaintiff, and not of his assignee;[43] but under a statute providing that where an officer neglects or refuses to return an execution as required by law, or makes a false return thereon, he and his sureties shall be liable to the party entitled to the money to be collected for the full amount of the debt, interest, and costs, to be recovered on motion, the assignee of a judgment rendered in an action aided by attachment is the proper moving party in a motion to recover against a constable and his sureties the amount of the judgment, on account of the neglect of the constable to return an order of sale of the attached property,[44] and the assignor of such judgment, having no interest in it after the assignment, is not a proper party to such motion.[45] It has been held that proceedings for the failure of a sheriff to return an order for the sale of perishable property seized under attachment and to pay over the proceeds should be at the instance of the clerk of the court to which such order of sale was returnable;[46] but a justice of the peace may proceed in his own name against a constable and his sureties for fees collected by the constable and not paid over.[47] It has also been held that a motion against the sheriff and his sureties for taxes collected may be made in the name of the chairman of the county, although the sheriff's bond is made payable to the state.[48] As a general rule summary proceedings upon the sheriff's bond must be against all the sureties;[49] but where one of the sureties is dead the proceedings may be against the sheriff and the remaining sureties,[50] without including the representatives of the deceased surety.[51] Under the Alabama statute the summary remedy may be pursued against the sureties, or such of them as have received notice, without the sheriff;[52] but in Tennessee the sureties can be reached in summary proceedings

levies is not bad because of its joining those two kinds of levy as grounds for the motion).

38. Hendricks *v.* Shoemaker, 3 Gratt. (Va.) 197, holding, however, that the justice should give a separate and distinct judgment in each case.

39. Garey *v.* Edwards, 15 Ala. 105.

40. McMahan *v.* Kyle, 9 Port. (Ala.) 507, holding that where a notice against a constable and his sureties for a failure to return an execution recited that the justice who issued the execution was not in office, it would be presumed, on demurrer, that the justice by whom the notice was issued was his successor.

41. Bondurant *v.* Woods, 1 Ala. 543.

42. See, generally, PARTIES, 30 Cyc. 1.

43. Wilson *v.* Broder, 10 Cal. 486.

44. Ranken *v.* Jones, (Tex. Civ. App. 1899) 53 S. W. 583.

45. Ranken *v.* Jones, (Tex. Civ. App. 1899) 53 S. W. 583.

46. Reid *v.* Bibb, 5 Ala. 281, holding that there was no authority for such a proceeding at the instance of the judge of the court to which the order was returnable.

47. Rose *v.* Cobb, 64 Mo. 464, so holding under Wagner St. p. 845, § 24.

48. Dawson *v.* Clark, 3 Sneed (Tenn.) 438.

49. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27; Com. Bank *v.* Cravens, 5 J. J. Marsh. (Ky.) 383; Sutton *v.* Stark, 1 T. B. Mon. (Ky.) 147; Hearn *v.* Ewin, 3 Coldw. (Tenn.) 399; Gibson *v.* Martin, 7 Humphr. (Tenn.) 127; Rice *v.* Kirkman, 3 Humphr. (Tenn.) 415; Harrison *v.* Lane, 4 Munf. (Va.) 238.

Under the Alabama statute the motion need not be against the sheriff and all the sureties. James *v.* Moseley, 47 Ala. 299.

50. Bittick *v.* McEwen, 7 Heisk. (Tenn.) 1; Gibson *v.* Martin, 7 Humphr. (Tenn.) 127 (holding that this is permissible when the administrator of the deceased surety is not known or there is no administrator at the time of the motion); Rice *v.* Kirkman, 3 Humphr. (Tenn.) 415; Chapman *v.* Chevis, 9 Leigh (Va.) 297; Jacobs *v.* Hill, 2 Leigh (Va.) 393. See also Hearn *v.* Ewin, 3 Coldw. (Tenn.) 399.

51. Chapman *v.* Chevis, 9 Leigh (Va.) 297. *Compare* Gibson *v.* Martin, 7 Humphr. (Tenn.) 127.

52. Maxwell *v.* Pounds 116 Ala. 551, 23

only through their principal or jointly with him.[53] It has been held that where the statute authorizes proceedings against the sheriff "or" his sureties, a proceeding cannot be maintained against the sheriff and his sureties jointly.[54]

**15. Pleading.**[55] Where the notice answers the purpose of a declaration[56] no formal declaration or complaint is required.[57] On a motion by a clerk of court against a sheriff and his sureties for his failure to return an execution for costs, a plea that the money was paid before notice issued is good, without averring by whom or to whom payment was made.[58] Where a plea to a motion against the sheriff and his sureties goes to the default, and it is not stated by whom pleaded, it will be considered as the plea of the sheriff.[59] A plea by the sureties setting up the invalidity of the bond in that it is made payable to the governor and his successors in office instead of to the state as required by statute should expressly negative the execution by them of any official bond payable to the state.[60] In a proceeding for failure to return an execution, a plea of "not guilty," although not the most appropriate, is sufficient to throw on plaintiff the burden of supporting the allegations of his notice.[61] When a motion is made against a sheriff and his sureties, at the instance of the clerk of the supreme court, for failing to return an execution, it is not essential that the pleas asserting the return of the execution, and payment should be verified by oath.[62]

**16. Issues.**[63] In a summary proceeding against a sheriff and his sureties for the failure of the former to return an execution, an issue, without regard to technicality, may be made up under the direction of the court.[64] On motion against a constable and his sureties for his failure to return an execution, the sureties may litigate the question of the liability of their principal.[65]

**17. Variance.**[66] A variance between the judgment stated in the notice and that proved on the trial is not fatal where not such as to mislead defendants to their prejudice;[67] but there can be no recovery where the proof adduced shows a default different from that alleged in the notice.[68] In a proceeding for failure of the sheriff to pay over on demand money collected under execution, plaintiff is not required to prove that the demand was made at the time stated in the notice.[69]

**18. Evidence.**[70] The moving party must prove all facts necessary to support a recovery.[71] So it is incumbent upon the moving party to prove the fact of

So. 730 [*following* Reed *v.* Summers, 79 Ala. 522; *Ex p.* Wilson, 54 Ala. 296]; Camp *v.* Watt, 14 Ala. 616.

Prior to the enactment of the statute establishing this rule it was held that the proceeding could not be pursued against the sureties in the absence of the sheriff. Orr *v.* Duvall, 1 Ala. 262 [*followed* in Peck *v.* Colby, 31 Ala. 252; James *v.* Auld, 9 Ala. 462; Mason *v.* Brazier, 1 Ala. 635].

53. Burroughs *v.* Goodall, 2 Head (Tenn.) 29.

54. Wood *v.* Sayre, 7 T. B. Mon. (Ky.) 663 [*followed* in Martin *v.* Hardin Justices, 6 J. J. Marsh. (Ky.) 7].

55. See, generally, Pleading, 31 Cyc. 1.

56. See *supra*, X, G, 13, b.

57. Henderson *v.* Plumb, 18 Ala. 74; Condry *v.* Henley, 4 Stew. & P. (Ala.) 9.

58. Glover *v.* Chandler, 11 Ala. 161.

59. Glover *v.* Chandler, 11 Ala. 161.

60. Paddleford *v.* Moore, 32 Miss. 622.

61. Shute *v.* McRae, 9 Ala. 931.

62. Glover *v.* Chandler, 11 Ala. 161.

63. See, generally, Pleading, 31 Cyc. 670.

64. Shute *v.* McRae, 9 Ala. 931.

65. Robertson *v.* Coker, 11 Ala. 466.

66. See, generally, Pleading, 31 Cyc. 700.

67. Hix *v.* Cornelison, 7 Coldw. (Tenn.) 299, holding that where a notice of motion against a constable and his sureties, for failure to return an execution, described the judgment as having been rendered against "Phillips and others," while the proof on the trial showed that it was rendered against "Phillips and Logan," the variance was immaterial.

68. Johnson *v.* Petty, 5 Ala. 528, holding that in a proceeding against a constable and his sureties by notice to recover money collected by him on execution, plaintiff was not entitled to recover, on proof that the constable had levied an attachment in his favor, and that defendant therein had placed in the constable's hands money or property to indemnify him for a liability incurred by the failure to take a bond.

69. Evans *v.* State Bank, 15 Ala. 81, holding that proof of demand made at any time after the receipt of the money by the sheriff and before the motion is sufficient.

70. See, generally, Evidence, 16 Cyc. 821.

71. Johnson *v.* Bradley, 11 Bush (Ky.) 666; Terrill *v.* Cecil, 3 Metc. (Ky.) 347; Tilford *v.* Creel, 1 A. K. Marsh. (Ky.) 568; Cox *v.* Ross, 56 Miss. 481 (holding that where a plaintiff in execution, on a motion against the sheriff of another county and his

suretyship,[72] whenever this is contested;[73] but it has been held that where the sureties appear and plead it is not necessary to prove the fact of suretyship unless it is put in issue by a plea denying the execution of the bond,[74] as otherwise the appearance and defense amounts to an admission of the suretyship.[75] Where defendants set up an affirmative defense they must prove the matters relied on.[76] The general rules upon the subject [77] govern as to the admissibility [78] and the weight and sufficiency [79] of the evidence in a summary proceeding upon an official bond.

sureties for failure to return an execution, counts on his alleged judgment for the amount thereof, and not on the execution, and the sheriff takes issue on an allegation of the judgment's existence, plaintiff must introduce the judgment in evidence to make out his case); Haley *v.* Greenwood, 28 Tex. 680.

72. Harris *v.* Bradford, 4 Ala. 214; Reid *v.* Planters', etc., Bank, 3 Ala. 712; Barton *v.* State Bank, 1 Stew. & P. (Ala.) 471 [*following* McWhorter *v.* Marrs, Minor (Ala.) 376]; Tilford *v.* Creel, 1 A. K. Marsh. (Ky.) 568; Johnson *v.* Thompson, 4 Bibb (Ky.) 294.

Where the motion is for a default with respect to the taxes of a particular year, it is incumbent upon the moving party to show at the trial that the sheriff, with the persons named as sureties, had duly executed a bond for the faithful discharge of the duties of his office for that year. Monteith *v.* Com., 15 Gratt. (Va.) 172.

73. Tilford *v.* Creel, 1 A. K. Marsh. (Ky.) 568.

74. Harris *v.* Bradford, 4 Ala. 214; Jameson *v.* Harper, 1 Port. (Ala.) 431; Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139; Poer *v.* Brown, 24 Tex. 34.

75. Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139.

76. Mitcheson *v.* Foster, 3 Metc. (Ky.) 324 (so holding where, on motion against the sheriff and his sureties for failing to return an execution to the office whence it issued, a defense was interposed that the sheriff had lost or mislaid it, or had mailed it to the office whence it issued, and that after diligent search he could not find it); Chaffin *v.* Stuart, 1 Baxt. (Tenn.) 296 (so holding as to a defense that plaintiff's act or interference caused the default).

77. See EVIDENCE, 16 Cyc. 821.

78. See Nash *v.* Muldoon, 16 Nev. 404 (holding that, on motion to recover money collected by the sheriff on execution, his receipt of the money might be established by other evidence than his return); Vaughan *v.* Warnell, 28 Tex. 119 (holding that the officer's return was admissible as evidence in favor of the sureties, although such return was not made until after a motion for failure to make a return as this fact went only to the credibility of the return); Washington County *v.* Dunn, 27 Gratt. (Va.) 608 (holding that on a motion against a sheriff and his sureties for the county levies, which he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's accounts, was competent evidence against the sureties to show the amount for which the sheriff was indebted, although made without notice to them).

79. Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665 (holding that in a proceeding for failure to make the money on an execution a claim of exemption on the part of the execution debtor was sufficient to overcome the *prima facie* liability of the sheriff and his sureties arising from a levy on property); Casky *v.* Haviland, 13 Ala. 314 (holding that on motion for judgment against a sheriff and the sureties on his official bond for failing to return an execution, it was not necessary that the jury should be satisfied beyond a reasonable doubt that plaintiff's case had been made out, as all that was necessary was that there should be such a preponderance of proof as would convince the jury by the application of the ordinary tests of truth); Price *v.* Cloud, 6 Ala. 248 (holding that where the sureties became such before the return-day, proof of the return of an execution satisfied, and of a demand for the money and failure to pay over was sufficient to charge them); Mershon *v.* Com., 2 Metc. (Ky.) 371 (holding that a statement of the auditor of public accounts of the amount of revenue due and owing by the sheriff, and an official copy of his bond, would authorize a judgment on motion against the sheriff and his sureties); Com. *v.* Webb, 42 S. W. 737, 19 Ky. L. Rep. 944 (holding that under a statute which made a receipt from the treasurer alone admissible as evidence on behalf of defendants upon a motion by the state against the sheriff and his sureties to recover public revenues collected by the sheriff, the state might, in such a summary proceeding, plead and prove a mistake in the auditor's settlement with the sheriff, although the sheriff had a quietus from the auditor); Garrett *v.* Hamblin, 11 Sm. & M. (Miss.) 219, 49 Am. Dec. 53 (holding the evidence sufficient to establish the fact of a false return); Washington County *v.* Dunn, 27 Gratt. (Va.) 608 (holding that on a motion against a sheriff and his sureties for the county levies, which he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's account, was conclusive upon the sureties if they had notice as provided by statute, and *prima facie* evidence of the sheriff's indebtedness even in the absence of notice); Cox *v.* Thomas, 9 Gratt. (Va.) 312 (holding that on motion by a sheriff against a deputy and his sureties, it was not necessary that he should produce the whole record of the cause in which he was subjected to liability for the default of

**19. Trial.**[80] The sureties are not, as a matter of constitutional right, entitled to a jury trial before judgment against them,[81] but the statutes sometimes authorize a jury trial in such cases.[82] A motion against a sheriff and his sureties for failing to pay revenue into the treasury may be tried and judgment rendered on a day of the term subsequent to that for which it was docketed for trial.[83] In Kentucky on a motion by a sheriff against his deputy and his sureties for failure to account for a part of the revenue tax of a certain year, the court decides both law and fact.[84]

**20. Verdict and Findings.**[85] In proceedings for failure to pay over money, a finding that such money was received by the officer is necessary to support a judgment against defendants,[86] unless such receipt is a matter of record.[87] In order to support a judgment against defendants the verdict should not only find the sheriff's default, but also negative any defense interposed by plea.[88]

**21. Judgment.**[89] In a summary proceeding on a sheriff's bond the petitioner has the right to discontinue as to the principal obligor and take judgment against the sureties.[90] A judgment for not returning an execution must show in whose favor the execution issued.[91] A judgment by default must show affirmatively every fact necessary to give the court summary jurisdiction,[92] and must also show the facts upon which the liability of defendants depends,[93] and that every material averment of the motion was proved.[94] Where the motion is for a failure to return process, judgment cannot be rendered for an insufficient return.[95] Where there is a joint notice to a constable and a surety on his official bond for judgment thereon on several defaults, the justice should give a separate judgment in each case.[96] A judgment by motion against a sheriff and his sureties may be void as

the deputy, but it was sufficient to produce so much thereof as shows such liability; and if the judgment recited the necessary facts, the recital was *prima facie* evidence against the deputy and his sureties).

The record of the county court has been held conclusive as to the proper execution of the bond (Calwell *v.* Com., 17 Gratt. (Va.) 391; Vaughn *v.* Com., 17 Gratt. (Va.) 386, so holding where the record stated that a sheriff, who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified") in the absence of fraud (Calwell *v.* Com., *supra*).

The return of the sheriff is only *prima facie* evidence against his sureties and not conclusive upon them (State Bank *v.* Twitty, 9 N. C. 5, holding, however, that where money had been paid into the hands of a sheriff by an individual under a belief that the sheriff had an execution against him, when he had not, and afterward an execution came to the sheriff's hands against him, which was returned satisfied to the amount before received of such individual, and the sureties admitted the sheriff's receipt of the money but denied his authority to receive it, the return of the sheriff bound the sureties), although it may be considered by the jury as some evidence of the value of goods of which it sets forth an uncompleted sale (Com. *v.* Rees, 2 Whart. (Pa.) 266).

80. See, generally, Trial.

81. Murry *v.* Askew, 6 J. J. Marsh. (Ky.) 27 (holding that a statute authorizing judgment against the sureties without a jury trial was valid); McCrosky *v.* Riggs, 12 Sm. & M. (Miss.) 712 [*following* Lewis *v.* Garrett, 5 How. (Miss.) 434].

82. Mason *v.* Brazier, 1 Ala. 635.

83. Mershon *v.* Com., 2 Metc. (Ky.) 371.

84. Johnson *v.* Thompson, 4 Bibb. (Ky.) 294.

85. See, generally, Trial.

86. Mason *v.* Brazier, 1 Ala. 635.

87. Mason *v.* Brazier, 1 Ala. 635.

88. Mason *v.* Parker, 1 Ala. 684.

89. See, generally, Judgments, 23 Cyc. 623.

90. Poer *v.* Brown, 24 Tex. 34.

91. Marshal *v.* Hill, 8 Yerg. (Tenn.) 101.

92. Morgan *v.* Billings, 3 Ala. 172; Yancey *v.* Hankins, Minor (Ala.) 171.

93. Chandler *v.* Reid, 114 Ala. 390, 21 So. 475 (holding that a judgment by default in a proceeding by motion for money collected on execution must show that proof was made that the money was collected, that the sheriff failed to pay it on demand, and that defendants notified were the sureties of the sheriff); Morgan *v.* Billings, 3 Ala. 172.

94. Warwick *v.* Brooks, 70 Ala. 412, holding that a judgment entry in summary proceedings against a sheriff and his sureties for failure to return an execution, reciting that, "defendants not being represented in court" and "the presiding judge having been of counsel," the clerk selected an attorney of the court to preside on the trial, "and issue being joined upon the motion of the plaintiff for a judgment against the defendants, thereupon comes a jury," was fatally defective.

95. Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

96. Hendricks *v.* Shoemaker, 3 Gratt. (Va.) 197.

to the sureties and valid as to the principal.[97] The fact that the judgment is in favor of a firm instead of the individual members thereof is only matter in abatement and not cause for error.[98] In Tennessee the rule has been established that in all cases the judgment must set forth a showing of the existence of a state of facts authorizing the exercise of the jurisdiction of the court.[99]

**22. Amount of Recovery.** The full amount for which the officer and his sureties have become liable may be recovered in summary proceedings,[1] but the court has refused to allow interest in such a proceeding in the absence of a statute providing

97. Sherrell *v.* Goodrum, 3 Humphr. (Tenn.) 419, so holding as to a judgment against a sheriff and a set of sureties whose liability had terminated at the time of the default on which the judgment was based.

98. Marshal *v.* Hill, 8 Yerg. (Tenn.) 101.

99. *Ex p.* Savage, 4 Baxt. (Tenn.) 337 (holding that a judgment on a motion against a sheriff and his sureties for his deputy's failure to return an execution must recite the office of the sheriff, the suretyship, the deputyship, and the failure of the deputy to return the execution); Wynne *v.* Taylor, 5 Heisk. (Tenn.) 691 (holding that a judgment against a constable and the surety on his official bonds which does not show the official character of the principal debtor and that the other was surety, or that the surety had due notice, is invalid); Curry *v.* Munford, 5 Heisk. (Tenn.) 61 (holding that a judgment by motion against a sheriff and his sureties, based on an execution at the suit of an executor, is not valid, if rendered in favor of an administrator with the will annexed, unless it recites the death or resignation of the executor and the appointment of the administrator); Burt *v.* Davidson, 5 Humphr. (Tenn.) 425 (holding that a judgment on motion for failure to return an execution was fatally defective where it did not state the judgment upon which the execution issued, or state that it appeared to the justice that the persons other than the officer against whom the judgment was rendered were sureties of the officer); Snell *v.* Rawlings, 3 Humphr. (Tenn.) 85 (holding that on a motion against A as sheriff and his sureties for failure of a deputy to pay over money collected on an execution, a judgment setting forth that it had been made to appear to the court that A was sheriff, that the other defendants were his securities, that the relation of principal and deputy existed between the sheriff and the party collecting the money, and the collection of the specified sums of money, was sustained by the facts therein stated, but that it was otherwise as to a judgment stating that the execution came to the hands of the sheriff, without showing at what time, and that he neglected to make due and proper return).

**Recital of return-day not necessary.**—A judgment by motion against a sheriff and his sureties for insufficient return of execution, which recites the date of issuance of the writ, need not recite the date of the return-day. Gunn *v.* Boone, 7 Heisk. (Tenn.) 8.

**The record must distinctly show the particular ground** upon which the motion is made and upon that the judgment, to be valid, must be rested. Hence a judgment based upon a motion deficient in proper recitals is void, although such motion may refer to a notice already spread upon the minutes, embracing the necessary facts. Johnson *v.* Bruster, 2 Baxt. (Tenn.) 99.

**Appellate judgments of the supreme court** are not within the rule requiring summary judgments to recite the jurisdictional facts. Bittick *v.* McEwen, 7 Heisk. (Tenn.) 1.

1. Goodrum *v.* Root, 2 Metc. (Ky.) 427; McDaniel *v.* Brown, 8 Leigh (Va.) 218; Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186, holding that upon a motion under Code, c. 121, § 5, the court may give judgment against the sheriff and his sureties for so much as plaintiff is entitled to recover in any form of action by virtue of the sheriff's official bond, although the demand be not of a fixed sum, or one capable of being fixed by arithmetical calculation, but be for an unascertained amount, which, if the sheriff had been sued for a tort, would have sounded in damages.

**The amount due and collectable on an execution,** when the officer's statutory liability for damages for not returning it first accrues, and the percentage thereon annexed as a penalty, constitutes the utmost sum which can be recovered on motion against the officer and his sureties. Partlow *v.* Lawson, 2 B. Mon. (Ky.) 46; O'Bannon *v.* Huffman, 1 B. Mon. (Ky.) 212.

**Computation of interest and statutory damages.**— On motion against a sheriff and his sureties for failure to pay into the treasury the public moneys in his hands by December 15, interest is recoverable on the same from the first day of June preceding; and the twenty per cent statutory damages should be estimated on the amount due on December 15, instead of on the balance due when the motion is made. Mershon *v.* Com., 2 Metc. (Ky.) 371.

**Indorsement that part of amount made by sale.**— Under a statute making a constable and his sureties liable to a judgment on motion for the amount of an execution, together with thirty per cent damages, where the constable has failed to return the writ within thirty days, the fact that a constable had indorsed that a part of the amount of the execution was made by a sale of property does not render it proper to exclude the amount so reported to have been made in the calculation of the per centum, unless the same has been paid to plaintiff. Stephens *v.* Lewis, 8 B. Mon. (Ky.) 150.

**Where amount of execution paid.**—Where on a motion by plaintiff in an execution

therefor.[2] On a motion against a constable and his sureties for the penalty for failing to make due return of an execution, where the notice fails to specify what penalty is claimed, but only states that execution was not returned as required by law, and asks judgment for the amount of the execution, interest, costs, and damages, the claimant cannot recover the highest penalty, although the proof may show him entitled to it, but only the smallest amount of damages allowed for a failure to return.[3] A court has refused to allow statutory penal interest where, without excuse for the delay, several terms of court were allowed to pass before instituting the proceedings.[4]

**23. Review.**[5] Where, in a proceeding against a sheriff and his sureties by motion, the return on the citations does not show that the sureties were served with a petition designating them, the defect is available in the supreme court on writ of error to a judgment entered by default.[6] On appeal from a decree against a sheriff and his sureties, on summary motion, for non-return of an execution, and for failure to collect and pay over moneys thereunder, it will be presumed, in the absence of a bill of exceptions, that all the necessary facts recited in the decree were supported by sufficient evidence.[7] Where the sheriff alone has prayed an appeal from such decree he cannot object that there is no evidence in the record of the execution of a bond, with his co-defendants as sureties.[8] In summary proceedings under a statute which does not provide for notice to defendants, a recital in the judgment that due notice was given of the motion is sufficient on appeal to show a determination by the court that a reasonable notice had been given, and to sustain the court's jurisdiction and the validity of the judgment.[9]

**H. Actions[10] on Official Bonds — 1. Right of Action — a. In General.** The general rule is that any person who has been injured by the sheriff's official default or misconduct has a right of action on the bond;[11] but in order to give a right of action on the bond there must have been some damage resulting to the

against the sheriff and his sureties for a failure to return it for thirty days after the return-day, it appears that the amount of the execution has been paid to plaintiff by a defendant in the execution after such failure, plaintiff cannot recover the amount thereof, but only the thirty per cent damages for which the sheriff rendered himself liable by his official delinquency. Sanders *v.* Kentucky Bank, 2 Metc. (Ky.) 327.

**Rule in proceeding by sheriff against deputy and sureties.**—Where a high sheriff has satisfied a judgment recovered against himself for the default of his deputy in failing to pay over money received on an execution, he can, on a motion against the deputy and his sureties, recover only the amount of such judgment, and not the aggregate amount of debt, interest, and costs, with interest thereon. Weaver *v.* Skinker, 4 Gratt. (Va.) 160. In a summary proceeding by a sheriff against his deputy and the sureties on the latter's official bond, plaintiff cannot recover more than the amount of the money which such deputy had received on execution, although the judgment which the creditor may have recovered against the sheriff himself, on account of the failure of his deputy, may be for a greater amount. Drew *v.* Anderson, 1 Call (Va.) 51.

2. Pitman *v.* Couts, 6 J. J. Marsh. (Ky.) 90 (holding that interest on the debt is not recoverable on a motion against a sheriff and his sureties for failure to return an execution); Jacobs *v.* Hill, 2 Leigh (Va.) 393. See also Weaver *v.* Skinker, 4 Gratt. (Va.) 160. But *compare* Williams *v.* Hall, 2 Dana (Ky.) 97.

3. Judy *v.* Howard, 2 Metc. (Ky.) 44.

4. Donley *v.* Wiggins, 52 Tex. 301 [*following* Scogins *v.* Perry, 46 Tex. 111].

5. See, generally, Appeal and Error, 2 Cyc. 474; Review, 34 Cyc. 1695.

6. Haley *v.* Greenwood, 28 Tex. 680.

7. Cowan *v.* Lay, (Tenn. Ch. App. 1896) 42 S. W. 68.

8. Cowan *v.* Lay, (Tenn. Ch. App. 1896) 42 S. W. 68.

9. Arthur *v.* State, 22 Ala. 61.

10. Actions generally see Actions, 1 Cyc. 634.

11. Rowland *v.* Wood, 4 Dana (Ky.) 194.

**One who is bail in replevin** may maintain an action on the bond of the constable for his wrongful refusal to levy an execution on the goods of the judgment debtor until, the debtor's property having been wasted, the bail was obliged to pay the debt. State *v.* Druly, 3 Ind. 431 [*followed* in State *v.* Madison, 32 Ind. 390].

**One whose property is wrongfully sold by** the sheriff has a right of action on the bond, although the sale is void, since it casts a cloud upon his title. State *v.* Leach, 10 Ind. 308.

**Where a sheriff seizes property subject to a prior attachment** levied by a constable, either the constable or the prior attachment plaintiff may maintain an action on the sheriff's bond. State *v.* Willard, 2 Houst. (Del.)

complaining party from the breach.[12] An action on the sheriff's bond for a mere default as distinguished from active misconduct cannot be maintained by one to whom the sheriff owed no duty in regard to the matter in connection with which the alleged default occurred.[13] Each individual who is injured must sue separately,[14] and there cannot be a recovery by an individual plaintiff for himself and also for another in whose process he had no interest.[15] The mere fact that an action on a sheriff's bond for failure to make the money on an execution is brought for the use of one other than the judgment creditor does not defeat the action by showing an illegal transfer of the right of action.[16] Where a sheriff pays over only a part of the money collected by him on an execution, and a surety of the judgment debtor, not knowing that there is any more money in the sheriff's hands, pays the balance, such payment does not impair the creditor's remedy against the sheriff, but operates as an equitable assignment of the claim to the surety, for which he may pursue the sheriff on his official bond.[17] Where a bond is payable to the governor for the time being and his successors, the right to sue vests in the successor, and not in the personal representatives of a deceased governor.[18] As a general

11, holding that where each of these parties brought an action, it was proper to enter judgment for plaintiff in the action brought by the prior attaching creditor and for defendant in the action brought by the constable who levied the prior attachment.

**Right of plaintiff's attorney.**—Where it is the duty of a sheriff, who collects money on an execution, to pay it over to the attorney of record of plaintiff, and it is the duty of such attorney to compel the sheriff to make such payment, by neglect of which the attorney becomes responsible to his client, and upon demand an attorney pays to his client the sum so collected, he has a remedy by action on the sheriff's bond for failure to pay over the amount to him. Governor *v.* Raley, 34 Ga. 173.

**A surety on the official bond** of a sheriff or constable has no right of action on the bond where he is injured by a breach. See Rutland *v.* Paige, 24 Vt. 181.

**12.** *Kentucky.*— Com. *v.* Reed, 3 Bush 516.

*Missouri.*— State *v.* Sondag, 15 Mo. App. 312.

*Pennsylvania.*— Com. *v.* McCoy, 8 Watts 153, 34 Am. Dec. 445. See also King *v.* Com., 103 Pa. St. 487.

*South Carolina.*— State *v.* Gilreath, 16 S. C. 100.

*Tennessee.*— Harrison *v.* Brown, 1 Swan 272.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 387.

**13.** Thompson *v.* Miller, 56 Cal. 425, holding that where, in an action against the maker and two indorsers of a promissory note, brought at the written request of the junior indorser, an attachment was issued and placed in the hands of the sheriff, with instructions to levy upon property of the maker and first indorser; but the sheriff failed to make the levy, and therefore the junior indorser was compelled to pay the debt, such junior indorser could not maintain an action against the sheriff and his sureties for failure to make the levy.

**One having a claim against a town** for a default of its constable cannot proceed directly on the bond executed by the constable to the town, as there is no privity between the creditor and the sureties on the bond. Rutland *v.* Paige, 24 Vt. 181.

**An execution debtor** from whom money has been collected by the sheriff has no cause of action on the sheriff's bond for his failure to pay over the money to the execution creditor or to return the writ, for the debtor is discharged by payment to the sheriff, and if a second execution is issued and he again pays the money such payment is in his own wrong, as he might stop such execution by motion in the court from which it issued or by audita querela. Brooks *v.* Gibbs, 47 N. C. 326. But *compare* Com. *v.* Williams, 4 Litt. (Ky.) 335, holding that where a sheriff returns that he has made a less sum than in truth he has on an execution, and in consequence of such return another execution issues against the estate of the debtor, this is such an injury to him as will justify an action on the official bond of the sheriff.

**The prosecutrix in fornication and bastardy proceedings** has no such interest in the proceedings before sentence as will permit her to maintain an action on the official bond of a constable for the escape of defendant. Downing *v.* Com., 21 Pa. St. 215 [*following* Booz *v.* Engarman, 18 Pa. St. 263, and *distinguishing* Lantz *v.* Lutz, 8 Pa. St. 405].

**A person holding a mere equity** cannot sue on the official bond of the sheriff for a failure to execute and return a fieri facias. Hawkins *v.* Com., 3 A. K. Marsh. (Ky.) 339.

**14.** Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

**15.** Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

**16.** Governor *v.* Powell, 10 Ala. 544.

**17.** Merryman *v.* State, 5 Harr. & J. (Md.) 423.

**18.** Cannon *v.* Snowden, 4 Humphr. (Tenn.) 360.

**Bond not good as statutory bond.**—A constable's bond, payable to "Newton Cannon, in his lifetime, and his successors in office," is not a good statutory bond, and hence an action thereon may be maintained by the per-

rule the right of action upon a deputy sheriff's bond is in the sheriff himself, and no one else,[19] except that a surety of the sheriff who has been compelled to pay out money on account of the deputy's default may sue on such bond.[20]

**b. Sufficiency of Bond.** An action upon the bond is not precluded by the fact that the bond does not name all the specific conditions required by statute, where the condition inserted in the bond, and to which the breach is assigned, is broad enough to cover them all, or at least the act of malfeasance complained of.[21]

**c. Waiver of Right of Action.** Where, after a sheriff had rendered himself liable to plaintiff in an execution, the latter suffered several years to elapse without any action against the sheriff, although he was living in the county and solvent, and plaintiff subsequently issued alias executions, on which the debt was collected, although not paid over, by another officer, it was held that he had waived his right of action on the official bond of the first officer.[22]

**2. Grounds of Action.** An action on a sheriff's bond can be maintained only for some breach of official duty,[23] giving rise to a civil liability on the part of the officer,[24] such as would entitle plaintiff to recover against the sheriff in an action on the case.[25] But whenever there has been such an official misfeasance or default as constitutes a breach of the condition of the bond an action thereon will lie.[26]

**3. Nature and Form of Remedy — a. In General.** The liability of the sureties on the official bond of a sheriff or constable is *ex contractu* and not *ex delicto*,[27] even though the bond was given to cover damages resulting from torts or omissions,[28] and even as against the officer himself an action on the bond is in contract and not

sonal representative of Newton Cannon. Cannon *v.* Hollis, 4 Humphr. (Tenn.) 334.

**19.** Cook *v.* Palmer, 6 B. & C. 739, 9 D. & R. 723, 5 L. J. K. B. O. S. 234, 13 E. C. L. 331. See also Brayton *v.* Town, 12 Iowa 346; Hurlock *v.* Reinhardt, 41 Tex. 580, 582, where it is said: "We do not say, for we are not called upon to do so, that a deputy sheriff can under no circumstances be proceeded against upon his bond by a party injured in his own name. But, if so, it is not on a bare statement of a breach of duty, which, for aught that appears, may be compensated for by an action against the sheriff, the party immediately and directly liable to him for such breach of duty."

**The administrators of a sheriff** have a right of action on the bond of his deputy to save the sheriff harmless. Robertson *v.* Morgan, 3 B. Mon. (Ky.) 307.

**A receiver in supplementary proceedings** cannot sue on a bond given by an under-sheriff to the judgment debtor as sheriff, unless the sheriff, the judgment debtor, has made good the under-sheriff's default, as the cause of action belongs to the debtor as sheriff, and not as an individual, and the receiver represents the creditors. Norcross *v.* Hollingsworth, 83 Hun (N. Y.) 127, 31 N. Y. Suppl. 627.

**Judgment paid by surety.**—A sheriff may sue upon the bond of his deputy for a default of the latter, although a judgment recovered against the sheriff for such default was paid by his sureties and not by himself. Robertson *v.* Morgan, 3 B. Mon. (Ky.) 307.

**20.** Nebergall *v.* Tyree, 2 W. Va. 474.

**21.** Lasater *v.* Waites, (Tex. Civ. App. 1902) 67 S. W. 518 [*reversed* on other grounds in 95 Tex. 553, 68 S. W. 500].

**22.** Wright *v.* Johnson, 3 Sneed (Tenn.) 407.

**23.** Collier *v.* Stoddard, 19 Ga. 274.

**24.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**25.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**Liabilities of sheriff** generally see *supra*, V.

**26.** See the following cases:

*Alabama.*—Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

*Delaware.*— State *v.* Clymer, 3 Houst. 20.

*Indiana.*— State *v.* Druly, 3 Ind. 431.

*Kentucky.*— Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053.

*Louisiana.*— New Orleans *v.* Hozey, 2 Rob. 552.

*North Carolina.*— Buckley *v.* Hampton, 23 N. C. 318.

*Oregon.*— Habersham *v.* Sears, 11 Oreg. 431, 5 Pac. 208, 50 Am. Rep. 481.

*Pennsylvania.*— Palmer *v.* Com., 6 Serg. & R. 245.

*Virginia.*— Grandstaff *v.* Ridgely, 30 Gratt. 1.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 387.

**27.** Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766; Ghiradelli *v.* Bourland, 32 Cal. 585; Poydras *v.* Patin, 5 La. 324 [*followed* in Ballew *v.* Andrus, 10 La. 216]. See also Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053. But *compare* Williams *v.* Ragan, 153 Ala. 397, 407, 45 So. 185, where it is said: "The suit rests on the breached duty, not on the bond, and is, therefore, *ex delicto*, and not *ex contractu*."

**28.** Poydras *v.* Patin, 5 La. 324 [*followed* in Ballew *v.* Andrus, 10 La. 216].

in tort.[29] Apart from the statutory summary remedies,[30] the liability of the sureties can be enforced only by an action on the bond itself;[31] and debt on the penalty has been held to be the proper form of action.[32]

**b. Election of Remedies.**[33] Where a sheriff has taken an insufficient bail-bond, and plaintiff has elected to hold the sheriff and his sureties liable as bail, he is concluded by the remedy so chosen and cannot afterward resort to the official bond of the sheriff.[34]

**c. Successive Actions.** Under some statutes there may be separate successive actions on a sheriff's official bond for each breach thereof,[35] until the penalty is exhausted;[36] but under other statutes there can be but one action upon a sheriff's or constable's bond, in which judgment is to be entered in favor of the people for the full penalty;[37] but execution is issued for the amount found to be due the person to whose use the action was brought, with interest and costs,[38] and the judgment stands as security for subsequent breaches, in case of which other executions are awarded upon the same judgment upon proper proceedings instituted for the purpose.[39]

**d. Joinder of Causes of Action.**[40] Where two or more causes of action on the official bond of a sheriff or constable in favor of the same party grow out of the same transaction and are connected with the same subject of action, they may properly be united in the same petition or complaint;[41] but where the causes of

29. Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870, holding that therefore the right of action against the officer and the sureties on his bond for his failure to return an execution survives, on the death of the officer, against his administrator and the sureties.

30. See *supra*, X, G.

31. Lewis *v.* Little, 5 N. J. L. 685; Boyd *v.* Rose, 4 N. J. L. 230; Matlock *v.* Stow, 3 N. J. L. 532.

32. State *v.* Staggers, 12 Rich. (S. C.) 286 [*overruling* State Treasurers *v.* Walker, 2 Hill (S. C.) 629].

33. See, generally, ELECTION OF REMEDIES, 15 Cyc. 251.

34. Mosely *v.* Lyon, 48 Ga. 398.

35. White *v.* Wilkins, 24 Me. 299; Robeson County *v.* McAlpin, 28 N. C. 347; Branch *v.* Elliot, 14 N. C. 86; McMicken *v.* Com., 58 Pa. St. 213; Com. *v.* Watmough, 2 Miles (Pa.) 297; Shaeffer *v.* Jack, 14 Serg. & R. (Pa.) 426 (holding that the act of March 5, 1790, providing for separate actions, superseded the act of March 27, 1713, providing for a single action only); Campbell *v.* Com., 8 Serg. & R. (Pa.) 414.

**Excessive penalty.**—A sheriff's bond in a penalty greater than that required by the act of 1777 (Haywood Revisal, c. 118) is not within the provisions of that act, authorizing successive suits on such bonds, and is extinguished by the first judgment thereon. Branch *v.* Elliot, 14 N. C. 86.

36. Robeson County *v.* McAlpin, 28 N. C. 347.

**Penal sum as limit of liability** see *supra*, X, C, 15, b.

37. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662; State *v.* McDonald, 2 N. J. L. 355; New York *v.* Ryan, 9 Daly (N. Y.) 316; Davis *v.* Haffner, 2 Abb. Pr. (N. Y.) 187; Fuller *v.* Holmes, 1 Aik. (Vt.) 111.

38. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

39. *Colorado.*— Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662.

*Massachusetts.*—See Skinner *v.* Phillips, 4 Mass. 68.

*New Jersey.*— State *v.* McDonald, 2 N. J. L. 355.

*New York.*— New York *v.* Ryan, 9 Daly 316; Davis *v.* Haffner, 2 Abb. Pr. 187.

*South Carolina.*— Norton *v.* Mulligan, 4 Strobh. 355; State Treasurers *v.* Bates, 2 Bailey 362.

*Vermont.*— Fuller *v.* Holmes, 1 Aik. 111.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 384.

**Proceedings on suggestion.**—Where the proceeding on a sheriff's bond is by suggestion after judgment, the party coming in can present for the consideration of the court no other rights but his own. State *v.* Yongue, 6 Rich. (S. C.) 323. On a suggestion filed the sheriff may plead double, if he chooses, but he cannot both traverse and demur to the same portion of the suggestion. Treasurers *v.* Buckner, 2 McMull. (S. C.) 323.

40. See, generally, JOINDER AND SEVERANCE OF ACTIONS, 23 Cyc. 376.

**Misjoinder as defect of pleading** see *infra*, X, H, 11, a, (II).

41. Phœnix Ins. Co. *v.* McEvony, 52 Nebr. 566, 72 N. W. 956 (holding that in an action against a sheriff and the sureties on his bond to recover illegal fees charged and collected by him, plaintiff may join in his petition a cause of action to recover the penalty provided by statute for the charging and taking of illegal fees by an officer); Moore *v.* Smith, 10 How. Pr. (N. Y.) 361 (holding that in an action on a constable's bond plaintiff may, by proper allegations, join the following causes of action: (1) That the constable took sufficient goods on plaintiff's execution to satisfy it; (2) that he neglected to make return; and (3) that he withheld the money after the return-day).

action upon the official bond of such an officer are separate it is proper that they should be separately stated.[42]

**4. Conditions Precedent — a. Establishment of Liability of Officer.** As a general rule it is not a prerequisite to the maintenance of an action on the official bond of a sheriff or constable that the misconduct or default relied upon as a breach and the liability of the officer should be first established in a separate action against the officer alone,[43] although under some statutes this is required.[44]

**b. Ascertainment of Amount of Demand.** Ordinarily the ascertainment of the amount of the officer's liability is not a prerequisite to an action upon his bond,[45] although this is sometimes required.[46]

42. Moore *v.* Smith, 10 How. Pr. (N. Y.) 361.

43. *Alabama.*— Baghy *v.* Chandler, 8 Ala. 230; Governor *v.* White, 4 Stew. & P. 441, 24 Am. Dec. 763.

*California.*— Van Pelt *v.* Littler, 14 Cal. 194.

*Colorado.*— See Newman *v.* People, 4 Colo. App. 46, 34 Pac. 1006.

*Georgia.*— McCain *v.* Bonner, 122 Ga. 842, 51 S. E. 36; Jefferson *v.* Hartley, 81 Ga. 716, 9 S. E. 174.

*Kentucky.*— Governor *v.* Perkins, 2 Bibb 395.

*Michigan.*— People *v.* Lee, 65 Mich. 557, 32 N. W. 817.

*New Jersey.*— State *v.* Leeds, 31 N. J. L. 185.

*New York.*— Grieb *v.* Northrup, 66 N. Y. App. Div. 86, 72 N. Y. Suppl. 481; Berry *v.* Schaad, 50 N. Y. App. Div. 132, 63 N. Y. Suppl. 349 [*affirming* 28 Misc. 389, 59 N. Y. Suppl. 551]; *Ex p.* Chester, 5 Hill 555.

*Pennsylvania.*— Palmer *v.* Com., 6 Serg. & R. 245, holding that the injured person may either sue on the bond or, at his election, proceed first against the officer alone.

*South Carolina.*— Treasury Com'rs *v.* Moore, 2 Brev. 51.

*Tennessee.*— Jarnagin *v.* Atkinson, 4 Humphr. 470.

*Wisconsin.*—Bartlett *v.* Hunt, 17 Wis. 214.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 388.

44. *Maine.*— Dane *v.* Gilmore, 49 Me. 173; Bailey *v.* Butterfield, 14 Me. 112.

*Massachusetts.*— Calder *v.* Haynes, 7 Allen 387; Todd *v.* Bradford, 17 Mass. 567, holding that where one has a right of action under St. (1805) c. 99, against the representative of a deceased sheriff, whose estate is insolvent, for the misfeasance of the sheriff or his deputy, he must prosecute his claim before the commissioners and obtain a decree of the judge of probate in his favor, in order to entitle him to a remedy on the sheriff's bond.

*New York.*— Davis *v.* Haffner, 2 Abh. Pr. 187; People *v.* Spraker, 18 Johns. 390. The present rule in New York is otherwise. See *supra*, note 43.

*Vermont.*—The liability of the sheriff must he established hy judgment (Tute *v.* James, 46 Vt. 60; Hine *v.* Pomeroy, 39 Vt. 211) unless the sheriff has removed from the state (Hine *v.* Pomeroy, *supra*); and the death of a sheriff does not constitute a "removal from the state," so as to permit an action against the sureties on his bond without first suing the principal, but an allowance of the claim against the sheriff's estate is necessary (Tute *v.* James, *supra*).

*Virginia.*— See Preston *v.* Auditor Public Accounts, 1 Call 471.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 388.

A judgment by default in an action of trover against the sheriff for the value of goods taken hy him is a sufficient ascertainment of damages, within Rev. St. c. 80, § 12, to justify an action on the sheriff's official bond. Dane *v.* Gilmore, 49 Me. 173.

A judgment against the officer in assumpsit declaring for money had and received, or on an account annexed to the writ, or on a promise implied by law, is not sufficient to support an action on his official bond, as the proper remedy to establish official misfeasance or nonfeasance is by an action on the case. Bailey *v.* Butterfield, 14 Me. 112.

A judgment against a constable for nominal damages and costs in an action of replevin for goods attached by him is a judgment for misfeasance in office, within the meaning of St. (1814) c. 165, § 1, authorizing a person injured by any breach of the constable's bond to maintain an action therefor on the bond, provided a judgment for misfeasance shall have first heen recovered hy such person against the constable. Tracy *v.* Warren, 104 Mass. 376.

45. Newman *v.* People, 4 Colo. App. 46, 34 Pac. 1006 [*distinguishing* Sterling City Gold, etc., Co. *v.* Hughes, 3 Colo. 229; Sterling City Gold, etc., Co. *v.* Cock, 2 Colo. 24].

46. Dane *v.* Gilmore, 49 Me. 173. Under a statute providing that on the return of a domestic attachment the goods attached or the money arising therefrom shall he distributed among all the creditors of defendant, allowing a double share to the creditor causing the attachment, and that on the receipt of the proceeds of the sale of the attached property the court shall appoint auditors to adjust all claims and settle the proportions due the several creditors, the attaching creditor cannot bring an action on the recognizance of the sheriff without first proceeding under the statute to have all claims audited, and the amount to which he was entitled ascertained, notwithstanding the failure of the sheriff to return the proceeds of a sale into court. State *v.* Willard, 2 Houst. (Del.) 197.

**c. Exhausting Other Remedies.** Where there has been a breach of a sheriff's official bond, the injured party is not as a rule obliged to exhaust other remedies which might be available to him before bringing an action on the bond,[47] although under some statutes the remedy against the sheriff alone must be exhausted before proceeding against the sureties.[48]

**d. Quashal of Insufficient Replevy Bond Taken.** Where an officer takes a replevy bond with insufficient surety, plaintiff, to whom the bond is given, is not obliged to quash the bond in order to have recourse against the officer on his official bond.[49]

**e. Quashal of Levy or Sale.** Where an illegal levy of an execution and sale thereunder have been made, plaintiff purchasing the property for the amount thereof and the execution being returned satisfied, he should have the levy and sale quashed before he proceeds to enforce the liability of the sheriff by an action on his official bond for such illegal levy.[50]

47. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350 (holding that in an action by a landlord against a constable for loss of his landlord's lien by reason of a wrongful levy on the tenant's goods, a request to charge that, if plaintiff could sue the creditor in the execution to whom the proceeds of the sale were paid, then plaintiff could not recover against the constable and his sureties, was properly refused); Bagby *v.* Harris, 9 Ala. 173 (holding that in an action to charge the sheriff and his sureties for his neglect in releasing a boat attached, it is not necessary to show a distringas to him, if it is shown that he has parted with the custody); Pepper *v.* Com., 6 T. B. Mon. (Ky.) 27 (holding that where more land is sold by a sheriff than is necessary to satisfy an execution, his warranty to the purchaser does not supersede such purchaser's remedy on the official bond of the sheriff); State *v.* Koontz, 83 Mo. 323 (holding that where a constable improperly releases an attachment because, the property being claimed by a third person, plaintiff refused to furnish an indemnifying bond, and it appears that defendant has no other property subject to levy, an action can be maintained on the constable's bond by plaintiff, without the latter's suing out an execution on his judgment); State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44 (holding that where a sheriff makes an excessive levy on the property of a surety on an appeal-bond, and fails to notify him of his exemption and homestead rights, and sells his homestead and other property, the surety may maintain an action on the sheriff's official bond for the several breaches thereof, and is not bound to move the court to set aside the levy and sale); Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114, 442 (holding that where a person has been committed until a fine and costs are paid, and the sheriff has set him at large, it is not necessary that the state exhaust its remedy by execution and *capias pro fine* before bringing an action against the sheriff and the sureties upon his official bond). But *compare* Com. *v.* Rees, 1 Miles (Pa.) 330, holding that where, in replevin for goods distrained for rent, defendant obtained judgment for the amount of the rent, issued a retorno habendo, which was returned eloigned, and then took an assignment of the replevin bond from the sheriff and secured judgment thereon, he could not, without proceeding to execution on such judgment, resort to scire facias against the sheriff and his sureties on their official recognizance, on the ground that the sheriff had taken insufficient sureties in replevin.

48. Kirkpatrick *v.* White, 29 Pa. St. 176 (holding that in an action against the sureties on the official bond of a constable for his default, plaintiff must show that he used reasonable diligence to collect the amount from the constable by legal process, or that such process would have been fruitless by reason of the constable's insolvency); State Treasurer *v.* McGuire, Harp. (S. C.) 474; Treasury Com'rs *v.* Neuby, 1 McCord (S. C.) 184; Preston *v.* Auditor Public Accounts, 1 Call (Va.) 471.

A return of nulla bona against a defaulting constable is sufficient to entitle the creditor to proceed by scire facias against the sureties on the constable's bond, although he has property subject to execution. Kirkpatrick *v.* White, 29 Pa. St. 176.

A return of nulla bona to an execution against the administrator of a deceased sheriff is sufficient to sustain a suit on the sheriff's bond against his sureties. State Treasurer *v.* McGuire, Harp. (S. C.) 474.

The necessity of a return of nulla bona against the sheriff before commencing an action on his bond was done away with in South Carolina by the act of 1839, but this statute was prospective merely and not applicable where a sheriff was elected and gave bond before its enactment. State *v.* Wylie, 2 McMull. (S. C.) 1.

49. Miller *v.* Com., 4 B. Mon. (Ky.) 304.

50. Hamilton *v.* Vail, 2 Metc. (Ky.) 511, 514, where it is said: "If he should succeed in holding the sheriff or his sureties liable for the alleged illegal levy of the execution, the latter would, upon well-settled principles, become entitled to the benefit of the appellee's judgment against the defendants; but this judgment could not be enforced as long as the return upon the execution, showing full satisfaction of the judgment, is permitted to stand."

**f. Notice to Sureties of Default.** Notice to the sureties of an officer's default is not a prerequisite to the maintenance of an action on the bond therefor.[51]

**g. Demand** — (I) *DEMAND FOR MONEY.* As a general rule a demand upon the sheriff is a prerequisite to an action upon his official bond for a failure to pay over money collected;[52] but an action on the bond may be brought without a previous demand where the sheriff is dead[53] or out of the state,[54] or he has been ascertained to be insolvent.[55] A demand on a deputy sheriff who collects money will sustain an action on the bond of his principal for failure to pay over the same.[56] Where negligence in failing to collect is the breach assigned in a suit on a constable's bond no demand is necessary.[57]

(II) *DEMAND FOR PROPERTY.* No demand for the return of the property is necessary before commencing an action on a sheriff's bond for a wrongful levy,[58] or a wrongful withholding of property;[59] nor is the maintenance of an action for wrongfully releasing attached property dependent upon a previous demand for the property.[60]

(III) *DEMAND FOR COPY OF WARRANT.* Under the Pennsylvania statute it is held that an action will not lie on a constable's bond for an alleged wrongful levy and sale under execution where the complaining party failed to demand a perusal and copy of the process.[61]

(IV) *DEMAND FOR RETURN OF FEE BILLS.* In Kentucky it is held that a constable cannot be sued upon his bond for failure to return fee bills unless the return of such fee bills has been previously demanded by the person entitled thereto.[62]

**h. Leave of Court.** Under some statutes an individual must obtain the leave of the court as a prerequisite to the institution of an action upon the official bond of a sheriff or constable.[63] The person moving for leave to prosecute a sheriff's bond must show affirmatively that the sheriff has been guilty of some default or

51. McGehee *v.* Gewin, 25 Ala. 176 (holding that a sheriff is not required to notify the sureties on a deputy's bond of a default of the deputy before bringing suit on the bond); Cony *v.* Barrows, 46 Me. 497 (holding that it is not necessary to notify the sureties of the officer's default, or of a judgment recovered against him therefor).

52. *Alabama.*— Hill *v.* Fitzpatrick, 6 Ala. 314; Barton *v.* Peck, 1 Stew. & P. 486.

*Arkansas.*— Governor *v.* Pleasants, 4 Ark. 193.

*Kentucky.*— A demand is necessary where plaintiff does not reside in the officer's county (Griffith *v.* Com., 10 Bush 281; Canterberry *v.* Com., 1 Dana 415; Finn *v.* Wilson, 5 J. J. Marsh. 338), but not where plaintiff lives in the officer's county and does not demand statutory damages (Griffith *v.* Com., *supra*. *Contra*, Huston *v.* Hagar, 1 Duv. 24).

*New York.*— Rhinelander *v.* Mather, 5 Wend. 102.

*North Carolina.*— A demand is necessary (White *v.* Miller, 20 N. C. 50) except in the case of money collected for public purposes (State *v.* McIntosh, 31 N. C. 307 [*followed* in State *v.* Woodside, 31 N. C. 496]).

*South Carolina.*— State *v.* Easterling, 1 Rich. 310.

*Texas.*— De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 389.

Where the court has ordered money to be paid over to plaintiff by the sheriff, no demand is necessary to support an action on the sheriff's bond for failure to pay over. King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25.

53. State *v.* Easterling, 1 Rich. (S. C.) 310.

54. Fall River *v.* Riley, 138 Mass. 336 (holding that an action may be maintained upon a constable's bond, on proof of a judgment against him in an action for official misconduct, although no demand has been made upon him for payment of the amount of the judgment, where he has rendered such demand impossible by his withdrawal from the state); State Treasurers *v.* Gibson, 3 Hill (S. C.) 339.

55. State *v.* Easterling, 1 Rich. (S. C.) 310.

56. Hill *v.* Fitzpatrick, 6 Ala. 314; Coulter *v.* Commonwealth Bank, 3 B. Mon. (Ky.) 299.

57. Nixon *v.* Bagby, 52 N. C. 4.

58. Dishneau *v.* Newton, 91 Wis. 199, 64 N. W. 879.

59. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

60. Bagby *v.* Harris, 9 Ala. 173.

61. Com. *v.* Warfel, 157 Pa. St. 444, 27 Atl. 763.

62. Walters *v.* Chinn, 1 Metc. (Ky.) 499.

63. Litchfield *v.* McDonald, 35 Minn. 167, 28 N. W. 191 (holding that Gen. St. (1878) c. 78, §§ 1-3, requiring leave of court applied to constables' bonds and was not superseded by Gen. St. (1878) c. 10, § 42, au-

misconduct in office,[64] and that the applicant has done all that is necessary to give him a right to resort to the bond.[65] The granting or refusing of leave to prosecute the bond is discretionary with the court;[66] and it has been held that the court will not order the bond to be put in suit until it is shown that the sheriff is individually unable to respond in damages for the default, etc., alleged against him.[67] The recovery of a judgment against a sheriff for an escape establishes his liability so as to authorize an application by the party injured to prosecute the official bond,[68] but such an application cannot be made during the continuance of a stay of proceedings on the judgment against the sheriff.[69]

**i. Authority of Public Officer.** In Massachusetts it is held that a person injured by a breach of a constable's bond may bring an action thereon in the name of the city treasurer, to whom the bond is made payable, without obtaining authority from any public officer.[70]

**j. Assignment of Bond.**[71] Under a statute providing that upon a breach of the condition the bond "shall be assigned by the governor to the party or parties injured, who may maintain an action thereon in their own name" no action can be instituted on the sheriff's bond, in the name of the governor, for another's use, without an assignment of the bond by the governor to the person injured.[72]

**5. Defenses.**[73] Any defense which would be available to the sheriff in an action against him alone is available to the sureties in an action on the bond.[74] The fact that a defendant in attachment has discharged the sureties on the attachment bond in consideration of a money payment is no defense to an action by him upon the official bond of the sheriff for his wrongful acts.[75] A failure to set out the names of all the parties in an execution, as was done in the judgment on which it issued, is a mere irregularity of which no advantage can be taken by defendants in an action on the sheriff's bond for defaults and misfeasances in connection with the levy of the execution.[76]

**6. Jurisdiction[77] and Venue.**[78] The jurisdiction of particular courts in actions on official bonds of sheriffs or constables is a matter of statutory regulation.[79] The facts that a sheriff, after collecting money on execution, has died insolvent without paying it over, and that there has been no administration upon his estate,

thorizing any person injured by the acts or omissions of a constable to maintain an action on his bond); *Ex p.* Noble, 2 Cow. (N. Y.) 590; State *v.* Mann, 21 Wis. 684. See also *Ex p.* Chester, 5 Hill (N. Y.) 555. *Contra*, People *v.* Holmes, 2 Wend. (N. Y.) 281; State *v.* Cason, 11 S. C. 392.

64. *Ex p.* Reed, 4 Hill (N. Y.) 572; State *v.* Mann, 21 Wis. 684, holding that the application must show that the act complained of was done by virtue of office.

65. Rhinelander *v.* Mather, 5 Wend. (N. Y.) 102, holding that the applicant must show that a demand on the sheriff has been made.

**Previous recovery against sheriff need not be shown.**—*Ex p.* Chester, 5 Hill (N. Y.) 555.

66. People *v.* Conner, 8 Hun (N. Y.) 533, so holding, although the statute provided that on proof of the default "the court shall order that such bond be prosecuted."

67. Anderson *v.* Hitchcock, 2 Wend. (N. Y.) 299, holding that the inability of the sheriff may be shown by affidavit or otherwise.

68. *In re* Chamberlain, 42 Barb. (N. Y.) 281, 18 Abb. Pr. 103, 28 How. Pr. 1.

69. *In re* Chamberlain, 42 Barb. (N. Y.) 281, 18 Abb. Pr. 103, 28 How. Pr. 1.

70. Crocker *v.* Buttrick, 187 Mass. 461, 73 N. E. 650.

71. **Right of successsor of nominal obligee to sue without assignment of bond** see *infra*, X, G, 9, a, (I).

72. Governor *v.* Hunt, 3 Yerg. (Tenn.) 479.

73. **Particular matters affecting liability** see *supra*, X, D, *passim*.

74. Blyth *v.* People, 16 Colo. App. 526, 66 Pac. 680; Watts *v.* Colquitt, 66 Ga. 492; Wallace *v.* Holly, 13 Ga. 389, 58 Am. Dec. 518; Com. *v.* Duncan, 8 Pa. St. 93. See also Miller *v.* Pharr, 87 N. C. 396, holding that it is a sufficient defense to a suit on a constable's bond for failing to return a note given him for collection that the note had been sued and judgment obtained upon it.

75. Aigeltinger *v.* Whelan, 133 Cal. 110, 65 Pac. 125, so holding on the ground that such sureties had been guilty of no tortious act and were not joint tort-feasors with the sheriff, but their liability was only upon their contract.

76. Burns *v.* George, 154 Ala. 626, 45 So. 421.

77. **Jurisdiction of courts generally** see Courts, 11 Cyc. 633.

78. **Venue generally** see Venue.

79. Brown *v.* Com., 2 Ky. L. Rep. 214 (holding that under Gen. St. c. 28, art. 11, § 5, giving the criminal court for counties

do not give equity jurisdiction of a suit against his sureties.[80] According to various authorities an action on a sheriff's bond is properly brought in the county of which he is sheriff,[81] in the county where he [82] or his bondsmen [83] are domiciled, in the county where the cause of action arose,[84] in the county in which plaintiff or relator resides,[85] or in any county.[86] But it has been held that where process is issued from one county to the sheriff of another county an action on the sheriff's bond for a default in connection therewith cannot be brought in the county from which the process issued.[87]

**7. Time to Sue and Limitations — a. Time When Action May Be Commenced — Premature Actions.** Where a sheriff refuses to levy an execution on property shown to him by plaintiff, an action may be maintained on his bond before the return-day of the writ.[88]

**b. Time Within Which Action Must Be Commenced — Limitations [89] —** (1) *In General.* An action upon a sheriff's bond, like other actions, must be brought within the time allowed therefor by a statute, or else is barred.[90] Under some statutes an action on the official bond of a sheriff or constable must be brought

in the twelfth judicial district exclusive jurisdiction in criminal and penal proceedings, that court has not jurisdiction of an action by the trustee of the jury fund against the sheriff and the sureties on his official bond for not paying over the proceeds, on demand, of a collection by execution issued on a judgment on a forfeited recognizance); Greenfield *v.* Wilson, 13 Gray (Mass.) 384 (holding that the provision of St. (1845) c. 70, § 2, that in actions on constables' bonds "the like proceedings shall be had as in a suit by a creditor on administration bonds," does not require the action to be brought in the supreme court); Fohs *v.* Rain, 39 Misc. (N. Y.) 316, 79 N. Y. Suppl. 872 (holding that the bond of a marshal of the former city of Brooklyn may be prosecuted in the municipal court of the city of New York in the borough of Brooklyn); Levin *v.* Robie, 5 Misc. (N. Y.) 529, 25 N. Y. Suppl. 982 (holding that under an act creating a municipal court with jurisdiction theretofore possessed by justices of the peace except as otherwise provided in the act, it has jurisdiction of an action on a constable's bond for damages for failure to levy and return an execution, justices theretofore having had such jurisdiction, and the act having made no change with respect thereto); Campbell *v.* Com., 8 Serg. & R. (Pa.) 414 (holding that the court of common pleas has jurisdiction of an action on a constable's official bond).

80. Utica Bank *v.* Dill, 1 Paige (N. Y.) 466, holding that if the judgment creditor has any remedy at all it is in the supreme court.

81. Foster *v.* Wade, 4 Bush (Ky.) 628; Commonwealth Bank *v.* Harrison, 1 Bush (Ky.) 384. But *compare* Hopkins *v.* Haywood, 13 Wend. (N. Y.) 265.

82. Fay *v.* Edmiston, 28 Kan. 105.

83. Lasater *v.* Waits, 95 Tex. 553, 68 S. W. 500 [*reversing* (Civ. App. 1902) 67 S. W. 518], holding that Rev. St. art. 1194, subd. 9, providing that, where the foundation of the suit is a trespass, suit may be brought in the county where the trespass was committed, extends only to an action against the trespasser individually, and does not authorize the bringing of an action against the sureties on a sheriff's bond for a trespass committed by a deputy sheriff in the county where the trespass occurred instead of the county in which the bondsmen are domiciled, at least when neither the sheriff nor deputy are joined.

84. Fay *v.* Edmiston, 28 Kan. 105; McNee *v.* Sewell, 14 Nebr. 532, 16 N. W. 827. See also Hopkins *v.* Haywood, 13 Wend. (N. Y.) 265.

85. State *v.* McGee, 24 N. C. 209 (holding that an action on a sheriff's bond in the name of the state, to the use of the party injured, may be brought in the superior court of the county in which the relator resides, although all the defendants reside in a different county); State Treasurer *v.* Kelsey, 4 Vt. 371 (holding that an action on the sheriff's official bond for his neglect in executing a state treasurer's extent against a delinquent constable is properly brought in the county of the treasurer's residence, although different from that of the sheriff's precinct).

86. State *v.* Green, 5 Harr. (Del.) 270.

87. Fay *v.* Edmiston, 28 Kan. 105; Foster *v.* Wade, 4 Bush (Ky.) 628; Commonwealth Bank *v.* Harrison, 1 Bush (Ky.) 384. *Contra*, McNee *v.* Sewell, 14 Nebr. 532, 16 N. W. 827.

88. Shannon *v.* Com., 8 Serg. & R. (Pa.) 444.

89. **Limitation of actions generally** see Limitations of Actions, 25 Cyc. 963.

90. *California.*— Paige *v.* Carroll, 61 Cal. 211.

*Kentucky.*— The sureties are released after seven years, but an action on the bond may be brought against the sheriff at any time within fifteen years. Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053.

*Louisiana.*— McCloskey's Succession, 32 La. Ann. 146; Hugh *v.* Hernandez, 25 La. Ann. 360; Mulhollan *v.* Henderson, 3 Rob. 297.

*New Jersey.*— Knowlton Tp. *v.* Read, 11 N. J. L. 320.

*Ohio.*— King *v.* Nichols, 2 Ohio Dec. (Re-

within a certain time after the date of the obligation,[91] while under other statutes the period of limitations runs from the expiration of the officer's term,[92] the time of the accrual of the cause of action,[93] or the date of the breach of the bond on which the action is based.[94] A general provision that an action on a sheriff's bond "can only be brought within" a certain period does not allow such period for all such actions, but an action on the bond may become barred within a shorter period because within other provisions relating to limitations.[95] Apart from any

print) 564, 4 West. L. Month. 25; State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305.

*Pennsylvania.*— Com. *v.* Rose, 33 Pa. St. 199; Com. *v.* Rainey, 4 Watts & S. 186.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 393.

**A limitation of "motions" against the sheriff** is not applicable to a suit on his official bond. Chamberlin *v.* Brewer, 3 Bush (Ky.) 561.

**An action by warrant** against a constable's sureties to recover moneys collected by a constable by virtue of his office can only be barred by the same length of time that bars an action on the bond. Wilson *v.* Coffield, 27 N. C. 513.

**Actions on constable's bonds** are not limited to five years, under the statute of 1803, like actions on sheriff's bonds, but are within the statute of 1798, limiting actions against sureties in official bonds to seven years after cause of action has accrued. Owings *v.* Com., 8 Serg. & R. (Pa.) 530.

**Default not within statute.**—An act limiting the time within which an action may be brought against the sureties of an officer when he returns that the money is made on an execution does not apply to an action for failure to pay over money when no such return was made. Stanly *v.* Daily, 4 Humphr. (Tenn.) 55.

**Statute applicable to action against sheriff only.**—A statute limiting the time within which an action may be brought against a sheriff for an act done by virtue of his office does not apply to an action brought against the sureties on his bond, after the cause of action against him has been reduced to judgment within the time limited, and an execution thereon returned unsatisfied; but such action is governed by the general statute fixing the limitation for actions upon "a contract, obligation or liability, express or implied." Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

91. Com. *v.* Rose, 33 Pa. St. 199; Com. *v.* Rainey, 4 Watts & S. (Pa.) 186; Com. *v.* Clipsham, 16 Pa. Super. Ct. 50; Com. *v.* Geary, 7 Pa. Dist. 541, 21 Pa. Co. Ct. 217; Com. *v.* Custin, 6 Pa. Dist. 589.

**The date of the recognizance and not the time of its approval** is the time from which the statute runs. Wilson *v.* Com., 7 Watts & S. (Pa.) 181.

**Where the intention of the sureties to enlarge their liability in this respect is manifest** from the language of the bond the statute does not protect them. Com. *v.* Clipsham, 16 Pa. Super. Ct. 50, where it appeared that the act of March 29, 1824, provided that suits against the sureties of a constable should not be sustained "unless the same be instituted within three years after the date of such obligation," that the act of March 18, 1864, provided that constables in the city of Philadelphia should thereafter "be elected for the term of five years"; that the bond of a constable subsequently elected was conditioned for the faithful discharge of his duties "at all times during his continuance in office of constable"; and that the default complained of occurred more than three years after the execution of the bond, for which reason the sureties denied their liability; and it was held that the act of 1824 was not applicable but the sureties were liable as the phrase "his continuance in office" used in the bond "could refer only to his term of five years, during which they bound themselves as his sureties" and the bond, having been voluntarily given for a lawful purpose, might be enforced according to its terms even though in form it exceeded the requirements of the statute.

**Time for scire facias on cautionary judgment.**—Where a cautionary judgment is obtained against a sheriff and his sureties for the amount of the penalty of his official bond, within five years after its execution, a scire facias upon such judgment, issued after the expiration of the five years by one who was a stranger to the first judgment, will not entitle him to recover against the sureties. Com. *v.* Rainey, 4 Watts & S. (Pa.) 186.

92. Adams *v.* Overboe, 105 Minn. 295, 117 N. W. 496 [*followed* in Canfield *v.* Bodkin, 105 Minn. 522, 117 N. W. 498]; State *v.* Ferguson, 9 Mo. 288.

**The resignation of the officer** before the end of his term does not affect the operation of a statute limiting actions on a constable's bond to two years after the "expiration of the time for which the constable was appointed." State *v.* Ferguson, 9 Mo. 288.

93. *California.*— Paige *v.* Carroll, 61 Cal. 211.

*Illinois.*— Love *v.* People, 94 Ill. App. 237.

*Kansas.*— Ryus *v.* Gruble, 31 Kan. 767, 3 Pac. 518.

*Louisiana.*—McCloskey's Succession, 32 La. Ann. 146.

*Missouri.*— State *v.* Finn, 23 Mo. App. 290.

*Pennsylvania.*— Owings *v.* Com., 8 Serg. & R. 530.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 393.

94. Kohler *v.* Walden, 23 La. Ann. 299.

95. Ryus *v.* Gruble, 31 Kan. 767, 3 Pac. 518, holding that under Civ. Code, § 18, declaring that actions for taking, detaining, or injuring personal property must be

statutory limitation a delay of several years after judgment against a sheriff for his default has been obtained before suing on his bond will not bar the action on the bond, where no contract, consideration, or motive inducing the delay is shown,[96] unless sufficient time has elapsed to raise a presumption of performance of the condition of the bond.[97]

(II) *CONTINUING BREACH.* It has been held that the failure of a constable to collect claims against solvent persons, placed in his hands for collection, is a continuing breach of his bond, and hence an action therefor is not barred by the lapse of the statutory period after the time when he might with reasonable diligence have collected.[98]

(III) *EXTENSION OF PERIOD.* A statute extending the time in which actions on official bonds may be brought has been held not to apply to a bond executed prior to its enactment.[99]

(IV) *TIME WHEN CAUSE OF ACTION ACCRUES* — (A) *In General.* A right of action on the sheriff's bond for money in his official custody does not accrue until it becomes his duty to pay over the money to plaintiff,[1] and where the sheriff converts the proceeds of property pending litigation concerning the right thereto, the cause of action on his bond therefor does not accrue, and the statute does not begin to run, until it is determined who is entitled to such proceeds.[2] The cause of action on the official bond of a constable for a failure to take a sufficient bond in a replevin suit accrues when the suit is ended and a retorno is awarded.[3] A bond of a constable, conditioned simply to indemnify and save harmless the town from all damages, costs, and charges that may in any manner accrue to the town from his default or laches in his said office, is not broken until the town has been compelled to pay, or, being liable, has paid, or has, in some way, sustained actual damage.[4]

(B) *Action on Bond of Deputy.* Where the condition of a deputy's bond is to indemnify the sheriff from liability a cause of action upon the bond arises as soon as the sheriff is subjected to some legal liability on account of the deputy's acts or defaults,[5] although the sheriff has not been actually damaged and no action has been commenced against him;[6] but where the condition is to save

brought within two years, and actions on the official bonds of sheriffs, etc., within five years, an action on a sheriff's bond for the wrongful levy on and sale of personal property must be brought within two years.

**96.** Cony *v.* Barrows, 46 Me. 497 (holding an action not barred by a delay of ten or twelve years); Stanly *v.* Daily, 4 Humphr. (Tenn.) 55.

**97.** Treasurers *v.* McPherson, 2 McMull. (S. C.) 69 (holding that after the lapse of twenty years an action will not lie on the official bond of a sheriff for sums received by him for the state and charged on the books of the treasury); Stanly *v.* Daily, 4 Humphr. (Tenn.) 55.

**98.** State *v.* Patton, 35 N. C. 421.

**99.** Com. *v.* Geary, 7 Pa. Dist. 541, 21 Pa. Co. Ct. 217.

**1.** State *v.* Peacock, 45 Mo. 263.

**Order of court for payment.**—Where money collected by a sheriff on attachment is ordered by the court to be paid to plaintiff, his cause of action on the bond accrues at date of such order, and the statute runs from that time. King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25.

**2.** State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410 (holding that limitations could not begin to run against an action on the official bond of a sheriff for the conversion of proceeds of a sale under execution of property which was claimed by a third person under an alleged superior title, until the termination of the action by such third person determining the right to such property); State *v.* Finn, 23 Mo. App. 290 (holding that where a sheriff converts the proceeds of a sale of attached property the attachment plaintiff's cause of action does not accrue until the termination of the attachment suit, and hence is not barred by the lapse of the statutory period after the actual conversion).

**3.** Love *v.* People, 94 Ill. App. 237.

**4.** St. Albans *v.* Curtis, 1 D. Chipm. (Vt.) 164.

**5.** Robertson *v.* Morgan, 3 B. Mon. (Ky.) 307 [*followed* in Colter *v.* Morgan, 12 B. Mon. (Ky.) 278] (so holding in the case of a bond conditioned to save the sheriff harmless in any and every particular); Cooper *v.* Mowry, 16 Mass. 5; Westervelt *v.* Smith, 2 Duer (N. Y.) 449.

**6.** Robertson *v.* Morgan, 3 B. Mon. (Ky.) 307; Cooper *v.* Mowry, 16 Mass. 5.

**A bond conditioned to account for and pay over to the sheriff all money which might come to the deputy's hands by virtue of his office is a private bond, on which the sheriff may maintain an action to recover taxes**

the sheriff from damage, there must be some damage actually sustained by him before he can recover on the bond, and a mere liability is not sufficient.[7]

(c) *Effect of Requirement of Leave of Court to Sue.* Although the statute requires leave of court to sue as a prerequisite to an action upon an official bond,[8] such leave is not part of the cause of action, but that accrues independent of and prior to the application for leave, and the statute of limitations runs from the same time as though no such leave was required.[9]

**8. Abatement.**[10] Where a sheriff's bond runs to the state and an action thereon for failure to pay over taxes is commenced in the name of the state on the relation of a county officer, such action does not abate upon the death or going out of office of the relator.[11] The pendency of another action for the same cause against the sheriff alone has been held a good plea in abatement to an action on the bond.[12]

**9. Parties**[13] **— a. Plaintiffs** — (i) *Nominal Obligee of Bond.* Under some statutes an action on the official bond of a sheriff or constable must be brought in the name of the state,[14] the people,[15] the governor,[16] or such other officer or officers[17] or political entity[18] as may be named in the bond as obligee, to the use[19]

collected by the deputy as such, without first paying such taxes into the public treasury. Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999.

7. Gilbert *v.* Winman, 1 N. Y. 550, 49 Am. Dec. 359; Rowe *v.* Richardson, 5 Barb. (N. Y.) 385.

8. **Necessity for leave of court** see *supra*, X, G, 4, h.

9. Litchfield *v.* McDonald, 35 Minn. 167, 28 N. W. 191.

10. See generally, Abatement and Revival, 1 Cyc. 10.

11. Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545.

12. Commercial Bank *v.* Jarvis, 6 U. C. Q. B. O. S. 257.

13. See, generally, Parties, 30 Cyc. 1.

14. *Indiana.*— State *v.* McClane, 2 Blackf. 192.

*Kentucky.*— Com. *v.* Teal, 14 B. Mon. 29.

*Maryland.*— State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417.

*Mississippi.*— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423; James *v.* State, 49 Miss. 420.

*Missouri.*— State *v.* Davis, 35 Mo. 406; Miller *v.* Wall, 27 Mo. 440; Meier *v.* Lester, 21 Mo. 112; State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

*Pennsylvania.*— Campbell *v.* Com., 8 Serg. & R. 414.

*Texas.*— Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114, 442.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 395.

15. Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662; Lewis *v.* Little, 5 N. J. L. 685, holding that an action on a constable's bond must be brought in the name of the inhabitants of the township and not otherwise.

16. Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; Matthews *v.* Bailey, 25 Miss. 33; Harrison *v.* Brown, 1 Swan (Tenn.) 272.

17. Long *v.* Scott County Ct., 27 Ill. 384, holding that the county court, which succeeded to the power and authority of the county commissioners' court, may maintain an action on a constable's bond executed to it.

18. New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026 ("people of the county"); New York *v.* Brett, 2 Hilt. (N. Y.) 560 (holding that an action against the sureties on the official bond of a constable of the city of New York, given pursuant to the requirements of 2 Rev. Laws (1813), p. 397, § 147, to recover for a wrongful act done by the constable in his official capacity, must be prosecuted in the name of the mayor, aldermen, and commonalty of the city of New York).

**Where a city and county are coextensive,** a sheriff's bond running to the "People of the county" may be sued on by the "mayor, aldermen and commonalty," of the city as the legal entity representing the people. New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026.

19. *Kentucky.*— Com. *v.* Teal, 14 B. Mon. 29.

*Maryland.*— State *v.* Timmons, 90 Md. 10, 44 Atl. 1003, 78 Am. St. Rep. 417.

*Mississippi.*— Brown *v.* Weaver, 76 Miss. 7, 23 So. 388, 71 Am. St. Rep. 512, 42 L. R. A. 423; James *v.* State, 49 Miss. 420; Matthews *v.* Bailey, 25 Miss. 33.

*Missouri.*— State *v.* Davis, 35 Mo. 406.

*Pennsylvania.*— Brownfield *v.* Com., 13 Serg. & R. 265; Campbell *v.* Com., 8 Serg. & R. 414.

*Tennessee.*— Harrison *v.* Brown, 1 Swan 272.

*Texas.*— Spradley *v.* State, 23 Tex. Civ. App. 20, 56 S. W. 114.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 395.

**The assignee of a judgment** is a proper use plaintiff, although he has not the legal title and could not sue at law in his own name. Matthews *v.* Bailey, 25 Miss. 33 [*approving* Brown *v.* Lester, 13 Sm. & M. (Miss.) 392 (*followed* in James *v.* State, 49 Miss. 420)].

**The party who has the legal right** is the proper use plaintiff, and while the marking of the suit to the use of an assignee is proper, although not necessary, to disclose the interest of the latter, it cannot affect the rights or vary the remedies which the legal parties

or on the relation [20] of the injured party, and a private individual cannot sue on the bond in his own name.[21] Where the bond runs to a named officer and his successors in office, an action may be brought thereon in the name of a subsequent incumbent of the office without any assignment of the bond;[22] but it has also been held that an action on such a bond may be brought in the name of the person who was the incumbent of the office at the time when the bond was executed and need not be brought in the name of his successor.[23] Plaintiff in an action on the bond may be designated by his official title merely without the addition of his name;[24] but the individual who was the incumbent of the office when the bond was given cannot sue upon it in his individual name without stating his

on the record may have in respect to each other. Brownfield *v.* Com., 13 Serg. & R. (Pa.) 265.

**The paymaster of the regiment is the** proper use plaintiff in an action on a sheriff's bond for his failure to collect and account for militia fines. Bartlett *v.* Governor, 2 Bibb (Ky.) 586.

**State may maintain action for its own use.** — Com. *v.* Reed, 2 Bush (Ky.) 618.

**Action for injury to individual not maintainable in name of state alone.** — Dunn *v.* Com., 14 Serg. & R. (Pa.) 431.

**20.** State *v.* McClane, 2 Blackf. (Ind.) 192 (holding that an action on a sheriff's bond for not collecting militia fines due to the county seminaries may be brought in the name of the state, on relation of the treasurer, who is trustee of the fund); Rowland *v.* Wood, 4 Dana (Ky.) 194.

**The party injured at the time of the breach** of the condition of the bond must of necessity be the relator. He cannot assign his interest in the chose in action so as to enable the assignee therafter to bring an action on the bond as relator. Halcombe *v.* Deaver, 25 N. C. 56.

**The person to whom the money is due on** a claim placed in the hands of an officer for collection should be the relator in an action on the officer's bond for a breach of duty in respect to the claim, and the action is improperly brought on the relation of another officer in whose hands the claim was first placed and who transferred it for collection to the officer on whose bond a recovery is sought. State *v.* Farmer, 32 N. C. 45.

**The person with whom a constable makes a contract** for the collection of a note, and not the payee of the note, is the proper relator in an action on the constable's bond for a breach of duty in respect to the collection. State *v.* Corpening, 32 N. C. 58 [*following* State *v.* Lightfoot, 24 N. C. 306; Holcomb *v.* Franklin, 11 N. C. 274].

**Officer as relator against another officer.** — Where a constable, in order to relieve himself from liability for failing to collect a judgment in his hands, paid it off and put it into the hands of defendant as another constable to be collected for his benefit, he might well declare against the latter officer on his bond for failing to collect the money, and it was not necessary that the suit should be brought on the relation of the owners of the judgment. Garrow *v.* Maxwell, 51 N. C. 529.

**Holder of collateral security as relator.** — Where a debtor gave to his creditor as collateral security a bond of a third person, without indorsing it, and with an agreement that it should be returned if not collected, and the creditor delivered the bond to a constable for collection, taking a receipt therefor, and, on failure of the constable, through negligence, to collect the amount due, sued as relator the officer on his official bond, it was held that the suit was properly brought by the creditor. Chipley *v.* Albea, 53 N. C. 204.

**The clerk of the superior court may maintain** in his own name as relator an action on the official bond of the sheriff for the recovery of the costs which have accrued in such court, and have been collected by the sheriff, and are due and payable, not only to the clerk, but also to witnesses and parties, who are beneficiaries under executions. Jackson *v.* Maultsby, 78 N. C. 174.

**The execution plaintiff** and not the parties for whose benefit the execution was issued is the proper relator in an action on the sheriff's official bond for the misconduct of his deputy in his proceedings on the execution. Governor *v.* Hinchman, 1 Gratt. (Va.) 156.

**The county board of education is the proper** relator in an action on the sheriff's bond for failure to pay over taxes levied for school purposes, and hence the complaint in such an action need not aver that the county commissioners have refused to bring the action. Stokes County *v.* Wall, 117 N. C. 382, 23 S. E. 358.

**21.** Taylor *v.* Blyth, 9 Colo. App. 81, 47 Pac. 662; Miller *v.* Wall, 27 Mo. 440. See also Davis *v.* Haffner, 2 Abb. Pr. (N. Y.) 187.

**22.** Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; Governor *v.* Montfort, 23 N. C. 155; State Treasurers *v.* Bates, 2 Bailey (S. C.) 362.

**Where the bond does not comply with the statute** but is good as a common-law bond, it cannot be sued on in the name of the successors of the governor in office when it was given. State Bank *v.* Twitty, 12 N. C. 153.

**23.** Governor *v.* McCulloch, 2 Gratt. (Va.) 175, where the action was in the name of "Thomas W. Gilmer, late governor."

**24.** Bagby *v.* Chandler, 8 Ala. 230 [*approved* in Bagby *v.* Baker, 18 Ala. 653]; Pope County Ct. *v.* Shepard, 67 Ill. 585 [*following* Long *v.* Scott County Ct., 27 Ill. 384], holding that where the bond runs to the

official character, although he is designated therein by name as well as by the title of his office.[25]

(II) *REAL PARTY IN INTEREST.* Under some statutes an action on the official bond of a sheriff or constable is properly brought in the name of the person aggrieved or injured by a breach thereof,[26] and the nominal obligee of the bond is not a necessary party plaintiff.[27] Where the bond names no obligee, but contains an agreement to pay "each and every person" such sums as the officer may become liable for, an action is properly brought in the name of the injured person.[28] Where plaintiff leased certain property in his own name, the fact that he listed the property for taxation for certain years as trustee of another did not prevent him from maintaining a suit in his own name to recover damages for loss of his landlord's lien by reason of the sheriff's act.[29] The owner of a judgment is the person aggrieved by the failure of the sheriff to make the money on an execution issued thereon, or to pay over the money collected, although the judgment was originally rendered in favor of another, and hence such owner may sue on the sheriff's bond in his own name for such default;[30] and an assignee of a judgment rendered against a sheriff for damages arising from his misconduct in office may maintain an action in his own name on the sheriff's official bond to recover the amount of the damages.[31] Even a stranger to the process under which the sheriff was acting may bring an action upon the bond in his own name for an injury done to him by the sheriff under color of his office.[32] An action on an officer's bond for his failure to return property levied on when it became his duty to do so may be maintained by one joint owner without making the other joint owner a party.[33] Where a person enters into an agreement with another, the performance of which entitles him to an interest in certain property, and while the parties are proceeding to carry out the agreement the property is seized under a writ of attachment, such person is not only a proper, but a necessary, party to a suit on the sheriff's official bond.[34]

(III) *INTERVENTION.*[35] Under some statutes, where an action on the bond has been commenced, any other person having a right of action on the bond may come in to such action as a party plaintiff and file an additional declaration.[36]

justices of the county court, naming them, and their successors, the names of the individuals composing the court may be rejected as surplusage, and an action is properly brought in the name of "the county court" only. But *compare* Pegg *v.* Fountain County Treasurer, 3 Blackf. (Ind.) 255, holding that an action could not be maintained on a constable's bond in the name of "the treasurer of Fountain county," but should be in the name of the person who was treasurer.

25. Bagby *v.* Baker, 18 Ala. 653.

**The personal representatives** of a deceased governor who is the obligee in a statutory official bond have no right to sue thereon, but such right passes to the obligee's successor in office. Cannon *v.* Snowden, 4 Humphr. (Tenn.) 360.

26. *Alabama.*— Burns *v.* George, 154 Ala. 626, 45 So. 421, 119 Ala. 504, 24 So. 718.

*Georgia.*— Jefferson *v.* Hartley, 81 Ga. 716, 9 S. E. 174.

*Missouri.*— Ransom *v.* Cobb, 67 Mo. 375.

*New York.*— Levin *v.* Robie, 5 Misc. 529, 25 N. Y. Suppl. 982.

*South Dakota.*— Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190; Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 395.

**Distinction resting on form of action.**— It has been held that covenant will lie on an official bond in the name of the party aggrieved (Lawton *v.* Erwin, 9 Wend. (N. Y.) 233; Fellows *v.* Gilman, 4 Wend. (N. Y.) 414), but that an action of debt lies only in the name of the people (Lawton *v.* Erwin, *supra*).

27. Hollister *v.* Hubbard, 11 S. D. 461, 78 N. W. 949.

28. Magner *v.* Knowles, 67 Ill. 325.

29. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350.

30. Burns *v.* George, 154 Ala. 626, 45 So. 421, 119 Ala. 504, 24 So. 718; Dodge *v.* Kincaid, 30 Kan. 346, 1 Pac. 107; Montgomery *v.* Martin, 104 Mich. 390, 62 N. W. 578. See also Milliken *v.* McBroom, 38 Mo. 342.

31. Charles *v.* Haskins, 11 Iowa 329, 77 Am. Dec. 148.

32. Jefferson *v.* Hartley, 81 Ga. 716, 9 S. E. 174.

33. Williams *v.* Ragan, 153 Ala. 397, 45 So. 185.

34. Brackett *v.* Hinsdale, 2 Tex. Unrep. Cas. 468.

35. See, generally, PLEADING, 31 Cyc. 512.

36. White *v.* Wilkins, 24 Me. 299, holding that St. (1842) c. 19, so providing, is not unconstitutional.

**b. Defendants.** Ordinarily an action on an official bond is properly brought against the officer and his sureties as co-defendants;[37] but where, after a default, the sheriff dies, an action may be brought against his sureties without joining the personal representatives of the decedent.[38] Where the bond is in terms joint and several, or the statute requires that it be so construed or allows it to be so treated, an action thereon may be maintained against all the sureties jointly,[39] or against each of them severally,[40] or against the sheriff or his representatives alone.[41] Where an action on the sheriff's bond to recover the proceeds of attached property sold by the sheriff is brought by one who was not a party to the attachment suit, but who claims to have been a joint owner of the property sold, defendant in the attachment suit is a necessary party.[42] In an action by an execution creditor, as relator, against a constable and his sureties, on his bond, to recover money alleged to have been collected by the constable on such execution, and converted by him to his own use, an attorney to whom defendants allege the money was paid by relator's election is not a proper party defendant.[43]

**10. Process.**[44] The object of a statute requiring the clerk, before issuance of the writ in an action on a sheriff's bond, to indorse thereon the name of the party at whose instance and for whose use the suit is instituted, is simply to have some person designated and made responsible for costs, including the costs of defendant in case the suit should terminate in his favor; and the omission or neglect of the clerk to make such indorsement on an original writ does not render the writ illegal, nor does its omission on any of the renewed writs work a discontinuance of the action.[45]

**The right to intervene is cumulative to the** right to maintain a separate action on the bond. White *v.* Wilkins, 24 Me. 299.

37. *California.*— Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766.

*Colorado.*— Newman *v.* People, 4 Colo. App. 46, 34 Pac. 1006.

*Illinois.*— Babka *v.* People, 73 Ill. App. 246.

*Kansas.*— Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143.

*South Carolina.*—State Treasurers *v.* Bates, 2 Bailey 362.

*Canada.*— See Morris *v.* Graham, 1 U. C. Q. B. 521.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 396.

**An objection on the ground of misjoinder of parties** does not lie because the obligation of the sureties rests in contract while the officer is sued as a trespasser. Bell *v.* Peek, 104 Cal. 35, 37 Pac. 766.

38. Dishneau *v.* Newton, 91 Wis. 199, 64 N. W. 879.

**Although the statute requires that the sheriff be made a party** to an action on his official bond, where the sheriff has died before the commencement of the action against his sureties, it is not proper to stay the action until another action can be brought against the sheriff's representatives and determined. Morris *v.* Graham, 1 U. C. Q. B. 521.

**The personal representatives of a sheriff cannot be joined with his sureties,** in an action on the bond for a default by the sheriff in his lifetime. Boulton *v.* Hamilton, (Hil. T. 3 Vict.) 3 Ont. Case Law Dig. 6439.

39. *Idaho.*— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312.

*Illinois.*— Babka *v.* People, 73 Ill. App. 246.

*Kansas.*— Schilling *v.* Black, 49 Kan. 552, 31 Pac. 143.

*Pennsylvania.*— Beeson *v.* Com., 13 Serg. & R. 249.

*South Carolina.*— See State Treasurers *v.* Bates, 2 Bailey 362, holding that a statute providing that the sureties to a sheriff's bond shall each be liable for no more than his equal part of the penalty does not affect their liability to a joint action.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 396.

40. State *v.* McDonald, 4 Ida. 468, 40 Pac. 312; Babka *v.* People, 73 Ill. App. 246; Guess *v.* Barbee, 28 N. C. 279; Beeson *v.* Com., 13 Serg. & R. (Pa.) 249.

41. Babka *v.* People, 73 Ill. App. 246; State Treasurers *v.* Bates, 2 Bailey (S. C.) 362. See also Williamson *v.* King, 1 McMull. Eq. (S. C.) 41.

42. Rodrigues *v.* Trevino, 54 Tex. 198, so holding on the ground that the granting of the relief sought would affect the interest of defendant in the attachment suit.

43. Wilstach *v.* State, 58 Ind. 200.

44. See, generally, Process, 32 Cyc. 412.

45. Logan *v.* State, 39 Md. 177, 190, where a suit was brought on a sheriff's bond to recover fees placed in his hands for collection by A, clerk of the circuit court, and the original writ, indorsed "State of Maryland, at the instance and for the use of Isaac Neshitt" against the principal and sureties on the bond, was returned "*non sunt*," and sixteen other successive writs were issued from term to term, all of which, except the last, were returned "*tarde*," and under the seventeenth and last writ defendants were summoned, and appeared and pleaded, but it appeared that A died and letters of administration were granted on his estate before the last writ was issued, and his death was suggested, and his administrators appeared and had the case

**11. Pleading** [46] **— a. Complaint, Declaration, or Petition** [47] **—** (I) *In General.* In order to state a cause of action in a suit upon a sheriff's official bond the complaint, declaration, or petition must allege some right in plaintiff from the exercise of which he has been restrained by the malicious act of the sheriff,[48] or charge the sheriff with malfeasance or neglect in his ministerial capacity in the execution of some process in which plaintiff was concerned.[49] A petition in an action against a sheriff and a surety on his official bond which alleges that the sheriff wrongfully attached plaintiff's property under a process against a third person alone, and that the covenants of the official bond, a copy of which bond is filed as part of the petition, were thereby broken, shows that plaintiff intends to assert a cause of action on the sheriff's official bond for his official misconduct.[50] Where an execution is set out by way of inducement in an action on a sheriff's bond, a substantial description thereof is sufficient.[51] Where the bond is joint and several and the action is brought after the death of the officer, it is not necessary to allege non-payment of the penalty by the officer's representatives or to notice his death in the declaration.[52]

(II) *Misjoinder of Actions.* Where the complaint in an action against a sheriff and his official bondsmen alleges a cause of action against the former only as a trespasser, and against the latter only as signers of the bond, it is defective for misjoinder of actions;[53] but where a breach of the bond is alleged as a cause of action against all the parties the complaint is not open to this objection, although the breach set out is, as regards the sheriff, also a tort.[54] The assignment of various breaches of the bond cannot be regarded as the statement of several causes of action, so as to render the complaint obnoxious to the objection that more than one cause of action of the same class is embraced in one count.[55]

(III) *Averment of Interest in Subject-Matter.* One suing on a sheriff's bond for misfeasance preventing the collection of a judgment originally rendered in favor of another [56] may allege his ownership in general terms, without stating how it was acquired.[57]

(IV) *Allegations as to Bond.* The complaint, declaration, or petition in an action on the bond should set out the provisions of the bond,[58] show the penalty

entered on the docket "at their instance and for their benefit," and it was claimed by defendants that A's death, prior to the issuing of the last writ, rendered that writ nugatory, unauthorized, and illegal, and that there was therefore a discontinuance of the action, which let in the plea of limitations, but the court held otherwise, saying: "It was therefore entirely immaterial whether the last writ in this case had the name of a deceased party indorsed on it . . . or whether it was issued under directions previously given by Neshitt in his life-time to keep the suit alive, or by order of his administrators after his death, or by the clerk himself in supposed obedience to the rule of Court to renew as of course, unless otherwise specially directed. The fact that the State was and continued to be the legal plaintiff in the action, and that the writ was in fact renewed in due time, commanding the defendants to appear and answer 'an action at the suit of the State of Maryland,' preserved the continuity of the action and prevented a discontinuance."

**46.** See, generally, Pleading, 31 Cyc. 1.

**47. Form of declaration held sufficient** see People *v.* Wardlaw, 24 Ill. 570.

**Form of assignment of breaches held sufficient** see Laughran *v.* Campbell, 3 Blackf. (Ind.) 486.

**48.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**49.** South *v.* Maryland, 18 How. (U. S.) 396, 15 L. ed. 433.

**50.** Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053.

**51.** Adams *v.* State, 14 Ark. 17.

**52.** Com. *v.* Hughes, 10 B. Mon. (Ky.) 461.

**53.** Ghiradelli *v.* Bourland, 32 Cal. 585.

**54.** Bell *v.* Peck, 104 Cal. 35, 37 Pac. 766 [*following* Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80; Black *v.* Clasby, 97 Cal. 482, 32 Pac. 564; Van Pelt *v.* Littler, 14 Cal. 194, *distinguishing* Ghiradelli *v.* Bourland, 32 Cal. 585, and *followed* in Fuller Desk Co. *v.* McDade, 113 Cal. 360, 45 Pac. 694 (*citing* Brenot *v.* Robinson, 108 Cal. 143, 41 Pac. 37)].

**55.** State *v.* Davis, 35 Mo. 406.

**56. Right to sue for default in connection with judgment in favor of another** see *supra*, X, H, 9, a, (II).

**57.** Burns *v.* George, 119 Ala. 504, 24 So. 718.

**58.** Ghiradelli *v.* Bourland, 32 Cal. 585; Prince *v.* State, 42 Ind. 315; Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; Mann *v.* Martin, 82 Ky. 242; Bisack *v.* Pape, 7 Ohio Dec. (Reprint) 115, 1 Cinc. L. Bul. 126 [*following* State *v.* Caf-

thereof,[59] and state distinctly that it is the official bond of the sheriff as such.[60] It is also necessary to show that the sureties executed the bond;[61] and where the approval of the bond is necessary to its taking effect the complaint must show an approval thereof by the proper authorities,[62] or state facts showing a waiver of the approval,[63] or facts which estop the sureties from urging its non-approval.[64] But it has been held that the complaint need not show the registration or recording of the bond.[65] In a declaration upon a constable's bond, given by reason of an order of court because a former bond had become insufficient, it is not necessary to set out such order.[66] In an action by a city upon the official bond of a city constable for failure to pay over city taxes collected by him, a petition setting forth the bond, and alleging that the act incorporating the city required the constable to give bond and sufficient security in such form, manner, and amount as the city council should direct, subject to the approval of the mayor, and that the city council directed that the constable "should give bond, with security, in the form and manner of the aforesaid bond, and for the sum therein specified," is sufficient, without setting forth more particularly the directions of the city council.[67]

(v) *ASSIGNMENT OF BREACH OF BOND.* The complaint should allege with certainty and precision facts showing a breach of the condition of the bond,[68] and

fee, 6 Ohio 150]. But *compare* Pickering *v.* Pearson, 6 N. H. 559.

**A petition alleging merely that the bond was according to law** is bad. Bisack *v.* Pape, 7 Ohio Dec. (Reprint) 115, 1 Cinc. L. Bul. 126.

**Profert of bond.**— In a declaration against the sureties of a sheriff it is not necessary to make any profert of the covenant. McCrae *v.* Hamilton, 6 U. C. Q. B. O. S. 159.

**59.** State *v.* Johnson, 78 Mo. App. 569, holding, however, that where the petition contained the following averment: "Whereby defendants became liable to pay plaintiff to the use of said relator the sum of $2,000; wherefore plaintiff prays judgment against defendants in the sum of $2,000, the penalty of said bond, and that execution issue against the defendants for the sum of $177.00, the damages aforesaid, and for costs," this was a sufficient averment of the penalty of the bond.

**60.** Ghiradelli *v.* Bourland, 32 Cal. 585.

**61.** Ghiradelli *v.* Bourland, 32 Cal. 585; Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600; Philadelphia Fire Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723.

**An allegation that the bond was entered into as required by law** is sufficient to include or cover the performance of every act essential to the making and approval of the bond, and will support a judgment against the officer and the sureties. Philadelphia Fire Assoc. *v.* Ruby, 60 Nebr. 216, 82 N. W. 629.

**62.** Hill *v.* Ragland, 114 Ky. 209, 70 S. W. 634, 24 Ky. L. Rep. 1053; Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600; Philadelphia Fire Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723.

**Where approval is not necessary** to the validity of the bond it need not be averred. Davis *v.* Haydon, 4 Ill. 35; State *v.* Cromwell, 7 Blackf. (Ind.) 70; McCracken *v.* Todd, 1 Kan. 148; Carmichael *v.* Governor, 3 How. (Miss.) 236. Neither in such case is it necessary for the declaration to negative a disapproval which would invalidate the bond. Davis *v.* Haydon, 4 Ill. 35.

**63.** Philadelphia Fire Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723.

**64.** Philadelphia Fire Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723.

**65.** State *v.* Cromwell, 7 Blackf. (Ind.) 70 (so holding on the ground that recording is not essential to the validity of the bond); State *v.* Boyd, 120 N. C. 56, 26 S. E. 700 (holding that irregularities will not be presumed, but, if material, must be set up in the answer).

**66.** McElhanon *v.* Washington County Ct., 54 Ill. 163, holding that it is sufficient to set out the bond.

**67.** Marshall *v.* Bailey, 27 Tex. 686.

**68.** *Georgia.*— Berrie *v.* Taylor, 117 Ga. 56, 43 S. E. 411, holding that in a suit by a sheriff on a deputy sheriff's bond, the petition must distinctly set out wherein the deputy had failed in his duty, and an allegation that the sheriff had been ruled for failing to collect money on executions in the hands of the deputy is insufficient.

*Idaho.*— State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

*Kansas.*— Richardson *v.* Samuelson, 45 Kan. 589, 26 Pac. 12.

*Kentucky.*— Mann *v.* Martin, 82 Ky. 242; Fowler *v.* Com., 1 Dana 358.

*Vermont.*— Hide *v.* Childs, 1 D. Chipm. 230.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 399.

But *compare* Pickering *v.* Pearson, 6 N. H. 559.

**A particular breach must be alleged.**— People *v.* Brush, 6 Wend. (N. Y.) 454, holding that a breach that the sheriff did not in all things well perform the duties of his office was insufficiently assigned.

**An assignment "for a general misfeasance in office"** is too general and broad. Governor *v.* Harrison, 20 N. C. 599.

plaintiff can recover for such breaches only as are set out and relied on in the declaration.[69] Where the allegations concerning the default or misconduct on which the breach is predicated are such as would be sufficient as to the sheriff himself, they are sufficient as to his sureties.[70] Where the breach alleged is not within the reasonable meaning of the condition of the bond the declaration is demurrable.[71] An allegation that the act complained of was done by the officer "acting as constable . . . and under color of his office" is sufficient, under a statute making the bond of such an officer liable for all acts under color of his office, although the complaint does not allege that the bond contained any condition other than for the "faithful discharge of all duties devolving upon him as such Constable, according to law."[72] It has been held that where the declaration contains several assignments of breaches, some of which are good and others bad, the judgment on a demurrer must be for plaintiff.[73]

(VI) *SHOWING THAT DEFAULT OCCURRED WITHIN PERIOD COVERED BY BOND.* The complaint should show that the default occurred after the execution of the bond;[74] and it must be alleged that the default occurred during the officer's term, for which the sureties were bound,[75] or, if the default occurred after the expiration of the officer's term, the complaint must show, as against the sureties, that a successor had not been elected and qualified.[76] But where the act complained of was within the period for which such bonds usually run, it is not necessary to allege that the bond was still in force at the time.[77]

(VII) *ALLEGATION OF NON-PAYMENT OF PENALTY.* In a declaration on the official bond of a sheriff it is not necessary to allege the non-payment of the penalty of the bond by the obligors, but it is sufficient for the assignment of the breach to allege the non-payment of the sum demanded by the principal in the bond, whose duty it was to pay it.[78]

(VIII) *ALLEGATION AS TO OFFICIAL CAPACITY.* In order to charge the sureties it must be alleged that the act or default complained of was committed by the officer in his official capacity.[79]

**An averment of a breach which is in the alternative** is bad. Hazel *v.* Waters, 11 Fed. Cas. No. 6,283, 3 Cranch C. C. 420, so holding in an action by a purchaser of property sold by the officer which averred that the officer "refused to convey the said property to the said Hazel [plaintiff], or to permit him to take possession of the same."

**A declaration charging a sheriff with failure to return an execution** according to law states a breach of his official bond. Governor *v.* Pleasants, 4 Ark. 193.

**In an action by a sheriff on the official bond of his deputy,** he must assign breaches in his declaration. Barnard *v.* Darling, 11 Wend. (N. Y.) 28.

69. Hall, etc., Woodworking Mach. Co. *v.* Barnes, 115 Ga. 945, 42 S. E. 276.

70. Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190, so holding as to the allegations regarding demand and notice in an action for a wrongful seizure.

71. Jennings *v.* Bobe, 51 Fla. 229, 40 So. 194.

72. State *v.* Boyd, 120 N. C. 56, 26 S. E. 700.

73. Adams *v.* State, 6 Ark. 497. But *compare* Brownfield *v.* Com., 13 Serg. & R. (Pa.) 236.

74. State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62; Summers *v.* Hamilton, 6 U. C. Q. B. O. S. 113, holding that in an action for failure to pay over money a failure to allege that the money was received after the bond was executed was fatal.

75. Com. *v.* Hughes, 10 B. Mon. (Ky.) 461; Carmichael *v.* Governor, 3 How. (Miss.) 236.

76. Urmston *v.* State, 73 Ind. 175.

77. Robertson *v.* Fortune, 14 U. C. C. P. 444, 446, where it is said: "If the covenant has been determined before the usual period, it is a fact which was more properly within the knowledge of the sureties and should have been pleaded by them."

78. State *v.* Phares, 24 W. Va. 657.

79. *California.*—Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504, holding that a complaint alleging that a constable, acting in his official capacity, without authority of law and without right, maliciously and knowingly made an assault and trespass on plaintiff, compelling her to submit to an examination of her person, and taking from her certain property, was insufficient to sustain a judgment against the sureties on his official bond, as it did not state facts showing that the constable was acting under color of office.

*Illinois.*— People *v.* Wilmoth, 45 Ill. App. 73, holding that the complaint must state the facts and circumstances showing that the act complained of was done by the officer by color or by virtue of his office.

*Kansas.*— Richardson *v.* Samuelson, 45 Kan. 589, 26 Pac. 12.

*Kentucky.*— Com. *v.* Cole, 7 B. Mon. 250,

(IX) *SHOWING LIABILITY OF SURETIES.* The complaint or petition must state facts showing that the sureties are liable according to law.[80]

(X) *ALLEGATION OF DAMAGE.* The complaint must show that plaintiff has suffered some injury as a result of the default or misconduct complained of,[81] the manner in which plaintiff was damaged,[82] and that the injury was fairly and legally consequent upon such default or misconduct.[83] In an action for a wrongful seizure an averment that the goods seized and still held by the officer belong to plaintiff and are of a certain value lays a sufficient foundation for a measure of damages.[84]

(XI) *SUFFICIENCY OF ALLEGATIONS IN ACTIONS FOR PARTICULAR BREACHES* — (A) *Failure to Execute Process.* In an action for failure to levy an execution, it is necessary to allege that defendant in the execution had property which could have been found by the officer,[85] and upon which the levy

46 Am. Dec. 506; Brown *v.* Com., 6 J. J. Marsh. 635.

*Mississippi.*— Carmichael *v.* Governor, 3 How. 236.

*Pennsylvania.*— Com. *v.* Whitesides, 1 Wkly. Notes Cas. 508.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 398.

**Complaint held sufficient.**— A complaint alleging that a writ of attachment was issued against the property of D, and delivered to and received by H to be executed; that H, "while acting as deputy sheriff . . . in the pretended exercise of his duty as such officer, and while pretending to act" under the writ, seized plaintiff's property, sufficiently shows that H, in taking plaintiff's property, acted under the writ, and states a good cause of action. Dishneau *v.* Newton, 91 Wis. 199, 64 N. W. 879.

**Rejection of surplusage.**— Where the petition, by suitable averments, shows affirmatively that the act complained of was done by the sheriff while in the performance of an official duty, it is not subject to demurrer because of an additional averment that it was done "under color of his said office," but these words, being but a conclusion not warranted by the facts stated, are properly subjected as surplusage. Huffman *v.* Koppelkom. 8 Nebr. 344, 1 N. W. 243.

80. Griffith *v.* Com., 10 Bush (Ky.) 281.

A complaint showing the sheriff to be an officer de facto is sufficient to show the liability of his sureties for his acts. Ramsey County Com'rs *v.* Brisbin, 17 Minn. 451.

**Complaint held sufficient.**— A complaint which alleges that the sheriff as principal, and the other defendants as sureties, made and delivered his official bond as sheriff, by which defendants became jointly and severally bound for the faithful performance by the sheriff of his official duties, and then proceeds to state the alleged wrongful act of the sheriff in his official capacity, for which damages are sought, is sufficient to show a liability upon the part of the sureties. San Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80. See also State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

81. *Alabama.*— Powell *v.* Governor, 13 Ala. 516.

*California.*— Kendall *v.* Clark, 10 Cal. 17, 70 Am. Dec. 691, holding that a complaint against the sheriff on his official bond for selling a homestead, asking the value of the property as damages, was bad, as under such sale the purchaser took nothing, and the owner was not injured by the deed, which was simply inoperative.

*Kentucky.*— Com. *v.* Bartlett, 7 J. J. Marsh. 161; Com. *v.* Morton, 44 S. W. 647, 19 Ky. L. Rep. 1882, holding that a petition alleging that the sheriff had sold the lands of certain persons for taxes, who owned personalty worth more than the amount of the tax assessed against them, and plaintiff, having a vendor's lien on the lands sold, was compelled to buy in the property at the tax-sale, but not alleging that his lien was lost, or that the property bought by him was not of sufficient value to pay the unpaid purchase-money due him, as well as the tax, was had on demurrer.

*Nebraska.*— Aultman *v.* Grimes, 38 Nebr. 878, 57 N. W. 568.

*Vermont.*— Hide *v.* Childs, 1 D. Chipm. 230.

*West Virginia.*— Com. *v.* Fry, 4 W. Va. 721.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 398.

**Complaint held sufficient.**— Where a plaintiff declared that on a fieri facias against his goods a sheriff levied and made the debt, but falsely returned *nulla bona*, by reason of which a capias ad respondendum was issued and he was arrested and again compelled to pay the money, sufficient damage was shown to make the sheriff's sureties liable as for the wilful misconduct of the sheriff. Hexon *v.* Hamilton, 6 U. C. Q. B. O. S. 115.

82. State *v.* Kirby, 6 Ark. 453; Withrow *v.* Com., 10 Serg. & R. (Pa.) 231.

83. McCoy *v.* Reed, 5 Watts (Pa.) 300; Davis *v.* Hamilton, 6 U. C. Q. B. O. S. 111, holding that a declaration against a sheriff's surety which set out a judgment and execution against plaintiff in a former suit, and that the sheriff had levied the debt, but falsely returned *nulla bona*, by means of which return plaintiff was obliged to pay the debt again, was had, on general demurrer, in not showing how plaintiff was compelled to pay twice, the first payment having discharged the debt.

84. Richardson *v.* Samuelson, 45 Kan. 589, 26 Pac. 12.

85. Montgomery *v.* State, 53 Ind. 108; Lawton *v.* Erwin, 9 Wend. (N. Y.) 233.

might have been made,[86] and it has also been held necessary to allege that the officer was not directed by plaintiff or his agent not to make a levy.[87] In an action for failure to execute a capias ad satisfaciendum, the declaration must aver that while the officer held the execution, defendants therein, or some of them, were within his bailiwick, and might have been arrested.[88] In an action for failure to make the money on an execution, a complaint alleging that property was levied on by the sheriff and advertised for sale as property of the execution debtor is sufficient, without alleging that it was his property.[89] Where the action is for failure to levy an attachment, the petition must allege that plaintiff prosecuted his attachment suit to final judgment.[90] It has been held that a petition in an action based upon the officer's neglect of duty in carrying into effect an execution issued by a justice of the peace should specifically state the facts necessary to give jurisdiction to the justice.[91] In debt against a sheriff on his official bond for not making the money on an execution, it is not a sufficient breach to allege that he did not sell property taken on execution, but it should be alleged that he did not have the money before the court at the return-day of the execution.[92] Where the action is for failure to execute a writ of replevin the tender of a sufficient bond must be averred.[93] A complaint alleging that in an action on a note the sheriff failed to serve the only solvent maker, that the action on the note was dismissed as to such maker, that before another action could be brought such maker removed from the state with all his property, and that by reason of such neglect of duty plaintiff lost the entire debt sufficiently assigns a breach of the bond.[94]

(B) *Improprieties in Execution of Process.* In an action by an execution defendant on a sheriff's bond for misconduct of the sheriff in executing a writ of execution it is not necessary to set forth in the declaration the judgment on which the execution issued.[95]

(C) *Wrongful Seizure.* While a complaint in an action for a wrongful seizure should describe the property,[96] the absence of such description does not amount to a failure to state a cause of action,[97] but the defect must be reached by demurrer.[98]

86. State *v.* Kirby, 6 Ark. 453; State *v.* Shackleford, 15 Ind. 376; Major *v.* State, 8 Blackf. (Ind.) 71; State *v.* Soverns, 6 Blackf. (Ind.) 168; State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62.

**Complaint sufficient against general demurrer as warranting nominal damages.**— Where the complaint in a suit on a constable's bond for failure to collect an execution did not directly aver that the execution defendant had sufficient property subject to execution to satisfy it, or some part thereof, or what the facts were which constituted the return thereon of "No property found" a false return, or what was the value of the property charged to have been improperly set off to defendants as exempt, it was held that such complaint, although insufficient as a demand for full damages for the want of such averments, was good for nominal damages merely, and therefore sufficient on general demurrer. State *v.* Hammond, 72 Ind. 472, holding, however, that the omitted averments could not be supplied by the allegation that by the delay of such constable the execution defendant was enabled to, and did, dispose of all his property subject to execution.

**Value of property.**— It should be alleged that the property on which the sheriff was required to levy was of some value. Com. *v.* Fry, 4 W. Va. 721.

87. Montgomery *v.* State, 53 Ind. 108, 109 [*followed* in State *v.* Emmons, 88 Ind. 279], so holding under a statute making it the duty of a constable to levy and sell within a certain time "unless otherwise directed by the plaintiff, or his agent."

88. Jones *v.* State, 5 Blackf. (Ind.) 492; Lawton *v.* Irwin, 9 Wend. (N. Y.) 233.

89. Smith *v.* Castellow, 88 Ala. 355, 6 So. 750.

90. Shanklin *v.* Francis, 59 Mo. App. 178 (so holding on the ground that otherwise no injury to plaintiff appears); Com. *v.* Fry, 4 W. Va. 721.

91. Cornell *v.* Barnes, 7 Hill (N. Y.) 35; Lawton *v.* Erwin, 9 Wend. (N. Y.) 233, holding that a mere general averment that judgment was recovered in a court holden by and before A B, a justice of the peace in and for the county of O, and having full power and competent authority to hold such court and to render such judgment, was insufficient.

92. State *v.* Engles, 5 Ark. 26 [*followed* in State *v.* Holleman, 21 Ark. 413]. But *compare* Adams *v.* State, 6 Ark. 497.

93. State *v.* Stephens, 14 Ark. 264.

94. Colquitt *v.* Ivey, 62 Ga. 168.

95. Sanderson *v.* Hamilton, 1 U. C. Q. B. 460.

96. See Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246.

97. Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246.

98. Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246.

Where the action is based upon a seizure of exempt property the declaration must state facts showing the right to the exemption.[99] An allegation in a petition that the officer seized certain property while in plaintiff's possession and by force removed it from his possession and refused to deliver it to him is a sufficient averment of plaintiff's possession and the officer's interference therewith;[1] and a petition alleging that plaintiff was in possession of certain property by virtue of a chattel mortgage and that by reason of the officer's seizing and holding the property a right of action accrued to plaintiff is sufficient after judgment as to the ownership of plaintiff.[2]

(D) *Loss of Property.* A complaint in an action by a plaintiff in replevin for the loss of the property is defective where it does not state that the replevin action had been prosecuted to final judgment.[3] In an action for failure to safely keep attached property to satisfy the execution in the attachment suit, an allegation that plaintiff lost his debt by reason of such neglect is not essential.[4] In an action for negligence in suffering attached property to be wasted, a petition which alleges that the property had been attached as the property of the debtor, and that the attachment lien had been foreclosed, and an order for the sale of the property issued, is sufficient, although it does not aver that the attached property actually belonged to the debtor or was subject to attachment.[5]

(E) *Failure or Refusal to Deliver Property.* A complaint in an action for failure to deliver property must show plaintiff's right to have it delivered to him.[6] A complaint alleging as a breach of the bond that the officer refused to deliver possession of property taken in an action of detinue upon a defendant in such action tendering him a bond in double the value of the property need not set out the writ of detinue,[7] or the bond tendered;[8] nor is it demurrable because showing upon its face that the property was in the custody of the law.[9]

(F) *Wrongful Sale.* In an action for wrongfully selling property which it was the duty of the sheriff to reserve from sale, an allegation that the owner requested him to reserve it is mere surplusage.[10] In an action for selling mortgaged property, an allegation in the complaint that the officer levied on and sold the

99. People *v.* Zingraf, 43 Ill. App. 337 (holding that in an action on the bond of a constable for refusal to surrender exempt property levied upon, a declaration averring that, "within seven days of the time said execution was issued and levied upon said piano," plaintiff "executed under oath, her schedule for exemption, as by the statute in such case made and provided," was insufficient, since it showed neither that the piano was worth no more than one hundred dollars, nor that plaintiff was the head of a family, and the piano not worth more than three hundred dollars); State *v.* Bacon, 24 Mo. App. 403.

**Allegations as to non-possession of articles specifically exempted.**— In an action on a constable's official bond for violation of Rev. St. § 4907, in levying on less than three hundred dollars' worth of property without notifying the execution debtor of his right to select such property as exempt, under section 4906, in lieu of that specifically exempted by section 4903, the execution debtor need not allege that he did not possess the property specifically exempted, or that his entire property, including that levied on, did not exceed three hundred dollars, to which section 4906 limited his exemption right. State *v.* Brady, 53 Mo. App. 202.

1. Richardson *v.* Samuelson, 45 Kan. 589, 26 Pac. 12.

2. Richardson *v.* Samuelson, 45 Kan. 589, 26 Pac. 12.

3. Southern Orchard Planting Co. *v.* Gore, 83 Ark. 78, 102 S. W. 709.

4. Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415.

5. Casey *v.* Douglass, (Tex. App. 1890) 16 S. W. 172.

6. Southern Orchard Planting Co. *v.* Gore, 83 Ark. 78, 102 S. W. 709, holding that a complaint in an action by a plaintiff in replevin, which alleges that the officer failed to deliver the property to plaintiff "as required by law," did not show that plaintiff had given the bond which the statute made essential to a delivery to him of the property.

7. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

8. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

9. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

10. Crow *v.* State, 23 Ark. 684, so holding, where on execution defendant had claimed the benefit of the appraisement law and the property did not bring two thirds of its value.

property sufficiently charges that he levied on and sold all of it.[11] In an action for selling plaintiff's property under process against another person who was in possession thereof, it is not necessary to specifically allege that the property was not subject to sale on execution against the holder, but an averment of title in plaintiff is sufficient.[12] A complaint alleging that plaintiff demanded his personal property exemptions in time, but that defendant sheriff failed and refused to allot such exemptions to him, and afterward sold the property and applied the money to executions in his hands, sufficiently alleges a breach of defendant's bond.[13]

(G) *Sale at Inadequate Price.* In an action for damages caused by the sheriff's illegal and fraudulent conduct in selling property of plaintiff on execution, by reason of which the property was sold for much less than its value, it is not necessary to specify the illegal and fraudulent acts.[14]

(H) *Failure to Sell.* The declaration in an action for not selling property levied on should negative the giving of a forthcoming bond, if the property is such as may be relieved by such a bond.[15]

(I) *Failure to Convey Property Sold.* In an action for failure to convey to the purchaser property alleged to have been sold by the officer under execution, the declaration should state that the execution was levied on the property,[16] and that the property belonged to defendant in the execution,[17] and should describe the property with certainty.[18]

(J) *Failure to Collect.* In declaring on a sheriff's bond, for his failure to collect an account for officer's fee bills, it must be alleged that the fees were due and owing to the relator.[19] An averment that if the officer did not collect the money on a fee bill placed in his hands it was his own neglect and fault is not sufficient to make him liable under a statute declaring him responsible "for any injury for failing to collect the same, when by proper diligence it might have been collected." [20]

(K) *Failure to Pay Over Money.* Where the action is for failure to pay over money the collection thereof by the officer must be positively averred,[21] and it is also necessary to aver the failure to pay over [22] and to show plaintiff's right to

11. McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739.

12. Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

13. State *v.* Kenan, 94 N. C. 296.

14. State *v.* Gresham, 1 Ind. 190, Smith 94, holding that the declaration was sufficient where it alleged that the sheriff conducted the execution sale of plaintiff's property in an illegal and fraudulent manner for the purpose of injuring plaintiff, and did, by said illegal and fraudulent conduct, sell and cause to be sold said lands at a great sacrifice to plaintiff's damage.

15. State *v.* Hammett, 7 Ark. 492.

16. Hazel *v.* Waters, 11 Fed. Cas. No. 6,283, 3 Cranch C. C. 420.

17. Hazel *v.* Waters, 11 Fed. Cas. No. 6,283, 3 Cranch C. C. 420.

18. Hazel *v.* Waters, 11 Fed. Cas. No. 6,283, 3 Cranch C. C. 420.

19. Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391.

20. Walters *v.* Chinn, 1 Metc. (Ky.) 499.

21. Northcut *v.* Com., 3 Dana (Ky.) 483; Walters *v.* Chinn, 1 Metc. (Ky.) 499, holding that an allegation that the plaintiff "believes [the defendant] has collected," etc., and "if he has not, it is his own neglect," is insufficient.

**Specification of items not necessary.**— In an action for failure to pay over various moneys received by the sheriff, it is a sufficient assignment of the breach to aver a general receipt of the entire amount and failure to pay over, without specifying each particular item received. Governor *v.* White, 4 Stew. & P. (Ala.) 441, 24 Am. Dec. 763.

**Pleading acknowledgment of receipt.**— In debt on a sheriff's bond an assignment of breach that a deputy "acknowledged," after he ceased to be deputy, that he had received money on an execution, without assigning that the deputy had in fact received it, is insufficient. Bennett *v.* Giles, 6 Leigh (Va.) 316.

**An averment that the officer has collected a certain sum** for plaintiff, who was entitled to receive the same, and has failed and refused to pay over the same, is sufficient, without setting forth what claim was collected or from whom it was collected. Smith *v.* Wilkinson, 5 Coldw. (Tenn.) 157.

22. Hardin *v.* Governor, 5 Litt. (Ky.) 336 (holding that in an action on the official bond of the sergeant of the court of appeals to recover money collected by a deputy on an execution, an averment that it was collected by a deputy of defendant was not good, as it should also have alleged that the principal had failed to pay over the money collected, as well as the deputy); Boylan *v.* Hodgkinson, 50 Hun (N. Y.) 433, 3 N. Y. Suppl. 319

receive such money,[23] and the officer's duty to pay it over.[24] Where the action is for failure to pay over money collected on execution a demand and refusal must be alleged,[25] but it has been considered not necessary to set out the particular

(holding that a complaint against an under-sheriff alleging that he had sold under mortgage foreclosure property in which plaintiff was interested as devisee; that defendant, although requested, had refused to pay to plaintiff his share of the surplus; and that the sheriff had assigned to plaintiff his interest in defendant's bond to the extent of the surplus so received by defendant, was insufficient for not alleging that defendant did not pay the surplus over to his principal, or bring it into court, as the statute directs).

**Complaints held sufficient:** A complaint alleging the exaction of illegal fees, that an order was entered retaxing his fees, and that the officer had disobeyed the order refusing to repay the excess to plaintiff sufficiently alleges a breach of condition that the officer should pay over all moneys collected. Brennan *v.* State Bank, 10 Colo. App. 368, 50 Pac. 1076. In an action on a sheriff's bond for his failure to turn over money paid him on an execution sale, an allegation in the complaint that the sheriff "failed and refused to apply said money or any part thereof, toward the satisfaction of said execution," negatives payment by him of the amount to the clerk of the court, and is sufficient. State *v.* Cisney, 95 Ind. 265. It is a sufficient assignment of a breach to aver that the officer has collected a certain amount of money in his official capacity, which he has refused to account for and pay over. Hughes *v.* Smith, 5 Johns. (N. Y.) 168, so holding in an action upon the bond of an under-sheriff. A breach of the covenant that the sheriff would pay over moneys received by him sufficiently appears from an allegation "that he had by virtue of his office received certain monies which the plaintiffs are entitled to according to the true intent and meaning of the covenant, to wit, £50, within the four years mentioned by the covenant, but that he neglected and refused to pay them to the plaintiffs although often requested so to do." Shuter *v.* Graham, 2 U. C. Q. B. 164.

23. Meriam *v.* State, 7 Blackf. (Ind.) 245, holding that an assignment of a breach in a suit on a sheriff's bond that the sheriff had sold land on execution to the relator and received from him the price, that the sale was afterward set aside, and that the sheriff had refused to pay the money on demand to the relator was insufficient, as an averment that notice had been given to the sheriff that the sale had been set aside was necessary in such case.

**Statement of interests of joint owners.**— Where an action on a sheriff's bond is brought for the purpose of recovering a sum of money found by an order absolute on a rule against the sheriff to be due to two persons jointly, it is no objection to the sufficiency of the breaches assigned that the declaration does not state the amount of the interest of each in that sum. Towns *v.* Hicks, 6 Ga. 239.

24. Helena *v.* Biscoe, 19 Ark. 417 (holding that where the action is for a breach of the covenant in a town constable's bond that he should on the expiration of his term pay over to his successor all moneys belonging to the town, a declaration containing no averment that a successor has been appointed who is authorized to receive the money is fatally defective); State *v.* Hays, 30 W. Va. 107, 3 S. E. 177 (holding that a declaration in an action for failure to pay over money received by the sheriff in his official capacity for the use of the county, which fails to aver that, before such action was commenced, the county court had, by its order entered of record, or by a draft made in pursuance thereof, ordered him to pay such moneys to his successor in office, or to some other person, and that said sheriff had notice thereof, is, upon general demurrer, fatally defective).

**Complaint held sufficient.**— A petition alleging that plaintiff was the holder of an execution which was a special lien against certain secured property, that there had been a sale by the sheriff of a portion of the property, and that, after discharging certain taxes, there was in the hands of the sheriff a specified sum subject to plaintiff's execution; that, at plaintiff's instance, a rule *nisi* had issued against the sheriff in the superior court of the county of which he had been sheriff, and that a rule absolute had been obtained against him, requiring him to pay over money on plaintiff's execution, which he refused to do; and that the sum specified in the petition was in the sheriff's hands at the date of the rule absolute, and was still in his hands, sets forth a cause of action for a breach of the sheriff's official bond. Velvin *v.* Austin, 109 Ga. 200, 34 S. E. 335, holding that it was not necessary to allege that the execution was placed in the sheriff's hands, that there had been a failure or refusal to levy the execution, or that there was no other property on which the execution could be levied.

25. Governor *v.* Pleasants, 4 Ark. 193; Harris *v.* Perry, 2 Bush (Ky.) 101; Huston *v.* Hagar, 1 Duv. (Ky.) 24. See also Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161; Finn *v.* Wilson, 5 J. J. Marsh. (Ky.) 338, holding that as a constable is not bound to go out of the county to pay over money collected by him, a person residing out of the county must aver a demand and refusal before he can maintain an action on the bond for the money collected. But *compare* Wells *v.* Com., 8 B. Mon. (Ky.) 459 [*followed* in Com. *v.* Hughes, 10 B. Mon. (Ky.) 461] (holding that an averment of a demand is not necessary unless the record shows that plaintiff did not reside in the officer's county or have an agent therein); Grandstaff *v.* Ridgely, 30

time at which and manner in which the demand was made.[26] An express averment that the process under which the officer collected the money was directed to him is not essential if that fact can be implied from the other facts alleged.[27] In an action for failure to pay over money collected upon a county levy it is not necessary to allege that the levy was made by a majority of the justices of the county, or that they had all been summoned to attend the court.[28] In an action for failure to pay over license taxes and fees collected, the several items of defalcation need not be separately averred.[29] It has been held that a declaration for failure to pay over money collected under execution is bad when it does not allege any judgment to warrant the execution.[30] In an action of debt against a sheriff and his sureties for a failure on the part of the sheriff to collect and pay over militia fines, the declaration must set forth the names of the persons against whom the fines were assessed, and the several amounts of the fines, as stated in the certificate of the president of the court-martial.[31] Where a sheriff has rendered an account of the taxes collected by him in a settlement with the county treasurer, which account is not itemized, it is not necessary, in an action upon his bond for failure to pay over part of the money, for the complaint to specify any errors in such settlement.[32] Where the claims put into the officer's hands were not specifically set out in the assignment of the breach, but the declaration stated that plaintiff had placed in his hands for collection divers claims, which were particularly set out in a receipt given by the constable in his official capacity, and which was thereto annexed, appropriately marked, and averred the collection of moneys by the constable and his failure and refusal to pay over to the relator, it was held that the breach was well assigned.[33]

(L) *Misapplication of Proceeds of Sale.* In an action for the improper application of the proceeds of an execution sale it is not necessary that the complaint should set out the judgment on which the execution issued.[34]

(M) *Taking Insufficient Bond.* In an action to recover damages for taking an insufficient replevin bond a declaration alleging that the officer did not well and faithfully perform his official duty in the premises, and under this allegation making the necessary specifications, sufficiently alleges a breach of the bond;[35] and it is not necessary to set forth the suit upon the replevin bond and the failure of plaintiff to obtain satisfaction thereby.[36]

(N) *Failure to Return Process.* The complaint in an action for failure to return an execution should set out the judgment on which the execution issued,[37] and where the execution was issued by a justice of the peace it is necessary to state

Gratt. (Va.) 1 (holding that under Code (1873), c. 183, § 37, providing that an officer receiving money under an execution, when the creditor resides in a different county, shall not be liable to judgment for non-payment of the money until a demand of payment is made on him in his county or corporation, the declaration need not aver a demand of payment when it does not state where the creditor resides).

**Demand need not be specially alleged.**— Hill *v.* Fitzpatrick, 6 Ala. 314 [*overruling* McBroom *v.* Governor, 6 Port. (Ala.) 32].

26. Harris *v.* Perry, 2 Bush (Ky.) 101, 102, where it is said: "A demand being required by the statute, is a traversable fact; and, if it is so alleged as that an issue may be made thereon, it will be sufficient."

27. Com. *v.* Hughes, 10 B. Mon. (Ky.) 461.

28. State *v.* Phares, 24 W. Va. 657.

29. State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137.

30. Robertson *v.* Fortune, 14 U. C. C. P. 444; Bidwell *v.* McLean, 5 U. C. Q. B. O. S. 690. But *compare* Ricketson *v.* Com., 51 Pa. St. 155 [*following* Beale *v.* Com., 7 Watts (Pa.) 183; Beale *v.* Com., 16 Serg. & R. (Pa.) 150].

31. Chapman *v.* Weaver, 19 Ala. 626.

32. Greene County *v.* Taylor, 77 N. C. 404.

33. Governor *v.* Roach, 9 Gratt. (Va.) 13.

34. State *v.* Hamilton, 32 Ind. 104.

35. People *v.* Lee, 65 Mich. 557, 32 N. W. 817.

36. Adams *v.* Weisberger, 62 Nebr. 325, 328, 87 N. W. 16, where it is said: "The defendant in replevin suing upon the officer's bond need not plead how he expects to prove that the security was insufficient. It is enough for him to allege that it was insufficient and that in consequence of that fact he has suffered damages. The record of the suit on the replevin bond is not the only or conclusive, nor yet the complete evidence requisite to support the claim."

37. State *v.* Spencer, 4 Blackf. (Ind.) 310; Bidwell *v.* McLean, 5 U. C. Q. B. O. S. 690.

facts showing that the justice had jurisdiction.[38] An allegation that the officer "did not make legal service and return" of an execution placed in his hands is insufficient as an averment of failure to return the writ;[39] but a charge that the officer did not return an execution within the time limited by law is a good assignment of a breach of the bond.[40] Where the action is under a statute making the sheriff and his sureties liable for the amount of an execution and damages if the sheriff neglects, "without reasonable excuse," to return the execution within a certain time, the petition must allege that the delay to make the return was without reasonable excuse.[41]

(O) *False Return.* In an action for a false return it is not sufficient to allege that a false return was made;[42] but the declaration should state the nature of the return made,[43] and state facts which if true show that the return is false.[44] In an action for making a false return of *nulla bona* on an execution in favor of plaintiff, it is not necessary to allege that the judgment is unsatisfied.[45]

(P) *Illegal or Insufficient Return.* In an action based on the illegality and insufficiency of the officer's return to an execution, the declaration should show what the return actually made was.[46]

(Q) *Wrongful Arrest.* A complaint alleging that, claiming to act officially and in his official capacity, the sheriff seized and carried plaintiff to the jail of the county where he locked him up for twenty-four hours, wholly without warrant of law, and maliciously and wantonly, is sufficient as against a general demurrer.[47] A complaint in an action for an arrest by the sheriff's deputy is insufficient, where it does not allege that he was arrested without a warrant, or charge in general terms that the arrest was unlawful, although it negatives the conditions upon which a lawful arrest could have been made without a warrant.[48]

(R) *Assault.* A complaint alleging that the sheriff, with his deputies, came to plaintiff's premises and demanded possession of certain property described in a chattel mortgage, which plaintiff refused, unless the papers were produced; that the sheriff refused to produce any papers, except a written notice of foreclosure of the mortgage; and that the sheriff attempted to remove the property, and, while plaintiff was endeavoring to produce it, assaulted and beat him, and also alleging that in such matters the sheriff acted as sheriff and not otherwise, is sufficient as against a general demurrer.[49]

(S) *Escape.* A declaration for a voluntary escape of plaintiff's debtor must show that plaintiff had recovered a judgment.[50] In an action for an alleged escape of a debtor in custody under bail process an allegation in the declaration that the capias was "marked and indorsed for bail" is sufficient to show that the sheriff was required by the process in his hands to hold defendant therein to bail.[51] Where, in an action by a sheriff on the bond of his deputy, the breach assigned was that the order of a judge was delivered to the deputy for the committal to close custody of a debtor admitted to the limits, and that the deputy had arrested but suffered him to escape, but it was not alleged either that the debtor was on the limits when the order was delivered to the deputy, or that he was arrested on the limits by the deputy under it, the allegation of the breach was defective.[52]

38. Cornell *v.* Barnes, 7 Hill (N. Y.) 35.
39. Major *v.* State, 8 Blackf. (Ind.) 71.
40. Lawton *v.* Erwin, 9 Wend. (N. Y.) 233.
41. Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 188.
42. Com. *v.* Booker, 6 Dana (Ky.) 441; Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.
43. Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.
44. Com. *v.* Booker, 6 Dana (Ky.) 441; Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.
45. Lucas *v.* Governor, 6 Ala. 826.
46. Graham *v.* State, 6 Blackf. (Ind.) 32.
47. Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219.
48. Bonebrake *v.* Hunt, (Ariz. 1907) 89 Pac. 544.
49. Hall *v.* Tierney, 89 Minn. 407, 95 N. W. 219.
50. Brown *v.* Price, 6 T. B. Mon. (Ky.) 621.
51. Hutchison *v.* Governor, 23 Ala. 809.
52. Commercial Bank *v.* Jarvis, (East T. 5 Vict.) 3 Ont. Case Law Dig. 6378.

(T) *Charging Excessive Fees.* An assignment of breach, in that the sheriff unlawfully demanded and received one hundred dollars more than his legal fees for certain services specified, is good on general demurrer.[53]

(XII) *PRAYER FOR RELIEF.* A declaration on an officer's bond is not subject to demurrer because the damages asked are larger than the penalty of the bond;[54] nor does the fact that plaintiff asks judgment for a statutory penalty which cannot be recovered in an action, but only in summary proceedings, render the declaration bad on general demurrer.[55]

**b. Plea or Answer** — (I) *IN GENERAL. Nil debet,*[56] and *non damnificatus,*[57] are not proper pleas in an action on a sheriff's bonds. And where the breach assigned is a failure to return an execution issued from a court not of record, a plea that there is no record of such judgment and execution is bad.[58] But a plea of performance of covenants has been considered proper.[59] A plea which is not responsive to the breaches assigned in the declaration or to the allegations therein,[60] or which sets up facts which, even if true, would not relieve the officer or his sureties of liability,[61] is bad on demurrer, as is also an answer which is indefinite or uncertain.[62] But a plea denying a material and traversable allegation of the complaint

**53.** State *v.* Gresham, Smith (Ind.) 94.

**54.** Com. *v.* Lynd, 9 Wkly. Notes Cas. (Pa.) 510.

**55.** Com. *v.* Bradley, 1 Litt. (Ky.) 48.

**56.** Richman *v.* Powell, 7 N. J. L. J. 45; Hart *v.* Brady, 1 Sandf. (N. Y.) 626.

**57.** Martin *v.* Royster, 8 Ark. 74; State *v.* Gresham, 1 Ind. 190; Hart *v.* Brady, 1 Sandf. (N. Y.) 626. *Contra,* Rees *v.* Tichenor, 1 Miles (Pa.) 183.

**58.** Faulkner *v.* State, 9 Ark. 14.

**59.** Rees *v.* Tichenor, 1 Miles (Pa.) 183. See also Austin *v.* Parker, 13 Pick. (Mass.) 222; State Treasurers *v.* Wiggins, 1 McCord (S. C.) 568; Governor *v.* Organ, 5 Humphr. (Tenn.) 161. *Contra,* Martin *v.* Royster, 8 Ark. 74.

**60.** *Arkansas.*— Martin *v.* Royster, 8 Ark. 74, so holding as to general pleas of *non damnificatus* and covenants performed in an action by a sheriff on the bond of his deputy, assigning as a breach that the deputy collected money on execution and failed to pay it over.

*Illinois.*— Morgan *v.* People, 59 Ill. 58, holding that where the breach assigned was that the officer sold property of defendant in execution after being ordered by plaintiff to suspend the sale, a plea that the property was so sold by virtue of an execution in the officer's hands against the goods and chattels of defendant was bad.

*Indiana.*— Meriam *v.* State, 7 Blackf. 245, holding that in an action by a purchaser at an execution sale on the official bond of the sheriff for the money paid by plaintiff, an allegation in the declaration that the "sale" had been set aside is not met by a plea averring that the "execution" was not set aside.

*Kentucky.*— Com. *v.* Colgan, 5 B. Mon. 485, holding that in an action for taking insufficient security in a replevin bond on a warrant issued for rent alleged to be due and in arrear, a plea that the rent was not payable in money was bad.

*Maryland.*— Bramble *v.* State, 41 Md. 435, holding that in an action on a sheriff's official bond to recover the value of plaintiff's statutory exemption out of the proceeds of an execution sale of his property, a plea that plaintiff had no "legal" estate in the property sold was bad.

*New York.*— People *v.* Ten Eyck, 13 Wend. 448, holding that where the allegation, in an action on a sheriff's bond, was that an execution was delivered to defendant's deputy and that he levied on property sufficient to satisfy it but neglected to advertise and sell, and that subsequently another execution was delivered to another deputy of defendant, in favor of another plaintiff, by virtue of which the same property was levied on and sold, and the proceeds paid over to plaintiff in such second execution, a plea that before the sale of the property and before any money came to the sheriff's hands, he, on entering on the second year of his term of office, executed a new bond, with new sureties, was bad, the gist of the action being the neglect of the first deputy to advertise and sell, and such neglect having occurred before the change of sureties.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 400.

**61.** Williams *v.* Ragan, 153 Ala. 397, 45 So. 185, holding that in an action for failure to return personal property held under execution and claimed by the debtor to be exempt, where the execution creditor failed to furnish sufficient forthcoming bond, a plea stating that the constable relied on the advice of the debtor's attorney, and which was amended to show that the constable delivered the property to the creditor before he gave the bond, was bad on demurrer.

**62.** State *v.* Daugherty, 32 Ind. 350, holding that in an action on a sheriff's official bond, alleging several breaches thereof, an answer alleging, as to all and each breach mentioned in the complaint, that the breach was caused by, and that the acts and doings of the sheriff, as such, were caused by and done with the knowledge and consent of the relators, their agents and attorneys, was bad on demurrer, as too indefinite.

is not demurrable.[63] A general denial of all material allegations of the complaint, "except such allegations as are hereinafter admitted, stated, or qualified," will not control the effect of an affirmative allegation in the answer which in legal effect admits the cause of action.[64] In an action for turning over mortgaged property to the purchaser at an execution sale before the latter has complied with the condition of the mortgage, as required by statute, an allegation in the answer that the constable did nothing with the property after the sale, and did not turn it over to the purchaser, but left it with the person who had possession at the time of the levy, is insufficient, it not alleging that the property still remains in such possession, and that it can be reached by the mortgagee.[65]

(II) *PLEAS AS TO PARTICULAR MATTERS* — (A) *Existence of Judgment.* In an action for failure to execute final process, a plea denying in the very language of the declaration the existence of such a judgment as the one upon which it is alleged the execution issued is sufficient, although it is not in the technical form of a plea of *nul tiel record*, and concludes to the country instead of with a prayer for judgment.[66]

(B) *Variance Between Judgment and Process.* In an action for failure to levy and return an execution, a plea that the execution was not issued in conformity with the judgment, without showing in what respect it differs from the judgment, is bad on demurrer.[67]

(C) *Execution of Bond.* *Nul tiel record* is not a proper plea in an action on a sheriff's official bond,[68] but the proper plea to put in issue the execution of the bond is *non est factum*.[69]

(D) *Validity of Bond.* An allegation in the answer which denies the validity of the bond but does not allege facts sufficient to show the correctness of such conclusion is demurrable.[70]

(E) *Refusal of Proper Credits.* Where the defense of a sheriff to an action on his bond for taxes found to be due by him on the audit of his accounts is a refusal of credits to which he claims he is entitled, he must set out such credits specifically in his answer.[71]

(F) *Payment of Debt.* Where a statute providing for the appointment of a county treasurer is not mandatory, a sheriff who is sued on his bond for county revenue collected must, if a treasurer has been appointed, and the revenue paid to him, plead these facts.[72] In an action for failing to make the money on an

**63.** Crow *v.* State, 23 Ark. 684 (holding that where the gravamen of the action was trespass committed in selling plaintiff's property under an execution issued by the clerk of the circuit court upon a judgment of a justice of the peace, an allegation of the filing of the transcript in the office of the clerk was material and traversable); Rodes *v.* Young, 5 Dana (Ky.) 558 (holding that where, in an action for fee bills collected, one count averred that when they were placed in the hands of the deputy they were collectable by distress, which was an essential averment, a plea which averred a state of facts under which they were not, when delivered, collectable by distress, was good).

**64.** People *v.* Otto, 77 Cal. 45, 18 Pac. 869, holding that, although the answer in an action on the bond of a sheriff and *ex officio* tax collector, for failure to pay over taxes collected, denied generally all the material allegations, a subsequent allegation that a third person, "acting as undersheriff," collected the amount of taxes charged, was an admission qualifying the general denial, and rendering defendants liable, where their answer, although denying that their principal had collected and withheld the sum charged, did not aver that he paid over, or deny that he withheld, the amount collected by the under-sheriff; and that it was immaterial that the answer also alleged that the person acting as under-sheriff receipted for the taxes collected by him in the name of the sheriff by himself as under-sheriff, "without right or authority of law so to do."

**65.** McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739.

**66.** State *v.* Saddler, 6 Ark. 235.

**67.** State *v.* Saddler, 6 Ark. 235.

**68.** Brownfield *v.* Com., 13 Serg. & R. (Pa.) 265.

**69.** Brownfield *v.* Com., 13 Serg. & R. (Pa.) 236.

**70.** Winningham *v.* State, 56 Ind. 243, so holding as to an answer which alleged that the bond was void for want of authority in the clerk by whom it purported to be approved, but did not show what was the defect of authority relied upon.

**71.** Williamson *v.* Jones, 127 N. C. 178, 37 S. E. 202.

**72.** Catron *v.* Com., 52 S. W. 929, 21 Ky. L. Rep. 650.

execution, a plea that the debt was paid to plaintiff has been held bad where it did not allege the payment to have been made after the breach of duty by the sheriff.[73]

(G) *Prior Liabilities to Full Penal Sum.* The fact that the sureties have already been subjected to liability to the full amount of the penal sum[74] must be properly pleaded by them in order to be available.[75]

(III) *PLEAS IN CONFESSION AND AVOIDANCE.* Where plaintiff's right of action is complete under a statute, but there is a proviso or exception either in that or in some other statute, which may be made available to defeat it, defendant must plead such matter if he desires to avail himself of it.[76] A plea in confession and avoidance should allege facts sufficient to afford a complete justification.[77]

**c. Affidavit of Defense.** An affidavit of defense is not necessary in an action upon the official bond of a sheriff or constable.[78]

**73.** Governor *v.* Powell, 10 Ala. 544.

**74. Penal sum as limit of liability** see *supra*, X, C, 15, b.

**75.** Hexon *v.* Hamilton, 6 U. C. Q. B. O. S. 155, holding that the court would not stay proceedings against a sheriff's surety, on the ground that he had already paid the full amount of his liability, unless such payment were after plea pleaded.

**Plea not allowed after default judgment.**— The court has refused to relieve a sheriff's surety, who had suffered judgment to go against him by default, after damages had been assessed against him, by allowing him to plead that he had already paid the amount of his covenant under the statute. Scott *v.* McDonald, 6 U. C. Q. B. O. S. 238.

**76.** State *v.* Clark, 42 Mo. 519.

**77.** *Alabama.*— Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246, holding that in an action for a wrongful levy on a wife's property as that of her husband, a plea that plaintiff on more than one occasion had stated to the officer that the property levied on belonged to the husband, and that plaintiff was therefore estopped to allege that the property belonged to her, was demurrable where it showed on its face that such statements were made prior to the levy.

*Indiana.*— State *v.* Leavell, 3 Blackf. 117, holding that in an action upon a sheriff's bond for not collecting militia fines, a plea averring that he had not sufficient time from the time he received the list until he went out of office to collect the money "by distress or otherwise" was not a sufficient answer to a charge in the declaration that "he neglected and refused to collect," but the plea should have showed also that the sheriff used due diligence during the time he was in office and how much was done toward the collection.

*Maryland.*— Jamison *v.* State, 55 Md. 102, holding that in an action for fees placed in his hands for collection by the former clerk of court, a plea that the sheriff was unable to collect such fees by distress, execution, or otherwise on account of plaintiff's failure to make them out in a fair and clear manner and in words at length, as required by statute, was insufficient because it did not further allege that the sheriff was unable to collect the fees because the persons against whom the fees were chargeable required them to be made out in words at length, of which plaintiff had notice, and that he failed to furnish such account as required by law, and holding also that a plea that the fees did not accrue within three years before the sheriff received them was defective, where it did not further aver that the parties against whom the fees were charged refused to pay them, because they were barred.

*New York.*— Hart *v.* Brady, 1 Sandf. 626, holding that where in a suit by a sheriff on a bond executed to him by his deputy, plaintiff alleged the receipt of moneys and the conversion of the same by his deputy, his neglect to return writs, and other misfeasances and breaches of duty, pleas that the several acts charged were done by the leave and license of the sheriff were bad, because they did not show a valid discharge, which could only be under seal, or a valid waiver, no consideration being alleged.

*Canada.*— Corkery *v.* Graham, 1 U. C. Q. B. 315, holding that where the breach assigned was that the sheriff arrested a debtor and afterward allowed him to escape, a plea that the jail was accidentally destroyed by fire and so the debtor escaped was bad for not denying that the fire occurred through the negligence or default of the sheriff or his deputy.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 400.

**Answer held sufficient.**— In an action for failure to levy, an answer alleging that the officer went to the house of the execution defendant, demanded of him property on which to levy, and, on refusal, made "diligent search" and utterly failed to find such property, is sufficient on demurrer. State *v.* Neff, 74 Ind. 146, 150, where it is said: "We think that 'diligent search' is a fact, broadly stated, it is true, but, by demurring to the paragraph, the relator admitted the truth of the fact, just as broadly as it was stated. If the relator wished a specific statement of the acts done by the constable, in making 'diligent search,' he certainly could not get it by demurring to the paragraph for the want of facts. His only remedy, if any, was a motion for a more specific statement of the facts."

**78.** Barlin *v.* Com., 99 Pa. St. 42 [*followed*

**d. Replication or Reply and Subsequent Pleadings.** If plaintiff wishes to deny the facts relied on in a plea in avoidance of the breaches set forth in the declaration, he should traverse such facts in his replication,[79] and a replication which is argumentative and indefinite is bad.[80] So also where the plea may show a bar to plaintiff's action, notwithstanding the truth of the matter set up in the replication, such replication is bad.[81] Where defendants have pleaded performance generally, plaintiff should in his replication set forth a single breach.[82] A replication to a plea of performance alleging that defendant had collected a certain sum, and had not paid it over, pursuant to an order of court, is good.[83] A replication setting forth the giving of additional security need not set forth how the necessity therefor arose, or state that it was given in pursuance of a requisition of the officers having

in Com. *v.* Milnor, 23 Pa. Super. Ct. 1 (*following* also Corry *v.* Pennsylvania R. Co., 194 Pa. St. 516, 45 Atl. 341)]; Com. *v.* Hoffman, 74 Pa. St. 105; Barnhart *v.* Seanor, 8 Pa. Dist. 18. See also Baer *v.* Kuhl, 8 Pa. Dist. 389. *Contra*, Com. *v.* Yeisley, 6 Pa. Super. Ct. 273.

79. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

80. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405 (holding that where, in an action on a sheriff's bond for failure to sell property after levying thereon, a plea was interposed that the debtor claimed that the property was not hers, and that the sheriff honestly believed her claim, and demanded a bond of indemnity, or to be satisfied by competent legal advice that he could safely make sale of the property, and that no bond was given, and plaintiff did not satisfy the sheriff of his right to make the sale, and to this a replication was filed which admitted the refusal to give the bond of indemnity, but denied that plaintiff did not give the sheriff the advice of a competent attorney that he could take and sell the property, and averred that advice was given that the debtor claimed the property as trustee under a certain will, and that the will never covered the property, but that she was the owner, and the sheriff had no right to demand a bond of indemnity, and such a bond would have been nugatory and idle, the replication was bad); Austin *v.* Parker, 13 Pick. (Mass.) 222 (holding that where in debt on a deputy sheriff's bond conditioned to keep a fair register of all warrants which came to his hands, and to furnish annually a true copy thereof to the sheriff, defendant pleaded performance generally, and plaintiff replied that he had never furnished him with a true copy of any register, but had furnished him with a false writing purporting to be a true copy of the register, the replication was bad, as it alleged argumentatively only that defendant did not keep a fair register).

81. Brown *v.* Hamlin, 23 Miss. 392 (holding that where, in an action for failing to make the money on an execution, the sheriff pleaded that at the time such execution was levied plaintiff controlled several other executions against the same defendants, that the property levied on was sold for a large sum, and that plaintiff was the purchaser and did not pay over the purchase-money to the sheriff but retained it to the amount of the execution mentioned in his declaration, a replication that plaintiff did not retain the purchase-money to the amount of the execution and on account of it was bad on demurrer); Sedam *v.* Taylor, 21 Fed. Cas. No. 12,608, 3 McLean 547 (holding that where, in an action for taking insufficient security on a replevin bond, defendants pleaded that after the taking and return of the replevin an execution was issued and placed in the hands of the officer, who, before the bringing of the suit levied on divers goods and chattels, lands, and tenements of the said sureties on the replevin bond to the full value of the judgment, interest, and costs, a replication that the lands and tenements levied on under the execution were subject to a prior lien of a judgment against the said sureties, on which execution was issued and the above land sold, the proceeds of which were insufficient to pay that judgment, was bad as not being a complete answer to the plea).

82. Austin *v.* Parker, 13 Pick. (Mass.) 222, holding that where, in debt on a deputy sheriff's bond conditioned to keep a fair register of all warrants, etc., that should come to his hands as deputy, and to furnish to the obligee a true copy thereof quarterly, defendant pleaded performance, and plaintiff replied that defendant had never furnished him with a true copy of any fair register, etc., but had fraudulently and deceitfully furnished him with a certain false and fictitious writing purporting to be truly abstracted from a fair register by him kept, the replication was bad for duplicity, as it assigned more than one breach, every failure to furnish a copy at the end of a quarter of a year being a distinct breach.

**Sufficiency of assignment of breach.**—Where, after a plea of performance, the replication assigned as a breach "that the said sheriff, during his term of office, to wit, on the first day of January, 1821, and on divers days between that day and the 25th of January, 1817, had and received, for and on account of the said Treasurers, and their successors in office, a large sum of money, to wit, the sum of $2,396.22 and that he did not pay the same over," it was held that this replication, although very general, was sufficient. Treasurers *v.* Oswald, 2 McMull. (S. C.) 145.

83. State Treasurers *v.* Wiggins, 1 McCord (S. C.) 568.

a right to require it.[84] Where the replication shows a breach of the condition of the bond, a rejoinder which does not legally avoid such breach is bad on demurrer;[85] but nevertheless plaintiff may put the facts in issue by surrejoinder instead of demurring.[86] Where the replication assigned as a breach the recovery of a judgment by the relator, the issue of an execution thereon, the constable's levy of the execution on the debtor's goods of a value exceeding the amount of the judgment, and his failure to sell, etc., a rejoinder which stated that after the levy, and before the return-day, the debtor executed a delivery bond with sufficient sureties, that the goods were not delivered, and that the constable returned the delivery bond and the execution before return-day, was good.[87]

**e. Demurrers.** The proper method of disputing the legal sufficiency of defendant's plea is by demurrer thereto,[88] and defects in a replication must be taken advantage of by special demurrer.[89]

**f. Amendments.** Under proper circumstances the court may allow an amendment of the complaint, declaration, or petition in an action upon the sheriff's official bond;[90] but a petition which shows no right to maintain the action cannot be made effective by amendment.[91]

**12. Issues, Proof, and Variance.**[92] Where the declaration in an action for a false return on a replevin writ averred that the property belonged to plaintiff, a plea that the sheriff did not make a false return did not put the right of property

84. State Treasurers *v.* Taylor, 2 Bailey (S. C.) 524.

85. Cooper *v.* Mowry, 16 Mass. 5 (holding that where, in an action on a deputy's bond, plaintiff showed that the deputy, having attached certain goods on mesne process, released the attachment before the expiration of thirty days after judgment, a rejoinder by defendants that no notice was given to the deputy of the suing out of the execution, nor any demand made on him for the goods within the thirty days, was insufficient, as St. (1784) c. 28, § 11, required that all goods and chattels attached should be kept during thirty days after judgment, in order that execution might be levied thereon); Stevens *v.* Boyce, 9 Johns. (N. Y.) 292 [*followed* in Andrus *v.* Waring, 20 Johns. (N. Y.) 153] (holding that where in an action by a sheriff on a bond of his deputy conditioned to save him harmless "touching and concerning the return and execution of all processes, writs," etc., by the deputy, plaintiff, in his replication, assigned as a breach that the deputy had arrested a certain person, and suffered him to go at large without sufficient bail, and that plaintiff had been attached for not bringing in the body, and had been obliged to pay a certain sum, etc., and defendant rejoined that he took bail, who was at the time good, sufficient, and responsible, this rejoinder was had on demurrer, as the bond of the deputy included all risks incident to the execution of process, even the continued responsibility of bail to the sheriff).

86. Andrus *v.* Waring, 20 Johns. (N. Y.) 153.

87. State *v.* Jones, 8 Blackf. (Ind.) 270, holding further that an averment in such rejoinder that the delivery bond was made to the execution plaintiffs, A, B, and C, by the name of A and B, was unobjectionable.

88. Robey *v.* State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405.

89. State Treasurers *v.* Wiggins, 1 McCord (S. C.) 568.

90. Albright *v.* Mills, 86 Ala. 324, 327, 5 So. 591 (holding that where a complaint in an action against the sheriff and the sureties on his official bond averred that the wrongful act was committed under color of official authority, it was proper to allow it to be amended by the addition of an allegation that such act was a breach of the bond, the court saying: "The form of action was not changed by the amendment from one *ex delicto* to one *ex contractu*"); Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504 (holding that where the complaint in an action on the bond was sufficient as to the officer, but defective as to his sureties because not showing that the acts complained of were done by the officer in his official capacity, it was proper to allow an amendment of the complaint to cure the defect); Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899 (holding that it was within the discretion of the court to allow a complaint averring that plaintiff was "the absolute owner" of certain property to be amended by striking out the word "absolute"); Beeson *v.* Com., 13 Serg. & R. (Pa.) 249 (holding that the declaration in a suit against the sureties in a sheriff's bond might be amended, although five years had elapsed from the date of the bond). See also Borlin *v.* Highberger, 104 Pa. St. 143; Rainey *v.* Com., 10 Watts (Pa.) 343.

91. Dunn *v.* Com., 14 Serg. & R. (Pa.) 431, holding that where an action on a sheriff's official bond, for an injury done to an individual by the sheriff's official misconduct, was brought in the name of the commonwealth alone, the court could not properly permit the declaration to be amended by the introduction of the name of the injured individual as a party, so as to make it a suit for his use.

92. See, generally, Pleading, 31 Cyc. 1.

in issue.[93] In an action by a sheriff on his deputy's bond for a false return for which a judgment has been rendered against the sheriff, the proper issue is one in which is involved only the falsity of that part of the return on which the judgment in the former action against the sheriff was based, and it is proper to exclude an issue involving the falsity of the return generally.[94] Matters of inducement set out in the complaint cannot be rejected as surplusage, but must be proved; [95] but a failure to prove allegations which are merely cumulative and not an essential part of the matters set out is not fatal.[96] The proof must be within the issues made by the pleadings,[97] and must conform to the pleadings of the party by whom it is adduced,[98] and tend to support their allegations.[99] In an action for an alleged trespass a general denial is sufficient to allow proof of justification,[1] but defendants

93. State *v.* Youmans, Smith (Ind.) 172.

94. Wasson *v.* Linster, 83 N. C. 575.

95. State *v.* Crow, 11 Ark. 642, holding that where in an action against a sheriff and his sureties for an abuse of an execution issued by the clerk of the circuit court upon a judgment of a justice of the peace filed in the clerk's office, plaintiff unnecessarily set out the judgment, and defendant pleaded *nul tiel record* of such judgment remaining in the justice's court, etc., plaintiff was bound to prove it substantially as alleged.

96. Hoitt *v.* Holcomb, 32 N. H. 185, holding that where in debt on bond given to plaintiff as sheriff to indemnify him against liability on account of his deputy, plaintiff to a plea of release replied: (1) Fraud, without specifying the particulars; (2) false and fraudulent representations that there had been no breach of the condition of the bond; and that the deputy was not in arrear, but had paid up promptly, so that it would be safe for the plaintiff to give the release, on which issues were taken, and all the allegations of the replications were proved, except that there was no evidence of a technical breach of the condition of the bond, this was sufficient to maintain the issue on the part of plaintiff on either of the replications.

97. See Harper *v.* Moffit, 11 Iowa 527, holding that where plaintiff charged the officer with negligently permitting property levied on to be stolen, the officer, having joined issue on this charge, might introduce proof that it was stolen from his bailee.

98. Chandler *v.* Riddle, 119 Ala. 507, 24 So. 498; Forward *v.* Marsh, 18 Ala. 645 (holding that an averment in a declaration on an officer's bond that an execution was returnable according to the statute was to be understood as meaning that the execution was returnable, on its face, to the term of the court to which, by law, it should have been made returnable, and if, when offered in evidence, it appeared returnable at a time different from that, it should be excluded on account of the variance); Neighbors *v.* State, 41 Md. 478 (holding that in an action on a sheriff's bond for failure to pay over attorney's fees placed in his hands for collection, defendants might show, under a plea that the sheriff did account with and pay over to the attorney all fees which he received or collected or which he ought to have collected, that the sheriff could not collect the fees by reason of the insolvency or the non-residence of the person from whom they were due, or that the fees had been paid, or were not due, but that evidence showing only an offer to pay over was not admissible under a plea that the sheriff did account with and pay over to the attorney the fees due). See also Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961, holding that in an action against a constable and the sureties on his official bond to recover property seized by him under an execution, and damages, a plea of justification under the writ authorized evidence that the alleged sale of the property seized, prior to the seizure, was constructively fraudulent because of a want of immediate delivery followed by a continued change of possession, or that the sale was actually fraudulent and designed to hinder the creditors of the seller, or that the sale was designed to operate merely as security for money advanced by the buyer.

99. White *v.* Com., 3 Dana (Ky.) 461 (holding that where, in a declaration on a constable's bond, plaintiff averred that the constable collected sixty-one dollars, which he failed to pay over, and offered in evidence the constable's receipt for notes to collect, for which the commonwealth's paper was to be received, the evidence did not support the allegation); Jones *v.* Churchill, 4 J. J. Marsh. (Ky.) 43 (holding that in an action against a sheriff and his sureties for his deputy's failure to pay over money certified on his return of an execution placed in his hands for service, a defense that the collection was made by the deputy while acting as deputy for the sheriff's predecessor, for which he gave a receipt to the execution defendant, was not supported by evidence that the deputy was deputy for the sheriff's predecessor, and a receipt executed by him for the amount specified to the execution defendant, where the date of the receipt and the expiration of such predecessor's term was not shown, and it was not made to appear that the deputy, when the receipt was given, had in his possession an execution delivered to such predecessor for service).

Where the petition fails to make out a case against the sureties the defect cannot be supplied by proof. Cole *v.* Crawford, 69 Tex. 124, 5 S. W. 646.

1. State *v.* Beckner, (Ind. 1891) 26 N. E. 553.

cannot show under a general denial that the court which issued a certain writ had no jurisdiction to issue it.[2] Defendants cannot avail themselves of a supposed vacancy in the sheriff's office because of his failure to give a new annual bond, without special plea or special notice of the neglect as a defense.[3] A variance between pleading and proof which is slight and not of a character to mislead the adverse party to his prejudice is immaterial,[4] but a variance by which the adverse party might be prejudiced is fatal.[5]

**13. EVIDENCE [6] — a. Presumptions.** The presumption that public officers have done their duty obtains in an action on the official bond of a sheriff or constable;[7] and the acceptance of a sheriff's bond by the court is presumed where it is found on the files with nothing accompanying it to show that it has been rejected, and the sheriff has executed the duties of his office.[8] Where the bond is duly approved its delivery is implied.[9] Where a constable was appointed for a specified term and "until his successor should be elected and qualified" and the complaint in an action on his bond shows that the process in connection with which the default occurred was placed in his hands after the end of his definite term and does not negative the election and qualification of a successor, it will be presumed that the constable had gone out of office when he received the process.[10] Where

2. New Orleans *v.* Waggaman, 31 La. Ann. 299.

3. People *v.* Dumpley, 2 Mich. N. P. 197.

4. *Arkansas.*— State *v.* Fort, 18 Ark. 202 (holding that where, in an action on a sheriff's bond for neglect to serve an execution, the declaration set forth with particularity a decree in chancery, and the execution thereon, stating that costs were decreed to plaintiff, but on a plea of *nul tiel record* it appeared that the decree did not give costs, the allegation was merely inducement to the breach, and the variance immaterial); Adams *v.* State, 14 Ark. 17 (holding that where an execution was set out by way of inducement, there was no substantial variance where the bill alleged that the execution was for a debt of six hundred and fifty-eight dollars and thirty-six cents, and the further sum of sixty-seven dollars and fifty cents damages, and that put in evidence was for seven hundred and twenty-five dollars and eighty-six cents, together with the sum of nine dollars and thirty cents costs).

*Illinois.*— Greenberg *v.* People, 125 Ill. App. 626 [*affirmed* in 225 Ill. 174, 80 N. E. 100], holding that where the declaration in an action upon a constable's bond averred that defendant "had been duly elected as a constable of the county of Cook," and the bond recited that he "had been duly elected a constable in and for the town of North Chicago in the county of Cook," there was no material variance.

*Indiana.*— Turner *v.* State, 5 Blackf. 254, holding a variance of five cents between the amount of a judgment as stated in the declaration and the amount stated in the execution offered in evidence was immaterial.

*Missouri.*— State *v.* Miserez, 64 Mo. 596; State *v.* Martin, 8 Mo. 102, holding that in an action against a sheriff on his official bond for failing to make a proper return on an execution, a misdescription of the date of the judgment in the declaration was not material.

*Nebraska.*— Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577.

*South Carolina.*— State *v.* Rosborough, 2 Rich. 241, holding that where, in an action on a sheriff's bond for an escape, the declaration, in setting out the names of plaintiffs in the capias ad satisfaciendum alleged the name of one of them to be George H. Kelsey, and in the capias ad satisfaciendum offered in evidence the middle letter, H, was omitted, the variance was immaterial.

*Tennessee.*— Michie *v.* Governor, 4 Humphr. 486.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 404.

5. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350, holding that where the complaint alleged a bond executed on August 14 by defendants, and the bond which was offered in evidence was executed on August 13 by defendants and another person the variance was fatal.

6. See, generally, EVIDENCE, 16 Cyc. 821.

7. State *v.* Harper, 120 Ind. 23, 22 N. E. 80.

**Seizure of property of stranger to writ.**— Where, under a writ of attachment directing a sheriff to levy on the property of defendant therein, the officer seizes property in possession of a stranger to the writ, such seizure is *prima facie* wrongful as against the person in possession, and in an action therefor by the latter against the officer on his bond no presumption obtains in favor of the officer that he did his duty in making the levy. State *v.* Hope, 88 Mo. 430.

8. McClure *v.* Colclough, 5 Ala. 65, 72, where the court said that this was sufficient "to raise a violent, if not a conclusive presumption" of acceptance. See also Heath *v.* Shrempp, 22 La. Ann. 167, holding that where, while a city was under military rule, the military authorities appointed a constable and permitted him to act, the presumption was that they approved and accepted his bond.

9. Ramsey County Com'rs *v.* Brisbin, 17 Minn. 451.

10. Urmston *v.* State, 73 Ind. 175.

the action is based upon the officer's failure to execute [11] or return [12] final process it will be presumed that plaintiff was damaged [13] in an amount equal to that for the collection of which the process was issued; [14] but there is no presumption of damage resulting from a failure to execute mesne process.[15] In an action for the proceeds of attached property which the sheriff was ordered to pay plaintiff, it will be presumed that the sheriff received the proceeds of the sale before the order was made.[16] Where a sheriff executes a writ of attachment on property, and does not affix such a value as would charge him with less than plaintiff's claim, he is presumed to have satisfied himself that he had sufficient, and is chargeable on that basis in an action on his official bond.[17] The failure of a plaintiff in a capias ad satisfaciendum to call on the sheriff at the return of the writ to produce the body of defendant in court does not furnish ground for a presumption, in an action on the sheriff's bond for an escape, that defendant was discharged from custody by plaintiff's consent.[18] Where defendants claim that an execution debtor had no property which could be levied on, and the latter testifies that he had no such property, his admission on cross-examination that he owned a particular article which might be exempt raises the presumption, in the absence of contrary proof, that it was exempt.[19] It has been held that where claims subject to a single justice's jurisdiction are placed in the hands of a constable for collection, and he gives an accountable receipt therefor, merely signing his name to the receipt, it will be presumed, in an action on his official bond, that such claims were committed to him as an officer, unless the contrary appear.[20]

**b. Burden of Proof.** It is incumbent upon plaintiff to establish by proof all matters which are essential to his right to recover and are not admitted by defendants.[21] So plaintiff must prove the execution of the bond,[22] its delivery,[23] acceptance,[24] and approval,[25] and that there has been a breach of its conditions.[26] Plaintiff must also prove that in the matter complained of the officer was acting in his official capacity; [27] and it rests upon plaintiff to overcome by proof the presumption

11. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420; Smith *v.* Tooke, 20 Tex. 750.

12. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420; Smith *v.* Tooke, 20 Tex. 750.

13. See *supra*, notes 11, 12.

14. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420.

15. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420.

16. Chandler *v.* Riddle, 119 Ala. 507, 24 So. 498.

17. Roth *v.* Duvall, 1 Ida. 149.

18. State *v.* Lawson, 2 Gill (Md.) 62.

19. Dailey *v.* State, 56 Miss. 475.

20. Dunton *v.* Doxey, 52 N. C. 222. See also McNeale *v.* Governor, 3 Gratt. (Va.) 299.

21. Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; State *v.* Bettick, 1 Baxt. (Tenn.) 209.

22. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

**The bond should be given in evidence.**— State *v.* Sorrels, 60 Ind. 381.

**Where the execution of the bond is not put in issue** or denied by a plea of *non est factum* supported by affidavit, it is not necessary for plaintiff to show the action of the county court directing in what sum the bond should be given, or that the court approved the sureties thereon. Poer *v.* Brown, 24 Tex. 34.

23. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

24. McClure *v.* Colclough, 5 Ala. 65; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

**An averment that the sheriff's bond has never been accepted or approved** by the proper officer is sufficient to put the obligees on proof of the acceptance. McClure *v.* Colclough, 5 Ala. 65.

25. McClure *v.* Colclough, 5 Ala. 65.

26. Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; Young *v.* State, 7 Gill & J. (Md.) 253; Johnson *v.* Haynes, 37 Hun (N. Y.) 303.

**Even though the allegation of the breach is in the negative,** as where there is a failure on the officer's part to do his duty, the burden of proof rests on plaintiff. Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624; People *v.* Hayes, 63 Ill. App. 427 (failure to return execution); Taylor *v.* Galbraith, 65 N. C. 409; Everhart *v.* O'Bannon, 1 Tex. App. Civ. Cas. § 1288. *Contra*, State *v.* Schar, 50 Mo. 393, holding that in an action for failure to return an execution, it is sufficient for plaintiff to show that the execution was delivered to the officer, and the burden of proof then lies on the latter to show that he made due return of it.

27. Robertson *v.* Glenn, 3 Baxt. (Tenn.) 164.

**To authorize a recovery for a wrongful seizure** under execution, the execution must be produced in evidence. Com. *v.* Butzer, 2 Lack. Leg. N. (Pa.) 202.

that the officer has done his duty.[28] But it has been held that in an action on the official bond of a sheriff plaintiff is not obliged to prove that the sheriff was commissioned after the delivery of his bond.[29] Where in a suit on a constable's bond it appears that the constable was appointed by the county court, which has power to appoint only under certain circumstances, it is incumbent on plaintiff to show that such circumstances existed.[30] Where the action is based upon a default with respect to an execution plaintiff must prove the existence of the judgment,[31] and execution,[32] and a delivery of the execution to the officer.[33] In an action for failure to pay over money, plaintiff must prove the collection of the money by the officer,[34] a demand upon him therefor by plaintiff,[35] and a failure by the officer to pay over the money,[36] or such a misapplication of the money received or such misconduct on the part of the officer as establishes unfaithfulness in accounting with plaintiff and paying over to him what he was entitled to receive.[37] The burden is upon plaintiff to show that he has been damaged by reason of the matters complained of,[38] unless the default is such that the law presumes damage,[39] in which case the burden is upon defendants to show that plaintiff was not damaged,[40] or that the extent of the injury is less than that which the law presumes.[41] In an action on a constable's bond for failure to collect claims put into his hands for collection, it is not necessary for plaintiff to show in the first instance the validity of the claims.[42] It has been held that, even though leave of court to sue is necessary,[43] it is not essential to a recovery that plaintiff give any proof of such leave obtained.[44] Where defendants seek to justify the act or omission on which the action is based, the burden is upon them to establish the facts on which they rely;[45] and, where the sureties rely on the defense that the default complained of

28. State *v.* Harper, 120 Ind. 23, 22 N. E. 80, holding that where plaintiff attempted to hold a sheriff liable on his official bond for failure to levy an execution on exempt property, the burden was on plaintiff to show that the judgment on which the execution issued was rendered in an action sounding in tort.

29. Brownfield *v.* Com., 13 Serg. & R. (Pa.) 236, holding that as a defense on the ground that the sheriff was not commissioned arose under a proviso of the statute it was incumbent on defendant to plead it if he relied upon it.

30. Sumney *v.* Magness, 26 N. C. 217.

31. Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815 (holding that plaintiff must prove a valid judgment); State *v.* Miller, 48 Mo. 251 (holding that in an action for failure to levy an execution, the burden is on plaintiff to prove the existence but not the regularity of the judgment).

32. Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815.

33. Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815; Dubreuil *v.* State, 10 Mo. 435.

34. Taylor *v.* Pulaski County, 4 Ark. 596; Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815; Virginia *v.* Wise, 28 Fed. Cas. No. 16,972, 1 Cranch C. C. 142.

35. Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815; White *v.* Miller, 20 N. C. 50.

36. Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815.

37. White *v.* Miller, 20 N. C. 50.

38. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346; Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930, 3 L. R. A. N. S. 420; Johnson *v.* Haynes, 37 Hun (N. Y.) 303; Everhart *v.* O'Bannon, 1 Tex. App. Civ. Cas. § 1288.

39. See *supra*, X, H, 13, a.

40. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930; Ellis *v.* Blanks, (Tex. Civ. App. 1894) 25 S. W. 309.

41. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. 930.

42. Burtles *v.* State, 4 Md. 273, holding that the constable's receipt for the claims is *prima facie* evidence of their validity and evidence for the purpose of showing their invalidity must be adduced by defendants.

43. See *supra*, X, H, 4, h.

44. New York *v.* Brett, 2 Hilt. (N. Y.) 560, holding, however, that if this has been omitted, defendant may move to set aside the proceedings.

45. *Alabama.*— Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749, holding that in an action on a constable's bond for failure to redeliver property levied on, as alleged, under a writ, the burden was on him to sustain his defense that he took it as agent under a chattel mortgage.

*Iowa.*— Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788, 51 Iowa 605, 2 N. W. 420, holding that where a sheriff holding goods in his possession under an attachment released them on a third person's claim of ownership, the burden was on him to establish that the attached property did not belong to the execution defendant.

*Mississippi.*— Dailey *v.* State, 56 Miss. 475, holding that where a default in the return of execution had been established in an action on a sheriff's official bond, the burden of proof was on defendants to show the insolvency of the execution debtors.

is not covered by the bond, they assume the burden of proof.[46] So also where defendants deny that the bond is binding upon them, by reason of some illegality, the burden of proof is upon them.[47] Where the sheriff has failed to levy upon property in the possession of an execution debtor, the burden is on defendants to show that the property was not subject to the execution,[48] and the same is true where the sheriff has refused to levy on certain property upon being offered indemnity.[49] Where the action is for money collected by the sheriff in his official capacity, the burden of proof is on defendants to show what the sheriff has done with the money;[50] and where in a suit on a constable's bond for his failure to pay over the money collected on a note left with him for collection, and to return the note if not collected, it appeared that six years had elapsed since the note was left with the constable, it was held that it was to be presumed that the constable had received the money, and that the surety was bound to show that the constable had paid over the money collected or had returned the note.[51] Where the officer's return shows a levy of execution on property sufficient to satisfy it the burden is on him and his sureties to show a satisfactory disposition of the property.[52] Where in an action for failure to levy on certain property defendants have denied that the execution debtor owned the property and also alleged ownership of other persons as to particular articles, the latter allegations need not be proved.[53] It has been held that in an action on a sheriff's bond for failure to pay over taxes, the sheriff is chargeable with the amount of the tax list, and has the burden of showing a discharge of any part thereof.[54]

**c. Admissibility.** Subject to the general rules of evidence,[55] any evidence which bears upon the right to a recovery, and properly tends to establish the contentions of the party by whom it is offered, or to refute the contentions of the adverse party,[56] or to furnish a means of estimating correctly the injury which

*Pennsylvania.*— Pennsylvania Bank *v.* Potius, 10 Watts 148.

*Virginia.*— Sage *v.* Dickinson, 33 Gratt. 361, holding that the burden was on defendants to establish that property released from levy by the sheriff was not liable to levy.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 405.

46. Faulkner *v.* State, 9 Ark. 14, holding that where, in an action on a constable's bond for his failure to pay over moneys received on execution, the sureties admitted that the constable received the money, but alleged that he received it before the date of the bond, the burden was on them to prove that fact.

47. Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624.

48. Governor *v.* Campbell, 17 Ala. 566; Smith *v.* Banks, 60 Ga. 642, holding that where defendants sought to justify the sheriff's refusal to levy on property on the ground that the execution defendant had taken a homestead therein, they had the burden of proving that such homestead had been legally set apart and allowed by the proper court.

49. Klemm *v.* Bishop, 56 Ill. App. 613, holding that the burden was on defendants to prove that the property sought to be levied on was not the property of defendant in execution.

50. Hardee *v.* Dunn, 13 La. Ann. 161.

51. Hubbard *v.* Wall, 30 N. C. 11.

52. Mosely *v.* Hamilton, 4 Baxt. (Tenn.) 434.

53. Crosby *v.* Hungerford, 59 Iowa 712, 12 N. W. 582.

54. Stokes County *v.* Wall, 117 N. C. 377, 23 S. E. 358.

55. See EVIDENCE, 16 Cyc. 821.

56. *Alabama.*— Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350 (holding that in an action for a wrongful levy on property subject to a landlord's lien in favor of plaintiff, evidence that the constable was indemnified was admissible to show notice of the lien); Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346 (holding that under Code, § 273, requiring plaintiff, before he could recover, to show that he had been injured by the act complained of, an affidavit on attachment was admissible in an action on a constable's bond for sale of exempt property to show that the attachment was in fact issued for the enforcement of a valid and subsisting landlord's lien, and that the claim of exemption was frivolous); Craven *v.* Higginbotham, 83 Ala. 429, 3 So. 777 (holding that in an action for a false return parol evidence was admissible to establish the falsity of the return); Abbott *v.* Gillespy, 75 Ala. 180 (holding that, in an action for failure of the sheriff to enforce an execution, evidence of a filed and properly recorded claim of exemption, made by the execution debtor before the levy was made, and covering all the property found in his possession, was admissible).

*Georgia.*— Robinson *v.* Towns, 30 Ga. 818, holding that judgments on rules against a sheriff were admissible in evidence against him and his sureties in an action on his

plaintiff has suffered because of the default or misconduct complained of and the

bond for failure to pay over moneys so adjudged against him.

*Idaho.*— Robinson *v.* Kinney, 3 Ida. 479, 31 Pac. 815, holding that the decision of a district judge in another proceeding, which was expressly based upon a finding of the judge that the sheriff had received and retained certain money, was admissible in an action in the sheriff's bond to show the receipt of such money.

*Illinois.*— Magner *v.* Knowles, 67 Ill. 325, holding that in an action for the officer's failure to pay over money collected by him on execution, his receipt for the money, and admissions that he collected it, were competent evidence against him and his sureties.

*Indiana.*— Kackley *v.* State, 91 Ind. 437 (holding that where personalty encumbered by a mortgage was sold by a sheriff on an execution on a subsequent lien, and possession was delivered to the purchaser without requiring him to comply with the conditions of the mortgage, and in an action on the sheriff's bond defendants insisted that such mortgage was executed without consideration, plaintiff might show that the mortgage was given him to secure him in part as the mortgagor's surety and in part for money loaned, and might read in evidence notes made by him in discharge of such obligation, although not paid by him until after the commencement of the suit); State *v.* Hart, 12 Ind. 424 (holding that where the complaint set out an execution good on its face, and alleged a failure to serve it, the execution should have been admitted in evidence).

*Kansas.*— Ferguson *v.* Tutt, 8 Kan. 370, holding that parol evidence was admissible to show the contents of an order of sale on foreclosure, the record of which had been lost.

*Maryland.*— State *v.* Keech, 16 Md. 512 (holding that in an action on a constable's bond the docket entries and the evidence of the justice who rendered the judgments, showing that the judgments had been superseded in time, were admissible in evidence to exonerate the constable, even though the supersedeas might have been invalid); Naylor *v.* Simmes, 4 Gill & J. 273 (holding that evidence of a general custom of a sheriff to require his deputies to deliver all process to him for indorsement of returns thereon was competent in an action by the sheriff on the official bond of one of the deputies on the issue of the truth or falsity of a return).

*Mississippi.*— Carlisle *v.* Silver Creek, 85 Miss. 380, 37 So. 1015 (holding that in the absence of a plea denying the execution of the bond, the record containing a copy of the official bond of a village marshal was admissible in evidence in an action on the bond, and that it was proper to show by defendant, when a witness in his own behalf, that he executed the bond as village marshal); McIntyre *v.* Weathershy, 1 How. 331 (holding that in an action by an ex-sheriff on his successor's bond, for the fees collected by the latter on executions levied by plaintiff, the executions under which such fees were collected were admissible in evidence for plaintiff, although the fee bills of the executions levied by plaintiff were not attached).

*New York.*— Conner *v.* Keese, 32 Hun 98, holding that in an action on the bond of a deputy sheriff for a false return, evidence that the sheriff had told him to obey orders of the under-sheriff, and that defendant's conduct was in obedience to orders from such under-sheriff was admissible.

*North Carolina.*— Wasson *v.* Linster, 83 N. C. 575 (holding that in an action by a sheriff on the bond of his deputy, based on a judgment against the sheriff for a false return of the deputy to a process, reciting that defendant was not to be found in his county, evidence that plaintiff had had opportunity to serve the process while in his hands, and before he had placed it in the hands of defendant, was admissible either as original evidence or in rebuttal of plaintiff's testimony, for if the return was false by no act of defendant after the process came to him, but by the prior neglect of the sheriff, there would be no ground of recovery); McIntosh *v.* Bruce, 31 N. C. 511; State *v.* McGee, 29 N. C. 377 [the last two cases *explaining* McCall *v.* Fullenwider, 26 N. C. 364] (the last two cases holding that in an action on a sheriff's bond for a failure to collect a claim put in the hands of his deputy for collection, the receipt of the deputy given for the claim was, under the act of 1844, admissible in evidence against both the sheriff and his sureties).

*South Carolina.*— State *v.* Yougue, 9 Rich. 443 (holding that in an action on behalf of an execution debtor to recover the difference between the price bid at the first sale and that bid at a resale of lands, the resale not being within the time prescribed by law, evidence that such resale was postponed at the instance of the debtor himself, or of one to whom he had previously conveyed the land, was admissible); State Treasurers *v.* Bates, 2 Bailey 362 (holding that confessions of judgment, and oral admissions by a sheriff of official defaults, were admissible, being *prima facie* evidence against his sureties, although made after he was out of office; but the sureties might show that they were founded on mistake or fraud); Treasury Com'rs *v.* Allen, 2 Mill 88 (holding that in an action for not paying over moneys that were levied at plaintiff's suit, parol evidence was admissible in behalf of the sheriff to show that plaintiff directed him to apply money paid on the execution in payment of an execution in the sheriff's hands against plaintiff).

*Virginia.*— Beasley *v.* Robinson, 24 Gratt. 325 (holding that in an action against a sheriff and the sureties on his bond for moneys directed by the court to be paid plaintiff by the sheriff, where the sheriff's bond had been excluded from evidence on ac-

amount of damages which should be awarded to him if he succeeds[57] is admissible; but evidence which is incompetent,[58] irrelevant[59] or immaterial,[60] tends only to arouse the sympathies of the jury,[61] or is for any other reason objectionable under the general rules of evidence,[62] should be excluded. An admission of an officer

count of a variance between it and plaintiff's pleadings, the record of the court setting out the qualification of defendant as sheriff, and the names of his sureties, was admissible to show the existence of the bond and the identity of the signers); Governor *v.* Roach, 9 Gratt. 13 (holding that where the declaration in an action on a constable's bond set out specifically the claims for which the constable gave his receipt, and referred to it, the receipt was admissible in evidence as to those claims accurately described, although there was error in the description of one of them).

*United States.*— Virginia *v.* Wise, 28 Fed. Cas. No. 16,972, 1 Cranch C. C. 142, holding that, in debt on a sheriff's bond a return produced by plaintiff as evidence of the receipt of money must also be admitted as evidence of its payment to plaintiff, where it is so stated therein.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 406.

57. State *v.* Stone, 111 Mo. App. 364, 85 S. W. 950 (holding that in an action for a wrongful levy on certain lumber it was competent to show what was the market value of the lumber levied on and similar lumber at the time and place of the levy); Campbell *v.* Pope, 4 Fed. Cas. No. 2,365*a*, 1 Hempst. 271.

58. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346 (holding, in an action on a constable's bond for selling exempt property levied on under attachment, that the affidavit on which the attachment issued was not admissible to show that the nature of the debt was such as authorized the constable to disregard the claim for exemption, as it was not sufficiently described in the attachment to authorize him to look to it); State *v.* Easterling, 1 Rich. (S. C.) 310 (holding that in an action against a sheriff's sureties for money collected by the sheriff, and claimed to be applicable to plaintiff's judgments, a statement in writing by the attorney of plaintiff in the original action, who was dead, that the money was applicable to plaintiff's judgment, was inadmissible as evidence against the sureties).

59. Albie *v.* Jones, 82 Ark. 414, 102 S. W. 222, holding that in an action by the beneficiary and trustee in a deed of trust on the bond of an officer for having seized the property under an attachment against the mortgagor issued by a justice of the peace, it was proper to exclude the record of a suit in chancery and decree therein instituted against the mortgagor, the trustee, and the beneficiary by all the plaintiffs in the attachment case in which the deed of trust was adjudged to be valid as against the mortgagor's creditors and adjudging the judgment of the justice to be void, such proceedings having been subsequent to the seizure and sale, as the question was confined to the officer's justification in selling the property, which question was determinable according to the facts existing at the time of the seizure.

60. Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246; McGehee *v.* Gewin, 25 Ala. 176 (holding that in an action by a sheriff on the official bond of his deputy, who had left the state, for failure to pay over money on a fieri facias, evidence of the deputy's ability to pay at the time of his leaving the state and afterward was not admissible); McGowan *v.* Cassidy, 3 A. K. Marsh. (Ky.) 359 (holding that in an action on the bond of a constable for failure to return an execution and for the non-payment of money collected, evidence of a settlement between such constable and his predecessor, and the payment over to such predecessor of the money collected, was not admissible); Springett *v.* Colerick, 67 Mich. 362, 34 N. W. 683 (holding that in an action to recover damages for failure to perfect the levy of an attachment against certain real estate, evidence on behalf of defendants to show that, at the time the attachment was issued, the property was subject to a mortgage, and that proceedings had since been taken whereby the mortgage was foreclosed and the property sold, was inadmissible to excuse the default of the sheriff, as plaintiff was entitled to attach the equity of redemption); Karch *v.* Com., 3 Pa. St. 269 (holding that in an action for the escape of a defendant sentenced upon a conviction for fornication and bastardy, evidence of the insolvency of such defendant at the time of his sentence was inadmissible).

61. Rasco *v.* Jefferson, 142 Ala. 705, 38 So. 246, holding that in an action against a constable for an alleged wrongful levy, testimony of plaintiff that she told the constable to look at her twelve babies was inadmissible.

62. Sam Yuen *v.* McMann, 99 Cal. 497, 34 Pac. 80 (holding that in an action for detention, after the giving of an appeal and stay bond, of property levied on under execution, a letter of the sheriff offering to return part only of the property was properly excluded); Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420 (holding that since an agreement by an attaching party to give the sheriff a bond in excess of the amount necessary to indemnify him in an attachment proceeding was not enforceable, the sheriff could not give evidence thereof in an action against him on his official bond for releasing the entire levy without authority); Dunn *v.* Com., 14 Serg. & R. (Pa.) 431 (holding that in an action on the official bond of the sheriff a certified copy of the bond was not admissible, unless it distinctly appeared that the original was taken by the recorder as required by law); Euless *v.* Russell, (Tex. Civ. App. 1895) 34

may be evidence against himself in an action on his bond,[63] although it is not admissible against his sureties.[64] A sheriff's return is admissible for him in an action on his bond arising out of the matter to which the return relates.[65] In an action on a constable's official bond for failure to collect and pay over claims, a receipt of the constable for a claim placed in his hands is admissible to prove the fact that such claim came to his hands, although the receipt does not purport on its face to have been given in his official capacity.[66]

**d. Weight and Sufficiency** — (i) *In General.* The general rules by which the weight and sufficiency of evidence is determined [67] govern in respect to the effect of the evidence adduced in an action on the official bond of a sheriff or constable to establish or refute the existence [68] or execution [69] of the bond sued on, the service of summons in a particular action,[70] the existence of a judgment to support certain process,[71] the issuance of a valid execution,[72] the exemption of an execution debtor from arrest,[73] the amount of a debt or its being due,[74] the validity of claims placed in an officer's hands for collection,[75] the availability

S. W. 176 (holding that in an action against a sheriff and his sureties for the conversion of goods, the pleadings and an attachment in actions to which plaintiff was not a party were not admissible).

63. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346.

64. Bryan *v.* Kelly, 85 Ala. 569, 574, 5 So. 346 (so holding as to an admission of the officer that he had received a claim of exemption, the court saying: "It would be the better practice, to limit the operation of the evidence when received; but, this not being done, a co-defendant's only remedy is by a charge, limiting and confining its effect and operation to the defendant making the admission"); McDowell *v.* Burwell, 4 Rand. (Va.) 317. But *compare* Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680, holding that admissions of the sheriff are *prima facie* evidence against the sureties on his official bond unless made fraudulently, or through mistake, or in relation to matters not covered by the bond.

**General rule as to admissibility against surety of principal's admission** see PRINCIPAL AND SURETY, 32 Cyc. 137.

65. State *v.* Sharp, 2 Sneed (Tenn.) 615, so holding as to a return that a failure to levy on property was due to disputed ownership.

**Effect of amendment of return.**— In an action to charge a sheriff and his sureties for his failure to pay over money collected on an execution, the fact that the sheriff amended his return on the execution after a motion had been made to amerce him affects only the credibility of the return, and not its competency. Thomas *v.* Browder, 33 Tex. 783.

66. McNeale *v.* Governor, 3 Gratt. (Va.) 286. *Contra*, Smith *v.* Governor, 2 Rob. (Va.) 229.

67. See EVIDENCE, 17 Cyc. 753.

68. Treasurers *v.* Witsall, 1 Speers (S. C.) 220, holding that in an action on a sheriff's bond a certified copy produced and given in evidence under an act of the legislature making a copy evidence is enough to satisfy profert of it in the declaration.

69. Iberville Police Jury *v.* Sherburne, 17 La. 342, holding that proof hy one witness who swore to the signatures was sufficient, as Code, art. 2257, requiring contracts for sums exceeding five hundred dollars to be proved hy more than one witness, related exclusively to unwritten contracts.

70. Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686, 126 Am. St. Rep. 963, holding that in an action on a sheriff's bond for permitting an attached steamship to he taken from his custody a recital of the judgment in the attachment proceeding that personal service of summons was made upon the attachment defendant was *prima facie* evidence of the fact, and sufficient to show that the judgment in the attachment proceeding was based upon due service of process.

71. Hill *v.* Fitzpatrick, 6 Ala. 314, holding that a recital in an execution of the judgment on which it issued is *prima facie* evidence thereof.

72. Kantzler *v.* People, 11 Ill. App. 610, holding that in an action for failure to make the money on an execution, evidence that a paper purporting to be an execution was issued, and testimony of the justice that, if he issued an execution, it must have been in the usual form, and, if in the usual form, it must have been a valid execution, without any statement of its contents, was insufficient to show a valid execution.

73. State *v.* Hamilton, 9 Mo. 794, holding that where a sheriff to whom a capias was issued returned, "This execution is returned not satisfied, there being no property of Jesse B. Dale found in Boone county whereon to levy and make the same, and the said Dale having taken the benefit of the bankrupt law," such return did not, in an action for not arresting the debtor defendant, constitute *prima facie* evidence that such dehtor was exempt from arrest.

74. Hutchins *v.* Holcombe, 24 N. C. 211, holding that a constable's receipt for "an account" to collect was not even *prima facie* evidence that the amount of the account, or any part of it, was really due.

75. Burtles *v.* State, 4 Md. 273, holding that, although it did not appear from the receipt of a constahle, given for claims put in his hands for collection, that said claims had been proved under the statute for the probate of claims and accounts, yet the re-

or otherwise of property on which to levy,[76] the receipt of money by the officer,[77] the value of a particular party's interest in particular property,[78] the unlawfulness of a seizure of property,[79] a settlement between a sheriff and his deputy,[80] an officer's receipt of notice of a landlord's claim for rent,[81] and in general any matter bearing on the right of plaintiff to recover,[82] and the amount for which defendants

ceipt was *prima facie* evidence of the validity of the claims in an action on the constable's bond.

76. Dunphy *v.* Whipple, 25 Mich. 10, holding that in an action for failure to return an execution, a showing that the judgment debtor had transferred the lands levied on prior to the levy did not make out the defense that defendant had no property from which the money could be made, where the lands, notwithstanding this transfer, were sold on the execution for the amount of the debt.

77. Treasurer *v.* McGuire, Harp. (S. C.) 474, holding that the entry of the word "satisfied," by the sheriff, on an execution, was sufficient evidence, in an action on his official bond for failure to pay over the money, of his having received the money which it commanded to be made.

Under statute in Virginia it has been held that in a suit on a constable's official bond, a receipt purporting on its face to be given by the constable in his official capacity for claims placed in his hands for collection, six months having elapsed from the date thereof to the commencement of the action, is *prima facie* evidence of the receipt of the money by the constable, where the claim was placed in his hands to be warranted for, and was such as might have been recovered by warrant. McNeale *v.* Governor, 3 Gratt. 286 (holding further that where the receipt given by a constable for claims placed in his hands to be collected was in due form, and is signed by him, with initials appended to his name, which stand for constable of his county, this sufficiently indicated the official character of the receipt to render it admissible in evidence in an action against him on his official bond); Smith *v.* Governor, 2 Rob. 229.

78. Phillips *v.* Eggert, 133 Wis. 318, 113 N. W. 686, 126 Am. St. Rep. 963, holding that in an action on a sheriff's bond for permitting an attached steamship to be taken from his custody, testimony that witness was acquainted with the value of such property and had examined the ship, and in his judgment it was worth a specified sum, was sufficient proof of the value of attachment defendant's interest, in the absence of conflicting proof.

79. People *v.* Crowe, 130 Ill. App. 349, holding that an unlawful seizure was conclusively established, where it appeared that after the taking by the sheriff a trial of the right of property was had pursuant to the method prescribed by statute and a judgment rendered against the sheriff.

80. Graves *v.* Wood, 3 B. Mon. (Ky.) 34 (holding that where a sheriff filed his bill against his deputy and the latter's surety in a bond of indemnity, alleging the loss of the bond, and the deputy denied that he owed anything, and exhibited the bond in his answer, the possession of such bond, unaccounted for, was insufficient to prove full payment and settlement between the sheriff and the deputy as against proof that at the last settlement between the parties there was a balance due from the deputy, and the bond was not given up); Austin *v.* Moore, 7 Metc. (Mass.) 116 (holding that where a deputy sheriff gave to the sheriff a bond conditioned to render an account of writs and processes served by him, with the fees for service, once in six months, and in a suit on this bond twenty-nine years after its execution it was proved that the sheriff omitted for eleven years after his office terminated to call on the deputy for any account, and that there was no communication between them on the subject of such account, although the sheriff was embarrassed in his pecuniary affairs during those eleven years, and was, while in office, desirous of obtaining from his deputies what was accruing to him as fast as it was due, and sometimes received money from them in advance, this evidence would not warrant a jury in finding either payment or accord and satisfaction, so as to bar the action on the bond); Moore *v.* Thompson, 9 N. H. 541 (holding that in an action by a sheriff against his deputy on his bond to render a true account of services made by him for each six months, and to pay plaintiff his proportion of fees, evidence that plaintiff declared it to be his practice to make his deputies settle promptly, and of his sending a printed circular to other deputies to account at the end of each six months, was not sufficient to show an accounting or payment by defendant, the breach alleged in the bond being a neglect to account for the six months previous to his removal as deputy).

81. Borlin *v.* Com., 110 Pa. St. 454, 1 Atl. 404, holding that a landlord's notice to the sheriff of a claim for one year's rent out of the proceeds of the sale attached to the sheriff's return was sufficient evidence to show its receipt by the sheriff in an action against him on his official bond, although no mention was made of the paper in the return itself.

82. Evidence sufficient to warrant recovery see the following cases:

*Arkansas.*—Alexander *v.* State, 42 Ark. 41.

*Idaho.*— Bingham County *v.* Fidelity, etc., Co., 13 Ida. 34, 88 Pac. 829.

*Maryland.*— Fowler *v.* State, 99 Md. 594, 58 Atl. 444.

*Missouri.*— State *v.* Frazier, 89 Mo. 592, 1 S. W. 739; State *v.* Cobb, 64 Mo. 586; State *v.* Grupe, 36 Mo. 365; State *v.* Dickmann, 124 Mo. App. 653, 102 S. W. 44.

*Nebraska.*— Barton *v.* Shull, 62 Nebr. 570,

should be held liable because of the official misconduct or default of which plaintiff complains.[83]

(II) *Conclusiveness of Officer's Return.*[84] In an action on the official bond of a sheriff or constable the officer's return on process is conclusive as against the officer and his sureties,[85] and *prima facie* evidence in their favor,[86] but is subject to be impeached or contradicted by plaintiff.[87]

**14. Trial[88] — a. In General.** In an action on a sheriff's bond, on demurrer to the declaration, and judgment for plaintiff, the order for the jury should be to inquire into the truth of the breaches, as well as to assess damages, and the jury should be so sworn.[89] In an action for the loss of property seized under legal process, plaintiff may read the record of the case in which the writ was issued, including the writ itself without reading the return of the officer.[90] Where, in an action on a sheriff's bond for an alleged wrongful levy, defendant denied that claimant owned the property, defendant was entitled to cross-examine claimant's agent, alleged to have purchased the property from the judgment debtor, as to the price paid, and as to what the property was actually worth at the time.[91] Where the court has ordered several actions against a sheriff and his sureties consolidated, and a creditor has submitted his claim to the jury, another creditor has not the right to offer evidence to lessen the amount of such

87 N. W. 322; Russell *v.* Gillespie, 38 Nebr. 461, 56 N. W. 981.

*North Carolina.*— Wilson *v.* Coffield, 27 N. C. 513.

*South Carolina.*— State *v.* Easterling, 1 Rich. 310.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 407.

**Evidence not sufficient to warrant recovery** see the following cases:

*Alabama.*— Kelly *v.* Governor, 14 Ala. 541.

*Georgia.*— Keaton *v.* Governor, 17 Ga 228.

*Illinois.*— Putnam *v.* Traeger, 66 Ill. 89.

*Iowa.*— Musser *v.* Maynard, 55 Iowa 197, 6 N. W. 55, 7 N. W. 500.

*Pennsylvania.*— Com. *v.* Rooney, 167 Pa. St. 244, 31 Atl. 562.

*Texas.*— Goodale *v.* Douglas, 5 Tex. Civ. App. 695, 24 S. W. 966; Everhart *v.* O'Bannon, 1 Tex. App. Civ. Cas. § 1288.

*Canada.*— Hall *v.* Hamilton, (Hil. T. 4 Vict.) 3 Ont. Case Law Dig. 6402.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 407.

**83.** State *v.* Langdon, 57 Mo. 350 (holding that Wagner St. p. 845, § 23, requiring the judgment in an action on a constable's bond to be for "the amount ascertained to be due," etc., and one hundred per cent per annum, did not render the execution conclusive evidence as to the amount); Governor *v.* Sutton, 20 N. C. 622 (holding that where, in an action on a constable's bond, in which the breaches assigned were a failure to pay over money collected by the officer and a failure to collect sundry notes and accounts placed in his hands for collection, defendant paid a certain sum into court, according to a list of notes and accounts which he had prepared, such list, although *prima facie* evidence against him of all that it admitted, did not preclude him or his sureties from showing that there were mistakes in it); Montgomery County Ct. *v.* Chenault, 47 S. W. 457, 20 Ky. L. Rep. 704 (holding that receipts from the county judge presented by the sheriff in his settlement with the county court were properly rejected as credits in the absence of any showing as to what the amounts were paid for, the court having the right to conclude that they covered other vouchers already credited).

**84. Conclusiveness of return as against officer** see *supra*, VII, K, 4, b.

**85.** *Colorado.*—Breckenridge Mercantile Co. *v.* Bailif, 16 Colo. App. 554, 66 Pac. 1079; Bishop *v.* Poundstone, 11 Colo. App. 73, 52 Pac. 222.

*Illinois.*— Major *v.* People, 40 Ill. App. 323.

*Indiana.*— State *v.* Ruff, 6 Ind. App. 38, 33 N. E. 124.

*Kansas.*— Studebaker *v.* Johnson, 41 Kan. 326, 21 Pac. 271, 13 Am. St. Rep. 287 [*following* Thompson *v.* St. Joseph, etc., Loan, etc., Assoc., 23 Kan. 209; Ferguson *v.* Tutt, 8 Kan. 370].

*North Carolina.*— Walters *v.* Moore, 90 N. C. 41; State Bank *v.* Twitty, 12 N. C. 153.

*Pennsylvania.*— Brownfield *v.* Com., 13 Serg. & R. 265.

*Canada.*— Shuter *v.* Graham, 2 U. C. Q. B. 164; Phelps *v.* McDonell, 6 U. C. Q. B. O. S. 258.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 408.

**86.** Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; State *v.* Lawson, 2 Gill (Md.) 62; State *v.* Steel, 11 Mo. 553; Everhart *v.* O'Bannon, 1 Tex. App. Civ. Cas. § 1288.

**87.** Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749; Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768; State *v.* Lawson, 2 Gill (Md.) 62.

**88.** See, generally, Trial.

**89.** Adams *v.* State, 6 Ark. 497.

**90.** State *v.* Lawson, 8 Ark. 380, 47 Am. Dec. 728.

**91.** State *v.* Stone, 111 Mo. App. 364, 85 S. W. 950.

claim;[92] but, when a motion is made to distribute the money, an issue may be made to try the question of fraud in any of the claims.[93] Where in an action against a sheriff and the sureties on his bond on account of the failure of a deputy sheriff to levy and return an execution, after all the evidence was introduced the sheriff and the deputy asked to be allowed to withdraw the execution and make a return thereon, a copy of the same being left, it being then in evidence, stating that, as soon as it was returned to the county clerk's office, from whence it was issued, they would offer said return in evidence, it was held proper to refuse the application.[94]

**b. Questions For Jury.** Questions of fact arising upon the trial are properly left to the determination of the jury;[95] and where, in debt on a sheriff's official bond performance is pleaded, and plaintiff replies that defendant collected a certain sum, and failed to pay it over pursuant to the order of the court, and the jury has found for plaintiff on the issue of fact, the condition of the bond should be submitted to the jury to assess damages thereon.[96]

**c. Instructions.** It is incumbent upon the court to instruct the jury as to the law governing the case as presented by the pleadings and evidence,[97] and the questions which are presented for their determination.[98]

92. State Treasurers *v.* Bates, 1 Hill (S. C.) 409.

93. State Treasurers *v.* Bates, 1 Hill (S. C.) 409.

94. Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

95. *Alabama.*— Governor *v.* Daily, 14 Ala. 469, holding that whether certain circumstances amounted to a delivery of property was a question of fact.

*Maryland.*— Bruce *v.* State, 11 Gill & J. 382, holding that where a writ was delivered to a sheriff on the day on which his bond was renewed, the precise time of day when the new bond became available and whether the writ came to the sheriff's hands before or after that period were questions for the jury.

*Pennsylvania.*— Snively *v.* Com., 40 Pa. St. 75, holding that whether money was lost through the negligence of the sheriff was a question for the jury.

*Texas.*— Jacobs, etc., Co. *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386, holding that where, in an action for taking a claimant's bond with only one surety thereon instead of two as required by statute, defendant alleged that the bond, on its acceptance by him, contained two sureties, and the evidence was in conflict as to this issue, the question was one for the jury, and it was properly submitted, although the bond, as produced at the trial, contained only one surety.

*Canada.*— McMartin *v.* Graham, 2 U. C. Q. B. 365, holding that whether a delay of four days in selling property levied on, which four days expired about two weeks before the writ was returnable, was such negligence as to constitute wilful or negligent misconduct under the circumstances of the case was a question for the jury.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 415.

96. State Treasurer *v.* Wiggins, 1 McCord (S. C.) 568.

97. Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749 (holding that in an action on a constable's bond for failure to redeliver property levied on, as alleged, under a writ of detinue, it was error to refuse to instruct that, unless the jury were reasonably satisfied that the writ came into the hands of the constable before he took the property, he would not be liable, where, under the averments of the complaint, it was incumbent on plaintiffs to show that the property was taken by the constable under the writ, and, detinue bonds not having been given as required by the statute, it was returned by him); Richmond County Inferior Ct. *v.* Barr, Dudley (Ga.) 32 (holding that where in an action on a constable's bond the breach assigned was failure to advertise a levy and return in proceedings by attachment, by which means the attachment was dismissed, the court properly charged that, if plaintiff failed in his attachment on account of the neglect of the constable, plaintiff should recover, but, if plaintiff voluntarily dismissed his attachment on account of the supposed irregularity, such dismissal effectually discharged defendant and his securities); State *v.* Neff, 74 Ind. 146 (holding that in an action on a constable's official bond for failure to make the money under an execution, an instruction that, to entitle plaintiff to recover, the execution defendant must have been the owner of personal property subject to execution out of which the amount of relator's execution could have been made, was erroneous, as it was sufficient if only a part of the amount could have been made); Henry *v.* Com., 107 Pa. St. 361 (holding that where an execution was issued and handed to a sheriff on Saturday, and he returned it *nulla bona* on Monday, without having made any effort to find property, and without having asked plaintiffs or their attorney to point any out, instructions that if a sheriff had made diligent search and could find no property, he might return the execution before return-day without liability, even though defendant, after the return, and before the return-day, acquired property, were properly refused).

98. Craven *v.* Higginbotham, 83 Ala. 429,

**d. Verdict and Findings.** A verdict which states that the jury "find for the plaintiff, that the condition of the bond is broken, and assess his damages at" a certain amount is proper.[99] Where several actions against the sheriff and his sureties have been consolidated, and the amount of the several claims exceeds the penalty of the bond, the jury should find such fact in a general verdict, and assess separately the claims of each creditor.[1] Where the jury are not sworn to inquire into the truth of the breaches assigned, but merely as to the damages, but they return that they find the breaches true, the form of the verdict does not cure the omission and a final judgment upon the verdict is erroneous.[2]

**15. References.**[3] The statutes sometimes authorize a reference in an action on a sheriff's official bond,[4] but such a statute has been held not to apply to an action on a bond given by a deputy sheriff for the indemnity of his principal.[5]

**16. New Trial.**[6] Plaintiff's failure to introduce in evidence the bond on which the action is based is ground for a new trial, where there has been a verdict for plaintiff notwithstanding such omission.[7]

**17. Judgment**[8] **and Subsequent Proceedings — a. In General.** Although the action is brought against the sheriff and the sureties on his bond, plaintiff may dismiss as to the sureties, and have judgment rendered against the sheriff alone,[9] or judgment may be entered against the sheriff alone where it appears that he is liable for the default but his sureties are not.[10] Where a jury trial is had the judgment must conform to the verdict.[11] Where the petition is defective as to the sureties, and they stand on a demurrer thereto, but the sheriff answers, and the issue is found against the sheriff, it is error to render judgment against the sureties.[12]

3 So. 777 (holding that in an action on an official bond of a constable, for damages for making a false indorsement of "Forfeited" on a replevin bond, conditioned to deliver a wagon and yoke of oxen to the constable, a charge that, if the principal, at the time and place fixed, placed the property at the disposal of the constable, although she still remained in the wagon, and intended to claim it as exempt, and only made the delivery to relieve herself and bondsmen from liability, the jury must render a verdict for plaintiff, fairly submitted the question); Cole *v.* Crawford, 69 Tex. 124, 5 S. W. 646 (holding that in an action for the seizure of certain chattels claimed as exempt, it was proper to submit to the jury the question as to the total value of all the property instead of the specific value of each article seized).

**99.** Bartlett *v.* Hunt, 17 Wis. 214.

**1.** State Treasurers *v.* Bates, 1 Hill (S. C.) 409, holding that this should be done in order that a motion to order the amount of the verdict to be paid over to the creditors in proportion to their respective interests might be predicated upon the verdict.

**2.** Adams *v.* State, 6 Ark. 497.

**3.** See, generally, References, 34 Cyc. 770.

**4.** Willis *v.* Melvin, 53 N. C. 62; Gordon *v.* Com., 10 Watts (Pa.) 443.

**5.** Willis *v.* Melvin, 53 N. C. 62.

**6.** See, generally, New Trial, 29 Cyc. 707.

**7.** Bowers *v.* State, 69 Ind. 60.

**8.** See, generally, Judgments, 23 Cyc. 623.

**9.** Dewitt *v.* Oppenheimer, 51 Tex. 103.

**10.** Studebaker *v.* Johnson, 41 Kan. 326, 21 Pac. 271, 13 Am. St. Rep. 287.

**11.** Dodd *v.* Gaines, 82 Tex. 429, 18 S. W. 618 (holding that where, in an action against a sheriff and his sureties for unlawful levy, defendants alleged that they were indemnified by the attaching creditors, and asked that such creditors be made defendants, and that, if judgment was for plaintiff, defendants have judgment over against such indemnitors, who also answered, a verdict for plaintiff against each of the indemnitors did not justify a judgment for plaintiff against the sheriff and his sureties, or a judgment for the sheriff and his sureties against their indemnitors); Black *v.* Moore, 35 Tex. Civ. App. 613, 80 S. W. 867 (holding that where, in an action against a constable and his sureties, a verdict was rendered in favor of plaintiff for five hundred dollars damages against the constable and two hundred and fifty dollars damages against his sureties, the trial court had no jurisdiction to render judgment against the sureties for the amount of the verdict against the constable, and that the verdict did not fix the damages which plaintiff was entitled to recover as against both the constable and his sureties with such certainty as to authorize the court of civil appeals to render a judgment against both in the sum of five hundred dollars); Cook *v.* Greenberg, (Tex. Civ. App. 1896) 34 S. W. 687 (holding that in an action for wrongful seizure against a constable, the sureties on his official bond, and the principal and sureties on his indemnity bond, a verdict simply finding for plaintiff did not authorize a judgment over for the constable and the sureties on the official bond against the principal and sureties on the indemnity bond, it being necessary that the verdict find all the issues).

**12.** Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. 526, 13 Ky. L. Rep. 478. See also Felonicher *v.* Stingley, 142 Cal. 630, 76 Pac. 504.

Under a statute making the sureties to the official bond of a sheriff liable only each for his equal portion of the penalty, a joint judgment against the sureties for the penalty is improper and should be amended so as to express the sums for which they are severally liable.[13] According to some authorities the judgment should be for the amount of the damages sustained by the complaining party and not for the penalty of the bond;[14] but other authorities hold that judgment should be entered for the full penalty of the bond, to be discharged by payment of the damages assessed.[15] A judgment on the sheriff's bond takes precedence only from the date of its entry;[16] but a judgment on his recognizance has been held to relate, for the purpose of distribution, to the original lien created by the filing of the recognizance under the statute.[17]

**b. Writ of Inquiry or Assessment of Damages.** Where a demurrer to a replication is overruled and judgment entered for plaintiff and a writ of inquiry awarded, the quantum of the damages caused by the breach is the only subject of inquiry at the execution of the writ.[18] A notice of motion for leave to assess damages on a judgment entered on a sheriff's bond may be given by any attorney selected by the parties interested in obtaining the assessment,[19] and such notice is properly served on a sheriff and his sureties, and need not be served on the attorney who appeared for defendants in the action on the bond.[20] After judgment by default on a sheriff's bond, it is not necessary to assign breaches on the record before an assessment of damages may be had under the judgment,[21] and upon an application to assess damages upon a sheriff's bond after a judgment rendered thereon, the sheriff will not be allowed to set off a claim for fees upon an execution in a different case which had been placed in his hands in favor of the applicant.[22] Where damages are claimed on behalf of a person other than the original prosecutor, on a special notice before the issuance of the writ of inquiry for the assessment, such damages may be assessed by the same jury.[23]

**c. Execution.**[24] It is sometimes required by statute that where judgment is recovered by plaintiff in an action on the bond of a sheriff or constable the execution shall be first levied upon the property of the officer.[25] In a case where several executions had been obtained against the sheriff's sureties, exceeding the amount of their bond, they were directed in chambers to pay the amount of their respective liabilities to the sheriff to whom the executions were directed, with the costs, and

13. Treasurers *v.* Munday, 3 Hill (S. C.) 167.

14. Dougherty *v.* Peters, 2 Rob. (La.) 534 [*followed* in New Orleans *v.* Hozey, 2 Rob. (La.) 552]; McMicken *v.* Com., 58 Pa. St. 213; Com. *v.* Sayres, 1 Miles (Pa.) 235 (holding such to be the rule as to a bond taken under the act of April 15, 1834, although the rule was otherwise as to a bond taken under the act of March 29, 1824); Campbell *v.* Com., 8 Serg. & R. (Pa.) 414; Wolverton *v.* Com., 7 Serg. & R. (Pa.) 273.

**A subsequent claimant cannot vacate a satisfaction** of the judgment to let in his claim. Com. *v.* Watmough, 2 Miles (Pa.) 297.

**Pa. Act June 14, 1836, § 8,** requiring the final judgment in an action on an official bond to be: (1) For the commonwealth in the amount of the obligation; (2) for plaintiff in the amount of damages assessed and for the costs, did not apply to an action on a sheriff's official bond made before the statute was passed. Myers *v.* Com., 2 Watts & S. 60.

**Practice on default.**— While the regular practice on a failure of defendant to appear would be to enter an interlocutory judgment, and for the jury to assess the damage against the sheriff and the other defendants, the entry of a judgment for the amount due plaintiff was not a fatal irregularity. McMicken *v.* Com., 58 Pa. St. 213.

15. Wells *v.* Com., 8 B. Mon. (Ky.) 459; State *v.* Horn, 94 Mo. 162, 7 S. W. 116; New York *v.* Lyons, 1 Daly (N. Y.) 296; Smith *v.* Licking County Com'rs, 2 Ohio 312.

**Judgment under statutes allowing but one action on bond** see *supra*, X, H, 3, c.

16. *In re* Morris, 4 Pa. St. 162.

17. *In re* Morris, 4 Pa. St. 162.

**Lien arising from bond** see *supra*, X, C, 20.

18. Clark *v.* State, 7 Blackf. (Ind.) 570.

19. State *v.* Hamilton, 10 N. J. L. 190, holding that it is not necessary that the attorney should be the one employed in the original suits on which the assessment is to be made.

20. State *v.* Hamilton, 10 N. J. L. 190.

21. State *v.* Hamilton, 10 N. J. L. 190.

22. State *v.* Welsted, 11 N. J. L. 397.

23. Jersey City *v.* Chase, 30 N. J. L. 233.

24. See, generally, EXECUTIONS, 17 Cyc. 878.

25. Morris *v.* Graham, 1 U. C. Q. B. 521.

**Where the sheriff has died insolvent** before the commencement of an action against the

then, upon application to the court, proceedings against them were stayed.[26] Where the responsibility of the deputy on his bond to make payments before the suit is established, a sum paid by the sheriff after the commencement of the suit but before the trial, for which the deputy may be liable, may be included in the amount for which execution should issue on a judgment for the breach of the bond.[27] When judgment is entered for the penalty of the bond execution issues, not for the amount of the judgment, but for the amount of the damages to which the complaining party shows himself to be entitled.[28] The party at whose instance the sheriff's bond is sued may, after judgment against the sheriff and his sureties on the bond, move the court to have the amount of the original judgment, with interest and costs, levied on the execution against them, without previous notice to them of the motion for that purpose;[29] but another person who has also obtained a judgment against the sheriff is not entitled to have the amount thereof levied on the execution to be issued on the judgment recovered on the bond without such notice.[30]

**18. Damages[31] — a. In General.** Plaintiff in an action on an official bond is entitled to recover such sum and such sum only as will indemnify him for the injury which he has sustained;[32] but damages cannot be allowed for a loss which was not proximately caused by the misconduct or default on which the action is based,[33] nor can plaintiff recover damages which are merely speculative.[34] In an action for wrongfully attaching certain enumerated goods and others not enumerated the goods not enumerated are not to be taken into consideration in assessing the

sureties, such a statute does not require the proceedings to be stayed until the remedy against the sheriff's representatives or his property is exhausted. Morris *v.* Graham, 1 U. C. Q. B. 521.

**Where there is no judgment against the principal,** a statutory provision that the property of the sureties shall not be levied on until execution against the principal shall prove unavailing does not apply. Babka *v.* People, 73 Ill. App. 246.

26. Sinclair *v.* Baby, 2 Ont. Pr. 117.

27. Smith *v.* Berry, 37 Me. 298.

28. Austin *v.* Moore, 7 Metc. (Mass.) 116; Smith *v.* Licking County Com'rs, 2 Ohio 312.

**Plaintiff is not entitled to execution for the damages claimed,** but it is incumbent upon him to show how much he is actually entitled to. Austin *v.* Moore, 7 Metc. (Mass.) 116.

29. People *v.* Matthewson, 20 Johns. (N. Y.) 300 [*distinguishing* People *v.* Birdsall, 20 Johns. (N. Y.) 297].

30. Lewis *v.* Ball, 6 Cow. (N. Y.) 583; People *v.* Birdsall, 20 Johns. (N. Y.) 297.

31. See, generally, Damages, 13 Cyc. 1.

32. *Georgia.*— Ivey *v.* Colquitt, 63 Ga. 509; Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624; Taylor *v.* Johnson, 17 Ga. 521; Crawford *v.* Andrews, 6 Ga. 244.

*Illinois.*— Gruer *v.* People, 60 Ill. App. 123, holding that an award of three hundred dollars for allowing the escape of a prisoner in custody on a charge of bastardy was not excessive.

*Indiana.*— McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739; State *v.* Johnson, 1 Ind. 158, Smith 37.

*Kentucky.*— Phillips *v.* Ronald, 3 Bush 244, 96 Am. Dec. 216; Tudor *v.* Lewis, 3 Metc. 378; Snoddy *v.* Foster, 1 Metc. 160; Com. *v.* Lightfoot, 7 B. Mon. 298; Robertson *v.* Morgan, 3 B. Mon. 307; Canterberry *v.* Com., 1 Dana 415 [*followed* in Fowler *v.* Com., 3 Dana 135], holding that the act of 1827, section 2, authorizing judgment for a nominal amount in bank-notes against officers who had collected such money and failed to pay it over, did not apply to the sureties, but a recovery in a suit where the sureties were included could be only for the value of the paper when it ought to have been paid, and interest thereon.

*Louisiana.*— Marshall *v.* Simpson, 13 La. Ann. 437; New Orleans *v.* Hazey, 2 Rob. 552.

*Missouri.*— State *v.* Cobb, 64 Mo. 586; State *v.* Miller, 48 Mo. 251.

*North Carolina.*— McCracken *v.* Adler, 98 N. C. 400, 4 S. E. 138, 2 Am. St. Rep. 340; State *v.* Falls, 63 N. C. 188; Dickson *v.* Eskridge, 27 N. C. 411; McRae *v.* Evans, 18 N. C. 243.

*Ohio.*— Collins *v.* Skillen, 16 Ohio St. 382, 88 Am. Dec. 458.

*Pennsylvania.*— Com. *v.* Allen, 30 Pa. St. 49.

*Texas.*— Platt *v.* Philips, 37 Tex. 9; De la Garza *v.* Carolan, 31 Tex. 387; McKnight *v.* Carmichael, 7 Tex. Civ. App. 270, 27 S. W. 150; Steel *v.* Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474.

*Virginia.*— Perkins *v.* Giles, 9 Leigh 397, 33 Am. Dec. 249.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 413.

33. State *v.* Springer, 45 Mo. App. 252 (holding that where an attachment was levied on plaintiff's mortgaged homestead and on the corn growing thereon, which prevented him from raising money to pay off the mortgage, which was foreclosed, resulting in the loss of the homestead, the measure of damages was the value of the corn, and not the value of the homestead); McLaurin *v.* Buchanan, 60 N. C. 91.

34. Reynolds *v.* Weinman, (Tex. Civ. App. 1894) 25 S. W. 33, holding that in an action

damages;[35] and under a claim of special damages for loss of the possession and use of property, it is error to leave the jury to assess damages according to the value of the property as though the claim was for the loss thereof.[36] In an action by plaintiff in a judgment against the sureties of a sheriff to recover the moneys collected on an execution, the fees of the sheriff are not recoverable, except where they have been previously advanced by plaintiff.[37] Where an obligor on a constable's bond intended to comply with the statute, but instead of making the bond run to the city, as required, made it run to the city treasurer, it was held that such bond was by implication taken in trust for the city, and hence the damages in an action thereon should be measured by the interest of the city, and not of the treasurer.[38]

**b. Mitigation of Damages.** In an action on a sheriff's bond it may be shown, in mitigation of damages, that plaintiff has suffered little or nothing by the officer's default or breach of duty;[39] but where there has been a breach of duty in regard to the same matter in successive years for which the constable has given different bonds, the fact that the injured party might recover on the bond for the second year cannot mitigate the damages in an action on the bond for the first year.[40] So also in an action for neglect to execute process, the fact that the debtor against whom he held a claim might, even after being imprisoned on a capias ad satisfaciendum, pay other *bona fide* debts, to the disappointment of the judgment creditor, cannot be considered on the question of damages.[41]

**c. Nominal Damages.** An award of nominal damages is proper where it appears that, although the officer has been guilty of an official misfeasance or default, plaintiff has suffered no real injury.[42] But the recovery cannot be limited to nominal damages where the action is for a failure to arrest a debtor by whose

on a sheriff's official bond for damages resulting from his seizure and removal of certain goods constituting part of a general stock of merchandise, plaintiff could not recover for the alleged injury resulting to goods left after the seizure by reason of their separation from those taken.

35. Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436.

36. Pruett *v.* Williams, 156 Ala. 346, 47 So. 318.

37. Com. *v.* McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445.

38. Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. 443.

39. Taylor *v.* Johnson, 17 Ga. 521 [*overruling* Crawford *v.* Word, 7 Ga. 445, and *followed* in Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624]; State *v.* Tabler, 41 Md. 236 (holding that in an action for the amount of certain fees, placed in the sheriff's hands by an attorney for collection, defendants might show in mitigation of damages that the person from whom part of the fees were due at the time they were received for collection was insolvent, or a non-resident, and that such insolvency or non-residence continued up to the commencement of the suit); Knapp *v.* Sweet, 24 N. Y. Suppl. 817.

40. Hubbard *v.* Wall, 31 N. C. 20.

41. Sherrill *v.* Shuford, 32 N. C. 200.

42. *Alabama.*— Marcum *v.* Burgess, 67 Ala. 556; Bagby *v.* Harris, 9 Ala. 173.

*Delaware.*— State *v.* Willard, 2 Houst. 197.

*Illinois.*— People *v.* Johnson, 4 Ill. App. 346.

*Indiana.*— McDaniel *v.* State, 118 Ind. 239, 20 N. E. 739; State *v.* Dixon, 80 Ind. 150; State *v.* Blanch, 70 Ind. 204; State *v.* Shackleford, 15 Ind. 376; State *v.* Miller, 5 Blackf. 381; State *v.* Buckles, 8 Ind. App. 282, 35 N. E. 846, 52 Am. St. Rep. 476.

*Kentucky.*— Pepper *v.* Com., 6 T. B. Mon. 27.

*Missouri.*— State *v.* Carter, 92 Mo. App. 86; State *v.* Harrington, 28 Mo. App. 287 (holding that where a sheriff returned that the levies under two writs of attachment were contemporaneous, when in fact one levy preceded the other, but it appeared that the levy first made was not entitled to precedence, plaintiff whose writ was first levied could not recover substantial damages in an action on the sheriff's official bond for a false return); State *v.* Rayburn, 22 Mo. App. 303.

*North Carolina.*— Brunhild *v.* Potter, 107 N. C. 415, 12 S. E. 55; State *v.* Mangun, 31 N. C. 210; State *v.* Skinner, 25 N. C. 564; Buckley *v.* Hampton, 23 N. C. 318.

*Ohio.*— Bradt *v.* Skillen, 2 Ohio Dec. (Reprint) 727, 5 West. L. Month. 72.

*Texas.*— Smith *v.* Perry, 18 Tex. 510, 70 Am. Dec. 295.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 410.

**Contra.**— Com. *v.* McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445, holding that not even nominal damages can be recovered where no injury resulting from the default is shown.

**The disregard of a claim for exemption, by** selling the property in satisfaction of a lien which prevails against it, when the claim for exemption is in law and in fact frivolous, is not such a breach of the official bond of a constable as will entitle the owner of the property to recover nominal damages in an

arrest the debt might have been made,[43] or for the escape of a debtor imprisoned under a statute providing for imprisonment as a coercive remedy to compel payment of the debt.[44]

**d. Exemplary or Penal Damages.** Exemplary damages are not generally recoverable against the sureties;[45] and it has been held that statutory penal damages for which an official default of the officer has rendered his sureties liable[46] cannot be recovered in a common-law action on the bond, but only in the statutory summary proceeding.[47]

**e. Interest.**[48] In an action on a sheriff's bond interest may be allowed on the amount for which the officer's wrongful act has rendered defendants liable.[49]

**19. Review.**[50] In an action on a sheriff's bond, the execution and delivery of which is denied by the sureties, the refusal of the court to permit a full cross-examination of plaintiff's witnesses relative to the issue under the pleadings is sufficient ground, when assigned for error, to present for review the sufficiency of defects on the face of the bond to charge the obligee with notice of the sheriff's want of authority to deliver it on behalf of the sureties.[51] On appeal it will be presumed that all jurisdictional facts appeared on the trial,[52] and the judgment of the lower court will not be reversed because of an error which was not prejudicial to the appellant,[53] nor will the appellate court disturb a verdict on conflicting

action on the bond, in the absence of proof of actual damages. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346.

**43.** Murphy *v.* Troutman, 50 N. C. 379, holding that where, in an action on the official bond of a sheriff for negligently failing to arrest a person on a writ for debt, it appeared that such person had some property in another state, and had numerous friends and relations in the county, whom he had come to visit temporarily, it could not be said that the contingency of securing the debt in that manner was too remote, and therefore it was error for the court to instruct the jury that they should give only nominal damages for plaintiff, but plaintiff had a right to have submitted to the jury the instruction that, if they were satisfied that the debtor, if arrested, would have given bail, or, if imprisoned, would have assigned his money or effects, they should assess corresponding damages.

**44.** Gruer *v.* People, 60 Ill. App. 123, where it appeared that the situation of the debtor and his relatives was made such that payment could probably have been obtained through coercion.

**45.** See DAMAGES, 13 Cyc. 116.

**46. Liability of sureties for penalty or amercement** see *supra*, X, C, 16.

**47.** Marcum *v.* Burgess, 67 Ala. 556; Carter *v.* Sympson, 8 B. Mon. (Ky.) 155; Scogins *v.* Perry, 46 Tex. 111; De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328; McDowell *v.* Burwell, 4 Rand. (Va.) 317.

**Summary remedies on official bonds** see *supra*, X, G.

**48.** See, generally, INTEREST, 22 Cyc. 1459.

**49.** *Alabama.*— Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

*Arkansas.*— Crow *v.* State, 23 Ark. 684, holding, however, that the allowance or withholding of interest on the amount of plaintiff's loss is within the province of the jury and it is error to instruct the jury that they must allow interest.

*Georgia.*— Governor *v.* Raley, 34 Ga. 173.

*Illinois.*— Robertson *v.* Marshall County Com'rs, 10 Ill. 559.

*Kentucky.*— Canterberry *v.* Com., 1 Dana 415.

*Mississippi.*— Redus *v.* State, 54 Miss. 712.

*Montana.*— Maddox *v.* Rader, 9 Mont. 126, 22 Pac. 386 [*following* Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462].

*South Carolina.*— Treasurers *v.* Moore, 1 Nott & M. 214.

*Texas.*— Platt *v.* Philips, 37 Tex. 9; De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 413.

**Contra.**— Gibson *v.* Governor, 11 Leigh (Va.) 600.

**Time from which interest runs.**— In an action against the sureties of a sheriff for not paying over money collected by the sheriff, interest is only recoverable from the time the action was brought, unless a demand has been made on the sheriff before, and then from the demand. Treasurers *v.* Moore, 1 Nott & M. (S. C.) 214.

**50.** See, generally, APPEAL AND ERROR, 2 Cyc. 474; REVIEW, 34 Cyc. 1695.

**51.** Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

**52.** Westbrook *v.* Douglass, 21 Barb. (N. Y.) 602, holding that the jurisdiction of a justice of the peace would be presumed on appeal, where the docket of the justice was produced and read in evidence without objection, and the justice was examined as a witness, and no objection was taken to the validity of the judgment or to the sufficiency of the evidence to show that the justice has jurisdiction.

**53.** Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420, holding that where, in an action against a sheriff on his official bond for releasing without authority certain goods attached by him, he pleaded that the goods belonged to another, and full evidence as to the title thereto was admitted and correct in-

evidence.[54] Where after judgment in a county court there is an appeal to the circuit court which hears the case *de novo* and renders judgment in favor of the proper party, this cures any defect in the judgment of the county court in rendering judgment in favor of an improper party.[55]

## XI. CRIMINAL LIABILITIES.[56]

**A. In General.** In addition to the civil liabilities of sheriffs and constables [57] such an officer is subject to indictment for defaults or misfeasance such as refusal to execute a warrant delivered to him for that purpose,[58] forcibly entering a dwelling-house to serve civil process,[59] levying on exempt property,[60] refusing, on demand, to lay off a debtor's personal property exemption out of property levied on,[61] selling exempt property under execution,[62] bidding at his own sale [63] or becoming the purchaser thereat,[64] refusing to sell property because there is but one bidder at the sale,[65] wantonly and corruptly sacrificing property taken and sold under execution,[66] failing to pay over money collected by him,[67] failing to return an execution,[68] making a false return,[69] voluntarily allowing the escape of a prisoner for whose arrest he holds a warrant fair on its face,[70] neglecting to exercise supervision over the county jail as required by law, whereby persons

structions given, the exclusion of a question why he released the goods was not prejudicial error.

**Circumstances not rendering error harmless.**— Where judgment was rendered against a debtor and a transferee of his land, reciting that the transfer was fraudulent as against creditors, and ordering that the land be sold on execution, and that the surplus be paid into court for the use of the persons entitled to receive it, and the sheriff afterward made a return reciting the sale, the receipt by him of the amount paid, and the application of a part thereof to the judgment in suit and of the balance to another judgment rendered against the debtor alone, it was held, in an action on the sheriff's official bond, that the erroneous admission of parol evidence to contradict the sheriff's return was not rendered harmless by a showing that the transfer of the land was made in fraud of the debtor's creditors, and that the transferee had suffered judgment to go against her by default, in the absence of any showing that she had no other interest in the land. State *v.* Ruff, 6 Ind. App. 38, 33 N. E. 124.

54. Smith *v.* Holcomb, (Tex. Civ. App. 1892) 21 S. W. 717.

55. Boyd *v.* Randolph, 91 Ky. 472, 16 S. W. 133, 13 Ky. L. Rep. 53, holding that where, in an action on a sheriff's official bond under the Auditor's Agent Act (Gen. St. c. 93, § 3), the circuit court on appeal entered judgment for the commonwealth, this cured an error of the county court in entering judgment in favor of the auditor.

56. See, generally, CRIMINAL LAW, 12 Cyc. 70.

57. See *supra*, V.

58. Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383; Stewart *v.* State, 4 Blackf. (Ind.) 171; People *v.* Weston, 4 Park. Cr. (N. Y.) 226; State *v.* Furguson, 76 N. C. 197, peace warrant.

59. State *v.* Armfield, 9 N. C. 246, 11 Am. Dec. 762, holding that if a door be partly closed by those within, resisting the entrance of an officer seeking to serve civil process, the officer is indictable if he oppose them and thereby gain an entrance.

60. Pippin *v.* State, 36 Tex. 696.

61. State *v.* Carr, 71 N. C. 106.

62. State *v.* Haggard, 1 Humphr. (Tenn.) 390 (holding that where a statute exempted certain articles and provided that any levying officer who acted in contravention of the exemption law should be deemed guilty of a misdemeanor in office, a constable was indictable for selling an article exempted by a statute subsequently enacted); Pippin *v.* State, 36 Tex. 696.

63. Chambers *v.* State, 3 Humphr. (Tenn.) 237, holding that under Acts (1805), c. 31, providing that if any sheriffs, coroners, or constables should bid at their own sales, by themselves or by any person for their benefit, they should be liable to indictment for misdemeanor, a constable who at his own sale bid for another was indictable therefor.

64. State *v.* Williams, 4 Ind. 393.

65. State *v.* Johnston, 2 N. C. 293; State *v.* Joyce, 2 N. C. 43.

66. U. S. *v.* Bill, 24 Fed. Cas. No. 14,593, 2 Cranch C. C. 202, holding that in a prosecution against a constable for wantonly sacrificing property taken under execution, the jury could not find him guilty, unless they should be satisfied that he acted from a corrupt motive.

67. Mahar *v.* State, 28 Ark. 207; State *v.* Longley, 10 Ind. 482.

68. See State *v.* Smith, 5 Blackf. (Ind.) 327.

**Failure to return process not indictable at common law.**— State *v.* White, 5 Sneed (Tenn.) 620.

69. State *v.* Johnston, 2 N. C. 293; State *v.* Joyce, 2 N. C. 43.

70. Housh *v.* People, 75 Ill. 487, holding, however, that a constable will not be held liable criminally for allowing such escape, where the affidavit on which the warrant was

confined therein were aided to escape,[71] acting as constable without giving bond,[72] or failing to render a sworn statement of moneys collected for the county;[73] and under some statutes any wilful neglect or refusal of a sheriff or constable to discharge any duty of his office is a misdemeanor.[74] *A fortiori* if an officer commits an act which is in and of itself a violation of the criminal law he is indictable therefor the same as an individual.[75] But a sheriff having an execution in his hands is not indictable for levying on and seizing property in the possession of and belonging to a son of defendant in the execution, when he acts in good faith under a bond of indemnity.[76] Neither can an officer be indicted for levying an attachment or execution on property, the value of which is not unreasonably in excess of the demand to be satisfied.[77] Misfeasance or neglect of a deputy may subject him to indictment,[78] but the sheriff is not liable to a criminal prosecution therefor.[79]

**B. Indictment.**[80] The indictment must fully and certainly describe and identify the offense and allege the essential elements thereof,[81] and an indictment for failing to return an execution must state the substance at least of the execution.[82] It has been held that an indictment against a constable for neglecting to execute a warrant is sufficient, if it sets out a warrant legal upon its face,[83] and avers that the offense was an injury to the state.[84] An indictment against a constable for failing to pay over fines, penalties, and forfeitures collected by him as a part of the school fund need not allege that the same was withheld wilfully or with a fraudulent intent, nor need the money be denominated as a part of the school fund.[85] Each count in the indictment must be sufficient in itself,[86] and averments in one count cannot aid defects in another.[87]

issued fails to give the court issuing it jurisdiction.

71. Gordon *v.* State, 2 Tex. App. 154.

72. U. S. *v.* Evans, 25 Fed. Cas. No. 15,064, I Cranch C. C. 149.

73. Doyle *v.* State, 49 Ala. 28.

74. State *v.* Furguson, 76 N. C. 197; Gordon *v.* State, 2 Tex. App. 154.

75. See Duckett *v.* State, 93 Ga. 415, 21 S. E. 73; State *v.* Houston, 30 La. Ann. 1174.

76. State *v.* Tatom, 69 N. C. 35.

77. Pippin *v.* State, 36 Tex. 696.

78. State *v.* Berkshire, 2 Ind. 207. But *compare* State *v.* Kirby, 41 La. Ann. 298, 6 So. 578.

79. Com. *v.* Lewis, 4 Leigh (Va.) 664. *Contra*, State *v.* Johnston, 2 N. C. 293, holding that where a deputy makes a false return in the name of the sheriff, the sheriff is criminally liable therefor.

80. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

81. Doyle *v.* State, 49 Ala. 28 (holding that an indictment against a sheriff for failing to render to the county treasurer a written sworn statement of the moneys received by him for the county, as required by Rev. Code, § 917, must contain an averment that the moneys were received by the sheriff in his official character, and must also specify with certainty the term and year when such alleged failure occurred); State *v.* Longley, 10 Ind. 482 (holding that, as under 2 Rev. St. p. 480, § 3, it is optional with the constable to pay over money collected on execution to the justice or to plaintiff, an indictment for failure to pay over must allege nonpayment to either); State *v.* Williams, 4 Ind. 393 (holding that an indictment against a sheriff, under St. (1841) c. 104, § 5, charging that he procured one A to make a purchase for his benefit, and that A did then make such purchase with intent to defraud, etc., was insufficient, as the intent to defraud was the gist of the offense and should have been charged to exist in the sheriff, and not alone in A, through whom he made the purchase).

82. State *v.* Smith, 5 Blackf. (Ind.) 327.

83. Stewart *v.* State, 4 Blackf. (Ind.) 171, holding that the indictment need not contain an averment that the justice who issued the warrant had legal authority to do so, or an allegation that, previous to issuing the warrant, a complaint on oath was made to the justice charging the person to be arrested with the commission of a crime, or that a crime was committed in the view of the justice. See also State *v.* Furguson, 76 N. C. 197. But *compare* People *v.* Weston, 4 Park. Cr. (N. Y.) 226, holding that it is not sufficient that the warrant set forth in the indictment recites all the facts necessary to confer authority to issue it, but the indictment must allege that those facts were true.

84. Stewart *v.* State, 4 Blackf. (Ind.) 171.

85. Mahar *v.* State, 28 Ark. 207.

86. State *v.* Longley, 10 Ind. 482, holding that where the statute allows a constable to pay to plaintiff or to the justice all money collected by him by virtue of any writ, a count in an indictment for a failure to pay over money collected, which alleges only that he has not paid it to plaintiff, without alleging that he has not paid it to the justice, is defective; as is also a count alleging merely that on the expiration of his term of office the constable had the money in his possession but not negativing payment to plaintiff on that day.

87. State *v.* Longley, 10 Ind. 482.

## XII. LIABILITIES OF PARTIES, RECEIPTORS, AND OTHERS TO OFFICERS.

**A. Parties.** Where a sheriff on his official responsibility, and without any direction from the creditor, wrongfully levies on and sells exempt property of the debtor under execution, he cannot recover from the creditor the damages recovered against him by the debtor,[88] even though the execution creditor was present at the sale [89] and purchased some of the property,[90] or the proceeds of the sale were paid to such creditor.[91]

**B. Receiptors.** A written contract to pay a specified sum of money or redeliver on demand to an attaching officer specific articles of attachable property, which he has taken on mesne process, is a lawful contract,[92] and a recital of the attachment in such contract is sufficient evidence of a legal consideration therefor.[93] After a legal demand [94] an action may be maintained on such contract so long as the attaching officer is under a liability to the creditor or debtor for the property attached,[95] and the extent of that liability is the measure of damages.[96] Where property seized under process is delivered by the officer to a receiptor, the officer cannot hold the receiptor liable for failure to redeliver the property to him on demand, unless the officer himself has become subject to some liability by reason of his failure to hold or sell the property.[97] Where a sheriff delivered goods attached to a person who agreed to redeliver on demand, a demand at the dwelling-house of such person, although in his absence, is sufficient to charge him with the value of such articles in an action against him by the sheriff.[98] The approval by a plaintiff in attachment of a person taken as receiptor for property attached does not exonerate the officer from the duty of bringing a suit upon the receipt when the property is not produced.[99] Where the receiptor of attached property refuses to deliver it to the sheriff, who demands it for the purpose of levying an execution on it, and such refusal in the only reason why the execution is not levied, such receiptor is estopped, in an action of assumpsit against him by the sheriff on the receipt, from taking any advantage of the fact that no levy has been actually made.[1] Where the receiptor conceals from the levying officer his ownership of property and suffers the same to be seized as the property of defendant in the process, thus preventing a possible levy on other property, he is estopped from claiming the goods as his own when sued on the receipt; [2] but where the receipt does not admit that defendant in the process is the owner of the property, and the receiptor at the time asserts ownership in himself, he is not estopped to set up such ownership in an action

88. Russell *v.* Walker, 150 Mass. 531, 23 N. E. 383, 15 Am. St. Rep. 239; Kane *v.* Dauernheim, 60 Mo. App. 64.

89. Russell *v.* Walker, 150 Mass. 531, 23 N. E. 383, 15 Am. St. Rep. 239.

90. Russell *v.* Walker, 150 Mass. 531, 23 N. E. 383, 15 Am. St. Rep. 239.

91. Russell *v.* Walker, 150 Mass. 531, 23 N. E. 383, 15 Am. St. Rep. 239; Kane *v.* Dauernheim, 60 Mo. App. 64.

92. Foss *v.* Norris, 70 Me. 117.

93. Foss *v.* Norris, 70 Me. 117.

94. A legal demand is one properly made as to form, time, and place by a person lawfully authorized, before or after the rendition of judgment in the suits in which the property is attached, although the contract contains a stipulation for redelivery of the property "within thirty days after judgment in such actions if no demand be made"; and it is no valid objection to the demand that the sheriff's deputy calls upon the receiptor to redeliver the articles, or in default thereof to pay according to his alternative stipulation. Foss *v.* Norris, 70 Me. 117.

95. Foss *v.* Norris, 70 Me. 117.

96. Foss *v.* Norris, 70 Me. 117.

97. Fisher *v.* Bartlett, 8 Me. 122, 22 Am. Dec. 225; Lewis *v.* Webber, 116 Mass. 450; Hayes *v.* Kyle, 8 Allen (Mass.) 300; Burt *v.* Perkins, 9 Gray (Mass.) 317; Dewey *v.* Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376; Learned *v.* Bryant, 13 Mass. 224; Perry *v.* Williams, 39 Wis. 339; Heath *v.* Keyes, 35 Wis. 668; Connaughton *v.* Sands, 32 Wis. 387; Main *v.* Bell, 27 Wis. 517. But *compare* Cornell *v.* Dakin, 38 N. Y. 253.

98. Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

99. Allen *v.* Doyle, 33 Me. 420.

1. Parks *v.* Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

2. Drew *v.* Livermore, 40 Me. 266; Penobscot Boom Corp. *v.* Wilkins, 27 Me. 345; Sawyer *v.* Mason, 19 Me. 49; Dewey *v.* Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376; Bursley *v.* Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Johns *v.* Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; Barron *v.*

upon the receipt.[3] An officer who has delivered attached property to a third person, taking an accountable receipt therefor, is not deprived of his right of action on the receipt by the act of a creditor in executing to the receiptor a writing acknowledging the receipt of the net proceeds of the sale of the property.[4] In an action by an officer upon a receipt for property attached, irregularities in the proceedings in the original suit constitute no defense, provided the judgment was valid.[5] Even the reversal of the judgment on which an execution issued will not bar an action in favor of the officer on a receipt for property taken on such execution;[6] and if the property receipted for has been restored to the original owner before the action is brought by the officer, the rule of damages is the amount of the officer's fees.[7]

**C. Obligors on Jail Limits' Bond.** A sheriff who is subjected to liability by reason of the escape of a prisoner who had given a jail limits' bond is entitled to recover against the obligors on such bond for the injury which he has thus suffered,[8] unless the judgment against him was rendered in consequence of his failure to avail himself of a good defense known to him at the time.[9]

**D. Obligors on Bail-Bond.** Where a sheriff who has taken a bail-bond omits to assign it, and is in consequence held as special bail, and compelled to pay the amount recovered in the action, he may sue on the bond as a common-law bond, and recover from the obligor the amount for which he has been held liable.[10] Where one arrested by a sheriff does not appear and put in bail within the time prescribed by the bail-bond, and the sheriff is ruled against, and attachment against him ordered before bail is put in, he may recover on the bond for such default, although he has not actually paid the costs of the attachment or put in bail to the original suit, or been subjected to any further liability.[11]

**E. Third Persons.** Where, by threats or promises to hold him harmless, a person induces an officer to deliver to him property which he has levied on, and the officer is subsequently compelled to pay to the execution plaintiff the value of the property so relinquished, the person who obtained the property is liable to the officer for the loss or damage sustained by him.[12]

**F. Actions by Officers**[13] **— 1. Right of Action — a. In General.** A sheriff who is entitled to the custody and possession of property has a right of action in damages or otherwise to protect his possession and to shield himself from responsibility,[14] but his right of action is limited by the degree of liability to be entailed on him should he illegally part with the property which it is his duty to hold.[15]

Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Perry *v.* Williams, 39 Wis. 339.

3. *California.*— Bleven *v.* Freer, 10 Cal. 172.

*Connecticut.*—See Jones *v.* Gilbert, 13 Conn. 507.

*Massachusetts.*— Bursley *v.* Hamilton, 15 Pick. 40, 25 Am. Dec. 423.

*Vermont.*—Adams *v.* Fox, 17 Vt. 361.

*Wisconsin.*— Perry *v.* Williams, 39 Wis. 339.

See 43 Cent. Dig. tit. "Sheriffs and Constables," §§ 319, 325.

4. Torrey *v.* Otis, 67 Me. 573, so holding on the ground that the receipt was a contract between the officer and the receiptor and could not be discharged by the act of the creditor.

5. Bean *v.* Ayers, 70 Me. 421.

6. Phelps *v.* Landon, 2 Day (Conn.) 370.

7. Phelps *v.* Landon, 2 Day (Conn.) 370.

8. Seymour *v.* Harvey, 8 Conn. 63; Kip *v.* Brigham, 6 Johns. (N. Y.) 158, 7 Johns. 168; Riley *v.* Seymour, 1 Wend. (N. Y.) 143; Warner *v.* Evens, 2 Tyler (Vt.) 121.

9. Ransom *v.* Keyes, 9 Cow. (N. Y.) 128.

10. Higgins *v.* Glass, 47 N. C. 353.

The sheriff cannot recover until he has paid the money, or at least until a judgment has been rendered against him for it. Pool *v.* Hunter, 49 N. C. 144.

11. Rosenstein *v.* Sammons, 1 Hill (N. Y.) 59, holding that in such case at least nominal damages may be recovered.

12. Turner *v.* Woodward, 123 Ga. 866, 51 S. E. 762, holding also that in such case it was not error for the court in its instructions to use the words "loss" and "damage" interchangeably.

13. See, generally, Actions, 1 Cyc. 634.

Actions by officers against indemnitors see *supra*, VI, Q.

Actions for fees and expenses see *supra*, IV, E, 6.

14. Robins *v.* Brown, 32 La. Ann. 430 [*explaining* Winn *v.* Elgee, 6 Rob. (La.) 100].

15. Robins *v.* Brown, 32 La. Ann. 430 [*explaining* Winn *v.* Elgee, 6 Rob. (La.) 100].

So where an officer who has reduced personal property to possession by a levy thereon is dispossessed he may recover the value of his special interest in the property in an action of trover,[16] or trespass;[17] but the mere fact that an officer has process in his hands, no levy having been made, gives him no such interest in defendant's property as entitles him to maintain trover[18] or replevin[19] in respect thereto, or to recover the proceeds of the property from an officer who has seized and sold the same under a junior writ.[20] Neither has an officer to whom an execution is delivered any right of action in himself against the execution defendant.[21] An officer who has attached property can maintain an action for it only upon the ground of his liability to the attaching creditor or the owner for its return;[22] and hence in an action by such officer it is competent to show that the property attached did not belong to the debtor.[23] A sheriff cannot maintain an action for officer's fees placed in his hands for collection, unless he has paid the amounts to the officers to whom they were due.[24] A sheriff who has levied on a debt under an attachment may bring an action to recover the amount.[25] A sheriff who has taken a bond under an order of court for the purchase-price of property sold cannot sue thereon in his individual name without showing by evidence *dehors* the instrument his ownership, or liability to pay its amount to the beneficiaries.[26] After a sheriff has made a sale of property, executed the deed, delivered the notes of the purchaser to the person entitled to them, and returned the writ into court, he is without further interest in the matter and cannot maintain a rule against the purchaser to show cause why he should not comply with the terms and conditions of the sale as announced.[27] Where a debtor has fraudulently assigned his property, and the assignee has converted it into money, which he has deposited with a third person, a sheriff, who has attached such money while in the hands of such third person, so far as he could, may bring an action to have such assignment set aside and the execution paid out of said money.[28] In a case where an under-sheriff who had farmed the profits of the sheriff's office directed a person to whom he was indebted to receive quit rents, levies, and fees, and discount them, together with what such person owed on the same account, out of his own private debt, and give receipts, it was held that on the under-sheriff proving insolvent, so that the sheriff was compelled to pay the amount to the public officers, he could recover against the person receiving the quit rents.[29] In Canada the sheriff, having the right to recover from those detaining them the amounts due on the building and jury fund, may take in law, in his capacity of sheriff, every action necessary to effect such recovery;[30]

16. *Illinois.*— Mulheisen *v.* Lane, 82 Ill. 117.

*Massachusetts.*— Ladd *v.* North, 2 Mass. 514. See also Polley *v.* Lenox Iron Works, 4 Allen 329.

*North Carolina.*— Hampton *v.* Brown, 35 N. C. 18.

*South Carolina.*—Alexander *v.* Collins, 3 Rich. 62.

*Wisconsin.*— Tronson *v.* Robson, 37 Wis. 353.

See 43 Cent. Dig. tit. "Sheriffs and Constables," § 318.

17. Ladd *v.* North, 2 Mass. 514 (holding that where goods attached are replevied out of the hands of the sheriff by the coroner, an action against the coroner for taking insufficient pledges on the replevin lies by the sheriff only); Hampton *v.* Brown, 35 N. C. 18; Alexander *v.* Collins, 3 Rich. (S. C.) 62.

18. Mulheisen *v.* Lane, 82 Ill. 117.

19. Mulheisen *v.* Lane, 82 Ill. 117.

20. Alexander *v.* Collins, 3 Rich. (S. C.) 62.

21. Matlock *v.* Stow, 3 N. J. L. 532.

22. Collins *v.* Smith, 16 Vt. 9 [*approved* in Wheeler *v.* Selden, 62 Vt. 310, 20 Atl. 197].

23. Wheeler *v.* Selden, 62 Vt. 310, 20 Atl. 197.

24. Goldsmith *v.* Pattison, 1 Harr. & J. (Md.) 205.

25. Davidson *v.* Chatham Nat. Bank, 5 N. Y. Civ. Proc. 167.

26. Buisson *v.* Hyde, 17 La. 19.

27. Caldwell's Succession, 15 La. Ann. 617.

28. Kelly *v.* Lane, 42 Barb. (N. Y.) 594, 18 Abb. Pr. 229, 28 How. Pr. 128, so holding under Code, § 232, providing that "the sheriff under the attachment shall collect and receive into his possession, all debts, credits and effects of the defendant" and "may take such legal proceedings either in his own name or in the name of such defendant as may be necessary for that purpose."

29. Morris *v.* Chamberlayne, Jeff. (Va.) 14.

30. Thibeaudeau *v.* St. Henry, 11 Quebec Super. Ct. 532.

but a sheriff cannot maintain an action on the case as for a fraudulent representation, when, having seized goods on an execution of a third person, he is afterward instructed by defendant to seize the same goods on his execution, although, on an adverse claim being set up, plaintiff in the first writ withdraws his execution, and defendant refuses to withdraw his or to indemnify the sheriff, and the adverse claimant afterward prosecutes the sheriff, and recovers for the illegal seizure and detention.[31]

**b. Actions by Deputies.** As a general rule a deputy sheriff cannot bring an action in his own name in relation to matters connected with his official duties;[32] but he may maintain an action on a promise made directly to him, although it relates to a matter connected with his official duties.[33]

**2. Defenses.** In an action by a sheriff against a plaintiff in attachment to recover the amount of a judgment rendered against the officer for serving the writ, defendant may show that the verdict against the officer was rendered on account of his illegal conduct subsequent to the attachment.[34] Where one arrested on execution in a civil action gives the sheriff a bond for the liberties of the jail, and is afterward permitted by the deputy sheriff, who is also jailer, to leave the liberties, this is a defense to an action by the sheriff against the sureties for an escape;[35] but it is not a sufficient plea in bar that the prisoner remains within the shrievalty and was at all times amenable to the original execution.[36] Where a sheriff paid out of the proceeds of the sale of a debtor's real estate, sold on an execution, the amount of a judgment which was supposed to be a lien, and took from the judgment creditor a refunding receipt, and the money was subsequently recovered from him by other parties, on the ground that the judgment was not a lien on the land sold; and the sheriff brought suit to recover back the money paid, it was a good defense that the sheriff had purchased other real estate from defendant in the execution, on which the judgment in question was clearly a lien, and had agreed to pay it off as a part of the consideration.[37]

**3. Limitations.**[38] Where a receiptor of property attached promises the officer "to re-deliver him the property on demand, or indemnify him against all damages he may sustain in consequence of his having attached the same," such receipt is an absolute undertaking to return the property on demand, and the officer's right of action accrues on his making such demand, and the statute of limitations then begins to run.[39] Where a sheriff has become personally liable to lien-holders by failure to make a proper return on a receipt given by a purchaser at an execution sale, the statute of limitations runs against his claim against the person giving the receipt, by virtue of a promised indemnity, from the date when the receipt was given and not from the time when the prior liens were brought to the sheriff's attention.[40]

**4. Parties**[41] **— Joinder of Actions.**[42] Where an attorney has brought suit

31. Jarvis *v.* Commercial Bank, 6 U. C. Q. B. O. S. 337.

32. Hampton *v.* Brown, 35 N. C. 18 (holding that a deputy sheriff cannot bring trover or trespass for goods seized by him on execution, and taken from him by another); Smith *v.* Joiner, 1 D. Chipm. (Vt.) 62. See also Hutchinson *v.* Parkhurst, 1 Aik. (Vt.) 258.

**In Massachusetts** a deputy sheriff who has attached personal property may maintain an action in his own name for the conversion of the property, although he has resigned his office and removed from the commonwealth. Polley *v.* Lenox Iron Works, 4 Allen 329.

**Joint action by sheriff and deputy** see *infra*, XII, F, 4.

33. Hutchinson *v.* Parkhurst, 1 Aik. (Vt.) 258 (holding that if a deputy sheriff can in any event maintain an action on a receipt for property attached by him, it is not in virtue of his office, but by virtue of a personal contract between him and the receiptor); Miller *v.* Goold, 2 Tyler (Vt.) 439 (promise to surrender body of debtor).

34. Boynton *v.* Morrill, 111 Mass. 4.

35. Wemple *v.* Glavin, 5 Abb. N. Cas. (N. Y.) 360, 57 How. Pr. 109.

36. Warner *v.* Evens, 2 Tyler (Vt.) 121.

37. Morrison *v.* Mullin, 34 Pa. St. 12.

38. See, generally, Limitations of Actions, 25 Cyc. 963.

39. Page *v.* Thrall, 11 Vt. 230.

40. Mark *v.* Osmer, 138 Pa. St. 1, 20 Atl. 841, holding that an action was barred after six years from the giving of the receipt where no fraud or concealment was shown.

41. See, generally, Parties, 30 Cyc. 1.

42. See, generally, Joinder and Splitting of Actions, 23 Cyc. 376.

against a sheriff for not returning an execution which was in the hands of his deputy, and the deputy has settled the amount of the debt and paid the attorney his costs, which prove to be excessive, an action for such excess is properly brought by the sheriff;[43] and where an execution plaintiff has received from the proceeds of a sale more than he is entitled to, an action to recover the excess should be in the name of the sheriff.[44] Where two officers levy on the same goods by virtue of separate executions, they cannot join in an action against a person who takes the goods away;[45] but it has been held that a sheriff and his deputy may jointly maintain an action for the value of property levied upon the deputy, and taken from his possession.[46]

**5. Pleading.**[47] In an action brought by a sheriff as such, a complaint stating that plaintiff is sheriff of a named county, duly elected, qualified, and acting is sufficient to show his capacity to maintain the action;[48] and where the action is against a person having in his possession property belonging to a defendant in attachment a general allegation that plaintiff has title to the property in question by virtue of a levy thereon under an attachment against the property of defendant in the attachment suit, to whom the property belongs, is sufficient on demurrer.[49] An allegation that the action is brought by the direction of the court or judge is not necessary in an action by a sheriff to collect a chose in action seized under attachment,[50] or to recover possession of attached property.[51] In an action by an officer sheriff on a promise made to him by a third person to surrender the body of a debtor during the life of the execution, it is not necessary to allege in the declaration that there was an officer ready to receive the debtor at the expiration of such term.[52] A declaration stating that, a certain judgment having been recovered, defendant, the attorney for the judgment creditor, delivered an execution to plaintiff as sheriff directing him to levy on certain property in the possession of a third person as the property of the judgment creditor, and that plaintiff believing such representation to be true levied upon and sold the property, and that plaintiff afterward suffered damage in an action brought by the owner of the property, is good;[53] and a plea to such declaration that defendant honestly believed that the property belonged to the judgment debtor and made such representation only for the purpose of assisting plaintiff in the execution of the writ is bad as not being a traverse of any particular fact.[54] Where a judgment was entered in favor of a sheriff executing a writ of replevin, and the sheriff executed to the judgment defendant a writing reciting that, in case the latter, "saves me harmless from all loss or damage by reason of said replevin bond, then the said judgment shall become null and void," it was held that on a scire facias quare executio non by the sheriff against the judgment defendant, a plea of *non damnificatus* was insufficient, but the plea should have stated facts showing a discharge from liability.[55]

43. Britton *v.* Frink, 3 How. Pr. (N. Y.) 102, holding this to be true, although the deputy stated, when he paid the costs, that he would pay them himself and bear the loss.

44. Longenecker *v.* Zeigler, 1 Watts (Pa.) 252, 302, holding that such an action could not be maintained in the name of the execution defendant.

45. Warne *v.* Rose, 5 N. J. L. 809.

46. Burton *v.* Winsor Utah Silver Min. Co., 2 Utah 240.

47. See, generally, Pleading, 31 Cyc. 1.

48. Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123, holding that it is not necessary to set forth the time, manner, and circumstances of the sheriff's election or appointment, or the details or regularity of the proceedings by which he was inducted into office.

49. Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123.

50. Davidson *v.* Chatham Nat. Bank, 5 N. Y. Civ. Proc. 167.

51. Kelly *v.* Breusing, 32 Barb. (N. Y.) 601, 33 Barb. 123.

52. Miller *v.* Goold, 2 Tyler (Vt.) 439.

53. Moodie *v.* Dougall, 12 U. C. C. P. 555, so holding upon the ground that the declaration expressly stated that there was a false representation, and that defendant directed plaintiff to levy and made him a mandatary or agent for taking the property.

54. Moodie *v.* Dougall, 12 U. C. C. P. 555, holding that such plea, being merely in confession and avoidance of the whole declaration, was an answer merely to the false representation and not to the direction to levy, which was the substance of the complaint.

55. Neville *v.* Williams, 7 Watts (Pa.) 421.

**6. VARIANCE.**[56] A complaint in an action by a sheriff on a jail limits' bond for an escape alleging a judgment and execution for a particular sum is not supported by a record showing a judgment and execution for a different sum.[57]

**7. EVIDENCE.**[58] An officer who, in a suit brought by himself, makes title to property under process of a court or magistrate, must show that the process was warranted by a regular judgment or regular proceedings.[59] In an action by a sheriff for the conversion of logs, of which he was in possession by virtue of the levy of an attachment, he must identify the logs converted as those subject to the lien of the attachment, and show when and in what manner the same were converted.[60] Where a sheriff brings an action alleging that he has suffered damage by reason of levying upon the property of a third person as that of a judgment debtor, by reason of the direction of defendant, the attorney for the judgment creditor, plaintiff must show that he actually suffered damage in order to maintain his action.[61] In an action by a constable against another, to recover the price of goods sold on an execution by defendant, but which had been previously levied on by plaintiff, defendant may prove that the suit is being prosecuted for the use of plaintiff in the judgment on which the execution issued which was first levied, and that such judgment was given for the purpose of defrauding defendant's creditors, who are the real defendants in the action.[62] Where a sheriff has paid the amount of an execution to plaintiff therein, such payment is not conclusive evidence that the sheriff received the money from defendant, but may be rebutted by opposing circumstances in an action by the sheriff against the execution debtor for the amount.[63] A judgment against the sheriff for the escape of a prisoner is conclusive in an action by him against the obligors on a bond for the prison limits provided they had notice of the pendency of the action against the sheriff.[64]

**8. TRIAL.** The general rules governing the trial of civil actions must be observed in actions brought by sheriffs or constables.[65]

**9. JUDGMENT.**[66] A county court cannot lawfully refuse a judgment in favor of an officer who shows a legal right to sue and recover against an individual because he has not accounted for moneys received for the county and refuses a settlement.[67] Where the sheriff brings an action against his deputy for money alleged to have been collected by the latter and not paid over, and the deputy makes default, the sheriff must nevertheless prove his claim and it is error to render judgment in his favor without such proof.[68] A deputy sheriff who takes a judgment in the name of the sheriff against a purchaser at a sheriff's sale and mixes up with such judgment a private demand due to himself cannot control the judgment, but it belongs to the sheriff.[69] Under a statute providing that in an action brought by a sheriff on a bond for the jail liberties, if it appears to the court on a motion in the sheriff's behalf that judgment has been rendered against him for the escape, and

56. See, generally, PLEADING, 31 Cyc. 700.
57. Rossiter *v.* Downs, 4 Conn. 292.
58. See, generally, EVIDENCE, 16 Cyc. 821.
59. Clark *v.* Norton, 6 Minn. 412 (holding that where an officer who has levied on property under process sues to recover the property, or its value, from a stranger intermeddling therewith, he must show, not only a process regular on its face, but that the court or officers had jurisdiction to issue it); Dunlap *v.* Hunting, 2 Den. (N. Y.) 643, 43 Am. Dec. 763 (so holding in a case of a suit by a constable for property seized by him on a warrant for a military fine).
60. Tronson *v.* Robson, 37 Wis. 353.
61. Moodie *v.* Dougall, 12 U. C. C. P. 555.
62. Reed *v.* Lawton, 2 Watts (Pa.) 50.
63. Bellinger *v.* Brown, 1 Strobh. (S. C.) 359, so holding in an action by the executor of the sheriff, and holding also that the question might properly be left to the jury.
64. Kip *v.* Brigham, 6 Johns. (N. Y.) 158, 7 Johns. 168; Riley *v.* Seymour, 1 Wend. (N. Y.) 143.

Appearance by obligor.—Although a sheriff has not given the obligors of a bond for the prison limits notice of a suit against him in time to charge the obligors, yet, where one of them appears in season to make a defense, he will not be allowed to allege want of due notice. Riley *v.* Seymour, 1 Wend. (N. Y.) 143.

65. See, generally, TRIAL.
66. See, generally, JUDGMENTS, 23 Cyc. 623.
67. Pemberton *v.* Brown, 5 Litt. (Ky.) 3.
68. Lampton *v.* Scott, 3 A. K. Marsh. (Ky.) 172 [*followed* in Trabue *v.* Thomas, 3 A. K. Marsh. (Ky.) 173].
69. Wilson *v.* Gale, 4 Wend. (N. Y.) 623.

that due notice of the pendency of the action against him was given to the prisoner and his sureties, the court must order a summary judgment for plaintiff, it must appear that due notice of the pendency of the action against him was given both to the prisoner and his sureties.[70]

**10. Damages.**[71] In an action by an officer against an execution plaintiff by following whose directions the officer has subjected himself to liability and loss, the officer cannot recover more than his actual loss sustained at the time of the action.[72] In an action by the sheriff, on the security taken by him for the liberties of the prison, for an escape, the correct rule of damage is the debt and costs on the execution, with interest;[73] in addition to which the sheriff is entitled to recover the costs of defending the suit against him.[74]

**11. Review.**[75] Objections not raised in the trial court cannot be urged for the first time on appeal.[76]

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**SHERIFF'S JURY.** A jury composed of no determinate number, but which may be more or less than twelve, summoned by the sheriff for the purpose of an inquisition or inquest of office.[1] (Sheriff's Jury: To Assess Damages, see Damages, 13 Cyc. 225. To Determine Claims of Third Persons, see Attachment, 4 Cyc. 736; Executions, 17 Cyc. 1209.)

**SHERIFF'S SALE.** See Attachment, 4 Cyc. 710; Executions, 17 Cyc. 1232; Sheriffs and Constables, *ante*, pp. 1682, 1926.

**SHIFT.** To change.[2] (To Shift: Burden of Proof — In Civil Case, see Evidence, 16 Cyc. 926; In Criminal Prosecution, see Criminal Law, 12 Cyc. 379.)

**SHIFTED WARRANTS or LOCATIONS.** One of the three classes of land warrants or locations under the Pennsylvania land laws; that is to say, where the survey is made on land different from that described.[3]

**SHIFTER.** A lever used to move belts from fixed to loose pulleys, or *vice versa*.[4]

**SHIFTING INHERITANCE.** See Descent and Distribution, 14 Cyc. 36.

**SHIFTING OF BURDEN OF PROOF.** See Criminal Law, 12 Cyc. 379; Evidence, 16 Cyc. 926.

**SHIFTING RISK.** A term in the law of fire insurance used to designate the risk created by a contract of insurance on stocks of merchandise and other similar property which are kept for sale or are subject to change by purchase and sale; the policy being conditioned to cover the goods in the stock at any and all times, and not to be affected by changes in the stock.[5]

70. Davidson *v.* Hertzbach, 15 Abb. N. Cas. (N. Y.) 185 note.

71. See, generally, Damages, 13 Cyc. 1.

72. Nelson *v.* Cook, 19 Ill. 440 (holding that in an action by a sheriff against a person by whose command he made an attachment and sold on execution certain goods, the value of which he has been obliged to pay to their real owner in another action, defendant is liable for the whole amount recovered of the sheriff in the former action, although the finding of the jury in that action was on several counts, which included the breaking open of the owner's store, with which this defendant had nothing to do; for the whole affair, in the eye of the law, constituted but one transaction); Churchill *v.* Moore, 15 Kan. 255 (holding that where the claim against the officer remained unsatisfied he had no cause of action).

73. Seymour *v.* Harvey, 8 Conn. 63.

74. Kip *v.* Brigham, 7 Johns. (N. Y.) 168.

75. See, generally, Appeal and Error, 2 Cyc. 474; Review, 34 Cyc. 1695.

76. Arnold *v.* Fowler, 94 Md. 497, 51 Atl. 299, holding that where in an action by a sheriff to recover from an execution creditor the amount which the sheriff had been compelled to pay because a levy made by the direction of such creditor was excessive, no special objection that there was no evidence that the sum which plaintiff had been compelled to pay was for an excessive levy was filed to plaintiff's prayer for an instruction, advantage could not be taken of such defect on appeal.

1. Black L. Dict. [*citing* 3 Blackstone Comm. 258].

2. Cunningham *v.* Hoff, 118 Ind. 263, 265, 20 N. E. 756.

3. Lauman *v.* Thomas, 4 Binn. (Pa.) 51, 57, where the other two classes are defined and explained.

4. Young *v.* Burlington Wire Mattress Co., 79 Iowa 415, 418, 44 N. W. 693.

5. Farmers' Mut. F. Ins. Assoc. *v.* Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284.

**SHIFTING USE.** A use which is so limited that it will be made to shift or transfer itself, from one beneficiary to another, upon the occurrence of a certain event after its creation.[6] (See, generally, WILLS.)

**SHINGLE SAWDUST.** A substance said to consist of long fibres of the wood cut out by the saw, of the length or nearly of the length, of the shingle bolt.[7] (See REFUSE, 34 Cyc. 1013.)

**SHINGLE SHAVINGS.** A substance said to consist of the portions of the shingles taken off by the machine in edging and trimming the shingle.[8]

**SHINPLASTERS.** Certain bills and notes, so called because they are for a small sum of money.[9]

**SHIP.** As a noun, a general name for all large vessels;[10] a locomotive machine for transportation over rivers, seas, and oceans;[11] every vessel of timber work able to float and be carried upon the water.[12] As a verb, putting the cargo into a vessel;[13] to put on board;[14] a term said to be equivalent to receive and carry.[15] (See ADMIRALTY, 1 Cyc. 797; COLLISION, 7 Cyc. 299; MARITIME LIENS, 26 Cyc. 743; SALVAGE; SEAMEN; SHIPPING; TOWAGE. See also BOAT, 5 Cyc. 718.)

**SHIP-BROKER.** A broker who negotiates the purchase and sale of ships and the business of freighting ships.[16] (See FACTORS AND BROKERS, 19 Cyc. 187 note 73; MARITIME LIENS, 26 Cyc. 758; SHIPPING.)

**SHIP CARPENTER or BUILDER.** The builder and repairer of vessels.[17] (See MARITIME LIENS, 26 Cyc. 761.)

**SHIP-CHANDLER.** One who deals in cordage, canvas, and other furniture of ships.[18]

**SHIP CHANNEL.** That part of the water on which vessels move.[19] (See CHANNEL, 6 Cyc. 891.)

**SHIPMASTER.** The captain or master of a merchant ship, appointed and put in command by the owner, and having general control of the vessel and cargo, with power to bind the owner by his lawful acts and engagements in the

6. Black L. Dict.

7. State *v.* Howard, 72 Me. 459, 463, where it is included in the term "refuse wood or timber" in a statute prohibiting its deposit in a river.

8. State *v.* Howard, 72 Me. 459, 463, where it is said to be included in the term "refuse wood or timber" in a statute prohibiting its deposit in a river.

9. Martin-Alexander Lumber Co. *v.* Johnson, 70 Ark. 215, 219, 66 S. W. 924, where it is said they are also commonly denominated "change tickets."

10. Mortimer Com. Dict. [*quoted* in U. S. *v.* Open Boat, 27 Fed. Cas. No. 15,967, 5 Mason 120, 137].

11. Warn *v.* Easton, etc., Transit Co., 2 N. Y. Suppl. 620, 622.

12. *In re* Raft of Cypress Logs, 20 Fed. Cas. No. 11,527, 1 Flipp. 543, 544.

"Ship of the United States" is a phrase which under the ship registry act is said to have a technical meaning, referring only to such ships as are registered under that act. U. S. *v.* Howard, 26 Fed Cas. No. 15,403, 3 Sumn. 12, 18, where it is further said that no ships or vessels except those wholly belonging to citizens of the United States shall be registered under this act.

"Ship or vessel of war" is a generic term which is said to include both national ships and private armed vessels. Wilson *v.* U. S., 30 Fed. Cas. No. 17,846, 1 Brock. 423, 429. And the term has been said further to include the armament, stores, provisions, money to pay crew, and in fact everything attached or on board of the ship in aid of her operations. U. S. *v.* Taylor, 188 U. S. 283, 289, 23 S. Ct. 412, 47 L. ed. 477; U. S. *v.* Dewey, 188 U. S. 254, 267, 23 S. Ct. 415, 47 L. ed. 463.

13. Robertson *v.* Wilder, 69 Ga. 340, 345, where it is distinguished from "landing."

14. Harrison *v.* Fortlage, 161 U. S. 57, 63, 16 S. Ct. 488, 40 L. ed. 616.

15. Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 493, 4 N. E. 163.

"Shipped" means placed on board of a vessel for the purchaser or consignee, to be transported at his risk (Fisher *v.* Minot, 10 Gray (Mass.) 260, 262 [*quoted* in Ledon *v.* Havemeyer, 121 N. Y. 179, 188, 24 N. E. 297, 8 L. R. A. 245]); the putting of the goods on board the vessel and taking a bill of lading therefor (Ledon *v.* Havemeyer, *supra*); put on board (Bowes *v.* Shand, 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. Rep. N. S. 837, 25 Wkly. Rep. 730 [*quoted* in Ledon *v.* Havemeyer, *supra*]); and has been said to be synonymous with "to load" (Midland Nav. Co. *v.* Dominion El. Co., 6 Ont. L. Rep. 432, 439). See also Grant *v.* Coverdale, 9 App. Cas. 470, 475, 5 Aspin. 353, 53 L. J. Q. B. 462, 51 L. T. Rep. N. S. 472, 32 Wkly. Rep. 831.

16. Little Rock *v.* Barton, 33 Ark. 436, 446.

17. People *v.* New York Floating Dry Dock Co., 63 How. Pr. (N. Y.) 451, 453.

18. Weaver *v.* The S. G. Owens, 29 Fed. Cas. No. 17,310, 1 Wall. Jr. 359.

19. The Oliver, 22 Fed. 848, 849. See also Western Pac. R. Co. *v.* Southern Pac. Co., 151 Fed. 376, 383, 386, 80 C. C. A. 606.

management of the ship.[20] (See, generally, MARITIME LIENS, 26 Cyc. 758; SHIPPING.)

**SHIPMENT.** A delivery on board a vessel;[21] a quantity of goods delivered at one time for transportation whether by sea or land;[22] the act of dispatching or shipping; especially the putting of goods or passengers on board ship for transportation by water;[23] the act of putting anything on board of a ship or other vessel;[24] the act of shipping or putting on board a ship.[25] (See, generally, SHIPPING.)

20. Black L. Dict.

21. Fisher *v.* Minot, 10 Gray (Mass.) 260, 262 [*quoted* in Ledon *v.* Havemeyer, 121 N. Y. 179, 188, 24 N. E. 297, 8 L. R. A. 245].

22. Black L. Dict. [*quoted* in Clark *v.* Lindsay, 19 Mont. 1, 4, 47 Pac. 102, 61 Am. St. Rep. 479].

23. Century Dict. [*quoted* in Clark *v.* Lindsay, 19 Mont. 1, 4, 47 Pac. 102, 61 Am. St. Rep. 479].

24. Webster Dict. [*quoted* in Ledon *v.* Havemeyer, 121 N. Y. 179, 187, 24 N. E. 297, 8 L. R. A. 245].

25. Worcester Dict. [*quoted* in Ledon *v.* Havemeyer, 121 N. Y. 179, 187, 24 N. E. 297, 8 L. R. A. 245].